

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

BMC Software, Inc.,

Plaintiff,

v.

ServiceNow, Inc.,

Defendant.

Civil Action No. 2:14-CV-00903-JRG

Jury Trial Demanded

DECLARATION OF DR. HUGH SMITH IN SUPPORT OF
BMC'S OPENING CLAIM CONSTRUCTION BRIEF
('683 AND '898 PATENTS)

BMC EXHIBIT 2002

ServiceNow, Inc. v. BMC Software, Inc.

CMB2015-00107

I, Hugh Smith, declare and state as follows:

1. I am currently the Director of Computer Engineering at California Polytechnic State University. I received a Ph.D. in Computer Science from Michigan State University in 1999. I have been active in the Computer Science, Computer Engineering, and Information Technology fields for the past 25 years. I attach a copy of my Curriculum Vitae as Exhibit 1.

2. I have been retained to provide expert opinions on behalf of BMC Software, Inc. in this matter with regard to the construction of certain terms and phrases of the 6,816,898 (the “898 patent”) and 7,062,683 (the “683 patent”) from the standpoint of the person of ordinary skill in the art at the times of these respective inventions.

3. I have authored a number of papers in the field of Information Technology and have attended a number of conferences related to these subjects, as shown in my Curriculum Vitae.

4. I hold a doctoral degree (PhD) in Computer Science, granted by Michigan State University (MSU) in 1999, as well as a Master’s degree in Computer Science from MSU and a Bachelor’s degree in Computer Science from Xavier University obtained in 1985.

5. I am currently an Associate Professor at California Polytechnic State University (Cal Poly) where I have been a faculty member since 2000. From 2009-2013, I was the Director of the Computer Engineering program at Cal Poly. My classes have included circuit board design, operating systems topics including system level programming and computer networks.

6. Over the last 30 years I have worked on a number of hardware and software related projects. During this time I worked at Procter & Gamble in their Management Systems Division. I worked on development and support of large systems. This included managing a team responsible for monitoring and troubleshooting a country wide networked system. I have also

taught computer networks at Cal Poly for the over the last 15 years. This includes two undergraduate computer networking courses and a graduate computer networking course.

7. I have reviewed U.S. Patent Nos. 6,816,898 (the “’898 patent”) and 7,062,683 (the “’683 patent”), including the claims, specification, prosecution history, and intrinsic references cited during prosecution of these patents. It is my opinion that I am a person of ordinary skill in the art regarding these patents, and I offer below my opinions regarding how a person of ordinary skill in the art would have understood certain claim terms at the time of the patents.

’898 Patent

“script”

8. A person having ordinary skill in the art at the time of the patent would have understood “script,” in light of the intrinsic record, to be a “set of instructions, procedures, and/or functions and related data adapted for implementation in a suitable computer language.”

9. My opinion is supported by the intrinsic record, including a patent cited during the prosecution history and on the cover of the ’898 patent to Bromberg (U.S. Patent No. 6,052,694).

I attach Bromberg as Exhibit 2. A portion of the Bromberg reference is cited below:

As used in this document, the terms ‘module’ and ‘script’ refer to a **set of instructions, procedures, and/or functions and related data adapted for implementation in a suitable computer language** such as C, C++, Java, or any other appropriate development language.

Bromberg at 2:43-50 (cited in the 9/26/2003 Office Action, attached as Exhibit 3).

10. I understand that ServiceNow is proposing that “script” should be construed as “instructions written in a plain text, interpretable language.” I disagree. ServiceNow’s construction is too narrow and seeks to limit the term “script” to only a “plain text, interpretable language,” language that does not appear in the ’898 patent specification. In contrast to ServiceNow’s construction, the ’898 patent states that “the present invention is not described

with reference to any particular programming language.” ’898 patent, Col. 3:63-65. In addition, the ’898 patent states, “The script in FIG. 4 is solely for illustration [*sic*], not to restrict the type of scripts that can be accepted nor the type of data that can be defined within the scripts.” ’898 patent, ’898 patent, Col. 9:60-62.

“script-based program”

11. A person having ordinary skill in the art at the time of the patent would have understood “script-based program,” in light of the intrinsic record, to be a “program based on a script.”

12. I understand ServiceNow’s construction is “a set of instructions written in a plain text, interpretable language.” I disagree with this construction, for the reasons discussed above with respect to the term “script” and also because it reads out the word “program.”

“service monitor”

13. A person having ordinary skill in the art at the time of the patent would have understood “service monitor,” in light of the intrinsic record, to be a “program for monitoring a device, application or server in a network.”

14. This construction is consistent with the specification which provides that the “new service monitor can then be activated to *monitor any applicable devices, applications or servers in the network.*” ’898 patent, Col. 8:52-54. The claims also recite “integrating the *program* to the performance management system as a service monitor.” ’898 patent, Col. 13:28-29.

15. I understand ServiceNow’s construction is “a program running on the performance management system that automatically collects user-defined data from the components of the network.” I disagree with this construction.

16. A person having ordinary skill in the art at the time of the patent reviewing the intrinsic record would not define a “service monitor” as “automatically collect[ing] user-defined data” or

by definition “running on the performance management system,” as ServiceNow has defined it. To the contrary, the specification teaches, in one embodiment, that the “service monitor” may appear in a list of monitors and the user must activate it before collection of data. ’898 patent, Col. 10:46-11:6.

“periodically”

17. To the extent a construction is necessary for this term, a person having ordinary skill in the art at the time of the patent would have understood “periodically,” in light of the intrinsic record, to mean “at an established interval of time.”

18. This construction is consistent with the intrinsic evidence which provides that the data collection may occur periodically at intervals such as “5 minutes” (’898 patent, Col. 8:1-2) or “15 minutes” (’898 patent, Fig. 6C).

19. I have also reviewed other intrinsic evidence and found it to be consistent with the construction above. For example, U.S. Patent 5,796,633 (attached as Exhibit 4), which is cited on the cover of the ’898 patent, recites “periodically . . . the periodic *comprising a predetermined interval.*” ’633 patent, Col. 15:26-30. Another reference, U.S. Patent No. 6,405,327 (attached as Exhibit 5), which is also cited on the cover of the ’898 patent, states that data is “periodically gathered” (’327 patent, Col. 5:46) and states that at “*a predefined period of time* (by default, every 15 minutes), the performance monitoring procedure ‘wakes up’ and gathers performance information.” ’327 patent, Col. 5:65-67.

20. It is my opinion that a person having ordinary skill in the art at the time of the patent reading the claims of the ’898 patent, in light of the specification and prosecution history, would have been informed with reasonable certainty about the scope of the invention. Further, even without the description in the specification and other intrinsic evidence regarding “periodically,”

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