
United States Court of Appeals
for the
Federal Circuit

EDWARD H. PHILLIPS,

Plaintiff-Appellant,

v.

AWH CORPORATION,
HOPEMAN BROTHERS, INC. and LOFTON CORPORATION,

Defendants-Cross Appellants.

Appeals from the United States District Court for the District of
Colorado in Case No. 97-CV-212, Judge Marcia S. Krieger

**BRIEF FOR *AMICI CURIAE* INTEL CORPORATION,
IBM CORPORATION, GOOGLE INC., MICRON
TECHNOLOGY, INC., AND MICROSOFT CORPORATION**

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FORM 9 CERTIFICATE OF INTEREST

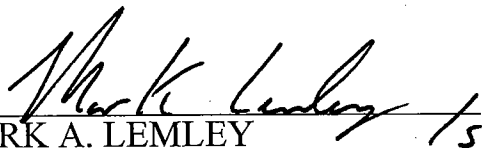
I certify the following:

1. I represent *amici curiae* Intel Corporation, IBM Corporation, Google Inc., Micron Technology, Inc., and Microsoft Corporation.
2. I do not represent a real party in interest.
3. No parent corporation or publicly held company owns 10% or more of either Intel Corporation, IBM Corporation, Google Inc., Micron Technology, Inc., or Microsoft Corporation's stock.
4. In addition to myself, I expect Brian L. Ferrall and Ryan M. Kent of Kecker & Van Nest, LLP, to appear in this Court on behalf of *amici curiae*.

Dated: September 20, 2004

Respectfully submitted,
KEKER & VAN NEST, LLP

By:


MARK A. LEMLEY
Attorneys for *Amici Curiae*

RMK

IDENTITY AND INTEREST OF PARTIES

Amici Intel Corporation, IBM Corporation, Google Inc., Micron Technology, Inc., and Microsoft Corporation (“*Amici*”) are large information technology companies. *Amici* are among the most innovative companies in their respective markets and regularly avail themselves of the patent system to protect their innovations. Collectively, *Amici* own more than 40,000 United States patents. *Amici* plan new products in light of possible patent coverage, enter into patent licensing arrangements, and have litigated patent cases, in most cases as both plaintiffs and defendants. Accordingly, *Amici* have a particular interest in seeing that the patent system serves the public by appropriately balancing the interests of pioneering inventors, follow-on improvers, and users of technology. *Amici* submit this brief in the interest of promoting this balance, and are not motivated by a desire to influence the outcome of any pending case.

ARGUMENT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Patent claims are set during a patent prosecution process that focuses on patentability in light of prior art cited by the applicant and the Patent and Trademark Office. The Examiner, a person having ordinary skill in the art, gives the claims their broadest reasonable interpretation consistent with the specification. The Examiner may choose to allow the claims based on arguments and/or

amendments made by the patentee. The record of the give-and-take between the applicant and the PTO is available to the public in the prosecution history.

Where those construing patent claims focus on dictionary meanings of claim terms without an appropriate grounding in the specification and prosecution history, there is a danger the interpretation of patent claims will differ markedly from the true scope of the invention they seek to define. Indeed, there are so many different dictionary definitions for any given word that it is impossible to predict with any confidence what meaning a court will choose. When resort to litigation is required in order to have reasonable confidence in the accuracy of a proposed claim construction, business decision-making is frustrated and drafting ambiguity is rewarded. Most importantly, the public is penalized when litigants with the benefit of hindsight pick and choose among dictionaries to obtain a desired definition.

The more reasonable and predictable course is to rely in the first instance on the specification and the prosecution history (including that of related applications) to discern the meaning of patent claims. The specification and prosecution history are a public record available to all without the need for litigation. Dictionaries and other evidence of the understanding of one of ordinary skill in the art may be consulted if necessary. The approach proposed by *Amici* will keep the *Markman* process consistent with the time honored practices of the Patent & Trademark

Office — practices sanctioned repeatedly by this Court and the Supreme Court — in interpreting patent claims.

