

**United States Court of Appeals
for the Federal Circuit**

SCA HYGIENE PRODUCTS AKTIEBOLAG
and SCA PERSONAL CARE, INC.,

Plaintiffs-Appellants,

v.

FIRST QUALITY BABY PRODUCTS, LLC,
FIRST QUALITY HYGIENIC, INC., FIRST QUALITY PRODUCTS, INC.,
and FIRST QUALITY RETAIL SERVICES, LLC,

Defendants-Appellees.

*Appeal from the United States District Court for the Western District of
Kentucky in Case No. 10-CV-0122, Chief Judge Joseph H. McKinley, Jr.*

**BRIEF OF *AMICI CURIAE* GARMIN INTERNATIONAL, INC.,
LIMELIGHT NETWORKS, INC., LINKEDIN CORP., MENTOR
GRAPHICS CORPORATION, NEWEGG INC., SAP AMERICA, INC., SAS
INSTITUTE INC., SYMMETRY LLC, AND XILINX, INC. ON
REHEARING *EN BANC* SUPPORTING DEFENDANTS-APPELLEES**

John D. Vandenberg
Philip Warrick
KLARQUIST SPARKMAN, LLP
One World Trade Center
121 S.W. Salmon Street, Suite 1600
Portland, Oregon 97204-2988
(503) 595-5300
john.vandenberg@klarquist.com
philip.warrick@klarquist.com

Counsel for *Amici Curiae*

APRIL 21, 2015

CERTIFICATE OF INTEREST

Counsel for *Amici Curiae* certifies the following:

1. The full name of every party or amicus represented by me is:

Garmin International, Inc., Limelight Networks, Inc., LinkedIn Corp., Mentor Graphics Corporation, Newegg Inc., SAP America, Inc., SAS Institute Inc., Symmetry LLC, and Xilinx, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

Garmin International, Inc. is a wholly-owned subsidiary of Garmin Ltd., a publicly-held company. Limelight Networks, Inc. is a publicly held company that has no parent corporation. Goldman Sachs owns ten percent or more of the shares of Limelight Networks, Inc. SAP America, Inc. is a privately held corporation and is a wholly owned subsidiary of SAP AG. LinkedIn Corp., Mentor Graphics Corporation, Newegg Inc., SAS Institute Inc., Symmetry LLC, and Xilinx, Inc. have no parent corporation, and no publicly held company owns 10 percent or more of their stock.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency, or that are expected to appear in this Court are:

Klarquist Sparkman, LLP,
John D. Vandenberg, and
Philip Warrick.

April 21, 2015

/s/ Philip Warrick

Philip Warrick
Counsel for *Amici Curiae*

TABLE OF CONTENTS

| | <i>Page</i> |
|--|-------------|
| CERTIFICATE OF INTEREST | i |
| TABLE OF AUTHORITIES | iv |
| INTEREST OF <i>AMICI CURIAE</i> | 1 |
| INTRODUCTION AND SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 3 |
| I. THE LACHES DEFENSE FURTHERS A BEDROCK POLICY OF PROMOTING PUBLIC NOTICE REFLECTED THROUGHOUT THE PATENT STATUTE AND OVER A CENTURY OF JURISPRUDENCE..... | 3 |
| A. The Patent Statute Promotes Notice..... | 5 |
| B. Gaps In The Patent Statute Result In Significant Notice Deficiencies And Enhanced Risk Of Inadvertent Infringement | 6 |
| C. Patentees Actively Seek To Exploit These Gaps To The Detriment Of The Public | 11 |
| D. The Public Interest In Patents Has Led Courts To Broadly Use Equity Restricting Their Procurement And Enforcement | 14 |
| E. Patent Law Has Consistently Recognized The Laches Defense | 16 |
| II. SEVERAL FUNDAMENTAL DISTINCTIONS BETWEEN COPYRIGHT AND PATENT LAW JUSTIFY THE AVAILABILITY OF THE LACHES DEFENSE | 19 |
| A. Patent Law Does Not Excuse Innocent Infringers Who Independently Create Patented Inventions..... | 20 |
| B. Evaluating Patent Infringement Risk Without Express Notice Is Significantly More Difficult In The Patent Context | 22 |

C. The Risk Of Evidentiary Prejudice Is Amplified For Patent Litigation Defendants..... 24

D. The Copyright Laches Defense Did Not Share The Rich History Of The Patent Law Doctrine 26

CONCLUSION..... 26

TABLE OF AUTHORITIES

| | <i>Page(s)</i> |
|---|----------------|
| Cases | |
| <i>A.C. Aukerman Co. v. R.L. Chaides Constr. Co.</i> , 960 F.2d 1020 (Fed. Cir. 1992) (en banc)..... | <i>passim</i> |
| <i>Amsted Indus. Inc. v. Buckeye Steel Castings Co.</i> , 24 F.3d 178 (Fed. Cir. 1994)..... | 7 |
| <i>Atl. Works v. Brady</i> , 107 U.S. 192 (1883) | 2 |
| <i>Bandag, Inc. v. Gerrard Tire Co.</i> , 704 F.2d 1578 (Fed. Cir. 1983)..... | 7 |
| <i>BMC Res., Inc. v. Paymentech, L.P.</i> , 498 F.3d 1373 (Fed. Cir. 2007)..... | 12 |
| <i>Boris v. Hamilton Mfg. Co.</i> , 253 F.2d 526 (7th Cir. 1958)..... | 24 |
| <i>Crown Packaging Tech., Inc. v. Rexam Beverage Can Co.</i> , 559 F.3d 1308 (Fed. Cir. 2009)..... | 7 |
| <i>Enzo Biochem, Inc. v. Applera Corp.</i> , 605 F.3d 1347 (Fed. Cir. 2010)..... | 11 |
| <i>Eon-Net LP v. Flagstar Bancorp</i> , 653 F.3d 1314 (Fed. Cir. 2011)..... | 16 |
| <i>Ericsson, Inc. v. D-Link Sys., Inc.</i> , 773 F.3d 1201 (Fed. Cir. 2014)..... | 16 |
| <i>Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.</i> , 535 U.S. 722 (2002) | 4, 20 |
| <i>Gustafson, Inc. v. Intersystems Indus. Prods., Inc.</i> , 897 F.2d 508 (Fed. Cir. 1990)..... | 20, 25 |
| <i>In re Seagate Tech., LLC</i> , 497 F.3d 1360 (Fed. Cir. 2007) (en banc)..... | 12 |

