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STATES DISTRICT COURT FOR DISTRICT OF

ACTNISION

ARTS

SOFTWARE, ROCKST GAMES, INC., SPORTS,

MEMORANDUM OPINION

ANDERSON CORROON NAFTALIS

NAFTALIS .

IN THE UNITED

THE DELAWARE

ACCELERATION BAY LLC,

Plaintiff,

v. BLIZZARD, INC. Defendant.

ACCELERATION BAY LLC,

Plaintiff,

v. ELECTRONIC INC.

Defendant.

ACCELERATION BAY LLC,

Plaintiff,

v. TAKE-TWO INTERACTIVE INC., AR AND 2K

INC. Defendants.

Civil Action No. 16-453-RGA

Civil Action No. 16-454-RGA

Civil Action No. 16-455-RGA

Philip A. Rovner, Jonathan A. Choa, Alan Silverstein, POTTER & LLP, Wilmington, DE; Paul J. Andre, Lisa Kobialka, James R. Hannah (argued), Hannah Lee, KRAMER LEVIN & FRANKEL LLP, Menlo Park, CA; Aaron M. Frankel (argued), KRAMER LEVIN & FRANKEL LLP, New York, NY. '

Plaintiff.

MORRIS, NICHOLS, ARSHT LLP,

S. WINSTON STRAWN LLP, WINSTON STRAWN LLP, P. WINSTON STRAWN LLP, Park,

WINSTON STRAWN LLP, WINSTON STRAWN LLP, WINSTON STRAWN LLP, San

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& Los Angeles, CA; Michael M. Murray, & New York, NY; David Enzminger, & Menlo CA; Dan K. Webb, Kathleen B. Barry, & Chicago, IL; Thomas M. Dunham (argued), Andrew R. Sommer, & Washington, DC; Krista M. Enns,

& Francisco, CA. Attorneys for Defendants.

JanuaryJ1,

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Presently U.S. Patent

'"344 patent"), U.S. Patent '"966 patent"), U.S. Patent '"634 patent"), U.S. Patent 6,910,069 '"069 patent"), U.S. Patent '"147 patent"), U.S. Patent '"497 patent").

Order

10, 206;

("Tr.")).

"It

exclude." 2005) "'[T]here

law."' 2013 Sept.

977-80 U.S. 370 Of "the

term."

"D.l. "are C.A.

before me is the issue of claim construction of multiple terms in No. 6,701,344 (the No. 6,714,966 (the No. 6,829,634 (the No. (the No. 6,732,147 (the and No. 6,920,497 (the I have considered the parties' Joint Claim Construction Brief. (D.I. 366). 1

I issued an and Stipulation Regarding Supplemental Claim Construction Briefing, pursuant to which the parties address terms 9, 21, 24-26, 28, and 37. (D.I. D.I. 215). I held oral argument on December 18, 2017. (D.I. 391 I. LEGAL ST AND ARD

is a bedrock principle of patent law that the claims of a patent define the invention to which the patentee is entitled the right to Phillips v. A WH Corp., 415 F.3d 1303, 1312 (Fed. Cir. (en bane) (internal quotation marks omitted). is no magic formula or catechism for conducting claim construction.' Instead, the court is free to attach the appropriate weight to appropriate sources 'in light of the statutes and policies that inform patent SoftView LLC v. Apple Inc., WL 4758195, at *1 (D. Del. 4, 2013) (quoting Phillips, 415 F.3d at 1324) (alteration in original). When construing patent

claims, a court considers the literal language of the claim, the patent specification, and the prosecution history. Markman v. Westview Instruments, Inc., 52 F.3d 967, (Fed. Cir. 1995) (en banc), aff'd, 517 (1996). these sources, specification is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed Phillips, 415 F.3d at 1315 (internal quotation marks omitted).

1 Citations to to the docket in No. 16-453.

3

"[T]he

application." "[T]he

patent." "In

words."

See USA, S. (2015).

"consists

treatises."

"A

patent." PLC Societa 1250 "a

interpretation." 505 2007)

words of a claim are generally given their ordinary and customary meaning .... [Which is] the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the effective filing date of the patent Id. at 1312-13 (citations and internal quotation marks omitted). ordinary meaning of a claim term is its meaning to [an] ordinary artisan after reading the entire Id. at 1321 (internal quotation marks omitted). some cases, the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood Id. at 1314.

When a court relies solely upon the intrinsic evidence-the patent claims, the specification, and the prosecution history-the court's construction is a determination of law.

Teva Pharm. Inc. v. Sandoz, Inc., 135 Ct. 831, 841 The court may also make factual findings based upon consideration of extrinsic evidence, which of all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned Phillips, 415 F.3d at 1317-19. Extrinsic evidence may assist the court in understanding the underlying technology, the meaning of terms to one skilled in the art, and how the invention works. Id. Extrinsic evidence, however, is less reliable and less useful in claim construction than the patent and its prosecution history. Id.

claim construction is persuasive, not because it follows a certain rule, but because it defines terms in the context of the whole Renishaw v. Marposs 'per Azioni, 158 F.3d 1243, (Fed. Cir. 1998). It follows that claim interpretation that would exclude the inventor's device is rarely the correct Osram GMBH v. Int 'l Trade Comm 'n, F.3d 1351, 1358 (Fed. Cir. (citation omitted).

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Patent

A-3('"147 patent"),

Patent

Patent II. BACKGROUND

The following claims are the most relevant for the purposes of this Markman. Claim 1 of the '147

1. A method of disconnecting a first computer from a second computer, the first computer and the second computer being connected to a broadcast channel, said broadcast channel forming an m-regular graph where m is at least 3, the method comprising: when the first computer decides to disconnect from the second computer, the first computer sends a disconnect message to the second computer, said disconnect message including a list of neighbors of the first computer; and when the second computer receives the disconnect message from the first computer, the second computer broadcasts a connection port search message on the broadcast channel to find a third computer to which it can connect in order to maintain an m-regular graph, said third computer being one of the neighbors on said list of neighbors. (D.I. 117-2, Exh. claim 11) (emphasis added). Claim 11 of the '147

11. A computer-readable medium containing instructions for controlling disconnecting of a computer from another computer, the computer and other computer being connected to a broadcast channel, said broadcast channel being an m-regular graph where mis at least 3, comprising: a component that, when the computer decides to disconnect from the other computer, the computer sends a disconnect message to the other computer, said disconnect message including a list of neighbors of the computer; and a component that, when the computer receives a disconnect message

from another computer, the computer broadcasts a connection port search message on the broadcast channel to find a computer to which it can connect in order to maintain an m-regular graph, said computer to which it can connect being one of the neighbors on said list of neighbors. ('147 patent, claim 11) (emphasis added). Claim 15 of the '147

15. The computer-readable medium of claim 11 wherein the computers that are connected to the broadcast channel are peers. ('147 patent, claim 15) (emphasis added).

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'069

('"069 patent"),

('"344 patent"), Patent

Patent Claim 1 of the Patent

1. A computer-based, non-routing table based, non-switch based method for adding a participant to a network of participants, each participant being connected to three or more other participants, the method comprising: identifying a pair of participants of the network that are connected wherein a seeking participant contacts a fully connected portal computer, which in tum sends an edge connection request to a number of randomly selected neighboring participants to which the seeking participant is to connect; disconnecting the participants of the identified pair from each other; and connecting each participant of the identified pair of participants to the seeking participant. (D.I. 117-2, Exh. A-5 claim 1) (emphasis added). Claim 1 of the '344 Patent

1. A computer network for providing a game environment for a plurality of participants, each participant having connections to at least three neighbor participants, wherein an originating participant sends data to the other participants by sending the data through each of its connections to its neighbor participants and wherein each participant sends data that it receives from a neighbor participant to its other neighbor participants, further wherein the network is m regular, where m is the exact number of neighbor participants of each participant and further wherein the number of participants is at least two greater than m thus resulting in a non-complete graph. (D.I. 117-2, Exh. A-1 claim 1). Claim 12 of the '344

12. The computer network of claim 1 wherein the inter-connections of participants form a broadcast channel for a game of interest. ('344 patent, claim 12) (emphasis added). Claim 13 of the '344

13. A distributed game system comprising: a plurality of broadcast channels, each broadcast channel for playing a game, each of the broadcast channels for providing game information related to said

game to a plurality of

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("'634 patent"), participants, each participant having connections to at least three neighbor participants, wherein an originating participant sends data to the other participants by sending the data through each of its connections to its neighbor participants and wherein each participant sends data that it receives from a neighbor participant to its neighbor participants, further wherein the network ism-regular, where m is the exact number of neighbor participants of each participant and further wherein the number of participants is at least two greater than m thus resulting in a non-complete graph; means for identifying a broadcast channel for a game of interest; and means for connecting to the identified broadcast channel. ('344 patent, claim 13) (emphasis added). Claim 19 of the '634 Patent

13. A non-routing table based computer-readable medium containing instructions for controlling communications of a participant of a broadcast channel within a network, by a method comprising: locating a portal computer; requesting the located portal computer to provide an indication of neighbor participants to which the participant can be connected; receiving the indications of the neighbor participants; and establishing a connection between the participant and each of the indicated neighbor participants, wherein a connection between the portal computer and the participant is not established, wherein a connection between the portal computer and the neighbor participants is not established, further wherein the network ism-regular and m-connected, where m is the number of neighbor participants of each participant, and further wherein the number of participants is at least two greater than m thus resulting in a non-complete graph. (D.I. 117-2, Exh. A-4 claim 19) (emphasis added). Claim 9 of the '497 Patent

9. A component in a computer system for locating a call-in port of a portal computer, comprising: means for identifying the portal computer, the portal computer having a dynamically selected call-in port for communicating with other computers;

7

("'497 patent"), FOR CONSTRUCTION

"a processes"

"at interconnected"

"group processes"

"The

interest," "The

interest," "participants" "computer network" "computers," "participants" "computer network" "computers" "computer processes,"

"computer network." "The

computer." means for identifying the call-in port of the identified portal computer by repeatedly trying to establish a connection with the identified portal computer through contacting a communications port or communications ports until a connection is successfully established; means for selecting the call-in port of the identified portal computer using a port ordering algorithm; and means for re-ordering the communications ports selected by the port ordering algorithm. (D.I. 117-2, Exh. A-6 claim 9) (emphasis added). III. TERMS 1. Term 9: "computer network" ('344/12; '966/12)

a. Plaintiff's proposed construction: group of connected computers and/or computer

b. Defendants' proposed construction: least two physical computers that are

c. Court's construction: of connected computers or group of connected computer

Term 9 appears in claim 12 of the '344 patent and claim 12 of the '966 patent, which cover, computer network of claim 1 wherein the interconnections of participants form a broadcast channel for a game of and computer network of claim 1 wherein the interconnections of participants form a broadcast channel for a topic of respectively.

The parties' dispute boils down to whether in a must be physical as Defendants argue, or whether in a

may be either physical or as Plaintiff argues. (D.I. 366 at 4).

To support its position, Plaintiff points to the language of dependent claims which further describe the (D.I. 366 at 11; Tr. at 34:19-23). Claim 9 covers, computer network of claim 1 wherein each participant is a process executing on a

8

10 "The participant." 10; 10).

10 "participants" "computer network" "computer processes" "computer."

"participants" "computer network" "computer processes" "participants" "computer network" "computer processes" "computer."

"computer network" "at interconnected," "group

processes."

"computer network" "it

channels." "computer network" "physical computers."

"computer network" "computers," of"computer processes," "computer network" "computer processes."

Plaintiff's "computer

10.

t l I l •

I ' I I I I I t ('344 patent, claim 9; '966 patent, claim 9). 2

Claim covers, computer network of claim 1 wherein a computer hosts more than one ('344 patent, claim '966 patent, claim

Together, the language of claims 9 and indicates that at least two in a

may be that exist on a single Given that the patent does not teach otherwise, if two in a may be

that exist on a single computer, there is no reason why all in a cannot be that exist on a single Accordingly, the is not limited to least two physical computers which are but can include either a of connected computers or group of connected computer

Defendants' arguments to the contrary are unavailing. First, Defendants note that an explicit advantage of the claimed is that the failure of a single computer will not divide the graph because would take a failure of [m] computers to divide the graph into disjoint sub-graphs, [that is,] two separate broadcast

('344 patent at 4:30-46). This advantage, argue Defendants, shows that the

must consist of (D.I. 366 at 12). However, just because this benefit exists when the is made up of but not when it is made up does not mean I must construe so as to exclude

Second, Defendants point to a statement from expert that the network could comprise ... either

multiple computers ... or software application programs

2 The '344 and '966 patents have identically-worded dependent claims 9 and

9

platforms." "computer network" "to computers."

