

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

EYESMATCH LTD. and
MEMOMI LABS INC.,

Plaintiffs,

v.

FACEBOOK, INC., INSTAGRAM, LLC and
WHATSAPP LLC.,

Defendants.

C.A. No. 21-cv-111-RGA

**INITIAL INFRINGEMENT CONTENTIONS OF PLAINTIFFS EYESMATCH LTD.
AND MEMOMI LABS INC.**

Pursuant to Paragraph 3.g.i.d. of the Court’s Scheduling Order (D.I. 23), Plaintiffs EyesMatch Ltd. (“EyesMatch”) and Memomi Labs Inc. (“Memomi”) hereby provide their initial infringement contentions to Defendants Facebook, Inc. (“Facebook”), Instagram, LLC (“Instagram”), and WhatsApp LLC (“WhatsApp”), (collectively, “Defendants”), as to U.S. Patent Nos. 7,948,481 (the “481 Patent”); 8,624,883 (the “883 Patent”); 8,982,109 (the “109 Patent”); and 8,982,110 (the “110 Patent”), (collectively, the “Asserted Patents”) with respect to the Facebook Application for Mobile Devices (the “Facebook App”), the Facebook Messenger Application for Mobile Devices (the “Messenger App”), the Facebook Portal Device (“Portal”), the Instagram Application for Mobile Devices (the “Instagram App”), and the WhatsApp Application for Mobile Devices (“WhatsApp”).

I. BACKGROUND

These disclosures are based on the limited information that Plaintiffs have been able to obtain to date. The structure and operation of Defendants’ products and methods is in significant part proprietary, has not yet been adequately disclosed by Defendants, and is expected to be the

subject of future discovery.

Further, Defendants' technical document production is deficient in numerous substantial respects, many of which have been identified by Plaintiffs and not yet remedied by Defendants.¹ Plaintiffs continue to take discovery to identify and/or evaluate additional instrumentalities or activities that are reasonably similar to those accused below. This disclosure is without any concession, agreement, admission, or waiver of any ultimate determination of relevance, admissibility, or discoverability of any particular information for any purpose, and without waiver of any attorney-client, work product, or other privilege or immunity. Plaintiffs make this disclosure, including the claim charts attached as Attachments 1-15, based on information presently available to them from public sources and from Defendants' productions of source code and technical documentation as of August 27, 2021, without the benefit of full discovery or the Court's claim construction. Plaintiffs reserve the right to supplement and/or amend this disclosure to the full extent consistent with the Court's rules and orders, for example, after receiving discovery from Defendants, including the production of technical documents, source code, and testimony, or as appropriate in response to the Court's guidance, construction of the Asserted Claims, or determination of other legal issues.

II. INITIAL CLAIM CHARTS FOR INFRINGEMENT OF THE ASSERTED PATENTS

Attachments 1-15 are initial claim charts² showing examples of Defendants' infringement

¹ Defendants have yet to produce the complete set of technical documentation for the products provided to Facebook employees, as Plaintiffs have requested through email correspondence on August 4 and 6, 2021. Defendants also have yet to produce any technical documentation for the WhatsApp Application for mobile devices.

² The infringement contentions are drafted to be understood by skilled persons in the art. Plaintiffs reserve their right to rely on technical documents to further clarify the terms and technologies used in the infringement contentions in its further expert reports and trial evidence.

of the Asserted Patents identifying, based on information available to Plaintiffs to date, specifically where each limitation of each asserted claim is found within or performed by exemplary Accused Products,³ including identification of the structures, acts, or materials in the Accused Products that perform functional limitations that may be governed by 35 U.S.C. § 112, ¶ 6 (pre-AIA) or 35 U.S.C. § 112(f) (post-AIA).⁴ These attachments are incorporated herein by reference. These attachments may contain Defendants' confidential material and are marked as such.

Pursuant to the Scheduling Order in this case (D.I. 23), Plaintiffs assert a total of 32 claims across the Asserted Patents as follows:

481 Patent: Claims 2, 3, 6, 8, 9, 11, 12, 13, 18

883 Patent: Claims 1, 2, 3, 8, 9, 12, 13, 14, 17

109 Patent: Claims 1, 2, 6, 8, 9, 17

110 Patent: Claims 1, 5, 6, 10, 11, 12, 16, 17

Several elements of the Asserted Claims may be satisfied by more than one feature, structure, process, or action found within or taken by Defendants or the Accused Products. The initial claim charts therefore may include alternative contentions and theories. For example, where multiple features are identified as corresponding to a particular claim element, the multiple features may be viewed as alternative or supplemental to one another. In addition, these charts are submitted without prejudice to Plaintiffs' supplementation, amendment, or revision of these disclosures at an appropriate future date. Plaintiffs expressly reserve the right to amend or supplement these disclosures for at least any of the following reasons, and as expressly permitted by the Delaware Default Standard for Discovery: Defendants' disclosure of source code used by

³ Identification of the Accused Products is set forth in Attachments 1-15.

⁴ Plaintiffs do not presently contend that any asserted claim element is governed by 35 U.S.C. 112, ¶ 6 (pre-AIA) or 35 U.S.C. § 112(f) (post-AIA).

any of the Accused Products, production of other non-public technical documentation or testimony concerning any of the Accused Products and/or their components, the disclosure of Defendants' claim construction positions, invalidity contentions, or non-infringement contentions, the Court's construction of any of the Asserted Claims or any other legal determination of other issues, or for any other permissible reason.

