

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

VISUAL INTERACTIVE PHONE CONCEPTS,
INC., a Nevada Corporation,

Plaintiff,

vs.

GOOGLE INC.,
a Delaware Corporation,

Defendant.

Hon. Lawrence P. Zatkoff

Mag. Judge Laurie Michelson

Case No. 11-cv-12348

GOOGLE INC.'S ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS

Defendant and Counterclaimant Google Inc. (“Google”), by its undersigned counsel, answers Plaintiff Visual Interactive Phone Concepts, Inc.’s (“VIPC”) First Amended Complaint For Patent Infringement, Dkt. No. 16, as follows:

THE PARTIES

1. Google lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 1 and therefore, denies the same.

2. With respect to paragraph 2, Google admits that it is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1600 Amphitheatre Parkway, Mountain View, California 94043. Google denies any remaining allegations of paragraph 2.

3. Google lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 3 and therefore, denies the same.

4. Google admits that it is a technology company that develops, uses, and sells products and services. Google admits that the Nexus One is a mobile phone that was offered for sale on the Google Web Store. Google admits that it develops an open-source software stack for mobile devices that includes an operating system, middleware and applications, called the Android platform ("Android"). Google admits that it develops a software product called "Android Market" that enables developers to publish and distribute their products to users of certain Android-compatible phones. Google admits that it develops software applications for use on mobile devices. Google admits that it provides a payment processing service called "Google Checkout" that may be used to process purchases made through Android Market. Google denies any remaining allegations of paragraph 4.

5. Google denies the allegations in paragraph 5.

6. Solely for purposes of this action, Google admits that it does business within this Judicial District. Google denies that it has committed any acts of patent infringement within this or any other district.

JURISDICTION

7. Google admits that the Amended Complaint purports to state an action for patent infringement. Google denies that it has committed any acts of patent infringement within this or any other district.

8. Google admits that the Amended Complaint purports to state an action for patent infringement and that this Court has subject matter jurisdiction over patent law claims. Google denies that it has committed any acts of patent infringement within this or any other district.

9. Solely for purposes of this action, Google does not contest personal jurisdiction in this District. Google denies that it has committed any acts of infringement within this or any other district and denies any remaining allegations of paragraph 9.

10. Google denies the allegations in paragraph 10.

11. Solely for purposes of this action, Google admits that venue is proper in the Eastern District of Michigan under 28 U.S.C. §§ 1391 and 1400, but denies that this district is the most convenient or appropriate forum and reserves its right to challenge or move for a change of venue under 28 U.S.C. § 1404 or any other applicable legal grounds.

FACTUAL BACKGROUND

A. The Patents at Issue

12. Google admits that United States Patent No. 5,606,361 (“the ‘361 Patent”), titled “Videophone interactive mailbox facility system and method of processing information,” indicates on its face that it was issued on February 25, 1997. Google lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 12 and therefore, denies the same.

13. Google admits that United States Patent No. 5,724,092 (“the ‘092 Patent”), titled “Videophone interactive mailbox facility system and method of processing information,” indicates on its face that it was issued on March 3, 1998. Google lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 13 and therefore, denies the same.

B. Development of the Patents

14. Google lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 14 and therefore, denies the same.

15. Google lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 15 and therefore, denies the same.

16. Google admits that paragraph 16 appears to contain a correct quotation of the '092 patent. Google otherwise denies the allegations in paragraph 16.

17. Google denies the allegations in paragraph 17.

18. Google denies the allegations in paragraph 18.

19. Google admits that the face of the '361 Patent indicates that: (1) it was issued on February 25, 1997, (2) Davidsohn and Cinotti are the inventors, and (3) the patent application was filed on May 10, 1995. Google lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 19 and therefore, denies the same.

20. Google admits that the face of the '092 Patent indicates that: (1) it was issued on March 3, 1998, (2) Davidsohn and Cinotti are the inventors, and (3) the patent application was filed on September 12, 1996. Google lacks knowledge or information sufficient to form a belief about the truth of the remaining allegations in paragraph 20 and therefore, denies the same.

21. Google lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 21 and therefore, denies the same.

C. The 2008 Reexamination Requests

22. Upon information and belief, admitted.

23. Google admits that Exhibits 1 and 2 to the Amended Complaint indicate that the United States Patent and Trademark Office issued Ex Parte Reexamination Certificates for both the '361 and '092 patents. Google denies the remaining allegations in paragraph 23.

24. Google admits that the face of the Ex Parte Reexamination Certificate for the '361 patent in Exhibit 1 to the Amended Complaint indicates that it was issued on April 6, 2010. Google denies any remaining allegations in paragraph 24.

25. Google admits that the face of the Ex Parte Reexamination Certificate for the '092 patent in Exhibit 2 to the Amended Complaint indicates that it was issued on May 11, 2010. Google denies any remaining allegations in paragraph 25.

26. Google lacks knowledge or information sufficient to form a belief about the truth of the allegations in paragraph 26 and therefore, denies the same.

CLAIM FOR RELIEF

Count I – Direct Infringement

27. Google re-alleges and incorporates by reference its answer to paragraphs 1 through 26 of its Answer as if fully set forth herein.

28. Google denies the allegations in paragraph 28.

29. Google admits that that it develops and supports an open-source software stack for mobile devices that includes an operating system, middleware and applications, called the Android platform ("Android"). Google admits that Android is designed, at least in part, according to Google's specifications. Google admits that it has sold mobile devices on the Google web store. Google admits that wireless service providers have distributed mobile phones. Google denies that it has committed any acts of infringement within this or any other district and denies any remaining allegations of paragraph 29.

30. Google admits that products running Android Market may allow consumers to purchase products published to Android Market. Google admits that Google's servers are utilized when purchases are made through Android Market. Google admits that information regarding the transaction may be stored on Google's servers. Google denies that it has committed any acts of infringement within this or any other district and denies any remaining allegations of paragraph 30.

31. Google admits that Android Market provides a marketplace through which a consumer may purchase products such as games, applications and video content. Google denies the allegations in paragraph 31.

32. Google admits that users of the Android Market are required to have a Google Checkout account in order to make purchases using Android Market. Google admits that creating a Google Checkout account involves creating a user profile and may involve providing credit card or other payment information to Google. Google admits that credit card information is encrypted. Google denies that it has committed any acts of infringement within this or any other district and denies any remaining allegations of paragraph 32.

33. Google admits that it processes payment when a user purchases products using Android Market. Google admits that these products may include games, applications or video content. Google admits that it may have contractual relationships with entities that sell products through Android Market. Google admits that it may collect a transaction fee associated with payment for a product. Google denies that it has committed any acts of infringement within this or any other district and denies any remaining allegations of paragraph 33.

34. Google admits that it has developed software for the Nexus One and Nexus S mobile devices. Google denies that it has committed any acts of infringement within this or any other district and denies any remaining allegations of paragraph 34.

35. Google admits that that the Nexus One mobile device and the Nexus S mobile device may allow a user to access Android Market to purchase products. Google admits that those products may include applications, games and/or video content. Google denies that it has committed any acts of infringement within this or any other district and denies any remaining allegations of paragraph 35.

36. Google admits that products manufactured by parties other than Google are installed with the Android operating system and with Android market. Google further admits that these products may allow users to purchase products through Android Market and Google Checkout and that transactions made using Android Market and Google Checkout involve the use of Google's servers. Google denies that it has committed any acts of infringement within this or any other district and denies any remaining allegations of paragraph 36.

37. Google denies the allegations in paragraph 37.

38. Google denies the allegations in paragraph 38.

39. Google denies that it has committed any acts of infringement within this or any other district and denies any remaining allegations of paragraph 39.

40. Google denies that it has committed any acts of infringement within this or any other district and denies any remaining allegations of paragraph 40.

41. Google denies that it has committed any acts of infringement within this or any other district and denies any remaining allegations of paragraph 41.

Count II – Indirect and Contributory Infringement

42. Google re-alleges and incorporates by reference its answer to paragraphs 1 through 41 of its Answer as if fully set forth herein.

43. Google denies that it has committed any acts of infringement within this or any other district and denies any remaining allegations of paragraph 43.

44. Google admits that it maintains a file system containing patent information received from the United States Patent and Trademark Office. Google admits that

<http://www.google.com/patents> provides access through the internet to this file system. Google denies any remaining allegations of paragraph 44.

45. Google admits that it maintains a file system containing patent information received from the United States Patent and Trademark office. Google admits that <http://www.google.com/patents> provides access through the internet to this file system. Google admits that its employees maintain the aforementioned file system containing patent information. Google admits that information regarding the VIPC patents is contained in the aforementioned file system. Google denies any remaining allegations of paragraph 45. Google further denies any allegation that it had actual or constructive notice of the VIPC patents by virtue of the aforementioned file system or otherwise.

46. Google denies that it has committed any direct or indirect acts of infringement, or otherwise induced or contributed to any acts of infringement by third parties, within this or any other district and denies any remaining allegations of paragraph 46.

47. Google admits that it provides its Android operating system and Android Market to handset manufacturers for use on their handsets. Google admits that Google Checkout may be used in conjunction with transactions initiated in Android Market. Google admits that it provides the Android operating system to any party for use in their products, including through Google's website <http://source.android.com/>. Google further admits that it provides the Android Market to handset manufacturers for use in their products. Google admits that it maintains websites such as <http://developer.android.com/> to describe the Android operating system and <http://market.android.com/> to describe Android Market. Google denies any remaining allegations of paragraph 47.

