

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

VIATECH TECHNOLOGIES, INC.,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 17-570-RGA
)	
MICROSOFT CORPORATION,)	JURY TRIAL DEMANDED
)	
Defendant.)	

SECOND AMENDED COMPLAINT FOR PATENT INFRINGEMENT

Plaintiff ViaTech Technologies, Inc. (“Plaintiff” or “ViaTech”), through its attorneys, for its Complaint against Defendant Microsoft Corporation (“Defendant” or “Microsoft”), alleges as follows:

THE PARTIES

1. Plaintiff is a corporation organized and existing under the laws of the State of Delaware having a place of business at 1136 Ashbourne Circle, Trinity, Florida 34655-7103.
2. Defendant Microsoft is a corporation organized and existing under the laws of the State of Washington having its principal place of business at One Microsoft Way, Redmond, WA 98052.

JURISDICTION AND VENUE

3. This action arises under the patent laws of the United States, Title 35 of the United States Code. Subject matter jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 and 1338(a).
4. Defendant Microsoft is subject to this Court’s specific and general personal jurisdiction consistent with due process and the Delaware Long Arm Statute, 10 Del. C. § 3104.

5. Venue in this Judicial District is proper under 28 U.S.C. § 1400(b).

6. Microsoft is registered to do business in Delaware, and has appointed Corporation Service Company, 2711 Centerville Rd., Suite 400, Wilmington, DE 19808, as its registered agent, and either directly, or indirectly through its distribution network, has transacted and/or continues to transact business in Delaware, and has regularly solicited and continues to regularly solicit business in Delaware.

7. Microsoft has also engaged in substantial activity within the State of Delaware and derives substantial revenue from goods or services provided to individuals in Delaware. Microsoft owns and operates a Microsoft Store located within this Judicial District at 137 Christiana Mall, Newark, DE 19702, that offers for sale, and sells, Microsoft software products and devices to customers within the state of Delaware, and offers technical support to customers within this Judicial District purchasing its software products and devices.

8. In a partnership with the Best Buy retail store chain, Microsoft also operates The Windows Store, located within this Judicial District at 4807 Concord Pike, Wilmington, DE 19803, that offers for sale, and sells, Microsoft software products and devices to customers within the state of Delaware, and offers technical support to Microsoft customers within this Judicial District purchasing its software products and devices.

9. Microsoft also owns and operates its online Microsoft Store, which also offers for sale, and sells, Microsoft software products and devices, and the digital content of content providers, to customers within this Judicial District, and offers technical support to Microsoft customers within this Judicial District purchasing digital content, and Microsoft software products, and devices.

10. Microsoft has also committed tortious acts within the State of Delaware, and the causes of action set forth in this Complaint arise from those acts. Microsoft develops, manufactures, distributes, and licenses software products having anti-piracy features, which infringe the patent asserted in this action, and which are, and have been, offered for sale, sold (directly or through defendant's retail stores and distribution network), purchased, and used in this Judicial District. Microsoft, directly or through its distribution network, also places infringing products within the stream of commerce, with the knowledge and/or understanding that such infringing products will be sold and/or used in the State of Delaware.

FACTUAL ALLEGATIONS

The Patent-in-Suit

11. ViaTech applied for its U.S. Patent No. 6,920,567, entitled "System and Embedded License Control Mechanism for the Creation and Distribution of Digital Content Files and Enforcement of Licensed Use of the Digital Content Files" ("the '567 patent," attached as Exhibit A) in April of 2000, and the patent was duly and legally issued by the United States Patent and Trademark Office on July 19, 2005. ViaTech is the owner by assignment of all rights, title, and interest in and to the '567 patent, including the right to sue for past infringement.

12. ViaTech's patented technology generally relates to methods and systems for controlling the use of files containing digital content, including system and license control mechanisms for use in creating, accessing, installing and distributing files containing digital content and for enforcing the licensed use of digital content files.

13. ViaTech has not licensed the '567 patent to Microsoft, its customers, end users, suppliers, or any other persons or entities in its supply chain or distribution chain, to practice the

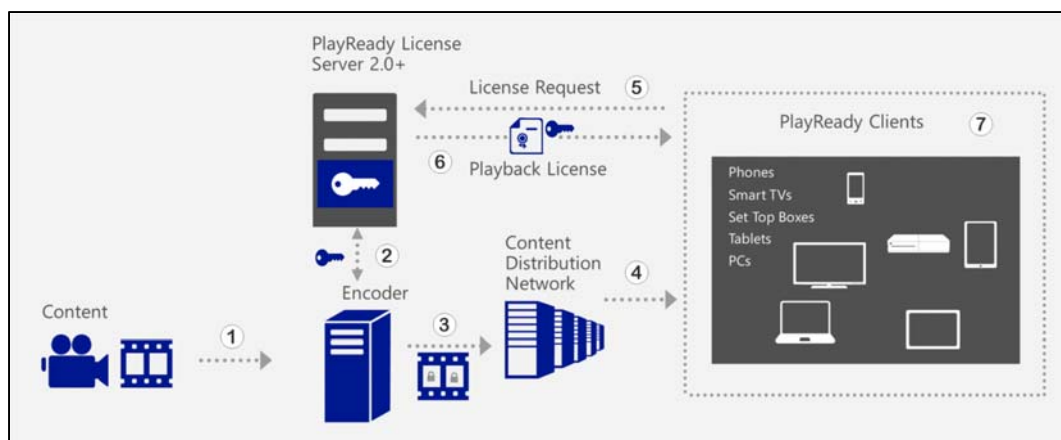
'567 patent. The practice of any claims of the '567 patent by Microsoft or any other persons or entities identified in this paragraph is unauthorized.

14. At a high level, digital content protection involves two considerations: (1) *what* is the content to be protected, and (2) *how* is that content to be protected. The '567 patent describes and claims “the *how*,” and the application of the patented technology to various types of content. Infringement of the '567 patent, therefore, requires assessment of the functionality and operation of the accused *protection technology* (the “how”) rather than simply the particular content that is protected (the “what”).

Microsoft's Infringing Technologies

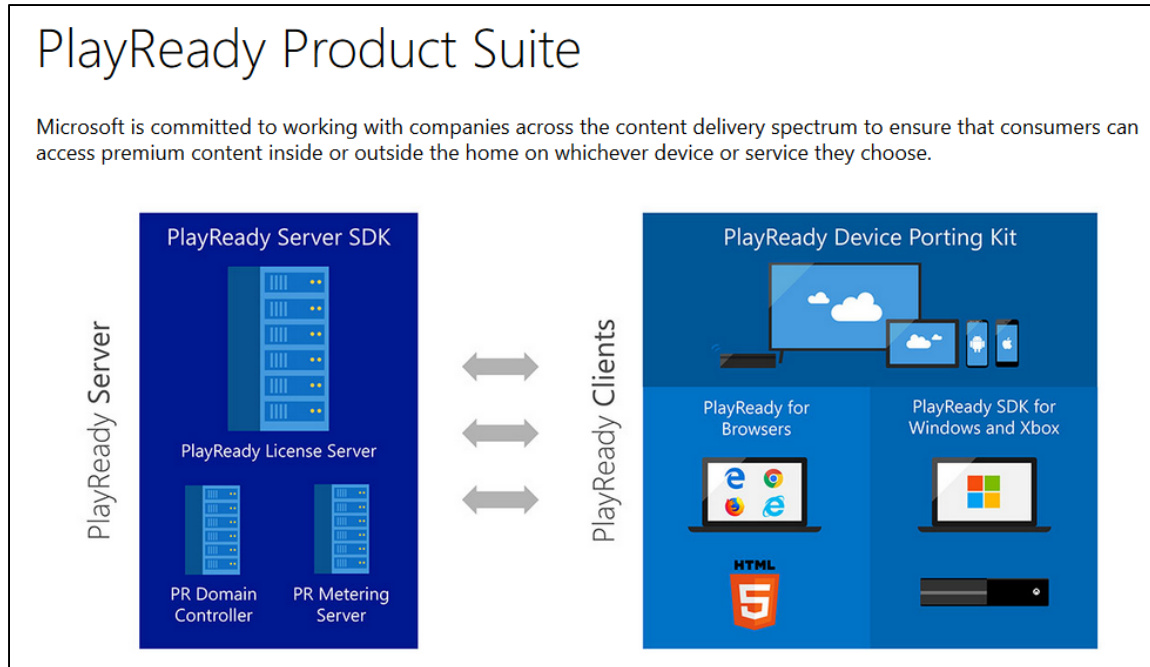
15. As described herein, Microsoft employs at least two protection technologies that infringe the '567 patent: (1) PlayReady technology (including the “PlayReady Product Suite”), and (2) Software Protection Platform technology (“SPP & OSPP”).

