UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WI-LAN INC.	§	
	§	
v.	§	CIVIL ACTION NO. 2:07-CV-473[TJW]
	§	
ACER, INC., *et al.*	§	
	§	**CONSOLIDATED WITH:**
	§	
WI-LAN INC.	§	
	§	CIVIL ACTION NO. 2:07-CV-474[TJW]
v.	§	
	§	
WESTELL TECHNOLOGIES, INC., *et al.*	§	JURY TRIAL REQUESTED

	§	
WI-LAN INC.	§	
	§	
v.	§	CIVIL ACTION NO. 2:08-CV-247[[TJW]
	§	
RESEARCH IN MOTION	§	
CORPORATION, *et al.*	§	JURY TRIAL REQUESTED

Wi-LAN INC.'S REPLY BRIEF IN RESPONSE TO
DEFENDANT LG ELECTRONICS MOBILECOMM U.S.A. INC.'S
PATENT RULE 4-5(b) RESPONSIVE CLAIM CONSTRUCTION BRIEF

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I. INTRODUCTION

Pursuant to P. R. 4-5(c), Plaintiff Wi-LAN Inc. ("Wi-LAN") respectfully submits this Reply Brief to Defendant LG Electronics Mobilecomm U.S.A. Inc.'s ("LGEMU") Responsive Claim Construction Brief for U.S. Patent No. RE37,802 ("the '802 patent"). (Dkt. No. 114 ("LG Br.").)

In its brief, LGEMU proposes constructions for the terms "spreading," "invertible randomized spreading," and "first computing means" that are wholly inconsistent with the intrinsic record and would exclude the preferred embodiments disclosed in the '802 patent (including the Fourier transform used in the disclosed OFDM spread spectrum embodiment). Furthermore, LGEMU's constructions are inconsistent with the proposed constructions presented by the other defendants and the expert testimony from both Wi-LAN's and Defendants' experts. In fact, LGEMU admits that it changes its proposed construction for the "first computing means" from its construction identified in the Joint Claim Construction Statement. (LG Br. at 13-14.)

II. SPREADING

The term "spreading" refers to modulating data symbols by codes of larger bandwidth. LGEMU argues that Wi-LAN's construction of "spreading" is inconsistent with the ordinary meaning.[1] (LG Br. at 5-6.) Contrary to LGEMU's argument, Wi-LAN's construction is not inconsistent with the ordinary meaning of spreading, but, rather, extends the ordinary meaning of spreading to include the use of Fourier transforms (e.g. the OFDM embodiment) disclosed and claimed by the '802 patent. (Gitlin Tr. 141:3-141:7; 136:21-143:13.[2]) Consistent with Wi-LAN's construction, the other defendants agree that "'spreading' refers to spreading an individual data symbol over an individual code," as opposed to reducing the effective bandwidth

[1] LGEMU improperly takes Dr. Gilin's statement in his declaration out of context. (LG Br. at 5.) Dr. Gitlin's statement is in reference to the extension of the ordinary meaning of spreading to include within its scope the operations of a Fourier transform (for the OFDM embodiment of the '802 patent) in which individual sinusoidal waves or harmonics (i.e., the highway lanes referred to in Wi-LAN's Opening Claim Construction Brief) are represented in the transform by codes of larger bandwidth and used to modulate individual data symbols for transmission. (*Gitlin Decl.*, ¶ 22; Gitlin Tr. 136:21-143:13.)

[2] "Gitlin Tr. ___" refers to the cited pages of the February 8, 2010 Deposition of Dr. Richard Gitlin attached hereto as Exhibit W.

of the system.[3] (Defendants' Opp., Dkt. No. 115 at 39; *Acampora Decl.*, ¶ 48.) Furthermore, spreading codes are known in the art as "codes of larger bandwidth." (Gitlin Tr. 162:14-165:9.) Indeed, Defendants' expert agrees that the spreading codes have a larger bandwidth than the input data. (Proakis Tr. 93:22-94:19.[4]) (*See also* Ex. Y, Roger L. Peterson, et. al., *Introduction to Spread Spectrum Communications* 52 (1995) ("Bandwidth spreading by direct modulation of a data-modulated carrier by a wide-band spreading signal or code is called *direct-sequence* (DS) *spread spectrum*.") (underlining added).)

LGEMU further argues that the '802 patent does not refer to a Fourier transform as a spreading transform. (LG Br. at 8.) This is incorrect. The first computing means in Figure 4 can include a Fourier transform as the spreading transform. (Ex. M, Claims 4-6; *Gitlin Decl.*, ¶ 29; Gitlin Tr. 124:22-125:20; 194:24-195:12; Proakis Tr. 19:6-10.) As the specification and claims make clear, one embodiment (an OFDM embodiment) of the patent using Figure 4 that performs "invertible randomized spreading" is where "the first transform is a Fourier transform and it is followed by a randomizing transform." The Fourier transform in this embodiment is expressly disclosed as performing the function of "spreading." (Ex. M, 5:6-12 ("OFDM Spread Spectrum"); Claims 4-6 ("the first computing means comprises…a transformer for operating on each set of N data symbols to generate modulated data symbols…corresponding to spreading of each data symbol over a separate code…in which the transformer effectively applies a first transform…in which the first transform is a Fourier transform and it is followed by a randomizing transform"); *see also* Claim 26; Ex. Z, Original Claims 2-3 ("the computing means carries out a first invertible spreading transformation…the first transformation is selected from the group comprising a Fourier transform, a Walsh-Hadamard transform…"); Ex. A, 1:2-5; 2:47-50; Gitlin Tr. 197:24-200:12.) In this embodiment, it is the Fourier transform that is used for

[3] Even Defendants' expert agrees that spreading does not require a reduction in the effective bandwidth as LGEMU proposes. *See* Proakis Tr. 76:22-77:14 (testifying that there can be spreading even when the chip rates of the input data and the spreading code are equal (i.e. where there is no reduction in the effective bandwidth)).

[4] "Proakis Tr. ___" refers to the cited pages of the February 19, 2010 Deposition of Dr. John G. Proakis attached hereto as Exhibit X.

spreading also because the randomizing transform does not spread. (*Gitlin Decl.*, ¶ 23; Gitlin Tr. 154:8-157:6; 196:9-12; 209:25-210:7; Proakis Tr. 29:19-25; 40:25-41:12.)[5]

III. INVERTIBLE RANDOMIZED SPREADING

An "invertible randomized spreading" refers to spreading and applying complex constants chosen randomly, in a manner that is invertible. LGEMU argues that "invertible randomized spreading" requires only the use of the randomizer transform illustrated in Figure 8 of the patent. (LG Br. at 10.) However, the parties' experts are in agreement that Figure 8 does not result in spreading. (*Gitlin Decl.*, ¶ 23; Gitlin Tr. 154:8-157:6; 196:9-12; 209:25-210:7; Proakis Tr. 29:19-25; 40:25-41:12.) Accordingly, LGEMU's proposed construction fails because one cannot perform spreading using the randomizer transform in the patent. (*Id.*) LGEMU further argues that Wi-LAN's construction is inconsistent with Dr. Gitlin's testimony that a randomizer transform, using multiplication by complex numbers, is always used in Figure 3 to perform "invertible randomized spreading." (LG Br. at 11.) However, Dr. Gitlin's testimony confirms that Wi-LAN's construction is correct because it clarifies that randomizing in the patent would be understood by one of ordinary skill in the art as "applying complex constants chosen randomly" as the patent describes the operation of the randomizer transform in Figure 8. (Ex. M, 3:12-14.) Furthermore, Dr. Gitlin has testified that the "Randomizer Transform" shown in Figure 8 is not the only way known to one of ordinary skill in the art to apply complex constants chosen randomly. (*Gitlin Decl.*, ¶ 23.) Indeed, Figure 1, which LGEMU agrees is corresponding structure for the first computing means, does not show the use of the "Randomizer Transform." (*Id.*) Rather, the specification describes applying DSSS codes that spread and apply random constants to the individual data symbols in a manner that is invertible. (Ex. M,

[5] Indeed, LGEMU agrees that Fourier Transforms may be used in the code generator of Figure 3. (LG Br. at 8.) However, LGEMU argues that the Fourier transform does not result in spreading. (*Id.*) LGEMU fails to appreciate that when a Fourier transform is the only transform used in connection with Figure 3, the spreading codes that are generated are the columns of the Fourier transform, which codes represent the individual orthogonal sinusoidal signals or harmonics used in the OFDM embodiment of the '802 patent. (Gitlin Tr. 113:10-114:19; 136:21-143:13; Proakis Tr. 22:11-25.) Thus, contrary to LGEMU's argument, the spreading codes can be derived from a Fourier transform. (*Gitlin Decl.*, ¶ 25.)

4:2-12.) Indeed, "[a] series of transforms are shown" only in the Figure 4 embodiment of the computing means 12. (Ex. M, 4:42-43.)

