

No. 2011-1546

**United States Court of Appeals
for the Federal Circuit**

ZAPMEDIA SERVICES, INC.,

Plaintiff – Appellant,

v.

APPLE INC.,

Defendant – Appellee.

**Appeal from the United States District Court for the Eastern District of Texas
in Case No. 08-CV-0104, Chief Judge David J. Folsom**

NONCONFIDENTIAL BRIEF OF APPELLEE APPLE INC.

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CERTIFICATE OF INTEREST

Counsel for the appellee Apple Inc. certifies the following:

1. The full name of every party represented by counsel is Apple Inc.
2. The party represented by counsel is the real party in interest.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by counsel is none.
4. The law firms of Williams Morgan & Amerson, P.C. and attorneys Danny L. Williams, Brian K. Buss, James A. Jorgensen, Michael Aaron Benefield, Ruben Singh Bains; Wong Cabello Lutsch Rutherford & Brucculeri, LLP and attorneys Keana Theresa Taylor, Keith Alan Rutherford, Louis Brucculeri, Russell T. Wong; Albritton Law Firm and attorneys Eric Miller Albritton, Stephen E. Edwards; Morrison & Foerster LLP and attorney Richard S.J. Hung; and Eric E. Bensen appeared for Apple Inc. before the District Court.

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Pursuant to Federal Circuit Rule 28(d)(1)(B), confidential material subject to a protective order has been redacted from this brief. The material omitted on pages iv, 4, 5, 16, 17, 18, 19, 20, 21, 37, 38, 39, 40, 41, 42, 43, 44, and 45 is protected material, as identified by the January 15, 2009 Protective Order.

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TABLE OF ABBREVIATIONS

A__	Joint Appendix Page
'414 patent	U.S. Patent No. 7,343,414, entitled "System and Method for Distributing Media Assets to User Devices and Managing User Rights of the Media Assets" and assigned to ZapMedia Services, Inc.
'704 patent	U.S. Patent No. 7,020,704, entitled "System and Method for Distributing Media Assets to User Devices Via a Portal Synchronized by Said User Devices" and assigned to ZapMedia Services, Inc.
Apple	Defendant-Appellee Apple Inc.
Court	United States Court of Appeals for the Federal Circuit
District Court	United States District Court for the Eastern District of Texas
iTunes	Apple's iTunes System
Milsted	U.S. Patent No. 6,345,256, entitled "Automated Method and Apparatus to Package Digital Content for Electronic Distribution Using the Identity of the Source Content" and asserted by the Examiner as prior art against the '704 and '414 patents
ZapMedia	Plaintiff-Appellant ZapMedia Services, Inc.

All emphasis in this brief is supplied unless otherwise indicated.

STATEMENT OF RELATED CASES

No other appeal from the same civil action has been before this or any other court. Appellee is unaware of any other case pending in this or any other court that will directly affect or be directly affected by this Court's decision.

The patent which is the subject of this appeal—the '414 patent—and its parent—the '704 patent—are both the subject of reexamination proceedings before the United States Patent and Trademark Office. On February 11, 2009, Apple filed an *inter partes* reexamination request for the '414 patent that was granted on April 8, 2009. In this reexamination, pending as reexamination control No. 95/001,143, all claims were finally rejected on six independent grounds that ZapMedia has appealed to the Board of Patent Appeals and Interferences. Appellant and Respondent have filed their appeal briefs with the Board in this reexamination. On February 11, 2009, Apple also filed an *inter partes* reexamination request for the '704 patent that was granted on April 13, 2009. In this reexamination, pending as reexamination control No. 95/001,144, all claims were finally rejected on two independent grounds that ZapMedia has appealed to the Board. Appellant and Respondent have filed their appeal briefs with the Board in this reexamination.

COUNTER-STATEMENT OF THE ISSUES

1. Whether the District Court correctly construed the ‘414 patent’s “authorization” claim language:

(a) “a plurality of media player devices as being authorized with the user account” as meaning “two or more media players specified in the user account, whereby referenced media assets can be copied (and/or used) through the user account only by those media players”; and

(b) “authorizing . . . a plurality of media player devices with a user account” as meaning “specifying two or more media players in the user account, whereby referenced media assets can be copied (and/or used) through the user account only by those media players.”

2. Whether the District Court correctly granted summary judgment of noninfringement based on its determination that there was no genuine dispute as to any material fact that Apple’s iTunes system does not perform the step of “authorizing a plurality of media player devices with a user account” (claims 1 and 10) and is not “capable of recognizing a plurality of media player devices as being authorized with the user account” (claim 4), and that Apple is entitled to judgment as a matter of law.

COUNTER-STATEMENT OF THE CASE

Introductory Statement. U.S. Patent No. 7,343,414, owned by ZapMedia, discloses a system and method for managing access to digital media assets by media player devices. According to arguments ZapMedia made during prosecution of the '414 patent and its parent patent, the '704 patent, the novel feature of the asserted '414 patent claims over the Milsted prior-art reference is that “subject to the usage conditions [Milsted’s media] assets can be copied and used by ANY player device, not a subset of player devices that are *associated* with a user account.” A710 (capitalization in original). This representation, that the '414 patent’s claimed invention limits copying of media assets to a subset of media players associated with the user account, is implied in the language of asserted claims 1, 4, and 10, which require “authorizing” the “plurality of media player devices with the user account” (or that the “plurality of media player devices” be “authorized”). A127 at claims 1, 4, and 10.¹ The '414 patent’s written description explains that “[a]s with the physical use of a CD in the bricks and mortar world, a user will have access to use his or her licensed assets on other infotainment devices that he or she owns or uses, provided those other client media player devices are

¹ During application of the '414 patent, in order to obtain allowance, ZapMedia amended the claims to change the terms “associate” and “associating” to “authorized” or “authorizing” for issued claims 1, 4, and 10. Thus, the “authorizing” claim language is necessarily more narrow than the term “associate.” See A726-33.

registered within the portal as being authorized to use the user’s licensed assets.” A125-26 at 10:64-11:2. Thus, the District Court correctly concluded that the “authorizing” claim language means “two or more media players specified in the user account, whereby referenced media assets can be copied (and/or used) through the user account only by those media players” and “specifying two or more media players in the user account, whereby referenced media assets can be copied (and/or used) through the user account only by those media players.” These constructions should be affirmed.

