No. 06-937

IN THE

Supreme Court of the United States

QUANTA COMPUTER, INC.,
QUANTA COMPUTER USA, INC.,
Q-LITY COMPUTER, INC.,
Petitioners,

v.

LG ELECTRONICS, INC.,
Respondent.

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

BRIEF OF *AMICUS CURIAE* INTELLECTUAL PROPERTY OWNERS ASSOCIATION IN SUPPORT OF THE RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae Intellectual Property Owners Association (IPO), a tax-exempt association, is a national organization founded in 1972 to represent the owners of intellectual property in the United States.[1] IPO's members currently include over 140

[1] Pursuant to this Court's Rule 37.6, *amicus* represents that this brief was not authored in whole or in part by counsel for any party. No IPO member has made a monetary contribution to the preparation or submission of this brief beyond normal

large and mid-sized companies and over 550 small businesses, law firms, inventors, authors, universities, executives and attorneys who own or are interested in patents and other forms of intellectual property in any industry or field of technology. IPO members are granted about 30 percent of the patents issued by the U.S. Patent and Trademark Office to U.S. nationals. IPO regularly represents the interests of its members before Congress and the U.S. Patent and Trademark Office and has filed *amicus curiae* briefs in this Court and other courts on significant issues of intellectual property law.

IPO is concerned with the interests of all of its members in all industries and all fields of technology. IPO believes that the position of Petitioners in their petition for writ of certiorari and in their initial brief would, if accepted, have wide-reaching implications on existing intellectual property agreements, causing uncertainty in the business community concerning current and future intellectual property licenses, assignments and other contracts.

In this brief, IPO explains how an adoption of the Petitioners' position would affect the business community. The filing of this brief was approved by the 50-member IPO Board of Directors, the members of which are listed in the Appendix.[2]

INTRODUCTION

Respondent LG Electronics, Inc. (LGE) cross-licensed its patent portfolio to Intel Corp. in 2000.

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membership dues payments. Counsel of record for all parties have consented to the filing of this brief.

[2] IPO procedures require approval of positions in briefs by a three-fourths majority of directors present and voting.

While Intel received complete rights to make, use, and sell products covered by LGE's patents, LGE alleges that the license excluded downstream purchasers (including Petitioners) who purchased the patented microprocessors and chipsets from Intel. LGE alleges that Petitioners used those Intel products to create new products or processes—different from the licensed Intel products—that infringed LGE's patent rights. LGE alleges that Petitioners had notice that the purchase of the patented microprocessors and chipsets did not include a license to combine them with other non-Intel products, which would result in infringement of LGE's patents. The United States Court of Appeals for the Federal Circuit reversed the District Court for the Northern District of California's grant of summary judgment of non-infringement in favor of Petitioners on the basis of patent exhaustion. The panel decision relied on the distinction between conditional sales and unconditional sales drawn in *B. Braun Medical, Inc. v. Abbott Labs.*, 124 F.3d 1419 (Fed. Cir. 1997) and held that LGE's conditional license to Intel did not grant Petitioners the right to practice all patents in LGE's portfolio.

SUMMARY OF ARGUMENT

This Court has long held that a patentee has the right to lawfully condition the sale or license of a patented product to limit the scope of the patent rights granted. Downstream purchasers should not be able to claim broader patent rights than those held by the party from whom they purchase.[3]

[3] This analysis does not depend on whether the patent is for a product or method.

Many businesses rely upon conditional licenses or sales in order to ensure rational distribution of intellectual property rights through a value-added chain of distribution, while providing an adequate reward for the development and public disclosure of the Constitutionally protected "Progress of Science and useful Arts." U.S. Const. art. I, § 8. Petitioners' position would jeopardize long-accepted business practices sustained by this Court in a wide range of industries, from the development and sale of genetically modified seeds, to microchip designs, to the sale and use of copyrighted content, such as video and music on DVDs and CDs.

If there is no material non-infringing use of a product, then the doctrine of patent exhaustion may be properly invoked to prevent patentees from collecting twice on the same product—once for the product itself and a second time for the patented use of the product—absent a clearly stated condition in the sale or license by the patentee that the purchase of the item does not convey a right to practice the patented use. For example, where a product is sold or licensed without restriction and the only material use of that product would infringe another patent owned by the seller or licensor, then patent exhaustion would preclude any further effort by the seller or licensor to collect royalties or damages. Otherwise, the patentee effectively would be able to collect twice from the purchaser or licensee who had properly believed, because there was no conditioning of the sale or license, that he was entitled to freely use the product, which was sold or licensed with no material non-infringing use.

Petitioners' purchase of a product from Intel does not automatically exhaust LGE's patents. Petitioners' use of LGE-licensed Intel products does not grant them a license to practice all of LGE's patents. This case is fundamentally different from this Court's past applications of the doctrine of patent exhaustion, which were developed in light of patentees' misuse of patent rights. The doctrine of patent exhaustion can find no application in a case where there is no allegation of illegal conduct by the patentee, in circumstances where the patentee has appropriately conditioned the license it granted.

ARGUMENT

I. THE PATENTEE'S ABILITY TO GRANT LIMITED LICENSES IS A RIGHT INHERENT IN THE PATENT GRANT

This Court has long sustained the rights of patentees to enforce conditions in license agreements. In *Providence Rubber Co. v. Goodyear*, 76 U.S. (9 Wall.) 788 (1869), Goodyear owned patents relating to India-rubber fabrics, and granted a conditional license to E. M. Chafee allowing him to practice the patents at Chafee's own place of business but prohibiting the sale of licensed products to the U.S. government. This Court approved the license conditions. By 1938, this Court had noted that "the practice of granting licenses for a restricted use is an old one." *Gen. Talking Pictures Corp. v. W. Elec. Co.*, 305 U.S. 124, 127 (1938) (citing to *Providence Rubber Co.*, 76 U.S. at 799). In *General Talking Pictures*, a patentee granted a limited license to manufacture amplifiers for either home use or commercial use (e.g., in a movie theater). *Id.* at 126. This Court upheld the condition, noting "[t]hat a restrictive license is legal seems clear." *Id.* at 127 (citing *Mitchell v. Hawley*, 83 U.S. (16 Wall.) 544 (1872)).

This Court's holdings have been widely understood to mean that "express conditions accompanying the sale or license of a patented product are generally upheld." *B. Braun Medical*, 124 F.3d at 1426 (Fed. Cir. 1997).

By contrast, a patent holder may choose instead to sell patented articles or license its technology without restriction, thus exhausting its patent rights with respect to the sold or licensed article. In *United States v. Univis Lens Co.*, 316 U.S. 241 (1942), this Court held:

> The patentee may surrender his monopoly in whole by the sale of his patent or in part by the sale of an article embodying the invention. His monopoly remains so long as he retains the ownership of the patented article. But sale of it exhausts the monopoly in that article and the patentee may not thereafter, by virtue of his patent, control the use or disposition of the article.

Id. at 250 (citing *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 549-50 (1852)). Thus, this Court has focused upon the scope of the grant by the patentee to determine whether the patent has been exhausted, or whether the patentee has reserved a portion of "the exclusive Right" protected by the Constitution.

The Federal Circuit likewise has focused upon the scope of the grant of the patentee to determine the propriety of conditional sales and licenses. In *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700 (Fed. Cir. 1992), the patented device was sold to hospitals and clearly marked with a notice that it was for "single use only." Medipart collected the devices and rebuilt them so they could be used again. Mallinckrodt's infringement action was rejected by the district court on summary judgment. Applying *General Talking Pictures*, the Federal Circuit reversed, holding that a sale could properly be conditioned as "single use only," thus rendering re-use an infringing act. As long as the condition was reasonably related to the subject matter within the scope of the patent claims and did not otherwise violate any law, such a condition was enforceable. "[A]ny conditions which are not in their very nature illegal . . . , imposed by the patentee and agreed to by the licensee . . . will be upheld by the courts." *Mallinckrodt*, 976 F.2d at 703. *Mallinckrodt* is consistent with *American Cotton-Tie Co. v. Simmons*, 106 U.S. 89 (1882), in which this Court upheld a finding of infringement when the patented product was stamped "licensed to use once only" and the defendants rebuilt and resold the patented product for re-use.

