Titans of Industry: The Frazier v. Ali of Patent Litigation

By: Richard Lee

The two largest individual shareholders in the smartphone industry, Samsung and Apple, have engaged in patent litigation that includes ten countries and millions of dollars in damages. Both companies have tried to get the other's product pulled from the market with very limited success. [1] In the United States, Apple, Inc. v. Samsung Electronics Co. has progressed all the way to the Supreme Court ("SCOTUS"). [2] SCOTUS has not heard a patent design case in 120 years which signals the increasing importance technology and its implications are playing in our society.

The proliferation of the smartphone industry began with Apple's massive investment into its flagship product, the iPhone, in 2004. That year, Apple elected to undertake a "bet-the-company project" to enter the smartphone market and invested hundreds of millions of dollars as well as thousands of employee-worked hours to create a "new, original, and beautiful object, something that would really wow the world." [3] The iPhone's monumental success was directly tied to its aesthetically innovative design. In 2007, Time Magazine recognized the iPhone as the invention of the year because by recognizing a good design is just as important as good technology in selling a successful product. [4] The iPhone's design is the foundation of the patent infringement case between Samsung and Apple that is currently being heard by SCOTUS.

Apple attributes a significant amount of the success of its iPhones to three design patents in their possession. The D'677 patent covers the iPhone's distinctive front face; most significant to the design is the combination of the black color, the speaker slot at the top of the screen, and the transparent surface that extends from edge-to-edge. [5] The D'087 patent covers the combination of the flat contour of the front face and the bezel, which is the edge separating the

glass display from the rest of the device. [6] The D'305 patent covers the unique arrangement of the iPhone's user interface, notably the "arrangement of rows of colorful square icons with rounded corners." [7] The culmination of these designs led to a product that was remarkably different than the other smartphones of its generation, and consequently marked the beginning of the phones we now use today.

In December 2015, it appeared the battle between Samsung and Apple in their U.S. patent litigation cases in the United States was coming to a close in the form of a settlement with Samsung agreeing to pay Apple $548.2 million for infringing upon some of Apple's designs. [8] The $548.2 million settlement was far below the $1 billion Apple was initially awarded back in 2012, which was overturned by the judge, and the $2.75 billion Apple was originally seeking to collect on Samsung's infringement. [9] While the two companies filed a joint settlement statement, Samsung indicated to the court that they reserved the right to be reimbursed for part or all of the $548 million if the patents are deemed invalid, through prior use or by lacking novelty [10], or if it were to win a case on appeal. [11]

Samsung appealed the decision of the Federal District Court to the Federal Circuit Court of Appeals, arguing that they were not liable for infringing on three specific patents: the '647, '721, and '172 patents. [12] Significantly, Samsung was not appealing the three design patents that provided the bulk of the settlement amount, but rather focused their appeal on the '172, '721, and '647 patents in an attempt to reduce the $548.2 million in damages.

The '647 patent involved a system and method for detecting and linking actions in structure such as phone numbers, addresses, and dates. [13] This application allowed the user to be able to perform actions with one click — like calling a phone number with just one tap on the pad — instead of copying and pasting the number into the appropriate application. [14] Samsung

appealed the denial of their motion for judgment on the '647 patent but the Appeals Court upheld the District Court's denial based on the record that there was substantial evidence to support the jury's finding that Samsung infringed upon several of Apple's patents. [15] The district court jury awarded $98.7 million based on this patent. [16]

The '721 patent covered the technology that made the smartphone lock screen easy to unlock while getting rid of unintentional contact. [17] This was Apple's solution to an important problem because if the phone could be unlocked by any contact there would be a pocket-dialing repercussion that would be a major inconvenience for consumers. [18] Apple addressed this issue by allowing the user to place his/her finger on a specific spot on the screen and use a purposeful motion to unlock the screen, which is the slide-to-unlock feature that has become standard on subsequent iPhone generations. [19] The appellate court upheld the district court's ruling and upheld the jury's finding that this patent was infringed on and was not an "obvious" result of combining two previous patents to create the necessary solution. [20] The holding noted a patent is not infringed upon if it were "obvious" that combining separate patents would result in the patent in question, such that a skilled artisan would combine these two patents and render the patent invalid. [21] The District Court jury awarded $3 million in damages based on this patent and the Appellate Court found the jury's decision to be supported by substantial evidence that Samsung infringed upon the '721 patent. [22]

The '172 patent involved the autocorrect recommendations system found in iPhones. [23] The '172 patent allowed the user to accept the autocorrect suggestions by hitting space or choosing the word, as opposed to the phone automatically auto-correcting the word without the user's consent. [24] Significantly, the Appellate Court appeared to only consider whether the jury's finding was supported by substantial evidence, sending a message that it believed these

issues to be factual in nature and therefore within the province of the jury to decide. After Samsung lost this appeal, only two choices were left: (1) pay the full $548.2 million or (2) appeal the case to SCOTUS.

