



No. 09-1006

**In the
Supreme Court of the United States**

MICROSOFT CORPORATION,

Petitioner,

v.

LUCENT TECHNOLOGIES INC.,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, based on the specific facts presented during a four-week patent infringement trial, the district court and the Federal Circuit properly applied the well-settled standards for resolving petitioner's post-trial motions.

CORPORATE DISCLOSURE STATEMENT

Respondent Lucent Technologies Inc. changed its name to Alcatel-Lucent USA Inc. on November 1, 2008. Alcatel-Lucent USA Inc. (formerly Lucent Technologies Inc.), is an indirect wholly owned subsidiary of Alcatel Lucent, a publicly held company organized under the laws of the Republic of France. No other publicly held company owns 10% or more of its stock.

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INTRODUCTION

The petition for certiorari in this case is wholly contrived: it presents questions that were never raised below, conjures up illusory intra- and inter-circuit splits, and asks this Court to review an interlocutory decision for classic fact-bound error correction. Tellingly, petitioner Microsoft launches a broadside attack on the jury system itself and a wholesale attack against Federal Circuit decisions in unrelated cases on unrelated issues, which provide no basis for granting the petition *based on the facts in this case*. The petition should therefore be denied.

Despite Microsoft's rhetoric, the Federal Circuit broke no new legal ground in this case, but merely applied the settled precedent of the regional circuit within which the case was tried to the unique facts presented. Having lost at trial, and before both the district court and the Federal Circuit in its attempt to overturn the jury's verdict, Microsoft now asks this Court to step in and reweigh each piece of evidence on which the Federal Circuit relied in holding that the district court did not abuse its discretion in upholding the jury verdict on infringement. This Court does not sit to review such quintessentially fact-specific exercises trusted to the lower courts, *see Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("this Court" is not "a court for correction of errors in fact finding"), especially when those factual issues are presented in an interlocutory petition, *see Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (noting the interlocutory nature

of the petition “alone furnishe[s] sufficient ground for the denial of the application”).

Far from presenting an issue of pressing national importance on which there is deep division within the Federal Circuit, much less among the federal courts of appeals writ large, Microsoft’s petition itself demonstrates that the standard for overturning a jury verdict is well-settled and is the subject of substantial agreement between the parties and both lower courts in this case. Indeed, even if the Federal Circuit misstated or misapplied that standard in this case—which it did not—Microsoft denied the Federal Circuit the opportunity to correct that alleged error by failing to raise this issue at all in its petition for rehearing. This Court “sits as a court of review,” *Duignan v. United States*, 274 U.S. 195, 200 (1927), not a court of first impression, and thus does not grant certiorari “when the question presented was not pressed or passed upon below,” *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotations omitted).

For all its hyperbole, Microsoft has not presented an issue worthy of this Court’s discretionary review. Given the unique facts of this case and Microsoft’s failure to identify either an issue of exceptional importance or a genuine conflict warranting this Court’s intervention—either within the Federal Circuit or among the circuits more broadly—this case presents *no occasion* to reweigh the evidence presented at trial, jettison well-settled precedent for overturning a jury verdict, or engage in the wholesale revision of the jury system in patent cases

that Microsoft apparently now seeks. Thus, the petition should be denied.

COUNTERSTATEMENT OF THE CASE

A. The Day Patent

Nearly 25 years ago, when personal computing technology was in a state of relative infancy, scientists at AT&T's Bell Laboratories invented a new method of entering information into computers. App. 3a. Before that invention, computer form-entry systems were largely text-based and required users to input information manually. Fed. Cir. Joint Appendix ("JA") 01108 at 1:8-22. The invention, disclosed in U.S. Patent No. 4,763,356 (the "Day patent" or "'356 patent"), involves displaying and completing computerized forms with the assistance of onscreen forms and tools. *Id.* at 1:25-37; App. 3a. Users of the invention can complete onscreen forms by operating pop-up tools adapted to facilitate entry of the particular type of information required by a particular section of the form. JA01108 at 1:25-37; App 3a. Those tools include menus, on-screen keyboards, and on-screen calculators. JA01093, JA01095, JA01097, JA01109 at 3:51-57, JA01110 at 5:1-5, JA01111 at 7:24-32.

The Day patent has 22 claims, and Claims 19 and 21 are at issue here:

Claim 19 is an independent claim for a method whose steps include: (1) displaying an onscreen form with two or more information fields, (2) identifying the type of information to be inputted into each field, (3) indicating one of the fields for information entry,

(4) displaying a predefined onscreen tool associated with the identified field and adapted to supply the information required by the field, and (5) inserting into the identified field information derived from a user's use of the onscreen tool. App. 7a-8a; JA01116.

Claim 21 depends from Claim 19 and adds the additional step of "displaying one or more of said information fields as a bit-mapped graphics field." App. 8a; JA01116.