"computer network" "computers."

"computer network"

"computer network" "network."

"computer network" "at interconnected,"

"computer network" "group processes." 10:

"a processes"

"each channels"

"network."

U.S.C.

10 operating on multiple separate hardware (Tr. at 26:3-10). Defendants also highlight a treatise, which defines mean an interconnected collection of autonomous (D.I. 366 at 5) (emphasis added). These pieces of extrinsic evidence demonstrate that in some contexts, a must consist of However, they are outweighed by intrinsic evidence which shows that need not be so limited in the context of the patents.

Finally, Defendants argue that the term must be differentiated from another term used in the patents, (D.1. 366 at 13-14). However, Defendants have failed to provide evidence that differentiating these terms requires construing

as least two physical computers that are and thus have failed to overcome the intrinsic evidence demonstrating that a is a of connected computers or group of connected computer 2. Term "network" ('344/13; '966/13)

a. Plaintiff's proposed construction:

Not indefinite.

group of connected computers and/or computer b. Defendants 'proposed construction:

Indefinite. c. Court's construction: of the broadcast

At the Markman hearing, the parties advised that they had agreed to a construction for

(Tr. at 6:11-7:12; D.I. 381 at 1; D.I. 412; D.I. 413). However, Defendants argue that the term is indefinite under 35 § 112. (D.I. 366 at 14).

"further ism-regular," "network"

"network"

"network" S. ("a

invention.")).

2006), "implication."

"said anode"

"an Independent claim 13 of the '344 patent and independent claim 13 of the '966 patent both include the limitation wherein the network but neither claim includes the word anywhere prior to that limitation. Claim 13 of the '344 patent, which is representative, reads as follows:

13. A distributed game system comprising: a plurality of broadcast channels, each broadcast channel for playing a game, each of the broadcast channels for providing game information related to said game to a plurality of participants, each participant having connections to at least three neighbor participants, wherein an originating participant sends data to the other participants by sending the data through each of its connections to its neighbor participants and wherein each participant sends data that it receives from a neighbor participant to its neighbor participants, further wherein the network is m-regular, where m is the exact number of neighbor participants of each participant and further wherein the number of participants is at least two greater than m thus resulting in a non-complete graph; means for identifying a broadcast channel for a game of interest; and means for connecting to the identified broadcast channel. ('344 patent, claim 13) (emphasis added).

Defendants argue that has no antecedent basis, and is indefinite because it fails to inform a person of ordinary skill in the art what refers to. (D.I. 366 at 17; Nautilus, Inc. v. Biosig Instruments, Inc., 134 Ct. 2120, 2124 (2014) patent is invalid for indefiniteness if its claims, read in light of the specification

delineating the patent, and the prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the

Plaintiff responds by citing to Energizer Holdings, Inc. v. Int'! Trade Comm 'n, 435 F.3d 1366, 1371 (Fed. Cir. which holds that an antecedent basis may present by (D.I. 366 at 15, 23). In that case, the claim term zinc had no explicit antecedent basis in the claim. However, the claim at issue recited anode gel comprised of zinc as the

11

component" "said anode,"

"anode gel" "said anode" "implication,"

Plaintiff

"network" "a participants" "a channels."

"network" 20).

2017 3670661, 2017), "the region"

"the region," "active region"

"the first."

"network" "plurality channels," "participants"

"broadcast channel"

"broadcast channel," "broadcast network," "can m-connected"

"m-regular" active anode prior to reciting zinc and the specification provided that the claimed anode gel was made of zinc. Thus, the Federal Circuit found to be the antecedent basis for zinc by and found the claim not indefinite. Energizer Holdings, Inc., 435 F.3d at 1368-71.

argues that this case is akin to Energizer Holdings, Inc., because a person of ordinary skill of the art would understand by implication that refers to plurality of

that are connected to one another and make up one of plurality of broadcast (D.I. 366 at 16, 24). Defendants, by contrast, argue that Energizer Holdings, Inc. is distinguishable because here, neither

the claim language nor the specification implies what refers to. (D.I. 366 at Instead, Defendants compare this case to Collabo Innovations, Inc. v. Omni Vision Techs., Inc., WL at *8-9 (D. Del. Aug. 25, where the term first active was found indefinite because the claim left open option of including more than one active

and the patent specification failed to provide guidance as to which would be Likewise, say Defendants, a person of ordinary skill in the art here would find it ambiguous whether refers to the of broadcast the

in a single broadcast channel, or something else. (D.I. 366 at 18). A is an overlay network formed on an underlying network. ('344 patent at 4:23-32). The '344 patent specification provides that a or

be maintained as m-regular and when the number of internal connections is even. ('344 patent at 14:63-15:4). The patent specification makes no reference to an underlying network.

