IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

REALTIME ADAPTIVE STREAMING, LLC Plaintiff, v. SLING TV L.L.C., SLING MEDIA L.L.C., DISH TECHNOLOGIES L.L.C., AND DISH NETWORK L.L.C. Defendants.	CIVIL ACTION NO. 1:17-CV-02097-RBJ PATENT CASE JURY TRIAL DEMANDED

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OF INVALIDITY

I. INTRODUCTION

Patent protection is a bargain between the Patent Office and the patentee. The Patent Office grants a limited monopoly to the patentee to make, use, and sell the claimed invention. In return, the patentee must do two things to avoid invalidity. First, the patentee must sufficiently describe the claims in the specification, *i.e.* the body of the patent, to allow others in the industry to understand and recognize the invention, or the patent is invalid. Second, the patentee must draft the claims so that they can also be reasonably understood or those claims are invalid as indefinite.

Realtime did not uphold its end of the bargain. First, there is simply nothing in the '610 patent's specification that provides adequate written description support for independent claim 9. Claim 9 recites "select[ing] one or more compression algorithms from among a plurality of compression algorithms to determine a plurality of compression algorithms to apply." In other words, the claim requires selecting one compression algorithm to determine more compression algorithms to apply. The specification's disclosure, however, is limited to selecting a single compression algorithm for compressing the data. This claim is invalid for failure to meet the written

description requirement.

Second, Realtime drafted every asserted claim ambiguously by including the term "asymmetric compression algorithm." Realtime specifically defined "asymmetric compression algorithm" in the specification and as "a compression algorithm in which the execution time for compression and decompression differ significantly" and agreed to this definition at *Markman*.[1] The term "differ significantly," however, is a term of degree, and the '610 patent provides no objective bounds to determine what is "significant" vs. insignificant. The claims are, therefore, invalid as indefinite.

For these reasons, explained in detail below, Defendants respectfully move the Court to enter judgment that each asserted claim of the '610 patent is invalid.

II. STATEMENT OF UNDISPUTED FACTS

The '610 Patent's Disclosure of Selecting an Algorithm: Claim 9 is directed to "select[ing] one or more compression algorithms from among a plurality of compression algorithms to determine a plurality of compression algorithms to apply." The specification, however, simply discloses selecting a single compression algorithm for compressing the data. '610 patent at 11:6–12:46. It never contemplates selecting one algorithm to determine additional algorithms of any kind.

The "Asymmetric" Requirement: Each asserted claim contains the term "asymmetric compression algorithm" or is dependent on a claim using the term. The '610 patent defines "asymmetric compression algorithm" as "a compression algorithm in

[1] During the *Markman* proceedings, Realtime agreed with the Court's construction but disagreed that the construction rendered the claims indefinite. Dkt. No. 151 at 11–13.

which the execution time for compression and decompression differ significantly." Dkt. No. 151 at 13, 26. Due to this lexicographical disclosure, the parties agreed, and the Court adopted, the '610 patent's definition as the construction for this term.[2]

"Differ significantly" is a term of degree, and the '610 patent does not define how much difference would be significant. The '610 patent instead explains that "with an asymmetrical algorithm, either the compression routine is slow and the decompression routine is fast or the compression routine is fast and the decompression routine is slow," '610 patent at 9:66–10:2, and "a 'symmetrical' data compression algorithm is . . . one in which the execution time for the compression and the decompression routines are substantially similar." *Id.* at 10:5–8; *see also id.* at 11:19–22. Moreover, the few examples that the '610 patent characterizes as asymmetric or symmetric do not provide a boundary for this term. *Id.* at 10:2–9.

III. LEGAL STANDARD

Summary judgment is appropriate if "there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An absence of a genuine dispute over any material fact shifts the burden to the non-movant to show that there is a genuine factual issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

A. Written Description

The statute mandates that a patent specification "shall contain a written

[2] The Court reserved judgment on whether the construction renders the term indefinite. Dkt. No. 151 at 13.

description of the invention." 35 U.S.C. § 112(a). "Compliance with the written description requirement is a question of fact but is amenable to summary judgment in cases where no reasonable fact finder could return a verdict for the non-moving party." *PowerOasis, Inc. v. TMobile USA, Inc.*, 522 F.3d 1299, 1307 (Fed. Cir. 2008). Whether the written description is sufficient turns on whether it "reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date." *Ariad Pharm., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010). In other words, "[w]hat is claimed by the patent [] must be the same as what is disclosed in the specification. . . ." *Id*. at 1347 (Fed. Cir. 2010) (*citing Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 736 (2002)).

B. Indefiniteness

A patent claim is indefinite unless it "particularly point[s] out and distinctly claim[s]" the invention. 35 U.S.C. § 112(b). This occurs when a claim, "read in light of the specification . . . and the prosecution history" fails to "inform, with reasonable certainty, those skilled in the art about the scope of the invention." *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014). And "[i]f a claim employs a term of degree, the intrinsic record must provide those skilled in the art with 'objective boundaries' with which to assess the term's scope." *In re Walter*, 698 F. App'x 1022, 1026 (Fed. Cir. 2017) (*citing Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1371 (Fed. Cir. 2014) (finding "unobtrusive manner" indefinite because it was "facially subjective claim language without an objective boundary.")).

An indefinite claim term renders invalid (a) the claim containing the term and (b)

all claims depending on that claim. *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1356 (Fed. Cir. 2005) (affirming summary judgment of invalidity for dependent claims where the indefinite term was present within the independent claim). "Whether a claim is invalid under 35 U.S.C. §112, ¶ 2, for indefiniteness is a question of law." *Union Pac. Resources Co. v. Chesapeake Energy Corp.*, 236 F.3d 684, 692 (Fed. Cir. 2001).

IV. ARGUMENT

A. Claim 9 Is Invalid under the Written Description Requirement

Claim 9 is invalid for lack of written description because it requires selecting one or more algorithms to determine additional algorithms to apply but the '610 patent's specification does not contain such a disclosure.[3] Claim 9 recites "select[ing] one or more compression algorithms from among a plurality of compression algorithms to determine a plurality of compression algorithms to apply." In other words, claim 9 does not simply select an algorithm to apply. Claim 9 requires selecting one algorithm to then determine additional algorithms to apply in a second step.

The '610 patent, however, only discloses selecting a single compression algorithm to compress the data. Ex. A, Bovik Decl. at ¶¶ 14–18. It uses different "data profiles" that include information organized in "access profiles" associated with "different data sets, which enables the controller … to select a suitable compression algorithm based on the data type." '610 patent at 11:30–36; *see also id.* at 8:4–36 ("access

[3] Asserted claims 10-14, 16, and 18 depend from claim 9 and are invalid because they include the same "selecting" limitation that lacks written description support.

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