

2012-1548, 2012-1549

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

APPLE INC. and
NeXT SOFTWARE, INC. (formerly known as NeXT Computer Inc.),

Appellants,

v.

MOTOROLA INC. (now known as Motorola Solutions Inc.)
and MOTOROLA MOBILITY, INC.,

Appellees-Cross-Appellants,

*Appeals from the United States District Court for the Northern
District of Illinois in Case no. 11-CV-8540, Judge Richard A. Posner*

**BRIEF FOR NOKIA CORPORATION AND NOKIA INC. AS
AMICI CURIAE IN SUPPORT OF REVERSAL AND
IN SUPPORT OF NEITHER PARTY**

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April 4, 2013

CERTIFICATE OF INTEREST

Counsel for *amici curiae* Nokia Corporation and Nokia Inc. certifies the following:

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

Nokia Corporation and Nokia Incorporated.

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:

N/A.

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

Nokia Corporation has no parent corporation and no publicly held company owns 10 percent or more of its stock.

Nokia Inc.'s parent corporation is Nokia Holding Inc. Nokia Holding Inc. owns 100 percent of the stock in Nokia Inc. Nokia Holding Inc.'s parent corporation is Nokia Corporation. Nokia Corporation owns 100 percent of the stock in Nokia Holding Inc.

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:

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STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Nokia Corporation (“Nokia”) is one of the largest manufacturers of wireless telecommunications equipment in the world.¹ Nokia employs approximately 38,000 people worldwide. Nokia has cumulatively invested over \$50 billion in research and development relating to mobile communications. As a result of this substantial commitment to technological progress, Nokia currently owns more than 10,000 patent families.

Nokia has recently been involved in numerous U.S. patent lawsuits, as both a plaintiff and defendant. Nokia is thus both a significant patent owner that might seek an injunction to protect its patent rights, and a manufacturer in an industry in which patent owners routinely issue threats of injunctions for patent infringement.

Nokia’s interest in this case is to advocate for patent laws that (i) protect patent rights as a means for promoting the constitutional goal of developing technology for public benefit; and (ii) foster and encourage innovation by allowing patent holders to obtain injunctive relief against infringing competitors in appropriate circumstances. Nokia’s interest is further to ensure that patent infringement damages are properly calculated

¹ No counsel for any of the parties authored any portion of this brief. No entity other than amici curiae Nokia Corporation and Nokia Inc. monetarily contributed to the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5)(A)-(C).

with respect to standard-essential patents for telecommunications network standards, which derive substantial value from interoperability and efficiencies created by a web of inventions created by various companies involved in developing the relevant standards. Nokia therefore writes to support reversal of the district court opinion to the extent that it establishes a bright-line rule prohibiting injunctive relief based on the infringement of standard-essential patents under all circumstances and to the extent that it requires that patent damages in the case of standard-essential patents in networked products be based purely on the smallest salable component of a product embodying the patent at issue. Nokia takes no position on any of the other substantive issues on appeal in this matter.

SOURCE OF AUTHORITY TO FILE

Amici have attached this brief to a motion for leave of the Court to file as *amici*.

SUMMARY OF ARGUMENT

In apparently creating a new bright-line rule prohibiting a patent holder from seeking injunctive relief based on the infringement of a standard-essential patent under all circumstances, the district court violated Supreme Court precedent and established a new test that goes beyond what has been suggested by various federal agencies that have studied the issues

surrounding standard-essential patents, including the Federal Trade Commission (“FTC”), the Department of Justice (“DOJ”) and the U.S. Patent & Trademark Office (“USPTO”). In so doing, the district court’s ruling threatens to unduly inhibit patent holders from obtaining fair compensation for the use of their patents, to increase patent litigation both domestically and worldwide, and to diminish the value of the standard-setting process as a whole.

Rather than a categorical prohibition on injunctive relief in the standard-essential patent context, the appropriateness of such relief should be considered on a case-by-case basis. The contractual commitments patent holders make in connection with various standards can differ substantially across standard-setting organizations and should not be treated summarily. The FTC has recently issued several public interest statements and consent orders, each of which counsel for this approach by noting that injunctive relief should be available in the standard-essential patent context under certain circumstances, such as where the infringing party is an unwilling licensee under the patent holder’s patents. Such a nuanced, case-by-case approach would also accord with the Supreme Court’s decision in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 393 (2006), which requires that courts

refrain from imposing bright-line rules preventing injunctive relief in patent cases.

