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15/252,615	08/31/2016	Nevoh Yemini	90164219	7818
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MICRO FOCUS LLC 500 Westover Drive #12603 Sanford, NC 27330			MITCHELL, JASON D	
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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* NEVOH YEMINI, ROY SELA, and  
AMICHAÏ NITSAN

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Appeal 2019-003241  
Application 15/252,615  
Technology Center 2100

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Before JOHNNY A. KUMAR, JASON J. CHUNG, and  
BETH Z. SHAW, *Administrative Patent Judges*.

KUMAR, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals the Final Rejection of claims 1–20. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. According to Appellant, ENTIT SOFTWARE LLC is the real party in interest. Appeal Br. 3.

## INVENTION

Claim 1 is illustrative of the invention and is reproduced below:

1. A method performed by a computing device, the method comprising:
  - performing stack trace sampling to obtain a compiled list of transactions performed by a software application during a preconfigured timeframe;
  - filtering the compiled list of transactions according to a set of filtering parameters to obtain a set of transaction instances that complies with the set of filtering parameters;
  - finding a set of non-instrumented methods within the obtained set of transaction instances that exceeds a percentage threshold of a total transaction time of the transactions within which the set of non-instrumented methods are found, wherein the percentage threshold is user-configurable;
  - and
  - adding a set of instrumentation points associated with the found set of non-instrumented methods into a points file to instrument the found set of non-instrumented methods.

## REJECTION AT ISSUE

Claims 1–20 stand rejected under 35 U.S.C. § 103 over Gagliardi (US 9,021,448 B1, Apr. 28, 2015) and Bansal (US 2015/0149554, A1, May 28, 2015).

## ANALYSIS

We have only considered those arguments that Appellant actually raised in the Briefs.<sup>2</sup> Arguments Appellant could have made, but chose not

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<sup>2</sup> Claims 2, 3, 6, 7, 10–14, and 16–20 are not argued separately, and will not be addressed separately.

to make, in the Briefs have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(iv) (2018).

We disagree with Appellant’s conclusions. We adopt as our own (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken and (2) the reasons set forth by the Examiner in the Examiner’s Answer in response to Appellant’s Appeal Brief. Ans. 3–9. We concur with the conclusions reached by the Examiner. We highlight and address specific findings and arguments for emphasis as follows.

At the outset, we determine Appellant argues the references separately.<sup>3</sup> The Examiner finds that Gagliardi teaches all elements of claim 1 except for the claim limitation “set of non-instrumented methods...exceeds a percentage threshold of a total transaction time of the transactions,” for which the Examiner relies upon Bansal. Final Act. 5–7; Ans. 4–7.

In particular, the Examiner properly identifies the relevant teachings in Gagliardi and Bansal and states how each claimed element is met by those teachings. *Id.*

The Examiner determines “Bansal teaches finding a set of methods that exceeds a percentage threshold of a total transaction time (par. [0071] ‘A determination is made as to whether the execution time of the method was longer than ... an average of previous method execution times’). *Id.* at 7.

The Examiner also concludes:

[I]t would have been obvious at the time of filing to filter the compiled list of transactions (Gagliardi col. 18, lines 46-50 “thread

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<sup>3</sup> One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

stack traces ... remove irrelevant ... information”) to obtain a set of transaction instances that exceeds a latency threshold (Bansal par. [0071] “execution time ... longer than a threshold”). Those of ordinary skill in the art would have been motivated to do so to “gather data for each and every method instance associated with [a] performance issue ... in an efficient low-cost manner” (Bansal par. [0022]).

*Id.*

Appellant argues (Appeal Br. 7–12; Reply Br. 4–8) that Bansal does not teach the claimed element in claim 1 of “finding a set of non-instrumented methods within the obtained set of transaction instances that exceeds a percentage threshold of a total transaction time of the transactions within which the set of non-instrumented methods are found, wherein the percentage threshold is user-configurable.” (hereinafter “total transaction time” feature). Independent claims 9 and 15 recite similar subject matter. Appeal Br. 11–12.

In particular, Appellant argues:

[A]lthough the average execution time in Bansal may be calculated from a total execution time, Bansal does not disclose that a determination is made as to whether a method exceeds a percentage threshold of the total execution time.

At best, therefore, Bansal discusses determining whether the execution time of a method exceeds a threshold, such as an average execution time, which is not equivalent to a percentage threshold of a total transaction time of the transaction within which the method is found. That is, the threshold for a method discussed in cited paragraph [0071] of Bansal does not take into consideration the transaction times of other methods of the transaction.

The Examiner responds (Ans. 5–6) that:

Bansal takes “transaction times of other methods of the transaction” into account when determining the average execution time (see e.g.

(par. [0007] “monitor the performance of the distributed application ... analyze the data to identify one or more ... “hot spot” methods”). In other words Bansal teaches monitoring an entire application or transaction (see e.g. par. [0008]) to determine which of the collection of methods comprising that application or transaction should be singled out for additional monitoring (see e.g. par. [0063]). Accordingly, when Bansal discusses comparing a specific method’s execution time to an “average of previous method execution times” those of ordinary skill in the art would have understood this to describe comparing the subject method’s execution time to the execution time of other methods. Accordingly the “average” execution time described by Bansal would have been understood to be the sum of execution times for all of the methods of the application or transaction (i.e. the total execution time) divided by the number of methods of that application or transaction.

We agree with the Examiner’s explanation (*id.*) that Bansal teaches the disputed total transaction time claim element because independent claim 1 does not preclude such a reading. *See In re Morris*, 127 F.3d 1048, 1054 (Fed. Cir. 1997).

Regarding dependent claims 4 and 18, while Appellant raises additional arguments for patentability of these claims (Appeal Br. 12–14), we find that the Examiner has responded in the Answer with sufficient evidence. Ans. 7–9. Therefore, we adopt the Examiner’s findings and underlying reasoning, which are incorporated herein by reference. Consequently, Appellant does not persuade us of error in the Examiner’s rejection of claims 4 and 18.

We have considered Appellant’s arguments in the Reply Brief, but find them unpersuasive to rebut the Examiner’s responses.

#### CONCLUSION

The Examiner did not err in rejecting claims 1–20 as being obvious under 35 U.S.C. § 103, over the cited combination of references.

DECISION

In summary:

<b>Claim(s) Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1-20	103(a)	Gagiliardi, Bansal	1-20	

TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED