

Case Nos. 19-2255, -2285

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

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**BIO-RAD LABORATORIES, INC.,  
THE UNIVERSITY OF CHICAGO,**  
*Plaintiffs-Appellees,*

v.

**10X GENOMICS, INC.,**  
*Defendant-Appellant.*

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On Appeal from the United States District Court  
for the District of Delaware  
No. 1:15-cv-00152-RGA, Hon. Richard A. Andrews

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**BRIEF OF AMICI CURIAE ELECTRONIC FRONTIER FOUNDATION  
AND R STREET INSTITUTE IN SUPPORT OF PETITION FOR  
REHEARING EN BANC**

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## CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 29(a) and 47.4, counsel for Electronic Frontier Foundation certifies that:

1. The full name of the parties I represent are:

Electronic Frontier Foundation and the R Street Institute

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) I represent is: N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party I represent are: None.

4. The names of all law firms and the partners or associates that appeared for the party I represent or are expected to appear in this Court are:  
Alexandra H. Moss, Electronic Frontier Foundation, San Francisco, California.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal: None beyond those disclosed by the parties.

6. No disclosure regarding organizational victims in criminal cases or regarding bankruptcy cases is applicable under Fed. R. App. P. 26.1(b) or (c).

October 15, 2020

/s/ Alexandra H. Moss  
Alexandra H. Moss

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## **STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE<sup>1</sup>**

The R Street Institute is a nonprofit, nonpartisan public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

The Electronic Frontier Foundation is a nonprofit civil liberties organization that has worked for more than 30 years to protect innovation, free expression, and civil liberties in the digital world. EFF and its more than 30,000 active donors have a powerful interest in ensuring that intellectual property laws serve the public by promoting more creativity and innovation than they deter.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Rehearing en banc should be granted to articulate how to apportion damages when the patent owner seeks to prove a reasonable royalty based on prior licenses. To date, it is widely recognized that guidance is lacking on this question, and that gap in doctrine has consequences. Numerous technology industries deal in complex, multifunction products and services for which

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<sup>1</sup> No party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting this brief. No person other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

correct apportionment of damages is critical. And ambiguity in the law is ripe for abusive exploitation through the manufacture of inflated past license rates, a problem that this Court itself has observed. The sum total of this deficiency in legal guidance is the deterrence of innovation, and this Court should grant review to avoid it.

Rehearing en banc should also be granted to align conflicting precedents and provide clear guidance on how to determine if the rationale for a claim amendment has only a tangential relation to a particular equivalent. This question has been percolating for almost twenty years, but practitioners and academics cannot say with certainty what it means. That needs to change.

## **ARGUMENT**

### **I. REHEARING SHOULD BE GRANTED TO RESOLVE THE OUTSTANDING QUESTION OF APPORTIONMENT OF REASONABLE ROYALTIES BASED ON PAST LICENSES.**

#### **A. The Question Is Notoriously Unresolved.**

While “use of past licenses” for computing reasonable royalties “must account for differences in the technologies and economic circumstances of the contracting parties,” *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1211 (Fed. Cir. 2010), this Court has never articulated guidance for how to do so. En banc rehearing should be granted to do so.

Panels of this Court have split on whether apportionment of past license



rates is needed at all. *Compare Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1227–28 (Fed. Cir. 2014), with *Commonwealth Sci. & Indus. Research Org. v. Cisco Sys., Inc.*, 809 F.3d 1295, 1303 (Fed. Cir. 2015). Assuming that apportionment is required (as the Supreme Court has directed, *Garretson v. Clark*, 111 U.S. 120, 121 (1884)), there is virtually no guidance on how to compute apportionment of a reasonable royalty based on past licenses. Past cases have given expert testimony free rein to characterize past license rates, even greatly unrelated ones, without guideposts on how those rates should be used to compute a reasonable royalty. *See, e.g., Finjan*, 626 F.3d at 1212; *ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc.*, 694 F.3d 1312, 1333 (Fed. Cir. 2012). So long as a past license meets this Court's low bar for admissibility, *see, e.g., ActiveVideo*, 694 F.3d at 1333; *Elbit Sys. Land & C4I Ltd. v. Hughes Network Sys., LLC*, 927 F.3d 1292, 1300 (Fed. Cir. 2019); *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1326 (Fed. Cir. 2014), juries are left to invent a reasonable royalty rate based on potentially nonanalogous data.

