United States District Court,
N.D. California.

DATAMIZE, LLC, a Wyoming limited liability corporation,
Plaintiff.
v.
PLUMTREE SOFTWARE, INC., a Delaware corporation; and BEA Systems, Inc, a Delaware Corporation,
Defendants.

No. C 04-2777 VRW

Aug. 7, 2007.

Pamela Phillips, Jeffrey E. Faucette, Howard Rice Nemerovski Canady Falk & Rabkin, San Francisco, CA, for Plaintiff.

David H. Kramer, Michael A. Ladra, Michael Brett Levin, Terrence J.P. Kearney, Bart Edward Volkmer, Esq., Matthew A. Argenti, Wilson Sonsini Goodrich & Rosati, Palo Alto, CA, for Defendants.

ORDER

VAUGHN R. WALKER**, Chief Judge.**

This action involves a patent dispute between Datamize, LLC ("Datamize"), the patent holder, and Plumtree Software, Incorporated ("Plumtree") over United States Patent No 6,460,040 ("the '040 patent") and United States Patent No 6,654,418 ("the '418 patent"). Plumtree seeks a declaration that these patents are invalid. Previously, the court concluded that it had jurisdiction to make this declaration and that the patents were invalid under the on-sale bar, 35 USC s. 102(b). Doc # 45. The court of appeals upheld the jurisdictional ruling, but reversed the grant of summary judgment in favor of Plumtree and remanded, noting that "it will be important for the district court to construe the patent claims at issue." *Plumtree v. Datamize,* 473 F.2d 1152, 1164 (Fed Cir2006). In compliance with that directive, the court, after recounting a bit more of the background, turns to construction of the claims and a motion for summary judgment by which Plumtree seeks to invalidate the patents for indefiniteness, 35 USC s. 112 para. 2.

I

A

Plumtree is a publicly traded computer software company located in San Francisco, California. Plumtree develops, markets and licenses "corporate portal" software. A "corporate portal" is web-based software that brings together a variety of applications and information in a comprehensive platform within an organization. Plumtree's customers use its software to develop their own corporate Intranet sites, which allow employees to access, manage and search a variety of information from within and outside of the

organization.

Datamize is a start-up software company located in Missoula, Montana. In early 1993, Datamize's single employee, Kevin Burns, invented the two patents at issue in this case. The '040 and the '418 patents were entitled "Authoring System for Computer-based Information Delivery System" and were continuations of Burns's U.S. Patent No 6,014,137 ("'137 patent"). In December 1994, Burns first completed a version of his kiosk authoring tool "reduc[ing] to practice the inventions claimed in the claims of the three patents." Doc # 9, Ex 3 at 78:18-24. The '137, '040 and '418 patents were issued on January 11, 2000, October 1, 2002, and December 2, 2003, respectively.

The kiosk authoring tool that Burns designed using the '040 and '418 patents is a "multimedia kiosk authoring system for use in developing and maintaining user interface screens for multimedia kiosk systems." Id, Exs 1-2. Burns designed the authoring system to "be used by persons with little or no experience in the intricate details of computer programming thereby making it easier for a large number of persons to set up kiosk interface screens." Doc # 30-2, para. 3. The system "accomplishes this by providing pre-defined building blocks or screen elements (i e, predefined windows, buttons, and images) to be used in constructing an interface screen." Id. Burns described the invention as "a method used to build interface screens for a kiosk or computer system."

As an example, the patents explain the authoring tool might be used to create electronic kiosks used at ski resorts to provide information to customers about ski conditions, local hotels and restaurants through a touch screen or key pad. The patented invention is not the kiosk itself, but is the software for, and the method of, creating the kiosk.

B

The present litigation is not the first time Datamize and Plumtree have met on the patent battlefield. The roots of the present action between Datamize and Plumtree reach back to May 17, 2002. On that date, Datamize filed suit against Plumtree in the United States Court for the District of Montana in Missoula alleging infringement of the '137 patent (the "Montana action"). Ever ready a combatant, Datamize on this same date sent a letter to Plumtree informing it that:

Datamize believes that Plumtree is infringing the '137 Patent by, among other things, providing software enabling the operation of portals and kiosks employing customization and personalization features. We also believe that Plumtree will infringe the claims in the continuation patent application when it issues as a patent [the later issued '040 patent]. From the prior communications, it does not appear that Plumtree has appreciated the implications of Datamize's patent rights.

Datamize's letter further informed Plumtree of the reasons behind the Montana action: "Because a direct assertion of patent infringement could subject Datamize to a declaratory judgment action by Plumtree in an inconvenient forum, [Datamize] has proceeded to preserve its rights by filing the attached Complaint in the United States District Court for the District of Montana (Missoula Division) where Datamize is located." Doc # 1, Ec at 2. To demonstrate further that Plumtree would soon be infringing the '040 patent, Datamize also enclosed the thirty-eight allowed claims later issued as the ' 040 patent on October 1, 2002.

