No. 13-720

IN THE

Supreme Court of the United States

STEPHEN KIMBLE, *et al.*,

Petitioners,

v.

MARVEL ENTERPRISES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* FOR THE CENTER FOR INTELLECTUAL PROPERTY RESEARCH OF THE INDIANA UNIVERSITY MAURER SCHOOL OF LAW AND OTHER LEGAL AND ECONOMIC SCHOLARS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amicus curiae is the Center for Intellectual Property Research of the Indiana University Maurer School of Law (the "Center"), joined by a number of other scholars whose names appear in the Appendix. Neither the Center nor Indiana University has any interest in the outcome of this matter. However, the Center, as a part of its mission, has a strong interest in seeing the patent law develop in a consistent and positive way.

SUMMARY OF ARGUMENT

This Court's decision in *Brulotte v. Thys Co.,* 379 U.S. 29 (1964), holding that post-expiration royalties in patent licenses are "unlawful per se," comes from an era when the Court did not strictly adhere to the economic principles that have become critical to this Court's "more recent jurisprudence." *Leegin Creative Leather Products v. PSKS*, 551 U.S. 877, 887 (2007). Scholars and commentators have long recognized as much, and have urged this Court to reconsider *Brulotte* when presented with an appropriate case.

This is just such a case. The *Brulotte* rule should be reconsidered because (1) it frustrates public policy

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have been given at least ten days' notice of *amici's* intention to file this brief and both have consented by email. Such consents are being submitted herewith.

supporting commercialization of inventions; and (2) it is out of step with this Court's current economics-based patent/antitrust jurisprudence.[2] The petition for certiorari should be granted.

ARGUMENT

I. *BRULOTTE* DISCOURAGES COMMERCIALIZATION OF INVENTIONS.

According to a recent Department of Commerce study, "factors linked to innovation are responsible for almost three-quarters of the Nation's post-WW II growth rate." Arti Rai *et al.*, *Patent Reform*: *Unleashing Innovation, Promoting Economic Growth & Producing High-Paying Jobs,* Department of Commerce (Apr. 13, 2010).[3] The patent system fosters this innovation by providing a limited period of exclusivity for inventors to make, use and sell their inventions in exchange for disclosure of information needed to make the inventions after the period of exclusivity has expired. *United States Constitution*, Art. 1, Sec. 8; Christine Varney, *Promoting Innovation Through Patent and Antitrust Law and Policy*, Department of Justice (May 26, 2010).[4]

In the years since *Brulotte,* products covered by patents and other forms of intellectual property have

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2. Whether the *Brulotte per se* rule should be scrapped in favor of the rule of reason or post-expiration royalties made legal *per se* is a question that can properly be addressed when this case is decided on the merits.

3. http://www.commerce.gov/sites/default/files/documents/migrated/Patent_Reform-paper.pdf

4. http://www.justice.gov/atr/public/speeches/260101.htm

"become increasingly important as a determinant of U.S. industrial progress." Richard Gilbert & Carl Shapiro, *Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No's Meet the Nineties*, 1997 Brookings Papers 283 (1997).[5] As a result, "[t]echnology licensing and related partnerships are essential in today's economy to remain globally competitive and to market the products that knowledge assets help to create." *Id.* at 283-84.

The rule established in *Brulotte* hinders the innovation needed to make our economy vibrant in an important way not recognized in 1964: the rule discourages flexible licensing agreements needed for commercialization of inventions. This Court has long recognized the unquestioned ability of a patent owner to license others to exploit the invention in exchange for a "fixed sum for the privilege to use the patents." *Automatic Radio Mfg. Co., Inc. v. Hazeltine, Inc.,* 339 U.S. 827, 833 (1950). While there are numerous ways in which a licensor and licensee might structure the payment of that sum, the *Brulotte* rule privileges a very few while forbidding all others, without economic justification.

For example, suppose a licensee has agreed to pay a fixed sum of $1 million for use of a patent over its remaining term. If the licensee pays the $1 million during the patent term, the *Brulotte* rule is satisfied. By contrast, if the licensee is unable to muster the $1 million fixed sum all at once, the parties might prefer to have the licensee sign a promissory note agreeing to pay $1 million, plus interest, in fixed amounts over a period that extends beyond the expiration of the patent. However, "*Brulotte*'s

5. http://faculty.haas.berkeley.edu/shapiro/ninenono.pdf

per se rule limits the ability of patentees to amortize royalty payments over longer periods than the remaining life of the patent, even when such an arrangement is in the interest of the licensee." Herbert Hovenkamp, et al., I IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law § 23.2b (2d Ed.).

