

No. 19-832

---

---

IN THE  
**Supreme Court of the United States**

---

APPLE, INC.,  
*Petitioner,*

v.

VIRNETX INC., ET AL.,  
*Respondents.*

---

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

---

**BRIEF OF THE R STREET INSTITUTE, THE  
ELECTRONIC FRONTIER FOUNDATION, AND  
ENGINE ADVOCACY AS *AMICI CURIAE* IN  
SUPPORT OF THE PETITION**

---

CHARLES DUAN  
*Counsel of Record*  
R STREET INSTITUTE  
1212 New York Ave NW Ste 900  
Washington DC 20005  
(202) 525-5717  
cduan@rstreet.org

*Counsel for amici curiae*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . .	ii
INTEREST OF <i>AMICI CURIAE</i> . . . . .	1
SUMMARY OF ARGUMENT . . . . .	2
ARGUMENT . . . . .	4
I. Certiorari Should Be Granted on the First Question Presented . . . . .	4
A. For Decades, the Federal Circuit Has Failed to Articulate Rules on How to Apportion Reasonable Royalties Based on Past Licenses . . . . .	4
B. Numerous Industries Involve Complex Multi-function Products and Services Incompatible with Nonapportionment of Patent Royalties . . . . .	8
1. <i>Computer Devices</i> . . . . .	9
2. <i>Software</i> . . . . .	10
3. <i>Automotive Industry</i> . . . . .	10
4. <i>Genetic Testing</i> . . . . .	12
5. <i>Pharmaceuticals and Biomedical Research</i> . . . . .	13
C. The Federal Circuit’s Decision Exacerbates Ongoing Problems with Abusive Gamesmanship in Patent Licensing . . . . .	15
D. Excessive Royalties Resulting from Overreliance on Past Licenses Will Deter Innovation . . . . .	19
II. Certiorari Should Be Granted on the Second Question Presented Because the Question Is Likely to Recur Frequently . . . . .	21
CONCLUSION . . . . .	24

## TABLE OF AUTHORITIES

### CASES

<i>ActiveVideo Networks, Inc. v. Verizon Communications, Inc.,</i> 694 F.3d 1312 (Fed. Cir. 2012) . . . . .	6
<i>Apple Inc. v. Motorola, Inc.,</i> 757 F.3d 1286 (Fed. Cir. 2014) . . . . .	6
<i>Ass'n for Molecular Pathology v. Myriad Genetics, Inc.,</i> 569 U.S. 576 (2013) . . . . .	12
<i>AstraZeneca AB v. Apotex Corp.,</i> 782 F.3d 1324 (Fed. Circ. 2015) . . . . .	13–14
<i>Commonwealth Scientific &amp; Industrial Research Organisation v. Cisco Systems, Inc.,</i> 809 F.3d 1295 (Fed. Cir. 2015) . . . . .	6, 9
<i>Cornell University v. Hewlett-Packard Co.,</i> 609 F. Supp. 2d 279 (N.D.N.Y. 2009) . . . . .	9
<i>Deere &amp; Co. v. International Harvester Co.,</i> 710 F.2d 1551 (Fed. Cir. 1983) . . . . .	17
<i>eBay Inc. v. MercExchange, LLC,</i> 547 U.S. 388 (2006) . . . . .	22
<i>Elbit Systems Land &amp; C4I Ltd. v. Hughes Network Systems, LLC,</i> 927 F.3d 1292 (Fed. Cir. 2019) . . . . .	6
<i>Ericsson, Inc. v. D-Link Systems, Inc.,</i> 773 F.3d 1201 (Fed. Cir. 2014) . . . . .	5–6
<i>Ericsson, Inc. v. InterDigital Communications Corp.,</i> 418 F.3d 1217 (Fed. Cir. 2005) . . . . .	17–18
<i>Evans v. Jeff D.,</i> 475 U.S. 717 (1986) . . . . .	16

(iii)

<i>Federal Trade Commission v. Qualcomm Inc.</i> , No. 19-16122 (9th Cir. to be argued Feb. 13, 2020) . . . .	11
<i>Finjan, Inc. v. Secure Computing Corp.</i> , 626 F.3d 1197 (Fed. Cir. 2010) . . . . .	5–6
<i>Garretson v. Clark</i> , 111 U.S. 120 (1884) . . . . .	6, 13, 21
<i>Georgia-Pacific Corp. v. U.S. Plywood Corp.</i> , 318 F. Supp. 1116 (S.D.N.Y. 1970) . . . . .	5, 7
<i>Impression Products, Inc.</i> <i>v. Lexmark International, Inc.</i> , 137 S. Ct. 1523 (2017) . . . . .	11
<i>LaserDynamics, Inc. v. Quanta Computer, Inc.</i> , 694 F.3d 51 (Fed. Cir. 2012) . . . . .	6
<i>Lucent Technologies, Inc. v. Gateway, Inc.</i> , 580 F.3d 1301 (2009) . . . . .	6, 10
<i>Microsoft Corp. v. Motorola, Inc.</i> , 795 F.3d 1024 (9th Cir. 2015) . . . . .	17
<i>Microsoft Corp. v. Motorola, Inc.</i> , No. 10-cv-1823 (W.D. Wash. Apr. 25, 2013) (findings of fact and conclusions of law) . . . . .	17
<i>Precision Instrument Manufacturing Co.</i> <i>v. Automotive Maintenance Machinery Co.</i> , 324 U.S. 806 (1945) . . . . .	21
<i>Quanta Computer, Inc. v. LG Electronics, Inc.</i> , 553 U.S. 617 (2008) . . . . .	9
<i>ResQNet.com, Inc. v. Lansa, Inc.</i> , 594 F.3d 860 (Fed. Cir. 2010) (per curiam) . . . . .	17
<i>Rude v. Westcott</i> , 130 U.S. 152 (1889) . . . . .	16

(iv)

<i>Slimfold Manufacturing Co., Inc.</i> <i>v. Kinkead Industries, Inc.</i> , 932 F.2d 1453 (Fed. Cir. 1991) . . . . .	20
<i>Spancion, Inc. v. International Trade Commission</i> , 629 F.3d 1331 (Fed. Cir. 2010) . . . . .	22
<i>State Industries, Inc. v. A.O. Smith Corp.</i> , 751 F.2d 1226 (Fed. Cir. 1985) . . . . .	20
<i>Transocean Offshore Deepwater Drilling, Inc.</i> <i>v. Maersk Drilling USA, Inc.</i> , 699 F.3d 1340 (Fed. Cir. 2012) . . . . .	18
<i>Uniloc USA, Inc. v. Microsoft Corp.</i> , 632 F.3d 1292 (Fed. Cir. 2011) . . . . .	7
<i>VirnetX, Inc. v. Cisco Systems, Inc.</i> , 767 F.3d 1308 (Fed. Cir. 2014) . . . . .	7–8
<i>Whitserve, LLC v. Computer Packages, Inc.</i> , 694 F.3d 10 (Fed. Cir. 2012) . . . . .	17
<i>Wordtech Systems, Inc.</i> <i>v. Integrated Networks Solutions, Inc.</i> , 609 F.3d 1308 (Fed. Cir. 2010) . . . . .	6

**CONSTITUTIONAL PROVISION**

U.S. Const. art. I, § 8, cl. 8 . . . . .	21
--	----

**STATUTES**

35 U.S.C. § 316(a)(11) . . . . .	22
Tariff Act of 1930 § 337(a)(1)(B), 19 U.S.C. § 1337 (2012) . . . . .	22
—— § 337(a)(2), (c) (2012) . . . . .	22

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.