

United States District Court,  
S.D. Texas, Corpus Christi Division.

**TWO-WAY MEDIA LLC,**  
Plaintiff.

v.

**AMERICA ONLINE, INC,**  
Defendant.

C.A. No. C-04-089

**Aug. 24, 2007.**

### ***SUPPLEMENTAL MARKMAN ORDER***

**HAYDEN HEAD, Chief Judge.**

On August 8, 2007, the Court issued its Markman Order interpreting the contested claim language in United States Patents Nos. 5,778,187 (the "187 Patent"), 5,983,005 (the "005 Patent"), and 6,434,622 (the "622 Patent"). (D.E. 341 ("Markman Order").) Instead of adopting either parties' proposed interpretation of "controlling the routing of the stream of packets," or the interpretation the Court read from the bench on July 19, 2007, the Court proposed a new interpretation of the claim language: FN1

FN1. *See* Pfizer, Inc. v. Teva Pharms.USA, Inc., 429 F.3d 1364, 1377 (Fed.Cir.2005) ("We ... recognize that 'district courts may engage in rolling claim construction, in which the court revisits and alters its interpretation of the claim terms as its understanding of the technology evolves.' ") (quoting Jack Guttman, Inc. v. Kopykake Enters., Inc., 302 F.3d 1352, 1361 (Fed.Cir.2002)).

directing a portion of the routing path taken by the stream of packets from one of a group of intermediate computers located in a specific geographic area to the user (Markman Order at 7.) The Court invited the parties to submit objections and/or proposed alterations to the revised construction no later than August 15, 2007, at 5:00 PM. AOL submitted its proposed alterations and objections on August 15, 2007, and TWM responded on August 16, 2007.FN2

FN2. The Court expressly stated in its Markman Order that proposed alterations and objections were to be submitted "no later than Wednesday, August 15, 2007, at 5:00 PM." (Markman Order at 8.) While TWM failed to meet this deadline, in the interests of justice, the Court has considered TWM's submission in making its decision.

Having reviewed the parties' submissions, the Court adopts the following construction of "controlling the routing of the stream of packets":

## **directing a portion of the routing path taken by the stream of packets from one of a designated group of intermediate computers to the user**

The Court's intention in re-construing this claim language is to encompass aspects of the preferred embodiment that appear to have been eliminated by the Court's prior construction. *See Vitronics Corp. v. Conceptronic*, 90 F.3d 1576, 1583 (Fed.Cir.1996) (stating that an interpretation that excludes a preferred embodiment "is rarely, if ever, correct and would require highly persuasive evidentiary support ..."). Specifically, the new construction is meant to convey that (1) the stream of packets need not be directed *to* the intermediate computer from a primary server in response to user selection signals, but rather *from* the intermediate computer to the user, and (2) the stream of packets need not be forwarded through the intermediate computer unchanged. The Court has also addressed the parties' dispute with respect to the required geographic location of the intermediate computers, concluding that the geographic locations of the intermediate computers need not be associated with the users.

### **A. The Stream Of Packets Need Not Be Routed To The Intermediate Computer In Response to User Selection Signals.**

The claim limitation at issue reads in its entirety:

controlling the routing of the stream of packets *in response to selection signals received from the users*

(87 Patent, 18:24-25.) Figures 8A-8C of the patent specification illustrate how the stream of packets is routed in response to user selection signals in the preferred embodiment. (*Id.*, 14:13-15:13.) First, the user software receives a "sorted list of Control Servers," which it contacts sequentially until it obtains a response. (*Id.*, 14:13-27.) Then, the responding Control Server sends the user software a "sorted list of Media Servers," which the user software again contacts sequentially until it receives a response. (*Id.*, 14:28-44.) "When the Media Server receives a valid PLAY command [from the user software], it initiates the delivery of audio information to the User ..." (*Id.*, 14:49-50.) Nowhere in this description is it suggested that the user software, at any time, initiates the transmission of the stream of packets from the Primary Server to the Media Server.

This is further confirmed by Figures 14-16B of the patent specification, which illustrate how information is transmitted *to* the Media Server in the preferred embodiment. (*Id.*, 16:3-28.) The Administration Server contacts the Control Server, which, in turn, contacts the Media Server, indicating to the Media Server that it should start receiving a channel from a particular Primary Server or other Media Server. (*Id.*, 16:3-19.) The Media Server then contacts the Primary Server or other Media Server and requests distribution of the channel. (*Id.*, 20-28.) User selection signals are not considered at any point during this process.

### **B. The Stream Of Packets Need Not Pass Through The Intermediate Computer Unchanged.**

The description of the preferred embodiment expressly includes systems in which the stream of packets changes in some way as it passes through the intermediate computer. For example, the specification states "the Media Servers receive unicast packet streams and they then duplicate these streams into more unicast streams ...," (*Id.*, 5:67-6:2), "the Media Servers can translate the incoming packets into broadcast or multicast packets for transmission to the local networks," (*Id.*, 6:9-11), and "the Media Server may choose to dynamically vary the packet size to accommodate changes in network conditions." (*Id.*, 7:12-14). Requiring that the stream of packets remain unchanged as it passes through the intermediate computer would exclude the preferred embodiment from the scope of the claim language.

### C. The Intermediate Computers Need Not Be Located In Geographic Areas Associated With The User.

The Court's revised claim construction also addresses the parties' dispute with respect to the required location of the intermediate computers. While there is language in the Court's original Markman Order that suggests that the intermediate computer must be located in a geographic area associated with the user, the Court has reconsidered its position on this point. Neither the language of the claims themselves, nor the patent specification, requires that the intermediate computer be located geographically near the user. Instead, the patent specification states: "The topology of the Internet dictates the ideal placement of Media Servers ... *For example*, the Media Servers which feed to Users *might be* placed on or close to networks which have a large number of subscribers to minimize the distance and number of data streams being transmitted." ('187, 3:18-28.) Based on this language, it appears that the intermediate computers are not required to be "placed on or close to networks which have a large number of subscribers." FN3 Including this limitation in the Court's claim construction would violate the Federal Circuit's prohibition on reading a limitation from the preferred embodiment into the claim. *See Burke, Inc. v. Bruno Indep. Living Aids, Inc.*, 183 F.3d 1334, 1341 (Fed.Cir.1999) ("[A]n attribute of the preferred embodiment cannot be read into the claim as a limitation.").

FN3. In making this determination, the Court need not address whether a user's geographic location and network location are the same. Based on the claim language and patent specification, it appears that the geographic location of the intermediate computer need not be associated with either the user's geographic or network location.

For the foregoing reasons, the Court adopts following claim constructions.

<b>Claim Language</b>	<b>Court's Construction</b>
controlling the routing of the stream of packets	directing a portion of the routing path taken by the stream of packets from one of a designated group of intermediate computers to the user
controlling the routing of the stream of information <sup>[FN4]</sup>	directing a portion of the routing path taken by the stream of information from one of a designated group of intermediate computers to the user

FN4. As stated in the Court's original Markman Order, the parties agree that "controlling the routing of the stream of information" should be construed consistently with "controlling the routing of the stream of packets." (Markman Order at 8.)

S.D.Tex.,2007.

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