IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WILDCAT INTELLECTUAL PROPERTY HOLDINGS, LLC,	§	
Plaintiff,	§	
v.	§	**CIVIL ACTION NO. 2:11-cv-00305-JRG**
4KIDS ENTERTAINMENT, INC., ET AL.,	§	**Jury Trial Demanded**
Defendants.	§	

NOTICE OF SUBMISSION OF *MARKMAN* HEARING PRESENTATION MATERIALS

Defendant Konami Digital Entertainment, Inc. hereby files this Notice of Submission of Presentation Materials used at the Court's December 20, 2012 *Markman* hearing. Attached hereto is a copy of Defendant's presentation.

Dated: December 21, 2012

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served this 21st day of December, 2012, with a copy of this document via the Court's CM/ECF system pursuant to Local Rule CV-5(a)(3).

/s/ Wendy J. Ray
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Defendants' Claim Construction Presentation

December 20, 2012

The '216 Patent

US006200216B1

(12) **United States Patent**
Peppel

(10) **Patent No.: US 6,200,216 B1**
(45) **Date of Patent: Mar. 13, 2001**

(54) **ELECTRONIC TRADING CARD**

(75) Inventor: **Tyler Peppel**, 109 W. St., No. 1, Sausalito, CA (US) 94965

(73) Assignee: **Tyler Peppel**, Mill Valley, CA (US)

(*) Notice: Subject to any disclaimer, the term of this patent is extended or adjusted under 35 U.S.C. 154(b) by 0 days.

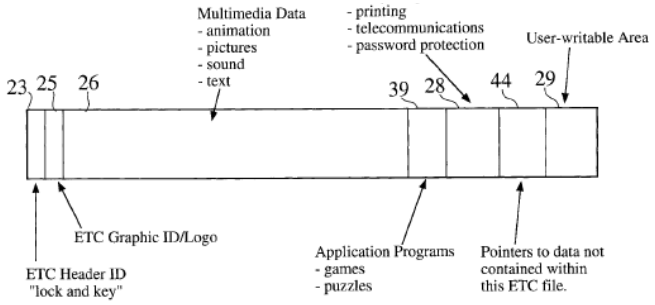
(21) Appl. No.: **08/398,862**

Primary Examiner—Michael O'Neill
(74) *Attorney, Agent, or Firm*—Michael A. Glenn

(57) **ABSTRACT**

A system for the application of a trading card metaphor to a disassociated computer program and the unique design of several hardware and software systems supports and enhances collecting, trading, game playing, and creating of digital electronic trading cards by taking the traditional trading card metaphor and uniquely updating and enhancing it for application in consumer digital media. An electronic

ELECTRONIC TRADING CARD



Claims to be construed

- Claim 1:

  A system for the implementation of a trading card metaphor, comprising:

  a disassociated computer program, consisting of a plurality of electronic trading cards (ETCs),

  each ETC corresponding to a disassociated computer code segment embodied in a tangible medium

  and having an electronic format that supports card scarcity and card authenticity.

- Claim 21:

  A method for the implementation of a trading card metaphor, comprising the steps of:

  [] dissociating a computer program, consisting of a plurality of electronic trading cards (ETCs),

  each ETC corresponding to a disassociated computer code segment and having an electronic format that supports card scarcity and card authenticity.

"Disassociated" Terms

Core Dispute:

- **Does "disassociated" mean "separate"?**

> However, Plaintiff cannot agree to the addition of the word "separate" because it is superfluous and inconsistent with the PTO Board of Appeals' March 13, 2000 Decision on Appeal Brief ("Opinion," attached to Plaintiff's Opening Br. at Ex. M). At pp. 3-5 of that

Wildcat's Reply Brief, Dkt. No. 187, at 4.

"Disassociated/Disassociating" Terms

- "Disassociated" is central to the claims:

1. A system for the implementation of a trading card metaphor, comprising:

a disassociated computer program, consisting of a plurality of electronic trading cards (ETCs),

each ETC corresponding to a disassociated computer code segment embodied in a tangible medium

and having an electronic format that supports card scarcity and card authenticity.

21. A method for the implementation of a trading card metaphor, comprising the steps of:

[] dissociating a computer program, consisting of a plurality of electronic trading cards (ETCs),

each ETC corresponding to a disassociated computer code segment and having an electronic format that supports card scarcity and card authenticity.

"Disassociated/Disassociating" Terms

- "Disassociated" is part of implementing the trading card metaphor (trading cards can be *separately* traded):

  1. A system for the implementation of a trading card metaphor, comprising:

     a disassociated computer program, consisting of a plurality of electronic trading cards (ETCs),

     each ETC corresponding to a disassociated computer code segment embodied in a tangible medium

     and having an electronic format that supports card scarcity and card authenticity.

