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11 Attorneys for Defendant  
BEST BUY CO., INC.

12  
13  
14 **UNITED STATES DISTRICT COURT**  
15 **SOUTHERN DISTRICT OF CALIFORNIA**

16 CONFIDENT TECHNOLOGIES, INC., )  
17 a Delaware corporation, )

18 Plaintiff, )

19 vs. )

20 BEST BUY CO., INC., a Minnesota )  
21 corporation, )

22 Defendant. )

23 AND RELATED COUNTERCLAIMS. )  
24  
25  
26  
27  
28

Case No. 18-cv-2552 JLS (LL)

**ANSWER, AFFIRMATIVE  
DEFENSES, AND  
COUNTERCLAIMS TO  
PLAINTIFF'S COMPLAINT**

**DEMAND FOR JURY TRIAL**

Judge: Hon. Janis L. Sammartino  
Courtroom: 4D

1 Defendant BestBuy.com, LLC<sup>1</sup> (“Best Buy” or “Defendant”) responds to Plaintiff  
2 Confident Technologies, Inc.’s (“Confident” or “Plaintiff”) Complaint and Jury Demand  
3 (the “Complaint”) as follows:

4 **NATURE OF THE ACTION**

5 1. Best Buy admits that Confident’s Complaint purports to bring an action for  
6 patent infringement under the patent laws of the United States, 35 U.S.C. § 271, *et seq.*,  
7 but it denies that it has committed any acts of infringement.  
8

9 **THE PARTIES**

10 2. Best Buy is without knowledge or information sufficient to form a belief as to  
11 the truth of the allegations in paragraph 2, and therefore denies them.

12 3. Best Buy admits that Best Buy Co., Inc. is a Minnesota company with a  
13 principal place of business in Richfield, Minnesota. BestBuy.com, LLC is a Virginia  
14 Limited Liability Company with a principal place of business in Richfield, Minnesota.  
15

16 **JURISDICTION AND VENUE**

17 4. Best Buy admits that this Court has subject matter jurisdiction over patent  
18 infringement claims pursuant to 28 U.S.C. §§ 1331 and 1338(a), but denies Confident’s  
19 allegations of patent infringement.

20 5. For purposes of this action only, Best Buy does not contest personal  
21 jurisdiction. Best Buy denies the remaining allegations in paragraph 5, and specifically  
22 denies that it has committed any acts of infringement.  
23

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24 <sup>1</sup> Plaintiff’s Complaint is directed to another entity, Best Buy Co., Inc. Best Buy  
25 contacted Plaintiff and informed Plaintiff that Best Buy Co., Inc. is not associated with  
26 the services identified as infringing in the Complaint. Rather, without admitting to  
27 liability or to the veracity of Plaintiff’s allegations, BestBuy.com, LLC is the entity  
28 associated with the [www.bestbuy.com](http://www.bestbuy.com) website, from which individuals can join the  
“Forums, Blog & More” pages as identified in the Complaint. The parties have agreed  
to substitute BestBuy.com, LLC for Best Buy Co., Inc. and, on January 17, 2019, filed  
a joint stipulation substituting the parties. Best Buy answers the allegations in the  
Complaint on behalf of BestBuy.com, LLC.



1 “Best Buy Gaming News” and “Latest & Greatest.” Best Buy admits that Google’s  
2 reCAPTCHA V2 (checkbox) widget appears on the forums.bestbuy.com website if a user  
3 chooses to register. Best Buy admits that the right portion of the image shown in Paragraph  
4 9 of the Complaint appears to show a portion of the code then utilized for Best Buy’s  
5 website. Best Buy is without knowledge or information sufficient to form a belief as to the  
6 truth of the allegations regarding Google’s service script, and therefore denies those  
7 allegations. Best Buy denies the remaining allegations in paragraph 9, and specifically  
8 denies that all users are directed to complete the reCAPTCHA verification shown in  
9 paragraph 9 of the Complaint.

10 10. Best Buy admits that to start using Google’s reCAPTCHA service, a user must  
11 obtain an API key pair for its site. The key pair consists of a site key and secret key. The  
12 site key is used to invoke the reCAPTCHA service on its website. Best Buy admits that its  
13 website includes code to display the reCAPTCHA v2 (checkbox) widget. According to  
14 Google’s reCAPTCHA website, “reCAPTCHA v2 requires the user to click a checkbox  
15 indicating the user is not a robot. This will either pass the user immediately (with [n]o  
16 CAPTCHA) or challenge them to validate whether or not they are human.”<sup>2</sup> After Google’s  
17 reCAPTCHA widget verifies that the user is most likely a human, it provides a unique  
18 token to the user. Best Buy’s website gets the user’s response token and uses Google’s  
19 reCAPTCHA API to verify that the token is valid.<sup>3</sup> If the token is valid, the user is granted  
20 access to the website resource. Best Buy denies the remaining allegations in paragraph 10,  
21 and specifically denies that it has committed any acts of infringement, that the user is  
22 presented with a matrix of non-overlapping images, and that the user submits tokens  
23 associated with images.

24 11. Denied.

25  
26  
27 <sup>2</sup> <https://developers.google.com/recaptcha/docs/versions>

28 <sup>3</sup> <https://developers.google.com/recaptcha/docs/verify>

**FIRST CLAIM FOR RELIEF**  
**(Infringement of the '578 patent)**

1  
2  
3       12. Best Buy repeats and incorporates each of the preceding paragraphs as if fully  
4 set forth herein.

5       13. Denied.

6       14. Best Buy admits that to start using Google's reCAPTCHA service, a user must  
7 sign up for an API key pair for its site. The key pair consists of a site key and secret key.  
8 The site key is used to invoke the reCAPTCHA service on Best Buy's website. Best Buy  
9 further admits that, according to Google's reCAPTCHA website, it currently offers the  
10 following client-side integrations: reCAPTCHA v3; reCAPTCHA v2 (checkbox);  
11 reCAPTCHA v2 (invisible); and reCAPTCHA v2 (Android). Best Buy admits that  
12 reCAPTCHA v2 (invisible), as well as the other reCAPTCHA versions, do not infringe the  
13 '578 patent. Best Buy admits that its website includes code to display the reCAPTCHA v2  
14 (checkbox) widget. According to Google's reCAPTCHA website, "reCAPTCHA v2  
15 requires the user to click a checkbox indicating the user is not a robot. This will either pass  
16 the user immediately (with [n]o CAPTCHA) or challenge them to validate whether or not  
17 they are human."<sup>4</sup> After Google's reCAPTCHA widget verifies that the user is most likely  
18 a human, it provides a unique token to the user. Best Buy's website gets the user's response  
19 token and uses Google's reCAPTCHA API to verify that the token is valid.<sup>5</sup> If the token  
20 is valid, the user is granted access to the website resource. Best Buy denies the remaining  
21 allegations in paragraph 14, and specifically denies that it has committed any acts of  
22 infringement and that it directs or controls Google's reCAPTCHA service.

