# IN THE
# COURT OF APPEALS OF VIRGINIA

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**Record No. 1399-22-4**

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**PEGASYSTEMS INC.,**

*Appellant*,

**v.**

**APPIAN CORPORATION,**

*Appellee*.

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## BRIEF OF PROFESSORS MARK GERGEN AND PAMELA SAMUELSON AS AMICI IN SUPPORT OF NEITHER PARTY

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## INTERESTS OF AMICI

Amici, Professors Mark Gergen and Pamela Samuelson, are legal scholars who study and have written about remedies based on unjust enrichment in the area of intellectual property.[1] This case involves an unjust-enrichment award based on an instruction to the jury shifting the burden to the defendant. Amici submit this brief to address that instruction's misunderstanding of the applicable law.

Professors Gergen and Samuelson have co-authored two papers on disgorgement as a remedy in the area of intellectual property: *Recalibrating the Disgorgement Remedy in Intellectual Property Cases*, 100 B. U. L. Rev. 1999 (2020) (also with John Golden), and *The Disgorgement Remedy in Design Patent Law*, 108 Calif. L. Rev. 183 (2020). Professor Gergen was an advisor to the Restatement (Third) of Restitution and Unjust Enrichment (2011). Professor Samuelson is an advisor to the current American Law Institute project on copyright law.

[1] All parties have consented to the submission of this brief. This brief was prepared entirely by amici and their counsel. No party or counsel for a party, and no person other than *amici curiae* or their counsel, made a monetary contribution intended to fund its preparation or submission.

Both amici are on the faculty of the University of California Berkeley School of Law.

Remedies based on unjust enrichment require a defendant to disgorge the profit resulting from a wrong. Amici are interested in the correct application of the burden-shifting approach that is sometimes used to measure how much of the defendant's sales stemmed from the misappropriation of a trade secret. Amici submit this brief to assist the Court in understanding (1) the showing the plaintiff must make to be entitled to the sales presumption, (2) the equitable nature of profit-based awards, and (3) the trial court's erroneous reliance on the Restatement (Third) of Unfair Competition.

## STATEMENT OF THE NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

Amici incorporate by reference Pegasystems Inc.'s Statement of the Nature of the Case and Material Proceedings in the Trial Court with respect to its discussion of the procedural history and unjust enrichment award. Opening Br. 1–3.

## ASSIGNMENTS OF ERROR

Amici incorporate by reference Pegasystems Inc.'s Assignments of Error. Opening Br. 4–5.

## STATEMENT OF FACTS

Amici incorporate by reference Pegasystems Inc.'s Statement of Facts. Opening Br. 6–18.

## STANDARD OF REVIEW

Amici incorporate by reference Pegasystems Inc.'s discussion of the appropriate standards of review. Opening Br. 18–19.

## SUMMARY OF ARGUMENT

In trade secret cases, for the sales presumption to apply, a plaintiff must show not only that the defendant misappropriated its trade secret but also that the product the defendant sold was either produced using this misappropriated trade secret or otherwise incorporated it. When making this showing, a plaintiff must establish that there was (1) a physical connection and (2) a sufficient causal connection between the defendant's sales and the misappropriated trade secret. The presumption that the defendant's sales of those products were attributable to the misappropriated trade secret only applies to such sales. If the sales presumption applies, the burden-shifting approach gives the defendant an opportunity to establish that only a portion (and not all) of its sales of the relevant good were attributable to the trade secret and that the defendant's expenses in producing that good should be deducted when determining the defendant's net profit.

The trial court did not apply this framework. It presumed that all of Pegasystems' sales were attributable to the allegedly misappropriated trade secret and did not require Appian to meet its burden of proof. But it is never appropriate to presume all of the defendant's sales are attributable to a misappropriated trade secret. The court's decision flies in the face of unjust-enrichment law and can find no support in the language it took out of context from the Restatement (Third) of Unfair Competition.

## ARGUMENT

The jury was given the following instruction for determining the unjust enrichment award:

> For unjust enrichment, Appian is entitled to recover Pegasystems' net profits. Appian has the burden of establishing by greater weight of the evidence Pegasystems' sales; Pegasystems has the burden of establishing by greater weight of the evidence any portion of the sales not attributable to the trade secret or trade secrets and any expenses to be deducted in determining net profits.

App. 15954. This deeply flawed instruction untethers the resulting award from whatever unjust enrichment actually occurred because of the misappropriated trade secret.

## I. Plaintiffs Have No Presumptive Right To Recover All of a Defendant's Profits, Because the Presumption Implicates Only Sales That Occurred Because of a Misappropriation.

To receive damages for unjust enrichment, a plaintiff must show that the defendant misappropriated its trade secret and that the defendant's sales of a particular good or goods occurred because of this misappropriation. If the plaintiff makes this showing, the defendant's sales of that good may be presumptively attributed to the misappropriation. If the court decides to apply the presumption, then the plaintiff is presumed to be entitled to every dollar of sales covered by the presumption. The burden then shifts to the defendant to establish which portions of its sales were not attributable to the trade secret and whether any expenses should be deducted to determine the defendant's net profit. This burden-shifting approach[2] makes it somewhat easier for the plaintiff to establish unjust enrichment.

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[2] Given that the damages framework in the Virginia Uniform Trade Secrets Act, Va. Code § 59.1-338(A), diverges slightly from that of

The trial court misapplied this sales presumption and burden-shifting approach in several ways. The first and most glaring error was the trial court's instruction that the sales presumption applies to all of Pegasystems' sales. App. 15954. But a plaintiff is never presumed to be entitled to recover all of a wrongdoer's profit.[3] Indeed, "[a]llegations that the defendant is a wrongdoer, and that the defendant's business is profitable, do not state a claim in unjust enrichment." Restatement (Third) of Restitution and Unjust Enrichment § 51, comment i (2011); *accord* Restatement (First) of Torts § 747, comment c (1934) ("[T]he defendant is liable not for the entire profits of his business but only for the profits earned by means of his tortious conduct.").

Uniform Trade Secrets Act § 3(a), it is unclear whether Virginia law even allows for burden-shifting. *See* Opening Br. 41–45. Amici assume, for the sake of argument, that this burden-shifting approach applies under Virginia law.

[3] A plaintiff can recover a defendant's entire profit by forgoing the presumption and actually establishing that the defendant's entire profit resulted from the misappropriated trade secret. *See USA Power, LLC v. PacifiCorp*, 372 P.3d 629 (Utah 2016) (finding sufficient evidence to support an award of the defendant's entire profit on a power plant it built because the evidence showed only one plant would be built in the area and that the misappropriated trade secret enabled the defendant to build that plant).

The trial court failed to include in its instruction two limitations on the presumption's scope: that Appian was required to establish (1) a physical connection and (2) a sufficient causal connection between Pegasystems' sales and the misappropriated trade secret. Although some collapse the distinction between these two requirements, amici view them as separate and distinct from each other.

### A. The Requirement of a Physical Connection

In a trade secret case, a plaintiff usually establishes a physical connection between a misappropriated trade secret and a defendant's sale by establishing that the good the defendant sold was produced using a trade secret or by establishing that the good incorporates a trade secret. For example, assuming the plaintiff could also meet the separate requirement that there be a sufficient causal connection, *see infra* Section I.B, a defendant who sold multiple lines of goods but used the misappropriated trade secret only when producing one line might be subject to the presumption that its sales occurred because of the misappropriated trade secret for that one line only, not for all lines. In other words, after the plaintiff makes its requisite showing, the defendant's sales from that one line might be presumptively attributed to the misappropriated trade secret and the burden would shift to the defendant to establish which portions of its sales from that one line were not attributable to the trade secret.

The trial court overlooked this basic requirement because of the amorphous character of Appian's trade secrets that Pegasystems allegedly misappropriated. Because the requirement that there be a physical connection between a defendant's sale and its wrongful conduct is clearly illustrated in areas of intellectual property (IP) law that involve tangible matters, amici examine similar presumptions that exist in trademark and copyright law.

1. In a trademark infringement case, a defendant may sell multiple lines of goods. Some but not all lines of goods may bear the infringing mark. If a plaintiff requested that the defendant's sales from all lines of goods (including from lines that did not bear the infringing mark) be presumptively attributed to the infringing mark, courts would immediately recognize that request as too broad. At most, the presumption would cover only sales of goods bearing the infringing mark. Restatement (Third) of Unfair Competition § 37, comment d (1995) ("Although a court will ordinarily infer that all sales of goods bearing an

infringing designation are attributable to the infringement, the inference may be rebutted . . . ."). The presence of an infringing mark on a good means there is a possible causal connection between the mark and the sale of the good. On the other hand, the absence of an infringing mark generally indicates that sales of those goods were not attributable to the (absent) infringing mark.