16. The first, PlayReady technology, is principally designed to protect electronic multimedia media, such as music and video. Microsoft sells or licenses its PlayReady Product Suite for use by content providers to protect digital content that is later distributed to end-users. For example, a content provider utilizes a PlayReady Encoder to transform a content file into a PlayReady-protected content file (encrypting the content and applying a security wrapper). The provider also utilizes a PlayReady License Server to manage the provision and management of licenses to use the PlayReady-protected content file. Microsoft illustrates this process in its PlayReady Content Protection White Paper (Exhibit B at 4) as follows:



Microsoft also sells or licenses its PlayReady Product Suite to developers so that they may include PlayReady decryption and verification technology in their applications and hardware devices so that PlayReady-protected content can be used on a diverse array of end-user devices, including web browsers, tablets and phones (i.e., iOS and Android devices), computers, and set-top boxes. The PlayReady Product Suite ecosystem is summarized pictorially in Microsoft's marketing materials as follows:¹

¹ See <https://www.microsoft.com/playready/features/> (last visited Dec. 8, 2018), incorporated herein by reference.



17. Microsoft actively encourages and aids content providers, content distributors, and developers to incorporate and deploy infringing PlayReady technology, whose use of PlayReady technology remains subject to Microsoft's monitoring and control pursuant to the PlayReady Product Suite license terms. On information and belief, Microsoft does so because it enjoys substantial licensing revenues from the incorporation of PlayReady technology into such devices and applications, and also from the sale and distribution of PlayReady-protected content.

18. The second protection technology, SPP/OSPP technology, in contrast, is used by Microsoft to secure its own Microsoft Windows and Microsoft Office applications from unauthorized copying, use, and distribution. SPP/OSPP allows Microsoft to enforce its own license terms against users of its Windows and Office products. On information and belief, Microsoft does not sell or license the SPP/OSPP technology to others, nor does it make available for use or license any SPP/OSPP development kits, licensing servers, or the like to third parties.

Microsoft's PlayReady Product Suite

19. Microsoft offers to sell and sells, directly and indirectly, to third parties the PlayReady Product Suite digital rights management (DRM) technology. This standalone technology enables the protection of digital content shared or distributed by those third parties or by those third parties' customers with or to others, such as end users. PlayReady technology protects various types of digital content, including but not limited to music, video, games, software, and images. PlayReady technology, at least in certain configurations, is sometimes referred to by Microsoft as the PlayReady Product Suite. Microsoft offers to sell and sells, directly and indirectly, to third parties the PlayReady Product Suite. The PlayReady Product Suite may include a Porting Kit for devices, a PC SDK (software development kit) and runtime, Server SDK.

20. The PlayReady Product Suite's PlayReady Server SDK may be used in conjunction with encryption to embed a PlayReady Header into a content file so as to enable licensing and management of the content file via the PlayReady technology.

21. PlayReady technology is designed to be integrated to allow playback or use of PlayReady protected content with applications (including third party applications developed using the PlayReady Product Suite Device Porting Kit or PlayReady SDK) that may be developed for or deployed on various devices and platforms. For example, Microsoft makes available exemplary code that is platform agnostic, and which may be used by a developer to enable the use of the PlayReady-protected content.

22. As an example, PlayReady, including the PlayReady Product Suite, can be used by a content provider to protect its digital content on devices running the Google Android ("Android") platform. Microsoft licenses PlayReady to content providers specifically for use on

Android devices. Microsoft offers to sell and sells or licenses PlayReady DRM software development kits (SDKs), application development kits (ADKs), server development kits, device porting kits, and test tools to content providers (for example) for their use in developing, testing and protecting their digital content and software applications running on an Android platform.

23. As an example, PlayReady, including the PlayReady Product Suite, can be used by a content provider to protect its digital content on devices running the Apple iOS (“**iOS**”) platform. Microsoft licenses PlayReady to content providers specifically for use on iOS devices. Microsoft offers to sell and sells or licenses PlayReady DRM software development kits (SDKs), application development kits (ADKs), server development kits, device porting kits, and test tools to content providers (for example) for their use in developing, testing and protecting their digital content and software applications running on an iOS platform.

24. As an example, PlayReady, including the PlayReady Product Suite, can be used by a content provider to protect its digital content on devices running the Microsoft Silverlight (“**Silverlight**”) platform. Microsoft licenses PlayReady to content providers specifically for use on devices with Silverlight. Microsoft offers to sell and sells or licenses PlayReady DRM software development kits (SDKs), application development kits (ADKs), server development kits, device porting kits, and test tools to content providers (for example) for their use in developing, testing and protecting their digital content on a Silverlight platform.

25. As an example, PlayReady, including the PlayReady Product Suite, can be used by a content provider to protect its digital content on devices running the Microsoft Xbox (“**Xbox**”) platform. Microsoft licenses PlayReady to content providers specifically for use on Xbox devices. Microsoft offers to sell and sells or licenses PlayReady DRM software development kits (SDKs), application development kits (ADKs), server development kits, device

porting kits, and test tools to content providers (for example) for their use in developing, testing and protecting their digital content and software applications running on the Xbox platform.

26. As an example, PlayReady, including the PlayReady Product Suite, can be used by a content provider to protect its digital content on devices running the Microsoft Windows platform. Microsoft licenses PlayReady to content providers specifically for use on Windows devices. Microsoft offers to sell and sells or licenses PlayReady DRM software development kits (SDKs), application development kits (ADKs), server development kits, device porting kits, and test tools to content providers (for example) for their use in developing, testing and protecting their digital content and software applications running on a Windows platform.

27. As an example, PlayReady, including the PlayReady Product Suite, can be used by a content provider to protect its digital content on devices running the Microsoft Windows Mobile (“**Windows Mobile**”) platform. Microsoft licenses PlayReady to content providers specifically for use on Windows Mobile devices. Microsoft offers to sell and sells or licenses PlayReady DRM software development kits (SDKs), application development kits (ADKs), server development kits, device porting kits, and test tools to content providers (for example) for their use in developing, testing and protecting their digital content and software applications running on a Windows Mobile platform.

28. Microsoft has identified and listed on its website numerous third party “Featured Technology Partners” who work with content providers to integrate PlayReady protection into their digital content. As an example, Microsoft’s website features an entity called NeuLion and includes an accompanying description of NeuLion’s services: “As an Intermediate, Final and Master PlayReady licensee, NeuLion provides end-to-end support for PlayReady DRM including content packaging and delivery, license management, and can securely deliver Subscription,

PPV, SVOD, EST and TVOD content to any connected devices.” *See*

<https://www.microsoft.com/playready/partners/>. As another example, an entity called IdeaNova, also featured on the same Microsoft website, offers that “IdeaNova services enable our customers to encrypt and play PlayReady DRM content on the devices of their choice, fully integrated into their customized software.” *Id.* On information and belief, NeuLion and IdeaNova, among other Featured Technology Partners identified on Microsoft’s website, have assisted content providers within the United States with integrating PlayReady technology into their content offerings in order to protect those offerings from unlicensed uses.

