UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ZEROCLICK, LLC, Plaintiff, v. APPLE INC., Defendant.	Case No. 15-cv-04417-JST **CLAIM CONSTRUCTION ORDER** Re: ECF Nos. 45, 46

Before the Court is Apple Inc.'s ("Apple") Opening Claim Construction Brief, ECF No. 45, as well as Zeroclick, LLC's ("Zeroclick") Opening Claim Construction Brief, ECF No. 46. Apple's Opening Claim Construction Brief argues that two terms in U.S. Patent No. 7,818,691 ("the '691 Patent") and one term in U.S. Patent No. 8,549,443 ("the '443 patent") (collectively, "the patents-in-suit") are indefinite, thereby rendering the patents-in-suit invalid. Zeroclick's Claim Construction Brief asks the Court to construe three separate terms contained within the claims of the patents-in-suit. Because the Court concludes that both of the patents-in-suit are invalid for indefiniteness, the Court will not construe the claims identified in Zeroclick's Claim Construction Brief.

I. BACKGROUND

On September 25, 2015, Zeroclick filed a Complaint against Apple, alleging infringement of the patents-in-suit. ECF No. 1. The '443 patent is a continuation of the '691 patent. Both patents are entitled "ZEROCLICK" and share a common specification. Both patents also claim priority to a United Kingdom patent application filed on May 11, 2000.

The basic concept behind both of the patents-in-suit is relatively simple. The specification explains that "[s]ince the invention of the mouse, the mouse has had two major functions. The

first was the movement of a pointer over a screen and the second was a button press/click." '691 patent at 3:3–5. The invention covered by the patents-in-suit, by contrast, allows for "all existing mouse functionality (or any other user input device and keyboard functionality)" to "occur by mouse movement alone." Id. at 21–23. "Thus[,] instead of activating functions . . . by the pointer coming into contact and clicking to confirm the selection and triggering of a . . . , with the Zeroclick, the user confirms the selection and triggers a function . . . by a subsequent pointer movement within a predetermined path . . . ." Id. at 17:29–36.

Zeroclick asserts two independent claims in the '691 patent: claims 2 and 52. ECF No. 45 at 5. Claim 2 provides:

> A graphical user interface (GUI), which may comprise an update of an existing program, that may fully operate a GUI by a two step method of movement of a pointer (0) to operate one or more functions within the GUI,
>
> wherein, said existing program is any existing program that can operate the movement of the pointer (0) over a screen (300) and has one or more functions operated by one or more other methods apart from said two step method,
>
> and/or one or more functions operated by said one or more other methods in said existing program can be updated to operate by said two step method,
>
> wherein said GUI executes one or more functions within the GUI by the completion of the following said two step method:
>
> first said pointer (0) is immediately adjacent or passes within a control area (1), which is an area of the screen (300) that may be any size including from a pixel on the screen (300) to occupying the whole screen (300),
>
> and second by the completion of a subsequent movement of said pointer (0) according to a specified movement generates a 'click' event, thereby triggering one or more functions within the GUI.

Claim 52 is nearly identical to claim 2, except that it covers the "method of operating a graphical user interface," as described in claim 2, while claim 2 covers the graphical user interface itself.

Regarding the '443 patent, Zeroclick asserts one independent claim: claim 19. ECF No. 45 at 7. Claim 19 provides:

> A device capable of executing software comprising:
>
> a touch-sensitive screen configured to detect being touched by a user's finger without requiring an exertion of pressure on the screen;
>
> a processor connected to the touch-sensitive screen and configured to receive from the screen information regarding locations touched by the user's finger;
>
> executable user interface code stored in a memory connected to the processor; the user interface code executable by the processor;
>
> the user interface code being configured to detect one or more locations touched by a movement of the user's finger on the screen without requiring the exertion of pressure and determine therefrom a selected operation; and
>
> the user interface code is further configured to cause one or more selected operations, which includes one or more functions available to the user interface code of the device, to deactivate while the user's finger is touching one or more locations on the screen.

On June 27, 2016, the parties filed Opening Claim Construction Briefs. ECF Nos. 45, 46. Apple's Opening Claim Construction Brief argues that two terms in the '691 Patent and one term in the '443 patent are indefinite, thereby rendering the patents-in-suit invalid. ECF No. 45. Zeroclick's Opening Claim Construction Brief asks the Court to construe three separate terms contained within the claims of the patents-in-suit. ECF No. 46. These matters are now before the Court.

II. JURISDICTION

Because this is a civil action arising under an Act of Congress relating to patents, this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1338.

III. LEGAL STANDARD

A. Claim Construction

The construction of terms found in patent claims is a question of law to be determined by the court. Markman v. Westview Instruments, Inc., 52 F.3d 967, 979 (Fed. Cir. 1995) (en banc), aff'd, 517 U.S. 370 (1996). "[T]he interpretation to be given a term can only be determined and confirmed with a full understanding of what the inventors actually invented and intended to

envelop with the claim." Phillips v. AWH Corp., 415 F.3d 1303, 1316 (Fed. Cir. 2005) (quoting Renishaw PLC v. Marposs Societa' per Azioni, 158 F.3d 1243, 1250 (Fed. Cir. 1998)). Consequently, courts construe claims in the manner that "most naturally aligns with the patent's description of the invention." Id.

The first step in claim construction is to examine the language of the claims themselves. "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, 415 F.3d at 1312 (quoting Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc., 381 F.3d 1111, 1115 (Fed. Cir. 2004)). A disputed claim term should be construed in light of its "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 application." Phillips, 415 F.3d at 1312–13. In some cases, the customary meaning of a disputed term to a person of ordinary skill in the art is readily apparent, and claim construction involves "little more than the application of the widely accepted meaning of commonly understood words." Id. at 1314. Claim construction may deviate from the ordinary and customary meaning of a disputed term only if (1) a patentee sets out a definition and acts as his own lexicographer, or (2) "the patentee disavows the full scope of a claim term either in the specification or during prosecution." Thorner v. Sony Computer Entm't Am. LLC, 669 F.3d 1362, 1365 (Fed. Cir. 2012).

Ordinary and customary meaning is not necessarily the same as a dictionary definition. "Properly viewed, the 'ordinary meaning' of a claim term is its meaning to the ordinary artisan after reading the entire patent. Yet heavy reliance on the dictionary divorced from the intrinsic evidence risks transforming the meaning of the claim term to the artisan into the meaning of the term in the abstract, out of its particular context, which is the specification." Phillips, 415 F.3d at 1321. Typically, the specification "is the single best guide to the meaning of a disputed term." Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed. Cir. 1996). It is therefore "entirely appropriate for a court, when conducting claim construction, to rely heavily on the written description for guidance as to the meaning of claims." Phillips, 415 F.3d at 1317. However, while the specification may describe a preferred embodiment, the claims are not

necessarily limited only to that embodiment. Id. at 1323.

Finally, in construing claims, courts may consider extrinsic evidence, such as "expert and inventor testimony, dictionaries, and learned treatises." Markman, 52 F.3d at 980. Expert testimony may be useful to "provide background on the technology at issue, to explain how an invention works, to ensure that the court's understanding of the technical aspects of the patent is consistent with that of a person of skill in the art, or to establish that a particular term in the patent or the prior art has a particular meaning in the pertinent field." Phillips, 415 F.3d at 1318. However, extrinsic evidence is "less reliable than the patent and its prosecution history in determining how to read claim terms." Id.

B. Means-Plus-Function Claiming

The Patent Act authorizes functional claiming: "[a]n element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof." 35 U.S.C. § 112, ¶ 6. "In enacting this provision, Congress struck a balance in allowing patentees to express a claim limitation by reciting a function to be performed rather than by reciting structure for performing that function, while placing specific constraints on how such a limitation is to be construed, namely, by restricting the scope of coverage to only the structure, materials, or acts described in the specification as corresponding to the claimed function and equivalents thereof." Williamson v. Citrix Online, LLC, 792 F.3d 1339, 1347 (Fed. Cir. 2015) (en banc). Thus, "if one employs means-plus-function language in a claim, one must set forth in the specification an adequate disclosure showing what is meant by that language." Blackboard, Inc. v. Desire2Learn, Inc. 574 F.3d 1371, 1382 (Fed. Cir. 2009) (internal quotation marks omitted). "If the specification does not contain an adequate disclosure of the structure that corresponds to the claimed function, the patentee will have failed to particularly point out and distinctly claim the invention as required by the second paragraph of section 112, which renders the claim invalid for indefiniteness." Id. (internal quotation marks omitted).