Several of the patent drawings illustrate aspects of the invention using the example of a form to place an order for an automobile. JA01092-1100. As the user steps through different data fields (such as model, year, tires, order quantity, and "bid date"), different pop-up tools appear on the screen to facilitate entry of data into each particular field. For example, figure 3 illustrates how a menu tool might appear onscreen with options such as "roadster," "4 dr. sedan," and "convertible" to facilitate the entry of data into the "model" field. And figure 5 illustrates how a calculator might appear onscreen to facilitate the entry of data into the "order quantity" field.

FIG. 3

The screenshot shows a web-based form for ordering a Saturn car. At the top, there are navigation buttons: SPECIALS, INTERVIEW, HISTORY, STATUS, and CLEAR. Below these is a header for 'SATURN' and 'Special Equipment Request Worksheet'. The form includes fields for 'Customer Name', 'Salesperson', and 'Sales Office'. A 'MODEL' dropdown menu is open, displaying options: 'ROADSTER', '4 DR. SEDAN', and 'CONVERTIBLE'. Other fields visible include 'Year', 'Engine', 'Transmission', 'Color', 'Tires', 'Wheels', 'Options', and 'Comments'. A 'GO' button is located at the bottom right.

Fig. 3 (JA01093)

FIG. 5

The screenshot shows the same Saturn car ordering interface as Figure 3, but with a calculator pop-up tool displayed over the 'QUANTITY' field. The calculator has a numeric keypad (0-9), a decimal point, and a 'CALC' button. The 'QUANTITY' field is currently empty. The rest of the form and navigation buttons are identical to Figure 3.

Fig. 5 (App. 9a; JA01095)

The Day patent expired in December 2006.

B. District Court Proceedings

1. In an action in the U.S. District Court for the Southern District of California, Lucent alleged that Microsoft Corporation ("Microsoft") and Dell Inc. ("Dell") indirectly infringed the Day patent by selling products designed to infringe and by instructing their customers to use those products in an infringing way. Specifically, Lucent alleged that the normal and intended uses of certain features of Microsoft Outlook, Microsoft Money, and Windows Mobile infringe Claims 19 and 21 of the Day patent. Among other things, Microsoft designed, sold, marketed and supported the infringing software and provided directions for using it in an infringing way. And Dell sold, marketed and supported computers preloaded with that infringing software, and additionally provided support and directions for using the software.

In support of its allegations, Lucent presented evidence to the jury over the course of a four-week trial, which also involved three other patents not at issue here. The evidence concerning infringement based on Microsoft Outlook focused on the Outlook calendar tool. In that regard, Lucent's expert witness Bruce Tognazzini explained how the software operates in a manner that infringes the Day patent. See JA07526-29; JA07531-33; JA08654-55. Lucent corroborated his testimony with testimony from Microsoft's witnesses, JA08086, as well as evidence including screen shots and video demonstrations of the Outlook software being used to infringe the Day patent. See JA16203-08; JA44237-81; JA11846; JA07529.

Lucent also presented evidence—including help files, tutorials, web pages, manuals, promotional materials, screen shots, video demonstrations of the software, and witness testimony—showing that Microsoft and Dell encouraged their customers to use all three software products in an infringing way. App. 94-95a (citing PX742 (excerpts of Microsoft Money user's guides); PX1139B (excerpt from Microsoft Outlook help files); PX651 (user's guide for Microsoft Windows Mobile product)). The evidence showed that Microsoft and Dell sold approximately *110 million* units of the three software products equipped to practice the claims of the Day patent. App. 35a.

Microsoft and Dell presented evidence and argument of their own in an attempt to rebut Lucent's infringement allegations, and also defended on the ground that Claims 19 and 21 of the Day patent were invalid for anticipation and obviousness in light of prior art. See 35 U.S.C. §§ 102-103.

Finally, the jury heard evidence from both sides regarding the appropriate amount of damages to be awarded to Lucent if the jury should find that the Day patent was infringed and not invalid. The Patent Act entitles a patentee to at least a "reasonable royalty" upon proof of infringement, 35 U.S.C. § 284, App. 104a, and the jury was instructed that a "reasonable royalty is the amount of money that would be agreed to in a hypothetical arm's-length negotiation between the plaintiffs and the defendants, with the parties operating under the assumptions that the negotiated patent is valid and would be infringed by the accused products."

JA00147. Microsoft argued that the jury should calculate damages using a “lump-sum” approach and should award Lucent \$6.5 million for all three products if it awarded damages. App. 104a-105a. Lucent argued for an 8% royalty, using actual sales of the infringing software as a base, and argued that Microsoft should pay approximately \$687 million if the jury found infringement. App. 104a-105a & n. 7.

