UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CUSTOMPLAY, LLC,

Plaintiff,

CASE NO. 9:17-cv-80884-KAM

v.

AMAZON.COM, INC.,

Defendant.
_____/

CUSTOMPLAY'S MOTION FOR PRELIMINARY INJUNCTION AND REQUEST FOR EVIDENTIARY HEARING

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, plaintiff CustomPlay, LLC ("CustomPlay") hereby moves for entry of an order enjoining defendant Amazon.com, Inc. ("Amazon") from continuing to make, use, offer to sell, or sell its X-Ray feature for movies and TV shows ("X-Ray") because, as more fully set forth below, X-Ray infringes three of CustomPlay's patents: U.S. Patent Nos. 8,494,346 B2 (the "'346 patent"); 9,124,950 B2 (the "`950 patent"); and 9,380,282 B2 (the "`282 patent") (collectively, the "CustomPlay Patents"). In support of this motion, CustomPlay submits the accompanying Declaration of Dr. Clifford Reader and Declaration of Max Abecassis, and states as follows:

I. INTRODUCTION

CustomPlay has developed and brought to market new, patented technologies enhancing the way audiovisual content is presented to, and used by, viewers. Among those technologies are numerous patented features allowing viewers to obtain information, interactively and in real time during the presentation of the content, about virtually anything in the images and sounds presented. Thus, while viewing audiovisual content, viewers are able to instantaneously obtain information about such things as actors or characters, scene locations, music in the soundtrack, or chattels (e.g., clothing, jewelry, cars), and even to proceed with purchasing items they see or hear. The patented technologies can be used in streaming video services as well as other methods of content delivery.

CustomPlay does not itself offer streaming video services. But in addition to developing the technology in the first place, CustomPlay is in the business of creating the data overlays that associate responsive information with the audiovisual content. Such painstaking mapmaking is indispensable to any serious commercial implementation of the technology.

Amazon offers streaming video services. CustomPlay approached Amazon about a strategic partnership in which Amazon would implement CustomPlay's patented technologies.

Amazon disregarded CustomPlay, but then proceeded to enhance its video streaming services with exactly the capabilities that CustomPlay not only had patented but had proposed to Amazon in good faith. The technology is, after all, a tight fit with Amazon's ambition to capitalize on synergies between its video streaming services and its other businesses, which include a vast movie-information database and, of course, the sale of virtually anything and everything in the river of commerce.

CustomPlay continues to seek an honest strategic partnership, particularly one in which CustomPlay contributes the mapmaking functions while a partner carries out the video-streaming functions. Amazon evidently performs both of those functions itself, and in so doing, has severely damaged the market for the sort of partnership that CustomPlay has assiduously sought.

A preliminary injunction is the only way to stop Amazon from pillaging CustomPlay's technology and destroying the business strategy that CustomPlay has rightfully planned for itself.

II. FACTUAL BACKGROUND

a. CustomPlay

CustomPlay is a South Florida technology enterprise with nineteen employees in Delray Beach. Abecassis Decl. ¶ 3. CustomPlay technologies are the result of its substantial investments in research and development. *Id.* ¶ 14. CustomPlay has developed software applications that provide in-depth information about video content, such as movies, to viewers interactively during presentation of the video content. Abecassis Decl. ¶¶ 4 - 13.

Since 2014 CustomPlay has made these applications available for download to end-users on its website. *See generally* http://www.customplay.com (last accessed July 24, 2017). Beginning in 2015, CustomPlay's technology has been available for download at Apple's App Store and Android's Google Play under the application name CustomPlay. Abecassis Decl. ¶ 11.

CustomPlay's applications practice and are covered by the CustomPlay Patents.

b. The CustomPlay Patents At Issue

CustomPlay is the owner of the '346 patent, entitled "Identifying a Performer During a Playing of a Video." The '346 patent teaches a feature for "providing a user, during playback of a segment from within a video, an identification of the performer/character that is depicted in that segment . . . to satisfy the real-time informational interests of a user and to deliver a more informed video viewing experience." '346 patent, col. 1 ln. 61 to col. 2 ln. 4. The '346 patent refers to this as the "Who" feature. The "Who" feature "enables the display of information identifying the performers and characters" depicted in a particular segment of a video. *Id.*, col. 2, ll. 36-39. The '346 patent's specification discloses that "[t]o activate the Who feature, a user may be provided a number of means, including, onscreen playback controls, remote control keys, voice control, other user interfaces, and/or any combinations of these methodologies and means." *Id.* col. 8, ll. 53-57. "[S]uperimposed on [a] frame of video [is] a visual depiction of each of the characters and corresponding performer's and character's name." *Id.*, col. 6, ll. 34-36. "[T]he visual depiction is a current image of the performer." *Id.*, col. 28, ln. 52 to col. 32, ln. 23.

