Court Hears Microsoft Patent Case

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WASHINGTON — Microsoft's challenge to a $290 million award against it in a patent infringement suit faced significant headwinds on Monday during arguments at the Supreme Court.

Some justices suggested that the court's precedents were at odds with Microsoft's position. The federal government supported the Canadian software company, i4i Limited Partnership, that had won in the lower courts.

Chief Justice John G. Roberts Jr. was recused from the case, apparently because he owns Microsoft stock, meaning that Microsoft would have to capture five of only eight available votes to win.

In defending against the lawsuit, which contended that Microsoft Word had infringed i4i's method for editing documents, Microsoft argued that the patent was invalid.

At the district court trial, the judge told a jury that it should find the patent invalid only if Microsoft could satisfy a heightened standard, that of presenting "clear and convincing evidence" of invalidity.

Thomas G. Hungar, a lawyer for Microsoft, said that was a mistake. The proper standard, he said, was proof by a "preponderance of the evidence," meaning that Microsoft should have had to prove only that the patent's invalidity was more likely than not. That is the usual standard in civil suits. Using the heightened standard "makes no sense," Mr. Hungar said, and "ensures the enforcement of invalid patents."

Justice Ruth Bader Ginsburg disagreed. "It would be hard to argue, Mr. Hungar, that it makes no sense, but it made sense to Cardozo."

In a 1934 decision, Justice Benjamin N. Cardozo wrote that the presumption that patents were valid was "not to be overthrown except by clear and cogent evidence." Mr. Hungar responded that the decision should apply only in limited circumstances that were not present in Microsoft's challenge.

Now it was Justice Elena Kagan's turn to disagree. "If you read that opinion, no one would gather from that opinion the kinds of limits that you're suggesting," she said of the 1934 decision.

Mr. Hungar went on to say that the patent law at issue in the case was not enacted until 1952, and did not require the heightened standard even if the 1934 opinion had.

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Justice Stephen G. Breyer said he was open to considering the statute a blank slate. "I'll assume that the language is open enough in the history so that we could make what would be a change," he said.

But Justice Breyer said he was unsure whether and what change was warranted given the competing interests.

He suggested two other possible approaches. One would be to have the officials in charge of making patent determinations reconsider their decisions.

His second proposal was to ask juries to determine only "brute facts," and leave to judges the ultimate determination of whether a patent is invalid.

Seth P. Waxman, representing the Canadian firm, said the 1952 law codified early decisions requiring clear and convincing proof. He added that Congress's failure to modify the law after more recent decisions imposing that heightened standard was evidence that it had "actively acquiesced" in the interpretation.

Justice Antonin Scalia, who was acting as presiding justice, questioned that formulation. "It's like passive activity, right?" he asked.

The justices let Mr. Waxman speak without interruption for extended stretches, generally a good sign for that lawyer's side.

Mr. Waxman said the heightened standard was warranted because it should not be easy to attack a government decision that bestowed a property right like a patent.

Justice Breyer said he understood "how important patents are and what a disaster it is to the person once they're invalidated."

But he said there was another side to the question.

"In today's world," Justice Breyer said, "where nobody really understands this technology very well, a worse disaster for the country is to have protection given to things that don't deserve it because they act as a block on trade, they act as monopolies and they will tie the country up in individual monopolies that will raise prices to consumers."

Near the end of the argument in the case, Microsoft Corporation v. i4i Limited Partnership, No. 10-290, Justice Breyer still sounded frustrated.

"What we're trying to do is we're trying to get a better tool, if possible, to separate the sheep from the goats," he said. "And so what is that better tool?"

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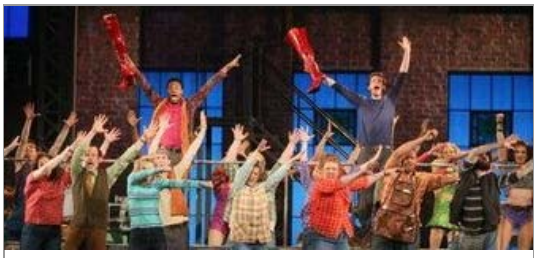

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