

NON-CONFIDENTIAL

2013-1084

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CENTILLION DATA SYSTEMS, LLC,

Plaintiff-Appellant,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC.,
QWEST CORPORATION,
and QWEST COMMUNICATIONS CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Indiana in consolidated case nos.
04-CV-0073 and 04-CV-2076, Senior Judge Larry J. McKinney

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May 20, 2013

CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant Centillion Data Systems, LLC, certifies the following (use “None” if applicable):

1. The full name of every party or amicus represented by me is:

Centillion Data Systems, LLC

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

CTI Group (Holdings), Inc. is the parent corporation of Centillion Data Systems, LLC, and owns 10 percent or more of its membership interest.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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CONFIDENTIAL MATERIAL OMITTED

The material omitted from page 7 discusses testimony contained in a deposition transcript designated as “Confidential – Attorneys’ Eyes Only” and a chart designated as “Contains Attorney Confidential Information”; the material omitted from the bottom of page 7 through the top of page 8 discusses a document describing technical or proprietary information designated as “ATTORNEYS’ EYES ONLY”; the material omitted from page 8, line 3, characterizes technical or proprietary information contained in a declaration filed under seal; the material omitted from page 8, lines 10-11, discusses testimony contained in a deposition transcript designated as “Confidential – Attorneys’ Eyes Only”; the material omitted from page 8, lines 13-14, discusses material contained in a declaration filed under seal; the material omitted on pages 8 and 9 and in footnote 1 discusses testimony contained in a deposition transcript designated as “Confidential – Attorneys’ Eyes Only” and a Qwest document designated as “Attorney Confidential”; the material omitted on page 11 quotes material contained in a brief filed under seal; the material omitted from page 14 quotes material contained in a brief filed under seal; the material omitted from page 17 cites and quotes a declaration discussing technical or proprietary information filed under seal; the material omitted from footnote 6, on pages 18-19, discusses testimony contained in a deposition transcript designated as “Confidential – Attorneys’ Eyes Only” and in a document discussing technical or proprietary information designated as “Contains Attorney Confidential Information”; the material omitted from the text on page 19 discusses technical or proprietary information contained in a declaration filed under seal; the material omitted from page 20 discusses testimony contained in a deposition transcript designated as “Confidential – Attorneys’ Eyes Only”.

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I. INTRODUCTION

For the reasons set forth in Centillion’s opening brief, the decision of the district court granting summary judgment of non-infringement by both the eBC and Logic systems is erroneous and should be reversed on both procedural and substantive grounds. Qwest’s appeal brief fails to provide this Court with any reasonable basis for affirming the judgment. Instead, Qwest’s arguments ignore the district court’s claim construction, mischaracterize the record, and contravene basic principles of patent law.

Qwest’s argument concerning the eBC system turns on its contention that the district court construed the language “organizing said summary reports into a format for storage, manipulation and display” to include a “requirement that the summary reports be database tables.” (Defs.-Appellees’ Br. 29, 48; “Q.Br.”) That contention is flatly contradicted by the record. In its Claim Construction Order the district court determined that the “generating” and “organizing” functions of the data processing means should be given their plain meanings, and that “[t]o the extent any clarification of those terms is necessary, *the court adopts Centillion’s construction for those terms* because they best comport with the plain meaning of those terms in the claims and the specification.” (A441; emphasis added.) Centillion’s construction of the “organizing” term was set forth in its Memorandum on Claim Construction as follows:

arranging analyzed or reorganized data [i.e., “summary reports”] into a format readable by software on a personal computer processing means.

Claim Constr. Mem. 32 (A5276). In other words, this claim language simply requires the data processing means to organize the summary reports into a PC-compatible format. There is no requirement that the summary reports be database tables.

Throughout the course of this litigation, including two rounds of summary judgment briefing on infringement issues, Centillion justifiably understood that this remained the meaning of the “organizing” language of the claims. Qwest’s contention, therefore, that Centillion had “proper notice” (Q.Br.44) that the district court would consider granting, *sua sponte*, summary judgment of non-infringement by the eBC system on an application of the “organizing” language at odds with its own claim construction is preposterous.

Nor is it any more plausible for Qwest to contend that the “create database tables” feature of the data processing means – one of the four capabilities of the computer program identified by the district court as *structure* corresponding to the claimed functions – should be combined with one of those *functions* to further limit the “format” of the summary reports to be a “database table.” Such conflating of the structural and function elements of a means-plus-function clause is contrary to law. Even though the computer program identified by the court as corresponding

structure pursuant to 35 U.S.C. § 112 ¶ 6, must be capable of performing various functions, including, *inter alia*, “creat[ing] database tables,” the only limitation on the “format” into which the data is organized by the data processing means is that it be “readable by software on a [PC]” (i.e., PC-compatible). It remains undisputed that Qwest’s eBC .TXT files are PC-compatible and thus satisfy this limitation.

