2020-1413

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MLC INTELLECTUAL PROPERTY, LLC,

Plaintiff-Appellant

v.

MICRON TECHNOLOGY, INC.,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of California
Case no. 3:14-cv-03657, Judge Susan Illston

BRIEF OF AMICI CURIAE HIGH TECH INVENTORS ALLIANCE AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION SUPPORTING APPELLEE

T. Andrew Culbert
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101
Phone: 206.359.3627
E-mail: ACulbert@perkinscoie.com

Andrew T. Dufresne
PERKINS COIE LLP
33 East Main Street, Suite 201
Madison, Wisconsin 53703
Phone: 608.663.7492
E-mail: ADufresne@perkinscoie.com

Theresa Nguyen
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, Washington 98101
Phone: 206.359.6068
E-mail: RNguyen@perkinscoie.com

Counsel for High Tech Inventors Alliance and
Computer & Communications Industry Association

June 2, 2020

CERTIFICATES OF INTEREST

Counsel for the High Tech Inventors Alliance (HTIA) certifies the following:

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

High Tech Inventors Alliance.

2. The name of the real party in interest represented by me is:

not applicable.

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

none.

4. HTIA did not participate in proceedings before the lower tribunal. The names of all law firms and the partners and associates that are expected to appear for HTIA in this court and who are not already listed on the docket for the current case are:

none.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal are:

none.

Dated: June 2, 2020

/s/ Andrew T. Dufresne
Andrew T. Dufresne

Counsel for the Computer & Communications Industry Association (CCIA) certifies the following:

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

Computer & Communications Industry Association.

2. The name of the real party in interest represented by me is:

not applicable.

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

none.

4. CCIA did not participate in proceedings before the lower tribunal. The names of all law firms and the partners and associates that are expected to appear for CCIA in this court and who are not already listed on the docket for the current case are:

none.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal are:

none.

Dated: June 2, 2020 /s/ Andrew T. Dufresne
Andrew T. Dufresne

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Blue Br.	MLC's Corrected Opening Brief
CCIA	Computer & Communications Industry Association
HTIA	High Tech Inventors Alliance
Micron	Defendant-Appellee Micron Technology, Inc.
MLC	Plaintiff-Appellant MLC Intellectual Property, LLC
Red Br.	Micron's Responsive Brief
'571 patent	U.S. Patent 5,764,571

INTRODUCTION

Unreliable damages theories remain pervasive in patent litigation—a problem that this case presents in stark relief. Plaintiffs routinely invoke prior license agreements to justify their demands, buoyed by the prominence of such evidence among the *Georgia-Pacific* factors. Too often, however, previous licenses are used as a shortcut around sound economic analysis. Simply pointing to a potentially comparable license does not satisfy the Federal Rules of Evidence or the legal standards governing patent damages. It does not excuse illogical conclusions untethered to the prior license's terms. And it does not diminish the plaintiff's obligation to establish a reasonable measure of damages tied to the value of the patented technology and the scope of the allegedly infringing use. Yet plaintiffs continue to push boundaries with an "anything goes" approach after identifying a license they call comparable.

This case is a prime example. The plaintiff alleged infringement of a single patent and demanded reasonable-royalty damages in the form of a running royalty. To support the claimed royalty rate, the plaintiff submitted expert testimony premised on two license agreements. Each of those agreements, however, covered more than 40 patents—foreign and domestic—and specified lump-sum payments without explaining any underlying calculation. Worse, the plaintiff's expert witness made no attempt to translate or unpack those previous lump-sum payments to derive an effective running royalty rate for the asserted patent. Instead, he relied on a separate most-favored-customer clause from one of the agreements to divine his proposed royalty rate, which he then tripled using a "rule of thumb" for applying international rates to U.S.-only sales. The plaintiff defended that dubious methodology by insisting its approach was reasonable because the underlying licenses were comparable.

