

2007-1386

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PRINCO CORPORATION and PRINCO AMERICA CORPORATION
Appellants,

v.

INTERNATIONAL TRADE COMMISSION,
Appellees.

v.

U.S. PHILIPS CORPORATION,
Intervenor,

Appeal from the
United States International Trade Commission in Investigation No. 337-TA-474

**AMICUS BRIEF FOR THE AMERICAN INTELLECTUAL PROPERTY LAW
ASSOCIATION IN SUPPORT OF NEITHER PARTY**

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

American Intellectual Property Law Association

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

(not applicable)

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

None.

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

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INTEREST OF *AMICUS CURIAE*

The American Intellectual Property Law Association (“AIPLA”) is a national, voluntary bar association of more than 16,000 members engaged in private and corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. AIPLA’s members are intimately involved with the legal and business issues underlying the development, commercialization, and exploitation of intellectual property. These include enforceability, antitrust, and licensing issues, as well those related to the development of technical standards.

AIPLA members are often on both sides of any matter, representing both plaintiffs and defendants for litigation and both licensors and licensees for transactions. As part of its central mission, AIPLA is dedicated to encouraging the healthy development of intellectual property law. Therefore, AIPLA’s interest in this case is not related to the interests of any particular party, entity, group, or industry, but rather to the legal rules and standards that apply at the intersection of antitrust laws and intellectual property laws. In furtherance of its vital interest in the legal issues presented by this case, AIPLA respectfully submits this *Amicus* Brief in Support of Neither Party.

INTRODUCTION

The Court has requested that the parties primarily address the issues in Section II of the panel's April 20, 2009 opinion. *See Princo Corp. v. International Trade Com'n*, 583 F.3d 1380, 1381 (Fed Cir. 2009) (per curiam). The panel opinion addresses allegations of misuse connected with Sony's "Lagadec" patent, one of several pooled patents licensed together for use in manufacturing Orange Book-compliant recordable compact discs and related products. *See Princo Corp. v. International Trade Com'n*, 563 F.3d 1301 (2009). Specifically, Section II of the panel's opinion analyzed whether an alleged agreement between Sony and Philips to license Lagadec only for Orange Book-compliant technology would amount to misuse when Lagadec allegedly also supported competing technologies. *Id.* at 1313-1319. The panel apparently assumed that the "rule of reason" applied, *id.* at 1314 n.11, but it also referred to *per se* illegal price fixing, noting that "[a]greements preventing patent licensing of competing technologies" are "not within the rights granted to a patent holder" *Id.* at 1315-16. The panel ultimately determined that there were no apparent procompetitive benefits to such a restriction, and concluded that such an agreement in this case could constitute misuse. *Id.* The panel, however, remanded the case to the International Trade Commission ("ITC") to determine whether the alleged agreement actually existed and to assess the extent to which the Lagadec technology could have been used to

develop a viable alternative technology platform. *Id.* at 1319-21.

Although AIPLA takes no position as to which party should ultimately prevail, AIPLA strongly urges the *en banc* Court to clearly articulate that the licensing conduct at issue in this case is *only* properly analyzed under the rule of reason, and not the *per se* rule. Moreover, AIPLA strongly urges the *en banc* Court to clearly place the burden of proving anticompetitive effect under the rule of reason on the party invoking the patent misuse defense or asserting antitrust claims (in this case, Princo). Under these circumstances, the burden of proof should require objective evidence that the challenged conduct results in demonstrable anticompetitive effects. Otherwise, there is the risk of chilling some intellectual property licensing practices that are, on balance, procompetitive. To this end, AIPLA duly notes the concerns expressed in Judge Bryson's opinion regarding the lack of such evidence in the current record. While AIPLA does not take a position on whether a remand in this case is warranted, careful attention to the need for a remand and a rigorous application of evidentiary and procedural standards is essential to the proper application of the rule of reason.

