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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 CYWEE GROUP LTD.,

11 Plaintiff,

12 v.

13 HTC CORPORATION, et al.,

14 Defendants.

CASE NO. C17-0932JLR

ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS WITH LEAVE TO  
AMEND

15 **I. INTRODUCTION**

16 Before the court is Defendants HTC Corporation and HTC America, Inc.'s  
17 (collectively, "HTC") motion to dismiss Plaintiff CyWee Group Ltd.'s ("CyWee") claims  
18 for induced infringement. (MTD (Dkt. # 35).) The court has considered the motion, the  
19 parties' submissions in support of and in opposition to the motion to dismiss, the relevant  
20 portions of the record, and the applicable law. No party has requested oral argument.  
21 Being fully advised, the court GRANTS HTC's motion to dismiss CyWee's induced  
22 infringement claims with leave to amend.



1 ¶ 11.) This sensor fusion technology is useful for games that incorporate the motion of  
2 the device into play, augmented reality applications, and virtual reality applications. (*See*  
3 *id.* ¶¶ 18, 21-22.)

4 CyWee initially sued HTC on June 16, 2017, and amended its complaint on July 6,  
5 2017, alleging direct infringement of the Patents-in-suit as well as indirect infringement  
6 through inducement. (*See generally* Compl. (Dkt. # 1); Am. Compl.) As relevant here,  
7 CyWee asserts that HTC indirectly infringes the Patents-in-suit by:

8 [i]nducing others to infringe on one or more claims of the [Patents-in-suit]  
9 through sale and/or use of the [Patents-in-suit] Accused Products. On  
10 information and belief, at least as a result of the filing of this action, HTC is  
11 aware of the [Patents-in-suit]; is aware that its actions with regards to  
12 distributors, resellers, and/or end users of the [Patents-in-suit] Accused  
13 Products would induce infringement; and despite such awareness will  
continue to take active steps—such as, creating and disseminating the  
[Patents-in-suit] Accused Products, and product manuals, instructions  
promotional and marketing materials, and/or technical materials to  
distributors, resellers, and end users—encouraging other’s infringement of  
the [Patents-in-suit] with the specific intent to induce such infringement.<sup>2</sup>

14 (Am. Compl. ¶ 28.) CyWee also attaches two claim charts to its amended complaint  
15 illustrating how the HTC products infringe upon the Patents-in-suit. (*See* ’438 Claim  
16 Chart (Dkt. # 20-1); ’978 Claim Chart (Dkt. # 20-2).) Both claim charts include several  
17 screenshots—the majority of which do not derive from HTC—depicting the computing  
18 code that presumably is used by the accused products and how that code allows the  
19 accused products to perform the protected methods. (*See, e.g.*, ’978 Claim Chart at 4-9.)

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22 <sup>2</sup> CyWee includes this identical allegation of induced infringement for both  
Patents-in-suit. (*See* Am. Compl. ¶¶ 28, 126.)

1 HTC moves to dismiss only these induced infringement claims for failure to state a claim.  
2 (MTD at 1.)

### 3 III. ANALYSIS

#### 4 A. Legal Standard

5 Dismissal for failure to state a claim “is proper if there is a lack of a cognizable  
6 legal theory or the absence of sufficient facts alleged under a cognizable legal theory.”  
7 *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (internal quotation  
8 marks omitted). “To survive a motion to dismiss, a complaint must contain sufficient  
9 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”  
10 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550  
11 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual  
12 content that allows the court to draw the reasonable inference that the defendant is liable  
13 for the misconduct alleged.” *Id.* Although the standard “asks for more than sheer  
14 possibility that a defendant has acted unlawfully,” it is not “akin to a probability  
15 requirement.” *Id.* Thus, the plausibility requirement “simply calls for enough fact[s] to  
16 raise a reasonable expectation that discovery will reveal” liability for the alleged  
17 misconduct. *Twombly*, 550 U.S. at 556.

18 When considering a motion to dismiss under Federal Rule of Civil Procedure  
19 12(b)(6), the court construes the complaint in the light most favorable to the nonmoving  
20 party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir.  
21 2005). The court must accept all well-pleaded facts as true and draw all reasonable  
22 inferences in favor of the plaintiff. *Wylar Summit P’ship v. Turner Broad. Sys., Inc.*, 135

1 F.3d 658, 661 (9th Cir. 1998). “Mere conclusory statements” or “formulaic recitation[s]  
2 of the elements of a cause of action,” however, “are not entitled to the presumption of  
3 truth.” *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (citing *Twombly*,  
4 550 U.S. at 555). On a motion to dismiss, the court may consider the pleadings,  
5 documents attached to the pleadings, documents incorporated therein, or matters of  
6 judicial notice. *Ritchie*, 342 F.3d at 908 (citing *Van Buskirk v. Cable News Network, Inc.*,  
7 284 F.3d 977, 980 (9th Cir. 2002)).

