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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DATAMIZE, LLC, a Wyoming
limited liability corporation,

No C 02-5693 VRW

Plaintiff,

ORDER

v

PLUMTREE SOFTWARE, INC, a
Delaware corporation,

Defendant.

_____/

Plaintiff Datamize, LLC (Datamize), alleges that defendant Plumtree Software, Inc's (Plumtree) corporate portal software infringes a Datamize patent. In response, Plumtree seeks summary judgment of invalidity of the Datamize patent for indefiniteness. Doc # 51. Plumtree argues that use of the term "aesthetically pleasing" in the Datamize patent's sole independent claim runs afoul of 35 USC § 112 ¶ 2 and renders the patent invalid. Because the meaning of claim terms is a question of law for the court and because a patent must particularly point out and distinctly claim the invention, "aesthetically pleasing" is too indefinite a term by which to

United States District Court
For the Northern District of California

1 claim an invention. Plumtree's motion for summary judgment (Doc
2 # 51) is GRANTED.

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8 Defendant Plumtree is a developer, marketer and
9 licensor of "corporate portal software." Decl Michael B Levin
10 (Levin Decl; Doc # 52) at 2 ¶ 8, Exh G at 2. Corporate portal
11 software is web-based software that brings together a variety of
12 personalized and integrated corporate information, such as
13 sales, marketing and engineering information. See id at 2 ¶ 9,
14 Exh H at 4. The software can be used to develop corporate
15 intranet sites that allow employees to access, search and manage
16 corporate information. See id at 2 ¶ 8, Exh G at 4.

17 Plaintiff Datamize alleges that Plumtree's corporate
18 portal software infringes United States Patent No 6,014,137 (the
19 '137 patent), which Datamize now owns. See Ans & Counterclaim
20 (Doc # 11) at 2 ¶¶ 6-9. The '137 patent was originally obtained
21 by Kevin Burns as the result of a provisional application filed
22 on February 27, 1996. See generally Patent (Levin Decl at 1 ¶
23 2, Exh A). Burns had invented an authoring system to be used in
24 developing and maintaining user interface screens on kiosks or
25 computers. Id at 3:25-28. The patent's claims describe an
26 "electronic kiosk system having a plurality of interactive
27 electronics kiosks" and a method for "defining custom interface
28 screens customized for individual kiosks." Id at 20:37-38,

1 20:40. The system allows quick and easy customization of
2 interfaces across large numbers of kiosks, with large amounts of
3 information potentially available to each individual kiosk. Id
4 at 3:28-38.

5 The '137 patent acknowledged the existence of prior art
6 consisting of commercial authoring software used to create and
7 modify computer interface screens; but this software allegedly
8 required substantial effort to create custom screens. Id at
9 2:18-20, 3:5-7. The '137 patent's invention allegedly improves
10 upon the prior art through a kiosk authoring tool that provides
11 the individual creating the kiosk system (the system author)
12 with a "limited range of choices" for customizing the kiosks'
13 interface screens. Id at 3:52-57. The system author will only
14 be presented with choices that the authoring tool has found to
15 be aesthetic and functional. Id at 3:52-66. This enables
16 system authors with limited computer programming experience to
17 set up kiosk interface screens with ease. Id at 3:48-52.

18 The '137 patent contains only one independent claim,
19 describing a method comprised in part of the following steps:

20 [b] providing a plurality of pre-defined
21 interface screen element types, each element
22 type defining a form of element available for
23 presentation on said custom interface screens,
24 wherein each said element type permits limited
25 variation in its on-screen characteristics in
26 conformity with a desired uniform and
27 aesthetically pleasing look and feel for said
28 interface screens on all kiosks of said kiosk
system,

each element type having a plurality of
attributes associated therewith, wherein
each said element type and its associated
attributes are subject to pre-defined con-
straints providing element characteristics
in conformance with said uniform and
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3 aesthetically pleasing look and feel for
4 said interface screens, and

5 * * *

6 [d] assigning values to the attributes assoc-
7 iated with each of said selected elements con-
8 sistent with said pre-defined constraints,
9 whereby the aggregate layout of said plurality
10 of selected elements on said interface screen
11 under construction will be aesthetically pleasing
12 and functionally operable for effective delivery
13 of information to a kiosk user;

14 * * * .

