

United States District Court,
D. Delaware.

INLINE CONNECTION CORPORATION,
Plaintiff.

v.

AOL TIME WARNER INCORPORATED, et al,
Defendants.

Inline Connection Corporation,
Plaintiff.

v.

EARTHLINK, INC,
Defendant.

Nos. C.A. 02-272-MPT, C.A. 02-477-MPT

Oct. 18, 2005.

Background: Owner of patents for method of transmitting multiple frequency signals over conventional telephone wiring brought action alleging infringement by Internet service providers' (ISPs') digital subscriber line (DSL) products. Following denial of parties' cross-motions for summary judgment, 364 F.Supp.2d 417, two ISPs separately moved for reconsideration.

Holdings: The District Court, Thyng, United States Magistrate Judge, held that:

- (1) patents did not limit placement of signal interface to single point of convergence, and
- (2) fact issue existed as to whether ISP provided asymmetric digital subscriber line (ADSL) service to its subscribers via remote location digital subscriber line access multiplexers (DSLAMs).

Motions denied.

5,844,596, 6,236,718, 6,243,446, 6,542,585. Construed.

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MEMORANDUM OPINION

THYNGE, United States Magistrate Judge.

I. INTRODUCTION

This is a patent infringement case. On April 12, 2002, Inline Communication Corporation ("Inline") FN1 filed suit alleging infringement by AOL Time Warner Incorporated, FN2 America Online, Inc. ("AOL"), FN3 and EarthLink, Inc. ("EarthLink") FN4 (hereinafter, AOL and EarthLink are referred to as "defendants") of four of its patents: U.S. Patent Nos. 5,844,596 (the " '596 patent"), 6,243,446 (the " '446 patent"), 6,542,585 (the " '585 patent"), and 6,236,718 (the " '718 patent") (collectively "the patents-in-suit"). FN5 Inline alleges defendants' Digital Subscriber Line products infringe claim 61 of the '596 patent, claims 1-6 of the 446 patent, claims 1, 2, 4, 8 and 9 of the '585 patent and claims 22, 24, 38 and 39 of the '718 patent. The procedural history and descriptions of the patented technology and the allegedly infringing products are detailed in this court's previous claim construction and summary judgment opinions, familiarity with which is assumed by the reader. FN6

FN1. Inline is a Virginia corporation with its principal place of business in Virginia.

FN2. AOL Time Warner Incorporated is a Delaware corporation with its principal place of business in New York. AOL Time Warner Incorporated was subsequently dismissed from this action. *See* D.I. 266.

FN3. AOL is a Delaware corporation with its principal place of business in Virginia.

FN4. EarthLink is a Delaware corporation with its principal place of business in Georgia.

FN5. The '596, '446, and the '585 patents are each continuations of a patent application filed July 14, 1989. The July 14, 1989 application issued as U.S. Patent No. 5,010,399 (the " '399 patent"), which is not asserted in this action. More specifically, the '585 patent is a continuation of the application that resulted in the '446 patent, which is a continuation of the application that resulted in the '596 patent. Throughout this opinion, the '596, '446, and '585 patents may be collectively referred to as the " '596 family of patents" as they each share a substantially identical written disclosure. The '718 patent is also a continuation of the patent application filed July 14, 1989, which resulted in the '399 patent and has a separate written disclosure.

Because the '596 family of patents each share a substantially identical specification, citation to the '596 patent's specification, or to the "common specification," in this opinion should be understood to refer to the same language in the written descriptions of the '446 patent and the '585 patent.

FN6. *Inline Connection, Corp. v. AOL Time Warner Inc.*, 302 F.Supp.2d 307 (D.Del.2004) (the "*Markman* Opinion"); *Inline Connection, Corp. v. AOL Time Warner Inc.*, 364 F.Supp.2d 417 (D.Del.2005) (the "*Summary Judgment Opinion*").

On April 13, 2005, this court issued its Summary Judgment Opinion denying both plaintiff's partial motion for summary judgment of infringement and defendants' motion for summary judgment of non-infringement of the '596 family of patents based on its determination that there remains a material question of fact to be determined at trial. On April 27, 2005 defendants jointly filed a motion for clarification and reconsideration of the Summary Judgment Opinion (the "joint motion").FN7 On the same date, AOL separately filed an additional motion for reconsideration of that opinion (the "AOL motion"). FN8 This is the court's decision on those motions.