On November 23, 2002, Magistrate Judge Leif Erickson of the district court in Missoula issued a report and recommendation that the Montana action be dismissed for lack of personal jurisdiction over Plumtree. In

response to Magistrate Judge Erickson's report and recommendation, on December 4, 2002, Plumtree filed suit in this court seeking a declaratory judgment for non-infringement of the '137 patent ("DJ1"). DJ1 was assigned to the undersigned. Plumtree agreed to stay DJ1 pending a ruling by a Montana district judge on the personal jurisdiction issue. On July 8, 2003, Judge Donald Molloy adopted Magistrate Judge Erickson's findings and dismissed the Montana action for lack of personal jurisdiction. On August 7, 2003, Datamize filed a motion to realign itself as plaintiff in DJ1. The court granted realignment on October 6, 2003.

On September 3, 2003, Datamize filed a patent infringement claim against nine online security brokerage firms in the Eastern District of Texas, Marshall Division, based on the '040 patent ("TX action"). On April 15, 2004, Datamize moved to add additional infringement claims in the TX action based on the '418 patent, which issued on December 2, 2003. The judge in the TX action subsequently allowed Datamize to add these additional claims. Plumtree, however, was *not* a defendant in the TX action. The parties inform the court that the TX action was resolved in 2005. Doc # 63 at 3.

On March 31, 2004, Plumtree filed a motion for summary judgment in DJ1 claiming that the '137 patent was indefinite. On July 9, 2004, the court granted Plumtree's motion. On August 5, 2005, the Federal Circuit affirmed the court's grant of summary judgment in favor of Plumtree.

On the same day that this court granted Plumtree's motion for summary judgment in DJ1, Plumtree filed this action ("DJ2").

II

The construction of patent claims is a question of law to be determined by the court. Markman v. Westview Instruments, Inc., 517 U.S. 370, 372, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). The goal of claim construction is "to interpret what the patentee meant by a particular term or phrase in a claim." Renishaw PLC v. Marposs Societa per Azioni, 158 F.3d 1243, 1249 (Fed.Cir.1998). "[T]he claims define the scope of the right to exclude; the claim construction inquiry, therefore, begins and ends in all cases with the actual words of the claim." Id at 1248. The court may, if necessary, consult a variety of sources to determine the meaning of a claim term, including "the words of the claims themselves, the remainder of the specification, the prosecution history and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms and the state of the art." Innova/Pure Water, Inc. v. Safari Water Filtration Systems, Inc., 381 F.3d 1111, 1116 (Fed.Cir.2004). Also, the words of a claim " 'are generally given their ordinary and customary meaning.' " Phillips v. AWH Corp., 415 F.3d 1303, 1312 (Fed.Cir.2005) (citing Vitronics Corp. v. Conceptronics, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996)). "The ordinary and customary meaning of a claim term 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." Id at 1313. See also Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc., 326 F.3d 1215, 1220 (Fed.Cir.2003).

With these legal principles in mind, the court construes the disputed claim language of the patents.

1. "Kiosk"

This term is located in claims 1-3, 5-13, 15, 16 and 27-29 of the '040 patent. The parties dispute whether this term should be construed with the limitation that the computer delivery system be "generally accessible to some segment of the public." Doc # 66 at 6, Doc # 70 at 5. Datamize argues that "kiosk" refers to any standalone computer station "having a display screen and some form of input device." To support its definition, Datamize argues that the term "kiosk" is "used in a 'broad sense to include stand-alone kiosks as

well as general purpose computers configured to serve the same functions as a stand-alone kiosk.' " Doc # 66 at 6. Plumtree argues that the term "kiosk" should be limited to include only computer delivery systems that are "generally accessible to some segment of the public." Plumtree cites language from the patent stating, "An electronic kiosk refers to a computer-based information delivery system generally accessible to some segment of the public for retrieving information or initiating transactions." '040 patent at 1:17-20. For the reasons given below, the court construes "kiosk" as "a computer-based interactive system that delivers information to a user in order to allow the user to make selections or initiate transactions."

Plumtree's proposed construction is problematic because the claim language does not require a kiosk to be "generally accessible to the public." While it is true that the kiosks most often are used to display and gather information in public areas, a kiosk does not cease to be a kiosk if it is placed in an area that is not generally accessible to the public-a point Datamize persuasively argued at the August 3 hearing. The words "generally accessible to some segment of the public" only describe a typical use of the kiosk, and in no way limit or require that the invention be accessible to a segment of the public. Plumtree argues that the '040 patent "teaches that kiosks may be found in a number of public settings such as 'museums, and exhibitions, airports, public transportation stations, banks * * *." Doc # 70 at 6. As Datamize correctly points out, however, the claim language clearly states that the kiosk "may" be found in those locations, not that the kiosk "must be" or "is" found at those locations.

