UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

CPC PATENT TECHNOLOGIES PTY LTD.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 6:21-cv-00165-ADA
	)	
APPLE INC.,	)	**REDACTED/PUBLIC VERSION**
	)	
Defendant.	)	

CPC PATENT TECHNOLOGIES PTY LTD.'S MOTION FOR PARTIAL SUMMARY JUDGMENT OF INFRINGEMENT

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I. INTRODUCTION

Plaintiff, CPC Patent Technologies Pty Ltd. ("CPC"), brought this action alleging, *inter alia*, that the iPhone equipped with Face ID ("the Accused Instrumentalities") manufactured and sold by defendant, Apple Inc. ("Apple"), literally infringes claim 1 of U.S. Patent No. 9,665,705 ("the '705 Patent"). While CPC alleges infringement of other patent claims by other Apple devices, it is beyond factual dispute that the Accused Instrumentalities infringe claim 1 of the '705 Patent, and CPC is entitled to summary judgment on that issue.

II. ASSERTED PATENT[1]

On May 30, 2017, the '705 Patent, entitled "Remote Entry System," was duly and legally issued by the United States Patent and Trademark Office, with an application priority date of 2003. *See* Ex. A.[2] In 2019, CPC acquired a patent portfolio, including the '705 Patent, from biometric technology pioneer Securicom (NSW) Pty Ltd. ("Securicom") from the liquidator of Securicom and inventor Christopher Burke. At least as early as March 19, 2020, CPC provided Apple specific notice of infringement regarding the '705 Patent.

On February 23, 2021, CPC filed its Complaint for, *inter alia*, Apple's infringement of the '705 Patent, which included a description of, *inter alia*, how Apple's Face ID literally infringed the claims of the '705 Patent. On February 17, 2022, CPC filed its Amended Claim Chart for the '705 Patent. *See* Docket Entry ("DE") 81-2.

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[1] As this Motion only seeks summary judgment in regard to the '705 Patent, allegations and factual details pertaining to the remaining patents at issue in this action are not included herein.
[2] References to "Exhibits" or "Ex." herein refer to the Exhibits attached to the Declaration of George C. Summerfield filed concurrently herewith, unless otherwise specified.

III. THE GOVERNING LEGAL STANDARDS

A. The Legal Standards for Summary Judgment

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, a "court ***shall*** grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" (emphasis added). This language "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Further, "[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A).

The Court, in the context of summary judgment, must substantively evaluate the evidence offered by the moving party, and the party who opposes the motion to determine whether the evidence raises a "material" fact question that is "genuine." *See Crystal Semiconductor Corp. v. Opti, Inc.,* No. 97-CA-026, 1999 WL 33457762 at *1 (W.D. Tex. April 29, 1999), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505, 2510 (1986). The nonmoving party may not rest on its pleadings alone, but must carry the burden of providing evidence of a genuine issue of material fact. *See id.* (citation omitted). The Court is to view the evidence in the light most favorable to the nonmoving party and indulge all reasonable inferences in favor of that party. *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1263 (5th Cir.1991), *cert. denied,* 502 U.S. 1059, 112 S. Ct. 936 (1992).

Regional circuit law determines the standard for summary judgment in patent infringement suits. *See, e.g., Lexion Med., LLC v. Northgate Techs., Inc.,* 641 F.3d 1352, 1358 (Fed. Cir. 2011). The Fifth Circuit has held that "[t]he standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court." *James v. Sadler,* 909 F.2d 834, 837 (5th Cir.1990), *citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 106 S.Ct. 1348, 1356 (1986). Once supported, the nonmoving party must provide specific facts to show there is a genuine issue for trial, and neither "conclusory allegations" nor "unsubstantiated assertions" will satisfy the non-movant's burden. *Wallace v. Texas Tech Univ.,* 80 F.3d 1042, 1047 (5th Cir. 1996).

