

**United States Court of Appeals  
for the Federal Circuit**

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TIVO INC.,

*Plaintiff-Appellee,*

v.

ECHOSTAR CORPORATION, ECHOSTAR DBS CORPORATION,  
ECHOSTAR TECHNOLOGIES CORPORATION, ECHOSPHERE  
LIMITED LIABILITY COMPANY, ECHOSTAR SATELLITE LLC,  
and DISH NETWORK CORPORATION,

*Defendants-Appellants.*

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*Appeal from the United States District Court for the Eastern District of  
Texas in case no. 2:04-CV-01, Judge David Folsom.*

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**BRIEF OF *AMICUS CURIAE* INTELLECTUAL PROPERTY OWNERS  
ASSOCIATION ON *EN BANC* REHEARING  
IN SUPPORT OF NEITHER PARTY**

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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***Tivo Inc., v. Echostar Corporation, Echostar DBS Corporation, Echostar Technologies Corporation, Echosphere Limited Liability Company, Echostar Satellite LLC, Dish Network Corporation,***

**2009-1374**

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**CERTIFICATE OF INTEREST**

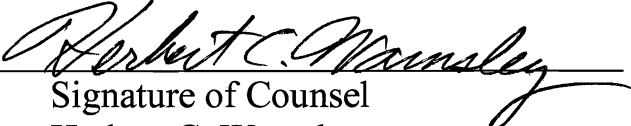
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1. The full names of every party or amicus represented by me is:  
**Intellectual Property Owners Association**
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: **NONE**
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of *amicus curiae* represented by me are: **NONE**
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## INTEREST OF THE *AMICUS CURIAE*

The Intellectual Property Owners Association (“IPO”) submits this brief as *amicus curiae* pursuant to Fed. R. App. P. 29 and Rule 29 of this Court to address the four questions set forth by this court in its May 14, 2010 Order in this matter. That Order provides that *amicus* briefs may be filed without leave of Court.

*Amicus curiae* IPO is a trade association representing companies and individuals in all industries and fields of technology who own or are interested in U.S. intellectual property rights. IPO's membership includes more than 200 companies and more than 11,000 individuals who are involved in the association either through their companies or as inventor, author, executive, law firm, or attorney members. Founded in 1972, IPO represents the interests of all owners of intellectual property as well as a broad range of interests in such ownership, including manufacturers, parties to licenses and similar agreements, and those generally interested in patents, trademarks, copyrights and trade secrets. The members of IPO's Board of Directors, who approved the filing of this brief, are listed in the Appendix<sup>1</sup>. IPO adheres to a policy of submitting *amicus curiae* briefs on significant issues affecting the value of intellectual property rights or the ability of intellectual property owners to obtain redress effectively and efficiently for

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<sup>1</sup> Tivo Inc. is a member of IPO; however, it did not participate in the discussions regarding or take part in the decision to file this brief and did not participate in its preparation.

infringement or threatened infringement of those rights. IPO does not support the position of either party in this case, and takes no view on the merits, but rather submits this Brief to set forth its answers to the four questions posed in this Court's May 14, 2010 Order granting rehearing *en banc*.

### **SUMMARY OF ARGUMENT**

The issues raised in this Court's *en banc* rehearing Order highlight the tension between two fundamental policies the United States patent system is designed to advance. On the one hand, injunctions against infringing activities are essential to secure for the patent owner the exclusive rights conferred by the patent grant. Accordingly, the Patent Act expressly empowers district judges "to grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, in such terms as the court deems reasonable." 35 U.S.C. § 283; *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

The ability of district courts to enforce their injunctions – and to impose sanctions on litigants who act in contempt of those injunctions – is particularly crucial in patent infringement cases. Contempt proceedings in patent cases almost always involve an alleged effort by an adjudged infringer to redesign the infringing product or process in order to continue its commercial activities in a noninfringing manner. It is only after the patent owner has litigated – typically for years and likely spending millions of dollars in the process – that the court has entered a

permanent injunction that the patent owner is now asking to be enforced. Before a patent case ever reaches the point where the grant of a permanent injunction can be sought, the patent owner has already established infringement and has overcome challenges to the patent's validity and (and far too often its enforceability). The patent owner also may have faced a separate validity challenge by way of reexamination, one or more appeals, and perhaps a stay of the injunction pending appeal. During all that time, the clock has continued to tick on the limited duration of exclusivity the patent owner has been granted. If the patent owner must restart protracted and costly infringement proceedings from the beginning each time the infringer claims to have developed a noninfringing redesign, the exclusivity period that is at the heart of the patent grant is further eroded.

