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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-2185-GHK (AJWx)	Date	November 25, 2009
Title	*Move, Inc., et al. v. Real Estate Alliance Ltd., et al.*		

Presiding: The Honorable	**GEORGE H. KING, U. S. DISTRICT JUDGE**	
Beatrice Herrera	N/A	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: (In Chambers) Order re: Joint Motion for Claim Construction

I. Background

This matter is before us on the Parties' Joint Motion for Claim Construction ("Motion"). We have considered the Parties' briefing, and hereby deem this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts in this case, we will repeat them only as necessary. Accordingly, we rule as follows.

Defendant and Counterclaimant Real Estate Alliance Ltd. ("REAL") is the owner by assignment of U.S. Patent No. 4,870,576 ("'576 patent") and U.S. Patent No. 5,032,989 ("'989 patent"), a continuation-in-part of the invention described in the parent '576 Patent. The patents describe specific methods for locating available real estate properties using a zoom-enabled map on a computer. On August 8, 2007, REAL filed counterclaims for patent infringement against Plaintiffs and Counterclaim-Defendants Move, Inc. ("Move"), the National Association of Realtors ("NAR"), and the National Association of Home Builders ("NAHB"), alleging that these entities directly infringed the patents by using the methods disclosed therein to display the locations of real estate properties on multiple websites operated by Move. REAL also named as Defendants a number of real estate brokers, agents, multiple listing services, home builders, and rental property owners and managers. On July 27, 2009, the Parties filed their Joint Motion for Claim Construction, presenting eight disputed claims under the '576 patent and five disputed claims under the '989 patent. On August 17, 2009, we denied REAL's motion for certification of a nationwide class of purported infringement defendants comprised of real estate brokers, agents, multiple listing services, home builders, and rental property owners and managers.

II. Claim Construction

The Parties dispute the construction of the following terms or phrases.[1] We discuss each in turn.

[1] In REAL's Summary of Expert Opinions Regarding Claim Construction, REAL lists seven terms or phrases, which the Parties agreed should be accorded their plain and ordinary meaning.

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In the leading case on claim construction, *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (*en banc*), the Federal Circuit stated that: "The inquiry into how a person of ordinary skill in the art understands a claim term provides an objective baseline from which to begin claim interpretation . . . . Importantly, the person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification." *Id*. at 1313. "[T]he specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess. In such cases, the inventor's lexicography governs." *Id*. at 1316 (citation omitted). Otherwise, claim language is to be given the ordinary and customary meaning to a person having ordinary skill in the art. *Id*. at 1312 (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). "[T]he context of the surrounding words of the claim also must be considered in determining the ordinary and customary meaning of those terms." *ACTV, Inc. v. Walt Disney Co.*, 346 F.3d 1082, 1088 (Fed. Cir. 2003). The specification "is always highly relevant to the claim construction analysis. Usually it is dispositive; it is the single best guide to the meaning of a disputed term." *Phillips*, 415 F.3d at 1315 (quoting *Vitronics*, 90 F.3d at 1582).

A. '576 Patent

1. "Selecting a landmark as a reference point from a list of available landmarks"

We first analyze the term "selecting." While we acknowledge that Claim 1 begins with the phrase, "[a] method for locating available properties for purchase comprising the steps *performed by a computer*" ('576 patent, 14:53-54 (emphasis added)), we do not think this phrase modifies the ordinary and customary meaning of "selecting." "Selecting" necessarily embraces a concept of choice. Construing the full claim language, it is clear that a human user must choose a "landmark as a reference point *from a list of available landmarks*." (*Id*. 14:56-57). To be sure, the invention described in the '576 patent offers the menu and processes the user's ultimate choice, but it is the user of the invention who chooses which landmark will serve as the "reference point." This is supported by the "Theory of the Invention," which states that "[t]he user can change the landmark location from a menu of landmarks." (*Id*. 1:47-48). Later sections of the '576 patent confirm that the user makes a variety of choices from other menus: "Having entered the search location boundary, the user is then prompted for the numerical range data entries. Having *selected* numerical range data values, the user is then prompted with a series of menus and asked for *selections*." (*Id*. 2:3-8 (emphasis added); *see also id*., 9:42-47 ("After saving the location data, the user is prompted for numerical range data, such as minimum and maximum price for the target listing. After having selected several numerical ranges, a series of menus are displayed so that the user may select one or several selections on each menu.")). We adhere to the Federal Circuit's requirement that "[u]nless the patent otherwise provides, a claim term cannot be given a different

