

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION**

WEBROOT, INC., OPENTEXT INC.,

§

§

Plaintiffs,

§

v.

§

AO KASPERSKY LAB,

§

W-22-CV-00243-ADA-DTG

TREND MICRO, INC.,

§

W-22-CV-00239-ADA-DTG

SOPHOS LTD.,

§

W-22-CV-00240-ADA-DTG

CROWDSTRIKE HOLDINGS, INC.,

§

W-22-CV-00241-ADA-DTG

FORCEPOINT, LLC,

§

W-22-CV-00342-ADA-DTG

PLAINTIFFS' SURREPLY CLAIM CONSTRUCTION BRIEF

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Plaintiffs Webroot, Inc. and Open Text, Inc. (“Plaintiffs” or “OTI”) respond to AO Kaspersky Lab, Trend Micro, Inc., Sophos Ltd., CrowdStrike, Inc., CrowdStrike Holdings, Inc., and ForcePoint, LLC’s (collectively, “Defendants”) Reply Claim Construction Brief. Defendants persist in proposing unnecessary constructions of easily understood words, constructions that depart from the plain and ordinary meaning and improperly import limitations from the specification or prosecution history. None of the terms that Defendants identify are limited by any clear and unequivocal disclaimer or definition found in the intrinsic record. Likewise, Defendants incorrectly assert that many claim terms are invalid as indefinite when each one is easily understood with reasonable certainty by a POSITA based on the patent disclosures.

I. THE ’250/’389/’721 PATENTS

A. “similar objects” / “similar computer objects”

Defendants have needlessly over-complicated and taken the terms “similar objects” and “similar computer objects” hopelessly out of context of the claim language to create a faux indefiniteness issue. To argue that “similar objects” and “similar computer objects” renders the ’250 and ’389 Patents indefinite, Defendants improperly analyze these terms in a vacuum. But claim terms must be considered in their appropriate context in the claims and from the perspective of a POSITA. ECF 98 at 5; *see also Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005).

A POSITA clearly understands what “similar objects” and “similar computer objects” are in the context of the claim language itself. For instance, claim 1 of the ’250 Patent specifies that the claimed “method of classifying a computer object as malware” includes the step of “receiving data about a computer object from *each of plural remote computers on which the object or similar objects are stored.*” *See* ’250 Patent at claim 1 (emphasis added¹). Thus, claim 1 specifically claims

¹ All emphasis is added unless noted otherwise.

“plural remote computers” that can be one of two possible types: (1) remote computers which store the “computer object” itself; or (2) remote computers which store “similar computer objects.”

In *both* cases, the remote computers transfer data about the “computer object” to a base computer to allow the base computer to determine “whether the data about the computer object received from the plural computers indicates that the computer object is malware.” *Id.* Thus, a POSITA reading claim 1 of the ’250 Patent would understand that a “similar object” is not the “computer object” itself but nonetheless has relevant data that the base computer can use for assessing the behavior of a “computer object” to determine whether it is malware. *Id.*²

The intrinsic record further confirms the claim language. The specifications explain that a computer object that purports to be a version of “notepad.exe,” a common program found in computers running Microsoft Windows, can be evaluated by comparing its behavior with one or more objects that use the *same or similar* identifying information to determine whether that computer object is malware. ’250 Patent at 10:56-66; ’389 Patent at 10:58-11:1. This is confirmed by the ’250 Patent file history. During prosecution, applicant stated that the ’250 Patent’s techniques are “founded on receiving information about objects present on a plurality of remote computers at a base computer” which “allows analysis to be performed mapping the behavior and attributes of objects known across the community in order to identify suspicious behaviour and to identify malware at an early stage.” *See* Ex. 26 at WBRT001662-1663. Notably, Defendants rely on precisely this language to describe the ’250 Patent in a recently filed IPR. Ex. 19 at 1.

Defendants completely ignore this clear disclosure and instead mischaracterize the testimony of OTI’s expert, Dr. Medvidovic. At the outset, Defendants cannot rely on extrinsic evidence such as expert testimony to change the clear disclosure in the intrinsic record. *Phillips*,

² Substantially the same analysis applies to the term “similar computer objects” in the ’389 Patent.

