

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

<b>Eolas Technologies Incorporated,</b>	§	
	§	
<b>Plaintiff,</b>	§	<b>Civil Action No. 6:09-CV-00446-LED</b>
	§	
<b>vs.</b>	§	
	§	
<b>Adobe Systems Inc., Amazon.com, Inc.,</b>	§	<b>JURY TRIAL</b>
<b>Apple Inc., Argosy Publishing, Inc.,</b>	§	
<b>Blockbuster Inc., CDW Corp.,</b>	§	
<b>Citigroup Inc., eBay Inc., Frito-Lay, Inc.,</b>	§	
<b>The Go Daddy Group, Inc., Google Inc.,</b>	§	
<b>J.C. Penney Company, Inc., JPMorgan</b>	§	
<b>Chase &amp; Co., New Frontier Media, Inc.,</b>	§	
<b>Office Depot, Inc., Perot Systems Corp.,</b>	§	
<b>Playboy Enterprises International, Inc.,</b>	§	
<b>Rent-A-Center, Inc., Staples, Inc., Sun</b>	§	
<b>Microsystems Inc., Texas Instruments Inc.,</b>	§	
<b>Yahoo! Inc., and YouTube, LLC</b>	§	
	§	
<b>Defendants.</b>	§	

**EOLAS' REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO SUPPLEMENT ITS  
INFRINGEMENT CONTENTIONS FOR ANDROID 3.0**

## **I. INTRODUCTION**

Eolas is requesting leave to supplement its initial infringement contentions concerning Google's Android operating system to account for Google's recent release of Android 3.0.

Approximately one year after service of Eolas's initial infringement contentions, Google released Android 3.0, a new major release of the Android operating system. Android 3.0 added new infringing functionality and expanded the range of Google-supported devices beyond cell phones to also include tablet devices.

Since Google's February 22, 2011 announcement of its SDK for Android 3.0, Eolas sent supplemental claim charts on March 27, 2011 and met and conferred with Google on April 8, 2011. As Google opposed Eolas's supplementation of infringement contentions, but was unable to provide any legitimate reason for its opposition, Eolas filed this motion on April 18, 2011.

## **II. ARGUMENT**

Both parties agree on the four factors this Court normally considers in determining whether a party has met the good cause requirement for supplementing infringement contentions. The four factors are: "(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); *see also S & W Enters., L.L.C. v. Southtrust Bank of Ala., NA*, 315 F.3d 533, 535–36 (5th Cir. 2003); Motion at 3 (Dkt. No. 634); Response at 6 (Dkt. No. 647).

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

Eolas has consistently served its Infringement Contentions and supplements to Infringement Contentions in a diligent manner. Google did not publicly release Android 3.0 or

otherwise disclose the new functionality at issue until late February 2011. Eolas contacted Google and provided the supplemental infringement contentions approximately one month later, on March 27, 2011. After communications and a meet and confer with Google's counsel, Eolas filed a motion for leave to supplement on April 18, 2011. Eolas's supplemental infringement contentions could not have been served before the release of the new infringing functionality, and were thus provided once Eolas had an opportunity to review the released product.

Rather than address the factor of Eolas's timely supplementation of infringement contentions, Google chooses instead to attack the sufficiency of Eolas's initial infringement contentions served on March 5, 2010.<sup>1</sup> But this Court has already decided that issue in its Sept. 1, 2010 order. Dkt. No. 401 (denying motion to strike Eolas's infringement contentions).<sup>2</sup>

Eolas's original infringement contentions are sufficient to accuse Google and YouTube products disclosed and released as of March 5, 2010. Eolas's original infringement contentions were mapped to Android 2.1, the most current Android release at the time of filing. While Eolas did not update the infringement contentions for every *minor* release of Android (2.2 and 2.3) in the past year, Eolas has been diligent in moving to supplement infringement contentions for the first *major* release of Android since the initial infringement contentions were served.

The major features released with this major version release of Android necessitate the supplemental infringement contentions. Android 3.0 is the first version of Android to officially support tablet devices. *See* discussion *infra* Part II.B. Examples of changes with Android 3.0 can be found through the various press releases and screenshots contained in the exhibits to

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<sup>1</sup> Response at 6–7 (claiming “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.”).

<sup>2</sup> After Eolas's service of infringement contentions on March 5, 2010, Adobe filed a motion on July 7, 2010 that included a motion to strike Eolas's infringement contentions. Dkt. No. 367. Google and YouTube joined Adobe's motion on Aug. 26, 2010. Dkt. No. 393. After a hearing, this Court denied that motion on Sept. 1, 2010. Dkt. No. 401.

Eolas's motion for leave to supplement.<sup>3</sup> Eolas provided these supplemental infringement contentions as soon as practically possible after Android's first new major release since this litigation began.

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

Both parties appear to agree that Android 3.0 should be included in this case. Google believes "Android is already part of the case," but that no supplementation is warranted by Android's new major version release. Response, at 8. Eolas, on the other hand, believes that the new major release of Android warrants supplementation of the infringement contentions concerning Android, especially since this is the first version of Android specifically tailored to tablet devices. Motion, at 7.