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However, the Parties never in fact agreed to what that plain and ordinary meaning should be. (Def.'s Summ. Expert Ops., at 22-23). As Move has not addressed, let alone contested, these proffered constructions, we do not view this as a live dispute.

meaning in the various claims of the same patent." *Georgia-Pacific Corp. v. U.S. Gypsum Co.*, 195 F.3d 1322, 1331 (Fed. Cir. 1999), *amended by* 204 F.3d 1359 (Fed. Cir. 2000). Within the context of this patent, the term "selecting" therefore cannot be "performed by a computer" in the absence of a human user's input. The ordinary and customary meaning of "selecting" as used in this patent necessarily entails human choice. "Selecting" means "choosing" under the '576 patent.

We next analyze the term "landmark." REAL suggests that we define "landmark" to mean any "prominent or conspicuous structure on, or feature of land (as in something identifiable or identified) as a point from which to measure the distance of other objects." (Mot. 1). The relevant portion of the specification states: "A labeled distance indicator is displayed which calculates the distance between the window box center and the selected landmark location. The user can change the landmark location from a menu of landmarks." ('576 patent, 1:45-48). If "landmark" is read in isolation, it might make sense to conclude that this term embraces anything that would orient a person in space as she is navigating through the geographic area of interest, *i.e.* "landmarks" used in driving directions. However, we think the inclusion of the phrase "the list of available landmarks" is pertinent here. (*Id*. 14:56-57). If we were to adopt REAL's construction, every gas station, fast food restaurant, and commercial enterprise of any kind would have to be included in this list. However, in order for the list of landmarks to be useful in orienting the user in his or her searches, logically, it must be predetermined, finite, and more limited in scope than a comprehensive business directory. In order for the list to be finite and helpful to the average user, it must be restricted to those "landmarks" with cultural, historical, or other widely recognized significance. Otherwise, the user will have to scroll through a menu of landmarks as long as the phone book listings. That cannot be the implication of this language. REAL misreads Move's proposed construction as narrowed to only historically or culturally significant sites. Move's proposed construction embraces sites with any kind of significance; historical, cultural, and aesthetic significance are listed merely as examples. Logically, the patented invention can only plausibly include well-known "landmarks," not every gas station, as that is the only way to make such a program searchable and usable by a general audience. REAL has proffered a permissible definition of "landmark"; however, it is not a proper construction given its context and the other intrinsic evidence. *See Moba, B.V. v. Diamond Automation, Inc.*, 325 F.3d 1306, 1315 (Fed. Cir. 2003) ("[T]he best indicator of claim meaning is its usage *in context* as understood by one of skill in the art at the time of invention.") (emphasis added).

Accordingly, we conclude that "selecting a landmark as a reference point from a list of available landmarks" means "choosing a building or site with historical or other significance (*e.g.* cultural, aesthetic, etc.) as a point from which to measure the distance of other objects."

2. "Displaying"

With respect to the second dispute, the Parties agree that "displaying" means "making perceptibly evident," but disagree over whether this claim language is restricted to displays "on a computer." (Mot. 14). REAL suggests that a printout is also contemplated by "displaying." This argument is belied by the subsequent language in Claim 1(c): "accepting commands to cause the

location of said cursor to traverse said displayed map in any cardinal direction and to change the size of said first cursor." ('576 patent, 14:62-65). Since the patented invention clearly contemplates the ability of the user to move the cursor along the displayed map and to change the size of the area enclosed by the first area selection cursor, we think Claim 1 limits itself and therefore restricts the act of "displaying" to displaying the images and/or information on a computer monitor. This construction is buttressed by two additional facts: (1) the fact that Claim 1(d) requires "zooming said displayed map . . ." (*Id*. 14:66); and (2) the "Abstract" states that the invention described a method for locating properties that utilizes "a map *displayed on a CRT* [cathode ray tube]." (*Id*. Abstract (emphasis added)).

Finally, during prosecution, the inventor represented that his invention constituted a system that includes "a map displayed on a CRT." (Nixon Decl., Ex. 11, at 9). Nowhere in the '576 patent's intrinsic evidence is there even a hint that displaying might also embrace a tangible printout of the map. By contrast, the '989 patent's specification does clearly describe printouts at various points, but notably, never in connection with "displaying a map": "When the user is satisfied that the property listing file is complete, he can select the 'Print' option from the Main Menu to print the Property Listing File." ('989 Patent, 5:40-42). Where, as here, the "specification makes clear at various points that the claimed invention is narrower than the claim language might imply, it is entirely permissible and proper to limit the claims." *Alloc, Inc. v. Int'l Trade Comm'n*, 342 F.3d 1361, 1370 (Fed. Cir. 2003). Accordingly, we conclude that this phrase means "making perceptibly evident on a computer."

3. "First area selection cursor having boundaries"

There is not much of a dispute here, as the Parties are each construing one element of the phrase, but ignoring the other element. REAL wholly fails to acknowledge and incorporate the restrictive language of "having boundaries." Claim 1 recites the steps of: (1) "accepting commands . . . to change the size of the first cursor"; (2) "zooming said displayed map to coincide with the boundaries of said first cursor"; (3) "converting the area enclosed by said first cursor to values"; and (4) displaying "information about distance and direction from the center of said first cursor[.]" ('576 Patent, 14:62-15:3). These steps establish that the cursor itself: (a) is variable in size subject to the user's manipulation, *i.e.*, not simply a pointer or crosshair cursor; and (b) encloses and thus defines an area of interest on the map. (Nixon Decl., Ex. 11, Amendment of '576 patent (Oct. 20, 1987), at 13 (noting that the claims "require a variably sized area selection cursor"). REAL's construction, which ignores the phrase "having boundaries," would include a pointer cursor which, as REAL's expert concedes, is not variable in size and does not enclose an area. (Nixon Decl., Ex. 7, Shasha Tr., 98:6-22). The specification, in the "Theory of the Invention" section, clarifies that the first cursor is a "rubberband window box." ('576 patent, 1:43-44). Mindful of the prohibition against reading a limitation from the specification back into the claim language, this phrase is merely confirmatory of our independently derived outcome that the area selection cursor must have boundaries. *See SciMed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc.*, 242 F.3d 1337, 1341 (Fed. Cir. 2001) ("Where the specification makes clear that the invention does not include a particular feature, that feature is deemed to be outside the reach of the claims of the patent, even though the language of the claims, read without reference to the specification, might be considered broad enough to encompass the feature in question.").

We also note that the inventor argued during prosecution that prior art systems could not "select properties based upon an indication of strictly geographic area, particularly one designated by applying a boundary to a graphically displayed map." (Nixon Decl., Ex. 15, at 8-9); *see also Netword, LLC v. Centraal Corp.*, 242 F.3d 1347, 1352 (Fed. Cir. 2001) ("[N]either do the claims enlarge what is patented beyond what the inventor has described as the invention."). We do not think the boundaries can be invisible as REAL suggests, as that would make it impossible for the user to adjust it as described in Claim 1(c). While REAL acknowledges the area selection cursor is "interactive so that a user can position and re-size the cursor," REAL fails to explain how this would be possible if the area selection cursor's borders were hidden from view. (Mot. 23; *see also* '576 patent 1:6-10 (describing invention as using "an interactive graphical locator interface")).

The only flaw in Move's proposed construction is that it fails to account for the fact that the cursor is a tool or utility implemented by a computer, which is the ordinary and customary meaning of the term to a person having ordinary skill in the art. (*See, e.g.*, Logan Decl., Ex. E, IBM Vocabulary for Data Processing, Telecommunications, and Office Systems 100 (7th ed. 1981) (defining "cursor" as "a movable marker that is used to indicate a position on a display space" or "[a] displayed symbol that acts as a marker to help the user locate a point in text, in a system command, or in storage")).[2] Our inclusion of this phrase should resolve REAL's contention that Move's proposed construction embraces a crayon box drawn on a computer screen. (Mot. 24). That would be obviously inadequate, in light of Claim 1(c)'s requirement that the user be able to manipulate the cursor. ('576 patent, 14:62-65). Accordingly, we combine elements of both proposed constructions and conclude that this phrase means "a tool or utility implemented by a computer for selecting a geographic area of interest by causing a boundary to be superimposed over the displayed map." "Selecting" shall have the same meaning as with disputed phrase 1, *see supra*.

4. "Information about distance and direction from the center of said first cursor to said landmark"

We think this disputed language is relatively straightforward. REAL proposes that we construe this language to mean "any information about the relative location of one or more objects." (Mot. 24). There are two problems with this overbroad construction.

