

FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

2012 SEP 20 P 4:46

INTELLIGENT VERIFICATION SYSTEMS, LLC,

Plaintiff,

v.

MICROSOFT CORPORATION

and

MAJESCO ENTERTAINMENT CO.,

Defendants.

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

Case No. 2:12cv525

JURY TRIAL

DEMANDED

COMPLAINT

Plaintiff Intelligent Verification Systems, LLC ("IVS") brings this action against Microsoft Corporation ("Microsoft"), and Majesco Entertainment Company ("Majesco"), jointly and severally, for patent infringement arising out of the Patent Laws of the United States, Title 35, United States Code.

I. PARTIES

1. All facts herein are alleged on information and belief except those facts concerning IVS's own activities.

2. IVS is a Virginia Limited Liability Company with its principal place of business at 4202 Sonia Court, Alexandria, Virginia 22309. IVS is the inventing and owning company of various patents related to biometric systems that facilitate user interaction, entertainment, and enjoyment.

3. Microsoft is a Washington corporation with its principal place of business at One Microsoft Way, Redmond, Washington 98052. Microsoft may be served with this complaint through its registered agent, Corporation Service Company, Bank of America Center, 16th Floor, 1111 East Main Street, Richmond, Virginia 23219.

4. Majesco is a Delaware corporation with its principle place of business at 160 Raritan Center Parkway, Edison, New Jersey 08837.

II. JURISDICTION AND VENUE

5. This is an action for patent infringement under the Patent Act, 35 U.S.C § 271.

6. This Court has personal jurisdiction over Microsoft, in part, because Microsoft has subscribers who reside in the Eastern District of Virginia, and sells infringing products and provides infringing services and downloads and software updates to its subscribers and consumers in this district; sells and offers for sale through the Microsoft store at Tysons Corner and at the Fashion Centre at Pentagon City, Virginia, infringing gaming systems, video games and video game components, and regularly conducts business in this District; has solicited business and has attempted to derive financial benefit from residents of the Commonwealth of Virginia, including benefits directly related to the instant cause of action set forth herein; and has committed and continues to commit acts of patent infringement in this District. This Court has personal jurisdiction over Majesco, in part, because Majesco manufactures for sale and/or sells infringing video games to consumers in the United States and, more particularly, in the Eastern District of Virginia.

7. This Court has subject matter jurisdiction by virtue of Sections 1331 and 1338(a) of Title 28, United States Code.

8. Venue in this Court is proper by virtue of Sections 1391(b) and (c) and 1400(b) of Title 28, United States Code.

III. BACKGROUND

A. IVS and the IVS Patent

9. IVS is one of the early pioneers of technology that allows computer or computer-like system users to enjoy the benefits of entertainment and interaction facilitated by the use of biometric recognition. Biometric recognition technology was historically relegated to security applications. IVS first recognized that biometric facial recognition could facilitate and enhance user interaction, entertainment and enjoyment of games, toys, and entertainment devices. Thus, IVS designed an efficient, near real-time system employing biometric facial recognition to facilitate end-user interaction, entertainment, and enjoyment. IVS's biometric recognition technology and invention covers entertainment apparatus, including specifically video games, video game consoles and systems, video game peripherals, and online and network based entertainment associated with video game systems, all of which employ biometric facial and/or expression recognition to facilitate interaction, entertainment and enjoyment.

10. To protect their inventions, IVS and its inventors filed numerous patent applications that cover biometric recognition technology, including specifically the application of that technology to video game systems, video games, and related entertainment apparatus. On June 13, 2006, the United States Patent and Trademark Office issued United States Patent No. 7,062,073 (the '073 patent). The '073 patent was duly and legally issued to IVS as the legal assignee of the IVS inventors, David Tumey and Tianning ("Tony") Xu. The title of the '073 patent is "Animated Toy Utilizing

Artificial Intelligence and Facial Image Recognition.” A true and correct copy of the '073 Patent is attached as Exhibit A.

11. Prior to IVS's invention, biometric facial recognition and expression recognition was relegated to use in security settings, which tolerate time-delayed identification results. Additionally, at that time, no one had conceived of using biometric facial recognition and expression recognition to facilitate end-user interaction, entertainment and enjoyment on adapted entertainment apparatus.

12. Recognizing these shortcomings, the IVS '073 patent describes and claims an entertainment apparatus, including a video game and its associated subsystems, utilizing biometric recognition and expression recognition based on facial features in order to facilitate end-user interaction, entertainment, and enjoyment. Particularly, the '073 patent describes and discloses, as a preferred embodiment, an entertainment apparatus, operable to perform biometric facial recognition, comprising an acquisition device (including a camera), a processor, memory, and an interactive entertainment device providing interaction, wherein said entertainment device is a computer or computer-like-system executing biometric face recognition and expression recognition algorithms such that the identification and expression result facilitates interaction, entertainment, and enjoyment during operation, particularly during play of video games or similar entertainment.

