United States District Court,
C.D. California.

NOMADIX, INC., a Delaware corporation,
Plaintiff.
v.
SECOND RULE LLC, a Delaware corporation,
Defendants.

No. CV 07-01946 DDP (VBKx)

Oct. 15, 2008.

Background: Holder of patents for computer communications systems brought action against competitor, alleging infringement.

Holding: The District Court, Pregerson, J., held that claim terms relating to mobile Internet access devices would be construed.

So ordered.

6,130,892, 6,636,894, 6,857,009, 6,868,399, 7,088,727. Construed.

Douglas G. Muehlhauser, Perry D. Oldham, Stephen C. Jensen, Knobbe Martens Olson and Bear, Irvine, CA, for Plaintiff.

AMENDED CLAIM CONSTRUCTION ORDER

[Motion filed on August 4, 2008]

DEAN D. PREGERSON**, District Judge.**

This matter is before the Court on claim construction for the patents-in-suit. After reviewing the materials submitted by the parties and considering the arguments therein, **the Court adopts the following constructions of disputed claim terms.**

I. BACKGROUND AND PATENTS-IN-SUIT

Plaintiff Nomadix, Inc. brings this patent infringement action against Defendant Second Rule, LLC under 35 U.S.C. s. 271. Nomadix alleges that Second Rule's products, including its NetAccess device, infringe claims in five patents Nomadix owns. Second Rule asserts defenses of noninfringement and invalidity, and

counterclaims for declaratory judgment. FN1

In particular, Nomadix claims that Second Rule has violated: Claims 1, 13, 15, 18, and 20 of U.S. Patent No. 6,868,399 (filed October 20, 2000) ("'399 Patent"); Claims 11, 17, 19, and 20 of U.S. Patent No. 7,088,727 (filed October 6, 2000) ("'727 Patent"); Claim 1 of U.S. Patent No. 6,130,892 (filed March 12, 1998) ("'892 Patent"); Claims 1, 6, and 7 of U.S. Patent No. 6,636,894 (filed December 8, 1999) ("'894 Patent"); and Claims 1, 23, and 35 of U.S. Patent No. 6,857,009 (filed October 23, 2000) ("'009 Patent").

The technology at issue generally concerns systems and methods for facilitating communications between a computer (e.g., a laptop) and a network (e.g., the Internet). The relevant patents are practiced in places such as hotels and airports to provide mobile users access to the internet over a connection that is not the computer's "home" network without manual reconfiguration of the computer. For example, to communicate with a network, a computer generally needs to target data specifically for the network. Most computers are configured so that they communicate with a "home" network. When a user travels with his laptop computer, he is no longer connected to the home network. Thus, when the user seeks to connect to the internet in, for example, an airport, his computer will send data addressed to the home network. Some of the claimed inventions intercept and/or modify data coming from a user's device as the device seeks to connect as usual to its home network, and then facilitate automatic and transparent connections to a foreign network. These methods work through a gateway device.

A. '892 Patent ***and*** '727 Patent

The '892 and '727 Patents describe systems and methods to facilitate connection to foreign networks without reconfiguration by having a "gateway" on a foreign network pretend to be the home network of a visiting computer. The gateway accomplishes this by intercepting packets intended by the home network and modifying them so that they can connect to the foreign network.

The '892 Patent discloses a nomadic router or translator that allows a laptop computer to be connected to any location on the internet or other digital data communication system by "automatically and transparently" reconfiguring the terminal to its new location by processing outgoing and incoming information. The '727 Patent discloses a device that, when a user attempts to connect to the internet, automatically determines the network settings for the user device and/or a network and modifies packets appropriately to facilitate the connection.

B. '894 Patent

The '894 Patent describes a method by which the gateway device disclosed above can selectively force the visiting computer's web browser to access a login portal page (such as a hotel home page or a page requiring user identification or billing information) instead of the web browser's normal home page. The invention also allows the management service (e.g., the hotel) to control which users are granted access and to maintain user information in a user profile database.

C. %2C399 Patent

The '399 patent discloses a means of integrating the gateway system with existing management systems used in, for example, hotels, to track telephone usage for billing purposes. Using existing protocols, it provides billing data for internet usage in the same format as the management system normally uses to track telephone calls and automatically adds internet usage charges to customers' bills. The gateway device

reconfigures the usage data it receives to meet one of the protocols supported by the management system, and the management system uses that data for automatic billing purposes.

D. %2C009 Patent

The '009 patent is designed for computers whose home networks use a proxy server to act as an intermediate traffic router between the user's computer and the rest of the internet. The '009 Patent discloses a method by which the gateway device acts as a "transparent proxy"-that is, the gateway on the foreign network pretends to be and acts as the user's proxy server.

II. THE CLAIM CONSTRUCTION PROCESS

A patent infringement analysis involves two steps: (1) determining the meaning and scope of the patent claims asserted to be infringed; and (2) comparing the properly construed claims to the accused device. Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed.Cir.1995), *aff'd,* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). Only the first step of this process is before the Court at this juncture.

The Supreme Court has held that claim construction is a question of law for courts, not a question of fact for juries. Markman v. Westview Instruments, Inc., 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). Claim construction is conceptually distinct from discovery of which products or processes might be infringing.

The starting point for claim construction is a disputed term's "ordinary" meaning. Phillips v. AWH Corp., 415 F.3d 1303, 1313 (Fed.Cir.2005) (en banc). This ordinary meaning is the meaning that a person of ordinary skill in the art would attribute to a claim term in the context of the entire patent, including the specification and prosecution history. *Id.* "The inquiry into how a person of ordinary skill in the art understands a claim term provides an objective baseline from which to begin claim interpretation." *Id.*

In determining the proper construction for a claim term, the claim language, the specification, and the prosecution history-collectively referred to as "intrinsic evidence"-are the most important. *Id.* at 1314. "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." *Id.* at 1312 (internal quotation marks omitted). Thus, the first step is to look to the words of the claims themselves to define the scope of the patented invention. K-2 Corp. v. Salomon S.A., 191 F.3d 1356, 1364 (1999). Other claims of the patents in question, both asserted and unasserted, can also be valuable sources of enlightenment as to the meaning of a claim term. Phillips, 415 F.3d at 1314. Because claim terms are normally used consistently throughout the patent, the usage of a term in one claim can often illuminate the meaning of the same term in other claims. *Id.* Differences among claims can also be a useful guide in understanding the meaning of particular claim terms. *Id.*

The claims, of course, do not stand alone; the person of ordinary skill in the art "is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, *but in the context of the entire patent, including the specification.*" *Id.* at 1313, 1314 (emphasis added). This is true because although the claims themselves may provide guidance as to the meaning of a particular term, those terms are part of an "integrated written instrument ... consisting principally of a specification that concludes with the claims." *Id.* at 1315 (quotations omitted). Thus, the specification is "the *primary basis* for construing the claims" in light of the "statutory requirement that the specification describe the claimed invention in full, clear, and exact terms." *Id.* (internal quotations omitted) (emphasis added).

