No. 13-720

In The Supreme Court of the United States

STEVEN KIMBLE, ET. AL,

Petitioners,

v.

MARVEL ENTERTAINMENT, INC.,

Respondent.

On a Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

BRIEF OF INTELLECTUAL PROPERTY OWNERS ASSOCIATION IN SUPPORT OF PETITIONERS

PHILIP S. JOHNSON, *PRESIDENT*
KEVIN H. RHODES, *CHAIR*
AMICUS BRIEF COMMITTEE
INTELLECTUAL PROPERTY OWNERS ASSOCIATION
1501 M Street, N.W.
Suite 1150
Washington, D.C. 20005
(202) 507-4500

ROBERT P. TAYLOR
COUNSEL OF RECORD
RPT LEGAL STRATEGIES PC
2443 Fillmore Street #332
San Francisco, CA 94115
(415) 447-3975
robert.taylor@rptstrategies.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

Intellectual Property Owners Association (IPO) is a trade association representing companies and individuals in all industries and fields of technology that own or are interested in U.S. intellectual property rights.[1] IPO's membership includes more than 200 companies and a total of over 12,000 individuals who are involved in the association, either through their companies or as inventor, author, executive, law firm or attorney members. Founded in 1972, IPO represents the interests of all owners of intellectual property. IPO regularly represents the interests of its members before Congress and the USPTO and has filed *amicus curiae* briefs in this Court and other courts on significant issues of intellectual property law. The members of IPO's Board of Directors, which approved the filing of this brief, are listed in the Appendix.[2]

IPO submits this brief in support of Petitioners. IPO members collectively are parties to thousands of licensing arrangements reflecting a wide variety of commercial considerations. When two parties have freely negotiated an arm's length license agreement, IPO believes that they should be compelled to live up to their commitments, barring some extraordinary

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[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 *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented in writing to the filing of this brief.

[2] IPO procedures require approval of positions in briefs by a two-thirds majority of directors present and voting.

consideration of sufficient moment to set aside a lawful contract. The freedom to contract in commercially rational ways and the reliable enforceability of those contracts are among the most fundamental and valued precepts of our judicial system.

SUMMARY OF ARGUMENT

In deciding whether to overrule the 50 year old precedent established in *Brulotte v. Thys*, 379 U.S. 29 (1964), IPO urges the Court to bear in mind:

> "the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.'"

Kelly v. Kosuga, 358 U.S. 516, 520 (1959), quoting the dissent in *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 217, 271 (1909). Where the parties to a patent license – for their own private purposes and in an arm's length transaction free of coercion – agree to defer payment of some portion of the total consideration until after expiration of the licensed patent(s), a rule of law that automatically allows the licensee to escape its payment obligations after enjoying all the benefits of the license clearly has the potential for unjust outcomes.

In *Brulotte v. Thys*, 379 U.S. 29 (1964), this Court held that a patent license provision for payment of royalties accruing after expiry of a licensed patent was not enforceable under any circumstances, notwithstanding that the licensee entered into the contract voluntarily and devoid of coercion. The *Brulotte* rule allows a clever licensee, after agreeing to make payments extending beyond expiry of the patent, simply to renege on the contract at the moment the patent expires.[3]

The rationale for the *Brulotte* ruling was rooted in antitrust law and, more specifically, its loosely defined offspring, the "patent misuse" defense, as both were being applied in 1964. At that time, this judicially created defense could be invoked by the defendant in any suit for patent infringement or contract action to enforce a patent license. The misuse defense was triggered if the defendant could demonstrate efforts by the patent owner to commercialize the claimed invention in ways that had economic impact outside the precisely worded claims of the patent.

At the time *Brulotte* was decided, this Court (i) presumed that all patents conferred economic market power, (ii) preferred the widespread use of *per se* rules for determining antitrust liability over asking the lower courts to perform the hard work of a rule of reason analysis, and (iii) believed that restrictions of any kind in a patent license should be viewed as improper restraints of trade. All three of these foundational notions that underpin *Brulotte* have since been rejected or severely eroded either by legislation or by the Court itself. As a result,

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[3] Such was essentially the fact pattern before the court in *Peter Scheiber v. Dolby Laboratories, Inc., et al*, 293 F.3d 1014, 1016 (7th Cir. 2002), *cert. denied*, 537 U.S. 1109 (2002). After carefully rejecting each of the possible grounds for applying a *per se* rule of antitrust law to ban post-expiration royalties, the appellate court nevertheless considered itself bound to follow *Brulotte*, which it characterized as "economic nonsense, imputing systematic irrationality to businessmen." *Id*. at 1020.

