

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

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No. 2010-1536

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JOHN MEZZALINGUA ASSOCIATES, INC. (doing business as PPC, Inc.),  
*Appellant,*

v.

INTERNATIONAL TRADE COMMISSION,  
*Appellee.*

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT  
151

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Appeal from the United States International Trade Commission in  
Investigation No. 337-TA-650

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**BRIEF OF AMICI CURIAE VERIZON COMMUNICATIONS INC.  
AND GOOGLE INC. IN SUPPORT OF NEITHER PARTY  
AND SUPPORTING AFFIRMANCE**

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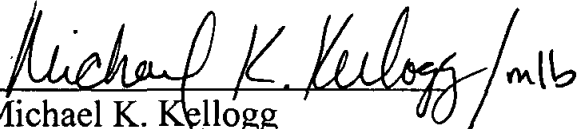
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Counsel for Amicus Curiae Verizon Communications Inc. certifies the following:

1. The full name of every party or amicus represented by me is Verizon Communications Inc.
2. The names of the real parties in interest represented by me are: None.
3. All parent corporations and any publicly held companies that own 10% or more of the stock of the parties represented by me are: None.
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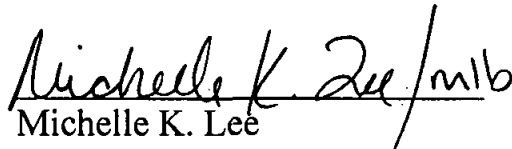
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## STATEMENT OF INTEREST OF AMICI CURIAE<sup>1</sup>

Amici curiae are leading providers of high technology products and services, whose business – like that of many firms in the information services, communications, and electronic technological fields – depends on systems and devices that incorporate a large number of components and perform a variety of functions. As such, amici must frequently defend against allegations of patent infringement. Amici also own large patent portfolios, reflecting their role as leading innovators in the communications and computer fields. Amici rely on their intellectual property to bring cutting-edge products and services to the market. As both owners of intellectual property and frequent targets of meritless patent litigation, amici have a strong interest in a system of patent remedies that rewards rather than impedes innovation.

Amici have a strong interest in seeing that the statute defining the jurisdiction of the International Trade Commission (“ITC” or “Commission”) is properly interpreted and enforced. The ITC is a special forum dedicated to protecting domestic industries. Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, therefore grants the ITC jurisdiction over patent disputes only when a

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<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for amici curiae represent that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici or their counsel, made a monetary contribution to the preparation or submission of this brief.



patentee's efforts to produce or promote the use of its technology in the United States are threatened by unfair competition through foreign trade.

A robust domestic industry requirement prevents the ITC from becoming simply another patent court available to adjudicate purely private interests, unconnected to any public harm. Such a requirement is particularly important because the extraordinary remedy of an exclusion order, and the speed with which it is available, make the Commission an appealing forum for patent holders seeking to use their intellectual property rights to extract far more than the economic benefit created by their inventions; companies faced with this prospect may be willing to pay substantial sums to avoid having to stop using technology in which they have heavily invested. Congress's clear intention in passing section 337 was to protect domestic industries, not to allow hold-up litigation by parties that are neither producing nor promoting their technology.

## SUMMARY OF ARGUMENT

The Commission correctly determined that the appellant here had not shown a domestic industry in a patent it neither practiced nor promoted, but merely asserted against other companies that it alleged were already using the patented invention. But the Commission erred in suggesting that appellant could have established a domestic industry by simply engaging in licensing activities for which the sole purpose is to derive revenue from alleged infringers. Such activity does not suffice to invoke the remedies of 19 U.S.C. § 1337. The statute's domestic industry requirement demands proof of expenditures connected to "the articles protected by the patent." 19 U.S.C. § 1337(a)(3). A patentee can meet this requirement by showing exploitation of the patent through licensing efforts undertaken to promote the development and production of articles that embody the patented technology. This is clear from the statutory context: "licensing" is enumerated along with engineering and research and development, all of which are the precursors to eventual manufacture or use of technology by or at the behest of the patentee, rather than exercises in stopping others from using the technology.

The legislative history cited in the Commission's opinion confirms that Congress did not intend those remedies to be available to complainants who merely hold intellectual property rights for the purpose of exacting fees from others who they allege are using their technology. The reason is simple: these

patent holders already have a complete remedy available in federal district court. They do not need the exclusionary remedies available from the Commission to protect their interests.

