

Case No. 2013-1564

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**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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SCA HYGIENE PRODUCTS AKTIEBOLAG  
and SCA PERSONAL CARE, INC.,

*Plaintiffs-Appellants,*

v.

FIRST QUALITY BABY PRODUCTS, LLC,  
FIRST QUALITY HYGIENIC, INC.,  
FIRST QUALITY PRODUCTS, INC.,  
and FIRST QUALITY RETAIL SERVICES, LLC,

*Defendants-Appellees.*

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Appeal from the United States District Court  
for the Western District of Kentucky  
in Case No. 10-cv-0122, Chief Judge Joseph H. McKinley, Jr.

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**BRIEF OF AMICI CURIAE ELECTRONIC FRONTIER FOUNDATION  
AND PUBLIC KNOWLEDGE IN SUPPORT OF  
DEFENDANTS-APPELLEES**

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April 23, 2015

**CERTIFICATE OF INTEREST**

Pursuant to Federal Circuit Rules 29(a) and 47.4, counsel for *Amici Curiae* certifies that:

1. The full names of the *amici* represented by me are:

Electronic Frontier Foundation and Public Knowledge

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:

N/A

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

None.

4. The name of all law firms and the partners or associates that appeared for the party or *amici* now represented by me in the trial court or are expected to appear in this Court is: Vera Ranieri, Electronic Frontier Foundation, San Francisco, California.

April 23, 2015

/s/ Vera Ranieri  
Vera Ranieri  
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Electronic Frontier Foundation &  
Public Knowledge

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**INTEREST OF *AMICI CURIAE***

*Amicus curiae* the Electronic Frontier Foundation (“EFF”) is a non-profit civil liberties organization that has worked for more than 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 22,000 dues-paying members have a strong interest in helping the courts and policy-makers strike the appropriate balance between intellectual property and the public interest. As part of its mission, EFF has served as *amicus* in many important copyright cases, including *UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F.3d 1006 (9th Cir. 2013); *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687 (7th Cir. 2012); and *Viacom Intern., Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

EFF has also served as *amicus* in many important patent cases, including *Alice Corp. Pty. Ltd. v. CLS Bank Int’l*, 134 S. Ct. 2347 (2014); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014); *Bilski v. Kappos*, 561 U.S. 593 (2010); *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007); and *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).<sup>1</sup>

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<sup>1</sup> Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, *amici* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Furthermore, no person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. *Amici* file this brief pursuant to this Court’s December 30, 2014 Order



*Amicus curiae* Public Knowledge is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. As part of this mission, Public Knowledge advocates on behalf of the public interest for a balanced patent system, particularly with respect to new and emerging technologies. Public Knowledge has previously served as *amicus* in key patent cases. *E.g.*, *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014); *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014); *Ultramercial, Inc. v. Hulu, LLC*, 772 F. 3d 709 (Fed. Cir. 2014).

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permitting the views of *amici* without motion or consent of the parties. Unless otherwise noted, web sites cited in this brief were last visited on April 22, 2015.

## INTRODUCTION

The laches doctrine has played a critical role in the functioning of patent law for decades. As this Court noted in *Aukerman*, laches has been “long recognized” as a defense to patent infringement claims. *A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1028 (Fed. Cir. 1992) (“*Aukerman*”). In patent cases, laches plays an important and narrowly tailored role to accommodate the “peculiar and special” circumstances around patents. *See id.* at 1040 (citation omitted).

Delay in bringing a lawsuit is generally understood to create the possibility of evidentiary prejudice, with the prejudice increasing with the passage of time. *See Galliher v. Cadwell*, 145 U.S. 368, 373 (1892) (laches solves “an inequity founded upon some change in the condition or relations of the property or the parties”). In patent infringement actions, unlike in copyright infringement actions, evidentiary prejudice disproportionately harms those accused of infringement, due to the elements of, and defenses to, patent infringement and the legal burdens of proof that both the rightsholder and those accused of infringement must meet. These harms are particularly felt when a patent defendant is accused of infringing a patent relating to software, where often the best defense relies on prior art that is more likely to become difficult or impossible to find after the passage of time, especially compared to prior art patents and traditional printed publications.

