

2015-1914, -1919

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

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ALTERA CORPORATION, XILINX, INC.,

*Plaintiffs-Appellants,*

v.

PAPST LICENSING GMBH & CO. KG,

*Defendant-Appellee.*

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*Appeals from the United States District Court for the Northern District of  
California in Case Nos. 5:14-cv-04794-LHK and 5:14-cv-04963-LHK,  
Judge Lucy H. Koh*

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**BRIEF FOR AMICI CURIAE AO KASPERSKY LAB,  
LIMELIGHT NETWORKS, INC., QVC, INC., SAS INSTITUTE  
INC., SYMMETRY LLC, AND VIZIO, INC. IN SUPPORT OF  
PLAINTIFF-APPELLANT XILINX, INC.**

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DECEMBER 21, 2015

**CERTIFICATE OF INTEREST**

Counsel for *amici* certifies the following:

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

AO Kaspersky Lab, Limelight Networks, Inc., QVC, Inc., SAS Institute Inc., Symmetry LLC, and VIZIO, Inc.

2. The name of the real party in interest represented by us is:

N/A

3. All parent corporations and any public companies that own 10 percent or more of the stock of the parties represented by me are:

AO Kaspersky Lab is a wholly owned subsidiary of Kaspersky Lab Ltd.

Investment entities affiliated with Goldman, Sachs & Co. own over 10 percent of Limelight Networks, Inc.

QVC is a wholly owned subsidiary of Liberty Interactive Corporation.

SAS Institute Inc. and Symmetry LLC have no parent corporations, and there are no public companies that own 10% or more of them.

VIZIO, Inc. does not have any parent corporations. AmTRAN Technology Co., Ltd., a publicly traded Taiwanese company, owns 10 percent or more of VIZIO, Inc.'s stock.

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

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*Amici curiae* AO Kaspersky Lab, Limelight Networks, Inc., QVC, Inc., SAS Institute Inc., Symmetry LLC, and VIZIO, Inc. (collectively “*Amici*”) respectfully submit this brief in support of Plaintiff-Appellant Xilinx, Inc. (“Xilinx”).

### **INTEREST OF AMICI CURIAE<sup>1</sup>**

*Amici*, their affiliates, or the industries they represent have all been subjected to frequent patent licensing demands from foreign patent assertion entities, left with no viable way to “clear the air” of these allegations, and then sued in distant forums that are unrelated to the alleged infringement and the actions that gave rise to the suit. *Amici* thus have a substantial interest in recognizing personal jurisdiction over such foreign PAEs.

### **SOURCE OF AUTHORITY TO FILE**

This brief is timely filed under Federal Rule of Appellate Procedure 29(e). Counsel for Xilinx and Altera Corporation consent to this filing. Counsel for Papst Licensing GmbH & Co. KG also consents to this filing, although it opposes the position advanced. The filing is thus proper under Federal Rule of Appellate Procedure 29(a).

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(c), *amici* state: 1) no party’s counsel authored this brief in whole or in part; 2) no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and 3) no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

## **ARGUMENT**

The district court dismissed this case for lack of personal jurisdiction. In doing so, the court considered each of defendant Papst Licensing's contacts with California in isolation. To each, the court applied an overly formalistic framework derived from its reading of this Court's *Red Wing Shoe* line of cases. Such an approach does not comport with this Court's and the Supreme Court's personal jurisdiction case law and unjustly favors patent assertion entities.

### **I. DENYING PERSONAL JURISDICTION IN CASES SUCH AS THIS WOULD UNJUSTLY FAVOR PATENTEES WHOSE SOLE BUSINESS IS LICENSING AND ENFORCEMENT.**

Some patent assertion entities already leverage strategic advantages over alleged infringers. Such "PAEs" generally face little risk because they are immune to counterclaims of infringement, have substantially lower discovery costs, and at most stand to lose a patent covering not products, but settlement receipts. *See Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1327–28 (Fed. Cir. 2011). Defending against allegations of patent infringement costs companies significant sums. Even where less than \$1,000,000 is at risk, mounting a defense can cost at least \$700,000. These costs increase to \$2,000,000 or even \$5,500,000 or more, depending on how much is at risk. AMERICAN INTELLECTUAL PROPERTY LAW ASS'N, REPORT OF THE ECONOMIC SURVEY 34, I-129–I-132 (2013).

Some PAEs regularly leverage this asymmetrically high-cost of litigation to force settlements by threatening litigation but offering a way out by paying a nuisance-value settlement. Other than litigation, these threats and the resulting negotiations are often a PAE's primary (or even sole) business activity. By upholding the district court's decision, this Court would further solidify this PAE business model and encourage foreign PAE activity by allowing such activity to continue with minimal risk of facing declaratory judgment actions in the United States.

