

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

EOLAS TECHNOLOGIES
INCORPORATED,

PLAINTIFF,

v.

ADOBE SYSTEMS INC., et al.,

DEFENDANTS.

§ Civil Action No. 6:09-CV-446-LED

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JURY TRIAL DEMANDED

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**GOOGLE’S OPPOSITION TO EOLAS’ MOTION FOR LEAVE TO
SUPPLEMENT ITS INFRINGEMENT CONTENTIONS FOR ANDROID 3.0**

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I. INTRODUCTION

The Android browser and YouTube application were publicly available at the time that Eolas filed its initial “Android” infringement contentions over a year ago. Google asked Eolas to amend its contentions regarding Android because these contentions did not properly put Google on notice of Eolas’ infringement theories, failing to describe how the Android “browser” allegedly infringed Eolas’ asserted claims. Eolas refused to do so. Now, after the completion of claim construction and as the close of discovery approaches, Eolas seeks to assert new infringement theories, including a theory against the previously unaccused YouTube application, all under the guise that amended contentions are justified by a “new version” of Android – Android 3.0.

First, Eolas has failed to meet its burden of demonstrating that the *accused functionality* has changed in some relevant way. Eolas has not identified *how* any of the features introduced in version 3.0 of Android, such as resizing of windows for larger table devices, are pertinent to the accused functionality such that the supplementation is warranted. The accused functionality, the Android “browser”, existed in versions of Android available at the time Eolas submitted its original infringement contentions.

Second, Eolas’ original contentions for Android referenced only a “browser.” To the extent that those contentions stated cognizable infringement theories, there is no dispute that the same theory applies to all subsequent versions of Android. Yet Eolas is now attempting to add new infringement theories concerning Android by attempting to encompass, for the first time, the YouTube application for Android as the accused “browser”, even though the YouTube application is a standalone application that is not accessed through a browser. Indeed, the YouTube application was included in versions of Android released before Eolas filed its original infringement contentions. But

Eolas' attempt to support a new infringement theory concerning Android by simply pointing to the fact that Android 3.0 is a new version is improper, especially because the YouTube standalone application is not a new feature added to Android 3.0, but has been long available on Android.

Third, Google and YouTube (collectively "Google") will be unduly prejudiced by if Eolas is permitted to pursue new infringement theories concerning Android at this late stage. In particular, Google has prepared its noninfringement defenses on Android, including claim construction positions, based on Eolas' original infringement theories that referenced only a "browser." Accusing standalone applications for the first time, such as the YouTube application, presents a significant shift in Eolas' infringement theory because all of the patent claims require a browser and the YouTube app is not a browser.

Fourth, a continuance will exacerbate the prejudice to Google. As evidenced by this latest motion, Eolas views each new software version as an opportunity to modify its moving-target infringement theories. This approach hinders Google's ability to prepare for its defense and costs a great deal in attorney fees and other costs.

For all of these reasons, Eolas' motion should be denied.

II. FACTS

Android is a mobile operating system ("OS") that includes, *inter alia*, the Android browser. The Android OS supports applications or "apps"—i.e., stand-alone software programs that operate on a mobile device. Many apps allow users to access online content without the use of a generalized browser program. An example is the YouTube app for directly accessing YouTube videos from a mobile device. A YouTube app has existed since the launch of the first Android-powered phone in 2008. *See* Ex. 1

(“On September 23, T-Mobile announced the world's first Android-powered phone, the G1. The phone comes preloaded with Search, Maps, Gmail with Contacts, Calendar, Google Talk, and YouTube.”).

At the time Eolas served its initial infringement contentions relating to Android on March 5, 2010, the current version of Android was Android 2.0/2.1. Those contentions mentioned a “browser,” but as Google explained in a motion to the Court in August 2010, “Eolas does not appear to have any Rule 11 basis for certain allegations, such as with respect to Google’s Android operating system.” Dkt. 393, p.8. Specifically, although the original contentions referenced a “browser,” they did not provide sufficient detail to understand how the “browser” might infringe the patent claims. The initial contentions did not even attempt to accuse the YouTube app of infringement.¹

Eolas did not modify its contentions after Android 2.2 released in May 2010 or Android 2.3 released in December 2010. Both Android 2.2 and Android 2.3 were used for handheld mobile phones such as the Droid line of devices made and sold by Motorola, Samsung and HTC, the same devices referenced in Eolas’ original contentions. In the meantime, larger tablet devices started to arrive on the market. In February 2011, Google released Android 3.0, which among other things provided for better utilization of the larger tablet screen.

