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The End of the Imitation Age?: The Effect of Apple Inc. v. Samsung

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THE END OF THE IMITATION AGE?: THE EFFECT OF *APPLE INC. V. SAMSUNG*

BY: MELISSA BARCENA *

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I. INTRODUCTION

In 2012 Apple, Inc. (Apple) won its patent and trademark infringement claim against Samsung Electronics Company (Samsung). One has to wonder what effect this decision has upon the consumer. Historically, scholars and experts have viewed antitrust laws and intellectual property laws as contradictory. That is, intellectual property laws seek to provide creators exclusive control of certain technology, while at the same time antitrust laws seek to prevent one person or corporation from having monopoly power. However, the more recent belief is that intellectual property and antitrust laws do share the same fundamental goals. The recent ruling in *Apple, Inc. v. Samsung Electronics Co.* creates an area of confusion. If imitation is not allowed in today’s world, will consumers be forced to pay higher prices for their technology? If prices do increase, are intellectual property laws truly promoting their goal of protecting the consumer?

This case has the potential to end the “imitation age” of the electronics industry. If companies such as Samsung are penalized for their attempt to create a successful product, even at the expense of originality, then many companies will be fearful of mimicking others. This will make it difficult for companies to create unique products as easily, quickly, or inexpensively as they have been able to do.

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This will affect the consumer because it will lower the number of available choices and increase prices.

Part II of this note will discuss the facts of the case between Apple and Samsung. Part III will discuss trade dress, trademarks, and patents. Part V describes the significance and implications of Apple's victory in this case. Lastly, part VI will conclude the topics presented in this note and part VII is an appendix that includes photographs of the electronics at issue.

II. FACTS OF THE APPLE, INC. V. SAMSUNG ELECTRONICS CO. CASE

In 2011 Apple brought a claim against Samsung in the United States District Court's Northern District of California. Apple brought similar cases against Samsung across the globe, most notably in Australia and Germany. In its complaint, Apple claimed that it created a "game changer" in the mobile phone industry when it introduced the iPhone.¹ Prior to the introduction of the iPhone, there was no computer that used a display screen that allowed for touch control, referred to as Multi-Touch™ (Multi-Touch) interface.² This Multi-Touch interface "allows users to navigate their iPhone, iPod touch, and iPad devices by tapping and swiping their fingers on the screen."³ Apple further claimed that the iPhone has a "distinctive user interface, icons, and eye-catching displays that [gives] the iPhone an unmistakable look."⁴ According to Apple, all of these features have been combined in an "elegant glass and stainless steel case with a distinctive user interface that [gives] the iPhone an immediately recognizable look."⁵ Apple further alleged that the design and new technological features have been "uniquely associated with Apple as its source."⁶

Three years after the introduction of the iPhone, Apple released the iPad.⁷ The iPad shares many of the iPhone's features including a user interface that is similar to the iPhone.⁸ Apple asserts that prior to the iPad, there was no other computer product that resembled the iPad, but that the design was similar to other Apple products, such as the iPhone and iPod touch.⁹ These products have been advertised throughout the country in a variety of forms, including "network and syndicated television, the Internet, billboards, magazines, and newspapers—with the vast majority of the advertisements featuring photographs of the distinctive design of these products."¹⁰

Due to Apple's success with these computers, the company has protected its

¹ Plaintiff's Complaint at 1, *Apple Inc. v. Samsung Elecs. Co.*, (No. 11-CV-01846-LHK) (N.D. Cal. Dec. 17, 2012), 2011 WL 1523876.

² *Id.* at 1.

³ *Id.* at 4.

⁴ *Id.* at 1.

⁵ *Id.* at 4.

⁶ *Id.*

⁷ *Id.*

⁸ *See id.* at 4–5.

⁹ *Id.* at 5.

¹⁰ *Id.*

design and technology through intellectual property rights.¹¹ Apple claims that it has been awarded patents through the United States Patent and Trademark Office (U.S. PTO) and owns all rights, title, and interest in those patents.¹² Some of these rights are utility patents.¹³ There are seven utility patents that Apple claimed that Samsung infringed upon: 1) Ellipse Fitting for Multi-Touch Surfaces, 2) Method and Apparatus for Displaying Information During an Instant Messaging Session, 3) Method and Apparatus for Displaying and Accessing Control and Status Information in a Computer System, 4) List Scrolling and Document Translation, Scaling and Rotation on a Touch-Screen Display, 5) Application Programming Interfaces for Scrolling Operations, 6) Method and Apparatus for Displaying a Window for a User Interface, and 7) Cantilevered Push Button Having Multiple Contacts and Fulcrums.¹⁴

Furthermore, Apple claims that the U.S. PTO has awarded design patents.¹⁵ According to Apple these patents cover “many famous ornamental features of Apple’s devices, such as the flat black face, metallic bezel, and the distinctive matrix of application icons.”¹⁶

In addition to patent infringement, Apple also claims that Samsung infringed upon its iPhone Trade Dress.¹⁷ The trade dress that Apple refers to is the appearance of the iPhone, in addition to its interfaces and packaging.¹⁸ Apple asserts that the iPhone has a distinctive appearance due to its

flat rectangular shape with rounded corners, a metallic edge, a large display screen bordered at the top and bottom with substantial black segments, and a selection of colorful square icons with rounded corners that mirror the rounded corners of the iPhone itself, and which are the embodiment of Apple’s innovative iPhone user interface.¹⁹

Once again, Apple asserts that this design is associated with Apple.²⁰ Apple also asserts that none of these distinctive elements are functional.²¹

