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Microsoft i4i Oral Arguments Complete at Supreme Court

Written by **Gene Quinn**
President & Founder of **IPWatchdog, Inc.**
Patent Attorney, Reg. No. 44,294
Zies, Widerman & Malek
E-mail | **Blog** | **Twitter** | **LinkedIn**
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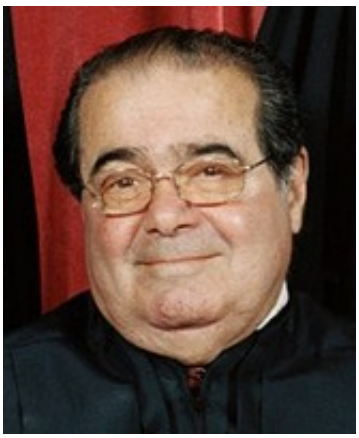

Justice Scalia, who presided over the Court in Microsoft v. i4i

At 11:03 am this morning Justice Scalia, sitting in for the recused Chief Justice John Roberts, called the most recent Supreme Court foray into patent law saying: “We’ll hear argument now in… Microsoft

Corporation v. i4i Limited Partnership." The Chief Justice recuses himself from any and all Microsoft cases before the Supreme Court, so eight Justices are left to decide whether it is appropriate to require clear and convincing evidence to find an issued patent claim invalid during litigation. In a nutshell, Microsoft and the amici supporting Microsoft would rather have a lower threshold (i.e., preponderance of the evidence) at least with respect to prior art that was not considered by the patent examiner during prosecution of the patent application at the United States Patent and Trademark Office. On the other side of the case, i4i, along with its amici and the Solicitor General, argue that the current standard should not be changed.

Before jumping into the oral argument, it is probably worthwhile to give some background. On August 11, 2009, that the United States District Court Judge in the Eastern District of Texas issued its final order in the trial between Microsoft and i4i. Microsoft was found to infringe **U.S. Patent No. 5,787,449**, and in addition to losing approximately $300 million, Judge Leonard Davis also entered a permanent injunction that was to become effective 60 days from the judgment date. Microsoft was ordered to cease selling the ubiquitous word processing program Word that contained certain XML functionality that was found to infringe the i4i patent. On August 21, 2009, the United States Court of Appeals for the Federal Circuit issued an Order granting Microsoft an expedited appeal of its patent infringement loss to i4i Limited Partnership. The Federal Circuit granted the stay of the permanent injunction on September 3, 2009, pending hearing of the appeal. Oral arguments were also granted in expedited fashion, and were held on September 23, 2009. On December 22, 2009, the Federal Circuit issued its decision upholding Judge Davis' decision with one small exception. The Federal Circuit found the 60 day period in which the injunction was to become effective too short, instead preferring to give Microsoft 5 months to comply with the permanent injunction, which meant that the permanent injunction went into effect on January 11, 2010. Subsequently, Microsoft filed a petition for writ of certiorari with the United States Supreme Court. The Supreme Court granted certiorari in Microsoft Corporation v. i4i Limited Partnership on November 29, 2010, with Chief Justice John Roberts taking no part in the decision or petition. The Supreme Court did not request the views of the Solicitor General prior to determining whether to take the case, choosing rather to accept the matter with no input from the United States government.

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The attorney for Microsoft, Thomas Hungar, came out firing right away, arguing right out of the box:

The Federal Circuit's clear and convincing evidence standard ensures the enforcement of invalid patents, even though this Court recognized in KSR that invalid patents stifle rather than promote the progress of liberal arts. Under this Court's decisions Grogan and Huddleston, the default preponderance standard should govern in all cases because section 282 does not specify a heightened standard of proof.

Hungar would go on to say that the clear and convincing standard "makes no sense," which nearly immediately drew the first comment from the bench with Justice Ginsburg saying that it would be difficult to say the standard makes no sense when it was supported by Justice Cardozo and Judge Rich. Ginsberg would later, in a nearly annoyed way, say "then you have to be saying that Judge Rich got it wrong…" Hungar cut off Justice Ginsburg, not typically a wise move.

Those familiar with Justice Scalia know how he likes to mention horses during oral argument, frequently talking about horse drawn carriages during patent arguments. He did not disappoint. On the heels of Justice Ginsberg's comment Scalia cut straight to the chase and explained that what didn't seem to make sense was applying different standards "only when the prior art hadn't been considered," pointing out "you can't ride both horses. They're going in different directions."

Justice Kagan next got into the act after Hungar attempted to parse Justice Cardozo's words and say they related to "the limited context of priority inventions." Kagan observed: "But Justice Cardozo certainly didn't limit his holding in the way you suggest. The language of that opinion is extremely broad. And if you read that opinion, no one would gather from that opinion the kinds of limits that you're suggesting on it."