Qwest, however, has ignored that the district court explicitly defined the “organizing” language to mean only that the “format” is “readable by software on a [PC],” and has contrived an argument in support of summary judgment of non-infringement predicated on a thoroughly confused understanding of the claim language coupled with an alleged admission by Centillion’s expert, Dr. Jack Grimes. According to Qwest, this so-called admission follows from Dr. Grimes’ statement that “the .TXT file is technically data for a database table, rather than a table per se.” (Q.Br.54.) Qwest has, however, taken Dr. Grimes’ statement completely out of context and misleadingly omitted the most relevant portion of his declaration, namely, his explanation that persons of ordinary skill in the art would call the .TXT file “a database table.” (A4375.)

Qwest’s arguments regarding the judgment of non-infringement by the Logic system are also flawed. As explained in Centillion’s opening brief, that judgment turned on the district court’s determination that PACs did not satisfy the “as specified by the user” limitation of the claims. Qwest’s arguments effectively

confirm the principal point asserted in Centillion’s brief, namely, that there is a genuine dispute of material fact as to whether the inclusion of PACs in customer billing data “selects, or makes specific, the character of” the data. Qwest merely repeats its factual arguments pursuant to which the district court decided genuinely disputed fact issues in violation of Rule 56.

In view of the foregoing, as well as the reasons set forth in Centillion’s opening brief, the judgment of non-infringement and the award of costs should be vacated and reversed, and the case remanded to the district court for a trial on the merits.

II. REPLY STATEMENT OF FACTS

A. The Patent in Suit

Qwest’s argument concerning the eBC system is predicated on its contention that the summary reports be organized into “database tables.” The specification of the ’270 Patent, however, discloses only that the summary reports are organized into a “table” *format* – not into “database tables” per se. It discloses an “editing and table accumulation program that performs the bulk of the mainframe processing work.” (U.S. Patent No. 5,287,270 col.7 ll.32-33, filed Feb. 15, 1994, A57.) It goes on to describe a number of such “tables” – referred to as “summary reports and graphs” (*id.* 1.51, A57) – including the following:

Number of calls, length, and total call cost for each accounting or project code;

Number of calls, length, and total cost for day, evening and night calls for each carrier;

Number of calls, length, and total cost of calls of each call type;

Number of calls, length, and total cost for day, evening, and night calls to each terminating area code;

....

After further describing how these “tables” are preprocessed by the editing and table accumulation program, the specification states:

The ultimate target of the carrier-supplied billing information is a *database located on the user’s personal computer*, which database is organized, at the logical level, into a number of tables. To permit subsequent processing steps to identify the information contained in records, each record which is outputted by the editing and table accumulation program has a record-type identifier, specifying the particular *database table* to which the record belongs.

(*Id.* col.8 ll.25-33) (emphasis added). The specification later describes how the “tables” of data generated by the editing and table accumulation program are ultimately loaded into “target database table[s]” (*id.* col.30 l.18; A68) on the user’s personal computer.

The only “database table[s]” specifically identified as such in the specification are those that populate the “database located on the user’s personal computer,” as described above. The specification does not describe any databases at the back end of the system (i.e., in the mainframe processing segment), and the editing and table accumulation program does not function to create “database tables” per se. Nevertheless, because they contain data intended to populate

a destination database, persons of ordinary skill in the art would call “tables” such as those generated by the editing and table accumulation program “database tables” (A4753.) The district court’s usage of the term in that manner when it identified the corresponding structure of the data processing means as “a computer that is programmed ... to create database tables ...” is consistent with that understanding.

B. The Court’s Claim Construction

The parties agree that the district court construed the “data processing means” limitation as a means-plus-function clause pursuant to 35 U.S.C. § 112 ¶ 6. After first identifying the claimed functions as: (1) “generating preprocessed summary reports,” and (2) “organizing said summary reports into a format for storage, manipulation and display on a computer data processing means,” the district court then identified the corresponding structure as “a computer that is programmed to segregate data by customer and record type, to edit and accumulate data to produce reports, to create database tables and additional records for storage, and to convert the data into a PC-compatible format and its equivalents.” (A435-41.)

The court concluded that its discussion of the algorithm for performing the generating and organizing functions “obviates the need to interpret the generating and organizing functions any further.” (A441.) It rejected Defendants’ further construction of these terms as “not comport[ing] with the plain meaning of the

terms in the claims or in the specification,” and held “[t]o the extent any clarification of those terms is necessary, *the Court adopts Centillion’s construction* of those terms because they best comport with the plain meaning of the terms in the claims and the specification.” *Id.* (emphasis added). Thus, the meaning of the “organizing” term, as set forth in Centillion’s memorandum on claim construction, is as follows:

arranging analyzed or reorganized data [i.e., “summary reports”] into a format readable by software on a personal computer processing means.

Claim Constr. Mem. 32. (A5276.)

C. Qwest’s .TXT and .FMT Files

The district court held that the “.TXT files, even apart from the .FMT files, are sufficient to constitute summary reports as that term has been construed, as they include ‘a collection of ... reorganized data.’” Order Granting Qwest’s Mot. for Summ. J. 21, Oct. 15, 2012, ECF No. 929 (“Order”). (A5051.) It is undisputed that the [

] (A1428-29; A3655.)

Moreover, the [

] *Id.* [

] (A4036.) As explained by Dr. Grimes in his declaration, persons of ordinary skill in the art would call the [] “database tables” because they contain data intended to populate a table in a destination database. (A4752-53.)

D. Project Account Codes (PACs)

In order to activate the PAC functionality in the Qwest systems, a customer must contact Qwest at the time it subscribes to the service. As stated in Qwest’s User Manuals: “Account codes are present in your call data records only if you have set up account codes when you signed up for your service with Qwest.”

(A2266.) Once a customer signs up for PACs, [

]. (A1443.)

Unlike CDR fields in which telephone numbers and other data inherent to a call are captured, [

]. (A2933.)

E. On-Demand

“On-Demand allows a customer to submit a request to receive billing data for a particular previous billing cycle ... In doing this the customer ‘selects ... the character of’ the information being provided, specifying that the information cover only a particular time period.” (Order 18, A5048.) In addition to specifying the time period, [

].¹ (A1620; *see* A4249-50.) In response to such a request, the eBCBO will generate a report containing data files for that Group. The “character” of the information is thus made specific by both time period and Group.

III. ARGUMENT

A. The District Court Erred in Granting Summary Judgment of Non-Infringement by the eBC System

1. The Sua Sponte Grant of Summary Judgment was Without Notice and an Opportunity to be Heard

Qwest tacitly concedes that its motion for summary judgment of non-infringement did not assert that the eBC system fails to “organiz[e] the summary reports into a format for ... display.” It argues, however, that Centillion had sufficient notice that the court might grant summary judgment on this basis merely by having filed its own motion for partial summary judgment of infringement, even though the parties did not brief this issue and the court’s ruling was at odds with the Claim Construction Order. (Q.Br.44-46.) Qwest is incorrect.

¹ The eBC system allows customers to have their call data records [

]
(A1441; A1887-88; A4250.) Customers specify how they wish to have their call records organized, and the composition of their Groups, at the time they subscribe to the service with Qwest. [

] is generated by the eBCBO and sent to the customer for each specified Group. (A1441.)

Although a district court may grant summary judgment on grounds not raised by one of the parties, it may only do so after giving the parties notice and an opportunity to respond. Fed. R. Civ. P. 56(f)(2). Accordingly, a party is not on notice that summary judgment may be entered against it on a ground not asserted in an adverse party's motion for summary judgment. Moreover, a party's decision to move for summary judgment on a particular ground does not put the movant on notice that the court might grant summary judgment on some other ground. *R.J. Corman Derailment Servs., L.L.C. v. Int'l Union, Local Union 150*, 335 F.3d 643, 650 (7th Cir. 2003). The Seventh Circuit observed "[t]his is the precise reason why our court has repeatedly explained that it is appropriate to grant summary judgment *sua sponte* only when it is clear that neither side will be disadvantaged or unfairly surprised by the move." *Id.* (citing *Jones v. Union Pac. R.R. Co.*, 302 F.3d 735, 740 (7th Cir. 2002); *Goldstein v. Fidelity & Guar. Ins. Underwriters, Inc.*, 86 F.3d 749, 751 (7th Cir. 1996)) (emphasis added). Noting that it had "recently expressed [its] disfavor" of *sua sponte* grants of summary judgment, the court further noted that "*sua sponte* awards of summary judgment 'tend to defeat the very purpose they are designed to serve – judicial efficiency.'" *Id.* (quoting *S. Ill. Riverboat Casino Cruises, Inc. v. Triangle Insulation & Sheet Metal Co.*, 302 F.3d 667, 668 (7th Cir. 2002)).

The remaining cases cited by Qwest fail to support its position. (Q.Br.44-45.) Significantly, in those cases, unlike the instant case, the parties clearly briefed and argued the very issues decided by the district court.

