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United States District Court,  
 N.D. California.  
 EXPEREXCHANGE, INC., Plaintiff(s),  
 v.  
 DOCULEX, INC., et al., Defendant(s).  
 No. C-08-03875 JCS.

Nov. 16, 2009.

Daniel Ralph Richardson, Richardson Intellectual Property Law, San Francisco, CA, for Plaintiff.

David Wesley Swift, Kinsella, Weitzman, Iser, Kump & Aldisert, LLP, Jeremiah Tracy Reynolds, Kinsella Weitzman, Santa Monica, CA, for Defendants.

**ORDER GRANTING IN PART AND DENYING IN PART STATUTE OF LIMITATIONS MOTION FOR SUMMARY JUDGMENT, GRANTING DISCOVERY CRACKER SUMMARY JUDGMENT MOTION, DENYING MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT, AND DENYING RULE 56(f) MOTION [Docket Nos. 55, 61, 80, 89]**

JOSEPH C. SPERO, United States Magistrate Judge.

**I. INTRODUCTION**

\*1 In this case, ExperExchange contends that DocuLex's incorporation of ExperExchange's optical character recognition ("OCR") software into some of DocuLex's document management software products exceeds the scope of the license agreement between the parties. DocuLex has filed two summary judgment motions. The first seeks summary judgment on all of ExperExchange's claims on the basis that they are barred under the relevant statutes

of limitations and other doctrines ("the Statute of Limitations Summary Judgment Motion"). The second motion seeks summary judgment that DocuLex's Discovery Cracker product does not contain ExperExchange's OCR software and therefore, all of ExperExchange's claims fail as to that product ("the Discovery Cracker Summary Judgment Motion"). ExperExchange, in turn, has filed a Motion for Leave to Amend Complaint ("Motion to Amend"), seeking to add claims for fraud and to name an additional defendant, CT Summation, Inc. Plaintiff has also requested a continuance under Rule 56(f) of the Federal Rules of Civil Procedure to allow for additional discovery relating to issues raised in connection with Defendants' summary judgment motions ("the Rule 56(f) Motion"). The parties have consented to the jurisdiction of a United States magistrate judge pursuant to 28 U.S.C. § 636(c).<sup>FN1</sup>

<sup>FN1</sup>. At this point in the litigation, CT Summation is not a party to the action and has neither consented to nor declined magistrate jurisdiction.

A hearing on the motions was held on Friday, November 6, 2009 at 9:30 a.m. For the reasons stated below, the Statute of Limitations Summary Judgment Motion is GRANTED in part and DENIED in part. The Discovery Cracker Summary Judgment Motion is GRANTED. The Motion to Amend is DENIED. Plaintiff's Rule 56(f) request for additional discovery is DENIED.

**II. BACKGROUND**

**A. Undisputed Facts Regarding Statute of Limitations Summary Judgment Motion**

The parties have stipulated to the following undisputed facts in the Joint Statement of Undisputed Facts submitted in support of the Statute of Limitations Summary Judgment Motion (quoted verbatim):

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*JOINT STATEMENT OF UNDISPUTED FACTS*

DocuLex, Inc. is a small software company located in Winter Haven, Florida. [FN 1: Declaration of Carl J. Strang, III (“Strang Decl.”), ¶ 2, filed on July 23, 2009, in support of Defendants’ Motion for Summary Judgment, or in the Alternative, Summary Adjudication] DocuLex designs and sells document management software products that allow customers to efficiently manage their company records and information. [FN 2: *Id.* ¶ 3; Declaration of David Bailey (“Bailey Decl.”) ¶ 2, filed on July 23, 2009, in support of Defendants’ Motion for Summary Judgment, or in the Alternative, Summary Adjudication] ExperExchange, Inc. (formerly ExperVision, Inc.) is a core technology company that licenses its optical character recognition (OCR) software-entitled Recognition Toolkit Software (“RTK”) to manufacturers and software developers in exchange for royalty fees. [FN 3: Strang Decl., ¶ 4; Bailey Decl., ¶ 3]

