

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

TRIPLAY, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 13-1703-LPS-CJB
)	
WHATSAPP, INC.,)	
)	
Defendant.)	
)	

REPORT AND RECOMMENDATION

In this action filed by Plaintiff TriPlay, Inc. (“Plaintiff” or “TriPlay”) against Defendant WhatsApp, Inc. (“Defendant” or “WhatsApp”), Plaintiff alleges that Defendant directly (and as to one patent, willfully) infringes four of Plaintiff’s patents (the “Asserted Patents” or the “patents-in-suit”). (D.I. 80) Presently before the Court is the matter of claim construction regarding terms appearing in two of the Asserted Patents: United States Patent Nos. 8,332,475 (the “475 patent”) and 8,874,677 (the “677 patent”). The Court recommends that the District Court adopt the constructions set forth below.

I. BACKGROUND

A. The Parties

TriPlay is a Delaware corporation with its principal place of business in New York, New York. (*Id.* at ¶ 2) It and its wholly owned subsidiary, TriPlay Communications, Ltd., were formed for the purpose of “creating and developing a device agnostic content delivery technology that would enable users to communicate across devices (mobile or otherwise) regardless of the device manufacturer.” (*Id.* at ¶ 7) TriPlay is the owner of the patents-in-suit. (*Id.* at ¶¶ 1, 11)

Defendant WhatsApp is incorporated in Delaware, and has its principal place of business

in Santa Clara, California. (*Id.* at ¶ 3) WhatsApp offers a “cross-platform messaging product called WhatsApp Messenger[,]” which facilitates communication between users of mobile devices made by various manufacturers. (*Id.* at ¶ 18)

B. The Asserted Patents

The two Asserted Patents at issue here—the '475 and '677 patents—are both entitled “Messaging System and Method[;]” they relate to the electronic messaging field, and, “in particular, to cross-platform messaging.” ('475 patent, col. 1:5-6; '677 patent, col. 1:5-6) The patents share identical specifications. (D.I. 93 at 2 n.2)¹ The patents provide for, *inter alia*, a system for “message communication via a communication media between one or more originating communication devices assigned to a sender and one or more destination communication devices assigned to a receiver[.]” ('475 patent, col. 5:22-26) The specification describes the system as comprising an “access block” and a “media block[.]” (*Id.*, col. 5:27-36) The patents further set forth various systems and methods that generally involve adapting or converting the layout and/or format of a message based on criteria relating to the capabilities of the destination device or to the communication media being transferred. (*See, e.g., id.*, cols. 5:22-45, 6:36-59, 7:1-19, 7:30-53) The '677 patent varies from the '475 patent, *inter alia*, in that it explicitly recites an “initial message includ[ing] a video[.]” and conversion of that video. (*See, e.g., '677 patent*, col. 23:23-51)

C. Procedural Posture

TriPlay commenced this action on October 15, 2013, alleging that WhatsApp infringed

¹ In light of this, the Court will cite only to the '475 patent unless otherwise noted, and when the Court hereafter refers to “the patent” or “the patent specification,” that is a reference to the '475 patent unless otherwise noted.

the '475 patent. (D.I. 1) In lieu of answering TriPlay's Complaint, WhatsApp filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), in which it argued that the claims of the '475 patent fell outside the scope of patentable subject matter under 35 U.S.C. § 101 ("Section 101"). (D.I. 7, 8) Chief Judge Leonard P. Stark referred that motion (the "First Motion to Dismiss") to the Court for resolution. (D.I. 19)

The Court ultimately issued a Report and Recommendation granting the First Motion to Dismiss as to claim 12 of the '475 patent, and denying the motion without prejudice as to the remaining claims. *TriPlay, Inc. v. WhatsApp Inc.*, Civil Action No. 13-1703-LPS, 2015 WL 1927696, at *19 (D. Del. Apr. 28, 2015). In doing so, the Court concluded that the patent eligibility of representative claim 1 of the '475 patent could turn on whether the constructions of certain terms transformed an otherwise abstract idea into patent-eligible subject matter. *Id.* at *17-19. Chief Judge Stark later issued a Memorandum Order adopting, in all substantive respects, the Court's Report and Recommendation; in doing so, Chief Judge Stark agreed that issues of claim construction had to be resolved before any further dispositive Section 101 motion could be filed. *TriPlay, Inc. v. WhatsApp, Inc.*, Civil Action No. 13-1703-LPS, 2015 WL 4730907, at *1 (D. Del. Aug. 10, 2015).

