

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

ANCORA TECHNOLOGIES, INC.,

Plaintiff,

v.

LG ELECTRONICS INC. and LG
ELECTRONICS U.S.A., INC.,

Defendants.

CIVIL ACTION NO. 1:20-CV-0034

JURY TRIAL DEMANDED

ANCORA TECHNOLOGIES, INC.,

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD., and
SAMSUNG ELECTRONICS AMERICA,
INC.,

Defendants.

CIVIL ACTION NO. 1:20-CV-0034

JURY TRIAL DEMANDED

PLAINTIFF'S REPLY CLAIM CONSTRUCTION BRIEF

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Defendants’ Response (Dkt. 49) proves Ancora’s point: Defendants’ positions are not supported by the claims or the specification. Instead, Defendants rely on snippets from the prosecution history and other litigations as the main and often only basis for their constructions. None support Defendants’ positions—much less satisfy the “high” standard required to show “patentee disclaimer.” *Avid Tech., Inc. v. Harmonic, Inc.*, 812 F.3d 1040, 1045 (Fed. Cir. 2016).

Defendants thus turn to rhetoric—accusing Ancora of a variety of purported misconduct, including walking away from positions taken in prior litigations. The accusations are baseless. As Defendants know, Ancora changed a construction only when (1) a court subsequently construed a term or (2) Defendants told Ancora they understood it to be narrower than Ancora had explained.

Ancora further addresses these issues (as well as the other shortcomings in Defendants’ constructions) below—again discussing the terms in the order in which they appear in the claims.

1. “license” (Claim 1 - Preamble) / “license record”

“License” Does Not Need to Be Construed: As Ancora explained in its Opening Brief at page 5 and its Response at page 20, the portion of the preamble containing the word “license” describes an intended use or purpose for the structurally complete invention described in the claim body. It thus is not limiting, and the word “license” needs no construction. *TomTom, Inc. v. Adolph*, 790 F.3d 1315, 1324 (Fed. Cir. 2015) (portion of preamble stating an intended use is non-limiting).

Notably, Defendants do not dispute that Claim 1 recites a structurally complete invention. Instead, they argue the preamble is limiting because “license” purportedly “provides required antecedent basis” for terms like “license record” and “license authentication bureau” and because a proposed construction uses the word “licensed.” Defs. Resp. at 20 & n.8. Defendants are wrong.

Certainly, Defendants cite nothing to support their argument that use of a similar word in a proposed construction is enough to render a preamble limiting. Nor can they. The very case Defendants cite shows that reference to even identical words in a later claim is not enough to justify

antecedent basis treatment. *Am. Med. Sys., Inc. v. Biolitec, Inc.*, 618 F.3d 1354, 1359 (Fed. Cir. 2010) (holding that “the preamble term ‘photoselective vaporization of tissue’ does not provide a necessary antecedent basis for the term ‘the tissue’ in the bodies of each” claim). Similarly, not one of the “almost 30 phrases” Defendants point to start with the words “said” or even “the”—further demonstrating that none actually refer back to the word “license” in the Claim 1 preamble.

Defendants’ “License” Construction Contradicts the Specification: Even if the term “license” were limiting, Defendants’ construction would be incorrect.

First, it is inconsistent with the specification, which teaches that—as used in the ’941 Patent—a “license” refers to “authorization or verification to run.” Ancora Br. at 6 (citing ’941 Patent at 1:6-8, 1:59-62, and 2:14-26).¹ Indeed, the fact that Defendants have to leap immediately to dictionary definitions shows the weakness of their argument. Even ignoring that—as Ancora explained at page 22 of its Response—Defendants’ dictionaries show “there is not a single, accepted meaning” of the word “license,” “the question is not whether there is a settled ordinary meaning of the term[] in some abstract sense.” *Eon Corp. IP Holdings v. Silver Spring Networks*, 815 F.3d 1314, 1320 (Fed. Cir. 2016). “The only meaning that matters . . . is the meaning in the context of the patent.” *Id.* And here, the specification consistently uses “license” to refer to a program’s authorization or verification to run—a concept broader than a “legal contract.” *Texas Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1203 (Fed. Cir. 2002) (“If more than one dictionary definition” is consistent with the intrinsic record, the construction must include each.).

