



KeyCite Yellow Flag - Negative Treatment

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E.D.Tex., August 6, 2015

2013 WL 4630447
United States District Court,
E.D. Texas, Marshall Division.

Personalized Media Communications LLC

v.

[Zynga, Inc.](#)

Case No. 2:12-CV-68-JRG-RSP

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[Expand Construed Terms](#)

**CLAIM CONSTRUCTION
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[ROY S. PAYNE](#), UNITED STATES MAGISTRATE
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BACKGROUND

Before the Court is the parties' claim construction briefing (Dkt. 77, 80 and 86). In addition, the Court heard oral arguments on April 17, 2013. There are four patents-in-suit: U.S. Patent No. 7,734,251 (the “ ’251 Patent”), U.S. Patent No. 7,797,717 (the “ ’717 Patent”), U.S. Patent No. 7,860,131 (the “ ’131 Patent”), and U.S. Patent No. 7,908,638 (the “ ’638 Patent”).¹

The patents-in-suit are part of patent family which has extensive prosecution and litigation history. The parent application for the patents-in-suit was filed in 1981 and issued as U.S. Patent No. 4,694,490 (the “ ’490 Patent”). The ’490 Patent was supplemented by a continuation-in-part application in 1987, which issued as the U.S. Patent No. 4,965,825 Patent (the “ ’825 Patent”). The patents in suit, filed in May and June 1995, are part of a chain of continuation applications filed from the ’825 Patent. The family of patents has been the subject of multiple infringement actions including District Court and ITC actions. The prior actions include most recently *Personalized Media Communication, LLC v. Motorola, Inc., et al.*, 2:08-cv-70 (E.D. Tex.) in which a claim construction order was issued at Dkt. 271 (the “*EchoStar* Order”).

Fourteen groups of terms are presented by the parties for construction. Two of those terms relate to constructions issued in *EchoStar*.

The patents in suit generally relate to the delivery of programming content to consumers. More particularly the patents relate to the concept of delivering “personalized” programming. The patents in suit share a common Abstract:

*2 A unified system of programming communication. The system encompasses the prior art

(television, radio, broadcast hardcopy, computer communications, etc.) and new user specific mass media. Within the unified system, parallel processing computer systems, each having an input (e.g., 77) controlling a plurality of computers (e.g., 205), generate and output user information at receiver stations. Under broadcast control, local computers (73, 205), combine user information selectively into prior art communications to exhibit personalized mass media programming at video monitors (202), speakers (263), printers (221), etc. At intermediate transmission stations (e.g., cable television stations), signals in network broadcasts and from local inputs (74, 77, 97, 98) cause control processors (71) and computers (73) to selectively automate connection and operation of receivers (53), recorder/players (76), computers (73), generators (82), strippers (81), etc. At receiver stations, signals in received transmissions and from local inputs (225, 218, 22) cause control processors (200) and computers (205) to automate connection and operation of converters (201), tuners (215), decryptors (224), recorder/players (217), computers (205), furnaces (206), etc. Processors (71, 200) meter and monitor availability and usage of programming.

¹251 Abstract.

APPLICABLE LAW

“It 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 v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc) (quoting *Imnova/Pure Water Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)). To determine the meaning of the claims, courts start by considering the intrinsic evidence. See *id.* at 1313. *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 861 (Fed. Cir. 2004); *Bell Atl. Network Servs., Inc. v. Covad Commc'ns Group, Inc.*, 262 F.3d 1258, 1267 (Fed. Cir. 2001). The intrinsic evidence includes the claims themselves, the specification, and the prosecution history. See *Phillips*, 415 F.3d at 1314; *C.R. Bard, Inc.*, 388 F.3d at 861. Courts give claim terms their ordinary and accustomed meaning as understood by one of ordinary skill in the art at the time of the invention in the context of the entire patent. *Phillips*, 415 F.3d at 1312–13; *Alloc, Inc. v. Int'l Trade Comm'n*, 342 F.3d 1361, 1368 (Fed. Cir. 2003).

The claims themselves provide substantial guidance in determining the meaning of particular claim terms. *Phillips*, 415 F.3d at 1314. First, a term's context in the asserted claim can be very instructive. *Id.* Other asserted or unasserted claims can also aid in determining the claim's meaning because claim terms are typically used consistently throughout the patent. *Id.* Differences among the claim terms can also assist in understanding a term's meaning. *Id.* For example, when a dependent claim adds a limitation to an independent claim, it is presumed that the independent claim does not include the limitation. *Id.* at 1314–15.

