

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

EXPRESS MOBILE, INC.,

Plaintiff,

v.

BIGCOMMERCE, INC.,

Defendant.

Civil Action No. _____

JURY TRIAL DEMANDED

COMPLAINT FOR PATENT INFRINGEMENT

Plaintiff Express Mobile, Inc.. (“Express Mobile” or “Plaintiff”), for its Complaint against Defendant BigCommerce, Inc., (“BigCommerce” or “Defendant”), alleges the following:

NATURE OF THE ACTION

1. This is an action for patent infringement arising under the Patent Laws of the United States, 35 U.S.C. § 1 *et seq.*

THE PARTIES

2. Plaintiff is a corporation organized under the laws of the State of Delaware with a place of business at 3415 Custer Rd. Suite 104, Plano, TX 75023. Express Mobile is registered to conduct business in the State of Texas under the d/b/a Xpressmo, Inc.

3. Upon information and belief, BigCommerce is a corporation organized and existing under the laws of Texas, with a place of business at 11305 Four Points Dr., #300, Austin, TX 78726-2204, and can be served through its registered agent, Eddie Machaalani, 2711 West Anderson Lane, Suite 200, Austin, Texas 78757. Upon information and belief, BigCommerce sells and offers to sell products and services throughout the United States, including in this judicial district, and introduces products and services that into the stream of

commerce and that incorporate infringing technology knowing that they would be sold in this judicial district and elsewhere in the United States.

JURISDICTION AND VENUE

4. This is an action for patent infringement arising under the Patent Laws of the United States, Title 35 of the United States Code.

5. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a).

6. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b), (c), (d) and/or 1400(b). On information and belief, Defendant conducts business in this District, the claims alleged in this Complaint arise in this District, and the acts of infringement have taken place and are continuing to take place in this District.

7. On information and belief, Defendant is subject to this Court's general and specific personal jurisdiction because Defendant has sufficient minimum contacts within the State of Texas and this District, pursuant to due process and/or the Texas Long Arm Statute because Defendant purposefully availed itself of the privileges of conducting business in the State of Texas and in this District, because Defendant regularly conducts and solicits business within the State of Texas and within this District, and because Plaintiff's causes of action arise directly from Defendant's business contacts and other activities in the State of Texas and this District.

BACKGROUND

8. Express Mobile originally filed a complaint for patent infringement on April 8, 2016.

9. Express Mobile dismissed its complaint without prejudice on the understanding that the parties would engage in good faith negotiations to resolve all claims.

10. The parties entered into a stand down agreement while the parties engaged in discussions regarding resolution of Express Mobile's claims against BigCommerce.

11. Discussions regarding resolution of Express Mobile's claims against BigCommerce progressed until January 2017, at which time discussions broke down.

12. Express Mobile, in conformance with the terms of the parties' stand down agreement, gave notice of its intent to re-file its complaint for patent infringement against BigCommerce.

COUNT I – INFRINGEMENT OF U.S. PATENT NO. 6,546,397

13. The allegations set forth in the foregoing paragraphs 1 through 12 are incorporated into this First Claim for Relief.

14. On April 8, 2003, U.S. Patent No. 6,546,397 ("the '397 patent"), entitled "*Browser Based Web Site Generation Tool and Run Time Engine*," was duly and legally issued by the United States Patent and Trademark Office. A true and correct copy of the '397 patent is attached as Exhibit A.

15. The inventions of the '397 patent resolve technical problems related to website creation and generation. For example, the inventions enable the creation of websites through browser-based visual editing tools such as selectable settings panels which describe website elements, with one or more settings panels corresponding to commands, which features are exclusively implemented utilizing computer technology.

16. The claims of the '397 patent do not merely recite the performance of some business practice known from the pre-Internet world along with the requirement to perform it on the Internet. Instead, the claims of the '397 patent recite one or more inventive concepts that are rooted in computerized website creation technology, and overcome problems specifically arising in the realm of computerized website creation technologies.