Datamize's proposed construction of a "general purpose computer or a stand-alone station having a display screen and some form of input device" is also problematic because it is too broad. If Datamize's proposed construction were accepted, there would be little difference between a kiosk and a standard, general purpose computer. A typical computer workstation has a display screen and one or more input devices. A kiosk is a more specialized version of a standard computer and therefore should have narrower specifications. The claims describe an interactive system that can deliver information to a user in order to make selections. For example, in claim 1, the language states that the invention is to present "customized assortments of said information * * * [which enable] a kiosk user to select one or more screen elements." '040 patent at 20:7-27.

Accordingly, the court finds that the function of a kiosk is information retrieval and delivery, and construes "kiosk" as "a computer-based interactive system that delivers information to a user in order to allow the user to make selections or initiate transactions."

2. "Computer"

This term is located in claims 14 and 30 of the '040 patent and in all claims of the '418 patent. Doc # 70 at 7. Plumtree proposes "a general purpose computer configured to serve the same function as a kiosk." Doc # 70 at 7. Datamize contends that "computer" as used in the patents does not need to be construed. Datamize also states that "[i]f the court agrees that the function of a kiosk is retrieving information or initiating a transaction, then Datamize does not object to Plumtree's proposed construction of 'computer.' " Doc # 75 at 7. Because "computer" is a term well-known by persons of ordinary skill in the art, the court declines to construe it at this time.

3. "[W]herein at least one of said screen elements permits limited variation in its on-screen characteristics in conformity with a desired uniform look and feel" ('040 all claims)

"[S]aid screen elements having on-screen characteristics * * * providing a generally uniform look and feel with other interface screens of said plurality of computers" ('418 all claims)

Datamize proposes that both of these clauses be interpreted as "a degree of variation in [the kiosk's] on-screen characteristics sufficiently limited to ensure that a user can create customized screens that are generally uniform." Doc # 75 at 8. Plumtree argues that the clause in the '040 patent should be construed as "[t]he limited variation ensures that the resulting interface screens have a look and feel that must be both desired and uniform," and that the clause in the '418 patent should be construed as "[t]he interface screens for all computers in the system all have a 'generally uniform look and feel.' " Doc # 70 at 9. Plumtree also contends that the terms "limited variation" and "desired uniform look and feel" are indefinite. Id. Plumtree argues further, in its motion for summary judgment, that because the terms are indefinite, the patents should be declared invalid. See Doc # 72. The court addresses the terms "limited variation" and "uniform look and feel" in turn, followed by each of the two clauses.

a. "limited variation"

The term "limited variation" appears in the '040 patent. Datamize argues that this term should be construed as "a degree of variation [of] on-screen characteristics sufficiently limited * * *." Doc # 75 at 8. Plumtree argues, in its motion for summary judgment, that the term is indefinite because it is vague and offers no guidance in determining whether something falls in or out of the boundaries set by the term "limited."

As recognized by both parties, "limited variation" is not a technical term, but a term of general usage. Doc # 72 at 11; Doc # 77 at 14. As stated above, words of a claim are generally given their ordinary and customary meaning. See Phillips, 415 F.3d at 1312. Plumtree argues that Semmler v. American Honda Motor Co., 990 F.Supp. 967, 975 (S.D.Ohio 1997) and Amgen, Inc. v. Chugai Pharmaceuticals Co., 927 F.2d 1200 (Fed.Cir.1991) support the argument that "limited" is too vague. Doc # 77 at 15. In *Semmler,* the term in dispute was "considerable fuel savings." See Semmler, 990 F.Supp. at 967. In *Amgen,* the dispute centered on the word "about" in the term "about 160,000 IU/AU." See Amgen, 927 F.2d at 1200. In both of these cases, the terms were found to be indefinite. Plumtree argues that "limited" falls into the same category as the terms "about" and "considerable" because there is a lack of precise guidance on when exactly the variations fall outside the boundaries of "limited." The court disagrees.

In Playtex Products, Inc. v. Proctor & Gamble, Co., 400 F.3d 901, 907 (Fed.Cir.2005), the Federal Circuit declined to impose a numerical, or precise constraint on the term "substantially uniform thickness." *Id.* The court also restated its holding from a prior case that " 'words of approximation, such as 'generally' and 'substantially,' are descriptive terms 'commonly used in patent claims to avoid a strict numerical boundary to the specified parameters.' " *Id* (citing Anchor Wall Sys. v. Rockwood Retaining Walls, Inc., 340 F.3d 1298, 1311 (Fed.Cir.2003)). Additionally, in Verve, LLC v. Crane Cams, Inc., 311 F.3d 1116, 1120 (Fed.Cir.2002), the Federal Circuit held that claim language that accommodates minor variations is not indefinite. See also *Ecolab, Inc v. Envirochem, Inc,* 265 F3d 1358, 1366 (Fed Cir2001).

