

No. 12-1802

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

DR. MICHAEL JAFFÉ,

Appellant,

v.

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

Appellees.

*On Appeal from the United States Bankruptcy Court for the Eastern
District of Virginia at Alexandria (Hon. T. S. Ellis, III, Judge)*

**BRIEF OF AMICUS CURIAE
INTELLECTUAL PROPERTY OWNERS
ASSOCIATION IN SUPPORT OF APPELLEES**

RICHARD F. PHILLIPS, *President*
KEVIN H. RHODES, *Chair*
Amicus Brief Committee
INTELLECTUAL PROPERTY
OWNERS ASSOCIATION
1501 M Street, NW
Suite 1150
Washington, DC 20005
(202) 507-4500

JEFFREY K. SHERWOOD,
GARY M. HOFFMAN,
MEGAN S. WOODWORTH
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006
(202) 420-4128
*Attorneys for Amicus Curiae Intellectual
Property Owners Association*

November 19, 2012

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i>	1
ARGUMENT	2
I. The Protection of Intellectual Property Licenses in Bankruptcy Proceedings Offered by Section 365(n) is a Fundamental Public Policy of the United States.....	2
A. The Strong Protection of Intellectual Property Licenses is Deeply Rooted in this Nation’s History and Tradition.	2
B. In Drafting Section 365(n), Congress Expressed Its Clear Intent that Intellectual Property Licenses for U.S. Intellectual Property Rights Be Preserved in Bankruptcy Proceedings.....	4
C. Appellants Ask for This Court to Act Against Clear Congressional Intent.....	7
II. Failure to Apply Section 365(n) in This Case Would Bring Uncertainty to U.S. Intellectual Property Rights, and This Unsettling of Expectations Would Negatively Impact U.S. Technological Innovation.	8
III. Application of German Law Regarding Intellectual Property Licenses in This Case in Order to Interfere With Property Rights Granted Under U.S. Law Would Violate a Fundamental Public Policy of the United States.....	11
CONCLUSION	12
CERTIFICATE OF COMPLIANCE.....	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Aronson v. Quick Point Pencil Co.</i> , 440 U.S. 257 (1979).....	4
<i>Bonito Boats, Inc. v. Thunder Craft Boats, Inc.</i> , 489 U.S. 141 (1989).....	3
<i>Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	8
<i>Dalton v. Specter</i> , 511 U.S. 462 (1994).....	8
<i>In re Logical Software, Inc.</i> , 66 B.R. 683 (Bankr. D. Mass. 1986)	5
<i>In re Qimonda AG</i> , 462 B.R. 165 (Bankr. E.D. Va. 2011).....	11
<i>In re Qimonda AG Bankr. Litig.</i> , 433 B.R. 547 (E.D. Va. 2010)	10
<i>Kewanee Oil Co. v. Bicron Corp.</i> , 416 U.S. 470 (1974).....	3, 4
<i>Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.</i> , 756 F.2d 1043 (4th Cir. 1985)	4, 5
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977).....	3
STATUTES	
35 U.S.C. § 1506	7, 8
35 U.S.C. § 1507(b)	7

OTHER AUTHORITIES

Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813)	3
Letter from Isaac Newton to Robert Hooke (February 5, 1675)	9
Peter S. Menell, <i>Bankruptcy Treatment of Intellectual Property Assets: An Economic Analysis</i> , 22 Berkeley Tech. L.J. 733 (2007).....	8, 9
S. Rep. No. 100-505 (1988)	5, 6, 7
U.S. Const. art. I § 8, cl. 8.....	3, 7

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Intellectual Property Owners Association (IPO) submits this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a) and Rule 29(a) of this Court.¹ 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 over 12,000 individuals who are involved in the association 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. IPO regularly represents the interests of its members before Congress and the United States Patent and Trademark Office and has filed *amicus curiae* briefs on significant issues of intellectual property law. The members of

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

IPO's Board of Directors, which approved the filing of this brief, are listed in the appendix.²

ARGUMENT

The Bankruptcy Court correctly found that German Insolvency Law regarding intellectual property licenses should not be applied to U.S. patent rights in this case because 11 U.S.C. § 365(n) represents a fundamental public policy excepted from Chapter 15's comity mandate by 11 U.S.C. § 1506. Application of German law in this case would defeat the policies and purposes of the statutory rights to continued access to intellectual property reflected in Section 365(n). As such, comity must give way to the public policy codified in Section 365(n).

