

No. 10-0290

IN THE
Supreme Court of the United States

MICROSOFT CORPORATION,
Petitioner,

v.

14I LIMITED PARTNERSHIP, ET AL.,
Respondents.

**On Writ of Certiorari to the United States Court of
Appeals for the Federal Circuit**

BRIEF OF *AMICUS CURIAE* PROJECT FASTLANE, INC.
IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The *Amicus Curiae*, Project Fastlane, Inc. of Bainbridge Island, Washington (“Project Fastlane”) is a young and award-winning Internet and mobile commerce software company creating online marketplaces for remote browsing and purchasing of consumer goods and services. As an Internet-based enterprise, Project Fastlane develops software products for consumer and corporate use. In 2010, Project Fastlane’s Location Aware Mobile Marketplace won the PayPal X Developer Challenge Grand Prize for the most innovative mobile software application. Project Fastlane has and intends to continue to create valuable intellectual property. In the competitive and rapidly growing mobile commerce market in which Project Fastlane competes, innovation is the key to success. Hence, Project Fastlane, in order to provide the best products to its users, depends on reliable, stable patent protection for its software and Internet-related innovations.¹

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, apart from the *Amicus Curiae* or its counsel. The written consent of all parties was granted in accordance with Supreme Court Rule 37.3(a).

QUESTION PRESENTED

The Patent Act provides that "[a] patent shall be presumed valid" and that "[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity." 35 U.S.C. § 282. The Federal Circuit held below that Microsoft was required to prove its defense of invalidity under 35 U.S.C. § 102(b) by "clear and convincing evidence," even though the prior art on which the invalidity defense rests was not considered by the Patent and Trademark Office prior to the issuance of the asserted patent. The question presented is: Whether the court of appeals erred in holding that Microsoft's invalidity defense must be proved by clear and convincing evidence.

SUMMARY OF THE ARGUMENT

1. The clear and convincing evidentiary standard is consistent with this Court's century-long established jurisprudence that the validity of a patent can only be overcome by a heightened standard of proof. As Justice Cardozo unequivocally stated in *Radio Corp. of America*, "through all the verbal variances, however, there runs this common core of thought and truth, that one otherwise an infringer who assails the validity of a patent fair upon its face bears a heavy burden of persuasion, and fails unless his evidence has more than a dubious preponderance." The legislative history of the 1952 Patent Act is clear that when Congress codified this presumption of patent validity in § 282, it was aware of this Court's precedent requiring clear and convincing evidence to invalidate a patent. The United States Court of Appeals of the Federal Circuit has also ruled numerous times that the presumption of validity under §282 required clear and convincing evidence to prove invalidity. As such, lowering the burden of proof would run afoul of this Court's precedent as reflected in an unbroken line of opinions.

2. Lowering the standard of proof required to invalidate a patent would also undermine the deference given to the U.S. Patent and Trademark Office. Based upon the presumption of administrative law principle, the Examiner shall be given deference because it is the act of Congress that vested the authority of decision-making power in the Examiner. Thus when a patent is issued and stamped its seal of approval by the

Patent Office, a heightened standard should apply. Lowering the burden of proof would essentially amount to putting the patent examination process on the same pedestal as a registration system, e.g., a copyright registration system, undercutting the very purpose and design of the rigorous patent examination process.

3. This Court has never categorically held that the preponderance of the evidence is the presumptive standard for all civil cases. Instead, the standard for a particular case, as Justice Harlan writes in *In re Winship*, is a “fundamental assessment of the comparative social disutility” of erroneous factual determinations. This Court has utilized this “social disutility” analysis to determine the appropriate standard of proof for various civil cases. In *Radio Corp. of America*, this Court held that challenges to validity of patent warranted a heightened standard of proof. As such, the standard of proof applied here must also be a heightened standard. Furthermore, this Court has stated in *Addington* that a clear and convincing standard would be appropriate when its purpose is to protect “important interests.” In *Seymour v. Osborne*, the Court characterized patents as “exclusive right and liberty,” suggesting that patents are more than mere economic interest. In fact, patents include various private and public interests that when weighted would result in inhibiting future innovation and create instability in our patent system.

4. The U.S. patent system and the perceived strength of an issued patent has helped encourage foreign investment in the United States, providing a valuable economic tool for innovative,

entrepreneurial companies to bring jobs, research, and new technology to the United States.

5. Presently, the United States patent system is an attractive to foreign investors because of the strength and reliability of the patent system. However, a change in the evidentiary standard will leave prospective patentees unable to evaluate the strength of their patent assets, particularly if invalidity may be achieved easily under a lessened standard.

6. A patent is a right that carries the gravitas of being a “privilege” or “exclusive right and liberty” as American jurisprudence from the early nineteenth and twentieth centuries reveal. The Founding Fathers intended for a U.S. patent to be a right that should require a heightened standard for deprivation (i.e., invalidation) and not one that should be akin or analogized to a mere property right, thus requiring only a showing of mere preponderance. A U.S. patent was never intended to be easily granted, or invalidated.

