Neutral Citation Number: [2012] EWHC 1882 (Pat)

Case No: HC 11 C 03050

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
PATENTS COURT

Rolls Building
7 Rolls Buildings
London EC4A 1NL

Date: 09/07/2012

Before :

HIS HONOUR JUDGE BIRSS QC
(Sitting as a Judge of the High Court)

- -

Between :

SAMSUNG ELECTRONICS (UK) LIMITED	**Claimant**
- and -	
APPLE INC.	**Defendant**

- -
- -

Henry Carr QC and Kathryn Pickard (instructed by **Simmons & Simmons**) for the **Claimant**
Michael Silverleaf QC and Richard Hacon (instructed by **Freshfields**) for the **Defendant**

Hearing dates: 18th, 19th June 2012

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE BIRSS QC

His Honour Judge Birss QC :

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Introduction

1. This action concerns Community Registered Design No. 000181607-0001. The design belongs to the defendant (Apple). Among the named designers are Sir Jonathan Ive and Steve Jobs. The claimant (Samsung) seeks a declaration that three of its Galaxy tablet computers (the Tab 10.1, Tab 8.9 and Tab 7.7) do not infringe. Apple counterclaims for infringement. One of the matters to be dealt with is whether the counterclaim should be stayed. The validity of the registration is not in issue in this case. Samsung has applied to revoke the registration at OHIM.

2. Henry Carr QC and Kathryn Pickard appear for Samsung instructed by Simmons & Simmons. Michael Silverleaf QC and Richard Hacon appear for Apple instructed by Freshfields.

3. Samsung contends that its tablets do not infringe. It submits that when the registered design is understood in its proper context, bearing in mind the existing design corpus and the degree of freedom of the designer, the overall impression the Apple design

produces on the informed user is a different one from that produced by any of the three Samsung tablets.

4. Apple does not agree. It agrees that the registered design must be understood properly bearing in mind the existing design corpus and the degree of freedom of the designer but contends that when that exercise is carried out, the result is that the overall impression produced on the informed user by each Samsung tablet is not a different one from that produced by the registered design.

5. No witnesses of fact were called. At the case management conference the court directed that the parties may each call an expert to address the issue of degree of freedom and features dictated solely by technical function. Each side did so. Samsung called Mr Itay Sherman and Apple called Mr Alan Ball. Each side cross-examined the other's expert witness at trial. Otherwise the trial consisted of oral submissions. It took two days. Each side submitted that the evidence of the other's expert was addressed to the wrong question. I will address that issue below after I have considered the law.

6. This dispute is being litigated between the parties in other countries. The validity case is before OHIM. In Germany the first instance court in Düsseldorf held that the Galaxy tablets infringed the design but on appeal the Düsseldorf Court of Appeal decided there was no infringement. However the German court did grant an injunction on the Samsung tablets on a different basis under German unfair competition law. In the Netherlands Apple lost at first instance and on appeal. Both the German and Dutch proceedings are preliminary proceedings. It was not disputed that Apple has the right to start full infringement proceedings in those countries and that the preliminary decisions are not binding. This action is the first substantive hearing in the Community of the issue of infringement.

The Apple design

7. The various images making up the Apple design are at Annex A.

8. Apple did not contend that either of its famous iPad products should be used as concrete examples of the Apple design. Neither the original iPad nor the iPad 2 are identical to the design. Whether either of them is or is not within the scope of protection would be a matter of debate. To use either as an example of the Apple design would be to beg the question of the true scope of Apple's rights.

9. Looking at the Apple design itself, what strikes the eye immediately is its simplicity. The article is unadorned and tile shaped. The large faces are blank with the screen on one side and the back completely blank. Image 0001.3 looks at the article in plan view if it was sitting on a table: the corners are rounded; there is a rim around the whole edge. The transparent surface covers the whole of the front face all the way to the rim. An issue I have to resolve is the significance of the dotted lines visible in images 0001.1 and 0001.3. The side views show that the article is quite thin (images 0001.2, 0001.5, 0001.6, 0001.7) and also show that the edges form a right angle (90°) to the front face but a curve to the back face. Images 0001.6 and 0001.7 show sockets for connectors. They are marked in dotted lines and no issue arises about that marking. This clearly indicates that the design does not include those features.

10. Samsung submitted that the dotted lines visible in images 0001.1 and 0001.3 also do not form a protected feature in the registration. Part of this submission relied on paragraph 11.4 of the OHIM Examination Guidelines which indicates that dotted lines may be used to indicate elements for which no protection is sought or elements which are not visible in a particular view. Apple submitted that the Guidelines were permissive and not mandatory and that in this case, the dotted lines around the screen would be understood to indicate the presence of a visible border on the screen. The border will be created by a difference in appearance between what lies under the glass on either side of the dotted line.

11. There is no mandatory rule that dotted lines must be interpreted in a particular way. The Guidelines are not determinative. No doubt in most cases dotted lines will be understood to have been used in accordance with them, but each registration must be understood on its own merits. On the facts of this case I accept Apple's submission. Looking at the two images, the dotted lines would be understood as showing that there is an edge visible under the glass. It is obviously a border around the screen. In cross-examination Mr Ball expressed the view that the registration indicated that the border would only be visible when the screen was switched on but would be invisible when off. I disagree. There is nothing in the images to show that the border is only visible when the product is in a certain state. The border is visible all the time.

The Samsung Tablets

12. The Samsung Galaxy tablets are at Annex B. They are very thin tile shaped articles. The front face is quite blank. In plan view the corners are rounded, there is a rim around the edge and a border around the screen. The edges of the article are curved, so that they bulge outwards somewhat. The sides have buttons. The back surfaces of the three Samsung tablets differ.

13. The backs of Galaxy Tabs 10.1 and 8.9 have what Samsung call a clutch purse feature. The backs have two colours. There is a gray/black combination and a gray/white combination. In both cases the gray region forms a rim around the whole back surface and has a thicker part along one side. This thicker part carries the camera. The main part of the back is either black or white as the case may be.

14. The back of the Galaxy Tab 7.7 has three zones. The zones at the two ends are a smooth silvery gray coloured plastic. The central zone is a silvery gray metal with a rougher texture.

15. Apart from the backs, the key difference between the various Galaxy tabs is size. The Tab 10.1 is the largest and Tab 7.7 is the smallest. The aspect ratios of length to width of the various Galaxy Tabs are broadly the same. All three are about the same thickness. The Tab 7.7 is the thinnest but only by a small amount.

Features relied on by Apple

16. Apple submitted that the similarities between the design and the Samsung tablets could be divided into the following seven features:

    i) A rectangular, biaxially symmetrical slab with four evenly, slightly rounded corners;

ii) A flat transparent surface without any ornamentation covering the entire front face of the device up to the rim;

iii) A very thin rim of constant width, surrounding and flush with the front transparent surface;

iv) A rectangular display screen surrounded by a plain border of generally constant width centred beneath the transparent surface;

v) A substantially flat rear surface which curves upwards at the sides and comes to meet the front surface at a crisp outer edge;

vi) A thin profile, the impression of which is emphasised by (v) above;

vii) Overall, a design of extreme simplicity without features which specify orientation.

17. Samsung pointed to differences between the lists of features relied on by Apple in the various parallel proceedings. I did not find analysing these differences to be a profitable exercise.

Stay of the infringement case under Art 91?

18. The relationship between the proceedings in this country and the validity proceedings in OHIM was addressed by Mann J (***Samsung v Apple*** [2012] EWHC 889 (Ch)) and then on appeal to the Court of Appeal (the court consisting of the Master of the Rolls (Lord Neuberger), Lloyd LJ and Moore-Bick LJ) in ***Samsung v Apple*** [2012] EWCA Civ 729. The Court's conclusion as to the effect of Art 91(1) of Council Regulation (EC) No 6/2002 was that the existence of the OHIM proceedings does not require Samsung's claim for a declaration of non-infringement to be stayed but it does require Apple's counterclaim for infringement to be stayed, unless there are "special grounds" allowing the claim to proceed (judgment of the court, paragraph 47).

19. Apple did not oppose Samsung's suggestion that the infringement counterclaim should not be stayed but the Court of Appeal held that the agreement of the parties, or absence of opposition on the part of the claimant, was not sufficient by itself to amount to "special grounds" (judgment of the court paragraph 48). The Court of Appeal were not confident that they had before them all the relevant material on which to decide this question and so decided to remit it to be decided at the time of the trial. I now have to decide the point.

20. In paragraph 49 the Court of Appeal explained the legislative policy relating to "special grounds" and drew attention to certain features of this case which might be relevant. The policy is concerned with the problem that allowing the infringement proceedings to continue opens up the possibility of parallel proceedings on the same issue and a risk of inconsistent judgments on the same point between a Community design court and OHIM. The "special grounds" have to be sufficient to justify that risk. The features of this case the Court drew attention to are: first that these proceedings do not include validity therefore there is no risk of an inconsistent validity judgment; second that there is a need for a speedy determination of the claim, although whether that justifies allowing the counterclaim to proceed rather than only

the claim may require thought; third, that the parties agree or do not object, although not determinative, is a relevant factor.

21. In considering what to do I believe I should consider whether any party would be prejudiced by the stay or by the refusal of a stay, I must consider the policy behind this part of the Regulation and the risk of inconsistent judgments and I must look at the overall balance of justice. All this is carried out bearing in mind that the Regulation provides that the court shall stay the infringement action unless special grounds exist not to do so. The clear emphasis is on a stay. To avoid it there must be *special* grounds not to.

22. Before me both parties agree that the counterclaim should not be stayed. That disposes of any prejudice. The parties are best able to look after their own interests. Samsung have not sought a declaration of invalidity in these proceedings and both sides agree therefore that there is no risk of inconsistent judgments between the Community design court and OHIM. As regards considering the issue of infringement, this action is going to consider infringement anyway since that is the purpose of Samsung's claim for a declaration. On any view the matter is plainly commercially urgent.

23. Is a declaration enough to satisfy the commercial urgency of the claim or should the infringement claim proceed too? Apple submitted that if the court decides that the Galaxy tablets (or any of them) infringe then it would be unfair for Apple to have to wait for relief pending the outcome at OHIM. I agree. Thus while there is no risk of injustice if I allow the infringement claim to proceed, there is a genuine risk of injustice if I stay the counterclaim and allow the declaration issue to be heard without it.

24. Taking all these points together I find that there are special grounds not to stay the infringement counterclaim. I will not do so.

The witnesses

25. Mr Sherman has degrees in Electrical Engineering and Biomedical Engineering and has worked in the telecommunications industry for the last 20 years. In the last ten years his focus has been on mobile handset and mobile consumer electronic technology and products. Between 2007 and 2010 he was Chief Technology Officer (CTO) for modu Ltd, a handset and accessories manufacturer. One such product involved an advanced digital picture frame. He has served as the head of the handset cluster of the Israeli Mobile Association (IMA) and has lectured on handset technology and design. He currently provides consultancy services to a number of technology companies and this includes monitoring the mobile handset and tablet computer market and the design and technology trends in it. He has followed the design changes in the tablet computer industry for at least the last decade. Mr Sherman is the named inventor on a number of patents and is not the named designer on any registered designs or design patents.

26. He was a good witness and Mr Silverleaf did not criticise him. Mr Sherman accepted in cross-examination that his primary area of expertise was functional rather than aesthetic design. Mr Sherman also accepted that he had never designed a tablet computer nor supervised anyone designing such a product, however I bear in mind

that he did have experience of the designs in the mobile handset and tablet computer market.

27. Mr Ball is an industrial designer and inventor. He has a degree in industrial design. He has worked for a range of companies since graduating in 1987 and has designed a wide range of products. These include a combined optical scanner for Symbol Technologies Inc., a portable fan for Black & Decker Inc., binoculars, a combined mop head with squeegee, a water filter, a mouthpiece for an inhaler for Glaxo Group Ltd and a toaster oven for Cuisinart (Conair Corp.). A particular product which Mr Ball has designed is a hand held computer called the Pepper Pad.

28. Mr Carr submitted that Mr Ball was not an impartial expert and in his evidence had set out to support Apple. Mr Carr took four points:

    i) Mr Ball said the Apple design was *strictly* rectangular rather than just generally rectangular. The submission was that when Mr Carr put to Mr Ball a statement to the contrary made by Apple to OHIM, rather than disagree with Apple, Mr Ball adopted a strained construction of the language used. When Mr Ball was confronted with Apple's words he struck me as being surprised by them. I think his evidence was a reflection of the genuineness of his view that the design is strictly rectangular. He deduced that Apple must have meant the same thing since he could not see how they could mean anything else. That is not an indication of bias or a lack of independence.

    ii) Mr Ball used a particular photograph of the TC1000 tablet computer which was said to exaggerate the differences between the TC1000 and the Apple design. When pressed Mr Ball could not remember why he had used the image he had. I am not surprised. I took his answer as genuine and not an attempt to cover up a sleight of hand. In my judgment there is nothing in this point.

    iii) It was submitted that Mr Ball was not prepared to agree readily with propositions which were plainly right. I think this largely arose because Mr Ball's evidence and Samsung's case put in cross-examination came from very different directions, which I will deal with below. Mr Ball often did not agree because he, as a designer concerned with aesthetics, genuinely did not regard them as plainly right.

    iv) In cross-examination Mr Ball referred to a feature of the Samsung tablets even though his evidence was not concerned with infringement. That did not betray a lack of independence. It would be fanciful to think that Mr Ball was unaware of the fundamental issue which this case is about and I am not surprised he mentioned that point in the context of the question he was asked.

29. Looking at Mr Ball's evidence overall and bearing in mind Mr Carr's four points, I thought Mr Ball was a fair witness doing his best to help the court and explain things from his point of view. I reject the submission that he was not impartial.

The law

30. Council Regulation (EC) No 6/2002 applies to this case. There is no point in quoting the Articles in this judgment. Article 3 defines "design". Articles 4, 5 and 6 relate to validity, a design must be new and have individual character. Article 8 excludes features dictated solely by function. Art 10 defines the scope of protection in a manner analogous to the definition of individual character in Art 6. A design will infringe if it does not produce on the informed user a different overall impression. In assessing the scope of protection, the degree of freedom of the designer in developing his design shall be taken into consideration. Recital 14 explains that overall impression depends on the existing design corpus, the nature of the product, the industrial sector and the degree of freedom of the designer.

The cases

General matters

31. I start by reminding myself that what really matters is what the court can see with its own eyes (per Jacob LJ in ***Dyson v Vax*** [2012] FSR 4 at paragraphs 8 and 9, emphasising a passage from his judgment in ***Procter & Gamble v Reckitt Benckiser*** [2008] ECDR 3 (paragraphs 3 and 4)). The most important things are the registered design, the accused object and the prior art and the most important thing about each of these is what they look like.

32. I also remind myself that while the exercise is a visual one, judgments have to be written and reasons necessarily expressed in words. However I must bear in mind that it is the overall impression which counts and not a verbalised list of features, see paragraph 46 of the judgment of Arnold J at first instance in ***Dyson v Vax*** [2010] FSR 39 and his reference there to the observations of Mann J in ***Rolawn Ltd v Turfmech Machinery Ltd*** [2008] EWHC 989 (Pat); [2008] R.P.C. 27 (paragraph 123, 125 and 126). As Mann J said, "*one of the problems with words is that it is hard to use them in this sphere in a way which avoids generalization. But what matters is visual appearance, and that is not really about generalities.*"

The informed user

33. The designs are assessed from the perspective of the informed user. The identity and attributes of the informed user have been discussed by the Court of Justice of the European Union in ***PepsiCo v Grupo Promer*** (C-281/10P) [2012] FSR 5 at paragraphs 53 to 59 and also in ***Grupo Promer v OHIM*** [2010] ECDR 7, (in the General Court from which ***PepsiCo*** was an appeal) and in ***Shenzhen Taiden v OHIM***, case T-153/08, 22 June 2010.

34. Samsung submitted that the following summary characterises the informed user. I accept it and have added cross-references to the cases mentioned:

    i) He (or she) is a user of the product in which the design is intended to be incorporated, not a designer, technical expert, manufacturer or seller (***PepsiCo*** paragraph 54 referring to ***Grupo Promer*** paragraph 62; ***Shenzen*** paragraph 46).

    ii) However, unlike the average consumer of trade mark law, he is particularly observant (***PepsiCo*** paragraph 53);

iii) He has knowledge of the design corpus and of the design features normally included in the designs existing in the sector concerned (***PepsiCo*** paragraph 59 and also paragraph 54 referring to ***Grupo Promer*** paragraph 62);

iv) He is interested in the products concerned and shows a relatively high degree of attention when he uses them (***PepsiCo*** paragraph 59);

v) He conducts a direct comparison of the designs in issue unless there are specific circumstances or the devices have certain characteristics which make it impractical or uncommon to do so (***PepsiCo*** paragraph 55).

35. I would add that the informed user neither (a) merely perceives the designs as a whole and does not analyse details, nor (b) observes in detail minimal differences which may exist (***PepsiCo*** paragraph 59).

Designs dictated solely by function

36. Article 8(1) excludes from protection features of appearance that are dictated solely by function. Since these proceedings have been expedited, Samsung does not pursue the allegation that any of the seven features of the design in suit as defined by Apple are dictated solely by function.

37. The correct interpretation of Art 8(1) was considered by Arnold J in ***Dyson***. The learned judge held that the approach decided upon in ***Lindner Recyclingtech GmbH v Franssons Verkstäder AB*** (Case R 690/2007-3 [2010] ECRD 1) by the OHIM Third Board of Appeal, should be followed and that the different approach endorsed by the Court of Appeal in ***Landor & Hawa v Azure*** [2007] FSR 9 was obiter and should not be followed. The ***Landor & Hawa*** approach, also called the "*multiplicity of forms*" theory, is that a design is not dictated solely by function if it can be shown that the same technical function can be achieved by another design. The alternative approach, which comes from ***Amp v Utilux*** [1972] RPC 103 (House of Lords) is that a product's configuration is solely dictated by its technical function if every feature of the design was determined by technical considerations. ***Lindner*** summarised the position as follows:

> "36. It follows from the above that art. 8(1) CDR denies protection to those features of a product's appearance that were chosen exclusively for the purpose of designing a product that performs its function, as opposed to features that were chosen, at least to some degree, for the purpose of enhancing the product's visual appearance. It goes without saying that these matters must be assessed objectively: it is not necessary to determine what actually went on in the designer's mind when the design was being developed. The matter must be assessed from the standpoint of a reasonable observer who looks at the design and asks himself whether anything other than purely functional considerations could have been relevant when a specific feature was chosen."

38. Apple also submitted that OHIM's preference in ***Lindner*** for the ***Amp v Utilux*** approach can be seen to have become fully entrenched at OHIM (see ***ACV***

Manufacturing NV v AIC SA [2012] ECDR 13 at para 14). It was common ground before me that Arnold J's conclusion was correct. In any case I agree with Arnold J.

39. Since Samsung is not pursuing the Art 8(1) allegation against any of the seven features of the design in suit as defined by Apple, one might ask what the relevance of this issue is. Samsung submits that there is very limited design freedom and that the interpretation of Art 8(1) is relevant to design freedom. I will address design freedom next.

Design freedom

40. In ***Grupo Promer*** the General Court addressed design freedom in paragraphs 67-70. In ***Dyson*** Arnold J summarised that passage from ***Grupo Promer*** as follows:

> "design freedom may be constrained by (i) the technical function of the product or an element thereof, (ii) the need to incorporate features common to such products and/or (iii) economic considerations (e. g. the need for the item to be inexpensive)."

41. Category (i) is common ground. Apple submitted that categories (ii) and (iii) are very much open to doubt but I have not found it necessary to explore that question on the facts of this case.

Design Corpus

42. Recital 14 indicates that the overall impression produced on the informed user by a design depends on the "existing design corpus" taking into consideration the nature of the product to which the design is applied, the industrial sector to which it belongs and the degree of freedom of the designer in developing the design.

43. Samsung's case on the facts is that the design corpus in this case as at 24 May 2004 is represented by the designs making up Schedule A to its Particulars of Claim. This is a list of 51 designs. The first item on the list is an "Etch-A-Sketch". This is a child's toy which has been available since the 1960s. It is plainly not a handheld or tablet computer, nor even a computer monitor nor electronic photoframe. It has no electronic screen at all.

44. The term "handheld computer" is the Art 36(2) indication of the product in the Apple registered design. Whatever the correct definition of the relevant product is in relation to the Apple registered design, I would be surprised if it included an Etch-A-Sketch.

45. Samsung submitted that whilst Art 36(2) requires the applicant for registration to indicate the products in which the design is intended to be incorporated, the Art 36(2) indication cannot be used to limit the prior art designs that make up the design corpus. That is because Art 36(6) states that the indication does not affect the scope of protection of the design as such and Samsung cited ***Green Lane Products v PMS International*** [2008] F.S.R 28, at paragraph 79 for that proposition. This is a narrow submission about the effect of the Art 36(2) indication and I accept it.

46. There is however a wider point which I raised with Mr Carr in argument. Also in Schedule A and apart from the Etch-A-Sketch, are various designs which appear to be intended as computer monitors rather than handheld computers. While the Etch-A-Sketch did not play a major role in this case, a distinction, if there is one, between computer monitors and handheld computers could be significant. The design constraints applicable to an Etch-A-Sketch are plainly different from those applicable to a tablet computer and even the design constraints applicable to a computer monitor may or may not be the same as those applicable to a tablet computer.

47. However I did not hear detailed argument on this point and Apple did not dispute that the design corpus in this case included all the items in Schedule A (save for one which post-dated the design). The case has been argued on that footing and I will work on that basis. That means that no issue of law arises before me on content of the design corpus and I do not need to consider the law on that question.

Effect of differences between the registered design and the design corpus

48. A design should receive a broader scope of protection where the registered design is markedly different to the design corpus and a narrower scope of protection where it differs only slightly from the design corpus. Arnold J explained in ***Dyson*** paragraph 39-40 that this proposition follows from Recital 14 of the Regulation, the judgment of the General Court in ***Grupo Promer*** (para 72) and the Court of Appeal in ***Procter & Gamble*** (para 35(iii)). I agree.

49. At paragraph 41 of ***Dyson***, Arnold J expressed a qualification to the idea that a markedly different design always gets a broad scope of protection. If the design is based on new technology which brings new design constraints then the differences between the design and the existing corpus based on old technology might have little relevance when it comes to comparing a subsequent design based on the new technology with the registered design. Apple submitted that this was correct. I agree.

50. Apple also submitted that the point could be taken further so that changes in design features which the informed user will recognise as having been enabled by technological advance - for example where it becomes possible to make a product bigger or smaller - will be accorded little significance by the informed user who will see them as simply an aspect of technological development. I do not accept Apple's submission. The argument would mean that a Community registered design would expand in scope over time as technology advanced.

51. Apple drew my attention to paragraph 74 of the judgment of the General Court in ***Grupo Promer*** in which the Court agreed with the ruling of the Board of Appeal that:

> "as regards the assessment of the overall impression produced by the designs at issue on the informed user, the latter will automatically disregard elements 'that are totally banal and common to all examples of the type of product in issue' and will concentrate on features 'that are arbitrary or different from the norm'."

52. Apple submitted that this showed that a design feature need not be unique to be relevant. It is only disregarded if it is totally banal. Thus, Apple submitted, for a

feature to be relevant it merely needs to differ from the norm and by logical extension, the greater the difference from the norm, the more weight to be attached to it. The point of this submission is to challenge the manner in which Apple contended Samsung was advancing its case. I do not think Apple's characterisation of Samsung's case was entirely accurate but in any case I accept Apple's submission on the law at least as follows. The degree to which a feature is common in the design corpus is a relevant consideration. At one extreme will be a unique feature not in the prior art at all, at the other extreme will be a banal feature found in every example of the type. In between there will be features which are fairly common but not ubiquitous or quite rare but not unheard of. These considerations go to the weight to be attached to the feature, always bearing in mind that the issue is all about what the items look like and that the appearance of features falling within a given descriptive phrase may well vary.

The correct approach, overall

53. The exercise must start with identifying the informed user and the existing design corpus. The overall impression is something produced on the informed user.

54. Although the outcome depends on overall impression, as a practical matter the design must be broken down into features. Each feature needs to be considered in order to give it appropriate significance or weight. Each feature needs to be considered in three respects. A feature dictated solely by function is to be disregarded. As long as it is not disregarded, each feature must be considered against the design corpus and it must be considered from the point of view of design freedom.

55. Since this case is concerned with infringement only and not validity, the list of features is a list of similarities said to exist between the design and the alleged infringement. Aside from considering similarities, the differences between the design and the alleged infringement also need to be addressed and weighted. For all the similarities and differences, the weighting exercise is concerned with assessing the significance of the similarity to the informed user. Things which look the same because all the products in the class look that way do not excite the informed user's interest to the same extent as unusual features.

56. Taking into account the similarities and differences, appropriately weighted, the court can decide whether the alleged infringement produces a different overall impression on the informed user from that produced by the registered design.

