

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

TIVO INC.,

Plaintiff-Appellee,

v.

EHOSTAR CORPORATION, EHOSTAR DBS CORPORATION, EHOSTAR
TECHNOLOGIES CORPORATION, EHOSTAR LIMITED LIABILITY COMPANY,
EHOSTAR SATELLITE LLC, and DISH NETWORK CORPORATION,

Defendants-Appellants.

*Appeal from the United States District Court for the Eastern District of Texas in
Case No. 2:04-CV-01, Judge David Folsom*

**BRIEF OF AMICUS CURIAE
INTERNATIONAL INTELLECTUAL PROPERTY INSTITUTE
IN SUPPORT OF PLAINTIFF-APPELLEE**

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CERTIFICATE OF INTEREST

Counsel for *amicus curiae*, the International Intellectual Property Institute, certifies the following:

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

International Intellectual Property Institute (IIPi)

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. There are no parent corporations and any publically held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by me.
4. The names of all the attorneys that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this court are:

INTERNATIONAL INTELLECTUAL PROPERTY INSTITUTE (IIPi)
Hon. Bruce A. Lehman
Andrew Jaynes
Jason D. Koch
Cameron Coffey

September 17, 2010

Hon. Bruce A. Lehman
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STATEMENT OF INTEREST OF AMICUS CURIAE

The International Intellectual Property Institute (IIPI) is a non-partisan, not-for-profit 501(c)(3) corporation located in Washington, DC. As an international development organization and think tank, IIPI is dedicated to increasing the awareness of intellectual property as a tool for sustainable economic growth. Since 1998, the institute has been involved in research, public education, training workshops, technical assistance, institution building, and consultative services to achieve this goal.

This case is important for preserving the health of the U.S. patent system. Because we live in a world where wealth generation is increasingly the result of ideas rather than products, IIPI believes that it is critical that we protect our industries that are rooted in the intellectual assets of our citizens. A ruling against TiVo, Inc., based on the arguments presented below, would deeply weaken patent protections and undermine the use of intellectual property as a tool for economic growth in America.

The Honorable Bruce A. Lehman is the Chairman and President of IIPI. From August 1993 through December 1998, Mr. Lehman served as Assistant Secretary of Commerce and U.S. Commissioner of Patents and Trademarks. As the leader of the U.S. delegation to WIPO's December 1996 Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, he successfully concluded

negotiations which resulted in the adoption of two treaties: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Mr. Lehman's guidance on the development of the intellectual property provisions of the Uruguay Round Agreement, now known as TRIPS, has enabled American creators and inventors to more easily protect their creations from piracy throughout the world.

This brief is submitted under the authority of this Court's order dated May 14, 2010, granting *en banc* review, in which the Court stated that *amici curiae* may submit briefs without leave of this Court. In addition, IIPi has received the consent of the plaintiff-appellee for the filing of this brief of *amicus curiae*.

SUMMARY OF THE ARGUMENT

The issues raised by this Court's *en banc* order reflect the primary tension inherent to the United States patent system. The issuance of a patent grants a legal monopoly of a fixed duration which is intended to incentivize the development of technological innovations. By granting a legal monopoly, however, patents also deter marketplace competition and prevent the development of innovations that are too similar to, and therefore within the scope of, the patent.

In order to maximize innovation, this Court must carefully balance protecting the rights of current patent holders with allowing future entrepreneurs the freedom to innovate. If the scales tip too far in either direction, innovation and economic development are impeded. Therefore, in enforcing patent rights, our judicial system must attempt to vigorously protect issued patents from infringements while being mindful not to overextend the patents' boundaries and stifle the development of legitimate innovations.

Often when a trial court determines that a product infringes on a patent, the infringer will modify their product and carry on with their business. If this results in a continuation of the dispute, this Court can achieve balance by allowing the trial court discretion in determining when the patent holder may litigate infringement through a contempt proceeding. The summary nature of contempt hearings makes them the most convenient and efficient forum to determine if

redesigned products continue to infringe. If the infringer fails to adequately design around the patent, the proceedings provide finality to the litigation, promoting judicial economy and assuring that the patent holder's rights are enforced. The high burden of proof that the patent holder must meet to prove contempt ensures that the trial court curbs only actual infringements while legitimate attempts to design around patents are permitted.

By contrast, forcing a patent holder to commence a new lawsuit to litigate whether a redesigned product continues an infringement creates an opportunity for mischief. The initiation of a new action is a costly and time-consuming affair. Depending on the nature of the product in question and the resources of the parties involved, an unscrupulous infringer can simply keep modify their product in meaningless ways, making the patent holder endlessly litigate the same issue—the ultimate dilatory tactic.

Without the ability to effectively and affordably enjoin a party from infringing a patent, the trial court's finding of infringement would likely result in no more than a compulsory license. This will hinder innovation as investors choose to avoid these technologies because compulsory licenses are often made at below-market rates, depriving investors and inventors of the full benefits of their work. Even if the license is not compulsory, the difficulties of enforcement will put patent holders at a disadvantage when they negotiate licensing terms.

Similarly, the standard for determining contempt must be an objective one. A patent's scope is ambiguous by nature. Allowing biased individuals to interpret them anew in each case would result in inconsistent treatment, depriving future entrepreneurs of clear guidance as to their true and proper boundaries. Because this lack of certainty would discourage investment, creating an exception for the infringer's good faith would ultimately deter innovation.

Finally, the trial court must be mindful of the nature of the products when fashioning an injunction. For many modern products, the inventive step is in the software code that powers the device. When these products are found to infringe, the court must make sure that there is a break in service between the infringer and the resulting customers. Otherwise, the infringer is rewarded for their malfeasance while the patent holder is not compensated for lost sales.

ARGUMENT

I. DETERMINING WHETHER A REDESIGNED PRODUCT CONTINUES TO INFRINGE IN A CONTEMPT PROCEEDING IS PROPER WHEN THE COURT CAN CLEARLY ESTABLISH THAT THE INJUNCTION WAS VIOLATED

A trial court may properly determine if a redesign continues the original product's infringement in a contempt proceeding whenever the court can clearly establish that the injunction against infringement has been violated. The court can clearly establish whether an injunction has been violated if it can confidently conclude, after reviewing the record as well as additional testimony, that it has the

facts necessary to make the determination. If at any point during this process the court determines that the evidentiary issues turn the proceedings into something closer to a full trial than to a summary hearing, it may appropriately require the initiation of a new suit to litigate the matter.

This standard, which requires deference to the trial court's judgment, provides patent holders with an effective forum in which to enforce favorable judgments, maximizes judicial efficiency, maintains the dignity of the court, and protects the alleged infringer's right to due process. In turn, the court correctly balances the protection of a validly issued patent with protecting legitimate attempts to design around it, thereby appropriately incentivizing innovation.

A. Courts Generally Have Broad Discretion in Enforcing Their Orders to Ensure Compliance and Preserve Judicial Authority

Courts have broad discretion in enforcing their orders. *See Perfect Fit Industries, Inc. v. Acme Quilting Co., Inc.*, 673 F.2d 53, 57 (2nd Cir. 1982) (“the district court has broad discretion to design a remedy that will bring about compliance”); *Feltner v. Title Search Co.*, 283 F.3d 838, 841 (7th Cir. 2002) (“It is well established that the decision by a district court to enter a finding of civil contempt is discretionary and we review it only to determine if there was an abuse of discretion or its entry was clearly erroneous”). This is necessary to ensure that litigants respect the court's authority and abide by its judgments. *U.S. v.*

Giovanelli, 897 F.2d 1227, 1230 (S.D.N.Y. 1989) (“Summary punishment is warranted for contempt in the face of the court because of the state's need to maintain the court's dignity as well as public respect for it and its orders”). Without the ability to find those who choose to ignore the court’s rulings in contempt, the laws that the court seeks to uphold would be rendered ineffective.

For general matters, there is no threshold inquiry that a court must entertain prior to the commencement of a civil contempt hearing other than the tacit recognition that the accused contemnor is subject to an actual and specific prior court order. *Schaefer Fan Co., Inc. v. J & D Mfg.*, 265 F.3d 1282, 1289 (Fed. Cir. 2001) (to be held in contempt for violating a court order the party must have actual knowledge of the order and the order must be sufficiently specific to be enforceable). If the record reveals that there is no contempt, it is a simple matter for the court to find as such and dismiss accordingly. If discovery or testimony is required to determine whether contempt has occurred, then the court is permitted to consider it. *KSM Fastening Systems, Inc. v. H.A. Jones Co., Inc.* 776 F.2d 1522, 1534 (Fed. Cir. 1985) (“Most circuits have favored a middle ground granting discretionary authority in the trial court to determine how much relitigation may be required in the interest of justice”). As the finder of fact, these decisions are left to the discretion of the trial court and reviewed only for clear error on appeal. *Schaefer*, 265 F.3d at 1289.

