UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:22-cv-07556-RGK-SHK	Date	September 11, 2023
Title	***GoTV Streaming, LLC v. Netflix, Inc.***		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Joseph Remigio	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS) Order Re: Motions for Summary Judgment [DEs 125, 134]**

I. INTRODUCTION

On November 10, 2022, GoTV Streaming, LLC ("Plaintiff") filed the operative First Amended Complaint ("FAC") against Netflix, Inc. ("Defendant") alleging claims for direct and induced patent infringement. (ECF No. 44.) On February 16, 2023, the Court dismissed the claims for induced patent infringement, leaving only Plaintiff's claims for direct infringement. (ECF No. 64.)

Presently before the Court are Defendant's Motion for Summary Judgment (ECF No. 125) and Plaintiff's Motion for Partial Summary Judgment (ECF No. 134). For the following reasons, the Court **GRANTS in part** Defendant's Motion and **GRANTS in part** Plaintiff's Motion.

II. FACTUAL BACKGROUND

This case is about digital media technology; specifically, methods of delivering and rendering digital content for wireless devices.

The following facts are uncontroverted unless otherwise stated:

Hands-On Mobile, Inc. ("Hands-On") was a mobile media and network applications developer that developed applications for mobile phones. One such application was "Astrology Zone," first released in or before 2006, which delivered horoscopes and other astrology-related information to mobile phones. (Pl.'s Mot. Summ. J., Chen Decl., Ex. 7, ECF No. 134-9.) Around 2007, Hands-On released the Hands-On Mobile Binary Runtime Environment (HOMBRE), a new mobile development platform. (*Id.*, Ex. 2, ECF No. 134-4.) The exact date of its release is uncertain, but according to a March 2007 press release, HOMBRE had been under development for "[m]ore than two years and was "already in use across the world." (*Id.*, Ex. 4, ECF No. 134-6.) After the release of HOMBRE, Hands-On began migrating its existing mobile applications to the newly developed platform, including

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:22-cv-07556-RGK-SHK	Date	September 11, 2023
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Astrology Zone. (*See id.*, Ex. 3 at 163:5–11, ECF No. 134-5.) The exact timing of this migration is uncertain. (*See id.*)

Later the same year that Hands-On issued the HOMBRE press release, on August 1, 2007, Hands-On filed a patent application directed to new methods and systems for rendering content on wireless devices. The claims in this application were embodied by the very same HOMBRE platform that Hands-On had recently released. (Def.'s Opp'n Summ. J., Dyer Decl., Ex. B at 139:18–21, ECF No. 171-4.) Ultimately, this application would lead to the issuance of three patents: United States Patent Nos. 8,103,865, 8,478,245, and 8,989,715 (collectively, the "Asserted Patents"). The Asserted Patents, like the initial application, are directed to methods and systems for rendering content on wireless devices. The Asserted Patents also shared a specification and the original application's effective filing date: August 1, 2007.

The Asserted Patents were later assigned to Hands-On's successor, Phunware, Inc., which in 2022, assigned the Asserted Patents to Plaintiff, making it the sole and exclusive owner of the Asserted Patents. (*See* Def.'s Mot. Strike, Marshall Decl., Ex. B, ECF No. 143-4.) Plaintiff does not sell or offer to sell any products that practice the Asserted Patents. (Pl.'s Opp'n Summ. J. at 17, ECF No. 168.)

Defendant operates Netflix, an eponymous streaming media service that delivers digital content to customers' wireless devices. (*See* Def.'s Mot. Summ. J., Dyer Decl., Ex. DD, ECF No. 125-32.) To support the multitude of different devices its customers own, Defendant provides several different user interface platforms, such as Web, TV, iOS, and Android. (*Id.*, Ex. O at 18:6–11, 18:20–23, 21:7–25, ECF No. 140-9.) The Web platform is accessed using a supported web browser. (*Id.*, Ex. R at 20:17–24, 22:25–23:5, ECF No. 140-12.) Other platforms, such as TV, iOS, and Android, may require the user to download and install a device-specific application from Defendant. (Pl.'s Opp'n, Clark Decl., Ex. 4 at 13–24, ECF No. 168-7.) Defendant performs routine internal tests of its different interface platforms. (*Id.*, Ex. 5 at 147:21–150:3, ECF No. 168-8; *id.*, Ex. 6 at 125:10–126:19, ECF No. 168-9.) Some of these tests are performed multiple times daily. (*Id.*, Ex. 6 at 125:10–18.)

Plaintiff alleges that each of Defendant's user interface platforms (collectively, the "Accused Products"), infringe the Asserted Patents either literally or under the doctrine of equivalents.

