

# APPLE v SAMSUNG

## Development of design law in EU

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Home > Mobile/Wireless > Smartphones

News

# Apple and Samsung are now top smart device makers

Together, the two companies account for 37% of smartphones, tablets and PCs

By **Matt Hamblen**

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Computerworld - Apple and Samsung have emerged as the global kings of smartphones, tablets and PCs even though the two vendors have very different product and pricing strategies, IDC said Monday.

On price, Apple's average selling price (ASP) for all its products is \$310 more than Samsung's ASP, IDC said. That meant Samsung was able to ship to retailers about 20 million more smartphones, tablets, and PC's than Apple during the third quarter.

In all, Samsung sold 66.1 million "smart devices" in the quarter, outpacing the 45.8 million from Apple, IDC said.

In terms of market share, Samsung had 21.8% of all tablets, smartphones, desktops and laptops shipped during the period, while Apple had 15.1%. At that rate, Samsung grew by 97% over the third quarter of 2011, while Apple grew by 38%.

The remaining vendors each had less than 7% of the market for all these devices, with Lenovo at 7%, HP at 4.6% and Sony at 3.6%. The total number of shipments for all vendors for all smart devices was 303.6 million, IDC said.

"The battle between Samsung and Apple at the top of the smart connected device space is stronger than ever," said Ryan Reith, an IDC analyst. The fact that Apple charges higher prices while shipping 20 million fewer products "speaks volumes about the premium product line that Apple sells," Reith said.

Smartphones will comprise 60.1% of all smart devices shipped in 2012, IDC predicted, followed by 17.2% for laptops, 12.5% for desktop PCs and 10.2% for tablets. All smart devices shipped in 2012 will total nearly 1.2 billion devices, IDC said.

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**One Question Site Survey**  
IT TAKES ONLY SECONDS TO ANSWER BELOW

Which of the following companies are you aware of as providers of Business Communications and Collaboration systems and solutions?  
SELECT UP TO 3 ANSWERS.

Siemens

Cisco

Microsoft

Alcatel

Avaya

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**iPHONE 4**

**v**

**Galaxy S Plus**



## APPLE iPad 2

v

## SAMSUNG GALAXY 10.1





# APPLE VS SAMSUNG

SH\*T JUST GOT REAL

# The design issues

- Registered Community Designs
- Copyright
- Unfair competition
- 3-D Trade mark

# GALAXY TABLET 7.7



# GALAXY TABLET 10.1 v 10.1V





# RCD-issues

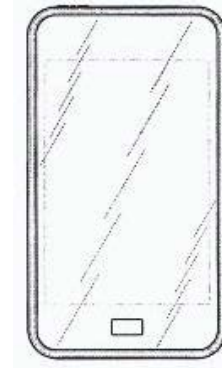
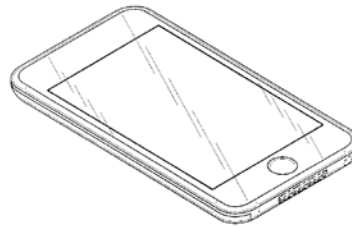
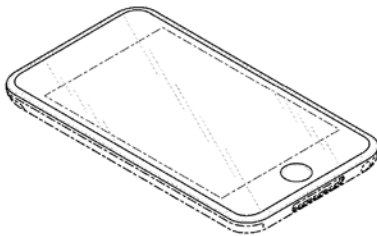
- Validity priority rights
- Meaning dotted lines
- Individual character: **overall impression on the informed user**
- Scope of protection
  - Again: overall impression on informed user
  - Freedom of designer
  - Exclusion of technical features

# Validity priority claim

•US Design Patent D604,297

•US Design Patent US D602,014

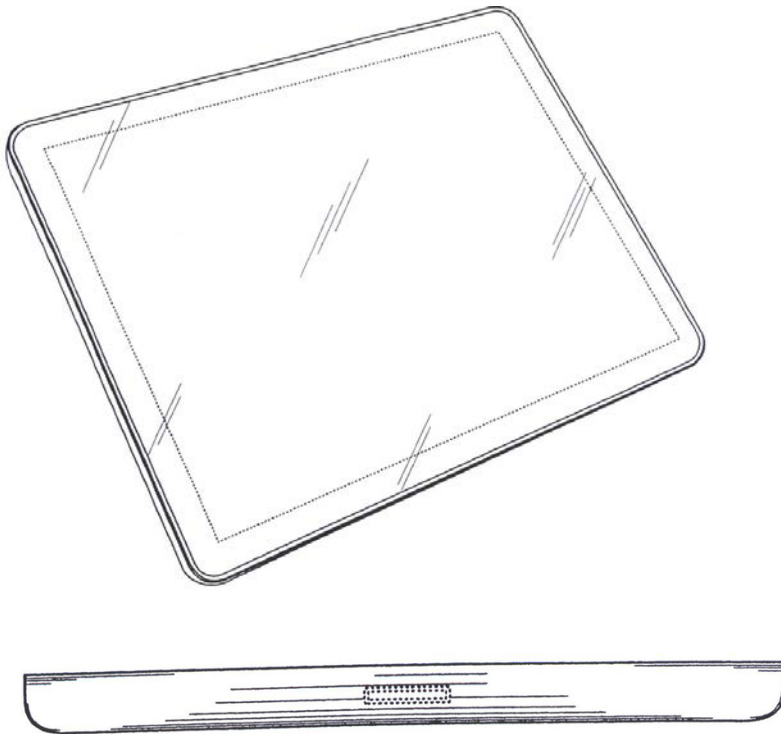
•GM 888920-0018



Art. 41 CDRReg.: Priority right for the same design, meaning: identical design (District Court The Hague). No patent approach, no partial priority.

Manual OHIM: ...*identity with the corresponding Community Design without the addition or suppression of features...*

# Dotted lines



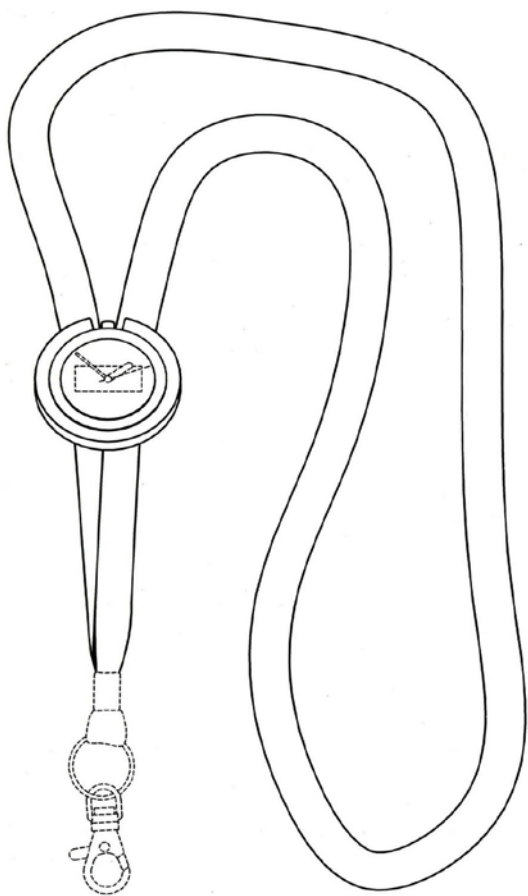
**APPLE RCD 181607-0001**

# Dotted lines

- **Manual OHIM:**
  - *Features of a Community Design which are disclaimed are disregarded for the purposes of comparing the designs. This applies to the features of a Community design represented in dotted lines, boundaries or colouring or in any other manner making clear that protection is not sought for those features*

# Dotted Lines

General Court, *Sphere Time*, 2011, T-68/10



- (64) ...it must be held that the attachment clip of the contested design, the hands of the watch and the rectangular element affixed to the watch face do not form part of the elements that are protected by the contested design ...

# Dotted Lines

- UK CoA Oct. 18, 2012
  - *This is faintly absurd: a bit like the notice-board reading “Ignore this notice”....The simplest explanation...is this: the drawings have hatching which clearly indicates a flat, shiny surface. This goes over the dotted line. So the latter is there to show a border below the shiny transparent surface*
- Similar: Hague CoA and Düsseldorf CoA
- But what about sockets, etc.?
  - Düsseldorf CoA: dotted line because their exact positioning is being kept open



# Individual character

- Art. 4 CDReg.
  - *A design shall be protected by a Community design to the extent that it is new and has individual character*
- Art. 6 CDReg.
  - *A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public*



# Informed user

- CJ, *Grupo Promer*, C-281/10, 2011
  - middle man between average consumer and sectoral expert
  - will make direct comparison, when possible
  - knows the various designs in the sector
  - has certain degree of knowledge re. design features
  - shows relatively high degree of attention when using



# Informed user Apple v Samsung

- CoA UK, CoA The Hague, CoA Düsseldorf
  - apply principles of *Grupo Promer*, informed user = the user of a tablet computer comparing products side by side with relatively great attention, being aware of the different designs available and having knowledge of features such designs normally possess.



# Informed user Apple v Samsung

- Role of trade mark *SAMSUNG* on tablet?
  - **High Court UK:** *I find that the presence of writing on the front of the tablet is a feature which the informed user will notice ... The fact that the writing happens to be a trade mark is irrelevant. It is ornamentation of some sort*
  - **CoA Düsseldorf:** *Design law protects designs not trademark rights from the risk of confusion. Design protection must be seen in isolation from the manufacture of the specific product sold...A design does not become a different design ...simply because it is offered for sale by another manufacturer under its mark*

# Role of prior art in scope of protection

- Art. 85 CDReg.
  - *In proceedings in respect of an infringement action ...of a registered Community design, the Community design court shall treat the Community design as valid.*
- Apple: validity not at stake, no room for judging prior art; even if prior art plays a role in infringement, one can only make 1 to 1 comparisons
- Art. 6:
  - *A design shall be protected by a Community design to the extent that it ... has individual character*
- Musker:
  - *if features which ... lack individual character ... are the only features of similarity, there is no infringement*

# Role of prior art in scope of protection

- Recital 14 CDReg.
  - *The assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user ... clearly differs from that produced on him by the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design.*

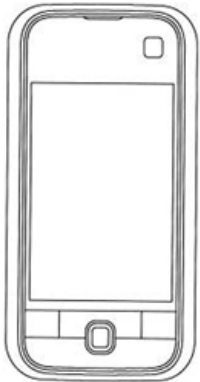
# Role of prior art in scope of protection

- Federal Supreme Court Germany, *Untersetzer*, 2010:
  - The scope of protection conferred on a registered design depends on the degree to which it differs from prior art designs
- LJ Jacob in *Proctor & Gamble*:
  - *Next is not a proposition of law but a statement about the way people (and this the notional informed user) perceive things. It is simply that if a new design is markedly different from anything that has gone before, it is likely to have a greater overall visual impact than if it is “surrounded by kindred prior art.” ... It follows that the “overall impression” created by such a design will be more significant and the room for differences which do not create a substantially different overall impression is greater*

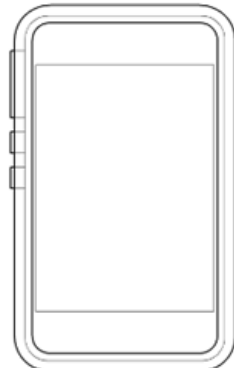
# Role of prior art in scope of protection

- Confirmed in GC, *Antrax*, T-83/11, 2012
  - A saturation of the prior art can be such that the informed user is more sensitive for differences in the designs
- This is what Samsung argues in the phone design case

