

No. 2021-1888

In the
United States Court of Appeals
for the Federal Circuit

CENTRIPETAL NETWORKS, INC.,

Plaintiff-Appellee,

v.

CISCO SYSTEMS, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Virginia in Case No. 2:18-cv-00094-HCM-LRL.
The Honorable **Henry C. Morgan**, Judge Presiding.

**BRIEF OF *AMICUS CURIAE* ALLIANCE OF U.S. STARTUPS &
INVENTORS FOR JOBS (“USIJ”) AND INNOVATION ALLIANCE (“IA”) IN
SUPPORT OF APPELLEE AND AFFIRMANCE**

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2021-1888
Short Case Caption Centripetal Networks, Inc. v. Cisco Systems, Inc.
Filing Party/Entity Alliance of U.S. Startups and Inventors for Jobs; Innovation Alliance

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- AEGEA Medical
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- ConnectCloud
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	13
I. Whether to Enhance Damages for Patent Infringement Is a Determination Committed to the Sound Discretion of the Trial Court	13
II. The Court Below Determined Enhancement in Accordance with the Principles Laid Out in <i>Halo</i>	17
A. The Trial Court’s Use of the <i>Read</i> Factors Is Not Precluded by <i>Halo</i>	21
III. Investments in Critical Strategic Technologies in Our Country Have Been Declining for More Than a Decade.....	24
CONCLUSION.....	28

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Amazon.com v. Barnes & Noble</i> , 239 F.3d 1343 (Fed. Cir. 2001).....	20, 21
<i>Daiichi Sankyo Co. v. Matrix Labs., Ltd.</i> , 619 F.3d 1346 (Fed. Cir. 2010).....	19-20
<i>eBay, Inc., et al. v. MercExchange, LLC</i> , 126 S. Ct. 1837 (2006).....	6, 7, 8
<i>Global-Tech Appliances, Inc. v. SEB S.A.</i> , 131 S. Ct. 2060 (2011).....	19
<i>Halo Electronics, Inc. v. Pulse Electronics, Inc.</i> , 136 S. Ct. 1923 (2016).....	<i>passim</i>
<i>In re Seagate Technology, LLC</i> , 497 F.3d 1360 (Fed. Cir. 2007).....	8, 9, 14, 15
<i>Kolstad v. American Dental Assn.</i> , 527 U.S. 526 (1999).....	17
<i>Markman v. Westview Inst. Inc.</i> , 52 F.3d 967 (Fed. Cir. 1995).....	21
<i>Neal v. Farmers Ins. Exch.</i> , 21 Cal. 3d 910 (1978)	27
<i>Octane Fitness, LLC v. Icon Health & Fitness, Inc.</i> , 134 S. Ct. 1749 (2014).....	16
<i>Presidio Components, Inc. v. Am. Tech. Ceramics Corp.</i> , 875 F.3d 1369 (Fed. Cir. 2017).....	22, 23
<i>Read Corp v. Portec, Inc.</i> , 970 F.2d 816 (Fed. Cir. 1992).....	21, 22, 23

Statutes and Other Authorities:

35 U.S.C. § 284..... 2, 3, 15, 16

35 U.S.C. § 3114

35 U.S.C. § 3214

Adam Mossoff, *Institutional Design in Patent Law: Private Property Rights
or Regulatory Entitlements*,
92 So. Cal. L. Rev. 921 (2019)4

Cisco 2021 Annual Report..... 10, 24, 27

Fed. R. App. P. 29(b)1

Fed. R. Civ. P. 52(a)(6).....19

Kristen Osenga, “Patent Theft as a Business Strategy,” *Big Tech’s IP Theft A
Common Problem with a High Cost*, Richmond Times-Dispatch (2021).....4

Mark F. Shultz, “The Importance of an Effective and Reliable Patent System to
Investment in Critical Technologies”26

Public Law 112-29 (2011) 3-4

Restatement (Second) of Torts § 8A (1965).....16

Restatement (Second) of Torts § 908(2) (1979).....27

“The Trouble with Patent-Troll-Hunting,” *The Economist*,
dated December 14, 20194

The Alliance of U.S. Startups and Inventors for Jobs (“USIJ”) and Innovation Alliance (“IA”) submit this brief as *amici curiae* pursuant to Fed. R. App. P. 29(b) in support of Plaintiff-Appellee, Centripetal Networks, Inc., in appeal by Defendant-Appellant, Cisco Systems, Inc., from judgment entered October 5, 2020, finding willful infringement of four patents owned by Centripetal and assessing damages and enhanced damages against Cisco. In particular, USIJ and IA support the district court’s finding that Cisco’s infringement was “willful and warranted enhancement,” and we specifically address points raised by the High Technology Inventor Alliance (“HTIA”) in its *amicus* brief supporting its member, Cisco.