Second, Defendants’ argument that the “concept of ‘verification’ is at odds with the concept of ‘license’” also is incorrect. Defs. Resp. 21-22. Defendants ignore that the specification uses the words “licensed” and “verified” interchangeably. *E.g.*, ’941 Patent at 1:54 (“licensed to

¹ Unless otherwise noted, all emphasis in this brief has been added.

run”), 1:61 (same), 2:20 (“verified to run”), 2:30 (same). Defendants also ignore that, during prosecution, the patentee said that its method includes at least “a process where a software program verifies its authenticity using a license (verification structure).” Ancora Ex. 24 at ANCORA_342.

Finally, Defendants’ “unique key” argument also is wrong. To the extent a key is required at all, many of the asserted claims expressly contemplate that a “pseudo-unique key” suffices.

Defendants’ Unsupported “License Record” Construction Is Wrong: Defendants cite nothing in either of their briefs to support their “is licensed” limitation. Nor do Defendants respond to the fact that—as the *Apple I* court found—Ancora’s “for verifying that licensed program” construction is the correct one. *Ancora Techs., Inc. v. Apple Inc.*, 2012 WL 6738761, at *12 (N.D. Cal. Dec. 31, 2012) (“*Apple I*”); Ancora Resp. at 22-23. Defendants do not even address the patentees’ explanation that the claimed method includes “a process where a software program verifies its authenticity using a license (verification structure).” Ancora Ex. 24 at ANCORA_342.

2. “volatile memory”

In support of their construction, Defendants accuse Ancora of “playing fast and loose with this court.” Defs. Resp. at 29. The accusation is baseless. As explained in Ancora’s Opening Brief at page 8, the Federal Circuit held that—as used in the ’941 Patent—“volatile memory” includes both “memory whose data is not maintained when the power is removed” and situations where memory “become[s] inaccessible through the usual means once power is removed (even if the data can still be found on the hard disk by more sophisticated means).” *Ancora Techs., Inc. v. Apple, Inc.*, 744 F.3d 732, 737 (Fed. Cir. 2014) (*Apple II*) (citing ’941 Patent at 4:53-54, 8:1-2).

Defendants know this. Defendants also know that Ancora amended their construction in this case because—unlike other defendants—Defendants said they understood Ancora’s prior construction would exclude the very “inaccessible” example the Federal Circuit had identified.

Finally, and to be clear, Defendants’ offer to “include[e] virtual RAM” in its construction

is not enough. The phrase “virtual RAM” suggests that RAM is required even though “virtual memory” refers to a technique of using non-volatile memory (including a computer’s hard disk) in a volatile way. See Ancora Ex. 25 (MICROSOFT COMP. DICTIONARY (5th ed.) (defining “virtual memory” as memory that “may be partially simulated by secondary storage such as a hard disk”).

3. **“BIOS”**

Defendants’ Argument Refutes Their “Stored in ROM” Limitation: As an initial matter, Defendants admit that Ancora is correct: “BIOS memory” is not limited to being stored in ROM. Defs. Resp. at 24-25. Instead, they argue that “BIOS” somehow refers to “BIOS instructions,” which they say must be stored in ROM. *Id.* The argument is baseless.

Claim 1 refers only to “memory area of a BIOS” or “memory of the BIOS.” It never refers to BIOS “instructions.” Further, to the extent the patent discloses anything akin to BIOS “instructions,” it teaches that they may be changed, which cannot be true if they are stored only in ROM. ’941 Patent at 3:10-13 (noting consequences of data residing in the BIOS (which is necessary for the computer’s operability) [being] inadvertently changed)).

Defendants also cite nothing to support their statement that “Ancora does not dispute that there is a ROM portion of the BIOS memory.” In reality, Ancora noted embodiments “having only one non-volatile memory,” which necessarily means it is not limited to ROM. *Id.* at 3:23-25. Further, nothing in Claim 1 requires a “unique key”—a limitation described in dependent claims.