III. CLAIM CONSTRUCTION

The Parties move for summary judgment on issues of infringement and validity. The disposition of these issues depends, at least in part, on the Court's construction of various disputed claim terms. *See Bayer AG v. Elan Pharm. Rsch. Corp.*, 212 F.3d 1241, 1247 (Fed. Cir. 2000) (explaining that the first step to an infringement inquiry is defining the scope of the asserted claims). Accordingly, before delving into the merits of the summary judgment motions, the Court first engages in claim construction.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:22-cv-07556-RGK-SHK	Date	September 11, 2023
Title	***GoTV Streaming, LLC v. Netflix, Inc.***		

In a patent case, the Court may engage in claim construction as part of its order on a summary judgment motion. *See, e.g.*, *Spigen Korea Co., Ltd. v. Ispeak Co., Ltd.*, 2016 WL 3982307, at *4 n.2 (C.D. Cal. July 22, 2016) (citing *Conoco, Inc. v. Energy & Env't Int'l, L.C.*, 460 F.3d 1349, 1359 (Fed. Cir. 2006)). Claim construction begins with the language of the claims, which are given their "ordinary and customary meaning," or "the meaning that the term would have to a person of ordinary skill in the art." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005) (en banc). In construing claim language, the Court considers intrinsic evidence, such as the claims, specification, and prosecution history, as well as extrinsic evidence, such as treatises and dictionaries. *Id.* at 1312–17. However, extrinsic evidence is "less significant than the intrinsic record in determining the legally operative meaning of claim language." *Id.* at 1317 (internal quotations omitted) (quoting *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 862 (Fed. Cir. 2004)).

In their dueling Motions for Summary Judgment, the Parties dispute the proper construction of the following terms:

"rendering command"
"discrete low level rendering command"
"wireless device generic template"
"custom configuration"
"rendering blocks"

The Court analyzes each term in turn.

A. "rendering command"

The Parties dispute the proper construction of the term "rendering command," which is used in various claims across each of the Asserted Patents. For instance, claim 1 of the '865 Patent recites:

> 1. A server implemented method for processing data for a wireless device, comprising:
> . . .
> generating a page description based on said wireless device generic template, and a capability of the wireless device, said page description having at least one discrete low level *rendering command* that is within said rendering capability of said wireless device but that is of a syntax that is wireless device generic . . . .

('865 Patent at 20:41–63 (emphasis added).) The Parties' positions are summarized in the table below:

Plaintiff's Proposed Construction	Defendant's Proposed Construction

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:22-cv-07556-RGK-SHK	Date	September 11, 2023
Title	***GoTV Streaming, LLC v. Netflix, Inc.***		

A description for rendering a page component, such as the width or the height of the component.	An instruction to generate graphics on a display or generate audio content.[1]

The Parties appear to dispute two aspects of the term's construction: the proper scope of "rendering" and the proper scope of "command." The Court begins with "rendering."

1. *"rendering"*

Plaintiff argues that "rendering" should be construed broadly to simply refer to page components. In contrast, Defendant argues that "rendering" should be construed narrowly to refer to only graphics and audio.

On balance, the Court finds that Plaintiff's construction is appropriate. While graphics and audio are the only two types of renderable components referred to by name in the specification, there is no indication that these are the only types of components that may be rendered. (*See, e.g.*, *id.* at 21:21–24 ("said description includes at least one display rendering command and at least one audio rendering command.").) For this reason, Plaintiff's broader construction is more appropriate.

2. *"command"*

Plaintiff argues that "command" should be construed broadly to include descriptions of page components, such as the desired width or the height of components. In contrast, Defendant argues that "command" should be construed narrowly to refer only to instructions, which go a step beyond descriptions by being executable and triggering various actions. Plaintiff supports its construction with intrinsic evidence via excerpts of the specification explaining that "basic commands" "may be a description for rendering." (*Id.* at 13:22–25, 15:62–64.) Defendant also supports its construction with intrinsic evidence via another excerpt explaining that a "client command" "triggers an action," as well as dependent claim 4 of the '865 Patent, which states that "at least one discrete low level rendering command is operable to be executed." (*Id.* at 14:18–21, 21:4–7.) Further, Defendant argues that its construction is consistent with extrinsic evidence from various dictionaries that define computer commands as instructions that start or execute actions. (Def.'s Mot. Summ. J, Dyer Decl., Exs. E–F, ECF No. 125-7–8.)

On balance, the Court finds that Plaintiff's construction is appropriate. The excerpts that both Parties rely on demonstrate that commands can differ in functionality—just as mere descriptions are commands, so too are instructions that trigger and execute actions. Presumably, an instruction is a more

[1] Defendant originally argued a proposed construction that included only graphics, not audio. Defendant concedes that this construction was lacking, as the Asserted Patents contain several references to audio rendering, and accordingly revised their construction to include audio content.

complicated type of description, as it not only describes a desired outcome, but is also capable of bringing about that outcome itself.

This conclusion is further supported by the dependent claim that Defendant relies on, which shows that "operable to be executed" is simply an optional characteristic of commands. Dependent claims refer back to and further limit another claim, thereby covering a narrower but overlapping scope. 37 C.F.R. 1.75(c). Because the dependent claim has a narrower but overlapping scope, it follows that a device that infringes the dependent claim must also infringe the independent claim. However, a device that infringes the independent claim might not infringe the dependent claim. Or in simpler terms, an apple is a fruit, but not all fruits are apples.

Returning to the claims at hand, independent claim 1 includes "at least one discrete low level rendering command." ('865 Patent at 20:41–63.) Dependent claim 4, which depends on claim 1, adds the further limitation that the "discrete low level rendering command . . . is operable to be executed." (*Id.* at 21:4–7.) The fact that this "operable to be executed" limitation is in a dependent claim implies that not all commands are operable to be executable. Simpler commands, like descriptions, may read on claim 1 without reading on claim 4. Thus, "operable to be executed" is an optional characteristic of commands, not a necessary one. And although mere descriptions would conflict with Defendant's proffered dictionary definitions, given the specification and claims' greater significance as intrinsic evidence, the Court concludes that the proper construction includes descriptions. *See Phillips*, 415 F.3d at 1317.

