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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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Ex parte ZOHAR ALON and ROY FEINTUCH

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Appeal 2019-002905
Application 15/378,331
Technology Center 2400

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Before ALLEN R. MacDONALD, CAROLYN D. THOMAS, and
ERIC B. CHEN, *Administrative Patent Judges*.

THOMAS, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant[1] appeals from the
Examiner's decision to reject claims 1–21. *See* Claim Appendix. We have
jurisdiction over the appeal under 35 U.S.C. § 6(b).

We AFFIRM.

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[1] We use the word "Appellant" to refer to "applicant" as defined in
37 C.F.R. § 1.42. Appellant identifies the real party in interest as Dome 9
Security LTD. Appeal Br. 3.

Appeal 2019-002905
Application 15/378,331

The present invention relates generally to secured access for a computing platform. *See* Spec. Abstract.

Independent claims 1 and 11, reproduced below, are representative of the appealed claims:

> 1. A method for secured access for a computing platform comprising:
>> generating an on-the-fly access lease to the computing platform, wherein the on-the-fly access lease defines provisions for accessing at least one firewall port of the computing platform, wherein the provisions include at least a lease duration for accessing the at least one firewall port; and
>> controlling access to resources of the computing platform through an opening of the at least one firewall port of the computing platform, wherein the access to resources of the computing platform is determined based on the generated on-the-fly access lease and the security settings.

> 11. A system for secured access for a computing platform comprising:
>> at least one computing platform comprising at least one resource and at least one firewall port;
>> a policy server configured to control port access security and connectivity settings for the at least one computing platform; and
>> a communication link communicatively connecting between the at least one computing platform and the policy server, the communication link is configured to serve a secure tunnel communication there through, wherein the secure tunnel communication is intermittently established over the communication link;
>> wherein an on-the-fly access lease to the at least one port of the at least one computing platform defining provisions for access the at least one firewall port of the computing platform is acquired, wherein the provisions include at least a lease duration for accessing the at least one firewall port; and
>> wherein the policy server is configured to send instructions to open the at least one firewall port of the at least one computing platform during a communication using the secure tunnel

communication respective of the acquired on-the-fly access lease and security settings.

Appellant appeals the following rejections:

R1. Claims 5, 6, and 11–20 are rejected under 35 U.S.C. 112(a) or 35 U.S.C. § 112 (pre-AIA), first paragraph, as failing to comply with the written description requirement. Final Act. 6–7.

R2. Claims 11–20[2] are rejected under 35 U.S.C. § 101 because the claimed invention is directed to non-statutory subject matter. Final Act. 8–15.

R3. Claims 1, 7, and 21 are rejected under 35 U.S.C. § 102(b) as being anticipated by Chang (US 2002/0078377 A1, June 20, 2002). Final Act. 15–20.

R4. Claims 2–6 and 8–20 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Chang and Hyndman (US 2006/0075478 A1, Apr. 6, 2006). Final Act. 20–23.

We review the appealed rejections for error based upon the issues identified by Appellant, and in light of the arguments and evidence produced thereon. *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential).

ANALYSIS

Rejection under § 112
Claims 5, 6, and 11–20

The Examiner finds that claims 5 and 11 "recite 'intermittent connection' as well as 'communication is intermittently established' [and]

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[2] Although the header of the rejection lists claims 10–20 as being rejected under § 101, we shall treat this as a typographical error and instead, treat this as a rejection of claims 11–20. *See* Final Act. 7; *see also* Reply Br. 2.

[s]upport for this is not found in the prior specification," i.e., parent Application No. 13/106,153. *See* Final Act. 7. In other words, the Examiner issues a rejection under § 112, first paragraph, because support is allegedly not found in the parent application, as opposed to the instant application, i.e., a priority issue.

In response, Appellant contends that "[s]upport for this subject matter is contained at least in paragraph 9 of the instant specification . . . . In addition, paragraph 22 of the instant specification, which corresponds to paragraph 28 of the parent application, states . . . may occur **periodically** . . . this means the communication may be intermittent." Appeal Br. 6–7. Appellant further contends that "these claims are original to the instant application as filed and thus support themselves." *Id.* at 7. Finally, Appellant contends:

> Next, even if, *arguendo,* the Examiner is correct with regard to support in the prior application, which Appellants are **not** admitting, all that means is that claims 5–6 and 11–20 are only entitled to the filing data of the instant application and not of the parent. As such, a rejection under 35 U.S.C. [§]112, first paragraph is **not** appropriate.

Appeal Br. 7. We agree with Appellant.

Although it is true that claims are entitled to the benefit of the earlier filing date only if they are "fully supported under 35 U.S.C. [§]112 by the earlier parent application" (MPEP 706.02(VI)(B) 8th ed., Rev. 8, July 2010), the question presented by the Examiner's rejection is not whether Appellant deserves the benefit of the earlier filing date, but rather did Appellant have *possession* of the claimed subject matter as of the filing date of the instant application. *See* Final Act. 6–7.

