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- Ex. B Patent database search results reflecting 3,310 hits for “code for causing”
- Ex. C Patent database search results reflecting 4,837 hits for “software [and] operable to”

I. INTRODUCTION

Plaintiff Eolas Technologies Inc. (“Eolas”) files this response in opposition to Defendants’ motion for partial summary judgment of indefiniteness. Dkt. No. 568 (“D.Br.”). The motion should be denied because, as shown below, none of the asserted claims of U.S. Patent Nos. 5,838,906 (“the ’906 patent”) or 7,599,985 (“the ’985 patent”) are indefinite.

II. RESPONSE TO STATEMENT OF ISSUES TO BE DECIDED

- Eolas is no longer asserting claims 12 and 14 of the ’906 patent — accordingly, there is no issue for the Court to decide with respect to these claims.
- Claims 6-8 and 13 of the ’906 patent and claim 28 of the ’985 patent are not mixed method/apparatus claims under the narrow holding of *IPXL*. Rather, these are “computer readable” code claims. All of the relevant authority holds that such claims are not invalid mixed method/apparatus claims. Claims drafted in this form merely describe the capability of the claimed apparatuses, they do not claim the activity itself.¹
- As explained in Eolas’ claim-construction briefing, claims 6-8 and 13 of the ’906 patent and claims 16-28 and 40-43 of the ’985 patent are not subject to 35 U.S.C. § 112, ¶ 6, as none of these claims use the word “means.” Dkt. No. 537 at 26-28. Further, these claims are not indefinite because they describe the capability of the claimed apparatuses; they do not claim the activity itself.
- Again, claims 6-8 and 13 of the ’906 patent and claims 16-28 and 40-43 of the ’985 patent are not subject to 35 U.S.C. § 112, ¶ 6, as none of these claims use the word “means.” Dkt. No. 537 at 26-28. But even if that were not the case, the patents disclose sufficient corresponding structure to avoid a finding of indefiniteness.

III. RESPONSE TO STATEMENT OF MATERIAL FACTS

Eolas takes no issue with Defendants’ statement of facts 1-17, comprised largely of excerpts from the asserted claims. Eolas does dispute fact 18, however, which contains an argumentative and misleading characterization of Eolas’ infringement contentions. D.Br. at 12.

¹ Defendants further argue that claim 14 of the ’906 patent and claims 29-31 of the ’985 patent are indefinite for allegedly covering both an apparatus and a method of using that apparatus. D.Br. at 1. As Eolas has since notified defendants that it is no longer asserting these claims in this litigation, that issue is moot. Ex. A.

IV. ARGUMENT

A. The Asserted “Computer Readable” Code Claims Are Not Indefinite.

Claims 6-8 and 13 of the '906 patent and claim 28 of the '985 patent are not mixed method/apparatus claims under the narrow holding of *IPXL*. Rather these claims are drafted in the familiar “computer readable” code form. In particular—

- claims 6-8 and 13 of the '906 patent claim “computer readable program code for causing;” and
- claim 28 of the '985 patent claims “one or more computer readable media encoded with software . . . operable to.”

Claims drafted in this form are exceedingly common,² and *all* of the relevant authority holds that claims such as these are not invalid as mixed method/apparatus claims.

In *IPXL*, the Federal Circuit held that a claim (written in means-plus-function form) was invalid for claiming both a system and method for using that system. *IPXL Holdings, LLC v. Amazon.com, Inc.*, 430 F.3d 1377, 1384 (Fed. Cir. 2005). The specific claim at issue recited:

The *system of claim 2* [including an input means] wherein the predicted transaction information comprises both a transaction type and transaction parameters associated with that transaction type, and the *user uses the input means* to either change the predicted transaction information or accept the displayed transaction type and transaction parameters.

Id. (emphasis in original). This claim was invalid as indefinite because it recited both a “system” (*i.e.*, an apparatus) and user action (*i.e.*, a method step). *Id.* *IPXL*'s holding was narrow, confined to the specific claim language at issue in that case. *See id.* The claim language at issue here is dispositively different from the language at issue in *IPXL*.

² The “code for causing” language at issue in the '906 patent appears in the claims of 3,310 issued patents. Ex. B. Similarly, the “software . . . operable to” language at issue in the '985 patent appears in the claims of 4,837 issued patents. Ex. C.

In essence, Defendants argue that the active language used in claims 6-8 of the '906 patent (“for causing”) and claim 28 of the '985 patent (“operable to”) import method steps into apparatus claims. They are incorrect. The authority addressing claims written in this form consistently holds that such language serves to “describe the capability of the apparatuses, they do not claim the activity itself.” *Ricoh Co., Ltd. v. Katun Corp.*, 486 F. Supp. 2d 395, 402 (D.N.J. 2007).³ Such claims are not invalid under the narrow holding of *IPXL*. *See id.*; *see also SynQor, Inc. v. Artesyn Techs., Inc.*, No. 2:07-CV-497-TJW-CE, 2010 U.S. Dist. LEXIS 74808, *96 (E.D. Tex. July 26, 2010) (“The Court agrees with numerous other courts in that the holding in the *IPXL* case is very limited.”). Defendants point to *no* authority, in fact, holding a “computer readable” code claim indefinite for using active language such as “for causing” or “operable to.” D.Br. at 5-6.

That is because every court faced with an assertion that “computer readable” code claims were indefinite as mixed method/apparatus claims under *IPXL* for using active language much like “for causing” or “operable to” has rejected that assertion. The defendant in *Yodlee, Inc. v. Cashedge, Inc.*, No. 05-CV-1550, 2006 U.S. Dist. LEXIS 86699 (N.D.Cal. Nov. 29, 2006), for example, pointed to language claiming “upon activation of the presented link.” *Id.* at *12-13. The court held that this language did not violate the rule of *IPXL*, and explained that

Defendant argues [that] infringement of these claims can only take place by virtue of human interaction. Defendant’s argument, however, is incorrect. . . . Infringement occurs **when a device that has the capability of performing the steps described under paragraph (b) is manufactured and sold.** Whether a user actually activates the link presented by the infringing device is of absolutely no import.

³ “[C]laims containing both a physical description of an apparatus and a description of the apparatus’ function, e.g., ‘communicates,’ ‘populates,’ ‘configured to,’ and ‘upon activation,’ were not impermissible apparatus-method claims. Instead, these ‘claims simply use active language to describe the capability of the apparatuses; they do not claim the activity itself.’” *Ricoh*, 486 F. Supp. 2d at 402 (internal citations omitted).

Id. at *13-14 (emphasis added). Likewise, facing claims that recited “to selectively plug or unplug a discharge mouth of a developer container mounted to an image forming apparatus,” the court in *Ricoh* also declined to apply the rule of *IPXL*. *Ricoh*, 486 F. Supp. 2d at 402-03 (conducting a survey and concluding that, “[i]n almost all cases, the district courts have held that the suspect claims did not cover both an apparatus and a method”); *see also Microprocessor Enhancement Corp. v. Tex. Instruments Inc.*, 520 F.3d 1367, 1375 (Fed. Cir. 2008) (finding that a “pipelined processor for executing instructions” was “clearly limited to a pipelined processor possessing the recited structure and capable of performing the recited functions”).

Claim 6 of the '906 patent (and therefore also dependent claims 7-8 and 13) claim “computer readable program **code for causing . . .**” D.Br., Ex. D at claim 6 (emphasis added). This language is nearly identical to the “code to . . .” or “code providing . . .” language found not subject to *IPXL* in *Convolve, Inc. v. Dell, Inc.*, No. 2:08-CV-244-CE, 2011 U.S. Dist. LEXIS 817, at *52 (E.D. Tex. Jan. 5, 2011). As the court explained in *Convolve*, “[u]nlike *IPXL Holdings*, where an accused infringer would have no knowledge of infringement of the method limitations at the time a device meeting the apparatus claim limitations was sold, an accused infringer would know whether it met the limitations at the time its device was sold because the accused infringer would know whether the device stored code that met the remaining limitations of the patent.” *Id.* at *52-53. The same is true here, and claims 6-8 and 13 of the '906 patent are not invalid mixed method/apparatus claims.