17. The claims of the '397 patent recite an invention that is not merely the routine or conventional use of website creation systems and methods. Instead, the invention describes a browser-based website creation system and method in which the user-selected settings representing website elements are stored in a database, and in which said stored information is retrieved to generate said website.

18. The technology claimed in the '397 patent does not preempt all ways of using web site or web page authoring tools nor preempt the use of all web site or web page authoring tools, nor preempt any other well-known or prior art technology.

19. Accordingly, each claim of the '397 patent recites a combination of elements sufficient to ensure that the claim in practice amounts to significantly more than a patent on an ineligible concept.

20. Plaintiff is the assignee and owner of the right, title and interest in and to the '397 patent, including the right to assert all causes of action arising under said patents and the right to any remedies for infringement of them.

21. Upon information and belief, Defendant has and continues to directly infringe at least claims 1 through 6, 8, 9, 11, and 37 of the '397 patent by making, using, selling, importing and/or providing and causing to be used a browser-based website and/or web page authoring tool in which the user-selected settings representing website elements are stored in a database, and in which said stored information is retrieved to generate said website (the "Accused Instrumentalities"). The Accused Instrumentalities include but are not limited to Defendant's website building tools.

22. In particular, claim 1 of the '397 patent generally recites a method enabling production of websites on and for computers with browsers and virtual machines, by presenting,

through a browser, a selectable settings menu describing elements, such setting(s) corresponding to commands to the virtual machine; generating a display in accordance with selected settings; storing information regarding selected settings in a database; generating a website at least in part by retrieving said information; and building web page(s) to generate said website and a run time file, where the run time file uses the stored information to generate virtual machine commands for the display of at least a portion of web page(s).

23. The Accused Instrumentalities infringe claim 1 of the '397 patent through a combination of features which collectively practice each limitation of claim 1. (*See, e.g.*, www.developer.bigcommerce.com; <http://dictionary.reference.com/browse/virtual+machine?s=t>).

24. Claim 2 of the '397 patent generally recites an apparatus for producing websites on and for computers having a browser and a virtual machine, said apparatus comprising an interface to present a settings menu which describes elements, said panel presented through a browser, where the selectable setting(s) corresponds to commands to the virtual machine; a browser to generate a display in accordance with selected setting(s); a database for storing information regarding selected settings; and a build tool having run time file(s) for generating web page(s) and using stored information to generate commands to the virtual machine for generating at least a portion of web page(s).

25. The Accused Instrumentalities infringe claim 2 of the '397 patent through a combination of features which collectively practice each limitation of claim 2. (*See, e.g.*, www.developer.bigcommerce.com; <http://dictionary.reference.com/browse/virtual+machine?s=t>).

26. Claim 3 of the '397 patent recites the apparatus of claim 2, wherein the database is a multi-dimensional array structured database.

27. The Accused Instrumentalities infringe claim 3 of the '397 patent. (*See, e.g.*, <https://developer.bigcommerce.com/api/stores/v2/products#get-a-product>).

28. Claim 4 of the '397 patent recites the apparatus of claim 3, wherein the representative information is Boolean data, numeric data, string data or multi-dimensional arrays of various multimedia objects.

29. The Accused Instrumentalities infringe claim 4 of the '397 patent through a combination of features which collectively practice each limitation of claim 4. (*See, e.g.*, <https://developer.bigcommerce.com/api/data-types>).

30. Claim 5 of the '397 patent recites the apparatus of claim 4, wherein said elements include multimedia objects selected from the group consisting of a color, a font, an image, an audio clip, a video clip, a text area and a URL.

31. The Accused Instrumentalities infringe claim 5 of the '397 patent through a combination of features which collectively practice each limitation of claim 5. (*See, e.g.*, https://support.bigcommerce.com/articles/Public/Using-the-WYSIWYG-Editor/?q=media&l=en_US&fs=Search&pn=1).

32. Claim 6 of the '397 patent recites the apparatus of claim 2, wherein said elements are selected from the group consisting of a button, an image, a paragraph, a frame, a table, a form and a vector object.

33. The Accused Instrumentalities infringe claim 6 of the '397 patent through a combination of features which collectively practice each limitation of claim 5. (*See, e.g.*, https://www.youtube.com/watch?time_continue=101&v=Z9KyarKVK7E).