23       15. Best Buy admits that to start using Google's reCAPTCHA service, a user must  
24 sign up for an API key pair for its site. The key pair consists of a site key and secret key.  
25 The site key is used to invoke the reCAPTCHA service on its website. Best Buy denies the  
26

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27 <sup>4</sup> <https://developers.google.com/recaptcha/docs/versions>

28 <sup>5</sup> <https://developers.google.com/recaptcha/docs/verify>

1 remaining allegations in paragraph 15, and specifically denies that it has committed any  
2 acts of infringement.

3 16. Denied.

4 17. Denied.

5 18. Best Buy is without knowledge or information sufficient to form a belief as to  
6 the truth of the allegations in paragraph 18. Best Buy specifically denies that its use of  
7 reCAPTCHA V2 technology embodies other claims set forth in the '578 patent, and denies  
8 that it has committed any acts of infringement.

9 19. Best Buy reserves the right to assert any additional defenses or counterclaims  
10 based on any amendments to Plaintiff's infringement theories.

11 20. Denied.

12 21. Denied.

13 22. Denied.

14 23. Denied.

15 24. Denied.

16 25. Denied.

17  
18 **SECOND CLAIM FOR RELIEF**  
**(Declaratory Relief)**

19 26. Best Buy repeats and incorporates each of the preceding paragraphs as if fully  
20 set forth herein.

21 27. Best Buy denies that it has committed any acts of infringement. Otherwise,  
22 admitted.

23 28. Denied.

24 **PRAYER FOR RELIEF**

25 Best Buy denies that Confident is entitled to any relief in this case, and prays that  
26 the Court deny all relief sought by Confident.  
27  
28



1 irreparable, and Confident has an adequate remedy at law. Furthermore, the balance of  
2 hardships favors Best Buy, and an injunction against Best Buy would harm the public  
3 interest.

4 **FIFTH AFFIRMATIVE DEFENSE**  
5 **(Prosecution History Estoppel)**

6 33. Confident is estopped, by virtue of cancellations, amendments,  
7 representations, and/or concessions made to the U.S. Patent and Trademark Office during  
8 the prosecution of the '578 patent, or during the prosecution of any applications for patents  
9 from which they claim priority, or during inter partes review proceedings, from construing  
10 any claims of the '578 patent to have been infringed by Best Buy.

11 **SIXTH AFFIRMATIVE DEFENSE**  
12 **(Estoppel, Waiver, and Unclean Hands)**

13 34. Confident's purported claims are barred in whole or in part by one or more of  
14 the equitable doctrines of estoppel, waiver, unclean hands, and/or other equitable remedies.

15 **SEVENTH AFFIRMATIVE DEFENSE**  
16 **(Statutory Limitations on Damages and Costs)**

17 35. Confident's claims for damages and costs are limited by 35 U.S.C. §§ 286,  
18 287, and/or 288.

19 **COUNTERCLAIMS**

20 Defendant and Counterclaim-Plaintiff BestBuy.com, LLC ("Best Buy") asserts the  
21 following counterclaims against Plaintiff and Counterclaim-Defendant Confident  
22 Technologies, Inc. ("Confident"):

23 **THE PARTIES**

24  
25 1. Counterclaim-Plaintiff BestBuy.com, LLC ("Best Buy") is a Virginia Limited  
26 Liability Company with a principal place of business in Richfield, Minnesota.

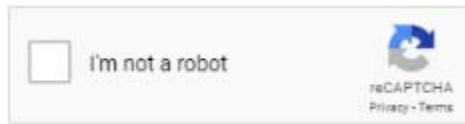




1           3. To participate in Best Buy’s Community Forum, website users can register  
2 using the form provided on the registration page, [https://forums.bestbuy.com/t5/user/use  
3 rregistrationpage](https://forums.bestbuy.com/t5/user/userregistrationpage).

4           4. Google’s reCAPTCHA v2 (checkbox) technology is incorporated into the  
5 registration page on the Best Buy Community Forum to distinguish between human and  
6 non-human users trying to gain access to particular website functionality.

7           5. The Google reCAPTCHA v2 (checkbox) method that is incorporated into  
8 the registration page on the Best Buy Community Forum includes code to display the  
9 below reCAPTCHA v2 (checkbox) widget:

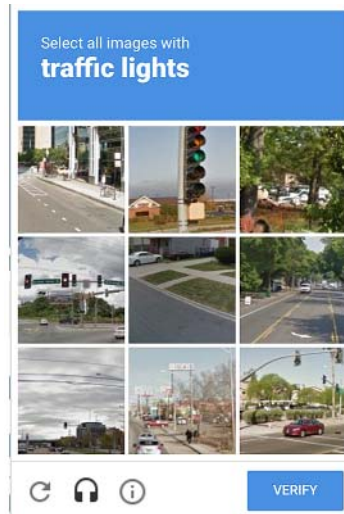


13           6. Upon information and belief, when a user clicks the checkbox, it triggers a  
14 sophisticated algorithm that, among other things, analyzes the user’s browser history and  
15 how the user moved his or her mouse before clicking on the checkbox to guess if the user  
16 is a human or non-human.

17           7. If the user is suspected to be human, the user is allowed to register with the  
18 community without further interaction.

19           8. If the user is suspected to be non-human, the Google reCAPTCHA widget  
20 presents the user with a reCAPTCHA challenge.

1           9. For example, Google’s reCAPTCHA challenge (shown below) instructs the  
2 user to select all images with traffic lights and then click “verify”:



12  
13           10. The Google reCAPTCHA v2 (checkbox) challenge, shown in Paragraph 9,  
14 does not instruct the user to select only one image.