I. THE PROTECTION OF INTELLECTUAL PROPERTY LICENSES IN BANKRUPTCY PROCEEDINGS OFFERED BY SECTION 365(N) IS A FUNDAMENTAL PUBLIC POLICY OF THE UNITED STATES.

A. The Strong Protection of Intellectual Property Licenses is Deeply Rooted in this Nation's History and Tradition.

Innovation, and with it, discovery, has been a key element of American culture throughout our history. From the very birth of this nation, our Founders considered the creation and maintenance of a stable and effective patent system of

² IPO procedures require approval of positions in briefs by a two-thirds majority of directors present and voting. International Business Machines Corp., Intel Corp., and Micron Technology, Inc. are members of IPO's Board of Directors; however, they did not participate in the discussions regarding or vote on the decision to file this brief and did not participate in its preparation.

fundamental importance. *See* Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813) (“Society may give an exclusive right to the profits arising from [inventions], as an encouragement to men to pursue ideas which may produce utility”). The protection of intellectual property rights is considered a fundamental public policy both under an originalist approach, because it reflects the clear intent of the framers of the Constitution, and under a historical approach, because it is “deeply rooted in this Nation’s history and tradition.” *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).

From its inception, the Constitution has called for U.S. legislation to govern intellectual property in order to “promote the Progress of Science and useful Arts.” U.S. Const. art. I § 8, cl. 8. The first Congress responded by passing the Patent Act of 1790, and Thomas Jefferson’s 1793 definition of an invention still persists today. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 147 (1989). Though the Patent Act has undergone many changes since its inception, U.S. patent protection has consistently been available to inventors, and has remained an important element of national progress.

The Supreme Court has recognized that the exclusive rights offered by our patent system serve to incentivize innovation, which often entails “enormous costs in terms of time, research, and development.” *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974). As a result, the Court noted, strong intellectual property

protection “will have a positive effect on society through the introduction of new products and processes of manufacture into the economy, and the emanations by way of increased employment and better lives for our citizens.” *Id.*

Licensing of intellectual property rights serves a similar function, in that it allows inventors to authorize others to use their inventions, thus expanding the reach of the benefits created by those inventions. Further, “permitting inventors to make enforceable agreements licensing the use of their inventions in return for royalties provides an additional incentive to invent[.]” *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979). For at least these reasons, intellectual property licensing is an essential part of promoting technological innovation, furthering a founding ideal of this Nation.

B. In Drafting Section 365(n), Congress Expressed its Clear Intent that Intellectual Property Licenses for U.S. Intellectual Property Rights Be Preserved in Bankruptcy Proceedings.

Congress enacted the Section 365(n) exception in direct response to this Court’s decision in *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043 (4th Cir. 1985). In *Lubrizol*, this Court held that a debtor’s intellectual property licenses could be rejected by the trustee under Section 365 because they were considered executory contracts. *Id.* at 1046. In so ruling, this Court recognized the “chilling effect” its decision would have on the valuable

licensing process, but chose to defer to Congress in light of the absence of an exception for intellectual property licenses under Section 365. *Id.* at 1048.

The aftermath of the *Lubrizol* decision made clear that this potential “chilling effect” was a realistic threat to our thriving intellectual property licensing system. Shortly after the decision, a bankruptcy court in Massachusetts relied heavily on the *Lubrizol* opinion to find that a software license which accounted for 100% of the licensee’s income was an executory contract under Section 365 which could be rejected by the trustee under the “business judgment” test. *In re Logical Software, Inc.*, 66 B.R. 683, 685-86 (Bankr. D. Mass. 1986). In response, Congress acted quickly to mitigate the harsh results that this decision imposed on our licensing regime, which it acknowledged “has evolved over many years to the mutual benefit of both the licensor and the licensee and to the country’s indirect benefits.” S. Rep. No. 100-505, at 3 (1988). The Senate recognized that the failure to protect intellectual property licenses in bankruptcy proceedings would pose a “threat to the development of American Technology” and “the creative process that has nurtured innovation in the United States.” *Id.* at 1-2. Thus, it sought for Section 365(n) to “immediately remove” this “burden on American technological development” that was “never intended by Congress.” *Id.*