34. Claim 8 recites the apparatus of claim 2, wherein said elements include one or more objects on a web page, and wherein said description of elements are a transition or an animation of at least one of said elements on a page.

35. The Accused Instrumentalities infringe claim 8 of the '397 patent through a combination of features which collectively practice each limitation of claim 8. (*See, e.g.*, <https://www.youtube.com/watch?v=ZDmIwRUosRQ>; <https://support.bigcommerce.com/articles/Public/Using-the-Carousel-Builder>).

36. Claim 9 recites the apparatus of claim 2, wherein said elements include a button or an images, wherein said selectable settings include the selection of an element style, and wherein said build engine includes means for storing information representative of selected style in said database.

37. The Accused Instrumentalities infringe claim 9 of the '397 patent through a combination of features which collectively practice each limitation of claim 8. (*See, e.g.*, <https://www.youtube.com/watch?v=Z9KyarKVK7E>; <https://support.bigcommerce.com/articles/Public/Using-the-Carousel-Builder>).

38. Claim 11 recites the apparatus of claim 9, wherein said elements are described by a transformation or a timelines of said selected styles.

39. The Accused Instrumentalities infringe claim 11 of the '397 patent through a combination of features which collectively practice each limitation of claim 8. (*See, e.g.*, <https://www.youtube.com/watch?v=ZDmIwRUosRQ>; <https://support.bigcommerce.com/articles/Public/Using-the-Carousel-Builder>).

40. Claim 37 of the '397 patent generally recites [a]n apparatus for producing websites with web page(s) on and for a computer with a browser and a virtual machine, the

apparatus comprising: an interface for building a website through control of website elements, being operable through the browser on to: present a selectable settings menu, accept settings, and generate the display in accordance with an assembly of settings contemporaneously with the acceptance thereof, at least one setting being operable to generate said display through commands to said virtual machine; an internal database associated with the interface for storing information representative of one or more of assembly of settings for controlling elements of the website; and a build tool to construct web page(s) of the website having: an external database containing data corresponding to the information stored in the internal database, and one or more run time files, where said run time files use information stored in the external database to generate virtual machine commands for the display of at least a portion of one or more web pages.

41. The Accused Instrumentalities infringe claim 37 of the '397 patent through a combination of features which collectively practice each limitation of claim 37. (*See, e.g.*, <https://support.bigcommerce.com/articles/Public/Using-the-WYSIWYG-Editor>; <https://support.bigcommerce.com/articles/University/Design-Basics-Video>; <https://developer.bigcommerce.com/themes>; *see* <http://lwn.net/Articles/603518/>; <http://dictionary.reference.com/browse/virtual+machine?s=t>; <https://developer.bigcommerce.com/api/stores/v2/products#create-a-product>).

42. Upon information and belief, these Accused Instrumentalities are used marketed, provided to, and/or used by or for Defendant's partners, clients, customers and end users across the country and in this District.

43. Defendant was made aware of the '397 patent and its infringement thereof at least as early as the filing of this complaint.

44. Upon information and belief, since at least the time Defendant received notice, Defendant has induced and continues to induce others to infringe at least one claim of the '397 patent under 35 U.S.C. § 271(b) by, among other things, and with specific intent or willful blindness, actively aiding and abetting others to infringe, including but not limited to Defendant's partners, clients, customers, and end users, whose use of the Accused Instrumentalities constitutes direct infringement of at least one claim of the '397 patent.

45. In particular, Defendant's actions that aid and abet others such as its partners, customers, clients, and end users to infringe include advertising and distributing the Accused Instrumentalities and providing instruction materials, training, and services regarding the Accused Instrumentalities. On information and belief, Defendant has engaged in such actions with specific intent to cause infringement or with willful blindness to the resulting infringement because Defendant has had actual knowledge of the '397 patent and knowledge that its acts were inducing infringement of the '397 patent since at least the date Defendant received notice that such activities infringed the '397 patent.