15 Id at 20:37-21:23 (emphasis added). The remaining claims in the
16 '137 patent appear to be dependent on this first claim. See id
17 at 21:24-22:41; Mot Sum J (Doc # 51) at 5:3-5; Opp Mot Sum J
18 (Doc # 60) at 11:1-2.

19 Apparently, the patent examiner for the '137 patent
20 never commented upon the use of the words "aesthetically
21 pleasing" in that patent. See Opp Mot Sum J at 6:6-7. Prior to
22 the issuance of the '137 patent, however, Datamize filed a
23 continuation application, which eventually resulted in the
24 issuance of United States Patent No 6,460,040 (the '040 patent),
25 which is not asserted in the present action. See Levin Decl at
26 2 ¶ 4, Exh C. The '040 patent contained a claim with language
27 virtually identical to the independent claim in the '137 patent;
28 specifically, the claim in the '040 patent contained the words
"aesthetically pleasing" several times. See Levin Decl at 2 ¶
4, Exh C at 6-7. The examiner for the '040 patent rejected that
language and stated that "[a]esthetically pleasing is an
individual conclusion and is highly subjective." Id at 2 ¶ 5,
Exh D at 2. Datamize responded to the examiner by listing its

1 reasons for including the language and pointing out that the
2 examiner for the '137 patent had allowed the language in
3 connection with the '137 patent. Id at 2 ¶ 6, Exh E at 2-3.
4 Shortly afterward, the patent examiner contacted the prosecuting
5 attorney to inform him that he would allow the claims if the
6 contested language were deleted. Id at 2 ¶ 7, Exh F at 1.
7 Datamize agreed to do so, apparently on the basis that this
8 change would actually broaden the claims, would reflect the
9 unimportance of the "aesthetically pleasing" language and would
10 expedite the patent's issuance. See id; Opp Mot Sum J at 8:13-
11 23.

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15 The dispute presented in this case actually commenced
16 in the United States District Court for the District of Montana.
17 In May of 2002, Datamize brought suit in that court, alleging
18 that Plumtree had infringed the '137 patent. 10/6/03 Ord (Doc #
19 32) at 2:3-7. On December 4, 2002, Plumtree filed an action in
20 the Northern District of California for declaratory judgment.
21 Doc # 1. The Montana action was dismissed for lack of personal
22 jurisdiction on July 8, 2003. 10/6/03 Ord at 2:9-15, 2:25-28.
23 Subsequently, on July 17, 2003, Datamize filed its answer in
24 Plumtree's Northern District action and counterclaimed for
25 patent infringement. Doc # 11. A claims construction hearing
26 date was set for September 1, 2004. Doc # 23.

27 On October 6, 2003, the court granted Datamize's motion
28 for realignment (Doc # 18), ordering that Datamize be designated

1 the plaintiff and Plumtree be designated the defendant. 10/6/03
2 Ord at 12:10-15. Then, on March 31, 2004, Plumtree filed the
3 instant motion for summary judgment on the issue whether the
4 '137 patent is invalid. Doc # 51. Plumtree contends that the
5 '137 patent is invalid because the term "aesthetically
6 pleasing," which appears three times in the patent's sole
7 independent claim, is too indefinite. The court took the matter
8 under submission without a hearing. See Civ LR 7-1(b).

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10 II

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12 A

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14 In reviewing a summary judgment motion, the court must
15 determine whether genuine issues of material fact exist,
16 resolving any doubt in favor of the party opposing the motion.
17 "[S]ummary judgment will not lie if the dispute about a material
18 fact is 'genuine,' that is, if the evidence is such that a
19 reasonable jury could return a verdict for the nonmoving party."
20 Anderson v Liberty Lobby, 477 US 242, 248 (1986). "Only
21 disputes over facts that might affect the outcome of the suit
22 under the governing law will properly preclude the entry of
23 summary judgment." Id. And the burden of establishing the
24 absence of a genuine issue of material fact lies with the moving
25 party. Celotex Corp v Catrett, 477 US 317, 322-23 (1986).
26 Summary judgment is granted only if the moving party is entitled
27 to judgment as a matter of law. FRCP 56(c).

