

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

UNILOC USA, INC., et al.

Plaintiffs,

v.

NATIONAL INSTRUMENTS CORP., et al.

Defendants.

Civ. Action No.: 6:10-cv-00472

JURY TRIAL DEMANDED

**UNILOC'S OPPOSITION TO PERVERSIVE SOFTWARE, INC.'S
MOTION FOR LEAVE TO CONSTRUE PREVIOUSLY CONSTRUED TERM**

Plaintiffs Uniloc USA, Inc. and Uniloc Singapore Limited (“Uniloc”) file this opposition to Defendant Pervasive Software, Inc.’s Motion for Leave to Construe Previously Construed Term and would show the Court the following:

I. PERVasive’s MOTION IS UNTIMELY

In its May 20, 2011 Memorandum Opinion and Order, the Court stated:

The Court notes that many claim terms have been previously construed and appealed to the Federal Circuit. While the Court understands the parties’ need to preserve their rights for appeal, the Court prefers to minimize the time spent on previously construed terms. Accordingly, before the parties file a Joint Claim Construction and Prehearing Statement, the parties shall meet and confer regarding preserving the parties’ arguments for appeal by stipulation rather than resubmitting previously construed terms for construction. The parties must seek leave and show good cause to submit previously construed terms for construction.

(Dkt. No. 136, p. 7 (emphasis added)). The Court reaffirmed this mandate in its June 8, 2011 Docket Control Order:

The Court prefers to minimize the time spent on previously construed terms. The parties shall meet and confer regarding preserving the parties’ arguments for appeal by stipulation rather

than resubmitting previously construed terms for construction. The parties must seek leave and show good cause to submit previously construed terms for construction. The parties shall coordinate to file one Joint Claim Construction and Prehearing Statement applicable to all the Uniloc cases.

(Dkt. No. 150, p. 7).

The deadline for the parties to file their combined P.R. 4-3 Joint Claim Construction and Prehearing Statement was August 29, 2011, and Uniloc's opening claim construction brief is due on September 12, 2011. Uniloc's understanding of the Court's Orders is that if Pervasive wished to submit previously construed terms, it needed to have sought leave from the Court weeks ago in order to provide the Court an opportunity to consider the request and rule prior to the filing of the P.R. 4-3 Joint Statement. Pervasive failed to do so. Now, instead of preparing its opening claim construction brief, Uniloc is forced to engage in unnecessary motion practice because of Pervasive's failure to timely comply with this Court's orders. Furthermore, Pervasive's belated motion now forces Uniloc to guess at what issues will be relevant in drafting its opening brief on claim construction.

II. THERE IS NO NEW PRIOR ART FOR THE COURT TO CONSIDER

The term "licensee unique ID" was previously construed by the District of Rhode Island to mean "a unique identifier associated with a licensee." *See Uniloc USA, Inc. v. Microsoft Corp.*, 447 F. Supp. 2d 177, 183-189 (D.R.I. 2006). The Federal Circuit affirmed the construction on appeal. *See Uniloc USA, Inc. v. Microsoft Corp.*, 290 Fed. Appx. 337, 344 (Fed. Cir. 2008) ("The district court correctly construed the 'licensee unique ID' as a unique identifier associated with a licensee that can be, but is not limited to, personally identifiable information about the licensee or user.").

Pervasive argues that this Court should “clarify” the previous construction in light of certain prior art references, particularly United States Patent No. 4,796,220 to Wolfe.¹ To this end, Pervasive claims “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 omits from its motion, however, that the Federal Circuit specifically considered Wolfe in connection with the proper meaning of “licensee unique ID,” addressing Wolfe and what constitutes “solely platform information” as follows:

Microsoft is, however, correct that the licensee unique ID cannot be based solely on platform-related user information. The specification distinguishes the disclosed invention from U.S. Patent No. 4,796,220 (the ‘220 patent) stating: ‘U.S. Pat. No. 4,796,220 [Wolfe] does not contemplate or disclose utilization of information which is unique to the user or intended licensee as part of the registration process which is to be distinguished from identification of the platform upon which the software is proposed to be run.’ ‘216 patent col.1 ll.60-65.

Uniloc, 290 Fed. Appx. at 343 (emphasis added).

In essence, Pervasive is not satisfied with the prior outcome and is simply asking this Court to reconsider. Such does not meet the Court’s good cause threshold for re-submitting previously-construed terms, and the Court should decline Pervasive’s request.

III. PERVERSIVE’S PROPOSED “CLARIFICATION” CONFLICTS WITH FEDERAL CIRCUIT PRECEDENT

Pervasive wishes to alter the prior construction to include a “clarification” that the unique identifier associated with a user “cannot be based solely on platform-related user information, including software serial number or hardware configuration or both.” In approving the district court’s construction, the Federal Circuit stated:

¹ Wolfe appears on the face of the ‘216 Patent and is discussed in the Patent’s background section of the ‘216 Patent. (Exh. A at cover page, Col. 1:57-65 (United States Patent No. 5,490,216)).

The district court correctly construed the “licensee unique ID” as a unique identifier associated with a licensee that can be, but is not limited to, personally identifiable information about the licensee or user. This definition of the non-platform-related unique user information needed to generate the licensee unique ID could encompass vendor-supplied information.

Uniloc, 290 Fed. Appx. at 344 (emphasis added). The Federal Circuit continued:

We are unconvinced by Microsoft’s argument that, during prosecution, Uniloc clearly and unmistakably disavowed the use of vendor-provided information, such as the Product Key, to generate the licensee unique ID. We agree with the district court that the single sentence, when read in context, does not preclude the vendor-provided inputs for the generation of licensee unique IDs.

Id. at n. 5 (emphasis added).

Thus, the Federal Circuit has indicated that vendor-supplied information such as a Product Key (much like a software serial number) is non-platform-related unique user information, not platform-related user information as Pervasive’s construction suggests.

IV. THE ROSENBLATT DECLARATION ARGUMENT IS A RED HERRING

Pervasive insinuates that the Court should grant leave based on paragraphs 15-28 of the November 23, 2010 Rosenblatt declaration. As a preliminary matter, the declaration was submitted in connection with the recently-concluded reexamination in which the Patent Office confirmed all claims of the ‘216 Patent, and the Patent Office did not rely on it:

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The affidavit under 37 CFR 1.132 filed 29 November 2010 by William R. Rosenblatt has been considered and entered into the record. The affidavit is unpersuasive because it entirely consists of opinions regarding the applicability of the cited prior art.

(Exh. B at p. 5 (Office Action mailed January 18, 2011)).

Further, a review of the Rosenblatt declaration demonstrates that Mr. Rosenblatt believes the term “licensee unique ID” requires “a unique identifier that is somehow associated with a licensee.” (Exh. C at ¶23 (Rosenblatt Declaration dated Nov. 23, 2010)). This is, essentially, the same construction accorded the term by the district court and the Federal Circuit. Thus, the declaration presents nothing new for this Court to consider.

V. CONCLUSION

For the reasons stated above, Uniloc respectfully requests that the Court reject Pervasive’s belated motion to alter the previous construction of the term “licensee unique ID.” Furthermore, Uniloc requests an expedited decision from the Court so that Uniloc can conform its opening claim construction brief to the Court’s expectations.

Dated: August 31, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August 2011, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Eastern District of Texas, Tyler Division, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

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