

No. 12-1802

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DR. MICHAEL JAFFÉ, as Insolvency Administrator
over the Estate of Qimonda AG, i.In.,

Appellant,

v.

SAMSUNG ELECTRONICS COMPANY, LTD.; INFINEON TECHNOLOGIES
AG; INTERNATIONAL BUSINESS MACHINES CORP.; HYNIX
SEMICONDUCTOR, INC.; INTEL CORPORATION; NANYA TECHNOLOGY
CORP.; MICRON TECHNOLOGY, INC.

Appellees.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

**BRIEF FOR THE SEMICONDUCTOR INDUSTRY ASSOCIATION,
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,
NATIONAL ASSOCIATION OF MANUFACTURERS, AND
BUSINESS SOFTWARE ALLIANCE
AS AMICI CURIAE IN SUPPORT OF APPELLEES**

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INTEREST OF AMICI CURIAE¹

The Semiconductor Industry Association (“SIA”) is the leading voice of the U.S. semiconductor industry. SIA represents U.S. companies involved in research, design, and manufacture of semiconductors. Semiconductors are a foundation of the information technology sector and essential to modern communications, entertainment, national defense, health care, transportation, and other aspects of our economy. SIA works to encourage policies and regulations that fuel innovation, propel business, and drive international competition in order to maintain a thriving semiconductor industry in the United States. Semiconductor manufacturing is one of the most important manufacturing sectors of our economy, and semiconductors are among the country’s top exports. SIA is a 501(c)(6) nonprofit industry organization.

The Chamber of Commerce of the United States of America (the “Chamber”) is the world’s largest business federation. The Chamber represents 300,000 members and indirectly represents the interests of more than three million

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), counsel for amici curiae represent that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici or their counsel, made a monetary contribution to the preparation or submission of this brief. Some members of amici associations are parties to this case. SIA received contributions for its share of the funding of this brief from its members, including both parties and non-parties. Pursuant to Federal Rule of Appellate Procedure 29(a), amici curiae state that all parties have consented to the filing of this brief.

companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files amicus briefs in cases that raise issues of vital concern to the Nation's business community.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future.

The BSA | The Software Alliance ("BSA") is an association of the world's leading software and hardware technology companies. On behalf of its members, BSA promotes policies that foster innovation, growth, and a competitive marketplace for commercial software and related technologies. BSA members develop hundreds of new products each year, contributing to a significant sector of the U.S. economy. And by virtue of their inventions, BSA members collectively hold more than 85,000 patents and frequently issue licenses to practice those patents.

In this case, SIA, the Chamber, NAM, and BSA's interests are perfectly aligned. Amici firmly believe that an opinion from this Court permitting appellant's rejection of Qimonda's cross-licenses with appellees could have a devastating impact not just on the American semiconductor industry, but on the American economy as a whole. Semiconductor firms depend on cross-licensing to protect their massive investments in research, development, and manufacturing. Without the certainty that cross-licenses provide, semiconductor producers will be less likely to invest in the development and production of new technologies in the United States. That reduced investment directly harms U.S. manufacturing and the associated decrease in innovation adversely impacts American consumers and the U.S. economy.

SUMMARY OF ARGUMENT

The semiconductor industry is characterized by the need for massive investments in research, development, and manufacturing and a web of interrelated semiconductor patents. To mitigate the concerns that these factors working in tandem create, the semiconductor industry has adopted the practice of engaging in broad cross-licenses. Firms regularly allow their competitors to practice their patents in exchange for the same privilege. This practice has yielded substantial

benefits to the semiconductor industry, American consumers, and the U.S. economy.

Allowing the unilateral rejection of cross-licenses as the result of a foreign insolvency proceeding threatens to erase these benefits. In the absence of the protection and certainty that cross-licensing provides, semiconductor firms will be reluctant to make the sizeable investments necessary to operate competitively. Semiconductor firms will be forced to pay twice for a license: once when they enter the cross-license and then again after a cross-licensor's patents have been incorporated and switching costs are high. This creates the very real possibility that post-rejection licensing negotiations will result in a royalty demand that reflects switching costs and not the ex ante value of the practiced patent. The end result is that consumers are harmed, U.S. manufacturing is threatened, and innovation suffers.