FN7. D.I. 301.

FN8. D.I. 300.

II. STANDARD OF REVIEW

Neither the joint motion nor the AOL motion specifically cite the particular rule from the Federal Rules of Civil Procedure or the Local Rules of this court as the basis for their motions. The joint motion, however, cites *BP Amoco Chemical Co. v. Sun Oil Co.*, 200 F.Supp.2d 429, 431 (D.Del.2002) [sic 432] for the proposition that "[m]otions for reconsideration can be granted where there is a need to correct a clear error of law or fact to prevent manifest injustice." FN9 Consequently, the court will reiterate the legal standard set forth in *BP Amoco* that will be applied to defendants' motions.

FN9. D.I. 301 at 5.

Motions for reconsideration, as a general rule, are granted sparingly and only in limited circumstances. *See Dentsply Int'l. v. Kerr Mfg. Co.*, 42 F.Supp.2d 385, 419 (D.Del.1999). A party bringing a motion seeking to alter or amend an order, pursuant to Fed.R.Civ.P. 59(e), must establish one of three grounds: (I) there is an intervening change in controlling law, (ii) new evidence has become available, or (iii) there is a need to correct the court's clear error of law or fact or to prevent manifest injustice. *Max's Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir.1999) (citing *North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir.1995)). Furthermore, motions for reconsideration "should not be used to rehash arguments already briefed." *Dentsply*, 42 F.Supp.2d at 419.FN10
FN10. *BP Amoco*, 200 F.Supp.2d at 432 (footnote omitted).

The *BP Amoco* court also noted that "the [Federal] Rules [of Civil Procedure] do not expressly recognize motions for reconsideration" but determined that it would treat the plaintiff's motion in that case as a motion to reconsider its prior order and would "incorporate the standards of both Rule 59 and Local Rule 7.1.5." FN11 The court stated that, like motions brought pursuant to Rule 59:

FN11. *Id.* at 432 n. 2.

[M]otions for reargument under Delaware Local Rule 7.1.5, are granted only in narrow circumstances. A court should only grant reargument when (i) the court has patently misunderstood a party; (ii) the court has made a decision outside of the adversarial issues presented to the court by the parties, or (iii) the court has made an error not of reasoning but of apprehension. *Schering Corp. v. Amgen, Inc.*, 25 F.Supp.2d 293, 295 (D.Del.1998). Like motions for reconsideration, motions for reargument cannot be granted in circumstances where the movant simply "rehashes material and theories already briefed and decided." *Id.* In addition, "a motion for reargument may not be used to supplement or enlarge the record" on which the court made its initial decision. *Stairmaster Sports/Medical Products, Inc. v. Groupe Procycle, Inc.*, 25 F.Supp.2d 270, 292 (D.Del.1998).FN12
FN12. *Id.* at 432.

The court will, likewise, apply the legal standards set forth in *BP Amoco* in its consideration of defendants' motions for reconsideration.

III. POSITIONS OF THE PARTIES

A. THE JOINT MOTION

Defendants' joint motion argues that the court's construction of the "signal interface" claim term requires that "the signal interface must be located at the particular point of convergence that is the *pre-existing interface point* where 'the public telephone network (i.e., an ordinary telephone trunk line)' meets the extended pairs." FN13 Defendants base that argument on their interpretation of the court's determination, in the Summary Judgment Opinion, of the inventor's definition of the phrase "public trunk line," which definition is a part of its "signal interface" construction.

FN13. D.I. 301 at 2.

According to defendants, if the court's Summary Judgment Opinion is interpreted to permit the claimed "signal interface" to be interposed at any of the multiple pre-existing points of convergence on the telephone wiring network, then the placement of the "signal interface" defines the public trunk line and extended pairs segments of the telephone wiring network. Because the court expressly rejected such an interpretation, defendants argue, any reading of the court's opinion other than to require a single point of convergence at the boundary of the public trunk line and the extended pairs is inconsistent with the court's analysis. Based on this single point of convergence argument, defendants maintain that Inline has failed to present evidence establishing that a remote terminal DSLAM is located at that particular pre-existing point of convergence and, therefore, that the court should reconsider its prior order and grant defendants' motion for summary judgment of non-infringement.

Inline argues that defendants' motion for reconsideration should be denied for several reasons.