2. **Qwest's .TXT Files are "Organiz[ed] into a Format for Storage, Manipulation and Display on a [PC]"**

In holding that Centillion had not brought forth evidence that the data processing means organizes the summary reports into a format for display (Order 22, A5052), the court applied the claim language in a manner contrary to its own claim construction. Indeed, the Claim Construction Order expressly rejected the Defendants' proposal to limit the construction of the "organizing" language beyond its plain meaning and, insofar as any clarification was required, *adopted Centillion's construction*, namely, "arranging analyzed or reorganized data into a format readable by software on a personal computer processing means." (A441, citing Claim Constr. Mem. 32, A5276.)

Having so defined the "organizing" function of the claims, it was error for the district court to require evidence of any additional functionality for displaying the .TXT files beyond that necessary to place them into a format in which they are "readable by software on a [PC]." *See JWV Enters., Inc. v. Interact Accessories, Inc.*, 424 F.3d 1324, 1331 (Fed. Cir. 2005) ("[A] court may not construe a means-plus-function limitation 'by adopting a function different from that explicitly recited in the claim.'" (quoting *Micro Chem., Inc. v. Great Plains Chem. Co.*,

194 F.3d 1250, 1258 (Fed. Cir. 1999)); *see also* *Generation II Orthotics, Inc. v. Med. Tech., Inc.*, 263 F.3d 1356, 1364-65 (Fed. Cir. 2001) (“When construing the functional statement in a means-plus-function limitation, we must take great care not to impermissibly limit the function by adopting a function different from that explicitly recited in the claim”).

Centillion presented sufficient evidence from which a reasonable jury could conclude that Qwest’s PC-compatible ASCII text files are indeed “readable by software on a [PC].” (A1428-29; A2100-01; A2110-22.) Consequently, the district court erred by unduly focusing on the “display” language of the claim and requiring evidence of additional “formatting” functionality it apparently believed was required for the eBCBO to “perform[] the steps necessary to format the .TXT file for display.” (Order 22, A5052.)

Contrary to Qwest’s assertion (Q.Br.48-50), Centillion does not “challenge” the district court’s claim construction. Nor did Centillion ever “acknowledge” any requirement that the format of the summary reports be “database tables.” The cropped quotation from Centillion’s summary judgment brief – repeated several times by Qwest in its appeal brief – is highly misleading. As seen from the following, Qwest stitched together pieces of two separate and distinct segments from Centillion’s summary judgment brief to convey the false impression that Centillion’s argument required the “format” to be a “database table”:

[t]he call_detail.txt file, together with its corresponding call detail.fmt file is a “database table” . . . Thus, these “summary reports” . . . are organized into a “format for storage, manipulation and display on a personal computer.””

(Q.Br.46, 48.)²

Using ellipses preceding the word “Thus,” Qwest omitted a full page of text, including the *actual* paragraph to which the word “Thus” refers:

- **eBCBO is programmed to convert data:** [

] Ex. 1 (Ashok 2008 Dep. I 41:4-42:12).

[

] as shown in Exhibit 16 (QCC-1548239-40); see also Ex. 12 (QCC-1562980-81); SMF ¶ 16.

Thus, these “summary reports” (i.e., “collection of analyzed and/or reorganized data”) are organized into a “format for storage, manipulation and display on a personal computer.” See generally Ex. 18 (QCC-0058-61); SMF ¶ 19.

(A1408-09; emphasis added.) The full text clearly indicates that Centillion was arguing that the “organizing said summary reports into a format for storage, manipulation and display” limitation is satisfied by the *conversion of the XML data into PC-compatible ASCII file pairs*. It does not indicate any reference to the “create database tables” element of the data processing means, as suggested by the cropped quotes proffered by Qwest.

² These same passages are repeated on page 19 of Qwest’s brief with slightly more text, but the quotation suffers from the same defect and is no less misleading.

3. **Qwest’s Argument in Support of the Summary Judgment of Non-Infringement is Based on a Confused and Conflated Understanding of the “Data Processing Means”**

This Court has consistently held that the construction of a means-plus-function clause requires two separate and distinct steps. *See, e.g., Omega Eng’g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1321 (Fed. Cir. 2003). First, the court must identify the claimed function. Second, the court identifies the corresponding structure in the written description that performs that function. *Id.* It is error to combine the two steps and confuse function with structure. *See JW Enters.*, 424 F.3d at 1330:

The district court’s ... construction confuses function with structure. Determining a claimed function and identifying structure corresponding to that function involve distinct, albeit related, steps *** [T]he district court effectively combined the two steps, resulting in the inappropriate inclusion of structure ... in the construction of the claimed function.

Id.