57. The point of design protection must be to reward and encourage good product design by protecting the skill, creativity and labour of product designers. This effort is different from the work of artists. The difference between a work of art and a work of design is that design is concerned with both form and function. However design law is not seeking to reward advances in function. That is the sphere of patents. Function imposes constraints on a designer's freedom which do not apply to an artist. Things which look the same because they do the same thing are not examples of infringement of design right.

58. How similar does the alleged infringement have to be to infringe? Community design rights are not simply concerned with anti-counterfeiting. One could imagine a design registration system which was intended only to allow for protection against

counterfeits. In that system only identical or nearly identical products would infringe. The test of "different overall impression" is clearly wider than that. The scope of protection of a Community registered design clearly can include products which can be distinguished to some degree from the registration. On the other hand the fact that the informed user is particularly observant and the fact that designs will often be considered side by side are both clearly intended to narrow the scope of design protection. Although no doubt minute scrutiny by the informed user is not the right approach, attention to detail matters.

59. Finally it bears recording that it was common ground before me that copying is irrelevant to the issue of infringement of a Community registered design. Samsung submitted and Apple did not disagree that considering whether a product was produced by copying an article made to the registered design was irrelevant.

The approach of Mr Sherman vs the approach of Mr Ball

60. Now that I have dealt with the applicable law, I can address the difference between the approach in evidence of the two experts.

61. For Samsung, Mr Sherman set out to consider whether or not the seven features making up Apple's list of similarities were dictated solely by function. He did so by explaining technical or functional reasons for each of these features. He took each feature in turn and explained its functional advantages. Mr Silverleaf submitted that Mr Sherman had no interest in aesthetics and was looking at the matter simply as a functional engineer. His mindset was function. Mr Silverleaf submitted that this was not helpful evidence on design freedom.

62. For Apple, Mr Ball set out to address design freedom and to deal with constraints on that freedom imposed by technical function etc. His view was that, for each of the features in issue, there existed a wide range of options available to the designer. He also addressed a list of features which Samsung contended were solely dictated by technical function. His view was that although function would play a part in the design, it was often a small part and there were alternative ways of designing all of those features.

63. Mr Carr criticised Mr Ball's evidence as not focussed on answering the correct question. The argument is that Mr Ball should have been giving evidence about technical restrictions on design freedom and so his views that other shapes were possible and that the design was "sublime" were not to the point and/or were matters for the court.

64. This case is not concerned with the validity of the registered design. That is a matter for OHIM in due course. I am concerned with infringement. I have to decide whether the Samsung tablets produce a different overall impression on the informed user from that produced by the Apple design. In order to assess that, part of the task is to go through the list of features and similarities relied on "*to consider to what extent they had technical significance and thus affected design freedom*" (per Jacob LJ in ***Dyson*** at paragraph 22). In order to perform that task I need to know whether and to what extent there may be technical reasons for certain features. The issue is not simply a binary question of whether a given feature is dictated solely by function or not. Samsung accept before me that none of the seven features as Apple articulate them

are dictated *solely* by function so as to be disregarded completely. The issue is one of weight. For a given feature it is relevant to know if there are technical considerations relevant to it (Mr Sherman). But when a feature can represent the product of a mixture of technical considerations and aesthetics (leaving aside economic or other factors), it is also relevant to know if there are alternatives (Mr Ball). The balance of those factors is a key part of the task I have to perform. Both witnesses evidence is of assistance in addressing that question albeit that they approach the matter from opposite directions.

Assessment

65. Community design infringement cases are supposed to be simple. The material presented in this case is complex and detailed. Aside from the evidence of the experts, there were lengthy skeleton arguments and schedules addressing whether various features were present in the design corpus. Given the commercial importance of this dispute I do not criticise the parties for putting it forward in this way. In deference to that importance I have gone through the material in full detail. The end result is a judgment much longer than should be necessary in a case about infringement of a Community design right.

The informed user

66. It was common ground that the informed user is a user of handheld (tablet) computers.

The existing design corpus

67. Samsung's Schedule A represented its case on the design corpus. Subject to a point on item 51, Apple accepted it with some additions in the evidence of Mr Ball. It is not possible to attach images of the whole design corpus to this judgment.

68. The products making up the design corpus are not purely functional designs like engine parts. Although the informed user in this case will be a person interested in the functioning of the products concerned, how they work and their performance, the informed user in this case is someone interested in the aesthetics. How a product looks matters to the informed user.

69. I find that the informed user in this case will consider the products side by side. These products are sold to the public in shops and on websites. There is nothing in this case to make a side by side comparison impractical or uncommon.

70. Considering the design corpus generally, Mr Sherman explained that the idea of tablet computers has existed for a long time, and pointed out they had been imagined in science fiction, referring to Star Trek (from 1966 onwards) and 2001: A Space Odyssey (Stanley Kubrick, 1968). Item 2 in Schedule A is a display device from 2001: A Space Odyssey. Mr Sherman's view was that optimal design principles for tablet computers had been commonly understood for a long time and by 2004 it was understood that any tablet computer should offer unfettered views of electronic media by means of a large display screen and that the screen would be the main element in the design of any tablet. I accept that evidence.

71. Mr Sherman also explained that there has long been a general tendency to try to ensure that mobile electronic devices are as small and light as possible subject to technical considerations. Mr Ball did not disagree and extended that point by explaining that in his view, since 2004, due to the development of small components it is possible to make thinner products. I accept this evidence of both Mr Sherman and Mr Ball.

Particular designs in the design corpus

72. The parties did not agree about the correct interpretation of certain documents in the design corpus (Schedule A to the Particulars of Claim). It is convenient to deal with those issues at this stage.

Stevenson

73. Stevenson (Item 25 in Schedule A) is a Canadian design registration No. 89155 for a data display unit. The relevant figures are below:

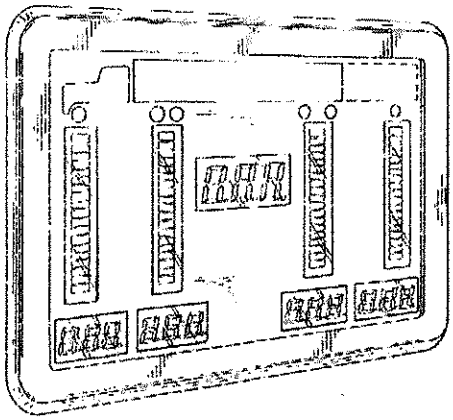


FIG. 1

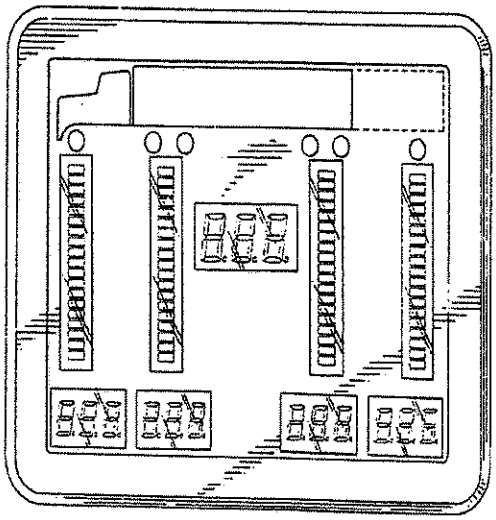


FIG. 2

FIG. 3

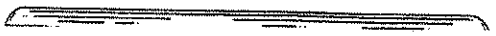


FIG. 4

74. The parties did not agree which way round these images should be understood. Apple submitted the curves are on the front of the unit curving away to a crisp edge at the rear. Samsung submitted the curves are on the rear side, curving towards a crisp edge at the front. If Samsung is correct the shape of the object overall is very similar to the Apple design. In my judgment Apple are right. Looking at the figures as a whole, to my eye figure 2 shows the view if one was looking at figure 3 from the left hand side as it appears above. The curves on the edges are visible in fig 1. If Samsung was right, fig 4 would be upside down. Although fig 4 is not complete in the images provided by the parties, enough of it is visible to see the point.

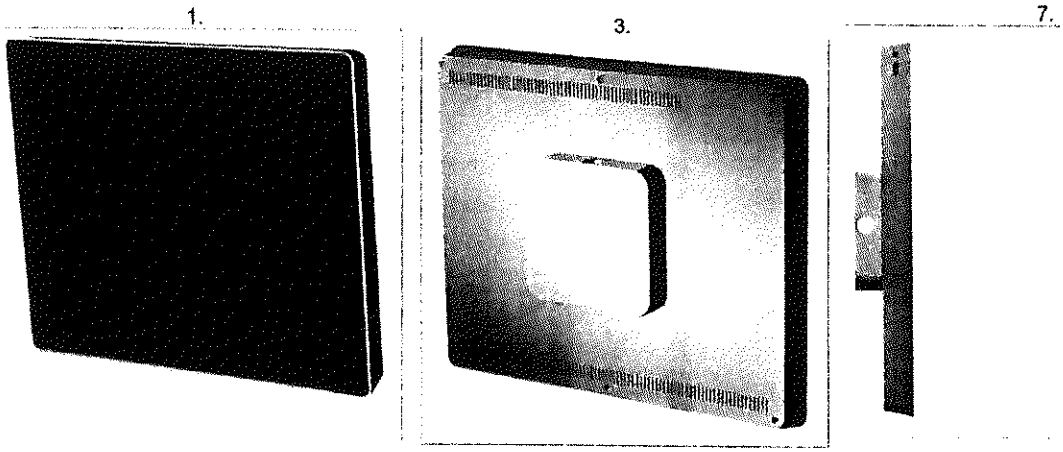
75. Before me Apple also submitted that Stevenson shows a group of small displays rather than a single display. I reject that interpretation. In my judgment Stevenson shows a single display screen. It has a border, visible in fig 1 and fig 2. The screen and border are under a flat transparent surface which reaches all the way to the rim. The rim is curved towards the back.

76. In the judgment of the Dutch Court of Appeal in the Hague dated 24th January 2012 Stevenson is referred to there as Design '155 (see paragraphs 6.17 to 6.20). I believe those passages are based on Samsung's interpretation of Stevenson which it appears Apple did not dispute in that court. The Dutch court held that this prior design had what were called features F1 and F2. Together those are "a predominantly flat rear which bends at the sides to form the very thin edge mentioned in C [*i.e. the rim around the front face*]". The Dutch court held that Stevenson has a large number of elements of Apple's design. I would agree with that if Stevenson is understood as Samsung submit. However I reject Samsung's interpretation of Stevenson. I will deal with Stevenson's relationship to the Apple design below along with the rest of the design corpus.

Ozolins and the Bloombergs

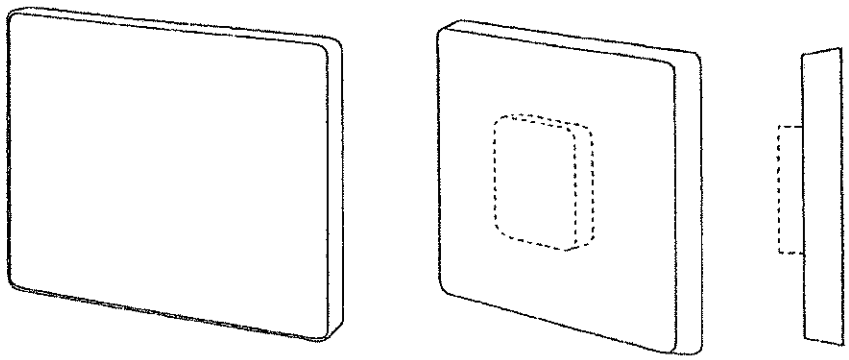
77. Three notable items in Schedule A are Ozolins (item 50), Bloomberg 1 (item 43) and Bloomberg 2 (item 42). There may be a relationship between them but I will consider each one separately.