Such untethered use of prior-license evidence fundamentally distorts the patent-damages analysis. When permitted, it is highly prejudicial: the inherent authority of expert testimony becomes magnified when applied to something so arcane as a hypothetical negotiation for calculating damages, and relying on comparable-license evidence—no matter how attenuated from the ultimate damages theory—has intuitive appeal as a seemingly objective benchmark for patent valuation. Furthermore, the self-perpetuating nature of comparable-license theories creates powerful incentives for patentees to stretch (or even engineer) license agreements to support excessive royalty demands with no other basis and no connection to the value of the patented technology at issue.

Fortunately, the law provides ready and effective tools to prevent experts from advancing illogical and unreliable prior-license theories: the Federal Rules of Evidence. In this case, the district court recognized that the issue was not whether the asserted license agreements could be considered comparable, but whether the plaintiff's expert would be allowed to extrapolate license rates from those agreements using speculative analysis and arbitrary calculations. The district court conducted a careful analysis and correctly excluded the disputed testimony.

This Court should therefore affirm.

Indeed, it should do so in a published opinion. It may be tempting for district courts faced with similarly dubious damages testimony to throw up their hands and leave the jury to sort things out. After all, allowing evidentiary questions to be subsumed in a black-box jury verdict is safer for purposes of appellate review than excluding a party's damages expert before trial. A precedential opinion affirming the district court's orders would promote meaningful scrutiny of damages evidence and encourage district courts to crack down on royalty demands that bear little relation to patent value, thereby furthering the efficient and effective operation of the patent system. District courts must have confidence to address and exclude untenable comparable-license theories, and the attentive gatekeeping that took place here should be upheld and encouraged.[1]

STATEMENT OF INTEREST

The High Tech Inventors Alliance (HTIA) is a coalition organized by leading technology companies to advocate on patent law and policy issues in favor of a

[1] Because Appellant MLC Intellectual Property, LLC has not consented to the filing of this brief, amici concurrently submit a motion for leave to file. No party or counsel for a party has authored this brief in whole or in part, and no one other than amici, their members, or their counsel has contributed any money intended to fund the preparation or submission of this brief.

system that promotes and protects real investments in technological development. HTIA members are some of the most innovative companies in the world.[2] They create products and services in the computer, software, semiconductor, and communications fields that support growth in every sector of the economy. To support such ongoing innovation, HTIA members invest over $100 billion in research and development each year, and they collectively hold more than 300,000 patents.

The Computer & Communications Industry Association (CCIA) is an international nonprofit association representing a broad cross-section of computer, communications, and Internet industry firms that collectively employ nearly a million workers and generate annual revenues in excess of $540 billion.[3] CCIA is dedicated to promoting innovation and enhancing society's access to information and communications. CCIA's members are leaders in research and development in a wide range of technologies and hold approximately 5% of all currently active U.S. patents, and members appear as both plaintiffs and defendants in patent litigation.

Accordingly, amici strongly support the patent system and effective patent protection. At the same time, their members—like many in the high-tech industry

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[2] The members of HTIA are: Adobe, Amazon, Cisco, Dell, Google, Intel, Microsoft, Oracle, Salesforce, and Samsung. *See* High Tech Inventors Alliance, https://www.hightechinventors.com/about/ (last visited June 1, 2020).

[3] CCIA's membership includes more than twenty leading technology companies. A full list is available at https://www.ccianet.org/about/members/ (last visited June 1, 2020).

and other operating companies across the broader economy—have frequently been defendants in suits brought by parties that use patent litigation as a portfolio investment strategy.

Furthermore, as prolific patentees and producers of complex products, members of HTIA and CCIA have extensive experience as both licensors and licensees of intellectual property. Amici are thus familiar with the many complex, circumstance-specific factors and interests—whether economic, technical, litigation-induced, or strategic—that go into every license or cross-license negotiation. They also frequently grapple with the interplay between license negotiations and patent damages awards. Companies accused of patent infringement often agree to resolve disputes on terms that serve their own short-term interests, and thus may agree to license terms that do not affect their own practical obligations but can be exploited by the patentee in later assertions against other companies. Once executed, such licenses accrue outsized influence to distort future licensing and future damages calculations.