Brulotte has become a vestigial anachronism that should be overruled.

In *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006) (*ITW*), this Court unanimously rejected the two fundamental premises of the patent misuse doctrine – namely that market power can be presumed from the existence of a patent and that any form of tying is a *per se* violation of the antitrust laws. The *ITW* opinion acknowledges that the presumption of market power by the Court began in the patent misue context (*Id.* at 39), that procompetitive benefits often flow from much of the conduct held to be misuse in earlier times (*Id.* at 36), and that it would be "absurd" to continue to presume market power for antitrust cases in the aftermath of its rejection by Congress as a basis for a finding of patent misuse (*Id.* at 41).

IPO respectfully submits that it would be equally "absurd" to leave the *Brulotte* rule in place. Where a patent owner does not enjoy market power derived from its patent(s), a *per se* rule that condemns automatically any and all post-expiration consideration is unwarranted and may make it more difficult in some situations for patent owners to grant licenses to their patents. Moreover, such a rule undermines the basic integrity of contracts and, as noted, allows sophisticated licensees to take unfair advantage of less sophisticated patent owners.

It is possible, of course, that cases may arise in which a licensor enjoys market power because of its patent(s) and uses that market power to coerce licensees into agreeing to post-expiration royalties that injure competition. Where such power does exist and is used for anticompetitive purposes, antitrust law can readily be called upon to prevent or redress such abuse. In reality, the vast majority of licensing transactions do not involve the exercise of market power, and the parties should be accorded the freedom necessary to contract in ways that make commercial sense for both.

ARGUMENT

I. ANTITRUST CONCEPTS USED IN 1964 INSPIRED THE RULING IN *BRULOTTE*.

A. The antitrust underpinnings of *Brulotte* are undeniable.

Contrary to the argument that Respondent is likely to advance in this case, and contrary to the views expressed by the United States in its brief opposing certiorari,[4] the decision in *Brulotte* does indeed rest specifically on antitrust principles as those principles were being interpreted in 1964. The *Brulotte* opinion, authored by Justice William O. Douglas, states unequivocally:

> "[W]e conclude that a patentee's use of a royalty agreement that projects beyond the expiration date of the patent is unlawful *per se*. If that device were available to patentees, the free market visualized for the post-expiration period would be subject to monopoly influences that have no proper place there."
>
> …
>
> "[T]o use [the leverage of the patent] to project … royalty payments beyond the life of the patent is

[4] Brief of the United States as Amicus Curiae at 7-8, *Steven Kimble, et. al. v. Marvel Entertainment, Inc.*, No. 13-720 (Oct. 30, 2014).

> analogous to an effort to enlarge the monopoly of the patent by tieing [sic] the sale or use of the patented article to the purchase or use of unpatented ones. [Citing two antitrust cases that are discussed in fn5, below]. The exaction of royalties for use of a machine after the patent has expired is an assertion of monopoly power in the post-expiration period when, as we have seen, the patent has entered the public domain." 379 U.S. at 32, 33.

The phrase "unlawful *per se*" in that passage referred to the analytical technique used in antitrust analysis through which business transactions could be held unlawful without regard to their motivation or economic impact.[5] It is not a term normally used in patent law. Moreover, the Court's reliance on the *Ethyl* and *Mercoid* cases in comparing post-expiration royalties to unlawful tying demonstrates further the antitrust foundation for the opinion.

[5] *E.g.*, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (agreement between providers of bar review courses to eliminate competition between themselves and to share revenues held *per se* illegal). The subject of *per se* rules is discussed below in Section II.A.

Both of those cases involved this Court's affirmation of findings under the antitrust laws.[6]

Well before 1964, this Court was using *per se* rules from antitrust law and the Court's then prevailing presumption of market power to shape the outer contours of permissive behavior accorded to patent owners. As noted in another opinion by Justice Douglas, *Mercoid Corporation v. Minneapolis Honeywell Regulator Co.*, 320 U.S.680, 684 (1946):

> "The legality of any attempt to bring unpatented goods within the protection of the patent is measured by the anti-trust laws not by the patent law. For the reasons stated in *Mercoid v. Mid-Continent Investment Co.,* … the effort here made to control competition in this unpatented device plainly violates the anti-trust laws …."