Thus, in response to this Court's first question in its December 30, 2014 *en banc* order, *Petrella*<sup>2</sup> does not overrule *Aukerman*. More specifically, the policy discussion in *Petrella* does not apply to the Patent Act.<sup>3</sup>

## ARGUMENT

### **I. Laches in Patent Cases Is Necessary to Ensure Greater Fairness in Validity Determinations.**

By demanding patent owners bring their cases without undue delay, the laches doctrine promotes greater fairness in determinations of patent validity, thus demonstrating why laches continues to be a vital doctrine to patent law today. Determinations of validity are highly time-dependent, relying on evidence that is easily attenuated or lost over the passage of time. Undue delay would thus make invalidity harder to prove, unfairly harming both the accused infringer and the public at large. Laches is needed to help prevent such harms.

#### **A. Evidence of Invalidity Relating to Prior Art Is Time-Dependent and Thus Harder to Substantiate After Delay**

Invalidity is often a key disputed issue in determining liability for patent infringement. But over time, evidence becomes more difficult to locate or loses its temporal placement. This can lead to inequity, as the patent owner might be able to successfully assert an otherwise non-novel or obvious patent solely due to the loss

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<sup>2</sup> *Petrella v. Metro-Goldwyn-Mayer*, 134 S. Ct. 1962 (2014) ("*Petrella*").

<sup>3</sup> *Amici* do not address the second question posed by the Court's December 30, 2014 Order.

of evidence that occurs through the passage of time, resulting in undeserved damages awards or settlements.

For example, evidence of prior use is often difficult to find given the loss of records that occurs over time. *Cf. Woodland Trust v. Flowertree Nursery Inc.*, 148 F.3d 1368, 1371 (Fed. Cir. 1998) (discussing the necessity of corroborating oral testimony in patent law). If the invalidating prior use is one made by a company that has since gone bankrupt—an easy possibility during the 20-year lifespan of a patent—records may be destroyed or become impossible to find or authenticate.<sup>4</sup> Indeed, even for companies that are successful, records are regularly destroyed pursuant to standard document retention policies. LexisNexis Discovery Services, *Elements of a Good Document Retention Policy 3* (2007) (advising companies to limit data retention to no longer than is necessary under statute, or as needed for business purposes, in order to limit liability), available at [http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI\\_WP\\_ElementsOfAGoodDocRetentionPolicy.pdf](http://www.lexisnexis.com/applieddiscovery/lawlibrary/whitePapers/ADI_WP_ElementsOfAGoodDocRetentionPolicy.pdf).

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<sup>4</sup> Many “dotcom bubble” companies, such as Pets.com, quickly went into relative obscurity, but their business models are now used by modern, profitable companies. See Robert McMillan, *Turns Out the Dot-Com Bust’s Worst Flops Were Actually Fantastic Ideas*, *Wired* (Dec. 8, 2014), <http://www.wired.com/2014/12/da-bom/>. Failed startup companies from that era are unlikely to have meticulously saved documents—that is, if they still exist—but their innovations could easily be relevant prior art to patents that are asserted today.

Similarly, whether a particular publication was publicly available so as to qualify as a printed publication under 35 U.S.C. § 102 also becomes harder to prove with the passage of time. Witnesses may not be able to accurately recall whether a publication was easily accessible, or documentation may be unable to show that the publication was distributed without restrictions. *See SRI Int'l, Inc. v. Internet Security Systems, Inc.*, 511 F.3d 1186, 1194 (Fed. Cir. 2008) (discussing whether documents on a company's Internet-accessible FTP server were sufficiently disseminated to qualify as "public" under the Court's precedent); *Samsung Elec. Co. v. Rembrandt Wireless Techs.*, IPR2014-00514, 2014 WL 5840662 (PTAB 2014) (discussing whether IEEE working group is sufficiently "public" to be considered prior art).