7. Originally described as an “exclusive right and liberty,” an issued U.S. patent bears a strong presumption of validity, which has been a large factor in Project Fastlane’s decisions to make significant investments of time, money, and resources towards protecting its inventions. While every enterprise carries a measure of risk, calculated risks are not acceptable without an appreciable assessment of the potential rewards. If a significant barrier to competitive entry (i.e., a U.S. patent) is not available to companies such as Project Fastlane, innovation will stagnate and move offshore. Without the strength of a U.S. patent withstanding scrutiny under a heightened

evidentiary standard, incentives for technical innovation would be greatly diminished across various sectors of the U.S. economy. Project Fastlane, and other innovative companies depend on the strength of U.S. patents to foster its growth in a competitive economy, particularly the rapidly developing mobile commerce market.

8. By lowering or bifurcating the evidentiary standard, this Court will create many unintended consequences, including overburdening the USPTO, override Congress' efforts to enact patent reform, and defy over two centuries of jurisprudence and legislation that were specifically directed to encouraging innovation and investment in, among others, U.S. software sectors.²

² Counsel and the present *Amicus Curiae* wishes to gratefully acknowledge the contributions of Hye Ihn Rhee, J.D. in the preparation of this brief.

INTRODUCTION

The Supreme Court's precedent and the intent of our Founding Fathers are clear. This Court has always held that the standard of proof to overcome a presumption of validity is clear and convincing. In fact, this Court has never stated that the presumption of validity can be overcome by a preponderance of the evidence nor stated that the evidentiary standard depends on whether the United States Patent and Trademark Office (USPTO) considered allegedly-anticipatory prior art. The petitioner's argument that evidentiary standards should depend on whether the prior art was considered by the USPTO would simply undermine the very foundation of our patent system – causing instability, unreliability, and unsettled expectations that a valid patent can be overturned easily in exchange for disclosing inventions for the sake of the public welfare. Lowering this evidentiary standard will undermine the credibility of the USPTO. A stable, reliable patent system provides the very fuel that drives the economic engine of our Nation: Innovation.

A strong patent system encourages innovation. Without this protection, the inventors would have no recourse other than to preserve in secrecy useful inventions. For software-related enterprises, the speed of innovation and rate at which new inventions are developed requires a stable patent system in order to ensure that timely protection is available. However, if the "bargained-for" exchange of the patent system is weakened by lowering the evidentiary standard by

which a patent may be invalidated, software-development companies such as Project Fastlane will lose significant competitive and economic tools, resulting in decreased motivation to compete, patent and, eventually, innovate. When inventions are not disclosed to the public, the social contract originally underlying our Founding Fathers' vision for a patent system is broken.

The value of innovation is deeply ingrained in the core foundation of our Nation. Our Founding Fathers explicitly included in the Constitution the mandate that gave Congress the power to award "exclusive rights and liberties" to inventors to promote the useful arts and sciences. As "exclusive rights and liberties," strong, enforceable patents have persisted because of the vision that innovation would be promoted and encouraged.

Software companies such as Project Fastlane have an expectation that granted patents received by it shall provide protection in exchange for disclosing their novel inventions to the public. Without this expectation, Project Fastlane and other innovative startups would be discouraged from investing time and resources to advance valuable technology.

Thus, Project Fastlane urges the Court to maintain the evidentiary standard for determining patent invalidity as requiring clear and convincing evidence and no other. Further, the Court should not bifurcate the present standard as there is no precedent for such a dual standard in the patent jurisprudence of the United States.

ARGUMENT

I. THE PROPER EVIDENTIARY STANDARD TO INVALIDATE A PATENT IS CLEAR AND CONVINCING

A. The Requirement that Patent Invalidation Be Proven by Clear and Convincing Evidence is Consistent with This Court's Precedent.

The preponderance of the evidence standard departs from the Supreme Court's century long established jurisprudence that the validity of patent can only be overcome by a heightened standard of proof. Prior to the passage of Section 282 of the Patent Act, this Court always held that a heightened standard of proof was required to invalidate a patent. *Smith v. Hall*, 301 U.S. 216, 233 (1937); *Mumm v. Jacob E. Decker & Sons*, 301 U.S. 168, 171 (1937); *Radio Corp. of America v. Radio Engineering Laboratories, Inc.*, 293 U.S. 1, 2 (1934); *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U.S. 45, 60 (1923); *Adamson v. Gilliland*, 242 U.S. 350, 353 (1917); *Deering v. Winona Harvester Works*, 155 U.S. 286, 300-301 (1894); *Morgan v. Daniels*, 153 U.S. 120, 122-123 (1894); *The Barbed Wire Patent*, 143 U.S. 275, 284, 292 (1892); *Cantrell v. Wallick*, 117 U.S. 689, 695-696 (1886); *The Corn-Planter Patent*, 90 U.S. 181, 227 (1874); *Coffin v. Ogden*, 85 U.S. 120, 124 (1874).