Morever, the *Brulotte* rule would inexplicably forbid numerous alternative approaches that might be economically optimal for the licensor and licensee. For example, suppose a patentee offers a license for a royalty of 10% of sales per year for the remaining 10 years of the patent. In response, the offeree, out of a concern for cash flow, proposes 5% for 20 years, which the patentee accepts. Under *Brulotte's* per se rule, the Court would deem the patentee to have leveraged its patent in a manner that expanded the patent's scope whereas, in fact and as an economic proposition, it was the licensee who leveraged his willingness to enter into a license to obtain more favorable royalty terms. To penalize the patentee for accepting the best terms it could get for a license to its patent would both impose an undue hardship on the individual patentee and discourage optimizing economic returns for inventive activity.

Consider a further example premised on the observation that "[b]oth licensor and licensee may be better served by an arrangement in which the royalty rate is low but the term of royalty extended. The low royalty rate might help the licensee in the early investment phase and thereby encourage it to take the risks to launch new, and thus inherently risk-prone, technology." 3 Roger M. Milgrim & Eric E. Bensen, Milgrim on Licensing §18.05 (2013). Suppose a potential licensee of a patent having limited remaining life decides to build its business quickly through expensive promotion, hoping customers will remain loyal to it after the patent expires. To be able to afford the promotion expense, the potential licensee proposes to pay the licensor reduced royalties on sales before the patent's expiration in exchange for continued royalties thereafter, seeing the post-expiration sales as resulting from activities during the patent term. *Cf. Aronson v. Quick Point Pencil Co.,* 440 U.S. 257 (1979) (royalties payable after product is in the public domain are equivalent to "other costs involved in being the first to introduce a new product to the market.") This and innumerable similar examples of flexible royalty arrangements are precluded by *Brulotte* even if they could lead to increased commercialization of inventions because the *Brulotte* Court was "unable to conjecture" any legitimate reason for extending royalties beyond a patent's expiration. *Brulotte,* 379 U.S. at 32.

By precluding flexible licensing arrangements, even if suggested by and advantageous to the licensee, *Brulotte* "causes affirmative social harm" because it "unduly restricts access and exploitation of the patented invention, producing unjustified inefficiencies." Chiappetta, *supra* at 42-43. *Accord* Rochelle Cooper Dreyfuss & Lawrence S. Pope, *Dethroning Lear? Incentives To Innovate After MedImmune*, 24 Berkeley Tech. L.J. 971, 973 (2009) ("*Lear* and *Brulotte* are certainly out of step with current economic understanding and business practices. Rules that give licensing parties greater flexibility to structure their arrangements can make licensing more efficient, improve public access to new technologies, and enhance incentives to innovate.")

The *Brulotte* decision has adverse effects on innovation that the Court did not anticipate. For that reason alone, the Court should reconsider its *Brulotte* decision. *Leegin Creative Leather Products v. PSKS*, 551 U.S. 877, 894 (2007) (*per se* rule overruled because it "would proscribe a significant amount of procompetitive conduct.")

II. *BRULOTTE* IS INCONSISTENT WITH THE COURT'S CURRENT JURISPRUDENCE AND ITS CONCEPTUAL FOUNDATIONS HAVE BEEN ELIMINATED.

A. Under the Court's Current Jurisprudence, *Per Se* Rules Must be Justified by Economic Analysis.

It is not surprising that *Brulotte* ignored the adverse effects on innovation and the disclosure of inventions caused by its rule of *per se* illegality. The decision comes from an era in which this Court's antitrust jurisprudence reflected "a search for ways to simplify the government's burden of proof." William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. of Econ. Perspectives 43, 49 (2000). Many of those decisions, like *Brulotte,* imposed rules of *per se* illegality without any consideration of economic effects.

Under what this Court has called its "more recent jurisprudence," *per se* rules "must be based on demonstrable economic effect rather than . . . upon formalistic line drawing." *Leegin, supra,* 551 U.S. at 88, *quoting Continental T.V. v. GTE Sylvania,* 433 U.S. 36, 58-59 (1977). Consequently, "few decisions of [the *Brulotte*] era command praise today." Kovacic & Shapiro, *supra,* at

51. In fact, most of the *per se* decisions of the *Brulotte* era have been overruled.

For example, in *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380 (1967), decided three years after *Brulotte*, the Court declared restrictions on a dealer's territories illegal *per se* on the authority of "the ancient rule against restraints on alienation." In 1977 the Court overruled *Schwinn*, however, noting that "an antitrust policy divorced from market considerations would lack any objective benchmark." *Continental T.V. v. GTE Sylvania,* 433 U.S. 36, 53 n.21 (1977). In rejecting *per se* condemnations of vertical territorial restrictions, the Court took account of "substantial scholarly and judicial authority supporting their economic utility." 433 U.S. at 57-58.

In 1997, the Court overruled *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), decided four years after *Brulotte*. *State Oil Co. v. Khan,* 522 U.S. 3 (1997). The Court found "insufficient economic justification for *per se* invalidation of vertical maximum price fixing" and considered "the substantial criticism the decision has received." 522 U.S. at 18.

In the nearly fifty years since *Brulotte,* this Court's shifting method of analysis has also led antitrust enforcement authorities to change their views on the illegality of a variety of activities once thought to be illegal *per se.* That change has been especially pronounced with respect to licensing of patents and other forms of intellectual property. *See Windsurfing International, Inc. v. AMF, Inc.*, 782 F.2d 995, 1002 (Fed. Cir. 1986) ("Recent economic analysis questions the rationale behind holding any licensing practice per se anticompetitive," citing, *inter alia, GTE Sylvania.*)

In the early 1970's, following on the heels of *Brulotte, Schwinn and Albrecht*, the Antitrust Division of the Department of Justice announced nine licensing practices, apparently considered illegal *per se,* which became known as the "Nine No No's." Richard Gilbert & Carl Shapiro, *Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No's Meet the Nineties*, 1997 Brookings Papers 283, 285-86 and n.8 (1997).[6]

In 1995, the Department of Justice and Federal Trade Commission issued *Antitrust Guidelines for the Licensing of Intellectual Property* ("Licensing Guidelines").[7] These Licensing Guidelines rejected the *per se* approach of the Nine No No's "because licensing often has significant efficiency benefits." Gilbert & Shapiro, *supra,* at 287.[8] This approach was then followed in the 2007 Report that rejected *per se* treatment of post-expiration royalties because "[c]ollecting royalties beyond a patent's statutory term can be efficient." U.S. Dept. of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition 12 (2007).

As this Court has recognized, the broad provisions of the Sherman Act are given shape "by drawing on common-law tradition." *National Soc. of Professional Engineers*

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6. http://faculty.haas.berkeley.edu/shapiro/ninenono.pdf

7. http://www.justice.gov/atr/public/guidelines/0558.htm

8. Prof. Gilbert led the task force that drafted the Licensing Guidelines. Gilbert & Shapiro, *supra,* at 283.

v. U.S., 435 U.S. 679, 688 (1978).[9] Consequently, when resolving issues arising under the antitrust laws, this Court has an interest "in recognizing and adapting to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Because of that accumulating experience, the Court's methods of analyzing antitrust issues are different than they were when *Brulotte* was decided. *Per se* rules can no longer be justified without "demonstrable economic effect rather than . . . upon formalistic line drawing." *Leegin, supra,* 551 U.S. at 88. *Brulotte* made no effort to determine the economic consequences of its ruling, Hovenkamp, et al., *supra*, at § 23.a (observing that the *Brulotte* Court did not attempt to analyze anticompetitive effects), and it is doubtful that any anticompetitive effects existed, because once the patents expired, "other manufacturers would be free to duplicate the patented technology without obligation to the patentee." *Id.* That alone warrants a reconsideration of the rigid *per se* treatment of post-expiration royalties that decision requires.

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9. The principles underlying patent misuse are similarly derived from the common law. Mark A. Lemley, *The Economic Irrationality of the Patent Misuse Doctrine,* 78 Cal. L.Rev. 1599, 1608 (1990).

B. *Brulotte* Was a Departure from Existing Law and Its Conceptual Foundations Have Been Eliminated by Subsequent Decisions of This Court.

1. *Brulotte* Was a Departure from Existing Law.

The *Brulotte* decision, like the overruled *Schwinn* decision, "was an abrupt and largely unexplained departure from" existing law. *GTE Sylvania,* 433 U.S. at 47. *Brulotte* holds that requiring a licensee to pay royalties on products not covered by a patent constitutes "projection of the patent monopoly." *Brulotte,* 379 U.S. at 32. That conclusion was inexplicably contrary to this Court's decision in *Automatic Radio Mfg. Co., Inc. v. Hazeltine, Inc.,* 339 U.S. 827 (1950).