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"network" "broadcast channel."

"network" "plurality channels" "network" "each"

"plurality participants."

"network" "each channels," "network" "m-regular."

10 U.S.C. S. "peers"

"participants similar"

"equally network"

"computers information" "peers" "computers" "participants" "that information."

"participants." "computers." "Peers"

"A

" "computer[ ]" "a channel," "participants." "The

r

Accordingly, in light of the intrinsic evidence, it would be clear to a person of ordinary skill in the art that refers to a

Defendants argue that even if Plaintiffs argument is credited and refers to a broadcast channel, it is unclear which of the claims' of broadcast the

refers to. (D.I. 366 at 22). However, the claims explicitly dictate that broadcast channel must provide game information to a of ('344 patent, claim 13). Thus, a person of ordinary skill in the art would understand that refers to

of the broadcast and that each must be Thus, the claims in which term appears are not indefinite under 35 § 112. Nautilus, Inc., 134 Ct. at 2124. 3. Term 21: and "peer-to-peer connections" ('147/15)

a. Plaintiff's proposed construction: that are b. Defendants' proposed construction: privileged and equipotent computers of the

c. Court's construction: that are equally able to send and receive

The parties agree that are either or are equally able to send and receive (Tr. at 54:7-24).

Plaintiff argues that my construction must refer to (Id.). Defendants, on the other hand, argue that it must refer to (Id.).

appears in claim 15 of the '14 7 patent. Claim 11 of the '14 7 patent, from which claim 15 depends, covers, computer readable medium containing instructions for controlling disconnecting of a computer from another computer .... The claim refers to s and to broadcast but never to Claim 15 of the' 147 patent covers, computer readable medium of claim 11 wherein the computers that are connected to the

13

peers." "participants."

"peers" "computers

"peer-to-peer connections,"

"instructions

participants"

"A "

U.S.C. 101.

"a

table(s)" "A "is

Plaintiff

I l l t ; f broadcast channel are (Emphasis added). Likewise, it does not contain a reference to

Accordingly, I construe to mean that are equally able to send and receive information."

I do not construe because that term does not appear in an asserted claim. (Tr. at 45 :8-46:6). 4. Term 24: "A non-routing table based computer readable medium containing

instructions for controlling communications of a participant of a broadcast channel within a network" ('634/19) a. Plaintiff's proposed construction:

Not indefinite and covers patent eligible subject matter.

for controlling communications within a network that does not need routing tables or switch-based methods to move messages between b. Defendants' proposed construction:

The preamble is limiting.

non-routing table based computer readable medium ... is indefinite. Also, the claim covers mere printed matter, thus the claimed limitations are given no patentable weight, and/or the claim covers patent ineligible subject matter under 35

§ c. Court's construction:

computer-readable medium containing instructions that control communications of a participant of a broadcast channel within a network that does not use routing

non-routing table based computer readable medium ... indefinite. At the Markman hearing, the parties advised that they had agreed on a construction for term 24. (Tr. at 8:3-9; D.I. 381at1; D.I. 412; D.I. 413). Later, argued that it disagrees that the preamble is limiting. (D.I. 417). However, Defendants' proposed construction, to which

14

Plaintiff Plaintiff

"not taking,"

Plaintiff "instructions" "functionally network." Plaintiff

U.S.C. 101, U.S.C.

"a

invention." S.

"incomprehensible combinations."

