No. 16-1011

In the Supreme Court of the United States

WESTERNGECO LLC,

Petitioner,

v.

ION GEOPHYSICAL CORPORATION

Respondent.

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

BRIEF OF AMICUS CURIAE THE INTELLECTUAL PROPERTY LAW ASSOCIATION OF CHICAGO IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that lost profits arising from prohibited combinations occurring outside of the United States are categorically unavailable in cases where patent infringement is proven under 35 U.S.C § 271(f).

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I. INTEREST OF AMICUS CURIAE[1]

The Intellectual Property Law Association of Chicago ("IPLAC") submits this brief as amicus curiae in support of Petitioner on the question presented.[2,3] Founded in 1884, IPLAC is the country's oldest bar association devoted exclusively to intellectual property matters. Located in Chicago, a principal locus and forum for the nation's authors, artists, inventors, scholarly pursuits, arts, creativity, research and development, innovation, patenting, and patent litigation, IPLAC is a voluntary bar association of over 1,000 members with interests in the areas of patents, trademarks, copyrights, and trade secrets, and the legal issues they present. Its members include attorneys in private and corporate practices before

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in any part, no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and no person other than the *amicus curiae*, its members, or its counsel, made such a monetary contribution.

[2] In addition to footnote 1, IPLAC believes that (a) no member of its Board or Amicus Committee who voted to prepare this brief, or any attorney in the law firm or corporation of such a member, represents a party to this litigation in this matter, (b) no representative of any party to this litigation participated in the authorship of this brief, and (c) no one other than IPLAC, or its members who authored this brief and their law firms or employers, made a monetary contribution to the preparation or submission of this brief.

[3] In this Court, Respondent and Petitioner filed blanket consents for the filing of amicus briefs on February 1 and February 2, 2018, respectively.

federal bars throughout the United States, as well as the U.S. Patent and Trademark Office and the U.S. Copyright Office.[4] IPLAC (a not-for-profit) represents both patent holders and other innovators in roughly equal measure. In litigation, IPLAC's members are split roughly equally between plaintiffs and defendants. As part of its central objectives, IPLAC is dedicated to aiding the development of intellectual property law, especially in the federal courts. A principal aim is to aid in the development and administration of intellectual property laws and the manner in which the courts and agencies, including the United States Patent and Trademark Office, apply them. IPLAC is also dedicated to maintaining a high standard of professional ethics in the practice of law, providing a medium for the exchange of views on intellectual property law among those practicing in the field, and educating the public at large.

II. SUMMARY OF ARGUMENT

The damages section of the patent statute, 35 U.S.C. § 284, provides that "the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty . . . ." This Court has held that Section 284 is intended to place the patent owner in a position as good as he would have been if there had been no infringement. The appellate court deprived the Petitioner of its lawful remedy by incorrectly finding

[4] Although over 30 federal judges are honorary members of IPLAC, none of them was consulted or participated in any way regarding this brief.

that to do so would require extraterritorial application of U.S. patent law.

This case raises important issues of the application of the patent damages statute and the presumption against extraterritoriality. Here, there would be no extraterritorial application of U.S. law. Respondent is a U.S. company and its actions in the U.S. were held to infringe Petitioner's patents. No foreign entity was found to infringe the patents or required to pay damages for activities outside of the U.S.

These issues are important because of the global reach of U.S. based businesses. Patented products manufactured part by part, with the parts then sold in uncombined form to off-shore entities that assemble them, coupled with the requisite intent, is an infringement under § 271(f). The appellate court's categorical ruling precludes a patent owner from recovering its lost profits resulting from such infringement. That ruling also contravenes Section 284's mandate that a patent owner shall receive all of the damages adequate to compensate for the infringement.

IPLAC further supports the Petitioner because the Federal Circuit's failure to permit lost profits damages of the type at issue here may significantly impact U.S. patent owners and their sales and marketing activities world-wide.

III. ARGUMENT

A. Background Decisions

This case has been back and forth between this Court and the Federal Circuit, resulting in multiple decisions, dissents, and an order denying rehearing *en banc*.

1. After a jury trial, the district court entered a judgment that Respondent ION infringed claims of the asserted patents under 35 U.S.C. §§ 271(f)(1) and 271(f)(2), found no willful infringement, awarded damages of lost profits and a reasonable royalty as found by the jury. The lost profits award involved profits on activities that occurred outside the United States.

