

NON-CONFIDENTIAL

2009-1504

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MICROSOFT CORPORATION,

Defendant-Appellant,

v.

i4i LIMITED PARTNERSHIP et al.,

Plaintiffs-Appellees.

Appeal from the United States District Court
For The Eastern District of Texas in 6:07-CV-00113
District Court Judge Leonard Davis

**HEWLETT-PACKARD COMPANY'S *AMICUS CURIAE* BRIEF IN
SUPPORT OF DEFENDANT-APPELLANT'S EMERGENCY MOTION TO
STAY PERMANENT INJUNCTION PENDING APPEAL**

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August 24, 2009

CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* HEWLETT-PACKARD COMPANY certifies the following:

1. The full name(s) of every party represented by me are:
DELL INC. and HEWLETT-PACKARD COMPANY
2. The name(s) of the real parties in interest represented by me are:
DELL INC. and HEWLETT-PACKARD COMPANY
3. All parent corporations and any publicly held companies that own 10 percent or more stock of the parties represented by me are: None.
4. The names of all law firms and the partners or associates that appeared for DELL INC. and HEWLETT-PACKARD COMPANY in the trial court or are expected to appear in this court are:

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Dated: August 24, 2009

Respectfully submitted,
FISH & RICHARDSON P.C.

By 

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CONFIDENTIAL MATERIAL OMITTED

Confidential business information of Hewlett-Packard has been omitted. The material omitted on page 1 describes the nature and magnitude of harm to Hewlett-Packard if the injunction is not stayed, and the steps Hewlett-Packard would have to take were the injunction maintained; the material omitted on page 2 describes Hewlett-Packard’s ability to timely comply with the injunction; the material omitted pages 3-4 describes the magnitude of the injunction on Microsoft Word to Hewlett-Packard and the contractual provisions governing software changes between Hewlett-Packard and Microsoft; the material omitted on pages 4-5 describes Hewlett-Packard’s ability to timely comply with the injunction and the harm to Hewlett-Packard arising from the injunction.

TABLE OF AUTHORITIES

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FEDERAL CASES

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I. STATEMENT OF INTEREST

Hewlett-Packard Company (“Hewlett-Packard”) is a large distributor of Microsoft’s (currently enjoined) Word software. Microsoft Word is included on [] of the desktop and consumer notebook computers that Hewlett-Packard sells. The injunction ordered by the District Court for the Eastern District of Texas (“the District Court”) in this matter [

. This is especially true if the injunction is not stayed pending resolution of the appeal in this matter because [

]

Hewlett-Packard’s position as a large distributor of Microsoft Word also makes it well-situated to speak to the issues of injury to third parties and to the public interest that are relevant to this Court’s assessment of Microsoft’s motion to stay the injunction.

II. ARGUMENT

The District Court’s injunction of Microsoft Word will have an impact far beyond Microsoft. Microsoft Word is ubiquitous among word processing software and is included on [] computers sold by Hewlett-Packard. Implementing a revised version of Word to include with Hewlett-Packard computers [

]

]

Hewlett-Packard urges the Court to consider the impact of an injunction of Microsoft Word on its business and its customers in weighing the equities involved in granting or denying Microsoft's motion to stay the injunction pending appeal.

A. Hewlett-Packard's Process For Installing Software

Hewlett-Packard sells both desktop and consumer notebook computers that are equipped with Microsoft Word, among other software. For both types of computers, Hewlett-Packard installs software on the computers via "images," which are computer files that include all of the content of a computer's hard disk. [August 21, 2009 Declaration of Yolanda Rivas ("Rivas Decl."), ¶ 3; August 21, 2009 Declaration of Derek Goode ("Goode Decl."), ¶ 3] [

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The images that are used in the manufacturing of Hewlett-Packard's consumer notebook and desktop computers are carefully tested and validated, both internally and at Hewlett-Packard's various factories. [Rivas Decl., ¶ 6; Goode Decl., ¶ 6] The testing on the images ensures correct operation on Hewlett-Packard's hardware as well as correct interoperability of the various software components that are included. [*Id.*] Such testing is vitally important because computers consist of thousands of hardware and software components, and changing one feature usually has unintended consequences. The millions of people who use PCs on a daily basis rely on Hewlett-Packard's rigorous testing to insure that they can get their work done and not lose their data.