B. Microsoft's Infringing Products and Services

13. After IVS and its inventors Tumey and Xu invented and disclosed its claimed technology and video game system in the '073 patent, biometric facial recognition and facial expression recognition became the driving force behind a new era of identity-based

interaction and entertainment in the video game arena. On November 15, 2001, Microsoft released its first Xbox game console for sale in the United States. The Xbox game console is an entertainment apparatus comprised of a processor, memory, and entertainment element, comprised of the game console platform itself used alone or in conjunction with video games. Subsequently, on or around November 15, 2002, Microsoft released its Xbox LIVE service, allowing players of Xbox games to play together over broadband connections to the Internet, to download entertainment content, including video games, and to play video games remotely.

14. On or around November 22, 2005, Microsoft released its next-generation Xbox 360 game console in the United States, a system which is also specially designed to be capable of using Microsoft's Xbox LIVE service. The Xbox 360 game console, like the original Xbox, is an entertainment apparatus comprised of a processor, memory, and entertainment element, either stand-alone or in conjunction with video games and/or Xbox LIVE. Between the November 22, 2005, Xbox 360 game console release and the November 4, 2010, debut of the Kinect Sensor and associated components (5 years), Microsoft sold 21,705,028 Xbox 360 game console units in the United States alone, for an average of 361,750 units sold per month. During this same five-year timeframe, world-wide Xbox LIVE membership rose from 2 million to 25 million, for an average of 366,666 newly added memberships per month.

15. On or about November 4, 2010, Microsoft introduced Kinect for the Xbox 360 ("Kinect"), a sensor including a camera that is specifically designed to perform facial recognition and expression recognition to facilitate end-user interaction, entertainment and enjoyment when used in conjunction with the Xbox 360 game console. Kinect is

sold for use with existing and new Xbox 360 video game consoles, Xbox LIVE, and Video Games specifically designed to make use of Kinect ("Kinect Games"). Each Kinect sold is for use with a new or existing Xbox 360 game console, that when combined with the gaming console forms a Kinect Gaming System entertainment apparatus and that when used alone or in conjunction with Xbox LIVE or video games, facilitates end-user interaction, entertainment, and enjoyment through biometric facial and expression recognition.

16. Within 60 days of the Kinect's introduction to the market, Microsoft sold 8 million Kinects. This unheralded 60-day sales rate of this new biometric facial recognition and expression recognition device allowed Microsoft's Kinect to claim the Guinness World Record of being the "fastest selling consumer electronics device." In the immediate months following the Kinect debut, Kinect Bundles (pre-packaged combinations of a new Xbox 360 gaming console, a Kinect, and several Kinect Games) accounted for more than two-thirds of all new Xbox 360 game console sales. Since the debut of Kinect, during a 23-month span as of September 13, 2012, a total of 24.27 million Xbox 360 game consoles have been sold worldwide, with approximately 13.35 million units of those sales occurring in North America. The average North American sales rate for the Xbox 360 game console from the date of introduction of Kinect through September 13, 2012, is 580,000 units per month, which represents a rate increase in the rate of sales of Xbox 360 game consoles, associated with the debut of the Kinect, of 61% over pre-Kinect Xbox 360 sales. During this same 23-month timeframe, world-wide Xbox LIVE membership rose from 25 million to at least 45 million, for an average of 869,565 newly added memberships per month, which represents a rate increase in the rate

of new Xbox LIVE memberships, associated with the debut of the Kinect, of 137% over pre-Kinect Xbox LIVE memberships. As of today, users spend an estimated 2.1 billion entertainment hours per month using Xbox LIVE. Since the Kinect debut, 20 million Kinect units have sold worldwide, with approximately 11 million Kinect units sold in the United States. The average North American sales rate for Kinect from its date of introduction through September 13, 2012 is 478,260 units per month. The ratio of Kinect to new Xbox 360 sales during this span averaged nearly 1:1.

17. In addition to income from the sales of Kinect, Kinect Game Systems, Xbox LIVE content and memberships, and sales of infringing third-party Kinect games through Microsoft stores, Microsoft derives additional revenue from its wholly owned subsidiary, Microsoft Game Studios. Microsoft Game Studios produces video games that use biometric-based facial and expression recognition to facilitate entertainment, interaction, and enjoyment as provided by the Kinect Gaming System and the IVS patent. These Kinect Games may be used alone with the Kinect Gaming System or in conjunction with Xbox LIVE, which likewise uses biometric-based facial and expression recognition to facilitate entertainment, interaction, and enjoyment as provided by the IVS patent.

18. On November 4, 2010, Microsoft, through Microsoft Game Studios, released Kinect Adventures, a Kinect Game specifically adapted to use, in combination with the Kinect Gaming System and optionally the Xbox LIVE service, biometric recognition and expression recognition based on facial features in order to facilitate end-user interaction, entertainment, and enjoyment during game-play. Since the date of Microsoft's release of Kinect Adventures, at least 16.88 million copies of the game have been sold worldwide, with at least 10.23 million copies sold in the United States. At least Kinect Adventures,

along with Microsoft Kinect Games such as Kinect Rush, Kinect: Disneyland Adventures, Hole in the Wall, and Dance Central 2, used alone or in conjunction with Xbox LIVE, infringe the IVS patent because each is specifically adapted to use, in combination with the Kinect Gaming System and optionally the Xbox LIVE service, biometric recognition and expression recognition based on facial features in order to facilitate end-user interaction, entertainment, and enjoyment during game-play.

19. On June 6, 2011, Microsoft, through Microsoft Game Studios and its subsidiary Kinect Labs, released Kinect Me, a Kinect Game made operable by Xbox LIVE, specifically adapted to use, in combination with the Kinect Gaming System, biometric recognition and expression recognition based on facial features in order to facilitate end-user interaction, entertainment, and enjoyment during game-play. At least Kinect Me, along with Microsoft Kinect Labs Kinect Games such as Avatar Kinect, likewise made operable by Xbox LIVE, infringe the IVS patent because each is specifically adapted to use, in combination with the Kinect Gaming System and the Xbox LIVE service, biometric recognition and expression recognition based on facial features in order to facilitate end-user interaction, entertainment, and enjoyment during game-play.

20. Microsoft also receives revenue from third-party game producers (directly or from sales through Microsoft stores) in exchange for allowing the third-party game producers to develop and sell Kinect Games for use with Kinect Game System and/or Xbox LIVE and to utilize the Kinect Gaming System software. Additionally, Microsoft retains direction and control over third-party game publishers and developers, such as Majesco and Harmonix through an agency or contractual relationship with regards to the manufacture, development, publishing, and distribution of Kinect games. This agency

relationship is evidenced by Microsoft's requirement that publishers and developers submit to Microsoft's review, testing, approval, and certification with regards to all phases of game production, from concept to distribution of final product.

21. Video game play, interactive entertainment, and interaction/entertainment on the Xbox 360 console and/or Xbox LIVE, when facilitated by the biometric facial and expression recognition technology implemented by the Kinect Gaming System, infringes the IVS '073 patent. As a result of Microsoft's unauthorized and infringing use of IVS's patented technology, IVS has suffered damages in at least the tens of millions of dollars.

22. Microsoft has had knowledge of the '073 Patent since at least the date of a letter it received, prepared by counsel for IVS on June 20, 2011. Moreover, Microsoft is a sophisticated company that likely has reviewed the '073 Patent in connection with other litigation involving its products, including Xbox, Xbox 360, Xbox Live, and Kinect.

C. Majesco's Infringing Products and Services

23. On February 13, 2012, Majesco released Zumba Fitness Rush, a Kinect Game specifically adapted to use, in combination with the Kinect Gaming System and optionally the Xbox LIVE service, biometric recognition and expression recognition based on facial features in order to facilitate end-user interaction, entertainment, and enjoyment during game-play.

24. Since the date of Majesco's release of Zumba Fitness Rush, at least 80,000 copies of the game have been sold worldwide, with at least 4,000 copies sold in the United States.

25. Majesco receives revenue and derives profits from the sales of infringing Kinect Games, including at least Zumba Fitness Rush.

26. Majesco, through at least its Kinect Game, Zumba Fitness Rush, infringes the IVS '073 patent. As a result of Majesco's unauthorized and infringing use of IVS's patented technology, IVS has suffered monetary damages.

27. Majesco manufactures, develops, distributes, and publishes biometric facial and expression recognition-based Kinect Games adapted for the Kinect Gaming System under the direction and control of Microsoft through an agency or contractual relationship.

IV. CAUSES OF ACTION

A. Patent Infringement

28. Microsoft, through its Kinect Gaming System, Xbox LIVE service, and Microsoft Games Studio games, has, without authority, consent, right, or license, and in direct infringement of the IVS Patent, made, used, offered for sale, and/or imported/exported the patented invention disclosed and claimed by at least claims 1, 2, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of the IVS '073 patent in this country. This conduct constitutes direct infringement under 35 U.S.C. § 271(a) and/or (f).

29. The direct infringement actions of third-party Kinect Games are attributable to Microsoft in accord with the principles of joint infringement because Microsoft retains direction and control over these third-party Kinect Games through provision of the Kinect, the Xbox 360, and Xbox LIVE.

30. Microsoft has knowingly, through its Kinect Gaming System, Xbox LIVE service, and Microsoft Game Studio games, induced infringement of the IVS '073 patent by providing software and online and hardcopy resources and literature specifically intended to be instructive to both end-users and third-party game developers who use its

products in a manner that directly infringes the aforesaid claims of the IVS patent. This conduct constitutes induced infringement under 35 U.S.C. § 271(b).

31. Microsoft also has knowingly, through its Kinect Gaming System, Xbox LIVE service, and Microsoft Games Studio games, provided software and hardware designed for use in practicing the aforesaid claims of the IVS '073 patent, where that software and hardware constitutes a material part of the invention that is not a staple article of commerce, and which has no use other use than for infringing video game play.

Microsoft has committed these acts with knowledge that the software and hardware it provides is specially made for use in a manner that directly infringes the IVS '073 patent. This conduct constitutes contributory infringement under 35 U.S.C. § 271(c).

32. Majesco, through at least its Kinect Game Zumba Fitness Rush, has, without authority, consent, right, or license, and in direct infringement of the IVS Patent, made, used, offered for sale, and/or imported/exported the patented invention disclosed and claimed by at least claims 1, 2, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of the IVS '073 patent in this country. This conduct constitutes direct infringement under 35 U.S.C. § 271(a) and/or (f).

33. Majesco, through at least its Kinect Game Zumba Fitness Rush, has knowingly induced infringement of the IVS '073 patent by providing software and online and hardcopy resources and literature specifically intended to be instructive to end-users in using its products in a manner that directly infringes the aforesaid claims of the IVS patent. This conduct constitutes induced infringement under 35 U.S.C. § 271(b).

34. Majesco, through at least its Kinect Game Zumba Fitness Rush, has knowingly provided software and hardware designed for use in practicing the claims of the IVS '073

patent, where that software and hardware constitutes a material part of the invention that is not a staple article of commerce, and which has no use other use than for infringing video game play. Majesco has committed these acts with knowledge that the software and hardware it provides is specially made for use in a manner that directly infringes the IVS '073 patent. This conduct constitutes contributory infringement under 35 U.S.C. § 271(c).

35. Microsoft and Majesco's infringing conduct is unlawful and willful and will likely continue unless enjoined by this Court. This willful conduct by Microsoft and Majesco makes this an exceptional case as provided in 35 U.S.C § 285.

36. As a result of Microsoft and Majesco's infringement, IVS has been damaged, and will continue to be damaged, until Microsoft and Majesco are enjoined from further acts of infringement.

37. IVS faces real, substantial and irreparable damage and injury of a continuing nature from Microsoft and Majesco's infringement for which IVS has no adequate remedy at law.

B. Jury Demand

38. IVS demands a trial by jury on all issues.

WHEREFORE, IVS prays:

(a) That this Court find Microsoft and Majesco have committed acts of patent infringement under the Patent Act, 35 U.S.C § 271;

(b) That this Court enter judgment that:

(i) IVS is the owner of the '073 Patent and all rights of recovery under the '073 Patent;

(ii) the IVS '073 Patent is valid and enforceable; and

(iii) Microsoft and Majesco have willfully infringed the IVS '073 Patent;

(c) That this Court issue an injunction enjoining the defendant(s), its officers, agents, servants, employees and attorneys, and any other person in active concert or participation with them, from continuing the acts herein complained of, and more particularly, that the defendant(s) and such other persons be permanently enjoined and restrained from further infringing the IVS '073 Patent;

(d) That this Court require defendants Microsoft and Majesco to file with this Court, within thirty (30) days after entry of final judgment, a written statement under oath setting forth in detail the manner in which Microsoft and Majesco have complied with the injunction;

(e) That this Court award IVS the damages to which it is entitled due to Microsoft's and Majesco's patent infringement with both pre-judgment and post-judgment interest;

(f) That Microsoft's and Majesco's infringement of IVS '073 Patent be adjudged willful and that the damages to IVS be increased by three times the amount found or assessed pursuant to 35 U.S.C. § 284;

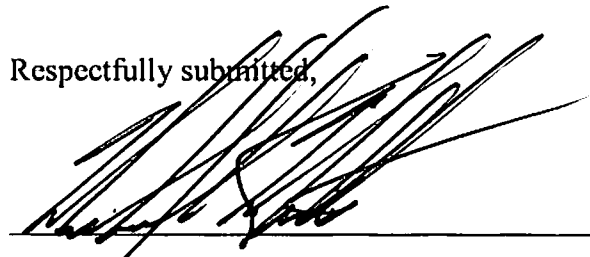
(g) That this be adjudged an exceptional case and that IVS be awarded its attorney's fees in this action pursuant to 35 U.S.C. § 285;

(h) That this Court award IVS its costs and disbursements in this civil action, including reasonable attorney's fees; and

(i) That this Court grant IVS such other and further relief, in law or in equity, both general and special, to which it may be entitled.

Dated: 9-20-2012

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Michael K. Mutter', is written over a horizontal line.

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