IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

IP INNOVATION L.L.C. and TECHNOLOGY LICENSING CORP.,

Plaintiffs/Counterclaim Defendants,

v.

RED HAT, INC. AND NOVELL, INC.,

Defendants/Counterclaim Plaintiffs.

Civil Action No. 2:07-cv-447 (RRR)
Jury Trial Demanded

JOINT PRELIMINARY JURY INSTRUCTIONS

I. PRELIMINARY INSTRUCTIONS

MEMBERS OF THE JURY:

You have now been sworn as the jury to try this case. As the jury you will decide the disputed questions of fact.

As the Judge, I will decide all questions of law and procedure. From time to time during the trial and at the end of the trial, I will instruct you on the rules of law that you must follow in making your decision.

Soon, the lawyers for each of the parties will make what is called an opening statement. Opening statements are intended to assist you in understanding the evidence. What the lawyers say is not evidence.

After the opening statements, the Plaintiffs will call witnesses and present evidence. Then, the Defendants will have an opportunity to call witnesses and present evidence. After the parties' main case is completed, the Plaintiffs may be permitted to present rebuttal evidence. After all the evidence is completed, the lawyers will again address you to make final arguments. Then I will instruct you on the applicable law. You will then retire to deliberate on a verdict.

Keep an open mind during the trial. Do not decide any fact until you have heard all of the evidence, the closing arguments, and my instructions.

Pay close attention to the testimony and evidence.

If you would like to take notes during the trial, you may do so. If you do take notes, be careful not to get so involved in note taking that you become distracted and miss part of the testimony. Your notes are to be used only as aids to your memory, and if your memory should later be different from your notes, you should rely on your memory and not on your notes. If you do not take notes, rely on your own independent memory of the testimony. Do not be

unduly influenced by the notes of other jurors. A juror's notes are not entitled to any greater weight than the recollection of each juror concerning the testimony. Even though the court reporter is making stenographic notes of everything that is said, a typewritten copy of the testimony will not be available for your use during deliberations. On the other hand, any exhibits may be available to you during your deliberations.

Until this trial is over, do not discuss this case with anyone and do not permit anyone to discuss this case in your presence. Do not discuss the case even with the other jurors until all of the jurors are in the jury room actually deliberating at the end of the case. If anyone should attempt to discuss this case or to approach you concerning the case, you should inform the Court immediately. Hold yourself completely apart from the people involved in the case—the parties, the witnesses, the attorneys and persons associated with them. It is important not only that you be fair and impartial but that you also appear to be fair and impartial.

Do not make any independent investigation of any fact or matter in this case. You are to be guided solely by what you see and hear in this trial. Do not learn anything about the case from any other source. This means that you must not consult a dictionary, textbook, encyclopedia, talk with a person you consider knowledgeable, or go to the Internet for information about some issue or person in this case.

During the trial, it may be necessary for me to confer with the lawyers out of your hearing or to conduct a part of the trial out of your presence. I will handle these matters as briefly and as conveniently for you as I can, but you should remember that they are a necessary part of any trial.

Authority:

FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS, Instruction 1.1 (2009) (adapted).

II. SUMMARY OF CONTENTIONS

To help you follow the evidence, I will now give you a summary of the positions of the parties.

The Plaintiffs in this case are IP Innovation L.L.C. and Technology Licensing Corporation, collectively referred to as "Plaintiffs" or "IPI." The Defendants are Red Hat, Inc. and Novell, Inc., collectively referred to as "Defendants."

This case involves three United States Patents: U.S. Patent No. 5,072,412, U.S. Patent No. 5,394,521, and U.S. Patent No. 5,533,183, each titled "User Interface With Multiple Workspaces for Sharing Display System Objects." For convenience, the parties and I will often refer to these three patents collectively as the "patents-in-suit" or by using only the last three numbers of the patent number, namely, "the '412 patent," "the '521 patent," and "the '183 patent."

Plaintiffs filed suit in this Court seeking money damages from Defendants for allegedly infringing the patents-in-suit by using, selling, and/or offering for sale in the United States products that Plaintiffs argue are covered by claims 1 and 21 of the '412 patent, claim 8 of the '521 patent, and claim 1 of the '183 patent. Plaintiffs also argue that Defendants actively induced their customers to infringe the patents-in-suit.

