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 14 PUBLIC KNOWLEDGE

15 **UNITED STATES DISTRICT COURT**
 16 **NORTHERN DISTRICT OF CALIFORNIA**
 17 **(San Jose Division)**

18 ARISTA NETWORKS, INC.,

19 Plaintiff,

20 v.

21 CISCO SYSTEMS INC.,

22 Defendant.

Case No. 5:16-cv-00923

**[PROPOSED] BRIEF FOR PUBLIC
 KNOWLEDGE AS AMICUS CURIAE IN
 SUPPORT OF PLAINTIFF**

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INTEREST OF AMICUS CURIAE

Amicus curiae Public Knowledge is a nonprofit organization dedicated to promoting innovation, creativity, and competition in the technology industry 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, consumers, and small competitors for a balanced copyright system, particularly with respect to new and emerging technologies.¹

Public Knowledge has previously served as *amicus* in important copyright, competition, and standard essential patent cases at the intersection of competition and intellectual property rights, such as *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468 (6th Cir. 2015), *cert. granted in part sub nom. Star Athletica, L.L.C. v. Varsity Brands, Inc.*, No. 15-866, 2016 WL 98761 (U.S. May 2, 2016), *Google, Inc. v. Oracle America, Inc.*, 135 S. Ct. 1021 (2015) (mem.), and *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024 (9th Cir. 2015), where it was cited by the court (*id.* at 1031, 1052 n.22).

Public Knowledge submits this brief to assist the court by explaining the importance of open standards to the public and in the technology industry and the competitive harms that can occur when standards are closed off, as well as the important role that antitrust law can play in appropriate cases to guard against abuse of previously open standards and the resulting harm to competition.

INTRODUCTION

This case involves allegations that the Defendant abused a *de facto* industry standard process. Defendant allegedly held out and actively promoted certain interfaces as an industry standard and then reversed course and closed off access to those standard interfaces after they

¹ Counsel for Plaintiff Arista advised that it consents to the filing of this brief; counsel for Defendant Cisco advised it would neither consent nor decline to consent at this time and will determine its response once it has a chance to review the brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, its members, and its counsel, made monetary contribution to the preparation or submission of this brief.

1 became widely adopted and relied upon by consumers, to insulate itself from competition and
2 maintain its monopoly. Pl.'s Compl. 4, 6-9.

3 *Amicus* recognizes that the accuracy and sufficiency of the factual allegations in this case
4 are highly contested. *Amicus* takes no position on the merits, the resolution of factual disputes,
5 whether the complaint meets standing and injury requirements, or whether the complaint satisfies
6 *Iqbal*, 556 U.S. 662 (2009), and *Twombly*, 550 U.S. 544 (2007). Rather, *amicus* submits this brief
7 to help explain how an open standard, while beneficial overall to innovation and competition, can
8 lock users in to one supplier and product if the open standard is closed off. Exerting control over a
9 previously open standard in this way can allow a firm with monopoly power to foreclose
10 competition on the merits and maintain its monopoly in violation of Section 2 of the Sherman Act,
11 15 USC § 2.

12 The issues raised by this case reach beyond a competitive battle between two networking
13 equipment companies. The heart of the controversy is interoperability and innovation: innovators,
14 startups, established competitors, and consumers rely on consistent, clear industry standards and
15 the expectation that opened standards will remain open. Antitrust has an important role to play in
16 ensuring that widely-adopted, open standards are not abused to create or maintain monopoly
17 power. *Amicus* therefore urges this Court, in ruling on the motion to dismiss, to be cautious not to
18 conclude that, as a matter of law, denial of access to a previously open industry standard can never
19 be anticompetitive.

20 **ARGUMENT**

21 The technology industry owes part of its success to open, interoperable, and consistent
22 standards. Control over a widely-used industry standard may position a firm to exercise control
23 over the entire market or products that rely on that standard.

