# After the verdict, the reckoning

**There has never been a more high-profile patent case than that between Apple and Samsung in the Northern District of California. And the August verdict could be a game changer for more than the two companies that faced off across the courtroom floor**

The news that a verdict had been reached in *Apple v Samsung* caught everyone by surprise. Just three days after they had been sent away by Judge Lucy Koh to discuss three weeks' worth of detailed oral testimony and to review thousands of pages of written evidence, and following less than 24 hours of deliberation, the nine members of the jury announced that they had come to a decision. Lawyers rushed from hotel rooms and offices to be in the San Jose courthouse to hear what had been decided; more journalists than had ever attended a patent trial dropped coffee cups and sandwiches to make sure they were there too; across the world the Twitterati held its breath.

**Devastating victory**

When the verdict was read out, it soon became clear that this was no split decision. Instead, Apple had won a devastating victory on almost every count. Not only did the jury reject Samsung's claims that Apple's patents were invalid and that five of its own patents had been infringed, but it also found that five out of the seven Apple patents in suit had been wilfully infringed by the Korean company. The '381 patent, covering bounce-back technology, was found to have been infringed by 21 Samsung products named by Apple; while 18 of the 21 were found to have infringed the '915 patent, covering the use of a single finger to scroll through a page, as well as using two fingers to zoom in and out. Samsung was also found to have infringed Apple design patents, as well as trade dress. On a bleak morning for Samsung there were just two rays of light: the Galaxy Tab was found not to have infringed upon Apple's iPad design patents; while the jury rejected Apple's call for US$2.5 billion in damages, awarding 'just' US$1,049,343,540 instead.

Speaking subsequently to the BBC, jury foreman Velvin Hogan was clear about the thinking behind the decision: "The jurors wanted to send a message to the industry at large that no matter who you are - whether you are Apple, whether you are Samsung, or anybody - if you wilfully take the risk to cross the line and start infringing and you get caught, and again I emphasise wilfully, you need to be prepared to pay the cost for that."

Now that the jury has had its say, the focus switches to Judge Koh. She has three big calls to make. The first is whether to uphold the decision; she has the power to strike some or all of it down if she is persuaded that the jury got it wrong. The second will come should she determine that the result will stand; then she has to rule on the level of damages – should they be reduced, stay the same or be increased to reflect wilful infringement by Samsung? Finally, there is the question of injunctions; Apple has identified a number of Samsung mobile phone models whose import into, and distribution and sale within, the United States it would like to be injuncted; the decision is expected in December, just in time for Christmas.

**It's the injunction, stupid**

But while the damages award has attracted the most mainstream attention, it is the injunction that is of the greatest interest to both Apple and Samsung. As Apple has fought the "thermonuclear war" that the late Steve Jobs launched against Android, what is really at stake is the company's ability to exclude competition which it believes is infringing on its patent rights. A billion dollars here or there is nothing to it or to Samsung. What really matters is being able to put products in front of consumers, what those products can do, how they can do it and how much they cost.

Following its triumph in San Jose, Apple holds the whip hand on that front. Assuming that the verdict stands and the company is granted the injunctions it wants (and that the Federal Circuit upholds the verdict, which is by no means certain given that it is not unknown for it to reverse first instance decisions), the question for current CEO Tim Cook and the company's other leaders is how they play their win. Do they use it to extract a prime licensing fee from Samsung; or do they seek to shut the competition out and wait for it to spend money developing potentially sub-optimal workarounds?

The former option is the one Microsoft would take and would mean Apple having a significant stake in every unit of the currently infringing products that Samsung sells. This would not only swell Apple's coffers, but also force Samsung to up its prices and/or lower its margins; the downside for Apple is that licensing would mean greater competition and, potentially, a smaller share of the market. On the other hand, while enforcing the injunction would no doubt have an impact on both the price and the attractiveness of Samsung's offerings, it would also lead to accusations that Apple is seeking to stifle competition, with all the negative brand connotations that could have. What's more, the non-infringing products that Samsung will inevitably produce at some stage may prove to be more popular than the iPhone and the iPad, so cutting Apple's market share, without royalties to soften the blow.

With victory comes responsibility and Apple has some big calls to make. From afar, licensing, not exclusion, may look like the company's best option for all kinds of reasons, but a thermonuclear strategy may preclude such an option.

**Android anxiety**

But Apple and Samsung are not the only companies affected by their dispute. The August decision was a major shot across the bows of the entire Android ecosystem. If Samsung, with all the US patents that it owns, can be left so utterly defeated, what chance is there for other Android producers and what can they and Google do about it?

