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

ABSOLUTE SOFTWARE, INC,
Plaintiff.
v.
STEALTH SIGNAL, INC. and Computer Security Products, Inc,
Defendants.

June 17, 2009.

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

David Kent Anderson, Julie B. Cunningham, Anderson & Cunningham, Houston, TX, Jeffrey Furr, Attorney at Law Furr Law Firm, Utica, OH, for Defendants.

ORDER ON CLAIMS CONSTRUCTION

EWING WERLEIN, JR.**, District Judge.**

The Court has carefully read and considered the Report and Recommendation on Claim Construction filed by Special Master David B. Johnson, Ph.D. (Document No. 177), and the Amendment to Report and Recommendation on Claim Construction (Document No. 200) filed by Special Master Johnson. Several objections have been filed by the parties, namely, Plaintiff Absolute Software, Inc.'s Objections to the Report and Recommendation on Claim Construction (Document No. 178), Absolute's Objections to the Amendment to Report and Recommendation on Claim Construction (Document No. 201), Defendant/Counterclaimants Stealth Signal, Inc. and Computer Security Products, Inc.'s Objections to Special Master's Markman Report and Recommendations (Document No. 179), and Stealth Signal's Amended Objections to Special Master's Amended Markman Recommendations (Document No. 204), which supersedes Stealth Signal's previously filed Objections to Special Master's Amended Markman Recommendations (Document No. 202).

After having made a *de novo* determination of claims construction for the four patents at issue, and having carefully reviewed the Special Master's thorough and well supported Report and Recommendation on Claim Construction and Amendment to that Report and Recommendation, as well as the submissions of the parties including their filed objections to the Special Master's Report and Amendment to Report, the Court is of the opinion that the Special Master's Report and Recommendation as modified by the Amendment to Report, and the Special Master's claims construction recommendations contained therein with regard to all four Patents, are correct and should be and hereby are accepted by the Court in their entirety. Accordingly, it is further

ORDERED that the disputed terms in (A) the '758, '863, '914 Patents, and (B) the '269 (Baran) Patent, are

construed as follows:

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

Term	Asserted Claims[FN1]	Construction

FN1. The list of asserted claims for each term includes asserted claims in which the term occurs either expressly or impliedly.

global network	'758: all except 72, 73	the Internet the telephone network is not a global network, but the Internet includes and uses the telephone network
	'863: all	
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 '863: all	information that indicates the identity of the computer, whether or not this information also indicates the identity of the agent
	'914: all	
providing (in the context of "providing identifying indicia and location information," "providing ... identifying indicia," "providing ... one or more of the global network communication links," or "providing ... one or more of the Internet communication links")	'758: all '863: all	the agent furnishing, supplying, or making available

Term	Asserted Claims	Construction
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 one or more of the global network communication links	'758: all except 72, 73	no separate construction needed, beyond the clarification that a two-step process is not required
contacting a host monitoring system without signaling the visual or audible user interface	'914: all	getting in touch with or communicating with a host monitoring system without signaling (not necessarily through active suppression) the visual or audible user interface
reported lost	'914: all	reported no longer in one's possession, care, or control, through negligence, accident, theft, etc.

B. ***The '269 Patent***

Term	Asserted Claims	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	11, 29,	operating in such a way as to be invisible to, or to not be perceived by, the user

the user	31-33, 35, 38	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

Term	Asserted Claims	Construction
monitor means programmed for collecting data on at least one performance feature of said electrical apparatus of interest to the system surreptitiously of a user of said electrical apparatus	1-3, 6-8, 12-14, 16-17	means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6 *Recited Function:* collecting data on at least one performance feature of the electrical apparatus surreptitiously of a user of the electrical apparatus
("monitor means")		*Corresponding Structure:* (1) a microprocessor with four leads and an interface to a randomizer; (2) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, in which the software collects the performance data by generating an interrogation signal that is applied to the electrical apparatus and, in response, reading from the apparatus the status signal including information that the apparatus was preprogrammed to provide, or in which the software collects the performance data by reading from the monitored registers of the apparatus; or (3) the equivalent
monitoring means for monitoring the use of said software surreptitiously of a user of said electrical apparatus	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

