

Appeal No. 2014-1335, -1368

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**UNITED STATES COURT OF APPEALS**

*for the*

**FEDERAL CIRCUIT**

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APPLE INC., a California corporation

*Plaintiff - Cross-Appellant,*

v.

SAMSUNG ELECTRONICS CO., LTD, a Korean corporation,  
SAMSUNG ELECTRONICS AMERICA, INC., a New York corporation,  
SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, a Delaware limited  
liability company.

*Defendants - Appellants.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF CALIFORNIA IN CASE NO. 5:11-CV-01846,  
JUDGE LUCY H. KOH

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**NATIONAL GRANGE'S *AMICUS CURIAE* BRIEF IN  
SUPPORT OF DEFENDANTS-APPELLANTS'  
ARGUMENT FOR REVERSING OR VACATING DESIGN  
PATENT DAMAGES**

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May 30, 2014

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

APPLE INC. v. SAMSUNG ELECTRONICS CO., LTD.

Appeal No. 2014-1335, -1368

**CERTIFICATE OF INTEREST**

Counsel for *Amicus Curiae* The National Grange of the Order of the Patrons of Husbandry certifies the following:

1. The full name of every party represented by me is:

The National Grange of the Order of the Patrons of Husbandry

2. The name of the real party in interest represented by me is:

The National Grange of the Order of the Patrons of Husbandry

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by me are:

None.

4. The names of all law firms and the partners or associates that appeared for *Amicus Curiae* in the trial court or are expected to appear in this court are:

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Dated: May 30, 2014

Respectfully submitted,

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**STATEMENT OF INTEREST OF *AMICUS CURIAE***

The National Grange of the Order of the Patrons of Husbandry (“National Grange”) is a nonprofit, nonpartisan, fraternal organization that advocates for rural America and agriculture. A dedicated nonpartisan grassroots organization since 1867, National Grange works to ensure that America’s farmers, ranchers and other rural residents receive the resources they need to stay current and competitive in both global and local economies. This includes ensuring that America’s rural residents enjoy the same access to quality goods and services as their urban counterparts. In fulfilling this mission, National Grange labors to affect policy on a host of issues relevant to rural America, including the expansion and proliferation of broadband internet access.

Smartphones, like the Samsung products subject to appeal, provide a key role in providing internet access to America’s rural communities. Although broadband internet use is growing through advances in infrastructure, home access to broadband in rural areas lags far behind that of urban communities. With limited wired options for internet access, many rural residents rely on their smartphones’ wireless broadband capabilities as their primary source of internet access. As such, smartphones are important tools that enable rural Americans to connect and conduct business online and to access education, healthcare and government services.

As a nonpartisan advocate on behalf of its members, National Grange is deeply concerned that rural communities get wide access to mobile devices. Because National Grange believes that excessive patent damage judgments, untethered to the importance of the patented feature or design relative to the overall device, jeopardize the rural and agricultural communities' access to these important devices, National Grange provides this brief as *amicus curiae*.

The National Grange, through its undersigned counsel, hereby represents that it has authored this brief and that no other person, party in this proceeding, or counsel for a party in this proceeding has authored any part. No party to this proceeding or counsel for a party to this proceeding made any monetary contribution to fund the preparation or submission of this brief.



***AMICUS CURIAE* BRIEF OF NATIONAL GRANGE**

**I. STATEMENT PURSUANT TO Fed. R. App. P. 29(a)**

Pursuant to Federal Rule of Appellate Procedure 29(a), National Grange certifies that all parties have consented to the filing of this amicus brief.

**II. ARGUMENT**

The jury’s award of nearly \$399 million in infringer’s profits as damages for design patent infringement should be reversed or vacated. It is an onerous remedy that may lead to reducing internet access in rural communities throughout America. Design patent infringement damages cannot properly be measured solely on 100% of an infringer’s profit. Instead, causation of damages or attribution of profit to the patented design must be considered.

**A. The District Court Legally Erred By Instructing The Jury To Award Design Patent Damages Equal To “Entire Profit” Under 35 U.S.C. § 289**

Section 289’s provision that design patent infringement may be compensable “*to the extent* of [the infringer’s] total profit” provides a ceiling—not a floor—for

design patent infringement. 35 U.S.C. § 289 (emphasis added).<sup>1</sup> Section 289 sets forth the damages permissible for design patents:

Whoever during the term of a patent for a design, without license of the owner,

(1) applies the patented design, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or

(2) sells or exposes for sale any article of manufacture to which such design or colorable imitation has been applied shall be liable to the owner *to the extent of* his total profit, but not less than \$250, recoverable in any United States district court having jurisdiction of the parties.

*Id.* (emphasis added).

The district court instructed the jury that it was authorized to award profits for design patent infringement for Samsung’s “entire profit” for each product and “not just the portion of the profit attributable to the design or ornamental aspects covered by the patent.” *See* Dkt. 2783, Jury Instruction No. 31. This instruction incorrectly invited the jury to consider the infringer’s profits for the entire device as a floor for design patent damages. *See id.* (“Apple is entitled to all profit earned by Samsung on sales of articles that infringe.”). Had Congress intended the “total profit” to be a floor for design patent damages, Congress could have drafted

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<sup>1</sup> Section 289 was not amended via the American Invents Act. *See generally* Leahy–Smith America Invents Act (“AIA”), Pub. L. No. 112-29, 125 Stat. 284 (2011). In fact, the AIA only references section 289 to indicate that modifications to terms in amended sections should not apply to section 289. *Id.* § 20(j)(2) (“The amendment made by paragraph (1) shall not apply to the use of such term in the following sections of title 35, United States Code: . . . Section 289.”)

section 289 to use language like that found in section 284, which establishes a reasonable royalty as a floor for damages for utility patent infringement. *See* 35 U.S.C. § 284 (“[T]he 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.”) (emphasis added). Indeed, section 289 itself contemplates a range of damages with a floor \$250. *See* 35 U.S.C. § 289(2) (stating damages shall be “not less than \$250”).

Congress’s choice of language in section 289 stating that design patent damages may rise “to the extent of” total profit rather than that they be “in no event less than” total profit is presumed to have meaning. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (“[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.”) (quoting 2A N. Singer, STATUTES AND STATUTORY CONSTRUCTION § 46:06, p. 194 (6th rev. ed. 2000)). The district court legally erred in misinterpreting section 289 by instructing the jury that Apple was entitled to Samsung’s total profits for the entire device.

The district court further erred in concluding that *Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437 (Fed. Cir. 1998), “clearly foreclose[s]” tailoring damages for design patent infringement to only the portion of the profits “earned by the patented design features.” A100. *Nike* addressed section 289 for the

purpose of determining whether design patents had a marking requirement when the patentee seeks recovery of the infringer's profits. *Nike*, 138 F.3d at 1437 (reversing district court's holding that the marking statute does not apply when remedies are obtained under section 289). Any discussion on whether section 289 permits limiting recovery of infringer's profits to those attributable to the infringing design was dicta.<sup>2</sup>

### **B. Excessive And Disproportionate Design Patent Infringement Awards Harm Consumers**

The impact of the district court's massive \$399 million jury award for design patent infringement has potentially harmful repercussions for America's rural communities. Smartphones, like the Samsung products subject to appeal, provide a key role in providing internet access to America's rural communities. The Department of Commerce reported that, as of 2011, 72 percent of urban (metropolitan) households connect to the internet at home using broadband compared to only 58 percent of rural (nonmetropolitan) households—a 14 percentage-point gap. U.S. Department of Commerce, *Exploring the Digital*

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<sup>2</sup> Numerous commentators have addressed the unfairness of permitting a design patent owner to recover the infringer's entire profit from the sale of the product, whether or not the design was the basis for buying the product. *See, e.g.*, Mark A. Lemley, *A Rational System of Design Patent Remedies*, 17 STAN. TECH. L. REV. 221 (2013); Thomas Cotter, *Apple v. Samsung and Awards of Defendant's Profits: the Potential for Overcompensatory Damages in Design Patent Infringement Cases* (Aug. 29, 2012), <http://www.lexology.com/library/detail.aspx?g=33b72227-e5f1-477b-8f4a-3afdcd91a8bb>.