First, Inline contends defendants did not move for summary judgment on the remote terminal DSLAM location and that the joint motion is actually a new motion for summary judgment and is, therefore, improper in the context of a motion to reconsider.

Second, Inline maintains that the court adopted defendants' construction of "signal interface" and that the joint motion is an inappropriate attempt to modify that construction.

Third, Inline disagrees with defendants' request that the court clarify its summary judgment order to require that Inline present evidence that each accused remote terminal DSLAM is located at a specific pre-existing point of convergence on the telephone wiring network. This request is based on defendants' alleged misinterpretation of the court's opinion. Inline maintains that the court found, and the patents explicitly state, that there are multiple points of convergence at which the claimed "signal interface" may be interposed. Inline suggests that the court's opinion determined only that the "signal interface" must be interposed at one of those pre-existing points of convergence, rather than "anywhere" on the telephone wiring network. Inline asserts that there is no conflict with the court's rejection of the argument that the "signal interface" may be interposed at any point on the telephone wires downstream of the "telephone exchange" and the court's finding that a remote terminal interface point is an existing point of convergence. This assertion is based on inline's argument that, the court emphasized that it is the existing telephone network that is used to implement the invention and existing points of convergence are part of this existing network.

Finally, Inline contends that defendants have failed to rebut its evidence purportedly showing that defendants offer and/or sell ADSL services using remote terminals located at one of these points of convergence. According to Inline, defendants misstate the standard for proving infringement, which does not require that Inline show that defendants "actually provide" ADSL service through remote terminal DSLAMs but that, under 35 U.S.C. s. 271, the patent statute defines infringement to include an "offer" for sale of an infringing product or service. Inline contends that the evidence in the summary judgment record, at the very least, supports the court's conclusion that there is a material issue of fact as to whether defendants infringe the '596 family of patents.

B. THE AOL MOTION

In AOL's separate motion, it argues that, in determining that there is a triable issue of fact, the court erroneously considered evidence presented by Inline cumulatively, rather than separately with regard to each defendant, and that the only evidence cited by the court that is specific to AOL is insufficient to raise a material question of fact, as it is purportedly unauthenticated hearsay which would be inadmissible at trial.

In opposition to the AOL motion, Inline again asserts that AOL did not move for summary judgment of non-infringement on the remote terminal DSLAM configuration. Therefore, Inline contends that the AOL motion is not a motion to reconsider at all, but rather, is a new motion for summary judgment. Inline also maintains that the AOL motion does not satisfy the standard for a motion for reconsideration as it, purportedly, presents no new evidence or change in controlling law. Inline argues that AOL points to no clear error of law and fails to identify a manifest injustice that would occur if the court denies the motion.

IV. DISCUSSION

A. THE JOINT MOTION

[1] Defendants' joint motion rests on their premise that, although there are multiple pre-existing points of convergence on a telephone wiring network, the court's April 13, 2005 Summary Judgment Opinion requires the claimed "signal interface" be interposed at only one of those points of convergence. Defendants contend that any other interpretation of the court's summary judgment opinion is inconsistent with the court's determination that placement of the "signal interface" does not define certain segments of the telephone wiring network. As explained below, neither the court's opinion, nor the common specification support defendants' premise. The court determines, therefore, that there is no need to reconsider or clarify its

FN14. Because the court determines that the basic premise of defendants' joint motion is incorrect, it is unnecessary to address Inline's alternative arguments in opposition to that motion.

The parties' cross motions for summary judgment were based primarily upon this court's construction of the "signal interface" claim term. In the *Markman* Opinion, the court adopted defendants' proposed construction of "signal interface," verbatim, construing that term to mean, "[a] device interposed on the opposite end (i.e., the local side) of the public trunk line (as defined by the inventor in the patent) from the telephone exchange that performs the recited functions of the incorporated circuitry." FN15

FN15. *Inline Connection, Corp. v. AOL Time Warner Inc.*, 302 F.Supp.2d 307, 329 (D.Del.2004).

