No. 15-927

IN THE
Supreme Court of the United States

SCA HYGIENE PRODUCTS AKTIEBOLAG AND
SCA PERSONAL CARE, INC.,
Petitioners,

v.

FIRST QUALITY BABY PRODUCTS, LLC,
FIRST QUALITY HYGIENIC, INC.,
FIRST QUALITY PRODUCTS, INC., AND
FIRST QUALITY RETAIL SERVICES, LLC,
Respondents.

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

BRIEF OF DELL, ACUSHNET, APPLIED MATERIALS, ASUSTEK, CABLELABS, CANON, COMCAST, CTIA, FAIRCHILD SEMICONDUCTOR, GLOBAL AUTOMAKERS, GOOGLE, HP, INTEL, THE INTERNET ASSOCIATION, JCPENNEY, L BRANDS, MASTERCARD, MICRON, NEWEGG, QVC, RED HAT, SAMSUNG, SAP, SAS, SYMMETRY, T-MOBILE, VARIAN MEDICAL SYSTEMS, VISA, VIZIO, XEROX, AND XILINX AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

OTHER MATERIALS

INTEREST OF *AMICI CURIAE*[1]

Amici are technology companies, trade associations of Internet, wireless communications, automotive, and computer companies, financial services companies, and retailers that use and sell high-technology products. We represent more than $5.5 trillion of market capitalization and employ many of the world's most innovative computer scientists and engineers. Innovators in all fields are united in asserting that, when it enacted Section 282 of the 1952 Patent Act, Congress intended to and did preserve and codify the courts' longstanding practice of allowing laches as a defense in patent infringement cases, including against claims for money damages. In this brief, we present our views on the enormous practical importance of laches in protecting innovators from the prejudice that may arise from unreasonable delay in the assertion of patent claims.

A full list of *amici* joining this brief is set forth in the Addendum.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represent that all parties have consented to the filing of this brief. Petitioners have filed a letter with the Clerk granting blanket consent to the filing of *amicus* briefs; written consent of respondents is being submitted contemporaneously with this brief.

INTRODUCTION AND SUMMARY

Laches provides a crucial defense against abuses in modern patent litigation. *Amici*, who make, use, and sell high-technology products, rely on laches to protect themselves against assertions of patent infringement that have become far more difficult, expensive, and uncertain to defend as a result of unreasonable delay. *Amici* fully support the position of respondents ("First Quality") that laches is and should remain a defense to damages claims for infringement, and agree with First Quality that this result best respects the intent of Congress in the Patent Act and shows fidelity to the longstanding precedent of this Court. This brief complements that showing by illustrating the importance of a laches defense with case examples drawn from the experience and research of *amici*; by explaining the special need for protection from unreasonable delay in the patent context (as distinct from that of copyright); and by providing empirical data about the role of non-practicing entities ("NPEs") in bringing unreasonably delayed patent cases.

I. Laches is a remedy for prejudice caused by unreasonable delay. Such prejudice can usefully be analyzed in two categories: evidentiary prejudice, where the loss of evidence over time makes it harder to defend a case; and economic prejudice, where an accused infringer has made investments or other business decisions without realizing its potential exposure to charges of infringement. Evidentiary prejudice includes situations where the passage of time makes it difficult to determine the real inventor of a patented technology, to show the time at which a technology was already on sale or in public use, to establish the state of the art in proving that an

invention was obvious when made, to unearth old licensing agreements that provide a defense to infringement charges, or to establish (when contesting damages) how the accused infringer would have gone about its business if it had known to avoid the patented technology. All of these issues are problems that affect real cases when an infringement action is brought many years – in NPE cases, typically 15 or more years – after the relevant patent issued.

Economic prejudice comes primarily from investments that an accused infringer has made in developing a new product or service, unaware that the product incorporates a patented feature. Technology choices can be difficult to change once a product goes to market and after the accused infringer has invested in infrastructure, established supply lines, built inventories, trained employees, and developed customer acceptance of the product or service. Economic prejudice may also occur when a patented technology is incorporated into a common standard with which a range of different manufacturers must comply so that their products will work together.

Sunk investments and adoption of standards produce a phenomenon that scholars call "lock-in": a barrier of high costs that an operating company must pay at the time of litigation to stop using a patented technology, even though earlier it could have paid much lower costs to select an alternative to that technology. It is not hard to find recent cases where lock-in costs amount to hundreds of millions or even billions of dollars; and *amici* discuss some of those cases in this brief. Too often, the leverage created by a patent case against a commercially successful product is based not on value added by the patented technology itself but on the patent holder's ability

to threaten independent innovation and investment incorporated in the same product. Laches protects innovators by preventing patent holders from profiting from such threats after unfairly lying in wait.

II. Evidentiary and economic prejudice from unreasonable delay have special importance in patent as compared to copyright cases. It is thus understandable that (as First Quality has shown) Congress preserved a laches defense in the Patent Act, even though (as this Court held in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014)) Congress declined to do so in the Copyright Act.

Copyright holders and patent holders are differently situated with respect to lost evidence. In a copyright case, lost evidence can make it difficult to prove how and why an accused infringer originally began using a copyrighted work, weakening the copyright holder's case. Patent holders, by contrast, are less likely to be harmed and may even benefit from lost evidence. An accused infringer must often (either when challenging the validity of a patent, or when contesting a showing of damages) produce evidence about things that happened before the patent was issued, or evidence in the hands of third parties. Worse, if challenging the validity of the patent, the accused infringer must generally support that challenge with clear and convincing evidence. As a result, unreasonable delay diminishes an accused patent infringer's ability to defend itself in a way that has no parallel in copyright.

Copyright cases also generally have very different economic incentives and implications than do patent cases. Because copyright infringement requires copying, it is seldom innocent; but patent infringement does not require copying, and where such

infringement occurs, it is often innocent. Also, the rights to a new book, song, or movie are usually worth most when it is released. Their value diminishes afterwards. A copyright holder that permits infringement during this period has much to lose. For a significant number of patent holders – mostly NPEs – the value of a patent lies in its potential to function as a tool for extracting license fees and settlements from those already locked into using the patented technology. That value goes up over time as the technology becomes more widespread, creating a built-in incentive for unreasonable delay in patent litigation that does not exist in copyright.