In contrast, Wi-LAN's construction is consistent with both the Figure 1 and Figure 4 embodiments of the computing means. In Figure 1, DSSS codes are applied to both spread the data symbols and apply complex constants chosen randomly (i.e. DSSS codes perform both spreading and randomization). (Gitlin Tr. 76:25-77:6.) In Figure 4, a spreading transform is used and a randomizing transform is used which applies complex constants chosen randomly. (Gitlin Tr. 154:15-19; 155:22-156:7.)

IV. FIRST COMPUTING MEANS

LGEMU argues that Figure 3 is required to perform the function of "operating on the plural sets of N data symbols to produce modulated data symbols corresponding to an invertible randomized spreading of the first stream of data symbols." (LG Br. at 12.) However, Figure 3 "illustrates the code generator of the MC codes." (Ex. M, 4:29.) The code generator is not clearly linked structure for the "first computing means," and including such structure would serve to read an additional functional limitation into the computing means (i.e., "generating multiple codes") that is not present. Indeed, the other defendants expressly agree with Wi-LAN. (Defendants' Opp. at 37 ("[T]he specification clearly links only the computing means 12 in Figures 1 and 4 to the claimed function, not the code generator in Figure 3.").) It is the structure that actually performs the recited function in the claim that is corresponding structure. *See Asyst Techs., Inc. v. Empak, Inc.*, 268 F.3d 1364, 1371 (Fed. Cir. 2001) ("The corresponding structure to a function set forth in a means-plus-function limitation must actually perform the recited function, not merely enable the pertinent structure to operate as intended…."). Indeed, claim 3 clarifies that the function of generating the multiple codes is a separate function from the "operating" function of the "first computing means." (Ex. M, Claim 3 ("[T]he direct sequence spread spectrum codes are generated by operation of a non-trivial transform on a sequence of input signals.").) Contrary to LG's argument, Figure 1 alone can produce an "invertible

randomized spreading" when the codes used in Figure 1 are invertible randomized spreading codes. (Gitlin Tr. 76:25-77:6.)

LGEMU also changes its proposed construction for the "first computing means" and no longer agrees with the other parties that Figure 4 is corresponding structure. (LG Br. 13-14.) In short, LGEMU proposes a construction of "spreading" such that the claims would not cover the preferred embodiments disclosed in the patent. This is improper. *See MBO Labs., Inc. v. Becton, Dickinson & Co.*, 474 F.3d 1323, 1333 (Fed. Cir. 2007) ("[A] claim interpretation that excludes a preferred embodiment from the scope of the claim is rarely, if ever, correct.").

Contrary to LGEMU's argument, Dr. Gitlin testified that Figure 4 performs the recited function of "spreading." (*Gitlin Decl.*, ¶ 22; Gitlin Tr. 150:1-18; 154:8-157:6.) LGEMU's argument mistakenly focuses on the overall effect of the invention, a position with which even the other defendants disagree.[6] Furthermore, LGEMU improperly argues that Wi-LAN cannot rely on the prosecution history as evidence that Figure 4 is clearly linked corresponding structure. *See Default Proof Credit Card Sys., Inc. v. Home Depot U.S.A., Inc.*, 412 F.3d 1291, 1298 (Fed. Cir. 2005) ("A structure disclosed in the specification qualifies as 'corresponding' structure only if the specification or prosecution history clearly links or associates that structure to the function recited in the claim.") (*emphasis added*).[7]

A. The '802 Patent Discloses an Algorithm for Invertible Randomized Spreading

LGEMU argues that "the '802 patent's specification must disclose an algorithm for the claim's recited function." (LG Br. at 19.) This is incorrect. A patentee is obligated to disclose an algorithm only when the sole disclosed structure is a general purpose computer. *See Aristocrat Techs. Austl. PTY Ltd. v. Int'l Game Tech.*, 521 F.3d 1328, 1334 (Fed. Cir. 2008)

[6] *See* Defendants' Opp. at 39 ("Wi-LAN's contention that 'bandwidth need not be reduced' by the '802 patent's system focuses on the overall effect of the invention, not the individual spreading which occurs to each data symbol. The claims confirm that 'spreading' refers to spreading an individual data symbol over an individual code, just as in the prior art."); *see also Acampora Decl.*, ¶ 48.

[7] Moreover, claims 4 and 20 confirm that the "first computing means" can comprise "a transformer" as illustrated by element 12 in Figure 4. In contrast, there is no "transformer" in Figure 1.

