Bedrock Computer Technologies, LLC v. Softlayer Technologies, Inc. et al Doc. 520

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

Bedrock Computer Technologies LLC, Plaintiff, v. Softlayer Technologies, Inc., et al., Defendants.	Case No. 6:09-CV-269 JURY TRIAL DEMANDED

DEFENDANTS' REPLY IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND OBJECTIONS TO MEMORANDUM OPINION & ORDER ON CLAIM CONSTRUCTION (Dkt. No. 369)

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Defendants submit this reply in further support of their Motion for Reconsideration and Objections to the Court's Memorandum & Opinion Order on Claim Construction (Dkt. No. 431). Defendants respectfully request that the Court reconsider the Memorandum & Opinion Order on Claim Construction ("Order") (Dkt. No. 369) and adopt Defendants' proposed constructions and arguments for the disputed claim terms as set-forth in Defendants' claim construction briefs and objections and for the reasons herein.

I. Reconsideration and Objections to Terms

A. "Removing . . . from the linked list"

The definition adopted for this term in the Order is clearly erroneous because the definition when used in place of the term "removing" in the resulting specification often makes no sense. This was clearly pointed out in Defendants' opening brief. Bedrock does not contest this fact, but focuses on a snippet of the patent taken out of context. The specification, figures, pseudocode, goals of the invention, and the inventor testimony all make clear that "removing an expired record" requires both adjustment to the pointer and deallocation of the record from memory.[1] Finding that removal procedure is distinct from deallocation is clearly erroneous.[2]

Bedrock's argument in support of the Order's construction relies *solely* on a two-sentence snippet from specification's description of Figure 4, which is "a flowchart of a remove procedure that removes a record."[3] Bedrock neglects to point out that the two sentence snippets are embedded in a three-paragraph description of the "remove procedure" of Figure 4.[4] When read in the context of all three paragraphs and Figure 4, there is no question that removal requires deallocation. Figure 4 discloses both pointer adjustment (at boxes 51, 52, and 53) and

[1] *See* Dkt. No. 431 at 2-6.
[2] *See id.*
[3] *See* '120 patent at 7:16-17.
[4] *See* '120 patent at 7:16-64; Dkt. No. 431 at 3-6.

deallocation of the record "to be removed" (at box 55) as shown below.[5]

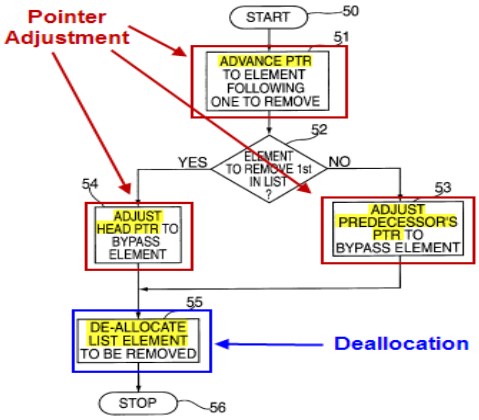

FIG. 4

Furthermore, the description of the "Remove Procedure" in the pseudocode clearly includes both pointer adjustment and deallocation as shown below.[6]

Remove Procedure

```
procedure remove (var elem_to_del: list_element_pointer;
                  previous_elem: list_element_pointer;
                  index: 0 . . . table_size – 1);
/*   Delete elem_to_del↑ from list, advancing elem_to_del to next element. previous_elem points to
     elem_to_del's predecessor, or nil if elem_to_del↑ is 1st element in list.*/
var p: list_element_pointer;                          /* Save pointer to elem_to_del for disposal. */
begin
  p : = elem_to_del;                          /* Save so we can dispose when finished adjusting pointers. */
  elem_to_del : = elem_to_del↑ .next;
  if previous_elem = nil                                  /* Deleting 1st element requires changing */
    then table[index] := elem_to_del                                  /* head pointer, as opposed to */
    else previous_elem↑ .next := elem_to_del;                          /* predecessor's next pointer. */
    dispose (p)                                                  /* Dynamically de-allocate node. */
  end                                                  /* remove*/
```

Pointer Adjustment

Deallocation

Instead of addressing the context of these two sentence snippets with respect to Figure 4, Bedrock asks this Court to ignore the clear teachings of Figure 4, the pseudocode and the numerous descriptions of removal in the specification.[7] Bedrock's argument and the proposed construction runs afoul of *Phillips v. AWH Corp.* and completely divorces the claims from the context of the specification and the goals of the invention.[8]

Furthermore, claims 1 and 5 both require "means for . . . removing." The corresponding

[5] *See* '120 patent at Fig. 4.
[6] *See* '120 patent at 13:1-22 and 14:1-22.
[7] *See* Dkt. No. 369 at 12-13; Dkt. No. 300 at 5; Dkt. No. 481 at 3-4.
[8] *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed.Cir. 2005) ("claims 'must be read in view of the specification, of which they are a part.'").

structure for these claims includes pointer adjustment and deallocation as shown in Figure 4 and the pseudocode. It is legal error to ignore and not include the deallocation step in Figure 4 (box 55) and the deallocation instruction in the pseudocode ("dispose(p)") as part of the structure corresponding to "means for removing."[9]

As stated in the opening brief, the definition of this term in the Order simply does not make sense when used as the definition of "removing" as that term is used in the specification, while the definition proposed by Defendants makes sense when used at all places in the specification in which "removing" is used. Bedrock did not seriously contest this point in its response. The Order is in clear error, and Defendants' construction should be adopted.[10]

B. "When the Linked List is Accessed"

The Order's basis for finding that "access" does not mean "traversal" is in clear error. The construction in the Order is based on the erroneous conclusion that the specification of the '120 Patent does not use the term or a form of the term "traverse" to describe accessing a linked list of records.[11] However, Defendants identified in their claim construction briefs and motion for reconsideration and objections multiple locations in the specification where the inventor described accessing the linked list as "traverse" or "traversing" the linked list.[12] Bedrock, on the other hand, does not identify any other example of an "access" in the specification. The '120 patent describes "when the linked list is accessed" in only one way, as walking through the records in the list to identify and remove expired records. The term "access" remains undefined by the Court and should be given the only construction proposed by a party and supported by the specification – "traversal."[13]

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[9] *Harris Corp. v. Ericsson Inc.*, 417 F.3d 1241, 1254-55 (Fed. Cir. 2005) (finding that the figure requires a two-step process and the claim cannot cover only the first step of the process).
[10] Dkt. No. 369 at 9-13; *see* Dkt. No. 431 at 2-6.
[11] Dkt. No. 369 at 21, FN. 24 ("None of the cited portions of the specification [by the Defendants] use 'traversal'").
[12] *See e.g.* Dkt. No. 431 at 708.
[13] The '120 patent's reexamination histories also support Defendants' construction. *See* Excerpts in Exh. 1.

C. "Dynamically Determining Maximum Number"

Bedrock argues that the specification does not impose a temporal limitation on when the dynamic determination occurs.[14] However, Bedrock ignores the claim language itself. The claims require the dynamic determination of a "maximum number [of records] for the record search means to remove." In the Order, Magistrate Judge Love states that the "maximum number need only be an upper limit as to the records to be removed" and not a single number.[15] However, the construction in the Order contradicts this finding and renders the "to remove" term of the claim element meaningless if the maximum number can be determined "while" or "after" records are being removed. The software must determine the maximum number of records it is permitted to remove before it accesses the list and begins identification and removal of expired records. Otherwise, the anomalous result of removing more records than permitted by the maximum number may occur. Bedrock fails to acknowledge that the claim language includes the "to remove" limitation.[16]

The Order is also in clear error for not construing "maximum number." Defendants' proposed construction, based on the file history and the context of the specification, requires the dynamic determination of a "single number that serves as an upper limit" on the number of records to be removed (*e.g.*, 10 records upon a first determination, 7 records upon a second determination, etc.).[17] Bedrock resists the construction of a maximum number so that it can attempt to argue that a number is an indeterminate "all" or "some" records.[18] Accordingly, Defendants' proposed construction for should be adopted.

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[14] *See* Dkt. No. 481 at 6-7.
[15] Dkt. No. 369 at 18. Defendants opening brief points out that the Order misinterpreted Defendants' proposed construction of a "single number" as requiring a "single, constant number."
[16] *See* Dkt. No. 431 at 8-10.
[17] *See* Dkt. No. 431 at 9.
[18] *See* Dkt. No. 481 at 7.

D. "automatically expiring" / "expired"

The Order's construction disregards language from the Detailed Description of the '120 patent that defines these terms. In particular the '120 patent states that expiration "is determined by comparing some portion of the contents of the record to some external condition."[19] Bedrock argues that the Court should not incorporate language from the Detailed Description because the inventor did not clearly disavow claim scope or act as his own lexicographer. Yet Bedrock fully supports the Order's construction that reads limitations from the Background discussing different storage types into the construction.[20] The Order clearly erred in failing to adopt the inventor's clear definition of expiration from the Detailed Description, and Defendants' construction should be adopted.