Accordingly, the Court adopts Plaintiff's proposed construction for "rendering command" in its entirety: "a description for rendering a page component, such as the width or the height of the component."[2]

B. <u>"discrete low level rendering command"</u>

The Parties also dispute the proper construction of the term "discrete low level rendering command," which although used in the specification of each of the Asserted Patents, is only used in the claims of the '865 Patent. Claim 1 of the '865 Patent recites:

> 1. A server implemented method for processing data for a wireless device, comprising:
> . . .
> generating a page description based on said wireless device generic template, and a capability of the wireless device, said page description having at least one *discrete*

[2] Defendant also argues that including the phrase "such as the width or the height of the component" is improper because not all page components use width or height. Width or height are clearly used as examples, as they were introduced with the phrase "such as." And examples need not be applicable to every renderable component.

> *low level rendering command* that is within said rendering capability of said wireless device but that is of a syntax that is wireless device generic . . . .

('865 Patent at 20:41–63 (emphasis added).) The Parties' positions are summarized in the table below:

Plaintiff's Proposed Construction	Defendant's Proposed Construction
A discrete rendering command that is tailored based on wireless device capability.	Indefinite

In essence, the Parties dispute whether the term "discrete low level rendering command" has any proper construction or is indefinite. Under the definiteness requirement of 35 U.S.C. § 112, ¶ 2, patent claims must particularly point out and distinctly claim the subject matter which the inventor regards as his invention.[3] Claims fail to meet this requirement and are indefinite if, when "read in light of the specification delineating the patent, and the prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention." *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 789 F.3d 1335, 1340–41 (Fed. Cir. 2015). And if a claim is indefinite, it is invalid as a matter of law. *See id.*

Plaintiff argues that "discrete low level rendering command" is not indefinite, supporting its proposed construction with excerpts of the specification and claims describing discrete low level rendering claims that are "tailored" to or "within" a wireless device's capabilities, such as:

> Basic commands are precompiled by the server 230 and ready for rendering by the client 210. It is appreciated that *basic commands* are written in a syntax that is device generic regardless of the device type but whose parameters *are tailored based on the wireless device capabilities. As such*, precompiled *basic commands are discrete low level rendering commands* tailored based on the rendering capability of the client 210.

('865 Patent at 13:18–25 (emphasis added); *see also id.* at 20:53–58 ("at least one discrete low level rendering command that is within said rendering capability of said wireless device").) Defendant argues that these portions do not support Plaintiff's construction and that the patent fails to indicate the meaning of the term, thereby rendering the term indefinite.

On balance, the Court agrees with Defendant. Plaintiff's construction fails because it renders significant portions of the specification and claims to be superfluous. For instance, substituting Plaintiff's construction into the above excerpt of the specification results in the following:

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[3] Because the Asserted Patents have effective filing dates of August 1, 2007, before the America Invents Act ("AIA") took effect, the Court considers the pre-AIA statutes cited herein.

As such, precompiled basic commands are discrete rendering commands that are tailored based on wireless device capability tailored based on the rendering capability of the client 210.

This substitution renders the phrase "tailored based on the rendering capability of the client" superfluous. As the Federal Circuit has made clear, a construction that renders terms "void, meaningless, or superfluous" is "highly disfavored." *Wasica Fin. GmbH v. Cont'l Auto. Sys., Inc.*, 853 F.3d 1272, 1288 n.10 (Fed. Cir. 2017). On this basis, Plaintiff's proposed construction must be rejected. Without any alternative construction, and without any other guidance from the patent, its prosecution history, or the relevant art, the Court finds that the term is indefinite. *See Haemonetics Corp. v. Baxter Healthcare Corp.*, 607 F.3d 776, 781 (Fed. Cir. 2010) ("we construe claims with an eye toward giving effect to all of their terms, even if it renders the claims inoperable or invalid.") (internal citations omitted); *Skyhook Wireless, Inc. v. Google, Inc.*, 2012 WL 4076180, at *14 (D. Mass. Sept. 14, 2012) (holding that a term is indefinite because the only proposed construction rendered terms superfluous).

Accordingly, the Court rejects Plaintiff's construction and finds the term "discrete low level rendering command" indefinite. Because each claim uses or depends on a claim that uses this term, each of the claims, and by extension, the '865 Patent is indefinite and therefore invalid. *See Teva Pharms. USA*, 789 F.3d at 1340–41.

C. "wireless device generic template"

The Parties also dispute the proper construction of the term "wireless device generic template," which is only used in the claims of the '865 Patent. However, because each of the claims of the '865 Patent are indefinite and therefore invalid, the Court need not construe this term.

D. "custom configuration"

The Parties also dispute the proper construction of the term "custom configuration," which is used in the claims of each of the Asserted Patents. Claim 1 of the '865 Patent[4] recites:

> 1. A server implemented method for processing data for a wireless device, comprising:
>
> . . .
>
> sending a *custom configuration* to the wireless device, said *custom configuration* being specific to said application program;

[4] Although the Court finds that the '865 Patent is invalid as indefinite, the Court nonetheless looks to the '865 Patent to construe the disputed claim terms because the '865 Patent, regardless of its validity, "derive[s] from the same patent application and share[s] many common terms" with the other Asserted Patents, so as to serve as significant intrinsic evidence for claim construction. *See, NTP, Inc. v. Rsch. in Motion, Ltd.*, 418 F.3d 1282, 1293 (Fed. Cir. 2005), *abrogated on other grounds*, *Zoltek Corp. v. U.S.*, 672 F.3d 1309, 1313 (Fed. Cir. 2012).