8 **B. CyWee’s Induced Infringement Claims**

9 “Whoever actively induces infringement of a patent shall be liable as an  
10 infringer.” 35 U.S.C. § 271(b). Induced infringement has three elements: (1) knowledge  
11 of the patent, (2) knowledge that the induced acts will infringe, and (3) intent to bring  
12 about the infringement. *Commil USA, LLC v. Cisco Sys., Inc.*, --- U.S. ---, 135 S. Ct.  
13 1920, 1925, 1928 (2015); *see also Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S.  
14 754, 760 (2011) (“[I]nducement must involve the taking of affirmative steps to bring  
15 about the desired result.”). Thus, CyWee must plead facts “plausibly showing that [HTC]  
16 specifically intended [its] customers to infringe the [Patents-in-suit] and knew that the  
17 customers’ acts constituted infringement.” *In re Bill of Lading Transmission &*  
18 *Processing Sys. Patent Litig.*, 681 F.3d 1323, 1339 (Fed. Cir. 2012).

19 HTC does not challenge the first element, knowledge of the patent. Instead, it  
20 focuses on the remaining two elements and argues that the induced infringement claims  
21 must be dismissed because CyWee fails to sufficiently allege (1) HTC’s knowledge that  
22 the induced acts will infringe, and (2) HTC’s specific intent to bring about the

1 infringement—specifically, any affirmative steps taken to cause others to infringe the  
2 Patents-in-suit. (See MTD at 1.) The court addresses each argument in turn.

3 1. End User Infringement

4 HTC argues that CyWee “alleges no facts showing how any third party’s ‘use’  
5 constitutes infringement of the Patents-in[s]uit” and thus fails to sufficiently plead HTC’s  
6 knowledge that their end users’ actions constitute infringement. (MTD at 6.) The court  
7 disagrees. “A plaintiff may sufficiently plead the knowledge required for induced  
8 infringement by alleging that it . . . inform[ed] [the defendants] of the patent and that  
9 their customers are infringing the patent by using their products.” *Intellicheck Mobilisa,*  
10 *Inc. v. Wizz Sys., LLC*, No. C15-0366JLR, 2016 WL 258524, at \*4 (W.D. Wash. Jan. 21,  
11 2016). The plaintiff need not allege that the defendant acknowledged infringement was  
12 occurring. *Id.* In *Intellicheck Mobilisa, Inc. v. Wizz Systems, LLC*, the plaintiff’s  
13 allegations that it informed the defendant how the accused products infringe on specific  
14 claims in the patents-in-suit by using a claim chart with examples of such infringement  
15 were sufficient at the pleading stage. *Id.* at \*3.

16 The same is true with CyWee’s pleadings. CyWee informed HTC, through its  
17 claim charts, how HTC products infringe on specific claims in the Patents-in-suit. (See  
18 *generally* ’438 Claim Chart; ’978 Claim Chart.) These claim charts, along with the filing  
19 of the suit, inform HTC that several of its products utilize the methods protected by  
20 CyWee’s Patents-in-Suit and that use of the accused products by its customers infringe  
21 upon the Patents-in-Suit as well. See *Intellicheck Mobilisa, Inc. v. Honeywell Int’l Inc.*,  
22 No. C16-0341JLR, 2017 WL 5634131, at \*11 (W.D. Wash. Nov. 21, 2017) (allowing

1 post-suit knowledge to satisfy the knowledge element for indirect infringement). From  
2 these allegations, the court can draw the reasonable inference that HTC knew its  
3 customers, through the use of its accused products, were infringing upon the  
4 Patents-in-suit. *See Iqbal*, 556 U.S. at 678. At this stage, such a reasonable inference is  
5 sufficient. *See Bill of Lading*, 681 F.3d at 1341.

