

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

NEOMEDIA TECHNOLOGIES, INC.,
a Delaware corporation,

Plaintiff,

v.

AIRCLIC INC., a Delaware corporation.

Defendant.

Civil Action No. 04-CV-1704

Judge McLaughlin

AMENDED COMPLAINT FOR PATENT INFRINGEMENT AND DAMAGES

Plaintiff NeoMedia Technologies, Inc. (hereinafter “NeoMedia”), by and through its attorneys, complains and alleges against AirClic Inc. (hereinafter “AirClic”) as follows:

PARTIES

1. Plaintiff NeoMedia is an entity organized and existing under the laws of the State of Delaware and having a place of business at 2201 Second Street, Fort Myers, Florida 33901.

2. Defendant AirClic is a corporation organized and existing under the laws of the State of Delaware and having a place of business at 411 South State Street, Newton, Pennsylvania 18940. NeoMedia is advised and believes, and on that basis alleges, that AirClic is registered to transact and, in fact, does transact business within the State of Pennsylvania and in this District, and has committed acts of patent infringement as hereinafter set forth within the State of Pennsylvania and in this District.

PREVIOUS LAWSUITS

3. NeoMedia and AirClic have been in a similar business for years. Among other things, each party provides services that allow their customers to access information from various sources, such as the Internet, by scanning, entering or reading machine readable

indicia, such as Universal Product Codes (UPC), that are found on almost every article of commerce sold today.

4. On May 9, 2001, NeoMedia entered into a License Agreement with Symbol Technologies, Inc. (“Symbol”), in which Symbol, was given a worldwide right to grant licenses to itself and to third parties under NeoMedia’s intellectual property for a fixed fee per device. The license with Symbol only addressed Symbol devices, and did not include a license to manufacture, use, offer for sale, sell or provide a switch, such as a database, registry or other similar functionality.

5. In early 2001, the parties met to discuss an arrangement whereby they would cross-license their patents and technology. In July of 2001, the parties entered into a letter of intent in which AirClic would provide an advance against the Licensing Agreement to NeoMedia, and the parties would effect a cross-license. Subsequently, AirClic provided some of the advance to NeoMedia.

6. AirClic, however, backed out of its end of the letter of intent, and demanded that NeoMedia return the advance.

7. On September 5, 2001, AirClic filed a lawsuit against NeoMedia in the Court of Common Pleas of Montgomery County, Pennsylvania (the “State Court Action”), to get NeoMedia to return the advance, and for a declaration that AirClic need not provide NeoMedia with further funding under the letter of intent.

8. On November 21, 2001, while the State Court Action was proceeding, AirClic filed a declaratory judgment action in the Eastern District of Pennsylvania, captioned *AirClic, Inc. v. NeoMedia Technologies, Inc., No. 01-cv-5497* (Pollack, J.) (the “First Federal Case”). AirClic sought a determination that three of NeoMedia’s Patents were invalid and

unenforceable. At no time did AirClic deny that it was infringing any of the NeoMedia patents.

9. On September 18, 2002, the Court granted NeoMedia's Motion to dismiss the First Federal Case on the grounds that no case or controversy existed between the parties.

10. The parties settled the State Court Action in December 2003.

11. On January 26, 2004, the parties met to discuss a resolution to the patent issues. After failing to resolve the differences, NeoMedia filed a complaint in the United States District Court of the Northern District of Illinois, captioned *NeoMedia Technologies, Inc. v. AirClic, Inc., No. 04-cv-0566* (the "Second Federal Case"). NeoMedia asserted that AirClic had infringed and continued to infringe four of NeoMedia's patents, and that AirClic's infringement was willful and wanton.

12. Shortly thereafter, AirClic filed a motion to re-open the First Federal Case. Although AirClic argued that NeoMedia's acts subsequent to the filing of the First Federal Case created jurisdiction, on May 12, 2004, the Court denied AirClic's motion, stating that "[s]ubsequent events do not operate to impeach a determination that jurisdiction existed, or did not exist, at the time the determination was made."

13. On April 15, 2004, the Illinois Court dismissed the Second Federal Case against AirClic and another defendant for lack of personal jurisdiction.

14. On April 19, 2004, AirClic filed a second declaratory judgment action in the Eastern District of Pennsylvania, captioned *AirClic, Inc. v. NeoMedia Technologies, Inc., No. 04-cv-1692* (the "Third Federal Case"), again alleging that three of NeoMedia's Patents were invalid and unenforceable. AirClic's allegations were similar to the dismissed First Federal Case, and again AirClic failed to assert that it was not infringing NeoMedia's patents.