What is at issue here is Justice Cardozo's opinion in **Radio Corp. of Am. v. Radio Eng'gLabs., Inc.**, 293 U.S. 1, 8-10 (1934), where over and over again he talked about a heightened standard or proof required to invalidate claims. Justice Cardozo endeavored to make sense of the various articulations of the heightened standard and said: "Through all the verbal variances, however, there runs this common core of thought and truth, that one otherwise an infringer who assails the validity of a patent fair upon its face bears a heavy burden of persuasion, and fails unless his evidence has more than a dubious preponderance." Cardozo would go on to talk about that a "clear conviction" is necessary to invalidate claims, and also used the following language:

- "unless the countervailing evidence is clear and satisfactory."
- "the conviction might not be clear enough to overthrow…"
- "evoke a clear conviction that the patents were invalid…"

Thus, the Justices seemed enormously skeptical of any rule that would overrule Justice Cardozo's pronouncement relative to the heightened level of scrutiny.

The discussion turned away from Supreme Court precedent and Judge Rich to the 1952 Patent Act and the Federal Circuit handling of the presumption. Justice Ginsburg correctly observed that the Federal Circuit has nearly since its inception uniformly applied a clear and convincing standard since at least 1984. She opined: "one would have expected that there would have been bills proposed to change it. Were there any?" To which Hungar had to reply: "No, Your Honor, not that I'm aware of."

Justice Sotomayor took a slightly different approach, pointing out that the Federal Circuit cases that have allegedly softened the clear and convincing standard have done so through instruction to the jury that some of the prior art was not considered by the patent examiner. She then asked: "You didn't ask for such an instruction in this case; is that correct?" After initially dodging the question Hungar finally responded: "We didn't ask—" He was immediately cut of as if being cross examined by Sotomayor, which of course he was. Justice Sotomayor was clearly troubled with the all or nothing request of Microsoft of the District Court; namely charge preponderance of the evidence and do not explain the standard as clear and convincing but with some prior art not being considered by the patent examiner.

Next to express skepticism was Justice Breyer, who pointed out that at least some of the amici who characterize themselves as supporting the Microsoft position "but they really don't." Justice Breyer continued the probing regarding jury instructions and why careful jury instructions don't solve the problem. Hungar explained: "I don't think it addresses the problem because the fundamental problem is imposing this heightened standard on the jury that has no moorings in the statute and no moorings in common sense…" Personally, I would have left the "common sense" argument by now because it was readily apparent the Court didn't like the implication that neither Justice Cardozo or Judge Rich could be characterized as lacking "common sense" when both directly endorsed a heightened standard well above a mere preponderance.

Ginsburg, who was turning out to be one of the hotter members of this extremely hot Court, asked to return to the enactment of the 1952 Patent Act. In a very loaded way she asked: "So by adding a presumption of validity, must Congress have intended to do something more than simply repeat that the defendant has the burden of proof?" Hungar said no, this elicited a question about whether we are referring to the burden of production or the burden of persuasion from Justice Kennedy, followed by Justice Alito saying:

If the challenger has the burden of persuasion, wouldn't it almost go without saying that the challenger would also have the burden of production on the issue of invalidity? So what would be added then by — what role is played then by that sentence, a patent shall be presumed valid?

Soon thereafter Hungar's time expired.

Next up was Attorney Seth Waxman, representing i4i. In his opening remarks he dropped a phrase clearly captured the attention of the Court. Waxman pointed out that "for the past 28 years Congress has actively acquiesced in the Federal Circuit's consistent holding expressly drawn from RCA that the standard is 'clear and convincing.'" Immediately Justice Ginsburg and Justice Scalia jumped to inquire. Ginsburg asking, "How actively do we acquiesce?" Scalia saying, "It's like passive activity, right?" Laughter abounded as Waxman, seemingly comfortable and laid back quipped "I may want to submit a supplemental brief on that point." Ultimately, Waxman would point out that Congress has been quite active in the patent arena during the past 28 years and simultaneously have been "well aware of the clear and convincing evidence standard…" It seems clear to me that Waxman dropped the phrase he knew would get a rise out of the Court, almost as if he were a batter skillfully convincing the pitcher to throw the pitch he knew he could hit out of the park.

