

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

WI-LAN INC.,

Plaintiff,

v.

ALCATEL-LUCENT USA INC., et al.

Defendants.

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Civil Action No. 6:10-cv-521-LED

JURY TRIAL DEMANDED

PLAINTIFF WI-LAN INC.'S REPLY CLAIM CONSTRUCTION BRIEF

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I. INTRODUCTION

Defendants' proposed constructions are wrong for several reasons. First, it is the claims—not the preferred embodiment—that define the invention. Yet Defendants repeatedly try to import limitations into the claims based on nothing more than their argument that the preferred embodiment does it in this fashion. Second, Defendants ignore that the ordinary meaning of a term cannot be narrowed absent a clear redefinition or disclaimer of the same. Third, Defendants cherry-pick dictionary definitions—importing limitations from the narrowest—while ignoring the definitions that are consistent with the broader teaching in the patents. To the extent they are not addressed elsewhere,¹ Wi-LAN responds to Defendants' errors below and asks the Court to adopt its proposed constructions for the reasons set forth in Wi-LAN's Opening Brief, Dkt. 167 ("Wi-LAN's Brief") and herein.

II. REPLY TO DEFENDANTS' PROPOSED CONSTRUCTIONS

1. Subscriber Terminal

Defendants' attempt to limit the term "subscriber terminal" to only "fixed-location" subscriber terminals based on the preferred embodiment should be rejected. The only reference to fixed-location subscriber terminals in the patents-in-suit is a single sentence in the description of the preferred embodiment. *See* '326 Pat. col.6 l.61-63. Defendants' argument that "the inventors intended, and deliberately expressed, their invention to encompass only the fixed-location devices" in the preferred embodiment is simply wrong. *See* Defendants Responsive Claim Construction Brief, Dkt. 175 ("Defs.' Br."), at 8. As explained in Wi-LAN's Brief, the reference to fixed-location subscriber terminals in Figure 1 is expressly described as just an "example" of a system to which the specification expressly says "the invention is *not* limited." *See* Wi-LAN Br. 7 (quoting '326 Pat. col.6 l.32-33; col.28 l.13-16) (emphasis added). Defendants entirely ignore this in their brief.

¹ Defendants' arguments for the "time slot" and "channel pool" terms are fully addressed in Wi-LAN's Brief and its constructions should be adopted for the reasons already set forth. Wi-LAN responds to the arguments regarding the means-plus-function terms in its opposition to Defendants' Motion for Summary Judgment of Indefiniteness.

Instead, they wrongly assert that “subscriber terminal” had no ordinary meaning in the art. *See* Defs.’ Br. 6. But persons of skill in the art commonly used the term “subscriber terminal” to refer to both fixed-location and mobile devices in the early-mid 1990s. This is evident from the use of “subscriber terminal” in other telecommunications patents filed near in time to the patents-in-suit. *See, e.g.,* U.S. Pat. No. 5,603,095 col.1 l.29-33 (filed Sep. 27, 1993) (“Thus the subscriber network comprises, in the same way as a normal mobile telephone network, . . . the **subscriber terminals (mobile telephones)** having a radio connection with the base stations.”), col.4 l.29-31 (explaining that a “subscriber terminal” may comprise a “conventional telephone set,” but “the **subscriber terminal** can also be a **portable mobile telephone**. . . .”); U.S. Pat. No. 5,239,682 col.3 l.38-40 (filed Jun. 6, 1991) (“Base stations form the interface between a number of **subscriber terminals** such as **portable handsets** 13a and 13b and PSTN 12.”); U.S. Pat. No. 5,659,598 col.2 l.3-14 (filed Oct. 6, 1994) (describing a “subscriber terminal” for use in a “mobile telecommunications system”); WO 96/37054 p.8 l.5-6 (filed Apr. 19, 1996) (describing “[w]hen the **subscriber terminal equipment moves**”) (all emphases added).²

Because the ordinary meaning of “subscriber terminal” encompasses both fixed and mobile devices, Defendants’ attempt to limit the claims to only the former fails absent a clear redefinition or disclaimer in the intrinsic record. *See Aventis Pharma S.A. v. Hospira, Inc.*, --- F.3d ---, 2012 WL 1155716, at *3 (Fed. Cir. Apr. 9, 2012) (explaining that the “[Federal Circuit] recently reiterated th[is] **stringent standard** for narrowing a claim beyond its plain and ordinary meaning in *Thorner v. Sony Computer Entertainment America L.L.C.*, 669 F.3d 1362 (Fed. Cir. 2012)” (emphasis added)).³ Simply disclosing an embodiment where the subscriber terminal is a fixed-location device, as the inventors did here, does not “express an intent to redefine the term.” *See Thorner*, 669 F.3d at 1368.

² WO 96/37054 was cited during prosecution of U.S. Pat. No. 6,195,327 and, thus, is intrinsic evidence. Copies of these patents are attached as Exhibits I-IV respectively to the Decl. of Jeffrey T. Han in support of this brief.

³ The “stringent standard” from *Thorner* was cited in Wi-LAN’s Brief to rebut Defendants’ improper attempts to narrow the ordinary meaning of the claims. *See* Wi-LAN Br. 4, 6-7. Defendants fail to respond to *Thorner* in their brief.

Attempting to turn the standard on its head, Defendants urge that the inventors redefined “subscriber terminal” by not explicitly referring to it as a “mobile device.” *See* Defs.’ Br. 6-7. But the Federal Circuit has consistently rejected exactly the *redefinition-by-omission* claim construction argument Defendants make here. *See, e.g., Aventis*, 2012 WL 1155716, at *4 (refusing to limit the term “perfusions” to those lasting “at least eight hours,” notwithstanding the specification’s express teaching that the “new perfusions” and all of the embodiments had stability exceeding eight hours); *Thorner*, 669 F.3d at 1368 (“disclosing embodiments that all use the term the same way . . . is *not* sufficient to redefine a claim term” (emphasis added)).⁴

Ignoring *Aventis*, *Thorner*, and the other precedent on precisely this point, Defendants rely on a single, distinguishable case to try to defend their position. *See* Defs.’ Br. 7 (citing *Am. Calcar, Inc. v. Am. Honda Motor Co.*, 651 F.3d 1318 (Fed. Cir. 2011)). In *American Calcar*, the invention was a centralized entertainment system for automobiles that could display information relating to different radio stations or “sources.” *Id.* at 1324, 1337-39. The Federal Circuit limited the term “source” to just fixed radio sources because the specification described other components in the invention, specifically a “frequency scanner,” which would be unnecessary if the sources were not fixed radio stations. *Id.* at 1338. In contrast, nothing in the intrinsic record of the patents-in-suit suggests that the “techniques for processing data transmitted and received over a wireless link” of the “present invention” would not work with mobile subscriber terminals like those sold by Defendants. *See* ’326 Pat. col.1 l.8-12.

Finally, Defendants’ attempt to narrow the claims based on documents relating to one of the applicant’s commercial embodiments is contrary to precedent. *See* Defs.’ Br. 8 (referring to Exs. 7 and 8 thereto). It is a “bedrock principle of patent law” that the claims, not the commercial embodiment,

⁴ *See also Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 907 (Fed. Cir. 2004) (refusing to limit the term “syringe receiving opening” to require a “pressure jacket” because “all that [defendant] can point to in the [intrinsic record] is the absence of any embodiment that lacks a pressure jacket”); *ACTV, Inc. v. Walt Disney Co.*, 346 F.3d 1082, 1091 (Fed. Cir. 2003); *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1327-28 (Fed. Cir. 2002).

define the scope of the invention. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc). Indeed, it is error to use the patentee’s commercial embodiment to construe the claims. *Int’l Visual Corp. v. Crown Metal Mfg. Co.*, 991 F.2d 768, 771-72 (Fed. Cir. 1993) (“In concluding that the claims are limited to a plastic housing, the court apparently focused on [the patentee’s] commercial embodiment This was erroneous”). This Court should reject the invitation to commit that error, particularly given the ordinary meaning of “subscriber terminal” and the inventors’ express intent that the invention not be limited to only those subscriber terminals shown in the preferred embodiment.

Defendants also erroneously argue the reference to “subscriber terminal” in the preamble of the Central Terminal claims⁵ is limiting because the preamble also refers to a “wireless link” between a subscriber and central terminal, which the body of the claim later refers to for antecedent. *See* Defs.’ Br. 9-10. But this is not the law. In *Catalina*, the Federal Circuit held that particular language in the preamble was not limiting because, while the body of the claim referred back to *other* parts of the preamble, it did not refer to or otherwise rely on *that particular* language for antecedent. *Catalina Mktg. Int’l Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801, 810 (Fed. Cir. 2002). The Central Terminal claims do not refer to “subscriber terminal” outside the preamble. Because that term appears only in the preamble, and the claims are directed to other inventions (such as the central terminal), the reference to “subscriber terminal” in the preamble of these claims is not limiting. *See* Wi-LAN Br. 8-9.

