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6 Attorneys for Defendants

7 THE INTERNET SOCIETY and INTERNET  
ENGINEERING TASK FORCE

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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

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SAN FRANCISCO DIVISION

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TODD S. GLASSEY and MICHAEL E.  
12 MCNEIL,

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Plaintiffs,

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v.

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MICROSEMI INC; THE IETF and ISOC, and  
19 THE US GOVERNMENT and INDUSTRY  
PARTNERS (INCLUDING BUT NOT  
LIMITED TO APPLE, CISCO,  
20 EBAY/PAYPAL, GOOGLE, JUNIPER  
NETWORKS, MICROSOFT, NETFLIX and  
21 ORACLE), USPTO ALJ PETER CHEN ESQ,  
and TWO INDIVIDUALS (MARK  
22 HASTINGS and ERIK VAN DER KAAY) AS  
"NAMED DOES",

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Defendants.

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) CASE NO.: 14-CV-3629 (WHA)

) DEFENDANTS THE INTERNET  
) SOCIETY AND INTERNET  
) ENGINEERING TASK FORCE'S REPLY  
) IN SUPPORT OF THEIR MOTION TO  
) DISMISS

) Hearing Date: November 20, 2014

) Time: 8:00 a.m.

) Place: Courtroom 8

) Judge: Hon. William H. Alsup

1 **PRELIMINARY STATEMENT**

2 In opposing the motion to dismiss of Defendants the Internet Society (“ISOC”) and the  
3 Internet Engineering Task Force (“IETF”) (collectively, the “ISOC Defendants”), Plaintiffs fail to  
4 identify any allegations in their amended Complaint (the “FAC”) that cure the myriad deficiencies  
5 of the FAC. Although the opposition brief occasionally alludes to some of the elements for their  
6 claims, Plaintiffs merely offer conclusory assertions that the FAC “fully meets the requirements”  
7 for various causes of actions. (*E.g.*, Dkt. 84 at 12.) Nor do the newfound allegations contained in  
8 the various filings that accompanied Plaintiffs’ opposition brief—which amount to little more than  
9 conclusory allegations—merit further amendment of the FAC, since they also fail to save  
10 Plaintiffs’ deficient pleadings.

11 **ARGUMENT**

12 In short, because the FAC, along with the additional, conclusory allegations included in  
13 Plaintiffs’ opposition filings, fail to establish any cause of action against the ISOC Defendants, all  
14 claims against the ISOC Defendants should be dismissed with prejudice.

15 **A. Tortious Interference with**  
16 **Prospective Economic Advantage**

17 The opposition brief presents Plaintiffs’ tortious interference allegations as intertwined with  
18 their antitrust allegations. (*See id.* at 9.) In doing so, however, Plaintiffs still fail to assert essential  
19 elements of tortious interference: knowledge of, intent to disrupt, or actual disruption by the ISOC  
20 Defendants of an economic relationship between Plaintiffs and Microsemi (or any other third  
21 party). *See Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1151 (9th Cir. 2008).  
22 Additionally, Plaintiffs fail to address the fact that their tortious interference claim is barred by the  
23 statute of limitations (*see* Dkt. 73 at 4-5), and instead make an unrelated argument concerning the  
24 timeliness of their antitrust claims. As such, this claim should be dismissed with prejudice.

25 **B. Antitrust Claims**

26 In their opposition, Plaintiffs attempt to define a relevant product market by claiming the  
27 “IETF is its own Market Sector.” (*Id.* at 6.) But ““a company does not violate the Sherman Act by  
28 virtue of the natural monopoly it holds over its own product.”” *See, e.g., Apple, Inc. v. Psystar*

1 Corp., 586 F. Supp. 2d 1190, 1198 (N.D. Cal. 2008) (quoting *Green Country Food Market, Inc. v.*  
2 *Bottling Grp.*, 371 F.3d 1275, 1282 (10th Cir. 2004)). Plaintiffs have offered no justification for  
3 finding that the IETF constitutes a legally plausible single-brand market, particularly considering  
4 that the IETF merely provides a forum and publication venue for Internet specifications and  
5 standards developed through the collaborative activity of its participants. As such, the IETF is only  
6 one of many different standards organizations operating in this area. Moreover, the use of IETF  
7 standards is completely voluntary, and the IETF takes no steps to enforce the use of those  
8 standards. Accordingly, Plaintiffs have not and cannot identify a single-brand product market that  
9 is dominated by the IETF. *See id.* at 1196, 1198.