III. NPEs, which make no products and provide no services of their own, have a special tendency to delay bringing suit for patent infringement. Without any reason to use their patents to protect market share from infringing competition, NPEs tend to wait to sue, allowing others to build up businesses and then claiming a share of the profits (or a payment to go away). NPEs typically base their strategies on acquiring patents from others rather than prosecuting patents on their own; they acquire older patents in order to leverage evidentiary and economic prejudice. In 2015, some 12% of patents asserted by NPEs in litigation had already expired at the time of suit.

Unreasonable delay in patent assertion not only causes prejudice, but also signals that claims are lower quality and less likely to succeed. But such claims can still have substantial settlement value (especially relative to the market prices of old patents) because litigation over old claims is difficult, expensive, and uncertain. Laches provides a needed remedy to this problem that continues to plague the most innovative parts of our economy.

ARGUMENT

Laches is and should be an available defense to all claims for patent infringement, including claims for money damages. As the *en banc* Federal Circuit reasoned, and as First Quality has set forth in its brief, the text, structure, history, and contemporaneous interpretations of the Patent Act all show that in 1952 Congress meant to incorporate existing defenses to patent infringement. Laches, as applied to claims for money damages as well as for injunctions or accountings, was one of the defenses that Congress codified. Resp. Br. 16-33; Pet. App. 18a-35a. Congress's record of leaving laches untouched when amending the Patent Act – most recently in the America Invents Act of 2011 – confirms its intent to preserve that doctrine. Resp. Br. 33-36. The tools of statutory construction thus show that *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), which addressed the very different text, structure, and history of the Copyright Act, does not require this Court to reject laches as a defense in patent cases. Resp. Br. 36-40; Pet. App. 23a, 35a-38a.

Amici will not repeat those points here. This brief focuses instead on the current, compelling need for laches to protect operating companies from unreasonably delayed claims for patent infringement. It draws from *amici*'s experience as innovators frequently sued for infringement based on aging and expired patents. It uses contemporary examples and recent empirical data to demonstrate the ongoing practical importance of laches. Those examples and data show that the concerns that led courts to develop and Congress to codify a laches defense to damages for patent infringement are even more pressing in today's marketplace and litigation climate. Unreasonable

delay in asserting patent claims, whether careless or strategic, can cause serious prejudice to companies that make, use, and sell technological products. The problem of unreasonable delay in patent cases has important aspects that are special to patent law and do not appear in other areas such as copyright law. That helps explain why Congress chose to codify and preserve the defense of laches in patent litigation.

I. OPERATING COMPANIES NEED LACHES AS A REMEDY FOR UNREASONABLE DELAY IN PATENT CASES

A. Unreasonable Delay Causes Evidentiary and Economic Prejudice

Courts applying the defense of laches in patent cases have recognized two general categories of prejudice. One is *evidentiary* prejudice: the documentary, testimonial, and physical evidence needed to defend against charges of infringement may be lost or become stale during a period of unreasonable delay. *See*, *e.g.*, *Wanlass v. General Elec. Co.*, 148 F.3d 1334, 1340 (Fed. Cir. 1998) (describing "deceased and unavailable witnesses, . . . the fading memories of available witnesses," and the destruction of older models of the accused product); *see generally Order of R.R. Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-49 (1944) (explaining that one purpose of both limitations periods and laches is to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared").

The prejudicial loss of evidence is particularly likely where (as is frequently the case) an alleged infringer is wholly unaware that it may be charged with infringement of a particular patent, and so has

no reason to preserve documents necessary for a defense. When suit is brought years later, it may be impossible to find business records, licensing agreements, and key witnesses who could otherwise have supported a defense on either liability or damages. Loss of evidence is even more likely for types of evidence, like prior art and witness testimony about a patented technology's development, that necessarily come from the time before the patent holder or its predecessor applied for a particular patent. Such delays may occur even within the already lengthy six-year period of 35 U.S.C. § 286, but especially after the much longer delays discussed in the illustrative cases below.

The other general category is *economic* prejudice: during a period of unreasonable delay, an accused infringer may invest in building up business based on a technology later alleged to be infringing. *See*, *e.g.*, *Rome Grader & Mach. Corp. v. J.D. Adams Mfg. Co.*, 135 F.2d 617, 619 (7th Cir. 1943) (affirming dismissal of suit based on laches where infringer had "made extensive improvements and built up a prosperous business" while patentee delayed in bringing suit; infringer and investors should not be penalized where infringer "could have centered manufacture" on non-infringing products and thereby averted expending "great sums" had patentee's actions been timely). The laches defense recognizes the unfairness of allowing a patent holder to wait in the weeds while an innovator commits resources, becomes locked into a particular product design, and achieves success that makes it an attractive litigation target. *See Dwight & Lloyd Sintering Co. v. Greenawalt*, 27 F.2d 823, 827 (2d Cir. 1928) (L. Hand, J.) (discussing the inequity of awarding relief after "the patentee has let

the infringer slowly build up a large business without protest"). As with evidentiary prejudice, economic prejudice is most likely to be acute where the accused infringer has no notice that it may be infringing; but it can also occur where (as here) a patent holder makes an initial charge of infringement and then fails to follow up for years. *See* Pet. App. 6a (First Quality "likely would have 'restructured its activities to minimize infringement liability if SCA had brought suit earlier'").

The laches defense is particularly important in situations where an accused infringer could have made an inexpensive decision to use an alternative to a patented technology at an earlier time, but having become locked in must take expensive measures to switch technologies. *See*, *e.g.*, William F. Lee & A. Douglas Melamed, *Breaking the Vicious Cycle of Patent Damages*, 101 Cornell L. Rev. 385, 409-10 (2016) ("*Vicious Cycle*") (explaining that "direct and indirect investments in the infringing technology," such as "incorporat[ing] the technology into its products, configur[ing] factories to produce it, train[ing] employees and customers in its use, and so on," can "often make it very difficult for the infringer to switch to a different technology *ex post*").[2] In "sectors

[2] *See also* Justin R. Orr, *Patent Aggregation: Models, Harms, and the Limited Role of Antitrust*, 28 Berkeley Tech. L.J. 525, 551-52 (2013) ("[T]rolls often wait to assert patents until practicing entities are 'locked in' to a technology. This strategy exploits the patent system's notice failure and high information costs, allowing the troll to extract higher payments than if the party asserted against was able to identify and either bargain ex ante or design around the patented process before investing in means of production."); Robert P. Merges, *The Trouble with Trolls: Innovation, Rent-Seeking, and Patent Law Reform*, 24 Berkeley Tech. L.J. 1583, 1590 (2009) ("*Trouble with Trolls*") (explaining lock-in as the result of the difference between "the

such as [information technology], which involve multi-component products," lock-in is most often due not to the value of the infringing technology itself but instead to the many independent, complementary innovations that are put at risk by a patent case. *See id.* (giving examples of "interoperating components" and features).