24 To illustrate, imagine that Delphi Corporation is one of several medical billing system and
25 software companies. In order to use these systems and software, employees of hospitals and
26 doctors' offices must develop a detailed knowledge of thousands of billing codes representing the
27 myriad of possible medical conditions—a high human capital cost that makes hospitals wary of
28

1 investing in software out of a fear of being locked in to a particular vendor forever. To help
2 convince hospitals to purchase Delphi systems and software, therefore, Delphi represents to
3 hospitals that if they purchase Delphi software and learn Delphi billing codes, the human capital
4 and training investment won't go to waste, because Delphi's codes will be "industry standard."
5 Any billing software provider can use the same codes and interoperate with Delphi's systems.
6 Because of this apparent low risk of lock-in, hospitals choose Delphi's systems and software over
7 its competitors. Over time, Delphi achieves a monopoly in billing systems and software.

8 As more hospitals and doctors use the industry standard Delphi billing codes, the more
9 valuable it is for other hospitals and doctors to use them. The large pool of current and potential
10 employees who are skilled at using these codes makes it easier for hospitals to hire experienced
11 employees without incurring major training costs. These network effects help the Delphi billing
12 codes to succeed in becoming the *de facto* industry standard.

13 Five years later, Alpha Billing enters the market with a superior billing system and
14 software. Reflecting market demand, Alpha's software relies upon Delphi's industry standard
15 representations and uses the Delphi codes. Although Alpha offers its own alternative codes, it
16 finds that hospitals insist on using Delphi's code with Alpha's systems and software because given
17 the large sunk costs in employee training and system configuration, switching is too costly and
18 leads to too many clerical errors. By offering a superior product that uses Delphi billing codes,
19 Alpha's system begins to make inroads into Delphi's systems and software market share. Delphi,
20 fearing this new competition, responds by changing course from its historic industry standard
21 availability and denying Alpha access to the billing codes, in part by asserting copyright over the
22 codes. If Delphi succeeds in closing off access to the previously open standard codes, it will
23 significantly foreclose competition from Alpha and other rivals. Hospitals and other customers
24 that thought they were avoiding being locked in to a particular software provider will become
25 locked in to Delphi. Prices will rise and innovation will be diminished. Delphi will thwart its
26 competition, not by offering a superior product, but by abusing the *de facto* standard status of its
27 billing codes, and will maintain its monopoly in billing systems and software.

28

1 The allegations in this case largely reflect this hypothetical example of standards abuse.

2 **I. The Closing Off of an Open Standard Presents a Serious and Harmful Problem for**
3 **Consumers and Competition**

4 The complaint in this case alleges that Defendant's command-line interfaces ("CLIs") have
5 become a *de facto* industry standard. Pl.'s Compl. 6. Industry standards are an important
6 component of computing and networking product markets: they promote interoperability, reduce
7 the costs of innovation, and stimulate rigorous competition. *See* Carl Shapiro & Hal R. Varian,
8 *Information Rules: A Strategic Guide to the Network Economy* 230 (1999). Such standards may be
9 the inevitable result of rigorous competition in network markets because such markets often are
10 "tippy, meaning that [they] can tip in favor of one player or another. It is unlikely that all will
11 survive." Shapiro & Varian, *supra*, at 176. This "tipping" effect can also apply to standards:
12 multiple, incompatible standards usually cannot coexist for long, and generally one standard will
13 triumph or competitors will negotiate "a single, compromise standard." *Id.*

14 *A. Standards Can Be Vital to Interoperability, Innovation, and Competition*

15 Industry standards involve a tradeoff: in exchange for "locking in" consumers and
16 competitors to a single *standard*, standards promote interoperability (the ability of devices to
17 communicate with other devices), reduce the risk that consumers will become "stranded" by
18 purchasing a product that cannot communicate with others, and, if the standards are open, ensure
19 that consumers will not become "locked in" to a single *provider*. *See* Shapiro & Varian, *supra*, at
20 230; *see also Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846, 2012 WL 1672493, at *1 (N.D.
21 Cal. May 14, 2012) (identifying the tradeoff as an aspect of standardization).

22 Ethernet switches interact with CLIs in a method similar to network effects: as network
23 engineers gravitate towards one form of CLI, the Ethernet switches using that CLI become more
24 valuable, as it becomes easier for consumers who purchase those switches to find network
25 engineers to service them. *See* Stanley M. Besen & Joseph Farrell, *Choosing How to Compete:*
26 *Strategies and Tactics in Standardization*, 8 J. Econ. Perspectives 117, 118 (1994). Standards
27 assume an especially important role in network markets like switches because in such markets the
28 standard's "sponsor" benefits from increased adoption of that standard. *See id.* Firms in network

1 markets may develop standards in a formal process via standard-setting organizations (formal or
2 *de jure* standards), or a firm may create a *de facto* standard “spontaneously[,] due to [the]
3 marketplace success” of one particular innovation. Janice M. Mueller, *Patent Misuse Through the*
4 *Capture of Industry Standards*, 17 Berkeley Tech. L.J. 623, 634-35 (2002).