28 The nonmoving party may not simply rely on the

1 pleadings, however, but must produce significant probative
2 evidence supporting its claim that a genuine issue of material
3 fact exists. TW Elec Serv v Pacific Elec Contractors Ass'n, 809
4 F2d 626, 630 (9th Cir 1987). The evidence presented by the
5 nonmoving party "is to be believed, and all justifiable
6 inferences are to be drawn in his favor." Anderson, 477 US at
7 255. "[T]he judge's function is not himself to weigh the
8 evidence and determine the truth of the matter but to determine
9 whether there is a genuine issue for trial." Id at 249.

10 The issue of indefiniteness is appropriate for summary
11 judgment. Determining the question of indefiniteness is a
12 conclusion "'drawn from the court's performance of its duty as
13 the construer of patent claims * * *.'" Bancorp Services, LLC v
14 Hartford Life Ins Co, 359 F3d 1367, 1372 (Fed Cir 2004), quoting
15 Atmel Corp v Info Storage Devices, Inc, 198 F3d 1374, 1378 (Fed
16 Cir 1999). Like claims construction, the determination whether
17 a claim is impermissibly indefinite is a legal conclusion. Id;
18 All Dental Prodx, LLC v Advantage Dental Products, Inc, 309 F3d
19 774, 778 (Fed Cir 2002); see Honeywell Int'l, Inc v Int'l Trade
20 Comm'n, 341 F3d 1332, 1338 (Fed Cir 2003). As such,
21 indefiniteness is a question of law appropriate for resolution
22 at the summary judgment stage. Mossman v Broderbund Software,
23 Inc, 1999 US Dist LEXIS 8014, *19 (ED Mich) (Zatkoff, J).

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Plumtree contends that the term "aesthetically pleasing" is impermissibly indefinite as a matter of law and thus invalidates the claims in the '137 patent. The Patent Act requires, among other things, that the patent's claims "particularly point[] out and distinctly claim[] the subject matter which the applicant regards as his invention." 35 USC § 112 ¶ 2. "[T]he limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others and the assurance that the subject of the patent will be dedicated ultimately to the public.'" Markman v Westview Instruments, Inc, 517 US 370, 390 (1996), quoting General Elec Co v Wabash Appliance Corp, 304 US 364, 369 (1938).

This is important because

[o]therwise, a zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims would discourage invention only a little less than unequivocal foreclosure of the field [internal citation omitted], and the public [would] be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights [internal citation omitted].

Markman, 517 US at 390 (internal quotations omitted).

Accordingly, the § 112 ¶ 2 definiteness requirement "focuses on whether the claims * * * adequately perform their function of notifying the public of the [scope of the] patentee's right to exclude.'" Honeywell, 341 F3d at 1338, quoting S3 Inc v nVIDIA

1 Corp, 259 F3d 1364, 1371-72 (Fed Cir 2001).

2 In assessing the definiteness requirement, the court
3 should determine whether those skilled in the art would
4 understand what is claimed when the claim is read in light of
5 the specification. Bancorp, 359 F3d at 1372. This
6 determination should be made in accordance with "the familiar
7 canons of claim construction." All Dental Prodx, 309 F3d at
8 780. This means that the court should primarily evaluate the
9 language of the claim itself but should also assess the
10 intrinsic evidence, including the patent specification and
11 prosecution history. Id; see Elekta Instrument SA v OUR
12 Scientific Int'l, Inc, 214 F3d 1302, 1307 (Fed Cir 2000).

13 Although the court may look to extrinsic evidence if necessary
14 to its understanding of the patent, such evidence in general,
15 and expert testimony in particular, is disfavored. See Texas
16 Digital Systems, Inc v Telegenix, Inc, 308 F3d 1193, 1212 (Fed
17 Cir 2002); Elekta Instrument, 214 F3d at 1307.