Defendants Admit Their “Automatically” Limitation Is Wrong: In their response, Defendants admit (as they must) that BIOS “can also be run manually if a user desires.” Defs. Resp. 25 (emphasis in original). Their attempt to limit the ’941 Patent BIOS to running “automatically” thus is plainly incorrect and should be rejected.

4. **“non-volatile memory of the BIOS”**

As Ancora explained on pages 12-14 of its Opening Brief, the Federal Circuit understood

that “non-volatile memory of [a/the] BIOS” simply refers to “memory space associated with the computer’s basic input/output system (BIOS), rather than other memory space.” *Apple II*, 744 F.3d at 733. The Examiner shared that understanding. “During examination, the Examiner defined ‘BIOS’ as “the set of essential software routines that test hardware at startup, start the operating system, and support the transfer of data among hardware devices.” Defs. Ex. 28 at 5.

In contrast, Defendants ask the Court to limit the claims to the very prior art shortcomings the patent was invented to overcome—shortcomings that would lead to the absurd result of the invention not being able to “[s]et up a verification structure in the erasable, non-volatile memory of the BIOS” as Claim 1 expressly requires. Such a “nonsensical interpretation” is incorrect and must be rejected. *Indivior Inc. v. Dr. Reddy’s Labs., S.A.*, 930 F.3d 1325, 1343 (Fed. Cir. 2019).

- i) The Court Should Reject Defendants’ “Not Recognized by an Operating System as a Storage Device” and “Does Not Have a File System” Limitations.

Defendants’ first argument depends on their mischaracterization of the prosecution history, which they argue contains “the applicants’ representations regarding the shortcomings of the standard BIOS memory used in the invention.” Defs. Resp. 11-12. Defendants are wrong. As the below text shows, the patentee only was describing the prior art limitations that had precluded OS-level programmers from being motivated to develop software to write to the BIOS:

An ordinary person skilled in the art makes use of OS features to write data to storage mediums. There is no OS support whatsoever to write data to the system BIOS. Therefore, an ordinary person skilled in the art would not consider the BIOS as a possible storage medium. Furthermore, it is common that all peripheral devices in the PC are listed and recognized by the OS except for the BIOS

Second, no file system is associated with BIOS. Every writable device connected to the PC is associated with an OS file system to arrange and manage data structures. An example for such a file system would be FAT, FAT32, N1FS, HPFS, etc. that suggests writing data to the writable device. No such file system is associated with the BIOS. This is further evidence that OS level application programmers would not consider the BIOS as a storage medium.

Ancora Ex. 3 at ANCORA_438. Specifically, in the prior art, (1) there was “no OS support” to

write data to BIOS and (2) there was no “OS file system . . . associated with BIOS.”² *Id.*

In contrast, the patentee said that the invention “proceeds against conventional wisdom in the art” by doing the opposite: “[u]sing BIOS to store application data.” *Id.*; *Ancora Techs., Inc. v. HTC Am., Inc.*, 908 F.3d 1343, 1350 (Fed. Cir. 2018) (“*HTC*”) (“the record . . . shows that the claimed invention moves a software-verification structure to a BIOS location”). Indeed, the Beeble White Paper submitted during prosecution as an exemplary embodiment describes a utility that recognized the BIOS and maintained a file system in it. Ancora Ex. 18 at ANCORA_278.

Defendants’ construction would preclude any of this from occurring. It would result in the nonsensical outcome where the OS agent could not carry out its express Claim 1 function of “[s]et[ting] up a verification structure in the erasable, non-volatile memory of the BIOS”—something Defendants admit could not be done if their limitations were adopted. Defs. Br. at 17.

And, to be clear, Mr. Mullor said nothing to the contrary. The testimony Defendants quote at pages 11-12 shows only that the invention was not focused on changing BIOS “hardware.” Instead, it taught a “software” solution that improves “this already available hardware” by enabling BIOS to be recognized—and used—by OS-level software agents (like the Beeble product) to store data. *E.g.*, Ex. 27 (Mullor Tr.) at A1825 (“Our idea essentially is -- was to build a software licensing technology that combines this already available hardware with software that we will develop, and create an elegant solution that has the advantages with none of the disadvantages.”).