48. Google admits that it provides the Android operating system to any party for use in their products, including through Google's website <http://source.android.com/>. Google further admits that it provides the Android Market to handset manufacturers for use in their products. Google admits that it maintains websites such as <http://developer.android.com/> to describe the Android operating system and <http://market.android.com/> to describe Android Market. Google further admits that it licenses certain Android and Android Market marks to third parties for use in their marketing or advertising. Google denies any remaining allegations of paragraph 48.

49. Google admits that it provides information relating to the development of products to third parties that develop products published to Android Market. Google denies any remaining allegations of paragraph 49.

50. Google denies that it has committed any direct or indirect acts of infringement, or otherwise contributed to any acts of infringement by third parties, within this or any other district and denies any remaining allegations of paragraph 50.

51. Google denies that it has committed any direct or indirect acts of infringement, or otherwise induced or contributed to any acts of infringement by third parties, within this or any other district and denies any remaining allegations of paragraph 51.

52. Google denies that it has committed any direct or indirect acts of infringement, or otherwise induced or contributed to any acts of infringement by third parties, within this or any other district and denies any remaining allegations of paragraph 52.

53. Google denies that it has committed any direct or indirect acts of infringement, or otherwise induced or contributed to any acts of infringement by third parties, within this or any other district and denies any remaining allegations of paragraph 53.

54. Google denies that it has committed any direct or indirect acts of infringement, or otherwise induced or contributed to any acts of infringement by third parties, within this or any other district and denies any remaining allegations of paragraph 54.

55. Google denies that it has committed any direct or indirect acts of infringement, or otherwise induced or contributed to any acts of infringement by third parties, within this or any other district and denies any remaining allegations of paragraph 55.

56. Google denies that it has committed any direct or indirect acts of infringement, or otherwise induced or contributed to any acts of infringement by third parties, within this or any other district and denies any remaining allegations of paragraph 56.

AFFIRMATIVE DEFENSES

Further answering the Complaint, Google asserts the following affirmative and other defenses. In addition to the affirmative and other defenses described below, subject to its responses above, Google specifically reserves all rights to allege additional affirmative and other defenses that become known through the course of discovery.

1. The Amended Complaint fails to state a claim upon which relief can be granted because Google does not infringe and has not infringed (not directly, contributorily, or by inducement) and is not liable for infringement of any valid and enforceable claim of the '361 or '092 patents.

2. The claims of the '361 and '092 patents are invalid for claiming non-novel and/or obvious subject matter pursuant to 35 U.S.C. §§ 102 (a), 102 (b), 102 (e), and/or 103 (a), including, but not limited to being taught by, suggested by, and/or obvious in view of, the prior art.

3. The claims of the '361 and '092 patents are invalid and/or unenforceable for failure satisfy one or more conditions of patentability set forth in 35 U.S.C. § 112, including failure of written description, lack of enablement, and claim indefiniteness.

4. VIPC's claim for damages, if any, against Google for alleged infringement of the '361 and '092 patents is limited by 35 U.S.C. §§ 286, 287, and/or 288.

5. On information and belief, VIPC's claims for relief are barred, in whole or in part, by the equitable doctrines of laches and estoppel.

6. Any and all products or actions accused of infringement have substantial uses that do not infringe and do not induce or contribute to the alleged infringement of the claims of the '361 and '092 patents.

7. VIPC is partially or wholly barred from the relief sought because of Parker Hannifin's intervening rights under 35 U.S.C. §§ 252 & 307(b).

8. VIPC is not entitled to injunctive relief because any alleged injury to VIPC is not immediate or irreparable, and VIPC has an adequate remedy at law.

COUNTERCLAIMS

For its counterclaims against Plaintiffs and Counter-Defendant Visual Interactive Phone Concepts, Inc. ("VIPC"), Defendant and Counter-Plaintiff Google Inc. ("Google") states as follows:

THE PARTIES

1. Google is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1600 Amphitheatre Parkway, Mountain View, California 94043.

2. Upon information and belief, VIPC is a corporation organized and existing under the laws of the State of Nevada, with a principal place of business at 1 President Street, Staten Island, New York, 10314.

JURISDICTION AND VENUE

3. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) and by virtue of VIPC's admissions in the First Amended Complaint that venue is proper in this District.

4. This Court has personal jurisdiction over VIPC who has submitted to such jurisdiction by bringing a complaint in this Court against Google Inc. for infringement of United States Patent Nos. 5,606,361 ("the '361 Patent") and 5,724,092 ("the '092 Patent") (collectively "the Asserted Patents").

