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

PACKET INTELLIGENCE LLC,	§	
	§	
v.	§	CASE NO. 2:16-CV-230-JRG
	§	
NETSCOUT SYSTEMS, INC., et al.	§	
	§	
	§	
	§	

CLAIM CONSTRUCTION
MEMORANDUM AND ORDER

Before the Court is Plaintiff Packet Intelligence LLC's ("Plaintiff's") Opening Claim

Construction Brief (Dkt. No. 55). Also before the Court are Defendants NetScout Systems, Inc.,

Sandvine Corporation, and Sandvine Incorporated ULC's (collectively, "Defendants'") response

(Dkt. No. 57) and Plaintiffs' reply (Dkt. No. 58).

The Court held a claim construction hearing on March 2, 2017.

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I. BACKGROUND

Plaintiff brings suit alleging infringement of United States Patents No. 6,651,099 ("the

'099 Patent"), 6,665,725 ("the '725 Patent"), 6,771,646 ("the '646 Patent"), 6,839,751 ("the '751

Patent"), and 6,954,789 ("the '789 Patent") (collectively, the "patents-in-suit," which are also

sometimes referred to as the "Asserted Patents") (Dkt. No. 55, Exs. A–E). Plaintiff submits that

the patents-in-suit "are generally directed to classifying and monitoring network traffic." (Dkt.

No. 55, at 1.)

The '099 Patent, for example, is titled "Method and Apparatus for Monitoring Traffic in a

Network" and issued on November 18, 2003. The Abstract of the '099 Patent states:

> A monitor for and a method of examining packets passing through a connection
> point on a computer network. Each packets [*sic*] conforms to one or more
> protocols. The method includes receiving a packet from a packet acquisition
> device and performing one or more parsing/extraction operations on the packet to
> create a parser record comprising a function of selected portions of the packet.
> The parsing/extraction operations depend on one or more of the protocols to
> which the packet conforms. The method further includes looking up a flow-entry
> database containing flow-entries for previously encountered conversational flows.
> The lookup uses the selected packet portions and determining [*sic*] if the packet is
> of an existing flow. If the packet is of an existing flow, the method classifies the
> packet as belonging to the found existing flow, and if the packet is of a new flow,
> the method stores a new flow-entry for the new flow in the flow-entry database,
> including identifying information for future packets to be identified with the new
> flow-entry. For the packet of an existing flow, the method updates the flow-entry
> of the existing flow. Such updating may include storing one or more statistical
> measures. Any stage of a flow, state is maintained, and the method performs any
> state processing for an identified state to further the process of identifying the
> flow. The method thus examines each and every packet passing through the
> connection point in real time until the application program associated with the
> conversational flow is determined.

The patents-in-suit all claim priority to, and incorporate by reference, Provisional

Application No. 60/141,903, filed on June 30, 1999. The applications that led to the '099 Patent,

the '725 Patent, the '646 Patent, and the '751 Patent were all filed on June 30, 2000. The

application that led to the '789 Patent was filed on October 14, 2003, and the '789 Patent is a

continuation of the '099 Patent. Plaintiff submits that "[t]he specifications of the Asserted

Patents are similar . . . ." (Dkt. No. 55, at 6 n.4.) Also, the patents-in-suit filed on June 30, 2000,

incorporate each other by reference. '099 Patent at 1:11–36; '724 Patent at 1:12–38; '646 Patent

at 1:12–33; '751 Patent at 10:7–35. The Court therefore cites the specification of only the '099

Patent unless otherwise indicated.

II. LEGAL PRINCIPLES

This Court's claim construction analysis is guided by the Federal Circuit's decision in

Phillips v. AWH Corporation, 415 F.3d 1303 (Fed. Cir. 2005) (en banc). In *Phillips*, the court

reiterated that "the claims of a patent define the invention to which the patentee is entitled the

right to exclude." 415 F.3d at 1312 (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration

Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)). "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." *Id.* at 1316 (quoting *Renishaw PLC v. Marposs Societa' per

Azioni*, 158 F.3d 1243, 1250 (Fed. Cir. 1998)).

In claim construction, patent claims are generally given their ordinary and customary

meaning, which "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 effective filing date of the patent

application." *Id.* at 1312-13. This principle of patent law flows naturally from the recognition

that inventors are usually persons who are skilled in the field of the invention and that patents are

addressed to, and intended to be read by, others skilled in the particular art. *Id.*

Despite the importance of claim terms, *Phillips* made clear that "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.* The written description set forth in the specification, for example, "may act as a sort of dictionary, which explains the invention and may define terms used in the claims." *Markman*, 52 F.3d at 979. Thus, as the *Phillips* court emphasized, the specification is "the primary basis for construing the claims." *Phillips*, 415 F.3d at 1314–17.   However, it is the claims, not the specification, which set forth the limits of the patentee's invention. Otherwise, "there would be no need for claims." *SRI Int'l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1121 (Fed. Cir. 1985) (en banc).

The prosecution history also plays an important role in claim interpretation as intrinsic evidence that is relevant to the determination of how the inventor understood the invention and whether the inventor limited the invention during prosecution by narrowing the scope of the claims. *Phillips*, 415 F.3d at 1314–17; *see also Microsoft Corp. v. Multi-Tech Sys., Inc.*, 357 F.3d 1340, 1350 (Fed. Cir. 2004) (noting that "a patentee's statements during prosecution, whether relied on by the examiner or not, are relevant to claim interpretation"). In this sense, the prosecution history helps to demonstrate how the inventor and the United States Patent and Trademark Office ("PTO") understood the patent. *Id.* at 1317. Because the prosecution history, however, "represents an ongoing negotiation between the PTO and the applicant," it may sometimes lack the clarity of the specification and thus be less useful in claim construction. *Id.*

Courts are also permitted to rely on extrinsic evidence, such as "expert and inventor testimony, dictionaries, and learned treatises," *id.* (quoting *Markman*, 52 F.3d at 980), but *Phillips* rejected any claim construction approach that sacrifices the intrinsic record in favor of extrinsic evidence. *Id.* at 1319. Instead, the court assigned extrinsic evidence, such as dictionaries, a role subordinate to the intrinsic record. In doing so, the court emphasized that claim construction issues are not resolved by any magic formula or particular sequence of steps.

Id. at 1323–25. Rather, *Phillips* held that a court must attach the appropriate weight to the sources offered in support of a proposed claim construction, bearing in mind the general rule that the claims measure the scope of the patent grant. "In cases where . . . subsidiary facts are in dispute, courts will need to make subsidiary factual findings about [the] extrinsic evidence. These are the 'evidentiary underpinnings' of claim construction [discussed] in *Markman*, and this subsidiary factfinding must be reviewed for clear error on appeal." *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 841 (2015).

III. AGREED TERMS

In their December 9, 2016 Joint Claim Construction and Prehearing Statement (Dkt. No. 53, at 2) and their February 17, 2017 Joint Claim Construction Chart (Dkt. No. 59, at 4), the parties set forth their agreement as to the following term in the patents-in-suit:

Term	Agreement
"child protocol"	"a protocol that is encapsulated within another protocol"

IV. DISPUTED TERMS

The Court herein addresses the disputed terms in the order in which they have been presented in the Joint Claim Construction and Prehearing Statement and the Joint Claim Construction Chart filed by the parties. (Dkt. No. 53, at Exs. A & B; Dkt. No. 59.)

The parties appear to agree that the disputed terms should have the same construction across all of the patents-in-suit. (*See* Dkt. No. 55, at 6; *see also Omega Eng'g, Inc, v. Raytek Corp.*, 334 F.3d 1314, 1334 (Fed. Cir. 2003) ("we presume, unless otherwise compelled, that the same claim term in the same patent or related patents carries the same construed meaning").)

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