In *Hazeltine*, a patent licensee argued that an agreement requiring "payment on unpatented goods" during the term of the patent constituted patent misuse. *Hazeltine,* 339 U.S. at 832. The licensee argued that the agreement was "identical in principle" to "'Tie-in' cases" in which a licensor requires the licensee to purchase unpatented goods from the licensor. *Id.* Such "Tie-ins" are condemned because they foreclose at least a portion of the market to competitors of the patent owner and "competition on the merits in the market for the tied item is restrained . . . ." *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 12 (1984); *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947).

The *Hazeltine* Court expressly rejected the claimed analogy, holding that the required payment of money for selling unpatented goods "does **not** create another monopoly." 339 U.S. at 833 (emphasis added). Relying on this conclusion, the Court held that requiring the payment of royalties on all sales, whether covered by the patent or not, is "not per se a misuse of patents . . . ." *Hazeltine,* 339 U.S. at 834. Justices Douglas and Black dissented from this decision.

The *Brulotte* decision was written by Justice Douglas, who essentially adopted his dissenting views in *Hazeltine.* Without rejecting the logic of *Hazeltine* that requiring royalties on unpatented products **cannot** "create another monopoly" (339 U.S. at 833), the *Brulotte* Court simply "decline[d] the invitation to extend it so as to project the patent monopoly beyond the 17-year period." 379 U.S. at 33. The Court provided no basis for its conclusion that requiring royalties on unpatented products after a patent's expiration has a different effect from requiring royalties on unpatented products before that expiration. Instead, the Court's decision simply relied on the analogy to tying cases that the *Hazeltine* majority had expressly rejected. *Id.*

The decision in *Brulotte* that an agreement to pay royalties after a patent has expired is "unlawful per se" (379 U.S. at 32) was also an abrupt departure from the views of leading scholars at the time. Patent and licensing treatises, relying on existing cases, concluded that "an agreement to pay royalties after a patent has expired may be valid and binding." *Ar-Tik Systems, Inc. v. Dairy Queen, Inc.,* 302 F.2d 496, 506 (3d Cir. 1962). The Supreme Court of Washington, in the decision reversed in *Brulotte*, expressly took note of those authorities and the cases on which they relied. *Thys Co. v. Brulotte,* 382 P.2d 271, 290-

91 (Wash. 1963). In reversing, this Court did not mention the treatises or the cases.

2. The Express Foundations of *Brulotte* Have Been Eliminated by Subsequent Decisions of this Court.

The Court has rejected *per se* rules from the *Brulotte* era "when the theoretical underpinnings of those decisions are called into serious question." *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 42 n.3 (2006), quoting *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997). The underpinnings of the *Brulotte* decision began crumbling soon after the case was decided.

In *Zenith Radio Corp. v. Hazeltine Research, Inc.* 395 U.S. 100 (1969), the Court again considered whether requiring royalties on unpatented products during a patent term should be illegal *per se.* Although citing the *Brulotte* decision, the Court ignored its language about efforts to extend a patent beyond its legitimate scope being "unlawful per se" no matter what the circumstances. Instead, the Court characterized *Brulotte* as articulating the "principle that a patentee may not use the power of his patent to levy a charge for making, using, or selling products not within the reach of the monopoly granted by Congress." 395 U.S. at 136-37.

The Court expressly noted that the relevant consideration is whether the licensor "used its patent leverage to coerce a promise to pay royalties on [products] not practicing the learning of the patent." 395 U.S. at 138. As a result, "[i]f convenience of the parties rather than patent power dictates the [challenged] royalty provision, there are no misuse of the patents and no forbidden conditions attached to the license." 395 U.S. at 138.

The market power of the patent, the existence of coercion and the convenience of the licensee are precisely the factors the *per se* rule articulated in *Brulotte*, by its express terms, **precludes** being considered. *See Brulotte*¸ 379 U.S. 34-38 (Harlan, J., dissenting). This Court's characterization of the *Brulotte* holding shows that even by 1969, its rigidity was being rejected. But that characterization cannot relieve the lower courts from following it, as written. *See also Schreiber v. Dolby Laboratories, Inc.*, 293 F.3d 1014, 1019 (7th Cir. 2002), *cert. denied*, 537 U.S. 1109 (2003) (inconsistent decisions of the Court provide "no warrant for declaring *Brulotte* overruled.")