Eolas’ newly proposed contentions significantly modify Eolas’ infringement theories with respect to Android and accuse the YouTube app of infringement for the first time. *Compare* Dkt. 634, Ex. 9, *with* Dkt. 634, Ex. 10.² For

¹ Using a word search, the word YouTube does not show up in the 422 pages of Android contentions.

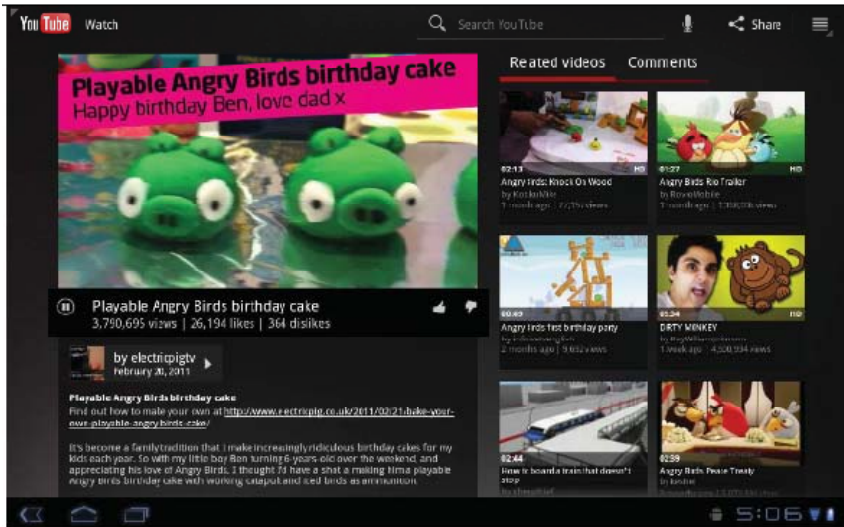
² Eolas only attached the contentions related to the ‘906 patent to its motion to amend. It did not attach either set of contentions for the ‘985 patent.

example, whereas the original contentions merely mention the browser, Eolas' new theories describe the browser as performing claim steps. The only previous mention of YouTube by Eolas was as a website that is visited through a browser, not as a stand-alone application that does not need a browser to operate.

Eolas' motion fails to specifically identify any accused functionality of Android 3.0 that did not exist in Android 2.0, Android 2.1, Android 2.2, or Android 2.3.³ Specifically, Eolas fails to articulate any reasons why the changes to the browser or YouTube app are *relevant to the accused functionality* such that supplementation is necessary. With respect to the Google browser, Eolas simply announces that there is "new functionality" without any pertinent explanation. *See, e.g.,* Dkt. 634, p. 3 ("Android 3.0 offered new embedded browser functionality and a '[n]ew UI designed from the ground up for tablets."); p. 5 ("Android 3.0 updated this previously-accused functionality, necessitating Eolas' supplemental contentions.").

With respect to the YouTube app, Eolas focuses almost exclusively on the fact that the Android browser and YouTube app have been re-sized to fit on a tablet screen. Eolas argues that "This additional screen real estate is important because it allows the YouTube player on tablet devices to play embedded interactive YouTube movies." Dkt. 634, p.6. But even the original 2008 version of the YouTube app displayed multiple YouTube movies, as seen below in a comparison of the 2008 YouTube app with the screen shot of the Android 3.0 YouTube app from Eolas' brief:

³ The only evidence cited by Eolas relating to the accused functionality is to piece together a vague statement relating to "'updates [to the] set of standard apps' such as the 'browser'" From Google press releases. Dkt. 634, p.2.



Eolas Screen Shot, Dkt. 634, p. 6.



Ex. 1 (2008 YouTube app).

In response to a request from Eolas’ counsel request to amend its contentions, Google’s counsel explained that “Android 3.0 is simply a new version of a pre-existing product that has already been accused of infringement by Eolas.” *See* Dkt. 634-6. On April 5, 2011, counsel for Eolas e-mailed counsel for Google seeking “a brief call on Friday morning . . . to make sure that we are not talking past each other.” Ex. 2

(e-mail from J. Budwin). During that call Google requested a formal meet and confer to address the issues raised by Eolas' request. Eolas refused and instead filed this motion.

III. DISCUSSION

“The purpose of Local Patent Rules is to ‘further the goal of full, timely discovery and provide all parties with adequate notice and information with which to litigate their cases, not to create supposed loopholes through which parties may practice litigation by ambush.’” *Davis-Lynch, Inc. v. Weatherford Int’l, Inc.*, No. 6:07-cv-559, 2009 U.S. Dist. LEXIS 130654, *3-4 (E.D. Tex. April 24, 2009) (quoting *IXYS Corp. v. Advanced Power Tech., Inc.*, 2004 U.S. Dist. LEXIS 10934, 2004 WL 1368860, *3 (N.D. Cal. June 16, 2004)).

“Patent Rule 3-7 incorporates Rule 16(b)’s good cause standard by stating ‘amendment or modification of the Preliminary or Final Infringement Contentions . . . may be made only by order of the Court, which shall be entered only upon a showing of good cause.’” *STMicroelectronics, Inc. v. Motorola, Inc.*, 307 F. Supp. 2d 845, 849 (E.D. Tex. 2004) (quoting P.R. 3-7). The Court considers the following factors to determine whether the moving party has demonstrated good cause: (1) the explanation for the failure to meet the deadline; (2) the importance of the thing that would be excluded; (3) the potential prejudice in allowing the thing that would be excluded; and (4) the availability of a continuance to cure such prejudice. *S & W Enters., L.L.C. v. Southtrust Bank of Ala., NA*, 315 F.3d 533, 535-36 (5th Cir. 2003).

A. The Explanation for the Failure to Meet the Deadline

Eolas' argument that its supplementation is timely misses the mark. Eolas had over a year to supplement its contentions regarding Android, but refused to do so despite being notified by Google that its initial contentions failed to put Google on notice

of its infringement theories. Eolas is now attempting to assert *new* infringement theories, including a theory against the previously unaccused YouTube application, all under the guise that amended contentions are justified by a “new version” of Android. Eolas argues at length that “Eolas’ initial infringement contentions *do* identify the browser functionality of the Android platform.” Dkt. 634, p. 4. Yet Eolas fails to articulate why any of the new features in Android 3.0 necessitates its new infringement theories.

Thus, there is no dispute that the infringement theories articulated in Eolas’ initial infringement contentions continue to apply to new versions of accused software. The only dispute is whether Eolas can create new infringement theories at this stage of the case.⁴ As Google explained above, Eolas has failed to point to any aspect of the Google browser that has changed in a manner that is relevant to the accused functionality. *See, e.g., Alt v. Medtronic, Inc.*, No. 2:04-cv-370, at p. 4 (E.D. Tex. Oct. 28, 2005) (Ex. 3) (denying motion for leave where plaintiff “has not provided any reason for his delay in asserting [a new infringement theory] against already-accused products in the case”); *see also Realtime Data, LLC v. Packeteer, Inc.*, No. 6:08-cv-144, 2009 U.S. Dist. LEXIS 73217, *26 (E.D. Tex. Aug. 18, 2009) (denying motion for leave to amend where the plaintiff failed to explain how any late information was “pertinent to the amendments”).

B. The Importance Of The Thing That Would Be Excluded

Eolas argues that “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

⁴ For reasons that Google has stated for nearly a year, those initial infringement contentions fail to support any proper infringement theory against the Android browser, although they do mention the Android browser. Providing new infringement theories at this stage of the case is clearly improper. *Realtime Data, LLC v. Packeteer, Inc.*, No. 6:08-cv-144, 2009 U.S. Dist. LEXIS 73217, *30-31 (E.D. Tex. Aug. 18, 2009) (“With a lawsuit of great complexity, it is all the more imperative to avoid springing new claims on Defendants at a late stage.”).

well as an entire line of devices—tablets that run Android 3.0.” Dkt. 634, p. 7. This simply is not true. To the extent that Eolas’ initial contentions properly accused Android, Android is already part of the case and Eolas has not demonstrated that supplementation is warranted. *See* Dkt. 634, Ex. 6 (“Android 3.0 is simply a new version of a pre-existing product that has already been accused of infringement by Eolas.”); Ex. 1 (“Android as a product is already at issue in this case”); *see also Alt*, Ex. 3 at pp. 4-5 (finding that plaintiff “can assert his infringement issues related to the EnTrust product line against claim 1, which is already in the case and has been briefed and argued by the parties”). Eolas’ mention of tablets is another red herring; the previous versions of Android also ran on tablets.

C. The Potential Prejudice In Allowing The Thing That Would be Excluded

Eolas states that Google will not be prejudiced because Android is already at issue in the case and “it was Google’s own choice to develop and release Android 3.0 when it did.” Dkt. 634, p. 7. However, it is not the inclusion of Android 3.0 in the case that prejudices Google, but rather Eolas’ attempt to create new infringement theories for Android after claim construction and the inclusion of an entirely new type of product, the YouTube app, at this late stage of the case. *See Sybase, Inc. v. Vertica Systems, Inc.*, No. 6:08-cv-24, Ex. 4, p. 4 (finding that “at this late stage of the case would cause a great deal of prejudice to [the parties] and the Court [because] [t]he parties have concluded their claim construction briefing on the ’229 Patent and the Markman hearing was held on November 5, 2009.”); *see also RealTime*, U.S. Dist. LEXIS 73217, *37 (“The Defendants have justifiably relied on Plaintiff’s Original Infringement Contentions as a framework for proceeding through discovery and preparing to file dispositive motions and for trial”).

Eolas also argues that its new infringement theories “could [not] possibly implicate claim construction issues, particularly in light of the rule that ‘claims may not be construed with reference to the accused device.’” Dkt. 634, pp. 7-8 (quoting *NeoMagic Corp. v. Trident Microsystems, Inc.*, 287 F.3d 1062, 1074 (Fed. Cir. 2002)). To the contrary, “courts in this district recognize that ‘it is likely that . . . amended [infringement contentions] will impact [a defendant's] claim construction positions and invalidity contentions.’” *See Davis-Lynch*, 2009 U.S. Dist. LEXIS 130654, *4 (quoting *MacLean-Fogg Co. v. Eaton Corp.*, No. 2:07-CV-472, 2008 U.S. Dist. LEXIS 78301, 2008 WL 4601476, *2 (E.D. Tex. Oct. 6, 2008)). For example, if Google were aware that Eolas would now accuse an app such as YouTube of infringement, it would have considered additional arguments relating to the “browser” limitation. *See Alt*, Ex. 3 at pp. 5 (explaining that “the Court is persuaded by Medtronic’s argument that it’s Markman briefing and arguments would have focused more on the functionality language that appears in both claims 1 and 16 if the same terms in claim 16 were being construed as well”). Thus, Google will be severely prejudiced if Eolas is allowed to amend its infringement contentions at this stage of litigation, after claim construction has completed and close of discovery approaches.

D. The Availability Of A Continuance To Cure Such Prejudice

Eolas’ argues that the Court need not consider this factor because Google will not be prejudiced. To the contrary, Google will be severely prejudiced if Eolas is allowed to change its infringement theories on Android and insert a new line of products, the YouTube app, into the lawsuit after claim construction and near the close of discovery. This is particularly true since these products were released well before Eolas’

served its initial contentions, and Google has prepared its case for the last year based on those initial contentions.

Indeed, Eolas' latest tactics also demonstrate why a continuance cannot cure any prejudice to Google. Google is constantly working to improve and update its software. It is apparent that Eolas will use any update as an attempt to "litigate by ambush" and change its infringement contentions. A continuance will only result in additional prejudice to Google, both in its ability to defend this case and the costs of defense. *See Sybase*, Ex. 4, p. 4 ("Considering that the claim construction briefing and the Markman hearing have already concluded, a continuance is not likely to remedy any potential prejudice that Vertica might suffer if infringement contentions concerning the '228 Patent were added to the case."); *see also RealTime*, U.S. Dist. LEXIS 73217, *41 (explaining that "the requested changes are significant enough that the parties would essentially have to continue litigating this case, while beginning discovery anew on the new . . . accused products").

IV. CONCLUSION

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

Dated: May 5, 2011

Respectfully submitted,

By: /s/ Robert J. Goldman, with permission
by Michael E. Jones

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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, Mark Francis and Joshua Van Hoven, counsel for Google, conducted a personal conference by telephone with Josh Budwin and Matt Rappaport, counsel for Eolas. The parties did not reach an agreement regarding the issue addressed herein, leaving the issue open for the Court to resolve.

*/s/ Sasha G. Rao, with permission by
Michael E. Jones*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on May 5, 2011. Any other counsel of record will be served by First Class U.S. mail on this same date.

/s/ Michael E. Jones