

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 14-0679 JVS (DFMx) Date January 14, 2015  
Title Essociate, Inc. V. 4355768 Canada Inc.

Present: The James V. Selna  
Honorable

Karla J. Tunis  
Deputy Clerk

Not Present  
Court Reporter

Attorneys Present for Plaintiffs:  
Not Present

Attorneys Present for Defendants:  
Not Present

**Proceedings:** (IN CHAMBERS) Order Granting Defendant’s Motion to Strike  
Infringement Contentions (fld 12-8-14)

Plaintiff Essociate, Inc. (“Essociate”) asserts that Defendant 4355768 Canada, Inc., dba CrakMedia (“CrakMedia”) is infringing Essociate’s U.S. Patent No. 6,804,660 (“660 Patent”). (Compl., Docket (“Dkt.” No. 1.) CrakMedia now moves the Court to strike Essociate’s patent infringement contentions. (Mot., Dkt. No. 28.) Essociate opposes. (Opposition to Mot. (“Opp’n”), Dkt. No. 29.) CrakMedia has replied. (Reply, Dkt. No. 33.)

For the following reasons, the Court **GRANTS** CrakMedia’s motion to strike Essociate’s infringement contentions.

**I. Factual and Procedural Background**

On April 30, 2014, Essociate filed an action against CrakMedia for infringing the ‘660 Patent, which embodies an internet advertising system. (Compl.; Decl. of Ben Davidson (“Davidson Decl.”), Ex. 1 (‘660 Patent), Dkt. No. 27-2.) The Complaint did not specify which claims of the ‘660 Patent that CrakMedia allegedly infringed. Pursuant to Patent Local Rule 3-1 and before the deadline set by that rule,<sup>1</sup> Essociate served CrakMedia the required Infringement Contentions on November 3, 2014. (Decl. of Keith Scully (“Scully Decl., Ex. 1 (Disclosure of Asserted Claims & Infringement Contentions (“Original Infringement Contentions”)), Dkt. No. 30; Opp’n, 2:11.) The Original

<sup>1</sup> The Court has adopted the Northern District of California’s Patent Local Rules for patent matters. (See also Order Setting Rule 26(f) Scheduling Conference, 5, Dkt. No. 19.)

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Infringement Contentions clarify that Essociate alleges CrakMedia is infringing Claims 15, 23, 28, and 36 of the ‘660 Patent. (Original Infringement Contentions, 1.) Throughout the Claim Chart of the Original Infringement Contentions, Essociate discusses an internet advertising affiliate system on VideosZ.com as an example of how CrakMedia allegedly infringes the ‘660 Patent. (*Id.* at Claim Chart Ex.) On November 24, 2014 Essociate received a declaration from SCTR Services, LLC, which operates VideosZ.com. (Opp’n, 3:3–7; Scully Decl., Ex. B (Decl. of Clement Picquet (“Picquet Decl.”)), Dkt. No. 30.) Without seeking leave of the Court, on December 1, 2014 Essociate served CrakMedia Amended Infringement Contentions. (Scully Decl., Ex. C (Amended Disclosure of Asserted Claims and Infringement Contentions (“Amended Infringement Contentions”)), Dkt. No. 30; Opp’n, 3:22.)

CrakMedia now moves this Court to strike Essociate’s Amended Infringement Contentions and its Original Infringement Contentions. (Mot., 24:5–10.) CrakMedia also requests that the Court stay infringement-related discovery and CrakMedia’s obligation to submit invalidity contentions until Essociate has provided sufficient infringement contentions. (*Id.*)

## II. **Legal Standard**

The Patent Local Rules require that the “Disclosure of Asserted Claims and Infringement Contentions” contain “[s]eparately for each asserted claim, each accused . . . instrumentality (‘Accused Instrumentality’) . . . of which the party is aware. This identification shall be as specific as possible. Each product, device, and apparatus shall be identified by name or model number, if known.” Patent L.R. 3-1(b). The infringement contentions also must contain “[a] chart identifying specifically where each limitation of each asserted claim is found within each Accused Instrumentality.” Patent L.R. 3-1(c). This rule is a discovery device that “takes the place of a series of interrogatories that defendants would likely have propounded had the patent local rules not provided for streamlined discovery.” *Network Caching Tech., LLC v. Novell, Inc.*, No. C-01-2079-VRW, 2002 WL 32126128, at \*4 (N.D. Cal. Aug. 13, 2002).