By applying the rule of reason and holding parties to their burden of proving anticompetitive effect, the Court can strike the appropriate balance between the complementary goals of intellectual property law and antitrust principles. This approach will help maintain strong protections for intellectual property, which

foster innovation, competition, and consumer benefits. It will ensure that licensing practices are not condemned absent proof of actual and substantial anticompetitive harm. And when there are demonstrable anticompetitive effects that outweigh the procompetitive benefits, the long-standing, well-established rule of reason approach allows the courts to address that conduct as the law requires.

ARGUMENT

A. THE RULE OF REASON IS THE PROPER APPROACH FOR ANALYZING ALLEGATIONS OF MISUSE THAT ARISE FROM LICENSING RESTRICTIONS ON POOLED PATENTS.

The panel decision apparently assumed, but did not decide, that the rule of reason applied to the allegation of misuse stemming from any licensing restrictions associated with Lagadec. *See Princo*, 563 F.3d at 1314 n. 11 (“Because we conclude that the licensing practice alleged by Princo would, if proven, violate the rule of reason, we need not determine whether it should be evaluated under a *per se* rule”); *see also id.* at 1326 (Bryson, J., concurring in part and dissenting in part) (noting that Princo had the burden of demonstrating anticompetitive effect). The *en banc* Court should squarely hold that *only* the rule of reason applies to allegations of misuse that arise from the licensing restrictions on pooled patents that are at issue in this case. Applying the rule of reason in these circumstances is consistent with the modern principles governing the law of antitrust and intellectual property. Moreover, a clear statement from the *en banc* Court that the

rule of reason applies would provide certainty about how to analyze this licensing conduct and allow firms to maximize the use of intellectual property in ways that advance competition and consumer benefits. It would also avoid the “chilling effect” that an over-expansive application of the misuse doctrine or antitrust principles would have on investment in new technology and related endeavors.

This approach is well-grounded in the law of patent misuse. Misuse is an equitable defense to patent infringement that aims to “prevent a patentee from using the patent to obtain market benefit beyond that which inures in the statutory patent right.” *Monsanto Co. v. McFarling*, 363 F.3d 1336, 1341 (Fed. Cir. 2004) (internal quotation marks omitted). The doctrine “bars a patentee from using the patent’s leverage to extend the monopoly of his patent to derive a benefit not attributable to the use of the patent’s teachings.” *Zenith Radio Corp. v. Hazeltine Res., Inc.*, 395 U.S. 100, 135-36 (1969). “The key inquiry is whether, by imposing conditions that derive their force from the patent, the patentee has impermissibly broadened the scope of the patent grant with anticompetitive effect.” *U.S. Philips Corp. v. International Trade Com'n (Philips I)*, 424 F.3d 1179, 1197-1198 (Fed. Cir. 2005) (quoting *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1372 (Fed. Cir. 1998)).

A handful of practices have been identified as constituting *per se* misuse, but this is “a very narrow category[.]” Hovenkamp, Janis & Lemley, IP and Antitrust,

§ 3.3 at 3-11 (2009 Supp.). For example, a tying arrangement that conditions a license on the purchase of a separate staple good is considered to be *per se* misuse when the patentee has market power in the tying product market. *See Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 869 (Fed. Cir. 1997); 35 U.S.C.

§ 271(d)(5). A license that requires payment of post-expiration royalties is also considered *per se* misuse. *See Va. Panel Corp.*, 133 F.3d at 869. Neither of these practices are at issue in the instant case.

For most allegations of misuse, however, this Court usually applies the rule of reason to determine whether competition has been harmed. *Id.* at 869. The rule of reason requires a court to “weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). A court applying this rule “must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature and effect.” *Philips I*, 424 F.3d at 1197-1198 (quoting *Va. Panel Corp.*, 133 F.3d at 869).