15. On April 20, 2004, NeoMedia filed a complaint in the Eastern District of Pennsylvania, captioned *NeoMedia Technologies, Inc. v. AirClic, Inc., No. 04-cv-1704* (“the Fourth Federal Case”), alleging that AirClic had infringed and continued to infringe four of NeoMedia’s Patents, and that AirClic’s infringement was willful and wanton.

16. Based on the two cases filed in this Court, the parties agreed to consolidate the Third and Fourth Federal Cases.

17. In May 2004, AirClic and Symbol entered into an End User License Agreement under the NeoMedia patents, in which any device that AirClic purchased from Symbol and paid a royalty of \$2.50, would become a licensed device. As such, the purchaser of that licensed device from AirClic would be licensed under the relevant NeoMedia patents to use that particular device. The End User License Agreement specifically states that a switch is not a device that can be licensed under the agreement. Therefore, AirClic has no right to manufacture, use, offer for sale or sell a switch, or to provide a switch, such as its Mobile Information Platform, to an end user.

NATURE OF THE ACTION, JURISDICTION AND VENUE

18. This is a civil action for patent infringement arising under the Patent Laws of the United States, and more specifically, under Title 35, United States Code § 1 *et seq.*

19. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338.

20. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) and (c) and 28 U.S.C. § 1400(b).

THE PATENTS-IN-SUIT

21. On August 3, 1999, United States Patent No. 5,933,829 (“the ’829 patent”), entitled “Automatic Access of Electronic Information Through Secure Machine-Readable

Codes on Printed Documents,” was duly and legally issued by the United States Patent and Trademark Office. A copy of the ’829 patent is attached hereto as Exhibit A.

22. On November 2, 1999, United States Patent No. 5,978,773 (“the ’773 patent”), entitled “System and Method For Using an Ordinary Article of Commerce to Access a Remote Computer,” was duly and legally issued by the United States Patent and Trademark Office. A copy of the ’773 patent is attached hereto as Exhibit B.

23. On August 22, 2000, United States Patent No. 6,108,656 (“the ’656 patent”), entitled “Automatic Access of Electronic Information Through Machine-Readable Codes on Printed Documents,” was duly and legally issued by the United States Patent and Trademark Office. A copy of the ’656 patent is attached hereto as Exhibit C.

24. On March 6, 2001, United States Patent No. 6,199,048 B1 (“the ’048 patent”), entitled “System and Method For Automatic Access of A Remote Computer Over a Network,” was duly and legally issued by the United States Patent and Trademark Office. A copy of the ’048 patent is attached hereto as Exhibit D.

25. The ’829 patent, the ’773 patent, the ’656 patent, and the ’048 patent (collectively “the patents-in-suit”) are valid and subsisting and are owned by NeoMedia.

PATENT INFRINGEMENT AND END USER LICENSE AGREEMENT

26. NeoMedia repeats and realleges each of the allegations of paragraphs 1 through 25 as if set forth fully herein.

27. AirClic has developed, used, offered for sale, sold and/or provided a switch, i.e., its Mobile Information Platform (MIP), to its customers and end users. AirClic’s MIP, which is a web based platform, associates and connects machine readable indicia, such as bar codes, Scanlets, and SmartCodes, with a corresponding web page, application, service or information. Users can scan, speak, take a picture from a cell phone, or manually enter a code

on a device such as a scanner, mobile phone, camera phone, PDA, two-way pager, PC or standard telephone to connect to a web page, application, service or information. A copy of the Technology Overview of AirClic's MIP from AirClic's website, <http://www.airclic.com>, is attached hereto as Exhibit E.

28. AirClic has provided and continues to provide "product [that] lets users request information (anything from catalog entries to flight times) via SmartCodes (ID numbers, phone numbers or miniature bar codes called Scanlets). Users enter the codes either via portable scanners (one is a little larger than a cigarette lighter, another connects directly to a cell phone) or by entering numbers at a website or into a phone. AirClic maps the codes to other information, such as product entries in a company's catalog or web URLs on a site, and responds with the proper data via wireless browser, text or automated voice." A copy of *Companies to Watch* by Christopher Lindquist from <http://www.cio.com>, and a copy of *MediaPost* by Ken Liebeskind from <http://www.airclic.com>, are attached hereto as Exhibit F.

29. AirClic has manufactured and continues to manufacture, use, offer for sale, sell and provide the AirClicker, which is used to scan codes such as UPC codes, Scanlets, and SmartCodes. The AirClicker is then connected (or may be connected during the scan), via a SmartConnect cable, to a device such as a cell phone, PDA or PC, so that the scanned data can be uploaded, and information such as a web link can be retrieved and displayed on the device. A copy of AirClic's marketing material from <http://www.airclic.com> is attached hereto as Exhibit G.

