UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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ZSCALER, INC.,
Petitioner,

v.

SYMANTEC CORPORATION,
Patent Owner.

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Case IPR2018-00929
Patent 6,285,658 B1

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Before JEFFREY S. SMITH, BRYAN F. MOORE, and NEIL T. POWELL,
Administrative Patent Judges.

SMITH, *Administrative Patent Judge*.

DECISION
Instituting *Inter Partes* Review
35 U.S.C. § 314(a)

I. INTRODUCTION

Petitioner filed a Petition for *inter partes* review of claims 1–10, 12, 16, and 17 of US Patent 6,285,658 B1 (Ex. 1001, the '658 patent"). Paper 1 ("Pet."). Patent Owner filed a Preliminary Response. Paper 9 ("Prelim. Resp."). Institution of an *inter partes* review is authorized by statute when "the information presented in the petition . . . and any response . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." 35 U.S.C. § 314(a).

Upon consideration of the Petition and the Preliminary Response, we are persuaded Petitioner has demonstrated a reasonable likelihood that it would prevail in establishing the unpatentability of at least one claim of the '658 patent. Accordingly, we institute an *inter partes* review on all challenged claims and grounds raised in the Petition.

A. Related Matters

The '658 patent, along with several other patents, is the subject of *Symantec Corporation and Symantec Limited v. Zscaler, Inc.*, 17-cv-04414 (N.D. Cal.), transferred from 17-cv-00806 (D. Del.) filed June 22, 2017. Pet. 2–3; Paper 5 (Patent Owner's Mandatory Notice).

B. The '658 Patent

The '658 patent relates to management of network bandwidth based on information ascertainable from multiple layers of Open Systems Interconnection (OSI) network model. Ex. 1001, 1:58–60. A method classifies packet network flows to determine a policy of a service level, and to enforce the policy by direct rate control. Ex. 1001, Abstract. Packet network flows are applied to a classification model based on selectable information obtained from a plurality of layers of a multi-layered communication protocol. *Id.* The flow is mapped to

defined traffic classes assignable by an office manager. *Id*.

C. Illustrative Claim

Claims 1, 6, and 10 of the challenged claims of the '658 patent are

independent. Claim 1 is illustrative of the claimed subject matter:

1. A method for allocating bandwidth in a connection-less network system having an arbitrary number of flows of packets, including zero, using a classification paradigm, said allocation method comprising the steps of:

parsing a packet into a flow specification, wherein said flow specification contains at least one instance of any of the following: a protocol family designation, a direction of packet flow designation, a protocol type designation, a plurality of hosts, a plurality of ports, in http protocol packets, a pointer to a URL; thereupon,

matching the flow specification of the parsing step to a plurality of hierarchically-recognized classes represented by a plurality of nodes, each node having a traffic specification and a mask, according to the mask; thereupon,

having found a matching node in the matching step, associating said flow specification with one class of said plurality of hierarchically-recognized classes represented by a plurality nodes; and

allocating bandwidth resources according to a policy associated with said class.

Ex. 1001, 19:28–52.

D. References

Petitioner relies on the following references. Pet. 5–6.

Ex. 1005   Wakeman, "*Implementing Real Time Packet Forwarding Policies Using Streams*," 1995 USENIX Technical Conference, New Orleans, LA.
Ex. 1006   Choudhury   US 5,541,912   July 30, 1996

E. Asserted Grounds of Unpatentability

Petitioner contends that claims 1–10, 12, 16, and 17 of the '658 patent are unpatentable based on the following grounds:

Reference(s)	Basis	Challenged Claims
Wakeman	§ 102(b)	1–3, 6–9, and 16
Wakeman and Choudhury	§ 103	4, 5, 10, 12, and 17

II. Analysis

A. Claim Construction

The parties agree that the '658 patent has expired, and that the *Phillips* standard applies to claim construction. Pet. 11; Prelim. Resp. 8. "[T]he words of a claim 'are generally given their ordinary and customary meaning' . . . that the term would have to a person of ordinary skill in the art in question at the time of the invention." *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005) (en banc) (citations omitted). "[T]he 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 [it] appears, but in the context of the entire patent, including the specification." *Phillips*, 415 F.3d at 1313. For example, a "claim construction that excludes [a] preferred embodiment [described in the specification] 'is rarely, if ever, correct and would require highly persuasive evidentiary support.'" *Adams Respiratory Therapeutics, Inc. v. Perrigo Co.*, 616 F.3d 1283, 1290 (Fed. Cir. 2010) (citation omitted). But "a claim construction must not import limitations from the specification into the claims." *Douglas Dynamics, LLC v. Buyers Products Co.*, 717 F.3d 1336, 1342 (Fed. Cir. 2013) (citation omitted). Therefore, "it is improper to read limitations from a preferred embodiment described in the specification– even if it is the only embodiment–into the claims absent a clear indication in the intrinsic record that the patentee intended the claims to be so limited."

Dealertrack, Inc. v. Huber, 674 F.3d 1315, 1327 (Fed. Cir. 2012) (citation omitted).

Petitioner proposes construction for the terms "excess information rate" and "guaranteed information rate" recited in claims 4, 5, 10, 12, 17, "policy" recited in all challenged claims, and "speed scaling" recited in claims 5 and 12. Pet. 12–15. Patent Owner contends that no construction of any claim term is necessary at this preliminary stage. Prelim. Resp. 8.

For purposes of this decision, we determine no terms need an explicit construction to resolve a controversy at this preliminary stage. *See Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999) (only those terms which are in controversy need to be construed and only to the extent necessary to resolve the controversy).

B. Asserted Anticipation by Wakeman: Claims 1–3, 6–9, and 16

1. Wakeman (Ex. 1005)

Wakeman relates to implementing class based queueing (CBQ) mechanisms to provide real time policies for packet forwarding. Ex. 1005, Abstract. CBQ allows the traffic flows sharing a data link to be guaranteed a share of the bandwidth when the link is congested, yet allows flexible sharing of unused bandwidth when the link is unloaded. *Id.* Flows requiring low delay are given priority over other flows, so that links can be shared by multiple flows yet meet policy and Quality of Service (QoS) requirements. *Id.*

2. Claims 1, 9–13, 16–19

Independent claim 1 recites "parsing a packet into a flow specification, wherein said flow specification contains at least one instance of any of the following: a protocol family designation, a direction of packet flow designation, a protocol type designation, a plurality of hosts, a plurality of ports, in http protocol packets, a pointer to a URL." Petitioner contends this limitation is disclosed by

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