

**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-LED

JURY TRIAL DEMANDED

**DEFENDANT AOL INC.'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR
CLARIFICATION AND RECONSIDERATION OF JUDGE LOVE'S ORDER DENYING
SUMMARY JUDGMENT REGARDING THE LEGAL ISSUE OF WHETHER MERE
CAPABILITY IS SUFFICIENT FOR INFRINGEMENT OF CLAIMS 1-2 OF THE '120
PATENT [DKT. NO. 665]**

In Bedrock's Opposition to AOL's Motion for Clarification and Reconsideration, Bedrock incorrectly asserts that claim 1 of U.S. Patent No. 5,893,120 ("the '120 patent") is a purely means-plus-function claim. While certain elements of claim 1 are written using means-plus-function language, the first element of the claim, quoted below, is not a means-plus-function claim element:

a linked list to store and provide access to records stored in a memory of the system, at least some of the records automatically expiring

'120 Patent at claim 1. For this reason, Bedrock's only cited case, *Mass Engineered*¹ does not apply to claim 1.

Furthermore, Bedrock's response completely ignores recent Federal Circuit case law cited in AOL's Motion. In *Centillion Data Sys. v. Quest Commc'n Int'l, Inc.*, the Federal Circuit held that "to 'use' a system for purposes of infringement, a party must put the invention into service, i.e., control the system as a whole and *obtain benefit* from it." 631 F.3d 1279, 1284 (Fed. Cir. 2011) (emphasis added). Here, Bedrock has no evidence, nor can it, that AOL obtains any benefit from the accused code. The only testimony on this issue is that of Bedrock's infringement expert, Dr. Jones, who has unequivocally testified that he has no evidence AOL executes the accused code. In the absence of any evidence to the contrary, AOL is entitled to summary judgment.

AOL respectfully requests that the Court clarify the legal issue of whether the functional elements of system claims 1-2 of the '120 Patent must be performed in order to infringe. If the Court has already determined that the system claims do require actual performance, AOL respectfully requests the Court to reconsider its order denying summary judgment for AOL.

¹ *Mass Engineering Design, Inc. v. Ergotron, Inc.*, 663 F. Supp. 2d 361, 378 (E.D. Tex. 2009)

Respectfully submitted, this 31st day of March 2011.

/s/ Deron Dacus

Deron R. Dacus
Texas Bar No. 00790553
derond@rameyflock.com
Ramey & Flock, P.C.
100 E. Ferguson, Suite 500
Tyler, Texas 75702
Telephone: (903) 597-3301
Facsimile: (903) 597-2413

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

Louis A. Karasik (*pro hac vice*)
lou.karasik@alston.com
Rachel Capoccia
rachel.capoccia@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 Defendant AOL Inc.

CERTIFICATE OF SERVICE

This is to certify that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this March 31, 2011. Any other counsel of record will be served by first class mail.

/s/ *Deron Dacus*