IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

UNILOC USA, INC., et al., Plaintiffs, v. AVG TECHNOLOGIES USA, INC.,	§ § § § § §	Case No. 2:16-cv-00393-RWS LEAD CASE
BITDEFENDER LLC,	§	Case No. 2:16-cv-00394-RWS
PIRIFORM, INC.,	§	Case No. 2:16-cv-00396-RWS
UBISOFT, INC.,	§	Case No. 2:16-cv-00397-RWS
Defendants.		

UNILOC USA, INC., et al., Plaintiffs, v. ADP, LLC,	§ § § § § §	Case No. 2:16-cv-00741-RWS LEAD CASE
BIG FISH GAMES, INC.,	§	Case No. 2:16-cv-00858-RWS
BLACKBOARD, INC.,	§	Case No. 2:16-cv-00859-RWS
BOX, INC.,	§	Case No. 2:16-cv-00860-RWS
ZENDESK, INC.,	§	Case No. 2:16-cv-00863-RWS
KASPERSKY LAB, INC.,	§	Case No. 2:16-cv-00871-RWS
SQUARE ENIX, INC.,	§	Case No. 2:16-cv-00872-RWS
Defendants.		

OPENING SUPPLEMENTAL CLAIM CONSTRUCTION BRIEF

The Court ordered the parties to file supplemental claim construction briefs, with respect to two newly-disputed terms. Although the terms are newly disputed, the different constructions arise from an issue the parties earlier briefed: whether claims of the '578 (and '293) patents *require* applications be executed at the client -- a construction that would exclude those systems that execute applications at the server. (Dkt. 140, pp. 4-7; Dkt. 150, pp. 5-10; Dkt. 155, pp. 2-10).[1] How the Court decides that issue should control the construction here.

I. "Application Launcher Program"

Terms and Phrases	Plaintiff's Proposed Construction	Defendants' Proposed Construction
"application launcher program"	"a program distributed to a client to initially populate a user desktop and to request *execution of the application program*"	"a program distributed to a client to initially populate a user desktop and to request *the application program from a server*"

All of the claims of the '578 patent require an "application launcher program" (hereinafter, "launcher").[2] The '578 patent describes a launcher as a program the server distributes to a client to "initially populate the user desktop" (12:26-27)[3] by "provid[ing] for a user interface" (e.g., displaying an icon that corresponds to the application) "to execute the application." (3:64 – 4:2). The program is called a "launcher" because when the user "selects" the application (by, e.g., mouse-clicking on the icon), the launcher requests execution of

[1] All docket cites are to 2:16-cv-00393-RWS.

[2] "An application launcher program" is required only by *dependent* claims of the '466 (3-6, 10-11, 18-21, 25-26, 31-34, 38-39); '766 (2, 8, 14); and '293 (10) patents.

[3] Citations in this section are to columns and lines of the '578 patent specification.

("launches") the application itself. The launcher could have other functions, depending upon the embodiment.[4]

The written description of the '578 patent describes different embodiments of the launcher, but features common to all embodiments include 1) the launcher is associated with an application; 2) the launcher is distributed to a client; 3) the launcher "populates" the desktop, e.g., it causes the desktop to display an icon corresponding to the associated application; and 4) the user's selecting the icon causes the launcher to request execution of the application: ("The [launcher] provides … to the server [a] request to initiate execution of the application.") (4:6-9); ("Upon selection of the icon displayed by the [launcher], the selected application is 'launched' by requesting the URL of the application from the … server.") (8:14-17); ("The display icon is displayed through the browser's graphic user interface representing the users' desktop and allowing an authorized user to execute an application … by selecting the displayed icon of the [launcher]." (10:58-62).

Uniloc draws its proposed construction directly from the "Summary of the Invention" in the specification of the '578 patent, which describes the launcher as providing user information to the server "along with the *request to initiate execution* of the application," (4:6-9) (emphasis added). As for Defendants' proposal --"request the application… from a server"-- the "Summary of the Invention" does not even mention that. Rather, that particular way of approaching execution of the application is not mentioned until later in the patent (11:60-12:1), and then only as a characteristic of an "alternative" embodiment (11:27-30). Defendants' proposed

[4] For example, the '578 patent describes the launcher as determining the user ID and providing user information to the server (4:6-8), and providing an interface to allow a user to specify the configurable parameters of the application. (3:66-67; 10:52-54.)

construction describes only one embodiment, which the inventors relegated to a later portion of the specification.

Defendants' construction does not cover all launchers. For example, it would not cover launchers that request execution at the server. As discussed in earlier briefing (Dkt. 140, p.4; Dkt. 155, pp. 2-3), applications can be executed at either the server or at the client. When an application is executed at the server, the launcher would not request the application *from* the server. Rather, the launcher would need only provide the server with a "request to initiate execution of the application," as the Summary of the Invention provides.

The specification does describe an embodiment in which, per the Defendants' construction, the launcher requests an application from the server. (11:65-12:1). But the '578 patent does not refer to this as "the invention," but rather as one of the "*[a]lternative* preferred embodiments… described in" the '466 patent.[5] (11:27-30) (emphasis added).

Defendants' proposed construction not only excludes all systems that execute applications at the server, it does not even cover a described embodiment that executes applications at the client. The specification includes an embodiment where the launcher distributed to the client includes the entire application the vendor provided. (14:32-34). Because that launcher already includes the application, it would not "request the application" from the server, as Defendants' construction would require. A construction that would read out a preferred embodiment is rarely, if ever, correct. *Vitronics v. Conceptronic, Inc.*, 90 F.3d 1576,

[5] As discussed in earlier briefing (Dkt. 140, pp. 4-5; Dkt. 155, pp. 2, 6-7), claims of the '466 patent are limited to embodiments that execute applications at the client, rather than the server, because those claims include "providing an instance of the [application] to the client for execution." The same limitation appears in claims 3, 9, and 15 of the '766 patent (Dkt. 140, Ex. B). Those claims of the '766 patent should be classified with the '466 patent claims for these claim construction purposes.

1583-84 (Fed. Cir. 1996). Nothing in the specification suggests a reason why the inventors would have wanted to exclude this – or any other – embodiment.

II. "Available for Use"

Terms and Phrases	Plaintiff's Proposed Construction	Defendants' Proposed Construction
"make the application program available for use"	"make the application program available for use"	"make the application available for access *and download*, responsive to user requests"

This term appears only in the claims of the '293 patent. The IBM inventors directed the '293 patent to the portion of a network that stores an application on a central network management server and then transfers that application, as part of a file packet, to an intermediate server.

"Available for use," given its ordinary and customary meaning, is not limiting. Typically, a user would select an application by clicking the corresponding icon on his desktop. If that application had been made "available for use" at the server, it could either be executed there or downloaded to the client for execution, depending upon the how the system was designed.

Defendants, by asking the Court to require the application be available for *download*, seek to narrow the claim to exclude systems that execute the application at the server.

There is no basis for imposing that restriction. The intrinsic evidence does not support it. The relevant portion of Claim 1 of the '293 patent, as originally filed, was written:

> A method for distribution of application programs to a target station on a network comprising the steps executed on a centralized network management server coupled to the network of … *distributing the file packet to the target station*.

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