

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

VISUAL INTERACTIVE PHONE  
CONCEPTS, INC.,

Plaintiff,

v.

GOOGLE, INC.

Defendant.

Case No. 11-cv-12348

Hon. Lawrence P. Zatkoff

Maj. Judge Laurie J. Michelson

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**JOINT CASE SUMMARY**

**1. Statement of claim or claims of plaintiff(s), including legal theories, and basis of federal jurisdiction.**

Plaintiff's statement:

This is an action seeking relief with respect to infringement of a United States Patent under 35 U.S.C. §§ 271 and 281. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a) because this action arises under the Patent Laws of the United States, Title 35 of the United States Code. Venue is proper in the Judicial District under 28 U.S.C. §§ 1391 and 1400.

VIPC's U.S. Patents Nos. 5,606,361 and 5,724,092 (the "patents-in-suit") cover a "videophone interactive mailbox facility system and method of processing information." The invention disclosed in the patents facilitates transactions carried out through the use of a system that includes, to summarize, (1) a video-capable telephone handset for viewing information and

for inputting information related to transactions, (2) a data center that collects and stores information relating to commercial transactions, and, in some cases, (3) a “vendor station” capable of transmission and receipt of vendor information to or from the central data center.

VIPC is informed and believes, and thereon alleges, that Google makes, uses, and sells a system that infringes the VIPC patents. To summarize, at least since 2009, Google has jointly developed and/or overseen the development of several different video-capable wireless telephone handsets, such as the Nexus One and Nexus S handsets, which are videophones as described in the patents. Google develops and supports a mobile operating system known as Android that is installed on the Nexus One, Nexus S, and many other video-capable wireless handsets. Google’s Android Market sells various games and mobile handset applications, and also offers video content such as feature films for rent or purchase by Android Market customers. Operators of video-capable wireless handsets running variants of the Android operating system, including Google’s agents, may initiate transactions from such handsets to make purchases of goods from the Google Android Market. These transactions are routed through Google’s data center, which collects and stores transaction information.

Furthermore, VIPC is informed and believes, and thereon alleges, that Google, through its agents, employees and servants has induced infringement and/or engaged in acts of contributory infringement.

**2. Statement of claim or claims and defense of defendant(s), and third-party plaintiff(s), and defense of third-party defendant(s), including legal theories.**

Defendant’s statement:

VIPC appears to be accusing Android Market available on Nexus One and Nexus S handsets of infringement of U.S. Patent Nos. 5,606,361 (“the ‘361 patent”) and 5,724,092 (“the ‘092 patent”). *See* Am. Compl., Doc. # 16, ¶¶ 29-41, 47-56. Google denies that it has infringed, either directly, indirectly, literally, or under the doctrine of equivalents, any valid claim of the patents asserted by VIPC in this action.

Google further asserts that the claims of the ‘361 and ‘092 patents are invalid because they: (1) claim 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, *see* Am. Answer & Counterclaim, Doc. # 22, at 10-11 (preliminarily identifying relevant prior art), and/or (2) fail to 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 with respect to at least one or more terms, *see id.* at 11-12 (preliminarily identifying terms that are indefinite and/or not enabled).

Google raises several other affirmative defenses in response to VIPC’s claims, including defenses based on the statute of limitation, marking, laches, estoppel, and intervening rights. *See id.* at 12-14.

In addition to its affirmative and other defenses, Google has filed a Counterclaim seeking a declaratory judgment of non-infringement and/or invalidity for both patents at issue.

### **3. Actual damages sought.**

#### **A. Plaintiff’s Actual Damages**

VIPC is seeking damages in an amount no less than a reasonable royalty. VIPC also requests reasonable attorneys’ fees, costs, pre-judgment interest, post-judgment interest, and any

other relief to which it is entitled, including increased damages under 35 U.S.C. § 284. Discovery is necessary in order to provide a specific calculation of VIPC's damages.

