2017-1517, -1518

United States Court of Appeals for the Federal Circuit

CASCADES PROJECTION LLC,

Appellant,

v.

EPSON AMERICA, INC., and SONY CORPORATION,

Appellees.

Appeals from the United States Patent and Trademark Office, Patent Trial and Appeal Board, Nos. IPR2015-01206 and IPR2015-01846

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Cascades Projection LLC **v.** Epson America, Inc.

Case No. 2016-1750

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

The *Amici Curiae* are 13 law professors who teach and write on patent law, property law, and constitutional law. They have an interest in both promoting continuity in the evolution of these interrelated doctrines and ensuring that the patent system continues to achieve its constitutional function in promoting innovation by securing constitutionally protected property rights to its creators and owners. Although *amici* may differ amongst themselves on other aspects of patent law and constitutional law, they are united in their professional opinion that the panel decision in *MCM Portfolio v. Hewlett Packard Co.*, 812 F.3d 1284 (Fed. Cir. 2015) should be reversed because it contradicts long-established constitutional protections for patents. They have no stake in the parties or in the outcome of the case. The names and affiliations of the members of the *amici* are set forth in Appendix A.

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[1] No party's counsel authored this brief in whole or part; no party or party's counsel contributed money intended to fund preparing or submitting the brief. Fed. R. App. P. 29(c)(5). The Center for the Protection of Intellectual Property, an academic center at the Antonin Scalia Law School at George Mason University, paid for the printing and filing fees. The parties have consented to this filing and a motion for leave to file is being submitted with this brief.

SUMMARY OF ARGUMENT

The panel decision in *MCM Portfolio v. Hewlett Packard Co.*, 812 F.3d 1284 (Fed. Cir. 2015), relied on by the PTAB in this case, contradicts longstanding Supreme Court decisions reaching back to the early nineteenth century recognizing that issued patents are vested private property rights. The petitioner fully addresses the legal errors in *MCM Portfolio* and how it directly conflicts with *McCormick Harvesting Mach. Co. v. Aultman-Miller Co.*, 169 U.S. 606 (1898), and thus *amici* here offer an additional insight that is necessary to understand the profound error of the *MCM Portfolio* panel decision: the legal definition and protection of patents as *private rights* under the Constitution is rooted in longstanding Supreme Court and Circuit Court decisions going back much further than the 1898 decision in *McCormick Harvesting*. Since the Antebellum Era in the early nineteenth century, the Supreme Court and Circuit Courts repeatedly and consistently defined patents as constitutionally protected *private rights*—specifically, as *private property rights*—and thus accorded patents the protections of the Due Process Clause and the Takings Clause.

To make this clear, *amici* detail the enduring and binding early nineteenth-century case law establishing that patents are private property rights protected by the Constitution. *See, e.g.*, Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents under the Takings Clause*, 87 B.U. L. Rev. 689, 700–11 (2007) (discussing this case law). Congress explicitly endorsed this case law in codifying the legal definition of patents as "property" in 35 U.S.C. § 261. *See* Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 Harv. J. L. & Tech. 321, 343–45 (2009) (discussing the text and legislative history of § 261 as "codify[ing] the case law reaching back to the early American Republic that patents are property rights").

The Supreme Court recently confirmed the continuing vitality and relevance of the revered legal proposition that patents are private property rights. In *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2427 (2015) (Roberts, C.J.), the Supreme Court approvingly quoted nineteenth-century case law that "[a patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without

compensation land which has been patented to a private purchaser" (quoting *James v. Campbell*, 104 U.S. 356, 358 (1882)). Directly relevant to this case, the Supreme Court held eighteen years ago that patents are property rights secured under the Due Process Clause of the Fourteenth Amendment. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

MCM Portfolio directly conflicts with both modern and long-established decisions on the constitutional protection of patents as private property rights. The result of this contradiction with the Supreme Court's jurisprudence on patents has a far-reaching, negative impact for the protection under the Constitution of all "exclusive property," *James*, 104 U.S. at 358, creating a precedent that can be cited for denying basic due process protections in other cases involving vested property interests under the Constitution. Thus, it is necessary for this court to reaffirm *en banc* the precise constitutional and legal status of patents as private property rights by granting the petition and reversing the panel decision.

ARGUMENT

The Supreme Court unequivocally defined patents as property rights in the early American Republic. In one case in 1824, Justice Joseph Story wrote for a unanimous Supreme Court that the patent secures to an "inventor . . . a property in his inventions; a property which is often of very great value, and of which the law intended to give him the absolute enjoyment and possession." *Ex parte Wood*, 22 U.S. (9 Wheat.) 603, 608 (1824).[2] In hearing patent cases while riding circuit, Justice Story explicitly relied on real property case law as binding precedent in his opinions.[3] Justice Story was not an outlier, as many

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[2] *See also Hayden v. Suffolk Mfg. Co.*, 11 F. Cas. 900, 901 (C.C.D. Mass. 1862) (instructing jury that a "patent right, gentlemen, is a right given to a man by law where he has a valid patent, and, as a legal right, is just as sacred as any right of property").

[3] *See, e.g.*, *Brooks v. Byam*, 4 F. Cas. 261, 268–70 (C.C.D. Mass. 1843) (Story, Circuit Justice) (analogizing a patent license to "a right of way granted to a man for him and his domestic servants to pass over the grantor's land," citing a litany of real property cases from classic common law authorities, such as *Coke's Institutes*, *Coke's Littleton*, *Viner's Abridgment*, and *Bacon's Abridgement*); *Dobson v. Campbell*, 7 F. Cas. 783, 785 (C.C.D. Me. 1833) (Story, Circuit Justice) (relying on real property equity cases in which "feoffment is stated without any averment of livery of seisin" in assessing validity of patent license).

other Justices and judges repeatedly used common-law property concepts in their opinions in patent cases, such as "title"[4] and "trespass."[5] They also invoked property rhetoric, such as referring to infringement as "piracy."[6] Legally and rhetorically, federal courts

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[4] *See, e.g.*, *Carr v. Rice*, 5 F. Cas. 140, 146 (C.C.S.D.N.Y. 1856) (noting that "assignees [of a patent] become the owners of the discovery, with perfect title," and thus "[p]atent interests are not distinguishable, in this respect, from other kinds of property"); *Hovey v. Henry*, 12 F. Cas. 603, 604 (C.C.D. Mass. 1846) (Woodberry, Circuit Justice) (instructing jury that "[a]n inventor holds a property in his invention by as good a title as the farmer holds his farm and flock").

[5] *See, e.g.*, *Goodyear Dental Vulcanite Co. v. Van Antwerp*, 10 F. Cas. 749, 750 (C.C.D.N.J. 1876) (analogizing patent infringement to a "trespass" of horse stables); *Burliegh Rock-Drilling Co. v. Lobdell*, 4 F. Cas. 750, 751 (C.C.D. Mass. 1875) (noting that the defendants "honestly believ[ed] that they were not trespassing upon any rights of the complainant"); *Livingston v. Jones*, 15 F. Cas. 669, 674 (C.C.W.D. Pa. 1861) (accusing defendants of having "made large gains by trespassing on the rights of the complainants"); *Eastman v. Bodfish*, 8 F. Cas. 269, 270 (C.C.D. Me. 1841) (comparing evidentiary rules in a patent infringement case to relevant evidentiary rules in a trespass action).

[6] *See, e.g.*, *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 12 (1829) (Story, J.) (recognizing that "if the invention should be pirated, [this] use or knowledge, obtained by piracy" would not prevent the inventor from obtaining a patent); *Batten v. Silliman*, 2 F. Cas. 1028, 1029 (C.C.E.D. Pa. 1855) (decrying defendant's "pirating an invention"); *Buck v. Cobb*, 4 F. Cas. 546, 547 (C.C.N.D.N.Y. 1847) (recognizing goal of patent laws in "secur[ing] to inventors the rewards of their genius against the incursions of pirates"); *Dobson v. Campbell*, 7 F. Cas. 783, 785 (C.C.D.

throughout the nineteenth century consistently affirmed that infringement is "an unlawful invasion of property." *Gray v. James*, 10 F. Cas. 1019, 1021 (C.C.D. Pa. 1817). As Circuit Justice Levi Woodbury explained in 1845: "we protect intellectual property, the labors of the mind, . . . as much a man's own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears." *Davoll v. Brown*, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845).[7]

Me. 1833) (concluding that patent-assignee has been injured by "the piracy of the defendant"); *Grant & Townsend v. Raymond*, 10 F. Cas. 985, 985 (C.C.S.D.N.Y. 1829) (noting that the patented machine had "been pirated" often); *Earle v. Sawyer*, 8 F. Cas. 254, 258 (C.C.D. Mass. 1825) (instructing jury that an injunction is justified by defendant's "piracy by making and using the machine").