Defendants deny that they have infringed, or actively induced infringement of, the asserted claims of the patents-in-suit. Defendants also argue that the asserted claims of the patents are invalid. I will instruct you later as to the ways in which the claims of a patent may be invalid. In general, however, a patent claim is invalid if it is not new or is obvious in view of the state of the art at the relevant time, or if the inventors are not properly named.

Your job will be to decide whether or not Defendants have infringed any asserted claims of the patents-in-suit and whether or not those claims are invalid. If you decide that Defendants

have infringed any valid asserted claim of the patents-in-suit, you will then need to decide any money damages to be awarded to Plaintiffs.

Authority:

FEDERAL CIRCUIT BAR ASSOCIATION MODEL PATENT JURY INSTRUCTIONS, Instruction A.2 (2009) (adapted); 35 U.S.C. § 282.

III. PATENTS-IN-SUIT

The '412, '521, and '183 patents generally describe a computer based graphical user interface that spans across multiple workspaces. Within a workspace is a collection of display objects, called "tools," that have visually distinguishable features (e.g., icons or windows). The display objects can be shared between workspaces. When a user switches between workspaces to perform different tasks, the display objects or tools that are common among the workspaces are displayed in the new workspace and are perceptible as the same.

Authority:

MEMORANDUM OPINION AND ORDER, *IP Innovation, LLC v. Red Hat, Inc.*, (E.D. Tex.) (Docket No. 87) (adapted).

IV. OVERVIEW OF APPLICABLE LAW

In deciding the issues I just discussed, you will be asked to consider specific legal standards. I will give you an overview of those standards now and will review them in more detail before the case is submitted to you for your verdict.

The first issue you will be asked to decide is whether Defendants have infringed the asserted claims of the patents-in-suit. Infringement is assessed on a claim-by-claim basis. There are a few different ways that a patent may be infringed. I will explain the requirements for each of these types of infringement to you in detail at the conclusion of the case. In general, however,

Defendants may infringe the patents-in-suit by using, selling, and/or offering for sale in the United States a product or method that meets all the requirements of an asserted claim of the patents-in-suit. Defendants may also indirectly infringe the patents-in-suit by inducing another person or entity to infringe. To prove indirect infringement, Plaintiffs must show that Defendants were aware of the patents, intended to cause others to infringe the patents, and the infringement actually was carried out by others in the United States. Plaintiffs must show Defendants' infringement by a preponderance of the evidence. I will provide you with more detailed instructions on the requirements for each of these types of infringement at the conclusion of the case.

Another issue you will be asked to decide is whether the asserted claims of the patents-in-suit are invalid. A patent may be invalid for a number of reasons, including because it claims subject matter that is not new or is obvious. For a claim to be invalid because it is not new, Defendants must show that all of the elements of a claim are present in a single previous system, or sufficiently described in a single previous printed publication or patent. We call these previous devices and publications "prior art." If a claim is not new, it is said to be anticipated by prior art. I will provide you with more detailed instructions at the conclusion of the case regarding the requirements that a device or publication must satisfy to qualify as prior art.

Another way that a claim may be invalid is that it may have been obvious. Even though every element of a claim is not shown or sufficiently described in a single piece of prior art, the claim may still be invalid if it would have been obvious to a person of ordinary skill in the field of technology of the patent at the relevant time. You will need to consider a number of questions in deciding whether the asserted claims of the patents-in-suit are obvious.

A patent may also be invalid if too few or too many of the actual inventors are named on the patent or if there was no collaboration or concerted efforts among the named inventors. Defendants must show invalidity by clear and convincing evidence. I will provide you detailed instructions on these questions at the conclusion of the case.

If you decide that any asserted claim of the patents-in-suit has been infringed and is not invalid, you will then need to decide any money damages to be awarded to Plaintiffs to adequately compensate them for the infringement. A damages award should put Plaintiffs in approximately the same financial position that they would have been in had the infringement not occurred, but in no event may the damages award be less than what Plaintiffs would have received had they been paid a reasonable royalty. I will instruct you later on the meaning of a reasonable royalty. You may not include in your award any additional amount as a fine or penalty, above what is necessary to compensate Plaintiffs for the infringement, in order to punish Defendants. I will give you more detailed instructions on the calculation of damages at the conclusion of the case.