Amici direct their answers primarily to the Court’s questions 1 and 3. With respect to these questions, *Amici* believe that the public notice function of patents is best served by focusing first on the language of the claims construed in light of the specification and prosecution history of the instant patent and related cases. Courts should resort to extrinsic evidence such as dictionaries only in cases of ambiguity in the intrinsic evidence.

II. Courts Should Rely In The First Instance On The Specification And The Prosecution History To Discern The Meaning Of Patent Claims

A. Litigants Can Exploit Ambiguities in Claim Construction to Unreasonably Broaden or Narrow the Scope of Patents

The Patent and Trademark Office (“PTO”) processes over 300,000 patent applications and issues nearly 200,000 patents each year. *See* U.S. Patent and Trademark Office, *U.S. Patent Statistics Report*, available at http://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.pdf (last modified July 2004). Given its vast workload and endemic underfunding, the scrutiny that the PTO can give to each application is limited. Indeed, patent examiners spend an average of only 18 hours spread over a three-year period on any given patent application. Mark A. Lemley, *Rational Ignorance At The Patent Office*, 95 NW. U. L. REV. 1495, 1500 (2001). During that examination, the PTO does not typically refer to dictionaries to

determine the meaning of claim terms to the skilled artisan. *Cf.* MPEP § 901.06(a)IA (8th ed., rev. 2 2004) (pointing out that while encyclopedias and dictionaries are available in the Information Center, they are not circulated to examiners). Further, many of the ambiguities of claim construction simply do not arise during patent prosecution, but only in infringement proceedings. And because the PTO examines applications soon after the invention was made, ambiguities resulting from later developments in technology or between conflicting dictionary definitions are unlikely to come up during prosecution. While interested parties have access to the specification and the file history, and can use it to understand and interpret the patent claims, they are unlikely to be able to predict what dictionary definition a court may choose in subsequent litigation.

Where patent claims are interpreted differently in litigation than before the PTO, the public at large as well as the interested parties are harmed by the resulting lack of clear notice. Patentees and accused infringers may seek to manipulate the scope of patents, the former seeking to cover with their patent a range of processes or products that is beyond the true scope of the invention and the latter seeking to artificially narrow claims that fairly encompass an accused product. Indeed, some patent owners seek patent claims with scope well beyond anything they in fact invented. *See, e.g., Multiform Desiccants, Inc. v. Medzam*, 133 F.3d 1473 (Fed. Cir. 1998) (patentee's broad dictionary definition submitted

for “misleading” reasons in both prosecution and litigation rejected as conflicting with the specification). They then use these artificially broad patents to hold up manufacturers in an entire industry, exacting royalty payments with the threat of costly litigation or injunctive relief. In the Internet field, to pick just one example, the appearance of previously unknown patentees claiming to have invented fundamental technology such as hyperlinking, or multimedia, or video-on-demand, or search engine technology, has become a regular occurrence.

Conversely, defendants can pick through various possible meanings for a term, hoping to string together a list of definitions so narrow that the patentee is deprived of an effective scope of protection. *See, e.g., TI Group Auto. Sys. v. VDO N. Am., L.L.C.*, 375 F.3d 1126, 1135-36 (Fed. Cir. 2004) (defendant choosing too narrow a definition of “within”). As the Supreme Court recently noted in a different context, “[t]he language in the patent claims may not capture every nuance of the invention or describe with complete precision the range of its novelty.” *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd*, 535 U.S. 722, 731 (2002).

Nor is the problem limited to litigation. Patent claims are routinely construed in many contexts other than litigation: licensing negotiations, product clearances or design-arounds, and the like. Greater certainty will thus benefit many business decision-makers, not merely litigants.

B. Excessive Reliance on Dictionaries Renders Claims Less, Not More, Certain

Excessive reliance by courts on dictionaries can effectively strip the claims of their notice function. Because there is no standard dictionary used to define terms, parties construing patents can pick and choose among hundreds of dictionaries containing thousands of definitions for any given word. Indeed, Professor Joe Miller of the Lewis & Clark Law School has documented the use of 24 different general-purpose English language dictionaries by the Federal Circuit in claim construction issues in the last nine years. Joseph Scott Miller & James A. Hilsenteger, *The Proven Key: Roles and Rules for Dictionaries in the Patent Office and the Courts*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=577262. The public should not have to wait until a court selects one or more of a myriad of dictionaries in order to be able to ascertain an appropriate claim construction with reasonable confidence. *Cf.* William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 679 (1990) (explaining how dictionaries do not avoid the problem of subjectivity of language, because the decision maker must choose among different definitions based on their own subjective understanding of meaning). By selecting the broadest definition — or in some circumstances all of the definitions¹ — from this multitude, patentees can

