



January 18, 2013

Via ECF and Hand Delivery

The Honorable Leonard P. Stark
U.S. District Court for the District of Delaware
844 N. King Street, Unit 26, Room 6100
Wilmington, DE 19801-3556

**Re: SOFTVIEW LLC v. APPLE INC., et al. (CONSOLIDATED)
Civil Action No. 10-389-LPS**

Dear Judge Stark:

Pursuant to the Court's Order (D.I. 560), SoftView submits this letter brief regarding the parties' now-agreed to construction of "original" and SoftView's newly-proposed construction of "preserve(s)"/"preserved"/"preserving"/"preservation"

I. "Original"

The parties have reached an agreement that "original" should be construed to mean: "as designed for a desktop computer."

II. "Preserves"¹

Preferred construction: plain and ordinary meaning

Alternative construction: "keeps substantially the same or identical look and feel"

A. "Preserves" should be given its ordinary and customary meaning.

As discussed in SoftView's claim construction briefing and at oral argument at the claim construction hearing, "preserves" should be construed to have its plain and ordinary meaning. It is well established that "[t]he words of a claim are generally given their ordinary and customary meaning." *Meditronic Inc. v. Boston Scientific Corp.*, 695 F.3d 1266, 1275 (Fed. Cir. 2012), quoting *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005) (en banc). Indeed, Defendants themselves understand the plain and ordinary meaning of "preserves" sufficiently to opine that certain Web pages are preserved. Markman Tr. at 166 (Counsel for Defendant Apple, Inc.: "The ones where it is exact, that is preserved. That is easy."). Defendants argue instead that the plain and ordinary meaning is too "loosy-goosy" because it lacks mathematical precision sufficient to eliminate any dispute between the parties' respective experts regarding whether Web pages that are not exactly preserved meet the claim limitation. Markman Tr. at 140, 152.

¹ The claim term in dispute is "preserve(s)"/"preserved"/"preserving"/"preservation." Because there is no substantive difference between that various grammatical iterations, SoftView focuses on "preserves" here.



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However, Defendants cite no law supporting the proposition that because two experts may dispute infringement, the claim construction is either incorrect or indefinite. Indeed, the opposite is true. *See, e.g., Exxon Research and Engineering Co. v. U.S.*, 265 F.3d 1371, 1375 (Fed. Cir. 2001) ("If the meaning of the claim is discernible, even though the task may be formidable and the conclusion may be one over which reasonable person will disagree, we have held the claim sufficiently clear to avoid invalidity on indefiniteness grounds.").

B. Alternatively, "preserves" can be construed as "keeps substantially the same or identical look and feel" of an original page's layout, functionality and design.

If the Court believes that "preserves" should be construed, however, SoftView proposes a construction that is consistent with that term's plain and ordinary meaning and with its usage in the patents-in-suit: "keeps substantially the same or identical look and feel." This language is from the patent specification. *See, e.g.*, 2:31-33² ("Moreover, the rendered displays provide *substantially the same or identical* layout as the original Web page.") (emphasis added); 2:49-56 ("The methods and software enable users of various devices . . . to view and interact with Web pages in a manner independent of the screen resolution . . . while maintaining the *look and feel* of browsing such pages with a conventional desktop browser.") (emphasis added).

C. "Preserves" under either construction is sufficiently definite.

"Only claims 'not amenable to claim construction' or 'insolubly ambiguous' are indefinite." *Haemonetics Corp. v. Baxter Healthcare Corp.*, 607 F.3d 776, 783 (Fed. Cir. 2010). The inverse is also true: "only a reasonable degree of particularity and definiteness" is needed to avoid a finding of indefiniteness; "mathematical precision is not required." *Exxon Research and Engineering Co.*, 265 F.3d at 1380-81.

Defendants accept that when the layout, functionality, and design of a Web page rendered on a mobile device is identical to that of the original Web page, the layout, functionality, and design has been preserved. *See, e.g.*, Markman Tr. at 166 (Counsel for Defendant Apple, Inc.: "The ones where it is exact, that is preserved. That is easy."). Thus, the issue is only where to draw the line between Web content that is "preserved" and Web content that is not "preserved," when the preservation is not perfect.

The specification makes clear that the inventors did not intend their invention to require perfect preservation of the layout, functionality, and design of a Web page. In addition to summarizing the invention as "provid[ing] substantially the same or identical layout as the original Web page" (2:32-33), the inventors also provided examples of acceptable imperfections.

