

No. 2021-1725

**United States Court of Appeals
for the Federal Circuit**

DYFAN, LLC,
Plaintiff-Appellant,

v.

TARGET CORPORATION,
Defendant-Appellee

Appeal from the United States District Court for the Western District of Texas
in C.A. No. 6:19-cv-00179-ADA, Judge Alan D Albright

**RESPONSE OF DYFAN TO TARGET'S COMBINED PETITION FOR
PANEL REHEARING AND REHEARING *EN BANC***

Timothy Devlin
Derek Dahlgren
DEVLIN LAW FIRM LLC
1526 Gilpin Avenue
Wilmington, DE 19806
Telephone: (302) 449-9010
tdevlin@devlinlawfirm.com
ddahlgren@devlinlawfirm.com

*Attorneys for Plaintiff-Appellant
Dyfan, LLC*

Date: June 9, 2022

CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant Dyfan, LLC certifies the following:

1. The full name of every party represented by us is:

Dyfan, LLC

2. The name of the real party in interest represented by me is:

N/A.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

N/A.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Attorneys who appeared in the trial court:

Toler Law Group, PC: Aakash S. Parekh and Christopher M. Scurry;
McDonnell Boehnen Hulbert & Berghoff LLP: Jeffrey G. Toler; and
Devlin Law Firm, LLC: Timothy Devlin, Derek Dahlgren, Nadiia Loizides,
and Cory Edwards.

Attorneys expected to appear in this Court:

Devlin Law Firm, LLC: Timothy Devlin and Derek Dahlgren.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b).

Dyfan, LLC v. Target Corporation, 6:21-cv-00114-ADA (W.D. Tex.)

6. Any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees).

N/A.

Dated: June 9, 2022

/s/ Derek Dahlgren
Derek Dahlgren

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I. INTRODUCTION

The Petition should be granted. But not for the reasons Target asserts. This Court should hold, consistent with the Panel’s opinion and *Zeroclick*, that software claims with functional language are not subject to 35 U.S.C. § 112(6) (“§ 112(6)”) when they recite terms of art, describe the limitation’s operation, and a person of skill would have been aware of suitable conventional software. This Court should confirm that provides sufficient structure and that the presumption against § 112(6) remains intact.

This is the right case to clarify the threshold question of whether § 112(6) applies—a question of exceptional importance. The record demonstrates that a person of skill would have been aware of conventional “off the shelf” software programs that perform the claimed functionalities. It shows that the claims are replete with terms of art and structure as well as providing specific details about the systems’ operations and how the different structural elements are interconnected. Taken together, the facts make this an ideal case for addressing the interplay between software limitations and § 112(6), and to clarify the reach and application of *Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015) and *Zeroclick, LLC v. Apple, Inc.*, 891 F.3d 1003 (Fed. Cir. 2018).

II. ARGUMENT

A. Target's Flawed Arguments Demonstrate that the Court Should Provide *En Banc* Guidance

Target's arguments and the District Court's claim construction are two recent examples of the confusion in this area of the law. To resolve this ambiguity, this Court should revisit *Williamson* and its precedent regarding software claims and the application of § 112(6). The Court should take this opportunity to reconcile this Court's handling of the "module" term in *Williamson*, the user interface code terms in *Zeroclick*, and the code/application and system terms in this case, and the sufficiency of structure where software claims include limitations directed to terms of art and conventional software coupled with language describing its operation.

1. The Panel Did Not Misapply *Williamson*

Target claims the Panel misapplied *Williamson*. (Pet., 13-18.) Not so. The Panel properly applied the standard established in *Williamson* for rebutting the presumption against § 112(6) and found Target had not. (Slip Op., 15, 18-19.) It did not deviate from *Williamson*.

Williamson involved a "distributed learning control module" for performing various functions. 792 F.3d at 1349-51. The Court, in the non-*en banc* portion of the opinion, concluded that neither "module" nor the surrounding claim language provided sufficient structure. *Id.* Unlike this case, *Williamson* did not involve

commercially available software coupled with a detailed recitation of its operation in the claim.

Target argues *Williamson* is “strikingly similar.” (Pet., 10.) It points to *Williamson’s* finding that it is not enough if a skilled person “could” have written code for performing the function. *Id.* This is not similar. Whether a skilled person “could” write code is fundamentally different than a skilled person recognizing various “off-the-shelf” software that may be used based on the claim language including the description of its operation. *See Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1340 (Fed. Cir. 2016) (“[T]he sufficiency of the structure is viewed through the lens of a person of skill in the art and without need to ‘disclose structures well known in the art.’”) (quoting *Biomedino, LLC v. Waters Techs. Corp.*, 490 F.3d 946, 952 (Fed. Cir. 2007)).

The Court should grant the Petition and clarify this distinction between *Williamson* and *Zeroclick* and the Panel’s opinion.

2. The Panel Correctly Analyzed the Limitations in the Context of the Entire Claim

Target claims the Panel did not consider all the recited functions in the claims, again allegedly contrary to *Williamson*. (Pet., 13-18.) That is wrong. The Panel expressly “look[ed] beyond the initial ‘code’ or ‘application’ term to the functional language to see if a person of ordinary skill would have understood the claim limitation as a whole to connote sufficiently definite structure.” (Slip Op., 14.)

It found that Target’s own expert, Dr. Goldberg, had admitted that the word “code” *when coupled with the language describing its operation* connotes structure. (Slip. Op., 12 (citing Appx882-86).) Based on the record, the Panel concluded that a skilled person “could have, at the relevant time, selected existing ‘off-the-shelf software’ to perform specific services and functions.” (*Id.*; *see also* Appx887 (62:15-64:11).) It properly held that the use of “code” or “application” “*in combination with the recitation of the code or application’s operation*” would have connoted structure to persons of ordinary skill.” (Slip Op., 14.)¹

Looking to the surrounding claim language was consistent with this Court’s precedent. *Zeroclick*, 891 F.3d at 1008. *See also Cox Communs., Inc. v. Sprint Commun. Co. LP*, 838 F.3d 1224, 1232 (Fed. Cir. 2016) (“Indeed, here, functional language promotes definiteness because it helps bound the scope of the claims by specifying the operations that the ‘processing system’ must undertake.”); *Rodime PLC v. Seagate Tech., Inc.*, 174 F.3d 1294, 1304 (Fed. Cir. 1999) (looking at the interconnection of the structural components and relation to other elements of the claimed combination).

¹ All emphasis is added unless otherwise indicated.

3. The Panel Relied on Numerous Admissions and Did Not Focus Solely on “Displaying Information”

Dr. Goldberg admitted that conventional software existed for more than just “displaying information.” (Slip. Op., 12 (citing Appx882-86).) For example, Dr. Goldberg admitted that when a cellular device is used with a particular protocol, a skilled person would have known what software would be needed for the base station and cell phone based on the communications protocol being used. (Appx887 (64:12-65:9); Appx882 (44:16-25); Appx882 (45:1-9); Appx882 (44:2-10).)

He testified that the protocols are a term of art. (Appx876 (20:24-25:1).) Dr. Goldberg also testified that protocols:

[G]overn[] not only the format of messages sent, but the types of messages that have to be exchanged between the mobile device and the network, and that includes certain handshaking protocols, handshaking rules that require a series of messages back and forth to provide both the mobile device and the network with sufficient information in order to be able to communicate.

(Appx876 (19:14-24).)

Dr. Goldberg also admitted that there were common graphic libraries with corresponding APIs that a skilled person would have known could be used. (Appx924 (211:1-212:1).) He stated that there were standard software modules that were available in software libraries for generating messages from received information. (Appx924 (213:4-25).)

He admitted that display, as both a verb and noun, was a term of art and that a person of skill would know it contains driver software that can be used by “off-the-shelf” user interface software to control how data is displayed. (Appx886-87 (59:17-62:10); Appx889 (72:1-12).) He also testified that “if the developer knows what he wants to display, then there are software modules he can use to generate the display of the content that he wants to display.” (*Id.*) Similarly, he stated:

A developer of a system or device knew exactly what information they wanted to display to the user and in what form, and what information they wanted to receive back from the user and in what form, they could either select existing off-the-shelf software, user interface software that performed those functions or they could build it themselves using frameworks provided by the devices such as mobile phones for building user interfaces.

(Appx885 (54:7-18).) Dr. Goldberg agreed there were also known “off the shelf” applications that could be used. (Appx885 (56:19-25; 57:6-19); *see also* Appx883-84 (49:9-50:4) (proxy servers are term of art).)

The record shows that a skilled person “would have known of off-the-shelf code and applications for displaying any desired information.” (Slip Op., 14.) It demonstrates that there was available software for sending and receiving messages, and for generating messages based on received information. (*E.g.*, Appx924 (213:4-25); Appx885 (54:7-18).) Target’s argument that the Panel improperly narrowed the scope of the limitation in its analysis is refuted by the record.

4. Target’s Arguments Regarding General Purpose Computers and Special Programming are Irrelevant

Target argues that the claimed functionality requires special programming. (Pet., 14-17.) But the record shows that software for various functions *already existed* and was available to people of skill in the art, negating Target’s entire argument. (Cf. Appx708, ¶21 (Dr. Goldberg opining that “symbol generator” is not indefinite because it was sufficient to identify modules of known code).)

Even setting that aside, as this Court noted in *Apple Inc. v. Motorola, Inc.*:

[W]here a claim is not drafted in means-plus-function format, the reasoning in the *Aristocrat* line of cases does not automatically apply, and an algorithm is therefore not necessarily required. The correct inquiry, when “means” is absent from a limitation, is whether the limitation, read in light of the remaining claim language, specification, prosecution history, and relevant extrinsic evidence, has sufficiently definite structure to a person of ordinary skill in the art.

757 F.3d 1286, 1298 (Fed. Cir. 2014). Here, Target failed to rebut the presumption against § 112(6) and *Aristocrat* does not apply. This is another point the Court could confirm.

5. The Panel Did Not Error in Its Consideration of the Intrinsic Record

Target’s assertion that the Panel did not consider the specification is mistaken. (Pet., 18.) The Panel expressly discussed the specification. (Slip Op., 2-3.) It noted that intrinsic evidence can be informative in determining whether the claim recites

sufficient structure. (Slip Op., 8-9.) It even referred to the prosecution history as another useful source. (*Id.*)

Notably, Target does not identify anything in the specification that undermines Dr. Goldberg’s admissions or the Panel’s conclusions. Absent any such argument, “[t]he name of the game is the claim.” *E.g., Cosmokey Sols. GMBH & Co. KG v. Duo Sec. LLC*, 15 F.4th 1091, 1100 (Fed. Cir. 2021) (citation omitted). The “essential inquiry” the Panel decided is “whether the words of the claim are understood by persons of ordinary skill in the art to have a sufficiently definite meaning as the name for structure.” *Williamson*, 792 F.3d at 1348.

What Target does “identify” changes nothing. Target’s assertion that “code,” “application” and “logic” are used interchangeably and refer to no structure is unsupported. (Pet., 18.) Likewise, Target’s reference to “mobile device” does not account for the remainder of the claim language nor change the analysis. While the specification may include many embodiments, the claims are detailed and specific. (Appx129–30 (’292 patent col. 39:61–42:18).) *See also Intamin Ltd. v. Magnetar Techs., Corp.*, 483 F.3d 1328, 1336-37 (Fed. Cir. 2007) (stating “a claim need not cover all embodiments” and “[a] patentee may draft different claims to cover different embodiments.”). Moreover, a wireless PDA, a mobile phone device, tablet computer, or vehicle are conventional mobile devices that a person of skill in the art would have readily understood, particularly when viewed in the context claimed.

If anything, not referencing Dyfan’s express statements during prosecution that no term was intended to be drafted under § 112(6), which was never contested by the examiner, is a more significant omission than Target’s references to the shared specification. (*See* Appx571; Appx623.) But the fact is these issues were briefed and argued, and the Panel determined as a matter of law how much weight to accord them, if any. (Slip Op., 6.)

