

FINAL ORDERS OF THE DISTRICT COURT

U.S. District Court
District of Delaware (Wilmington)

CIVIL DOCKET FOR CASE #: 1:19-cv-00291-JLH

CoolTVNetwork.com, Inc. v. Blackboard, Inc.

01/25/2024	93	<p>ORAL ORDER: Pending before the Court is Plaintiff's pro se "Rule 60 Motion." (No. 19-291, D.I. 89; No. 19-292, D.I. 106; No. 19-293, D.I. 116; No. 19-194, D.I. 95; No. 19-295, D.I. 101; No. 19-296, D.I. 103; No. 19-297, D.I. 97; No. 19-534, D.I. 102; No. 19-535, D.I. 98.) When this case was filed in 2019, Plaintiff CoolTVNetwork.com, Inc. was a Limited Liability Company represented by licensed counsel. (D.I. 1, para 2.) LLCs cannot appear pro se in federal court. <i>See Dougherty v. Snyder</i>, 469 F. App'x 71, 72 (3d Cir. 2012). That said, it appears that Mr. Wakefield told the Federal Circuit on appeal in 2022 that Plaintiff was then operating as a "sole proprietorship," and the Federal Circuit accepted that representation and permitted Mr. Wakefield to appear pro se "on behalf of CoolTVNetwork.com." (No. 2021-2191, D.I. 104 (Fed. Cir. Sept. 1, 2022).) As Defendants do not oppose the Court ruling on the pending motion (<i>see, e.g.</i>, No. 19-291, D.I. 90 at 1 n.3), the Court has considered it. The motion is denied at least for the reason that it is untimely. The Clerk of Court shall e-mail a copy of this Order to Mr. Wakefield at the address set forth in his Motion. Ordered by Judge Jennifer L. Hall on 1/25/2024. Associated Cases: 1:19-cv-00291-JLH et al.(ceg) (Entered: 01/25/2024)</p>
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Appx00002a

05/20/2024	97	ORAL ORDER: Pending before the Court is Plaintiff's "Motion for Clarification/Reargument" (No. 19-291, D.I. 94; No. 19-292, D.I. 111; No. 19-293, D.I. 121; No. 19-294, D.I. 100; No. 19-295, D.I. 106; No. 19-296, D.I. 108; No. 19-297, D.I. 102; No. 19-534, D.I. 107; No. 19-535, D.I. 103). Local Rule 7.15 states that [m]otions for reargument shall be sparingly granted. The decision on a motion for reargument is within the district court's discretion and such motions are granted usually only under circumstances where the court has patently misunderstood a party, made a decision outside the adversarial issues presented by the parties, or made an error not of reasoning but of apprehension. Those circumstances are not present here. Accordingly, the Motion is DENIED . Ordered by Judge Jennifer L. Hall on 5/20/2024. Associated Cases: 1:19-cv-00291-JLH et al.(ceg) (Entered: 05/20/2024)
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Appx00003a

COOLTVNETWORK.COM, INC.,)	
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Plaintiff,)	
)	
v.)	C.A. No. 19-295-LPS-JLH
)	
LIMELIGHT NETWORKS, INC.,)	
)	
Defendant.)	
)	
COOLTVNETWORK.COM, INC.,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 19-296-LPS-JLH
)	
MICROSOFT CORP.,)	
)	
Defendant.)	
)	
COOLTVNETWORK.COM, INC.,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 19-297-LPS-JLH
)	
OOYALA, INC.,)	
)	
Defendant.)	
)	
COOLTVNETWORK.COM, INC.,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 19-534-LPS-JLH
)	
SNAP INC.,)	
)	
Defendant.)	
)	

COOLTVNETWORK.COM, INC.,)
)
 Plaintiff,)
)
 v.) C.A. No. 19-535-LPS-JLH
)
 TRAPELO CORP.,)
)
 Defendant.)
 _____)

REPORT AND RECOMMENDATION

Pending before the Court are the parties' claim construction disputes related to terms in United States Patent No. 7,162,696 (the "'696 Patent"). I held a *Markman* hearing on October 19, 2020. I recommend that the Court adopt the constructions as set forth below.

I recommend that the claim terms with agreed-upon constructions be construed as follows:

	Term	Court
1	"tangible retaining medium" Claims 1, 15, 17, 18	"physical storage medium"
2	"entertainment mode" Claims 1, 15, 17, 18	"mode that allows the user to click a multifunctional hot spot that specifies a movie, video, or audio file related to the selected multifunctional hot spot"
3	"link mode" Claims 1, 15, 17, 18	"mode that allows the user to click a multifunctional hot spot that provides a hyperlink to a related or targeted web pages, object, or file"

The parties have agreed on the construction of a number of terms, and I recommend to Judge Stark that he adopt those agreed-upon constructions.