Here, the term "limited" is not unlike terms such as "generally" and "substantially." Both "generally" and "substantially" serve to create approximate boundaries, much in the same way that "limited" does. If the clause had instead stated "at least one of said screen elements permits *substantial* variation in its on-screen characteristics * * *," *Playtex* and *Anchor Wall* would permit the clause, despite the lack of precise constraints. Since there is little difference in the function of the words "substantial" and "limited" as a boundary, the court does not find the term indefinite, and construes "limited variation" according to its plain and ordinary meaning. Accordingly, the court finds "limited variation" to mean a "degree of variation of on-screen characteristics sufficiently limited."

b. "uniform look and feel"

The term "uniform look and feel" appears in both the disputed clauses of the ' 040 and '418 patents. Datamize argues that the term "look and feel" is a collection, or set of on-screen characteristics that creates a certain style. See Doc # 66 at 8-9. Plumtree argues in its motion for summary judgment that the term is vague and subjective. Doc # 72 at 6.

Plumtree contends that the term "uniform look and feel" has several problems. First, it contends that the term "look and feel" is vague because, "[t]wo people may have different opinions as to what are the significant aspects of an interface screen that constitute its 'appearance and functionality.' " Id. Plumtree argues that the term is inexact, and therefore problematic. Id. Second, Plumtree maintains that the term "uniform" is also problematic because "the claim requires a comparison between different interface screens to determine whether they have the same 'look and feel,' " and that this comparison "is inherently subjective" because the patents "provide no objective standard for [determining] whether the 'look and feel' of different interface screens is 'uniform.' " Id.

With respect to the term "uniform," the court is guided by Cordis Corp. v. Medtronic AVE, Inc., 339 F.3d 1352 (Fed.Cir.2003). In *Cordis,* the disputed claim term was "substantially uniform thickness." *Id* at 1360. The Federal Circuit addressed the term and held that it did not require a numerical restriction on the "substantially uniform" limitation. *Id* at 1362. Notably, the Federal Circuit allowed the term to be construed, raising no objection that "uniform" was vague or indefinite. Similarly, in *Ecolab,* 265 F3d at 1366, the Federal Circuit held that the term "substantially uniform" was not indefinite. Based on the fact that the Federal Circuit scrutinized a term with the word "uniform" (at least twice) and made no objections to the word, this court finds that the term "uniform" in "uniform look and feel" does not render the claim indefinite.

Plumtree's argument that the term "look and feel" is subjective is also unpersuasive. As Datamize argues in its response to Plumtree's summary judgment motion, the "look and feel" of a screen is defined by the specifications. Doc # 77 at 10. The "look and feel" of the resulting screens are outputs of a program. One can look to the source code to see what elements, along with their positions on the screen, constitute a given output. It follows that these elements and their positions and functions are what give the resulting screen its "look and feel." These characteristics can easily be determined. Accordingly, the term "look and feel" indefinite.

Furthermore, as stated above, the ordinary and customary meaning of a claim term is the meaning that the term would have to person of ordinary skill in the art. Phillips, 415 F.3d at 1313. The term "look and feel" is a term that is readily known and recognized by a person of ordinary skill involved in software use and development. The court finds persuasive Datamize's response, which points out that Plumtree itself distributes literature that uses the term "look and feel" in connection with Plumtree products. Doc # 77 at 19-22.

Having found that the terms "limited variation" and "uniform look and feel" are not indefinite, the court now addresses the proper construction for the two disputed clauses. Because the language of the two clauses contain no technical terms, but only terms of general usage, the court adopts a construction that is in line with the plain and ordinary meaning of the words. The proposed construction by Datamize meets this standard, and so the court adopts this construction-"a degree of variation in its on-screen characteristics sufficiently limited to ensure that a user can create customized screens that are generally uniform"-for both

clauses.

4. "Element(s)" ('040 and '418 patents)

This term is located in both the '040 and the '418 patents. Datamize's proposed construction is "a window; a background image or artwork for providing a backdrop for a window or for background within a window; a button; a hot spot or area on the screen for activating actions, a test string; a video clip; an audio clip; a slide sequence; an animation sequence; or NAV object." Doc # 66 at 11. Plumtree proposes that "element" be construed as "an item that appears on an interface screen (such as a button)." Doc # 70 at 11.

Datamize argues that "element" should be construed "as explicitly defined in the specification." Doc # 66 at 11. Datamize cites claim language which states, in relevant part:

[A] given screen will include a variety of elements for presentation to a user such as one or more windows, one or more background images or artwork for providing a backdrop for a window or for background within a window, a number of buttons; a number of 'hot spots,' ie, areas on a screen for activating actions, text strings, video clips, audio clips, slide sequences, or animation sequences.

