

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

Promethean Inc.,)	
)	
Plaintiff,)	
)	Case No. 9:10-cv-106
v.)	
)	
eInstruction Corporation,)	
)	
Defendant.)	
)	

COMPLAINT

Plaintiff Promethean Inc. (‘Promethean’), by its attorneys at The Heartfield Law Firm and McDermott Will & Emery LLP, hereby brings this action against Defendant eInstruction Corporation (‘eInstruction’) and alleges as follows:

NATURE OF THE ACTION

1. Falsely marking an unpatented article for the purpose of deceiving the public is unlawful under the false marking statute, 35 U.S.C. § 292, and is punishable by a civil penalty.
2. eInstruction Corporation has committed and continues to commit this offense by deceptively marking its products and its advertising with a U.S. patent that plainly does not cover them.
3. eInstruction’s false marking injures both the public and eInstruction’s competitors, including Promethean. Promethean brings this action under the false marking statute to hold eInstruction accountable for its bad acts.

THE PARTIES

4. Plaintiff Promethean Inc. is a Delaware corporation with its principal place of business in Alpharetta, Georgia.

5. Upon information and belief, Defendant eInstruction Corporation is a Texas corporation with its principal place of business in Denton, Texas, in the Eastern District of Texas.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

7. This Court has personal jurisdiction over eInstruction because eInstruction has continuous and systematic contacts with Texas including the maintenance of its headquarters in Denton, Texas. Additionally, upon information and belief, eInstruction has committed violations of the false marking statute in Texas.

8. Venue is proper in the Eastern District of Texas pursuant to 28 U.S.C. §§ 1391(b).

FACTS

9. Promethean is a leading educational technology company. In the United States, Promethean's educational technology products include interactive whiteboards, learning response systems, wireless interactive tablets, and accessories for these products.

10. eInstruction is one of Promethean's largest competitors in the U.S. market. eInstruction directly competes with Promethean in selling interactive whiteboards, learning response systems, and wireless interactive tablets. In the sale of wireless interactive tablets, eInstruction is the market leader, according to information published by Futuresource Consulting Limited.

11. Upon information and belief, eInstruction holds several U.S. patents, including U.S. Patent No. 6,930,673 (the "673 patent"), entitled "Collaborative Input System."

12. eInstruction marks its wireless interactive tablet product, the Interwrite MOBI (the "Mobi"), with the 673 patent. Specifically, the Mobi bears a sticker marked with "U.S. Pat. No. 6,930,673."

13. The Mobi is not covered by any claim of the 673 patent.

14. A representative claim of the 673 patent is claim 1, which claims:

A collaborative input system comprising:

a host computer;

a display associated with the host computer, the host computer being constructed and arranged to execute an application to provide an image on the display;

a plurality of electromagnetic digitizers provided separate from the host computer, each digitizer having an input surface defining a space that is mapped to coincide with the display via computer readable medium, at the host computer, having stored thereon sequences of instructions for mapping the space to the display, each digitizer being constructed and arranged to have no display features, each digitizer having a pen structure operatively associated with the input structure such that proximity of the pen structure with respect to the input surface, as a result of a user's input, is detected by the digitizer;

a wireless communication link between a single transceiver associated with the host computer and the plurality of the digitizers such that a user's input can be transmitted from one of the digitizers, be received by the host computer, and be represented graphically on the display together with the image in real time, thereby permitting a user associated with the one digitizer to personally provide input to the host computer displaying the image; and

computer readable medium, at the host computer, having stored thereon sequences of instructions for prioritizing and managing data from each of the plurality of digitizers.

15. In other words, claim 1 of the ¶73 patent purports to claim a system comprised of a host computer, a plurality of digitizers (tablets), a wireless communications link, and software on the host computer.

16. The Mobi is not such a system.

17. The Mobi is not a "host computer" as that term is used in the ¶73 patent.

18. Upon information and belief, eInstruction does not sell "host computers" as that term is used in the ¶73 patent.

19. The Mobi is not a wireless communications link.

20. The Mobi is not and does not contain software residing on a host computer.

21. The Mobi is a digitizer.

22. Each Mobi tablet is not a "plurality of digitizers," as that term is used in the ¶73 patent.

23. The digitizers that are part of the system or method covered by each claim of the ¶73 patent must be "arranged to have no display features."

24. Each Mobi tablet has a liquid crystal display.

25. Upon information and belief, eInstruction knows that the ¶73 patent does not cover the Mobi. eInstruction's knowledge is manifested by its prosecution of the ¶73 patent. eInstruction knows that it had to add the "arranged to have no display features" limitation in order to get the claims of the ¶73 patent allowed by the examiner for the U.S. Patent and Trademark Office. eInstruction knows that its Mobi tablets have a liquid crystal display.

26. Upon information and belief, eInstruction also knows that the system claims of the ¶73 patent require a "host computer." eInstruction knows that the Mobi is not a host computer and that eInstruction does not sell host computers. eInstruction knows that each Mobi

is a single digitizer rather than a plurality of digitizers. eInstruction knows that the Mobi is not and does not contain software residing on a host computer.

