

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

ACCELERATION BAY LLC,	)	
	)	
Plaintiffs,	)	
	)	C.A. No. 16-453-WCB
v.	)	
	)	
ACTIVISION BLIZZARD INC.,	)	
	)	
Defendants.	)	

**ACCELERATION BAY LLC’S LETTER BRIEF REGARDING  
THE CONSTRUCTION OF “M-REGULAR” IN CLAIM 1 OF THE ’147 PATENT**

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The Court should reject Activision’s eleventh-hour request to import into “m-regular” a requirement that the network be incomplete. The Court already construed “m-regular” without requiring that it be incomplete. D.I. 275 at 14-15. Activision did not previously request a construction that “m-regular” must be incomplete and, therefore, waived the argument.<sup>1</sup>

Claim 1 of the ’147 Patent requires a broadcast channel that forms an “m-regular graph,” but does not require that the graph is incomplete:

A method of disconnecting a first computer from a second computer, the first computer and the second computer being connected to a broadcast channel, *said broadcast channel forming an m-regular graph where m is at least 3*, the method comprising:

In contrast, Claim 1 of the ’344 Patent includes a clause specifically requiring a network that is both “m-regular” and “non-complete”:

further wherein the network is *m-regular*, where m is the exact number of neighbor participants of each participant *and further wherein* the number of participants is at least two greater than m *thus resulting in a non-complete graph*.

The inventors’ use of both “m-regular” and “non-complete” confirms their awareness of that the two concepts are distinct. Their decision not to include an “incomplete graph” limitation in the claims of the ’147 Patent should be credited. *Comark Commc’ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1186-87 (Fed. Cir. 1998) (noting the starting point of claim construction is the “asserted claim itself” and there is a presumed ““difference in meaning and scope when different words or phrases are used in separate claims.””) (citation omitted). Moreover, the use of the “further wherein” language in Claim 1 of the ’344 Patent confirms that m-regular and non-complete have distinct meanings to a person of ordinary skill in the art. Otherwise there would

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<sup>1</sup> Activision contends that *O2 Micro Int’l Ltd. v. Monolithic Power Sys., Inc.*, requires that the Court address this issue. 467 F.3d 1355 (Fed. Cir. 2006). *O2 Micro* does not apply because the m-regular claim term was already construed as part of the Court’s extensive claim construction process. There is no new development that requires reconsideration of the prior construction.

be no need to include the modifier in Claim 1 of the '344 Patent that the m-regular network must also be non-complete. Indeed, Activision's technical expert, Dr. Wicker, confirmed that an "m-regular" network can be either "complete" or "incomplete," confirming that an m-regular network should not be limited to only incomplete networks. 5/1/24 Draft Trial Tr. at 224:2-3 ("I showed you an m-regular graph that was *also incomplete*."), 213:1-2 ("So not only is this m-regular, or, in this case, 4-regular, *it's also complete*.") (emphasis added).

Activision's proposed construction also should be rejected because it would render as mere surplusage the "further wherein .... Thus resulting in a non-complete graph" clause in Claim 1 of the '344 Patent. "[I]nterpretations that render some portion of the claim language superfluous are disfavored." *Power Mosfet Techs., L.L.C. v. Siemens AG*, 378 F.3d 1396, 1410 (Fed. Cir. 2004). Instead, terms should be "construe[d] . . . with an eye toward giving effect to all of their terms" lest it "undermine[]" the essential notice function of patent claims.

*Haemonetics Corp. v. Baxter Healthcare Corp.*, 607 F.3d 776, 781 (Fed. Cir. 2010).

There is no basis to import into Claim 1 of the '147 Patent a requirement that the graph be incomplete. Indeed, the words "incomplete" or "non-complete" do not appear *anywhere* in the specification of the '147 Patent. It would be improper to import limitations from another patent, such as the '344 Patent, into the '147 Patent. *Aventis Pharms. Inc. v. Amino Chems. Ltd.*, 715 F.3d 1363, 1373 (Fed. Cir. 2013) (Courts should "look to the words of the claims themselves . . . to define the scope of the patented invention."). The '344 and '147 Patents are not related and have different specifications.

Finally, the file history further confirms that "m-regular" should not be construed to be incomplete. During the prosecution of the '147 Patent, the "m-regular" limitation was originally set forth in a dependent claim. Ex. 1 (12/11/03 Amendment) at 11. In order to overcome a prior

art rejection, the inventors reformed that dependent claim into an independent claim including the “m-regular” limitation. *Id.* at 4-6, 11. Their accompanying argument to overcome the rejection was limited to the claimed network being m-regular, and made no reference to the network being incomplete. *Id.* at 8-13.<sup>2</sup>

Activision suggests that the Court’s prior rulings in the *Take-Two* summary judgment order found Claim 1 of the ’147 Patent to require an incomplete network. Neither party presented that issue to the Court in connection with the summary judgment briefing because most of the asserted claims at issue in that case expressly recited networks that were both m-regular and incomplete. Thus, the Court’s passing reference in the background section of the summary judgment order to the claims being directed to networks that are m-regular and incomplete was not a claim construction decision. *See Acceleration Bay LLC v. Take-Two et al*, 1:16-cv-00455-RGA, D.I. 492 at 2 (D. Del. Mar. 23, 2020).

Accordingly, the Court’s prior construction for “m-regular” should not be changed to include an “incomplete” network requirement.

Respectfully submitted,

/s/ Philip A. Rovner

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cc: All counsel of Record (Via ECF Filing, Electronic Mail)

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<sup>2</sup> IPR 2016-00747 does not support importing into Claim 1 of the ’147 Patent a limitation that the network be incomplete. Activision appears to be relying on some general characterizations of the art that were not used in Acceleration Bay’s response to any of the specific grounds at issue (which was based on m-regularity) and were not argued as claim construction. The PTAB’s decision not to institute on Claim 1 did not depend on or even refer to the asserted references failing to disclose an incomplete network. Ex. 2 at 15-16. Thus, there was no “clear and unmistakable disclaimer” to support a disavowal of claim scope and there is no claim construction from the PTAB for the Court to consider adopting. *Cont’l Circuits LLC v. Intel Corp.*, 915 F.3d 788, 796-97 (Fed. Cir. 2019).