

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

NETWORK-1 TECHNOLOGIES, INC.,

Plaintiff,

v.

GOOGLE LLC and YOUTUBE, LLC,

Defendants.

14 Civ. 2396 (PGG)

14 Civ. 9558 (PGG)

**PLAINTIFF NETWORK-1 TECHNOLOGIES, INC.’S
STATEMENT OF MATERIAL FACTS FOR WHICH THERE IS NO GENUINE ISSUE**

Pursuant to Local Civil Rule 56.1, Plaintiff Network-1 Technologies, Inc., herby submits the following statement of material facts for which it contends there is no genuine issue to be tried in support of motion for summary judgment against Google LLC and Youtube, LLC (collectively “Google”).

**I. FACTS FOR WHICH THERE IS NO GENUINE ISSUE CONCENING
GOOGLE’S INVALIDITY ASSERTIONS REGARDING THE “CLANGO”
PRIOR ART REFERENCE**

**A. Google Relies On The “kd-tree search algorithm” Allegedly Present
In The Clango “System” To Satisfy At Least One Element Of Every
Claim For Which That System Is Claimed To Be Prior Art**

1. On or about December 20, 2019, Google served the expert report of Dr. Trevor Jackson Darrell regarding invalidity of the Patents in suit. Affidavit of Brian D. Ledahl, Ex. 1, Darrell report.¹

2. In his report, Dr. Darrell asserts that Clango was a system offered by a company called Audible Magic for identifying music that a computer user was playing on their computer over the Internet. Ex. 1, Darrell Report at pp. 64-65.

3. Dr. Darrell opines that the Clango “system” anticipated all elements of claim 17 of the asserted U.S. Patent No. 8,010,988 (the “‘988 patent”), rendered obvious asserted claims 33, 34, and 35 of the asserted U.S. Patent No. 8,205,237 (the “‘237 patent”) (standing alone), and also rendered obvious all of the asserted claims of the patents-in-suit, including claims 1, 8, 10, 16, 18, 25, 27, and 33 of the asserted U.S. Patent No. 8,904,464 (the “‘464 patent”) in combination with a prior art patent called Chen. Ex. 1, Darrell Report at pp. 89, 170, 187, 204, 209, 226, 227, 231, 236, 251, 253, 254, 257, 262, 263, 265.

4. Claim 17 of the ‘988 patent (which depends on claim 15) requires identification of an electronic work “based on a non-exhaustive search identifying a neighbor,” “wherein the non-exhaustive search is sublinear.” Ex. 2, ‘988 Patent.

5. Dr. Darrell contends that this claim element of claim 17 was disclosed in the Clango system through the “lookup algorithm” of the system that Dr. Darrell describes as a “kd-tree search algorithm.” Ex. 1, Darrell Report at ¶¶ 181; 187; 207.

6. Claim 33 of the ‘237 patent requires “using the media work extracted features to perform a sublinear approximate nearest neighbor search of reference extracted features.” Ex. 3, ‘237 Patent.

7. Claims 34 and 35 depend from claim 33 and do not further modify this claim element. *Id.*

¹ All exhibits are attached to the concurrently filed affidavit of Brian D. Ledahl.

8. Dr. Darrell contends that this element of claims 33-35 was disclosed in the Clango system by the same “kd-tree search algorithm” referenced above in connection with the ‘988 patent. Ex. 1, Darrell Report at ¶¶ 351-352.

9. Where Dr. Darrell relies on Clango in combination with some other asserted prior art, he also relies on Clango for disclosure of the search elements of the claims. *See* Ex. 4, Darrell Deposition at 236:7-15.

10. With respect to claim 17 of the ‘988 patent, Dr. Darrell relies on a combination of Clango with the Chen reference. Ex. 1, Darrell Report at ¶ 298.

11. In this combination, Dr. Darrell points to the same “kd-tree search” discussed above as allegedly disclosing the “non-exhaustive search identifying a neighbor” “wherein the non-exhaustive search is sublinear” claim element. Ex. 1, Darrell Report at ¶¶ 311, 313, 319.

12. Dr. Darrell relies on the same combination of Clango with the Chen reference in connection with his opinions regarding obviousness of claims 33, 34, and 35 of the ‘237 patent. Ex. 1, Darrell Report at ¶¶ 382, 433, 447.

13. In the combination of Clango and Chen, Dr. Darrell points to the same “kd-tree search” discussed above as allegedly disclosing the “using the media work extracted features to perform a sublinear approximate nearest neighbor search of reference extracted features” claim element. Ex. 1, Darrell Report at ¶¶ 389, 392, 397.

14. Independent claims 1 and 18 of the ‘464 patent requires “correlating, by the computer system using a non-exhaustive, near neighbor search.” Ex. 5, ‘464 patent.

15. Asserted claims 8, 10, and 16 of the ‘464 patent depend from claim 1 and do not further modify this claim element. *Id.*

16. Asserted claims 25, 27, and 33 of the ‘464 patent depend from claim 18 and also do not further modify this claim element. *Id.*

17. For claims 1, 8, 10, 16, 18, 25, 27, and 33 of the ‘464 Patent, Dr. Darrell relies on the same combination of Clango and the Chen reference discussed above. Ex. 1, Darrell Report at ¶¶ 463, 499, 505, 510, 520, 533, 538, 543.

18. Dr. Darrell further points to the same “kd-tree search algorithm” functionality of Clango as allegedly disclosing the search claim elements as discussed with respect to the ‘988 and ‘237 patents above. Ex. 1, Darrell Report at ¶¶ 467, 469, 523.

B. Statement Of Facts Showing a Lack of Public Use of the Relevant Portions of Clango Under 35 U.S.C. § 102(a)

19. The Clango “system” performed the “kd-tree search algorithm” upon which Google relies on an Audible Magic server separate from any “user” of the system. Ex. 6, Wold Depo. at 14:3-13; 29:21-30:22.

20. The kd-tree search algorithm functionality of Clango was not disclosed to the public through the availability or use of the Clango system. Ex. 7, Schrempp Depo. at 161:22-162:9; Ex. 6, Wold Depo. at 93:8-94:1; 98:19-22; 204:17-205:1; 212:15-213:6; Ex. 4, Darrell Depo. at 152:6-13; 153:5-13; 237:2-240:11.

C. Statement Of Facts Showing Suppression or Concealment of the Relevant Portions of Clango Under 35 U.S.C. § 102(g)

21. Google offered no evidence that Audible Magic ever publicly disclosed the kd-tree search functionality of the Clango “system” to the public. Ex. 4, Darrell Depo. at 45:1-46:7; 155:9-20; Ledahl Decl. ¶ 20 (Audible Magic continues to this day to maintain the confidentiality of computer code, documents and testimony regarding the Clango search functionality).

D. Statement Of Facts Showing a Lack of Corroboration of Testimony Regarding The Relevant Features Of The Clango System

22. Google asserts that the relevant Clango system was embodied in alpha and beta releases that took place in July 2000 (alpha) and August 2000 (beta). Ex. 1, Darrell Report at ¶¶ 131, 135.

23. With respect to the search functionality of Clango, Dr. Darrell, does not suggest that there was any difference between these two alleged releases. Ex. 4, Darrell Depo. at 97:21-99:19.

24. Google did not produce or identify the computer code actually compiled into either the alpha or beta release of Clango. Ex. 4, Darrell Depo. at 102:5-103:6; 104:16-108:8; 110:18-111:2; 111:3-112:16; 113:3-115:18; 132:21-133:15; Ex. 1, Darrell Report at ¶ 193.

E. Statement Of Facts Showing a Lack of Motivation for a POSITA to Combine Clango With Chen With An Expectation Of Success

25. With respect to claim 17 of the '988 patent, Dr. Darrell relies on a combination of Clango with the Chen reference. Ex. 1, Darrell Report at ¶ 298.

26. Dr. Darrell relies on the same combination of Clango with the Chen reference in connection with his opinions regarding obviousness of claims 33, 34, and 35 of the '237 patent. Ex. 1, Darrell Report at ¶¶ 382, 433, 447.

27. For claims 1, 8, 10, 16, 18, 25, 27, and 33 of the '464 Patent, Dr. Darrell relies on the same combination of Clango and the Chen reference discussed above. Ex. 1, Darrell Report at ¶¶ 463, 499, 505, 510, 520, 533, 538, 543.

28. A person skilled in the art would not have known of the search algorithm functionality of the Clango system at the filing date of the Cox patents. Ex. 7, Schrempp Depo. at 161:22-162:9; Ex. 6, Wold Depo. at 93:8-94:1; 98:19-22; 204:17-205:1; 212:15-213:6; Ex. 4, Darrell Depo. at 152:6-13; 153:5-13; 237:2-240:11.

II. FACTS FOR WHICH THERE IS NO GENUINE ISSUE CONCERNING GOOGLE'S INVALIDITY ASSERTIONS REGARDING THE "FREEAMP" PRIOR ART REFERENCE

A. Google Relies On The "two-level hash structure" search algorithm Allegedly Present In The FreeAmp "System" To Satisfy At Least One Element Of Every Claim For Which That System Is Claimed To Be Prior Art

29. Claim 17 of the '988 patent (which depends on claim 15) requires identification of an electronic work "based on a non-exhaustive search identifying a neighbor," "wherein the non-exhaustive search is sublinear." Ex. 2, '988 Patent.

30. Dr. Darrell contends that this claim element was disclosed in the FreeAmp system through the "search algorithm" of the FreeAmp system in August of 2000 that Dr. Darrell describes as a "two-level hash structure." Ex. 1, Darrell Report at ¶¶ 242-243.

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