415 F.3d at 1318. Defendants mistakenly argue that Dr. Medvidovic “confirmed that whether two objects are ‘similar’ is subjective.” ECF 110 at 1 (emphasis omitted). Rather, Dr. Medvidovic explained that two objects are “similar” if they have “any identifiable similarity for the purposes of the system.” And here, the “purpose of the system” is clear and defined as explained above—namely, using data received from objects on remote computers in assessing whether to classify a “computer object” as malware. Thus, the “purpose of the system” is not some vague concept that depends on the “unrestrained, subjective opinion” and “unpredictable vagaries” of “a particular individual purportedly practicing the invention” as Defendants contend. *Id.* Any object that provides information that can be used for this purpose is a “similar object,” and as Dr. Medvidovic explained, *any* engineer informed about the “purpose of the system” would be able to determine whether the remote computer contains a similar object. Ex. 18 at 45:4-14.

Defendants’ entire indefiniteness position rests on the false premise that “similar” refers to some degree of comparison between objects. ECF 110 at 1-3. But as just discussed, the term “similar objects” is not used this way. Nevertheless, Defendants’ fail to establish indefiniteness of “similar objects.” Defendants do not address the facts (i) that the specifications describe a system that collects and leverages data about computer objects from multiple sources to identify malicious objects (ECF 98 at 5), (ii) that in the field of malware detection object similarity was a well-known concept used for detecting malicious objects that rapidly evolved or were easily modified, or (iii) that the specifications describe sending data about computer objects in the form of a key for efficient comparison. *Id.* at 7. Nor do Defendants’ experts rebut these facts.

Defendants’ indefiniteness claim presents no expert testimony of how a POSITA would understand “similar objects” in the context of the ’250/’389 Patents. *Id.* at 4. Defendants misrepresent that *Akzo* and *Freeny* “resolved indefiniteness without relying on or requiring expert

testimony.” *Id.* In fact, the defendants in these cases did not provide any expert testimony and did not prevail on indefiniteness. *Akzo Nobel Coatings, Inc. v. Dow Chem. Co.*, 811 F.3d 1334, 1345 (Fed. Cir. 2016); *Freeny v. Murphy USA, Inc.*, No. 2:13-cv-791-RSP, 2015 WL 294102, at *14, *17, *21, *24 (E.D. Tex. Jan. 21, 2015). In *Akzo*, the Federal Circuit noted that “Dow has provided no evidence to show that a person of ordinary skill in the art would not know with reasonable certainty the steps to which the limitation in claim 2 applies.” *Akzo*, 811 F.3d at 1338. In *Freeny*, the Court noted that “Defendant does not provide or rely upon any expert for its proposition that the term is indefinite or that one of ordinary skill in the art would not be reasonably certain as to the scope of this claim element.”³ *Freeny*, 2015 WL 294102 at *14, *17, *21, *24.

Defendants’ reliance on *ACQIS LLC v. Alcatel-Lucent USA Inc.*, No. 6:13-CV-638, 2015 WL 1737853 (E.D. Tex. Apr. 13, 2015) and *Vstream Techs., LLC v. PLR Holdings, LLC*, No. 6:15-CV-974-JRG-JDL, 2016 WL 6211550 (E.D. Tex. Sept. 27, 2016) is likewise misplaced. ECF 110 at 1, 2. In *ACQIS*, the court found that the patent did not define “similar” except in the case where two objects were identical. That is not the case here. For *Vstream*, Defendants incorrectly attempt to frame a POSITA’s understanding of “similar objects” in terms of a percentage similarity. *Id.* at 2. But, as Dr. Medvidovic explained, the ’250 Patent “is not concerned with a specific degree or threshold of similarity.” Ex. 18 at 67:13-14. As noted above, a POSITA understands the term

³ None of Defendants’ cited cases (ECF 110 at 4) hold that indefiniteness can be established without expert testimony in the circumstances present here. In *Gree, Inc. v. Supercell Oy*, No. 219-CV-00070-JRG-RSP, 2020 WL 2332144, at *34 (E.D. Tex. May 11, 2020) and *Luminati Networks Ltd. v. BIScience Inc.*, No. 2:18-CV-00483-JRG, 2019 WL 6683268, at *9-*10 (E.D. Tex. Dec. 6, 2019), the Courts examined a claim drafting error and the analysis only related to the internal coherence of the claim language. In *Noah Sys., Inc. v. Intuit Inc.*, 675 F.3d 1302, 1319 (Fed. Cir. 2012) the Federal Circuit rejected an attempt to use expert testimony to “fill the gaps in a specification” where the specification failed to describe an algorithm for performing a claimed function for a means-plus-function claim. The Federal Circuit explained that “the prohibition against using expert testimony in this manner is a direct consequence of the requirement that the specification itself adequately disclose the corresponding structure.” *Id.*, 675 F.3d at 1312.

“similar objects”/“similar computer objects” based on whether an object has relevant data that a base computer can use to ascertain if a computer object is malware.

B. “behaviour of the object” / “behaviour of the computer object” / “behavior information about the first computer object” / “object behavior information”

This claim language requires no construction. The plain and ordinary meaning of this language does not limit “behavior” to affirmative actions performed by an object, and Defendants cite no clear and unambiguous definition or disavowal to the contrary. ECF 98 at 8-9. Defendants irrelevantly and confusingly argue that the source of the behavior information (*i.e.* how the behavior information is derived) is relevant to what the “behavior of the object is”—it is not—and then incorrectly argue that the applicant disavowed an objects’ attributes and source code as providing information about the object’s behavior during prosecution. ECF 110 at 5. At most, the prosecution history distinguishes signature matching based on hashes and says nothing to define the “behavior” of an object or whether behavior is limited to affirmative actions performed by an object—as opposed to deriving behavior from the object’s reactions to events, its environment, or other behavioral characteristics and/or features of the object. ECF 110, Ex. A-1 at 3; *see TrackThings LLC v. Amazon.com, Inc.*, No. 6:21-cv-720-ADA, 2022 U.S. Dist. LEXIS 105718, at *5 (W.D. Tex. 2022) (no clear disavowal); *see also Epistar Corp. v. Int’l Trade Comm’n*, 566 F.3d 1321, 1335 (Fed. Cir. 2009) (criticism of a particular technique does not rise to the level of a clear disavowal). Accordingly, Defendants’ attempt to change the plain and ordinary meaning of the “behavior” claim language should be rejected.

C. “automatically”

The term “automatically” is straightforward and requires no construction. ECF 98 at 9-10. The core question is whether a lay juror needs the term “automatically” construed to understand it. OTI submits that a lay juror does not. Defendants argue that plain and ordinary meaning does

not resolve the parties’ dispute as to the term’s scope, but parties’ disagreement as to whether a term requires construction does not, itself, require that the term be construed under *O2 Micro*, and the Court is free to conclude that the proper construction is plain and ordinary meaning. *See, e.g., ActiveVideo Networks, Inc. v. Verizon Comms., Inc.*, 694 F.3d 1312, 1326 (Fed. Cir. 2012). The specification clearly uses the term “automatically” to describe an action that necessarily and inevitably occurs as a result of a particular circumstance, for example explaining that “[b]y monitoring activity of the parent process, if it is later found that the parent process is malware, then all of the issue processes can all **automatically** be recorded in the local database as bad.” ’250 Patent at 17:36-39; *see also* 3:31-35, 7:10-16 (“trusted installers are automatically authorized to proceed”); 11:45-47; 17:25-30; 17:40-49. This does not, for example, foreclose all human involvement in determining what should and should not be stored.

The prosecution history statements cited by Defendants do not define automatically and certainly do not state “without human involvement.” Instead, the statement is that a “**human decision is not necessary** to generate the mask or monitor the operation.” ECF 110 at 6. While the scope of Defendants’ proposed construction is unclear—including how they contend that construction departs from the plain and ordinary meaning—Defendants do not explain why their construction uses entirely different language than the prosecution history they purport to rely on.

D. “a mask for the computer object...”

OTI and Kaspersky agree that this term does not need construction. *See* ECF 98 at 10-14. Defendants’ attempt to restrict this claim language rests on a misrepresentation that the only embodiments disclosed in the specification use a list of acceptable behavior. ECF 110 at 6-8. Contrary to Defendants’ assertions, the specification indicates that the mask may detect good behaviors, normal behaviors and bad behaviors:

In practice, therefore, in one embodiment the behaviour of the object is continually

monitored at the remote computer(s) 2 and information relating to that object continually sent to and from the community database 7 to determine whether the object is running within its expected mask.... Thus, if for example the object, on a regular basis (say monthly or yearly) opens a new port to update itself or to obtain regular data, then this information is flagged.... Similarly, *if the object attempts to connect to a known unsafe website, database or to take action that is known as generally being action only taken by unsafe programs*, then again the object may be considered to be unsafe.

