

No. 10-290

IN THE
Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

i4i LIMITED PARTNERSHIP, *et al.*,
Respondents.

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

**BRIEF *AMICI CURIAE* OF
INTELLECTUAL VENTURES MANAGEMENT,
DR. ANANDA CHAKRABARTY AND THE
HONORABLE DR. G. WILLIAM FOSTER
IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*

As inventors and intellectual property holders, *amici* rely on the protections of the United States patent laws and believe that a strong patent system is necessary to support innovation.

Intellectual Ventures Management fosters innovation by providing inventors with necessary research tools and funding. Intellectual Ventures also develops inventions internally, buys and licenses inventions from others, and routinely prosecutes patents before the PTO. Its co-founder and CEO, Dr. Nathan Myhrvold, is the former Chief Technology Officer of Microsoft.¹

Dr. Ananda Chakrabarty is a scientist and researcher, and the holder of numerous patents. He is the Distinguished University Professor at University of Illinois at Chicago, Department of Microbiology and Immunology. His current work focuses on cells, proteins, and bacteria, and researching ways to prevent the development of human cancer cells. One of Dr. Chakrabarty's patents was the subject of this Court's decision in *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

Dr. George William "Bill" Foster is one of the few Ph.D. physicists ever to have served in Congress, representing the 14th District of Illinois from March

¹ Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel has made a monetary contribution intended to fund its preparation or submission. Counsel for all parties consented to the filing of this brief and copies of the letters of general consent have been filed with the Clerk.

2008-2011. He received his Ph.D. in Physics from Harvard University in 1983. He has been elected a Fellow of the American Physical Society; received the Rossi Prize for Cosmic Ray Physics for the discovery of the neutrino burst from Supernova SN1987a; received the Particle Accelerator Technology Prize from the Institute of Electrical and Electronic Engineers; and was awarded an Energy Conservation award from the U.S. Department of Energy for his invention and application of permanent magnets for Fermilab's accelerators. He has played a leading role in several groundbreaking experiments in elementary particle physics, and has designed and built equipment using a number of advanced technologies, including high speed electronics, superconducting magnets, analog and digital integrated circuit design, and high power electronics. Dr. Foster is also the co-founder of Electronic Theatre Controls, Inc., the world's largest manufacturer of stage lighting equipment. It has patented many of its inventions during its 35 years of existence and has both enforced those patents and defended against patent actions by others.

Because *amici* rely on patent laws to protect their investments and innovations, they have a vital interest in ensuring that patent laws are applied in a manner consistent with the ultimate constitutional goals of providing for a limited term of exclusive use for new technologies, in order to encourage their development and disclosure to benefit the public.

Amici are concerned that the sweeping change to the prevailing legal standard proposed by Microsoft will have a significant adverse effect on investments by the most innovative creators and distributors of technology, harm consumers and the economy,

disturb the policies established by Congress in the Patent Act, disrupt the settled expectations of inventors, and upend over a century of case law from this Court holding that a clear and convincing standard is appropriate when attempting to invalidate a written instrument of the United States.

SUMMARY OF ARGUMENT

For over a century, this Court has required clear and convincing evidence to invalidate a patent. In 1934, Justice Cardozo traced the history of the strong presumption of patent validity and wrote for this Court: “[T]hrough all the verbal variances, however, there runs this common core of thought and truth, that one otherwise an infringer who assails the validity of a patent fair upon its face bears a heavy burden of persuasion, and fails unless his evidence has more than a dubious preponderance.” *Radio Corporation of America v. Radio Engineering Laboratories*, 293 U.S. 1, 8 (1934). Yet a “dubious preponderance” standard is exactly what Microsoft and its *amici* now propose.

The clear and convincing standard for invalidating a patent is an integral part of maintaining a strong and stable patent property right. Consistency in the patent right is vital to maintaining a continually innovative society. Inventors and investors rely on a robust and predictable patent system to promote innovation. “[L]ike any property right, [a patent’s] boundaries should be clear. This clarity is essential to promote progress, because it enables efficient investment in innovation.” *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki*, 535 U.S. 722, 730-31 (2002). Changing the standard of proof upsets these settled expectations.

Congress has refused to alter the clear and convincing standard despite repeated opportunities to do so. In the patent reexamination context outside of litigation, no presumption of validity applies. “A prima facie case of unpatentability of a claim pending in a reexamination proceeding is established when the information compels a conclusion that a claim is unpatentable under the preponderance of evidence, burden-of-proof standard.” 37 C.F.R. § 1.555(b). If the Court changes the standard here to a preponderance of the evidence, the same standard would apply to challenges both with a presumption of validity and without one. Such an anomalous result shows why overcoming the presumption in 35 U.S.C. § 282 requires clear and convincing evidence. Any other result would strip Section 282 of any effective force.