At the *Markman* stage of these proceedings, the parties did not articulate specific positions regarding how the inventor defined the public trunk line in the '596 family of patents' common specification. The inventor's definition of public trunk line gained import at the summary judgment stage, however, as the parties' motions were centered on the "signal interface" claim term which is, in part, defined by reference to the public trunk line. Thus, a considerable portion of the court's summary judgment opinion was devoted to a discussion of the court's prior constructions of the "signal interface" and "telephone exchange" claim terms. After that discussion, the court examined the intrinsic evidence to determine how the inventor defined the public trunk line in the patents and how that definition relates to those two claim terms.

In that opinion, the court noted that its "construction of 'signal interface' has both a location and a functional component. The location component is 'a device interposed on the opposite end (i.e., the local side) of the public trunk line (as defined by the inventor in the patent) from the telephone exchange....' The functional component is 'a device ... that performs the recited functions of the incorporated circuitry.'" FN16 It is the location component of that construction with which defendants' joint motion is primarily concerned.

FN16. *Inline Connection, Corp. v. AOL Time Warner Inc.*, 364 F.Supp.2d 417, 428-29 (D.Del.2005).

At the summary judgment stage, defendants asserted that "[t]he inventor defined the public trunk line as the communication path running from the telephone company central office ... at one end to a point within or just outside a structure, where twisted pairs of telephone lines from individual residences, apartments, or offices converge, i.e., 'the point of convergence.'" FN17

FN17. *Id.* at 429 (quoting D.I. 271 at 3-4 (internal quotation marks omitted)). In footnote 71 of the Summary Judgment Opinion, which provided the citation for the above quote, the court also included additional direct quotations from defendants' summary judgment briefs that reiterated defendants' position regarding the public trunk line. Surprisingly, in its opposition to the joint motion, Inline seemingly cites footnote 71 of the Summary Judgment Opinion as the court's own statements, *see* D.I. 305 at 8, despite the fact that the Summary Judgment Opinion cited to the Docket Index ("D.I.") number for defendants' briefs for those quotations. More surprisingly, defendants' reply brief cites Inline's quotation of footnote 71, apparently also not recognizing their own words from prior briefing. *See* D.I. 312 at 6 n. 2.

Inline argued, in part, that:

"[T]he patent divides the transmission path into two segments: the public trunk ... and the extended pairs.... *[I]t is the signal interface itself, because of its function, that divides the telephone lines into the public trunk segment and the extended pairs segment.* By definition, then, the signal interface is at the 'local' end of the trunk. The 'public' end is on the opposite side and connects to the switching center." FN18

FN18. Id. at 430 (quoting D.I. 257 at 7) (footnotes omitted).

The court disagreed with Inline's arguments regarding how the inventor defined the public trunk line. The court's review of the common specification led to its conclusion that the various elements of the telephone wiring network (i.e., the public trunk line, extended pairs, and points of convergence at which the claimed "signal interface" might be interposed) were existing elements of the telephone wiring network which were not defined by the placement of the "signal interface." FN19

FN19. Id. at 432-34.

The court also disagreed with defendants' contention that the public trunk line was defined by the inventor in the patents such that the claimed "signal interface" must be placed at "a point within or just outside a structure," as the common specification's description of extended pairs of varying lengths contradicted that position.FN20

FN20. Id. at 434-35.

In the Summary Judgment Opinion, the court stated that:

Based on the plain language of the patents, ... the court determines that the inventor defined the public trunk line in the patents as the telephone twisted pairs, and any fiber optic line, traveling from the 'telephone exchange' to an existing point of convergence at which the claimed 'signal interface' may be interposed.FN21

FN21. Id. at 436.

Defendants state that "[t]he final paragraph at the conclusion of section B of the Summary Judgment Order[, i.e., the just-quoted definition of public trunk line.] ... might be interpreted to mean that the public trunk line ends at any point of convergence where a signal interface has been placed." FN22 Defendants contend, however, that:

FN22. D.I. 301 at 6 n. 1.

[S]uch an interpretation is flatly inconsistent with Sections A and B of the Court's Analysis in the Order, as

well as the *Markman* Order, which make clear (1) that the public trunk line, the extended pairs, and the point of convergence at which they meet are all pre-existing parts of the telephone network and (2) that the public telephone trunk line is not defined by the placement of the signal interface.FN23
FN23. *Id.* at 6-7 n. 1.