An enjoined infringer is not merely a hypothetical or incipient competitor. It typically has established capabilities for manufacturing and distribution already in place. Its infringing activities have already reached a level of harm to the patent owner or threaten harm that justified the time, money and resources the patent owner invested in the infringement suit. And post-*Ebay*, entry of the injunction has already confirmed that the patent owner has suffered irreparable injury and that damages are inadequate to compensate for that injury. *See eBay*, 547 U.S. at 388. As a practical matter, if findings of contempt are made too difficult to obtain, or the sanctions too innocuous, an infringer can simply run out the clock on the patent

term by subjecting the patent owner to serial infringement cases on successive redesigns, with the only threat being a monetary damage award after the patent expires. Effective sanctions for contempt of injunctions are essential to deter such behavior and to require infringers to make substantial redesigns that clearly avoid infringement, lest they be subject to such sanctions.

On the other hand, an equally strong policy the patent system is designed to promote is the encouragement of designing around what a patent claims, which spurs competition and advances the state of the art. *See Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (“a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy”). Were findings of contempt too easy to obtain, or the sanctions too harsh, the courts might stifle good faith, legitimate and pro-competitive design-around activity.

Thus, courts must strike a careful balance between these conflicting policies. Contempt has long been recognized as an extraordinary remedy, not one to be applied when there has been an effort to redesign a noninfringing product or process that raises genuine questions of infringement: “[c]ontempt is a severe remedy, and should not be resorted to where there is a fair ground of doubt as to the wrongfulness of the defendant’s conduct.” *Abbott Labs. v. Torpharm, Inc.*, 503



F.3d 1372, 1383 (Fed. Cir. 2007) (quoting *Cal. Artificial Stone Paving Co. v. Molitor*, 113 U.S. 609, 618 (1885)).

IPO believes that this Court's jurisprudence over the past twenty-five years since *KSM Fastening Sys. v. H.A. Jones Co.*, 776 F.2d 1522 (Fed. Cir. 1985), has generally struck the proper balance. The analytical framework established in *KSM* – the two-step determination of (1) whether a contempt proceeding is appropriate; and (2) if so, whether the newly-designed product or process still infringes – has worked well and should not be abandoned. This case does provide a timely opportunity, however, to clear up some ambiguities arising from differing language that has crept into various panel opinions since *KSM*.

In particular, IPO believes that this Court should adopt a single, objective test for the first step of the *KSM* analysis. The focus of the inquiry should be on those new features of the newly-accused product or process that are relevant to the infringement analysis. Changes to a product or process – even significant changes – are not relevant to the contempt finding if they do not impact the infringement analysis. And subjective factors, such as the defendant's good faith belief that it designed around the patent, may be relevant to the sanctions imposed but they should have no place in the contempt determination. Patent infringement actions should have fewer, not more, subjective elements.

IPO believes that contempt should remain an extraordinary remedy and that its use should be restricted to those cases where it is clearly and convincingly appropriate. That is not to say, however, that a district court lacks other equitable tools to enforce its injunctions short of a contempt proceeding and finding, and without requiring a new trial. For example, the court may amend or clarify the injunction, or may issue a temporary restraining order or a preliminary injunction against the new product to preserve the *status quo* while new infringement issues are considered. IPO believes this Court should emphasize that these tools remain available and within the sound discretion of the district judge.

### **ARGUMENT**

In *KSM*, this Court established a two-part test for the proper exercise of discretion by a district court in dealing with a contempt motion. As the first step, the district court must compare the redesigned product or process with the product or process originally held to infringe and ascertain whether a contempt proceeding is appropriate. *KSM*, 776 F.2d at 1530-32. If the redesign is “more than colorably different” from the original such that it creates “substantial open issues with respect to infringement to be tried,” that ends the inquiry as to contempt. *Id.* at 1532; see also *Additive Controls & Measurement Sys. v. Flowdata, Inc.*, 154 F.3d 1345 (Fed Cir. 1998) (applying two-step *KSM* analysis).