Apple believes that it has an “innovative style to [the] packaging”²² The packaging “features a compact black or black-and-white box with eye-catching metallic silver lettering on a matte black surface . . . [t]he outside of the box has a clean style—with minimal wording and a simple, prominent, nearly full-size photograph of the iPhone product itself.”²³ This uniqueness is found not only

¹¹ *Id.* at 6.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 7.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 8.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 8–9.

externally on the package, but also internally.²⁴ Once the box is opened, the only visible item is the actual iPhone “emphasizing the accessible nature of the iPhone itself. The design entices purchasers to pick up the iPhone and try it out, without worrying that it is complicated.”²⁵ Apple believes that this packaging design identifies Apple as the source of the product and that none of the packaging design elements are functional.²⁶ Apple believes that the iPod touch has a similar design and packaging to the iPhone, all of which are distinctive to Apple and none of which are functional.²⁷ In addition, Apple asserts that the iPad has a distinctive trade dress similar to that of the iPhone and iPod touch such as rounded corners and a large screen with a black border.²⁸ The iPad’s packaging is as unique and purposeful as the packaging on the iPhone and iPod touch.²⁹

In relation to these trade dresses, “Apple owns three [trademark] registrations for the design and configuration of the iPhone.”³⁰ The first registration “is for the overall design of the product, including the rectangular shape, the rounded corners, the silver edges, the black face, and the display of sixteen colorful icons.”³¹ The second registration is for “a rectangular handheld mobile digital electronic device with rounded corners.”³² The third registration “is for a rectangular handheld mobile digital electronic device with a gray rectangular portion in the center, a black band above and below the gray rectangle and on the curved corners, and a silver outer border and side.”³³

Apple claims that there are certain non-functional elements of Apple’s designs that lead to the trade dress at issue.³⁴ These elements include:

[A] rectangular product shape with all four corners uniformly rounded; the front surface of the product dominated by a screen surface with black borders; as to the iPhone and iPod touch products, substantial black borders above and below the screen having roughly equal width . . . ; as to the iPad product, substantial black borders on all sides being roughly equal in width; a metallic surround framing the perimeter of the top surface; a display of a grid of colorful square icons with uniformly rounded corners; and a bottom row of square icons (the “Springboard”) set off from the other icons and that do not change as the other pages of the user interface are viewed.³⁵

Apple also believes that there are certain non-functional elements of Apple’s packaging designs that lead to the trade dress at issue.³⁶ These elements include:

²⁴ *See id.* at 9.

²⁵ *Id.*

²⁶ *Id.* at 9–10.

²⁷ *Id.* at 10.

²⁸ *Id.*

²⁹ *Id.* at 11.

³⁰ *Id.* at 12.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 12–13.

³⁶ *Id.* at 13.

[A] rectangular box with minimal metallic silver lettering and a large front-view picture of the product prominently on the top surface of the box; a two-piece box wherein the bottom piece is completely nested in the top piece; and use of a tray that cradles products to make them immediately visible upon opening the box.³⁷

In addition to Apple's trade dress, Apple also has registered trademarks that are used consistently in Apple's mobile products.³⁸ One such trademark is a green icon "with a white silhouette of a phone" that represents the telephone application.³⁹ A second trademark is a green icon with a white speech bubble that represents the mobile messaging application.⁴⁰ A third trademark is an icon with a sunflower that represents the photo application.⁴¹ A fourth trademark is an image of gray gears that represents the settings application.⁴² A fifth trademark is "an icon that features a yellow note pad that represents the application for notes."⁴³ Finally, the sixth trademark "is . . . [a] silhouette of a man on . . . [an] address book that represents the icon for contacts."⁴⁴ Apple uses all of these trademarks on its iPhone, iPod touch, and iPad.⁴⁵ In addition, "[t]o represent [its] iTunes application, Apple uses an icon that is purple . . . [with] a silhouette of two eighth-notes superimposed on the white circular band . . ."⁴⁶ This is also the logo for the iTunes online music service, a logo available on any computer, not simply a Mac.

Apple alleged that Samsung introduced the following products into the electronics market, "each of which infringes on one or more of Apple's Intellectual Property Rights: the Samsung Captivate, Continuum, Vibrant, Galaxy S 4G, Epic 4G, Indulge, Mesmerize, Showcase, Fascinate, Nexus S, Gem, Transform, Intercept, and Acclaim smart phones and the Samsung Galaxy Tab tablet".⁴⁷ It was found during trial that Samsung's infringement was so apparent that the Galaxy products actually appear to be Apple products due to the rectangular shape, silver edging, substantial black borders, and colorful icons.⁴⁸ Apple believes that when a Galaxy phone is used in public, many consumers view it as an Apple product.⁴⁹ Apple asserts that not only is the product design a blatant copy of Apple products, but a copy of Apple's packaging as well.⁵⁰ Before trial, Samsung's packaging included:

[A] rectangular box with metallic silver lettering and a large front-view picture of the product prominently [displayed] on the top surface of the box; and a two-piece box wherein the bottom piece is completely nested in the top piece; and use of a

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 14

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 15.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 16.

⁴⁷ *Id.* at 16–17.

⁴⁸ *Id.* at 17.