[Means-plus-function limitations]

I will first address the two means-plus-function disputes. The parties dispute whether the specification discloses corresponding structure for the two means-plus-function limitations in claim 1.

The parties agree on a number of things. They agree that the two claim limitations at issue employ means-plus-function language and are therefore subject to the requirements of 35 U.S.C. § 112 ¶ 6.²

The parties also agree that, for purposes of construing these means-plus-function limitations, the patent must disclose an algorithm in the specification that corresponds to the claimed function. That is in accordance with Federal Circuit law, as set forth, for example, in *Aristocrat Techs. Australia Pty Ltd. v. Int'l Game Tech.*, 521 F.3d 1328, 1333 (Fed. Cir. 2008). That case states that “in a means-plus-function claim ‘in which the disclosed structure is a computer, or microprocessor, programmed to carry out an algorithm, the disclosed structure is not the general purpose computer, but rather the special purpose computer programmed to perform the disclosed algorithm.’”³ The specification can express the required algorithm in any understandable terms including as a mathematical formula, in prose, or as a flow chart, or in any other manner that provides sufficient structure. *Finisar Corp. v. DirecTV Grp., Inc.*, 523 F.3d 1323, 1340 (Fed. Cir. 2008).

wherein said hot spots are visualized by outlines, shading, or illumination or a combination of each, at a predetermined area on the display;
wherein said Multifunctional Hot Spot apparatus is made to reside on and is executing on a computing system;
means, defined by said instructions, for selecting and activating at least one of said predetermined functions by clicking on each particular Multifunctional Hot Spot.
Independent Claims 15, 17, and 18 are similar to Claim 1 but are directed to “[a] tangible computer readable storage medium” (Claims 15 and 18) and “[a] Multifunctional Hot Spot method” (Claim 17).

² Currently codified at 35 U.S.C. § 112(f).

³ *Aristocrat Techs.*, 521 F.3d at 1333 (quoting *WMS Gaming, Inc. v. Int'l Game Tech.*, 184 F.3d 1339, 1349 (Fed.Cir.1999)).

However, if the specification is not clear as to the structure that the patentee intends to correspond to the claimed function, then the patentee has not paid the price for invoking § 112 ¶ 6.⁴ If an applicant fails to set forth an adequate disclosure, the applicant has in effect failed to “particularly point out and distinctly claim the invention” as required by § 112 ¶ 2. Under 35 U.S.C. § 112 ¶ 2 and ¶ 6, therefore, “a means-plus-function clause is indefinite if a person of ordinary skill in the art would be unable to recognize the structure in the specification and associate it with the corresponding function in the claim.” *Noah Sys., Inc. v. Intuit Inc.*, 675 F.3d 1302, 1311-12 (Fed. Cir. 2012). A computer-implemented means-plus-function limitation is also indefinite if the specification does not disclose any corresponding algorithm. *Triton Tech of Texas, LLC v. Nintendo of Am., Inc.*, 753 F.3d 1375, 1378 (Fed. Cir. 2014).

[“means for performing . . .”/“performing . . .”]

The first means-plus-function limitation is “means for performing at least one of a plurality of predetermined functions executed with the selection of each particular hot spot.” That phrase is followed by a number of wherein clauses.

Plaintiff’s proposed construction is set forth in the latest version of the joint claim chart. Plaintiff asserts that the claimed function is “performing at least one of a plurality of predetermined functions executed with the selection of each particular hot spot.” Although there are a number of wherein clauses that follow the means for performing phrase, Plaintiff argues that they should not be considered in construing the claimed function.

In the joint claim chart, Plaintiff sets forth the following as corresponding structure: “computer hardware and/or software operating according to the following disclosure” and then goes on to cite 20 lines of text from column 1, more than 40 lines from column 2, the entirety of column 3, almost all of the substance of column 4, 20 lines from column 5, all of column 6, 20 lines from columns 7 and 8, Figures 1A, 1B, 1C, 2A, 2B, 2C, two structures in Figure 3, and Figure 4.⁵ In sum, Plaintiff says that the corresponding

⁴ *Aristocrat Techs.*, 521 F.3d at 1333.

⁵ (See C.A. No. 19-291, D.I. 57 (Second Amended Joint Claim Construction Chart) at 8-11.)

structure is approximately 50% of the text of the patent and eight of the nine figures.

