

2009-____

CONFIDENTIAL

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MICROSOFT CORPORATION,

Defendant-Appellant,

v.

i4i LIMITED PARTNERSHIP et al.,

Plaintiffs-Appellees.

Appeal from the Eastern District of Texas

No. 6:07-CV-00113

**EMERGENCY MOTION
TO STAY PERMANENT INJUNCTION PENDING APPEAL**

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MICROSOFT CORPORATION V. I4I LP
2009-_____

Counsel for the Defendant-Appellant certifies the following:

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

Microsoft Corporation.
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 me is: N/A.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:
N/A.
4. There is no such corporation as listed in paragraph 3.
5. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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CONFIDENTIALITY STATEMENT

Confidential research and development, commercial process, and business information of Appellants and Appellees that is the subject of the district court's protective order or has been filed under seal has been [bracketed] in this motion.

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INDEX OF ABBREVIATIONS

ABBREVIATION	REFERENCE
'449 patent	U.S. Patent No. 5,787,449
D.E.	Docket Entry from district court docket
DTX	Defendant's Trial Exhibit
FH	File History
PTO	U.S. Patent and Trademark Office

All emphasis has been added unless otherwise indicated.

INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION
A	Permanent Injunction (D.E. 413)
B	Memorandum Opinion and Order (D.E. 412)
C	Notice of Appeal
D	Tostevin Declaration (<i>confidential</i>)
E	U.S. Patent No. 5,787,449
F	Excerpts from File History for '449 patent
G	DTX-2384 (Excerpts from Plaintiffs' Responses to Microsoft's Fifth Set of Interrogatories (Nos. 26–27))
H	Excerpts from transcript of <i>Markman</i> Hearing (Feb. 28, 2008)
I	June 15, 2009 Office Action in Reexamination of '449 Patent
J	Plaintiffs' Motion for Permanent Injunction or in the Alternative a Post-Judgment Royalty (D.E. 349) (<i>confidential</i>)
K	Excerpts from Trial Transcript (May 13, 2009 Afternoon)
L	Excerpts from Trial Transcript (May 12, 2009 Morning)
M	Excerpts from Trial Transcript (May 15, 2009 Afternoon)
N	Excerpts from Trial Transcript (May 12, 2009 Afternoon)

CONFIDENTIALITY STATEMENT

Confidential research and development, commercial process, and business information of Appellants and Appellees that is the subject of the district court's protective order or has been filed under seal has been [bracketed] in the exhibits designated as confidential above.

Pursuant to FED. R. APP. P. 8 and FED. CIR. R. 8, Appellant Microsoft Corporation (“Microsoft”) hereby moves for an order staying the permanent injunction issued by the U.S. District Court for the Eastern District of Texas (Davis, J.) pending Microsoft’s appeal to this Court. The permanent injunction is attached as Exhibit A. The district court’s memorandum opinion and order denying Microsoft’s motion to stay the injunction (and other post-verdict relief) is attached as Exhibit B. Microsoft’s notice of appeal is attached as Exhibit C.

Microsoft also requests an immediate administrative stay to maintain the status quo while the Court considers the merits of Microsoft’s motion for stay. *See, e.g., Vizio v. ITC*, No. 2009-1386 (June 10, 2009) (granting temporary administrative stay). As described below, the district court’s injunction, which is predicated on several fundamental legal errors, compels Microsoft to act immediately and already is imposing costs on Microsoft that it will never recover if this injunction is overturned on appeal. To facilitate the resolution of this motion, Microsoft requests that the Court immediately enter a briefing schedule requiring Appellees i4i Limited Partnership and Infrastructures for Information, Inc. (collectively, “i4i”) to file their response by August 24, 2009, and allowing Microsoft to file a reply by August 28, 2009. To mitigate any harm imposed on the parties by the enforcement or stay of the permanent injunction, Microsoft also requests that the Court establish an expedited briefing schedule for the merits of this appeal. Microsoft informed i4i of the filing of this motion (which is being served by electronic mail and overnight mail); i4i opposes the requested relief.