² All patent specification cites refer to the column and line numbers of U.S. Patent No. 7,461,353.



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For example, "[i]t is noted that in some instances, the display of the paragraph may be reformatted to fit the characteristics of the display, rather than following the original format in the zoom-out view." 20:64-67. In other words, while the positioning and relative proportions of a paragraph of text will be preserved, the exact positioning of each letter of text within that paragraph may vary at different zoom levels.³

The inventors were also clear about the features of a Web page that would be preserved, because they emphasized the invention's focus on HTML-based Web content. The patent specification lists the "layout and attribute information" defined by "sets of tags contained in HTML code corresponding to the page." 7:56-59. "The tags define various HTML layout and display information, including tables, paragraph boundaries, graphic image positions and bounding box sizes, typeface styles, sizes, and colors, borders, and other presentation attributes." Thus, these are characteristics that one of ordinary skill in the art would consider when determining whether Web content is preserved or not. In particular, the specification mentions "bounding boxes" dozens of times because this is a mechanism used to preserve layout.

Defendants contend that the patent file histories give inconsistent examples of preserved and un-preserved Web pages. *See, e.g.,* Ds' Resp. Br. at 24-25; Markman Tr. at 149-152. In fact, the file histories are perfectly consistent. The differences in the University of Texas, CNET, and Arbidol examples on the Opera browser (Johnson Decl. Exs. 16-18) are *differences in layout*: the relative positioning and proportions of all three pages vary greatly from the originals. In the CNET page, the layout inconsistencies even cause certain text to overlap. Thus, the *layout* has not been preserved. In contrast, the New York Times examples only show *differences in non-HTML content*—content which does not have to be preserved according to the claims. Specifically, the invention focuses only on the preservation of *HTML-based content*,⁴ so other types of Web content do not have to be preserved, such as some of the graphical advertisements in Figures 2a and 2b, which do not display properly. *See, e.g.,* P's Opening Br. at 22. Figure 2a also shows some text that is not aligned in an identical manner as the original (although the paragraph or grouping of text is proportional and properly positioned), as explicitly allowed for by the patent specification. *Id.*, *see* 20:64-67. Thus, these examples from the prosecution history are quite helpful in exemplifying what must be preserved, and what need not be preserved, providing sufficient notice to the public of the scope of the patent claims.

The term "preserves" should be understood in the context of the state of the art at the time of the invention. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (en banc) ("[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention."). A standard browser

³ For example, a word at the end of a line of text at one zoom level may appear instead at the beginning of the next line at a different zoom level.

⁴ Claim 35, for example, claims only "preserves the original layout, functionality, and design of the **HTML-based Web page content** of each Web page." (emphasis added).



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for mobile devices in use in the late 1990s (and well into the early 2000s) was a text-only WAP (Wireless Application Protocol) browser that made no effort whatsoever to preserve the layout, functionality, and design of an original Web page designed for a desktop browser. *See* Ex. 1 at SV0006729. Other mobile browser solutions proposed in that era included (a) deliberately reformatting Web pages to better fit on mobile devices and (b) dividing a Web page into a grid of tiles to be displayed sequentially on the mobile device—neither of which methods preserved a Web page's layout, functionality, and design. *See* Ex. 2; Ex. 3 at AB00023453. Anyone can recognize the difference between these rudimentary mobile browsers and one that "preserves" (i.e., keeps substantially the same or identical look and feel of) the layout, functionality, and design of the original Web page. Despite Defendants' hand-wringing about a "loosy-goosy standard" (Markman Tr. at 140), the parameters of the term preservation are clear when the claims are read in view of the intrinsic evidence and considered from the perspective of the state of the art at the time of the invention.

D. Courts accept "substantially" as a routine and sometimes "necessary" claim term and claim construction. It is not indefinite.