[7] *See also Ball v. Withington*, 2 F. Cas. 556, 557 (C.C.S.D. Ohio 1874) (noting that patents are a "species of property"); *Carew v. Boston Elastic Fabric Co.*, 5 F. Cas. 56, 57 (C.C.D. Mass. 1871) (explaining that "the rights conferred by the patent law, being property, have the incidents of property"); *Lightner v. Kimball*, 15 F. Cas. 518, 519 (C.C.D. Mass. 1868) (noting that "every person who intermeddles with a patentee's property . . . is liable to an action at law for damages"); *Ayling v. Hull*, 2 F. Cas. 271, 273 (C.C.D. Mass. 1865) (discussing the "right to enjoy the property of the invention"); *Gay v. Cornell*, 10 F. Cas. 110, 112 (C.C.S.D.N.Y. 1849) (recognizing that "an invention is, within the contemplation of the patent laws, a species of property").

This case law is directly relevant to this case, because it underscores the Supreme Court's decision in *McClurg v. Kingsland*, 42 U.S. (1 How.) 202 (1843), in which this prohibited Congress from retroactively limiting property rights in existing patents that had been issued under subsequently repealed patent statutes. *Id.* at 206. *McClurg* makes clear that patents are private property rights under the Constitution, relying on real property precedents and providing legal protections to patent owners as owners of property rights more than 50 years before the 1898 decision in *McCormick Harvesting*.

In *McClurg*, Justice Henry Baldwin wrote for an unanimous Court states that "a repeal [of a patent statute] can have no effect to impair the *right of property* then existing in a patentee, or his assignee, according to the well-established principles of this court." *Id* (emphasis added). In sum, a patent issued to an inventor created *vested property rights*, and "the patent must therefore stand" regardless of Congress's subsequent repeal of the statutes under which the patent originally issued. *Id.*

In reaching this decision about the fundamental constitutional protection in vested property rights in issued patents, Justice Baldwin

relied on the "well-established principles of this court." *Id.* Further confirming the status of patents as private property rights, Justice Baldwin continued the common practice of the time in relying on real property cases as determinative precedent in patent cases. *See id.* (citing *Society for the Propagation of the Gospel in Foreign Parts v. New Haven*, 21 U.S. (8 Wheat.) 464 (1823) (addressing the legal status of real property rights under the treaty that concluded the Revolutionary War)). In relying on such "well-established principles" set forth in *Society*, the *McClurg* Court made clear in 1843—more than 50 years before *McCormick Harvesting*—that patents are private property rights as a matter of constitutional doctrine, a legal point that the *MCM Portfolio* decision directly contradicts.

Consistent with these basic constitutional protections afforded to patents by the Supreme Court and Circuit Courts in the early nineteenth century, it is unsurprising that they also consistently held that patents are private property rights secured under the Takings Clause. *See, e.g.*, *United States v. Burns*, 79 U.S. 246, 252 (1870) (stating that "the government cannot, after the patent is issued, make use of the improvement any more than a private individual, without

license of the inventor or making compensation to him"); *Cammeyer v. Newton*, 94 U.S. 225, 234 (1876) (holding that a patent-owner can seek compensation for the unauthorized use of his patented invention by federal officials because "[p]rivate property, the Constitution provides, shall not be taken for public use without just compensation"); *McKeever v. United States*, 14 Ct. Cl. 396 (1878) (rejecting the argument that a patent is a "grant" of special privilege, because the text and structure of Article 1, Section 8, Clause 8 within the Constitution, as well as court decisions, clearly establish that patents are private property rights).

The Supreme Court today has repeatedly confirmed that patents are private property rights that are secured under the Constitution. *See, e.g.*, *Horne*, 135 S. Ct. at 2427; *Fla. Prepaid*, 527 U.S. at 642. The Supreme Court warned the Federal Circuit in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 739 (2002), that courts must respect "the legitimate expectations of inventors in their property" and not radically unseat such expectations that have long existed since the nineteenth century. Chief Justice John Roberts also stated in *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837 (2006), that nineteenth-century decisions should be accorded significant weight

in modern patent law in determining the nature of the property rights secured to patent-owners. *Id.* at 1841–42 (Roberts, C.J., concurring).

CONCLUSION

For the foregoing reasons, *amici* urge this court to grant the petition for initial *en banc* consideration, to reverse the panel decision in *MCM Portfolio*, and to hold that patents are private property rights secured as such under the Constitution in accord with longstanding jurisprudence from the early nineteenth century.

Date: March 1, 2017

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United States Court of Appeals
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Cascades Projection LLC v. Epson America, Inc., 2016-1790

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March 1, 2017

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