**A. The district court's framework may immunize patent assertion entities from suit.**

Some PAEs often run their business by sending threatening letters, negotiating licenses, and litigating. Their business model requires no additional contacts with a forum that would bolster its jurisdictional contacts. If a PAE acts against a California company, for example by sending threatening letters, and in doing so creates an Article III case or controversy sufficient for declaratory judgment jurisdiction, then the Court should consider where those acts took place and how important they were to creating the subject matter jurisdiction. In that scenario, a campaign directed at a California target may make up all of the PAE's business regarding that target. And not only might that be the full extent of the PAE's business operations for that target, but that kind of interaction may well make up the entire nature of the PAE's operations. The PAE's contacts with the target's home state should be viewed in that context.

Under the district court’s narrow framework, however, a PAE may freely engage in its only modes of operation and target businesses in every corner of the United States without fear of suit in any of those places. Again, that framework would exclude all the contacts that created the subject matter jurisdiction from consideration for purposes of personal jurisdiction. And thus, with minimal effort, a PAE could structure its businesses to almost entirely avoid declaratory judgment actions,<sup>2</sup> while leaving it largely free to sue for infringement where and when it pleases.

The district court’s approach especially insulates foreign companies, like Papst Licensing, from declaratory judgment actions. Yet, foreign companies have become increasingly active in U.S. litigation. Marketa Trimble, *Foreigners in U.S. Patent Litigation: An Empirical Study of Patent Cases Filed in Nine US Federal District Courts in 2004, 2009, and 2012*, 17 Vand. J. Ent. & Tech. L. 175, 198 (2014) (discussing the “rapid growth” in foreign plaintiff filed suits, with some districts seeing increases of 675%).

**B. The district court’s framework frustrates the purpose of the Declaratory Judgment Act.**

The Declaratory Judgment Act sought to restore balance between alleged infringers and putative plaintiffs. Before the Act, such alleged infringers had no

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<sup>2</sup> As discussed below, certain non-resident patentees are subject to suit in the Eastern District of Virginia. *See* 35 U.S.C. § 293.

cause of action and no way to “clear the air”:

Before the [Declaratory Judgment] Act, competitors victimized by [scare-the-customer-and-run tactics] were rendered helpless and immobile so long as the patent owner refused to grasp the nettle and sue. After the Act, those competitors were no longer restricted to an *in terrorem* choice between the incurrence of a growing potential liability for patent infringement and abandonment of their enterprises; they could clear the air by suing for a judgment that would settle the conflict of interests.

*Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1360 (Fed. Cir. 1998) (quoting *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 735 (Fed.Cir.1988)); *see also* Lisa A. Dolak, *Power or Prudence: Toward A Better Standard for Evaluating Patent Litigants’ Access to the Declaratory Judgment Remedy*, 41 U.S.F. L. Rev. 407, 408-09 (2007) (discussing Congress’s intent to provide a cause of action to alleviate uncertainty). Congress thus created an important countervailing force to guard against pre-litigation abuse and the destructive forces of uncertainty.

Categorically excluding the only types of contacts required for an entity like Papst Licensing to do business frustrates Congress’s intent in passing the Declaratory Judgment Act. Remarkably under the district court’s approach, Xilinx may not sue to clear the air regarding a United States patent in the state where (i) it is located, (ii) all of its allegedly infringing activity took place, and (iii) all of the acts creating subject matter jurisdiction took place. This outcome denies accused infringers like Xilinx the benefits of the Declaratory Judgment Act.

**C. The district court’s framework leads to aggressive, one-sided forum shopping.**

Before the availability of the declaratory judgment action, alleged infringers faced aggressive forum shopping. Without a cause of action, alleged infringers could not sue, leaving patentees free to sue where, and when, they pleased. In passing the Declaratory Judgment Act, Congress sought to correct this. *See Adam D. Kline, Any Given Forum: A Proposed Solution to the Inequitable Economic Advantage That Arises When Non-Practicing Patent Holding Organizations Predetermine Forum*, 48 IDEA 247, 265 (2008) (“Congress provided for declaratory judgment actions to protect potential defendants from pre-litigation abuses, such as aggressive forum shopping, on the part of the putative plaintiff.”).

Forum shopping is both measurable and problematic. Patentees file far more suits in the Eastern District of Texas and Delaware than elsewhere, with 1,425 and 946 new suits respectively in 2014. Brian C. Howard, *Lex Machina, 2014 Patent Litigation Year in Review* at 5 (2015).

The framework that the district court adopted would largely eliminate the possibility of personal jurisdiction over many PAEs in declaratory judgment actions. This would leave the patentee free to choose the forum in every case. This rule again unnecessarily exacerbates the imbalance between alleged infringers and putative plaintiffs.