(holding that an algorithm must be disclosed where the specification "goes no farther than saying that the claimed functions are performed by a general purpose computer"); *Blackboard, Inc. v. Desire2Learn, Inc.*, 574 F.3d 1371, 1383 (Fed. Cir. 2009) (holding that an algorithm must be disclosed where the patentee argued that the corresponding structure was "any computer-related device or program that performs the function"); *Net Moneyin, Inc. v. Verisign, Inc.*, 545 F.3d 1359, 1366-1367 (Fed. Cir. 2008) (holding that an algorithm must be disclosed where the identified corresponding structure was a "general purpose bank computer"); *Finisar Corp. v. DirecTV Group, Inc.*, 523 F.3d 1323, 1340-1341 (Fed. Cir. 2008) (holding that an algorithm must be disclosed where the specification simply recited "software"). Because the parties in this case agree that the '802 patent discloses alternative corresponding structures (Figures 1 and 4) other than a general purpose computer, the '802 patent need not disclose an algorithm.

Furthermore, the '802 patent does disclose an algorithm to a person of ordinary skill in the art.[8] (*Gitlin Decl.* ¶ 19.) Wi-LAN's expert declaration in support of its Opening Claim Construction Brief explains how Figures 1 and 4 of the '802 patent disclose an algorithm for the "first computing means" claim terms. (*Id.*) Additionally, Defendants' expert agrees that Figures 1 and 4 disclose algorithms. (Proakis Tr. 41:19-44:18.)

1. The '802 Patent Discloses an Algorithm for Applying Complex Constants Chosen Randomly

LGEMU argues that the patent provides no algorithm for carrying out the recited function of producing "invertible randomized spreading" because it fails to disclose how to generate the complex constants used for randomizing. (LG Br. at 19.) However, LGEMU's argument is a red herring. The '802 patent discloses an algorithm for producing an "invertible randomized spreading" using complex constants chosen randomly and even provides a "Randomizer Transform" illustrating an algorithm for applying these complex constants. (Ex. M, 3:12-14;

[8] *See AllVoice Computing PLC v. Nuance Communs., Inc.*, 504 F.3d 1236, 1245 (Fed. Cir. 2007) ("[A]lgorithms in the specification need only disclose adequate defining structure to render the bounds of the claim understandable to one of ordinary skill in the art."); *Intel Corp. v. VIA Techs.*, 319 F.3d 1357, 1367 (Fed. Cir. 2003) (knowledge of a person of ordinary skill in the art can be used to make clear how to implement a disclosed algorithm).

Figure 8.) Figure 8 of the '802 patent is described as "a schematic showing the Randomizer Transform (RT) where a (1) a (2) . . . a (N) are complex constants chosen randomly." (Ex. M, 3:12-14.) As described above with respect to LGEMU's argument that Figure 3 is corresponding structure, generating these complex constants is not even part of the function required to produce an "invertible randomized spreading," rendering LGEMU's argument irrelevant. Moreover, as Wi-LAN's expert testified, "[t]he complex constants chosen in figure 8 could be derived from a PN sequence." (Gitlin Tr. 161:8-13.) Indeed, methods to generate random complex constants are well known in the art.[9] (*Gitlin Decl.* ¶ 25.) In short, LGEMU's argument is that even though the patent discloses the algorithm to produce the "invertible randomized spreading" using complex constants chosen randomly, the patent does not provide a source code level disclosure of how these complex constants are generated by the transceiver. However, LGEMU's argument is contrary to the controlling case law for means-plus-function terms which holds that "algorithms in the specification need only disclose adequate defining structure to render the bounds of the claim understandable to one of ordinary skill in the art." *AllVoice*, 504 F.3d at 1245. Contrary to LGEMU's argument, the "key" to the invention is not how complex constants are generated, which is well known in the art, but rather the application of the complex constants chosen randomly for use in "invertible randomized spreading."

2. The '802 Patent Discloses an Algorithm for Selecting Transforms to Produce Invertible Randomized Spreading[10]

LGEMU argues that the '802 patent provides a "grab-bag" of transforms without providing any guidance as to which ones will result in "invertible randomized spreading." (LG Br. at 22.) In doing so, LGEMU ignores the plain language of the claim which requires that the transforms provide "spreading" and "randomization," and that the transforms be "invertible." In

[9] *See* Ex. AA ("It is well known in the art that a randomizer transform, as disclosed in the specification at page 4 and in Fig. 8, actually does not generate a perfectly randomized signal, which is impossible, but a near approximation to it, in other words a pseudo-random signal.").