2. Similarly, in a copyright infringement case, a defendant may sell multiple types of works. If only one of the defendant's works infringed on the plaintiff's copyright, the plaintiff would not be entitled to a presumption that the sales of all of the defendant's works, including non-infringing works, were attributable to the copyright infringement. Assuming the plaintiff could make the requisite showing, the plaintiff would at most be entitled to a presumption that sales of the infringing works were attributable to that infringement. As in the trademark context, the presence of the infringing material means that there is a possible causal connection between the sale of the work and the infringing material. But if the defendant's work did not include any infringing material, there is no reason to think the defendant's sale occurred because of the (absent) infringing material.

The Restatement (Third) of Restitution and Unjust Enrichment illustrates this basic point through *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939), *aff'd*, 309 U.S. 390 (1940). MGM produced the movie "Letty Lynton" that contained infringing material. The plaintiff could only recover the "proportion of Studio's overall profits that is derived from the production and distribution of 'Letty Lynton' as distinct from its other activities." Restatement (Third) of Restitution and Unjust Enrichment § 51, Illustration 14. The court in *Sheldon* thus established that the plaintiff is only entitled to a portion of the net profit of sales covered by the presumption.

Although this sales presumption typically extends only to sales containing the infringing material, the presumption can sometimes extend to sales of works that do not have the requisite physical connection. If the work at issue does not contain the infringing material (thus lacking the physical connection), sales of that work may still fall within the sales presumption if the defendant's sales of that work were dependent on its sales of other works that did contain the infringing material. For instance, in *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505 (9th Cir. 1985), MGM used five songs from the plaintiff's musical in a revue at the MGM Grand Hotel in Las Vegas. The court held the plaintiff could recover a share of the profit from the hotel's hotel and gaming operations, as well as a share of profits from the revue, because some of the hotel's profits from customers' gambling and staying overnight were dependent on the revue. Even then, however, the sales presumption did not extend to MGM's profits from other activities that were generated entirely independent of the revue.

3. The sales presumption operates almost identically in trade secret cases. In these cases, the sales presumption at its outer limits presumes that the defendant's sales were attributable to the misappropriated trade secret only for goods that were either produced using the trade secret or incorporated the trade secret.[4] *See, e.g.*, *USM Corp. v. Marson Fastener Corp.*, 467 N.E.2d 1271, 1276 (Mass. 1984) ("Once a plaintiff demonstrates that a defendant made a profit from the sale of products produced by improper use of a trade secret, the burden shifts to the defendant to demonstrate those costs properly to be offset

[4] Amici believe the necessary physical connection between a product and a trade secret can be something other than the trade secret being used in the production of a product or the trade secret being incorporated in a product. For example, a physical connection might be established by the trade secret being used in the sale of a product.

against its profit and the portion of its profit attributable to factors other than the trade secret.”).

As in copyright law, this presumption can extend to sales of products that were not produced using or did not incorporate the trade secret, *if* the plaintiff can establish that the defendant’s sales of these goods were dependent on its sales of goods produced using or incorporating the trade secret. The Restatement (Third) of Unfair Competition addresses how this qualification operates within the basic rule:

> The defendant must account not only for profits earned on sales of products incorporating the trade secret, but also on other *sales dependent on the appropriation*. For example, profits on the sale of consumable supplies used in a machine embodying the trade secret or profits on spare parts and service may be included in the accounting to the extent that such profits were made possible by the defendant’s sale of the original product.

Restatement (Third) of Unfair Competition § 45, comment f (emphasis added). In other words, even if there is no physical connection between the misappropriated trade secret and a specific good, the sales presumption may still apply if the defendant’s sale of that good was dependent on the sale of a different good that used or incorporated the trade secret.

*ADA Motors, Inc. v. Butler*, 432 P.3d 445 (Wash. Ct. App. 2018), illustrates how the lack of a physical connection between a misappropriated trade secret and a sale reduces the universe of the defendant's sales subject to the sales presumption and the burden-shifting approach. In *ADA Motors*, the misappropriated trade secret was a customer list that a car salesman took with him when he moved from the plaintiff's car dealership to the defendant's car dealership. The plaintiff did not even attempt to argue that all of the defendant's sales were attributable to the misappropriated list. Instead, it limited its claim to 412 of the defendant's sales, which were to customers included on the misappropriated list.