In short, at most, the patentee simply identified prior art limitations, which “do[es] not indicate a disavowal or disclaimer of claim scope.” *Gemstar-TV Guide Int’l, Inc. v. Int’l Trade*

² Also incorrect is Defendants’ representation “that the Examiner stated that Misra and Ewertz collectively disclosed storing license records in BIOS memory.” Defs. Resp. at 11. The Examiner stated the opposite—emphasizing that he was allowing the ’941 Patent precisely because “the closest prior art systems, singly or collectively, do not teach licensed programs running at the OS level” interacting with BIOS. Ancora Ex. 2 (Examiner’s Reason for Allowance) at ANCORA_451.

Comm’n, 383 F.3d 1352, 1375 (Fed. Cir. 2004) (“Gemstar’s statements in the prosecution history do not indicate a disavowal or disclaimer of claim scope, but merely provide an example to illustrate differences between the invention and the prior art.” (citation omitted)); *Avid Tech.*, 812 F.3d at 1046-47; *Mass. Inst. of Tech. v. Shire Pharm., Inc.*, 839 F.3d 1111, 1120 (Fed. Cir. 2016).

ii) Defendants’ “Memory That Stores the BIOS” Construction Is Wrong.

Defendants’ second argument is a red herring. Ancora does not dispute that the invention requires that a verification structure be stored in the “non-volatile memory of the BIOS” (i.e., memory associated with the BIOS such that BIOS operations are able to recognize and use it).³

What Ancora seeks to avoid is the trap that Defendants are laying: one where “memory of the BIOS” is limited to “memory that stores [BIOS] software.” Defs. Resp. 12. Such a requirement conflicts with the specification, which teaches that the verification structure may be established in a different BIOS memory area than the BIOS software. ’941 Patent at 1:39-2:12 (teaching how, in one “non-limiting example” embodiment, the BIOS software is stored in a first BIOS memory area while the verification structure is stored in a second BIOS memory area); *id.* at 6:18-21.

Given such statements, it is not surprising that Defendants cite nothing in the specification or claims to support their construction. And Ancora never said anything different in other litigation. In *HTC*, for example, the “specific storage location” Ancora identified was the “erasable, non-volatile memory of BIOS”—the same memory Ancora is pointing to now. Defs. Ex. 29 at 39.

5. “program”

The dispute regarding this term is simple. Defendants accuse Ancora of “overreaching” and trying to “expand the scope of the claim” simply by adopting the Federal Circuit’s construction

³ Though irrelevant here, only a finding of judicial estoppel binds a patentee to a prior litigation statement. And estoppel does not apply where the prior court “did not explicitly construe” the term at issue. *SanDisk Corp. v. Memorex Prod., Inc.*, 415 F.3d 1278, 1291 (Fed. Cir. 2005).

of this term. Defendants are wrong. In reviewing this term, the Federal Circuit explicitly considered the “can be executed” limitation and removed it—holding that the “clear meaning” of this term was “a set of instructions for a computer.” *Apple II*, 744 F.3d at 734-35, 737.

6. “selecting a program residing in the volatile memory”

Defendants do not cite a single piece of intrinsic evidence to support their “running a program . . .” construction. Instead, they point solely to the fact that Ancora proposed the construction in a prior case. But Ancora explained in that very litigation that its construction required only that a single program be “loaded into memory for execution.” Ancora Ex. 15 at 16.

Defendants’ remaining arguments also are wrong. Defs. Resp. 25-26. Defendants do not dispute that their construction is inconsistent with at least one embodiment of the patent—reason enough to reject it. *Eko Brands, LLC v. Adrian Rivera Maynez Enterprises, Inc.*, 946 F.3d 1367, 1373 (Fed. Cir. 2020) (rejecting construction that “would exclude such a preferred embodiment”).

Further, Defendants’ “establishing” and/or “loading” argument ignores that the claims and specification identify each as examples of what “selecting” can include. ’941 Patent at 2:10-26 (stating that selecting can include “loading” and “accessing”), 6:7-10 (stating that, “according to one embodiment of the invention,” “[s]electing (17) a program includes the step of: establishing a licensed-software-program in the volatile memory”). Indeed, during prosecution, the Examiner found that a POSITA would understand “selecting a program” to be satisfied by art reciting loading “code to be executed” or “stor[ing] instructions for execution.” Defs. Ex. 5 at ANCORA_357.

7. “using an agent to set up a verification structure in the erasable, non-volatile memory of the BIOS”

To support their means-plus-function argument, Defendants try to portray Ancora as having represented “agent” to be a previously unknown concept. Defendants are wrong. “Agent” had an established meaning as a “software program or routine.” What was novel was the tasks the

Ancora “agent” was programmed to perform. And because the intrinsic record details the agent’s structure and how it can accomplish such tasks, “agent” does not invoke § 112 ¶ 6.

“Agent” Is Not a Nonce Word: To support their argument, Defendants rely heavily on the fact that one dictionary says an “agent” “may be software, hardware, or both.” Defs. Resp. 3. But the Federal Circuit has made clear that dictionary definitions are relevant only to the extent they are “consistent with the use of the words in the intrinsic record.” *Texas Digital*, 308 F.3d at 1204; see *Zeroclick, LLC v. Apple Inc.*, 891 F.3d 1003, 1008 (Fed. Cir. 2018) (looking to intrinsic record).

And here, that record confirms that “agent” is a “software program or routine.” The Examiner and the patentee expressly understood “agent” to mean software. See Ancora Resp. 5-6. The Federal Circuit likewise described the invention as “a piece of software,” *Apple II*, 744 F.3d at 735. And Defendants themselves identify multiple statements in which the inventor confirmed that the patent is directed to “software”—not hardware. Defs. Resp. 11-12.

Defendants also flip the § 112 ¶ 6 inquiry on its head by arguing that the E²PROM manipulation commands—which illustrate how the “agent” can write data to BIOS—“are not an algorithm.” Defs. Resp. 4. But as this Court held, the search for an algorithm occurs only if the presumption against § 112 ¶ 6 is overcome. *Digital Retail Apps, Inc. v. H-E-B, LP*, 2020 WL 376664, at *3 (W.D. Tex. Jan. 23, 2020). Indeed, *Genband USA v. Metaswitch Networks* rejected the same argument, explaining the “issue [that] arises only if a term is found to be a means-plus-function term.” 2015 WL 4722185, at *17 (E.D. Tex. Aug. 7, 2015).

Tellingly, Defendants now abandon their prior reliance on *Genband*, which they previously cited as an example of an “agent” “cannot[ing] sufficient structure” because “the claims and specification explained how the ‘agent’ interacted with other components in a way that informed its structural character.” Defs. Br. 8 n.3. The ’941 Patent does the same. It describes how its agent

interacts with other components (like BIOS), including how it can use specific E²PROM manipulation commands to accomplish its task. ’941 Patent at 1:59-2:26, 5:9-6:52; see *Ancora Resp.* 5-6. Such descriptions show that “the presumption [against § 112 ¶ 6] stands.” *Digital Retail*, 2020 WL 376664, at *2 (finding that the term “first communication module” was a means-plus-function term where the specification did not disclose “how the software performs the functions”).⁴

Defendants also fail to distinguish *Zeroclick* and *SecurityProfiling*. Just like in *Zeroclick*, the ’941 patent is directed to improving existing software—known structure. Further, similar to *SecurityProfiling*, the consistent dictionary definitions and the research of Defendants’ expert show that, “to one skilled in the art, [agent] would suggest any one of several well-known structures.” Defs. Resp. 6 (quoting *SecurityProfiling, LLC v. Trend Micro Am., Inc.*, 2018 WL 4585279 at *3 (N.D. Tex. Sept. 25, 2018)). Nothing more is required.⁵