⁴⁹ *Id.*

⁵⁰ *Id.* at 20.

design that cradles products to make them immediately visible upon opening the box.⁵¹

Furthermore, it was found that Samsung copied its trademarked application icons.⁵² For instance, Samsung's telephone application icon, music application icon, messaging icon, note taking application icon, contacts application icon, settings application icon, and photo application icon are visibly similar to those of Apple.⁵³ Apple asserts that Samsung's use of Apple's trademarked designs and trade dress are "likely to cause confusion or mistake, or to deceive consumers, purchasers, and others into thinking that Samsung's products are" in some way affiliated with Apple.⁵⁴ Apple explains that this is especially likely because Samsung Galaxy products are:

[T]he type of products that will be used in public—on the bus, in cafes, in stores, or at school, where third parties, who were not present when the products were purchased, will associate them with Apple because they have the unmistakable Apple look that is created from the various elements of the Apple Trade Dress.⁵⁵

The root of Apple's concern over its trademarked and patented features is that the company invests large amounts of resources to develop cutting edge products.⁵⁶ Apple spends time not only on technical research, but also development and design research.⁵⁷ Furthermore, Apple believes that part of its popularity is due to the fact that their products are so different from others on the market.⁵⁸ Apple also believes that this is why consumers seem to eagerly anticipate their products because they are "outlier[s]" in technology and communication.⁵⁹ Apple maintains that Samsung is not only benefiting from Apple's investments, but it is also threatening to tarnish the very reputation that has led to Apple's success.⁶⁰

Based on all of the previous information, a jury found for Apple in August of 2012. In October of 2012, Samsung appealed the decision.

III. INTELLECTUAL PROPERTY LAW BACKGROUND

A. Trade Dress

Trade dress infringement can be categorized as a subcomponent of unfair competition law.⁶¹ Courts typically consider and apply the policies that underlie

⁵¹ *Id.*

⁵² *Id.* at 23–24.

⁵³ *See id.*

⁵⁴ *Id.* at 24.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 24–25.

⁶¹ 55 AM. JUR. PROOF OF FACTS 3D *Proof of Trade Dress Infringement* § 1 (2000).

the laws of unfair competition.⁶² These policies include, “protecting the public from confusion as to the source of goods and services; preventing a junior user from trading on the reputation and goodwill of a senior user; and maintaining competitive markets.”⁶³ Thus, intellectual property law has many of the same policies as antitrust laws—mainly to protect the consumer.⁶⁴ Historically, “trade dress” referenced package design including colors and symbols.⁶⁵ Trade dress can also refer to the shape or appearance of the product.⁶⁶ In certain instances, specific elements of a trade dress, or the entire trade dress, may be registered as trademarks.⁶⁷ Furthermore, trade dress may be protected by statute or by common law, especially by the law of unfair competition.⁶⁸

The Lanham Act protects registered trade dress to be protected by permitting trade dress claims to be filed as trademark infringement claims.⁶⁹ The Lanham Act also permits claims to be brought under section 43(a), the “federal unfair competition” portion of the statute.⁷⁰

i. Trade Dress and Trademark

The Lanham Act defines a “trademark” as:

[A]ny word, name, symbol or device, or any combination thereof—(1) used by a person, (2) or which a person has a bona fide intention to use in commerce . . . to identify and distinguish his or her goods, . . . from those manufactured or sold by others and to indicate the source of the goods . . .

Trade dress is “somewhat broader” than trademarks.⁷² Trademark generally involves a specific word, phrase, or design, while trade dress is typically “a combination of sometimes disparate elements comprising . . . the appearance of packaging for a product.”⁷³ Modern courts recognize that trade dress “include[s] [the] totality of the elements comprising a visual image presented to consumers.”⁷⁴ Therefore, one cannot avoid liability for infringement by arguing that the certain elements of a trade dress are not protectable and, thus, the entire dress is not protectable.⁷⁵

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ RESTATEMENT (THIRD) OF UNFAIR COMPETITION §16 cmt. a (1995).

⁶⁶ J. THOMAS MCCARTHY, *The Need to Identify the Elements of Trade Dress*, in MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 8.3 (4th ed., 2012).

⁶⁷ *Proof of Trade Dress Infringement*, *supra* note 61.

⁶⁸ *Id.*

⁶⁹ 15 U.S.C. § 1114 (2012).

⁷⁰ 15 U.S.C. § 1125(a) (2012).

⁷¹ 15 U.S.C. § 1127 (2012).

⁷² *Proof of Trade Dress Infringement*, *supra* note 61, § 3.

⁷³ *Id.*

⁷⁴ *Id.* § 5.

⁷⁵ *Id.*; see *Falcon Rice Mill, Inc. v. Cmty. Rice Mill, Inc.*, 725 F.2d 336, 347 (5th Cir. 1984) (“[S]imilarity is to be determined by comparing the overall impression created by the designs, rather than by focusing on details.”).

The Lanham Act was designed “to make ‘actionable the deceptive and misleading use of marks’ and to protect persons engaged in [] commerce against unfair competition.”⁷⁶ In order for a plaintiff to succeed in an action for trade dress infringement, he must prove that his product is distinctive and that there is a likelihood of confusion between his product and the defendant’s.

The Lanham Act is used to determine trademark and trade dress infringement claims.⁷⁷ In relevant part the Lanham Act states:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval⁷⁸ of his or her goods, services, or commercial activities by another person

ii. *Distinctiveness*

Both trademarks and trade dress “must be distinctive of the goods or services in conjunction with which [they are] used in order to be protectable.”⁷⁹ The term “distinctive” is unique to trademark law; it does not carry the same colloquial meaning that is usually used in ordinary English language.⁸⁰ There are two types of distinctiveness: inherent and acquired.⁸¹ An inherently distinctive mark “performs a source-identifying role from the moment it is adopted and used.”⁸² There is no need to prove distinctiveness with an inherently distinctive mark, as long as the plaintiff can define exactly what the trade dress comprises.⁸³

“Distinctiveness” occurs when the design or packaging of a product is unique enough to identify the product’s source.⁸⁴ When this secondary meaning occurs, the design or package is considered a trade dress and thus is protected.⁸⁵ The Supreme Court has historically used the stringent “primary significance” standard, which states that a secondary meaning occurs when “the primary significance . . . in the minds of the consuming public is not the product but the producer.”⁸⁶ Some factors which may establish a secondary meaning include “the length or exclusivity of use of a mark, the size or prominence of the plaintiff’s

⁷⁶ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 767–68 (1992) (citing 15 U.S.C. § 1127 (2012)).