[10] Contrary to LGEMU's argument (LG Br. at 21), Dr. Gitlin testified that "invertible randomized spreading" can be achieved through the use of the structures for the computing means in either Figure 1 or Figure 4. (Gitlin Tr. 76:25-77:6; 154:15-19; 155:22-156:7.)

view of the plain language of the recited function, it is clear to one of ordinary skill in the art that a spreading operation must modulate the data symbols by codes of larger bandwidth, a randomizer operation must apply complex constants chosen randomly, and the result must be invertible. (Gitlin Tr. 76:25-77:6.) First, as Dr. Gitlin testified, and as explained above (*supra* at 2-3), examples of spreading transforms provided in the patent that use codes of larger bandwidth are the Fourier and Walsh transforms. (Gitlin Tr. 206:21-207:14.) Second, as Dr. Gitlin testified, an example of a transform that randomizes in the context of the '802 patent is a randomizer transform. (Gitlin Tr. 197:2-4.) Finally, the transforms must be invertible as made clear by the claim language ("invertible randomized spreading") and the specification. (Ex. M, 4:29-34; 5:6-7.) Accordingly, LGEMU's argument that the patent never discusses the protocol for producing invertible randomized spreading is baseless.

LGEMU's next unfounded argument is that the '802 patent does not provide guidance on how to select the order of the transforms. (LG Br. at 22-23.) LGEMU's argument fails because the order of the transforms is irrelevant, so long as the order is known and the inverse transforms can be applied by the receiver. (Proakis Tr. 27:4-8.)

B. LGEMU Should be Precluded from Arguing Invalidity Under 35 U.S.C. §112

On October 16, 2009, Defendants in the above captioned action (including LGEMU) served their invalidity contentions. In Section (D)(2), Defendants stated that:

> The '802 patent's specification fails to disclose support for [the first computing means] as applied by Wi-LAN's assertions of infringement against the accused products. Claims 1, 17, 23, 33 and any claims dependent thereon are invalid for failing to comply with the enablement and/or written description requirements, or to particularly point out and distinctly claim the subject matter regarded as an invention as applied by Wi-LAN's assertions of infringement against the accused products.

(Ex. AB.) However, Defendants have failed to provide any more specificity regarding the basis for their proposed invalidity arguments with respect to the "first computing means." (*See* Ex. AC, Jan. 7, 2010 letter from J. Taylor to J. Petrsoric failing to provide basis for invalidity arguments.)

Defendants failed to provide any basis for their invalidity arguments with respect to the "first computing means" in their invalidity contentions. Instead, Defendants merely provided a stock paragraph alleging that numerous claim terms in the '802 patent are "invalid for failing to comply with the enablement and/or written description requirements, or to particularly point out and distinctly claim the subject matter regarded as an invention as applied by Wi-LAN's assertions of infringement against the accused products." (Ex. AB.) Defendants' stock paragraph has failed to put Wi-LAN on notice as to Defendants' invalidity contentions and has resulted in prejudice to Wi-LAN. Moreover, Defendants' proposed claim constructions for the "first computing means" did not allege that the terms were invalid or that the specification failed to disclose corresponding structure. LGEMU should not now be heard to argue that the "first computing means" is invalid under 35 U.S.C. §112 when it has not previously put Wi-LAN on notice of this contention. *See Saffran v. Johnson & Johnson*, No. 2:07-CV-0451, 2009 U.S. Dist. LEXIS 19615, at *3 (E.D. Tex. Feb. 24, 2009) ("The patent rules are designed to require parties to crystallize their theories of the case early in the litigation and to adhere to those theories once they have been disclosed."). LGEMU should also not be allowed to unveil its invalidity contentions for the first time in its claim construction brief when it has also refused to provide a substantive response to Wi-LAN's interrogatory regarding the bases for LGEMU's contention that the '802 patent is invalid for failure to comply with 35 U.S.C. §112.[11]

V. CONCLUSION

As explained above, LGEMU's constructions of "spreading," "invertible randomized spreading," and "first computing means" are contrary to the teachings of the patent, would exclude preferred embodiments, and are inconsistent with the other defendants' positions. In contrast, Wi-LAN's constructions are true to the intrinsic record and supported by both Wi-LAN's and the Defendants' expert testimony. Finally, LGEMU's argument that the "first computing means" is indefinite for failing to disclose an algorithm fails because the parties agree

[11] LGEMU answered Wi-LAN's interrogatory requesting in detail all factual and legal bases for LGEMU's contentions that the claims of the '802 patent are invalid for failure to comply with the requirements of § 112 merely by incorporating its invalidity contentions which provide no details. (Ex. AD.)

that the patent discloses alternative corresponding structure other than a general purpose computing device. Accordingly, Wi-LAN respectfully submits that its constructions should be adopted by the Court.

DATED: February 25, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was electronically filed in compliance with Local Rule 5.1. As such, this notice was served on all counsel who are deemed to have consented to electronic service on February 25, 2010.

/s/ Sam Baxter
Sam Baxter