

No. 18-1724

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

DODOCASE VR, INC., fka Dodocase, Inc.,

Plaintiff-Appellee,

v.

MERCHSOURCE, LLC, dba Sharper Image,

Defendant-Appellant,

THREESIXTY BRANDS GROUP, LLC, dba Sharper Image,

Defendant.

Appeal from the United States District Court
for the Northern District of California in No. 3:17-cv-07088-EDL
Magistrate Judge Elizabeth D. Laporte

**BRIEF OF AMICI CURIAE INTELLECTUAL PROPERTY
LAW PROFESSORS IN SUPPORT OF COMBINED PETITION FOR
PANEL REHEARING AND REHEARING EN BANC**

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 29(a) and 47.4, counsel for *amici curiae* certifies that:

1. The full names of the *amici* I represent are: Intellectual Property Law Professors (See Attachment A).
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) I represent is: N/A.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the *amici curiae* I represent are: None.
4. The names of all law firms and the partners or associates that appeared for the *amici* I represent or are expected to appear in this Court (and who have not or will not enter an appearance in this 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: PTAB IPR2018-00494; PTAB PGR2018-00019; PTAB PGR2018-00020.

June 3, 2019

/s/ Phillip R. Malone

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INTEREST OF AMICI CURIAE¹

*Amici curiae*² are twenty-one law professors at universities throughout the United States. These professors have no personal interest in the outcome of this case, but they have a professional interest in seeing patent law develop in a way that incentivizes innovation without unduly restricting competition or constricting the public domain.³

SUMMARY OF ARGUMENT

The panel's decision squarely conflicts with *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969), in its disregard of strong federal policy favoring challenges to patent validity. “[F]ederal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent.” *Id.* at 668. Because licensees are often the only parties with sufficient incentive to challenge an invalid patent, protecting licensee-initiated validity challenges is essential to maintaining statutory bounds on patent monopolies. *Id.* at 670. Where parties attempt to restrict validity challenges by contract, *Lear* requires courts to consider

¹ *Amici*'s motion for leave accompanies this brief. No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting this brief. No person other than *amici* or their counsel contributed money that was intended to fund preparing or submitting this brief.

² A full list of *amici* can be found in the Appendix.

³ *Amici* thank Stanford Law School Juelsgaard Intellectual Property and Innovation Clinic Certified Law Students Mary Hwang and Rebecca Weires for their substantial assistance in drafting this brief.

whether “overriding federal policies would be significantly frustrated” by the contract. *Id.* at 673; *Massillion-Cleveland-Akron Sign Co. v. Golden State Adver. Co.*, 444 F.2d 425, 427 (9th Cir. 1971).

The panel’s decision permits this strong public interest to effectively be swept aside. It enables patent holders to transform ubiquitous, boilerplate forum selection clauses in their license agreements to preclude administrative review of patent validity before the PTAB. Though non-precedential, the panel’s decision will have broad and retroactive effects on the ability of licensees to challenge invalid patents. Yet the panel makes this change with no mention, let alone any consideration, of *Lear* or the weighing it requires.

The error in the panel’s decision is even clearer in this case because it contradicts, without justification, Congress’ policy choice in the 2011 America Invents Act (“AIA”). The AIA protects “the public’s paramount interest in seeing that patent monopolies are kept within their legitimate scope,” *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1374 (2018) (quoting *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2135 (2016)), by providing efficient validity review proceedings to licensees. Yet, the panel ignored this clear policy and went out of its way to undermine it without identifying any countervailing interest. Because *Lear* requires significant justification for contractual restrictions that work “such a substantial impairment of overriding

federal policy,” 395 U.S. at 673, this Court should grant rehearing.

ARGUMENT

I. The Panel’s Analysis Conflicts with *Lear* Because It Precludes Validity Challenges Without First Considering Federal Patent Policy.

The Supreme Court’s decision in *Lear* requires courts to consider the demands of federal patent law when enforcing contracts that bear on licensee validity challenges. *Lear*, 395 U.S. 653; *Massillion-Cleveland-Akron Sign*, 444 F.2d at 427 (explaining that *Lear* requires lower courts to consider patent policy when enforcing contracts). The panel’s decision permits boilerplate forum selection and choice of law provisions to broadly preclude PTAB validity challenges. Remarkably, the panel does not even mention *Lear*, let alone attempt to perform the kind of analysis *Lear* mandates.

