

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

FENNER INVESTMENTS, LTD.,	§	
	§	
vs.	§	
	§	CASE NO. 6:11cv348 LED-JDL
CELLCO PARTNERSHIP d/b/a	§	
VERIAON WIRELESS, et al.		

**REPORT & RECOMMENDATION OF
UNITED STATES MAGISTRATE JUDGE**

Before the Court is Defendant Cellco Partnership d/b/a Verizon Wireless's ("VZW") Motion for Summary Judgment and Early Claim Construction. (Doc. No. 89) ("VZW MTN."). Plaintiff Fenner Investments Ltd. ("Fenner") filed a Response (Doc. No. 93) ("RESPONSE"), and VZW filed a Reply (Doc. No. 96) ("REPLY"). On February 27, 2013, the Court held a hearing on the matter. For the reasons set forth herein, the Court adopts the constructions set forth below, and **RECOMMENDS DENYING** VZW's Motion for Summary Judgment of Non-infringement (Doc. No. 89).

BACKGROUND

Plaintiff Fenner Investments, Ltd. ("Fenner") alleges VZW infringes Claim 1 of U.S. Patent No. 5,561,706 ("the '706 patent"). The '706 patent is titled "System for Managing Access by Mobile Users to an Interconnected Communications Network where a Billing Authority is Identified by a Billing Code from the User," and discloses a system for managing a communication network for mobile users. Claim 1 is the only asserted claim and is set forth below:

1. A method of providing access to a mobile user in a communications system having a plurality of interconnected radio frequency communication switches for selectively

collecting calls to mobile users via radio frequency links, a plurality of billing authorities for maintaining service profiles of mobile users and a plurality of location authorities for maintaining current locations of mobile users within the interconnected communication switches, the method comprising:

- receiving at a radio frequency communication switch a personal identification number from a mobile user;
- receiving from the mobile user at the communication switch a billing code identifying one of the plurality of billing authorities maintaining a service profile for the mobile use[r], wherein different ones of the plurality of billing authorities may maintain the service profile or a second profile for the mobile user identified by the personal identification number;
- requesting a service profile of the mobile user from the billing authority identified by the received billing code;
- storing in memory the service profile received from the billing authority; and
- providing the mobile user access to the switch.

‘706 patent at 5: 61–67; 6: 1–14.

In its motion, VZW presented three terms from Claim 1 it felt warranted summary judgment of non-infringement if the Court adopted its construction of those terms. Those terms include, “personal identification number,” “billing code,” and “mobile user.” (Doc. No. 89) Fenner presented its proposed construction of those terms, as well as its positions on infringement in its responsive brief. (Doc. No. 93). The Court heard argument on February 27, 2013.

CLAIM CONSTRUCTION PRINCIPLES

“It 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 exclude.’” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)). The Court examines a patent’s intrinsic evidence to define the patented invention’s scope. *Id.* at 1313–14; *Bell Atl. Network Servs., Inc. v. Covad*

Commc'ns Group, Inc., 262 F.3d 1258, 1267 (Fed. Cir. 2001). Intrinsic evidence includes the claims, the rest of the specification and the prosecution history. *Phillips*, 415 F.3d at 1312–13; *Bell Atl. Network Servs.*, 262 F.3d at 1267. The Court gives claim terms their ordinary and customary meaning as understood by one of ordinary skill in the art at the time of the invention. *Phillips*, 415 F.3d at 1312–13; *Alloc, Inc. v. Int'l Trade Comm'n*, 342 F.3d 1361, 1368 (Fed. Cir. 2003).