Yet, under the Commission's ultimate conclusion – which was at odds with the bulk of its reasoning – the section 337 remedy will now be available to these very intellectual property holders, who seek not to encourage the adoption of their innovative technology but to stop (or tax) its use. In holding that the domestic industry requirement of section 337 encompasses licensing activities that are wholly unrelated to promoting the practice of the patent, the Commission has essentially read the domestic industry requirement out of the statute. Under its decision, any company that spends enough money asserting its intellectual property rights against others – without making articles protected by those rights or encouraging others to start doing so – can avail itself of a forum whose procedures and remedies were designed to protect the productive efforts of domestic industry. That is not and cannot be what Congress intended.

Accordingly, although amici curiae support affirmance of the Commission's ruling that no domestic industry exists in this case, they urge this Court to undo the Commission's unwarranted expansion of that standard.

## ARGUMENT

Section 337 is not designed to encourage patent litigation, much less to provide a forum to extract large settlements on the threat of exclusion, but to protect domestic industry and, in particular, the domestic adoption of new technologies from infringing imports. The Commission may order relief based on patent infringement grounds “only if an industry in the United States, relating to *the articles* protected by the patent . . . , exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2) (emphasis added). The statute goes on to define when that standard is met:

For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent . . . concerned – (A) significant investment in plant and equipment; (B) significant employment of labor or capital; or (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

*Id.* § 1337(a)(3).

In this case, the Commission correctly determined that no domestic industry existed with respect to U.S. Patent No. D440,539 (the '539 patent), a design patent directed to a closed compression-type coaxial cable connector. The owner of the '539 patent, a company doing business as PPC Inc., has not invested in or promoted the production of connectors that implement the patented design and apparently has no intent to do so. *See Commission Op.* at 42. Accordingly, PPC

failed to show any domestic industry related to the '539 patent; this Court should affirm the Commission's finding of no violation on that ground.

But the Commission made one critical misstep on its way to reaching the correct determination. It interpreted section 337(a)(3)'s reference to "licensing" to encompass "licensing activities for which the sole purpose is to derive revenue from *existing* production." Commission Op. at 50 (emphasis added). That interpretation is at odds with the statute's text, history, and purpose. It is imperative that this Court clarify that patent-holding complainants seeking to rely on the "licensing" provision of section 337(a)(3)(C) to satisfy the domestic industry requirement may do so only if they have made substantial investments in urging development or production of articles incorporating the patented technology by others who are not already practicing the patent.

Under the Commission's misinterpretation, the "licensing" provision would offer no meaningful limits, and section 337 could be freely invoked by entities that are neither practicing their patents nor promoting the development or use of protected articles by others, but only advancing their own litigation agenda. Moreover, the domestic industry requirement would no longer benefit the American public by promoting the propagation of new technology and the availability of innovative articles; instead, non-practicing patent holders could use

the Commission to exclude *all articles* practicing the patented invention from entering the country. Patent litigation is not a protectable domestic industry.

**I. THE LANGUAGE OF SECTION 337(a)(3) DOES NOT ENCOMPASS ENFORCEMENT-BASED LICENSING EXPENDITURES**

As discussed more fully in Part II, the Commission correctly recognized that the design, history, and purpose of section 337 all suggest that a domestic industry exists only when meaningful “steps to foster *propagation or use* of the underlying intellectual property” are being taken. Commission Op. at 49 (emphasis added). But it nonetheless held that licensing efforts unconnected to fostering use of the technology in question can constitute a domestic industry. The Commission reached this incongruous result because it found that “the plain language of the statute does not limit the types of licensing activities that the Commission can consider.” *Id.*

The Commission based this finding on the statute’s use of the term “exploitation” to describe the set of activities, including licensing, that can be used to show a domestic industry. *See id.* at 49-50. It cited competing dictionary definitions of “exploit,” one of which (“to put to a productive use”) would exclude licensing that does not promote use of the patented technology, and one of which (“to take advantage of”) would not. From this the Commission determined that “Congress’s use of the term ‘licensing’ therefore also covers both types of licensing activities.” *Id.* at 50.

