

FEDERAL COURT

BETWEEN:

**WI-LAN INC. and
WI-LAN TECHNOLOGIES CORP.**

Plaintiffs/Defendants by Counterclaim

-and-

**D-LINK SYSTEMS, INC. and
D-LINK CANADA INC. (d.b.a. D-LINK NETWORKS)**

Defendants/Plaintiffs by Counterclaim

**REPLY AND DEFENCE TO
SECOND AMENDED COUNTERCLAIM**

1. Save where expressly admitted, Wi-LAN Inc. and Wi-LAN Technologies Corp. (collectively, “Wi-LAN”) deny each and every allegation made by D-Link Systems, Inc. and D-Link Canada Inc. (collectively, “D-Link”) in the Second Amended Statement of Defence and Counterclaim, as particularized by the Defendants’ Response to Demand for Particulars (the “Defence”). Wi-LAN repeats and relies upon the allegations set out in the Statement of Claim.
2. Wi-LAN admits the allegations made in paragraphs 3 and 4 of the Defence save as to the final sentence in paragraph 3, in respect of which Wi-LAN puts D-Link to the strict proof.
3. Wi-LAN denies the allegations contained in paragraph 7 of the Defence and states that the impugned products do infringe the claims of the ’975 Patent. Wi-LAN states that D-Link is limited to the allegations of non-infringement asserted in paragraph 7 of the Defence and no others.
4. Wi-LAN admits the allegations contained paragraph 11 of the Defence.

5. Wi-LAN denies each of the allegations, which are, in fact, legal conclusions, recited in paragraphs 10, 14 to 23 and 27, and puts D-Link to their strict proof. Wi-LAN specifically denies and puts D-Link to the proof of the allegations that:

- (a) any of the recited publications are citeable prior art;
- (b) any common knowledge exists that renders any aspect of the '975 Patent anticipated or obvious; and
- (c) any of the cited prior art, alone, in combination, or in combination with any alleged common general knowledge renders any aspect of the '975 Patent anticipated or obvious.

6. With respect to paragraph 18 of the Defence, Wi-LAN asserts that claims 1 and 14, and their dependent claims, are not inoperable, or, in the alternative, they only claim subject matter that could or would be made to operate by the skilled addressee without undue experimentation.

7. Wi-LAN admits that the statements identified in item 7(b) of the Response to Demand for Particulars were made during the course of patent prosecution. Wi-LAN denies the legal conclusions and the balance of the allegations contained in item 7(a) of the Response to Demand for Particulars.

8. Wi-LAN denies the allegations contained in paragraph 24 of the Defence and puts D-Link to their strict proof. Wi-LAN asserts that Wi-LAN Technologies Corp. has and has always had standing in this action and the right to sue and recover for damages.

9. Wi-LAN denies the allegations contained in paragraph 25 of the Defence that the inventors of the '975 Patent were ATRC researchers and were not Zagloul and Fattouche, and asserts that the inventors were, in fact, Zagloul and Fattouche. Wi-LAN asserts that Zagloul and

Fattouche validly assigned the '975 Patent to Wi-LAN. Wi-LAN puts D-Link to strict proof of the contrary.

10. Wi-LAN denies the allegations contained in the second sentence of paragraph 26 of the Defence. Wi-LAN admits that Fattouche entered an agreement on or about March 1, 1989, but denies that it had the effect of vesting any rights in ATRC with respect to the '975 Patent, and denies that the '975 Patent was “developed in relation to his research activities with ATRC.” Wi-LAN denies the balance of the allegations in this paragraph.

11. Wi-LAN admits granting licences on favourable terms to the companies identified in item 10(a) of the Response to Demand for Particulars. Wi-LAN denies that the D-Link has requested a licence on reasonable terms, or even has knowledge of what D-Link considers reasonable terms. Wi-LAN denies that its licensing has been unreasonable or discriminatory. Wi-LAN denies that any of its licensing arrangements are relevant to the allegations of infringement and invalidity in this proceeding. Wi-LAN states that D-Link has never commenced an application under section 65 of the *Patent Act* in respect of the '975 Patent. In the alternative, Wi-LAN states that D-Link's failure to avail itself of reasonable licensing opportunities warrants the grant of the fullest monetary relief to Wi-LAN.

