

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

IRON OAK TECHNOLOGIES, LLC,
Plaintiff,

V.

HP INC.

Defendant

Journal of Management Inquiry

CIVIL ACTION NO. 1:17-cv-01068

JURY TRIAL DEMANDED

MICROSOFT CORPORATION'S UNOPPOSED MOTION TO INTERVENE

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT.....2

I. Microsoft Is Entitled to Intervene as of Right Pursuant to Rule 24(a)(2). 2

 A. Microsoft’s Motion to Intervene Is Timely. 3

 B. Microsoft Has a Significant Interest in This Lawsuit. 4

 C. Microsoft’s Ability to Protect its Interests Will Be Impaired
 if it Cannot Intervene. 6

 D. HP Cannot Adequately Represent Microsoft’s Interest..... 7

II. In the Alternative, Microsoft Should Be Permitted to Intervene Permissively. 8

CONCLUSION 9

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>City of Houston v. Am. Traffic Sols., Inc.</i> , 668 F.3d 291 (5th Cir. 2012)	2
<i>Edwards v. City of Houston</i> , 78 F.3d 983 (5th Cir. 1996)	3
<i>Heaton v. Monogram Credit Card Bank of Ga.</i> , 297 F.3d 416 (5th Cir. 2002)	7, 8
<i>Indus. Tech. Research Inst. v. LG Elecs., Inc.</i> , No. 3:13-cv-2016-GPC-WVG, 2014 WL 5325709 (S.D. Cal. Oct. 17, 2014)	6
<i>Intellectual Ventures I LLC v. AT&T Mobility LLC</i> , No. 12-cv-193-LPS, 2014 WL 4445953 (D. Del. Sept. 8, 2014)	5, 7
<i>Iron Oak Technologies, LLC v. Dell Inc.</i> , No. 1:17-cv-00999 (W.D. Tex., Austin Div.)	5
<i>Reid v. General Motors Corp.</i> , 240 F.R.D. 257 (E.D. Tex. 2006)	9
<i>Sec. and Exch. Comm’n v. U.S. Realty & Imp. Co.</i> , 310 U.S. 434 (1940)	8
<i>Secure Axxess, LLC v. Nintendo of Am. Inc.</i> , No. 2:13-cv-32-JRG, 2014 WL 986169 (E.D. Tex. Mar. 7, 2014), <i>vacated sub nom.</i> <i>In re Nintendo of Am., Inc.</i> , 756 F.3d 1363 (Fed. Cir. 2014)	4
<i>Select Retrieval, LLC v. ABT Elecs.</i> , No. 11-cv-3752, 2013 WL 6576861 (N.D. Ill. Dec. 13, 2013)	5
<i>Sierra Club v. Espy</i> , 18 F.3d 1202 (5th Cir. 1994)	3
<i>Stauffer v. Brooks Brothers, Inc.</i> , 619 F.3d 1321 (Fed. Cir. 2010)	2
<i>Texas v. United States</i> , 805 F.3d 653 (5th Cir. 2015)	2, 4, 7
<i>TiVo Inc. v. AT&T, Inc.</i> , No. 2:09-cv-259, 2010 WL 10922068 (E.D. Tex. Mar. 31, 2010)	3, 8
<i>U.S. Ethernet Innovations, LLC v. Acer, Inc.</i> , No. 6:09-cv-448-JDL, 2010 WL 11488729 (E.D. Tex. May 10, 2010)	6, 9

Other Authorities

Federal Rule of Civil Procedure 24.....*passim*

INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 24, Microsoft Corporation (“Microsoft”) files this unopposed motion for leave to intervene in the above-entitled action as of right pursuant to Rule 24(a)(2), or alternatively, with permission of the Court pursuant to Rule 24(b)(1)(B).¹ As the marketers, sellers, distributors, and sole suppliers of the Windows products identified in Iron Oak’s infringement allegations, Microsoft is a “true defendant” to this action, with a clear interest in this litigation and the right to be a party defendant.