CustomPlay is also the owner of the '950 patent, entitled "Providing Item Information Notification During Video Playing." The inventions taught in the '950 patent include technology "to provide, during a playing of a video, an indication that item information is available for an item being currently depicted within the video." '950 patent, col. 2, ll. 13-16. The patent teaches, for example, that:

> FIG. 1D is a representation of a video frame **101** within the motion picture at a subsequent instance within the same clip that includes the video frame **100** shown in FIG. 1C. In this case, the camera has focused on the girl **120** and the man **130**. The "90 Day Balloons" **113** depicted in the video frame **100** of FIG. 1A is not depicted in the frame **101**, and only the ream [sic] of the "Top Hat" **133** of FIG.

> 1A is depicted in the frame **101**. In this example, the item identification routines are configured to search a plurality of segment definitions to identify segment definitions that are responsive to the request location and a predetermined play period prior to the request location. In this instance, since the segments definitions for each of the noteworthy items are responsive to either the request location or the predetermined play period prior to the request location, an image and textual identification are nonetheless provided for the "90 Day Balloons", the "Stripe Dress", and the "Top Hat" (FIG. 1D **112**, **113**, **122**, **123**, **132**, **133**).

Id., col. 9, ln. 61 to col. 10, ln. 10. *See also id.* claims 1-20.

Further, CustomPlay is the owner of the '282 patent, entitled "Providing Item Information During Video Playing." The inventions taught in the '282 patent include technology to "satisfy the real-time informational interests of a user and to deliver a more informed and entertaining video viewing experience." '282 patent, col. 1, ln. 65 to col. 2, ln 7. The '282 patent discloses:

> During a playing of a video, a user may desire to obtain item identification information and/or shopping information for an item being depicted within the video. In such situations, it is advantageous to be able to provide, a user during a playing of a video, item information for certain items being depicted, especially where those items are product placements.

Id., col. 13, ll. 26-32. "A musical note icon may be displayed in connection with a purchasable musical item, e.g., a song being currently played within the video." *Id*,. col. 7, ll. 53-56. *See also id.*, col. 33, ln. 16 to col. 37, ln. 10.

c. Amazon's Infringing X-Ray for Movies & TV Shows

Amazon operates a video-on-demand service titled Amazon Video that offers users a library of streaming television shows and films for rental or purchase. Amazon's X-Ray feature is available on numerous film and television show titles in the Amazon Video library. Amazon's website describes X-Ray as follows: "X-Ray for Movies & TV Shows lets you access actor bios, background information, and more from the Internet Movie Database (IMDb) directly onscreen."

What is X-Ray for Movies & TV Shows?, Amazon.com, Inc., https://www.amazon.com/gp/help/customer/display.html?nodeId=201423010 (last visited July 26, 2017).

The information available to viewers through Amazon's X-Ray feature is supplied by IMDb, an online database of information related to films and television programs, including cast, production crew, fictional characters, biographies, plot summaries, trivia, and reviews. IMDb is a wholly owned subsidiary of Amazon.

Functionally, Amazon's X-Ray feature is based on an unencrypted file that contains the information to be displayed (*i.e.*, what actor is appearing on screen, which song is being played in the video, trivia and other information). Reader Decl. ¶¶ 32-40. X-Ray data files are used on a playback device alongside Amazon Video content (*i.e.*, a film or television show). *Id.* In the X-Ray data files, data is organized into segments that have a start and an end time, measured in milliseconds. *Id.* Each segment contains a section denoting onscreen information (*e.g.,* trivia, cast member information) to be displayed for the entirety of that segment. The onscreen information related to each segment is displayed during playback. *Id.*

The Complaint alleges that Amazon's X-Ray feature infringes claims 4-6 and 10-20 of the '346 patent, claims 2, 4, 6, 14, 16, and 19 of the '950 patent and claims 4, 7-9, 12, 14, 16, 18, and 19 of the '282 patent. This motion concerns only Amazon's infringement of claims 4, 14 and 17 of the '346 patent, claim 19 of the '950 patent, and claim 19 of the '282 patent.

