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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Todd S. Glassey In Pro Se and
Michael E. McNeil In Pro Se,
             Plaintiffs,
        vs.
Microsemi, et Al.,
             Defendants

Case No.: 3:14-CV-03629-WHA

**PARTIAL SUMMARY JUDGEMENT – Count-8
IETF PERFORMANCE RIGHTS AWARD**

Date: January 29th 2015
Time: 8 AM
Courtroom 8
Judge W.H. Alsup

PARTIAL SUMMARY JUDGEMENT – Count-8 IETF PERFORMANCE RIGHTS AWARD

1. May it please the Court, on January 29th 2015 at 8AM or as soon as may be considered, Plaintiffs in the above captioned action hereby move, pursuant to Fed. R. Civ. P. 56(b), for Partial Summary Judgment in their favor, and against DEFENDANT IETF, issuing Plaintiffs a PERFORMANCE RIGHTS STANDING against any IETF protocol Plaintiffs can demonstrate contains their protected PHASE-II IPs.

2. This motion is made up of this Notice of Motion and Motion, Declarations, Memorandum of Points and Authorities, and Exhibits, with Testimony to be given at the time of the hearing into this matter.

BACKGROUND

3. This Motion is a precursory motion for a set of secondary set of summary

   judgment motions 35 USC 271 and 17 USC Infringement claims pertaining to

   PERFORMANCE RIGHTS in programs which contain Plaintiffs' PHASE-II IPs and

   which are controlled under the IETF's Copyright and Performance Licensing

   control therein.

4. QUESTION - what happens to the IP rights for a Derivative Program created

   from a Standard which contains PATENT PROTECTED Intellectual Properties.

   How do those Patented Computer Program Rights translate into Programs

   which are written and infringe and republished under a separate copyright

   cover?

5. Plaintiffs have documented 20 notices over 2006-2008 of Infringement on

   Plaintiffs' PHASE-II IP enforcement rights which IETF refuses to

   recognize, and have stopped noticing the IETF after filing a Blanket

   Denial of Rights to use any PHASE-II IP in any Standards Documents;

   Plaintiffs have identified 64 other key Internet Backbone protocols which

   in today's versions from the IETF infringe US6370629's Claims 19-32

   Controls in one or more areas.

6. For the CORE PROTOCOLS they also have no no-infringing methods of

   operation. As such these infringements pertain to critical Internet

   Protocols which today control all key Internet Operations.

Summary Relief Statement

7. Plaintiffs seek a summary order against IETF, and its sub-licensees (by

   their reliance on the IETF's Master License), granting Plaintiffs full

   PERFORMANCE RIGHTS STANDING against the execution of any program derived

   from an IETF Standard containing Plaintiffs' PHASE-II IPs.

8. That this is a full Performance Rights Standing against the entire

   Publication Length of that Document and Plaintiffs enjoy all protections

and privileges against the Copyright controlled performance rights for the

execution of those programs.

9. This is appropriate for all IETF Standards after being served with the

Master Cease and Desist any and all uses including in systems IETF

operates upon in 2005, 2006, 2007, 2008 and 2010.

Table of Contents

Cases

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

The Court must accept all well plead complaints as factual and accurate

10. Under precedent, the court must accept as true all of the well-pleaded facts alleged in the complaint, and may not dismiss the action unless it is convinced that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Bloor v. Carro, Spanbock, Londin, Rodman & Fass,* 754 F.2d 57 (2d Cir.1985); *Austad v. United States,* 386 F.2d 147 (9th Cir.1967).

IETF, the keeper of the Worlds LAN and Internet Networking Standards

11. The IETF, the folks who publish all of the STANDARDS globally for LAN and Internet Applications, is an organization which is run by the Internet Society and functionally operated by ISOC with hand-in-hand help from the Industry Members and the US Government; all of the key parties who use its practices as a way of creating network and Internetworking which talks to each other.

12. Without the Standards the Internet would not be possible, but these same standards also control all local area networking outside of the

Ethernet Standard itself, so all switches and routers speak IETF Protocols

meaning the IETF protocols run the world as well.

IETF Protocols Specifications called RFC's create a Software Program...

