

TERM	CONSTRUCTION
“time for exchanging at least one message/[messages] between the [host server] site switch and a [first] client machine”	Plain and ordinary meaning
“virtual switch”	“system of switches identified by an address that provides redundant network paths while preventing network loops”

Seven years after the Federal Circuit's seminal *Phillips* decision,³ the canons of claim construction are now well-known even if not perfectly understood by parties and courts alike. Recognizing the many cases since *Phillips* that have summarized its holding and expounded upon its teachings, and in the interest of rendering a prompt decision to guide the parties as trial rapidly approaches, the court will cite to the claim construction canons only as necessary to illuminate its reasoning and conclusions. In that same interest, the court will not endeavor to provide a lengthy background of the patents, their underlying technology, and this litigation, and will instead presume the reader's familiarity with the discussion of these topics in Judge Koh's previous claim construction order.⁴

With respect to the “time for exchanging” term, A10 urges a construction that would limit the time to the “interval between the time the host server site switch receives a message from a program on a client device and the time the host server site switch receives an associated acknowledge message sent by the program.” As support for this construction, A10 notes that the specification associates the term with round-trip time (“RTT”) and further teaches that “[t]o provide an RTT under the present invention described above, ... a site switch... monitors the RTT time – the time difference between receiving a TCP SYN and a TCP ACK for the TCP connection – and records it in an entry of the cache database.”⁵ A10 is correct that “[w]hen a patent thus describes the features of the ‘present invention’ as a whole, this description limits the scope of the invention.”⁶ But, as Brocade responds, the use of the “present invention” in the specification may

³ *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005).

⁴ See Docket No. 434.

⁵ Docket No. 620, Ex. 1 at 6:24-33.

⁶ *Verizon Servs. Corp. v. Vonage Holdings Corp.*, 503 F.2d 1295, 1308 (Fed. Cir. 2007).

1 also describe particular embodiments that are compatible with the invention, even if not compelled
2 by it.⁷ That appears to be the case here. The language of the term itself confirms that the exchange
3 at issue may be initiated by either the host server or the client, a scenario inconsistent with A10's
4 proposed construction and in conflict with the Federal Circuit's teaching that the analytical focus of
5 any construction must focus on claim language.⁸ In addition, A10's proposed construction is
6 described as part of a flow diagram in a figure – Figure 2 – specifically identified as but one
7 embodiment of the invention.⁹ Under these circumstances, the court is compelled to give the claim
8 term its full range of plain and ordinary meaning.

9 With respect to the “virtual switch” term, A10 acknowledges that the term appears in a
10 preamble, but urges that it should nevertheless be recognized as a limitation and construed because
11 the term “breathes life and meaning in to the claims and, hence, is a necessary limitation to
12 them.”¹⁰ A10 points out that the language of the claim in which the term appears (Claim 1 of the
13 '195 patent) demands configuration of the switch so that it can act in concert with the system of
14 switches that comprise the “virtual switch.” This notion is emphasized by the use of the definite
15 article “the” before a reference to the system of switches in the body of the claim, referring to its
16 antecedent basis in the preamble. The court agrees with A10 that the effect is to provide “a
17 fundamental characteristic of the claim invention” that acts as a limitation on claim scope.¹¹ The
18 court also agrees with A10 that the requirements that the virtual switch be identified by an
19 addressed and be loop-free do not reflect preferred embodiments of the invention but rather the
20 claimed invention itself. The specification not only teaches these features,¹² but emphasizes that
21 the features are “in accordance with the present invention” and in sections providing a

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23 ⁷ See *Rambus, Inc. v. Infineon Techs. AG*, 318 F.3d 1081, 1094-95 (Fed. Cir. 2003).

24 ⁸ See *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 111, 1116 (Fed. Cir. 2004); *Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294 (Fed. Cir. 2003).

25 ⁹ See Docket No. 620, Ex. 1 at 4:15, 67-5:8.

26 ¹⁰ *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 866 (Fed. Cir. 1985).

27 ¹¹ *Vizio, Inc. v. Int'l Trade Comm'n*, 605 F.3d 1330, 1340-41 (Fed. Cir. 2010).

28 ¹² See Docket No. 620, Ex. 3 at 2:40-51; 3:41-49; 2:64-3:17; 9:33-41.

1 “Background” and “Brief Summary of the Invention” that are specifically distinguished from a
2 later section providing a “Detailed Description of the Preferred Embodiments.” This teaches more
3 than a compatible feature, as discussed above regarding the “time for exchanging” term. In the
4 context of the specification of the whole, and in particular the claim language itself, it teaches a
5 feature of the invention that is required.¹³

6 **IT IS SO ORDERED.**

7 Dated: 7/5/2012



8 PAUL S. GREWAL
9 United States Magistrate Judge

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26 ¹³ Cf. *Netcraft Corp v. eBay, Inc.*, 549 F.3d 1394, 1398 (Fed. Cir. 2008) (“we agree with the district
27 court that the . . . specification’s repeated use of the phrase ‘the present invention’ describes the
28 invention as a whole”); *Honeywell Int’l, Inc. v. ITT Indus., Inc.*, 452 F.3d 1312, 1318 (Fed. Cir.
2006 (agreeing with the district court’s construction that the disputed term should be consistent
with “the present invention”).