United States District Court,
S.D. Texas, Houston Division.

ABSOLUTE SOFTWARE, INC., and Absolute Software Corp,
Plaintiffs/Counter Defendants.
v.
STEALTH SIGNAL, INC., and Computer Security Products, Inc,
Defendants/Counter Plaintiffs.

Feb. 8, 2008.

John C. Cave, Ted Dalton Lee, Gunn & Lee PC, San Antonio, TX, Marc A. Fenster, Irene Y. Lee, Russ August Et Al, Mark Alan Flagel, Latham & Watkins, Los Angeles, CA, for Plaintiffs/Counter Defendants.

J. Christopher Reynolds, John Scott Black, Gibbs & Bruns, LLP, Houston, TX, Jeffrey Furr, Attorney at Law Furr Law Firm, Utica, OH, for Defendants/Counter Plaintiffs.

Court-Filed Expert Resumes

REPORT AND RECOMMENDATION ON CLAIM CONSTRUCTION

DAVID B. JOHNSON**, Special Master.**

Plaintiffs/Counterclaim Defendants Absolute Software, Inc., and Absolute Software Corporation (collectively, "Absolute"), allege that Defendants/Counterclaim Plaintiffs Stealth Signal, Inc., and Computer Security Products, Inc. (collectively, "Stealth"), infringe Claims 1, 2, 3, 10, 12, 14, 17, 18, 20, 29, 31, 33, 34, 35, 41, 42, 43, 48, 51, 53, 57, 63, 64, 72, and 73 of United States Patent No. 6,244,758 (the "'758 Patent"); Claims 12, 14, 18, 66, 77, 78, and 80 of United States Patent No. 6,300,863 (the "'863 Patent"); and Claims 4 and 5 of United States Patent No. 6,507,914 (the "'914 Patent"). FN1 Document No. 1 at 3-7; Document No. 91 at 1 n. 1. The ' 758 Patent, consisting of 75 claims, was issued to Absolute on June 12, 2001. The ' 863 Patent, consisting of 94 claims, was issued to Absolute on October 9, 2001. The ' 914 Patent, consisting of 9 claims, was issued to Absolute on January 14, 2003.

FN1. Although the Complaint additionally asserts that Stealth infringed other patents owned by or licensed to Absolute, only those listed above have been asserted in Absolute's subsequent briefs.

Stealth counterclaimed, alleging that Absolute infringes Claims 1, 2, 3, 6, 7, 8, 11, 12, 13, 14, 16, 17, 20, 25, 29, 30, 31, 32, 33, 35, and 38 of United States Patent No. 5,406,269 (the "'269 Patent"), and that the '758, '863, and ' 914 Patents are invalid or unenforceable. Document No. 10 at 4-7; Document No. 93 at 1. The '269 Patent, consisting of 38 claims, was issued to David Baran on April 11, 1995. Stealth represents that it is the exclusive licensee of this patent, with the right under this license to profit from and pursue all rights, remedies, and/or causes of action against Absolute for any infringement of this patent. Document No. 10 at

6; *see also* Document No. 90-2 at 6.

The Court by Order dated April 10, 2007, appointed me to serve as Special Master in this case for purposes of claim construction. Document No. 143.

On June 7 and 8, 2007, I conducted a day and a half *Markman* hearing during which the parties presented evidence and arguments in support of their proposed claim constructions for numerous claim terms in the four patents-in-suit. The parties also submitted a number of different briefs addressing claim construction, including a joint claim chart of disputed claim terms, and supplemental briefs following the hearing. *See* Document Nos. 90-91, 93, 102, 108-09, 113-15, 124-25, 131, 139-40, and 155-158. After carefully considering the parties' submissions and arguments, the patents-in-suit, and those portions of the prosecution histories submitted by the parties, this report sets out my recommendations on the correct construction for each of the disputed terms of the patents-in-suit.

I. *Law Governing Claim Construction*

A. *General Legal Standards*

Claim construction is strictly a legal question for the court. Markman v. Westview Instruments, Inc., 52 F.3d 967, 977-78 (Fed.Cir.1995), *aff'd,* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). "It is a bedrock principle of patent law that the claims of a patent define the invention to which the patentee is entitled the right to exclude." Phillips v. AWH Corp., 415 F.3d 1303, 1312 (Fed.Cir.2005) (en banc) (internal quotation marks and citations omitted). Thus, "a claim construction analysis must begin and remain centered on the claim language itself ...." Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc., 381 F.3d 1111, 1116 (Fed.Cir.2004).

"It is well-settled that, in interpreting an asserted claim, the court should look first to the intrinsic evidence of record, *i.e.,* the patent itself, including the claims, the specification and, if in evidence, the prosecution history." Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed.Cir.1996) (citing Markman, 52 F.3d at 979); *see also* Phillips, 415 F.3d at 1314. "Such intrinsic evidence is the most significant source of the legally operative meaning of the disputed claim language." Vitronics, 90 F.3d at 1582.

In general, claim terms are construed in accordance with their ordinary and customary meaning as understood by one of ordinary skill in the art in question. *See* L.B. Plastics, Inc. v. Amerimax Home Prods., Inc., 499 F.3d 1303, 1308 (Fed.Cir.2007); Phillips, 415 F.3d at 1313. The common and ordinary meaning controls unless the intrinsic evidence clearly redefines the claim term so as to put one reasonably skilled in the art on notice that the patentee intended to assign the term a different meaning. Union Carbide Chems. & Plastics Tech. Corp. v. Shell Oil Co., 308 F.3d 1167, 1177 (Fed.Cir.2002); *see also* Bell Atl. Network Servs., Inc. v. Covad Commc'ns Group, Inc., 262 F.3d 1258, 1268 (Fed.Cir.2001) ("Generally, there is a heavy presumption in favor of the ordinary meaning of claim language as understood by one of ordinary skill in the art. This presumption is overcome: (1) where the patentee has chosen to be his own lexicographer, or (2) where a claim term deprives the claim of clarity such that there is no means by which the scope of the claim may be ascertained from the language used." (internal citations and quotation marks omitted)).

Specifically, a patentee may "choose to be his own lexicographer and use terms in a manner other than their ordinary meaning, as long as the special definition of the term is clearly stated in the patent specification or file history." Vitronics, 90 F.3d at 1582. Therefore, both the specification and prosecution history must be reviewed to discern whether the inventor "consistently and clearly use[d] a term in a manner either more or

less expansive than its general usage in the relevant community, [ ] thus expand [ing] or limit[ing] the scope of the term in the context of the patent claims ." CollegeNet, Inc. v. ApplyYourself, Inc., 418 F.3d 1225, 1231 (Fed.Cir.2005); *see also, e.g.,* Honeywell Int'l, Inc. v. Univ. Avionics Sys. Corp., 493 F.3d 1358, 1361-64 (Fed.Cir.2007) (concluding, upon examining the specification and prosecution history, that a patentee had used the term "heading" in a manner inconsistent with its common meaning).

Other claims of the patent in question can also be valuable sources of enlightenment as to the meaning of a claim, given that claim terms are normally used consistently throughout a patent. Phillips, 415 F.3d at 1314. "Differences among claims can also be a useful guide in understanding the meaning of particular claim terms." *Id*. "For example, the presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim." *Id*. at 1314-15.

On occasion, however, "the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words." *Id*. at 1314 (internal citations omitted). "Dictionaries, encyclopedias and treatises, publicly available at the time the patent is issued, are objective resources that serve as reliable sources of information on the established meanings that would have been attributed to the terms of the claims by those of skill in the art." Tex. Digital Sys., Inc. v. Telegenix, Inc., 308 F.3d 1193, 1202-03 (Fed.Cir.2002). Nevertheless, such secondary sources must always be viewed in context with the intrinsic evidence, to avoid "transforming the meaning of the claim term to the artisan into the meaning of the term in the abstract, out of its particular context, which is the specification." Phillips, 415 F.3d at 1321.

B. ***Claim Construction of Means-Plus-Function Elements***

Title 35, U.S.C. Section 112, paragraph 6, provides:

[A]n element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.

35 U.S.C. s. 112 para. 6. This paragraph of Section 112 is an exception to the general rule that "[a] patentee's invention is only found in a patentee's claims ...." Noelle v. Lederman, 355 F.3d 1343, 1352 (Fed.Cir.2004); *see also* O.I. Corp. v. Tekmar Co., 115 F.3d 1576, 1583 (Fed.Cir.1997) (explaining that means-plus-function elements relieve the patentee of the burden of reciting all possible means that might be used).

"A claim limitation that actually uses the word 'means' invokes a rebuttable presumption that [35 U.S.C.] s. 112 para. 6 applies." CCS Fitness, Inc. v. Brunswick Corp., 288 F.3d 1359, 1369 (Fed.Cir.2002); *accord* Seal-Flex, Inc. v. Athletic Track & Court Constr., 172 F.3d 836, 848 (Fed.Cir.1999). This presumption applies regardless of whether the claim discloses an apparatus or a method. *See, e.g., On* Demand Machine Corp. v. Ingram Indus., Inc., 442 F.3d 1331, 1336, 1340-41 (Fed.Cir.2006) (affirming trial court's limitation of clause in method patent reciting, "providing means for a customer to visually review said sales information," to those structures in the specification that serve an equivalent function); J & M Corp. v. Harley-Davidson, Inc., 269 F.3d 1360, 1364 & n. 1, 1367 (Fed.Cir.2001) (construing "gripping means" disclosed in independent claims for a device and method as means-plus-function limitations).

The foregoing presumption invoked when the claim limitation uses the word "means" is rebutted if the claim itself recites sufficient structure, material, or acts to perform the claimed function, *see* Micro Chem., Inc. v. Great Plains Chem. Co., 194 F.3d 1250, 1257 (Fed.Cir.1999), or if it fails to recite a function associated with the means, *see* Seal-Flex, Inc., 172 F.3d at 848.

If an element is construed as a means plus function limitation, then the court must identify (1) the claimed function; and (2) the structures disclosed within the specification that correspond to the recited function. *See* JVW Enters., Inc. v. Interact Accessories, Inc., 424 F.3d 1324, 1330 (Fed.Cir.2005); Epcon Gas Sys., Inc. v. Bauer Compressors, Inc., 279 F.3d 1022, 1032 (Fed.Cir.2002).

In identifying the recited function, a court may not adopt a function different from that explicitly recited in the claim, nor may it import functions from a working embodiment not specifically recited in the claim. *See* JVW Enters., Inc., 424 F.3d at 1331.

To ascertain the structure that corresponds with the recited function, the specification must clearly link or associate a structure with the particular function recited in the claim. *See* Med. Instrumentation & Diagnostics Corp. v. Elekta AB, 344 F.3d 1205, 1210 (Fed.Cir.2003). Thus, a structure that is disclosed in the specification but is not clearly associated with the particular claimed function is not a "corresponding structure." Id. at 1211.

"[I]f one employs means-plus-function language in a claim, one must set forth in the specification an adequate disclosure showing what is meant by that language. If an applicant fails to set forth an adequate disclosure, the applicant has in effect failed to particularly point out and distinctly claim the invention as required by the second paragraph of section 112." In re Donaldson Co., 16 F.3d 1189, 1195 (Fed.Cir.1994) (en banc) (distinguishing between the improper importation of limitations in the specification into the claim, and "constru[ing] a limitation already in the claim in the form of a means-plus-function clause" in light of the statutory mandate in s. 112). In such a case, the claim fails for indefiniteness. *See* Default Proof Credit Card Sys. ., Inc. v. Home Depot U.S.A., Inc., 412 F.3d 1291, 1302-03 (Fed.Cir.2005).

Whether the specification sufficiently discloses and links a structure to the claimed function is viewed from the standpoint of one of ordinary skill in the art. *See* Med. Instrumentation, 344 F.3d at 1212; *see also, e.g.,* Medtronic, Inc. v. Advanced Cardiovascular Sys., Inc., 248 F.3d 1303, 1313 (Fed.Cir.2001) (concluding the disputed structures did not correspond with the disclosed functions because "one skilled in the art would not perceive any clear link or association between these structures and the [recited] function"). Stated differently, the central question is "whether one of skill in the art would understand the specification itself to disclose the structure, not simply whether that person would be capable of implementing that structure." Med. Instrumentation, 344 F.3d at 1212.

While the corresponding structure need not include all things necessary to enable the claimed invention to work, it must include all structures that actually perform the recited function. *See* Cardiac Pacemakers, Inc. v. St. Jude Med., Inc., 296 F.3d 1106, 1119 (Fed.Cir.2002).

II. ***Discussion4***

A. ***The Patents-in-Suit***

1. ***The*** **'*758, '863, and* '914 Patents**

The '758, '863, and '914 Patents, held by Absolute, are generally directed to tracing the location of lost or stolen electronic devices, such as laptop computers, cellular telephones, desktop computers, and other small, portable electronic devices or expensive home and office electronic equipment. '758 Patent, Column 1, Lines 46-65; '863 Patent, Column 1, Line 51-Column 2, Line 3; '914 Patent, Column 1, Lines 42-62. As described in the '758 Patent, the invention operates through an "agent" that is implanted in the electronic device and which initiates calls from the device to a host monitoring system (referred to as the "host system") to provide unique identifying indicia and location information for the device. '758 Patent, Column 2, Lines 19-27. The agent is designed to evade detection and to be transparent to an unauthorized user, and may also be designed to resist attempts to disable it by an unauthorized user. Id., Column 2, Lines 29-21.

The '863 Patent is a continuation-in-part of the '758 Patent. The asserted claims in both patents relate to a method and apparatus in which the agent calls the host system via a global network such as the Internet. FN2 In these claims, the location of the electronic device is indicated to the host system by providing the host system with one or more of the "global network communication links" used to enable the transmission between the electronic device and the host system. *See, e.g.,* id., Column 21, Lines 23-27; id., Column 23, Line 63. Column 24, Line 2. "These Internet communication links will assist the host system in tracking the [electronic device]." Id., Column 10, Lines 26-28.

FN2. Asserted Claims 72 and 73 of the '758 Patent are limited specifically to the Internet rather than to a "global network." '758 Patent, Column 26, Lines 16-40.

The '914 Patent is also a continuation-in-part of the '758 Patent. The asserted system claims of the '914 Patent are similar to those of the '758 and '863 Patents, except that they include a specific limitation of not signaling the visual or audible user interface and are not limited to a global network such as the Internet. *See* '914 Patent, Column 627, Lines 18-23. The asserted claims of the '914 Patent also state reporting only identification information, not location information, from the agent to the host system. Id., Column 627, Lines 25-27.

2. ***The*** **'269 Patent**

The '269 Patent, assigned to David Baran and licensed by Stealth, is generally directed to remote monitoring of an electrical apparatus and the prevention of misuse of proprietary software on this device. '269 Patent, Column 1, Lines 11-13. The invention operates through hardware or software that is secretly added to the electronic apparatus and which initiates surreptitious calls to report various data to a remote monitoring station (generally referred to, e.g., as the "central site"). Id., Column 2, Lines 50-55; id., Column 3, Line 43. The invention attempts to make it difficult to defeat the apparatus's calls and to avoid detection of these calls by the user of the electronic apparatus. Id., Column 2, Lines 32-44; id., Column 7, Lines 50-53.

The '269 Patent describes the use of the invention with systems connected via a telephone using a modem or via a connection to a local area network (LAN). Id., Column 7, Lines 56-58. In calling the central site, the electrical apparatus in the invention may report two types of data to the central site: "performance data" and data related to the software and the use of this software on the device. *See., e.g.,* id., Column 8, Lines 9-20; id., Column 9, Lines 40-43; id., Column 10, Lines 48-50. For example, the information reported from the electronic apparatus to the central site may include "the serial number of [the] apparatus [ ] or the software

that it is running, how many out-going calls per hour are made on each of the available channels, from what telephone number the call was made, and any other information that would be useful in detecting operational problems with [the] apparatus [ ] or maintaining the quality of performance of [the] apparatus [ ] to the user." Id., Column 3, Lines 54-61.

When the electronic apparatus calls the central site, the central site may receive location information for the electronic apparatus through the telephone company's Automatic Number Identification (ANI) service FN3 or, when a packet communications system is used to call the central site, through the source address from packet headers sent from the electronic apparatus to the central site. Id., Column 2, Lines 45-47; id., Column 13, Lines 9-16.

FN3. *The Authoritative Dictionary of IEEE Standards Terms* defines "automatic number identification (ANI)" as "a network service that delivers the phone number/billing number of the calling party." 66 (7th ed.2000). *Newton's Telecom Dictionary* defines "ANI" as follows: "Automatic Number Identification. A phone call arrives at your home or office. Somewhere in that call is a series of digits which tell you the phone number of the phone calling you. These digits may arrive in analog or digital form. They may arrive as touchtone digits inside the phone call or in a digital form on the same circuit or on a separate circuit." 50 (14th ed.1998).

B. *Claim Construction*

1. *The '758, '863, and* '914 Patents

a. "Global network"

The term "global network" appears expressly or by way of dependence in all asserted claims of the '758 Patent except Claims 72 and 73 and in all asserted claims of the '863 Patent.

The parties have agreed that the term "global network" means "the Internet" and that "the telephone network is not a[g]lobal [n]etwork, but the Internet includes and uses the telephone network." Document No. 139 at 3. In light of the usage of the terms "global network" and "Internet" throughout the '758 and '863 Patents and their prosecution histories, I conclude that the parties' proposed definition for this term is correct.

b. "*One or more of the global network communication links used to enable transmission between said electronic device and said host system*"

The term "one or more of the global network communication links used to enable transmission between said electronic device and said host system" appears expressly, or impliedly by way of dependence, in all asserted claims of the ' 758 and '863 Patents.FN4 Absolute proposes that this term should be construed to mean "[i]nformation regarding at least one of the IP addresses through which communication occurs." Document No. 139 at 3. Stealth proposes the somewhat similar definition of "[t]he IP addresses of one or more of the internet routers between the client computer and the host computer that were used to enable the transmission," and further argues that "[t]he source IP address of the client computer is not a global network communication link." Id. Absolute disagrees with this exclusion of the source IP address. Document No. 91 at 15.

FN4. Claims 72 and 73 of the '758 Patent use the phrase "internet communication links" rather than "global network communication links." ' 758 Patent, Column 26, Lines 24-26, 36-38. In light of the conclusion above that "global network" means "the Internet," the terms "global network communication links" and "internet communication links" are treated as synonymous here.

Although not apparent in the wording of Stealth's proposed construction for this term, Stealth further argues that this term should be interpreted as meaning *all* of the global network communication links used to enable this transmission. *See* Document No. 90-2 at 17-18. Stealth bases this argument on its contention that this interpretation is the only embodiment taught by the patents. However, the plain language of the claims-and even the plain language of Stealth's own proposed construction-states "one or more," not "all." In addition, "[e]ven when the specification describes only a single embodiment, the claims of the patent will not be read restrictively unless the patentee has demonstrated a clear intention to limit the claim scope using words or expressions of manifest exclusion or restriction." Liebel-Flarsheim Co. v. Medrad, Inc., 358 F.3d 898, 906 (Fed.Cir.2004) (internal quotation marks omitted). I find no such clear intention to limit the claim scope here, and I therefore reject Stealth's attempt to change the meaning of "one or more." I conclude that "one or more" here means simply what it says, "one or more," not "all."

In order to determine the correct construction for the term "one or more of the global network communication links used to enable transmission between said electronic device and said host system," it is necessary to determine the meaning of the phrase "global network communication links" embedded within it. As noted above, the parties agree that "global network" means "the Internet," and thus the issue here is the meaning of "communication links" within the Internet.

Absolute relies primarily on the declaration of its expert, Mr. Gregory Ennis, in its argument as to the proper meaning of the phrase "global network communication links." Mr. Ennis opines that "[t]he term 'global network communication link' as used in the '758 and '863 patents has a common and ordinary meaning to those of ordinary skill in the field of communication networks." Document No. 89 at 4 para. 16 (emphasis added). Mr. Ennis goes on to contend that "[a] person of ordinary skill in the art would understand the term 'global network communication link' to mean ' *information regarding* one or more of the nodes along the particular communication pathway within the global network by which information is transmitted from the client electronic device to the host system. *In the context of the Internet, one or more of the IP addresses through which communication occurs*.' " Id. (emphasis added).

However, Mr. Ennis offers no support for this contention as to the ordinary meaning of "global network communication link." Furthermore, his declaration in this regard is rather vague and does not clearly state that each individual such IP address is a "global network communication link." It merely states that "one or more of the IP addresses through which communication occurs" provides "information regarding" the global network communication links.

Stealth arrives at its definition of "global network communication links" by relying instead on the language in three places within the patent specification:

The following is a discussions [sic] of how the traceroute routine operates within the Internet to provide *the Internet links which connect the client computer to the host*. The Internet is a collection of local area networks joined by *IP routers*. These IP routers read the numerical destination address of the IP packet sent

by each computer ... before sending it to the next appropriate router.

...

... [T]he agent initiates a traceroute routine which provides the host with *the Internet communication links that were used to connect the client computer to the host*. *These Internet communication links* will assist the host system in tracking the client computer.

...

These addresses and the times that they were accessed are compared with internal logs of the proxy server which record its clients' Internet access history. In this way, the client can be uniquely identified and located.

Document No. 90-2 at 16-17 (emphasis in original) (quoting '758 Patent, Column 11, Lines 25-33; id., Column 10, Lines 23-28, Lines 36-40).

However, these passages from the '758 Patent specification do not provide an actual definition of the phrase "global network communication links." Instead, they describe some aspects of one embodiment of the invention using traceroute and only suggest some relationship between "global network communication links" and IP routers; in some way, traceroute "provides the host with the Internet communication links," but this does not necessarily mean that the "global network communication links" are each themselves literally one of these IP routers or one of the IP addresses of these IP routers.

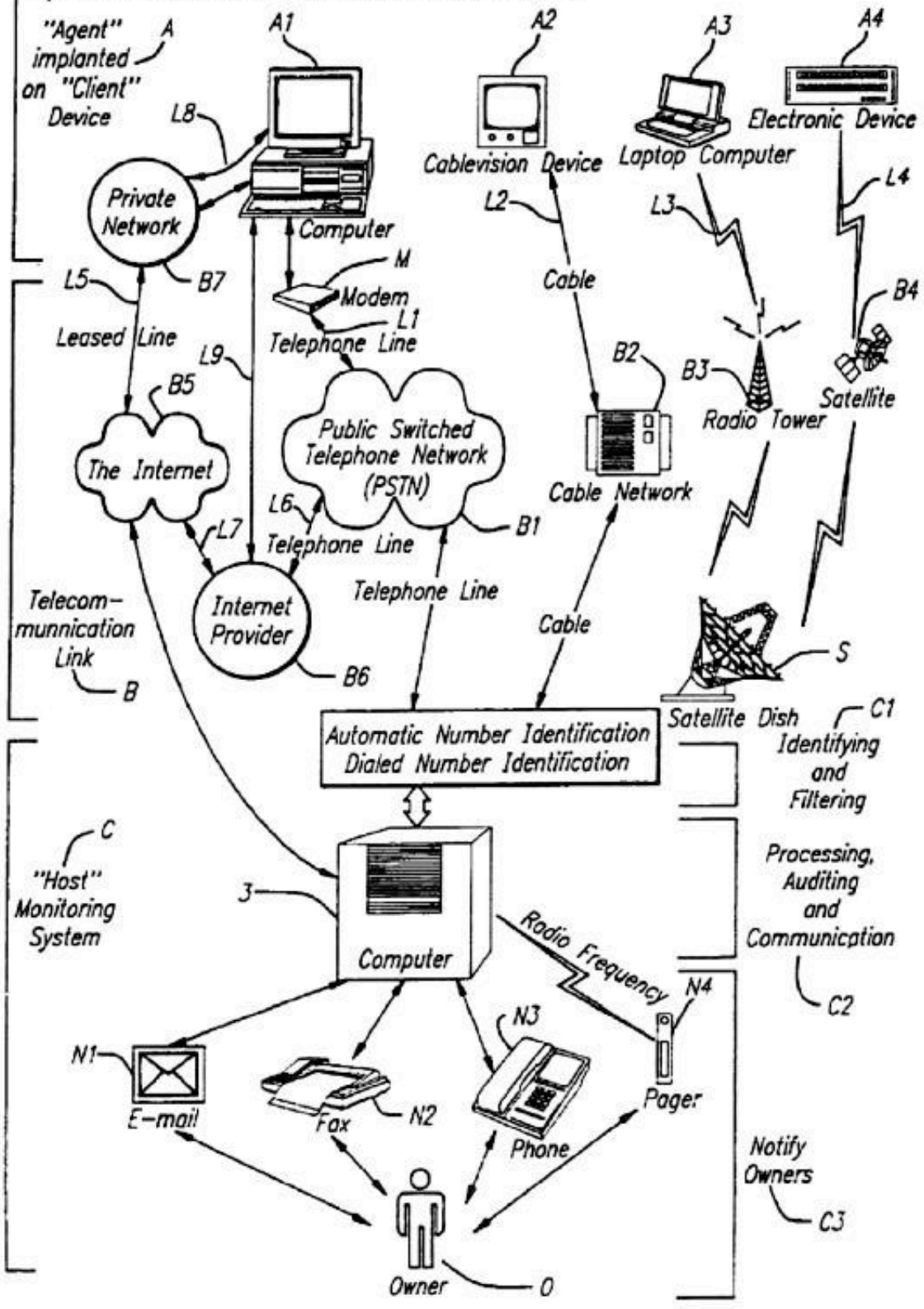
In attempting to find support for the correct definition of the phrase "communication link," I carefully examined the use of exactly this phrase (or its plural) in both the '758 and '863 patents. Based on this examination, I found a number of problems with a definition of "communication link" as being either an "IP router" or an "IP address of a router." I also found a number of points indicating a different definition for the phrase "communication link" that appears to be the correct definition. I address these in the four points below.

First, the '863 specification refers to the act of a node "establishing a communication link" to another node, or states that some node "establishes a communication link" to another node. For example, the specification states that the agent "*establishes a communication link* to the Host [and] sends its identity ...." '863 Patent, Column 12, Lines 59-61 (emphasis added). In this context, substituting "IP router" or "IP address of a router" does not make sense: the agent cannot "establish[ ] an IP router to the Host" and cannot "establish an IP address of a router to the Host." The English does not work. As another example, in describing a possible implementation of the agent, the specification states that "the functionality of the Agent may be implemented in the circuitry of any hardware device capable of *establishing a communication link* through sending and receiving packets of data." '863 Patent, Column 3, Lines 50-53 (emphasis added). Here, too, substituting "IP router" or "IP address of a router" does not make sense.

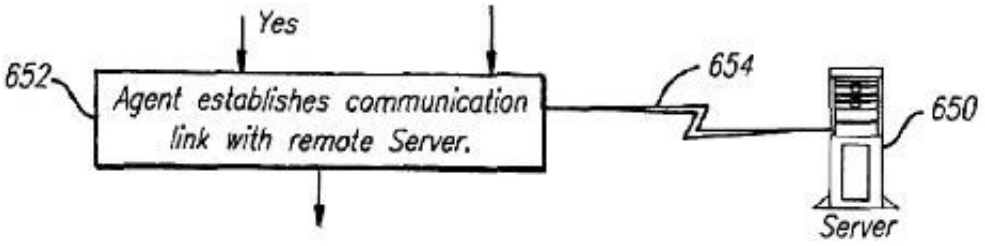
Second, Figure 1 in both the '758 and '863 Patent specifications depicts a specific example of a "communication link" and a number other similar items identified as "links." These examples are clearly not depicted as being either IP routers or IP addresses of routers. A copy of Figure 1 is reproduced below. In describing L9 in Figure 1 (L9 is shown in the upper left portion of Figure 1, connected to client computer A1), the patents state that "client computer Al may be linked directly to Internet provider B6 via wireless

communication link L9." '758 Patent, Column 5, Lines 51-52 (emphasis added); *see also* '863 Patent, Column 7, Lines 12-13. The specification here uses exactly the phrase in question, "communication link," to describe L9. In further describing L8 and L9 (L8 is shown above L9 in Figure 1), the patents state that "client computer 10 may be linked to Internet provider 9 *o* and private network 9 *p* via wireless *links* L9 and L8 respectively." '758 Patent, Column 6, Line 65-Column 7, Line 1 (emphasis added); *see also* '864 Patent, Column 8, Lines 27-29. This passage from the specification uses the word "links" as a noun in describing both L8 and L9, apparently with the same meaning as the earlier use of the phrase "communication link" used in describing L9. In Figure 1, L8 and L9 are each shown as a line depicting the connection between two nodes, not as the nodes themselves, and not as an IP router or as the IP address of a router. Figure 1 also depicts L1 through L7 in a manner similar to L8 and L9.

FIG. 1


Agent implanted via hardware, software, firmware (such as ROM, Flash ROM, EPROM, microprocessor)
"Agent" implanted on "Client" Device
A
A1
A2
A3
A4
L8
Private Network
Computer
Cablevision Device
Laptop Computer
Electronic Device
L2
L3
L4
M
Modem
L5
B7
Cable
B4
L1
Leased Line
Telephone Line
L9
B2
B3
B5
Public Switched Telephone Network (PSTN)
Radio Tower
Satellite
The Internet
Cable Network
L6
L7
B1
Telephone Line
Telephone Line
Telecom-munnication Link
Internet Provider
Cable
B6
S
B
Satellite Dish
C1
Automatic Number Identification Dialed Number Identification
Identifying and Filtering
C
"Host" Monitoring System
3
Computer
Radio Frequency
Processing, Auditing and Communication
C2
N4
N3
N1
E-mail
Fax
N2
Phone
Pager
Notify Owners
C3
Owner
O

Third, the specification of the '863 Patent, in detailing the operation of the SPC embodiment of the invention, states the first step of a CompuTrace SPC transaction as follows: "Step 652, The SPC initiates *communication link 654* to the CompuTrace Server ...." '863 Patent, Column 30, Lines 31-32 (emphasis added). The relevant portion of Figure 23, referenced in this step, is reproduced below. As with L1 through L9 in Figure 1, the communication link 654 here is not shown as an IP router or as the IP address of a router. It is shown as a line depicting the connection to the CompuTrace server.



Fourth, the patents state that "[t]he Internet is a collection of networks linked together by IP routers and *high speed digital links*." '758 Patent, Column 7, Lines 45-46 (emphasis added). The English structure of this sentence suggests that "IP routers" and "high speed digital links" are two distinct things rather than being the same as each other. Although the phrase here is "high speed digital links" rather than "communication links," it is clear that these phrases both refer to a type (or types) of "links" in the Internet (and thus, global network links). Further, the patents also state that "[e]ach IP router has a unique IP address." Id., Column 8, Lines 38-39. Thus, links are likewise something different from IP addresses, as each router (rather than each link) has an IP address.

In addition, in further attempting to find support for the correct definition of the phrase "communication link," I examined technical dictionaries to determine the common and ordinary meaning of this phrase to those of ordinary skill in the art. *The Authoritative Dictionary of IEEE Standards Terms* defines "communications link" as "[a]ny of the communications *media,* for example, microwave, power line carrier, wire line." 198 (7th ed.2000) (emphasis added). In addition, *Newton's Telecom Dictionary* defines "data link" as "[a] term used to describe the *communications link* used for data transmission from a source to a destination. In short, a phone line for data transmission. Or, A[sic] fiber optic transmitter, cable, and receiver that transmits digital data between two points." 200 (14th ed.1998) (emphasis added). This dictionary also defines "link" as "[a]nother name for a communications channel or circuit." Id. at 416. These definitions, dating from the time of the invention, further demonstrate that the correct definition for the term "communication link" is neither an "IP router" nor an "IP address of a router," and is not limited to any type of intermediate forwarding node. Rather, these definitions show that the accepted meaning of this term at the time of the invention comprised the connection (either direct or indirect) used for data transmission between two nodes.

Interpretation of patent claims presents a question of law. *See* Monsanto Co. v. Syngenta Seeds, Inc., 503 F.3d 1352, 1356 (Fed.Cir.2007) (citing Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1451 (Fed.Cir.1998) (en banc)). Although a court will generally accept the parties' agreed stipulations regarding the definition of a claim term, it possesses "inherent authority to decline to accept a stipulation if it is erroneous as a matter of law." Regents of Univ. of Cal. v. Micro Therapeutics, Inc., 507 F.Supp.2d 1074, 1080 (N.D.Cal.2007).

I therefore conclude that a "global network communication link" is "any connection (either direct or indirect) used for data transmission between two nodes in the Internet." Note that such a communication link may be identified by giving the IP address of each of the two nodes at either end of the communication link, but neither of these IP addresses and neither of these nodes is itself a "communication link." For example, traceroute "provides the host with the Internet communication links that were used to connect the client computer to the host," '758 Patent, Column 10, Lines 24-26, in that traceroute provides a list of the IP addresses of the Internet nodes through which communication from the client computer to the host traverses. The connection between each of these consecutive nodes is a communication link in the Internet, as is the connection between any other two Internet nodes.

This definition of a "communication link" is consistent with the language used throughout the specifications. For example, in describing the sequence of IP addresses collected by traceroute, the specification of the '758 Patent states that "[t]his route, *representing* the sequence of Internet communication links between the computer and the host, is then transmitted to the host Internet monitoring subsystem 9y." '758 Patent, Column 11, Lines 48-51 (emphasis added). The specification here does not say that this sequence of IP addresses literally *is* the sequence of communication links; rather, it merely says that this sequence of IP addresses in some way "represent[s]" the sequence of communication links.

Furthermore, addressing Stealth's contention that "the source IP address of the client computer is not a global network communication link," this definition of a "communication link," and the portions of the specifications cited above to support this definition, makes clear that the client computer may be the endpoint of a communication link.

Based on the foregoing, I conclude that the correct construction for the term "one or more of the global network communication links used to enable transmission between said electronic device and said host system" is: "the identification of one or more (perhaps less than all) of the connections (either direct or indirect) between two nodes in the Internet (one of the nodes may be the electronic device itself) used to enable data transmission between said electronic device and said host system."

c. "*Identifying indicia*"

The term "identifying indicia" appears expressly, or impliedly by way of dependence, in all asserted claims of the '758, '863, and '914 Patents. FN5 Absolute suggests that no construction is needed for this term, although if the Court deems otherwise, Absolute suggests a construction of "information that serves to identify the computer." Document No. 139 at 6-7. Stealth, instead, proposes that "[t]his term means computer identifying indicia," and that "it does not mean agent identifying indicia." Id.

FN5. Although the parties have requested construction of this term only in the context of the '914 Patent, I address it here also in the context of the '758 and '863 Patents in the interests of achieving a consistent claim construction across these three related patents.

This term, as it is used in Claim 4 of the '914 Patent, appears in the context of the full phrase "providing the host monitoring system with *identification indicia of the computer,* whereby the host monitoring system could identify whether the computer has been reported lost based on the *identifying indicia*." '914 Patent, Column 627, Lines 26-30 (emphasis added). From this context, it is clear that "identifying indicia" and

"identification indicia of the computer" refer to the same thing.

I find nothing in the '758, '863, or '914 Patents to indicate that the inventor intended anything other than the plain and ordinary meaning of the word "indicia," and neither party has suggested any specialized meaning for this word. Examining the *American Heritage Dictionary of the English Language,* I find the plain and ordinary meaning of "indicia" to be "identifying marks; indications." 919 (3d ed.1996). I therefore conclude that "identifying indicia" means "information that indicates the identity of the computer."

The parties essentially agree on this point, but Stealth seeks to further limit the construction of this term to exclude indicia that (also) identifies the agent. However, I find no support for this further limitation in the three patents. In particular, if some form of indicia indicates the identity of the agent and, in doing so, also indicates the identity of the computer, then such indicia is "identifying indicia," as that term is used in the three patents; if, instead, such form of indicia identifies the agent but does not thus indicate the identity of the computer, then it is not "identifying indicia." For example, information that indicates the identity of the agent as Agent A (rather than Agents B or C) is "identifying indicia" if it can be determined based on this information that this is also Computer 1 (rather than Computers 2 or 3), but it is not "identifying indicia" if the relationship between this agent identity and the corresponding computer identity cannot be determined.

I therefore conclude that the correct construction for the term "identifying indicia" is: "information that indicates the identity of the computer, whether or not this information also indicates the identity of the agent."

d. "*Providing*"

The term "providing," in the context of "providing identifying indicia and location information," "providing ... identifying indicia," "providing ... one or more of the global network communication links," or "providing ... one or more of the Internet communication links" in the '758 and '863 Patents, appears expressly, or impliedly by way of dependence, in all asserted claims of the '758 and '863 Patents.

Absolute suggests that the term "providing" requires no construction, because it is "a plain English word used in its ordinary sense and would be readily understood by a person of ordinary skill in the art." Document No. 115 at 9.

Stealth, on the other hand, proposes that this term requires clarification that it is the agent that is "providing." In particular, Stealth contends that "[g]iving it the broadest possible interpretation, the specification is [ ] clear that the agent is the part of the system that collects the information and that [ ] is providing it through some transmission mechanism." Document No. 108 at 5.

Among the asserted claims of the '758 Patent in which this term appears, four are independent claims (Claims 1, 41, 72, and 73).FN6 Claims 1 and 72 each describe the agent as "said agent *used for providing* identifying indicia and location information ...." ' 758 Patent, Column 21, Lines 13-14; id., Column 26, Lines 17-18 (emphasis added). Claims 41 and 73 each describe the agent as "said agent *providing* identifying indicia and location information ...." Id., Column 23, Lines 56-57; id., Column 26, Lines 31-32 (emphasis added). Among the asserted claims of the ' 863 Patent in which this term appears, two are independent claims (Claims 1 and 57).FN7 Claim 1 describes the agent as "an agent initiating communication and *providing* identifying indicia to a host system ...." ' 863 Patent, Column 33, Lines 14-16 (emphasis added). Claim 57 describes the agent as "an agent for initiating communication with a host

monitoring system and *providing* identifying indicia to a host monitoring system ...." Id., Column 36, Lines 48-51 (emphasis added).

FN6. The term "providing" also occurs in unasserted independent Claims 36 and 65 of the '758 Patent. Claim 36 describes the agent as "said agent *providing* identifying indicia ...." '758 Patent, Column 23, Lines 28-29 (emphasis added). Claim 65 describes the agent as "an agent for *providing* identifying indicia ...." Id., Column 25, Lines 37-38 (emphasis added).

FN7. The term "providing" also occurs in unasserted independent Claim 37 of the '863 Patent. Claim 37 describes the agent as "said agent *providing* identifying indicia ....." '863 Patent, Column 35, Lines 34-35 (emphasis added).

In each of these claims, this text appears in the preamble of the claim, with the word "providing" appearing one or more times later within the body of the claim after the preamble. Within the body of each claim, no indication is given as to who or what is performing the "providing," but based on a careful examination of the language used throughout each claim, I find this language related to "providing" in the preamble to be limiting.

In particular, if the claim drafter "chooses to use *both* the preamble and the body to define the subject matter of the claimed invention, the invention so defined, and not some other, is the one the patent protects." Bell Commc'ns Research, Inc. v. Vitalink Commc'ns Corp., 55 F.3d 615, 620 (Fed.Cir.1995) (emphasis in original). Further, when the limitations in the body of the claim "rely upon and derive antecedent basis from the preamble, then the preamble may act as a necessary component of the claimed invention." Eaton Corp. v. Rockwell Int'l Corp., 323 F.3d 1332, 1339 (Fed.Cir.2003). Stated differently, "a preamble limits the invention if it recites essential structure or steps, or if it is 'necessary to give life, meaning, and vitality' to the claim." Catalina Mktg. Int'l, Inc. v. Coolsavings.com, Inc., 289 F.3d 801, 808 (Fed.Cir.2002) (quoting Pitney Bowes, Inc. v. Hewlett-Packard Co., 182 F.3d 1298, 1305 (Fed.Cir.1999)).

In each of these independent claims in the '758 and '863 Patents, the agent is introduced and defined in the preamble using the language above, and then is consistently referred to in the body of the claim as "*said* agent," clearly referring back to the agent so defined in the preamble, and thus clearly deriving antecedent basis from the preamble.

The above language, "providing" or "used for proving," in the asserted independent claims from the '758 Patent refers both to "identifying indicia" and to "location information," and this language in the asserted independent claims from the '863 Patent refers to "identifying indicia." Throughout the body of each of the asserted claims, the term "identifying indicia" is used consistently. The term "location information" also refers to "one or more of the global network communication links."

At the *Markman* hearing, Absolute agreed that the term "providing" means that it is the agent that is "providing." Document No. 159 at 90:3-9, 97:2-3, 98:3-99:10. The *American Heritage Dictionary of the English Language* defines "provide" as "[t]o furnish; supply" or "[t]o make available; afford." 1458 (3d ed.1996). *Random House Webster's Unabridged Dictionary* similarly defines "provide" as "to make available; furnish" or "to supply or equip." 1556 (9th ed.2001). I find nothing in the patents or in the prosecution history to suggest that the phrases "providing" and "used for providing" differ in meaning from

each other when used in this context; they both mean that it is the agent that is providing.

I therefore conclude that the correct construction for the term "providing," in the context of "providing identifying indicia and location information," "providing ... identifying indicia," "providing ... one or more of the global network communication links," and "providing ... one or more of the Internet communication links," is: "the agent furnishing, supplying, or making available."

e. "*Providing said identifying indicia*"

The term "providing said identifying indicia" appears expressly, or impliedly by way of dependence, in all asserted claims of the '758 and '863 Patents. Absolute suggests that no construction for this term is needed but, if the Court deems otherwise, proposes a construction of "making available or supplying, directly or indirectly, the identifying indicia." Document No. 139 at 4. Stealth, on the other hand, does not propose any specific construction but argues that the construction must be limited such that it "requires at least some form of indirect transmission of the data." Id. In its supplemental *Markman* brief, Stealth modified its proposed construction to require "providing the identifying indicia through a DNS query." Document No. 156 at 10.

Stealth bases its arguments for these proposed constructions on its contention that "[t]here is only one way of the agent providing the host system with the identifying indicia shown in the internet embodiment of these patents. This is by encoding it into a DNS query, and the entire invention relative to the internet embodiment is based upon this teaching. *Sending the information directly as data is not taught*." Document No. 108 at 5-6 (emphasis added). However, this argument is incorrect. Claim 1 of the '758 Patent introduces the invention in which "said electronic device [is] connectable to said host system through a global network." '758 Patent, Column 21, Lines 15-16. Claim 2 adds a limitation: "The method of claim 1 wherein said global network is the Internet." '758 Patent, Column 21, Lines 28-29. This limits Claim 2 to encompass methods in which the global network is the Internet, but Claim 1, being broader, covers methods in which the global network *may* be the Internet or may be any other type of global network. Claims 10 and 11 then read as follows:

10. The method of claim 1 wherein said step of providing said host system with said identifying indicia is accomplished by *sending a data packet including address information relating to the source of the global network transmission*.

11. The method of claim 2 wherein said step of providing said host system with said identifying indicia is accomplished by *sending a domain name service query with said identifying indicia encoded therein*.

'758 Patent, Column 22, Lines 5-13 (emphasis added). Although Claim 11 is limited to using a DNS query, Claim 10 (in which the global network *may* be the Internet) sends the information directly as a data packet. The '758 Patent thus *explicitly* claims what Stealth argues is not taught. Although Claim 10 is a method claim, I find nothing in either the '758 or '863 Patents to suggest that the other types of claims in these patents should not be interpreted in a consistent manner with respect to the term "providing said identifying indicia."

Stealth, in its supplemental *Markman* brief, also cites specifically to Nystrom v. Trex Co., 424 F.3d 1136 (Fed.Cir.2005) as authority for limiting this term to require that the providing be done through a DNS query. However, the issue in *Nystrom* is distinct from the present case. The argument in *Nystrom* was

whether to allow *broadening* the claim term "board" from its ordinary meaning, which both parties agreed was "a piece of sawed lumber," to instead encompass "relatively obscure definitions that are not supported by the written description or prosecution history." Nystrom, 424 F.3d at 1145. "[I]n the absence of something in the written description and/or prosecution history to provide explicit or implicit notice to the public-i.e., those of ordinary skill in the art-that the inventor intended a disputed term to cover *more than* the ordinary and customary meaning revealed by the context of the intrinsic record, it is improper to read the term to encompass a *broader* definition simply because it may be found in a dictionary, treatise, or other extrinsic source." Id. at 1145 (emphasis added) (citing Phillips, 415 F.3d at 1321). Stealth, instead, seeks to *narrow* the definition of the plain English phrase "providing said identifying indicia" here to cover only a specific procedure for providing the indicia. Furthermore, in the Nystrom Patent, the invention was *introduced* in the context of wood flooring materials, and throughout the written description, the term "board" was consistently used to describe wood decking material cut from a log. *Id*. at 1143-44. In the ' 758 Patent's written description, instead, the invention is *introduced* entirely independently from the use of DNS, *see* '758 Patent, Column 2, Lines 16-31, and the use of a DNS query is described later as being only one embodiment or another aspect of the invention.

Therefore, based on the above discussion, I reject Stealth's attempt to limit this term to requiring the use of a DNS query or to requiring at least some form of indirect transmission.

Based on the preceding discussion and in light of the construction of the terms "providing" and "identifying indicia" above, I find that the term "providing said identifying indicia" does not separately require construction, beyond the clarification that "providing said identifying indicia" is not limited to some form of indirect transmission of the data or to requiring that the providing be done through a DNS query.

f. "*Evading detection*"

The term "evading detection" appears expressly, or impliedly by way of dependence, in all asserted claims of the '758 Patent except Claims 72 and 73,FN8 and expressly or impliedly in asserted Claims 18 and 66 of the ' 863 Patent. Absolute suggests that this term does not require construction but, in the alternative, proposes a construction of "avoiding detection, e.g., from an unauthorized user." Document No. 139 at 5. Stealth, instead, proposes to construe this term to mean that the "[a]gent must at least avoid detection from the operating system of the computer." Id. Thus, the parties' proposed constructions primarily differ regarding from who (or what) detection must be avoided: "an unauthorized user" or "the operating system of the computer."

FN8. Several of these claims include "evades detection" or "evade detection" instead of "evading detection." *See, e.g.,* '758 Patent, Column 21, Line 20; id., Column 22, Line 39.

In examining the language in the patent specifications, I find two instances in which the patents make clear that the proper construction for this term must include evading detection from an unauthorized user, and that (merely) evading detection from the operating system of the computer is not sufficient: (1) "The agent is designed to evade detection and resist attempts to disable it by an unauthorized user," '758 Patent, Column 2, Lines 29-31; and (2) "The system remains transparent to an unauthorized user via implementation of well known deflection methods," id., Column 10, Lines 44-45.

Although Absolute's proposed construction includes the necessary aspect of evading detection from an

unauthorized user, I find it otherwise vague in making "from an unauthorized user" only an example of the type of evading detection required. However, I find nothing in the specification or prosecution history of the patents to suggest any further type of evading detection that is required.

Therefore, I find that the correct construction for the term "evading detection" is: "remaining transparent and avoiding detection from an unauthorized user of said electronic device."

g. "*Automatically*"

The term "automatically" appears expressly, or impliedly by way of dependence, in all asserted claims of the '758 Patent except Claims 72 and 73, and impliedly by way of dependence in all asserted claims of the '863 Patent. Absolute suggests a construction for this term of "[w]ithout human intervention." Document No. 139 at 5. Stealth, on the other hand, suggests a construction of "without requiring an external event." Id.

In examining the language of the claims in the '758 and '863 Patents, I find Absolute's construction of "without human intervention" to be incorrect. For example, Claim 31 of the '758 Patent states: "The method of claim 1 wherein said agent provides said identifying indicia *automatically and without user intervention*." '758 Patent, Column 23, Lines 5-7 (emphasis added). Since the language here states that the providing of the identifying indicia is to be done *both* automatically *and* without human intervention, these two phrases generally cannot mean the same as each other. Similar language is used in this regard in Claims 38 and 59 of the '758 Patent. *See* '758 Patent, Column 23, Lines 43-44; id., Column 25, Line 14.

I therefore reject Absolute's construction for the term "automatically" and conclude that Stealth's proposed construction is correct: "without requiring an external event."

h. "*Automatically providing said host system with said identifying indicia through said global network [and] providing said host system with one or more of the global network communication links*"

The parties have requested construction of the term consisting of the combination of the two phrases "automatically providing said host system with said identifying indicia through said global network" and "providing said host system with one or more of the global network communication links." This term appears expressly in asserted Claims 1 and 41 and impliedly by way of dependence in all asserted claims of the '758 Patent except Claims 72 and 73. Absolute proposes that no construction of this term is needed, whereas Stealth proposes that this term requires a "[t]wo-step process where the identifying indicia is automatically and indirectly provided in the first step, and the list of IP routers used to enable the transmission is sent in a second step." Document No. 139 at 5.

Based on the discussion above for the term "providing said identifying indicia," I reject Stealth's attempt here to insert "indirectly" into the provision of the identifying indicia. Further, in light of the discussion above for the phrase "global network communication links" within the term "one or more of the global network communication links used to enable transmission between said electronic device and said host system," I reject Stealth's attempt to substitute "the list of IP routers" for "one or more of the global network communication links." The question thus becomes simply whether the two actions-"automatically providing said host system with said identifying indicia through said global network" and "providing said host system with one or more of the global network communication links"-must be performed in two, separate steps rather than in a single step.

Stealth's argument for a two-step process is based on two points. *See* Document No. 113 at 7-8.

First, Stealth argues that only a two-step process is taught in the specification, asserting that "[i]n the first step, the agent automatically provides its identifying indicia to the host monitoring center using a DNS query," and "[i]n the second step, the global network communication links are collected by the agent and provided to the host monitoring center." Id. at 7. However, this argument is improper, as it requires reading limitations from the preferred embodiment into the claims. Although a court must read claims in light of the specification, the court may not read limitations from the specification into the claims. Comark Commc'ns, Inc. v. Harris Corp., 156 F.3d 1182, 1186-87 (Fed.Cir.1988); *see also* Gemstar-TV Guide Int'l, Inc. v. Int'l Trade Comm'n, 383 F.3d 1352, 1368-69 (Fed.Cir.2004) (refusing to construe descriptions in the preferred embodiment as limitations on claim terms).

Second, Stealth argues that the use of two separate steps is demonstrated by the fact that "the claims describe the first step of providing identifying indicia step [sic] as 'automatic' whereas the second step of providing the global communication links is not so described." Document No. 113 at 8. However, the fact that the provision of the global network communication links is not described in the claims as being "automatic" does not require that it may *not* be automatic. Since the provision of the global network communication links may in fact be automatic, it may be combined into the same step as the automatic provision of the identifying indicia.

I therefore conclude that no separate construction is needed for the combination of the two phrases "automatically providing said host system with said identifying indicia through said global network" and "providing said host system with one or more of the global network communication links," beyond the clarification that a two-step process is not required.

i. "*Contacting a host monitoring system without signaling the visual or audible user interface*"

The term "contacting a host monitoring system without signaling the visual or audible user interface" appears expressly in asserted Claim 4 and impliedly by way of dependence in asserted Claim 5 of the '914 Patent. For clarity, the complete context of the use of this phrase in Claim 4 is reproduced below, with the relevant phrase highlighted:

4. A computer security monitoring system, comprising:

...

agent means embedded in the computer for sending signals to the telecommunication interface including signals for *contacting a host monitoring system without signaling the visual or audible user interface,* and for providing the host monitoring system with identification indicia of the computer, whereby the host monitoring system could identify whether the computer has been reported lost based on the identifying indicia.

'914 Patent, Column 627, Lines 18-19, 22-29. Absolute proposes a construction of "[i]nitiating communication with a host without signaling the visual or audible user interface." Document No. 139 at 6. Stealth, instead, proposes a construction of "the agent suppresses the visual or audible user interface of the computer when in contact with the monitoring center." Id.

The first issue to resolve in the construction of this term is the correct meaning of the word "contacting" as

it is used here. Absolute contends that the word "contacting" encompasses only the *initiation* of the contact with the host monitoring system, stating that this term, "as used in Claim 4 of the ' 914 Patent, should be construed according to its plain, ordinary meaning-initiating communication with a host without signaling the visual or audible user interface." Document No. 109 at 16.

As I find no clear definition of the word "contacting" in the patent, I agree that the word "contacting" should be interpreted according to plain English. Although Absolute offers no support for its contention as to the plain ordinary meaning, the *American Heritage Dictionary of the English Language* defines the verb "contact" to mean "to get in touch with; communicate with." 406 (3d ed.1996). Similarly, *Random House Webster's Unabridged Dictionary* defines the verb "contact" to mean "to communicate with." 437 (2d ed.2001). Both dictionaries thus endorse a meaning of "contacting" to describe the entire communication, not simply the initiation of the communication. Since there is no clear indication that the patentee intended to limit the use of this word to only the initiation of the communication, I find that the word "contacting" as used in the patent is not so limited.

The second issue to resolve in the correct construction of the term "contacting a host monitoring system without signaling the visual or audible user interface" is the correct meaning of the phrase "without signaling the visual or audible user interface" as it is used here. Stealth contends that "without signaling" requires an explicit action to actively suppress any signaling. *See* Document No. 125 at 6. However, I find no support for this contention in the patent and treat "without signaling" according to its plain English meaning. I find that the claim only requires no signaling to take place. Nothing in the claim limits the meaning to require an active suppression. For example, it would be possible for the agent to operate on a computer configured such that the default behavior of the computer (even without the agent) is not to signal the visual or audible user interface during *all* communication. On such a computer, it would take an explicit action to signal the user interface, rather than to suppress such signaling. In this case, the agent need not take any explicit action in order for this communication to take place without signaling the user interface. I therefore find that the phrase "without signaling the visual or audible user interface" need not involve an active suppression of the user interface.

Based on the foregoing, I conclude that the correct construction for the term "contacting a host monitoring system without signaling the visual or audible user interface" is: "getting in touch with or communicating with a host monitoring system without signaling (not necessarily through active suppression) the visual or audible user interface."

j. "*Reported lost*"

The term "reported lost" appears expressly in asserted Claim 4 and impliedly by way of dependence in asserted Claim 5 of the '914 Patent. Absolute proposes that no construction of this term is needed, but if the Court deems otherwise, Absolute proposes a construction of "reported no longer to be found." Document No. 139 at 6. Stealth, on the other hand, proposes that this term means (only) "reported lost" and that, in particular, it does not mean "reported stolen" or "reported lost or stolen." Id.

The correct construction for this term, therefore, requires determining the correct definition of the word "lost." Stealth seeks to define this word narrowly, to entirely exclude "stolen" from the definition; specifically, Stealth argues that " '[r]eported lost' has a completely different connotation than 'reported stolen' because the latter relates to an actual crime in which the police can and typically will be involved in the recovery process." Document No. 113 at 15. However, whether or not the police can or typically will be

involved in the recovery process does not clearly indicate the correct meaning for either "lost" or "stolen."

Stealth also argues that "the inventor always used the 'lost' term accompanied with the 'or stolen,' " contending that this indicates that the inventor intended these two words to mean different things. Id at 16. However, the basis for this argument is incorrect. Although the two words are used together throughout the Background of the Invention and the Summary of the Invention sections of the '914 Patent specification, only the word "stolen" is used in the Abstract and in the Description of Preferred Embodiments section. *See* ' 914 Patent Abstract; id ., Column 8, Line 65; id., Column 9, Line 2. In the claims, only the word "lost" is used. *See* '914 Patent, Column 627, Lines 10, 29; id., Column 628, Line 19.

I find nothing in the '914 Patent to indicate that the inventor intended other than the plain and ordinary English meaning of the word "lost" as used in the term "reported lost." The *American Heritage Dictionary of the English Language* includes a definition of "lost" as "[n]o longer in the possession, care, or control of someone or something." 1063 (3d ed.1996). This definition is consistent with the inclusion of the concept of "stolen" within the meaning of "lost," as an item that has been stolen is "[n]o longer in the possession, care, or control of" the person who formerly possessed the item. This same dictionary also defines the word "lose" to mean "[t]o be unsuccessful in retaining possession of; mislay" and "[t]o come to be deprived of the ownership, care, or control of (something one has had) as by negligence, accident, or *theft*." Id. at 1062 (emphasis added). *Random House Webster's Unabridged Dictionary* similarly defines "lose" to mean "no longer possessed or retained" as well as "no longer to be found." 1137 (2d ed.2001). This dictionary defines "lost" to mean "to come to be without (something in one's possession or care), through accident, *theft,* etc., so that there is little or no prospect of recovery." Id. (emphasis added). In the definitions from both dictionaries, one of the ways in which something may become "lost" (to "lose" something") is through "theft."

I therefore conclude that the correct construction for the term "reported lost" is: "reported no longer in one's possession, care, or control, through negligence, accident, theft, etc."

2. *The* '269 Patent

a. " *Semi-random rate*"

The term "semi-random rate" occurs expressly in asserted Claims 1, 12, and 25 and impliedly by way of dependence in asserted Claims 2-3, 6-8, 13-14, and 16-17 of the '269 Patent. Absolute proposes to construe this term to mean "occurring once at a random time within a predetermined time interval," whereas Stealth proposes a construction of "at intervals that vary somewhat randomly." Document No. 139 at 14. The difference between the two proposed definitions is thus in the degree of randomness required.

Stealth cites to only one place in the '269 Patent specification for support of its proposed construction: "Schedule the transmissions to occur randomly-the monitored apparatus shouldn't phone home every Monday at 8 A.M." '269 Patent, Column 6, Lines 38-40; *see also* Document No. 102 at 5. However, although this cited portion of the specification does indeed discuss randomness, it does not appear to serve as a clear definition of the term "semi-random rate."

Absolute, on the other hand, cites to numerous places in the patent specification, including to the one sentence in the specification, outside of the claims, that uses the exact term in question: "The call initiation is preferentially triggered at a carefully controlled *semi-random rate,* perhaps once a week." FN9 ' 269 Patent, Column 2, Lines 57-59 (emphasis added). The quoted sentence appears to describe the same

situation as that in the passage cited by Stealth but further describes the semi-random rate as being "carefully controlled," e.g., the call is triggered at a random time but occurs once within each week.

FN9. This sentence also occurs in the Abstract of the '269 Patent.

The preferred embodiment of the invention is described in terms of this randomness being controlled by Randomizer 10:

Randomizer 10 performs two different functions. The first is that of a clock to *insure that one call per time period, such as day/week/month, is made to the Central Site*. Second, that call is made *randomly at only one time during that period. The present invention is designed to make one, and only one, call during the selected period to enable processor 40 to detect situations where more than one system is using the same copy of the software*. If more than one system 18 is using software with the same serial number there will be more than one interrogation occurring during that time period.

... The random number is chosen from a range of numbers that corresponds to the total number of clock time units necessary to cause one output per the selected time period, e.g. day/week/month. Thus *the triggering time is uniformly randomly distributed over the selected time interval, say one month*.

Id., Column 4, Lines 29-40, 45-50 (emphasis added). This aspect of controlling the randomizer such as to ensure that only one call per selected time period is made to the central site is critical to the correct operation of the invention to detect situations in which more than one system is using the same copy of the software. This aspect of the invention, for example, is also recited in Claim 35, which states that "said interpretation means of said central site means tracks the unique copy identification information received in each transmission from each of said remote computers to detect if more than one remote computer is using the same copy of said software." Id., Column 14, Lines 3-8; *see also* id., Column 2, Lines 39-41.

Based on the foregoing, I conclude that the correct construction for the term "semi-random rate" is: "occurring once at a random time within a predetermined time interval."

b. "Location"

The term "location" occurs expressly in asserted Claims 1, 20, and 25 and impliedly by way of dependence in asserted Claims 2-3, 6-8, 13-14, and 16-17 of the '269 Patent. Absolute contends that this term should be construed to mean "physical location," whereas Stealth proposes to construe it to "[i]nclude [ ] a source network location (such as originating phone number or source address) from which a street address may be obtained." Document No. 139 at 17.

Absolute bases its contention that "location" means (only) "physical location" on statements made by the Applicant and Examiner during prosecution. Specifically, in an October 6, 1992 Office Action, the Examiner rejected the filed claims that later became Claims 1, 20, and 25 of the '269 Patent, under 35 U.S.C. s. 103 as being obvious over U.S. Patent Nos. 4,703,324 ("Cole") and 4,361,832 ("White"). *See* Document No. 154-3 at 47. In a February 25, 1993 response, the Applicant amended the independent claims to include a "locating means for utilizing source identification information to identify the location of each of said remote sites." Document No. 154-3 at 57; *see also* id. at 58 (using similar language); id. at 59 (same). The Applicant explained this amendment to the Examiner as follows:

As amended, each of the independent claims, calls for in-part, each of the remote site means including a monitoring means for collecting data on at least one performance feature of the electrical apparatus, and the central site means including locating means for utilizing the source identification information from the remote site means to identify the *location* of each of said remote sites.

None of the cited references taken alone or together show or suggest these features. The systems disclosed by Cole and White each specifically *identify the sending unit,* not *the location of the sending unit*. In each of those systems it would be known that a particular unit, say # 42 of White, were out there somewhere, *but there is no suggestion of how the physical location of those units could be remotely determined*. In fact neither of the cited references even allude to the possibility that units would move around and that "movement" would be of interest to any one. Whereas in the invention of the above-identified patent application, the movement of the apparatus is not only is of interest, provision has been made to track it.

Document No. 154-3 at 61 (emphasis in original).

Absolute argues that this amendment "shows that applicant was using location to refer to physical location, and not 'source identification information.' " Document No. 154 at 2. However, I disagree and instead conclude that this explanation served simply to distinguish *any* form of "location" over the "identity" of the remote device (e.g., unit # 42), as disclosed in Cole and White. "Identity" indicates *which* unit but says nothing about *where* that unit is. In this explanation by the Applicant, I find no clear disavowal of a broader definition of location that includes not only "physical location" but also other forms of "location" including "source network location (such as originating phone number or source address) from which a street address may be obtained."

Indeed, as noted by Absolute, the Examiner maintained the rejection, stating in a May 13, 1993 Office Action, also citing U.S. Patent No. 4,718,005 ("Feigenbaum"), as follows:

In an analogous art, Feigenbaum et al shows that addresses can be used to determine location of calling devices (see claim 1). Furthermore *it is common to use ANI devices to determine the location of calling devices*. Therefore, it would have been obvious, to one having ordinary skill in the art, at the time of the invention, to use the identification information to determine the location of the calling devices because Feigenbaum et al teaches the use of this feature, and ANI devices are commonly used to provide this feature for security effects.

Document No. 154-3 at 67 (emphasis added). This statement on May 13, 1993 by the Examiner, coming *after* the February 25, 1993 response by the Applicant noted above, shows the Examiner's use of the word "location" to mean the source telephone number, the result of the telephone company's Automatic Number Identification (ANI) service. This statement by the Examiner clearly demonstrates that the Examiner (still) understood the meaning of the word "location" to include the source telephone number. Furthermore, this statement demonstrates that the February 25, 1993 response by the Applicant explaining the amendment did not form a clear disavowal of scope in the meaning of "location" to exclude the source telephone number, as it clearly was not treated as such by the Examiner.

The word "location" (or its plural) occurs only in the claims of the ' 269 Patent, not in the written description. Claims 1 and 8 are representative of this usage:

1. A performance monitoring system, a portion of which is for inclusion in an electrical apparatus, to monitor performance features of that electrical apparatus during operation surreptitiously of a user of said electrical apparatus, said system comprising:

...

central site means for receiving information from at least one remote site means, said central site including:

...

detection means for comparing the decoded collected data from each remote site means with the expected corresponding data for electrical apparatus of the type in which said remote site means is installed *to identify the location of* each of said remote sites means.

...

8. A performance monitoring system as in claim 1 wherein said transmission means of said remote site means transmits said message packet to said central site means *amid other messages that are being transmitted to other locations*.

'269 Patent, Column 8, Lines 1-5, 21-23, 29-34; id., Column 9, Lines 6-10 (emphasis added). Nothing in Claim 1 clearly indicates any limitation on the type of "location" intended, whether physical location, network location, or otherwise. The word "locations" in Claim 8, however, must have a meaning of the word "location" that can be used as a destination to which to transmit "said message packet" and "other messages that are being transmitted" at the same time. Upon further examining the language in the '269 Patent, it is clear that "telephone numbers" can be used as such a destination to which to transmit. For example, Claim 4 refers to "a list of at least two telephone numbers at said central site means to which to transmit said status information." '269 Patent, Column 8, Lines 47-51. It is clear then that the meaning of the word "location," as used in the '269 Patent, includes "telephone numbers" and is not limited to meaning only "physical location."

Based on the foregoing, I conclude that the correct construction for the term "location" is: "physical location, or network location (such as a source telephone number or source network address) from which a physical location can be obtained."

c. "*Unique usage agreement information*"

The term "unique usage agreement information" occurs expressly in asserted Claims 11 and 29 and impliedly by way of dependence in asserted Claims 30-33, 35, and 38 of the '269 Patent. Absolute proposes a construction of "a serial number that uniquely identifies each original copy of the software." Document No. 139 at 17. Stealth, instead, proposes a construction of "unique information related to the software license agreement associated with that copy of the software." Id.

This term is used in Claims 11 and 29 to describe information that is embedded in the software at the remote computer and is reported to the central site for use, together with the monitored usage information also reported by the remote computer, in determining if the usage agreement for this remote computer has been violated. In particular, for clarity, Claim 11 is reproduced below:

11. A method for monitoring software usage of owner-leased proprietary software residing in at least one remote computer surreptitiously of a user of said remote computer to detect violations of software usage agreements surreptitiously of a user of said remote computer at a central site means, said method comprising the steps of:

a. *imbedding unique usage agreement information* that is transparent to the user *in each original copy of said owner-leased proprietary software;*

b. each of said at least one remote computers monitoring the use of said software of step a. surreptitiously of a user of said remote computer;

c. each of said at least one remote computers automatically, at various times, *reporting said terms of said usage agreement imbedded in said software and the use of said software by said remote computer monitored in step b.* to said central site means surreptitiously of a user of said remote computer;

d. said central site means receiving the report of step c. from at least one remote computer;

e. *said central site means interpreting the received reports of step d. from each of said at least one remote computers to determine when each usage agreement is violated;* and

f. said central site means transmitting software operation modification information to each of said at least one remote computers at which an agreement violation was detected in step e. surreptitiously of a user of said remote computer to modify said owner-leased proprietary software residing in the appropriate remote computers.

'269 Patent, Column 9, Lines 27-58 (emphasis added). Claim 29, a system claim rather than a method claim, is substantially identical in its use of this term. *See* id., Column 12, Lines 5-35.

Step c of Claim 11 refers to the "unique usage agreement information" also as "*said terms* of said usage agreement imbedded in said software," id., Column 9, Lines 41-42 (emphasis added). The plain English of the phrase "said terms" clearly refers back to the "unique usage agreement information," suggesting the form of the "information" required. In particular, I conclude from this that Absolute's proposed construction, requiring only "a serial number that uniquely identifies each original copy of the software," is incorrect, as a "serial number" is not the actual "terms of said usage agreement."

Stealth's proposed construction of "unique information related to the software license agreement associated with that copy of the software," however, is too vague, as it does not clearly indicate what type of information is included and how it must be "related to" the license agreement.

I therefore conclude that the correct construction for the term "unique usage agreement information" is: "information describing the unique usage agreement for this copy of the software, including a statement of the terms of that usage agreement."

d. "*Terms of said usage agreement imbedded in said software*"

The term "terms of said usage agreement imbedded in said software" occurs expressly in asserted Claims 11

and 29 and impliedly by way of dependence in asserted Claims 30-33, 35, and 38 of the '269 Patent. FN10 Absolute contends that this term should be construed as "the conditions limiting what is granted by a license agreement, such as the duration or expiration date, number of authorized installations/seats, number of authorized users, or restrictions relating to backup copies." Document No. 139 at 17. In contrast, Stealth proposes a construction of "the imbedded or included Unique Usage Agreement Information." Id.

FN10. Claim 29 uses the similar term "terms of said usage agreement," *see* '269 Patent, Column 12, Lines 21-22, which, in context, I take to be synonymous.

Stealth's proposed construction is little more than a restatement of the term itself, ignoring the words "terms of." I therefore reject Stealth's proposed construction and conclude that the correct construction for the term "terms of said usage agreement imbedded in said software" is: "parameters detailing what is granted by the license agreement for the software, such as the duration or expiration date, number of authorized installations/seats, number of authorized users, or restrictions relating to backup copies of the software."

e. "*Surreptitiously of a user*"

The term "surreptitiously of a user" occurs expressly, or impliedly by way of dependence, in all asserted claims of the '269 Patent. Absolute proposes to construe this term to mean "stealthily and without the knowledge of the user of a monitored apparatus at the remote site," whereas Stealth proposes a definition of "[d]esigned to operate in a stealthy manner relative to a user." Document No. 139 at 18. The parties' proposed constructions thus appear to differ primarily in the addition of the qualifier "designed to" in Stealth's proposed construction.

The term "surreptitiously of a user" was first introduced during prosecution by an amendment dated September 22, 1994, in which the Applicant remarked as follows:

Each of the claims that previously included the terms "independently and surreptitiously" have been amended to remove the term "independently" and further to specify that the claimed action performed by in [sic] the remote site means is *performed surreptitiously of the user of the apparatus at the remote site*.

Document No. 154-2 at 45 (emphasis added).

However, no specific definition of the word "surreptitiously" is clearly provided in the '269 Patent, and neither party has suggested any specialized meaning of this word. The *American Heritage Dictionary of the English Language* defines the word "surreptitious" to mean "obtained, done, or made by clandestine or stealthy means" and "acting with or marked by stealth." 1808 (3d ed.1996). The same dictionary defines "stealthy" to mean "marked by or acting with quiet, caution, and secrecy *intended* to avoid notice." Id. at 1759 (emphasis added). Thus, to do something "surreptitiously of a user" does not require that it be done "without the knowledge of the user," as apparently suggested by Absolute. It need only be done in a way that is "*intended* to avoid notice" of the user.

Based on the foregoing, I conclude that the correct construction of the term "surreptitiously of a user" is: "operating in a stealthy manner, intended to avoid notice of the user of the apparatus at the remote site."

f. "*Transparent to the user*"

"Transparent to the user of said software"

The term "transparent to the user" occurs in asserted Claim 11 of the '269 Patent, and the term "transparent to the user of said software" occurs expressly in asserted Claim 29 and impliedly by way of dependence in asserted Claims 31-33, 35, and 38 of the '269 Patent. For each party, the same proposed construction is offered for both of these terms, and neither party treats these two terms separately in their arguments. Absolute contends that these terms should both be defined to mean "hidden from or unseen by the user of the software that's usage is being monitored." Document No. 139 at 19. Stealth, instead, proposes a construction of "without creating a nuisance to the licensed user (i.e. without requiring user intervention)." Id.

Stealth's contention that "transparent" requires "without creating a nuisance" is derived from one specific passage in the specification:

The software sales path is presently a one-way process in which knowledge (software) moves from the developer to the end-user. What is needed is a user transparent device which can serve as a conduit for information in the other direction; i.e. from the end-user's system back to the developer/manufacturer, *without creating a nuisance to the user*.

'269 Patent, Column 2, Lines 23-29 (emphasis added). However, this portion of the specification does not clearly provide a specific definition of "transparent." At most, it simply states that a "user transparent device" will not "creat[e] a nuisance to the user."

As no specific definition of the word "transparent" is clearly provided in the '269 Patent, I conclude that this word should be interpreted according to its plain and ordinary English meaning. *Random House Webster's Unabridged Dictionary,* provides the following definition of "transparent" as it relates to a process or software in the area of computers: "operating in such a way as to not be perceived by users." 2012 (2d ed.2001). Similarly, *The Authoritative Dictionary of IEEE Standards Terms* defines "transparent" as "[t]o perform in a manner that is invisible to, and of no concern to a user." 1210 (7th ed.2000).

I therefore conclude that the correct construction for the terms "transparent to the user" and "transparent to the user of said software" is: "operating in such a way as to be invisible to, or to not be perceived by, the user of the software."

g. "*Performance data*"

The term "performance data" occurs in asserted Claims 20 and 25 of the '269 Patent. Absolute contends that this term should be construed to mean "parameters relating to the operational details of a monitored device." Document No. 139 at 19. Stealth, on the other hand, proposes a construction of "any data of interest to the system that the agent can collect from the monitored device that is useful to monitoring its operation, including information relating to the location and identity of the monitored device or any software that it is running." Id.

Some aspects of the performance monitoring features of the invention are described in the '269 Patent specification as follows:

Performance Monitoring: For example, fax and voice service systems are relatively complex, and it is difficult for the customer to properly *monitor all of the functions of the system*. It would be helpful to be

able to *detect configuration errors* (wrong phone number programmed into the system) as well as monitoring the performance of units once they are installed so that the supplier can recommend *configuration changes* to the customer. This information could also be used for sales purposes, e.g. to determine those customers who are ready for system *capacity* upgrades.

Fault detection and isolation: System design efforts seek to create "set it and forget it" systems. Ideally, once installed in a phone closet, the customer need never worry about the actual *working* of the system. This poses a problem: if one non-critical component fails the customer will probably not notice it. For example, if a fax board in a fax server stops *working,* the unit will probably continue to function normally, although at a reduced capacity. *Problems of this nature generally go undetected for several months until the customer becomes increasingly annoyed at the declining performance of the system.*

'269 Patent, Column 1, Lines 32-54 (emphasis added). The performance monitoring features are further described as follows:

Monitoring means 14 then generates an interrogation signal 16 that is applied to apparatus 18. In response, apparatus 18 generates a status signal 20 back to monitoring means 14, with signal 20 including information that apparatus 18 was preprogrammed to provide. *That information would include, for example, the serial number of apparatus 18 or the software that it is running, how many out-going calls per hour are made on each of the available channels, from what telephone number the call was made, and any other information that would be useful in detecting operational problems with apparatus 18 or maintaining the quality of performance of apparatus 18 to the user.*

Id., Column 3, Lines 49-61 (emphasis added).

Other aspects of the performance monitoring are described as concerned with the usage of the device. *See, e.g.,* id., Column 1, Lines 61-62 (describing the "need for hard numbers to quantify exactly how much traffic the systems in the field are experiencing"); *see also* id., Column 5, Line 68-Column 6, Line 3 (describing the intent of the invention to "monitor performance parameters such as disk space usage, total number of incoming and outgoing calls, and the number of calls per modem/FAX/DTMF board").

Further aspects of the performance monitoring are described as being concerned with the software on the device. *See, e.g.,* id., Column 1, Line 67-Column 2, Line 22 (describing the need for detection of "illegal copying" of the *software*); id., Column 4, Lines 19-22 (describing the detection of "nonstandard performance, such as performance that is not in accordance with the manufacture's [sic] specifications or with the *license agreement*" (emphasis added)).

Based on the foregoing, I conclude that the correct construction for the term "performance data" is: "data related to the operation, working, configuration, or usage of the electrical apparatus, any functions of the electrical apparatus, or the software on the electrical apparatus, including the serial number of the apparatus or the software that it is running."

h. "*Performance feature*"

The term "performance feature" occurs expressly in asserted Claims 1 and 12 and impliedly by way of dependence in asserted Claims 2-3, 6-8, 13-14, and 16-17 of the '269 Patent. Absolute and Stealth originally each proposed this term to have the same construction as the term "performance data," above: Absolute

proposed "parameters relating to the operational details of a monitored device," whereas Stealth proposed "any data of interest to the system that the agent can collect from the monitored device that is useful to monitoring its operation, including information relating to the location and identity of the monitored device or any software that it is running." Document No. 139 at 19.

At the *Markman* hearing, however, both parties agreed that the construction of the terms "performance data" and "performance feature" differ in the sense that the former is the data itself, whereas the latter is a feature of the electrical apparatus about which such data can be collected by the electrical apparatus. *See* Document No. 160 at 86:24-88:9.

I therefore conclude that the correct construction for the term "performance feature" is: "a feature of the electrical apparatus, any functions of the electrical apparatus, or the software on the electrical apparatus, about which data related to the feature's operation, working, configuration, or usage, including the serial number of apparatus or the software that it is running, may be collected by the electrical apparatus."

i. "*Monitor means programmed for collecting data on at least one performance feature of said electrical apparatus of interest to the system surreptitiously of a user of said electrical apparatus*"

The term "monitor means programmed for collecting data on at least one performance feature of said electrical apparatus of interest to the system surreptitiously of a user of said electrical apparatus" ("monitor means") occurs expressly in asserted Claims 1 and 12 and impliedly by way of dependence in asserted Claims 2-3, 6-8, 13-14, and 16-17 of the '269 Patent. The parties agree that this term is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6, and that the recited function is: "collecting data on at least one performance feature of the electrical apparatus surreptitiously of a user of the electrical apparatus." Document No. 139 at 8.

The parties disagree, however, on the disclosed structures corresponding to the claimed function. Absolute contends that the corresponding structure is a "microprocessor with four leads and an interface to a randomizer or its equivalent." Id. Stealth, in its supplemental *Markman* brief, proposed that the corresponding structure is "programming running on a separate microprocessor based subsystem or the internal processor of the monitored device ... that collects [performance] data from the monitored device by generating an interrogation signal to the monitored device or by reading a monitored register, or its equivalent." Document No. 156 at 5-6.

In Absolute's proposed construction of this term, the corresponding structure is entirely hardware. Absolute asserts that "software is not clearly linked to any of the particular recited functions for any of the means-plus-function (MPF) elements in dispute, and software therefore cannot constitute 'corresponding structure' for any of the MPF elements under controlling Federal Circuit case[s] ...." Document No. 155 at 1. Absolute identifies the following statement as what it contends is one of only two statements that the '269 Patent makes regarding "software":

As seen from the above-discussion, the present invention can be implemented by means of a separate microprocessor based subsystem or implemented by means of software that operates on the internal processor of the apparatus 18 to be monitored.

Document No. 155 at 2 (quoting '269 Patent, Column 5, Lines 63-67). Absolute maintains that this statement does not sufficiently recite any structure and that "the generic reference to 'hardware' or 'software' is not a

sufficient recitation to constitute 'structure' under controlling Federal Circuit authority." Document No. 155 at 2.

In support of its contention, Absolute cites *Altiris Inc. v. Symantec Corp.,* which stated that "merely pointing out that the relevant structure is software rather than hardware is insufficient." 318 F.3d 1363, 1376 (Fed.Cir.2003). However, the issue in *Altiris* was whether sufficient structure had been disclosed *within the patent claim itself* to avoid interpretation of the claim element as a means-plus-function element, not whether sufficient corresponding structure had been disclosed *within the patent specification* for construction of this element as a means-plus-function element: The presumption "that the inventor used the term ['means'] advisedly to invoke the statutory mandates for means-plus-function clauses ... can be rebutted where the *claim,* in addition to the functional language, recites structure sufficient to perform the claimed function in its entirety." Id. at 1375 (emphasis added) (internal quotations omitted).

The patent claim at issue in *Altiris* recited that the "means of booting" included "a first set of commands" and "a second set of commands," and although the court indeed found that "commands" are a form of software, this did not recite sufficient structure to perform the entirety of the function: "[B]ecause 'commands' (*i.e.,* software) is so broad as to give little indication of the particular structure used here and is described only functionally, one must still look to the specification for an adequate understanding of the structure of that software." Id. at 1376 (emphasis added). The *Altiris* court thus concluded that this element was a means-plus-function element, and upon "look[ing] to the specification for an adequate understanding of the structure of that software," the court indeed found sufficient structure. Id. at 1376-77. I therefore conclude that Absolute's reliance here on *Altiris* is misplaced.

Absolute also contends that the quoted statement above from the '269 Patent "does not make 'software that operates on the internal processor' corresponding structure for any MPF element because it is not discussed in connection with *any particular* recited function." Document No. 155 at 3 (emphasis added). Absolute cites Medical Instrumentation & Diagnostics Corp. v. Elekta AB, 344 F.3d 1205, 1210 (Fed.Cir.2003) in support of this position, but the issue in *Medical Instrumentation* is distinct. In that case, the issue concerned a claim limitation of a "means for converting said plurality of images into a selected format." Med. Instrumentation, 344 F.3d at 1209-10. Although various passages in the specification linked software to a number of functions, the Federal Circuit found that none of these references clearly linked software to the function of converting images into a selected format. *See* id. at 1212-19.

In contrast, in the '269 Patent specification, software has clearly been linked to *all* functions of the invention within the apparatus to be monitored: The invention is described as being able to be "implemented by means of a separate microprocessor based subsystem *or* implemented by means of software that operates on the internal processor of the apparatus 18 to be monitored." ' 269 Patent, Column 5, Lines 63-67 (emphasis added). The specification thus clearly links the entirety of the invention at the remote site, including each of the functions performed by the invention at the remote site, to a software-only implementation.

In *Medical Instrumentation,* there was no blanket statement linking software to all of the functions, but in the '269 Patent, at the remote site, there is. In "assess[ing] the adequacy of disclosure of structure corresponding to a means-plus-function limitation," "interpretation of what is disclosed must be made in light of the knowledge of one skilled in the art." Atmel Corp. v. Info. Storage Devices, Inc., 198 F.3d 1374, 1380 (Fed.Cir.1999). Whereas Absolute maintains that "software has not been 'clearly linked' with any of the *particular* recited functions of the [means-plus-function] elements" in dispute, Document No. 155 at 2 (emphasis added), I believe it is clear that one of skill in the art would understand that software is clearly

linked to *all* functions of the invention at the remote site, without exception.

Although already clear, this linkage to software is further reinforced by the many uses of the words "programmed," "preprogrammed," etc., within the '269 Patent. Absolute lists these individually in its supplemental *Markman* brief but contends that these statements do not link any of the functions of the disputed means-plus-function elements to software, arguing that "[n]one of these references clearly indicates *software* versus *preprogrammed hardware*." Document No. 155 at 3-4 (emphasis added). However, based on the common usage of the word "program" at the time of the invention,FN11 I conclude that one of ordinary skill in the art would understand "program" to mean a software implementation.

FN11. For example, *Newton's Telecom Dictionary* defines "program" as "[i]nstructions given to a computer ... to perform certain tasks. Most vendors improve (update) their *software* programs continuously." 571 (14th ed.1998) (emphasis added). *Microsoft Press Computer Dictionary* defines "program" as "[a] sequence of instructions that can be executed by a computer. The term can refer to the original source code or to the executable (machine language) version. *Also called software*." 384 (3d ed.1997) (emphasis in original). *Webster's New World Computer Dictionary* defines "program" as "[a] list of instructions, written in a programming language, that a computer can execute so that the machine acts in a predetermined way. *Synonymous with software*." 298 (9th ed.2001) (emphasis added).

Furthermore, "[i]n a means-plus-function claim in which the disclosed structure is a computer, or microprocessor, programmed to carry out an algorithm, the disclosed structure is not the general purpose computer, but rather the special purpose computer programmed to perform the disclosed algorithm." WMS Gaming, Inc. v. Int'l Game Tech., 184 F.3d 1339, 1349 (Fed.Cir.1999):

A general purpose computer, or microprocessor, programmed to carry out an algorithm creates 'a new machine, because a general purpose computer in effect becomes a *special purpose computer* once it is programmed to perform particular functions pursuant to instructions from program software.' The instructions of the software program that carry out the algorithm electrically change the general purpose computer by creating electrical paths within the device. *These electrical paths create a special purpose machine for carrying out the particular algorithm*.

Id. at 1348 (emphasis added) (quoting In re Alappat, 33 F.3d 1526, 1545 (Fed.Cir.1994) (en banc)) (internal citations and parenthetical omitted). This type of "special purpose machine" is apparently a form of exactly what Absolute has referred to above as "preprogrammed hardware."

I therefore conclude that Absolute's rejection of the uses of the words "programmed," "preprogrammed," etc., used within the '269 Patent to indicate software is incorrect.

In contrast to Absolute's proposed corresponding structure consisting only of hardware, Stealth's proposed corresponding structure consists only of software running on a computer ("programming running on a separate microprocessor based subsystem on the internal processor of the monitored device that collects data from the monitored device by generating an interrogation signal to the monitored device or by reading a monitored register, or its equivalent."). Document No. 156 at 5-6. However, as discussed above, all functions of the invention at the remote site may be implemented entirely in hardware *or* in software running on the internal processor at the remote site. Stealth has also acknowledged this conclusion. *See* id. at 4.

In finding corresponding structure for a means-plus-function element that may be implemented in software running on a computer, "[t]he structure of a microprocessor programmed to carry out an algorithm is limited by the disclosed algorithm." WMS Gaming, Inc., 184 F.3d at 1348. It is therefore necessary to identify the particular algorithm that is disclosed in the '269 Patent specification for this means-plus-function element. An algorithm need not be disclosed as computer source code or as a mathematical formula. *See* Finisar Corp. v. The DirecTV Group, Inc., 416 F.Supp.2d 512, 518 (E.D.Tex.2006). Rather, "the steps, formula, or procedures to be performed by the computer [or microprocessor] might be expressed textually, or shown in a flow chart," so long as such disclosure would enable one of ordinary skill in the art to determine the limitations on what is claimed. *Id.; see also* Budde v. Harley-Davidson, Inc., 250 F.3d 1369, 1381-82 (Fed.Cir.2001).

Based on a careful reading of the '269 Patent specification, I find the following details of the algorithm disclosed:

Monitoring means 14 then generates an interrogation signal 16 that is applied to apparatus 18. In response, apparatus 18 generates a status signal 20 back to monitoring means 14, with signal 20 including information that apparatus 18 was preprogrammed to provide.

'269 Patent, Column 3, Lines 49-54. Adding further to the disclosed algorithm, the specification also states:

Signal 72 (signal 12 in FIG. 1) initiates the readout of all the monitored registers 74 ....

Id., Column 4, Lines 53-54.

I therefore conclude that the term "monitor means programmed for collecting data on at least one performance feature of said electrical apparatus of interest to the system surreptitiously of a user of said electrical apparatus" is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6.

The recited function is: "collecting data on at least one performance feature of the electrical apparatus surreptitiously of a user of the electrical apparatus."

The corresponding structure is: "(1) a microprocessor with four leads and an interface to a randomizer; (2) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, in which the software collects the performance data by generating an interrogation signal that is applied to the electrical apparatus and, in response, reading from the apparatus the status signal including information that the apparatus was preprogrammed to provide, or in which the software collects the performance data by reading from the monitored registers of the apparatus; or (3) the equivalent."

j. "***Monitoring means for monitoring the use of said software surreptitiously of a user of said electrical apparatus***"

The term "monitoring means for monitoring the use of said software surreptitiously of a user of said electrical apparatus" ("monitoring means") occurs expressly in asserted Claim 29 and impliedly by way of dependence in asserted Claims 30-33, 35, and 38 of the '269 Patent. The parties agree that this term is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6, and that the recited function is: "monitoring the use of said software surreptitiously of a user of said electrical apparatus ." Document No.

139 at 10.

Absolute contends that the corresponding structure is a "microprocessor with four leads and an interface to a randomizer or its equivalent." Id. Stealth, in its supplemental *Markman* brief, proposed that the corresponding structure is "programming running on a separate microprocessor based subsystem or the internal processor of the monitored device ... that collects data [regarding the usage of software on the monitoring device] from the monitored device by generating an interrogation signal to the monitored device or by reading a monitored register, or its equivalent." Document No. 156 at 5-6.

For all of the reasons discussed above for the term "monitor means," I reject Absolute's attempt to limit the corresponding structure for this term to include only a hardware implementation. In addition to a hardware implementation, the '269 Patent specification also clearly links this function of the invention, and indeed all functions at the remote site, without exception, to a software implementation.

Furthermore, the arguments of the two parties regarding this term are the same as for the term "monitor means" above, and based on the reasoning for that term, I draw the same conclusions with respect to the corresponding structure. I furthermore find the detailed algorithm performed by a software implementation of this term to be the same as that for the "monitor means" above, with the exception that the data collected is regarding the use of the software on the electrical apparatus.

I therefore conclude that the term "monitoring means for monitoring the use of said software surreptitiously of a user of said electrical apparatus" is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6.

The recited function is: "monitoring the use of said software surreptitiously of a user of said electrical apparatus."

The corresponding structure is: "(1) a microprocessor with four leads and an interface to a randomizer; (2) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, in which the software collects data on the use of said software by generating an interrogation signal that is applied to the electrical apparatus and, in response, reading from the apparatus the status signal including information that the apparatus was preprogrammed to provide, or in which the software collects data on the use of said software by reading from the monitored registers of the apparatus; or (3) the equivalent."

k. "*Formatting means for creating a message bearing packet containing data collected by said monitoring means*"

The term "formatting means for creating a message bearing packet containing data collected by said monitoring means" ("formatting means") occurs expressly in asserted Claims 1 and 12 and impliedly by way of dependence in asserted Claims 2-3, 6-8, 13-14, and 16-17 of the '269 Patent. The parties agree that this term is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6, and that the recited function is "creating a message bearing packet containing data collected by the monitor means." Document No. 139 at 12.

Absolute contends that the corresponding structure is a "transceiver, dialer, and HDLC encoder/decoder, in cooperation with a microprocessor, or their equivalent." Document No. 139 at 12. However, for all of the

reasons discussed above for the term "monitor means," I reject Absolute's attempt to limit the corresponding structure for this term to include only a hardware implementation. In addition to a hardware implementation, the '269 Patent specification also clearly links this function of the invention, and indeed all functions at the remote site, without exception, to a software implementation.

Stealth contends that the corresponding structure for the "formatting means" is "programming running on a separate microprocessor based subsystem or the internal processor of the device to be monitored that organizes the collected data into a packet for transmission using HDLC or any standard or quasi-standard formatting, or its equivalent." Document No. 156 at 6.

Based on a careful reading of the specification, I find the following details of the algorithm for the "formatting means" disclosed:

[L]ogical unit 24[ ] organizes the information of signal 22 into a packet for transmission to the Central Site by modem, fax, DTMF generator, or other transmission means. Each packet contains all relevant data (information that the apparatus was preprogrammed to provide) within a single logical envelope including the telephone number to be called and the serial number of the apparatus being monitored....

The packetization of the data in block 24 can be performed by several techniques that are well known in the art. For example, with FAX modems the HDLC frame structure as defined in CCITT T.30 is generally preferred.FN12 There are similar standards or quasi-standards for modems and DTMF equipped systems.

FN12. *Microsoft Press Computer Dictionary* defines "HDLC" as an "[a]cronym for High-level Data Link Control. A protocol for information transfer adopted by the ISO.... Messages are transmitted in units called frames, which can contain differing amounts of data but which must be organized in a particular way." 228 (3d ed.1997).

'269 Patent, Column 3, Line 62-Column 4, Line 12. Thus, encoding in any "standard[ ] or quasi-standard[ ]" format must be included in the algorithm for the corresponding structure, in addition to HDLC format. The *Microsoft Press Computer Dictionary* provides two definitions for "standard," as follows:

1. *A de jure technical guideline* advocated by a recognized noncommercial or government organization that is used to establish uniformity in an area of hardware or software development.... 2. *A de facto technical guideline* for hardware or software development that occurs when a product or philosophy is developed by a single company and, through success and imitation, becomes so widely used that deviation from the norm causes compatibility problems or limits marketability.

447 (3d ed.1997) (emphasis added). Other dictionaries provide similar definitions. For example, *Random House Webster's Unabridged Dictionary* defines "standard" as "something considered by an authority or by general consent as a basis of comparison." 1857 (2d ed.2001). *Webster's New World Computer Dictionary* defines "standard" as "[i]n computing, a set of rules or specifications that, taken together, define the architecture of a hardware device, program, or operating system. Standards are *often* maintained by an independent standard body, such as the American National Standards Association (ANSI)." 348 (9th ed.2001) (emphasis added).

From this, I conclude that the two definitions from the *Microsoft Press Computer Dictionary* represent the

accepted meaning of the two terms, respectively, "standard[ ] or quasi-standard[ ]," as used in the '269 Patent specification, to one of ordinary skill in the art.

Based on the foregoing, conclude that the term "formatting means for creating a message bearing packet containing data collected by said monitoring means" is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6.

The recited function is: "creating a message bearing packet containing data collected by said monitoring means."

The corresponding structure is: "(1) a transceiver, dialer, and HDLC encoder/decoder; (2) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, in which the software organizes the data within a single logical envelope including the telephone number to be called and the serial number of the apparatus being monitored, packetizing the data using HDLC or any other standard or quasi-standard formatting; or (3) the equivalent."

l. "*Transmission means for initiating, at a semi-random rate, the transmission of the message packet from the formatting means to the central site means of the system surreptitiously of a user of said electrical apparatus*"

The term "transmission means for initiating, at a semi-random rate, the transmission of the message packet from the formatting means to the central site means of the system surreptitiously of a user of said electrical apparatus" ("transmission means") occurs expressly in asserted Claims 1 and 12 and impliedly by way of dependence in asserted Claims 2-3, 6-8, 13-14, and 16-17 of the '269 Patent. The parties agree that this term is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6, and that the recited function is "initiating, at a semi-random rate, the transmission of the message." Document No. 139 at 13.

Absolute initially contended that the corresponding structure for this function is "a randomizer implemented in or controlled by a microprocessor and a modem, fax, or DTMF encoder, or their equivalent." Document No. 139 at 13. Recognizing, however, that the function is "initiating" the transmission "at a semi-random rate," and not actually performing the transmission itself, Absolute, at the *Markman* hearing, modified its proposed corresponding structure to include only the randomizer. Document No. 159 at 235:8-236:5.

Stealth, on the other hand, contends that "this limitation [of the transmission being initiated at a semi-random rate] should not be construed under the 'means-plus-function' rubric. The Baran Patent is clear that the transmission means is not the portion of the system that is creating the semi-random timing of the transmission means but rather is executing the initiating of the transmission based upon a semi-random timing signal that is provided by the system by means other than the transmission means." Document No. 156 at 7. However, Stealth provides no support for this contention, and I find that it is clearly contrary to the plain language of the recited function. The function is the initiation at a semi-random rate, not merely the initiation alone. In addition, the specification distinguishes the invention over prior art by pointing out that prior systems did not include this "random periodicity of the calling-out function to prevent its anticipation by the local system user .... " '269 Patent, Column 2, Lines 36-38. The language of "at a semi-random rate" in the recited function of the "transmission means" is the only place where this distinction is included in the claims.

Based on a careful reading of the specification, I find that Figure 2, in blocks 60 through 78, shows a flow

chart that includes this function. Figure 2 is described as "a flow chart that is provided to illustrate the operation of the randomizer block 10 in cooperation with selected functions of the other blocks of FIG. 1." Id., Column 4, Lines 26-28. The randomizer corresponds to blocks 62 through 72, with 72 being the output from the randomizer. Block 74 corresponds to the monitor means, and the call to the central site is actually initiated at block 78. The randomizer is shown triggering the monitor means at a semi-random rate, and once the monitor means completes collecting the performance data, the call to the central site is initiated. This sequence of events, also shown generally in Figure 1, blocks 10, 14, 18, 24, and 28, and the connectors between these blocks 12, 16, 20, 22, and 26, results in the call being initiated at the semi-random rate produced by the randomizer.

The specification describes the randomizer as follows: "The system of the present invention includes a randomizer 10 *which determines when the status of the apparatus 18 is to be reported to the Central Site* by generating a wake-up signal 12 to activate the monitoring means 14." Id., Column 3, Lines 45-49 (emphasis added). In addition to the flow chart of the operation of the randomizer shown in Figure 2, "[e]ach of FIGS. 5-7 illustrate optional modifications to the randomizer flow chart of FIG. 2 to implement several of the other potentially useful features discussed above. These can be added individually, or in any combination to include as many or as few of the features in a particular installation." Id., Column 6, Lines 63-68.

I therefore conclude that the term "transmission means for initiating, at a semi-random rate, the transmission of the message packet from the formatting means to the central site means of the system surreptitiously of a user of said electrical apparatus" is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6.

The recited function is: "initiating, at a semi-random rate, the transmission of the message packet from the formatting means to the central site means of the system surreptitiously of a user of said electrical apparatus."

The corresponding structure is: "(1) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, executing the algorithm depicted in the flow chart of Figure 2, blocks 62 through 78 (excluding block 74), possibly also including any or all of the modifications depicted in Figures 5 through 7; or (2) the equivalent ."

m. "*Transmitting means for automatically, at various times, reporting said terms of said usage agreement and the use of said software by said remote computer detected by said monitoring means to said central site means surreptitiously of a user of said remote computer*"

The term "transmitting means for automatically, at various times, reporting said terms of said usage agreement and the use of said software by said remote computer detected by said monitoring means to said central site means surreptitiously of a user of said remote computer" ("transmitting means") occurs expressly in asserted Claim 29 and impliedly by way of dependence in asserted Claims 30-33, 35, and 38 of the '269 Patent. The parties agree that this term is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6, and that the recited function is "automatically, at various times, reporting said terms of said usage agreement and the use of said software by said remote computer detected by said monitoring means to said central site means surreptitiously of a user of said remote computer." Document No. 139 at 14. Unlike the "transmission means" discussed above, the function of the "transmitting means" plainly includes the actual transmission of the data, not just the initiation of the transmission.

Absolute contends that the corresponding structure for this function is "a randomizer implemented in or controlled by a microprocessor and a modem, fax, or DTMF encoder, or their equivalent." Document No. 139 at 14. Although Absolute apparently includes a software implementation of the randomizer in its proposed construction for this term, Absolute again attempts to limit the remainder of its construction here to a hardware-only implementation. For all of the reasons discussed above for the term "monitor means," I reject this hardware-only limitation. In addition to a hardware implementation, the '269 Patent specification also clearly links this function of the invention, and indeed all functions at the remote site, without exception, to a software implementation.

Stealth contends that the corresponding structure for the "transmitting means" is "the programming to report, at various times, the usage agreement information and the software use information to the central site through a communication device." Id.

Whereas the recited function of the "transmission means" discussed above requires a timing of "at a semi-random rate," the recited function of the "transmitting means" here instead requires only a timing of "at various times." *Compare* '269 Patent, Column 8, Lines 16-17, *with* id., Column 12, Lines 20-21. This limitation of "at various times" appears to place no specific requirement on the timing of the "transmitting means," with no requirement for any form of random timing.

In carefully examining the '269 Patent specification for corresponding structures clearly linked to the function of the "transmitting means," I find the following passage:

Next, monitoring means 14 generates an output signal 22 to logical unit 24 which organizes the information of signal 22 into a packet for transmission to the Central Site by modem, fax, DTMF generator, or other transmission means. Each packet contains all relevant data (information that the apparatus was preprogrammed to provide) within a single logical envelope including the telephone number to be called and the serial number of the apparatus being monitored. A telephone call is then initiated (block 28) to the Central Site with the outgoing packet 26 being converted by a modem, fax or DTMF generator in the send data unit 32 and sent to the Central Site as a conventional telephone signal 34.

The packetization of the data in block 24 can be performed by several techniques that are well known in the art. For example, with FAX modems the HDLC frame structure as defined in CCITT T.30 is generally preferred. There are similar standards or quasi-standards for modems and DTMF equipped systems.

'269 Patent, Column 3, Line 61-Column 4, Line 12. Logical unit 24 is shown in Figure 1 of the '269 Patent as a block labeled "CREATE PACKETS." The actual transmission of the report to the central site is further explained in the specification as follows:

The same modem, or modems, normally used by the local system being monitored is (are) also used for an outgoing data call to ensure that the telephone connection is always accessible to the monitoring apparatus. For voice mail systems which lack modems, DTMF (Touchtone) can be used to transfer data.

Id., Column 2, Lines 61-67.

I therefore conclude that the term "transmitting means for automatically, at various times, reporting said terms of said usage agreement and the use of said software by said remote computer detected by said monitoring means to said central site means surreptitiously of a user of said remote computer" is a means-

plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6.

The recited function is: "automatically, at various times, reporting said terms of said usage agreement and the use of said software by said remote computer detected by said monitoring means to said central site means surreptitiously of a user of said remote computer."

The corresponding structure is: "(1) a modem, fax, or DTMF generator; (2) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, in which the software, in response to an output signal from the monitoring means, organizes data, consisting of the output from the monitoring means as well as the terms of the software usage agreement, within a single logical envelope including the telephone number to be called and the serial number of the apparatus being monitored, packetizing the data using HDLC or any other standard or quasi-standard formatting and then transmitting the data using a modem, fax, or DTMF generator; or (3) the equivalent."

n. "***Decoding means for receiving and processing the packet of said collected data on at least one performance feature of said electrical apparatus of interest to the system from at least one remote site means***"

"***Decoding means for receiving and processing said collected performance data from each remote site means***"

The term "decoding means for receiving and processing the packet of said collected data on at least one performance feature of said electrical apparatus of interest to the system from at least one remote site means" ("decoding means") occurs expressly in asserted Claim 1 and impliedly by way of dependence in asserted Claims 2-3 and 6-8 of the '269 Patent. The similar term "decoding means for receiving and processing said collected performance data from each remote site means" occurs in asserted Claim 20 of the '269 Patent. '269 Patent, Column 10, Lines 57-59. The language in these two terms is substantially the same, and their meaning in the context of the patent appears to be the same. The parties have agreed to treat them as synonymous, *see* Document No. 139 at 15, and I do so here.

The parties agree that each of these terms is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6, and that the recited function is "receiving and processing the packet of said collected data on at least one performance feature of said electrical apparatus of interest to the system from at least one remote site means." *Id*. at 15.

Absolute contends that the corresponding structure is "an HDLC decoder to decode data received over a telephone line, or the equivalent thereto." Document No. 139 at 15. In support of this contention, Absolute cites to the following sentence from the '269 Patent specification: "Included are a multi-port transceiver/encoder/decoder/dialer 118 for receiving the signal 34 from each of the remote sites, and for sending information to those sites." ' 269 Patent, Column 5, Lines 40-43; *see also* Document No. 93 at 12. In support of limiting the decoder specifically to HDLC, Absolute further asserts that, "[b]ecause the only formatting means explicitly disclosed is an HDLC encoder, the corresponding structure should be limited to an HDLC decoder to decode data received over a telephone line, or the equivalent thereto." Id.