'040 patent at 6:21-28, Doc # 66 at 11. As Plumtree correctly points out, the cited language only gives examples of what an element could be. The claim language neither restricts nor limits "element" to the listed examples. Because there is no intrinsic evidence that limits or restricts the term to the uses cited by Datamize, the court adopts a definition more in line with the plain meaning of the word, and construes "element" as "a visual or audio item presented to the user."

5. "Kiosk user," "computer user," "user at an individual computer." ('040 patent)**.**

The term "kiosk user" is found in claims 1-3, 5-13, 15, 16, 27 and 30 of the ' 040 patent. Doc # 66 at 12. The term "computer user" is found in claim 30 of the '040 patent. Id. The term "user at an individual computer" is found in claims 14 through 26 of the '040 patent. Id. Plumtree proposes all three of the terms to mean "[t]he end-user of a kiosk/computer." Datamize argues that these terms do not need to be construed. If they are to be construed, Datamize proposes that "kiosk user" and "computer user" be construed as a "user of a kiosk/computer," and that "user at an individiual computer" be construed as "an end-user of a kiosk/computer." For the reasons stated below, the court declines to construe the terms.

The dispute, or confusion, over the term "user" arises because the patentee has used the word "user" to refer to both the person using the patented invention to create the kiosk systems and the person using the kiosk. For example, claim 14 of the '040 patent states, in part:

[E]nabling a user at an individual computer of said plurality to select one or more screen elements from said predefined screen element plurality and to select onscreen characteristics of said at least one screen element permitting limited variation in its on-screen characteristics * * *.

'040 patent at 21:41-46. Here, the word "user" is used to refer to a person that is using the invented method of creating screens for kiosk systems. In contrast, claim 27 of the '040 includes the word "user" to refer to the end-user of the kiosk system, stating that the interface screen "will have a uniform look and feel and be functionally operable for effective delivery of information to a kiosk user." '040 patent at 23:7-10.

Datamize contends that the phrases "kiosk user," "computer user," and "user at an individual computer" do

not have any special definitions and argues that there is no basis for Plumtree's assertion that all three of the phrases have to mean the same thing (ie "the end-user of kiosk/computer"). Doc # 75 at 10. Plumtree argues that the term "kiosk user" and "computer user" must mean the same thing throughout the patent. Plumtree cites Fin Control Systems Pty v. OAM, Inc., 265 F.3d 1311, 1318 (Fed.Cir.2001) and Omega Engineering, Inc v. Raytek Corp., 334 F.3d 1314, 1334 (Fed.Cir.2003) to support its argument that unless otherwise stated, the same claim term in the same patent carries the same meaning. Doc # 70 at 13. Plumtree argues that there is "no evidence * * * that the patentee intended 'user' to mean both 'end-user' and 'system author.' " *Id*. This argument fails, however, because the patent language explicitly uses the word "user" to refer to both the user of the kiosk and the user of the kiosk-designing system. There is no reason here why the term "user" cannot refer to both groups. Restricting and confining the term "user" to just one construction would be akin to saying that the word "maker" could not apply to both a person making carpentry tools, and a person who uses the tools to make tables. Of course, a patentee can certainly limit, or even change, the meaning of a common word, but that is not the case here.

Moreover, the use of the term "user" to refer to both groups of people does no violence to the plain and ordinary meaning of the word, nor does it stretch the intentions of the patentee at the time that the patent was filed. See Phillips, 415 F.3d at 1312-13.

Accordingly, the court declines to construe the terms "kiosk user," "computer user," and "user at an individual computer."

6. "Master database" ('040 patent)

The term "master database" is found in claims 27-30 of the '040 patent. Datamize proposes "database" to mean "an organized collection of data," and a "master database" to mean "a controlling database." Doc # 66 at 14. Plumtree's proposed construction for "master database" is "[a] collection of information containing all or substantially all of the information content that can be displayed on any kiosk in the kiosk system." Doc # 70 at 13. The actual claim language states, in part:

* * * providing a master database of information from said plurality of information providers, said master database referencing information content from said providers to be displayed on any of said plurality of kiosks * * *

'040 patent at 22:44-47.

The court fails to see how Datamize's construction, "controlling database," is an adequate definition. Datamize does not explain exactly what it is that the "master database" is controlling. In its opening brief, Datamize states, "the master database of the '040 patent is a controlling database, referencing or containing the information content that may potentially be used throughout the kiosk system." Doc # 66 at 15. Yet, neither Datamize nor the claim language make any reference to anything being controlled by the "master database." In fact, there is no mention in the patent language of any kiosk system having more than one database.

The patent language describes a "master database" as a collection of information from which the kiosk system can pull up information to be displayed on its screens. '040 patent at 22:44-47. This database can reside on a remote server, where information retrieval by the individual kiosks would take place over a network, or it can reside on the kiosk system itself. '040 patent at 4:65-5:3; 19:31-34. In either case, the

database would contain all of the information necessary for the kiosk system, supporting Plumtree's construction.