A rule requiring damages in U.S. patent cases to be based exclusively on the smallest salable component of a product embodying the patent in suit is likewise dangerous in the context of standard-essential patents in networked telecommunications products. As an initial matter, in Nokia's experience, royalty rates for such patents are typically based on, and applied against, the price of the end product in private negotiations between parties in the industry. This makes sense for several commercial reasons, and reflects the fundamental value of telecommunications technology in such products. For example, the ETSI IPR Policy requires holders of standard-essential patents to grant licenses to "sell, lease or otherwise dispose of EQUIPMENT," where EQUIPMENT is defined as "any system, or device fully conforming to a STANDARD." In most cases components or subsystems are not sufficient to fully conform to such standards, and as a result patent holders have no obligation under these kinds of SSO policies to grant licenses at the component level.

Moreover, standard-essential patents in the telecommunications industry often enable features that support the fundamental telecommunications functionality embedded in end user devices but the

entire benefits, efficiencies, or fundamental nature of the technologies covered by such standard-essential patents may not be readily apparent or appropriately valued by end-user consumers who may have come to take such broadly deployed and fundamental technologies for granted. In addition, the benefits of these kinds of inventions may at times be more fully realized by network operators in other parts of the network system, for example through cost savings or performance improvements or enabling new or improved services, thereby leading to such operators (*i.e.*, trade customers) mandating the desired standard features for all devices in their networks. As a result, such a patented feature may drive demand not only for a single product, but an entire category of products or services. The value illustrated in this example is by no means limited to the benefits of interoperability created by the standard itself.

Furthermore, the functionality covered by telecommunications standard-essential patents is sometimes, at least in part, embodied in components that are currently sold inexpensively because: (1) the manufacturers of such components make no investments in research and development for the standardized technologies they embed in their components; (2) such standardized features do not differentiate such components from each other; (3) such components are made and sold in

countries with few granted standard-essential patents or weak patent enforcement regimes; and/or (4) such manufacturers currently pay no royalties to standard-essential patent holders on such components because industry practice has been to license standard-essential patents at the end user device level. Thus, using the sales price of such components as a basis for establishing, and against which to apply, reasonable royalties for standard-essential patents would constitute a paradigm shift in the telecommunications industry that could leave standard-essential patent holders undercompensated to such a degree that it could, absent other changes, threaten further contributions by such patent holders to telecommunications industry standards. As a result, in the telecommunications standard-essential patent context and based on industry practice, we believe that royalty rates based on, and applied against, the entire market value of the end product are appropriate.

Nokia takes no position on any substantive issues discussed in this appeal other than those mentioned in this brief. Based upon its interest in a healthy patent system, which protects the rights of patent holders and thereby encourages innovation, Nokia requests that this Court expressly reject a rule prohibiting patent holders from seeking injunctive relief based on the infringement of standard-essential patents under all circumstances.

Nokia also requests that this Court reject a rule requiring damages for the use of standard-essential patents in networked telecommunications products to be based upon the smallest salable unit embodying the relevant patent.

ARGUMENT

I. WHETHER INJUNCTIVE RELIEF IS APPROPRIATE BASED ON THE INFRINGEMENT OF STANDARD-ESSENTIAL PATENTS SHOULD BE DETERMINED ON A CASE-BY-CASE BASIS.

A. The District Court's Order Seems to Create a Bright-Line Rule Prohibiting Injunctive Relief Based on the Infringement of Standard-Essential Patents Under All Circumstances.

The district court's order appears to fashion a bright-line rule prohibiting injunctive relief under all circumstances in the standard-essential patent context. Judge Posner writes that:

[b]y committing to license its patents on FRAND terms, Motorola committed to license the '898 to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent. How could it do otherwise? How could it be permitted to enjoin Apple from using an invention that it contends Apple *must* use if it wants to make a cell phone with UMTS telecommunications capability – without which it would not be a cell *phone*.

Apple, Inc. v. Motorola, Inc., 869 F. Supp. 2d 901, 914 (N.D. Ill. 2012).

This language appears to indicate that where a FRAND commitment has been made, injunctive relief may never be sought nor received in order to

ensure that no manufacturer seeking to implement a standard is ever blocked from doing so.

The district court seems to hedge the extremity of this statement by noting that “I don’t see how, given FRAND, I would be justified in enjoining Apple from infringing the ‘898 unless Apple refuses to pay a royalty that meets the FRAND requirement.” *Id.* Thus, it appears that had Apple outright refused to pay a FRAND royalty rate, it is possible that there would have been some room for injunctive relief. Yet the court also apparently rejected Motorola’s argument that Apple’s refusal to enter into negotiations to determine FRAND terms entitled Motorola to seek injunctive relief based on its patents, finding instead that Apple’s refusal “ran the risk of being ordered by a court to pay an equal or even higher royalty rate, but that is not the same thing as Motorola’s being excused from no longer having to comply with its FRAND obligations.” *Id.* Further, the court made no findings concerning whether Apple had refused to pay a FRAND royalty rate or was otherwise an unwilling licensee. Thus, it could be argued that the district court’s ultimate finding is that where a patent holder has made a FRAND commitment with respect to a patent, it may not seek or obtain injunctive relief based on the infringement of that patent under any circumstances.

To the extent that the district court's order creates such a rule, this Court should reverse the opinion and require that claims for injunctive relief based on the infringement of a standard-essential patent be evaluated on a case-by-case basis as outlined by various federal agencies and as required by the Supreme Court.

B. A Bright-Line Rule Prohibiting Injunctive Relief in the Standard-Essential Patent Context Would Harm the Standardization System and Violate Supreme Court Precedent.

Just as the unfettered availability of injunctive relief in every case in which a patent holder claims the infringement of a standard-essential patent could create a patent hold-up problem, as the patent holder could attempt to exploit additional value created by the inclusion of their intellectual property in a standard by demanding supracompetitive royalties from companies that would have difficulty adopting alternative technology, so too a categorical bar on such relief would swing the pendulum too far in the opposite direction.

If a FRAND commitment for a patent operates as a complete waiver of the right to seek injunctive relief under any circumstances, manufacturers of standard-compliant products lose much of their incentive to negotiate for a FRAND royalty rate in a timely and good faith manner. Each manufacturer could simply infringe until litigation was brought, allowing the

court to set the royalty rate for them several years after the commencement of the litigation, and in some cases potentially escape responsibility by making enforcement prohibitively difficult through restructuring of corporate organizations, manufacturing operations, and/or distribution channels. To adequately enforce its rights, a patent holder could be forced to litigate against every manufacturer of standard-compliant products in multiple fora across the world to ensure that all covered sales would be compensated. This, in turn, would result in a greater multiplication of patent litigation creating a greater drain on the courts. Further, it could threaten the standardization process as a whole, as patent holders would be forced to consider the likely difficulties in obtaining fair compensation for the use of their patents before making FRAND commitments concerning them.

This tension between ensuring that standard-essential patents are available for use by manufacturers that wish to make standard-compliant products and ensuring that patent holders have the means to obtain fair compensation for their intellectual property is recognized by several federal agencies that have recently considered these issues. The DOJ and USPTO, in a joint policy statement concerning standard-essential patents, noted the potential for patent hold-up with regard to such patents. However, they noted that injunctive or exclusionary relief should remain an option in

certain cases: “[a]n exclusion order may still be an appropriate remedy in some circumstances, such as where the putative licensee is unable or refuses to take a F/RAND license and is acting outside the scope of the patent holder’s commitment to license on F/RAND terms.” U.S. Dep’t of Justice & U.S. Patent & Trademark Office, “Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments,” at 7 (Jan. 8, 2013). These agencies explain that where a manufacturer refuses to engage in negotiations to determine FRAND terms, including through insistence on inappropriate terms, or where the manufacturer lies outside the jurisdiction of a court that could award damages, injunctive relief may be appropriate. The DOJ and USPTO continue that “[t]his list is not an exhaustive one. Rather, it identifies relevant factors when determining whether public interest considerations should prevent the issuance of an exclusion order based on infringement of a F/RAND-encumbered, standards-essential patent...” *Id.* at 7-8. This is far from a complete bar on injunctive relief, but rather counsels in favor of case-by-case examination in order to determine whether an individual licensee has refused to engage in negotiations to determine FRAND terms for a license and to pay such negotiated or determined compensation to the patent owner.

The FTC has recently taken steps to prevent patent holders from using standard-essential patents unfairly. The FTC's argument is that "[a] SEP-holder that makes a voluntary FRAND commitment promises to license its SEPs on fair and non-discriminatory terms to anyone willing to accept a license, *i.e.*, a 'willing licensee.'" *In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120, Complaint at 3. The FTC defines a willing licensee as a party that is willing to accept licensing terms that have been voluntarily negotiated or determined to be FRAND by a court or other third party. *See id.* Yet again, this concept does not mean that injunctive relief should never be available in the standard-essential patent context. Indeed, the FTC stated that "[w]e agree that injunctions may issue in certain situations even when a RAND-encumbered SEP is involved, such as when a licensee is unwilling to license on FRAND terms..." *In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120, Statement of the Commission at 4, fn. 14. In the case of Google, this is represented by the fact that Google is permitted to seek injunctive relief concerning standard-essential patents under certain defined circumstances. *See In the Matter of Motorola Mobility LLC and Google Inc.*, FTC File No. 121-0120, Decision and Order at 7-8.

