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

WEBROOT, INC., OPEN TEXT INC., *Plaintiffs,* **-v- AO KASPERSKY LAB,** *Defendant.*	§	**6:22-cv-00243-ADA-DTG** **LEAD CASE**
WEBROOT, INC., OPEN TEXT INC., OPEN TEXT CORPORATION, *Plaintiffs,* **-v- TREND MICRO, INC.,** *Defendant.*	§	**6:22-cv-00239-ADA-DTG**
WEBROOT, INC., OPEN TEXT INC., OPEN TEXT CORPORATION, *Plaintiffs,* **-v- SOPHOS LIMITED,** *Defendant.*	§	**6:22-cv-00240-ADA-DTG**
WEBROOT, INC., OPEN TEXT INC., *Plaintiffs,* **-v- CROWDSTIKE, INC., CROWDSTRIKE HOLDINGS, INC.,** *Defendants.*	§	**6:22-cv-00241-ADA-DTG**
WEBROOT, INC., OPEN TEXT INC., OPEN TEXT CORPORATION, *Plaintiffs,* **-v-**	§	**6:22-cv-00342-ADA-DTG**

FORCEPOINT, LLC,	**§**
Defendant.	**§**
	§
	§

CLAIM CONSTRUCTION ORDER

Before the Court are the Parties' claim construction briefs: Defendants AO Kaspersky Lab; Trend Micro, Inc.; Sophos Limited; Crowdstrike, Inc. and Crowdstrike Holdings, Inc.; and Forcepoint, LLC's Opening Claim Construction Brief (ECF No. 263), Plaintiffs Webroot, Inc. and Open Text Inc.'s ("OTI") Response Brief (ECF No. 304), Defendants' Reply Claim Construction Brief (ECF No. 323), OTI's Sur-Reply (ECF No. 345), and the Joint Claim Construction Statement (ECF No. 341). On July 24, 2023, the Court provided the parties with its Preliminary Claim Constructions, and on July 25 2023, the Court held a *Markman* hearing. During that hearing, the Court informed the Parties of the final constructions for the disputed terms. This Order does not alter any of those constructions.

The Court issues this Order to memorialize the Court's final claim construction rulings for the parties, and to inform the parties that the Court plans to issue a more-detailed Order explaining its analysis in due course. The deadline to file any objections to the undersigned's claim construction rulings (pursuant to Federal Rules of Civil Procedure 59 and 72) do not need to be filed until 14 days after that more fulsome Order is entered upon the docket.

SIGNED this 25th day of July, 2023.

DEREK T. GILLILAND
UNITED STATES MAGISTRATE JUDGE

Term	OTI's Proposed Construction	Defendants' Proposed Construction	Court's Final Construction
#1: "pestware" U.S. Patent No. 8,181,244, Claims 1–4, 7, 9–12, 15; U.S. Patent No. 8,201,243, Claims 1, 3, 6, 8, 12; U.S. Patent No. 8,856,505, Claims 1, 2, 4, 6, 7, 9, 11, 12, 14, 16-20; U.S. Patent No. 8,719,932, Claims 1, 2, 5, 7, 12, 13 Proposed by Trend Micro / Sophos	Plain and ordinary meaning	'244, '243, '932 Patents: "a trojan, spyware, or adware program that collects information about a person or an organization" '505 Patent: "any program that collects and/or reports information about a person or an organization and any 'watcher processes' related to the pestware"	'244, '243, '932 Patents: "a trojan, spyware, adware, or malware program that collects information about a person or an organization" '505 Patent: "any program that collects and/or reports information about a person or an organization and any 'watcher processes' related to the pestware"

Term	OTI's Proposed Construction	Defendants' Proposed Construction	Court's Final Construction
#2: "kernel-mode driver" U.S. Patent No. 8,181,244, Claims 1, 9; U.S. Patent No. 8,201,243, Claims 1, 6, 12; U.S. Patent No. 8,719,932, Claims 1, 12 Proposed by CrowdStrike	Plain and ordinary meaning	CrowdStrike disagrees with Webroot's proposed constructions for the "kernel-mode" terms in CrowdStrike's Counterclaim patents. Dkt. 196. To the extent the Court construes those terms as proposed by Plaintiffs, CrowdStrike contends that a similar construction be applied to "kernel-mode driver." On that basis only, CrowdStrike proposes the following construction: "driver operating in kernel-mode." Should the Court agree with CrowdStrike that the "kernel-mode" terms in CrowdStrike's Counterclaim patents be afforded its plain and ordinary meaning, CrowdStrike will withdraw this construction.	Plain-and-ordinary meaning