Finally, Defendants try to immunize themselves from their admission that the specification recites algorithms for the “agent,” arguing that such algorithms cannot rebut the presumption against § 112 ¶ 6, otherwise “means-plus-function claiming” would be “impossible.” Defs. Resp. 6. But courts can and do use algorithms to defeat assertions of means-plus-function claiming. See *Sci. Telecommc’ns, LLC v. Adtran, Inc.*, 2016 WL 6872311, at *3 n.16 (D. Del. Nov. 21, 2016) (“[T]he disclosed algorithm is sufficiently definite structure, and § 112, ¶ 6 does not apply.”). To hold any different would render all software patents subject to § 112, ¶ 6. Defendants’ admission that the specification contains such an algorithm thus preserves the presumption. See *id.* (noting

⁴ Ancora notes that—contrary to what Defendants represent—this Court did not address E²PROM manipulation commands in its *Digital Retail* decision, much less find they were not algorithms.

⁵ Also incorrect is Defendants’ dismissal of Ancora’s pre-*Williamson* cases finding that “software” and “code” connote structure. *Eolas* and *Aloft* “did not utilize the pre-*Williamson* ‘strong’ presumption.” *AGIS Software Dev., LLC v. Huawei Device USA Inc.*, No. 2:17-CV-513-JRG, 2018 WL 4908169, at *18 (E.D. Tex. Oct. 10, 2018) (relying on pre-*Williamson* case). Further, each case plainly found that software can connote structure.

Defendants' failure to show "algorithm [was not] sufficiently definite structure").

Defendants' Structure Is Incomplete: Even if § 112 ¶ 6 applied, Defendants' construction is incorrect because it omits the alternative algorithms described at 1:60-2:1 and 3:51-61. With respect to the first, Defendants argue that it is "too narrow." But the passage at 1:40-59 plainly does not relate to the description of "setting up a verification structure." Nor is 3:51-61 objectionable because it touches on the dependent claim embodiments for "setting up a verification structure." To the contrary, Claim 3 expressly states that it may suffice.

8. "set up a verification structure"

Defendants' response shows why its construction should be rejected. They do not even try to justify replacing "set up a verification structure" with "forming a structure." Nor can they. "Courts do not rewrite claims." *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1364 (Fed. Cir. 1999).

Defendants' "encrypting a license record using a pseudo-unique key for each computer" limitation also should be rejected. Defs. Resp. at 7. Not only does it render Claim 8 superfluous, but it conflicts with Claim 7, which states that the "set up" step can be satisfied merely by "certifying the existence of a pseudo-unique key" and "establishing at least one license record location."⁶ *Haemonetics Corp. v. Baxter Healthcare Corp.*, 607 F.3d 776, 781 (Fed. Cir. 2010).

The patentee also never relied on the use of a key to overcome a rejection of Claim 1 as Defendants claim. See Ancora Resp. at 12-13. As explained in Ancora's Response at page 12, the Examiner did not even mention a key when addressing Claim 1; he raised that point only for then-pending Claims 3, 5, and 7-9. Defs. Ex. 3 at ANCORA_324-27 (noting "Ginter et al do not disclose

⁶ Defendants' only rebuttal to this obvious claim-differentiation issue includes an obvious error. In pointing to the patent at 6:18-28 to argue that the "set up" step includes the step of "establishing a license record," Defendants confuse "establishing a license record location," as recited in Claims 7 and in the specification at 6:20-21, with "establishing a license record," as recited in Claim 8 and in the specification at 6:22-27. See Defs. Resp. at 10. Those steps are distinct. In any event, the specification at 6:18-28 describes only a non-limiting embodiment. See '941 Patent at 5:6-7.

pseudo unique keys”). The patentee’s discussion thus was plainly directed to those claims.