2. On July 2, 2015, in *WesternGeco LLC v. ION Geophysical Corp.*, 791 F.3d 1340 (Fed. Cir. 2015) ("*WesternGeco – I*"), the Federal Circuit affirmed the judgment of infringement and concluded that the district court committed no error in finding no willful infringement. *Id.* at 1347-49, 1353-54. The court rejected, 2-1, the award of lost profits for infringement under 35 U.S.C. § 271(f) resulting from activities outside the U.S. because such an award would require applying § 271(f) extraterritorially. *Id.* at 1351. Regarding the majority's lost profits ruling, Judge Wallach dissented, noting that the infringing acts under § 271(f) occurred in the U.S. and that an "appropriate connection" existed between that domestic infringement and the resulting lost foreign sales. *Id.* at 1360.

3. On October 30, 2015, the Federal Circuit denied WesternGeco's petition for rehearing *en banc*. Pet.App. 176a-180a. Joined by Judges Newman and Reyna, Judge Wallach dissented from denial of that petition in relation to the lost profits issue for the reasons he provided in dissent in the previous panel decision. *Id.*

4. In February 2016, WesternGeco petitioned this Court for certiorari asking, among other things, that its petition be held until the Court announced its decision in *Halo Electronics v. Pulse Electronics*, 136 S. Ct. 579 (2016), argued three days earlier. The petition requested that the Court grant certiorari, vacate, and remand ("GVR") for further consideration if *Halo* did anything other than completely affirm the Federal Circuit's *Seagate* test for willful infringement. When this Court abrogated the *Seagate* test in deciding *Halo* on June 13, 2016, the Court issued the GVR order and remanded WesternGeco's case to the Federal Circuit. 136 S. Ct. 2486 (2016).

5. After remand, on September 21, 2016, the Federal Circuit issued its second opinion *WesternGeco LLC v. ION Geophysical Corp.*, 837 F. 3d 1358 (Fed. Cir. 2016) ("*WesternGeco – II*"). In that opinion, the court vacated the district court's finding of no willful infringement and remanded that issue to the district court for consideration under the *Halo* standard. On all other issues, including the non-availability of lost profits, the court reinstated its earlier opinion. *Id.* Regarding the majority's refusal to award lost profits, Judge Wallach again dissented. *Id.* at 1365-69.

B. Congress Explicitly Made Extraterritorial Activities Part of Several of the Patent Statues

Congress defined patent infringement in 35 U.S.C. § 271. While Congress has limited certain portions of the statute to activities occurring solely within the U.S., it has expressly covered, in other portions of the statute, activities in the U.S. coupled with activities in foreign countries.

On their face, activities that give rise to infringement defined in Sections 271(a)-(e), inclusive, are limited to actions occurring in the United States.

- Section 271(a) defines infringing activities to include (i) making, (ii) using, (iii) offering to sell, or (iv) selling any patented invention "within the United States," as well as (v) importing any patented inventions into the United States. 35 U.S.C. § 271(a).

- Section 271(b) defines inducement, without mention of location. However, the predicate for infringement is § 271(a), which focuses on activity in the U.S.

- Section 271(c) addresses contributory infringement, and requires an offer to sell, a sale, or importation of a specified component within the U.S. Therefore, extraterritorial activities are not covered.

- Section 271(d) places limits on infringement under §§ 271(a), (b) and (c).

- Section 271(e) addresses activities occurring within the U.S. with regard to drugs or biological products, *i.e.*, unique situations not present here.

On the other hand, both Sections 271(f), which is relevant here, and 271(g) explicitly address extraterritorial activities.

- Section 271(f) is directed to those who would otherwise supply all or a substantial portion of the components of a patented invention in or from the U.S., with the components then assembled outside of this country, just to avoid infringement. On its face, § 271(f) requires significant activity in this country as a *sine qua non* of patent infringement.

- Section 271(g) extends liability to the importation, offers to sell, sales, or uses of a product within the U.S., where the product is made outside the U.S. by a process patented in the U.S. Again, no infringement takes place unless a significant act is performed in this country. By itself, performing the patented process entirely outside of the U.S. is not considered infringement at all.

C. Because Infringement Occurred in the United States, Section 271(f) Does Not Prohibit the Court from Considering Foreign Activities in Measuring Appropriate Damages

Sections 271(f)(1) and 271(f)(2) form the basis for the infringement judgment affirmed by the Federal Circuit. Together, those sections provide that any person who supplies from the United States in an uncombined manner: (i) all or a substantial portion of the components of a patented invention (§ 271(f)(1)), or (ii) any component of a patented invention that is especially made or especially adapted for use in the invention and is not a staple article of commerce (§ 271(f)(2)), shall be liable as an infringer if the components or component become combined outside of the United States in a manner that would infringe the patent if such combination had occurred in the United States.

ION's infringement of WesternGeco's patents occurred in the United States. ION does not dispute that it manufactured components of the patented sensor systems in the U.S. and then exported them to foreign countries where such components were combined. That combination resulted in the jury's verdict of infringement of the four asserted patents under both 35 U.S.C. §§ 271(f)(1) and 271(f)(2). Pet.App. 170a-171a. (Because the district court held on summary judgment that ION infringed claim 18 of the '520 patent under 35 U.S.C. § 271(f)(1), that claim was before the jury only as to infringement under 35 U.S.C. § 271(f)(2). Consequently, in the district court, all of the asserted claims were held to have been infringed under each of these statutes. *WesternGeco – I,* 791 F.3d at 1343-44.) The Federal Circuit unanimously affirmed the § 271(f)(2) infringement findings, *id.* at 1354, and ION did not petition this Court for review of them.

As to damages, the jury awarded WesternGeco lost profits of $93,400,000 and a reasonable royalty of $12,500,000. On appeal, ION did not challenge the reasonable royalty award but did challenge the "award of lost profits resulting from lost contracts for services to be performed abroad." *Id.* at 1349. On this issue, the majority held that "lost profits cannot be awarded for damages resulting from these lost contracts." *Id.* Judge Wallach dissented from the majority's lost profits holding and would have permitted such lost profits. *Id.* at 1354-1364.

Although the infringement in this case indisputably occurred in the United States, the Federal Circuit devised a rigid, *per se* rule precluding recovery of lost profits damages caused by infringement under § 271(f) if those damages arose outside of the U.S. The Federal Circuit misconstrues and misapplies the clear and unambiguous language of § 271(f) and the reasons why Congress enacted that statute. Rather than treating § 271(f) as a separate, stand-alone liability statute, the court read that section as identical to §§ 271(a) – (b) in territorial scope. But, that conclusion is erroneous because § 271(f) clearly states that certain actions occurring within the United States coupled with activities occurring outside the United States will give rise to infringement liability within the U.S.[5]

There is no question that ION's infringement under Section 271(f) required consideration of actions both in the U.S. and outside the U.S. That is what Sections 271(f)(1) and 271(f)(2) demand and that is what the jury found. The question to be answered is the scope of damages available to WesternGeco for that infringement.

The answer to that question is found in Section 284, which plainly provides that a successful patent owner "shall" recover "damages adequate to compensate for the infringement," with no statutory

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[5] Section 271(f) states:

> "(1) Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.
>
> (2) Whoever without authority supplies or causes to be supplied in or from the United States any component of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial noninfringing use, where such component is uncombined in whole or in part, knowing that such component is so made or adapted and intending that such component will be combined outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer."

restriction on where those damages are deemed to have occurred, thus ensuring that the infringer pays for tort it has committed. *Cf. General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654-55 (1983) ("Congress sought [by Section 284] to ensure that the patent owner would in fact receive full compensation for '*any damages*' he suffered as a result of the infringement," emphasis in original, quoting H.R. Rep. No. 1587, 79th Cong., 2d Sess. 1-2 (1946)). Indeed, the Federal Circuit itself has embraced this conclusion. *King Instruments Corp. v. Perego*, 65 F.3d 941, 947 (Fed. Cir. 1995) ("Section 284 imposes no limitation on the types of harm resulting from infringement that the statute will redress. The section's broad language awards damages for any injury as long as it resulted from the infringement."). One manner of determining those damages is a lost profits analysis. Among other things, this analysis requires evidence on the amount of infringing sales made by the defendant so that the patent owner plaintiff can show the profits it would have received had it made those sales.

The foreign activities here resulted in the sales upon which WesternGeco based its lost profits damages. The majority concluded that if an award of lost profits was measured by activity occurring in a foreign country that would give an extraterritorial effect to the patent statute. *WesternGeco – I*, 791 F.3d at 1349-51. Specifically, the Federal Circuit held that "[j]ust as the United States seller or exporter of a final product cannot be liable for use abroad, so too the United States exporter of component parts cannot be liable for use of the infringing article abroad." *Id.* at 1351. In so holding, the majority erred.

Of particular relevance to the present case, both this Court and the Federal Circuit have relied at least in part, on foreign sales in the calculation of damages based on domestic infringement. For example, in *Goulds' Mfg. Co. v. Cowing*, 105 U.S. 253 (1881), the Court included the sale of pumps used in both the U. S. and Canada as a basis for the lost profits damage calculations. Similarly, in *R.R. Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506, 1519 (Fed. Cir. 1984), the Federal Circuit held that "the award includes royalties for 1,671 carsets sold to foreign customers for installation in truck assemblies in foreign countries." The court further held that infringement was complete when the carsets were made in the U.S., and that "[w]hether those carsets were sold in the U.S. or elsewhere is therefore irrelevant." *Id*.

This precedent establishes that foreign activities may be considered in relation to damage calculations, provided there is a connection between those foreign activities and instances of domestic infringement. These considerations follow from § 284's express requirement that a court "*shall* award the claimant damages *adequate to compensate for the infringement*," 35 U.S.C § 284 (emphasis added), along with this Court's recognition that when promulgating § 284, Congress sought to ensure that the patent owner would receive full compensation for any damages arising from the infringement. *General Motors Corp.*, *supra*, 461 U.S. at 654–55.

When determining lost profits, the patent statutes provide that an issued patent has "the attributes of personal property." 35 U.S.C. § 261. Patent infringement is a tort. *See*, *e.g.*, *Schillinger v.*

United States, 155 U.S. 163 (1894). Thus, the traditional "but for" tort law test is useful in determining the amount of damages. In tort law, compensatory damages are used to put the injured party in the same position she would have been had the tort not been committed. The Federal Circuit too has recognized this principle. *Mentor Graphics Corp. v. Eve-USA, Inc.,* 851 F.3d 1275, 1284 (Fed. Cir. 2017) ("Compensatory damages are a staple across most every area of law. And compensatory damages under the patent statute, which calls for damages adequate to compensate the plaintiff for its loss due to the defendant's infringement, should be treated no differently than the compensatory damages in other fields of law." Citing *Livesay Window Co. v. Livesay Indus., Inc.,* 251 F.2d 469, 471 (5th Cir. 1958)). This Court has noted that the "but for" damages a patentee must establish answer the question "had the Infringer not infringed, what would Patent Holder-Licensee have made?" *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 507 (1964), quoting *Livesay Window*, *supra*, 251 F.2d at 471. The patent damages statute is consistent with the damages approach taken in tort law.

At trial, the parties addressed lost profits by following the "but for" approach laid out 40 years ago in *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1156 (6th Cir. 1978). As the district court noted, the evidence presented to the jury "satisfies the *Panduit* test, which creates a presumption of 'but for' causation when met." *WesternGeco L.L.C. v. ION Geophysical Corp.*, 953 F.Supp.2d 731, 756 (S.D.Tx. 2013). The long accepted *Panduit* test requires the patent owner to prove:

(i) demand for the patented product, (ii) absence of acceptable non-infringing substitutes, (iii) the patent owner's manufacturing and marketing capability to exploit the demand, and (iv) the amount of the profit the patent owner would have made. *Panduit*, 575 F.Supp.2d at 1156; *see e.g., State Industries, Inc. v. Mor-Flow Industries, Inc.*, 883 F.2d 1573, 1577 (Fed. Cir. 1989) (referring to the *Panduit* test as a "standard way of proving lost profits" and stating that "we have accepted it as a nonexclusive standard for determining lost profits." Citations omitted); *Mentor Graphics, supra,* 851 F.3d at 1284-85 (The *Panduit* test is "[o]ne 'useful but nonexclusive' method to establish the patentee's entitlement to lost profits. . ." (citations omitted).

The Federal Circuit did not address the evidence that the district court held supported a lost profits award under *Panduit*; instead, the appellate court found that an award of lost profits based on foreign activity would be an extraterritorial application of the patent laws.

But, the patent damage statute has no express territorial limitation. Rather the statute is aimed at addressing the amount of recovery that a successful patent owner "shall" receive. Had Congress wanted to limit the application of Section 284 to events occurring only in the U.S., it could have amended that statute at the same time it enacted Section 271(f) in response to the Court's decision in *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972). That decision held that under the infringement statutes applicable then, infringement was avoided if parts of a patented product were shipped to foreign countries where they were then combined to form the patented product. But Section 271(f) nullified the effect of *Deepsouth*.

Congress, however, did not amend the damages Section 284 to add a territorial limitation, even though Section 271(f) envisioned that there would be activity in foreign countries that would result in an infringement within the U.S. The Federal Circuit's prohibition of applying Section 284 to foreign activities, in connection with Section 271(f) infringement, negates Section 271(f), and will, if this Court affirms, require a Congressional do-over to ensure that the full scope of Sections 271(f) and 284 is available to patent owners.