Amici have a strong interest in a patent system that fairly balances the rights of patent owners and those of producers who face infringement accusations. This interest includes ensuring that damages awards are premised on reliable methods that best approximate the incremental value of patented technologies, which serves the bedrock aim of the patent system to benefit all parties, and ultimately the public, by promoting efficient dissemination and commercialization of new technology. Achieving those ends requires careful treatment of the prior-license evidence so commonly proffered to establish damages, as well as diligent scrutiny of expert testimony purporting to interpret or expand upon such agreements. Any ruling that disturbs the district court's meticulous and well-reasoned evidentiary rulings in this case would promote unreasonable and unreliable royalty calculations in litigation and in private licensing negotiations, compromising the necessary balance in calibrating compensation under the patent system. Such an outcome would adversely affect not only the membership of HTIA and CCIA, but also the technology industry as a whole and consumers who increasingly rely on high-tech products and services in their daily lives.

ARGUMENT

This appeal presents a clear example of the widespread misuse of comparable-license evidence that technology firms encounter all too frequently, both in licensing and litigation. Amici urge this Court to affirm and endorse the district court's careful, well-reasoned exercise of its fundamental gatekeeping obligation.

A. MLC's unjustifiable approach is emblematic of a broader problem with the unreliable use of comparable-license evidence

The district court correctly excluded the testimony of MLC's damages expert. That testimony stretched the asserted prior-license evidence far past its limits and applied arbitrary adjustments with no connection to the facts of the case.

MLC's damages expert premised his testimony on two prior licenses (to Hynix and Toshiba) that granted worldwide rights in MLC's entire patent portfolio, which included the asserted '571 patent among 40 other U.S. and foreign patents. Those agreements required the licensees to make lump-sum payments in exchange for rights that extended through the full life of all licensed patents. Appx123-124.

MLC's expert relied on those worldwide, multi-patent, lump-sum licenses to support damages for alleged infringement of a single U.S. patent in the form of ongoing royalties. That basic mismatch in license scope and between MLC's ongoing-royalty damages theory and its lump-sum license evidence alone made MLC's damages theory suspect and would have required thorough explanation and economic analysis to convert between the two royalty formats. *See WhitServe, LLC v. Comput. Packages, Inc.*, 694 F.3d 10, 30-31 (Fed. Cir. 2012) (holding that lump-sum payments "should not support running royalty rates without testimony explaining how they apply to the facts of the case"); *see also Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1330 (Fed. Cir. 2009) (applying the same premise to reciprocal use of running-royalty licenses to support lump-sum damages theory).

But MLC's expert did not just fail to explain a relationship between his proposed ongoing royalty and the prior lump-sum terms—he relied on a different license provision entirely. Specifically, he looked to a separate "most-favoured customer" clause that appeared in only one of the two agreements and specified that the licensee's future payments, "if any," could be reduced if the patentee subsequently licensed the same portfolio at a royalty rate less than 0.25%. Appx124 (quoting Hynix license § 4.3). But neither that provision nor any other in either license applied a 0.25% rate to Hynix or Toshiba or provided any information about how their respective lump-sum payments had been calculated. Based on the Hynix "most-favoured customer" clause, MLC's expert nonetheless concluded that both of the prior lump-sum licenses "reflected" a 0.25% royalty rate. The district court correctly rejected that assertion as lacking any factual basis in the record and premised on speculation rather than reliable principles and methods. Appx139-141.