The court disagrees with defendants' conclusion, based on those assertions, that there is only one point of convergence at which the claimed "signal interface" may be interposed. Defendants correctly note that the court stated: "[t]he patent explains, '[t]he [signal] interface provided by the invention ... replaces the *existing interface* between the public telephone network (i.e., an ordinary telephone trunk line) and the telephone lines that leads to individual residences.'" FN24 That statement, however, should not be taken to mean that the claimed "signal interface" may be interposed at one, and only one, point of convergence. As the court previously determined, placement of the claimed "signal interface" does not define the public trunk line and the extended pairs, which segments of the telephone wiring network the court also determined are described in the common specification as pre-existing structures. Neither the Summary Judgment Opinion nor the common specification limit placement of a "signal interface" to a single, particular point of convergence, as defendants request the court to rule on their motion for reconsideration.

FN24. *Id.* at 2 (quoting *Inline*, 364 F.Supp.2d at 432 (quoting '596 patent 8:9-13)).

Defendants may confuse certain statements by the court as supporting their single interface point theory. For instance, the court stated that:

Because the 'signal interface' is interposed at a pre-existing point of convergence, the public trunk line running from the 'telephone exchange' to that point, and the extended pairs that run from that point to the local networks are also pre-existing structures and the specification consistently describes them as such. For example, the patents state, the ... transceiver/switch [i.e., the claimed 'signal interface,'] is connected to multiple pairs of telephone wire pairs from the local telephone exchange (the trunk line) and the extended telephone wire pairs leading to separate local networks of telephone wiring.FN25

FN25. *Inline*, 364 F.Supp.2d at 434 (quoting '596 patent 9:1-6); *see also, e.g., id.* at 432 ("The patents explain, '[t]he [signal] interface provided by the invention ... replaces the existing interface between the public telephone network (i.e., an ordinary telephone trunk line) and the telephone lines that lead to individual residences.' The telephone lines that lead from the existing interface, or point of convergence, to the individual residences (i.e., to the local networks) are the extended pairs." (quoting '596 patent 8 :9-13) (footnote omitted)).

That statement, and the additional statement recited in footnote 25 of this opinion, do not, however, limit the '596 patent's coverage to only a single point of convergence. Those quotes merely express the court's determination that the public trunk line, extended pairs, and points of convergence are pre-existing elements of the telephone wiring network and, as such, contradicted *Inline*'s argument that the placement of a "signal interface" defined the public trunk line and the extended pairs. Because those elements are described in the common specification as pre-existing structures, the court rejected *inline*'s related argument that the patent covered a DSLAM located within the "telephone exchange." Those quotes were not meant to indicate that the court determined that the common specification supports only a single point of convergence at which the

claimed "signal interface" may be interposed.FN26 More importantly and as explained below, the common specification, from which the court quoted extensively in the Summary Judgment Opinion, also contradicts that argument.

FN26. *Cf. id.* at 432 ("[T]he public trunk line, the extended pairs and the *points* of convergence (where the claimed 'signal interface' may be interposed) are described as existing elements of the telephone wiring network." (emphasis added)).

The court determined that the patent merely requires that the claimed "signal interface" be interposed at a pre-existing point of convergence on the local side of the public trunk line.FN27 The court noted that "[t]he common specification lists several points of convergence at which the claimed 'signal interface' may be interposed" and that:

FN27. The Summary Judgment Opinion made clear that the court's construction of "signal interface," and the requirement that a point of convergence must be on the local side of the public trunk line, "distinguishes the 'local side' from the " 'telephone exchange side' of the public trunk line; 'a device interposed on *the opposite end (i.e., the local side) of the public trunk line ...from the telephone exchange.*' " *Id.* at 432 n. 81. An understanding of this distinction also explains why a DSLAM located within a "telephone exchange" does not infringe under the court's construction of "signal interface."

[T]he specification states that "[t]he present invention relates to a system for simultaneous two-way communication of video signals and other signals between multiple networks of telephone wiring *whose twisted pairs converge together into a single bundle, wiring block, or other common points of access*, and a high capacity communication line located at that point of access." FN28

FN28. *Id.* at 432-33 (quoting '596 patent 1:23-28).

The court quoted several examples from the common specification reciting various points of convergence. In particular, the court quoted the common specification which states that:

"In the case of apartment buildings, the point of access can be *the 'wiring closets'* found in those buildings.... [T]he twisted pairs providing telephone service to the units of an apartment building often converge *in a room in the basement of such a building*, providing a point of common access to a large number of units. *Other 'common points of access'* often available in an apartment building are the *wiring closets* that are often located on every floor." FN29

FN29. *Id.* at 433 (quoting '596 patent 1:36-37; 63:6-12) (footnote omitted).