## **II. PERSONAL JURISDICTION IS APPROPRIATE UNDER THESE FACTS.**

The district court applied an overly formalistic framework to each of Papst Licensing's contacts based on its reading of this Court's *Red Wing Shoe* line of cases. While recognizing that cease and desist letters may establish minimum contacts, these cases further stand for the proposition that those letters cannot alone meet the reasonableness prong. But that strict approach may not fit into the Supreme Court's framework for analyzing personal jurisdiction issues.

### **A. The Supreme Court has articulated a flexible and adaptable framework for analyzing personal jurisdiction.**

As the Supreme Court stated 35 years ago, “[t]he limits imposed on state jurisdiction by the Due Process Clause . . . have been substantially relaxed over the years.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S. Ct. 559, 565 (1980). Much of this “relaxation” is tied to technological progress. *See Hanson v. Denckla*, 357 U.S. 235, 250–51 (1958) (“As technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome.”). The Court recognized in 1958 that technological progress necessarily alters the contours of what due process requires, and technological growth has only accelerated between then and now. *See Daimler*

*AG v. Bauman*, 134 S. Ct. 746, 753 (2014) (“[T]hat strict territorial approach yielded to a less rigid understanding, spurred by changes in the technology of transportation and communication, and the tremendous growth of interstate business activity.” (internal quotation marks omitted)); *World-Wide Volkswagen*, 444 U.S. at 293, 100 S. Ct. at 565 (“The historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided.”).

Technology has also made possible a robust patent monetization industry that operates in an increasingly interconnected and global market. A company like Papst Licensing can build an entire business model around investigating, purchasing, and attempting to license patents in California, thousands of miles away from its headquarters in Germany. In the face of such advancements, it is reasonable to expect personal jurisdiction requirements to evolve as well. But even under case law several decades old, there should have been personal jurisdiction here.

**B. The *Red Wing Shoe* line of cases support a finding of personal jurisdiction.**

The Federal Circuit applies a three-part test to determine if personal jurisdiction exists, asking whether “(1) the defendant purposefully directed its activities at residents of the forum state, (2) the claim arises out of or relates to the defendant’s activities with the forum state, and (3) assertion of personal jurisdiction is reasonable and fair.” *Elecs. For Imaging, Inc. v. Coyle*, 340 F.3d

1344, 1350 (Fed. Cir. 2003). “The first two factors correspond to the ‘minimum contacts’ prong of the *International Shoe* analysis, and the third factor with the ‘fair play and substantial justice’ prong.” *Id.*

In *Red Wing Shoe*, the Court considered the sufficiency of cease and desist letters to establish personal jurisdiction. *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355 (Fed. Cir. 1998). In that case, the patentee had sent three cease and desist letters, but otherwise, its only other relationship with the forum was that some licensees happened to do business there. While the letters were sufficient to establish minimum contacts, the Court held that jurisdiction would be unreasonable under the circumstances.

**1. Cease and desist letters alone are sufficient minimum contacts.**

The Supreme Court has long held that even a single contact is sufficient for personal jurisdiction. *See McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201 (1957); *see also Red Wing Shoe Co.*, 148 F.3d at 1359–60. In *Red Wing Shoe*, while the court ultimately declined to find personal jurisdiction, it recognized that cease and desist letters alone satisfied the minimum contacts requirement: “[C]ease-and-desist letters alone are often substantially related to the cause of action (thus providing minimum contacts) . . . .” *Red Wing Shoe*, 148 F.3d at 1360. While there are numerous other contacts here, Papst Licensing’s cease and desist letters relate directly to the cause of action and can alone

establish minimum contacts under *Red Wing Shoe*. (Joint Opening Brief at 17–23.)

**2. The assertion of personal jurisdiction is reasonable and fair under these facts.**

Exercising personal jurisdiction must also be reasonable. “Once the plaintiff has shown that there are sufficient minimum contacts to satisfy due process, it becomes defendants’ burden to present a ‘compelling case that the presence of some other considerations would render jurisdiction unreasonable.’”

*Elecs. For Imaging*, 340 F.3d at 1351–52 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 105 S. Ct. 2174, 2184 (1985)). “The reasonableness inquiry encompasses factors including (1) the burden on the defendant, (2) the interests of the forum state, (3) the plaintiff’s interest in obtaining relief, (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and (5) the shared interest of the several states in furthering fundamental substantive social policies.” *Id.* at 1352.

Despite finding the first two prongs presumably met, *Red Wing Shoe* declined to assert personal jurisdiction under the reasonableness prong. *Red Wing Shoe*, 148 F.3d at 1360 (“A better explanation for this court’s statement that cease-and-desist letters alone do not suffice to create personal jurisdiction lies in the second prong of the traditional Due Process inquiry.”). However, the Court provided little insight into its reasoning and never applied the Supreme Court’s

reasonableness factors. The court instead explained that its jurisdiction-limiting rule encouraged settlements. *See Red Wing Shoe*, 148 F.3d at 1361 (“Treating such hybrid cease-and-desist letters differently would also be contrary to fair play and substantial justice by providing disincentives for the initiation of settlement negotiations.”).