Authority:

FEDERAL CIRCUIT BAR ASSOCIATION MODEL PATENT JURY INSTRUCTIONS, Instruction A.4 (2009) (adapted); *IP Innovation L.L.C. v. Red Hat, Inc.*, 2:07-cv-00447 (E.D. Tex. March 29, 2010) (Hon. R. Rader sitting by designation) (Docket No. 183, at p. 3); *Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572, 1576 (Fed. Cir. 1996); Plaintiffs' Proposed Final Jury Instructions, *Cornell Univ. v. Hewlett-Packard Co.*, 01-CV-1974-RRR-DEP (N.D.N.Y.) (Docket No. 958-3) (adapted).

V. OUTLINE OF TRIAL

The trial will now begin. First, each side will make an opening statement. An opening statement is not evidence. It is simply an opportunity for the lawyers to explain what they expect the evidence will show.

There are two standards of proof that you will apply to the evidence, depending on the issue you are deciding. On some issues, you must decide whether certain facts have been proven by a preponderance of the evidence. A preponderance of the evidence means that the fact that is to be proven is more likely true than not, i.e., that the evidence in favor of that fact being true is sufficient to tip the scale, even if slightly, in its favor. On other issues that I will identify for you, you must use a higher standard and decide whether the fact has been proven by clear and convincing evidence, i.e., that you have been left with an abiding conviction that the truth of the fact sought to be proven is highly probable.

These standards are different from the standard that you may have heard about in criminal proceedings where a fact must be proven beyond a reasonable doubt. On a scale of these various standards of proof, as you move from preponderance of the evidence, where the proof need only be sufficient to tip the scale in favor of the party proving the fact, to beyond a reasonable doubt, where the fact must be proven to a very high degree of certainty, you may think of clear and convincing evidence as being between the two standards.

After the opening statements, Plaintiffs will present their evidence in support of their contention that the asserted claims of the patents-in-suit have been infringed by Defendants. To prove infringement of any claim, Plaintiffs must persuade you that it is more likely than not that Defendants have infringed that claim. Plaintiffs will then also put on evidence on the amount of damages that they believe they are entitled to receive for Defendants' infringement. Plaintiffs

must prove the amount of damages to which they contend they are entitled by a preponderance of the evidence.

Defendants will then present their evidence that the asserted claims of the patents-in-suit are invalid. To prove invalidity of any claim, Defendants must persuade you by clear and convincing evidence that the claim is invalid. In addition to presenting their evidence of invalidity, Defendants will put on evidence responding to Plaintiffs' proof of infringement and damages.

Plaintiffs may then put on additional evidence responding to Defendants' evidence that the asserted claims of the patents-in-suit are invalid, and to offer any additional evidence of infringement. This is referred to as "rebuttal" evidence. Plaintiffs' "rebuttal" evidence may respond to any evidence offered by Defendants.

During the presentation of the evidence, the attorneys for the parties will be given brief opportunities to explain what they believe the evidence has shown or what they believe upcoming evidence will show. Your decisions should not be influenced by whether the attorneys choose not to make an explanation about the evidence or to not respond to the other side's comments. The attorneys' comments are not evidence and the attorneys are being allowed to comment solely for the purpose of helping you to understand the evidence.

After the evidence has been presented, the attorneys will make closing arguments. These closing arguments are not evidence. I will then give you final instructions on the law that applies to the case. After the closing arguments and instructions, you will then decide the case.

Authority:

FEDERAL CIRCUIT BAR ASSOCIATION MODEL PATENT JURY INSTRUCTIONS, Instruction A.5 (2009) (adapted); Closing Jury Instructions in *Cornell Univ.*

v. Hewlett-Packard Co., 01-CV-1974-RRR-DEP (N.D.N.Y.) (Hon. R. Rader sitting by designation).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 25, 2010 all counsel of record were served with a copy of the foregoing JOINT PRELIMINARY JURY INSTRUCTIONS by the Court's CM/ECF system per Local Rule CV-5(a)(3).

DATE: April 25, 2010 /s/ Mark N. Reiter