In *Radio Corp. of America*, Justice Cardozo unequivocally stated that "through all the verbal variances, however, there runs this common core

of thought and truth, that one otherwise an infringer who assails the validity of a patent fair upon its face bears a heavy burden of persuasion, and fails unless his evidence has more than a dubious preponderance.” 293 U.S. at 7-8. This Court consistently held that “there is a presumption of validity, a presumption not to be overthrown except by clear and cogent evidence.” *Id.* at 2.

In light of the Court’s long-established judicial rule regarding the standard of proof to overcome the presumption of validity, Congress codified the presumption of patent validity in 1952. §282 states that “[a] patent shall be presumed valid” and “[t]he burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity.” 35 U.S.C. §282. When Congress codified this presumption of validity, it was aware of this Court’s precedent requiring a clear and convincing evidence to invalidate a patent. The legislative history of the 1952 Patent Act clearly indicates that Congress intended to codify this existing common law. H.R. Rep. No. 82-1923, at 29 (1952); *accord* S. Rep. No. 82-1979, at 2422 (1952); Reviser’s Note to §282 (1952). Given that Congress clearly intended to codify existing common law, it would be inconsistent to argue that §282 imposed any lower standard of proof.

Following this Court’s precedent, the United States Court of Appeals for the Federal Circuit³

³ The Federal Circuit decisions are significant because Congress created the Federal Circuit in 1982 as means to address the regional inconsistencies and disuniformity in the U.S. patent system. See H.R. Rep. No. 97-312, at 20-21 (1981) (suggesting that Federal Courts Improvement Act

also ruled that a presumption of patent validity under §282 required clear and convincing evidence to prove invalidity. *See Shumer v. Lab. Computer Sys., Inc.*, 308 F.3d 1304, 1315 (Fed. Cir. 2002) (“To overcome this presumption of validity, the party challenging a patent must prove facts supporting a determination of invalidity by clear and convincing evidence.”); *Ryco, Inc. v. Ag-Bag Corp.*, 857 F.2d 1418, 1423 (Fed. Cir. 1988) (“[A] patent is presumed valid, and the party attacking validity has the burden of proving facts supporting a conclusion of invalidity by clear and convincing evidence.”); *Connell v. Sears Roebuck & Co.*, 722 F.2d 1542, 1549 (Fed. Cir. 1983) (holding that prior art not considered by the USPTO “does not change the burden and does not change the requirement that that evidence establish presumption-defeating facts clearly and convincingly.”). Lowering the burden of proof would run afoul of this Court’s precedent as reflected in an unbroken line of opinions.

B. The Heightened Evidentiary Standard Gives Proper Deference to the United States Patent and Trademark Office.

Lowering the standard of proof required to invalidate a patent also undermines the deference given to the USPTO. The present *Amicus* contends that deference to the USPTO is based on

was designed to address the issue of “disuniformity” in the regional circuits); Federal Courts Improvement Act (“FCIA”), P.L. 97-164, 96 Stat. 25 (codified at 28 U.S.C. §1295).

the presumption of administrative correctness—administrative law principle that an agency enjoys a presumption of validity. *See Western Elec. Co. v. Piezo Technology, Inc.*, 860 F.2d 428, 433 (Fed. Cir. 1988). It is the act of Congress vesting the authority of decision-making power in the examiner that gives rise to the presumptive correctness. *See Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1573-1574 (Fed. Cir. 1993) (stating that the presumption “may be viewed as a presumption of administrative correctness...”); *Lannon Mfg. Co. v. U.S. Int’l Trade Comm’n*, 799 F.2d 1572, 1575 (Fed. Cir. 1986) (“*Section 282* is based on the presumption of administrative correctness, a presumption derived from both public policy and pragmatic efficiency.”). Judge Giles Rich, one of the two principal drafters of the Patent Act of 1952, explained that the presumption of validity is based partly on the principle that “...a qualified government agency presumed to have properly done its job...” *American Hoist & Derrick Co. v. Sowa & sons, Inc.*, 725 F.2d 1250, 1359 (Fed. Cir. 1984).

When a patent is issued and stamped with the seal of the United States Patent and Trademark Office, it is a result of the USPTO having performed its duty. A heightened standard of proof duly recognizes this very expert process employed by the Office. Obtaining a patent is a painstaking process that an applicant must go through, as evidenced by the elaborate procedures set forth in the Manual of Patent Examining Procedures. Lowering the burden of proof would essentially amount to analogizing the patent examination process to a registration system (e.g., a copyright

registration system), thus undercutting the very purpose and design of a rigorous patent examination system, as started in 1836, which ensures strong, presumptively valid patents shall issue forth. Clear and convincing standard is necessary to preserve this deference given to the USPTO.

