Nos. 2015-1171, 2015-1195, 2015-1994

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. 5:12-cv-00630, Hon. Lucy H. Koh

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BRIEF *AMICUS CURIAE* OF THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF GRANTING SAMSUNG'S PETITION FOR FURTHER REHEARING EN BANC

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November 21, 2016

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 is not a subsidiary of any corporation and has issued no stock.

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 21, 2016

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INTEREST OF *AMICUS CURIAE*[1]

The Computer & Communications Industry Association ("CCIA") represents over twenty companies of all sizes providing high technology products and services, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services – companies that collectively generate more than $465 billion in annual revenues.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

CCIA is very concerned about the Court's unusual actions in this case. A diversity of perspectives among the members of a court is a desirable thing, and no one would expect every panel to agree on every case. *Amicus* CCIA respectfully suggests, however, that the Court consider the impact that the posture of this case is having on the patent community's perception of the Court.

An *en banc* court completely redoing the work of the original panel, without additional briefing or argument, is unprecedented at the Federal Circuit. The uniqueness of this situation cannot help but draw attention, regardless of the actual issues at stake. At least some observers are speculating about various motives for

[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. All parties have consented to the filing of this brief.

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

the *en banc* court's actions; this speculation is only encouraged by the majority opinion's lack of clarity about why it was necessary to decide this case *de novo* with no additional briefing.

The majority identified no question of "exceptional importance" or inconsistency with court precedent, as the Federal Rules of Appellate Procedure require. It appears that the *en banc* court decided that it disagreed with the case-specific application of the law by the original panel. That is, the *en banc* court seems to have placed itself in the role of the original panel.

At a minimum, the *en banc* court has potentially damaged the credibility of the Court and undermined the authority of panel decisions. If a majority of the Court is willing to take on the role of a sort of "super panel," what is the value of a three-member panel decision? And if this does indicate internal conflict, what does that bode for patent law?

Patent law is already in a time of change. The America Invents Act went into effect just five years ago, and the Supreme Court has weighed in on more patent cases in the last ten years than it had in the 40 years before. L. Oullette, *Supreme Court Patent Cases*, WRITTEN DESCRIPTION (2016), http://writtendescription.blogspot.com/p/patents-scotus.html. Even the appearance of conflict within the Federal Circuit will likely cause additional anxiety within an already nervous patent community.

In order to remove the uncertainty that has resulted, *amicus* CCIA requests that the Court vacate its *en banc* opinion and issue an *en banc* order that allows for briefing and argument. In the alternative, *amicus* CCIA requests that the majority reissue its opinion with clarification of its reasons for taking this case *en banc* without further briefing.

ARGUMENT

The majority stated that it granted Apple's petition for rehearing *en banc*:

> to affirm our understanding of the appellate function as limited to deciding the issues raised on appeal by the parties, deciding these issues only on the basis of the record made below, and as requiring appropriate deference be applied to the review of fact findings.

Petition at 28. This stated rationale appears to be inconsistent with Federal Rule of Appellate Procedure 35(a):

> (a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
>
> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> (2) the proceeding involves a question of exceptional importance.

The majority did not identify inconsistent precedent or a question of "exceptional importance." An ordinary reader of the majority opinion is left to conclude that the majority took the case *en banc* for some other reason. Moreover, because the original panel apparently agreed to amend its opinion to remove any use or

citations to extra-record evidence, Pet. at 102 (Dyk, J. dissenting), the majority's actions are difficult to explain.

This lack of explanation has led to uncomfortable public speculation about lack of harmony within the Court:

> The en banc majority (for seven judges), in an opinion by Judge Moore, proclaimed that it was merely applying existing law on obviousness and infringement. That proclamation rings hollow. How can a precedential en banc opinion discussing obviousness, claim interpretation, and the court's precedent not impact the law? If the contrary, why was the case taken en banc?
>
> …
>
> The highly unusual posture of the Apple-Samsung en banc case may even cause some to question whether the decision smacks of pro-patentee bias.

D. Chisum & J. Mueller, *Chisum and Mueller Dissect The Recent En Banc Decision In Apple v Samsung – "Smartphone Wars: Federal Circuit Shenanigans?"*, PATENTS4LIFE (Oct. 31, 2016), http://patents4life.com (select "October 2016" hyperlink).

> It did seem odd that the Federal Circuit didn't conduct oral argument or further briefing in the Apple v. Samsung en banc decision. Others have tried to explain away the decision as being unnecessary for the court's analysis. The cynic in me thinks that it was to avoid having to recuse any of the majority due to amicus briefing by relatives' firms. I believe at least three of the Federal Circuit judges have relatives at firms in position to submit amicus briefs. With three recusals, that would have left the vote 4-3 without Judge Hughes' tenuous "concurrence in the result without opinion."

A couple of observations about Apple v. Samsung, 717 MADISON PLACE, (Oct. 7, 2016, 5:18PM), http://www.717madisonplace.com/?p=8212.

> While there are differences between the approaches of Federal Circuit judges, I wouldn't have thought that eight non-panel judges would totally agree that the three panel judges got everything (except the part about Samsung's offensive counterclaims) wrong. This is just a highly unusual discrepancy.
>
> …
>
> What one could imagine (and I'm not saying this is something I necessarily believe to be the case, but it would be plausible) is that somehow the eight non-panel judges' agreement was made easier by some circuit judges wanting to settle accounts with, or weaken, the Chief Judge.

F. Mueller, *Majority of Federal Circuit sides with Apple against Samsung: impact assessment, next steps*, FOSS PATENTS (Nov. 15, 2016), http://www.fosspatents.com (select 2016 archive, select October archive, then select the second article in October).

Such speculation undermines the Court's authority and is unhealthy for the patent community. But it is also indicative of a larger nervousness among patent stakeholders. The law itself has changed substantially in the last decade, leaving many people wondering anxiously about the future. Part of the role of the Federal Circuit is to provide some stability to patent law. The uncomfortable posture of this case is not consistent with that role.

Accordingly, CCIA urges the Court to return to its standard procedures and rehear this case again *en banc*, this time with additional briefing and oral argument.

CONCLUSION

For the foregoing reasons, *amicus* CCIA requests that the Court vacate its *en banc* opinion and issue an *en banc* order that allows for briefing and argument. In the alternative, *amicus* CCIA requests that the majority reissue its opinion with clarification of its reasons for taking this case *en banc* without further briefing.

Respectfully submitted,

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November 21, 2016

CERTIFICATE OF SERVICE

I hereby certify, that on this 21st day of November 2016, 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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