Moreover, the clear and convincing standard is appropriate to invalidate a patent. Historically, in challenges to a duly issued written instrument of the United States, a challenger needed to show more than a preponderance of evidence in order to invalidate the instrument. For example, in *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 381 (1887), the Court traced the history of why a high standard applies to the invalidation of written instruments. *Maxwell* also discussed how a “clear, unequivocal, and convincing” standard was even more important when the government issues a written instrument due to the “title emanating from the government of the United States under its official seal.” *Id.*

The United States Patent and Trademark Office (PTO) examines the application not just for prior art,

but also for the other requirements of a patent, such as written description, enablement, and definiteness. The PTO also searches for relevant prior art references. While many of these references are cited in the file history, the Manual of Patent Examination and Procedure specifically instructs examiners that “[t]he examiner is not called upon to cite all references that may be available, but only the ‘best.’” U.S. Patent and Trademark Office, *Manual of Patent Examining Procedure* (8th ed., rev. 1, Jul. 2010) § 904.03. Thus, the premise of Microsoft’s original argument in its petition for certiorari – that all prior art that has been considered by the examiner is cited in the patent – is simply incorrect. The PTO may have considered many prior art references that are not cited on the face of the patent or in the prosecution history.

Microsoft’s argument that a preponderance standard applies when the PTO has not considered the reference also raises numerous difficult issues. For example, the following consequences could arise:

- A preponderance standard could apply even if uncited references are less relevant to the claimed invention than the cited references. In such a case, any uncited prior art may weaken the patent, even if not at all material to the issued claims.
- The same effect could occur if the patentee has cited a prior art patent, but not a related scientific paper with exactly the same disclosure as the patent. The uncited paper is immaterial because the patent has issued over the identical disclosure from the related patent. Nonetheless the lowering of the standard as proposed in the instant case would weaken the patent.

- Microsoft’s dual-standard position also raises issues of how to treat other validity challenges such as written description, enablement, and indefiniteness that do not depend on prior art.

- It is not clear how, when and by which entities these issues should be resolved. Microsoft seems to ask this Court effectively to legislate these important questions.

- Litigation about the nature of uncited prior art references (*e.g.*, their relevance, whether they are cumulative, whether they were actually ever considered by the PTO) will lead to lengthy and expensive litigation discovery, motions and proceedings before final determination of infringement and validity.

Congress is the appropriate body to decide these questions, which require careful study and consideration of effects upon the U.S. patent system and economy. “From their inception, the federal patent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989). Moreover, such a balancing is especially appropriate here, because of the asymmetry in collateral estoppel. Patent holders can never assert their patent again once it is found invalid, while a judicial finding that a patent is not invalid still leaves the patent open to later challenges. As a result, patentees risk invalidation of their patents every time they litigate, even if a patent has been found not invalid in numerous

previous actions. *Blonder-Tongue Labs. v. Univ. of Illinois Found.*, 402 U.S. 313, 329-30, 350 (1971).

If adopted, Microsoft’s argument would “disrupt the settled expectations of the inventing community. . . . Fundamental alterations in [patent] rules risk destroying the legitimate expectations of inventors in their property.” *Festo*, 535 U.S. at 739. Because Microsoft’s argument is contrary to precedent, history, and the statute, this Court should affirm the judgment below.

ARGUMENT

I. A STRONG AND STABLE PATENT PROPERTY RIGHT GRANT IS FUNDAMENTAL TO PROTECTING INNOVATION

For well over a century, accused infringers have had to demonstrate clear and convincing evidence in order to invalidate a patent. As Justice Cardozo wrote for the Court in *Radio Corporation of America v. Radio Engineering Laboratories*, 293 U.S. 1, 8 (1934) (Cardozo, J.) (“RCA”), “there runs this common core of thought and truth, that one otherwise an infringer who assails the validity of a patent fair upon its face bears a heavy burden of persuasion, and fails unless his evidence has more than a dubious preponderance.” Investors have relied and continue to rely on this standard of proof, which affects the value of every patent. Finding in favor of Microsoft’s argument risks upsetting the settled expectations of all who rely on the patent system to protect intellectual property – inventors, investors, and companies of all sizes.

A. Patents Encourage and Promote Innovation

This Court and Congress have recognized that the patent right granted by the Constitution is a form of property that promotes innovation. “The inventor has, during this period, a property in his inventions: a property which is often of very great value, and of which the law intended to give him the absolute enjoyment and possession.” *Ex parte Wood & Brundage*, 22 U.S. (9 Wheat) 603, 608 (1824). “[A] patent owner . . . possesses ‘the right to exclude others from using his property.’” *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); *see also Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki*, 535 U.S. 722, 73(2002) (noting that a patent “rewarding innovation with a temporary monopoly . . . is a property right”); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (holding that patents are a property right subject to Fourteenth Amendment protections). This right was “a reward, an inducement, to bring forth new knowledge.” *Graham v. John Deere Co.*, 383 U.S. 1, 9 (1966) (discussing the views of Thomas Jefferson). Congress also explicitly has recognized that “patents shall have the attributes of personal property.” 35 U.S.C. § 261.

From the time of the Constitution itself, inventors long have relied on a strong patent system, as well as on investors, to develop and fund their innovations.²

² At the Constitutional Convention in August 1787, an inventor of the steamship — John Fitch — demonstrated his new invention to most of the Conventions’ delegates. Thompson Westcott, *Life of John Fitch: The Inventor of the Steamboat* 192 (1857). Two weeks later, the Convention approved the Patents
(continued...)

To this day, investors remain vital and necessary in bringing patents to market. The PTO office “may be the single greatest facilitator of private sector job creation and economic growth in America. It is this agency, after all, that issues the patents that small businesses — especially technology startups — need to attract venture capital investment, develop new products and services, and serve their historic role as the primary source of almost all new net job growth in America.” Henry R. Nothhaft & David Kline, *The Biggest Job Creator You Never Heard Of: The Patent Office*, Harv. Bus. Rev. (May 6, 2010) (available at http://blogs.hbr.org/cs/2010/05/the_biggest_job_creator_you_ne.html) (last visited March 16, 2011). Patents themselves contribute up to 22.5% of the value of the S&P 500. See FTC Testimony of James Malackowski, *The Evolving IP Marketplace* (April 17, 2009) (available at <http://www.ftc.gov/bc/workshops/ipmarketplace/apr17/docs/jmalackowski.pdf>) (last visited March 16, 2011).

Many independent inventors and small companies still raise necessary funding by selling interests in their ventures to financial backers willing to take a risk on an unproven idea. These inventors join laboratories that give them access to equipment and resources in exchange for a share of the company. They create business plans in order to convince venture capitalists to invest in an unproven

Clause. This history — along with the importance of the inventors’ ability to raise money to bring their ideas to market — appears in Brief *Amici Curiae* of Martin Cooper and Intellectual Ventures *et al.* on Behalf of Respondent, *eBay, Inc. v. MercExchange*, L.L.C. No. 05-130, Supreme Court of the United States (filed March 10, 2006).

product. See, e.g., Warren K. Mabey, Jr., *Deconstructing The Patent Application Backlog - A Story Of Prolonged Pendency, PCT Pandemonium & Patent Pending Pirates*, 92 J. Pat. & Trademark Off. Soc'y 208 (2010) (“[S]mall startup firms generally rely on patents to attract venture-capital. In many high technology fields, the only asset that small startup firms may have is the promise of patent protection.”) (citing testimony of David Kappos, the then-Vice President and Assistant General Counsel at IBM and the current Director of the Patent and Trademark Office); Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry*, 83 Tex. L. Rev. 961, 974-76 (2005) (discussing the role of patent rights in facilitating investment in the software industry). And they license their patents to others in exchange for royalty payments, which in many cases help fund future research and development. Cf. *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979) (“Permitting inventors to make enforceable agreements licensing the use of their inventions in return for royalties provides an additional incentive to invention.”).

Venture capitalists, angel investors, and corporations require strong patent protection if they are to invest in a small company whose only asset is an idea. See, e.g., David J. Kappos, *Building Bridges and Making Connections Across the IP System*, 20 Fed. Cir. Bar J. 273, 274 (2010) (noting that “76% of startup managers report that VC investors consider patents when making funding decisions”) (speech of Director of PTO); Clarisa Long, *Patent Signals*, 69 U. Chi. L. Rev. 625, 653 (2002) (“Among venture capitalists, both the quantity and quality of patents have long been factors that are taken into

consideration when deciding whether to invest in a company, particularly in its early stages.”); Mark A. Lemley, *Reconceiving Patents In The Age Of Venture Capital*, 4 J. Small & Emerging Bus. L. 137, 143 (2000) (“Venture capitalists love patents”). While some of these start-up companies become highly successful, others encounter difficulties for various reasons. But ideas that fail in the market when first attempted often later succeed when market and technological factors mature.

Investors recognize such pitfalls, yet still risk their capital. Their ability to profit – and thus invest in the first instance – depends in large measure on the predictability of patent rules and on the knowledge that intellectual property allows them to recoup their investment. To those who invest in innovation, a patent system that properly values intellectual property is critical. A large component of this regime is the clear and convincing evidence standard for challenges to a patent’s validity. Investors have relied and continue to rely on this standard, which affects the value of every single issued patent.

B. Lowering the Standard of Proof Would Disrupt the Settled Expectations of Inventors and Investors

This Court and the Federal Circuit consistently have held that an issued patent acquires a presumption of validity that a challenger can overcome only by showing more than a preponderance of the evidence.

“[T]he presumption of validity shall prevail against strangers as well as parties unless the

countervailing evidence is clear and satisfactory.” *RCA*, 293 U.S. at 9; *see also id.* at 2 (“[T]here is a presumption of validity, a presumption not to be overthrown except by clear and cogent evidence.”). The Brief of the American Intellectual Property Law Association ably demonstrates the long history of this Court requiring challengers to demonstrate this high threshold of evidence. *See* Brief of American Intellectual Property Law Association On Behalf of Neither Party (filed February 2, 2011) at 6-13 (discussing, among others, *RCA*, 238 U.S. at 1; *Mitchell v. Tilghman*, 86 U.S. 287, 390-91 (1873); *Cantrell v. Wallick*, 117 U.S. 689, 695 (1886); *The Barbed Wire Patent*, 143 U.S. 275, 284 (1892); *Morgan v. Daniels*, 153 U.S. 120 (1894); *Adamson v. Gilliland*, 242 U.S. 350, 353 (1917); and *Mumm v. Jacob E. Decker & Sons*, 301 U.S. 168, 171 (1937)).

In *Washburn v. Gould*, 29 F. Cas. 312, 320 (C.C.D. Mass. 1844), Justice Story’s jury instructions for a challenge to a patent’s validity based on prior art stated that the alleged infringer “must satisfy you beyond a reasonable doubt, that there was a prior invention to Woodworth’s, because the plaintiff has a right to rest upon his patent for his invention, till its validity is overthrown.” And while, in the words of the *RCA* court, the “verbal variances” changed in the ninety years between *Washburn* and *RCA*, it remained true that a defendant could not overcome a patent’s presumption of validity merely by showing a preponderance of the evidence. 293 U.S. at 8.

Since its inception, the Federal Circuit also has required an evidentiary showing of invalidity higher than a mere preponderance. *See Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1549 (Fed. Cir. 1983).

Indeed, its “clear and convincing” formulation is the modern-day equivalent to the “clear and satisfactory” language in this Court’s decision in *RCA*. One of the principal authors of the 1952 Patent Act, Judge Rich of the Federal Circuit, wrote for that court that the standard of proof “must be by clear and convincing evidence or its equivalent, by whatever form of words it may be expressed.” *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1360 (Fed. Cir. 1984) (citing *RCA*); *see also Addington v. Texas*, 441 U.S. 418, 424 (1979) (“The intermediate standard . . . usually employs some combination of the words ‘clear,’ ‘cogent,’ ‘unequivocal,’ and ‘convincing.’”).

“[L]ike any property right, [a patent’s] boundaries should be clear. This clarity is essential to promote progress, because it enables efficient investment in innovation.” *Festo*, 535 U.S. at 730-31. The clear and convincing evidence standard has been settled law in the Federal Circuit for nearly three decades. It has been part of this Court’s decisions since the nineteenth century. Congress has been well aware of this background, and has not changed it. This Court should not lower the standard now.

II. LOWERING THE REQUISITE STANDARD OF PROOF TO A PREPONDERANCE WOULD EFFECTIVELY OVERRULE SECTION 282

Congress was well aware of this Court’s legal precedent on the clear and convincing standard necessary to overcome a patent’s presumption of validity when it codified that presumption in 35 U.S.C. § 282 in 1952. “Section 282 introduces a declaration of the presumption of validity of a patent,

which is now a statement made by courts in decisions, but has had no expression in the statute.” H.R. Rep. No. 82-1923, at 10 (1952); *see also* AIPLA Brief 20-24.

In more recent times, Congress has refused to alter this standard, despite heavy lobbying from interested parties and awareness of this very issue. Senator Hatch, the then-Chairman of the Judiciary Committee’s Subcommittee on Intellectual Property, stated in a hearing addressing this question that “some believe that various aspects of litigation, including the presumption of validity, and the clear and convincing standard of proof place unwarranted burdens on a party seeking to challenge a patent’s validity.” *Perspectives on Patents: Post-Grant Review Procedures and Other Litigation Reforms: Hearing Before the Subcomm. on Intellectual Property of the Senate Comm. on the Judiciary*, 109th Cong. 2 (2006) (statement of Sen. Hatch).³

In contrast, a preponderance standard applies to those processes where Congress has deemed a presumption of validity inappropriate and where Section 282 is inapplicable. For instance, in patent reexamination proceedings, no presumption of

³ *See also American Innovation at Risk: The Case for Patent Reform: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 36 (2007) (statement of Daniel B. Ravicher, Executive Director, Public Patent Foundation) (calling for a negation of the Federal Circuit’s “super presumption”); *Perspectives on Patents: Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 109th Cong. 160–64 (2005) (statement of Joel Poppo, Deputy General Counsel, Micron Technologies, Inc.).

validity exists. See Act of Dec. 12, 1980, Pub. L. No. 96-517, § 1, 94 Stat. 3015 (adding 35 U.S.C., ch. 30, re ex parte reexaminations); Optional Inter Partes Reexamination Procedure Act of 1999, Pub. L. 106-113, 113 Stat. 1536, 1501A-567 (amending 35 U.S.C. § 100 and ch. 30 and adding ch. 31 re inter partes reexaminations); Patent and Trademark Office Authorization Act of 2002, Pub. L. No. 107-273, §§ 13105–106, 116 Stat. 1900–901 (amending 35 U.S.C. §§ 134, 141, 303, 312, 315 to expand scope of “substantial new question of patentability” and provide third-party right to appeal); *In re Etter*, 756 F.2d 852, 856-57 (Fed. Cir. 1985) (describing the reexamination procedure and noting that the “focus of the limited proceedings under Chapter 30 thus returns essentially to that present in an initial examination, *i.e.*, to a time at which no presumption of validity had been created”). In these proceedings, the standard is preponderance of the evidence. See, *e.g.*, 37 C.F.R. § 1.555(b) (“A prima facie case of unpatentability of a claim pending in a reexamination proceeding is established when the information compels a conclusion that a claim is unpatentable under the preponderance of evidence, burden-of-proof standard.”).

Changing the standard to a “preponderance of the evidence” would mean that the same standard applies to challenges *with* a presumption of patent validity and *without* that same presumption. Thus, in the context of patents, a presumption with a “mere preponderance of the evidence” effectively is no presumption at all. *RCA*, 293 U.S. at 8.

**III. THE “CLEAR AND CONVINCING”
STANDARD OF PROOF PROPERLY
REFLECTS THE IMPORTANCE OF A
PATENT’S PROPERTY RIGHT AND IS
CONSISTENT WITH THE HISTORY OF
OTHER WRITTEN INSTRUMENTS OF
THE GOVERNMENT**

In the context of the granting of a government right, a clear and convincing evidence standard to overturn that right is eminently appropriate. It also is consistent with other government grants, especially where the challenge alleges a mistake in a duly issued written instrument of the government. The clear and convincing evidence standard promotes the protection of the property right inherent in a patent grant. It properly places the burden on those who, in effect, wish to divest patentees of their property. “[T]he clear-and-convincing-evidence standard accommodates society’s competing interests in increasing the stability of property rights and in putting resources to their most efficient uses.” *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984).

The patent property right here stems directly from an explicit Constitutional provision. Congress has developed a specific and detailed process by which prospective inventors apply for a patent. The Executive Branch, through the PTO, reviews the merits of a patent application. The PTO determines if the application meets the standards for patentability, such as novelty, non-obviousness, utility, enablement, and written description.

The granting of a patent with its exclusive rights is thus not a matter undertaken lightly. It

represents the full authority of the United States government, through laws enacted by Congress and applied by the Executive Branch, to give inventors a limited exclusive right in exchange for disclosing ideas to the public. “Patents are not given as favors . . . but are meant to encourage invention by rewarding the inventor with the right, limited to a term of years fixed by the patent, to exclude others from the use of his invention.” *Eldred v. Ashcroft*, 537 U.S. 186, 216 (2003) (alteration in original) (quoting *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964)); see also *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 149 (1989).

Once granted, the patent does not give the holder any monetary right. Rather, “the federal patent scheme creates a limited opportunity to obtain a property right in an idea.” *Bonito Boats*, 489 U.S. at 149. That property right is “the right to *exclude* others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States” 35 U.S.C. § 154. While this right of exclusion is limited, it is fundamental to the nature of property rights. “The hallmark of a protected property interest is the right to exclude others. That is ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979)). A challenge to a patent’s validity is thus not a casual undertaking, nor is it equivalent to civil tort law where the burden of proof normally is the preponderance standard.