78. Bloomberg 2 (item 42) is a Community registered design for a computer screen or computer monitor registered in June 2003. Front (1), back (3) and edge (7) views of Bloomberg 2 are:



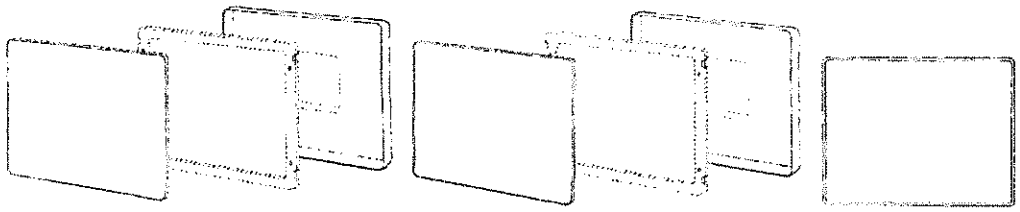
79. Bloomberg 1 (item 43) is a German registered design (Geschmacksmuster) registered in June 2003. The product is described as a "flat screen without frame". Front (fig 1), back (fig 2) and side (fig 6) views of Bloomberg 1 are:

FIG. 1 FIG. 2 FIG. 6



80. Further figures from the Bloomberg 1 registration have a bearing on the issues. Smaller versions of them are:

FIG. 3 FIG. 3a FIG. 4



81. Apple submitted that it was unclear whether Bloomberg 1 had a rim around the screen or not. This involved a close analysis of the figures, consideration of an argument about the oddities in some of the figures (particularly figs 1, 3 and fig 3a) and reference to the product as a screen "without frame". I acknowledge the oddities in the drawings but taken together I find that the front face of Bloomberg 1 has a thin rim around the edge. The rim is clearly shown in figure 4, the frontal view, and I believe the rim is shown at the bottom and left side of the drawing in figure 1. Fig 1 has the oddity in that the rim has not been drawn on the top or right hand side but that is just a minor drawing error. For what it is worth I interpret "without a frame" to mean without the sort of plastic frame which one often finds around the front of display screens, i.e. without a bezel.

82. The rear of Bloomberg 1 has a unit mounted on the back which is obviously for attachment to a stand (see Figs 2 and 6). The unit is drawn in dotted lines and I am sure that in this context it is intended to indicate that as a matter of design right, that aspect of the design is not claimed. However as an item in the design corpus I reject the idea that this means one can regard Bloomberg 1 as a disclosure of a different design with a pure flat blank back wall. It is not. The article shown has a rear mounted rectangular unit. Whatever legal rights may or may not be claimed, in my

judgment what is disclosed by Bloomberg 1 is a device with a rear broadly rectangular unit. Even if the informed user is taken to pay attention to the legal significance of the dotted lines, the most that can be said is that they are an indication of design freedom in this area. So any other shape could be placed there. That does not mean the document actually discloses an article with a completely flat back. Far from it. In patent law it is clear that a general teaching in the prior art does not make available to the public a specific instance within that generality, as a matter of disclosure. So "fixing means" does not disclose a nail. To hold otherwise is capable of being unfair to inventors. In my judgment the same principle must apply to designs. Even if I take the dotted box of Bloomberg 1 as a general disclosure in the sense that it indicates the designer could put anything in that region of the design, it does not disclose any other particular design. Otherwise it could be taken as a disclosure of anything – for example a hemispherical rear unit. That would be absurd. It does not disclose a completely flat backed device either.

83. Ozolins (item 50) is a United States patent application published in March 2004. It is entitled "Bezel-less Electronic Display". It is a patent (sometimes called a "utility" patent) rather than a design patent. Apple submitted that I should ignore Ozolins altogether because it is a patent, is not concerned with the design aspects of the article and would be understood by the informed user as such. I reject that. The fact it is a patent is irrelevant. Ozolins contains depictions of products and the informed user would see that.

84. Figure 1 of Ozolins is:

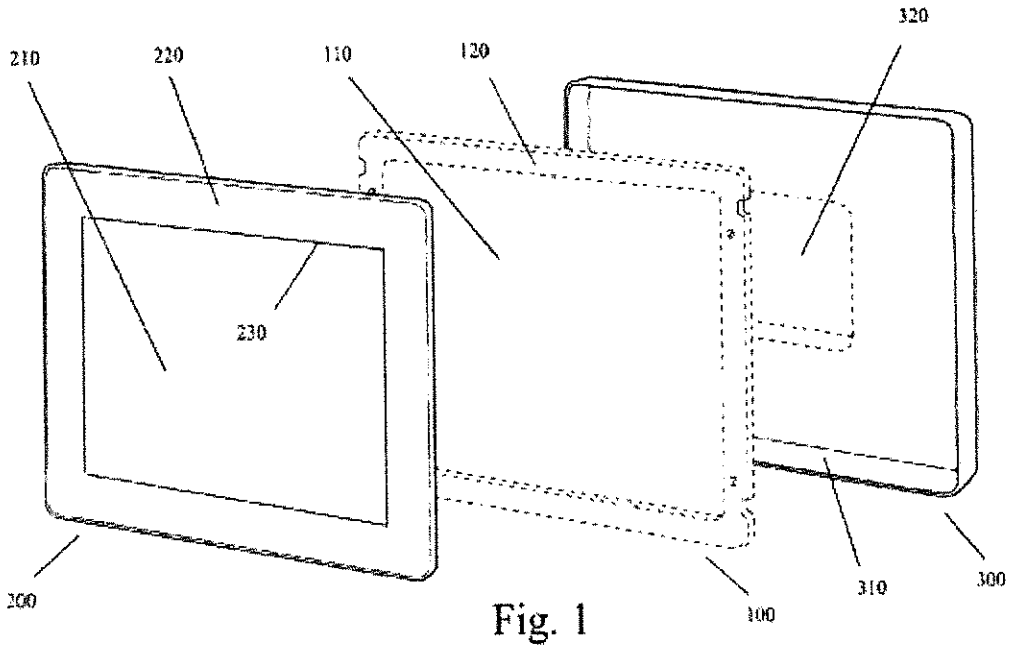


Fig. 1

85. Although schematic, this would be understood to show a display with a visible border (at least when switched on) and also a rim all around the front face. The front cover 200 can be a glass sheet with a transparent part 210 and region 220 which can be painted with opaque paint. The appearance of region 220 can be made to match the appearance of display screen 110 when switched off [Ozolins paragraph 0037].

86. Figure 5 is clearly intended to represent a fair reflection of what the Ozolins screen would look like in practice, as follows:

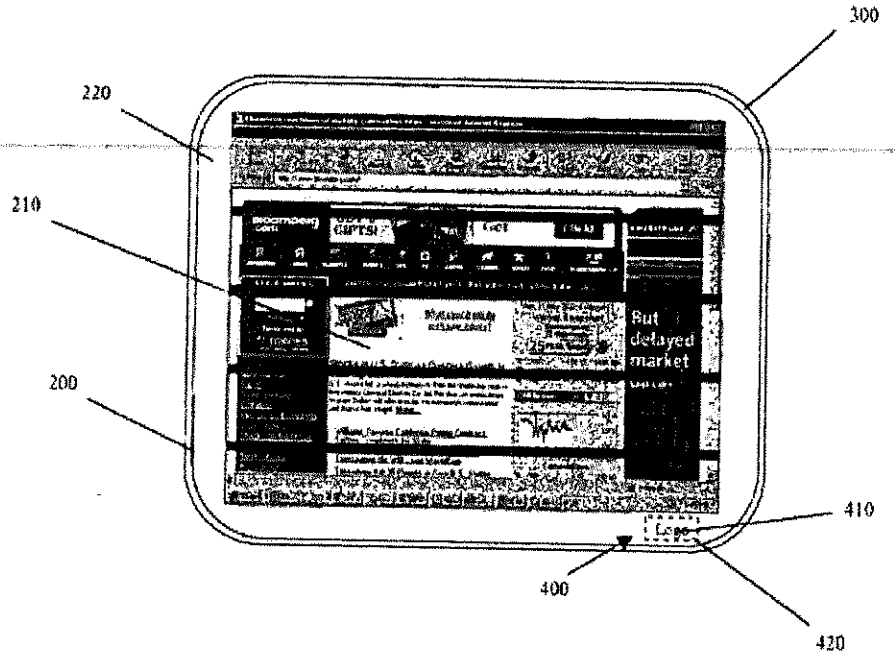


Fig. 5

87. The only minor element in which Fig 5 differs from Fig 1 is in the corners. The rounding of the corners in Fig 5 is larger and the screen border ends up thinner at the corners than in Fig 1. Figs 4 and 5 of Ozolins (I will not reproduce them) show that the rim could project forward to the front (fig 5) or the transparent glass cover could go all the way to the edge (fig 4).

88. Figure 9 shows an exploded perspective view of the display unit:

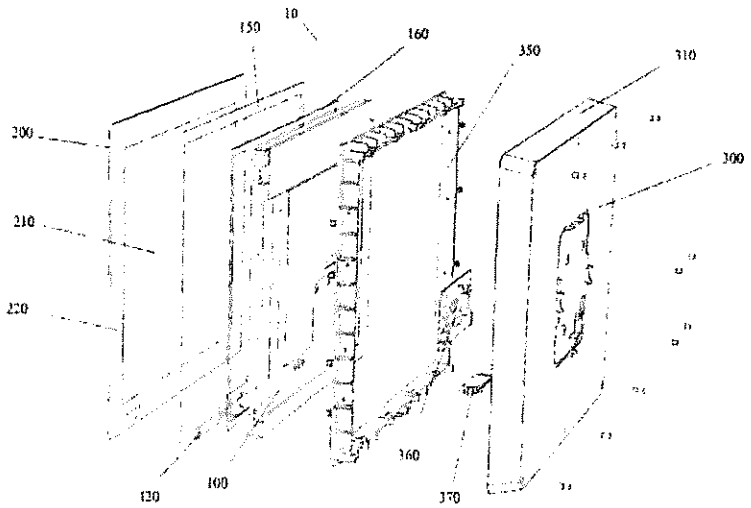


Fig. 9

89. A point arising on Ozolins concerns the rear of the housing. As far as the rear is concerned, figure 1 is more generalised than figure 9. Figure 1 has a rectangular region 320 marked on the rear unit 300. The document explains that:

> "An opening 320 at the rear of enclosure 300 may be provided so as to allow access to the rear of electronic display device 100, where, for example, input and output connectors may be located."

90. A person putting Ozolins into practice can clearly determine for themselves how to attach input and output cables and how to attach a rear bracket. The German court held that Ozolins was thus a disclosure of a shape with a "closed planar back" [p32 of the translation], in other words an article with a substantially flat rear surface. I respectfully disagree. Ozolins clearly does not care how the cables or brackets are attached but there will always be wires coming in or out and some sort of bracket fixings. There is no suggestion they are unnecessary. Simply because the text quoted above uses the word "may" does not mean that Ozolins is describing any design other than one with the cables and brackets fitted at the back. It may well be technically obvious that other ways of configuring Ozolins are possible but that cannot be relevant. The issue must be what, as a matter of design (i.e. the appearance of the whole or a part of a product, Art3(a)), is actually disclosed by Ozolins. I believe it is the exercise of hindsight to see a disclosure of a design with a substantially flat rear surface in this document.

The German and Dutch decisions

91. These are Community wide rights and harmony between courts of different member states on issues like this is very desirable. However I find myself in a position in which I respectfully disagree with the assessment of the Dutch Court of Appeal on Stevenson and the German Court of Appeal on Ozolins. These documents form important parts of the design corpus. Ozolins played a significant role in both decisions, especially the German decision, and Stevenson was important in the Dutch decision. Given these areas of disagreement and given their preliminary character, I will not place reliance on the German or Dutch decisions nor will I make this judgment longer than it already is by analysing those decisions in detail.

Assessment of the features relied on

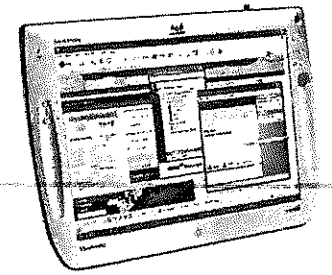
(i) A rectangular, biaxially symmetrical slab with four evenly, slightly rounded corners;

(i)(a) Design freedom

92. This feature has two elements - the "*rectangular, biaxially symmetrical slab*" and the "*four evenly, slightly rounded corners*". In relation to design freedom I will address them separately.

93. As to the first element, Mr Sherman's view was that display devices are historically rectangular and biaxially symmetrical. There is no doubt that display screens are rectangular for functional reasons, but although the screen itself is strictly rectangular in shape, designers have freedom as regards the shape of the device itself. Mr Ball

illustrated this point with a number of examples. I will use one, the Viewsonic Airpanel V150, February 2003:



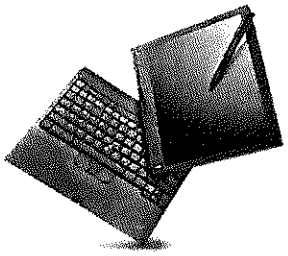
94. Although the precisely rectangular shape of the screen has led the designer of this device to create a broadly rectangular product, the article has curved sides and is not symmetrical on two axes. It has a mirror plane of symmetry running vertically but no mirror plane of symmetry running horizontally.

