
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

01 COMMUNIQUE LABORATORY, INC.

Plaintiff-Appellant,

v.

LOGMEIN, INC.

Defendant-Appellee,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
VIRGINIA IN CASE NO. 1:10-CV-01007, SENIOR JUDGE CLAUDE M. HILTON

**REPLY BRIEF OF PLAINTIFF-APPELLANT
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CERTIFICATE OF INTEREST

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01 Communique Laboratory, Inc.

2. The name of the real party in interest we represent is:

SAME AS ABOVE

3. The parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public, of the party or *amicus curiae* represented by counsel are:

NONE

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

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I. INTRODUCTION

The premise of LogMeIn's brief is that 01 Communique, to distinguish its invention from the prior art, represented during the reexamination that the location facility was limited to one device, and one device alone.

This premise is incorrect in two respects. First, 01 Communique did not represent during the reexamination that the location facility was limited to one device. To the contrary, it reaffirmed during the reexamination that its location facility could be sub-divided and distributed over multiple devices comprising the locator server, and the Patent Office acknowledged that the specification was still controlling. 01 Communique explained during the reexamination that "through distributed processing, there is no distinction between a single server computer performing a set of operations or several computers performing those same operations." (A6102). And the Patent Office confirmed during the reexamination that "the specification of the '479 Patent clearly defines that the server comprises one or more computers[.]" (A28159 at lines 28-29).

Second, contrary to the thrust of LogMeIn's arguments, 01 Communique did not need to limit the location facility to one device to distinguish itself from the prior art. As the Patent Office confirmed during the reexamination, what distinguishes the '479 Patent from the prior art is that the location facility creates the communication channel, regardless of how many servers the location facility is

distributed upon. The Patent Office, knowing full well that the specification teaches that the location facility can be sub-divided and distributed over multiple devices comprising the locator server, confirmed the '479 Patent claims because, in its own words, "the prior art fails to teach or suggest that the location facility determines the then current location of the personal computer and creates a communication channel between the remote computer and the personal computer." (A20008).

LogMeIn misrepresents the reexamination history of the '479 Patent in service of its arguments on appeal, ignoring important parts of the reexamination and dissembling with respect to others. The specification clearly teaches that the "location facility" can be subdivided and distributed over multiple computers comprising the locator server, and the reexamination did not narrow the teaching of the specification.

The specification is the single best guide to understanding the claims. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (en banc). The '479 Patent specification provides that the locator server, on which the location facility runs, "may comprise one or more computers" and teaches that "a number of computer program facilities are described in this invention . . . such facilities can be sub-divided into separate facilities." (A4016 at col. 5, line 24-25; A4018 at col. 10, lines 11-16).

A disclaimer of these teachings from the specification would have to be equally clear to disavow the corresponding scope attributable to the claims. *Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1324 (Fed. Cir. 2003). Far from disclaiming this scope, however, the reexamination *confirmed* that the location facility functionality can be subdivided and distributed over multiple computers comprising the locator server.

LogMeIn makes three arguments on appeal for the proposition that there was a disclaimer of the specification's definition of "location facility" during reexamination, none of which has merit.

First, LogMeIn argues that Dr. Ganger's declaration disclaimed the "subdivided over multiple computers" scope by stating that the location facility "itself" creates the communication channel, as opposed to "some other component." But there was no such disclaimer. Because the location facility can be distributed over multiple computers comprising the locator server, the fact that it creates the communication channel "itself" means only that the location facility, *viewed as a whole*, does so. The reexamination history shows that, in the context of distinguishing certain prior art techniques, Dr. Ganger used the phrase "some other component" simply to refer to other components of the claims, namely the personal computer and the remote computer.

Indeed, a critical aspect of the '479 Patent's invention is that the locator server, not the personal and/or remote computers, creates the communication channel. The Patent Office understood the '479 Patent's invention in terms of these three components finding that, unlike the prior art, the location facility on the locator server "creates a communication channel *between the remote computer and the personal computer.*" (A20008) (emphasis added).