Amici curiae respectfully submit that the Commission erred. This Court has explained that, when there are competing definitions of a disputed statutory term, “we must look beyond the particular language being construed.” *Bayer AG v. Housey Pharms., Inc.*, 340 F.3d 1367, 1372 (Fed. Cir. 2003). Critically, and contrary to the Commission’s approach, there is no automatic preference for the broadest possible meaning of a disputed term. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 852 (2001) (rejecting broad interpretation of term’s “ordinary meaning” when the statute “read as a whole” made clear that “the better interpretation” was the narrow one). Instead, the applicable definition is determined by looking “first to other provisions of the statute,” then considering legislative history and policy. *See Bayer*, 340 F.3d at 1372. All of these factors – the other provisions of the statute, the legislative history, and policy – make clear that the word “licensing” as used in section 337 refers to activities that put technology to a productive use.<sup>2</sup>

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<sup>2</sup> There is no basis for this Court to accord the Commission’s interpretation deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Here, the Commission does not invoke deference; rather, the Commission thought the statute gave it no choice but to interpret “exploit” in a way that was contrary to the design, history, and purpose of the statute. But, as discussed in the text above, there is no ambiguity in the meaning of the term. “Exploit” in this context can mean only promote, not stop or tax. “In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.” *FDA v. Brown & Williamson Tobacco*

As an initial matter, at least four aspects of the text indicate that Congress intended to limit the “exploitation” through “licensing” under paragraph (a)(3)(C) to activities designed to promote development of articles incorporating the patented technology, not merely to obstruct or collect a fee from those who are already producing their own articles with it.

1. What the statute makes relevant to a finding of domestic industry is, in part, “substantial investment in its exploitation, including . . . licensing.” 19 U.S.C. § 1337(a)(3)(C). In this statutory setting, the natural meaning of “exploitation” is to develop or use the *articles covered by the patent*, not the legal-exclusivity right conferred by it. This common-sense meaning of “exploiting a patent” is also the one repeatedly used by this Court. *See, e.g., Avocent Huntsville Corp. v. Aten Int’l Co.*, 552 F.3d 1324, 1336 (Fed. Cir. 2008) (describing licensing as permitting the *licensee* to “exploit[]” the patent), *cert. denied*, 129 S. Ct. 2796 (2009); *Air Turbine Tech., Inc. v. Atlas Copco AB*, 410 F.3d 701, 711 (Fed. Cir. 2005) (“exploitation” means patented technology is “put into practical use”); *Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1362 (Fed. Cir. 2001) (describing licensee as enjoying right to “exploit” the patents by selling covered products);

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*Corp.*, 529 U.S. 120, 132 (2000); *see also Brown v. Gardner*, 513 U.S. 115, 118 (1994) (“Ambiguity is a creature not of definitional possibilities but of statutory context[.]”). This Court similarly rejected *Chevron* deference to the Commission in *Kyocera Wireless Corp. v. ITC*, 545 F.3d 1340, 1355 (Fed. Cir. 2008), where the Commission had misread the statute.



*Ethicon, Inc. v. United States Surgical Corp.*, 135 F.3d 1456, 1468 (Fed. Cir. 1998)

(noting that patent owner may license others to “exploit the patent” by selling articles that practice the patented invention).

2. This meaning of “exploitation” is in fact the only sensible one given the other two terms in the three-item enumeration of paragraph (a)(3)(C):

“engineering” and “research and development.” As the Commission itself noted, both of these terms “represent efforts to facilitate and/or hasten the practical application of the invention.” Commission Op. at 47. Under “the commonsense canon of *noscitur a sociis*, . . . a word is given more precise content by the neighboring words with which it is associated.” *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008); *see also Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961) (“The maxim *noscitur a sociis*, that a word is known by the company it keeps, . . . is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress.”).

Applying this principle to paragraph (a)(3)(C), “licensing” is naturally construed to relate only to promoting the development of articles incorporating the patent, not merely exercising a legal exclusion right.

Engineering and research and development likewise refine the know-how for *product* creation and commercial implementation; they are not directed to the act of wielding a legal right as a tool to demand money. Merely seeking licenses from

others who are already allegedly practicing the patent is an attempt to stop (or at least tax) that activity, not to expand it. By contrast, licensing efforts that encourage others to develop or produce articles protected by the patent fit comfortably with the other elements enumerated in paragraph (a)(3)(C).

The Commission itself recognized the significance of this statutory context: “The terms ‘engineering’ and ‘research and development’ may inform the interpretation of ‘licensing’ because they are all placed together in the same list.” Commission Op. at 46. Engineering and research and development have nothing to do with the legal rights enjoyed by patent owners. Congress’s grouping of these terms properly suggested to the Commission that it should consider “licensing activities related to the *practical application* of the invention.” *Id.* at 47 (emphasis added).

