

February 25, 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.*, 6:09-CV-00269 –
Defendants’ Supplemental Letter Brief Requesting Summary Judgment of No Willful Infringement

Dear Judge Love:

Defendants respectfully submit this supplemental letter brief in support of their motion for summary judgment on the issue of no willful infringement of the ’120 patent. Bedrock’s position that legal conclusions of third-party fact witnesses provide a basis to assert willful infringement is without merit. While Bedrock largely presents these witnesses’ statements out of context, these statements do not change the undisputed evidence that (i) Bedrock did not file a preliminary injunction, (ii) the USPTO has now granted a second re-examination of the ’120 patent, and (iii) there exist substantial invalidity and non-infringement defenses, which are the subject of motions for summary judgment before this Court.¹ Accordingly, the Defendants have not been objectively reckless in continuing the “alleged” infringing activity, as a matter of law.

Preliminary Injunction. Bedrock has presented no material evidence of extenuating circumstances sufficient to excuse its failure to seek a preliminary injunction. Bedrock’s failure to seek a preliminary injunction precludes an award of enhanced damages based solely on post-filing willfulness.²

First and Second Reexaminations. On February 22, 2011, the USPTO again provided indisputable evidence that Defendants’ invalidity defenses are objectively reasonable by again granting reexamination on the ’120 patent. AOL-MYSPACE-BED462-477³; App. No. 90/011,426, Granting Request for *Ex Parte* Reexamination, Feb. 22, 2011. This effectively negates the PTO’s Intent to Issue a Reexamination Certificate (“IIRC”) on January 14, 2011, and moots Bedrock’s argument that the IIRC makes Defendants’ actions objectively reckless.

Moreover, Bedrock cites to *WebMap* which discusses, but does not apply, exceptions to the preliminary injunction rule where “extenuating circumstances” might establish an “objectively high likelihood of infringing a valid patent.” *WebMap Techs., LLC v. Google, Inc.*, No. 2:09-CV-343, 2010 WEL 3768097, at *4 (E.D. Tex. Sep. 10, 2010). While *WebMap* cites *St. Clair* as an example of one such exception, *St. Clair* involved issuance of reexamination certificates by the USPTO, not merely a notice of intent to do so, *without any claim amendments*. *St. Clair Intellectual Prop.*

¹ Defendants and Bedrock have filed numerous briefs in support of their respective positions on claim construction, invalidity, and noninfringement. See Dkt. Nos. 275, 283, 284, 299, 300, 311, 316, 326, 369, 372, 431, 440, 462, 463, 479, and 481. See also 505, and 507.

² See Defendants’ Opening Letter Brief Requesting Permission to File Motion for Summary Judgment of No Willfulness [Dkt. 384], pp. 1-2, January 12, 2011.

³ Defendants are sending to your chambers courtesy copies of all deposition excerpts and produced documents cited herein.

Consultants, Inc. v. Palm, Inc., No. 06-404-JJF-LPS, 2009 WL 1649751, at *1 (D.Del. Jun.10, 2009). Here, Bedrock narrowed half of the claims of the '120 patent to overcome the Examiner's rejections. By substantively amending its claims, Bedrock conceded that its original claims were materially flawed. See *Bloom Eng. Co. v. N. Am. Mfg. Co., Inc.*, 129 F.3d 1247, 1249-50 (Fed. Cir. 1997). The new limitations combined with the USPTO's twice finding a substantial new question of patentability and issuing an office action rejecting all of '120 patent's claims, are indisputable facts demonstrating that Defendants' invalidity defenses were, and remain, objectively reasonable.⁴

Third-Party Fact Witnesses. In its supplemental letter brief (Dkt. No. 496), Bedrock asserts as new evidence of willfulness statements by mere third-party fact witnesses that are clearly nothing more than legal opinions.⁵ A prior art fact witness may testify concerning the prior art he authored but, unless designated as an expert, he is not qualified to render an opinion on infringement. See *In re Omeprazole Patent Litig.*, 2000 WL 1145399 at *8 (S.D.N.Y., Aug. 1, 2000). Under F.R.E. 701 and 704, legal conclusions, such as patent infringement or validity, reached by third-party fact witnesses are not probative and are thus inadmissible. See, e.g., *U.S. v. Hayes*, 118 Fed. Appx. 856, 857 (5th Cir. 2004); *U.S. v. Izydore*, 167 F.3d 213, 218 (5th Cir. 1999). Consequently, Bedrock's last-ditch effort to identify any shred of evidence to support its willfulness claim is without merit.