15           11. The Google reCAPTCHA v2 (checkbox) challenge, shown in Paragraph 9,  
16 instructs the user to select all images that belong to the selected image category.

17           12. The Google reCAPTCHA v2 (checkbox) challenge, shown in Paragraph 9,  
18 includes images of multiple objects within each cell of a matrix.

19           13. The Google reCAPTCHA v2 (checkbox) challenge, shown in Paragraph 9,  
20 includes a bottom, right cell of a matrix with images of both a car and a traffic light.

21           14. The Google reCAPTCHA v2 (checkbox) challenge, shown in Paragraph 9,  
22 includes over-lapping images within the cells of a matrix.

23           15. The Google reCAPTCHA v2 (checkbox) challenge, shown in Paragraph 9,  
24 does not display access codes associated with the images presented to the user.

25           16. The Google reCAPTCHA v2 (checkbox) challenge, shown in Paragraph 9,  
26 lacks an access code field for typing or entering access codes associated with the images  
27 presented to the user.

28           **B. Confident’s Asserted Patent**

1           17. Patent Application No. 12/332,266 was filed on December 10, 2008, and  
2 later matured into U.S. Patent No. 8,621,578 (“the ’578 patent”).

3           18. Claim 1 of the ’578 patent contains the limitation: “wherein the image  
4 recognition task comprises an instruction to select one image corresponding to the  
5 selected image category from the matrix of non-overlapping randomly selected images.”  
6 [Doc. No. 1-2, ’578 patent at 9:11-15].

7           19. During prosecution of the ’578 patent, the Applicant amended claim 1, in  
8 part, as follows:

9  
10           each image ~~comprises~~ is associated with a unique randomly generated access code, wherein the  
11 image recognition task comprises an instruction to select ~~an~~ one image corresponding to the  
12 selected image category from the matrix of non-overlapping ~~dynamic graphical arrangement of~~  
randomly selected images;

13 [Ex. B (Excerpted ’578 Patent File History, 5-17-2013 RCE) at 28].

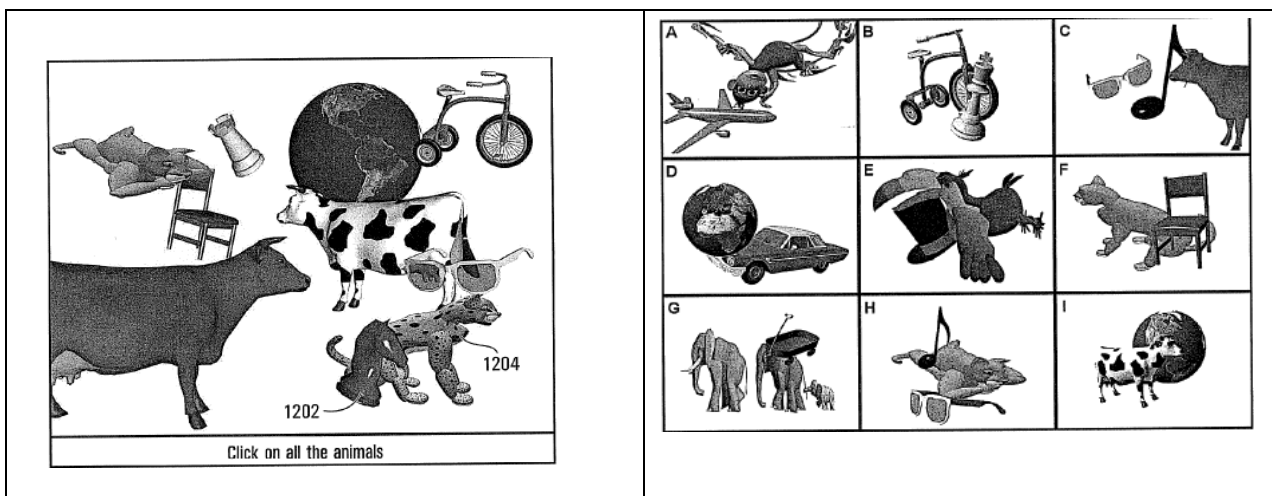
14           20. The Applicant also discussed U.S. Patent Pub. No. 2008/0216163 to Pratte  
15 et al. (“Pratte”), attached hereto as Exhibit A, and stated that Pratte failed to teach the  
16 “image recognition task” claimed by the ’578 patent because “the claimed ‘image  
17 recognition task comprises an instruction to select one image corresponding to the  
18 selected image category from the matrix of non-overlapping randomly selected  
19 images.” [Ex. B (Excerpted ’578 Patent File History, 5-17-2013 RCE) at 29 (emphasis  
20 in original)].

21           21. Figures 12A and 12B of Pratte are shown below:

22  
23           

<b>Fig. 12A</b>	<b>Fig. 12B</b>
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24  
25  
26  
27  
28



[Ex. A (Pratte) at 13]

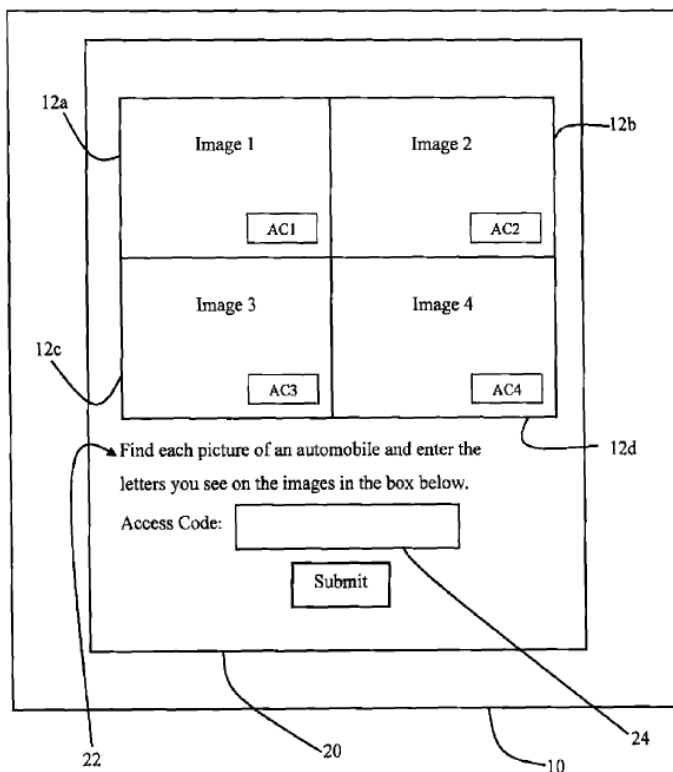
22. The Applicant further stated that “Pratte does not instruct a user to select ‘one image.’ Rather, Pratte instructs a user to select **all** images that are associated with animals.” [Ex. B (Excerpted ’578 Patent File History, 5-17-2013 RCE) at 29 (emphasis in original)].

