

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 PETITION FOR REHEARING *EN BANC***

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**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 district 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.

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- Jamilah King, *How Big Telecom Used Smartphones to Create a New Digital Divide*, ColorLines, December 6, 2011
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(http://colorlines.com/archives/2012/07/young_latino_smartphone_users_spend_176_billion_on_mobile_devices.html)10
- Mario H. Lopez, *Leveraging Mobile Broadband for Hispanic Communities*, POLITICS365, Apr. 29, 2013
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(http://www.pewhispanic.org/files/2013/03/Latinos_Social_Media_and_Mobile_Tech_03-2013_final.pdf)6
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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 as entrepreneurs, consumers, and engaged participants in society. It is interested in this case because the rapid growth of smartphone use among Hispanics in the United States makes the continuing availability of competitive phone options at reasonable prices, and preventing excessive burdens on innovation and consumer choice, of great importance to that community. HLF is also interested because Hispanics are among the fastest growing segments of small business owners and employees, and the severe liability and damages rules applied by the panel are a threat to competitors generally and small businesses especially.

SUMMARY OF ARGUMENT

The panel decision in this case affirms a staggering amount of damages based on limited supposed infringements of minor design features of Apple's iPhone. That excessive penalty will reduce consumer choice, raise prices, and undermine

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.

the functionality of 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. The damages rule applied by this Court also particularly threatens small businesses that may inadvertently cross the line between permissible and impermissible design similarities only to find all of their profits forfeit and their businesses potentially bankrupted.

Reasonable access to mobile broadband 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 phone and internet connections. Today, 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.

Sensible and predictable limits on design-patent infringement and damages in general also are important to the Hispanic community. The Hispanic community disproportionately starts and is employed in small businesses. But smaller businesses are especially vulnerable to overbroad liability risks and draconian damages such as allowed by the panel opinion. Lacking the financial and legal resources of larger entities, small businesses are more likely to mistakenly run afoul of the panel's broad and indeterminate application of design-patent liability and to be put out of business by excessive damages.

This Court *en banc* should adopt a narrower approach to liability and damages that takes into consideration competing consumer and small-business concerns.

ARGUMENT

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

The roughly \$399 million in damages upheld in this case for design-patent infringement, based primarily on the similar overall appearance of Samsung and Apple smart-phones, is remarkable for both its size and its disconnect from any real-world harm. The court required no evidence that the *ornamental* qualities of the accused design features meaningfully drove consumer choice; the award is a wind-fall for Apple, a punishment of Samsung, and a burden on consumers.

As discussed in Samsung’s Petition, at 2, the \$399 million in damages represents Samsung’s entire profits from products having minor features held to infringe Apple’s design patents. *Amicus* agrees with Petitioners that allowing a finding of infringement based on “overall appearance” of the accused products and “any perceived similarities” of the designs, Pet. at 3 (quoting jury instructions), is not faithful to the requirements of patent law, traditional tort law, or sensible economic policy. Bearing in mind that only minor portions of a product are even alleged to have violated a design patent, the various unprotected functional similarities alone could easily cause a similar “overall appearance” in design, regardless of subtle ornamental differences in those features. As a result, the panel approach endorsing the

instructions below would effectively expand the design-patent monopoly to encompass common functional qualities not protectable under the design patent laws.

Amicus also agrees that allowing the recovery of total profits from sales of multifaceted products based on minor superficially similar features, without analysis or opportunity to rebut the causal assumptions, is excessive and inconsistent with damages principles. Pet. at 10. This is particularly true in the case of cell phones where purchasing decisions are made on many factors, with minor ornamental design similarities taking a far back seat to price, size, functionality, operating system, available apps, and performance.

Such overbroad liability and damages rules increase the costs and risks to competitors, expand the patentee's monopoly over common and functional features, and ultimately reduce consumer choice and increase consumer expense. They also threaten the existence of businesses – particularly small businesses – that seek to compete with design-patent holders. Broad liability and crushing damages will force competitors to steer far clear of anything that could provoke a lawsuit and to eschew even unprotected functional features and enhancements that might lead to a similar “overall appearance.” Smaller companies in particular would be least able to take the risk or bear the costs of litigation avoidance or defense, or worse still, a bankrupting damages award, and thus would be unable to compete as

effectively on price and functionality.² Consumers thus would find it more difficult to obtain goods with the features they desire at prices they can afford as producers and manufacturers of all sizes become more hesitant to innovate under the threat of losing their total profits as damages for even a minor design similarity.

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 an over-broad approach to damages in this case. 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 liabil-

² The Hispanic community has a particular interest in threats to small businesses and entrepreneurs because Hispanic small businesses are among the fastest growing business segments in the United States. Geoscape, *Hispanic Businesses & Entrepreneurs Drive Growth in the New Economy 2* (2nd Annual Report 2014) (“Hispanic businesses are growing at twice the rate of all U.S. firms” and add “nearly \$500 billion in revenue” to the economy.”) (http://www.geoscape.com/HBR/pdf/Geoscape_HispanicBusinessOwners_FINAL.pdf); *id.* at 3 (Hispanic-owned businesses had a 43% growth rate since 2007, more than double the rate for all U.S. firms for that period); *id.* at 3 (“the Latino share of all new entrepreneurs is 20.4%, compared to 16% a decade ago.”); *id.* at 8 (“Hispanic-owned businesses are our nation’s fastest growing business community.”); United States Dept. of Labor, *The Latino Labor Force at a Glance 2* (Apr. 5, 2012) (“Latino-owned businesses were the fastest growing small business ... expanding at nearly twice the rate of the national average between 2002 and 2007.”) (http://www.dol.gov/_sec/media/reports/HispanicLaborForce/HispanicLaborForce.pdf).

ity for features and forms common to many or most smart-phones imposes an unwarranted monopoly on such basic attributes and undermines consumer choice based on price and other, more salient, features.

Such 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. As noted in HLF's prior *amicus* brief in this case, Doc. 52, May 30, 2014, at 7-8, the Hispanic community has been adopting smartphone and mobile broadband technology at an especially rapid pace and often relies on such technology to the exclusion of expensive landlines and wired internet access.³

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 An-

³ See Mark Hugo Lopez, Ana Gonzalez-Barrera & Eileen Patten, *Closing the Digital Divide: Latinos and Technology Adoption* 21 (Pew Hispanic Center, Mar. 7, 2013)

(http://www.pewhispanic.org/files/2013/03/Latinos_Social_Media_and_Mobile_Tech_03-2013_final.pdf) ("By mid-2012, 34% of all U.S. adults and about half of Hispanics (47%) resided in a cellphone-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."); Jamilah King, *How Big Telecom Used Smartphones to Create a New Digital Divide*, ColorLines, December 6, 2011 (http://colorlines.com/archives/2011/12/the_new_digital_divide_two_separate_but_unequal_internets.html) ("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. ... 33 percent of white subscribers use their cell phones to surf the Internet, 51 percent of Latinos and 46 percent of African Americans do.").

droid and a data plan is much less than \$1,000 for a laptop computer and broadband connection.” King, *Big Telecom*, *supra* n. 3.⁴ 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.* (the lack of home broadband in many households is sometimes because it is “too costly” but also because “services just aren’t available or the infrastructure simply does not exist”).

Cultural differences also provide some of the explanation for the high reliance by Hispanics on mobile broadband and smartphones. *Hispanic Broadband Access: Making the Most of the Mobile, Connected Future 3* (The Hispanic Institute, Mobile Future July 2012) (http://www.thehispanicinstitute.net/files/u2/Full_Text_3.pdf) (“Hispanics are highly mobile, and thus rely more heavily than other groups on wireless devices

⁴ Affordability likewise drives consumer choice between Apple and Android products. Black cell-phone users, for example, prefer more affordable Android-based phones (such as those produced by Samsung) over iPhones. King, *How Big Telecom Used Smartphones to Create a New Digital Divide* (“More than a quarter of black cell phone users have Androids, ... five times more than those who use iPhones. ... [O]nly 12 percent of white smartphone users prefer Androids. The retail price of the Droid Incredible is over \$200 cheaper than the iPhone.”).

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.”).

Mobile internet access is especially important to the Hispanic community and others because it is increasingly essential to participation in modern commercial, educational, political, and social life. Access to government services, civic and political involvement, and education all are offered through the internet. *See HLF Amicus Br.* at 11-15. “[F]or 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.” *Hispanic Broadband Access* at 2. 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.* at 14. “[W]hen 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 6.⁵

Economic activity also is 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.” Mario H. Lopez, *Leveraging Mobile Broadband for Hispanic Communities*, POLITICS365, Apr. 29, 2013

⁵ See also *Hispanic Broadband Access* at 11 (“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.”); *Id.* at 13 (“[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.”).

(<http://politic365.com/2013/04/29/leveraging-mobile-broadband-for-hispanic-communities/>). According to Gus West, Board Chair of The Hispanic Institute, “[m]obile broadband is essential for the economic advancement of Hispanics.” Jorge Rivas, *Young Latino Smartphone Users Spend \$17.6 Billion on Mobile Devices*, ColorLines, July 23, 2012 (http://colorlines.com/archives/2012/07/young_latino_smartphone_users_spend_17_6_billion_on_mobile_devices.html).

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 and punishing your competitors where there is little or no evidence of commercial harm. This Court thus should place meaningful limits on the overbroad liability and damages approach adopted by the panel and strike a more reasonable balance between the interests of design-patent holders and the interests of consumers, competitors, and the public as a whole.

CONCLUSION

For the reasons above, this Court should grant rehearing *en banc*.

Respectfully Submitted,

s/ Erik S. Jaffe _____

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CERTIFICATE OF SERVICE

I hereby certify that, on this 1st day of July, 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