¹ *Texas Digital Sys. v. Telegenix, Inc.*, 308 F.3d 1193, 1203 (Fed. Cir. 2002) (“If more than one dictionary definition is consistent with the use of the words in the

expand inventions of incremental value into patents of staggering breadth. In theory, the very breadth of these patents may render them invalid. But given the strong presumption of patent validity and the documented reluctance of juries to find patents invalid on grounds of enablement and written description,² putative defendants or licensees may settle less than meritorious claims, and products that are truly free of infringement and would benefit the public may never enter the marketplace.

The driving force behind these problems is that the meaning of patent claims is being divorced from the context of the invention itself. Certain of this Court's opinions, while not ruling out resort to the specification and prosecution history altogether, have rather strictly limited it, holding that the specification can be a source of meaning only where the specification expressly defines a term or "clearly disavows" the plain meaning of the term. *See, e.g., Unitherm Food Sys., Inc. v. Swift Eckrich, Inc.*, 375 F.3d 1341, 1351 (Fed. Cir. 2004); *Nystrom v. Trex Co., Inc.*, 374 F.3d 1105, 1111-12 (Fed. Cir. 2004); *Texas Digital Sys. v. Telegenix, Inc.*, 308 F.3d 1193, 1203 (Fed. Cir. 2002). Finding such a disavowal is rare, not

intrinsic record, the claim terms may be construed to encompass all such consistent meanings.").

² *See* John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AM. INTEL. PROP. L. ASS'N Q.J. 185, 208-09 Tbls. 1-2 (1998) (an empirical study of patent litigation demonstrating that less than 10% of invalidity cases are decided on § 112 ¶1 grounds).

only because of the high standard these opinions have set but because patent specifications aren't written with particular dictionary definitions in mind, and so there is no reason for patentees to clearly disavow definitions they have never seen. Indeed, patent prosecutors have a strong incentive to avoid any explicit disavowal in light of the teachings of this Court's opinions. The result is that in practice, if a patentee does not expressly define a term in the specification, these decisions counsel resort to the "plain meaning" of a dictionary (or a collection of all of the definitions in all of the dictionaries), rather than to the specification, to understand what the patent means.

Freed from the bounds of the specification and prosecution history, parties construing patent claims, including litigants on both sides, often seek to characterize the "plain meaning" of the patent claims as something very different than what the patentee invented. Because dictionaries are so varied and malleable, each side can normally present an impeccable lexicographical pedigree for its "plain meaning." Yet this so-called "plain meaning" may be entirely divorced from the specification and file history, and thus from the intent of the patentee.³ Nor can the order of dictionary results be relied upon to select between definitions, as some dictionaries list definitions from the earliest meaning to the latest meaning.

³ For example, one well-respected dictionary defines the term "may" to mean "shall" or "must" — a definition that is contrary to that understood by most attorneys. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 719 (1995).

Id. at 19a. Using other dictionaries that list definitions in the order of most common usage among lay people (as perceived by a lexicographer without the use of statistical sampling) may result in the selection of a definition that is different than that ascribed by those of skill in the art.⁴

In *Amici*'s experience, district court judges seeking to faithfully apply the plain meaning rule are left to choose between these opposing dictionary definitions without looking to the patent itself for guidance. This is an impossible task. The result of this fruitless search for an objective "plain" meaning in dictionaries, rather than in the patent record itself, is that the patentee's intentions are lost and the patent's claims fail to provide reasonable notice to the public of the scope of the patent, leaving "a zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims." *United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228, 236 (1942). This Court has repeatedly emphasized the "notice function" of patent claims. *See, e.g., PSC Computer Prods., Inc. v. Foxconn Intern., Inc.*, 355 F.3d 1353, 1358 (Fed. Cir. 2004); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 344 F.3d 1359 (Fed. Cir. 2003); *Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420 (Fed. Cir. 1997). For all their supposed objectivity, relying on the "plain meaning" of claim terms found in

⁴ *See* Barbara Wallraff, *Dictionaries – Just Because They Say It Doesn't Make It So*, N. Y. TIMES SUNDAY MAG., Sept. 5, 2004, at 18 (using a privately selected usage panel to decide whether a definition is appropriate).

dictionaries provides insufficient notice of the scope of those claims, substantially impeding licensing or business decisions. Because there is no way for the parties to know which definition will prevail, even for simple terms like “a,”⁵ “or,”⁶ “to,”⁷ “including,”⁸ and “through,”⁹ to name a few, patentees, accused infringers, and others having an interest in the technology are left in an atmosphere of uncertainty, unable to resolve their plausible but opposing interpretations at least until the district court’s *Markman* hearing, and often until appeal.

C. Using the Specification and Prosecution History to Establish the Context of Claim Terms Best Promotes Notice, Certainty and Proper Claim Scope

Claim construction does not have to work this way. The Supreme Court in its *Markman* decision clearly contemplated that the courts would apply “the standard construction rule that a term can be defined only in a way that comports with the instrument as a whole.” *Markman v. Westview Instruments*, 517 U.S. 370, 389 (1996). The Court emphasized that the task in construing claims was to “ascertain whether [a] proposed definition fully comports with the specification

⁵ *North American Vaccine, Inc. v. American Cyanamid Co.*, 7 F.3d 1571, 1581 (Fed. Cir. 1993).

⁶ *Kustom Signals, Inc. v. Applied Concepts, Inc.*, 264 F.3d 1326 (Fed. Cir. 2001).

⁷ *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1459 (Fed. Cir. 1998) (en banc); *Chef America, Inc. v. Lamb Weston Foods*, 358 F.3d 1371 (Fed. Cir. 2004).

⁸ *Toro Co. v. White Consolidated Indus., Inc.*, 199 F.3d 1295 (Fed. Cir. 1999).

⁹ *Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420 (Fed. Cir. 1997).

and claims and so will preserve the patent’s internal coherence.” *Id.* The Court’s emphasis on the context of the patent was not new. As Supreme Court precedent has held for over one hundred thirty years, “it is fundamental that claims are to be construed in the light of the specifications and both are to be read with a view to ascertaining the invention.” *United States v. Adams*, 383 U.S. 39, 49 (1966) (citing *Seymour v. Osborne*, 78 U.S. (11 Wall.) 516, 547 (1871)).

This Court and its predecessors have on many occasions emphasized that the specification “is the single best guide to the meaning of a disputed term.” *Guttman, Inc. v. Kopykake Enters., Inc.*, 302 F.3d 1352, 1360 (Fed. Cir. 2002). As the Court put it in *Renishaw*, “[u]ltimately, the interpretation to be given a term can only be determined and confirmed with a full understanding of what the inventors actually invented and intended to envelop with the claim. . . . The construction that stays true to the claim language and most naturally aligns with the patent’s description of the invention will be, in the end, the correct construction.” *Renishaw PLC v. Marposs Societa’ per Aziona*, 158 F.3d 1243, 1250 (Fed. Cir. 1998).

Reading claims in the context of the patented invention better serves the notice function of patents because it gives both the patentee and competitors a single source to look to in order to understand the scope of the invention. It is also consistent with the PTO’s own practice, repeatedly sanctioned by this Court. If,

pursuant to this Court's long standing instructions, the PTO is relying on the specification to determine the "broadest reasonable construction" for purposes of examining the patent,¹⁰ it makes little sense to abandon that focus on the specification once the patent enters litigation. Doing so permits interpretations of claims inconsistent with the scope the PTO afforded them when it concluded they were patentable in the first place.

This does not mean that dictionaries have no place in claim construction; far from it. But the meaning of a word is always dependent on the context in which it is used. *See* Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247, 1247 (1990) (citation and quotation omitted) ("The meaning of any 'text' is a function not of the bare words, but of its context and the relevant culture. Because of the context, words sometimes have a meaning quite different from what might be found in Webster's or the Oxford English Dictionary. Courts do not and should not make a fortress out of the dictionary"); JOHN DEWEY, LOGIC 349 (1938) (the dictionary meanings of words are only "potential rather than actual until they are linked to other words."). In practice, ignoring that context in the hope of finding some "absolute" or invariable meaning has proven fruitless. *See, e.g., Int'l*

¹⁰ *In re American Academy of Sciences Tech Center*, 367 F.3d 1359, 1364 (Fed. Cir. 2004).

Rectifier Corp. v. IXYS Corp., 361 F.3d 1363, 1373-74 (Fed. Cir. 2004) (rejecting district court’s dictionary definition); *Linear Technology Corp. v. Impala Linear Corp.*, 379 F.3d 1311 (Fed. Cir. 2004) (rejecting dictionary definition applied by district court while using a different edition of the dictionary in reaching its conclusion); *Brookhill-Wilk I, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1300 (Fed. Cir. 2003) (“While dictionaries and treatises are useful resources in determining the ordinary and customary meaning or meanings of disputed claim terms, the correct meaning of a word or phrase is informed only by considering the surrounding text.”).

Dictionaries may be useful where ambiguity remains after due consideration of the specification and the prosecution history. Domain-specific dictionaries and treatises (e.g., technical dictionaries for technical terms, business dictionaries for business terms in business method patents) in particular may be evidence of how the person having ordinary skill in the art would understand a technical term. However, they are merely secondary aids to understanding what the patentee has invented, and not the primary source of the meaning of patent claims. Where the specification and file history leave ambiguity remaining, and a clear definition is not ascertainable from dictionaries and treatises, protection of the public (the

intended beneficiaries of the patent system) requires that a suitable narrowing presumption be adopted.¹¹

The use of the patent specification to understand the context of the invention is entirely consistent with a structured approach to evidence in claim construction cases. The Court does not need to adopt a holistic, “totality of the circumstances” test in order to take the context of the invention into account. Rather, it merely needs to make sure that in establishing the hierarchy of evidence proper attention is given to the invention itself. We believe that that interpretation should begin with the language of the claims themselves, construed in light of the specification and file history.¹² If the meaning of claim terms is disputed, the Court should first look to the context of the disputed terms — the rest of the claim in which the terms appear, their use in other claims, and the way they are described in the specification. The prosecution history (including that of formally related cases, i.e., parents, grandparents, those that are continuations, divisionals, or

¹¹ A narrowing presumption is appropriate since the patentee has it within his power to avoid ambiguity. One such suitable narrowing presumption would be that when multiple dictionary meanings appear to be reasonable, the narrowest definition should be chosen. If that presumption still does not resolve the ambiguity, the patent may be presumed invalid on § 112 grounds.

¹² Even where claim terms appear clear on their face, reference to the specification is always needed to ascertain whether the patentee has chosen to act as his own lexicographer.

continuations-in-part of a common ancestor application)¹³ should always be consulted along with the specification to determine whether the patentee made particular representations defining the disputed terms. Finally, should this evidence fail to resolve the ambiguity, the Court should look outside the public record to domain-specific dictionaries and treatises, and if necessary, to general purpose dictionaries.¹⁴ While expert testimony may be permitted at the trial court's discretion, it is subject to manipulation, and so it should be limited to tutoring the court and explaining why in light of the technology a particular definition from a pre-existing extrinsic source should be favored over alternatives. *See Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996).

Looking to the specification and the prosecution history does not mean that patentees should be limited to the preferred embodiment they actually disclose. This Court's precedents have been quite clear in distinguishing between the permissible use of the specification as a tool to *understand* the meaning of claim

¹³ Reference to foreign counterpart applications may be had in appropriate cases, *Caterpillar Tractor Co. v. Berco, S.p.A.*, 714 F.2d 1110, 1116 (Fed. Cir. 1983), but due caution must be employed, *Northern Telecom Ltd. v. Samsung Electronics Co., Ltd.*, 215 F.3d 1281, 1296 (Fed. Cir. 2000), since patentability standards differ in other jurisdictions.

