

How Media Got the Biggest Bite of (The) Apple: A Look at the Media Misperception in the Apple-Samsung Case

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COMMENTS

HOW MEDIA GOT THE BIGGEST BITE OF (THE) APPLE: A LOOK AT THE MEDIA MISPERCEPTION IN THE APPLE-SAMSUNG CASE

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In her spare time, Neha enjoys dancing, reading, and traveling.

I. INTRODUCTION

“*Apple v. Samsung*: [t]he [p]atent [t]rial of the [c]entury.”¹ If the preceding sentence generated thoughts about your phone, it is because there is a 50% chance that the phone you own is made by one of these parties. Together, Apple and Samsung sell over half of the world’s smartphones. Thus, the *Apple v. Samsung* (“Apple-Samsung”) trial was followed, at least on a superficial level, by most Americans. For most of us, the Apple-Samsung trial paints a picture of a courtroom where attorneys on both sides are arguing over rectangles, and gestures such as pinch-to-zoom. This is because such a narrative was created by the numerous technical and mainstream media outlets that extensively covered the trial. While all of these outlets covered the trial proceedings, only a handful accurately communicated the details of the patents at issue.

This Comment focuses on the implications that media misperception in the Apple-Samsung case can have on patent law. Section II of this Comment provides a background of the issues in the Apple-Samsung litigation. Section III analyzes the Apple patents that are at issue in the Apple-Samsung litigation, and discusses the prior art references considered by the United States Patent and Trademark Office (“USPTO”). Section IV discusses media’s interpretation of the patents, and where these misperceptions come from. Finally, Section V describes how media’s misperception has affected various areas of law, and the implications it can have on patent law.

II. BACKGROUND OF THE CASE

On April 15, 2011, Apple sued Samsung in the United States District Court for the Northern District of California.² Apple claimed that Samsung infringed its design patents and utility patents in twenty of Samsung’s devices.³ In return, Samsung filed a countersuit claiming that Apple infringed ten of its patents.⁴ After over a year of proceedings involving several motions, depositions, and

1. Ashby Jones & Jessica E. Vascellaro, *Apple v. Samsung: The Patent Trial of the Century*, WALL ST. J., July 24, 2012, available at <http://online.wsj.com/article/SB10000872396390443295404577543221814648592.html>.

2. Complaint, *Apple, Inc. v. Samsung Electronics Co.*, 2011 WL 1523876 (N.D. Cal. Apr. 15, 2011) (No. 11-1846).

3. Amended Complaint at 50–60, *Apple, Inc. v. Samsung Electronics Co.*, 2011 WL 2582932 (N.D. Cal. June 16, 2011) (No. 11-1846).

4. Complaint at 9–15, *Samsung Electronics, Co., Ltd. v. Apple Inc.*, 2011 WL 1607199 (N.D. Cal. Apr. 27, 2011) (No. 11-2079).

injunctions,⁵ the case finally reached a jury trial stage in late July 2012.⁶ After three weeks of trial proceedings, the jury found that Samsung had infringed on six of the seven patents⁷ and granted a \$1.05 billion verdict in favor of Apple.⁸ However, the presiding judge recently reduced the awarded damages down to \$4.5 million, finding that the jury award was based on “Samsung’s profits, which is an impermissible type of compensation for utility patent infringement.”⁹

Apart from the jury trial in the United States, Apple and Samsung commenced patent litigation elsewhere in the world.¹⁰ While Apple won the battle in the United States, Samsung won the battle in Japan,¹¹ Australia,¹² the United Kingdom (“UK”),¹³ and the Netherlands¹⁴ where the respective courts found that Samsung did not infringe on Apple’s patents. On the other hand, a South Korean court found that both Apple and Samsung infringed on each other’s patents and banned the infringing products from shops in the country.¹⁵

5. For a complete timeline of the events involving the Apple v. Samsung case, see Joseph Parish, *Apple vs. Samsung: The Complete Lawsuit Timeline*, THE VERGE (Nov. 2, 2011, 5:34 PM), <http://www.theverge.com/apple/2011/11/2/2533472/apple-vs-samsung>; see also Charlie Osborne, *Apple v. Samsung Timeline: The Guide to What’s Happening*, ZDNET (Aug. 14, 2012, 1:11 PM), <http://www.zdnet.com/apple-v-samsung-timeline-the-guide-to-whats-happening-7000002625/>.

6. Andrea Chang, *Jury Selection Begins in Apple vs. Samsung Trial*, L.A. TIMES, July 30, 2012, available at <http://articles.latimes.com/2012/jul/30/business/la-fi-tn-apple-samsung-jury-20120730>.

7. Verdict Form, *Apple, Inc. v. Samsung Electronics Co.*, (N.D. Cal. Aug. 24, 2012) (No. 11-1846), available at <http://cyber.law.harvard.edu/people/ffisher/IP/Apple%20Samsung%20Jury%20Verdict.pdf>.

8. Verdict & Settlement Summary, *Apple, Inc. v. Samsung Electronics Co.*, 37 Trials Digest 15, available at 2012 WL 4078433.

9. *Apple, Inc. v. Samsung Electronics Co.*, 2013 WL 772525, (N. D. Cal. Mar. 1, 2013) (No. 11-1846) (denying Apple’s motion of an increase in the awarded damages, and ordering a new trial for certain devices, including Galaxy SII AT&T and the Galaxy Tab).

10. The two technology giants fought litigation battles in ten countries: Australia, United Kingdom, United States, South Korea, Japan, France, Italy, Netherlands, Germany, and Spain.

11. Hiroko Tabuchi and Nick Wingfield, *Tokyo Court Hands Win to Apple Over Samsung*, N.Y. TIMES, Aug. 31, 2012, available at <http://www.nytimes.com/2012/09/01/technology/in-japan-a-setback-for-apples-patent-fight.html>.

12. Ross Kelley, *Samsung Gets a Win in Apple War*, THE WALL ST. J., Dec. 1, 2011, available at <http://online.wsj.com/article/SB10001424052970204262304577069012404125718.html>.

13. *Samsung Galaxy Tab “Not As Cool” as Apple’s iPad, Judge Rules*, THE HUFFINGTON POST (July 9, 2012), http://www.huffingtonpost.com/2012/07/09/samsung-galaxy-tab-not-as-cool-as-apple-ipad_n_1658892.html; see also *Samsung Electronics (UK) Ltd. v. Apple, Inc.*, at 190, [2012] EWHC 1882 (Pat), <http://www.bailii.org/ew/cases/EWHC/Patents/2012/1882.pdf> (holding that Samsung does “not have the same understated and extreme simplicity which is possessed by the Apple design. They are not as cool”).

14. Zack Whittaker, *iPad Hasn’t Cornered Market on Round Corners, Says Dutch court*, CNET (Jan. 16, 2012, 9:39 AM), http://news.cnet.com/8301-13579_3-57564310-37/ipad-hasnt-cornered-market-on-round-corners-says-dutch-court/.

