

United States District Court,  
N.D. California, San Jose Division.

**LEGATO SYSTEMS, INC., (Now EMC Corp.),**  
Plaintiff(s).

v.

**NETWORK SPECIALISTS, INC,**  
Defendant(s).

No. C 03-02286 JW

**Nov. 18, 2004.**

Behrooz Shariati, Jones Day, Catherine Shiang, Heller Ehrman LLP, Menlo Park, CA, Krish Gupta, Associate General Counsel, William R. Clark, EMC Corporation, Hopkington, MS, Terrence Patrick McMahon, Vera M. Elson, Lucy Haeran Koh, McDermott, Will & Emery, Palo Alto, CA, for Plaintiff.

Drew M. Wintringham, Daniel M. Goldfisher, James V. Mahon, Mark Rueh, Clifford Chance U.S. LLP, New York, NY, Q. Huy Doan Do, DLC Law Group, San Francisco, CA, Daniel Ross Harris, Clifford Chance Rogers & Wells, Palo Alto, CA, Nancy Karen Raber, Clifford Chance U.S. LLP, Menlo Park, CA, for Defendant.

## **ORDER FOLLOWING *MARKMAN* HEARING**

**JAMES WARE, District Judge.**

### ***I. INTRODUCTION***

This is a patent infringement case. Plaintiff, Legato Systems ("Legato"), asserts that, Defendant, Network Specialists, Inc. ("NSI") infringe both United States Patent No. 5,799,141 ("141 patent") and United States Patent No. 6,308,283 ("283 patent") (collectively "patents-in-suit").

The Court conducted a hearing on September 24, 2004 in accordance with *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), to construe the disputed terms and phrases of the asserted claims. The Court requested that the parties submit a list of the disputed terms and phrases. This order gives the Court's construction for some of the disputed terms and phrases. The Court explained that it would construe additional terms at a later date, if requested by either party.

### ***II. BACKGROUND***

The '283 patent is a continuation of the '141 patent. The patents share a specification. The '141 patent was filed on June 9, 1995 and the '283 patent was filed on May 8, 1998.

The patents-in-suit are for a "Real-Time Data Protection System And Method." '141 patent, Title. The

invention allows a computer user to select a data file to which he or she will make changes. Then, as the user makes changes to the data file the invention sends the changes to an identical data file on a remote computer system. Thus, important data files on one computer system can be lost or destroyed, but recovered from the remote system including any recent changes made to the data files.

There are fourteen claims in the '141 patent, three of which are independent claims. There are seventeen claims in the '283 patent, three of which are independent. There are at least eighteen terms and phrases in dispute throughout both patents. Insofar as the Court construes a term or phrase in one section of either patent the construction should be consistently applied throughout between both patents unless specifically noted otherwise.

### *III. STANDARDS*

The construction of the claims in a patent is a matter left to the province of the court. *Markman*, 517 U.S. at 391. A court's objective is to determine the plain meaning, if any, that those of ordinary skill in the art would apply to the language used in the patent claims. *Warner v. Ford Motor Co.*, 331 F.3d 851, 854 (Fed. Cir.2003) (citing *Rexnord v. Laitram Corp.*, 274 F.3d 1336, 1342 (Fed. Cir.2001)). While the court may look to pertinent art dictionaries, treatises and encyclopedias for assistance, *Texas Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1202-03 (Fed. Cir.2002), the intrinsic record is the best source of the meaning of claim language. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir.1996). Unless the inventor has manifested an express intent to depart from the ordinary and accustomed meaning that patent claim language has in the art, there is a heavy presumption that the inventor intended the ordinary meaning to apply. *See Teleflex Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1325 (Fed. Cir.2002) (en banc) (citation omitted); *Bell Atlantic Network Servs., Inc. v. Covad Communications Group, Inc.*, 262 F.3d 1258, 1268 (Fed. Cir.2001) (citation omitted). The use of extrinsic evidence in the claim construction process is "proper only when the claim language remains genuinely ambiguous after consideration of the intrinsic evidence." *Interactive Gift Express, Inc. v. Compuserve Incorp.*, 256 F.3d 1323, 1332 (Fed. Cir.2001).

### *IV. DISCUSSION*

#### *A. Disputed Terms*

With the disputed terms FN1 in bold, Claim 1 of the ' 141 patent recites:

FN1. The Court recognizes that the parties' dispute reaches beyond the first claim of the '141 patent. As noted above, the Court intends to give consistent construction to all terms disputed in the patents-in-suit.