If the two versions are sufficiently similar such that the redesign fails the first step – *e.g.*, the redesign is not more than colorably different from the original – then it becomes appropriate for the court to take the second step and determine whether the redesign still infringes the claims of the patent. *KSM*, 776 F.2d at 1532. Without infringement, there is no basis for a finding of contempt of an injunction: “[i]nfringement is the *sine qua non* of an injunction against infringements.” *Id.* at 1528.

Although IPO believes the two-step *KSM* procedure is the proper analytical framework for determining whether there has been contempt of an injunction, for the reasons explained below in IPO’s answer to the second question in this Court’s *en banc* rehearing Order, we believe that the “colorable differences” test is not the most instructive way to frame the first step. It may tend to divert the district court’s focus solely to a simple physical comparison of the old and new products or processes, and in doing so distract from an equally relevant inquiry – whether there are substantial new factual or legal issues raised on the question of infringement when one compares the infringed patent’s claims to the new product or process. *See Additive Controls*, 154 F.3d at 1345 (district court must compare redesign both with original infringing design and with patent claims). But regardless of the exact articulation of the first step of the *KSM* analysis, above all, IPO believes that this Court should adopt a single, objective test.

In *KSM*, the Court properly emphasized the importance of affording district courts broad discretion in dealing with contempt issues. *KSM*, 776 F.2d at 1528. There are sound reasons for doing so. The district court judge presiding over the contempt hearing is usually familiar with legal and technical issues that led to the initial finding of infringement, has evaluated the evidence and arguments firsthand, has observed any witnesses and assessed their credibility, and has the best vantage point to consider the multitude of issues that may be necessary to determine whether the defendant acted in contempt of the injunction. Injunctions may take many forms. Redesign efforts will vary in the level and nature of the modifications. The defendant may or may not seem credible when explaining its actions and the modifications it made to its infringing product or process. The rules for determining contempt must be sufficiently flexible to allow the district court to balance all of this, and any other relevant information.

On review, the district court decision should be entitled to considerable deference. Provided that the contempt issues were analyzed within this Court's legal framework, the district court's order should be upheld unless the court abused its discretion. *See Additive Controls*, 154 F.3d at 1349 (“Within those general constraints [of the *KSM* two-step analysis], the district court has broad discretion to determine how best to enforce its injunctive decrees.”) (citation omitted).

The Court's May 14<sup>th</sup> Order requests the parties to address four issues. As *amicus curiae*, IPO now sets forth its views on each of those four issues.

**I. Following A Finding Of Infringement By An Accused Device At Trial, Under What Circumstances Is It Proper For A District Court To Determine Infringement By A Newly Accused Device Through Contempt Proceedings Rather Than Through New Infringement Proceedings?**

In IPO's view, the two-step *KSM* process should be retained because it does – and should – afford the district court judge considerable discretion in deciding whether contempt proceedings are proper to determine infringement by the new product or process. The district court typically has the background and context needed to assess the changes made in the redesign and is in the best position to evaluate the parties' evidence and arguments first-hand. *MAC Corp. of Am. v. Williams Patent Crusher & Pulverizer Co.*, 767 F.2d 882, 886 (Fed. Cir. 1985). For those reasons, maintaining the abuse of discretion standard of review for the district court's decision on this first step is appropriate. *See Abbott Labs. v. Torpharm, Inc.*, 503 F.3d 1372, 1380 (Fed. Cir. 2007).

That is not to say, however, that well-established boundaries are not needed within which the district court may exercise its sound discretion. Lest the accused infringer be subject to contempt sanctions when there truly are new infringement issues to adjudicate, the patent owner should continue to bear the well-established burden of proving that contempt proceedings are proper by clear and convincing

evidence. *See Preemption Devices, Inc. v. Minnesota Mining & Mfg. Co.*, 803 F.2d 1170, 1172-73 (Fed. Cir. 1986).

As explained more fully in IPO's answer to the next question, the various tests for whether this burden has been met, such as "fair ground of doubt as to the wrongfulness of the defendant's conduct," "more than colorable differences" and "substantial open issues of infringement," all appear to be different ways of expressing the same underlying inquiry: what is the magnitude and impact of differences between the infringing design and the newly-accused design of the product or process, insofar as those differences are material to the infringement analysis? Simply to recite those tests without more does not provide enough guidance to district courts or litigants. *See, e.g., KSM*, 776 F.2d at 1530 ("stating that the 'difference' must be more than 'colorable' provides little guidance to the appropriateness of contempt proceedings").

