2015-1686

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

TECSEC, INC.

Plaintiff-Appellant,

v.

ADOBE SYSTEMS, INC.

Defendant-
Appellee,

and

SAS INSTITUTE, INC., SAP AMERICA, INC., SAP, AG, CISCO SYSTEMS, INC., SYBASE, INC., SOFTWARE AG, SOFTWARE AG, INC., PAYPAL, INC., ORACLE CORPORATION AND ORACLE AMERICA, INC.

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia in 1:10-CV-115, Judge Leonie M. Brinkema

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REPLY BRIEF FOR PLAINTIFF-APPELLANT

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October 23, 2015

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Nos. 2015-1686

Certificate of Interest

Counsel for Plaintiff-Appellant TecSec, Inc. certify the following:

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

TecSec, Incorporated

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:

TecSec, Incorporated

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:

None

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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Parties

TecSec	TecSec, Incorporated
Adobe	Adobe Systems, Incorporated

Defined Terms

(___:____)	Column and line number in patent or page and lines in deposition transcript
'702 Patent	U.S. Patent No. 5,369,702 to Shanton entitled "Distributed Cryptographic Object Method"
'452 Patent	U.S. Patent No. 5,680,452 to Shanton entitled "Distributed Cryptographic Object Method"
'755 Patent	U.S. Patent No. 5,717,755 to Shanton entitled "Distributed Cryptographic Object Method"
'781 Patent	U.S. Patent No. 5,898,781 to Shanton entitled "Distributed Cryptographic Object Method"
DCOM	Distributed Cryptographic Object Method
DCOM Patents	'702 Patent, '452 Patent, '755 Patent and '781 Patent collectively
Asserted System Claims	'702 Patent claims 8 and 9 and '781 Patent claims 14 and 15
Asserted Method Claims	'702 Patent claims 1 and 4, '452 Patent claim 1, '755 Patent claim 1, and '781 Patent claims 1 and 3.
Asserted DCOM Claims	Asserted DCOM System Claims and Asserted DCOM Method Claims

Accused Product(s) *or* Acrobat	Adobe Acrobat Standard and Pro Versions, Versions 5 and up, as well as other Adobe products that include or are bundled with Acrobat
court *or* district court	United States District Court for the Eastern District of Virginia, Honorable Leonie Brinkema presiding

INTRODUCTION

Nothing in Adobe's Response Brief demonstrates that the district court's abbreviated summary judgment procedures and *sua sponte* grant of summary judgment on an unbriefed issue constituted proper notice required by Rule 56 and Fourth Circuit precedent. Noticeably, Adobe could not argue that it moved for summary judgment on the grounds that the district court used to support its *sua sponte* finding of no infringement, nor could Adobe dispute that TecSec was precluded from taking discovery on that very issue. Because TecSec was not provided proper notice and an opportunity to present evidence regarding the "selecting a label" limitation, the district court's judgment must be reversed.

Perhaps recognizing that the district court's *sua sponte* decision cannot be upheld, Adobe spends the majority of its Response arguing that this Court should affirm the finding of no infringement based on alternative grounds that the District Court already rejected as unpersuasive. But Adobe's arguments on each point fail because TecSec demonstrated, based on the admissions of Adobe's own corporate representative and the unrebutted testimony of TecSec's expert, that the accused Acrobat products meet each of the contested claim limitations under the claim constructions adopted by the district court, as well as under the proper constructions as advocated by TecSec. Accordingly, a genuine issue of fact exists

for each issue raised by Adobe sufficient to defeat summary judgment, and the judgment of no infringement should be reversed.

ARGUMENT

I. The District Court's *Sua Sponte* Grant of Summary Judgment Was Procedurally Flawed

Adobe acknowledges that a district court may only grant summary judgment if the party against whom summary judgment is granted was given "notice and an adequate opportunity to demonstrate a genuine issue of material fact." Adobe Br. at 20-21 (citing *Liobmedia, LLC, v. Dataflow/ Alaska, Inc.*, 349 F. App'x 843, 844 (4th Cir. 2009) and *Rutecki v. CSX Hotels, Inc.* 290 F. App'x 537 (4th Cir. 2008)); *see also* Fed. R. Civ. P. 56(f). Here, it is undisputed that: 1) Adobe did not move for summary judgment on the "selecting a label" limitation; 2) the District Court precluded TecSec from taking discovery on any issue not raised in Adobe's Motion; and 3) the District Court provided no advance notice that it was contemplating granting summary judgment on the "selecting a label" limitation..

In its Brief, Adobe attempts to claim that it generically raised the "selecting a label" issue in a pre-discovery letter (Adobe Br., 13), but the letter nowhere indicates that the "selecting a label" limitation is missing from Acrobat. Regardless, the letter is irrelevant because Adobe opted not to move for summary judgment on that ground, a fact that Adobe conceded at the hearing. A3934, 4:23-

25 ("the Court is correct that we did not separately argue the issue of being unable to select what we don't think is a label in the first instance…").

Adobe does not dispute that its motion for summary judgment was filed before the start of discovery and that the district court's discovery plan expressly prevented TecSec from taking any discovery on issues not raised in Adobe's motion. *See* A48-A60. This was not just a hypothetical limitation; the district court specifically enforced this restriction and precluded TecSec from obtaining discovery on every issue that the district court deemed beyond the scope of Adobe's motion. *See* A61 (discovery requests denied by district court because they sought "information not necessary to respond to defendant Adobe's Motion for Summary Judgment"). Thus, TecSec could not have obtained discovery on this unbriefed issue.

Finally, although required under Rule 56, the district court itself never provided explicit notice it was contemplating a grant of summary judgment on the "selecting a label" limitation or that TecSec needed to come forward with evidence or face a judgment of no infringement. Instead, the district court merely stated at the abbreviated summary judgment hearing that the court had a "question" that it was contemplating sending the parties back to address in writing. A3932, 2:15-19 ("I actually have a question, and I don't think either side has really addressed or briefed this issue, and so I want to raise it with you orally here in court, and most

likely I'm going to send you back to the offices to brief it in detail."). There is a world of difference between posing a question about an unbriefed issue at a hearing and providing proper notice under Rule 56. In fact, Rule 56 contemplates that the proper course is usually for a district court to invite a motion for summary judgment, which will then provide the opposing party with the proper notice and opportunity to seek and present evidence in opposition. *See* Advisory Committee Notes to 2010 Amendment to Fed. R. Civ. P. 56(f) ("In many cases it may prove useful first to invite a motion; the invited motion will automatically trigger the regular procedure of subdivision (c)."). But here, when invited by the district court, Adobe declined the court's invitation to brief the issue, leaving no motion for TecSec to oppose. Thus, when TecSec addressed the district court's question about the "selecting a label" limitation at the hearing, it was merely to explain why Adobe likely declined the invitation to move on those grounds. A3937, 7:12-14 ("I think the reason they didn't argue that is there is no reasonable argument to make that it is not selected."). The entire colloquy between the district court and TecSec took no more than a few minutes. During the hearing, the district court never even mentioned the proposed "preexisting label" construction that it ultimately adopted. Because there was no motion to oppose and because TecSec had been precluded from taking discovery on any issue not raised by Adobe in a motion, it would have been nonsensical for TecSec to brief the issue.

The cases cited by Adobe do not supports its contention that TecSec was provided proper notice and a full opportunity to present evidence. *See* Adobe Br. at 23. In *Matthews v. Thomas*, 385 F. App'x 283, 288-89 (4th Cir. 2010), the district court did not grant summary judgment *sua sponte*, but instead granted summary judgment following a motion for reconsideration after the moving party sought summary judgment on the specific grounds ultimately relied upon by the district court. Here, in contrast, it is undisputed that Adobe did not move for summary judgment on the "selecting a label" limitation. Similarly, in *Allstate Ins. Co. v. Fritz*, 452 F.3d 316, 323 (4th Cir. 2006), the district court granted summary judgment for all defendants on a common legal issue specifically raised in a brief filed by one of the defendants, and the appeals court found that the plaintiff had prior notice of the issue by means of that defendant's motion, a full discovery period, and a full opportunity to present its evidence in opposition.

Adobe makes the incredible argument that TecSec points to no facts or evidence that it could have submitted that would have changed the result. This ignores the fact that Adobe's motion was filed before discovery commenced and TecSec was precluded from taking discovery on issues not raised in Adobe's motion. Rather than support Adobe's argument (Adobe Br. at 24-25), the Fourth Circuit's decision in *Amzura Enters., Inc. v. Ratcher*, 18 F. App'x 95, 103-104 (4th Cir. 2001) supports TecSec's position. In *Amzura*, the Fourth Circuit cited three

facts to justify the district court's grant of summary judgment without a motion: 1) discovery was complete; 2) the case was set for trial and all evidence was already gathered and prepared; 3) the district court had previously expressed concerns about the lack of evidence for the particular issue that served as the basis for the grant of summary judgment. Here, none of these factors were present: 1) TecSec was precluded from taking discovery on any issues not raised in Adobe's motion; 2) the motion was filed before discovery even began and the case was nowhere near ready for trial; and 3) the district court had never previously mentioned the "selecting a label" limitation. Adobe's attempt to distinguish *Mikkelsen Graphic* (Adobe Br., 24) fails because regardless of the grounds, "[i]f the court has '**not provide[d] the parties with adequate notice or an opportunity for [the losing party] to present evidence** and argument in opposition to the motion,' granting summary judgment *sua sponte* is inappropriate." *Mikkelsen Graphic Eng'g, Inc. v. Zund Am., Inc.*, 541 F. App'x 964, 973 (Fed. Cir. 2013) (emphasis added) (alterations in original). As a result, this Court should find that proper notice was not provided here and that the *sua sponte* grant of summary judgment of literal infringement must be vacated.

As TecSec noted in its opening brief, the district court's finding that TecSec failed to show infringement for the "selecting a label" limitation under the doctrine of equivalents also must be vacated. Br., 21, n. 4. TecSec could not have provided

a detailed doctrine of equivalents analysis with respect to the "selecting a label" limitation because Adobe did not raise that limitation as a non-infringement ground in its motion and TecSec was precluded from taking discovery on the issue or addressing it in its opposition. A61. Indeed, TecSec had no notice prior to the hearing that the limitation was in dispute at all.

II. The District Court's *Sua Sponte* Grant of Summary Judgment Was Substantively Flawed

The district court's *sua sponte* grant of summary judgment of no infringement for all asserted claims based on the "selecting a label" limitation was erroneous for at least three substantive reasons: 1) the asserted system claims do not contain a "selecting a label" limitation; 2) the district court erred in reading in a "preexisting label" limitation; and 3) even under the district court's improper construction, a genuine issue of fact exists as to whether Acrobat meets this limitation. Adobe's opposition fails to demonstrate that this Court should affirm the district court's *sua sponte* ruling.

A. "Selecting A Label" Is Not A Limitation Of The Asserted System Claims

There can be no dispute that the "selecting a label" limitation does not appear in any of the Asserted System Claims. Indeed, the word "select" does not appear anywhere in the system claims. This Court has long warned that apparatus and method claims "are directed toward different classes of patentable subject

material" and that the distinction should not be "blurred." *Baldwin Graphic Sys., Inc. v. Siebert, Inc.*, 512 F.3d 1338, 1344 (Fed. Cir. 2008); *In re Kollar*, 286 F.3d 1326, 1332 (Fed. Cir. 2002) (recognizing "the distinction between a claim to a product, device, or apparatus, all of which are tangible items, and a claim to a process, which consists of a series of acts or steps"). The district court erred in ignoring this critical distinction and reading method steps into system claims.

Adobe asks this Court to repeat this error, arguing that the district court's finding that the system claims and method claims have identical scope is justified based solely on a statement in the Background section of TecSec's summary judgment opposition brief, indicating that method Claim 1 was "exemplary" for purposes of TecSec's opposition to Adobe's motion. Adobe Br., 30. However, TecSec's opposition was directed solely to the issues raised in Adobe's motion, and that Adobe did not raise the "selecting a label" limitation as a basis for a finding of no infringement. As a result, there was no reason for TecSec to highlight this limitation as being absent from the system claims.

Similarly, during the exceptionally brief summary judgment argument, when the district court raised the "selecting a label" limitation for the first time *sua sponte*, the system claims were never mentioned. TecSec, therefore, had no indication that the district court was contemplating granting summary judgment of no infringement for the system claims based on a limitation that is not even present

in the system claims. Adobe's bald assertion that the district court "made it clear to both parties" that the "selecting a label" limitation could resolve "all asserted claims" is unaccompanied by a citation to the record, and a plain reading of the hearing transcript reflects no such indication by the district court. *See* Adobe Br., 31.

The cases relied upon by Adobe do not support a finding that TecSec waived any argument that the system claims have a different scope from the method claims. Adobe Br., 30-31. For example, in *SmartGene, Inc. v. Advanced Biological Labs., SA*, 555 F. App'x 950, 954 (Fed. Cir. 2014), this Court found that a party waived an issue only because the Appellee raised an issue in its brief and the Appellant did not rebut the assertion in its reply brief. But here, Adobe conceded that it never raised the "selecting a label" limitation in its briefing at the district court, and therefore TecSec could not have waived an argument that "selecting a label" was not a limitation of the system claims in its opposition.

This Court's precedence makes clear that the words of the claims define the scope of the patent. *See, e.g., Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1577 (Fed. Cir. 1996) ("We look to the words of the claims themselves ... to define the scope of the patented invention."). The asserted system claims do not contain a "selecting a label" limitation, and it was error for the district court to find such a

limitation *sua sponte*. For this reason alone, the district court's grant of summary judgment of no infringement with respect to the system claims must be reversed.

B. The District Court Improperly Construed "Selecting A Label" To Require Selection Of A "Preexisting Label"

The district court's construction is flawed because the plain and ordinary meaning of the word "selecting" does not require selection from a pre-existing list of choices. Indeed, Adobe's product documentation for Acrobat uses the word "select" to simply mean "choose" or "pick," and not necessarily from a pre-existing set of options. For example, Adobe instructs its customers that when they wish to convert a file or web page to a PDF in Acrobat, they must "select a name" for the file to be saved.[1] There is no requirement that a user must "select" a preexisting file name from a drop-down list. Instead, as with nearly every computer program, a user can "select" nearly any name it chooses for the file.

Rather than starting with an analysis of the claim language as informed by the specification, Adobe argues for the first time that this Court should rely upon non-contemporaneous extrinsic evidence that was not a part of the record in the district court. Adobe Br., 27, 28 (citing dictionaries from 2003 and 2007, when the

[1] *See, e.g.*, http://help.adobe.com/en_US/acrobat/X/pro/using/WS58a04a822e3e50102bd615109794195ff-7f60.w.html ("select a name and location for the PDF")

priority date of the DCOM Patents is in 1993). This approach directly contradicts this Court's rule that extrinsic evidence should only be used if the intrinsic evidence is unclear. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1319 (Fed. Cir. 2005). But even if these untimely references were relevant, they support TecSec's position, rather than Adobe's. For example, the Merriam-Webster definition for "select" in the context of computers is simply "to choose." Adobe Br., 27. Notably, this definition omits the language from the alternate definition that the choice must be "from a group." Similarly, the definition Adobe cites from MacMillian's Dictionary is: "to choose something on a computer screen, *usually* from a menu (list) of choices." Adobe Br., 27-28 (emphasis added). Even this definition acknowledges that it is not necessary that the choice must be from a pre-existing list. As a result, it would be improper for this Court to read in a limitation from a dictionary where the dictionary definition does not even support that the "pre-existing" limitation is essential. *See Phillips*, 415 F.3d at 1321-22 (discussing dangers of relying on dictionary definitions divorced from intrinsic evidence).

When Adobe does refer to the specification, Adobe cannot identify any passage that indicates that the selection of a label can only include the selection of a pre-existing label. Instead, Adobe resorts to passages discussing the selection of "objects" rather than labels, but even those passages are admittedly only "examples," and cannot be used to import a limitation into the claims. Compare

Adobe Br., 28 ("The specification provides examples of 'selecting' existing objects for a preview function.") with *Phillips*, 415 F.3d at 1323 ("[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments.").

Next, Adobe argues that TecSec's position is contrary to the position that TecSec took more than fourteen years ago in an unrelated case. Adobe Br., 28. As an initial matter, the district court in that case never adopted a claim construction for the term "selecting a label," and thus no estoppel could attach. But more importantly, TecSec's position in that case was entirely consistent with its position now. In *Protegrity*, TecSec simply proposed that "selecting" be construed as "choosing." Pl. TecSec's Claim Constr. Br. at **8-9, *TecSec, Inc. v. Protegrity, Inc.*, No. 2:01-cv-233 (E.D. Va. Nov. 14, 2001), ECF No. 24. Other courts have come to the same conclusion. *See, e.g., Clintec Nutrition Co. v. Baxa Corp*, 988 F. Supp. 1109, 1116 (N.D. Ill. 1997) ("To select is to choose."). While TecSec's expert in that case indicated that the choosing is *typically* done in a variety of ways, TecSec's proposed construction made it clear that the claimed "selecting" or "choosing" was not limited to the expert's exemplary list of ways to choose. It is not necessary, however, for this Court to substitute the synonym "choosing" for the word "selecting," since both words are equally understandable by a jury. *See C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 863 (Fed. Cir. 2004) ("[M]erely

rephrasing or paraphrasing the plain language of a claim by substituting synonyms does not represent genuine claim construction."). Thus, TecSec believes that no construction is necessary for the word "selecting" here.

Adobe completely misses the point in its claim differentiation argument. *See* Adobe Br., 29. First, the claim element that Adobe highlights relates to creating and selecting an "object," and has nothing to do with "selecting a label." *Id.* But more importantly, the added limitation of "creating" in dependent claim 2 means that that limitation of first creating an object is permitted, but not required, in independent claim 1, otherwise the claims would have identical scope. *Laitram Corp. v. NEC Corp.*, 62 F.3d 1388, 1392 (Fed. Cir. 1995) (holding that the printing by "strobing" limitation expressly claimed in the dependent claim necessarily must be covered by the more general language in the independent claim). Thus, claim 1 must cover situations where an object is "selected" but not first "created" in a preliminary step, as claim 1 also recites "selecting an object …"

The district court has acknowledged that neither the plain language of the claims, nor the specification, mandates that the label be "pre-existing." A9, A20, A22. Adobe points to nothing in the claims or specification regarding the "selecting a label" to justify importing this limitation. As a result, it was error for the district court to read the "pre-existing" label limitation into the claims, and this construction must be vacated. *See Source Vagabond Sys. Ltd. v. Hydrapak, Ltd.*,

753 F.3d 1291, 1299-1300 (Fed. Cir. 2014) ("[A]n analysis that adds words to the claim language without support in the intrinsic evidence . . . does not follow standard canons of claim construction." (quotation marks and bracketing omitted)).

C. Even Without The Benefit Of Discovery, A Genuine Issue Of Fact Exists As To Whether A Label Is Selected With the Acrobat

Adobe misstates the record in arguing that TecSec provided no evidence that Acrobat meets the "selecting a label" limitation. Adobe Br., 33. In fact, TecSec's evidence that Acrobat meets this limitation, even as construed by the district court, is unrebutted. TecSec's expert, Dr. Jones, testified that a user must select the type of security to be used (which is a preexisting label type), and that Acrobat must use this selection to write the specific label (the encryption dictionary) into the trailer of an encrypted PDF file. A3772, ¶ 40. Dr. Jones further testified that this process meets the limitation of "selecting a label." A3790, ¶ 67. Adobe's corporate representative similarly admitted that an unencrypted PDF file does not contain an encryption dictionary (which the district court found to be a label) and that once a user chooses to encrypt a PDF by selecting "Encrypt with Certificate," an encryption dictionary is selected and applied to the encrypted PDF. A3618, 54:4-16. This necessarily demonstrates that a label must be selected (whether by the user or by the system) before it can be applied. This process specifically meets Adobe's explanation of how a label, as construed by the district court, must be selected. A3933, 3:12-14 ("***[s]electing a label*** is an action that is taken by the user

of the system and ***is the action of saying I want to apply a particular kind of label*** or a particular label."). As a result, TecSec has at least demonstrated that a genuine issue of material fact exists as to whether Acrobat meets this limitation, and the district court's judgment must be reversed.

III. This Court Should Not Affirm The Judgment of No Infringement On Alternative Grounds That The District Court Found Unpersuasive

The district court did not grant summary judgment on any ground raised by Adobe in its motion, stating that "the arguments that Adobe made were not in the Court's view in most cases overwhelming or persuasive." A4365-A4366, 5:15-6:1. Further, despite previous written denials by Adobe, Adobe's corporate representative admitted all ten of TecSec's Requests for Admission that were relevant to the issue of Adobe's infringement. A3472-3473, A3490-A3492. Nevertheless, Adobe asks this Court to ignore the evidence, including those binding admissions and the unrebutted testimony of TecSec's expert, and affirm the judgment of no infringement on grounds that the district court found unpersuasive. This Court should reject Adobe's invitation to commit error.

A. Acrobat Contains An Object-Oriented Key Manager

As set forth in TecSec's Opening Brief, the district court erred in construing "object oriented key manager," which appears only in the Asserted Method Patent Claims. *See* Br., 44-47. TecSec's proposed construction, "software that controls access to the algorithm used to encrypt and decrypt objects," is the only proper

construction supported by the express claim language, the specification, the prosecution history, and the unrebutted declaration of TecSec's expert. Br., 45-47. And while this Court should reject the district court's flawed construction and adopt TecSec's proposed construction, even under the district court's construction the evidence presented by TecSec demonstrates that Acrobat meets this limitation.

Adobe argues that "there is no evidence that Acrobat stores, distributes, changes, replaces or destroys keys," but this is nothing more than a transparent attempt to read in additional steps into the method claims. Adobe Br., 38. With respect to infringement of the asserted method claims, the only step that the object oriented key manager must perform is the step of controlling access to the encryption algorithm. *See, e.g.*, Claim 1 of the '702 Patent (inside cover) (describing the steps of "accessing the object oriented key manager" and "selecting the encryption algorithm"). There are no steps related to storing, distributing, changing, replacing or storing keys, and thus performing those steps is not required for a finding of infringement.

Nevertheless, TecSec presented evidence that the accused Acrobat products include a software component called a security handler, which manages the entire encryption process for Acrobat. *See, e.g.*, A3788-A3789, ¶¶ 61-63; *see also* A3656, p. 55 (defining security handler as "a software module with implements various aspects of the encryption process and controls access to the contents of the

encrypted document."). The security handler generates the key for encryption upon saving of the PDF document following a user's selection of a security method and encryption algorithm. A3585, 14:3-12. The individual elements of the PDF document are then encrypted on an object-by-object basis. *See, e.g.*, A3609, 42:22-24. The security handler writes out the necessary elements to recreate the key (for decryption) to the encryption dictionary. A3587, 17:7-22. If a user attempts to access a PDF document secured with password security and encryption, the security handler attempts to validate the entered password and, if correct, creates the key for decryption from the information that it wrote into in the encryption dictionary. A3589-A3595, 19:10-25:18. The encrypted objects are then decrypted on an object-by-object basis. *See, e.g.*, A3609-A3610, 42:22-43:4. The security handler changes the key upon a new password being entered by creating a new key for encryption, applying that key, and then generating a new encryption dictionary. A3583-A3585, 12:13-14:12. Finally, the security handler also destroys and replaces the key upon a new password being entered through overwriting the previous key information in the encryption dictionary. *See* A3787-A3788, ¶¶ 60-62. Accordingly, TecSec has demonstrated that Acrobat's security handler manages the entire operation with respect to the encryption of objects in PDF documents, and satisfies the definition of object-oriented key manager under either construction. A3788-A3789, ¶ 63.

B. Acrobat Provides A Display Header

The district court erred in construing these terms by mixing parts of speech and providing nonsensical constructions when no construction is required because the terms would be readily understandable to a layperson. Br., 34-35. While the district court did not provide any infringement analysis with respect to the "display" and "display header" limitations, even under the district court's flawed claim construction, TecSec demonstrated that Acrobat both creates a "display header" and performs the step of "displaying the first label as a header array." For example, TecSec showed that Acrobat displays a listing of the various permission and security levels for a document on its properties menu for a user. *See* A3750-A3753. The security properties dialog box shown below provides information that is derived from the information in the encryption dictionary. A3797-A3799, ¶¶ 85-87.



See A3750-A3753. TecSec's expert opined that this display meets the "display header" and "display" limitations, and his testimony is unrebutted. A3797, ¶ 85. This unrebutted expert testimony alone creates an issue of fact sufficient to overcome a motion for summary judgment. Moreover, TecSec provided evidence that Acrobat meets these display elements under the doctrine of equivalents since the displayed security properties are equivalent to that contained within the encryption dictionary. A3798, ¶ 86. Accordingly, this Court should decline to find no infringement on this alternative ground.

C. The District Court Struck Adobe's Argument Regarding Memory Hardware

Finally, Adobe asks this Court to affirm summary judgment of no infringement with respect to the system claims based on an argument that Acrobat does not include memory hardware. Br., 41. Adobe's argument fails for two reasons. First, the district court struck Adobe's argument regarding memory hardware completely. *See* A64 ("Sections II and III of Adobe's Motion for Summary Judgment [Dkt. No. 710] be and are STRICKEN WITHOUT PREJUDICE"); Op., 35, n. 20. As a result, TecSec was not obligated to oppose Adobe on those grounds and, per the district court's discovery orders, was precluded from taking discovery on that issue. A61.

Second, even if this argument had not been stricken, the undisputed evidence overwhelmingly demonstrates that Adobe created and used systems where Acrobat

was installed on computers with memory hardware, thereby infringing the system claims. For example, Adobe's 30(b)(6) witness conceded that he used and operated a system with Acrobat installed on a computer, and used that system to perform the steps required to encrypt PDF files at multiple levels. A3565, 104:6-7. He also conceded that a blog posting by Adobe described how Acrobat can be used for "persistent protection" of objects by encrypting PDF documents and embedding them in other encrypted PDF documents (e.g., portfolios or envelopes). *See* A3683. Thus, the witness confirmed that the PDF file from Adobe's blog shows how Adobe used Acrobat to create an encrypted and password protected PDF envelope that contains an embedded, encrypted and password protected PDF document. A3563-A3565, 102:9-104:7; *see also* A3763-A3769, ¶¶ 26-34. Therefore, it is beyond dispute that Adobe has made and used infringing systems by installing Acrobat on computers having memory.

D. Acrobat Provides For "Labels" and "Labelling"

1. Adobe Encrypts And Labels The Same Object

Adobe's argument that there is a "mismatch" between the encrypted object and the object that is labelled is nonsensical. Both Adobe's corporate representative and TecSec's expert confirmed that when a user selects password security or certificate security with Acrobat and encrypts a PDF document, the security handler creates an encryption dictionary that is attached to the trailer of

that same PDF document. *See* A3587-A3588, 17:23-18:1; A3614-A3615, 48:20-49:9; *see also* A3790-A3791, ¶¶ 67-68. The district court found that the encryption dictionary meets the construction for the term "label" as used with certificate security. A38-A39. Adobe's 30(b)(6) witness confirmed that each encrypted file or object has its own unique encryption dictionary. A3629-A3630, 71:9-72:16. Thus, every encrypted object is separately labelled. Adobe's novel argument is unsupported by the record.

2. The District Court's Construction For "Label" Improperly Reads In A Limitation From The Background Section Of The Specification Describing The Prior Art

TecSec explained that the district court erred in construing "label" by importing a limitation from the background section of the specification describing the prior art. Br., 38-39 (citing A156, 2:34-40; A26). Adobe continues to ignore the language in the background section that refers to and distinguishes U.S. Patent No. 5,396,707 from the claimed invention. *See* A156, 2:30-66 ("A system such as that described above is disclosed in U.S. Patent Application Ser. No. 08/009,741 . . ."); A3789-A3790, ¶ 66.

Adobe also fails to address that in each case where the patentee was describing the claimed invention, the patentee deliberately used the words "the present invention," but when describing the '707 patent used the term "this invention" to make clear that patentee was not referring to the claimed DCOM

invention. *See* A156, 1:6; 2:34-35; A157, 3:12, 18, 21, 25, 29 and 42; 4:14, 31, 38 and 40; A158, 5:18. It is improper for a court to assume that the background discussion of prior art defines the claimed invention. *See, e.g., Emblaze Ltd. v. Apple, Inc.*, No. 5:11-cv-01079-PSG, 2014 U.S. Dist. LEXIS 144197, at *15-*16 (N.D. Cal. Oct. 9, 2014) (holding the background section in a patent describes prior art and should not be assumed to describe the claimed invention).

Finally, Adobe disregards the claim language, which should be the starting point for any claim construction analysis, as well as the remainder of the specification. *Phillips*, 415 F.3d at 1312, 1314. The claim language provides no special meaning for a "label," other than that it is used to identify an object. *See, e.g.*, claim 1 of the '702 Patent. Similarly, the examples in the specification of the '702 patent (*i.e.*, examples 1, 2 and 3), describe selecting labels for an object to identify the object. *See, e.g.*, '702 patent, A159, 8:5; A160, 9:14, 10:20; *see also* A3789, ¶ 64. Thus, TecSec's proposed construction comports with the plain and ordinary meaning and is in line with the usage of the term in the '702 patent. A3789, ¶ 64. Accordingly, the district court's overly restrictive construction should be rejected, and TecSec's construction should be adopted.

3. Adobe's Encryption Dictionary As Used With Password Security Is A Label Under Either Construction

Adobe provides no argument to challenge the district court's conclusion that the encryption dictionary with certificate security meets the district court's

construction for "label." However, Adobe urges this Court to affirm in part on the grounds that password security does not meet the construction for label. Adobe Br., 43-44. Adobe argues that the password is not stored, but instead that password keys are stored to test whether the password entered by a user is correct. *Id.* This argument has no merit, as the claims do not require that the password be stored, only that the encryption dictionary (i.e., the label) is used to control access to the encrypted file. *See, e.g.*, Claim 1 of the '702 Patent (inside cover). That is precisely how Acrobat's password security works. The plain and ordinary meaning of "password" is a "security method that **identifies a specific authorized user** . . . by a unique string of characters that a user types as an identification code." A3740-A3741; A3743. Adobe's corporate representative confirmed that upon an access attempt, Acrobat will check the encryption dictionary to attempt to verify the password, which identifies a particular user and controls access to the file. A3538, 66:2-6 ("Q. So password security -- either password security, certificate security, or LiveCycle Rights Management server security -- can control access, encrypt and set permissions? A. Yes."); A3592-3593, 22:16-23:17, A3594, 24:22-24, 24:19-20 ("The side effect of testing for the user password produces the actual key to the file."). Thus, Acrobat's encryption dictionary when used with password security meets the "label" limitation under any construction.

4. "Labelling" Is Not A Proper Basis For Summary Judgment, But Acrobat Provides for "Labelling" In Any Event

In this district court, the term "labelling" did not form the basis for any non-infringement argument advanced by Adobe. Nevertheless, Adobe asks this Court to affirm the district court's judgment based on a *sua sponte* decision provided solely in a footnote of the district court's order. Adobe Br., 44 (citing A40, n.23). For all of the reasons outlined in TecSec's Opening Brief and above, summary judgment on this basis is improper because insufficient notice was provided and TecSec was precluded from taking discovery on issues not raised in Adobe's motion. Labelling was not briefed as a summary judgment ground nor was the term discussed at the summary judgment hearing.

Disregarding the procedural defects, Adobe asks this Court to affirm by reiterating the district court's statement that "what TecSec alleges is a label is not 'attached to' the object, it is a part of the object." Adobe Br. at 44 (citing A40, n.23). The district court cited no evidence for this conclusion, and indeed none exists. Adobe's corporate representative conceded that an unencrypted PDF does not have an encryption dictionary in its trailer, and that at the conclusion of the encryption process Acrobat writes (i.e., inserts) an encryption dictionary into the trailer. *See* A3585, 14:21-22. There is only one logical conclusion – if there was no encryption dictionary appended to the PDF file before encryption, and there is an encryption dictionary appended to the encrypted PDF file after encryption, then

the encryption dictionary was attached to the PDF file. This is precisely as detailed by TecSec's expert, whose declaration is unrebutted. A3772, ¶ 40; A3791, ¶69. Accordingly, there is no basis to support the district court's *sua sponte* decision.

Finally, Adobe argues that this Court should reverse the district court's construction and adopt Adobe's construction, which attempts to add the temporal limitation "attachment of a label to an object by software after encryption of that object." Adobe Br. at 45 (emphasis added). Adobe argues for some unexplained reason the word "compartmentalization" necessitates this temporal restriction, but it is impossible to determine for Adobe's brief why this would be the case. There is no disclaimer in the specification indicating that labelling must occur at a particular time, and the plain language of the claims confirms this. For example, claim 1 of the '702 patent recites the steps of selecting the object to encrypt, encrypting the object, and "labelling the encrypted object." From this language, it is clear that, at least for this particular claim, the action of labelling occurs following encryption of the object – otherwise there would be no encrypted object to label. But nothing in the claims indicates that this must always be the case. Thus, Adobe's proposed construction adds unnecessary, and duplicative, limitations to the term. *See U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997) (claim construction "is not an obligatory exercise in redundancy.").

Regardless of the construction, as set forth above, Adobe's corporate representative conceded that the labelling with Acrobat does not occur until the last step of the encryption process, and that each encrypted file or object has its own unique encryption dictionary. A3629-A3630, 71:9-72:16. Thus, every encrypted object is separately labelled, and Adobe's proposed construction provides no basis for a finding of no infringement.

E. The District Court Properly Found That Acrobat Provides For "Multi-Level . . . Security"

As noted by Adobe, "multi-level security" has been construed to require "multiple layers of encryption." Adobe Br., 46-47. The district court correctly concluded that Acrobat meets the "multi-level . . . security" limitation through the PDF envelope and PDF portfolio functionality. A36-A37.

Adobe claims in its Brief that Acrobat can encrypt only one level of information – either a PDF document itself or the attachments to the PDF document, but not each in turn. Adobe Br., 47. Adobe's product documentation, Adobe's customer facing website, the testimony of Adobe's corporate representative, and the unrebutted testimony of TecSec's expert, however, belie this assertion. Adobe's corporate representative refuted Adobe's arguments, admitting that the accused Acrobat products can be used to embed encrypted PDF objects in other PDF objects which are also encrypted. Specifically, Mr. Kaufman testified that Acrobat can encrypt PDF documents and secure those documents

with password or certificate security, and that those protected and encrypted PDF documents can be embedded using Acrobat in a PDF portfolio or PDF envelope, that in turn can be encrypted and protected with password or certificate security. *See* A3546-A3547, 75:12-76:25; A3552-A3553, 81:7-82:4; A3628-A3633, 70:18-75:3. Each time the PDF container is encrypted, any previously encrypted contents are admittedly encrypted a second time. *See* A2490-A2491, ¶ 20; A3546-A3547, 75:7-76:25. This process results in embedded, encrypted PDF objects nested in other encrypted PDF objects, identical to that disclosed in the DCOM Patents, as shown below:

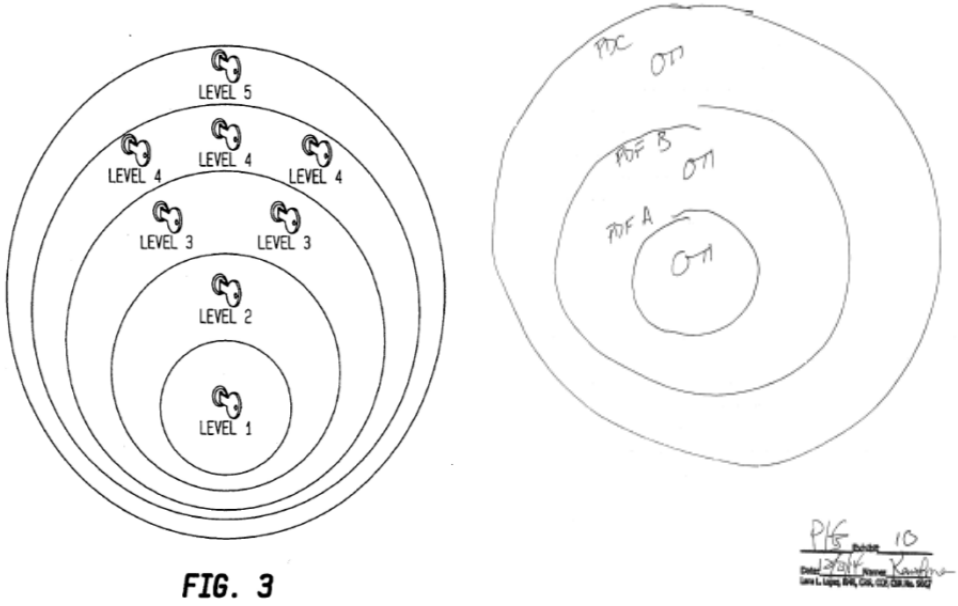


FIG. 3

Figure 3 of the '702 patent (on left) is described as showing an encrypted object (i.e., the Level 5 object) that contains a web of embedded encrypted objects nested within the other encrypted objects. *See* '702 patent, 11:18-20. Exhibit 10 to

the deposition of Mr. Kaufman (on right) depicts the capability of Acrobat to embed encrypted PDF documents within other encrypted PDF documents, either as attachments or as embedded in PDF portfolios or envelopes. *See* A3568-A3569, 111:13-112:22; A3628-A3633, 70:18-75:3. Mr. Kaufman confirmed this fact. *See* A3628-A3633, 70:18-75:3. He also admitted that each of these encrypted PDF objects can be protected with a unique password or certificate. *See, e.g.,* A3629, 71:23-25. Thus, there can be no dispute that Acrobat can embed encrypted objects within other encrypted objects and meet the "multi-level . . . security" limitation. *See* A3761-A3762, ¶ 21. Moreover, Mr. Kaufman admitted that he personally used Acrobat to perform these steps, demonstrating direct infringement of both the system and method claims. A3565, 104:6-7.

Similarly, the Adobe blog discussed previously (*supra* at 20) depicts the very multi-level security that TecSec accuses in the context of using Acrobat for the "persistent protection" of objects by encrypting PDF documents and embedding them in other PDF documents (e.g., portfolios or envelopes) that are themselves encrypted. *See* A3683. Mr. Kaufman confirmed that the PDF file linked to the blog posting shows an encrypted and password protected PDF envelope that contains an embedded, encrypted and password protected PDF document. A3563-A3565, 102:9-104:7; *see also* A3763-A3769, ¶¶ 26-34.

TecSec's expert similarly demonstrated how Acrobat can be used to meet the "multi-level security limitation. A3769-A3776, ¶¶ 35-44.

Finally, Adobe attempts to argue that "multi-level . . . security" requires multiple labels that provide an additional layer of protection in addition to encryption. While the claim construction does not contain such a limitation, Adobe's 30(b) representative expressly admitted that when an encrypted PDF file is embedded in another PDF file, each file will have its own password and each file must have its own unique encryption dictionary (i.e., each will have its own label). A3629, 71:12-25. In addition, Mr. Kaufman admitted that these labels provide a layer of protection in addition to encryption. A3538, 66:2-6 ("Q. So password security -- either password security, certificate security, or LiveCycle Rights Management server security -- can control access, encrypt and set permissions? A. Yes.").[2] Accordingly, Acrobat provides for multiple labels at multiple levels, and Adobe's argument must be rejected.

IV. Reassignment On Remand Is Necessary

The procedural errors in this case are almost too numerous to list, and have created an environment where TecSec has not received a fair opportunity to present evidence or have its claims heard. The district court allowed for Adobe to

[2] Mr. Kaufman also admitted TecSec's Requests for Admission Nos. 21 and 22, which directly address this issue. A3634-A3635, 76:13-77:8.

move for summary judgment of no infringement before discovery even commenced, severely limited TecSec's ability to take discovery after the motion was filed, and then granted summary judgment *sua sponte* on an issue on which Adobe did not move, and on which TecSec was precluded from taking discovery.

Moreover, the district court has provided several indications that these one-sided rulings will almost certainly continue if this case is remanded, noting in footnotes that the district court has conducted independent validity and non-infringement analyses on grounds not raised by any defendant, and without the benefit of discovery, briefing or argument, determined that the asserted patents may have invalidity issues and may not be infringed for other reasons. *See* A12, n. 10.

While reassignment should be used sparingly, this case presents one of the clearest instances where reassignment is necessary to preserve the appearance of impartiality and protect TecSec from undue prejudice.

CONCLUSION

For the above-mentioned reasons, TecSec respectfully requests from this Court the following relief:

(1) an order setting forth the proper constructions for the DCOM Patents;

(2) an order vacating the district court's Order granting judgment of no infringement; and

(3) on remand, instructions to reassign this case to a different judge in the Eastern District of Virginia.

Respectfully Submitted

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October 23, 2015

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of October, 2015, the foregoing REPLY BRIEF FOR PLAINTIFF-APPELLANT was electronically filed with the Clerk of the Court using the CM/ECF system which will issue an electronic notification to counsel of record.

/s/ Michael A. Oakes
Michael A. Oakes

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

The undersigned, an attorney, hereby certifies that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Circuit Rule 32(b). This brief contains 6,948 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

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