15. Evan Ramstead & Min Sun Lee, *South Korea Court Says Samsung, Apple Infringed Each*

III. ANALYSES OF THE PATENTS AT ISSUE

Patents are defined by the USPTO as “[a] grant of property right that [it] issue[s] to the inventor.”¹⁶ Of the three types of patents – utility patents, design patents, and plant patents – that are issued by the USPTO, only design patents and utility patents were the subject of litigation in the Apple-Samsung case. A utility patent protects the way an invention functions,¹⁷ whereas a design patent protects the way an invention looks.¹⁸ A design patent is limited to protecting the “new, original[,] and ornamental design for an article of manufacture,”¹⁹ and cannot encompass features that are primarily functional.²⁰ Because a design patent is issued based on appearance, the application includes a single claim,²¹ followed by a series of illustrations that convey the design of the article to the examiner.²² Conversely, a utility patent usually has multiple claims where each claim discloses the invention, which the applicant seeks to be protected.²³ Because the nature of a utility patent is visually less interesting compared to design patents, the exact function claimed in a utility patent is harder to comprehend.

A. Design Patents

The design patents at issue in the Apple-Samsung case include Patent Nos. US D618,677 S (‘677) and US D593,087 S (‘087) covering the iPhone design;²⁴

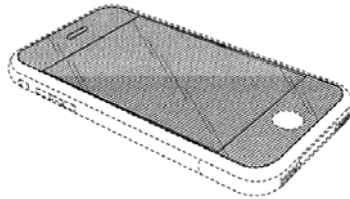


FIG. 1

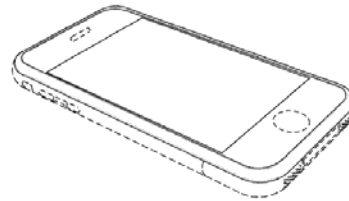


FIG. 9

Others' Patents, WALL ST. J., Aug. 24, 2012, available at <http://online.wsj.com/article/SB10000872396390444812704577608242792921450.html>.

16. *General Information Concerning Patents*, USPTO, http://www.uspto.gov/patents/resources/general_info_concerning_patents.jsp#heading-2 (last visited Nov. 22, 2013).

17. 35 U.S.C. § 101 (2006).

18. 35 U.S.C. § 171 (2006).

19. *Id.*

20. *Lee v. Dayton-Hudson Corp.*, 838 F.2d 1186 (Fed. Cir. 1988).

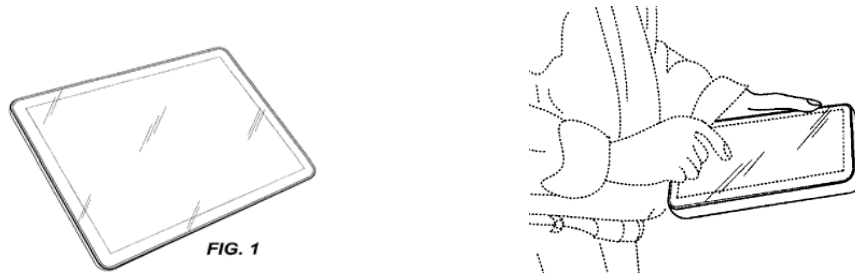
21. MPEP § 1502.01 (C) (8th ed., Aug. 2011).

22. *In re Daniels*, 144 F.3d 1452, 1456 (Fed. Cir. 1998).

23. MPEP § 1502.01(C) (8th ed., Aug. 2011).

24. U.S. Patent No. D618,677 S fig.1 (filed Nov. 18, 2008); U.S. Patent No. D593,087 S (filed Jul. 30, 2007).

Patent No. US D504,889 ('889) covering the iPad design,²⁵



and US D604,305 ('305) covering the graphical user interface for the iPhone.²⁶ In the above illustrations, only the design in solid line is claimed. The dashed lines, seen around the edges of the iPhone figures, are what the inventor is disclaiming from the patent. This means that the overall design of the iPhone is claimed, and not just the rounded rectangles separately. However, in the iPad patent, the inventor is not only claiming the overall design of the tablet but also the shape of the iPad, the rounded rectangle itself.

B. Utility Patents

1. Apple's Patents at Issue in the Apple-Samsung Trial

Amongst the disputed utility patents, Patent No. US 7844915 ('915) on the "application programming interfaces for scrolling operations"²⁷ has been at the forefront in the ongoing litigation.²⁸ This software patent distinguishes one finger touch applied to the display screen from multiple touch points.²⁹ Moreover, the only claim at issue was claim 8 of the patent.³⁰ This claim protects any storage device such as "a phone" that performs the following method:³¹

25. U.S. Patent No. D504,889 S fig.1,9 (filed Mar. 17, 2004).

26. U.S. Patent No. D604,305 (filed Jun. 23, 2007).

27. U.S. Patent No. 7,844,915 col.1 l. 7 (filed Jan 7, 2007).

28. According to Apple, this was the most valuable software patent at issue. Kevin Bostic, *Samsung Gets a Boost with USPTO's 'Final' Rejection of Apple's Pinch-to-Zoom Patent*, APPLE INSIDER, July 29, 2013, available at <http://appleinsider.com/articles/13/07/29/samsung-gets-a-boost-with-usptos-final-rejection-of-apples-pinch-to-zoom-patent>.

29. *Id.*

30. Final Jury Instructions No. 18 at 5, *Apple, Inc. v. Samsung Electronics Co.*, 2012 WL 3568795 (N.D. Cal. Aug. 21, 2012) (No. 11-1846).

31. '915 Patent.

the user touches the screen;³²
 the program is started by creating an event object in response to the input;³³
 the program determines whether it is a scroll or a gesture by determining if the user has placed one finger on the touch screen, or two or more fingers;³⁴
 based on the number of fingers, the program issues instructions for either a scroll or a gesture;³⁵
 if the phone detects one finger, the user is taken to the desired view by scrolling through the window;³⁶
 if the phone detects two or more fingers, the program “scales the view,” which has the same effects as zooming.³⁷

While the ‘915 Patent does not protect the “pinch-to-zoom” feature of an iPhone, Apple does have a limited software patent for the “pinch” feature.³⁸ Patent No. US 7812826 (‘826) on “[p]ortable [e]lectronic [d]evice with [m]ulti-[t]ouch [i]nput” covers the following method:³⁹

a multi-touch display screen detects at least two contacts resembling a multi-touch gesture;⁴⁰
 the gesture adjusts the image in accordance with the motion of the contacts;⁴¹
 the first set of contacts is broken, and the device detects a second set of at least two contacts;⁴²
 these contacts perform another gesture *within a pre-determined time interval after the breaking of the first set of contacts* (emphasis added) to adjust the image in accordance with the motion of the second set of contacts.⁴³

32. *Id.* at col.24, l. 1.

33. *Id.* at col.24, l. 4.

34. *Id.* at col.24, l. 5–10.

35. *Id.* at col.24, l. 11.

36. *Id.* at col.24, l. 13.

37. *Id.* at col.24, l. 16–20.

38. U.S. Patent No. 7,812,826, col. 1 l. 7–8 (filed Dec. 29, 2006).

39. ‘826 Patent.

40. *Id.* at col.14, l. 6–10.

41. *Id.* at col.14, l. 11–13.

42. *Id.* at col.14, l. 14–16.

