

# U.S. Supreme Court will hear Microsoft's appeal of a judgment awarded to Toronto-based i4i

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**Victor Krichker & Maya Medeiros**

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The Supreme Court of the United States (SCOTUS) will hear Microsoft's appeal to overturn a judgment finding that Microsoft Word infringes U.S. Patent Number 5,787,449 held by Toronto-based i4i. The judgment awarded US\$290 million in damages to i4i and issued a permanent injunction barring Microsoft from selling infringing versions of Microsoft Word. The injunction has been stayed pending the appeal. The judgment is said to be the largest patent infringement verdict ever to be affirmed on appeal.

The i4i patent relates to markup language technology. A markup language uses tags or codes to define how the content between the tags should be displayed. The patent relates to a method for editing markup language documents by storing the document content separately from the markup language tags or codes using a mapping mechanism. This allows a user to edit the structure of the document (the tags and codes) without accessing the content.

Microsoft argues that i4i's patent is invalid because the claimed invention was sold by i4i as a software product more than a year before the patent application was filed. A patent is presumed valid and the burden of establishing invalidity rests on the asserting party. Microsoft could not prove by clear and convincing evidence that the sold product embodied the claimed invention as the software was destroyed before trial. Microsoft is asking the SCOTUS to reduce the existing "clear and convincing evidence" standard to a lower standard permitting invalidity to be established by a preponderance of evidence when invalidity evidence was not previously considered by the United States Patent and Trademark Office (USPTO). Microsoft argues that the existing heightened evidentiary standard arises out of deference to the expertise of the USPTO examiners. In this case, the invalidity evidence relied on by Microsoft was not considered by the USPTO during the examination of the i4i patent application.

This case has caught the attention of industry. A number of large technology companies, including Google, Intel, Facebook, Apple, and Yahoo! filed amicus curiae briefs in support of Microsoft.

If the SCOTUS agrees with Microsoft and establishes a lower evidentiary standard for invalidity evidence not previously considered by the USPTO, it will likely be easier for defendants being accused of patent infringement to invalidate patents. Counsel for i4i contends that a lower invalidity standard may be destructive to the value of patents. Microsoft and its supporters argue that, by invalidating questionable patents, a lower standard may strike an appropriate balance between respecting rights of patent holders and fostering progress. The case will be heard during the first half of 2011 as *Microsoft Corp. v. i4i LP*, case number 10-290.

**Victor Krichker**, B.Sc. (Civil Eng.), LL.B., is a partner with Bereskin & Parr LLP and is the leader of the Software/High Technology Practice group. He can be reached in Toronto at 416.957.1699 or [vkrichker@bereskinparr.com](mailto:vkrichker@bereskinparr.com).

**Maya Medeiros**, B.Sc. (Comp. Sci. & Math), LL.B., is an associate lawyer in Bereskin & Parr LLP's Software & High Technology Practice group. She can be reached in Toronto at 416.957.1688 or [mmedeiros@bereskinparr.com](mailto:mmedeiros@bereskinparr.com).