When assessing the reasonableness of delay and problems of evidentiary and economic prejudice, district courts properly look to the six-year period created by 35 U.S.C. § 286 as a guideline: after six years of delay, there is a presumption that the delay was unreasonable and that it caused prejudice. *See* Pet. App. 9a (citing *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020 (Fed. Cir. 1992)). That presumption gives effect both to Congress's intent to preserve a laches defense and to its judgment that the six-year period reflects a reasonable time to bring suit, and is consistent with the approach generally taken by courts of equity where limitations defenses and laches overlap or coexist.[3]

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ex ante time frame [that] corresponds to the period before a company makes sunk cost investments in any given technology" and "[t]he ex post time frame [that] is the time after these investments have been made").

[3] *See Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) (observing that statutes of limitation "have been drawn upon by equity . . . for the light they may shed in determining . . . whether the plaintiff has inexcusably slept on his rights"); *Levey v. Brownstone Asset Mgmt., LP*, 76 A.3d 764, 769 (Del. 2013) ("In determining whether an action is barred by laches, the Court of Chancery will normally, but not invariably, apply the period of limitations by analogy as a measure of the period of time in which it is reasonable to file suit.").

B. Real-Life Examples from Recent Cases Show the Effects of Evidentiary and Economic Prejudice

1. *Princeton Digital*

An example of how evidentiary and economic prejudice work together to put a patent defendant at a massive disadvantage is *Princeton Digital Image Corp. v. Dell Inc.*, No. 1:13-cv-00238-LPS (D. Del. filed Feb. 15, 2013), in which *amicus* Dell faced a lawsuit that had been delayed for more than 15 years.[4] The patent in that case covered a method for encoding JPEG images for display on a website, and it was owned by General Electric ("GE") from the time it issued in 1989 until it expired in 2007. *Princeton Digital* Br. 1. Two years after the patent expired, it was bought by a non-practicing entity ("NPE") named Princeton Digital Image Corp., which proceeded to file 59 patent infringement cases. *Id.* at 1, 6. Princeton Digital waited four more years after purchasing the expired patent before finally suing Dell for infringement in 2013. *Id.* at 1.

While GE owned the patent, Dell built a successful business in online sales of computers. In 1997, Dell was the first company ever to have $1 million in online sales in a single day. *Id.* at 6. In 2000, Dell sold more than $40 million online every day. *Id.* Its sales continued to grow rapidly between 2000 and 2007. For nearly two decades – the life of the patent – Dell displayed JPEG pictures of its products on its

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[4] The relevant facts of *Princeton Digital* are set forth in Dell's Brief in Support of its Motion for Summary Judgment on Laches, Dkt. No. 81 (redacted version filed Mar. 26, 2015) ("*Princeton Digital* Br."). The case was later resolved by stipulated dismissal. Accordingly, the district court did not decide the laches issue.

website. During those years, GE licensed the patent extensively to many companies, but never suggested that Dell was infringing the patent. Indeed, Dell was unaware of the patent throughout that entire time, so far as anyone was able to determine in the later litigation. *Id.* at 1-2.

The long delay between the beginning of Dell's open use of JPEG images on its website (in 1997) and Princeton Digital's lawsuit (in 2013) created serious evidentiary problems for Dell's defense. For example, Dell had reason to believe that one or more of the vendors with whom it contracted in building its online business in the late 1990s may have had a license from GE, which would have provided Dell with a defense against infringement, *id.* at 17-18; but the delay made it difficult even to determine who those vendors had been, and still more difficult to track them down and investigate their licensing arrangements as of more than 15 years earlier. Similarly, challenging the validity of the patent for novelty or obviousness would have required Dell to delve into the history of online image display during the 1980s; much of the content available on the Internet or its predecessors during those years no longer exists.

The economic prejudice to Dell caused by the unreasonable delay of the patent's successive holders was also dramatic. Had GE approached Dell in 1997 – or even in 2000 or 2003 – and contended that Dell was infringing GE's patent, Dell's options would have included selecting a different technology for encoding and displaying images on its website and obtaining a license (either directly from GE or through a GE-licensed vendor). Had Dell chosen to obtain a license, the price that GE or its vendor would charge and Dell would pay would have reflected the fact that

Dell was not yet locked into GE's technology and could have chosen a competing option. The scenario with which Dell was confronted in *Princeton Digital* – an NPE's claim that Dell had no right to use a technology that was by then generating billions of dollars of revenue, *id.* at 11 – would never have arisen.

2. *LendingTree*

An example involving online mortgage and lending companies, *LendingTree, LLC v. Zillow, Inc.*, 2014 WL 1309305 (W.D.N.C. Mar. 31, 2014), similarly illustrates how both evidentiary and economic prejudice operate against patent defendants. LendingTree held a patent (later invalidated) on a method for coordinating borrowers and lenders through electronic credit applications over the Internet. The accused infringer, NexTag, Inc., was both LendingTree's competitor and its business partner. LendingTree had "top-to-bottom corporate knowledge" of NexTag's allegedly infringing online system as early as 2003. *Id.* at *1-5. LendingTree delayed bringing suit until 2010 and never informed NexTag that it believed NexTag was infringing the patent. *Id.* at *1, *11, *21.