In other words, "the best source for understanding a technical term is the specification from which it arose, informed as needed, by the prosecution history." *Id.* (citations and quotations omitted). Consistent with this principle, courts have recognized that the specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess. *Id.* at 1316. In such cases, the inventor's lexicography governs. *Id.* In other cases, the specification may reveal an intentional disclaimer, or disavowal, of claim scope by the inventor. *Id.* In that instance as well, the inventor has dictated the correct claim scope, and the inventor's invention, as expressed in the specification, is regarded as dispositive. *Id.*

While a court interprets claim terms in light of the specification, it must be careful not to "import[ ] limitations from the specification into the claims absent a clear disclaimer of claim scope." Andersen Corp. v. Fiber Composites, LLC, 474 F.3d 1361, 1373 (Fed.Cir.2007). "[T]he distinction between using the specification to interpret the meaning of a claim and importing limitations from the specification into the claim can be a difficult one to apply in practice." Phillips, 415 F.3d at 1323. In walking that "tightrope," *see* Andersen, 474 F.3d at 1373, a court's focus should "remain[ ] on understanding how a person of ordinary skill in the art would understand the claim terms," Phillips, 415 F.3d at 1323. Being mindful of the purpose of the specification is important: because "the purposes of the specification are to teach and enable those of skill in the art to make and use the invention and to provide a best mode for doing so," the patentee may perform this teaching function by providing an example. Id. at 1323-24. Alternatively, in some cases, the patentee may intend for the embodiments and claims to be coextensive. *Id.* The court should make its determination with attention to the "manner in which the patentee uses a term within the specification and claims." *Id.* at 1323.

The prosecution history also plays an important role in claim interpretation "by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be." *Id.* at 1317. The prosecution history consists of "the complete record of the proceedings before the PTO and includes the prior art cited during the examination of the patent." *Id.* Like the specification, the prosecution history provides evidence of how the PTO and the inventor understood the patent. *Id* . Although the prosecution history is generally less useful than the specification for claim construction purposes, it can still inform the meaning of the claim language by demonstrating how the inventor understood the invention and whether the inventor limited the invention in the course of prosecution, making the claim scope narrower than it would otherwise be. *Id.*

Consideration of the intrinsic evidence should resolve any ambiguity in claim terms in most situations. *See id.* at 1313-14 (citation omitted). Only in instances where the meaning of the claim term remains ambiguous in light of the intrinsic evidence may the Court consider certain "extrinsic evidence" in construing the claims.

Dictionaries and treatises can also be useful extrinsic evidence, particularly when they inform the understanding a person of ordinary skill would have in light of the intrinsic evidence. *Id.* at 1318. However, precedent counsels against reliance on dictionary definitions at the expense of the specification, because such reliance "focuses the inquiry on the abstract meaning of words rather than on the meaning of claim terms within the context of the patent." *Id.* at 1321; *see also* Nystrom v. Trex Co., 424 F.3d 1136, 1145 (Fed.Cir.2005).

With all of these principles in mind, a court's ultimate goal is to construe the disputed terms consistently with the way an inventor defined them and a person of skill in the art would understand them. "The

construction that stays true to the claim language and most naturally aligns with the patent's description of the invention will be, in the end, the correct construction." Phillips, 415 F.3d at 1316.

III. PERSON OF ORDINARY SKILL

As mentioned above, a court must conduct claim construction against the backdrop of how a person having ordinary skill in the art would understand the patent. *Id*. at 1313. Second Rule proposes that the appropriate level of skill for the patents-in-suit is "a post-high school education in computer science, or related area, but not necessarily a four-year degree, as well as at least two years working in dveloping computer applications, or equivalent education and work experience." Def.'s Op. Br. at 3. Nomadix does not offer a contrary proposal, but indicates that it may take issue with Second Rule's proposed level of skill. Pl.'s Reply at 1-2.

In their disputes over the proposed constructions, the parties' arguments do not depend on variances in understanding that persons of different skill levels would have with respect to the claim terms . FN2 Accordingly, in the absence of a contrary proposal or evidence, the Court adopts Second Rule's proposed level of skill.

III. CONSTRUCTION OF THE CLAIM TERMS

Nomadix argues that, of the five patents-in-suit, only one claim term needs construction, the term "agent" from the '399 patent; with regard to all of the other claim terms, Nomadix argues, no construction is necessary because the meaning is clear. FN3 Second Rule, on the other hand, identifies for construction roughly 40 terms and phrases among the five patents-in-suit.

A court need not construe every claim term in a patent. *See* United States Surgical Corp. v. Ethicon, Inc., 103 F.3d 1554, 1568 (Fed.Cir.1997). Rather, a court during claim construction should only construe terms the meaning of which is the subject of legitimate disagreement, and should construe them in a way that will be helpful to the jury as it performs the second step of the infringement analysis. *See* Markman, 52 F.3d at 976. "Claim construction is a matter of resolution of disputed meanings and technical scope[.] ... It is not an obligatory exercise in redundancy." United States Surgical Corp., 103 F.3d at 1568. That said, a court should resolve all terms about which the parties have a legitimate dispute as to meaning, so as to avoid claim construction arguments in front of the jury. *See 02* Micro Intern. Ltd v. Beyond Innovation Technology Co., 521 F.3d 1351, 1361 (Fed.Cir.2008) ("A determination that a claim term 'needs no construction' or has the 'plain and ordinary meaning' may be inadequate when a term has more than one 'ordinary' meaning or when reliance on a term's 'ordinary' meaning does not resolve the parties' dispute.").

The parties agree that, because of the relationship between the patents-in-suit, to the extent the Court construes a term, the meaning of the term should be consistent both within the patent in which the term appears, Rexnord Corp. v. Laitram Corp., 274 F.3d 1336, 1342 (Fed.Cir.2001), and among the related patents that derive from the same initial application, Elkay Mfg. Co. v. Ebco Mfg. Co., 192 F.3d 973, 980 (Fed.Cir.1999).

While the Court finds it necessary to construe more than solely the term "agent" from the '399 patent, the Court does not find it necessary to separately construe every term the parties discuss in their briefs. Indeed, many of the disputes over claim terms boil down to a single disputed concept. *See, e.g.,* Subsection B, infra. The Court has identified for construction the terms discussed below. For the remaining terms, the Court finds that no construction is necessary and the terms will be given their ordinary meaning.

A. " *Agent* "/" *Absent Additional Agent* " (' 399 Patent)

Term	Nomadix's Construction	Second Rule's Construction	Court's Construction
agent	"special software for managing the communication between the computer and the gateway device"	"client software (such as a web browser, i.e., Internet Explorer)"	"special client software for managing the communication between the client and the gateway device"
absent additional agents implemented by a user's computer	absent additional special software implemented by the computer for managing the communication between the computer and the gateway device	without using an agent [client software] on the user's computer	absent additional special client software implemented by the computer for managing the communication between the computer and the gateway device

[1] The parties agree that the "absent additional agents" terms in the '399 patent require construction. The parties present separate constructions for "agent," as used in Claims 1, 6, 13, and 18; and for each of the phrases in which the term appears, "absent additional agents implemented the computer" (Claims 1 and 13) and "absent additional agents implemented by a user's computer" (Claims 6 and 18). The parties primarily argue over whether (1) these phrases require that the invention communicate with the user's computer to connect to the network without using *any* software on the user's computer or (2) the phrases merely require that the invention connect to networks and track usage without user needing to install special software for that connection.