29. Microsoft has also identified and listed on its PlayReady website numerous third party “Featured Technology Partners” who provide “Client SDK Provider (Android, iOS, Mac, other)” services to third party content providers, indicating that these Partners assist such providers in integrating PlayReady into their offering for the Android and iOS platforms, among others.

30. Microsoft has also identified and listed on its PlayReady website numerous third party “Featured Technology Partners” who provide “Encoding & Packaging” services to third party content providers, indicating that these Partners assist such providers by encoding and packaging their content using PlayReady. On information and belief, such Partners have used PlayReady or have assisted third party content providers in encoding and packaging their content using PlayReady.

31. On information and belief, Microsoft offers to sell and sells through its Microsoft Store or through other distribution mechanisms applications and other content created by third party content providers that is protected using PlayReady technology. On information and belief, Microsoft offers to sell and sells through its Microsoft Store or through other distribution

mechanisms applications that enable the display or performance of digital content such as movies or music that is protected by PlayReady technology. For example, Microsoft has identified on its website numerous third-party content providers that are licensed to use PlayReady technology, such as Netflix, a well-known provider of visual and audio content. *See* <https://www.microsoft.com/playready/licensing/list/>.

32. PlayReady technology for use with Android, iOS and other non-Windows hardware and software platforms is offered for sale and sold by Microsoft directly or through Microsoft's retail stores, distribution network, and/or Featured Technology Partners, and is purchased and used by third party content providers and those acting for them for use in their software, devices, and digital content.

33. PlayReady technology for use with Android, iOS and other non-Windows hardware and software platforms is offered for sale and sold by Microsoft directly or through Microsoft's retail stores, distribution network, and/or Featured Technology Partners, to third party content providers and those acting for them for use by end users, for example, the content providers' customers, in accessing, operating, or using software, devices, and digital content created by such content providers.

34. PlayReady technology for use by third parties with Microsoft Windows-enabled products and with Windows Phone is also offered for sale and sold by Microsoft, directly or through Microsoft's retail stores, distribution network, and/or Featured Technology Partners, and is purchased and used by Microsoft customers and those acting for them for use in their software, devices, and digital content that may be used on Windows phones or on computers having a Windows operating system.

35. Microsoft implements PlayReady technology in its Silverlight and Xbox hardware and software platforms, which hardware and software are offered for sale and sold by Microsoft directly through Microsoft's online Store, retail stores and distribution network, to the public.

36. Microsoft also provides PlayReady technology to customers and to Featured Technology Partners to enable them to develop and sell digital content protected using such technology for use on Microsoft's Silverlight and Xbox hardware and software platforms, for example audio and visual games which are played using versions of the Xbox console.

37. Microsoft licenses PlayReady technology to third parties for use in developing and testing, digital content and software applications on Microsoft servers or servers of its PlayReady-authorized licensees.

38. Microsoft licenses PlayReady technology to third parties to facilitate the development of PlayReady-enabled devices such as smart TVs, set-top boxes, kiosks, and mobile devices, incorporating PlayReady technology.

Microsoft's Software Protection Platform (SPP) & Office Protection Platform (OSPP)

39. On information and belief, Microsoft does not use PlayReady for the protection of its Windows and Office software products. Instead, Microsoft utilizes one or more different license control mechanisms to protect such products. These security mechanisms, which are based on and include software that is different from the PlayReady DRM software, are referred to generally by Microsoft as "product activation" features. Microsoft describes "product activation" on its website as "an anti-piracy technology designed to verify that software products have been legitimately licensed" and as a method to "prevent software counterfeiting."

40. Activation is mandatory pursuant to Microsoft's Software License Terms, which state that unless the software is activated, a user has "no right to use the software after the time permitted for activation."

Windows

41. Microsoft includes license control mechanisms in its "Windows" line of operating system software. Versions of Windows® operating system software products have been sold by Microsoft under a number of different product names, including but not limited to "Windows Vista," "Windows 7," "Windows 8," and "Windows 8.1," and "Windows 10."

42. There are multiple ways a customer can purchase or license Windows products from Microsoft, for example: (1) buy a new PC with Windows preinstalled; (2) upgrade an existing PC using a retail package; (3) purchase an upgrade online; or (4) build a PC from scratch and install Windows.

43. Microsoft released its Software Protection Platform (SPP) in or around 2007 to protect its Windows Vista operating system product, and continued to utilize SPP to protect subsequent releases of its Windows operating systems. SPP provides a centralized platform for managing the licensing of Windows, including functions for obtaining, storing, and accessing product keys indicative of the purchase of a license by a user and license files that define the terms of the license. SPP also includes functions to communicate license-related information to Microsoft servers, including Activation Verification Servers (AVS) to activate the Windows software by obtaining and storing a new license.

44. Windows performs a licensing check when it is started, and either prompts a customer to activate, or automatically attempts to activate, if the product has not yet been activated.

45. During activation, Windows “pairs your product key with your hardware configuration and helps verify that your copy of Windows hasn’t been used on more computers than the Microsoft Software License Terms allow. Usually, you need to activate Windows only once, unless you make a significant hardware change.” Windows evaluates the user’s system fingerprint based on a pre-set, determined range of tolerance, which considers the nature and magnitude of any changes to the user system’s hardware, before permitting access to its digital content. As explained on Microsoft’s website: “[w]hen you make a significant hardware change to your computer, such as upgrading the hard disk and memory at the same time, you might be required to activate Windows again.”

46. The Windows Activation Technologies utility and the Software Protection Platform cause program files (including the files “slsvc.exe” or “sppsvc.exe”) to be installed on the user’s computer that control access to Windows, also cause Windows activation keys and subkeys to be added to the registry of a user’s computer, and in addition cause data files (including the file “tokens.dat”) to be created on a user’s computer, that contain, among other things, information about the licensing and activation status of the operating system.

47. Windows provides a mechanism for communicating between the user system and Microsoft in order to communicate license definition information, and provides a graphical user interface (“GUI”) for communications between the user and user-accessible functions of the Windows Activation Technology utility and Software Protection Platform.

Office

48. In or around 2010, Microsoft implemented technology similar to SPP to protect its Office Products (including “Office 2010,” “Office 2013,” and “Office 365”)² called the Office

² These do not include Office for Mac.

Software Protection Platform (OSPP). On information and belief, the OSPP technology is related to the SPP technology (but not PlayReady).

49. There are three types of licenses available from Microsoft for its Office products: (1) “perpetual,” which permits use of the licensed program as long as the user owns the product; (2) “subscription,” which permits use of the program for a predetermined time period; and (3) “product trial program,” which permits use on a limited trial basis. Microsoft offers a “convert” option for its “product trial program” license, which allows a product trial user to convert that license to either a perpetual license or a subscription license.

50. In its Office 2010 software products, Microsoft implements its product activation features through the “Microsoft Office Activation Wizard.” In its Office 2013 software products, activation is automatic if the user is connected to the internet during installation, or re-installation. If the user is not connected to the internet, activation is implemented through the Activation Wizard. In its Office 365 software products, activation is automatic during installation, or re-installation. These product activation features are part of SPP/OSPP.

51. Microsoft’s Office software products perform a licensing check every time a user starts an Office application. If a user fails to activate an Office product, Microsoft sends an activation reminder each time the user starts an Office application. As explained by Microsoft on its website, “[t]he reminder helps make sure that you are aware that license activation is required and that you can complete the product activation process before the program enters reduced functionality mode.”

52. As also explained by Microsoft on its website, the Microsoft SPP/OSPP features create a hardware identification that “represents the configuration of your PC at the time of activation.” The features also “can detect and accept changes to your PC configuration” on

which Office has been installed such that “[m]inor upgrades will not require re-activation,” but major changes to the computer over time may require reactivation.