18 The court should not hold the claim to be indefinite
19 simply because "it poses a difficult issue of claim
20 construction; if the claim is subject to construction, i e, it
21 is not insolubly ambiguous, it is not invalid for
22 indefiniteness." Bancorp, 359 F3d at 1372 (citing Honeywell,
23 341 F3d at 1338-39). Evaluating the indefiniteness question in
24 this fashion serves to protect the statutory presumption of
25 patent validity. Bancorp, 359 F3d at 1372 (citing 35 USC §
26 282); see Honeywell, 341 F3d at 1338-39. When the question of
27 indefiniteness is close, it should be resolved in favor of the
28 patentee. Bancorp, 359 F3d at 1372 (citing Exxon Research &

1 Engineering Co v United States, 265 F3d 1371, 1375 (Fed Cir
2 2001)).

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10 The court begins, as it must, with the ordinary and
11 customary meaning of the words "aesthetically pleasing." See
12 Texas Digital, 308 F3d at 1201-02, 1204. "The terms used in the
13 claims bear a heavy presumption that they mean what they say and
14 have the ordinary meaning that would be attributed to those
15 words by persons skilled in the relevant art." Id at 1202
16 (internal quotation omitted). The court may turn to a
17 dictionary to aid it in ascertaining the ordinary and customary
18 meaning of the disputed language. Id.

19 Webster's New Collegiate Dictionary defines the word
20 "aesthetic" as "of, relating to, or dealing with aesthetics or
21 the beautiful" or "appreciative of, responsive to, or zealous
22 about the beautiful." Webster's New Collegiate Dictionary at 61
23 (9th ed 1990). This is similar to the definition from the
24 American Heritage Dictionary, Fourth Edition, that Plumtree
25 advances, which defines "aesthetic" as "of or concerning the
26 appreciation of beauty or good taste" or "characterized by a
27 heightened sensitivity to beauty." Levin Decl at 3 ¶ 13, Exh L
28 at 3. Webster's New Collegiate Dictionary defines the word

United States District Court
For the Northern District of California

1 "pleasing" as "giving pleasure," which is similar to Plumtree's
2 asserted definition of "giving pleasure or enjoyment."
3 Webster's New Collegiate Dictionary at 903; Levin Decl at 3 ¶
4 13, Exh L at 4. Taken together, therefore, the phrase
5 "aesthetically pleasing" seems to mean "having beauty that gives
6 pleasure or enjoyment" - in other words, "beautiful." Such a
7 term seems to the court to be quite subjective.

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9 ii

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11 The court may examine the intrinsic record to
12 determine whether the patent's specification provides an
13 explicit definition of the term that clarifies or differs from
14 its ordinary dictionary meaning. See Texas Digital, 308 F3d at
15 1204. In the case at bar, the '137 patent's specification
16 provides little guidance with respect to the meaning of the term
17 "aesthetically pleasing" and does not seem specifically to
18 define the term. The patent's Summary of Invention uses the
19 term or similar terms in several instances. For example, the
20 patent states:

21 The authoring system enables the user inter-
22 face for each individual kiosk to be customized
23 quickly and easily within wide limits of vari-
24 ation, yet subject to constraints adhering the
25 res[ult]ing interface to good standards of
26 aesthetics and user friendliness.

27 Patent at 3:28-32 (emphasis added). The Summary of Invention
28 further states:

29 [M]ajor aesthetic or functional design choices
30 * * * may be built into the system taking into
31 account the considered opinions of aesthetic
32 design specialists, database specialists, and

1 /
2 academic studies on public access kiosk systems
3 and user preferences and problems. Only a
4 limited range of pre-defined design choices
5 is then made available to a system author.

6 Id at 3:57-66 (emphasis added). As Plumtree notes, this
7 language provides no information regarding an objective
8 definition of "aesthetically pleasing." The language suggests,
9 however, that "aesthetics" are an important limitation on the
10 claimed invention and that whether something is aesthetically
11 pleasing may be subject to different opinions. The
12 specification, therefore, does not seem to limit the
13 subjectivity of the term "aesthetically pleasing."