Reviewing claims of misuse under the rule of reason ensures that courts do not inadvertently prohibit practices that ultimately benefit competition. As the

Supreme Court recently explained in the related antitrust context, “the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.” *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). The approach reflects a broad consensus that “effect on competition is the only legitimate concern of the patent misuse doctrine.” Hovenkamp, IP and Antitrust, § 3.2c at 3-9.

The Supreme Court has expressed the same concerns about the overuse of *per se* rules in the licensing of intellectual property. In *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979), the Court declined to apply a *per se* rule in analyzing the blanket licensing of musical copyrights. *Id.* at 24. Instead, the Court held that the rule of reason should apply, recognizing that the licensing practices at issue provided a “substantial lowering of costs” that was “potentially beneficial to both sellers and buyers”). *Id.* at 21. *See also F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 458-459 (1986) (expressing reluctance “to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious”); *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 92 (1984) (applying rule of reason to plan restricting televising of college football games). Relying on this line of cases, the United States Department of

Justice and Federal Trade Commission have observed that “[i]n the vast majority of cases, restraints in intellectual property licensing arrangements are evaluated under the rule of reason.” U.S. DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property, § 3.4 (1995).

More than twenty years ago, this Court recognized the advantages of applying the rule of reason, rather than a *per se* approach, to allegations that the licensing of patents constituted misuse. In *Windsurfing Intern. Inc. v. AMF, Inc.*, 782 F.2d 995 (Fed. Cir. 1986), the Court explained that “[r]ecent economic analysis questions the rationale behind holding any licensing practice *per se* anticompetitive.” *See also In re Ciprofloxacin*, 544 F.3d 1323 (Fed Cir. 2008) (noting, in a Sherman Act case, that the “Supreme Court has expressed reluctance to adopt *per se* rules where the economic impact is not immediately obvious”). The rule of reason’s cautious approach is particularly appropriate for reviewing the licensing of pooled patents, such as those at issue in this case. The pooling of licenses has widely been recognized as benefiting competition, and thus appropriate for rule of reason analysis. Since its decision in *Standard Oil Co. v. United States*, 283 U.S. 163 (1931), “the Supreme Court has recognized that cross-licensing and patent pooling arrangements can be pro-competitive.” Hovenkamp, *IP and Antitrust*, § 34.4, at 34-17. In *Standard Oil*, the Court considered an antitrust claim asserted against members of a pooling arrangement for patents

related to a process of “cracking” oil for the purpose of manufacturing gasoline. *Standard Oil*, 283 U.S. at 165-166. In its analysis, the Court noted that “the interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation.” *Id.* at 171.

Indeed, in the prior decision in this case, this Court recognized the procompetitive effects of package licensing. In *Philips I*, the Court observed that “package licensing has the procompetitive effect of reducing the degree of uncertainty associated with investment decisions” and therefore applied the rule of reason. *Philips I*, 424 F.3d at 1191, 1198. And in its tying analysis, the panel properly recognized the “likely procompetitive benefits of package licensing patents which reasonably might be necessary to practice a given technology.” *Princo*, 563 F.3d at 1311. *See also Matsushita Elect. Indust. Co. v. Cinram Intern., Inc.*, 299 F. Supp. 2d 370, 376 (D. Del. 2004) (“Patent pooling arrangements may serve valid competitive objectives”). The fact that a patent or pool of patents may contain, for example, restrictions on the use of a particular patent does not alter the applicability of the rule of reason. *See, e.g., B. Braun Medical, Inc. v. Abbot Laboratories*, 124 F.3d 1419, 1426 (Fed. Cir. 1997) (“Field of use restrictions . . . are generally upheld, and any anticompetitive effects they may cause are reviewed in accordance with the rule of reason”) (citations omitted). *See also U.S.*

DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property, § 2.3 (1995) (“Field-of-use, territorial, and other limitations on intellectual property licenses may serve pro-competitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible”).