| | |
|---|------------|
| <i>Kewanee Oil Co. v. Bicron Corp.</i> , 416 U.S. 470 (1974) | 26 |
| <i>Lane & Bodley Co. v. Locke</i> , 150 U.S. 193 (1893) | 20, 21, 22 |
| <i>Leggett v. Standard Oil Co.</i> , 149 U.S. 287 (1893) | 22 |
| <i>Maloney-Crawford Tank Corp. v. Rocky Mountain Natural Gas Co.</i> , 494 F.2d 401 (10th Cir. 1974)..... | 23 |
| <i>Mayo Collaborative Servs. v. Prometheus Labs., Inc.</i> , 132 S. Ct. 1289 (2012) | 29 |
| <i>Miller v. Bridgeport Brass Co.</i> , 104 U.S. 350 (1881) | 18 |
| <i>Minn. Mining & Mfg. Co. v. Berwick Indus., Inc.</i> , 532 F.2d 330 (3d Cir. 1976)..... | 23 |
| <i>Motorola, Inc. v. United States</i> , 729 F.2d 765 (Fed. Cir. 1984)..... | 6 |
| <i>Nautilus, Inc. v. Biosig Instruments, Inc.</i> , 134 S. Ct. 2120 (2014) | 6, 8, 21 |
| <i>Olympia Werke Aktiengesellschaft v. Gen. Elec. Co.</i> , 712 F.2d 74 (4th Cir. 1983)..... | 22 |
| <i>Petrella v. Metro-Goldwyn-Mayer, Inc.</i> , 134 S. Ct. 1962 (2014) | 2, 31, 32 |
| <i>Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.</i> , 324 U.S. 806 (1945) | 17, 19 |
| <i>SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC</i> , 767 F.3d 1339 (Fed. Cir. 2014), vacated 2014 WL 7460970 (Fed. Cir. Dec. 30, 2014)..... | 17 |
| <i>Sears, Roebuck & Co. v. Stiffel Co.</i> , 376 U.S. 225 (1964) | 19 |

| | |
|---|--------|
| <i>Selle v. Gibb</i> , 741 F.2d 896 (7th Cir. 1984)..... | 25 |
| <i>Smith v. Sinclair Ref. Co.</i> , 257 F.2d 328 (2d Cir. 1958)..... | 24 |
| <i>SmithKline Beecham Corp. v. Apotex Corp.</i> , 403 F.3d 1331 (Fed. Cir. 2005)..... | 31 |
| <i>SRI Int’l, Inc. v. Advanced Tech. Labs., Inc.</i> , 45 F.3d 443 (Fed. Cir. 1994) (non-precedential) | 12 |
| <i>State Indus., Inc. v. A.O. Smith Corp.</i> , 751 F.2d 1226 (Fed. Cir. 1985)..... | 4 |
| <i>Studiengesellschaft Kohle mbH v. Eastman Kodak Co.</i> , 616 F.2d 1315 (5th Cir. 1980)..... | 23 |
| <i>Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found., LP</i> , 422 F.3d 1378 (Fed. Cir. 2005)..... | 19 |
| <i>Tex. Digital Sys., Inc. v. Telegenix, Inc.</i> , 308 F.3d 1193 (Fed. Cir. 2002)..... | 8 |
| <i>Therasense, Inc. v. Becton, Dickinson & Co.</i> , 649 F.3d 1276 (Fed. Cir. 2011) (en banc)..... | 18, 19 |
| <i>TWM Mfg. Co. v. Dura Corp.</i> , 592 F.2d 346 (6th Cir. 1979)..... | 23 |
| <i>Wanlass v. Gen. Elec. Co.</i> , 148 F.3d 1334 (Fed. Cir. 1998)..... | 21 |
| <i>Whitman v. Walt Disney Prods., Inc.</i> , 263 F.2d 229 (9th Cir. 1958)..... | 23 |
| Statutes | |
| 35 U.S.C. § 112..... | 5, 7 |
| 35 U.S.C. § 271..... | 21 |
| 35 U.S.C. § 282..... | 3 |

| | |
|----------------------|---------------|
| 35 U.S.C. § 286..... | 3, 18, 20, 24 |
| 35 U.S.C. § 287..... | 6 |

Other Authorities

| | |
|--|--------|
| Brian J. Love, <i>Interring the Pioneer Invention Doctrine</i> , 90 N.C. L. Rev. 379 (2012)..... | 10 |
| Fred H. Cate, <i>The Technological Transformation of Copyright Law</i> , 81 Iowa L. Rev. 1395 (1996) | 28 |
| Harry Surden, <i>Efficient Uncertainty in Patent Interpretation</i> , 68 Wash. & Lee L. Rev. 1737 (2011) | 9 |
| Herbert Hovenkamp, <i>Competition for Innovation</i> , 2012 Colum. Bus. L. Rev. 799 (2012) | 20 |
| John A. Gibby, <i>Software Patent Developments: A Programmer’s Perspective</i> , 23 Rutgers Computer & Tech. L.J. 293 (1997)..... | 9 |
| Mark A. Lemley & Philip J. Weiser, <i>Should Property or Liability Rules Govern Information?</i> , 85 Tex. L. Rev. 783 (2007) | 11 |
| Mark A. Lemley, <i>Ignoring Patents</i> , 2008 Mich. St. L. Rev. 19 (2008)..... | 26 |
| Mark A. Lemley, <i>Should Patent Infringement Require Proof of Copying?</i> , 105 Mich. L. Rev. 1525 (2007) | 26 |
| Michael Risch, <i>The Failure of Public Notice in Patent Prosecution</i> , 21 Harv. J.L. & Tech. 179 (2007) | 10 |
| Peter S. Menell & Michael J. Meurer, <i>Notice Failure and Notice Externalities</i> , 5 J. Legal Analysis 1 (2013)..... | 12, 14 |
| Roberto Fontana et al., <i>Reassessing Patent Propensity: Evidence from a Data-Set of R&D Awards, 1977-2004</i> , Working Papers 2013/09 (2013)..... | 28 |