Similar to the claims of the '906 patent, claim 28 of the '985 patent claims “one or more computer readable media encoded with software . . . **operable to.**” D.Br., Ex. E at claim 28 (emphasis added). This “operable to” limitation makes clear that the active language that follows represents functional limitations on the capabilities of the apparatus, not method steps.

See *Collaboration Props., Inc. v. Tandberg ASA*, No. 05-CV-1940, 2006 U.S. Dist. LEXIS 42465, at *16 (N.D. Cal. June 23, 2006) (finding that “configured to” language represented a “statement of functionality” rather than a method step). Accordingly, claim 28 of the ’985 patent is also not invalid as a mixed method/apparatus claim.

Significantly, in *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197 (Fed. Cir. 2010), the Federal Circuit recently considered—and validated—language similar to that found in the claims at issue here. As the Federal Circuit explained,

[t]he storage medium claims similarly cover capability. Claim 65 of the ’194 patent recites a “**computer-readable storage medium storing program code for causing** a server that serves as a gateway to a client to perform the steps of: receiving . . .; comparing . . .; and preventing execution” This language does not require that the program code be “active,” only that it be written “for causing” a server (’194 patent claim 65) or a computer (’780 patent claim 18) to perform certain steps.

Id. at 1205 (emphasis added).⁴ While not expressly addressing issues raised by *IPXL*, this case nevertheless represents a critical and controlling confirmation that claims written in the “computer readable” code form cover *capability*. Again, therefore, such claims are not invalid as mixed method/apparatus claims.

The only two cases cited by Defendants are distinguishable, for at least two reasons. D.Br. at 6; *IPXL*, 430 F.3d at 1379; *Ariba, Inc. v. Emptoris, Inc.*, No. 9:07-CV-90, 2008 U.S. Dist. LEXIS 59862 (E.D. Tex. Aug. 7, 2008). First, and most critically, neither involved claims written in the “computer readable” form at issue here. See *IPXL*, 430 F.3d at 1379, 1384 (“An electronic financial system for”); *Ariba*, 2008 U.S. Dist. LEXIS 59862, *21 (“A bidding device operated by . . .”). Second, both cases involved claims in which human action was

⁴ See also *Fantasy Sports Props. v. Sportsline.com, Inc.*, 287 F.3d 1108, 1117-18 (Fed. Cir. 2002) (“in order to infringe the ’603 patent, the code underlying an accused fantasy football game must be written in such a way as to enable a user of that software to utilize the function . . . without having to modify that code”).

explicitly required by the language of the claims—which is *not* the case here. *See IPXL*, 430 F.3d at 1384 (“the *user uses the input means* to either change the predicted transaction information or accept the displayed transaction type and transaction parameters”); *Ariba*, 2008 U.S. Dist. LEXIS 59862, at *20-21 (“[a] bidding device *operated by a potential seller . . . wherein a bid submitted by the potential seller operating the bidding device is compared to the corresponding bid ceiling*”) (emphasis added). The two cases relied upon by Defendants are thus readily distinguishable, and provide no reason to find the “computer readable” code claims at issue here invalid.

In light of the relevant authority discussed above, the Court should find that claims 6-8 and 13 of the ’906 patent and claim 28 of the ’985 patent are not mixed method/apparatus claims under the narrow holding of *IPXL*.

B. The Asserted Claims Do Not Use Purely Functional Language.

Defendants contend that if § 112, ¶ 6 is found not to apply,⁵ then claims 6-8 and 13 of the ’906 patent and claims 16-28 and 40-43 of the ’985 patent should be found indefinite because they use “purely functional” language. Defendants are incorrect for at least three reasons, and as explained below, their argument finds no support in the relevant case law.

