

I. CONTESTED CLAIM TERM NOS. 1-11**A. Contested Term No. 1: “selection kernel”**

Realtek argues that “[c]laims 1, 6, and 11 of the ’643 patent recite a selection kernel, a term that has no meaning in the art and does not connote structure by itself.” Doc. 41 at 2. Realtek provides no expert opinion to support this statement. Bandspeed’s expert testified that a POSITA would understand the meaning of the term and cited to, as an example, the basic selection kernel described in an earlier Bluetooth specification. *See* Doc. 40-1 at 8-9; Doc. 40-13 at 129. Realtek’s argument is further belied by its brief, where Realtek describes what a selection kernel exists in the prior art Bluetooth Standard. Doc. 41 at 8-10. Further, the PTAB determined “selection kernel” was not indefinite and adopted a definition consistent with Bandspeed’s construction. Doc. 40-14 at 11. Realtek cites no evidence to support its contention that “[d]ifferent competitors could implement the selection of channels each in different ways, even ways not possible at the time of the invention and clearly not contemplated by the patentee, yet each would satisfy Plaintiff’s proposed construction as long as they achieve the stated result.” Realtek’s unsupported argument should be rejected. Finally, Realtek argues Bandspeed’s proposal lacks “any corresponding structure.” This is not a MPF claim so no corresponding structure must be identified.

Realtek cannot meet its burden to “show by clear and convincing evidence that a skilled artisan could not discern the boundaries of the claim based on the claim language, the specification, and the prosecution history, as well as her knowledge of the relevant art area.”¹ Consistent with Bandspeed’s proposal, a POSITA would understand a “selection kernel” to be “a device or mechanism of a participant that selects communications channels to form the hopping sequence.”

B. Contested Term No. 2: “the hopping sequence”

¹ *Haemonetics Corp. v. Baxter Healthcare Corp.*, 607 F.3d 776, 783 (Fed. Cir. 2010).

Realtek claims that the alleged lack of antecedent basis “is an indication of indefiniteness,” but fails to show that a POSITA would not understand the term read in light of the specification.² Further, Realtek provides no explanation for its failure to disclose its contention in its invalidity contentions. Doc. 40 at 8-9. Realtek cannot prove indefiniteness by clear and convincing evidence.

Although the sole basis for Realtek’s claim of indefiniteness of “the hopping sequence” is the lack of antecedent basis, Doc. 35-1 at 5, Realtek relies on two new arguments, both unrelated to a lack of antecedent basis, that it omitted from its invalidity contentions. The Court may reject the arguments on this ground alone. Doc. 40 at 8-9. In addition, both arguments fail on the merits.

First, Realtek mistakenly asserts that claim 2 requires the claimed device to use *simultaneously* “a communication channel from both the first and second set of communications channel[s]” Doc. 41 at 6. Realtek omits the language from claim 2 showing each hopping sequence is “based on the frequency hopping protocol” that includes the first and second sets of communications channels: “at each hop in the hopping sequence *based on the frequency hopping protocol*, only one communications channel of the [first/second] set . . . is used.”³ Claim 2 further discloses a sequence in which the first set of communications channels is used “for a first period of time” and then the second set of communications channels is used “for a second period of time *that is after the first period of time*”⁴ Thus, the claim does *not* require “simultaneous communications” over a channel from both the first and second sets and would be readily understood by a POSITA. Doc. 40-1 at 13-15.

Second, Realtek incorrectly claims that the specification’s definition of “hopping

² MPEP § 2173.05(e); *See also In re Downing*, 754 Fed. App’x 988, 996 (Fed. Cir. 2018); *Energizer Holdings, Inc. v. Int’l Trade Comm’n*, 435 F.3d 1366, 1370-71 (Fed. Cir. 2006).

³ Doc. 40-6 at 27:25-26, 30-31.

⁴ *Id.* at 27:9-14 (emphasis added).

sequence” is ambiguous. Doc. 41 at 6. A POSITA would readily ascertain the meaning of the term “the hopping sequence” as defined by the specification. Doc. 40-1 at 13-15. Indeed, Realtek agreed to the same definition of “hopping sequence” for the ’418 and ’614 patents. Doc. 35-1 at 3.

C. Contested Term No. 3: “[first/second/third] performance [criterion/criteria]”

Realtek argues the jury should not be permitted to apply their “ordinary understanding” of the term “performance” because it has a broad scope Doc. 41 at 7. Claim terms are to be construed based on their plain and ordinary meaning with “only two exceptions to [the] general rule,” which are when the patentee acts as his own lexicographer or disavows the full scope of the claim term either in the specification or during prosecution.⁵ Neither of those conditions are present. The jury should be permitted to apply the plain meaning of the word. Realtek cites a dictionary definition for “performance” of “[m]anner of functioning.” Doc. 41 at 7. But, as used in the asserted claims, this “manner of functioning” itself makes sense. The claim language is clear that it is “*performance* of a plurality of communications channels” such that even if it were read as “[*manner of functioning*] of a plurality of communications channels,” it would be acceptable. The term “performance” is a common word with no special meaning. No construction is necessary.

D. Contested Term No. 4: “a [first]/[second] time”

Realtek provides no justification that the claims are limited only to taking “a fraction of a second to test the performance of a communications channel.” In fact, Realtek states that the first and second time element in the ’418 patent refer to “the time required to test a communications channel,” with that duration of time not limited, and particularly not limited to an “instant” or fraction of time. To the contrary, the specification identifies determining channel performance at various times other than “an instant of time” including testing performance “according to a

⁵ *Thorner v. Sony Computer Entm’t Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012).

specified schedule, such as the expiration of a specified time period.” Doc. 40-3 at 6:47-57; *id.* at 8:24-29. The word “instant” is not claimed. It should not be added.

E. Contested Term Nos. 5 and 6: “channel index” and “apply[ing] an index . . .”

Although Realtek contends that the ’520 patent provides no explanation of these terms, it ignores the claim language and acknowledges sections of the specification providing explanation more than adequate to allow a POSITA to understand the terms. For example, although Realtek claims “channel index does not appear in the specification,” Doc. 41 at 8, it ignores the claim language explaining that the device “load[s] channel *indices* of the subset of communications channels into [a] register,”⁶ revealing that channel indices are indicators or identifiers of channels. Realtek also cites Fig. 5A of the ’520 Patent, showing that the “channel indices” “load[ed] into the register,” as described in the claim language,⁷ consist of channel indicators such as addresses.⁸ Thus, Realtek’s argument is reduced to the dubious claim that a POSITA would be unable to determine that “channel indices” refers to more than one “channel index.”

Similarly, although Realtek claims the specification “sheds no light on” the application of an index to the indicator of the identified communications channel, it cites the portion of the specification that explains the process of applying an index to the channel indicator of a candidate channel to determine a replacement channel for use⁹ and acknowledges that this index “is applied to the output of the selection kernel” and is different from the channel index (i.e. channel

⁶ Doc. 40-10 at 28:6-7.

⁷ *Id.* at 28:6-7 (“load channel indices of the subset of communications channels into the register”).

⁸ Doc. 41 at 10 (“an address is shown” in Fig. 5A); *id.* at Fig. 5A; Doc. 40-1 at 15 (“[T]he patent describes the use of a channel index for each channel, which, based on the claim language and the specification, a POSITA would understand is an indicator of a channel such as an address.”). *See also* Ex. 18, RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY at 971 (“*Computers a.* a value that identifies and is used to locate a particular element within a data array or table”).

⁹ *Compare* Doc. 40 at 14 (citing Doc. 40-10 at 20:30-59) *with* Doc. 41 at 9-10.

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