30. AirClic has manufactured, used, offered for sale, sold and provided its Connected Windows, which has been and continues to be accessible on AirClic's website, to allow a user to enter a SmartCode, AirNumber or Scanlet in order to locate the desired information or web

page. A copy of AirClic's ClicCenter, which was accessed from AirClic's home page at <http://www.airclic.com>, is attached hereto as Exhibit H.

31. In May of 2004, AirClic entered into an End User License Agreement with Symbol. A copy of the End User License Agreement is attached hereto as Exhibit I.

32. The End User License Agreement grants a license under the NeoMedia patents for the Symbol devices that AirClic purchases from Symbol and pays a royalty on. The license for that particular device passes through to the end user, such that the end user that uses that device is licensed under the relevant NeoMedia patents.

33. The End User License Agreement does not cover the manufacture, use, offer for sale or sale of any of AirClic's switches, nor does it allow AirClic to provide services pertaining to those switches, including AirClic's MIP.

34. The End User License Agreement does not provide a license for any device that was not manufactured by or for Symbol, or any device that AirClic has not paid a royalty on.

35. The use of various cell phones, camera phones, PDAs, and other hand-held devices that were not manufactured by or for Symbol or for which AirClic did not pay a royalty, that can be used to access AirClic's switch, infringes NeoMedia's patents. A copy of some of the devices that can be used to access AirClic's switch obtained from <http://www.airclic.com/devices> is attached hereto as Exhibit J.

36. By entering into the End User License Agreement, AirClic admits that NeoMedia's patents are valid and that AirClic's end users need a NeoMedia patent license to operate the devices on AirClic's switch.

37. As described herein, AirClic has manufactured, or has had manufactured for it, and has used, or actively induced others to use, and has offered for sale, sold and provided, technology that allows users to scan, speak, take a picture of, or manually enter codes, such as

bar codes, UPC codes, SmartCodes, AirNumbers, telephone numbers, and Scanlets associated with items, such as articles of commerce, to access information, web sites, applications and services pertaining to those items.

38. AirClic has infringed and is infringing, within this district and elsewhere within the United States, one or more claims of the patents-in-suit in violation of 35 U.S.C. § 271 through the manufacture, use, offer for sale or sale of its switch or by providing its switch to end users, as described above. AirClic's infringement is direct, as well as contributory, and by actively inducing infringement by others.

39. AirClic had actual and constructive notice of the existence of the patents-in-suit, and despite such notice, failed to cease and desist its infringing actions, and now continues to engage in acts of infringement of the patents-in-suit. AirClic's continued acts of infringement has been, and will continue to be, wanton and willful.

40. AirClic's infringing activities have damaged and continue to damage NeoMedia. Upon information and belief, AirClic will continue to infringe upon the patents-in-suit causing harm to NeoMedia's business, market, reputation and goodwill unless AirClic's infringing activities complained of herein are preliminarily and permanently enjoined by this Court.

PRAYER FOR RELIEF

WHEREFORE, plaintiff NeoMedia prays for relief against AirClic as follows:

A. That U.S. Patent Nos. 5,933,829, 5,978,773, 6,108,656 and 6,199,048 be adjudged infringed by AirClic and that the infringement be held to be willful;

B. That NeoMedia be awarded compensatory damages for past infringement by AirClic in an amount no less than a reasonable royalty, in a sum to be determined at trial, and that said damages be trebled in view of the willful and deliberate nature of the infringement;

C. That AirClic, its officers, agents, servants, employees and attorneys, and other persons in active concert or participation with AirClic be preliminarily and permanently enjoined from further infringement of the patents-in-suit;

D. That AirClic be ordered to deliver to NeoMedia for destruction all infringing products and systems in their possession, including AirClic's MIP and any other switch or registry;

E. That this case be declared an exceptional case under 35 U.S.C. § 285, and that NeoMedia be awarded its attorney fees incurred in this action;

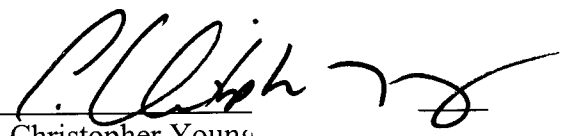
F. For an award to NeoMedia of costs of this action, interest on the award and other charges to the maximum extent permitted; and

G. For such other further relief as the Court deems just and proper under the circumstances.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of AMENDED
COMPLAINT FOR PATENT INFRINGEMENT AND DAMAGES was served upon:

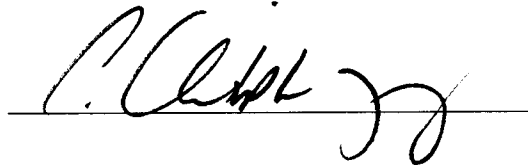
Via First Class Mail

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via U.S. mail, postage prepaid, this 1st day of July 2004.

A handwritten signature in black ink, appearing to read "P. Criswell", is written over a horizontal line. The signature is stylized and cursive.