46. Upon information and belief, Defendant is liable as a contributory infringer of the '397 patent under 35 U.S.C. § 271(c) by offering to sell, selling and/or importing into the United States website development platforms to be especially made or adapted for use in an infringement of the '397 patent. The Accused Instrumentalities are a material component for use in practicing the '397 patent and are specifically made and are not a staple article of commerce suitable for substantial non-infringing use.

47. Since the date of the filing of this complaint, Defendant's infringement of the '397 patent has been willful.

48. Plaintiff has been harmed by Defendant's infringing activities.

COUNT II – INFRINGEMENT OF U.S. PATENT NO. 7,594,168

49. The allegations set forth in the foregoing paragraphs 1 through 48 are incorporated into this Second Claim for Relief.

50. On September 22, 2009, U.S. Patent No. 7,594,168 entitled *Browser Based Web Site Generation Tool and Run Time Engine* was duly and legally issued by the United States Patent and Trademark Office. A true and correct copy of the '168 patent is attached as Exhibit B.

51. The inventions of the '168 patent resolve technical problems related to website creation and generation. For example, the inventions enable the creation of websites through browser-based build tools and a user interface, which features are exclusively implemented utilizing computer technology.

52. The claims of the '168 patent do not merely recite the performance of some business practice known from the pre-Internet world along with the requirement to perform it on the Internet. Instead, the claims of the '168 patent recite one or more inventive concepts that are rooted in computerized website creation technology, and overcome problems specifically arising in the realm of computerized website creation technologies.

53. The claims of the '168 patent recite an invention that is not merely the routine or conventional use of website creation systems and methods. Instead, the invention describes a browser-based website creation system including a server comprising a build engine configured to create and apply styles to, for example, a website with web pages comprised of objects.

54. The technology claimed in the '168 patent does not preempt all ways of using web site or web page authoring tools nor preempt the use of all web site or web page authoring tools, nor preempt any other well-known or prior art technology.

55. Accordingly, each claim of the '168 patent recites a combination of elements sufficient to ensure that the claim in practice amounts to significantly more than a patent on an ineligible concept.

56. Plaintiff is the assignee and owner of the right, title and interest in and to the '168 patent, including the right to assert all causes of action arising under said patents and the right to any remedies for infringement of them.

57. Upon information and belief, Defendant has and continues to directly infringe at least claims 1 and 6 of the '168 patent by making, using, selling, importing and/or providing and causing to be used a browser-based website and/or web page authoring tool in which the user-selected settings representing website elements are stored in a database, and retrieval of said information to generate said website (the "Accused Instrumentalities"). The Accused Instrumentalities include but are not limited to Defendant's website building tools.

58. In particular, claim 1 of the '168 patent generally recites a system for assembling a web site comprising a server with a build engine, the web site comprising web pages with objects (one button or one image object), the server accepting user input to associate a style with objects, wherein a button or image object is associated with a style that includes values defining transformations and time lines; wherein each web page is defined entirely by the objects and the style associated with the object, produce a database with a multidimensional array comprising the objects that comprise the web site including data defining the object style, number, and an indication of the web page that each object is part of, and provide the database to a server accessible to web browser; wherein the database is produced such that a web browser with access to a runtime engine is configured to generate the website from the objects and style data extracted from the provided database.

59. The Accused Instrumentalities infringe claim 1 of the '168 patent through a combination of features which collectively practice each limitation of claim 1. (*See, e.g.*, <https://www.bigcommerce.com/features/create-beautiful-online-store/>;
<https://www.bigcommerce.com/features/secure-web-hosting/>; <https://youtube/EXtni5aqsYg>
<https://www.youtube.com/watch?v=Z9KyarKVK7E>;
<https://www.bigcommerce.com/theme-store/>;
<https://support.bigcommerce.com/articles/Public/Web-Pages-Overview>;
<https://developer.bigcommerce.com/api/media-types>;
<https://developer.bigcommerce.com/api/stores/v2/products#get-a-product>;
<https://developer.bigcommerce.com/api/media-types>; <https://youtube/EXtni5aqsYg>;
<http://lwn.net/Articles/603518/>).