C. The Requirement of Clear and Convincing Evidence to Prove Patent Invalidity is Consistent with General Legal Principles of Standard of Proof.

There is no “default” standard of proof in civil cases. Unlike criminal law where this Court has unequivocally held that the reasonable-doubt standard is constitutionally required for all criminal prosecutions, this Court has never categorically held that a preponderance of the evidence is the presumptive standard or the “default” rule for all civil cases. *See In re Winship*, 397 U.S. 358, 362 (1970) (stating that “[...]expressions in many opinions of this Court indicate that it has long been assumed that proof of a criminal charge beyond a reasonable doubt is constitutionally required); *Brinegar v. United States*, 338 U.S. 160, 174 (1949) (stating that “[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common law tradition, to some extent embodied in the Constitution...”).

Indeed, a preponderance of the evidence is the common standard of proof applicable in most civil cases. *See Herman & MacLean v. Huddleston*, 459

U.S. 375, 389-390 (1983). The intermediate standard, however, is “no stranger to civil law.” *Woodby v. INS*, 385 U.S. 276, 285 (1966). In *Addington v. Texas*, this Court held that “[o]ne typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant.” 441 U.S. 418, 424 (1978). This Court also held that a clear and convincing evidentiary standard is also appropriate in particular civil cases. See *Addington*, 441 U.S. at 423 (civil commitment); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52 (1971) (libel); *Woodby*, 385 U.S. at 285 (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization). Based on these cases, the petitioner and its amici contend that a clear and convincing standard is solely limited to the above exceptions unless a case involves uniquely important individual interests such as a personal liberty or important civil right. (*Petitioner Br.* 14-16). Thus, they argue, the heightened standard is improper because the validity issues in patent litigation do not threaten the individuals with a significant deprivation of liberty. *Id.* at 16. The petitioner, however, fails to mention that this Court has held that challenges to validity of patent warranted a heightened standard of proof. *Radio Corp. of America*, 293 U.S. at 2. Accordingly, the patent must be viewed along with other civil cases in which the Court imposed a heightened standard of proof.

Nevertheless, the present *Amicus* contends that challenges to the validity of a patent do implicate important interests, warranting a heightened standard of proof. In fact, the question of whether a case warrants a preponderance of the

evidence or a clear and convincing standard is not a black-and-white test. The choice of standard for a particular case, as Justice Harlan writes, is a “fundamental assessment of the comparative social disutility” of erroneous factual determinations. *In re Winship*, 397 U.S. at 370. The Supreme Court has utilized this “social disutility” analysis to determine the appropriate standard of proof for various civil cases. *See Santosky v. Kramer*, 455 U.S. 745 (1981).

In particular, this Court has stated that a clear and convincing standard would be appropriate when its purpose is to protect “important interests.” *See Addington*, 441 U.S. at 423-24. In *Seymour v. Osborne*, the Court characterized a patent as an “exclusive right and *liberty*,” suggesting that patents are more than mere economic interest. 78 U.S. 516, 533 (1870) (*emphasis*). In every case, the Court’s determination of whether to impose a heightened standard of proof required a balancing of private and public interests involved. *See Rosenbloom*, 403 U.S. at 49-50. Likewise, the determination of an applicable legal standard for patent validity cases requires weighing various private and public interest involved.

Most importantly, a patent system “embodies a carefully crafted bargain for encouraging the creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice the invention for a period of years.” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-151 (1989). In essence, the U.S. patent system is a social contract between the inventor and the public, compensating the former for the good of the

latter. *See Kendall v. Winsor* 62 U.S. 322, 328 (1858) (describing a patent as “at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals, and the incentive to further efforts for the same important objects.”); *Seymour*, 78 U.S. at 533 (stating that patents should be regarded “...as public franchises granted to inventors” and “...practice for the public benefit, as contemplated by the Constitution and sanctioned by laws of Congress.”); *see generally* Jeanne C. Fromer, *Patent Disclosure*, 94 Iowa L. Rev. 539, 553 (2009). In this relationship between the inventor and the public, disclosure is an important mechanism in promoting innovation. Disclosure allows a subsequent participant (once patent expires or via license) to study and build upon the existing arts. Instead of reinventing a new product each time, licensees and subsequent users can have access to existing technology by licensing (i.e., asset monetization) strong, presumptively valid patents. A licensee, however, is motivated to license a patent under the assumption that it will not be easily invalidated (i.e., validity is upheld with deference to the USPTO to be overcome only through clear and convincing evidence to the contrary). Without this motivation, patent value would be denuded as the incentive to innovation is eviscerated. Licensees can use a licensed patent to improve on an existing invention and contributions would not only advance the technology, but serve the greater public good. *See generally* Martin Campbell-Kelly, *Not All Bad: an Historical Perspective on Software Patents*, 11 Mich. Telecom. Tech. L. Rev. 191 (2005). As such, a mere possibility of

erroneous judgment under a preponderance system in which a valid patent can easily be overthrown would not only undermine the public's confidence in the U.S. patent system, but would also discourage inventors from disclosing their inventions and, thereby, hinder innovation.