1. A data protection system comprising:

a. a **local computer system** containing one or more **data files** residing in a **file system**, which are accessed by at least one **application program having no data protection code**;

b. a **remote computer system** for storing back-up copies of at least one of the one or more data files, each of the back-up copies corresponding to one of the one or more data files;

c. a **network** connecting the local computer system and the remote computer system;

d. a **mirroring driver that captures change information representing an individual change to a file**

**from a selected subset of the one or more data files by the at least one application program; and**

e. a **file system driver** on the local computer system that applies the individual change to one of the one or more data files;

f. wherein the **mirroring driver is attached to the file system driver; and**

g. wherein the **change information** is transmitted from the local computer system across the network to the remote computer system substantially concurrently with the time the individual change is made on the local computer system.

'141 patent, 10 :59-67; 11 :1-17.

**1. "local computer system"**

The parties request a construction of the phrase "local computer system." The Court finds that "local computer system" means "at least one computer workstation containing one or more data files, residing in a file system, which are accessed by at least one application program having no data protection code, and having direct access to file storage." The Court's construction is consistent with the description following the phrase in Claim 1 except that the Court adds the concept of direct access to file storage. Access to file storage is a necessary component of "local computer system" because the ability to access data with an application assumes, without stating, that data is stored and readily accessible. Including "having direct access to file storage" achieves a complete definition of "local computer system" that is congenial to common understanding.

**2. "data files"**

The parties request a construction of "data files." The Court finds that "data files" has an ordinary meaning of "at least one file to which data can be written, read from or both."

**3. "file system"**

The parties request a construction of "file system." The Court declines to construe "file system" pending further proceedings in the case.

**4. "application program having no data protection code"**

The parties request a construction of the phrase "application program having no data protection code." Legato argues that the phrase should mean "a computer program used for an application that does not create backup copies of data files to a secondary storage device." NSI argues that the phrase should mean "a computer program used for an application having no code for the protection of data." The Court adopts NSI's construction.

The phrase "no data protection code" is a categorical statement. Legato's construction goes beyond the simple categorical meaning of the word "no" with relation to the presence of "data protection code." The Patentee had the option to use a more embracing term or phrase in place of "no." Indeed, if the Patentee had expressly manifested a desire to have the word "no" mean anything other than its normal categorical meaning, he had the opportunity in the specification. Moreover, the Patentee could have expressly described "data protection code" as contemplating a secondary storage device. However, the specification states that

"[i]t is yet another object of the present invention to provide a back-up system that can be used with existing application programs that contain *no data protection code* without modification to the application programs." '141 patent, 2 :5-8 (emphasis added). Nothing in the '141 patent's specification suggests that the Patentee sought to reduce the limitation of his language to anything other than what it states.

##### **5. "*remote computer system*"**

The parties request a construction of the phrase "remote computer system." The Court finds that "remote computer system" means: "Separate computer system connected to the local computer system over a network. A remote computer system is a system for storing back-up copies of at least one of the one or more data files, where each of the back-up copies corresponds to one of the at least one data files on the local system."

NSI argues that the construction of "remote computer system" should incorporate the concept of a "distance greater than usual" between the local and remote computer systems. However, the '141 specification limits its discussion of remote computer systems to their function, that is,

[r]emote computer system 5 contains duplicate (back-up) copies of the selected data files on disk 9. Upon receipt of a write request, a program on the remote computer system 5 stores the request in a request log and then sends a confirmation message to the local computer system 1 indicating that the request has been received by the remote computer system.... As is clear from this description, multiple local computer systems can communicate with one remote computer system.

'141 patent, 3 :23-37.

The '141 patent does not require any geographical distance between the computer systems. Moreover, the phrase "distance greater than usual" is ambiguous because the specification offers the jury no guidance in determining what a "usual" distance would be, let alone what a "distance *greater* than usual" would be. Thus, the concept of distance is best left out of the construction.

##### **6. "*a network connecting the local computer system and the remote computer system*"**

The parties request a construction of the phrase "a network connecting the local computer system and the remote computer system." The Court finds that "a network connecting the local computer system and the remote computer system" means "the infrastructure for communication between the local computer system and the remote computer system."

NSI argues that the construction should include reference to "computers, and other peripherals such as printers ..." NSI's Responsive Claim Construction Brief ("NSI Construction Brief"), Exh. 2. The '141 patent's specification only describes "network" as a "local or wide area network." '141 patent, 3 :14-15. NSI uses a dictionary definition for its construction. NSI Construction Brief, Exh. 2 (citing Dictionary of Computer and Internet Words (2001) at 185). The Court does not see the need to import the limitation of "computers, and other peripherals" into its construction because peripherals are not necessary to a network, which is the infrastructure for communication between such peripherals.