| | |
|---|----------------|
| Roger D. Blair & Thomas F. Cotter, <i>Strict Liability and Its Alternatives in Patent Law</i> , 17 Berkeley Tech. L.J. 799 (2002)..... | 27 |
| Samson Vermont, <i>Independent Invention as a Defense to Patent Infringement</i> , 105 Mich. L. Rev. 475 (2006)..... | 27 |
| Ted Sichelman, <i>Commercializing Patents</i> , 62 Stan. L. Rev. 341 (2010) | 8 |
| Tun-Jen Chiang, <i>The Reciprocity of Search</i> , 66 Vand. L. Rev. 1 (2013)..... | 14, 15, 21, 29 |
| U.S. Patent & Trademark Office, <i>Performance & Accountability Report, Fiscal Year 2013</i> , available at http://www.uspto.gov/about/stratplan/ar/USPTOFY2013PAR.pdf | 9 |
| Rules | |
| Fed. R. Civ. P. 29..... | 1 |

INTEREST OF *AMICI CURIAE*¹

Amici are leading technology and service companies employing thousands of innovators and providing valuable products and services throughout the United States and the world. A number of *amici* engage in extensive research and development and manage significant patent portfolios related to numerous and diverse fields. *Amici* also frequently defend against allegations of infringement based on patents previously unknown to *amici*, asserted long after the patent owner knew of *amici*'s allegedly infringing activity and long after *amici* independently invested significant resources into bringing successful products and services to market. *Amici*'s considerable experience with patent litigation provide them with valuable insight regarding the question presented.²

¹ Pursuant to Federal Circuit Rule 29(c)(5), no counsel for a party authored this brief in whole or in part, and no party or party's counsel contributed money intended to fund its preparation or submission. No person other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

² *Amici* submit this brief pursuant to the Court's invitation in its December 30, 2014 Order on Petition for Rehearing En Banc.

INTRODUCTION AND SUMMARY OF ARGUMENT

Courts must guard against the patent law rewarding “speculative schemers” who impede “the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith.” *Atl. Works v. Brady*, 107 U.S. 192, 200 (1883). This danger of ambush-by-patent is no less today than it was in the 19th Century, and the longstanding equitable restraints on such abuse should not be cast aside.

For over a century, the laches defense in patent litigation has incentivized early disclosure of infringement allegations to avoid economic and evidentiary prejudice and promote follow-on innovation. The Supreme Court’s decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), does not undermine this long-standing and critical role of laches in patent cases. In part, that is because the equitable doctrine of laches furthers these important objectives of a healthy patent system by filling statutory gaps that have no corollary in the copyright context. For example, the strict-liability nature of direct patent infringement presents a significant risk of innocent or inadvertent infringement not faced by copyright defendants. In addition to the economic prejudice frequently accompanying such inadvertent infringement, the risk of evidentiary prejudice is amplified in patent cases—which often turn on proving details of decades-old

technology—and disproportionately prejudices defendants challenging patent validity. For these reasons, the laches defense should be preserved in patent cases.

ARGUMENT

Amici submit this brief to highlight important policy considerations underlying the availability of the laches defense in patent cases, as well as relevant distinctions between patent and copyright law. These distinctions—along with the historical recognition of the laches defense in patent law—provide support for the continued availability of this defense in addition to the statutory interpretation and other arguments briefed by Defendants-Appellees (collectively, “First Quality”).³

I. THE LACHES DEFENSE FURTHERS A BEDROCK POLICY OF PROMOTING PUBLIC NOTICE REFLECTED THROUGHOUT THE PATENT STATUTE AND OVER A CENTURY OF JURISPRUDENCE

The laches defense furthers the same bedrock public policy of clear notice promoted throughout the Patent Statute. Clear and timely public notice of patent rights is essential to our patent system, which spurs innovation not only by the lure of patent-protected profits to the first inventor but also by the cost-savings incentive to all second inventors seeking to innovate around the patent claims to avoid the cost of royalties. These dual engines of innovation are of equal

³ *See, e.g.*, First Quality Br. (Dkt. No. 149), at 13-16, 23-26 (distinguishing the 35 U.S.C. § 286 limitation on damages from the Copyright Act’s statute of limitations and explaining that Congress intended the 35 U.S.C. § 282 “unenforceability” defense to preserve equitable defenses including laches).

importance to the proper functioning of our patent system, which relies on clear public notice to promote new and improved solutions outside the scope of previously patented inventions. *See, e.g., Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 731 (2002) (describing “the delicate balance the law attempts to maintain between inventors, who rely on the promise of the law to bring the invention forth, and the public, which should be encouraged to pursue innovations, creations, and new ideas beyond the inventor’s exclusive rights”); *State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985) (“One of the benefits of a patent system is its so-called ‘negative incentive’ to ‘design around’ a competitor’s products, even when they are patented, thus bringing a steady flow of innovations to the marketplace.”).

The laches defense historically has played a critical role in promoting clear notice by compelling patent owners to act with some dispatch once they have reason to believe there is an infringement. The sooner that notice is given, the sooner the accused party might endeavor to innovate around the patent and—if successful—give the public more choice in the marketplace and perhaps an improved product. Without the laches defense, patent owners could routinely and knowingly lie in wait for years, watching damages mount until unsuspecting defendants are incentivized to innovate around the patent only after writing off millions of dollars in sunk costs related to the allegedly infringing technology.

Moreover, patent owners could wait until the patent is expired, at which point the accused's incentive to innovate around evaporates entirely. For this reason, eliminating the patent laches defense would deter—and not promote—innovation.

A. The Patent Statute Promotes Notice

Our patent system relies on clear and timely notice of patent rights, and the patent owner is best situated to provide it. Hence, Congress has enacted numerous provisions in the Patent Statute that promote clear and timely public notice. For example, 35 U.S.C. § 112(b) requires patent applicants to draft claims “particularly pointing out and distinctly claiming the subject matter which the inventor . . . regards as the invention.” As recently interpreted by the Supreme Court, this statute demands that patent applicants “be precise enough to afford clear notice of what is claimed” to avoid “[a] zone of uncertainty which enterprise and experimentation may enter only at the risk of infringement claims.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2129 (2014) (quoting *United Carbon Co. v. Binney & Smith Co.*, 317 U.S. 228, 236 (1942)).