2. The jury returned a special verdict on all four patents. For the Day patent, the jury was asked to indicate whether each defendant indirectly infringed the claims of the Day patent, and to specify which software products and which claims formed the basis of its verdict. App. 76a; JA00063-64. The jury was instructed on both types of indirect infringement—induced infringement under 35 U.S.C. § 271(b) and contributory infringement under 35 U.S.C. § 271(c)—JA00101-108, but was not asked to render separate verdicts on each. App. 4a, 76a, 97a, 100a. The jury found Microsoft liable for infringement of both claims: Claim 19 as to Microsoft Money, Microsoft Outlook and Windows Mobile and Claim 21 as to Windows Mobile. App. 4a, 76a. The jury found that Dell was not liable for infringement of either claim. *Id.* Moreover, the jury rejected the defendants’ invalidity defenses. JA00065.

Regarding damages, the jury did not fully adopt either side’s approach. The jury opted for the lump-sum approach that Microsoft urged at trial, and awarded Lucent \$357,693,056.18—a sum considerably greater than the figure Microsoft urged, but slightly less than 53% of the figure that Lucent requested. App. 4a, 39a, 104a-105a.

3. After trial, Microsoft and Lucent both filed motions for judgment as a matter of law or a new trial, and Microsoft sought a remittitur of the damages award. Among other things, Microsoft challenged the sufficiency of the evidence supporting the jury's finding of infringement, the jury's rejection of Microsoft's invalidity defenses, and the jury's damage award. App. 73a, 83a, 86a, 89a-90a, 104a-105a. Lucent challenged the jury's finding that Dell did not infringe. App. 73a, 101a.

In ruling on the parties' post-trial motions, the district court recognized, *inter alia*, that Ninth Circuit law applied, that motions for judgment as a matter of law should be denied if the jury's verdict is supported by "substantial evidence," and that the court could grant a new trial if "the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice." App. 81-82a (quoting cases). The district court denied all of the parties' post-trial motions regarding the Day patent. App. 83a-109a.

The district court assessed the evidentiary support for the jury's infringement verdict in some detail. App. 89a-101a. In addressing Microsoft's argument that Lucent failed to prove specific acts of direct infringement, App. 93a-96a, the district court found that "Lucent introduced sufficient circumstantial evidence for the jury to conclude that Microsoft customers actually used the software to carry out the method steps of the '356 patent ... A reasonable jury could have reviewed this extensive record and concluded, based on the circumstantial

evidence, that there was direct infringement.” App. 94a-95a. The district court also rejected Microsoft’s post-trial challenge to the credibility of Lucent’s expert, noting that “[t]he jury also assessed his credibility and rendered its verdict.” App. 93a.

In ruling on Lucent’s challenge to the jury’s verdict that Dell did not infringe, the district court again looked closely at the evidence of infringement and noted that “[n]ot all of the documents and evidence necessarily implicated Dell.” App. 101a. Moreover, the court determined, the jury could reasonably have determined that Dell was not as culpable as Microsoft in encouraging infringement, as “Dell is a reseller of the accused Microsoft software, while Microsoft is the designer and programmer.” App. 102a. In defending the jury’s finding that Dell did not infringe, Dell also pressed Microsoft’s argument that Lucent failed to present sufficient evidence of direct infringement by customers. *Id.* However, the district court explicitly rejected that argument and stated that “the Court does not rely on this part of Dell’s argument in upholding the jury’s verdict on the Microsoft products.” *Id.*

4. Microsoft and Dell appealed to the U.S. Court of Appeals for the Federal Circuit (the jury had found Dell liable for infringement of another patent). During the pendency of the appeal, Dell and Lucent settled, Pet. ii, and Microsoft and Lucent executed a stipulation dismissing all claims between them except those relating to the Day patent. App. 4a n.2.

C. Federal Circuit Proceedings

1. On appeal, Microsoft again challenged the sufficiency of the evidence supporting the jury's finding of infringement, the jury's rejection of Microsoft's obviousness defense, and the jury's damage award. App. 2a. The Federal Circuit upheld the jury's verdict of infringement and nonobviousness, but vacated the jury's damage award and remanded for a new trial. App. 2a, 70a-71a. Lucent also cross-appealed the district court's earlier grant of summary judgment on other claims of the Day patent, but the court affirmed that ruling, App. 70a, and those claims are not at issue here.

In reviewing the district court's decision to deny Microsoft's motions for judgment as a matter of law and for a new trial, the court of appeals applied the same standard of review as the district court applied to the jury's verdict. App. 5a. Like the district court, the court of appeals recognized that Ninth Circuit law applied, *id.*, that a motion for judgment as a matter of law should be denied if the jury's verdict is supported by substantial evidence, and that the court should grant a new trial if "the verdict is against the clear weight of the evidence." App. 6a (quoting *Pavao v. Pagey*, 307 F.3d 915, 918 (9th Cir. 2002)).

First, the court of appeals affirmed the district court's decision not to disturb the jury's verdict of nonobviousness. App. 7a-21a. The court reviewed the evidence at length and concluded that a reasonable jury could have found that Microsoft did not meet its burden to prove, by "clear and

convincing evidence,” that claims 19 and 21 of the Day patent were obvious. App. 19a, 21a.