A foreign bankruptcy official's promise to license the patents at issue on "reasonable and nondiscriminatory" terms does not solve the problem. Being forced to pay twice is inherently unreasonable. Moreover, there is substantial uncertainty over what constitutes a "reasonable and nondiscriminatory" royalty rate in an industry where cross-licensing is ubiquitous. And the Government's suggestion that there may be a viable defense to infringement in a later proceeding

only prolongs the uncertainty. Because cross-licensing requires certainty to flourish, deferring the questions this case presents does not ameliorate the grave threat to efficient cross-licensing.

ARGUMENT

I. Cross-Licensing Is Of Vital Importance To The Semiconductor Industry And The U.S. Economy.

Semiconductors play a critical role in our daily lives. They are necessary components in televisions, cellular phones, computers, and in the braking, acceleration, and electronic control systems in all automobiles. Semiconductors enable the operation of life-saving medical devices and play an important part in equipment employed in the pursuit of our national security. They even play an essential part in enabling seamless travel across international borders: there are semiconductors in the microchips in newly issued U.S. passports. *See* 2 Tr. 199:2-5; 2 Tr. 201:17-19, 203:1-6.

The innovation enabled by semiconductors has not come cheap—massive investments in research, development, and manufacturing capability has been required at every step along the way. *See* Fed. Trade Comm'n, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* Ch. 3

at 31 (2003) (“2003 IP Report”); 2 Tr. 216:14-19; 3 Tr 259-260.² Semiconductor firms collectively dedicate billions of dollars to R&D in an attempt to attain improvements in semiconductor capacity and efficiency. Translating those inventive efforts into practical benefits for consumers requires the investment of billions more. The average semiconductor fabrication facility costs \$4 to \$5 billion dollars to construct. 3 Tr. 279. And every few years when the technology changes in the ongoing effort to make semiconductors faster and smaller, semiconductor firms have to retool existing plants or build new fabrication facilities from scratch.

These multi-billion dollar investments in R&D and manufacturing capability are unavoidable costs of doing business in the highly competitive and constantly evolving semiconductor industry. Despite the computing power they enable, the features on a semiconductor are incredibly small, and today commonly measured in nanometers, a unit that is 1/100,000 the width of a human hair. *See* National Research Council of the National Academies, *A Matter of Size: Triennial Review of the National Nanotechnology Initiative* (2006); *see also* 3 Tr. 279. Manufacturing these intricate devices requires great precision and accuracy; the smallest error can ruin a wafer containing hundreds of semiconductors. Furthermore, the viability

² Throughout this brief amici rely on the sources cited for the assertion referenced and take no position on the ultimate policy-related conclusions expressed in those sources.

and profitability of a semiconductor manufacturer is dictated by its ability to recapture the enormous upfront capital investments by repeatedly and reliably producing functioning semiconductors. A semiconductor company with a product that is head and shoulders above the rest will not survive, let alone thrive, if a non-trivial percentage of its products come off the line inoperable. *See* 3 Tr. 280.

As with many other highly-innovative industries, semiconductor firms frequently seek to safeguard their investments by obtaining patent protection. There can be hundreds of process steps involved in making a single integrated circuit, and that semiconductor product might integrate hundreds of different circuit patterns. There are more than 420,000 semiconductor patents held by more than 40,000 parties. 2003 IP Report Ch. 3 at 34. The resulting patent thicket creates serious difficulties for innovating firms. Any given semiconductor product may practice hundreds (and in some cases thousands) of patents. *See* 3 Tr. 267-68. As a result, “in the semiconductor industry, companies . . . find it all too easy to unintentionally infringe on a patent” when designing a product, “potentially exposing themselves to billions of dollars of liability and/or an injunction forcing them to cease production of key products.” Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, Innovation and Policy and the Economy 1, 121 (2001); *see id.* at 125 (“manufacturers can potentially

infringe on hundreds of patents with a single product”); 2003 IP Report Ch. 2 at 28 (“in industries such as semiconductors in which the ratio of patents to products is high,” a firm cannot make a new product “without infringing hundreds if not thousands of patents” (internal quotation marks omitted)).