As noted by Petitioner, recent decisions of Congress and this Court have eliminated any basis for the *Brulotte* decision under its articulated rationale. The *Brulotte* Court found the required payment of royalties after the expiration of the patent to be "analogous to an effort to enlarge the monopoly of the patent by tying the sale or use of the patented article to the purchase or use of unpatented ones. *See Ethyl Gasoline Corp. v. United States,* 309 U.S. 436; *Mercoid Corp. v. Mid-Continent Inv. Co.,* 320 U.S. 661, 664-665, and cases cited." *Brulotte,* 379 U.S. at 179. The tying analogy itself was rejected by this Court in *Automatic Radio Mfg. Co., Inc. v. Hazeltine, Inc.,* 339 U.S. 827, 833 (1950). Leaving aside the inappropriateness of the analogy,[10] the cases cited in 1964 had held that tying

10. *Brulotte's* conclusion that requiring payment of royalties "after the patent has expired is an assertion of monopoly power in

arrangements involving patents were always illegal based on the presumption that all patents, no matter what their claims covered, created a "monopoly." *Ethyl Gasoline,* at 456 ("The patent law confers on the patentee a limited monopoly, the right or power to exclude all others from manufacturing, using, or selling his invention."); *Mercoid,* at 666 ("The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly.")

The presumption that a patent inevitably creates a monopoly "has its foundations in the judicially created patent misuse doctrine." *Illinois Tool Works, Inc. v. Independent Ink, Inc.,* 547 U.S. 28, 31 (2006). In 1988, Congress eliminated the presumption that a patent necessarily creates a monopoly in the context of claims for patent misuse based on allegations of tying involving a patent. *Id.* at 39; 35 U.S.C. §271(d)(5).

In *Illinois Tool Works Inc. v. Independent Ink, Inc.¸* 547 U.S. 28 (2006), this Court looked at its cases

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the post-expiration period" analogous to tying agreements (379 U.S. at 179-80) is wrong as a matter of economics, a fact on which economists and commentators agree. *See, e.g.,* Harold See and Frank M. Caprio, *The Trouble with* Brulotte: *The Patent Royalty Term and Patent Monopoly Extension*, 1990 Utah L. Rev. 813, 847 ("In no way, however, can the patent monopoly be extended beyond its term by the use of a royalty."); John W. Schlicher, 2 Patent Law, Legal and Economic Principles §13:192 (2d ed. 2004) ("The use of the longer royalty term does not permit the patent owner to turn a patent with a 20 year term into a patent with a 30 year term . . . . The market power existing during the term patent can be exploited only once."); Raymond T. Nimmer and Jeff Dodd, Modern Licensing Law § 13:31 (2012) (Post-expiration royalties do not "expand the claims or the scope of the patent.").

holding that the existence of a patent necessarily makes tying illegal. Recognizing the "vast majority of academic literature on the subject" and the action of Congress in the misuse context, the Court overruled all prior decisions holding that patents inevitably create the market power necessary to make a tie involving patents illegal *per se. Id.* at 43 and n. 4. As a result, a claim of tying involving a patent "must be supported by proof of power in the relevant market rather than by a mere presumption thereof." *Id.*

The enactment of 35 U.S.C. §271(d)(5) and the decision in *Illinois Tool Works* have eliminated the express underpinnings of the *Brulotte* rule. Patents are no longer presumed to create monopoly power. The elimination of the presumption on which the *per se* rule of *Brulotte* was based is another sufficient justification for a reconsideration of that rule. *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 42 n.3 (2006).

CONCLUSION

By ignoring the potential pro-competitive benefits of flexible licensing arrangements, including arrangements that may allow for post-expiration royalties, the *Brulotte* decision "causes affirmative social harm." Vincent Chiappetta, *Living with Patents: Insights from Patent Misuse*, 15 Marquette Intellectual Property L. Rev. 1, 142-43 (2011). Two Courts of Appeals have invited the Court to reconsider the rigid rule *Brulotte* requires them to apply. *Zila, Inc. v. Tinnell*, 502 F.3d 1014, 1019-20 (9th Cir. 2007); *Schreiber*, 293 F.3d at 1018. They have been joined by what was described in 2002 as a "tidal wave of legal and economic scholarship." *Scheiber, supra,* 293 F.3d at 1020. In 2007, the Department of Justice and Federal Trade Commission added to that scholarship, rejecting *per se* treatment for post-expiration royalties because "[c] ollecting royalties beyond a patent's statutory term can be efficient." U.S. Dept. of Justice & Fed. Trade Comm'n, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition 12 (2007).[11] The Court should grant the petition for certiorari and should take up this opportunity to reconsider *Brulotte* against the backdrop of contemporary views on the economics of patent licensing.

Respectfully submitted,

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11. http://www.justice.gov/atr/public/hearings/ip/222655.pdf

APPENDIX

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