Appeal Nos. 2014-1335, 2015-1029

United States Court of Appeals
for the
Federal Circuit

APPLE INC., a California Corporation

Plaintiff - Appellee,

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.

Appeal from the United States District Court for the Northern District of California in Case No. 5:11-CV-01846, Judge Lucy H. Koh

NATIONAL GRANGE'S *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITION FOR REHEARING *EN BANC*

Timothy Q. Delaney (*Attorney of Record*)
Laura A. Lydigsen
BRINKS GILSON & LIONE
455 N. Cityfront Plaza Drive
Suite 3600
Chicago, IL 60611
Telephone: (312) 321-3200

Attorneys for Amicus Curiae the National Grange of the Order of the Patrons of Husbandry

July 1, 2015

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPLE INC. V. SAMSUNG ELECS. CO., LTD.

Appeal Nos. 2014-1335, 2015-1029

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(s) of every party represented by me are:

The National Grange of the Order of the Patrons of Husbandry

2. The name(s) of the real parties in interest represented by me are:

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:

Timothy Q. Delaney
Laura A. Lydigsen
BRINKS GILSON & LIONE
455 N. Cityfront Plaza Dr. – Ste. 3600
Chicago, IL 60611
(312) 321-4200

Dated: July 1, 2015

Respectfully submitted,

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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 both traditional broadband and mobile broadband internet access. National Grange also has a long history of advocating for policies to protect America's rural community from unwarranted claims of design patent infringement.

Smartphones, like the Samsung products subject to the Court's decision, 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. That access is also critical for communications on farms that may span

several hundreds of acres. 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 have wide access to necessary products from farm equipment to mobile devices. Because National Grange believes that excessive patent damage judgments, untethered to the importance of the patented feature or design, jeopardize the rural and agricultural communities' access to these important products, National Grange provides this brief as *amicus curiae*.

Pursuant to Fed. R. App. P. 29(c)(5), 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**

The panel's affirmance of an excessive damages award of nearly $399 million cannot be squared with the plain language of 35 U.S.C. § 289. The panel erroneously reasoned that section 289 required an award of Samsung's total profit on its smartphones even though the three design patents held infringed pertain to

only a few discrete features of those phones. In doing so, the panel failed to recognize that damages for design patent infringement under 35 U.S.C. § 289 cannot properly be 100% of an infringer's profit in every case. Instead, causation of damages or attribution of profit to the patented design must be considered in order to determine appropriate damages stemming from the infringement.

The far-reaching potential ramifications of the panel's error warrant en banc review. In this case alone, the panel's erroneous interpretation of section 289 resulted in an enormous and unjustifiable $399 million award that may lead to reduced internet access in rural communities throughout America. In future cases involving multiple design patents, which may impact a broad range of industries, the panel's interpretation of section 289 as requiring an award of total profits for infringement of a design patent pertaining to a single feature of a product—no matter how minor—may result in an infringer paying out its entire profits on a single product several times over.

I. En Banc Review Is Necessary To Prevent Section 289 From Being Used To Disgorge All Profits For A Single Product Multiple Times

The panel's holding that an infringer is required to pay all of the infringer's profits under 35 U.S.C. § 289 without regard for the patented design's contribution to the overall product opens the door for an absurd and unjust result: disgorgement of the infringer's profits for one product multiple times over. Specifically, under the panel's interpretation of section 289, if a single product infringes multiple

design patents, the infringer could be required to pay a full award of profits for each design patent. While this scenario would have been unlikely in the 1880s when section 289 was enacted, since modern products "can easily be covered by dozens or even hundreds of different patents," multiple damage awards are not only likely to occur, but would be financially devastating to infringers. *See, e.g.*, Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991, 1992 (2007) Accordingly, en banc review is warranted to prevent such future absurd and excessive multiple damage awards.