60. In particular, claim 6 of the '168 patent generally recites a system for assembling a web site comprising a server with a build engine, the web site comprising web pages with objects (one button or one image object), the server accepting user input to associate a style with objects, wherein a button or image object is associated with a style that includes values defining transformations and time lines; wherein each web page is defined entirely by the objects and the style associated with the object, produce a database with a multidimensional array comprising the objects that comprise the web site including data defining the object style, number, and an indication of the web page that each object is part of, and provide the database to a server accessible to web browser; wherein the database is produced such that a web browser with access to a runtime engine is configured to generate the website from the objects and style data extracted from the provided database, where said data is stored as one or more of a Boolean an integer, a string, a floating point variables, or a URL.

61. The Accused Instrumentalities infringe claim 6 of the '168 patent through a combination of features which collectively practice each limitation of claim 1. (*See, e.g.*, <https://www.bigcommerce.com/features/create-beautiful-online-store/>;
<https://www.bigcommerce.com/features/secure-web-hosting/>; <https://youtube/EXtni5aqsYg>
<https://www.youtube.com/watch?v=Z9KyarKVK7E>;
<https://www.bigcommerce.com/theme-store/>;
<https://support.bigcommerce.com/articles/Public/Web-Pages-Overview>;
<https://developer.bigcommerce.com/api/media-types>;
<https://developer.bigcommerce.com/api/stores/v2/products#get-a-product>;
<https://developer.bigcommerce.com/api/media-types>; <https://youtube/EXtni5aqsYg>;
<http://lwn.net/Articles/603518/>; *See, e.g.*, <https://stencil.bigcommerce.com/docs/configjson-reference>).

62. On information and belief, these Accused Instrumentalities are used marketed, provided to, and/or used by or for Defendant's partners, clients, customers and end users across the country and in this District.

63. Defendant was made aware of the '168 patent and its infringement thereof at least as early as the filing of this Complaint.

64. Upon information and belief, since at least the time Defendant received notice, Defendant has induced and continues to induce others to infringe at least one claim of the '168 patent under 35 U.S.C. § 271(b) by, among other things, and with specific intent or willful blindness, actively aiding and abetting others to infringe, including but not limited to Defendant's partners, clients, customers, and end users, whose use of the Accused Instrumentalities constitutes direct infringement of at least one claim of the '168 patent.

65. In particular, Defendant's actions that aid and abet others such as its partners, customers, clients, and end users to infringe include advertising and distributing the Accused Instrumentalities and providing instruction materials, training, and services regarding the Accused Instrumentalities. On information and belief, Defendant has engaged in such actions with specific intent to cause infringement or with willful blindness to the resulting infringement because each Defendant has had actual knowledge of the '168 patent and knowledge that its acts were inducing infringement of the '168 patent since at least the date Defendant received notice that such activities infringed the '168 patent.

66. Upon information and belief, Defendant is liable as a contributory infringer of the '168 patent under 35 U.S.C. § 271(c) by offering to sell, selling and/or importing into the United States computerized trading platforms to be especially made or adapted for use in an infringement of the '168 patent. The Accused Instrumentalities are a material component for use in practicing the '168 patent and are specifically made and are not a staple article of commerce suitable for substantial non-infringing use.

JURY DEMAND

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiff demands a trial by jury on all issues triable as such.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment for itself and against Defendant as follows:

- A. An adjudication that Defendant has infringed the '397 and '168 patents;
- B. An award of damages to be paid by Defendant adequate to compensate Plaintiff for Defendant's past infringement of the '397 and '168 patents, and any continuing or future infringement through the date such judgment is entered, including interest, costs, expenses and an accounting of all infringing acts including, but not limited to, those acts not presented at trial;

C. A declaration that this case is exceptional under 35 U.S.C. § 285, and an award of Plaintiff's reasonable attorneys' fees; and

D. An award to Plaintiff of such further relief at law or in equity as the Court deems just and proper.

Dated: February 27, 2017

DEVLIN LAW FIRM LLC

By: /s/ Robert Kiddie

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