95. A broadly rectangular shape is to a large extent driven by the function of using a rectangular screen but designers have a fair degree of design freedom and an important aspect of the exercise of that design freedom relates to aesthetics. Designers choose the overall shape to enhance the appearance of the article.

96. As to the second element, a significant debate at trial related to rounded corners. Mr Sherman's evidence was that rounded corners are preferred for manufacturing reasons (it is easier to make them, especially by plastics injection moulding) and for ergonomic reasons (they are comfortable, safe and easy to use). He also explained that a large degree of rounding will reduce the display size or increase the size of the device and risks wasting volume. The latter is important because these devices are made as thin as possible and a smaller volume means less room for components.

97. In cross-examination Mr Sherman accepted that injection moulding could produce corners with a radius 1.5x the thickness of the material. So with a plastic housing 0.8mm thick, the corner radius could be 1.2mm. To my eye such a corner would not be a rounded corner like the ones in the Apple design. That sort of corner would look fairly sharp to the informed user.

98. Mr Ball did not accept that rounded corners were chosen for purely functional reasons. He pointed to articles with crisp corners such as items 20 and 21 of Schedule A. Some of the corners on these articles are quite sharp. He also referred to the IBM ThinkPad notebook computer from 2005 and an IBM ThinkPad X41 tablet from 2005 which has edges which appear sharp. The tablet is:

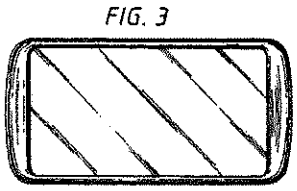


99. I doubt any designer would design a hand held display device with flat sharp precisely 90° corners. There is a degree of corner rounding in all these designs and to that extent the design freedom is limited somewhat. However although some degree of rounding of corners is ubiquitous, the degree of rounding differs substantially from product to product. The considerations of volume, display size and ergonomics are trade offs which illustrate design choices the designer has to make. The appearance of the article plays an important part of that process of choice. Designers wanting a clean crisp appearance can choose quite sharp corners like the IBM ThinkPad. Designers can choose a highly rounded shape if they wish (see the Chumby below).

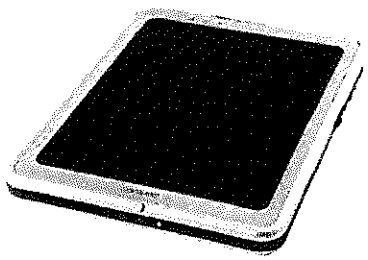
(i)(b) Occurrence in the design corpus

100. In the design corpus as a whole, a good number of devices are symmetrical about both axes but very many are not. A fairly common shape, illustrated by the Gridpad (item 6) and the Knight Ridder tablet (item 17), involves having a larger distance from the bottom of the screen to the bottom edge than the distance between the top edge of the screen to the top edge. Such shapes do not have a horizontal plane of symmetry. Most products have a vertical axis of symmetry although some do not.

101. However there are many designs in the design corpus which can be described as "a rectangular, biaxially symmetrical slab with four evenly, slightly rounded corners". Examples include Showbox (Item 10), item 12, Stevenson, TC1000 (item 40), Bloomberg 1, Bloomberg 2, Ozolins and Flatron (item 49). These all fall within the description as a matter of words, but to my eye they do not all look identical to the Apple design. Showbox (10) has a much larger rim. Canon (12) is biaxially symmetrical but is not strictly rectangular and has no border under the glass. TC1000 has a thicker rim and a border feature with two parts, the silvery border visible below and a black border around the screen. Bloomberg 1, Bloomberg 2, Ozolins and Flatron (item 49) all have rounded corners virtually identical to the Apple design but figure 5 of Ozolins has much more rounded corners than the Apple design. Images of Flatron and Showbox appear in this judgment below. Canon (item 12) and TC1000 (item 40) look like this:



Canon



TC1000

102. Although the informed user would recognise that feature (i) is present in the design corpus, I do not accept it is so common as to be regarded as banal or commonplace.

(i)(c) Samsung Tablets' similarity to this feature

103. All three tablets are the same as far as feature (i) is concerned. They are all rectangular, biaxially symmetrical slabs with four evenly, slightly rounded corners. Not only that, but they all look virtually identical to the Apple design in this respect.

There are small differences in aspect ratio but they are very minor. The rounded corners are a tiny bit larger than the Apple design but the difference is trivial. The rounding is not as large as for example can be see in Ozolins Fig 5.

(i)(d) Overall significance of "a rectangular, biaxially symmetrical slab with four evenly, slightly rounded corners"

104. The rectangular display screen is totally banal and determined solely by function. Apart from that there are some other design constraints applicable to this feature but they do not account for the identity between the Samsung tablets and the Apple design. These devices do not need to have biaxial symmetry nor be strictly rectangular. Nevertheless the significance of this identity is reduced by the fact that there are other designs in the design corpus which are very similar too.

(ii) A flat transparent surface without any ornamentation covering the entire front face of the device up to the rim;

(ii)(a) Design freedom

105. Mr Sherman explained that although older display screens using cathode ray tubes were not flat, by the 1990s large flat display screens such as LCD screens became available. Plainly the surface of the screen has to be transparent to work at all. Although there are today LCD screens with curved surfaces, they are rare. None of this was controversial.

106. The issue is concerned not with the display screen itself but with the area around it. The Apple design shows that the transparent surface covers the entire front cover of the device up to the rim. Mr Ball's view was that many devices in 2004 had a bezel, a raised frame or border around the display which allowed the user to hold the product without touching the surface. An example is the GridPad (item 6) and another is Knight Ridder (item 17). The Knight Ridder tablet looks like this:

107. A raised border also protects the screen somewhat. If the article is placed screen downwards, the display may not be scratched. Mr Sherman explained that the change from resistive touch screen technology to capacitive touch screen technology allowed the bezel necessary to protect the soft resistive touch screen to be removed. As a result the top surface could be made flush with the display housing and a tough "gorilla glass" used as a cover. Mr Ball's view was the capacitive touch screen technology had not developed in 2004.

108. As a practical matter all displays have a border feature of some sort and to that extent design freedom is constrained. The designer has to choose what sort of border feature(s) to have and aesthetics play a part in that choice. There was no constraint

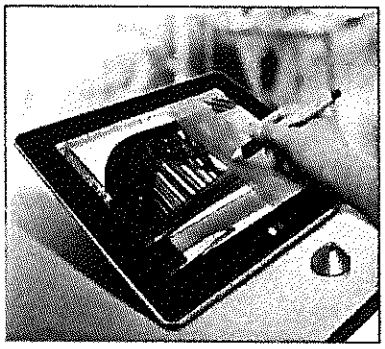
demanding that the front have no bezel. It was possible to do it that way but no designer was driven to do this by functional constraints.

109. Mr Sherman explained that touch screen technology allowed for the removal of physical keys and buttons on the front of the device. This allowed the front to become a surface without ornamentation. While that is true to a certain extent in my view the design corpus shows that designers in fact often chose to retain some physical keys and buttons. Many of the touch screen devices in schedule A did not have front surfaces devoid of features. The GridPad (item 6) has buttons on the top border, a slot for the pen on the left and ornamental ridges running down the right hand side. The border of the AIPTEK device (item 35) has a pen holder. The border of the Tatung Go Tablet PC (Item 45) has all kinds of features visible on it – what look like buttons, indicator lights and speaker grilles. The TC1000 (item 40) had indicator lights around the screen.

110. As Mr Sherman explained, reducing or eliminating physical keys or buttons allows for a more compact and therefore portable device and reduces number and complexity of hardware elements likely to break or malfunction in manufacture. I find that the degree of ornamentation on the front surface of the device is a matter of the designer choice. Like many other features in this case, there are functional trade offs to consider but there are also aesthetic considerations. Un-ornamented front surfaces of display devices existed but so too did front surfaces carrying features of one sort or another which were the result of the designer exercising their freedom in a different way.

(ii)(b) Occurrence in the design corpus

111. There are designs in the design corpus with feature (ii) such as Showbox (10), Bloomberg 1, Bloomberg 2, Ozolins, and Flatron. Not only do they fall within the description as a matter of words, to my eye Bloomberg 1 and 2, Ozolins and Flatron all look very similar to the Apple design as far as this feature is concerned. As regards ornamentation, the Flatron has a little LG logo at the bottom:



112. However although the informed user would recognise that feature (ii) is present in the design corpus, I do not accept it is so common as to be regarded as banal or commonplace. It is less common than feature (i). To illustrate the point there are examples from the design corpus which have feature (i) but not feature (ii) such as TC1000. Another example of variation around this theme is Stevenson, which has a

flat transparent surface out to the rim but the front of the unit is then curved at the edges away from the screen.

(ii)(c) Samsung Tablets' similarity to this feature

113. All three tablets are the same as far as feature (ii) is concerned. The front of each Samsung tablet has a tiny speaker grille and a tiny camera hole near the top edge and the name Samsung along the bottom edge.

114. The very low degree of ornamentation is notable. However a difference is the clearly visible camera hole, speaker grille and the name Samsung on the front face. Apple submitted that the presence of branding was irrelevant and cited a copy in Spanish of an OHIM decision dated 8th November 2006 between ***Isogona S.L v Centrex S.A.U***, case R 216/2005-3. I was provided with a translation of part of one sentence in paragraph 26. As I read it the point in that case was not approached as a matter of principle, it was concerned with the facts. In that case the branding did not form part of the design. However in the case before me, the unornamented nature of the front face is a significant aspect of the Apple design. The Samsung design is not unornamented. It is like the LG Flatron. I find that the presence of writing on the front of the tablet is a feature which the informed user will notice (as well as the grille and camera hole). The fact that the writing happens to be a trade mark is irrelevant. It is ornamentation of some sort. The extent to which the writing gives the tablet an orientation is addressed below.

115. The Samsung tablets look very close to the Apple design as far as this feature is concerned but they are not absolutely identical as a result of a small degree of ornamentation.

(ii)(d) Overall significance of this feature

116. There are modest design constraints applicable to this feature but they do not account for the close similarity between the Samsung tablets and the Apple design. Setting aside the design corpus, the close similarity between Apple and Samsung would be very striking. However the design corpus contains some identical and very close designs albeit that many other more ornamented design are available too, as well as designs incorporating a bezel. Overall the informed user's knowledge of the design corpus reduces the significance of this similarity somewhat.

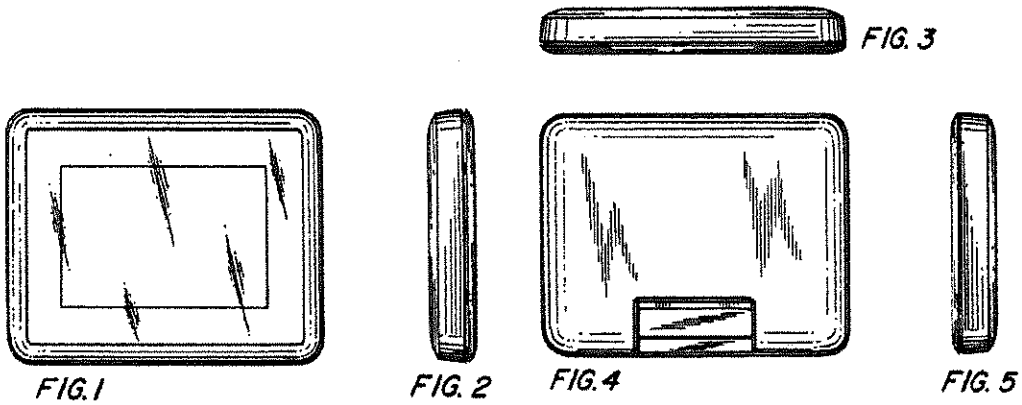
(iii) A very thin rim of constant width, surrounding and flush with the front transparent surface;

(iii)(a) Design freedom

117. Mr Sherman explained that there were a limited number of manufacturing options to build a tablet computer. One option was to use the bezel so that the frame surrounds and overlaps the screen. Another was to use an encapsulation type of construction which has no bezel. In that way the device is made from two cases with all elements of the front of the device part of the top case. His view was that the Apple design used this second method. When using this method a very thin rim is natural. The case walls are made as thin as possible to save space, weight and cost. Mr Sherman explained that it is easier to manufacture a rim of constant width. It makes sense to

bring the rim to the front of the device rather than terminate below the transparent front surface since the latter exposes the surface to the environment. A flush rim also prevents dirt accumulating in corners.

118. Mr Ball's view was that there was a high degree of design freedom in this respect. The front surface could be designed to curve around the corners as sides as in Stevenson (item 25). Mr Ball said this meant there was no rim. I do not accept there is no rim in Stevenson but I do accept that the appearance of the rim in Stevenson is quite different from that shown in the Apple design. Mr Ball also referred to item 12, with a rim of varying width, and to item 40 (the TC1000). The TC1000 demonstrates that a thin rim is by no means necessary. There was an example of the TC1000 available in court. Looked at in plan view, the same view as image 0001.3, the rim of the TC1000 is quite wide and is very much wider than the rim in the Apple design. Another example is the Showbox (item 10) which has a very similar front face design as far as features (i) and (ii) are concerned but a much thicker rim than the Apple design:



119. As before, this aspect of the design is the product of trade offs by the designer which include functional considerations but also include aesthetics. The designer can choose to have a flush rim or a bezel, can choose the rim thickness and whether it is constant around the device. Within a general overall constraint, the designer has significant aesthetic design freedom.

(iii)(b) Occurrence in the design corpus

120. There are designs in the design corpus with feature (iii) such as Bloomberg 1, Bloomberg 2, Ozolins, and Flatron which are visually identical to the Apple design, albeit differences arise in relation to other features. However although the informed user would recognise that feature (iii) is present in the design corpus, I do not accept it is so common as to be regarded as banal or commonplace. Many other options are available.

(iii)(c) Samsung Tablets' similarity to this feature

121. All three tablets are the same as far as feature (iii) is concerned. Although the sides bulge, when viewed from the front the Samsung tablets look virtually identical to the Apple design in this respect.

(iii)(d) Overall significance of "a very thin rim of constant width, surrounding and flush with the front transparent surface"

122. The overall significance of this similarity is the same as for feature (ii). The identity between the Samsung tablets and the Apple design is not due to a lack of design freedom and would be very striking but for the fact that there are also identical designs in the design corpus. That somewhat reduces the significance of this similarity.

(iv) A rectangular display screen surrounded by a plain border of generally constant width centred beneath the transparent surface;

(iv)(a) Design freedom

123. I have addressed the rectangular display screen above. The issue here is the border.

124. Mr Sherman explained that there were technical reasons for some kind of border around a screen. There needs to be wiring to activate the display although while that explains the presence of a border on some edges of the display, I did not understand his evidence to be that this mandated a border on all four sides. There are also ergonomic reasons to have a touch insensitive border around a touch screen, so that it can be held without activating the screen. In order to hold the device in both orientations, portrait and landscape, a sufficient border is needed on all four sides.

125. Mr Ball's view was that the border did not need to be of constant width and referred to the VIA Zwitter PC (item 32) which does indeed show black borders along the top and bottom of the screen which are wider than the borders running down the sides. He also pointed out that designers could choose to ornament the border and colour it in a way that is always visibly distinct from the display area regardless of whether the display is on or off. I have interpreted the Apple design as having a border visible at all times.

126. I find that there is a degree of design constraint applicable here. The devices need some kind of border. The border need not be as described in feature (iv) but there are limits on design freedom.

(iv)(b) Occurrence in the design corpus

127. Irrespective of the matter of design freedom, to my eye, feature (iv) would strike the informed user as a rather common feature.

128. The vast majority of displays are framed with a substantial border of some kind. The common bezel feature gives the screen a framed appearance albeit there is a clear visual difference from the Apple design given that the bezel frame is opaque and sits above the surface. There may be an example of a display with no border at all in Bloomberg 1 but that may have a border, albeit only visible when the display is switched on. The informed user would regard truly borderless displays as rare.

129. In its feature analysis at annex 5 to its skeleton, Samsung submitted that AIPTEK (Item 35) and items 39, 47 48 had feature (iv). I disagree. The border in AIPTEK (image below under feature (vi)) is present but even if it is under a transparent surface

(it is not clear to me), it is covered in ridges (or lines) and looks totally different. There is a border in item 39 but it is not under the transparent surface and the whole object looks entirely different. There is a bezel in item 47 and a very thin border around the screen inside the bezel. To my eye it is on top of the glass. Item 48 has a border under the transparent surface but it is not plain.

130. The border in the TC1000 (item 40) is closer to feature (iv). It has a border which, while not underneath the transparent surface, is contiguous with it.

131. Plain borders of generally constant width which appear to be beneath a transparent surface are often found in the design corpus. Many are found in a unit which is not symmetrical and that creates a slight difference in appearance. These include items 8, 17 (Knight Ridder), 26 (Wacom), 32 (not totally plain), 33 (probably) and 44 (Tablet PC). The Wacom (item 26) has a border which in itself looks like the Apple design but in a different setting. It is:

132. However to my eye some members of the design corpus exhibit feature (iv) in a manner essentially identical to the Apple design, such as items 10 (Showbox), 25 (Stevenson), 49 (Flatron) and 50 (Ozolins). These all have plain borders of generally constant width centred beneath the transparent surface. I appreciate that the border in the Apple design is visible whether the product is on or off but that does not mean the contrast between the border and the screen is the same in both cases. The design covers the case in which there is a visible but not prominent border when switched off just as much as the case in which contrast is always high. The Showbox border is drawn in the same way as the Apple design and must therefore be visible at all times. Ozolins has the option of making the border match the screen when off but it is an option and the visual effect of the contrast is not clear. There is no evidence the Flatron border would be invisible when off and I will take it that the border is always visible. To my eye the shape of the borders in Flatron and Ozolins (fig 1 but not fig 5) look identical to the Apple design. The range of items in the design corpus which have a border feature which looks like the Apple design is striking.

(iv)(c) Samsung Tablets' similarity to this feature

133. All three tablets are the same as far as feature (iv) is concerned. They are very close to the Apple design. The only difference is that the border is a little larger. The contrast between the border and the screen when the tablet is switched off is low. The border is visible but it is not prominent when the screen is off.

(iv)(d) Overall significance of "a rectangular display screen surrounded by a plain border of generally constant width centred beneath the transparent surface"

134. This is a feature in which design freedom is constrained considerably but that alone does not account for the close similarity between Samsung and Apple. However the significance of that similarity between the Galaxy tabs and the Apple design is

reduced by the presence of a number of designs with very similar features in the design corpus.

(v) A substantially flat rear surface which curves upwards at the sides and comes to meet the front surface at a crisp outer edge

(v)(a) Design freedom

135. There are two elements to consider, first the flat back and second the curve upwards at the sides and the crisp edge.

136. Considering the first element, for devices to be placed on a table, plainly a generally flat back is chosen for functional reasons. However the rear surface can be generally flat enough to sit on a table without being completely flat. A completely flat rear is not universal in the design corpus and there is a clear element of design freedom. Mr Ball produced a picture of the rear of the Pepper Pad to illustrate that a designer can use sculpted edges at the back as finger holds. The image also shows that the back has other features on it like screw holes and the like. Choosing to put screw holes on the rear of the product is not just a purely functional decision, it influences the appearance of the design as well. Another possibility is to put feet on the back.

137. The second element is almost entirely aesthetic. Mr Sherman expressed the view that curvature led to a reduction in internal volume. Curving and rounding are chosen by designers for a number of reasons and the enhancement of the appearance of the article has an important part to play in those design choices. I accept that the choices have an effect on volume but I was not persuaded this imposed a significant designer constraint. If a designer wanted to employ a given curved edge for aesthetic reasons, they would not reject it as a result of functional constraints.

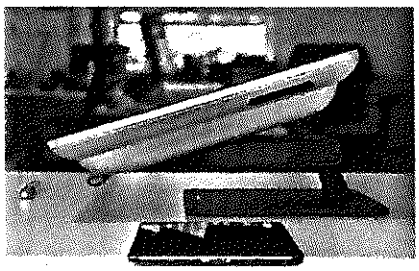
138. In the Apple design the flat rear surface meets the edges at a quarter circle curve and the side edge then has a straight part coming up to meet the front at a right angle. The rounding between the side and the bottom makes the article appear to sit above the surface on which it is resting. This enhances the appearance of thinness (see feature (vi) below). The angle between the side edge and the front makes what Apple refer to as a crisp edge. It is a reasonable description. Most of the corners and edges of the Apple design are rounded but this edge is relatively sharp. There was a suggestion that this crisp edge plays a part in the enhancement of the appearance of thinness. I do not accept that. The impression of thinness is enhanced by the curve at the back, not by the crisp edge at the front.

(v)(b) Occurrence in the design corpus

139. I will consider the two elements separately first.

140. There are numerous designs with flat backs but they are not universal and many of the designs which have front faces identical to or closely similar to the Apple design have rear surfaces which are different. In particular:

i) The LG Flatron has a complex rounded back face a bit like a stepped pyramid:



ii) The Bloomberg 1 and 2 designs have a rounded rectangular block protruding from an otherwise flat back.

iii) The only concrete example depicted by Ozolins (figure 9) shows a complex structure in the middle of the rear face to attach to a bracket and wires. The other figures are generic. There is no disclosure of a completely flat rear surface.

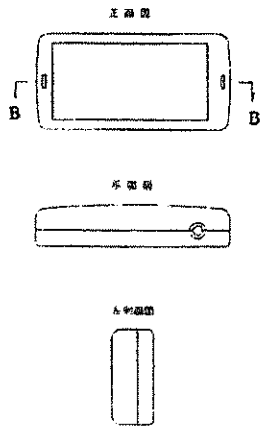
141. As regards the second element of feature (v), many designs do not have a crisp 90° edge between the sides and the front face. For example the sides of the TC1000 (item 40) are curved towards the back to achieve the visual thinning effect but the designer has chosen to use a similar curve up to the front face as well. In my judgment this front curve, as well as helping to give the TC1000 a rounded appearance overall, also serves to try to make the TC1000 seem thinner. It means that the TC1000 has no crisp edge.

142. Stevenson (item 25) is the opposite of the Apple design. The curve in Stevenson is on the front and the crisp edge is at the back. This makes a very different impression. Item 35 (AIPTEK) has the same arrangement.

143. A number of designs have a sharp or crisp edge between the sides and the front face, such as Ozolins, Bloomberg 1 and Bloomberg 2, but these also have sharp or crisp edges at the rear face as well and the appearance is completely different.

144. Samsung's feature analysis schedule splits feature (v) into three parts but overall the schedule contends that feature (v) is present in items 6 (Gridpad), 7 (Krolopp), 10 (Showbox), 11, 12, 14, 16, 17 (Knight Ridder), 22, 24, 25 (Stevenson), 28 33, 34, 35 (AIPTEK), 36, 37, 40 (TC1000), 47, 48, 49 (Flatron). Items 11, 12, 33, 36 and 37 are not even close. I have rejected items 25 (Stevenson), 35 (AIPTEK) and 40 (TC1000) above. As for 6, 10, 14, 16, 17, 22, 47 and 48, to my eye although there are similarities, the sides of these various designs are different. The sides of 6 (Gridpad) either curve at both top and bottom faces or are roughly square at both faces. The sides of 10 (Showbox) are essentially flat with a sharp transition at the bottom meeting a gentle curve on the rear face. There is a similar arrangement at the top. There also appears to be a groove on the side near the top. Item 14 could be the same but it is hard to say. Item 16 looks similar but there is a groove at the bottom. Item 17 (Knight Ridder) has rounded sides but I do not see a crisp edge. Item 22 has a square side and a rounded side but not a side with a combination of the two. Item 47 is similar in a way but overall looks quite different as a result of all the other detailing. The side of item 48 is hard to make out but looks more complex than the Apple design.

145. However there are designs in the corpus which are relevant to the appearance of this feature (v) if I bear in mind (as I will address below) that Apple contends the sides of the Samsung tablets satisfy this feature. Items 7 and 36 are fairly close although I note that item 7 Krolopp is a "radio transceiver" and does not appear to have a screen at all and item 36 otherwise looks quite different. Very close are items 24, 28 and 34. The profile of item 24 when looked at end on (the bottom figure below) is the same as the Apple design. The profile of item 24 looked at from the side (the middle figure below) has a gentle curve. The edge has a prominent line on the side which presumably marks the join between two halves of the casing.



Item 24

146. Item 28 looks very like the Samsung edge. Item 34 has a slight groove as well. They are:

Item 28 Item 34

147. Although I have scrutinised the various drawings and images in the design corpus documents carefully for the purpose of this case, it seems to me that care needs to be taken here. The informed user is a user of the products made to these drawings rather than a person presented with the drawings themselves. The drawings necessarily try to show the detailed shape of the article with precision. There is a risk that this will exaggerate the significance of truly tiny details. Also the visual significance of the shape of the sides depends on the thickness of the product overall.

(v)(c) Samsung Tablets' similarity to this feature

148. There is a tiny difference between the appearance of the sides of the Galaxy Tab 7.7 as opposed to the Tab 10.1 and Table 8.9. I do not regard it as material and will consider all three tablets together for this feature.

149. Unlike the quarter circle and crisp edge of the Apple design, the Samsung tablets have a shallower continuous curve from the base and a slight bulge coming to a shallower angle with the front surface. The difference in curving is real but minor. Apple

submitted that the Samsung tablets have a crisp edge. I agree. Looked at in minute detail, the Samsung edge is not as crisp as the Apple design because the bulge means that the sides meet the top face at a slightly larger angle than 90° but the visual effect is very similar.

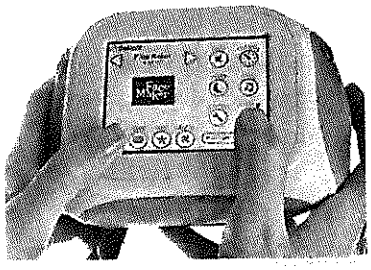
(v)(d) Overall significance of "a substantially flat rear surface which curves upwards at the sides and comes to meet the front surface at a crisp outer edge"

150. There is one serious design constraint applicable to this feature. The back needs to be generally flat. Apart from that there is considerable design freedom. The sides are very similar but these kinds of sides for products are not unusual. The informed user would recognise the Apple design in this respect as belonging to a familiar class of products with somewhat curved sides and a fairly crisp edge. The Samsung tablets are members of the same familiar class.

(vi) A thin profile, the impression of which is emphasised by (v) above;

(vi)(a) Design freedom

151. I have accepted that there is a trend in electronics to make devices thinner. Mr Ball pointed out that products could be designed with a relatively thick profile and referred to a device called the Chumby which is clearly very thick. Very approximately (it is hard to say) side on it has an aspect ratio of 5:1 (length:depth). A picture is:



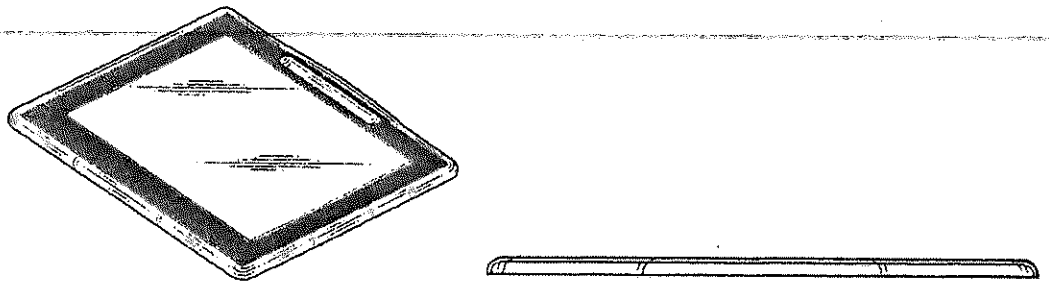
152. Samsung suggested this was to be regarded merely as a kind of bedside clock. I reject that. On the evidence the Chumby is a hand held computer device with a touch screen. It may be a niche product but I do not know to what extent other devices in Schedule A are niche products.

153. The point of Chumby is to illustrate that designers are not constrained to make thin devices. However the Chumby device has a small screen and can therefore afford to be very thick. A handheld computer with a screen large enough to read a body of text comfortably could not have the aspect ratio of the Chumby. Designers of handheld computers are constrained to make the products relatively thin. There are exceptions like the Chumby but it is a special case.

154. However "relatively thin" includes a wide range of actual thicknesses of products. As I address below, the design corpus contains products thinner than the Apple design and ones thicker too. No doubt thinner products contain less computing power than thicker ones.

(vi)(b) Occurrence in the design corpus

155. All of the articles in Schedule A are relatively thin but the degree of thinness varies considerably. The comparison is complicated significantly by the fact that the various drawings and images are of different sizes. One has to visualise how thick they would be if they were the same length or width. Despite those difficulties certain conclusions can be reached. Stevenson and AIPTEK (item 35) are much thinner than the Apple design. The front and side of AIPTEK (item 35) can be seen below:



156. Showbox (item 10) and the electronic book (item 28) are much thicker than the Apple design and the Flatron is even thicker still. Ozolins and Bloomberg 1 and 2 are closer to the Apple design (not including the extra unit on the back in the case of Bloomberg 1 and 2) but they are still appreciably thicker. Also, unlike the Apple design, they do not employ the visual effect of curved sides to enhance the thinness. Various items in Schedule A look to be the same thickness as the Apple design, such as item 22. There is no need to reproduce it.

157. Samsung submitted that the TC1000 provides a concrete illustration of the thickness of the Apple design. Mr Carr illustrated the point by inviting me to place the TC1000 exhibit on its side against an image of the Apple design which was roughly the same length. Mr Silverleaf submitted that this was not right and the comparison had to be treated with care. At first sight the TC1000 did look similar to me but looking more carefully, the apparent similarity was due to the thickness of the portion of the side edge actually in contact with the page. The TC1000 itself is much thicker than that side edge. I do not accept that the TC1000 is a good guide to the size of the Apple design. The TC1000 is too thick. It is about half as thick again as the Apple design. In other words the Apple design is no more than 2/3 of the thickness of the TC1000.

158. Overall as compared to the design corpus, the Apple design is relatively thin. While many designs in 2004 are thicker, some were about the same and there were thinner ones available too. The informed user would not regard the Apple design as exceptionally thin.

159. It is clear that using a curve or cut-away between the side edge and the back to enhance the appearance of thinness is an expedient found in the design corpus. A number of examples are given in feature (v) above. It is not banal but it is a common technique.

(vi)(c) Samsung Tablets' similarity to this feature

160. To be exact the Galaxy Tab 7.7 is proportionately thicker relative to its lateral dimensions than the Tab 10.1 or 8.9 but the difference between them is not great. Although it is true to say that all three tablets satisfy feature (vi) as a matter of words because they each have "*a thin profile, the impression of which is emphasised by (v)*",

the important point is that the Samsung tablets are much thinner than the Apple design. To my eye they are about half the thickness of Apple for the same length or width. This is something the informed user will notice.

161. Apple submitted that the advances in technology meant that the informed user would not attribute much significance to the fact that the Galaxy tablets are so much thinner. They are thinner because technology has advanced. I do not doubt that the very thin profile of the Samsung tablets is to a large degree the result of technological advances since 2004. However I have rejected on principle the argument that this could justify reducing the significance to the informed user of this difference in their appearance. Despite rejecting the point on principle I will consider it on the facts next.

162. A designer wishing to make a thinner product has to choose to put fewer components inside the casing but that is another example of the trade off between function and aesthetics. A designer could choose to trade lower functionality (say shorter battery life) for aesthetics (say a thinner device). I imagine it would have been practically impossible to build a device as powerful as the Galaxy tablets in 2004 with the same profile but that is a function of the capabilities of the particular tablet devices. The design corpus is not limited to powerful tablet computers with all the functions of a Galaxy tablet or an iPad. In 2004 the design corpus included designs which are thicker than or the same thickness as the Apple design and some which are even thinner, including item 35, the AIPTEK tablet.

(vi)(d) Overall significance of "a thin profile, the impression of which is emphasised by (v) above"

163. The Samsung tablets look very much thinner than the Apple design. That is important to the informed user. The Samsung tablets use the same thinness enhancing edge effect as the Apple design but that is not very significant in itself as this technique was often used although I note that none of the members of the design corpus which have closely similar front views to the Apple design use this feature.

(vii) Overall, a design of extreme simplicity without features which specify orientation

(vii)(a) Design freedom

164. The Apple design is extremely simple. There is no detail or ornament on the front or rear faces of the product (there are a few unclaimed sockets on the edges). The blank nature of the faces gives the design an overall simplicity. Mr Ball described this overall aspect of the Apple design as showing the designer's restraint in not adding additional shapes, features and ornamentation which was the norm in hand held products of the time. He described the design as sublime and said that none of the products in Schedule A demonstrated an equivalent simplicity or elegance.

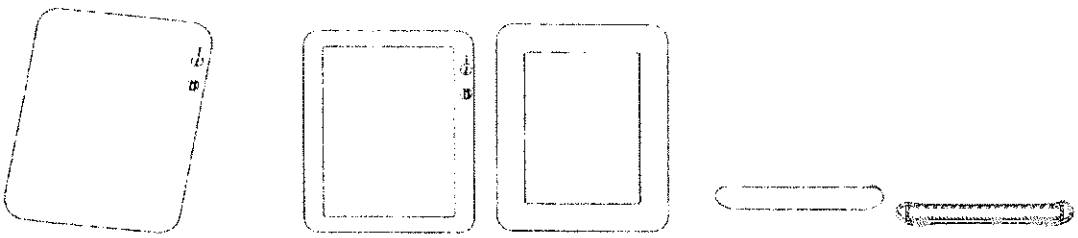
165. A number of devices in Schedule A have quite busy designs with buttons and indicators. This is indicative of a high degree of design freedom. There was no functional constraint forcing designers to make extremely simple, featureless designs.

166. The lack of "*features which specify orientation*" refers to the fact that without ornamentation the design has nothing to distinguish the top edge from the bottom or left from right. I do not accept that this lack of orientation is the product of a design

constraint. Even if the designer wishes to give the display the ability to turn from landscape to portrait format or vice versa, there is no need to avoid orientation features on the front. Samsung submitted that the TC1000 had this capability. Assuming it does, albeit in a slower and less elegant manner than the Galaxy tablets (or the iPad for that matter), it shows an example of a device with that change of format capability but also has detailing on the front which distinguishes landscape from portrait orientation such as the brand name (Compaq) and other indicators.

(vii)(b) Occurrence in the design corpus

167. Many products in the design corpus have busy, complicated areas on the front surface, around the screen (e.g. items 32 (VIA Zwitter PC), 38 (Viewsonic) and 39). However simpler less adorned designs exist too. Designs with simple front faces exist: e.g. Flatron, Bloomberg 1 and 2 and Ozolins but the backs of these products are not very simple. Simple overall designs exist such as Krolopp (item 7), Showbox (item 10), Canon (item 12) and Stevenson (item 25). The simplest of those is Stevenson but to varying degrees they all look different from the Apple design. They do show that simplicity itself is not a unique feature. One item Samsung drew attention to in this respect was item 28 (an electronic book):



front (off) front (on) back side edge internal section

168. This is quite a simple design but the front panel has prominent buttons (or indicators) which detract from the simplicity considerably. Such buttons are exactly what the Apple design does not have. From the internal section it appears to have what may be a rubbery outer surface.

169. One aspect not mentioned so far is the unadorned back face of the product. I have addressed the fact that the back is flat but part of the simplicity of the Apple design is that the rear face has nothing on it whatsoever. A number of products have backs which are not simple blank faces. The TC1000 has a strikingly complex rear face covered in details, many of them functional in nature. Other examples are Bloomberg 1 and Bloomberg 2 with a central rectangular block.

170. The informed user is not used to seeing decorative features on the rear faces of these designs and simple blank rear faces are quite common. Examples are items 5, 7 (Krolopp), 12 (largely blank with a rim), 16 (largely blank with a rim), 17 (Knight Ridder), 22 (almost), 24 (although curved), 28 (with a panel but otherwise blank), 34 (mostly) and 35 (AIPTEK). A blank flat back is not so common as to be banal but the informed user would regard this aspect as a fairly conventional feature of the Apple design.

(vii)(c) Samsung Tablets' similarity to this feature

171. From the front and sides, the three Galaxy tablets are the same. The simplicity is notable. There are some hardly visible buttons on the edges. A difference noted before is the front camera hole, speaker grille and name. The writing gives the tablet an orientation. In the Tab 10.1 and 8.9 the name (and to a lesser extent the camera hole) orients the item in landscape rather than portrait. Landscape is the natural way to hold those tablets. In the Tab 7.7 the same features orient the item in portrait format. There is writing on the back face but unlike the front face, the informed user would not pay much heed to writing on the back. It looks like branding and some legally necessary information which no normal user would ever read.

172. Like the Apple design (and unlike many products in the design corpus) the Samsung tablets have no indicator lights or other details on the front face. I have accepted Mr Sherman's view that there was a trend for large displays in order to offer unfettered views of the electronic media but that does not detract from the significance of this similarity. Although screens were large, they did not necessarily cover the entire front face (consider TC1000, Wacom (item 26) and Knight Ridder (17)).

173. The backs of the Galaxy tablets have prominent visual features. The Tab 10.1 and Tab 8.9 are the same. They have the so called "clutch purse" feature. It is a unique feature which distinguishes those tablets from the Apple design and from the design corpus. To my eye the clutch purse feature is a little less visually prominent in the white and gray version than in the black and gray version.