Qwest’s distortion of the court’s construction of the data processing means not only ignores the meaning of the “organizing” function set forth in the Claim Construction Order itself, but is contrary to the foregoing precedent of this Court. The premise underlying Qwest’s argument is that the claims require the summary reports generated by the data processing means to be “database tables.” That argument, however, improperly conflates the structural and functional components of the means-plus-function clause.

The structure identified by the district court corresponding to the recited functions is “a computer that is programmed ... to create database tables” This computer program – while described in terms of functional-type elements – is nonetheless “structure” in terms of 35 U.S.C. § 112 ¶ 6. *See WMS Gaming Inc. v. Int’l Game Tech.*, 184 F.3d 1339, 1349 (Fed. Cir. 1999); *see also Aristocrat Techs. Austl. Pty Ltd. v. Int’l Game Tech.*, 521 F.3d 1328, 1333 (Fed. Cir. 2008); *Harris Corp. v. Ericsson Inc.*, 417 F.3d 1241, 1249 (Fed. Cir. 2005) (characterizing the rule of *WMS Gaming* as “[T]he corresponding structure for a § 112 ¶ 6 claim for a computer-implemented function is the algorithm disclosed in the specification”).

The database tables referred to in the court’s claim construction, therefore, are associated with the algorithm that constitutes the structure of the data processing means, not its function. Qwest’s assertion that the “format” into which the summary reports (i.e., .TXT files) are organized by the data processing means must be “database tables” improperly conflates and confuses the two.

4. Qwest’s “Database Tables” Argument Fails to Provide an Alternative Basis for Affirmance of the Judgment

Even if this Court concludes that Qwest’s “database tables” argument should be considered as relating to the required *structure* of the data processing means, the

argument still fails to provide any basis for affirmance of the judgment.³ Qwest is correct that Centillion asserted in support of its motion for partial summary judgment that the .TXT files were “database tables.” That assertion, however, specifically related to the “create database tables” portion of the computer program that Centillion contends satisfies the structure identified by the district court as corresponding to the claimed functions. In support of that assertion, Centillion submitted a declaration of its expert, Dr. Grimes, who opined that persons of ordinary skill in the art would call the []” (A4752-53.)

Dr. Grimes stated:

one of ordinary skill in the art knows that when you are sending files whose main purpose is to be imported into a database, where each file contains data for one of the tables in the database, those files are commonly referred to as “database tables.” []

]

(A4753.)

Qwest’s contention that “Centillion’s expert admits that a.TXT file is not a database table” (Q.Br. 54), misrepresents Dr. Grimes’ opinion. Viewed in context,

³ The judgment of non-infringement was based on the asserted failure of Centillion to provide evidence that the eBC system satisfies the “organizing” function of the claims, not on any purported deficiency relating to the structure identified by the district court as corresponding to the claimed functions.

Dr. Grimes' Declaration contains no such admission. While Dr. Grimes candidly acknowledged that "technically" the .TXT file is "data for a database table, rather than a table per se ...," the relevant inquiry is not what a Ph.D. in Computer Science and Electrical Engineering, such as Dr. Grimes,⁴ would call the .TXT files, but what a person of ordinary skill in the art would call them.

That is precisely the part of Dr. Grimes' opinion that Qwest omitted.

Whether a claim term – as properly construed from the standpoint of persons of ordinary skill in the art – reads on an accused instrumentality is a question of fact. *WMS Gaming*, 184 F.3d at 1346. At a minimum, there was a genuine dispute⁵ as to whether the .TXT files are "database tables" within the meaning of that term to persons of ordinary skill in the art.⁶

⁴ See Grimes' Expert Report ¶ 4. (A2940.)

⁵ Dr. Grimes' Declaration is not in any way "contradictory" to his deposition testimony in which he explained how a database table is structured in an operative database system on a user's personal computer. An actual database table in an operative database system is one thing, a file containing a "table" of data intended to be imported into a database, commonly referred to as a "database table," is another. Indeed, it is apparent that even the district court's usage of the term is consistent with the latter. Thus, the cases discussed by Qwest on page 55 of its brief discussing the so-called "sham affidavit" rule are inapposite.

⁶ Insofar as the district court's finding that there is sufficient evidence that the .TXT files satisfy the "summary reports" limitation is challenged by Qwest on the basis of the "database tables" issue (Q.Br.56-57), the challenge fails for the same reason. Moreover, there is more than sufficient evidence that the [

If this Court were to conclude that the meaning of the derivative term “database tables” needs clarification, it may be elucidated in view of the intrinsic evidence. *Advanced Fiber Techs. Trust v. J&L Fiber Servs., Inc.*, 674 F.3d 1365, 1373 (Fed Cir. 2012). The specification discloses that the editing and table accumulation program performs several functions including accumulating data to create various “tables” that are intended to be loaded into a “target database table” on a user’s personal computer. It is reasonable to conclude, therefore, that persons of ordinary skill in the art construing the phrase “create database tables” in view of the specification would understand it to refer to the “tables” that are generated by the editing and table accumulation program and intended to be loaded into a “target database table” on a user’s PC. (A4752-53.)