Last year, in an interview with the *San Francisco Chronicle*, Google's patent counsel Tim Porter blamed the company's lack of patent power on its relative youth. That seemed like

*continued on page 8*

*Apple v Samsung, continued from page 6*

a poor excuse at the time and now David Lawee, vice president of corporate development, has admitted as much. In an in interview with Bloomberg TV, Lawee stated that Google had got its strategy wrong. "We actually didn't invest in the patent ecosystem," he said. "We weren't patenting things as aggressively as we should have been. We didn't really believe 'rounded corners' were patentable. We just didn't buy into that notion of protecting your IP, and it [the smartphone war] was a wake-up call." Of course, Google now owns the sizeable Motorola Mobility patent portfolio and more than 2,000 other patents it has purchased from IBM, as well as others acquired from a range of other companies; it is also investing much more heavily in creating patents in-house, with the amount of applications it is submitting to the USPTO significantly up on the numbers from a few years ago. In the past, Google has vowed to protect its Android partners from patent attack; in the wake of Apple's victory, those partners will want to see evidence that this is happening.

Coincidentally or not, a few days after the San Jose verdict, stories emerged that Tim Cook and Google CEO Larry Page had held talks about a possible resolution of some of the issues driving the smartphone patent wars. According to a Reuters report, a truce "involving disputes over basic features and functions in Google's Android mobile software" has been discussed. Some kind of peace accord would certainly be welcomed by the Android community, but for that to happen it may mean Google having to bite the bullet on doing a few high-profile and uncomfortable licensing deals. Whether the company is ready for that yet is very much open to doubt.

**An antitrust dilemma**

Away from the corporate world, the result of *Apple v Samsung* may also pose some interesting questions for competition and antitrust authorities. On both sides of the Atlantic this year, senior officials have expressed concern at the way in which companies do and/or could assert FRAND-related rights to curtail their competitors. Indeed, in the European Union both Samsung and Motorola Mobility are under investigation by the Competition Directorate General over their use of FRAND patents, following complaints from Microsoft and Apple.

What happens, though, if the assertion of standards-essential patents is the only way in which companies can defend themselves from patent attacks by their rivals? It could well be, for instance, that both Samsung and Motorola (read Google) would argue that the reason they might feel it necessary to assert FRAND rights in court is because they are coming under constant Android-related attacks from the likes of Apple and Microsoft. And on the face of it, such an argument could be persuasive: after all, it's not as if any of the Android businesses was a well-known, aggressive patent enforcer before the smartphone wars began.

If this is the case, the authorities could then find themselves on the horns of a dilemma: the reason they might want to halt what they see as the abuse of standards-essential patents in litigation is to allow industries to develop freely, so giving consumers greater product choice at the best possible price. But in cracking down on companies going to court with their FRAND rights, or in limiting their ability to gain injunctive relief, they may end up ensuring that the opposite actually happens; so that just a few companies with well-thought-through, well-executed IP strategies dominate the market and can set pricing levels and the terms of how the market works through licensing and exclusion.

Should consumers have to pay the price because a few years back Google and other companies got their IP strategies wrong and are now scrambling to make up the lost ground by resorting to FRAND-related litigation? Now there's an issue that could give regulators at the European Commission, the Department of Justice and elsewhere a few sleepless nights.

All that said, it is important to remember one very salient point: *Apple v Samsung* is by no means over. To use a sporting analogy, half time is approaching, but has not yet arrived. Once Judge Koh has had her say, the players can return to the dressing rooms to contemplate the second half, but unless the two sides sit down and reach an agreement, the final score will only be known once the Federal Circuit has delivered its decision. Even then, there is a chance that the Supreme Court may take things into extra time. As of now, Apple stands victorious. It is by no means certain that this will be the case in a couple of years' time when everything is finally done and dusted. ■

**What they said …**

After the jury decision in *Apple v Samsung*, reaction was swift:

*We are grateful to the jury for their service and for investing the time to listen to our story and we were thrilled to be able to finally tell it. The mountain of evidence presented during the trial showed that Samsung's copying went far deeper than even we knew. The lawsuits between Apple and Samsung were about much more than patents or money. They were about values. At Apple, we value originality and innovation and pour our lives into making the best products on earth. We make these products to delight our customers, not for our competitors to flagrantly copy. We applaud the court for finding Samsung's behaviour wilful and for sending a loud and clear message that stealing isn't right.*
**Apple spokeswoman Katie Cotton**

*Today's verdict should not be viewed as a win for Apple, but as a loss for the American consumer. It will lead to fewer choices, less innovation, and potentially higher prices. It is unfortunate that patent law can be manipulated to give one company a monopoly over rectangles with rounded corners, or technology that is being improved every day by Samsung and other companies. Consumers have the right to choices, and they know what they are buying when they purchase Samsung products. This is not the final word in this case or in battles being waged in courts and tribunals around the world, some of which have already rejected many of Apple's claims. Samsung will continue to innovate and offer choices for the consumer.*
**Samsung statement**

*The court of appeals will review both infringement and the validity of the patent claims. Most of these don't relate to the core Android operating system, and several are being re-examined by the US Patent Office. The mobile industry is moving fast and all players — including newcomers — are building upon ideas that have been around for decades. We work with our partners to give consumers innovative and affordable products, and we don't want anything to limit that.*
**Google statement**