Numerous commentators have observed this deficiency in guidance. Several agree that prior license royalty rates “are likely to require extensive adjustment before they can be considered fairly comparable” but that the *Georgia-Pacific Corp. v. U.S. Plywood Corp.* factors “do not prescribe any particular method for quantifying the appropriate royalty.” Roy J. Epstein &

Alan J. Marcus, *Economic Analysis of the Reasonable Royalty: Simplification and Extension of the Georgia-Pacific Factors*, 85 J. Pat. & Trademark Off. Soc’y 555, 572 (2003); see Christopher B. Seaman, *Reconsidering the Georgia-Pacific Standard for Reasonable Royalty Patent Damages*, 2010 BYU L. Rev. 1661, 1694 (2010). More directly, one remarks that this Court has “not identified any kind of concrete analysis that apportionment requires.” Bernard Chao, *Implementing Apportionment*, 2019 Patently-O Pat. L.J. 20, 21 (2019). En banc review should be granted to correct this deficiency.

**B. The Question Affects Numerous Important Industries.**

Clarifying how past licenses should be used to determine a reasonable royalty is of great importance to a wide variety of industries that deal with complex technologies aggregating numerous functions. The methodology of apportionment is especially critical for these complex multifunction technologies.

**Computers and software.** Computer devices are often complex, multifunction devices that could trigger the same apportionment problems present in this case. It is well-known that smartphones implicate numerous patents—over 300,000 by one estimate. See Joel Reidenberg et al., *Patents and Small Participants in the Smartphone Industry*, 18 Stan. Tech. L. Rev. 375, 382 tbl.2 (2015). Other computer devices are also highly multifunctional, such that

damages must “account only for the value of the [components] incorporating the patented technology.” *Cornell Univ. v. Hewlett-Packard Co.*, 609 F. Supp. 2d 279, 283 (N.D.N.Y. 2009) (Rader, J., sitting by designation); *see also Quanta Comput., Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 635 (2008). Computer software is also multifunctional, and failure to apportion damages can lead to “inconceivable” damages awards. *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1333 (2009).

**The automotive industry.** Modern cars are multifunctional machines incorporating computers, sensors, and other cutting-edge technologies. *See* Shefali Kapadia, *Moving Parts: How the Automotive Industry Is Transforming*, Supply Chain Dive (Feb. 20, 2018), <https://www.supplychaindive.com/news/moving-parts-how-the-automotive-industry-is-transforming/516459/>; Jonathan Bach & Mike Colias, *Is It a Car or a Computer?*, Wall St. J. (Sept. 19, 2016), <https://www.wsj.com/articles/is-it-a-car-or-a-computer-1474251122>. This complexity has led industry groups to worry about “patentees’ extraction of royalties based on innovations wholly unattributable to the patentable invention.” Brief of Association of Global Automakers et al. at 21, *Fed. Trade Comm’n v. Qualcomm Inc.*, No. 19-16122 (9th Cir. Nov. 29, 2019). Proper apportionment of reasonable royalties based on past licenses will thus be critical to the automotive industry.

**Pharmaceuticals.** Drugs and medical treatments are also frequently complex, multifunction products potentially subject to patents on only small components thereof. In *AstraZeneca AB v. Apotex Corp.*, this Court awarded damages on an entire pharmaceutical product, despite the patent at issue being directed not to the drug but rather a coating on it. *See* 782 F.3d 1324, 1339–40 (Fed. Cir. 2015). This leads to a paradox: Should the holders of two separate patents, one on the drug and another on the coating, both enjoy royalties based on the unapportioned whole, effectively a double recovery? Problems like these show the need for a unified, coherent approach to apportionment.

