

---

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

---

i4i LIMITED PARTNERSHIP and  
INFRASTRUCTURES FOR INFORMATION INC.,  
*Plaintiffs-Appellees,*

v.

MICROSOFT CORPORATION,  
*Defendant-Appellant.*

US COURT OF APPEALS  
FEDERAL CIRCUIT  
RECEIVED  
FEB 16 2010

---

Appeal from the United States District Court for the Eastern District of  
Texas in case no. 07-CV-113, Judge Leonard Davis.

---

**RESPONSE TO MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF  
COMBINED PETITION FOR REHEARING AND REHEARING EN BANC**

---

Douglas A. Cawley  
Jeffrey A. Carter  
McKool Smith, PC  
300 Crescent Court, Ste. 1500  
Dallas, TX 75201  
(214) 978-4000

T. Gordon White  
McKool Smith, PC  
330 West 6th Street, Ste. 1700  
Austin, TX 78701  
(512) 692-8700

Donald R. Dunner  
Don O. Burley  
Kara F. Stoll  
Jason W. Melvin  
FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, LLP  
901 New York Avenue, NW  
Washington, DC 20001  
(202) 408-4000

Erik R. Puknys  
FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, LLP  
3300 Hillview Avenue  
Palo Alto, CA 94304  
(650) 644-6644

February 16, 2010

*Attorneys for Plaintiffs-Appellees  
i4i Limited Partnership and  
Infrastructures for Information Inc.*

---

## RESPONSE TO MOTION FOR LEAVE

i4i opposes Microsoft's motion for leave to file a reply in support of its combined petition for panel rehearing and rehearing en banc. The clear import of both the Federal Rules and this Court's rules is that a reply supporting a rehearing petition should be filed only when the Court requests one. But since the Court did not request one here, Microsoft's motion should be denied.

Moreover, Microsoft's alleged reasons for needing a reply are meritless. While Microsoft says it needs a reply to explain its position on willfulness, its reply devotes less than a page to this issue. And while Microsoft also says it needs a reply to "explain how i4i has mischaracterized the panel decision and the current state of the law," its reply—where it does not simply rehash the same points made in its petition—consists of responses to straw-man arguments i4i never made.

### **I. The Federal Rules of Appellate Procedure Contemplate Filing a Reply Supporting a Petition for Rehearing Only When Requested**

Rule 35(e) of the Federal Rules of Appellate Procedure states that a party cannot file a response to a petition for rehearing en banc "unless the court orders" one. *See also* Fed. R. App. P. 40(a)(3) ("Unless the court requests, no answer to a petition for panel rehearing is permitted."). Similarly, this Court's rules provide for a response to a rehearing petition only "if the court requests" it. Fed. Cir. R. 35(e)(4); *see also* Fed. Cir. R. 40(d). The plain language of these rules, which do not even mention replies, suggests that once the rehearing petition has been filed,

any further briefing is to be *only* at the court's direction. Moreover, the failure of these rules to even mention replies stands in marked contrast to other rules. *See, e.g.,* Fed. R. App. P. 27(a)(4), 28(c); Fed. Cir. R. 8(b), 18(b), 21(c), 27(c).

In fact, this Court's rules regarding responses to mandamus petitions are similar to those relating to rehearing petitions in that a response can be filed only when ordered (Fed. Cir. R. 21(a)(5)), but in the mandamus context, the rules expressly provide that where a response has been ordered, the petitioner may file a reply (Fed. Cir. R. 21(c)). The absence of a similar rule in the context of rehearing petitions strongly suggests that replies are not contemplated in this context.

The reason is obvious. When rehearing is sought, the Court has *already* reviewed a minimum of *three* briefs, heard oral argument, and issued its decision. The Court should not then be bombarded with another litany of briefs in connection with a rehearing petition—unless *the Court decides* it wants further briefs beyond the petition itself. In fact, during the course of this appeal, this Court has considered Microsoft's motion to stay the injunction (three briefs from the parties and three briefs from amici supporting Microsoft), the parties' merits briefs (and one amicus brief supporting Microsoft), Microsoft's two 28(j) letters (and two responses from i4i), Microsoft's rehearing petition (as well as an amicus brief supporting Microsoft and i4i's response), and, now, Microsoft's motion for leave

to file a reply in support of its petition and the reply itself (plus this response and—undoubtedly—a Microsoft reply). This Court should say, “Enough.”

## **II. Microsoft’s Proposed Reply Largely Repeats the Same Arguments Microsoft Already Made in Its Petition**

Most of Microsoft’s proposed reply simply repeats the same arguments Microsoft made in its petition—to which i4i has already responded. For example, at 1-3 of its reply, Microsoft repeats the allegation it made in its petition (at 4-8, 13) that the panel opinion “described but, never *analyzed*” Wagner’s testimony, but i4i has already shown that this is nonsense. The only way a court can possibly analyze an expert’s testimony is to describe it as the panel did—in the context of the standards the district court was required to apply (slip op. at 28) and the appellate standard of review (*id.* at 31, 34-35). Thus, as i4i has already explained, when the panel concluded that “Wagner based his calculations on facts meeting [Rule 702’s] minimum standards of relevance and reliability,” and that “these facts had a sufficient nexus to the relevant market, the parties, and the alleged infringement” (*id.* at 34), the panel obviously was analyzing Wagner’s testimony. *See* i4i Response to Combined Petition (“Response”) at 5.

