

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEAPFROG ENTERPRISES, INC.,)
)
) Plaintiff,)
))
) v.) Civil Action No. 03-927-GMS
))
))
FISHER-PRICE, INC. and)
MATTEL, INC.,)
))
) Defendants.)

ORDER

1. A *Markman* hearing to construe the disputed terms and phrases of U.S. Patent No. 5,813,861 (the ‘861 patent) is scheduled to take place before the court on March 8, 2005.
2. The court has considered the submissions of the parties and determined that there exist certain terms and phrases in claim 25 of the ‘861 patent for which the court requires further discussion by the parties:
 - a. The term “switch;”
 - b. The term “housing;”
 - c. The term “plurality;”
 - d. The phrase “each letter being associable with a switch;”
 - e. The term “reader;”
 - f. The phrase “configured to communicate the identity of the depiction to the processor;”
 - g. The term “selection;”

- h. The phrase “wherein selection of a depicted letter activates an associated switch to communicate with the processor;”
 - I. The term “sound;” and
 - j. The phrase “causing the sound production device to generate a signal corresponding to a sound associated with the selected letter, the sound being determined by a position of the letter in the sequence of letters.”
3. As to the term “switch,” the court requests the parties’ views on whether it would be more accurate to construe that term according to the dictionary definition pointed to in the plaintiff’s brief (D.I. 85 at 5-6), rather than as “a structure for opening and closing an electrical circuit path.” More specifically, the court would like to know whether the defendants’ proposed construction improperly limits “switch” to mechanical structures that physically open and close electrical circuit paths.
4. The court also requests the parties’ views on whether, as the plaintiff suggests, the construction of the term “switch” should include a reference to activation via “contact with or proximity to a selected letter [or indicia bearing unit].” The court is cognizant of the fact that the specification uses the language proposed by the plaintiff. ‘861 at 3:63-65. However, claim 25 contains the phrase “selection of a depicted letter activates an associated switch,” which seems to contemplate a means for selecting depicted letters distinct (to some degree) from the associated switches. And yet, claim 25 does not appear to be explicitly limited by any such means. In other words, because the phrase “depiction of a sequence of letters” seems to refer to letters as they appear on the card inserted into the reader, rather than to

indicia bearing units available for selection,¹ the selection of a depicted letter must be accomplished through some means, such as by pressing or touching an indicia bearing unit, which serves to activate a distinct but associated switch. But since claim 25 does not spell out the means for selecting, the court is concerned that construing “switch” in the manner suggested by the plaintiff may improperly import into claim 25 the heretofore-absent means for selecting. Therefore, the parties should address whether the court is correct in its observations about claim 25, and if so, whether the plaintiff’s construction is permissible. The parties should cite any Federal Circuit case law addressing the proper claim construction in this situation, as well as any implications of U.S. Patent. No. 5,188,533 on this issue.

5. As to the term “housing,” the court requests the parties’ views on whether the defendants’ proposed construction is improperly limiting. The court also requests the parties’ views on whether “housing” requires construction at all.
6. As to the term “plurality,” the court requests the parties’ views on whether the proper construction should be “one or more,” given the apparent interchangeability of those terms in the patent specification. ‘861 at 1:38, 1:51, 1:64.
7. As to the phrase “each letter being associable with a switch,” the court requests the parties’ views on whether the defendants’ proposed construction is accurate in light of the court’s observation in ¶ 4 above. In other words, the “depiction of a sequence of letters” seems to refer to letters as they appear on the card inserted into the reader, rather than to the indicia bearing units. Thus, the court is interested in the parties’ views as to whether it should

¹In fact, the parties’ agreement on the construction of “depiction of a sequence of letters” as “depicted word” seems to support this view because the indicia bearing units certainly do not form a word.

actually be the indicia bearing units that “must be connected to – or be able to be connected to – a switch,” rather than the depicted letters. If so, the court is interested in the parties’ views as to the proper construction of this phrase.

8. As to the term “reader,” the court requests the parties views on the proper construction of this term. In particular, the court is interested in the limitations placed on this term, if any, by the prior art cited in the plaintiff’s reply brief. The court is also interested in the parties’ views as to whether the defendants’ proposed construction encompasses more than was contemplated by the patentee, in light of both the examples for alternative readers cited in the specification, and the fact that punch cards may essentially be information storage devices.
9. As to the phrase “configured to communicate the identity of the depiction to the processor,” the court requests the parties’ views on whether this phrase should be construed as having its plain and ordinary meaning.
10. As to the term “selection,” the court requests the parties’ views, in light of ¶ 4 and ¶ 7 above, on whether the plaintiff’s proposed construction improperly imports a means-for-selecting limitation.
11. As to the phrase “wherein selection of a depicted letter activates an associated switch to communicate with the processor,” the court requests the parties’ views on whether this phrase requires construction. The parties should also address the question of whether a one-to-one correspondence between depicted letters and switches must be reflected in the construction of this phrase, particularly in light of the fact that specification discusses multi-letter combinations such as “th” and “ch.” ‘861 at 5:1-3.

12. As to the term “sound,” the court requests the parties’ views on whether a construction besides “phoneme” would be more helpful to a lay jury. If so, the court is interested in the parties’ views on what that construction should be.
13. As to the phrase “causing the sound production device to generate a signal corresponding to a sound associated with the selected letter, the sound being determined by a position of the letter in the sequence of letters,” the court requests the parties’ views on whether this phrase requires construction. The parties should also address the question of whether a one-to-one correspondence between depicted letters and sounds must be reflected in the construction of this phrase.

IT IS HEREBY ORDERED that:

Each party shall allocate a sufficient percentage of its total allotted presentation time at the March 8, 2005 *Markman* hearing to enable it to adequately address the topics outlined in ¶¶ 3-13 above.

Dated: February 22, 2005

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE