



## TAKING A BIG BITE OF APPLE

Yale prof awarded \$625 million in patent case

By THOMAS B. SCHEFFEY

Old photos of Professor David Gelernter's lived-in office in the computer science department at Yale depict a sprawling array of the scholar's scattered papers, and teetering books.

If necessity is the mother of invention, you can see why he would have invented his "lifestream" software. It archives every type of computerized file in chronological order, and can pull together any relevant groups of files as needed. It's a pack rat's dream. Nothing needs to be thrown away, just digitized. Then everything's at your fingertips.

Gelernter, of Woodbridge, and Yale graduate student Eric Freeman, of Branford, explained those ideas in 2001 in three patents they earned that year. These made interesting reading back then. For a brief period, they came to life in a commercially unsuccessful software product called Scopeware Vision that halted production in 2004. According to author James Fallows, writing in *The New York Times* in 2004, Gelernter's backers folded, "despairing of staying in the race when Microsoft had so clearly indicated that it would include disc-search functions in Longhorn, its next version of Windows, scheduled for release in 2006."

But instead of fading into an historical footnote, the patents and inventors of New Haven-born Scopeware are now suddenly making big news and, in all likelihood, big money.

Last week, the patents were the basis for a Tyler, Texas federal court jury awarding Gelernter's Mirror Worlds LLC a stunning \$625.5 million verdict against computer giant Apple Inc. The jury found that Apple intentionally infringed on the patents to create its Cover Flow, Time Machine and Spotlight display tools.

Cover Flow flips record album art like floating panels in an onyx-floored museum. Time Machine automatically saves up-to-date copies of everything on a computer — photos, music, videos, documents, applications, and settings. Spotlight searches through a hard drive with precision and speed.

This infringement award, according to business publisher Bloomberg, is the fourth largest patent verdict in U.S. history.

Last March, in an interview with the blog BigThink, Gelernter foreshadowed the impending legal news, referencing what he thought might be the biggest patent suit in history, while saying he couldn't care less about the money.

He was well aware major companies were making important products with his lifestream invention. "That makes me angry personally," he said, "not because of the money, but because of the deliberate failure to acknowledge work that we would have made freely available as academics and that companies will not acknowledge because there is so much money involved."

Attorney Patrick Kelley, of the Tyler, Texas firm of Ireland, Carroll & Kelley, said that Mirror Worlds' legal team "has a policy of not commenting on this while it's going on."

But several Connecticut patent litigation lawyers said that Gelernter's altruistic statements would have zero impact on his ability to collect hard cash through settlement



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**Hartford attorney William Cass called the Texas jury's findings 'wacky' because jurors did not indicate how they figured damages of \$208 million per patent violation.**

or appeal. And, they say, the aptly-named David Gelernter has scored a scholar-warrior's blow to the Apple Goliath, based in Cupertino, Calif.

Steven Moore, a patent litigation lawyer at Kelley Drye in Stamford, said: "There's risk on both sides, and I would suspect that this thing would settle. But Apple is well known for fighting. They fight tooth and nail. Having to go back and justify this kind of loss to your in-house counsel isn't easy."

Moore's co-counsel in many patent cases,

James Nealon, said Gelernter is in a very favorable position as he heads into settlement negotiations, or an appeal. Both Moore and Nealon have gone up against Apple in litigation.

### Historic Figure

In 1993, Gelernter was a victim of a package bomb sent to him at Yale by the Unabomber, Ted Kaczynski, which permanently injured both his right eye and his right hand. He wrote about his recovery in his 1997 book, "Drawing Life: Surviving the Unabomber." He contributes to the *Weekly Standard* and other neo-conservative publications, and has written widely on an eclectic range of topics, including the aesthetic potential of computer design.

Besides being an intriguing, Renaissance man of sorts (he also paints), Gelernter has a big advantage over many claimants of patent infringement. He's actually manufactured and sold a useful product. In patent lingo, that's known as practicing the art. Recent statistics, Nealon said, show that overwhelmingly, courts tend to not find infringement where the claimant has never put his patent to some practical use.

An individual like Gelernter, holding just a handful of patents, is often cast as a patent "troll," attempting to exact money on far-fetched grounds. But in this case, the Texas jury sympathized with Gelernter's case. It found Apple knowingly engaged in intentional infringement – an unusually harsh finding, said William Cass, a Hartford patent litigation lawyer at Cantor Colburn.

After reviewing the patents and the verdict form, Cass pronounced the jury's findings opaque and downright "wacky." It fails

to specify precisely which patent claims were infringed. "I wish I could tell you which claims were abridged, but I can't because the judge didn't specify that the jury tell us," said Cass. The upshot? "More work for the lawyers."

U.S. District Judge Leonard Davis "didn't break it down into lost profits or reasonable royalty either, on the damages side. That's very unusual," Cass noted. "We have no idea how they calculated this \$208 million [per patent], but it seems they bought the plaintiff's version."

Cass is currently engaged in a David v. Goliath case of his own, representing a small company against Nikon, represented by Boston mega-firm Fish & Richardson.

Nealon and Moore, the Stamford lawyers at Kelley Drye, said one of the most important factors in patent litigation is the location of the court. Gelernter's Mirror Worlds Technologies Inc. was founded in New Haven. But Mirror Worlds LLC, the plaintiff in this action, is incorporated in Tyler, Texas, giving it access to the pro-plaintiff "rocket docket" courtrooms of Texas' Eastern District.

Said Cass: "They are no more specialized in patent [issues] than any other judges, but they have implemented court procedures to streamline the process. It's the same way with the Northern District of California and the Eastern District of Virginia."

Many large companies don't like the rocket dockets. If a corporate defendant can mire a small-potatoes patent claimant in some non-streamlined jurisdiction, a slow and ugly litigation death may result. "If they can get you into a jurisdiction where it's going to take you four or five years of litigating, they will fight with everything," Moore said, including requests for

Rule 11 sanctions challenging their opponent's professional integrity. "With everything being thrown at you, you're just going to have to back off, and [the lawsuit] is just going to die," Moore concluded.

Nealon and Moore represented New Haven inventor Triantafyllos Tafas who challenged the U.S. Patent Office and won an ambitious reversal of a proposed policy that he claimed would unfairly impede small inventors.

### Court Disorder

District courts are not organized with any separate patent specialization, which Cass says is unfortunate. "Think about this. We have a tax court. We have a bankruptcy court. Maybe we should have a court that deals with patents as a specialized area of the law—but we don't. It's a little nutty."

But Apple and Gelernter face a whole new roll of the dice if they head to an appeal. The Federal Circuit Court of Appeals in Washington D.C. is the sole location for patent appeals, and is known for its patent expertise. Still, results can vary widely based on the judges on each panel, the Connecticut attorneys noted.

In many cases, the appellate court conducts what is essentially an entirely new inquiry. The jury interrogatories in the Texas case, Cass noted, are unlikely to provide a helpful record of guidance. "It's surprisingly vague," he noted. Apple's lawyers, who have also declined comments to the media, contend that counting \$208 million cumulatively against each of the three patents is an impermissible "triple-dipping."

Judge Davis has stayed entry of judgment in the case, while both sides engage in a hectic motion exchange over the verdict amount. ■