II. The Motion for Reconsideration and Objections to the Order Are Timely

Defendants timely moved for reconsideration and objected to the Court's Order and did not waive their objections. The Court issued its Order setting forth its basis for its claim construction on January 10, 2011, and the Defendants properly moved for reconsideration and filed their objections on January 17, 2011 (Dkt. No. 431). Bedrock confuses objecting to the Court's Provisional Claim Construction Order (Dkt. No. 326) ("Provisional Order") with objecting to the Court's final Order. Judge Love made clear in his December 3, 2010 standing "Order Regarding Objections to Provisional Claim Construction Orders" that "the parties need not object to the provisional claim construction order…."[21] Defendants have timely moved for reconsideration and objections to the Order, and the Court should consider the arguments as set forth in Defendants' motion.

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[19] *See* '120 patent at 6:5-13.
[20] *See* Dkt. No. 481 at 7-8.
[21] Standing Order, available at *http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=19715.*

Respectfully submitted, this the 25th day of February 2011.

/s/ E. Danielle T. Williams
Steven Gardner
E. Danielle T. Williams
John C. Alemanni
KILPATRICK TOWNSEND &
STOCKTON LLP
1001 West 4th Street
Winston-Salem, NC 27101
Telephone: 336-607-7300
Fax: 336-607-7500

William H. Boice
Russell A. Korn
KILPATRICK TOWNSEND &
STOCKTON LLP
Suite 2800
1100 Peachtree Street
Atlanta, GA 30309-4530
Telephone: 404-815-6500
Fax: 404-815-6555

J. Thad Heartfield
Texas Bar No. 09346800
thad@jth-law.com
M. Dru Montgomery
Texas Bar No. 24010800
dru@jth-law.com
THE HEARTFIELD LAW FIRM
2195 Dowlen Road
Beaumont, TX 77706
Telephone: 409-866-2800
Fax: 409-866-5789

Attorneys for Defendants Softlayer Technologies, Inc. and Amazon.com, Inc.

/s/ Louis A. Karasik (with permission)
Frank G. Smith
frank.smith@alston.com
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309
Telephone: (404) 881-7240
Facsimile: (404) 256-8184

Alan L. Whitehurst
alan.whitehurst@alston.com
Marissa R. Ducca
marissa.ducca@alston.com
ALSTON & BIRD LLP
The Atlantic Building
950 F Street, N.W.
Washington, DC 20004
Telephone: (202) 756-3300
Facsimile: (202) 756-3333

Michael J. Newton (SBN 24003844)
mike.newton@alston.com
ALSTON & BIRD LLP
Chase Tower
2200 Ross Avenue, Suite 3601
Dallas, TX 75201
Telephone: (214) 922-3423
Facsimile: (214) 922-3839

Louis A. Karasik (*pro hac vice*)
lou.karasik@alston.com
ALSTON & BIRD LLP
333 South Hope Street
16th Floor
Los Angeles, CA 90071
Telephone: (213) 576-1148
Facsimile: (213) 576-1100

Attorneys for Defendants AOL Inc. and Myspace, Inc.

/s/ Christopher D. Bright (with permission)
Yar R. Chaikovsky
California State Bar No. 175421
John A. Lee
California State Bar No. 229911
McDermott Will & Emery LLP
275 Middlefield Road, Suite 100
Menlo Park, CA 94025
Tel: 650.815.7400
Fax: 650.815.7401
E-mail: ychaikovsky@mwe.com
Email: jlee@mwe.com

Christopher D. Bright
Cal. Bar No. 206273
McDermott Will & Emery LLP
18191 Von Karman Ave, Ste. 500
Irvine, California 92612
Tel: 949.757.7178
Fax: 949.851.9348
E-mail: cbright@mwe.com

Attorneys for Defendant Yahoo! Inc.

/s/ Todd Briggs (with permission)
Claude M. Stern
claudestern@quinnemanuel.com
Evette D. Pennypacker
evettepennypacker@quinnemanuel.com
Todd M. Briggs
toddbriggs@quinnemanuel.com
Antonio Sistos
antoniosistos@quinnemanuel.com
QUINN EMANUEL URQUHART & SULLIVAN, LLP
555 Twin Dolphin Dr., 5th Floor
Redwood Shores, CA 94065
Telephone: 650-801-5000
Facsimile: 650-801-5100

Michael E. Jones
mikejones@potterminton.com
Texas State Bar No. 10929400
POTTER MINTON, PC
110 N. College
Tyler, Texas 75702
Telephone: (903) 597-8311
Facsimile: (903) 593-0846

Attorneys for Google, Inc. and Match.com, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of February 2011 a true and correct copy of the foregoing has been served on all counsel of record via electronic mail.

/s/ E. Danielle T. Williams
E. Danielle T. Williams