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.

April 17, 2009.

AMENDMENT TO 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 various claims of United States Patent Nos. 6,244,758 (the "'758 Patent"), 6,300,863 (the "'863 Patent"), and 6,507,914 (the "'914 Patent"). Document No. 1 at 3-7; Document No. 91 at 1 n.1.; *see also* Document No. 177 at 1-2 & n.1. Stealth counterclaimed, alleging that Absolute infringes various claims 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; *see also* Document No. 177 at 2.

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 155-58.

On February 8, 2008, I submitted the Report and Recommendation on Claim Construction, incorporated herein by reference, setting out my recommendations on the correct construction for each of the 28 disputed terms in the patents-in-suit. Document No. 177. Following the submission of this Report, the parties submitted various objections and responses to the recommendations contained in the Report. *See* Document Nos. 178-79, 181-83, and 189. After carefully considering these objections and responses, I apprised the Court of my desire to file an amendment to the Report, and the Court by Order dated October 1, 2008, notified the parties that it would receive this Amendment and defer ruling on the parties' pending objections until the Amendment is filed. Document No. 197.

Accordingly, this Amendment sets forth a revised construction for three claim terms originally construed in

my earlier Report and Recommendation on Claim Construction. All other recommended constructions in the Report remain unchanged.

I. *Revised Claim Constructions*

A. "*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. Prior to the *Markman* hearing and the Report and Recommendation on Claim Construction, Absolute suggested a construction for this term of "[w]ithout human intervention." Document No. 139 at 5. Stealth, on the other hand, suggested a construction of "[w]ithout requiring an external event." Id. In the Report and Recommendation on Claim Construction, I adopted Stealth's proposed construction, recommending a construction of "without requiring an external event ." Document No. 177 at 39-40.

Absolute now agrees that its original construction for this term of "[w]ithout human intervention" was incorrect. Document No. 178 at 6 & n.3. Instead, Absolute now offers a construction for the new phrase "automatically providing" of "the agent being programmed to furnish, supply, or make available." Id. at 2-3. However, the term "automatically," not "automatically providing," was identified by the parties as a disputed term in the parties' Joint Claim Chart of Disputed Claim Terms. Document No. 139 at 5. Indeed, this chart was actually submitted by Absolute, id. at 2, and I see no suggestion there that the term "automatically providing" was a disputed term or should have been included in the chart, nor does Absolute now point to any such suggestion.

Furthermore, the chart also included the term "providing" as a disputed term, and I have already recommended in the Report and Recommendation on Claim Construction a construction for the term "providing." Document No. 177 at 33. The recommended construction for the term "providing" is: "the agent furnishing, supplying, or making available." Id. Comparing this recommended construction for "providing" to Absolute's newly proposed construction for the phrase "automatically providing," it appears that Absolute now seeks, in effect, to construe the term "automatically" as "being programmed to."

Absolute also now argues that the term " 'automatically' by itself does not need any special construction," suggesting that instead "[i]t is the case with the word 'automatically' that the plain meaning is sufficient." Document No. 178 at 2-3. Absolute offers two dictionary definitions-"self acting" and "having a self-acting or self-regulating mechanism"-and states that "[n]either Stealth nor the Special Master has pointed to any intrinsic evidence suggesting that some other meaning should be given to the term 'automatically.' " Id. at 3-4. However, this seems an odd statement for Absolute to make, as neither of its proposed constructions-its original one of "[w]ithout human intervention" nor its newly offered one involving "being programmed to"-match either of these dictionary definitions. That is, neither dictionary definition forbids *human* intervention, and neither dictionary definition is limited to operation that is *programmed*.

It is clear that there is a genuine dispute over the correct construction for the term "automatically." Indeed, as noted previously, Absolute has now effectively offered two different proposed constructions for this term, and Stealth has offered yet another, different proposed construction. "When the parties present a fundamental dispute regarding the scope of a claim term, it is the court's duty to resolve it." *02* Micro Int'l Ltd. v. Beyond Innovation Tech. Co., 521 F.3d 1351, 1362 (Fed.Cir.2008). I therefore conclude that construction of the term "automatically" is indeed necessary and reject Absolute's argument to the contrary.