23. During prosecution of the ’578 patent, the Applicant stated that, “Pratte does not provide a matrix of non-overlapping images. Rather, Pratte employs over-lapping images either in a window (see, e.g., Fig. 12A) or within the cells of a matrix (see, e.g., Fig. 12B).” *Id.* at 30.

24. The Applicant further stated that “[o]verlapping images is important to Pratte as one of ordinary skill in the art recognizes that humans, as opposed to computers, are better able to classify an image when a portion of that image is occluded by another image.” *Id.*

25. The Summary of the Invention section of the specification of the ’578 patent states, in part, “[e]ach image of the dynamic graphical arrangement comprises a unique and randomly generated access code. . . . An input is received from the user access device. The input comprises the unique randomly generated access code corresponding to the at least one image from the selected category.” [Doc. No. 1-2, ’578 patent at 1:21-28].

26. Figure 2 of the '578 patent, below, shows access code field 24.



*Id.* Fig. 2.

The specification of the '578 patent states “[u]pon presentation of the dynamic graphical arrangement, a user is instructed to select images from the selected category assigned for the access session and to type or enter within an access code field 24 the characters displayed for images from the selected category.” *Id.* at 5:38-42.

27. During prosecution, the claims of the '578 patent were rejected over U.S. Publication No. 2008/0244700 to Osborn *et al.* in combination with other art, including U.S. Publication No. 2009/0077629 to Douceur *et al.*

28. During prosecution, the Examiner explicitly stated that certain claims of the '578 patent would be allowable if rewritten in independent form to include limitations from the base claim and any intervening dependent claims and if “wherein the user is still granted access to the website” was added. [Ex. B (Excerpted '578 Patent File History, 7-18-2013 Office Action) at 31-33].

1           29. The Applicant amended the claims of the '578 patent to add “wherein the  
2 user is still granted access to the website”:

3                   wherein the matrix comprises at least one image known to belong to the selected image  
4                   category, at least one image known to not belong to the selected image category and at least one  
5                   image suspected to belong to the selected image category and wherein the user is still granted  
6                   access to the website when the input from the user access device comprises selection of the at  
7                   least one image known to belong to the selected image category and selection or omission of the  
8                   at least one image suspected to belong to the selected image category.

9 [Ex. B (Excerpted '578 Patent File History, Applicant 7-23-2013 Reply) at 34-35.

10           **C. Patents and Printed Publications Pre-Dating the '578 Patent**

11           30. The subject matter claimed in the '578 patent was also the subject matter of  
12 patents and printed publications filed or published prior to the time when the '578  
13 application was filed, including but not limited to those listed in paragraph 114.<sup>6</sup>

14           31. The earliest priority date that the '578 patent is entitled to is December 10,  
15 2008.

16           32. U.S. Publication No. 2008/0244700 to Osborn *et al.* (“Osborn”) entitled  
17 “Methods and Systems for Graphical Image Authentication” was filed on February 21,  
18 2008 and published on October 2, 2008. [Ex. C (Osborn)].

19           33. Because Osborn was published prior to December 10, 2008, Osborn is prior  
20 art to the '578 patent under 35 U.S.C. § 102(a).

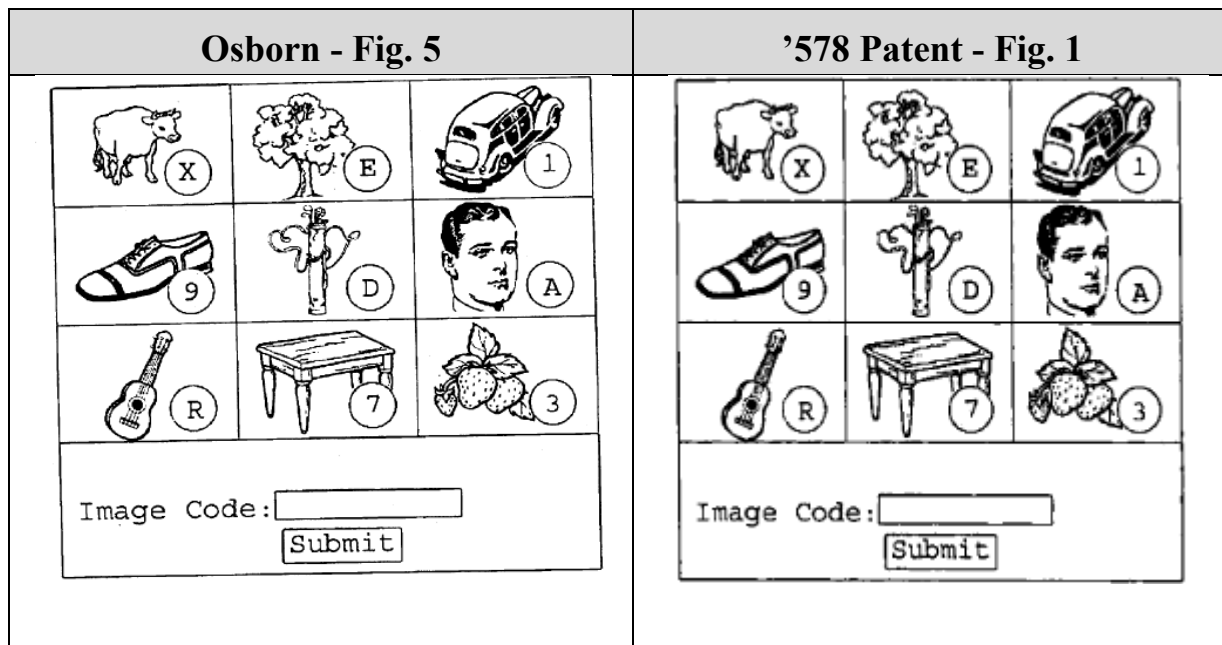
21           34. Because Osborn was filed prior to December 10, 2008, Osborn is prior art  
22 to the '578 patent under under 35 U.S.C. § 102(e).