The importance of innovation is embedded in our U.S. Constitution. Article I, Section 8, Clause 8 of the U.S. Constitution gives explicitly Congress the power “[T]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, §8, cl. 8. Despite Founding Fathers distaste for the British and concern about the vice of monopoly systems, they still modeled the U.S. patent system after the British patent system under which inventors were granted an exclusive right to invention in exchange for disclosure. *See Vivian J. Fong, Are We Making Progress?: The Constitution as a Touchstone for Creating Consistent Patent Law and Policy*, 11 U. Pa. J. Const. L 1163, 1176 (2009). Our Founding Fathers understood that innovation parallels a reliable and strong patent system. As such, lowering the standard of proof would undermine the intent of our Founding Founders.

Based upon analyzing social disutility of erroneous factual determinations, lowering the standard of proof would ultimately inhibit innovation and create instability in our patent system. Therefore, a heightened standard of proof is justified to protect these important interests.

II. THE EVIDENTIARY STANDARD SHOULD NOT BE LOWERED IF THE UNITED STATES WISHES TO REMAIN A LEADER IN INNOVATION

A. The United States is a Leading Forum for Foreign Investment, Which Supports Innovation.

Following the Patent Act of 1790, the United States patent system has depended on a patent bargain to encourage innovation. This patent bargain is based upon inventors publicly disclosing their inventions in exchange for a limited monopoly. The United States is currently home to 139 of the world's 500 largest companies, a number that is more than double any other country.⁴ Moreover, 65 of the top 100 software companies in the world reside in the United States.⁵ As such, these companies access the legal protection of the United States including a stable patent system.

The United States is also the leading forum for foreign investments in the past decade.⁶

⁴ Fortune, Global 150: Our annual ranking of the world's largest corporations, (July 26, 2010), <http://www.money.cnn.com/magazines/fortune/global500/2010/countries/US.html>.

⁵ Michel van Kooten, *Global Software Top 100 – Edition 2010*, SOFTWARE TOP 100 (September 29, 2010), <http://softwaretop100.org/global-software-top-100-edition-2010>.

⁶ U.N. Conference on Trade & Agreement [UNCTAD], Div. on Investment & Enterprise, *Inward and outward foreign direct investment flows, annual, 1979-2009* (Oct. 19, 2010),

Specifically, foreign direct investments have increased six-fold from 2003 to a staggering \$325 billion in 2008. *Id.* Foreign investment is often used to support innovative activities in many industries, including those related to software, Internet, social media, and other information technologies, for which U.S. law has become increasingly stable and tolerant.

To address this issue, the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which is administered by the World Trade Organization (WTO), was created in 1995. TRIPS sets minimum standards for many forms of intellectual property regulation as applied to other WTO members. Generally, developing countries experience a rapid growth in the number of patent filings shortly after joining TRIPS. For example the number of patent applications nearly doubled from 46 thousand to 90 thousand in the Republic of Korea after joining TRIPS in 1995.⁷ Moreover, foreign domestic investment increased ten-fold within five years of its accession to TRIPS.⁸ Other developing countries such as China, Vietnam, and Malaysia also shared similar experiences after joining TRIPS.⁹ Outside investment begins to enter a jurisdiction as intellectual property laws stabilize.

<http://unctadsta.unctad.org/TableViewer/tableView.aspx?ReportId=88>.

⁷ WIPO, *Intellectual Property in Asian Countries: Studies on Infrastructures and Economic Impact*, at 14, (2007),

http://www.wip.int/freepublications/en/intproperty/1018/wipo_pub_1018.pdf.

⁸ *Id.* at 17.

⁹ *Id.* at 12.

Developing a stable set of intellectual property laws, including creating strong patent rights (i.e., patent rights that are not easily invalidated), among other factors, increases the attractiveness of a given jurisdiction to innovation-oriented enterprises. Accordingly, the United States patent system still remains attractive due to the certainty that patentees will have presumptively valid patents that will not be easily invalidated by a mere preponderance of the evidence.

B. Lowering the Evidentiary Standard for Invalidity Will Introduce Uncertainty in the United States Patent System, Thereby Discouraging Domestic and Foreign Investment in the United States.

The United States has experienced economic growth while applying the “clear and convincing” standard to validity. Changing the evidentiary standard at this time to a “preponderance of the evidence” will introduce uncertainty to present and future patent holders as to the strength of a United States patent. This will lead to a decrease in innovation.

