Nos. 12-1548, 12-1549

In the
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPLE INC. and NeXT SOFTWARE, INC. (formerly known as NeXT Computer, Inc.),

Plaintiffs-Appellants,

v.

MOTOROLA, INC. (now known as Motorola Solutions, Inc.) and MOTOROLA MOBILITY, INC.,

Defendants-Cross-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois
in Case No. 11-CV-8540, Judge Richard A. Posner

BRIEF OF *AMICUS CURIAE* BSA | THE SOFTWARE ALLIANCE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTEREST

Counsel for *amicus curiae* certifies the following:

1. The full name of every party or amicus curiae represented by me is:

   BSA | The Software Alliance

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:

   BSA | The Software Alliance

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of any party or amicus curiae represented by me are as follows:

   None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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INTEREST OF AMICUS CURIAE

BSA | The Software Alliance (BSA) is an association of the world's leading software and hardware technology companies.* On behalf of its members, BSA promotes policies that foster innovation, growth, and a competitive marketplace for commercial software and related technologies. BSA members pursue patent protection for their intellectual property and as a group hold a significant number of patents. In addition, BSA members routinely participate in standards-setting organizations and license patents held by other companies and individuals. Because patent policy is vitally important to promoting the innovation that has kept the United States at the forefront of software and hardware development, BSA members have a strong stake in the proper functioning of the U.S. patent system.

The members of the BSA include Adobe, Apple, Autodesk, Bentley Systems, CA Technologies, CNC/Mastercam, Dell, Intel, Intuit, McAfee, Microsoft, Minitab, Oracle, PTC, Rosetta Stone, Siemens PLM, Symantec, TechSmith, and The MathWorks.

INTRODUCTION AND SUMMARY OF ARGUMENT

Among the patents at issue in this infringement litigation between Apple,

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* Pursuant to Fed. R. App. P. 29(c)(5), amicus certifies that no party's counsel wrote this brief in whole or part, that no counsel or party contributed money intended to fund this brief, and that no one other than amicus, its members, and its counsel made such a contribution. The parties have consented to the filing of this brief.

Inc., and Motorola, Inc., is Motorola's U.S. Patent No. 6,359,898. That patent, which is "part of a portfolio of patents for enabling communication between cell phones and cell towers," is claimed by Motorola to be essential to employing certain voluntary industry standards to communicate over particular telecommunications networks. *Apple, Inc.* v. *Motorola, Inc.*, 869 F. Supp. 2d 901, 911-912 (N.D. Ill. 2012); see also App. to Apple's Opening Br. A51-A54 (Order of Jan. 16, 2012) (describing patent in further detail). In recognition of its claim that the '898 patent is essential to compliance with the relevant industry standard, Motorola has committed to licensing the patent on reasonable and nondiscriminatory (RAND) terms. See *Apple, Inc.*, 869 F. Supp. 2d at 911-912. The district court found that by making this commitment, Motorola "implicitly acknowledged that a royalty is adequate compensation for a license to use that patent," *id.* at 914, and, accordingly, denied Motorola's request for injunctive relief.

Although BSA takes no position with respect to the ultimate resolution of this appeal, in BSA's view the district court correctly recognized that injunctions ordinarily are not an appropriate remedy for infringement of a standard-essential patent when the patentee has made a RAND commitment. A patentee's commitment to license its standard-essential patent on RAND terms is highly relevant, and usually will be dispositive, in the application of the traditional four-factor test that governs a court's exercise of equitable discretion under *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). In *other* contexts, the application of traditional equitable principles supports the availability of injunctive relief. Injunctions may be necessary and appropriate to protect the patentee's ability to recover the full value of its intellectual property, and in appropriate cases courts should respect a patentee's choice whether to "exclude others from making, using, offering for sale, or selling the invention," 35 U.S.C. § 154(a)(1), (2), or to license a patent to others. But in the context of RAND-encumbered, standard-essential patents, the principle that courts should respect patentees' choices about how best to exploit their intellectual property rights is a principle that usually counsels in favor of denying injunctive relief. In that context, the patentee has already indicated, through its RAND commitment, a preference to exploit its intellectual property by making it available for use by all parties that wish to implement the standard, in exchange for reasonable royalties and for the increased demand that results from the adoption of a standard for which the patent is declared essential.

Moreover, routinely granting injunctions to remedy infringement of a RAND-encumbered, standard-essential patent would disserve the public interest by threatening to deprive consumers of the substantial benefits associated with voluntary industry standards. The standards-setting process cannot function effectively if would-be implementers of standards face the risk that, having sunk considerable investment in reliance on a RAND commitment, the patentee may then use the threat of an injunction to obtain unjust enrichment, whether by obtaining royalties greater than it would have been able to obtain if a different standard had been adopted, or by making other unreasonable demands. If implementers face that risk, they are likely to react by refusing to adopt standards that implicate standard-essential patents.

ARGUMENT

I. Traditional Equitable Principles Support Injunctive Relief To Prevent Patent Infringement In Some Circumstances

The U.S. Constitution expressly recognizes that, to "promote the Progress of * * * useful Arts," it is essential to provide economic incentives for those who develop new inventions. U.S. Const. Art. I, § 8, Cl. 8. To that end, the Patent Act affords patent-holders the "right to exclude others" from practicing or selling the invention for a period of years. 35 U.S.C. § 154(a)(1). In this manner, the patent system "represents a carefully crafted bargain that encourages both the creation and the public disclosure of new and useful advances in technology, in return for an exclusive monopoly for a limited period of time." *Pfaff* v. *Wells Elecs., Inc.*, 525 U.S. 55, 63 (1998); see also *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954); *King Instruments Corp.* v. *Perego*, 65 F.3d 941, 950 (Fed. Cir. 1995).

Given the role patents play in facilitating innovation generally, and in the software industry in particular, it is important that courts stand ready to remedy patent infringement and protect patentees' "right to exclude others from making, using, offering for sale, or selling the invention" for a period of years. 35 U.S.C. § 154(a)(1), (2). Although the Patent Act provides authority for courts to order monetary damages to remedy patent infringement, see 35 U.S.C. § 284, an after-the-fact award of damages will be insufficient to vindicate a patentee's intellectual property rights in some cases. Congress has therefore given district courts the power to "grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by a patent." 35 U.S.C. § 283.

In *eBay Inc*. v. *MercExchange, L.L.C.*, 547 U.S. 388 (2006), the Supreme Court emphasized that the courts' power to enjoin patent infringement should be exercised in accordance with familiar principles of equity practice. Disapproving of a principle that courts should "issue permanent injunctions against patent infringement absent exceptional circumstances," *MercExchange, L.L.C.* v. *eBay Inc*., 401 F.3d 1323, 1339 (Fed. Cir. 2005), the Supreme Court held that a plaintiff seeking an injunction must satisfy the traditional four-factor test for injunctive relief. See 547 U.S. at 391.

Injunctive relief is often an appropriate remedy for patent infringement. Continuing infringement of a valid patent denies the patentee its "right to exclude others from making, using, offering for sale, or selling the invention," 35 U.S.C.

§ 154(a)(1), which will often cause irreparable harm. In many cases, moreover, the irreparable injury caused by continued patent infringement is also unlikely to be remedied by monetary damages. Particularly in a fast-moving field such as the software industry, "[c]ompetitors change the marketplace." *Polymer Techs., Inc.* v. *Bridwell*, 103 F.3d 970, 975 (Fed. Cir. 1996). Although the competitive injuries caused by an infringing product might in theory be remediable by an award of damages, quantifying damages is sometimes difficult or impossible because of the complexity of the relevant market dynamics. See, *e.g.*, *Riles* v. *Shell Exploration & Prod. Co.*, 298 F.3d 1302, 1311 (Fed. Cir. 2002) (noting that a reasonable royalty "contemplates a hypothetical negotiation between the patentee and the infringer at a time before the infringement began" and that "this analysis necessarily involves some approximation of the market as it would have hypothetically developed absent infringement").

In BSA's view, the primary goal of the patent system—providing economic incentives for those who develop new inventions—is best advanced when patentees generally have the ability to use their patent rights as they see fit. And in appropriate cases, the choices made by patentees with their respect to their patent rights should be backed by the ability to obtain injunctive relief.

II. For RAND-Encumbered, Standard-essential Patents, Injunctive Relief Usually Is Not An Appropriate Remedy

The same general considerations are relevant when a patentee has committed to license a standard-essential patent on RAND terms, but in that context, the patentee's RAND commitment ordinarily will indicate that an injunction is *not* appropriate. Critically, the principle that courts should respect patentees' right to use their intellectual property as they see fit means that courts ordinarily should *deny* injunctive relief when a patentee's RAND commitment evidences a decision that a monetary award (rather than exclusion) ensures an appropriate reward for the patentee's inventive efforts.

It should be noted, however, that BSA does not support a rule that injunctive relief is never available for infringement of a RAND-encumbered, standard-essential patent. An award of injunctive relief may in fact be appropriate if the *eBay* factors warrant such relief. For example, assuming that the patent is found to be infringed, not invalid, enforceable, and covered by the standard, an injunction may be appropriate if the infringer refuses to pay a RAND royalty determined by a court or arbitrator. In addition, in proceedings before the U.S. International Trade Commission, the functional equivalent of an injunction—an exclusion order precluding importation of infringing products in the United States, see 19 U.S.C. § 1337(d)—may be an appropriate remedy when the infringer is not subject to the jurisdiction of a court that could award damages for the infringement. In the mine-run case, however, injunctive relief ordinarily is not appropriate to remedy infringement of a RAND-encumbered, standard-essential patent.

That conclusion follows from the four-factor test for injunctive relief that *eBay* requires. As an initial matter, because the premise of a RAND commitment is that the patentee will make licenses available on reasonable terms to those who wish to practice the patent, a patentee who has made a RAND commitment ordinarily will be unable to establish that denial of an injunction would lead to "irreparable injury." *eBay*, 547 U.S. at 391. See Federal Trade Comm'n, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* 235 (2011), available at http://www.ftc.gov/os/2011/03/110307patentreport.pdf (noting that a RAND commitment "provide [s] strong evidence that denial of [an] injunction * * * will not irreparably harm the patentee").

By the same token, a RAND commitment ordinarily will make impossible a showing "that remedies available at law, such as monetary damages, are inadequate to compensate" for the patentee's injury. *eBay*, 547 U.S. at 391. As Judge Posner correctly observed, "[b]y committing to license its patents on FRAND terms," a patentee commits to license the patent "to anyone willing to pay a FRAND royalty and thus implicitly acknowledge[s] that a royalty is adequate compensation for a license to use that patent." *Apple, Inc.* v. *Motorola, Inc.*, 869 F. Supp. 2d 901, 914 (N.D. Ill. 2012); see also *Microsoft Corp.* v. *Motorola, Inc.*, No. C10-1823JLR, 2012 WL 5993202, at *6 (W.D. Wash. Nov. 30, 2012) (observing that, because Motorola's RAND commitment required it to grant Microsoft a

RAND license on certain patents, a court-imposed RAND license agreement would "adequately remedy Motorola as a matter of law").

The other components of the traditional test for injunctive relief likewise reinforce the conclusion that injunctions ordinarily should not be available with respect to RAND-encumbered patents. The "balance of hardships," *eBay*, 547 U.S. at 391, will often favor the infringer of a standard-essential patent that is subject to a RAND commitment. When a patent is incorporated into an industry standard, implementers of the standard generally face high switching costs that may prevent them from redesigning their products to avoid infringing the patent. If an implementer has made substantial investments tied to the standard, it may be cost-prohibitive for the implementer to change course and develop a new product. That lock-in effect is also likely to be reinforced by the nature of industry standardization, because departing from the industry standard would cause the implementer's product to lose the benefits of compatibility with the products of other implementers. Declining to issue an injunction, by contrast, ordinarily works no significant hardship on the patentee, because the reasonable royalty that will be awarded in lieu on an injunction is exactly what the patentee committed to accept in the first place by undertaking to license its patent on RAND terms. And as we discuss below, the "public interest," *eBay*, 547 U.S. at 391, would be threatened if courts frequently awarded injunctions to remedy infringement of RAND-encumbered, standard-essential patents, because such remedies could seriously destabilize the standards-setting process and thus deprive consumers of its considerable benefits.

Awarding an injunction in favor of a patentee that has made a commitment to license its standard-essential patent on RAND terms would also be inconsistent, in many cases, with the basic principle that an injunction is an equitable remedy. See 35 U.S.C. § 283 (providing that courts in patent cases "may grant injunctions *in accordance with the principles of equity*") (emphasis added); see also, *e.g.*, *eBay*, 547 U.S. at 391 (stressing that "[t]he decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court"); *Odetics, Inc.* v. *Storage Tech. Corp.*, 185 F.3d 1259, 1272 (Fed. Cir. 1999) ("recogniz[ing] that district courts, as befits a question of equity, enjoy considerable discretion in determining whether the facts of a situation require it to issue an injunction"). As Judge Posner aptly explained, a patentee will typically "agree[] to license its standard-essential patents on FRAND terms as a *quid pro quo* for their being declared essential to the standard." *Apple, Inc.*, 869 F. Supp. 2d at 914. In doing so, the patentee understands that its RAND commitment will induce adopters of the standard to make substantial investments in the course of implementing the standard on the assumption that a license to practice the standard-essential patent will be made available on reasonable terms. When a patentee refuses to honor its commitment, and instead seeks to expropriate an adopter's sunk investment costs through negotiations held under the threat of an injunction that would bar the implementers' product from the market, the patentee's behavior can only be described as an opportunistic bait-and-switch. In other words, the patentee has committed to providing technology at a reasonable price and then demanded an unreasonable royalty.

In an important sense, therefore, a patentee that has breached its RAND commitment in this manner arrives in court with unclean hands, and it should very rarely be entitled to obtain the discretionary equitable remedy of an injunction. Cf. *Aptix Corp.* v. *Quickturn Design Sys., Inc.*, 269 F.3d 1369, 1374 (Fed. Cir. 2001) (upholding district court's invocation of unclean-hands doctrine to dismiss patent suit on the basis of litigation misconduct). The very point of a RAND commitment, in the context of standard-essential patents, is that the patentee has chosen to relinquish a portion of the negotiating leverage that a patent ordinarily confers, as a *quid pro quo* for adoption of a standard that requires use of the patent-holder's technology. Giving that patentee an injunction, however, is likely to restore much of the leverage the patentee voluntarily gave up, and to do so after other members of the standards-setting organization have detrimentally relied on the RAND commitment and the corresponding standard.

III. Courts Should Weigh The Public Interest In Effective Standard Setting When Deciding Whether To Issue An Injunction As A Remedy For Infringement Of RAND-Encumbered, Standard-Essential Patents

In addition to its effects on the *private* interests of patentees and implementers, the "*public* interest," *eBay*, 547 U.S. at 391 (emphasis added), may be implicated if courts award injunctions to remedy infringement of RAND-encumbered, standard-essential patents. Such a practice could seriously destabilize the standards-setting process and thus deprive consumers of its considerable benefits. For that reason, the public interest will ordinarily tilt decidedly against injunctive relief in this context.

A. Voluntary Standards Provide Large Public Benefits

"Voluntary consensus standards-setting activities benefit consumers and are in the public interest." See U.S. Dep't of Justice & U.S. Patent & Trademark Office, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* 4-5 (2013) ("DOJ/PTO Policy Statement"), available at http://www.justice.gov/atr/public/guidelines/290994.pdf. Indeed, "[i]ndustry standards are widely acknowledged to be one of the engines driving the modern economy." U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* 33 (2007) ("DOJ/FTC Report"), available at http://www.justice.gov/atr/public/hearings/ip/222655.pdf.