##### **7. "*a mirroring driver that captures change information representing an individual change to a file from a selected subset of the one or more data files by the at least one application program*"**

The parties request a construction of the phrase "a mirroring driver that captures change information representing an individual change to a file from a selected subset of the one or more data files by the at least one application program." The Court finds that "driver" is a generic term that means "software that invokes, controls or monitors input or output operations." The word "mirroring" means "process by which a file is written in one or more places at substantially the same time." In conjunction, the phrase "mirroring driver" means "software that invokes, controls or monitors the input or output operations of a process by which a file is written in one or more places at substantially the same time."

The parties also dispute whether the embedded phrase "mirroring driver" should be constructed as a "means-plus-function" element under 35 U.S.C. s. 112, para. 6. The phrase "mirroring driver" appears in the independent claims 1 and 9 of the '141 patent and in the independent Claims 1, 10, and 16 of the '283 patent. The phrase "mirroring driver means" appears in Claim 14 of the '141 patent. NSI argues that all of the instances of "mirroring driver" or "mirroring driver means" should be constructed as means-plus-function elements under s. 112, para. 6. Legato does not dispute that the phrase "mirroring driver means" in Claim 14 of the '141 patent is to be constructed as a means-plus-function element. However, Legato argues that a person skilled in the art would recognize the phrase "mirroring driver," used elsewhere, as expressing sufficient structure to avoid construction as means-plus-function elements.

"[T]he use of the term 'means' is central to the analysis" of whether an element should be construed as a means-plus-function. *Personalized Media v. Int'l Trade Comm'n*, 161 F.3d 696, 703 (Fed. Cir. 1998). "[T]he use of the word 'means' creates a presumption that s. 112, para. 6 applies, and that the failure to use the word 'means' creates a presumption that s. 112, para. 6 does not apply." *Id.* at 703-04 (internal citations omitted).

These presumptions can be rebutted if the evidence intrinsic to the patent and any relevant extrinsic evidence so warrant. *See, e.g., Cole v. Kimberly-Clark Corp.*, 102 F.3d 524, 531 (Fed. Cir. 1996) (noting that whether s. 112 para. 6 is invoked involves an analysis of the "patent and the prosecution history," and consulting a dictionary definition of "perforation" to understand if one of skill in the art would understand this term to connote structure). In deciding whether either presumption has been rebutted, the focus remains on whether the claim as properly construed recites sufficiently definite structure to avoid the ambit of s. 112, para. 6.

*Id.* at 704.

Here, Claim 1 does not use the word "means." Thus, there is an initial presumption that the element is not a means-plus-function element. *ASM Am., Inc. v. Genus, Inc.*, 260 F.Supp.2d 827, 855 (citing *Personalized Media*, 161 F.3d at 703-04). However, even in the absence of the word "means," a claim element must also "recite or refer to terms that are reasonably well understood in the art as names for structure" to avoid construction under s. 112, para. 6. *Watts v. XL Sys., Inc.*, 232 F.3d 877, 881 (Fed. Cir. 2000). The Court may look to the intrinsic evidence and any relevant extrinsic evidence to make its determination. *Personalized Media*, 161 F.3d at 705.

The claim elements containing "mirroring driver" lack structure. The word "mirroring" does not specify a particular kind of driver or structure in the same way a person skilled in the art would expect of words like "printer" or "disk." While the word "driver" might be understood as structural, the addition of "mirroring" communicates a level of abstraction away from any structure that "driver" suggests. On the other hand, combining terms like "printer" or "disk" with "driver," e.g., "disk driver" or "printer driver," would connote sufficient structure to a person skilled in the art.

At the *Markman* hearing Legato's counsel stated that "everyone agrees that mirroring is this back-up or copying." Sept. 24, 2004 Hearing Transcript ("Transcript"), 45:24-5. However, the phrase "mirroring driver" requires examining the specification to ascertain what is claimed.FN2 It appears that the patentee acted as his own lexicographer in providing a technical definition for "mirror" by way of comparison with other words. ' 141 patent, 1 :37-39 ("Another known method for protecting data is to duplicate (or mirror) all data write operations occurring on a primary device onto one or more secondary (back-up) devices.").

FN2. As noted below, when the Court asked Legato's counsel "What is a mirroring driver?" counsel referred to the '141 patent specification. Transcript, 48:5-11. This suggests to the Court that the phrase "mirroring driver" would not have been understood as structural outside of the patent.

The functional description following "mirroring driver" further invites a means-plus-function construction. '141 patent, 11 :3-6 ("a mirroring driver that captures change information representing an individual change to a file from a selected subset of the one or more data files by the at least one application program"). In *Mas-Hamilton Group v. LaGard, Inc.*, 156 F.3d 1206, 1214 (Fed.Cir .1998), the Federal Circuit upheld a district court's interpretation of a claim as a mean-plus-function claim where the claim did not use the word "means." The Federal Circuit was concerned that the "claimed 'lever moving element' [was] described in terms of its function and not its mechanical structure." *Id.* Accordingly, the claim was either amenable to a very broad interpretation to cover "any device that can cause the lever to move" or had to be read in light of the specification. *Id.* As such, the district court construed the claim as a means-plus-function claim to limit the phrase " 'lever moving element' to structures disclosed in the specification and equivalents." *Id.*

Here, the Court faces a similar problem. The phrase "mirroring driver," as claimed in the '141 patent does not connote a known structure and the remainder of the claim element offers only functional language. *See* '141 patent, 11 :3-6. As noted above, a person skilled in the art would not have understood what a "mirroring driver" without referencing the specification. As such, the phrase "mirroring driver" is susceptible to a broad interpretation because it lacks technical specificity outside of the specification. *Cf.* *Mas-Hamilton*, 156 F.3d at 1214. Thus, the Court finds that the phrase "mirroring driver" does not describe a structure that was known in the art. Accordingly, the phrase, "mirroring driver" to be construed under s. 112 para. 6.

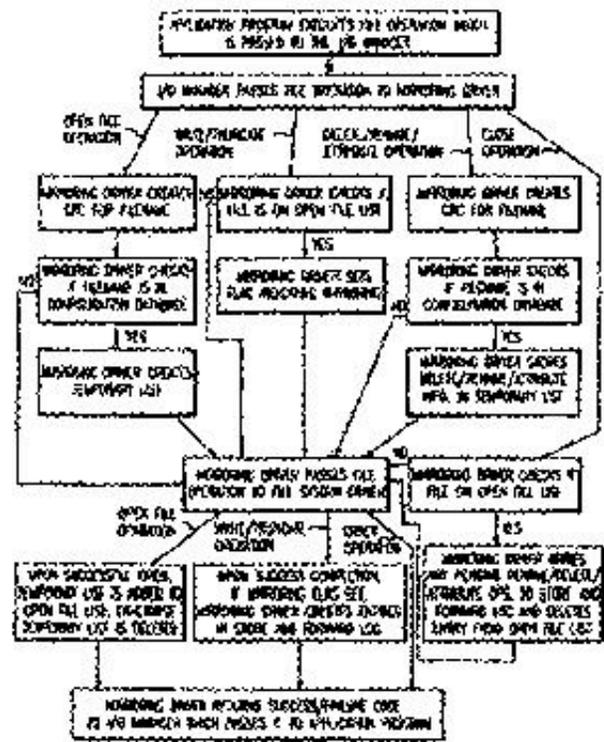
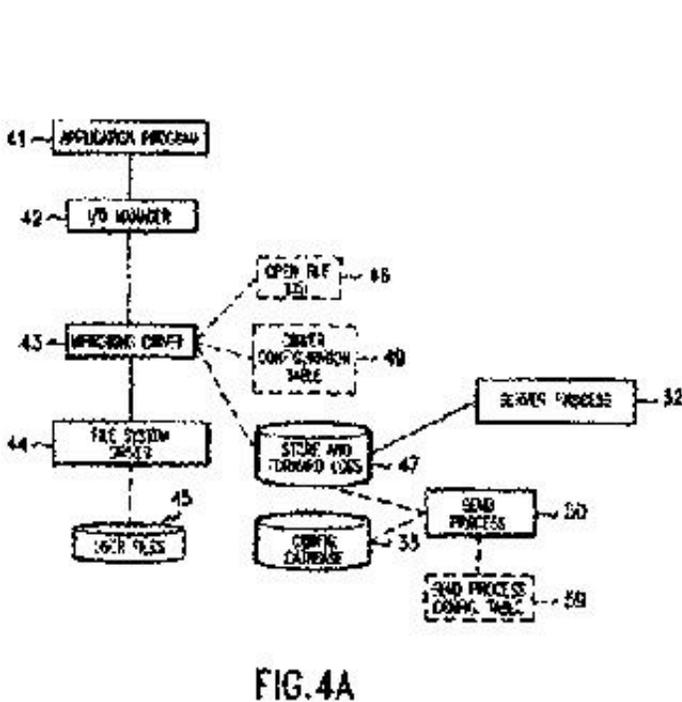
Having concluded that "mirroring driver" requires means-plus-function construction, the Court's construction requires two steps. *Asyst Tech., Inc. v. Empak, Inc.*, 268 F.3d 1364, 1369 (Fed.Cir.2001). First, the Court must identify the function recited in the claim. *Id.* "Second, the court must identify the corresponding structure set forth in the [specification] that performs the particular function set forth in the claim." *Id.*

