

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.	§	

**PERVASIVE SOFTWARE INC.'S REPLY TO PLAINTIFFS' RESPONSE**  
**IN OPPOSITION TO MOTION FOR LEAVE TO CONSTRUE**  
**PREVIOUSLY CONSTRUED TERM**

Uniloc would have this Court believe that the Examiner's explicit claim construction in the Reexamination of the '216 Patent, which concluded August 5, 2011, can be ignored by this Court in its Markman hearing and claim construction. The meaning of the term "licensee unique ID" was a critical part of the Reexamination and should be controlling. Indeed, the Patent Office explicitly construed the term "licensee unique ID" on August 5, 2011 and this construction should be considered by this Court.

Uniloc argued throughout the Reexamination that the Patent Office was misconstruing the claims by giving certain terms an unreasonably broad interpretation, see for example the Rosenblatt Declaration referenced below. Uniloc was successful in having the Patent Office adopt a narrow claim construction to avoid the prior art, culminating in the August 5, 2011 Office Action confirming claims 1-20, attached hereto as Exhibit A. Most importantly, in the STATEMENT OF REASONS FOR PATENTABILITY AND/OR CONFIRMATION, Exhibit A at p. 5, the Examiner adopted a restricted claim construction for the term "licensee unique ID" as a basis for confirming the claims:

The licensee unique ID generated by the means recited in each of the claims must be derived from at least piece of information that is specific to the user, such as name, billing information, or product information unique to the instantiation entered by the user. The information cannot be specific to the computer or independently generated by the computer.

What Uniloc seeks to do is advocate a narrow claim construction before the Patent Office to avoid the prior art, but advocate a broad claim construction before this Court to ensnare potential infringers practicing the prior art. The Patent Office's reexamination construction of the term "licensee unique ID" is not inconsistent with prior court decisions and should be considered by this Court in construing the term.

#### THE ROSENBLATT DECLARATION IS RELEVANT

The Rosenblatt Declaration is one of many examples where Uniloc advocated a narrow claim construction of "licensee unique ID" to the Patent Office in the Reexamination to avoid the prior art. For example, at paragraph 22 Rosenblatt urges that:

"Derived from" suggests a calculation or algorithm that takes the user information as input. The invention leaves open possibilities for other methods of generating unique IDs from user information -- table lookups, for example. Therefore a looser relationship between the user information and the ID is warranted, and the unique ID is "associated with" the licensee.

Other examples exist in the Reexamination File History where Uniloc advocated a narrow claim construction of "licensee unique ID" which should be considered by this Court in construing the term.

A primary task for this Court during claim construction is to consider the prosecution history and prior art to determine how the Patent Office and Inventor understood the invention. *Phillips v. AWH Corporation*, 415 F.3d 1303, 1317 (Fed. Cir. 2005). Here, the Patent Office made an explicit claim construction of the term "licensee unique ID." *See*, 37 CFR. 1.104(e).

## TIMELINESS

Uniloc complains bitterly about the timeliness of Pervasive's Motion for Leave to Construe Previously Construed Term. Uniloc appears to make the argument that defendants should have filed a motion prior to the meet and confer conference of August 25, 2011. Such a reading of this Court's Memorandum Opinion of May 20, 2011 makes no sense and would subject this court to needless motion practice. On August 25, 2011 during the meet and confer conference, Pervasive learned that Uniloc would not agree to have this Court construe the term "licensee unique ID," notwithstanding the Patent Office construction of that term on August 5, 2011.

The Rosenblatt Declaration (Exhibit A to Pervasive's Motion for Leave to Construe Previously Construed Term, Document 243-1) was not available from the Patent Office. Uniloc supplied the Rosenblatt Declaration to defendants at 5:53 a.m. August 29. Pervasive filed its Motion several hours later at 3:13 p.m. on August 29. Under any standard, Pervasive's Motion for Leave to Construe Previously Construed Term was timely.

## CONCLUSION

The Patent Office confirmed the claims of the '216 Patent based on a restricted claim construction for the term "licensee unique ID" a few weeks ago. For the reasons set forth above, good cause exists for this Court to construe the term "licensee unique ID".

Dated: September 9, 2011

Respectfully submitted,

By: /s/ Charles D. Huston  
Charles D. Huston  
State Bar No. 10328950  
DAFFER MCDANIEL, LLP  
700 Lavaca Street, Suite 720  
Austin, TX 78701  
Tel. (512) 476-1400  
Fax (512) 703-1250

**ATTORNEYS FOR PERVASIVE  
SOFTWARE INC.**

**CERTIFICATE OF SERVICE**

The undersigned certifies that on September 9, 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