During the period from 2003 to 2010, a number of things happened that made it harder for NexTag to defend itself. One of the individuals named as a co-inventor on the patent died, *id.* at *21; most of the employees who had been involved with NexTag's allegedly infringing system left, *id.* at *22; LendingTree's CEO during the relevant period became unavailable as a witness due to failing health, *id.* at *23; and many competing companies that might have provided non-infringing alternatives went out of business, making it harder for NexTag to show that it could have done business without the allegedly

infringing system, *id.* Important witnesses testified at deposition or trial that they could not recall important facts and details because too much time had passed. *Id.* at *21-22. Those factors hindered NexTag's ability to assert defenses under the on-sale bar and related public-use provision of 35 U.S.C. § 102(a)(1). *Id.* at *21.

NexTag also made substantial investments in its accused product during the period from 2003 to 2010, spending "over a hundred million [dollars] to . . . attract 'traffic' to the accused website." *Id.* at *5. It also entered into business transactions with LendingTree that it would likely have avoided if it had known LendingTree would sue. *Id.* at *25. Perhaps most important of all, NexTag did not during the period of unreasonable delay make efforts to design around the patent by developing a non-infringing system, which the evidence showed would have been possible to do by eliminating certain steps of the patented method. *See id.* at *25-26 (noting as well that, "had NexTag faced an infringement suit earlier, it could have exited the mortgage lead generation market earlier or redirected its investments to other products").

3. *I/P Engine*

An example involving online search and advertising software is *I/P Engine, Inc. v. AOL Inc.*, 915 F. Supp. 2d 736 (E.D. Va. 2012). The patents in that case issued in 2001 and 2004. They involved a system for filtering and presenting search and advertising results.[5] They were originally held by Lycos, an early

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[5] *See I/P Engine, Inc. v. AOL Inc.*, 874 F. Supp. 2d 510, 514-15 (E.D. Va. 2012) (describing and construing the patents), *rev'd*, 576 F. App'x 982 (Fed. Cir. 2014) (per curiam) (holding them invalid as obvious), *cert. denied*, 136 S. Ct. 54 (2015).

online-search competitor. As early as 2003, Lycos was a customer of current *amicus* Google for the very services later accused to be infringing. *Id.* at 747. During their long business relationship, Lycos never suggested to Google that its activities infringed the patent. *Id.* at 747-48. Later, after Lycos went through a series of corporate ownership transfers, I/P Engine bought the patents and in 2011 asserted infringement claims against Google, AOL, and other major Internet companies.

The district court applied laches based on evidentiary prejudice because critical documents had been lost and witnesses had become unavailable. *Id.* at 747. It observed that "the only thing that changed" from the years when Lycos and Google carried on a business relationship and Lycos never mentioned infringement "was that the patents-in-suit were purchased by I/P Engine, a non-practicing entity, for the sole purpose of bringing this litigation," and concluded that "the dilatory nature of this suit is precisely why the doctrine of laches has been applied to patent law." *Id.* at 747-48.

4. *Medinol*

An example from the medical device industry is *Medinol Ltd. v. Cordis Corp.*, 15 F. Supp. 3d 389 (S.D.N.Y. 2014), *summary affirmance granted*, No. 15-1027 (Fed. Cir. Dec. 22, 2015), *cert. petition filed*, No. 15-998 (U.S. Feb. 2, 2016), which involved a group of patents on technologies related to articulated stents, used to treat coronary disease. Medinol held patents related to two different types of stents (articulated and flexible stents). In 2000, Medinol sued Cordis on the flexible-stent patents, but did not

assert the articulated-stent patents. *Id.* at 394-96.[6] Cordis began work on an alternative product that did not infringe the flexible-stent patents, *id.* at 394, but did not ultimately need it: in 2004, it prevailed by invalidating the flexible-stent patents. *Id.* at 395. In 2007, the parties settled other claims between them and entered into a distribution agreement. *Id.* at 396-98. In 2013, however, after their relationship soured, Medinol filed a suit asserting that Cordis's stents infringed the articulated-stent patents. By then, Cordis had left the coronary stent market entirely. *Id.* at 398-400.

After a bench trial, the district court ruled that laches barred Medinol's claims in their entirety. *Id.* at 392, 409. The court's analysis focused on economic prejudice: if Medinol had not delayed asserting its alleged rights under the articulated-stent patents for nearly a decade after learning the relevant facts in the flexible-stent litigation, Cordis could have done any of a number of things differently. *See id.* at 409 (finding that, through its unreasonable delay, Medinol "deprived [Cordis] of the opportunity to modify its business strategies"). Specific things that Cordis could have done included declining to enter into a business relationship with Medinol; developing a non-infringing alternative, as it had earlier done with respect to Medinol's other patents; "exit[ing] the stent market earlier"; and "redirect[ing] its investments to other products." *Id.* at 408. Even without any specific finding of evidentiary prejudice (though it is hard to imagine there was not some loss of

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[6] One articulated-stent patent issued in 1999, before Medinol's original action against Cordis was filed; others issued in 2000 and 2003, while the suit was pending, and one later in 2005. *See Medinol*, 15 F. Supp. 3d at 392.

evidence between 2004 and 2013), the court found that was enough to justify invoking laches.

5. *High Point*

An example involving wireless infrastructure is *High Point Sarl v. Sprint Nextel Corp.*, 67 F. Supp. 3d 1294 (D. Kan. 2014), *aff'd in part on other grounds*, 817 F.3d 1325 (Fed. Cir. 2016). Sprint had worked for two decades to build its digital nationwide wireless network. In the 1990s and 2000s, Sprint invested billions of dollars in building that network, using and buying equipment from a range of vendors, including Lucent Technologies Inc. *Id.* at 1299. The four patents-in-suit were issued to Lucent in 1993 and 1994, and Lucent continued to hold them until 2000. At that time, it transferred the patents to a new company as part of a corporate spin-off. *Id.* In 2008, after many years during which "[n]one [of the patentees] mentioned infringement," High Point, a "non-practicing patent-assertion entity," bought the 14- and 15-year-old patents for $2 million, and sued Sprint for infringing by using the equipment Sprint had been purchasing from Lucent and other vendors since 1996. *Id.* at 1299, 1306, 1318.[7]

The district court found that Sprint had established a laches defense based on both evidentiary and economic prejudice.[8] As for evidentiary prejudice,

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[7] Sprint had obtained a license from Lucent for the equipment that it had purchased from Lucent, but High Point argued (among other things) that the license did not protect Sprint when Sprint combined equipment from Lucent with equipment from other vendors. *See High Point*, 67 F. Supp. 3d at 1300-02.

