

United States Court of Appeals
for the Federal Circuit

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

Plaintiffs-Appellants,

v.

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

Defendants-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 OF AMICUS CURIAE THE INTELLECTUAL PROPERTY
LAW ASSOCIATION OF CHICAGO AS AMICUS CURIAE
SUPPORTING NEITHER PARTY**

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December 4, 2012

CERTIFICATE OF INTEREST

Counsel for The Intellectual Property Law Association of Chicago as *amicus curiae* certifies the following:

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

The Intellectual Property Law Association of Chicago
2. IPLAC submits this brief *amicus curiae* and has no interest in the outcome of the case.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None
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:

Law firms	Banner & Witcoff, Ltd. and
Partners or Associates of Banner & Witcoff, Ltd.	Charles W. Shifley

December 4, 2012

/s/ Charles W. Shifley
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INTEREST OF AMICUS CURIAE

Founded in 1884, the Intellectual Property Law Association of Chicago (“IPLAC”) is the oldest intellectual property law association in the nation. It has approximately 1,000 members, who represent a full spectrum of the intellectual property law profession ranging from law firm attorneys to sole practitioners, corporate attorneys, law school professors, and law students. IPLAC is centered in Chicago, a principal forum for patent litigation in this country. Every year, IPLAC’s members prosecute thousands of patent applications and litigate many patent lawsuits in Chicago and across the country.¹

IPLAC is a not-for-profit organization. A principal aim is to aid in the development and administration of intellectual property laws and the manner by which they are applied by the courts and by the United States Patent and Trademark Office. Its purposes include making “more definite, uniform and convenient the rules of practice in the courts” in relation to the patent law. IPLAC is also dedicated to maintaining a high standard of professional ethics in the practice of patent, trademark, copyright, trade secret, and associated fields of law, and further dedicated to providing a medium for the

¹ While over 30 federal judges are honorary members of IPLAC, none of them was consulted or participated in any way on this brief.

exchange of views on intellectual property law among those practicing in the field and to educating the public at large.

This case concerns in large part *Daubert* challenges to patent damages presentations. IPLAC does not take a position on whether any of the parties satisfied or fell short of *Daubert* standards as to their potential damages presentations.

IPLAC's goals in this amicus brief heed the words of Chief Judge Rader in the ABA Landslide interview in the March/April 2011 issue, to help the Court see the implications of its decision in this case long term, including the effect on the IP community and the market, and whether it would affect investment, ameliorate unintended consequences, and make the law more predictable and more amenable to facilitate business decisions.

Quoting Chief Judge Rader:

The best amicus briefs try to help us see the implications of our cases long term, how this would affect a particular segment of the IP community or a particular part of the marketplace, how it would inhibit investment, and whether it would spur investment and cause more dedication to proper IP principles. That's the kind of thinking we need. We need something that looks long term and tries to predict with statistics and insights into how the court's cases would have some impact downstream in the marketplace. ...

[W]e recognize and must recognize that our cases have an impact beyond just the parties before us and again that's where

the amicus process can inform us and help us to give a better decision. We can resolve the case before us in a responsible manner according to the law and at the same time ameliorate any unintended consequences if we understand them in advance. We can write the case in a way that narrowly decides the issue before the parties without having any impact beyond that case, or we can resolve it in a way that gives guidance for future cases and makes the law more predictable and more amenable to facilitate business decisions. But we need information before we can do that well.

No party's counsel authored the brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; no person other than the amicus curiae, its members or its counsel, contributed money that was intended to fund preparing or submitting the brief. The Intellectual Property Law Association of Chicago has authority to file this amicus curiae brief because all parties have consented to its filing.

ARGUMENT

I. Damages Law in Patent Cases is Trending Toward Ever More Exactness in Damages Presentations

Damages law in patent cases is trending toward ever more exactness in damages presentations. Recently this Court admonished that damages presentations must be based on sound economic and factual predicates. *See, LaserDynamics, Inc. v. Quanta Computer, Inc.*, No. 2011-1440, slip op. at 24 (Fed. Cir. August 30, 2012), citing *Riles v. Shell Exploration & Prod. Co.*, 298 F.3d 1302, 1311 (Fed. Cir. 2002). And, some long-standing damages theories appear to be losing favor.