The statutory marking requirement likewise promotes public notice of patent rights. Section 287(a) provides that—where patentees fail to mark embodiments of their patented inventions—“no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter.” 35 U.S.C. § 287(a). This Court

has recognized “a fundamental rationale supporting section 287—supplying notice in order to prevent innocent infringement.” *Motorola, Inc. v. United States*, 729 F.2d 765, 772 (Fed. Cir. 1984). This provision requires actual notice of infringement should *patent-practicing* patentees fail to mark their products: “not merely notice of the patent’s existence or ownership,” but rather “the affirmative communication of a specific charge of infringement by a specific accused product or device.” *Amsted Indus. Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 187 (Fed. Cir. 1994).

B. Gaps In The Patent Statute Result In Significant Notice Deficiencies And Enhanced Risk Of Inadvertent Infringement

In practice, these statutory measures often fall short, resulting in critical notice deficiencies. For example, courts have held that “the notice requirement of [Section 287] does not apply where the patent is directed to a process or method.” *Bandag, Inc. v. Gerrard Tire Co.*, 704 F.2d 1578, 1581 (Fed. Cir. 1983). Thus, owners of patented processes or methods need not mark their products to avoid surrendering damages incurred prior to providing actual notice to the alleged infringer. And courts have further excused patentees from compliance with the marking statute’s requirements “where the patentee only asserted the method claims of a patent which included both method and apparatus claims.” *Crown Packaging Tech., Inc. v. Rexam Beverage Can Co.*, 559 F.3d 1308, 1316 (Fed. Cir. 2009). Moreover, the marking requirement is rendered entirely ineffective when

patentees do not practice their inventions. *See Tex. Digital Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1220 (Fed. Cir. 2002) (“The recovery of damages is not limited . . . where there are no products to mark.” (citing *Wine Ry. Appliance Co. v. Enter. Ry. Equip. Co.*, 297 U.S. 387, 395 (1936))). Given the historically small percentage of patents successfully commercialized, this exception broadly exempts the majority of patent owners from the statutory notice requirements. *See Ted Sichelman, Commercializing Patents*, 62 *Stan. L. Rev.* 341, 363 (2010) (citing “strong evidence that most patented inventions are never commercialized”).

Nor is the mere publication of issued patents sufficient to provide notice of potential infringement claims. Even assuming prospective compliance with the Supreme Court’s recent clarification that Section 112(b) requires patents to “inform, with reasonable certainty, those skilled in the art about the scope of the invention,” *Nautilus*, 134 S. Ct. at 2124, proactively monitoring existing patents is a notoriously expensive, time-consuming, and unreliable endeavor, particularly in light of the fact that there are more than two million issued patents currently in effect, with ever-increasing numbers of applications being filed. *See U.S. Patent & Trademark Office, Performance & Accountability Report, Fiscal Year 2013*, at 189 tbl.2, 192 tbl.6, *available at* <http://www.uspto.gov/about/stratplan/ar/USPTOFY2013PAR.pdf> (reporting that from 1993 to 2013, the number of patent applications filed tripled from under 200,000 to over 600,000 per year, and that the

number of patents issued each year similarly increased from just over 100,000 to nearly 300,000); *see also* Harry Surden, *Efficient Uncertainty in Patent Interpretation*, 68 Wash. & Lee L. Rev. 1737, 1813 (2011) (“Firms cannot know which patents will be asserted and, to some degree, must internalize the risk of all patents and not just the 5% that ultimately are asserted in some way.”); John A. Gibby, *Software Patent Developments: A Programmer’s Perspective*, 23 Rutgers Computer & Tech. L.J. 293, 353 (1997) (“A plethora of obvious software patents makes it difficult to search the prior art The occasional useful software patent will be lost in a sea of obvious patents.”).

Moreover, investors and follow-on innovators attempting to perform due diligence face a daunting task of navigating the minefield of existing patents with indeterminate claim scope. “To even determine whom to approach, an improver would theoretically have to review the many thousands of patents issued in his industry in the previous two decades and, even if an improver paid to search for and review all relevant existing patents, it is unlikely he would be able to say with any certainty exactly which patents he should license because it is extraordinarily difficult to determine the scope of patent claims.” Brian J. Love, *Interring the Pioneer Invention Doctrine*, 90 N.C. L. Rev. 379, 441 (2012). Indeed, the well-documented challenges in predicting enforceable patent scope have led many to conclude that “patent law has failed to accomplish one of its essential missions:

allowing interested parties to understand a patent’s scope in a consistent and predictable manner.” Michael Risch, *The Failure of Public Notice in Patent Prosecution*, 21 Harv. J.L. & Tech. 179, 180 (2007); *see also Enzo Biochem, Inc. v. Applera Corp.*, 605 F.3d 1347, 1348 (Fed. Cir. 2010) (Plager, J., dissenting from denial of petition for rehearing) (observing that “it is not until three court of appeals judges randomly selected for that purpose pick the ‘right’ interpretation that the public, not to mention the patentee and its competitors, know what the patent actually claims”).

Furthermore, the complexity of modern products and services compounds the difficulty in performing clearance searches. “In the last few decades . . . [m]ore and more products incorporate not a single new invention but a combination of many different components, each of which . . . can easily be covered by dozens or even hundreds of different patents.” Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 Tex. L. Rev. 783, 797 (2007) (internal footnote omitted) (noting that “[a]s a striking example, literally thousands of patents have been identified as essential to the . . . standards for 3G cellular telephone systems”). Patent owners understand and often exploit these difficulties in identifying potentially relevant patents, covertly planning ambushes under the cover of millions of unexpired patent claims. *See* Peter S. Menell & Michael J. Meurer, *Notice Failure and Notice Externalities*, 5 J. Legal Analysis 1, 14 (2013)

(“Nonpracticing entities in the patent world benefit from the difficulty that the developers face in searching the millions of patents and patent claims.”).