27. eInstruction's knowledge that the '673 patent does not cover the Mobi is further manifested by its conduct in attempting to enforce the '673 patent against Promethean. eInstruction has filed a complaint against Promethean in the U.S. International Trade Commission. eInstruction's complaint and communications between the parties since the complaint was filed establish that eInstruction believes that its claim against Promethean is for inducement of infringement. eInstruction knows that it has no claim for direct infringement against Promethean for the sale of Promethean's tablet products, because eInstruction recognizes that a tablet device standing alone, whether Promethean's or eInstruction's, is not covered by the claims of the '673 patent.

28. Upon information and belief, through its marking and its advertising, eInstruction intends to deceive the public into believing that the '673 patent covers the Mobi. eInstruction further intends to deceive the public into believing that its tablets are the only tablets that can be lawfully used.

29. Upon information and belief, eInstruction has also falsely marked its Interwrite DualBoard product (the "DualBoard") with the '673 patent. Its posters for DualBoard are marked with the phrase "U.S. Patent # 6,930,673."

30. The DualBoard is not covered by the '673 patent.

31. Upon information and belief, by virtue of its design and marketing of the DualBoard, eInstruction knows that the DualBoard is not covered by the '673 patent. eInstruction knows that the DualBoard is not a host computer. eInstruction knows that the DualBoard is not a plurality of digitizers. eInstruction knows that the DualBoard is not and does

not contain software residing on a host computer. eInstruction's knowledge that the DualBoard is not covered by the '673 patent is further established by its description of the technology covered by the '673 patent in its complaint against Promethean in the U.S. International Trade Commission.

32. eInstruction has also falsely marked its RFCOM product (the "RFCOM"). Its posters for DualBoard state that RFCOM is covered by "U.S. Patent # 6,930,673."

33. RFCOM is not covered by the '673 patent.

34. Upon information and belief, by virtue of its marketing of RFCOM, eInstruction knows that RFCOM is not covered by the '673 patent. eInstruction knows that RFCOM is not a host computer. eInstruction knows that RFCOM is not a plurality of digitizers. eInstruction knows that RFCOM is not and does not contain software residing on a host computer. eInstruction's knowledge that RFCOM is not covered by the '673 patent is further established by its description of the technology covered by the '673 patent in its complaint against Promethean in the U.S. International Trade Commission.

35. Upon information and belief, eInstruction has also falsely marked its RF Hub product (the "RF Hub"). Its posters for DualBoard state that the RF Hub is covered by "U.S. Patent # 6,930,673."

36. The RF Hub is not covered by the '673 patent.

37. Upon information and belief, by virtue of its marketing of the RF Hub, eInstruction knows that the RF Hub is not covered by the '673 patent. eInstruction knows that the RF Hub is not a host computer. eInstruction knows that the RF Hub is not a plurality of digitizers. eInstruction knows that the RF Hub is not and does not contain software residing on a host computer. eInstruction's knowledge that the RF Hub is not covered by the '673 patent is

further established by its description of the technology covered by the ¶673 patent in its complaint against Promethean in the U.S. International Trade Commission.

38. eInstruction has also falsely marked its Interwrite Mobi Dock product (the "Mobi Dock"). Its posters for the Mobi Dock are marked with the phrase "U.S. Patent # 6,930,673."

39. The Mobi Dock is not covered by the ¶673 patent.

40. Upon information and belief, by virtue of its marketing of the Mobi Dock, eInstruction knows that the Mobi Dock is not covered by the ¶673 patent. eInstruction knows that the Mobi Dock is not a host computer. eInstruction knows that the Mobi Dock is not a plurality of digitizers. eInstruction knows that the Mobi Dock is not and does not contain software residing on a host computer.

41. eInstruction's marking of its products with a patent that does not cover them deceives and harms the public. The public is harmed by being led to believe that the marked eInstruction products are patented when, in fact, they are not. This misinformation impacts purchasing decisions. The public is also harmed by the general injury false marking inflicts on the patent system.

42. Promethean is also specifically harmed by eInstruction's false marking. eInstruction has used its submission of its falsely marked Mobi product to persuade the U.S. International Trade Commission to investigate Promethean. eInstruction also uses its false claims in its advertising and marketing as a means to win competitive advantage over Promethean, ultimately costing Promethean sales and market share.

COUNT ONE – FALSE MARKING

43. Promethean incorporates and realleges the above-stated allegations as if fully asserted herein.

44. eInstruction has violated and continues to violate the false marking statute by marking, affixing, and using in advertising in connection with unpatented articles, including the Mobi, DualBoard, RFCOM, RF Hub, and Mobi Dock, the word "patent" and words and numbers importing the same is patented, with the purpose of deceiving the public.

45. eInstruction is subject to a fine of up to \$500 for each falsely marked article it has sold, with such penalty to be split evenly between Promethean and the United States.

JURY DEMAND

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

REQUESTED RELIEF

WHEREFORE Promethean requests that the Court enter judgment in its favor and against eInstruction and grant the following relief:

- (a) A determination that eInstruction has violated 35 U.S.C. § 292;
- (b) An award to Promethean and the United States of the full penalty arising from each of eInstruction's false marking violations; and
- (c) Granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ J. Thad Heartfield

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