No. 2014-1802

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.

On Appeal from the United States District Court for the Northern District of California, Case No. 12-cv-00630, Hon. Lucy H. Koh

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BRIEF *AMICUS CURIAE* OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF DEFENDANTS-APPELLANTS SAMSUNG ET AL. IN SUPPORT OF GRANTING SAMSUNG'S PETITION FOR REHEARING EN BANC

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November 2, 2015

CERTIFICATE OF INTEREST

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Federal Circuit Rule 47.4, Matthew Levy, counsel for *amicus curiae* the Computer & Communications Industry Association certifies the following:

1. The full name of the party represented by me is the Computer & Communications Industry Association.

2. The name of the real party in interest represented by me is the Computer & Communications Industry Association.

3. The Computer & Communications Industry Association has no parent corporation and no publicly held corporation has an ownership stake of 10% or more in it.

4. The names of all law firms and attorneys that appeared for the party now represented by me in this proceeding are Matthew Levy, see below.

November 2, 2015

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INTEREST OF *AMICUS CURIAE*[1]

The Computer & Communications Industry Association ("CCIA") is an international, nonprofit association representing a broad cross section of computer, communications and Internet industry firms employing more than 750,000 workers and generating annual revenues in excess of $540 billion.[2]

[1] No counsel for any party authored this brief in whole or part; no such party or counsel made a monetary contribution intended to fund its preparation or submission; and no person other than *amicus* made such a contribution. No party opposes the accompanying motion for leave filed pursuant to Federal Circuit Rule 40(g).

[2] A list of CCIA members is available at https://www.ccianet.org/members. Appellant Samsung and Google, Inc. are CCIA members, but took no part in the preparation of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel majority created a new and dangerous standard for establishing irreparable harm: a patent owner need only show that infringing features "were related to infringement and were important to customers" in choosing which product to buy. The primary problem with this standard is that it leaves out any requirement of showing any actual harm.

The correct question is whether the patent actually lost any sales or was forced to lower its prices as a direct result of the defendant's infringement. If the patent owner sold the same number of items at the same price as it would have without the infringement, it simply hasn't suffered harm.

The technology industry produces some of the most innovative and complex products ever known. These include smart phones, digital video recorders, video game consoles, as well as software for business, entertainment, and education. Many of these products, if not most, involve hundreds or thousands of smaller features that have been patented. But one or two small features are not typically what make a particular product desirable.

By removing the requirement that a patent owner show a direct link, i.e., a causal nexus, between the particular patents infringed and some actual harm, the panel majority's decision greatly increases the effective scope of patents for minor improvements. "Requiring a showing of nexus is necessary

to prevent undue leverage wielded by patents on minor features." *Apple Inc. v. Samsung Elecs. Co.,* No. 14-1802, slip op. at 3 (Fed. Cir. Sept. 17, 2015) (Prost, J., dissenting) ("*Apple IV*"). The majority's decision puts a thumb on the scale in favor of granting injunctions, as was the case before *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006). *See Apple IV* at 13 (Prost, J., dissenting). "[I]njunctive relief [is] appropriate when and if . . . the causal nexus requirement is met." *Apple IV* at 14 (Prost, J., dissenting). This Court should restore the equitable rule announced by the *eBay* decision.

There is no dispute that patents are a critical part of protecting innovations. CCIA's member companies in particular protect many of their products (which are some of the most innovative products ever developed) using patents. At the same time, there must be a balance. Patents should be valued accurately so as to avoid the risk of patent hold-up, which can block access to these innovative products. Unfortunately, the panel's decision threatens to distort the value of minor patents and give out-sized leverage to patent owners.

Because of the importance of this decision, *amicus* CCIA urges the Court to vacate the panel's decision and reconsider the issue en banc.

ARGUMENT

The panel majority's new rule for establishing a causal nexus to irreparable harm means that a patent for even the smallest improvement now has the power of a much broader patent. The majority's "new and lower causal nexus appears disconnected from the reality of multicomponent devices. It fails to appreciate that even those most innovative technology products are made up of countless small advances, not a few pioneering ones." Bernard Chao, *Causation and Harm in a Multicomponent World* at 9 (U. Denv. Sturm C. of Law Legal Studies Research Paper Series, Working Paper No. 15-56, Oct. 27, 2015), http://ssrn.com/abstract=2681204.

Weakening the causal nexus standard, as the majority has done, greatly increases the value of even the most minor improvement patent. While damages are apportioned based on the value of the contribution of a patent to the accused product, injunctions are not so fine-grained in their effects. This overvaluing of patents for minor features greatly increases the risk of patent hold-up.

"The value of a patent, for better or worse, is related to the likelihood that it could be successfully enforced in litigation. The value of the patent is also a function of the likely damages that could be obtained in litigation." Gene Quinn, *For Patent Owners Patent Quality is All About Value*, IP

WATCHDOG (June 24, 2015), http://www.ipwatchdog.com/2015/06/24/patent-owners-patent-quality-value/id=59010/. Increasing the availability of injunctions for otherwise minor patented features distorts patent value because "an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent." *eBay Inc.*, 547 U.S. at 396 (Kennedy, J. concurring) (internal citation omitted).

> The right to obtain an injunction thus gives the patent holder the power to hold-up an infringing firm that has made specific investments to design, manufacture, and sell the infringing product. The prospect of such hold-up affects the negotiating strengths of the two parties prior to the onset of litigation.

Carl Shapiro, *Injunctions, Hold-Up, and Patent Royalties*, AM. L. & ECON. REV. 280, 283 (2010).

The risk of patent hold-up is particularly problematic for technology companies. The threat of enjoining the sales of a complex device that required a large amount of research and development to produce can make it possible to extract a much larger settlement than a patent for one minor feature can possibly justify. *See id.* Moreover, for many technology companies, one device is a substantial portion of their product lines, magnifying the impact of a potential injunction even further.

Weakening the link between alleged irreparable harm and the infringed patent greatly expands the effective scope of that patent, particularly in complex devices. This case provides a good example. Apple's U.S. Patent 8,046,721 covers a "slide to unlock" feature, which is one of thousands of features of the iPhone. And yet, the panel majority's weakened standard for causal nexus has given that one patent the power of a much broader patent with the ability to block sales of several Samsung phone models. In essence, that one small feature is being used to block literally hundreds of other, unrelated features.

Features of the smartphone are, by a number of estimates, covered by over 200,000 patents. *See* Daniel O'Connor, *One in Six Active U.S. Patents Pertain to the Smartphone*, DISRUPTIVE COMPETITION PROJECT BLOG (Oct. 17, 2012), http://www.project-disco.org/intellectual-property/one-in-six-active-u-s-patents-pertain-to-the-smartphone/. This means that any smartphone manufacturer runs the risk of being faced with an injunction for infringing any one of thousands of patents. Such a result makes no sense and is not in the public interest:

> When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.

eBay, Inc., 547 U.S. at 397 (Kennedy, J., concurring).

CONCLUSION

For the foregoing reasons, *amicus* CCIA requests that this Court vacate the panel's decision and reconsider the issue en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, that on this 2nd day of November 2015, a true and correct copy of the foregoing Brief of *Amicus Curiae* the Computer & Communications Industry Association was timely filed electronically with the Clerk of the Court using CM/ECF, which will send notification to all counsel registered to receive electronic notices.

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