“[C]laims ‘must be read in view of the specification, of which they are a part.’ ” *Id.* (quoting *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (en banc)). “[T]he specification ‘is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.’ ” *Id.* (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)); *Teleflex, Inc. v. Ficoso N. Am. Corp.*, 299 F.3d 1313, 1325 (Fed. Cir. 2002). This is true because a patentee may define his own terms, give a claim term a different meaning than the term would otherwise possess, or disclaim or disavow the claim scope. *Phillips*, 415 F.3d at 1316. In these situations, the inventor's lexicography governs. *Id.* The specification may also resolve ambiguous claim terms “where the ordinary and accustomed meaning

of the words used in the claims lack sufficient clarity to permit the scope of the claim to be ascertained from the words alone.” *Teleflex, Inc.*, 299 F.3d at 1325. But, “ ‘[a]lthough the specification may aid the court in interpreting the meaning of disputed claim language, particular embodiments and examples appearing in the specification will not generally be read into the claims.’ ” *Comark Commc'ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1187 (Fed. Cir. 1998) (quoting *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1571 (Fed. Cir. 1988)); see also *Phillips*, 415 F.3d at 1323. The prosecution history is another tool to supply the proper context for claim construction because a patent applicant may also define a term in prosecuting the patent. *Home Diagnostics, Inc. v. Lifescan, Inc.*, 381 F.3d 1352, 1356 (Fed. Cir. 2004) (“As in the case of the specification, a patent applicant may define a term in prosecuting a patent.”).

*3 Although extrinsic evidence can be useful, it is “ ‘less significant than the intrinsic record in determining the legally operative meaning of claim language.’ ” *Phillips*, 415 F.3d at 1317 (quoting *C.R. Bard, Inc.*, 388 F.3d at 862). Technical dictionaries and treatises may help a court understand the underlying technology and the manner in which one skilled in the art might use claim terms, but technical dictionaries and treatises may provide definitions that are too broad or may not be indicative of how the term is used in the patent. *Id.* at 1318. Similarly, expert testimony may aid a court in understanding the underlying technology and determining the particular meaning of a term in the pertinent field, but an expert's conclusory, unsupported assertions as to a term's definition are entirely unhelpful to a court. *Id.* Generally, extrinsic evidence is “less reliable than the patent and its prosecution history in determining how to read claim terms.” *Id.*

CONSTRUCTION OF DISPUTED TERMS

A. “subscriber”²

The primary dispute relates to whether a “subscriber” is one who agrees to pay for content and whether subscriber merely equates to using information.

PMC

PMC asserts that the patents teach that “many different classes of subscriber will exist with different information demands.” ²⁵¹ 272:64–67. PMC asserts that the patents teach that one class of subscribers is television viewers.

At the station of Figs 7 and 7B, a subscriber decides to watch a particular television program the audio of which is stereo simulcast on a local radio station, in a fashion well known in the art. Said subscriber switches power on to TV set, 202, and manually selects the proper channel, which is, for example, channel 13, at the television tuner, 215, of said set, 202, thereby display of the video and audio information of the transmission of said channel.

'251 209:60–67.

In the example, the subscriber station of Fig. 1 is in New York City and is tuned to the conventional broadcast television transmission frequency of channel 13 at 8:30 PM on a Friday evening when the broadcast station of said frequency, WNET, commences transmitting a television program about stock market investing, “Wall Street Week.” ... From said program originating studio said program is transmitted by conventional television network feed transmission means, well known in the art, to a large number of geographically dispersed intermediate transmission stations that retransmit said program to millions of subscriber stations where subscribers view said program.

'251 11:19–35. PMC cites to '251 9:14–16 as an example that describes subscribers being “duly authorized” but where no payment requirement is mentioned. PMC asserts that charging a subscriber is only described in the patents as an “example.” Dkt. 77 at 7 (citing '251 45:29–40). PMC also asserts that there are other examples in the specification where there is a payment required, but that the payment is not from the subscriber: “advertisers and others who pay for the transmission and performance of programming...” '251 2:21–24. PMC also asserts that other examples describe payment as not the only option:

Moreover, this system must have the capacity to ensure that programming

supplied for pay or for other conditional use is used only in accordance with those conditions. For example, subscriber station apparatus must display the commercials that are transmitted in transmissions that advertisers pay for.

*4 '251 2:33–37.

PMC asserts that for all the different types of subscribers, the commonality is that they are all viewers of programming. PMC cites the language: “Thus each viewer—including the subscriber of the station of FIGS. 7 and 7F, said second subscriber, and said third subscriber.” ('251 at 259:63–67) and the language “in the case of any programming that is outputted at any given output apparatus, thereby enabling a subscriber to view or hear or read” ('251 166:33–36; *See also* '251 201:16–20).

PMC asserts that the asserted claims say nothing about payment. PMC asserts that construing the term to require payment would exclude embodiments in the specification in which no payments occur. Dkt. 77 at 9.

