

In the
United States Court of Appeals
for the
Federal Circuit

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.

*On Appeal from the United States District Court for the Northern District of California
in Case No. 11-CV-01846-LHK · Honorable Lucy H. Koh*

**BRIEF AMICI CURIAE OF 27 LAW PROFESSORS
IN SUPPORT OF APPELLANT SAMSUNG**

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INTEREST OF AMICI

Amici are law professors at schools throughout the United States. We have no personal interest in the outcome of this case, but a professional interest in seeing that patent law develops in a way that encourages rather than retards innovation and creativity.

No one other than the undersigned wrote or funded any portion of this brief. Both parties have consented to the filing of this brief.¹

¹ Apple asked that we disclose that one of the academic signatories of this brief, Lemley, is also a partner at a law firm, Durie Tangri, that represents Google in unrelated matters. Lemley signs this brief in his individual capacity as a law professor. Durie Tangri has not been involved in the preparation of this brief. In any event, Durie Tangri does not represent Google in patent matters, and Google is not a party to this action.

SUMMARY OF ARGUMENT

The jury in this case awarded to Apple Samsung's entire profit from the products that infringed Apple's design patents. Never mind Samsung's own patents, its engineering and design work, and the technologies of Google and countless other inventors incorporated in the Samsung phones. The result was that it was Apple's product design, not any technical features, that was responsible for the overwhelming majority of the damages award.

The jury did this because the district court held that current law required it. *See* Apple, Inc. v. Samsung Elecs. Co., No. 11-CV-01846-LHK, 2012 WL 2571332 (N.D. Cal. June 30, 2012) (granting motion in limine excluding Samsung's testimony on apportionment because design patents do not permit apportionment). Unlike patents on technical inventions, or for that matter copyrights or trademarks, the court held that design patent law requires that infringers—even innocent infringers—pay the plaintiff their entire profit from the sale of the infringing product, even if the design was only a small feature of that product. 35 U.S.C. §289.

That rule, based on rather different circumstances that are more than a century old, makes no sense. As applied to a modern, multicomponent product it drastically overcompensates the owners of design patents, and correspondingly undervalues technical innovation and manufacturing know-how. It punishes even

innocent infringers, particularly now that one can infringe a design patent merely on a finding that two independently developed designs are too similar to the ordinary observer. And it leaves troubling questions about what to do with all the other claimants to a share of the defendant’s profits. We suggest that this Court interpret section 289, in accordance with wise policy and the remainder of the patent statute, to limit the award of profits in design patent cases to profits attributable to the act of infringement.

ARGUMENT

I. The Origin and Context of Section 289

Patent law has always included a damages apportionment principle. While early patents tended to be on fairly simple machines or chemical inventions, with the industrial revolution we started to patent small parts of large, multicomponent inventions like locomotives. When courts awarded damages or defendant’s profits² for infringement of those patents, they faced the problem of calculating damages attributable to the patent rather than to the defendant’s product as a whole. In *Garretson v. Clark*, for example, the Supreme Court said the patentee “must in

² Defendant’s profits were available under the Patent Act of 1870, which provided that “the claimant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby.” Act of July 8, 1870, ch. 230, § 55, 16 Stat. 198, 206. Congress abolished the infringer’s profits remedy in utility patent cases in 1946. Act of Aug. 1, 1946, ch. 726, § 1, 60 Stat. 778.

every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features" 111 U.S. 120, 121 (1884).

In the nineteenth century, design patents were no different. In a series of cases involving carpet sellers, the *Dobson* cases, the Supreme Court found infringement of design patents but found no evidence allowing them to distinguish between the value of the patented design and the value of the unpatented carpet itself. As a result, the Court ultimately awarded only nominal damages of \$0.06. *Dobson v. Dornan*, 118 U.S. 10, 18 (1886); *Dobson v. Bigelow Carpet Co.*, 114 U.S. 439 (1885); *Dobson v. Hartford Carpet Co.*, 114 U.S. 439 (1885).

The fact that the patentee won the case but was awarded only \$0.06 incensed many in Congress. In 1887, when Congress rewrote the Patent Act, it responded to these concerns by passing a new provision addressing design patent infringement. That provision set a floor of \$250 for design patent damages, and made a defendant "further liable for the excess of such profit over and above" \$250. Act of Feb. 4, 1887, ch. 105, § 1, 24 Stat. 387, 387. Notably, the 1887 Act made defendants liable only for knowing acts of design patent infringement.