Defendants argue that the claimed function is “for each hot spot selected, performing at least one of a plurality of predetermined functions.” Defendants further argue that construction of the claimed function should include the limitations set forth in the wherein clauses that follow the means for performing clause.

Defendants assert that, under either Plaintiff’s or Defendants’ proposed construction of the claimed function, the specification does not disclose sufficient structure to perform the function, rendering the phrase indefinite.

I agree with Defendants. I will accept solely for purposes of the argument that Plaintiff’s construction of the claimed function is correct, since it has less detail than Defendants’ proposed function. My logic for doing the analysis this way is this: if the specification fails to disclose sufficient structure to support Plaintiff’s less-detailed proposed function, then it also fails to support Defendants’ proposed function. That logic has support in the case law, for example, in Judge Bryson’s opinion in the *Aristocrat Techs.* case.⁶

That said, the claim goes on to say what predetermined functions are required, namely, a shop mode, a bid mode, an interact mode, an entertainment mode, and a link mode. And, during oral argument, Plaintiff appeared to acknowledge that the means for performing required means for performing each of those modes.⁷

So, assuming for purposes of the argument that the claimed function is performing at least one of a plurality of those predetermined functions executed with the selection of each particular hot spot, I agree with Defendants that the specification does not disclose an algorithm for how to perform the function.

For example, the flow charts set forth in the figures disclose that, depending on the mode, clicking on a hot spot will activate one of the predetermined functions. But the claim calls for a means for performing one of the predetermined functions, not a means for determining which predetermined function to perform out of a

⁶ 521 F.3d at 1332-1333.

⁷ (C.A. No. 19-291, D.I. 61 (“Hr’g Tr.”) at 54:24-55:1; *see also id.* at 49:15-22, 51:4-55:4, 55:9-18.)

plurality of predetermined functions. And nothing in the figures or specification describes how the claimed predetermined functions are performed. Consequently, they don't support the means for performing limitation.⁸

While I only need to look to the patent itself to conclude that the means for performing language is indefinite, I note that my conclusion is consistent with the declaration of Defendants' expert.⁹

In short, I agree with Defendants because Defendants' argument is right. And my analysis could end there. To complete the record, however, I note that Plaintiff's argument and Plaintiff's counsel's approach to claim construction are wrong.

As I already mentioned, Plaintiff, in each of the three joint claim charts filed with the court, proposed the corresponding structure as approximately 50% of the patent and eight of the nine figures. But much of the cited text and figures are unrelated to the claimed function, as counsel for Plaintiff acknowledged at the hearing.¹⁰ Moreover, at the hearing, counsel represented that he would describe for the Court the "portions of this citation that are relevant" in order to "bring . . . into focus" the corresponding structure.¹¹ In this district, a *Markman* hearing is not the time to raise a new claim construction argument. New arguments made at a *Markman* hearing are waived.¹²

Regardless, Plaintiff's counsel didn't bring anything into focus at the *Markman* hearing with respect to this limitation.

Nor did Plaintiff's brief. The opening brief appeared to suggest that the corresponding structure for this limitation could be found in dependent claims 2, 3, and 13. Yet it cited no authority supporting [the] proposition [that dependent claims can supply the

⁸ See *ePlus, Inc. v. Lawson Software, Inc.*, 700 F.3d 509, 518-20 (Fed. Cir. 2012).

⁹ (See C.A. No. 19-291, D.I. 51 (Joint Appendix in Support of Claim Construction Brief ("J.A.")) at 061-69.)

¹⁰ (Hr'g Tr. at 49:23-50:5.)

¹¹ (Hr'g Tr. at 48:9-14, 49:9-10.)

¹² See, e.g., *Watkins v. Int'l Union, Security, Police & Fire Professionals*, C.A. No. 15-444-LPS, 2016 WL 1166323, at *4 n.4 (D. Del. Mar. 23, 2016) (refusing to consider argument raised for the first time at a hearing and collecting cases).

required structure]. The closest that Plaintiff ever came to identifying a corresponding algorithm was in its reply brief. There, it suggested that the corresponding structure is an “applet” as set forth in Figures 1A, 1B, 1C, 2A, 2B, and 2C. But Plaintiff’s reply brief then went on to confuse the argument by citing to Figure 3, which is an illustration of a user interface, not an algorithm.¹³

Regardless, an “applet” is not a specific algorithm. An applet is a general word for an application, a computer program. As Defendants point out, and Plaintiff hasn’t disputed, an applet is a class of algorithms. Where the patent uses the term applet, it is simply an abstraction that describes the function being performed. It does not constitute an algorithm supporting the means for performing limitation.¹⁴

Instead of identifying the specific structure that performs the claimed function, Plaintiff’s briefing focused on its contention that a person of skill in the art would be able to code a program to perform the desired function. Plaintiff essentially argued that the specification was enabling.