To determine whether a purportedly means-plus-function term is indefinite, courts employ

a two-step process. First, courts determine whether the term-in-question is a means-plus-function term. "[T]he use of the word 'means' in a claim element creates a rebuttable presumption that § 112, para. 6 applies." Id. at 1348. Conversely, "the failure to use the word 'means' . . . creates a rebuttable presumption . . . that § 112, para. 6 does not apply." Id. In Williamson, the Federal Circuit recently "abandon[ed] characterizing as 'strong' the presumption that a limitation lacking the word 'means' is not subject to" means-plus-function treatment. Id. at 1349. "In making the assessment of whether [a] limitation in question is a means-plus-function term . . . [,] the essential inquiry is . . . whether the words of the claim are understood by persons of ordinary skill in the art to have a sufficiently definite meaning as the name for structure." Id. Thus, "when a claim term lacks the word 'means,' the presumption can be overcome and § 112, para. 6 will apply if the challenger demonstrates that the claim term fails to 'recite[] sufficiently definite structure' or else recites 'function without reciting sufficient structure for performing that function.'" Id. (quoting Watts v. XL Sys., Inc., 232 F.3d 877, 880 (Fed. Cir. 2000).

Once a court determines that a claim term is a means-plus-function term, the court "next determine[s] whether the specification discloses sufficient structure that corresponds to the claimed function." Id. at 1351. This, in turn, is a two-step process:

> The court must first identify the claimed function. Then, the court must determine what structure, if any, disclosed in the specification corresponds to the claimed function. Where there are multiple claimed functions, . . . the patentee must disclose adequate corresponding structure to perform all of the claimed functions. If the patentee fails to disclose adequate corresponding structure, the claim is indefinite.

Id. at 1351–52 (internal citation omitted).

When a defendant challenges a means-plus-function term as indefinite, "indefiniteness must be proven by 'clear and convincing evidence' because patents are entitled to a presumption of validity that is not readily overcome." Verint Systems Inc. v. Red Box Recorders Ltd., --- F. Supp. 3d ---, 2016 WL 54688 (S.D.N.Y. Jan. 4, 2016) (citing Microsoft Corp. v. i4i Ltd. Partnership, 564 U.S. 91, 102 (2011)). However, "[i]n determining whether [the] presumption [based on the lack of the word 'means'] has been rebutted, the challenger must [only] establish by

a preponderance of the evidence that the claims are to be governed by § 112, ¶ 6." Advanced Ground Info. Sys., Inc. v. Life360, Inc., --- F.3d ---. No. 2015-1732, 2016 WL 4039771, at *4 (Fed. Cir. July 28, 2016).

IV. ANALYSIS

A. Claims 2 and 52 of the '691 patent: "program that can operate the movement of the pointer (0)"

Both claims 2 and 52 of the '691 patent include the following limitation: "wherein, said existing program is any program that can operate the movement of the pointer (0) over a screen (300) and has one or more functions operated by one or more other methods apart from said two step method." Apple argues that the phrase "program that can operate the movement of the pointer (0)" is a means-plus-function term under Williamson and that the term is indefinite because the specification fails to identify any related structure. ECF No. 45 at 13–14. The Court agrees.

First, the Court must determine whether "program that can operate the movement of the pointer (0)" is a means-plus-function term. Because the phrase does not use the word "means," there is a "rebuttable presumption . . . that § 112, para. 6 does not apply." Williamson, 792 F.3d at 1348. This presumption may be overcome, however, if Apple "demonstrates that the claim term fails to recite sufficiently definite structure or else recites function without reciting sufficient structure for performing that function." Id. at 1349 (internal quotation marks omitted).