Patent owners are surely aware of such realities. It is not uncommon for patent applicants and owners themselves to destroy records related to patent applications pursuant to standard document retention policies, even though the records may be relevant to any patent assertion that occurred later in time. *See* David O'Brien, *Discovery of Draft Patent Applications: Considerations in establishing a draft retention policy*, 2 Tex. Intell. Prop. L.J. 237, 256 (Spring 1994) (recommending all drafts of patent applications be destroyed one year after

patent issues)<sup>5</sup>; *see generally Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311 (Fed. Cir. 2011).

### **B. Delay Complicates Assessment of the Level of Skill in the Art**

Certain patent infringement defenses, including obviousness under 35 U.S.C. § 103, require making inferences as to the technical capacity and knowledge of persons skilled in the relevant art at or before the asserted patent's priority date. *See KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 418-19 (2007) ("*KSR*") (instructing courts to consider the common sense capacity of a person skilled in the art).

The ordinary artisan standard increasingly burdens defendants attempting to show obviousness. Experts are often called on to both discuss the state of the prior art as of the priority date and mentally exclude any post-priority advances in a field. *See generally*, Jonathan J. Darrow, *The Neglected Dimension of Patent Law's PHOSITA Standard*, 23 Harv. J. L. Tech. 227, 235 (2009) (discussing the person having ordinary skill in the art ("*PHOSITA*") standard).

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<sup>5</sup> Of course, patent owners have incentives to retain documents that may help show validity of a patent, for example evidence that could help antedate prior art. *See Cordance Corp. v. Amazon.com, Inc.*, 658 F.3d 1330, 1333-35 (Fed. Cir. 2011) (discussing patent owner's evidence of prior conception). But patent owners are also incentivized to ensure destruction of documents that would hurt them. *Cf. Oasis Research, LLC v. Carbonite, Inc.*, No. 4:10-CV-00435, 2015 WL 123642 (E.D. Tex. Jan. 8, 2015) (granting judgment as a matter of law that evidence was not sufficient to show patent applicant failed to identify alleged co-inventor).

This Court, as well as the Supreme Court, recognizing the difficulty in reconstructing the past, have analyzed objective indicia of nonobviousness. *See Mintz v. Dietz & Watson*, 679 F.3d 1372, 1378 (Fed. Cir. 2012). However, many of the objective indicia come later in time than the priority date, for example industry praise, commercial success, and copying, see *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 17-18 (1966), and are thus less vulnerable to evidentiary prejudice due to the passage of time.

Thus although objective indicia can help to protect patent *owners* from prejudice in delayed cases, there is little to relieve the timeliness prejudice on defendants. Indeed, defendants bear the burden of coming forward with evidence that a skilled artisan would have possessed the knowledge required to make an improvement obvious. *See Mintz*, 679 F.3d at 1379.

### **C. Prejudicial Delay Is Most Problematic in the Fastest-Innovating Industries**

Prejudice due to delayed infringement actions is especially harmful to those in high technology industries. In particular, software development happens at a fast pace, often in a context of intense competition. It is an iterative process, frequently based in response to user needs and feature requests. *See, e.g.*, Windows Feature Suggestions, UserVoice (Microsoft officially soliciting feature requests from the public for upcoming “Windows 10” product), <https://windows.uservoice.com/forums/265757-windows-feature-suggestions>. The processes are often

decentralized, and the formal development tools are optimized for collaboration and efficiency rather than litigation record keeping. Moreover, disclosure of new features to the public often occurs by releasing new versions, rather than through patents or printed publications.<sup>6</sup> Often release notes are published via a webpage, which by its very nature can be ever-changing and thus subject to loss. *See generally* W3C, *HTML5: A vocabulary and associated APIs for HTML and XHTML*, W3C Recommendation 1.3 (Oct. 28, 2014), available at <http://www.w3.org/TR/html5/>.