The claim language and the specification provide little, if any, guidance as to the meaning of "absent additional agents." The lack of a definition for the phrase in the specification is perhaps the result of the context in which the phrase appeared. The original application, which did not include the "absent additional agents" limitations, was rejected as obvious over U.S. Patent No. 5,987,430 (Van Horne et al.)(the "Van Horne" patent). Lezama Decl. Ex. 8 ('392 Patent Prosecution History) at N002475-76. The applicants subsequently filed an amendment which added the "absent additional agent" limitations. The applicants argued that the Van Horne patent "provide[d] no teaching of a gateway device that can manage communication with a client absent special client software." Id. at N002487. The Examiner approved the patent, finding that, with these amendments, the invention was not obvious over the Van Horne patent. Id. at N002496-97.

The definition provided by the applicants during the amendment process is instructive as to how the "absent additional agent" phrases should be properly construed. The applicants defined the phrases in explaining how the invention was distinct from the Van Horne patent:

The present invention, and specifically the novel gateway device of the present invention teach and claim a method for automatic billing based on service usage that can be implement without the client implementing special client software (i.e., an agent) to manage the communication between the client and the gateway device.

Id. at N002487; *see also* id. ("In this situation, the user benefits from being able to access networks without having to implement (and store) special client software or reconfigure the computer in any other manner.").

The parties seem to agree that the teachings of the Van Horne patent are determinative in interpreting what the amendments (and therefore the "absent additional agent" limitations) mean. Arguing in favor of the patentability of the amended claims, the applicants represented to the Examiner that the Van Horne patent taught a system that required users to load "special client software" and possibly otherwise reconfigure their settings in order to make a connection to an electronic computer network. Id. at N002487-88. Second Rule argues that the Court should look to the Van Horne patent itself, rather than the applicants' interpretation of it in arguing the patentability of their amended claims.

Second Rule's protests notwithstanding, the Van Horne patent appears to require special client software. Claim 1 of the Van Horne patent has a limitation requiring that "the client system running client software for managing the communications between the client system and the electronic communications network." Moreover, the specification explains that "[t]he client system 10 operates client software 90 for use with the present invention." Van Horne Patent at Col. 6, ll. 56-57. The specification discloses a number of ways the special client software can be stored (e.g., through floppy disk or CD, or "loaded into volatile memory ... during operation"). The specification further discloses how the client software works with the server in making a connection, including updating components or installing missing components. *See* id. at Cols. 9-10. The explanation provided by the applicants, and the subsequent approval by the patent examiner support this construction.

Second Rule would limit the term "agent" to the general computer science definition, i.e., software that runs on a client's computer, or "client software" of any kind. Second Rule claims that the applicants disavowed the use of *any* client software during prosecution through its arguments regarding amendment. Second Rule overstates that disavowal. The applicants distinguished the amended claim from Van Horne on the ground that the Van Horne patent did not teach a gateway interface that works "Independent of Communication Managing Client Software Being Implemented on the Client." This argument does not disavow the use of *all* client software, but rather client software for managing the communications that needs to be implemented by the computer or user. Additionally, while the meaning of the term "agent" in the computer science field may simply be "client software," a court considers that definition in the context of the patent and its intrinsic evidence, including definitions provided by the applicants during prosecution. *See* Phillips, 415 F.3d at 1317 ("Like the specification, the prosecution history provides evidence of how the PTO and the inventor understood the patent."). Thus, the Court's construction modifies this dictionary term to reflect the specifics of the patent.

The parties also dispute the significance of the term "additional." Second Rule argues that because there is no mention of an "agent" otherwise in the claims, "additional" should be read to have no meaning. Nomadix criticizes Second Rule for reading "additional" out of the claim, and argues instead that the full meaning of "additional agent" should be "additional special software implemented by the computer for managing the communication between the computer and the gateway device." The Court finds that "additional" is not superfluous. The applicants explained during claim construction that the invention works without a user needing to install software for communicating that is different than what they already have to connect to the internet. The court may not rewrite the claim during claim construction, neither to read out language nor to import additional limitations. Accordingly, the Court will not read out the term "additional."

B. *Durational Terms: "Billing," "Call Accounting Record," "Access," and "Usage" Terms (*'399 Patent)

The parties also dispute terms related to usage and billing. While the parties set forth different constructions

of a number of phrases involving the terms "billing," "access," "usage," and "call accounting record," the conflict in constructions of each of these terms centers on two issues.

First, and primarily, the parties dispute whether the disclosed invention necessarily tracks and bills for the *duration* a client uses the network. In proposing its construction for the various billing terms, Second Rule does not seek to construe the terms "bill" or "billing" but rather to interpret "access" and "usage" within those phrases as "time spent using the network." *See* Joint Claim Construction Statment ("JCCS") Ex. A at 3-4. In proposing its construction for "call accounting record format," Second Rule primarily seeks to ensure that term is limited to necessarily include "data representative of the duration of the individual user/subscriber's use of the computer system." Id. at 6. And, in proposing its constructions of "access" and "usage," Second Rule seeks to ensure that access and usage include "the duration of such access." Id. at 8. Nomadix argues that the claim terms, as interpreted in light of the specification, are not so limited.

Second, and relatedly, the parties dispute whether measurements of access or usage can include billing for initial access, or necessarily include only duration after the client has connected to the network.

The language of the '399 Patent's claims does not expressly include a limitation as to whether the disclosed invention must track, provide data regarding, or bill for time spent on the network. Rather, the claim terms simply provide for billing for "usage" and "access" to the network, and that the data is sent to the management system in different protocols, such as a call accounting record format. Nor does the claim language provide further indications as to meaning, without additional interpretation of the protocols in the claims.

Second Rule's argument in favor of a duration-billing limitation begins with, and ultimately rests on, its interpretation of "Call Accounting Record." Second Rule argues that independent Claims 1 and 6 each require that data be formatted into Call Accounting Record format, which, according to Second Rule, necessarily includes a "duration" measurement. Accordingly, Second Rule argues, billing for usage and access in those claims must be based on duration. Moreover, because the term should be interpreted consistently throughout the ' 399 patent, billing throughout the various claims should include the durational limitation, including the billing terms in independent Claims 13 and 18. *See* Def.'s Opening Br. at 41-44; Def.'s Reply Br. at 15-19.

Because Second Rule's proposed interpretation of all of these terms relies on the requirements of "Call Accounting Record," it makes sense to begin construction there.

1. *Call Accounting Record*

[2] Independent Claims 1 and 6 include limitations related to Call Accounting Record ("CAR") format. FN4 CAR format is one way that the gateway device can format the data. ' 399 Patent at col.7 ll.53-55. The specification discusses the meaning of CAR beginning at Col. 7, l.53, with reference to Figure 3. The example of the CAR provided at Figure 3 includes a measurement of duration. The specification explains that the Figure 3 CAR "include data representative of month/day 310, extension/room 315, time 320, duration 325 (e.g., in minutes), charge 330, phone number 335, routing code 340, and the like, as well as additional data 300 that may be necessary for accurate ordering, transmittal, and/or reception of the call accounting record." Id. at col.7 ll. 58-64.

The specification makes clear that these data measurements are exemplary only. Indeed, the specification

repeatedly discloses that the data included can be modified "as needed to conform to the format requested by the management system." Id. at col.7 ll. 57-58; *see also* id. at col.8 ll.41-65. Figure 3 expressly includes a category for "additional data that may be necessary for" the CAR. Id. at col.7 l.62. But these modifications need not be *additions* to the data illustrated in Figure 3. Rather, the specification recognizes that there may be deletions or replacements of particular types of data, depending on the particulars of the management system. Id. at col.8, ll.49-65. The specification uses the example of telephone numbers, which are included in Figure 3, to illustrate this point, explaining:

[W]hen a user/subscriber is obtaining access to the hotel network via the gateway device, no telephone number is dialed or called. Therefore, when possible, data within the CAR format (i.e., telephone record), such as telephone numbers, may be replaced with a descriptive record that indicates some other data that the property management systems wishes to track ro record.

Id. at col.8 ll.55-61.

Moreover, this interpretation is consistent with the remainder of the written description, which refers to billing for usage and access to networks, but couches its disclosures in permissive, not mandatory, language and repeatedly discloses that the information should be adjusted for the particulars of the situation. *See,* e.g ., id. col.3 ll. 14-17 ("data representative of he user's access to the computer network *can include* ...") (emphasis added); col.6 ll.36-41 (the gateway device "can" monitor and record information "such as" identity, time, etc.); col.7 ll.43-47.

Accordingly, the proper construction of CAR does not include a durational limitation.

Aside from this durational argument, the parties' proposed constructions of the term "call accounting record" differ. While Nomadix proposes that the term be construed as "a format that can be used to organize data related to telephone calls," Second Rule's construction (without the durational limit) reads: "a data record format corresponding to an individual user/subscriber's use of the computer system." Read in the context of the claims, the Court does not find a meaningful difference between these two constructions. The Court adopts Nomadix's construction, however, because it is less cumbersome.

2. ***Billing Terms***

As noted above, Second Rule's construction of the various phrases does not revolve around the term "billing," but rather around the "usage" and "access" portions of those phrases. For example, when Second Rule asks the Court to construe the phrase "for automatically billing the user *based upon usage* of the computer network," its proposed construction is "for automatically billing the user *for time spent* using the computer network." FN5 These proposed constructions are consistent with its proposed constructions for "access" and "usage," for Claims 6 and 18. Accordingly, it seems best to discuss "access" and "usage" as opposed to "billing." The proper construction of the phrases identified in the "billing terms" category will incorporate those constructions, and need no separate analysis.

3. ***Access and Usage***

Second Rule's arguments regarding the "access" and "usage" terms are largely based on the analysis it proffers for CAR. Second Rule bolsters its arguments with regard to usage and access by arguing that the terms necessarily include time spent on the network, as opposed to simply charge for accessing the network, because the specification indicates an "intentional disavowal of any construction" of the billing and usage

terms that would cover pre-payment billing for network access.

If the specification reveals an intentional disclaimer or disavowal of claim scope by the inventor, "the inventor has dictated the correct claim scope," and that intention is dispositive. Phillips, 415 F.3d at 1316. A disavowal must be clearly expressed. Teleflex, Inc. v. Ficosa N. Am. Corp., 299 F.3d 1313, 1325 (Fed.Cir.2002).

Here, the specification does not include such a disavowal, and Second Rule's argument to the contrary is unavailing. While the specification discloses that the invention can be used such that users do not have to pre-pay for access, it also contemplates an authorization sequence that would require the user "to enter a user name and ID to identify the user, or may require registration (e.g., input of a credit card number) or pre-payment for use of the system." *Compare* '399 Patent at col.6 ll.21-26 *with* id. at col.6 ll.42-48. The criticisms of an "onerous" billing procedure in the specification likewise do not preclude billing for access itself because the criticism rests on issues of efficiency, not what is being billed. *See* id. at col.2 ll.14-20, 33-42.

[3] Rather, the specification seems to suggest that charges for access itself are included in the invention. In discussing the integration of the billing features of the invention with different types of management systems, the specification explains that "the management system can register network access as a long distance call, or can establish a special fee for such access and add the cost of that access to a customer's bill in the same manner as a long distance call." Id. at col.9 ll.5-23.

Because the claim language does not suggest a limitation on the terms "access" as "usage" that requires data and charges be durational in nature; because the specification likewise does not suggest the claims are so limited; and because the parties have pointed to no portion of the prosecution history that speaks to this term, the Court will not read in a limitation. *Cf. Renishaw PLC v. Marposs Societa' per Azioni,* 158 f.3d 1243, 1249-50 (Fed.Cir.1998).

In light of the Court's construction, the phrases disputed by the parties are properly construed as follows.

Phrase	**Court's Construction**
'399 Claim 1: "for automatically billing the user based on usage of the computer network"	"for automatically billing the user based on usage of the computer network"
'399 Claim 13: "for automatically billing the user based upon the physical location of the user and the usage of the computer network"	"for automatically billing the user based upon the physical location of the user and the usage of the computer network"
'399 Claim 13: "for billing purposes"	"for billing purposes"
'399 Claims 1 & 6: "call accounting record format"	"a format that can be used to organize data related to telephone calls"
'399 Claims 1 & 6: "a call accounting record"	"a protocol that can be used to organize data related to telephone calls"
'399 Claim 6: "collecting data corresponding to the user's access to said computer network"	"collecting data corresponding to the user's access to said computer network"
'399 Claim 18: "the user's network usage"	"the user's use of the computer network"

C. " *Data* " ('399 Patent *and* ' 727 Patent)

Term	Nomadix's Construction	Second Rule's Construction	Court's Construction
'399 Patent, Claim 1: "data," in the phrase: "wherein said management system receives the data formatted by the network gateway dvice and utilizes the data formatted by the network gateway device for billing purposes"	No construction necessary	The meaning of "data" when read in the context of the patent is "the call accounting record format data"	The meaning of "data" when read in the context of the patent is "the call accounting record format data"
'727 Patent, Claim 11: "data"	information contained in one or more packets	packets of data	information contained in one or more packets

The parties have put two "data" terms at issue.

[4] With regard to the '399 patent, the Court agrees with Second Rule that, in context, the meaning of "data" in this phrase is "the call accounting record format data." Nomadix argues that there is no need for construction, but does not dispute this interpretation in its briefs. For the sake of clarity at the infringement stage, the Court adopts this Construction.

In the context of the '727 Patent, the parties dispute whether the term "data" should be limited to multiple packets of data or should also include a single packet of data. To support its construction that data must be more than one packet, Second Rule points to the language of Claim 17 as well as other references to "packets" throughout the specification.

The term "data" is not limited to multiple packets because there is no indication of such a limitation in either the claims or the specification. The specification uses both the singular and plural form of the term "packet." Although the specification makes frequent references to the plural "packets," the specification also refers to "packet" at many other points. *E.g .*, '727 Patent at col. 4, ll. 52-55; Fig. 4; col. 6, ll. 61-65; col. 13, ll. 36 & 65; col. 14, l.6. Accordingly, the proper construction of "data" is that set forth by Nomadix.

C. " ***Intercepting*** **"** Terms **(** ***'892, '727, '894,*** '009 Patents **)** FN6

Term	Nomadix's Construction	Second Rule's Construction	Court's Construction
intercepting	"handling [e.g., data, packets] targeted for another device"	"stopping, seizing, or interrupting in progress [e.g., data, packets] that is not intended for the network device"	
"receiving and processing [e.g., data, packets] targeted for another device"			

[5] The term "intercepting" is at issue in four of the patents, and is used in eight phrases offered for construction. While their constructions of the term "intercepting" are different, each party uses its construction consistently for each term. The parties' constructions differ in two respects: (1) their characterizations of what the device does to the data ("handling" as opposed to "stopping, seizing, or

interrupting in progress") and (2) their phrasing of where the data or packets are originally directed.FN7

The use of "intercepting" in the '892 patent indicates that "intercepting" refers to the action of "receiving" packets that are not intended for it. Within the language of Claim 1, the use of "intercepting" in context appears to indicate that the device is not the intended recipient of the packets, but somehow acquires them. Additionally, in the portion of the specification describing "Initialization and Self-Configuration," the specification repeatedly uses the terms "receive" and "accept" to describe what the nomadic router does with packets or requests intended for another device. *See, e.g.,* ' 892 Patent, Col. 11, l.65; Col. 12, ll. 28, 56, 60; *see also* id. at Col. 6, l.57 (describing the role of routers generally as to "accept").

The prosecution history highlighted by the parties provides further guidance, and confirms that the Applicant was using the term "intercept" to mean "receive and process." The parties' arguments rely on the same portion of the prosecution of the '892 patent. In explaining the invention to the patent examiner during the prosecution of the '892 patent, the Applicant explained:

Applicants' solution to establishing communication with an incompatible or improperly configured device was to intercept packets transmitted from the device. Applicants provide three examples (of the many possible) of how packets can be intercepted.... **In each case, the present invention intercepts packets, i.e., receives and processes packets,** which are not intended for the nomadic router/translator and in fact are likely intended for a device or host (such as a router or gateway) which is not on the foreign network (thus, are incompatible).

Lezama Decl. Ex. 6 at 110 ('892 prosecution history at N000610) (emphasis added). Moreover, during reexamination, the patent examiner explicitly construed "intercepting" to mean "receiving." *See* Lezama Decl. Ex. 7 at 117 ('892 patent file at N010655).FN8 The Court finds the definition provided by the Applicant here to be the most appropriate and consistent. FN9

The Court views Nomadix's construction, "handles," as close to the one it adopts, but too broad in light of the prosecution history it relies on in its brief. While arguing that the Applicant expressly defined the term "intercepting" and quoting the "i.e., receives and processes" language in support of that claim, Nomadix chooses a different word altogether and then argues that the term is "consistent" with the definition provided in the prosecution history. The Court finds it more appropriate to use that direct language.

Second Rule points to a dictionary definition of "intercepting," and argues that the definition there provides the appropriate "ordinary meaning" of the term. Although Second Rule's argument may indeed be persuasive in the absence of intrinsic evidence, the meaning of the term conveyed through the patent claim, specification, and prosecution history suggests that a different definition is more appropriate here. *Cf.* Phillips, 415 F.3d at 1317-19.

While the claim language appears to encompass "stopping, seizing, or interrupting in progress" data, the term does not appear so limited. That said, Second Rule's construction finds some support from the specification. For example, the specification of the '892 patent describes the nomadic router as "redirect[ing]" packets outbound from the host computer to itself. '892 Patent, Col. 11, ll.50-56. The use of this term squares with the characterization of "intercepting" as "interrupting" in the intended progress toward another device. However, with no disavowal and no use of any of the words "stop," "seize," or "interrupt," the Court finds Second Rule's construction inappropriately limiting. The Court also notes that Second Rule, like Nomadix, quotes the portion of the prosecution history that defines "intercepts" and

argues that its proposed construction-again, using different words-is more consistent with that definition.

Additionally, the parties' proposed constructions differ in the precise language they use to indicate that claimed inventions receive and process information intended for another network. Substantively, the Court finds no difference in what Nomadix's and Second Rule's proposed constructions intend to convey, and neither party's reply takes issue with this part of its opponent's construction. The Court adopts Nomadix's construction of this term, however, because it provides a more concise means of conveying the same definition.

D. " *Original Destination Address Access Request* " Terms (' 894 Patent)

Term	**Nomadix's Construction**	**Second Rule's Construction**	**Court's Construction**
Claim 1: "all original destination address access requests originating from a computer"	"all access requests for an original destination address originating from a computer"	"all requests originating from a computer to communicate with a specific internet address or email account"	"all access requests for an original destination address originating from a computer"
Claim 6: "the original destination address requests from the computer"	"all access requests for an original destination address from the computer"	all requests originating from a computer to communicate with a specific internet address or email account"	"all access requests for an original destination address from the computer"
destination address		[derived from proposed construction above:] a specific internet address or email account	a specific network location, such as an internet address, email account, FTP address, or other address accessible via an online service

[6] Turning to the '894 Patent, the parties next argue over the terms "original destination address access requests" and "original destination address requests." As described above, the invention disclosed by the '894 Patent is essentially a forced-redirection service that functions without requiring the user to reconfigure the computer or otherwise install software. For example, when a hotel guest attempts to access a specific internet location such as an internet address or an email account using internet services provided by the hotel, the invention allows the hotel to forcibly redirect the guest to a "portal page," which can, for example, require a logon or provide a description of the hotel's services. The patent appears to use "original destination address access request" and "original destination address request" to refer to the location that the computer is seeking in its initial connection, e.g., an initial internet homepage like Google. The invention intercepts these requests, decides whether redirection is necessary, and proceeds through additional steps.

The parties appear primarily to disagree over (1) the extent to which the term needs construction and (2) whether the "destination address" must be limited to a "specific internet address or email account." Even if the individual words are readily understandable, the Court finds that construction would be helpful to a jury because the terms take on a more technical meaning in the context of the patent. Moreover, the parties dispute the scope of what they designate, and the jury will need guidance as to what structure is covered by the patent and what is not. *Cf. 02* Micro Int'l, Ltd., 521 F.3d at 1361.

The claim language does not specifically address the meaning of "original destination address request." The

claim language indicates, however, and the parties do not appear seriously to dispute, that at the very least the "original destination address request" is different than the "redirected destination address." *Compare* '894 Patent col.13 ll.50-51 *with* id. col.13 ll.61-64. While the invention "receives" all original destination address access requests, it replaces those that need to be redirected with a "redirected destination address." *See* id. col.13 l.50-col.14 l.3. Accordingly, the Court finds the use of the word "original" to be meaningful and helpful. Second Rule's proposed construction involving "originating from the computer," though perhaps not incorrect, is potentially confusing when the terms "original" and "redirected" appear to refer to the particular type of "destination address."

Aside from suggesting that "original" has a particular meaning, however, the claim language does not otherwise indicate the scope of an "original destination address access request" as disputed by the parties. That is, the claim language does not indicate whether the destination address is limited to an internet address or email account. Both parties look to the specification for support. Neither party points to any portion of the prosecution history that would modify or supplement this interpretation.FN10

While the written description expressly mentions internet addresses and email accounts, the invention does not appear limited to them. When the specification refers to internet addresses or email accounts, it does so with permissive language or language indicating an non-exclusive example. In the "Summary of the Invention," for example, the inventor suggests the term "original destination address access request" "can include" an HTTP protocol. Id. col.4 ll.22-31 ("[R]edirecting the browser located on the user's computer *can include* receiving a Hyper-Text Transfer Protocol (HTTP) request for the destination address and responding with an HTTP response corresponding to the login page." (emphasis added)); *see also* id. col.5, ll.5-11 ("The method includes receiving at a gateway device a request from a user for access to a destination address, *such as* an Internet address ..." (emphasis added)); id. at col.9, ll.31-33 ("This can occur where a user initially opens a web browser resident on the user's computer and attempts to access a destination address, *such as* an Internet site."). At other points, the inventor uses the broader term "destination network" or "destination location." *See* id. at col.5 ll.22-30 ("... where the AAA server intercepts the request from the user for access to the destination network and redirects the user to a portal page ..."); id. at col.5 ll.43, 49; col.7 ll.62-63; col.9 l.27.

Additionally, the specification explicitly contemplates "destination address" locations other than Internet sites and email accounts. After using the internet as an example, the inventor explains that "[t]he destination address can also include any address accessible via the network or an online service, and can include the portal page." Id. at col.9, ll.33-36. The specification goes on to indicate that a management system can decide what requests to redirect: redirection can be tailored to include only webpages, as opposed to "all traffic, including E-mails, FTPs, or any other traffic. Therefore, once authorized, if a user does not attempt to access a webpage through the user's internet browser, the gateway device can forward the communication transparently to user's requested destination without requiring the user to access the portal page." Id. at col.9 ll.41-48. Because the invention describes how address request redirection can be limited, by implication the types of original destination addresses contemplated in the invention are more numerous.

Some of the language in the '894 Patent does suggest that destination address are limited in the way Second Rule suggests. For example, the explanation of Home Page Redirect does not use open language of the type quoted above: "More specifically, the gateway device, AAA server, or portal page redirect unit receives the user's HTTP *request for a web page* and sends back the HTTP response...." Id. at col.9 ll.15-18 (emphasis added). In the context of the patent as a whole, however, the Court does not think that a person of skill would read this language as limiting.

As support for its interpretation of "address," Second Rule proffers a dictionary entry that defines "address" as "a name or a sequence of characters that designates an email account or a specific site on the Internet or other network." Def.'s Op. Br. at 15 (citing *Am. Heritage Dictionary of the English Language* (4th Ed., 2000)). Although dictionary definitions are relevant to the understanding of claim terms and establishing their ordinary meaning, the Court does not find the dictionary definition persuasive here because the intrinsic evidence, i.e., the examples used in the specification, suggests that internet sites and email accounts are non-exclusive examples. Additionally, the Court notes that Second Rule has further limited its construction from the dictionary definition it quotes: while the dictionary definition includes "other network," Second Rule's construction eliminates this language.

Accordingly, the Court finds that "destination address access request" is not limited to a request to communicate with a specific internet address or email account. At the same time, however, the Court finds Nomadix's construction only partially helpful: a jury may still need help understanding what a "destination address" is. The Court finds examples appropriate to illuminate that meaning, and adopts as the definition of "destination address" the following phrase: "a specific network location, such as an internet address, email account, FTP address, or other address accessible via an online service." The Court emphasizes that the list following "such as" is meant to be helpful to a jury but, consistent with the discussion above, not exclusive. Otherwise, the Court adopts Nomadix's construction of the phrases at issue.FN11

E. " *Storing,*" " *Stores,*" " *Stored* " (' 894 Patent)

Term	Nomadix's Construction	Second Rule's Construction	Court's Construction
Claim 1: storing	preserving	recording data into a data storage device	recording data into a data storage device
Claim 6: stores	preserves	records data into a data storage device	records data into a data storage device
Claims 1 & 7: stored	preserved	recorded data on a data storage device	recorded data on a data storage device

[7] The parties also debate the meaning of the verbs "storing," "stores," and "stored" in the context of the '894 patent. Second Rule argues that its construction reflects the ordinary meaning because it is consistent with the commonly used definitions in a technical dictionary, as well as the prosecution history and the specification. Nomadix objects to Second Rule's construction of the term on the ground that it is inappropriately limiting. Nomadix primarily argues that Second Rule's interpretation "implies that the data is stored in one location either permanently or long term." Pl.'s Op. Br. at 37. Second Rule, however, expressly disclaims such a limitation in its Reply Brief. Def.'s Reply at 22 ("Nomadix suggests that Second Rule's common definition 'implies that the data is stored in one location either permanently or long term.' There are no such implications of further limitations in Second Rule's proposed construction.").

With the understanding that none of the "storing" terms are limited to long-term storage, and rather *can* include dynamic memory such as RAM, the Court finds Second Rule's construction of "storing" persuasive. Accordingly, the Court finds that the proper construction of "storing" is "recording data into a data storage device." This construction reflects the ordinary meaning of the term because it is the definition provided by a relevant technical dictionary. *See* McGraw-Hill Dictionary of Scientific and Technical Terms (6th Ed.2002). FN12 Additionally, this construction appears consistent with the way "storage" is used in the

prosecution history and throughout the specification, which appear to contemplate a location for the preserved data. In its Amendment and Response to the patent office action rejecting some of its claim terms, the applicants explained the invention by using the phrase "placed in storage" to describe the storage functions reflected by the claim terms that are at issue here. *See* Foster Decl. Ex. B-3 at 5 ("If redirection of the destination address access request is required, then the original destination address is placed in storage ..."). Moreover, throughout the specification, the inventors repeatedly use "storing" language in conjunction with a information contained in a user profile database. *E.g.,* Col.3 l.50; Col. 4 ll.3, 41, 46-47; Col. 11 ll.18-20; Col. 12 ll.24-28; Col.13 l.27. (As Nomadix points out, and Second Rule appears to concede, there is no language limiting the information stored in that database to long-term storage.) Although the Court does find the construction it adopts more limited than "preserving," Nomadix has set forth no further arguments showing how this ordinary meaning conflicts with the intrinsic or other evidence, or how its definition better comports with the appropriate meaning in the context of the context of the patent.

F. "*Browser Redirect Message*" (' 894 Patent)

Term	Nomadix's Construction	Second Rule's Construction	Court's Construction
Claims 1 and 6: "a browser redirect message"	a message instructing a computer receiving the message to redirect	an HTTP redirect message	a message instructing a computer receiving the message to redirect its browser

[8] Because the parties dispute the meaning of the term "browser redirect message" in the context of the patent, and because the term is a technical one, the Court considers construction necessary. *Cf. 02* Micro Intern. Ltd., 521 F.3d at 1361.

Second Rule argues that the appropriate construction defines "a browser redirect message" as identical to the commonly used term "HTTP redirect message." Essentially, Second Rule argues that there is no ordinary meaning of the term "browser redirect message," and it is not mentioned in the specification. Accordingly, Second Rule argues, the Court should look to the extrinsic evidence. An "HTTP redirect message," which serves a function similar to the "browser redirect message," was a known redirection method at the time of filing. *See* Def.'s Op. Br. at 20-21 & Foster Decl. Ex. F.

Nomadix argues that the term is not limited to HTTP protocol because other protocols (and redirection of them) were available at the time the claim terms were filed; because the references incorporated into the patent application contemplated those additional protocols; and because most browsers supported a number of different protocols. Additionally, Nomadix argues that claim differentiation supports its construction that redirection is not limited to HTTP.

The Court agrees with Nomadix that the term "browser redirect message" is not limited to HTTP, even if the inventors anticipated that HTTP would be the most commonly used protocol. Claim construction rests primarily on intrinsic evidence; however, "less reliable" extrinsic evidence "can shed useful light on the relevant art." Phillips, 415 F.3d at 1317-18. Here, the intrinsic evidence indicates that the term "browser redirect message" can include protocols aside from HTTP.

In the context of the '894 Patent, the browser redirect message serves to "reassign[ ] the modified request to an administrator-specified, redirected destination address." '894 Patent, Claims 1 & 6. *Cf.* K-2 Corp. v. Salomon S.A., 191 F.3d 1356, 1363 (Fed.Cir.1999) ("[F]unctional language is, of course, an additional

limitation on the claim."). Aside from this functional limitation, the claims themselves do not impose a limitation on what a "browser redirect message" is.

The language in the specification lays the foundation for both Nomadix's and Second Rule's constructions. The Summary of the Invention portion of the specification uses open, not exclusive, language to describe redirection. The Summary discloses that "redirecting the browser located on the user's computer *can* include receiving a Hyper-Text Transfer Protocol (HTTP) request for the destination address and responding with an HTTP response corresponding to the login page." '894 Patent col.4 ll.24-31 (emphasis added). The explanation of redirection in the description of one preferred embodiment uses more limited language, however. The specification explains that " *[t]he* redirection" utilizes "Home Page Redirect(HPR)," and "specifically" explains that, pursuant to HPR, the requests for access and the responses are in HTTP. Id. at col.9 ll.5-25. *Cf. Honeywell Int'l,* 452 F.3d at 1318 (repeated use of phrase "the invention" in connection with descriptions relevant to finding limitation). While a court interprets claim terms in light of the specification and the embodiments described therein, a court should avoid reading limitations into a claim term from the preferred embodiments. Phillips, 415 F.3d at 1323; Andersen Corp. v. Fiber Composites, LLC, 474 F.3d 1361, 1373 (Fed.Cir.2007). The Court is hesitant to read a limitation in from this characterization, but considers it relevant in assessing the scope contemplated by the patent.

In the context of the disclosures incorporated in the prosecution history, however, the Court finds that as a whole the intrinsic evidence suggests that the claim term is not limited to HTTP. During prosecution of the '894 patent, the Patent Office considered a number of U.S. and foreign patent documents. Lezama Decl. Ex. 15 ('894 Patent File History) at N000822-23, N001089-91, N001207 (Information Disclosure Statements and References Cited). *See* Phillips, 415 F.3d at 1317 (intrinsic evidence "includes the prior art cited during the examination of the patent"). Those references indicate: (1) that although HTTP was the most commonly used transfer protocol, other protocols were also in use, Lezama Decl. Ex. 16 at col.1 ll.26-41 (listing other protocols in addition to HTTP); (2) that redirection was possible for those other protocols, Lezama Decl. Ex. 17 at 1; and (3) that popular browsers such as Internet Explorer supported those other protocols, Lezama Decl. Ex. 18 at col.5 ll.24-32; Ex. 19 at col.21 ll.30-31. Against this backdrop, the Court finds it likely that a person of skill in the art would understand the term "browser redirect message" was not limited to a single (popular) protocol, and that it was broader than the redirection method "HTTP redirect message."

In addition to the art referenced in the prosecution history, claims cancelled during prosecution support this construction. Original Claim 9, which was cancelled after it was rejected during prosecution, included a single limitation above the claim on which it depends, Original Claim 7. Original Claim 1 did not include a redirection limitation. Original Claim 7, which depended on Original Claim 1, added redirection, claiming: "[t]he method of claim 1, further comprising the step of directing the user to a portal page after the step of receiving from the user a request for access to the destination network and prior to the step of determining if the user is entitled access to the destination network." Foster Decl. Ex. B-4 at 21. Claim 9 added only one further limitation, that requiring HTTP redirection. It claimed "[t]he method of claim 7, wherein redirecting the browser located on the user's computer includes receiving a[n] [HTTP] request for the destination address and responding with an HTTP response corresponding to the login page." *Id*. Because Original Claim 9 was a dependent claim, and because it included only a single limitation beyond the redirection suggested in Original Claim 7, the doctrine of claim differentiation counsels against reading an HTTP limitation into the other prior claims. *See* Acumed LLC v. Stryker Corp., 483 F.3d 800, 806 (Fed.Cir.2007)(noting that the claim differentiation presumption "is especially strong when the limitation in dispute is the only meaningful difference between and independent and a dependent claim"). Accordingly, the suggestion is that the redirection technique contemplated by Original Claim 7 was not limited to HTTP.

Additionally, Original Claim 9 suggests that the inventors knew how to indicate HTTP when they so intended.

Of course, because these claims were cancelled, the Court does not consider them dispositive. At the very least, however, these cancelled claims support the conclusion that, while the inventors contemplated that browser redirection would likely be done through HTTP, a "browser redirect message" is not limited to HTTP.

Second Rule's citation to extrinsic evidence for how a person of skill would understand "browser redirect message" is relevant. Indeed, the Court credits the comparison in function between an "HTTP redirect message" and the apparent function of the "browser redirect message" here. Because "HTTP redirect message" is more limiting than the intrinsic evidence appears to require, however, the Court does not find it to be the proper construction.

Accordingly, the Court finds that "browser redirect message" cannot properly be construed as "HTTP redirect message," and largely adopts Nomadix's construction of the term. The Court also notes, however, that Nomadix's proposed construction reads out the term "browser." For the sake of clarity as to what the computer is being instructed to redirect, the Court inserts the word "browser" into Nomadix's definition, so that it reads: "a message instructing a computer receiving the message to redirect its browser."