Proceeding from his unfounded 0.25% rate, MLC's expert made further arbitrary adjustments. He purported to correct for differences between the cited licenses, which covered worldwide rights in dozens of patents, and a hypothetical negotiation limited to the one U.S. patent asserted against Micron. Yet in doing so, MLC's expert illogically arrived at an *increased* rate by *tripling* his initial 0.25% figure based on a "rule of thumb" presuming that one-third of worldwide product shipments end up in the United States. Appx126-127; *see also* Appx128-129 (testimony describing "rule of thumb" allegedly followed by MLC's predecessor-in-interest). Pairing that facile royalty-rate adjustment with the asserted rule of thumb for the royalty base would yield the same bottom-line royalty for a U.S.-only license as one conferring worldwide rights. In other words, for that calculation to make any sense, one would have to assume that the licensed foreign rights—covering up to two-thirds of all licensed products—contributed zero value to the cited prior licenses.

Setting aside that obvious defect, MLC's approach suffered from an even more fundamental problem: reliance on an arbitrary rule wholly divorced from the facts at issue. The purported one-third/two-thirds division between domestic and foreign sales was no different than other abstract "rules of thumb" this Court has rejected as unreliable and impermissible for use in calculating damages. *See, e.g.*, *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1318 (Fed. Cir. 2011) (rejecting the 25% rule of thumb); *VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1332-34 (Fed. Cir. 2014) (rejecting generalized reliance on the Nash Bargaining Solution without tethering assumptions to the facts of the case); *LaserDynamics, Inc. v. Quanta Comput., Inc.*, 694 F.3d 51, 69 (Fed. Cir. 2012) (holding that a royalty adjustment "plucked out of thin air" warranted exclusion); *Exmark Mfg. Co. v. Briggs & Stratton Power Prods. Grp.*, 879 F.3d 1332, 1349-51 (Fed. Cir. 2018) (similar).

In short, the disputed testimony from MLC's damages expert was deeply flawed on a number of levels, and the district court was more than justified in excluding it.[4] This appeal is thus in one sense unremarkable. But amici submit that the

[4] Micron's brief provides further analysis and detailed discussion of additional problems with the MLC's use of the Hynix and Toshiba licenses, Red Br. at 40-44, as well as his flawed opinions regarding the applicable royalty base, *id.* at 22-36.

excluded testimony, and MLC's defense of it, illustrates a broader problem with the use of purportedly comparable licenses that warrants this Court's attention.

The issue manifests in a common tendency among plaintiffs to stretch and distort comparable-license evidence to support economically unjustifiable reasonable-royalty calculations. Most patentees cannot obtain lost profits and therefore seek reasonable-royalty damages instead. Reasonable-royalty theories are often based on prior-license evidence, which "must be sufficiently comparable to the hypothetical license at issue." *VirnetX*, 767 F.3d at 1330. The problem lies in equating the comparability of a prior license *used in* a damages calculation with the reliability of the *damages calculation itself*. Parties commonly mistake—or actively conflate—the two, supposing that use of an assertedly comparable license negates the need for further scrutiny of reasonable-royalty theories based on such evidence. In other words: "*The licenses we cite are comparable, so beyond that anything goes*."

This case neatly encapsulates that recurring problem, and the district court's rulings present a model solution. MLC's primary argument for admitting the disputed expert testimony was "that the Hynix and Toshiba licenses are comparable and the use of comparable licenses is a well-established methodology." Appx139. But courts must go further. Admissibility depends not on the "reasonableness *in general*" of a particular analytical approach, but on whether it has been reliably applied to the dispute at hand. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153-54 (1999).

As the district court recognized, the issue here was *how* MLC's expert used the Hynix and Toshiba licenses, "not whether those license agreements are comparable." Appx139. Patentees must establish comparability, but their burden does not end there.[5] They bear a further burden to establish (and courts, an obligation to confirm) the reliability of damages theories premised on such evidence.

Examples mirroring MLC's approach are legion.[6] Firms large and small, including members of HTIA and CCIA, face the same "anything goes" approach to

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[5] It appears questionable whether the Hynix and Toshiba licenses were in fact sufficiently comparable here. As noted above, the prior licenses were global portfolio licenses with lump-sum payouts, while this case is limited to the U.S., involves only a single patent, and relates to a reasonable royalty not inferred from the prior lump-sum amounts but from a separate "most favored customer" provision found in one of the two licenses. Amici lack complete information, however, and take no position on this question.