Furthermore, software is often not patented, even though it may be invalidating prior art. Specifically, in information technology, oftentimes the prior art consists of systems and knowledge disclosed to the public through informal knowledge sharing. *See, e.g., Suffolk Techs., LLC v. AOL Inc.*, 752 F.3d 1358, 1365 (Fed. Cir. 2014) (concluding an Internet newsgroup posting is a public disclosure).

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<sup>6</sup> For example, from 2004 to 2014, Mozilla released 29 versions of its “Firefox” web browser. *See Mozilla Introduces the Most Customizable Firefox Ever with an Elegant New Design*, Mozilla (Apr. 24, 2014), <https://blog.mozilla.org/press/2014/04/mozilla-introduces-the-most-customizable-firefox-ever-with-an-elegant-new-design/> (last accessed Mar. 28, 2015). A search of the patent assignment database shows that Mozilla was not the assignee of any patents or applications until June 2014, when it was assigned two related applications. *See* USPTO Patent Assignment Database, USPTO (last accessed April 22, 2015), <http://assignment.uspto.gov/#/search?q=mozilla&sort=patAssignorEarliestExDate%20desc%2C%20id%20desc&synonyms=false>.



Unlike traditional printed publications and patents, non-traditional printed publications such as websites and prior use prior art are subject to greater loss. *See, e.g., About the Internet Archive*, <https://archive.org/about/> (discussing how content on the Internet is lost over time). Nowhere is this more true than with prior art in the information technology field, due to the nature of product development and disclosures to the public. For example, Internet web pages are dynamic, and are often modified, either by the web developer or even the end user. *See, e.g., Greasemonkey Firefox Browser Add-On*, <https://addons.mozilla.org/en-US/firefox/addon/greasemonkey/> (allowing users to modify third party web pages using customized styles).

This fluid and mutable nature of the Internet also leads to the well-known problems of link rot and reference rot. This is the problem of technical publications, whether found on the Internet or in formal journals, themselves linking to web pages that subsequently disappear or change. A 2013 study of this phenomenon investigated the lifespan of links in scientific literature. *See Jason Hennessey & Steven Xijin Ge, A cross disciplinary study of link decay and the effectiveness of mitigation techniques*, *BMC Bioinformatics* 2013, 14(Suppl 14): S5 (October 9, 2013), available at <http://www.biomedcentral.com/1471-2105/14/S14/S5/>. Researchers analyzed nearly 15,000 links in scientific papers and found that the median lifespan of cited web pages was only 9.3 years. Worse, only 62%

of these cited pages were archived. Thus, even if a publication does not disappear completely, it may still become less useful over time as many of the works it cites change or become unavailable.

Further, those innovating in the high technology sector, particularly small companies and independent developers, might keep only very limited dated and documented histories of their activities. *See* Peter Vogel, *No Comment: Why Commenting Code is Still a Bad Idea*, VisualStudio Magazine (July 2013) (noting that leaving human-readable comments on computer code is time consuming and potentially misleading). Sophisticated programmers may use version control systems to maintain development history, but even these are insufficient to fully document advances in the art. *See* Jonathon Creenaune, *Migrating from Subversion to Git and the Lessons Learned*, Dr. Dobb's (October 16, 2012), <http://www.drdobbs.com/architecture-and-design/migrating-from-subversion-to-git-and-the/240009175> (“[The popular version control system ‘Subversion’] is known to be a pain and works solely on revision history—not actual content[.] [A] lot of people avoid [the version control system] or use it infrequently and not as part of their day-to-day workflow.”); Issue 1256, Subversion, [http://subversion.tigris.org/issues/show\\_bug.cgi?id=1256](http://subversion.tigris.org/issues/show_bug.cgi?id=1256) (last modified April 8, 2015) (Subversion does not preserve the creation dates of code added to it, but rather the upload date of the code, making it potentially unsuitable or misleading for establishing prior art

timelines.); Ian Skerrett, *Eclipse Community Survey 2014 Results* (June 23, 2014), <https://ianskerrett.wordpress.com/2014/06/23/eclipse-community-survey-2014-results/> (Subversion is used by one-third of surveyed developers in 2014; over half of developers in prior-year surveys).