A. Patent Policy Favors Validity Challenges and Cannot Be Overcome Absent Compelling Countervailing Interests.

The Supreme Court has recognized a compelling interest in challenging and eliminating invalid patents to promote competition. “[T]he grant of monopoly power to a patent owner constitute[s] a limited exception to the general federal policy favoring free competition.” *Lear*, 395 U.S. at 663 (citing *Kinsman v. Parkhurst*, 59 U.S. 289 (1856)). “It is as important to the public that competition should not be repressed by worthless patents, as that the patentee of a really valuable invention should be protected in his monopoly.” *Lear*, 395 U.S. at 664

(quoting *Pope Manufacturing Co. v. Gormully*, 144 U.S. 224, 234 (1892)).

Even though eliminating invalid patents is socially beneficial, patent validity challenges are underfunded public goods. First, information asymmetries mean “accused infringers will almost always have better access to the information needed to litigate noninfringement, while patent holders will often have better access to the information needed to litigate invalidity.” Roger A. Ford, *Patent Invalidity Versus Noninfringement*, 99 Cornell L. Rev. 71, 105 (2013).

Second, the challenger does not internalize the full public benefit of a validity challenge, making successful challenges even scarcer. Joseph Farrell & Robert P. Merges, *Incentives to Challenge and Defend Patents: Why Litigation Won’t Reliably Fix Patent Office Errors and Why Administrative Patent Review Might Help*, 19 Berkeley Tech. L.J. 943, 950-55 (2004). “[A]ll else being equal, a defendant might prefer to win with a noninfringement defense than with an invalidity defense and might prefer to settle than to win with an invalidity defense.” Ford, *supra*, at 110-11. The preferred outcome in both scenarios allows the defendant to “avoid[] conveying a gift to competitors.” *Id.* at 111.

Patentees are incentivized to restrict validity challenges by contract to protect their monopoly profits, further discouraging validity challenges. Restrictions in license agreements are particularly troubling because “[l]icensees may often be the only individuals with enough economic incentive to challenge

the patentability of an inventor's discovery." *Lear*, 395 U.S. at 670. Left unchecked, contractual restrictions could eviscerate patent validity challenges.

In *Lear*, the Supreme Court considered this tension between contractual restrictions and patent policy in the context of licensee estoppel, and it resolved in favor of patent validity challenges. The court was confronted with the conflicting demands of contract law, which "forbids a purchaser to repudiate his promises simply because he later becomes dissatisfied with the bargain," and federal policy, which "requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent." *Id.* at 668. The Court held federal patent policy is "overriding," *Id.* at 673, and explained, "[T]he equities of the licensor [under contract law] do not weigh very heavily when they are balanced against the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain," *Id.* at 670.

The Court overturned the doctrine of patent licensee estoppel and held that federal patent policy protects licensee challenges to the patents underlying their licenses. *Id.* at 671. The Supreme Court subsequently reaffirmed licensees' standing to bring validity challenges even if neither party has breached the contract. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 137 (2007).

B. The Panel’s Decision Frustrates Patent Policy By Expanding Contractual Bars to Validity Challenges.

Rehearing is exceptionally important because of the decision’s sweeping impact on existing patent licensor-licensee relationships. Forum selection clauses are ubiquitous boilerplate provisions of patent licenses, including assignment agreements, joint development agreements, manufacturing agreements, and sourcing agreements. *See* D. Patrick O’Reilley & D. Brian Kacedon, *Drafting Patent License Agreements* Ch. 23 (8th ed. 2015) (characterizing choice of law and forum provisions as “so common that such provisions are included in many contracts without regard for their purpose or effect”). Moreover, these clauses survive contract termination even without savings clauses. *Baker v. Econ. Research Servs., Inc.*, 242 So. 3d 450, 453 (Fla. Dist. Ct. App. 2018); *Zaitzeff v. Peregrine Fin. Grp., Inc.*, No. CV 08-02874 MMM, 2008 U.S. Dist. LEXIS 130974, at *22 (C.D. Cal. June 23, 2008).