G. " *Selectively Modifying* " *and* " *Selectively Providing* " (' 009 Patent)

Term	Nomadix's Construction	Second Rule's Construction	Court's Construction
Claims 1 & 23: selectively modifying intercepted packets	choosing whether to modify intercepted packets and accordingly modifying intercepted packets	choosing which intercepted packets will be altered and accordingly modifying such intercepted packets	choosing whether to modify intercepted packets and accordingly modifying intercepted packets
Claims 1 & 23: selectively providing network services	choosing whether to provide network services and accordingly providing network services	choosing which network services will be provided and accordingly providing network services	choosing whether to provide network services and accordingly providing network services
selectively provides a proxy service	chooses whether to provide a proxy service and accordingly provides a proxy service	chooses which proxy services will be provided and accordingly provides proxy services	chooses whether to provide a proxy service and accordingly provides a proxy service

Because the parties dispute the meaning of the term "selectively" in the context of the patent, the Court considers construction necessary. *Cf. 02* Micro Int'l Ltd., 521 F.3d at 1361.

[9] The parties' dispute as to these terms centers on whether the term "selectively" in "selectively modifies" and "selectively provides" means "choosing *which* " or "choosing *whether*." That is, Second Rule essentially argues that the limitation requires the invention to actually modify packets or actually provide a network or proxy service; Nomadix argues that the limitation requires the device to choose whether a packet needs to be modified, or whether a proxy service needs to be provided, but the invention need not always modify the packet or provide a service.

The intrinsic evidence supports "choosing whether" as the proper construction for both the "selectively modifying" and "selectively providing" terms. In particular, the preferred embodiments contemplate that the invention may not modify packets or provide services in every instance. The specification explains that, while all packets are monitored, not every user's packets require modification. The specification describes packet translation and processing with attention to Figure 6. *See* '009 Patent at col.8 l.41-col.9 l.33. The specification explains that packet translation may not occur for every subscriber: the configuration manager only provides address translation "when the subscriber is mis-configured for the foreign network," but it must "monitor all packets to determine when to selectively perform address translation." Id. col.9 ll.11-15; *see also* id. col .9 ll.49-50.

Additionally, proxy services need not be provided to every subscriber. The specification describes proxy processing with reference to Figure 13. *See* id. at col.14 l.43-col.16 l.15. Figure 13 shows that the configuration manager/adapter's initial step is to determine "whether the subscriber is proxied, i.e. whether the client browser or other application is configured to use a proxy server." Id. at col.14 ll.46-49. If the subscriber is not proxied, the sequence bypasses the steps for providing proxy services. *See* id. at Fig.13. However, proxy service may be provided even when not otherwise required for a connection. Even if the client browser in not configured to use a proxy server, the access provider may require proxy service for security purposes. Id. at col.16 ll.4-13. The specification frames this forced-proxy alternative as possible, but not mandatory for every embodiment of the invention.

Second Rule suggests that this construction is too broad, and draws the Court's attention to two arguments. First, Second Rule sets forth a claim differentiation argument. It argues that construing "selectively" as "choosing whether" makes the term equivalent to "determining whether," a phrase used in Claim 34. Claim differentiation has less persuasive force when considered with phrases used in different independent claims. *See* Curtiss-Wright Flow Control Corp. v. Velan, Inc., 438 F.3d 1374, 1380-81 (Fed.Cir.2006); *see also* Hormone Research Foundation, Inc. v. Genenetech, Inc., 904 F.2d 1558, 1567 n. 15 (Fed.Cir.1990). Moreover, the additional language in this construction-"and accordingly modifying ..." or "and accordingly providing ..."-gives the "selectively" terms a different meaning than "determining whether."

Second Rule also argues that this construction could read the "selectively" limitation out of the claim because it could, for example, allow a system to infringe the patent if it never modifies packets or if it modifies every packet, in either case because the system *always* chooses to do those things. When considered in the context of the patent as a whole, including the claims' other limitations and the intrinsic evidence, the Court is not persuaded that this concern should trump the construction suggested by the specification.

Rather, the Court finds that the intrinsic evidence supports Nomadix's construction of the "selectively" phrases, and adopts that construction. *See* Phillips, 415 F.3d at 1316.

G. *Terms Not Requiring Construction*

To the extent Second Rule has asked the Court to construe terms not listed here, the Court finds it unnecessary to do so.

III. CONCLUSION

For the foregoing reasons, **the Court adopts** the constructions of the claim terms identified above.

IT IS SO ORDERED.

FN1. Second Rule noticed a partial motion for summary judgment to be heard on October 20, 2008. In its motion, Second Rule argues that four of the five patents-in-suit contain claims that fail to meet the requirements of 35 U.S.C. s. 112, and are therefore invalid.

FN2. The parties' arguments with respect to at least one of the claim terms at issue, however, do reference the understanding that "one skilled in the art" would have. *See* Pl.'s Reply at 22 (discussing "browser redirect message" in the '894 Patent).

FN3. However, Nomadix sets forth its proposed constructions in case the Court does find construction necessary.

FN4. The limitation in Claim 1 provides: "wherein the network gateway device formats the data into call accounting record format ..."; the limitation in Claim 6 provides "reconfiguring said data into call accounting record format."

FN5. The only "billing" phrase for which Second Rule does not include a durational limitation is "for billing purposes." Second Rule's construction is "to bill the user." The Court finds that this phrase does not need construction.

FN6. The Court properly rests construction of the "intercepting" terms on the '892 Patent. The '727 Patent is a continuation of the ' 892 Patent. The '009 and '894 Patents incorporate the '892 Patent' s specification by reference.

FN7. In its opening brief, Second Rule construes the full term "intercepting packets transmitted from the user device which would otherwise be dropped by devices on the foreign network" as "stopping, seizing, or interrupting in progress a packet transmitted from the user device that is not intended for the network device." However, in other places, Second Rule appears to treat this "not intended for the network device" language as part of its definition for "intercepting." The Court treats it as the latter.

FN8. Second Rule cautions against the use of arguments from reexamination to broaden a patent holder's claim term. The Court is careful not to do so here. Rather, the Court finds that this particular comment is consistent with the remaining record.

FN9. The dependent claims in the '892 patent provide additional guidance, suggesting there is more to "intercepting" than just "receiving." In Claims 2-4, "intercepting" constitutes both intercepting some kind of broadcast from the host computer and replying with more information. Although the Court will not import limitations from dependent claims into the independent claims, *see* Acumed LLC v. Stryker Corp., 483 F.3d

800, 806 (Fed.Cir.2007), this interpretation supports a construction of the term that includes receiving and processing. "Handles," Nomadix's proposed construction, also indicates action beyond simply "receiving."

FN10. Second Rule does, however, give context to how the term was added.

FN11. This construction is consistent with the Court's construction of the term "browser redirect message," below, which anticipates more than simply an HTTP protocol.

FN12. The patent application was originally filed in 1999; in response to a patent Office Action rejecting the original 16 claims, the applicants filed an amendment in 2003, which added the claims that would become Claims 1, 6, and 7. *See* Foster Decl. Exs. B-2 & B-3. Accordingly, this definition is contemporaneous and relevant in determining the ordinary meaning.

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