Justice Alito then articulated the difficult he was having accepting the i4i position based on his interpretation of the statute. This exchange followed:

JUSTICE ALITO: If I could take you back to first principles, which is where you started, I have three problems in seeing your interpretation in the language of section 282. First, the statute says the burden of establishing invalidity of a patent, et cetera, et cetera, shall rest on the parties asserting such invalidity. If Congress wanted to impose a clear and convincing burden, why in the world would they not have said that expressly in that sentence? Number two, if the first sentence, "a patent shall be presumed valid," means that — is talking about the burden, then it's superfluous, because that's dealt with in the second sentence. And, third, the phrase "shall be presumed valid" doesn't seem to me at all to suggest clear and convincing evidence. A presumption normally doesn t have anything to do with clear and convincing evidence. Most presumptions can be disproved by much less than clear and convincing evidence. So how do you read that in — your — your position into the language of the statute?

MR. WAXMAN: Well, as to presumptions generally, I found particularly persuasive your opinion for the Third Circuit in GI Holding. But more -

JUSTICE ALITO: I've gotten a lot smarter since then. (Laughter.)

After apologies to Justice Scalia, who has little regard for legislative history, Waxman pointed out that "the Senate committee report said that they were… 'codifying the existing presumption of patent validity…'"

Justice Ginsburg, who clearly wasn't buying the Microsoft position, gave Waxman a soft-serve question about whether in keeping with Judge Rich's articulation of the standard could the District Court could have given an instruction that "defendant's evidence would carry more weight if it hadn't been presented to the Patent Office?" Waxman said, "Yes, and the Federal Circuit has said that over and over and over again."

Justices Scalia and Sotomayor continued to probe Waxman regarding a potential jury instruction. At one point Waxman articulated a possible jury instruction thusly: "the burden of proof is clear and convincing evidence, but you may find that burden more easily met if you find that there was, in fact, evidence relating to validity that was not, in fact, considered by the PTO when it issued this property right." This lead Sotomayor to notice that "it's not clear and convincing evidence if you phrase it that way, that is something less than that." Scalia also noted such a jury instruction "would require determining what it was that the Patent Office considered." That was something Scalia said "would better be avoided."

As the discussion turned away from a possible jury instruction Justice Ginsburg for the first time seemed to ask a question suggesting she may be friendly to the Microsoft position, but of course it could have been simply an easy question to help Waxman get back on strong footing. With respect to the Patent Office not having considered certain prior art, Ginsburg asked, "but if they haven't judged anything, what is the justification for continuing to have the clear and convincing standard?" Waxman pointed out there were four justifications, but only got to three of them. They were: (1) "an fringer's validity challenge is a collateral attack on a government decision"; (2) "the harm from an erroneous determination is hugely asymmetrical"; and (3) "this is a grant of a property right that under the Constitution is specifically designed to induce reliance in exchange for the inventor's honoring her half of the patent bargain, that is public disclosure…"

Next up was Malcolm Stewart, on behalf of the United States as amicus curiae supporting the

respondents, i4i. Much of Stewart's time, which was brief, was taken up by the language of the statute itself. What Justice Kennedy and Justice Alito were concerned with earlier captured Justice Sotomayor's attention when questioning Stewart. The statutory language of 35 U.S.C. § 282 starts out by saying: "A patent shall be presumed valid." Then the last sentence of the first paragraph says: "The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity." The following exchange took place regarding the statutory language:

> *JUSTICE SOTOMAYOR: Counsel, the problem with your argument, assuming its validity, is why do you need the second sentence? If Congress was intending to sweep up in the use of the word "presumption" the need to overturn it by clear and convincing evidence, why did you need the second sentence saying that the other side now bore the burden of persuasion?*
>
> *MR. STEWART: I think there is a belt and suspenders quality to the statute, no matter how you parse it, but I think that Microsoft has essentially the same problem, because they have constructed a theory under which the second sentence does something that the first has not, does not, but they haven't constructed any theory as to why the first sentence is not superfluous. That is, given the second sentence to the effect that the burden of establishing invalidity is on the challenger, there's no more work to be done by the first sentence.*

Justice Alito continued to express skepticism with respect to applying a heightened standard across the board relative to prior art never considered by the Patent Office. Stewart pointed out that there were three reasons that this makes sense, but then provided only two. Stewart explained:

The first one is that the patent — the grant of a patent has historically been understood to reflect a quid pro quo between the applicant and the government, and the applicant's part of the bargain was disclose that which might otherwise be maintained as a trade secret…

The second is related to the patentee's reliance interests, but is more instrumental. That is, independent of our concerns for fairness to the patent applicant, Congress could reasonably determine that there are enough uncertainties along the way to getting a patent, to having it overturned on various other grounds that in an invalidity suit the patent — the patentee should have reasonable confidence that it won't be overturned unless the evidence is clear.