6       2. Specific Intent and Affirmative Steps by HTC

7       Nonetheless, the court grants HTC's motion to dismiss because CyWee has failed  
8 to sufficiently plead specific intent. A claim of indirect infringement "must contain facts  
9 plausibly showing that [the defendant] specifically intended their customers to infringe  
10 the [patents]." *Bill of Lading*, 681 F.3d at 1339. This scienter standard is demanding  
11 because the law is "reluctan[t] to find liability when a defendant merely sells a  
12 commercial product suitable for some lawful use." *DSU Med. Corp. v. JMS Co.*, 471  
13 F.3d 1293, 1305 (Fed. Cir. 2006) (en banc). Specific intent can be shown through  
14 circumstantial evidence, but "the mere knowledge of possible infringement will not  
15 suffice." *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1328 (Fed. Cir. 2009).

16       Evidence of "active steps . . . taken to encourage direct infringement, such as  
17 advertising an infringing use or instructing how to engage in an infringing use, show an  
18 affirmative intent that the product be used to infringe." *Metro-Goldwyn-Mayer Studios*  
19 *Inc.*, 545 U.S. at 936. In other words, "one who distributes a device with the object of  
20 promoting its use to infringe copyright, as shown by clear expression or other affirmative  
21 steps taken to foster infringement, is liable for the resulting acts of infringement by third  
22 parties." *Id.* at 936-37. "Courts have found inducement allegations sufficient when, for

1 example, the complaint contains ‘factual allegations setting forth the similarities between  
2 the patent claims and the advertised features of the [defendant’s] products.’” *Bascom*  
3 *Research LLC v. Facebook, Inc.*, Nos. C12-6293SI, C12-6294SI, C12-6295SI,  
4 C12-6296SI, C12-6297SI, 2013 WL 968210, at \*5 (N.D. Cal. Mar. 12, 2013).

5 HTC argues both that (1) CyWee “alleges no facts that plausibly show that HTC  
6 took ‘affirmative steps’ to cause its end users or customers to infringe the Patents-in-  
7 [s]uit” (MTD at 4-5), and (2) the pleadings contain no factual allegations supporting  
8 specific intent in general (*id.* at 5).<sup>3</sup> CyWee, in response, points to its assertions that HTC  
9 continued to sell, promote, and disseminate product manuals and instructions to its  
10 distributors, resellers, and end users, even after learning of the alleged infringement.  
11 (Resp. at 5-8.) The court agrees with HTC that the pleadings as presented do not contain  
12 sufficient factual allegations for the court to reasonably infer specific intent.

13 CyWee is correct that generally, when “a party, with knowledge of another party’s  
14 patent, advertises or promotes its product for use in an infringing manner, this is  
15 sufficient to support an inference that the promoting party intended to induce  
16 infringement.” *CreAgri, Inc. v. PinnacLife Inc.*, No. 5:11-cv-06635-LHK, 2013 WL  
17 3958379, at \*4 (N.D. Cal. July 29, 2013) (citing *Bill of Lading*, 681 F.3d at 1341-42);  
18 (*see* Resp. at 5). But, as expressly noted in the *CreAgri, Inc. v. PinnacLife Inc.* quote, the

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20 <sup>3</sup> HTC incorrectly suggests that the taking of affirmative steps and specific intent are two  
21 separate elements of induced infringement. (*See* MTD at 4-5 (describing the two as the first and  
22 second elements of induced infringement).) Instead, the two concepts are intertwined, as  
affirmative steps taken by the defendant may be used to establish its specific intent. *See Metro-*  
*Goldwyn-Mayer Studios Inc.*, 545 U.S. at 936. Thus, the court considers HTC’s two arguments  
together.



1 advertisement or promotion must advocate for “use in an infringing manner” for the court  
2 to reasonably infer specific intent. *See id.* “Where defendants have not touted the  
3 benefits of the accused products in ways that track the asserted patents, courts generally  
4 do not infer specific intent.” *Memory Integrity, LLC v. Intel Corp.*, 144 F. Supp. 3d 1185,  
5 1195 (D. Or. 2015) (“*Memory Integrity II*”). This requirement, that the post-knowledge  
6 actions teach an infringing use, ensures that “ordinary acts incident to product  
7 distribution, such as offering customers technical support or product updates, will not  
8 support inducement liability in themselves.” *Id.* at 1193.

9       The cases that CyWee relies upon illustrate this distinction. In each of CyWee’s  
10 cited cases, the complaint survives the motion to dismiss because the pleadings include  
11 specific factual allegations on how the defendant’s actions were connected to infringing  
12 uses of the accused product. (*See Resp.* at 5-6, 8); *Bill of Lading*, 681 F.3d at 1341-43  
13 (denying motion to dismiss when the pleadings included advertisements that specifically  
14 touted the ability of the accused products to perform the same functions as disclosed in  
15 the patent). For instance, in *CreAgri*, the plaintiff explicitly identified the defendant’s  
16 website statements, YouTube videos, and a study conducted by the defendant which  
17 “promote[d] and encourage[d] [the defendant’s] customers and study participants to use  
18 [the accused product] in a manner that allegedly infringes the [patent-in-suit].” 2013 WL  
19 3958379, at \*3. In *Intellicheck Mobilisa.*, the complaint identified the specific website  
20 where continued sales were being made and asserted that the manuals “instruct[ed]  
21 customers to operate those products to practice the claimed invention.” 2016 WL  
22 258524, at \*1. In *Tranxition, Inc. v. Novell, Inc.*, the pleadings referenced a webpage as

1 evidence that the defendant continued to encourage use of its infringing software. No.  
2 03:12-cv-01404-HZ, 2013 WL 2318846, at \*5 (D. Or. May 27, 2013).

3         When, on the other hand, the defendant's actions do not recommend an infringing  
4 use, courts decline to infer specific intent. *See, e.g., Memory Integrity II*, 144 F. Supp. 3d  
5 at 1195. In *Memory Integrity*, the court dismissed the plaintiff's induced infringement  
6 claims twice: first with the original complaint, and then again after the plaintiff was  
7 granted leave to amend. *See generally Memory Integrity, LLC v. Intel Corp.*, No.  
8 3:15-cv-00262-SI, 2015 WL 4251026 (D. Or. July 13, 2015) ("*Memory Integrity I*");  
9 *Memory Integrity II*. In *Memory Integrity I*, the plaintiff alleged that the defendant acted  
10 with specific intent because it continued to provide instructions and technical support  
11 regarding the accused products. 2015 WL 4251026, at \*2-3. The court observed,  
12 however, that the pleadings were silent on whether the instructions taught an infringing  
13 use; moreover, the pleadings did not allege that the defendant advertised the accused  
14 product for use in an infringing manner. *Id.* at \*2-3. Accordingly, because the plaintiff  
15 pled "*no* specific facts regarding the instructions and technical support provided by [the  
16 defendant]," the court determined there was "nothing sufficient to permit the inference  
17 that [the defendant] *specifically* intended that its customers use its products in an  
18 infringing manner." *Id.* at \*3.

19         The plaintiff returned with an amended complaint in *Memory Integrity II*, in which  
20 it added dozens of factual allegations, including several examples of the instructions and  
21 technical support provided by the defendant. 144 F. Supp. 3d at 1196. However, these  
22 examples "[did] not teach how to use [the accused products] to infringe [the

1 patents-in-suit], but simply describe how the [accused products] work.” *Id.* Because the  
2 examples in the pleadings did not instruct on how to engage in infringing uses, the factual  
3 allegations “only establish[ed] that [the defendant] described features of the company’s  
4 own products”—actions that evince “ordinary acts incident to product distribution” rather  
5 than “purposeful, culpable expression and conduct.” *Id.* (internal quotation marks  
6 omitted) (quoting *Metro-Goldwyn-Mayer Studios Inc.*, 545 U.S. at 937).

7 The pleadings here resemble the allegations in *Memory Integrity*. Although  
8 CyWee asserts that HTC continued to create and disseminate product manuals,  
9 instructions, and marketing materials, it offers no specific details about those promotional  
10 and instructional materials. (*See* Am. Compl.) The court agrees with CyWee that it is  
11 not required to identify specific instructions at this stage. (*See* Resp. at 8); *Bill of Lading*,  
12 681 F.3d at 1339. But without any inkling as to what HTC asserted in those materials,  
13 the court is unable to discern whether HTC “touted the benefits of the accused products  
14 in ways that track the asserted patents” or taught “how to use the [accused products] to  
15 infringe [the patents-in-suit],” rather than “simply describ[ing] how the [accused  
16 products] work.”<sup>4</sup> *See Memory Integrity II*, 144 F. Supp. 3d at 1195-96. As such, the  
17 court cannot reasonably infer from CyWee’s pleadings that HTC specifically intended for

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20 <sup>4</sup> In its response, CyWee alleges that HTC advertises infringing use and provides  
21 instructions and a video specific to the motion-detection features of its accused products. (*See*  
22 Resp. at 10.) However, the court may not consider this material because it was neither included  
nor referred to in CyWee’s amended complaint. *See Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d  
992, 998 (9th Cir. 2010).

1 its distributors, resellers, or end-users of its accused products to infringe upon the  
2 Patents-in-suit.<sup>5</sup> *See Memory Integrity I*, 2015 WL 4251026, at \*3.

3 CyWee argues that the attachments to its amended complaint, namely the claim  
4 charts and Dr. Gans’s declaration, permit the court to reasonably infer HTC’s specific  
5 intent. (*See Resp.* at 6-7.) The court disagrees. Although the claim charts allow the  
6 court to infer that HTC had knowledge regarding its end-users’ infringement, *see supra*  
7 § III.B.1, the claim charts do not demonstrate anything—directly or circumstantially—  
8 about HTC’s intent. Indeed, the vast majority of the screenshots included in the claim  
9 charts do not derive from HTC at all: Only one out of the 22 screenshots originated from  
10 HTC. (*See* ’438 Claim Chart; ’978 Claim Chart.) Nor does Dr. Gans opine on HTC or  
11 any of its products. Instead, he describes only his understanding of the technology  
12 behind the Patents-in-suit and its advantages over prior art. (*See generally* Gans. Decl.)  
13 None of the attachments include factual assertions that allow the court to draw any  
14 reasonable inferences regarding HTC’s state of mind.

15 Because CyWee does not plead sufficient factual allegations regarding HTC’s  
16 continued actions after HTC learned of the alleged infringement, the court cannot  
17 reasonably infer that HTC specifically intended its distributors, resellers, or end users to

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19 <sup>5</sup> To the extent CyWee is relying only on HTC’s continued sales of the accused products,  
20 such sales alone do not support an inference that HTC specifically intended to induce  
21 infringement. The court agrees with *Memory Integrity II* that such reasoning is inconsistent with  
22 the Federal Circuit’s reasoning in *Bill of Lading*. *See* 144 F. Supp. 3d at 1195. In *Bill of Lading*,  
the Federal Circuit went “far beyond considering whether the defendant continued to sell the  
allegedly infringing products” and considered, in addition, the content of the defendant’s  
advertisements and product literature. *Id.* (citing *Bill of Lading*, 681 F.3d at 1341-43).  
Accordingly, the court will not infer specific intent from the continued sales of the accused  
products alone.

1 infringe the Patents-in-suit. Accordingly, on this ground, the court grants HTC's motion  
2 to dismiss CyWee's induced infringement claims.

3 **C. Leave to Amend**

4 As a general rule, when a court grants a motion to dismiss, the court should  
5 dismiss the complaint with leave to amend. *See Eminence Capital, LLC v. Aspeon, Inc.*,  
6 316 F.3d 1048, 1051-52 (9th Cir. 2003) (citing Fed. R. Civ. P. 15(a)). The policy  
7 favoring amendment is to be applied with "extreme liberality." *Id.* at 1051. In  
8 determining whether dismissal without leave to amend is appropriate, courts consider  
9 such factors as undue delay, bad faith or dilatory motive on the part of the movant,  
10 repeated failure to cure deficiencies by amendments previously allowed, undue prejudice  
11 to the opposing party by virtue of allowance of the amendment, and futility of  
12 amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

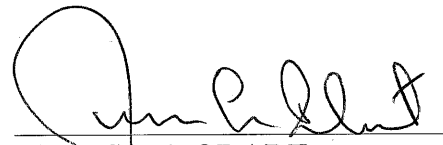
13 CyWee requests leave to amend its complaint should the court grant HTC's  
14 motion (Resp. at 9-11), and HTC does not oppose amendment (Reply (Dkt. # 40) at 8).  
15 The court agrees. There is no evidence of undue delay, bad faith, or dilatory motive on  
16 CyWee's part, nor is there any indication that HTC will suffer prejudice if the court  
17 permits amendment, especially in light of HTC's lack of opposition to amendment. *See*  
18 *Foman*, 371 U.S. at 182. Further, although CyWee has previously amended its  
19 complaint, it amended as of right and without any indication from the court that the  
20 original complaint was defective. *See id.* Finally, it is not clear that the deficiencies in  
21 the complaint could not be cured by amendment. *See id.* at 182. Indeed, CyWee cites  
22 material in its responsive briefing that it "expects to cite" if given a chance to amend.

1 (Resp. at 11.) The court therefore grants CyWee leave to amend its induced infringement  
2 claims within ten (10) days of the entry of this order.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the court GRANTS HTC's motion to dismiss CyWee's  
5 claims of induced infringement (Dkt. # 35). The court DISMISSES CyWee's induced  
6 infringement claims without prejudice and GRANTS CyWee leave to amend those  
7 claims within ten (10) days of the date of this order.

8 Dated this 1<sup>st</sup> day of March, 2018.

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10 JAMES L. ROBART  
11 United States District Judge  
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