B. The District Court Erred in Granting Summary Judgment of Non-Infringement by the Logic System

1. Centillion Submitted Sufficient Evidence That PACs Satisfy the “As Specified By the User” Claim Limitation

Whether a claim term, as properly construed, reads on an accused device is an issue of fact. *WMS Gaming*, 184 F.3d at 1346. In order to have granted summary judgment in Qwest’s favor, the court was required to find that there was no genuine factual dispute regarding the “as specified by the user” limitation. *See Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1323 (Fed. Cir. 2009).

(A1428-29; A2100-01; A3653-65.)

]

Given the substantial evidence and expert declarations of record regarding this limitation (A1393-94, 1409-11), the district court erred in finding that there were no genuine disputed facts on this issue and granting summary judgment.

In its opening brief, Centillion argued that since this Court previously held that “the act of subscribing to the service” causes the back-end processing of the Accused Systems to generate the requisite summary reports, it follows that if a customer, ancillary to the act of subscribing, contacts Qwest to request that its reports include PACs, any reports so generated must, by any definition, be “specified by the user.” *See* Cent. Br. 45-46. Qwest’s response that “A Qwest customer does not contact Qwest and specify that it wishes its reports include PAC data” (Q.Br.32), misrepresents the record. Qwest’s own User Manuals and the testimony of its Rule 30(b)(6) witness confirm that “Account Codes are present in your call data records only if you have set up account codes when you signed up for your service with Qwest.” (A2266; *see* A1443.) Moreover, after a customer signs up for PACs, [

]. (A1443.)

Qwest acknowledges that its customers “can request that they have the PAC feature in their telecommunications service” (Q.Br.32), but quibbles that “[t]his request for PAC is completely independent of any reports received” *Id.* That

contention divorces fact from reality. Qwest fails to explain why any customer would go to the trouble of setting up account codes with their Account Manager at the time they signed up for the service if they did not intend to use that functionality to download CDRs containing PAC data for billing analysis. Whether such a customer intends to use Logic, eBC, or some third-party client application software for that purpose is irrelevant.

Also without merit is Qwest's contention that a request to have PACs included in the billing data does not change the "character" of the data. That argument hinges on Qwest's assertion that the PAC *field* is "always present in the billing data" (Q.Br.32.) But a dormant field with NULL values is fundamentally different from one with real data whose functionality has been enabled by the user in order to be useful in billing analysis. Qwest concedes that the data fields are one of the features that make up the character of a billing file. (Q.Br.27.)

It contends, however, that while a change in "the type of fields" included in the billing data may affect its character, the enablement of a dormant field to capture real data does not. This is a distinction without a difference. Broadly construed, the "character" of the billing data is "specified by the user" in both instances.

Qwest argues, on the one hand, that when a “COBRA/TRACE” customer selected one or more report types from among four different types it specified the character of the report but, on the other, contends that when a Qwest customer signs up for reports with PAC data it does not. Qwest cannot have it both ways. This Court has held that “specified by the user” has a broad construction. *Centillion Data Sys., LLC v. Qwest Commc’ns Int’l, Inc.*, 631 F.3d 1279, 1289 (Fed. Cir. 2011). Given that summary judgment of “no anticipation” by the COBRA/TRACE prior art because of the “specified by the user” limitation was held to be improper, so should the summary judgment of non-infringement by the Logic system based on that limitation.

Finally, Qwest’s assertion that “Centillion is untying the user’s selection from the data processing means and relying on an entry at the time a call is made to provide the ‘selection’” (Q.Br.33), is incorrect. It is not the *entry* of the PAC data by the user that satisfies the claim language, but rather the *configuration* of the eBCBO (i.e., the “data processing means”) to generate summary reports containing PAC data (i.e., “as specified by the user”). That configuration occurs as a result of the “selection” made by the user when it signs up for the service with Qwest. Thus, contrary to Qwest’s assertion, Centillion does not contend that “merely changing the data – of the PAC or the telephone number” is what determines the “character” of the billing data. Consequently, Qwest’s assertion that Centillion has

misread the district court's claim construction "to encompass any reports that include telephone numbers" (Q.Br.34-35), is incorrect.

