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United States District Court
Northern District of California

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

IN RE: PERSONALWEB
TECHNOLOGIES, LLC ET AL PATENT
LITIGATION

Case No. [18-md-02834-BLF](#)

**ORDER DECLINING TO CLARIFY OR
SUPPLEMENT CLAIM
CONSTRUCTION ORDER**

[RE: ECF 507]

AMAZON.COM, INC., et al.,
Plaintiffs,

Case No. [18-cv-00767-BLF](#)

v.

[RE: ECF 137]

PERSONAL WEB TECHNOLOGIES,
LLC, et al.,
Defendants.

PERSONALWEB TECHNOLOGIES, LLC,
et al.,

Case No. [18-cv-05619-BLF](#)

Plaintiffs,

[RE: ECF 48]

v.

TWITCH INTERACTIVE, INC.,
Defendant.

On August 16, 2019, this Court issued its Claim Construction Order in this multidistrict litigation (“MDL”), construing all ten disputed claims terms identified by the parties. Mere hours later, the parties began a heated dispute about whether any of PersonalWeb Technologies, LLC’s (“PersonalWeb”) infringement theories were valid in light of the Court’s constructions. As a result,

1 PersonalWeb filed the present Motion to Clarify or Supplement Claim Construction Order, seeking
2 clarification or supplementation of the Court’s construction of the term “unauthorized or
3 unlicensed.” *See* Motion, ECF 507. PersonalWeb asserts that it “needs clarification to determine
4 if the Court meant something different than ‘valid rights to content’ (*i.e.*, a narrower/license
5 instrument-type of meaning).” Motion at 2. If so, PersonalWeb states that it will withdraw its
6 technical expert’s infringement report and dismiss the case, preserving its appellate rights. *Id.*

7 After the Motion was filed, the Court held a telephone conference and heard the parties’
8 positions. ECF 514. Subsequently, Amazon filed an Opposition (Opp’n, ECF 521) and
9 PersonalWeb filed a Reply (Reply, ECF 527). Pursuant to Civil Local Rule 7-1(b), the Court finds
10 the instant motion suitable for decision without oral argument and hereby VACATES the hearing
11 set for December 12, 2019. For the reasons discussed below, the Court DENIES PersonalWeb’s
12 motion.

13 I. BACKGROUND

14 In this MDL, PersonalWeb alleges patent infringement by Amazon.com, Inc. and Amazon
15 Web Services, Inc., and separately by dozens of Amazon’s customers (collectively, “Amazon”),
16 related to the customers’ use of Amazon’s CloudFront and Simple Storage Service (“S3”) in
17 connection with downloading files from S3. Two of the cases comprising this MDL are proceeding
18 at this time: *Amazon v. PersonalWeb* (Case No. 5:18-cv-00767-BLF), in which PersonalWeb asserts
19 counterclaims of patent infringement, and *PersonalWeb v. Twitch Interactive, Inc.* (Case No. 5:18-
20 cv-05619-BLF), in which PersonalWeb asserts claims of patent infringement and which the Court
21 has designated as a representative customer case. In each of these two actions, PersonalWeb alleges
22 infringement of four patents: U.S. Patent Nos. 6,928,442 (“the ’442 patent”); 7,802,310 (“the ’310
23 patent”); 7,945,544 (“the ’544 patent”); and 8,099,420 (“the ’420 patent”).

24 PersonalWeb filed its opening claim construction brief on April 8, 2019. ECF 399. The
25 next day, the Court issued an order instructing the parties to limit the briefing to no more than ten
26 disputed terms, pursuant to Patent Local Rules for the Northern District of California. ECF 401,
27 *See* Patent L.R. 4-3(c). PersonalWeb filed an amended opening claim construction brief on April
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1 12, 2019.

2 The term “licensed/unlicensed,” as found in claim 20 of the ’310 patent and claim 10 of the
3 ’442 patent, was included in PersonalWeb’s initial (and noncompliant) opening claim construction
4 brief (ECF 399) but was dropped in the amended brief (ECF 406). The parties’ respective proposals
5 are below:

<u>PersonalWeb’s Proposal</u>	<u>Amazon’s Proposal</u>
“un-/licensed:” plain and ordinary meaning Alternative Construction: “un/licensed:” not legally / legally permitted	valid / invalid right to content

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10 ECF 399 at 2. Claim construction briefing was concluded on April 29, 2019. *See* ECF 406;
11 412; 420. The Court held a tutorial on May 2, 2019, followed by a *Markman* hearing on May 24,
12 2019, and issued its Claim Construction Order on August 16, 2019. Order, ECF 485.

13 The disputed term for which PersonalWeb seeks clarification, is “unauthorized or
14 unlicensed,” as found in claim 20 of the ’310 patent. The parties’ proposed constructions are listed
15 below:

<u>PersonalWeb’s Proposal</u>	<u>Amazon’s Proposal</u>
Plain and ordinary meaning Alternatively: “not permitted or not permitted under a license”	“not compliant with a valid license”