B. The trial court must maintain its discretion to determine the appropriateness of contempt proceedings in redesign cases to prevent dilatory tactics

Injunctions against infringement are routinely tested by the adjudicated infringers. Parties who are enjoined from selling an infringing product commonly continue their business by redesigning the product. In doing so, they attempt to circumvent the patent's claims and, therefore, the terms of the injunction.

Patent holders typically prefer to litigate whether these redesigns continue to infringe through contempt proceedings rather than through new suits. Because a contempt hearing is considered to be a continuation of the prior case, *KSM*, 776 F.2d at 1524 (“the contempt motion being merely part of the original action”), a patent holder is able to gain redress from the judicial process that is affordable and timely. They have already overcome many procedural obstacles that new litigants must face. *Id.* (“The adjudged infringer is already under the jurisdiction of the court and may be summoned to appear to respond on the merits”). More importantly, the summary nature of the hearings also keeps legal costs relatively low. *Id.* (“Contempt proceedings are generally summary in nature and may be decided by the court on affidavits and exhibits without the formalities of a full trial.”).

Conversely, requiring a new action to litigate every change that an infringer makes in their product, no matter how minor, puts the patent holder at risk of

having to repeatedly reestablish infringement. *Interdynamics, Inc. v. Firma Wolf*, 653 F.2d 93, 97-98 (3rd Cir. 1981) (“if a patentee could only attack each modified product in a new infringement action, no matter how minimal the modification . . . the patentee would be put to the expense of reestablishing the scope of its patent and the patent’s congruence with the allegedly infringing product.”). This creates a perverse incentive for adjudicated infringers to make insignificant modifications to their products as a dilatory tactic, allowing them to continue to profit from the infringement during a period of potentially endless litigation. *Id.* at 98 (“If these essential aspects of a patentee’s rights could be reopened at the option of the infringer . . . [t]his could lead to more litigation because infringers would have an incentive to . . . relitigate issues in a contempt proceeding.”). If the infringer is better able to handle the costs of litigation and is able to outlast the patent holder, the patent holder may be denied justice.

Requiring the patent holder to relitigate the same infringement is also fundamentally unfair to the patent holder. Under the doctrine of collateral estoppel, an issue which was determined by the court in prior litigation is conclusive in subsequent suits involving the same parties. *Mother’s Restaurant, Inc. v. Mam’s Pizza Inc*, 723 F. 2d 1566, 1569 (Fed. Cir 1983). The doctrine prevents legal harassment and the waste of judicial resources, and it preserves the integrity of decisions by ensuring the finality of judgments. *Allen v. McCurry*, 449 U.S. 90, 94

(1980)(“res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication”). It applies in patent cases, as it does in others. However, patent prosecutions also have the equivalency test, which states that “if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form or shape.” *Graver Tank & Mtg. Co. v. Linde. Air Products Co.*, 339 U.S. 605, 608 (1950) (quoting *Union Paper-Bag Machine Co. v. Murphy*, 97 U. S. 120, 125 (1877)). The equivalency test ensures that would-be infringers cannot avoid a patent’s protections by making insignificant modifications to their design while still copying the essential elements of the patented device. In essence, the doctrine prevents fraud on the patent system. Read together, these two doctrines—collateral estoppel and the equivalency test—outline when relitigation in patent litigation is appropriate, given fairness concerns. Since many redesigns are essentially the same in this context, relitigation should be avoided to prevent judicial waste and legal harassment.

In order to prevent these abusive legal tactics and ensure fairness, the district court must maintain its broad discretion to determine the appropriateness of contempt proceedings in product redesigns cases. The current “colorable difference” standard grants the district court such discretion. *KSM*, 776 F.2d at

1528. (“So long as the district court exercises its discretion to proceed or not to proceed by way of a contempt proceeding within these general constraints, this court must defer to its judgment on the issue.”). The “colorable difference” standard requires the district court to compare the redesigned product to the infringing product that it is based upon. *Additive Control & Measurement Sys., Inc., v. Flowdata, Inc.*, 154 F.3d 1345, 1349 (Fed. Cir. 1998) (“[W]hether a contempt hearing is the appropriate forum . . . turns on a comparison between the original infringing product and the redesigned device.”). This evaluation inherently requires the district court to apply its own judgment. *KSM*, 776 F.2d at 1531 (“The standard . . . is difficult to articulate with precision, since it involves, to a large extent, the exercise of judicial discretion.”).

Indeed, most of the circuits have correctly deferred to the district court’s judgment in these cases. *Id.* at 1533 (Newman, J., concurring in part) (“[M]ost of the circuits. . . recognize. . . the need for discretion in district courts to handle contempt cases simply and expeditiously.”). Even the need for expert testimony does not preclude the trial court, at its discretion, to find that a contempt proceeding is proper. *Additive*, 154 F.3d at 1349 (“Although our case law suggests that the need for expert testimony counsels against the use of contempt proceedings . . . the district court did not abuse its discretion.”), *Abbott*

Laboratories v. Torpharm, Inc., 503 F.3d 1372, 1379 (Fed. Cir. 2007) (“need for expert testimony [is] not dispositive.”).

Furthermore, it is important that the trial court be given broad discretion due to the fact-based nature of redesign cases. *See KSM*, 776 F.2d at 1532 (Newman, J., concurring in part) (“Careful analysis of the decisions of the various circuits shows how fact-dependent these decisions have been.”). Determining whether a redesigned product continues an adjudicated infringement is an exercise in weighing the factual elements of two similar products. The outcome of this comparison will always depend on the intricacies of the products involved. As the court of first review, the trial court’s experience with the case makes it the best-equipped arbiter to adjudicate these factual issues. At the beginning of the summary proceedings, the trial court should already be well-versed in the relevancy of the design changes, the scope of the patent, and the terms of the injunction. Requiring another court, either on review or in a new proceeding, to adjudicate the redesign is a waste of the court’s time and resources as the new court would have to familiarize themselves with what the trial court already knows.

C. The higher standard of proof required in contempt proceedings protects legitimate efforts to design around patents

In order to prove contempt, the moving party bears the burden of showing by “clear and convincing evidence” that the contemnors violated a specific and

definite order of the court. *KSM*, 776 F.2d at 1524 (“[T]he movant bears the heavy burden of proving violation by clear and convincing evidence.”). Because “the issue in contempt proceedings is violation vel non of the injunction” and “[i]nfringement is the sine qua non of violation of an injunction against infringements,” a patent holder seeking to enforce their patent rights by litigating infringement in a redesign case must prove by clear and convincing evidence that the redesign continues the enjoined infringement. *Id.* at 1528.

The higher standard of proof protects the defendant’s legitimate efforts to design around a patent. If a district court can determine with “clear and convincing” certainty that the court’s orders have been violated, there should be no due process concerns, because there would be no “fair ground of doubt” regarding the wrongfulness of the defendant’s conduct. *Cal. Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885) (“[C]ontempt . . . should not be resorted to when there is a fair ground of doubt as to the wrongfulness of the defendant’s conduct.”). If this standard is not met, however, then it may be doubtful whether the redesign continues the infringement, and it is appropriate to have a full and fair trial on the merits. *Id.* As such, the “clear and convincing” standard protects legitimate efforts to design around a patent and assures that the patent’s boundaries are not inappropriately enlarged.

II. A REASONABLE, GOOD-FAITH BELIEF OF NON-INFRINGEMENT SHOULD HAVE NO BEARING ON A FINDING OF CONTEMPT

That the infringer invested time and money to redesign a product—even with a reasonable, good-faith belief of non-infringement—is irrelevant as to whether the infringer violated the terms of a court-ordered injunction. Therefore, it should have no bearing on whether the court finds the party in contempt.

The purpose of civil contempt is to provide a remedy to the aggrieved party. *See Spindelfabrik Suessen-Schurr, et al v. Schubert & Salzer Maschinenfabrik Aktiengesellschaft, et al*, 903 F.2d 1568, 1578 (Fed. Cir. 1990) (a civil contempt action is “remedial, and for the benefit of the complainant.”) (citations omitted); *Doe v. General Hospital of District of Columbia*, 434 F.2d 427, 431 (1970) (the court’s task in a civil contempt proceeding is “to enforce compliance with an order of the court”). Because of this remedial objective, intent is irrelevant in civil contempt proceedings. *See Waffenschmidt v. McCay*, 763 F.2d 711, 726 (1985) (“good faith is irrelevant as a defense to a civil contempt order”); *Additive Controls*, 154 F.3d at 1353 (“[A] party need not intend to violate an injunction to be found in contempt.”).