⁷⁷ 15 U.S.C. § 1125 (2012); see Deborah F. Buckman, Annotation, *When is Trade Dress “Inherently Distinctive” for Purposes of Trade Dress Infringement Actions Under § 43(a) of Lanham Act (15 U.S.C.A. § 1125(a))—Cases After Two Pesos*, 161 A.L.R. FED. 327, 327 (2000).

⁷⁸ 15 U.S.C. § 1125(a)(1)(A) (2012).

⁷⁹ *Proof of Trade Dress Infringement*, *supra* note 61, § 6.

⁸⁰ *Two Pesos, Inc.*, 505 U.S. at 767–68.

⁸¹ *Proof of Trade Dress Infringement*, *supra* note 61, § 6.

⁸² *Id.*

⁸³ *Proof of Trade Dress Infringement*, *supra* note 61, § 7.

⁸⁴ *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 28 (2001).

⁸⁵ *Id.*

⁸⁶ *Kellogg Co. v. Nat’l Biscuit Co.*, 305 U.S. 111, 118 (1938).

enterprise, and the existence of substantial advertising by the plaintiff, . . .”⁸⁷ Monetary relief under the Lanham Act is only available to a plaintiff who demonstrates that its trade dress already acquired a “secondary meaning” in the minds of consumers by the time the defendant released its product to the public.⁸⁸

iii. Likelihood of Confusion

After a trade dress or trademark is established as distinctive, the plaintiff must prove that the defendant unlawfully copied, and thus infringed, upon the dress.⁸⁹ To prove this, “the plaintiff must show that ‘the defendant’s activities have created a likelihood of confusion, deception, or mistake as to the source of the goods or services of the parties, or as to affiliation, connection, or association between the parties.’”⁹⁰ A likelihood of confusion may be found “where the plaintiff’s dress and the defendant’s dress are so similar that it is likely consumers will be deceived into thinking . . . that there is some association or connection between the parties.”⁹¹ This is typically determined by a visual comparison of the two products, viewed by the trier of fact.⁹² Elements such as “size, color, shape, design, texture, words, and symbols may be considered.”⁹³ The total image of the trade dress must be looked at; dissimilarities in particular elements will not matter.⁹⁴

The “degree of similarity needed to establish liability . . . depend[s] on . . . [many] factors including the relative strength of the . . . trade dress, the nature of the trade dress, the manner in which the goods . . . are marketed, and the standard of care that the ordinary purchaser will be required to exercise.”⁹⁵ The typical test for confusion has been what the casual observer thinks when he sees the defendant’s trade dress alone.⁹⁶ However, there is no clear consensus as to what an “ordinary” purchaser is.⁹⁷ Some courts say that the observer must be someone who exercises a reasonable degree of caution.⁹⁸ On the other hand, some courts have held that the incautious may be the ordinary person.⁹⁹

⁸⁷ *Proof of Trade Dress Infringement*, *supra* note 61, § 5.5; *see* *President & Trs. of Colby Coll. v. Colby Coll.-NH*, 508 F.2d 804, 807–08 (1st Cir. 1975). Other factors to consider include: the plaintiff’s size, sales volume, the extent of its distribution, market surveys demonstrating that the mark has acquired a “secondary” source-identifying meaning to the public, and testimony of the perceptions of consumers and others. *Proof of Trade Dress Infringement*, *supra* note 61, § 5.5.

⁸⁸ *Proof of Trade Dress Infringement*, *supra* note 61, § 5.5.

⁸⁹ *Id.*

⁹⁰ *Proof of Trade Dress Infringement*, *supra* note 61, § 11; *see* 15 U.S.C. § 1125(a) (2012).

⁹¹ *Proof of Trade Dress Infringement*, *supra* note 61, § 11.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Oriental Foods, Inc. v. Chun King Sales, Inc.*, 244 F.2d 909, 915 (9th Cir. 1957) (“[T]he likelihood of confusion cannot be measured by the effect of the similarity on the rankly careless and unconcerned. To do so would place too great a burden on innovation and change in the manufacture and merchandising of commercial products.”).

⁹⁹ *Harold F. Ritchie, Inc. v. Chesebrough-Pond’s, Inc.*, 281 F.2d 755, 761 (2d Cir. 1960)

Determining if there has been actual confusion in a trade dress or trademark claim is a question of fact. In order to establish that there is a likelihood of confusion, the plaintiff is not required to show actual confusion.¹⁰⁰ However, “a strong presumption that confusion is not likely arises if no actual confusion occurs after the parties’ marks have been used concurrently in the same market for a substantial period of time.”¹⁰¹ Therefore, time on the market is a factor in determining substantial confusion.¹⁰² Yet, even if there is actual confusion, if it does not involve the diversion of customers, then courts typically do not factor this into a likelihood of confusion discussion.¹⁰³ An exception to this is if a salesperson is actually confused about a product, because it could then lead to customer confusion.¹⁰⁴

Under the Lanham Act, “a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark’s owner.”¹⁰⁵ To determine if a mark has this level of recognition, courts typically consider these factors: “(i) [t]he duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties[;] (ii) [t]he amount, volume, and geographic extent of sales of goods or services offered under the mark[;] (iii) [t]he extent of actual recognition of the mark.”¹⁰⁶ If all of these factors are found to be in the plaintiff’s favor, then the court will likely find that there is a mark with enough recognition to be considered a trademark under the Lanham Act.

iv. *Functionality*

If a trade dress is functional, then a defendant’s use of the trade dress cannot be infringement.¹⁰⁷ Generally, “a trade dress [will be found to] be functional if it contributes to efficiency or economy in manufacturing, or to the product’s durability.”¹⁰⁸ For example, if a defendant “would [be forced] to spend money [in order] to not copy a particular feature of plaintiff’s trade dress, that feature may be considered functional and . . . not entitled to protection.”¹⁰⁹ A related doctrine is

“Confusion on the part of the careless or inattentive purchaser may not be disregarded.” *Am. Chiclé Co. v. Topps Chewing Gum, Inc.*, 208 F.2d 560, 563 (2nd Cir. 1953).

¹⁰⁰ LOUIS ALTMAN & MALLA POLLACK, *CALLMAN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES* § 21.82 (4th ed. 2011).

¹⁰¹ *Id.*

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ 15 U.S.C. § 1125(c)(2)(A) (2012).

¹⁰⁶ 15 U.S.C. § 1125(c)(2)(A)(i)–(iii) (2012).

¹⁰⁷ 15 U.S.C. § 1125(a)(3) (2012) (“In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.”); *see also Proof of Trade Dress Infringement*, *supra* note 61, § 13.

¹⁰⁸ *Proof of Trade Dress Infringement*, *supra* note 61, § 13.

¹⁰⁹ *Id.*

“aesthetic functionality.”¹¹⁰ The aesthetic functionality doctrine provides that “where a product’s trade dress [is] more aesthetically appealing to consumers, the trade dress [is] functional per se” and not entitled to protection.¹¹¹ Although not all circuits have adopted the aesthetic functionality doctrine, the Ninth Circuit has.¹¹² The Ninth Circuit Court of Appeals held that certain “designs were ‘functional’ because they satisfied a ‘demand for the aesthetic as well as for the utilitarian.’”¹¹³

There are two tests that a court may use to determine aesthetic functionality: “the comparable alternatives test” and “the effective competition test”.¹¹⁴ The “comparable alternatives test” “asks whether protection of certain features of a trade dress would [still] leave a variety of comparable alternatives [for] competitors [to] use [in] order to compete in the market.”¹¹⁵ “[I]f . . . alternatives do not exist, then the feature is functional, but if . . . alternatives do exist, then the feature is not functional” and protected.¹¹⁶ The “effective competition test” “asks [if] trade dress protection . . . would hinder the ability of another manufacture to compete effectively in the market.”¹¹⁷ “If such a hindrance is probable, then the [dress] is functional” and is not protected.¹¹⁸

B. Patent Infringement Generally

i. Design Patents

Typically after a “company has developed a new design,” it seeks out a way to protect the design.¹¹⁹ A design may be protected through three mechanisms: a federal trademark, a copyright, or a design patent.¹²⁰ A federal trademark is appropriate when the “design is to be used to designate the origin of goods or services.”¹²¹ When a company protects its design by a federal trademark, it does so by way of the U.S. PTO.¹²² A copyright is appropriate when the design is “an original work of authorship fixed in tangible form, such as a two-dimensional product label or a three-dimensional product configuration.”¹²³ The company files

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Pagliari v. Wallace China Co.*, 198 F.2d 339, 344 (9th Cir. 1952) (“The law encourages competition not only in creativeness but in economy of manufacture and distribution as well. Hence, the design being a functional feature of the china, we find it unnecessary to inquire into the adequacy of the showing made as to secondary meaning of the designs.”); see *Proof of Trade Dress Infringement*, *supra* note 61, §§ 13–13.5.

¹¹³ See *Pagliari*, 198 F.2d at 344.

¹¹⁴ See *Proof of Trade Dress Infringement*, *supra* note 61, § 13.5.

¹¹⁵ *Id.*

¹¹⁶ See *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 642 (6th Cir. 2002); *Proof of Trade Dress Infringement*, *supra* note 61, § 13.5.

¹¹⁷ *Abercrombie & Fitch Stores, Inc.* 280 F.3d at 642.

¹¹⁸ *Id.*

¹¹⁹ 105 AM. JUR. PROOF OF FACTS 3D *Establishing Infringement of a Design Patent* § 2 (2009).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

for a copyright in the United States' Copyright Office.¹²⁴ Lastly, a design patent is appropriate when the company seeks to protect, “new, original, and ornamental designs that are used for articles of manufacture.”¹²⁵ Design patents are generally sought in order to protect the “nonfunctional aspects of the ornamental design illustrated in the patent.”¹²⁶ Design patents are obtained by filing an application with the U.S. PTO.¹²⁷ The application should include figures that illustrate the ornamental design.¹²⁸ “After [the] application is [submitted], an examiner . . . [then evaluates] the application and determine[s] if the . . . design is patentable.”¹²⁹ This evaluation consists of determining “ornamentality, novelty, and nonobviousness of the claim.”¹³⁰ Once “an application is approved, the inventor [receives] a notice and [must] pay the issue and publication fees.”¹³¹

ii. Design Patent Infringement

When “[the] owner of a valid design patent . . . believes that [this] patent has been infringed” he may bring an action.¹³² Typically, this action is brought under the Federal Patent Act.¹³³ An infringement claim would be brought “when any person without authority applies the patented design, or any colorable imitation thereof, to any article of manufacture for the purpose of sale or sells or exposes for any sale any article of manufacture to which the design or colorable imitation has been applied.”¹³⁴

The first step in deciding a patent infringement claim is “constru[ing] the claim of the design patent [because] the claim defines the property interest.”¹³⁵ “After [this,] the claim is compared to the alleged infringing design.”¹³⁶ “The [alleged infringing] design and the patented design do not have to be identical in order for infringement to exist.”¹³⁷ “[P]rior to September 2008[, a] patent owner had to prove that the [alleged infringing] design infringed the patented design under [two tests¹³⁸]: the *Gorham [Manufacturing Co v. White]* ‘ordinary observer’

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* § 3.