The Court should also affirm the District Court’s grant of summary judgment of non-infringement because there is no genuine dispute as to any material fact that Apple’s iTunes system does not perform the step of “authorizing a plurality of media player devices with a user account” (claims 1 and 10) and is not “capable of recognizing a plurality of media player devices as being authorized with the user account” (claim 4). Indeed, because it is undisputed that Apple’s iTunes system allows *unauthorized* devices to access media assets by logging in through a user account and then downloading the desired media assets, Apple’s iTunes system does not restrict copy and/or use of media assets to only those media player devices that are authorized devices.

Further, although ZapMedia argued and persists in arguing against the District Court’s grant of summary judgment based on its proposed claim

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construction that would require actual downloading of the media asset to occur from the user account, this is a question of law and does not create a factual issue meriting reversal of the District Court's order. [

] Thus, under either the District Court's construction or ZapMedia's proposed construction, there is no infringement. The Court should therefore affirm the District Court's grant of summary judgment of noninfringement.

In addition, because ZapMedia acknowledges that the District Court's grant of summary judgment was based on the "authorization" limitation and not the District Court's interpretation of "user account," this Court need not construe this claim phrase to affirm summary judgment of noninfringement. Nevertheless, even under ZapMedia's proposed construction of "user account," summary judgment should also be affirmed because Apple cannot infringe ZapMedia's '414 patent.

[

] Moreover, under the District Court's original construction of "user account" that did not require a login/password and that was advocated by ZapMedia, ZapMedia's expert admitted that Apple's iTunes account— which includes a login/password— is a "user account." Thus, it is

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immaterial whether the correct construction of “user account” requires a login/password because ZapMedia admits that the iTunes store account is a “user account” and it includes a login/password.

Procedural History. In its *Markman* Order, the District Court construed the “authorizing” claim language from ZapMedia’s ‘414 patent to mean that “authorized” media players are the only media players that can access media assets through the user account. The District Court based its construction on the claim language, written description, and prosecution history. [

]

COUNTER-STATEMENT OF FACTS

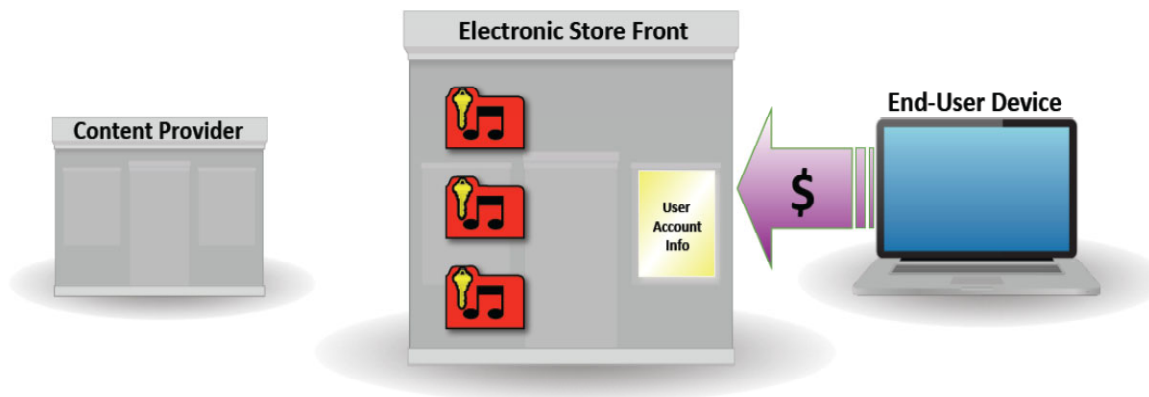
A. Technical Background

ZapMedia's '414 and '704 patents relate to specific systems for distributing media assets such as music or video files. The patented systems were not the first, nor even among the earliest systems of this type. Thus, the technology discussed and claimed in the '414 and '704 patents is illuminated by the prior art. The Court may gain some appreciation of the prior art through a short review of a single reference—Milsted—which was discussed extensively by ZapMedia during the original prosecution of both patents. In addition to providing background, Milsted is highly relevant because ZapMedia made clear, repeated, defining statements to the Patent Office in order to distinguish Milsted and obtain allowance.

“During the late 1990s, IBM announced the Madison project, which was a comprehensive system for secure media distribution over the Internet.” A483. The Madison project yielded many patents, one of which was Milsted. *Id.* The media system disclosed by Milsted includes three major components. *See* A608 at 12:9-24. First, there are content providers like Sony or MGM that are the ultimate source of media assets. *See* A608-09 at 12:25-13:15. Second, there is an electronic store front which distributes the media assets supplied by the content providers. *See* A609 at 13:16-14:3. Milsted's electronic store front may include three parts: a content hosting site that stores media assets, a clearinghouse that

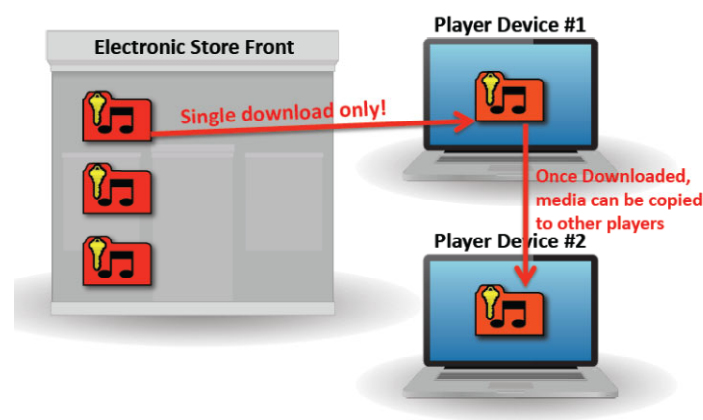
deals generally with security/encryption for the media assets, and a Digital Content Store that is essentially a website that provides the user with the ability to shop for media assets. *Id.* Third and finally, there are media player devices that a user can employ to acquire and use media content. *See* A609-10 at 14:51-15:9.

As shown schematically below, a user of the Milsted system can use a media player device to access an account through an electronic store and buy music files. *See* A643 at 82:54-62. As the keys in the picture indicate, Milsted teaches that each music file is protected by encryption or watermarking and, due to this protection, can be used only by media players that have a key to unlock the file. *See* A624 at 44:31-39.



Milsted also teaches that, when acquiring a music asset, *the user can download the asset only a single time from the Electronic Store Front.* *See* A638 at 72:39-49. As illustrated below, if the user has multiple player devices, *only one device could download the content and it could do so only one time.* *Id.* After that

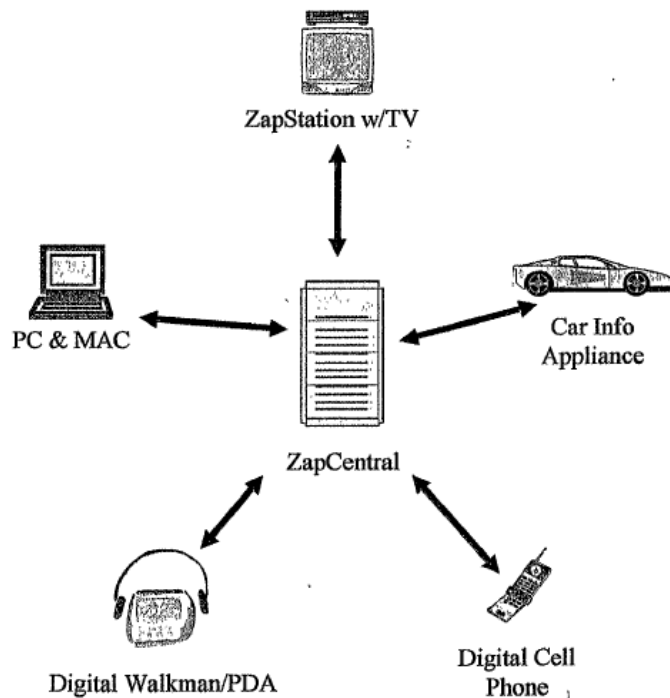
single download, however, the media asset could be shared by the downloading player device, and then played with *any* other media player device *as long as the other player device had a proper key*. See A614-15 at 24:50-25:9; see also A610 at 15:64-16:2. Thus, Milsted undisputedly discloses sharing between media player devices.



B. Technology of ZapMedia’s ‘414 and ‘704 Patents

ZapMedia’s ‘414 and ‘704 patents describe a system for using a portal or server to control distribution of media assets such as songs and videos. The diagram below (taken from the patents’ specification) shows how media player devices such as a “digital walkman/PDA” or “ZapStation w/TV” interact with a

portal or server (“ZapCentral”) to access the songs or videos desired by a user. *See* A662, 681.²



ZapMedia’s patents teach that a user will obtain an account on the server (e.g., “ZapCentral”). A212 at 10:26-31. The user’s account keeps track of the user’s media, for example, a list of songs and videos that the user has rights to use. *Id.* at 10:31-34. The account also keeps track of the user’s player devices such as the specific Walkman and ZapStation registered by the user. *See id.* at 10:61-64; *see also* A213 at 11:12-38. According to the patents, the system works by

² The diagram is present in two of the provisional patent applications incorporated by reference in the ‘414 and ‘704 patent (U.S. Provisional App. No. 60/157,736 at Fig. 4 and U.S. Provisional App. No. 60/176,833 at p. 14).

allowing the media players registered in the account to use the portal (ZapCentral) to access songs or videos referenced in the media list kept with the account. *See id.* This system controls distribution of the media because the portal will provide media referenced in an account only to a registered set of player devices that are associated with that same account. *See id.*

C. The Prosecution History

ZapMedia's '414 patent is a direct continuation of U.S. Patent Application No. 09/679,688, now U.S. Patent No. 7,020,704.³ A109. As a result, both the '414 and '704 patents share an identical written description and related prosecution histories. Indeed, during prosecution and reexamination of both patents, ZapMedia made a series of arguments to distinguish the Milsted reference from the same claims and technology at issue in this appeal in order to convince the Examiners to allow the patents. Furthermore, during prosecution of the '704 and '414 patents, ZapMedia made clear that the recited "user account" must specify *all* of the media player devices that are allowed to access the account's media assets. These arguments spanned a number of submissions to the Patent Office, and a summary of several key arguments may be understood from a few pages of argument ZapMedia made to the Patent Office in September 2007, during prosecution of the

³ For purposes of consistency, Apple uses "ZapMedia" to refer to ZapMedia and its predecessors-in-interest.

‘414 patent in October 2004, during prosecution of the ‘704 patent, and throughout the reexamination proceedings of both patents.

1. During prosecution of the ‘414 patent, ZapMedia distinguished Milsted as not disclosing allowing copying of media assets by a subset of devices that are associated with the user account

In the September 2007 Amendment, ZapMedia explained that unlike what is disclosed in application claim 84 (‘414 patent claim 1), Milsted “does not describe, suggest or teach the provision of a user account to a user as recited in claim 84.”

A708. ZapMedia sought to focus the Examiner’s attention on the association of a user account with a plurality of media player devices that may access the media assets:

[T]he applicants want to more specifically focus the Office’s attention towards the claimed element that builds on the user account element, and that is the element of: *providing a media asset portability application that can associate a plurality of media player devices with the user account, wherein the plurality of referenced media assets may be accessed by any one of the plurality of media player devices that are associated with the user account.*

Id. (emphasis in original). As ZapMedia explained, “claim 84 clearly recites that a user can enable a plurality of media player devices, on a user account basis, to access assets licensed to the user.” *Id.* But “Milsted does not disclose this element of claim 84, and in fact, the inclusion of such a capability *would actually destroy the whole purpose of Milsted.*” *Id.*

In contrast to its claimed invention, ZapMedia distinguished Milsted as describing

an elaborate technique for protecting copyrighted material including watermarking the content with the licensing parameters. More specifically, Milsted describes a secure digital content electronic distribution system. In general, *the purpose of Milsted is focused on preventing such actions such as the actions recited in claim 84*. Milsted presents techniques to modify assets so as to prevent them from being shared by other player devices. And although Milsted does indicate that assets can be copied to another player device, the use of the asset is governed by licensing rights that are embedded in the asset *without regard to the device being associated with the user account*.

A708-09. Thus, ZapMedia distinguished Milsted as follows: “subject to the usage conditions, [Milsted’s media] assets can be copied and used by ANY player device, not a subset of player devices that are *associated* with a user account.”

A710 (capitalization in original).

ZapMedia further argued that Milsted’s disclosed sharing technique was different from that of the ‘414 patent claims because Milsted disclosed governing sharing by watermarking and embedded controls: “Once downloaded, the playback and copying of the content is governed by the watermark or embedded controls. Thus, this does not include the element of *associating a plurality of media devices with a user account* and allowing the media devices to access the licensed assets as recited in Claim 84.” *Id.* ZapMedia also argued that Milsted did

not disclose providing a plurality of media players with “access” to media assets as required by the ‘414 claims because the Milsted server would not allow *each* media player to download its own copy of a media asset. *Id.* ZapMedia told the Patent Office:

[U]sing the technique described in Milsted, *it is not possible for multiple devices to download the content.* The content can only be downloaded by an end user device that has participated in the above- enumerated steps to obtain a License SC and a symmetric key. Content can only be downloaded by an end user device that has obtained a valid License SC and provided it to the content source, it is a *one time download only.*

Id. Finally, ZapMedia expressly related these comments to all the claims of the ‘414 patent that are currently asserted in this case (including application claim 87, ‘414 patent claim 4, and application claim 93, ‘414 patent claim 10): “With regards to the other independent claims . . . the above-presented arguments are equally applicable.” A711.

2. During prosecution of the ‘704 patent and reexamination of the ‘414 patent, ZapMedia argued that the “user account” must specify all the media players that are allowed to access the account’s media assets

In October 2004, following a rejection of its pending claims over the Milsted reference, ZapMedia added to the ‘704 patent application a series of new claims (application claims 31-49). Although these claims do not contain the identical “authorizing” language at issue here, like the authorizing language at issue here,

the claims do not explicitly state that the assets may be accessed only by the player devices associated with the user account. Nevertheless, ZapMedia's basis for asserting that these new claims were patentable relied on the ability of the claimed "user account" to manage media assets across more than one player device:

Each of the portals and systems recited in new claims 31-49 include the feature/element/limitation of enabling a user to *manage media assets across a plurality of media player devices associated with a particular user account.*

A808. ZapMedia explicitly told the Examiner that the claimed "user account" could "manage media assets across a plurality of media player devices" by having the user account specify all authorized devices: "*The user account specifies the plurality of media player devices that may access the media assets.*" *Id.*

Furthermore, during prosecution of the currently-pending reexamination, ZapMedia expressly conceded this point: "As quoted in the Introduction, the prosecution history of the '414 and '704 patents *requires* that a user account specify '*the plurality of media player devices that may access the media assets.*'"

A765-66.

3. During reexamination, ZapMedia argued that encryption of a media asset does not relate to the authorizing language in the asserted claims

The '414 and '704 patents currently are the subject of *inter partes* reexaminations pending before the Patent Office. A747-97; A1237-83. As part of these proceedings, ZapMedia reaffirmed that encryption does not relate to the

authorizing limitations: “Regardless of whether a particular media asset is or is not licensed to a given user, and *regardless whether that particular media asset is or is not protected by some kind of encryption*, the claims of the ‘414 patent are directed to methods and systems that can further manage access to media assets by requiring there to be a user account under which a plurality of media player devices are *authorized*.” A752 (emphasis in original).

In addition, during reexamination of the ’704 patent, ZapMedia articulated the vast differences between an encryption-based system and the claimed system, which is based on using authorized players to access media assets:

In contrast to the user-device focused approach of [the] *claimed invention that allows users to conveniently manipulate their authorized players and licensed content*, the content focused DRM systems of the prior art are like an entire drawer full of loose keys where each key fits only one media asset. *A user must possess the correct usage right DRM keys to unlock, decrypt, copy, or move a specific media asset*. In some content focused DRM systems, each media player device or the communication path to each device is also locked, but with a separate key. In these systems, the user must now find in the drawer full of loose keys the two separate keys needed to access a particular media asset on a particular device.

A1242-43; *see also* A1240.

D. iTunes Does Not Authorize Non-Desktop Devices

As explained above, ZapMedia’s patents claim systems for managing access to media assets by limiting access only to those media player devices that have

been registered with a user account. In contrast, Apple's iTunes Store allows "enabled" desktop computers and non-enabled desktop computers or "peripheral" devices such as iPods, iPhones, iPads, Apple TV, etc., to access media assets.

[

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]

E. Apple's Expert Performed Experiments that Demonstrated Unauthorized Downloads Through iTunes to a User Account

[

] *See* A3738-3810. Dr. Kelly's testimony, which is outlined below, shows [

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]

At no point has ZapMedia disputed the following facts that are shown from
Dr. Kelly's experiments:[

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] *See* A94-101.

SUMMARY OF ARGUMENT

I. This appeal is about the correct construction of the “authorizing” claim language from claims 1, 4, and 10 of the ‘414 patent. Under the District Court’s construction, media player devices must be authorized with a user account in order to access the desired media assets through that user account. This construction was correct, because it is supported by the plain language of the claims, which require “authorizing” the media players, or that the media players be “authorized” to access the media assets. Moreover, during prosecution of the ‘414 patent and its parent patent (the ‘704 patent), and during reexamination proceedings for both patents, ZapMedia made express disclaimers over the prior-art Milsted reference on the basis that only authorized media player devices can

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access a media asset through the user account. ZapMedia must be held to those statements. In addition, the written description expressly recites that each user account has media player devices associated with it and that only those devices can access the media assets associated with that account. Accordingly, because the plain language, prosecution history, and written description all support the District Court's claim construction of the authorizing language, this Court should affirm the District Court's claim construction.

II. Because there is no dispute that Apple's iTunes system allows unauthorized devices to access a user account to retrieve media assets, the District Court correctly granted summary judgment of noninfringement. [

] This Court should therefore affirm the District Court's grant of summary judgment of noninfringement.

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III. Because ZapMedia concedes that the District Court’s grant of summary judgment of noninfringement was based on the authorization limitation and not the requirement that the “user account” have a login/password, this Court need not construe the term “user account” to affirm the District Court’s grant of summary judgment of noninfringement. [

]

ARGUMENT

I. THE DISTRICT COURT’S CONSTRUCTIONS OF THE “AUTHORIZING” CLAIM LANGUAGE WERE CORRECT

The central issue on appeal is whether the District Court correctly construed the “authorization” claim language from claims 1, 4 and 10. It did. Despite ZapMedia’s attempt to frame the District Court’s construction of the authorizing claim language as complicated by an ambiguous prosecution history, nothing could be further from the truth. Indeed, as explained in more detail below, the prosecution history of both the ‘414 patent and the ‘704 patent includes repeated clear disclaimers—emphasized, at one point, in capital letters—that support the

District Court’s construction; the plain language of the claims is unambiguous that media player devices must be authorized through a user account in order to access the desired media assets, and the written description states that the media player device must be authorized through the user account. Accordingly, this Court should affirm the District Court’s constructions of the “authorizing” claim language.

A. The Plain Claim Language Supports the District Court’s Claim Constructions

1. The “authorizing” language requires that only the authorized media players be allowed to access the media assets

ZapMedia ignores the plain language of asserted claims 1, 4 and 10, all of which require “authorizing” the “plurality of media player devices with the user account” or that the “plurality of media player devices” be “authorized . . . with the user account” in order for that device to access the media assets. A127 at claims 1, 4 and 10.

1. A method of managing access to a plurality of media assets comprising the steps of:

providing a user with a user account;

storing references to a plurality of media assets which the user has a license to use; and

authorizing over a network a plurality of media player devices with the user account,

wherein the plurality of referenced media assets can be accessed by any one of the authorized plurality of media player devices.

Id. at claim 1.

4. A media asset management system comprising:
a server comprising:
a user account corresponding to at least one user;
a server database application having at least references to a plurality of media assets associated with the user account; and

an application residing on at least one of the authorized plurality of media player devices and enabling the at least one authorized media player device to access one or more of the media assets associated with the user account.

Id. at claim 4.

10. A method of managing access to a plurality of media assets comprising the steps of:

providing a user with a user account;

allowing the user to license a plurality of media assets;
associating the licensed plurality of media assets with the user account;

authorizing over a network a plurality of media player devices with the user account;

providing access to at least one of the plurality of licensed media assets by any one of the plurality of authorized media player devices.

Id. at claim 10.

Tellingly, despite ZapMedia’s argument that this Court should adopt a broader construction of the “authorizing” claim language that would make access through a user account permissive for all media players—whether authorized or not—ZapMedia never argues that the claim language says that the media players “*may*” be authorized with the user account. And, indeed, it does not. A61 (noting that the claims “reflect that the relevant ‘access’ is access to media assets as they reside in the claimed systems by way of the user account”).

Instead of acknowledging that the plain language supports the District Court’s claim construction, ZapMedia argues that the presence of the term “plurality” in each of the asserted claims requires a broad, open-ended construction of the authorizing claim language. Brief at pp. 50-51. The open-ended nature of the term “plurality,” however, only extends to the object it is modifying—in this case, the number of media assets or authorized player devices. A127 at claims 1, 4, and 10 (referring to a “plurality of referenced media assets,” “plurality of media player devices,” “plurality of licensed media assets,” and a “plurality of authorized media player devices”). The presence of the term “plurality” does not negate or alter the claim limitation requiring that media assets be accessed through the user account by authorized player devices. In the absence of any language creating permissive access to media assets by both authorized and unauthorized devices,

there should be no question that the plain language of the claims requires that the media players accessing the media assets be “authorized with the user account.”

Indeed, when faced with analogous claim language, this Court’s predecessor held: “Granting that there is no explicit negative limitation to this effect, the claim language, in our opinion, renders such a limitation implicit.” *In re Cummings*, 418 F.2d 932, 935 (C.C.P.A. 1969). Specifically, in *Cummings*, the claim language recited “preparing a viscous ceramic suspension in a liquid carrier of ground ceramic materials which have been mixed and *then reacted*” and then “forming a casting from the ceramic suspension. . . .” *Id.* at 934. Despite this claim language, the Board held that in the absence of an explicit negative limitation, the claim language should be interpreted broadly to allow inclusion of “unreacted” materials in the casting. *Id.* at 935. The Court rejected the Board’s construction, ruling that the claim limited the casting to reacted materials:

We do not agree with the board’s view that the language of claim 5 permits of the inclusion of “unreacted” materials in the final sintered article. Granting that there is no explicit negative limitation to this effect, the claim language, in our opinion, renders such a limitation implicit. It is clear that in the claimed process only “the” casting and equally is used to form “the” casting and equally clear that “the” ceramic suspension is prepared only from materials “which have been mixed and then reacted.”

Id. Likewise here, despite the lack of an explicit negative limitation requiring that only authorized devices can access media assets through the user account, the claim language renders that limitation implicit.

2. The District Court’s analysis of claim 4 applied equally to claims 1 and 10

ZapMedia also argues that the District Court erred by extending its analysis of the “authorizing” language in claim 4 to its construction of claims 1 and 10. Notably, ZapMedia goes so far as to assert that “the District Court was focused on claim language other than the claim terms in question.” Brief at p. 49 (emphasis in original.) Contrary to ZapMedia’s assertion, however, the District Court simply referenced and adopted its detailed discussion of the claim language, prosecution history, and written description to arrive at its construction of “a plurality of media player devices as being authorized with the user account” in claim 4 and to its construction of the authorization claim language—“authorizing . . . a plurality of media player devices with a user account”—in claims 1 and 10.

ZapMedia does not argue that it was inappropriate for the District Court to apply its analysis of claim 4’s common prosecution history and specification to claims 1 and 10, but instead argues that, because claim 4 is an apparatus claim and claims 1 and 10 are method claims that make no reference to the “system” in claim 4, they should have received separate treatment in the District Court’s claim construction order. Brief at p. 54. But ZapMedia never articulates why the

absence of the term “system” in claims 1 and 10 should alter the Court’s analysis of the authorizing language, all of which recite authorizing media devices “with the user account.”

Claim 4 is unquestionably an apparatus claim that describes a system consisting of “a plurality of media player devices as being authorized with the user account.” By contrast, claims 1 and 10 are method claims that require “authorizing . . . a plurality of media player devices with a user account.” Although the apparatus/method distinction does not affect the requirement that media players are authorized by the user account such that media assets can be “copied (and/or used)” only by media players authorized through the user account, the District Court recognized the structural difference between the claims and used appropriately differing constructions for the apparatus claim (claim 4) and the method claims (claims 1 and 10). The District Court correctly construed the apparatus claim limitation to mean “two or more media players *specified* in the user account” A62. In contrast, the court construed the two method-claim limitations to mean “*specifying* two or media players in the user account” A66. Thus, the District Court correctly recognized that as an apparatus claim, claim 4 must contain two or more media players that are “specified” while method claims 1 and 10 require the step—that is, the action—of “specifying” the media players. Beyond this distinction, though, there is no difference in the relevant

claim language of claims 1, 4, and 10 that warranted separate discussion.

ZapMedia's attempt to create an issue without establishing that there is any significant material difference between the claim language of the asserted claims is without merit. *See Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1540 (Fed. Cir. 1983) (“We sit to review judgments, not opinions.”).

3. The District Court's constructions of the “authorizing” claim language is consistent with its construction of “access the plurality of media assets . . . across the plurality of media player devices”

ZapMedia seeks to create a red herring by asserting that the District Court's claim construction should be rejected because it is inconsistent with the District Court's construction of “access the plurality of media assets . . . across the plurality of media player devices” from claim 7 of the '704 patent. A195 at claim 7; *see also* Brief at pp. 51-53. More specifically, ZapMedia argues that because the District Court rejected Apple's argument that, in the context of claim 7 of the '704 patent, “access” is through a central server portal rather than through a media player device, that “access” must be construed broadly to mean “retrieve[] or obtain[], including for use[].” Brief at p. 52. But the District Court's construction of “access” in asserted claims 1, 4, and 10 is consistent with its construction of that term in claim 7.

First, nothing in the District Court's construction suggests that “access” is not being construed as “retrieve[] or obtain[], including for use[].” Indeed, it is

perfectly appropriate to construe the recited “access” in claims 1, 4, and 10 as through the user account while still recognizing that such access means “retrieve[] or obtain[], including for use[].” In addition, the District Court’s construction accords with this Court’s precedent that claim terms should not be interpreted “in a vacuum, devoid of the context of the claim as a whole.” *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1347 (Fed. Cir. 2008). Thus, because claims 1, 4, and 10 require that the authorization of media player devices take place “with the user account,” and the “accessing” step follows that “authorizing” step as a “wherein” clause, the District Court was correct to require that the access be “with the user account.” In contrast, ZapMedia’s proposed construction would require that this Court ignore a key limitation in the claims—“with the user account.” Accordingly, because the plain language of the claims supports the District Court’s construction, this Court should affirm.

B. The Prosecution History Supports the District Court’s Claim Constructions

ZapMedia’s portrayal of the prosecution history as ambiguous with respect to the “authorizing” claim limitations fails. ZapMedia explicitly, and repeatedly, disclaimed the construction it now offers—in the prosecution of the ‘414 patent, in the prosecution of its parent ‘704 patent, and in the reexamination proceedings of both patents. *See TIP Sys., LLC v. Phillips & Brooks/Gladwin, Inc.*, 529 F.3d 1364, 1371 (Fed. Cir. 2008) (“This court has held that the prosecution history of a

related patent application may inform construction of a claim term, when the two applications are directed to the same subject matter and a clear disavowal or disclaimer is made during prosecution of the related application.”).