While “enablement of a device requires only the disclosure of sufficient information so that a person of ordinary skill in the art could make and use the device,” disclosure of the corresponding structure as required by § 112 ¶ 6 “serves the very different purpose of limiting the scope of the claim to the particular structure disclosed, together with equivalents.”¹⁵ Plaintiff’s argument that the function is enabled does not save the means-plus-function term from being indefinite.¹⁶

To sum up, Plaintiff does not point to any algorithm that clearly corresponds to the claimed function. And Plaintiff’s inability to point to a specific algorithm in its proposed construction supports Defendants’ argument that a person of skill in the art would

¹³ (See C.A. No. 19-291, D.I. 50 (Joint Claim Construction Brief) at 13-16, 25-29.)

¹⁴ See *Blackboard, Inc. v. Desire2Learn Inc.*, 574 F.3d 1371, 1382-83 (Fed. Cir. 2009); see also *Noah Sys.*, 675 F.3d at 1311-12. This point is reinforced by the teaching in the specification that “a downloadable custom plug-in(s) may be used . . . instead of a Java applet.” (’696 patent, 8:7-9.)

¹⁵ *Aristocrat Techs.*, 521 F.3d at 1336.

¹⁶ *Id.* at 1336-38; *Blackboard, Inc.*, 574 F.3d at 1385.

be unable to recognize the corresponding algorithm from the specification and link it to the function in the claim.

Accordingly, I reject Plaintiff's construction and I agree with Defendants that the means for performing phrase is indefinite.

Independent claims 15, 17, and 18 do not use means-plus-function language. But they each have a limitation very similar to the "means for performing" phrase in claim 1. Specifically, they require "performing at least one of a plurality of predetermined functions executed with the selection of each particular hot spot."

Defendants contend that those phrases should be interpreted the same way as the means for performing limitation in claim 1. In other words, Defendants argue that the performing limitations in the dependent claims should be treated as means-plus-function limitations and held indefinite.

Plaintiff's brief did not challenge Defendants' argument that the performing limitations in the other independent claims should rise and fall with the means for performing limitation in claim 1. Indeed, Plaintiff's brief suggested its agreement that those limitations be treated the same. Specifically, pages 28-29 of the joint brief sets forth Plaintiff's argument that the performing limitations are not indefinite "[f]or the same reasons" as the means for performing limitation.¹⁷

As I have concluded that "means for performing" in claim 1 is indefinite, I also therefore conclude that the "performing" phrases in claims 15, 17 and 18 are indefinite.

As those are all of the independent claims, I could stop there. To complete the record, however, I will set forth the remainder of the claim construction rulings and briefly set forth my rationale.

["means for selecting and activating . . ."]

The second means-plus-function limitation in claim 1 recites "means, defined by said instructions, for selecting and activating at least one of said predetermined functions by clicking on each particular Multifunctional Hot Spot."

Plaintiff argues that the claimed function is "selecting and activating at least one of said predetermined functions by clicking on each particular Multifunctional Hot Spot." In the joint claim

¹⁷ (See C.A. No. 19-291, D.I. 50 at 28-29.)

chart, Plaintiff points to the corresponding structure as the same 50% of the text of the patent and eight of the nine figures that it cited for the “means for performing” limitation, along with a few more lines of text.¹⁸

Defendants argue that the function is “selecting and activating at least one predetermined function by the user clicking on each particular Multifunctional Hot Spot.” Defendants further contend that the specification does not disclose corresponding structure to perform the function, rendering the phrase indefinite.

I will assume that Plaintiff’s claimed function is correct for purposes of my analysis. Again, my logic here is that, if the specification does not disclose structure for Plaintiff’s proposed function, it would not disclose structure for Defendants’ proposal.

The parties again agree that the language is means-plus-function language. And the specification must disclose an algorithm that allows the computer to carry out the claimed functions of “selecting” and “activating.”¹⁹

In its briefing, Plaintiff argues that the cited portions of the specification, “when read together, accurately convey structure, both in algorithm and prose, that serves to perform the function of ‘selecting and activating.’”²⁰ But the cited portions of the specification [in the joint claim chart] are the same portions on which Plaintiff relied to show the ‘algorithm’ corresponding to the means for performing. Plaintiff never explains which of those portions describe the means for performing and which describe the means for selecting and activating. It is thus impossible . . . to determine [from Plaintiff’s papers] which portions correspond to which claimed function. Here, again, Plaintiff’s inability to point to corresponding structure in its proposed construction supports Defendants’ argument that a person of ordinary skill in the art would be unable to recognize the corresponding structure from the specification and link it to the function in the claim.