Term	OTI's Proposed Construction	Defendants' Proposed Construction	Court's Final Construction
#3: "suspicion of pestware" / "suspected of originating pestware" / "suspected pestware object" / "suspected pestware process" / "suspicious activity" / "suspected pestware" / "suspected pestware-related event" / "suspected to be pestware-related" U.S. Patent No. 8,181,244, Claims 1, 3, 4, 6, 9, 10, 11, 12; U.S. Patent No. 8,201,243, Claims 1, 3, 12; U.S. Patent No. 8,719,932, Claims 1, 2, 5, 12, 13 Proposed by CrowdStrike	Plain and ordinary meaning	Indefinite	Not indefinite. Plain-and-ordinary meaning.
#4: "time of interest includes a time interval" / "time of interest including a time interval U.S. Patent No. 8,181,244, Claims 1, 9 Proposed by Sophos	Not indefinite; Plain and ordinary meaning	Indefinite	Not indefinite. Plain-and-ordinary meaning.

Term	OTI's Proposed Construction	Defendants' Proposed Construction	Court's Final Construction
#5: "externally networked [pestware research entity / source]" U.S. Patent No. 8,201,243, Claims 1, 2, 6, 12, 13; U.S. Patent No. 8,181,244, Claims 1, 7–10; U.S. Patent No. 8,719,932, Claims 1, 3, 5, 10, 12, 14 Proposed by Trend Micro / Forcepoint	Plain and ordinary meaning	"networked [pestware research entity / source] that is external to the computer's internal network"	Plain-and-ordinary meaning.

Term	OTI's Proposed Construction	Defendants' Proposed Construction	Court's Final Construction
#6: "a timestamp module" U.S. Patent No. 8,181,244, Claims 9, 14 Proposed by Trend Micro	Not subject to § 112 ¶ 6; Not indefinite. Plain and ordinary meaning	Subject to § 112 ¶ 6. **Functions**: (claim 9) to generate a time of interest including a time interval in response to detected activity on the computer that is indicative of pestware, to issue a timestamp after generating the time of interest, and to initiate, in response to the issuance of the timestamp, identification of indicia of pestware (claim 14) [in addition to claim 9 function,] generate the time of interest as a point in time **Structure**: Indefinite	Not subject to § 112 ¶ 6. Plain-and-ordinary meaning.
#7: "potential pestware activity" U.S. Patent No. 8,181,244, Claims 9, 10, 15 Proposed by Trend Micro	Plain and ordinary meaning	Indefinite [Withdrawn, but Trend Micro preserves its position in the event Plaintiffs or Open Text Corp. object to or appeal from the Court's construction of "potentially malicious script" in Trend Micro's '992 patent]	N/A

#8: "a heuristics module" U.S. Patent No. 8,181,244, Claims 11, 12; U.S. Patent No. 8,201,243, Claims 5, 7 Proposed by Trend Micro / Forcepoint	Not subject to § 112 ¶ 6; Not indefinite. Plain and ordinary meaning	Subject to § 112 ¶ 6. **Functions**: ('244 patent, claim 11) evaluate whether the event is a suspected pestware-related event before the research portion accesses information in at least one log that relates the event to the suspected pestware object ('243 patent, claim 6) to identify an activity on the computer that is indicative of pestware residing on the computer and to analyze the activity to determine whether one or more weighted factors associated with the activity exceeds a threshold ('932 patent, claim 5) analyze the API call activity to determine whether one or more weighted factors associated with the API call activity exceeds a threshold Additional functions recited in dependent claims **Structure**: Indefinite	Not subject to § 112 ¶ 6. Plain-and-ordinary meaning.

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#9: "identify[ing] . . . access[ing] . . . report[ing] . . ." U.S. Patent No. 8,201,243, Claims 1, 6, 12 Proposed by Forcepoint / Sophos	Plain and ordinary meaning	Order of steps: "identify[ing]," "access[ing]," and "report[ing]" must occur in order	**All claims**: No order recited except for "identify[ing]," "access[ing]," and "report[ing]" must occur in order
#10: "monitor[ing] . . . stor[ing] . . . analyz[ing] . . . identify[ing] [a suspected pestware object] . . . identi[fying] [an externally networked source] . . . report[ing] . . ." U.S. Patent No. 8,719,932, Claims 1, 5, 12 Proposed by CrowdStrike, Forcepoint, Sophos	Plain and ordinary meaning	Order of steps: (a) "monitoring" comes before "storing," "analyzing," and "identifying" [a suspected pestware object]; and then (b) "identify[ing]" [a suspected pestware object], "identi[fying]" [an externally networked source], and "report[ing]" must occur in order	**All claims**: No order recited except for "identify[ing]" [a suspected pestware object], "identi[fying]" [an externally networked source], and "report[ing]" must occur in order