1. ZapMedia distinguished the Milsted reference as not disclosing “associating a plurality of media devices with a user account”

During prosecution of the ‘414 patent, ZapMedia consistently distinguished its claimed invention from the Milsted reference on the basis that Milsted does not disclose associating a plurality of media devices with a user account. In particular, during prosecution, ZapMedia explained that a primary focus of its claimed invention was the association of a user account with a plurality of media player devices that may access the media assets:

[T]he applicants want to more specifically focus the Office’s attention towards the claimed element that builds on the user account element, and that is the element of: *providing a media asset portability application that can associate a plurality of media player devices with the user account, wherein the plurality of referenced media assets may be accessed by any one of the plurality of media player devices that are associated with the user account.*

A708 (emphasis in original). Moreover, ZapMedia explained, “claim 84 clearly recites that a user can enable a plurality of media player devices, on a user account basis, to access assets licensed to the user.” *Id.*

In contrast, ZapMedia said, “Milsted does not disclose this element of claim 84, and in fact, the inclusion of such a capability would actually destroy the whole purpose of Milsted.” *Id.* Thus, ZapMedia urged that “subject to the usage conditions, [Milsted’s media] assets can be copied and used by ANY player device, not a subset of player devices that are *associated* with a user account.” A710. Rather than associating media player devices with a user account to access media assets, Milsted discloses an encryption technique through which *any* media player with the necessary software could copy and use media assets. *See, e.g., id.*

In addition, even though the claimed invention does not preclude the use of encryption techniques such as those taught in Milsted, ZapMedia explained during the pending reexamination that, “[r]egardless of whether a particular media asset is or is not licensed to a given user, and *regardless whether that particular media asset is or is not protected by some kind of encryption*, the claims of the ‘414 patent are directed to methods and systems that can further manage access to media assets by *requiring there to be a user account under which a plurality of media player devices are authorized.*” A752-53. This statement completely contradicts the argument ZapMedia made in its claim-construction reply brief that because the term “exclusive” is not used in the prosecution history, some media players may be unauthorized and may instead rely on DRM techniques to limit access to media assets. *See* A854. ZapMedia cannot be allowed to rely on its prosecution

statements to preserve patentability while disclaiming them in order to obtain claim constructions that are more favorable to its infringement positions. *See Springs Window Fashions LP v. Novo Indus., L.P.*, 323 F.3d 989, 995 (Fed. Cir. 2003) (“The public notice function of a patent and its prosecution history requires that a patentee be held to what he declares during the prosecution of his patent.”); *see also American Piledriving Equip., Inc. v. Geoquip, Inc.*, 637 F.3d 1324, 1336 (Fed. Cir. 2011).

Likewise, during prosecution of the ‘704 patent, ZapMedia explicitly told the Examiner that the claimed “user account” “manage[s] assets across a plurality of media players” by having the user account specify all of the devices that may access the media assets: “*The user account specifies the plurality of media player devices that may access the media assets.*” A808. And during the pending reexamination proceedings, ZapMedia conceded that: “[a]s quoted in the Introduction, the prosecution history of the ‘414 and ‘704 patents *requires* that a user account specify ‘*the plurality of media player devices that may access the media assets.*’” A765-66. Through these statements, ZapMedia articulated that Milsted does not disclose accessing media assets exclusively through a plurality of media player devices associated with a user account.

2. The District Court did not say that the prosecution history was ambiguous

ZapMedia cites no statements from the prosecution history in support of its proposed construction—there are none—but instead cites to the District Court’s order in which that court explained that it looked to the claim language to determine whether the issue should focus on what devices can *play* certain media assets versus what devices can *access* media assets.

The parties [sic] dispute is largely a matter of perspective. One perspective is to consider what devices can *play* certain media *assets*. Another perspective is to consider what devices can *access* media assets by way of the claimed media asset management *system*. Reference to the claims at issue resolves that the latter perspective is more appropriate for construing the claim terms now at issue.

A60 (emphasis in original); *see also* Brief at p. 48. Nothing in the District Court’s statement suggests that the prosecution statements were themselves ambiguous. After consulting the claim language, which makes no reference to “playing” media assets, the District Court explained that “[t]hese claims reflect that the relevant ‘access’ is access to media assets as they reside in the claimed systems by way of the user account.” A61. Thus, because the claims disclose accessing media assets rather than playing media assets, the District Court correctly recognized that the prosecution history demands that the authorization claim language be construed to

require that media player devices be authorized through a user account in order to access the media assets.

C. The Written Description Supports the District Court’s Claim Constructions

ZapMedia points to the District Court’s analysis of the “access” claim language in claim 7 of the ‘704 patent to support its proposed construction of the authorizing claim language in claims 1, 4, and 10 of the ‘414 patent. Brief at 53; *see also* A62-63. To be sure, the portion of the specification cited in ZapMedia’s brief is directed to instances where a media player device is accessing an encrypted media asset. *See* A126 at 11:12-56. Encrypted media assets are a particular class of media assets and this portion of the specification is not directed to the more general limitation that is a precursor to access—whether the media asset is encrypted or not—namely, that the player device be authorized by the user account. When the media player device is authorized, then the specification explains that the nature of the access is not defined, but the specification clearly requires a pre-authorized device as a precursor to access.

Specifically, an earlier portion of the specification explains that “each account on the portal has one or more media player devices associated with it, and one or more users associated with a given account. Users on any media player device may have access to assets on any other media player device associated with

that account[.]” A125 at 9:60-65. This functionality requires that the user’s account contain a listing of all the associated media player devices to determine where the licensed media assets may be used.

Moreover, in its claim construction reply brief, ZapMedia argued that because the written description discloses the use of a variety of DRM techniques to protect media assets, authorization of every media player device that accesses a media asset was not required. A855-56. In short, ZapMedia asserts that authorization of a media player device may be unnecessary where the media asset is protected through a DRM technique. *See id.* But the portions of the written description cited by ZapMedia do not support this argument. Namely, ZapMedia relies on the disclosure made in column 9, lines 63-66 of the ‘414 patent to support its argument that “users may have access to assets on any media player device” including unauthorized media player devices. *See* A855. The entirety of this disclosure, however, explicitly requires that the media player devices be associated (authorized) with a user account: “Users on any media player device may have access to assets on any other media player device *associated with that account[.]*” A574 at 9:63-65.

