

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

UNILOC USA., INC., et al.	§	
	§	
Plaintiffs,	§	
	§	CIVIL ACTION NO. 6:10-CV-00472-LED
v.	§	
	§	
NATIONAL INSTRUMENTS CORP., et al.	§	JURY TRIAL DEMANDED
	§	
Defendants.	§	

**MOTION FOR LEAVE TO CONSTRUE PREVIOUSLY CONSTRUED TERM**

Defendant Pervasive Software hereby moves for leave for this court to construe the claim term “licensee unique ID.” This term was construed in the previous Microsoft litigation: *Uniloc USA, Inc. v. Microsoft Corp.*, 447 F. Supp.2d 177 (D.R.I. 2006), 290 F.App’x 337 (Fed. Cir. 2008) (No. 2008-1121) (non-precedential), 640 F. Supp.2d 150 (D.R.I. 2009), 632 F.3d 1292 (Fed. Cir. 2011).

In the Microsoft litigation, it was recognized that “licensee unique ID” could not include solely platform-related information. *Uniloc I*, 290 Fed.App’x at 342-43. (“Microsoft is, however, correct that the licensee unique ID cannot be based solely on platform-related user information.” citing the Wolfe ‘220 patent and the ‘216 patent at 1:60-65). However, neither the Rhode Island District Court nor the Federal Circuit in the Microsoft litigation reached the issue of what constitutes “solely platform related information.” Pervasive’s proposed construction of “licensee unique ID” does not conflict with the previous constructions, but clarifies the exclusion of “platform-related user information.” Pervasive does not seek to clarify the previous court rulings that the terms “licensee unique ID,” “security key,” “enabling key,” and “registration key” are synonymous.

The prior art clearly details the use of a software serial number or hardware configuration information or both as information used by a local computer to obtain a license key or authorization to use the software installed on the local computer. For example, the Wolfe ‘220 patent shows how software serial numbers are generated and assigned. Wolfe 4:49-62. The ‘220 Wolfe patent shows a unique key/software serial number sent from the local computer to a remote licensing server. ‘220 Wolfe 5:10-25. A hardware configuration code for the local computer is also generated and sent to the remote licensing server. ‘220 Wolfe 5:1-10. The hardware configuration code may be based on an algorithm. Wolfe 5:33-40. The software serial number or hardware configuration code can be encrypted for secure communication to the remote licensing server if desired. ‘220 Wolfe 6:7-9, 7:1-4. *See also*, Hellman ‘093 6:3-8, Fig. 2, 6:62-7:2; Grundy ‘598, 12:36-38, 18:25-33, 14:39-42, 15:13-16, 18:20-25 Fig. 3, Fig. 5 and 6.

The prior art of record in this case is intrinsic evidence. *V-Formation v. Benetton Group & Rollerblade, Inc.*, 401 F.3d 1307 (Fed. Cir. 2005) (“This court has established that “prior art cited in a patent or cited in the prosecution history of the patent constitutes intrinsic evidence. ... “) Therefore, the analysis by this court and the parties in construing the term “licensee unique ID” will be confined to the intrinsic evidence.

In view of the clear teachings in the prior art showing the use of a software serial number or hardware configuration information or both as information used by a local computer to obtain a license key or authorization to use the software, any claim construction that reads on such prior art disclosure would render the claim invalid. A claim should be construed in view of the specification and prosecution history, which includes the prior art. The prosecution history and prior art provide evidence on how the Patent Office and Inventor understood the invention. *Phillips v. AWH Corporation*, 415 F.3d 1303, 1317 (Fed. Cir. 2005). Here, the patent-in-suit has

just finished reexamination in the patent office – offering new evidence of how the inventor and the Patent Office understood the claimed invention in view of the prior art. In fact, Plaintiff has just produced today a Declaration by its expert, William Rosenblatt, opining as to the necessity for the Patent Office to address claim construction in Reexamination and his understanding of the meaning of the term “licensee unique ID.” (Rosenblatt Declaration, paras. 15 – 28, copy attached as Exhibit A.) Defendants should be permitted to have this court consider the prior art and such new evidence.

A court should construe a term if there is an actual dispute concerning the term. "When the parties raise an actual dispute regarding the proper scope of these claims, the court, not the jury, must resolve that dispute. . . . When the parties present a fundamental dispute regarding the scope of a claim term, it is the court's duty to resolve it." *O2 Micro v. Beyond Innovation*, 521 F.3d 1351 (Fed. Cir. 2008).

In view of the foregoing, Defendant, Pervasive Software requests this court to construe the claim term “licensee unique ID.” A proposed claim construction is attached to this motion as Exhibit B.

Dated: August 29, 2011

Respectfully submitted,

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**ATTORNEYS FOR PERVASIVE  
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**CERTIFICATE OF SERVICE**

The undersigned certifies that on August 29, 2011 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 pursuant to Local Rule CV-5(a)(3)(A).

/s/ Charles D. Huston \_\_\_\_\_  
Charles D. Huston

**CERTIFICATE OF CONFERENCE**

I certify that counsel have complied with the "Meet and Confer" Requirement set forth under L.R. CV-7(h). During a teleconference with Plaintiffs' counsel on August 25, 2011, a discussion regarding Defendant Pervasive Software's request to construe the claim term "licensee unique ID" resulted in an impasse, leaving an open issue for the Court to resolve.

/s/ Charles D. Huston \_\_\_\_\_  
Charles D. Huston