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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

INNOVATIVE COMMUNICATIONS TECHNOLOGIES, INC.,
Plaintiff,

v. **Civil No. 2:12cv7**

VIVOX, INC.,
Defendant,

- and -

INNOVATIVE COMMUNICATIONS TECHNOLOGIES, INC.,
Plaintiff,

v. **Civil No. 2:12cv9**

STALKER SOFTWARE, INC.,
Defendant.

OPINION AND ORDER

These cases involve actions alleging infringement of five patents owned by plaintiff Innovative Communications Technologies, Inc. ("Innovative") which disclose an invention concerning internet telephony technology, also known as Voice Over Internet Protocol ("VoIP"). The first patent is entitled "Point-to-Point Internet Protocol" and was issued on August 22, 2000, as United States Patent No. 6,108,704 (the "'704 patent"). The second patent is entitled "Point-to-Point Computer Network Communication Utility Utilizing Dynamically Assigned Network Protocol Addresses" and was issued on October 10, 2000, as United States Patent No. 6,131,121 (the "'121 patent"). The third patent is entitled "Graphic User Interface for Internet Telephony Application" and was issued on December 28, 1999, as United States Patent No. 6,009,469 (the "'469 patent"). The fourth patent is entitled "Point-to-Point Internet Protocol" and was issued on March 2, 2004, as

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United States Patent No. 6,701,365 (the "'365 patent"). The fifth patent is entitled "Establishing a Point-to-Point Internet Communication" and was issued on January 28, 2003, as United States Patent No. 6,513,066 (the "'066 patent"). The original patent application disclosing the invention was filed on September 25, 1995, and was issued as the '704 patent. The other four patents were issued from continuing patent applications, each of which claims priority to the original September 25, 1995, application.

Presently before the Court is the claim construction of several terms found in claims of these five patents. The Court's construction of these terms is explained herein.

I. BACKGROUND

A. The Invention

Innovative, a Delaware corporation with its alleged principal place of business in Virginia, is the assignee of the '704, '121, '469, '365, and '066 patents. In the preferred embodiment, these patents describe a method for delivering real-time "point-to-point" voice communications services over the Internet, similar to direct-dial voice calls made over traditional telephone networks. The invention disclosed in these patents addresses an apparently common problem in the field of internet telephony—although real-time "point-to-point" communications are readily supported between computers with fixed Internet Protocol (IP) addresses, such communications are not so easily established between computers with dynamically assigned IP addresses, which may change as often as every time the computer user connects to the Internet. The plaintiff has suggested an apt analogy in which one person seeks to initiate a telephone call to a second person whose telephone number changes after each call. The '704 patent provides a method for overcoming this problem by providing what amounts to an electronic phonebook or directory assistance service, permitting the first computer to obtain the second computer's current IP address (or phone number) from a

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connection server (the electronic phonebook or directory assistance service), and then initiate "point-to-point" voice communications (a direct-dial call) between the two computers over the Internet, without any further assistance or intervention by the connection server. The other four patents describe refinements or enhancements to the invention as originally disclosed.

B. Procedural History

On January 4, 2012, Innovative filed suit against defendant Vivox, Inc. ("Vivox"), alleging in a five-count complaint that Vivox infringed the '704, '121, '469, '365, and '066 patents by "selling, offering to sell, and using VoIP products and/or services, such as VoiceEverywhere Game Connect." That same day, Innovative also filed suit against defendant Stalker Software, Inc., doing business as CommuniGate Systems ("CommuniGate"), alleging in a three-count patent that CommuniGate infringed the '704, '365, and '066 patents by "selling, offering to sell, and using VoIP products and/or services, such as the CommuniGate Pro Server." Innovative also sued a third defendant, ooVoo, LLC ("ooVoo"), but that action was settled and voluntarily dismissed by stipulation on October 11, 2012.

In a joint statement submitted to the Court on August 7, 2012, the parties identified twenty-one disputed claim terms, grouped into fifteen sets of similar or related terms. The parties were able to agree, however, that the claim term "process," found throughout the patents-in-suit, means "a running instance of a computer program or application."

On September 14, 2012, each side filed its claim construction brief and supporting exhibits. In their claim construction brief, the defendants conceded that three of the original disputed claim terms need not be construed as their meaning is clear based upon the plain and ordinary meaning of the terms. These terms include: "in response to an identification of one of the entries by a requesting process providing one of the identifier and the network protocol address to the requesting process

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providing one of the identifier and the network protocol address to the requesting process"; "retrieving the IP address of the second unit from the database using the connection server"; and "retrieving the IP address of the second processing unit in response to the positive on-line status of the second processing unit."

On October 10, 2012, the Court held a Markman hearing. At hearing, the defendants further conceded that an additional eight of the original disputed claim terms need not be construed as their meaning is clear based upon the plain and ordinary meaning of the terms. These terms include: "query"; "server process"; "server"; "address server"; "database"; "program code configured to receive the current network protocol address of one of the processes coupled to the network, the network protocol address being received by said one of the processes from an Internet access server"; "program code configured to receive an identifier associated with said one process"; and "program code configured to receive queries or one of the network protocol address and the associated identifier of said one of the processes from other processes over the computer network at the server, and to allow the establishment of a packet-based point-to-point communication between said one of the processes and one of said other processes."[1]

C. Disputed Claim Terms

Eleven claim terms remain in dispute:

1. "point to point" found in claim 1 of the '704 patent, claims 8, 13, and 14 of the '121 patent, claim 5 of the '469 patent, claims 1 and 3 of the '365 patent, and claims 1, 2, 6, and 7 of the '066 patent;

2. "establishing a point-to-point communication" found in claim 1 of the '704 patent, claims 8, 13, and 14 of the '121 patent, claim 5 of the '469 patent, and claims 1, 2, 6, and 7 of the '066 patent;

[1] ooVoo appears to have been the defendant primarily concerned with these claim terms. ooVoo participated in the claim construction briefing process, but it did not participate in the Markman hearing on October 10, 2012.

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3. "to allow the establishment of a packet-based point-to-point communication" found in claims 1 and 3 of the '365 patent;

4. "network protocol address" found in claims 1, 33, 36, 38, and 41 of the '704 patent, claims 8, 13, and 14 of the '121 patent, claims 5 and 6 of the '469 patent, and claims 1 and 3 of the '365 patent;

5. "dynamically assigned network protocol address" found in claim 33 of the '704 patent and claim 8 of the '121 patent;

6. "computer usable medium" found in claims 1 and 38 of the '704 patent and claim 1 of the '365 patent;

7. "assigned to the process upon connection to the computer network" found in claims 33 and 38 of the '704 patent;

8. "received by the first process following connection to the computer network" found in claim 1 of the '704 patent and claims 13 and 14 of the '121 patent;

9. "off-line message" found in claims 3 and 8 of the '066 patent;

10. "online message" or "on-line message" found in claims 6 and 7 of the '066 patent; and

11. "providing one of the network protocol address and the associated identifier of said one process" found in claim 3 of the '365 patent.

II. APPLICABLE LAW

Patents consist of "claims," and claim construction is a matter of law to be determined by the Court. Markman v. Westview Instruments, Inc., 517 U.S. 370, 388 (1996). The purpose of claim construction is to "determin[e] the meaning and scope of the patent claims asserted to be infringed." Markman v. Westview Instruments, Inc., 52 F.3d 967, 976 (Fed. Cir. 1995) (en banc), aff'd, 517 U.S. 370 (1996). "It is a bedrock principle of patent law that the claims of a patent define the invention to which the patentee is entitled the right to exclude." Phillips v. AWH Corp., 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc) (internal quotation marks omitted).

"The words of a claim are generally given their ordinary and customary meaning." Id. at 1312. "[T]he ordinary and customary meaning of a claim term is the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention, i.e., as of the

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