In addition, ZapMedia cites column 11, lines 12-29, which recites that “[e]ach client media player device that the user owns becomes a licensed playback device for his or her registered multimedia assets if the scope of that license so

permits.” A575 at 11:17-20. Each of the media player devices, however, are able to access the media assets because they have already been authorized through the user account. The same is true of column 11, lines 38-49, which recites “*associating* licensed” media assets with a user’s “*family* of client media player devices[.]” And nothing in the other portions of the written description relied on by ZapMedia (A571 at 3:41-51 and A574 at 10:51-60) negates the requirement that media player devices must be authorized with a user account as a precursor to access. That a variety of rights management rules (including various DRM techniques) also may be used to protect assets, does not change this requirement.

Thus, because ZapMedia has expressly provided for authorization of media player devices by the user account before access to media assets, and because this is also supported by the plain language of the claims and disclaimers made during the prosecution history, this Court should affirm the District Court’s construction of the authorizing language in claims 1, 4 and 10 to require that the media player devices be authorized through the user account in order to access the desired media assets. *See Jack Guttman, Inc. v. Kopykake Enter., Inc.*, 302 F.3d 1352, 1360 (Fed. Cir. 2002) (“Where as here, the patentee has clearly defined a claim term, that definition ‘usually is dispositive; it is the single best guide to the meaning of a disputed term.’”); *see also American Piledriving*, 637 F.3d at 1336

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II. THE COURT SHOULD AFFIRM THE DISTRICT COURT’S GRANT OF SUMMARY JUDGMENT OF NONINFRINGEMENT

The District Court’s grant of summary judgment of noninfringement was based on a question of law—claim construction—and did not involve factual issues. Accordingly, there can be no genuinely disputed issues of material fact. Indeed, the “factual” issues that ZapMedia identifies—whether media assets are copied through a user account— are nothing more than a dispute over claim construction. In addition, because Apple cannot infringe ZapMedia’s ‘414 patent under ZapMedia’s proposed construction of “user account” or the District Court’s construction and because the court based its grant of noninfringement on the “authorization” limitation, this Court need not construe the “user account” term to affirm the District Court’s grant of summary judgment.

A. An iTunes User Can Access a Licensed Media Asset Through a User Account By a Device That Is Unspecified In The iTunes User Account

In a failed attempt to create an issue of fact, ZapMedia asserted that there is a dispute over whether an iTunes user can copy a licensed media asset through her iTunes Store Account using an unauthorized device. Brief at pp. 55-56. [

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- 1. Under the District Court’s or ZapMedia’s construction of “copied,” iTunes cannot infringe the ‘414 patent**

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2. **ZapMedia’s expert testimony did not create a genuine issue of material fact**

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Accordingly, the District Court—and this Court—need not rely on expert testimony or resolve any alleged dispute concerning competing expert opinions, to grant summary judgment of noninfringement. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1318 (Fed. Cir. 2005) (en banc) (quoting *Key Pharms. v. Hercon Labs. Corp.*, 161 F.3d 709, 716 (Fed. Cir. 1998)) (“a court should discount any expert testimony ‘that is clearly at odds with the claim construction mandated by the

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claims themselves, the written description, and the prosecution history, in other words, with the written record of the patent.””).

B. The Construction of “User Account” is Not Material to this Appeal

ZapMedia devotes several pages of its brief to whether the District Court correctly construed the term “user account” to include a login/password. Brief at pp. 59-63. Notably, ZapMedia never suggests that the District Court’s summary judgment should be reversed based on this construction, and indeed it should not, for at least three reasons: (1) ZapMedia concedes that the District Court’s order granting summary judgment is based on Apple’s failure to meet the authorizing claim limitation and does not turn on the inclusion of a login/password for the user account; [

] and (3) because ZapMedia has equated the claimed “user account” with the iTunes account, there can be no dispute that a download is “through the user account” when a user logs into her iTunes account with a username and password and downloads a song. Thus, it is undisputed that Apple does not infringe under ZapMedia’s or the District Court’s construction of “user account” and because the District Court’s grant of summary judgment was not

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based on inclusion of the login/password limitation, this Court need not address the construction of that phrase.

1. ZapMedia concedes that the District Court’s grant of summary judgment of noninfringement was based “solely” on the “authorizing” limitations

ZapMedia concedes that the District Court’s grant of summary judgment of noninfringement was based on the “authorizing” limitations. Brief at 34 (“As it turns out, the negative limitation imposed by the District Court constituted the *sole basis* for the grant of summary judgment.”). Thus, because the District Court did not base its grant of summary judgment on its construction of a “user account” requiring a login/password, the District Court’s construction of that phrase need not be decided by this Court in order to affirm summary judgment. [

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- 3. Because ZapMedia concedes that an iTunes store account is a “user account,” the District Court’s construction requiring that “user account” contain a login/password is immaterial**

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CONCLUSION

The judgment should be affirmed.

Dated: December 8, 2011

Respectfully submitted,



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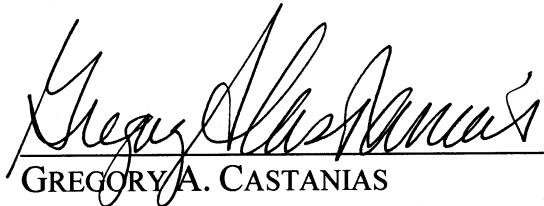
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CERTIFICATE OF SERVICE

I certify that on December 8, 2011, copies of the foregoing
NONCONFIDENTIAL BRIEF OF APPELLEE APPLE INC. were served upon
counsel of record by Overnight Delivery, and upon all of the following counsel via
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I also certify that on December 8, 2011, one original and 4 bound copies of
the foregoing NONCONFIDENTIAL BRIEF OF APPELLEE APPLE INC., were
filed, by hand delivery, in the Office of the Clerk, United States Court of Appeals
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). I certify that the foregoing BRIEF OF APPELLEE APPLE INC. contains 10,167 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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). The brief has been prepared in a proportionally spaced typeface using Microsoft WORD 2007 in size 14 font Times New Roman.

Dated: December 8, 2011



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