As Absolute notes, the term "automatically" was added to Claims 1, 36, 41, and 65 in an amendment to overcome the Examiner's rejection of those claims. Document No. 178 at 4. The Applicants explained the addition of "automatically" in this amendment as follows:

Claims 1, 3-8, 10, 12, 17-20, 27, 29, 35-37, 39, 41, 43-48, 51, 55-56, 65, 67-68, and 70-71 stand rejected under 35 U.S.C. s. 103(a) as being unpatentable over *Loeb* United States Patent No. 4,999,621 in view of conventional knowledge in the art. Independent claims 1, 36, 41 and 65 are amended to identify the automatic nature of the communication between the agent and the host. *Loeb* teaches human intervention to establish and maintaining [sic] a communications link to the host, *Loeb*. does not teach or suggest an imbedded agent automatically initiating communications with a host.

Document No. 178, Exh. D (Amendment of September 18, 1998) at 17 (emphasis in original).

Absolute suggests that this amendment clearly shows that "[t]he applicants ... were disclaiming establishing and maintaining a communications link to the host without the use of an imbedded agent ...." Document No. 178 at 4. However, Stealth disagrees with this reading of the amendment, suggesting that rather than adding "automatically" to the claims to limit them to use of an imbedded agent, the Applicants added "automatically" to limit the claims to "an imbedded agent *automatically* initiating contact with a host ." Document No. 181 at 2 (emphasis in original). "In other words, an imbedded agent that automatically initiates contact with a host, not just an embedded agent." *Id*. I believe Stealth's reading of the amendment is the correct one. The issue with *Loeb* was not whether or not it used an imbedded agent, but rather whether it initiated contact in response to "human intervention" or did so "automatically."

In addition, as Stealth further points out, Absolute's newly proposed construction of "automatically" (or "automatically providing") does not in fact distinguish the claimed invention over *Loeb:*

Under Absolute's definition, the device or method meets the "automatically providing" limitation as long as the agent has been programmed to provide the identification indicia. Absolute's proposed definition is descriptive of the agent and its function, but it does not capture the meaning of "automatically". The agent can be programmed to furnish, supply or make available the identification indicia in response to a user's command. This is the situation in *Loeb*. Under Absolute's proposed definition, *Loeb* would meet the "automatically providing" limitation because the invention in *Loeb* is programmed to furnish the identification indicia in response to a command from the user. Obviously, this not what the patentee intended to claim. Nor is it what the Examiner intended to allow.

Document No. 181 at 2-3 (emphasis in original). I agree and thus reject Absolute's newly proposed construction of "automatically" (or "automatically providing").

In determining the correct construction for the term "automatically" in the Report, I adopted Stealth's proposed construction for two reasons. First, as I pointed out (and as Absolute has now agreed), Absolute's originally proposed construction of "[w]ithout human intervention" was incorrect in light of the use of the phrase "automatically and without user intervention" in the claims. Document No. 177 at 39-40; Document No. 178 at 6 & n.3. Second, Stealth's proposed construction of "without requiring an external event" appeared to capture the ordinary meaning of the word "automatically" without introducing incorrect additional limitations such as the restriction on "human intervention" as proposed by Absolute.

However, upon further consideration, I now believe that this construction of "without requiring an external

event" is too narrow. As Stealth has now pointed out,

[a]n ordinary definition of the term "automatically" is "acting or operating in a manner *essentially* independent of external influence or control". *This is the way the term is used in the Absolute patents; this is the way the term was used in the prosecution history; and, this is the way the invention works as disclosed in the Absolute patents*.

Document No. 181 at 3 (emphasis added). Stealth cites to "*The American Heritage Dictionary of the English Language, Fourth Edition,* published by Houghton Mifflin Company (2006)" in support of this definition. *Id*.