In justifying the new statute, members of Congress referred to the *Dobson* cases, saying "[i]t now appears that the design patent laws provide no effectual money recovery for infringement Since that [*Dobson*] decision the receipts of

the Patent Office in the design department have fallen off upwards of 50 per cent” The House Report felt that unfair because “it is the design that sells the article” and thus the profit from that article “is not apportionable.” It went on to conclude that “[i]t is expedient that *the infringer’s entire profit on the article should be recoverable.*” H.R. REP. NO. 49-1966, at 1 (1886), *reprinted in* 18 CONG. REC. 834 (1887). And indeed that is how some courts in the nineteenth century read the statute.³

Congress wasn’t too worried about the potential unfairness of the entire profit rule in 1887 because the knowledge requirement was thought to limit the scope of design patent litigation to true copyists. Representative Butterworth said that “no man will suffer either penalty or damage unless he willfully appropriates the property of another.” 18 CONG. REC. 836 (1887). And the House Report assured us that “an innocent dealer or user is not affected.” H.R. REP. NO. 49-1966, at 4.

The design patent damages provision exists in substantially modified form in what is now section 289 of the Patent Act. Notably, the current version of the statute drops the long-standing requirement that the defendant know it was infringing. Like the rest of patent law, design patent infringement is now a strict

³ See *Untermeyer v. Freund*, 58 F. 205, 212 (2d Cir. 1893) (“The manifest purpose of [C]ongress was to enlarge the remedy against infringers of design patents, and to declare that the measure of profits recoverable on account of the infringement should be considered to be the total net profits upon the whole article.”).

liability offense. The Federal Circuit has required design patentees to “mark” their products with patent numbers, providing theoretical constructive notice to the public,⁴ but marking applies only to patentees who make products, and even independent designers are on the hook for patent infringement in modern design patent law. And if those independent designers infringe, the district court’s interpretation of section 289 suggests they will be liable for their entire profit, whether attributable to the design or not.

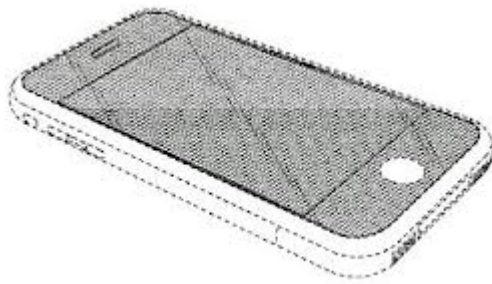
It is worth comparing this regime to its closest analogue, trademark law. The primary remedy for trademark infringement is an injunction against continued infringement. Plaintiffs can recover damages and a defendant’s profits only if they can show the defendant was a willful infringer. 15 U.S.C. § 1114 (2011). Even then, the award of profits is discretionary. *Faberge, Inc. v. Saxony Prods., Inc.*, 605 F.2d 426, 429 (9th Cir. 1979) (“Willful infringement may support an award of profits to the plaintiff, but does not require one.”). And the trademark statute provides that the award must amount only to “compensation” and not a “penalty.”

⁴ The phrase “knowing that the same has been so applied” was removed from section 289 in the 1952 Patent Act. Congress enacted a marking requirement at the same time, 35 U.S.C. § 287(a), and apparently concluded that the constructive notice provided by a duty to mark design patents was an adequate substitute for the actual notice required by the law until that time. *See Nike Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1439-41, 1445 (Fed. Cir. 1998) (reviewing this history and concluding that “the 1952 Act can not have intended to eliminate both actual and constructive notice from liability under § 289, after a century of legislative concern about notice”).

15 U.S.C. § 1117(a). Even when a court will award profits, “an accounting is intended to award profits only on sales that are attributable to the infringing conduct.” *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1408 (9th Cir. 1993). Copyright law too requires apportionment of profits. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 402 (1940).

II. Awarding a Defendant’s Entire Profits Makes No Sense in the Modern World

Further, the congressional assumption in 1887 that “it is the design that sells the article”⁵ may well be true of carpets, but it is surely not true of all design patents. True, the classical design patent covers the design of the entire product. But not all design patents cover an entire product. Here is one of Apple’s many design patents on its iPhone.⁶



The claim covers only the portion in solid rather than dotted lines, so it covers only the black, flat front face of the phone.

⁵ H.R. REP. NO. 49-1966, at 3 (1886), *reprinted in* 18 CONG. REC. 834 (1887).

⁶ U.S. Patent No. D618,677. fig.1 (filed Nov. 18, 2008).

