

**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.

CIVIL ACTION No. 6:10-CV-521-LED

**DEFENDANTS' SURREPLY TO PLAINTIFF'S MOTION FOR NEW TRIAL
CONCERNING THE NON-INFRINGEMENT OF THE PATENTS-IN-SUIT**

Wi-LAN's reply on its motion for new trial simply rehashes the arguments it made in its motion and ignores the points in Defendants' response that make clear Wi-LAN is not entitled to a new trial on infringement. Defendants and their experts dutifully applied the Court's constructions, and the jury rendered its just verdict. Wi-LAN's motion should be denied.

A. The jury's verdict for the overlay-code patents is supported by the evidence.

In its reply, Wi-LAN continues to argue that Defendants' experts did not apply the proper construction for "overlay code." [ECF 497, at 1]. Wi-LAN is still incorrect. The Court construed "overlay code" as "an additional code that subdivides an orthogonal channel." [ECF 200, at 14].¹ That construction, which Defendants' experts used in their analyses, undermines Wi-LAN's entire infringement theory and precludes its request for a new trial.

1. The jury was provided substantial evidence that the accused products do not provide any code that subdivides an orthogonal channel.

Under the Court's construction, an "overlay code" must (1) be an "additional code" that (2) "subdivides an orthogonal channel." Wi-LAN's motion addresses only the first requirement, improperly arguing that Defendants confused the jury about the meaning of "additional code." But in their response, Defendants pointed out that Wi-LAN's motion should be denied regardless of Wi-LAN's arguments because substantial evidence demonstrated that the OVSF codes in the accused products do not subdivide any orthogonal channels, and thus, could not meet the second requirement. [ECF 492, at 6]. Wi-LAN's reply does not address, much less dispute, Defendants' position regarding the second requirement. For this reason alone, the Court may deny Wi-LAN's new-trial motion.

¹ Curiously, in neither its motion nor its reply does Wi-LAN actually recite the Court's construction.

2. *The jury was provided substantial evidence that the accused products do not have an “additional code” other than the orthogonal code.*

With regard to the first requirement of the Court’s construction — that the overlay code must be an additional code — Wi-LAN repeats its baseless argument that the Court rejected inclusion of the word “separate” in the construction of “overlay code.” At no point in the claim-construction briefing did Defendants seek to include the word “separate” in their proposed construction. Instead, during the *Markman* hearing, while the Court was trying to determine whether some compromise construction could be agreed upon, Defendants suggested that “separate” be used instead of “additional.” Rather than holding that the claims could be satisfied without a separate code, the Court found that Defendants’ suggestion was unnecessary because having an “additional code” implied having a separate code: “If it is an additional code, then wouldn’t that imply that it was separate?” Hearing Tr., at 59:24–35 (attached as Exhibit A to Defendants’ Response).

Further, in explaining its construction, the Court held that “an overlay code is an additional code **other than** the orthogonal code.” [ECF 200, at 14 (emphasis added)]. Nevertheless, throughout the trial, Wi-LAN and its experts tried to persuade the jury that one equals two — that a single OVSF code can be both an orthogonal code and an additional overlay code. Defendants, on the other hand, consistently used the Court’s construction of “additional code.” In any event, the jury **was not asked** to find whether an OVSF code was both an “orthogonal code” and a *separate* “overlay code”; the jury was asked to find whether the accused products infringed under the Court’s claim construction. The jury was not confused.

Moreover, even if some confusion were possible — which Defendants dispute — it would have been solely of Wi-LAN’s creation. As explained in their response, Defendants’ experts testified about the separateness of the overlay code *only in response to questions from*

*Wi-LAN's counsel.*² And during closing argument, while Wi-LAN's counsel used the word "separate" no less than **thirty times**, Defendants' counsel did not argue a single time that the claims required "separate" codes. Instead, Defendants' counsel discussed the Court's actual claim construction, even providing a simple analogy for the jury:

If one of my kids came to me and they just — I gave them a cookie. They eat the cookie, and they said: Dad, may I have another cookie, or *may I have an **additional** cookie?* How do you think they would react if I said: The additional cookie that you can have is the one you just ate? Does that make any sense to you? Right? Additional is more. It's additional. It's extra. It's something — it's another. It's not the same thing.³

Contrary to Wi-LAN's assertions, Defendants did not confuse the jury about whether the overlay code has to be separate from the orthogonal code or even whether there is any difference between "separate" and "additional." Defendants and their experts applied the Court's construction, and the jury could have decided as a factual matter that a single OVSF code is not "an additional code that subdivides an orthogonal channel." The Court should deny Wi-LAN's motion.