3. This limited meaning of “licensing” in section 337 is further confirmed by the statute’s repeated references to a domestic industry in the “articles” covered by the patent being asserted. Paragraph (a)(2), which establishes the domestic industry requirement, permits the Commission to order relief only if such an industry “relating to *the articles* protected by the patent . . . exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2) (emphasis added). Likewise, paragraph (a)(3) elaborates on this requirement by listing certain activities that are evidence of a domestic industry, but each activity must be

undertaken “with respect to *the articles* protected by the patent.” *Id.* § 1337(a)(3) (emphasis added). Licensing arrangements that promote adoption of the patented technology are undertaken in order to facilitate production of such articles. By contrast, an enforcement-based licensing program is not an investment in protected “articles”; it is an investment in an abstract legal right. Indeed, such efforts will often have the effect of *discouraging* investment in articles that practice the patent, in order to avoid licensing fees.

4. Finally, the very term “domestic industry” is at odds with the Commission’s ultimate interpretation of the statute. In common parlance, the word “industry” connotes the production of goods. And, in another area of the Commission’s jurisdiction, the term is expressly defined in this way. *See* 19 U.S.C. § 1677(4)(A) (countervailing and antidumping statute, defining “industry” as “the producers as a whole of a domestic like product”). Again, licensing that promotes the development of articles protected by the patent is consistent with the notion of establishing a domestic industry; extracting a licensing fee from an existing (allegedly infringing) producer is not.

In sum, every part of the statutory text points to the conclusion that “licensing,” as used in paragraph (a)(3)(C), does not include litigation, or the threat of litigation, that exploits the legal right provided by a patent while seeking to stop or tax use of the covered technology. This Court “must give effect to the

unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43 & n.9 (court may “employ[] traditional tools of statutory construction” in ascertaining congressional intent); *see also Candle Corp. of Am. v. ITC*, 374 F.3d 1087, 1093 (Fed. Cir. 2004) (quoting *Chevron*). Accordingly, the Court should affirm the Commission’s determination that no domestic industry in the ’539 patent exists but clarify that PPC’s litigation costs should not have been considered as part of that determination.<sup>3</sup>

## **II. THE PURPOSE AND LEGISLATIVE HISTORY OF SECTION 337 DO NOT PERMIT PATENT-ENFORCEMENT COSTS TO COUNT TOWARD ESTABLISHING A DOMESTIC INDUSTRY**

Even if the statute, read as a whole, were ambiguous as to what kinds of “licensing” counted toward the domestic industry requirement, the purpose and history of the provision confirm that litigation and other enforcement-based patent licensing efforts are not included. The Commission thoroughly canvassed the evidence and concluded that “[a]llowing patent infringement litigation activities alone to constitute a domestic industry would place the bar for establishing a domestic industry so low as to effectively render it meaningless.” Commission Op. at 46. Inexplicably, the Commission ultimately determined that this

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<sup>3</sup> Plainly, if the Commission found no domestic industry even considering PPC’s litigation costs, it would not have found one without those costs. Therefore, the Court need not remand for further agency consideration because “it is clear that the agency would have reached the same ultimate result had it considered the new ground.” *Fleshman v. West*, 138 F.3d 1429, 1433 (Fed. Cir. 1998) (internal quotation marks omitted).

“meaningless” standard was in fact the one that applied. But its earlier conclusion that Congress did not intend that result is unquestionably correct.

1. Section 337 and its predecessor were enacted as trade statutes, aimed at protecting the “rights of domestic manufacturers” against imported products that are improper for any of a variety of reasons, including patent infringement.

*Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247, 260 (C.C.P.A. 1930) (discussing 1922 predecessor to 1930 enactment of section 337); *see also* Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 WM. & MARY L. REV. 63, 67 (2008) (deeming section 337 “[o]ne of the oldest intellectual property measures to reflect [the] pro-protection sentiment” of trade regulation). The Commission is not meant to duplicate the patent-enforcement forum provided by federal district courts. It is a specialized forum dedicated to protecting domestic industries against unfair competition from foreign goods. As this Court has recognized, “the Commission’s primary responsibility is to administer the trade laws, not the patent laws.” *Tandon Corp. v. ITC*, 831 F.2d 1017, 1019 (Fed. Cir. 1987). Section 337’s domestic industry requirement maintains that focus by limiting the Commission’s jurisdiction to situations involving a conflict between foreign trade and the vitality of American industry.