Term	OTI's Proposed Construction	Defendants' Proposed Construction	Court's Final Construction
#11: "identity of the externally networked source is selected from a group consisting of an I.P. address, a URL, an email client, and a program" U.S. Patent No. 8,719,932, Claims 1, 9, 12 Proposed by Kaspersky	Plain and ordinary meaning	The identity of the externally networked source is selected from a closed group of specified alternatives, that is, either an I.P. address, or a URL, or an email client, or a program, and nothing else	Plain-and-ordinary meaning

Term	OTI's Proposed Construction	Defendants' Proposed Construction	Court's Final Construction
#12: "kernel-level monitor"	Plain and ordinary meaning	CrowdStrike disagrees with Webroot's proposed constructions for the "kernel-level" terms in CrowdStrike's Counterclaim patents. Dkt. 196. To the extent the Court construes those terms as proposed by Plaintiffs, CrowdStrike contends that a similar construction be applied to "kernel-level monitor." On that basis only, CrowdStrike proposes the following construction: "monitor operating in kernel-mode." Should the Court agree with CrowdStrike that the "kernel-level" terms in CrowdStrike's Counterclaim patents be afforded its plain and ordinary meaning, CrowdStrike will withdraw this construction.	Plain-and-ordinary meaning

#13: "a research portion configured . . ." U.S. Patent No. 8,181,244, Claim 9; .S. Patent No. 8,201,243, Claim 6; U.S. Patent No. 8,719,932, Claim 5 Proposed by Sophos / Trend Micro / Forcepoint / Kaspersky	Not subject to § 112 ¶ 6; Not indefinite. Plain and ordinary meaning	Subject to § 112 ¶ 6 **Functions**: ('244 patent, claim 9) to be executed by the hardware processor and to access at least one log on a file storage device of the computer to relate the time of interest to at least one externally networked source of potential pestware activity on the computer ('243 patent, claim 6) a research portion configured to access, in response to a prompt from the heuristics module, a first set of recorded information on the computer that relates the activity to at least one file residing on the computer, and wherein the research portion is configured to access a second set of recorded information on the computer that relates the at least one file to an externally networked source from which the file was received ('932 patent, claim 5) to identify, in response to a prompt from the heuristics	Not subject to § 112 ¶ 6. Plain-and-ordinary meaning.

Term	OTI's Proposed Construction	Defendants' Proposed Construction	Court's Final Construction
		module, a suspected pestware object on the computer **Structure**: Indefinite; no corresponding structure	

#14: "a reporting portion configured . . ." U.S. Patent No. 8,181,244, Claim 9; .S. Patent No. 8,201,243, Claim 6; U.S. Patent No. 8,719,932, Claim 5 Proposed by Sophos / Trend Micro / Forcepoint / Kaspersky Proposed by Trend Micro / Forcepoint / Kaspersky	Not subject to § 112 ¶ 6; Not indefinite. Plain and ordinary meaning	Subject to § 112 ¶ 6 **Functions**: ('244 patent, claim 9) to be executed by the hardware processor and to generate a report that identifies at least one externally networked source of potential pestware activity ('243 patent, claim 6) to generate a report that identifies the externally networked source of the file and to report an identity of the externally networked source to an externally networked pestware research entity so as to enable the externally networked pestware research entity to research whether the externally networked source is a source of pestware ('932 patent, claim 5) to generate a report including a reference to an identity of an externally networked source of the suspected pestware object and to report the identity of the externally networked source to an externally networked pestware research entity	Not subject to § 112 ¶ 6. Plain-and-ordinary meaning.