¹⁴ As this Court has recently emphasized, usage of terms specific to the art in question must take precedence over the definition of those terms in general-purpose dictionaries. *Vanderlande Indus. Nederland BV v. Int'l Trade Comm'n*, 366 F.3d 1311, 1321 (Fed. Cir. 2004).

terms and the impermissible use of the specification to *vary* the meaning of the patent claims by reading in new limitations. *See Novartis Pharmaceuticals Corp. v. Abbott Labs.*, 375 F.3d 1328, 1335 (Fed. Cir. 2004) (“Although extrinsic evidence may be used by the court to help understand the disputed limitation, it may not be used to vary, contradict, expand, or limit the claim language from how it is defined, even by implication, in the specification or file history.”). To be sure, the line between these two can be difficult to draw in any particular case. But the proper response is not to divorce the claims from the context of the invention altogether, particularly since this is the context in which one of ordinary skill reads the claims.¹⁵ Rather, the goal of courts when relying on the context of the invention in claim construction is the same as the goal when using dictionaries: to understand the meaning of the claimed invention and give it its proper scope, neither so narrow as to deny effective protection nor so broad as to grant patentees exclusive rights beyond what the patentee invented. The risk of reading in, or reading out, claim scope may well be greater when dictionaries, rather than the specification, are used as the primary definitional source. A dictionary that defines a term broadly would result in giving a claim term a much broader scope than the

¹⁵ Because patent Examiners are ones of skill in the art, it makes particular sense to permit them to rely on the skilled artisan’s understanding of the claim terms rather than to send them looking for dictionaries.

intrinsic evidence supports. On the other hand, use of a narrow definition could result in importing limitations into the claim that are just as pernicious as limiting the claim to the preferred embodiment.

Tying the meaning of claim terms to the principle of the patentee's actual invention reduces uncertainty. While the "plain meaning" approach seeks to make things more certain, the hundreds of potential interpretive sources available under a dictionary-based approach create debilitating uncertainty in practice. By contrast, there is only one specification and one prosecution history, and focus on those documents will help the parties understand the meaning of the patent claims before litigation.

Reducing uncertainty by focusing on the meaning of claim terms in the context of the invention benefits patentees, accused infringers, and, most importantly, the public. Accused infringers can be less fearful of those who distend the scope of their patents in an effort to ensnare an entire industry in a web of infringement. Patentees benefit too, both because they avoid the opposite problem of courts reading claims in an artificially narrow fashion and because they avoid the correspondingly greater risk of invalidity if their patents are read too broadly. Finally, both sides, and the public at large, benefit from the increased certainty that comes with a fixed reference point that can be consulted as a first resort in cases of ambiguity.

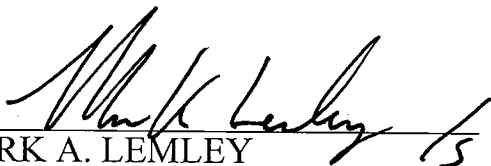
III. CONCLUSION

We believe that this Court should treat the intrinsic record of the patent as the fundamental basis of claim construction.

Dated: September 20, 2004

Respectfully submitted,
KEKER & VAN NEST, LLP

By:


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FORM 19 CERTIFICATE OF COMPLIANCE



I certify the following:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 4,172 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in a Times New Roman font of 14 points.

Dated: September 20, 2004

Respectfully submitted,
KEKER & VAN NEST, LLP

By:  /s
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AFFIDAVIT OF SERVICE

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
Nos. 03-1269, -1286**

-----)
EDWARD H. PHILLIPS,
Plaintiff-Appellant,

v.

AWH CORPORATION, HOPEMAN
BROTHERS, INC. and LOFTON CORPORATION,
Defendants-Cross Appellants
-----)

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by KEKER & VANNEST, LLP Attorney for Amici Curiae.

That on the 20th day of September 2004, I served the within **BRIEF FOR AMICI CURIAE INTEL CORPORATION, IBM CORPORATION, GOOGLE INC., MICRON TECHNOLOGY, INC., AND MICROSOFT CORPORATION** in the above captioned matter upon:

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via Federal Express

Unless otherwise noted, 31 copies have been delivered to the court on the same date as above.

September 20, 2004