  21. A method for the implementation of a trading card metaphor, comprising the steps of:

     [] dissociating a computer program, consisting of a plurality of electronic trading cards (ETCs),

     each ETC corresponding to a disassociated computer code segment and having an electronic format that supports card scarcity and card authenticity.

"Disassociated/Disassociating" Terms

- Wildcat agrees that "dissociating" means "separating"
- The inventor admits that "dissassociated" means "separate
- Wildcat's proposed constructions ignore that ETCs must be capable of being independently collected and traded
- The Board of Patent Appeals recognized this fact and resolved the disputes in Defendants' favor:
  - During prosecution, the applicant appealed rejections based on 35 U.S.C. § 101 and anticipation by the Smith reference
  - To address these rejections, the Board analyzed the nature of the invention and interpreted "disassociated" as "separate"

"Disassociated/Disassociating" Terms

Claim Term	Defendants' Construction	Wildcat's Construction
[CLAIM 1] a disassociated computer program, consisting of a plurality of electronic trading cards (ETCs)	a **separate** computer program that is not part of larger computer program, and only includes two or more electronic trading cards	a computer program that is not part of a larger computer program and that only includes two or more electronic trading cards
[CLAIM 21] dissociating a computer program, consisting of a plurality of electronic trading cards (ETCs)	**AGREED CONSTRUCTION:** **separating** a computer program so that it is not part of a larger computer program and that only includes two or more electronic trading cards	

"Disassociated/Disassociating" Terms

- The inventor also admitted that "dissassociated" must mean "separate"

Q. Can you tell me what is meant by disassociated?
A. It means separate but capable of being associated.

Peppel Depo. at 205:23-206:1.

Q. If I'm referring to a disassociated computer code segment, what does that mean?
A. One which is separate from other code segments but capable of being associated with them.

Peppel Depo. at 211:1-4.

"Disassociated/Disassociating" Terms

- The Board of Patent Appeals *started* its opinion by interpreting "disassociated":

OPINION

Interpretation of "disassociated"

The claims first require interpretation. "[T]he name of the game is the claim." In re Hiniker Co., 150 F.3d 1362, 1369, 47 USPQ2d 1523, 1529 (Fed. Cir. 1998). In particular, we define the term "disassociated" which appears in all independent claims.

Decision on Appeal, Dkt. No. 183-5, at 3.

"Disassociated/Disassociating" Terms

- "Disassociated" means "separate":

a tangible medium, although it could have that meaning also. The term "disassociated" is used in the specification in the sense of "separate," "standing by itself," or "not part of something else," which is consistent with its normal meaning of "detached from association." For example, the specification discusses the opportunity for "multimedia products that allow consumers to browse, create, collect, and exchange disassociated pieces of multimedia data" (emphasis added) (page 4, lines 7-8) as opposed to "large, monolithic collections of data that can only be

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Decision on Appeal, Dkt. No. 183-5, at 4.

"Disassociated/Disassociating" Terms

- "Disassociated" is the opposite of "monolithic" – something that can be traded independently, i.e. separately.

a tangible medium, although it could have that meaning also. The term "disassociated" is used in the specification in the sense of "separate," "standing by itself," or "not part of something else," which is consistent with its normal meaning of "detached from association." For example, the specification discusses the opportunity for "multimedia products that allow consumers to browse, create, collect, and exchange disassociated pieces of multimedia data" (emphasis added) (page 4, lines 7-8) as opposed to "large, monolithic collections of data that can only be browsed by the consumer" (page 4, lines 9-10). As another example, the specification discusses "disassociated components in the form of ETCs" (page 20, lines 2-3).

Decision on Appeal, Dkt. No. 183-5, at 4-5.

"Disassociated/Disassociating" Terms

- The specification (cited by the Board) confirms that disassociated is the opposite of "monolithic" – something that can be traded independently, i.e. separately