I generally agree with Stealth here that "[t]his is the way the term is used in the Absolute patents; this is the way the term was used in the prosecution history; and, this is the way the invention works as disclosed in the Absolute patents." But this definition now cited by Stealth differs from Stealth's proposed construction that I recommended in the Report ("without requiring an external event"), most significantly in the insertion of the qualifier "essentially."

The 1996 edition of this same dictionary (from the time that the patent applications were filed) includes this same definition, "acting or operating in a manner *essentially* independent of external influence or control," under the word "automatic," the adjective form of "automatically." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 125 (3d ed.1996) (emphasis added). This dictionary also offers two examples to illustrate this specific definition: "an automatic light switch; a budget deficit that triggered automatic spending cuts." *Id*. An automatic light switch may be triggered, for example, by someone entering the room or by the switch detecting that no one remains in the room; an automatic spending cut, as described in the dictionary's example, may be triggered by the occurrence of a budget deficit. In both cases, the actions of the "automatic" operation are carried out without further external influence or control, but a triggering event initiates the automatic operation.

Stealth's proposed construction of "without requiring an external event" would seem to disallow this type of triggering event and is thus clearly incorrect. The word "essentially" in the definition from *The American Heritage Dictionary of the English Language,* which Stealth now agrees "is the way the term is used in the Absolute patents," appears to better capture this notion that an "automatic" operation may be initiated by some triggering event but then proceeds without "external influence or control." In addition, as detailed in the discussion above with respect to the prosecution history Amendment of September 18, 1998, this initiating event here is also clearly limited to not involving "human intervention," in order to distinguish the claimed invention over *Loeb*.

In response to the originally recommended construction of "without requiring an external event," Absolute also argues that this construction "will not aid the jury in understanding the claim" since it "introduc[es] the concept of an 'external event.' " Document No. 178 at 2. Absolute asks, "external to what?" *Id*. The definition from *The American Heritage Dictionary* of "acting or operating in a manner essentially independent of external influence or control," discussed above, also refers to something "external." However, I believe that it is clear here that the word "external" refers to something that is external to the process or mechanism that operates "automatically."

Based on the reasons detailed above, including the prosecution history and the ordinary definition of the word "automatically," I therefore conclude that the correct construction for the term "automatically" is:

"acting or operating in a manner essentially independent of external influence or control; this action or operation may be triggered by some external event, but such a triggering event must not involve human intervention."

B. "*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 proposed a construction for this term of "occurring once at a random time within a predetermined time interval," whereas Stealth proposed a construction of "at intervals that vary somewhat randomly." Document No. 139 at 14. In the Report and Recommendation on Claim Construction, I adopted Absolute's proposed construction, recommending a construction for this term of "occurring once at a random time within a predetermined time interval." Document No. 177 at 49-51.

In the original claim construction briefings, the treatment of this term by both parties was quite short and offered little support for either party's position; Absolute's total treatment of this term amounted to about half of a page, and Stealth's total treatment was even less. *See* Document No. 93 at 11-12; Document No. 102 at 5, 45; Document No. 114 at 12; Document No. 124 at 4; *see also* Document No. 139 at 14 nn.17-18. In briefings since the issuance of the Report and Recommendation on Claim Construction, both parties have taken the opportunity to significantly expand their treatment of this term. *See* Document No. 179 at 17-21; Document No. 182 at 7-8.

In particular, Stealth now presents a new argument based on claim differentiation with respect to dependent Claim 5. Document No. 179 at 20-21. Absolute does not address this new argument in its response to Stealth's objections. *See* Document No. 182 at 7-8. Claim 5 of the ' 269 Patent, unasserted in this case, reads as follows:

5. A performance monitoring system as in claim 1 wherein:

said semi-random rate of said transmission means of each of said remote site means *has a selected range of values;* and

said detection means of said central site means *includes fraudulent usage detection* for detecting the receipt of status information including the same unique identification from different remote site means during the same selected range of values of the semi-random transmission rate.

