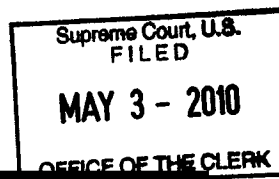


No. 09-1006



IN THE
Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

LUCENT TECHNOLOGIES, INC.,
Respondent.

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

**REPLY IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

CARTER G. PHILLIPS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

JOHN E. GARTMAN
JOHN W. THORNBURGH
FISH & RICHARDSON
P.C.
12390 El Camino Real
San Diego, CA 92130
(858) 678-5070

Counsel for Petitioner

May 3, 2010

CONSTANTINE L. TRELA, JR.*
ROBERT N. HOCHMAN
TACY F. FLINT
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000
ctrela@sidley.com

*Counsel of Record

Blank Page

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI	1
I. THE QUESTIONS ARE PROPERLY PRESENTED FOR THIS COURT'S REVIEW....	2
II. THE FEDERAL CIRCUIT CREATED NEW STANDARDS FOR APPLICATION OF RULES 50 AND 59	3
A. The Federal Circuit Relied On "Evidence" That Could Not Be Held To Support A Verdict Under The Law Applied By Other Circuits.....	4
B. On The Federal Circuit's Own View Of The Evidence, A New Trial Was Required.....	7
III. THE FEDERAL CIRCUIT HAS FINALLY ADJUDICATED THE QUESTIONS PRESENTED	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
<i>Bangert Bros. Constr. Co. v. Kiewit W. Co.</i> , 310 F.3d 1278 (10th Cir. 2002).....	8
<i>Berghuis v. Smith</i> , 130 S. Ct. 1382 (2010) ...	9
<i>Cox Broad. Corp. v. Cohn</i> , 420 U.S. 469 (1975).....	9
<i>Duignan v. United States</i> , 274 U.S. 195 (1927).....	3
<i>Duncan v. Colo. Dep't of Corr.</i> , 15 F. App'x 730 (10th Cir. 2001)	8
<i>Dupuis v. Toledo</i> , No. 96-30191, 1997 WL 367452 (5th Cir. June 9, 1997)	8
<i>Gann v. Fruehauf Corp.</i> , 52 F.3d 1320 (5th Cir. 1995).....	8
<i>Gibraltar Sav. v. LDBrinkman Corp.</i> , 860 F.2d 1275 (5th Cir. 1988).....	8
<i>Goldstein v. Cox</i> , 396 U.S. 471 (1970)	9
<i>Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson</i> , 130 S. Ct. 1396 (2010).....	9
<i>i4i Ltd. P'ship v. Microsoft Corp.</i> , 598 F.3d 831 (Fed. Cir. 2010).....	8
<i>Knowlton v. Greenwood Indep. Sch. Dist.</i> , 957 F.2d 1172 (5th Cir. 1992).....	8
<i>KSR Int'l Co. v. Teleflex Inc.</i> , 548 U.S. 902 (2006).....	3
<i>KSR Int'l Co. v. Teleflex Inc.</i> , 550 U.S. 398 (2007).....	10
<i>Maryland v. Shatzer</i> , 130 S. Ct. 1213 (2010).....	9
<i>Merck & Co. v. Reynolds</i> , No. 08-905, 2010 WL 1655827 (U.S. Apr. 27, 2010).....	9
<i>Rent-A-Center West, Inc. v. Jackson</i> , 130 S. Ct. 1133 (2010)	3

TABLE OF AUTHORITIES—continued

	Page
<i>Snyder v. Phelps</i> , No. 09-751 (U.S. Mar. 8, 2010)	3
<i>United States v. Williams</i> , 504 U.S. 36 (1992)	3
<i>Webco Indus., Inc. v. Thermatool Corp.</i> , 278 F.3d 1120 (10th Cir. 2002)	8
 RULE	
Sup. Ct. R. 13.1(3)	2

Blank Page

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Lucent's Brief in Opposition tries in vain to change the subject. The Federal Circuit's opinion raises serious questions about the legal standards for review of jury verdicts in patent cases. The court held that in patent cases, a "legally sufficient evidentiary basis" exists to support a jury verdict of infringement under Rule 50 even where the only supporting "evidence" is nothing more than express speculation and unsupported attorney argument. Lucent's effort to avoid that holding and to transform the petition into a garden-variety disagreement over how the Federal Circuit assessed the evidence fails on its face.