23           35. Osborn discloses a system and method for providing authentication using an  
24 arrangement of dynamic graphical images. A user is required to input a username, and if  
25 the username is validated, a grid of images that corresponds to pre-defined categories is  
26 displayed. Each of the images is overlaid with an image identifier. The user identifies

27 <sup>6</sup> Best Buy’s mapping of the claim language to the prior art is based on Plaintiff’s  
28 apparent claim interpretations. Best Buy reserves its right to amend its mapping as the  
case progresses.

1 images corresponding to the pre-selected image category by inputting the corresponding  
2 image identifier. The identity of the user is verified by matching the image identifiers  
3 provided by the user with the image identifiers selected in a pre-chosen authentication  
4 sequence.

5 36. Fig. 5 of Osborn [Ex. C (Osborn)] and Fig. 1 of the '578 patent [Doc. No. 1-  
6 2] are shown below:

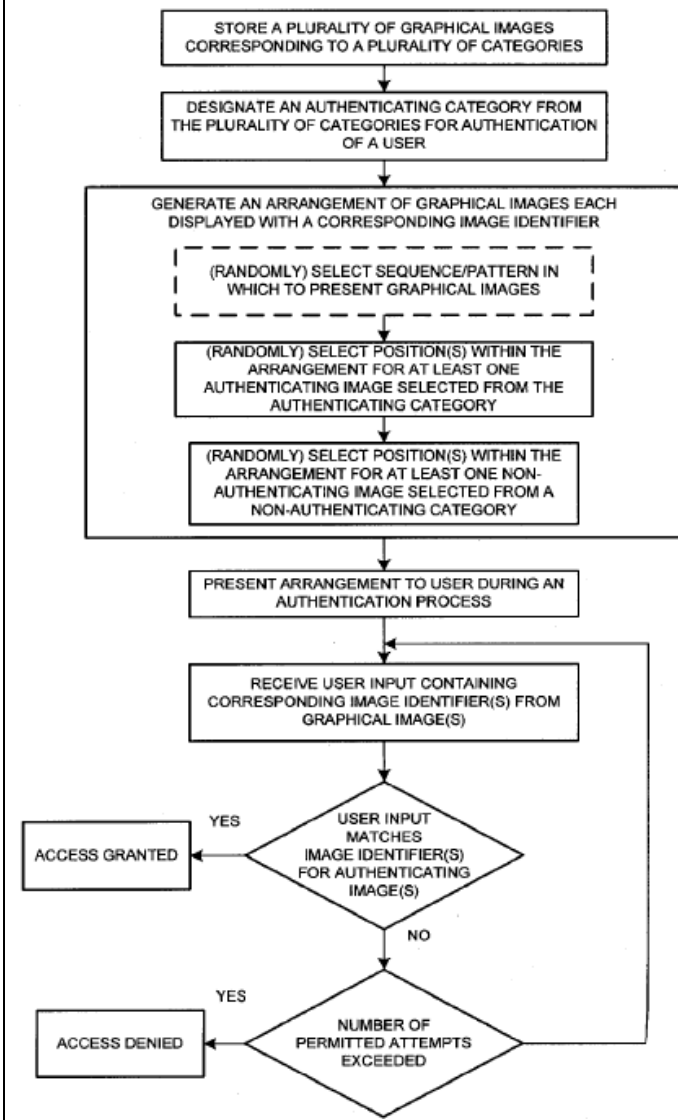


18 37. Fig. 8 of Osborn [Ex. C (Osborn)] and Figs. 3A and 3B of the '578 patent  
19 [Doc. No. 1-2] are shown below:

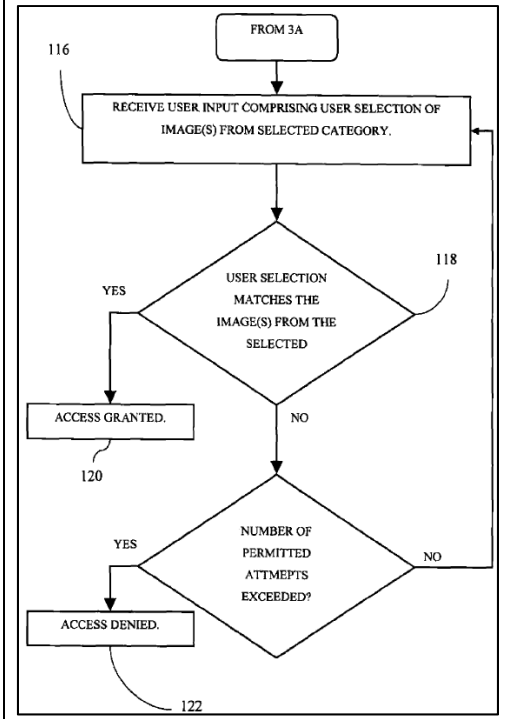
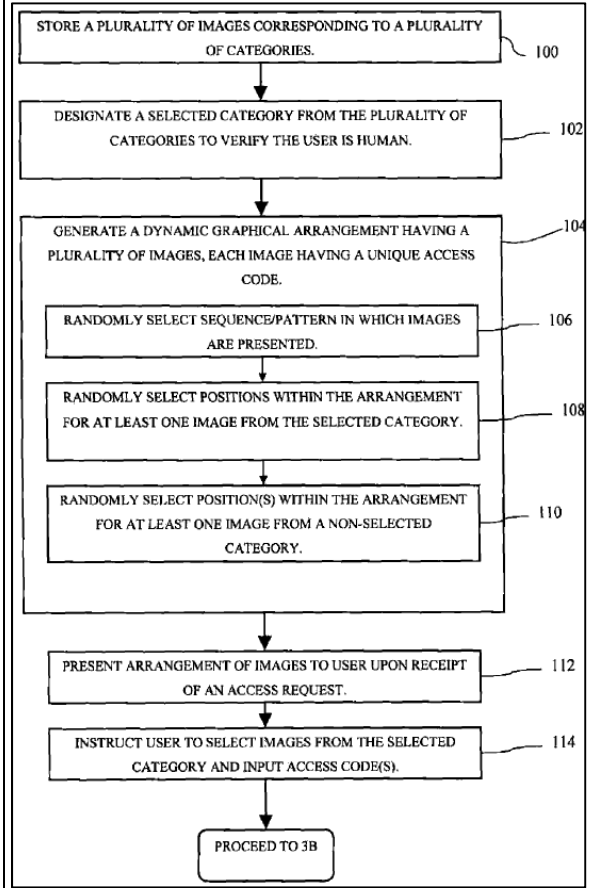


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**Osborn - Fig. 8**



**'578 Patent - Figs. 3A and 3B**



1           38. Osborn discloses generating a matrix of non-overlapping randomly selected  
2 images in response to an access request of a user. [*See, e.g.*, Ex. C (Osborn) Fig. 5, ¶ 62].

