

**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' OBJECTIONS
TO REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE
JUDGE (Dkt. No. 372)**

Defendants submit this reply in further support of their Objections to the Report and Recommendation of United States Magistrate Judge (Dkt. No. 440) regarding the indefiniteness of claim terms of the '120 Patent. Defendants respectfully request that the Court reject the findings in the Report and Recommendation of United States Magistrate Judge ("Report") (Dkt. No. 372) and grant Defendants' motion for Summary Judgment because the '120 Patent fails to disclose sufficient structure to support the following means-plus-function limitations in the claims at issue: "means for dynamically determining a maximum number to remove," "hashing means," and "record search means utilizing a search key to access the linked list" indefinite.

I. Expert Testimony is Not Required to Show Lack of Sufficient Structure

Bedrock asserts in its response that Defendants have not put forth evidence of the level of skill in the art and therefore cannot meet their burden.¹ Bedrock cites to general proposition case law regarding claim construction and means-plus-function principles but does not cite any authority to support the unfounded assertion that without expert testimony Defendants cannot meet their burden. Expert testimony of one of ordinary skill in the art is not required for claim construction and for the Court to recognize the complete lack of any structure in the specification that is clearly linked to the function of the claims.² In fact, this Court, in *Advanceme, Inc. v. Rapidplay, LLC*, Case No. 6:05-CV-424 LED, found means-plus-function claims indefinite for failure to disclose sufficient structure without requiring expert testimony. Accordingly, Defendants' have provided sufficient evidence to support a finding of Summary Judgment of Indefiniteness.

¹ Bedrock Response at 2 (Dkt. No. 479).

² *Personalized Media Comm., LLC v. Intern'l Trade Comm'n*, 161 F.3d 696, 705 (Fed. Cir. 1998) ("A determination of claim indefiniteness is a legal conclusion that is drawn from the court's performance of its duty as the construer of patent claims.").

II. Objections to Terms

A. Claims 2 and 6: “means for dynamically determining maximum number to remove”

Bedrock effectively concedes in its response brief that the structure identified by the Order does not determine a maximum number of records to remove.³ The structure identified in the Report and propounded by Bedrock for this limitation is thus not clearly linked to the claimed function, as is required, and thus the claims containing this limitation (claims 2 and 6) are indefinite as a matter of law.

The Report construed the function in claims 2 and 6 to be “dynamically determining maximum number for the record search means to remove in the accessed linked list of records.”⁴ The Report construed the corresponding structure to be the choice between the Search Table Procedure or the Alternate Search Table Procedure.⁵ Defendants pointed out that the Order is erroneous for three reasons: (1) under these two procedures, the number of records removed is determined only after the records are removed, and thus the procedures do not determine records to remove (they have already been removed); (2) these two procedures do not determine or calculate a maximum *number* (an actual number/numeric value such as 5, 10, or 13) of records *to remove*⁶; and (3) there is no algorithm in the specification disclosing such a “choice.”

Bedrock’s arguments confirm that Defendants’ first basis holds true -- neither of the two procedures determines a maximum number of records to remove. Bedrock states in its brief that the choice between the two procedures “results in either the removal of all expired records, some but not all of them, or none of them.”⁷ Therefore, under Bedrock’s argument, the system only

³ Bedrock Response at 3.

⁴ Report at 12 (emphasis added).

⁵ *Id.* at 13.

⁶ *See* ‘120 patent at 6:56-66 and at cols. 11-14.

⁷ Bedrock Response at 3 (emphasis added).

knows how many records are removed after the Search Table Procedure or the Alternate Search Table Procedure completes operation. Bedrock is left with the tortured argument that this “structure” determines *ex post facto* the number of records to remove. It cannot be reasonably disputed that a **resulting number** of removed records is not the same as determining a **maximum number to remove**. Therefore, the supposed structure of the “choice” between the two procedures is not clearly linked to the function of “determining a maximum number of records to remove.”