A change to the evidentiary standard will have prospective patentees wondering how to evaluate what they are receiving in the patent bargain. While it is certain that they are receiving less than before, it is uncertain how much weaker that protection will be. This may lead many prospective patentees to reevaluate whether there is another innovation-friendly forum that is better suited for them and, if so, cause a decrease in innovation in the United States. Moreover, there

is historical evidence that uncertainty (i.e., instability) in a patent system results in less foreign investment. For example, India's parliamentary patent reform in 2005 created uncertainty as to the patentability of pharmaceuticals and software patents and, subsequently, outside investment from the United States decreased by one-third.¹⁰ Thus, changing the heightened evidentiary standard for invalidation of a U.S. patent will decrease innovation to prospective patentees, deter foreign investment, and lead to a decline in innovation as technical talent leaves our shores for other jurisdictions.

¹⁰ NIC, Ministry of Commerce & Industry, *Fact Sheet on Foreign Direct Investment* (December 2006), http://dipp.nic.in/fdi_statistics/india_fdi_dec_2006.pdf; supra note 6.

III. LOWERING OR BIFURCATING THE EVIDENTIARY STANDARD FOR INVALIDATING A UNITED STATES PATENT WILL HAVE UNDESIRABLE CONSEQUENCES FOR THE UNITED STATES AND ITS SOFTWARE-RELATED INDUSTRIES

A. The Long-Settled Expectation That Technology Firms Can Protect Software-Related Inventions Using Patents Will Be Weakened by Introducing Uncertainty Due To a Lowered Evidentiary Standard.

When Thomas Jefferson returned from duty as the U.S. ambassador to France, he set about establishing the USPTO in 1793 understanding that inventors must have an expectation that patents provide “...an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society.” Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* 13 THE WRITINGS OF THOMAS JEFFERSON 326, 334-335 (Andrew A. Lipscomb ed., 1903) [hereinafter Jefferson Letter] Whether a patented invention provides utility is often decided by the consuming public, but whether a patent has value is often a subjective conclusion determined by the patentee or its executives, employees, investors, or directors. Further, the value placed on a potential patent is also determined by similar stakeholders, but is far more influenced by the industry and market factors of a given technical field. In software, patents command significant value,

monetarily or strategically, because copyright, trade secrets, and other forms of intellectual property law provide more limited rights and protections. The basic nature of computer programs, applications, and software (i.e., "software") is such that object or source code is often released to licensees or customers as all or part of a licensed product, thus making trade secret protection unavailable. Copyright registrations also provide limited protection due to the broad latitude with which software can be designed around, reverse engineered, or modified so as to be almost unrecognizable in form to original program code, source, object, or otherwise. Coupled with very fast development cycles (sometimes measured in months or lasting only a year, depending upon the complexity of the software), rapidly changing technology, new platform and standards adoption, these factors motivate reliance upon a stable, predictable patent system.

Further, if patents are available for protecting software-related inventions, patentees must be able to rely upon the certainty that a granted patent is presumed valid, to be overcome only in the instance of a heightened evidentiary standard. To do so otherwise radically affects the enforcement characteristics and strategies for U.S. patents.

In rapidly changing areas of technology, weakening the strength of a U.S. patent by facilitating invalidation through a showing of a mere preponderance of evidence (i.e., prior art), also suggests that the only advantage (and investment attraction) of an Internet or software-

driven enterprise is its speed of execution to arrive at the marketplace. Against companies that have cash reserves measured in billions of dollars, this is not only impractical, but ludicrous and odious to the intention of our Founding Fathers, as discussed below.

It is in keeping with our Nation's jurisprudence that patent law supports exclusive, strong, and liberal patent rights, which extends to technical fields of endeavor such as software development and indicates that patents, in any field, cannot be invalidated easily. *See Diamond v. Chakrabarty*, 447 U.S. 303, 308 (1980); *see also Seymour*, 78 U.S. at 533; *Bilski*, 130 S. Ct. at 3225; *Prometheus Lab., Inc. v. Mayo Coll. Servs.*, 628 F.3d 1347 (2010).

The settled expectation of the bargained-for exchange between inventors and the public are present in any industry or technical field, including software and Internet-related business in fields such as content, social media, search, electronic commerce, and others. Petitioner and its amici argue that a lowered evidentiary standard for invalidating a patent should be applied, if not wholly then partially to prior art not previously considered by the USPTO, providing only vacuous administrative reasoning and never addressing the detriment that could be visited upon the nature of free competition within the U.S. economy. The petitioner seeks to dismiss this impact as it perceives greater benefit is gained by more easily invalidating asserted patents. However, the present *amicus* contends that lowering the evidentiary standard will not only diminish settled expectations, but run

contrary to our Nation's jurisprudence and founding.