To whatever extent *Brulotte* can be characterized as no more than an interpretaton of the Patent Act,

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[6] To support its unlawful tying analysis, the *Brulotte* opinion states:

> "See *Ethyl Gasoline Corp*. v. *United States*, 309 U.S. 436 (1940); *Mercoid Corp*. v. *Mid-Continent Inv. Co*., 320 U.S. 661, 664-665, and cases cited." 379 U.S. at 33.

Notably, the *Ethyl* case was brought by the United States purely as an antitrust case under Section 1 of the Sherman Act, alleging that the defendant had used the power inherent in licensing its patents to preclude the sale of leaded gasoline to unlicensed entities. A finding in favor of the Government by the District Court was affirmed by this Court.

Mercoid was a ruling by this Court reversing the Seventh Circuit and holding the patents in question unenforceable for patent misuse, restoring an antitrust injunction in favor of the accused infringer, and remanding for a further determination of the availability of treble damages for an established violation of the antitrust laws.

as suggested in the Brief of the United States (pp. 7-8), the decision reflected a forced accommodation of patent law to the wooden principles of antitrust as they were then being applied. The Court's 2006 opinion in *ITW* traces the development of the patent misuse defense, its reliance on a presumption of market power thought to be extant in patents and copyrights, and the "intertwin[ing]" of patent misuse and antitrust law commencing with the 1947 decision in *International Salt v. U.S.* 547 U.S. at 38-45.

In any event, *Brulotte* should not be viewed as a rule of patent law. The holding, if not one of antitrust law rendering a contract provision unlawful, and therefore unenforceable, can only be one of general contract law. Nothing in the Patent Act limits the manner in which two parties, for their own account, may define the consideration to pass between themselves in exchange for the licensee's right to use a patented invention. The Patent Act states only that patents shall have the attributes of personal property. 35 U.S.C. § 261.[7]

B. The patent misuse defense itself, as it stood in 1964, was primarily an antitrust doctrine.

To appreciate how the *Brulotte* Court used antitrust law to define the permissible range of conduct accorded a patent owner, it is useful to examine the evolution of the "patent misuse" defense. This judicially crafted defense could be

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[7] *Cf., Motion Picture Co. v. Universal Film Co.*, 243 U.S. 502, 513 (1917), where the Court by way of dicta stated that license provisions imposed by the patent owner should be tested by principles of general law, not patent law. The *Motion Picture* case is discussed more fully in Section I.B, below.

raised by a defendant accused of patent infringement and, in a few instances (*e.g., Brulotte*), by the defendant in contract actions brought to enforce licenses. The only discernible organizing principle guiding application of the misuse defense was that a patent owner who engaged in a commercial transaction that somehow had an economic impact falling outside the precise scope of the claims of the patent was at risk of being denied judicial enforcement of its property or contract rights. To borrow from the parlance used in numerous misuse decisions, the market power of the patent was being used unlawfully to "extend the monopoly" to something not covered by the patent, which in essence was a form of unlawful tying. *ITW*, 547 U.S. at 34.

Although premised on antitrust concepts and theoretically intended to preserve competition, there was rarely if ever an effort to identifiy a relevant market or examine market power, both of which today are regarded as the most basic aspects of almost any antitrust analysis. In 1964, those prerequisites were simply assumed where patents were involved. *Id.* at 38 *et seq.*

The relevant line of misuse cases began with *Motion Picture Co. v. Universal Film Co.*, 243 U.S. 502 (1917), wherein this Court held that a patent owner could not assert infringement claims against a company that exhibited unpatented films using a patented film projector in contravention of a label prohibition placed there by the manufacturer. Although the Court at that time did not employ the term "misuse," it did make clear that a claim for patent infringement – as a matter of patent law – would not lie against the use of unpatented articles.

The Court buttressed its decision by noting that the 1914 addition of the Clayton Act to the antitrust laws made it unlawful to sell goods on terms that inhibited competiton. *Id.* at 517-18.

Over the next few years, the Court became increasingly strident in its use of antitrust concepts to condemn conduct related to patents. In *Carbice Corp. v. American Patents Corp.*, 283 U.S. 27 (1931), the Court refused to find contributory infringement arising from the sale of dry ice to companies using a patented double-walled cardboard container for shipping perishable items. The Court went out of its way to emphasize what it viewed as the illegality of the conduct under the antitrust laws:

> "Relief is denied because the Dry Ice Corporation is attempting, without sanction of law, to employ the patent to secure a limited monopoly of unpatented material used in applying the invention. The present attempt is analogous to the use of a patent as an instrument for restraining commerce which was condemned under the Sherman Anti-Trust Law …."