While the BIO includes numerous citations to the Joint Appendix, even Lucent does not and cannot produce a single quotation from a document or testimony that amounts even to circumstantial evidence of direct infringement. When the Federal Circuit quoted Lucent's mischaracterization of the record to support its ruling, it accepted Lucent's lawyerly spin in lieu of genuine evidence, contrary to the standards of every other Court of Appeals. And even Lucent will not defend the Federal Circuit's reliance on the only testimony that court actually cited—the observation of Lucent's own expert (BIO 16)—which is plainly and expressly speculative. Further, the Federal Circuit denied Microsoft a new trial on infringement even though it found that the verdict was contrary to the weight of the evidence.

Rules 50 and 59 do not permit such rulings, and the approach the Federal Circuit took here is contrary to the law of every other circuit. Microsoft raised these important issues in the Federal Circuit, and that court passed on them, issuing a final decision as to

each, not subject to revision on remand. This Court should grant the petition to ensure that patent cases are not exempt from the generally applicable standards for post-judgment review.

I. THE QUESTIONS ARE PROPERLY PRESENTED FOR THIS COURT'S REVIEW.

Lucent asserts that Microsoft “presents questions that were never raised below.” BIO 1; *see also, e.g.*, BIO 2 (“This Court ... does not grant certiorari when the question presented was not pressed or passed upon below.”) (citations and internal quotation marks omitted); BIO 25 (“the Court should not grant certiorari to correct an alleged error that was never raised below”). That is ludicrous. Microsoft’s appeal from the denial of its post-trial motions under Rules 50 and 59 squarely presented the question of the proper legal standards to be applied in reviewing the jury’s verdict under those rules. Indeed, the Federal Circuit “passed upon” the question at length. *See* App. 21a-27a.

Lucent’s bizarre claim that Microsoft “never raised” the question in the Federal Circuit is actually an overstatement of the benign fact that Microsoft did not seek rehearing in the Federal Circuit on this issue. To Lucent “[i]t 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.” BIO 27. What would be “extraordinary” would be to conclude, contrary to this Court’s own rules, that a question must be raised in a rehearing petition in order to be eligible for review on a petition for certiorari. This Court’s Rule 13 makes clear that there is no requirement that a litigant seek rehearing in the court of appeals before petitioning for certiorari. *See, e.g.*, Sup. Ct. R. 13.1(3) (“The time to file a petition for a writ of certiorari runs from the

date of entry of the judgment But *if* a petition for rehearing is timely filed in the lower court ..., the time to file the petition for a writ of certiorari ... runs from the date of the denial of rehearing”) (emphasis added). Lucent cites no support for its novel argument that a petition for rehearing on the questions presented is a prerequisite for certiorari.¹ And there is none: this Court routinely grants certiorari when parties have not sought rehearing in the court of appeals on the questions presented. *See, e.g., Snyder v. Phelps*, No. 09-751 (U.S. Mar. 8, 2010) (granting certiorari), *Rent-A-Center West, Inc. v. Jackson*, 130 S. Ct. 1133 (2010) (same); *KSR Int’l Co. v. Teleflex Inc.*, 548 U.S. 902 (2006) (same).

II. THE FEDERAL CIRCUIT CREATED NEW STANDARDS FOR APPLICATION OF RULES 50 AND 59.

Lucent asserts that “Microsoft challenges the application of undisputed, legal principles to the facts of this case.” BIO 15. Lucent is wrong.

As explained in the petition, the Federal Circuit departed from the legal principles accepted by all other circuits in two significant ways. First, the Federal Circuit found a “legally sufficient evidentiary basis” to support the verdict under Rule 50 in materials that would not be regarded as evidence under the law applied by other circuits—namely, express speculation and attorney argument un-

¹ The two cases Lucent cites (BIO 2) for the proposition that this Court does not grant certiorari “when the question presented was not pressed or passed upon below” require that a question be presented to the court of appeals *at all*—not in a petition for rehearing. *See United States v. Williams*, 504 U.S. 36, 44-45 (1992); *Duignan v. United States*, 274 U.S. 195, 200 (1927).

ported by facts. *See* Pet. 11-18. Second, even under the Federal Circuit's own characterization of the evidence—as “something less than the weight of the evidence” and “just ‘more than a mere scintilla,’” App. 26a-27a—a new trial was required under the legal standards that other circuits, including the Ninth Circuit, would apply. *See* Pet. 25-27. In short, this Court's review of the Federal Circuit's novel legal standards under Rules 50 and 59 is warranted.

A. The Federal Circuit Relied On “Evidence” That Could Not Be Held To Support A Verdict Under The Law Applied By Other Circuits.

Lucent never denies that a Federal Circuit ruling affirming a patent infringement judgment based on a novel and unique interpretation of the standards under Rules 50 and 59 would merit review by this Court. Only this Court can ensure that the Federal Circuit applies to patent cases the same basic procedural standards applicable in other litigation in federal courts. Instead, Lucent asserts this Court should deny review here because the Federal Circuit merely disagreed with Microsoft over how to assess the evidence. That is not so. Lucent's BIO cannot overcome the Federal Circuit's reliance on express speculation and attorney argument—materials that would not be considered in support of a jury verdict under the law in any other circuit.