The present *Amicus* has a significant interest in the outcome of this case as it is investing heavily in new technology development. *See Lotus Dev. Corp. v. Borland Int'l., Inc.*, 39 F.3d 807, 818 (1st Cir. 1985), *aff'd*, 516 U.S. 233 (1996). In 1985, the U.S. Court of Appeals for the First Circuit (and affirmed by this Court) found that certain aspects of software (i.e., the underlying methods and processes of operation) are uncopyrightable subject matter, thus suggesting by implication patenting of software was available. *See id.*; *see also Donald C. Hutchins v. Zoll Med. Corp.*, 492 F.3d 1377, 1383 (Fed. Cir. 2007). Since then, a legacy of jurisprudence has developed that refined our Nation's jurisprudence as to the patenting of process-related inventions underlying software and Internet-based businesses and organizations, culminating most recently in *Bilski* and the present case. *See* 130 S. Ct. at 3225.

Given the legacy of *Lotus* and subsequent jurisprudence from the U.S. Court of Appeals for the Federal Circuit over the last two decades, including *State Street Bank*, the present *Amicus* has relied on the developed certainty that software may be protected using the patent system and that an issued patent bears a strong presumption of validity that can be overcome only by a showing of clear and convincing evidence. *See* 148 F.3d 1368 (Fed. Cir. 1998); *Shumer*, 308 F.3d at 1315; *Ryco*, 857 F.2d at 1423; *Connell*, 722 F.2d at 1549. In other words, the present *Amicus* relies upon the certainty and predictability that its software-related innovations can be patented and any

issued patents obtained shall not be easily invalidated, thus warranting investments in patent protection. If not for this certainty that a patent may be invalidated only with a heightened showing (i.e., “a heavy burden of persuasion,” as stated by Justice Cardozo) and giving deference to the fulfilled burden of the USPTO, an Internet or software-related enterprise such as the present *Amicus* will be detrimentally impacted in erecting legal barriers to entry against competitors, fundraising, deterring piracy and unauthorized use or reproduction, licensing, and protecting rapidly-developed technologies, to name a few areas. *Radio Corp. of America*, 293 U.S. at 7-8.

B. As an “Exclusive Right and Liberty,” an Issued United States Patent Bears a Strong Presumption of Validity, Which is a Powerful Incentive to Invest in Innovation.

Given the prosperous and stable nature of the U.S. Internet and software-related markets, its entrepreneurial culture, highly-trained technical work force, sophisticated fundraising environment (e.g., venture capital, private equity, public stock infrastructure, and the like) and stable intellectual property rights, the present *Amicus* chooses to reside in the United States.¹¹ The

¹¹ Internet and software-related enterprises design, develop, distribute, license, sell, or otherwise software such that, in 2007 alone, more than 1.7 million people were employed in the U.S., having jobs that typically paid salaries that were 195% of the national average and, collectively, contributed over \$260 billion to the U.S. economy, the largest software market in the world (i.e., in 2008, the United States

expectation this *Amicus* holds in the strength of a U.S. patent is one that is derived from long-standing jurisprudence, legislation, and tradition, finding roots in, at least, the 1952 Patent Act. This expectation is strong and requires treatment as a “privilege” or “an exclusive right and liberty”, as originally established in the early history of our Nation. *See James G. Wilson v. Lewis Rousseau and Charles Easton*, 45 U.S. 646 (1846); *see also Elisha Bloomer v. John W. McQuewan, et al.*, 55 U.S. 539 (1852);

The Founding Fathers intended for a U.S. patent to carry the gravitas that accompanies a civil right, but one that secures a property right. While rising to neither the level of treatment of a natural right nor being relegated to treatment as purely a civil right, a patent was meant to be a strong and powerful conveyance by the government, providing an exclusive monopoly, for a limited time, as encouragement for the disclosure of the fruitful endeavors of an inventor. *See* Jefferson Letter at 334-335. According to the Founders, patent rights were often described as an “exclusive right and liberty,” carrying such weight as to be treated beyond mere property, but as a privilege. *See id.*; *see also* Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating The Patent Privilege in Historical Context*, 92 Cornell L. Rev. 953, 965 (2007).

represented almost 46% of the entire global software market). Business Software Alliance, *Software Industry Facts and Figures* (visited March 17, 2011) <http://www.bsa.org/country/Public%20Policy/~media/Files/Policy/Security/General/sw_factsfigures.ashx>.

In the context of the contemporary treatment of “privileges,” U.S. patents were not meant to be granted nor invalidated easily. As set forth above, two centuries of well-developed case law demonstrates that the presumption of validity must be overcome only by a showing of clear and convincing evidence. Were this not the settled expectation derived from over 200 years of jurisprudence, the present *Amicus*, among others, may find a more predictable patent system worthy of protecting software-related innovation. Admittedly, there are many factors that contribute to the U.S. being the largest innovation market in the world. However, were we to refute the Founding Fathers’ intent that a U.S. patent should be treated as a “privilege” or “an exclusive right and liberty,” it is unlikely that our dominant position can be maintained.

C. By Lowering or Bifurcating the Evidentiary Standard, This Court Will Incorrectly Preempt Congress’ Efforts to Combat Excessive Patent Litigation Trends and Create Other Undesirable Consequences.