Id. at 33.[8]

In *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488 (1942), the Court allowed the misuse defense to be raised by a direct infringer of the asserted patent and one unaffected by the misuse.

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[8] Accord: *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458 (1938) (sale of emulsified asphalt used in patented process for curing concrete not contributory infringement); *B. B. Chemical Co. v. Ellis*, 314 U.S. 495, 495-498 (1942) (patent misuse barred relief even where sale of accused products had been actively promoted to practice patented process and where accused products were not staple articles of commerce).

Id. at 494. The patent owner had leased patented machines to its customers for use in a food processing line, requiring the lessees to purchase salt from the patent owner to measure the royalties due on the machines. In allowing the infringer to avoid an injunction and continue to sell infringing machines, the Court held that the misuse defense, while grounded in the need to protect competition, did not require a specific finding of violation of the antitrust laws. *Id.* at 394.

In 1946, as already noted, the Court in the *Mercoid* cases essentially abolished the doctrine of contributory infringement by holding that any effort to enforce a patent against a defendant selling something less than the full invention claimed in the patent was a *per se* violation of the antitrust laws. 320 U.S. at 684.

In 1947, the Court cited its decision in *Morton Salt* as the basis for affirming a judgment against International Salt under Section 1 of the Sherman Act for essentially the identical practice of leasing patented machines used in food processing and requiring the lessee to purchase salt. This type of tying, the Court held, was a *per se* violation of the Sheman Act. *International Salt v. United States*, 332 U.S. 392, 396 (1947); *see*, *ITW*, 527 U.S. at 39.

These cases defined the judicial environment in which *Brulotte* was decided. It was one of considerable judicial hostility to the patent system in general and to license restrictions in particular.

C. *Brulotte* reflects a routine application of the misuse defense.

The conduct most likely to be dubbed patent misuse in 1964 involved licensing or sales arrangements that could be characterized in some fashion as unlawful tying. All of the cases discussed in the previous Section, for example, fit that mold. The patent owner either was requiring a licensee to purchase something from the patent owner or was leasing or selling a patented product or machine and requiring the purchase of unpatented products. The Court in *Brulotte* viewed the post-expiration payments as just another form of tying and therefore misuse of the patent. The patent owner, said the Court, was using the power of the patent to require the licensee to pay for something to which the patent owner was not entitled. 379 U.S. at 33.

As discussed in the next Section, most of the foundational principles supporting the misuse defense have been eroded or modified by statute. There is, however, an even more fundamental flaw with the analysis in *Brulotte*. The Court's reasoning is circular. Only if one first assumes that the patent owner should not be permitted to grant a license for the duration of the patent and spread the payments over a longer period of time can the tying analog even arguably apply. Otherwise, the post-expiration payments are simply the parties' way of providing contractually for compensaton to the patent owner. The dissenting opinion of Justice Harlan in *Brulotte* points out the difficulty in trying to distinguish between the patent misuse that the Court attaches to the licenses in that case and a slightly modified form of deferred payment that is referred to as something other than patent royalties. 379 U.S. at 34-39.

II. THE RIGID ANTITRUST CONCEPTS THAT UNDERPIN *BRULOTTE* HAVE BEEN RELAXED SUBSTANTIALLY.

Commencing in the late 1970s, many of the foundational antitrust concepts relied on by the *Brulotte* Court, either directly or by implication, were either abandoned or substantially modified. The automatic invocation of *per se* rules is no longer used with the same frequency. The presumption of market power, as noted in the preceeding discussion of the *ITW* case, has been abandoned. And an affirmative policy of promoting licensing has replaced the perceptions of the 1960 and 1970s that limits on a licensee should be viewed, in an of themselves, as restraints of trade.

A. The widespread use of *per se* rules of antitrust liability has been largely discontinued.

The use of *per se* rules in antitrust cases is essentially a rule of judicial convenience, adopted to permit a finding that certain types of conduct can be treated as facially unlawful without making a careful examination of the reasons for or the economic effects of the conduct. As the Court noted in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344 (1982):

> "Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, [the Court] has applied a conclusive presumption that the restraint is unreasonable. As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and

litigation efficiency, we have tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable."