Defendants' single point of convergence argument would result in the '596 family of patents not covering "signal interfaces" being placed in the wiring closet of an apartment building, as well as, at other points of convergence in wiring closets on different floors of such building. This is so because, under defendants' interpretation, those several points of convergence, at different intermediate points on the extended pairs, could not meet their argued-for interpretation of the court's "signal interface" construction (which includes the inventor's definition of public trunk line) as requiring a single point of convergence at the boundary of

the public trunk line and the extended pairs. That argument is, therefore, inconsistent with the language of the common specification.

The apartment building embodiment was also noted in the court's discussion of the parties' literal infringement arguments as they related to the location component of the court's "signal interface" construction:

The fact that there may, or may not, be additional points of convergence downstream from a remote terminal also does not mean that the wires traveling from a remote terminal to another point of convergence are not extended pairs. The common specification provides an example of multiple, or intermediate, points of convergence interposed on the same set of extended pairs in the description of an apartment building implementation.... Nothing has been cited to the court to indicate that instances of intermediate points of convergence are limited to [the apartment building] embodiment.... FN30

FN30. Id. at 440-41.

Apart from excluding the specifically recited apartment building embodiment from the patent's coverage, a result that is "rarely, if ever, correct," FN31 defendants' position would impermissibly narrow the scope of the patent by excluding other pre-existing intermediate points of convergence. FN32

FN31. See *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1583 (Fed.Cir.1996) (stating that a construction that excludes a preferred embodiment "is rarely, if ever, correct and would require highly persuasive evidentiary support."); *see also* *Applera Corp. v. Micromass UK Ltd.*, 186 F.Supp.2d 487, 504-08 (D.Del.2002) (rejecting proposed construction that would read out preferred embodiment illustrated in figure).

FN32. The apartment building embodiment also contradicts defendants' assertion that the multiple points of convergence recited in the patent, e.g., a 'punch-down' panel, a telephone pole, a pedestal, or a wiring closet, simply mean that different users may be connected to the public trunk line via different *types* of points of convergence. D.I. 312 at 7. The "wiring closets that are often located on every floor" of an apartment building are undisputably *multiple* points of convergence of the same *type* along the same set of extended pairs.

Defendants concede that "[t]here are multiple points of convergence on the public telephone network between the user's residence and the central office," FN33 and cite a textbook, "DSL Advances," (also cited by Inline in its summary judgment briefing) detailing those multiple points of convergence. Defendants state that "DSL Advances":

FN33. D.I. 301 at 7.

[S]hows multiple points of convergence between a particular user's residence and the central office, including the point of convergence where multiple "drop lines" from residences connect with "distribution cables" at telephone poles or wiring pedestals and the point of convergence where multiple distribution

cables then connect with "feeder cables" that run to the central office. FN34
FN34. *Id.* at 7-8.

Defendants argue, however, that only one of these existing points of convergence is the one at which the claimed "signal interface" may be interposed. Defendants contend that "[t]he final paragraph at the conclusion of section B of the Summary Judgment Order ... might be interpreted to mean that the public trunk line ends at any point of convergence where a signal interface has been placed" but argue such an interpretation is inconsistent with other parts of the court's Summary Judgment Opinion, as they interpret that opinion.FN35 As explained above, however, the inventor's definition of public trunk line does not exclude the possibility that there are multiple points of convergence at which the claimed "signal interface" may be interposed. Rather than redefining the pre-existing public trunk line and extended pairs segments of the telephone wiring network, the court determined that the common specification describes some of those as intermediate points of convergence on the extended pairs. A "signal interface" at one of those pre-existing intermediate points of convergence does not, as defendants argue, redefine the also pre-existing public trunk line or extended pairs. To reiterate, "[n]othing has been cited to the court to indicate that instances of intermediate points of convergence are limited to [the apartment building] embodiment...." FN36 Furthermore, placement of the claimed "signal interface" at any of those points of convergence also meets the functional component of the court's construction of that term by "prevent[ing] high frequency signals from being transmitted onto the public trunk line and back to the 'telephone exchange.'" FN37

FN35. *Id.* at 6 n. 1.