These statutory gaps are critical because direct patent infringement is a strict liability offense with no knowledge requirement. *See, e.g., In re Seagate Tech., LLC*, 497 F.3d 1360, 1368 (Fed. Cir. 2007) (en banc) (“Because patent infringement is a strict liability offense, the nature of the offense is only relevant in determining whether enhanced damages are warranted.”); *BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1381 (Fed. Cir. 2007) (“Direct infringement is a strict-liability offense”). Thus, “an innocent infringer is no less liable for patent infringement than a willful infringer.” *SRI Int’l, Inc. v. Advanced Tech. Labs., Inc.*, 45 F.3d 443 (Fed. Cir. 1994) (non-precedential). Absent the protections of the laches doctrine, this strict liability attaches even when patent owners unreasonably and inexcusably delay notice to the material prejudice of the accused infringer. *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1028 (Fed. Cir. 1992) (en banc). As such, statutory gaps permitting delayed notice and enforcement present an enhanced risk of innocent or inadvertent infringement by companies developing, manufacturing, marketing, and selling products or services thought to be encumbrance-free.

**C. Patentees Actively Seek To Exploit
These Gaps To The Detriment Of The Public**

The risk of delayed notice is not merely theoretical. Indeed, patent-assertion strategies frequently seek to leverage delays in bringing suit. “When the price of lodging resource claims is low, claimants have little to lose and potentially a lot to gain from hoarding rights and lying low. . . . [E]ven a small possibility of extracting substantial value from independent developers who commercialize similar technologies can justify the up-front claiming investment.” Menell & Meurer, *supra*, at 14; *see also id.* at 18 (identifying several factors unique to intangible rights that “encourage resource claimants to hide and obfuscate notice information in several important circumstances”).

One commentator has likened this deferred-notice incentive to a seemingly absurd system for adjudicating collisions between bicycles and pedestrians in which “injured pedestrians are given a supercompensatory award, so they are in fact made better off if they are involved in a collision. . . . In such a world, pedestrians would hide in bushes and jump in front of oncoming bicycles at the last minute.” Tun-Jen Chiang, *The Reciprocity of Search*, 66 Vand. L. Rev. 1, 30 (2013). All too frequently, patent owners do exactly that, “only springing up after the industry has sunk irreversible investments into an infringing project.” *Id.*

Nor is delayed notification and enforcement a recent phenomenon. To the contrary, deliberately postponing notice has featured prominently in patent owner litigation strategies throughout the history of our patent system:

The phenomenon is so common, and the profits so large, that it has occurred throughout the history of patent law under various names. In the nineteenth century, this was known as the “patent shark” phenomenon, where patentees ambushed farmers who had made irreversible investments in their inadvertently infringing farm equipment. In the twentieth century, this was known as the “submarine patent” phenomenon, where patentees would hide (“submerge”) their patents in the patent office until an industry had made irreversible investments, and then the patentee would “surface” to hold the industry to ransom. Today, the problem is known as the “patent troll” phenomenon, after the mythical troll that hides under a bridge before emerging to demand a ransom. In all these cases the patentee’s strategy is the same. And in all these cases, the underlying theme is that patentees benefit from, and thus affirmatively seek, to have their patents infringed and obtain an ex post holdup remedy, rather than to avoid such infringement through ex ante negotiations.

Id. at 30-31 (internal footnotes omitted).

This “ex post holdup” strategy has very real and prejudicial effects. Where patentees provide timely notice of alleged infringement, the accused party may attempt to design around the asserted claims with new and different solutions. Often, these options become less viable the more entrenched the accused party has become in the market, rendering it susceptible to inflated “holdup” royalties or settlement agreements. This “patent hold-up” effect is amplified in the context of so-called “standard essential patents,” where patent holders may “demand[] excessive royalties after companies are locked into using a standard.” *Ericsson*,

Inc. v. D-Link Sys., Inc., 773 F.3d 1201, 1209 (Fed. Cir. 2014) (“Because the standard *requires* that devices utilize specific technology, compliant devices *necessarily* infringe certain claims in patents that cover technology incorporated into the standard.”). The prevalence of such standards in modern technology—driven by the need for interoperability between devices—permits patent owners to ambush not only a single alleged infringer, but also an entire industry once irreversible investments have been made to ensure compliance with these standards.⁴

This is precisely the type of economic prejudice that the laches doctrine works to prevent—“a defendant and possibly others . . . suffer the loss of monetary investments or incur damages which likely would have been prevented by earlier suit.” *Aukerman*, 960 F.2d at 1033. Absent this safety net, “a patentee may intentionally lie silently in wait watching damages escalate, [even] where an infringer, if he had had notice, could have switched to a noninfringing product.” *Id.* (internal citation omitted).

In this case, for example, Plaintiffs-Appellants (collectively, “SCA”) purportedly knew of the alleged infringement since at least October of 2003, yet

⁴ This “holdup” effect of delayed notice similarly benefits those litigants who “act[] in bad faith by exploiting the high cost to defend complex litigation to extract a nuisance value settlement.” *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1327 (Fed. Cir. 2011).

failed to bring suit until August 2010. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 767 F.3d 1339, 1347 (Fed. Cir. 2014), *vacated* 2014 WL 7460970 (Fed. Cir. Dec. 30, 2014). During this time First Quality “made a number of capital expenditures” resulting from this delay, and thus suffered economic prejudice. *Id.* (noting that “[t]he record evidence suggests that First Quality would have restructured its activities to minimize infringement liability if SCA had brought suit earlier”); *see also* First Quality Br. at 4-7.

D. The Public Interest In Patents Has Led Courts To Broadly Use Equity Restricting Their Procurement And Enforcement

Courts have broadly applied equitable restrictions on abusive patent prosecution and enforcement practices because “[a] patent by its very nature is affected with a public interest.” *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816 (1945) (affirming district court’s dismissal of claims “for want of equity”). “The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.” *Id.*

For that reason, the courts have exercised substantial equity in policing bad-faith tactics employed during prosecution. For example, the doctrine of inequitable conduct allows courts to find “an entire patent (or even a patent family) unenforceable” if it determines that “the patentee’s misconduct resulted in the unfair benefit of receiving an unwarranted claim.” *Therasense, Inc. v. Becton,*

Dickinson & Co., 649 F.3d 1276, 1292 (Fed. Cir. 2011) (en banc). Indeed, courts have also looked to the laches doctrine in this context. For example, the Supreme Court repeatedly has applied laches to invalidate patents resulting from unjustifiably-delayed reissue applications. *E.g.*, *Miller v. Bridgeport Brass Co.*, 104 U.S. 350, 356 (1881) (“[I]n reference to reissues made for the purpose of enlarging the scope of the patent, the rule of laches should be strictly applied; and no one should be relieved who has slept upon his rights, and has thus led the public to rely on the implied disclaimer involved in the terms of the original patent.”). This Court has likewise held patents unenforceable when confronted with dilatory prosecution tactics. *See, e.g.*, *Symbol Techs., Inc. v. Lemelson Med., Educ. & Research Found., LP*, 422 F.3d 1378, 1385 (Fed. Cir. 2005) (“[P]rosecution laches may render a patent unenforceable when it has issued only after an unreasonable and unexplained delay in prosecution.”), *amended*, 429 F.3d 1051 (Fed. Cir. 2005).