Indeed, in other areas where the property right depends on a government grant, courts apply a clear and convincing evidence standard in challenges to revoke that property right. In *Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 143 U.S. 394, 416 (1892), this Court discussed another type of government grant — land patents. The Court addressed a mining claim and held that “[t]he presumption in favor of its validity attends the placer patent, as it does all patents of the government of any interest in the public lands which they purport to convey.” The Court further discussed what such presumption meant: “Clear and convincing proof would seem, therefore, to be necessary to overcome the presumption thus arising that the applicant for the placer patent did not know at the time of the existence of any such lode.” *Id.* at 417.

The *Iron Silver* decision was no isolated occurrence. In *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 381 (1887), the Court held that “clear, unequivocal, and convincing” evidence is required to invalidate a federal land patent. The Court noted the strong historical basis for requiring such a standard to invalidate a written instrument, quoting both Justice Story’s treatise and Chancellor Kent:

In Story’s *Equity Jurisprudence* (section 157) it is said that relief will be granted in cases of written instruments only where there is a plain mistake, clearly made out by satisfactory proofs. Chancellor KENT, in the case of *Lyman v. United Ins. Co.*, 2 Johns. Ch. 632, which had reference to reforming a policy of insurance, says: “The cases which treat of this head of equity jurisdiction

require the mistake to be made out in the most clear and decided manner, and to the entire satisfaction of the court.”

121 U.S. at 380-81.

In *Maxwell*, the Court also specifically addressed that it was even more important to keep the clear and convincing standard to revoke a governmental instrument as opposed to a private contract. “[H]ow much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal.” *Id.* at 381. The Court held that because of “the respect due to a patent [and] the presumptions that all the preceding steps required by the law had been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are *clearly stated and fully sustained by proof.*” *Id.* (emphasis added).

The Court in *Maxwell* then reiterated why it was so important to respect a property right duly issued by the United States government:

It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the president of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack

them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.

Id. at 380-81. In short, because of the reliance interests in these government-issued property rights, a preponderance standard was insufficient.

The clear and convincing standard remains in place today for suits involving the eviction or forfeiture of a mining claim. “[F]orfeiture of a mining claim for failure to do annual labor must be established by clear and convincing proof that the former owner has failed to have performed the required work or made the necessary improvements.” *Exxon Mobil Corp. v. Norton*, 346 F.3d 1244, 1252-53 (10th Cir. 2003) (quoting *United States v. Herr*, 130 I.B.L.A. 349, 358 (1994)); *see also United States v. Bagwell*, 961 F.2d 1450, 1455 (9th Cir. 1992) (discussing the standards for evicting a mill site claimant under the Mining Law of 1872 and concluding that “[i]f there is clear and convincing evidence of bad faith under either of these two inquiries, a claimant may be evicted from the mill site and the claim declared invalid”); *cf. Best v. Humboldt Placer Min. Co.*, 371 U.S. 334, 335-36 (1963) (discussing mining rights and stating that “[w]e deal here with a unique form of property. A mining claim on public lands is a possessory interest in land that is ‘mineral in character’ and as respects which discovery ‘within the limits of the claim’ has been made. . . . It must be shown before a [land] patent issues that at the time of the application for patent the claim is valuable for minerals. . . .”) (internal quotation marks omitted).

The Court has applied these land patent principles to invention patents. For example, in *United States v. American Bell Telephone Co.*, 167 U.S. 224, 251 (1897), the Court cited *Maxwell* and held that “[t]he government, therefore, in order to make out its case, must affirmatively show that the delay has been caused in some way by the conduct of the applicant, and before its patent can be set aside the government must, in accordance with the rules laid down in respect to land patents, establish that fact clearly.” *Cf. United States v. Stinson*, 197 U.S. 200, 204 (1905) (land patent case citing both *Maxwell* and *American Bell*).

“[C]ourts must be cautious before adopting changes that disrupt the settled expectations of the inventing community. . . . Fundamental alterations in [patent] rules risk destroying the legitimate expectations of inventors in their property.” *Festo*, 535 U.S. at 739. This Court should not lightly undertake a revision to these “settled expectations” across all issued patents, especially where Congress is aware of the issue and has chosen not to change the law and where this Court has endorsed variations of the “clear and convincing” standard for well over a century. In this case, like others in the intellectual property context, “a page of history is worth a volume of logic.” *Eldred v. Ashcroft*, 537 U.S. 186, 200 (2003) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)); see also *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring) (quoting *New York Trust*). The clear and convincing standard represents the considered judgment of both the Court and Congress to give special protection to the patent’s property right and to its status as a duly-

issued written instrument of the United States Government.