FN36. *Inline*, 364 F.Supp.2d at 441.

FN37. *Id.* at 436.

Consequently, the court disagrees with defendants' premise that the summary judgment opinion limits the '596 family of patents to covering only a "signal interface" interposed at one of the multiple points of convergence on the local side of the public trunk line. The court has reiterated portions of the common specification supporting its rejection of defendants' argument and finds no conflict with that rejection and the inventors' definition of public trunk line gleaned from the common specification. Because the court finds no clear error of fact in need of correction, nor has the court patently misunderstood the parties' arguments or made an error of apprehension, the joint motion is denied.FN38

FN38. Defendants have not suggested there has been an intervening change in controlling law, that new evidence has become available, or that the court has made a decision outside of the adversarial issues presented to the court by the parties (those several other bases on which a court might grant a motion to reconsider under Fed.R.Civ.P. 59(e) or Delaware Local Rule 7.1.5).

B. THE AOL MOTION

[2] In its reply brief, AOL frames the issue for reconsideration of its motion as: "whether *Inline* presented

sufficient evidence in the summary judgment record to raise a genuine issue of fact as to whether AOL actually provides ADSL service to subscribers via leased lines from a telephone company that utilizes DSLAMs located in remote terminals." FN39 In the Summary Judgment Opinion, the court concluded that a genuine issue of fact was raised by the evidence before the court and, for the reasons explained below, that conclusion remains unchanged.

FN39. D.I. 313 at 1.

[3] As an initial matter, the court has determined not to consider those additional materials submitted by Inline with its briefing on the AOL motion which were not part of the summary judgment record. It is improper to consider such additional materials on a motion for reconsideration.FN40 Furthermore, the court declines Inline's invitation to convert the AOL motion to a new motion for summary judgment in order to properly consider its additional evidence.

FN40. *See Stairmaster Sports/Medical Prods. v. Groupe Procycle, Inc.*, 25 F.Supp.2d 270, 292 (D.Del.1998) ("[W]hile the parties followed Local Rule 7.1.5 by keeping the briefs relatively short, they filed no less than four 'declarations' containing a minimum of 16 exhibits, the majority of which were not part of the summary judgment record. A motion for reargument cannot be used as a vehicle to supplement the record put before the Court prior to its decision on summary judgment. If the rule were otherwise, finality of summary judgment rulings would be nothing more than a never to be attained fond dream.").

AOL argues that the court erroneously considered the evidence presented cumulatively and that the court relied on a single document pertaining directly to AOL, a "Ticket Checklist" produced by AOL, in determining that there is a triable issue of fact. Because AOL contends that the "Ticket Checklist" is unauthenticated hearsay evidence, it argues that there is no competent evidence upon which a reasonable jury could conclude that AOL subscribers are provided ADSL service. AOL, therefore, requests that the court reconsider its summary judgment order and grant AOL's motion for summary judgment of non-infringement.

In support of its argument, AOL emphasizes the court's statement in the Summary Judgment Opinion that:

Inline has presented evidence demonstrating that phone companies are increasingly employing DSLAMs in remote terminals for use by ADSL providers. Inline has also elicited testimony from defendants acknowledging that ADSL service may be provided through a DSLAM at a location other than a central office. The fact that phone companies provide ADSL access via DSLAMs located in remote terminals, and defendants' acknowledgment of that fact, is not sufficient evidence to establish, as a matter of law, whether defendants' subscribers actually utilize ADSL lines from remote terminals.FN41

FN41. Inline, 364 F.Supp.2d at 437-38 (footnotes omitted).

AOL attaches far greater significance to the final sentence of that quotation than was intended by the court. Based on the evidence concerning telephone companies' providing ADSL access via DSLAMs in remote terminals, and related testimony regarding that service, the court determined that such evidence was not sufficient to hold, as a matter of law, that defendants' subscribers actually utilize ADSL lines from remote

terminals. Therefore, the court could not *grant* Inline's motion for summary judgment of infringement based on that evidence. The court did not state that that evidence was insufficient to raise a material question of fact.

Rather than holding that such evidence raised a material question of fact and denying each parties' cross summary judgment at that point in the opinion, the court then considered other evidence presented by Inline to determine if that additional evidence was sufficient to establish, as a matter of law, that defendants' infringe Inline's patents. The court discussed evidence specific to each defendant and determined that, even with this additional evidence, there was still a question of fact regarding whether defendants' subscribers utilize ADSL lines from remote terminals.