2. In 1988, Congress amended section 337 to include licensing, among other activities, as a factor in the domestic industry analysis. Representative Robert Kastenmeier proposed this change in response to “some recent incorrect applications” of the domestic industry test by the Commission. 132 Cong. Rec. 30,816 (Oct. 14, 1986). The decisions he cited all involved complainants who had either engaged in or arranged for the manufacture of articles embodying their creations. See *In re Certain Products with Gremlins Character Depictions*, USITC Inv. No. 337-TA-201 (1986) (copyright holder had extensively promoted its design by licensing it for use on mass-market products); *In re Certain Limited-Charge Cell Culture Microcarriers*, USITC Inv. No. 337-TA-129 (1984) (academic researchers and licensees were putting patented invention into practice through domestic research and development); *In re Certain Miniature, Battery-Operated, All Terrain, Wheeled Vehicles*, USITC Inv. No. 337-TA-122 (1982) (inventor had granted exclusive license to manufacturing company to produce and sell toy vehicles incorporating his design).

As the Commission explained, the addition of paragraph (a)(3)(C) to section 337 was aimed at ensuring that such complainants could license their inventions to manufacturers that would then begin practicing the patent. “Congress contemplated that the domestic industry requirement would cover entities such as ‘universities and other intellectual property owners who engage in extensive

licensing of their [patent] rights to *manufacturers.*'” Commission Op. at 47 (quoting H.R. Rep. No. 100-40, pt. 1, at 157 (1987); S. Rep. No. 100-71, at 129 (1987)) (alteration and emphasis in Commission opinion). Another example cited by the Commission was “small companies, such as biotech startups, that license their patents in order to generate sufficient capital to manufacture a product in the future.” *Id.* The point of this amendment, in other words, was to bring within the Commission’s scope those companies and individuals who do not themselves manufacture products embodying their creations but who work with others to do so, and who suffer real injury from unauthorized use of their intellectual property.

Congress was careful to preserve the statute’s exclusion of mere patent enforcement against alleged infringers as a gateway to the Commission. Indeed, Congress rejected a proposal to do away with the domestic industry requirement altogether, refusing to “transform the ITC into an intellectual property court” open to “non-domestic companies with no United States investment.” 132 Cong. Rec. at 30,816 & n.5 (statement of Rep. Kastenmeier). It ensured that the Commission would be available, for example, to American universities engaged in “extensive licensing of their rights to manufacturers.” *Id.* at 30,811 (statement of Rep. Dan Rostenkowski). But at the same time it preserved the role of the domestic industry requirement as “a gatekeeper to prevent the excessive use of the ITC under section 337.” *Id.* at 30,816 (statement of Rep. Kastenmeier).

The Senate report accompanying the 1988 amendments is to the same effect. The report explains that the domestic industry requirement serves “to preclude holders of U.S. intellectual property rights who have no [other] contact with the United States . . . from utilizing section 337.” S. Rep. No. 100-71, at 129.<sup>4</sup> Therefore, it continued, the intellectual property owner must be “actively engaged in steps leading to the exploitation of the intellectual property, including application engineering, design work, or other such activities” — work, that is, involving development of the technology, not work involving assertion of the legal exclusivity right. *Id.* at 130. The Senate Committee stressed that it did “not want to see [the newly added] language used as a loophole to the industry requirement.” *Id.* Yet that is precisely the result under the Commission’s interpretation of the licensing factor.

3. The Commission apparently believed it was avoiding the result warned against by Congress – creating a fatal loophole to the domestic industry

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<sup>4</sup> Recent statistics suggest that foreign companies are in fact making significant use of the Commission as a forum. Indeed, approximately 90% of ITC cases brought by foreign complainants are brought against domestic respondents, either alone or along with other foreign respondents. *See Chien, 50 WM. & MARY L. REV.* at 89 & tbl.3. Moreover, although the ITC was designed to allow domestic firms to check foreign infringement, the ITC appears to have proven just as attractive to foreign firms as district court: the percentage of foreign complainants in section 337 investigations actually exceeds the percentage of foreign plaintiffs in district court patent cases, where the patent holder need not show *any* domestic industry to obtain relief. *See id.* at 88 (contrasting 15% foreign ITC complainants with 13% foreign district court plaintiffs). This is not what Congress intended.



requirement – by distinguishing between mere patent litigation and patent litigation tied to licensing. *See, e.g.*, Commission Op. at 50. But that is a distinction without a difference, because all patent litigation by a non-practicing entity is tied to licensing.