10 The opposition brief also confirms that Plaintiffs do not seek redress for antitrust injury, but  
11 rather for their personal economic injury, “i.e. the inability to enforce [Plaintiffs’] patent.” (Dkt. 84  
12 at 14.) Because Plaintiffs cannot identify a plausible relevant market or assert *antitrust* injury, their  
13 antitrust claims should be dismissed with prejudice. *See Jefferson Parish Hosp. Dist. No. 2 v.*  
14 *Hyde*, 466 U.S. 2, 29 (1984); *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App’x 554, 557 (9th Cir.  
15 2008).

16 C. **Infringement**

17 1. **Patent Infringement and Inducement of Patent Infringement**

18 Even if Plaintiffs do have ownership rights in the patents identified in the FAC, they still  
19 cannot assert patent infringement claims against the ISOC Defendants. Plaintiffs do not identify  
20 any “product” that ISOC Defendants create or market, but rather claim that standards promulgated  
21 by the IETF constitute infringement. A patent infringement claim requires that the alleged  
22 infringer “makes, uses, offers to sell, or sells any patented invention.” 35 U.S.C. § 271(a). The  
23 ISOC Defendants, as mere convenors of technical collaboration and publishers of the resulting  
24 standards, do not engage in the activities necessary for infringement. Accordingly, Plaintiffs fail to  
25 identify how publication of IETF standards constitutes an infringement of their patent rights.

26 Nor do Plaintiffs explain how publication of specifications and standards constitutes a  
27 “global mandate for infringement.” (*See* Dkt. 84 at 11.) Plaintiffs make nothing more than  
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1 conclusory allegations of direct infringement by third parties and also fail to allege that the ISOC  
2 Defendants *intended* for the promulgation of standards to foster direct infringement. To the  
3 contrary, the IETF disclaimer (which is attached to IETF standards) precludes any claim for  
4 inducement:

5           The IETF takes no position regarding the validity of scope of any  
6           Intellectual Property Rights or other rights that might be claimed to  
7           pertain to the implementation or use of the technology described in  
8           this document or the extent to which any license under such rights  
9           might or might not be available; nor does it represent that it has made  
10          any independent effort to identify any such rights. . . .

11           (See Dkt. 80-4 at 8, 21 (BCP 79).)<sup>1</sup> Contrary to Plaintiffs’ suggestion that the ISOC Defendants are  
12          improperly licensing their patented technology (*e.g.*, Dkt. 84 at 9), IETF standards expressly  
13          disclaim that the IETF is granting any “license” of patented technology discussed therein.

14           Moreover, through its own intellectual property policies, the IETF demonstrates a clear  
15          respect and deference for the valid patent and other intellectual property rights of its participants  
16          and third parties. For example, IETF policies affirmatively require that participants disclose the  
17          existence of any intellectual property rights that they believe cover, or may ultimately cover, the  
18          technology under discussion by an IETF working group. (*See* Dkt. 80-4, at 5.)

19           To the extent that Plaintiffs are asserting a claim for infringement based upon the ISOC  
20          Defendants’ use of computers that allegedly contain Plaintiffs’ patented technology—a claim that  
21          potentially could extend to every computer user in the world based on Plaintiffs’ overly broad  
22          assertions—such claim still must fail. As a threshold matter, these allegations are conclusory and  
23          fail to include sufficient specificity to provide the ISOC Defendants with notice of what aspects of  
24          their computer use infringe upon Plaintiffs’ purported patent rights. *See Bender v. LG Elecs.*  
25          *U.S.A., Inc.*, No. 09-02114, 2010 WL 889541, at \*6 (N.D. Cal. Mar. 11, 2010) (“Sufficient  
26          allegations would include, at a minimum a brief description of what the patent at issue does, and an

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27          <sup>1</sup> Because the IETF does not take any position on the validity of any intellectual property rights or  
28          licenses that may be necessary for the implementation of certain technology, Plaintiffs lack  
        standing to the extent they are accusing the IETF of violating its own policies by refusing to  
        enforce its rules “against any party other than Plaintiffs” (Dkt. 84 at 6), because such claims are  
        not redressable. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

