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U.S. District Court
District of Delaware (Wilmington)
CIVIL DOCKET FOR CASE #: 1:17-cv-01751-CFC-CJB

Personal Audio LLC v. Google LLC   Date Filed: 12/06/2017
Assigned to: Judge Colm F. Connolly   Jury Demand: Plaintiff
Referred to: Judge Christopher J. Burke   Nature of Suit: 830 Patent
Case in other court: USDC/EDTX, 1:15-cv-00350   Jurisdiction: Federal Question
Cause: 35:271 Patent Infringement

Date Filed	#	Docket Text
01/06/2022	705	REPORT AND RECOMMENDATION: The Court, having reviewed Defendant's motion for summary judgment of invalidity of claims 2 and 3 of the '076 patent ("Motion"), (D.I. 564), and the briefing related thereto, (D.I. 565; D.I. 601; D.I. 632), recommends that the Motion be DENIED. With this Motion, Defendant is asking the Court to conclude that claims 2 and 3 are indefinite; it argues this is so because: (1) the claims include means-plus-function limitations, which in turn claim functions that involve taking certain action with regard to a currently playing program segment "in response to a single 'Back' command" (re: claim 2) and "in response to two consecutive 'Back' commands" (re: claim 3); and (2) the patent purportedly does not clearly link performance of these functions to a structure that can distinguish between "single" and "consecutive" back commands. (D.I. 565 at 5; see also D.I. 331 at 54) As an initial matter, the Court disagrees with Plaintiff that these limitations "do not recite any functional requirement to measure time[.]" (D.I. 601 at 1) As Defendant notes, (D.I. 565 at 4; D.I. 632 at 1), in order to be able to determine if two "Back" commands are "consecutive" (as opposed to simply being two single "Back" commands), a structure would have to be able to determine if the two commands are sufficiently close in time (i.e., what the parties have described as being able to determine whether the second command occurs within a "predetermined amount of time"). Indeed, both in its briefing here, and in earlier submissions, Plaintiff has implicitly or explicitly acknowledged that this is so. (D.I. 176 at 12; D.I. 331 at 50; D.I. 565 at 4 (citing D.I. 571, ex. E at para. 278); D.I. 601 at 2; D.I. 632 at 1) However, on the question of whether summary judgment of indefiniteness should be granted, the Court must side with Plaintiff and say "no." Defendant has the burden to prove indefiniteness by clear and convincing evidence. (D.I. 601 at 1) Here, Plaintiff asserts, citing the report of its expert, Dr. Almeroth, that: (1) the function of reading and determining how long an audio player has played is something that could have been accomplished by a general purpose computer, i.e., a general purpose computer running Windows 95; and (2) thus, "the recital of a general purpose computer with the specified algorithms [i.e., those already contained in the Court's current construction with regard to structure] is sufficient to perform the recited functions and the claims are not indefinite." (D.I. 571, ex. E at paras. 286-88; D.I. 601 at 3); see also Ergo Licensing, LLC v. CareFusion 303, Inc., 673 F.3d 1361, 1364-65 (Fed. Cir. 2012) (explaining that while an algorithm must normally be disclosed for a general purpose computer to satisfy the means-plus-function disclosure requirement for structure, that is not required when "the function can be achieved by any general purpose computer without special programming") (internal quotation marks and citation omitted). In its reply brief, Defendant contends that this is incorrect, and that "distinguishing between 'single' and 'consecutive' commands to skip Back in a music player clearly requires special programming and is not akin to a generic function like producing sound." (D.I. 632 at 2 (citation omitted)) But Defendant cites to nothing in the record in support of this conclusion (i.e., to no expert report, or other record source), and that type of response is not sufficient to meet the clear and convincing evidence hurdle. Please note that when filing Objections pursuant to Federal Rule of Civil Procedure 72(b)(2), briefing consists solely of the Objections (no longer than ten (10) pages) and the Response to the Objections (no longer than ten (10) pages). No further briefing shall be permitted with respect to objections without leave of the Court.(Objections to R&R due by 1/20/2022) Ordered by Judge Christopher J. Burke on 1/6/2022. (lih) (Entered: 01/06/2022)