[6] *See, e.g.*, *Mondis Tech., Ltd. v. LG Elecs., Inc.*, Nos. 2:07-cv-565-TJW, 2:08-cv-478-TJW, 2011 WL 2417367, at *6 (E.D. Tex. June 14, 2011) (precluding expert's testimony citing prior-license provision that penalized licensee validity challenges to support tripling the reasonable royalty rate because those clauses "would not be relevant for the purpose that Dr. Magee intends to use them"); *Avocent Redmond Corp. v. Rose Elecs.*, No. C06-1711RSL, 2013 WL 8844098, at *4-5 (W.D. Wash. Mar. 11, 2013) (expert arbitrarily tripling rate specified in a comparable license); *Meridian Mfg., Inc. v. C & B Mfg., Inc.*, 340 F. Supp. 3d 808, 849-50 (N.D. Iowa 2018) (excluding expert's speculative analysis of prior licenses); *NetFuel, Inc. v. Cisco Sys. Inc.*, No. 5:18-cv-02352-EJD, 2020 WL 1274985, at *11-15 (N.D. Cal. Mar. 17, 2020) (rejecting unreliable analysis of prior-license evidence); *MAZ Encryption Techs. LLC v. Blackberry Corp.*, No. 13-304-LPS, 2016 WL 4490706, at *2 (D. Del. Aug. 25, 2016) (excluding expert's arbitrary analysis of prior licenses); *Sprint Commc'ns Co. v. Comcast IP Holdings, LLC*, No. 12-1013-RGA, 2015 WL 456154, at *1-2 (D. Del. Jan. 30, 2015) (granting motion to exclude evidence regarding prior licenses to additional patents without sufficiently accounted for economic differences); *XpertUniverse, Inc. v. Cisco Sys., Inc.*, No. 09-157-RGA, 2013 WL 936449, at *3-4 (D. Del. Mar. 11, 2013) (damages expert purporting to use

comparable-license theories on a daily basis, and the disputes that reach this Court's docket only scratch the surface. For every appeal that squarely presents the unreliable use of comparable-license evidence, numerous others have been resolved on other grounds, settled, or left unappealed—not to mention the equally widespread misapplication of prior agreements in the daily private licensing negotiations that vastly outnumber litigated disputes. Further guidance from this Court is needed to confirm that both comparability *and* reliable methods are required when parties and their experts use prior licenses in reasonable-royalty determinations.

Leaving juries to weigh disputed damages theories built on unreliable expert analysis is highly prejudicial. Arguments even nominally premised on previous license agreements have intuitive appeal when framed as drawing on objective benchmarks of patent value. That effect is compounded when juries hear unreliable or legally deficient damages theories presented with the imprimatur of a qualified expert. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993) ("Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it."); *cf. Enplas Display Device Corp. v. Seoul Semiconductor Co.*, 909 F.3d

comparable licenses showing 3-5% rate to support $32M damages on $937,000 in accused sales); *Trs. of Bos. Univ. v. Everlight Elecs. Co.*, Nos. 12-11935-PBS, 12-12326-PBS, 12-12330-PBS, 2015 WL 6408118, at *2-4 (D. Mass. Oct. 23, 2015) (admitting testimony from damages expert that combined the highest direct and sublicense royalty rates from revised versions of an agreement even though the first rate had been reduced in return for the second).

398, 409-12 (Fed. Cir. 2018) (vacating damages award where court denied motion to exclude and jury then adopted expert's legally erroneous damages theory despite legally correct jury instructions). It is therefore especially critical that courts overseeing patent damages disputes take seriously their "basic gatekeeping obligation," *Kumho*, 526 U.S. at 147, and prevent unreliable expert testimony invoking comparable licenses from reaching juries.