In *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006), the Supreme Court severely and properly restricted the ability of non-practicing entities to obtain injunctive relief; to the extent that their patents have been infringed by existing producers, they can, as a practical matter, seek licensing fees (reflecting a reasonable royalty based on the value of the patent itself), rather than threatening an injunction that permits them to extract even more value from a product in which their technology happens to be embedded (perhaps as a minor component).<sup>5</sup> As Justice Kennedy observed in his concurring opinion in *eBay*, there is a growing practice “in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.” *Id.* at 396 (citing Federal Trade Comm’n, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, ch. 3, pp. 38-39 (Oct. 2003), available at

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<sup>5</sup> This fact is not changed by this Court’s recent statement that *eBay* does not control the remedial authority of the Commission once a violation of section 337 is found. *See Spansion, Inc. v. ITC*, Nos. 2009-1460 et al., 2010 WL 5156992, at \*21 (Fed. Cir. Dec. 21, 2010). Moreover, *Spansion* dealt with the appropriateness of remedial action after the Commission had already found a violation of section 337. Here, the question is whether a prospective complainant has made a threshold showing of a violation. The two issues are governed by different statutory provisions.

<http://www.ftc.gov/os/2003/10/innovationrpt.pdf>); *see also* Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 2008 (2007) (noting the role of injunctive relief, such as that available from the Commission, in enabling such non-practicing entities “to negotiate a settlement for an amount of money significantly exceeding the amount that the patent holder could expect to earn in damages based on reasonable royalties”).

Accordingly, the ITC’s equation of “domestic industry” with “patent litigation tied to licensing” is incoherent and renders the domestic industry requirement meaningless. An entity that is itself practicing the patent, or that has made substantial investments in urging adoption of the patented technology by others who are not already practicing the patent, may properly seek to protect this domestic industry. But an entity whose sole use of the patent is to litigate against existing companies who allegedly infringe the patent may not, even if the end goal of such litigation is to extract licensing fees. In such cases, there is no domestic activity threatened by foreign imports, and there is no basis for applying section 337.

The Commission’s decision that licensing unconnected to promoting use of the patented technology can satisfy the “substantial investment” prong of the domestic industry requirement would grant patent owners engaged in such activity access to the expedited procedures and extraordinary remedies available in section

337 investigations.<sup>6</sup> In doing so, it would undermine the longstanding, specialized purpose of the section 337 remedy. That is not what Congress intended when it added “licensing” as a factor in the domestic industry analysis.

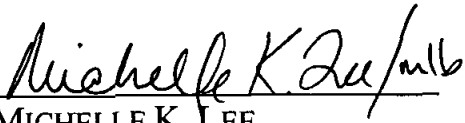
### CONCLUSION

This Court should affirm the Commission’s determination that no domestic industry exists with respect to the ’539 patent. Amici curiae respectfully suggest that, in doing so, the Court should make clear that section 337(a)(3) does not permit the Commission to consider costs related to licensing alleged infringers as evidence of a domestic industry. Patent licensing may be considered only to the extent that the patent holders have made substantial investments in urging adoption of the patented technology by others who were not already practicing the patent.

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<sup>6</sup> Although the Commission did not find a domestic industry based on the litigation expenditures of the complainant in this case, the Administrative Law Judge’s decision provides ample guidance to patent owners seeking to achieve that result. The prospective complainant need only expend notable sums drafting and sending cease-and-desist letters, preferably to a large number of prospective licensees, and document its costs in filing infringement actions, conducting settlement negotiations, and drafting licenses. *See Remand Initial Determination at 8.*

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December 28, 2010

## CERTIFICATE OF SERVICE

I, Michael K. Kellogg, hereby certify that, on December 28, 2010, I caused two copies of the foregoing BRIEF OF AMICI CURIAE VERIZON COMMUNICATIONS INC. AND GOOGLE INC. IN SUPPORT OF NEITHER PARTY AND SUPPORTING AFFIRMANCE to be served by first-class mail, postage prepaid, on the following:

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## CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the applicable type-volume limitations. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b), this brief contains 4,714 words. This certificate was prepared in reliance on the word count of the word-processing system (Microsoft Office Word 2007) used to prepare this brief.

The undersigned further certifies that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

  
Michael K. Kellogg

## DECLARATION OF AUTHORITY

Pursuant to Federal Circuit Rule 47.3(d), I, Melanie L. Bostwick, hereby declare, under penalty of perjury under the laws of the United States, that Verizon Communications Inc. and Google Inc., and their respective counsel, consent to the filing of the foregoing brief and have authorized me to sign the brief on their behalf.

  
Melanie L. Bostwick