United States Court of Appeals for the Federal Circuit

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ANCORA TECHNOLOGIES, INC.,
Plaintiff-Appellant,

v.

APPLE, INC.,
Defendant-Cross Appellant.

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2013-1378, -1414

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Appeals from the United States District Court for the Northern District of California in No. 11-CV-6357, Judge Yvonne Gonzalez Rogers.

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Decided: March 3, 2014

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JOHN S. LEROY, Brooks Kushman P.C., of Southfield, Michigan, argued for plaintiff-appellant. With him on the brief were MARK A. CANTOR, MARC LORELLI, and JOHN P. RONDINI.

DEANNE E. MAYNARD, Morrison & Foerster LLP, of Washington, DC, argued for defendant-cross appellant. With her on the brief were BRIAN R. MATSUI and NATALIE R. RAM, OF WASHINGTON, DC; MICHAEL A. JACOBS, RICHARD S.J. HUNG, and FRANCIS C. HO, of San Francisco, California; and BITA RAHEBI, of Los Angeles, California.

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Before RADER, *Chief Judge,* TARANTO, and CHEN, *Circuit Judges.*

TARANTO, *Circuit Judge.*

Ancora Technologies, Inc., owns U.S. Patent No. 6,411,941, which claims methods for verifying that a software program on a computer is not there without authorization, but is licensed to be there. In December 2010, Ancora sued Apple Inc., alleging that products running Apple's iOS operating system infringed the '941 patent. The United States District Court for the Northern District of California construed the claims. *Ancora Techs., Inc. v. Apple Inc.*, 11-CV-06357, 2012 WL 6738761 (N.D. Cal. Dec. 31, 2012). Ancora stipulated to summary judgment of non-infringement under the district court's construction of the claim term "program." The district court subsequently entered final judgment dismissing all claims and counterclaims. Ancora appeals the district court's construction of "program," while Apple cross-appeals the district court's holding that the terms "volatile memory" and "non-volatile memory" are not indefinite. We affirm in part, reverse in part, and remand.

BACKGROUND

The '941 patent, entitled "Method of Restricting Software Operation within a License Limitation," describes a method of preventing unauthorized software use by checking whether a software program is operating within a license and stopping the program or taking other remedial action if it is not. The specification states that methods for checking license coverage of software were known in the art at the time the inventors applied for the '941 patent. But some of those methods were vulnerable to hacking, the specification observes, while others were expensive and inconvenient to distribute. '941 patent, col. 1, lines 19-32.

The specification describes a method that it says overcomes those problems. In particular, it discloses using the memory space associated with the computer's basic input/output system (BIOS), rather than other memory space, to store appropriately encrypted license information to be used in the verification process. *See, e.g., id.*, col. 1, line 46, through col. 2, line 5; *id.*, col. 4, lines 45-48; *id.*, col. 5, lines 19-24. It states that, while the contents of the BIOS memory space may be modified, the level of programming expertise needed to do so is unusually high, and the risk of accidentally damaging the BIOS and thereby rendering the computer inoperable "is too high of a risk for the ordinary software hacker to pay." *Id.*, col. 3, lines 4-14. Thus, the inventors stated that their method makes use of the existing computer hardware (eliminating the expense and inconvenience of using additional hardware), while storing the verification information in a space that is harder and riskier for a hacker to tamper with than storage areas used by earlier methods.

Claim 1, the only independent claim Ancora asserts, is representative:

> 1. A method of restricting software operation within a license for use with a computer including an erasable, non-volatile memory area of a BIOS of the computer, and a volatile memory area; the method comprising the steps of:
>
> > selecting a program residing in the volatile memory,
> >
> > using an agent to set up a verification structure in the erasable, non-volatile memory of the BIOS, the verification structure accommodating data that includes at least one license record,

verifying the program using at least the verifi-
cation structure from the erasable non-
volatile memory of the BIOS, and

acting on the program according to the verifica-
tion.

Id., col. 6, line 59, through col. 7, line 4.

The parties have not meaningfully disagreed about
the ordinary meaning of the claim terms at issue on
appeal: "program," "volatile memory," and "non-volatile
memory." But Apple has relied on examples in the speci-
fication, as well as statements by the applicants and the
examiner during prosecution, to argue that the terms do
not have those ordinary meanings in this patent. Specifi-
cally, Apple has argued that the term "program" (which is
to be verified for authorization under a license) is limited
to an *application* program, *i.e.*, one that relies on an
operating system in order to run, thus excluding an
operating system itself. Apple also has argued that the
terms "volatile memory" and "non-volatile memory" are
indefinite because an example given in the specification is
irreconcilable with the ordinary meaning of the terms.
The district court agreed with Apple on the first point
(finding non-infringement on that basis) but disagreed
with Apple on the second (rejecting invalidity for indefi-
niteness on that basis). Both sides appeal. We have
jurisdiction under 28 U.S.C. § 1295(a)(1).

DISCUSSION

Claim construction and indefiniteness are matters of
law that this court reviews de novo. *Cybor Corp. v. FAS
Techs., Inc.*, 138 F.3d 1448, 1451 (Fed. Cir. 1998); *Praxair,
Inc. v. ATMI, Inc.*, 543 F.3d 1306, 1319 (Fed. Cir. 2008).

A

Ancora challenges the district court's conclusion that
the term "program" is limited to application programs,

thereby excluding operating systems from the class of programs that the claimed method checks for authorization under a license. We agree with Ancora. A claim term should be given its ordinary meaning in the pertinent context, unless the patentee has made clear its adoption of a different definition or otherwise disclaimed that meaning. *See, e.g., Thorner v. Sony Computer Entm't Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012). There is no reason in this case to depart from the term's ordinary meaning.

Apple nowhere seriously disputes that the ordinary meaning of the word "program" in the computer context encompasses both operating systems and the applications that run on them (as well as other types of computer programs). And the district court explained that, although the term "program" may have many different meanings depending on the context, "to a computer programmer" a program is merely a "set of instructions" for a computer. *Ancora*, 2012 WL 6738761, at *7. That clear meaning governs here, we conclude, because there is nothing sufficient to displace it.

The claims themselves point against a narrowing of the term "program" to application programs. Claim 1 recites a "method of restricting software operation" (if license coverage of the software cannot be verified) and refers to the restricted software simply as a "program." '941 patent, col. 6, line 59, through col. 7, line 4. In contrast, independent claim 18, which is not asserted here, recites a "method for accessing an *application* software program" and then repeatedly refers to the "*application* software program." *Id.*, col. 8, lines 31-52 (emphases added). Although claim 18 is not a dependent claim, and claim differentiation as an interpretive principle is often of limited importance, the difference in terminology tends to reinforce, rather than undermine, adoption of the broad ordinary meaning of "program" by itself.

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