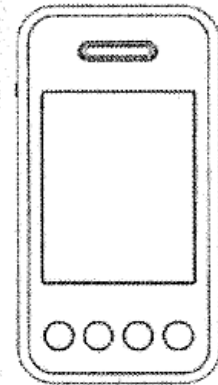
# Prior art Apple's phone RCD's



GM 590831-0001



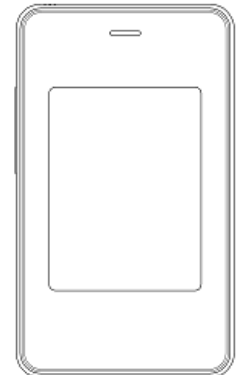
JP 1241383



KR 30-398307



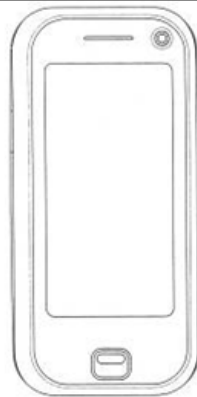
JP 1241638



KR 30-0418547



JP 001235888



RCD 718770-0007



LG Prada



JP D1204221



Bluebird pidion PDA



# Features solely dictated by technical function

- Art. 8 CDRReg. applies if:
  - A. the function mandates the feature (only this shape is possible; design is protectable if it could be made in a different shape), or
  - B. the function is the cause of the shape, even if other shapes are possible
- UK courts: B
- Dutch courts: B
- German courts, Musker and AG in *Philips/Remington* case (obiter!): A
- In Apple v Samsung cases: no features were considered to fall under exception of art. 8, but technical aspects were considered in the context of freedom of the designer



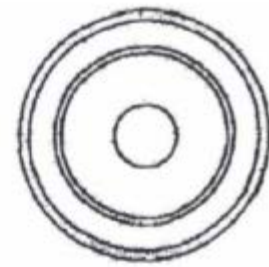
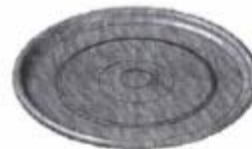
# Freedom of designer

- Art 10(2) CDReg.:
  - *In assessing the scope of protection, the degree of freedom of the designer in developing his design shall be taken into consideration*

# Freedom of designer

- What influences this freedom?
- GC, *Grupo Promer*, T-9/07, 2010:

*the designer's degree of freedom in developing his design is established, **inter alia**, by the constraints of the features imposed by the technical function of the product or an element thereof, or by statutory requirements applicable to the product. Those constraints result in a standardisation of certain features, which will thus be common to the designs applied to the product concerned*



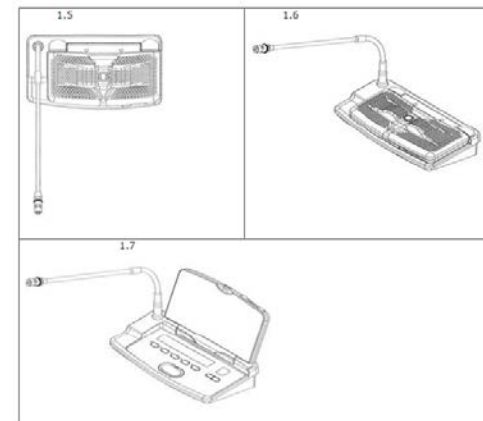


# Freedom of designer

- GC, *Grupo Promer*, T-9/07, 2010:  
*the freedom ... was severely restricted, because, ..., [t]he paradigm ... is a small flat or nearly flat disk on which coloured images can be printed and often the disk is curved towards the centre, so that a noise is made if a child's finger presses the centre of the disk', and 'a rapper that does not possess these characteristics is unlikely to be accepted in the marketplace'*

# Freedom of designer

- But: GC, *Shenzen*, T-153/08, 2010
  - the question whether a design does or does not follow a general design trend is relevant, at the most, in relation to the aesthetic perception of the design concerned and can therefore, possibly, have an influence on the commercial success of the product in which the design is incorporated
  - it is not relevant in the examination of the individual character of the design concerned, which consists in verifying whether the overall impression produced by it differs from the overall impressions produced by the designs made available earlier, irrespective of the aesthetic or commercial considerations