Given that contempt proceedings are summary in nature, the analysis should also draw upon principles of summary judgment practice under FED. R. CIV. P. 56 and motions for judgment as a matter of law under FED. R. CIV. P. 50(a). Under this approach, it would normally be inappropriate in a contempt setting for the district court to make new factual determinations that it could not have made prior to trial under Rule 56 or after trial under Rule 50(a) – namely, whether there is a genuine issue of material fact still to be resolved. As the *KSM* court explained:

Under the above standard for determining a colorable difference [adopted by the court], a party may seek relief by way of contempt proceedings only if the issues are appropriate for summary disposition. If substantial issues need to be litigated, particularly if expert and other testimony subject to cross-examination would be helpful or necessary, the court may properly require a supplemental or new complaint. The question to be answered under such standard is essentially a *procedural* one. Must substantial new issues be litigated to determine infringement?

*KSM*, 776 F.2d at 1531 (emphasis in original).

Under this approach, genuine issues of material fact may become apparent and end the contempt proceedings as part of the threshold inquiry into whether a contempt proceeding is proper in the first place, or as part of the second step of the *KSM* inquiry to decide infringement. On balance, applying summary judgment standards provides a reasonable degree of protection for the patent owner and the infringer. The patent owner's request for a contempt finding cannot be defeated merely by raising *any* new infringement issue. There must exist a genuine issue of fact and it must be material to the question of infringement. Conversely, the standard allows the infringer to proceed with redesign work and does not chill legitimate efforts to do so. If a redesign does not raise at least a triable issue of fact as to whether the new product or process still infringes, the infringer is running a significant risk that it will be held in contempt and should be held accountable if it is proven wrong.

In contempt proceedings, one important legal issue that may arise is claim construction. The redesign may require a previously uncontested claim element to be construed for the first time, or it may require the district court to revisit a previous construction in view of new issues created as to that claim element by the new product or process. Just as with factual issues, even if the parties disagree as to whether claim construction must begin anew as part of a new infringement action, that does not necessarily preclude a finding of contempt. *E.g., Additive Controls*, 154 F.3d at 1350 ("the presence of a new issue ... even a new issue of claim construction, does not necessarily [preclude a finding of contempt] as long as the new issue does not raise a substantial question of infringement"). Only if the claim construction dispute creates enough doubt, or open issues, to require the district court, thereafter, to resolve disputed issues of material fact to decide whether there is infringement should a contempt proceeding be improper as a matter of law as a forum to resolve the issue.

This, of course, does not mean that a district court should never, in the exercise of its sound discretion, conclude that significant new issues of claim construction are relevant to whether a contempt proceeding is appropriate. Clearly significant legal issues – even ones that might be resolved in summary proceedings – may nevertheless be relevant to whether the court believes that a redesign is sufficiently different from its predecessor to require a new proceeding. It bears



repetition that the nature of discretion is such that many factors may inform the district court's ultimate decision, the need for new evidence, additional claim construction and expert testimony being among such factors. *Additive Controls*, 154 F.3d at 1349-50.

Although there are many indicia of whether contempt proceedings may be proper, none should be dispositive. For example, the need for additional discovery, or for fact or expert testimony, or for an evidentiary hearing with cross-examination of witnesses, may indicate that open issues preclude a contempt proceeding, but that is not necessarily the case. The evidence as to the disputed issues must be material to the infringement analysis and must give rise to issues that cannot be decided in summary proceedings. *See Additive Controls*, 154 F.3d at 1349-50 (affirming appropriateness of contempt proceeding despite the need to receive expert testimony).

**II. How Does “Fair Ground Of Doubt As To The Wrongfulness Of The Defendant’s Conduct” Compare With The “More Than Colorable Differences” Or “Substantial Open Issues Of Infringement” Tests In Evaluating The Newly Accused Device Against The Adjudged Infringing Device? See Cal. Artificial Stone Paving Co. v. Molotor, 113 U.S. 606, 6189 (1885); KSM Fastening Sys., Inc. v. H.A. Jones Co., 776 F.2d 1522, 1532 (Fed. Cir. 1985).**

From the outset, courts have used these tests almost interchangeably. *See, e.g., California Paving* 113 U.S. (1885) at 618 (new infringement suit “is by far the most appropriate one where it is really a doubtful question whether the new

process adopted is an infringement or not”); *KSM*, 776 F.2d at 1530, 1532 (referring to the test as “colorable differences,” as whether “there are substantial open issues with respect to infringement to be tried,” and as whether there is “fair ground for doubt” as to whether the injunction has been violated); *MAC Corp.*, 767 F.2d at 885-86 (“fair ground of doubt”).