. . .
sending said page description to the wireless device such that the wireless device is capable of presenting at least one content item from said plurality of content items using both said page description and said *custom configuration*.

('865 Patent at 20:41–63 (emphasis added).) The Parties' positions are summarized in the table below:

Plaintiff's Proposed Construction	Defendant's Proposed Construction
A configuration that determines certain graphical appearances, or the look and feel, of the application.	Instructions that determine the look and feel of the application.

Plaintiff argues for a broader construction that uses the word "configuration," whereas Defendant argues for a narrower construction limited to "instructions." Both Parties again rely on different portions of the specification. Plaintiff relies on a portion stating that "[t]he custom configuration is the theme and determines certain graphical appearances of the requested application. In other words, the custom configuration provides the 'look and feel' of the content of the requested application." (*Id.* at 3:14–17.) Defendant relies on another portion stating that the terms "custom configuration" and "configuration data" are used interchangeably, and that "configuration data may be a set of low level instructions." (*Id.* at 7:62–63, 8:3–5.)

On balance, the Court finds a combination of the two proposed instructions is appropriate. Defendant's proposed construction is inappropriate insofar as it construes "custom configuration" as requiring instructions. The only portion of the specification that Defendant relies on states that "configuration data *may* be a set of low level instructions." (*Id.* (emphasis added).) It does not state that configuration data *must* be a set of low level instructions, or include instructions of any kind. Plaintiff's proposed construction is also inappropriate because it includes the phrase "certain graphical appearances." As the specification makes clear, "certain graphical appearances" and "look and feel" are equivalent. (*Id.* at 3:14–17 ("In other words . . . .").) Including both phrases would be redundant. Because both Parties at least agree that the phrase "look and feel" is proper, the Court uses that phrase in its construction.

Accordingly, the Court adopts the following modified construction of "custom configuration": "a configuration that determines the look and feel of the application."

E. <u>"rendering blocks"</u>

Finally, the Parties dispute the proper construction of the term "rendering blocks," which is used in the claims of each of the Asserted Patents. Claim 4 of the '865 Patent recites:

> 4. The method of claim 1, wherein said at least one discrete low level rendering command of said page description is operable to be executed by a plurality of *rendering blocks* of a graphical user interface of the wireless device.

(*Id.* at 21:4–7 (emphasis added).) The Parties' positions are summarized in the table below:

Plaintiff's Proposed Construction	Defendant's Proposed Construction
Blocks that perform discrete rendering operations.	Graphical user interface items that display application content to a user and enable a user to interact with an application.

Plaintiff argues for a broader construction that simply refers to "rendering operations," whereas Defendant argues for a narrower construction limited to displayable, interactive items. Plaintiff supports its proposed construction with a portion of the specification that states: "a graphical user interface layer 108 includes a number of individual rendering blocks 108a that perform discrete rendering operations to render a received page description." (*Id.* at 7:21–23.) Defendant relies on another portion that states: "The graphical user interface 108 rendering blocks (e.g. icons) 108a render content and enable a user to interact with the requested application." (*Id.* at 8:21–23.)

On balance, the Court finds Plaintiff's proposed construction is appropriate. Plaintiff's construction best encompasses each of the embodiments set forth in the specification. In contrast, Defendant's construction excludes multiple embodiments. For instance, Defendant's construction is limited to the display of graphics, despite the specification and claims' references to audio rendering. (*See, e.g.*, *id.* at 9:34–35 ("Sound is a rendering block for a non visual control to play sound.").) Likewise, Defendant's construction is also limited to user interactive elements, despite indications that user interactivity is optional. (*See, e.g.*, *id.* at 8:66–9:1 ("An image is a rendering block to display an image. An action *may* be associated to the image.").) These limitations are inconsistent with other embodiments and therefore improper. *Oatey Co. v. IPS Corp.*, 514 F.3d 1271, 1276–77 (Fed. Cir. 2008).

Accordingly, the Court adopts Plaintiff's proposed construction: "blocks that perform discrete rendering operations."

F. Conclusion

In sum, the Court construes the disputed claim terms as follows:

Claim Term	Court's Construction

"rendering command"	"A description for rendering a page component, such as the width or the height of the component."
"discrete low level rendering command"	Indefinite.
"wireless device generic template"	Not construed as moot.
"custom configuration"	"A configuration that determines the look and feel of the application."
"rendering blocks"	"Blocks that perform discrete rendering operations."

Having completed claim construction, the Court proceeds to analyze the Parties' Motions for Summary Judgment, beginning with Defendant's Motion.

IV. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. Judicial Standard

Under Federal Rule of Civil Procedure 56(a), a court may grant summary judgment only if "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To prevail on a summary judgment motion, the movant must show that there are no genuine issues of material fact as to matters on which it has the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Upon such a showing, the Court may grant summary judgment on all or part of the claim. Fed. R. Civ. P. 56(a).

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. *See Celotex*, 477 U.S. at 324. Nor may the non-moving party merely attack or discredit the moving party's evidence. *Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 96–97 (9th Cir. 1983). The non-moving party must affirmatively present specific evidence sufficient to create a genuine issue of material fact for trial. *See Celotex*, 477 U.S. at 324. The materiality of a fact is determined by whether it might influence the outcome of the case based on the contours of the underlying substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes over such facts amount to genuine issues if a reasonable jury could resolve them in favor of the nonmoving party. *Id.*

B. Discussion

Defendant moves for summary judgment, seeking judgment that: (1) Defendant does not infringe the Asserted Patents; (2) the claims of the '865 Patent are invalid as indefinite; and (3) Plaintiff's request for an ongoing royalty was waived. The Court addresses each argument in turn.