In order to satisfy the written description requirement, "the [original] specification must describe an invention understandable to that skilled artisan and show that the inventor actually invented the invention claimed." *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed. Cir. 2010) (en banc). "[T]he test for sufficiency is whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date." *Id.* (citations omitted). One shows possession "by such descriptive means as words, structure, figures, diagrams, formulas, etc., that fully set forth the claimed invention." *Lockwood v. American Airlines, Inc.*, 107 F.3d 1565, 1572 (Fed. Cir. 1997).

The Examiner's finding of lack of descriptive support for the appealed claims 5, 6, and 11–20 is without merit. This is so because, as pointed out by Appellant above, the "original claims" provide literal support for themselves. *See In re Anderson*, 471 F.2d 1237, 1238–39 (CCPA 1973) (unamended original claim is a part of the original disclosure). Additionally, Appellant's Specification at paragraph 9 describes "the secure tunnel communication is intermittently established." Spec. ¶ 9.

Accordingly, the Examiners' rejection of claims 5, 6, and 11–20 under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement, i.e., had possession of the claimed invention, is reversed.

Rejection under § 101
Claims 11–20

The Examiner determines that the elements of claims 11–20 "may be considered software per se and are therefore direct[ed] to non-statutory

subject matter." Final Act. 7. Specifically, the Examiner finds that "Applicant's own [S]pecification explicitly teaches a situation where the 'computing platform' and 'server' may be solely 'associated [with] software.'" Ans. 5 (citing Spec. ¶ 35).

For example, Appellant's Specification states:

> According to some embodiments of the present invention, a server or any computing platform (300A) may comprise some processing logic, circuit, device, system and/or *associated software* for executing processing functions for the server (e.g.[,] Platform operating memory/space 305A).

Spec. ¶ 35 (emphasis added).

> Some embodiments of the invention, for example, may take the form of an entirely hardware embodiment, *an entirely software embodiment*, or an embodiment including both hardware and software elements. Some embodiments may be implemented in software, which includes but is not limited to firmware, resident software, microcode, or the like.

Spec. ¶ 44 (emphasis added). In other words, Appellant's Specification states that some embodiments may be entirely hardware, *entirely software*, or both hardware and software, i.e., a server or any computing platform may comprise . . . associated software.

However, a claim that recites no more than software, logic, or a data structure (i.e., an abstraction) does not fall within any statutory category. *In re Warmerdam*, 33 F.3d 1354, 1361 (Fed. Cir. 1994). Significantly, "[a]bstract software code is an idea without physical embodiment." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 449 (2007).

Although Appellant contends that, in claim 11, "a platform, a server, and a communication link are all terms used to describe **hardware**, or at least must include hardware in conjunction with software" (Appeal Br. 8),

Appellant's Specification clearly describes an *entirely software* embodiment, an idea without a physical embodiment. As such, the issue is not whether one of ordinary skill in the art would have understood the embodiments in the disclosure to be within the scope of the claims, but whether *software per se* would also be within the scope of the claims. It is common to assign structural names to software modules for the purpose of identifying the module function. Here, the Examiner construes independent claim 11 to include software modules with structural names, which is consistent with at least one embodiment in Appellant's Specification, i.e., a *software per se* implementation. *See* Ans. 5

Notably, claim 11 recites "at least one [(1)] *computing platform* . . . a [(2)] policy *server configured to* control port access . . . [and (3)] *a communication link* . . . between the at least one computing platform and the policy server . . . *configured to* serve a secure tunnel." *See* claim 11 (emphasis added). None of these three elements recite physical structure limitations, but rather claim 11 recites the phrase "configured to" numerous times followed by a series of steps.

Additionally, as used by Appellant, "computing platform," "policy server," and "communication link" are broad enough to encompass both a "software system" and a "computer system." A patent claim that is broad enough to cover both statutory subject matter and nonstatutory subject matter is subject to rejection under 35 U.S.C. § 101. *Amgen, Inc., v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1329 (Fed. Cir. 2003).

Although Appellant directs our attention to numerous extrinsic definitions for "computing platform" and "server" (*see* Appeal Br. 9–13), our reviewing court guides that extrinsic evidence is unlikely to result in a

reliable interpretation of patent claim scope unless considered in the context of the intrinsic evidence. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1319 (Fed. Cir. 2005) (en banc). The court in *Phillips* guided that "different dictionaries may contain somewhat different sets of definitions for the same words. A claim should not rise or fall based upon the preferences of a particular dictionary editor, or the court's independent decision, uninformed by the specification, to rely on one dictionary rather than another." *Id.* at 1322. The court in *Phillips* reaffirmed its view that the specification "is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term." *Id.* at 1315 (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). Here we find that Appellant's Specification clearly describes a *software per se* implementation.

