

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

Eolas Technologies Incorporated,

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Plaintiff,

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Civil Action No. 6:09-CV-00446-LED

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vs.

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Adobe Systems Inc., Amazon.com, Inc.,

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JURY TRIAL

Apple Inc., Argosy Publishing, Inc.,

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Blockbuster Inc., CDW Corp.,

§

Citigroup Inc., eBay Inc., Frito-Lay, Inc.,

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The Go Daddy Group, Inc., Google Inc.,

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J.C. Penney Company, Inc., JPMorgan

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Chase & Co., New Frontier Media, Inc.,

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Office Depot, Inc., Perot Systems Corp.,

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Playboy Enterprises International, Inc.,

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Rent-A-Center, Inc., Staples, Inc., Sun

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Microsystems Inc., Texas Instruments Inc.,

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Yahoo! Inc., and YouTube, LLC

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Defendants.

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**EOLAS' MOTION FOR LEAVE TO SUPPLEMENT ITS
INFRINGEMENT CONTENTIONS FOR ANDROID 3.0**

I. INTRODUCTION

Pursuant to Patent Rule 3-6, Plaintiff Eolas Technologies Incorporated (“Eolas”) respectfully requests leave to supplement its infringement contentions as to Defendant Google Inc. (“Google”).

Eolas served its original infringement contentions against Google on March 5, 2010. Google’s Android operating system was one of the accused products in Eolas’ infringement contentions. Google recently released a new version of its Android operating system, version 3.0 (“Android 3.0”). With Android 3.0, Google has added new infringing functionality. Moreover, Android 3.0 now expands the range of Android-based devices beyond cell phones to include compatibility with tablet devices. Shortly after Google’s introduction of Android 3.0, Eolas provided Google with supplemental claim charts to explicitly address Google’s newly implemented changes to Android.

Eolas has clearly met the good cause standard for supplementing infringement contentions. First, Google released Android 3.0 after Eolas had served its original infringement contentions. Second, Eolas served supplemental claim charts on Google as soon as Eolas was able to conclude its investigation of Android 3.0. Third, excluding Android 3.0 would require duplicative litigation. Finally, Google would suffer no undue prejudice by being held accountable for its latest infringing activity.

II. BACKGROUND

Google is one of twenty-one defendants which Eolas has accused of infringing U.S. Patent Nos. 5,838,906 and 7,599,985 by using the inventions in those patents to interact with embedded interactive objects, such as video, on webpages. On March 5, 2010, Eolas served its infringement contentions on Google pursuant to P.R. 3-1. (Ex. A.1.) Eolas included separate claim charts for eighteen categories of Google products, including Google’s Android platform

for mobile devices. (*Id.* at 2-3.) Eolas based its March 5, 2010 infringement contentions for Android on the then-current Android version, Android 2.1. (Ex. A.2 (“Android 2.1 is a minor platform release deployable to Android-powered handsets starting in January 2010.”).)

As is common with software, Google continued to develop and update the Android operating system. On February 22, 2011 Google announced “that the full SDK for Android 3.0 is now available to developers.” (Ex. A.3) Android 3.0 offered new embedded browser functionality and a “[n]ew UI designed from the ground up for tablets.” (Ex. A.4 (“Android 3.0 is a new version of the Android platform that is specifically optimized for devices with larger screen sizes, particularly tablets. It introduces a brand new, truly virtual and ‘holographic’ UI design, as well as an elegant, content-focused interaction model.”).) As the documentation further explains, “[t]he Android 3.0 platform introduces many new and exciting features for users and developers” including “updates [to the] set of standard apps” such as the “browser.” Ex. A.8.

Immediately after Eolas learned of the release of Android 3.0, Eolas began investigating the new functionality of Android 3.0. (Ex. A.5.) On March 27, 2011, Eolas sent Google supplemental claim charts for Android 3.0 and requested that Google consent to Eolas’ motion for leave to supplement its infringement contentions. (*Id.*) On April 3, 2011, Google sent Eolas the following three sentence response:

There is no good cause to supplement infringement contentions at this late, post-*Markman* stage in the case. In addition, ***Android 3.0 is simply a new version of a pre-existing product that has already been accused of infringement by Eolas.*** There is no reason why Eolas could not have identified the Google Browser and YouTube Player [sic] in its initial infringement contention claim charts.

(Ex. A.6.) (emphasis added).

On April 8, 2011, Eolas and Google conducted a telephonic meet-and-confer pursuant to Local Rule CV-7. Google was unable to articulate any legitimate reason for opposing Eolas' supplemental infringement contentions. On April 18, 2011, Eolas filed this motion.

III. ARGUMENT

This Court typically considers four factors in relation to whether a party has met the good cause requirement to supplement infringement contentions under P.R. 3-6: “(1) the explanation for the party’s failure to meet the deadline, (2) the importance of what the Court is excluding, (3) the potential prejudice if the Court allows the thing that would be excluded, and (4) the availability of a continuance to cure such prejudice. *MacLean-Fogg Co. v. Eaton Corp.*, No. 2:07-CV-472, 2008 U.S. LEXIS 78301, at *4 (E.D. Tex. Oct. 6, 2008). Here, the first three factors clearly weigh in favor of granting Eolas leave to supplement and the fourth is inapplicable. Thus, pursuant to P.R. 3-6, Eolas has clearly shown good cause to supplement its infringement contentions to specifically address the newly added functionality of Google’s Android 3.0.

A. Eolas Has Met All Deadlines and Acted Diligently in Supplementing Infringement Contentions for Products Subsequently Released by Google.

Eolas has been both diligent in developing its infringement theories with respect to Google’s products and forthcoming in disclosing them to Google. Eolas served its initial P.R. 3-1 infringement contentions on March 5, 2010 (Ex. A.1). Several months later, on September 21, 2010, Eolas wrote Google explaining that Eolas had learned of a new functionality (called Google Instant) recently added to Google’s website. (Ex. A.7.) Eolas requested Google’s consent to a motion for leave to supplement infringement contentions for Google Instant. (*Id.*) Google did not oppose that motion (Dkt. No. 426), and the Court granted it (Dkt. No. 436).

Similarly, Eolas has been diligent and forthcoming with respect to supplementing its infringement contentions for Google's release of Android 3.0. In late February 2011, Google released Android 3.0 to the public, and on March 27, 2011, Eolas sent Google a letter attaching claim charts for the accused Android 3.0 platform. (Ex. A.5.) Further, Eolas filed this motion one week after the telephonic meet-and-confer with Google concerning this dispute.

Eolas' present motion for leave to supplement regarding Android 3.0 is clearly timely. *See MacLean-Fogg Co.*, U.S. LEXIS 78301, at *3-5 (finding diligence where more than three months passed between a March 5, 2008 production and the plaintiff's June 20, 2008 motion to amend infringement contentions based on that production); *MASS Engineered Design, Inc. v. Ergotron, Inc.*, No. 2:06-cv-272, 2008 U.S. Dist. LEXIS 35577, at *15-16 (E.D. Tex. Apr. 30, 2008) (finding diligence where the plaintiff filed a motion to amend infringement contentions one month after being able to access the defendant's website that identified new accused products).

Google's basis for objecting to Eolas' supplemental infringement contentions does not withstand scrutiny. In objecting, Google took the position that "[t]here is no reason why Eolas could not have identified Google Browser and YouTube Player [running on Android 3.0] in its initial infringement contention claim charts." (Ex. A.6.) However, Eolas' initial infringement contentions *do* identify the browser functionality of the Android platform. A few examples from the preamble of claim 1 from the initial infringement contentions make this plain:

- "In addition, Google provides the infrastructure (e.g. the operating system and ***the browser***), in addition to instructions to users, and causes them to use the Google Nexus one and Google Android for mobile (and other) devices in an infringing manner in their default and expected uses." (Ex. A.9 at 1) (emphasis added).

- Screenshot showing embedded interactive Flash playing within the browser on an Android device:

I thought you might like to see this video of some examples Flash content running on this great new phone.