Section 365 was never meant to be “a mechanism for stripping innocent licensee[s] of rights central to the operations of their ongoing business and

stripping the American licensing system of its dependability and flexibility.” *Id.* at 4. To highlight this, Congress explicitly stated that it considers licensing to be extremely valuable to technological development in that it allows an inventor to “retain sufficient ownership of his innovation so that he shares in the ultimate economic reward, while sharing that reward as remuneration to those who would provide the financing and refinement necessary to achieve economic success.” *Id.* If uncertainty surrounded the practice of licensing, as Congress believed the *Lubrizol* decision had done, this would result in “undercompensation of U.S. inventors.” *Id.*

Congress drafted the Section 365(n) exception to mirror the treatment real estate leases receive under Section 365(h)(1), which it noted was necessary, due to the particular nature of unique property. *Id.* at 4. In the case of both real estate leases and intellectual property rights, the underlying property is unique, and therefore “when the lessee or licensee is threatened with loss of use of the property, it is not possible to obtain precise cover from another source.” *Id.* The Section 365(n) exception, therefore, sought to realign the treatment of intellectual property with that of other unique property that had long been excepted by Section 365.

In enacting Section 365(n), Congress foresaw a “cumbersome” and “chilling” world of licenses fraught with uncertainty where parties would have to

resort to complete assignments rather than economical licenses, and wisely steered this country away from that future. *Id.* at 3. Allowing for U.S. patent rights to fall prey to the same fate under Chapter 15 of the Bankruptcy Code would go directly against Congressional intent and U.S. public policy.

C. Appellants Ask for This Court to Act Against Clear Congressional Intent.

Congressional intent is clear regarding the issue before this Court. By enacting Section 365(n), Congress expressly intended to remedy a threat to the health of our technology industries by preserving intellectual property licenses in the case of insolvency. Here, the patents at issue are rights granted by the law of the United States, though the debtor is foreign. Thus, the purpose of Section 365(n) still holds true.

Although the bankruptcy code generally requires that assistance to a foreign representative be “consistent with the principles of comity,” 11 U.S.C. § 1507(b), Congress has expressly instructed that comity must yield when an action would be “manifestly contrary to the public policy of the United States.” 11 U.S.C. § 1506. Congress has expressly spoken on the issue of how to treat intellectual property licenses in bankruptcy, and has in Section 365(n) enacted a clear policy in furtherance of its constitutional power to “promote the Progress of Science and useful Arts.” U.S. Const. art. I § 8, cl. 8.

Where Congress has spoken so clearly, comity cannot read Section 365(n) out of the Bankruptcy Code.³ To do so would be “manifestly contrary to the public policy of the United States.” *See* 11 U.S.C. § 1506.

II. FAILURE TO APPLY SECTION 365(N) IN THIS CASE WOULD BRING UNCERTAINTY TO U.S. INTELLECTUAL PROPERTY RIGHTS, AND THIS UNSETTLING OF EXPECTATIONS WOULD NEGATIVELY IMPACT U.S. TECHNOLOGICAL INNOVATION.

If licensees could easily be stripped of their rights when the licensor faces bankruptcy, every licensing contract will be fraught with uncertainty at the outset. This would prove detrimental because intellectual property licensing is crucial to technological development.

Much of the value of a patent lies in the ability to freely form licensing agreements based on that patent. Peter S. Menell, *Bankruptcy Treatment of Intellectual Property Assets: An Economic Analysis*, 22 Berkeley Tech. L.J. 733, 738-40 (2007). Licensing allows for inventors to monetize their ideas by opening the door for commercializing an invention, while also allowing others to build from licensed inventions and further develop the technology.

³ When Congressional intent is clear, “that intention is the law and must be given effect.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984); *see also Dalton v. Specter*, 511 U.S. 462, 477 (1994) (“[O]ur conclusion . . . follows from our interpretation of an Act of Congress, by which we and all federal courts are bound.”).