174. The back of the Tab 7.7 is different from the backs of the other two. The Tab 7.7 is has a two tone arrangement. There is a visible difference in texture between the two end zones and the central zone. This is also different from the Apple design. In my judgment the difference between the Tab 7.7 and Apple is less significant than the difference between the "clutch purse" back designs on the other Samsung tablets and the Apple design. In other words the Tab 7.7 product is the closest to the Apple design.

(vii)(d) Overall significance of "overall, a design of extreme simplicity without features which specify orientation"

175. From the front the Samsung tablets are very simple, albeit not quite as simple as the Apple design. The Samsung tablets have features which specify orientation, albeit they are not prominent. From the back the designs differ. The back of the Samsung tablets is striking. Ornamentation on the back face of a product strikes the informed user as unusual. That enhances the significance of this difference. On the other hand the fact the difference is on the back of the product and not the front reduces its significance.

Samsung's Schedule B

176. Schedule B to the Particulars of Claim consisted of a list of seven features Samsung contended were dictated solely by function. I have dealt with the first six already: rectangular shape; rounded corners; flat transparent surface; surface without ornamentation; touch insensitive border; and thin profile.

177. One I have not addressed is point 7 "at least one button or switch and at least one port to enable the device to be charged". Mr Ball agreed that these were almost a

functional requirement albeit that the designer has a wide degree of freedom in choosing how these features are designed into the product.

The overall impression of the Apple design

178. Having gone through the various features individually it is necessary to pull it all together and consider the overall impression of the Apple design on an informed user.

179. The way the seven features are written, four of them relate to the front of the product, the rear and sides are addressed in two ((v) and (vi)) and the overall position summed up in feature (vii). The front is important but there is a risk of overemphasis. The design is for an object which is hand held and therefore does not simply rest on a desk with its back invisible. The informed user, who is particularly observant, will pick up these objects and will look at the back.

180. In evidence Apple emphasised the way in which Samsung offered the tablets for sale on the internet, with more views of the front than of the back. I do not regard that evidence as having much to do with this case. The informed user will not simply look at images of these products on websites.

181. Viewed without the design corpus, the appearance of the front surface of the Apple design would be given significant importance but that significance is reduced by the presence of identical features in the design corpus. The Apple design has a relatively thin profile but not excessively so. If the product was roughly 25cm long (c.f. the Tab 10.1) it would be about 1.5cm thick, comparable to the thickness of a finger.

182. The extreme simplicity of the Apple design is striking. Overall it has undecorated flat surfaces with a plate of glass on the front all the way out to a very thin rim and a blank back. There is a crisp edge around the rim and a combination of curves, both at the corners and the sides. The design looks like an object the informed user would want to pick up and hold. It is an understated, smooth and simple product. It is a cool design.

The overall impressions compared

183. I remind myself that the informed user is particularly observant, shows a relatively high degree of attention and in this case conducts a direct comparison between the products.

184. To my eye the most important similarities are as follows:

i) The view from the front is really very striking. The Galaxy tablets are not identical to the Apple design but they are very, very similar in this respect. The Samsung tablets use the very same screen, with a flat glass plate out to a very thin rim and a plain border under the glass.

ii) Also neither Apple nor Samsung have indicator lights or buttons on the front surface or obvious switches or fittings on the other surfaces. There are some subtle buttons on the edges of the Galaxy tablets but they do not contribute to the overall impression. There is an overall simplicity about the Samsung devices albeit not as extreme as the simplicity of the Apple design.

iii) The thinness enhancing effect of the sides creates the same impression. It causes both the Apple design and the Galaxy tablets to appear to float above the surface on which they rest. However the details of the side edges are not the same. The Apple design has a pronounced flat side face which the informed user would see clearly (and feel). It is absent from the Samsung tablets.

185. There are some minor differences but to my eye there are two major differences. The most important difference between the Samsung Galaxy tablets and the Apple design is the thinness of the Galaxy tablets. The next most significant difference is the detailing on the back of each of the tablets.

186. It is hard to appreciate relative thickness from drawings and photographs. A product made to the Apple design and of similar length would be about twice as thick as any of the Galaxy Tabs. The product to the Apple design will look thinner as a result of the side curves but the same visual effect on the edges of the Galaxy Tabs makes them look even thinner. Resting on a table side by side the surface of a product made to the Apple design will be noticeably above these tablets. To an informed user, the Galaxy tabs do not merely look like a thin version of the Apple design, they look like a different, thinner design of product.

187. The back of the Apple design is the place in which there are fewer constraints on design freedom (apart from being generally flat) and more variety in the design corpus. The curving of the rear surfaces of the Galaxy Tabs is a bit different from the Apple design but not significantly so. What strikes the informed user is the detailing on the back faces of the Samsung products. I will consider the Tab 7.7 since to my eye that has the least visually prominent detailing. If the Tab 7.7 does not infringe, then neither does the Tab 10.1 nor Tab 8.9. The informed user will see that in this product Samsung has exercised the available design freedom by having visible detailing on the rear of the articles. To have this sort of detail on the back would strike the informed user as unusual.

188. Are these two differences enough to overcome the similarity at the front and the similarity in overall shape? Apple submitted that the front face and overall shape are what matters because the informed user will principally spend his time looking at the front face and holding the object in his hand. I do not regard the overall shape as very significant but there is a very obvious visual similarity at the front. In my judgment the key to this case is the strength or significance of that similarity. As I have said the significance of the near identity of the front surfaces of these products is reduced to a degree by the existence of similar fronts in the design corpus. The question is – to what degree?

189. This case illustrates the importance of properly taking into account the informed user's knowledge and experience of the design corpus. When I first saw the Samsung products in this case I was struck by how similar they look to the Apple design when they are resting on a table. They look similar because they both have the same front screen. It stands out. However to the informed user (which at that stage I was not) these screens do not stand out to anything like the same extent. The front view of the Apple design takes its place amongst its kindred prior art. There is a clear family resemblance between the front of the Apple design and other members of that family (Flatron, Bloomberg 1 and 2, Ozolins, Showbox, Wacom). They are not identical to

each other but they form a family. There are differences all over these products but the biggest differences between these various family members are at the back and sides. The user who is particularly observant and is informed about the design corpus reacts to the Apple design by recognising the front view as one of a familiar type. From the front both the Apple design and the Samsung tablets look like members of the same, pre-existing family. As a result, the significance of that similarity overall is much reduced and the informed user's attention to the differences at the back and sides will be enhanced considerably.

190. The informed user's overall impression of each of the Samsung Galaxy Tablets is the following. From the front they belong to the family which includes the Apple design; but the Samsung products are very thin, almost insubstantial members of that family with unusual details on the back. They do not have the same understated and extreme simplicity which is possessed by the Apple design. They are not as cool. The overall impression produced is different.

Conclusion

191. The Samsung tablets do not infringe Apple's registered design No. 000181607-0001.

Annex A – The Apple design

Image 0001.1 (front):

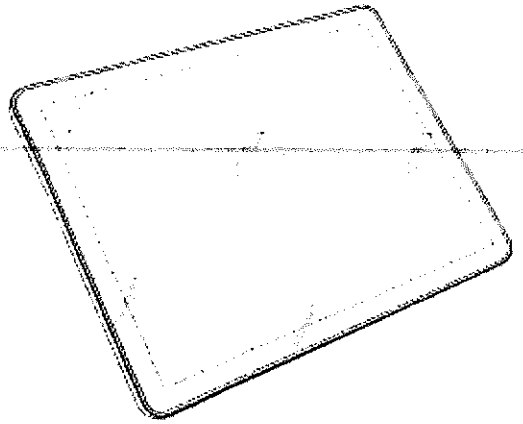


Image 0001.2 (rear):

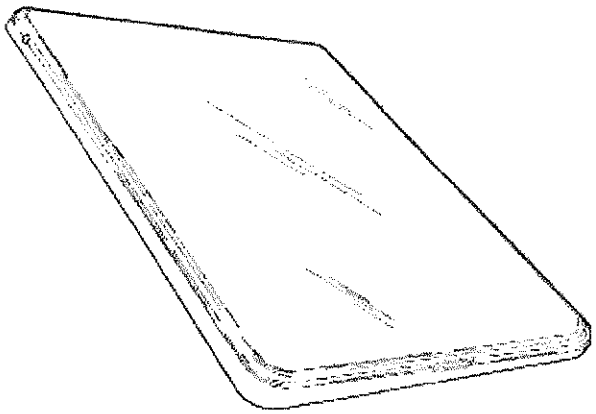


Image 0001.3 (front):

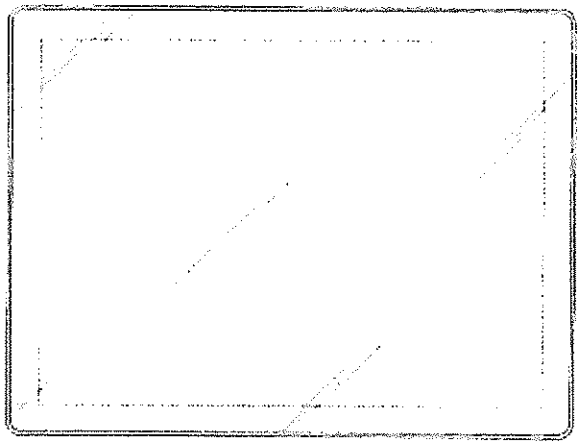


Image 0001.4 (rear):

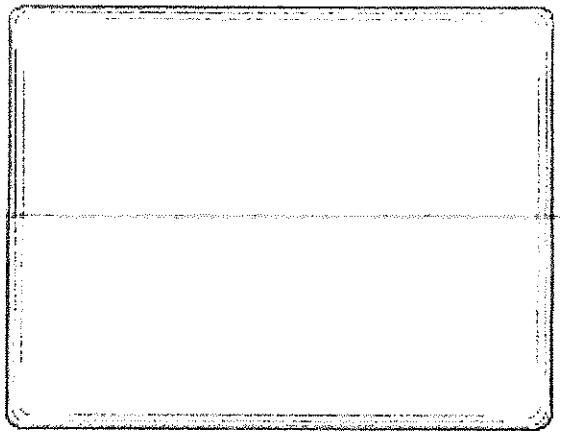


Image 0001.5:

Image 0001.6:

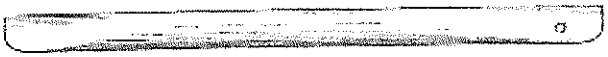
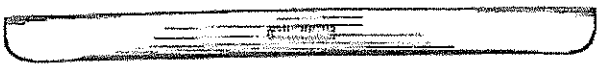


Image 0001.7:

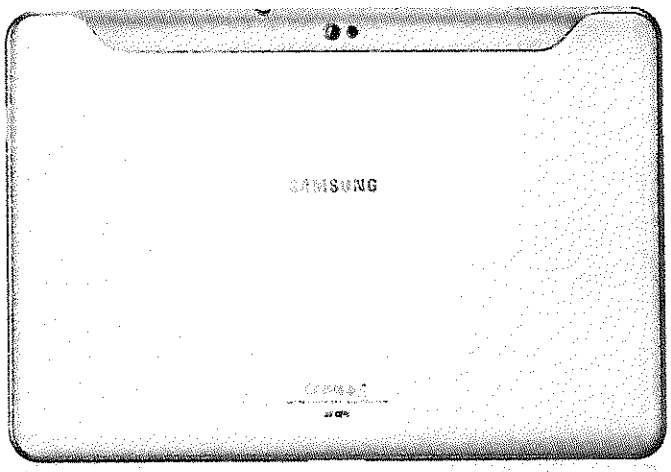


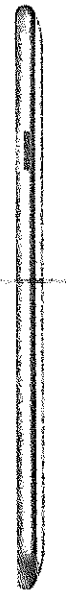
Annex B – Samsung tablets

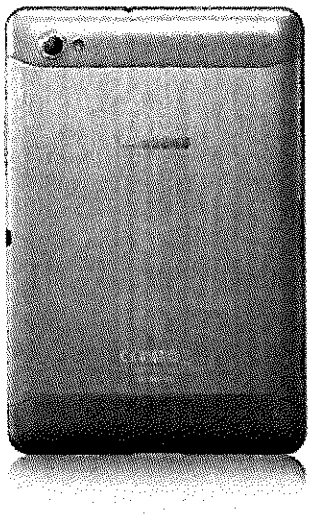
Galaxy Tablet 10.1

12:25 PM
26
SAMSUNG

Samsung Galaxy 8.9





12:25 PM
26
SAMSUNG

Samsung Galaxy Tab 7.7