Term	OTI's Proposed Construction	Defendants' Proposed Construction	Court's Final Construction
		Structure: Indefinite; no corresponding structure	
#15: "receiving . . . receiving . . . receiving . . . determining . . . determining . . ." U.S. Patent 8,763,123, Claims 1, 4, 13, 16 Proposed by CrowdStrike	Plain and ordinary meaning	Order of steps: Step [1C] before Step [1D]; Steps [1A] to [1D] must all occur before Step [1E]	**All claims**: No order recited except for Steps [1C], [1D], [1E] must be performed in the order recited.
#16: "security products" U.S. Patent 8,763,123, Claims 1, 3, 4, 6, 10, 11, 12, 13, 14, 15, 16 Proposed by Sophos	Plain and ordinary meaning	anti-malware systems including anti-virus software, antispyware, firewall, and anti-adware	Plain-and-ordinary meaning.
#17: "behavior rules" U.S. Patent 8,856,505, Claims 1, 2, 6, 7, 11, 12, 16, 17 Proposed by Sophos	Plain and ordinary meaning	Plain-and-ordinary meaning wherein the plain-and-ordinary meaning does not include the static attributes of the monitored application.	Plain-and-ordinary meaning.

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#18: "scan[ning] data in a registry" U.S. Patent 8,856,505, Claims 1, 6, 11 Proposed by CrowdStrike	Plain and ordinary meaning	Plain-and-ordinary meaning, wherein the plain-and-ordinary meaning of "scan[ning] data in a registry" does not include detecting reads of a registry.	Plain-and-ordinary meaning[1] [1] – Note not for the jury the plain-and-ordinary meaning of "scan[ning] data in a registry" does not include detecting reads of a registry.
#19: "pestware management engine" U.S. Patent 8,856,505, Claims Proposed by Trend Micro	Not subject to § 112 ¶ 6; Not indefinite. Plain and ordinary meaning	This limitation is a means-plus function limitation governed by 35 U.S.C. § 112, ¶ 6 **Functions**: (Claims 2, 7, 12): compile behavior rules to include in the set of behavior rules (Claim 16): modify the behavior rules utilized by a kernel-level monitor **Structure**: Indefinite for failure to disclose corresponding structure or algorithm	Not subject to § 112 ¶ 6. Plain-and-ordinary meaning.

Term	OTI's Proposed Construction	Defendants' Proposed Construction	Court's Final Construction
#20: "the boot sequence" U.S. Patent 8,856,505, Claims Proposed by Trend Micro	Not indefinite; Plain and ordinary meaning	Indefinite	Not indefinite. Plain-and-ordinary meaning.
#21: Order of method steps U.S. Patent 8,856,505, Claims 1 , 6, 11 Proposed by Sophos and CrowdStrike	Plain and ordinary meaning	Order of steps: the managing and generating steps happen before the analyzing step, which happens before the modifying step.	**All claims**: No order recited except for the "generating" step must happen before the "analyzing" step

#22: a memory comprising: . . ." U.S. Patent 8,856,505, Claim 6 Proposed by Sophos	Not subject to § 112 ¶ 6; Not indefinite. Plain and ordinary meaning	Subject to § 112, ¶ 6. **Functions**: (1) monitor events during a boot sequence of the computer (2) manage pestware-related events during first period in a boot sequence of the computer, the first period in the boot sequence occurring before the computer becomes configured to run native applications, before a WIN32 subsystem is loaded, and after a kernel is loaded (3) manage pestware-related events in accordance with a set of behavior rules during a second period in the boot sequence occurring when the computer is configured to run native applications (4) generate, in response to the monitoring, a record of events, the record of events including the pestware-related events (5) analyze the record of events so as to identify the pestware-related events (6) modify the set of behavior rules so as to prevent the pestware related events	Not indefinite. Plain-and-ordinary meaning.

Term	OTI's Proposed Construction	Defendants' Proposed Construction	Court's Final Construction
		(7) scan data in a registry of the computer for pestware during the second period in the boot sequence **Structure**: no corresponding structure (no algorithm)	
#23: "the static data points" U.S. Patent 11,409,869, Claims 1, 10, 15, 18, 32, 46 Proposed by Sophos	Not indefinite; Plain and ordinary meaning	Indefinite	Not indefinite. Plain-and-ordinary meaning.
#24: "within a predetermined range" U.S. Patent 11,409,869, Claims 18, 32, 46 Proposed by CrowdStrike / Forcepoint / Sophos / Trend Micro	Plain and ordinary meaning	Plain-and-ordinary meaning, wherein the plain-and-ordinary meaning of "range" is a numerical range or a subset of a "particular scale" with at least a lower limit or an upper limit, but not necessarily both.	Plain-and-ordinary meaning, wherein the plain-and-ordinary meaning of "range" is a numerical range or a subset of a "particular scale" with at least a lower limit or an upper limit, but not necessarily both.