Plumtree's proposed construction is also supported by the prosecution history of the '137 patent and the specification of the '040 patent. During the prosecution of the '137 patent, Datamize attempted to distinguish certain of its pending claims from the Consolatti patent by requiring that those claims include the step of "providing a master database of information." Consollati discloses an authoring tool for creating computer interface screens. Doc # 71, Ex A at 2:43-45. According to Datamize:

The present invention relies on a database that is integral to the authoring system and that had no counterpart in Consolatti. The database contains all, or at least substantially all, the information content needed for all the kiosks of the system. The present invention defines interface screens in part by executing queries in the database to achieve such tasks as determining how many buttons are needed on certain interface screens to access information content and associating items of information content with button actions.

Doc # 71, Ex B at 6. Plumtree's construction of "master database" incorporates the very words used by Datamize to distinguish Consolatti. "When multiple patents derive from the same initial application, the prosecution history regarding a claim limitation in any patent that has issued applies with equal force to subsequently issued patents that contain the same claim limitation." Biovail Corp. Intern. v. Andrx Pharmaceuticals, Inc., 239 F.3d 1297, 1301 (Fed.Cir.2001) (citing Jonsson v. The Stanley Works, 903 F.2d 812, 817-18, 14 USPQ2d 1863, 1868 (Fed.Cir.1990)).

Moreover, the specification of the '040 patent explicitly states "[t]o implement the kiosk system, a database of all information to be displayed at any individual kiosk is constructed." '040 patent at 14:23-25. The specification then indicates that the system need not include a central database server but may simply have each kiosk of the system store the entire database of information available to kiosks in the system (i e, the master database). '040 patent at 4:60-5:3, 19:31-58. This would not be feasible if the master database did not contain the entirety of the information needed for the kiosk system, but merely referenced information contained in other databases.

Finally, Plumtree's construction is more in line with the plain and ordinary meaning of the term "master database," and closer to the meaning it would have to a person of ordinary skill in the art. A person familiar with the technology described in these patents would take "master database" to mean a database that contains all of the information required by the system.

Accordingly, the court adopts Plumtree's proposed construction and construes the term "master database" as "a collection of information containing all or substantially all of the information content that can be presented on any kiosk in the kiosk system."

7. "Object" ('418 patent)

The term "object" appears numerous times in the '418 patent. Datamize proposes that an "object" is "an instance of data derived from an associated object oriented program." Doc # 70 at 14. Plumtree proposes "object" to mean "an item appearing on a display screen that can be individually selected and manipulated." Id. For the reasons given below, the court declines to construe the term "object."

Plumtree argues that adopting Datamize's proposed construction would be "import[ing] the extraneous notion of object-oriented programming." Doc # 70 at 15. Plumtree contends that there is "no intrinsic evidence that would suggest that 'object' can only be 'an instance of data derived from an associated object oriented program' " and that "object" should be construed in a similar fashion as "element." Id. Datamize argues, however, that the term "object" is used by the patentee in the same manner as it is commonly used in object oriented programming. Doc # 75 at 12.

"In construing patent claims, the court must apply the same understanding as that of persons knowledgeable in the field of the invention. 'Patents are written not for laymen, but for and by persons experienced in the field of the invention.' " Merck and Co. v. Teva Pharmaceuticals USA, Inc., 347 F.3d 1367, 1370 (Fed.Cir.2003) (citing Voice Techs Group, Inc. v. VMC Sys., Inc., 164 F.3d 605, 615 (Fed.Cir.1999)). Here, a person of ordinary knowledge and skill in the art would know that the patentee was using the term "object" as it is used in object oriented programming. In object oriented programming, an "object" is an instance of a class. A class is a combination of definitions for different characteristics. An object is the embodiment of particular versions of the different characteristics. The claim language clearly indicates that the patentee had this usage in mind in using the term. In both the '040 and the ' 418 patents, the language states that "[t]he authoring system uses the methods of object oriented programming. The system is specified by the following Object Class Definition Tables." '040 patent at 6:37-40; '418 patent at 6:40-42. The claim language also shows that the patentee used the term "object" in the same manner that he used the term "element." For example, the specifications state: " * * * [the] item can be removed from the definition table and the affected interface screen re-defined to remove any buttons or other objects that may have been associated with the sold-out item." '418 patent at 21:39-42.

Accordingly, the court declines to construe the term at this time and leaves it to be determined by its context as it appears in the claim language.

8. Whether claims 24 and 36 of the '418 patent **are method or apparatus claims**

Plumtree argues that claims 24 and 36 of the '418 patent are method claims. Doc # 70 at 15. Datamize contends that the two claims are apparatus claims. Doc # 75 at 13.

A method claim recites a series of steps or actions, while an apparatus claim recites a tangible item. See In re Kollar, 286 F.3d 1326, 1332 (Fed.Cir.2002).