Licensing strengthens the goals of our intellectual property system by allowing for inventors to use the innovations of the past to new ends. As Issac Newton explained, technological development is only possible by “standing on the shoulders of giants.” *See* Letter from Isaac Newton to Robert Hooke (February 5, 1675). When a patent-holder licenses his invention to another, he not only reaps the benefits from his investment of time, money, and effort, but he also enables others to further the technological field through modifications and improvements.

Intellectual property licensing agreements require certainty to function properly. Due to the vast resources often necessary to invest in technological development, by the time a licensor has gone into debt, the “licensee may have made substantial specific investments in reliance on the continued licensing of intellectual property rights.” Menell, *supra*, at 768. By that time, licensees who are forced to renegotiate licenses long after they have been implemented have no bargaining power, forcing them to either accept unreasonable “hold-up payment” terms to a new licensing agreement, or cease using the licensed innovation. Not only could this result in substantial losses to the licensee, but it also poses a challenge for both potential licensors and licensees at the outset of negotiations, because licensees will be wary of licensors with any indication of financial instability, and the increased uncertainty will drive up the cost of contracting. Further, U.S. companies will shy from cross-border licensing, for fear of the

possibility of unilateral rejection by a foreign representative many years later. Failure to apply Section 365(n) to licenses of U.S. patent rights would therefore severely weaken the thriving licensing market that has become ever more crucial to inventors seeking to bring their inventions to the public.

The irrevocable licensing agreements at issue in this case are cross-license agreements which cover tens of thousands of patents. *See In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 552 (E.D. Va. 2010). Appellant argues that, because the debtor is no longer in operation, and therefore unable to actively use Appellees' intellectual property, Appellees have received a "windfall," one which the foreign representative merely seeks to remedy by unilaterally rejecting these agreements and requiring the renegotiation of royalty payments. *See Appellant's Opening Br.*, at 56-59. Such royalty renegotiations, however, were not contemplated by the parties at the outset of their transactions, and since then, all parties have invested resources in developing products in reliance on the continual availability of these cross-licenses. If Appellees are now forced – against the original intent of the

contracting parties – to renegotiate royalty payments long after the cross-licenses were entered, the practice of cross-licensing will be marred with uncertainty.⁴

III. APPLICATION OF GERMAN LAW REGARDING INTELLECTUAL PROPERTY LICENSES IN THIS CASE WOULD VIOLATE A FUNDAMENTAL PUBLIC POLICY OF THE UNITED STATES.

The underlying U.S. patents in this case were granted under United States law, and their enforcement is governed by United States law. There is a fundamental public policy that these rights, which were created by U.S. law and are grounded in U.S. history and tradition, be governed by U.S. law. The very property at stake in the underlying cross-licenses exists only by the power of U.S. law – the rejection of these contracts under foreign law, when U.S. law has specifically sought to protect them, would violate this public policy.

If German law were to be applied in this case in regards to the debtor's U.S. intellectual property licenses, U.S. intellectual property law would no longer be uniform. Rather, licensing of U.S. patents domestically would safely fall under the

⁴ Qimonda's foreign representative in this case has considered the sale of Qimonda's patent portfolio in its entirety to a non-practicing entity ("NPE"). *In re Qimonda AG*, 462 B.R. 165, 174 (Bankr. E.D. Va. 2011). Such a sale would render Appellees' formerly-licensed products vulnerable to patent infringement lawsuits. Even if the foreign representative were to instead offer Appellees reasonable and non-discriminatory ("RAND") royalty terms, the bankruptcy court recognized that the calculation of such terms is uncertain and that they do not lessen the lack of bargaining power Qimonda's licensees would face. *Id.* at 181-82.

Section 365(n) exception, while licensing of U.S. patents across international borders would face an uncertainty that Congress has expressly attempted to eradicate. This jarring difference would promote disunity in the application of U.S. intellectual property law. Such a result would violate public policy of the United States.

As the bankruptcy court noted, application of German law in place of the Section 365(n) exception in this case would “frustrate a U.S. court’s ability to administer the Chapter 15 proceeding . . . particularly if a party continues to enjoy the benefits of the Chapter 15 proceeding.” Refusing to apply the Section 365(n) exception in this case would allow for a foreign representative to “cherry-pick” applicable law in a Chapter 15 proceeding. The bankruptcy court’s original order applied Section 365, and the foreign representative only sought to amend the order to avoid application of Section 365(n) when he discovered that it would be too burdensome. Allowing for a foreign representative to wield Chapter 15’s comity mandate in a manner that frustrates a U.S. court’s ability to administer a Chapter 15 proceeding would over-extend foreign law and violate U.S. fundamental public policy.