5 *De facto* standards can emerge as the result of a “full openness” strategy, where a firm
6 pushes its technology towards becoming a *de facto* standard by encouraging other firms to adopt
7 the technology as a standard, permitting potential competitors “to make products complying with
8 the standard, whether they contributed to its development or not.” Shapiro & Varian, *supra*, at
9 200. Firms use full openness to “overcom[e] a stalemate in which no single firm is in a position to
10 drive home its preferred standard without widespread support.” *Id.* at 201. Generally, newer firms
11 tend to favor full openness standards “to neutralize installed-base disadvantages or to help
12 assemble allies,” whereas dominant incumbents eschew full openness strategies because they
13 already benefit from an existing base of consumers and need not solicit allies. *Id.* The process by
14 which a full openness strategy results in a *de facto* standard is similar to the process by which a
15 standard-setting organization adopts a standard: firms agree to compete over “marketing, brand
16 name, and distribution” rather than technological capability. *Id.*

17 *B. Closing Off Previously Open Access to Widely Adopted Standards Can Exclude Rivals*
18 *and Harm Competition and Consumers*

19 Standards are not a panacea for firms and consumers. In exchange for the benefits
20 standardization provides, standardization can impose high switching costs on consumers and
21 competitors. Shapiro & Varian, *supra*, at 11. For example, when switching to a new standard,
22 “files are unlikely to transfer perfectly, incompatibilities with other tools often arise, and . . .
23 retraining is required.” *Id.* Switching to a new standard, even a superior one, may be unattractive
24 because the new technology requires retraining and other costs but lacks the installed base of users
25 and corresponding network effects of the current standard. See Joseph Farrell & Garth Saloner,
26 *Installed Base and Compatibility: Innovation, Product Preannouncements, and Predation*, 76 Am.
27 Econ. Rev. 940, 940 (1986). The increased costs make it difficult not only for consumers to adopt
28 alternative standards but for competitors to develop superior, “giant killing” standards. See *id.* at

1 940 n.3; Shapiro & Varian, *supra*, at 12. As a result, alternative standards are rarely viable choices
2 to which consumers or vendors may switch. Thus, while open industry standards can prevent
3 consumers from being locked in to a specific *product* due to switching costs, such standards
4 increase the costs of switching to a new *standard*, even if competing technology (or technology
5 reliant on a competing standard) is superior. *See* Farrell & Saloner, *supra*, 940.

6 However, so long as a standard is open for use, lock-in to a particular standard does not
7 necessarily raise competitive concerns. While consumers may not be able to switch to another
8 standard, they do enjoy competitive choices for their suppliers while reaping the interoperability
9 and other benefits a standard provides. But these choices persist only so long as the standard is
10 open. Once a standard is widely adopted, the ability to close off access to that standard can grant
11 significant market control, resulting in anticompetitive effects “if the companies promoting the
12 standard block others from adhering to the standard.” Carl Shapiro, *Setting Compatibility*
13 *Standards: Cooperation or Collusion, in* Expanding the Boundaries of Intellectual Property:
14 Innovation Policy for the Knowledge Society 81, 91 (Rochelle Cooper Dreyfuss et al. eds., 2001).
15 In other words, when a firm enjoys control over a widely-used, heavily-demanded standard, that
16 standard can be “‘hijacked’ by companies seeking to extend [it] in proprietary directions, and thus
17 in time gain[ing] control over the installed base.” Shapiro & Varian, *supra*, 257. Such conduct
18 leads to one of “the worst outcomes for consumers.” *Id.* at 231.

19 This behavior is sometimes described as an “open early, close late” strategy, where a firm
20 “might obtain a dominant position based in part on certain ‘open’ policies that induce reliance by
21 complementary firms, and then later exploit that position by offering less favorable
22 interconnection terms or by refusing to interconnect with them altogether.” *Testimony Before the*
23 *Antitrust Modernization Commission: Exclusionary Conduct* 15 (Sept. 29, 2005) (statement of
24 Prof. Carl Shapiro). This strategy is particularly concerning where the firm opening early
25 competes among complementary firms. *Id.* at 15-16.

26 Such hijacking or control over a formerly open *de facto* standard can occur in various
27 ways, including conduct like the copyright holdup alleged in this case. Holdup can occur where
28

1 the sponsor of a *de facto* industry standard asserts copyright after consumers and rivals are locked
2 in to use of that property through previous representations by the sponsor that the allegedly
3 protectable property is an open, available industry standard. *See* Joseph Farrell et al., *Standard*
4 *Setting, Patents, and Hold-up*, 74 Antitrust L.J. 603, 608 n.26 (2007) (identifying copyright as a
5 providing an opportunity for hold-up); Andrea Pacelli, Note, *Who Owns the Key to the Vault?*
6 *Hold-up, Lock-out, and Other Copyright Strategies*, 18 Fordham Intell. Prop., Media & Ent. L.J.
7 1229, 1239-40 (2008) (describing copyright holdup)

8 The potential for anticompetitive effects is illustrated by the efforts that standard-setting
9 organizations undertake to guard against such abuse when including protected property in formal
10 standards. Before protected (typically patented) technology or property is included in an official
11 standard, standard-setting organizations typically require the owner to take various steps to
12 minimize the opportunity for abuse, such as agreeing to not assert the patents or to license on fair,
13 reasonable, and non-discriminatory (“FRAND”) terms. *See* Anne Layne-Farrar et al., *Pricing*
14 *Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments*,
15 74 Antitrust L.J. 671, 672-73 (2007). FRAND terms protect consumers and competition by
16 preventing standards-essential patent holders from abusing the market power conferred by
17 inclusion in the standard, market power “which otherwise would not have existed.” *In re*
18 *Negotiated Data Solutions*, FTC Docket No. C-4234, Compl. ¶ 21 (Sept. 22, 2008); *see* Layne-
19 Farrar et al., *supra*, at 672.

20 There is no meaningful economic or competitive difference between withdrawing access to
21 a widely-adopted, relied-upon *de jure* standard and withdrawing access to a widely-adopted,
22 relied-upon *de facto* standard. In both instances, one competitor controls a component of
23 competition that, due to standardization, has resulted in consumer lock-in and high switching
24 costs. However, even where the sponsor of a *de facto* standard encouraged—and benefited from—
25 widespread use as an industry standard, *de facto* standardization lacks the protections that the
26 formal, *de jure* standards process enjoys which mitigate the dangers of hold-up.

27

28

1 Historically, courts have been more concerned with patent holdup rather than copyright
2 holdup, largely because patents cover functional items while copyrights do not. *See, e.g.,* Pacelli,
3 *supra*, at 1239 (explaining, briefly, history of patent holdup in contrast to copyright holdup).
4 However, concerns over copyright holdup may now be more significant following the Federal
5 Circuit’s recent decision in *Oracle America, Inc. v. Google Inc.*, 750 F.3d 1339, 1367 (Fed. Cir.
6 2014), which found that Java APIs, a form of functional code, are copyrightable. Prior to the
7 decision, the software industry expected that functional interfaces, like APIs, were not entitled to
8 copyright protection. *See* Brief for Public Knowledge as *Amicus Curiae* Supporting Petition for
9 Writ of Certiorari 11-23, *Google, Inc. v. Oracle Am., Inc.*, 135 S. Ct. 2887 (2015) (denying cert),
10 <https://www.publicknowledge.org/assets/uploads/documents/brief-oracle-v-google.pdf>. As *amicus*
11 argued in that brief, it believes functional methods of operation, like interfaces, are beyond the
12 scope of copyright protection and the case was wrongly decided. Nevertheless, the decision may
13 lead sponsors of other previously open interfaces and similar functional standards to try to use
14 copyright to restrict use of the standards. The result could be to place firms that relied on historical
15 representations and expectations about the openness of functional code at the mercy of
16 competitors newly claiming to own the standards, especially competitors that compete in
17 providing products reliant on those standards and that wish to exclude rivals. *See id.*

18 Finally, the competitive harm from patent and copyright holdup occurs regardless of
19 whether the sponsor of the standard intentionally deceived adopters from the beginning about its
20 commitment to openness, or if the sponsor decided to close off the standard to foreclose
21 competition at some point after initially holding it out as a standard and gaining market power.
22 The economic and competitive effects are the same and there is no basis for requiring heightened
23 pleading or evidence of fraud in assessing those effects.

24 **II. Closing Off Previously Open Access to a *De Facto* Standard Interface May Constitute**
25 **Predatory Conduct That Can Violate Section 2 of the Sherman Act**

26 The Ninth Circuit has “long held” that claims under Section 2 of the Sherman Act “may be
27 premised upon predatory conduct that is aimed at achieving or maintaining a monopoly. . . .
28 [M]onopolization of trade has two elements: ‘the possession of monopoly power in the relevant

1 market and . . . the acquisition or perpetuation of this power by illegitimate ‘predatory’ practices.’”
2 *Coal. for ICANN Transparency, Inc. v. Verisign, Inc.*, 611 F.3d 495, 505 (9th Cir. 2010) (quoting
3 *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 546, 541-42 (9th Cir. 1991)).

4 The holdup process described above—where a firm gains market power by offering its
5 technology as an open standard and then withdraws access to that technology to foreclose
6 competition—provides a means for a firm to maintain a monopoly that is not “a consequence of a
7 superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S.
8 563, 571 (1966). Instead of competing on the merits by introducing a better product or engaging in
9 more efficient operations, the firm coerces consumers to reject rivals and remain with the
10 monopolist’s products by exploiting control over a *de facto* standard that standardized due to the
11 firm promising to *not* take that exact course of action. While this particular course of dealing may
12 be a novel form of anticompetitive conduct, and it can include the use of intellectual property as
13 part of the holdup, it still “impair[s] the opportunities of rivals and . . . does not further
14 competition on the merits or does so in an unnecessarily restrictive way.” *Cascade Health*
15 *Solutions v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008).

16 A. *Exclusionary Conduct Can Include Novel Behavior*

17 The Sherman Act does not require that conduct fit neatly into specifically predefined
18 categories such as tying or exclusive dealing. “[T]he means of illicit exclusion, like the means of
19 legitimate competition, are myriad.” *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir.
20 2001) (*en banc*) (*per curiam*); *see also Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148
21 F.3d 1080, 1087 (D.C. Cir. 1998) (“[A]nticompetitive conduct can come in too many different
22 forms, and is too dependent upon context, for any court or commentator ever to have enumerated
23 all the varieties.”) (internal quotations omitted). Instead, to determine when anticompetitive
24 conduct violates the Sherman Act, courts assess whether there is a legitimate, procompetitive
25 justification for the conduct beyond its tendency to exclude competition. *See, e.g., Eastman Kodak*
26 *Co. v. Image Tech Servs., Inc.*, 504 U.S. 451, 467 (1992); *High Tech. Careers v. San Jose Mercury*
27 *News*, 996 F.2d 987, 990 (9th Cir. 1993).

1 For example, in *Microsoft*, the court found Microsoft’s conduct—such as commingling
2 code to prevent third parties from pre-installing alternative browsers and preventing users from
3 uninstalling Internet Explorer—anticompetitive. 253 F.3d. at 65-66. Even though such actions did
4 not fit neatly within any one type of predatory conduct, it caused anticompetitive effects without
5 procompetitive justifications and thus violated Section 2. *See id.* at 66-67; *see also F.T.C. v.*
6 *Actavis*, 133 S. Ct. 2223, 2235-36 (2013) (holding that, despite some courts finding them “immune
7 from antitrust attack,” reverse payment settlements, where patent holders pay patent infringers in a
8 settlement, can violate antitrust laws). More recently, the Second Circuit found anticompetitive
9 another type of novel conduct, product hopping, where pharmaceutical companies, facing the
10 expiration of a patent, “product hop” by introducing inconsequential changes to medications and
11 inducing physicians to switch patients to the new formulation, thereby excluding generic
12 competitors. *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 643-44 (2d Cir.), *cert.*
13 *dismissed sub nom. Allergan PLC v. New York ex. rel. Schneiderman*, 136 S. Ct. 581 (2015).
14 Although such conduct was “novel,” and the antitrust issue one of of first impression, the court
15 found that product hopping “crosses the line from persuasion to coercion and is anticompetitive.”
16 *Id.* at 654. .