B. The Requirements for Infringement

"[W]hoever 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." 35 U.S.C. § 271(a). "Determination of the issue of infringement entails a two step analysis-construction of the claims, a matter of law; followed by application of the claims to the accused device, a question of fact." *Crystal Semiconductor,* 1999 WL 33457762 at *2, *quoting Voice Techs. Group, Inc. v. VMC Sys., Inc.,* 164 F.3d 605, 612 (Fed. Cir. 1999). "To prove literal infringement, the patentee must show that the accused device contains every limitation in the asserted claims." *Crystal Semiconductor,* 1999 WL 33457762 at *2*, quoting Mas–Hamilton Group v. LaGard, Inc.,* 156 F.3d 1206, 1211 (Fed. Cir. 1998). "[A] court may grant summary judgment when, upon construction of the claims and with all reasonable factual inferences drawn in favor of the non-movant, it is apparent that only one conclusion as to

infringement could be reached by a reasonable jury." *Crystal Semiconductor,* 1999 WL 33457762 at *2*, quoting ATD Corp. v. Lydall, Inc.,* 159 F.3d 534, 540 (Fed. Cir. 1998).

IV. CPC IS ENTITLED TO SUMMARY JUDGMENT OF INFRINGEMENT

A. Claim Construction

As noted above, an infringement analysis begins with claim construction. *Crystal Semiconductor,* 1999 WL 33457762 at *2. Claim 1 of the '705 Patent reads as follows:

> A system for providing secure access to a controlled item, the system comprising:
>
> a memory comprising a database of biometric signatures;
>
> a transmitter sub-system comprising:
>
> a biometric sensor configured to receive a biometric signal;
>
> a transmitter sub-system controller configured to match the biometric signal against members of the database of biometric signatures to thereby output an accessibility attribute; and
>
> a transmitter configured to emit a secure access signal conveying information dependent upon said accessibility attribute; and
>
> a receiver sub-system comprising:
>
> a receiver sub-system controller configured to:
>
> receive the transmitted secure access signal; and
>
> provide conditional access to the controlled item dependent upon said information;
>
> wherein the transmitter sub-system controller is further configured to:
>
> receive a series of entries of the biometric signal, said series being characterised according to at least one of the number of said entries and a duration of each said entry;
> map said series into an instruction; and
>
> populate the data base according to the instruction, wherein the controlled item is one of: a locking mechanism of a physical access structure or an electronic lock on an electronic computing device.

Ex. A, at col. 15 line 62 – Col. 16 line 23.

The parties have now completed the Court's claim construction process. As part of that process, the parties agreed to the following constructions from claim 1 of the '705 Patent:

Limitation	Construction
"series"	plain and ordinary meaning, defined as "a number of things or events of the same class coming one after the other in spatial or temporal succession"
"instruction"	plain and ordinary meaning, defined as "a command, operation, or order given to a computer processor by a computer program"
"database"	"organized structure of data"
"conditional access"	"access based on accessibility attribute"
"biometric signal"	"physical attribute of the user (i.e., fingerprint, facial pattern, iris, retina, voice, etc.)"

DE 57 at 2-3.

The Court held a claim construction hearing on February 10, 2022. DE 75. Thereafter, the Court construed the following two disputed limitations from claim 1 of the '705 Patent:

Limitation	Construction
"being characterized according to at least one of the number of said entries and a duration of each said entry"	"being characterized according to" is given its plain and ordinary meaning. The Court rejects the proposal to construe these words as "identifying and storing" "at least" modifies "one of the number of said entries." The claim additionally requires "a duration of each said entry."
"biometric signature"	Plain and ordinary meaning
"accessibility attribute"	"attribute that establishes whether and under which conditions access to the controlled item should be granted to a user"

DE 76 at 2.

As the construction exercise for claim 1 has been completed, Apple should not be allowed to raise issues in the context of summary judgment that should have been clarified during the claim construction proceeding. *Crystal Semiconductor,* 1999 WL 33457762 at *2–3.