3           39. Osborn discloses the dynamic graphical arrangement comprising one  
4 randomly selected image from a selected image category chosen for an image recognition  
5 task and at least one image not from the selected image category. *See, e.g., id.*, Figs. 5  
6 and 8, ¶¶ 58-59, 66, 68, 72, 87.

7           40. Osborn discloses that each image is associated with a unique randomly  
8 generated access code. *See, e.g., id.*, Figs. 5 and 8, ¶¶ 58, 62.

9           41. Osborn discloses that the image recognition task comprises an instruction to  
10 select one image corresponding to the selected image category from the matrix of non-  
11 overlapping randomly selected images. *See, e.g., id.*, Figs. 5 and 8, ¶¶ 58-59, 62.

12           42. Osborn discloses the dynamic graphical arrangement of randomly selected  
13 images to the user. *See, e.g., id.*, Figs. 5 and 8, ¶¶ 58-59, 66, 68, 72.

14           43. Osborn discloses communicating the image recognition task to the user. *See,*  
15 *e.g., id.*, Figs. 5 and 8, ¶¶ 58-59, 62.

16           44. Osborn discloses receiving an input from the user access device at a server  
17 system. *See, e.g., id.*, Fig. 8, ¶¶ 59, 88.

18           45. Osborn discloses the input comprising the unique randomly generated  
19 access code corresponding to the at least one image from the selected category. *See, e.g.,*  
20 *id.*, Fig. 8, ¶¶ 59, 88.

21           46. Osborn discloses the server system comparing the input from the user access  
22 device to an authenticating reference code. *See, e.g., id.*, Fig. 8, ¶¶ 59, 88.

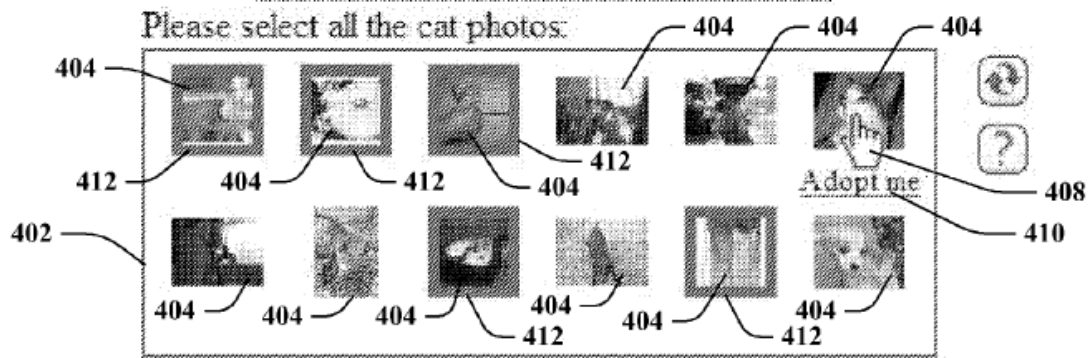
23           47. Osborn discloses that the matrix comprises at least one image known to  
24 belong to the selected image category and at least one image known to not belong to the  
25 selected image category. *See, e.g., id.*, Figs. 5 and 8, ¶¶ 58-59, 66, 68, 72, 87.

26           48. Osborn discloses that the user is granted access to the website when the input  
27 from the user access device comprises selection of the at least one image known to belong  
28 to the selected image category. *See, e.g., id.*, Fig. 8, ¶¶ 59, 88.

1 49. U.S. Publication No. 2009/0077629 to Douceur *et al.* (“Douceur”) entitled  
2 “Interest Aligned Manual Image Categorization for Human Interactive Proofs” was filed  
3 on September 17, 2007. [Ex. D (Douceur)].

4 50. Because Douceur was filed prior to December 10, 2008, Douceur is prior art  
5 to the ’578 patent, under 35 U.S.C. § 102(e).

6 51. Douceur discloses a system and method for distinguishing between human  
7 and non-human computer users by using a database of categorized images, which are  
8 displayed as part of Turing test challenge (commonly known as a CAPTCHA) as shown  
9 below:



17 [Ex. D (Douceur) Fig. 4]

18 After the user makes its selections, the service determines if the user is a human or a non-  
19 human and reports back to the application. The application then determines if the user  
20 should be granted access. *See, e.g., id.*, Figs. 4, 7 and 8, ¶ 44.

21 52. Douceur discloses generating a matrix of non-overlapping randomly  
22 selected images in response to an access request of a user. *See, e.g., id.*, Figs. 3-4, ¶¶ 29,  
23 35.

24 53. Douceur discloses the dynamic graphical arrangement comprising one  
25 randomly selected image from a selected image category chosen for an image recognition  
26 task and at least one image not from the selected image category. *See, e.g., id.*, Figs. 3-4,  
27 ¶¶ 29, 35.  
28

1           54. Douceur discloses that each image is associated with a unique randomly  
2 generated access code. *See, e.g., id.*, Fig. 7, ¶¶ 29, 35.

3           55. Douceur discloses that the image recognition task comprises an instruction  
4 to select one image corresponding to the selected image category from the matrix of non-  
5 overlapping randomly selected images. *See, e.g., id.*, Figs. 3-4, ¶¶ 25, 29, 35.

6           56. Douceur discloses presenting the dynamic graphical arrangement of  
7 randomly selected images to the user. *See, e.g., id.*, Figs. 3-4, ¶¶ 25, 29, 35.

8           57. Douceur discloses communicating the image recognition task to the user.  
9 *See, e.g., id.*, Fig. 3, ¶¶ 25, 29, 33.

10          58. Douceur discloses receiving an input from the user access device at a server  
11 system. *See, e.g., id.*, Figs. 7 and 10, ¶¶ 29, 32, 35, 41.