Samsung chose to appeal the case to SCOTUS and was granted certiorari on the issue of how to apportion patent infringement damages. SCOTUS will review the issue of whether Samsung has to pay the full profits from every phone that used the infringed technology or limit damages to the profits directly attributed to the specific designs of the technology. [25] The specific design patents at issue are D'677, D'087, and D'305. The relevant legislation at the core issue before SCOTUS is 35 U.S. Code § 289, which stipulates that whoever (1) applies the patented design "to any article of manufacture for the purpose of sale..." or (2) sells any article of manufacture to which such "...design or color imitation has been applied shall be liable to the owner to the full extent of his total profit." [26] A key phrase and issue of this statute is the phrase, 'total profit', and how to instruct lower courts to apply this phrase in future cases.

Apple argued in a brief to SCOTUS that the iconic designs and patents that Samsung was found to have infringed upon could only be remedied by full profits from the entire product. [27] Apple argued that Congress was spurred to create design patent rights because the emergence of intricate designs for sophisticated items that gave these items new and original appearances may enlarge demand for the product, and thus would be a meritorious service to the public to protect these kinds of patents. [28] Apple furthered claimed Congress wanted to make it possible to receive profits from design infringements because it is the design that sells the product in this case. [29] Apple also points to legislative history where Congress has preserved the phrase "total profit," when courts have applied full product profit remedies. [30] Finally, Apple argued that Samsung is a Global 500 company with worldwide reach who profited from directly and

deliberately infringing on their fiercest competitor, which is exactly what Congress was trying to avoid. [31]

Samsung argues in their brief to SCOTUS that the "article of manufacture" is less than the total profit product. [32] Samsung points to the government's explanation that "article of manufacture" encompasses "any item made by human labor, including manufactured items that are not sold as separate commodities but instead function as components of a larger product." [33] Samsung attempts to establish that since the design patents function as components of a larger product, the total profit remedy is limited to those patents attributable to the component. [34] Samsung further stipulates Congress did not repeal background principles of causation in §289, which counsels interpretation of "article of manufacture" as encompassing a product component to which a patented design is applied and not the entire product. [35] Samsung also argued that it should not have to pay total profits from the infringed technology because the devices are extremely complex machines that use "thousands of patented features." [36]

Samsung stated if SCOTUS does not rule in its favor, repercussions would manifest in "an infringer of a patented cup holder design must pay its entire profits on the car." [37] Samsung's argument is grounded in the notion that an adverse ruling will impose overreaching and severe penalties that are disproportionate to the value of the infringed technology when compared to the overall product; this would make costs higher for producers and also stifle innovation; it would stifle innovation because a business is only profitable if the value it creates exceeds the cost of performing the value activities. [38] An adverse ruling would potentially drive up the costs and stop innovation before it occurs.

Apple retorted that they have invested billions of dollars developing the iPhone, the massive success of which is directly attributed to its unique design and features and Samsung

copied these features in order to stop losing sales. [39] Apple's lawyer, Seth Waxman, argued that collecting the entire profit is justifiable because the iPhone's central design cannot be distinguished from the phone. [40] Apple argues the punitive nature of collecting full profit damages is fair because the commercial success of the iPhone is attributable to the entire product, which cannot be distinguished from the Samsung infringed technology. Apple also argued that since the "total profits" phrase in §289 has been interpreted to mean profits of the entire product for over a century, Samsung provided no evidence that affirming the Federal Circuit's application of the rule would cause such a surge in litigation now. [41]

Multiple Supreme Court justices have commented on the difficulty of establishing a precedent that would allow the lower courts to determine damages in patent infringement cases. After the first session in front of the Supreme Court justices ended last month, Justice Anthony Kennedy stated that neither side gave any instruction on how to measure the damages and that if he were part of the jury, he wouldn't know what to do. [42] Justice Stephen Breyer cited the difficulty of measuring the damages and seems to be in favor of allowing the lower courts to listen to the arguments established by both sides and "work it out." [43] If the Supreme Court does establish a standard, multiple justices seem to be leaning towards adopting the standard that will be easiest for the lower courts to implement.

The implication of such a ruling will conceivably have no direct impact on the consumers, but it could limit the tech industry's ability to share innovations of portions of its product if the Court rules in Apple's favor. [44] Advances in technology has created an information revolution that creates an access to information, which allows companies to gain competitive advantages through methods like imitating the industry leader's strategic innovation. [45] The argument for finding in favor of Samsung's proposal is further grounded in the fear that

advancements in the technology industry will be slowed because its growth depends on the sharing of information between different companies. Information sharing can spawn new businesses by creating derived demand for new products, making it possible to customize products, and creating interrelationships among industries that were previously separate. [46]

SCOTUS will most likely not make a decision until June 2017. The coming months and subsequent sessions may give a more substantive inkling of which way the specific justices are leaning, however, at the moment it appears the majority of justices are not partial to one standard or another. This case has the potential to greatly impact not only the smartphone market but every industry that employs patents, spanning beyond the technology world.

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