### B. The Requirement of a Sufficient Causal Connection

The existence of a physical connection between a sale and a misappropriated trade secret only establishes a *possible* causal connection between the trade secret and a sale. For the sales presumption to apply, the plaintiff must also take the next step and establish a sufficient causal connection between the sale and the misappropriated trade secret.

*ADA Motors* is directly on point. The trial court gave an instruction similar to the instruction the trial court gave here. 432 P.3d at 451. The court of appeals held this was error and that the jury should have been instructed that the "plaintiff has the initial burden of proving sales attributable to the trade secret." *Id.*; *accord Alifax Holding Spa v. Alcor Sci. Inc.*, 404 F. Supp. 3d 552, 574 (D.R.I. 2019) (explaining that "[n]othing in the Restatement's framework relieved [the plaintiff] from its obligation to prove causation in the first instance"). As for the standard of causation, some courts require that the misappropriated element be sufficiently important that it "drives demand" for the product. *See, e.g.*, *Versata Software, Inc. v. Internet Brands, Inc.*, 902 F. Supp. 2d 841, 855–57 (E.D. Tex. 2012) (holding rule allowing plaintiff to recover the "full amount of . . . profits" on sales is appropriately applied when trade secrets "were the basis for the core features" of the products offered by defendant).

As in the physical-connection context, amici think it is useful to look to similar burden-shifting approaches in other parts of IP law because they also combine a requirement of a physical connection with a requirement of a sufficient causal connection.

1. Under trademark law, the presence of the infringing mark on a good establishes a presumption of causation. The burden then shifts to the defendant to rebut the presumption by establishing that the infringing mark was not a substantial factor in the sale. *See* Restatement (Third) of Unfair Competition § 37, comment d ("Although a court will ordinarily infer that all sales of goods bearing an infringing designation are attributable to the infringement, the inference may be rebutted . . . .").

*Truck Equipment Service Co. v. Fruehauf Corp.*, 536 F.2d 1210 (8th Cir. 1976), illustrates how this works. The defendant copied the trapezoidal design of the plaintiff's cornhusker semi-trailer. *Id.* at 1221–22. The district court found that only twenty percent of the defendant's profits in three states "were attributable to its unlawful use of the distinctive appearance" of the plaintiff's cornhusker. *Id.* at 1221. The plaintiff sought to recover the defendant's profits on sales in thirteen states where it sold or at least advertised trailers. The court narrowed this to three states because they were the only states in which the plaintiff had significant sales, creating a possibility that customers were confused by the infringing appearance. *Id.* at 1221–22. Moreover, because only twenty percent of the defendant's sales in the three states occurred because of its trailer's appearance, the plaintiff's award was "further limit[ed]" to twenty percent of the defendant's profits "to insure that the amount of profits disgorged by [the defendant] was equal to the benefit it received from its unlawful use of the distinctive appearance" of the plaintiff's cornhusker. *Id.* at 1222. In other words, even though the plaintiff had shown that the defendant's sales of its trailer were attributable to its infringing appearance, the plaintiff was only entitled to twenty percent of the defendant's profits in three states because the defendant successfully established that eighty percent of its sales did not occur because of the infringing appearance. *See id.*

2. Unlike in trademark and trade-secrets cases, Section 504(b) of the Copyright Act establishes a plaintiff-friendly presumption that the defendant's sales are attributable to the copyrighted material. *See* 17 U.S.C. § 504(b). Under this statutory presumption, "[i]n establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue" and not proof of the portion of sales directly attributable to the infringement. *See id.* Once the copyright owner supplies this evidence, the burden shifts to the infringer "to prove

his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work." *Id.*

However, courts have declined to apply this presumption when the infringing material was an insignificant factor in the defendant's sale. This judge-created exception to the Copyright Act's statutory presumption means that plaintiffs in some cases must establish a causal connection between the infringement and sale (much as they would in the trademark and trade-secret context) and allows courts to refrain from applying the statutory presumption when doing so would be absurd.