Moreover, this Court has recognized that an enjoined infringer assumes the risk of a contempt finding by attempting to redesign a product around the terms of an injunction. *KSM*, 776 F.2d at 1526 (“[A]n enjoined party . . . bears the risk that the

enjoining court may find changes to be too insubstantial to avoid contempt.”). This is necessary because the claims of a patent are inherently indefinite in scope. *See American Foundry & Manufacturing Co. v. Josam Manufacturing Co.*, 79 F.2d 116, 117 (8th Cir. 1935) (“The indefinite character of . . . [the] limitations on the valid boundaries any particular patent inevitably produces somewhat of [a] vagueness as to those boundaries except as such are settled by judicial definition.”). Permitting adjudicated infringers to substitute their own judgment for that of the court would lead to inconsistent interpretations. This would further confuse future inventors about the patents’ boundaries and hinder the development of useful innovations. If an injunction seems ambiguous, the enjoined party may always ask for clarification.

III. ERODING A PATENT HOLDER’S ABILITY TO ENFORCE THEIR RIGHTS LESSENS THEIR INCENTIVE TO INNOVATE

The value of a patent is in the right to exclude others. *See Brief for American Bar Association as Amici Curiae Supporting Respondents, Ebay Inc. v Mercexchange*, 547 U.S. 388 (2006) (No. 05-130). Patents grant the patent holder a legal monopoly of limited duration over the protected innovation. This ensures that the patent holder receives the commercial benefits of the innovation during that time. It is because they know that they will receive the fruits of their efforts that investors are incentivized to invest and inventors to innovate.

Once a patent is validly issued, court ordered injunctions against infringement are the most important remedy a patent holder has to enforce their right to exclude. Without the ability to effectively and affordably enjoin a party from infringing a patent and prevent the unauthorized use of patented materials, a finding of infringement will, at best, result in a compulsory license.

A system in which compensatory licenses are significantly easier to enforce than injunctions against infringement discourages innovation. Compulsory licenses deter investment in innovation because the licensing fees that result are almost always below the full value of the monopoly. *See eg* Jamie Feldmen, *Compulsory Licenses: The Dangers Behind the Current Practice*, 8 J. INT'L BUS. & L. 137, 162 (Spring 2009) (investors are unlikely to invest in a device if a compulsory license is the most likely remedy to infringement). This is because market trends and intangible value are difficult to determine with certainty, making it nearly impossible for a judge to accurately estimate marketplace value. *See i4i Ltd. P'ship v. Microsoft Corp.*, 93 U.S.P.Q.2d 1947, 1966 (Fed. Cir. 2010) (“[L]oss of market share, brand recognition and customer goodwill . . . defy attempts at valuation, particularly when the infringing acts significantly change the relevant market.”); *Bank of Am. Nat'l Trust & Savings Ass'n v. 203 N. LaSalle St. P'ship*, 426 U.S. 434, 457 (1999) (“[T]he best way to determine value is exposure to a market.”).

Meanwhile, strong patent enforcement mechanisms encourage innovation by assuring that patent holders receive fair value when they negotiate licenses. Economically, it can be more efficient to pay a licensing fee rather than to invest in designing around a patent. When it is apparent that a license is necessary to conduct business, strong enforcement mechanisms ensure that negotiations result in a higher and more expeditious payment. However, if a potential infringer knows they will be granted a compulsory license at a lower rate and the patent holder will need to initiate expensive litigation to have their rights enforced, the incentives to negotiate for a license are much lower.

V. THERE MUST BE A BREAK IN SERVICE FOR AN INJUNCTION AGAINST INFRINGEMENT TO BE EFFECTIVE

Normally, when an infringer is enjoined from selling a product, it must fully remove the device from the marketplace which results in a break in the relationship with its customers. If the infringer chooses to design around the infringement, it offers the new product to the consumer in a competitive environment, giving the customer the choice of purchasing either the infringer's new product or a competing good. This transitional period is crucial because it provides competitors an opportunity to reach the customers that the infringer had unfairly obtained from the infringement.