Second, LogMeIn argues that 01 Communique disclaimed the "subdivided over multiple computers" scope while traversing a rejection based on the Crichton references, U.S. Patent No. 6,104,716 and GB Patent No. 2323757 (collectively, "Crichton"). To the contrary, the discussion regarding Crichton did not relate to whether the claimed location facility could be subdivided and distributed over multiple computers comprising the locator server. Rather, the discussion addressed the unrelated issue whether Crichton's "server end proxy" could be read on the claimed "data communication facility" of the personal computer in the '479 Patent.

Third, LogMeIn argues that the Court should infer disclaimer of the "subdivided over multiple computers" scope from the Patent Office's rejection of claim 49 during the reexamination premised on an alleged lack of support in the specification. But support for the limitation "the server computer program is subdivided into separate facilities distributed over more than one computer" was

directly considered during the reexamination in connection with Claim 64 (A6105), and the Patent Office found that the specification supported this subject matter. (A28159 at lines 27-30). Moreover, the Patent Office found that the original claims already encompassed this scope. (A28160 at lines 1-3).

Because the specification explicitly teaches that the “location facility” can be subdivided and distributed over multiple computers comprising the locator server and the reexamination confirmed that understanding, it was error for the district court to construe “location facility” to be something that could *not* be subdivided and could *not* be distributed over multiple computers. Summary judgment based on the district court’s improper claim construction should be reversed and remanded for trial, and the term “location facility” should be construed as “computer software associated with the locator server, which may comprise one or more computers.”

II. ARGUMENT

LogMeIn argues that “01 never successfully claimed a remote access system in which the location facility functions are distributed among different software programs running on different computers.” (Red Brief at 3). The intrinsic record of the ‘479 Patent is precisely to the contrary. The specification expressly defines the “location facility” as capable of being subdivided and distributed over one or more computers, 01 Communique reaffirmed that meaning during reexamination,

and the Patent Office confirmed during the reexamination that the claims encompass that scope. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979-80 (Fed. Cir. 1995), aff'd 517 U.S. 370 (1996) (explaining that definitions appearing in the specification are used in interpreting the coverage of the claims and such a construction may be confirmed by what the patentee said during prosecution).

A. The Specification Expressly Provides That The Location Facility May Be Subdivided And Distributed Over Multiple Computers Comprising The Locator Server

The aspect of the '479 Patent's invention relevant to this appeal is the ability of the location facility, running on the locator server, to create communication channels between the personal and remote computers. The locator server of the '479 Patent, with its associated location facility, allows a user who is away from their home or office computer to access that computer whether or not it is publicly addressable. (*See, e.g.*, A4017 at col.8, lines 7-13; A4019 at col. 11, lines 10-15).

When 01 Communique applied for the '479 Patent, it did so with distributed computing in mind. In distributed computing, a problem is subdivided into tasks, the tasks being broken up among several computers and the computers communicating with each other to achieve a common goal. (A24005 at ¶ 8). This is an essential aspect of modern computing. (A24005 at ¶ 9 – A24006 at ¶ 10).

To prevent someone from circumventing the '479 Patent by simply distributing the location facility over multiple computers comprising the locator server, 01 Communique included language in its specification to account for the concept of distributed computing. Accordingly, the specification states that the locator server may be comprised of one or more computers. "Server computer 12 [the locator server] may comprise one or more computers, as is well known." (A4016 at col. 5, lines 24-25). LogMeIn argues that this definition from the specification does not specifically mention the term "location facility" (Red Brief at 34), but it is clear from the specification and claims that the location facility is simply the software, i.e. computer programs, running on the locator server. (A4018 at col. 10, lines 11-13; *see e.g.*, A4018 at col 10, lines 51-54).

Moreover, the specification also states that "a number of computer program facilities are described in this invention [S]uch facilities can be sub-divided into separate facilities." (A4018 col. 10, lines 11-16). LogMeIn argues that this definition "does not specify which of the numerous different facilities mentioned in the patent can be combined or subdivided." (Red Brief at 36). Quite correct. The definition applies to *all* facilities, including the location facility.