Newer version control systems such as Git allow for better record keeping and provide many other technical improvements. However, the usefulness and searchability of code for prior art purposes continues to rely heavily on thorough and accurate documentation. Cf. Jeniffer Cloer, *10 Years of Git: An Interview with Git Creator Linus Torvalds* (Apr. 6, 2015), <http://www.linux.com/news/featured-blogs/185-jennifer-cloer/821541-10-years-of-git-an-interview-with-git-creator-linus-torvalds> (discussing difficulties with producing good commit messages and other documentation when using GitHub, a Git repository hosting service). Indeed, the inability to produce enough evidence of decades-old software source code may mean the difference between liability and invalidity. See, e.g., *i4i Ltd. P'Ship v. Microsoft Corp.*, 598 F.3d 831, 846-48 (Fed. Cir. 2010) (defendant failed to clearly and convincingly show prior art product implicated on-sale bar, in part because source code that would have shown whether or not product embodied invention was routinely deleted upon project completion) *aff'd sub nom Microsoft Corp. v. i4i Ltd. P'Ship*, 131 S. Ct. 2238 (2011).

Because development happens iteratively, in collaboration with users and other developers, in a mixture of public and private environments, technology defendants are poorly positioned to fight delayed suits. Absent the threat of laches, patent owners can exploit these realities to more easily assert patents that would be invalidated but for the practical inability to find and establish cognizable evidence.

**D. By Using Unreasonable Delay to Impede Proof of Invalidity, Patent Owners Can Harm Not Just Litigation Parties but Also the Public at Large**

The public interest is harmed when patent owners avoid subjecting their patents to the scrutiny of timely litigation. “A patent by its very nature is affected with a public interest.” *Precision Instrument Mfg. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 816 (1945). The “primary object” of the patent monopoly is its benefit to the public and community at large. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 511 (1917). Patent policy makes public disclosure as a “centerpiece,” because disclosure both makes innovation publicly accessible and demarcates the limited monopoly right. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989). The patent system also relies on “substantially free trade” in publicly known, unprotected conceptions so the public can build on prior knowledge. *See id.* at 155. Permitting patent owners to impede invalidity determinations by unreasonably delaying litigation would undermine these fundamental principles.

Improper delay also impacts the general public. Since *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313 (1971), a finding of invalidity has worked to collaterally estop a patent owner from making any legal claims based on the invalidated claims. This helps eliminate “unwarranted patent grants,” and insulates the public from having to “pay tribute to would-be monopolists without need or justification.” *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2233 (2013). Thus, unfair obstacles to an invalidity finding harm not only a defendant’s invalidity defense, but also the public’s ability to practice what should, lawfully, be in the public domain.

## **II. Because of These Doctrinal Concerns Unique to Patent and Not Copyright, *Petrella* Is Inapplicable**

The time-dependence of the validity determination also demonstrates why *Petrella*’s highly copyright-specific policy analysis is inapplicable to patent cases, for at least two reasons. First, copyright validity is often uncontested. Patent validity, by contrast, is almost always disputed and demands substantial showings of evidence, with the ability to prevent prejudice often unilaterally within the control of the party holding the power to delay. As a copyright case, *Petrella* had no occasion to consider patent law’s validity issues.

Second, *Petrella* relied on an assumption that both plaintiffs and defendants would be equally harmed by undue delay since plaintiffs would lose time-dependent evidence of copying. 134 S. Ct. at 1976-77. But the successful assertion

of patent infringement requires no showing of copying, so the harms of undue delay primarily fall upon defendants, creating inequities not within the contemplation of *Petrella*.