'269 Patent, Column 8, Lines 53-63 (emphasis added).

Generally, the doctrine of claim differentiation " 'create[s] a presumption that each claim in a patent has a different scope.' " Versa Corp. v. Ag-Bag Int'l Ltd. 392 F.3d 1325, 1330 (Fed Cir.2004) (quoting Comark Commc'ns, Inc. v. Harris Corp., 156 F.3d 1182, 1187 (Fed.Cir.1998)). However, this presumption is easily met here, as Claim 5 includes the limitation that the detection means includes "fraudulent usage detection." This limitation is not present in Claim 1, from which Claim 5 depends, making the scope of Claim 5 clearly different from that of Claim 1.

More specifically, with respect to dependent claims, the presumption created by the doctrine of claim differentiation "is especially strong when the limitation in dispute is the only meaningful difference between

an independent and dependent claim, and one party is urging that the limitation in the dependent claim should be read into the independent claim." SunRace Roots Enter. Co. v. SRAM Corp., 336 F.3d 1298, 1303 (Fed.Cir.2003) (citing Ecolab Inc. v. Paraclipse, Inc., 285 F.3d 1362, 1375 (Fed.Cir.2002)). However, the limitation in dispute here, the meaning of "semi-random rate," is not the only meaningful difference between independent Claim 1 and dependent Claim 5.

In examining all of the claims again in light of Stealth's new claim differentiation argument, I find that the issues with respect to Claim 21 are similar to those raised by Stealth for Claim 5. Specifically, Claim 21 is a dependent claim, depending from independent Claim 20, and the differences between this dependent and independent claim are similar to those between Claims 5 and 1. Claim 21 of the '269 Patent, unasserted in this case, reads as follows:

21. A central site performance monitoring system as in claim 20 wherein the remote site means initiates transmission to said central site system at a semi-random rate and has a semi-random rate *within a selected range of values* with the status information being accompanied by a unique machine determinable identification, said detection means of said central site system further *includes fraudulent usage detection* for detecting the receipt of status information including the same unique identification from different remote site means during the same selected range of values of the semi-random transmission rate.

'269 Patent, Column 10, Line 65-Column 11, Line 8 (emphasis added). Neither party addressed Claim 21 in their briefs, but I believe that the discussion above regarding claim differentiation with respect to Claim 5 applies as well with respect to Claim 21.

Thus, I find the doctrine of claim differentiation here with respect to Claims 5 and 21 not to be directly of assistance in determining the correct construction of the term "semi-random rate." As the description of the semi-random rate having "a selected range of values" is not the only meaningful difference between between each of Claims 5 and 21 and the respective independent claim from which it depends, the doctrine of claim differentiation is satisfied without resolving whether the "selected range of values" for the "semi-random rate" is present in the respective independent claim or is only added by the dependent claim.

Finding no basis for construction of the term "semi-random rate" within this claim differentiation argument or within other analyses of the claims alone, I return to the patent's specification. In further analyzing the specification, I note repeated statements in the specification about features of "the present invention" as a whole, including in the clear description of the nature of the random timing of calls to the central site.

"When a patent thus describes the features of the 'present invention' as a whole, this description limits the scope of the invention." Verizon Serv. Corp. v. Vonage Holdings Corp., 503 F.3d 1295, 1308 (Fed.Cir.2007); *see also* Honeywell Intern., Inc. v. ITT Indus., Inc., 452 F.3d 1312, 1318-1320 (Fed.Cir.2006) (after noting that "[o]n at least four occasions, the written description refers to the fuel filter as 'this invention' or 'the present invention'," stating that "[t]he public is entitled to take the patentee at his word and the word was that the invention is a fuel filter," and therefore limiting the claims as such); SciMed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc., 242 F.3d 1337, 1343-44 (Fed.Cir.2001) (stating that because a structure was described as being a part of "the present invention" in the written description, there was "strong evidence that the claims should not be read to encompass the opposite structure").