The panel’s reading of the forum selection clause in this case invites patentees to employ their existing or future standard forum selection clauses to bar PTAB review. The panel’s broad preclusion of PTAB review circumvents the bounds *Lear* places on license agreements, undermining *Lear*’s protection of validity challenges. Left uncorrected, the panel’s decision frustrates the “strong federal policy favoring free competition in ideas which do not merit patent protection.” *Lear*, 395 U.S. at 656.

C. The Panel Ignored *Lear*'s Requirement to Consider Patent Policy.

The Supreme Court's decision in *Lear*, and applicable Ninth Circuit precedent, require careful consideration of compelling patent policy when assessing any contract that implicates the availability of validity challenges. Under *Lear*, courts must "weigh the federal policy embodied in the law of intellectual property against even explicit contractual provisions and render unenforceable those provisions that would undermine the public interest." *Idaho Potato Comm'n v. M & M Produce Farm & Sales*, 335 F.3d 130, 137 (2d Cir. 2003), followed by *Idaho Potato Comm'n v. G&T Terminal Packaging, Inc.*, 425 F.3d 708, 714-16 (9th Cir. 2005)).

Recognizing that parties could creatively fashion their licenses to sidestep *Lear*, courts consider federal patent policy wherever parties attempt to contract around *Lear* to preclude validity challenges. And they regularly invalidate such provisions. For example, the Ninth Circuit found it "unimportant that . . . the covenant [not to challenge a patent] is part of a settlement agreement rather than of a typical patent licensing agreement," because it would be easy for parties to "couch licensing arrangements in the form of settlement agreements." *Massillion-Cleveland-Akron Sign*, 444 F.2d at 427; see also *Rates Tech., Inc. v. Speakeasy, Inc.*, 685 F.3d 163, 164 (2d. Cir. 2012) (voiding, under *Lear*, a no-challenge clause in a settlement agreement entered after accusation of infringement but prior to any

litigation).

Here, the panel disregarded *Lear*'s protection of federal patent policy by allowing a patentee to use a common license provision to limit licensee validity challenges. It does so without the policy analysis that *Lear* mandates.

II. The Policy Considerations Favoring Validity Challenges Are Stronger in This Case Than in *Lear*.

Lear's requirement that contracts be interpreted and enforced in accordance with federal patent policy applies even more forcefully in this case. Federal policy favoring validity challenges is stronger for PTAB proceedings, which are focused solely on validity, than it is for district court litigation. Further, neither the "demands of contract law" nor any other compelling interest, compels the panel's strained and expansive reading of the forum selection clause. And even if they did, the clause, interpreted so expansively, would be unenforceable. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (holding a forum clause is unenforceable if it would contravene a strong public policy expressed by statute or judicial decision).

A. With the AIA, Congress Adopted a Strong Policy Favoring Validity Challenges Before the PTAB.

Congress recognized and reaffirmed the strong policy preference in favor of validity challenges when it enacted the AIA. PTAB review proceedings exist to protect the public's interest in a robust public domain. *See Oil States*, 138 S.

Ct. at 1378 (describing inter partes review, like the initial determination to grant a patent, as a matter “involving public rights”). The purpose of these proceedings is reflected in their design:

- The PTAB “considers the same statutory requirements that the PTO considered when granting the patent”—requirements that prevent the “issuance of patents whose effects are to remove existent knowledge from the public domain.” *Oil States*, 138 S. Ct. at 1374 (2018); *see* 35 U.S.C. § 311(b) (2018).
- Patentees may move to amend or narrow their claims during inter partes review (“IPR”). 35 U.S.C. § 316(d) (2018). This reflects the PTAB’s purpose to align a patent monopoly’s bounds with its proper statutory scope, not simply to invalidate patents in order to resolve infringement disputes.