“[A]ll courts agree that the degree of specificity under Local Rule 3-1 must be sufficient to provide reasonable notice to the defendant why the plaintiff believes it has a ‘reasonable chance of proving infringement.’” *Shared Memory Graphics LLC v. Apple, Inc.*, 812 F. Supp. 2d 1022, 1025 (N.D. Cal. 2010) (quoting *View Eng’g, Inc. v. Robotic*

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Vision Sys., Inc., 208 F.3d 981, 986 (Fed. Cir. 2000)). While the patent rules do not “require the disclosure of specific evidence nor do they require a plaintiff to prove its infringement case. . . . a patentee must nevertheless disclose what in each accused instrumentality it contends practices each and every limitation of each asserted claim to the extent appropriate information is reasonably available to it.” DCG Sys. v. Checkpoint Techs., LLC, No. C 11–03792 PSG, 2012 WL 1309161, at \*2 (N.D. Cal. Apr. 16, 2012) (internal quotation marks omitted); Shared Memory Graphics, 812 F. Supp. 2d at 1025 (patent holder “must map specific elements of Defendants’ alleged infringing products onto the Plaintiff’s claim construction”).

### III. Discussion

CrakMedia moves to strike Essociate’s Amended Infringement Contentions because Essociate filed them without leave of the Court pursuant to Patent Local Rule 3-6. CrakMedia also moves to strike Essociate’s Original Infringement Contentions because they fail to meet the requirements of Patent Local Rule 3-1. To determine which set of contentions is the operative one, the Court must first address whether to strike Essociate’s Amended Infringement Contentions.

#### A. Court Strikes the Amended Infringement Contentions

Under Patent Local Rule 3-6, a party may amend its preliminary infringement contentions “only by order of the Court upon a timely showing of good cause.” The rule further provides that “[t]he duty to supplement discovery responses does not excuse the need to obtain leave of court to amend contentions.” Patent L.R. 3-6.

Essociate served CrakMedia its Original Infringement Contentions on November 3, 2014. (Original Infringement Contentions; Opp’n 2:11.) Without seeking leave from the Court, Essociate served CrakMedia Amended Infringement Contentions on December 1, 2014. (Amended Infringement Contentions; Opp’n, 3:22.) Essociate asserts that the minor amendments to the contentions were made in response to newfound information from a declaration submitted to Essociate by a third party, SCTR Services, which operates the VideosZ.com website that Essociate uses as an example of infringing activities in its contentions. (Opp’n, 3–4; Picquet Decl.) This newfound information from SCTR Services allegedly helped Essociate to pinpoint the correct portion of the Uniform Resource Locator (“URL”) used by VideosZ.com that allegedly constitutes

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CrakMedia's patent infringement. (Opp'n, 3:8–4:13.) Essociate asserts that the addition of this information in the Amended Infringement Contentions does not prejudice CrakMedia. (Id. at 4:14.)

However, Patent Local Rule 3-6 does not make an exception for amendments that do not prejudice the opposing party. In fact, it has no exceptions at all. It makes clear that any amendment to Infringement Contentions, even one resulting from the duty to supplement discovery responses, cannot be made until the Court issues an order allowing for the amendment based on the party's showing of good cause. See Patent Local Rule 3-6. Essociate's Opposition Brief indicates that it is aware that the Northern District of California's Patent Local Rules apply here (Opp'n, 1:8–9 n.1); yet, it did not seek leave of the Court to serve CrakMedia Amended Infringement Contentions. As a result, pursuant to Patent Local Rule 3-6, the Court must strike Essociate's Amended Infringement Contentions. The Original Infringement Contentions are the operative contentions for this Motion.