**A. Validity of a Copyright Is Practically Never Contested, While Validity of Patents Is Highly Contested**

Although a valid copyright is required to make a claim for copyright infringement, validity is often not contested in copyright matters. *See, e.g., Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574-75 (1994) (validity not at issue, as it was “uncontested” that defendant’s acts “would be an infringement” but for fair use); *cf. LexMachina, Copyright Findings by Judgment Event* (showing that, for all copyright cases pending as of January 2009, only 2.7% of judgment events<sup>7</sup> resulted in a finding of a lack of ownership/validity of the copyright at issue, with a further 6.4% percent of judgment events finding ownership/validity).

In contrast, defendants in patent cases commonly challenge the validity of the patent at issue, often based on the lack of novelty or nonobviousness under §§ 102 and 103, respectively. *See, e.g., John R. Allison, Mark A. Lemley & David*

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<sup>7</sup> Judgment events include the following: default judgment, consent judgment, judgment on the pleadings, summary judgment, trial, and judgment as a matter of law. The data show, of 3019 judgment events, 84 were those that found “No Ownership/Validity,” and 193 were those that found “Ownership/Validity.” “Ownership/Validity” is defined as proof that the copyright is valid and that the party asserting the copyright owns the right to do so. Data last accessed April 20, 2015.

L. Schwartz, *Understanding the Realities of Modern Patent Litigation*, 92 Tex. L. Rev. 1769, 1778, 1784-85 (2014) (finding that, of cases filed in 2008-2009, motions for summary judgment on invalidity were filed in roughly 45% of cases, of which 70% related to anticipation or obviousness).

That distinction, in turn, presents patent defendants with evidence-gathering challenges that copyright defendants rarely face. For example, both of these invalidity defenses require prior art predating the priority date of the patent. Thus patent defendants must frequently rely on evidence from many years prior to the filing of a lawsuit in order to make their prima facie case. In addition, patent validity is directly affected by the actions of third parties. Third parties have evidence that shapes the scope and content of the prior art, and those third parties likely give little, if any, thought to maintaining records for use by others in patent infringement actions. Copyright defendants, in contrast, often defend allegations of infringement using their *own* materials. *See, e.g., Campbell*, 510 U.S. at 582 (lyrics of defendant's own song established parody defense); *Graham v. James*, 144 F.3d 229, 235-38 (2d Cir. 1998) (discussing use of license as defense to copyright infringement).

A further distinction lies in the burdens of proof. In both copyright and patent litigation, an alleged infringer can raise invalidity as a defense. *Compare* 17 U.S.C. § 410(c) (copyright registration carries presumption of validity) *with* 35

U.S.C. § 282(b)(2) (defenses to patent infringement include patent invalidity). However, patent defendants, unlike their copyright counterparts, must establish invalidity with “clear and convincing” evidence. *Compare* 35 U.S.C. § 282(a), (b)(2) & *Microsoft Corp.*, 131 S. Ct. at 2251-52, with *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1144 (9th Cir. 2003) (copyright defendant need only offer “some evidence or proof” to rebut presumption of validity). Thus, stale evidence risks prejudices not faced by defendants in copyright infringement litigation.

**B. The Lack of a Required Showing of Copying for Patent Infringement Further Distinguishes the Copyright-Specific Holding of *Petrella***

The Supreme Court decided *Petrella*, in part, on the grounds that although laches in bringing suit could create evidentiary prejudice, the prejudice would be “at least as likely” to harm plaintiffs as defendants. *Petrella*, 134 S. Ct. at 1977. This reasoning can be understood, in part, by the recognition that a copyright plaintiff must show *copying* in order to prevail on a claim for direct infringement. *See, e.g., Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 275 (2d Cir. 1936) (liability without copying is “contrary to the very foundation of copyright law”); *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1163 (9th Cir. 1977) (“It has often been said that in order to establish



copyright infringement a plaintiff must prove ownership of the copyright and ‘copying’ by the defendant.”).