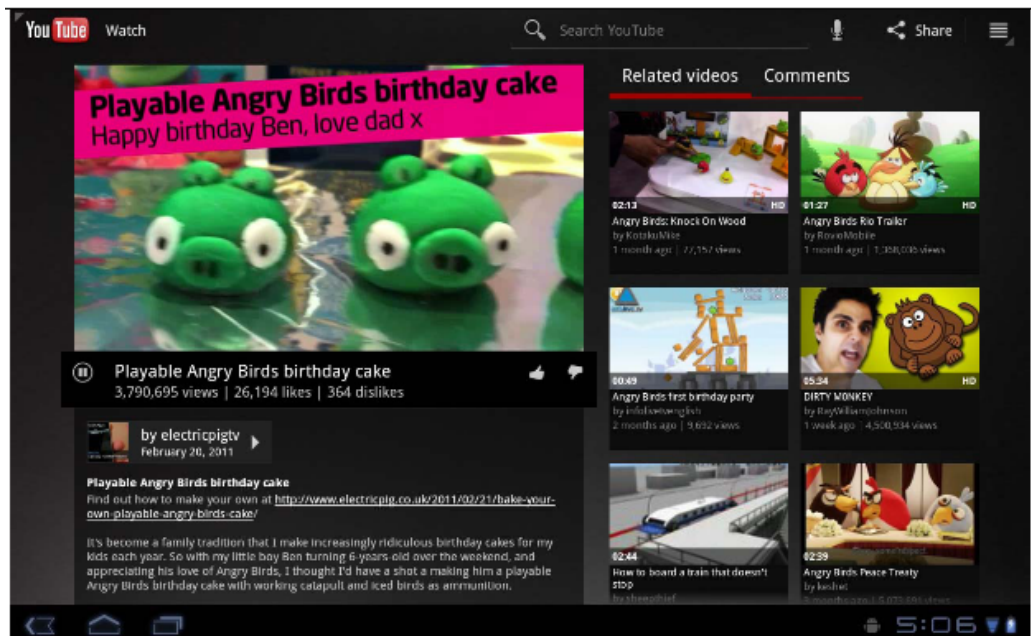
(Ex. A.9 at 2).

- “And of course the platform really wouldn’t be complete without some applications, and so we’ve built them. We’ve included *a web browser*, email client, instant messaging, a camera for the phone, a dialer, contacts, and the list goes on.” (Ex. A.9 at 5) (emphasis added).

Accordingly, since the March 5, 2010 date of Eolas’ initial infringement contentions, the browser functionality included as part of the Android platform has been at the forefront of Eolas’ infringement allegations against Android. Android 3.0 updated this previously-accused functionality, necessitating Eolas’ supplemental contentions. (Ex. A.8). Eolas’ supplemental infringement contentions for Android 3.0 continue to reference the browser. (Ex. A.10 at 2).

As to the YouTube Player, its operation and functionality is directly tied to the type of device it operates on. Prior to the release of Android 3.0, the Android platform supported only mobile phones, with small screens. Now, with the release of Android 3.0, the Android platform

added support for tablet devices, with larger screens. As Google explains, “Android 3.0 is a new version of the Android platform that is specifically optimized for devices with larger screen sizes, particularly tablets.” (Ex. A.4). This additional screen real estate is important because it allows the YouTube player on tablet devices to play embedded interactive YouTube movies. This is shown in Eolas’ supplemental infringement contentions for Android 3.0:



Source: YouTube Player for the Android 3.0 operating system for tablets

(Ex A.10 at 8). Accordingly, the YouTube player in Google’s newly released, and tablet-optimized, Android 3.0 offers new infringing functionality.

Google’s objection to Eolas’ supplemental infringement contentions for Android 3.0 is inexplicable given the fact that Google did not publicly release Android 3.0, or disclose the new functionality at issue here, until late February 2011. Thus, there is simply no legitimate argument that Eolas should have been able to address infringing functionality that had been neither disclosed nor released.