5. This Court has subject matter jurisdiction over these Counterclaims pursuant to 28 U.S.C. §§ 1331 and 1338.

FACTS GIVING RISE TO THE COUNTERCLAIMS

6. On May 27, 2011, Counterclaim-Defendant commenced a civil lawsuit against Google alleging that Google infringed one or more claims of the Asserted Patents.

7. Counterclaim-Defendant created an actual and justiciable case and controversy between Counterclaim-Defendant and Google concerning whether the claims of the Asserted Patents are valid and/or infringed by Google.

8. Google has not directly or indirectly infringed, and is not directly or indirectly infringing, upon any claims of the Asserted Patents.

COUNT ONE - Declaratory Judgment of Non-Infringement of '361 Patent

9. Google restates and incorporates by reference its allegations in paragraphs 1-8 of its Counterclaims as if fully set forth herein.

10. An actual case or controversy exists between Google and VIPC as to whether the '361 patent is infringed by Google.

11. A judicial declaration is necessary and appropriate so that Google may ascertain its rights regarding the '361 patent.

12. Google has not infringed and does not infringe, directly or indirectly, any valid and enforceable claim of the '361 patent.

COUNT TWO - Declaratory Judgment of Non-Infringement of '092 Patent

13. Google restates and incorporates by reference its allegations in paragraphs 1-12 of its Counterclaims as if fully set forth herein.

14. An actual case or controversy exists between Google and VIPC as to whether the '092 patent is infringed by Google.

15. A judicial declaration is necessary and appropriate so that Google may ascertain its rights regarding the '092 patent.

16. Google has not infringed and does not infringe, directly or indirectly, any valid and enforceable claim of the '092 patent.

COUNT THREE - Declaratory Judgment of Invalidity of '361 Patent

17. Google restates and incorporates by reference its allegations in paragraphs 1-16 of its Counterclaims as if fully set forth herein.

18. The claims of the '361 patent are invalid for claiming non-novel and/or obvious subject matter pursuant to 35 U.S.C. §§ 102 (a), 102 (b), 102 (e), and/or 103 (a), including, but not limited to being taught by, suggested by, and/or obvious in view of, the prior art.

19. The claims of the '361 patent are invalid and/or unenforceable for failure satisfy one or more conditions of patentability set forth in 35 U.S.C. § 112 including failure of written description, lack of enablement, and claim indefiniteness.

COUNT FOUR - Declaratory Judgment of Invalidity of '092 Patent

20. Google restates and incorporates by reference its allegations in paragraphs 1-19 of its Counterclaims as if fully set forth herein.

21. The claims of the '092 patent are invalid for claiming non-novel and/or obvious subject matter pursuant to 35 U.S.C. §§ 102 (a), 102 (b), 102 (e), and/or 103 (a), including, but not limited to being taught by, suggested by, and/or obvious in view of, the prior art.

22. The claims of the '092 patent are invalid and/or unenforceable for failure satisfy one or more conditions of patentability set forth in 35 U.S.C. § 112 including failure of written description, lack of enablement, and claim indefiniteness.

EXCEPTIONAL CASE

23. On information and belief, this is an exceptional case entitling Google to an award of its attorneys' fees incurred in connection with defending and prosecuting this action pursuant to 35 U.S.C. § 285, as a result of, inter alia, VIPC's assertion of the Patents-in-Suit against Google with the knowledge that Google does not infringe any valid or enforceable claim of the Patents-in-Suit and/or that the Patents-in-Suit are invalid and/or unenforceable.

PRAYER FOR RELIEF

WHEREFORE, Google prays for judgment as follows:

a. A judgment dismissing VIPC's Complaint against Google with prejudice;

- b. A judgment declaring that Google has not infringed, contributed to the infringement of, or induced others to infringe, either directly or indirectly, any valid and enforceable claim of the '361 or '092 patents;
- c. A judgment declaring that the '361 and '092 patents are invalid and unenforceable;
- d. A judgment declaring that Google has not willfully infringed and is not willfully infringing any valid and/or enforceable claim of the '361 or '092 patents;
- e. A judgment declaring that this case is exceptional and an award to Google of its reasonable costs and expenses of litigation, including attorneys' fees and expert witness fees;
- f. A judgment declaring, limiting or barring VIPC's ability to enforce the '361 and '092 patents in equity; and
- g. Such other and further relief as this Court may deem just and proper.

DEMAND FOR JURY TRIAL

In accordance with Fed. R. Civ. P. 38(b), Google demands a trial by jury on all issues so triable.

Respectfully submitted,

DICKINSON WRIGHT PLLC

s/ Michelle L. Alamo

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Attorneys for Defendant Google Inc.

Date : August 22, 2011

I hereby certify that on August 22, 2011, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record.

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