Plaintiff Iron Oak Technologies, LLC (“Iron Oak”) brought suit against HP Inc. (“HP”) asserting infringement of two patents assigned to Iron Oak: U.S. Patent No. 5,699,275 (“the ’275 Patent”) and U.S. Patent No. 5,966,658 (“the ’658 Patent”) (collectively, the “Asserted Patents”). Dkt. 1 ¶¶ 9, 17. *See also*, Dkt. 11 ¶¶ 9, 17. Iron Oak claims that the Asserted Patents are infringed by “HP laptops and tablets . . . running Microsoft Windows XP, Windows Vista, or Windows 7, or other windows versions . . .” (“the Accused Products”). *See* Dkt. 1-4 at 2, 9.² Throughout its charts alleging infringement, Iron Oak repeatedly references operations provided by Microsoft Windows code and/or through Microsoft web sites. Dkt. 1-4, *passim*.

Microsoft is a “true defendant” in this case with a direct and substantial interest in this litigation. Microsoft is the developer, marketer, and distributor of the Windows operating systems relied upon prominently in Iron Oak’s infringement theories. Microsoft supplied HP (and other United States customers) with the Windows products, and, as the supplier of the accused Windows operating systems, Microsoft has a substantial interest in defending the Accused Products against

¹ Microsoft attaches to this Motion its Complaint in Intervention, (Ex. 1) as required by Rule 24(c).

² Iron Oak’s Amended Complaint, Dkt. 11, references the accused products as described in Exhibit F; however, Iron Oak failed to attach an Exhibit F to the Amended Complaint. The citations in this Motion to accused products, therefore, are to Exhibit F to Iron Oak’s Complaint, Dkt. 1-4.

allegations of infringement. Indeed, Microsoft’s relationship with HP, as well as with its other domestic customers who are not parties to this suit, could be greatly impacted by the outcome of this litigation. Microsoft is a true defendant in this matter, and Microsoft is entitled to intervene as a matter of right pursuant to Rule 24(a)(2).³

ARGUMENT

I. MICROSOFT IS ENTITLED TO INTERVENE AS OF RIGHT PURSUANT TO RULE 24(A)(2).

Federal Rule of Civil Procedure 24(a) governs intervention as of right. *Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015). Because the issue of intervention is not unique to patent law, regional circuit law controls. *See Stauffer v. Brooks Brothers, Inc.*, 619 F.3d 1321, 1328 (Fed. Cir. 2010) (denial of intervention reviewed under regional circuit’s law). Rule 24 is to be “liberally construed,” and under Fifth Circuit law, courts “should allow intervention where no one would be hurt and the greater justice could be attained.” *Texas*, 805 F.3d at 657 (quoting *Brumfield v. Dodd*, 749 F.3d 339, 341 (5th Cir. 2014) and citing *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994)).

Under Rule 24(a)(2), a movant must be permitted to intervene when the four requirements of Fed. R. Civ. P. 24(a)(2) are met:

- (1) the application for intervention must be timely;
- (2) the applicant must have an interest relating to the property or transaction which is the subject of the action;
- (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest;
- (4) the applicant’s interest must be inadequately represented by the existing parties to the suit.

Texas, 805 F.3d at 657 (citation omitted). Intervention as of right “must be measured by a practical rather than technical yardstick.” *City of Houston v. Am. Traffic Sols., Inc.*, 668 F.3d 291, 293 (5th

³ Alternatively, Microsoft requests that the Court allow it to intervene permissively pursuant to Rule 24(b)(1)(B).

Cir. 2012) (internal quotation marks omitted). Here, Microsoft meets all four requirements.

A. Microsoft’s Motion to Intervene Is Timely.

Timeliness is determined from all of the circumstances in a case, including the time lapse between notice of the intervenor’s interest in the case to the filing of the motion to intervene, the extent of prejudice to existing parties as a result of timing of the motion, the extent of the prejudice to the moving party if leave to intervene is denied, and the existence of unusual circumstances militating either for or against a determination that the motion is timely. *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996). The timeliness analysis is contextual, not absolute, and “[t]he requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner.” *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994).