1 allegation that certain named and specifically identified products or product components also do  
2 what the patent does, thereby raising a plausible claim that the named products are infringing.”).  
3 Moreover, the true basis for these allegations appears to be a dispute between Plaintiffs and other  
4 parties with ownership rights in the patented technologies. (*See, e.g.*, FAC ¶¶ 44-126.) Because  
5 the other co-owners of the patented technology are co-defendants of the ISOC Defendants (and not  
6 joining in the infringement claims), Plaintiffs cannot assert a patent infringement claim against the  
7 ISOC Defendants. *See Ethicon, Inc. v. U.S. Surgical Corp.*, 135 F.3d 1456, 1467 (Fed. Cir. 1998)  
8 (“An action for infringement must join as plaintiffs all co-owners.”) (affirming dismissal of patent  
9 infringement claim where all owners did not join in or consent to the lawsuit).

10 Accordingly, any claim for patent infringement or inducement of patent infringement  
11 against the ISOC Defendants should be dismissed with prejudice.

## 12 2. Copyright Infringement and Inducement of Copyright Infringement

13 Plaintiffs’ opposition does not address the fact that the FAC fails to identify their ownership  
14 of any copyright registrations. Accordingly, all claims sounding in copyright infringement should  
15 be dismissed with prejudice. *See San Jose Options, Inc. v. Ho Chung Yeh*, No. 14-00500, 2014  
16 WL 1868738, at \*3-\*4 (N.D. Cal. May 7, 2014).

## 17 D. Fraud

18 Although Plaintiffs make conclusory assertions that the ISOC Defendants engaged in  
19 “fraud actions,” they still fail to identify a single misrepresentation or omission made by the ISOC  
20 Defendants. *See Shreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.  
21 1986). Moreover, because Plaintiffs allege they notified the ISOC Defendants of these purported  
22 “frauds” in 2004 (FAC ¶¶ 34, 40), any such claims are time-barred. Cal. Civ. Proc. Code § 338(d).  
23 Accordingly, Plaintiffs’ claims sounding in fraud against the ISOC Defendants should be dismissed  
24 with prejudice.

## 25 E. Misappropriation of Trade Secrets

26 Plaintiffs assert in their opposition that “Parties within IETF” had access to certain trade  
27 secrets from “CertifiedTime Inc.” (Dkt. 84 at 15.) These new allegations, which were absent from  
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1 the FAC, are wholly conclusory and lack any detail to demonstrate actual ownership of a trade  
2 secret. *See* Cal. Civ. Code § 3426.1(d). Even if Plaintiffs could demonstrate ownership of a trade  
3 secret, they still cannot assert a cause of action against the ISOC Defendants because neither the  
4 FAC nor the opposition papers allege any improper activity by the ISOC Defendants to obtain the  
5 purported trade secrets. *See Cytodyn, Inc. v. Amerimmune Pharms., Inc.*, 160 Cal. App. 4th 288,  
6 297 (Cal. Ct. App. 2008). The opposition brief merely asserts that “Parties within the IETF” had  
7 access to the purported trade secrets and that some of that information appeared in IETF standards.  
8 (Dkt. 84 at 15.) Because these allegations demonstrate no wrongful activity by the ISOC  
9 Defendants—and the FAC contains only a passing reference to trade secrets—any claim for  
10 misappropriation of trade secrets should be dismissed with prejudice.

11 **F. Conversion**

12 The FAC also only made a passing reference to conversion. As Plaintiffs’ opposition brief  
13 makes clear, any purported “conversion claim pertains to Microsemi’s” actions and is rooted in the  
14 allegations of patent infringement. (*Id.*) Accordingly, any claim for conversion against the ISOC  
15 Defendants should be dismissed with prejudice. *See Gerawan Farming, Inc. v. Rehrig Pac. Co.*,  
16 No. 11-01273, 2012 WL 691758, at \*7 (E.D. Cal. Mar. 2, 2012).



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**ECF CERTIFICATION**

I hereby certify that a true and correct copy of the foregoing document was filed electronically on this 17th day of October, 2014. As of this date, all counsel of record, except Plaintiff Michael E. McNeil, in *pro se*, have consented to electronic service and are being served with a copy of this document through the Court's CM/ECF System.

/s/ Jason D. Russell  
JASON D. RUSSELL