¹³³ *Id.*; see 35 U.S.C. § 289 (2012).

¹³⁴ *Establishing Infringement of a Design Patent*, *supra* note 120, § 3 (citing 35 U.S.C. § 289 (2012)).

¹³⁵ *Id.* § 5; see *IXYS Corp. v. Advanced Power Tech., Inc.*, 301 F. Supp. 2d 1065, 1071 (N.D. Cal. 2004) (quoting *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996)) (“Courts are to construe disputed claim language according to ‘an objective test of what one of ordinary skill in the art at the time of the invention would have understood the term to mean.’”).

¹³⁶ *Establishing Infringement of a Design Patent*, *supra* note 120, § 5.

¹³⁷ *Id.*

¹³⁸ *Id.* § 6.

test and the ‘point of novelty’ test.”¹³⁹ Under the ordinary observer test, design patent infringement is found “if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other.”¹⁴⁰ The point of novelty test stated “[f]or a design patent to be infringed . . . no matter how similar two items look, ‘the accused device must appropriate the novelty in the patented device which distinguishes it from the prior art.’”¹⁴¹ Although both the ordinary observer and the point of novelty tests are distinct, case law has previously viewed the two tests as “conjunctive.”¹⁴²

“[T]he point of novelty test has been [easily applied] in simple cases [where] the claimed design [was] based on a single prior art reference.”¹⁴³ This is because it is relatively simple to identify the point of novelty.¹⁴⁴ “However, [it has been] more difficult to apply [the test when] the claimed design has [many] features” at issue, and thus, can cause confusion as to what the specific point of novelty is.¹⁴⁵ Thus, due to the difficult application of the point of novelty test, its role in design patent law has been discarded by the Federal Circuit Court of Appeals.¹⁴⁶ “The court has [said] that the purpose of the . . . test [is] ‘to focus on those aspects of a design which render the design different from prior art designs.’”¹⁴⁷ Thus, the court in *Egyptian Goddess [L, Inc. v. Swisa, Inc.]* felt that this purpose was “served . . . by applying the ordinary observer test through the eyes of an observer [who was] familiar with the prior art.”¹⁴⁸ The court determined that this allowed the observer to see any similarities between the two designs, without placing any “exaggerated importance to small differences,” which may have happened using the point of novelty test.¹⁴⁹ In addition, this approach avoids the question of what “combination of old features” constitute a point of novelty.¹⁵⁰ Thus, since 2008 a modified version of the ordinary observer test has been the primary test used to determine design patent infringement.¹⁵¹

Under the modified ordinary observer test, “[i]f the [alleged infringing] design consists of a combination of [features from prior art] that creates an appearance that is deceptively similar to the [alleged infringing] design, even to an observer familiar with similar prior art designs, a finding of infringement is

¹³⁹ *Id.*

¹⁴⁰ *Id.* (citing *Gorham Mfg. Co. v. White*, 81 U.S. 511, 528 (1871)).

¹⁴¹ *Litton Sys., Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1444 (Fed. Cir. 1984) (quoting *Sears, Roebuck & Co. v. Talge*, 140 F.2d 395, 396 (8th Cir. 1944)), *abrogated by* *Braun Inc. v. Dynamics Corp. of Am.*, 975 F.2d 815 (Fed. Cir. 1992).

¹⁴² *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 671 (Fed. Cir. 2008).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See id.*

¹⁴⁷ *Id.* at 677 (quoting *Sun Hill Indus., Inc. v. Easter Unlimited, Inc.*, 48 F.3d 1193, 1197 (Fed. Cir. 1995)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *See id.*; *Establishing Infringement of a Design Patent*, *supra* note 120, § 6.

justified.”¹⁵²

iii. *Design Patent Defenses*

There are several defenses to an action for design patent infringement.¹⁵³ The first of these defenses is “noninfringement, absence of liability for infringement, or unenforceability.”¹⁵⁴ The second defense is “invalidity of the patent on any ground specified in Part II of Title 35 of the United States Code.”¹⁵⁵ “The three most common defenses [under this Act are:] invalidity based on lack of ornamentality, lack of novelty, and obviousness of the patented design.”¹⁵⁶ The third available defense is “invalidity of the patent or any claim in suit for failure to comply with any requirement of section 112 of Title 35 of the United States Code.”¹⁵⁷ Finally, the defense may raise “any fact or act made a defense by Title 35.”¹⁵⁸

One of the most common defenses under this section is lack of ornamentality.¹⁵⁹ In order for a patent to be valid the design patent must be primarily ornamental, not functional.¹⁶⁰ This determination is made by viewing the design in its entirety and searching for certain functional considerations.¹⁶¹ These considerations include:

- (1) whether the protected design represents the best design; (2) whether alternative designs would adversely affect the utility of the specified article; (3) whether there are any concomitant utility patents; (4) whether the advertising touts particular features of the design as having specific utility; and (5) whether there are any elements in the design or an overall appearance clearly not dictated by function.¹⁶²

“Functionality [is] found [when] the [patented design] is essential to the use or purpose of the article.”¹⁶³ In addition, if the patented design affects the cost or quality of the object then functionality will be found.¹⁶⁴ “[T]he design [should] be reviewed to determine whether functional considerations . . . only [allow for] one design or whether [other] designs [can] be used.”¹⁶⁵ Furthermore, the designer’s

¹⁵² James L. Buchwalter, Annotation, *Application of Ordinary Observer Test in Action for Infringement of Design Patent*, 52 A.L.R. FED. 2d 353, § 4 (2011).