Accordingly, we affirm the Examiner's rejection of claims 11–20 under 35 U.S.C. § 101 for being directed to non-statutory subject matter.

Rejection under § 102(b)
Claims 1, 7, 21

Appellant contends that it "is well-known, on-the-fly means, '**activities that develops or occur dynamically** <u>rather than as the result of something that is statically predefined</u>.'" Appeal Br. 16. Appellant further contends that "[b]y contrast, Chang teaches predefined times . . . these times do **not** refer to generating an . . . on-the-fly lease but rather they refer to particular *firewall **properties***" (*id.*), and "[a] key to the fact that Chang is not teaching or suggesting the creation of an on-the-fly lease is the specification of start time 802." *Id.* at 17.

In response, the Examiner finds that claim 1 merely defines "on-the-fly" as including "at least a lease duration for accessing the at least one firewall port" and Chang teaches this feature. *See* Ans. 6 (*citing* Chang Fig. 8 and ¶ 86). The Examiner further determines that "Appellant's [S]pecification has no definition whatsoever of 'on-the-fly' . . . Therefore, the term 'on-the-fly' must be given the broadest reasonable interpretation." Ans. 7. The Examiner determines that "the temporary access lease which changes based on the time as taught by Chang can be considered a dynamic access lease or 'on-the-fly' access lease." *Id.* at 8. We agree with the Examiner.

Although we agree in part with Appellant that Chang disclose a "start time 802" for which the port can be accessed (*see* Appeal Br. 17; *see also* Chang Fig. 8), we disagree that having such a "start time" is contrary to an "on-the-fly access lease." For example, as noted by the Examiner (*see* Ans. 6), claim 1 also requires "a lease duration," i.e., a start and stop time. As exemplified by Appellant's claim 1, such a start and stop time does not appear to take away from the access lease being "on-the-fly."

Instead, as reasonably interpreted by the Examiner, and we agree, the broadest reasonable interpretation of an "on-the-fly" access lease is a lease that changes. *See* Ans. 8. Here, the Examiner points out that Chang discloses a "temporary access lease which changes based on the time." *Id.*

Specifically, Chang discloses if a port is not configured for a user, an application request for the port on behalf of the user fails, but thereafter the port can be configured for the user if the timing is correct and the user is part of the security group. *See* Chang, Fig. 9, steps 918–922. In other words, Chang discloses securing a port for only a single user at a time and thereafter

waiting for another user request for the port, i.e., changing port access based on time. *See* Chang ¶ 98.

In fact, Appellant concedes that "Chang discloses on-the-fly configuration" (*see* Reply Br. 6), but tries to distinguish Chang's on-the-fly configuration by stating that "the time-based access of Chang is static." *Id.* Even if this is the case, we note that claim 1 does not specify what specific part of the access lease is "on-the-fly," i.e., claim 1's on-the-fly access lease merely requires duration provisions for accessing the port. Claim 1 does not require that any start time be on-the-fly. As such, Appellant fails to persuasively distinguish the conceded on-the-fly configuration of Chang from the claimed "on-the-fly" access lease.

Accordingly, we sustain the Examiner's rejection of claim 1. Appellant's arguments regarding the Examiner's rejection of independent claim 21 rely on the same arguments as for claim 1, and Appellant does not argue separate patentability for dependent claim 7. *See* Appeal Br. 16–20. We, therefore, also sustain the Examiner's rejection of claims 7 and 21.

Rejection under § 103(a)
Claims 2–6 and 8–20

Because Appellant has not presented separate patentability arguments or have reiterated substantially the same arguments as those previously discussed for patentability of claim 1 above (*see* Appeal Br. 6–7), claims 2–6 and 8–20 fall therewith. *See* 37 C.F.R. § 41.37(c)(1)(vii).

CONCLUSION

Appellant has demonstrated that the Examiner erred in rejecting claims 5, 6, and 11–20 under 35 U.S.C. § 112 as failing to comply with the written description requirement.

However, the Examiner's rejections of: (1) claims 11–20 as being directed to non-statutory subject matter; (2) claims 1, 7, and 21 as being anticipated by Chang; and (3) claims 2–6 and 8–20 as being unpatentable over Chang and Hyndman are all affirmed.

In summary:

Claims Rejected	35 U.S.C. §	Reference(s)/Basis	Affirmed	Reversed
5, 6, 11–20	112	Written Description		5, 6, 11–20
1–5, 10	101	Software per se	11–20	
1, 7, 21	102	Chang	1, 7, 21	
2–6, 8–20	103	Chang, Hyndman	2–6, 8–20	
Overall Outcome			1–21	

Because at least one rejection encompassing all claims on appeal is affirmed, the decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED