

Nos. 14-1335 & 14-1368

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, and 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, Judge Lucy H. Koh.

**BRIEF OF THE HISPANIC LEADERSHIP FUND AS *AMICUS CURIAE*
IN SUPPORT OF DEFENDANTS-APPELLANTS**

Erik S. Jaffe
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amicus Curiae

**CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE
STATEMENT**

Amicus curiae the Hispanic Leadership Fund (HLF) is a not-for-profit 501(c)(4) corporation. It has no shareholders, is not traded on any exchange, and has no parents or subsidiaries. HLF did not participate in the court below. The only counsel appearing for HLF in this Court is Erik S. Jaffe, Erik S. Jaffe, P.C., listed on the cover of this brief.

CONTENTS

CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE STATEMENTi

CONTENTS..... ii

AUTHORITIES iii

INTEREST OF *AMICUS*1

SUMMARY OF ARGUMENT.....1

ARGUMENT.....3

I. THE LIABILITY AND DAMAGES IN THIS CASE ARE EXCESSIVE AND WILL UNDERMINE COMPETITION AND RAISE PRICES.3

II. THE AVAILABILITY OF REASONABLY PRICED AND FULL FEATURED CELL PHONES IS IMPORTANT TO THE HISPANIC COMMUNITY AND OTHERS WHO RELY ON THEIR PHONES FOR INTERNET ACCESS AND OTHER ACTIVITIES.....6

CONCLUSION.....15

AUTHORITIES

Other Authorities

Hispanic Broadband Access: Making the Most of the Mobile, Connected Future 16 (The Hispanic Institute, Mobile Future July 2012) (available at http://www.thehispanicinstitute.net/files/u2/Full_Text_3.pdf) passim

Jamilah King, *How Big Telecom Used Smartphones to Create a New Digital Divide*, ColorLines, December 6, 2011, available at http://colorlines.com/archives/2011/12/the_new_digital_divide_two_separate_but_unequal_internets.html) 9, 10, 14

Jorge Rivas, *Young Latino Smartphone Users Spend \$17.6 Billion on Mobile Devices*, ColorLines, July 23, 2012 (available at http://colorlines.com/archives/2012/07/young_latino_smartphone_users_spend_176_billion_on_mobile_devices.html) 11, 13, 14

Mario H. Lopez, *Leveraging Mobile Broadband for Hispanic Communities*, POLITICS365, Apr. 29, 2013 (available at <http://politic365.com/2013/04/29/leveraging-mobile-broadband-for-hispanic-communities/>) 7, 13

Mark Hugo Lopez, Ana Gonzalez-Barrera & Eileen Patten, *Closing the Digital Divide: Latinos and Technology Adoption* (Pew Hispanic Center, March 7, 2013) (available at http://www.pewhispanic.org/files/2013/03/Latinos_Social_Media_and_Mobile_Tech_03-2013_final.pdf) 7, 8

Constitutional Provisions

U.S. CONST., Art. I, sec. 8, cl. 8.....6

INTEREST OF *AMICUS*¹

Amicus curiae the Hispanic Leadership Fund (HLF) is a non-partisan 501(c)(4) social-welfare organization that is dedicated to strengthening working families by promoting common-sense public policy solutions rooted in free enterprise, limited government, and individual freedom, with a particular interest in issues affecting the Hispanic community. It is interested in this case because of the rapid growth of cell-phone and smartphone use among Hispanics in the United States, particularly as a primary route for accessing the internet. Ensuring the continuing availability of a range of competitive phone options at reasonable prices, and preventing unnecessary or excessive burdens on innovation and consumer choice, is thus of great interest to HLF.

SUMMARY OF ARGUMENT

The decision below threatens the important public-policy interests in giving consumers access to competitive, fully functional, and affordable mobile broadband technology, such as smartphones. The staggering amount of damages awarded, and the overbroad view of the law that allowed for such liability and damages, will reduce consumer choice, raise prices, and undermine the functionality of

¹ This brief is filed with the consent of all parties. No party's counsel authored this brief in whole or in part. No party or party counsel, and no person other than *Amicus* and its counsel, contributed money that was intended to fund preparing or submitting this brief.

smartphones seeking to compete with Apple's iPhone, making it more difficult for many consumers to obtain such phones with the features they desire at prices they can afford.

Reasonable access to mobile broadband technology and smartphones is especially important to the Hispanic community. Hispanics in the U.S. have embraced such technology at a growing rate, often to the exclusion of home-based landlines and broadband connections. In today's world, reasonable and affordable access to such technology is increasingly essential for civic participation, running small businesses, educational opportunities, accessible medical care, and a myriad other activities. Creating barriers to such access through unwarranted monopoly protection, higher prices, and fewer choices disserves the Hispanic community and other groups who rely on their smartphones to enable them to fully engage with their communities on civic, economic, educational, social and personal matters.

This Court should adopt a narrower approach to liability and damages that takes into consideration competing public-policy and consumer concerns and values, which ultimately are a substantial purpose behind patent and trademark law in the first place.

ARGUMENT

I. THE LIABILITY AND DAMAGES IN THIS CASE ARE EXCESSIVE AND WILL UNDERMINE COMPETITION AND RAISE PRICES.

The roughly \$930 million in damages awarded in this case, based primarily on the supposedly similar appearance of Samsung and Apple smart-phones is remarkable for both its size and its disconnect from any real-world harm. Without any suggestion that consumers were deceived into buying Samsung phones believing they were Apple phones, and with little or no evidence that the particular attributes and features in dispute drove consumer choice in any meaningful way, the award is merely a windfall for Apple, a punishment of Samsung, and ultimately a burden on consumers.

As discussed in Samsung's Opening Brief to this Court, at 12, the astounding amount of damages awarded in this case were predominately for infringement of design patents and dilution of trade dress. The damages generally included all of Samsung's profits from the sale of phones deemed too similar in appearance to Apple phones, in addition to Apple's claimed lost profits from additional phones it supposedly would have sold had the Samsung phones at issue not been on the market at all. *Id.* at 9-12.

Amicus will not rehash the arguments that Samsung has persuasively set forth regarding the legal errors in the court below, but will instead simply note those is-

sues identified by Samsung that are responsible for the damages being so high and that threaten to stifle innovation and competition:

- The award of Samsung's full profits for products where the allegedly infringing features are minor elements of the phones that were not shown to be primary drivers of sales, Samsung Br. at 20, 35-36, 39-41, which raises the economic stakes for relatively minor manufacturing and design decisions.
- The failure to require any proof of consumer deception or confusion, Samsung Br. at 24, 28-29, which increases the likelihood of finding liability while simultaneously divorcing such liability from any meaningful real-world impact caused by the alleged infringement.
- The design-patent and trade-dress protection of features that are functional enhancements to phones but not entitled to protection under utility patents, Samsung Br. at 47-52, 56-57, which effectively expands the patent monopoly on such functional features, undermining the public-access purpose of the Constitution's Patent Clause.
- The failure to require a finding of intentional use of supposed trade dress to mislead consumers, Samsung Br. at 43, 55-56, 58, thus expanding lia-

bility even in situations of innocent use of trade dress that caused no confusion or deception in fact.

In each instance above, the damages or liability rules applied increase the costs and risks to competitors, expand Apple's monopoly over common and functional features of smart-phones, and ultimately reduce consumer choice and increase consumer expense. Faced with such massive potential liability, competing manufacturers will be forced to steer far clear of anything that could provoke a lawsuit from Apple. Such manufacturers would have to eschew even unprotected functional features and enhancements, would need to spend far more time and resources on litigation avoidance or defense, and ultimately would be unable to compete as effectively on price and functionality. Consumers would bear the brunt of those consequences in the end, being forced to choose between monopoly-priced Apple phones and consequently more expensive and less functional competing phones required to work around the vague boundaries of Apple's overbroad design-patent and trade-dress claims.

As to each of the issues noted above, the district court should have provided more detailed and limiting instructions on the proper scope of liability and damages, or should have issued rulings setting narrower limits on such liability and damages. It did not do so. This Court now has a similar opportunity to choose between a looser or tighter construction of the requirements for damages and liability.

In making that choice, this Court should bear in mind the public-policy concerns that animate patent and trademark law, the important public purposes and benefits behind the “limited Times” requirement in the Patent Clause, U.S. CONST., Art. I, sec. 8, cl. 8, and an overarching concern for consumers and society, who are supposed to be the ultimate beneficiaries of the innovation and competition fostered by these laws.

II. THE AVAILABILITY OF REASONABLY PRICED AND FULL-FEATURED CELL PHONES IS IMPORTANT TO THE HISPANIC COMMUNITY AND OTHERS WHO RELY ON THEIR PHONES FOR INTERNET ACCESS AND OTHER ACTIVITIES.