The specification even describes a preferred embodiment of the invention in which the location facility is explicitly subdivided and distributed over several computers. The '479 Patent describes a location facility having a directory service

program that maintains information relating to personal computers connected to the system. (A4017 at col. 7, lines 37-40). The patent further provides that the directory service program may be located on a server that is separate from but accessible by the locator server: “In the particular embodiment illustrated herein, said directory service program 28 is operably associated with Server Computer 12. For the sake of clarity, said directory service program 28 can be either resident on said Server Computer 12 or remote from said Server Computer 12 but accessible therefrom.” (A4016 at col. 6, lines 46-49).

A description of the existing technology in the Background section of the specification further confirms that the functionality of the location facility can be subdivided and distributed over one or more computers:

Also, by “portal” what is meant is generally understood is a means for facilitating communication from point A to point B. More than one interconnected computer or process may co-operate to provide a single “portal”. For example, a first computer or process comprising the “portal” may provide means for locating B at least once. Thereafter, communication between A and B may be facilitated through a second computer or process independent of the first computer or process.

(A4014 at col. 2, lines 39-46). LogMeIn argues that this example is irrelevant because the functions described are not the specific functions of the claimed location facility of the invention. (Red Brief at 34-35). The example confirms, however, as do other aspects of the specification, that one of ordinary skill in the art would understand that multiple computers and/or multiple processes performed

by the computers can operate together as a locator server and its associated location facility.

LogMeIn also argues that the use of “the” in the claims requires departure from the general rule that “a” in a claim can mean “more than one” and thus the claimed “a locator server computer” must be one computer. (Red Brief at 31). The specification teaches that the locator server can be distributed over multiple computers comprising the locator server. (A4016 at col. 5, lines 24-25). Distributing the functionality over more than one computer does not result in more than one “locator server computer.”¹ LogMeIn further argues that the general rule does not apply because the claims recite that the locator server has “*its* location on the Internet being defined by a static IP address.” (Red Brief at 31) (emphasis in original). The Patent Office acknowledged during the reexamination, however, that “the locator server may comprise several computers that together share a single, common link to the Internet... .” (A28161 at lines 13-15). LogMeIn’s own expert also acknowledged that a single server “can have a single address whereas the actions are undertaken by more than one physical computer.” (A25004, line 15 – A25005, line 5).

¹ In any event, the use of “the” in the claims does not preclude multiple locator servers. *Baldwin Graphic Systems, Inc. v. Siebert, Inc.*, 512 F.3d 1338, 1342 (Fed. Cir. 2008) (“[t]he subsequent use of definite articles ‘the’ or ‘said’ in a claim to refer back to the same claim term does not change the general rule, but simply reinvokes that non-singular meaning”).

Additionally, LogMeIn argues that the “location facility” cannot be distributed over more than one computer because the specification criticizes multi-program solutions “for remote access.” (Red Brief at 33). But these “multi-program solutions” were for managing electronic mail, pager messages, fax and voice mail, not remote access. (A4014 at col. 1, lines 17-27). Indeed, the specification distinguishes message management programs from remote access programs: “Single programs for managing such variety of messages are known, but such programs do not provide full remote access via the Internet to management of such messages and contact information.” *Id.* at lines 29-32.

B. The Reexamination Confirmed That The Location Facility May Be Subdivided And Distributed Over Multiple Computers Comprising The Locator Server

1. The Patent Office Found That The Claims Cover A Location Facility Subdivided And Distributed Over Multiple Computers Comprising The Locator Server

LogMeIn argues that during the reexamination the Patent Office relied upon representations from 01 Communique that the location facility was limited to one device. (Red Brief at 16). To the contrary, 01 Communique represented that the location facility could be subdivided and distributed over multiple computers comprising the locator server. 01 Communique submitted new claim 64 during the reexamination containing the limitation “the server computer program is subdivided into separate facilities distributed over more than one computer.” (A6105).