First, claims 6-8 and 13 of the ’906 patent and claims 16-19 and 28 of the ’985 patent are apparatus claims. These apparatus claims expressly designate that the functional limitations therein are to be accomplished through a particular structure, namely “**computer readable program code** for causing . . .” (claims 6-8 and 13 of the ’906 patent) or “**software . . . operable to . . . cause**” (claims 16-19 and 28 of the ’985 patent). Faced with a similar issue, this Court

⁵ And because none of these claims contain the term “means,” there is a presumption—which Defendants have not even attempted to overcome—that § 112, ¶ 6 does not apply. Dkt. No. 537 at 26-28.

recently held that “code” is not purely functional. *Convolve*, 2011 U.S. Dist. LEXIS 817, *53-54 (“Although Defendants argue that ‘code’ is not structure, the Court concludes that, here, ‘code’ does connote structure. Unlike in *Mas-Hamilton*, where all possible methods for implementing the recited function would have been covered by the asserted claim, only software implementations are covered by this claim.”). Other courts have reached a similar result, and have rejected arguments like those made here by Defendants. *See Reiffin v. Microsoft Corp.*, No. C-98-0266-VRW, 2002 U.S. Dist. LEXIS 21690, *45 (N.D.Cal. Apr. 30, 2002) (finding that “a thread of instructions executable by the microcomputer” was a recitation of structure).⁶

Second, claims are interpreted in light of the specification and with knowledge of one of ordinary skill in the art. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005). The Federal Circuit has held that in the context of apparatus claims written to cover software—like those at issue here—the requirements of § 112 can be satisfied by using functional language to describe the capability of that software. *See Fonar Corp. v. General Elec. Co.*, 107 F.3d 1543, 1549 (Fed. Cir. 1997) (“As a general rule, where software constitutes part of a best mode of carrying out an invention, description of such a best mode is satisfied by a disclosure of the functions of the software. This is because, normally, writing code for such software is within the skill of the art, not requiring undue experimentation, once its functions have been disclosed.”); *see also Reiffin*, 2002 U.S. Dist. LEXIS 21690, *46-47 (“When discussing software programs, however, disclosing the software structure and the function that software is expected to execute

⁶ These cases are in line with a large body of precedent affirming the validity of apparatus claims employing a broad structural term without applying § 112, ¶ 6. *See, e.g., Lighting World, Inc. v. Birchwood Lighting, Inc.*, 382 F.3d 1354, 1360 (Fed. Cir. 2004) (“connector assembly”); *Phillips v. AWH Corp.*, 415 F.3d 1303, 1311 (Fed. Cir. 2005) (“steel baffles”); *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1369 (Fed. Cir. 2002) (“reciprocating member”); *Personalized Media Communs. LLC v. ITC*, 161 F.3d 696, 704 (Fed. Cir. 1998) (“digital detector”); *Apex Inc. v. Raritan Computer, Inc.*, 325 F.3d 1364, 1373 (Fed. Cir. 2003) (“circuit”).

may be enough to satisfy the disclosure requirements of § 112.”). Such limitations are not “purely functional” and do not run afoul of the requirements of § 112.

Third, claims 20-27 and 40-43 of the ’985 patent are method claims, and neither § 112, ¶ 6 nor the *Halliburton* case cited by Defendants apply to such claims. D.Br. at 9; *Halliburton Oil Well Cementing Co. v. Walker*, 329 U.S. 1, 11-14 (1946); 35 U.S.C. § 112. This is confirmed by the *O.I. Corporation* case, where the Federal Circuit explained that

claiming a step by itself, or even a series of steps, does not implicate section 112, P 6. Merely claiming a step without recital of a function is not analogous to a means plus a function. We note that the *Halliburton* case concerned an apparatus claim, not a process claim, and we must be careful not to extend the language of this provision to situations not contemplated by Congress. If we were to construe every process claim containing steps described by an “ing” verb, such as passing, heating, reacting, transferring, etc. into a step-plus-function limitation, we would be limiting process claims in a manner never intended by Congress.

O.I. Corp. v. Tekmar Co., 115 F.3d 1576, 1583 (Fed. Cir. 1997); *see also Generation II Orthotics, Inc. v. Medical Tech., Inc.*, 263 F.3d 1356, 1368 (Fed. Cir. 2001). Method claims that include an “ing” verb—like claims 20-27 and 40-43 of the ’985 patent, D.Br., Ex. E—thus do not implicate § 112, ¶ 6.