INTEREST OF *AMICUS CURIAE*

Amicus curiae USIJ is a coalition of startup companies, inventors, investors, and entrepreneurs whose businesses depend upon stable and reliable patent protection as an essential foundation for making long-term investments of capital and time commitments to high-risk ventures developing new technologies.¹ USIJ was formed in 2012 to address concerns that legislation, policies and practices adopted by the U.S. Congress, the Federal Judiciary and certain Federal agencies were and are placing individual inventors, entrepreneurs and research-intensive

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than these *amici curiae* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

startups (“the Invention Community”) at an unsustainable disadvantage relative to their larger incumbent rivals, both domestic and foreign, and others that would make wrongful use of their inventions and patents. A disproportionately large number of strategically critical breakthrough inventions are attributable to such individual inventors and small companies, this case being exemplary).

USIJ’s fundamental mission is to assist and help inform members of Congress, the Federal Judiciary and leaders in the Executive branch regarding the critical role that patents play in our nation’s economic system and the particular importance of startups and small companies to our country’s economic health and its continued leadership role in the development of strategically critical technologies.

Amicus curiae Innovation Alliance is a coalition of R&D-based technology companies representing innovators, patent owners, and stakeholders from a diverse range of industries that believe in the critical importance of maintaining a strong patent system that supports innovative enterprises of all sizes.

SUMMARY OF ARGUMENT

Amici submit this brief to emphasize the importance to entrepreneurs and their investors of assuring fully compensatory patent damage awards, as provided for in Section 284 of the patent statute, along with enhanced damages where

appropriate.² We urge this Court to review the trial court’s Finding of Fact and Conclusions of Law³ in light of the predatory business strategy that has become pervasive in much of the digital technology industry and perhaps elsewhere.

Predatory infringement is sometimes referred to by large companies as “efficient infringement,” which is best described as a business strategy in which a large company with massive resources simply refuses to take a license from a startup or small company whose patents it infringes, choosing instead to deploy whatever funding and personnel are needed to prevail in any patent litigation – without regard to its merits, its duration or its impact on the patent owner. Designed to take maximum advantage of far greater access to resources, this strategy usually involves hiring a large number of the best lawyers available, initiating multiple challenges to the validity of the plaintiff’s patents at the Patent Trial & Appeals Board (“PTAB”) pursuant to the Leahy-Smith America Invents Act (Public Law

² Section 284 states, in pertinent part:

“Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

“When the damages are not found by a jury, the court shall assess them. In either event, the court may increase the damages up to three times the amount found or assessed.”

³ This brief addresses the Opinion and Order filed October 5, 2020 in Case 2:18-cv-00094-HCM-LRL, Document No. 621, referred to here as “Findings.”

112-29 (2011) and 35 U.S.C. §§311, *et seq* and 321, *et seq*), excessive discovery requests and resistance to the discovery sought by the patent owner, requests for extensions of time to prolong the period of infringement and the profits that it brings, and as many motions and appeals as will be tolerated by the judicial process – until the patent owner simply goes away or fails. This pernicious strategy was described succinctly and candidly by a former Apple executive to a reporter from “The Economist”:

“Boris Teksler, Apple's former patent chief, observes that ‘efficient infringement’, where the benefits outweigh the legal costs of defending against a suit, could almost be viewed as a ‘fiduciary responsibility,’ **at least for cash-rich firms that can afford to litigate without end.**”

<https://www.economist.com/business/2019/12/14/the-trouble-with-patent-troll-hunting> (The Economist, 12/14/2019) (emphasis supplied).⁴

⁴ See also, Adam Mossoff, *Institutional Design in Patent Law: Private Property Rights or Regulatory Entitlements*, 92 So. Cal. L. Rev. 921, 939-41 (2019) (describing “efficient infringement” and how the loss of injunctive remedies and the PTAB have promoted this business practice by large companies); “Patent Theft as a Business Strategy,” Kristen Osenga, *Big Tech’s IP Theft A Common Problem with a High Cost*, Richmond Times-Dispatch (2021), https://richmond.com/opinion/columnists/kristen-osenga-column-big-techs-ip-theft-a-common-problem-with-a-high-cost/article_36f103a9-1d98-5659-9e13-418911338b7d.html.

Given the enormous expense that can be inflicted on a small or undercapitalized patent owner facing “litigation without end,” the effect of efficient infringement is that few if any startups and small firms are able to muster the resources necessary to bring lawsuits to enforce their patents against a dominant incumbent, which in turn renders patents all but irrelevant to their businesses.

For companies that want to invent strategically critical technologies that may take years to perfect and are easily copied once proven successful, reliably enforceable patents are an absolute necessity to justify the necessary investments of time and resources. For these innovators, the current state of patent enforcement is a disaster that we, as a nation, must correct if we are to maintain our position of leadership in the world.⁵ *Amici* recognize that this case is not a proper forum to try and address all of the aspects of the patent system that have made patents unreliable for the very innovators we would like most to incentivize, but certainly this Court can take some of the profitability out of blatant, wanton “efficient infringement” that this case exhibits.⁶ Cybersecurity should be at or near the top of

⁵ As noted in the Argument section, Part III, the weakening of patents coincides with a significant shift of investment capital away from strategically significant technologies that require patents for justifying the investment of time and resources and into lower-risk activities that are less dependent on patents.

⁶ Concern that this Court may affirm the award against Cisco, one of its members, is what prompted the so-called High Technology Inventor Alliance to file its *amicus* brief, which we address below in the Argument section, pp. 20 - 26. HTIA comprises ten of the largest companies that dominate digital technologies in

(Footnote Cont'd on Following Page)

any list of critical technologies, and Cisco’s egregious behavior here – if allowed to succeed – would further undermine the incentives of brilliant young inventors to devote their time to address one of our most important national concerns – network security.

While adequate compensation for infringement has always been important to patent owners, it became even more so following the Supreme Court’s 2006 decision in *eBay, Inc., et al. v. MercExchange, LLC*, 126 S.Ct. 1837 (2006), which marked the beginning of the systematic weakening of the U.S. patent system that continued over the ensuing 15 years. In *eBay*, the Court eliminated the long-standing rebuttable presumption that a patent owner, after litigating successfully against an infringer, was entitled to an injunction, barring some overarching public interest concern to the contrary.⁷ Since the beginning of the patent system and

the U.S and worldwide. HTIA is primarily a lobbying group that has been extremely successful in influencing Congress and the Administration to adopt policies that favor the corporate giants and suppress the ability of small competitive companies to get a foothold, including particularly the ability of these small companies to enforce patents that might otherwise facilitate such a competitive foothold.

HTIA members are Google, Cisco, Amazon, Intel, Adobe, Salesforce, Microsoft, Dell, Oracle and Samsung. Their collective market capitalization is currently over \$8,000,000,000,000, a figure that exceeds the entire gross national products of every country on earth save the United States, China and Japan.

⁷ The trial judge denied an injunction in this case, in part because the “ripple effect” might fall on the military and civilian efforts to maintain internet security. Finding, p. 163.

until *eBay*, that presumption had been applied routinely by trial and appellate courts, and its elimination represented a cataclysmic shift in the balance of power between patent owners and the companies to which they became adverse, either as infringers or as potential licensees.

In a concurring opinion in *eBay*, while agreeing in theory with the majority that injunctions in patent cases should be analyzed using traditional principles of equity, Chief Justice Roberts cautioned:

“From at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases. **This ‘long tradition of equity practice’ is not surprising, given the difficulty of protecting a right to exclude through monetary remedies that allow an infringer to use an invention against the patentee’s wishes ...** When it comes to discerning and applying those standards, in this area as others, ‘a page of history is worth a volume of logic.’” [citations omitted] (emphasis supplied). *Id.* at 1841 - 42.

This observation proved to be prescient. As this Court and the district courts applied the *eBay* ruling, it became next to impossible for startups and small company patent owners to obtain injunctions to protect their statutory right to exclude and they were left with only the possibility of monetary damages. Prior to *eBay*, a reasonable expectation on both sides of a licensing negotiation was that if

litigation ensued, an injunction was likely to be entered to stop infringement, which in turn gave even a very large incumbent a compelling reason to at least consider settling patent cases and/or taking a license from a startup or smaller company. After *eBay*, however, there was no longer any such incentive, and many large companies began routinely to ignore the patents of smaller companies, harvesting enormous profits from the infringement for the duration of the litigation and beyond.

The efficient infringement problem was exacerbated the following year, when this Court rendered its *en banc* decision in *In re Seagate Technology, LLC*, 497 F.3d 1360 (Fed. Cir. 2007). The two-step test for enhancement of damages announced in *Seagate* imposed an essentially impossible burden on patent owners any time the defendant's lawyers could cobble together a plausible legal theory for invalidity or noninfringement – which is almost always the case for large and highly profitable companies such as Cisco that can afford superbly skilled lawyers. As a result, many lawyers for patent owners stopped trying even to allege willful infringement. For nearly a decade, the combined effects of *eBay* and *Seagate* eliminated virtually all the risk associated with deliberate and wanton infringement, and gave rise to a culture of scorn and disrespect for the patents of smaller companies, a phenomenon particularly prevalent in the behavior of many of the corporate giants that comprise the digital electronics industry. And even

though the Supreme Court’s 2016 decision in *Halo Electronics, Inc. v Pulse Electronics, Inc*, 136 S.Ct. 1923 (2016) later overruled *Seagate* and attempted to restore a measure of balance to the analysis used by trial courts in determining whether to enhance damages, this disrespect for patents owned by others has become deeply entrenched and has persisted, as the trial court’s Findings in this case on enhanced damages exemplify.

Nor is the *Centripetal* case a singular example of Cisco’s predatory infringement inflicted on a far smaller patent owner that recently has made its way to this Court. In *SRI International, Inc. v. Cisco Systems, Inc.*, Docket No. 20-1685, Document #48 (Fed. Cir. September 28, 2021), this Court reversed the trial court and restored a finding of enhanced damages based upon facts remarkably similar to those found by the trial court in the instant case, namely Cisco’s efforts to assert that its products did not have a key infringing feature when its own product literature belied the assertion. This Court read Cisco’s conduct as the absence of a reasonable belief in a noninfringement defense:

“SRI identified an internal Cisco document that [contrary to the arguments of Cisco’s lawyers] shows a ‘Meta Event Generator’ plainly depicting a hierarchical arrangement of monitors correlating multiple events. J.A. 38708. Cisco’s own technical witness similarly acknowledged that this ‘Meta Event Generator’ functions to correlate events. J.A. 21813 (Trial Tr.

1519:3–5) (‘Meta is specialized to combine events into a bigger event.’).

Further combined with testimony from SRI’s expert that the accused products correlate events, Cisco-customer testimony that Cisco’s product correlates events, and third-party testing confirming the same, the jury had a reasonable basis to believe that Cisco did not have any reasonable defenses to infringement.” Slip Op., p. 8.⁸

The role of enhanced damages is primarily punitive. *Halo* at 1932, 1939.

Like most punitive damage awards, the trial court’s finding that Cisco’s infringement was willful and the discretionary enhancement of the damage award are designed to deter similar predatory conduct in the future, or at least to motivate the defendant to consider whether efficient infringement is still a viable business strategy. A corollary to the same point is that the award must be of sufficient magnitude to get the attention of the senior management of the offending company. Cisco has a current market capitalization of \$243B and reported annual revenue for fiscal 2021 of \$50B.⁹ Given that Cisco over the course of three years sold over \$21B worth of infringing equipment and services, which the trial court apportioned to try and capture the value of just the infringing features. *Amici* submit that the

⁸ We discuss the *SRI* case more fully in the Argument portion of this brief.

⁹ Cisco 2021 Annual Report, p.4.

court's award of a 10% royalty on \$8B and 2.5x enhancement is appropriate for this purpose.¹⁰

Equally important, however, is the deterrent effect the ruling below may have on the behavior of other large companies for which efficient infringement has also proven to be a highly profitable business strategy. The *amicus* brief filed by HTIA reflects an obvious concern that affirmation of the judgment below may impose limits on the extent to which some of HTIA's other members can continue riding roughshod over the patent rights of startups and companies that are far smaller than they, in most cases multiple orders of magnitude smaller. We address some specifics of the HTIA *amicus* brief more fully in the Argument section.

USIJ and IA respectfully submit that the center of gravity of the U.S. legal system has shifted far too heavily in favor of infringers and that it is time to restore the enforcement of property rights in a manner that takes some of the ill-gotten profits out of patent infringement and allows highly innovative smaller companies to challenge the dominant incumbents and to thrive. This is not merely a legal and social problem – it is a matter of grave concern to our national security, because venture capital funded startups for at least the last 50 years have provided a major

¹⁰ The actual sales, before apportionment by the Court to use only the value of the infringing features as the royalty base was \$21.4 B. The Court found that only about 35% of the sales reflect value based on the infringing technology. Findings at 143 to 160.

source of renewal in the U.S. economy, particularly in the strategic technologies needed for the health, welfare and safety of Americans, such as cybersecurity.¹¹ Earlier this year, the National Security Commission on Artificial Intelligence issued its report on, *inter alia*, the preparedness of our country to compete on a global basis with our most important competitor nations. The report includes the following cautionary observations (p. 201):

“China is both leveraging and exploiting intellectual property (IP) policies as a critical tool within its national strategies for emerging technologies ... The United States has failed to similarly recognize the importance of IP in securing its own national security, economic interests, and technology competitiveness. ... China is poised to ‘fill the void’ left by weakened U.S. IP protections, particularly for patents, as the U.S. has lost its comparative advantage in securing stable and effective property rights in new technological innovation.”

¹¹ Ironically, apart from Samsung, all the members of HTIA once were U.S. startups with amazing ideas for implementing new discoveries and technologies, many relying on patents to protect their investments and to compete with existing incumbents far larger than they.