IV. ANY CHANGES TO THE STANDARD OF PROOF FOR CHALLENGES TO PATENT VALIDITY SHOULD COME FROM CONGRESS

Petitioners and their *amici* seek a fundamental change in patent policy, a change that turns on precisely the kind of weighing of interests and gauging of consequences best left to Congress. Changing the precedent requiring a clear and convincing standard of proof for challenges to patent validity requires a balancing between a patentee's right to exclude and public access to innovation. Congress, not this Court, is tasked with weighing these issues and legislating accordingly. "From their inception, the federal patent laws have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy." *Bonito Boats*, 489 U.S. at 146.

Judicially intervening to "fix" one part of the overall scheme risks tilting the balance against applying for a patent at all. "The federal patent system . . . embodies a carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice the invention for a period of years. '[The inventor] may keep his invention secret and reap its fruits indefinitely. In consideration of its disclosure and the consequent benefit to the community, the patent is granted.'" *Id.* at 150-51 (alteration in original)

(quoting *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 186-187 (1933)). It is even more important not to disrupt this “carefully crafted bargain” here because of the practical considerations in determining when to lower the burden of proof and consequences of doing so.

The clear and convincing standard, for example, balances against the risk of invalidity that patent holders face every time they try to enforce the right to exclude. While accused infringers bear the burden of proving a patent’s invalidity by clear and convincing evidence, patent holders face their own risks in defending a patent’s validity every time they accuse a party of infringement. However, due to the asymmetry in collateral estoppel relating to patent invalidity, a finding of invalidity in any one lawsuit is thereafter binding against the patentee. *See, e.g., Blonder-Tongue Labs. v. Univ. of Illinois Found.*, 402 U.S. 313, 329-30, 350 (1971). Thus, patent holders risk losing all their rights every time they sue – even if they have prevailed on the issue of validity in every previous case.

This continued risk of invalidity goes hand in hand with a higher standard of proof. Microsoft tries to limit the *RCA* decision by arguing that the case was “concerned not with the standard of proof in the abstract, but instead with the ability of non-parties to relitigate priority issues based on the same evidence that had already been fully litigated.” Microsoft Br. 29. But this point applies just as forcefully to modern-day patent cases. Patents often are litigated more than once, with the attendant risk to the patent holder in each litigation. A “clear and convincing” standard properly balances the infringer’s ability to challenge a patent with the

threat to the patent holder that a single adverse judgment can eliminate its property right.

Moreover, Microsoft's position has other practical problems that Congress is in the best position to weigh in the first instance. Microsoft's position in the lower courts and in its petition for certiorari was that the preponderance standard applies where the PTO had not considered the prior art. *See, e.g.*, Pet. at 14-15; J.A. at 192a (oral objection in District Court) (“[W]e object on the burden of proof issue for the reasons that we’ve stated in earlier motions in limine *regarding prior art not considered by the Patent Office*, that the burden of proof should not be clear and convincing evidence. THE COURT: All right. That objection is overruled.”) (emphasis added); *id.* at 124a n.8 (showing Microsoft's alternative jury instruction that tied the preponderance standard to whether the PTO had considered the art); *id.* at 124a (Revised Joint Proposed Final Jury Instructions also tying the standard “prior art not considered by the Patent Office”); *see also id.* at 121a, n.29 (Joint Proposed Revised Preliminary Jury Instruction) (same); *id.* at 127a n.62 (same); Brief of Microsoft to the Federal Circuit at 45 (arguing that the jury instruction on clear and convincing evidence “was error, since the relevant evidence was never presented to the PTO”).⁴

⁴ For these reasons, Microsoft's new broad position that the preponderance standard applies across the board to the presumption in Section 282 was never even pressed or passed upon below. The Federal Circuit likewise understood Microsoft's position to encompass only art not before the PTO. Pet. App. 23a (“According to Microsoft, the burden of proof
(continued...)”) (continued...)

Application of a dual-standard presumption is unworkable and impractical.

As a simple threshold matter, it is impossible to tell what the PTO actually has “considered.” Examiners do not necessarily record every piece of prior art they review. *See, e.g., Lear Siegler, Inc. v. Aeroquip Corp.*, 733 F.2d 881, 885 (Fed. Cir. 1984) (“The failure to cite specific prior art is not conclusive proof that the art was not considered.”). The Patent and Trademark Office’s Manual of Patent Examining Procedure (“MPEP”) instructs that “[t]he examiner is not called upon to cite all references that may be available, but only the ‘best.’” U.S. Patent and Trademark Office, *Manual of Patent Examining Procedure* (8th ed., rev. 1, Jul. 2010) § 904.03; *see also* § 904 (acknowledging that patent applicants submit prior art, but requiring examiners to do their own broad search, covering both patents and “nonpatent literature,” and only requiring a document that the examiners use in their decision to be treated as a “reference”); § 904.02 (further detailing the breadth of examiner’s search).