[8] The court also found that High Point's predecessors in interest had engaged in "[m]isleading [c]onduct" sufficient to give rise to a finding of estoppel, 67 F. Supp. 3d at 1307-08, which provided an independent basis for its ruling for Sprint. Some of the prejudice findings quoted and cited in text were

the court found that Sprint's ability to "establish[] key facts" about the original invention of the patented technologies had been destroyed by the passage of time. *Id.* at 1316. It explained that Sprint "could not overcome its burden" on certain issues related to the inventorship of High Point's patents because "so much time ha[d] passed, documents and correspondence ha[d] been destroyed or otherwise disappeared, memories ha[d] faded, and many folks [we]re simply no longer able to answer important questions about the conception and reduction to practice [of] the patent." *Id.*; *see also id.* at 1318.

As for economic prejudice, the court found that, when High Point asserted infringement, the cost to Sprint of changing to a new technology would have been prohibitively high: Sprint was locked in. That occurred for two reasons: *first*, the large volume of Sprint's investments in the allegedly infringing technology, *see id.* at 1315 ("Sprint poured billions of dollars into purchasing, installing, and later upgrading its equipment in pursuit of its [wireless] infrastructure plan"); *second*, the tie between those investments and a plan to achieve "interchangeab[ility] [and] 'interoperab[ility]'" across Sprint's network and with other networks by adhering to "interoperability standards," *id.* at 1299, 1308-10. Had Sprint known earlier of the need to protect itself from infringement litigation, it could have replaced the infringing infrastructure at a relatively low cost, used a different technology, purchased equipment exclusively from licensed suppliers, or negotiated additional licensing agreements. *Id.* at 1314-18.

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made in the court's estoppel analysis and incorporated into its laches analysis as well. *Id.* at 1315-18.

Courts should be able to invoke the doctrine of laches to provide relief for unreasonable delay in cases like those described above. As First Quality has shown, that doctrine has long been the law and was codified in the 1952 Patent Act. As the court of appeals further recognized, where the delay has been especially unreasonable (or even, as in *Medinol*, deliberate) or has caused special prejudice, the equitable discretion of a district court should extend to denying all relief – not only damages before the date of filing, but also any injunction and any royalty. *See* Pet. App. 39a-41a (recognizing the "possibility that laches [can] foreclose injunctive relief); *id.* at 42a (explaining that ordinarily a patent holder "remains entitled to an ongoing royalty" despite laches but that this rule may not apply in "egregious circumstances"). As this Court put it in *Menendez v. Holt*, although in most cases "[m]ere delay or acquiescence cannot defeat the remedy by injunction in support of [a] legal right," there are some cases in which delay "has been continued so long, and under such circumstances, as to defeat the right itself." 128 U.S. 514, 523 (1888). District courts should retain the power to do equity in those extraordinary cases as well as in ordinary ones.

II. UNREASONABLE DELAY CAUSES GREATER PREJUDICE IN PATENT CASES THAN IT DOES IN COPYRIGHT CASES

Petitioners ("SCA") and their *amici* rely heavily on this Court's decision in *Petrella*, 134 S. Ct. 1962, contending that the Patent Act is just like the Copyright Act. First Quality has shown why those contentions are incorrect as a matter of text, structure, and history. Consistent with the focus of this brief on policy and practical issues, *amici* will explain why

unreasonable delay in patent cases and in copyright cases has different consequences and should be treated differently. Drawing such a distinction is consistent with *Petrella* itself, which noted that the Court had not had "occasion to review" the question presented here, *id.* at 1974 n.15; and is also consistent with the position of the United States, which supported the result in *Petrella* but acknowledged "potential differences presented by the Patent Act,"[9] and which has not supported SCA here or in the court of appeals below.

The differences between patent and copyright are important here because, in patent cases, unreasonable delay disproportionately harms accused patent infringers and helps patent holders. This Court's reasoning in *Petrella* that "[a]ny hindrance caused by the unavailability of evidence . . . is at least as likely to affect plaintiffs as it is to disadvantage defendants," *id.* at 1977, cannot be applied to patent cases because patent defendants have a greater need for older evidence, such as prior art. Similarly, *Petrella*'s observation that there is "nothing untoward about waiting to see" the effect of "an infringer's exploitation . . . [on] the copyrighted work," *id.* at 1976, makes sense as applied to copyright litigation, but far less so as applied to patent litigation, which is frequently driven by lock-in. Four important differences are set forth below.

First, accused infringers in patent cases frequently assert defenses that become more difficult to prove with the passage of time. The on-sale bar at issue in *Lending Tree*, 2014 WL 1309305, at *21, is one example, as are the inventorship defenses at issue in

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[9] Br. for the U.S. as *Amicus Curiae* Supporting Petitioner at 25 n.5, *Petrella*, No. 12-1315 (U.S. filed Nov. 22, 2013).

High Point, 67 F. Supp. 3d at 1316. More generally, defenses of invalidity for lack of novelty and obviousness are mainstays of modern patent litigation, and both require evidence at least as old as the patent itself – which, as the cases discussed above show, can be two decades old when suit is brought. In some cases, the accused product itself predates the asserted patent, rendering the patent invalid – but only if the relevant evidence is still available. The burden is on the accused infringer to prove invalidity, and the Patent Act generally requires it to do so by clear and convincing evidence, *see Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 95 (2011),[10] putting the patent holder in an excellent position to fend off challenges to its patent by pointing to gaps or uncertainty in the evidence.[11] Where evidence is in the hands of third parties (such as a third-party inventor) with no incentive at all to preserve it, the problem of evidentiary prejudice becomes even worse. Accused copyright infringers do not face similar problems.

Second, an accused patent infringer will also face increased difficulty in contesting damages over time, especially where it has become locked in to the

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[10] A preponderance-of-the-evidence standard applies in the administrative *inter partes* review proceeding created by Congress in the America Invents Act, 35 U.S.C. § 316(e), but such proceedings apply only to a limited set of potential invalidity claims, *id.* § 311(b).