In IPO’s view, the fundamental inquiry, at its core, should be the same under each of these three tests – the phrases “fair ground of doubt as to the wrongfulness of the defendant’s conduct,” “more than colorable differences” and “substantial open issues of infringement” all are just different ways of expressing whether the differences between the original and redesigned products or processes create a substantial and genuine issue of material fact, such that a summary disposition of the infringement issue is unwarranted.

IPO believes that the Federal Circuit, having taken this case *en banc*, should announce a single test for determining when a decision to proceed with a contempt proceeding, as opposed to a new trial or some other procedure, is an abuse of discretion. The focus of the inquiry should be limited to changes to the newly-accused product or process that are relevant to the infringement analysis. In particular, this Court should ask whether the alleged changes raise substantial new issues on the question of infringement when one compares the claims to the new product or process.

For this reason, the “no more than colorable differences” test is less instructive than the other two articulations. It risks an unduly narrow comparison of the new and old products or processes, at the expense of a careful consideration of whether the changes have meaningful impact upon the infringement analysis. *See Preemption Devices*, 803 F.2d at 1175 (district court may not just compare the magnitude of differences between the original and new devices without reference to patent claims); *KSM*, 776 F.2d at 1524, 1528-29 (same).

As for the other two articulations of the test, the *KSM* court recognized that “substantial open issues” give rise to “fair ground for doubt”:

If there are substantial open issues with respect to infringement to be tried, contempt proceedings are inappropriate. The presence of such disputed issues creates a fair ground for doubt that the decree has been violated.

*KSM*, 776 F.2d at 1532 (citation omitted).

We believe that this test – whether or not there are substantial open issues with respect to infringement that create a fair ground for doubt that the injunction has been violated – remains as well-said and relevant today as it was twenty-five years ago. We urge the Court to adopt it as a single test of whether a contempt proceeding is proper.

**III. Where A Contempt Proceeding Is Proper, (1) What Burden Of Proof Is On The Patentee To Show That The Newly Accused Device Infringes (See KSM, 776 F.2d at 1524) And (2) What Weight Should Be Given To The Infringer's Efforts To Design Around The Patent And Its Reasonable And Good Faith Belief Of Noninfringement By The New Device, For A Finding Of Contempt?**

**A. What Burden Of Proof Is On The Patentee To Show That The Newly Accused Device Infringes?**

It has long been the rule that, in a contempt proceeding, the patent owner bears the burden of proof, by clear and convincing evidence, on the issue of infringement by the newly-accused device. *See Preemption Devices*, 803 F.2d at 1172-73; *KSM*, 776 F.2d at 1524. Given the summary nature of the proceedings, and the harshness of the sanctions that may follow a finding of contempt, we see no reason to revisit this well-settled question. If the patent owner fails to prevail under this burden of proof, it can still proceed in a new infringement proceeding, where it need only prove infringement by a preponderance of the evidence.

We note, however, that a primary purpose of a contempt ruling is to preserve the district court's inherent powers to enforce its orders. *See, e.g.*, 18 U.S.C. § 401. There may be egregious situations in which a district court might act *sua sponte* to initiate a contempt inquiry or issue an order to show cause requiring the enjoined party to prove a relevant fact.

**B. What Weight Should Be Given To The Infringer's Efforts To Design Around The Patent And Its Reasonable And Good Faith Belief Of Noninfringement By The New Device, For A Finding Of Contempt?**

There is no intent element of contempt or “good faith” exception that precludes a finding of contempt. *See Additive Controls*, 154 F.3d at 1353 (“a party [as opposed to a non-party] need not intend to violate an injunction to be found in contempt”). In the final analysis, the measure of whether there has been a good-faith effort to redesign depends solely on the extent to which the enjoined party has removed its infringing product or process from the scope of the patent claims.

To avoid being held in contempt of an injunction, the enjoined party need only demonstrate a lack of clear and convincing evidence that it violated the injunction. Allowing the enjoined party to avoid contempt by arguing that it spent a lot of time and money on its redesign, however, may miss the point entirely if that redesign does not present open issues as to infringement or create a fair ground of doubt.