This public interest also underlies the courts’ historically broad use of equity to limit unjust enforcement. *See Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1964) (“[T]he prerequisites to obtaining a patent are strictly observed, and when the patent has issued the limitations on its exercise are equally strictly enforced.”). In addition to the equitable doctrines of laches and estoppel, for example, the unclean hands doctrine supplies “a remedy for egregious misconduct” during patent litigation, *Therasense*, 649 F.3d at 1287, including “[a]ny willful act

concerning the cause of action which rightfully can be said to transgress equitable standards of conduct,” *Precision Instrument*, 324 U.S. at 815.

E. Patent Law Has Consistently Recognized The Laches Defense

Among the equitable doctrines flexible enough to combat abusive litigation tactics, the laches defense serves as an important restraint against patent-assertion strategies that endeavor to leverage delayed notice and enforcement—seeking royalties from established market players long after irreversible investments have led to successful products or services that the patent owners played no role in developing or bringing to market. Such tactics should not be encouraged. *Cf. Gustafson, Inc. v. Intersystems Indus. Prods., Inc.*, 897 F.2d 508, 511 (Fed. Cir. 1990) (declining to “reward use of the patent system as a form of ambush”). Accordingly, courts have long recognized the necessity of curbing such abuse by barring claims by those who sleep on their rights. *See Lane & Bodley Co. v. Locke*, 150 U.S. 193, 200-01 (1893) (noting that courts will not assist a patentee who “slept upon his rights, and shows no excuse for his laches in asserting them”).

The laches doctrine incentivizes prompt disclosure, which should be encouraged, as clarity regarding property rights has been observed to be “essential to promote progress, because it enables efficient investment in innovation.” *Festo*, 535 U.S. at 730-31. And, the patent owner plainly is best situated to provide this notice. *See* Herbert Hovenkamp, *Competition for Innovation*, 2012 Colum. Bus. L.

Rev. 799, 826-27 (2012) (“[T]he cost of providing notice of a particular property right is almost always less than the cost of searching among many.”); Chiang, *supra*, at 63 (“[P]lacing the search obligation on patent holders is likely to be efficient in many cases, because patentees are often the lower-cost searchers.”). Just as “patent applicants face powerful incentives to inject ambiguity into their claims,” which the patent drafter is best-positioned (and indeed obligated) to resolve, *Nautilus*, 134 S. Ct. at 2129, “[a]llocating the burden to patentees to seek out infringers is proper, ... because compared to potential infringers, they are in the best position to know the scope of their patent protection and, therefore, also to know likely places to find infringement.” *Wanlass v. Gen. Elec. Co.*, 148 F.3d 1334, 1339 (Fed. Cir. 1998) (noting that patentees generally face “comparatively lower costs in investigating potentially infringing activities than competitors would incur conducting patent searches on every aspect of their products”).

This equitable doctrine was recognized by the Supreme Court well over 120 years ago. In *Lane & Bodley*, the Court characterized “the long period that the plaintiff permitted to elapse before he resorted to his legal remedy” as a fact “of great significance” in reversing a judgment against an accused patent infringer. *Lane & Bodley*, 150 U.S. at 200-01. And in *Leggett v. Standard Oil Co.*, 149 U.S. 287 (1893), the Court affirmed a dismissal in favor of an accused infringer,

finding, *inter alia*, that the patent plaintiff's 14-year delay in bringing suit "shows such laches as will clearly preclude any right to relief." *Id.* at 294.

This same defense has been available to unfairly prejudiced defendants throughout the history of this Court, and in the regional circuits long before the establishment of this Court. *See Aukerman*, 960 F.2d at 1029-30 & n.6 (citing various cases and noting that "[a]s a defense to a claim of patent infringement, laches was well established at the time of recodification of the patent laws in 1952," and that "[w]ithout exception, all circuits recognized laches as a defense to a charge of patent infringement despite the reenactment of the damages limitation in the 1952 statute"); *see also, e.g., Olympia Werke Aktiengesellschaft v. Gen. Elec. Co.*, 712 F.2d 74, 76-77 (4th Cir. 1983) (recognizing the laches defense and noting that "delay is presumed unreasonable" when it "has exceeded the statutory six-year period"); *Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 616 F.2d 1315, 1325-26 (5th Cir. 1980) (noting that Section 286 "merely limits the period of recovery of damages to six years" and that "laches may . . . bar a suit brought within the period specified by [Section 286]"); *TWM Mfg. Co. v. Dura Corp.*, 592 F.2d 346, 348 (6th Cir. 1979) ("Since the statute [Section 286] limits only the period for recovery of damages, courts employ the traditional, equitable doctrine of laches for determining the timeliness of infringement actions."); *Minn. Mining & Mfg. Co. v. Berwick Indus., Inc.*, 532 F.2d 330, 334 (3d Cir. 1976) (affirming

judgment of laches against patent owner); *Maloney-Crawford Tank Corp. v. Rocky Mountain Natural Gas Co.*, 494 F.2d 401, 404 (10th Cir. 1974) (indicating that defendants may show “circumstances requiring the application of laches,” even “[w]here an action is brought within the analogous limitation period [of Section 286]”); *Whitman v. Walt Disney Prods., Inc.*, 263 F.2d 229, 232 (9th Cir. 1958) (re-affirming pre-1952 precedent that “in connection with the bar of laches, from the earliest days federal courts have emphasized the distinction between a reasonable and an unreasonable delay in bringing suit— even within the period designated by the statute of limitations” (quoting *Gillons v. Shell Co.*, 86 F.2d 600, 610 (9th Cir. 1936))); *Smith v. Sinclair Ref. Co.*, 257 F.2d 328, 329 (2d Cir. 1958) (affirming judgment that a plaintiff’s “fourteen-year delay in taking any steps to enforce his patent rights amounted to laches”); *Boris v. Hamilton Mfg. Co.*, 253 F.2d 526, 529 (7th Cir. 1958) (“Laches is an equitable doctrine, not fixed by any unyielding measure, but to be determined in each case under its factual situation . . .”).