First, the specification makes clear that the displayed labeled distance indicators for both the first and second area selection cursors calculate information: (1) "As the user changes the window box position, the labeled distance indicator changes to reflect the distance from the displayed landmark"; and (2) "The labeled distance indicator is redisplayed and now *calculates* the distance between the rubberband circle center and the current landmark location." ('576 patent, 1:50-52, 1:63-65 (emphasis

[2] "Judges are free to consult such resources at any time in order to better understand the underlying technology and may also rely on dictionary definitions when construing claim terms, so long as the dictionary definition does not contradict any definition found in or ascertained by a reading of the patent documents." *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1584 n.6 (Fed. Cir. 1996).

added)). This language is present in both Claims 1(b) and 2(k). It is nearly identical in both places, differing only in the references to the first and second cursors, respectively. Therefore, we construe both in parallel; each involved the display of computed data. REAL does not explain how the labeled distance indicators could be continually updated without these calculations after user adjustments. Second, REAL's proposed construction ignores the requirement that information about both distance and direction be provided.

Accordingly, we conclude that this phrase means "computed data that indicates what the distance and directional relationship is between the center of the selection cursor and the landmark." "Information about distance and direction" shall have the same meaning in dependent Claim 2 concerning the "second area selection cursor." (*Id*. 15:18-22).

5. "Zooming said displayed map to coincide with the boundaries of said first cursor thereby displaying a higher level of detail"

First, the claim language and specification make clear that the zooming function enhances only the area enclosed by the first area selection cursor. Under the "Theory of the Invention," the patent specification states that: "the user can then change the world coordinate display to equal the boundaries of the window box. The size of the viewport remains constant so that the display now appears to have zoomed down closer to earth." ('576 patent, 1:53-56; *see also id*., 9:28-33).

Second, the Parties dispute whether the phrase "zooming . . . thereby displaying a higher level of detail" in Claims 1(d) and 3(d) entails "displaying one or more additional elements or items of information not shown at the lower magnification." (Mot. 27). Prior art cited during prosecution included optical projection systems, such as the Fitzgerald patent for a "Motor Vehicle Map Display System" (U.S. Patent No. 4,312,577), which only enlarged elements present in a static, translucent slide. (*Id*.). These "[o]ptical projection systems . . . do nothing more than enlarge elements already present and perceptible and do not display a higher level of detail as a result of zooming." (Bacastow Decl. ¶ 5). Thus, in overcoming the patent examiner's initial rejection based upon the Fitzgerald patent, the '576 patent's inventor distinguished the prior art, which could only enlarge images, from the digital zooming described in the '576 patent: "Because Fitzgerald teaches the use of an optical projection system, his zoom operation fails to provide a greater level of details as required." (Nixon Decl., Ex. 11, Amendment of '576 patent (Oct. 20, 1987), at 13). REAL's expert, Dr. Shasha, declares that with this amendment, the inventor distinguished the Fitzgerald patent "as not being capable of providing a greater level of detail, because Fitzgerald disclosed only an optical zoom, which only makes possible a higher level of magnification . . . . It is undoubtedly correct that after 'zooming,' 'information is disclosed as a result of zooming that cannot be seen at all before the zoom." (Shasha Decl. ¶ 22). Holding a strong magnifying lens up to the computer screen will not reveal any "higher level of detail"; the digital process of "zooming" is required to reveal that hidden detail.

The Parties do not dispute that digital zooming is a different technology from mere magnification in an optical projection system. REAL, however, argues that "zooming" necessarily

entails adding a level of detail or information into the map. (Mot. 30-33). We are advised that this process is known as "thresholding" or "scale dependent display." (Pltfs.' Summ. Expert Ops., Owen Astrachan, at 11 ("The technique of adding elements to, or removing elements from, a map display at different visual scales is known in the art, and is sometimes referred to as 'thresholding' or 'scale dependent display.' The technique may be called thresholding because certain elements are only shown when the visual scale is set above a certain threshold associated with those elements.")). Move's expert Owen Astrachan explains that: "[p]roviding for a scale dependent display prevents clutter on a map display by omitting certain elements from the display at smaller visual scales where they would tend to overlap and including those elements at larger visual scales where they would tend to be shown far enough apart to be independently perceived. This particular technique, however, is not the only way to alleviate clutter." (*Id*. at 12). Astrachan argues that there is nothing in the '576 patent or the '989 patent to indicate that "zooming" is restricted to thresholding. (*Id*. at 13-17). Therefore, he advances a broader construction, essentially arguing that the "higher level of detail" is at all times embedded in the map, even when imperceptible to the naked eye. For instance, Astrachan asserts that: "In the '576 patent, there are town labels and boundaries in FIG. 3B that are not visible in FIG. 3A, which may be an example of adding elements that were not previously shown . . . However, persons of ordinary skill in the art would understand FIGS 3A and 3B to be merely an example of one way in which a computer user can 'zoom' 'thereby displaying additional details,' and would not conclude that the invention is limited in this way." (*Id*. at 15). The graphics are then digitally "re-positioned" upon zooming, so that the information, including but not limited to discrete property points, boundary lines, and town and county names, becomes perceptible: "a higher level of detail can be 'displayed,' without elements being added, in a digital zooming system wherein at a smaller scale, two separate items overlap, and thus appear on the map as only a single point, but at a higher scale, are re-positioned such that they are each individually perceptible." (Mot. 28 (citing Bacastow Decl. ¶ 6).[3]