Thus, the principles favoring the application of the rule of reason, rather than a *per se* approach, should apply to the specific misuse allegations in this case. The specific restraint at issue here—Sony’s and Philips’ alleged agreement that Lagadec would not be licensed for any use other than manufacturing Orange Book-compliant products—does not fall into the narrow category of cases that have been held to constitute *per se* misuse. *See Va. Panel Corp.*, 133 F.3d at 869. Nor can it be maintained that the courts have the “considerable experience” with this type of licensing relationship necessary to classify them as *per se* violations. *See Broadcast Music*, 441 U.S. at 9 (“[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations”) (quoting *United States v. Topco Associates, Inc.*, 405 U. S. 596, 607-608 (1972)); *see also Leegin*, 551 U.S. at 886-887.

However, the panel opinion is unclear. Despite its apparent invocation of the rule of reason, *see Princo*, 563 F.3d at 1314 n. 11, aspects of the decision suggest that the panel adopted or at least would permit on remand application of a

per se approach.¹ In particular, although the panel recognized that an agreement not to license a patent for use in a competing technology could have no anticompetitive effects (if the purported alternative technology “could not have been” commercially viable, *id.* at 1318-1319), the panel indicated that such an agreement never has procompetitive effects. *See id.* at 1315, 1316.

It is far from clear that the panel was correct on this point. When parties have agreed to pool patents for the purposes of licensing a technology standard, restrictions on the further use of the pooled patents could incentivize both the licensee and the licensor to develop the pooled technology and related products.

¹ The panel cited a number of cases for the proposition that “[a]greements among competitors not to compete are classic antitrust violations.” *Princo*, 563 F.3d at 1315-1316. But the cases cited by the panel predate the modern view favoring rule of reason review for “the vast majority of cases [involving] restraints in intellectual property licensing arrangements[.]” U.S. DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property, § 3.4 (1995). Indeed, some of the cases cited by the panel involved traditional anticompetitive conduct with which the courts had sufficient familiarity to invoke the *per se* approach. *See Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (publishers’ division of geographic territory for the offering of bar-review courses); *U.S. v. Topco Associates, Inc.*, 405 U.S. 596 (1972) (territorial division of sales of food products). Although *United States v. New Wrinkle, Inc.*, 342 U.S. 371, 380 (1952), involved the pooling of patents for a type of paint finish, the agreement in that case followed protracted litigation between the owners of competing patents and amounted to a naked attempt to fix prices. *Id.* at 373-374. The alleged agreement between Sony and Philips cannot be so easily characterized; the patent pool at issue arose from the joint development of a technology standard. The Lagadec and Raaymakers patents cover one aspect of what became the Orange Book standard, and it is unclear whether they ever could have been potentially competitive. Because of the complexities involved in this licensing arrangement, the Court should reject a truncated *per se* analysis in this case.

Moreover, permitting such agreements reduces the economic risk inherent in sharing information during the development of standards such as the Orange Book. These potential procompetitive benefits are another reason to apply the rule of reason, especially when it is unclear whether restrictions on the licensing of the Lagadec technology resulted in any actual or possible harm to competition. *See Princo*, 563 F.3d at 1318-1319 (noting that “proof that a suppressed technology could not have been viable would be sufficient to negate a charge of misuse”).

In sum, an inflexible, *per se* approach to evaluating the alleged license agreement between Sony and Philips ignores the potential for procompetitive benefits that may inherently arise from such an arrangement. It also would depart from the clear and uniform trend favoring the use of the rule of reason over a *per se* approach to review of intellectual property licensing. The rule of reason is the long-established and favored method of analysis because it requires courts to consider a variety of factors to ensure that the challenged activity is actually anticompetitive in effect. The *en banc* Court should eschew a *per se* approach and should make clear that only the rule of reason applies in this case.