12. Wi-LAN denies the allegations contained in paragraphs 29, 30 and 31 of the Defence and puts the D-Link to their strict proof. Wi-LAN states that none of the circumstances alleged justify these pleas.

13. Wi-LAN states that none of the allegations contained in paragraph 32 of the Defence is relevant to this proceeding and do not form a basis for defence to patent infringement, allegations of patent invalidity or a denial of any relief claimed. In any event, Wi-LAN asserts that it has practised and commercialized the subject matter of the '975 Patent, including through its licensing partners. Wi-LAN admits the incorporation date of Wi-LAN Technologies Corp. In respect of the final two sentences of paragraph 32, Wi-LAN states that Wi-LAN Technologies Corp.

owns, licenses for fees and enforces patents, but otherwise denies the pejorative characterization of the company and its business. Wi-LAN admits that its licensees provide Canadian consumers with useful and desirable products in accordance with internationally adopted standards.

14. Wi-LAN denies the allegations contained in paragraph 33 of the Defence and puts D-Link to their strict proof. Wi-LAN states that it is presumptively entitled to demand that its patent rights be respected. Wi-LAN states that patent licensing is an essential element of its business. Wi-LAN states that the Court's failure in this case to order an injunction or delivery up, or to grant only a reasonable royalty, would encourage wilful violation of Wi-LAN's patent rights and irreparably compromise Wi-LAN's business interests. Wi-LAN states that the '975 Patent presumptively entitles it to exclusive rights throughout the relevant market.

15. With respect to the allegations contained in paragraph 34 of the Defence, Wi-LAN admits the issuance of the examiner's report on the date identified, the request for an extension of time on the date identified and the terminal date of the extension. Wi-LAN admits that the claims of the application for the '975 Patent were amended. Wi-LAN denies the balance of the allegations and the characterizations in paragraph 34 and puts D-Link to their strict proof.

16. Wi-LAN admits the allegations contained the first sentence of paragraph 35 of the Defence. Wi-LAN denies the balance of the allegations in the paragraph and puts D-Link to their strict proof.

17. Wi-LAN denies the allegations contained in subparagraph 36(a) of the Defence. Wi-LAN states that an accounting of profits would not generate difficulties in this action and puts D-Link to strict proof of the contrary. Wi-LAN repeats and relies upon the allegations in paragraph 14 above.

18. Wi-LAN denies the allegations contained in subparagraphs 36(b), (c) and (d) of the Defence and puts D-Link to the strict proof of the propriety of any such limitation upon the claim for monetary relief. Wi-LAN repeats and relies upon the allegations in paragraph 14 above.

19. Wi-LAN denies the allegations contained in paragraph 37 of the Defence. Wi-LAN states that D-Link sells a number of products in conjunction with the “impugned products”, including antennas, network cables, network media devices and their accessories, internet cameras, VOIP products, print servers, network storage devices, firewalls, routers and modems.

20. With respect to paragraph 38 of the Defence, Wi-LAN denies that any apportionment is appropriate. Wi-LAN asserts that none of the infringing products would have been sold but for the infringing components.

21. Wi-LAN denies the allegations contained in paragraph 39 of the Defence and asserts that there is no foundation for the grant of the relief that D-Link requests.

22. Wi-LAN denies that D-Link is entitled to any of the relief requested in paragraph 40 of the Defence. Wi-LAN states that patents can only be revoked under paragraph 32(2)(c) of the *Competition Act* where the Attorney General has laid an information. By the admission of D-Link, which Wi-LAN accepts, no information has been laid by the Attorney General. Accordingly, there is no foundation for this claimed relief.

Dated at Toronto, Ontario this 5th day of February 2008.

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