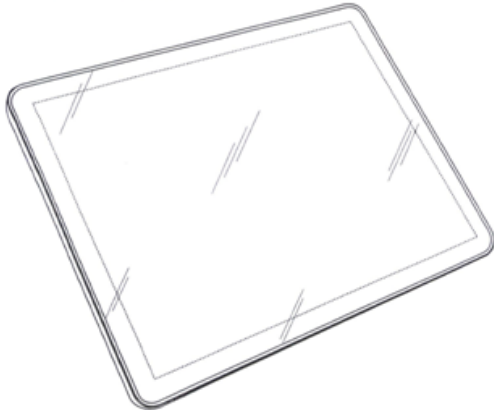
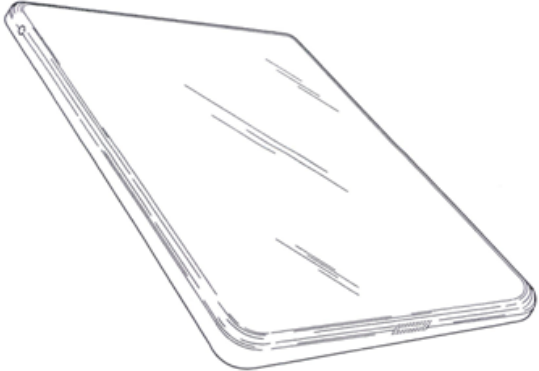

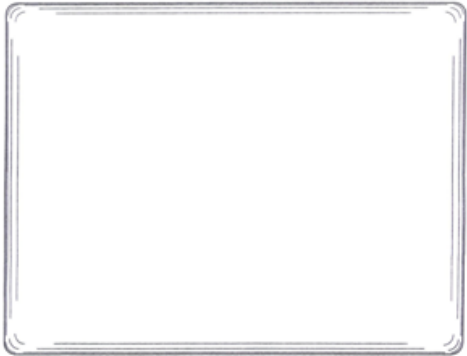





# Freedom of designer

- Not only restricted by technical or statutory requirements, but also by trends, fashion, economical requirements
- See also: Musker and German authors Eichmann and Becker
- Green Paper 1991:  
*The provision expresses the principle that, the more limited the freedom of the designer is in developing his design due to technical or marketing constraints (standardization, mechanical or physical constraints, necessity of taking into account deep-rooted marketing requirements by the clients, features imposed by fashion), the more weight has to be given to small differences or variations (...)*

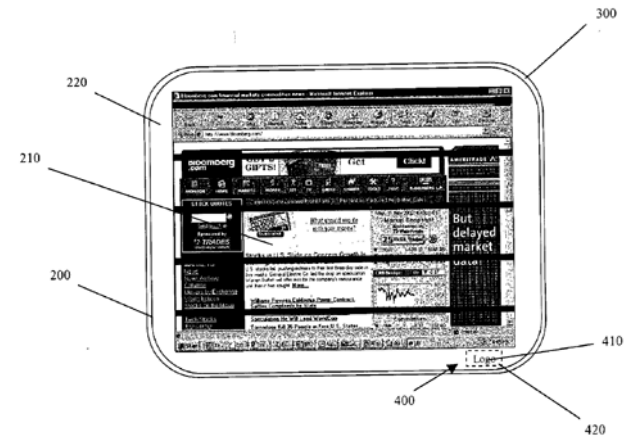
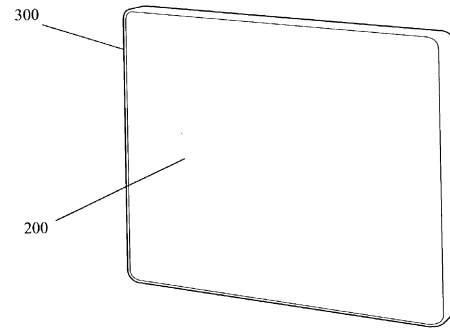
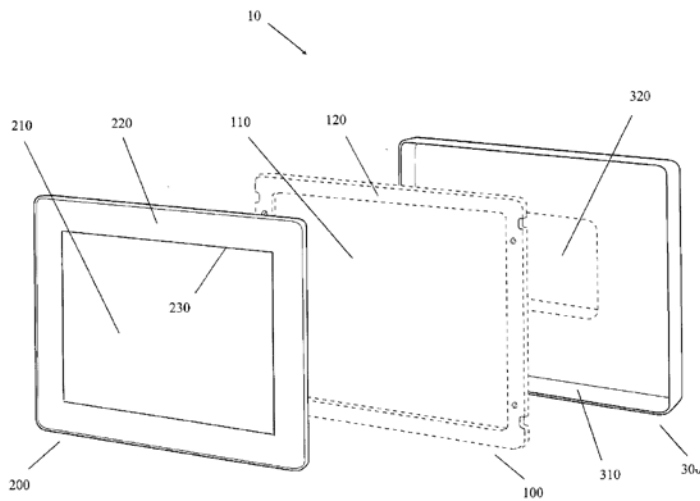


# APPLE RCD 181607-0001

	
0001.1	0001.2
	
0001.3	0001.4
	
0001.5	0001.6
	
0001.7	

# Prior art RCD 181607-0001

US Patent Appl. 2004/0041504 A1 (“Ozolins”)



# Prior art RCD 181607-0001

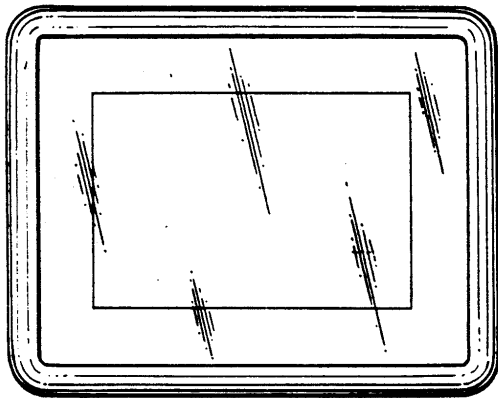
HP Compaq TC1000 tablet computer



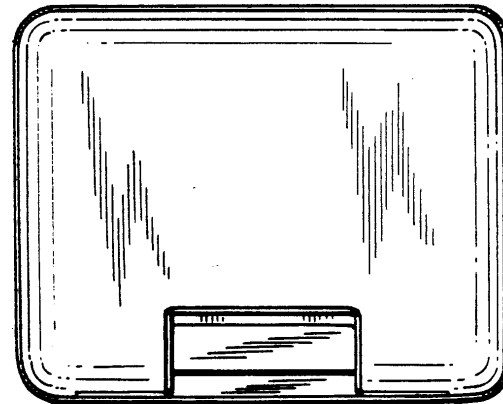


# Prior art RCD 181607-0001

US Design Patent 333,574 ("Showbox")



*FIG. 1*



*FIG. 4*

# Prior art RCD 181607-0001

LG Flatron L1530 TM monitor



# Same overall impression?

- CJ, *Grupo Promer*, C-281/10, 2011
  - when possible, informed user will make direct comparison with knowledge of features designs normally possess, but:
- CJ, *Neuman v Baena*, C-101, 102/11, 2012