The combination of the massive investments necessary to bring a semiconductor to market and the host of patents that may read on the resulting product presents semiconductor producers with a potential dilemma. One option would be to dedicate substantial resources ex ante to investigate what patents a firm’s semiconductor may rely on in order to attempt to design around those patents or negotiate a license before sunk costs have been amassed. A second option would be to proceed from design to manufacture without certainty about whether the new product infringes and running the risk of expensive litigation that could end in an enormous damages award and an injunction barring the sale of products utilizing the semiconductor. Neither option is attractive because both would engender significant costs.

Fortunately, the semiconductor industry has found a third way: cross-licensing. When two companies engage in cross-licensing, they both agree to allow the other company to practice their patents—typically for the life of the patent. There is also frequently a forward-looking component to these cross-licenses.

“[T]he companies generally agree to grant licenses to each other for patents that will be issued several years into the future.” Shapiro, *supra*, at 130; *see* 3 Tr. 282 (describing these arrangements).

Cross-licenses provide such obvious advantages to the other potential options for negotiating the patent thicket that they have become ubiquitous in the semiconductor industry. Firms avoid the high transaction costs of searching out potentially relevant patents, the “inefficient endeavor of a patent-by-patent licensing scheme,” and the need for design around. *Texas Instruments, Inc. v. Hyundai Elecs. Indus., Co. Ltd.*, 49 F. Supp. 2d 893, 901 (E.D. Tex. 1999); *see* Bronwyn H. Hall & Rosemarie Ham Ziedonis, *The Patent Paradox Revisited: An Empirical Study of Patenting in the U.S. Semiconductor Industry, 1979-1995*, 32 RAND J. of Econ. 101 (2001). Broad cross-licensing also allows semiconductor firms to minimize the risk and associated costs of a later infringement suit. What is more, cross-licensing encourages cooperation among companies in developing new technologies. When a cross-license is the default, participants in joint design efforts need not worry about protecting their contribution to the ultimate product; the cross-license provides all of the protection needed. *See* 3 Tr. 277.

The benefits of cross-licensing also accrue to the downstream consumers of semiconductor-driven products. The enhanced design freedom that cross-licensing

provides allows firms to dedicate their time and resources to developing improved and more innovative products rather than avoiding infringement. This shortens product design cycles, yields better products, and creates efficiencies that result in lower end-user prices. Moreover, cross-licenses allow competitors to produce similar products without fear of infringement. As a result, companies compete on quality and price, to consumers' benefit. Indeed, there are few markets with the same combination of intense capital investment and highly competitive markets, and cross-licensing is the key.

As central as cross-licensing is to the semiconductor industry, it is of tremendous importance to the broader economy. As already noted, semiconductors are component parts of many of the most vital products on the market today. *See* Dale W. Jorgenson, *Info. Tech. and the U.S. Econ.*, 91 *Am. Econ. Rev.* 1-32 (2001). But even beyond that, the semiconductor industry has been the leading edge of the wedge when it comes to cross-licensing, and the practice and its benefits have now spread to other industries. Patent cross-licensing is common “in many technology fields including computers, biotechnology, telecommunications, medicine, and voice processing.” R. Trevor Carter, *Legalizing Patent Infringement: Application of the Patent Exhaustion Doctrine to Foundry Agreements*, 28 *Ind. L. Rev.* 689, 694-95 (1995) (footnotes omitted); *see, e.g.*, 2003

IP Report Ch. 41 n.268 (noting prevalence of cross-licensing in information technology industries more broadly). Cross-licensing is also broadly employed in the creation of industry standards, which allow for product interoperability; “increase innovation, efficiency, and consumer choice; foster public health and safety; and serve as a ‘fundamental building block for international trade.’” U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 33 (2007); see 3 Tr. 262-63; 3 Tr. 301-03.