II. SEVERAL FUNDAMENTAL DISTINCTIONS BETWEEN COPYRIGHT AND PATENT LAW JUSTIFY THE AVAILABILITY OF THE LACHES DEFENSE

Contrary to SCA’s assertions, *see* SCA Br. (Dkt. No. 84), at 14, copyright and patent law contain significant distinctions relevant to the availability of the laches defense. In addition to the statutory distinctions between the damages-

limiting provision of Section 286 and the statute of limitations found in the Copyright Act, *see* First Quality Br. at 13-16, notable distinctions include the enhanced risk of inadvertent infringement, the increased difficulty of prospectively evaluating infringement risk, the disproportional risk of evidentiary privilege, and the historical recognition of laches as an important and legitimate defense for unjustly-ambushed defendants.

**A. Patent Law Does Not Excuse Innocent Infringers
Who Independently Create Patented Inventions**

The public policy of promoting clear public notice does not apply with nearly the same force in the copyright context. The copyright defense of independent creation provides a safety valve not available to the strict liability tort of direct patent infringement. *See, e.g., Gustafson*, 897 F.2d at 511 (“In our patent system, . . . patentees are authorized to sue ‘innocent’ manufacturers immediately after their patents issue and without warning.”). More specifically, copyright infringement requires copying, which in turn requires both knowledge and access to the copyrighted work. *See, e.g., Selle v. Gibb*, 741 F.2d 896, 901 (7th Cir. 1984) (“Proof of copying is crucial to any claim of copyright infringement because no matter how similar the two works may be (even to the point of identity), if the defendant did not copy the accused work, there is no infringement.”). Not so with patent infringement: “[Patent] protection goes not only to copying the subject matter, which is forbidden under the Copyright Act, but also to independent

creation.” *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 478 (1974) (internal citation omitted); *see also id.* at 490 (contrasting patent law with trade secret law, which “does not forbid the discovery of the trade secret by fair and honest means, e.g., independent creation or reverse engineering”); 35 U.S.C. § 271(a).

Patent law gives patent owners not just the right to prevent others from copying their ideas, but the power to control the use of their idea--even by those who independently develop a technology with no knowledge of the patent or the patentee. This is a power that exists nowhere else in intellectual property (IP) or real property law.

Mark A. Lemley, *Should Patent Infringement Require Proof of Copying?*, 105 Mich. L. Rev. 1525, 1525 (2007).

Consequently, the risk of inadvertent infringement by independent developers is very real and increasingly common. “Many, perhaps most, patent lawsuits are filed against independent developers who themselves came up with the idea, generally at about the same time the patentee did.” Mark A. Lemley, *Ignoring Patents*, 2008 Mich. St. L. Rev. 19, 25 & n.25 (2008) (further noting that “independent development . . . seems to be present in the overwhelming majority of patent cases”); *see also* Roger D. Blair & Thomas F. Cotter, *Strict Liability and Its Alternatives in Patent Law*, 17 Berkeley Tech. L.J. 799, 810 (2002) (“[T]he probability of independent development of an invention . . . may be relatively high, as demonstrated by the fact that, at any given time, multiple researchers are working on the very same engineering and scientific problems.”); Samson

Vermont, *Independent Invention as a Defense to Patent Infringement*, 105 Mich. L. Rev. 475, 478 (2006) (“This type of neck-and-neck finish is common. Researchers frequently converge on the same idea at roughly the same time.”).

This distinction highlights the need to incentivize timely notice of infringement allegations. Inadvertent infringers should not be held hostage by patent owners who opportunistically delay notice in order to ambush those who independently and in good faith invest in bringing products and services to market. These tactics harm not only the litigants, but also the public, which is deprived of the possible follow-on innovations resulting from timely notice.

B. Evaluating Patent Infringement Risk Without Express Notice Is Significantly More Difficult In The Patent Context

As discussed above, evaluating prospective patent infringement risk is a challenging endeavor for even the most diligent investigator. *See* Section I.B, *supra*. Those investigating copyright infringement risk, however, enjoy distinct advantages. For one, virtually all tangible works enjoy copyright protection, effectively putting would-be copiers on notice merely by their existence. *See* Fred H. Cate, *The Technological Transformation of Copyright Law*, 81 Iowa L. Rev. 1395, 1400 (1996) (noting that the federal copyright “law now protects every letter, memo, note, home video, answering machine message, e-mail, and doodle”). The existence of a commercial product or process, however, provides little clue regarding patent protection, as many innovations are not patented and many more

are judicially exempt from the statutory marking requirements. *See* Roberto Fontana et al., *Reassessing Patent Propensity: Evidence from a Data-Set of R&D Awards, 1977-2004*, Working Papers 2013/09, at 15 (2013) (analyzing the top 100 industrial innovations worldwide each year, from 1977 to 2004 and concluding that “a relative low number of important innovations are patented”); *see also* Section I.B, *supra*. As such, the existence of a machine or process often provides little or no notice of any applicable patent protection.

Moreover, many patentees do not actually reduce their inventions to practice, much less commercialize them, requiring resort to analyzing the hundreds of thousands of patents issued every year. As previously discussed, attempting to monitor—much less analyze—all issued patents is a costly and unreliable endeavor. *See Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289, 1305 (2012) (noting that “searches of existing patents and pending patent applications” are “costly and time-consuming”); *see also* Chiang, *supra*, at 3 (describing the “patent thicket” phenomenon, in which “producers face excessively high search costs because a commercial product is often covered by thousands of overlapping patents and finding every last patent is impossible”). In sum, identifying potential exposure to patent infringement is significantly more complex and prone to error than a corresponding copyright analysis.