'250 Patent at 15:5-25; *see also* '250 Patent at 15:47-57.

Defendants' position attempts to rewrite the claim language. ECF 110 at 6-8. The claim language states that the mask "defines acceptable behavior for the object." The mask can *define* acceptable behavior by identifying and detecting behaviors and/or actions that are acceptable or unacceptable. ECF 98 at 11-12. Nothing that Defendants point to in the specification or prosecution history limits that definition to a list, let alone only a specific "list of acceptable actions." Accordingly, Defendants' narrow construction should be rejected and the "mask" claim language given its plain and ordinary meaning.⁴

E. "running said object" / "executing the computer object"

The Plaintiff and nearly every Defendant save CrowdStrike, do not believe these easily understood terms require construction. ECF 98 at 14-15. These terms have common, everyday meanings in reference to computers that a lay jury will easily understand. CrowdStrike admits that "[t]here should be no disagreement over the technical meanings of these terms" (ECF 86 at 12) but then suggests that multiple technical meanings are possible: "the issue is not whether the jurors will apply a technical meaning. The issue is to make sure the jurors apply the proper technical

⁴ Defendants' attempt to discredit OTI's analogy confirms its validity. ECF 110 at 8. According to Defendants, "identifying unacceptable behaviors like 'playing in traffic or with fire' does not mean all other behaviors are acceptable—nor would it be possible to list all potentially unacceptable behaviors to 'define' acceptable behavior in the negative." Defendants' logic applies equally to identifying acceptable behaviors; not all acceptable behaviors could possibly be defined either. In reality, it may well be more efficient to set out the unacceptable behaviors rather than attempting to define the entire universe of acceptable behaviors.

meaning.” ECF 110 at 8-9. CrowdStrike provides no evidence of the multiple technical meanings that are possible for these terms, or how the jury might misapply these technical meanings, let alone that one “proper technical meaning” must be selected from multiple technical meanings. CrowdStrike does not identify any clear and unambiguous definition or disavowal in the intrinsic record, or any other reason, to depart from the plain and ordinary meaning of these terms, and instead give them a more complicated, identical meaning particularly when Defendants recognize that different terms are presumed to have different meanings. *Id.* at 28.

F. “events initiated [by] or involving the [computer] object”

OTI and at least three Defendants propose no further construction for this claim language, confirming that the plain and ordinary meaning suffices. By contrast, two Defendants propose a construction that is inconsistent with the plain and ordinary meaning. ECF 98 at 15-16. Defendants provide no basis for narrowly restricting the construction of the “events” claim language to focus on “actions performed” alone. ECF 110 at 9. That construction is inconsistent with the plain language which refers to events “*involving* the object,” and the specification which explains that “events...define the actions *or behaviors* of an object acting upon another object or some other entity.” ’250 Patent at 12:64-65. The specification further describes how events can be “initiated by” a computer object and how events can *involve* a computer object indirectly, such as when initiated or carried out by that object’s progeny. *Id.* at 11:3-41 (explaining that “one object’s behavior can be influenced or changed by its association or linkage to another”). Rather than support its proposed construction, Defendants mischaracterize OTI’s position and improperly attempt to read a requirement for each event to have exactly one actor and one victim from the specification into the claims. *Deere & Co. v. Bush Hog, LLC*, 703 F.3d 1349, 1354 (Fed. Cir. 2012) (citing *Phillips*, 415 F.3d at 1323).

G. “first remote computer” / “second remote computer”

To the extent Defendants attempt to redefine the term “remote computer,” the term “remote computer” is discussed separately and should be given its plain and ordinary meaning. ECF 98 at 18-22; *infra* at 10-11. As explained below, Defendants’ improperly attempt to give “remote computer” a narrow construction that departs from the plain and ordinary meaning. With that understanding, OTI agrees that the “first remote computer” in claim 1 of the ’389 Patent is not a computer identical in every respect to the “second remote computer.”

H. “correlating... at least a portion of the data about the computer object...”

OTI and all Defendants except Kaspersky agree that the “correlating” limitation is understood according to its plain and ordinary meaning and needs no specific construction. ECF 98 at 18. Kaspersky incorrectly asserts that construction is required under *O2 Micro*, but Kaspersky identifies no “ambiguity” in this claim term. *See ActiveVideo Networks, Inc.*, 694 F.3d at 1326.