43. *Id.* at col.14, l. 17–22.

The patent specifically claims the magnification,⁴⁴ orientation,⁴⁵ rotation,⁴⁶ and *de-pinching* (emphasis added).⁴⁷ The reason that this patent is limited is because Apple does not have a patent on the gesture of “pinch-to-zoom” but instead has a patent on “pinching to zoom, and then pinching to zoom again within some fixed period of time.”⁴⁸ The patent does not define what that fixed period of time is. This patent does give Apple limited ownership over the “pinch-to-zoom” gesture; however, it was not in dispute at the trial because Apple did not assert it.

There were two other utility patents in dispute at the Apple-Samsung trial. Claim 50 of the US Patent No. 7864163 (‘163) covered “tap-to-zoom” feature.⁴⁹ Under ‘163, the user taps once to zoom in and taps twice to zoom out.⁵⁰ While this claim does cover a method of zooming, it does not cover the “pinching” gesture. The other patent in dispute was claim 19 of US Patent No. 7469381 (‘381) covering inertial scrolling and the “bounce-back” effect.⁵¹ The “pinch” gesture is not covered in any of the 20 claims of ‘381. Claim 8 of ‘915 patent, which was misinterpreted as covering the “pinch”, covers the programming interface for gestures that include “pinch-to-zoom,” “tap-to-zoom,” and inertial scrolling; it does not, however, cover the pinch-to-zoom gesture itself.⁵²

2. Preliminary Invalidity of the Patents Based on Prior Art References⁵³

Post-trial, the ‘915 patent was preliminarily invalidated by the USPTO through an *ex parte* reexamination.⁵⁴ Claim 8 of the patent, which was at issue,

44. *Id.* at col.14, l. 25–27.

45. *Id.* at col.14, l. 28–29.

46. *Id.* at col.14, l. 30–31.

47. *Id.* at col.14, l. 32–33.

48. Nilay Patel, *Apple Awarded Limited Patent on Pinch-to-Zoom*, ENGADGET (Oct. 13, 2010, 3:25 PM), <http://www.engadget.com/2010/10/13/apple-awarded-limited-patent-on-pinch-to-zoom/> (last visited Nov. 22, 2013).

49. U.S. Patent No. 7,864,163 col. 29, l. 14–40 (filed Sep. 4, 2007).

50. *Id.*

51. U.S. Patent No. 7,469,381 col.36, l. 59- col.37, l. 22 (filed Dec. 14, 2007); *see also* David Ruddock, *Apple’s Rubber-Banding Patent is Invalid – Here’s What it Actually Means*, ANDROID POLICE, <http://www.androidpolice.com/2012/10/23/apples-rubber-banding-patent-is-invalid-heres-what-that-actually-means-and-why-it-was-invalidated/#the-381-patent-what-is-was-it> (last visited Nov. 22, 2013).

52. ‘915 Patent.

53. Prior Art References are inventions that were patented, described in a particular publication, or in public use, on sale, or otherwise available to public before the effective date of the claimed invention. *See* 35 U.S.C. § 102 (2006).

54. *Ex parte* reexamination is when a third party can file a request for reexamination of a patent by the USPTO during the enforceability of the patent. However, after the request the requesting party is no longer involved in the reexamination process. *See* MPEP § 2200 (C) (8th ed., Aug. 2001) and 35 U.S.C § 302 (2006).

was tentatively rejected under two grounds.⁵⁵ The first was under 35 U.S.C. § 102(c) as anticipated by US Patent No. 7,724,242 ('242).⁵⁶ It was also rejected under 35 U.S.C § 103(a) as unpatentable over Japanese Pub. No. 2000-163031A ("Japanese Patent") and in view of a 1991 paper, titled "The Automatic Recognition of Gestures," authored by Dean Harris Rubine ("Rubine").⁵⁷

The '915 patent was preliminarily invalidated because it was anticipated by the '242 patent and hence, negated novelty.⁵⁸ The '242 patent protects a "touch driven method and apparatus to integrate and display multiple image layers forming alternate depictions of the same subject matter."⁵⁹ As noted by the patent examiner in the office communication, the written description of the '242 Patent discloses a device that performs a method similar to that of the '915 Patent.⁶⁰ Even though it is described in the detailed written description, the '242 patent does not specifically claim the "pinch-to-zoom" gesture, and the patent examiner determined that the '242 Patent had anticipated the '915 Patent.⁶¹

The '915 patent was also tentatively rejected for being non-obvious under a combination of two relevant prior art references. The patent examiner explained that the Japanese patent was issued for a device that performs a method where a user touches the screen with one or more contact points and the device detects the contact position, pressure, and area of the finger but does not explicitly describe "creating an event object in response to the input."⁶² The examiner then explained that Rubine does discuss creating an event object in

55. Ex parte Reexamination Communication Transmittal Form, *available at* <http://www.groklaw.net/pdf4/AppleVsSamsung-2202ExA.pdf>.

56. *Id.* at 3.

57. *Id.*

58. 35 U.S.C. § 102 (2006).

59. U.S. Patent No. 7,724,242 (filed Nov. 23, 2005).

60. The '242 Patent discloses the following method:
 the user touches the screen using one or more contacts;
 the program is started by creating an event object in response to the input;
 the program determines whether the input matches a predetermined pattern and therefore constitutes a gesture;
 if it is a gesture, the program then identifies the kind of action inputted;
 actions include both panning operations such as scrolling, as well as, other gestures such as zooming;
 a single contact point is scrolling, and two or more contact points may include zooming;
 the program performs based on the number of contact points and issues either a scroll or another gesture accordingly;
 if one contact point is detected, the user is taken to the image in the initiated direction;
 if two or more contact points are detected, the program performs a zoom-in function.

61. Ex parte Reexamination Communication Transmittal Form, *supra* note 55, at 6–9.

62. *Id.* at 21–22.

response to the input, which is received in the form of gestures.⁶³ According to the examiner, it would be obvious to a person having ordinary skill in the art that Rubine's teachings can be used to create an event object in response to the user input that is detected by the method as described by the Japanese Patent.⁶⁴ The examiner found that the remaining portions of Claim 8 of the '915 patent were similar to the '242 patent and rejected it under the theory of non-obviousness. While the '915 patent had been tentatively rejected, Apple had an opportunity to rebut the decision and fight to keep the patent valid, or to amend it so that it is still relevant in the present case. However, on July 26, 2013, the USPTO issued a final rejection on all 21 claims of the '915 patent.⁶⁵

IV. MEDIA'S TAKE ON PATENTS

Patent wars have been the focus of media coverage long before the Apple-Samsung battle.⁶⁶ The Apple-Samsung trial, dubbed as "one of the biggest [] ever,"⁶⁷ was covered by many news outlets and most people, outside the patent world, relied on the media coverage to understand the intricate details of the patents at issue.⁶⁸ Many internet sources, which included both technological⁶⁹

63. *Id.* at 22.

64. *Id.* at 23.