13. The RFC is a cookbook for how to build a network-practice or process, i.e

it is a specific statement of method, and that means a Standard can in

fact be based on processes and practices which are part of a method

patent, especially true in the new world of patenting programs.

14. Because a network standard is a process-specification for the

implementation of a computer networking program and its licensing provides

either a blanket or, for "SYSTEMS AND PROGRAMS BUILT FROM ITS USE, A PER-

USE PERFORMANCE RIGHT type license.

The IETF is a Rogue State

15.   The IETF has become somewhat of a rogue state which has allowed the

Corporate Sponsors to create and manage their own camps.

16.   Most independent parties have no real chance unless they are backed by

a University of getting an IETF Working Group setup or actually

undertaking a protocol standardization effort (a two year minimum

financial commitment to the IETF and the underlying engineering costs).

17.   Inside the IETF process (see Exhibits BCP78 and BCP79 for the complete

framework today) the workgroups churn away compromised documents between

the engineering partnerships. Generally this is two or more companies or

universities and often a government or two as well. That has an implied

cost of several million dollars today as well placing a statement of worth

on an IETF Standard as being somewhere between two million and four

million to considerably more in some programs.

18.   Once prototypes are built and the functionality taken to the next step,

the IETF publishes all documents under a basic research exemption under

section 107 of the Copyright Code even though they are not a research

entity (they maintain that as the IRTF) and refuse to create a licensing

model with meets DMCA or create a takedown policy for any documents which

contain unauthorized, stolen or already copyrighted IP from another source

not authorizing its inclusion in the IETF document copyright protection.

19. Copyright protection extends to the particular form in which an idea is

expressed. In the case of software, copyright law would protect the source

and object code, as well as certain unique original elements of the user

interface.

Defendants CISCO, JUNIPER, Apple, Google, Microsoft, and Oracle all implement their own IETF Licensed Products for resale

20. CISCO and JUNIPER sell Network Infrastructure Equipment. These are

specialized computers with programs which implement the processes

standardized in the IETF PROTOCOL SPECIFICATIONS. So if there are

infringing designs, i.e. Patent Protected IP in those Standards it will be

mirrored into every device Cisco and Juniper make which runs that protocol

module. Apple, Google, Microsoft and Oracle all implement pure software,

and in all but Oracle's case also implement cellular and mobile (pad)

systems. As such they also create and reproduce IETF Protocols as does

Oracle in its Sun OS network computer service infrastructure and products.

As such all six of these defendants are directly tied to the IETF license

and its Licensing Policies under BCP78 and BCP79 (both exhibits on this

filing).

21. Copyright Section 102 and the associate sections provide that no

copyright release can be asserted on an un-released Intellectual Property

component of a Copyrighted Work, specifically Computer Programs which

Implement the IETF Protocol Standards with Plaintiffs' PHASE-II IP so

heavily integrated that they cannot function without it.

22. Copyright 102 also provides a relief as well in a reverse of the **Apple Computer, Inc. vs. Microsoft Corporation**, 35 F.3d 1435 ruling. In this case Patent Protected Programs were copied into the Standards Documents which were then relicensed by the IETF for millions to use for their own network developments.

23. This buries the Plaintiffs' Protected PHASE-II IP into a computer which is programmed by each of the Defendants implementing the IETF protocols.

24. Those programs infringe when they are executed. The runtime licensing against the Use of the Programs is controlled under "performance rights" i.e. the ability to execute or "perform the work" as in to run the program.

A.   Mazer and the Supreme Court's view on Patents with associated Copyrights

25. Plaintiffs assert that they as the actual owners of PHASE-II Rights do, and that this precedent is based on common sense, reinforced by the Nimmer on Copyrights commentary on Mazer[1] from the US Supreme Court, affirming that while Copyrights Cannot have Associated Patents per the USDC, the reverse can and is in fact true and that according to the Mazer ruling from the Supreme Court a Patent may in fact if it qualifies have Copyright Protections available for it in very specialized ways. In the case of Computer Programs those constrain PERFORMANCE RIGHTS.

26. In the context of the Copyright Act those Programs are controlled either by an open license or a closed one. Closed licenses can, and many do, operate based on a PERFORMANCE based Use and in fact most commercial software is "Entitled on a PER EXECUTION BASIS" at startup.