II. CONDITIONAL LICENSING IS A COMMON PRACTICE IN MANY INDUSTRIES

This Court should not lightly disrupt the well-established principle that limited license grants and conditional sales do not exhaust a patentee's ability to control the use of its intellectual property. Relying on this Court's well-settled precedent, there is a broad practice among owners of intellectual property of relying on the ability to condition sales of patented goods.

For example, owners of copyrighted works such as video, music, and software commonly sell CDs or DVDs with a limitation that they are for "home use only." The same content is sold to commercial users at a much higher price, reflecting the greater value of the CD or DVD to a commercial user. Copyright holders long have recognized that the economic value of the right to play a movie in public for a large number of people, to use music in the soundtrack of a movie or television show, or to use software in a Fortune 100 corporation is significantly greater than the economic value of an individual's private use of the same movie or song or software. Conditional licenses and sales of intellectual property ensure that the price for the right to use the protected intellectual property is commensurate with its economic value. If such conditional licenses were not possible, creators of copyrighted content, whether they are musicians, studios, or software designers, would not receive appropriate economic compensation for commercial use of their work. "The copyright protects originality rather than novelty or invention—conferring only 'the sole right of multiplying copies.'" *Mazer v. Stein*, 347 U.S. 201, 218 (1954). The same rule should apply to patent holders. There is no basis in law, logic, or public policy for differentiating between the copyright interest and the patent interest in permitting conditioned sales.

Applying this rule to patent rights is proper for three reasons. First, the same patented product may have different economic value depending upon its use. Second, a patent may have multiple embodiments, and each embodiment may have a distinct application and different value. Third, one patent claim may cover a single component while a separate claim may cover the component in a completed system. A manufacturer of the component would require a license only for the former, while a company that adds value by assembling a complete system would require a license only for the latter, so a conditional license to each (at a lower price than the whole) optimizes economic efficiency.

The economic problems and disincentives to licensing that would result from Petitioners' contrasting rule are illustrated by genetically modified crop seeds, which can significantly increase the yield-per-acre of valuable crops. In an economically rational system, an owner of a patent for such seeds will be allowed to condition a sale so that the purchaser can use the patented seeds only to create harvestable food products and cannot create a new crop of genetically modified seeds to be replanted. Otherwise, the patent owner, faced with the prospect of its purchasers becoming competitors by selling the next generation of seeds, would have to recoup its entire investment in the first season of sales. It is easy to see that for seeds requiring years of costly and risky research this would be impossible. The net result of Petitioners' rule, then, would be to discourage the investment risk necessary for such products and many beneficial technologies would never be developed at all. It is thus advantageous to both the patent holder and the licensee, as well as to society, that the licensee should be permitted to pay a lower price for a limited right under the patent. If a farming company desires to harvest seeds for sale or use as seeds, rather than as a food crop, it should negotiate a license to pay a higher fee for that more valuable use of the patented technology.

Conditioned sales of patented goods are also common in the electronics industry. For example, a patented microprocessor may provide increased speed over previous processors. This increased speed could be of greatest economic value in high-end research computers and of relatively lower value in home use PCs. Thus, the maximum value of the identical patented component can depend upon its use. While such a processor has some value to all computer manufacturers, its value is greatest when put to optimal use. The patentee may wish to sell the processor at its highest price for its optimal use and charge a lower price for other uses. The patentee should be able to manufacture and sell the processors at a lower price to those who buy subject to the condition that they will not be resold for use in high-end computers. If the Court were to adopt Petitioners' position, however, an inventor of that patented processor could not provide this differential pricing dependent upon use. Instead, the patentee would have to offer licenses to manufacturers at a rate representing the highest value of the patent, which would increase the costs of all systems using the technology and likely reduce its market share. Alternatively, the patentee could price the patented product as a commodity, thereby foregoing compensation for the full value of the innovation and decreasing the incentive to develop new and better processors.

Similarly, patents in the software industry often cover software products that are applicable in a variety of contexts. A technology for organizing and optimizing the use of memory in a computer, for example, would be useful when incorporated into a memory-intensive software application, but it could be far more useful (and valuable) when incorporated into an operating system. Petitioners' approach denies software developers the ability to license patented technology at a rate that is appropriate for their individual use. Instead, a developer hoping to use the technology in a low-value application would be forced to pay the same license fee that a company such as Microsoft would pay to incorporate the technology into a high-value operating system.