Even if the exact piece of prior art was not “considered” by the examiner, several practical issues remain. If, on one hand, the rule were that *any* piece of uncited art lowers the standard, such a rule would gut the “clear and convincing” standard and the presumption of validity. It is essentially always possible to find *some* additional piece of prior art, even if cumulative to the art actually cited. It is possible, for example, that the “unconsidered” art

should have been less for prior art that was not before the PTO, as was the case for Rita and DeRose.”).

may be a technical paper by an author that is the same in substance to a patent issued to that same author. It is also possible – indeed, it is likely in many instances – that the art not cited by the examiner will be cumulative to the art cited by the examiner or otherwise essentially immaterial.

Microsoft’s question as presented to this Court in the certiorari petition does not distinguish between cumulative prior art and prior art of new significance. It is possible under Microsoft’s proposed rule that the preponderance standard would apply because a particular piece of prior art was not before the PTO — even though everything in that “undisclosed” reference already was in front of the PTO through other pieces of prior art. A lack of clarity regarding when to lower the standard means that courts and litigants would face even more expensive and lengthy battles about whether a particular piece of prior art is sufficiently new to result in a lower standard. And because challenges to a patent’s validity often involve other issues besides prior art such as written description, enablement, and indefiniteness, the question arises whether and how the dual standard applies in these cases. Differing standards also increase the likelihood of juror confusion. If some pieces of prior art were considered by the PTO while others were not, jurors would receive instructions on validity based upon two different standards of proof. These competing standards would dilute the presumption for the same claims.

Moreover, such a rule would simply encourage applicants to cite irrelevant and cumulative art to the PTO. Applicants would have an incentive to try to ensure that all prior art is before the PTO, even if

most of the references are not material. However, applicants may be in practice penalized for citing too much prior art; defendants argue (and courts hold) that patentees commit inequitable conduct by “burying” a particularly material reference with other non-material references to the PTO. *See, e.g., Molins PLC v. Textron, Inc.*, 48 F.3d 1172 (Fed. Cir. 1995) (“[B]urying’ a particularly material reference in a prior art statement containing a multiplicity of other references can be probative of bad faith.”); MPEP, § 2004, item no. 13 (“It is desirable to avoid the submission of long lists of documents if it can be avoided. Eliminate clearly irrelevant and marginally pertinent cumulative information”). Thus, an applicant who cites cumulative or less relevant pieces of prior art in order to avoid later arguments about a reduced standard of proof simply provide an inequitable conduct argument to the defendant. And a rule that encourages the over-citation of art burdens both the PTO and applicants. Indeed, such a rule would actually exacerbate the granting of poor-quality patents by forcing the examiner to spend time on references that are not relevant.

Congress, not this Court, is the appropriate entity to weigh these considerations in the first instance: (1) whether a preponderance standard should apply when the art was not cited; (2) whether, if so, the preponderance standard should apply to all pieces of prior art or only non-cumulative pieces of prior art; and (3) whether, if a preponderance standard applies only to non-cumulative pieces, how to determine whether a piece of prior art is sufficiently material to lower the standard of proof. Congress can hear from all sides, and determine a proper course of action that properly balances all interests.

Finally, a decision changing the application of the clear and convincing standard would constitute a major shift in patent litigation. Patent trials are a commonplace occurrence in courts across the country. A change to the standard of proof affects every one of these cases, of which thousands are filed each year, as well as all those on appeal. The Federal Circuit docketed many hundreds of patent appeals each year. See United States Court of Appeals for the Federal Circuit, *Filings of Patent Infringement Appeals from the U.S. District Courts*, available at http://www.cafc.uscourts.gov/images/stories/the-court/statistics/Caseload_Patent_Infringement_Line_chart_for_appeals_filed_2001-2010.pdf (last visited March 16, 2011) (noting that 398 patent infringement appeals were docketed in fiscal year 2009 and 399 were docketed in fiscal year 2010). A change in the standard risks sending every case involving invalidity back to the district court for another trial. At a minimum, should the Court be inclined to change the standard it should do so only prospectively. And the disruption to the patent system from any change to the standard demonstrates why Congress is the branch most suited to balance the competing interests here.

Microsoft's argument is wrong in either its broad or narrow form. It runs squarely against this Court's prior decisions — both within the context of invention patents and outside it. It upsets the settled expectations of a duly issued written instrument of the United States. It usurps Congress's proper role in crafting the balance between patent rights and public access. And it risks stifling the flow of money into new inventions necessary to power the economy in the years to come.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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