1. *Non-Infringement*

A defendant that "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." 35 U.S.C. § 271. A patent infringement analysis requires two steps. First, the Court construes the claims to determine their scope and meaning. *See Bayer AG*, 212 F.3d at 1247. Second, the Court compares the properly construed claims to the accused device. *Id.* Having already completed claim construction, the Court begins with the second step: comparing the properly construed claims to the Accused Products.

"To prevail [on infringement], the plaintiff must establish by a preponderance of the evidence that the accused device infringes one or more claims of the patent either literally or under the doctrine of equivalents." *Id.* "To prove literal infringement, the [plaintiff] must show that the accused device contains every limitation in the asserted claims. If one limitation is missing or not met as claimed, there is no literal infringement." *Mas-Hamilton Grp. v. LaGard, Inc.*, 156 F.3d 1206, 1211 (Fed. Cir. 1998) (citations omitted). To prove infringement under the doctrine of equivalents, the plaintiff must show that any differences between the asserted claims and the accused device are "insubstantial." *WMS Gaming, Inc. v. Int'l Game Tech.*, 184 F.3d 1339, 1352 (Fed. Cir. 1999).

Plaintiff asserts that Defendant infringes numerous claims from each of the Asserted Patents, either literally or under the doctrine of equivalents, through the sale and use of the Accused Products. Defendant moves for summary judgment of non-infringement, arguing that it does not infringe for two reasons: (1) the Accused Products do not use a "rendering command" as required by each of the Asserted Patents; and (2) the Accused Products do not use a "wireless device" or "non-transitory computer usable medium" as required by the '245 Patent. The Court addresses each argument in turn.

a. *"rendering command" in the Asserted Patents*

Plaintiff asserts numerous claims from each of the Asserted Patents, all of which include a limitation related to a "rendering command." Defendant argues that it does not infringe any of the Asserted Patents because "rendering command" should be construed to cover instructions, and the Accused Products do not use instructions. As explained above, however, the Court rejects Defendant's construction of "rendering command" and instead adopts Plaintiff's construction, which more broadly includes descriptions. Defendant does not argue that the Accused Products lack descriptions, and thus this argument fails.

b. *"wireless device" or "non-transitory computer usable medium" in the '245 Patent*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:22-cv-07556-RGK-SHK	Date	September 11, 2023
Title	***GoTV Streaming, LLC v. Netflix, Inc.***		

Plaintiff asserts four claims from the '245 Patent: claims 1, 4, 5, and 16. Claims 1, 4, and 5 are method claims that recite methods of rendering content on a "wireless device." Claim 16 is system claim that recites a "non-transitory computer usable medium" that implements a method of rendering content on a wireless device. Defendant argues that it does not infringe either type of claim because it merely sells software, and that the sale of software does not constitute infringement of method or system claims. The Court addresses each type of claim in turn.

i. Method Claims

To prove direct infringement of a method claim, a plaintiff must show that "each and every step of the method or process was performed" by the defendant "either personally or vicariously." *Aristocrat Techs. Australia Pty Ltd. v. Int'l Game Tech.*, 709 F.3d 1348, 1362 (Fed. Cir. 2013); *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301, 1307 (Fed. Cir. 2012), *overruled on other grounds*, 572 U.S. 915. The mere sale of software containing instructions to perform a patented method does not directly infringe the patent. *Ricoh Co., Ltd. v. Quanta Comput. Inc.*, 550 F.3d 1325, 1335 (Fed. Cir. 2008).

The asserted method claims recite a method of rendering content on a wireless device that comprise several steps, including: "receiving" configurations and content, "using" a graphical user interface to generate content, and "rendering" the content on a wireless device. ('245 Patent at 20:41–64.) Plaintiff asserts that Defendant performs each of these steps when performing internal tests on its own devices and when customers use the Accused Products on their own devices. Defendant argues that both theories fail as a matter of law. As explained below, the Court finds that Plaintiff's theory regarding internal tests may proceed, but its theory regarding use by customers fails as a matter of law.

(a) Internal Tests

Plaintiff asserts that the Accused Products render content on wireless devices by performing each step of the asserted method claims. Plaintiff further asserts that Defendant runs daily internal tests of the Accused Products using its own wireless devices. Plaintiff thereby argues that Defendant infringes the method claims by running these tests because Defendant personally performs each step of the method claims. Defendant argues in its Reply[5] that this theory fails because it was not timely disclosed and Plaintiff has provided insufficient supporting evidence. Both of Defendant's arguments fail.

First, it is unclear from the record that this theory was untimely. Defendant attempts to demonstrate untimeliness by citing to Plaintiff's May 30, 2023 interrogatory responses which purportedly do not mention this theory. (Def.'s Reply Mot. Summ. J., Dyer Decl., Ex. B, ECF No. 187-

[5] Defendant did not raise any arguments regarding the testing theory in its original Motion. Rather, Defendant raised arguments in its Reply brief, only after Plaintiff asserted its testing theory in its Opposition.

4.) At best, this simply shows that Plaintiff had not disclosed the theory as of that date. Plaintiff conceivably could have timely disclosed it at a later date or might have good cause for untimely disclosure. The Court has no way of knowing at this juncture because Plaintiff has not been afforded an opportunity to respond to arguments raised in Defendant's Reply. The Court declines to find the theory untimely.

Second, Plaintiff has provided sufficient evidence to create a genuine issue of material fact. Plaintiff has proffered the testimony of Defendant's employees to establish that Defendant performs daily tests of the Accused Products, as well as expert opinion that Defendant infringes by performing these tests. (*See, e.g.*, Pl.'s Opp'n Mot. Summ. J., Clark Decl., Ex. 6 at 125:9–126:18; *id.*, Ex. 2 ¶ 293, ECF No. 168-5.) Accordingly, Plaintiff's theory of infringement of the asserted method claims based on internal testing may proceed.

(b) Use by Customers

Plaintiff also argues that Defendant infringes when customers use the Accused Products, arguing that Defendant personally performs the steps, or alternatively, that the steps may be attributed to Defendant because they are performed automatically. Both theories fail.

First, Plaintiff fails to establish a genuine issue of material fact as to whether Defendant personally performs the steps of the method claims when a customer uses the Accused Products. As written, the method claims require all steps to be performed on the customer's device. For instance, the steps of claim 1—receiving configurations and content, using a graphical user interface to generate content, and rendering the content on the wireless device—are written from the device's perspective indicating that they must be performed on the device. *See, e.g.*, *Sapphire Crossing LLC v. Abbyy USA Software House, Inc.*, 497 F. Supp. 3d 762, 766 (N.D. Cal. 2020) (finding that the step "automatically uploading electronic data . . . from a computer" was written in a way that required the step to be performed on the computer). Because the steps must be performed on the device, the steps are performed by whoever controls the device. And here, when a customer uses the Accused Products using her own wireless device, Defendant does not perform the steps. *See Int'l Bus. Machs. Corp. v. Booking Holdings, Inc.*, 775 Fed. Appx. 674, 678 (Fed. Cir. 2019) (finding that because a step occurs on a customer's device, a defendant seller can be liable for direct infringement only if the customer's performance can be attributed to the defendant "as if [defendant] had performed the [] step itself."). Plaintiff fails to present any evidence or authority that would suggest otherwise.[6] Thus, Plaintiff's first theory fails.

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[6] To be sure, Plaintiff cites to numerous excerpts of deposition testimony where Defendant's employees stated that Defendant "receives," "uses," and "renders" when the Accused Products are in use. But in context, these employees were simply describing how the Accused Products operated, not that Defendant personally performs these steps when a customer uses the

Second, Plaintiff's theory of liability based on automatic performance fails as a matter of law. Plaintiff argues that under *SiRF Technology, Inc. v. International Trade Commission*, a software developer may directly infringe a method patent by selling a product that, once activated, "automatically perform[s] the disputed steps of the claims at issue." 601 F.3d 1319, 1331 (Fed. Cir. 2010). However, the Federal Circuit has since clarified that liability under *SiRF* is unavailable when the entire method is performed on the end product; at least one step must be performed on equipment directly controlled by the developer. *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1221–22 (Fed. Cir. 2014). Thus, while the defendant in *SiRF* directly infringed because it performed a claimed communication step on its own satellite, the defendant in *Ericsson* did not directly infringe because each claimed step was performed on a customer's device. *Id.*; *see also Koninklijke Philips N.V. v. Zoll Med. Corp.*, 656 Fed. Appx. 504, 521 (Fed. Cir. 2016) (finding *SiRF* inapplicable because each step of a method claim was performed on the end product). Here, each of the steps of the method claims must be performed on the customer's device. Defendant therefore cannot be held liable for direct infringement under *SiRF*. Thus, Plaintiff's second theory also fails. Accordingly, Plaintiff's theory of infringement of the asserted method claims based on customers' use of the Accused Products fails.

ii. System Claim

The Parties also make similar arguments with respect to claim 16 of the '245 Patent, a system claim. Claim 16 is directed to a "non-transitory computer usable medium," or in other words, a physical device such as a "disk, hard drive, or other data storage device." *CyberSource Corp. v. Retail Decisions, Inc.*, 654 F.3d 1366, 1373 (Fed. Cir. 2011). Specifically, claim 16 recites a physical device containing program instructions for a computer to perform the rendering methods set forth in the method claims above. Plaintiff similarly asserts that Defendant infringes this claim when performing internal tests and when customers download and use the Accused Products. As explained below, the Court again finds that Plaintiff's theory regarding internal tests may proceed, but its theory regarding use by customers fails as a matter of law.

(a) Internal Tests

As explained above, Plaintiff asserts that the Accused Products render content on wireless devices by performing each step of the asserted method claims, and that Defendant runs daily tests of the Accused Products using its own wireless devices. Plaintiff thereby argues that Defendant infringes the corresponding system claim by running these tests because in order to run these tests, Defendant must necessarily download and execute the Accused Products from a physical data storage device. Defendant argues that this theory fails because it was not timely disclosed and lacks supporting evidence. However,

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Accused Products. For example, although one employee stated that "we receive the data used to render," the employee was responding to a question about how the Accused Products operate. (*See, e.g.*, Pl.'s Opp'n Mot. Summ. J., Clark Decl., Ex. 6 at 62:19–62:25, ECF No. 168-9.)

as explained above, both of Defendant's arguments fail. Accordingly, Plaintiff's theory of infringement of the system claim based on internal testing may proceed.