In addition to contradicting the thinking of various federal agencies, a complete bar to injunctive relief based on the infringement of a standard-essential patent would outright conflict with the Supreme Court's decision in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006). In *eBay*, the Court determined that a party seeking injunctive relief for patent infringement must show:

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and the defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Id. at 391. Where the district court had mentioned this test but had “appeared to adopt certain expansive principles suggesting that injunctive relief could not issue in a broad swath of cases,” the Supreme Court struck the very idea of such “expansive principles” down, holding that “traditional equitable principles do not permit such broad classifications.” *Id.* at 393. A rule preventing injunctive relief in the case of all standard-essential patents under all circumstances would be just such an expansive principle, and such a test should not be countenanced.

The Supreme Court's holding in *eBay* prevents the negative consequences of rules such as the one suggested by the district court's order in this case. An absolute bar on injunctive relief in the standard-essential

patent context would harm patent holders, needlessly multiply patent litigation, and damage the entire standardization process. Applying the factors for injunctive relief as required by *eBay* would instead balance the interests of the parties by maintaining general availability of standard-essential patents to willing licensees while ensuring that patent holders receive fair compensation for the use of their patents.

II. THE ROYALTY BASE FOR DAMAGES FOR INFRINGEMENT OF STANDARD-ESSENTIAL PATENTS IN NETWORKED TELECOMMUNICATIONS PRODUCTS SHOULD NOT BE LIMITED TO THE SMALLEST SALABLE COMPONENT EMBODYING THE PATENT.

In *Lucent Techs., Inc. v. Gateway, Inc.*, this Court acknowledged that “sophisticated parties routinely enter into license agreements that base the value of the patented inventions as a percentage of the commercial products’ sales price.” 580 F.3d 1301, 1339 (Fed. Cir. 2009). This Court went on to explain that in cases involving products that incorporate a number of patents, “[t]here is nothing inherently wrong with using the market value of the entire product [as a royalty base], especially when there is no established market value for the infringing component or feature, so long as the multiplier accounts for the proportion of the base represented by the infringing component or feature.” *Id.*

This should be kept in mind when considering damages for standard-essential patents in the context of telecommunications technologies that

enable various products to network with one another, such as patents relating to cellular technologies that enable devices made by various manufacturers to interoperate. As an initial matter, such patents are typically licensed using the price of the end product to arrive at the appropriate royalty rate as well as a royalty base against which to apply the rate, as in the *Lucent* case. And they are typically licensed at the end user device level. Standards-essential patent holders in the telecommunications space do not typically license or have any obligation to license component makers – as Intel suggests must be done – and, as a result, the current market prices for components related to cellular functionality bear no element of costs for royalties owed to patent holders for the standardized technologies that such component manufacturers include in their products essentially for free.

It is also important to note, however, that the technologies covered by standard-essential patents in end user devices enable features and efficiencies that relate not only to end user devices but to the networks that support those devices – also beyond the obvious benefits of interoperability created by a standard as such. The benefits of these kinds of inventions may at times be more fully realized by network operators in other parts of the network system, for example through cost savings or performance improvements enabling new or improved services, thereby leading to such

operators (*i.e.*, trade customers) mandating the desired standard features for all devices in their networks. As a result, the benefits that an end user enjoys for his or her cellular device are driven, at least in part, by the services and features that the cellular network provider is able to provide as a result of the technologies included in the standard. Moreover, the technologies at issue may not be readily apparent or appropriately valued by end-user consumers who may have come to take such broadly deployed and fundamental technologies for granted, though the same technology may be highly valued by network operators and other trade customers who make the purchasing decisions on behalf of all of their customers. Therefore, establishing a rule that royalties for such fundamental technologies as those used in telecommunications standards must be based on the cost of a relatively inexpensive component in an end user device simply because the benefit of the invention is not readily apparent or appropriately valued by the end user runs the risk of vastly undercompensating holders of telecommunications standards essential patents and discouraging further investment in telecommunications standards.

CONCLUSION

For the reasons set forth above, *amici* urge this Court to expressly reject a rule prohibiting patent holders from seeking injunctive relief based on the infringement of standard-essential patents under all circumstances and to reject a rule requiring damages for the use of standard-essential patents in networked telecommunications products to be based upon the smallest salable unit of the product embodying the relevant patent.

DATED: April 4, 2013

Respectfully submitted,

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APPLE INC. v MOTOROLA, INC., 2012-1548, -1549

CERTIFICATE OF SERVICE

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by ALSTON & BIRD LLP, Attorneys for Amici Curiae to print this document. I am an employee of Counsel Press.

I hereby certify that on April 4, 2013, I electronically filed the foregoing **BRIEF FOR NOKIA CORPORATION AND NOKIA INC. AS AMICI CURIAE IN SUPPORT OF REVERSAL AND IN SUPPORT OF NEITHER PARTY** with the Clerk of Court using the CM/ECF System, which will serve via email notice of such filing to any of the following counsel registered as CM/ECF users:

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