12          59. Douceur discloses the input comprises a unique randomly generated access  
13 code corresponding to the at least one image from the selected category. *See, e.g., id.*,  
14 Fig. 7, ¶¶ 29, 35.

15          60. Douceur discloses the server system comparing the input from the user  
16 access device to an authenticating reference code to confirm the user is a human and not  
17 a computer. *See, e.g., id.*, ¶ 32.

18          61. Douceur discloses that the matrix comprises at least one image known to  
19 belong to the selected image category, at least one image known to not belong to the  
20 selected image category and at least one image suspected to belong to the selected image  
21 category. *See, e.g., id.*, Figs. 3-4 and 7, ¶¶ 25, 29, 31, 32, 35, 36.

22          62. Douceur discloses that the user is still granted access to the website when  
23 the input from the user access device comprises selection of the at least one image known  
24 to belong to the selected image category and selection or omission of the at least one  
25 image suspected to belong to the selected image category. *See, e.g., id.*, Fig. 7, ¶¶ 25, 29,  
26 31, 32, 35, 36, 37.

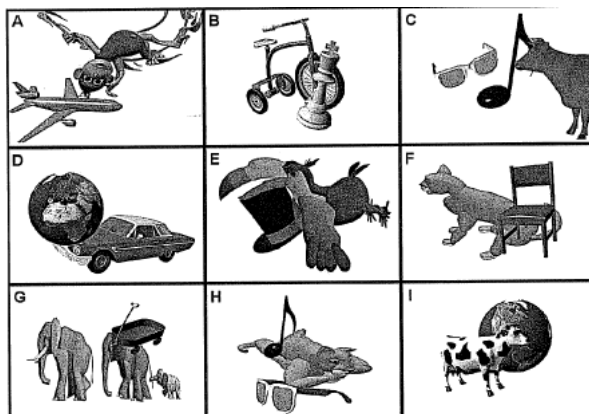
27          63. Douceur discloses every element recited in one or more claims of the '578  
28 patent.

1 64. U.S. Patent Pub. No. 2008/0216163 to Pratte *et al.* (“Pratte”) entitled,  
2 “Method and Apparatus for Network Authentication of Human Interaction and User  
3 Identity,” was filed on January 31, 2008 and published on September 4, 2008. Ex. A.

4 65. Because Pratte was published prior to December 10, 2008, Pratte is prior art  
5 to the ’578 patent, under 35 U.S.C. § 102(a).

6 66. Because Pratte was filed prior to December 10, 2008, Pratte is prior art to  
7 the ’578 patent under 35 U.S.C. § 102(e).

8 67. Pratte discloses a system and method for distinguishing between human and  
9 non-human computer users by requiring the user to solve a CAPTCHA challenge, where  
10 a display screen requires users to select all images containing the required objects (e.g.,  
11 select all of the chess pieces) as shown below:



12 [Ex. A (Pratte), Fig. 12B].

13  
14  
15  
16  
17  
18  
19 If the objects are successfully identified, the server authorizes access to the services. If  
20 the objects are not properly identified, the server provides notification of failure to the  
21 client and denies further access. *Id.*, Fig. 12B, ¶¶ 139-41.

22  
23 68. Pratte discloses generating a matrix of non-overlapping randomly selected  
24 images in response to an access request of a user. *See, e.g., id.*, Fig. 12B, ¶ 139.

25 69. Pratte discloses a dynamic graphical arrangement comprising one randomly  
26 selected image from a selected image category chosen for an image recognition task and  
27 at least one image not from the selected image category. *See, e.g., id.*, Fig. 12B, ¶¶ 98,  
28 135, 139, 141, 149, 150.

1           70. Pratte discloses that each image is associated with a unique randomly  
2 generated access code. *See, e.g., id.*, Fig. 12B, ¶ 101.

3           71. Pratte discloses that the image recognition task comprises an instruction to  
4 select one image corresponding to the selected image category from the matrix of non-  
5 overlapping randomly selected images. *See, e.g., id.*, Fig. 12A, ¶¶ 136, 139, 140.

6           72. Pratte discloses presenting the dynamic graphical arrangement of randomly  
7 selected images to the user. *See, e.g., id.*, Figs. 12A, 12B, ¶¶ 98, 135, 136, 137, 139, 141,  
8 149, 150.

9           73. Pratte discloses communicating the image recognition task to the user. *See,*  
10 *e.g., id.*, Fig. 12A, ¶¶ 108, 136, 139, 140.

11           74. Pratte discloses receiving an input from the user access device at a server  
12 system. *See, e.g., id.*, Fig. 9, ¶¶ 101, 111, 139, 141.

13           75. Pratte discloses the input comprising the unique randomly generated access  
14 code corresponding to the at least one image from the selected category. *See, e.g., id.*,  
15 Fig. 9, ¶¶ 101, 111, 139.

16           76. Pratte discloses the server system comparing the input from the user access  
17 device to an authenticating reference code to confirm the user is a human and not a  
18 computer. *See, e.g., id.*, Fig. 9, ¶¶ 101, 111, 112, 139, 141.

19           77. Pratte discloses the matrix comprises at least one image known to belong to  
20 the selected image category and at least one image known to not belong to the selected  
21 image category. *See, e.g., id.*, Fig. 12B, ¶¶ 98, 135, 139, 141, 149, 150.

22           78. Pratte discloses that the user is granted access to the website when the input  
23 from the user access device comprises selection of the at least one image known to belong  
24 to the selected image category. *See, e.g., id.*, Fig. 9, ¶¶ 101, 111, 112, 139, 141.

25           79. The publication entitled “Asirra: A CAPTCHA that Exploits Interest-  
26 Aligned Manual Image Categorization” by Jeremy Elson, et al. (“Elson”) was published  
27 on or before November 2, 2007. [Ex. E (Elson)].  
28

1           80. Because Elson was published more than one year prior to December 10,  
2 2008, Elson is prior art to the '578 patent, under 35 U.S.C. § 102(b).

3           81. Elson discloses a CAPTCHA challenge that asks users to identify cats out  
4 of a set of 12 photographs of both cats and dogs. [*See, e.g.*, Ex. E (Elson), Abstract].

5           82. Elson discloses generating a matrix of non-overlapping randomly selected  
6 images in response to an access request of a user. *See, e.g., id.*, Fig. 1, §3.1.

7           83. Elson discloses a dynamic graphical arrangement comprising one randomly  
8 selected image from a selected image category chosen for an image recognition task and  
9 at least one image not from the selected image category. *See, e.g., id.*, Fig. 1, §3.

10          84. Elson discloses that each image is associated with a unique randomly  
11 generated access code. *See, e.g., id.*, Fig. 1, §5.2.

12          85. Elson discloses that the image recognition task comprises an instruction to  
13 select one image corresponding to the selected image category from the matrix of non-  
14 overlapping randomly selected images. *See, e.g., id.*, Fig. 1, Abstract.

15          86. Elson discloses presenting the dynamic graphical arrangement of randomly  
16 selected images to the user. *See, e.g., id.*, Fig. 1, §3.1.

17          87. Elson discloses communicating the image recognition task to the user. *See,*  
18 *e.g., id.*, Fig. 1, Abstract.

19          88. Elson discloses receiving an input from the user access device at a server  
20 system. *See, e.g., id.*, Fig. 1, Abstract, §§5.1, 5.2.

21          89. Elson discloses the input comprising the unique randomly generated access  
22 code corresponding to the at least one image from the selected category. *See, e.g., id.*,  
23 Fig. 1, Abstract, §§3.1, 5.1, 5.2.

24          90. Elson discloses the server system comparing the input from the user access  
25 device to an authenticating reference code to confirm the user is a human and not a  
26 computer. *See, e.g., id.*, Fig. 1, Abstract, §§3.1, 5.1, 5.2.

27          91. Elson discloses that the matrix comprises at least one image known to belong  
28 to the selected image category, at least one image known to not belong to the selected

1 image category and at least one image suspected to belong to the selected image category.  
2 *See, e.g., id.*, Fig. 1, §§3, 4.1.

3 92. Elson discloses that the user is still granted access to the website when the  
4 input from the user access device comprises selection of the at least one image known to  
5 belong to the selected image category and selection or omission of the at least one image  
6 suspected to belong to the selected image category. *See, e.g., id.*, Fig. 1, §§3, 4.1, 5.1.

7 93. Elson discloses every element recited in one or more claims of the '578  
8 patent.

9 94. The publication entitled "Image Recognition CAPTCHAs" by Monica  
10 Chew and J.D. Tygar ("Chew") was published in September 2004. [Ex. F (Chew)].

11 95. Because Chew was published more than one year prior to December 10,  
12 2008, Chew is prior art to the '578 patent under 35 U.S.C. § 102(b).

13 96. Chew discloses various image recognition CAPTCHAs, including an image  
14 recognition CAPTCHA where five images of the same subject and one image of a  
15 different subject are displayed to a user, and the user must identify the image that is of a  
16 different subject to pass the test. [*See, e.g., Ex. F (Chew), Abstract, Fig. 1, §2*].

17 97. Chew discloses generating a matrix of non-overlapping randomly selected  
18 images in response to an access request of a user. *See, e.g., id.*, Fig. 1, §2.

19 98. Chew discloses the dynamic graphical arrangement comprising one  
20 randomly selected image from a selected image category chosen for an image recognition  
21 task and at least one image not from the selected image category. *See, e.g., id.*, Fig. 1, §2.

22 99. Chew discloses that the image recognition task comprises an instruction to  
23 select one image corresponding to the selected image category from the matrix of non-  
24 overlapping randomly selected images. *See, e.g., id.*, Fig. 1, §2.

25 100. Chew discloses the dynamic graphical arrangement of randomly selected  
26 images to the user. *See, e.g., id.*, Fig. 1, §2.

27 101. Chew discloses communicating the image recognition task to the user. *See,*  
28 *e.g., id.*, Fig. 1, §2.







1 Complaint—nor does the specification enable a person of ordinary skill in the art to make  
2 and use the alleged claimed invention without undue experimentation.

3 116. For example, the specification fails to describe or enable the “wherein the  
4 matrix comprises at least one image known to belong to the selected image category, at  
5 least one image known to not belong to the selected image category and at least one image  
6 suspected to belong to the selected image category and wherein the user is still granted  
7 access to the website when the input from the user access device comprises selection of  
8 the at least one image known to belong to the selected image category and selection or  
9 omission of the at least one image suspected to belong to the selected image category”  
10 limitation [Doc. No. 1-2, ’578 patent at 9:26-35].

11 117. Thus, an immediate, real and justiciable controversy exists between  
12 Confident, on the one hand, and Best Buy, on the other hand, with respect to the alleged  
13 validity of the ’578 patent.

14 118. Best Buy is entitled to a declaratory judgment that the claims of the ’578  
15 patent are invalid.

### 16 **EXCEPTIONAL CASE**

17  
18 119. For the reasons set forth in Best Buy’s Defenses and Counterclaims, this is  
19 an exceptional case entitling Best Buy to an award of its attorneys’ fees incurred in  
20 connection with defending and prosecuting this action pursuant to 35 U.S.C. § 285.

### 21 **PRAYER FOR RELIEF**

22 WHEREFORE, Best Buy respectfully requests that the Court grant the following  
23 relief:

- 24 (a) A judgment in favor of Best Buy denying Confident all relief requested in its  
25 Complaint in this action and dismissing Confident’s Complaint against Best Buy  
26 with prejudice;  
27  
28

- 1 (b) A declaration that Best Buy has not infringed and is not infringing, either literally  
2 or under the doctrine of equivalents, any valid or enforceable claims of the '578  
3 patent, that Best Buy has not contributed to or induced, and is not contributing to  
4 or inducing, infringement of any valid or enforceable claims of the '578 patent,  
5 and that Best Buy is not liable for any infringement;
- 6 (c) A declaration that the claims of the '578 patent are invalid;
- 7 (d) A judgment awarding Best Buy prejudgment and post-judgment interest and its  
8 costs, fees and other expenses incurred in this action;
- 9 (e) A declaration that this is an exceptional case within the meaning of 35 U.S.C. §  
10 285 and that Best Buy be awarded its attorneys' fees; and
- 11 (f) Any and all other relief as this Court may deem just and proper.

12 **JURY DEMAND**

13  
14 Best Buy demands trial by jury on all issues so triable, including specifically on  
15 Confident's claims, Best Buy's defenses thereto, and Best Buy's counterclaims.

16  
17 Date: January 17, 2019

18 Respectfully submitted,

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