17 Especially when a case involves the highly innovative, rapidly changing technology
18 market, the flexibility of the Sherman Act to cover the “myriad forms” of “illicit exclusion,” *see*
19 *Microsoft Corp.*, 253 F.3d at 58, is critical to protect against anticompetitive conduct that has no
20 procompetitive business justification and harms competition, particularly at the motion to dismiss
21 stage when only the allegations in the complaint are being examined.

22 *B. Conduct Involving Intellectual Property Is Not Immune from the Sherman Act*

23 The mere fact that conduct involves intellectual property does not by itself insulate that
24 conduct from antitrust liability. As the Supreme Court noted in its reverse-payments patent
25 settlement case, “[i]t would be incongruous to determine antitrust legality by measuring the . . .
26 anticompetitive effects solely against patent law policy, rather than by measuring them against
27 procompetitive antitrust policies as well.” *F.T.C. v. Actavis*, 133 S. Ct. 2223, 2231 (2013).
28

1 Intellectual property rights do not justify anticompetitive effects that result from firms
2 combining intellectual property rights with other exclusionary conduct. *New York v. Actavis*, 787
3 F.3d at 660 (2d Cir.). The *Microsoft* court rejected as “frivolous” Microsoft’s claim that asserting
4 lawfully-acquired intellectual property rights “cannot give rise to antitrust liability,” instead
5 holding that intellectual property rights do not lead to “an absolute and unfettered right to use” the
6 property. 253 F.3d at 63.

7 Use of intellectual property rights can constitute predatory conduct when the assertion is
8 combined with other—even legal—conduct such that “the comprehensive effect is likely to stymie
9 competition, prevent consumer choice and reduce the market’s ambit.” *In re Suboxone*
10 (*Buprenorphine Hydrochloride & Naloxone*) *Antitrust Litig.*, 64 F. Supp. 3d 665, 682 (E.D. Pa.
11 2014); *see also Free Hand Corp. v. Adobe Sys. Inc.*, 852 F. Supp. 2d 1171, 1180 (N.D. Cal.
12 2012) (finding that anticompetitive conduct can include otherwise legal conduct, especially if the
13 actor enjoys monopoly power).

14 For example, the Second Circuit found use of intellectual property rights predatory when
15 the assertion of that IP included other conduct such that the overall effect was “to coerce
16 consumers rather than persuade them on the merits,” *New York v. Actavis*, 787 F.3d at 654.
17 Assertion of intellectual property rights may also be predatory where the assertion of IP violates
18 FRAND commitments. *See, e.g., Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir.
19 2007) (holding actionable patent holder’s intentionally false FRAND-licensing promise when
20 accompanied with industry reliance and subsequent breach); *Apple Inc. v. Samsung Elecs. Co.*,
21 No. 11-CV-01846, 2012 WL 1672493, at *7-8 (N.D. Cal. May 14, 2012) (declining to dismiss
22 counterclaim that violation of FRAND terms violated Section 2). The policies underlying
23 intellectual property, particularly over interface standards where copyright protection, if any, is
24 fairly thin, do not alone provide sufficient business justification for anticompetitive conduct
25 involving IP when a monopolist uses the rights “not only as a shield to protect his invention, but as
26 a sword to eviscerate competition unfairly.” *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d
27 1572, 1576 (Fed. Cir. 1990).

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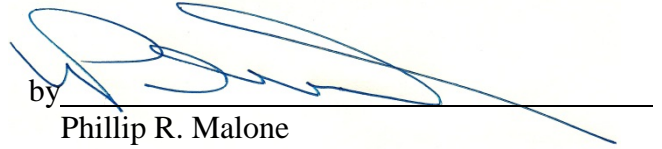
CONCLUSION

For the foregoing reasons, *amicus* urges the Court, in assessing the sufficiency of the allegations in the complaint, not to apply an overly narrow legal standard that would dictate, as a matter of law, that creating a *de facto* industry standard and then closing off that standard in a way that harms competition and excludes rivals can not be anticompetitive under Section 2.

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Respectfully submitted,

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