As more fully set forth below, and as supported by the opinion of CustomPlay's expert, Amazon's X-Ray clearly infringes each of these claims.

III. ARGUMENT

This Court has the discretion to issue an injunction to "prevent the violation of any rights secured by patent." 35 U.S.C. § 283; *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392 (2006) (stating that well-established principles of equity apply to issuance of injunctions under the Patent Act). By issuing a preliminary injunction, the Court preserves the status quo by preventing infringement of one or more patents while a decision on the merits of the case remains pending. *Abbott Labs. v. Sandoz*, 544 F.3d 1341, 1344-45 (Fed. Cir. 2008).

A plaintiff seeking a preliminary injunction must satisfy four factors: (1) that it is likely to succeed on the merits; (2) that it is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. *AstraZeneca LP v. Apotex Corp.*, 633 F.3d 1042, 1050 (Fed. Cir. 2010) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 25 (2008)); *see also Trebro Mfg., Inc. v. Firefly Equip., LLC*, 748 F.3d 1159, 1165 (Fed. Cir. 2014). CustomPlay is able to satisfy each of the requisite prongs, and is entitled to a preliminary injunction in its favor and against Amazon X-Ray.

1. CustomPlay is Likely to Succeed on the Merits of its Claims for Patent Infringement

The federal patent statute presumes that all patents are valid. 35 U.S.C. § 282. This presumption of validity applies at the preliminary injunction stage and, indeed, every stage of the litigation. *Canon Computer Sys. Inc. v. Nu-Kote Int'l, Inc.*, 134 F.3d 1085, 1088 (Fed. Cir. 1998). In the event that Amazon attempts to oppose this motion by challenging the validity of the CustomPlay patents, Amazon will bear the heavy burden of proving, by clear and convincing evidence, that the CustomPlay patents are invalid. *Purdue Pharma L.P. v. Boehringer Ingelheim GmbH*, 237 F.3d 1359, 1365 (Fed. Cir. 2001).

The Court is not required to resolve the validity of the CustomPlay patents at the

preliminary injunction stage; rather, the Court should "make an assessment of the persuasiveness of the challenger's evidence, recognizing that it is doing so without all evidence that may come out at trial." *New England Braiding Co. v. A.W. Chesterton Co.*, 970 F.2d 878, 882-83 (Fed. Cir. 1992). Taking into consideration that every patent is presumed valid, if Amazon "fails to identify any persuasive evidence of invalidity, the very existence of [CustomPlay's] patents satisfies [its] burden on validity." *Purdue Pharma*, 237 F.3d at 1365.

Having established that the CustomPlay patents are presumptively valid at the preliminary injunction stage, CustomPlay must establish only that it is likely to succeed on the merits of its underlying claims for patent infringement. *Abbott Labs.*, 544 F.3d at 1358. In this regard, CustomPlay need only demonstrate that at least one claim of one of its presumptively-valid patents has been infringed by Amazon.

a. Amazon's Infringement of the `346 Patent

As discussed above, CustomPlay's '346 patent covers a "Who" feature that enables the display of information identifying the performers and characters depicted in a particular video segment. Amazon describes its X-Ray feature as follows:

> Have you ever watched a movie or TV show and wondered, "Who's that guy?", "What's she been in?", or "What is that song?" Never have that problem again. Amazon today announced that X-Ray—a customer-favorite feature since it launched on Fire tablets—is now available directly on your TV screen using Amazon Fire TV and Fire TV Stick. Exclusive to Amazon Instant Video, X-Ray for Movies and TV Shows is powered by IMDb—the #1 movie website in the world, with a database of more than 180 million data items, plus over 200 million unique monthly visitors worldwide.

For the First Time Ever, X-Ray for Movies and TV Shows Now Available Directly on Your TV – Answer the Classic Movie-Watching Question "Who's That Guy?" with Your Amazon Fire TV, Business Wire (Apr. 13, 2015, 9:00 a.m.), http://www.businesswire.com/news/home/20150413005383/en/Time-X-Ray-

Movies-TV-Shows-TV-%E2%80%94. Amazon's X-Ray feature directly infringes claims 4, 14, and 17 of the '346 patent.

i. Direct Infringement of Method Claims 14 and 17 under § 271(a)

Amazon's X-Ray feature embodies the methods recited in claims 14 and 17 of the '346 patent. Claim 14 of the '346 patent recites:

> A method of processing data, the data comprising: (i) a plurality of segment definitions each defining a video segment within a video; (ii) a name of a performer of a character depicted within a defined video segment; and (iii) a reference to a visual depiction of a performer of a depicted character; the method comprising the steps of:
>
> receiving, from a user, during a playing of a video, a request for information for identifying a performer of a character that is depicted during the playing of the video;
>
> identifying a current location in the video;
>
> identifying a segment definition that includes the identified location;
>
> identifying a name of a performer of a character depicted within a video segment defined by the identified segment definition;
>
> retrieving, responsive to the reference, a visual depiction of the performer of the depicted character; and
>
> providing, the user, the identified name of the performer of the depicted character, and the visual depiction of the performer of the depicted character.