65. *Office Action in Ex Parte Reexamination*, SCRIBD.COM, <http://www.scribd.com/doc/156502653/13-07-26-Cover-Page-Final-USPTO-Action-Rejecting-Apple-s-915-Pinch-To-zoom-API-Patent> (last visited Nov. 22, 2013); *see also USPTO hands down final (but not really final) rejection of Apple's pinch-to-zoom API patent*, FOSS PATENTS, July 28, 2013, available at <http://www.fosspatents.com/2013/07/uspto-hands-down-final-but-not-really.html>.

66. *See The Telephone Suit*, N.Y. TIMES, Sept. 13, 1885, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F00816F73A5D10738DDDAA0994D1405B8584F0D3> (covering the fight between Alexander Graham Bell and Western Union over the invention of the telephone); *see also Aeroplane Suit Opens: Curtiss Sued by the Wright Brothers for Patent Infringement*, BOS. EVENING TRANSCRIPT, Dec. 15, 1909, available at <http://news.google.com/newspapers?id=IZ0-AAAIAIBAJ&sjid=q1kMAAAAIAIBAJ&pg=4351,5674213&dq=wright+curtis+suit&hl=en> (covering the suit brought by the Wright Brothers for a preliminary injunction against Curtiss from manufacturing and selling aeroplanes); *see also Rights of Patentees – A Singular Case*, N.Y. TIMES, Jul. 9, 1863, available at <http://www.nytimes.com/1863/07/09/news/rights-of-patentees-a-singular-case.html> (covering the Sewing Machine patent infringement suit between Singer and Akins & Felthousen); *see also Suzanne Galante, TrendMicro Wages Patent War*, CNET NEWS (Jul. 8, 1997, 12:45 PM), available at http://news.cnet.com/Trend-Micro-wages-patent-war/2100-1001_3-201229.html (reporting on the antivirus software patent war fought by TrendMicro, Integralis, McAfee and Symantec).

67. *See Michelle Fitzsimmons, Apple vs. Samsung: Complete Trial Coverage*, TECHRADAR (Aug. 10, 2012), <http://www.techradar.com/us/news/mobile-computing/tablets/apple-vs-samsung-complete-trial-coverage-1091852> (last visited Nov. 22, 2013).

68. *See, e.g., Newsnight* (BBC TWO television broadcast Aug. 28, 2012), available at <http://www.bbc.co.uk/programmes/b01mfj1z>.

69. Nilay Patel, *The Myth of Pinch-to-Zoom: How a Confused Media Gave Apple Something It Didn't Own*, THE VERGE (Aug. 30, 2012, 2:31 PM), <http://www.theverge.com/2012/8/30/3279628/apple-pinch-to-zoom-patent-myth>; Austin Carr, *Will Apple's Patent Victory Create A Usability Hell?*,

and non-technological sites,⁷⁰ misperceived the patents asserted at trial.⁷¹

A. Design Patents

1. Confused Analysis

Within the context of design patents, many media outlets thought it was absurd that Apple obtained a patent on rectangles.⁷² Few thought it was “lame” that the jury found that Apple owned any product that was “rectangular in shape and white” or “rectangular in shape and black.”⁷³ Some reported that it was a loss of innovation, and that now a company can file patents for “triangles [or] parallelograms,” or any other basic shape.⁷⁴ While the reporters criticized the jury for finding these patents valid, it was a general consensus that the real culprit was the USPTO that awarded a ridiculous patent for a round-cornered, rectangular device.⁷⁵

2. Correct Analysis

Few correctly reported that while Apple did assert a patent for the iPad

FAST COMPANY (Aug. 28, 2012, 11:07 AM), <http://www.fastcodesign.com/1670652/will-apples-patent-victory-create-a-usability-hell>.

70. Gerry Shih & Dan Levine, *Apple Triumphs Over Samsung in Landmark Patent Case*, CHI. TRIB., Aug. 24, 2012, available at http://articles.chicagotribune.com/2012-08-24/business/sns-rt-us-apple-samsung-trialbre87n13v-20120824_1_apple-patent-claims-ceo-tim-cook-tablet-market; Craig Timberg & Hayley Tsukayama, *Post-‘pinch’? Apple Patent Case Win Could Point to New Digital Age for Smartphones*, WASH. POST, Aug. 27, 2012, available at http://www.washingtonpost.com/business/economy/post-pinch-apple-patent-case-win-could-point-to-new-digital-age-for-smartphones/2012/08/27/894c0e18-f07b-11e1-adc6-87dfa8eff430_story.html?hpid=z1.

71. Carr, *supra* note 69; Kevin Drum, *Hold On: Maybe Apple Doesn’t Own Pinch-to-Zoom After All*, MOTHER JONES (Aug. 29, 2012, 12:13 PM), <http://www.motherjones.com/kevin-drum/2012/08/hold-maybe-apple-doesnt-own-pinch-zoom-after-all>.

72. Kal Raustiala & Chris Sprigman, *Apple vs Samsung: Who Owns the Rectangle?*, FREAKONOMICS (Aug. 3, 2012, 10:38 AM), <http://www.freakonomics.com/2012/08/03/apple-vs-samsung-who-owns-the-rectangle/>; Nick Wingfield, *Apple Case Muddies the Future of Innovations*, N.Y. TIMES, Aug. 27, 2012, available at http://www.nytimes.com/2012/08/27/technology/apple-samsung-case-muddies-future-of-innovation.html?_r=0.

73. Henry Blodget, *Let’s Be Honest – Apple’s Patent Lawsuit Was Totally Lame*, BUSINESS INSIDER (Aug. 28, 2012, 2:11 PM), <http://www.businessinsider.com/apple-patent-lawsuits-2012-8>.

74. R. Keith Sawyer, *Apple Wins Patent Case, Innovation Loses*, HUFFINGTON POST (Aug. 29, 2012, 11:39 AM), http://www.huffingtonpost.com/dr-r-keith-sawyer/apple-wins-patent-case_b_1834603.html.

75. Michael Hiltzik, *Blame a Dysfunctional Patent System for Apple vs. Samsung Verdict*, L.A. TIMES, Aug. 28, 2012, available at <http://articles.latimes.com/2012/aug/28/business/la-fi-hiltzik-20120828>; Mike Stenger, *Featured: The Battle Begins, Apple vs Samsung Trial Starts Today*, ANDROID HEADLINES, Jul. 30, 2012, available at <http://www.androidheadlines.com/2012/07/featured-the-battle-begins-apple-vs-samsung-trial-starts-today.html>; Robert Nazarian, *Apple wins, consumers lose, and the USPTO should be ashamed*, TALK ANDROID, Aug. 25, 2012, available at <http://www.talkandroid.com/129260-apple-wins-consumers-lose-and-the-uspto-should-be-ashamed/>.

design that claimed rounded rectangles ('889), the jury did not find patent infringement on it.⁷⁶ Tim Worstall compares design patents with trademark law and reports that Apple is not “claiming a patent . . . on rectangles with rounded corners[,] . . . [but] a distinctive feature of the i[Phone].”⁷⁷ Steve Wildstrom of Tech.pinions clarifies in more detail that the jury not only rejected “infringement claims based on patent ‘889 but also “rejected eight of [thirteen] claims under []’087[,] which deal specifically with the rectangles-with-rounded-corners design of the iPhone.”⁷⁸