Courts frequently do not apply this plaintiff-friendly presumption when the infringing content was used in an advertisement, because it would be absurd to presume that infringing content in an advertisement caused the sale of a good. For example, in *Davis v. The Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001), The Gap published an advertisement in multiple magazines of people wearing Gap clothing. One of the people pictured wore Davis's fashionable eyewear jewelry, which Davis claimed was infringement. Davis sought a percentage of The Gap's profits and submitted evidence of The Gap's parent company's net sales and revenues. *Id.* at 160. Although Section 504(b) of the Copyright Act requires a copyright owner "to present proof only of the infringer's gross revenue," the court concluded that "'gross revenue' under the statute means gross revenue reasonably related to the infringement, not unrelated revenues." *Id.* Because Davis did not "limit[]" the gross revenues to "eyewear or accessories" or even to "Gap label stores," the court held that Davis had not met his burden of proof and that the burden accordingly did not shift to The Gap to "prove its deductible expenses and elements of profits from those revenues attributable to factors other than the copyrighted work." *Id.*

This exception is not limited to cases in which the infringing content is in an advertisement. For instance, in *Walker v. Forbes, Inc.*, 28 F.3d 409 (4th Cir. 1994), there was a single infringing photograph in a special issue of Forbes magazine. The court held Walker, the copyright owner, was not entitled to a portion of Forbes' net profit on sales of the special issue, observing that "[i]f, as here, the infringement occurs as a small part of a much larger work, the fact-finder properly focuses not on the profit of the work overall, but only on the profit that the infringement contributes." *Id.* at 415.

* * *

As these trademark and copyright cases show, the presumption that a defendant's sales of a good are attributable to the misappropriated trade secret requires first that the plaintiff show there is (1) a physical connection and (2) a sufficiently causal connection between the sale of the good and the misappropriated trade secret. The trial court therefore misapplied the sales presumption and the burden-shifting approach in its instruction to the jury.

## II. The Presumption Is Only Applied When It Yields a Reasonable Estimate of the Profit Resulting from the Misappropriation.

The burden-shifting approach the trial court misapplied in this case comes from the law of equity, as do profit-based remedies more generally.[5] The equitable origin of the rule is important because, like other equitable remedies, a plaintiff has no right to a profit-based award and a plaintiff has no right to a specific method for determining the profit resulting from the misappropriation of a trade secret, such as the rule

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[5] One consequence of the equitable origin of the remedy is that a claim for disgorgement based on trade-secret misappropriation carries no Seventh Amendment right to a jury trial in federal court. *See Texas Advanced Optoelectronic Sols., Inc. v. Renesas Elecs. Am., Inc.,* 895 F.3d 1304, 1319–26 (Fed. Cir. 2018).

the trial court misapplied in this case. As the Restatement (Third) of Unfair Competition explains, "[a]n accounting of profits remains an equitable remedy, subject to a balancing of the relative equities of the plaintiff, the defendant, and the public."[6] Restatement (Third) of Unfair Competition § 37, comment f.

A court only applies the burden-shifting approach when the plaintiff makes the requisite showing discussed above and when the court determines that applying the burden-shifting approach is likely to yield an accurate measure of the defendant's profit that is causally attributable to the misuse of trade secrets. *See USM Corp.*, 467 N.E.2d at 1277 ("The guiding principle is to order the wrongdoing defendant to give up all gain attributable to the misuse of the trade secret and to measure that gain as accurately as possible.").

The Restatement (Third) of Unfair Competition describes this as a threshold determination that an award of "the actor's own pecuniary gain resulting from the appropriation" is appropriate and that a particular

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[6] Section 37, comment f, concerns gain-based remedies in trademark law, which it refers to generically as an accounting of profits. Section 45, comment f explains, "[t]he general rules governing accountings of profits are applicable in trade secret actions."

method is "the appropriate method of measuring such relief." Restatement (Third) of Unfair Competition § 45. The Restatement proceeds to list six factors that inform this determination, one of which is "the degree of certainty with which the plaintiff has established the fact and extent of . . . the actor's pecuniary gain resulting from the appropriation." *Id.* § 45(2)(a).

The Uniform Trade Secrets Act follows equity in providing a reasonable royalty as a backup remedy in part because it is sometimes not possible to accurately measure profits that occurred because of a misappropriated trade secret. Although this determination is sometimes difficult, the solution is not to apply an inaccurate presumption or improperly shift the burden of proof but is instead to award a reasonable royalty. *See* Restatement (Third) of Unfair Competition § 45, comment g ("[I]n cases in which the defendant's gain from the trade secret is difficult to measure but apparently exceeds the plaintiff's loss, a reasonable royalty may be the best means of approximating the defendant's unjust enrichment.").