'346 patent, col. 30, ln. 51 to col. 31, ln. 3.

Amazon's X-Ray performs each step recited in claim 14 of the '346 patent. Reader Decl. ¶¶ 59-62. Amazon's X-Ray receives from a user, during the playback of a video like a movie or TV show, a request for information for identifying a performer of a character that is depicted during the playing of the video. *Id*. After receiving this request, Amazon's X-Ray identifies: a current location in the video, a segment definition that includes the identified location, and a name of a performer of a character depicted within a video segment defined by the identified segment

definition. *Id*. Thereafter, Amazon's X-Ray: retrieves, responsive to the reference, a visual depiction of the performer of the depicted character; provides the user with the identified name of the performer of the depicted character; and provides the user with a visual depiction of the performer of the depicted character.

Similarly, claim 17 of the '346 patent covers the following method:

> A method of processing data, the data comprising: (i) a name of a performer of a character depicted within a video frame of a video; and (ii) a reference to a visual depiction of the performer of the depicted character; the method comprising the steps of:
>
> receiving, from a user, during a playing of a video, a request for information for identifying a performer of a character that is depicted during the playing of the video;
>
> identifying a current location in the video;
>
> identifying a name of a performer associated with the identified location;
>
> retrieving, responsive to the reference, a visual depiction of the performer; and
>
> providing, the user, the identified name of the performer, and the visual depiction of the performer.

'346 patent, col. 31, ll. 10-24.

Amazon's X-Ray performs each step recited in claim 17 of the '346 patent. Reader Decl. ¶¶ 63-78. Amazon's X-Ray receives, from a user, during a playing of a video (*e.g.,* a movie or TV show), a request for information for identifying a performer of a character that is depicted during the playing of the video. *Id*. ¶¶ 69-71. Thereafter, Amazon's X-Ray identifies a current location in the video, and a name of a performer associated with the identified location. *Id*. ¶¶ 72-73. Amazon's X-Ray thereafter retrieves, responsive to the reference, a visual depiction of the performer and provides the user the identified name of the performer, and the visual depiction of the performer. *Id*. ¶¶ 74-78.

ii. *Direct Infringement of Apparatus Claim 4 Under § 271(a)*

Amazon makes, offers to sell, and sells various generations of digital media players under the brand name "Fire TV." Reader Decl. ¶¶ 27-29. Similarly, Amazon makes, offers to sell, and sells various generations of tablet computers under the brand name "Kindle Fire." The Fire TV and Kindle Fire tablet are collectively referred to hereinafter as "Amazon Devices." Amazon Devices are configured with the capability for playing X-Ray-enabled video titles streamed from the Amazon Video library. Amazon Devices are capable of performing each of the steps recited in claim 4 of the '346 patent. *Id*. ¶¶ 42-57. Accordingly, Amazon Devices infringe claim 4 of the '346 patent in violation of 35 U.S.C. § 271(a). *Id.* Claim 4 of the '346 patent recites:

> An apparatus capable of processing data, the data comprising: (i) a plurality of segment definitions each defining a video segment within a video; (ii) a name of a performer of a character depicted within a defined video segment; and (iii) a reference to a visual depiction of a performer of a depicted character; the apparatus performs the steps of:
>
> receiving, from a user, during a playing of a video, a request for information for identifying a performer of a character that is depicted during the playing of the video;
>
> identifying a current location in the video;
>
> identifying a segment definition that includes the identified location;
>
> identifying a name of a performer of a character depicted within a video segment defined by the identified segment definition;
>
> retrieving, responsive to the reference, a visual depiction of the performer of the depicted character; and
>
> providing, the user, the identified name of the performer of the depicted character, and the visual depiction of the performer of the depicted character.

'346 patent, col. 29, ll. 20-40.

Amazon Devices are capable of receiving from a user, during the playing of a video (such as a TV show or movie), a request for information for identifying a performer of a character that

is depicted during the playing of the video. *Id.* ¶¶ 47-5. Amazon Devices are capable of then identifying: a current location in the video; a segment definition that includes the identified location; and the name of a performer of a character depicted within the user-selected video segment. *Id.* ¶¶ 53-54. Thereafter, Amazon Devices are capable of retrieving a visual depiction of the performer of the depicted character. *Id.* ¶¶ 55-57. Amazon Devices are capable of then providing users with the name of the performer of the depicted character and a visual depiction of the performer of the depicted character. *Id.*

b. Amazon's Infringement of the `950 Patent

Amazon directly infringes at least apparatus claim 19 of the '950 patent pursuant to 35 U.S.C. § 271(a). As previously discussed, Amazon Devices stream content from the Amazon Video Library. Claim 19 of the '950 patent recites:

> An apparatus capable of processing data and instructions executable by a processor; the apparatus, when executing the instructions, performs the steps of:
>
> retrieving a video frame identifier that is responsive to a play location within a playing of a video;
>
> displaying, responsive to the video frame identifier, an initial indication that item information is available that is responsive to the play location;
>
> retrieving a subsequent video frame identifier that is responsive to a subsequent play location;
>
> displaying, responsive to the subsequent video frame identifier and contemporaneously with the displaying of the initial indication, a subsequent indication that item information is available that is responsive to the subsequent play location;
>
> receiving, following the displaying of the subsequent indication, a request responsive to the initial indication, for item information; and
>
> displaying item information associated with the initial indication that item information is available.

'950 patent, col. 37, ln. 13 to col. 38, ln. 11.

Amazon Devices perform the functionality of each claim limitation present in claim 19 of the '950 patent. Reader Decl. ¶¶ 79-95. Amazon Devices retrieve a video frame identifier that is responsive to a play location within a playing of a video. *Id.* ¶¶ 85-86. Thereafter, Amazon Devices: display, responsive to the video frame identifier, an initial indication that item information is available that is responsive to the play location; retrieve a subsequent video frame identifier that is responsive to a subsequent play location; and display, responsive to the subsequent video frame identifier and contemporaneously with the displaying of the initial indication, a subsequent indication that item information is available that is responsive to the subsequent play location. *Id.* ¶¶ 87-90. Amazon Devices then receive, following the displaying of the subsequent indication, a request responsive to the initial indication for item information. *Id.* ¶¶ 91-95. Finally, Amazon Devices display item information associated with the initial indication that item information is available. *Id.*

c. Amazon's Infringement of the `282 Patent

Amazon infringes at least apparatus claim 19 of the '282 patent pursuant to 35 U.S.C. § 271(a). As previously discussed, Amazon Devices stream content from the Amazon Video Library. Claim 19 of the '282 patent recites:

> An apparatus capable of processing data and instructions executable by a processor; the apparatus, when executing the instructions, performs the steps of:
>
> receiving, from a user during a playing of a video, a request for information relating to a depiction within the video;
>
> identifying a request location that is responsive to the request for information;
>
> retrieving a first video frame identifier that is responsive to the request location, and contemporaneously retrieving a second video frame identifier that is different from the first video frame identifier and that is responsive to a location that is prior to the request location; and
>
> displaying information associated with the first video frame

> identifier, and contemporaneously displaying information associated with the second video frame identifier that is different from the information associated with the first video frame identifier.

'282 patent, col. 36, ln. 58 to col. 37, ln. 7.

Amazon Devices are capable of performing the functionality of each claim limitation present in claim 19 of the '282 patent. Reader Decl. ¶¶ 96-117. Amazon Devices are capable of receiving, from a user during a playing of a video, a request for information relating to a depiction within the video. *Id.* ¶¶ 109-110. Thereafter, Amazon Devices are capable of: identifying a request location that is responsive to the request for information; and retrieving a first video frame identifier that is responsive to the request location and, contemporaneously, a second video frame identifier that is different from the first video frame identifier and that is responsive to a location that is prior to the request location. *Id.* ¶¶ 111-114. Amazon Devices are capable of displaying information associated with the first video frame identifier and, contemporaneously, information associated with the second video frame identifier that is different from the information associated with the first video frame identifier. *Id.* ¶¶ 115-117.

