United States District Court,
D. Massachusetts.

AKAMAI TECHNOLOGIES, INC,
v.
LIMELIGHT NETWORKS, INC.

Civil Action No. 06-11109-RWZ

Feb. 8, 2008.

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ZOBEL**, District Judge.**

Prior to this court's claim construction in the instant case, Akamai and Limelight submitted a Stipulated Order Establishing the Constructions for Certain Claim Terms as Agreed Upon by the Parties (Docket # 74 ("Stipulation").) In that Stipulation, the parties adopted, for certain terms the construction determined by the court in an earlier case which also asserted claims from the '703 Patent. *Akamai Technologies, et al v. Digital Island, Inc., et al,* (Docket # 137, No. 00-cv-11851-RWZ). In particular, the parties stipulated to the construction of the terms "tagging" and "to resolve to a domain other than the content provider domain" used in claims 19 and 34 of the '703, claims which are also asserted in this case:

1. The term "tagging" in claims 17, 19, and 34 of the '703 patent means "providing a 'pointer' or 'hook' so that the object resolves to a domain other than the content provider domain"; and

2. The term "to resolve to a domain other than the content provider domain" in claims 17, 19, and 34 of the '703 patent means "to specify a particular group of computers that does not include the content provider from which an optimal server is to be selected."

The problem with the parties' Stipulation, however, is that, while they agree on the construction, they disagree on the meaning of the word "optimal" used therein. Limelight, relying on the dictionary definition of "optimal" as "best" and on argument in Akamai's motion for JMOL substituting the word "best" for "optimal," argues the term means a single best content server. In particular, because the court granted that motion it argues that Akamai obtained relief using one meaning of the word "optimal" and is estopped from

advocating any different definition here.

Limelight, however, misidentifies the issue in the *Digital Island* case. In that case, the Federal Circuit ruled that a prior reference did not anticipate the Akamai patents because it did not suggest that the selection of an optimal server should be made during the DNS resolving process. Indeed, the anticipation issue focused on Akamai's selection of the content server to use in the DNS system just before that content is accessed, i.e. just before returning the IP address of the content server to the end user. Thus, Limelight now emphasizes the wrong portion of Akamai's argument to this court. (*See* Docket # 113, 22 (emphasizing "does not 'disclose or fairly suggest' selection of a best server").) What did or did not constitute an optimal server was not an issue in determining whether the jury verdict should stand, rather it was that the '598 patent did not disclose the selection of the content server "*during the resolving process*." (*Id*. (emphasis added).) Akamai could have described the selection criteria for the content server as "optimal," "best" or "purple," and the court would still have granted the JMOL, the particular basis for selection of the server was not the issue, only *when* the selection was made. Therefore, Akamai is not estopped from arguing, as it does now, that what constitutes an "optimal" or "best" server is defined by the patent.

To resolve the current dispute, the court must construe the substituted term "optimal" using the claims, specification and prosecution history. (*See* Order Regarding Claim Construction (Docket # 92), Part II.) The analysis is similar to the court's prior construction of Terms 16 and 17, in which Limelight proposed adding the limitation that the given content server be "a single, optimal content server." (*Id*. at 25.)

With construed and stipulated substitutions, claim 19 of the '703 Patent reads: "for a given page normally served from the content provider domain," the patented method requires providing "hook[s]" or "pointer[s]" to embedded objects in the page so that requests for those objects "specify a particular group of computers ... from which an optimal server is to be selected." The final step of the method requires "serving at least one of the embedded object [s]" from "a particular one of the content servers ... instead of from [a server in] the content provider domain." (*Id*.) Read in light of the earlier step, the "particular one of the content servers" must refer to the optimal server or servers referenced in the earlier step.

As Limelight notes, the dictionary meaning of the word "optimal" means "[m]ost favorable or desirable; optimum" and "[b]est; most likely to bring success or advantage." (Docket # 113, 19.) An optimal server, as described in the specification, is one that is "close to end users" ('703 Patent, col.2 l.48), "tailored to viewers in [a particular] location" (*id*., col.2 l .64), is not "overloaded" (*id*., col.3 l.46) and "is most likely to already have a current version of the required file." (*Id*., col.5 ll.40-41.) The selection of an optimal server is also dependent on network conditions. (*See id*., col.10 l.11.) While ultimately the object is served from only a single content server, nothing in the specification or the claims limits "an optimal server" to only a *single best* server. Claim 20 specifically requires "for each embedded object, identifying *one or more* content servers from which the embedded object may be retrieved." (*Id*. Claim 20 (emphasis added).) The specification describes the local DNS server as only "responsible for returning the IP address of one of the ghost servers on the network that is close to the user, not overloaded, and most likely to already have the required data." (*Id*. col.10 ll.58-61.) In addition, the mechanism described in the specification for translating virtual ghost names to real ghost servers assigns only a subset of the available servers to serve a particular object. (*See id*. col.11 ll.45-55.) Therefore, the "best" server, measured in terms of latency, may not be the optimal server if it is not likely to have the requested object.

Thus, claim 19 requires the content delivery system to serve an embedded object from one or more content servers which are "[m]ost favorable or desirable," that is, servers which meet some or all of the criteria

described in the specification. Dependent claims 21 and 22 narrow the method to optimal servers determined by particular criteria, "resolving a request to the domain as a function of a requesting user's location" (*id.*, claim 21) and ("resolving a request to the domain as a function of a requesting user's location and then-current Internet traffic conditions"). (*Id.*, claim 22). Claim 34 limits the selection of a server to one "that is likely to host the embedded object and that is not overloaded." (*Id.*, claim 34.)

Thus, the word "optimal" in the stipulated substitution is limiting in that it requires the selection of a content server that is better than other possible choices in terms of the criteria established by the specification. Because the parties disagree on whether the Limelight system returns an optimal server under this construction, it is a question the jury must decide.

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