B. Court Strikes the Original Infringement Contentions

CrakMedia raises four reasons as to why Essociate's Original Infringement Contentions (hereinafter, "Infringement Contentions" or "Contentions") are insufficient under Patent Local Rule 3-1. (Mot., 9–21.) The Court agrees that the Contentions are inadequate on three of the four grounds, thus requiring that the Court strike the Contentions only on the grounds discussed in Sections III.B.1–3.

1. **Infringement Contentions are Insufficient Under Patent Local Rule 3-1(b)**

Essociate's Infringement Contentions assert that the Accused Instrumentalities are:  
[A]ll versions of CrakMedia's affiliate-marketing service made, used, offered for sale, or sold in, or imported into, the United States since the '660 Patent issued, including but not limited to CrakMedia's online CrakRevenue affiliate platform . . . all computer and network hardware and software for these CrakMedia products, and all services supporting these CrakMedia products or offered in connection with these products . . . .

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(Original Infringement Contentions, 2.) CrakMedia argues that Essociate’s description of the Accused Instrumentalities is overly broad and thus violates Patent Local Rule 3-1(b). (Mot., 18–20.) In response, Essociate admits that “it is possible that some portions of CrakMedia’s system are used for other, non-infringing purposes.” (Opp’n, 10–11.) Essociate also contends that it cannot evaluate which portions of CrakMedia’s system, beyond the CrakRevenue affiliate platform, are allegedly infringing the ‘660 Patent until CrakMedia “cooperates with discovery.” (Id. at 12:11–15.)

However, Essociate’s argument puts the cart before the horse. Essociate cannot pin its hopes on discovery and bundle together products that admittedly have the potential to be non-infringing with the single product that Essociate allegedly “knows” infringes the ‘660 Patent. Allowing Essociate to cast such a wide net would defeat the purpose of Patent Local Rule 3-1, which is to “require parties to crystallize their theories of the case early in the litigation and to adhere to those theories once they have been disclosed.” Atmel Corp. v. Info. Storage Devices, No. C 95-1987 FMS, 1998 U.S. Dist. LEXIS 17564 at \*7 (N.D. Cal. Nov. 5, 1998). If Essociate comes across evidence in discovery which reveals that other CrakMedia products are infringing the ‘660 Patent, then Essociate can seek to amend its Contentions to include them as Accused Instrumentalities. Until then, however, it cannot allege that all hardware, software, and services related to the CrakRevenue affiliate platform are Accused Instrumentalities when it admits that some of them may not be infringing the ‘660 Patent. Moreover, Essociate’s references to “all computer and network hardware and software” and “all services” fail to address each product separately. Hewlett-Packard Co. v. EMC Corp., No. C 02-04709 JF (PVT), 2003 U.S. Dist. LEXIS 22742 at \*3 (N.D. Cal. July 9, 2003) (“The [contentions] must address each product (or other accused instrumentality) separately.”) They also identify CrakMedia products by functionality, which is insufficient under Patent Local Rule 3-1(b). See Vigilos LLC v. Sling Media Inc., No. C-11-4117 SBA (EDL), 2012 U.S. Dist. LEXIS 189491 at \*13–14 (N.D. Cal. July 12, 2002). For these various reasons, Essociate’s broad list of products as Accused Instrumentalities is insufficient under Patent Local Rule 3-1(b).