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[1] *Mazer v. Stein,* 347 U.S. 201, 219, 74 S.Ct. 460, 471, 98 L.Ed. 630 (1954).

Named Defendants all have other Infringements, this pertains to IETF derived products they build and sell or give away.

27. Additionally most of the Named Defendants have Software Clients and
    Server Systems which serve them with infringing services, and those both
    constitute direct infringements as well, together with inducements to
    infringe when they are executed by third parties with the server systems
    in the Defendants' Operations – but those are addressed in other motions.

28. Microsoft as just one example brands its Operating System images based
    on both location and time of activation and cryptographically signs their
    control–blocks to create the tokens used to re-compute the Entitlement at
    Startup time.

29. This practice is a direct infringement of Claims 19–32 of the US6370629
    Patent, making each startup action – i.e., simply turning on a Microsoft
    Operating System on any of the Computers it is sold for or run atop in the
    United States and arguably the rest of the World as well.

30. Apple, Google, Oracle as well as the commercial operators Ebay (and
    through this unnamed DOE AliBaba) and Ebay's Bank PayPal Inc, have the
    same issues. Each of their transactions in one or more ways infringe on
    US6370629's Claims 19–32 as well.

31. As another example, YouTube – the Ad which pops up and says "After N
    Seconds You can skip this" – that whole process as well as AdWords and
    their control practices are an infringement of Claims 19–32 as well. The
    secured transport handles the data signing and verification as a part of
    the appliance-like functionality in the Infringement Model.

32. This makes each and every video or image viewed through YouTube an
    infringement.

Xerox v. Apple commentary

33. The court framed the use of copyright in regard to everything pursuant

to a design but stopped short of a performance rights statement against

the execution of the code which contains infringing materials.

The signers of our Constitution were as experienced in practical endeavors as they were in political activities. From an appreciation of both, the signers determined to permit the establishment of property rights in the realm of ideas. Hence, Article I, Section 8 of the Constitution provides that Congress shall have the power:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to Their respective Writings and Discoveries.

Under the laws enacted pursuant to this clause, copyright protection is not available for many useful ideas (e.g., supermarkets, self-service gasoline stations, discount retailing, theories about historical facts). *See* A. Alchian & W. Allen, *Exchange and Production* 292-293 (3d ed. 1983); M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 2.11[A], at 2-157 to 2-159, § 2.18[H], at 2-213 (1989). Originators of such nonprotected ideas must derive their profits ("Ricardian rents") by being the first or most innovative to produce or deliver goods and services embodying nonprotected ideas (*see* A. Alchian and W. Allen, *supra,* at 189-191). But for creators of protected ideas, copyrights offer an additional reward by legally sanctioning a monopoly in accordance with the terms set by Congress. As a monopolist, a copyright holder will charge more and produce less than the price or output which would obtain under competitive conditions, but the resulting monopoly rent from copyright affords an incentive for socially beneficial creative activity:

34. The economic philosophy behind the clause empowering Congress to grant

patents and copyrights is the conviction that encouragement of individual

effort by personal gain is a most productive way to advance public welfare

through the talents of authors and inventors in "Science and useful Arts."

Sacrificial time and efforts devoted to such creative activities deserve

rewards commensurate with the value of the innovative services rendered.

CONCLUSION AND RELIEF

35. As noted from the Ninth Circuit ruling in Xerox v. Apple, because the

Copyright Act doesn't allow the Court to unpublish or delicense a

copyright as issued. The IETF is fully aware of this and its licensing

program has been mentored under the watchful eye of Professor Jorge

Contares Esq, a Rhodes Scholar and key Internet Advocate. One who in this

instance apparently covered up this key flaw in the legal framework he as

the IETF's counsel was personally responsible for over a decade with his

Firm Wilmer Hale.

36.   Because of the problems in pulling a fraudulently published document

under US Copyright, which does not have a DMCA compliance practice because

of both MAZER and the Ninth Circuit ruling on de-registering Copyrights

being not an available form of relief under the law, Plaintiffs assert

there is only one possible relief for their infringement. Granting

Plaintiffs standing as a co-copyright holder specifically for PERFORMANCE

RIGHTS from derivative Computer Programs crafted to implement parts of or

all of the IETF Standards which infringe.