C. The Risk Of Evidentiary Prejudice Is Amplified For Patent Litigation Defendants

One of the purposes of the laches defense—avoiding evidentiary prejudice—is amplified in the patent context. The risk of evidentiary prejudice is particularly acute in patent litigation and disproportionately prejudices alleged infringers and other parties challenging patent validity.

As recognized by this Court, the laches defense ensures ““that litigation will be decided on the basis of evidence that remains reasonably accessible and that those against whom claims are presented will not be unduly prejudiced by delay in asserting them.”” *Aukerman*, 960 F.2d at 1029 (quoting *Envtl. Def. Fund v. Alexander*, 614 F.2d 474, 481 (5th Cir. 1980)); *see also Trafalgar Shipping Co. v. Int’l Milling Co.*, 401 F.2d 568, 571 (2d Cir. 1968) (“The purpose of laches is simply to relieve a decision-making body of the duty to resolve, and to prevent one party from having to prove, issues as to which the relevant evidence has been lost due to the delay of the other party.”).

Six years might as well be an eternity in many fast-moving technological sectors. Consequently, delayed notice often forces accused infringers to become technology historians. Determining whether or not the asserted patent contributed a new and non-obvious addition to the existing art necessarily requires access to documents and witness pre-dating not only the damages limitation period of Section 286, but also the patent’s effective filing date. Often, the best evidence of

non-publication prior art becomes increasingly difficult to obtain the longer the patentee delays suit. Memories fade, notes are lost, files are deleted, former employees become unavailable, and outmoded devices are discarded. Thus, enforcement delays increase the likelihood of improperly-granted patents being leveraged against otherwise royalty-free pursuits in contravention of another important policy objective of our patent system: “Both this court and the Supreme Court have recognized that there is a significant public policy interest in removing invalid patents from the public arena.” *SmithKline Beecham Corp. v. Apotex Corp.*, 403 F.3d 1331, 1354 (Fed. Cir. 2005).

Patentees, on the other hand, are less likely to be prejudiced, as they of course have notice of their own patent and will thus in most cases preserve favorable evidence of, for example, conception and reduction to practice. This disparity stands in stark contrast to the Supreme Court’s observation that, in copyright litigation, “[a]ny hindrance caused by the unavailability of evidence . . . is at least as likely to affect plaintiffs as it is to disadvantage defendants.” *Petrella*, 134 S. Ct. at 1977. And unlike copyright, where the “registration mechanism . . . reduces the need for extrinsic evidence,” because “[k]ey evidence in the litigation, then, will be the certificate, the original work, and the allegedly infringing work,” *id.*, patent litigation defendants frequently rely on (often technologically ancient) extrinsic evidence of invalidating prior art. *See First Quality Br.* at 19-21.

**D. The Copyright Laches Defense Did Not Share
The Rich History Of The Patent Law Doctrine**

Perhaps due in part to these distinctions, the copyright laches defense did not enjoy the same consistency in regional circuit law as observed in patent cases. As discussed in Section I.E, *supra*, the laches defense was not subject to a circuit split in the patent context prior to the creation of this Court, whereas the Supreme Court expressly “granted certiorari to resolve a conflict among the Circuits on the application of the equitable defense of laches to copyright infringement claims.” *Petrella*, 134 S. Ct. at 1972. *Amici* submit that the long-standing recognition of this equitable doctrine in the patent law weighs in favor of preserving a status quo that Congress has not chosen to alter, despite multiple significant overhauls to the statutory text. *See* First Quality Br. at 26-30.

CONCLUSION

The Supreme Court’s decision in *Petrella* does not alter the historically and prospectively sound rationales for preserving the laches defense in patent law. This Court should reaffirm that patentees may not “intentionally lie silently in wait watching damages escalate, particularly where an infringer, if he had had notice, could have switched to a noninfringing product.” *Aukerman*, 960 F.2d at 1033 (internal citation omitted). Without this critical protection, “speculative schemers” will further suppress innovation and frustrate commerce by ambushing successful market participants with opportunistically delayed notice and enforcement

proceedings. For these reasons, this Court should re-affirm the availability of the laches defense to defendants accused of patent infringement and affirm the District Court's grant of summary judgment of laches in this case.

April 21, 2015

Respectfully submitted,

/s/ Philip Warrick

John D. Vandenberg

Philip Warrick

KLARQUIST SPARKMAN, LLP

One World Trade Center

121 S.W. Salmon Street, Suite 1600

Portland, Oregon 97204-2988

(503) 595-5300

john.vandenberg@klarquist.com

philip.warrick@klarquist.com

Counsel for *Amici Curiae*

**United States Court of Appeals
for the Federal Circuit**

SCA Hygiene Products v. First Quality Baby Products, No. 2013-1564

CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by KLARQUIST SPARKMAN, LLP, Attorneys for *Amicus Curiae* to print this document. I am an employee of Counsel Press.

On **April 21, 2015**, counsel has authorized me to electronically file the foregoing **BRIEF OF AMICI CURIAE GARMIN INTERNATIONAL, INC., et al.**, with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to any of the following counsel registered as CM/ECF users:

Kenneth P. George
(kgeorge@arelaw.com)
Charles R. Macedo
(cmacedo@arelaw.com)
Mark Berkowitz
(mberkowitz@arelaw.com)
Amster Rothstein & Ebenstein LLP
90 Park Avenue
New York, NY 10016
212-336-8000
Counsel for Appellees

Martin J. Black
(martin.black@dechert.com)
Kevin M. Flannery
(kevin.flannery@dechert.com)
Teri-Lynn A. Evans
(teri.evans@dechert.com)
Sharon K. Gagliardi
(sharon.gagliardi@dechert.com)
Dechert LLP
2929 Arch Street
Philadelphia, PA 19104-2808
(215) 994-4000
Counsel for Appellants

Two paper copies will also be mailed to the above counsel at the time paper copies are sent to the Court. Any counsel for *Amicus Curiae* appearing at the time of filing, will be served only via the CM/ECF e-mail notice.

Upon acceptance by the Court of the e-filed document, thirty-one paper copies will be filed with the Court within the time provided in the Court's rules.

April 21, 2015

/s/ Robyn Cocho
Counsel Press