Claim 24 of the '418 patent states, in part:

A computer program storage medium readable by a computing system and encoding a computer program for executing a computer process for providing customized assortment of information content from a plurality of information providers for display in one or more customized interface screens in a plurality of computers * * *

'418 patent at 24:5-10. Claim 36 of the '418 patent states, in part:

A computer program storage medium readable by a computing system and encoding a computer program for executing a computer process for providing customized assortment of information content from a plurality of information providers for display in one or more customized interface screens in a plurality of computers, the computer process comprising:

enabling selection of said a customized assortment of information content for a first computer of said plurality from information content from said plurality of information providers * * *

'418 patent at 25:14-23.

Plumtree argues that these claims are method claims because the claim language seems to describe a process, or a series of steps that are performed by the invention. Doc # 70 at 15. In the alternative, Plumtree argues that the claims are indefinite because they contain characteristics of "both a method * * * and an apparatus." Id. Plumtree cites IPXL Holdings, LLC v. Amazon, Inc., 430 F.3d 1377, 1384 (Fed.Cir.2005) to support its argument that such claims should be declared invalid for indefiniteness. *Id*. Datamize contends, however, that the claim language is not indefinite, and that the claims are apparatus claims. Datamize points to the claim language stating "[a] computer program storage medium" to support its argument that these claims describe a tangible item and are therefore apparatus claims. Doc # 75 at 13.

The court first notes that the claims are not models of clarity. The claims start out describing a tangible item ("computer program storage medium"). As Datamize points out, all examples of computer program storage meda, like floppy disks, CDs or DVDs, are tangible items. Doc # 75 at 13. If the claim language ended there, there would be no dispute that the claims are apparatus claims. The claim language continues, however, and in so doing, also appears to describe a process:

* * * encoding a computer program for executing a computer process for providing customized assortment of information content from a plurality of information providers for display in one or more customized interface screens in a plurality of computers, the computer process comprising:

enabling selection of said a customized assortment of information content for a first computer of said plurality from information content from said plurality of information providers * * *

'418 patent at 25:14-23.

From the court's perspective, the claim language describes a tangible item that stores a program. Thus the claims appear to be apparatus claims. The claim language also describes the design and the function of the program that is stored on the tangible item. Given the process described by the claim language, these claims appear simultaneously to state method claims, making them so-called "hybrid" claims. See *Claim Construction in the Federal Circuit* (Thomson West 2006) at 55-57.

Plumtree contends that such claims are invalid for indefiniteness, citing IPXL Holdings, 430 F.3d 1377 (Fed.Cir.2005). In *IPXL Holdings,* the disputed claim described a "system," but also included steps on how a user might use that system. 430 F.3d at 1384. The Federal Circuit held that it was unclear whether "infringement occurred when one creates the system * * * or whether infringement occurs when the user actually uses the [system]." *Id*. This ruling, however, is unclear in its application to the present case. The ruling does not state whether *any* claim that contains both method and apparatus descriptions is ipso facto invalid for indefiniteness. It merely states that such language is problematic if it does not adequately inform the public of where infringement occurs.

The Federal Circuit has held that "process steps can be treated as part of a product claim if the patentee has made clear that the process steps are an essential part of the claimed invention." Andersen Corp. v. Fiber

Composites, LLC, 474 F.3d 1361, 1375 (Fed.Cir.2007). Here, it is clear that the process steps are an essential part of the claim. The claim language describes in great detail the program, or the process, that is to be stored on the "computer program storage medium." The storage medium takes its character from its function and capacity to store a program that carries out these precise steps. See also Sandisk Corp. v. Memorex Products, Inc., 415 F.3d 1278 (Fed.Cir.2005) (Court dealt with method claim having a significant preamble setting forth apparatus features of a computer system in which the claimed method is practiced).

Collaboration Properties, Inc. v. Tandberg ASA, 2006 WL 1752140 (N.D.Cal.) is also instructive. In *Tandberg,* Judge Patel, of this district, found that *IPXL Holdings* stood for the narrow rule that a single claim "may not purport to cover a system, independent of any use of the system, and simultaneously purport to cover a particular use of the system." *Id* at 7. That is not the case here. The claim language describes a tangible item that is defined by certain steps, essential to the claimed invention.

Accordingly, the court finds that claims 24 and 36 are apparatus claims.

III

A

The court turns to Plumtree's motion for summary judgment. Doc # 72. The summary judgment standard is the same in a patent case as in any other case. Union Carbide Corp. v. American Can Co., 724 F.2d 1567, 1571 (Fed.Cir.1984). In deciding a summary judgment motion, the court must determine whether genuine issues of material fact exist, resolving any doubt in favor of the party opposing the motion. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id*.

The burden of establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). When the moving party has the burden of proof on an issue, the party's showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. Calderone v. United States, 799 F.2d 254, 258-59 (6th Cir.1986). Summary judgment is granted only if the moving party is entitled to judgment as a matter of law. FRCP 56(c).

