No. 20-362

In The
Supreme Court of the United States

COCHLEAR CORPORATION, et al.,

Petitioners,

v.

ALFRED E. MANN FOUNDATION
FOR SCIENTIFIC RESEARCH, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

BRIEF *AMICI CURIAE* OF INTELLECTUAL PROPERTY PROFESSORS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES

INTEREST OF *AMICI*

Amici curiae are intellectual property law professors throughout the United States. Appendix A includes a list of the *amici*. We have considerable experience with both patent practice and patent doctrine. *Amici* have no personal interest in the outcome of this litigation, but we share a professional interest in seeing that the patent laws are applied in such a way as to provide adequate incentives for innovation.[1]

SUMMARY OF ARGUMENT

This Court should grant certiorari on question 2 to resolve the circuit split on how to treat general jury damages verdicts when the underlying verdict is overturned in part. It should reject the Federal Circuit's inconsistent position that every patent must have monetary value when patentees assert them, but that the same patents are presumed to have no value when the jury verdict based on those patents is overturned.

[1] *Amici* certify that no party or party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief, and no person or entity—other than *amici* or their counsel—authored the brief or made a monetary contribution to its preparation or submission. All parties have been given ten days' notice and have consented to the filing of this brief.

ARGUMENT

This Court should grant certiorari on question 2. As the petition notes, there is a split among the circuits on how to treat general jury verdicts when part of the basis for that verdict is overturned on appeal. In addition to the split identified in the petition, the Federal Circuit has issued contradictory opinions on the question of whether a damages award can be sustained when some but not all the findings of patent infringement are reversed on appeal. *Compare Verizon Servs. Corp. v. Vonage Holdings Corp.*, 503 F.3d 1295, 1310 (Fed. Cir. 2007) ("where the jury rendered a single verdict on damages, without breaking down the damages attributable to each patent, the normal rule would require a new trial as to damages."); *Accentra, Inc. v. Staples, Inc.*, 500 Fed. Appx. 922, 931 (Fed. Cir. 2013) (same); *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 849–50 (Fed. Cir. 2010), *aff'd*, 564 U.S. 91 (2011) (same); *NTP, Inc. v. Research In Motion, Ltd.*, 418 F.3d 1282, 1326 (Fed. Cir. 2005) (same); *Omega Patents, LLC v. CalAmp Corp.*, 920 F.3d 1337 (Fed. Cir. 2019) (same) *with WesternGeco LLC v. Ion Geophysical* Corp., 913 F.3d 1067, 1074 (Fed. Cir. 2019) (holding that even if only one of several claims once shown to a jury as a basis for damages remains valid, so long as that claim was shown to the jury to be essential to those damages, then any error in instruction is harmless, and the entire award of lost profits can be sustained); *Avid Tech., Inc. v. Harmonic, Inc.*, 812 F.3d 1040, 1047 (Fed. Cir. 2016) (same); *cf. Whitserve LLC v. Computer Packages, Inc.*, 694 F.3d 10 (Fed. Cir. 2012) (affirming a general

jury verdict after reversing the jury's finding of liability with respect to certain claims of a patent but not an entire patent).

In resolving that conflict, this Court should reaffirm its traditional approach to general jury verdicts, which requires a retrial when an essential part of the underlying verdict is reversed and the court cannot know how much of the verdict is attributable to that error. *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 312–13 (1986) (where "the verdict does not reveal the means by which the jury calculated damages," an error in one theory supporting the verdict " 'is difficult, if not impossible, to correct without retrial, in light of the jury's general verdict' "); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 482 n.3 (2008) (*quoting Greenbelt Co-op. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 11 (1970) ("when it is impossible to know, in view of the general verdict returned whether the jury imposed liability on a permissible or an impermissible ground, the judgment must be reversed and the case remanded.")).

That approach is particularly appropriate in patent cases like this one. It will almost never be possible to tell how much of a general verdict is attributable to an invalidated patent in cases where more than one patent is at issue. The Federal Circuit has repeatedly held that every patent has value in the form of a reasonable royalty. *See Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1327–28 (Fed. Cir. 2014). In *Apple*, the Court overturned the district court's conclusion that a patentee could not show infringement because its expert

evidence was excluded. The Court started from the presumption that "a holder of a valid and infringed patent has inherently suffered legal damage at least to the extent of a lost license royalty opportunity." *Id*. at 1330 (quoting 7 Donald S. Chisum, *Chisum on Patents* § 20.07[3][a] (2011)). It went on to require affirmative evidence in the record that a patent was valueless before treating the value as zero:

> [T]here is nothing in the record suggesting that Apple would have been willing to accept no payment for Motorola's infringement. Nor is there any evidence that, at the time of infringement, Motorola concluded that the '647 patent had no value.

Id. at 1327–28.

Put another way, under Federal Circuit law the proper damage award for any patent is never zero. The logical corollary of that conclusion is that eliminating a patent from the case must necessarily reduce the jury's general damages award to some extent. But because we cannot know how much it should be reduced, that fact will ordinarily require a new trial. The error will never be harmless, and there is no way to know how much harm it causes. But under settled Federal Circuit law we know it cannot be zero.

The fact that witnesses for both parties testified to a single damages number for the case as a whole does not change that result. It is not surprising or problematic that a party will present a single damages number to a jury in a multi-patent case. When the jury

evaluates the patents, it can presumably factor its own determinations of validity and infringement into its damages calculation. But when the jury errs in determining validity or infringement a recalculation of damages based on the correct legal ruling is required.

The '691 patent, if it alone had been valid and infringed, would surely have generated some royalty. The jury's finding that it was infringed means that under the law the jury was required to attribute some royalty payment to it. But the jury's damages award was a general verdict, which means that we cannot know how much of its damages award the jury attributed to the '691 patent. Now that that patent has been invalidated, a new trial is warranted on the issue of damages.

More generally, even if an error in a general jury verdict outside patent law can sometimes be harmless, patent cases are different, for the very reason that the law says there must be damages attributable to each finding of infringement, even if multiple patents cover the same product.

Alternatively, perhaps the flaw lies in the Federal Circuit's rule that patents must always have value. This Court has found the violation of other rights to be compensable only with nominal damages of $1 when injury is not proven. *Carey v. Piphus*, 435 U.S. 247 (1978). But even if this Court were to reverse course and adopt some form of harmless error analysis, it should make clear that it was doing so because the Federal Circuit's "all patents have value" rule is wrong.

In neither event should it let the current "heads I win, tails you lose" policy stand.

The lower courts have understandably striven to avoid retrials when possible. The best practice to reduce the inefficiency of having to hold a new trial is for courts to require or encourage special verdict forms breaking down damage awards in cases that include multiple claims. *See* Vanessa L. Otero, *How Much is Really at Stake? Damages Statutes Collide in Multiple IP Litigation*, 96 J. Pat. & Trademark Ofc. Soc'y 346, 368–70 (2014). But it does not follow, as the Federal Circuit held here, that a party who does not insist on a special verdict form has somehow waived its rights to the proper application of the law of general verdicts. To the contrary, any party that accepts a general verdict also accepts the risk of a new trial on damages if the verdict is reversed in part. It is Mann, not Cochlear, that must bear that burden here. This Court should accordingly resolve a second split in the circuits by holding that a party does not waive its rights to correct an erroneous jury verdict merely because it accepted a general verdict form. Accepting a general verdict form means accepting the consequences of declining to ask the jury for detailed findings. One of those consequences is that if the underlying verdict is reversed in part, a retrial on damages is required.

CONCLUSION

This Court should grant the petition for certiorari on question 2.[2]

Respectfully submitted,

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[2] *Amici* take no position on the other questions presented.