(b) Use by Customers

Plaintiff also argues that Defendant infringes when customers use the Accused Products, arguing that by selling the Accused Products intended for download and use by customers, Defendant "uses" its customers' devices. Defendant disagrees, arguing that this theory fails as a matter of law. The Court agrees with Defendant. This theory fails.

Plaintiff relies on one case, *Centillion Data Systems, LLC v. Qwest Communications International, Inc.*, for the proposition that a defendant may "use" hardware it does not physically control. 631 F.3d 1279, 1284–86 (Fed. Cir. 2011). Plaintiff misapplies *Centillion*, however. In *Centillion*, the claimed system for data processing comprised both a front-end element (a customer's computer) and a back-end element (the defendant's servers). *Id.* The district court originally found that neither defendant nor its customers infringed the system claim because the customer lacked physical and direct control over the back-end and the defendant lacked physical and direct control over the front-end. *Id.* at 1284. On appeal, the Federal Circuit found the district court's holding erroneous. The Federal Circuit explained that the proper test was not whether a party exercised physical and direct control of each individual element, but whether the party "puts the system as a whole into service, i.e., controls the system and obtains benefit from it." *Id.* at 1285. Accordingly, the Federal Circuit found that the customers used the claimed system because they could request and receive processed data from the back-end, thereby "put[ting] the claimed invention into service" and obtaining benefit from it. *Id.* Crucially, however, the Federal Circuit found that the defendant did not use the claimed system because it did not put the front-end into service. *Id.* at 1286. The defendant had merely sold software, and "[s]upplying the software for the customer to use is not the same as using the system." *Id.*

Here, applying the proper test for "use" under *Centillion*, Defendant does not use its customers' devices so as to infringe the asserted system claim. Defendant merely supplies software for its customers to use, much like the defendant in *Centillion*. Accordingly, Plaintiff's theory of infringement of the system claim based on customers' use of the Accused Products also fails.

In sum, the Court **GRANTS** Defendant's Motion for Summary Judgment of non-infringement as to the '245 Patent, but only as to Plaintiff's theories of infringement based on the use of the Accused Products by Defendant's customers. The Court **DENIES** Defendant's Motion for Summary Judgment of non-infringement as to all other grounds.

2. *Invalidity for Indefiniteness*

Under 35 U.S.C. § 112, patent claims must particularly point out and distinctly claim the subject matter which the inventor regards as his invention. If a patent claim fails to meet this requirement, it is

indefinite and invalid as a matter of law. *See Teva Pharms. USA*, 789 F.3d at 1340–41 (citing *Nautilus*, 572 U.S. at 901).

Defendant argues that each of the asserted claims of the '865 Patent are invalid because the term "discrete low level rendering command," which is used in each claim, is indefinite. As explained above, *see supra* Section III.B., the Court agrees. Accordingly, the Court **GRANTS** Defendant's Motion for Summary Judgment of invalidity as to the '865 Patent.

3. *Ongoing Royalty*

An ongoing royalty is a form of forward-looking relief whereby a court may order a defendant to make payments for post-trial infringement. *See Paice LLC v. Toyota Motor Corp.*, 504 F.3d 1293, 1314 (Fed. Cir. 2007). Because an ongoing royalty is based on infringement that has not yet occurred, it is a form of equitable relief, not compensatory relief. Matthews, 4 Annotated Patent Digest § 30:90.50. Typically, an ongoing royalty is awarded "in lieu of an injunction." *Paice*, 504 F.3d at 1314. In such cases, the court often encourages the parties to negotiate a license themselves, and only if the parties fail to reach an agreement does the court intervene to assess and award a reasonable royalty. *Id.* at 1315.

Defendant argues that Plaintiff should be barred from seeking an ongoing royalty, arguing that Plaintiff has waived its right to an ongoing royalty because Plaintiff failed to affirmatively plead that it was seeking an ongoing royalty and stated it was only seeking compensatory damages. The Court disagrees.

At the very outset of the case, Plaintiff indicated in its initial Complaint that it was seeking both compensatory and equitable relief. (Compl. at 46, ECF No. 1.) Defendant argues that this pleading was insufficient, as Plaintiff should have specified it was seeking an ongoing royalty. Defendant does not cite any authority in support of this position, however. To be sure, Defendant cites two cases in which courts found that specific requests for ongoing royalties or injunctive relief were sufficient to allow the plaintiff to seek such remedies at trial. *See Erfindergemeinschaft UroPep GbR v. Eli Lilly & Co.*, 2017 WL 3034655, at *2 (E.D. Tex. July 18, 2017); *Apple, Inc. v. Samsung Elecs. Co.*, 2014 WL 6687122, at *3–4 (N.D. Cal. Nov. 25, 2014). However, these cases found that such requests were *sufficient*, not *necessary* for the plaintiff to seek those remedies, as Defendant now argues.

Defendant alternatively argues that Plaintiff has abandoned its right to pursue ongoing royalties because it asked for compensatory damages in its initial disclosures. Defendant does not identify any part of these disclosures that indicates that Plaintiff exclusively sought compensatory damages, or otherwise disclaimed its prior request for equitable relief. Nor does Defendant point to any authority suggesting that Plaintiff's failure to include equitable relief in its initial disclosures should prevent Plaintiff from seeking equitable relief now.