53. The Microsoft SPP/OSPP features provide a mechanism for communicating between a user’s system and Microsoft in order to communicate license definition information and activate Office. The features also provides a GUI for communications between the user and user-accessible functions of the Microsoft Office product activation feature and SPP/OSPP. Similar to Windows, the Microsoft Office product activation feature causes program files (including the file “osppsvc.exe”) to be installed on the user’s computer that control access to Office applications, also causes Office activation keys and subkeys to be added to the registry of a user’s computer, and in addition causes data files (including the file “tokens.dat”) to be created on a user’s computer, that contain, among other things, information about the licensing and activation status of the software.

54. Materials created by Microsoft (available at, *e.g.*, <http://technet.microsoft.com> and <http://support.microsoft.com>) instruct customers how to purchase, use and activate Windows and Office products in accordance with one or more of the claims of the ’567 patent, as set forth in detail below.

Prior Litigation

55. ViaTech previously filed an action for infringement of the ’567 patent against Microsoft in a prior proceeding (D. Del. No. 1:14-cv-1226) (“*ViaTech I*”) on September 24, 2014, alleging infringement based on Microsoft’s “product activation features for reducing software piracy” used to protect certain Microsoft Windows and Microsoft Office products, specifically the Software Protection Platform and Office Software Protection Platform (SPP/OSPP) software. In that action, the district court construed various claim terms of the ’567

patent, including “file,” and “dynamic license database” in an order dated June 14, 2016. In particular, the district court construed “file” as “a collection of data that is treated as a unit by a file system.” Based on this construction and by subsequent orders by the court, ViaTech was effectively limited in its infringement case in *ViaTech I* to pre-installation Windows.

56. Prior to final judgment in the *ViaTech I* matter on June 12, 2017, ViaTech instituted the current action on May 15, 2017, based upon PlayReady, a standalone product and technology sold and licensed to third parties which is different from SPP/OSSP that Microsoft uses to protect its Windows and Office products from unauthorized distribution and use.

57. On June 12, 2017, the district court entered summary judgment of non-infringement in Microsoft’s favor in *ViaTech I*. Applying its “file” and “dynamic license database” constructions, the district court found that the asserted claims were limited to pre-installation Windows in view of its construction of “file,” and that pre-installation Windows did not infringe the asserted claims because “ViaTech cannot prove the accused products meet the ‘license database’ and ‘file’ limitations at the same time.”

58. ViaTech appealed the district court’s claim construction holdings and its summary judgment determination (*ViaTech I Appeal*, Fed. Cir. No. 17-2276). In an opinion dated May 23, 2018, the Federal Circuit changed the district court’s constructions of the “file” and “dynamic license database” claim terms. The court also held that ViaTech had not preserved its infringement arguments as to post-installation Windows, and thus had waived them on appeal. Likewise, the panel affirmed the district court’s summary judgment ruling that ViaTech waived any claim of infringement under the doctrine of equivalents.

59. While the Federal Circuit and this Court found that infringement as to post-installation Windows, and under the doctrine of equivalents, was “waived” because it was not

adequately presented or preserved, there was no adjudication of those issues on the merits in *ViaTech I*, and issue preclusion does not apply to them. *See In re Zwanziger*, 741 F.3d 74, 77 (10th Cir. 2014); *Bowdry v. United Airlines, Inc.*, 58 F.3d 1483, 1490 (10th Cir. 1995).

60. Patent infringement is a continuing tort, and Microsoft's infringement of the '567 patent has continued unabated, including after the judgment issued in *ViaTech I*. Because allegations of infringement occurring after final judgment in *ViaTech I* could not have been brought in that action, the doctrine of claim preclusion does not bar them from this proceeding. *See Mentor Graphics Corp. v. EVE-USA, Inc.*, 851 F.3d 1275, 1298 (Fed. Cir. 2017).

61. The *Kessler* doctrine³ does not bar claims of infringement based upon Microsoft's *ViaTech I* post-judgment activity at least because *ViaTech* has not sued Microsoft's customers, and because *ViaTech* has a good faith argument that the Supreme Court's decision in *Kessler* was limited to suits concerning customer activity, and that any decisions by lower courts purporting to extend *Kessler* to anyone other than customers as a matter of claim preclusion rather than issue preclusion represents an unwarranted and improper extension of *Kessler*. *See e.g., Tech. Licensing Corp. v. Thomson, Inc.*, 738 F. Supp. 2d 1096, 1101 (E.D. Cal. 2010) ("The *Kessler* doctrine appears to be nothing more than a patent-specific application of res judicata

³ *See* D.I. 25 at 9 ("Were Plaintiff to accuse activity taking place after the First Action's final judgment, I would need to assess whether the *Kessler* doctrine [*Kessler v. Eldred*, 206 U.S. 285 (1907)] applies. However, Plaintiff has not done so, and the parties have not briefed that issue⁷ [fn. 7] Claim preclusion applies to both claims that existed before the filing of the First Complaint and claims that accrued after the filing of the First Complaint, but before the judgment. However, 'claim preclusion d[oes] not bar allegations of infringement occurring after the prior final judgment because the patentee *could not* have brought those claims in the prior case.' *Mentor Graphics Corp. v. EVE-USA, Inc.*, 851 F.3d 1275, 1299 (Fed. Cir. 2017) [emphasis in original]. The *Kessler* doctrine, which is 'separate and distinct' from claim and issue preclusion, 'fills the gap between' claim preclusion and issue preclusion, 'allowing an adjudged non-infringer to avoid repeated harassment for continuing its business as usual post-final judgment in a patent action.' *Brain Life*, 746 F.3d at 1056 (emphasis omitted).").

between manufacturers of allegedly infringing products and their customers in patent infringement suits against the customer.”); *see also MGA, Inc. v. Gen. Motors Corp.*, 827 F.2d 729, 734 (Fed. Cir. 1987) (“The *Kessler* doctrine bars a patent infringement action against a customer of a seller who has previously prevailed against the patentee....”); *SpeedTrack, Inc. v. Office Depot, Inc.*, 791 F.3d 1317, 1323 (Fed. Cir. 2015) (“The *Kessler* doctrine bars a patent infringement action against a customer of a seller who has previously prevailed against the patentee....”); *Shoom, Inc. v. Elec. Imaging Sys. of Am., Inc.*, No. C 07-05612 JSW, 2011 WL 4595212, at *3 (N.D. Cal. Oct. 4, 2011) (“The *Kessler* doctrine also affords a party’s customers a measure of certainty that their decision to purchase or use a product will not be met with litigation.”).

62. Even if the *Kessler* doctrine were applicable to claims against Microsoft for conduct occurring after the *ViaTech I* judgment, ViaTech’s claims as to SPP/OSPP as implemented in post-installation Windows are not barred under the *Kessler* doctrine because the SPP/OSPP technology in Post-Installation Windows has never been held to be non-infringing by a final court judgment. *See ViaTech Techs. Inc. v. Microsoft Corp.*, 733 F. App’x 542, 543-544, 552 (Fed. Cir. 2018) (“ViaTech waived the argument that post-installation Windows is a ‘file’ by not squarely presenting it to the district court” and “[w]e agree with the district court that ViaTech did not properly present or preserve the argument that post-installation Windows is a file and affirm the district court’s waiver finding.”); *see also In re Zwanziger*, 741 F.3d 74, 77 (10th Cir. 2014) (“A finding that an issue of fact or law is waived is not a decision on the merits” and therefore issue preclusion does not apply); *see also Bowdry v. United Airlines, Inc.*, 58 F.3d 1483, 1490 (10th Cir.1995) (finding that a “waived” argument is not addressed “on the merits”); *see also Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 257 (D.C. Cir.1992) (concluding

that a court's rejection of an argument on grounds of procedural insufficiency is not a decision “on the merits”).

63. The *Kessler* doctrine and the doctrine of claim preclusion do not apply to claims for infringement that are based upon the making, use, offer for sale, sale or importation into the United States of PlayReady. The *Kessler* doctrine and the doctrine of claim preclusion do not apply to claims for infringement that are based on Microsoft’s sale or licensing to third parties of products or technology sold or licensed independently of Windows or Office. The *Kessler* doctrine and the doctrine of claim preclusion do not apply to claims for infringement that are based on Microsoft’s offer for sale or sale of third party products, including digital content made by such third parties.

Accused Instrumentalities

64. **PlayReady Product Suite.** The accused PlayReady technology includes Microsoft’s PlayReady DRM software, as well as software applications, web applications, client devices, and digital content incorporating PlayReady DRM software, and PlayReady DRM server development kits, software development kits, application development kits, and device porting kits for developing software applications, web applications, client devices, and digital content incorporating PlayReady DRM software, as well as test tools for users of PlayReady client software development kits, application development kits, server development kits, and device porting kits, including the Microsoft PlayReady test server. The accused PlayReady technology includes PlayReady-protected content and client software on Microsoft and non-Microsoft products as discussed in Paragraphs 21-27 above.

65. **Software Protection Platform (SPP) and Office Software Protection Platform (OSPP)** when used to protect Windows or Office, but only post-judgment in *ViaTech I*⁴ and only for Post-Installation Windows.⁵

Microsoft's Knowledge of the '567 Patent

66. Microsoft became aware of the '567 patent, the subject matter of the patent, and the inventions claimed in the patent, at least as early as September of 2005, shortly after ViaTech's '567 patent was granted, during the prosecution of Microsoft's U.S. Patent No. 7,366,915 ("the '915 patent," applied for in April of 2002 and granted in April of 2008), which describes and claims digital licensing methods and systems. The '567 patent was cited as prior art during prosecution of the patent application filed by Microsoft that led to the '915 patent, and in a response to a December 12, 2005 Office Action, Microsoft attorneys explained their understanding of the '567 patent, and its claimed subject matter, in extensive detail. ViaTech's '567 patent was also cited as prior art to Microsoft's attorneys during the prosecution of other Microsoft patents (*see, e.g.*, Microsoft's U.S. Patent No. 7,644,442, which describes and claims a "method, system and computer-readable medium for deterring software piracy," and Microsoft's U.S. Patent No. 8,224,750, which describes and claims "a method and a system for changing license rights to a software product installed on a computer").

⁴ This Court issued final judgment in *ViaTech I* on June 12, 2017. ViaTech filed its initial complaint in the present lawsuit ("*ViaTech II*") on May 15, 2017 (D.I. 1), prior to the final judgment in *ViaTech I*. *See also* D.I. 25 at 9 ("Plaintiff's original Complaint was filed prior to the Judgment in the First Action, and therefore applies to prejudgment activity.").

⁵ In *ViaTech Techs. Inc. v. Microsoft Corp.*, 733 F. App'x 542, 551 (Fed. Cir. 2018), which involved the appeal of *ViaTech I*, the Federal Circuit found that pre-installation Windows cannot infringe the '567 patent because "[t]he pre-installation version of Windows...lacks a database." Accordingly, ViaTech herein asserts infringement only against the post-installation version of Windows.

67. Microsoft attorneys also cited ViaTech's '567 patent as relevant prior art in connection with the prosecution of numerous other Microsoft patents (*see, e.g.*, U.S. Patent Nos. 7,873,578; 7,552,341; 7,849,329; 8,181,265; 7,716,476; 8,117,094; 8,336,085; 8,464,348; 8,176,564; 8,353,046; 8,347,078; 8,781,969; 8,725,646; 8,719,171; and 8,700,535; all of which relate to anti-piracy licensing systems and methods).

68. Independently, at various times from 2011 through 2013, ViaTech representatives corresponded with Microsoft regarding the '567 patent, noting in their correspondence that the patent was, in their judgment, highly relevant to Microsoft's business and fundamental to digital rights management.

69. ViaTech also provided notice of its patent by including the '567 patent number on its website through which it conducts business.

70. On information and belief, the above made Microsoft aware of the '567 patent and its applicability to the Accused Instrumentalities, including the likelihood that Microsoft infringed the '567 patent either directly or indirectly.

71. Microsoft also became aware of the '567 patent, the subject matter of the patent, and the inventions claimed through ViaTech's prior litigation against Microsoft (*ViaTech I*) for infringement of the '567 patent, which was filed in this court on September 24, 2014.

72. Microsoft also became aware of the '567 patent, the subject matter of the patent, and the inventions claimed through the initial filing of the complaint for infringement of the '567 patent in this action on May 15, 2017.

FIRST COUNT
(DIRECT AND INDIRECT INFRINGEMENT OF U.S. PATENT NO. 6,920,567 UNDER
35 U.S.C. § 271(a), (b) and (c) – PLAYREADY TECHNOLOGY)

73. ViaTech hereby incorporates by reference the allegations set forth in Paragraphs 1-72 of this Complaint as though fully set forth herein.

74. Microsoft has directly infringed and continues to directly infringe, literally or under the doctrine of equivalents, one or more claims of the '567 patent in violation of 35 U.S.C. §271(a), including claim 8 of the '567 patent, by making, using, offering to sell, selling, and/or importing, in this District and elsewhere in the United States, Microsoft's PlayReady technology, including the PlayReady Product Suite.

75. For example, Microsoft's PlayReady technology and software infringes claim 8 of the '567 patent, which is dependent upon claim 1, and which provides:

[From Claim 1]

[A] The digital content file including a license control mechanism for controlling the licensed use of digital content of claim 1, comprising:

[B] a digital content, and

[C] an embedded file access control mechanism embedded in the digital content file and including

[i] a license functions mechanism embedded in the digital content file and including

[a] a license monitor and control mechanism communicating with a dynamic license database and monitoring use of the digital content by a user to determine whether a use of the digital content by a user compiles with the license defined in the dynamic license database, and

[b] a license control utility providing communications between a user system and an external system to communicate license definition information between the user system and the external system, including

[i] a graphical user interface associated with the license control utility to provide communication between a user and user accessible functions of the license functions mechanism, and

[D] the dynamic license database wherein the dynamic license database is associated with the digital content file for storing information controlling operations of the file access control mechanism and license information controlling licensed use of the digital content]

[From Claim 8]:

[E] The digital content file including a license control mechanism for controlling the licensed use of digital content of claim 1, wherein the digital content of the digital content file comprises: digital data.

76. In general, Microsoft's PlayReady Product Suite is used to protect digital content distributed to end-user devices and systems on multiple platforms, including Android, iOS, Xbox, Silverlight, web browsers (via Microsoft plug-ins), various types of consumer electronics devices, and on computers including Windows and non-Windows operating systems.

77. More particularly, Microsoft's PlayReady DRM technology and software "secures content by encrypting data files." Ex. B at 4. Further, upon information and belief, the PlayReady DRM technology and software include a license control mechanism for controlling the licensed use of the music and video content of those files. *Id.* ("These [data files] may be moved, archived, streamed, copied, or distributed without restrictions. In order to decrypt these data files, a digital key is required. This key is contained within a license. Each license also contains rights and polices that specify how the files may be used, and under what conditions.")

78. Further, upon information and belief, Microsoft's PlayReady DRM technology and software includes a PlayReady Header Object, which enables PlayReady clients to acquire a license for and decrypt the content in a media file. The PlayReady header object can also store an embedded license directly in a media file for controlling access to the file. *Id.*, at 9.

79. Upon information and belief, the PlayReady Header Object is added to and stored in the digital content file prior to distribution. The Header Object stores a PlayReady Rights Management Header containing metadata about a license including a key ID that identifies the digital content key, the type of encryption used to encrypt the file, a URL for a license acquisition service, and custom attributes that the content provider defines. The Header Object also stores licenses embedded in the files prior to distribution, or licenses that are acquired and

stored in the PlayReady Header Object post-distribution. The Rights Management Header enables PlayReady clients to acquire or locate a license for, and decrypt, the music and video content of the files according to the terms of the license. The PlayReady Header Object is a dynamic license database that is incorporated into and part of each digital music and video content file.