The specification describes Figure 1 as "a flow chart of the major functions performed by *the present invention*." '269 Patent, Column 3, Lines 8-9 (emphasis added). Figure 1 depicts "RANDOMIZER" 10

within the remote site as part of the present invention. Figure 2 is then described as showing "a detailed flow chart of the randomizer portion of the flow chart of FIG. 1." Id ., Column 3, Lines 10-11. This description of Figure 2 immediately follows the description of Figure 1 above as depicting the functions performed by "the present invention" and identifies Figure 2 as depicting in more detail a portion of what is shown in Figure 1, thus clearly indicating that Figure 2 also applies to "the present invention" as a whole rather than to any specific embodiment of it. Figure 2 shows, within the randomizer of the present invention, the matching of a randomly chosen time against the current time in order to determine when to trigger a call to the central site ("INCREMENT CLOCK COUNTER," "MATCH AGAINST RANDOM NUMBER," "IS RANDOM TIME TRIGGERED," "CALL CENTRAL SITE"). And immediately following this description of Figure 2, Figure 3 is described as showing "a functional block diagram of the remote site electronics of the present invention." Id., Column 3, Lines 12-13 (emphasis added). Figure 3 is further described as "a hardware implementation of *the present invention* shown as a block diagram with the functions implemented in device 100." Id., Column 4, Line 67-Column 5, Line 1.

Within this context, the specification includes a section entitled "DETAILED DESCRIPTION OF THE PREFERRED EMBODIMENT," although this section routinely cites its subject as "the present invention" and provides the only detailed description of Figures 1-3, each of which depicts the present invention. Beginning with the first sentence of this section setting the context as "[r]eferring first to the flow chart of FIG. 1," the contents of this section remain centered on the present invention as a whole. Within this section, the specification clearly states that "[t]he present invention is designed to make one, and only one, call during the selected period," giving as examples of the period, intervals "such as day/week/month." Id., Column 4, Lines 31-35. More fully, the specification states this 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.

...

FIG. 2 is 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. 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.

Randomizer 10 includes an independent clock 61 to provide basic timing. Each clock pulse increments counter 62 to produce an output signal 64 for comparison against a random number produced by block 66. *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 3, Lines 45-49; Column 4, Lines 26-50 (emphasis added).

Figures 5-7 illustrate alternative embodiments of the invention incorporating "optional modifications to the

randomizer flow chart of FIG. 2 ...." Id., Column 6, Lines 63-64; *see also* id., Column 7 Lines 1-49. "FIG. 5 illustrates the modification to FIG. 2 to allow the remote site to slip the call to the central site into other traffic that apparatus 18 is engaging in." Id., Column 7, Lines 1-3. "FIG. 6 illustrates the updating of the telephone number of the central site in the remote site." Id ., Column 7, Lines 18-19. "The routine of FIG. 7 will give the remote site monitoring system the ability to randomly pick an outgoing telephone line from those lines to which apparatus 18 has available." Id., Column 7, Lines 31-34. However, none of these optional modifications to the invention alter the properties of randomizer 10 detailed above, including the fact that, based on this randomizer, "[t]he present invention is designed to make one, and only one, call during the selected period," "such as day/week/month," id., Column 4, Lines 31-35, at a time "uniformly randomly distributed over the selected time interval," id., Column 4, Lines 49-50.

Stealth argues that the original recommended construction of this term of "occurring once at a random time within a predetermined time interval" in the Report and Recommendation on Claim Construction "limited the claim to the particular 'semi-random' process in the preferred embodiment ...." Document No. 179 at 17. Stealth further argues that "[t]he specification describes this feature as a preference, whereas the [Special Master] makes it a limitation." Id. at 18. However, although, in two places, the '269 Patent does use the word "preferentially" as part of describing this semi-random process, the complete text in the patent in these two places actually states that "[t]he call initiation is *preferentially* triggered at a *carefully controlled* semi-random rate, perhaps once a week." Id., Abstract; id., Column 2, Lines 57-59 (emphasis added). These are the only two places in the patent in which "carefully controlled" is applied to the "semi-random rate," and these are likewise the only two places in the patent in which this particular semi-random process is described as a preference. Thus, and in light of the clear statements with respect to "the present invention" discussed above, it appears that what is described as a preference in each of these two places in the patent is simply that the "semi-random rate" be "carefully controlled." The previous discussion above, instead, demonstrates that the rate based on "one, and only one, call during the selected period," id., Column 4, Lines 33-35, at a time "uniformly randomly distributed over the selected time interval," id., Column 4, Lines 49-50, is a property of the invention as a whole, not of any particular embodiment of it.

I note, however, that the specification states that "[t]he present invention is *designed to* make one, and only one, call during the selected period," id., Column 4, Lines 33-35 (emphasis added), not that it always makes exactly this one call or that it never makes additional calls during any period. This distinction appears to be in recognition of two features that are clearly part of the present invention that may cause this specific timing to occasionally vary somewhat. These two features of the invention were also discussed by Stealth in its objections to the Report and Recommendation on Claim Construction. *See* Document No. 179 at 18-20.

One such feature of the invention that may somewhat modify the timing of calls to the central site is that the call may be delayed and repeated, such as if the phone line to the central site is busy when a call is attempted. This feature is described in detail in the specification as follows:

The Central Site (block 82) either accepts the call (block 90) or not (block 84), depending upon whether the line is busy, etc. If the call is not accepted, a wait delay is introduced by block 86 and the delayed signal 88 loops back to block 78 to *try calling again*. This process is *repeated until the call is completed*.

Id., Column 4, Lines 55-61 (emphasis added). This detail is given by the specification as part of the description of the randomizer 10 as depicted in Figure 2, with no language to indicate that it is included only in certain embodiments of the invention; this behavior is also clearly shown in Figure 2 itself ("CALL CENTRAL SITE," "IS THE CALL ACCEPTED?," "WAIT DELAY"), which depicts the randomizer in the

present invention. The other feature of the invention that may somewhat modify the timing of calls to the central site is that additional calls may be made due to an "emergency interrupt." This feature is described in detail in the specification as follows:

The monitored apparatus 18 is shown having four leads in communication with microprocessor 102. One lead is for the test probe signal 16 for initiating the monitoring process. In addition there are three separate signals 20a, 20b and 20c which correspond to signal 20 in FIG. 1. These signals are *emergency interrupt 20a,* partial address 20b and data bus 20c. The emergency interrupt signal occurs when the apparatus 18 being monitored indicates nonstandard performance. *This sets off a telephone call of a class other than the random triggered time*.

Id., Column 5, Lines 24-34 (emphasis added). This detail is given by the specification as part of the description of the randomizer 10 implementation depicted in Figure 3. Although Figure 3 is described as showing "a *hardware implementation* of the present invention," id., Column 4, Lines 67-68 (emphasis added), the specification offers no language to indicate that such "emergency" calls are included only in hardware implementations; indeed, this description in the specification indicates that the emergency interrupt 20a of Figure 3 corresponds to signal 20 in Figure 1, which shows "a flow chart of the major functions performed by the present invention," id., Column 3, Lines 8-9 (emphasis added), clearly indicating that this emergency interrupt is a part of "the present invention" as a whole.

Each of these features of the invention that may cause the timing of calls to the central site to vary from the normal rate of "one, and only one, call during the selected period," id., Column 4, Lines 33-35, at a time "uniformly randomly distributed over the selected time interval," id., Column 4, Lines 49-50, do so only in exceptional conditions. If the phone number to the central site is busy, the call may be retried later, possibly causing additional calls during the same period or causing another call during the next period. If an emergency interrupt occurs, a call in addition to the normal randomly-timed call may be made during the current period. In the absence of such exceptional conditions, however, the patent is clear that the present invention as a whole normally makes exactly one call to the central site at a randomly chosen time during each occurrence of a repeating predetermined time interval.

Therefore, based on the analysis above, I conclude that the correct construction for the term "semi-random rate" is: "normally taking place exactly once at a randomly chosen time during each occurrence of a repeating predetermined time interval."

C. "*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. In the Report and Recommendation on Claim Construction, I recommended that this term be treated as 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 packet from the formatting means to the central site means of the system surreptitiously of a user of said electrical apparatus." Document No. 177 at 82-86. Neither party has objected to these recommendations. I further recommended in the Report that 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." Id. at 86.

Stealth, in arguing for a revised construction for the term "semi-random rate," points out that a revision in the construction of the term "semi-random rate" also would require a change in the corresponding structure in the construction for this "transmission means" term. Document No. 179 at 21. I agree, in that the function of this "transmission means" term 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." *See* Document No. 177 at 85-86 (emphasis added). The corresponding structure for this "transmission means" term must include all structures disclosed in the specification that are clearly linked to the recited function, including the initiation of the transmission at a "semi-random rate," as that term is construed.

Therefore, based on the foregoing and on the revised construction for the term "semi-random rate" recommended above, I conclude that the corresponding structure for 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: "(1) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, executing a combination of the algorithm depicted in the flow chart of Figure 2, excluding block 74, the algorithm described in Column 4, Lines 58-63, and the algorithm described in Column 5, Lines 30-34, possibly also including any or all of the modifications depicted in Figures 5 through 7; or (2) the equivalent." My recommendation that this term be treated as a means-plusfunction 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 packet from the formatting means to the central site means of the system surreptitiously of a user of said electrical apparatus" remains unchanged.

II. *Summary*

I therefore respectfully recommend that the constructions for the term "automatically," as this term is used in the '758 and '863 Patents, and for the terms "semi-random rate" and "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," as these two terms are used in the '269 Patent, be modified as discussed above; all other constructions originally detailed in my Report and Recommendation on Claim Construction should remain unchanged.

The summary below lists the recommended constructions for each of the disputed terms in the '758, '863, '914, and '269 Patents, as detailed in my original Report and Recommendation on Claim Construction, incorporating the revisions as recommended in this Amendment:

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

Term	**Asserted Claims** [1]	**Recommended Construction**
global network	'758: all	the Internet

	except 72, 73	
	'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: all	the agent furnishing, supplying, or making 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	acting or operating in a manner essentially independent of external influence or control; this action or operation may be triggered by some external event, but such a triggering event must not involve human intervention
	'863: all	
automatically providing said host system with said identifying indicia through said global network [and] providing said host system with	'758: all except 72, 73	no separate construction needed, beyond the clarification that a two-step process is not required

one or more of the global network communication links		
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.

FN [1]. The list of asserted claims for each term includes asserted claims in which the term occurs either expressly or impliedly.

B. The '269 Patent

Term	**Asserted Claims**	**Recommended Construction**
semi-random rate	1-3, 6-8, 12-14, 16-17, 25	normally taking place exactly once at a randomly chosen time during each occurrence of a repeating predetermined time interval
location	1-3, 6-8, 13-14, 16-17, 20, 25	physical location, or network location (such as a source telephone number or source network address) from which a physical location can be obtained
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	1-3, 6-	means-plus-function element construed pursuant to 35 U.S.C. s.

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	8, 12-14, 16-17	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 *Corresponding Structure:*
("monitor means")		(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 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 ("transmission 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:* 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 *Corresponding Structure:*
		(1) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, executing a combination of the algorithm depicted in the flow chart of Figure 2, excluding block 74, the algorithm described in Column 4, Lines 58-63, and the algorithm described in Column 5, Lines 30-34, 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	29-33, 35, 38	means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6

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		
		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		*Corresponding Structure:* (1) a multi-port transceiver/ encoder/decoder/dialer using HDLC or any other standard or quasi-standard formatting; or (2) the equivalent

data from each remote site means		
("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 *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 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		
("detection means")		
interpretation means for interpreting the received information from each of said at least one remote computers to determine when each usage agreement is violated	29-33, 35, 38	means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6 *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

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