B. It Is Important that the Issue of Android 3.0 Infringement Be Addressed Now.

The newly released Android 3.0 is very important to this litigation. If Eolas were denied leave to supplement, Eolas would be unable to accuse this significant new version of one of the main accused products as well as an entire line of devices—tablets that run Android 3.0. In that circumstance, Eolas would be forced to initiate duplicative litigation on the same patents and updated versions of the very accused products already at issue. This would be a waste of resources for the Court as well as for Eolas and Google. The Android 3.0 update to the previously accused Android platform should be addressed now so that it can be resolved in one litigation. *See MASS Engineered*, 2008 U.S. Dist. LEXIS 35577, at *16; *NIDEC Corp. v. LG Innotek Co.*, No. 6:07-cv-108, 2009 U.S. Dist. LEXIS 106667, at *6 (E.D. Tex. Sept. 2, 2009).

C. There Is No Potential Prejudice to Google in Being Held Accountable for Its Latest Infringing Activity.

Google is in no way prejudiced by Eolas' supplemental infringement contentions. First, as Google itself recognizes "Android 3.0 is simply a new version of a pre-existing product that has already been accused of infringement by Eolas." (Ex. A.6). Second, it was Google's own choice to develop and release Android 3.0 when it did. Moreover, Google never disclosed Android 3.0 to Eolas or produced a meaningful set of related documents even though Google was developing Android 3.0 during this litigation. *See* P.R. 3-4(a); *Honeywell Int'l, Inc. v. Acer Am. Corp.*, 655 F. Supp. 2d 650, 656-58 (E.D. Tex. 2009). (*See also* Dkt. No. 247 ¶¶ 2(B), 10.) Finally, as discussed above, Eolas timely provided supplemental claim charts to Google.

Google has taken the position that Eolas should not be permitted to supplement its infringement contentions merely because the *Markman* hearing has already occurred in this case. (Ex. A.6.) The *Markman* hearing occurred just last month. (Dkt. No. 249 at 4) More importantly, Google has not even attempted to articulate how addressing Android 3.0 could

possibly implicate claim construction issues, particularly in light of the rule that “claims may not be construed with reference to the accused device.” *NeoMagic Corp. v. Trident Microsystems, Inc.*, 287 F.3d 1062, 1074 (Fed. Cir. 2002) (citation omitted). Google cannot legitimately argue that Eolas’ supplemental infringement contentions prejudice Google with regard to the *Markman* proceedings or anything else set out in the Court’s schedule. *See Arbitron, Inc. v. Int’l Demographics Inc.*, No. 2:06-CV-434, 2009 U.S. Dist. LEXIS 3191, at *7 (E.D. Tex. Jan. 16, 2009) (finding no prejudice where the Court had already entered an order on claim construction); *Performance Pricing, Inc. v. Google Inc.*, No. 2:07-cv-432, 2009 U.S. Dist. LEXIS 84211, at *14-15 (E.D. Tex. Sept. 15, 2009) (same).

D. A Continuance Is Unnecessary Because There Is No Prejudice.

The Court need not consider the fourth factor as allowing supplemental infringement contentions will not prejudice Google and Google has not even suggested any alleged prejudice to Eolas in meeting and conferring on this motion. *See MacLean-Fogg*, 2008 U.S. Dist. LEXIS 78301, at *7; *MASS Engineering*, 2008 U.S. Dist. LEXIS 35577, at *16-17; *Forgent Networks, Inc. v. Echostar Techs. Corp.*, No. 6:06-cv-208, 2006 U.S. Dist. LEXIS 88872, at *11 (E.D. Tex. Dec. 8, 2006).

IV. CONCLUSION

For the foregoing reasons, Eolas respectfully requests that the Court grant its motion to supplement its infringement contentions.

Dated: April 18, 2011.

McKool Smith, P.C.

/s/ Mike McKool

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CERTIFICATE OF CONFERENCE

The undersigned certifies that the parties have complied with Local Rule CV-7(h)'s meet-and-confer requirement. On April 8, 2011, Josh Budwin and Matt Rappaport, counsel for Eolas, conducted a personal conference by telephone with Mark Francis and Joshua Van Hoven, counsel for Google. The discussions ended conclusively in an impasse, leaving an open issue for the Court to resolve. Google opposes this motion.

/s/ Josh Budwin

Josh Budwin

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic services on April 18, 2011. Local Rule CV-5(a)(3)(A).

/s/ Josh Budwin

Josh Budwin