01 Communique explained, in submitting this claim, that “in the context of computer systems it is well understood that, through distributed processing, there is no distinction between a single server computer performing a set of operations or several computers performing those same operations.” (A6102).

Although the reexamination requester argued that new claim 64 improperly broadened the scope of the originally issued claims, the Patent Office found to the contrary explaining that “in contrary to the Third Party requester’s concerning, i.e., enlarging the scope of the issued claims, the remaining new claims do not broaden the issues claims because they are further limiting the subject matter of their respective previous claims.” (A28160 at lines 1-3). These findings demonstrate that the originally issued claims encompass a location facility that is subdivided and distributed over more than one computer, and expressly contradict the argument advanced by LogMeIn that the reexamination contained a clear and unmistakable disclaimer of claim scope.

2. Dr. Ganger’s Statements Did Not Disavow The Clear Meaning Of The Specification

LogMeIn argues that Dr. Ganger disavowed the specification’s teaching of distributed computing when he stated that the “location facility” “itself”—as contrasted with “some other component”—creates the communication channel. (Red Brief at 25). But LogMeIn has taken the word “itself” out of context.

Because the specification expressly teaches that the location facility may be distributed over multiple computers comprising the locator server, the word “itself” does not mean that the location facility must be limited to a particular device. Rather it means that the location facility, however it is configured—whether on one, five, or fifty computers—must create the communication channel.

And as to the meaning of “some other component,” 01 Communique’s statements to the Patent Office during reexamination make clear that Dr. Ganger was juxtaposing the location facility of the locator server with two other components of the system—the personal computer and the remote computer. For example, in the Response to the Action Closing Prosecution (“ACP Response”) that refers to these statements by Dr. Ganger, 01 Communique explained:

As will be discussed below, the asserted locator server computer of several of the cited references (e.g., NetMeeting, ILS, NAT P2P, NAT P2P Games and LapLink in view of RemotePassage) is merely “used by,” “enables” or “facilitates” *the personal and remote computers to create communication channel between each other*. The asserted locator server computers do not actually “create” the communication channel. Instead, it only provides information to the personal and/or remote computer so that *the personal and remote computers can create a communication channel with each other*.

(A19007) (emphasis added).

Dr. Ganger’s meaning is also confirmed by statements he made in his declaration that distinguish each of the references cited in the above-quoted section of the ACP Response. He distinguished each of these references from the claims

on the basis that the personal or remote computer creates the communication channel, not the location facility of the locator server. (A18008 at ¶ 24; A18014 at ¶ 40; A18015 at ¶ 43). In confirming the '479 Patent claims over NetMeeting, ILS, NAT P2P, NAT P2P Games and LapLink in view of RemotePassage, the Patent Office expressly relied on this distinguishing feature as identified by Dr. Ganger. (A20006-07).²

The meaning of Dr. Ganger's statements was thus clear.

And were there any confusion about the matter, 01 Communique specifically reiterated during the reexamination that "through distributed processing, there is no distinction between a single server computer performing a set of operations or several computers performing those same operations through distributed computing," (A6102-3) and the Patent Office acknowledged that "the specification of the '479 Patent clearly defines that the server computer comprises one or more computers[.]" (A28159 at lines 28-29). Understanding that the location facility could be spread out over multiple servers comprising the locator server, the Patent Office confirmed the claims because the location facility associated with the locator server, as opposed to the personal or remote computers, created the

² A patent that LogMeIn cites as a purported example of relevant prior art, U.S. Patent No. 7,130,888 ("the '888 Patent"), *see* Red Brief at 7-8, was not relied upon in the decision below. This patent describes yet another system in which the personal and/or remote computers create the communication channel, not the location facility of a locator server, and has no relevance to this appeal.

communication channel. “[T]he prior art fails to teach or suggest that the location facility determines the then current location of the personal computer and creates a communication channel between the remote computer and the personal computer.” (A20008). This finding has nothing to do with whether the location facility can be located on more than one computer.