IPO does not believe that more subjective elements should be added to patent litigation. A finding of contempt should be measured as objectively as possible, so that litigants and district judges can discern where the boundaries of contempt reside and to preserve uniformity among districts in the administration of the patent system. The infringer's subjective belief (or an opinion of counsel) should not be directly relevant to whether the injunction has been clearly and

convincingly violated and thus that contempt sanctions may be warranted. Good faith and the enjoined party's subjective beliefs may, however, properly play a role in tailoring the remedy for the contempt.

Keep in mind that if the adjudged infringer has reasonable and honest concerns as to the effectiveness of its redesign, it can always go to the patent holder, and if necessary, back to the district court to seek clearance *before* it launches its redesign. If the infringer chooses to redesign in secret and to launch without such clearance, it accepts the risk that the district court may conclude that there are no substantial new issues as to infringement and thus a finding of contempt is warranted. The infringer cannot then avoid being held in contempt by stating it believed the redesign was noninfringing, it obtained an opinion of counsel, it spent a lot of time and money on the redesign, etc., if in the end the infringer violated the injunction so clearly that the district court concludes that the action is contempt.

#### **IV. Is It Proper For A District Court To Hold An Enjoined Party In Contempt Where There Is A Substantial Question As To Whether The Injunction Is Ambiguous In Scope?**

There is no question that an ambiguous injunction cannot be the basis for a contempt ruling. *See* FED. R. CIV. P. 65(d) (injunctions “shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained”). This court has interpreted that

language to require injunctions against patent infringement to specify the prohibited products and acts, both for purposes of notice and to avoid stifling redesign efforts:

This court has said that the rule upholding contempt judgments only for devices previously adjudged to infringe, or for colorable imitations of those infringing devices, is for the purpose of avoiding the effect of overly broad injunctions. This rule indeed permits a party subject to injunction to design around the claims of a patent with less risk of contempt proceedings.

*Additive Controls & Measurement Sys. Inc. v. Flowdata, Inc.*, 986 F.2d 476, 480 (Fed. Cir. 1993) (citations omitted). An enjoined party cannot be held in contempt of an injunction for actions not prohibited with such specificity. *See Abbott Labs.*, 503 F.3d at 1383 (refusing to find that filing second ANDA constituted contempt because injunction did not specifically prohibit such filing).

A more difficult question is: What constitutes a genuine and substantial question as to whether the scope of an injunction is ambiguous? We submit that the law should discourage this question being asked in contempt proceedings, and instead should encourage the enjoined party to seek clarification from the district court and/or appeal the granting of the injunction. While the clarification and/or appeal process proceeds, the enjoined infringer cannot, of course, simply refuse to comply with the injunction (unless a stay has been granted). To do so would clearly constitute contempt of the injunction.

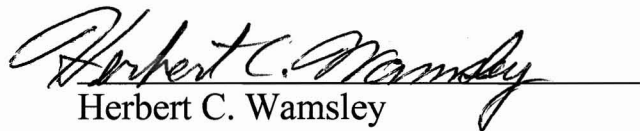
Similarly, an enjoined infringer who believes that there is ambiguity as to the scope of the injunction should not be allowed unilaterally to resolve that ambiguity in its own favor, launch a clearly infringing redesign, and then avoid a finding of contempt by claiming the injunction was ambiguous. An adjudged infringer who engages in self-help, rather than seeking to clarify its legal rights through the judicial process before launch of its new design, does so at its peril.

To be sure, there is nothing in this Court's rules or jurisprudence that requires every party subject to an injunction to seek clarification or appeal before putting its redesign on the market. But the fact that an adjudged infringer launched a clearly infringing redesign without informing or seeking clearance from the district court, without conferring with the patent owner to determine whether infringement is still in dispute, and without exercising its right to appeal the injunction, should put to rest any *ex post* argument that the injunction was ambiguous.

## **CONCLUSION**

IPO respectfully urges the Court to answer the four issues it has posed as discussed herein and to clarify the legal framework and discretion afforded the district courts in enforcing their injunctions by contempt hearings, rulings and sanctions as set forth in this brief.





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## **APPENDIX**

## APPENDIX<sup>1</sup>

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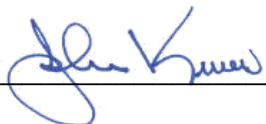
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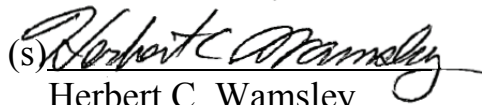
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