Performance standards, which set minimum requirements for all products in a general product category, see *id.* at 33 n.1, can provide important assurances to consumers regarding quality and safety. See *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (noting that voluntary safety standards "can have significant procompetitive advantages"). In addition, these standards may promote price competition by allowing consumers to better understand what they are purchasing and to more readily compare the offerings of competing producers.

In telecommunications and high-technology markets, interoperability standards, which allow products made by different firms to interoperate with one another, see DOJ/FTC Report 33 n.1, play a particularly important role. To take one example, voluntary standards permit a hard drive produced by one company to plug into a computer manufactured by a different company and work reliably. In addition, "[s]tandards make networks, such as the Internet and wireless telecommunications, more valuable by allowing products to interoperate." *Id.* at 33. Motorola's '898 patent is a good example; as Judge Posner explained, it is part of a portfolio of patents for enabling communications between cell phones and cell towers, and it is claimed by Motorola to be essential to a network protocol that allows phones produced by a variety of manufacturers to interoperate over the same telecommunications network. See *Apple, Inc.*, 869 F. Supp. 2d at 911-912.

The benefits to consumers of interoperable technology are substantial. As an initial matter, an interoperable product is simply a more valuable product. A hard drive that worked with only a single brand of computer would be less useful for storing files and moving them from location to location, and a cell phone that worked with only a single model of cell tower, rather than a wide variety of them, would be much less useful. Second, "[s]tandards can make products less costly for firms to produce," DOJ/FTC Report 33, and the cost savings may be passed along to consumers in the form of lower prices. To illustrate this effect, it is helpful to consider how computer manufacturers would react if there were no industry-standard connectors and protocols for using hard drives with a computer. If every hard drive came with its own proprietary connector, computer manufacturers might well react by filling their devices with multiple ports to accommodate all of the various hard drives a consumer might purchase. The inclusion of this duplicative hardware would raise costs to manufacturers and would ultimately produce higher prices for consumers.

Moreover, interoperability standards promote competition and consumer choice by decreasing the chance that a consumer will be locked into one company's suite of compatible products. Because of interoperability standards, a consumer need not purchase a hard drive from the same manufacturer that produced her computer. She is free to choose the drive that provides her preferred combination of price and quality, without risking incompatibility with her previous purchases. To take another example, the same consumer may purchase a wireless router produced by one manufacturer while remaining confident that the router will allow her to use a standardized networking protocol to connect a wide range of devices produced by other manufacturers, such as laptops, tablets, printers, and much more.

Without the promise of interoperability afforded by industry standards, it would be significantly more difficult for new, innovative entrants to enter the market and compete with established manufacturers. Because adopting just one of the entrant's products might render a host of the consumer's existing devices obsolete, consumers would be deterred from purchasing the new entrant's technology even if, on its own merits, it is superior to the competition.

B. The Standards-Setting Process Will Be Undermined If Patentees That Fail To Honor Their RAND Commitments Can Nonetheless Obtain Injunctions

Routinely awarding injunctions to remedy infringement of RAND-encumbered, standard-essential patents would disserve the public interest by undermining the standards-setting process that produces those consumer benefits. As the Department of Justice and the Patent and Trademark Office have explained in connection with proceedings for exclusion orders before the ITC, standards-setting organizations and the many companies that work in consultation with them are well aware of the possibility that, once a patented technology is included in an industry standard and companies begin to implement it, the holder of the patent may threaten to block its use as part of an opportunistic strategy to extract an unreasonably high royalty. See DOJ/PTO Policy Statement 4-5. To protect against that risk, standards-setting organizations often require that participants in the standards-setting process commit to license their patents on RAND terms before those patents will be incorporated into a standard. See DOJ/PTO Policy Statement 5. Many standards-setting organizations recognize that such a policy can promote fair and robust competition between licensees that adopt a standard, and provide additional assurance that the adoption of a standard will not have the unintended effect of distorting competition in a manner that could harm consumers. See *Broadcom Corp.* v. *Qualcomm Inc.*, 501 F.3d 297, 313 (3d Cir. 2007).