Zynga

Zynga asserts that the claims, specification and prosecution history support its position. With regard to the claims, Zynga asserts that the claims include both “user” and “subscriber” (“subscriber specific data,” “user specific data,” “user specific subscriber datum,” “subscriber data”). Dkt. 80 at 3 (citing numerous claims). Zynga asserts that PMC's construction of “subscriber” merely reduces to the same as “user.” Zynga asserts its construction recognizes the differences between “user” and “subscriber.” Dkt. 80 at 3.

Zynga asserts that the specification citations PMC relies on with regard to conventional broadcast television relate to a system where even broadcast television is subscription based:

The prior art includes so-called “addressable” systems ... Such systems enable broadcasters to turn off subscriber station decoder/decryptor apparatus of subscribers who do not pay their bills and turn them back on when the bills are paid.

'717 5:32–38. Zynga asserts that its construction does not require payment upfront, but rather merely an agreement to pay. Zynga asserts that PMC does not cite to any portion of the specification in which a subscriber has not so agreed. Dkt. 80 at 4.

Zynga also asserts that the Examiner understood the term to requirement payment citing the Examiner's statements:

Zworykin has been cited to evidence the fact that it was notoriously well known in the TV distribution arts to have scrambled certain TV signals so to have prevented unauthorized reception by unauthorized viewers (i.e. those who have not paid for the programming) ...

In such situations it was known to have been desirable, if not necessary, to have scrambled the TV programming to prevent unauthorized use/reception by people who have not subscribed ...

Dkt. 80 Ex. 5 at 72 ('251 Final rejection dated 4/28/04). Additionally Zynga cites to the Examiner statement that:

a) At the time of applicant's alleged invention, it was known to have used conventional TV distribution networks to convey "premium" TV programming to users who subscribe to, and pay a fee for, the premium TV service; ...'

b) It is also noted that CATV distribution networks were inherently subscription based systems ... Thus, CATV system typically included subscription fees to be paid by the subscribers for the "premium" CATV service.

*5 Dkt. 80 Ex. 6 at 27–28 ('251 Advisory Action dated 11/24/04).

PMC's Reply

PMC asserts that Zynga limits "subscriber" to just one class of subscribers (paying subscribers), ignoring the specifications statement of "many different classes of subscribers." Dkt. 86 at 1. PMC asserts that examples of non-payers are the millions of viewers of the "Wall Street Week" program that are described as "subscribers." Dkt. 86 at 2 (citing '251 11:19–35). PMC asserts that Zynga's file history citations merely establish that one class of subscribers is paying subscribers. PMC asserts that the term "user" and "subscriber" is utilized interchangeably such as in the specification where it states "[f]or example, only at subscriber stations where user specific stock data is maintained...." Dkt 86 at 2 (quoting '717 231:4–

9). PMC notes that the parties have agreed other terms may share a common meaning, for example the parties have agreed that "data" and "information" have the same meaning. Dkt. 86 at 2.

Analysis

Zynga has pointed to examples in the specification and file history in which a subscriber has paid for services. However, Zynga has not pointed to a disclaimer or disavowal in the specification in which a "subscriber" must be a "paying subscriber." In contrast, as noted in the specification, "many different classes of subscriber will exist with different information demands." '251 272:64–67. Further, there are examples describing television subscribers with no clear disclaimer that such television subscribers are limited to "premium TV service" paying subscribers. '251 11:19–35, 209:60–67. In addition, the statement that "advertisers and others may pay for the transmission and performance of programming" ('251 2:22–24) further implies that the programming may be paid for by persons other than subscribers, thus indicative of the potential of free subscriptions. Viewing the intrinsic record as a whole there is not a disclaimer or disavowal limiting subscribers to paying subscribers.

PMC, however, attempts to merely equate the term "subscriber" with "user." PMC has not established that the two terms carry the same ordinary meaning and has not pointed to evidence in the intrinsic record establishing that the patentee disavowed the ordinary meaning of "subscriber." Though PMC may be correct that one may be a "free subscriber" or a "paid subscriber," PMC has not established that a mere user equates to a subscriber. The conventional meaning of "subscriber" means something more than a "user." Similarly, as used in the specification, for example, any and all television viewers are not described as subscribers, rather subscribers are described in association of those specially configured stations disclosed with reference for example to Figures 1, 3, and 7. At the hearing, PMC agreed that a subscriber is more than a mere user, but rather someone arranges to receive information such as for example through a request or agreement. Such an interpretation is in conformance with the claims and in conformance with the specification, which includes general television descriptions (as opposed to mandating "premium" television) and includes advertiser payment. The intrinsic record as a whole does not teach that payment is required to be a subscriber.

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