Lastly, Stewart turned to address a question earlier brought up by Justice Kagan about the insufficiency of reexamination to solve all invalidity challenges. Stewart recognized that the alleged infringer could not

go back to the Patent Office for reexamination and have the "expert agency" consider all evidence because reexamination only allows the presentation of patents and printed publications. He did, however, bring up that Congress is currently on the verge of amending the patent laws in a way that would allow for post grant review of a greater scope "where for a limited window of time after a patent is issued, people who oppose the issuance of the patent can come in and object on any ground."

During rebuttal, Justice Breyer asked Hansen a very difficult question regarding why shouldn't the alleged infringer have to return to the Patent Office if they could have and if they don't then they should be forced to live with the heightened burden because if they had wanted a lower burden they could have gone back to the Patent Office with reexamination. After trying to dodge the question and Justice Breyer not letting him off the hook with repeated follow-up questions, Hansen explained: "the problem is, re-exam takes a long time, patents plaintiffs generally oppose stays of litigation for re-examination, because they want to get to the jury because they know that juries are much more likely to uphold patents than either judges or the Patent Office on re-exam. So they want to get the case litigated as quickly as possible so you get through the court system before the re-exam has been completed."

At 12:02 pm, 59 minutes after oral argument began, Justice Scalia utter the words: "The case is submitted." Now the wait begins for a decision, which should come out this term, which means before the end of June.

While I reserve my right to change my mind after further consideration, analysis and feedback from others, it is my feeling that i4i will prevail. Whether that prevailing is as the result of a 4 to 4 tie, which would uphold the underlying Federal Circuit opinion, or as the result of an outright majority victory time will tell. With Justice Roberts recusing himself i4i only needs 4 votes to effectively win, although that would hardly settle the matter and assuredly lead to another case on these same issues. With the Court knowing that Justice Roberts would recuse himself because of the presence of Microsoft in the case it would seem unlikely that going into the oral argument it was believed that a 4 to 4 tie would be likely.

Based on the oral argument it would seem to me that Justices Ginsburg and Scalia are squarely in favor of i4i. It would seem that Justices Sotomayor and Breyer would lean toward resolving the matter through the use of jury instructions, which would be in keeping with current Federal Circuit case law. Justice Kagan, along with Ginsburg and Scalia, seemed keenly aware that Microsoft's position would require overruling Justice Cardozo's opinion in RCA, which is something the Supreme Court is almost always loathe to do. Justices Kennedy, Alito and Sotomayor seem troubled by the belt and suspenders approach of Congress to § 282. And we know absolutely nothing about what Justice Thomas thinks other than it

would seem quite likely he will agree with Justice Scalia, with whom he seems to share nearly identical philosophies. So the way I would count the votes is at least 6 to 2 in favor of at least a clear and convincing standard that relies on jury instructions to inform the jury that they may give more weight to prior art that was not in front of the patent examiner, which is how the Federal Circuit has increasingly handed the presumption over the years.

The waiting game begins.

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32 comments
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1. EG **April 18th, 2011 4:55 pm**

   Gene,

   Nice report. As you suggest, it may be dificult to determine whether a particular Justice is for or against based on a tough question to counsel. But from what you said, it sounds like Hungar (for Microsoft) was in deep “hot water” throughout his portion of the oral argument. That the Justices caught onto the Cardozo’s Radio Corp. opinion and Judge Rich’s views works favorably for i4i. And that the government also supports i4i doesn’t hurt, and may help. Anyway, as you said, we’ll have to wait and see.

2. **Gene Quinn April 18th, 2011 5:05 pm**

   EG-

   I really like the math for i4i. They only need 4 votes to prevail, and yes, it seemed that Hungar was beaten from pillar to post. It didn’t seem like any of them were buying what he was selling.

   On top of that, as you point out, the Supreme Court overwhelmingly agrees with the Solicitor General when the U.S. government is not a party and steps in as a amicus supporting one side over the other.

   -Gene

3. **Sean Flaim April 18th, 2011 5:07 pm**

   Waxman got out the fourth “first principle” at the very end of his time:

   ” . . .This is my final first principle, I suppose — that changing this long-standing standard would marginalize the PTO, the expert agency that we know Congress created to superintend the issuance and re-examination of patents, and to the extent that there are significant policy concerns which I agree with - may I finish my sentence?

   JUSTICE SCALIA: Finish your sentence.

   MR. WAXMAN: – which I agree with: A, Congress is on the job; and, B, there is — those policy reasons say nothing about what Congress thought about the Patent Office in 1952 when it applied this Court’s
   unanimous presumption.

4. **Patrick April 18th, 2011 5:41 pm**

   Gene,

   Absolutely agree that Waxman knew what he was doing with his “actively acquiesced” comment. He showed everyone what a former Solicitor General can do in front of the Supremes …

   I agree with Hal Wegner’s assessment that all three attorneys argued admirably, but if these

cases were decided solely on the basis of the respective attorneys' performances, I think Waxman and i4i would win in a walk …

5. Joe **April 18th, 2011 5:51 pm**

   Gene, if you're right, then why did the Court bother granting cert?

6. Steve M **April 18th, 2011 6:30 pm**

   Thanks for the info and analysis, Gene.

   Here's a question I'll bet many besides myself would have liked the justices to ask Mr. Hungar:

   "Why is your client willing to risk having many of their own 1,000′s of current and pending patents negatively impacted–including being found invalid–should we find in favor of its position?"

7. Steve M **April 18th, 2011 6:34 pm**

   ps Gene–do you have a link to the oral args?

8. **Gene Quinn April 18th, 2011 6:38 pm**

   Joe-

   I don't really know why the Supreme Court took this case. Perhaps to address the dicta from KSR v. Teleflex? Perhaps because they thought they were going to determine that for prior art not considered they would make a change until they realized what that might mean?

   Upwards of 75% of the time the Supreme Court follows the Solicitor General when the SG appears as an amicus. Some made a big deal about the Court deciding to take this case without requesting the views of the SG, and at this point in time it would appear that criticism was justified. Despite what they think, and despite what the many generalists and law professors who support the Supreme Court think, the truth is they just don't know very much about patent cases. A lot of these issues look quite simple on their face. Bilski is a great example; how hard can patent eligibility be after all. So I think they might have improvidently rushed into granting cert. without having any idea how traumatic a decision changing the standard would be.

   As Justice Breyer pointed out, even some of the amicus claiming to support Microsoft were not really supporting them. IBM filed a neutral brief on the outcome (not saying i4i should win) but supported sticking with clear and convincing evidence. Then you have the Solicitor General and some other heavy hitters on the i4i side. It would shock me if the i4i position doesn't prevail, particularly given they would have to overrule Justice Cardozo. Not that they like to overrule prior Supreme Courts ever, but Cardozo just isn't any old Justice. They would also have to throw Judge Rich under the bus and we know they respect him enormously.

   -Gene

9. **Gene Quinn** **April 18th, 2011 6:42 pm**

   Steve M-

   Microsoft is willing to risk it because they are no longer an innovator company and rather than rely on patents they rely on market size to dominate. Microsoft hasn't innovated anything worthwhile in a very long time, being late to practically every innovation over the past 10 years and then either not catching up or simply losing because they were so late to market.

   Here is the link to the entire transcript:

   http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-290.pdf

   Enjoy!

   -Gene

10. blue **April 18th, 2011 6:46 pm**

    Since i became an inventor i've personally experienced MS's dirty tricks in stealing ideas from new startups. MS goes around spying on inventors in real-time, it takes their ideas and tries to design around the ideas so that it wont get caught for industrial espionage (which is a criminal not a civil offense).

    It may get sued if the patent is well drafted but at least it won't be liable for willful infringement. It uses the same tricks repeatedly and it may get really lucky if it had taken an invention from a sloppy inventor who had not clearly disclosed the essential features of the invention…

11. **Gene Quinn** **April 18th, 2011 6:48 pm**

    Patrick-

    I agree with you regarding Waxman. When you know what you are doing it really shows.

    As far as Hal's assessment, I think they all did OK. I think Waxman and Stewart did a great job. I think Hungar did OK. I am not a fan of interrupting the Justices, which he did frequently. Of course, he was largely dealt a terrible hand given that he was asking for reversal of decades of law, a reversal of Justice Cardozo and was against the SG as well as major amici.

    Time will tell!

    -Gene

12. blue **April 18th, 2011 7:01 pm**

    Gene,

    you are absolutely right. I am not a MS hater, in fact i respect bill gates and steve ballmer's leadership in the industry but its obvious that MS does not innovate and it does not need to because MS finds it more convenient to simply steal or copy…

13. Steve M **April 18th, 2011 10:07 pm**

    Thanks Gene (and for the link); that makes sense (in an odd sort o' way).

    Guess it's more important to stop the innovators . . . than to protect their own IP.

    Do you suppose the other companies (who sell products and services) who filed amici in support of MS feel the same way?

14. New Here **April 18th, 2011 10:13 pm**

    Having read over the transcript from the SCOTUS website, I found something that has my attention in this case:

    Hungar:

    "The — we've cited numerous cases in our
    brief at pages 34 through 36.
    reply brief at footnote 3 reference a list of over 200
    cases, some from before 1952 and some from after 1952,
    all recognizing that the presumption of validity was
    weakened or eliminated when the prior art evidence was
    not considered by the Patent Office."