80. Upon information and belief, the acquired or located licenses stored in the Header Object can be modified by binding to a domain certificate, as well as updated and renewed, by for example, Microsoft Edge, Groove Music and Movies & TV applications that incorporate PlayReady DRM software installed on Xbox consoles, Lumia mobile phones, and Surface personal computers and tablets that also incorporate PlayReady DRM software.

81. Upon information and belief, acquired or located licenses may also be stored in a secure repository on the end-user devices in a location and manner that is controlled by the PlayReady technology and software and which constitutes a dynamic license database, including as that term was interpreted in the *ViaTech I Appeal*. The combination of the PlayReady-protected content and the PlayReady software (including, for example, the PlayReady header object inserted by other components of the PlayReady Product Suite, and the license(s) obtained from the PlayReady License Server) constitute a “file” as the term was interpreted in the *ViaTech I Appeal*.

82. By making, using, offering for sale, and/or selling products in the United States, and/or importing PlayReady Product Suite products into the United States, including but not limited to Microsoft’s PlayReady DRM technology and software, Microsoft has directly infringed and is directly infringing, literally or under the doctrine of equivalents, one or more

claims of the '567 patent, including without limitation claim 8, in violation of 35 U.S.C. § 271(a).

83. More specifically, Microsoft's PlayReady DRM technology and software contains a digital content file including a license control mechanism for controlling the licensed use of digital content. Microsoft sells and offers to sell digital content, as well as client applications and client devices, incorporating PlayReady DRM technology and software for controlling access to and the licensed use of digital content. Microsoft also sells and offers to sell the PlayReady Product Suite for developing digital content, as well as client applications and client devices that incorporate PlayReady DRM technology and software for controlling access to and the use of PlayReady-protected digital content files. As examples, Microsoft offers to sell and sells digital content, client applications, and client devices incorporating PlayReady DRM technology and software, including, but not limited to: Microsoft Edge, Groove Music, and digital music and video content for Xbox consoles, Lumia mobile phones, and Surface personal computers and tablets, incorporating PlayReady DRM software

84. As additional examples, Microsoft offers to sell and sells the PlayReady Product Suite for developing digital content, as well as client applications and client devices incorporating PlayReady DRM technology and software, including: PlayReady Server SDKs; Silverlight SDKs for Windows and MacOS X; Microsoft PlayReady Client SDKs for Windows Store apps; Microsoft Windows Phone SDKs; Microsoft Xbox ADKs (Xbox 360 and Xbox One); Microsoft PlayReady Client SDKs for Android; Microsoft PlayReady Client SDKs for iOS; and Microsoft PlayReady Device Porting Kits for developing smart TVs, set-top boxes, kiosks, and mobile devices.

85. Microsoft's PlayReady Product Suite and DRM technology and software support many types of digital content, including movies, live TV, music, games, ringtones, and images.

86. Microsoft's PlayReady Product Suite allows for the incorporation of an embedded file access control mechanism into digital content files so as to create PlayReady-protected content files that include a file access control mechanism. PlayReady-protected content on a PlayReady compatible device includes a license functions mechanism embedded in the digital content file and includes a license monitor and control mechanism communicating with a dynamic license database and monitoring use of the digital content by a user to determine whether a use of the digital content by a user complies with the license defined in the dynamic license database. A license control utility is included therein for providing communications between a user system and an external system (*e.g.*, a PlayReady License Server, PlayReady Domain Controller, or PlayReady Metering Server) to communicate license definition information between the user system and the external system. Also included is a graphical user interface associated with the license control utility to provide communication between a user and user accessible functions of the license functions mechanism, and the dynamic license database wherein the dynamic license database is associated with the digital content file for storing information controlling operations of the file access control mechanism and license information controlling licensed use of the digital content.

87. For example, digital content files offered for sale and sold by Microsoft and Microsoft's licensees, and used by purchasers and end users (including Microsoft employees) of digital content, client applications, and client devices incorporating PlayReady DRM technology and software, include a header object rights management header that can be used to store an embedded license directly in the digital content file. A PlayReady client finds and extracts the

PlayReady rights management header from the file, then processes the header data to decrypt the content with the content key in the license and control access to the content according to the terms of the license. The licenses are embedded in the digital content before distribution and can be modified through PlayReady DRM client software components, for example, by adding a PlayReady domain license to the header. As another example, the license may be obtained from the PlayReady License Server utilizing the license control mechanism and information from the PlayReady header object.

88. As one example, Microsoft offers to sell, sells, and distributes through its Microsoft Store and Xbox Live store digital content files created or distributed by numerous third-party content providers incorporating PlayReady technology. Such digital content files include digital data, such as games or software in digital form, that also include license function mechanisms that monitor and control usage of the digital content to protect against unlicensed use of such digital content. Such digital content files also include a license control utility that provides a communication mechanism for communicating license definition information with an external system, and a graphical user interface. Such digital content files further include a license database to store information pertinent to the license terms for controlling exercise of the license consistently with the terms of the license for the digital content file.

89. On information and belief, Microsoft has directly infringed claim 8 through its own downloading, installation and use of PlayReady-protected content by, at least, its employees in the course of their employment, and through its making, using and selling of its own PlayReady-protected content and devices.

90. Microsoft also has induced, and is now inducing, the infringement of at least claim 8 of the '567 patent under 35 U.S.C. § 271(b) by making, using, distributing, selling, and

offering to sell the PlayReady Product Suite's DRM technology and software to content providers, client application providers, and device providers (including Microsoft PlayReady device, server, and service licensees and Microsoft PlayReady technology partners), and third-party software developers and end users of servers, software applications, web applications, digital content, and client devices that incorporate PlayReady DRM technology. The use of PlayReady-protected content on software applications, web applications and client devices constitutes direct infringement by such end users of at least claim 8 of the '567 patent.

91. Microsoft has actively encouraged and instructed, and is encouraging and instructing, content, client application, and device providers (including licensees of Microsoft's PlayReady Product Suite and other PlayReady technology partners), and third-party software developers and end users of software applications, web applications, digital content, and client devices incorporating PlayReady DRM software, who are not licensed by plaintiff, to use PlayReady Product Suite to include PlayReady DRM protection and playback features in software applications, web applications, digital content, servers, and client devices to control access to and the licensed use of digital content. Microsoft does so with the knowledge that the induced acts constitute direct infringement by at least such end users of at least claim 8 of the '567 patent. Microsoft promotional materials, for example, instruct digital content providers, client application providers, and device providers (including Microsoft PlayReady Product Suite device, server, and service licensees and Microsoft PlayReady technology partners), and third-party software and device developers how to incorporate and use PlayReady DRM software in software applications, web applications, digital content, servers, and client devices to control access to and licensed use of digital content, in a manner that infringes at least claim 8 of

the '567 patent.⁶ Such use of PlayReady technology remains subject to Microsoft's monitoring and control pursuant to the PlayReady Product Suite license terms. Microsoft knows and intends that third-party content and device providers use PlayReady, and knows and intends that such providers' end users use PlayReady in an infringing manner.

92. As another example, Microsoft distributes music and video digital content incorporating PlayReady DRM software to end users through its Groove Music⁷ (formerly known as Xbox Music) and Movies & TV / Xbox Video applications. The Groove Music and Movies & TV applications, and Microsoft's Edge web browser application, also incorporate PlayReady DRM software, and Microsoft encourages and instructs end users of such devices to access the content using its Groove Music and Movies & TV applications and Edge web browser application and on other supported devices and platforms in a manner that constitutes direct infringement.⁸

⁶ See, e.g., <https://www.microsoft.com/playready/partners/>; <http://technet.microsoft.com>; <http://support.microsoft.com>; <https://www.microsoft.com/playready/>; <https://www.microsoft.com/playready/documents/>; and <https://www.microsoft.com/playready/licensing/compliance/>; see also Ex. C at 4 ("Microsoft PlayReady Developing PlayReady Clients" white paper, which states, in relevant part, that Microsoft's PlayReady DRM technology and software is made to be used on "Third Party Platforms").