37.   From Xerox v. Apple:

The Copyright Act does not provide that a court may order the cancellation of a
copyright. Of course, the inquiry does not end there. In determining whether a private
right of action can be implied from a regulatory statute, the court must look to the Mazer
Ruling for authorization and then the *Cort v. Ash* for the controlling factors:

- Is the plaintiff a member of a class for whose *especial* benefit the statute was
  enacted?
- Is there any indication of legislative intent, explicit or implicit, either to create
  such a remedy or to deny one?
- Is it consistent with the underlying purposes of the legislative scheme to imply
  such a remedy for the plaintiff?
- Is the cause of action one traditionally relegated to state law, so that it would be
  inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975) (citations
omitted).

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38.   As noted from the Ninth Circuit ruling in Xerox v. Apple, because the

Copyright Act doesn't allow the Court to unpublish or delicense the

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copyright as issued, in order that a Copyright may not be used to

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unilaterally invalidate a US Software Patent, Plaintiffs should be granted

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Performance Rights against Any Programs or like which are derived from

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IETF Protocol Specifications which contain PHASE-II IP. Likewise

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Plaintiffs are a unique subcategory holder of enforcement rights against a

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set of Intellectual Properties which are Patent Protected and which are

today in use in millions of networking systems globally with no

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compensation to Plaintiffs whatsoever.

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39.   As such the Trial Court should issue this in a ruling granting

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Plaintiffs' Motion.

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40.   And finally we see from the Xerox v. Apple " In copyright law, remedies

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not provided are remedies not intended.[2]" Which is why the Supreme Court

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Ruling in Mazer stating that certain patents could in fact have copyright

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protection added to them; certainly Software Patents are exactly that

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animal.

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41.   That being the point - that Copyright Protections are available for Run

Time Control against the execution of the binary or digital program are in

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fact Performance Rights in their purest definition and clearly anyone with

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Intellectual Property contained within those Programs would have Copyright

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Protection under the law automatically as an un-released participant in

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[2] There is no indication in the legislative history that additional remedies are implicit in any other sections of the Act. *See generally* S.Rep. 94-473 (Nov. 20, 1975), H.R.Rep. 94-1476 (Sept. 3, 1976), and H.R.Con.Rep. 94-1733 (Sept. 29, 1976), *reprinted in* 5 U.S.Code, Cong. and Admin.News, 94th Cong., 2d Sess. 5659 (1976). The fact that a plaintiff's ideal relief is not specified in §§ 501 *et seq.* does not give the courts license to grant such relief simply upon application by the plaintiff. Except in this case MAZER in fact does allow the awarding of a recognition of the addition of PHASE-II IP to IETF standards in a performance right against the execution of those derivative programs from those standards.

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1   the publication of that program earning that IP own full rights in that

2   system as any other co-copyright holder has.

3   ## *Closing*

42. As such Plaintiffs move this Motion be granted and they be awarded a

4   full and formal co-copyright owner standing in the copyright over the

5   actual Standard Document; and/or

6   43. At the very least be awarded PERFORMANCE RIGHTS STANDING in the

7   execution of any Programs implemented to those "infringing standards"

8   which are the product of the IETF it relicenses use of. That this be made

9   inclusive of any and all IETF protocols created or issued since the Patent

10 issued in 2002 through the terminus of the US Patent.

    44. That this include any and all IETF protocols shunted into the IETF

11 TRUST created recently to isolate certain Intellectual Property issued

12 from the main body of the IETF as well.

13 45. That this be set for any protocol or other process which Plaintiffs

14 can demonstrate "contains an infringing or inducement to infringe

15 component" (aka embedded PHASE-II technologies) as part of any program or

16 other 'thing' which would be capable of using the IETF protocol standards.

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25   **ECF FILING DECLARATION**

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      This filing was made on this day from my ECF account and as such was properly served on all parties with the exception of the State of California who still refuses to answer the complaint. The State is as such being mailed a paper-copy for their review.

Dated this 29th day of November, 2014

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