2. Orthogonal Channels

Nothing in the intrinsic record supports the requirement in Defendants’ construction that orthogonal channels must be “defined by” an orthogonal code. *See* Defs.’ Br. 10. As explained in Wi-LAN’s Brief, the specification says that these channels are created by such codes and the claims are written in open-ended “comprising” form such that there is nothing to prevent the use of information, in

⁵ The Central Terminal claims are ’326 Pat. claim 1, ’819 Pat. claims 1 and 12, and ’327 Pat. claims 1, 11, 13, 15, 17, and 19. *See* Wi-LAN Br. 8 (defining same).

addition to an orthogonal code, to create these orthogonal channels. *See* Wi-LAN Br. 11. The fact that Defendants do not even try to respond to this argument in their brief is telling.

Defendants' lone objection to Wi-LAN's construction is based on a misreading of the same. As explained in Wi-LAN's Brief, the intrinsic record teaches: (1) orthogonal codes are used to create orthogonal channels, and (2) orthogonal codes cross-correlate to zero. *See* Wi-LAN Br. 10. Defendants agree on these points. *See* Defs.' Br. 10-11. But they draw an unintended distinction between "orthogonal channel" and "orthogonal code" in Wi-LAN's construction in an attempt to justify their own. *Id.* To the extent the Court decides that clarification on this point would be helpful, Wi-LAN proposes the following addition (underlined) to its construction for orthogonal channels: "a set of channels created using orthogonal codes that cross-correlate to zero with respect to each other."

3. Time Division Multiplexing (TDM) Techniques

As explained in Wi-LAN's Brief, Defendants' attempt to import their "defined, repeated sequence" limitation into "time division multiplexing (TDM) techniques" is contrary to the description of the preferred embodiment, wherein the allocation occurs dynamically and is based on user demand. Wi-LAN Br. 13-14. While Defendants argue that their construction is "entirely consistent" with the dynamic allocation of time slots, this is simply not true. *See* Defs.' Br. 19. Defendants' construction requires that the channel be "shared," *i.e.*, allocated, "among multiple wireless links . . . in a defined, repeated sequence," even where there is no data to transmit to a given subscriber terminal. *See id.* at 12; *see also id.* at 19 (quoting an extrinsic source stating that "TDM transmits empty space when the device being polled is not active" in support of their construction). That construction is diametrically opposed to the "demand-based access" taught in the specification. *See* '326 Pat. col.6 l.66-col.7 l.2 ("Each subscriber terminal **20** can be provided with a permanent fixed access link to its central terminal **10**, but *in preferred embodiments demand-based access is provided*, so that the number of subscribers

which can be supported *exceeds the number of available wireless links.*” (emphases added)).⁶

In contrast, many of the other definitions of TDM, from the same sources Defendants cite, do *not* require the allocation of time in a “defined, repeated sequence” and are thus consistent with the intrinsic record. For example, Defendants ignore the broader definition of “time-division multiplexing (TDM)” in the same IEEE dictionary that is the source for their “defined, repeated sequence” limitation. That definition states that TDM is simply: “[a] method by which two or more channels of information are transmitted over the same link by allocating a different time interval for the transmission of each channel.” Wi-LAN Br. Ex. E at 1115. Moreover, the boxcars example quoted in Defendants’ brief is just an example. *See* Defs.’ Br. 14-15. The actual definition from that reference provides that TDM involves “interleaving a piece of each signal one after another,” but does not limit the allocation of those signals to a “defined, repeated sequence.” Defs.’ Br. Ex. 12 at 606.

The reason some dictionary definitions of TDM include a defined, repeated sequence limitation, and others do not, is because the technique evolved over time. For example, Defendants quote the description of an early, limited form of TDM from a 1989 *Computerworld* article. *See* Defs.’ Br. 19. But what Defendants omit is that the same article evidences that, even as early as 1989, the ordinary meaning of TDM had broadened: “*TDM now comes in a variety of forms*, one of which—statistical TDM—has become important enough to assume the dimensions of an entirely new category. Statistical multiplexers, which *dynamically allocate bandwidth* so that only active devices receive a share, have effectively taken over the low-speed end of the TDM market” Sanford Bingham, *Multiplexers*, *Computerworld*, Nov. 27, 1989, at 61, 64 (attached as Ex. V) (emphases added). This “statistical multiplexing” is defined, in another extrinsic source Defendants rely on, as “[a] *time*