We agree with Move that the intrinsic evidence does not restrict "zooming . . . thereby displaying a higher level of detail" to thresholding. After thorough examination of the '576 and '989 patents, we cannot find any evidence that information is added into the map upon zooming. The '576 patent states that "[m]ap boundary lines are displayed with greater detail [upon zooming]" ('576 patent, 1:56-57), and that "[m]ap boundary lines with erasable labels are displayed with greater detail [upon zooming] . . . ." (*Id*. 4:37-38; *see also* '989 patent, 2:4-5, 4:52-54 (same)). This language from the specifications of both patents does not resolve the ambiguity in the term of art "zooming." The mere fact that more boundary lines, or erasable labels may be revealed by "zooming" does not speak to whether or not that such information was already embedded in the map, though imperceptible, prior to the zooming.

[3] *See also* Pltfs.' Summ. Expert Ops., Owen Astrachan, at 16 ("[E]ven in digital mapping systems, elements may be shown in such close proximity to one another at certain visual scales that the elements overlap and cannot be independently perceived. Indeed, in some cases, two or more elements may be mapped to the same pixels on a display screen. Zooming in on an area of the map causes the elements to be repositioned farther apart from one anther such that elements that were always present, but not individually perceptible, now become perceptible.")).

Moreover, Figures 3A and 3B in either the '576 patent or the '989 patent do not establish that details are added into the map upon zooming. First, the detailed description may not be read to restrict the scope of claim language. *Kara Tech. Inc. v. Stamps.com Inc.*, 582 F.3d 1341, 1347-48 (Fed. Cir. 2009) (citing *Phillips*, 415 F.3d at 1323) ("The claims, not specification embodiments, define the scope of patent protection. The patentee is entitled to the full scope of his claims, and we will not limit him to his preferred embodiment or import a limitation from the specification into the claims."). Second, the only difference between the two sets of diagrams is the presence of property points in the '989 patent, which was a new feature. ('576 patent, Figs. 3A and 3B; '989 patent, Figs. 3A and 3B). Finally, it is telling that REAL has not argued that digital zooming to display a "higher level of detail" may only be achieved through a process of "thresholding" or "digital zooming." Without some proof of that, the patentee is "entitled to the full scope of his claims," including any digital zooming process that results in the displaying of a higher level of detail, not including mere magnification. *Kara Tech. Inc.*, 582 F.3d at 13448. Accordingly, we are unpersuaded that "zooming . . . thereby displaying a higher level of detail" necessarily entails "displaying one or more additional elements or items of information not shown at the lower magnification." We are only convinced of the fact that digital zooming is a technological advancement different in kind from magnification in optical projection systems such as the Fitzgerald patent. The '576 and '989 patent language is capacious enough to embrace any system implemented with a computer that does not merely magnify miniaturized detail, but rather reveals details within the map not previously perceptible even with the aid of magnification.

Accordingly, we conclude that "zooming said displayed map to coincide with the boundaries of said first cursor thereby displaying a higher level of detail" means "causing the computer to display closer up and with more detail perceptible, other than by the mere use of optical magnification, only the area enclosed by the actual boundaries of the cursor so that the display appears to have zoomed down to earth." We construe this phrase to encompass "thresholding," as that is a technique for making a higher level of detail perceptible which does not rely on magnification.

6. "Values representative of geographic location and maximum distance from said geographic location"

This claim language, which is used in Claims 1(e) and 2(m), refers to the conversion of the area selection cursor into data that can be used to search the database. ('576 patent, 15:3-5, 15:30-32). The "geographic location" is clearly the center of the first or second area selection cursor, as that is the only meaning that makes sense in context. The specification states that the "maximum distance" must be calculated from said geographic location, *i.e.* the center, to the edge of the cursor. (*See, e.g., id*. 1:45-47 ("A labeled distance indicator is displayed which calculates the distance between the window box center and the selected landmark location.")). If the corners of the cursor could serve as the "geographic location," the requisite "maximum distance" calculation would be impossible and illogical.

