

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

**DATA ENGINE TECHNOLOGIES
LLC**

Plaintiff,

v.

MICROSOFT CORPORATION

Defendant.

§ **Civil Action No.: 6:13-cv-00735**

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JURY TRIAL DEMANDED

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PLAINTIFF'S ORIGINAL COMPLAINT

Plaintiff Data Engine Technologies LLC (“Data Engine”) files this Original Complaint for patent infringement against Defendant Microsoft Corporation (“Microsoft”).

PARTIES

1. Plaintiff Data Engine Technologies LLC is a limited liability company existing under the laws of Texas with its principal place of business at 6136 Frisco Square Blvd., Suite 385, Frisco, Texas 75034.

2. Defendant Microsoft Corporation is a corporation existing under the laws of Washington with its principal place of business located at One Microsoft Way, Redmond, Washington 98052. It can be served through its agent for service: Corporation Service Company DBA +, 211 E. 7th Street, Suite 620, Austin, Texas 78701.

JURISDICTION AND VENUE

3. This is an action for patent infringement under the Patent Laws of the United States, Title 35 of the United States Code.

4. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a).

5. Venue is proper in this judicial district under 28 U.S.C. §§ 1391(b) and 1400(b). Upon information and belief, Microsoft has transacted business in this district, has a regular and established place of business in this district, has committed and/or induced acts of patent infringement in this district, and resides in this district.

FACTS

6. On November 6, 2001, the United States Patent and Trademark Office (“USPTO”) duly and legally issued United States Patent No. 6,314,558 (“the ’558 patent”), entitled “Byte Code Instrumentation”. Data Engine holds all right, title, and interest in and to the ’558 patent.

7. Upon information and belief, Microsoft makes, uses, sells, offers for sale, and/or imports into the State of Texas, in this judicial district, and elsewhere within the United States, software that infringes the ’558 patent.

8. On November 4, 2003, the USPTO duly and legally issued United States Patent No. 6,643,842 (“the ’842 patent”), entitled “Byte Code Instrumentation”. Data Engine holds all right, title, and interest in and to the ’842 patent.

9. Upon information and belief, Microsoft makes, uses, sells, offers for sale, and/or imports into the State of Texas, in this judicial district, and elsewhere within the United States, software that infringes the ’842 patent.

10. On July 3, 2007, the United States Patent and Trademark Office (“USPTO”) duly and legally issued United States Patent No., 7,240,335 (“the ’335 patent”), entitled “Byte Code Instrumentation”. Data Engine holds all right, title, and interest in and to the ’335 patent.

11. Upon information and belief, Microsoft makes, uses sells, offers for sale, and/or imports into the State of Texas, in this judicial district, and elsewhere within the United States, software that infringes the '335 patent.

COUNT I: INFRINGEMENT OF THE '558 PATENT

12. Data Engine incorporates the foregoing paragraphs as if fully set forth here.

13. Microsoft has been and is now directly infringing the method claims of the '558 patent in the State of Texas, in this judicial district, and elsewhere within the United States by, among other things, making, using, licensing, selling, offering for sale, and/or importing software, including the software application Microsoft.net Profiling API ("Infringing Product"), covered by one or more method claims of the '558 patent, all to the injury of Data Engine. Microsoft had actual knowledge of the '558 patent no later than January 9, 2007. On January 9, 2007, the USPTO issued United States Patent No. 7,162,710 ("the '710 patent"). Microsoft was the original assignee of the '838 patent and received that assignment the day the application was filed. The '558 patent is cited as a reference in the '710 patent. As a result, on or before January 9, 2007, IBM had actual notice of the '558 patent. However, this was not the last time the '558 would be cited as prior art against a patent application assigned to Microsoft. In addition to the '710, the '558 patent was cited as prior art against U.S. Patent No. 7,210,124; U.S. Patent No. 7,251,810; U.S. Patent No. 7,283,991; U.S. Patent No. 7,308,684; U.S. Patent No. 7,421,682; U.S. Patent No. 7,484,205; U.S. Patent No. 7,496,904; U.S. Patent No. 7,624,304; and U.S. Patent No. 8,225,286 either by the Examiner or by Microsoft itself. As a sophisticated user of the patent system, on information and belief, due to its repeated analysis of the '558 patent, Microsoft knew or should have known its making, using, licensing, selling, offering for sale and/or importing its software constituted infringement, and that its instructions to customers for use of the Infringing Product would contribute to and induce their infringement.

14. It is Data Engine's belief that the Infringing Product could not have been developed without a high likelihood that the software would infringe upon the '558 patent.

15. Microsoft advertises and promotes the Infringing Product on its website.¹ Microsoft provided, makes, uses, licenses, sells, and offers the Infringing Product for sale with the specific intent that its customers use those products in an infringing manner.²

16. As described above, Microsoft knew or should have known that the Infringing Product, when used in combination with other software to instrument that software, is both patented and infringing, as Microsoft has been exposed to the '558 patent no less than ten times. On information and belief, the Infringing Product, when used in conjunction with other software, has no substantial non-infringing uses other than performing the claimed methods for instrumenting.

17. As described above, in addition and/or in the alternative, Microsoft has been and is now indirectly infringing by way of inducing infringement and/or contributing to the infringement of the method claims of the '558 patent in the State of Texas, in this judicial district, and elsewhere within the United States by, among other things, making, using, licensing, selling, offering for sale, and/or importing software, including the software application Microsoft.net Profiling API, covered by one or more method claims of the '558 patent, all to the injury of Data Engine. In the case of such infringement, the users of the software are the direct infringers of the '558 patent.

18. Microsoft's acts of infringement have been willful, deliberate, and in reckless disregard of Data Engine's patent rights, and will continue unless permanently enjoined by this Court.

¹ http://msdn.microsoft.com/en-us/library/bb384493.aspx#profiling_api

² <http://www.microsoft.com/en-us/download/details.aspx?id=13382>

19. Data Engine has been damaged by Microsoft's infringement of the method claims of the '558 patent in an amount to be determined at trial, and has suffered and will continue to suffer irreparable loss and injury unless Microsoft is permanently enjoined from infringing the method claims of the '558 patent.

20. At least as early as its receipt of this Original Complaint, Microsoft has had additional and incontrovertible knowledge of the '558 patent and written notice of the infringement.

COUNT II: INFRINGEMENT OF THE '842 PATENT

21. Data Engine incorporates the foregoing paragraphs as if fully set forth here.

22. Microsoft has been and is now directly infringing the method claims of the '842 patent in the State of Texas, in this judicial district, and elsewhere within the United States by, among other things, making, using, licensing, selling, offering for sale, and/or importing software, including the software application Microsoft.net Profiling API covered by one or more method claims of the '842 patent, all to the injury of Data Engine. Microsoft had actual knowledge of the '842 patent no later than June 3, 2008. On June 3, 2008, the USPTO issued U.S. Patent No. 7,383,443 ("the '443 patent"). Microsoft was the original assignee of the '443 patent. The '842 patent was cited as prior art by the Examiner against the patent application that issued as the '443 patent. As a result, on or before June 3, 2008, Microsoft was aware of the '842 patent. However, this was not the last time the '842 would be cited as prior art against a patent application assigned to Microsoft. The '842 was also cited as prior art, either by an examiner or by Microsoft itself, against U.S. Patent No. 7,590,521; U.S. Patent No. 8,225,286 and U.S. Patent No. 8,261, 244, all assigned to Microsoft. As a sophisticated user of the patent system, on information and belief, due to its repeated analysis of the '842 patent, Microsoft knew or should have known its making, using, licensing, selling, offering for sale

and/or importing its software constituted infringement, and that its instructions to customers for use of the Infringing Product would contribute to and induce their infringement. It is Data Engine's belief that the Infringing Product could not have been developed without a high likelihood that the software would infringe upon the '842 patent.

23. Microsoft advertises and promotes the Infringing Product on its website.³ Microsoft provided, makes, uses, licenses, sells, and offers the Infringing Product for sale with the specific intent that its customers use those products in an infringing manner.⁴

24. As described above, Microsoft knew or should have known that the Infringing Product, when used in combination with other software to instrument that software, is both patented and infringing, as Microsoft has been exposed to the '842 patent no less than four times. On information and belief, the Infringing Product, when used in conjunction with other software, has no substantial non-infringing uses other than performing the claimed methods for instrumenting.

25. In addition and/or in the alternative, Microsoft has been and is now indirectly infringing by way of inducing infringement and/or contributing to the infringement of the method claims of the '842 patent in the State of Texas, in this judicial district, and elsewhere within the United States by, among other things, making, using, licensing, selling, offering for sale, and/or importing software, including the software application Microsoft.net Profiling API, covered by one or more method claims of the '842 patent, all to the injury of Data Engine. In the case of such infringement, the users of the software are the direct infringers of the '842 patent.

³ http://msdn.microsoft.com/en-us/library/bb384493.aspx#profiling_api

⁴ <http://www.microsoft.com/en-us/download/details.aspx?id=13382>

26. Microsoft's acts of infringement have been willful, deliberate, and in reckless disregard of Data Engine's patent rights, and will continue unless permanently enjoined by this Court.

27. Data Engine has been damaged by Microsoft's infringement of the method claims of the '842 patent in an amount to be determined at trial, and has suffered and will continue to suffer irreparable loss and injury unless Microsoft is permanently enjoined from infringing the method claims of the '842 patent.