Furthermore, the Report erred because even if the “choice” could correctly be considered to be an algorithmic structure that decides between the Search Table Procedure or the Alternate Search Table procedure, no such algorithm describing the “choice” is disclosed. The Report states that the decision is based on a variety of factors listed in the specification.⁸ However, the Report erred in equating factors that may be considered by an algorithm with an algorithmic structure that actually employs these factors.⁹ Bedrock does not identify any algorithmic structure that employs the factors in an algorithm that makes a choice between the two procedures.

B. Claim 5: “hashing means . . .”

The Report is in error because it reads “hashing means” not to require a hashing function. The Report defined the function as “to provide access to records stored in memory of the system and using an external chaining technique to store the records with same hash address at least some of the records automatically expiring.”¹⁰ Bedrock contends that the “linked list” performs the function “to provide access to records stored in a memory of the system” and that the hash

⁸ Dkt. No. 372 at 13 (citing the ‘120 patent at 7:4-10).

⁹ See e.g., *Typhoon Touch Tech., Inc. v. Dell, Inc.*, No. 6:07-cv-546, 2009 WL 2243126, *16 (E.D. Tex. Jul. 23, 2009) (ability to devise a structure from the disclosure is insufficient).

¹⁰ Report at 8.

table performs the function of “using an external chaining technique to store the records with same hash address at least some of the records automatically expiring.”¹¹

However, linked lists are merely external chains on the hash table used to store records. To access records stored in a hash table, hashing must be performed, which requires a hashing function.¹² There is no disclosure of an algorithmic structure for hashing, which renders the “hashing means” indefinite. The Report’s identification of a single line of pseudocode that takes a “record_key” as a parameter, performs an unknown operation, and returns an index is not sufficient structure for a hashing algorithm.¹³

Bedrock searches for a middle ground in its response and states that to the extent the Court finds that a hashing function is required and disclosed, it must embody the bounds of the “inner functionality for hashing” disclosed as “truncation, folding, transposition, [or] modulo arithmetic.” While Defendants do not believe that sufficient structure is disclosed, Defendants agree that if the Court were to find sufficient structure disclosed it would be limited to the hashing functionality of “truncation, folding, transposition, [or] modulo arithmetic” disclosed in the specification. Thus, if the Court agrees with Bedrock’s argument in this regard, it should find that the disclosed structure for the function is limited to hashing functionality of “truncation, folding, transposition, [or] modulo arithmetic” disclosed in the specification.

C. “Claims 1 and 5: “record search means utilizing a search key to access the linked list”

Claims 1 and 5 are invalid because the ‘120 patent fails to disclose algorithmic structure for function of the “record search means,” namely “utilizing a search key to access the linked list.” The figures, specification, and pseudocode of the ‘120 patent describe only one way of

¹¹ Bedrock Response at 5.

¹² *See id.*

¹³ Dkt. No. 372 at 9; ‘120 patent at cols. 11-12.

accessing the linked list utilizing a search key – through the execution of a hashing function. As discussed with reference to hashing means, there is no disclosure of an algorithmic structure for executing a hash function. Bedrock’s argument that Defendants are asking the Court to “require the structure corresponding to the recited function to have its own corresponding structure” is misplaced.¹⁴ The ‘120 Patent does not provide any algorithmic structure “for utilizing a search key to access the linked list” nor does Bedrock point to any algorithmic structure that utilizes the search key to access a linked list.

Bedrock again searches for a middle ground in its response and states that to the extent the Court finds that a hashing function is required and disclosed, it must embody “truncation, folding, transposition, [or] modulo arithmetic.” Like the “hashing means,” if the Court agrees with Bedrock’s argument in this regard, it should find that the disclosed structure for the function is limited to hashing functionality of “truncation, folding, transposition, [or] modulo arithmetic” disclosed in the specification.

CONCLUSION

For the foregoing reasons and the reasons, Defendants respectfully request that the Court grant Defendants’ Motion for Summary Judgment of Indefiniteness as to Claims 1, 2, 5, and 6.

¹⁴ Bedrock Response at 6.

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

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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.

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