[11] Some prior art can be identified by looking at published documents such as previous patents, but there are many other types of prior art. *See* 35 U.S.C. § 102(a) (including art that is "in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention"). Even for patents and other published documents, testimony by fact witnesses who developed or were familiar with invalidating art is frequently key at trial.

patented technology, even though damages are limited to the six-year period before filing the complaint under 35 U.S.C. § 286. Patent royalty damages are determined by considering a hypothetical negotiation between a willing licensor and willing licensee. The negotiation is (or should be) assumed to occur before the accused infringer first began using the patent; or, in some cases, before the patent was first incorporated into an industry standard.[12] If such a negotiation would have taken place long before the litigation, it becomes difficult for the accused infringer to show its alternatives to using the patented technology, before the costs of switching to an alternative increased.[13] After the accused infringer has become locked in, the patent holder often (improperly) argues for a high royalty by pointing to the high amount it would cost the accused infringer to switch to a new technology at the time of litigation, or to exit the relevant market. Thus, just as with liability, the accused infringer has a greater need to develop facts about things that happened long ago, such as the cost to adopt an alternative technology at the time of first

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[12] *See*, *e.g.*, *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1233 (Fed. Cir. 2014) ("Because [standard-essential patent] holders should only be compensated for the added benefit of their inventions, the jury must be told to differentiate the added benefit from any value the innovation gains because it has become standard essential.").

[13] *See Vicious Cycle*, 101 Cornell L. Rev. at 411-12 (arguing that courts assessing patent damages should, but do not always, exclude "factors like lock-in costs" when determining a reasonable royalty, and that failing to exclude lock-in costs overcompensates patent holders); *see also supra* note 2 (additional sources discussing lock-in costs).

alleged infringement. Copyright law has a different statutory scheme for damages.[14]

Third, a copyright holder has the burden of proving copying, *see Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); a patent holder, by contrast, can establish infringement by proving merely that the infringer was making, using, or selling the patented technology during the damages period. Independent invention is irrelevant to patent infringement. *See*, *e.g.*, *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 489-90 (1974) (contrasting trade secret law, which permits "independent creation [and] reverse engineering," to patent law, which does not). There are therefore few cases in which a copyright infringer was unaware of the copyright holder's rights and the possibility that it might face a future lawsuit based on those rights. Such scenarios are, however, common in patent cases.

Accused infringers without previous knowledge of a patent are especially common in patent cases involving new high-technology products. In the experience of *amici*, such cases frequently involve independent invention of allegedly patented features, rather than deliberate copying, because of the sheer number of technological patents currently in force and of the extraordinary intellectual fertility (and massive research investments) common to *amici*'s industries. Independent invention is not itself a defense to claims for patent infringement, but is a situation

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[14] *Compare* 17 U.S.C. § 504 (basic (non-enhanced) recovery for copyright infringement of actual damages plus profits of the infringer, or statutory damages as an alternative) *with* 35 U.S.C. § 284 (basic recovery for patent infringement of actual damages, but no less than a reasonable royalty; no provision for statutory damages or disgorgement of profits).

where the equities weigh relatively less in favor of the patent owner and more in favor of the innocent alleged infringer. Congress has recognized those equities explicitly in several provisions of the Patent Act, which provide for equitable limitations on a patent holder's right to recover where a patent is reissued or amended in a way that may affect the rights of those already practicing the patented technology.[15]

Fourth, the economic motivations for and effects of unreasonable delay are likewise different in copyright cases. The damages caused by copyright infringement are usually greatest towards the beginning of the infringement period – for example, most new movies, music, and books earn most of their revenues "in the first few years after publication, with a sharp decrease in receipts over time,"[16] so it is a real loss for their copyright holders to wait to sue and forgo royalties (or an injunction) during the initial period of infringement. For many patents, their litigation value is greatest near (or even after) their expiration dates, when the technologies to which they purportedly grant exclusive rights are firmly embedded in the business practices of operating companies, or in products and services that have achieved significant market share. As explained in Part III, it is not uncommon for NPEs to purchase

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[15] *See* 35 U.S.C. § 252 (allowing a court to impose "such terms as the court deems equitable for the protection of investments made or business commenced before the grant of [a] reissue[d]" patent); *id.* § 318 (similar provision for claims amended during *inter partes* review).

[16] Wendy J. Gordon, *Authors, Publishers, and Public Goods: Trading Gold for Dross*, 36 Loy. L.A. L. Rev. 159, 180 (2002).

patents that are near expiration and then use them to attack settled practices and developed markets.

An especially problematic type of lock-in occurs where companies must practice the patented technology to adhere to a widely adopted industry standard.[17] The *High Point* case illustrates that problem. The patents in that case, which issued in 1993 and 1994, applied to a wireless technology standard called code division multiple access ("CDMA"). 67 F. Supp. 3d at 1299. If during the 1990s, while building its network, Sprint had been alerted by High Point's predecessors to the possibility of infringement liability based on its use of CDMA technology, it could have used an existing alternative technology standard or negotiated a reasonably priced license in light of the alternatives it then had available. *Id.* at 1314. By 2008, when High Point accused Sprint of infringement, Sprint had made a multi-billion-dollar

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[17] The problem of lock-in triggered by industry standards is now well recognized. Many standard-setting organizations have adopted policies requiring participants who have patents that cover industry standards to license on a reasonable, non-discriminatory basis, often interpreted to mean at rates that could be obtained in open negotiations, not after lock-in. *See generally* Joseph S. Miller, *Standard Setting, Patents, and Access Lock-In: RAND Licensing and the Theory of the Firm*, 40 Ind. L. Rev. 351, 356-57 & n.20 (2007) (citing, *inter alia*, Carl Shapiro & Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy* 228, 241 (1999)). These requirements represent imperfect attempts to prevent patent holders from demanding supracompetitive royalties based on the hold-up value of the patent rather than on the value of the technology. Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents*, 28 Berkeley Tech. L.J. 1135, 1137-40 (2013) (describing antitrust litigation that has been brought in efforts to enforce no-hold-up and reasonableness requirements).

commitment to CDMA and could no longer switch at reasonable cost. *Id.* at 1315.