Next, the court of appeals affirmed the district court’s decision not to disturb the jury’s infringement verdict. App. 21a-35a. The court rejected Microsoft’s argument that “Lucent failed to introduce any evidence that any customer actually used the claimed method in any of the Microsoft products.” App. 22a. The court reviewed the evidence and found that “[t]he circumstantial documentary evidence, supplementing the experts’ testimony, was just barely sufficient to permit the jury to find direct infringement by a preponderance of the evidence.” App. 24a-25a. Moreover, the court agreed with Lucent’s characterization of its evidence at trial:

As Lucent notes “Microsoft not only designed the accused products to practice the claimed invention, but also instructed its customers to use the accused products in an infringing way.”

App. 24a. That quoted phrase appears at page 21 of Lucent’s opening brief at the Federal Circuit, and is immediately followed by a lengthy citation to the record evidence, including testimony by Lucent’s experts at trial, deposition testimony of Microsoft employees shown at trial, and various exhibits explaining how the accused products work. *See* Lucent Fed. Cir. Resp. Br. at 21 (citing JA44258-59; JA44277-79; JA07443; JA15763-67; JA44237-81; JA07801; JA15768-69; JA15775-85; JA15961-6005; JA16016-177; JA16369-413; JA45040-68; JA66710-11; JA66707-09). Microsoft unsurprisingly disputed the nature and quality of some of that evidence in its

reply brief. Microsoft Fed. Cir. Rep. Br. at 31-32 & n. 11. However, the court found that the evidence was sufficient to sustain the jury verdict against Microsoft's motion for judgment as a matter of law, and to support the district court's exercise of discretion in denying a new trial. App. 24a-25a. The court went on to reject Microsoft's other arguments regarding infringement, and affirmed the district court's holding in that regard. App. 24a-35a.

The court of appeals did, however, vacate the jury's damages award, finding that "substantial evidence does not support the jury's verdict of a lump-sum royalty payment of \$357,693,056.18." App. 36a. The court examined Lucent's evidence at length, App. 35a-70a, and ultimately concluded that the damage award was "against the clear weight of the evidence." App. 36a, 61a. The court noted that "[i]t is well established that speculation does not constitute 'substantial evidence,'" App. 44a, and found that the connection between the licenses of record and the damages awarded by the jury was too speculative. App. 42a-48a. The court, thus, vacated the damages award and remanded for a new trial on damages. App. 69a-70a.

2. Microsoft petitioned for rehearing en banc, arguing that the Federal Circuit should overrule its prior precedents and change the law of invalidity. An issued U.S. patent is presumed valid, 35 U.S.C. § 282, and an accused infringer who defends on the ground that a patent is invalid must prove the invalidity of the patent by "clear and convincing evidence." App. 19a, 86a. Microsoft's en banc petition argued that the Federal Circuit should make

an exception to that rule and hold that the standard of proof is a preponderance of the evidence when the accused infringer raises a defense of invalidity in light of prior art and the patent office did not consider the asserted prior art when it issued the patent. The Federal Circuit called for a response from Lucent and subsequently denied Microsoft's petition without comment. App. 147a-148a.

Microsoft did not petition for panel rehearing, nor did its en banc petition raise any of the issues now presented in its petition for certiorari. Microsoft never argued that the panel had misapplied the standards for granting judgment as a matter of law or a new trial, much less that it had "adopted and applied new and unique substantive standards for post-trial review of jury verdicts of infringement." Pet. 11; *see id.* at 4.

The Federal Circuit's mandate issued on November 30, 2009, and proceedings in the district court on remand are ongoing. No. 3:07-CV-2000-H (S.D. Cal.). The case has been set for trial on December 3, 2010.

REASONS FOR DENYING THE WRIT

This petition is not worthy of this Court's review for three simple reasons.

First, Microsoft has presented a classic challenge to the factual determinations and assessments made by the jury and the courts below. Distilled to its essence, Microsoft argues that the Federal Circuit erred in affirming the district court's holding that Lucent presented sufficient evidence to support the

jury's verdict of indirect infringement. Despite Microsoft's rhetoric, no dispute exists regarding the appropriate standards for setting aside a jury verdict. Instead, Microsoft challenges the application of those standards to the facts in this case. But this Court, of course, does not sit to provide such fact-bound error correction.