At the time of the initial infringement contentions, Google was focused only on smart phones, neglecting other devices such as tablets and not even having an Android certification for tablets.<sup>4</sup> While some manufacturers did cobble together tablets running an open-source version of Android, Google specifically discouraged such devices until the release of Android 3.0.<sup>5</sup> Google first supported Android on tablet devices with version 3.0 and started allowing for

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<sup>3</sup> See, e.g., Motion, Exh. A.8, at 2 ("The Android 3.0 platform introduces many new and exciting features for users and developers." "Android 3.0 is a new version of the Android platform that is specifically optimized for devices with larger screen sizes, particularly tablets."); Motion, Exh. A.10, at 6, 7, 5-7 ("We [Adobe] have been working very closely with Google to ensure tight integration between Flash Player 10.2 and new OS and browser capabilities in Android 3.0." "Deeper integration with the Android browser rendering engine (Android 3.0.1+ only)." "Deeper integration of Flash Player and the enhanced Android 3.0 browser delivers faster and better rendering of rich, interactive web content resulting in a browsing experience similar to the desktop.").

<sup>4</sup> Ganapati, Priya, *Android Devices Crave Google's Attention*, WIRED, March 29, 2010, <http://www.wired.com/gadgetlab/2010/03/android-devices-crave-googles-attention/> ("But these oddball devices [(including tablets)] bringing up the rear are running into an unexpected challenge: neglect by Google." "Today Google is 100 percent focused on smartphones" (quoting Kevin Kitagawa). "Though Android is free and open source, Google exercises control over what devices can access the Android Market's applications and receive extensive developer support. And, currently, only smartphones running Android qualify.") (Exh. A).

<sup>5</sup> Ogg, Erica, *Google: Android not yet ready for tablets*, CNET, Sept. 10, 2010, [http://news.cnet.com/8301-31021\\_3-20016085-260.html](http://news.cnet.com/8301-31021_3-20016085-260.html) (citing Hugo Barra, Google's director of mobile products) (Exh. B).

Android compatibility certification of tablet devices. These tablet devices, along with the other features of Android 3.0 are important to this case.

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

Eolas's Supplemental Infringement Contentions are in direct response to Google's latest infringing activity: Google's release of Android 3.0. Google cannot continue to release new and updated infringing products during the course of litigation and expect them to avoid incorporation into this lawsuit.

Eolas is not springing newly accused products on Google. Though Google focuses solely on the name "YouTube," Response at 3, 3 n.1, Eolas's initial infringement contentions specifically call out applications in describing the infringement,<sup>6</sup> and even Google describes YouTube as an application, Response at 2–3. Eolas is not accusing new products, but supplementing its infringement contentions to account for the new features of a major new Android release.

Eolas is not springing new patents or claims on Google. Google cites both *Sybase, Inc. v. Vertica Systems, Inc.*, No. 6:08-cv-24 (E.D. Tex. Nov. 30, 2009) and *Alt v. Medtronic, Inc.*, No. 2:04-cv-370 (E.D. Tex. Oct. 28, 2005), but those cases involve supplementation that would have added new patents or new claims.<sup>7</sup> Eolas's Supplemental Infringement Contentions refer to claims 1, 2, 3, 6, 7, 8, 11, 12, 13, and 14 of U.S. Patent No. 5,838,906. Motion, Exh. A.10.

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<sup>6</sup> Motion, Exh. A.9, at 5, 121 ("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."); *id.* at 7, 123 (discussing creation of games as applications for Android); *id.* at 16, 120 ("The Android SDK provides the tools and APIs necessary to begin developing applications that run on Android-powered devices. This site provides information about Google projects based on the Android platform, such as external libraries that extend the Android platform, Android applications, hosted services and APIs, the Android Developer Contest, and more. Everything on this site is provided by Google for the benefit of Android developers."); *id.* at 126–27 (discussing the Ustream application).

<sup>7</sup> The motion in *Sybase* was to add claims of infringement of previously unasserted U.S. Patent No. 5,794,228 to a case already asserting U.S. Patent No. 5,794,229. *Sybase*, No. 2:04-cv-370, at 1–2. The motion in *Alt* was to add previously unasserted claim 16 of U.S. Patent No. 5,014,722 to a case already asserting claim 1. *Alt*, No. 2:04-cv-370, at 1.

Eolas has already asserted each of these claims, among others, against Android in Eolas's initial infringement contentions. Motion, Exh. A.9.

Eolas's Supplemental Infringement Contentions do not create a new infringement theory for Android devices. Google's Response does not even attempt to identify any of the supposedly new infringement theories. Rather, Eolas's Supplemental Infringement Contentions apply Eolas's long-standing infringement theories against Google's new Android 3.0 software and newly supported tablet devices.

Just last week, on May 9, 2011, this Court allowed Eolas to supplement Eolas's Infringement Contentions to add the newly released Amazon Cloud Player. Dkt. No. 652. Here, Eolas's supplemental Infringement Contentions continue to assert existing claims against an existing product line, but update them to account for Android's new major 3.0 release.

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

As Google will suffer no prejudice by Eolas's Supplemental Infringement Contentions, there is no need for a continuance. Google does not even argue that a continuance is necessary. Rather, Google appears to indicate that a timely trial is better. Response, at 10.

**III. CONCLUSION**

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

Dated: May 16, 2011.

**McKool Smith, P.C.**

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**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 May 16, 2011. Local Rule CV-5(a)(3)(A).

*/s/ Josh Budwin*  
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Josh Budwin