## III. The Restatement (Third) of Unfair Competition Does Not Support the Trial Court's Jury Instruction.

The trial court took its jury instruction directly from § 45, comment f of the Restatement (Third) of Unfair Competition. The only changes the trial court made were to substitute "Appian" for "the plaintiff" and "Pegasystems" for "the defendant"; to expand comment f's use of the term "burden" to "burden of establishing by greater weight of the evidence"; and to change "trade secret" to "trade secret or trade secrets."

The similarities between comment f and the trial court's jury instruction are striking. The language in comment f explained that:

> The plaintiff is entitled to recover the defendant's net profits. The plaintiff has the burden of establishing the defendant's sales; the defendant has the burden of establishing any portion of the sales not attributable to the trade secret and any expenses to be deducted in determining net profits.

Restatement (Third) of Unfair Competition § 45, comment f. Likewise, the trial court instructed the jury that:

> For unjust enrichment, Appian is entitled to recover Pegasystems' net profits. Appian has the burden of establishing by greater weight of the evidence Pegasystems' sales; Pegasystems has the burden of establishing by greater weight of the evidence any portion of the sales not attributable

> to the trade secret or trade secrets and any expenses to be deducted in determining net profits.

App. 15954.

Although the Restatements of the Law serve as valuable secondary sources for lawyers, the comments they include are not intended to serve as instructions for lay juries. When referring to a rule, the authors drafting the comments frequently omit parts of the rule that they believe are self-evident in context. Indeed, comment f itself goes on to make clear that the plaintiff is not entitled to recover the net profit on all of the defendant's sales and is only entitled to recover the net profit on sales resulting from the trade secret misappropriation. Restatement (Third) of Unfair Competition § 45, comment f (explaining that "[t]he defendant must account not only for profits earned on sales of products incorporating the trade secret, but also on other sales dependent on the appropriation").

The authors of the Restatement clearly did not mean to imply that a defendant had to account for profits on its total sales when a misappropriated trade secret was not incorporated in the product. What the authors instead meant was that the defendant's sales are an appropriate starting point for measuring unjust enrichment only when a trade secret is incorporated in a product.

Likewise, the authors of the Restatement did not mean to imply that the presumption automatically applies to sales of products incorporating the trade secret. The comments make clear that the presumption is only intended to reach profits resulting from the misappropriation and that the presumption should not apply when a trade secret is unlikely to drive demand for a product. Restatement (Third) of Unfair Competition § 45, comment f ("[W]hen the trade secret relates to a single component of a product marketable without the secret, an award to the plaintiff of defendant's entire profit may be unjust.").

The authors of the Restatement understandably did not spell these nuances out every time they referred to a rule. Indeed, the authors' explanation of the sales presumption in the trade-secret context closely tracked the language in the Copyright Act, which provides that a copyright owner need only "present proof . . . of the infringer's gross revenue." 17 U.S.C. § 504(b). But no one would read Section 504(b) as allowing a copyright owner to recover the defendant's total profits (less expenses and apportionment). *See Davis*, 246 F.3d at 160. The Copyright

Act's reference to the "infringer's gross revenue" is merely a reference to the infringer's gross revenue from sales of works that contain the infringing material (plus other sales that are causally connected to these sales). *See id.* (defining "gross revenue" as "gross revenue reasonably related to the infringement, not unrelated revenues"). And courts have refused to rely on gross revenue when infringing material is a small part of a much larger work because it would be absurd to presume that the presence of the infringing material caused the sale. *See supra* Section I.B.

*       *       *

It is never correct to presume that all of a defendant's sales are attributable to the misappropriation of a trade secret. The most that can be presumed is that sales of products produced by or incorporating the trade secret are attributable to that trade secret. And this presumption applies only when the trade secret is sufficiently important that it "drives demand" for the product or is otherwise a substantial factor in a sale. Although trial courts have discretion in choosing whether to use this method when determining disgorgement awards, this method should only be used when it fairly reflects the defendant's profit resulting from the misappropriation. The trial court's jury instruction was thus erroneous.

## CONCLUSION

For the foregoing reasons, this Court should explain that the trial court incorrectly applied the sales presumption and burden-shifting approach in its jury instruction. Amici take no position on any other issues or the disposition of this appeal.

Respectfully submitted,

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## CERTIFICATE OF TRANSMISSION AND SERVICE

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