



February 20, 2010

A Reply by Professor Andrew Chin

Through its counsel, Jan McDavid, IBM has submitted a response to my white paper on “Refusals to License and Installed-Base Opportunism in the Mainframe Computer Industry: The Investigation of IBM.” Both my paper and Ms. McDavid’s response are based primarily on factual contentions raised by the parties in *T3 Technologies v. IBM*, now pending in the Second Circuit. Because the district court in that case dismissed the complaint on the pleadings, and the predecessor case (*IBM v. Platform Solutions, Inc.*) was mooted when IBM acquired PSI, none of these factual disputes have been resolved. Ms. McDavid apparently seeks to litigate those factual disputes through the AAI’s publication of her response.

Of course, the AAI is not an appropriate forum for such litigation. And of course, I am not — and therefore cannot act as — an attorney on behalf of T3, PSI or any other party in the pending proceedings. This is why, throughout my paper, I refer to T3’s factual allegations as alleged facts. Ms. McDavid repeatedly accuses me of factual error, but nowhere explains why it is factually erroneous to refer to allegations as allegations. In fact, if it were a rule that a comment cannot make reference to allegations (without concluding whether the allegations have merit), it would be impossible to educate the public as to what may be at stake in an important public controversy that is being litigated and apparently also being investigated by the government.

Ironically, it is IBM and their attorneys who have consistently sought to preclude the *judicial* review of factual disputes in the *T3* case. In the district court, IBM moved to dismiss T3’s complaint, thereby precluding any substantive review of the disputed facts. Judge Kaplan’s decision granting that motion is based on his review of the pleadings and the undisputed facts, and appropriately makes no findings as to any disputed facts. Ms. McDavid erroneously characterizes Judge Kaplan’s decision as a judicial determination that T3’s case (as described in my paper) “turns on a set of facts . . . that do not exist.”

While Judge Kaplan correctly declined to proceed to factual adjudication on IBM’s motion to dismiss, my paper does take issue with the district court’s failure to acknowledge the limiting role of patent claim scope in defining the right of a patentee unilaterally to refuse a license a patent under the antitrust laws that was recognized, albeit ambiguously, by both the *Xerox* and *Kodak* courts and by numerous subsequent commentators. It is this ambiguity that remains for the Second Circuit to resolve in the *T3* case.

IBM's response nowhere addresses my extensive treatment of these legal propositions. Instead, its allegations of legal "error" stem entirely from my supposed reliance on the proposition that IBM's "true motivation" in refusing to deal was unrelated to any desire to exercise its intellectual property rights (i.e., IP rights were merely a 'pretext')." Such an argument can be found nowhere in my paper. (Indeed, neither the word "pretext" nor the phrase "true motivation" appears anywhere in my paper.) IBM's legal analysis also prematurely assumes that a disputed issue of fact in the *T3* case will be resolved in IBM's favor: i.e., that IBM's refusal to license its patents will be found not to be based on any condition relating to the development, marketing or use of alternative mainframe platforms.

Both the factual allegations in T3's complaint and the legal validity of Judge Kaplan's opinion are still pending review in the Second Circuit. At this juncture, an impartial and careful reader will recognize IBM's response for what it is: a flawed and failed effort to discredit opposing views on the courthouse steps.