Similar considerations have less weight in the copyright context – not only because the copyright limitations period is three years shorter than the six-year period created by 35 U.S.C. § 286, but for other reasons as well. It is unlikely that a single work will plausibly infringe more than a handful of copyrights; it is more likely that a potential copyright infringer will know its risks in advance; and, as explained above, there is no liability for independently creating a work that resembles a copyrighted work, *see Eden Toys, Inc. v. Marshall Field & Co.*, 675 F.2d 498, 501 (2d Cir. 1982). Thus, although in *Petrella* the Court found that the plaintiff's suit "put at risk only a fraction of the income MGM has earned" and would "work no unjust hardship on innocent third parties," 134 S. Ct. at 1978, a stale patent claim is much more likely to inflict hardship on innocent third parties (including consumers of accused products and services) as well as on innocent defendants that no longer have the meaningful ability to choose between alternative technologies and stand to lose investment in research, development, and further innovation.

III. REMEDIES FOR DELAY ARE NEEDED IN PATENT LITIGATION BROUGHT BY NON-PRACTICING ENTITIES

Unreasonable delay is a special problem in patent litigation brought by a certain type of patent holder: the NPE. An NPE is usually defined as an organization that buys and asserts patents but does not make or use patented technologies.[18] *See generally eBay*

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[18] *See* White House, Council of Economic Advisors Issue Brief, *The Patent Litigation Landscape: Recent Research and*

Inc. v. MercExchange, L.L.C., 547 U.S. 388, 396 (2006) (Kennedy, J., concurring) (describing the development of an "industry . . . in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees").[19]

NPEs that assert patents as their business have different incentives in patent litigation than do operating companies. When an operating company that is itself making, using, or selling a patented technology uses a patent to protect its exclusive rights to that technology, it usually has incentives to act promptly: infringing competition is eating away at its market share and profits, and it wants competitors to stop using its patented technology right away. An operating company also often has "incentives to recoup . . . substantial [research and development] costs,"[20] which gives it another incentive to bring any infringement actions relatively quickly.

An NPE, by contrast, may prefer to scan the market and wait for potential litigation targets to

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Developments 3 (Mar. 2016) ("*Patent Litigation Landscape*"), *available at* https://www.whitehouse.gov/sites/default/files/page/files/201603_patent_litigation_issue_brief_cea.pdf.

[19] *See also* RPX Corp., *2015 Report: NPE Litigation, Patent Marketplace, and NPE Cost* 13 (83% of NPE patent enforcement campaigns filed in 2015 were filed by patent assertion entities ("PAEs"), whose campaigns were responsible for 96% of all defendants added to NPE campaigns), *available at* https://www.rpxcorp.com/wp-content/uploads/sites/2/2016/07/RPX-2015-Report-072616.FinalZ.pdf; *see also id.* at 82 (distinguishing PAEs, which "earn revenue predominantly through asserting patents," from other NPEs such as universities and inventors).

[20] *Patent Litigation Landscape* 4 (citing Brian J. Love, *An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls Without Harming Innovators?*, 161 U. Pa. L. Rev. 1309 (2013) ("*Patent Litigation Timing*")).

become more successful and more firmly locked in to the patented technology before it brings an infringement action. Doing so serves its primary interest in extracting settlements and damage awards. Strategic delay also allows NPEs to choose targets more carefully, such as by selecting firms "with large cash holdings"[21] or with "small legal teams."[22] Further, NPEs often acquire patents on the secondary markets, and acquired patents may already be at or near the end of their lifespan,[23] as was the patent in *Princeton Digital*. Expired or near-expired patents are less useful to operating companies because they cannot protect the company's market position. But they are quite useful to NPEs that seek to use them to impose a tax on innovative products that were created without knowledge of the patent.

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[21] Lauren Cohen, *et al.*, *The Growing Problem of Patent Trolling*, 352 Science 521, 521 (Apr. 2015) ("*Growing Problem*"); *see id.* ("Both within the patent space and across litigation more broadly, NPE patent litigation is unique in the extent to which it is driven by cash."); *see also Patent Litigation Landscape* 4 (discussing the above finding and another study finding that the "likelihood of being accused of patent infringement . . . increase[s] substantially after [a] firm complete[s] its initial public offering").

[22] *Growing Problem*, 352 Science at 521.

[23] *See Patent Litigation Timing*, 161 U. Pa. L. Rev. at 1332 ("As a whole, NPE-asserted patents are three times more likely to have changed hands between issue and enforcement than product company-asserted patents . . . . Patents do not reach acquisition firms until about 9.5 years after issue, and those firms wait 2.4 additional years on average before filing suit."); *see generally Trouble with Trolls*, 24 Berkeley Tech. L.J. at 1591 ("Typically, the troll waits until a technology is fully entrenched before scouting around for patents to acquire or asserting the patents it holds.").

The asymmetric litigation advantages created by unreasonable delay, as discussed in Part II, are also particularly helpful to NPEs. Because NPEs are interested in patents exclusively for their litigation value, they care greatly about factors that improve a patent holder's odds in court. NPEs are also disproportionately likely to bring suits on low-quality patents: studies estimate that 59% of NPE-asserted patents have at least one invalid claim, compared to 42% of all patents asserted in litigation.[24] Factors that make it harder for an accused infringer to invalidate a patent, such as the loss of evidence necessary to disprove novelty or prove obviousness, *see supra* pp. 20-21, are thus particularly valuable to NPEs.

Empirical research has confirmed that NPEs generally assert patents significantly older than those enforced by operating companies. A 2013 study found a "dramatic" difference between the age of patents asserted by the two types of litigants: "on average, product-producing companies finish enforcing their patents before NPEs even begin."[25] A more recent review, set forth below, reached similar results:

