

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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MICROSOFT CORPORATION,  
Petitioner

v.

VIRNETX, INC.,  
Patent Owner

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U.S. Patent No. 6,502,135

IPR2014-00558

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**REQUEST FOR REHEARING UNDER 37 C.F.R. § 42.71(d)**

Mail Stop Patent Board  
Patent Trial and Appeal Board  
U.S. Patent and Trademark Office  
P.O. Box 1450  
Alexandria, VA 22313-

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## **I. Statement of Relief Requested**

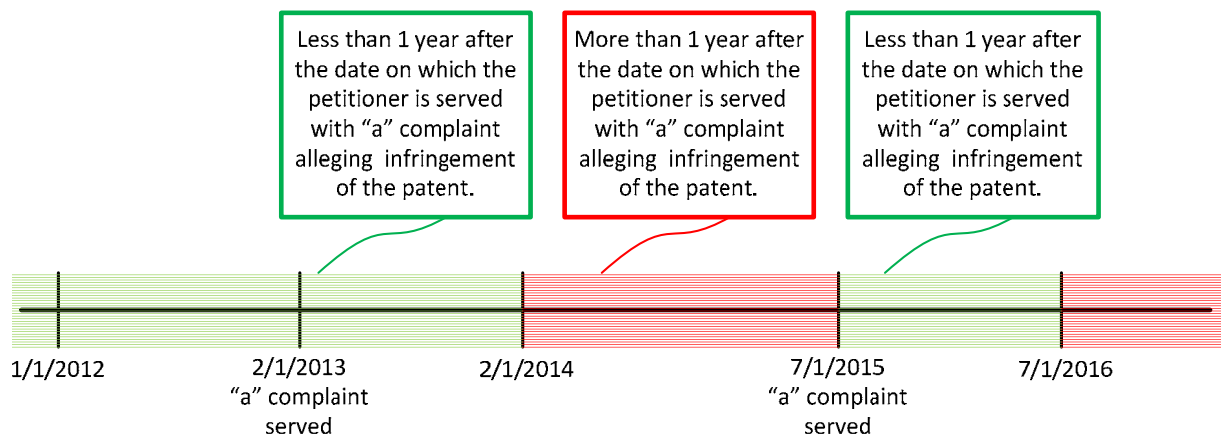
Pursuant to 37 C.F.R. § 42.71, Microsoft Corporation (“Petitioner” or “Microsoft”) requests rehearing on the decision by the Board to deny institution of an *inter partes* review of the ’135 patent. Petitioner respectfully submits that the Board did not properly apply the *Chevron* principles of statutory interpretation when applying 35 U.S.C. § 315(b).

## **II. Proper Application of *Chevron* Principles to 35 U.S.C. § 315(b)**

If a “statute’s text does not explicitly address the precise question” at issue, interpretation must go beyond the statute’s text to consider “the statute’s structure, canons of statutory construction, and legislative history” to determine Congress’s “intention on the precise question at issue.” *See Timex VI, Inc. v. US*, 157 F. 3d 879, 882 (Fed. Cir. 1998) (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 & n. 9 (1984)). Microsoft submits that the statutory text of § 315(b) itself does not explicitly address the precise question of how to interpret the phrase “a complaint alleging infringement of the patent” in the case where there are multiple complaints. Therefore, under the principles set forth in *Chevron*, the Board must go beyond the text of the statute to consider evidence such as legislative history to determine Congress’s intent for the application of § 315(b) to the facts of this case.

As previously set forth beginning on page 8 of the Petition, Microsoft presented reasons why the inclusion of the indefinite article “a” before the subject “complaint” creates an ambiguity in the application of § 315(b) to the current situation – where an IPR is filed within one year of service of a subsequent complaint alleging infringement of the patent, but after one year from service of an initial complaint(s) alleging infringement of the same patent. Though in its Institution Decision the Board adopted one interpretation of § 315(b), Microsoft set forth an equally plausible interpretation that emerges from the “plain language” of the statute when considered in light of the current situation. To resolve which of these interpretations is proper, the Board should have turned to the legislative history of § 315(b).

In particular, Microsoft proposed that § 315(b), through its use of the indefinite article “a”, should be interpreted as designating a one-year timeframe in which a petitioner may file a petition for *inter partes* review after “a complaint for infringement” has been served, regardless of whether the complaint with regard to which this timeframe is calculated is the first, second, or third complaint. The following diagram illustrates this point.



Because both the Board's and Microsoft's interpretations of § 315(b) emerge from a plain-language reading of the statutory text, the statutory text itself cannot explicitly address the precise question of which of multiple complaints should be considered "a complaint" for purposes of assessing the one-year time limitation set forth in § 315(b). Accordingly, *Chevron* dictates that the Board employ other "tools of statutory construction", including assessing legislative history, in construing Congress's intent on this matter. *See Timex VI, Inc.*, 157 F. 3d at 882. Yet, in the Institution Decision, no justification was provided other than plain text. *See Paper 13*, p. 4 ("we interpret 'a complaint,' in accordance with the plain language of 35 U.S.C. § 315(b), to include 'a complaint' as explicitly stated.")

When one considers the legislative history of § 315(b), as Microsoft did in pages 10 to 13 of its Petition, it is clear that Microsoft's interpretation of § 315(b) should prevail.

As indicted in the Petition soliciting *inter partes* review, the legislative history of § 315(b) reveals Congresses mutual goals of preventing "abusive serial

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