Accordingly, the Court **DENIES** Defendant's Motion as to ongoing royalties.[7]

C. Conclusion

For the foregoing reasons, the Court **GRANTS in part** Defendant's Motion for Summary Judgment. Specifically, the Court holds as follows:

1. Defendant's Motion for Summary Judgment of non-infringement as to each of the Asserted Patents for lack of a "rendering command" is **DENIED**.
2. Defendant's Motion for Summary Judgment of non-infringement as to the '245 Patent is **DENIED** as to Defendant's internal testing of the Accused Products but **GRANTED** as to customers' use of the Accused Products.
3. Defendant's Motion for Summary Judgment of invalidity as to the '865 Patent is **GRANTED**.

The Court now proceeds to analyze Plaintiff's Motion for Summary Judgment.

V. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff moves for partial summary judgment, seeking judgment that the Asserted Patents are valid over Astrology Zone, a mobile application that Defendant argues may render the Asserted Patents invalid under the "on-sale bar."[8]

Under the on-sale bar, a person cannot obtain a patent on an invention that was "in public use or on sale in this country, more than one year prior to the date of application for patent in the United States." 35 U.S.C. § 102(b). The on-sale bar does not necessarily invalidate an entire patent, however. Rather, "[t]he on-sale bar is evaluated on a claim by claim basis, so that some claims of a patent may be found to be barred while others are not." *Allen Eng'g Corp. v. Bartell Indus., Inc.*, 299 F.3d 1336, 1353 (Fed. Cir. 2002).

Here, the Asserted Patents have effective filing dates of August 1, 2007. To trigger the on-sale bar, a product practicing the Asserted Patents must have been in public use or sold in the United States prior to August 1, 2006. It is undisputed that some versions of Astrology Zone were released and sold prior to August 1, 2006. It is also undisputed that some, but not all versions of Astrology Zone used HOMBRE, a development platform that "embodies" the Asserted Patents. Thus, the relevant question

[7] Plaintiff alternatively argued that to the extent that the Court finds it cannot seek ongoing royalties, its expert testimony related to future infringement is still proper in support of compensatory damages based on the theory of a reasonable, lump sum royalty. Defendant concedes that such a theory is proper, thus the Court need not address this argument.
[8] Plaintiff also moved for summary judgment on claim construction, asking the Court to construe various claim terms. Because the Court construed these above, *see supra* Section III.A., the Court need not address them here.

for the on-sale bar is whether a version of Astrology Zone released prior to August 1, 2006 used HOMBRE.

Defendant argues that there is a genuine issue of material fact as to whether any such version used HOMBRE, but Defendant's argument falls short. Defendant refers to a March 2007 press release introducing HOMBRE, which states that HOMBRE was "Based on Proven, Real-World Technology" and that "HOMBRE's proprietary network layer is already in use across the world," after having been under development for "[m]ore than two years." (Pl.'s Mot. Summ. J., Chen Decl., Ex. 4.) Defendant argues that this language raises a reasonable inference that Astrology Zone used HOMBRE prior to August 1, 2006. However, this language indicates only that these early versions of Astrology Zone *could* have used HOMBRE. Without more, this evidence only enables a jury to speculate as to whether these versions used HOMBRE, which is insufficient to overcome summary judgment. *See, e.g., Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996) ("mere allegation and speculation do not create a factual dispute for purposes of summary judgment."); *Athridge v. Aetna Cas. & Sur. Co.*, 604 F.3d 625, 631 (D.C. Cir. 2010) ("The possibility that a jury might speculate in the plaintiff's favor . . . is simply insufficient to defeat summary judgment."). And while Defendant argues that its lack of evidence stems from discovery misconduct, Defendant provides no proof for such claims. Because Defendant fails to create a genuine issue of material fact, summary judgment is proper.

Accordingly, the Court **GRANTS** Plaintiff's Motion for Partial Summary Judgment as to the validity of the Asserted Patents over the Astrology Zone application.

VI. CONCLUSION

For the foregoing reasons, the Court **GRANTS in part** Defendant's Motion for Summary Judgment, and **GRANTS in part**[9] Plaintiff's Motion for Partial Summary Judgment.

Specifically, the Court holds as follows:

1. Defendant's Motion for Summary Judgment of non-infringement as to each of the Asserted Patents for lack of a "rendering command" is **DENIED**.
2. Defendant's Motion for Summary Judgment of non-infringement as to the '245 Patent is **DENIED** as to Defendant's internal testing of the Accused Products but **GRANTED** as to customers' use of the Accused Products.
3. Defendant's Motion for Summary Judgment of invalidity as to the '865 Patent is **GRANTED**.

[9] The Court's ruling with respect to Plaintiff's Motion is in part because Plaintiff also sought certain claim constructions in its Motion, not all of which were adopted.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:22-cv-07556-RGK-SHK	Date	September 11, 2023
Title	***GoTV Streaming, LLC v. Netflix, Inc.***		

4. Plaintiff's Motion for Summary Judgment of validity of the Asserted Patents over the Astrology Zone application is **GRANTED**.

Additionally, the Court construes the disputed claim terms as follows:

Claim Term	Court's Construction
"rendering command"	"A description for rendering a page component, such as the width or the height of the component."
"discrete low level rendering command"	Indefinite.
"wireless device generic template"	Not construed as moot.
"custom configuration"	"A configuration that determines the look and feel of the application."
"rendering blocks"	"Blocks that perform discrete rendering operations."

IT IS SO ORDERED.

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