INTRODUCTION

Based on its finding that Microsoft infringed a patent that the PTO already had provisionally rejected upon reexamination as anticipated and obvious, and its further conclusion that “Microsoft’s infringement causes i4i to suffer irreparable harm for every new XML customer that purchases an infringing Microsoft product” (Ex. B at 55), the district court issued the permanent injunction from which Microsoft now appeals.

That injunction gives Microsoft 60 days from August 11, 2009, to redesign its flagship *Word* software to remove an obscure functionality relating to custom XML—a functionality that indisputably has several noninfringing uses—and to push the redesigned versions of *Word* through all of its distribution channels. [A Microsoft representative declared under penalty of perjury that redesigning and redistributing in all distribution channels multiple versions of *Word* “would require at least six to seven months to complete.” (Ex. D ¶ 6)] Unless Microsoft can find a way to accomplish these tasks in 60 days, absent a stay from this Court, on October 10, 2009, Microsoft will be compelled to stop distributing *Word* and the popular *Office* software suite (which includes *Word* and programs not implicated in this litigation, such as *Excel* and *Power Point*) in the U.S. market until it is able to distribute the redesigned versions of *Word* and *Office*.

Already, Microsoft is expending enormous human and financial capital to make its best effort to comply with the district court’s 60-day deadline. The same “traditional principles of equity” (*eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006)) that district courts must apply in deciding whether to grant an

injunction here dictate that Microsoft be provided an opportunity to appeal before it is compelled to redesign or withdraw from the market a product that indisputably has thousands of noninfringing uses, that even on i4i's telling has been used in an infringing manner by only two percent of U.S. users since 2003, and that may, after an appeal, be found not to infringe at all.

BACKGROUND

1. This case concerns a type of computer technology called Markup Language. At its most basic, a Markup Language is a way of indicating how bare written content should be displayed—what should be in boldface, for example, or what should be centered, or where line breaks should appear. In a Markup Language, the textual content—say, a judicial opinion—is nested between “tags” that indicate how it should look on a computer screen.

The type of Markup Language that is perhaps most common in everyday experience is Hyper Text Markup Language, or HTML, which is used to present text on web pages. Every Internet browser, such as Internet Explorer, can read HTML, which is why web pages appear the same on every computer screen—the same words are centered, the same text is hyperlinked, the same background appears. To see an example of how Markup Language works, a user may type the Federal Circuit's web address (www.cafc.uscourts.gov) into Internet Explorer, and select “View” on the toolbar, and then “Source.” A plain-text window pops up on the screen with the HTML code. One segment of HTML that is shown reads:

<title>United States Court of Appeals for the Federal Circuit</title>

This is Markup Language. The content—“United States Court of Appeals

for the Federal Circuit”—is nested between a pair of nearly identical tags for “title” that comprise an opening tag and a closing tag (the addition of “/” makes a tag a closing tag). Those tags tell the web browser that the text should be displayed as a title for the web page.

Although HTML proved useful for web-page design because it is relatively easy to work with and effective at displaying text, many businesses and other users were unsatisfied with it as a Markup Language. They wanted a Markup Language that could not only display text in appealing ways to human eyes, but could also indicate other properties about the textual content. For example, a business might want a set of tags that indicates that the tagged content is a customer’s telephone number. That way, if the business decides to transfer millions of telephone numbers between different computers, each computer can immediately recognize the stream of numbers as telephone numbers—instead of, say, prices. To accomplish this, one needs tags that, rather than indicating how the text should appear on a computer screen, tell other computers what the text means.

To address this need, computer scientists in the 1990s created Extensible Markup Language, or XML (whose precursor was Standard Generalized Markup Language, or SGML). Unlike HTML, XML is not a language per se, but rather a general-purpose set of rules for encoding documents electronically that allows users to create their own custom document-encoding schemes that are specific to the users’ particular needs. That is to say, whereas HTML has a set of a defined tags that always mean the same thing, XML lets users create their own tags that are useful to their businesses—“customer’s telephone number,” “boldface,” or

whatever. Users then employ their unique tags to write an application-specific scheme that looks roughly like HTML.