Condemnation of collaborative arrangements as *per se* violations of antitrust law was widely used prior to the late 1970s. Around that time, however, the Court began to recognize that in a complex economy, as ours had become, it was no longer sound antitrust policy to condemn agreements as *per se* unlawful without some examination of their purpose and economic effect. *See, e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (nonprice vertical restraints to be tested by the rule of reason); *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979) (collective license of copyrights not *per se* price fixing); *NCAA v. Bd. of Regents of the University of Oklahoma*, 468 U.S. 85 (1985) (output restrictions on televising of college football games tested by rule of reason); *California Dental Assn. v. FTC*, 526 U.S. 756, 780-81 (1999) ("[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."); *Leegin Creative Leather Products v. PSKS, Inc.* 127 S.Ct. 2705 (2007) (vertical price restrictions to be tested by rule of reason analysis, overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373).[9]

More directly relevant to the issues here, the Court during the 1980s began to soften its views as to tying. Thus, in *Jefferson Parish Hospital Dist. No.*

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[9] Notably, both *Continetal TV* and *Leegin* involved the overruling of earlier precedents, notwithstanding the doctrine of *stare decisis*.

2 v. Hyde, 466 U.S. 2 (1984), the Court held that rather than being treated as a *per se* violation of Section 1 of the Sherman Act – illegal without regard to its motivation or economic impact – tying should be evaluated more fully as to its actual economic impact.[10]

B. Abolition of the presumption of market power in 2006 removed all tying from the *per se* category.

As noted in the Summary of Argument, the Court in the *ITW* case rejected unanimously the notion that market power should be presumed from the existence of a patent copyright. The Court noted, in particular, that Congress in 1988 had added sections (4) and (5) to 35 U.S.C. § 271 (d), requiring a showing of market power before tying could be held to be patent misuse. 547 U.S. at 41.

In the aftermath of that statutory amendment and the *ITW* case, any form of tying that previously

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[10] This was a distinct departure from the *per se* ruling in the *International Salt* case, discussed in Section I.B, *supra*. In *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 7-8 (1958), the Court relied on *International Salt* to reiterate that tying was unlawful *per se*. While ostensibly acknowledging that tying might be harmless without market power, the Court nevertheless held that a showing of market power was not essential to establishing a violation of the Sherman Act. *See also*, *United States v. Paramount, Inc.,* 334 U.S. 131, 156-159 (1948) (block booking of copyrighted films *per se* unlawful).

As applied to patents and copyrights, the *Jefferson Parish* Court continued to honor the presumption that patents and copyrights conferred market power: "the sale or lease of a patented item on condition that the buyer make all his purchases of a separate tied product from the patentee is unlawful." 466 U.S. at 16.

might have been held to be a *per se* violation of the antitrust laws was necessarily converted to a rule of reason case, requiring the Court to examine the motivation and competitive impact of a restraint of trade. In light of these major revisions to the underlying law, it seems apparent that if *Brulotte* were before the Court today, the absence of any proof of anticompetitive impact would compel a different result.

C. The Department of Justice reversed its own views as to license restrictions.

Equally relevant to the question before the Court was the major shift that took place in the 1980s in the attitude of the Department of Justice toward patent licensing and the use of license restrictions. Beginning in the 1940s and continuing through the 1960s and 1970s, the Department of Justice challenged many types of patent and copyright license restrictions as *per se* violations of U.S. antitrust law, again without regard to the purpose or economic impact of the restriction. *E.g.*, *United States v. Univis Lens, Co.*, 316 U.S. 241 (1942) (*per se* unlawful to control licensee prices); *International Salt Co. v. United States.*, 332 U.S. 392 (1947) (requiring purchase of unpatented commodity *per se* unlawful); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (block booking of films *per se* unlawful); *United States v. Loew's Inc.*, 371 U.S. 38 (1968) (same).

Reflective of its hostility toward licensing restrictions, officials of the Department of Justice, starting in 1970, began to publish their well-known list of license restrictions that the agency regarded as *per se* violations of antitrust law, a list that came to be known as the "Nine No Nos."[11] There was little question but that the effect of the misuse doctrine and the condemnation of many types of license restrictions meant that companies often would opt not to license at all rather than place their patents at risk. *See, e.g.*, 1966 Report of the Presidential Commission to Study the Patent Laws, p. 45-46 p. 45-46 (essentially endorsing the views of the Department of Justice).[12] The prevailing view, however, was that no licensing at all was preferable to allowing a patent owner to impose restrictions on a licensee that extended beyond the precise scope of the claims of the patent.