Second, there is no merit to Microsoft's claim that the Federal Circuit "adopted and applied new and unique substantive standards for post-trial review of jury verdicts of infringement." Pet. 11. Instead, the court of appeals correctly recognized that it was bound to apply Ninth Circuit law in this case and explicitly stated that it was applying the standards as established by that court. App. 5-6a. Nor is there any merit to Microsoft's, repeated yet unsupported, claim that the Federal Circuit held that the jury's verdict of infringement was "against the clear weight of the evidence," but nonetheless failed to grant Microsoft a new trial. See Pet. 10, 11, 25. Indeed, the court of appeals held that the district court did not abuse its discretion in holding that the infringement verdict was supported by substantial evidence. App. 26-27a. Moreover, to the extent Microsoft argues that the court of appeals misstated, misapplied, or modified that standard, the Federal Circuit should have been given the chance to correct any such "error" in the first instance. But Microsoft did not raise this issue in its petition for rehearing en banc and did not seek panel rehearing at all. This Court does not sit to consider issues first raised in a petition for certiorari, and thus the writ should be denied.

Third, the petition is interlocutory, as the Federal Circuit vacated the jury's damages award and remanded to the district court for a new trial on damages. *See* App. 36a, 61a, 66a. As a result, there is no final judgment for this Court to review. That alone counsels against granting the petition.

I. Microsoft Challenges The Application Of Settled Law To The Facts In This Case And Asks This Court To Engage In Classic Fact-Bound Error Correction.

As this Court cautions litigants in its rules, “[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Sup. Ct. R. 10. Microsoft, however, devotes the majority of its petition to challenging the lower court's application of well-settled law to the facts of this case. At bottom, Microsoft argues that the evidence presented in this case was not sufficient to support the jury's indirect infringement verdict. Microsoft thus raises the same fact-bound challenges that were rejected by the district court and by the Federal Circuit.

1. As an initial matter, Microsoft challenges the application of undisputed, legal principles to the facts of this case. For instance, it is undisputed that to establish that Microsoft indirectly infringed the Day patent, Lucent was required to prove direct infringement as well. *See e.g., Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336, 341 (1961). Indeed, both the district court and the Federal Circuit properly identified this principle and applied it in this case. *See* App. 21a, 93a.

Applying these undisputed principles to the facts in this case, the courts below held that while Lucent presented “little, if any, direct evidence of infringement,” App. 23a, *see* App. 93a-94a, “Lucent introduced sufficient circumstantial evidence for the jury to conclude that Microsoft customers actually used the software to carry out the method steps of the ’356 patent,” App. 94a; *see* App. 24a-25a. To be sure, the Federal Circuit candidly noted that, in its view, the evidence was “just barely sufficient”—but such candor does not undermine its or the district court’s determination of sufficiency. Indeed, the Federal Circuit ultimately agreed with Lucent that “Microsoft not only designed the accused products to practice the claimed invention, but also instructed its customers to use the accused products in an infringing way.” App. 24a. That circumstantial evidence, the court held, “was just adequate to permit a jury to find that at least one other person within the United States during the relevant time period, other than the expert, had performed the claimed method.” *Id.* While the court also noted that Lucent’s expert testified that he and his wife had used other accused software in an infringing manner, and opined that “[i]t’s hard to imagine that we’re the only two people in the world that ever used it,” *Id.*, that observation was neither critical to the Federal Circuit’s ruling, nor even referenced in the district court’s ruling.

Microsoft attacks this portion of the Federal Circuit’s opinion on two grounds. *First*, Microsoft claims that the Federal Circuit erred by creating a “new” rule “that speculative testimony” provides a sufficient evidentiary basis to support a jury verdict.

But, of course, the Federal Circuit made no such new rule, nor did it purport to do so. Rather, even accepting Microsoft's characterization, the court merely noted the expert's testimony in passing before moving on to find that "the jury reviewed evidence relating to the extensive sales of Microsoft products and the dissemination of instruction manuals for the Microsoft products," and was entitled to rely on that evidence to infer direct infringement. App. 24a (citing *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261 (Fed. Cir. 1986)). This circumstantial evidence of infringement, the court held, provided a sufficient basis for the jury to have "reasonably concluded that, sometime during the relevant period from 2003 to 2006, more likely than not one person somewhere in the United States had performed the claimed method using the Microsoft products." App. 25a. In any event, however sliced, Microsoft is simply attacking the lower court's evaluation of the specific evidence in this case, and does not present an issue warranting this Court's discretionary review.

Second, Microsoft criticizes the court of appeals for "quot[ing] *Lucent's brief on appeal*," Pet. 17 (emphasis in original), and asserts that "the arguments of counsel are simply not evidence," *id.* (quoting *United States v. Sandini*, 888 F.2d 300, 311 (3d Cir. 1989)). That argument amounts to no more than an attack on the court's writing style. As the opinion makes clear, the Federal Circuit held that the circumstantial evidence of infringement identified in Lucent's brief below, not the argument of counsel, was sufficient to support the jury's verdict of infringement. See App. 23a. And that brief

pointed the court to evidence that was sufficient to support a finding of direct infringement. *See* Lucent Fed. Cir. Resp. Br. at 21 (citing JA44258-59; JA44277-79; JA07443; JA15763-67; JA44237-81; JA07801; JA15768-69; JA15775-85; JA15961-6005; JA16016-177; JA16369-413; JA45040-68; JA66710-11; JA66707-09). That the court quoted from Lucent's brief to express its agreement with Lucent's assessment of that evidence in no way cheapens the court's holding. Thus, Microsoft's argument that the court of appeals somehow created a "new and unique" standard for post-trial review of jury verdicts of infringement by "conclud[ing] that speculative testimony and lawyer argument can provide a sufficient evidentiary basis to support a jury verdict," Pet. 11, borders on specious.

Similarly, Microsoft criticizes the court of appeals for failing to provide record citations for the circumstantial evidence that it identified. *See* Pet. 17. But a court of appeals opinion is not a math assignment for this Court to grade, and the court of appeals is not required to "show its work." Courts need not provide pin cites for every piece of evidence on which they rely. Nevertheless, the evidence on which the Federal Circuit relied is easily identifiable by reference to the briefs filed below. *See* Lucent Fed. Cir. Resp. Br. at 21 (citing JA44258-59; JA44277-79; JA07443; JA15763-67; JA44237-81; JA07801; JA15768-69; JA15775-85; JA15961-6005; JA16016-177; JA16369-413; JA45040-68; JA66710-11; JA66707-09). The portion of Lucent's brief from which the Federal Circuit quoted provides extensive citations to the circumstantial evidence of infringement referenced by the court, including trial

testimony, deposition testimony of Microsoft employees shown at trial, and various exhibits explaining how the accused products work. Likewise, the district court's decision—which the Federal Circuit was affirming—extensively documented the evidence of direct infringement, including “evidence in the form of instruction and encouragement offered via tutorials, help files, web pages, manuals, promotional materials, the testimony of those familiar with these materials, and other sources.” App. 94-95a (providing record citations to excerpts of Microsoft Money's user's guides, excerpts of Microsoft Outlook help files, and the user's guide for Microsoft Windows Mobile product). Like the court of appeals, the district court held that “[a] reasonable jury could have reviewed this extensive record and concluded, based on the circumstantial evidence, that there was direct infringement.” App. 95a. Thus, the manner in which the court of appeals crafted its opinion provides no basis for further review in this Court.

2. Next, Microsoft challenges the lower courts' evaluation of the record evidence. *See* Pet. 17. In short, Microsoft argues that the Federal Circuit and the district court should have read the record evidence differently. Specifically, Microsoft asserts that the court of appeals erred in finding there was sufficient evidence that Microsoft “instructed its customers to use the accused products in an infringing way,” App. 24a, because, according to Microsoft, the instruction manuals Lucent cited in its brief on appeal merely “dealt with the use of Outlook generally—not use of the allegedly infringing date-

picker,” Pet. 17. But that is simply a quarrel with how to read the record.

Microsoft then argues that the Federal Circuit erred in holding that Microsoft’s manuals could constitute circumstantial evidence of infringement because “[g]eneric instruction manuals that do not teach an infringing use are not circumstantial evidence of direct infringement by users.” Pet. 17 (citing *Golden Blount, Inc. v. Robert H. Peterson Co.*, 438 F.3d 1354, 1363 (Fed. Cir. 2006); *ArthroCare Corp. v. Smith & Nephew, Inc.*, 406 F.3d 1365, 1377 (Fed. Cir. 2005)). But that assumes the conclusion that the manuals did not teach an infringing use—a conclusion rejected by the jury and the courts below. In any event, as Microsoft’s reliance on Federal Circuit precedent demonstrates, Microsoft is not mounting a legal challenge to the legal principles at play. Instead, Microsoft asks this Court to engage in nothing more than classic fact-bound error correction. Because “[a] court of law, such as this Court” is not “a court for correction of errors in fact finding,” *Graver Tank*, 336 U.S. at 275, the petition should be denied.

3. Finally, unhappy with the application of settled law to the facts here, Microsoft launches into an extended discussion of cases and issues wholly irrelevant to this case. See Pet. 18-25. Microsoft first directs a broadside on the jury system itself. See Pet. 18-19 (“There is strong evidence that the patent litigation process already contains a strong jury bias in favor of patentees.”); see also *id.* at 18-20. But as this charge makes clear, it is Microsoft—not the courts below—that would create out of whole

cloth a new standard for post-judgment relief from jury verdicts in patent cases. See e.g. Pet. 20 (asserting that this “known bias in favor of patentees in jury trials” should “raise the focus of reviewing courts”). There is, of course, no basis in law or logic for the Court to invent such a standard, but even if there were, this case presents an especially poor vehicle where this issue was not even presented to the court of appeals. Indeed, this Court’s “traditional rule” precludes a grant of certiorari “when the question presented was not pressed or passed upon below,” *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotations omitted), precisely because the Court “sits as a court of review,” not a court of first impression, *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Microsoft also attempts to cobble together an intra-circuit split by citing a string of irrelevant cases involving review of *damages awards*. See Pet. 22-24. Microsoft claims that these cases represent “inconsistent rulings from different panels of the Federal Circuit on questions of damages,” *id.*, but fails to explain how these cases, or this alleged division, has any relevance to this case. As previously discussed, in this case the Federal Circuit *vacated the damages award* and remanded to the district court for a new damages trial. See App. 69a-71a. Thus there are no damages-related issues before this Court, and Microsoft’s discussion of those cases is a distracting aside that in no way bolsters its case for certiorari.

II. The Federal Circuit Did Not Create A New Standard For Reviewing Jury Verdicts In Patent Cases And Any Challenge Should Have Been Presented To That Court In The First Instance.

Microsoft's contention, that the Federal Circuit "distort[ed]" "post-judgment standards" by denying its request for a new trial on infringement, presents no basis for this Court to grant certiorari in this case. The Federal Circuit neither invented nor imposed a new standard for granting a new trial. Rather, the Federal Circuit recognized that Ninth Circuit law applied in reviewing both the denial of the motion for judgment as a matter of law and the denial of the motion for a new trial. *See* App. 6a (citing *Pavao v. Pagay*, 307 F.3d 905 (9th Cir. 2002)). And even if the court of appeals had misstated or misapplied Ninth Circuit law—which it did not—the Court should not grant certiorari to engage in error correction over an issue that petitioner failed to raise below.

1. In affirming the denial of judgment as a matter of law, the court of appeals concluded that "substantial evidence" supports the jury's verdict that Microsoft infringed the Day patent. *See* App. 26-27a. In so doing, the Federal Circuit pointed to two descriptions of the substantial evidence standard from this Court's cases, stating that "Lucent's circumstantial evidence of infringement was 'something less than the weight of the evidence,' *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966), yet it was just 'more than a mere scintilla,' *Consol. Edison Co. v. NLRB*, 305 U.S. 197 (1938)." App. 26-27a (parallel citations omitted).

To be sure, a jury verdict may be set aside, “even though supported by substantial evidence,” where the court determines that “the verdict is *contrary* to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial judge, a miscarriage of justice.” *Moist Cold Refrigerator Co. v. Lou Johnson Co.*, 249 F.2d 246, 256 (9th Cir. 1957) (emphasis added). But neither the district court nor the Federal Circuit (which was reviewing the district court’s denial of a new trial for an abuse of discretion) made any such finding in this case.

Unable to present a credible challenge to the Federal Circuit’s actual holding in this case, Microsoft sets up a straw man to knock down instead. Microsoft argues that by stating that the circumstantial evidence of infringement was “something less than the weight of the evidence” but “just ‘more than a mere scintilla,’” in the context of affirming the denial of judgment as a matter of law, the Federal Circuit really meant that the infringement verdict was “contrary to the clear weight of the evidence,” and thus should be overturned. *See* Pet. 25. Hence, Microsoft asserts, the Federal Circuit should have held that the district court abused its discretion in denying Microsoft a new trial on infringement. *See* Pet. 25-26.

Microsoft misreads the Federal Circuit’s opinion. The fact that a court determines that the evidence barely clears the “substantial evidence” hurdle does not compel a determination that it is against the weight of the evidence, thus requiring a new trial. In other words, while the minimal substantial evidence

necessary to uphold a jury verdict falls somewhere between “the weight of the evidence” and “more than a mere scintilla,” the question of whether that verdict is nonetheless actually “*contrary* to the weight of that evidence,” is a different inquiry. Of course the Federal Circuit knew and applied the standard for granting a new trial; indeed, *it granted petitioner a new trial on damages*, applying the very same standards that it used in reviewing the challenge to liability. App. 36a.

In support of its straw man argument, Microsoft criticizes the Federal Circuit for applying the substantial evidence standard as articulated in *Consolo* and *Consolidated Edison* because those cases involved review of agency decisions. See Pet. 25-26. But courts routinely apply the substantial evidence standard as it is described in those cases to jury verdict challenges. Indeed, it is well established that the substantial evidence necessary to support a jury verdict is “something less than the weight of the evidence, and is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if different conclusions also might be supported by the evidence.” *Bangert Bros. Constr. Co. v. Kiewit W. Co.*, 310 F.3d 1278, 1292 (10th Cir. 2002); see also *Webco Indus., Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1128 (10th Cir. 2002); *Duncan v. Colo. Dep’t of Corr.*, 15 Fed. App’x 730, 733 (10th Cir. 2001); *Dupuis v. Toledo*, No. 96-30191, 1997 WL 367452, at *2 (5th Cir. June 9, 1997); *Gann v. Fruehauf Corp.*, 52 F.3d 1320, 1326 (5th Cir. 1995); *Knowlton v. Greenwood Indep. Sch. Dist.*, 957 F.2d 1172, 1178 (5th Cir. 1992); *Gibraltar Sav. v. LDBrinkman Corp.*, 860 F.2d 1275, 1297-98