[

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B. Impact of an October 10, 2009 Injunction of Microsoft Word

If Microsoft is required to ship a revised version of Word in Hewlett-Packard's computers, a change would need to be made to Hewlett-Packard's images. Making such a change would require extensive time- and resource-consuming re-testing. [Rivas Decl., ¶ 7; Goode Decl., ¶ 7] [

]

[

]

C. The Court Should Weigh the Hardship to Hewlett-Packard and its Customers

The District Court's injunction thus will impose heavy burdens on Hewlett-Packard, and will also adversely impact the public interest. The Court should consider these factors in weighing the equities relevant to Microsoft's motion to stay the injunction. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (noting that two factors regulating the issuance of a stay of injunction are "whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and ... where the public interest lies"); *accord Standard Havens Products, Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990); *see also Hoots v. Com. of Pa.*, 651 F.2d 177, 178 (3d Cir. 1981) (finding that "the prospect of irreparable injury, harm to third parties, and demands of public interest thus support staying the district court order.")

The adverse impact on Hewlett-Packard is also relevant to the propriety of the injunction. Under *eBay*, one of the factors that the patentee must demonstrate is "that the public interest would not be disserved by an injunction." *eBay, Inc. v. MercExchange LLC*, 547 U.S. 388, 391 (2006). Harm to customers is a consideration in evaluating the impact of the injunction on the public interest. *z4 Technologies, Inc. v. Microsoft Corp.*, 434 F.Supp.2d 437, 443-444 (E.D. Tex.

2006) (considering adverse impact of injunction on Microsoft's customers in evaluating the public interest factor); *see also Advanced Cardiovascular Sys., Inc. v. Medtronic Vascular, Inc.*, 579 F.Supp.2d 554, 561 (D. Del. 2008) (denying an injunction and noting record evidence of physician preference for the accused products). Hewlett-Packard urges the Court to consider the serious adverse impact of an injunction of Word on Hewlett-Packard, other PC sellers, and the PC-using public in evaluating whether the injunction should stand. At a minimum, should the injunction be affirmed following the Court's scheduled hearing on September 23, 2009, Hewlett-Packard respectfully requests that the injunction not take effect until 120 days following this Court's decision.

III. CONCLUSION

For the foregoing reasons, this Court should grant Microsoft's Emergency Motion to Stay Permanent Injunction Pending Appeal, or alternatively, expand the effective date of the injunction by 120 days from its ruling.

Dated: August 24, 2009

Respectfully submitted,

FISH & RICHARDSON P.C.

By: 

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HEWLETT-PACKARD
COMPANY

Addendum

Confidential Declarations of
Derek Goode and
Yolanda Rivas

Filed Under Seal

CERTIFICATE OF SERVICE

It is hereby certified that on August 24, 2009, two true and correct copies of the attached CONFIDENTIAL HEWLETT-PACKARD COMPANY'S *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S EMERGENCY MOTION TO STAY PERMANENT INJUNCTION PENDING APPEAL were caused to be served on the attorneys of record at the following addresses as indicated:

<u>VIA OVERNIGHT DELIVERY</u>	
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I declare under penalty of perjury of the laws of the United States of America that the above is true and correct. Executed August 24, 2009 at Washington, D.C.



Judith Best

CERTIFICATE OF COMPLIANCE

The undersigned individual hereby certifies that HEWLETT-PACKARD COMPANY'S *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLANT'S EMERGENCY MOTION TO STAY PERMANENT INJUNCTION PENDING APPEAL complies with Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) limiting briefs to 7,000 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, Office 2003, in Times New Roman, 14 point.

Dated: August 24, 2009



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