Finally, there were some media outlets that did not address the verdict but correctly reported pre-trial that the only patent in which Apple claimed infringement on rounded rectangles was the '889 patent.⁷⁹ Yet, much like the confused media outlets, even those that correctly pointed out the claims asserted by Apple blamed the USPTO for awarding an “absurd” patent covering a rectangular shape.⁸⁰

B. Utility Patents

1. Confused Analysis

There was a lot more confusion in the area of utility patents concerning the pinch-to-zoom gesture. There were some that criticized the verdict in favor of Apple, stating that it is “outrageously stupid”⁸¹ that smartphone developers have to come up with alternatives to the pinch. Others applauded the verdict emphasizing that this will bring about a new revolution in the smartphone industry, incentivizing Apple’s competitors to consider alternatives to the “pinch.”⁸² These websites also misperceived that Apple has a patent on “how humans interact with their machines once they become standardized.”⁸³ Some commented on the fact that this may result in costly legal fees for those who

76. Verdict Form, *supra* note 7 at 7.

77. Tim Worstall, *All You Need To Know About The Apple, Google, Samsung, Motorola Patent Wars*, FORBES Oct. 22, 2012, available at <http://www.forbes.com/sites/timworstall/2012/10/22/all-you-need-to-know-about-the-apple-google-samsung-motorola-patent-wars/>.

78. Steve Wildstrom, *Pinch-to-Zoom and Rounded Rectangles: What the Jury Didn't Say*, TECH.PINIONS (Aug. 29, 2012), <http://techpinions.com/pinch-to-zoom-and-rounded-rectangles-what-the-jury-didnt-say>.

79. Raustiala & Sprigman, *supra* note 72.

80. *Id.*

81. “Forcing smartphone developers to come up with a different way of doing things for the sake of coming up with a different way of doing things is outrageously stupid.” Kyle Vanhemert, *Apple's Big Verdict: Bad for Usability, But It Won't Stop True Innovation*, FAST COMPANY (Aug. 27, 2012, 12:44 PM), <http://www.fastcodesign.com/1670642/apples-big-verdict-bad-for-usability-but-it-wont-stop-true-innovation>.

82. Timberg & Tsukayama, *supra* note 70.

83. *Id.*

want to keep using these now familiar features.⁸⁴

Some websites did not completely get it wrong but remained confused as to whether Apple owned the “pinch” feature or not. Carr of Fast Company consults with Carani, an IP attorney, who acknowledges that Apple is not patenting a concept and that the specific language of the patent claim has to be analyzed in order to determine if the feature incorporating such a concept is actually owned by Apple. Carani does not, however, clarify whether these claims were asserted in the trial or not.⁸⁵ Kevin Drum from Mother Jones tries to clarify this by referring to both the ‘915 patent and the ‘381 patent in his post. He states that while claim 8 of the ‘915 *does* make a reference to “scaling the view” and sounds like the “pinch,” it is not clear.⁸⁶ Moreover, “scaling the view” could refer to the two-finger tap to zoom out and not the “pinch.”⁸⁷ He also mentions that the “pinch” is described in the ‘381 patent but that claim was not asserted at trial.⁸⁸ While Drum states different theories as to what could be covered under ‘915, he, like many other commentators, fails to clarify what ‘915 *does* cover.

2. Correct Analysis

The numerous flawed analyses of the ‘915 Patent evidences the intricacy and confusion involved; however, Nilay Patel of The Verge correctly explains the ‘915 Patent. He explains that the ‘915 Patent covers the programming interface, which detects if one finger on the screen is scrolling or if two or more fingers are doing something else.⁸⁹ While the programming interface is *one possible step* (emphasis added) on the road to pinch-to-zoom, it is not the feature itself.⁹⁰ Further, Patel also explains that the Samsung attorneys tried to demonstrate on the Android where the “scrolling” gesture described by ‘915 could be carried out using two fingers. This means there are two input points rather than a single input point,⁹¹ thus taking it beyond the scope of infringement of the ‘915 claims.

84. David Talbot, *Apple/Samsung: The Verdict on Innovation*, MIT TECHNOLOGY REVIEW (Aug. 29, 2012), <http://www.technologyreview.com/news/429014/applesamsung-the-verdict-on-innovation/>.

85. Carr, *supra* note 69.

86. Drum, *supra* note 71; *see also* Kevin Drum, *Making Sense of the Great Apple vs. Samsung Patent Battle*, MOTHER JONES (Aug 26, 2012, 09:26 PM), <http://www.motherjones.com/kevin-drum/2012/08/making-sense-great-apple-vs-samsung-patent-battle>.

87. *Id.*

88. *Id.*

89. Patel, *supra* note 69.

90. *Id.*

91. *See* ‘915 Patent. However, Samsung lawyers were caught demonstrating pinch-to-zoom instead, and the jury did not buy it.

C. *What Drives this Popular Perception?*

There are multiple reasons why so many reporters are mistaken. First, claims of patents—utility patents—are hard for non-lawyers to read and understand.⁹² A patent attorney documents the patent claims to best describe the invention.⁹³ These claims have to be written such that a person having ordinary skill in the art (“PHOSITA”) can replicate the invention once the patent expires.⁹⁴ Thus, patent claims are usually hard to understand by those that are either not as skilled in the art as the inventor, or are not attorneys trained to successfully comprehend the claims of a patent. That is why many writers find it much easier to use “shorthand that obscures important details.”⁹⁵

Second, apart from the fact that many claims can be hard to understand, the sheer length of utility patents deters people from reading the ones in dispute. The language in these patents can be “tedious, legalistic, and often deliberately obfuscatory.”⁹⁶ The ‘915 patent and the ‘826 patent, both concerning the “pinch” feature, consist of a total of thirty-five claims filling up about three printed pages, and yet, most articles found it difficult to make a comparison.⁹⁷ Steve Wildstrom of Tech.pinions assumes that because the “pinch” was a hot topic at the trial, once Apple won the case, most writers must have assumed that one of the infringed patents covered the “pinch.”⁹⁸

Third, the marketing strategies of these major corporations play an essential role in what the media reports. The myth of Apple owning the “pinch” probably began when Steve Jobs exclaimed “And boy, have we patented it!” during the MacWorld 2007 keynote.⁹⁹ While delivering the keynote, he mentions the multi-finger gesture capabilities of the iPhone and *moves his hands back and forth*¹⁰⁰ in a motion similar to that of the “now familiar pinch-to-zoom.”¹⁰¹ Jobs was right, Apple did in fact patent methods of using multi-finger gestures; however, Jobs does not explicitly say in his speech that Apple patented the “pinch.” Perhaps the media misinterpreted his gesture or it may have been one

92. Patel, *supra* note 69.

93. See 35 U.S.C. § 112 (2006).

94. *Id.*

95. Patel, *supra* note 69.

96. Wildstrom, *supra* note 78.

97. See ‘915 Patent and ‘826 Patent.

98. Wildstrom, *supra* note 78.

99. Steve Jobs, *Introducing the New iPhone*, YOUTUBE (Jan. 10, 2007), <http://www.youtube.com/watch?v=8JZBLjxPBUU> (last visited Nov. 22, 2013).