6. Target’s Attempt to Distinguish *Zeroclick* Should be Rejected

Target’s arguments concerning *Zeroclick* are baseless. It argues that *Zeroclick* involved a new way of using conventional programs that existed at the time of invention to achieve “the same result” or “identical results.” (Pet., 20.) That is essentially what its expert admitted with respect to Dyfan’s patent claims. (*E.g.*, Appx924.) It also mischaracterizes *Zeroclick*. There is no discussion of achieving the “same results” or “identical results.” *Zeroclick*, 891 F.3d at 1008-09. In *Zeroclick*, the claims included a modification to existing GUIs. *Id.* Regardless, as Target points out, the Court in *Zeroclick* concluded that the claim limitations were directed to conventional software programs. *Id.* The Panel came to the same conclusion. (Slip Op., 13.) There is no tension. Target’s concerns regarding breadth are unfounded. In both cases, the claims are directed to new uses and combinations of conventional software. *Id.* And in both cases, the District Court had incorrectly found the limitations contained nonce terms. (Slip Op., 13-14.) Rather than

distinguish the Panel’s opinion from *Zeroclick*, this Court should grant the Petition and confirm the similarities and the proper reach of *Williamson*.

B. This Is a Matter of Exceptional Importance Warranting *En Banc* Review

This is an important issue. A search of the U.S. Patent and Trademark Office’s database² on patents from 1976 to present shows that there are more than 222,000 patents that claim “code” and recite “computer” and “software” in the specification. There are roughly another 200,000 that claim “application” while reciting “computer” and “software” in the specification. There are also over 420,000 pending patent applications claiming “application” and reciting “computer” and “software” in the specification. The same applies to pending applications claiming “code” and reciting “computer” and “software” in the specification.³ These numbers are certainly not accurate but do demonstrate there are significant numbers of patents

² <https://patft.uspto.gov/netahtml/PTO/search-adv.htm> (last accessed June 9, 2022). The following searches were used: (1) ACLM/("application") AND SPEC/(computer AND software); and (2) ACLM/("code") AND SPEC/(computer AND software).

³ The search results for pending applications were the same whether “application,” “code” or “mobile device” was used as the search term being claimed. All resulted in 426,785 applications. Thus, these numbers are almost certainly inaccurate but still demonstrate the importance of these issues involved in this case.

and applications involved, highlighting the importance of providing clarity in this area of the law.

The Panel recognized software is defined, in part, by its function. (Slip Op., 14-15.) Dr. Goldberg stated “code” is a set of instructions. (Appx909 (152:10-25).) One dictionary defines “software” as “programs that tell a computer what to do. The term contrasts with hardware, which refers to the actual physical machines that make up a computer system. The hardware by itself is of little value without software.” BARRON’S DICTIONARY OF COMPUTER AND INTERNET TERMS 460 (11th ed. 2013). Another defines “software” as:

A computer program or program, in contrast to the physical equipment on which programs run (hardware). Simultaneously singular and plural, the word compels some speakers to add the redundant ‘software program’ or ‘software programs’ in an attempt to clarify the noun’s number. Software is conventionally divided into two categories: system software (programs needed to operate the computer) and application programs (programs that enable users to perform tasks using the computer).

WEBSTER’S NEW WORLD DICTIONARY OF COMPUTER TERMS 497 (8th ed. 2000). Both definitions make it clear that software itself does not have physical structure. But it is created to do something—to serve some function. Because software is inherently functional, the Court should confirm that claimed functions and recited

operations can provide structural support for software claims and reign in the misapplication of *Williamson* and so-called nonce words.

III. CONCLUSION

Dyfan respectfully requests that the Court grant the Petition, confirm the analytical approach in *Zeroclick* and the Panel's opinion, and clarify this important area of the law.

Dated: June 9, 2022

Respectfully submitted,

/s/ Derek Dahlgren

Timothy Devlin

Derek Dahlgren

DEVLIN LAW FIRM LLC

1526 Gilpin Avenue

Wilmington, DE 19806

Telephone: (302) 449-9010

Facsimile: (302) 353-4251

tdevlin@devlinlawfirm.com

ddahlgren@devlinlawfirm.com

Attorneys for Plaintiff-Appellant

DYFAN, LLC

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Response of Dyfan to Target's Combined Petition For Panel Rehearing and Rehearing En Banc complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2) and Federal Circuit Rule 32(a) because it contains 2,487 words, excluding parts exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2), and has been prepared with a proportionally spaced typeface using Microsoft Word in 14 point Time New Roman font.

/s/ Derek Dahlgren
Derek Dahlgren

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2022, I caused a copy of this document to be served by transmitting it via e-mail or electronic transmission to Defendant-Appellee's counsel of record.

/s/ Derek Dahlgren
Derek Dahlgren