Infringers can avoid a break in service when they design around an injunction by altering their products' software code. Without a break, the infringer maintains their illicitly-obtained customers to the detriment of the patent holder, who suffers both lost sales and licensing opportunities. Because the infringer continues to reap the benefits of its wrongful actions to the detriment of the patent holder, the infringer is rewarded for its malfeasance and the injunctive relief is illusory.

The trial court should ensure that an injunction provides true equitable relief by requiring an interruption in service between the infringer and its customers. There are many ways that the court can achieve this break without necessitating that a company "go into each of its customers' homes and physically remove" the product. *Tivo, Inc. v. Echostar Corp., et al*, at 23. One method to accomplish this would be to require that the infringer notify its customers and provide them an opportunity to renegotiate their contracts. The trial court could also grant the patent holder an opportunity to communicate a competing offer.

Allowing infringers to design around injunctions without a break in service robs patent holders of competitive opportunities and rewards infringers by permitting them to keep the customers that it obtained through its infringement. If patent holders are to receive equitable relief, the court must provide just remedies by considering the unique nature of the infringing products to ensure that there is a break in the relationship between the infringers and their customers.

CONCLUSION

It is proper for the trial court to adjudicate the issue of whether a redesigned product continues an enjoined infringement through a contempt proceeding whenever the trial court can clearly establish that the injunction against the infringement was violated. This broad test grants the trial court discretion in determining the forum for the litigation, which correctly balances the defendant's due process rights with patent holder's right to exclude and maximizes the prospect of future innovations.

Permitting the trial court to preserve judicial authority, where courts have traditionally maintained broad discretion, prevents dilatory tactics. Otherwise, infringers could game the system by requiring endless litigation, simply by changing their products in an insignificant way as a response to each finding of infringement. This would undermine the inventor's incentive to innovate as it would prove extremely difficult to effectively enforce their right to exclude.

Allowing the trial courts discretion is not an open door policy which allows patent holders to abuse the due process rights of the accused. The contempt proceeding's higher standard of proof—requiring clear and convincing evidence—protects inventors' legitimate efforts to design around patents by ensuring that

there is a full and fair trial on the merits whenever there is a fair doubt as to infringement.

If this Court does make changes to the current law, it must be sure to protect the investor's incentive to innovate. For example, this Court must maintain that a reasonable, good-faith belief of non-infringement should have no bearing on a finding of contempt. To do otherwise invites an element of subjectivity into patent interpretations that make their boundaries more uncertain. In turn, this uncertainty would have a chilling effect on future innovation as inventors and investors shy away from similar devices due to being unsure of the risk of an infringement suit.

This Court should also require a break in service in order to guarantee the effectiveness of injunctions against infringement. Only a break in service can provide the aggrieved patent holder the opportunity to regain the customers that it lost to the infringer. Without a break, the infringer may continue on by supplying a similar product to its customers, thereby maintaining the market share that it illicitly obtained. Infringers should not be allowed to profit in this manner. Moreover, when fashioning an injunction, courts must be mindful of the manner of the device. Software-based technologies can exacerbate the break-in-service issue. The customer may never become aware of the infringement when a product is modified by simply patching its software code.

If this Court in any way erodes the patent holder's ability to enforce their right to exclude, our patent system moves one step closer to being nothing more than a system of compulsory licenses. The U.S. patent system has never functioned this way, and for good reason. Compulsory licenses are less effective than the right to exclude at stimulating the development of innovations because they provide a lower rate-of-return to the patent holder.

CERTIFICATE OF SERVICE

1. I hereby certify that an original and thirty (30) copies of the foregoing **BRIEF OF AMICUS CURIAE INTERNATIONAL INTELLECTUAL PROPERTY INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLEE** were hand delivered to the Clerk of the Court for the United States Court of Appeals for the Federal Circuit on September 17, 2010, at the address listed below.

Clerk of the Court
United States Court of Appeals for the Federal Circuit
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2. I also certify that two (2) true and correct copies of the foregoing **BRIEF OF AMICUS CURIAE INTERNATIONAL INTELLECTUAL PROPERTY INSTITUTE IN SUPPORT OF PLAINTIFF-APPELLEE** were served via commercial carrier on September 17, 2010, to each of the principal counsel of record as follows:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) or Federal Rule of Appellate Procedure 28.1(e). The brief contains 4619 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Appellate Procedure 28.1(e) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, 14 point font.

September 17, 2010

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