100. *Id.*

101. Sanusi Ismaila, *Contrary to Popular Belief, Apple Doesn't Own the "Pinch to Zoom" Patent*, TECHSUPLEX (Aug. 30, 2012), <http://www.techsuplex.com/2012/08/30/contrary-to-popular-belief-apple-doesnt-own-the-pinch-to-zoom-patent/>.

of Jobs' famous "reality distortion field" moments.¹⁰²

Similarly, the myth of rounded rectangles probably emerged due to an "obfuscation" employed by Samsung.¹⁰³ After the verdict, Samsung issued an official statement: "Today's verdict should not be viewed as a win for Apple, but as a loss for the American consumer. . . . It is unfortunate that patent law can be manipulated to give one company a monopoly over rectangles with rounded corners."¹⁰⁴ Many reporters assumed that since Samsung had released an official statement, Apple must have won control over rectangles.

Finally, a lot of media outlets are driven by demands of the audiences and, hence, want to provide entertainment as opposed to accurate information.¹⁰⁵ It is not just that these outlets are no longer concerned with actual facts, but rather because of the vast domain of the internet, all of these websites are in a race to be the first to deliver information. All that large companies have to do is leak information to a few news outlets and it will spread all over the internet within a few hours.¹⁰⁶ In fact, the marketing chief of Apple testified at trial that the company routinely counts on free press coverage to promote its devices to users.¹⁰⁷ Accordingly, it is foreseeable that a company could have the ability to sway a particular issue in their favor simply by leaking certain information

102. "Reality Distortion Field" is a humorous term used to describe Steve Jobs' charisma and its effects on the developers working at Apple. "From the beginning, Jobs flexed his powerful reality-distortion field to bend employees to his will, so pushing the most susceptible customers and the press around with the same psi power only comes naturally." Jack Shafer, *The Apple Polishers, Explaining the Press Corps Crush on Steve Jobs and Company*, SLATE (Oct. 13, 2005, 7:04 PM), http://www.slate.com/articles/news_and_politics/press_box/2005/10/the_apple_polishers.html. The term has also been used by Apple's competitors to criticize Apple. (For those of us who live outside the Apple's distortion field. BLACKBERRY, <http://blogs.blackberry.com/2010/10/rim-responds-to-apples-distortion-field/> (last visited Nov. 22, 2013)).

103. Wildstrom, *supra* note 78.

104. Brian X. Chen, *Apple Beats Samsung: First Reactions*, N.Y. TIMES, Aug. 24, 2012, available at <http://bits.blogs.nytimes.com/2012/08/24/samsung-apple-reactions/>.

105. "The media's dilemma lies in the structure of the media system in the United States. It is predominantly a private business that receives its financial support largely from advertisers or audience fees. To stay lucrative, the general audience media must maximize the number of viewers. . . . Generally, media organizations have responded to this challenge with more brevity, simplicity, and, if possible, entertaining angles to news stories. When they operate in this spirit of these guidelines, they often produce shallow infotainment." Doris A. Graber, *Whither Televised Election News? Lessons from the 1996 Campaign*, HARV. INT'L J. PRESS/POL., 112, 117 (Spring 1998), available at <http://hij.sagepub.com/content/3/2/112.full.pdf+html>.

106. Sean Kalinich, *Samsung v. Apple Trial Highlighted By Bad Reporting and Spin*, DECRYPTED TECH (Aug. 8, 2012), <http://www.decryptedtech.com/editorials/samsung-v-apple-trial-highlighted-by-bad-reporting-and-spin> (last visited Nov. 22, 2013).

107. Adam Satariano & Joel Rosenblatt, *Marketing Chief Gives Glimpse into Apple*, SFGATE (Aug. 3, 2012, 8:42 PM), <http://www.sfgate.com/technology/article/Marketing-chief-gives-glimpse-into-Apple-3761800.php>.

to the media.¹⁰⁸ In return, the media has no incentive to further investigate the leaked information because it runs the risk of losing free access to emerging controversial information or losing the advantage of being the first to report the information due to the time spent investigating. Thus, media misrepresentations of patent issues will likely continue.

V. WHY IS THIS RELEVANT?

It is important that media's reports on patent litigation are accurate because this can have a legal and an economic effect.¹⁰⁹ The recipients of this information include legislators, judges, and the consumers of the product integrating the particular patent.¹¹⁰ Media scholars have asserted in their studies that "media constructed public perceptions may affect judicial outcomes because 'Supreme Court [J]ustices are influenced in their work by what they read and hear from the media.'"¹¹¹ Because patent law is obscure, "media portrayals have a particular 'sway' over the public attitude;"¹¹² the more obscure the subject, the more media representations influence public perceptions.¹¹³ While it is hard to predict whether a member of the jury or the judge has kept up with the news and is biased in making his decision, it is possible that a judge who may not be familiar with the intricate details of a particular patent may subconsciously rely on the knowledge that he or she has acquired through the media representations that were made during the trial proceedings at the district court level.¹¹⁴

Further, media misperceptions can directly affect policymaking in the particular area of law that is on the media's hotplate. When an issue is at the

108. Kalinich, *supra* note 106. Samsung leaked excluded evidence to just four news outlets and it was all over the internet within hours.

109. See Evan Ramstad, *Samsung Shares Drop as Investors Fear More Pain*, WALL ST. J. Aug 27, 2012, available at <http://online.wsj.com/article/SB10000872396390444327204577614210744826328.html>; see also Walter Hamilton & Andrea Chang, *Apple Shares Rise After It Prevails in Samsung Case*, L.A. TIMES, Aug. 24, 2012, available at <http://articles.latimes.com/2012/aug/24/business/la-fi-mo-apple-shares-samsung-20120824>.

110. Lisa A. Dolak & Blaine T. Bettinger, *The United States Patent System in the Media Mirror*, 58 SYRACUSE L. REV. 459, 466 (2008); see also PATENTLY-O, *Who Reads Patently-O*, January 30, 2013, <http://www.patentlyo.com/patent/2013/01/who-reads-patently-o-top-corporate-and-governmental-subscribers.html>.

111. Dolak & Bettinger, *supra* note 110. .

112. *Id.* at 502.

113. *Id.* at 465.

114. For example, Hon. Judge Posner is an author on at least one internet article where he discusses his decision in the Apple v. Motorola case from 2012; thus, it can be inferred that Judge Posner must be familiar with what the media outlets are reporting about the case. See Richard A. Posner, *Why There Are Too Many Patents in America*, THE ATLANTIC (Jul. 12, 2012, 10:20 AM), available at <http://www.theatlantic.com/business/archive/2012/07/why-there-are-too-many-patents-in-america/259725/>.

forefront in the media, it “creates a ‘demand’ from the politicians for ‘solutions’ to the ‘problem.’”¹¹⁵ Such effects have been evident in the areas of immigration law,¹¹⁶ bankruptcy legislation,¹¹⁷ health insurance policy making,¹¹⁸ and most substantially criminal law.¹¹⁹

A. *Media’s Effect on Criminal Law*

Within the context of criminal law, media possibly has the most “insistent focus on violent crime.”¹²⁰ High profile murder cases, such as the O. J. Simpson and Casey Anthony trials, have been nationally televised.¹²¹ These crimes are good stories to sell because it is easy for the human mind to blame an individual for his wrongdoing to an undeserving victim.¹²² The immense hype by the media of these stories has the ability to convert the public into an “armchair jury.”¹²³ However, if a real jury fails to convict the defendant, the public perception shifts and may “generate a negative stigma on the entire American criminal justice system” as unable to produce just results.¹²⁴ The public misperceives the acquittal as a “wrong[ful] exoneration”¹²⁵ and fears a “rupture

115. Melissa C Brown, *Equal Protection in a Mean World: Why Judge Cahill was Right in United States v. Clary*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 307, 325 (1997).

116. Monica Soderlund, *The Role of News Media in Shaping and Transforming the Public Perception of Mexican Immigration and the Laws Involved*, 31 LAW & PSYCHOL. REV. 167, 177 (2007) (“[W]hen millions of immigrant workers participated in the ‘A Day Without an Immigrant’ boycott, the attention paid to it by the media perhaps helped in shifting public opinion about immigration. This shift may have been the impetus for the recent immigration policy endorsed by President Bush, which may grant current immigrant residents a chance to gain U.S. citizenship.” (footnotes omitted))

117. Melissa B. Jacoby, *Negotiating Bankruptcy Legislation Through the News Media*, 41 HOUS. L. REV. 1091 (2004).

118. Peter D. Jacobson and Shannon Brownlee, *The Health Insurance Industry and the Media: Why the Insurers Aren’t Always Wrong*, 5 HOUS. J. HEALTH L. & POL’Y 235, 252 (2005) (“As portrayed in the media, the basic story was deceptively simple: . . . the ‘nasty’ insurance industry denying women an opportunity for life-saving treatment. . . . Not surprisingly, there was little formal opposition once the proposal got to the floor of the entire legislature.”)

119. *Infra* notes 119-140. See also Susan Bandes, *Fear Factor: The Role of Media in Covering and Shaping the Death Penalty*, 1 OHIO ST. J. CRIM. L. 585, 585 (2004) (discussing media’s influence on the controversy surrounding the death penalty. When Gov. Ryan expressed his views of considering clemency for those on death row, one commentator wrote, “rarely has a public official engaged in such a stunning act of cruelty.”)

120. Bandes, *supra* note 119.

121. Kevin Walsh, Book Review, 11 J. HIGH TECH. L. 1(2011-2012); Nicholas A. Battaglia, *The Casey Anthony Trial and Wrongful Exonerations: How “Trial by Media” Cases Diminish Public Confidence in the Criminal Justice System*, 75 ALB. L. REV. 1579 (2011-2012); Theodore R. Marmor, *A Summer of Discontent: Press Coverage of Murder and Medical Care Reform*, 20 J. HEALTH POL. POL’Y & L. 495 (1995).

122. Bandes, *supra* note 119, at 591.

123. See Battaglia, *supra* note 121 at 1582.

124. *Id.*

125. *Id.*

of the social order.”¹²⁶ This fear and outrage “tend to generate demand for retribution, and harsh sentences,” ultimately resulting in more prisons being built despite evidence that such expansion is an “ineffective response to the problem of crime.”¹²⁷

Perhaps the best example of media’s influence on legislation is seen through Congress’ “frenzied” passage of the Controlled Substances Act of 1986. (“Anti-Drug Abuse Act”)¹²⁸ In the 1980s, major news outlets declared a nationwide “crack cocaine epidemic.”¹²⁹ More than a thousand stories appeared in the months leading up to the 1986 elections, including five stories in Newsweek and Time Magazine.¹³⁰ Some news outlets reported that “children exposed to crack in vitro were time bombs,”¹³¹ while others wrote that because of crack “[m]en have given up their paychecks. Women have prostituted themselves. Children have stolen from their parents. Men and women have stolen appliances, jewelry[,] and televisions from friends and families.”¹³² The cocaine related death of basketball star Len Bias further added to the public fear.¹³³ The media coverage led to a misperception that crack was more dangerous than powder cocaine,¹³⁴ and in response Congress quickly enacted the Anti-Drug Abuse Act establishing a 100:1 cocaine to crack ratio.¹³⁵ Under this ratio requirement, a defendant convicted of simply possessing five grams of crack would have to be convicted of selling 500 grams of cocaine to trigger the same mandatory sentence.¹³⁶

However, the force of media frenzy regarding crack cocaine proved to be unfounded as many who voted for the Act later admitted that they had learned

126. Bades, *supra* note 119, at 592.

127. *Id.*

128. *United States v. Clary*, 846 F. Supp. 768, 784 (E.D. Mo. 1994) (stating that media reports caused Congress to react irrationally and in that “frenzied” state, the members “depart[ed] from . . . procedures that are *routinely* considered a part of legislative process”).

129. Sarah Hyser, *Two Steps Forward, One Step Back: How Federal Courts Took the “Fair” Out of The Fair Sentencing Act of 2010*, 117 PENN ST. L. REV. 503, 508 (2012).

130. While Time Magazine called crack “Issue of the Year,” according to Newsweek, crack was the biggest news story since Vietnam and Watergate. See Jason A. Gillmer, Note, *United States v. Clary: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497, 545 (1995); Brown, *supra* note 115, at 341; see also David H. Angeli, Note, *A “Second Look” at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection*, 34 AM. CRIM. L. REV. 1211 (1997).

131. Hyser, *supra* note 129, at 508 (quoting 132 CONG. REC. 8291 (1986) (footnotes omitted)).

132. Gillmer, *supra* note 130, at 500.

133. Brown, *supra* note 115.

134. According to National Drug Intelligence Center, crack is made by dissolving powder cocaine in a mixture of water and ammonia or baking soda, and boiling it until a solid substance is formed. This solid substance is then dried and sold as crack. *Crack Cocaine Fast Facts*, NAT’L DRUG INTELLIGENCE CTR., available at <http://www.justice.gov/archive/ndic/pubs3/3978/#What>.

135. See Anti-Drug Abuse Act of 1986, H.R. 5484, 99th Cong. §1002, 100 Stat. 3207 (1986).

136. *Id.*

“a great deal in the last 20 years,” and the assumption that crack was more dangerous than cocaine was false.¹³⁷ Vice President Joe Biden, who was “one of the authors of this legislation[,] . . . has said that ‘[e]ach of the myths upon which we based the disparity has since been dispelled or altered.’”¹³⁸ While introducing the Fair Sentencing Act, these senators confessed that the “crack/powder disparity disproportionately affect[ed] African Americans,” who [we]re incarcerated at “nearly six times the rate of White Americans.”¹³⁹ The hurried legislation, without thorough analyses of the issue, led to an unfair statute targeting a specific group of people resulting in an ineffective judicial system.¹⁴⁰

In both examples—murder trials and the crack cocaine legislation—media’s misperception leads to an overcorrection of the problem. In violent crimes, media bias directs the public to thinking a defendant is bad, and convicts the defendant in the public square before the jury verdict is rendered. When the conviction that the public seeks is not achieved by the trial, stricter sentences are implemented to prevent the public from losing faith in the criminal justice system. Similarly, for crack cocaine, the misperception that rock was more dangerous than powder guided Congress into implementing harsher unjust punishments for poor drug users who used crack as opposed to their more affluent counterparts who used cocaine. These rushed decisions were not positive contributions to criminal law, and any decisions made in a similar manner will not likely prove beneficial to patent law.