In the pharmaceutical context, a patented compound that has multiple uses typically will have greater value for one use than for another, so patentees license the patent to manufacturers with certain conditions regarding the use for which they may manufacture the compound.[4] A patented compound used to treat heart disease may have immense value and will demand a high license fee. If the same patented compound may also be used in hair conditioner, it might bring a lower license fee for that purpose. Petitioners' approach to patent exhaustion would allow a distributor to buy subject to a condition that it could only resell the compound as hair conditioner, pay a lower sales price, then sell the compound at a premium to companies that repackage and sell it for its regulated use to treat heart disease. Though the patentee took all reasonable steps to protect its rights, and though the eventual medical use of the compound was never authorized by the patentee, the rule proposed by the Petitioners would preclude the patentee from pursuing an infringement case – contrary to the long line of cases exemplified by *Providence Rubber Co.*, 76 U.S. 788, *General Talking Pictures*, 305 U.S. 124, and *Mallinckrodt*, 750 F.2d 700.

The use of conditional licensing is so widespread that almost every industry routinely employs it and, as a result, its impact is felt throughout the population. A device embodying a patented method for determining location based on GPS[5] signals may

[4] This example has been simplified for illustrative purposes and does not take into account any regulatory approval issues.

[5] GPS, or global positioning system, is a satellite-driven navigation system that allows receivers to determine their location from microwave signals.

provide a certain level of accuracy (and command a proportionate license fee) when used to manufacture navigation systems for use in low cost personal GPS systems, while the same method may garner a much higher license fee when used in more exacting applications such as surveying or aircraft navigation systems. A patented method for encrypting and securing data has value to certain Internet-based shopping sites, and the same method may have far more value (and correspondingly higher licensing rates) when used in higher-end applications, such as commercial inter-bank communications. These are only a few of the thousands of examples that one may encounter on a daily basis demonstrating that patent owners, just like copyright holders, require the ability to condition licenses in order to make their property available for many different applications on a sensible economic basis, with those who derive the greatest benefit from the patented invention paying the most and those deriving the least benefit paying least.

III. PUBLIC POLICY FAVORS ENFORCING CONDITIONAL SALES OR LICENSES

Sound public policy supports enforcing conditioned sales or limited licenses of patented goods. An owner of a property right generally can condition the use of that right by another; thus, a patent owner should be able to fashion a license that grants less than the full patent right. It should be no different when a patentee elects to manufacture the patented item itself rather than grant another the license to do so.

Conditioned sales of a patented good, provided the limitation is lawful, are entirely consistent with the policy underlying the patent law, as articulated by this Court in *E. Bement & Sons v. National Harrow Co.*, 186 U.S. 70, 91 (1902):

> The very object of these [patent] laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts.

If this Court adopts the rule advanced by Petitioners, then patentees will be forced to shift to less efficient methods to obtain protection for their inventions to the detriment of the patent system, licensees, and ultimately the public. A patentee today might obtain one patent covering an invention with dependent claims directed to the invention in combination with other components. A patent for a piston, for example, may include claims to the piston in combination with a crankshaft (or a special kind of crankshaft or engine) or claims to cover a method of fabricating the piston. Under Petitioners' rule, the patentee would be induced to file several patents of varying scope so that a sale under one of them would not exhaust the patentee's entire patent rights. In the piston example, the patentee would license one patent to a manufacturer covering only the piston itself. Once a purchaser of the manufacturer's piston attempts to use it in combination with a particular crankshaft in a certain kind of engine, the patentee would then offer a license to that purchaser for a different patent covering the combination. This process, repeated for inventions with more applications, would greatly increase the cost of patenting and increase the difficulties in securing patent clearance for competing manufacturers.

Shifting the burden from license agreements to the patenting process would create a number of undesirable consequences. Inventors would be forced to file many patent applications to cover each intended use or embodiment of an invention. Applicants would thus be forced to anticipate all possible options regarding the use and marketing of the product and file separate applications for each. This would increase the number of applications filed with the already overburdened U.S. Patent and Trademark Office. In contrast to the licensing practices in place today, which permit patentees and manufacturers to negotiate and accept conditions, the Petitioners' approach would encourage gamesmanship. It would encourage patentees to atomize their inventions into separate applications in order to do what can be done today much more simply and rationally by making a sale subject to clearly stated lawful conditions on the licensed use.

Logic and sound public policy require notice but only by the patentee to the first purchaser or first licensee. Thus, when a patentee grants a limited patent right and wishes to enforce its reserved patent rights against infringers who act outside of the license grant, clear notice to the first purchaser or first licensee is necessary.

IV. CONDITIONAL LICENSES ARE SUBJECT TO PATENT EXHAUSTION WHEN PAIRED WITH AN ABUSE OF PATENT RIGHTS

Petitioners and some *amici curiae* argue that the conditional license at issue in this case cannot be squared with this Court's precedent. Although conditional licenses have been used in the industry and accepted by this Court for many years, it is equally important for this Court to reinforce its decisions holding that conditional licenses cannot protect abusive or illegal practices. In cases involving conditional licenses that extend a patentee's monopoly too far, patent exhaustion acts as an appropriate limit. For example, this Court has applied the doctrine when the patent owner was committing violations of antitrust laws or trying to impose impermissible geographic restrictions on the use of its products. Understood in this context, there is no conflict between the line of cases reaffirming a patentee's right to grant conditional licenses and the line of cases applying patent exhaustion.

A. Patent Exhaustion Applies In Cases of Antitrust Violations

When a conditional license is used to improperly control downstream pricing after the sale of a patented item, the antitrust laws have been violated, and the conditional license is appropriately voided. In *Univis Lens Co.*, 316 U.S. 241, a patent holder for optical lens technology manufactured only portions of the patented lenses, selling those portions to various manufacturers to complete. Depending on the nature of the manufacturer, the license required a different price for the finished product. This Court found that the patentee had exhausted its rights over the lenses when it sold the unfinished portion to the licensees to finish the product. Thus, the price restrictions, unlawful as a matter of antitrust law, were not justified as an exercise of patent rights.

B. Patent Exhaustion Applies When a Patentee Attempts To Limit the Use of an Article to a Geographic Region

This Court also has applied the doctrine of patent exhaustion to limit a patentee's inappropriate efforts to restrict the use of a patented article after sale to a geographic region within the United States. In *Hobbie v. Jennison*, 149 U.S. 355 (1893), a patentee had licensed a patent on certain types of metal pipes to several companies, with each receiving a certain territory in which it could act as sole licensee. One such licensee, with territory in Michigan, sold pipes within the state to a purchaser who used them in Connecticut. A second licensee, having Connecticut as part of its territory, sued the Michigan licensee. This Court determined that patent exhaustion applied to the pipes because "the sale of a patented article by an assignee within his territory carries the right to use it *everywhere*, notwithstanding the knowledge of both parties that a use outside of the territory is intended." *Id.* at 361 (emphasis added). *See also Keeler v. Standard Folding-Bed Co.*, 157 U.S. 659, 666 (1895) (holding that a purchaser of a patented article from one licensed to sell only in a certain region has a right to use the article "unrestricted in time or place"); *Adams v. Burke*, 84 U.S. (1 Wall.) 453 (1873) (holding that a license containing geographic restrictions could only limit the area of permitted sale, not the area of subsequent use). These cases were, of course, limited to attempts to restrain the use of the product within the United States, as United States patents do not have force or effect outside of the United States.

CONCLUSION

The realities of the market and the nature of patented rights require flexible licensing arrangements. As this Court has held for over one hundred years, patentees may place conditions on their licensing of inventions, so long as they do not use those conditions to abuse their patent rights. Conditional licenses that are used improperly, in violation of antitrust laws, are subject to the doctrine of patent exhaustion. Valid conditional licenses, however, are necessary to both patentees and licensees in order to bring useful technologies to the appropriate markets for an appropriate exchange of economic value. If intellectual property is to be effectively used and protected, the Court must re-enforce its precedent endorsing conditional sales and license agreements, when the conditions are not unlawful.

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[2] As counsel for an interested party, Mr. Simon did not participate in the preparation, discussion, or vote on the brief.