In light of the authority cited herein, Defendants’ reliance on two opinions from the Board of Patent Appeals and Interferences (“BPAI”) is misguided. *See Am. Med. Sys., Inc. v. Laser Peripherals, LLC*, 712 F. Supp. 2d 885, 910 (D. Minn. 2010) (considering the relevance of *Ex parte Miyazaki*, 89 U.S.P.Q.2d 1207, 2008 Pat. App. LEXIS 26 (BPAI Nov. 19, 2008)). For one thing, the BPAI explicitly limited its holding in these decisions to “claim construction before the USPTO.” *Miyazaki*, 2008 Pat. App. LEXIS 26, at *36. This is in part because, “[d]uring prosecution, ‘the PTO gives claims their broadest reasonable interpretation’ It would be inconsistent with the role assigned to the PTO in issuing a patent to require it to interpret claims in the same manner as judges who, post-issuance, operate under the assumption the patent is

valid.” *Ex parte Rodriguez*, 92 U.S.P.Q.2d 1395 (BPAI 2009); *see also Enzo Biochem, Inc. v. Applera Corp.* 605 F.3d 1347, 1349 (Fed. Cir. 2010) (Plager, J., dissenting) (approving of the BPAI’s recognition in *Miyazaki* “that the circumstances are different between pre-issuance and post-issuance application of the definiteness standard with regard to claim terms.”). For another, BPAI opinions “are not binding on federal courts.” *Am. Med. Sys.*, 712 F. Supp. 2d at 910 (citing *Noelle v. Lederman*, 355 F.3d 1343, 1350 (Fed. Cir. 2004)). Accordingly, these BPAI decisions do not, and cannot, change the rule articulated by the Federal Circuit in *O.I. Corporation* and *Generation II Orthotics*. Defendants’ cases thus do not support the conclusion that Eolas’ method claims implicate § 112, ¶ 6.

C. The Asserted Claims are Not Subject to § 112, ¶ 6.

As a threshold—and determinative—matter, § 112, ¶ 6 does not apply to any claims of the ’906 or ’985 patents. As explained in the claim-construction brief filed concurrently herewith, as well as in Eolas’ opening claim-construction brief, Defendants have not even attempted to overcome the presumption that none of these claims are governed by § 112, ¶ 6. Dkt. No. 537 at 26-28. Neither have they attempted to distinguish Eolas’ cases rejecting their arguments on this issue. Dkt. No. 537 at 26-27. Instead, Defendants argue that these cases are non-binding because they come from district courts—notwithstanding the fact that the only authority even arguably supporting Defendants’ assertions comes from the BPAI. Dkt. No. 569 at 28-29. The two Federal Circuit cases cited in Defendants’ claim-construction brief—*Altiris* and *Aristocrat*, Dkt. No. 569 at 29—each involved terms written in means-plus-function form,⁷ which is not the case for any of the claims in the ’906 or ’985 patents.

⁷ *See Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363, 1376 (Fed. Cir. 2003); *Aristocrat Techs. Australia PTY Ltd. v. Int’l Game Tech.*, 521 F.3d 1328, 1332 (Fed. Cir. 2008).

If, despite the foregoing, § 112, ¶ 6 is found to apply to claims 6-8 and 13 of the '906 patent and claims 16-28 and 40-43 of the '985 patent, then the corresponding structure for these claims is found in the patents' specifications. Eolas provided the corresponding structure for each of these claims in Exhibit A to the parties' Joint Claim Construction and Prehearing Statement. Dkt. No. 479. This corresponding structure is not, as Defendants imply, D.Br. at 12-13, limited to that found in the source code attached to the patent applications.

V. CONCLUSION

For the foregoing reasons, Eolas respectfully requests that the Court deny Defendants' motion for partial summary judgment of indefiniteness in its entirety. Dkt. No. 568.

Dated: February 18, 2010.

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CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the foregoing document were served to all counsel of record via the Court's ECF system.

/s/ Josh Budwin
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