B. THE RULE OF REASON REQUIRES PROVING, NOT PRESUMING, ALLEGED ANTICOMPETITIVE EFFECTS

Because conduct involving licensing of intellectual property can result in significant procompetitive benefits, and because overly excessive policing of such practices carries a high risk of inhibiting incentives for continued innovative

investment and efforts, the rule of reason in this context should require that the party alleging misuse bear the initial burden of demonstrating that the challenged practice restrains competition *in fact* based on objective evidence and sound economics. The *en banc* Court should, therefore, hold Princo to this burden when determining whether remand to the ITC is appropriate based on the record in this case. *See Princo*, 563 F.3d at 1323 (Bryson, J., concurring) (arguing that “there is no force to Princo’s contention that the Commission’s finding on that issue is unsupported by substantial evidence”).

Such an approach is entirely consistent with established law. Patent misuse is an affirmative defense. *Windsurfing Intern.*, 782 F.2d at 1001 (Fed. Cir. 1986). Accordingly, the party asserting misuse (in this case, Princo) has the ultimate burden of proving it. *Id.*; *Undersea Breathing Systems, Inc. v. Nitrox Technologies, Inc.*, 985 F.Supp. 752, 780 (N.D. Ill. 1997). That party must “show that the patentee has impermissibly broadened the ‘physical or temporal scope’ of the patent grant *with anticompetitive effect.*” *Windsurfing Intern.*, 782 F.2d at 1001 (citing *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 343 (1971)) (emphasis added). In particular, the party is usually expected to “demonstrate that the patentee has power in the relevant market.”

Hovenkamp, IP & Antitrust, §3.3 at 3-11.² See also, e.g., *Minebea Co., Ltd. v. Papst*, 444 F. Supp. 2d 68 (D.D.C. 2006) (noting that power in the relevant market is a pertinent factor for determining patent misuse). Moreover, demonstrating misuse under the rule of reason generally requires “a full-fledged economic inquiry into the definition of the market, barriers of entry, and the like.” Hovenkamp, IP & Antitrust, §3.3 at 3-11.

It is incumbent on the party alleging misuse to meet its burdens with evidence, not mere assumptions. See *Philips I*, 424 F.3d at 1194 (reversing ITC’s rule of reason analysis because “evidence did not show . . . any negative effect on commercially available technology”); see also *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc.*, 386 F.3d 485, 506-507 (2d Cir. 2004) (“Under the rule of reason, the plaintiffs bear an initial burden to demonstrate the defendants’ challenged behavior had an *actual* adverse effect on competition as a whole in the relevant market”) (emphasis in the original; internal quotation marks omitted).

To be sure, the rule of reason does not require the same level of detailed analysis in every case:

² The patent itself may not be presumed to create market power. *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 46 (2006) (overruling prior precedent and holding, in a Sherman Act case, that a plaintiff must prove a patent holder’s market power).

[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions.

California Dental Ass'n v. F.T.C., 526 U.S. 756, 780-81 (1991). Thus, courts have employed a less searching rule of reason analysis in antitrust cases involving conduct deemed “inherently suspect” because of its close relationship to known harmful practices, *see Polygram Holding, Inc. v. F.T.C.*, 416 F.3d 29, 38 (D.C. Cir. 2005), or where the “the behavior had the potential for genuine adverse effects on competition.” *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996). But in light of the complexity of the parties’ arrangement to pool and license their intellectual property, the inherent procompetitive effects that might arise from such conduct, and the uncertainty in the record regarding the commercial viability of the Lagadec technology, “any anticompetitive effects of given restraints are far from intuitively obvious,” and a more stringent application of the rule of reason should apply. *See California Dental Ass’n*, 526 U.S. at 759.