Congress empowered the PTAB to provide efficient processes for licensees to challenge invalid patents and protect the public domain. *See* H.R. Rep. No. 112-98, pt. 1, at 39-40 (2011) (describing intent for IPR to be a “more efficient system for challenging patents that should not have issued”). Congress’ design of the processes reflects that intent:

- Any party except the patent owner may request PTAB review. Pre-AIA, “any third-party requester” could seek inter partes review

(“IPR”), 35 U.S.C. § 311(a) (2012), but post-AIA, “a person who is not the owner of a patent” can do so, 35 U.S.C. § 311(a) (2018). This change unequivocally reveals Congress’s intent to make IPRs available broadly, including to licensees.

- The standard of proof of unpatentability in an IPR (preponderance of the evidence) is lower than in district court (clear and convincing), reflecting Congressional intent to streamline validity review in order to weed out invalid patents.

B. There Is No Countervailing Interest in This Case.

The contract itself does not provide countervailing reasons to overcome such strong patent policy interests. The significant differences between PTAB validity review and district court litigation reveal how incorrect the panel was to read a standard forum selection clause to cover PTAB review. PTAB review proceedings are an administrative “second look at an earlier administrative grant of a patent.” *Cuozzo*, 136 S. Ct. at 2144. The Supreme Court has expressly acknowledged that “[i]n several significant respects, inter partes review is less like a judicial proceeding and more like a specialized agency proceeding.” *Id.* at 2143 (characterizing inter partes review’s basic purpose as to “reexamine an earlier agency decision”). The purpose of these proceedings, as evident in their design, is to review and ensure validity; the PTAB does not adjudicate

infringement or contract disputes. It makes little sense to read a contract clause governing disputes *that arise out of the contract* to apply to administrative agency proceedings that do not.

The panel's decision is not supported by the sort of countervailing interests that supported this Court's decision in *Flex-Foot*, 238 F.3d at 1370. There, defendant-appellant was contractually estopped from challenging the validity of a patent, but in a very different context than this case: the parties had conducted discovery and fully briefed opposing summary judgment motions on the issue of invalidity and then voluntarily entered a settlement agreement with a clear and unambiguous waiver of future challenges of patent validity. *Id.* at 1368-70. The court carefully considered *Lear* (unlike in this case) and "whether such contractually created estoppel is void as against public policy." *Id.* at 1368. Distinguishing *Lear*, it found significant countervailing interests in the "important policy of enforcing settlement agreements and res judicata." *Id.* Those policy interests are absent where the contract was formed before significant litigation activity, as in *Massillion-Cleveland-Akron Sign*, 444 F.2d 42, *Rates Tech*, 685 F.3d 163, and this case.⁴

⁴ The principal case on which the panel relies also did not address *Lear*. There, the court was construing a governing law clause of a license agreement to restrict a patentee's infringement claim. *Texas Instruments Inc. v. Tessera, Inc.*, 231 F.3d 1325, 1329–32 (Fed. Cir. 2000). This case, however, restricts a

The panel's sweeping elevation of boilerplate forum selection clause language is contrary to Congress's clear intent to allow and even facilitate licensee validity challenges before the PTAB. *Lear* requires courts to consider the exceptionally important patent policy interests in validity challenges. Because the panel failed to engage in any such consideration and ignored binding precedent, this Court should grant rehearing to correct the error.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the panel to reconsider or the Court to rehear this matter en banc.

June 3, 2019

Respectfully submitted,

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licensee's validity challenge. *Lear* requires strong countervailing interests to overcome federal policy against constraints on licensee validity challenges.

APPENDIX

Amici curiae law professors are listed below. Affiliation is provided for identification purposes only. All signatories are participating in their individual capacity, not on behalf of their institutions.

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2019, I caused the foregoing **BRIEF OF AMICI CURIAE INTELLECTUAL PROPERTY LAW PROFESSORS IN SUPPORT OF COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC** to be served by electronic means via the Court's CM/ECF system on all counsel registered to receive electronic notices.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS**

I hereby certify as follows:

1. The foregoing **BRIEF OF *AMICI CURIAE* INTELLECTUAL PROPERTY LAW PROFESSORS IN SUPPORT OF COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC** complies with the type-volume limitation of Fed. R. App. P. 32(a) and Fed. Cir. R. 35(g), as in effect of this case's docketing date. The brief is printed in proportionally spaced 14-point type, and the brief has 2536 words according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)).

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and with 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 for Mac in 14-point Times New Roman font.

June 3, 2019

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