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15 The court may also examine the patent's prosecution
16 history to determine whether any light may be shed on the
17 definition of the disputed term. All Dental Prodx, 309 F3d at
18 780; see Texas Digital, 308 F3d at 1204. According to the
19 parties, the patent examiner for the '137 patent never raised
20 any concerns regarding the "aesthetically pleasing" phrase. See
21 Mot Sum J at 12:15-13:2; Opp Mot Sum J at 15:10-11. But the
22 court may also consider the prosecution history of the related
23 '040 patent. See Microsoft Corp v Multi-Tech Systems, Inc, 357
24 F3d 1340, 1349 (Fed Cir 2004) (noting that "the prosecution
25 history of one patent is relevant to an understanding of the
26 scope of a common term in a second patent stemming from the same
27 parent application"). As noted above in section I(A), the
28 patent examiner for the '040 patent questioned the term

1 "aesthetically pleasing" as being "highly subjective." See
2 Levin Decl at 2 ¶ 5, Exh D at 2. Initially, Datamize responded
3 to the patent examiner's rejection of the language by offering
4 various justifications for the language, including: (1) the
5 language was not intended to imply judgment about relative
6 artistic merits; (2) whether the system author's sense of
7 aesthetics complies with some other standard of beauty or good
8 taste is irrelevant; (3) the point of the language is that the
9 system author can create an "aesthetically pleasing look and
10 feel" that the system author "desire[s]". See id at 2 ¶ 6, Exh
11 E at 2. Ultimately, Datamize chose to delete the language from
12 its application for the '040 patent, stating that the language
13 was "not intended to identify qualities separate and apart from
14 the remainder of the claim element" and was "superfluous and
15 unnecessary to the claims." Id at 2 ¶ 7, Exh F at 1-2. The
16 prosecution history of the related '040 patent, therefore, does
17 not provide a more objective means of ascertaining the meaning
18 of "aesthetically pleasing." In fact, the prosecution history
19 suggests that the language has little meaning at all.

20 Accordingly, consideration of the relevant factors
21 suggests that the term "aesthetically pleasing" is impermissibly
22 indefinite under § 112 ¶ 2.

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26 In addition to the above factors, consideration of and
27 comparison with relevant case law may prove useful. Plumtree
28 argues that, when a disputed term is highly subjective, courts

1 often find that the term is too indefinite to meet the
2 requirements of § 112 ¶ 2. For example, in Mossman, the
3 district court concluded that the term "readily follow" was
4 impermissibly indefinite, in part because the patent in question
5 did "not mention or even attempt to establish any criteria for
6 determining whether a display can be 'readily followed'" and
7 because the term was "not defined and has no particular meaning
8 in the [] patent claims." Mossman, 1999 US Dist LEXIS 8014 at
9 *21. Another case cited by Plumtree is STX, Inc v Brine, Inc,
10 37 F Supp 2d 740 (D Md 1999) (Davis, J), aff'd 211 F3d 588 (Fed
11 Cir 2000), in which the defendant challenged the term "improved
12 handling and playing characteristics" in a patent for a lacrosse
13 stick. The STX court found the term impermissibly indefinite,
14 agreeing with the defendant that "this alleged limitation is
15 subjective on so many levels it is impossible to determine the
16 scope of [the] term." Id at 755 (internal quotation omitted).
17 And Plumtree also cites Semmler v American Honda Motor Co, Inc,
18 990 F Supp 967 (SD Ohio 1997) (Graham, J). The Semmler court
19 concluded that the term "considerable fuel savings" was
20 impermissibly indefinite because the word "considerable" was
21 imprecise and did not reasonably apprise a person skilled in the
22 art of what was meant. Id at 975. These three cases dealt with
23 terms that are similar to the term at issue in the case at bar -
24 all are terms with very subjective ordinary meanings that are
25 not sufficiently narrowed by the patents in question.

