

Todd S. Glassey, In Pro Se
Todd S. Glassey In Pro Se,
305 McGaffigan Mill Rd.
Boulder Creek CA 95006
408-890-7321
tglassey@earthlink.net

Michael E. McNeil, In Pro Se
Michael E. McNeil, In Pro Se
PO Box 640
Felton CA 95018-0640
831-246-0998
memcneil@juno.com

UNITED STATES DISTRICT COURT
San Francisco Division

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
PLAINTIFFS' RESPONSE TO IETF MOTION TO
DISMISS

Judge: W.H. Alsup
Where: Court Room 8, 19th Fl
When: Jan. 15th 2015, 8:00AM

PLAINTIFFS' RESPONSE TO IETF MOTION TO DISMISS

1. Plaintiffs Response to Defendant IETF's Motion to Dismiss as a key one to resolve, since if there is a direct claim against IETF herein there is a similar claim against the whole class of its Copyright Relying End-users and Resellers.
2. As such Plaintiffs refute IETF's Motion to Dismiss, agree that while we are amateurs and not professional attorneys, we believe that the main

1 charges against the IETF are factual and properly plead. They pertain
2 to Patent Infringement (35 USC 271 a, b, and c) and its presumption to
3 license third parties through its copyright, sidestep or set aside
4 Plaintiffs Enforcement Rights against the Technologies called PHASE-II
5 IP.

6 3. Further the Summary Motion for a Finding of Performance Rights is both
7 well plead and specific to the alleged uncompensated and unapproved
8 inclusion of PHASE-II IPs which Plaintiffs are the sole owners of
9 within IETF standards. Additionally COUNT 8 fully charges a 35 USC 271
10 Infringement of PHASE-II Technologies, and the relicensing of those
11 through its own Copyright fully, thus authorizing third parties to use
12 and develop derivatives without compensation or requirement to license,
13 those PHASE-II IP containing Network-Protocol Program-Standards. A
14 clear Sherman Act Section-Two and Clayton Act Section-Four violation in
15 addition to the 35 USC 271(a) and (c) violations alleged in the
16 complaint.

17 4. That based on the Plaintiffs' rights as the sole owners of PHASE-II IPs
18 the IETF motions to dismiss "based on the mechanics" argument of the
19 failings of the First Amended Complaint (FAC) have been corrected to a
20 litmus level to allow the matter to proceed; and that at this time the
21 next step is to prove there is actually PHASE-II IP inside of the
22 noticed IETF Standards.

23 5. That by way of the clarifications of Antitrust Actions and specific
24 Sherman Act violations in addition to clarification of the INDUCEMENT
25 TO INFRINGE claim against the IETF, specific cures were put in place

1 based on the analysis of the Court in its OSC ruling pertaining to the
2 FAC itself.

3 6. As such Plaintiffs assert that the Second Amended Complaint (SAC) meets
4 the minimum hurdles for both specificity, and relief per Iqbal,
5 Twombly, and all of the key FRCP constraints including the specificity
6 for the fraud pleading under FRCP 9(b).

7 7. To summarize, Plaintiffs Respond that the Court should dismiss the IETF
8 Motion to Dismiss and award the Plaintiffs (or whoever it determines
9 owns the third party enforcement rights against the PHASE-II IP
10 protected inside of US6370629) those enforcement and performance rights
11 or losses against any programs derived from IETF Network Interface
12 Program Standards which can be demonstrated to contain PHASE-II
13 Protected IP; and in so doing move forward with the CMC, Trial Setting
14 and Discovery in the matter herein.

15
16
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21 **Cases**

22 Ashcroft v. Iqbal , 129 S. Ct. 1937, 1949 (2009)..... 5
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Statutes

35 USC 271..... 8, 10

35 USC 271 (b)..... 10

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1 **Memorandum of Points and Authorities**

2
3 ***No actual Denial of Infringement***

4 8. The IETF has not specifically denied it used Software in Hardware
5 Systems which utilizes (PHASE-II) infringing code, or that it was the
6 party responsible for "specifying and approving as the IETF" the
7 content of any Standard's Document (Aka RFC). Further that its
8 COPYRIGHT LICENSE is what authorized the publication of that document
9 and claims full accountability therein.

10
11 ***Meeting Iqbal's specific claims and relief request hurdles***

12 9. Plaintiffs' SAC specifically identifies and alleges that IETF is
13 operating Computers which use infringing PHASE-II Technology in both
14 their document publication process and inside the network service
15 programs used to provide interconnectivity today.

16 10. That in performing their business of creating Standards they did
17 provide these infringing services to themselves and their partners
18 through their standards platform softwares which contain Infringing
19 Phase-II IPs .

20 11. That these are at the very least those practices which infringe on
21 those controls taught by US6370629's Claims 19-32.

22
23 "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than
24 labels and conclusions, and a formulaic recitation of the elements of the cause of action will not
25 do." Bell Atl. Corp. v. Twombly, , 550 U.S. 544, 555 (2007) (citations, quotation marks, and
brackets omitted); see also Ashcroft v. Iqbal , 129 S. Ct. 1937, 1949 (2009).

1 12. For instance, in *Iqbal*, the plaintiff had alleged that then-Attorney
2 General John Ashcroft and other federal officials had purposefully and
3 invidiously discriminated against him. *Iqbal*, 129 S. Ct. at 1948.
4 Citing *Feeney*, 442 U.S. at 279, the Supreme Court found that
5 “purposeful discrimination requires more than ‘intent as volition or
6 intent as awareness of consequences.’” *Iqbal*, 129 S. Ct. at 1948. To
7 meet this particular requirement Plaintiffs specifically stated that
8 IETF used software which contained infringing code and that the
9 infringements were from US6370629, which (at least at one time)
10 Plaintiffs controlled sole rights to. That it further licensed third
11 parties to produce and sell that code with no compensation to
12 Plaintiffs or Microsemi, whichever of the two owns the rights.

13
14 **IETF was noticed formally - meeting the Proof of Intent in Infringement**

15 13. Since we can and do show notice to IETF, based on *Iqbal* the Plaintiffs
16 must plead sufficient factual matter to show that Defendant IETF/ISOC
17 adopted and implemented the policies controlling the use of their
18 Copyright protected software designs with intent to not compensate or
19 properly license the PHASE-II IP Components of the identified and other
20 IETF Software Standards. As such this filing fully meets *Iqbal* as well
21 as *Twombly*.

1 ***Plaintiffs positive and negative standing as the originators of PHASE-***
2 ***II technologies***

3 14. Additionally, as to enforcement against PHASE-II Technologies today,
4 someone owns these rights and their value, either Plaintiffs directly
5 or Plaintiffs as shareholders in Microsemi have standing here to ask
6 that this question which appears nowhere in the Microsemi Asset
7 disclosure to SEC be resolved.

8 **Negative Loss Standing**
9

10 15. Further, originally (prior to the DDI Settlement) only Plaintiffs had
11 standing. That means no matter who owns the US6370629 Patent's
12 enforcement rights today for this area of IP, that Plaintiffs
13 originally owned all rights and controls on PHASE-II IPs and their
14 applications to controls in time and location stamped documents, power
15 grid, GPS based location or other location-controlled softwares, in
16 utilization of which US6370629 PHASE-II Services provides a mechanism
17 "for opening and closing digital data streams specifically for
18 application-layer and infrastructure systems based on time and
19 location."

20 16. Plaintiffs as stated contracted Hastings and DDI to file their patents
21 for them. Datum acquired DDI in violation of the Co-Inventor Agreement
22 to create the situation for the DDI settlement.

1 **Plaintiffs' Rights to assess Profits and Damages if fully supported**

2 17. Plaintiffs have unique rights because they are entitled to either
3 enforce or take losses against the areas of enforcement denied to them.

4 18. As such Plaintiffs' standing to collect and catalog all of the
5 existing infringements *as losses against the PHASE-II Technology uses*
6 *in all jurisdictions that US6370629 was filed in is true irrespective*
7 *of who owns those 3rd party enforcement rights today.*

8
9 **Plaintiffs assert there is no problem in identifying the infringing**
10 **components of the Defendants products**

11
12 19. Plaintiffs allege that inside the Code used to implement these programs
13 this set of PHASE-II features is easily identified and provides unique
14 advantages that providing those services through other methods does not
15 support. That a simple analyzer can be run against the source code and
16 it will extract specific lines of code which infringe in each product,
17 because the infringements are very similar in form.