B. Claim Coverage

The second part of an infringement analysis involves comparing a claim, as construed, to the accused instrumentality, and each limitation of the former must be found in the latter. *See*

Crystal Semiconductor, 1999 WL 33457762 at *2. In its responses to CPC's interrogatories, Apple identified 15 models of its iPhone product equipped with Face ID (characterized as by Apple as a "Recognition Sensor"). *See* Ex. B at 7-8. The following table shows how the Accused Instrumentalities literally satisfy each limitation of claim 1 of the '705 Patent:

Claim 1	Construction	Claim Coverage
A system for providing secure access to a controlled item, the system comprising:		The Accused Instrumentalities include 15 models of iPhone equipped with Face ID as the "Recognition Sensor." Ex. B at 7-8.
a memory comprising a database of biometric signatures;	"organized structure of data" DE 57 at 3 Plain and ordinary meaning. DE 57 at 2.	In light of claim 4 of the '705 Patent, which depends from claim 1 and specifies that a "***biometric*** sensor" is responsive to "face patterns," the plain meaning of "biometric signature" includes data corresponding to face patterns. Declaration of William C. Easttom II (Easttom Decl.), ¶ 13. As claim 1 is directed to a "memory comprising a database" storing the biometric signatures, the signatures would not constitute analog data. The signatures would be binary representations of that data. *Id.* To be accessible, which is the primary purpose of a database, the data therein must be organized. *Id.*, ¶ 14. The Accused Instrumentalities allow for the registration of binary data corresponding to multiple faces. *Id.*, ¶ 15. The Secure Enclave is a system on chip that is contained in the Accused Instrumentalities. *Id.*, ¶ 16. The users' binary data corresponding to facial patterns is stored in a nonvolatile storage

Claim 1	Construction	Claim Coverage
		device assigned to the Secure Enclave in the Accused Instrumentalities. *Id.*, ¶ 17.
a transmitter sub-system comprising:		The Accused Instrumentalities have a transmitter sub-system for the reasons set forth below.
a biometric sensor configured to receive a biometric signal;	"physical attribute of the user (i.e., fingerprint, facial pattern, iris, retina, voice, etc.)" DE 57 at 3.	The Accused Instrumentalities contain the TrueDepth camera system, which maps the geometry of a user's face. *Id.*, ¶ 21.
a transmitter sub-system controller configured to match the biometric signal against members of the database of biometric signatures to thereby output an accessibility attribute; and	"attribute that establishes whether and under which conditions access to the controlled item should be granted to a user" DE 76 at 2.	The '705 Patent describes a "duress attribute," "granting access but with activation of an alert tone to advise authorities of the duress situation." *Id.*, ¶ 24, *quoting* Ex. A at col. 8, lines 30-32. The Accused Instrumentalities are equipped with a Secure Enclave having a Secure Enclave Processor ("SEP"), which provides the computing power for the Secure Enclave. Easttom Decl., ¶ 25. Matching of facial data is performed on the Accused Instrumentalities by the SBIO app on the SEP. *Id.,* ¶ 26. During matching on the Accused Instrumentalities, the Secure Enclave compares incoming facial data from the biometric sensor against the stored templates to determine whether to unlock the device or respond that a match is valid (for Apple Pay, in-app, and other uses of Face ID). *Id.,* ¶ 27. A match of biometric data by the SEP generates a signal providing varying degrees of access to the subject Accused Instrumentality. *Id.*, ¶¶ 28-29. For example, in the event that a user's biometric data does not

Claim 1	Construction	Claim Coverage
		match the data stored in the Accused Instrumentalities, the user is nonetheless allowed to access thereto to make an emergency call, in which case the iPhone also sends out an alert to the emergency contacts stored in the Accused Instrumentalities. *Id.*, ¶ 29.d.
a transmitter configured to emit a secure access signal conveying information dependent upon said accessibility attribute; and		If access to an Accused Instrumentality is to be granted, the Secure Enclave re-encrypts (re-wraps) a file key with an ephemeral key (which is only generated if access is to be granted), and sends the re-encrypted file key to the file system driver of the application processor. *Id.*, ¶ 31. Upon a successful match, the Secure Enclave acts as a transmitter in order to emit the re-wrapped file key to the application processor for unwrapping the Data Protection keys, unlocking the device or account. *Id.*, ¶ 32. [redacted] *Id.*, ¶ 33. The signal generated and transmitted by the SEP provides varying degrees of access to the subject Accused Instrumentality. *Id.*, ¶¶ 28-29.
a receiver sub-system comprising:		For the reasons set forth below, the Accused Instrumentalities have a receiver sub-system.
a receiver sub-system controller configured to:		The application processor (the "AES Engine"), is the receiver sub-system controller for the Accused Instrumentalities. *Id.*, ¶ 37.
receive the transmitted secure access signal; and		The re-wrapped file key transmitted by the Secure Enclave in the Accused Instrumentalities is