28. At least as early as its receipt of this Original Complaint, Microsoft has had additional and incontrovertible knowledge of the '842 patent and written notice of the infringement.

COUNT III: INFRINGEMENT OF THE '335 PATENT

29. Data Engine incorporates the foregoing paragraphs as if fully set forth here.

30. Microsoft has been and is now directly infringing the method claims of the '335 patent in the State of Texas, in this judicial district, and elsewhere within the United States by, among other things, making, using, licensing, selling, offering for sale, and/or importing software, including the software application Microsoft.net Profiling API covered by one or more method claims of the '335 patent, all to the injury of Data Engine. Microsoft had actual knowledge of the '335 patent no later than September 15, 2009. On September 15, 2009, the USPTO issued U.S. Patent No. 7,590,521 ("the '521 patent"). Microsoft was the original assignee of the '521 patent. The '335 patent was cited as prior art by the Examiner against the patent application that issued as the '521 patent. As a result, on or before September 15, 2009, Microsoft was aware of the '335 patent. However, this was not the last time the '335 would be cited as prior art against a patent application assigned to Microsoft. The '335 was also cited as prior art by Microsoft itself, against U.S. Patent No. 8,332,822, also assigned to

Microsoft. As a sophisticated user of the patent system, on information and belief, due to its repeated analysis of the '335 patent, Microsoft knew or should have known its making, using, licensing, selling, offering for sale and/or importing its software constituted infringement, and that its instructions to customers for use of the Infringing Product would contribute to and induce their infringement.

31. It is Data Engine's belief that the Infringing Product could not have been developed without a high likelihood that the software would infringe upon the '335 patent.

32. Microsoft advertises and promotes the Infringing Product on its website.⁵ Microsoft provided, makes, uses, licenses, sells, and offers the Infringing Product for sale with the specific intent that its customers use those products in an infringing manner.⁶

33. As described above, Microsoft knew or should have known that the Infringing Product, when used in combination with other software to instrument that software, is both patented and infringing, as Microsoft has been exposed to the '335 patent more than once. On information and belief, the Infringing Product, when used in conjunction with other software, has no substantial non-infringing uses other than performing the claimed methods for instrumenting.

34. In addition and/or in the alternative, Microsoft has been and is now indirectly infringing by way of inducing infringement and/or contributing to the infringement of the method claims of the '335 patent in the State of Texas, in this judicial district, and elsewhere within the United States by, among other things, making, using, licensing, selling, offering for sale, and/or importing software, including the software application Microsoft.net Profiling API, covered by one or more method claims of the '335 patent, all to the injury of Data Engine. In the case of such infringement, the users of the software are the direct infringers of the '842 patent.

⁵ http://msdn.microsoft.com/en-us/library/bb384493.aspx#profiling_api

⁶ <http://www.microsoft.com/en-us/download/details.aspx?id=13382>

35. Microsoft's acts of infringement have been willful, deliberate, and in reckless disregard of Data Engine's patent rights, and will continue unless permanently enjoined by this Court.

36. Data Engine has been damaged by Microsoft's infringement of the method claims of the '335 patent in an amount to be determined at trial, and has suffered and will continue to suffer irreparable loss and injury unless Microsoft is permanently enjoined from infringing the method claims of the '335 patent.

37. At least as early as its receipt of this Original Complaint, Microsoft has had additional and incontrovertible knowledge of the '335 patent and written notice of the infringement.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Data Engine Technologies LLC prays for the following relief against Defendant Microsoft Corporation:

A. A judgment in favor of Data Engine that Microsoft has infringed, directly and/or indirectly by way of inducing infringement and/or contributing to the infringement of the method claims of Data Engine's '558, '842 and '335 patents;

B. A permanent injunction, enjoining Microsoft along with its officers, directors, agents, servants, employees, affiliates, divisions, branches, subsidiaries, and parents from infringing, inducing the infringement of, or contributing to the infringement of the method claims of Data Engine's '558, 842 and '335 patents;

C. A judgment and order requiring Microsoft to pay Data Engine damage for Microsoft's infringement of the method claims of Data Engine's '558, 842 and '335 patents, together with interest (both pre- and post-judgment), costs and disbursements as fixed by this Court under 35 U.S.C. § 284;

D. A judgment and order finding Microsoft's infringement is and/or has been willful and awarding treble the amount of damages and losses sustained by Data Engine as a result of Microsoft's infringement under 35 U.S.C. § 284;

E. A judgment and order finding that this is an exceptional case within the meaning of 35 U.S.C. § 285 and awarding to Data Engine its reasonable attorneys' fees; and

F. Such other and further relief in law or in equity to which Data Engine may be justly entitled.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury of any and all issues triable of right before a jury.

Dated: October 1, 2013

Respectfully submitted,

AHMAD, ZAVITSANOS, ANAIPAKOS, ALAVI & MENSING, P.C.

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