    Note, "recognizing that the presumption of validity was
    weakened or eliminated when the prior art evidence was
    not considered by the Patent Office".
    It is an unavoidable question that is raised about, has a reasonable degree of prior art been considered,
    having all doubt left with only an obvious single result, validity is true.

    What basis are patents granted if not knowing a reasonable degree of prior art before hand, I would like to understand this better. Validity based upon a limited degree of prior art is ignoring an important part of law, facts imo.

    I hope the SCOTUS in their work on this case knows the importance of prior art, and the role prior art plays in validity — because otherwise the patent system becomes a house of cards. Imho.

15. Blind Dogma **April 19th, 2011 10:47 am**

    New Here,

    A bit of adivce when reading legal transcripts: Be aware that if you are rading without an understanding of the legal impacts, you are likely to only glean those facets that "catch your attention" because they tend to reinforce your pre-conceived notions.

    In that path lie Kool Aid fountains for you (and riches for me).

16. New Here **April 19th, 2011 11:26 am**

@BD
You do forget BD, that us little folks have money for access to those that know the law and "legal impacts", that we can always learn from, but not always quote from. As for riches, seems you are under the idea that us little folks are all poor ?
Do tell BD what you think, remembering as one Corp in this case with riches, has placed some important patent law out of reach of control of those that fear the result from one that is a patent holder risking the system for all involved — with or without riches.

My post is based upon question, and not any pre-determinations of what I believe think or wish. It questions some important points of the patent system from a vaild point made in the arguments, quoted, being that cases referenced, the Court can find, review to take more opinion and facts to consider. If such weakening of the presumption of validity is found by the Court, I can see that it will have an impact on this case. To ignore facts as prior art that is denied equal presumption of validity, is another question for patent law as a whole.

I'll have what you're drinking, its just good manners that way.

17. Blind Dogma **April 19th, 2011 12:13 pm**

"*As for riches, seems you are under the idea that us little folks are all poor ?*"

Not at all.

The reference is to the fact that there are those who are only too eager to jump and buy my delicious Kool-Aid, thus providing riches to me. There is no reference at all to anyone else (even little folk) being all poor. As far as drinking what I am selling – I don't touch the stuff (that's just bad business).

You are trying too hard to read into my note a message that is not there.

The rest of you rmessage is in such poor shape that I cannot determine (once again) what you are trying to say. Please, please, please do not post in such stream of conscience manner – you waste your time as well as mine.

18. New Here **April 19th, 2011 12:35 pm**

@BD

"– you waste your time as well as mine."

First, the post wasn't addressed to you ! my time is not a waste !
second, I didn't ask you what you think about it ! waste of your time is because of you !
You place yourself square in the middle of it and come out swinging at me over it !

How I write ?
Odd you didn't save time and mention it in #15. You always have the option to ignore it, and I'm being fair about this too !

Thanks.

19. Blind Dogma **April 19th, 2011 1:21 pm**

    New Here,

    As I have repeatedly mentioned – I strive to understand your viewpoint. I really do.

    And you should take it that if I canmake no sense of what you post, how many others as well cannot understand you. I, at least, point out to you that you might just as well be writing in ancient Sanskrit for your ideas would come across just as opaquely.

    If you take this as "swinging at you," then that is a "you" problem. Being misunderstood is one thing, Being mad and misunderstood only impacts you more. If you really only care to post to see your own words down, and do not care that anyone else can understand them, then by all means continue on your path. And just as you say that I can ignore your posts, you can ignore my replies. I, at least, am trying to help you.

20. New Here **April 19th, 2011 1:59 pm**

    @BD

    This will be the last of this here. I wish for this thread to continue on with the subject "Microsoft i4i Oral Arguments Complete at Supreme Court". I just put my 2 in because I enjoyed reading it.

    So as not to have any misunderstandings, I offer below, to show that what I write is understandable.
    With the link for credit: **http://dictionary.reference.com/browse/sentence**

    sen·tence
    1.
    Grammar. a grammatical unit of one or more words, bearing minimal syntactic relation to the words that precede or follow it, often preceded and followed in speech by pauses, having one of a small number of characteristic intonation patterns, and typically expressing an independent statement, question, request, command, etc., as Summer is here. or Who is it? or Stop!

    Let it go.
    Thanks.

21. Blind Dogma **April 19th, 2011 5:26 pm**

    New Here,

    The very fact that you offer a definition in no way validates that what you write is understandable.

    It simply is not.

    It is hardly a matter of me "Letting it go." It is a matter of you taking yourself seriously enough to give at least a minimal effort to see **that others** understand what you are trying to say.

