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Posner's approach in *Apple* causes some concern in patent world

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Earlier this summer, Judge Richard A. Posner, sitting as a U.S. District Court judge, dismissed *Apple, Inc. v. Motorola, Inc.*, one of the leading cases in the global legal arena where the world's smartphone manufacturers are bludgeoning each other with assertions of patent infringement. The business press lauded him. But his decision is wrong in a number of ways and would do serious harm to the patent system if followed.

Posner periodically sits as a district court judge in cases on subjects that interest him. Intellectual property is one where he has both an interest and strong opinions, some of which he subsequently expressed in a piece in the The Atlantic titled "Why There Are Too Many Patents in America." And, in this case, it appears that Posner let his opinions guide his decision to a detrimental effect.

Start with the legal errors. Concerning available remedies, Posner took issue with the approach for calculating reasonable-royalty patent damages that has been the legal standard for about 40 years — the *Georgia-Pacific* test.

And he challenged the availability of injunctions in certain patent cases without legal justification. Based on a recent Federal Trade Commission (FTC) policy statement, he argued against injunctions for patents essential to industry standards. But the FTC is often at odds with other government departments in this area and, more importantly, the agency's policies lack the force of law.

Separately, he suggested that injunctions should generally be difficult to attain in patent cases between competing companies, even though other courts issue them about 85 percent of the time in such matters.

With respect to legal process, Posner conducted a *Daubert* inquiry of both sides' experts more like a trial cross-examination, picking apart individual aspects of their opinions that he disagreed with, rather than focusing on the acceptability of their methodologies. And a big part of his criticism was based on his own ideas about how people and companies in the smartphone industry act, despite having no factual basis or experience in the field. For example, he excluded one expert's opinions because that expert relied on the statements by the company's own engineers about noninfringing alternatives to the infringing patented features, rather than speaking with independent engineers unaffiliated with the company.

But consultants often rely on information from company personnel despite possible bias. One reason for doing so is that personnel at these operating companies often have a better sense of how competitors' products operate, and what is feasible in those products, than independent consultants with less immediate knowledge about the industry.

Similarly, Posner criticized an expert with technical expertise for discussing the cost of what the expert had concluded would be a noninfringing microchip. Someone with procurement expertise, Posner maintained, would have more knowledge.

But in that industry, the technical compatibility is what is critical; people with chip expertise generally also know chip prices, which is a simple and easily determined fact.

Expert opinions are more important and central in patent cases than in other complex litigation. And if excluding experts for reasons like these was acceptable, no one would enforce patent rights, because even top experts (as at least some of those in this case were) could face exclusion, eviscerating the case for unanticipated reasons.

Finally, Posner's opinion set an extremely high and impracticable bar on thoroughness and precision in calculating damages that would make almost any patent case too expensive and uncertain to pursue.

He demanded at least three consumer surveys to determine the value of smartphone features alleged to infringe. But the types of surveys he wanted would cost somewhere between $100,000 to $250,000 each and it is not clear that they even could answer his question: If you were asked the monetary value of a particular feature on your iPhone, would you be able to come up with a number?

On another point, Apple used HTC's experience in designing around one of the same patents in a prior case as a proxy for what Motorola would have to undertake if found to infringe.

But Posner considered that evidence insufficient, requiring an analysis of "HTC the company," "HTC's cellphones," "the engineering resources that HTC devoted to modifying its phones" and the possibility of different design-around requirements for Motorola.

> ***"Richard A. Posner concluded that Motorola should have evaluated the possibility and cost of Apple breaking its national contract with Verizon ... in order to avoid infringement."***

There is a strong likelihood that this evidence from a foreign nonparty would be unavailable, setting aside the expense of trying to obtain it. And this major analytical undertaking would merely be directed at eliminating potential imprecision in what likely was a pretty good estimate.

Perhaps most remarkably, Posner concluded that Motorola should have evaluated the possibility and cost of Apple breaking its national contract with Verizon (at one point, the only service provider Apple was using to sell phones) in order to avoid infringement of a Motorola patent. The speculativeness and complexity of such an analysis and the number of experts needed (at least legal, antitrust, telecommunications-market and technical) is as hard to imagine as anticipating that a judge would require evaluation of such a remote hypothetical scenario.

In short, Posner used the inherent and legally acceptable uncertainty in calculating damages, which is particularly challenging in one of the world's largest and most dynamic industries, to dismiss the damages claim. Applying this level of scrutiny in future cases, particularly those with smaller damages at stake, would make pursuing such a case pointless.

There has been much criticism about perceived excessive patent enforcement and widespread adoption of Posner's approach would reduce patent cases dramatically.

In a country whose economy increasingly depends on intellectual property, and in a world where other countries are strengthening their patent systems, there is at least room for debate about whether that is wise policy.

But our courts are instead tasked with implementing the law as it exists, and the U.S. Court of Appeals for the Federal Circuit, not the 7th Circuit, will have a final say on whether Posner did so in this case.