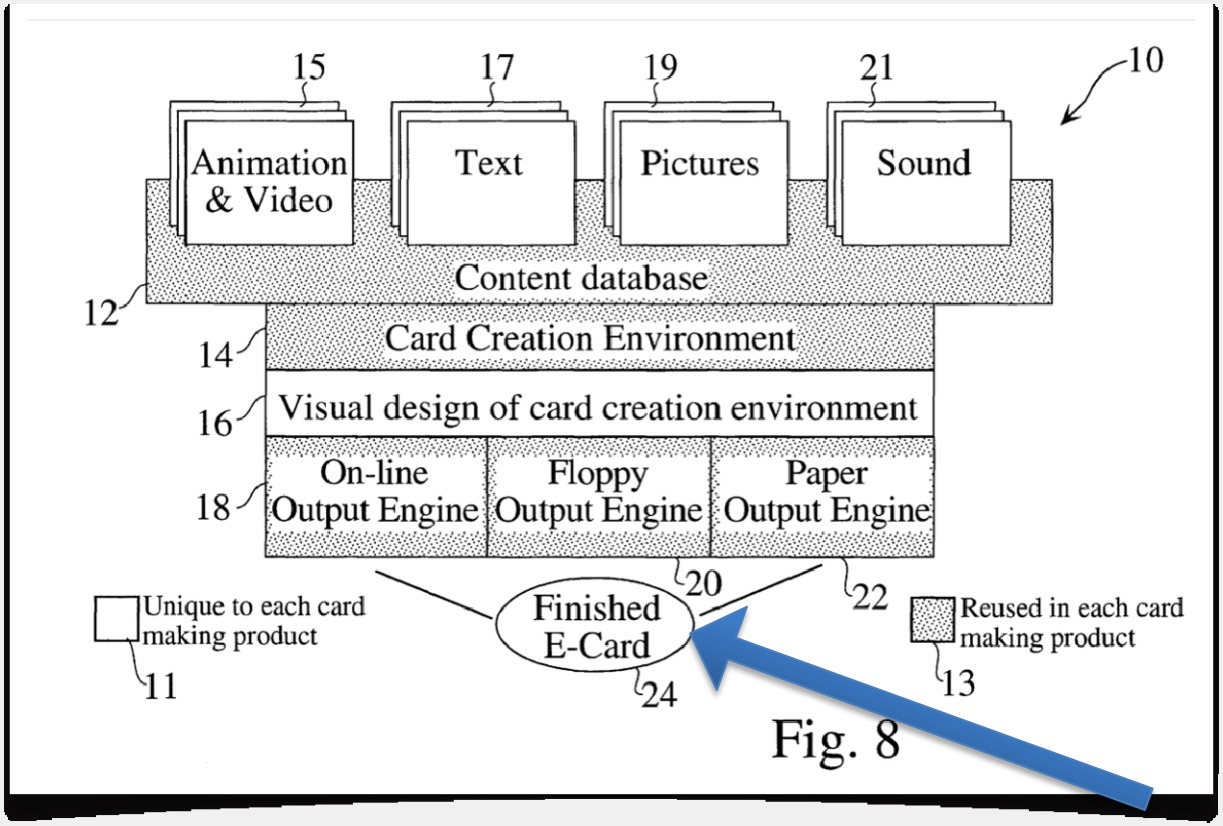
Although these trends may seem loosely related, they converge in a potential product opportunity to create systems for disassociated consumer multimedia, i.e. multimedia products that allow consumers to browse, create, collect, and exchange disassociated pieces of multimedia data. Almost all multimedia software is published today as large, monolithic collections of data that can only be browsed by the consumer—much like the analog publishing model of books and movies.

The trends mentioned above create the potential for electronically literate consumers to take advantage of data compression and affordable high-density storage to create, collect, and exchange disassociated pieces of multimedia information using their multimedia personal computers and video game systems. Collecting and exchanging can occur on physical media such as high fdensity floppy discs or on on-line systems. Early manifestations of this opportunity are seen today in electronic mail and children's electronic paint programs which allow graphics to be created on screen by consumers.

'216 patent
Col. 3, lines 9-28

"Disassociated/Disassociating" Terms

- Fig. 8 of the specification shows ETCs being separately assembled from larger monolithic collections of data:



"Disassociated/Disassociating" Terms

- The Board's conclusion: "disassociated" means "separate"

We interpret "a disassociated computer program" in claim 1 to be a separate computer program, i.e., a program that is not part of a larger computer program. The "ETC corresponding to a disassociated computer code segment" in all of the independent claims is interpreted to mean that the ETC is a separate computer code segment, i.e., a code segment that is not part of a larger code segment. Because the claims do not recite that the computer program or the computer code segment is stored on a tangible medium, no medium is expressly or impliedly claimed.

Decision on Appeal, Dkt. No. 183-5, at 5

"Disassociated/Disassociating" Terms

- Under Wildcat's erroneous construction, cards could not be separately collected and traded – because two different cards could correspond to the same code segment

disassociated in any way. As long as the computer code segments are "disassociated," that is, they are "not part of a larger code segment," then "disassociated" is met. The fact that more than one ETC may correspond with the same "disassociated computer code segment" would not change the "disassociated" status of the code segment itself. This concept is supported by a portion of Fig. 1 of the '216 Patent cited by Defendants at p. 18 of their Brief. Specifically, block 44 of Fig. 1 refers to "[p]ointers to data not contained within this ETC file." There is no reason that two different ETCs could not point to the same or different disassociated computer code segments. The claims contain no language that would prohibit that. If that were true, then

Wildcat's Reply Brief, Dkt. No. 187, at 9.