¹⁵³ *Establishing Infringement of a Design Patent*, *supra* note 120, § 8.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* § 9.

¹⁵⁷ *Id.* § 8.

¹⁵⁸ *Id.*

¹⁵⁹ *See id.* § 9.

¹⁶⁰ *Id.* § 10.

¹⁶¹ *Id.*; *see also* *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1259 (9th Cir. 2001) (“The fact that individual elements of the trade dress may be functional does not mean that the trade dress as a whole is functional; rather, ‘functional elements that are separately unprotectable can be protected together as part of a trade dress.’”); *CytoSport, Inc. v. Vital Pharms., Inc.*, 617 F. Supp. 2d 1051, 1078 (E.D. Cal.), *aff’d*, 348 F. App’x 288 (9th Cir. 2009).

¹⁶² *Establishing Infringement of a Design Patent*, *supra* note 120, § 10

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

testimony may be used to describe the reasoning behind the design, especially aesthetic reasoning.¹⁶⁶ If there is more than one way “to achieve a [certain] function, [then] the design will [likely] be considered ornamental” and thus valid.¹⁶⁷ However, it is important to remember that ornamentally is “[u]ltimately . . . a question of fact for [a] jury to decide.”¹⁶⁸

“The second defense [to be considered under Part II of Title 35] is lack of novelty.”¹⁶⁹ If a design “lacks novelty,” then courts have determined that the design has been “anticipated by prior art,” making the patent invalid.¹⁷⁰ The idea of novelty can be found in § 102 of the Patent Act, which states that a person is entitled to a patent unless others used the design before the application of the patent.¹⁷¹

“The [third] defense . . . under this section is obviousness.”¹⁷² Section 103 of the Patent Act requires that a design be nonobvious in order for the patent to be valid.¹⁷³ In order to find obviousness, there must be a determination as to whether the prior art renders the ornamental features obvious.¹⁷⁴ In addition,

A patent may not be obtained though the invention is not identically disclosed or described . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious to one of ordinary skill in the art to which the subject matter pertains.¹⁷⁵

A claim of invalidity due to obviousness “must be reviewed as a whole without focusing on selected features.”¹⁷⁶ Obviousness is a question of law, to be concluded “based on . . . factual inquiries.”¹⁷⁷ “These inquiries include (1) the scope of the content of the prior art, (2) the differences between the claims and the prior art, (3) the level of ordinary skill in the pertinent art, and (4) secondary considerations, if any, of nonobviousness.”¹⁷⁸ These are factual questions, and

¹⁶⁶ *Id.*

¹⁶⁷ *See id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* § 11.

¹⁷⁰ *Id.*

¹⁷¹ 35 U.S.C. § 102 (2012) (“A person shall be entitled to a patent unless—(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States”); *Establishing Infringement of a Design Patent*, *supra* note 120, § 10.

¹⁷² *Establishing Infringement of a Design Patent*, *supra* note 120, § 12.

¹⁷³ 35 U.S.C. § 103(a) (2012) (“A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.”); *Establishing Infringement of a Design Patent*, *supra* note 120, § 12.

¹⁷⁴ *Establishing Infringement of a Design Patent*, *supra* note 120, § 12.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*; *see* *Graham v. John Deere, Co.*, 383 U.S. 1, 17 (1966).

thus, “are for [a] jury to decide.”¹⁷⁹

IV. ANALYSIS

Following the jury’s verdict Samsung released a statement stating, “Today’s verdict should not be viewed as a win for Apple but as a loss for the American consumer It will lead to fewer choices, less innovation, and potentially higher prices.”¹⁸⁰

Samsung’s statements have truth to them. A free market economy, such as what we have in the United States, is “a system [in which] the buyers and sellers are solely responsible for the choices they make.”¹⁸¹ This system gives companies the power to price products and their distribution.¹⁸² However, these prices are dictated by supply and demand.¹⁸³ In an economy which does not allow for monopolies by one company,¹⁸⁴ prices are often much lower than they would otherwise be. As more and more companies create similar products the demand for the products decreases as the supply increases. Companies often rush to create more products to generate more revenue. Therefore, consumers benefit from this competition because they are able to pay lower prices. However, if the demand increases for a certain product, because its supply has decreased, then consumer’s prices are driven up. If companies were not allowed to create similar products then there would be no competition between companies and, thus, prices of technology would increase in order for companies to cover the cost of increased research and marketing.

When the first iPhone was released in 2007, it came with eight gigabytes of memory and only had five hours of talk time to its battery life.¹⁸⁵ However, only four years later, the iPhone 4S came with a standard sixteen gigabytes of memory (although there is a sixty-four gigabytes option) and includes up to eight hours of talk time, while still maintaining the same weight as the original.¹⁸⁶ This is a perfect example of technology improving in our economy. As time goes by, technology companies, such as Apple, are forced to make their already revolutionary products even better. Companies that do not improve their technology do not survive in this free market economy. Most companies understand that in this economy, the prices of technology do not increase; the only

¹⁷⁹ *Establishing Infringement of a Design Patent*, *supra* note 120, § 12.

¹⁸⁰ Donna Tam, *Samsung: Verdict is ‘loss for American consumer’*, CNET (Aug. 24, 2012 5:29 PM), http://news.cnet.com/8301-13579_3-57500261-37/samsung-verdict-is-loss-for-american-consumer.

¹⁸¹ Econ.Watch, *Free Market Economy*, ECONOMY WATCH (Oct. 14, 2010), <http://www.economywatch.com/market-economy/free-market-economy.htm>.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Kimberly Amadeo, *Monopoly*, ABOUT.COM, <http://useconomy.about.com/od/glossary/g/monopoly.htm> (last visited Feb. 15, 2013).

¹⁸⁵ *iPhone Q&A*, EVERYPHONE.COM (Apr. 12, 2010), <http://www.everymac.com/systems/apple/iphone/iphone-faq/iphone-original-battery-life-how-to-replace-battery.html>.

¹⁸⁶ Sam Costello, *What is an iPhone?*, ABOUT.COM, http://ipod.about.com/od/understandingiphonemodels/g/iphone_def.htm (last visited Feb. 16, 2013) (original iPhone weighed 2.8 ounces); *iPhone*, APPLE, <http://www.apple.com/iphone/compare-iphones/> (last visited Feb. 16, 2013) (iPhone 4S weighs 2.9 ounces).

thing that increases appears to be the benefits of each product.

After the court's finding that Samsung can no longer sell its Galaxy products because of their similarity to Apple's products, other technology companies may likely become too fearful of potential lawsuits to develop new products that may emulate another company's. If companies no longer compete with one another for the most revolutionary product, then prices of technology products will increase over time, instead of decreasing.

This phenomenon was described recently in *USA Today*, which stated:

A gradual decline in prices is inevitable for consumer electronics makers. But the recent downward pressure on tablet pricing also reflects a broader volatility in the market that has been turned upside down by the arrival of cheaper, snazzier models.¹⁸⁷ A decline in tablet prices will continue throughout the year, analysts predict.

This phenomenon has also been described in antitrust literature.¹⁸⁸ It has been said that “[p]atent law encourages innovation by granting [exclusive] rights [to exclude others] to patent holders.”¹⁸⁹ Without these rights, “rival [manufacturers] could copy [patented designs for] a lower price because they [did] not [need] to invest . . . money” in research.¹⁹⁰ However, now a patent holder can charge “supracompetitive” prices in order to recoup their investment in research.¹⁹¹ Although this may encourage inventors to increase innovation so that they do not have to pay for patent rights, it may also impose inefficiency.¹⁹² Consumers are suddenly excluded from the market.¹⁹³ It has been said that “[c]onsumers who would pay the competitive price for the patented product, but not the supracompetitive price charged by the patentee, are excluded from the market.”¹⁹⁴ Thus, efficient sales that should occur in the market, because consumers value goods more than it costs to make, no longer occur.¹⁹⁵ A huge demand by consumers will then go unmet because rivals cannot afford to be sued for patent infringement.¹⁹⁶

Many scholars argue that this inefficiency is outweighed by the long-term effect of patents, which is increased innovation.¹⁹⁷ They argue that as patents become necessary to increase profits, then more manufacturers will begin research and thus innovation will increase.¹⁹⁸ Thus, scholars believe that in the end patents

¹⁸⁷ Roger Yu, *Competition Sparks Tablet Price Cuts*, *USA Today* (Jan. 5, 2012, 8:21 PM) <http://www.usatoday.com/tech/news/story/2012-01-04/tablet-prices/52396730/1>.

¹⁸⁸ Christopher R. Leslie, *Patent Tying, Price Discrimination, and Innovation*, 77 *ANTITRUST* 811, 812 (2011).

¹⁸⁹ *Id.* at 811.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 812.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See Yu, *supra* note 186.

help balance out innovation and profits in a competitive market.¹⁹⁹

V. CONCLUSION

In August of 2012, Apple prevailed over Samsung in the District Court. Although Apple has won the first battle, they have hardly won the war. Samsung has appealed the decision, vowing to take the case to the Supreme Court if necessary. Though an analysis that the Ninth Circuit will likely follow, I have made my own predictions. I believe that Apple will again be able to show that Samsung is guilty of both trademark infringement and design patent infringement. Apple will most likely be able to show that the iPhone and iPad are both unique and novel to Apple. Their unique features are purely non-functional: they are not necessary for the devices to work. Thus, other smart phone and tablet manufacturers do not need to replicate such recognizable features of Apple devices in order to make functioning products. Rather, Samsung has chosen to replicate Apple's uniqueness simply to increase marketability and increase success. Such facts are not likely to prevail.

Although it seems that Apple will prevail in the United States, the cases are worldwide and so far, both sides have won some arguments and lost some arguments. Thus, it will be interesting to see how court decisions from other countries come into play on appeal.

No matter the outcome in this case, one thing is clear. The true people affected by these court decisions are the consumers. Consumers will be forced to pay higher prices for technology. This increase in prices will burden our economy, and thus may affect how often new technology is released. Due to this, we as consumers must question whether intellectual property law is serving its original purpose of protecting consumers. Some wonder if the benefits of patents outweigh the burdens imposed upon inventors, manufacturers, and consumers due to a lack of competition. Although this case will not be swayed by public opinion, it will be fascinating to watch as public policy is affected by the case between Apple and Samsung.

¹⁹⁹ *See id.*

VII. APPENDIX