The *Red Wing Shoe* test improperly narrows the scope of the jurisdictional inquiry by failing to shift the burden to the defendant and failing to analyze any of the Supreme Court’s reasonableness factors. The Court has never overruled *Red Wing Shoe* but has attempted to flesh out its doctrine. For example, in *Breckenridge Pharmaceutical*, the Court discussed what “other activities” are sufficient to establish personal jurisdiction but otherwise did not provide any analysis under the last prong. *See Breckenridge Pharm., Inc. v. Metabolite Labs., Inc.*, 444 F.3d 1356, 1363 (Fed. Cir. 2006). Similarly, in *Avocent*, the Court reviewed its *Red Wing Shoe* line of cases and again reiterated that cease and desist letters alone fail to meet the reasonableness prong. *See Avocent Huntsville Corp. v. Aten Int’l Co.*, 552 F.3d 1324, 1333 (Fed. Cir. 2008). However, the Court did not further explain its reasoning, especially within the context of the Supreme Court’s case law.

The Supreme Court has required only that the defendant “should reasonably anticipate being haled into court there” for jurisdiction to be

reasonable. *Burger King*, 471 U.S. at 474, 105 S. Ct. at 2183 (internal quotation marks omitted). “When a defendant seeks to rely on the ‘fair play and substantial justice’ factor to avoid the exercise of jurisdiction by a court that otherwise would have personal jurisdiction over the defendant, ‘he must present a *compelling* case that the presence of some other considerations would render jurisdiction unreasonable.’” *Id.* at 477, 105 S. Ct. at 2185 (emphasis added). Such exceptions to jurisdiction are rare:

[D]efeats of otherwise constitutional personal jurisdiction are limited to the rare situation in which the plaintiff’s interest and the state’s interest in adjudicating the dispute in the forum are so attenuated that they are clearly outweighed by the burden of subjecting the defendant to litigation within the forum.

*Akro Corp. v. Luker*, 45 F.3d 1541, 1549 (Fed. Cir. 1995). However, as Xilinx and Altera discuss, these interests are strong, despite being overlooked. (Joint Opening Brief at 26–27.) Surely a PAE could reasonably expect to be haled into court in California when it reaches into California to engage in the sole function of its business. Specific jurisdiction is thus reasonable here, and the Court should thus revisit its application of *Red Wing Shoe* in such cases.

**C. Section 293 supports jurisdiction in other U.S. forums.**

Section 293 provides jurisdiction in the Eastern District of Virginia over foreign owners of United States patents who do not have an agent available in the United States who can be served process. 35 U.S.C. § 293. This provision is not

aimed at preventing declaratory judgment actions in otherwise proper jurisdictions. Indeed, it applies even where the holder of the U.S. patent has made no efforts to license and enforce the patent. *See id.* “[T]he statute represents an important Congressional judgment that in exchange for obtaining the benefits of a United States patent, it is appropriate to require foreign patentees to submit to broader jurisdiction in United States Federal Court than that to which they would otherwise be subject.” *Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations Found.*, 297 F.3d 1343, 1353 (Fed. Cir. 2002).

Thus where the foreign patentee is beyond the reach of United States courts, section 293 provides “the same jurisdiction to take any action respecting the patent or rights thereunder that it would have if the patentee were personally within the jurisdiction of the court.” Section 293 does not rule out personal jurisdiction elsewhere. If it did, foreign PAEs could forum shop by simply designating their agent within the US district of their choice, thus preemptively selecting the only US court they can be sued in.

**CONCLUSION**

For the foregoing reasons, *amici* respectfully submit that the judgment of the district court be reversed.

DATED: December 21, 2015

Respectfully submitted,

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

*Altera Corporation v. Papst Licensing GmbH & Co. KG*, 2015-1914, -1919

**CERTIFICATE OF SERVICE**

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

Counsel Press was retained by KILPATRICK TOWNSEND & STOCKTON LLP, counsel for *Amici Curiae* AO Kaspersky Lab, Limelight Networks, Inc., QVC, Inc., SAS Institute Inc., Symmetry LLC, and VIZIO, Inc. to print this document. I am an employee of Counsel Press.

On **December 21, 2015** counsel has authorized me to electronically file the foregoing **Brief** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including any of the following:

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Upon acceptance by the Court of the e-filed document, six paper copies will be filed with the Court within the time provided in the Court's rules.

December 21, 2015

/s/ Robyn Cocho  
Counsel Press

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 29(c)(7), I hereby certify that the body of this brief, beginning with page 1, and ending with the last line of the Conclusion on page 14, including headings, footnotes, and quotations, complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d). The brief contains 3000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in Times New Roman, size 14-point font.

DATED: December 21, 2015

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