In the interim, TriPlay had filed a Second Amended Complaint, (D.I. 46), in which it alleged that WhatsApp infringed not only the '475 patent but also the '677 patent.² WhatsApp responded with another motion seeking dismissal of the claims of both patents on Section 101 grounds (the "Second Motion to Dismiss"). (D.I. 58)

² TriPlay later filed the operative Third Amended Complaint, which adds infringement allegations as to two other patents, not at issue here. (D.I. 80)

After he adopted the Court's Report and Recommendation regarding the '475 patent, Chief Judge Stark subsequently ordered, *inter alia*, that the parties submit both "a list of representative claims of [the '475 and '677 patents] that [would] adequately represent all claims of the '475 and '677 patents for purposes of deciding [WhatsApp's] motions to dismiss based on Section 101[.]" and a list of those claim terms or phrases that the "parties believe[d] need[ed] construction and their proposed claim constructions[.]" (D.I. 82) After receiving the parties' responsive submission, (D.I. 84), Chief Judge Stark ordered that: (1) WhatsApp's motions to dismiss were denied without prejudice to renew; (2) all issues regarding claim construction addressed in the parties' joint submission were referred to the Court for resolution; and (3) any future renewed motions seeking dismissal of the claims on Section 101 grounds were also referred to the Court for resolution, (D.I. 86).

The Court held a scheduling teleconference on October 2, 2015, in which it determined that it would first conduct a *Markman* hearing before considering any renewed Section 101 motions. Claim construction briefing concluded on November 10, 2015, (D.I. 103), and the Court held a *Markman* hearing on November 19, 2015, (D.I. 105 (hereinafter, "Tr.")).

II. STANDARD OF REVIEW

A. Principles of Claim Construction

It is well-understood that "[a] claim in a patent provides the metes and bounds of the right which the patent confers on the patentee to exclude others from making, using, or selling the protected invention." *Corning Glass Works v. Sumitomo Elec. U.S.A., Inc.*, 868 F.2d 1251, 1257 (Fed. Cir. 1989). Claim construction is generally a question of law, although subsidiary fact finding is sometimes necessary. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 837-38

(2015).

The Court should typically assign claim terms their “ordinary and customary meaning[,]” which is “the meaning that the term[s] would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent application.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005) (citations omitted). However, when determining the ordinary meaning of claim terms, the Court should not extract and isolate those terms from the context of the patent, but rather should endeavor to reflect their “meaning to the ordinary artisan after reading the entire patent.” *Id.* at 1321; *see also Eon Corp. IP Holdings v. Silver Spring Networks, Inc.*, 815 F.3d 1314, 1320 (Fed. Cir. 2016).

To that end, the Court should look first and foremost to the language of the claims themselves, because “[i]t is a bedrock principle of patent law that the claims of a patent define the invention to which the patentee is entitled the right to exclude.” *Phillips*, 415 F.3d at 1312 (internal quotation marks and citations omitted). For example, the context in which a term is used in a claim may be “highly instructive.” *Id.* at 1314. In addition, “[o]ther claims of the patent in question, both asserted and unasserted, can also be valuable” in discerning the meaning of a particular claim term. *Id.* This is “[b]ecause claim terms are normally used consistently throughout the patent, [and so] the usage of a term in one claim can often illuminate the meaning of the same term in other claims.” *Id.* Moreover, “[d]ifferences among claims can also be a useful guide[,]” as when, for example, “the presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim.” *Id.* at 1314-15.

In addition to the words of the claims, the Court should look to other intrinsic evidence.

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