Claim 1	Construction	Claim Coverage
		received by the file system driver of the AES Engine. *Id.*, ¶ 39. The receiver is the dedicated AES256 crypto engine (the "AES Engine") built into the direct memory access path. *Id.* The Secure Enclave [transmitter sub-system controller] transmits this key to the AES Engine [receiver sub-system controller] using dedicated wires. *Id.*
provide conditional access to the controlled item dependent upon said information;	"access based on accessibility attribute" DE 57 at 3.	In light of the parties' and the Court's construction, the construction of "conditional access" means "access based on the attribute that establishes whether and under which conditions access to the controlled item should be granted to a user." *Id.*, ¶ 41. Once the re-wrapped file key is received by the system driver of the application processor, it is provided to the AES Engine, which decrypts it the file key, whereupon the AES Engine has access to the encrypted files, providing access thereto to the user. *Id.*, ¶ 42. A user may be granted varying degrees of access to the Accused Instrumentalities, which is dependent upon the accessibility attribute that is generated in the transmitter sub-system. *Id.*, ¶¶ 28-29 & 43. For example, in the event that a user's biometric data does not match the data stored in the database, the conditional access granted to the user is the ability to make an emergency call, which is accompanied by an alert to the

Claim 1	Construction	Claim Coverage
		emergency contacts stored in the Accused Instrumentality. *Id.*
wherein the transmitter sub-system controller is further configured to:		The transmitter sub-system controller in the Accused Instrumentalities is further configured to perform the following functions.
receive a series of entries of the biometric signal, said series being characterised according to **at least one** of the number of said entries and a duration of each said entry;	plain and ordinary meaning, defined as "a number of things or events of the same class coming one after the other in spatial or temporal succession" DE 57 at 2. "'being characterized according to/determining/determine' is given its plain and ordinary meaning. The Court rejects the proposal to construe these words as 'identifying and storing…'" DE 76 at 2. "'at least' modifies 'one of the number of said entries.'" DE 76 at 2. "The claim additionally requires 'a duration of each said entry.'" DE 76 at 2.	The TrueDepth camera of the Accused Instrumentalities "projects and reads over 30,000 infrared dots to form a depth map of the face along with a 2D infrared image." *Id.*, ¶ 48. The user is instructed to "gently move your head to complete the circle" and "[g]ently move your head to complete the circle for a second time." *Id.*, ¶ 49. An image included with the instructions guides the user to "move your head slowly to complete the circle." *Id.* The continuous capture of facial image data in two successive circular motions satisfies the definition of "series," i.e., two events of the same class coming one after the other in temporal succession. *Id.*, ¶ 50. Further, this series of facial data entries is characterized by the number two, as in two circular motions wherein facial data is captured. *Id.*, ¶ 51. This series of facial data entries is also characterized by the duration of each entry, *i.e.*, the duration of time required to capture the images, which is evident from the instruction to move the user's head "slowly." *Id.*, ¶ 52.
map said series into an instruction; and	plain and ordinary meaning, defined as "a command, operation, or order given to a computer processor by a	The Accused Instrumentalities contains [redacted]

Claim 1	Construction	Claim Coverage
	computer program" Ex 57 at 3.	[redacted] *Id.*, ¶ 55. A mathematical representation of a user's face is calculated during enrollment and transmitted to the Secure Enclave. *Id.*, ¶ 56.
populate the data base according to the instruction,		During enrollment, the Secure Enclave in the Accused Instrumentalities processes, encrypts, and stores the corresponding Face ID template data. *Id.*, ¶ 58. The template data is stored in the secure nonvolatile storage associated with the Secure Enclave. *Id.* [redacted] *Id.*, ¶ 59. [redacted] *Id.*, ¶ 60. *Id.*
wherein the controlled item is one of: a locking mechanism of a physical access structure or an electronic lock on an electronic computing device.		The Accused Instrumentalities are computing devices. *Id.*, ¶ 62. [redacted] *Id.*, ¶ 63.