Even Congress has recognized cross-licensing’s far-reaching benefits. When adopting one of the statutory provisions at the heart of this case—11 U.S.C. § 365(n)—Congress noted the benefits that these sorts of arrangements create for not only the parties involved, but the country as a whole. See S. Rep. No. 100-505, at 3 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3200 (licensing works to “the mutual benefit of both the licensor and the licensee and to the country’s indirect benefit[.]”). Indeed, Congress recognized that such agreements “play[] a substantial role in the process of technological development” and are “fundamental” to the “creative process that has nurtured innovation in the United States.” *Id.*

II. Allowing Unilateral Rejection Of Cross-Licenses In Foreign Bankruptcy Cases Harms The Semiconductor Industry, U.S. Consumers, And The U.S. Economy.

Permitting the unilateral rejection of a patent cross-license when one of the parties to that license becomes insolvent will have a substantial adverse impact on the semiconductor industry and the broader economy. The basic problem with allowing unilateral rejection of patent cross-licenses is easily stated: the licensee must pay to practice the patent twice. After having already given its cross-licensee the valuable consideration of a license to practice its patents, the licensee must now pay again.

But the real vice of allowing unilateral ex-post rejection of a cross-license agreement is that the parties will not be able to recreate the ex ante negotiating environment. In other words, not only will the licensee be forced to pay twice, but the exaction in the second round will be both high and inefficient. Lest there be any doubt, the licensing fee demanded by the patentee post-rejection will almost certainly be far in excess of what the parties would have agreed to when the original cross-licensing agreement was reached. The reason is straightforward: at the time of design, an innovator may have a number of implementation options, but once a design is chosen, it may become much more difficult for the innovator to switch to an alternative that ex ante was a perfect substitute. This is so because the

design change becomes too costly, if not practicably commercially impossible. The patentee will be able to use the threat of an injunction to extract an extortionate royalty that reflects the licensee's switching costs (if switching is even possible)—here billions of dollars—rather than the actual market value of the patented invention at the time just before the design was implemented by the licensee.³ As both the Federal Trade Commission and Justice Kennedy have recognized, when sunk costs related to a patented invention have already been accrued and design decisions already made and acted upon, “the patentee can use the threat of an injunction to obtain royalties covering not only the market value of the patented invention, but also a portion of the costs that the infringer would incur if it were enjoined and had to switch.” Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* 5 (Mar. 2011); see *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring)

³ While the patentee may not be able to obtain an injunction in a U.S. court, see *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006), as it stands, the patentee would likely be able to obtain an exclusion order from the International Trade Commission, which has the same practical impact as an injunction. See Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the Int'l Trade Comm'n*, 50 Wm. & Mary L. Rev. 63, 99 (2008) (finding that an exclusion order issued in 100% of the patent cases where the ITC found a violation between 1995 and 2007); Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* 239 (Mar. 2011) (“Use of the ITC as a venue for patent challenges has tripled in the last ten years.”).

(“an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees”); Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Tex. L. Rev. 1991 (2007).

When this happens, consumers lose. If the patentee is able to obtain an extortionate licensing fee, then the licensee may be forced to increase its prices or reduce the quality of its products. At the very least, firms will increase their prices to account for the risk of infringement suits. The licensee will also have fewer dollars to dedicate toward R&D, reducing the positive externalities generated by such investments. If the patentee and the licensee cannot reach an agreement and the patentee is able to obtain an injunction, then consumer choice is diminished, competition is reduced, and innovation suffers.