The Federal Circuit "has repeatedly confirmed that relative terms such as 'substantially' do not render patent claims so unclear as to prevent a person of ordinary skill in the art from ascertaining the scope of the claim." *Deere & Co. v. Bush Hog, LLC*, No. 2011-1629, 2012 WL 6013405, *8-*9 (Fed. Cir. Dec. 4, 2012); *see also Medrad, Inc. v. MRI Devices Corp.*, 401 F.3d 1313, 1328 (Fed. Cir. 2005) (affirming district court's construction of the term "substantially uniform magnetic field" as a "magnetic field that is substantially uniform to obtain useful MRI images . . ." because that was how the term would have been interpreted by one of ordinary skill in the pertinent art).⁵ Instead, substantially is "commonly used in patent claims to avoid a strict numerical boundary to the specified parameter." *Ecolab, Inc. v. Envirochem, Inc.*, 264 F.3d 1358, 1366-69 (Fed. Cir. 2001) (construing the claim term "substantially uniform" to mean "largely, but not wholly the same in form"). Indeed, "such usage may be *necessary* in order to provide the inventor with the benefit of his invention. *Verve*, 311 F.3d at 1120 (emphasis added).

The concept of an imperfect comparison is not new to patent law, and it certainly does not predispose a claim term to indefiniteness. *See, e.g., Andrew Corp. v. Gabriel Electronics, Inc.*, 847 F.2d 819, 821-22 (Fed. Cir. 1988) (reversing a finding of indefiniteness for "substantially equal," noting that "[s]uch usages, when serving reasonably to describe the claimed subject matter to those of skill in the field of invention, and to distinguish the claimed subject matter from the prior art, have been accepted in patent examination and upheld by the

⁵ Other courts have also agreed that "substantially" is sufficiently definite. *See e.g., LG Display Co., Ltd. v. AU Optonics Corp.*, 686 F. Supp. 2d 429 (D. Del. 2010) (adopting patentee's proposed construction of the term "substantially equal" despite accused infringer's argument that "substantially equal" was indefinite).



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courts."); *Green Edge Enterprises, LLC v. Rubber Mulch Etc., LLC*, 620 F.3d 1287, 1299 (Fed. Cir. 2010) (reversing summary judgment of invalidity on the grounds that material issues of fact exist as to whether "looks like" is indefinite and noting "[w]e have held that similar terms relating to appearance, if sufficiently defined in the specification, are not necessarily indefinite").

E. Courts accept "look and feel" as a claim term and claim construction. It is not indefinite.

Courts have concluded that "look and feel" is definite. *See, e.g., Datamize, LLC v. Plumtree Software, Inc. ("Datamize II")*, No. C 04-2777, 2007 WL 5720627, *6-*7 (N.D. Cal. Aug. 7, 2007) ("The term 'look and feel' is a term that is readily known and recognized by a person of ordinary skill involved in software use and development."). In *Datamize II* the court rejected the accused infringer's indefiniteness argument because "[t]he 'look and feel' of a screen is defined by the specifications [t]hese characteristics can easily be determined. *Id.* In a related case, in contrast, the Federal Circuit found the term "aesthetically pleasing look and feel" to be indefinite because "beauty is in the eye of the beholder" and therefore "aesthetically pleasing" was indefinite. *Datamize, LLC v. Plumtree Software, Inc. (Datamize I)*, 417 F.3d 1342, 1349-1350 (Fed. Cir. 2005). Notably, the indefiniteness finding in *Datamize I* stemmed from the subjective term "aesthetically pleasing;" the court did not express any concern regarding the words "look and feel." *Id.*

F. This Court has found similar language to be definite.

This Court recently addressed a similar claim term in another case, and reached a conclusion consistent with SoftView's position here: *Intellectual Ventures I LLC v. Check Point Software Techs., Ltd.*, No. 10-1067-LPS, 2012 WL 6200337, *14-*15 (D. Del. Dec. 12, 2012). In *Intellectual Ventures*, the Court was asked to construe the claim term "retains an appearance, human readability, and semantic content of the email message." 2012 WL 6200337, at *15. The Court adopted the patentee's proposed construction: "retains **substantially** the same appearance, human readability, and semantic content of the email message, such that **all or substantially all** alphanumeric text in the email message remains human readable." *Id.* (emphasis added). In support of its proposed construction, the plaintiff had argued that "it may be impossible to maintain an identical appearance after eliminating executable code." *Id.* In adopting the plaintiff's proposed construction, the Court rejected the accused infringer's argument that plaintiff's construction was "too subjective and would risk rendering the asserted claims indefinite." *Id.*

For the reasons set forth above, SoftView respectfully requests that the Court adopt its proposed construction or its alternative construction.



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Respectfully submitted,

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