Claim language guides the Court's construction of claim terms. *Phillips*, 415 F.3d at 1314. “[T]he context in which a term is used in the asserted claim can be highly instructive.” *Id.* Other claims, asserted and unasserted, can provide additional instruction because “terms are normally used consistently throughout the patent.” *Id.* Differences among claims, such as additional limitations in dependent claims, can provide further guidance. *Id.*

“[C]laims ‘must be read in view of the specification, of which they are a part.’” *Id.* (quoting *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995)). “[T]he 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 term.’” *Id.* (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)); *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1325 (Fed. Cir. 2002). In the specification, a patentee may define his own terms, give a claim term a different meaning that it would otherwise possess, or disclaim or disavow some claim scope. *Phillips*, 415 F.3d at 1316. Although the Court generally presumes terms possess their ordinary meaning, this presumption can be overcome by statements of clear disclaimer. See *SciMed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc.*, 242 F.3d 1337, 1343–44 (Fed. Cir. 2001). This presumption does not arise when the patentee acts as his own

lexicographer. See *Irdeto Access, Inc. v. EchoStar Satellite Corp.*, 383 F.3d 1295, 1301 (Fed. Cir. 2004).

The specification may also resolve ambiguous claim terms “where the ordinary and accustomed meaning of the words used in the claims lack sufficient clarity to permit the scope of the claim to be ascertained from the words alone.” *Teleflex, Inc.*, 299 F.3d at 1325. For example, “[a] claim interpretation that excludes a preferred embodiment from the scope of the claim ‘is rarely, if ever, correct.’” *Globetrotter Software, Inc. v. Elam Computer Group Inc.*, 362 F.3d 1367, 1381 (Fed. Cir. 2004) (quoting *Vitronics Corp.*, 90 F.3d at 1583). But, “[a]lthough the specification may aid the court in interpreting the meaning of disputed language in the claims, particular embodiments and examples appearing in the specification will not generally be read into the claims.” *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1571 (Fed. Cir. 1988); see also *Phillips*, 415 F.3d at 1323.

The prosecution history is another tool to supply the proper context for claim construction because a patentee may define a term during prosecution of the patent. *Home Diagnostics Inc. v. LifeScan, Inc.*, 381 F.3d 1352, 1356 (Fed. Cir. 2004) (“As in the case of the specification, a patent applicant may define a term in prosecuting a patent”). The well-established doctrine of prosecution disclaimer “preclud[es] patentees from recapturing through claim interpretation specific meanings disclaimed during prosecution.” *Omega Eng’g Inc. v. Raytek Corp.*, 334 F.3d 1314, 1323 (Fed. Cir. 2003). The prosecution history must show that the patentee clearly and unambiguously disclaimed or disavowed the proposed interpretation during prosecution to obtain claim allowance. *Middleton Inc. v. 3M Co.*, 311 F.3d 1384, 1388 (Fed. Cir. 2002); see also *Springs Window Fashions LP v. Novo Indus., LP*, 323 F.3d 989, 994 (Fed. Cir. 2003) (“The disclaimer . . . must be effected with ‘reasonable clarity and deliberateness.’”)

(citations omitted). “Indeed, by distinguishing the claimed invention over the prior art, an applicant is indicating what the claims do not cover.” *Spectrum Int’l v. Sterilite Corp.*, 164 F.3d 1372, 1378–79 (Fed. Cir. 1988) (quotation omitted). “As a basic principle of claim interpretation, prosecution disclaimer promotes the public notice function of the intrinsic evidence and protects the public’s reliance on definitive statements made during prosecution.” *Omega Eng’g, Inc.*, 334 F.3d at 1324.

Although, “less significant than the intrinsic record in determining the legally operative meaning of claim language,” the Court may rely on extrinsic evidence to “shed useful light on the relevant art.” *Phillips*, 415 F.3d at 1317 (quotation omitted). Technical dictionaries and treatises may help the Court understand the underlying technology and the manner in which one skilled in the art might use claim terms, but such sources may also provide overly broad definitions or may not be indicative of how terms are used in the patent. *Id.* at 1318. Similarly, expert testimony may aid the Court in determining the particular meaning of a term in the pertinent field, but “conclusory, unsupported assertions by experts as to the definition of a claim term are not useful.” *Id.* Generally, extrinsic evidence is “less reliable than the patent and its prosecution history in determining how to read claim terms.” *Id.*

DISCUSSION

A. Disputed Terms

I. “personal identification number”

Plaintiff’s Proposed Construction	Defendant’s Proposed Construction	Court’s Construction
“a number separate from a billing code (as construed herein),	“a number separate from a billing code (as construed herein),	“a number separate from a billing code (as construed herein), identifying an individual system

identifying an individual system user”	identifying an individual system user, which is associated with the individual and not the device”	user, which is associated with the individual and not the device”
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VZW argues that the personal identification number must be associated with the individual and not with a device. VZW MTN. at 8. VZW cites to the specification, which states “[t]he personal identification numbers 2 are not associated with any particular communications unit or physical location but are associated with individual users.” ‘706 patent 2:31–37. VZW argues that the user and the device cannot be one in the same and the use of a gender to describe a “user” indicates the “user” must be a person, not a device. VZW MTN. at 10. VZW further argues that a construction conflating a “user” and a “device” would violate the written description because nowhere does the patent support sending the billing code and personal identification number from a device as opposed to being entered by a person. *Id.* at 12. Finally, VZW asserts the prosecution history supports its construction, citing to a prosecution statement to overcome the prior art Hayes system that disclosed a “mobile identification number.” See Ex. 11 to VZW MTN. at FH000161-62) (“Service in a convention cellular system, as described in Hayes et al., is based on a mobile identification number (MIN)...[t]he present invention, on the other hand, is centered around the mobile user, not the mobile telephone.”).

Fenner argues that VZW wrongfully imports concepts from other independent claims into independent Claim 1. RESPONSE at 2. Fenner makes a claim differentiation argument that the “personal identification number” need not be associated with the mobile user because Claim 19, which depends from independent Claim 18, recites a personal identification number that is independent of a particular device. *Id.* at 5. Fenner further asserts that nothing in the ‘706 patent disclaims storing the “personal identification number” in the device that is used to communicate

with the system. *Id.* at 5. Fenner cites to Claim 7 and argues that the association of the “personal identification number” with a device is necessary to achieve the claimed routing function. *Id.* at 6 (“receiving [a] personal identification number of a destination user; [and] routing the call to the destination user...”). Finally, Fenner argues the independence feature was a basic feature known in the prior art. *Id.* at 7 (citing S. Ginn, “Personal Communication Services: Expanding the Freedom to Communicate,” Pacific Telesis Group, *IEEE Communications Magazine*, 29(2): 30 (1991)).

The claim language recited in Claim 1 expressly associates the personal identification number with the mobile user. See ‘706 patent at 6:4, 10–11 (“personal identification number from a mobile user;” “mobile user identified by the personal identification number”). The specification supports this association, disclosing “[t]he personal identification numbers 2 are not associated with any particular communications unit or physical location but are associated with individual users.” ‘706 patent 2:31–37. Similarly, the prosecution history reveals that the patentee stated “[t]he present invention, on the other hand, is centered around the mobile user, not the mobile telephone,” when distinguishing the “mobile identification number” disclosed in the prior art. EX. 11 to VZW MTN. at FH000161-62.

Fenner’s claim differentiation argument that the “personal identification number” need not be associated with the mobile user because Claim 19 recites a personal identification number that is independent of a particular device, is not persuasive. First, Claim 19 depends from Claim 18, a separate independent claim from asserted Claim 1, which recites many differences, including a “personal identification code.” ‘706 patent at 8:40. Further, while Claim 19 recites a “personal identification number,” that claim is directed to an embodiment where both source and destination users have a personal identification number. Ultimately, Fenner’s arguments are not

persuasive in light of the express language in Claim 1, the specification, and the prosecution history, all of which disclose a personal identification number associated with the mobile user.