"non-routing based"

"The method."

l l l i I i f I f. I i I f ! i t

I [advised it agreed, stated the preamble is limiting. (D.I. 366 at 33-34; D.I. 381 at 1-2). failed to object to Defendants' contention that the preamble is limiting in its Markman briefing or at the Markman hearing, stating only generically that it was agreeing to the positions [Defendants were] which included indefiniteness and printed matter contentions. (Tr. at 8: 16-9:2). In fact, in its briefing, argued that the of the preamble limit the design of the (D.I. 366 at 57). Accordingly,

waived the issue, and the preamble is limiting. 3 Defendants argue that the term should be given no patentable weight under the printed matter doctrine, that the term covers patent ineligible subject matter under 35 § and that the term is indefinite under 35 § 112. (D.I. 366 at 33).

Whether the parties' agreed-upon construction implicates the printed matter doctrine and whether the term covers patent ineligible subject matter are not issues of claim construction. They are more appropriately addressed at the summary judgment stage. Accordingly, I do not address them now.

Turning to Defendants' indefiniteness argument, patent is invalid for indefiniteness if its claims, read in light of the specification delineating the patent, and the prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the Nautilus, Inc., 134 Ct. at 2124.

Defendants make two separate indefiniteness arguments. First, Defendants assert that the term is

indefinite because it uses word (D.I. 366 at 44). Second, Defendants assert that that the phrase table is itself indefinite. (Id. at 46).

3 For the same reasons, the term 25 preamble is also limiting. Additionally, in its briefing, Plaintiff argued, preamble [of term 25] limits the (D.1. 366 at 58-59).

15

"non-routing based" "computer medium" "non-routing

network." "non-routing medium" "nonsensical,"

Plaintiff "non-routing medium" "nonsensical." 11-20). Plaintiff

"non-routing based" "network." "A grammar." 708 "Even

patent."' Chef 2004) Control Corp. Corp., 190 1350,

2010) ("Moreover,

changeable").

"non-routing based" medium," "network."

"non-routing based" "[As to the first assertion, Defendants argue that table modifies

readable in the term table based computer readable medium containing instructions for controlling communications of a participant of a broadcast channel within a Because the term table based computer-readable is

Defendants assert that term 24 is indefinite. (D.I. 366 at 44). does not disagree that table based computer-readable is (Tr. at 58: Rather, argues that a person of ordinary skill in the art would understand that table modifies (D.I. 366 at 57).

claim must be read in accordance with the precepts of English In re Hyatt, F .2d 712, 714 (Fed. Cir. 1983). 'a nonsensical result does not require the court to redraft the claims of the Am., Inc. v. Lamb-Weston, Inc., 358 F.3d 1371, 1374 (Fed. Cir. (citing Process v. Hydreclaim F.3d 1374 (Fed. Cir. 1999)); see also Randall May Intern., Inc. v. DEG Music Prods., Inc., 378 F. App'x 989, 997 (Fed. Cir. the claim language teaches that the shoulder supporting members should be 'changeable' or 'adjustable': these terms immediately precede the term 'shoulder supporting members' and the only reasonable construction, therefore, is that these shoulder supporting members themselves, rather

than the entire assembly, should be adjustable or

Defendants are correct that as a matter of grammar, table modifies "computer-readable not (D.I. 366 at 45).

Furthermore, the '634 patent specification's only reference to table is a teaching that e]mbodiments of the invention deal with a non-routing table based method

16

network."

"non-routing based" "network."

"non-routing medium" "nonsensical," "fail[s]

invention." S.

"A

"a

participants"

"a

switches"

"the patent." 50).

"what limitation" "non- based." Second, for broadcasting messages in a ('634 patent at 2:46-47). This teaching does not shed light on term 24's grammar.

I cannot rewrite the patent to make table modify Accordingly, given that the parties agree that table based computer-readable

is claim 19 of the '634 patent to inform, with reasonable certainty, those skilled in the art about the scope of the Nautilus, Inc., 134 Ct. at 2124. The claim is therefore indefinite.

I need not reach Defendants' second indefiniteness assertion for this term. 5. Term 25: computer-bas_ed, non-routing table based, non-switch based method for

adding a participant to a network of participants" ('069/1) a. Plaintiff's proposed construction:

Not indefinite

network that is not directly based on routing tables or switch-based methods to move messages between b. Defendants' proposed construction:

The preamble is limiting and indefinite. c. Court's construction: computer-based method for adding a participant to a network of

participants that does not use routing table(s) or At the Markman, the parties advised that they had agreed on a construction, should I construe term 25. (Tr. at 9:3-14; D.I. 381 at 2; D.I. 412; D.I. 413). As is the case for term 24, the preamble is limiting. However, Defendants contend that term 25 is indefinite because term 'non-routing table based' is itself indefinite in the context of this (D.I. 366 at

To support their contention, Defendants make three arguments. First, Defendants argue the specification fails to disclose must be absent to meet the negative of routing table (D.I. 366 at 46). Defendants argue the specification does not

17

"routing-table based" "non-routing based." Plaintiffs "continued IPRs art"

805 1350,

"routing-table based" "non-routing based," Plaintiff

Plaintiff Plaintiff "routing table" "which nodes." ii

"lack meaning" "routing based" "non-routing table-based."