Indeed, even Lucent does not defend the Federal Circuit's citation as “circumstantial evidence” of infringement the expressly speculative statement of Lucent's expert that he found it “hard to imagine” that others had not directly infringed Lucent's patents. App. 24a. Lucent tries to downplay the significance of its expert's speculation to the Federal Circuit's holding, asserting that “that observation

was [not] critical to the Federal Circuit's ruling." BIO 16. But the Federal Circuit expressly acknowledged that without the "circumstantial evidence" of infringement, it would "likely have to reverse." App. 24a. An "observation" that makes the difference between affirmance and likely reversal is "critical" to say the least. The Federal Circuit's willingness to rely on such "evidence" as providing "just 'more than a mere scintilla'" of support for the jury's verdict sets it apart from all other circuits. *See* Pet. 14-16 (citing cases).

The other "circumstantial evidence" cited by the Federal Circuit is not evidence at all, but attorney argument from Lucent's appellate brief, which likewise would not support a jury verdict under any other circuit's interpretation of Rule 50. *See* Pet. 17-18. Lucent asserts that the court's failure to cite record evidence rather than Lucent's attorney spin was merely a matter of "the court's writing style," and that the court in fact meant to rely on "evidence of infringement identified in Lucent's brief below." BIO 17. But the opinion makes no reference to any of Lucent's supposed evidence, either specifically or generally, and Lucent cannot now rewrite the Court's opinion. Neither could the court of appeals have written the opinion Lucent says it meant to write, for none of the materials cited in Lucent's appellate brief support the attorney argument that the Federal Circuit quoted, namely that Microsoft "instructed its customers to use the accused products in an infringing way." App. 24a.

In its brief to this Court, Lucent recreates the string cite to Joint Appendix pages that it offered in its brief to the Federal Circuit, claiming that the Federal Circuit implicitly relied on the cited pages, *see* BIO 18, and that the Federal Circuit was not

required to “show its work,” *id.* While there is certainly no requirement for a *court* to “show its work,” one would at least expect a *litigant* defending a court’s reliance on the litigant’s spin on the record to demonstrate precisely what *in the record* the reviewing court might have understood to support the litigant’s view. But Lucent does not and cannot point to a single page in that string cite that actually supports the assertion that Microsoft “instructed its customers to use the accused products in an infringing way.” Instead, the string cite points to an Outlook help screen describing the use and benefit of forms generally (JA44258-59); an Outlook help screen describing the types of forms in Outlook (JA44277-79); testimony that Dell and Microsoft “promote Outlook and its ease of use in the forms” (JA7443); an online “tour” of Outlook describing how Outlook can be used to “[o]rganize information better” (JA15763-67); discs containing the Outlook software and a series of screen shots of Outlook software being used (JA44237-81); deposition testimony indicating that Microsoft has publicized Outlook’s calendar and that Microsoft Office includes Outlook (JA7801); a website promoting Windows Mobile as useful to, *inter alia*, “help your company improve workforce productivity by offering a line of business applications, easy access to e-mail, and enhanced security features” (JA15768-69); product descriptions for pocket PCs that use Windows Mobile (JA15775-85); an instruction manual for Pocket Word, which permits documents (not forms) to be typed using a “soft keyboard, Character Recognizer, or other available input method,” and a blog posting on the benefits of “[p]ersistent [s]torage,” which can improve battery life on Pocket PCs (JA15961-6005); a Dell-published User’s Guide, marked “Dell Confidential” and “Outside Counsel Only” (JA16016), for Dell Axim X5,

a Pocket PC (JA16016-177); screen shots of Windows Mobile (JA16369-413, JA45040-68); a press release stating that Microsoft had released Pocket PC and that Pocket PCs come with Pocket Outlook “with calendar, contacts, inbox, tasks and notes” (JA66710-11); and a press release indicating the release of Microsoft Money 2002 and stating that Money is “[k]nown for its ease of use and intuitive product design” (JA66707-09).

None of these items includes any instruction from Microsoft to “use the accused products in an infringing way.” *See* App. 24a. When the Federal Circuit quoted Lucent’s brief, then, it was not shorthand for evidence in the record, but rather elevated Lucent’s brief to the status of such evidence. Lucent’s unsupported attorney argument was the “legally sufficient evidentiary basis” the Federal Circuit found to support the jury’s verdict under Rule 50. This Court’s review of the Federal Circuit’s novel take on Rule 50 is warranted.