#### **B. Defendant's Actual Damages**

At this time, with the exception of its request for an award of reasonable costs and expenses of litigation under 35 U.S.C. § 285, including attorneys' fees and expert witness fees, Google is not seeking damages in conjunction with its Counterclaims.

#### **4. Expected witnesses.**

##### **A. Plaintiff's Expected Witnesses**

John Davidsohn, Chairman of VIPC's Board of Directors, President, and CEO of VIPC.

Anthony Cinotti, 40 Hillside Ave. # 0, Mahwah, NJ 07430.

Ezra Sutton, Esq., Plaza 9, 900 Route 9 North, Suite 201, Woodbridge, NJ 07095

Kenneth Kohn, Esq., see contact information above.

Ariel Reinitz, Esq., Leason Ellis, 81 Main St., Suite 503, White Plains, NY

Approximately ten or more corporate representatives of Google with knowledge of the alleged infringing system and products.

##### **B. Defendant's Expected Witnesses**

Google anticipates the following potential fact and/or third party witnesses:

1. The inventors, John Davidsohn and Anthony Cinotti.
2. VIPC's prosecuting patent counsel, Ezra Sutton.
3. VIPC's patent counsel during reexamination proceedings, Kenneth Kohn of Kohn & Associates.

4. Corporate designee of VIPC under FRCP 30(b)(6).
5. Google technical personnel knowledgeable about the accused products.
6. Google personnel knowledgeable about information pertinent to the relevant *Georgia Pacific* factors or other economic factors relevant to any damages claim presented by VIPC.
7. Third parties to which VIPC has offered, attempted, or actually, licensed the patents at issue or similar patents/technology, including, but not limited to, Infogear/Cisco, Handtrade.com, and Alcatel-Lucent.
8. Third parties knowledgeable about potential prior art.

**5. Whether any expert witnesses are anticipated and in what subject area.**

**A. Plaintiff's Anticipated Experts**

One or more expert witnesses are expected to testify for Plaintiff on technical issues related to Google's alleged infringement.

One or more expert witnesses are expected to testify for Plaintiff regarding the calculation of a reasonable royalty.

One or more expert witnesses may testify for Plaintiff as to defenses and/or counter-claims that may be raised by Defendant.

**B. Defendant's Anticipated Experts**

Google anticipates that it may present expert testimony on the following subject matters:

1. Claim Construction Issues
2. Noninfringement
3. Invalidity
4. Damages

**6. Amount of time needed for discovery and summary of discovery conducted to date.**

**A. Plaintiff's Proposal**

Eight months for fact discovery. Initial reports from retained experts under Rule 26(a)(2) shall be exchanged 21 days after the final close of fact discovery. Rebuttal expert reports shall be exchanged 35 days after the exchange of the initial expert reports. The deadline for completion of expert discovery shall be 35 days after the exchange of rebuttal expert reports.

Initial interrogatories, requests to admit, and document requests will be served prior to the scheduling conference.

**B. Defendant's Proposal**

Google proposes that the following deadlines apply in this action in the event that it is not transferred,<sup>1</sup> unless modified for good cause shown:

<b>Event</b>	<b>Proposed Due Date</b>
Exchange Initial Disclosures pursuant to FRCP 26(a)	November 18, 2011
Disclosure of Asserted Claims and Preliminary Infringement Contentions	December 7, 2011
Preliminary Invalidity Contentions	January 13, 2012
Parties exchange proposed claim terms to be construed by the Court	March 1, 2012
Parties exchange proposed claim constructions for all identified terms	March 20, 2012

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<sup>1</sup> In the event that the matter is transferred, the parties submit that the schedule should be left for ultimate determination by that Court.