This era of antitrust was later characterized in the 2003 report of the Federal Trade Commission as one of "overzealous antitrust enforcement":

> "[A]ntitrust dominated and patents were disfavored during the 1960s and 70s. … Overzealous antitrust enforcement culminated in the Department of Justice's 'Nine No-Nos,' a list of nine licensing practices that the Justice Department generally viewed as automatically

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[11] *E.g.*, speech by Bruce B. Wilson, Deputy Ass't Attorney. General, U.S. Department of Justice, entitled "Patent and Know-How License Agreements: Field of Use, Territorial, Price and Quantity Restrictions," Remarks Before the Fourth New England Antitrust Conference (1970). Mr. Wilson identified nine practices that DOJ believed were either *per se* illegal or highly suspect and to be avoided.

[12] Report of the President's Commission on the Patent System, "To Promote the Progress of Useful Arts," presented to the Committee on the Judiciary, United States Senate, Subcommittee on Patents, Trademarks, and Copyrights, 90th Congress, 1st Session (February 2, 1967)

> illegal. Most now believe that antitrust's ascendency during this period lacked both a sound economic foundation and a sufficient appreciation of the incentives for innovation that patents and patent licensing can provide."

FTC Report, "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy" (2003) at p.9 [quotation marks and footnote citations omitted].

DOJ's view of patents and copyrights began to change in the 1980s, after William F. Baxter was appointed Assistant Attorney General in charge of the Antitrust Division. DOJ acknowledged that license restrictions are often essential to the willingness of patent owners to allow others to practice their intellectual property.[13] By the mid-1990s, there was widespread agreement within the enforcement community that the licensing of intellectual property is normally procompetitive and highly desirable.

This shift was later reflected in the "Antitrust Guidelines for the Licensing of Intellectual Property," promulgated jointly by the Department of

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[13] *See, e.g.*, Abbott B. Lipsky, Deputy Assistant Attorney General, "Current Antitrust Division Views on Patent Licensing Practices," Remarks Before the American Bar Association Antitrust Section (Nov. 5, 1981), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,129; *see also*, Roger B. Andewelt, "National Productivity and Innovation Act of 1983," Remarks Before the Los Angeles Patent Law Association 15 (Nov. 1983), available at http://bayhdolecentral.com/bremmerPDF/Remarks_by_Roger_B._Andewelt_before_the_Los_Angelos_Patent_Law_Association,_11-15-1983.pdf

Justice and the Federal Trade Commission in 1995 ("IP Guidelines"):

> "Intellectual property typically is one component among many in a production process and derives value from its combination with complementary factors. Complementary factors of production include manufacturing and distribution facilities, workforces, and other items of intellectual property. The owner of intellectual property has to arrange for its combination with other necessary factors to realize its commercial value. Often, the owner finds it most efficient to contract with others for these factors, to sell rights to the intellectual property, or to enter into a joint venture arrangement for its development, rather than supplying these complementary factors itself." § 2.3.

The IP Guidelines go on to observe, moreover, that restrictions in licenses often may be essential to facilitate such transactions:

> "Field-of-use, territorial, and other limitations on intellectual property licenses may serve procompetitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible. These various forms of exclusivity can be used to give a licensee an incentive to invest in the commercialization and distribution of products embodying the licensed intellectual property and to develop additional applications for the licensed property. The restrictions may do so, for example, by protecting the licensee against free-riding on the licensee's investments by other licensees or by the licensor. They may also increase the licensor's incentive to license, for example, by protecting the licensor from

competition in the licensor's own technology in a market niche that it prefers to keep to itself." *Id.*

III. CONCLUSION

Enormous changes have taken place since 1964 in our understanding of the economics of patents and copyrights and the role that these property rights play in a complex economy. The rule in *Brulotte* reflects a simplistic, "one size fits all" approach to gauging the anticompetitive impact of post-expiration royalties. IPO urges this Court to replace the *per se* rule applied in *Brulotte* with a rule of reason approach, as the Court has done with numerous other aspects of antitrust law.

Respectfully submitted,

Philip S. Johnson,
President
Kevin Rhodes, *Chair*
Amicus Brief
Committee
Intellectual Property
Owners Association
1501 M Street, N.W.
Suite 1150
Washington, D.C. 20005
Tel: (202) 507-4500

Robert P. Taylor
Counsel of Record
RPT Legal Strategies PC
2443 Fillmore Street #332
San Francisco, CA 94115
Tel: (415) 447-3975

APPENDIX

APPENDIX[1]

Members of the Board of Directors
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BJ Watrous
Apple Inc.

Stuart L. Watt
Amgen, Inc.

Charlotte Whitaker
Motorola Solutions, Inc.

Jon D. Wood
Bridgestone Americas Holding, Inc.

Michael Young
Roche, Inc.