ARGUMENT

I. Whether to Enhance Damages for Patent Infringement Is a Determination Committed to the Sound Discretion of the Trial Court

For nearly two centuries, U.S. courts have treated willful infringement more harshly than innocent infringement. As outlined by the Supreme Court in the *Halo* decision, the original Patent Act provided for treble damages in all cases in which a patent owner established infringement, with no distinction drawn between a “wanton and malicious pirate” and an infringer who acted in ignorance or in good faith. 136 S.Ct. at 1928-30. In 1836, Congress recognized the unfairness of treating both classes of infringers alike and eliminated the automatic trebling aspect of damages, providing instead that a trial judge is empowered with the discretion to increase a damage award by up to three times according to the facts of the case. *Id.*

The original statutory provision did not specify the types of behavior that district courts were to consider in exercising their discretion to enhance damage awards, but over time an extensive body of jurisprudence developed around that question. In general, the courts recognize that in a typical run-of-the-mill patent case, there should be no enhancement of the damage award. Alternatively, where the infringement is egregious, willful or deliberate, the district court was given the discretionary power to order enhancement of the damage award by up to three times. [*Id.* at 1930]. A few examples of the circumstances in which enhancement is appropriate are listed in the *Halo* opinion: “selling ‘copied technology’ of ... former

employer;” “infringer acted willfully and deliberately;” “deliberate and willful infringement;” “wanton, deliberate and willful infringement;” “bald case of piracy.” (*Id.* at 1929). The *Halo* opinion emphasized that there is “no precise rule or formula” and that the “district court’s ‘discretion should be exercised in light of the considerations’ underlying the grant of that discretion.” *Id.* at 1932.

The central issue before the Supreme Court in the *Halo* case was the continued viability of this Court’s two-part test for establishing willfulness set forth in *In re Seagate Technology, LLC*, 497 F.3d 1360 (Fed. Cir. 2007). As viewed by the Supreme Court, *Seagate* required a patent owner to demonstrate that an infringer’s behavior was “objectively reckless,” which the Supreme Court considered to be an arbitrary and improper limit on the statutory grant of discretion given to the district court:

“The principal problem with *Seagate*’s two-part test is that it requires a finding of objective recklessness in every case before district courts may award enhanced damages. Such a threshold requirement excludes from discretionary punishment many of the most culpable offenders, such as the ‘wanton and malicious pirate’ who intentionally infringes another’s patent – with no doubts about its validity or any notion of a defense – for no purpose other than to steal the patentee’s business. [citation omitted]. Under *Seagate*, a district court may not even consider enhanced damages for such a pirate,

unless the court first determines that his infringement was “objectively” reckless.”

Halo, 136 S.Ct. at 1932.¹²

In overruling *Seagate*, the Court made clear that, while enhancement of damages is not for the routine infringement case and remains dependent upon a showing of “egregious” behavior by the infringer, patent piracy must still be punishable:

“The *Seagate* test reflects, in many respects, a sound recognition that enhanced damages are generally appropriate under §284 only in egregious cases. That test, however, is unduly rigid, and it impermissibly encumbers the statutory grant of discretion to district courts. [citation omitted]. In particular, it **can have the effect of insulating some of the worst patent infringers from any liability for enhanced damages.**”

(*Id.*) (emphasis supplied).

The *Halo* opinion identifies a couple of salient principles directly relevant to the instant case. First, the Court intended to preserve the traditional discretion of

¹² The Court also reversed the Federal Circuit’s requirement in *Seagate* that willfulness and its underlying facts be proven by “clear and convincing” evidence, ruling that a “preponderance of the evidence” test is more appropriate. 136 S.Ct. at 1934.

district judges to determine questions of enhancement, with appellate review limited to an “abuse of discretion.” For example, the Court noted:

“Section 284 gives district courts discretion in meting out enhanced damages. It ‘commits the determination’ whether enhanced damages are appropriate ‘to the discretion of the district court’ and ‘that decision is to be reviewed on appeal for abuse of discretion.’” *Id.* at 1934.

Second, the Court emphasized that there is no rigid formula that limits what the trial court can consider, other than the factors that have been used traditionally in assessing the exercise of discretion in this context (“we eschew any rigid formula for awarding enhanced damages under §284.”). *Id.* The Court made a direct comparison between the manner in which a district judge should approach the award of attorney fees under Section 285 and the enhancement of an award under Section 284, citing its earlier ruling in *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S.Ct 1749 (2014). *Halo* at 1934. In *Octane*, the Court endorsed a “totality of the circumstances” test to be used in assessing whether the defendant’s behavior was exceptional. 134 S.Ct. at 1756.

The *Halo* Court further observed that:

“... culpability is generally measured against the knowledge of the actor at the time of the challenged conduct. *See generally* Restatement (Second) of Torts §8A (1965) (‘intent’ denotes state of mind in which ‘the actor desires to

cause consequences of his act’ or ‘believes’ them to be ‘substantially certain to result from it’); *see also Kolstad v. American Dental Assn.*, 527 U. S. 526, 538 (1999) (‘Most often . . . eligibility for punitive awards is characterized in terms of a defendant’s motive or intent’).” 136 S.Ct. at 1933.