(5th Cir. 1988). And, it is equally established that the substantial evidence necessary to uphold a jury verdict “is more than a mere scintilla.” *State of Washington v. United States*, 214 F.2d 33, 41 (9th Cir. 1954) (quoting *Consol. Edison*, 305 U.S. at 229); see also *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 993 (11th Cir. 1993); *Johnson v. Hugo’s Skateway*, 949 F.2d 1338, 1343-44 (4th Cir. 1991); *Nat’l Fire Ins. Co. v. Housing Dev. Co.*, 827 F.2d 1475, 1482 (11th Cir. 1987); *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 238 (5th Cir. 1983); *J & J Farms, Inc. v. Cargill, Inc.*, 693 F.2d 830, 834-35 (8th Cir. 1982); *Bennett v. D.C. Transit Sys., Inc.*, 298 F.2d 325, 326 (D.C. Cir. 1962). Thus, Microsoft’s assertion that the Federal Circuit somehow effected an “inappropriate modification of generally applicable procedural rules in patent cases” by citing *Consolo* and *Consolidated Edison* is mistaken at best.

2. Moreover, even if the Federal Circuit misstated or misapplied the standards for judgment as a matter of law or for a new trial (which it did not), the Court should not grant certiorari to correct an alleged error that was never raised below. Microsoft denied the Federal Circuit an opportunity to correct the alleged error in the application of Ninth Circuit law by failing to raise this issue in its petition for rehearing en banc, and did not even seek panel rehearing at all. Instead, Microsoft’s petition for rehearing en banc was limited to challenging the Federal Circuit’s invalidity precedents, an issue not presented in Microsoft’s petition to this Court. Thus, even assuming that the Federal Circuit had imposed a new standard for resolving post-trial motions, the

Court's traditional practice of requiring that an issue be presented or passed on below before undertaking consideration requires denial of the writ.

Denial is all the more warranted here where the court below did not purport to do anything other than apply settled law to the unique facts of this case. The alleged misstatement or misapplication of the well-settled standards for resolving post-trial motions presents no occasion for this Court's intervention. Thus, Microsoft's discussion of unrelated cases, such as *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) and *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), where the Federal Circuit explicitly announced that it was creating or applying a patent-specific rule, is wholly inapposite. See Pet. 20-21. Indeed, in each of the cases that Microsoft cites for the proposition that "this Court has reversed Federal Circuit decisions applying patent law doctrines that improperly expanded the scope of patent rights," Pet. 21 n.5, before this Court granted certiorari, the Federal Circuit had been given the opportunity to reconsider the specific issue in the first instance, either in a petition for rehearing or in a series of cases squarely presenting the same issue. See *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617 (2008) (issue presented in combined petition for rehearing or rehearing en banc, Nos. 05-1261 et al., 2006 WL 2351226 at *13 (Fed. Cir. July 21, 2006)); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007) (issue presented in combined petition for rehearing or rehearing en banc, No. 04-1285, 2005 WL 4838014 at *1 (Fed. Cir. Sept. 15, 2005)); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 407 (2007) (noting that

Federal Circuit had applied that court's standard approach as demonstrated by *Al-Site Corp. v. VSI Int'l, Inc.*, 174 F.3d 1308, 1323-24 (Fed. Cir. 1999)); *Merck KGaA v. Integra Lifesciences I, Ltd.*, 545 U.S. 193, 195, 208 (2005) (issue presented in combined petition for rehearing or rehearing en banc, Nos. 02-1052, 02-1065, 2003 WL 24033437 at *5 (Fed. Cir. July 21, 2003)). It would be nothing short of extraordinary for this Court to address a claim of error that was not presented in a petition for rehearing below, particularly where the Federal Circuit was explicitly applying the law of the regional circuit, and did not purport to apply or create patent-specific doctrine.

III. Microsoft's Petition Is Interlocutory And, As Such, Should Be Denied.

Finally, Microsoft's petition asks the Court to engage in interlocutory review. That "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.*, 240 U.S. at 258; *see also DTD Enters., Inc. v. Wells*, 130 S. Ct. 7, 8 (2009) (Kennedy, J. joined by Roberts, C.J., and Sotomayor, J.) (concurring in denial of certiorari because "the petition is interlocutory"); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari because the case was "not yet ripe for review by this Court" where the circuit court had remanded to district court). "In the absence of clear and explicit authorization by Congress, piece-meal appellate review is not favored, and this Court above all others must limit its review of interlocutory orders." *Goldstein v. Cox*, 396 U.S.

471, 478 (1970) (internal citations omitted). Far from presenting any reason for this Court to make an exception to its established practice of denying review of interlocutory orders, Microsoft hardly acknowledges the interlocutory nature of this petition. Absent exceptional circumstances, which petitioner has not even attempted to identify, there is no basis for this Court to depart from its ordinary practice.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of *certiorari*.

Respectfully submitted,

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