Plaintiff "routing based" "non-routing based"

"non-routing based" "car" "routing based"

Plaintiffs "conflicting,"

I I i i teach what is meant by or table (Id. at 48). Third, Defendants argue that ... advance[ment o:fJ new interpretations of 'routing table's' meaning in the to distinguish other prior renders term 25 indefinite. (D.I. 366 at 46-48, 50-52).

As a preliminary matter, Defendants agree that their negative limitation argument is really a written description argument. (Tr. at 62:14-17; Inphi Corp. v. Netlist, Inc., F.3d

1355 (Fed. Cir. 2015)). It is not an issue of claim construction. As such, I do not consider it now. Defendants may re-argue the issue at the summary judgment stage.

As to Defendants' contention that the specification fails to teach what is meant by

and table agrees that the specification does not provide these teachings. (D.I. 366 at 57). Instead, argues that the terms are well- known in the art. (Id.). To demonstrate its point, points to a technical dictionary that defines as a table lists and keeps track of all possible routes between

(D.I. 366 at 57; D.I. 367-1, Exh. G at 21). Defendants do not dispute the applicability of this definition, but argue that it is just one of several definitions, which together indicate a of a universally understood for

table and its negative counterpart, (D.I. 366 at 46- 47). Defendants correctly argue that has characterized multiple prior art references as

table to distinguish prior art references from the table invention. (D.I. 366 at 47-48). But that does not mean table is indefinite. Just as can be readily understood to include numerous makes and models, table

can be readily understood to cover multiple prior art references. Defendants also argue that prior art characterizations are but do not explain how they are

18

"routing table" Plaintiff "more expansive"

Plaintiff.

Plaintiffs

"fail[s] invention." S.

U.S.C. 101.

U.S.C. 101. conflicting. (D.I. 366 at 47). In fact, Defendants argue that the technical dictionary definition of

offered by is than other definitions and characterizations offered by (Id.). This argument comports with the notion that the technical dictionary definition properly encompasses each of other definitions and characterizations.

Accordingly, I do not find that term 25 to inform, with reasonable certainty, those skilled in the art about the scope of the Nautilus, Inc., 134 Ct. at 2124. Because I do not find the term indefinite, I adopt the parties' agreed-upon construction. 6. Term 26: "A method of disconnecting a first computer from a second computer, the

first computer and the second computer being connected to a broadcast channel, said broadcast channel forming an m-regular graph where m is at least 3, the method comprising:" ('147/1) and "A computer-readable medium containing instructions for controlling disconnecting of a computer from another computer, the computer and the other computer being connected to a broadcast channel, said broadcast channel being an m-regular graph where mis at least 3" ('147/11) a. Plaintiff's proposed construction:

The preambles are limiting and cover patent eligible subject matter. b. Defendants 'proposed construction:

The preambles are limiting. Also, claim 11 covers mere printed matter; thus, the claimed limitations are given no patentable weight, and/or the claim covers patent ineligible subject matter under 35

§ c. Court's construction: none

The parties agree that the preambles are limiting. (D.I. 366 at 33). As is the case for term 24, Defendants argue that term 26 should be given no patentable weight under the printed matter doctrine and that the term covers patent ineligible subject matter under 35 § (D.I. 366 at 33-34). However, whether

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"A

"a

computer"

"a computer"

"a computer"

"component" "comprises" "means" "means computer," "means

computer," "means computer," "means ports."