II. The Court Below Determined Enhancement in Accordance with the Principles Laid Out in *Halo*.

Cisco’s brief argues that trial court committed numerous errors in its application of the principles set forth in *Halo*, including, for example, the factual finding that Cisco copied the technology disclosed by Centripetal (*e.g.*, (“no evidence showing that Cisco copied [Centripetal’s technology] ...”) Cisco Br., p.15. These arguments, at bottom, are simply an invitation to this Court to substitute its own judgment of the factual presentations for those of the trial judge, in contravention of the “abuse of discretion” and “clearly erroneous” limitations on appellate review. *Amici* submit that a fair reading of the trial court’s Findings on enhancement and his legal analysis demonstrate ample support for the discretionary enhancement.

Pages 149 to 151 of the Findings, for example, set forth facts that formed the basis for the trial court’s finding of copying, (i) commencing with a binding NDA wherein Cisco promised to use Centripetal’s disclosed information for no purpose other than the potential formation of a partnership, (ii) the disclosure by Centripetal

of novel features that allowed the Centripetal technology to deal with encrypted malware in real time, which Cisco had not previously been able to do, (iii) the efforts by Cisco personnel to study the Centripetal algorithms and patents to understand how its system operated, and (iv) the subsequent incorporation of Centripetal's key features into Cisco's own product offerings. The trial court's opinion elaborates on the foregoing facts as it goes through a detailed application of the relevant legal principles, concluding that the facts are highly probative and establish by a preponderance of the evidence that Cisco intentionally copied the novel features of Centrifugal's technology. (Findings, pp. 155 – 157). And while simple copying someone else's product may not always be considered "egregious behavior," the duplicity of enticing a smaller company like Centripetal to disclose the technology under the guise of entering into a partnership, and then copying the technology is the very essence of egregious conduct.

The trial court identified multiple instances of meetings between the two companies at which Cisco was provided, pursuant to the NDA between the parties, information related to Centripetal's filtering algorithms and the Centripetal patents. The court noted that a senior executive at Cisco, their "security architect," requested a demonstration of Centripetal's product containing its key features, and followed up with a blog posting confirming that Centripetal's product was "a cool new approach to leveraging threat data." (Findings at p.150, paragraphs 6 and 7).

The court also observed that between June 2015 and June 2017, when Cisco launched the accused products, its employees visited Centripetal's website 354 separate times looking at a total of 1206 pages, an activity that carries its own inference that Cisco's internal investigation went well beyond anything contemplated by the NDA.

Cisco's brief argues that Centripetal did not supply confidential information at any of their many meetings and that Cisco never saw the Centripetal algorithms or studied the Centripetal patent claims. (Cisco Br., p. 60).¹³ The trier of fact obviously concluded otherwise and cited trial exhibits and testimony on which the conclusion was based. The determination of willfulness is a fact issue as are all of the underlying facts supporting the overall conclusion. As such, these are the sole province of the trier of fact, whether the trial is before a jury or is a bench trial. The Findings of Fact are reviewable on appeal only to the extent they are clearly erroneous.¹⁴ Given the extensive Findings on each relevant point by the trial court,

¹³ Given the evidence cited in Findings at pages 150 and 151, this statement is likely false. Even if it were correct, however, it would add yet another fact from which a court might have concluded that Cisco had either knowledge of the infringement or was consciously avoiding such knowledge. *See, e.g., Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct 2060 (2011) ("willful blindness" to likelihood of infringement satisfied the intent requirement for induced infringement).

¹⁴ F.R.C.P. Rule 52(a)(6) provides that Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses'

(Footnote Cont'd on Following Page)

and particularly his opportunity to assess the credibility of Cisco's witnesses, it would difficult for this Court to find any error at all, let alone "clear error" sufficient to rule that the trial judge was mistaken.

Notably, some of the assertions in Cisco's brief reveal its motives and intentions to a greater extent than perhaps it intended. The nondisclosure agreement required Cisco to treat Centripetal's "**confidential, proprietary or non-public information**" as "strictly confidential" and "not use any Information in any manner . . . other than solely in connection with its consideration of" a possible partnership. Findings at p. 149 (emphasis supplied). To companies that do business ethically, that language clearly prohibits the recipient, after seeing Centripetal's "cool new approach to leveraging threat data," from incorporating that "approach" into its own product. Cisco, however, appears to believe that the NDA only prevented it from copying technology covered by Centripetal's patents. Cisco complains that it did not copy anything that was **patented** by Centripetal and that unpatented features disclosed in a patent should be free for copying, citing *Amazon.com v. Barnes & Noble*, 239 F.3d 1343, 1366 (Fed. Cir. 2001). Cisco Br.

credibility. *Daiichi Sankyo Co. v. Matrix Labs., Ltd.*, 619 F.3d 1346, 1352 (Fed. Cir. 2010) (clear error requires "a definite and firm conviction that a mistake was made").

at 59. This argument has zero to do with the ruling by the trial court in this case.¹⁵ It does, however, reveal how Cisco tries to rationalize its reading of an NDA that prohibited **all** use of “confidential, proprietary or non-public” information for any purpose outside the stated purpose of furthering a potential partnership. It is fair to conclude that Cisco was simply indifferent to whether it was violating the NDA; the “I am large and wealthy and they are small and struggling” philosophy is deeply imbedded in Cisco’s internal beliefs about itself. It is manifest here.

A. The Trial Court’s Use of the *Read* Factors Is Not Precluded by *Halo*.

Both Cisco and HTIA argue that the trial court improperly employed the so-called “*Read* Factors” in making its enhancement determination.¹⁶ Cisco Br. at 58; HTIA brief at p.4 and *passim*. This argument actually is the primary basis for HTIA’s brief, which makes the same point in multiple ways, presumably to make sure that this Court is aware that HTIA was fully satisfied with the state of

¹⁵ The *Amazon* decision involved only whether an Amazon patent could be enforced against an unclaimed feature of the Amazon website that had been copied by the defendant – the well-known “single click” purchase command. The decision has nothing to do with whether the unauthorized use of non-public information following a contractual commitment to refrain from doing so is relevant to the enhancement of damages for patent infringement.

¹⁶ This refers to a list of factors set out in *Read Corp v. Portec, Inc*, 970 F.2d 816, 826-27 (Fed. Cir. 1992), overruled on other grounds, *Markman v. Westview Inst. Inc.*, 52 F.3d 967 (Fed. Cir. 1995).

willfulness jurisprudence prior to *Halo*. These arguments proceed from the wrong premise to reach a wrong conclusion.

It is apparent from the Findings that the trial court was well aware of the Supreme Court's ruling in *Halo*; the case is cited 9 times in the Conclusions of Law Regarding Willful Infringement and Enhanced Damages. Nowhere does *Halo* provide or even suggest that a trial court should not use the *Read* factors as a checklist for organizing its thoughts in advance of deciding whether the infringement was willful and any enhancement of the damages. What *Halo* does say is that "courts should continue to take into account the particular circumstances of each case" (136 S.Ct. 1933), that "district courts are to be 'guided by [the] sound legal principles developed over two centuries'" (*Id.* at 1935), and that punishment should "generally be reserved for egregious cases typified by willful misconduct." (*Id.*)

The Supreme Court's reference to "two centuries of enhanced damages" would, of course, include the dozens of decisions over the previous 25-years that used the *Read* format for analyzing whether there should be enhancement. It would be surprising if the trial judge, following a 22-day trial, did not use an outline of points for keeping track of the evidence and organizing its thoughts and conclusions.

The HTIA brief cites *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 875 F.3d 1369, 1382 (Fed. Cir. 2017) to argue that "the Supreme Court never endorsed [the *Read*] factors, as this Court has recognized." That statement may be

true, but it is irrelevant. *Presidio Components* involved a situation in which the trial court decided that enhancement was not called for, but did not use a *Read* factor checklist for analysis. In affirming, this Court said that a district court is not **required** to use the *Read* factor format, but merely to “consider the particular circumstances of the case to determine whether it is egregious.” (*Id.*). It does not preclude the use of such factors as a checklist.

More recently, this Court in *SRI International, Inc. v. Cisco Systems, Inc.*, Docket No. 20-1685, Document #48 (Fed. Cir. September 28, 2021), endorsed the use of the *Read* factors to determine and assess enhanced damages, stating:

“... the district court appropriately considered the factors laid out in *Read Corp. v. Portec, Inc.*, including at least ‘the infringer’s behavior as a party to the litigation,’ the infringer’s ‘size and financial condition,’ the infringer’s ‘motivation for harm,’ and the ‘[c]loseness of the case.’” *SRI Op.* at p. 11.

The *SRI* opinion provides a relatively complete, though not surprising, answer to HTIA’s assertions about the suitability of using the *Read* factors.

The HTIA brief characterizes the trial court’s analysis as “cursory,” (p.2). In its Findings, however, the trial court devoted 13 pages to the question of willful infringement and enhancement of damages, detailing specific documents and testimony on which the court based its conclusions. With respect to copying, the court held that Cisco created its “network of the future” far too close in time after it

saw Centripetal’s “cool new approach to leveraging threat data,” for it to have been coincidental, particularly since Cisco’s engineers were touted as having “solved the unsolvable problem.” Findings, pp. 156 – 57.

It is worth noting in this context that for a company such as Centripetal, in trying to design and sell cybersecurity software and hardware for networks, has only a couple of choices in terms of selling it. Either they can approach every IT manager individually or they can form a partnership with the company that makes hardware that handles 85% of the world’s internet traffic, as Cisco claims it does,¹⁷ and try to integrate the new design into existing products. The NDA serves an important purpose, because disclosing key aspects of extremely valuable technology to competent engineers is inherently dangerous, bringing to mind the only adage used by bridge players – “one peek is worth a dozen or so finesses.” NDAs, however, are not airtight, which is an important reason that patent protection is also vital to small companies; it allows them to take risks in disclosing technology to larger companies without fear of theft, or at least with a remedy for theft.

III. Investments in Critical Strategic Technologies in Our Country Have Been Declining for More Than a Decade.

The House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law Report released a report last year entitled “Investigation of

¹⁷ Cisco’s 2021 Annual Report, p.13.

Competition in Digital Markets” by (“House Report”) is a 451-page assessment of the state of competition in the digital technologies. Although the Report is primarily concerned with the impact that Google, Facebook, Amazon and Apple are having on privacy and competition in the digital technologies, much of the report is equally applicable to some of the other corporate giants that comprise the HTIA. An important finding of the investigation shows a significant decline in the number of startups and entrepreneurs willing to start companies to compete with the large incumbents:

“In recent decades, however, there has been a sharp decline in new business formation as well as early-stage startup funding. The number of new technology firms in the digital economy has declined, while the entrepreneurship rate—the share of startups and young firms in the industry as a whole—has also fallen significantly in this market. Unsurprisingly, there has also been a sharp reduction in early-stage funding for technology startups.” House Report at p.46.

This conclusion confirms those in a number of other studies, including particularly one released last year by Professor Mark F. Shultz at the University of Akron showing the shift in venture capital spending away from critical technologies such as semiconductors that are dependent upon patents and toward lower risk investments, such as new marketing and financing techniques, consumer products,

hospitality, etc. See, Schultz, “The Importance of an Effective and Reliable Patent System to Investment in Critical Technologies,” <https://www.usij.org/research/2020/8/3/usij-releases-report-on-the-importance-of-an-effective-and-reliable-patent-system-to-critical-technologies>. These

developments do not bode well for our country.

We urge the Court to bear in mind, as it considers the issues in this case and others, the importance of inventors and innovators to our national security and welfare and the critical role that patents play in incentivizing such entrepreneurs and their investors to pursue risky technologies. Contrary to what HTIA and some of its members are telling the world, it is not these corporate giants that are the driving force for cutting edge innovation. It is smaller, more flexible and highly motivated startups and young companies that develop new ways of looking at problems. It was not Cisco, the goliath with a market cap of \$250,000,000,000, that figured out how to solve the “problem previously thought to be unsolvable.” It was Centripetal, a startup with fewer than 100 employees, still losing money after 10 years, and almost constantly in need of additional capital as it grows. Unlike the vast majority of the victims of “efficient infringement” by the technology giants, Centripetal was able to garner the funds needed to bring this case and to prevail. That is not the normal outcome.

When Cisco and HTIA complain about the size of the overall award, it is worth recalling just why the award is so high. The answer is simple, although not readily apparent – Cisco is a monopolist, claiming that 85% of all internet traffic passes through its routers and switches. Cisco Annual Report, p. 13. This allows the company to harvest what are essentially monopoly profits from its operations, and also accounts for how it can sell \$21B worth of infringing products in the short space of a couple of years. Cisco’s predatory behavior toward smaller companies – such as SRI and Centripetal – also helps explain how it became a monopolist and how it plans to remain such.

HTIA and Cisco are particularly concerned with *Read* factor 4, which takes into account a comparison between the financial resources available to the separate parties. Given the resources available to some of its some of its multi-trillion-dollar members, this particular factor is (and should be) worrisome. It is important to recall in this context that enhanced damages are purely punitive, and the size of punitive awards should be of a size that the miscreant will feel the pain. Restatement of Torts, Second (1979), §908(2) (“trier of fact may consider ... wealth of the defendant”); *Neal v Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 928 (“the function of deterrence . . . will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort”).

CONCLUSION

The trial judge in the instant case did a careful and thorough job of documenting the malevolent behavior one of the corporate giants in the digital technology industry. The court reached an outcome that seems quite reasonable to anyone who becomes familiar with the background and facts. The award will be felt by Cisco and its shareholders, as punitive damages should be, but it will not inflict any lasting injury. USIJ and IA strongly urge affirmation of the full amount of the award.

Dated: December 13, 2021

Respectfully submitted,

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

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