26 Although Datamize does not make much of an attempt to
27 distinguish these three cases, Datamize argues that the term
28 "aesthetically pleasing" is more like terms held to be

1 sufficiently definite in the All Dental Prodx and Bancorp cases.
2 In All Dental Prodx, the court concluded that the term "original
3 unidentified mass" was not impermissibly indefinite. All Dental
4 Prodx, 309 F3d at 780. But the prosecution history and
5 specification in that case supported the view that the disputed
6 term meant "a mass that does not have a specific preformed size
7 and shape." Id. Unlike the "aesthetically pleasing" term in
8 the present case, the meaning of the disputed term in All Dental
9 Prodx is objective and is not controlled by individual
10 subjective impressions. Datamize also relies on Bancorp, in
11 which the Federal Circuit found the term "surrender value
12 protected investment credits" to be definite. Bancorp, 359 F3d
13 at 1372. In so holding, the Bancorp court found that, although
14 the entire term was not separately defined by the patent, its
15 component terms were sufficiently well-defined by the patent to
16 make the meaning of the entire term readily discernable. Id.
17 Such is not the case in the present action, as the components of
18 the "aesthetically pleasing" term are subjective and not defined
19 by the patent.

20 Thus, the court agrees with Plumtree that the case law
21 supports finding the term impermissibly indefinite.

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25 Although the foregoing would seem to justify ruling
26 that the "aesthetically pleasing" language renders the '137
27 patent's claims impermissibly indefinite, the court also
28 considers the proposed constructions of "aesthetically pleasing"

1 offered by Datamize in its opposition brief. First, Datamize
2 appears to contend that "aesthetically pleasing" requirement is
3 met so long as the authoring tool imposes some constraints or
4 limitations on predefined screen elements provided by the
5 system. Opp Mot Sum J at 10:15-18; see also id at 14:10-13
6 (stating that "[f]or this claim limitation, the only thing that
7 is important for the purposes of infringement is whether there
8 are pre-defined limitations or constraints placed on the screen
9 elements types in conformity with the system developer's overall
10 design"). But interpreting the language in this fashion is
11 simply not proper. The patent separately describes the
12 necessity of such "predefined constraints" in paragraph [b] of
13 the independent claim. See Patent at 20:50-51, 21:7-8. The
14 term "aesthetically pleasing" must mean something different from
15 predefined constraints or limitations. It is a fundamental
16 principle of patent law that all words in a claim must be given
17 meaning. Ethicon Endo-Surgery, Inc v United States Surgical
18 Corp, 93 F3d 1572, 1582 (Fed Cir 1996); see Telemac Cellular
19 Corp v Topp Telecom, Inc, 247 F3d 1316, 1325 (Fed Cir 2001);
20 Elekta Instrument, 214 F3d at 1307. And the court is not
21 permitted to rewrite a claim to preserve its validity. Allen
22 Engineering Corp v Bartell Indus, Inc, 299 F3d 1336, 1349 (Fed
23 Cir 2002) (citing Rhine v Casio, Inc, 183 F3d 1342, 1345 (Fed
24 Cir 1999)). Although Datamize may believe the term is
25 unnecessary (as evidenced by their deletion of the term in
26 connection with the '040 patent), the court cannot simply ignore
27 the term as superfluous and read the term out of the claim.

28 Alternatively, Datamize implies that the "aesthetically

1 pleasing" term should be evaluated from the perspective of the
2 system author and that anyone else's perception of the screens
3 is irrelevant. See Opp Mot Sum J at 13:3-5; 14:7-9. This is
4 the interpretation of the claim that Datamize has evidently
5 advanced in the claims construction prehearing statement
6 submitted pursuant to Pat LR 4-3. See Supp Levin Decl at 2 ¶ 6,
7 Exh Q at 6. But this construction also does not save the term
8 from indefiniteness. For one thing, the plain language of the
9 claims does not support such a construction. Nowhere in the
10 claim does the patent limit the "aesthetically pleasing" term to
11 evaluation by the system author. Cf Patent at 20:37-21:23. Nor
12 does there appear to be any language in the patent specification
13 that would link the "aesthetically pleasing" requirement with
14 the system author. Cf id at 3:28-32, 3:57-66. Datamize points
15 out that the specification states in part that

16 major aesthetic or functional design choices
17 * * * may be built into the system taking into
18 account the considered opinions of aesthetic
19 design specialists, database specialists, and
20 academic studies on public access kiosk systems
21 and user preferences and problems. Only a limited
22 range of pre-defined design choices is then made
23 available to a system author.