⁷ Microsoft announced a discontinuation of its Groove Music service effective January 1, 2018.

⁸ See, e.g., <https://www.microsoft.com/en-us/store/movies-and-tv> (identifying compatibility with: MacOS via SilverLight; Xbox; Xbox One; Xbox and Windows platforms); <https://www.microsoft.com/en-us/movies-and-tv>; <https://answers.microsoft.com/en-us/musicandvideo/forum/xboxmusic/groove-music-cant-play-0xc00d0fcf-0x80070020/b141be1c-f6c9-43a7-a606-17de5166eb1e> ("We saw that you were having trouble with the Groove app. Hope this info helps. This issue is caused by a corruption in the PlayReady DRM store, so could be impacting content you've downloaded to your device with a Groove Music Pass."); <https://blogs.windows.com/windowsexperience/2016/07/13/get-better->

93. Microsoft possesses specific intent to encourage infringement. Microsoft has control over the design and manufacture of its PlayReady Product Suite and software for supported client applications and environments, and possesses specific intent to cause infringement by the use of its PlayReady software to control access to and use PlayReady-protected digital content. *See e.g.*, Ex. C at 4 (“Microsoft PlayReady Developing PlayReady Clients” white paper, which states, in relevant part, that Microsoft’s PlayReady DRM technology and software is made to be used on “Third Party Platforms”). Microsoft’s encouraging acts actually resulted in direct patent infringement.

94. Microsoft has also contributed to and is now contributing to the infringement of at least claim 8 of the ’567 patent under 35 U.S.C. § 271(c) by selling and offering to sell, within the United States, the PlayReady Product Suite which is used to incorporate PlayReady DRM technology into content files (*e.g.*, by embedding PlayReady header objects and license stores and to distribute and manage licenses), and to access and use such files in an infringing manner. Microsoft provides PlayReady Product Suite to content providers, client application providers, and device providers (including Microsoft PlayReady device, server, and service licensees and Microsoft PlayReady technology partners), and third-party software developers and to end users of software applications, web applications, digital content, and client devices incorporating PlayReady DRM software. Microsoft knows and intends that third party content and device

quality-video-with-microsoft-edge/ (“When it comes to video, the closer to the hardware, the better. From video hardware acceleration to PlayReady Content Protection and the Protected Media Path, Windows 10 is designed to provide the highest quality, most secure, and most power-efficient video playback available on any version of Windows. Microsoft Edge has been engineered to optimize for and take advantage of these Windows 10 built-in media capabilities, providing the best video experience of any browser on Windows 10 based on our data and testing. So go ahead, binge watch your favorite shows on Microsoft Edge!”).

providers use PlayReady, and knows and intends that such providers' end users use PlayReady in an infringing manner.

95. The PlayReady DRM technology and PlayReady-protected digital content files are material parts of the claimed inventions of the '567 patent, and Microsoft has knowledge that such technology and content files are especially made and adapted for use in infringing at least claim 8 of the '567 patent.

96. There are no substantial non-infringing uses of the PlayReady Product Suite, PlayReady-protected content files, the PlayReady DRM technology, or PlayReady header objects and embedded license stores, other than to control access to and license use of digital content according to license terms and policies stored in such header object embedded license stores and dynamic license databases, in a manner that infringes at least claim 8 of the '567 patent.

97. Microsoft has had and does have knowledge of the '567 patent as alleged above and that its actions would lead to the infringement of the '567 patent.

98. As a further example of indirect infringement, Microsoft at least through its PlayReady website, induces and contributes to infringement by encouraging third party content providers to use one of Microsoft's Featured Technology Partners, as alleged above, to encode and package their content using PlayReady, to use such Partners' license service and integration services, and to make such content available for platforms such as Android and iOS, and on Microsoft's own products such as Xbox 360 and Xbox One (collectively, "Xbox"). Microsoft further induces and contributes to infringement by making Xbox in such fashion as to support Microsoft's PlayReady DRM technology and software. *Id.*, at 5 (Xbox is "[u]sed to deploy PlayReady-enabled apps that leverage native Xbox APIs by using Xbox Application Development Kit. This SK can be used to implement PlayReady protection for live and on-

demand playback of Smooth Streaming content as a native support and various PlayReady features.”); *id.*, at 21 (“Xbox 360 and Xbox One natively support PlayReady. To develop an application for either console, use the Xbox Application Development Kit (ADK). To learn more about developing Xbox applications, see the Xbox Developers Program website.”); *see also* <https://docs.microsoft.com/en-us/windows/uwp/audio-video-camera/playready-Client-sdk> (“Use PlayReady DRM on Xbox One”).

99. Microsoft’s acts as set forth above induce third party content providers to infringe at least claim 8 of the ’567 patent by making, offering for sale and selling through the Microsoft Store and otherwise.

100. Microsoft’s acts as set forth above also induce third party content providers, through sale of their content, to cause users of such content to put into service or to infringe one or more method claims of the ’567 patent, such as claim 26, when users access the digital content of a digital content file using the method set forth therein. When users attempt to access a digital content file that has been prepared using PlayReady technology, and which has been protected using such technology, the file access control mechanism determines whether the license database associated with the digital content file contains license control information. The file access control system also determines whether the user’s system complies with the license information. When compliance has been determined, the file access control system decrypts the product information associated with the content, and allows the user to access the digital content in question, by decrypting that content, which is in the form of executable code.

101. Microsoft also infringes the ’567 patent directly and/or indirectly by providing PlayReady for use as alleged in Paragraphs 19-388.

102. Microsoft's infringement of the '567 patent has been and continues to be deliberate and willful, and, this is therefore an exceptional case warranting an award of enhanced damages and attorneys' fees pursuant to 35 U.S.C. §§ 284-285.

103. As a result of Microsoft's infringement of the '567 patent, ViaTech has suffered monetary damages, and seeks recovery in an amount adequate to compensate for Microsoft's infringement, but in no event less than a reasonable royalty with interest and costs.

SECOND COUNT
(DIRECT AND INDIRECT INFRINGEMENT OF U.S. PATENT NO. 6,920,567 UNDER
35 U.S.C. § 271(a), (b) and (c) - SPP/OSPP)

104. ViaTech hereby incorporates by reference the allegations set forth in Paragraphs 1-103 of this Complaint as though fully set forth herein.

105. ViaTech's allegations in its Second Count apply to Post-Installation Windows Products after final judgment in *ViaTech I* as set forth above.

106. Microsoft has directly infringed and continues to directly infringe, literally or under the doctrine of equivalents, one or more claims of the '567 patent (including without limitation claims 1-7, 13-15, and 28-31) in violation of 35 U.S.C. §271(a) by making, using, offering to sell, selling, and/or importing, in this District and elsewhere in the United States, Microsoft's Software Protection Platform and Office Software Protection Platform (SPP/OSPP).

107. Microsoft, for example, makes, uses, sells, offers for sale and imports into the United States its Microsoft Surface devices which include SPP/OSPP technology for the protection of Windows and/or Office and Windows installed on such devices. As another example, Microsoft's online and brick-and-mortar retail stores sell and offer for sale other manufacturers' devices with SPP/OSPP technology for the protection of Windows and/or Office and Windows installed on such devices (*e.g.*, Dell laptops with Windows already installed).