These disclosures provide examples of infringement that illustrate Plaintiffs' infringement theories. However, the examples are non-limiting and are included to assist in understanding Plaintiffs' infringement theories. For example, details regarding how the Accused Products implement the claims may vary from product to product in ways not material to the analysis of the Asserted Claims. The specific instrumentalities selected for the most detailed discussions in the accompanying charts are, as explained in the charts themselves and as further addressed in this document, to be understood as representative of other instrumentalities with structures, operation, or other charted characteristics that do not differ from the charted instrumentalities in ways material to Plaintiffs' theories of infringement for the charted claims.

III. INFRINGEMENT OF THE ASSERTED PATENTS UNDER THE DOCTRINE OF EQUIVALENTS

The attached initial claim charts disclose the elements of the Asserted Patents that are believed to be literally present in Defendants' technology. Plaintiffs reserve the right to further identify Defendants' infringement under the doctrine of equivalents as further discovery is provided by Defendants. Plaintiffs further reserve the right to assert infringement under the doctrine of equivalents in the event that Defendants claim that one or more limitations are not literally present.

IV. INDIRECT INFRINGEMENT OF THE ASSERTED PATENTS

To the extent that any element of any claims is practiced or alleged by Defendants to be

practiced by a party or entity other than Defendants, Plaintiffs may assert, and reserve the right to assert, that such other party or entity practices such element under the direction or control of Defendants or otherwise in a manner that renders Defendants responsible for the performance of the entirety of the Asserted Claims pursuant to, *inter alia*, Section 271(a), and associated case law. Further, to the extent that any element of any Asserted Claim is performed or alleged by Defendants to be performed by a party or entity other than Defendants, and Defendants further allege it is not liable for direct infringement, Plaintiffs assert that Defendants are liable for induced or contributory infringement pursuant to Sections 271(b) and 271(c) and associated case law. Defendants are liable under 271(b) and 271(c) for infringement by end users of the Accused Products in making and using infringing systems in connection with the Accused Products, and/or performing the claimed methods with the Accused Products. End users, for example, may use infringing systems by putting the claimed inventions into service, such as when they use the Accused Products to capture, manipulate, display, and share still and moving images, make infringing systems when they combine Defendants' software with mobile device hardware and/or software, and perform the steps of claimed methods using the Accused Products.

Defendants encourage their customers and other third parties to make and/or use the claimed systems, and performed claimed methods, for example, by providing and intending that third parties use the Accused Products to capture, manipulate, display, and share still and moving images in a manner that infringes, and providing instructions to do so; purposefully and voluntarily placing the Accused Products in the stream of commerce with the expectation that it will be used by customers in the District of Delaware; providing other components of the system that enable and/or make use of the Accused Products including, e.g., servers and other network equipment; advertising the Accused Products through its own and third-party media platforms, including

websites and television. Furthermore, the Defendants have actual knowledge of how the Accused Products work, including how they are used by customers. For example, as shown in Attachments 1-15, Defendants describe to end users how they may use the Accused Products to capture, manipulate, display, and share still and moving images in a manner that infringes.

Defendants' actions further constitute contributory infringement. For example, Defendants sell and offer to sell within the United States, and imports into the United States, and supplies or causes to be supplied from the United States, components that constitute material parts of the claimed inventions, knowing that such components are especially made or adapted for use in the Accused Products and methods. When, for example, components of the Facebook, WhatsApp, and Instagram Apps are combined with mobile device hardware, the resultant combination comprises an infringing system and performs the infringing methods. The components are not staple articles or commodities of commerce suitable for substantial non-infringing uses. The Accused Products are designed to be used in conjunction with, for example, mobile devices, servers, and other network infrastructure equipment. While Defendants do not charge their end users in cash for their services, it is well known that Defendants profit from those users' information. *See* D.I. 1 (Compl.), ¶ 32, n. 4 ("By having people spend more time on the sites or apps, they're obviously consuming more content, more pages, and giving Facebook the ability to monetize against that content and pages"). The Accused Products are downloaded and installed in a transaction constituting a sale. *See Nuance Communications Inc. v. Tell me Networks, Inc.*, 707 F. Supp. 3d 472, 487 (D. Del. 2010) ("In certain situations, a "license" in the latter sense of the word may be tantamount to a sale (e.g., a standard computer software license) because the product is just as immediately transferred to the "buyer" as if it were sold." (quoting *In re Kollar*, 286 F.3d 1326 (Fed. Cir. 2002))).

Plaintiffs incorporate by reference the allegations in their Complaint and any amendments

thereto, along with the analysis in the attached initial claim charts (Attachments 1-15) with respect to Defendants' indirect infringing activity. Plaintiffs further expect Defendants to produce documents and information during the course of discovery that will support Plaintiffs' indirect infringement allegations

V. WILLFUL INFRINGEMENT

Plaintiffs are informed and believe that Defendants' infringement of the Asserted Patents has been and continues to be willful as of the filing date of the Complaint in this matter. *See* D.I. 1 (Compl.), ¶¶ 92, 101, 110, 119, 128, 137, 147, 156, 165.

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Respectfully submitted,

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