Apple argues that "[t]he word 'program' refers to some form of 'software' or 'code', and thus the term effectively is 'software' or 'code' means that perform the function of 'operating the movement of a pointer.'" ECF No. 45 at 13. "But," according to Apple, "nothing in the claims . . . provides sufficiently definite structure for a 'program' that performs the recited function . . . ." Id.

Zeroclick does not attempt to identify any related structure recited in the claims. ECF No. 49 at 12–13. Rather, Zeroclick simply argues that "this claim term is clearly not being used as a means-plus-function limitation" because "it is used as an explanatory phrase characterizing the environment in which the invention operates." Id. at 12. Zeroclick, however, cites no authority to

support this argument. Id. at 12–13. Moreover, as Apple notes, courts must "construe claims with an eye toward giving effect to all of their terms, . . .even if it renders the claims inoperable or invalid." Haemonetics Corp. v. Baxter Healthcare Corp., 607 F.3d 776, 781 (Fed. Cir. 2010) (internal citation omitted). Accordingly, the Court rejects Zeroclick's suggestion that the Court ignore this claim term. Further, the Court concludes that the term "program that can operate the movement of the pointer (0)" is a means-plus-function term because the claim itself fails to recite any structure whatsoever, let alone "sufficiently definite structure." Williamson, 792 F.3d at 1349; id. at 1351–52 (finding the term "distributed learning control module" was a means-plus-function term because "the claim does not describe how the 'distributed learning control module' interacts with other components . . . in a way that might inform the structural character of the limitation-in-question or otherwise impart structure to the" term); Verint, 2016 WL 54688, at *9 (finding the term "computer application" failed "to provide sufficient additional structure that would not otherwise be implicitly understood if the claim were defined as 'means for performing' the aforementioned computer-implement functions").

Next, the Court must "determine whether the specification discloses sufficient structure that corresponds to the claimed function." Williamson, 792 F.3d at 1351. Here, the function of the means-plus-function claims is clear: "operat[ing] the movement of the pointer (0) over a screen (300)." It is equally clear that the specification does not disclose sufficient structure that corresponds to this function.

"[W]hen a computer is referenced as support for a function in a means-plus-function claim, there must be some explanation of how the computer performs the claimed function." Blackboard, 574 F.3d at 1384; Net MoneyIn, Inc. v. VeriSign, Inc., 545 F.3d 1359, 1367 (Fed. Cir. 2008) ("[A] means-plus function claim element for which the only disclosed structure is a general purpose computer is invalid if the specification fails to disclose an algorithm for performing the claimed function."); Aristocrat Techs. Australia Pty Ltd. v. Int'l Game Tech., 521 F.3d 1328, 1333 (Fed. Cir. 2008) ("Because general purpose computers can be programmed to perform very different tasks in very different ways, simply disclosing a computer as the structure designated to perform a particular function does not limit the scope of the claim to 'the corresponding structure, material,

or acts' that perform the function, as required by section 112 paragraph 6."). "Simply reciting 'software' without providing some detail about the means to accomplish the function is not enough." Finisar Corp. v. DirecTV Group, Inc., 523 F.3d 1323, 1340–41 (Fed. Cir. 2008). And yet that is precisely what the '691 patent does here. Indeed, Zeroclick does not even attempt to identify any language in the specification which discloses any corresponding "algorithm[1] for performing the claimed function." Williamson, 792 F.3d at 1352 ("We require that the specification disclose an algorithm for performing the claimed function."); ECF No. 49 at 11–13. Because Zeroclick "has failed to point to an adequate disclosure of corresponding structure in the specification," the Court concludes that the term "program that can operate the movement of the pointer (0)" is indefinite, thus rendering claims 2 and 52 invalid. Williamson, 792 F.3d at 1354.[2]

B. Claim 19 of the '443 patent: "user interface code"

Claim 19 of the '443 patent includes the following limitation: "user interface code being configured to detect one or more locations touched by a movement of the user's finger on the screen without requiring the exertion of pressure and determine therefrom a selected operation." Apple argues that this phrase is a means-plus-function term subject to section 112, paragraph 6. ECF No. 45 at 15–17. As with the previous limitation, because the "user interface code" phrase does not use the word "means," there is a "rebuttable presumption . . . that § 112, para. 6 does not apply." Williamson, 792 F.3d at 1348. Once again, however, the "user interface code" phrase may be deemed a means-plus-function term if the Court concludes that the claim "fails to recite sufficiently definite structure or else recites function without reciting sufficient structure for performing that function." Id. at 1349 (internal quotation marks omitted).