108. For example, the Microsoft Windows and Office products are themselves “digital content files” when installed on a compatible computer. Windows includes Software Protection Platform (SPP) components that are embedded within Windows, and include a file access control mechanism embedded in the digital content file, including a license function mechanism embedded therein. The SPP controls access to the Windows operating system within the end-user computer by checking locally on the end-user computer various functions of SPP via dynamic link libraries or the SPP services (sppsvc.exe) that are invoked by Windows at runtime. Likewise, Office may invoke the SPP mechanisms or the Office Software Protection Platform (OSPP) components that are embedded within Windows or Office, respectively, including the license function mechanism embedded therein, which controls access to the Office software within the end user computer by checking locally on the end user computer various functions of SPP or OSPP via dynamic link libraries or the SPP/OSPP services (sppsvc.exe/osppsve.exe) that are invoked by Office at runtime. License terms and restrictions are stored locally on the end user machine, such as in the secure token store.

109. SPP and OSPP monitor licenses and control communication with a dynamic license database by locating license information to determine allowed uses of the Windows and Office for Windows content based on the license store in the Trusted Store and/or Token Store. SPP and OSPP monitor use of the protected software to determine whether such use complies with the license(s) defined in the dynamic license database, and disabled features or displays notifications if an attempted use is not in accord with the stored license information. The dynamic license database (including without limitation the Trusted Store and Token Store) is present upon installation of Windows and/or Office and stores license information for controlling licensed use of the digital content, and are programmed to accept, modify, and delete licenses.

Such information is encrypted or digitally, preventing access or modification other than through SPP/OSPP.

110. Windows and Office with SPP/OSPP further include a license control utility that provides communications between the end-user system and an external system to communicate license definition information. For example, the Windows and Office product activation features communicate with external systems (*e.g.*, Microsoft Activation Service) to communicate license and purchase information (*e.g.*, end user license information). The utilities also provide a graphical user interface to facilitate communications between the end user and user accessible licensing functions, and to provide information concerning the Hardware ID, product keys, license details, and activation information, and to request activation of licenses stored in the dynamic license database.

111. The SPP and OSPP components include adaptive fingerprint security mechanisms to identify the user system on which the digital contents are licensed for use, including by generating a Hardware ID based on an assessment of the components installed in a user system, and a determination of whether a current Hardware ID is within a permissible tolerance threshold of a stored Hardware ID associated with a license file stored in the Token Store.

112. Microsoft also infringes the '567 patent under 35 U.S.C. § 271(b) & (c).

113. For example, Microsoft actively induces the infringement of at least claims 1–7, 13–15, and 28–31 of the '567 patent, literally or under the doctrine of equivalents, by making, manufacturing, testing and otherwise using, licensing, selling and offering to sell, and distributing Microsoft's Windows and Office Products for installation and/or use by customers, OEMs, distributors, and end users whose installation and use directly infringe one or more claims of the '567 patent. Microsoft encourages and instructs its customers, including OEMs

and end users, to infringe with knowledge that the induced acts constitute infringement. For example, Microsoft has been and is now intentionally requiring, instructing and directing OEMs and end users of its Windows and Office products who purchase, use and/or otherwise implement those products in their respective systems to install the software and inevitably use the product activation features of those products in order for the software products to function properly.

114. For example, Microsoft also actively induces infringement of at least claims 1–7, 13–15, and 28–31 of the ’567 patent, literally or under the doctrine of equivalents, by instructing and encouraging OEMs, systems integrators, and other third parties to install the Windows and/or Office products with SPP/OSPP technology onto computing devices thereby creating devices that directly infringe. Microsoft also actively instructs and encourages these parties to sell, offer to sell, distribute, redistribute or import into the United States these infringing devices.

115. Microsoft does the above with knowledge of the patented invention of the ’567 patent, and knowing that, by doing so, the OEMs, distributors, integrators, and end users directly infringe. Microsoft possesses specific intent to encourage infringement by these entities and their customers. Microsoft has control over the design and manufacture of its Windows and Office products that include the SPP/OSPP technology and product activation features, and possesses specific intent to cause infringement by the use of these products as described in more detail above.

116. Microsoft also contributes to the infringement of at least claims 1–7, 13–15, and 28–31 of the ’567 patent, literally or under the doctrine of equivalents, by making, manufacturing, testing and otherwise using, licensing, selling and offering to sell, and distributing Microsoft’s Windows and Office Products for installation and/or use by customers,

OEMs, distributors, and end users whose installation and use directly infringe one or more claims of the '567 patent. Microsoft encourages and instructs its customers, including OEMs and end users, to infringe with knowledge that the induced acts constitute infringement. For example, Microsoft has been and is now intentionally requiring, instructing and directing OEMs and end users of its Windows and Office products who purchase, use and/or otherwise implement those products in their respective systems to install the software and inevitably use the product activation features of those products in order for the software products to function properly.

117. For example, Microsoft also contributes to the infringement of at least claims 1–7, 13–15, and 28–31 of the '567 patent, literally or under the doctrine of equivalents, by instructing and encouraging OEMs, systems integrators, and other third parties to install the Windows and/or Office products with SPP/OSPP technology onto computing devices thereby creating devices that directly infringe. Microsoft also actively instructs and encourages these parties to sell, offer to sell, distribute, redistribute or import into the United States these infringing devices.

118. Microsoft does the above with knowledge of the patented invention of the '567 patent, and knowing that, by doing so, the OEMs, distributors, integrators, and end users directly infringe. Microsoft knows that its SPP and OSPP technologies are components used to practice the inventions of the '567 patent, and knows that these components are especially made and adapted for use in infringing the claims as described in more detail above. There are no substantial non-infringing uses for the SPP/OSPP and product activation components in Microsoft's Windows and Office products, nor are they staple articles of commerce. Those components form a material part of the combination; they are required and control access to those products each time they are launched on a user's computer or other device.

119. Microsoft's infringement of the '567 patent has been and continues to be deliberate and willful, and, this is therefore an exceptional case warranting an award of enhanced damages and attorneys' fees pursuant to 35 U.S.C. §§ 284-285.

120. As a result of Microsoft's infringement of the '567 patent, ViaTech has suffered monetary damages, and seeks recovery in an amount adequate to compensate for Microsoft's infringement, but in no event less than a reasonable royalty with interest and costs.

PRAYER FOR RELIEF

WHEREFORE, ViaTech prays for judgment and seeks relief against Microsoft as follows:

- A. For judgment that Microsoft has infringed and/or continues to infringe one or more claims of the '567 patent, directly, and/or indirectly by way of inducement or contributory infringement;
- B. For a preliminary and permanent injunction against Microsoft, its respective officers, agents, servants, employees, attorneys, parent and subsidiary corporations, assigns and successors in interest, and those persons in active concert or participation with them, enjoining them from infringement, inducement of infringement, and contributory infringement of the '567 patent, including but not limited to an injunction against making, using, selling, and/or offering for sale within the United States, and importing into the United States, any products and/or services that infringe the '567 patent;
- C. For judgment awarding ViaTech damages adequate to compensate it for Microsoft's infringement of the patent-in-suit, including all pre-judgment and post-judgment interest;

- D. For judgment that Microsoft has willfully infringed and continues to willfully infringe one or more claims of the patent-in-suit;
- E. For judgment that Microsoft has infringed in bad faith and continues to infringe one or more claims of the patent-in-suit in bad faith;
- F. For judgment awarding enhanced damages pursuant to 35 U.S.C. § 284;
- G. For judgment imposing a mandatory future royalty payable on each and every product or service sold by Microsoft in the future that is found to infringe the patent-in-suit and on all future products and services which are not colorably different from products found to infringe;
- H. For judgment awarding attorneys' fees pursuant to 35 U.S.C. § 285 or otherwise permitted by law;
- I. For judgment awarding costs of suit; and
- J. For judgment awarding ViaTech such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure and D. Del. LR 38.1, ViaTech hereby demands a trial by jury of this action.

ASHBY & GEDDES

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