Even if the statements of the third-party witnesses were not inadmissible legal conclusions, Bedrock has presented them out of context. For example, when Mr. Kuznetsov's statement that "[m]y analysis showed that code written by me does not actually collide with forementioned [sic] patent, my code uses quite different techniques" is viewed with his later statements clarifying that he was thinking of the accused code, which he authored, it actually supports the objective reasonableness of Defendants' non-infringement defense. On considering the prior art Linux code he also authored, Mr. Kuznetsov stated "I did not even look so far behind . . . Is not this enough to invalidate the patent?" See KTS0000004-0038, KTS0000039-0067, KTS0000173, KTS0000247.

Furthermore, Mr. Kuznetsov's statement that the "current Linux kernel actually contains logic which could be considered as infringing the patent," refers only to the GenID code, not the CAND code. See Kuznetsov Dep. at 95:22-97:20. Mr. Kuznetsov testified that the accused GenID code is virtually identical to code he wrote in prior art versions of Linux and that the prior art version is the same as the patent "up to letter."⁶ In summary, Mr. Kuznetsov's opinion, should the Court deem it to be admissible, is that the '120 patent is anticipated by the prior art Linux code written by Mr. Kuznetsov and that the accused GenID code is essentially identical to the prior art Linux code. Since Mr. Kuznetsov's opinions ultimately lead to a conclusion that the '120 is invalid, Bedrock's assertion that Mr. Kuznetsov's opinions are evidence of willfulness is without merit.

Bedrock's reliance on statements by Dr. Ostermann and Mr. McDonald are equally unavailing. Dr. Ostermann stated that there is an "important distinction" between the reference he

⁴ See Defendants' Reply Letter Brief Requesting Permission to File Motion for Summary Judgment of No Willfulness [Dkt. 445], p. 2, January 28, 2011.

⁵ Bedrock admits that the third-party fact witnesses were opining rather than stating facts within their knowledge. See Dkt. No. 496 at 2 ("Mr. Kuznetsov's opinion . . . dispelled both of Defendants' invalidity and noninfringement defenses;" "confirmed this opinion at his deposition;" "communicated this opinion directly to Defendants.")

⁶ Kuznetsov Dep. at 96:16-19 ("The code which was added by Eric Dumazet is exactly the same place which was used in my code dated about 1995, and does almost exactly the same thing."), 97:8-11 ("My code, written in 1995, directly collide with the patent. Actually, it used exactly the same technique which was described in the patent up to letter.")

authored and the '120 patent, and Mr. McDonald stated that he could not help Defendants use the source code he authored to defend against the '120 patent. To the extent that these statements are indications that the references authored by Dr. Ostermann and Mr. McDonald are not anticipatory prior art, the statements are inadmissible legal conclusions. Even assuming the statements are admissible, Dr. Ostermann and Mr. McDonald, after further review, do not currently hold the same positions.⁷

Finally, to the extent the legal opinions of the fact witnesses have any probative value, they merely animate the Defendants' subjective states of mind, which relate to the second, not the first, prong of the *Seagate* test for willfulness. *See, e.g., DePuy Spine, Inc. v. Medtronic SofamorDanek, Inc.*, 567 F.3d 1314, 1336-37 (Fed. Cir. 2009) (holding evidence of copying is only relevant to *Seagate's* second prong).

Expert Opinions. In addition to the reasons stated above and in earlier briefing on this issue, multiple experts have submitted reports and testified that Defendants do not infringe the '120 patent and that the '120 patent is invalid, further supporting the objective reasonableness of Defendants' defenses.

In sum, Bedrock has failed to put forth any evidence that the Defendants acted in an objectively reckless manner. Available evidence demonstrates that Defendants actions are objectively reasonable. Moreover, Bedrock failed to seek a preliminary injunction. Therefore, Defendants are entitled to a judgment as a matter of law that they do not and have not willfully infringed the '120 patent and respectfully request that the Court hold as much.

Respectfully submitted,

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⁷ *See* Ostermann Dep. at 107:25-108:5 (“Q: And so between the time when you carefully reviewed the patent and determined that there was an important distinction and now . . . you have a different opinion? A: Yes”); McDonald Dep. at 110:20-111:4 (“A: The patent itself? Q: Yes. A: Yes. I have given that one . . . more careful read. Q: And if you had read those documents that we just discussed prior to writing this e-mail, would you have written this same e-mail? A: No, I don't I believe I would have. I would have had a lot more questions.”)