

## The Apple v Samsung Saga: Dueling Adverse Inferences = No Advantage

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In a patent infringement suit by Apple, Inc. against Samsung Electronics Co, LTD, Apple filed a motion for an adverse inference jury instruction based on Samsung's alleged spoliation—the failure to preserve relevant evidence. The court, in addressing Apple's motion, reiterated a party's obligation to preserve evidence from the moment that litigation is reasonably anticipated, including identifying, locating and maintaining information that is "relevant to specific, predictable and identifiable litigation."

Samsung's corporate email system includes auto-delete functionality whereby email is automatically deleted within fourteen days, unless an individual employee manually chooses to retain a message or group of messages for a longer period of time. In August 2010, Apple provided Samsung with information regarding Samsung's potential infringement of certain patents held by Apple. Soon after, Samsung sent an email to certain of its employees stating that there was "a reasonable likelihood of future patent litigation between Samsung and Apple" and requesting that employees "preserve any and all such documents that may be relevant to the issues" in the potential litigation. Apple filed its lawsuit against Samsung in April 2011. After being sued, Samsung sent out another communication to a larger group of employees about preserving documents and held various meetings to explain the company's obligations.

Samsung argued that its duty to preserve did not arise until after Apple filed its lawsuit in April 2011. The court disagreed, finding that the duty began in August 2010 and that Samsung had "ample notice that the evidence was potentially relevant to litigation." Samsung's failure to disable the auto-delete functionality was a key factor in the court's decision. The court granted Apple's motion in part, ordering that the jury be instructed as follows:

Samsung has failed to prevent the destruction of relevant evidence for Apple's use in this litigation...I instruct you, as a matter of law, that Samsung failed to preserve evidence after its duty to preserve arose...You also may presume that Apple has met its burden of proving the following two elements by a preponderance of the evidence: first, that relevant evidence was destroyed after the duty to preserve arose...and second, the lost evidence was favorable to Apple.

Samsung then filed its own motion for sanctions for spoliation against Apple as Apple admitted it had not issued any litigation hold of its own until it filed suit against Samsung in April 2011. The magistrate judge found that Samsung's motion was untimely and denied it. Samsung appealed to the district judge both the granting of Apple's motion and the denial of its own motion.

The district judge held that the magistrate judge's ruling that Samsung's duty to preserve arose in August 2010 was not "clearly erroneous or contrary to law" and affirmed the granting of an adverse inference jury instruction. Given that the duty to preserve arose in August 2010, the district judge held that Apple's failure to issue a litigation hold until April 2011 resulted in the spoliation of relevant evidence and ordered that an adverse inference instruction also be given against Apple at trial. Under the circumstances, both parties agreed that neither adverse inference instruction should be given at trial. Samsung avoided the adverse inference instruction, but a jury still found Samsung liable for patent infringement and awarded Apple over one billion dollars in damages.

Two important lessons can be learned from this case. First, if litigation is reasonably foreseeable, ignoring the necessary steps to preserve relevant evidence can be a costly mistake. Turning off auto-delete systems, issuing a litigation hold, and monitoring employee compliance with the hold are usually required. Second, once a litigant argues for a specific

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trigger date for the duty to preserve, the litigant should be prepared to have that trigger date used against it. The litigant needs to carefully assess whether its own actions can withstand scrutiny under a motion for sanctions for spoliation using the same trigger date.