Indeed, requiring a more exacting analysis of the licensing practices at issue in this case, and imposing the burden on the party alleging misuse to come forward in the first instance with objective evidence of actual anticompetitive effects, will

help avoid the risk of mistakenly invalidating licensing practices that are, in fact, procompetitive. As is the case with antitrust enforcement, findings of misuse based upon “[m]istaken inferences and the resulting false commendations are ‘especially costly, because they chill the very conduct the antitrust laws are designed to protect.’” *Verizon Communications, Inc., v. The Law Offices of Curtis V. Trinko*, 540 U.S. 398, 414 (citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U. S. 574, 594 (1986)). With technology rapidly changing and evolving, even a single mistaken decision can have ripple effects through the industry, as companies are forced to adjust their strategies and avoid the uncertain risks of future litigation. The threat that uncertainty can stifle investment and innovation is why the Supreme Court has “repeatedly emphasized the importance of clear rules in antitrust law.” *Pacific Bell Telephone Co. v. Linkline Communications, Inc.* ___ U.S. ___, 129 S.Ct. 1109, 1120-1121 (2009). As was the case with Sherman Act liability in *Trinko*, “[t]he cost of false positives counsels against an undue expansion” of the misuse defense. *See Trinko*, 540 U.S. at 414. These same principles apply with equal force in the misuse context.

Thus, the *en banc* Court should consider whether the evidence presented by Princo demonstrated that any agreement between Sony and Philips to license Lagadec only for Orange Book applications had an actual anticompetitive effect that outweighed procompetitive effects. That, in turn, requires, at a minimum, an

evaluation of whether the evidence established that there was a viable market for non-Orange Book discs generally, that non-Orange Book discs would have made use of the Lagadec technology for encoding of position data, and that those discs would have been bona fide competitors of the Orange Book standard. *See Princo*, 563 F.3d at 1325 (“[U]nless the competing technology would have entered the market to become a significant competitive force, it could not have augmented future competition in an important way”). The rule of reason requires such evidence, rather than reliance on speculation and theory; otherwise, the analysis would fall short of demonstrating the required anticompetitive effects. As Judge Bryson noted, “Princo still needed to show that any agreement not to allow Lagadec to be licensed outside the Orange Book would have had some *anticompetitive effect* in order for the agreement to constitute a form of horizontal price fixing.” *Princo*, 563 F.3d, at 1326 (Bryson, J., concurring). *See also id.* at 1325-26 (rejecting “speculative” suggestions that are “unsupported by argument or evidence before the Commission”).

This is not to say that under the rule of reason an agreement not to license competing technology could never constitute misuse. If the party alleging misuse can meet its burden and demonstrate a real negative effect on competition that outweighs procompetitive benefits, including sufficient countervailing efficiencies, then a finding of misuse may very well follow from rule of reason analysis. To

this end, AIPLA leaves it to the Court to decide whether the evidence on this record supports a remand. But it is incumbent upon this Court to ensure that, on balance, a negative effect has actually occurred that it is not outweighed by countervailing procompetitive effects. Otherwise, the rule of reason loses its value as the time-tested best way to control truly anticompetitive conduct while protecting the well-acknowledged procompetitive benefits associated with the licensing of patents.

CONCLUSION

For these reasons, *amicus curiae* AIPLA respectfully requests that the Court clearly reaffirm that the rule of reason applies to the misuse claims at issue in this case and hold Princo to its burden of producing evidence of actual net anticompetitive effects stemming from any agreement between Sony and Philips to restrict the licensing of Lagadec for non-Orange Book technology.

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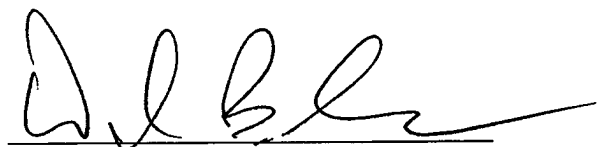
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I certify that the foregoing BRIEF OF AMICUS CURIAE AIPLA complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 4,358 words as measured by the word processing software used to prepare this brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B).

Date: December 4, 2009.

A handwritten signature in black ink, appearing to read 'D B Salmons', written over a horizontal line.

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