⁶ *See also* ’326 Pat. col.18 l.50-54 (explaining that channelization plans established according the preferred embodiment “ensure[] that . . . demand access services . . . are available”), col.21 l.4-col.22 l.4 (detailing the processes for obtaining available traffic channels when establishing a call), col.23 l.5-6 (explaining that after completing a call, the traffic channel is released so that it can be used in other wireless links).

division multiplexing technique in which time slots are *dynamically allocated* on the basis of need, *rather than on a preassigned basis.*” David J. Stang, *Network Security* 270 (6th ed. 1992) (attached as Ex. VI) (emphases added). By the time the patents-in-suit were filed in the mid-1990s, a person of skill in the art would understand that “TDM techniques” as claimed therein was not limited to the allocation of slots on a preassigned basis or in a defined, repeated sequence. This is particularly so in light of the specification’s express teaching regarding the same. *See, e.g.*, ’326 Pat. col.3 l.56-col.4 l.12 (describing flexible assignment of time slots depending on the type of data to be transmitted), col.6 l.66-col.7 l.2, col.18 l.50-54 (explaining that the preferred embodiment offers “demand based access”).

Finally, Defendants wrongly assert that data rates discussed in the specification can only be achieved by allocating time slots in a “defined, repeated sequence.” *See* Defs.’ Br. 18. Data rate is an average, expressed in the specification as kilobits per second. *See, e.g.*, ’326 Pat. col.4 l.1. The frames depicted in the preferred embodiments are only a tiny fraction of a second.⁷ It is entirely possible to send more data in some frames (*e.g.*, by dynamically allocating a larger time slot or multiple time slots) and less data in others and still achieve the same data rate per second described in the specification.

4. TDM Encoder / TDM Decoder

Defendants complain that Wi-LAN’s construction wrongly excludes embodiments where “hardware *and* software” are used to perform the functionality of the TDM encoder and decoder. *See* Defs.’ Br. 22 (emphasis in original). As a compromise to address this concern, Wi-LAN amends its constructions for these terms to encompass “hardware *and/or* software.”⁸ *See id.* (urging same).

Defendants’ argument that Wi-LAN’s construction is improper because it is “superfluous” with the surrounding claim language is without merit. *See* Defs.’ Br. 22-23. Wi-LAN’s construction

⁷ The specification discloses embodiments with frames “typically lasting” 4 milliseconds, ’326 Pat. col.17 l.33-35, and other embodiments where the entire frame is only 125 microseconds, *id.* col.15 l.44-47.

⁸ Wi-LAN’s amended construction for TDM encoder is “Hardware and/or software for applying TDM techniques” and for TDM decoder is “Hardware and/or software for extracting a data item from a predetermined time slot within the orthogonal channel.”

clarifies that the TDM encoder and decoder can be hardware and/or software. That much of the remainder of Wi-LAN's constructions follow directly from the claim language itself is no reason to reject them in favor of Defendants' (much less import into TDM decoder the same "defined, repeated sequence" limitation Defendants seek with respect to "TDM techniques"). If the claim language speaks for itself, this Court may decide that no further construction is necessary.

5. Overlay Codes

Defendants concede that "it does not matter whether the overlay code is applied . . . before or after the orthogonal code." Defs.' Br. 24 n.12. And they have no response to the argument that it likewise does not matter if the codes are applied simultaneously. *See* Wi-LAN Br. 20. The result of applying these codes is precisely the same whether they are applied before, after, or simultaneously.

Defendants' argument that applying the overlay and orthogonal codes simultaneously would render one of the claimed encoders superfluous is incorrect. Nothing in the intrinsic record requires the "first encoder" and "second encoder" to be separate components, or that different codes cannot be applied simultaneously. Indeed, Figure 12 of the specification depicts the simultaneous encoding of data using two codes with a single encoder. '819 Pat. col.16 l.6-8 (explaining that in Figure 12, "signal 219 is combined with a code sequence signal 216 for central terminal 10 to produce the downlink 212. Code sequence signal 216 is derived from a combination of a pseudo-random noise code signal 220 and a Rademacher-Walsh code signal 222."); *see also id.* Figs. 7A, 7B (depicting the simultaneous application of these codes, items 112 and 114, by spreader 116). Contrary to Defendants' argument, the reference to a "first encoder" and "second encoder" in the claims does not require those encoders to be separate components. *See, e.g., Linear Tech. Corp. v. Int'l Trade Comm'n*, 566 F.3d 1049, 1055-56 (Fed. Cir. 2009) (holding that a claimed "second circuit" and "third circuit" need not be separate

⁹ A "Rademacher-Walsh code" is a type of orthogonal code. A pseudo-random noise code is not an overlay code. Nevertheless, this example rebuts Defendants' argument that an encoder cannot apply two codes simultaneously.

circuits absent a clear disavowal of non-separate circuits in the intrinsic record); *Northeastern Univ. v. Google, Inc.*, No. 2:07-cv-486-CE, 2010 WL 4511010, at *7 (E.D. Tex. Nov. 9, 2010) (declining to construe “first portion” and “second portion” to be separate with no overlap).