**2. Infringement Contentions are Insufficient Under Patent Local Rule 3-1(c)**

In mapping the specific elements of the alleged infringing products onto the claim construction, the plaintiff must abide by Patent Local Rule 3-1(c), which requires that the

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infringement contentions include “[a] chart identifying specifically where each limitation of each asserted claim is found within each Accused Instrumentality.”<sup>2</sup> CrakMedia asserts three reasons why the chart in Essociate’s Infringement Contentions fails to sufficiently map elements of CrakMedia’s alleged infringing product onto the elements of Claim 15 in the ‘660 Patent. (Mot., 12–16.) Besides being written in means-plus-function form, the language in Claim 28 is similar to that in Claim 15; thus, CrakMedia challenges the adequacy of the Contentions regarding Claim 28 for the same three reasons it challenges those for Claim 15. (*Id.* at 17:11–18.)<sup>3</sup> Essociate responds that its Infringement Contentions and included Chart are sufficient because they need not “produce evidence of infringement,” but need only provide “sufficient specificity to provide defendants[] with notice of infringement beyond that which is provided by the mere language of the patents themselves.” Network Caching Tech., LLC v. Novell, Inc., No. C-01-2079 VRW, 2003 U.S. Dist. LEXIS 9881 at \*12–13 (N.D. Cal. Mar. 21, 2003); (Opp’n, 6:15–25.) The Court agrees with this standard, but disagrees that Essociate has met this standard.

First, CrakMedia challenges the adequacy of the Chart’s discussion of the configuring element of Claim 15, which provides: “a code segment for configuring an existing affiliate system to receive referrals from source Webmasters of an affiliate pool of Webmasters.” (‘660 Patent, 23:1–3.) On this point specifically, both parties’ briefs primarily focus on the inadequacy of the Chart in the Amended Infringement Contentions because those contentions explained how in the VideosZ.com example, a code segment configured a VideosZ.com URL that allowed CrakMedia access to VideosZ.com’s affiliate system. (Amended Infringement Contentions, Claim Chart Ex., 2.) However, the Original Infringement Contentions are the operative contentions for this Motion. Even so, Essociate’s Original Infringement Contentions regarding the configuring element of Claim 15 lack the specificity required by Patent Local rule 3-1. The Claim Chart in these contentions simply states that “[o]ne instance of an existing affiliate system so configured is VideosZ.com,” and cites where more information regarding

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<sup>2</sup> The chart required by this Patent Local Rule 3-1(c) is referred to in this Order as “Claim Chart” or “Chart.”

<sup>3</sup> Because the language between Claims 15 and 28 are so similar, the Court will only specifically cite and discuss the language in Claim 15, but the Court’s reasoning and conclusions apply in equal force to the Contentions regarding Claim 28.

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VideosZ.com’s affiliate system can be found. (Original Infringement Contentions, Claim Chart Ex., 2.) However, the Chart provides no explanation as to how this example maps CrakMedia’s alleged infringing product—the CrakRevenue affiliate platform—onto the configuring element of Claim 15. Simply naming the example, but not explaining the connection to CrakMedia’s alleged infringing product is not sufficiently specific to provide notice to CrakMedia.

Second, CrakMedia challenges the adequacy of the Chart’s discussion of the correlating element of Claim 15, which provides: “a code segment for correlating the received source Webmaster unique identifier [SID] to a target Webmaster unique identifier [TWUID] corresponding to the unique identification system of the requested Merchant affiliate system.” (‘660 Patent, 23:16–19.) The Chart in Essociate’s Infringement Contentions states that the “CrakRevenue affiliate platform includes program code . . . that can create or recognize a relationship between the SID and . . . a [TWUID].” (Original Infringement Contentions, Claim Chart Ex., 6.) CrakMedia argues that Essociate must not only state that the code creates a relationship that exists between the SID and TWUID, but also must specify what type of relationship the code creates. (Mot., 13:13–15:7.) Essociate responds that it need not specify a relationship type because this element of Claim 15 is not limited to a specific type of relationship. (Opp’n, 8:20–22.) The Court agrees with CrakMedia. On February 6, 2012, in a separate infringement action brought by Essociate, this Court construed the term “correlating” in the ‘660 Patent to mean “creating or recognizing a relationship between.” Essociate, Inc. v. Blue Whaler Inv., LLC, et al., No. CV 10-2107 JVS (MLGx), Order re Claim Construction of the ‘660 Patent at 19, Dkt. No. 140. The term “correlating” will likely be found to have the same meaning in this case. See Omega Eng’g, Inc. v. Raytek Corp., 334 F.3d 1314, 1334 (Fed. Cir. 2003) (“[W]e presume, unless otherwise compelled, that the same claim term in the same patent or related patents carries the same construed meaning.”). As a result, it appears that the “create or recognize a relationship” language from Essociate’s Contentions is essentially a restatement of the claim language—specifically the term “correlating”—in the ‘660 Patent. Essociate must provide specificity beyond restating the claim language, and thus must specify what type of relationship the CrakRevenue program code allegedly creates between the SID and TWUID. See Network Caching Tech., 2003 U.S. Dist. LEXIS 9881 at \*12–13.