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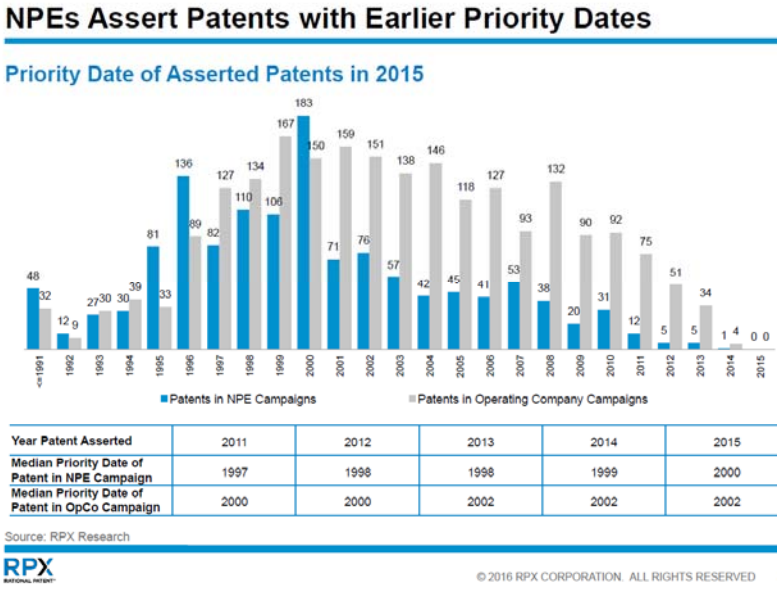
[24] *See Growing Problem*, 352 Science at 521-22 & nn.9-10; *see also* Michael Risch, *A Generation of Patent Litigation*, 52 San Diego L. Rev. 67, 107 (2015) (finding that, "as a percentage of those patents actually adjudicated, . . . NPE patents performed much more poorly than nonNPE patents" and had "some or all of their claims . . . invalidated slightly more than 50% of the time, compared to 25% for nonNPE"; but cautioning that the validity of many patents in the sample was never finally tested).

[25] *Patent Litigation Timing*, 161 U. Pa. L. Rev. at 1331-32; *see id.* ("On average, product-producing companies overwhelmingly begin litigating their patents early in the patent term, more than twelve years before expiration, and overwhelmingly finish with many years of patent life remaining, more than nine



Year Patent Asserted	2011	2012	2013	2014	2015
Median Priority Date of Patent in NPE Campaign	1997	1998	1998	1999	2000
Median Priority Date of Patent in OpCo Campaign	2000	2000	2002	2002	2002

Source: RPX Research

As shown, for lawsuits filed by NPEs in 2015, most (about 60%) of the asserted patents were at least 15 years old. The opposite was true for patents asserted in operating company lawsuits: most (about 60%) were less than 15 years old. The chart also shows that the scenario in *Princeton Digital* where an NPE bought a patent and sued on it after its expiration date is not unusual. In 2015, 12% of the patents asserted by NPEs expired that year, or already had expired. For operating companies, that share was 5%.

One recurring pattern – illustrated by *Princeton Digital*, *I/P Engine*, and *High Point* – involves an operating company that for business or other reasons

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years from expiration. NPEs, on the other hand, begin litigating their patents much later in the term, less than nine years from expiration on average, and overwhelmingly finish in the final few years of the patent term, with an average of 4.4 years (and a median of under three years) remaining.") (footnotes omitted).

chooses not to assert a patent during most of that patent's lifetime, but later sells the nearly expired patent to an NPE. Such transfers can occur because an operating company goes out of business, exits the market to which the transferred patents were relevant, or converts part of its intellectual property portfolio to cash. As the *I/P Engine* court noted when faced with this situation, such a sequence of events itself suggests that the patent holder's claims are weak on the merits. 915 F. Supp. 2d at 748. But without a laches defense, contesting a ten-year-old patent case on the merits becomes even more expensive and uncertain than it otherwise would be, making it easier for NPEs to extract payments that exceed the real value of their claims.

The clear distinction between the litigation practices of operating companies and NPEs also rebuts SCA's argument that retaining the laches doctrine will force companies to "fil[e] suit immediately," Pet. Br. 47, and therefore lead to an increase in litigation. Operating companies already tend to file early because they have businesses to protect and therefore place a higher value on early injunctive relief. NPEs, even when fully aware that laches may be a potential obstacle, tend to file late because their business models favor doing so and because they acquire patents late in those patents' lifecycle. A change in the law to remove laches as a defense to damages claims, as SCA suggests, would only increase NPEs' incentives for delay and remove an effective, long-used tool for dealing with abusive litigation practices.

Further evidence that laches in modern patent litigation is primarily focused on NPEs rather than on operating companies can be found by looking at the views of the various industries affected by this

case. As the Court is aware, in patent cases it is common for operating companies whose business models involve asserting their own patents (most often, pharmaceutical and biotech companies) to weigh in supporting expanded patent rights and narrowed defenses. Except for Medinol, which has a pending petition for certiorari on a related issue, *see supra* pp. 15-17, SCA has not received the support it could ordinarily expect from operating-company patent holders. Instead, in the court of appeals, First Quality was supported by a broad range of industries, including many of the present *amici* and others including leaders in the pharmaceutical and financial services industries.[26] We understand that many if not all of those *amici* will be filing again in this Court.

The overwhelming support for laches among businesses that make, use, and sell patented products and services – including those that use patents to defend their own exclusive rights – is an additional reason to reaffirm the century-old defense. Otherwise, innovators and their products would face even more abuse of the patent system than they do at present. *See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 739 (2002) ("[C]ourts must be cautious before adopting changes that disrupt the settled expectations of the inventing community.").

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[26] Relevant briefs supporting First Quality in the court of appeals include ECF Nos. 155 (technology companies including Garmin, LinkedIn, and present *amicus* SAP), 202 (Askeladden, a subsidiary of the Clearing House, an association of the world's largest banks), 204 (AT&T and present *amicus* T-Mobile), 205 (Cook Medical), 207 (Roche), 198 (several present *amici*), 199 (Johnson & Johnson, joined by its subsidiary Cordis, the defendant in the *Medinol* case), and 224 (Harley-Davidson and Rockwell Automation, among others). *See* JA15a-19a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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ADDENDUM

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ASUSTeK Computer Inc.
CableLabs
Canon Inc.
Comcast Corporation
CTIA – The Wireless Association
Dell Inc.
Fairchild Semiconductor International, Inc.
Google Inc.
HP Inc.
Intel Corporation
The Internet Association
J. C. Penney Corporation, Inc.
L Brands, Inc.
Mastercard Inc.
Micron Technology, Inc.
Newegg Inc.
QVC, Inc.
Red Hat, Inc.
Samsung Electronics Co., Ltd.
SAP America, Inc.
SAS Institute Inc.
Symmetry LLC
T-Mobile USA, Inc.
Varian Medical Systems, Inc.
Visa, Inc.

VIZIO, Inc.
Xerox Corporation
Xilinx, Inc.