AOL argues that the "Ticket Checklist" produced by AOL, and cited by the court, is unauthenticated hearsay which would be inadmissible at trial. It is unnecessary for the court to make a determination of the parties' arguments concerning the propriety of the court's consideration of that document, however, because a question of fact concerning the service AOL provides to its subscribers exists based on evidence, and AOL's acknowledgment, that AOL provides industry standard ADSL via lines leased from phone companies, which phone companies employ remote terminal DSLAMs.FN42

FN42. *See, e.g.*, D.I. 251 at 4 (Defendants' Joint Revised Motion for Summary Judgment ("ADSL is an industry-standard service offered by various telephone companies such as Verizon and BellSouth. Both AOL and EarthLink lease ADSL lines from telephone companies, which AOL and EarthLink then assign to their respective ADSL customers.)); Inline, 364 F.Supp.2d at 437-38. AOL's incorrect assumption that the "Ticket Checklist" was the sole piece of evidence relied upon by the court in determining that a question of fact exists as to AOL's ADSL service is likely the result of a statement by the court following its determination that evidence concerning telephone companies' implementation of DSLAMs in remote terminals for use by ADSL providers was insufficient to hold, as a matter of law, that EarthLink and/or AOL provide such service via remote terminal DSLAMs. That statement was that "Inline has, however, presented other evidence which raises a question of fact as to whether defendants provide ADSL service via a DSLAM located at a remote terminal." *Id.* at 438. Following that sentence is a discussion of certain evidence, including the "Ticket Checklist." That sentence, rather than indicating the basis for the court's determination that a question of fact exists, was meant to contrast evidence "suggest[ing] that defendants' ADSL service is only provided via central-office DSLAMs." *Id.* The court also notes that, although the "Ticket Checklist" is not evidence necessary for the court's determination of the AOL motion, at oral argument, AOL did not raise any objection to the competency of that document which was cited by Inline in its reply brief in support of its motion for partial summary judgment; a brief filed over six months prior to oral argument. *See* D.I. 275 at 19 n. 14 ("Moreover, AOL and EarthLink have both produced documents related to problems and their procedures for dealing with subscribers served through remote terminals." (citing the "Ticket Checklist" with regard to AOL)).

The court determined that, giving each of the non-movants the benefit of all reasonable inferences with regard to the evidence adduced in support of their competing summary judgment motions, "a question of fact remains as to whether defendants provide ADSL service to their subscribers via remote location DSLAMs, defendants' motion is denied with respect to such implementation. For the same reason, Inline's motion for summary judgment with respect to the 'signal interface' claim element is also denied." FN43

FN43. Inline, 364 F.Supp.2d at 448.

The court determined that the evidence presented during the summary judgment stage is sufficient to raise a triable issue of fact. After review of that evidence, the court does not find that it made a clear error of law on this point. Finding no other grounds upon which to grant AOL's motion to reconsider, the court denies that motion.

V. CONCLUSION

For the reasons stated above, defendants' joint motion and the AOL motion are denied.FN44

FN44. The court previously cautioned, in its prior opinion modifying the construction of a the "high frequency" claim term of the patents-in-suit that "[t]his opinion is not intended to be, nor should it be, viewed as an invitation for a disappointed party to seek 'a second bite at the apple' through motions for reargument and/or reconsideration anytime the court determines an issue contrary to the result advocated by a party." *Inline Connection, Corp. v. AOL Time Warner Inc.*, 347 F.Supp.2d 56, 63 n. 39 (D.Del.2004). It seems as if the litigants are coming perilously close to completely consuming the apple of this litigation through motion practice. After over three years since the filing of this suit, it is hoped that the parties, as well as the court, may now proceed to a timely resolution of this matter.

ORDER

For the reasons states in this court's October 18, 2005 Memorandum Opinion, IT IS ORDERED THAT:

Defendant's motion for clarification and reconsidered of the court's April 13, 2005 Order (D.I. 301) is **DENIED**.

America Online Inc.'s motion for reconsideration of the court's April 13, 2005 Order (D.I. 300) is **DENIED**.

D.Del.,2005.

Inline Connection Corp. v. AOL Time Warner Inc.

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