2. CustomPlay Will Suffer Irreparable Harm Without An Injunction

In the patent-infringement context, "[i]rreparable injury encompasses different types of losses that are often difficult to quantify, including lost sales and erosion in reputation and brand distinction." *Douglas Dynamics, LLC v. Buyers Prods. Co.*, 717 F.3d 1336, 1344 (Fed. Cir. 2013). These various forms of harm are entwined with loss of the exclusivity that is the foundation of patent law. U.S. Const. art. I, § 8, cl. 8; *Douglas Dynamics*, 717 F.3d at 1345 ("Exclusivity is closely related to the fundamental nature of patents as property rights. It is an intangible asset that is part of a company's reputation, and here, Douglas's exclusive right to make, use, and sell the patented inventions is under attack by Buyers's infringement.").

CustomPlay satisfies the irreparable injury factor based on Amazon's infringement of

CustomPlay's right to exclude and based on the injury that the infringement causes CustomPlay's reputation as an innovator. Absent an injunction, Amazon will likely continue its infringement. Monetary damages are not adequate to compensate CustomPlay for its damages, which are not merely financial.

a. The Injury to CustomPlay's Right to Exclude is Irreparable

Patent rights are rooted in the Constitution's grant of authority for Congress to "secur[e] for limited Times to . . . Inventors the exclusive Right to their respective . . . Discoveries." U.S. Const. Art. I, § 8, cl. 8. To effectuate that authorization, "Congress has enacted patent laws rewarding inventors with a limited monopoly." *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2124 (2014). The patentee obtains the right to invoke the "State's power" to prevent others from engaging in certain activities. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). Those activities include "making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States," 35 U.S.C. § 154(a)(1), and if the invention is a process, "using, offering for sale or selling throughout the United States," *id.*

Infringement of the patentee's right to exclude is an "injury" that is often irreparable, because a patentee's intentions for its innovation do not necessarily consist of merely seeking rent from would-be trespassers. As Chief Justice Roberts explained in his *eBay* concurrence:

> From at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases. This "long tradition of equity practice" is not surprising, given the difficulty of protecting a right to exclude through monetary remedies that allow an infringer to use an invention against the patentee's wishes.

eBay, 547 U.S. at 395 (Roberts, C.J., concurring).

CustomPlay has developed software applications that provide in-depth information to

movie viewers while they watch a movie. Abecassis Decl. ¶¶ 4-13. These applications provide contextual information that automatically identifies performers, locations, music and exceptional items, in video content, as it is displayed on screen. *Id.* CustomPlay's business model centers on the ability to partner with entertainment content providers, showcasing its technology as a value-added feature that end users of content providers can enjoy. *Id.* at ¶ 15. The technology for CustomPlay's movie companion applications is cutting edge and the marketplace for such technology is therefore nascent. In a business-to-business marketplace that is young and this complex, it is difficult, if not impossible, to accurately value CustomPlay's right to exclude. Indeed, other courts considering requests for injunctive relief have expressed the view that the violation of a patent owner's right to exclude can present a situation where monetary damages cannot adequately compensate the patent holder for that injury:

> For example, when an infringer saturates the market for a patented invention with an infringing product or damages the patent holder's good will or brand name recognition by selling infringing products, that infringer violates the patent holder's exclusionary right in a manner that cannot be compensated through monetary damages. This is because it is impossible to determine the portions of the market the patent owner would have secured but for the infringer's actions or how much damage was done to the patent owner's brand recognition or good will due to the infringement.

Commonwealth Sci. & Indus. Research Org. v. Buffalo Tech. Inc., 492 F. Supp. 2d 600, 605 (E.D. Tex. 2007).

Here, as in *Commonwealth*, the patented CustomPlay technology is not limited to a minor component in Amazon's X-Ray feature. The CustomPlay Patents are "the core technology embodied" in Amazon's X-Ray feature. *Commonwealth*, 492 F. Supp. 2d at 606. Because Amazon's infringement involves the "essence of the technology and is not a small component of

[the accused infringer's] products, monetary damages are less adequate" in compensating CustomPlay for Amazon's future infringement. *Id.*[1]

Monetary relief is inadequate to compensate for the Amazon's infringement, which has irreparably harmed CustomPlay and will continue to do so absent injunctive relief.

b. Amazon's Infringement Injures CustomPlay's Reputation as an Innovator

Amazon's infringement injures CustomPlay's reputation as an innovator. Infringement, the Federal Circuit has explained, can harm a company's reputation, "particularly its perception in the marketplace by customers, dealers, and distributors." *Douglas Dynamics*, 717 F.3d at 1344. In *Douglas Dynamics*, the Federal Circuit found irreparable harm to the patent owner because it would be perceived as less of an innovator if infringers could incorporate the innovations without crediting the patentee. *Id.* at 1344. Exclusivity, the Federal Circuit explained, is "an intangible asset that is part of a company's reputation." *Id.* at 1345.