CONCLUSION

Section 365(n) represents a fundamental public policy of the United States. The Court should apply Section 365(n) in this case under the public policy

exception of Section 1506, and refuse to apply German Insolvency Law in regards to the debtor's U.S. patent licenses. For the foregoing reasons, IPO respectfully submits that the decision of the lower court should be upheld and judgment entered for Appellees.

Dated: November 19, 2012

Respectfully submitted,

By /s/ Jeffrey K. Sherwood

Jeffrey K. Sherwood
Gary M. Hoffman
Megan S. Woodworth
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006-5403
Attorneys for Amicus Curiae

APPENDIX**Members of the Board of Directors
Intellectual Property Owners Association**

Russell W. Binns, Jr.
Avaya, Inc.

Henry Hadad
Bristol-Myers Squibb Co.

Tina M. Chappell
Intel Corp.

Jack E. Haken
Koninklijke Philips Electronics N.V.

Mark Costello
Xerox Corp.

Dennis R. Hoerner, Jr.
Monsanto Co.

William J. Coughlin
Ford Global Technologies LLC

Carl B. Horton
General Electric Co.

Robert DeBerardine
Sanofi-Aventis

Michael Jaro
Medtronic, Inc.

Anthony DiBartolomeo
SAP AG

Philip S. Johnson
Johnson & Johnson

Bart Eppenauer
Microsoft Corp.

George W. Johnston
Hoffman-La Roche Inc.

Louis Foreman
Enventys

Lisa K. Jorgenson
STMicroelectronics, Inc.

Scott M. Frank
AT&T

Charles M. Kinzig
GlaxoSmithKline

Darryl P. Frickey
Dow Chemical Co.

David J. Koris
Shell International B.V.

Bernard J. Graves, Jr.
Eastman Chemical Co.

Mark W. Lauroesch
Corning Inc.

Krish Gupta
EMC Corporation

Allen Lo
Google Inc.

Scott McDonald
Mars Inc.

Dennis C. Skarvan
Caterpillar Inc.

Jonathan P. Meyer
Motorola Solutions, Inc.

Russ Slifer
Micron Technology, Inc.

Steven W. Miller
Procter & Gamble Co.

Daniel J. Staudt
Siemens Corp.

Douglas K. Norman
Eli Lilly and Co.

Brian K. Stierwalt
ConocoPhillips

Elizabeth A. O'Brien
Covidien

Thierry Sueur
Air Liquide

Sean O'Brien
United Technologies Corp.

James J. Trussell
BP America, Inc.

Richard F. Phillips
Exxon Mobil Corp.

Cheryl J. Tubach
J.M. Huber Corp.

Dana Rao
Adobe Systems Inc.

Roy Waldron
Pfizer, Inc.

Kevin H. Rhodes
3M Innovative Properties Co.

Michael Walker
DuPont

Mark L. Rodgers
Air Products & Chemicals, Inc.

BJ Watrous
Apple Inc.

Curtis Rose
Hewlett-Packard Co.

Stuart L. Watt
Amgen, Inc.

Matthew Sarboraria
Oracle USA Inc.

Paul D. Yasger
Abbott Laboratories

Manny Schechter
IBM Corp.

Steven J. Shapiro
Pitney Bowes Inc.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-1802Caption: Dr. Michael Jaffe v. Samsung Electronics Co., Ltd., et. a**CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)**

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

- this brief contains 2,772 [state number of] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or
- this brief uses a monospaced typeface and contains _____ [state number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

- this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 [identify word processing program] in Times New Roman 14 [identify font size and type style]; or
- this brief has been prepared in a monospaced typeface using _____ [identify word processing program] in _____ [identify font size and type style].