I am not the only one to have commented so – I may be the only one that gives you the notice that you are not understood – and as I have repeatedly stated, I really do want to understand what you are trying to say.

I say "try" because you are failing at making much sense. You can choose to be mad at me for pointing this out, or you can choose to take more time and care in making sure that anybody else besides you (or a small clique of likewise gibberish speaking techies) can understand what you write. The choice, as always is yours. Just do not be too surprised if your thoughts and ideas are relegated to the trashbins if you choose to proceed in your stream of conscience broken English syntax.

22. New Here **April 19th, 2011 8:17 pm**

"The choice, as always is yours. Just do not be too surprised if your thoughts and ideas are relegated to the trashbins if you choose to proceed in your stream of conscience broken English syntax."

@Gene

You need to say something and end this now. If being taken off IPWatchdog is going to happen, that is for you to decide and I respect that. That decision is welcomed now and be done with it. If my English has continued to be a problem, I see you as a blog owner it would be your right to remove any entry without notice before now.

I have failed to find any posted requirements on IPWatchdog regarding anyone's English. If it exist, direct me to it so I can have the opportunity to read and understand it. If after reading I fail to meet those requirements then remarks to the point would be better understood.

Thanks.

23. Blind Dogma **April 19th, 2011 11:18 pm**

"*You need to say something and end this now. If being taken off IPWatchdog is going to happen, that is for you to decide and I respect that.*'

New Here,

What exactly do you want Gene to do? Ban you? Are you not listening to me? How many times must I say that I want to understand you? That I want to hear what you have to say?

You do not need Gene to remove yourself from posting (unless you lack that critical aspect of will power).

Why do you fight the more beneficial course of actually taking the time to construct your thoughts so that others can understand you?

24. New Here **April 21st, 2011 10:01 am**

@BD

RE #23

I can't appreciate your intentions for the criticism that doesn't come with any understanding for me, of why you don't understand what I have written. To be clear, your replies are more often short and offer nothing for someone, not just me, to pick up on what the understanding problem is.

If it is your intention to "help" or just desire to understand someone, then a small responsibility comes with the intention. It is that you communicate well enough, what is at issue and the information that provides the recipient with an understanding of what is at issue.

If you disagree with me about the responsibility and maybe find that it calls for too much attention to be given to someone, then some question in my opinion of why would someone with "good intentions" be involved in such an activity in the first place.

BD this is Gene's blog, if I have anything to say or to address about it, I say it to Gene — that is respect. To ban anyone, Gene can do that at any time without a request. I addressed your issue with my English to Gene for his consideration, and any action he wished to take on the matter — if any.

I would, being allowed to come here, post in peace, and if anyone has any problem with anything I have written, please let me know what it is, I will work with anyone towards an understanding the best I can if they are wanting to be clear what I have said. I enjoy reading the articles on IPWatchdog, I do not post on all articles as some are so deep into law matters, I just stay out. I do post over my head at times, and mean no showing any lack of respect doing so.

Thanks.

25. Blind Dogma **April 21st, 2011 1:16 pm**

New Here,

Gene has *not* appointed himself the "understanding-checker" of any who post here. That is the responsiblity of the individual poster. Likewise, it is not my responsibility to make sure either that your posts are understandable, or to point out *why* they are not undersrtandable. Your notion that I have this responsibility because I am the one that points out that your postings have no discernable meaning IS NOT ACCEPTED – making sure your postings can be understood by others is **strictly your responsibility**.

Why do you put so much effort into avoiding this responsibility? Spend half of that effort in making sure that your sentences are constructed so that others can understand them.

You want to avoid this responsibility by calling my *intentions* into question is likewise NOT ACCEPTED. That is like slapping someone in the face who attempts to help you. If **you** don't care that anybody else can understand you, that is your decision. You attempt to throw my helpful message that a particular post of yours conveys no discernable message in my face, and yet, continue to post that "*please let me know what it is*." I can only find such a post disengenuous. I have told you repeatedly in as graciousmanner as I can "what it is". Your

propensity to post in meandering, run-on free flow thoughts of whatever comes across your mind as you are posting is simply too disorganized to be able to discern just what you are trying to say.

You do **not** need to become overly sensitive and call on Gene as the moderator – as I said, that is not his role – and the only lack of respect going on is your lack of respect for yourself in that you slip into a mode of not caring enough that your message can be understood by others.

This is most definitely a "you" problem to the extent that only you can pause long enough to compose your thoughts in a careful and structured manner. "My issue" with your English is that what you post "may" have something worthwhile, *but I cannot tell* because you refuse to take the time to compose what you say.