As a first specific example, the entire market value rule, with evidence demonstrating that patented inventions embodied in complex products are valuable, important and essential to the products, appears to have fallen in disfavor. For example, in *LaserDynamics*, concerning a disc discrimination method for computers, the Court stated that “LaserDynamics' use of the entire market value rule was impermissible” and it was not enough to merely show that the method was “viewed as valuable, important, or even essential to the use of a laptop computer,” or that “a laptop computer without an [optical disc drive] practicing method would be commercially unviable.” *Id.* at 25-6. Further, market studies and consumer studies may be required. *Id.*

(proof required that the presence of the method is what motivated consumers to buy a laptop computer); *compare i4i Ltd. Partnership v. Microsoft Corp.*, 598 F.3d 831, 856 (Fed. Cir. 2010)(expert use of survey approved).

As a second example, theories that rely on rules, principles, baselines or apportionments developed from experience, such as the Goldscheider rule, are also losing favor. In *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1291, 1315 (Fed. Cir. 2011), for example, this Court held “as a matter of Federal Circuit law that the 25 percent rule of thumb is a fundamentally flawed tool for determining a baseline royalty rate in a hypothetical negotiation,” and “[e]vidence relying on the 25 percent rule of thumb is thus inadmissible under *Daubert* and the Federal Rules of Evidence.” Similarly, in *LaserDynamics*, the Court stated that a “one-third apportionment ... appears to have been plucked out of thin air,” and “[t]his complete lack of economic analysis to quantitatively support the one-third apportionment echoes the kind of arbitrariness of the ‘25% Rule’ that we recently and emphatically rejected from damages experts” Slip op. at 27.

As a third example, presentations that do not delve into the depths and the details of markets may also not be permissible. For example, in *BIC Leisure Products v. Windsurfing Intern.*, 1 F.3d 1214 (Fed. Cir. 1993), a lost

profits award was reversed for lack of showing that the infringer's customers would have purchased from the patent owner, because the record demonstrated that product demand was elastic and the market's entry level in which the infringer competed was particularly price sensitive. *Id.*; see also *Crystal Semiconductor v. Tritech Microelectronics*, 246 F.3d 1336, 1357 (Fed. Cir. 2001)(“The Supreme Court opened the door for price erosion damages... [I]n a credible economic analysis, the patentee cannot show entitlement to a higher price divorced from the effect of that higher price on demand for the product. In other words, the patentee must also present evidence of the (presumably reduced) amount of product the patentee would have sold at the higher price. Thus, ... the patentee's price erosion theory must account for the nature, or definition, of the market, similarities between any benchmark market and the market in which price erosion is alleged, and the effect of the hypothetically increased price on the likely number of sales at that price in that market.”)

As a fourth example, the pool of past licenses available for reasonable royalty presentations has been shrinking. For example, in *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860 (Fed. Cir. 2010), this Court rejected a damages theory based on past licenses because the expert used licenses with no

relationship to the claimed invention to drive the royalty rate up to unjustified double-digit levels, and did not provide any link between the licenses and the first factor of the *Georgia-Pacific* analysis. The Court held that “[w]ithout that link, as this court explained in *Lucent*: ‘We ... cannot understand how the [fact finder] could have adequately evaluated the probative value of [the] agreements.’ [citation omitted].” *Id.* at 871.

II. Damages Presentation Expenses Are Already High and Rising

Damages expert fees in patent cases often already run to the high hundreds of thousands of dollars and beyond. IPLAC members have reported examples of damages experts charging two hundred fifty thousand dollars, three hundred thousand dollars, and eight hundred thousand dollars, among other amounts. Moreover, lawyer expenses to work with damages experts are additional charges. The expenses are trending higher as the law trends to more exactness, for example, by the challenges raised by such cases as *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Lawyers recognize that patent damages recoveries are *entirely* dependent on expert testimony in almost all cases and they risk having damages testimony barred if it fails *Daubert* challenges.

The expenses of damages presentations are exacerbated if liability issues change after damages have been tried and if they must be re-tried. *LaserDynamics* exemplifies such an exacerbation of expenses. There, two damages trials were held, then an appellate decision determined some of the accused products were protected by an implied license, and the case was remanded for yet a third damages trial.

III. The Law Remains, However, That Patent Owners Are To Be Compensated for Infringement, and For No Less Than A Reasonably Royalty

While decision-making is trending to higher standards in patent damages presentations, recall is appropriate, however, that 35 U.S.C. §284 remains unchanged. A patent owner is to be awarded damages adequate to compensate for infringement, and in no even less than a reasonable royalty. *Id.* Damages may be found by a jury, or if not, the court shall assess them. *Id.* The fact of infringement establishes the fact of damage. *Lindemaann Maschinenfabrik v. American Hoist*, 895 F.2d 1403, 1406 (Fed. Cir. 1990). The duty of the court is to find for the patent owner with reasonable approximation. *Horvath v. McCord Radiator & Manufacturing Co.*, 100 F.2d 326, 335 (6th Cir. 1938), cert. denied, 308 U.S. 581 (1939). An injured patent owner is not to be denied the right to recover because damages cannot

be certainly measured. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 564 (1931).

IV. *Daubert* Standards Cannot Be Raised As High as the District Court Raised Them In This Case Without Wreaking Havoc On The Patent System

The changes underway and as described in part in section I. above are complicating enough for patent owners and alleged infringers and their counsel. The extreme changes to *Daubert* standards advocated by the District Court decision here seriously impair, if not eliminate, justice for those with fewer resources, and even those with ample resources, hence, contradicting the rule that an injured patent owner is not to be denied the right to recover just because damages cannot be measured with certainty, as stated in *Story Parchment*.

Not surprisingly, high patent case costs turn some deserving potential litigants away from the enforcement of their rights. The standards of the District Court, if they were to become the law of the land, likely would turn many more deserving potential litigants, both patent owners and alleged infringers, away from their rights. It is not hyperbole to assert that raising the standards to the level of the propounded by the District Court could wreak havoc on the patent system.

The amicus is not privy to the confidential portions of the record of the case – which is most of the record – but given the *Daubert* portion of the opinion economic principles, rather than the rule of law, appear to govern the decision. If this is the case, the decision creates standards of proof that parties to a patent litigation cannot possibly meet. Under these untenable standards, litigants will be left without damages expert testimony resulting in the dismissal of *all* or nearly all patent cases.

Consider the comparison between (a) what Apple's damages expert did for his '263 patent testimony when in need of technical information and technical conclusions with (b) what is asserted by the opinion to have been necessary for his testimony to be admissible.² The '263 patent is revealed by

² Amicus understands Apple has not appealed as to its '002 patent. But the District Court discussed first and referred back, in discussing Napper and the '263 patent, to (a) what Motorola's damages expert Mr. Wagner did for his Apple '002 patent testimony when in need of technical information and technical conclusions with (b) what is asserted by the opinion to have been necessary for his testimony to be admissible. As a result, that part of the District Court opinion must also be considered.

Wagner based his opinion as to the reasonable royalty on the Apple '002 patent on the cost of an available noninfringing alternative. He asserted the cost was \$67,000 through an interview of his Motorola counterpart expert for technical matters Mr. Cooper. Slip op. at 5. Cooper wrote code to support the availability of the alternative. *Id.* This approach is consistent with *Grain Processing Corp. v. American maize-Products Co.*, 184 F.3d 1341 (Fed. Cir. 1999), to the extent of relying on an alternative that was not on the market.

the opinion to be directed to “unquestionably ... a valuable feature of a smartphone.” Slip op. at 16.

The opinion states that when in need of technical information and technical conclusions, Apple’s expert Mr. Napper turned to Apple’s technical expert, Mr. Polish. *Id.* The opinion posits that Napper should have acted as if he were hired by Motorola, not Apple, and as if he were hired only for the purpose of advising on “how at the lowest cost Motorola might obtain the functionality of the ’263 patent without infringing that patent.” Slip op. at 16.