*Nation: America's Emerging Online Experience* 26 (2013). With limited wired options for internet access, many rural residents rely on their smartphones' wireless broadband capabilities for their primary source of internet access.

Smartphones are essential for rural Americans to connect online and to conduct business, access education, healthcare, and government services, among other things:

- In 2012, the Rural Mainstreet Index, which measures rural economics, reached a five-year high, no doubt in large part due to widespread adoption of mobile broadband. Creighton News Center, *Rural Mainstreet Index Highest Level Since 2007* (Dec. 20, 2012), <http://www.creighton.edu/publicrelations/newscenter/news/2012/december2012/december202012/decruralmainstreetnr122012>; see also Raul L. Katz, Javier Avila & Giacomo Meille, *Economic Impact of Wireless Broadband in Rural America*, Rural Cellular Association (Feb. 24, 2011), <http://competitivecarriers.org/wp-content/uploads/2011/02/Economic-Study-Executive-Summary-02.24.11.pdf>.
- Thirty percent of rural students attend schools where Advanced Placement (AP) classes—a staple of any application to a top university—are not available. Andrea Beesley, *Keeping Rural Schools Up To Speed*, *The Journal* (Oct. 4, 2011), <http://thejournal.com/articles/2011/10/04/>

ruralresearch.aspx#3ofHV94jCZptrYU.99. Because of recent advances in mobile technology, schools in rural areas are able to offer distance learning AP classes to their students. Bobby Hall, *K-12 Distance Education: The Case of Rural Schools*, The Cornell Policy Review (Mar. 6, 2012), <http://blogs.cornell.edu/policyreview/2012/03/16/k-12-distance-education-the-case-of-rural-schools-3>.

- Rural residents with weather-damaged property can use their smartphones to access the Federal Emergency Management Agency through the FEMA Smartphone App, which can help people in a disaster area get access to critical services and report incidents. Federal Emergency Management Agency, *Smartphone App*, <http://www.fema.gov/smartphone-app> (last updated Aug. 23, 2013).
- Advancements in mobile technology enable rural residents to interact with their medical professionals, including apps that allow rural residents to send diagnostic information to their doctors who could be in the nearest city hours away. See Clara Ritger, *How Mobile Apps Could Transform Rural Health Care*, National Journal (Nov. 11, 2013), <http://www.nationaljournal.com/innovation-works/how-mobile-apps-could-transform-rural-health-care-20131111> (“When it comes to rural health care, broadband is a matter of life or death.”).

The cost of permitting onerous remedies for design patent infringement as in the current case would likely be borne, at least in part, by rural consumers in the form of increased prices and reduced access to essential mobile wireless functionality. The harmful impact of excessive design patent infringement awards on availability of smartphones to consumers is compounded by the fact that a single smartphone may be covered by dozens if not hundreds of patents. *See, e.g.*, Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 1992 (2007) (recognizing that modern products, including smartphones, “can easily be covered by dozens or even hundreds of different patents”).

Because of the importance of smartphones to consumers, and in particular to the rural and agricultural community, the Court should give careful consideration to the potential harm that may come from an excessive design patent damages award in this case and other cases involving smartphones. By disgorging all profits from devices bearing infringing designs—without any showing of a causal nexus or attribution of profit to Samsung’s infringing design—the award of the trial court is untethered to compensatory harm suffered by the patentee or the unjustly derived gains of the infringer. The availability of such a draconian result will likely unfairly deter competition and reduce access.

### III. CONCLUSION

For the foregoing reasons, Amicus Curiae National Grange respectfully urges this Court to reverse or vacate the jury's award of \$399 million for design patent infringement.

Dated: May 30, 2013

Respectfully submitted,

/s/ Laura A. Lydigsen  
Counsel for *Amicus Curiae*  
National Grange



## **CERTIFICATE OF SERVICE**

I hereby certify that on May 30, 2014, I caused the foregoing document to be electronically filed using the CM/ECF system, which will send notification of such filing to all parties of record.

/s/ Laura A. Lydigsen