B

Plumtree requests summary judgment "that the '040 and the '418 patent claims are invalid on the ground that, as a matter of law, the terms 'limited variation' and 'desired uniform look and feel' of the '040 patent, and 'pre-defined constraints' and 'generally uniform look and feel' of the '418 patent are indefinite under 35 USC s. 112, para. 2." Doc # 72 at 1.

Every patent's specification must "conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention." 35 USC 112 para. 2 (2000). "Because the claims perform the fundamental function of delineating the scope of the invention, the purpose of the definiteness requirement is to ensure that the claims delineate the scope of the invention * * * " Datamize, LLC v. Plumtree Software, Inc., 417 F.3d 1342, 1347 (Fed.Cir.2005) (internal citations omitted). "The definiteness requirement, however, does not compel absolute clarity. Only claims 'not amenable' to

construction' or 'insolubly ambiguous' are indefinite. * * * Furthermore, a difficult issue of claim construction does not *ipso facto* result in a holding of indefiniteness." *Id*. "If the meaning of the claim is discernable, even though the task may be formidable and the conclusion may be one over which reasonable persons will disagree, we have held the claim sufficiently clear to avoid invalidity on indefiniteness grounds." Exxon Research & Eng'g v. United States, 265 F.3d 1371, 1375 (Fed.Cir.2001). The courts are required to "accord respect to the statutory presumption of validity, and [ ] protect the inventive contribution of patentees, even when the drafting of their patents has been less than ideal." Id at 1374-75. In doing so, the court follows "the requirement that clear and convincing evidence be shown to invalidate a patent." Datamize, 417 F.3d at 1348. See also Budde v. Harley-Davidson, Inc., 250 F.3d 1369, 1376 (Fed.Cir.2001).

1

Plumtree's first argument is that the term "uniform look and feel" is indefinite. Doc # 72 at 6. Plumtree argues that "uniform look and feel" is subjective, and that the intrinsic evidence does not "save" "uniform look and feel." Doc # 72 at 7. Plumtree also argues that Datamize has conceded that "uniform look and feel" is subjective, and that Datamize's proposed construction is also subjective. Doc # 72 at 10.

As stated above, the court finds that the term "uniform look and feel" is not indefinite. It is too late in the day of computer-related terminology to find that "look and feel" does not have a well understood meaning in that particular field. See Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1439 (9th Cir.1994) (Graphical user interfaces "are thought of as the 'look and feel' of a computer"). Plumtree's argument that the term "uniform" is subjective, and therefore indefinite, is unpersuasive. "Uniform" has been addressed by the Federal Circuit and upheld. The Federal Circuit has looked at the term "uniform" in a similar context, and did not find it to be vague, overly subjective or indefinite. See Cordis, 339 F.3d at 1360; see also *Ecolab,* 265 F3d at 1366. The term "look and feel" is subject to a reasonable construction because the specification of the system contains the requisite definitions to notify others of the elements and components that constitute "look and feel."

2

Plumtree also argues that the term "limited variation" is indefinite. Doc # 72 at 11. Plumtree contends that the intrinsic evidence does not save "limited variation" and that neither the specifications nor the prosecution history provide helpful guidance. *Id*. Finally, Plumtree argues that the existing case law supports the argument that "limited variation" is indefinite.

As the court discussed above, the term "limited variation" is not indefinite. The term "limited" serves to create a boundary to the amount of variation allowed and/or required by the claim. The Federal Circuit has upheld use of such words in other cases. See Playtex, 400 F.3d at 907. Because the term "limited variation" is a term of general usage, the court is not hampered by the absence of intrinsic evidence or prosecution history, and adopts the plain meaning.

3

Lastly, Plumtree argues that the term "predefined constraints" is indefinite. Doc # 72 at 13. Plumtree contends that the claim language provides no guidance on "how constrained the choices [in creating the screens] should be." *Id*. The court finds no basis for this argument.

The relevant claim language states, " * * * said screen elements having on-screen characteristics subject to

pre-defined constraints providing a generally uniform look and feel with other interface screens of said plurality of computers." '418 patent at 22:28-31. As the language shows, the term "predefined constraint" means a boundary that is set in advance, either by the system or by the system designer, for a particular screen element. Accordingly, the language is not indefinite.

IV

In sum, the court has construed or clarified the construction of the disputed terms of the '040 and '418 patents according to the patents' plain language, the intrinsic record and the Federal Circuit's guidance. Notwithstanding any further orders the court may make regarding claim construction, this order shall be deemed to be the "claim construction order" for scheduling purposes.

Finally, for the reasons above, Plumtree's motion for summary judgment (Doc # 72) is DENIED. Datamize's motion to supplement the record in opposition to summary judgment (Doc # 85) is DENIED AS MOOT.

SO ORDERED.

N.D.Cal.,2007.
Datamize, LLC v. Plumtree Software, Inc.

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