Likewise, at 3-6 of its proposed reply, Microsoft repeats the same basic misstatement Microsoft made in its petition (at 9-13) that the panel refused to conduct an excessiveness review, but i4i has already shown that was wrong as well (Response at 7-11). In particular, Microsoft fails even to acknowledge the panel’s

conclusion that i4i's expert testified, based on "facts [having] a sufficient nexus to the relevant market, the parties, and the alleged infringement" (slip op. at 34), that i4i's damages should fall between \$200–207 million, and the jury's award fell within that range. Response at 11 n.4. Under Fifth Circuit case law, the panel was entirely correct to affirm the award.

Microsoft's also mischaracterizes i4i's position (and the decisions of both the panel and the district court) in its treatment of the injunction. Specifically, Microsoft says that i4i's argument should be disregarded because "virtually *any* patent plaintiff" can claim that with an "injunction it 'might be able' to manufacture a product that competes with Microsoft." Proposed Reply at 6. As i4i has noted previously, however, it *does* manufacture a product that competes with Microsoft (Response at 11-12), and the reason an injunction is needed here is to "level[] the playing field so that i4i might be able to pursue its original plans of selling not just the version of its software it created in response to Microsoft's infringement but also the software it was originally selling in the market as it existed before Microsoft's infringement" (*id.* at 13).

Finally, contrary to Microsoft's proposed reply (at 7), i4i is not saying that the panel should "tak[e] i4i's word for it" that substantial evidence supports the willfulness verdict. Instead, i4i showed that the panel has already found, in the course of affirming the jury's contributory and induced infringement verdicts, that

i4i presented substantial evidence that Microsoft knew of the patent-in-suit, that it knew or should have known it was causing infringement, and that it *intended* for that infringement to occur. Response at 14-15. That same evidence was more than sufficient to satisfy both the objective and subjective prongs of *Seagate*. *Id.*

### III. Conclusion


i4i respectfully asks the Court to deny Microsoft's motion for leave to file a reply in support of its combined petition for panel rehearing and rehearing en banc.

Dated: February 16, 2010

Respectfully submitted,

Douglas A. Cawley  
Jeffrey A. Carter  
MCKOOL SMITH, PC  
300 Crescent Court, Ste. 1500  
Dallas, TX 75201  
(214) 978-4000

T. Gordon White  
MCKOOL SMITH, PC  
330 West 6th Street, Ste. 1700  
Austin, Texas 78701  
(512) 692-8700

  
Donald R. Dunner  
Don O. Burley  
Kara F. Stoll  
Jason W. Melvin  
FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, LLP  
901 New York Avenue, NW  
Washington, DC 20001  
(202) 408-4000

Erik R. Puknys  
FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, LLP  
3300 Hillview Avenue  
Palo Alto, CA 94304  
(650) 644-6644

*Attorneys for Plaintiffs–Appellees  
i4i Limited Partnership and  
Infrastructures for Information Inc.*

## CERTIFICATE OF INTEREST

Counsel for Plaintiffs-Appellees i4i Limited Partnership and Infrastructures for Information Inc. certify the following:

1. The full name of every party or amicus represented by us is:

i4i Limited Partnership and Infrastructures for Information Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is:

N/A.

3. All parent corporations and any publicly held companies that own 10% or more of the stock of any party represented by us are:

None.

4. The names of all law firms and the partners or associates that appeared for the parties now represented by us in the trial court or are expected to appear in this Court are:

Mike McKool, Jr., Douglas A. Cawley, Jeffrey A. Carter, Jill F. Lynch,  
Thomas G. Fasone III, Jennifer L. Henry, Martin C. Robson III, J.  
Austin Curry, and Jonathan R. Yim  
MCKOOL SMITH, PC, DALLAS, TX

T. Gordon White, Kevin L. Burgess, John B. Campbell,  
Gretchen K. Harting, and Joel L. Thollander  
MCKOOL SMITH, PC, AUSTIN, TX

Sam F. Baxter  
MCKOOL SMITH, PC, MARSHALL, TX

Robert M. Parker, Charles Ainsworth, and Andrew T. Gorham  
PARKER BUNT & AINSWORTH PC, TYLER, TX

Thomas J. Ward, Jr.  
WARD & SMITH LAW FIRM, LONGVIEW, TX

Donald R. Dunner, Don O. Burley, Kara F. Stoll, and Jason W. Melvin  
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP  
WASHINGTON, DC

Erik R. Puknys  
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP  
PALO ALTO, CA

## CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2010, two copies of the foregoing RESPONSE TO MOTION FOR LEAVE TO FILE A REPLY IN SUPPORT OF COMBINED PETITION FOR REHEARING AND REHEARING EN BANC were served by overnight courier (with courtesy copies sent by e-mail) to:

Matthew D. Powers  
WEIL GOTSHAL & MANGES LLP  
201 Redwood Shores Parkway  
Redwood City, CA 94065  
(602) 802-3200  
*matthew.powers@weil.com*

Matthew D. McGill  
GIBSON, DUNN & CRUTCHER LLP  
1050 Connecticut Avenue, NW  
Washington, DC 20036  
(202) 887-3783  
*mmcgill@gibsondunn.com*

John Thornburgh  
FISH & RICHARDSON PC  
12390 El Camino Real  
San Diego, CA 92130  
(858) 678-5080  
*thornburgh@fr.com*



---