This unjust double damages scenario is particularly likely to occur in the wake of the panel decision where design patents covering individual features of a single product are held by different patent owners. For example, the owner of a tractor might be forced to pay all profits for the entire tractor to the holder of a first design patent covering an ornamental design for the fender of the tractor. Subsequently, the same infringer again could be required to pay the value of its profits on the entire tractor to a second design patent holder for infringement of a patented design for the same tractor's wheel.[1]

[1] Alternatively, the panel interpretation is also problematic for design patent holders who may find that an infringer that has already paid a windfall to one design patent holder in the form of complete disgorgement of profits. Technically there are no profits left to pay a subsequent design patent holder, which will encourage a race to the courthouse. In addition, this will result in devaluing the

The Court should correct en banc the panel's misinterpretation of section 289 to prevent the harmful proliferation of a new species of non-practicing entities ("NPE") focused on extracting total profits for design patent infringement. In the late 1800s, National Grange battled a similar proliferation of "patent sharks," which were spawned from the relaxing of standards for design patents in the 1860s. The nineteenth century "sharks" sought to extract royalty payments from farmers based on dormant design patents covering farm tools. Gerard N. Magliocca, *Blackberries & Barnyards* 82(5) Notre Dame L. Rev. 1820, 1822-25 (2007); Robert P. Merges, *The Trouble with Trolls: Innovation, Rent-Seeking, and Patent Law Reform,* 24 BERKELEY TECH. L.J. 1583, 1593 (2009). Future design patent NPEs seeking to capitalize on the panel decision's potential to award total profits with no apportionment analysis, will likely attack a broad range of industries, including everything from the smartphones at issue here to the modern equivalent of "crowbars, spades, plows, [and] scrapers" targeted by nineteenth century "sharks." *See* Magliocca, *supra*, at 1821.

The panel erred in summarily discounting multiple recovery and other absurd results stemming from its interpretation of section 289 as "policy arguments

---

subsequent design holder's claims regardless of the importance of one design over the other in causing the sale of the product.

that should be directed to Congress."[2] Slip op. 27, n.1. To the contrary, courts have recognized that statutes should be interpreted to avoid absurd results – even where such an interpretation runs counter to the statute's plain meaning. *Nesovic v. United States*, 71 F.3d 776, 778 n.3 (9th Cir. 1995); *see also Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528-29 (1989) (Scalia, J., concurring) (reasoning that "defendant" in Fed. R. Evid. 609(a)(1) must also include civil plaintiffs because holding otherwise would produce an "absurd result"); *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) ("A literal reading of [statutes] which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose."). Here, the plain meaning of "to the extent of" in section 289 also weighs against the panel's contrary interpretation and the absurd multiple recoveries that flow from that interpretation. Thus, the panel erred in cursorily dismissing the potential for excessive multiple recoveries under its interpretation.

[2] 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*, (August 29, 2012), http://www.lexology.com/library/detail.aspx?g=33b72227-e5f1-477b-8f4a-3afdcd91a8bb.

II. The Impact Of The Panel's Excessive Award On Cell Phone Access Warrants En Banc Review

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 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); *see also* Raul L. Katz, Javier Avila, & Giacomo

Meille, *Economic Impact of Wireless Broadband in Rural America*, Rural Cellular Association (Feb. 24, 2011), at 8.

- 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). 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).
- Rural residents with weather-damaged property can use their smartphones to access the Federal Emergency Management Agency ("FEMA") Smartphone App, which can help people in a disaster area get access to critical services and report incidents. FEMA, *Smartphone App*, http://www.fema.gov/smartphone-app (last updated May 21, 2015).
- Advancements in mobile technology enable rural residents to interact with their medical professionals, including ECG, glucose and blood pressure 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) ("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.

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. By disgorging all profits from products bearing infringing designs—without any showing of a causal nexus or attribution of profit to the infringed 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 far beyond the product at issue in this case.

CONCLUSION

For the foregoing reasons, Amicus Curiae National Grange respectfully requests that the Court grant Defendants-Appellants' petition for rehearing en banc.

Dated: July 1, 2015

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2015, 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