The surrounding claim language further supports that the overlay and orthogonal codes need not be applied in series. Claim 1 of the '819 Patent recites: “a first encoder for combining *a data item* . . . with said orthogonal code” and “a second encoder arranged to apply the overlay code . . . to *said data item*.” If the claims were limited to the serial application of an overlay code after an orthogonal code, the claims would provide “a second encoder arranged to apply the overlay code . . . to *an encoded data item output from the first encoder*.” Likewise, had the inventors intended to require the application of the overlay code before the orthogonal code, the claim would read “a second encoder arranged to apply the overlay code . . . to a data item” and “a first encoder for combining the *encoded data item output from the second encoder* . . . with said orthogonal code.” But there is no “serial or temporal limitation” in the claim language. See *Wi-LAN Br. 20* (quoting *3M Innovative Props. Co. v. Avery Dennison Corp.*, 350 F.3d 1365, 1371 (Fed. Cir. 2003)).

Defendants’ argument that this term’s ordinary meaning is inherently limited to application “in series” is based on external sources that conflict with the preferred embodiments. The general purpose dictionary definition Defendants quote states that an “overlay” is “something laid . . . *over*,” *i.e.*, applied after, something else. See *Defs. Br. 24*. However, this non-technical dictionary definition expressly contradicts the preferred embodiments, which depict the application of the overlay code *before* the orthogonal code. See '819 Pat. fig. 7A, 7B, col.12 l.23-col.13 l.50; see also *Verizon Servs. Corp. v. Vonage Holdings Corp.*, 503 F.3d 1295, 1305 (Fed. Cir. 2007) (refusing to adopt the ordinary meaning of term from a dictionary definition that excluded a preferred embodiment from the scope of the claims). Likewise none of the references that Defendants cite in footnote 10 of their brief define the

term “overlay code” to mean that such codes are applied in series, but not simultaneously, with another code. These references at most provide examples of codes being applied in series with other codes. Of course, every one of those examples is consistent with Wi-LAN’s construction, which does not import a limitation on when the overlay code must be applied. And the existence of these examples in some external sources does not warrant the import of Defendants’ “in series” limitation into the claims.

6. Parameters pertaining to a wireless link within the cell indicative of whether that wireless link is subject to interference from signals generated by other cells

Notwithstanding Defendants’ assertion to the contrary, *see* Defs.’ Br. 26, the ’327 Patent expressly discloses that multiple readings of a single indicator can be used to monitor and reduce interference by reducing the number of channels in the channel pool. *See* ’327 Pat. col.2 1.29-44 (teaching that channels can be removed from use based on bit error rate (BER) signals); *id.* col.2 1.45-54 (teaching that channels can be removed from use based on the grade of service (GOS) signals). Defendants’ argument that the system must analyze “multiple indicators,” *see* Defs.’ Br. 27, is contrary to the express teaching that the channels can be removed to reduce interference based on a single indicator, such as BER, exceeding a threshold value. ’327 Pat. col.2 1.29-44.

Defendants’ argument that receiving multiple BER estimates “would serve no purpose,” *see* Defs.’ Br. 27, fails to account for the fact that parameters like BER change over time. The asserted claims require an “analyzer for receiving” the claimed parameters that is “arranged to compare those parameters with predetermined criteria and to generate an output signal dependent on that comparison.” ’327 Pat. cl. 1. An analyzer that receives, *e.g.*, BER parameters over time, compares them to a predetermined threshold value and outputs signals to add or remove traffic channels based on that comparison meets this limitation. The use of “a parameter” to refer alternatively to “the bit error rate (BER) for signals” and “a grade of service (GOS) signal” in dependent claims 2 and 3 is consistent with this construction because it may be read to refer to “a parameter” at a given point in time.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email and/or fax, on this the 13th day of April, 2012.

/s/ David B. Weaver