The Court pre-saged the question presented here in *eBay Inc. v. MercExchange LLC*, 547 U.S. 388 (2006), which addressed the appropriateness of the Federal Circuit's unique "general rule" regarding issuance of permanent injunctions, ultimately reversing the court and finding that the principles of equity apply to issuance of injunctions in patent infringement matters. *eBay*, 547 U.S. at 393-94. There, the Court stated:

> To be sure, the Patent Act also declares that "patents shall have the attributes of personal property," § 261, including "the right to exclude others from making, using, offering for sale, or selling the invention," § 154(a)(1). According to the Court of Appeals, this statutory right to exclude alone justifies its general rule in favor of permanent injunctive relief. 401 F. 3d

> at 1338. *But the creation of a right is distinct from the provision of remedies for violations of that right.* (*Id.* at 392, emphasis added)

Here, ION's violation of Section 271(f) created the WesternGeco's right to recover damages under the distinct damages statute, Section 284. By appreciating this distinction between liability and damages, and that Section 271(f) tied domestic infringement to additional activities occurring outside the U.S., there is no impermissible extraterritorial application of the U.S. patent laws. Here, the lost profits outside the U.S. that are sufficiently related to the domestic infringement can be used to determine the amount of damages adequate to compensate WesternGeco for infringement of its patents. *WesternGeco – I*, 791 F.3d at 1354-56, Judge Wallach dissenting-in-part; *WesternGeco – II*, 837 F.3d at 1365-67, Judge Wallach dissenting-in-part.

Where the majority strayed was in failing to recognize the distinction between liability and damages. The liability judgment, affirmed by the Federal Circuit, was based solely on ION's actions in the U.S. with no extraterritorial application of U.S. law. Had the court appreciated the distinction between liability and damages, it undoubtedly would have applied the patent damages statute in the traditional manner. That statute mandates that a successful patent owner "shall" be awarded "damages adequate to compensate for the infringement." 35 U.S.C.§ 284.

D. The Federal Circuit's Refusal to Permit Lost Profits for Section 271(f) Liability Will Have a Significant Adverse Impact on U.S. Businesses

The Federal Circuit's decision is likely to have a significant adverse impact on patenting and global trade practices.

The *quid pro quo* for obtaining a U.S. patent is the disclosure of the invention "in such full, clear, concise, and exact terms as to enable any person skilled in the art . . . to make and use the same . . ." 35 U.S.C. § 112(a). Patent applicants and owners recognize that the detailed nature of these disclosures allows the public to understand the inventions. The disclosure also advances science and technology by encouraging others to improve the disclosed inventions or to devise approaches that might avoid infringement but be competitive with the patented invention.

If allowed to stand, the Federal Circuit's decision of no lost profits damages for a Section 271(f) infringement will cause patent applicants and patent owners having an international business reach to rethink the desirability of seeking and obtaining patents. In particular, there are classes of inventions in which the reliance on trade secret laws and confidentiality (*i.e.*, non-disclosure) agreements may be used to keep the details of the inventions out of the public domain while affording the owners a distinct competitive advantage that other companies could not match. Taking this approach could be beneficial to the owner of the invention, but detrimental to the public at large. Ensuring that the patent owner can obtain its proven lost profits damages for Section 271(f) infringements incentivizes inventors and businesses to seek patents and disclose the details of their inventions to the public.

Similarly, a company having an international business and a patent portfolio covering the products it sells may have to consider whether the Federal Circuit's decision, if affirmed, will affect the monetary value of that portfolio. That company may not be able to obtain the amount of damages adequate to compensate for the Section 271(f) infringement.

Finally, the appellate court's decision will incentivize some companies to manufacture component parts in the U.S. and ship them off-shore for assembly, knowing that any damages that might be levied for a Section 271(f) infringement would exclude any of the patentee's lost profits. Surely, that is *not* the intent of the patent damages statute. Under Section 284, a patent owner shall be awarded "damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use of the invention by the infringer." The appellate court's ruling improperly makes a reasonable royalty award the "ceiling" and not the "floor" under Section 284.

In any event, U.S. and foreign attorneys aware of the Federal Circuit's decision will likely be asked to advise U.S. and foreign clients as to what can be done in order to comply with or avoid the results of that decision, either as a patent owner or a potential Section 271(f) infringer. A reversal of the appellate court's decision will affirmatively reinforce the patent damages statute's requirement that the patent owner "shall" recover "damages adequate to compensate for the infringement . . ." 35 U.S.C § 284.

IV. CONCLUSION

For the foregoing reasons, IPLAC respectfully suggests that the Court reverse the Federal Circuit and, on the question presented, hold that proven lost profits damages are recoverable for patent infringement found under 35 U.S.C. § 271(f), irrespective of where those damages are determined to have arisen or occurred.

Respectfully submitted,

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