Initial claim construction briefs from both parties due	April 20, 2012
Reply claim construction briefs from both parties due	May 18, 2012
Joint claim construction charts due	June 1, 2012
Claim construction hearing	July 2012
Fact discovery cut-off	February 20, 2013 or 60 days after the Court issues its Claim Construction Order, whichever is later
Initial expert reports due for party bearing burden of proof	21 days after the close of discovery,
Rebuttal expert reports due	30 days after the exchange of initial expert reports
Expert discovery cut-off	30 days after the exchange of rebuttal expert reports
Dispositive motions due	14 days after the close of expert discovery
Hearing on dispositive motions	To be set by the Court
Pretrial conference	To be set by the Court, but no earlier than October 11, 2013
Trial to commence	To be set by the court, but no earlier than November 2013

**1) Disclosure of Asserted Claims and Preliminary Infringement Contentions**

The “Disclosure of Asserted Claims and Preliminary Infringement Contentions” will contain the following information:

- a. Each claim of each patent in suit that is allegedly infringed;
- b. Separately for each asserted claim, each accused apparatus, product, device, process, method, act, or other instrumentality (“Accused Instrumentality”). This identification shall be as specific as possible. Each product, device, and apparatus must be identified by name or model number, if known. Each method or process must be identified by name, if known, or by any product, device, or apparatus which, when used, allegedly results in the practice of the claimed method or process;
- c. A chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality, including for each element that VIPC contends is governed by 35 U.S.C. § 112(6), the identity of the structure(s), act(s), or material(s) in the Accused Instrumentality that performs the claimed function;
- d. For each claim which is alleged to have been indirectly infringed, an identification of any direct infringement and a description of the acts of the alleged indirect infringer that contribute to or are inducing that direct infringement. Insofar as alleged direct infringement is based on joint acts of multiple parties, the role of each such party in the direct infringement must be described.
- e. Whether each element of each asserted claim is claimed to be literally present or present under the doctrine of equivalents in the Accused Instrumentality;
- f. For any patent that claims priority to an earlier application, the priority date to which each asserted claim allegedly is entitled;



- g. If VIPC wishes to preserve the right to rely, for any purpose, on the assertion that its own apparatus, product, device, process, method, act, or other instrumentality practices the claimed invention, VIPC must identify, separately for each asserted claim, each such apparatus, product, device, process, method, act, or other instrumentality that incorporates or reflects that particular claim; and
- h. If VIPC alleges willful infringement, the basis for such allegation.

**2) Preliminary Invalidity Contentions**

The Preliminary Invalidity Contentions will contain the following information:

- a. The identity of each item of prior art that allegedly anticipates each asserted claim or renders it obvious. Each prior art patent shall be identified by its number, country of origin, and date of issue. Each prior art publication must be identified by its title, date of publication, and where feasible, author and publisher. Prior art under 35 U.S.C. § 102(b) shall be identified by specifying the item offered for sale or publicly used or known, the date the offer or use took place or the information became known, and the identity of the person or entity which made the use or which made and received the offer, or the person or entity which made the information known or to whom it was made known. Prior art under 35 U.S.C. § 102(f) shall be identified by providing the name of the person(s) from whom and the circumstances under which the invention or any part of it was derived. Prior art under 35 U.S.C. § 102(g) shall be identified by providing the identities of the person(s) or entities involved in and the circumstances surrounding the making of the invention before the patent applicant(s);

- b. Whether each item of prior art anticipates each asserted claim or renders it obvious. If a combination of items of prior art makes a claim obvious, each such combination, and the motivation to combine such items, must be identified;
- c. A chart identifying where specifically in each alleged item of prior art each element of each asserted claim is found, including for each element that Defendants contend is governed by 35 U.S.C. § 112(6), the identity of the structure(s), act(s), or material(s) in each item of prior art that performs the claimed function; and
- d. Any grounds of invalidity based on indefiniteness under 35 U.S.C. § 112(2) or enablement or written description under 35 U.S.C. § 112(1) of any of the asserted claims.

**3) Exchange of Proposed Terms for Construction**

Each party shall serve on each other party a list of claim terms which that party contends should be construed by the Court, and identify any claim term which that party contends should be governed by 35 U.S.C. § 112(6).

The parties shall thereafter meet and confer for the purposes of limiting the terms in dispute by narrowing or resolving differences and facilitating the ultimate preparation of a Joint Claim Construction and Prehearing Statement.

**4) Exchange of Preliminary Claim Constructions and Extrinsic Evidence**

The parties shall simultaneously exchange proposed constructions of each term identified by either party for claim construction. Each such “Preliminary Claim Construction” shall also,

for each term which any party contends is governed by 35 U.S.C. § 112(6), identify the structure(s), act(s), or material(s) corresponding to that term's function.

At the same time the parties exchange their respective "Preliminary Claim Constructions," each party shall also identify all references from the specification or prosecution history that support its proposed construction and designate any supporting extrinsic evidence including, without limitation, dictionary definitions, citations to learned treatises and prior art, and testimony of any witnesses, including expert witnesses. Extrinsic evidence shall be identified by production number or by producing a copy if not previously produced. With respect to any supporting witness, including expert witnesses, the identifying party shall also provide a description of the substance of that witness' proposed testimony that includes a listing of any opinions to be rendered in connection with claim construction.

The parties shall thereafter meet and confer for the purposes of narrowing the issues and finalizing preparation of a Joint Claim Construction and Prehearing Statement.

#### **5) Joint Claim Construction and Prehearing Statement**

The parties shall complete and file a Joint Claim Construction and Prehearing Statement, which shall contain the following information:

- a. The construction of those terms on which the parties agree; and
- b. Each party's proposed construction of each disputed term, together with an identification of all references from the specification or prosecution history that support that construction, and an identification of any extrinsic evidence known to the party on which it intends to rely either to support its proposed construction or to oppose any other party's proposed construction, including, but not limited to,

as permitted by law, dictionary definitions, citations to learned treatises and prior art, and testimony of any witnesses, including expert witnesses.

**6) Discovery Plan**

The parties will meet and confer regarding discovery, including limitations on discovery. The parties expect to present a stipulated discovery order to the Court for its consideration.

**7) Discovery of Electronically Stored Information (“ESI”)**

The parties agree to meet and confer regarding any issues or disputes that may arise related to discovery of Electronically Stored Information (“ESI”). If, notwithstanding good faith efforts, the parties are unable to resolve any issues relating to discovery of ESI, any disputes will be brought to the Court for resolution in a joint submission with each side setting forth its respective positions. The parties expect to present a stipulated ESI protocol to the Court for its consideration.

**8) Protective Order**

This action is likely to require disclosure of confidential or proprietary technical and financial information. Accordingly, entry by the Court of an appropriate protective order will be required. The parties expect to present a stipulated protective order to the Court for its consideration.

**7. Anticipated depositions.**

**A. Plaintiff’s Anticipated Depositions**

Approximately ten or more corporate representatives of Google and related entities with knowledge of the alleged infringing system and products.

Approximately 4 or more expert depositions.

## **B. Defendant's Anticipated Depositions**

Google anticipates deposing the following potential fact and/or third party witnesses:

1. The inventors, John Davidsohn and Anthony Cinotti.
2. VIPC's prosecuting patent counsel, Ezra Sutton.
3. VIPC's patent counsel during reexamination proceedings, Kenneth Kohn of Kohn & Associates.
4. Corporate designee(s) of VIPC under FRCP 30(b)(6).
5. Third parties to which VIPC has offered, attempted, or actually, licensed the patents at issue or similar patents/technology, including, but not limited to, Infogear/Cisco, Handtrade.com, and Alcatel-Lucent.
6. Third parties knowledgeable about potential prior art.
7. Any expert witnesses identified by VIPC.

## **8. Relationship to other cases.**

The following pending cases allege infringement of the two VIPC patents at issue in this case:

*Visual Interactive Phone Concepts, Inc. v. United States Cellular Corporation*, Northern District of Illinois Case No. 11-cv-05289;

*Visual Interactive Phone Concepts, Inc. v. Cellco Partnership d/b/a Verizon Wireless*, Eastern District of Michigan Case No. 11-cv-12349;

*Visual Interactive Phone Concepts, Inc. v. Google, Inc.*, Eastern District of Michigan Case No. 11-cv-12348;

*Visual Interactive Phone Concepts, Inc. v. AT&T Mobility, LLC*, Eastern District of Michigan Case No. 11-cv-13106;

*Visual Interactive Phone Concepts, Inc. v. Apple, Inc.*, Eastern District of Michigan Case No. 11-cv-12310.

*Visual Interactive Phone Concepts, Inc. v. Samsung Telecommunications America, LLC*, E.D. Mich. Case No. 11-12945.

The following previously resolved cases also alleged infringement of the two VIPC patents at issue in this case:

*Visual Interactive Phone Concepts, Inc. v. Big Planet, Inc., et al.*, Northern District of California Case No. 99-cv-20936;

*Visual Interactive Phone Concepts, Inc. v. Virgin Mobile USA*, District of New Jersey Case No. 05-cv-02661;

*Visual Interactive Phone Concepts, Inc. v. Leap Wireless International, Inc.*, Southern District of California Case No. 07-cv-01991.

The following additional prior cases are related to licensing of the two VIPC patents at issue in this case:

*Visual Interactive Phone Concepts, Inc. v. HandTrade.Com*, Case No. 101847/2005 (Richmond County, NY);

*Visual Interactive Phone Concepts, Inc. v. HandTrade.Com*, Case No. 101122/2007 (Richmond County, NY);

*Anthony Cinotti et al. v. Visual Interactive Phone Concepts, Inc. et al.*, Case No. 00-A-425021 (Clark County, NV).

The following additional prior cases may be related to licensing of the two VIPC patents at issue in this case:

*Anthony Cinotti v. John Davidsohn*, Case No. 108248/2000 (New York County, NY);

*John Davidsohn v. Anthony Cinotti*, Case No. 100982/2007 (Richmond County, NY).

Three of the other defendants have filed motions to transfer venue. Apple has moved to transfer venue to the Northern District of California. Apple's motion to transfer is set for hearing on December 8, 2011.

Verizon has moved to transfer venue to the District of New Jersey, or in the alternative, to the Northern District of California.

AT&T Mobility has moved to transfer to the Northern District of Georgia, or in the alternative, the District of New Jersey or the Northern District of California.

It is anticipated that these matters will involve substantially similar issues with respect to claim construction and invalidity.

**9. Necessity of amendments to pleadings: additional parties, third-party complaints, etc.**

Plaintiff may amend its Complaint to add additional entities that may be facilitating or taking part in the activities that Plaintiff believes to be infringement.

At this time, Google does not anticipate any further amendment of the pleadings or addition of other parties, but reserves its right to seek leave to do so in the event that further proceedings in this matter warrant amendment or the addition of other parties.

**10. Anticipated motions, including whether dispositive motions are anticipated.**

**A. Plaintiff's anticipated motions**

Plaintiff may file motions for summary judgment.

Pre-trial motions in limine are also likely.

**B. Defendant's Anticipated Motions**

**1) Motion to Transfer Venue**

Google anticipates filing a motion to transfer venue to the Northern District of California pursuant to 28 U.S.C. § 1404(a).

**2) Motion for Summary Judgment**

Google anticipates that it may file one or more motions for summary judgment depending on the results of claim construction, discovery, and other proceedings in this matter.

**3) Motions-in-limine**

Pre-trial motions-in-limine are also likely.

**11. Anticipated costs of litigation.**

Unknown, but significant costs are likely.

**12. Whether case evaluation is desired.**

At this time, case evaluation is not desired by the parties.



Respectfully Submitted,

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Dated: October 14, 2011

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*Attorneys for Defendant Google, Inc.*

**CERTIFICATE OF SERVICE**

I, Sherri Sikorski, hereby certify that on October 14, 2011, I electronically filed Joint Case Summary with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record.

s/Sherri Sikorski

Sherri Sikorski

Dated: October 14, 2011