**A. Plaintiff Enters Into a License Agreement With DocuLex in 1999**

\*2 In May of 1999, DocuLex entered into a Recognition Toolkit Software License Agreement (the “License Agreement”) with ExperExchange. The License Agreement is a standard form contract that was prepared by ExperExchange’s transactional attorneys for use with all ExperExchange’s licensees. [FN 4: Deposition of Dr. Wang (“Wang Depo.”) at 116: 13-14. *See also* Deposition of Troy Sarmiento (“Sarmiento Depo.”) at 77: 19-20] The basic terms of the License Agreement remained unchanged and ExperExchange did not discuss any of the basic terms of the License Agreement with DocuLex. [FN 5: Sarmiento Depo. at 39: 3-5] Attachments 4 and 6 to the License Agreement were provided by DocuLex. By its terms, the License Agreement could be terminated by either party on a yearly basis or, if they chose not to terminate, it would be renewed automatically in May of each year. [FN 6: 1999 RSLA Agreement (“RSLA”) <sup>FN2</sup> at § 5(b)] Section 1(c) of the License Agreement grants Doc-

uLex a non-exclusive license to “reproduce and distribute copies of the RTK, in executable form only, together with and as an integral and non-severable part of the products manufactured and licensed by Licensee, as described more fully on Attachment 4 hereto.” [FN 7: *Id.* at § 1(c)] Attachment 4 states “see attached.” [FN 8: *Id.* at 10] Attached to Attachment 4 is a marketing brochure for DocuLex’s PDF. Capture product, which was provided by DocuLex. [FN 9: *Id.* at 11] Section 2(b) of the License Agreement states:

FN2. The Court notes that there is a single licensing agreement, entitled “RTK Software License Agreement,” entered into on May 24, 1999. *See* Declaration of Dale Kinsella in Support of Defendants’ Motion for Summary Judgment, or in the Alternative, Summary Adjudication [docket no. 55] (“Kinsella State of Limitations Summary Judgment Motion Decl.”), Ex. A. The parties refer to this agreement alternately as the “License Agreement” and the “RSLA.” The Court refers to the agreement as the “License Agreement.”

Licensee shall not: ... Authorize third parties or any other entity to use the portion of the Licensee Application that utilizes the RTK, or any part thereof, simultaneously on more than a single workstation or computer processor within a workstation or computer unless the third party has purchased additional licenses from licensee. [FN 10: *Id.* at 1]

Section 8(c) of the License Agreement states in relevant part:

“ExperVision agrees that the types of products described in Attachment 4, and products similar in nature, including future versions of these product types, are approved by ExperVision for use with the RTK. Licensee agrees to inform ExperVision in advance, of the nature of new, substantially different, Licensee Applications that would use

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the RTK, whether currently existing or hereafter developed” [FN 11: *Id.* at 3]

**B. In 1999, DocuLex Incorporates the RTK Software into its PDF Product Line and Pays Royalty Payments Accordingly**

Within the first month after the License Agreement was signed, DocuLex began incorporating ExperExchange's RTK software into multiple products (not just the PDF. Capture product listed in the License Agreement) and paying royalty payments. The 1999 royalty reports, for example, clearly show that DocuLex incorporated ExperExchange's RTK software into three of its products, OCR-it, PDF-it, and PDF.Capture. [FN 12: Declaration of Bo Yan (“Yan Decl.”), ¶ 7, filed on July 23, 2009, in opposition to Defendants' Motion For Summary Judgment, or in the Alternative, Summary Adjudication. See also Declaration of Dale Kinsella (“Kinsella Decl.”), Ex. B at 1, filed on July 23, 2009, in support of Defendants' Motion For Summary Judgment, or in the Alternative, Summary Adjudication. See also Bailey Decl., ¶¶ 6-7; Sarmiento Depo. at 131:5-10] Indeed, the very first royalty report DocuLex provided to ExperExchange, dated July 10, 1999 (covering 6/1/99-6/30/99), states clearly on the top of the page: “Products Sold Using the Engine [RTK]: Ocr-it, Pdf-it, & Pdf.Capture.” [FN 13: Kinsella Decl., Ex. B at 1] From 1999 through 2007, ExperExchange's Chief Operations Officer, Bo Yan, spoke with DocuLex engineers on a regular basis providing technical support to DocuLex for the RTK software as incorporated into a number of different products. [FN 14: Yan Decl., ¶¶ 5-6; Griffith Decl., ¶ 5; Bailey Decl., ¶¶ 8-10] In 2001, Bo Yan visited DocuLex's offices in Florida, met with DocuLex engineers to discuss incorporating ExperExchange's RTK software into future DocuLex products, and stayed at the house of DocuLex's Vice President of Research and Development, David Griffith. [FN 15: Griffith Decl., ¶ 6; Bailey Decl., ¶ 11] ExperExchange also received numerous emails regarding

DocuLex's use of the RTK software in some products other than the PDF.Capture product explicitly mentioned in the License Agreement. For example, on April 11, 2001, a DocuLex customer sent an email to Troy Sarmiento, ExperExchange's OEM Manager, which stated: “Troy, Attached is an example of the problem that we discussed. We are using the DocuLex PDF-it product (version 4.020) incorporating your toolkit (rtk.ll version 6.10.35.0622).” [FN 16: See Kinsella Decl., Ex. J]

**\*3 C. Prior to 2008, ExperExchange Does Not Object to DocuLex's Use of the RTK Software**

From 1999 to 2007, ExperExchange never once informed DocuLex that its broad use of the RTK software exceeded the scope of the License Agreement. [FN 17: Griffith Decl., ¶¶ 7-8; Bailey Decl., ¶¶ 10-12] During this time, Bo Yan, in his role as being responsible for technical support, encouraged DocuLex to incorporate the RTK software into as many products as possible so that ExperExchange would earn additional royalties for each such use. [FN 18: Yan Decl., ¶ 7; Griffith Decl., ¶ 9; Bailey Decl., ¶ 12] Bo Yan also worked closely with DocuLex to fix any bugs associated with the RTK software. [FN 19: Yan Decl., ¶ 6; Griffith Decl., ¶ 10; Bailey Decl., ¶ 10]

**D. From 1999 Through 2008, Plaintiff Accepts Royalty Payments For the Allegedly Unauthorized Use and Renews the License Agreement Each Year**

From 1999 through 2007, ExperExchange did not inform DocuLex that they were allegedly in breach of the License Agreement. During this same time period, ExperExchange accepted royalty payments from DocuLex and chose to renew the License Agreement with DocuLex each year. [FN 20: Morgan Decl., ¶ 4. See also Sarmiento Depo. at 102:18-20] From 1999 through 2008, DocuLex used ExperExchange's RTK software in its PDF products and DocuLex reported its use of the RTK software in over 208 separate Royalty Reports it

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sent to ExperExchange. [FN 21: Morgan Decl., ¶ 5; Kinsella Decl., Ex. B]

#### **E. In Late 2007, Bo Yan Resigns**

In late 2007, shortly before ExperExchange first objected to DocuLex's broad use of the RTK software, Bo Yan, ExperExchange's Chief Operations Officer, resigned. Although they had worked together closely on technical support issues for nine years, Bo Yan never informed DocuLex of his resignation. [FN 22: Griffith Decl., ¶ 11; Bailey Decl. ¶ 14]

#### **F. In February 2008, After Nine Years of Cooperation Between the Parties, Plaintiff Attempts to Renegotiate the License Agreement**

In early 2008, ExperExchange attempted to renegotiate the License Agreement. On February 22, 2008, Sophie Li of ExperExchange sent DocuLex an email stating that the current term of the License Agreement was set to expire in a few months and that ExperExchange was in the process of "reclaiming the pricing policies and renegotiating the terms of each RTK Software License Agreement (RSLA) with our clients." [FN 23: Kinsella Decl., Ex. L] The parties then began negotiating via email the terms of a new license agreement. [FN 24: Kinsella Decl., Exs. M, N, O, P and Q] On March 18, 2008, Sophie Li of ExperExchange wrote to DocuLex that: "We know DocuLex has been using [Plaintiff's] OCR engine in nearly half of your products." [FN 25: Kinsella Decl., Ex. O] These emails do not claim that DocuLex had exceeded the scope of the License Agreement.

#### **G. In May 2008, After the Negotiations For a New Agreement Hit a Standstill, ExperExchange Asserts For the First Time that DocuLex Breached the 1999 Agreement**

\*4 After the negotiations for a new license agreement fell apart ExperExchange asserted that DocuLex had allegedly breached the License Agree-

ment. On May 9, 2008, ExperExchange wrote: "The latest RSLA signed on May 24th, 1999 authorizes DocuLex to distribute your Application software, PDF Capture and PDF Capture only. Now as you have told us and we have found through research, you have integrated RTK into about 10 other software products and distributed them in the market, which obviously breaches the contract." [FN 26: Kinsella Decl., Ex. R] Troy Sarmiento's email goes on to accuses DocuLex of "one of the most serious crimes of all times" and threaten civil and criminal actions against DocuLex and its officers. [FN 27: Kinsella Decl., Ex. R]

#### **B. Undisputed Facts Regarding Discovery Cracker Motion**

The parties have stipulated to the following undisputed facts in the Joint Statement of Undisputed Facts submitted in support of the Discovery Cracker Summary Judgment Motion (quoted verbatim):

##### **A. In 2003, DocuLex Acquires the Discovery Cracker Product**

In 2003, DocuLex acquired the Discovery Cracker product from Advocate Solutions, Inc. based in Chicago. [FN 1: Declaration of Carl Strang, III ("Strang Decl."), ¶ 2, filed on August 7, 2009, in support of Defendants' Motion For Summary Adjudication] The Discovery Cracker product processes data (such as emails and Microsoft Word documents), extracts meta data, and converts the files to industry standard image files. [FN 2: *Id.*, ¶ 3. See also Declaration of Jim Grebey ("Grebey Decl."), ¶ 2, filed on August 7, 2009, in support of Defendants' Motion For Summary Adjudication.] At this time, the Discovery Cracker product did not have an OCR engine. [FN 3: Strang Decl., ¶ 4; Grebey Decl., ¶ 2]

##### **B. From 2003 to 2007 DocuLex Sells the Discovery Cracker Product**

From 2003 to 2007, DocuLex sold thousands of

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copies of the Discovery Cracker product and earned approximately \$9.8 million in revenue from sales of the Discovery Cracker product. [FN 4: Strang Decl., ¶ 6]

**C. In 2007, DocuLex Enters Into Negotiations With ExperExchange To License the RTK Software For Use in the Discovery Cracker Product**

In July 2007, DocuLex approached ExperExchange about licensing ExperExchange's RTK software for use in the Discovery Cracker product, thereby adding OCR capability to the product. [FN 5: Strang Decl., ¶ 8; Grebey Decl., ¶ 5] The majority of the data files processed by the Discovery Cracker product were text files which did not need to be OCR'ed (such as emails and Word documents). DocuLex sought to add OCR capability for the files which would need to be OCR'ed in order to be searchable. [FN 6: Grebey Decl., ¶ 6] DocuLex did not envision charging more for the Discovery Cracker product once the OCR capability was added. [FN 7: *Id.*] On July 4, 2007, Bo Yan, ExperExchange's Chief Operations Officer, wrote to ExperExchange's CEO, Dr. Wang:

\*5 The product is called Discovery Cracker (DC), a solution to search for legal electronic proof on a hard disk. It searches for the files on a hard disk and index them as legal evidences. It is on the market place, and there is no OCR support yet, which means it can only process text-based documents.... According to Jim (COO) and Thom, adding OCR will only give the product a competitive edge, and they will not charge customers extra money for the OCR feature. [FN 8: Kinsella Decl., Ex. C]

Shortly thereafter, Bo Yan removed himself from the license negotiations for Discovery Cracker and wrote: "In case DocuLex contacts me, I can claim I know nothing about the detail negotiations." [FN 9: Declaration of Dale Kinsella ("Kinsella Decl."), Ex. D, filed on August 7,

2009, in support of Defendants' Motion For Summary Adjudication] After much back and forth, the parties were unable to come to terms for a new license agreement. [FN 10: Strang Decl., ¶ 8; Grebey Decl., ¶ 7]

