UNITED STATES PATENT AND TRADEMARK OFFICE

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Artegis Law Group, LLP / Netflix
7710 Cherry Park Drive Suite T #104
Houston, TX 77095

EXAMINER
DESROSIERS, EVANS

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kcruz@artegislaw.com
sjohnson@artegislaw.com

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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Ex parte JAMES MITCH ZOLLINGER and FILIP PAUN[1]

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Appeal 2019-002255
Application 14/329,687
Technology Center 2400

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Before ALLEN MacDONALD, BARBARA A. BENOIT,
and MICHAEL M. BARRY, *Administrative Patent Judges*.

BARRY, *Administrative Patent Judge*.

DECISION ON APPEAL[2]

Pursuant to 35 U.S.C. § 134(a), Appellant appeals from the
Examiner's decision to reject claims 1–21. *See* Appeal Br. 1–19; Final Act.
1–16. We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

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[1] We use "Appellant" to refer to "applicant" as defined in 37 C.F.R. § 1.42.
Appellant identifies the real party in interest as NETFLIX, INC. Appeal Br.
3.

[2] We refer herein to the Final Office Action mailed Mar. 9, 2018 ("Final
Act."), Advisory Action mailed June 7, 2018 ("Post-Final Adv. Act."),
Appeal Brief filed Oct. 10, 2018 ("Appeal Br."), Answer mailed Nov. 21,
2018 ("Ans."), Reply Brief filed Jan. 22, 2019 ("Reply Br."), and the
Specification filed July 11, 2014 ("Spec.").

Introduction

Appellant describes the invention as "relat[ing] generally to cryptography in computer networks and, more specifically, to . . . check[ing] a computer device runs the correct version of a software program based on obfuscated initiation values of a cryptography protocol." Spec. ¶ 2.

Claim 1 is representative of the claims on appeal:

> 1.   A method, comprising:
>
> *receiving an application update for an application installed on a computing system, wherein the application update includes initial setup values for a key exchange protocol to be performed with a server machine, and the initial setup values are associated only with a current version of the application*;
>
> storing the initial setup values in a secret module included in a secure communication module associated with the computing system, wherein the secret module is obfuscated;
>
> applying the application update to the application;
>
> performing, based on the initial setup values, the key exchange protocol with the server machine to generate a key uniquely associated with the current version of the application; and
>
> storing the key in the secure communication module.

Appeal Br. 15 (Claims App'x) (disputed step emphasized).

Rejections[3]

The Examiner rejected claims 1, 4, 6–10, 13, 15–19, and 21 under 35 U.S.C. § 103 as unpatentable over Boesgaard Soerensen (US 2013/0254845

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[3] The Examiner indicated claims 2, 3, 5, 11, 12, 14, and 20 would be allowable if rewritten. *See* Final Act. 12; Post-Final Adv. Act. 1; Ans. 3.

A1; Sept. 26, 2013) ("Boesgaard"), Moroney (US 2009/0296940 A1; Dec. 3, 2009), and Bianco (US 6,345,359 B1; Feb. 5, 2002). *See* Final Act. 7–12.

The Examiner also rejected all pending claims "on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1–25 of US patent No. 8,782,420." Final Act. 3; *see also id.* at 4–6. Although the Examiner states this is a provisional double patenting rejection, on its face, this is not a ***provisional*** rejection since the conflicting claims have been patented.

ANALYSIS

35 U.S.C. § 103 Rejection

In rejecting claim 1 as obvious, the Examiner relies on Boesgaard to teach the disputed step of "receiving an application update for an application installed on a computing system, wherein the application update includes initial setup values for a key exchange protocol to be performed with a server machine, and the initial setup values are associated only with a current version of the application." Final Act. 7–8. In particular, for teaching "receiving an application update . . . installed on a comput[er] system, wherein the application update includes initial setup values for a key exchange protocol to be performed with a server machine," the Examiner relies Boesgaard's disclosure of a server updating key generation software on a client computer. *Id.* (citing Boesgaard ¶¶ 303, 409, 425, 522, 535). For teaching that "the initial setup values are associated only with a current version of the application," the Examiner relies on Boesgaard's disclosure for computing authentication tags that are used for document authentication. *Id.* at 8 (citing Boesgaard ¶¶ 81–84).

Appellant contends the Examiner errs by improperly combining disparate disclosures from Boesgaard and that Boesgaard fails to teach or suggest the disputed step's requirement that the "initial setup values for a key exchange protocol" "are associated only with a current version of the application," as recited. *See* Appeal Br. 11–13; Reply Br. 3–5. Particularly and persuasively, Appellant argues Boesgaard's disclosure of generating authentication tags for documents is unrelated to initial setup values that are associated only with a current version of an application and are for a key exchange protocol to be performed with a server, as recited. *Id.* at 11.

The Examiner responds "that the specification of the current application does not provide any specific description for 'initial setup values'" and that, under the broadest reasonable interpretation, the values disclosed in Boesgaard paragraphs 425 and 522 "can be equated to 'initial setup values' of the current application.'" Ans. 11 (emphasis omitted). The Examiner's response is unpersuasive because it does not address the specific recitation in claim 1 that the "initial values [are] for a key exchange protocol." The key exchange technology discussed in Boesgaard paragraphs 425 and 522 is generally unrelated to the document authentication tag technology discussed in paragraphs 81–84. In particular, we note there is no relationship between the use of a cryptographic key as part of an authentication tag, as discussed in paragraphs 81–84, and the means for generating a cryptographic key for use in a key exchange protocol, as discussed in paragraphs 425 and 522.

The Examiner does not explain, for instance, why an artisan of ordinary skill would have had a reason to use features of generating cryptographic keys for secure channel communication between two systems

as part of a document tag system, or vice-versa, as necessary to have arrived at claim 1's limitation for initial values for a key exchange protocol associated only with a current application version. *See In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006) (clarifying there must be "articulated reasoning with some rational underpinning to support the legal conclusion of obviousness"); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (quoting *Kahn*). We also note, contrary to the Examiner's statement that the Specification "does not provide any specific description for 'initial setup values'" (Ans. 11), Appellant's Specification provides a specific example embodiment of initial setup values. *See* Spec. ¶ 62.

Accordingly, we do not sustain the § 103 rejection of claim 1. We also, therefore, do not sustain the rejection of independent claims 10 and 19, which both recite limitations commensurate with the disputed step of claim 1 and stand rejected on the same basis. *See* Appeal Br. 16–17 (claim 10), 18–19 (claim 19); Final Act. 11 (claim 10), 11 (claim 19). We likewise do not sustain the rejection of the dependent claims 2–9, 11–18, 20, and 21.

Non-Statutory, Obviousness-type Double-Patenting Rejection

In view of our reversal of the 35 U.S.C. § 103 rejection of all the pending claims, we decline to rule on the non-statutory, obviousness-type double-patenting rejection. *See Ex parte Moncla,* 95 USPQ2d 1884 (BPAI 2010) (precedential).

CONCLUSION

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Reversed
1–21	103	Boesgaard, Moroney, Bianco	1–21

REVERSED