Stealth, citing to the same sentence in the '269 Patent specification, contends that the corresponding structure is "a multi-port transceiver/encoder/decoder/dialer 118 for receiving the signal 34 from each of the remote sites, and for sending information to those sites." Document No. 156 at 7. Although Stealth does not limit the decoder to HDLC, "sending information to those sites" does not correspond to the recited function.

For all of the reasons discussed above for the "formatting means," I find that the encoding is not limited to only HDLC but may also use any standard or quasi-standard formatting.

I therefore conclude that the terms "decoding means for receiving and processing the packet of said collected data on at least one performance feature of said electrical apparatus of interest to the system from at least one remote site means" and "decoding means for receiving and processing said collected performance data from each remote site means" are each a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6.

The recited function is: "receiving and processing the packet of said collected data on at least one performance feature of said electrical apparatus of interest to the system from at least one remote site means."

The corresponding structure is: "(1) a multi-port transceiver/encoder/decoder/dialer using HDLC or any other standard or quasi-standard formatting; or (2) the equivalent."

o. "*Detection means for comparing the decoded collected data from each remote site means with the expected corresponding data for electrical apparatus of the type in which said remote site means is installed to identify the location of each of said remote sites means*"

"Detection means for comparing the received collected data from each remote site means with expected data for electrical apparatus of the type in which said remote site means has been added to identify the location of each of said remote site means"

The term "detection means for comparing the decoded collected data from each remote site means with the expected corresponding data for electrical apparatus of the type in which said remote site means is installed to identify the location of each of said remote sites means" ("detection means") occurs expressly in asserted Claim 1 and impliedly by way of dependence in asserted Claims 2-3 and 6-8 of the '269 Patent. The similar term "detection means for comparing the received collected data from each remote site means with expected data for electrical apparatus of the type in which said remote site means has been added to identify the location of each of said remote site means" occurs in asserted Claim 20 of the '269 Patent. The language in these two terms is almost identical, and their meaning in the context of the patent appears to be the same. The parties have agreed to treat them as synonymous, Document No. 139 at 16, and I do so here.

The parties agree that each of these terms is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6, and that the recited function is "comparing the decoded collected data from each remote site means with the expected corresponding data for electrical apparatus of the type in which said remote site means is installed to identify the location of each of said remote sites means." *Id*. at 16.

"Having identified the function of [this limitation], we next construe the meaning of the words used to describe the claimed function using ordinary principles of claim construction." Lockhead Martin Corp. v. Space Systems/Loral, Inc., 324 F.3d 1308, 1319 (Fed.Cir.2003). The meaning of this function is clear from the plain language in the claim. The comparison must be between the "collected data" received from the remote site means and the "expected corresponding data for electrical apparatus of the type in which said remote site means is installed." Furthermore, the function, as recited in the claim, first introduces the phrase "remote site means" and then twice refers to "said remote site means," clearly referring back to the same "remote site means" each time this reference occurs. Thus, the "electrical apparatus" of which the "type" is

the subject here is the electrical apparatus in which the remote site means is included, from which the detection means has just received the "collected data." In addition, the "expected data" against which the comparison is made is that which is expected for all apparatus of the same type, not that for the individual remote site means that initiated the present call. Finally, this comparison between the "collected data" and the "expected corresponding data" must identify location of "each of said remote site means," not just certain ones selected based on the comparison.

This language in the recited function for the "detection means" is the result of two different, significant amendments to Claims 1 and 20 during prosecution of the '269 Patent. I will discuss here the history of Claim 1, although essentially identical history applies also to Claim 20.

As originally filed, the "detection means" limitation in Claim 1 read as follows:

detection means for comparing the received status information from each remote site with expected status information for electrical apparatus of the type to which said remote site has been added.

Document No. 154-3 at 24. Identifying the location of each of said remote sites means was originally not stated the claim.

Later, in response to a rejection by the Examiner that Claim 1 was unpatentable as obvious over Cole and White, *see* id. at 47, the Applicant, in a February 19, 1993, amendment, modified Claim 1, leaving the "detection means" limitation unchanged but adding a new "locating means" limitation as a further element within the central site means. The relevant portion of Claim 1 then read as follows:

detection means for comparing the received status information from each remote site with expected status information for electrical apparatus of the type to which said remote site has been added; and

locating means for utilizing source identification information to identify the location of each of said remote sites.

Id. at 57 (emphasis omitted). This amendment was the first introduction of language related to identifying the location of each of said remote sites means into the claim, but it was introduced as part of the recited function of the new "locating means," not the existing "detection means." At this time, the location of each of said remote sites was identified as a result of "utilizing source identification information" from the packet received by the central site means, not as a result of "comparing the received status information from each remote site with expected status information for electrical apparatus of the type to which said remote site has been added."

In a later Office Action dated March 24, 1994 (after another, unrelated amendment), the Examiner again rejected Claim 1, stating that "Claim 1 is incomplete, it is unclear what happens based upon the comparing operation of the detection means at the central site." Document No. 154-2 at 32. In response, in a September 19, 1994, amendment, the Applicant again modified Claim 1, removing the separate "locating means" and combining a portion of its function into the existing "detection means," to then read as follows:

detection means for comparing the decoded collected data from each remote site means with the expected corresponding data for electrical apparatus of the type in which said remote site means is installed *to identify the location of each of said remote sites means*.

Id. at 36-37 (earlier emphasis omitted). Thus, this amendment changed the way in which the location of each of said remote sites means was determined. No longer was location determined within the "locating means," as a result of "utilizing source identification information" from the packet received by the central site means. Instead, the location was now determined by a different means within the central site means, the "detection means," by "comparing the decoded collected data from each remote site means with the expected corresponding data for electrical apparatus of the type in which said remote site means is installed." The claim was then allowed, and the patent later issued, with the "detection means" in this form and with no separate "locating means" in the claim. Id. at 48.

Absolute contends that "[t]he specification does not disclose any structures clearly linked with the particular recited function." Document No. 139 at 16.

Stealth, instead, contends that the structure is "programming running on a microprocessor that examines the collected data for indications of non-standard performance, or its equivalent," and further contends that the disclosure of the algorithm performed by this software is provided in the '269 Patent specification at Column 4, Lines 19-25. Document No. 156 at 8-9. This passage is reproduced below:

At block 40 data 38 is examined for indications of nonstandard performance, such as performance that is not in accordance with the manufacture's [sic] specifications or with the license agreement. If a nonstandard performance signal is received, a warning signal 42 is generated and applied to block 44 where a request for manual or automatic investigation is flagged.

'269 Patent, Column 4, Lines 19-25.

Stealth's proposed construction excludes the identification of the location of the remote site means. However, Stealth previously agreed that the recited function of this means-plus-function element is "comparing the decoded collected data from each remote site means with the expected corresponding data for electrical apparatus of the type in which said remote site means is installed to identify the location of each of said remote sites means," clearly stating that the identification of the location is a part of the recited function. Document No. 139 at 16. Stealth also previously argued that the identification of the location was a result of comparing the collected data with the expected data, apparently being a part of the function of this element. *See* Document No. 102 at 2 (arguing infringement by asserting that "Absolute in fact does maintain a database which it uses to compare collected data with expected data *in order [to] identify the location of computers* that match the expected data criteria" (emphasis added)); id. at 25 (stating that "[t]he 'Detection Means' refers to the database stored in a monitoring center computer containing collected data for each remote site, *including its reported identity and location data,* and the programming to *compare the stored data in the database with an expected value for that data to identify each monitored device* meeting the comparison criteria" (emphasis added)); id. at 27 (asserting that "Baran teaches that the combination of the collected location and identity information stored in the database *provides the ability to identify the location of the device*" (emphasis added)). Stealth argued similarly at the *Markman* hearing, repeatedly asserting that the location is determined by the detection means as a result of comparing the collected data with the expected data. *See, e.g.,* Document No. 160 at 59:14-17 (stating that "this claim is-is actually reciting-and *this is in accordance with our briefing*-is reciting that *the comparison is being made for the purpose of identifying the location*" (emphasis added)).

Stealth now argues, instead, based on its newly proposed construction in its supplemental *Markman* brief, as

follows:

The claim further limits that a location of remote site means must be identified. However, this is not a function of the detection means. Both the written description of the Baran Patent and its file history show the function of the detection means is not to identify the location. Specifically, as seen in the February 19, 1993 Amendment A, page 5, amended claim 21 shows that the "detection means" performs the comparison operation and the "locating means" utilizes the source identification to identify the location of each of said remote sites.

The Examiner also expressly recognized that the function of the detection means was to compare and not to identify the location because the Examiner requested that the claim be clarified to further recite "what happens based upon the comparing operation of the detection means at the central site." August 24, 1994 Office Action, page 2, lines 18-20.

Document No. 156 at 9 (emphasis omitted). However, this argument by Stealth is historically misplaced. As discussed above, the final form of the "detection means" in Claims 1 and 20 is the result of two significant amendments. At the time of the February 19, 1993, amendment, cited by Stealth, the "detection means" and "locating means" were indeed separate, and the function of the "detection means" did not then include identification of the location of the remote site means. However, identification of the location was *added* to the function of the "detection means" in the September 19, 1994, amendment, made by the Applicant in response to the August 24, 1994, Office Action cited by Stealth. At all points in time cited by Stealth in its argument, the language for the "detection means" in Claims 1 and 20 was not yet in its final form. After the September 18, 1994 amendment, the function of the "detection means" then was in its final form and then did include identifying the location of the remote site means.

Since, as noted above, Stealth previously agreed that the recited function of the "detection means" includes identifying the location of the remote site means, and since Stealth's new argument to exclude this feature from the function is incorrect, I conclude that the correct function for the "detection means" is as was previously agreed by the parties.

Furthermore, after careful reading of the '269 Patent specification, I am unable to identify any structure clearly linked to the function of the "detection means," in the form in which Claims 1 and 20 were allowed and the patent issued, created by the September 19, 1994 amendment described above: "comparing the decoded collected data from each remote site means with the expected corresponding data for electrical apparatus of the type in which said remote site means is installed to identify the location of each of said remote sites means." No reference that I can find in the specification that relates to comparing the collected data with the expected corresponding data for that type of electrical apparatus also discusses identifying the location of the remote site means. Likewise, no reference in the specification that relates to identifying the location of the remote site means also discusses comparing the collected data with the expected corresponding data for that type of electrical apparatus.

"[I]f one employs means-plus-function language in a claim, one must set forth in the specification an adequate disclosure showing what is meant by that language. If an applicant fails to set forth an adequate disclosure, the applicant has in effect failed to particularly point out and distinctly claim the invention as required by the second paragraph of section 112." In re Donaldson Co., 16 F.3d at 1195. "This duty to link or associate structure to function is the quid pro quo for the convenience of employing s. 112, para. 6." Default Proof Credit Card Sys., Inc., 412 F.3d at 1298. "Fulfillment of the s. 112, para. 6 trade-off cannot be

satisfied when there is a total omission of structure." Atmel Corp., 198 F.3d at 1382. I am unable to find any corresponding structure, and neither party has identified any corresponding structure for the recited function of the "detection means" in the language of the '269 Patent as issued, after the amendments discussed above.

Based on the foregoing, I conclude that asserted Claims 1 and 20 of the ' 269 Patent, and asserted Claims 2-3 and 6-8 which depend from Claim 1, are invalid as indefinite under 35 U.S.C. s. 112 para. 2, for failure to disclose and clearly link any structure to the recited function of the "detection means" in these claims.

p. "*Interpretation means for interpreting the received information from each of said at least one remote computers to determine when each usage agreement is violated*"

The term "interpretation means for interpreting the received information from each of said at least one remote computers to determine when each usage agreement is violated" ("interpretation means") occurs expressly in asserted Claim 29 and impliedly by way of dependence in asserted Claims 30-33, 35, and 38 of the '269 Patent. The parties agree that this term is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6, and that the recited function is "interpreting the received information from each of said at least one remote computers to determine when each usage agreement is violated." Document No. 139 at 18.

Absolute contends that the corresponding structure is "a microprocessor that is programmed to detect situations where more than one system is using the same copy of the software by examining the serial number associated with the received data." Document No. 139 at 18. Stealth, instead, contends that the corresponding structure is "programming at the central site used to interpret the received information from each monitored computer to determine when a license agreement is violated." Id. Thus, both parties agree that the "interpretation means" is implemented in software, although they disagree on the disclosed algorithm that is linked to this function in the specification.

The claims in which the "interpretation means" occurs also include a "transmitting means for automatically, at various times, reporting said terms of said usage agreement and the use of said software by said remote computer detected by said monitoring means to said central site means surreptitiously of a user of said remote computer." '269 Patent, Column 12, Lines 20-25. The proper construction of each of the terms "transmitting means" and "terms of said usage agreement imbedded in said software" (and "terms of said usage agreement") have been discussed above.

It is in this context that the "interpretation means" interprets the information received from the remote site to determine when the usage agreement has been violated. This information received not only includes the contents of the report received from the "transmitting means," it also indirectly includes the timing of the receipt of this report. This timing information may be considered as information received form the remote site, as it is the remote site that chose to transmit the information at that time, causing the central site to receive it at that time.

Upon carefully examining the '269 Patent specification, I find the following passage:

At block 40 data 38 is examined for indications of nonstandard performance, such as performance that is not in accordance with the manufacture's [sic] specifications *or with the license agreement*.

'269 Patent, Column 4, Lines 19-22 (emphasis added). This portion of the specification discloses the use of

the data reported, not the timing of the report itself, to detect whether the usage agreement has been violated.

Another aspect of the corresponding structure for the "interpretation means" is disclosed in the following passage:

[I]f the Central Site observes multiple calls from the same software serial number in the same time period, then it can be certain that *that copy of the software has been installed on more than one system in the field*.

'269 Patent, Column 6, Lines 56-60 (emphasis added). This portion of the specification discloses the use of the timing of the call from the remote site to detect whether the usage agreement has been violated.

Based on the foregoing, I conclude that the term "interpretation means for interpreting the received information from each of said at least one remote computers to determine when each usage agreement is violated" is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6.

The recited function is: "interpreting the received information from each of said at least one remote computers to determine when each usage agreement is violated."

The corresponding structure is: "(1) software executing on the processor of the central site performing the algorithm of determining if the remote site software usage agreement has been violated, by comparing the reported terms of said usage agreement and the reported use of said software by said remote computer, or by determining if multiple calls from the same software serial number have been received in the same predetermined time period; or (2) the equivalent."

q. "*Remote site monitoring means*"

The term "remote site monitoring means" occurs only in asserted Claim 25 of the '269 Patent. For clarity, Claim 25 is reproduced below, with the occurrences of the term "remote site monitoring means" FN13 and the term "central site monitoring means" (discussed next) highlighted:

FN13. Steps a and f of the method use the phrase "remote monitoring means" rather than "remote site monitoring means." '269 Patent, Column 11, Lines 31, 54. Neither party has suggested construing these two phrases differently, and they are thus treated as synonymous here.

25. A method of monitoring the performance of at least one electrical apparatus surreptitiously of a user of said electrical apparatus at a remote site that includes *remote site monitoring means* that collects surreptitiously of a user of said electrical apparatus and reports performance data from said electrical apparatus surreptitiously of a user of said electrical apparatus to a *central site monitoring means,* said method comprising the steps of:
a. collecting data by said *remote monitoring means* on at least one performance feature of said electrical apparatus of interest;

b. formatting by said *remote site monitoring means* of a message bearing packet containing data collected in step a., said message bearing packet including unique identification information that was assigned to said electrical apparatus prior to shipping of said apparatus to said remote site;

c. *said remote site monitoring means* initiating transmission, at a semi-random rate, of said message packet of step b. to the *central site monitoring means;*

d. receiving the message packet of step c. at the *central site3 monitoring means* from each *remote site monitoring means;*

e. decoding the received massage packet of step d. at said *central site monitoring means;* and

f. comparing the performance data from step e. with the expected performance data at the *central site monitoring means* for each of the electrical apparatus of the type in which said *remote site monitoring means* is installed to identify the location of at least one *remote monitoring means*.

'269 Patent, Column 11, Lines 22-54 (emphasis added).
Absolute contends that the term "remote site monitoring means" is a means-plus-function limitation construed pursuant to 35 U.S.C. s. 112 para. 6, and proposes three functions for this limitation: "1) collecting data on at least one performance feature of said electrical apparatus of interest; 2) formatting a message bearing packet containing data collected in step a., said message bearing packet including unique identification information that was assigned to said electrical apparatus prior to shipping of said apparatus to said remote site; and 3) initiating transmission, at a semi-random rate, of said message packet of step b. to the central site monitoring means." Document No. 139 at 9. Absolute further contends that the corresponding structure is: "a microprocessor with four leads and an interface to a randomizer or its equivalents." Id. at 8-9.

