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

VIRNETX, INC.	§	
	§	
Plaintiff	§	
	§	
vs.	§	CASE NO. 6:07 CV 80
	§	PATENT CASE
MICROSOFT CORPORATION	§	
	§	
Defendant	§	
	§	

MEMORANDUM OPINION

This claim construction opinion interprets the disputed terms in U.S. Patent Nos. 6,502,135 ("the '135 patent"); 6,839,759 ("the '759 patent"); and 7,188,180 ("the '180 patent"). Appendix A contains the disputed terms, as they appear in the asserted claims of these patents. Appendix B contains a chart summarizing the Court's constructions.

BACKGROUND

Plaintiff VirnetX, Inc. ("VirnetX") accuses Microsoft Corporation ("Microsoft") of infringing claims of the '135, '759, and '180 patents. The '135 patent discloses a method of transparently creating a virtual private network between a client computer and a target computer. The '759 patent discloses a method for establishing a VPN without a user entering user identification information. The '759 patent is related to the '135 patent through other continuation-in-part applications/patents. The '180 patent discloses a method for establishing a VPN using a secure domain name service. The '180 patent is related to the '135 patent as a divisional patent of continuation-in-part applications/patents of the '135 patent. The '759 and '180 patents share the same specification.

APPLICABLE LAW

"It is a 'bedrock principle' of patent law that 'the claims of a patent define the invention to which the patentee is entitled the right to exclude.'" *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc) (quoting *Innova/Pure Water Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1115 (Fed. Cir. 2004)). In claim construction, courts examine the patent's intrinsic evidence to define the patented invention's scope. *See id.*; *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 861 (Fed. Cir. 2004); *Bell Atl. Network Servs., Inc. v. Covad Commc'ns Group, Inc.*, 262 F.3d 1258, 1267 (Fed. Cir. 2001). This intrinsic evidence includes the claims themselves, the specification, and the prosecution history. *See Phillips*, 415 F.3d at 1314; *C.R. Bard, Inc.*, 388 F.3d at 861. Courts give claim terms their ordinary and accustomed meaning as understood by one of ordinary skill in the art at the time of the invention in the context of the entire patent. *Phillips*, 415 F.3d at 1312–13; *Alloc, Inc. v. Int'l Trade Comm'n*, 342 F.3d 1361, 1368 (Fed. Cir. 2003).

The claims themselves provide substantial guidance in determining the meaning of particular claim terms. *Phillips*, 415 F.3d at 1314. First, a term's context in the asserted claim can be very instructive. *Id.* Other asserted or unasserted claims can also aid in determining the claim's meaning because claim terms are typically used consistently throughout the patent. *Id.* Differences among the claim terms can also assist in understanding a term's meaning. *Id.* For example, when a dependent claim adds a limitation to an independent claim, it is presumed that the independent claim does not include the limitation. *Id.* at 1314–15.

"[C]laims 'must be read in view of the specification, of which they are a part.'" *Id.* (quoting *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995) (en banc)). "[T]he specification 'is always highly relevant to the claim construction analysis. Usually, it is dispositive;

it is the single best guide to the meaning of a disputed term.'" *Id.* (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)); *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1325 (Fed. Cir. 2002). This is true because a patentee may define his own terms, give a claim term a different meaning than the term would otherwise possess, or disclaim or disavow the claim scope. *Phillips*, 415 F.3d at 1316. In these situations, the inventor's lexicography governs. *Id.* Also, the specification may resolve ambiguous claim terms "where the ordinary and accustomed meaning of the words used in the claims lack sufficient clarity to permit the scope of the claim to be ascertained from the words alone." *Teleflex, Inc.*, 299 F.3d at 1325. But, "'[a]lthough the specification may aid the court in interpreting the meaning of disputed claim language, particular embodiments and examples appearing in the specification will not generally be read into the claims.'" *Comark Commc'ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1187 (Fed. Cir. 1998) (quoting *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1571 (Fed. Cir. 1988)); *see also Phillips*, 415 F.3d at 1323. The prosecution history is another tool to supply the proper context for claim construction because a patent applicant may also define a term in prosecuting the patent. *Home Diagnostics, Inc., v. Lifescan, Inc.*, 381 F.3d 1352, 1356 (Fed. Cir. 2004) ("As in the case of the specification, a patent applicant may define a term in prosecuting a patent.").

Although extrinsic evidence can be useful, it is "'less significant than the intrinsic record in determining the legally operative meaning of claim language.'" *Phillips*, 415 F.3d at 1317 (quoting *C.R. Bard, Inc.*, 388 F.3d at 862). Technical dictionaries and treatises may help a court understand the underlying technology and the manner in which one skilled in the art might use claim terms, but technical dictionaries and treatises may provide definitions that are too broad or may not be indicative of how the term is used in the patent. *Id.* at 1318. Similarly, expert testimony may aid

a court in understanding the underlying technology and determining the particular meaning of a term in the pertinent field, but an expert's conclusory, unsupported assertions as to a term's definition is entirely unhelpful to a court. *Id.* Generally, extrinsic evidence is "less reliable than the patent and its prosecution history in determining how to read claim terms." *Id.*

CONSTRUCTION OF DISPUTED TERMS IN THE '135 PATENT[1, 2]

"virtual private network"

The '135 patent, claims 1 and 10; the '759 patent, claims 1 and 16; and the '180 patent, claims 1, 17, and 33 contain the term "virtual private network" ("VPN"). VirnetX contends that "virtual private network" means "a network of computers capable of privately communicating with each other by encrypting traffic on insecure communication paths between the computers, and which is capable of expanding to include additional computers and communication paths." Microsoft contends that "virtual private network" means "a network implemented by encapsulating an encrypted IP packet within another IP packet (that is, tunneling) over a shared networking infrastructure." The parties dispute whether the "FreeS/WAN" dictionary may be used to construe "virtual private network," whether VirnetX's proposed construction is overly broad, whether "virtual private network" requires anonymity, and whether IP tunneling is a limitation on "virtual private network." In light of intrinsic and extrinsic evidence, the Court construes "virtual private network" as "a network of computers which privately communicate with each other by encrypting traffic on insecure communication paths between the computers."

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[1]While this heading states "Construction of Disputed Terms in *the '135 Patent*," the claim terms addressed under this heading may also be found in the other asserted patents. This also applies to subsequent headings.

[2]Citations to the patents will not include the U.S. patent numbers to maintain brevity. Unless otherwise stated, these citations are of the U.S. patent numbers indicated in the heading that the citation falls under.

The '135 patent does not provide an explicit definition for "virtual private network." However, the '135 patent uses "virtual private network" in ways that are consistent with a "virtual private network" being "a network of computers which privately communicate with each other by encrypting traffic on insecure communication paths between the computers." The specification discusses a VPN in the context of connecting and communicating between nodes. For instance, the specification states, "In a second mode referred to as 'promiscuous per VPN' mode, a small set of fixed hardware addresses are used, with a fixed source/destination hardware address used for all nodes communicating over a virtual private network." Col. 23:11-14. This excerpt shows that the '135 invention includes nodes (computers) communicating over a virtual private network.

Furthermore, the claims and specification discuss a VPN in the context of private communication on insecure communication paths. Claim 1 states "A method of transparently creating a virtual private network (VPN) between a client computer and a target computer" and then states the steps of accomplishing this method including "requesting access to a secure web site." Col. 47:20-22, 30-31. Thus, claim 1 associates a "virtual private network" with "security." Also, the specification states, "If the user is not authorized to access the secure site, then a 'host unknown' message is returned (step 2705). If the user has sufficient security privileges, then in step 2706 a secure VPN is established between the user's computer and the secure target site." Col. 39:21:25. This excerpt shows how a "virtual private network" establishes a secure connection between nodes where security may not otherwise exist. Thus, the claim language and the specification are consistent with construing a "virtual private network" as "a network of computers which privately communicate with each other by encrypting traffic on insecure communication paths between the computers."

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