A copyright owner that delays filing suit may find it difficult to gather evidence of copying needed to show infringement. *See* Brief for the California Society of Entertainment Lawyers as *Amicus Curiae* at 10-11<sup>8</sup>, *Petrella v. Metro-Goldwin-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (No. 12-1315) (noting the difficulty a copyright plaintiff may encounter in making its prima facie case of infringement due to the passage of time). Proof of copying may take the form of either direct evidence or a combination of access and substantial similarity. *See Sid & Marty Krofft Television Prods.*, 562 F.2d at 1163. Either way, a tardy plaintiff may be hard-pressed to obtain evidence of the defendant’s acts. *See, e.g., Petrella*, 134 S. Ct. at 1971, 1976 (requiring plaintiff to show copying from decades before start of litigation and noting that it was plaintiff’s burden to establish a prima facie case of infringement); *cf. Art Attacks Ink, LLC v. MGA Ent’mt Inc.*, 581 F.3d 1138, 1143-45 (9th Cir. 2009) (copyright owner had failed to prove alleged infringer had access to copyrighted material at the time alleged infringement began, and thus failed to prove infringement); 4 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright* § 13.01[B] (Matthew Bender, Rev. Ed.) (the element of “copying”

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<sup>8</sup> Available at [https://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v3/12-1315\\_pet\\_amcu\\_csel.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v3/12-1315_pet_amcu_csel.authcheckdam.pdf).

includes “the factual question [of] whether the defendant, in creating its work, used the plaintiff’s material as a model, template, or even inspiration.”).

In contrast, a claim for direct patent infringement does not include the element of copying. *See Johnston v. IVAC Corp.*, 885 F.2d 1574, 1580 (Fed. Cir. 1989) (patent infringement involves showing that elements of a patent claim are contained in the accused device).<sup>9</sup> Indeed, from the patent owner’s perspective, the facts needed to maintain a cause of action under 35 U.S.C. § 271(a) can be found within the four corners of a patent on file with the United States Patent and Trademark Office, along with evidence from the alleged infringer showing each element of the patent claim at issue. *See Christopher A. Cotropia & Mark A. Lemley, Copying in Patent Law*, 87 N.C. L. Rev. 1421, 1425 (2009) (“Put simply, copying is irrelevant to the issue of liability.”). In the usual case, a patent owner does not need to consider evidence that is over six years old. Whether infringement began 15 years ago or 15 minutes ago is irrelevant to the patent owner’s prima facie case.

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<sup>9</sup> Actual copying is potentially relevant to claims of willful infringement. *See In re Seagate Technology, LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (analyzing defendant’s actions at the time of infringement to determine willfulness). In practice, however, allegations of actual copying are very rare in patent litigation. *See Christopher Cotropia & Mark Lemley, Copying in Patent Law*, 87 N.C. L. Rev. 1421 (2009) (finding that “a surprisingly small percentage of patent cases involve even allegations of copying, much less proof of copying”).

Thus, while a delay in suit may be “at least as likely” to harm plaintiffs as defendants in copyright cases, the balance of evidentiary prejudice is very different under the Patent Act.

### CONCLUSION

Laches under the Patent Act offsets an imbalance of evidentiary prejudices between patent litigation parties that has no analog under the Copyright Act. Evidence relating to patent infringement is most often contemporaneous with the lawsuit whereas evidence related to novelty and nonobviousness is most often contemporaneous with the filing of the patent. Judicial laches ensures that cases are “decided on the basis of evidence that remains *reasonably accessible*” and that defendants are not “unduly prejudiced.” *See Aukerman*, 960 F.2d at 1029 (emphasis added) (citation omitted). The public policy considerations of *Petrella* do not control, and laches under the Patent Act should be maintained.

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Respectfully submitted,

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April 23, 2015

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/s/ Vera Ranieri

Vera Ranieri

Attorney for *Amici Curiae*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of April, 2015, I caused copies of the foregoing Brief of *Amici Curiae* Electronic Frontier Foundation and Public Knowledge to be served by electronic means via the Court's CM/ECF system on all counsel registered to receive electronic notices.

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