(s) Jeffrey K. Sherwood

Attorney for Intellectual Property Owners Assoc

Dated: 11/15/2012

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

Dr. Michael Jaffé v Samsung Electronics Co., Ltd, et al., No. 12-1802

CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by INTELLECTUAL PROPERTY OWNERS ASSOCIATION, Amicus Curiae, to print this document. I am an employee of Counsel Press.

On **November 19, 2012**, Counsel for Appellants has authorized me to electronically file the foregoing **Brief for Amicus Curiae** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Jeffrey A. Lamken
Robert K. Kry
MOLOLAMKEN, LLP
The Watergate
600 New Hampshire Avenue, NW
Washington, DC 20037
202-556-2010
jlamken@mololamken.com
rkry@mololamken.com
Counsel for Appellant

John Paul DelMonaco
William H. Pratt
Jennifer M. Selendy
KIRKLAND & ELLIS, LLP
601 Lexington Avenue
New York, NY 10022
212-446-4800
jdelmonaco@kirkland.com
william.pratt@kirkland.com
jennifer.selendy@kirkland.com
Counsel for Appellees

Stephen Everett Leach
Lawrence A. Katz
LEACH TRAVELL BRITT PC
8270 Greensboro Drive, Suite 1050
McLean, VA 22102
703-584-8902
sleach@ltblaw.com
lkatz@ltblaw.com
Counsel for Appellees

Theodore Gates Brown, III
KILPATRICK TOWNSEND &
STOCKTON LLP
1080 Marsh Road
Menlo Park, CA 94025
650-324-6353
tbrown@kilpatricktownsend.com
Counsel for Appellees

Jonathan F. Cohn
Marc S. Palay
SIDLEY AUSTIN, LLP
1501 K Street, NW
Washington, DC 20005
202-736-8110
jfcohn@sidley.com
mpalay@sidley.com
Counsel for Appellees

Timothy J. Simeone
Christopher J. Wright
WILTSHIRE & GRANNIS, LLP
1200 18th Street, NW, Suite 1200
Washington, DC 20036
202-730-1300 x332
tsimeone@harriswiltshire.com
cwright@wiltshiregrannis.com
Counsel for Appellees

Dennis J. Abdelnour
William E. Devitt
KIRKLAND & ELLIS, LLP
300 North LaSalle Street
Chicago, IL 60654
312-862-3102
dabdelnour@kirkland.com
wdevitt@kirkland.com
Counsel for Appellees

John Kuropatkin Roche
PERKINS COIE LLP
Suite 600
700 13th Street, NW
Washington, DC 20005-2011
202-434-1627
jroche@perkinscoie.com
Counsel for Appellees

Mark R. Freeman
Stuart Delery
Mark R. Freeman
Civil Division, Appellate Section
Room 7228
950 Pennsylvania Avenue, NW
Washington, DC 20530-0000
202-514-5714
mark.freeman2@usdoj.gov
robert.loeb@usdoj.gov
Counsel for Amicus Curiae

Neil H. MacBride, U. S. Attorney
OFFICE OF THE UNITED
STATES ATTORNEY
2100 Jamieson Avenue
Alexandria, VA 22314-5194
usavae.alx.ecf.nar@usdoj.gov
Counsel for Amicus Curiae

Additional a paper copy will be mailed to the above counsel for the parties on appeal on this date.

Unless otherwise noted, 8 paper copies have been filed with the Court on the same date via U.S. Express Mail.

November 19, 2012

/s/ Robyn Cocho
Counsel Press

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at www.ca4.uscourts.gov/cmecftop.htm.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 12-1802 as

Retained Court-appointed(CJA) Court-assigned(non-CJA) Federal Defender Pro Bono Government

COUNSEL FOR: Intellectual Property Owners Association

as the (party name)

appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s)

/s/ Jeffrey K. Sherwood (signature)

Jeffrey K. Sherwood Name (printed or typed)

(202) 420-3602 Voice Phone

DICKSTEIN SHAPIRO LLP Firm Name (if applicable)

(202) 420-2201 Fax Number

1825 Eye Street, NW

Washington, DC 20006-5403 Address

sherwoodj@dicksteinshapiro.com E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on 11/19/2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

n/a (Service of all counsel as registered through CM/ECF with no paper copies required to be mailed).

[Empty box for additional service addresses]

/s/ Jeffrey K. Sherwood Signature

11/19/2012 Date