"[I]f the word 'means' appears in [a] claim element, there is a presumption that it is a means-plus-function element to which s. 112, para. 6 applies." Seal-Flex, Inc., 172 F.3d at 848. "This presumption is overcome if the claim itself recites sufficient structure or material for performing the claimed function or when it fails to recite a function associated with the means." *Id*. (internal citations omitted).

Stealth contends that no function has been recited for the "remote site monitoring means" limitation and thus that the presumption that the "remote site monitoring means" is a means-plus-function limitation has been overcome. Document No. 156 at 1. Specifically, Stealth contends that the recited steps of method Claim 25 should not be " 'bootstrapped' into the missing recitation of function." *Id*. Instead, Stealth maintains that this term should be construed to be "a separate microprocessor based subsystem or software that operates on the internal processor of a device to be monitored that enables the device to be remotely monitored by a remote site." *Id*. at 2.

Stealth asserts that, as Absolute did not dispute that the term "remote site means" in apparatus Claim 1 of the '269 Patent is not means-plus-function element, Absolute should not here be able to argue that the term "remote site monitoring means" in method Claim 25 is a means-plus-function element. Document No. 156 at 1. However, although these terms are similar, they are different, and the use of these terms in Claims 1 and 25 are distinct.

In carefully examining the language used in Claim 25 itself, I note that steps a and b of the method ("collecting data by said remote monitoring means" and "formatting by said remote site monitoring means") each refer to something that is performed "by" the remote site monitoring means. The *American Heritage Dictionary of the English Language* provides a definition of "by" to mean "[t]hrough the agency or action

of." 263 (3d ed.1996). Similarly, step c of the method ("said remote site monitoring means initiating transmission") states that the transmission is initiated by the remote site monitoring means. In Claim 1, the "remote site means" is not described as performing any particular operations, and no other function is recited in Claim 1 for the "remote site means," *see* '269 Patent, Column 8, Lines 6-20, whereas in Claim 25 here, the "remote site monitoring means" is described as performing the three operations of "collecting," "formatting," and "initiating transmission."

Stealth also argues that the issue with this term in Claim 25 of the '269 Patent is distinct from the issue in *On* Demand Machine Corp. v. Ingram Industries, Inc., 442 F.3d 1331 (Fed.Cir.2006), which Absolute has cited to as part of its support for its position. Document No. 156 at 1, 2. In *On Demand,* Claim 8, a method claim, contained the step of "providing means for a customer to visually review said sales information ...." 442 F.3d at 1340. I agree that there are differences between the issues in these two cases but disagree with Stealth's conclusion. The means-plus-function element in Claim 8 in *On Demand* was "means for a customer to visually review said sales information" and was only an element within the larger step itself of the method. *Id*. at 1340-41. The word "providing" was not a part of that means-plus-function element and, by the plain language of the claim, did not indicate that this "means" was itself performing this step of the method ("providing"). The *On Demand* court thus did not include "providing" within its construction of the recited function for this element. *Id*. at 1341. The issue in J & M Corp. v. Harley-Davidson. Inc., 269 F.3d 1360 (Fed.Cir.2001) is similar. In *J & M,* Claim 17, a method claim, contained an element of a "gripping means" within three of the steps of the method. 269 F.3d at 1364 n. 1. As with *On Demand,* the means-plus-function element in *J & M* was only an element within these three steps of the method, and the plain language of the claim did not indicate that the "gripping means" itself performed any of the steps of the method. *Id*. In contrast, the plain language of Claim 25 in the '269 Patent does indicate that the "remote site monitoring means" performs steps a, b, and c of the method.

Stealth further argues that the recent case of Prism Technologies, LLC v. VeriSign, Inc., 512 F.Supp.2d 174 (D.Del.2007), contradicts Absolute's position that the "remote site monitoring means" in Claim 25 of the '269 Patent should be construed as a means-plus-function element. However, as with *On Demand* and *J & M,* the plain language of the claim in *Prism* (Claim 24) did not indicate that the means-plus-function element in question there ("clearinghouse means") performed any of the steps of the method. *See* Prism Techs., LLC, 512 F.Supp.2d at 195-96.

As noted above, the plain language of Claim 25 clearly indicates that the "remote site monitoring means" performs each of the three operations of "collecting," "formatting," and "initiating transmission" recited in steps a, b, and c of the claim. I therefore conclude that the function of the "remote site monitoring means," as recited in the claim language, is to perform these three operations.

Based on the foregoing, I conclude that the term "remote site monitoring means" is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6.

The recited function is: "(a) collecting data on at least one performance feature of said electrical apparatus of interest; (b) formatting of a message bearing packet containing data collected in step a, said message bearing packet including unique identification information that was assigned to said electrical apparatus prior to shipping of said apparatus to said remote site; and (c) initiating transmission, at a semi-random rate, of said message packet of step b to the central site monitoring means."

I further conclude that the corresponding structure for the "remote site monitoring means" as disclosed in the

specification consists of the structures identified above, respectively, for the (a) "monitoring means," (b) "formatting means," and (c) "transmission means."

r. "*Central site monitoring means*"

The term "central site monitoring means" occurs only in asserted Claim 25 of the '269 Patent. For clarity, Claim 25 is reproduced above under the discussion of the term "remote site monitoring means," with the occurrences of the terms "remote site monitoring means" and "central site monitoring means" highlighted.

Absolute contends that this term is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6, and proposes three functions for this element: "1) Receiving the message packet of step c from each remote site monitoring means; 2) decoding the received message packet of step d; and 3) comparing the performance data from step 3 with the expected performance data for each of the electrical apparatus of the type in which said remote site monitoring means is installed to identify the location of at least one remote monitoring means." Document No. 139 at 11. For corresponding structures for each of the first two functions of the "central site monitoring means" it has identified, Absolute proposes "an HDLC decoder to decode data received over a telephone line, or the equivalent thereto." Id. For the third function above, Absolute contends that "[t]he specification fails to disclose any structure that performs the third function (comparing information to identify location)." Id.

Stealth, instead, makes the same arguments with respect to this term as it did for the term "remote site monitoring means" above. In summary, Stealth contends that no function has been recited for the "central site monitoring means" element and thus that the presumption that the "central site monitoring means" is a means-plus-function element has been overcome. Document No. 156 at 1. Stealth proposes instead to construe this term as "a computer that is disposed to monitor one or more remote devices installed with remote site means/remote site monitoring means." Id. at 2-3.

As with the discussion of the "remote site monitoring means," I carefully examined the language used in Claim 25 itself with respect to the "central site monitoring means." In contrast to the use of the term "remote site monitoring means" in Claim 25, I note that each of the occurrences of the term "central site monitoring means" describes an operation performed "at" the "central site monitoring means." FN14 *Compare* ' 269 Patent, Column 11, Lines 31, 34, 40, 45-46, 52-53, *with* id., Column 11, Lines 42-43, 44-45, 48, 50-51. Unlike the use of the word "by" for the "remote site monitoring means," I am unable to find any definition in a dictionary to support an interpretation that something performed "at" the "central site monitoring means" suggests that it is a function of the "central site monitoring means" to perform that operation.

FN14. Step c of Claim 25 also describes "initiating transmission ... *to* the central site monitoring means," '269 Patent, Column 11, Lines 40-43 (emphasis added), but neither party has suggested that this portion of the claim language indicates a function of the central site monitoring means.

For example, whereas, as noted above, the *American Heritage Dictionary of the English Language* defines "by" to mean "[t]hrough the agency or action of," the same dictionary provides definitions of the word "at" with meanings including at a location, at a direction, at a time, at a condition, and others. 115 (3d ed.1996). One definition provided by this dictionary for "at" is "by way of; through," but this definition is in the sense illustrated by the example sentence given by that dictionary of "exited at the rear gate," not in the sense of

"[t]hrough the agency or action of" as given by the definition of the word "by." Id. Over a total of 13 different definitions provided, none indicate that something done "at" the "central site monitoring means" is done by the "central site monitoring means." *See* id.

I therefore conclude that no function has been recited in Claim 25 for the "central site monitoring means," and that the presumption that this term is a means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6 has thus been rebutted.

I further conclude that the correct construction for the term "central site monitoring means" is: "a computer that is disposed to monitor at least one remote electrical apparatus, in cooperation with the remote site monitoring means included within each remote electrical apparatus being monitored."

C. *Summary*

Accordingly, I respectfully recommend that the disputed terms in the '758, ' 863, '914, and '269 Patents be construed as follows:

1. *The* '*758, '863, and* '914 Patents

Term	**Asserted Claims [FN15]**	**Recommended Construction**

FN15. The list of asserted claims for each term includes asserted claims in which the term occurs either expressly or impliedly.

global network	'758: all except 72, 73	the Internet
	'863: all	the telephone network is not a global network, but the Internet includes and uses the telephone network
one or more of the global network communication links used to enable transmission between said electronic device and said host system	'758: all	the identification of one or more (perhaps less than all) of the connections (either direct or indirect) between two nodes in the Internet (one of the nodes may be the electronic device itself) used to enable data transmission between said electronic device and said host system
	'863: all	
identifying indicia	'758: all	information that indicates the identity of the computer, whether or not this information also indicates the identity of the agent
	'863: all	
	'914: all	
providing	'758:	the agent furnishing, supplying, or making

	all	available
(in the context of "providing identifying indicia and location information," "providing ... identifying indicia," "providing ... one or more of the global network communication links," or "providing ... one or more of the Internet communication links")	'863: all	
providing said identifying indicia	'758: all	no separate construction needed, beyond the clarification that it is not limited to some form of indirect transmission of the data or to requiring that the providing be done through a DNS query
	'863: all	
evading detection	'758: all except 72, 73	remaining transparent and avoiding detection from an unauthorized user of said electronic device
	'863: 18, 66	
automatically	'758: all except 72, 73	without requiring an external event
	'863: all	
automatically providing said host system with said identifying indicia through said global network [and] providing said host system with one or more of the global network communication links	'758: all except 72, 73	no separate construction needed, beyond the clarification that a two-step process is not required
contacting a host monitoring system without signaling the visual or audible user interface	'914: all	getting in touch with or communicating with a host monitoring system without signaling (not necessarily through active suppression) the visual or audible user interface
reported lost	'914: all	reported no longer in one's possession, care, or control, through negligence, accident, theft, etc.

2. *The* '269 Patent

Term	**Asserted Claims**	**Recommended Construction**
semi-random rate	1-3, 6-8, 12-14, 16-17, 25	occurring once at a random time within a predetermined time interval
location	1-3, 6-8, 13-14, 16-17,	physical location, or network location (such as a source telephone number or source network address) from which a physical location can be obtained

	20, 25	
unique usage agreement information	11, 29, 30-33, 35, 38	information describing the unique usage agreement for this copy of the software, including a statement of the terms of that usage agreement
terms of said usage agreement imbedded in said software	11, 29, 30-33, 35, 38	parameters detailing what is granted by the license agreement for the software, such as the duration or expiration date, number of authorized installations/seats, number of authorized users, or restrictions relating to backup copies of the software
surreptitiously of a user	all	operating in a stealthy manner, intended to avoid notice of the user of the apparatus at the remote site
transparent to the user	11, 29, 31-33, 35, 38	operating in such a way as to be invisible to, or to not be perceived by, the user of the software
transparent to the user of said software		
performance data	20, 25	data related to the operation, working, configuration, or usage of the electrical apparatus, any functions of the electrical apparatus, or the software on the electrical apparatus, including the serial number of the apparatus or the software that it is running
performance feature	1-3, 6-8, 12-14, 16-17	a feature of the electrical apparatus, any functions of the electrical apparatus, or the software on the electrical apparatus, about which data related to the feature's operation, working, configuration, or usage, including the serial number of apparatus or the software that it is running, may be collected by the electrical apparatus
monitor means programmed for collecting data on at least one performance feature of said electrical apparatus of interest to the system surreptitiously of a user of said electrical apparatus	1-3, 6-8, 12-14, 16-17	means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6 *Recited Function:* collecting data on at least one performance feature of the electrical apparatus surreptitiously of a user of the electrical apparatus
("monitor means")		*Corresponding Structure:* (1) a microprocessor with four leads and an interface to a randomizer; (2) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, in which the software collects the performance data by generating an interrogation signal that is applied to the electrical apparatus and, in response, reading from the apparatus the status signal including information that the apparatus was preprogrammed to provide, or in which the software collects the performance data by reading from the monitored registers of the apparatus; or (3) the equivalent

monitoring means for monitoring the use of said software surreptitiously of a user of said electrical apparatus ("monitoring means")	29-33, 35, 38	means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6 *Recited Function:* monitoring electrical apparatus the use of said software surreptitiously of a user of said electrical apparatus *Corresponding Structure:* (1) a microprocessor with four leads and an interface to a randomizer; (2) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, in which the software collects data on the use of said software by generating an interrogation signal that is applied to the electrical apparatus and, in response, reading from the apparatus the status signal including information that the apparatus was preprogrammed to provide, or in which the software collects data on the use of said software by reading from the monitored registers of the apparatus; or (3) the equivalent
formatting means for creating a message bearing packet containing data collected by said monitoring means ("formatting means")	1-3, 6-8, 12-14, 16-17	means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6 *Recited Function:* creating a message bearing packet containing data collected by said monitoring means *Corresponding Structure:* (1) a transceiver, dialer, and HDLC encoder/decoder; (2) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, in which the software organizes the data within a single logical envelope including the telephone number to be called and the serial number of the apparatus being monitored, packetizing the data using HDLC or any other standard or quasi-standard formatting; or (3) the equivalent
transmission means for initiating, at a semi-random rate, the transmission of the message packet from the formatting means to the central site means of the system surreptitiously of a user of said electrical apparatus	1-3, 6-8, 12-14, 16-17	means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6 *Recited Function:* initiating, at a semi-random rate, the transmission

		of the message packet from the formatting means to the central site means of the system surreptitiously of a user of said electrical apparatus
("transmission means")		*Corresponding Structure:* (1) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, executing the algorithm depicted in the flow chart of Figure 2, blocks 62 through 78 (excluding block 74), possibly also including any or all of the modifications depicted in Figures 5 through 7; or (2) the equivalent
transmitting means for automatically, at various times, reporting said terms of said usage agreement and the use of said software by said remote computer detected by said monitoring means to said central site means surreptitiously of a user of said remote computer	29-33, 35, 38	means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6 *Recited Function:* automatically, at various times, reporting said terms of said usage agreement and the use of said software by said remote computer detected by said monitoring means to said central site means surreptitiously of a user of said remote computer
("transmitting means")		*Corresponding Structure:* (1) a modem, fax, or DTMF generator; (2) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, in which the software, in response to an output signal from the monitoring means, organizes data, consisting of the output from the monitoring means as well as the terms of the software usage agreement, within a single logical envelope including the telephone number to be called and the serial number of the apparatus being monitored, packetizing the data using HDLC or any other standard or quasi-standard formatting and then transmitting the data using a modem, fax, or DTMF generator; or (3) the equivalent
decoding means for receiving and processing the packet of said collected data on at least one performance feature of said electrical apparatus of interest to the system from at least one remote site means	1-3, 6-8, 20	means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6

		Recited Function: receiving and processing the packet of said collected data on at least one performance feature of said electrical apparatus of interest to the system from at least one remote site means
decoding means for receiving and processing said collected performance data from each remote site means		*Corresponding Structure:* (1) a multi-port transceiver/encoder/decoder/dialer using HDLC or any other standard or quasi-standard formatting; or (2) the equivalent
("decoding means")		
detection means for comparing the decoded collected data from each remote site means with the expected corresponding data for electrical apparatus of the type in which said remote site means is installed to identify the location of each of said remote sites means	1-3, 6-8, 20	means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6
		Recited Function: comparing the decoded collected data from each remote site means with the expected corresponding data for electrical apparatus of the type in which said remote site means is installed to identify the location of each of said remote sites means
detection means for comparing the received collected data from each remote site means with expected data for electrical apparatus of the type in which said remote site means has been added to identify the location of each of said remote site means		*Corresponding Structure:* none; each of these claims are invalid as indefinite under 35 U.S.C. s. 112 para. 2, for failure to disclose and clearly link any structure to the recited function
("detection means")		
interpretation means for interpreting the received information from each of said at least one remote	29-33, 35, 38	means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6

computers to determine when each usage agreement is violated		
		Recited Function: interpreting the received information from each of said at least one remote computers to determine when each usage agreement is violated
("interpretation means")		*Corresponding Structure:* (1) software executing on the processor of the central site performing the algorithm of determining if the remote site software usage agreement has been violated, by comparing the reported terms of said usage agreement and the reported use of said software by said remote computer, or by determining if multiple calls from the same software serial number have been received in the same predetermined time period; or (2) the equivalent
remote site monitoring means	25	means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6 *Recited Function:* (a) collecting data on at least one performance feature of said electrical apparatus of interest; (b) formatting of a message bearing packet containing data collected in step a, said message bearing packet including unique identification information that was assigned to said electrical apparatus prior to shipping of said apparatus to said remote site; and (c) initiating transmission, at a semi-random rate, of said message packet of step b to the central site monitoring means
		Corresponding Structure: the structures identified above, respectively, for the (a) monitoring means, (b) formatting means, and (c) transmission means
central site monitoring means	25	a computer that is disposed to monitor at least one remote electrical apparatus, in cooperation with the remote site monitoring means included within each remote electrical apparatus being monitored