Zeroclick argues that this term is not subject to section 112, paragraph 6 because the phrase "user interface" is "frequently construed without resorting to means-plus-function analysis." ECF

[1] "The algorithm may be expressed as a mathematical formula, in prose, or as a flow chart, or in any other manner that provides sufficient structure." Williamson, 792 F.3d at 1352.

[2] Because the Court has determined that claims 2 and 52 are invalid based on the indefiniteness of the term "program that can operate the movement of the pointer (0)," the Court need not consider Apple's alternative argument that the term "one or more functions within the GUI" is indefinite under section 112, paragraph 2. ECF No. 45 at 8–10.

No. 49 at 15. However, the phrase at issue here is "user interface *code*," not simply "user interface." Thus, Zeroclick's authority is inapposite. As Apple argues, it is "[t]he 'code' portion of the term and the related functional language [that] brings the term within the scope of *Williamson*." ECF No. 51 at 9; Williamson, 792 F.3d at 1350 (holding that use of the term "module," which is "simply a generic description for software or hardware that performs a specified function," without any other claim language that could "impart any structural significance to the term," rendered the term "distributed learning control module" subject to section 112, paragraph 6); Verint, 2016 WL 54688, at * (holding that the term "'computer application' does not provide sufficiently definite structure to limit the claim in any meaningful way," thereby rendering the term a means-plus-function term). Zeroclick makes no other argument why the "user interface code" phrase should not be treated as a means-plus-function term. Accordingly, because the use of the phrase "user interface code" provides the same "black box recitation of structure" as the use of the word "module" did in Williamson, and the claim language provides no additional clarification regarding the structure of the term, the Court concludes that "user interface code" constitutes a means-plus-function term. 792 F.3d at 1350.

Next, the Court considers "whether the specification discloses sufficient structure that corresponds to the claimed function." Williamson, 792 F.3d at 1351. The Court determines that the function of the "user interface code" is two-fold: (1) "to detect one or more locations touched by a movement of the user's finger on a screen without requiring the exertion of pressure," '443 patent at 82:20–23; and (2) to "determine therefrom a selected operation," id. at 23. Contrary to ZeroClick's argument that "the claim does not state that the user interface code must 'determine therefrom a selected operation,'" ECF No. 49 at 17, the fact that the phrase "determine therefrom a selected operation" is not directly preceded by the word "to"[3] strongly suggests that the phrase should be linked to the previous "to" in the claim such that the phrase can be read as follows: "user interface code being configured to . . . determine therefrom a selected operation." Moreover,

[3] Claim 19 provides, in relevant part: "user interface code being configured to detect one or more locations touched by a movement of the user's finger on the screen without requiring the exertion of pressure and determine therefrom a selected operation."

Zeroclick does not argue what other term in the claim language could possibly "determine therefrom a selected operation" if not the "user interface code." Id. As a result, the Court concludes that the "user interface code" has both functions identified above.

Finally, the Court "must determine what structure, if any, disclosed in the specification corresponds to" these two functions. Williamson, 792 F.3d at 1351. "In cases such as this, involving a claim limitation that is subject to § 112, para. 6 that must be implemented in a special purpose computer, [the Federal Circuit] has consistently required that the structure disclosed in the specification be more than simply a general purpose computer or microprocessor." Id. at 1352. Instead, the Federal Circuit "require[s] that the specification disclose an algorithm for performing the claimed function," which "algorithm may be expressed as a mathematical formula, in prose, or as a flow chart, or in any other manner that provides sufficient structure." Id.