**D. In August 2007, DocuLex Sells Its Litigation Division (Including the Discovery Cracker Product) to CT Summation**

In August 2007, DocuLex sold its Litigation Division (including the Discovery Cracker product) to CT Summation, Inc. [FN 11: Strang Decl., ¶ 9; Grebey Decl., ¶ 8; CT Summation Decl., ¶ 1] As part of this litigation, DocuLex received a declaration from CT Summation stating: "Neither version 4.8x nor 5.0x of Discovery Cracker included an OCR engine to create OCR text for image-only files, either before or after the acquisition by CT." [FN 12: CT Summation Decl., ¶¶ 2-3] As part of the sale, the DocuLex engineers who worked on the Discovery Cracker product went to work at CT Summation. [FN 13: Strang Decl., ¶ 11; Grebey Decl., ¶ 10]

**E. CT Summation Independently Negotiates License Agreement with ExperExchange to Add an OCR Engine to the Discovery Cracker Product**

After CT Summation acquired the Discovery Cracker product, CT Summation independently negotiated with ExperExchange to license ExperExchange's RTK software for use in the Discovery Cracker product. [FN 14: CT Summation Decl., ¶ 4; Grebey Decl., ¶ 11] On October 5, 2007, as part of the license negotiations, CT Summation wrote to ExperExchange to "explain the functionality of our products and how we plan to incorporate your OCR product." [FN 15: Kinsella Decl., Ex. F] CT Summation explained that "we do not have an OCR engine [in the Discovery Cracker product]." [FN 16: *Id.*] CT Summation further explained to Plaintiff that the OCR engine represented a very minor upgrade and "[b]ecause of this, we do not plan to increase the price of the

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product ...” [FN 17: *Id.*] On October 10, 2007, CT Summation entered into a License Agreement with ExperExchange to incorporate Plaintiff's RTK version 7 into the Discovery Cracker product. [FN 18: Kinsella Decl., Ex. G; CT Summation Decl., ¶ 4; Gebey Decl., ¶ 12]

#### **F. In February 2008, CT Summation Launches Discovery Cracker 5 .1, Which Includes an OCR Engine**

\*6 In February 2008, four months after it entered into a license agreement with ExperExchange, CT Summation launched its Discovery Cracker 5.1 product, which incorporated ExperExchange's RTK software. [FN 19: CT Summation Decl., ¶ 5; Gebey Decl., ¶ 13]

#### **G. In August 2008, ExperExchange Files Suit Against DocuLex Claiming Inter Alia that DocuLex's Discovery Cracker Product Had an OCR Engine and that ExperExchange was Entitled to a Percentage of the Acquisition Price CT Summation Paid to DocuLex**

In August 2008, ExperExchange filed the present lawsuit alleging that DocuLex infringed ExperExchange's copyrights and trademarks by using ExperExchange's RTK software in various products without proper authorization. [FN 20: See Complaint] Included in ExperExchange's list of infringing products was the Discovery Cracker product. [FN 21: See *id.*, Ex. D. See also *id.*, ¶ 16]

#### **C. The Complaint**

In the Complaint, ExperExchange names as defendants DocuLex and several of its officers, namely Carl Strang, Terry Morgan, David Bailey, Jim Grebey and David Griffith. Complaint, ¶¶ 2-7. According to the Complaint, Strang, Morgan and Bailey were the founders of DocuLex and hold the positions of President, Chief Financial Officer and Chief Strategy Officer, respectively. *Id.* The Complaint alleges that Jim Grebey is the Chief Operat-

ing Officer and David Griffith is the Chief Technology Officer of DocuLex. *Id.*<sup>FN3</sup>

FN3. It is undisputed that Jim Grebey left DocuLex when the Litigation Division of DocuLex was acquired by CT Summation, in 2007.