Here is another Apple iPhone design patent.⁷

U.S. Patent

Oct. 2, 2012

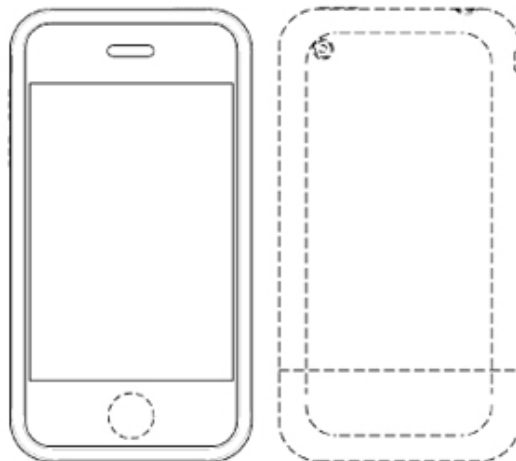
US D668,263 S



It is (barely) possible to argue with a straight face that it is the shape and overall design of the iPhone that causes consumers to buy it. It is not even remotely plausible that the shape of the Apple iTunes icon is what causes people to buy the iPhone, particularly when none of the patents Apple asserted cover the entire phone rather than discrete parts. And while these two patents happen to be owned by the same company, there is no reason to think that will always be true. And it literally cannot be the case that *both* the phone shape patent and the iTunes icon patent are the sole cause of the consumer buying the phone.

⁷ U.S. Patent No. D668,263. fig.1 (filed Oct. 8, 2010).

There are plenty more design patents that cover the same product; here are a couple.⁸



The world is more complex than it was in 1887, and so are products. The likelihood that a product has more than one patented design is much greater than it was in 1887. Virtual designs on things like icons are particularly likely to overlap, and there are more and more of them. Jason J. Du Mont & Mark D. Janis, *Virtual*

⁸ U.S. Patent No. D604,305 fig.1 (filed June 23, 2007) (top); U.S. Patent No. D593,087 fig.3, fig.4 (filed July 30, 2007) (bottom).

Designs, 17 STAN. TECH. L. REV. 107 (2013) (documenting the growth of virtual design patents). And if there is more than one patented design in a product, the syllogism that the design patent drives the sale of the product falls apart.

Nor does all the value of a product come from design patents. People don't buy iPhones simply because they look cool; they buy them because they function. Those functions are both of intrinsic value and are subject to many utility patents. Indeed, by one estimate there are 250,000 patents that arguably cover various aspects of a smartphone.⁹ To conclude that one design patent drives the purchase of the product, and therefore that all the defendant's profit is attributable to infringing that patent, is to say that none of those other contributions should be valued at all. The closest utility patent law comes to doing such a thing is the problematic "entire market value rule," under which a patent owner can win lost profits from sales it would have made of an entire product if it can show that the patent is the basis for demand of the product. But for most products (excluding, say, fashion) it is more plausible that a functional feature in a utility patent drives demand than that a patented design does. And even the entire market value rule requires a utility patent owner to prove that the patent was the basis for market demand, *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1318 (Fed. Cir. 2011), something the

⁹ See David Drummond, *When Patents Attack Android*, GOOGLE OFFICIAL BLOG (Aug. 3, 2011), <http://googleblog.blogspot.com/2011/08/when-patents-attack-android.html> (statement of David Drummond, Chief Legal Officer at Google).

current interpretation of section 289 does not. The assumption that underlies the entire profit rule, then, doesn't seem plausible in the modern world. *See* Mark A. Lemley, *A Rational System of Design Patent Remedies*, 17 **Stan. Tech. L. Rev.** 219, 233 (2013).

Further, awarding the defendant's entire profit based on a small contribution would cause significant mischief, as the Supreme Court noted in *Seymour v. McCormick*, 57 U.S. 480 (1853):

If the measure of damages be the same whether a patent be for an entire machine or for some improvement in some part of it, then it follows that each one who has patented an improvement in any portion of a steam engine or other complex machines may recover the whole profits arising from the skill, labor, material, and capital employed in making the whole machine, and the unfortunate mechanic may be compelled to pay treble his whole profits to each of a dozen or more several inventors of some small improvement in the engine he has built. By this doctrine even the smallest part is made equal to the whole, and 'actual damages' to the plaintiff may be converted into an unlimited series of penalties on the defendant.

We think, therefore, that it is a very grave error to instruct a jury 'that as to the measure of damages the same rule is to govern, whether the patent covers an entire machine or an improvement on a machine.'

Id. at 490-91.

III. Section 289 Should Not Be Interpreted to Require Disgorgement of Profits Unrelated to the Patented Design

The proper interpretation of section 289 should focus on the language of the statute as a whole. Section 289 currently reads in its entirety:

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.

Nothing in this section shall prevent, lessen, or impeach any other remedy which an owner of an infringed patent has under the provisions of this title, but he shall not twice recover the profit made from the infringement.