3. *Defendants did not import negative claim limitations or exclude the preferred embodiment.*

As it did in its motion, Wi-LAN accuses Defendants of importing a "negative limitation" into the claims requiring "a storage arranged to store the set of orthogonal codes." Wi-LAN's accusation is baseless. Indeed, the only testimony Wi-LAN cites on this point was addressing the

² See ECF 492, at 3–4 & n.6. Wi-LAN did not object to the testimony that it elicited, and thus, it cannot now complain that the jury was confused. Nor did it object when Defendants asked Martin Lysejko, a coinventor of the patents-in-suit who was presented by deposition, if the overlay code is a separate spreading code. Mr. Lysejko answered that the overlay code is an independent code: "The order of the process is that the data is first spread by an overlay code which in our description is an RW code, and then is subsequently spread by another direct sequence code which is an RW code, the two codes being independent of each other." **Ex. A** (attached): Trial Tr. at 11:5–13 (July 12, 2013) (Morning Session) (emphasis added).

³ **Ex. B** (attached): Trial Tr. at 99:1–11 (July 15, 2013) (emphasis added).

embodiments in the specification — not the claims. *See* Trial Tr. at 42:11–43:11 (July 11, 2013 (Morning Session)) (discussing column 3, lines 30–36 of the ’326 patent).

Wi-LAN also wrongly accuses Defendants of reading out the embodiment shown in Figure 15A of the patent. As Defendants’ response shows, Claim 5 of the ’326 Patent requires the second encoder to be “selectively operable instead of the TDM encoder” to apply the overlay code to the same data item — i.e., to a particular data item sent over a particular orthogonal channel. Thus, Claim 5 is not embodied in FIG. 15A, which applies overlay codes and TDM encoding to data items on different orthogonal channels. Figure 15A does, however, illustrate an embodiment of other claims. Claim 12 of the ’326 Patent, for example, does not require selective operation of a second encoder and a TDM encoder to a particular data item. Accordingly, Wi-LAN is not entitled to a new trial.

B. Defendants did not “import extraneous limitations” into the intercell-interference patent claims.

Clearly grasping at straws, Wi-LAN continues to assert that Dr. Wicker misapplied the claim language in the intercell-interference patent. Notably, just like the Motion, Wi-LAN’s reply quotes only one *question* posed to Dr. Wicker by Wi-LAN’s own counsel regarding the “indicative of” claim requirement. But as Defendants’ response revealed, Dr. Wicker supported his analysis in great detail, explaining, for instance, that the claimed analyzer must receive parameters that indicate interference from other cells. [ECF 492, at 10–11]. Wi-LAN has not shown that Dr. Wicker’s testimony was incorrect or that it resulted in any jury confusion.

Wi-LAN also repeats its incorrect assertion that Dr. Wicker imported a limitation from Claim 5 into Claim 11 of the intercell-interference patent. Notably, Wi-LAN cites only a single line from an answer in which Dr. Wicker stated that no channels are “locked out” in HSDPA. [ECF 497, at 4 (citing Trial Tr. at 70:14 (July 11, 2013 (Morning Session))]. Wi-LAN ignores

the rest of Dr. Wicker's answer, where he immediately explained that in HSDPA, no channels are taken out of use. *See* Response [ECF 492, at 12–13]. Thus, the accused products could not meet the claim limitations, which require the number of channels in the channel pool to be reduced.

Moreover, because Dr. Wicker's testimony that Wi-LAN complains of was elicited by Wi-LAN's own counsel on cross-examination, any possible confusion would be attributable to Wi-LAN. In any event, Wi-LAN did not object or request a limiting instruction, and therefore, cannot be heard to complain now.⁴

C. Wi-LAN's failure to object undermines Wi-LAN's request for a new trial.

Citing antiquated cases involving completely different facts — including a 1905 opinion from the Eighth Circuit — Wi-LAN argues that it was not required to object to the testimony about which it now complains. But as this Court explained in *z4 Technologies, Inc. v. Microsoft Corp.*, failure to object at trial constitutes a waiver of the right to complain and precludes the granting of a new trial. No. 6:06–CV–142, 2006 WL 2401099, at *18 (E.D. Tex. Aug. 18, 2006). Having failed to object to any of the testimony that it elicited, Wi-LAN is not entitled to a new trial.

Therefore, for the reasons stated above and in Defendants' Response, the Court should deny Wi-LAN's motion for new trial on infringement.

⁴ Wi-LAN deceptively states: "To the extent Dr. Olivier adopted Dr. Wicker's testimony, Wi-LAN's objections at trial had already been made and were sufficient." Contrary to Wi-LAN's suggestion, it did not object to Dr. Wicker's testimony on this issue. In addition, Wi-LAN ignores the fact that Dr. Olivier provided independent and detailed testimony regarding why the accused products did not meet the claim limitations. Wi-LAN does not challenge Dr. Olivier's independent analysis or testimony.

Dated: September 23, 2013

Respectfully submitted,

/s/ Richard L. Wynne, Jr.

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CERTIFICATE OF SERVICE

This is to certify that on September 23, 2013, the foregoing document was filed with the Court via the Court's ECF system, and thus, is deemed served under Local Rule CV-5.

/s/ Richard L. Wynne, Jr.

Richard L. Wynne, Jr.