"Corresponding to" Term

Claim Term	Defendants' Construction	Wildcat's Construction
each ETC corresponding to a disassociated computer code segment	each ETC is a computer code segment that is separate and not part of a larger ETC	each ETC being at least one computer code segment that is not part of a larger code segment

"Corresponding to" Term

Core Dispute

- **Is an ETC one disassociated code segment or many?**

is necessary to respond to one point--the last sentence. Defendants are improperly attempting to limit "electronic trading card" in the claims to a *single* "disassociated computer code segment."

Wildcat's Reply Brief, Dkt. No. 187 at 2.

"Corresponding to" Term

- Wildcat argues that ETCs are too "complex" to be a single disassociated code segment:

> The dispute narrows to this: Defendants argue that each electronic trading card is one disassociated computer code segment. Plaintiff argues that that cannot be the case because the claim does not require it, the complexity of ETCs disclosed in the specification contradicts it, and, as a technical matter, ETCs cannot function that way. Nevertheless, to narrow the issues in dispute, Plaintiff suggests a compromise position between its position and Defendants' position.

Wildcat's Reply Brief, Dkt. No. 187, at 9-10.

"Corresponding to" Term

- Wildcat offers no support for its complexity argument
- Nothing indicates that a code segment cannot be complex
- Nothing particularly complex about a code segment that includes header information, password protection, graphics or multimedia, or pointers

"Corresponding to" Term

- Wildcat argues that "a code segment" is presumed to mean "one or more code segments":

Corp. v. Kinetic Concepts, Inc., 223 F.3d 1351, 1356 (Fed. Cir. 2000) (holding the article "a" refers to "one or more" except in "rare circumstances when the patentee evinces a clear intent to so limit the article.").

The reason for this is simple. Whether in reference to an infringement or invalidity analysis, once a party has shown the presence of "a" claimed or disclosed feature, then the term "a" is met, regardless of whether more than one additional such feature is present in the accused product or asserted prior art reference.

Wildcat's Reply Brief, Dkt. No. 187, at 3.

- However, this presumption is inapplicable here.

"Corresponding to" Term

- Board of Patent Appeals clearly construed "a" as singular:
  - "The 'ETC corresponding to a disassociated computer code segment' in all of the independent claim is interpreted to mean that ETC is **a** separate computer segment" (Emphasis added. Decision on Appeal, Dkt. 183-5, at 5)
  - Wildcat acknowledges but seeks to run from the Board's decision:
    - "To the extent that the Board meant to construe ETC as being a single contiguous computer code segment, Plaintiff strongly disagrees." (Wildcat's Reply Brief, Dkt. 187, at 7)
- Wildcat has no valid basis for disagreeing with the Board of Patent Appeals' conclusion.

"Corresponding to" Term

- The "a" of the '216 patent should receive a singular interpretation here:
  - If an ETC corresponds to more than one computer code segments, these computer code segments would necessarily be associated with one another, which contradicts with the claim language "disassociated"
  - Nothing in the written description of the '216 patent indicates that ETC corresponds to more than one code segments

"Corresponding to" Term

- Wildcat's construction would defy the ordinary meaning of "correspond"
  - Wildcat also argues that <u>two different ETCs could point to the same disassociated computer code segment</u> (Wildcat's Reply Brief, Dkt. No. 187, at 9)
  - With Wildcat's "at least one" construction, there would be no correspondence between ETCs and disassociated code segments
    - "Correspond" = "to be equivalent or parallel" (Webster's Ninth New Collegiate Dictionary 293 (1985), EXTEVID-000006)
    - Wildcat asserts that "correspond<u>ing</u>" means "matching or connected with something that you have just mentioned"
    - But, Wildcat's argument and extrinsic evidence relates to the adjective "corresponding," not the verb "correspond" (WILDCAT000379)

"Corresponding to" Term

- The article "a" receives a singular interpretation when the patentee evinces a clear intent to so limit the article

  KCJ Corp. v. Kinetic Concepts, Inc., 223 F.3d 1351, 1356 (Fed. Cir. 2000)

- "A" should receive a singular interpretation based on written description and prosecution history

  AbTox Inc. v. Exitron Corp., 122 F.3d 1019, 1024 (Fed. Cir. 1997)

Summary

- In the "trading card metaphor" of the invention, cards can be separately collected and traded
  - Wildcat's position that *multiple* cards could correspond to a single code segment, and need not be separate, is inconsistent with the claimed invention
- The Board of Patent Appeals has already ruled that "disassociated" means "separate"