Like Douglas Dynamics, CustomPlay's reputation as an innovator is critical to its ability to compete in the ever-evolving digital entertainment marketplace. Abecassis Decl. ¶¶ 15-18. The presence of the patented features in Amazon's products creates an appearance that CustomPlay's corresponding features are commonplace, not innovative. Amazon's infringement thus robs CustomPlay of the recognition and good will to which CustomPlay is entitled in the minds of businesses and consumers alike. CustomPlay is irreparably harmed by Amazon's infringement.

[1] For the same reason, the existence of a causal nexus between the infringement and the irreparable harm is beyond dispute. CustomPlay seeks to enjoin only Amazon's infringing X-Ray service. *See Genband US LLC v. Metaswitch Networks Corp.*, --- F.3d ---, No. 2017-1148, 2017 WL 2918848, at *5 n.2 (Fed. Cir. July 10, 2017) ("The causal nexus inquiry may have little work to do in an injunction analysis when the infringing product contains no feature relevant to consumers' purchasing decisions other than what the patent claims. In such a case, causal nexus and consumer demand may be apparent from the simple act of infringing sales.").

c. The Injury to CustomPlay's Market Position Is Irreparable

Harm to a patentee's position in the marketplace establishes irreparable harm. *See Abbot*, 544 F.3d at 1362 ("Loss of market position [is] evidence of irreparable harm.").

CustomPlay aims to enter a strategic partnership with digital-entertainment content providers, so that the content providers build CustomPlay's patented movie-companion applications into their platforms, and consumers use the applications as value-added features. Abecassis Decl. ¶ 15. In particular, CustomPlay's goal is to partner with one or more providers of video streaming, with CustomPlay performing the role of creating the data overlays relating the pertinent enhanced information to the audiovisual content. CustomPlay has already developed expertise in that mapmaking enterprise, with a fully functional version available for use in conjunction with PC-based DVD playback.

The CustomPlay patents plainly entitle CustomPlay alone to control who makes, uses or sells this new technology, yet Amazon has seized that invaluable first-mover advantage for itself, in full knowledge of CustomPlay's patent rights.[2] As industry observers have recognized, Amazon's X-Ray offerings have given it "a competitive advantage in the growing streaming video market where it's trying to take on services like Netflix and Hulu, among others." *See* Ex. 1 hereto, https://techcrunch.com/2016/02/22/amazon-brings-x-ray-to-web-video/ (last accessed July 24, 2017). That "competitive advantage" has been gained entirely through the infringement of CustomPlay's patented technology.

[2] CustomPlay approached Amazon about a potential strategic partnership but was rebuffed, after which Amazon added the X-Ray feature to its video-streaming services, to great fanfare. *See* D.E. 1 ¶¶ 21-27; D.E. 1-6 to 1-10.

Loss of that first-mover advantage is severely and irreparably harmful to CustomPlay's ability to engage strategic partners. Abecassis Decl. ¶¶ 17-19. Amazon is pillaging the core technologies to which CustomPlay has devoted years of labor and many millions of dollars. CustomPlay's market position has been severely compromised, and the harm cannot be remedied with monetary damages alone.

3. The Harm to CustomPlay If An Injunction Is Not Granted Outweighs Any Conceivable Harm to Amazon from Being Ordered to Stop Infringing

"A party cannot escape an injunction simply because it is smaller than the patentee or because its primary product is an infringing one." *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1156 (Fed. Cir. 2011); *see also Aria Diagnostics, Inc. v. Sequenom, Inc.,* 726 F.3d 1296, 1305 (Fed. Cir. 2013) ("A record showing that the infringer will be put out of business is a factor, but does not control the balance of hardships factor.") (citations omitted). "On the other hand, requiring [the patentee] to compete against its own patented invention . . . places a substantial hardship on [the patentee]." *Robert Bosch*, 659 F.3d at 1156.