The foregoing shows that each of the limitations of claim 1 of the '705 Patent are literally contained in the accused instrumentalities. Easttom Decl., ¶ 64. Even with "all reasonable factual

inferences drawn in favor of" Apple, it is apparent that "only one conclusion as to infringement could be reached by a reasonable jury." *Crystal Semiconductor,* 1999 WL 33457762 at *2*, quoting ATD Corp.,* 159 F.3d at 540.

For its part, in its interrogatory response, Apple contended that CPC had failed to prove the presence of any claim 1 limitation in the iPhone, except the "biometric sensor configured to receive a biometric signal." *See* Ex. B at 26-27. Through its counsel, Apple honed its non-infringement position somewhat in correspondence with CPC's counsel. Therein, Apple argues that it does not practice the "at least one of the number of said entries and a duration of each said entry" limitation, as "the number and duration of Touch ID and Face ID entries used for enrollment are not maintained or used by the accused Apple products." Ex. C. The Court, in its claim construction, did not require that the number and duration of the entries of biometric signals comprising the series be maintained and used, however. DE 76 at 2. In fact, the Court rejected Apple's suggestion that the "being characterized" limitation include "identifying and storing." *See id.* Apple should not now be allowed to reintroduce these concepts into the construction of this limitation under the guise of different terms.

Nor should Apple be able to re-cast the issue of maintenance and use as one of fact. Given the Court's construction of the "being characterized by" limitation, the accused iPhones satisfy this limitation literally, as shown in the table above, irrespective of whether Apple maintains and uses the number and duration of the entries of biometric signals. To the extent Apple believes there to be any remaining uncertainty on this issue, it should have raised it during claim construction. *Crystal Semiconductor,* 1999 WL 33457762 at *2-3.

Apple also argued that "[t]he accused Apple products do not meet the 'under which conditions' part of the construction because no access in the accused Apple products is conditional.

Instead, the accused Apple products use Touch ID or Face ID to merely grant access or deny access." Ex. C. In other words, Apple claims that access to the Accused Instrumentalities is binary – either access is granted thereto, or it is not. As the tables above show, the accused iPhones allow for access with conditions, such as in the case of emergency calling. Easttom Decl., ¶ 29. This is analogous to the "duress attribute" embodiment taught in the '705 Patent whereby access to a controlled item is granted "but with activation of an alert tone to advise authorities of the duress situation." *Id.,* ¶ 24, *quoting* Ex. A, col. 8, lines 30-32.

Finally, it should be noted that, while CPC relies herein upon the declaration of its expert, Dr. Easttom, to establish the presence of the limitations of claim 1 in the Accused Instrumentalities. Dr. Easttom, with limited exception, relies upon documents and other materials that originate with Apple. *See, e.g.,* Declaration of Dr. Easttom Exs., 3, 4, 6, 7, 8, & 9. In other words, for Apple to contest infringement under these circumstances, it must argue anew that the proper scope of the claims do not cover the Accused Instrumentalities as they are characterized herein, which would be an improper return to claim construction, or it must disavow the content of its own material.[3] Either tactic would be insufficient to defeat summary judgment.

V. CONCLUSION

For the foregoing reasons, CPC respectfully requests that this Court grant the instant motion for partial summary judgment of infringement.

[3] Apple may contend that it needs additional discovery regarding its own product pursuant to Fed. R. Civ. P. 56(d), which would, of course, be disingenuous.

Dated: April 6, 2022

Respectfully submitted,

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