The present *Amicus* contends that there may be several undesirable consequences of judicially lowering the evidentiary standard for invalidating a U.S. patent, some of which have been previously addressed in this brief, but are worth mentioning again.

Globally, many other jurisdictions do not fare as well economically due to weakened intellectual property rights. See Mingzhi Li et al., *Strategies for Developing China’s Software Industry*, 1 INFO.

TECH. AND INT'L. DEV. 61-73, 61 (2003). (“The lack of intellectual property rights protection on the government side also contributes to the low spending on software, which further hinders software firms’ incentives to innovate.”). But no arguments have been presented that deny the strength of the U.S. patent system or the stable reliability that it provides to potential investors, entrepreneurs, and, most importantly, inventors. A strong, presumably valid U.S. patent is an important underlying assumption in ensuring our economy, let alone software-related industries, remain in global leadership positions.

Domestically, the burden placed on the USPTO will not be solved by weakening the evidentiary standard for invalidating a patent, but instead cast doubt upon the credibility of Jefferson’s agency, likely causing increased numbers of patent applications to be filed given the increased uncertainty of validity. When coupled to Congress’ current activities, including the recent passage in the 112th Congress of S.23 (the “America Invents Act of 2011”), the USPTO could experience a dramatic increase in operational burden as both a “First-to-File” and lowered evidentiary standard for invalidity are brought to bear. In other words, the lessened reliability of a U.S. patent may exacerbate an already declining scenario for inventors, resulting in greater numbers of filings in order to counter an increased potential risk of invalidation. The present *Amicus* instead argues that, though legislative action and increasing USPTO resources, the argument set forth by some amici that a lessened evidentiary standard will be moot, but the desired result (i.e.,

improving the efficiency of the USPTO) can be achieved.

Also, Congress itself has shown that strong patents are a vital component of our economy today. As reported in the 109th Session of Congress, patents provide several valuable features to the software industry, including aiding a company during acquisition negotiations or a public stock offering, prevent appropriation of technology by a larger, more well-funded competitor, and protecting software companies, large and small, by preventing unwanted utilization while remaining attractive to investors. CONGRESSIONAL RESEARCH SERVICE, PATENT REFORM: ISSUES IN THE BIOMEDICAL AND SOFTWARE INDUSTRIES, 109TH CONG., APRIL 7, 2006 (Wendy H. Schacht).

Further, lowering the evidentiary standard in contravention of the Founders' intentions (from what we can glean from Madison and Jefferson's writing (as described above)), whether entirely or partially, will only give reality to the fear that larger firms will dominate the U.S. software industry. James Bessen and Robert M. Hunt, "The Software Patent Experiment," Q3 2004 Business Review, p. 22, available at <<http://www.phil.frb.org>> (showing that only 25% of all software patents filed between 1994-1997 were attributable to non-manufacturing firms). Should the standard for invalidating a patent be lowered to requiring only a showing that meets a mere preponderance, this will facilitate defensive actions in patent infringement litigation for large national and multi-national corporate enterprises,

but only at the expense of eviscerating the value of patent holdings across all industries and fields.

Large financially-successful companies, such as those represented by almost every amici supporting the petitioner (apart from the academic amici) seek to lower the evidentiary standard of invalidity under 35 U.S.C. §102(b) in order to combat excessive, defensive patent litigation costs. In seeking to do so, the petitioner and its amici ignore the undesirable impact that would be visited upon countless industries throughout the U.S. were prior art (regardless of whether it was previously before the USPTO) required to only demonstrate by a mere preponderance that a given patent is invalid.

Still further, this *Amicus* maintains that its patenting efforts, as well as those of countless other businesses and industries, will be eviscerated in value. More troubling would be the removal of an important economic tool that enables businesses and individuals to compete against firms such as the petitioner and its supporting amici. Easing the standard by which invalidation may occur will only harm innovation and drive companies to place its research and development resources offshore in alternative stable, predictable software patenting regimes such as Germany or Japan at a time when the United States can ill afford to lose ground in global competition against other jurisdictions incubating Internet and software-friendly intellectual property regimes.

If this Court lowers the evidentiary standard for invalidating a patent due to anticipatory prior art, whether for prior art previously before the

USPTO or not, the basic underlying social compact that underlies our patent system will have been broken. If a U.S. patent may be invalidated under a mere preponderance standard, a valuable incentive for inventors to disclose innovations to the public to advance technical development will have been lost. The U.S. will no longer be known as a great incubator of globally-relevant and leading technologies in fields of endeavor characterized by the velocity of technological, cultural, and social change, such as mobile computing, social media, and software. This *Amicus* urges the Court to ensure that innovation in Internet and software-related industries is encouraged, providing a powerful incentive by backing a strong presumption of validity as demonstrated over two centuries of jurisprudence that petitioner has failed to deny.

CONCLUSION

Based on the foregoing reasons, this *Amicus Curiae* respectfully requests that the Court order the judgment of the court of appeals affirmed.

Very respectfully,

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