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20 Order at 6. During the claim construction proceedings, PersonalWeb contended that in the
21 context of the ’310 patent, the plain and ordinary meaning of “authorization” equates to
22 “permission.” *See Id.* In contrast, in PersonalWeb’s view, “license” was something narrower—“a
23 specific kind of authorization.” *Id.* In other words, PersonalWeb’s position was that “unauthorized”
24 should be construed differently than “unlicensed” and therefore the term “unauthorized or
25 unlicensed,” if construed at all, should be construed in a way that was boarder than “unlicensed”
26 and consistent with the “permission” theory. *See* ECF 406 at 7 (“If Amazon’s proposed construction
27 is adopted, it should be clarified that ‘unauthorized’ is not limited to the legal and/or contractual
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1 In distinguishing between “unauthorized” and “unlicensed,” PersonalWeb argued the
2 following:

3 A “license,” on the other hand, means something narrower. It is a
4 specific kind of authorization. The specification discusses licenses in
5 the sense of having legal permission to have a copy of a file. For
6 example, the specification states that a license table 136 maintains a
7 record of the True Names of “key files in the product (that is, files
8 which are required in order to use the product, and which do not occur
9 in other products)[.] Typically, for a software product, this would
10 include the main executable image and perhaps other major files such
11 as clip-art, scripts, or online help.” ’310 at 31:17-22. This
12 demonstrates the specification contemplates having a license is
13 having legal permission to possess things like program executables
14 and images such as clip-art, items that may be the subject, for
15 example, of a copyright license, or a license granted by an End User
16 License Agreement (EULA).

17 *Id.* at 2-3.

18 The Court rejected PersonalWeb’s argument and noted that “while PersonalWeb’s argument
19 in favor of separate meanings has superficial appeal, the intrinsic record reveals that the patentee
20 used the words ‘authorized’ and ‘licensed’ interchangeably in the ’310 patent.” *Id.* at 8. The Court
21 adopted Amazon’s proposed construction and held that “unauthorized or unlicensed” means “not
22 compliant with a valid license.” Order at 6-12.

23 During the claim construction proceedings, both parties discussed two *Markman* orders from
24 the Eastern District of Texas involving some of the patents-in-suit in the instant action: (1)
25 *PersonalWeb Techs., LLC v. Amazon.com Inc.*, No. 6:11-cv-658, Dkt. No. 140 (E.D. Tex. Aug. 5,
26 2013) (“Davis Order”) and (2) *PersonalWeb Techs., LLC v. IBM Corp.*, No. 6:12-cv-661-JRG, Dkt.
27 No. 103 at 25, 28 (E.D. Tex. Mar. 11, 2016) (“Gilstrap Order”). Order at 11. PersonalWeb argued
28 and the Court agreed that neither the Davis Order nor the Gilstrap Order were binding in this matter.
29 *Id.* The Court noted that “[n]either order addressed the ‘unauthorized or unlicensed’ term found in
30 claim 20 of the ’310 patent” and therefore neither order was “directly on point with the instant
31 dispute.” *Id.* Nevertheless, the Court found the Gilstrap Order to be the closer of two, in which
32 Judge Gilstrap noted that “‘authorization’ merely refers to a valid license” – a finding that was “not
33 inconsistent with the Court’s ruling on the instant dispute.” *Id.*

1 counsel because Amazon believed that PersonalWeb had no viable patent infringement theories in
2 light of the Court's constructions. Motion at 1. In response, PersonalWeb informed Amazon that
3 because Amazon had, earlier in the claim construction proceedings, advocated for the same
4 constructions as those in the Gilstrap Order, PersonalWeb intended to apply Judge Gilstrap's
5 construction of "licensed/unlicensed" as "valid/invalid rights to content" to its infringement
6 analysis. *Id.* at 1-2. Over Amazon's strong objection and threats of sanctions, PersonalWeb's expert
7 did, in fact, apply Judge Gilstrap's construction to his infringement analysis. *Id.* at 2. In addition,
8 PersonalWeb filed the present motion because it believes it needs "clarification to determine if the
9 Court meant something different than 'valid rights to content' (*i.e.*, a narrower/license instrument-
10 type of meaning)." *Id.* If so, PersonalWeb states that it will withdraw the report of the technical
11 expert and dismiss, in order to preserve appellate rights. *Id.*

12 In PersonalWeb's view, this Court's Order "does not appear fully dispositive on what it
13 means for something to be 'licensed' versus 'unlicensed.'" Motion at 2. Therefore, PersonalWeb
14 asks this Court to "expressly adopt Judge Gilstrap's March 11, 2016 order, construing 'licensed'
15 and 'unlicensed.'" *Id.* at 4. To support this position, PersonalWeb points to several instances in
16 which Amazon advocated for Judge Gilstrap's constructions during the claim construction
17 proceedings. Reply at 2-4 (citing Amazon's Patent L.R. 4-2 Disclosures; the parties' Joint Claim
18 Construction and Prehearing Statement (ECF 380); Amazon's Responsive Claim Construction Brief
19 (ECF 412); May 24, 2019 claim construction hearing).

20 Amazon responds that PersonalWeb's Motion "requests that the Court 'supplement' the
21 claim construction order by plugging into the Court's construction of the term 'unauthorized or
22 unlicensed' a construction by a different court of a different claim term not at issue here." Opp'n at
23 1. Amazon argues that "PersonalWeb had every opportunity to seek construction of different terms,
24 or to seek different constructions of 'unauthorized' or 'unlicensed,' or to oppose Amazon's proposed
25 construction that the Court adopted because it was 'unclear' – PersonalWeb did none of those
26 things." *Id.* at 2. Next, Amazon points out several instances in which PersonalWeb had argued
27 against Judge Gilstrap's constructions because PersonalWeb believed that "'license' had a clear
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