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Steve Jobs Heard in Supreme Court

Steve S. Chang

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In last week's Supreme Court hearing of the design patent case of Apple v. Samsung you could almost feel the presence of Steve Jobs.

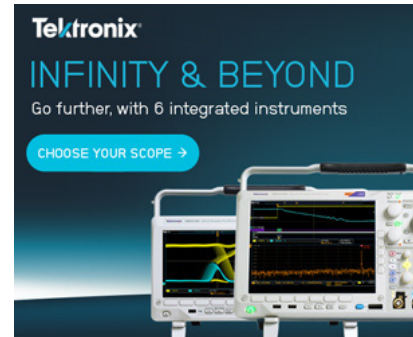
Just a week after the fifth anniversary of his untimely passing, Steve Jobs made an appearance -- at least in spirit -- at the U.S. Supreme Court. I was attending the oral argument in the patent suit between Apple and Samsung^[1], and as I watched the arguments unfold, I was reminded several times of Mr. Jobs' influence on our lives, the tech industry, and now the law. Here's a quick summary of what happened.

In 2011, Apple sued Samsung, alleging that 19 Samsung cell phones infringed several of Apple's patents. Apple ultimately prevailed, and won an award of \$399 million -- Samsung's entire profits on eleven of the accused smartphones.^[2] The issue at the Supreme Court was whether the lower courts properly interpreted U.S. patent laws in awarding all of Samsung's profits.

The patents at issue were design patents. When most people think about patents, they think about utility patents on new and useful inventions, like cancer-fighting drugs or flying cars.

Design patents, however, are different. Instead of covering useful inventions, design patents cover ornamental inventions. Most early design patents were for things like cast iron stoves. Although the technology behind different stoves may have been the same, different stovemakers went to great lengths to create cool ornamental designs for their stoves, and they lobbied for protection against copycats.

Apple asserted three design patents against Samsung -- two had Steve Jobs as an inventor and were focused on the front face of the iPhone, while a third was directed to the phone's home screen.



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resistion Whoever is using SAQP now would have highest density. It could be TSMC. Samsung has triple and Intel only has aggressive double (SADP), it is believed.

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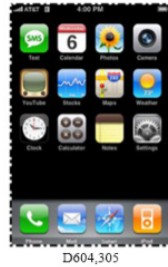
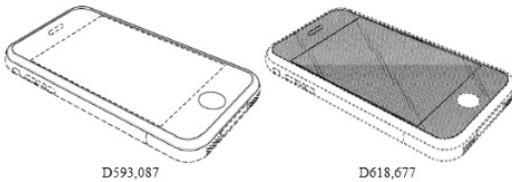
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Apple's case focused on three design patents on the original iPhone.

The trial court awarded \$399 million – all of Samsung's profits on the infringing phones because of a provision in the U.S. patent laws that addressed design patents. That provision states that whoever "applies the patented design...to any article of manufacture for the purpose of sale...shall be liable to the owner to the extent of his total profit."^[3]

That provision was expressly added by Congress in the late 1800s, in response to a series of court cases involving carpets. In those cases, a design patent holder successfully proved that carpet manufacturers had copied the patented design, but was awarded only six cents because they were unable to prove how much of the infringer's profits came from the design itself, as opposed to the carpets they sold.^[4]

While the total-profits concept might make sense for things like carpets, where the ornamental appearance is a main reason for purchase, it starts to raise eyebrows when applied to other products. One example used in the Supreme Court arguments involved a cup holder in a car: should the inventor of a novel cupholder design be entitled to all profits for a car, if the car had the infringing cupholder?

Chief Justice John Roberts made a remark that reminded me of Steve Jobs' passion for design. In particular, Chief Justice Roberts remarked that "all the chips and wires" on the inside of Apple's iPhone don't really contribute to the distinctive design of the phone's exterior case. I was reminded of how Jobs famously insisted on making even the unseen parts on the inside of Apple's products look as beautiful as possible.^[5]

The Supreme Court justices asked Samsung and Apple various questions about how courts should properly and fairly apply the existing design patent laws to situations like the cup holder. Both Apple and Samsung agreed that in general you would not want to give automatically the owner of the cup holder the entire profits of a car.^[6]

They said the issue should come down to how you prove what the "article of manufacture" actually was in a design patent case, and what effect that article had on the overall profits from the sale of the car. So in the cupholder case, the "article of manufacture" might just be the cupholder, and the proof of damages would focus on the effect that the cupholder had on the sales of the car.

We should know how the Supreme Court wants us to handle these issues when it releases its decision, expected sometime around June 2017.

--Steve Chang (schang@bannerwitcoff.com) is a partner with the intellectual property law firm of Banner & Witcoff, Ltd., working on design and utility patents.

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[1] *Samsung Electronics Co. et al. v. Apple Inc.*, No. 15-777 (U.S. December 16, 2015)

[2] Other damages were awarded as well, but the issue before the Supreme Court only dealt with the \$399 million.

[3] 35 U.S.C. 289.

[4] See, e.g., *Dobson v. Dorman*, 118 U.S. 10 (1886); *Dobson v. Hartford Carpet Co.*, 114 U.S. 439 (1885); and *Dobson v. Bigelow Carpet Co.*, 114 U.S. 439 (1885).

[5] As recounted in Walter Isaacson's *Steve Jobs*, Jobs once rejected an initial circuit board layout for the Apple II because "the lines were not straight enough." Chapter Six, p. 224 (iBooks edition)

[6] This is not to say that Apple agreed it shouldn't have gotten the full \$399 million. They still contend that the evidence at trial supported that award, regardless of whether the Supreme Court articulates a new standard as a result of Samsung's appeal. Samsung, on the other hand, contends that at a minimum, there should be a new trial after the Supreme Court sets forth the proper standard for applying the design patent damages provision.

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