Plaintiff’s opening brief also points to certain dependent claims as providing the corresponding structure. Not only did

¹⁸ (See C.A. No. 19-291, D.I. 57 at 14-15.)

¹⁹ *Aristocrat Techs.*, 521 F.3d at 1333.

²⁰ (See C.A. No. 19-291, D.I. 50 at 56.)

Plaintiff provide no support for its position that a dependent claim can provide the required structure, none of the cited dependent claims contain an algorithm for selecting and activating. Plaintiff's reply brief said something different. There, Plaintiff suggested that the interface set forth in Figure 3 was the means for selecting and activating, including the buttons.

Then, at the *Markman* hearing, Plaintiff's counsel represented to the Court that "today we will show what the means for selecting and means for activating actually is. It is actually the cursor or click is the means for selecting, and the mode control is the means for activating."²¹ That argument was made for the first time at oral argument. It is waived.

Even were it not waived, I'm unpersuaded that a POSITA would understand a mode control and click to be the corresponding structure for the means for selecting and activating. Indeed, the claim separately requires a mode control.

Regardless, at the *Markman* hearing, counsel proceeded to confound his own argument regarding the proposed structures by referring to separate user and software sides, each of which can [independently] perform the claimed functions.²² Nevertheless, Plaintiff failed to point to an algorithm describing how the computer performs those functions.

In sum, Plaintiff's proposed construction does not identify the algorithm corresponding to the "means for selecting and activating" limitation of claim 1. Accordingly, I agree with Defendants that the limitation is indefinite.

²¹ (Hr'g Tr. at 108:12-16.) When asked by the Court "why today is the day where you are going to 'actually' show what it is," counsel responded, "That would create a conflict between me and my client." (*Id.* at 108:17-109:1.)

²² At the hearing, Plaintiff's counsel stated the following:
And so really selecting and activating, you could read it a number of different ways. Selecting, you can say, okay, from the user's perspective it selects a hot spot, it selects the mode or predetermined function. But then from the system side, it selects and activates in the software. And so which is it? We can cite to both. If we cite to the system side, then we need to cite to a number of different places in the specification to show the means for activating, which would be the modes and what they do.
(Hr'g Tr. at 116:8-18.)

Accordingly, I recommend that the Court reject Plaintiff's construction and adopt Defendants' construction.

* * *

I believe that takes care of all of the disputed terms, but before I conclude my Report and Recommendation, I want to state for the record that my rulings rejecting Plaintiff's positions were based on my understanding of its positions. But Plaintiff's counsel often made his positions difficult to figure out, and I want to give three examples.

First, one of the biggest challenges in this proceeding was cutting through the noise created by counsel's citations to broad swaths of the specification in support of his proposed constructions. But his citations were often irrelevant to the terms under construction, as [he] admitted at the hearing.⁴⁴

Second, Plaintiff's positions often shifted between the joint claim chart, the briefing, and the hearing. This constant goalpost shifting made it difficult to pin down exactly what Plaintiff's arguments were. Counsel also waited until the hearing to raise several new arguments. It was evident that those positions had for the most part not been disclosed to Defendants before they were proffered in open court.

Third, counsel's briefing and argument were nowhere near models of clarity. Indeed, Plaintiff's brief cited a standard from a 2014 Federal Circuit case that was expressly overruled in 2015. Counsel proceeded to proffer that same overruled standard in open court during the *Markman* hearing, notwithstanding the fact that Defendants' brief pointed out his error.⁴⁵

That concludes my report and recommendation.

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(1)(B),(C), Federal Rule of Civil Procedure 72(b)(1), and District of Delaware Local Rule 72.1. Any objections to the Report and Recommendation shall be filed within fourteen days and limited to

⁴⁴ (See, e.g., Hr'g Tr. at 49:23-50:5.)

⁴⁵ (C.A. No. 19-291, D.I. 50 at 26, 29 n.15; Hr'g Tr. at 63:19-64:20.)

ten pages. Any response shall be filed within fourteen days thereafter and limited to ten pages. The failure of a party to object to legal conclusions may result in the loss of the right to *de novo* review in the district court.

The parties are directed to the Court's "Standing Order for Objections Filed Under Fed. R. Civ. P. 72," dated October 9, 2013, a copy of which can be found on the Court's website.

Dated: November 6, 2020



The Honorable Jennifer L. Hall
United States Magistrate Judge