B. On The Federal Circuit’s Own View Of The Evidence, A New Trial Was Required.

Lucent also misses the mark in its attempt to defend the Federal Circuit’s denial of a new trial. *See* BIO 23-24. The court made clear that the absence of any direct evidence of infringement and the scanty so-called “circumstantial evidence” of infringement amounted to “just ‘more than a mere scintilla’” and “less than the weight of the evidence.” App. 26a-27a. In other words, on the court’s own view of the evidence, which included treating expert speculation and attorney argument as evidence, the verdict survived outright reversal only by the barest of possible margins. *See* BIO 23-24 (acknowledging that a “mere scintilla” would require JMOL). That is, the

Federal Circuit itself concluded that the greater weight of the evidence supported a finding of noninfringement, and the jury's verdict of infringement was thus contrary to the weight of the evidence. Once a court reaches that conclusion, Rule 59, as interpreted by other circuits, requires a new trial. *See* Pet. 26-27 (citing cases).²

The Federal Circuit's later decision in *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 856-57 (Fed. Cir. 2010), makes clear that the Federal Circuit's novel treatment of Rule 59 is not an occurrence isolated to this case because, there too, the court imposed a hurdle on post-judgment relief that other circuits have not imposed. *i4i* is thus not, as Lucent argues, "irrelevant" because it "involv[es] review of damages awards," BIO 21, but is rather highly relevant: in that case, as here, the Federal Circuit took a patent-specific approach to Rule 59 entirely at odds with the approach of the regional circuits. *See* Pet. 23-24 & n.6 (citing cases).

² Lucent suggests that the Federal Circuit's decision was in line with decisions of the Tenth and Fifth Circuits, but that is wrong. Those cases state that a request to order entry of judgment in the defendant's favor fails if the verdict is supported by something less than the weight of the evidence. *See Bangert Bros. Constr. Co. v. Kiewit W. Co.*, 310 F.3d 1278, 1292 (10th Cir. 2002); *Webco Indus., Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1128 (10th Cir. 2002); *Duncan v. Colo. Dep't of Corr.*, 15 F. App'x 730, 733 (10th Cir. 2001); *Dupuis v. Toledo*, No. 96-30191, 1997 WL 367452, at *2 (5th Cir. June 9, 1997) (per curiam); *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). Those cases do not address the new trial standard under Rule 59, which, as Microsoft made clear in its petition, requires that a verdict be vacated when it is contrary to the clear weight of the evidence.

III. THE FEDERAL CIRCUIT HAS FINALLY ADJUDICATED THE QUESTIONS PRESENTED.

Finally, Lucent asserts that the fact that the Federal Circuit remanded the case for further proceedings concerning damages supports denial of the petition. BIO 27-28. But while the interlocutory posture of a case may be a factor, *see, e.g., Goldstein v. Cox*, 396 U.S. 471, 478 (1970) (declining to review “an interlocutory order of a trial court”), it is hardly decisive, especially under the circumstances here.

The questions Microsoft has presented concern only finally adjudicated matters. Both the district court and the Federal Circuit have finally adjudicated Microsoft’s infringement liability, and no further proceedings will take place on that issue in the lower courts. Where, as here “[n]othing that could happen in the course” of any ongoing proceedings “would foreclose or make unnecessary decision on the” presented questions, this Court’s review is not premature. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 480 (1975). Accordingly, this Court has not hesitated in its recent cases to grant certiorari despite the prospect of ongoing proceedings. *See, e.g., Merck & Co. v. Reynolds*, No. 08-905, 2010 WL 1655827, at *4 (U.S. Apr. 27, 2010) (reviewing appellate court determination that complaint was timely filed); *Berghuis v. Smith*, 130 S. Ct. 1382 (2010) (reviewing appellate court determination that habeas corpus petitioner was entitled to a new trial); *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396 (2010) (reviewing appellate court determination that district court had jurisdiction to hear plaintiff’s claim); *Maryland v. Shatzer*, 130 S. Ct. 1213, 1218 (2010) (reviewing appellate court decision reversing criminal conviction and

remanding for further proceedings); *see also KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 412-14 (2007) (reviewing Federal Circuit decision reversing grant of summary judgment of invalidity and remanding to district court for further proceedings).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

JOHN E. GARTMAN
JOHN W. THORNBURGH
FISH & RICHARDSON
P.C.
12390 El Camino Real
San Diego, CA 92130
(858) 678-5070

CONSTANTINE L. TRELA, JR.*
ROBERT N. HOCHMAN
TACY F. FLINT
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000
ctrela@sidley.com

Counsel for Petitioner

May 3, 2010

*Counsel of Record