("monitoring means")		*Corresponding Structure:* (1) a microprocessor with four leads and an interface to a randomizer; (2) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, in which the software collects 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	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
("formatting means")		*Corresponding Structure:* (1) a transceiver, dialer, and HDLC encoder/decoder; (2) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, in which the software organizes the data within a single logical envelope including the telephone number to be called and the serial number of the apparatus being monitored, packetizing the data using HDLC or any other standard or quasi-standard formatting; or (3) the equivalent
transmission means for initiating, at a semi-random rate, the transmission of the message packet from the formatting means to the central site means of the system surreptitiously of a user of said electrical apparatus	1-3, 6-8, 12-14, 16-17	means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6 *Recited Function:* initiating, at a semi-random rate, the transmission of the message packet from the formatting means to the central site means of the system surreptitiously of a user of said electrical apparatus
("transmission means")		*Corresponding Structure:* (1) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, executing 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 automatically, at various times, reporting said terms of said usage agreement and the use of said software by said remote computer detected by said monitoring means to said central site means surreptitiously of a user of said remote computer	29-33, 35, 38	means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6 *Recited Function:* automatically, at various times, reporting said terms of said usage agreement and the use of said software by said remote computer detected by said monitoring means to said central site means surreptitiously of a user of said remote computer
("transmitting means")		*Corresponding Structure:* (1) a modem, fax, or DTMF generator; (2) software executing on a separate microprocessor-based subsystem, or on the internal processor of the electrical apparatus, in which the software, in response to an output signal from the monitoring means, organizes data, consisting of the output from the monitoring means as well as the terms of the software usage agreement, within a single logical envelope including the telephone number to be called and the serial number of the apparatus being monitored, packetizing the data using HDLC or any other standard or quasi-standard formatting and then transmitting the data using a modem, fax, or DTMF generator; or (3) the equivalent
decoding means for receiving and processing the packet of said collected data on at least one performance feature of said electrical apparatus of interest to the system from at least one remote site means	1-3, 6-8, 20	means-plus-function element construed pursuant to 35 U.S.C. s. 112 para. 6 *Recited Function:* receiving and processing the packet of said collected data on at least one performance feature of said electrical apparatus of interest to the system from at least one remote site means
decoding means for receiving and processing said collected performance data from each remote site means ("decoding means")		*Corresponding Structure:* (1) a multi-port transceiver/encoder/decoder/dialer using HDLC or any other standard or quasi-standard formatting; or (2) the equivalent

Term	Asserted Claims	Construction
detection means for comparing the decoded collected data from each remote site means with the expected corresponding data for electrical apparatus of the type in which said remote site means is installed to identify the location of each of said remote sites means detection means for comparing the received collected data from each remote site means with expected data for electrical apparatus of the type in which said remote site means has been added to identify the location of each of said remote site means ("detection 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
interpretation means for interpreting the received information from each of said at least one remote computers to determine when each usage agreement is violated ("interpretation means")	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 *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

It is further

ORDERED that within twenty-one (21) days after the entry of this Order the parties shall file a proposed Amended Docket Control Order, which takes into account the suggestions in the Proposed Patent Case Scheduling Order, FN2 but which should be tailored by the parties as may be appropriate for this case. A status conference to finalize the Amended Docket Control Order and to discuss alternative dispute resolution, including mediation, is set as follows:

FN2. The Proposed Patent Case Scheduling Order is available at: http://www.txs.uscourts.gov/district/rulesproc/patent/schedulingorder.pdf

Date: ***July 24, 2009***

Time: ***4:30 p.m.***

Courtroom 11D

U.S. Courthouse & Federal Building

515 Rusk Avenue

Houston, Texas 77002

The Clerk will enter this Order, providing a correct copy to all counsel of record.

S.D.Tex.,2009.
Absolute Software, Inc. v. Stealth Signal, Inc.