We have gone through this exercise of my explaining to you *exactly* what the problem is now several times. The duty is yours and yours alone. Either take that responsibility seriously, or continue to post in reckless abandon and accept the consequences of that recklessness (that your opinions will be heavliy discounted because you dont care to be understood).

26. New Here **April 21st, 2011 3:44 pm**

@BD

You win, my hands up as I'm walking out.

In future, take the time to tell people why you don't understand them, because it too is a responsibility regardless of how they write or speak.

And as for what I said, being like slapping someone in the face who attempts to help, is far from the truth. Enough said.

With me out of here, the only consequence is I can spend that time elsewhere with learning and contributed work that continues to show results. Thanks for helping me make this wise decision to stop posting here.

FYI: Did you read about the DOJ and what must happen with those Novell patents, aiong with the mention of the OIN ? OMG!

27. Blind Dogma **April 21st, 2011 5:22 pm**

New Here,

To the contrary – you lose, and in a sense we all lose.

You lose because you would rather be lazy than be understood. If that is your attitude here, I can only imagine how pervasive that attitude may be across the spectrum.

You, yet again, ask me to take the time to tell people why. I have told you why time and again. The why is your penchant for NOT taking the time to organize your thoughts. And still you desire to pass off the responsibility that you alone truly have.

You want to say “far from the truth” and enough said – like somehow that changes the actual truth of what I have said. It doesn’t. It is just more laziness from you, as evidenced by your willingness to simply walk away rather than expend a minimal amount of effort making sure tht what you say is understandable.

As far as your efforts showing results – I congatulate you. To be just a little snide, I am sure those efforts do not involve communicating with other humans. If your decision is a wise one for you and I was able to help, I am happy for you. If, on the other hand your decision is one primarily driven by laziness and the decision to not bother being understood by others, then I am saddened, because you have chosen poorly, no matter what the end results.

As for the DOJ, Novell patents and the mention of OIN, I am not up to speed on those developments.

Do take care.

28. New Here **April 21st, 2011 7:41 pm**

@BD
Give it any spin you wish it doesn’t matter, and if you wanted the truth like I believe that, you should have asked and do something different for a change just for kicks.

As for the decision to set the record right is driven by I don’t want to bother with this here. Because it isn’t worth the time given to it. Melt downs over nothing is not what I’m about, and Melt downs are not communication for sure.

I wanted this to be the last as I just knew you would say something.

Believe what you want because I couldn’t care less and I’m sure others that don’t know me personally care even less. You’re telling what comes to mind only as stabs at me because you have nothing else worthwhile to say.

Have fun and you take care too, because I don’t know what you’re going to do without me. Goodbye.

29. Blind Dogma **April 21st, 2011 8:05 pm**

…I don’t want to bother…

…I couldn’t care less…

And you say I have nothing worthwhile to say…?

New Here – here’s my prediction – you will be back.

Why do I predict this? Because we have been through this exact same scenario before. You post in gibberish. i ask you not to post in gibberish. You become defensive and ask Gene to decide (to ban you?). I point out that that is not Gene’s job and that you are responsible for what you say. You threaten to leave and never come back. You come back. Repeat.

And yes, I ddo know what I am going to do without you. If you actually had taken the time to type intelligibly, that last attempt at a sting might have had some minor impact, but since you are too irresponsible and too lazy, it really has no effect.

But please, *when* you change your mind and come back and post, try to remember that posting is meant to *share* ideas, which means that you have to try to express you rideas so that they can be understood by others. And while there are plenty of people who only talk for themselves, most people quickly walk by them on the street corners of the big cities.

30. **patent litigation April 25th, 2011 6:01 pm**

    As far as I'm concerned, i4i won this patent litigation fairly at the lower courts, and Microsoft should have just let it go long before now.
    http://www.generalpatent.com/media/videos/general-patent-gets-results-its-clients

31. **Clear & Convincing: Supreme Court Affirms CAFC in Microsoft v. i4i | IPWatchdog.com | Patents & Patent Law June 9th, 2011 12:33 pm**

    [...] take the case, choosing rather to accept the matter with no input from the U.S. government. The oral argument was held on April 18, 2011. Numerous amici briefs were filed, and in something of a game-changing [...]

32. **American University Intellectual Property Brief » Microsoft v. i4i Decided: IP Community Crisis Averted? June 10th, 2011 1:18 am**

    [...] The Court, in affirming the Federal Circuit's ruling, upheld an almost 80-year-old-bedrock of patent law. Had Microsoft won, the effects could have been disastrous. In the worst-case scenario, issued patents would have been no more "valid" than patents still in examination. It would also be, to quote i4i's counsel, a "collateral attack on a government decision." [...]

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