Here, Microsoft has moved to intervene in the very early stages of this case, and Iron Oak suffers no prejudice based on the timing of this motion. Indeed, Iron Oak does not oppose this motion. Iron Oak brought suit against HP less than four months ago, on November 10, 2017. Dkt. 1. HP filed a Motion to Dismiss Plaintiff’s Complaint on January 18, 2018, Dkt. 8, and Iron Oak filed an Amended Complaint on February 1 2018, Dkt. 11. HP recently filed a renewed Motion to Dismiss Plaintiff’s Amended Complaint on February 15, 2018, Dkt. 13, and that motion remains pending. The Court has not held a scheduling conference in this case, nor has it set a date for trial. Accordingly, at this early stage of the proceedings, Microsoft’s motion to intervene is timely. *See, e.g., TiVo Inc. v. AT&T, Inc.*, No. 2:09-cv-259, 2010 WL 10922068, at *4 (E.D. Tex. Mar. 31, 2010) (no delay where nearly five months elapsed between filing of complaint and motion to intervene); *see also Edwards*, 78 F.3d at 1001 (noting that “most of our case law rejecting petitions for intervention as untimely concern motions filed after judgment was entered in the litigation”).

Moreover, there is no prejudice to HP by the timing of Microsoft’s motion to intervene,

and HP likewise supports the motion. Given that a schedule has only just been set and trial is still over two years away, no party is prejudice based on the timing of this motion.

B. Microsoft Has a Significant Interest in This Lawsuit.

The Fifth Circuit has interpreted Rule 24(a)(2) to require a “direct, substantial, legally protectable interest in the proceedings.” *Texas*, 805 F.3d at 657 (internal quotation marks omitted). This “inquiry turns on whether the intervenor has a stake in the matter that goes beyond a generalized preference that the case come out a certain way.” *Id.*

Here, Microsoft has a direct, substantial, and legally protectable interest in this litigation because Microsoft is a “true defendant” to Plaintiff’s claims against the Accused Products. *Secure Axxess, LLC v. Nintendo of Am. Inc.*, No. 2:13-cv-32-JRG, 2014 WL 986169, at *5 (E.D. Tex. Mar. 7, 2014) (finding party responsible for the marketing, sale, and distribution of accused products to retailers to be “true defendant”), *vacated sub nom. In re Nintendo of Am., Inc.*, 756 F.3d 1363, 1365 (Fed. Cir. 2014) (“[W]e agree with the district court that . . . Nintendo is the true defendant.”).

Iron Oak alleges that HP laptops and tablets running various versions of Windows infringe both asserted patents. Iron Oak’s Original Complaint against HP included claim charts (and Iron Oak’s Amended Complaint references claim charts) purporting to support its infringement theories and referencing Microsoft’s products, services and technology, including the Automatic Update and automatic network connection features of multiple Windows operating systems. Dkt. 1-4 (Exh. F). Iron Oak accuses “HP Laptops and Tablets . . . running Microsoft Windows” To support that accusation, Iron Oak identifies features of the Windows operating systems, Microsoft websites, or functionality that would be present on virtually any personal computer running Windows for each element of the asserted claims. *Id.* at 2-11.

Microsoft develops, markets, and distributes to HP the Windows operating systems that

provide features that, when implemented on HP computers, Iron Oak accuses of infringement. Microsoft's direct interest in the ongoing development, marketing, and distribution of these products is put at risk by Plaintiff's allegations of infringement. *See, e.g., Intellectual Ventures I LLC v. AT&T Mobility LLC*, No. 12-cv-193-LPS, 2014 WL 4445953, at *2 (D. Del. Sept. 8, 2014) (“[In a patent infringement action,] intervention is necessary to enable Intervenor to protect their interest in products which Intervenor manufacture for Defendants, an interest put at risk by the litigation as Plaintiffs accuse these products of infringement.”).

