

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

APPLE INC.,	)	Case No.: C 11-1846 LHK (PSG)
	)	
Plaintiff,	)	<b>ORDER CLARIFYING MAY 4, 2012</b>
v.	)	<b>ORDER</b>
	)	
SAMSUNG ELECTRONICS CO., LTD, a	)	<b>(Re: Docket No. 922)</b>
Korean corporation; SAMSUNG	)	
ELECTRONICS AMERICA, INC., a New York	)	
corporation; and SAMSUNG	)	
TELECOMMUNICATIONS AMERICA, LLC,	)	
a Delaware limited liability company,	)	
	)	
Defendants.	)	

In this patent infringement suit, Defendants Samsung Electronics Co., LTD., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC (collectively “Samsung”) seek clarification of the court’s May 4, 2012 order (“May 4 Order”) sanctioning Samsung for its non-compliance with the court’s December 22, 2012 order (“December 22 Order”). The court will not rehash here all of the details of these earlier orders. Suffice it to say that the court found that Samsung did not meet its obligation to produce all design-around code by this court’s deadline. For this non-compliance, the court barred Samsung from offering any evidence of its design-around efforts for each of the ‘381, ‘891 and ‘163 patents. The court further ordered that Samsung shall not argue that the design-arounds are in any way distinct from those versions of

1 code produced in accordance with the court's December 22 Order. Samsung was instead to rely  
2 solely on the versions of code that were produced on or before December 31, 2011.

3 In its papers and at the hearing held on Samsung's motion earlier today, Samsung discloses  
4 that after the court issued its May 4 Order, it discovered that, contrary to its previous suggestions to  
5 the court, Samsung had in fact produced at least some design-around code by December 31 for the  
6 following accused products: Galaxy S II, Exhibit 4G, Tab 10.1, and Epic 4G. And so Samsung  
7 contends that the dichotomy set forth by the court in the May 4 Order, between code produced by  
8 December 31 and design-around code produced after December 31, is not correct. Samsung asks  
9 that the court resolve the resulting ambiguity by confirming that Samsung may in fact offer the  
10 design-around code produced before the December 31 deadline. Samsung further requests  
11 clarification that the May 4 Order permits Samsung to offer evidence of its design-arounds other  
12 than source code, and further permits Samsung to offer evidence, both source code and non-source  
13 code, of its design-arounds for purposes other than liability for infringement, such as damages and  
14 injunctive relief.

15 Apple Inc. ("Apple") responds that Samsung's request is really a request for  
16 reconsideration that falls short of the requirements set forth by Civ. L.R. 7-9. Apple emphasizes  
17 Samsung's failure to establish why it could not produce evidence of its design-around production  
18 earlier in response to Apple's sanctions motion and specific questions posed by the court. However  
19 Samsung's request is properly characterized, Apple also argues that Samsung's production of  
20 design-around code for the Galaxy S II is for a T-Mobile version of the product not accused or  
21 otherwise at issue in this case. With respect to the Exhibit 4G and Tab 10.1 design-around code  
22 production, Apple notes that Samsung presented no evidence with its moving papers that these  
23 products ever implemented the design-around. With respect to the Epic 4G, Apple notes that  
24 Samsung's claim that it produced a version that includes the design-around is impossible to square  
25 with Samsung's previous representations that it either (1) produced the initial release of each  
26 accused product, or (2) the current release of each such product at the time this suit was filed in  
27 April 2011. As for Samsung's suggestion that it is permitted under the May 4 Order to offer non-  
28 source code evidence of its design-arounds at trial, and any evidence of its design-arounds for

1 purposes other than non-liability, Apple notes that the language of the May 4 Order needs no  
2 clarification and on its face bars such efforts.

3 Without criticizing Samsung's legitimate interest in knowing what it can and cannot do in  
4 the trial to come, the court initially must note that any need for clarification by Samsung is  
5 ultimately of Samsung's own making. The court drew a line between code produced by December  
6 31 and design-around code produced after that date based on Samsung's representations to this  
7 court. As Samsung itself acknowledges in its papers, "[t]he Court specifically relied on Samsung's  
8 mistaken statement that it did not produce any blue glow [design-around] source code until January  
9 23, 2012."<sup>1</sup>

10 But even if the court were willing to relieve Samsung of the burden of its mistake, the court  
11 must conclude that any evidence of Samsung's design-arounds should remain off limits to  
12 Samsung. The fact remains that Samsung failed miserably in meeting its obligation to produce all  
13 design-around code for all of the accused products by the December 22 Order's deadline. Nothing  
14 in Samsung's present request changes the fact that it did not produce source code for its '891 and  
15 '163 design-arounds until months after the December 31 deadline and even after the March 8, 2012  
16 close of fact discovery. Even as to the '381 patent, design-around code was not produced for  
17 products at suit, such as versions of the Galaxy S II for carriers other than T-Mobile, and Samsung  
18 offers no real explanation of how to reconcile its claim that it produced source code for a version of  
19 the Epic 4G that included design-around code with an earlier statement declaring otherwise. And  
20 regarding the Exhibit 4G and Tab 10.1, the court is loath to credit evidence of production produced  
21 for the first time in reply papers. Against this backdrop of non-compliance, it would hardly be fair  
22 to allow Samsung to offer what little design-around code it may have produced for a handful of the  
23 accused products, or to allow Samsung to produce all kinds of non-source code evidence, after it  
24 withheld substantial source code that would have permitted Apple to challenge such evidence.

25 And so in response to Samsung's request for clarification, here it is. As a sanction for  
26 Samsung's extended non-compliance with the December 22 Order, for each of the '381, '891 and  
27 '163 patents, Samsung may not offer any evidence of its design-arounds. This means no source  
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<sup>1</sup> Docket No. 898 (Mot. for Extension of Time) at 5.

code evidence, no non-source code evidence, no evidence of any kind, whether for liability purposes or any other purpose. Period. Because Apple only requested this sanction as to the upcoming jury trial, this restriction does not extend beyond trial to any post-trial proceeding such as those relating to the permanent injunction sought by Apple or contempt proceedings. The issue of Samsung's right to offer design-around evidence in any post-trial proceeding remains for another day.

**IT IS SO ORDERED.**

Dated: 6/19/2012

  
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PAUL S. GREWAL  
United States Magistrate Judge

United States District Court  
For the Northern District of California