2. **The District Court's Conclusion that the Phrase "As Specified by the User" Requires Actual Operability Was Erroneous Because the Claim Language Merely Requires Capability**

The district court's conclusion that the phrase "as specified by the user" requires actual operability is contrary to the Claim Construction Order. The court construed the structure corresponding to the functions recited in the data processing means limitation as "a computer that is programmed to [perform various steps]." (A435-36.) This is a clear recitation of capability, not actual operability. *See Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1205 (Fed. Cir. 2010) ("This language does not require that the program code be 'active,' only that it be written '*for causing*' ... *a computer ... to perform certain steps*"; emphasis added); *see also Fantasy Sports Props., Inc. v. SportsLine.com., Inc.*, 287 F.3d 1108, 1118 (Fed. Cir. 2002) ("[I]n order to infringe the ... patent, the code ... must be written in such a way as to enable a user of that software to utilize the function ... without having to modify that code"). An infringing system need only include a computer that is *programmed* to perform the functions

identified by the court in its claim construction, regardless of whether the computer is activated or utilized to perform any of those functions.⁷

Thus, Qwest’s assertion that the phrase “as specified by the user” is an “active limitation” (Q.Br.31) is contrary to the precedent of this Court. Should this Court conclude that the district court’s interpretation of the “as specified by the user” language is ambiguous, or otherwise deem it necessary, it is not barred by the law of the case doctrine from clarifying the claim construction and holding that the interpretation does not constitute an “active limitation.” *See AFG Indus., Inc. v. Cardinal IG Co.*, 375 F.3d 1367, 1372 n.2 (Fed. Cir. 2004).

Qwest’s reliance on *Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320, 1324 (Fed. Cir. 1987), is misplaced. In that case, the district court in Washington State concluded that the claim construction applied in an earlier suit between the same parties in California, in which a final judgment of infringement was affirmed by the Ninth Circuit, had preclusive effect. Thus, while the application of the claim construction in *Del Mar* was “actually litigated and

⁷ Although this Court previously considered the issue of infringement under the “use” prong of § 271 (*Centillion*, 631 F.3d at 1283-87), its subsequent en banc decision in *Akamai* clarified that the party that adds the final element to complete a system – here a Qwest customer – would be subject to liability as a direct infringer under the “make” prong. *See Akamai Techs., Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301, 1316 (Fed. Cir. 2012), *petition for cert. filed*, 81 U.S.L.W. 3438 (U.S. Feb. 1, 2013) (No. 12-960). Contrary to Qwest’s assertion (Q.Br.5n.3), this portion of the *Akamai* opinion was expressly directed to system claims, not method claims.

determined by a valid and final judgment ...” (*Restatement (Second) of Judgments* § 27 (1982)), the notion of the claim limitation being “active” was neither litigated nor decided in this case, and this Court is not precluded from reviewing that issue.

C. The District Court Abused its Discretion in Holding that Centillion’s Statement in its Prior Appellate Brief Constituted a “Judicial Admission” Excluding Third-Party Client Applications from the Scope of the Claims

The district court’s conclusion that Qwest’s systems that enable customization of eBC data files do not satisfy the “as specified by the user” limitation was based on its holding that Centillion had conceded that the use of *Qwest’s* client application software is necessary to infringe the claims. (Order 19, A5049.) Centillion made no such concession, and the district court’s holding that Centillion’s representations to this Court in the prior appeal constituted a “judicial admission” was an abuse of discretion.

The Seventh Circuit recognizes that a representation made in a brief or memorandum – though not constituting a formal “judicial admission” of a type set forth in pleadings and affidavits – *may* be treated as an admission if it is so clear, deliberate, and unambiguous that it rises to the level of a judicial admission.

Keller v. United States, 58 F.3d 1194, 1199 n.8 (7th Cir. 1995) (a judicial admission is a deliberate, clear, and unequivocal statement made in the case of a judicial proceeding); *see also United States v. Cunningham*, 405 F.3d 497, 504

(7th Cir. 2005); *United States v. One Heckler-Koch Rifle*, 629 F.2d 1250, 1253 (7th Cir. 1980).⁸

The decision in *American Title Insurance Company v. Lacelaw Corp.*, 861 F.2d 224, 226-27 (9th Cir. 1988), cited by Qwest, actually supports Centillion's argument that the statements made in its prior appellate brief should not have been treated as a judicial admission by the district court. Citing *Hub Floral Corp. v. Royal Brass Corp.*, 454 F.2d 1226, 1228-29 (2d Cir. 1972) ("inadvertent statements of fact made by counsel in briefs or memoranda should not be conclusively binding on the client in a summary judgment motion"), the Ninth Circuit held that the district court did not abuse its discretion in refusing to treat a certain statement in a party's trial brief as a binding judicial admission when that party introduced evidence at trial that *contradicted* the alleged admission. *Am. Title*, 861 F.2d at 226-27.