Third, CrakMedia challenges the adequacy of the Chart’s discussion of the corresponding element of Claim 15, which appears as part of the correlating element that

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is quoted in the first sentence of the immediately preceding paragraph. (See also ‘660 Patent, 23:18–19.) The Chart in Essociate’s Infringement Contentions simply states that there is a “TWUID [] corresponding to the unique identification system of VideosZ.com’s affiliate system.” (Original Infringement Contentions, Claim Chart Ex., 6.) Similar to its argument regarding the correlating element, CrakMedia argues that this contention is insufficiently specific because it does not explain how the cited TWUID is a value corresponding to the unique identification system of VideosZ.com’s affiliate system. (Mot., 15:8–17.) The Court agrees. As is the case with the correlating element, Essociate must be more specific than essentially reciting the claim language of the ‘660 Patent.

Therefore, for the foregoing reasons, Essociate’s Chart fails to map CrakMedia’s alleged infringing product onto three elements of Claim 15 in a manner that is sufficiently specific under Patent Local Rule 3-1. The similarity in the language between Claim 15 and Claim 28 require that this reasoning and conclusion apply with equal force to Essociate’s contentions regarding Claim 28.

**3. Infringement Contentions are Insufficient Under Patent Local Rule 3-1(e)**

Patent Local Rule 3-1(e) requires that the plaintiff specify in its infringement contentions “[w]hether each limitation of each asserted claim is alleged to be literally present or present under the doctrine of equivalents in the Accused Instrumentality.” Essociate alleges in its Infringement Contentions that CrakMedia’s Accused Instrumentalities directly infringe the asserted claims of the ‘660 Patent, but it also “contends in the alternative that the Accused Instrumentalities embody [the claim elements] under the doctrine of equivalents.” (Original Infringement Contentions, 2–3.) CrakMedia asserts that the doctrine of equivalents allegation is not a valid allegation because it lacks a theory of infringement. (Mot., 20–21.) Essociate admits that it lacks a theory of infringement under this doctrine and is simply “reserv[ing] the right to amend once further information is available.” (Opp’n, 14:22.)

However, the doctrine of equivalents “is not designed to give a patentee a second shot at proving infringement” if a claim element is found to not directly infringe the ‘660 Patent. Rambus Inc. v. Hynix Semiconductor, Inc., 2008 U.S. Dist. LEXIS 123187 at \*41 (N.D. Cal. Dec. 29, 2008). “The Patent Local Rules require a limitation-by-

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limitation analysis, not a boilerplate reservation.” Id. It is clear, and Essociate essentially admits, that the doctrine of equivalents allegation is a boilerplate reservation made for the purposes of maintaining a second shot to prove infringement. Thus, this allegation violates Patent Local Rule 3-1 and must be struck.