Indeed, in its response, the patentee stated in no uncertain terms that use of a key was limited to certain embodiments. *See* Defs. Ex. 4 at ANCORA_338 (“The present invention provides a method and system for identifying and restricting operation of an unauthorized software program. In a preferred embodiment, a key resides in . . . memory . . .”).⁷

Moreover, the point is moot. After the patentee made the statements at issue, it amended Claim 1 to first include and then remove any reference to a key. Nothing more is needed to show that a pseudo-unique key is not required. *Laryngeal Mask Co. v. Ambu*, 618 F.3d 1367, 1372-73 (Fed. Cir. 2010) (rejecting construction requiring a “a joint tube” where “just prior to issuance, the applicant deleted language concerning . . . the tube joint” and “the Examiner allowed the claims”).

9. “verifying the program using at least the verification structure”

The parties’ only dispute is whether the “verifying the program . . .” step must be done exclusively “through an operating system (OS) level application” as Defendants argue. It does not.

First, Defendants rely entirely on prosecution history disclaimer arguments to support their position. Yet none of the statements they identify satisfy the “demanding standard for finding a disclaimer.” *Avid Tech.*, 812 F.3d at 1045. To the contrary, the portion of the prosecution history Defendants cite merely reflects the proposition that an OS-level program (not an application) must participate in the claimed process. Ancora has no issue with that. As it has said, the “setting up” step requires the involvement of an OS-level software program or routine (i.e., an agent).

And contrary to what Defendants argue, the Examiner confirmed that very link between

⁷ The patentee’s reference in its February 2002 Response to a “pseudo-unique key recited in Claims 1 and 20” also does not support Defendants’ position. Defs. Resp. 8 (citing Defs. Ex. 8). As demonstrated by the patentee’s simultaneous amendment of Claim 1, this “is at worst a slip.” *Apple II*, 744 F.3d at 736. In any event, the patentee did not refer to “encryption” or come close to unambiguously requiring “encrypting a license record using a pseudo-unique key.”

“agent” and OS program. When he granted the patent, he stated that “the closest prior art systems . . . do not teach licensed programs running at the OS level” interacting with BIOS and that “the present invention overcomes this difficulty by using an [OS-level] agent to setup a verification structure in the . . . BIOS.” Ancora Ex. 2 at ANCORA_451; Ancora Ex. 4 at ANCORA_427 (defining “agent” as a “program”). Such context plainly demonstrates that the patentee never required the “verifying” step to be performed by an “OS level application”—much less the entire invention.^{8 9} *Absolute Software, Inc. v. Stealth Signal, Inc.*, 659 F.3d 1121, 1137 (Fed. Cir. 2011) (reference to “present invention” not limiting where “other portions of the intrinsic evidence do not support applying the limitation to the entire patent”).

Ancora’s *Apple II* statement likewise does not support Defendants’ construction. As the entirety of that brief shows, it was not focused on the verification software. Indeed, to avoid just this sort of argument, the Federal Circuit stated in its opinion: “We do not have before us a contention that the verification software must be an ‘application.’” *Apple II*, 744 F.3d at 736 n.1.

Second, there also is no support for Defendants’ attempt to require that the “verifying” step be performed exclusively by OS-level software. The invention requires the opposite. It “proceeds against conventional wisdom” by allowing the combined use of “BIOS and OS level programs.” Ancora Ex. 3 at ANCORA_437-38. Indeed, “[t]he applicants explained that their invention differed from the prior art in that it both operated as an application running through an operating system and used the BIOS level for data storage and retrieval—a combination . . . not previously

⁸ Even ignoring context, the passage does not limit “the invention” to an “OS-level application.” The patentee said only that “BIOS and OS level programs are normally mutually exclusive.” Ex. 3 at ANCORA_437. That alone refutes Defendants attempt to require exclusive operation.

⁹ In a footnote, Defendants also cite one embodiment describing a “license verifier application.” Defs. Resp. 16 n.6. Not only does the specification nowhere limit the “verifier application” to operating only at the “OS level,” the embodiment is expressly “non-limiting.” ’941 Patent at 1:45.

taught.” *Apple II*, 744 F.3d at 735-36. In other words, the invention “alter[ed] how the function is performed (in that the BIOS memory used for verification now interacts with distinct computer memory to perform a software-verification function).” *HTC*, 908 F.3d at 1350.