Accordingly, nothing in the reexamination supports LogMeIn’s claim that there was a representation that the location facility had to be located on one device, or that the Patent Office believed the claims to be so limited.

3. Crichton Was Unrelated To Whether A Location Facility May Be Subdivided And Distributed Over Multiple Computers Comprising The Locator Server

LogMeIn argues that 01 Communique disclaimed a subdivided location facility distributed over multiple computers in its arguments traversing the rejection of claims based on Crichton. LogMeIn argues that 01 Communique limited the location facility to one device because Crichton otherwise would have invalidated the patent. (Red Brief at 16).

But as noted above, 01 Communique did not need to limit the location facility to one device to distinguish the claims from the prior art, nor did it do so. The Patent Office, aware that the specification teaches that the location facility could be sub-divided and distributed over multiple devices comprising the locator server, confirmed the ‘479 Patent claims because the prior art—including Crichton

and other prior art references—“fails to teach or suggest that the location facility determines the then current location of the personal computer and creates a communication channel between the remote computer and the personal computer.” (A20008).

In truth, the rejection based on Crichton, and 01 Communique’s statements regarding that rejection, were unrelated to the structure of the location facility. Rather, the Patent Office and the parties were focused on whether the claimed “data communication facility” of the invention running on the *personal computer* component could be read on the “server end proxies” of Crichton. The Patent Office asserted that it could; 01 Communique successfully explained that it could not.

In applying Crichton to the claims of the ‘479 Patent, neither the reexamination requester nor the Patent Office ever asserted that the “server end proxy” of Crichton was part of the location facility. Indeed, such an arrangement would not make sense. For example, 01 Communique explained during the reexamination that, if the server end proxy were part of the location facility, the communication channel is set up “without any request for communication” contrary to the requirement of the ‘479 Patent claims. (A6202 at ¶ 19).

In the Request for Inter Partes Reexamination, the “server end proxy” of Crichton was asserted by the petitioner to correspond to the claimed “personal

computer.” (*See, e.g.*, A5002). The Patent Office similarly asserted that the server end proxy corresponded to the claimed data communication facility linked to the personal computer. (*See, e.g.*, A6011 at lines 24-26; A6012 at lines 3-4). In its ACP Response, 01 Communique stated that “the ACP maps the server end proxy to the data communication facility.” (A19009). Dr. Ganger stated that “the Crichton references teach away from the use of dynamic IP addresses for the server end proxy (i.e., the alleged data communication facility identified by both Citrix and the ACP). . . .” (A18006 at ¶ 16). The Patent Office confirmed the claims over Crichton because the “Server end proxy (i.e., data communication facility)” does not determine the then-current location of the personal computer. (A20006).³ The above statements reflect that the discussion concerning Crichton related to whether the “data communication facility” of the personal computer of the claims could be read onto Crichton’s “server end proxies”—it had nothing to do with the location facility.

4. Cancellation Of Claim 49 Did Not Disavow The Clear Meaning Of The Specification

LogMeIn argues that by cancelling claim 49, 01 Communique inferentially disclaimed the specification’s teachings. To the contrary, the Patent Office

³ LogMeIn argues repeatedly in the Red Brief that 01 Communique used the phrase “some other component” in connection with the Crichton reference, *see, e.g.*, Red Brief at 15, 39 and 48. This argument was not germane to the Crichton discussion and consequently was never made in connection with that reference.

expressly agreed with 01 Communique that the '479 Patent covers a location facility that can be subdivided and distributed over multiple computers that comprise the claimed "locator server computer."

During the reexamination, 01 Communique submitted proposed claims 48, 53, 59 and 70, each reciting the single limitation that "the locator server computer is comprised of more than one computer." (A6104-06). 01 Communique also submitted claim 64, reciting the single limitation that "the server computer program is sub-divided into separate facilities distributed over more than one computer." (A6105). 01 Communique cited the original patent application for support of these new claims, noting that "in the context of computer systems it is well understood that, through distributed processing, there is no distinction between a single server computer performing a set of operations or several server computers performing those same operations." (A6102-03).

As noted by the Patent Office, the reexamination requester objected to claims 48, 53, 59, 64 and 70, arguing that they lack support in the specification. (A28161 at lines 3-11). The Patent Office disagreed, and in finding support for each of these claims stated that "the disclosure of the '479 Patent has never defined that the locator server computer or server computer comprises a singular component. Actually, the specification of the '479 Patent clearly defines that the server computer comprises one or more computers at col. 5, lines 24-25."

(A28159).⁴ It is thus clear that the Patent Office did not reject new claim 49 because it claimed a sub-divided location facility distributed over more than one computer as LogMeIn suggests. Rather, claim 49 was rejected on a separate basis that is not relevant to this appeal.

New claim 49 recited a locator server comprising at least two computers, a feature found in claim 48—from which claim 49 depended—and which was found to be supported in the specification. But claim 49 also recited the limitation that the second computer facilitates communication sessions but “does not also perform” a separate location operation. (A6104). While 01 Communique identified language in the specification supporting this negative limitation, the Patent Office asserted that the specification language identified by 01 Communique “does not say that the second computer in the ‘portal’ does not also perform or participate in a location operation, which is required in [claim 49].” (A28161 at lines 27-28). By rejecting the proposed negative limitation, if anything, the Patent Office confirmed that a second computer *can* perform or participate in performing the location operation.

⁴ Ultimately, claims 48, 53, 59, 64 and 70 were rejected because they depended from claims 47, 52, 58, 63 and 69, each of which was rejected in the ACP on grounds unrelated to this appeal. (A28160). Given the rejection of claims 47, 52, 58, 63 and 69 and the strict limitations on amendments that can be entered after an ACP, 01 Communique was effectively foreclosed from changing the dependency of claims 48, 53, 59, 64 and 70 to obtain their allowance. See 37 C.F.R. § 1.116(a) - (b); MPEP (8TH ed. Rev. 7, July 2008) § 2673.

01 Communique's cancellation of Claim 49 thus cannot be viewed as acquiescence to the argument that the specification did not support a location facility subdivided and distributed over more than one computer. That issue was not considered in connection with claim 49, and when it was considered in connection with claims 48, 53, 59, 64 and 70, the Patent Office agreed that there was support in the specification for this feature and that the original claims encompassed this scope.⁵

C. Summary Judgment In 01 Communique's Favor, Not LogMeIn's Favor, Would Have Been Warranted Below

LogMeIn argues that its system contains Web Servers, Gateway Servers and Database Servers, none of which individually perform all the claimed functions of the "location facility" in the asserted claims of the '497 Patent. (Red Brief at 54-57). LogMeIn does not, however, point to any claimed function of the "location facility" that is not performed by the *combination* of these servers.

The asserted claims expressly cover a location facility that is subdivided and distributed over multiple computers comprising the locator server, and LogMeIn's argument on the facts is unavailing. LogMeIn's description of its system only serves to make clear that summary judgment of infringement would have been

⁵ 01 Communique also did not acquiesce regarding the separate and unrelated issue of whether the specification supported the negative limitation found in claim 49. In response to the assertion by the Patent Office, 01 Communique specifically pointed out and explained where the support for this negative limitation was found in the specification. (See A28269-70).

appropriate below, as all the required functions of the “location facility” are indeed performed by software that is run on the locator server of the system.

III. CONCLUSION

For the reasons set forth in this brief and its opening brief, 01 Communique requests that the Court reverse the district court’s claim construction and grant of summary judgment, construe the “location facility” of the ‘479 Patent claims as “computer software associated with the locator server, which may comprise one or more computers,” and remand for further proceedings.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2011 two (2) copies of the foregoing Reply Brief of Plaintiff-Appellant 01 Communique Laboratory, Inc. were served by the means indicated to the persons at the addresses listed:

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This brief contains 4536 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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November 7, 2011



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