Allowing the unilateral rejection of cross-licenses in this case calls the validity of all cross-licenses involving foreign entities into question. Cross-licensing depends on certainty. Semiconductor firms have made the massive investments discussed in reliance on the continued validity of their cross-licensing agreements. The semiconductor industry is global in nature, with foreign entities collectively representing about half of global semiconductor market share, and customers outside of the U.S. representing over 80% of the world semiconductor market. Semiconductor firms will justifiably be reluctant to sink billions of dollars

into R&D and construction when those investments can later be used as a bargaining chip by a foreign bankrupt entity seeking extortionate licensing terms. And when the certainty demanded by cross-licensing arrangements is diminished, all of the benefits from those arrangements—enhanced design freedom, more efficient use of firm resources, lowered transaction costs, better products, lower consumer prices, faster product design cycles, and increased innovation—are diminished as well.⁴

Allowing the unilateral rejection of cross-licenses would have a clear negative impact on manufacturing in the U.S. At a minimum, investment in new manufacturing facilities will be chilled because of the uncertainty created by allowing such rejection. That, however, may be only the tip of the iceberg. The Patent Act provides that “whoever without authority *makes* . . . any patented invention, within the United States . . . infringes the patent.” 35 U.S.C. § 271 (emphasis added). U.S.-based semiconductor companies ship their products outside the United States. In fact, semiconductors are among the top exports of the U.S. If the product is not ultimately meant for the U.S., semiconductor producers

⁴ That increased uncertainty adversely impacts investment and innovation is more than a mere hypothesis. Well-established economic methodology suggests that, all else being equal, when the uncertainty associated with an investment increases by 50%, that investment will not be pursued until the expected return on investment increases by 77%. 3 Tr. 286:14-24; see Avinash K. Dixit & Robert S. Pindyck, *Investment Under Uncertainty*, 135-74 (1994).

will have an incentive to move their manufacturing operations to another country in order to avoid infringement liability under U.S. law. *See* 3 Tr. 312; 4 Tr. 9. The loss of the billions of dollars in investment per semiconductor fabrication facility would directly and adversely impact U.S. manufacturing and American jobs.

The impact on the semiconductor industry in particular and the economy more broadly if the unilateral rejection of cross-licenses were permitted would be hard to overstate. “Innovation in the semiconductor industry would cease if patent owners could not cross-license their patents.” Herbert Hovenkamp et. al., *Anticompetitive Settlement of Intellectual Property Disputes*, 87 Minn. L. Rev. 1719, 1739 (2003). While allowing the unilateral rejection of cross-licenses is not the same as doing away with such licenses altogether, it is a real threat to the viability of cross-licensing. Allowing the unilateral rejection of cross-licenses in the bankruptcy context substantially undermines the cross-licensing process. Nor is there any reason to think that, if cancelation is allowed, the liquidation proceeding here will be an isolated event. The rule appellant seeks has the disturbing consequence of making many companies with substantial cross-licensing programs worth more dead than alive. There is a very real prospect that firms will attempt to locate their cross-licenses in a separate entity that is then taken into bankruptcy to allow it—or, more likely, some other opportunistic firm that acquires

the assets of a struggling intellectual property owner—to seek potentially extortionate royalties.

III. Neither A Promise To Negotiate A Reasonable Royalty Nor The Possibility Of A Defense To A Later Infringement Action Eliminates The Grave Threat To Efficient Cross-Licensing.

Both appellant and the United States as amicus go to great pains to explain away the severe practical impact of allowing the unilateral rejection of cross-licenses in this case. But neither the Administrator's professed willingness to negotiate a reasonable royalty nor the United States' suggestion of a possible defense to infringement addresses the very real threat to the cross-licensing process. Both alternatives inject uncertainty (not to mention unjustified costs) into a system that demands certainty.

Appellant's argument on this score boils down to the contention that no harm will be done to appellees in this case because appellant has agreed to relicense the right to practice the Qimonda patents to appellees on "reasonable and nondiscriminatory" terms. Appellant Br. 47-49. Aside from the fact that the Court's decision will set a precedent with no guarantee that future Administrators would also agree to relicense on reasonable and nondiscriminatory terms, appellant's argument misses the point. No matter the magnitude of the licensing fee offered by appellant, requiring appellees to pay any fee at all constitutes real

harm. Appellees already paid to practice the patents in question. This Court should not allow appellant to force appellees to pay twice.