The specification likewise refutes Defendants’ “exclusively OS” limitation. Not only does it never require that any operation be performed exclusively by an OS-level program or routine, ’941 Patent at 6:29-39, but it expressly contemplates embodiments where the “verifying” step involves BIOS operations—explaining that a “critical failure overlay will cause permanent disruption to the computer’s BIOS operations.” *Id.* at 5:60-62; *see also id.* at 2:1-26 (describing use of “E²PROM manipulation commands” and other interactions between OS-level programs and BIOS-level routines as part of the verification process). This would not be possible if, as Defendants argue, “the OS-level and the BIOS-level [are] mutually exclusive.” Defs. Resp. 16.

10. “acting on the program according to the verification”

There are four reasons why Defendants’ construction is wrong. Defs. Resp. 17.

First, Defendants incorrectly assert that the reference to “the verification” in the “acting” step imposes an ordering requirement. It does not. The “antecedent basis” rule is a drafting convention. *See* MPEP § 2173.05(e). And Defendants identify no case holding that the location of the “antecedent” in a method claim somehow bears on the ordering of steps.

Second, Defendants’ “OS-level application” limitation is wrong for all of the reasons discussed above at pages 12-13. It also is wrong because the Examiner not only recognized that the “acting” limitation does not require “using an agent,” *Ancora Ex. 2* at *ANCORA_449*, but Defendants’ construction would preclude the recited embodiment allowing for “scrambling sections of the BIOS . . . (or of functions interacting therewith).” ’941 Patent at 6:51-52.

Third, Defendants’ “is licensed” limitation is wrong for the reasons explained at page 3. It also is inconsistent with the specifications teaching that the “acting” step may also vary based on

whether “the comparing yields non-unity or insufficiency.” ’941 Patent at 6:40-45.

Finally, Defendants’ binary “allowing” or “restricting” choice improperly suggests that only two options are permitted even though the specification discloses a wide variety of exemplary potential actions, including “ask[ing] for additional user interactions” (*id.* at 5:60-61).

11. The Order of the Claim 1 Steps

By default, method steps have no order unless required by the claims or the specification. *Altiris, Inc. v. Symantec Corp.*, 318 F.3d 1363, 1369-70 (Fed. Cir. 2003). And as Ancora explained at page 23 of its Response, neither logic nor grammar requires that “Steps 1 and 2 be performed . . . before . . . 3 and 4” or that “Step 3 be performed before Step 4.” Defs. Resp. 23.

Further, in arguing against concurrent execution of steps, Defendants misrepresent *Kaneka* as holding that claims must affirmatively recite a “continuous process.” Defs. Resp. 23-24. In reality, *Kaneka* held that, if the “claims do not exclude a continuous process,” a sequential limitation is improper. *Kaneka Corp. v. Xiamen Kingdomway Grp. Co.*, 790 F.3d 1298, 1306 (Fed. Cir. 2015).¹⁰ And that is particularly true here where Defendants point to nothing to rebut the testimony of Ancora’s expert that sequential operation as not required. Defs. Resp. 24.

12. “first non-volatile memory area of the computer”

The Court should reject LG’s argument. Not only does it contradict the specification, which expressly states that a license record can be written to “the first or the second nonvolatile memory area,” ’941 Patent at 6:20-36, but LG’s argument is rebutted by the fact that LG’s construction would “violate[] black letter claim construction law” by rendering the additional ROM-specific language that the patentee added to Claim 18 entirely superfluous. *Haemonetics*, 607 F.3d at 781.

¹⁰ See *Xerox Corp. v. Google Inc.*, 801 F. Supp. 2d 293, 302 (D. Del. 2011) (no sequencing required where claims “do not preclude concurrent execution”); *Bedrock Computer Techs., LLC v. Softlayer Techs., Inc.*, 2011 WL 91089, at *12 (E.D. Tex. Jan. 10, 2011) (“the identifying step need not complete before the removing step can begin, thus allowing execution of the steps to overlap”).

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record, who are deemed to have consented to electronic service are being served this 27th day of April, 2020, with a copy of this document via the Court's CM/ECF system.

/s/ Jami Grounds
Jami Grounds