ExperExchange alleges that it has numerous copyrights for its OCR technology products, *see* Complaint, ¶ 13 & Ex. C (copyright registrations), and that it is the owner of the registered trademark EXPERVISION®. Complaint, ¶ 18 & Ex. B.<sup>FN4</sup> ExperExchange further alleges that the License Agreement granted DocuLex a non-exclusive license to sell and resell Plaintiff's RTK software for use in DocuLex's PDF.Capture, “which is a standalone, single-user desktop product.” *Id.*, ¶ 15. Finally, Plaintiff alleges that DocuLex incorporated Plaintiff's copyrighted software into at least 20 products that were not covered by the License Agreement, listed in Exhibit D to the Complaint.<sup>FN5</sup> *Id.*, ¶ 24 & Ex. D. ExperExchange asserts the following claims in this action:

FN4. According to the Complaint, ExperExchange is the successor in interest for EXPERVISION, Inc., which it purchased. Complaint, ¶ 1.

FN5. Plaintiff conceded at oral argument that Discovery Cracker is not listed in Exhibit D to the Complaint, or in the body of the Complaint.

*Claim One:* Direct copyright infringement against all defendants based on the allegation that Defendants “infringed some or all of Plaintiff's copyrights by publishing and placing upon on the market in excess of 20 separate and distinct products incorporating Plaintiff's registered copyrighted works or derivative works that were not covered by the [License Agreement];”

*Claim Two:* Contributory copyright infringement against DocuLex based on the allegation that

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DocuLex copied or aided and assisted in copying and making derivative works from Plaintiff's copyrighted RTK OCR technology;

*Claim Three:* Contributory copyright infringement against Carl Strang based on allegation that Carl Strang copied or aided and assisted in copying and making derivative works from Plaintiff's copyrighted RTK OCR technology;

\*7 *Claim Four:* Contributory copyright infringement against Carl Strang based on same allegations as Claim Three;<sup>FN6</sup>

FN6. In its Motion to Amend, Plaintiff acknowledges that Claims Three and Four are the same. See Motion to Amend at 7 (referring to Claim Three as "redundant").

*Claim Five:* Contributory copyright infringement against Terry Morgan based on allegation that Terry Morgan copied or aided and assisted in copying and making derivative works from Plaintiff's copyrighted RTK OCR technology;

*Claim Six:* Contributory copyright infringement against David Bailey based on allegation that David Bailey copied or aided and assisted in copying and making derivative works from Plaintiff's copyrighted RTK OCR technology;

*Claim Seven:* Contributory copyright infringement against Jim Grebey based on allegation that Jim Grebey copied or aided and assisted in copying and making derivative works from Plaintiff's copyrighted RTK OCR technology;

*Claim Eight:* Contributory copyright infringement against David Griffith based on allegation that David Griffith copied or aided and assisted in copying and making derivative works from Plaintiff's copyrighted RTK OCR technology;

*Claim Nine:* Breach of written contract against DocuLex based on the allegation that Defendants incorporated Plaintiff's OCR software into many

of their products without authorization, in violation of the License Agreement, which "specifically prohibited Defendants' use of Plaintiff's OCR technology in any other products [besides the single OCR product listed in the License Agreement, PDF. Capture], be they single user desktop, network or server based, without the specific written authorization of Plaintiff and the payment of an appropriate license fee."

*Claim Ten:* Trademark infringement in violation of § 43(a) of the Lanham Act against DocuLex based on the allegation that "Plaintiff's OCR runtime libraries as incorporated into Defendant's unauthorized products included the registered trademark, EXPERVISION®, of Plaintiff," which was likely to mislead purchasers of Defendants' products into thinking that those products were authorized by Plaintiff.

*Claim Eleven:* Trademark infringement, federal passing-off against DocuLex based on allegation that Defendants have offered Plaintiff's OCR technology and related services and equipment as its own products and services, constituting unfair competition.

*Claim Twelve:* Trademark infringement, California passing-off against DocuLex based on same allegations as Claim Eleven.

*Claim Thirteen:* Federal unfair competition against DocuLex based on allegation that DocuLex produced, sold and published products incorporating Plaintiff's OCR technology without the consent of Plaintiff, which was likely to mislead purchasers of Defendants' products into thinking that those products were authorized by Plaintiff.

*Claim Fourteen:* Unfair competition in violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.* and 17500 *et seq.* against DocuLex based on same allegations as Claim Thirteen.

*Claim Fifteen:* Conversion against DocuLex based on allegation that DocuLex created unauthorized