Accordingly, the Court finds that “personal identification number” is “a number separate from a billing code (as construed herein), identifying an individual system user, which is associated with the individual and not the device”

II. “billing code”

Plaintiff’s Proposed Construction	Defendant’s Proposed Construction	Court’s Construction
a code, separate from the personal identification number (as construed herein), identifying a particular billing authority (as construed herein)	a code, separate from the personal identification number (as construed herein), identifying a particular billing authority (as construed herein), entered by the mobile user (as construed herein)	a code, separate from the personal identification number (as construed herein), identifying a particular billing authority (as construed herein)

The parties agree on the basic contours of a construction for the term “billing code,” except that VZW wishes to add the requirement that the billing code be “entered by the mobile user.” VZW briefs the same arguments for billing code alongside its arguments presented above for “personal identification number.” VZW further cites to the specification, which states:

The user attempts to logon to a PCS switch at step 20 by entering his personal identification number 2 and billing code...The PCS switch receives at step 22 the personal identification number 2 and billing code from the user.

‘706 patent at 4:1–7.

Fenner argues that adopting VZW’s construction would improperly read the preferred embodiment onto the claim. RESPONSE at 8. Fenner notes that the claim does not recite a billing code being entered by a user; rather, it merely calls for a switch receiving a billing code. *Id.* citing ‘706 patent at 4:1 –7; Fig. 3.

While VZW wishes to add the limitation that the personal identification number be entered by the user, that additional requirement is not recited in Claim 1, where it easily could have been had the patentee intended to require the personal identification number be entered by the mobile user. Rather, as Fenner points out, VZW’s support for this limitation comes from the preferred embodiment. *See Phillips*, 415 F.3d at 1313 (“[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments.”). Accordingly, the Court finds that “billing code” requires no further construction other than the existing previous construction—the portion of the construction upon which the parties agree: “a code, separate from the personal identification number (as construed herein), identifying a particular billing authority (as construed herein).”

III. “mobile user”

Plaintiff’s Proposed Construction	Defendant’s Proposed Construction	Court’s Construction
“an individual using a mobile communication device” Alternatively: “from an individual system user using a wireless unit”	“a user who is mobile”	Not ripe for construction

VZW argues that the term “mobile,” as used in Claim 1, refers to “the ability of the ‘user’ to be mobile—not to any ‘mobile communications device.’” VZW MTN. at 15. VZW points to the specification to support its assertion, where the specification clearly discloses that the present invention can be used with “wire line and RF devices.” *Id.* citing ‘706 patent at 2:31–35 (“[a] plurality of personal identification numbers 2 are able to communicate with a personal communications systems switch 4 via wire line and radio frequency links.”).

Fenner argues that because the specification references a “communication unit” and “handset” it would be readily apparent to one of ordinary skill in the art that a person does not

communicate with a radio frequency switch without the assistance of a wireless mobile device. RESPONSE at 10–11, citing ‘706 patent at 2:36; 4:48.

For reasons that will be discussed in the following section, the Court finds that the terms involving “mobile user,” are not sufficiently presented to resolve the parties’ dispute on claim construction.

B. Summary Judgment of Non-infringement

Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED.R.CIV.P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The standard for summary judgment in a patent case is no different. *Nike Inc. v. Wolverine World Wide, Inc.*, 43 F.3d 644, 646 (Fed. Cir. 1994) (“summary judgment is appropriate in a patent case, as in other cases, when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.”).

The determination of infringement requires a two-step analysis. First, the court construes the claims at issue to determine the scope and meaning at claim construction; next, the court compares the construed claims of the patent against the accused products. *See, e.g., Business Objects, S.A. v. Microstrategy, Inc.*, 393 F.3d 1366, 1371 (Fed. Cir. 2004); *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1304 (Fed. Cir. 1999). Importantly, claim construction is a question of law, whereas infringement is a question of fact. *See Frank’s Casing Crew and Rental Tools, Inc. v. Weatherford Int’l, Inc.*, 389 F.3d 1370, 1376 (Fed. Cir. 2004). Therefore, “summary judgment of non-infringement can only be granted if, after viewing the alleged facts in the light most favorable to the non-movant, there is no genuine issue whether the accused device is encompassed by the claims.” *Pitney Bowes*, 182 F.3d at 1304.

