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 SURREPLY IN OPPOSITION TO PERVASIVE SOFTWARE, INC.'S MOTION FOR LEAVE TO CONSTRUE PREVIOUSLY CONSTRUED TERM

In its Motion, Pervasive seeks to have the Court revisit the Federal Circuit's construction of "licensee unique ID" based on previously considered prior art. Specifically, Pervasive alleges that the teachings of Wolfe provide a basis for advocating a narrow construction that excludes the use of "software serial numbers." However, as Uniloc previously pointed out, the Federal Circuit considered Wolfe in discussing the proper claim construction. Additionally, the Federal Circuit stated that "Uniloc has raised a genuine issue of material fact as to infringement given that its proffered evidence that Microsoft's Product Activation system inputs non-platform-related information unique to a user, such as the Product Key, to generate what might qualify as a licensee unique ID, the hash value." *Uniloc USA, Inc. v. Microsoft Corp.*, 290 Fed. App'x 337, 344 (Fed. Cir. 2008) ("Uniloc I").[1] This observation undercuts Pervasive's good cause argument. Instead of addressing the conflict with the Federal Circuit's opinion, Pervasive's Reply deflects and attempts to distort the reexamination history, in particular the Notice of Intent to Issue Reexamination Certificate ("NIIRC"), as a means to continue its lone crusade[2] to alter the Federal Circuit's construction. However, Pervasive still has not satisfied the good cause threshold for reconsidering previously construed terms.

I. PERVASIVE'S REVISED BASIS FOR RE-CONSTRUING "LICENSEE UNIQUE ID" IS NOT SUPPORTED BY THE EXAMINER'S REASONS FOR ALLOWANCE.

Pervasive conclusorily and incorrectly asserts that "Uniloc seeks to...advocate a narrow construction before the Patent Office to avoid prior art..."[3] Telling is the fact that Pervasive does not cite to any part of the reexamination history to support this allegation. Nor can it. As is detailed in Uniloc's opening brief on claim construction, Uniloc's reexamination efforts focused on educating the Examiner regarding what is (and what is not) taught in the prior art and the

[1] See also Opposition (Dkt. No. 251) at pp. 3-4.
[2] Uniloc notes that no other defendant in any of the Uniloc cases has joined Pervasive.
[3] Reply (Dkt. No. 254) at p. 2.

technical infeasibility of combining certain references.[4] Once the Examiner's technical misunderstandings were brought to light, he abandoned his rejections. Importantly, at no time did Uniloc advocate for a specific construction, much less the one proposed by Pervasive, to overcome any prior art. Uniloc relied on the construction of "licensee unique ID" as affirmed by the Federal Circuit.

Pervasive would have this Court believe that the Patent Office adopted a specific construction for "unique licensee ID." This is not accurate. In his Reasons for Allowance, the Examiner explicitly acknowledged that

> During reexamination, claims are given the broadest reasonable interpretation consistent with the specification and limitations in the specification are not read into the claims (*In re Yamamoto,* 740 F.2d 1569, 222 USPQ 934 (Fed. Cir. 1984)). Where there exists a final decision by the Court of Appeals for the Federal Circuit regarding the construction of claims, an interpretation is not reasonable where it is inconsistent with that decision.[5]

The Examiner went on to state that

> The licensee unique ID generated by the means recited in each of the claims must be derived from at least [sic] piece of information that is specific to the user, such as name, billing information, or product information unique to the instantiation [sic][6] entered by the user. The information cannot be specific to the computer or independently generated by the computer.[7]

The Federal Circuit has affirmed that a "licensee unique ID" is "a unique identifier associated with a licensee." *See Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1399-1300 (Fed. Cir. 2011) ("Uniloc II"). Further, the Federal Circuit explained that "the licensee unique ID cannot be based *solely* on platform related user information" and that licensee unique ID is a

[4] See Dkt. No. 257.
[5] Exh. D at UNI076154 (copy of Notice of Intent to Issue Reexamination Certificate) (emphasis added).
[6] It is believed that the Examiner meant to state "installation."
[7] Id. Furthermore, to the extent Pervasive is now seeking to have the Court adopt this statement, Uniloc notes this portion of the NIIRC appears to form the basis for the Group B Defendants' alleged disclaimer, which is the subject of the claim construction briefing. See Dkt. No. 258. Ironically, Pervasive does not appear to be part of the Group B Defendants. See Dkt. 247-2 (Exhibit B to P.R. 4-3 Statement) at p. 16.

"unique identifier *associated with* the licensee that can be, *but is not limited to*, personally identifiable information about the user of licensee." *Uniloc I*, 290 Fed. App'x at 344. The Examiner's statement that the licensee unique ID cannot be derived from information "*specific to* the computer or independently generated by the computer" conflicts with the Federal Circuit's observation that it cannot be derived *solely from* such information. Additionally, the difference in using information *associated with* a user as opposed to information *specific to* a user in generating a "licensee unique ID" was heavily contested in the Microsoft litigation. The Federal Circuit ultimately concluded that information "associated with the user" is the proper standard.