35 U.S.C. §289.

This language is derived in part from the 1887 Act. But the language itself contains ambiguities that should arguably be resolved in favor of apportionment. The language says a defendant is “liable to the owner to the extent of his total profit.” Read literally, there is no requirement in that language that the profit be the profit from the sale of the infringing product at all. If United Airlines uses a patented part in one of its planes, the patent owner cannot simply point to that infringement and say, “Now I am entitled to the entire profit from all aspects of United Airlines.” As the Seventh Circuit put it in the copyright context, a plaintiff must do more than simply attach the defendant’s income tax return to the complaint and say it wants all the money.¹⁰ The general principle of remedies law requires a plaintiff to show some connection between the profits and the

¹⁰ *Taylor v. Meirick*, 712 F.2d 1112, 1122 (7th Cir. 1983) (“If General Motors were to steal your copyright and put it in a sales brochure, you could not just put a copy of General Motors’ corporate income tax return in the record and rest your case for an award of infringer’s profits.”).

infringement, even though nothing in the statutory language expressly imposes such a requirement. Indeed, in one early design patent case in which the defendant sold refrigerators that had door latches that infringed the plaintiff's latch patent, the court refused to grant profits on the refrigerators themselves, instead defaulting to the \$250 statutory minimum because the intermediate good (the latch) was not sold separately. *Young v. Grand Rapids Refrigerator Co.*, 268 F. 966, 973-74 (6th Cir. 1920). The court assumed the plaintiff was not entitled to the entire profit on the refrigerator; there must be some connection between the patent and the profits sought. Even more explicit on this point is *Bush & Lane Piano Co. v. Becker Bros.*, 222 F. 902 (2d Cir. 1915), where the court said:

The question which seems to have received little attention upon the accounting, due probably to the form of the decree, is whether the profits made by the defendant should be the entire profits of the sales of the piano and case or the profits upon the sale of the case which alone is the sole subject of the patent. We are of the opinion that the latter rule should have controlled the accounting.

Id. at 903; see also Lemley, *supra*, at 235; Frederic H. Betts, *Some Questions Under the Design Patent Act of 1887*, 1 **Yale L.J.** 181 (1892).

“Some connection” isn’t necessarily apportionment. But here the final paragraph of section 289 may guide us. That provision prohibits double counting of the defendant’s profits and the plaintiff’s losses. In the course of defining “double counting,” it refers to the defendant’s profits measure as “the profit made from the infringement.” 35 U.S.C. §289. That clearly seems to contemplate some

kind of apportionment: the profit at issue in a design patent case is not the defendant's total profit, or even defendant's total profit from a single product, but the profit "made from"—that is, causally derived from—"the infringement."

Further evidence in support of that interpretation comes from another change in the 1952 Act. The 1952 Act deleted from section 289 language from the original statute that awarded profits "made by him from the manufacture or sale, as aforesaid, of the article or articles to which the design, or colorable imitation thereof, has been applied." That original language suggested that the profit was from the articles, not from the design. The deletion of that language, coupled with the reference in the second paragraph to "profits made from the infringement," suggests an intent to move away from profits on the whole product towards profits that result from the patented design.

But what of the legislative history from the 1887 Act, which seemed to reject the idea of apportionment? For those committed to fidelity to statutory text regardless of legislative intent, the question shouldn't matter. The fact that the modern statute seems to invoke apportionment is enough. But even judges who pay attention to legislative history should hesitate to apply it here. Not only does it lead to a nonsensical result, but it seems predicated on two assumptions: that the design is the basis for purchasing the product, and that only intentional copiers will be liable for their profits. Those assumptions may have made sense 130 years ago, but

they no longer do. Designs still sell some products, but design patents now cover attributes of many products far more complex than those contemplated by Congress in the nineteenth century. And section 289 has been amended to remove the requirement of intentional infringement. So Representative Butterworth's assurance that "no man will suffer either penalty or damage unless he willfully appropriates the property of another," 18 CONG. REC. 836 (1887), while true in 1887, is true no longer. Today a company could act in perfect good faith in adopting a similar design as a small aspect of a much larger product and still be forced to disgorge its entire profits from the product. Legislative history is relevant, if at all, because it illuminates Congressional intent. Here, what legislative history we have suggests Congress would not have intended the "very grave error" against which the Supreme Court warned in *Seymour*.

IV. Conclusion

This Court should require proof of some connection between the patented design and the defendant's profits, and order the district court to remit the award of profits to the extent it exceeds those profits attributable to the patented designs.

Dated: May 29, 2014

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APPENDIX A
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CERTIFICATE OF SERVICE

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I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore
Senior Appellate Paralegal
COUNSEL PRESS LLC

**CERTIFICATE OF COMPLIANCE PURSUANT TO
FRAP 32(a)(7)(B)-(C) AND FEDERAL CIRCUIT RULE 32(b)**

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2. EXCLUSIVE of the certificate of interest; table of contents; table of authorities; any addendum containing statutes, rules, or regulations, Appendix A containing the List of Signatories, and the certificate of service, this brief contains 3,349 words and is within the 7,000 word limit pursuant to Federal Circuit Rule 29(d).

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Dated: May 29, 2014

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