In the present case, not only has Amazon freely chosen to infringe CustomPlay's patents, but an injunction would not cause Amazon any cognizable hardship. Amazon is one of the world's largest companies. *See* Adam Samson, *Amazon leaps into $500bn club*, Financial Times, https://www.ft.com/content/685c2ff8-44f9-3cdc-9f52-62438a302b2a (July 26, 2017). Its video-streaming services would remain fully functional after the infringing X-Ray features are disabled, and a multitude of other Amazon products and services, which are completely unrelated to CustomPlay's patented technology, would be unaffected. *See Douglas Dynamics, LLC,* 717 F.3d at 1345. Indeed, Amazon's video-streaming services succeeded in the past without the infringing X-Ray feature, and even now only a portion of its content is available with the infringing X-Ray capabilities. *See id.* (noting accused infringer's acknowledgement that "its new design around was

ready for implementation"). Moreover, as a technical matter, it would be a simple – indeed, trivial – matter for Amazon to disable the X-Ray feature in its video-streaming services, and doing so would not impact Amazon's ability to continue offering those services without the infringing capabilities. Reader Decl. ¶ 118. In all likelihood, Amazon already has such capability built into its system, for testing purposes. *Id.* An injunction would work no meaningful hardship to Amazon.

In contrast, without an injunction, CustomPlay's investment in its technology would be pillaged and the years of work and millions of dollars spent developing, validating, and commercializing its product would be for naught. Abecassis Decl. ¶ 14. Requiring CustomPlay to compete against its own patented invention – and against Amazon, one of the largest corporations the world has ever known – when attempting to promote its inventions to others places a substantial hardship on CustomPlay. *Robert Bosch*, 659 F.3d at 1156. Any conceivable hardship Amazon alleges it will suffer pales in comparison.

4. A Preliminary Injunction Would Serve the Public Interest

"The patent laws promote . . . progress by offering a right of exclusion for a limited period as an incentive to inventors to risk the often enormous costs in terms of time, research and development" needed to create a new product and bring it to the market. *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974). Thus, "the 'encouragement of investment-based risk is the fundamental purpose of the patent grant, and is based directly on the right to exclude.'" *Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1383 (Fed. Cir. 2006) (quoting *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 599 (Fed. Cir. 1985)). "The statutory period of exclusivity reflects the congressional balance of interests, and warrants weight in considering the public interest." *Abbott Labs*, 544 F.3d at 1362.

The imposition of a preliminary injunction would serve the public interest by assuring

patent owners like CustomPlay that their expenditure of time, money, and creative talents in researching and developing their inventions will not be wasted. Likewise, the public interest would be grossly disserved by showing inventors that their investment of time, money and creative talents is pointless because a market behemoth can simply take the resulting innovation with impunity. Moreover, the public will not lose the benefit of the technology, because CustomPlay remains committed to its commercialization. The question is only whether that commercialization will be achieved legally with respect for CustomPlay's patent rights, or unlawfully in derogation of those rights. The public has no valid interest in the latter.

IV. CONCLUSION

CustomPlay's motion for a preliminary injunction should be granted and Amazon, its representatives, agents, servants, employees, attorneys and those persons in active concert or participation with Amazon, should be preliminary enjoined from directly or indirectly making, using, selling, or otherwise offering for sale the infringing X-Ray feature for movies and TV shows.

REQUEST FOR HEARING

CustomPlay requests an evidentiary hearing on this motion for preliminary injunction. A hearing would be helpful for the Court in evaluating the evidence and addressing the various preliminary injunctions factors and how they apply in this case. CustomPlay estimates that one to two days would be required for the hearing, and requests that the Court conduct said hearing at the earliest available opportunity, given the nature of, and the irreparable harm caused by, Amazon's ongoing infringement.

Dated: July 27, 2017

Respectfully submitted,

/s/ John C. Carey
John C. Carey (FBN: 78379)
jcarey@careyrodriguez.com
Ernesto M. Rubi (FBN: 32014)
erubi@careyrodriguez.com
Amy M. Bowers-Zamora (FBN: 105755)
abowers@careyrodriguez.com
CAREY RODRIGUEZ
MILIAN GONYA, LLP
1395 Brickell Avenue, Suite 700
Miami, Florida 33131
Tel.: (305) 372-7474
Fax: (305) 372-7475

Attorneys for Plaintiff CustomPlay, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of the Court using CM/ECF on July 27, 2017 and will be personally served contemporaneously with the Complaint and Summons in this action upon Defendant Amazon.com, Inc., by and through its registered agent, Corporation Service Co., 300 Deschutes Way SW, Ste. 304, Tumwater, WA 985010000, on the date and time specified in the forthcoming verified return of service.

By: */s John C. Carey*
John C. Carey