What is really disputed here is the meaning of "*values representative of* geographic location." ('576 patent, 15:3-4, 15:30-31). Move proposes the following construction: "data indicating and representative of the actual physical location on the earth's surface of the center of the enclosed area and

the distance from the actual physical location of the center of the enclosed area to the actual physical location on the earth's surface of the boundary of the enclosed area." (Mot. 33). REAL assumes that this construction is restricted to latitude and longitude, arguing that: "While actual physical locations (such as latitude and longitude) comprise one type of world coordinate system, it is not the only such system." (Mot. 36). However, Move's proposed construction is consistent with that obvious truth. The patented invention, even under Move's proposed construction, must only include values representative of the actual geographic location of the cursor. The values themselves may constitute any data, or as REAL puts it, any "alphanumerical" or "logical" information sufficient to indicate the actual geographic location. The values need not be latitude and longitude; a wholly contrived code or some other proxy to represent geographic location is embraced by this language. However, it is clear that the "values" derived from the positioning of the cursor must actually correspond to the actual physical location on the Earth's surface. The data representative of geographic position may be a mere proxy of any kind, but correspondence to the actual geographic location is obviously essential for the patented invention to achieve its purpose of helping users locate an actual available real estate property in an actual physical geographic area of interest. Without this strict correspondence, the patented invention would merely describe an exceedingly bad computer game, not a tool for locating properties.

Accordingly, we conclude that this phrase means "data indicating and representative of the actual physical location on the Earth's surface of the center of the enclosed area and the distance from the actual physical location of the center of the enclosed area to the actual physical location on the Earth's surface of the boundary of the enclosed area."

7. "Second area selection cursor enclosing an area"

Our construction of this language mirrors the construction for disputed phrase 3, *see supra*. We add only one limiting detail, provided by the claim language itself. In Claim 2(l), we are told that the patented invention "accept[s] commands to cause the location of said second cursor to traverse said displayed map in any cardinal direction and to change the *radius* of said second cursor." ('576 patent, 15:23-26 (emphasis added)). Therefore, whereas no shape is designated in the claim language for the first area selection cursor (the references to the "rubberband window box" are included in the specification (*see* '576 patent, 1:43-44)), the claim makes clear that the second area selection cursor can only be a circle. A circle is the only two-dimensional shape with a radius. In fact, the Parties agree that a "radius" is "the distance between the center and the perimeter of the circle." (Def.'s Summ. Expert Ops., Chart of Previously Disputed Claim Terms and Phrases, at 21). Accordingly, we conclude that this phrase means "a tool or utility implemented by a computer for selecting a search area by causing a circle-shaped boundary to be superimposed over the displayed map."

8. "Zooming said displayed map to substantially coincide with the boundaries of said cursor, thereby displaying a higher level of detail"

Patent claims must be definite under 35 U.S.C. § 112: "The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant

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regards as his invention." Additionally, "[b]ecause a claim is presumed valid, a claim is indefinite only if the 'claim is insolubly ambiguous, and no narrowing construction can properly be adopted.'" *Honeywell Int'l, Inc. v. Int'l Trade Comm'n*, 341 F.3d 1332, 1338-39 (Fed. Cir. 2003) (citation omitted). "Thus, the definiteness of claim terms depends on whether those terms can be given any reasonable meaning." *Id*.; *see also IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377, 1383-84 (Fed. Cir. 2005) ("A claim is considered indefinite if it does not reasonably apprise those skilled in the art of its scope.").

Using a term of degree, like "substantially," is not always fatal to a claim's validity. In one case, the Federal Circuit held that "substantially constant wall thickness" would have been understood "by persons experienced in this field of mechanics, upon reading the patent documents." *Verve, LLC v. Crane Cams, Inc.*, 311 F.3d 1116, 1119-20 (Fed. Cir. 2002) (concluding that guidance as to measurement of a term of degree can come from the intrinsic record or from the knowledge of a person having ordinary skill in the art). The court concluded that "when the term 'substantially' serves reasonably to describe the subject matter so that its scope would be understood by persons in the field of the invention, and to distinguish the claimed subject matter from the prior art, it is not indefinite." *Id*. at 1120.

Therefore, the phrase "substantially coincide" does not necessarily invalidate Claim 3(d). Rather, as REAL and its expert Dr. Dennis Shasha argue, "substantially coincide" would be understood by a person having ordinary skill in the art to merely account for minor variations from exact coincidence due to technological limitations. (Shasha Decl. ¶¶ 27-29). However, this phrase cannot be construed to mean "to coincide to the extent practicable, as by the software performing the zooming[,]" as this language would embrace even significant variations due to technological limitations. (Mot. 40, 42-45). A person skilled in computer programming and digital mapping and zooming would likely understand that the coincidence would be limited by the functionality of the software or hardware at issue. Under *Verve*, we may consult extrinsic evidence such as the meaning a term of degree would have to a person having ordinary skill in the art. The use of "coincide" without "substantially" in Claim 1(d) does not change our assessment, principally because Claims 1 and 3 recite different methods. Claim 1 recites "[a] method for locating available properties for purchase comprising the steps performed by a computer," whereas Claim 3 recites "[a] method for specifying the approximate geographic location of a real estate property . . . ." ('576 patent, 14:53-55, 16:1-3). The use of "approximate geographic location" in Claim 3 explains the use of "substantially." In Claim 1, the objective is merely to identify a general area of interest by orientation of a two-dimensional cursor; precision is not vital here, so the patent fails to include any term of degree in this claim. However, with respect to Claim 3, the objective is to view the geographic locations of each property, which will inevitably be subject to inherent technological limitations and therefore require the use of a term of degree to explain any slight variation. Notably, Plaintiffs do not quarrel with nor even seek to explain the use of "approximate" at the beginning of Claim 3. The use of "approximate" clearly does not render all of Claim 3's steps "insolubly ambiguous," and accordingly, we do not think "substantially" renders Claim 3(d), specifically, void for indefiniteness. *Honeywell Int'l, Inc.*, 341 F.3d at 1338-39.

Having decided this language is not indefinite and void, we must construe its meaning. Move argues that "substantially coincide" means "to largely, but not wholly correspond" or "to occupy approximately the same space." (Mot. 40). We believe this is an appropriate construction. To construe this phrase as " to coincide to the extent practicable," as REAL suggests, would embrace far more than slight variations, and we do not think the patent contemplates that. (*Id*.). Therefore, we construe this phrase to mean "causing the computer to display closer up and with more detail perceptible only the area enclosed by the actual boundaries of the cursor, or an area largely, but not exactly equal to the area enclosed by the actual boundaries of the cursor, so that the display appears to have zoomed down closer to Earth."

B. '989 Patent

1. "Creating a database of the available real estate properties"

This dispute concerns whether "creating a database" entails merely creating the structure or schema for the database, or whether it extends to populating the database fields. To be sure, there is some ambiguity here. For instance, the claim's use of the phrase "*of* the available real estate properties," as opposed to "*for* the available real estate properties," suggests that creation also entails population of the database. However, we think two facts point in favor of Move's construction.

First, the database is not populated by the inventor, but rather by third-party users, who wish to sell a property. "The Property Listing File Program is used to create, maintain, and transmit property listing files to the host system . . . . The user can create a property listing file by selecting the 'Create' option from the Main Menu." ('989 patent, 4:39-41, 4:44-45). It is these property listing files that are later searched by the buyer: "The present invention comprises a system of computer software for creating and maintaining both a real estate property database and a corresponding file of hard-copy real estate property listing advertisements, and for allowing searches of the database. A 'host system' having a database can be searched from 'remote' computer systems by the use of a public domain software program that is menu driven and includes a graphical locator interface to specify accurate search location boundaries." ('989 patent, 2:30-39).

Second, utilizing an open-source structure which requires third-party users to supply the data, the property listing database is dynamic and not fixed. The process of adding, deleting, and reorganizing files in the database, *i.e.* database "maintenance," is described in the '989 patent. (*Id*. 3:11-23; 10:30-35 ("After preparation of a seller specification for a property, that information is transmitted to host system 200 and used in database maintenance for entry of new property information into the database. After entry, such new property information becomes available for search by all buyers.")). We do not think the ordinary and customary meaning of "creating" can be stretched to cover this situation; the database is not "created" anew each time the database is updated with a new property listing file, as REAL argues. Nor do we think the database has yet to be "created" when the database structure, with a built-in capability to receive and incorporate new data on newly available properties, has been formed. Since the universe of available real estate properties is constantly changing and third-party users choose which

properties to input into the system, the inventor does not create a database with a fixed data set at the outset. As the inventor does not supply the data for the database himself, we are not sure what the inventor could possibly have patented beyond the structure and schema that permits this dynamic process of database population and maintenance to occur. Moreover, the fact that third-party users populate the database *does* in fact mean it is an empty set until sellers populate the database with property listing files. REAL is correct that Move's construction calls for an empty database, but it is only so initially prior to population. Therefore, we conclude that "creating a database" as used in Claim 1(a) does not entail the population of said database.

Accordingly, we conclude that this phrase means "creating the structure that houses data relating to available real estate properties that are maintained and arranged for ease and speed of search and retrieval by a computer, such structure including the tables, the fields in each table, and with relational databases, the relationships between the fields and tables. Creating a database is to be distinguished from uploading data to, inserting data in, adding data to, modifying data within or providing data to an existing database."

2. "Selecting a first area having boundaries"

In keeping with the meaning we gave these terms for disputed phrases 1 and 3 under the '576 patent analysis, *see supra*, we hereby conclude that this phrase means "choosing a geographic area of interest by causing a boundary to be superimposed over the displayed map using the first area selection cursor."

3. "Zooming in on the first area of the displayed map to about the boundaries of the first area to display a higher level of detail"

We construe this disputed phrase to be equivalent to disputed phrase 8 for the '576 patent, as "about" is a term of degree similar in effect to "substantially." Here, the language specifies the first area, so we have modified our construction accordingly. We hereby conclude that this phrase means "causing the computer to display closer up and with more detail perceptible only the area enclosed by the actual boundaries of the first area selection cursor, or an area largely, but not exactly equal to the area enclosed by the actual boundaries of the first area selection cursor, so that the display appears to have zoomed down closer to Earth."

4. "Selecting a second area having boundaries within the zoomed first area"

In keeping with the meaning we gave these terms for disputed phrases 1 and 3 under the '576 patent analysis, *see supra*, we hereby conclude that this phrase means "choosing a search area by causing a boundary to be superimposed over the displayed map using the second area selection cursor." Unlike the '576 patent, the '989 patent does not specify a shape for the second area selection cursor.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 07-2185-GHK (AJWx)	Date	November 25, 2009
Title	*Move, Inc., et al. v. Real Estate Alliance Ltd., et al.*		

5. "Appropriate geographic location"

Move maintains that "appropriate geographic location" signifies "[t]he location within the displayed second area intended to correspond to the actual physical location of the available real estate property on the earth's surface." (Mot. 56). REAL, by contrast, argues that this phrase is merely "[t]he location of available real estate property as practicably specified ('geocoded') in the database." (*Id.*). REAL goes on to state that "if the address of the property is specified in the database, an appropriate geographic location of the property corresponds to the address; if only the zip code of the property is specified in the database, then an appropriate geographic location of the property corresponds to the zip code." (*Id.*). In the '989 patent, a user creating a property listing file is prompted to pinpoint the appropriate geographic location:

> Map boundary lines with erasable labels are displayed with greater detail *and a movable crosshair cursor is displayed which allows the user to pinpoint a location on the map*. The user can then either return to the original zoom-up display or save the location of the crosshair cursor . . . . Having selected a location, the user is then prompted for the address of the property. The user must enter an address.

('989 patent, 4:52-61 (emphasis added)). The user identifies a pinpoint location for the real estate property; that is the "appropriate geographic location," not any computer-generated pinpoint based on the address information supplied by the user. The patent does not describe a method for independently verifying that this is the "actual physical location . . . on the earth's surface" in the specification or detailed description. (Mot. 56). Therefore, we are compelled to conclude that the information the creator of the property listing file supplies, the "geocoding," must stand as accurate. While it is clear that the user "must enter an address" in order to create a property listing file, it is unclear whether the user is required to pinpoint a location on the map" before proceeding. ('989 patent, 4:52-61). If the user can simply skip this step, REAL's position may have more credence. However, we construe the phrase "[h]aving selected a location" to imply that the user must pinpoint a location before proceeding. (*Id.* 4:59). The invention appears to rest on the reasonable assumption that sellers will input accurate and complete information on the properties they wish to sell; otherwise, buyers will not be able to search for and locate their properties.

Accordingly, we conclude that this phrase means "the location within the displayed second area identified by the creator of the property listing file using a movable crosshair cursor to pinpoint the location, which was intended to correspond to the actual physical location of the available real estate property on the Earth's surface."

III. <u>Conclusion</u>

We construe each of the disputed terms or phrases as set forth above. The Parties **SHALL**, **within fourteen (14) days** hereof, file a joint status report suggesting a proposed schedule for

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completion of this action. After reviewing that report, we will enter an appropriate order.

IT IS SO ORDERED.

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