Many public-policy concerns militate against a lax or over-broad approach to liability and damages in this case. Perpetual trade-dress protection for phone features that could, at best, only receive limited patent protection would stifle innovation and competition contrary to the “limited Times” requirement of the Patent Clause. U.S. CONST., Art. I, sec. 8, cl. 8. Damages that go beyond those demonstrably caused by the particular and limited infringements involved, and award *all* profits from a device with any infringing elements, encourage lawsuits and generate an *in terrorum* effect that stifles innovation, reduces competition, and raises prices. Imposing liability for features and forms common to many or most smartphones imposes an unwarranted monopoly on such basic attributes and undermines consumer choice based on price and other, more salient, features.

Such public-policy concerns are of particular relevance to the Hispanic community and other groups that rely heavily on smartphones to access the internet and to engage in other daily activities. While all ethnic groups have strongly gravitated toward mobile broadband technology and smartphones, the adoption of such technology within the Hispanic community has been growing at an especially rapid pace. According to research by the Pew Hispanic Center, nearly half (49%) of Hispanic adults own a smartphone. Mark Hugo Lopez, Ana Gonzalez-Barrera & Eileen Patten, *Closing the Digital Divide: Latinos and Technology Adoption* 21 (Pew Hispanic Center, March 7, 2013) (available at http://www.pewhispanic.org/files/2013/03/Latinos_Social_Media_and_Mobile_Tech_03-2013_final.pdf). While that rate is comparable to smartphone ownership among whites and blacks, *id.*, the rate of increase in Hispanic ownership of smartphones was significantly higher than that among other groups between 2010 and 2012. Mario H. Lopez, *Leveraging Mobile Broadband for Hispanic Communities*, POLITICS365, Apr. 29, 2013 (available at <http://politic365.com/2013/04/29/leveraging-mobile-broadband-for-hispanic-communities/>) (“ComScore tells us that in two years (2010-2012), Hispanic adoption of smartphones increased from 43 percent to 57 percent whereas adoption of

smartphones among the general population increased from 36 percent to 46 percent.”).²

Not only are Hispanics substantial and growing users of smartphones, they often rely on them exclusively and forego the expense of landlines altogether. *Hispanic Broadband Access: Making the Most of the Mobile, Connected Future* 16 (The Hispanic Institute, Mobile Future July 2012) (available at http://www.thehispanicinstitute.net/files/u2/Full_Text_3.pdf) (according to a study by the CDC, in “2011, 31.6% of U.S. households had wireless telephone service only, compared to 17.5% five years earlier [A]mong the 31.6% of households with wireless only, 40.8% are Hispanic, followed by 32.5% of African American households and 27.6% of Whites”); Lopez, *et al.*, *Closing the Digital Divide*, at 8 (“many households are choosing not to invest in a landline phone. By mid-2012, 34% of all U.S. adults and about half of Hispanics (47%) resided in a cellphone-

² Smartphones are similarly popular in the black community, and black cell-phone users prefer more affordable Android-based phones (such as those produced by Samsung) over iPhones and Blackberries. Jamilah King, *How Big Telecom Used Smartphones to Create a New Digital Divide*, ColorLines, December 6, 2011, available at http://colorlines.com/archives/2011/12/the_new_digital_divide_two_separate_but_unequal_internets.html (“More than a quarter of black cell phone users have Androids, which is more than twice the number of those who use Blackberries and five times more than those who use iPhones. ... In contrast, only 12 percent of white smartphone users prefer Androids. The retail price of the Droid Incredible is over \$200 cheaper than the iPhone.”).

only household. The share among Hispanics is higher than the shares of blacks (38%) or whites (30%), but this phenomenon has increased among all groups.”).

In addition to widespread adoption of smartphones, Hispanics and others are increasingly using their mobile devices to access the internet, often using their phones as their exclusive source of such access. “Research shows people of color are more likely to surf the Internet, send and receive messages, engage social media and produce or publish media on their phones.” Jamilah King, *How Big Telecom Used Smartphones to Create a New Digital Divide*, ColorLines, December 6, 2011, available at http://colorlines.com/archives/2011/12/the_new_digital_divide_two_separate_but_unequal_internets.html). “Nearly a fifth – 18 percent – of African American wireless subscribers use *only* their cell phones to get online, as do 16 percent of Latinos. Just 10 percent of whites say the same. While 33 percent of white subscribers use their cell phones to surf the Internet, 51 percent of Latinos and 46 percent of African Americans do.” *Id.*

There are a variety of reasons Hispanics and others may rely exclusively on smartphones for internet access. One reason is that it is “the most affordable way to get onto the information superhighway. A couple hundred dollars for an Android and a data plan is much less than \$1,000 for a laptop computer and broadband connection.” King, *Big Telecom*, *supra*. While cost is part of the reason

many may choose to forgo traditional broadband service at home, there are other obstacles as well, such as the lack of availability in poorer neighborhoods or rural communities. “According to the Federal Communication Commission’s 2010 National Broadband Plan, half of all Latinos in the U.S. don’t have access to broadband Internet at home, while over 40 percent of African Americans are without high-speed Internet in their homes.” *Id.*; *see also id.* (discussing a 2011 Department of Commerce report finding that the lack of home broadband in many households is sometimes because it is “too costly” but also because “in other instances, services just aren’t available or the infrastructure simply does not exist”).

Smartphones thus provide affordable access to precisely those communities that have lagged behind in access to traditional broadband options that depend on costly computers and home internet access. As Aaron Smith, an analyst at the Pew Research Center’s Internet & American Life Project, explained, “[w]hen you look at the groups that are more likely to say that they go online mostly using their cell phone, they tend to be most highly oriented around groups that have not had high levels of broadband adoption.” King, *Big Telecom*, *supra* (quoting Smith).

Cultural differences also provide some of the explanation for the high reliance by Hispanics on mobile broadband and smartphones. “In addition to the high cost of equipment and broadband service at home, the fact that 40% of U.S. Hispanics have emigrated from countries where wireless is more common than landlines part-

ly explains their embrace of mobile communications technology.” *Hispanic Broadband Access* at 3; *see also id.* (“Hispanics are highly mobile, and thus rely more heavily than other groups on wireless devices for a variety of communications needs, including job searches, connections with friends and family, contact with their children’s schools, conducting business and accessing important government information.”). As a result of such differences, “Latinos ... [are] 17 percent more likely than ‘non-Hispanic whites’ to use mobile phones to access the Internet” Jorge Rivas, *Young Latino Smartphone Users Spend \$17.6 Billion on Mobile Devices*, ColorLines, July 23, 2012 (available at http://colorlines.com/archives/2012/07/young_latino_smartphone_users_spend_17_6_billion_on_mobile_devices.html).

The importance of such mobile internet access to the Hispanic community and others can be seen in a number of areas where such access is becoming increasingly essential to participation in modern commercial, educational, political, and social life. For example, access to many government services is now offered through mobile broadband, which is important for those in the Hispanic community who may face difficulties taking advantage of more traditional routes for such services. *Hispanic Broadband Access* at 2 (“for key government services to be readily accessible to the public, they needed to be offered in a mobile-friendly way. No population has more to gain from such a move than the Hispanic population thanks to

their high use of mobile phones to access the Internet.”). Civic involvement and voting participation likewise increasingly rely on the internet and mobile broadband to bring information to voters, discuss political questions, and send reminders and encouragement to vote. *Id.* at 14. In addition to allowing greater engagement with the election process, “the Internet has also become the way in which we learn about policy decisions, learn about school closings on snow days, reserve books and other materials at the public library, express our opinions in letters-to-the-editor and conduct many other functions in the public space. Without broadband, and mobile broadband, especially, in the case of Hispanics, this all becomes more difficult.” *Id.*

Another example of the importance of smartphones and mobile broadband to the Hispanic community is in the area of education.

In school districts across the country, teachers are employing a growing array of mobile education tools and developing lesson plans that range from having students develop short mobile texting translations of classic literature to demonstrating reading comprehension to playing video games that teach age-appropriate math and vocabulary lessons in a fun and interactive way. All of these pioneering efforts engage connected students via their cell phones, a tool the students view as an integral part of their daily lives. ... Mobile education innovations are also helping to ensure that new academic efforts reach children from disadvantaged families, many of whom cannot afford the cost of a personal computer in the home.

Hispanic Broadband Access at 11.

Likewise in the healthcare arena, “[m]obile technology makes it possible for patients, such as Hispanics who are more likely to suffer from diabetes, obesity and cardiovascular disease than some other groups, to receive more personalized and immediate care. ... Access to mobile broadband gives Hispanics an efficient path to health care services of all types.” *Id.* at 13.

Economic activity is also an area in which Hispanics rely upon and have much to gain from smartphone technology. “[M]any Hispanics start their businesses from their homes. Mobile access to supplier and customer web sites often are essential to businesses that may be run out of a garage or even a car. Additionally, mobile banking may be more appealing to the roughly 40% of U.S. Hispanics who are foreign-born and often come to the United States from developing countries where mobile banking is more commonplace in everyday life. To fully take part in the American business mainstream, Hispanics must have access to mobile business and banking opportunities.” *Id.* at 15. Particularly in challenging economic times, “mobile Internet access allows Hispanics to search for work and take advantage of online training and education. Mobile Internet also keeps Hispanic entrepreneurs and innovators connected to their customers.” Lopez, *Leveraging Mobile Broadband for Hispanic Communities*, *supra*. According to Gus West, Board Chair of The Hispanic Institute, “[m]obile broadband is essential for the economic advancement of Hispanics.” Rivas, *Young Latino Smartphone Users*, *supra*.

In short, access to the internet through mobile broadband and smartphones is not a luxury, it “is fast becoming a prerequisite for participating in civic and economic life. From education to politics to even basic tasks like renewing a license plate, the town square is increasingly virtual.” King, *Big Telecom*, *supra*. As President Obama himself observed in a 2010 memorandum, “[e]xpanded wireless broadband access will trigger the creation of innovative new businesses, provide cost-effective connections in rural areas, increase productivity, improve public safety, and allow for the development of mobile telemedicine, telework, distance learning, and other new applications that will transform Americans’ lives.” *Hispanic Broadband Access 5* (quoting President Obama).

The Hispanic community in particular has much to gain from continued access to reasonably priced and fully functional smartphones and other mobile broadband options. “Mobile broadband is connecting the Hispanic community in never-before-seen ways, resulting in greater economic, civic, and political opportunities for Latinos,” said Jonathan Spalter, Chairman of Mobile Future.” Rivas, *Young Latino Smartphone Users*, *supra*. “The key word is ‘mobile,’ when it comes to Hispanic Americans, who continue to lag behind other groups in broadband access at home. Mobile broadband access provides a vast array of options and new uses for technology that could enhance Hispanics’ ability not just to connect, but also to utilize their connections in ways that allow them to function more fully in society.”

Hispanic Broadband Access at 5. Mobile broadband offers “Hispanics new routes to full participation in the American Dream.” *Id.* at 6.

The importance of mobile broadband access for Hispanics and others serves as a meaningful backdrop to the decision in this case, which threatens to reduce competition from, increase the price, and reduce the functionality of affordable smartphones. While *Amicus* believes that encouraging innovation through protection of intellectual capital serves an important purpose in improving products such as smartphones, such protection should not be allowed to drift over into a means for monopolizing a class of products, punishing your competitors where there is little or no evidence of commercial harm or consumer deception, and indefinitely denying consumers the benefits of public access to innovation after the “limited Times” for ordinary patent protection have run their course and served their purpose. This Court thus should place meaningful limits on the overbroad liability and damages approach adopted by the court below. It should strike a more reasonable balance between the aggressive commercial interests of litigants like Apple and the interests of consumers, competitors, and the public as a whole.

CONCLUSION

For the above-stated reasons, this Court should reverse or vacate the decision below.

Respectfully Submitted,

s/ Erik S. Jaffe

Erik S. Jaffe
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amicus Curiae

May 30, 2014

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of the Hispanic Leadership Fund as *Amicus Curiae* In Support of Defendants-Appellants, complies with the type-face requirements of Fed. R. App. P. 32(a)(5) & (6) and the 7,000 word type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) in that it uses Times New Roman 14-point type and contains 3255 words, excluding the table of contents, table of authorities, and certificates of counsel. The number of words was determined through the word-count function of Microsoft Word.

s/ Erik S. Jaffe _____
Erik S. Jaffe

CERTIFICATE OF SERVICE

I hereby certify that, on this 30th day of May, 2014, I caused the foregoing Brief of the Hispanic Leadership Fund as *Amicus Curiae*, to be served via the ECF system on all counsel therein.

s/ Erik S. Jaffe _____
Erik S. Jaffe

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Apple, Inc. v. Samsung Electronics Co., Ltd., et al.

No. 14-1335, -1368

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)
Hispanic Leadership Fund certifies the following (use "None" if applicable; use extra sheets
if necessary):

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

Hispanic Leadership Fund

2. The name of the real party in interest (if the party named in the caption is not the real
party in interest) represented by me is:

Same

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

None

4. The names of all law firms and the partners or associates that appeared for the party
or amicus now represented by me in the trial court or agency or are expected to appear in this
court are:

Erik S. Jaffe
Erik S. Jaffe, P.C.

5-30-2014

Date

s/ Erik S. Jaffe

Signature of counsel

Erik S. Jaffe

Printed name of counsel

Please Note: All questions must be answered

cc: _____