In fact, Kaspersky’s construction creates ambiguity where none otherwise exists. Specifically, it is unclear what Kaspersky means by “the same object” and how that differs from the claim language that already refers to “...data about *the* object...” The specification describes embodiments where many remote computers may see an object and provide information to a base station about the object. Ex. 2, 3:7-9, 4:43-45, 8:47-63, 10:43-49. And the patent contemplates that “the object” can have different creation dates across different computers. Ex. 2 at Abstract, 3:25-36, cl. 1. Kaspersky does not explain what its construction seeks to accomplish or whether it seeks to exclude these express embodiments. However, by injecting an additional term—“same”—the jury may apply undue significance to this newly added term and mistakenly exclude these express embodiments.

Nothing in the specification or prosecution history requires adding “same” to the claims. Instead, the three instances Kaspersky cites all parrot claim language referring to “the object” on the first/second (or plural) remote computers—the language that is already in the claims. ECF 86

at 16 (citing Ex. J-2 at 8-10; '389 patent at 3:7-9, 3:25-27, 4:43-45). Similarly, Kaspersky's reliance on prosecution statements where Applicant used the phrase "***the*** computer object," such as "the data about ***the*** computer object received from the plural computers," again simply parrots language that is already in the claims. *E.g.*, ECF 86 at 16; ECF 110 at 10. ***In fact, one of Kaspersky's citations appears to be relying on the amended claims themselves. Id.*** (citing '389 File History at 8). None of these statements is a disavowal or disclaimer that changes the ordinary meaning of the "correlating" claim language. Accordingly, Kaspersky's proposed construction for the "correlating" limitation should be rejected.

I. Order of Steps: "correlating, by the base computer, at least a portion of the data...; comparing, by the base computer, the correlated data"

This claim language should be given its plain and ordinary meaning and no further construction is necessary. Only two Defendants contend (incorrectly) that the "correlating" step must be completed prior to the "comparing" step. ECF 86 at 17; ECF 110 at 10. Undisputedly, claim 1 of the '389 Patent recites "correlating" only some data ("at least a portion of the data") before the "comparing" step. Thus, this claim language can be met if some received data is correlated ***after*** the "comparing" step. *See Interactive Gift Exp., Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1343 (Fed. Cir. 2001) (logically, step four could be performed before step one).

Defendants rely on a prosecution statement that references correlating "a portion of the data about the computer object": "there is no suggestion in Omote where ***at least a portion of the data about the computer object*** from the first and second remote computers ***is correlated***, the correlated data then being compared to other objects or entities to identify relationships." ECF 86 at Ex. J-2. But this statement confirms that only a portion of the data is correlated before the

comparing step.⁵

J. “remote computer(s)”

OTI and three Defendants concur that the term “remote computers” should be given its plain and ordinary meaning. ECF 98 at 18-22. Trend and Forcepoint’s proposed meaning departs from the plain and ordinary meaning and improperly reads limitations from the specification into the claims. *Id.* They focus only on certain embodiments while ignoring contradictory disclosures. For example, they redefine “remote computer” as a “local terminal”—even though the patents and corresponding GB Priority Application describe the invention broadly to include a “computer” not just a “local terminal.” ECF 110 at 21; Ex. 5 at 1:1-5 (“This invention relates to computer security. In particular, it relates to methods and systems for detecting whether a process operated on a computer is likely to be one which is safe to operate or is likely malware.”).

Defendants also mistakenly argue that, according to the GB Priority Application, the “remote computer” must be connected to a base computer via the Internet. But the GB Priority Application states that the computer network may be “a distributed network such as the Internet.” Ex. 5 at 5. This passage refers to distributed networks generally, and the Internet is just an example. The GB Priority Application even contemplates connecting a “local terminal” to some “other network” besides the Internet. *See id.* at 7:23-8:2 (“If the process is unknown, then this means that the process has not been run before at that *local terminal*. **In this case, details of the process are passed over the Internet or other network** to the community database....”). Neither Defendant points to any clear and unambiguous definition or disavowal that limits the universe of remote computers encompassed. Defendants’ proposed construction of “remote computer(s)” is an

⁵ Defendants’ cases are inapposite. ECF 86 at 17. Nothing of the ’389 Patent claims requires, as a matter of logic or grammar, that the “correlating” step be completed for all data about a computer object before the “comparing” step.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record as being served with a copy of the foregoing document via the court's CM/ECF system on January 6, 2023.

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