B. Failure to enforce evidentiary standards as to comparable-license theories creates and encourages a self-perpetuating feedback loop that undermines future royalty determinations

Another consideration further underscores the need for careful screening of damages theories that use comparable-license evidence: the circular, self-reinforcing nature of comparable-license assertions. *See generally* William F. Lee & A. Douglas Melamed, *Breaking the Vicious Cycle of Patent Damages*, 101 Cornell L. Rev. 385, 438-39 (2016).

Once admitted and successfully relied upon in court, a reasonable-royalty theory that overextends a preexisting license agreement creates a new and significant data point reinforcing the inflated demand. That strengthens the patentee's ability to take the same position in future negotiations, which in turn generates more licenses reflecting similar terms, which can then be cited as comparable in subsequent litigation, and so on. Excluding unreliable damages theories at the outset is key to breaking that cycle.

Insufficient gatekeeping also amplifies incentives for patentees to engineer misleading provisions or royalty structures into their license agreements. For example, a licensor might grant an early licensee additional consideration beyond the license itself to drive up the royalty rate reflected in the agreement, thereby creating an exaggerated marker for use in later assertions. If the transaction as a whole remains economically reasonable, the licensee will have little incentive to object to such terms—and may even perceive an indirect benefit through anticipated harm to its competitors—because it will be immunized from the licensor's use of the resulting agreement to support subsequent royalty demands. *See* Lee & Melamed, 101 Cornell L. Rev. at 418.

The effect is similar to a patentee's attempted use of licensing *offers* to establish a reasonable royalty rate. As this Court has long recognized, proposed but unaccepted license terms are prone to manipulation and have limited evidentiary value because "patentees could artificially inflate the royalty rate by making outrageous offers." *WhitServe*, 694 F.3d at 29-30; *Deere & Co. v. Int'l Harvester Co.*, 710 F.2d 1551, 1557 (Fed. Cir. 1983). Similarly, pursuing spurious license terms can allow patentees to create putative benchmarks unilaterally (or nearly so) for their own benefit in future royalty demands.

MLC's behavior here suggests just such a strategy. Hynix, an early licensee that paid a lump-sum royalty, received a most-favored customer clause specifying that its "future payments, *if any*" could be reduced if a subsequent licensee paid a royalty rate less than 0.25%. Appx124 (quoting the Hynix license) (emphasis added). But the license also specified that "[i]n no event shall Hynix receive any refund of any amount paid," and Hynix's lump-sum royalties were to be paid in full less than three years after execution—more than half within weeks and 75% in less than a year. *Id.* Hynix would have had little reason to care about that provision; for MLC, it posed minimal risk of lost income from Hynix while providing grounds to tell other prospective licensees that the Hynix agreement "reflected" a 0.25% royalty rate. MLC has done just that, both in this case and in other license negotiations. Appx126 n.6; Blue Br. 26 (referring to parallel assertions to other potential licensees "that the Hynix license was based on a 0.25% royalty rate").

As this case shows, a licensor can create such markers at little or no practical cost and with the prospect of substantial returns in the form of inflated royalties from later licensees. The success of such maneuvers ultimately depends, however, on the patentee's ability to prevail on such manufactured damages theories in court. The district court correctly excluded such a theory here, and its well-reasoned decision should be affirmed in a published opinion that provides much-needed guidance to district courts, future litigants, and prospective licensors and licensees.

CONCLUSION

The district court's rulings excluding testimony from MLC's damages expert should be affirmed.

Respectfully submitted,

PERKINS COIE LLP

by /s/ Andrew T. Dufresne
Andrew T. Dufresne

Counsel for Amici Curiae
High Tech Inventors Alliance and
Computer & Communications Industry
Association

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B). The brief contains 3,126 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) 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 and 14-point Times New Roman type.

Dated: June 2, 2020

/s/ Andrew T. Dufresne
Andrew T. Dufresne

Counsel for Amici Curiae
High Tech Inventors Alliance and
Computer & Communications Industry Association