

January 12, 2011

The Honorable John D. Love
William M. Steger Federal Building and United States Courthouse
211 W. Ferguson, Room 210
Tyler, Texas 75702

Re: *Bedrock Computer Technologies, LLC v. Softlayer Technologies, Inc. et al.*
Civil Action No. 6:09:cv269

Dear Judge Love:

Defendants¹ respectfully request permission to file a motion for summary judgment of invalidity of all asserted claims of U.S. Patent No. 5,893,120 (“’120 Patent”) based on anticipation and obviousness. The evidence will show that the ’120 Patent is invalid as a matter of law for at least the following two reasons. First, early versions of the Linux operating system anticipate the ’120 Patent. The Linux code identified in Bedrock’s Final Infringement Contentions (dated Nov. 30, 2010) is substantially identical to prior art Linux code. If this code infringes the ’120 Patent as Bedrock asserts, then the prior art code invalidates the ’120 Patent. Second, the ’120 Patent is anticipated by prior art references relied upon by the United States Patent & Trademark Office (“USPTO”) in a pending reexamination proceeding of the ’120 Patent to find all of the claims invalid.

I. CLAIMS 1-8 ARE ANTICIPATED BY EARLIER VERSIONS OF LINUX

The evidence will show that early versions of the Linux operating system were made publicly available well over a year before the filing date of the ’120 Patent. Linux versions 1.3.51, 1.3.52, and 2.0.1 (collectively “Prior Art Linux Code”) each anticipate all of the asserted claims of the ’120 Patent.² They each include all the limitations of all the asserted claims as interpreted by the Court. There are no genuine issues of material fact, as the Prior Art Linux Code is shown in detail in documents publicly available well over a year before the filing date of the ’120 Patent.

Moreover, Bedrock has accused Defendants of infringing the ’120 Patent by using servers that contain various versions of the Linux code. The Prior Art Linux Code is identical in material respect to the Linux code identified in Bedrock’s Final Infringement Contentions (dated Nov. 30, 2010). Because the identified code operates the same way in material respect as the Prior Art Linux code, and because Bedrock asserts that servers running such code infringe the ’120 Patent, Bedrock effectively admits the ’120 Patent is invalid. It is black letter law that claims must be construed the same for infringement and invalidity purposes. *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1330 (Fed. Cir. 2003). If the accused servers infringe, then it necessarily follows that the claims are invalid as a matter of law based on the

¹ This brief is filed on behalf of all current defendants in this litigation (collectively “Defendants”).

² The application that led to the ’120 Patent was filed on January 2, 1997.

Prior Art Linux Code. There are no genuine issues of fact that the Prior Art Linux Code anticipates the claimed elements of the '120 Patent.

II. CLAIMS 1-8 ARE ANTICIPATED BY THATTE AND MORRISON

An *ex parte* reexamination of the '120 Patent was filed on February 9, 2010.³ The USPTO rejected all of the asserted claims of the '120 Patent based on four references: “A *Queueing Analysis of Hashing with Lazy Deletion*” by John A. Morrison, et al. (“Morrison”), U.S. Patent No. 4,695,949 to Thatte et al. (“Thatte”), U.S. Patent No. 6,119,214 to Dirks, and U.S. Patent No. 5,724,538 to Morris et al. In order to overcome the prior art cited in the USPTO rejection, Bedrock amended method claims 3 and 7 of the '120 Patent. By amending these claims, Bedrock effectively admits that the method claims, as originally stated, are invalid. All asserted claims are invalid as a matter of law for the same reasons found by the USPTO.

The USPTO found that both Morrison and Thatte each anticipate the '120 Patent. For example, Morrison discloses an information storage and retrieval system in a dynamic dictionary using a hashing technique to maintain certain data structures within the storage system (Morrison at Abstract). The algorithm disclosed in Morrison is known as “hashing with lazy deletion,” and the lazy aspect of the lazy deletion algorithm is exactly what the '120 Patent describes as “on-the-fly” deletion – expired records are removed from linked lists in the hash table when those linked lists are accessed during an insertion operation ('120 Patent at 2:54:60).

The authors of Morrison explain that “[h]ashing with lazy deletion means keeping the items hashed by search key in a table of linked lists (separate chains); each time an item is added to a list, any items on that list that the new item shows to be expired are deleted from that list” (*id.*). Importantly, “there is no separate operation associated with clearing expired items out of the table: expired items are only deleted when they are encountered during an insertion operation” (*id.*). Therefore, for all of the same reasons found by the USPTO, Morrison teaches every element of the asserted claims.

By way of further example, Thatte addressed a problem similar to that discussed in the '120 Patent: to provide a memory management technique that is efficient, cost-effective, alleviates the need for frequent garbage collection, reduces the reference counting overhead, and allows reference counting to be implemented in practice (Thatte at 5:23-28). Thatte describes the use of a structure known as a “reference count filter” that keeps track of blocks of memory whose reference counts equal zero (*id.* at 6:36-44). Thatte explains that the preferred implementation of the reference count filter is a “hash table that can efficiently support the insert, delete, and reconcile operations” (*id.* at 8:39-41). The hash table uses external chaining to resolve collisions (*id.* at 8:53-62). Moreover, Thatte describes on-the-fly removal of expired records from the reference count filter (*id.* at 7:40-8:18). When the memory manager attempts to insert a record into the reference count filter when the filter is full, a reconciliation operation removes expired records from the reference count filter on-the-fly (*id.* at 7:21-26). Therefore, for all of the same reasons found by the USPTO, Thatte teaches every element of the asserted claims.

³ Reexamination Application No. 90/010,856

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III. CONCLUSION

For the foregoing reasons, the Court should permit the Defendants to submit its summary judgment motion of invalidity of the '120 Patent.

Sincerely,

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