Uniloc does not believe that the Examiner purposefully departed from the Federal Circuit's established construction, but was unfortunately imprecise in his choice of words, which led to the inconsistency with the Federal Circuit's interpretation. Yet Pervasive appears to believe that the Examiner's statement provides it with good cause to abandon the Federal Circuit's construction in favor of its construction forbidding "software serial number(s)." However, the Examiner's statement does not mention "software serial numbers." More importantly, the "product information unique to the [sic] instantiation" portion of the Examiner's statement comports with the Federal Circuit's observation that a "licensee unique ID" may be based on "Product Keys," and is fatal to Pervasive's argument that the Examiner's statement somehow provides support to discard or modify the Federal Circuit's construction.

II. THE ROSENBLATT DECLARATION DOES NOT PROVIDE PERVASIVE WITH GOOD CAUSE

Pervasive grossly mischaracterizes Paragraph 22 of the Rosenblatt declaration, which was submitted in connection with Uniloc's reply to the first reexamination office action. As pointed out in Uniloc's Opposition, which Pervasive conveniently ignores in its Reply, Mr. Rosenblatt ultimately decided, in the very next paragraph, that "licensee unique ID" "requires an

identifier that is somehow associated with the licensee"[8] - a position essentially identical to the construction affirmed by the Federal Circuit ("an identifier associated with a licensee"). Thus, Pervasive's contention that Mr. Rosenblatt's declaration "advocated a narrow claim construction of 'licensee unique ID'"[9] is patently false.

Further, Uniloc also pointed out that the Patent Office explicitly disregarded Mr. Rosenblatt's declaration. Pervasive fails to address this damaging fact. Furthermore, the Patent Office maintained its rejections after Uniloc's first reply (of which the Rosenblatt declaration was part) underscoring the fact that the declaration did not contribute to the allowance of any claims and undermining Pervasive's argument that it somehow bolsters its good cause argument.

Pervasive also states that "[o]ther examples exist in the Reexamination File History where Uniloc advocated a narrow claim construction of 'licensee unique ID.'"[10] Yet, Pervasive's Reply fails to provide any examples.

III. PERVASIVE IS RESPONSIBLE FOR THE UNTIMELINESS OF ITS MOTION

Pervasive is correct that Uniloc's reading of the May 20, 2011 Memorandum Opinion requires Pervasive to have sought leave for its Motion earlier in the claim construction process. The reason is axiomatic. Pervasive essentially waited until the beginning of Uniloc's claim construction briefing period to file its motion, forcing Uniloc to divert resources to oppose its belated motion, and leaving Uniloc to guess at the issues to be addressed in its opening claim construction brief. In accordance with the Court's Docket Control Order, Uniloc has already submitted its opening claim construction brief and did not address Pervasive's proposed

[8] Exh. C (Dkt. No. 251-3) at ¶ 23.
[9] Reply at p. 2.
[10] Id.

reconstruction because the Court has not granted leave.[11] Uniloc would be prejudiced if leave were granted at this stage in the claim construction process.

Pervasive tries to deflect blame to Uniloc regarding the tendering of the Rosenblatt deposition. The Rosenblatt declaration was originally submitted to the Patent Office on November 29, 2010 and is characterized as "[un]persuasive" in the Office's second office action mailed January 18, 2011. Pervasive's Reply fails to explain why it waited months to locate or ask for the declaration. It was not until the afternoon of August 25, 2011, during the P.R. 4-2(c) meet and confer, that one of the Uniloc Defendants informed Uniloc that it was having trouble locating the declaration. Uniloc promptly provided a copy the following Monday morning.[12] Furthermore, Pervasive's August 25 letter to Uniloc, requesting Uniloc's position on re-construing terms does not mention the declaration.[13] It is apparent that Pervasive intended to seek leave to re-construe terms before ever seeing the declaration. So any excuse based on the date Pervasive received the Rosenblatt declaration is suspect.

IV. CONCLUSION

Pervasive has not shown good cause for altering the Federal Circuit's affirmed construction for "licensee unique ID." Uniloc did not advocate for a different construction during the reexamination, and both the Examiner's Reasons for Allowance and the Federal Circuit's observations contradict Pervasive's proposed construction. Thus, Uniloc respectfully requests that the Court deny Pervasive's motion to re-construe the term "licensee unique ID."

Dated: September 16, 2011

Respectfully Submitted:

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[11] See Dkt. No. 257 at n. 3.
[12] Exh. E (copy of August 29, 2011 email transmitting Rosenblatt declaration).
[13] Exh. F (copy of August 25, 2011 letter from Chad D. Huston).

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September 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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