The European Telecommunications Standards Institute (ETSI), for example, requests that patents be available for licensing on RAND terms if they are to be essential to a standard. The relevant policy states:

> When an ESSENTIAL IPR [Intellectual Property Right] relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licenses on fair, reasonable and non-discriminatory terms and conditions under such IPR to at least the following extent:
>
> - MANUFACTURE, including the right to make or have made

customized components and sub-systems to the licensee's own design for use in MANUFACTURE;

- sell, lease, or otherwise dispose of EQUIPMENT so MANUFACTURED;
- repair, use, or operate EQUIPMENT; and
- use METHODS.

ETSI, *Rules of Procedure: Intellectual Property Rights Policy* § 6.1 (Nov. 30, 2011), available at http://www.etsi.org/images/etsi_ipr-policy.pdf. If the holder of the standard-essential patent refuses to provide the requested RAND-commitment, ETSI may suspend work on the implicated standard until the matter is resolved. See *id.* ¶ 6.3. And ETSI is by no means an outlier in this regard. In fact, a 2002 study found that twenty-nine of the thirty-six standards-setting bodies studied that had written intellectual property policies required participants to license under RAND terms. Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1906 (2002).

These policies and the RAND commitments obtained under them will have little practical impact if courts routinely grant injunctive relief in favor of a holder of a standard-essential patent that has committed to license on RAND terms. In the short term, granting injunctions will lead to substantially (and unexpectedly) higher costs for implementers of the standard. If the holder of the standard-essential patent is allowed to obtain an injunction that prevents the implementer's products from reaching the market, the patentee may extract a royalty that reflects *not* the reasonable economic value of its underlying invention, but rather the leverage associated with controlling access to the industry standard. See, *e.g.,* Joseph Farrell, et al., *Standard Setting, Patents, and Hold-Up*, 74 Antitrust L.J. 603, 607-608, 616-618 (2007).

In the longer term, however, granting injunctions in this context may destabilize the standards-setting process itself. Cf. DOJ/PTO Policy Statement 6 (noting that ITC exclusion orders based on infringement of RAND-encumbered, standard-essential patents may "harm competition and consumers by degrading one of the tools" standards-setting organizations "employ to mitigate the threat of * * * opportunistic actions" by patentees). When a company decides to adopt a patented technology to implement an industry standard, it does so on the understanding that, by requiring the patentee to accept a reasonable royalty, a RAND commitment will prevent the patentee from opportunistically taking advantage of the implementer's investment decisions to extract an unreasonably high royalty. If it becomes clear that RAND commitments do not in fact provide this protection to would-be implementers of industry standards, it is likely that many companies will simply refuse to adopt industry standards in the first place. Crucial technology markets would likely balkanize into competing proprietary platforms, depriving consumers of the substantial benefits associated with interoperability.

When an injunction would implicate a RAND-encumbered, standard-essential patent, courts should carefully consider the implications for the public interest in the standards-setting process when exercising their equitable powers. It is often likely that this public interest would be impaired by granting injunctions as a remedy for infringement of RAND-encumbered, standard-essential patents.

CONCLUSION

The Court should resolve this appeal consistent with the principle that injunctive relief ordinarily is an inappropriate remedy for infringement of a RAND-encumbered, standard-essential patent.

Dated: March 20, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because the brief contains 4,183 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface and type style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because the brief has been prepared using Microsoft Word 2010 in fourteen-point Times New Roman font, which is a proportionally spaced typeface.

Dated: March 20, 2013

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CERTIFICATE OF SERVICE

I certify that on March 20, 2013, I electronically filed the foregoing Brief of *Amicus Curiae* BSA | The Software Alliance in Support of Plaintiffs-Appellants with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit using the CM/ECF system. Pursuant to ECF-10(B) of this Court's May 17, 2012 Administrative Order Regarding Electronic Case Filing, I certify that I will submit to the Court six paper copies of this Brief within five days of this Court's acceptance of the brief in ECF. I certify that on March 20, 2013, a copy of the foregoing brief was served electronically through the Court's CM/ECF system on the following counsel:

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