"[a]

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 r

I the parties' agreed-upon construction implicates the printed matter doctrine and whether the term covers patent ineligible subject matter are not issues of claim construction. They are more appropriately addressed at the summary judgment stage. Accordingly, I do not address them now. 7. Term 28: component in a computer system for locating a call-in port of a portal

computer" ('497/9) a. Plaintiff's proposed construction:

The preamble is a limitation.

software module providing instructions to allow a computer executing those instructions to locate a call-in port of a portal b. Defendants' proposed construction:

The preamble is a limitation.

hardware component programmed to located a call-in port of a portal c. Court's construction:

The preamble is a limitation.

hardware component programmed to located a call-in port of a portal Term 28 is the preamble to claim 9 of the '497 patent. The parties agree that the preamble is a limitation. (DJ. 366 at 65). The of the preamble four different limitations, namely, for identifying the portal for identifying the call-in port of the identifying for selecting the call-in port of the identified portal and for re-ordering the communications ('497 patent, claim 9).

This Court previously construed each of these means-plus-function elements, which are terms 5-8. (DJ. 287 at 3-4). The structure identified for each function is processor

" (Id.). Plaintiffs

"Comprising" "a

claim." 501 "component" "comprises" "means" "functions," "processor[s]," "component"

"processor" "hardware." Plaintiff "all software" "requires execute"

"hardware," "software." "component" "hardware," Plaintiff "algorithms" "software." Plaintiff "component" "hardware"

Plaintiffs

"an ports"

"a

manner" "rule-based manner" programmed to perform the [given] algorithm .... The Court adopted this language from

proposed structures. (D. I. 2 7 5 at 10-13).

is term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the Genentech, Inc. v. Chiron Corp., 112 F.3d 495, (Fed. Cir. 1997). Because the of the preamble four and their corresponding

which include the necessarily includes at least one processor.

The parties agree that a is (Tr. at 75:20-25, 86:20-22). Even though argues that a processor to it, my means-plus- function constructions require that the processor is specifically programmed. The constructions therefore require rather than Accordingly, the of the preamble requires and I adopt Defendants' proposed construction.

argues that all citations in my means-plus-function constructions for terms 5-8 are to or (Tr. at 87:4-7). But already agreed that the

of the preamble requires by submitting its proposed constructions for terms 5-8. argument is therefore unavailing. 8. Term 37: "port ordering algorithm" ('497/9)

a. Plaintiff's proposed construction: algorithm used to select the order of the b. Defendants' proposed construction: rule-based procedure for generating an order of

portal computer ports in a non-random c. Court's construction: procedure for generating an order of portal computer

ports in a non-random

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"component" "comprises" "means" "means computer," "means computer," "means

algorithm," "means algorithm."

"means computer" "using algorithm."

i I "means" "for ports" "selected algorithm"

• f "port algorithm" "means." "port algorithm" "means" "means"

"means algorithm," "deterministic" "Deterministic" "non-random"

"means algorithm," "deterministic," "non-random," "random."

"port algorithm" "means"

"deterministic," "non-random," "port algorithm" "non-random."

Term 37 appears in claim 9 of the '497 patent. The claim covers a that

four different limitations, namely, for identifying the portal

for identifying the call-in port of the identifying for selecting the call-in port of the identified portal computer using a port-ordering and

for re-ordering the communications ports selected by the port ordering ('497 patent, claim 9) (emphasis added).

The third limitation specifies that for selecting the call-in port of the identified

must be accomplished a port ordering The fourth limitation specifies that its are re-ordering the communications that were already

by the port ordering of the third limitation. Unlike the third limitation, the fourth limitation does not provide that the ordering is used to accomplish its

Thus, claim language provides that the ordering accomplishes the of the third limitation only, and

not the of the fourth limitation. The parties agree that the third limitation, for selecting the call-in port of the identified portal computer using a port ordering involves a algorithm. (Tr. at 115:12-116:11). is the same as in this context. (Tr. at 96:5-6, 116:23-24). The parties also agree that the fourth limitation, for re-ordering the communications ports selected by the port ordering need not necessarily be, but may be, or (Tr. at 115:12-116:11).

Because the ordering is used only to accomplish the of the third limitation, which the parties agree involve a or algorithm, the ordering must be Accordingly, I adopt Defendants' proposed construction.

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CONCLUSION

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I In light of the parties' agreement, I need not address Defendants' argument that the patentee disclaimed non-random port ordering algorithms. (D.I. 366 at 72-74). IV.

Within five days the parties shall submit a proposed order consistent with this Memorandum Opinion.

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