Moreover, Microsoft's greater interest stems from the fact that it provides Windows operating systems to other customers in the United States, and thus has a greater interest in directly defending the potential claims against its own technology. Future lawsuits against its other customers could lead to inconsistent judgments. *See Select Retrieval, LLC v. ABT Elecs.*, No. 11-cv-3752, 2013 WL 6576861, at *2–3 (N.D. Ill. Dec. 13, 2013) (finding intervention of right supported by fact that intervenor's “other customers” were not accused of infringement, and “[intervenor] (through its customers) would be subject to potentially inconsistent judgments regarding whether its technology infringes the patent,” and intervenor's “ability to defend its technology could be compromised”). Because the non-Windows features identified in Iron Oak's claim charts would be present on virtually any personal computer, Microsoft has a reasonable apprehension that Iron Oak will sue other Microsoft customers. Indeed, Iron Oak has already filed suit against another of Microsoft's customers in this District alleging infringement of the same patents by products running Windows operating systems. *See Iron Oak Technologies, LLC v. Dell Inc.*, No. 1:17-cv-00999 (W.D. Tex., Austin Div.), Dkt. 15-3.

Additionally, Microsoft's interest arises from the potential harm to its other customer relationships should HP be found to infringe. *See U.S. Ethernet Innovations, LLC v. Acer, Inc.*,

No. 6:09-cv-448-JDL, 2010 WL 11488729, at *2 (E.D. Tex. May 10, 2010) (“Courts have held that beyond the injury that might arise from having to indemnify customers, a manufacturer such as [the Intervenor] faces the loss of its customer base and reputation as a result of patent infringement allegations.”) (citing *WS Packaging Grp., Inc. v. Global Commerce Grp., LLC*, 505 F. Supp. 2d 561, 566 (E.D. Wis. 2007)); *see also Indus. Tech. Research Inst. v. LG Elecs., Inc.*, No. 3:13-cv-2016-GPC-WVG, 2014 WL 5325709, at *4 (S.D. Cal. Oct. 17, 2014) (finding (while undisputed) a protectable interest where “[intervenor] may be unable to sell [the accused product] to U.S. customers if Plaintiff were to succeed in this litigation,” which may “adversely impair [intervenor’s] significantly protectable interest”).

Accordingly, Microsoft is entitled to defend vigorously issues such as claim construction, validity, and infringement that could impact Windows products well beyond the confines of this litigation. Microsoft’s substantial interests in this lawsuit warrant intervention as of right.

C. Microsoft’s Ability to Protect its Interests Will Be Impaired if it Cannot Intervene.

Microsoft’s ability to protect and defend its Windows products will be compromised if it does not intervene as a defendant in this action. For Iron Oak’s allegations that focus on features of the Windows operating systems and Microsoft’s websites, Microsoft is best suited to ensure that the facts regarding these products are fully developed and presented in this case.

Moreover, an adverse ruling could potentially impact Microsoft’s reputation and sales with its customer base, *see, e.g., U.S. Ethernet*, 2010 WL 11488729, at *2, affecting Microsoft’s relationships with other customers not named as defendants here. HP cannot be expected to defend Microsoft’s greater interest in protecting Microsoft’s customer base, especially where other Microsoft customers compete with HP.

Finally, an adverse judgment could also create precedent that could be used against

Microsoft and its customers in other proceedings related to the Windows operating systems. “The stare decisis effect of an adverse judgment constitutes a sufficient impairment to compel intervention.” *Heaton v. Monogram Credit Card Bank of Ga.*, 297 F.3d 416, 424 (5th Cir. 2002). For instance, this Court’s findings could potentially and adversely impact future issues of preclusion, infringement, equitable defenses, and invalidity determinations that bear directly on Microsoft’s products. Thus, Microsoft is best suited to protect its interests by intervening in this lawsuit.

D. HP Cannot Adequately Represent Microsoft’s Interest.

In the Fifth Circuit, in order to satisfy the “inadequate representation” requirement of Rule 24(a)(2), Microsoft need demonstrate only that its interests “may be” inadequately represented by the existing parties. *Texas*, 805 F.3d at 661. Although Microsoft bears the burden to establish inadequate representation, that burden is “minimal,” just not so minimal “as to write the requirement completely out of the rule.” *Id.* (citations omitted).