In any event, appellant's promise to relicense on "reasonable and nondiscriminatory," or RAND, terms provides cold comfort at best. No one proposing a royalty labels it "unreasonable" and the invocation of the RAND concept does not mean that there is an already-available, widely-accepted royalty rate just waiting to be applied in this context. "It is widely acknowledged that, in fact, there are no generally agreed upon tests to determine whether a particular license does or does not satisfy a RAND commitment." Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Mkt. Power*, 73 *Antitrust L.J.* 1, 5 (2005); see Mark R. Patterson, *Inventions, Industry Standards, and Intellectual Property*, 17 *Berkeley Tech. L.J.* 1043, 1053 (2002) ("the definition of 'reasonable' is not so clear"); Fed. Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* 192-93 (2011) (noting complaints that RAND is "vague and ill-defined—particularly with regard to what royalty is 'reasonable'"). Indeed, whether licensing terms meet RAND requirements has become a frequent topic of dispute. See, e.g., *Microsoft Corp. v. Motorola, Inc.*, 854 F. Supp. 2d 993, 1002-03 (W.D. Wash. 2012); *Proxim Inc. v. 3Com Corp.*, No. 1:01 civ. 155 (D.

Del. Filed Mar. 8, 2001); *In re Certain Wireless Commc'n Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof*, Inv. No. 337-TA-745 (ITC 2012). Moreover, with respect to this case specifically, it is highly unlikely that whatever royalty appellant offers will resemble the RAND royalty that would have been negotiated ex ante. After all, as appellant admits, it is the duty “of a German insolvency administrator” to secure “the highest possible return” for Qimonda’s creditors. 1 Tr. 74:9-18.⁵

The reality is that the “reasonable and nondiscriminatory” course of action in the semiconductor industry is to allow access to reciprocal cross-licenses before significant sunk costs are accrued. Accordingly, creation of a RAND royalty at some later point in time—here, liquidation—is an inherently artificial exercise that will allow the liquidated firm to capture some percentage of a hold-up value that the parties never intended. What is more, the provision of RAND terms in this case would do nothing to mitigate future uncertainty regarding what terms someone other than appellant might offer in the wake of cross-license rejection.

For its part, the Government suggests that this Court should avoid answering the questions presented in this case because the nature of the effect of appellant’s rejection of the Qimonda cross-licenses is better dealt with in a future infringement

⁵ Amici take no position on the merits of the RAND concept as a general matter.

suit against appellees. *See* U.S. Br. 30-32. Kicking the can down the road would be a grave mistake. As already discussed, the uncertainty generated by allowing foreign bankruptcy authorities to unilaterally reject a bankrupt entity's cross-licenses will have far-reaching—and potentially disastrous—effects. As far as uncertainty goes, not answering the questions this case presents now has essentially the same impact as answering the questions in favor of appellant.

Moreover, the Government's suggestion that these issues can be deferred until subsequent litigation is grossly inefficient. In order to get back to a point where a court can issue a judgment on the impact of the Administrator's rejection of the cross-licenses, the Administrator—or his successors in interest—would have to file an infringement suit against the cross-licensees. And in a case like this one involving a large and diverse patent portfolio, multiple suits involving multiple defendants—and if the patents were auctioned off, multiple plaintiffs—could result. Each suit would set off a long and expensive process—a patent infringement case, from start to finish, can take several years and the average cost of taking such a case to trial exceeds \$6 million. *See* Am. Intellectual Prop. Law Ass'n, *Report of the Economic Survey* (2009). And after all of that, it is unlikely that a district court would give credence to a licensing defense to infringement if this Court adopts the Government's view of the case.

CONCLUSION

For all these reasons, this Court should affirm the judgment below.

Respectfully submitted,

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Pursuant to Federal Rules of Appellate Procedure 29(c)(7) and 32(a)(7)(C), the undersigned certifies that, as counted by Microsoft Word 2010, this brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) in that it contains 4,443 words.

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I hereby certify that on November 20, 2012, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I further certify that I will cause 8 paper copies of this brief to be filed with the Court within two business days.

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