The function of the "mirroring driver" as recited in Claim 1 is to "capture change information representing an individual change to a file from a selected subset of the one or more data files by the at least one application program." '141 patent, 11 :3-6.

The Court construes the term "capture" to describe "a process in which information being stored to a disk drive is electronically seized or taken for a different purpose." FN3 The Court construes "selected subset of one or more data files" to mean "the user selected data files from which change information is backed-up."

FN3. It appears that "capture" and "intercept" are used interchangeably throughout the specification. Accordingly, the Court adopts the same construction for "intercept" as given for "capture."

The specification describes the structure required to carry out the mirroring driver's function. '141 patent, 5 :35-7 :40. The structure of a means-plus-function claim relating to software may be represented by the algorithm that controls the function of a computer. *See* WMS Gaming, Inc. v. Int'l Game Tech., 184 F.3d 1339, 1349 (Fed.Cir.1999) (stating that the disclosed structure is a computer programmed to perform the disclosed algorithm). At oral argument the Court asked Legato's counsel, "What is a mirroring driver?" Transcript, 48:8. Counsel responded by referencing Figure 4B. *Id.* at 48:11. The '141 specification recites that the "mirroring driver" receives file operations from the I/O Manager 42 and passes them to the file system driver 44, to which the "mirroring driver" is attached. '141 patent, 5:58-65. Figure 4A depicts the relation of the "mirroring driver" algorithm in relation to the programmed computer. Figure 4B depicts the algorithm of a "mirroring driver." The Court finds that the corresponding structure of "mirroring driver" is block 43, positioned between blocks 42 and 44 in Figure 4A as specifically described in Figure 4B and the equivalents thereof.



## 8. "file system driver"

The parties request construction of the phrase "file system driver." The Court finds that "file system driver" means "software that invokes, controls or monitors files." Unlike "mirroring driver," "file system driver" connotes a structure that was well known in the art and does not need to be construed as a means-plus-

function element. The '141 specification offers no specialized definition for "file system driver," which further indicates that the patentee intended for the term to be construed as the term is commonly understood by a person skilled in the art. Thus, the Court construes the phrase in accordance with the plain meaning in the art.

NSI's asserted construction for "file system driver" is "a software layer executing within an operating systems's input/output (I/O) stack to provide an interface by which an I/O manager can perform I/O independent of underlying physical devices." The Court finds NSI's construction unnecessarily limiting. Although NSI's definition may be consistent with extrinsic evidence, the specification does not impose any limitations on "file system driver" involving a computer's I/O stack. *Compare* '141, 5:54-7:39 (no reference to "I/O stack") *with* NSI's Construction Brief, 20-1 (citing Microsoft Developers Network Library, Understanding Driver and Operating System Basics). While extrinsic evidence, such as a dictionary, is general acceptable to aid the Court in its construction, *Texas Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1202 (Fed.Cir.2002), the Court does not find it necessary to go beyond what it sees as the plain meaning of the phrase and its use within the patent.

***9. "mirroring driver is attached to the file system driver"***

The parties request a construction of the phrase "mirroring driver is attached to the file system driver." The Court finds that "mirroring driver is attached to the file system driver" means "mirroring driver is compiled within the sequence of a computer's operating algorithm such that the file system driver is immediately preceded by the mirroring driver and any signal directed to the file system driver must first pass through the mirroring driver."

NSI's proposed construction seeks to include the concept of a layered input/output stack. The Court finds this is an unnecessary importation because there is no reference to an "input/output stack" in either the '141 or the '283 specifications.

***V. CONCLUSION***

The disputed terms within the claims of the '141 and the '283 patents are construed in accordance with the above stated constructions. The Court declines to construe any further terms until the need arises.

N.D.Cal.,2004.

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