Zeroclick does not make any argument for how the specification discloses the function of "determin[ing] therefrom a selected operation." ECF No. 49 at 17–18. Because "the patentee must disclose adequate corresponding structure to perform all of the claimed functions," this failure alone renders the "user interface code" phrase indefinite. Williamson , 792 F.3d at 1351. Even assuming, however, that the "user interface code" term only had one function—"detect[ing] one or more locations touched by a movement of the user's finger on a screen without requiring the exertion of pressure"—the Court concludes that the specification does not sufficiently disclose structure corresponding to this function.

Zeroclick argues that Figure 78 in the '443 patent "discloses an algorithm for performing this function." ECF No. 49 at 17. Not so. The specification describes Figure 78 as a "flow chart method that may be used of [sic] simulating a 'click' event by pointer movement." '443 patent at 5:49–50. The figure itself includes boxes containing phrases, such as: "Pointer movement to come in contact with control area 1;" "Pointer movement from the control 1 to the additional area 3;" "Initiation of subsequent movement within the additional area 3 in a predetermined path 3." '443 patent, Fig. 78. However, the figure does not describe in any way how the invention "detect[s] one or more locations touched by a movement of the user's finger on a screen without requiring the exertion of pressure." See In re Aoyama, 656 F.3d 1293, 1297 (Fed. Cir. 2011) (finding patent

did not "disclose enough of an algorithm to provide the necessary structure under 35 U.S.C. § 112 ¶ 6" where a figure in the specification "fail[ed] to describe, even at a high level, how a computer could be programmed to produce the structure that provides the results described in the boxes."). Rather, as Apple notes, "the flowchart merely assumes, at the first step, that some specialized computer software exists for detecting '[p]ointer movement to come in contact with control area 1.'" ECF No. 45 at 16.

Next, Zeroclick argues that "[t]he algorithm described textually at column 17, lines 1-5" of the '443 patent "discloses the required functions of detecting locations touched by movement at one or more locations, in this case, control area 1 and 3." ECF No. 49 at 18. Lines 1–5 of column 17 provide:

> ZC is Zeroclick. Zeroclick is defined as the triggering of a function related to a control area 1, or the simulation of a click for a control area 1, by the interaction of a pointer movement with an additional area 3 or predetermined path area 3 as described in the claims.

This portion of the specification does not disclose how the "user interface code" might "detect one or more locations touched by a movement of the user's finger on a screen without requiring the exertion of pressure." At most, this portion of the specification assumes the existence of, but fails to disclose, some method for detecting locations touched by the user's finger. Accordingly, the Court concludes that the patent fails to disclose any structure corresponding to both the "detecting" and "determining" functions of the "user interface code," thereby rendering this claim term indefinite and claim 19 of the '443 patent invalid. Williamson, 792 F.3d at 1354; Blackboard, 574 F.3d at 1384 (finding insufficient under section 112, paragraph 6 language in a specification that "describes an outcome, not a means for achieving that outcome"); Verint, 2016 WL 54688, at *10 (finding insufficient under section 112, paragraph 6 a "portion of the specification," which "assume[d] the existence of 'real-time data stream[s]' and describe[d] the characteristics of such streams that might make the construction of an integrated stream possible but contain[ed] no such step-by-step procedure for doing so.").[4]

[4] Zeroclick notes that "[t]here are also numerous more complicated movement sequences disclosed in algorithms throughout the specification each of which require detecting locations touched by movement at one or more locations." ECF No. 49 at 18 (citing large swaths of columns 17

CONCLUSION

The Court concludes that claims 2 and 52 of the ’619 patent, as well as claim 19 of the ’443 patent, are invalid for indefiniteness.

IT IS SO ORDERED.

Dated: August 16, 2016

JON S. TIGAR
United States District Judge

through 79 “and their equivalents”). While these algorithms may “require detecting locations touched by movement at one or more locations,” Zeroclick does not argue how any of these purported algorithms disclose how the “user interface code” might actually perform the detection. As a result, the Court declines to address each of these algorithms individually.

United States District Court
Northern District of California