18
19 **SAC Names all Defendants as direct infringers under 35 USC 271(a)**

20 20. With regard to all named Defendants, Plaintiffs believe that the SAC
21 cures specificity in 35 USC 271 related claims. Each of the specific
22 infringers are noticed under 35 USC 271(a) as parties using equipment
23 or software in their internal operations which infringes Claims 19-32
24 of US6370629.

1 **SAC Asks for specific relief - both damage and injunctive**

2 21. IETF Counsel fails to note in their motion that the SAC asks for very
3 specific relief including an order establishing a series of PERFORMANCE
4 RIGHTS under the Copyright Act for programs which will be run which
5 contain software that infringes the claims taught by US6370629 Claims
6 19-32 and others. Like the rest of this SAC, it at the bare minimum or
7 better level fully charges the Antitrust claims; and they are fully
8 enumerated and advanced per the current Ninth Circuit and USDC
9 Antitrust Filing standards.

10
11 **SAC Names IETF as a 35 USC 271(b) Inducer for Infringement**

12
13 22. The IETF specifies the actual design statements for creating programs
14 which implement their processes. These practices are documented in a
15 set of technical specifications for programs called RFCs or "Request
16 For Comments" documents. RFCs are advanced through a number of stages
17 along the path to IETF Standards Status but are implemented as products
18 as early as 1 year into the workflow as a result of the publication of
19 the IETF standard.

20 23. The IETF Standard itself (the RFC which contains infringing
21 Intellectual Properties) is in and of itself an attestation to the
22 commission of an infringement by those parties building the protocol
23 model for the IETF. They must create programs which meet their proposed
24 standards and run them against each other to prove interoperability,
25 the key step in advancing an IETF program effort. So upon Publication

1 of the Formal Use RFC the IETF is a direct partner to at least two
2 direct acts of infringement as well as being the party taking that
3 infringement and relicensing it for use under the IETF's Copyright
4 Umbrella.

5
6 24. A number of the Defendants provide hardware infrastructure including
7 cellular phone systems which also infringe, hence the parties they sell
8 those devices to infringe when they use them, making the end-users 35
9 USC 271(a) infringers and the parties selling them the devices 35 USC
10 271(b) inducers for infringement.

11
12 ***IETF's Motion to Dismiss is specious. The complaint is plead to a***
13 ***basic level***

14
15 25. IETF Counsel is incorrect. The SAC fully charges the IETF properly for
16 the 35 USC 271(a) as the key of its Infringement complaint. The
17 licensing of others to use derivatives of those Intellectual Properties
18 is the 35 USC 271b and c section violation. Additionally the action is
19 a Clayton Act Section-4 and Sherman Act Section-2 violation in the "Use
20 of the US Copyright Practice to contain a Patent Protected Intellectual
21 Property to create a third-party claim to the patent protected IP
22 external to the patent protections, and created and protected by
23 abusive use of the US Copyright Statute."

1 **IETF uses Infringing Equipment to deliver its services**

2 26. The IETF itself infringes (35 USC 271(a)) in its own operations - i.e.
3 uses computers to run the programs which create the IETF experience
4 which contain and rely on Infringing Softwares, and it does this on a
5 daily basis.

6
7 **IETF continuously shows reckless regard for US Patent and Copyright Law**

8
9 27. Each new day's infringement is a new act. Hence this complaint is
10 timely against their use and infringements at the very least over the
11 last two years.

12
13 28. In the IETF's case this is also compounded in that "each newly updated
14 instance of a noticed document is a new publication" under their
15 copyright, and stands as a distinct copyrighted document with its
16 inherent performance rights against any programs derived from it, as a
17 separate entity from the previous version¹.

18 29. This is true because the IETF never retires a License to Use in any of
19 the Standards they publish.

20 30. They (the IETF) likewise refuse to comply with any DMCA or any other
21 nation's IP requirements either. Their publication practice which they
22 outsourced yearly to a company called the RFC EDITOR Role publishes
23 documents for use in the standards practice.

24
25

¹ See IETF BCP79 and licensing provisions

IETF and its Sherman Act Violations

31. The question Plaintiffs have also raised in Count 8 pertain to a reckless set of behaviors in regard to sweeping Antitrust Violations under the carpet in situations such as the NEA protocol; The IETF NEA protocol happens to infringe on PHASE-II IP Rights so there is a direct claim against it and the antitrust violations Cisco committed in regard to the non-disclosed patent which surfaced a year and a half into the publication process, long after both Cisco and Juniper were providing access to NEA beta images of the test platform.

32. Those software images the RFCs were approved from in fact contained infringing functions which were so rudimentary to the NEA service model that it can not function without them meaning there are no non-infringing uses of NEA.

33. This, and the Patent Control side-step being done in repackaging patent protected PHASE-II IP into IETF standards, raises, in the larger Antitrust Question of Count 8, the issue of what rights does the patent or IP rights enforcement owner have in this situation? If, like unlicensed copyrighted content, it provides a dual-copyright standing in the final copyright issue, then both parties owning the enforcement rights against that content, in this case PHASE-II Technologies contained inside IETF Standards, would have rights. So the question for this the trial court to answer here is what rights generally a patent owner has against programs which are solely copyright protected? And in

1 this specific case, what rights Plaintiffs have against their PHASE-II
2 Intellectual Properties which appear as copyright-protected programs in
3 many IETF Standards Documents today.

4 34. As part of this discovery from IETF and its parent operator ISOC
5 Plaintiffs also seek to get a straight answer as to what License
6 actually controls the TCP/IP protocol which today every major
7 networking system on Earth uses. To answer this, under the existing
8 IETF model Plaintiffs rightly asked "how is commercial use handled
9 under their Licensing Models?" and for Plaintiffs' specific claim
10 against the IETF, "is there a Performance Right created for those
11 network-service programs taken, and if so does it include Plaintiffs'
12 PHASE-II IPs"?

13 14 **Transparency In Standards Practices**

15 35. The next question raised is one of transparency in the Standards
16 Practice, it being "where does the Standards Practice end and
17 commercial production begin?" because commercial production requires
18 commercial licensing.
19

20 **Antitrust Damage**

21 36. In Plaintiffs' case where use of PHASE-II was denied and then
22 intentionally coded into IETF standards, the damage this caused is
23 pretty clear since the IETF has no legal authority for protocols
24 containing any infringing component to ever license those for use in
25 production systems without releases from the actual rights holders.

1 37. The documents published under the IETF Copyright are a one-way-trip
2 into Copyright Protected use for any and all purposes meaning no matter
3 what is in those design specification statements, it gets written into
4 all of the derivative programs taken from the standards.

5 **Plaintiffs' assertions are documented by hundreds of IETF Standards**

6 **Documents**

7 38. Unlike Iqbal plaintiff's "bare assertions", the Plaintiffs claim that
8 many IETF Documents contain Program and Method Descriptions of those
9 Program Steps in Pseudo Code form, and as such they are functionally
10 high level specifications for the coding of those features of the
11 larger program.

12 39. That this is fully proven and documented by tens of thousands of emails
13 in Working Groups engineering by committee these various Systemic
14 Designs for Network Communication practices.

15 40. Unlike the pleading of conspiracy in Twombly, the staggering amount of
16 evidence, the actual publication of the Standards Documents as the Work
17 Product of IETF Working Groups supports the concept of an organized
18 conspiracy.

19 ***Filings are Timely - No Time Barred (PTO related) Claims***

20 41. The SAC uses this new-infringement-daily model and also provides the
21 dates of the recovery of the key documents from Microsemi including the
22 Feb. 26, 2013 release of the executed copy of the DDI Settlement and
23 correction for the USPTO original assignment which was published by PTO
24 on June 6, 2013.

25 42. The latter date was also communicated in that same month to the IETF
with a copy of the republished original Contract (the Co-Inventor

1 Agreement) showing rights, the updated Patent Office publication
2 showing the original filing as CONDITIONAL ONLY, the DDI Settlement,
3 and a new Cease and Desist all use demand.

4 43. The IETF ignored the letter and did not respond.

5
6 44. Both events created actionable claims based on those documents becoming
7 available and formally published in the case of PTO.

8 45. Both of these events are current, i.e. within the 2 year contractual
9 window for their review in this the Federal Court on their being paper
10 based contractual issues, as well as ones clearly violating the State
11 of California's Public Policy (per its California v. Beninsig Patent
12 Fraud Prosecution of 2010). Plaintiffs are also timely there. Finally,
13 California State timeline for review of the Contract is in fact four
14 years, and so the DDI Contract review demand is key and timely making
15 the IETF demands timely as well.

16
17 ***Recent Sherman and Clayton Act violations in the merger of***
18 ***Microsemi created another new date***

19 46. Finally, Microsemi recently committed another Sherman Act Violation in
20 refusing again in its merger to respond to Plaintiffs' request under
21 Sections 8.7 and 8.1, 8.3, and 8.4 of the DDI Settlement "to formally
22 notice IETF that Plaintiffs are the Sole Owners of PHASE-II
23 Technologies and hold all rights therein", a Clayton Act section two
24 violation, and a Clayton Act infringement with both the merger
25 requirements for the DDI Role Handoff per Section 8 of the Settlement

1 Agreement; and for their registration of the Merged Entity
2 "fraudulently alleging to SEC and PCAOB in their Corporate Filings
3 'that they had legal authority from Plaintiffs per this agreement to
4 complete the merger'".

5 47. As such this constitutes another Sherman Act Section Two claim against
6 Microsemi and its silent conspiracy partner the IETF.

7 **What Might Help the SAC**

8 48. Again, Plaintiffs are pro se litigants and amateurs. In present
9 retrospect what is legitimately missing in their opinion from the
10 Second Amended Complaint is Class Qualifications "for those parties
11 tied to the IETF Copyright License as their enablement for the use of
12 the infringing Intellectual Properties".

13 49. If the Court deems it necessary, those will be supplemented to the
14 Second Amended Complaint as Motions to keep the Trial Calendar in line
15 and on track.
16

17 **CONCLUSION**

18 50. In conclusion Plaintiffs assert that it is obvious that Microsemi has
19 used the IETF as a weapon against the Market Power of Plaintiffs'
20 PHASE-II Technologies in each of the Jurisdictions instances of
21 US6370629 were cross-filed in, all of which were later abandoned.
22

23 51. At any time along the path here Microsemi could have confirmed to the
24 IETF that *"Plaintiffs are the Sole Owners of PHASE-II IP and that if it*
25 *appears in their Standards, no matter who actually owns the patent*

1 *enforcement rights, Plaintiffs' rights to enforce claims for*
2 *infringement are codified in the contract",* an action which would have
3 forestalled this matter from becoming the global nightmare it is today.
4

5 52. A major issue lies in documenting the scope of PHASE-II IP inside
6 specific IETF Standards and moving forward with loss computations
7 against the Market Power damage done through the IETF's abuse of
8 Plaintiff's PHASE-II IP rights.

9 53. The scope of the damages caused in simple infringements is magnified
10 10,000 times or more by the IETF's actions; all of the Defendants
11 implementing Internet or Local Area Networking Services reliant on the
12 IETF's standards documents to define how their programs are to work
13 creates tens or hundreds of millions of daily infringers *each* in
14 millions of networks globally.

15
16 54. Plaintiffs request the Court deny the Motion to Dismiss at the very
17 least based on both the proper charging of the Sherman Act offenses as
18 well as the 35 USC 271(a) offense, which by a guilty finding will
19 confirm the 35 USC 271(b) and (c) infringements as well.
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Dated this 11th day of December, 2014

/s/ Todd S. Glassey

Todd S. Glassey, In Pro Se
Todd S. Glassey, In Pro Se
305 McGaffigan Mill Rd.
Boulder Creek CA 95006
408-890-7321
tglassey@earthlink.net

/s/ Michael E. McNeil

Michael E. McNeil, In Pro Se
Michael E. McNeil, In Pro Se
PO Box 640
Felton CA 95018-0640
831-246-0998
memcneil@juno.com

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