24 Id at 3:57-66. But this language does not link aesthetics with
25 the preferences of the system author. In fact, it seems to
26 support a different notion - that the aesthetic choices are
27 determined in accordance with the opinions of "aesthetic design
28 specialists." The language of the patent simply does not
support the construction Datamize advances - surely if the
screens were meant only to be "aesthetically pleasing" to the
system author, the patent could have so stated.

1 were it measured from the perspective of the system's end-users,
2 the term is sufficiently clear to one of ordinary skill in the
3 art. Id at 8 ¶¶ 21, 22.

4 There are several problems with relying upon the
5 Rosenblatt declaration. First, as noted earlier, expert
6 testimony is disfavored and should not be used to "vary or
7 contradict" the language of the claim. Texas Digital, 308 F3d
8 at 1212; see Honeywell, 341 F3d at 1339. And, even assuming
9 that expert opinion is admissible, Rosenblatt seems to have
10 admitted in deposition testimony that no objective measure of
11 aesthetics is disclosed in the patent itself or any of the
12 references cited. See Depo Jeremy Rosenblatt (Rosenblatt Depo;
13 Supp Decl Michael B Levin (Supp Levin Decl; Doc # 65) at 1 ¶ 2)
14 at 51:8-14, 53:2-5, 94:20-25, 108:21-25, 123:25-124:13.

15 Second, Rosenblatt relies primarily on an article
16 published in 2000, several years after the application for the
17 '137 patent was filed. As Plumtree points out, claim language
18 ought not to be defined by standards formulated after the
19 patent's application was filed. The court ought to "consider
20 the meaning of the claim as of the date the invention was
21 constructively reduced to practice - the date the patent
22 application was filed." Kopykake Enterprises, Inc v Lucks Co,
23 264 F3d 1377, 1383 (Fed Cir 2001). "[W]hen a claim term
24 understood to have a narrow meaning when the application is
25 filed later acquires a broader definition, the literal scope of
26 the term is limited to what it was understood to mean at the
27 time of the filing." Id. Interestingly, the 2000 article upon
28 which Rosenblatt relies concedes that "[n]o one knows how to

1 measure aesthetic value" and "[s]ome [] doubt that it can be
2 measured." Supp Levin Decl at 2 ¶ 3, Exh N at 4. The court
3 therefore finds that Datamize's expert testimony does little to
4 provide the court with an acceptable or definite meaning for the
5 term "aesthetically pleasing."

6 Because the court is unable to construe the term in a
7 way that is supported by the term's ordinary meaning, by the
8 intrinsic evidence or even by the extrinsic evidence, the court
9 must find that "aesthetically pleasing" is hopelessly
10 indefinite. Accordingly, the court GRANTS Plumtree's motion for
11 summary judgment of invalidity (Doc # 51).

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13 III
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15 For the foregoing reasons, the court GRANTS Plumtree's
16 motion for summary judgment on the issue of indefiniteness (Doc
17 # 51). Because the court's judgment appears to invalidate each
18 claim of the '137 patent, plaintiff is entitled to summary
19 judgment of invalidity of the '137 patent. Given that this both
20 resolves Plumtree's declaratory action and undermines Datamize's
21 claim of infringement, this order appears conclusively to
22 dispose of this case. Accordingly, the court VACATES all

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1 currently scheduled dates in this matter and directs the clerk
2 to close the file and terminate all pending motions.

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IT IS SO ORDERED.

_____/s/_____

VAUGHN R WALKER

United States District Judge

United States District Court
For the Northern District of California

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