B. Media’s Effect on Patent Law

1. Three Ways that Media Misperception Can Adversely Affect Patent Law

First, like criminal law, the area of patent law may be subjected to overcorrection of a non-problem based on media misperceptions. While design patents have been granted since the mid-1800s, and software patents have been granted since mid-1970s, only after the advent of the smartphone wars have they been the subject of nationwide discussion. Apple’s win of the infringement suit has revived a debate about whether software and design

137. *See* 155 Cong. Rec. S10488-01 (daily ed. Oct. 15, 2009) (statement of Sen. Richard Durbin), *available at* 2009 WL 3319524.

138. *Id.*

139. *Id.*

140. *Id.* (“Judge Walton . . . testified about ‘the agony of having to enforce a law that one believes is fundamentally unfair’ and that ‘jurors would tell [him] that they refused to convict, that even though they thought the evidence was overwhelming, they were not prepared to put another young black man in prison knowing the sentencing disparity.’”).

patents should be granted.¹⁴¹ Media's erroneous reporting that Apple owns the rectangle, not only leads to a public perception that such patents should not be granted but also that the patent system, in general, is flawed for awarding patent protection of such features.¹⁴² In order to prevent the public from viewing the patent system in a negative light, legislation may overcorrect the problem much like it did in the crack-cocaine legislation. This is a problem because it could eliminate the category of design patents altogether.

Second, media misperception could lead to an exact opposite result of overcorrection. Public misperception that patents may be awarded for shapes such as rectangles or gestures such as pinch-to-zoom, may lead to many inventors filing claims for similar features. The USPTO may soon have inventors filing applications to protect shapes like ovals or circles, or gestures such as zigzag or spiral. While it is unlikely that the USPTO will award patents for a shape or a gesture alone, it will be burdened by such frivolous claims and distracted from its already heavy workload. With the recent enactment of the Leahy-Smith America Invents Act of 2011 ("AIA"), the USPTO has issued a dramatically increased number of mobile patents within the first three months of the Act's implementation.¹⁴³ These frivolous patent applications will leave the already burdened USPTO even more understaffed and weigh down the system of governing patents with longer waits, creating widespread inefficiency.

Finally, media misperception is dangerous in the area of transactional patent law. Companies often engage in expensive deals to build up their patent portfolios. Traditionally, companies amassed patents to reduce the risk of being sued, and to deter litigation.¹⁴⁴ However, in recent times companies have begun to use their patent portfolios assertively rather than defensively. Media misperception may misguide such companies into buying out a patent on a mistaken belief that they have acquired a patent on a shape or a gesture. This will result in more litigation when the company sues anyone who tries to use

141. "Software patents are clogging the system at every possible point," says Christal Sheppard, an assistant professor of law at the University of Nebraska College of Law. Jessica A. Vascellaro, *Apple Wins Big in Patent Case*, WALL ST. J., Aug. 25, 2012, available at <http://online.wsj.com/news/articles/SB10000872396390444358404577609810658082898>.

142. *Id.*

143. By March 16, 2013, more than 130,000 non-provisional applications had been filed. Dennis Crouch, *Pre-AIA Filing Numbers*, PATENTLY-O (Mar. 29, 2013), <http://www.patentlyo.com/patent/2013/03/pre-aia-filing-numbers.html>. About one quarter of those patents will be awarded in the area of mobile devices. Stephen Lawson, *Study: One-quarter of U.S. Patents Issued This Year Will be in Mobile*, INFOWORLD (Mar. 28, 2013, 6:53 PM), http://www.computerworld.com/s/article/9237950/One_quarter_of_U.S._patents_issued_this_year_will_be_in_mobile_study_says.

144. Colleen V. Chien, *From Arms Race to Marketplace: The Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L.J. 297 (2010).

the particular shape or gesture. Such suits are frivolous and a burden on the judicial system because in reality, the patent asserted would not protect the invention in such broad sense.

2. What Can Be Done to Correct these Misperceptions?

In order to avoid adverse effects in the area of patent law, these misperceptions need to be corrected. Tech reporters can do a better job at addressing patent issues by understanding the patent claim at issue before reporting about it. This may be done by either reading the patent and/or consulting with an expert in the field.

Published patents are easy to find using the USPTO website or Google Patents. While the length can be a deterrent in reading the entire patent, during the litigation process, the reporter only needs to understand the claim that is at issue.¹⁴⁵ Claim 8 of the '915 patent is only twenty-two lines long, and fairly easy to read. A careful reading of the claim would have revealed that “pinch-to-zoom” is not mentioned anywhere through the claim, and much of the confusion regarding this patent could have been avoided. However, most tech reporters are not trained to read patents in a similar manner as patent attorneys. To encourage accurate reporting of the patent claims at issue, tech reporters who regularly report on intellectual property issues may be well advised to take a course in basic intellectual property law.¹⁴⁶

Alternatively, if the claims are in an area of technology that is fairly complicated, the tech reporter should consult with an expert in the field. In the present case, only two reporters who were confused about the '915 Patent consulted with a patent attorney, and updated the article on their website.¹⁴⁷ Patent attorneys are a good source since they work with claims on a daily basis and can easily ascertain language of the claim that might be otherwise complex. Similarly, when reporting on smartphone litigation, consulting a software engineer employed in the telecommunication field is also a good option because it is likely that he or she understands the underlying technology and can decipher the claims more efficiently. Since patents are hard to decipher, it is critical that such experts are consulted.

145. However, if there are any issues involving 35 U.S.C §112, the entire patent should be thoroughly read. In the present case, we are only concerned with the claims that the media misreported, for which the understanding of the claims alone should be sufficient.

146. Courses are offered at various universities to introduce engineers to the basics of intellectual property law. University of Illinois at Chicago offers a certification program in Engineering Management and Law, admission in the course is open to anyone who wishes to enroll.

147. Steve Wildstrom who wrote for Mother Jones consulted with Nilay Patel from the Verge and Carr who wrote the article for Fast Company consulted an intellectual property attorney Carani with McAndrews, Held & Malloy, who also occasionally writes for Patently-O.com.

VI. CONCLUSION

We live in a world created by narratives. In an era where all information is available at our fingertips within seconds, our perception of the world is built through stories we hear or read on the internet. Patent law has and will always be a subject of great confusion amongst those outside the patent world. For that reason, the majority of the public will likely rely on the stories circulating on the internet to shape their view of the patent system. Tech reporters writing on patent trials, therefore, have enormous responsibility to investigate the claims of patents at issue.

As outlined in this Comment, lack of proper investigation or consultation can have serious implications in all areas of patent law. It is essential that writers correct their method of reporting to prevent such adverse effects. A strong patent system is essential for a strong economy because the benefits of new technology are reaped by all.

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