**C. Lack of Clarity on Past License Apportionment Encourages Exploitation and Deters Innovation.**

Without clear guidance on how to apportion past licenses in computing a reasonable royalty, patent owners will be free to engage in exploitative practices to inflate potential awards, which will overcompensate patent holders and deter innovation.

Commentators observe a “variety of strategies” for inflating licenses to convince a court of a high reasonable royalty, such as reciting a high rate but then offering discounts under the table, or incorporating unrelated value into a bundled higher-looking royalty. Erik Hovenkamp & Jonathan Masur, *How Patent Damages Skew Licensing Markets*, 36 Rev. Litig. 379, 406–09 (2017) (cataloging such strategies); *see* Layne S. Keele, *Res “Q”ing Patent*

*Infringement Damages After Resqnet: The Dangers of Litigation Licenses as Evidence of a Reasonable Royalty*, 20 Tex. Intell. Prop. L.J. 181, 228 (2012); John C. Jarosz & Michael J. Chapman, *The Hypothetical Negotiation and Reasonable Royalty Damages: The Tail Wagging the Dog*, 16 Stan. Tech. L. Rev. 769, 788 (2013). Practitioners recommend “structuring your settlement to reflect a high effective royalty rate that the patentee can use in pursuing other larger defendants,” a strategy that commentators note “has the potential to work significant mischief.” Keele, *supra*, at 228 (quoting Brian Pandya, *Why Pay More? Using Patent Settlements to Calculate Reasonable Royalty Rates*, Corp. Couns. (May 31, 2010), <https://www.law.com/corpcounsel/almID/1202458974224/>).

This Court and others are fully aware that patentees could “inflate the reasonable royalty analysis with conveniently selected licenses,” *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 872 (Fed. Cir. 2010) (per curiam), and that “patentees could artificially inflate the royalty rate by making outrageous offers,” *Whitserve, LLC nv. Comput. Packages, Inc.*, 694 F.3d 10, 30 (Fed. Cir. 2012) (quoting *Deere & Co. v. Int’l Harvester Co.*, 710 F.2d 1551, 1557 (Fed. Cir. 1983)). In *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Drilling USA, Inc.*, this Court’s lack of guidance on apportionment forced a panel to affirm a jury’s damages award despite credible evidence that the patentee had

artificially inflated its “model license” on which the jury award was based.

*Transocean Offshore Deepwater Drilling, Inc. v. Maersk Drilling USA, Inc.*, 699 F.3d 1340, 1358 (Fed. Cir. 2012).

By overcompensating patentees, exploitation of ambiguity in patent damages will damage innovation. “When patentees are compensated for more than their invention is worth,” scholars have recognized “a corresponding disincentive for potential infringers to engage in beneficial commercial activity” and a “deadweight economic loss to society.” Brian J. Love, *Patentee Overcompensation and the Entire Market Value Rule*, 60 *Stan. L. Rev.* 263, 279 (2007); *see also* Fed. Trade Comm’n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* 148 (2011), <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>.

To avoid costly manipulation of patent damages that deters technological progress, this Court should make clear how reasonable royalties are to be calculated from past damages. Rehearing en banc should be granted.

## **II. REHEARING IS NECESSARY TO RECONCILE CONFLICTING PRECEDENTS ON THE TANGENTIALITY REBUTTAL TO PROSECUTION HISTORY ESTOPPEL.**

### **A. This Court’s Tangentiality Precedents Conflict.**

The Supreme Court has held that a patentee may rebut the presumption of prosecution history estoppel if the reason for amending the claim has “no more than a tangential relation to the equivalent in question.” *Festo Corp. v. Shoketsu*

*Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 740 (2002). This is the most frequently litigated of the rebuttals identified *Festo*,<sup>2</sup> and through litigation, inconsistencies have developed into divergent precedents that district courts, practitioners, and scholars struggle to reconcile.

Scholars have discussed the inconsistencies affecting this Court's tangentiality case law. *See, e.g.*, Lim, *supra* n.2, at 241 (There is ““still no consistent definition for when a narrowing amendment is tangential.””) (citing Blaine Larson, Comment, *How Tangential Does It Have to Be?: Making Sense of Festo's Tangential Limitations Doctrine*, 48 Hous. L. Rev. 959, 961 (2011); Christopher M. Holman, *Ajinomoto v. ITC, the Doctrine of Equivalents, and Biomolecule Claim Limitations at the Federal Circuit*, 39 Biotechnology L. Report 3 (2020) at 24 (discussing inconsistent tangentiality decisions).

*Amici* agree these conflicts intensified as the Court “retreated from holding inventors to the objectively apparent reason for their amendments.” Pet. at 11. By failing to require a reason that is “discernible from the prosecution history record,” *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 344

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<sup>2</sup> Daryl Lim, *Judging Equivalents*, 36 Santa Clara High Tech. L. J. 223, 275 (2020), available at: <https://digitalcommons.law.scu.edu/chtlj/vol36/iss3/1> (Between 2008 and 2018, “[t]wo-thirds of the cases that discussed prosecution history estoppel did not consider any of the exceptions, . . . a quarter (27.3%) discussed tangentiality, . . . about a sixteenth (6.6%) discussed foreseeability, and no cases discussed ‘some other reason.’”).

F.3d 1359, 1369 (Fed. Cir. 2003) (en banc), this decision continues that retreat and compounds it. This retreat must be reversed “if the public notice function of a patent and its prosecution history is to have significance.” *Id.* (citation omitted).

**B. Preserving the Public-Notice Function of Patents Is Essential to Promoting Innovation.**

The patent system exists to promote progress, but can only do so effectively if patents “inform, with reasonable certainty, those skilled in the art about the scope of the invention.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014). But the requirement of clear notice is in tension with the flexibility patentees get through the doctrine of equivalents. The Supreme Court has warned that the doctrine, “when applied broadly, conflicts with the definitional and public-notice functions of the statutory claiming requirement.” *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 29 (1997). It is therefore essential to ensure that limits to the doctrine are clearly drawn and consistently enforced.

Patents of uncertain scope may appeal to their owners, but they do not spur innovation as effectively as those with clear boundaries. *See Festo*, 535 U.S. at 730–31 (“Clarity is essential to promote progress, because it enables efficient investment in innovation.”). When developers and competitors can discern a patent’s boundaries, they can try to develop non-infringing



alternatives, and thus innovate further without fear of liability. When they cannot, they are more likely to waste resources on infringement or litigation that could have been avoided. *See id.* at 732.

Prosecution history estoppel is a crucial limit on the doctrine of equivalents that protects the public's reliance on the patent document and its prosecution history record. When an applicant changes claim language to exclude subject matter prior to allowance, persons of ordinary skill reading the patent should be able to expect that change will have the corresponding effect on its scope. If not, they should at least be able to expect that any rationale capable of rebutting the presumption of prosecution history estoppel will be objectively discernible from the patent and its file history. They should not have to learn through litigation that patent claims do not mean what they say because of a post-hoc rationale constructed for that purpose. If they do, the resulting uncertainty will impede efficient investment in innovation and encourage wasteful litigation on all sides.

## CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be granted.

October 15, 2020

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## CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2020, I caused the foregoing to be served by electronic means via the Court's CM/ECF system on all counsel registered to receive electronic notices.

/s/ Alexandra H. Moss  
Alexandra H. Moss

## CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. The foregoing Corrected Brief of Intervenor-Appellee Electronic Frontier Foundation In Support of Petition for Rehearing En.Banc complies with the type-volume limitation of Fed. Cir. R. 35(g). The brief is printed in proportionally spaced 14-point type, and there are 2,342 words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), that is, the tables of contents and citations, and certificates of counsel, and by Fed. Cir. R. 32(b), that is, the certificate of interest, the statement of related cases, and the addendum in an initial brief of an appellant).
2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and with the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft® Word for Mac 2016 in 14-point Times New Roman font.

October 15, 2020

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