Here, HP cannot adequately represent Microsoft’s interests absent Microsoft’s intervention because HP is not as “well-situated to understand and defend [Microsoft’s] products.” *Intellectual Ventures*, 2014 WL 4445953, at *2. HP computers contain many third-party components and software, and HP cannot be expected to shoulder the burden of becoming a technical expert on and the chief defender of each of these third-party products. In contrast, Microsoft possesses direct and superior technical knowledge of the Windows operating systems’ design and function and is best suited to ensure that Microsoft’s interests are adequately represented. Microsoft employs individuals with intimate knowledge of technical details of the identified Windows features, the industry standards and expectations with which these features conform, and the design and development processes underlying the Windows operating systems and Microsoft web sites. Microsoft also possesses documents related to the design and development of Windows. Microsoft

is simply better suited to defend the Microsoft Products involved in this lawsuit, and its presence as a party in this action will promote judicial economy and facilitate discovery.

Moreover, although HP can be expected to continue to defend against Iron Oak's allegations, Microsoft's interest in protecting its products from a finding of infringement far exceeds HP's interest. Microsoft sells the accused Windows products to other customers who are not named in this lawsuit—at least some of whom are direct competitors of HP. HP's defense of the infringement claims may be inadequate to protect Microsoft's interests with regard to these competing companies. *See Heaton*, 297 F.3d at 425 (“That the FDIC's interests and Monogram's may diverge in the future, even though, at this moment, they appear to share common ground, is enough to meet the FDIC's burden on this issue.”) (citation omitted).

Given that Microsoft has established all four requirements of Fed. R. Civ. P. 24(a), Microsoft is entitled to intervene as a matter of right.

II. IN THE ALTERNATIVE, MICROSOFT SHOULD BE PERMITTED TO INTERVENE PERMISSIVELY.

Microsoft alternatively requests the Court's permission to intervene under Federal Rule of Civil Procedure 24(b), which permits intervention for a party who “has a claim or defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P. 24(b)(1)(B); *TiVo Inc.*, 2010 WL 10922068, at *4. Permissive intervention “plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation.” *Sec. and Exch. Comm'n v. U.S. Realty & Imp. Co.*, 310 U.S. 434, 459-60 (1940).

Permissive intervention is appropriate here. Plaintiff's infringement allegations are directed at Windows products Microsoft supplies to HP. Consequently, the Court hearing this case could potentially determine common issues of preclusion, noninfringement, invalidity, and other determinations that bear directly on Microsoft's products, as well as HP's defense of this litigation.

See, e.g., U.S. Ethernet, 2010 WL 11488729, at *2 (granting permissive intervention where intervenor shared common questions of law and fact and similar defenses as named defendant); *Reid v. General Motors Corp.*, 240 F.R.D. 257, 260 (E.D. Tex. 2006) (granting intervention where intervenor and named defendant shared issues of noninfringement, invalidity, and unenforceability). Finally, as noted above, at this early stage, there is no undue delay or prejudice to either Iron Oak or HP if Microsoft is allowed to intervene.

CONCLUSION

For the foregoing reasons, Microsoft is entitled to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2), or permissively pursuant to Fed. R. Civ. P. 24(b)(1)(B).

Dated: February 23, 2018

Respectfully submitted,

/s/ Kelley A. Conaty

Kelley A. Conaty
kconaty@sidley.com
Texas Bar No. 24040716
SIDLEY AUSTIN LLP
2021 McKinney Avenue, Suite 2000
Dallas, TX 75201
(214) 981-3300

Richard A. Cederoth
(pro hac vice pending)
rcederoth@sidley.com
SIDLEY AUSTIN LLP
1 S. Dearborn Street
Chicago, IL 60603
(312) 853-7000

Michael J. Bettinger
(admitted *pro hac vice*)
mbettinger@sidley.com
SIDLEY AUSTIN LLP
555 California Street, Suite 2000
San Francisco, CA 94104
(415) 772-1200

ATTORNEYS FOR
MICROSOFT CORPORATION

CERTIFICATE OF SERVICE

I certify that on February 23, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Kelley A. Conaty
Kelley A. Conaty

CERTIFICATE OF CONFERENCE

Counsel for Microsoft Corporation conferred with counsel for Plaintiffs and counsel for HP, Inc. No party opposes this motion.

/s/ Kelley A. Conaty
Kelley A. Conaty