In 2003, Microsoft included in *Word 2003* an XML development platform that enables users to work on their custom XML projects in a variety of file formats within *Word's* window and menu-based word-processing program. Microsoft included an improved version of the platform in *Word 2007*, [and is planning (if the district court's injunction ultimately is lifted), a similar custom XML development platform in the soon-to-be released *Word 2010*.] In practice, *Word's* custom XML functionality is used by a small niche of customers. According to i4i's own survey taken to substantiate its \$200,000,000 claim for damages, only 2% of *Word* users in the U.S. have ever opened a document containing custom XML. And Microsoft's data indicates that the platform is used by 0.2%–0.5% of U.S. *Word* users. (Ex. K at 106–07) Many other software companies, including i4i, market software products that incorporate XML schemes as add-ons to *Word*. i4i's add-on products in particular are customized to the pharmaceutical industry. (See Ex. J at 2 & n.2; Ex. L at 24)

2. In 2007, four years after i4i's founder and Chief Technology Officer congratulated Microsoft on the useful XML development platform in *Word 2003* (Ex. M at 44–45), the '449 patent's new owner, i4i L.P.—an entity whose only asset is the patent-in-suit and whose financing is provided by litigation investor Northwater Patent Fund (*id.* at 81–82)—filed this lawsuit alleging that certain uses

of *Word*'s custom XML functionality infringe certain claims of its patent.¹

The '449 patent does not claim invention of any Markup Languages (HTML, SGML or especially XML, which is never mentioned in the '449 patent). Rather, the purported innovation of the '449 patent is to improve the editing of documents employing a Markup Language² by separating the tags—the patent calls them “metacodes”—from the content and storing them separately. The '449 patent teaches that this separation of tags from content can be accomplished by recording the location in the input content stream where each metacode goes (called an “address of use” in the patent), extracting the metacode, and then placing the metacode in a “metacode map”—a separate file that matches each metacode to its location. A user can then look at the metacode map to determine where each metacode belongs in the stream of content, even though the metacodes have been removed from the content stream. This, in turn, allows the '449 invention to achieve its fundamental goal of independent manipulation, in which the user may edit the structure of the document (*i.e.*, the metacodes) by accessing only a map of metacodes, without ever needing to access (or have access to) the content. (Exh. E at 7:6-10)

¹ Mid-way through this case, i4i L.P. added as a co-plaintiff Infrastructures for Information, Inc., (“i4i Inc.”), the original owner of the patent and now its “exclusive licensee.” As the plaintiffs explained, i4i Inc. [“is a small company with a few products”] (Ex. J at 12) that “has always struggled financially.” (Ex. L at 28) Currently 80% of i4i Inc.’s customers are pharmaceutical companies who require specialized XML software to submit data to the FDA. (Ex. L at 24)

² The preferred embodiment in the '449 patent uses the SGML markup language, a precursor to XML. (*See* Ex. E at 4:63-64)

i4i has not alleged that use of *Word* necessarily infringes the '449 patent. Rather, i4i has alleged that *Word* users infringe the '449 patent only when they use Microsoft's software to *open* files of *certain formats* (.xml, .docx, or .docm) that contain *custom XML instructions*, asserting that when used in this manner, *Word* separates tags from content and stores them in the manner claimed by the '449 patent. It is undisputed that opening files in the familiar and most-common ".doc" and ".dot" formats—even if such files contain custom XML—is *not* an infringing act. (Ex. G at 6–8)

3. After the *Markman* hearing, the district court invalidated the first thirteen claims in the patent for indefiniteness. (See D.E. 111 at 17–22) With respect to the remaining claims, however, the court interpreted several key limitations in a manner that stripped Microsoft of arguments that it could have made to show noninfringement and invalidity. In particular, the court construed several terms (such as "distinct map storage means" and "mapped content storage means") as not requiring the ability to independently manipulate the metacode map and mapped content (D.E. 304), even though the patent, the prosecution history, and i4i consistently touted independent manipulation as the key characteristic of the invention. (See D.E. 297)

The case proceeded to trial on three patent claims. Microsoft argued to the jury that the patent was invalid based on prior art and that in any event *Word* did not infringe the patent. The jury disagreed and rendered a verdict for i4i. (D.E. 326) The jury also found that Microsoft's conduct was willful. It awarded \$200,000,000 in compensatory damages, which is what the plaintiffs had asked for.