**4. Court Will Not Strike Infringement Contentions Based on Failure to Allege a Theory Satisfying 35 U.S.C. § 271(a)**

“It is the general rule under United States patent law that no infringement occurs when a patented product is made and sold in another country.” Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 441 (2007). Under 35 U.S.C. § 271(a), “whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.” The reach of § 271(a) is limited to infringing activities that occur within the United States. See Rotec Indust. v. Mitsubishi Corp., 215 F.3d 1246, 1251 (Fed. Cir. 2000). As a result, CrakMedia argues that Essociate fails to “identify a theory for suing a Canadian company for infringing claims of a U.S. Patent.” (Mot., 9:15–12:12.) CrakMedia requests that the Court require Essociate to explain its theory for how its allegedly infringing activities are occurring within the United States. (Id. at 12:10–12.) Essociate counters that it is inappropriate for the Court to address this issue at this stage in the litigation. (Opp’n, 12:18–13:8.) The Court agrees with Essociate.

CrakMedia cites multiple cases in which courts ruled against the patentee because the alleged infringing activities occurred outside the United States, but all of these rulings were made in the context of summary judgment or trial. (Mot., 9:15–12:12); see, e.g. Halo Elec., Inc. v. Pulse Elec., Inc., 769 F.3d 1371, 1378–81 (Fed. Cir. 2014) (summary judgment); Centillion Data Sys., LLC v. Qwest Commc’ns Int’l, Inc., 631 F.3d 1279, 1283–87 (Fed. Cir. 2011) (summary judgment); NTP, Inc. v. Research In Motion, Ltd., 418 F.3d 1282, 1313–18 (Fed. Cir. 2005), abrogated on other grounds by IRIS Corp. v. Japan Airlines Corp., 769 F.3d 1359, 1361 n.1 (Fed. Cir. 2014) (jury verdict). None of these cases hold that a court may strike infringement contentions because the patentee failed to allege a theory of infringing activities that occurred within the United States. Instead, these cases all demonstrate that such questions, such as whether CrakMedia is a Canadian corporation and whether CrakMedia’s Accused Instrumentalities were used in the United States, are questions of fact that the Court cannot address at this stage in the

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CrakMedia cites MediaTek, Inc. v. Freescale Semiconductor, Inc., No. C11-5341 YGR (JSC), 2013 U.S. Dist. LEXIS 77080 at \*9–11 (N.D. Cal. May 31, 2013), for the proposition that “to allege infringement under [Patent Local] Rule 3-1 [plaintiff] had to have a reasonable basis to believe that the infringing activities were tied to the United States as required by Section 271(a).” However, MediaTek did not involve a motion to strike infringement contentions; rather, MediaTek involved the patentee’s motion for leave to file amended infringement contentions. Id. at \*2. Moreover, MediaTek appears to only sympathize with this proposition, which the patentee asserted, and does not indicate that this proposition is a binding conclusion. Id. at \*12.

Accordingly, at this early stage in the litigation, the Court will not strike Essociate’s Infringement Contentions on the basis that it failed to allege a theory of infringement that occurred within the United States. The Court also will not require Essociate to do so in any future infringement contentions Essociate files. Although the Court does not strike Essociate’s Original Infringement Contentions on this ground, it strikes the Contentions in their entirety based on their insufficiencies under Patent Local Rules 3-1(b),(c),(e). Supra Sections III.B.1–3.

#### IV. Conclusion

For the foregoing reasons, the Court **GRANTS** CrakMedia’s Motion to Strike in its entirety. The Court strikes the Original Infringement Contentions and the Amended Infringement Contentions. However, the Court grants Essociate leave to serve a new set of infringement contentions that must address the insufficiencies described in Sections III.B.1–3. The Court stays infringement-related discovery and CrakMedia’s obligation to provide invalidity contentions until Essociate has served sufficient infringement contentions. The Court also orders that Essociate serve amended infringement contentions by February 3, 2015. As discussed at oral argument, these amended infringement contentions must comply with Patent Local Rule 3-1(d).

**IT IS SO ORDERED.**

Initials of Preparer

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