What is asserted by the opinion to have been necessary for the testimony of Wagner to have been admissible is that he not speak with Cooper but instead “canvass software firms in search of the lowest price and report back to Motorola.” The reasoning is that in “outside the litigation context ... Wagner would not ask an engineer at Motorola; Motorola would ask an engineer at Motorola, because Motorola doesn’t have to hire an outside consultant who is not an engineer to ask an engineering question of a Motorola engineer.” Slip op. at 6.

This requirement for admissibility and the reasoning to support it is too much. First, the reasoning is unjustified. As with Apple and Napper, it is entirely likely that a corporation would hire a consultant to advise it if it were to be requested to negotiate a patent license, and proceed as described as to them.

Moreover, the same nonresponsiveness by software firms as discussed as to Apple and Napper is not hard to counter-imagine. Again, damages experts cannot reasonably be expected to recreate the real world of the bidding process by canvassing potential providers of noninfringing alternatives at the time of litigation.

The idea that Apple’s damage expert Napper should have acted as if he were hired for Motorola to advise it toward the lowest cost alternative to infringement is untenable. There are certainly Federal Circuit cases that state that the existence and costs of non-infringing alternatives place limits on damages recoveries in specific cases. An example is the district court decision underlying the appeal in *Grain Processing Corp. v. American maize-Products Co.*, 184 F.3d 1341 (Fed. Cir. 1999), where the district court determined that the cost difference between an infringing product and a non-infringing product effectively capped the reasonable royalty award. *Id.* at 1347. No court or Congress has ever posited a universal rule that when seeking reasonable royalty damages, a patent owner *is entitled to a royalty based only on the lowest cost alternative to infringement*. Nor should the courts or the Congress require such a rule, as whether the lowest cost alternative represents the reasonable royalty is a matter of fact in a specific case. Courts *cannot* require this, as the Congress has provided that patent owners may seek and recover no less than reasonable royalties, not amounts *no more than* the “lowest cost alternative” royalties.

The district court’s opinion required the expert to canvass software firms, because outside the litigation context and in the real world, the expert

would not have asked his associated corporation's engineer for such information. This requirement for admissibility of damages testimony and the reasoning to support it are too much, unjustified, and illogical. It is entirely likely that a corporation with a patent would hire a consultant to advise it as it was requested to negotiate a patent license. The more sophisticated the corporation, the more likely the hiring of one or more experts. It is entirely likely the corporation would not consult its own engineers in the matter until the consultant(s) assessed the patent, advised that consulting company engineers was desirable, and conducted the consulting. It is entirely likely the consultant(s) would ask the engineers an engineering question - what would a noninfringing alternative design cost. And it is entirely likely the consultant would rely on the resulting answer.

There is no reason for a rule in patent damages cases that a party's damages expert cannot rely on the party's technical expert. Raising the requirements of patent damages presentations to include a requirement that damages experts must canvass potential providers of noninfringing alternatives – and not rely on the party's technical expert – is raising them too much.

Second, as to admissibility, Apple and Napper did not lack for admissible proof of a noninfringing alternative, in this case for \$29 to \$31 million, by lacking for different proof of a smaller or larger dollar number for an alternative resulting from canvassing software firms. The opinion is apparently only imagining that if Napper had made the effort of canvassing, the effort could have driven the number lower. It is an equally adequate imagining to think that the dollar number for alternatives other than adding a chip, slip op. at 16, for “unquestionably a valuable feature” would be higher due to lack of information outside Apple to work out how to construct an alternative for less.

Because requests for information on what software firms would charge – *i.e.*, requests for bids – would be made in the midst of litigation and would not lead to the award of a contract, Apple would need to inform the bidding firms that their bids could lead them into entanglement in the litigation, would not be leading to a contract and would be essentially gifts to Apple. The alternative is that Apple would defraud and/or offend the bidders. The information of no-contract-to-come would cause any reasonable firm to be completely non-responsive, respond by declining to respond, or be only as responsive as possible based on minimal efforts, half-

hearted efforts, and/or unsupported guesses – efforts that would not support reliable expert testimony. The only alternative would have been that Apple pay for hypothetical bids, itself hardly likely to lead to reliable estimates, and certainly a non-real-world alternative, as companies do not pay bidders for their bids in the real world.

It is this need to defraud and/or offend bidders that makes raising the requirements of patent damages presentations to this level too much. Damages experts cannot reasonably be expected to recreate the real world of the bidding process by canvassing potential providers of noninfringing alternatives at the time of litigation.

It is compelling that the lack of Apple and Napper canvassing benefited – not worked against – Motorola, as it prevented Apple and Napper from claiming, for “unquestionably [the] valuable feature” of uninterrupted, undistorted streaming of video and audio, that no noninfringing alternative was available at all, or only available for a multiple of \$31 million, such as \$62 million, \$93 million or even higher. Apple and Napper should have been perfectly free to hem themselves in against testimony that could have been more favorable to them and detrimental to Motorola.

It is perfectly reasonable to require an expert to “reject[] alternative hypotheses” where the expert is testifying to causation – *e.g.*, whether exposure to oil caused oyster bed destruction, or whether exposure to chemicals caused personal injuries. That is the nature of the cases cited by the District Court as to Napper’s testimony as to the ’949 patent, not specifically Wagner and the ’002 patent or Napper and the ’263 patent. Slip op. at 11, *see Clausen v. M/v New Carissa*, 339 F.3d 1049, 1057 (9th Cir. 2003) and *Claar v. Burlington Northern R. Co.*, 29 F.3d 499 (9th Cir. 1994). The same rule of requiring experts to reject alternative hypotheses, however, apparently underlies the decisions as to Wagner and the ’002 patent, and Napper and the ’263 patent. But the rule does not apply in the patent damages context. There is no “whole sub-body of *Daubert* law ... developed with respect to ... differential diagnosis” that is applicable in the patent damages area. *Clausen* at 1057. Causation in patent cases is proven by infringement, not differential diagnosis. As above, the fact of infringement establishes the fact of damage. *Lindemaann Maschinenfabrik*, 895 F.2d at 1406. Every effort of patent damages experts is to size an injury known to have been caused by infringer’s conduct, not prove it was caused by that conduct. “Differential diagnosis” is inapplicable.

The standards of the patent law as to patent damages presentations are high enough. Litigants in this case and outside this case should not be required to meet the standards of this case.

V. Economic Analysis is Present in the Decisionmaking of the District Court, and Is Inappropriate As Applied

Judge Posner, sitting by designation, takes an economic approach to decision-making in many areas of law including the patent area. Judge Posner uses an economic approach in this case. It is present in the Court's requirements that the patent owner must ground its damages case on (a) the lowest cost alternative (b) to be determined after a canvassing of suppliers of possible alternatives in the midst of litigation.³ It is present, moreover, in the statements that apply differential diagnosis to patent damages cases. It is further present in statements that experts should consider the cost of *noninfringement* as an available alternative to an infringer, such as "drop[ping] the tap" as to Napper and the '949 patent, slip op. at 13-14.⁴ The requirement (a) and (b) above can only arise from underlying views that "patents are a social waste," and there are too many of them.⁵ The single-

³ The same is true as to Motorola and Wagner.

⁴ And whether to "bother with [infringement]" as to Napper and the '002 patent, slip op at 8.

⁵ R. Posner, "Why There Are Too Many Patents In America," *The Atlantic*.

minded focus on the lowest cost alternative is a focus on social cost. The other requirements identified above can be supported only from the same views – they are expressions of a focus on the costs of patents to consumers, not expressions of the rule of law.

VI. Conclusion and Statement of Relief Sought

In conclusion, the Court should recognize that damages law in patent cases is trending toward ever more exactness in damages presentations. It should be aware that damages presentation expenses are already high and rising. It should see that *Daubert* damages decisions cannot require of litigants what the District Court here required of Apple and Napper as to the '263 patent without risking collapse of the patent system.

Respectfully submitted,

December 4, 2012

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 4,059 words, excluding parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 with 14 point Times New Roman type style.

Dated: December 4, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2012, I electronically filed the foregoing **BRIEF OF AMICUS CURIAE THE INTELLECTUAL PROPERTY LAW ASSOCIATION OF CHICAGO AS AMICUS CURIAE SUPPORTING NEITHER PARTY** with the Clerk of Court using the CM/ECF System, which will serve notice of such filing to any of the following counsel registered as CM/ECF users:

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