Similar circumstances exist here. Centillion expressly represented to this Court in its Reply Brief in the prior appeal that the Accused Systems include "third-party client applications that are formatted according to the schema provided by Qwest." (A3891.) Since the alleged "concession" is directly contradicted by that later representation, the district court's "interpret[ation of] Centillion's

⁸ *Soo Line R.R. Co. v. St. Louis S.W. Ry. Co.*, 125 F.3d 481 (7th Cir. 1997), also cited by Qwest, is inapposite. That case involved a statement in an amended complaint, thus constituting a "judicial admission" per se.

intention as an admission requiring installation of the Qwest client application software” (Q.Br.39; emphasis added) was unreasonable and thus constituted an abuse of its discretion. Centillion can hardly have “intended” to have excluded systems using third-party client applications from the scope of the claims when its express representation to this Court was to the contrary. At the very least, there was sufficient ambiguity as to Centillion’s “intention” that it vitiates any notion that the representation in question rose to the level of a judicial admission.

If anything was “conceded” by Centillion in its prior appeal brief, it is that infringement requires *installation of a client application*. Insofar as the district court’s holding concerning use of third-party client applications goes beyond that, it was an abuse of discretion and should be reversed.

D. The District Court’s Award of Costs Should Be Reversed

Qwest does not dispute that the party seeking costs bears the burden of proving that the claimed costs were reasonably and necessarily incurred for use in the case. Accordingly, “[p]revailing parties necessarily assume the risks inherent in a failure to meet that burden.” *Synopsys, Inc. v. Ricoh Co. (In re Ricoh Co. Patent Litig.)*, 661 F.3d 1361, 1367 (Fed. Cir. 2011) (citations omitted). Nor does Qwest dispute that a district court is required to analyze the claimed costs to determine if they are, in fact, consistent with 28 U.S.C. § 1920. *See Cengr v. Fusibond Piping Sys., Inc.*, 135 F.3d 445, 454 (7th Cir. 1998) (district court

should explain its decision to award or deny costs); *Weihaupt v. Am. Med. Ass'n*, 874 F.2d 419, 430 (7th Cir. 1989).

Citing *Cengr*, Qwest asserts that “the district court is not required to go into great detail to explain its rationale in awarding costs.” (Q.Br.58.) But here, as in *Cengr*, the district court provided *no justification* for its award of costs. “Applying the abuse of discretion standard to the cost award in this case is an impossible exercise given the utter lack of explanation for the award.” *Cengr*, 135 F.3d at 454; *see also Weihaupt*, 874 F.2d at 431 (“[t]he court failed to make any findings on, and thus we are unable to review, whether the [costs claimed] were allowable, much less determine whether they were reasonable in amount and necessity to the litigation”). In *Cengr*, the Seventh Circuit found that the district court had failed to justify its costs award by simply stating, “[c]osts are taxed in the amount of \$2,127.08 in favor of defendant and against plaintiff, Robert Cengr.” *Id.* Here, the district court’s Amended Entry of Judgment is no more illuminating: “Defendant Qwest is hereby awarded its costs in the amount of \$251,245.95 as set forth at Docket No. 830.” (A5134.) “With nothing more to go on, we find that there was no discretion for the district court to abuse – it used none.” *Cengr*, at 454.

Following Centillion’s motion for reconsideration regarding the premature award of costs, the court gave short-shrift to its objections and simply rubber

stamped Qwest's bill of costs, giving as the only reason that the litigation had been "pending for nine years" and had been "paper intensive." (A5166.) But the mere length of time a case has been pending or its complexity does not furnish an adequate justification for so large an award of costs. *See Summit Tech., Inc. v. Nidek Co.*, 435 F.3d 1371, 1381 (Fed. Cir. 2006) ("[T]he fact that a case is particularly complex does not give the prevailing party an unchecked right to collect nearly \$400,000 in costs").

Given Qwest's failure to support its costs with invoices or any attempt to explain how the photocopying and transcript expenses were reasonable and necessary and the district court's failure to do likewise, the award of costs should be reversed.

IV. CONCLUSION

For the foregoing reasons and those set forth in Centillion's opening brief, the judgment of non-infringement by the district court and the award of costs should be reversed.

DATED: May 20, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, that the body of this brief, beginning with the Introduction on page 1 and ending with the last line of the Conclusion on page 29, and including headings, footnotes, and quotations, contains 6,984 words, in compliance with the type-volume limitation of Rule 32(a)(7)(B)(ii) of the Federal Rules of Appellate Procedure.

DATED: May 20, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2013, I served a true and correct copy of the foregoing Reply Brief of Plaintiff-Appellant Centillion Data Systems, LLC through use of the Court's CM/ECF system on the Defendants-Appellees' counsel of record at their last-known addresses, as follows:

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