VZW has failed to set out a non-infringement position based on the Court's construction of "billing code," which does not require the user to enter the billing code. VZW states only that a user would not be aware of its existence when it is assigned to the device at the time of registration, but this position does not resolve infringement as a matter of law, leaving a genuine issue of material fact as to whether a user who turns on a device may satisfy this claim limitation. Further, for reasons explained below, the Court declined to construe "mobile user" based on the positions presented by the parties in their briefing. Thus, based on the Court's constructions set out herein, the only limitation that would render summary judgment in VZW's favor if not met by the accused system is "personal identification number."

As to the personal identification number, VZW argues that its accused CDMA system does not infringe Claim 1 of the '706 patent because the personal identification number is received from the mobile device and not the mobile user. VZW MTN. at 17. VZW maintains that this authentication process is "transmitted by the phone automatically upon registration without any involvement or knowledge of the user of the phone." *Id.* VZW states that Fenner's infringement contentions identify a value called the "NAI" as containing both the personal identification number and billing code, and that value is composed of the MDN ("mobile directory number") and the "realm." *Id.* VZW then goes on to argue that the MDN, which is the alleged personal identification number, is associated with the device and transmitted by the device such that the user does not take any action with respect to the MDN. *Id.* at 18. VZW points out that the MDN is the same number as the telephone number used to call the device, and that the MDN is the equivalent of the MIN in the Hayes prior art system, where the network transmits the MIN/MDN to the network during registration. *Id.* at 18–19. Finally, VZW argues that Fenner's contention that infringement occurs when a mobile user turns on a mobile device

should be rejected for reasons set forth by the Federal Circuit in *TPL*,¹ where the court rejected plaintiff's attempt to conflate a "user" and a "device." *Id.* at 19.

Fenner maintains that the limitation "not associated with device" does not preclude "storing the personal identification number in the device." RESPONSE at 15. Fenner urges that a reasonable jury may determine that limitation is met "even when the system user's personal identification number is stored in the device." *Id.*

While the Court finds that the personal identification number is associated with the user and not the device, at the present it cannot state as a matter of law that infringement cannot occur under Fenner's theory that the "association limitation" is satisfied where the personal identification number is stored in the mobile device. At the hearing, Fenner argued that this limitation is met when a call is placed by a mobile user, which then associates the personal identification number with the user automatically through the device. VZW cites *TPL* to argue that such a theory is not proper as it conflates the user and the device. VZW MTN. at 19. However, in *TPL* the court construed "receiving user" and rejected plaintiff's attempts to construe the term as a combination of a device and a person. *TPL*, 700 F.3d at 492. Here, Fenner has not proposed to construe "mobile user" as the combination of a device and a person. Instead, Fenner argues that the personal identification number, though stored in the device, is still associated with the user of the device. The '706 patent does not appear to preclude such a theory, and the Court found that Claim 1 of the '706 patent does not require that the personal identification number be entered by the user. In this light, the issue that the Court finds significant, but not resolved in the parties' proposed constructions of "mobile user," is whether the '706 patent requires the "mobile user" to be the person using the device or the person who owns the mobile device.

¹ *Technology Patents LLC, v. T-Mobile (UK) Ltd. et al.*, 700 F.3d 482, 497 (Fed. Cir. 2012).

For the reasons stated herein, the Court finds summary judgment improper at the present time. The Court therefore **RECOMMENDS DENYING** VZW's Motion without prejudice to re-urging at the dispositive motion stage.²

CONCLUSION

The Court sets forth the foregoing construction, and **RECOMMENDS DENYING** VZW's Motion for Summary Judgment of Non-infringement. Within fourteen (14) days after receipt of the Magistrate Judge's Report, any party may serve and file written objections to the findings and recommendations contained in the Report. A party's failure to file written objections to the findings, conclusions and recommendations contained in this Report within fourteen (14) days after being served with a copy shall bar that party from *de novo* review by the district judge of those findings, conclusions and recommendations and, except on grounds of plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United States Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996).

So ORDERED and SIGNED this 25th day of April, 2013.



JOHN D. LOVE
UNITED STATES MAGISTRATE JUDGE

² VZW should first file a letter brief for such a motion pursuant to the Court's DCO.