RCD 426895-0002



CTM 1312651 cl. 25, 28, 32

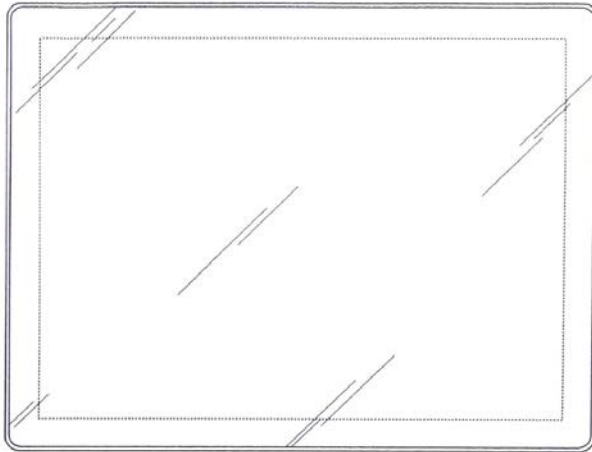




# Same overall impression?

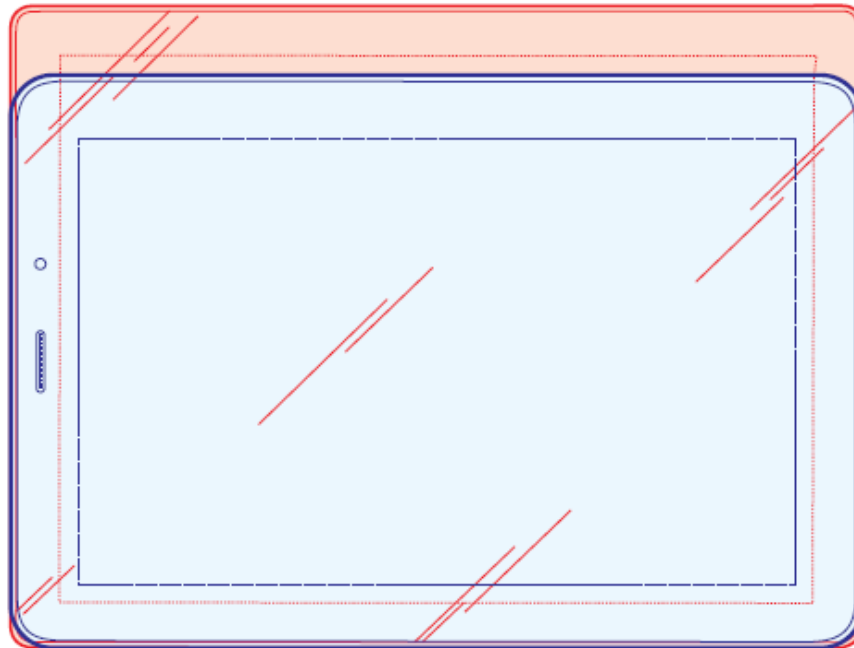
- CJ, *Neuman v Baena*, C-101, 102/11, 2012
  - repeats *Grupo Promer*-principle of direct comparison, but
  - assessment of designs under CDReg. is not limited to direct comparison
  - no error in law by GC reasoning on the informed user's imperfect recollection of the overall impression produced by the two silhouettes

# Same overall impression?



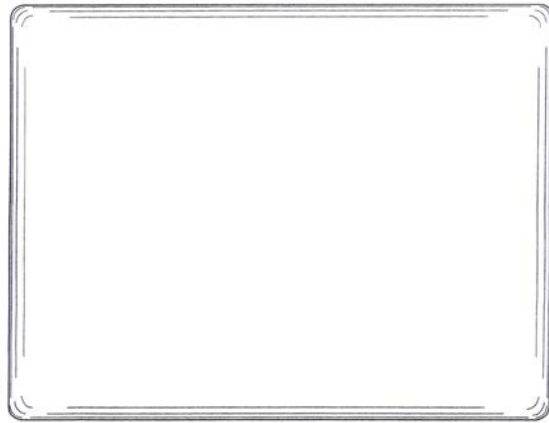
# Same overall impression?

Formal and visual agreement between surfaces



GALAXY Tab 7.7 design vs. Community Design no. 000181607-0001

# Same overall impression?



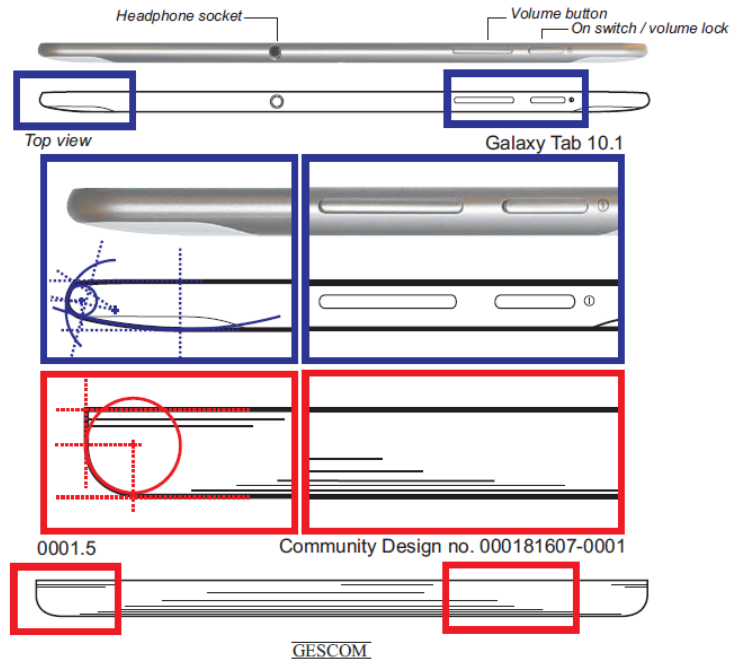
•0001.4 from the RCD



•(Galaxy 7.7)

# Same overall impression?

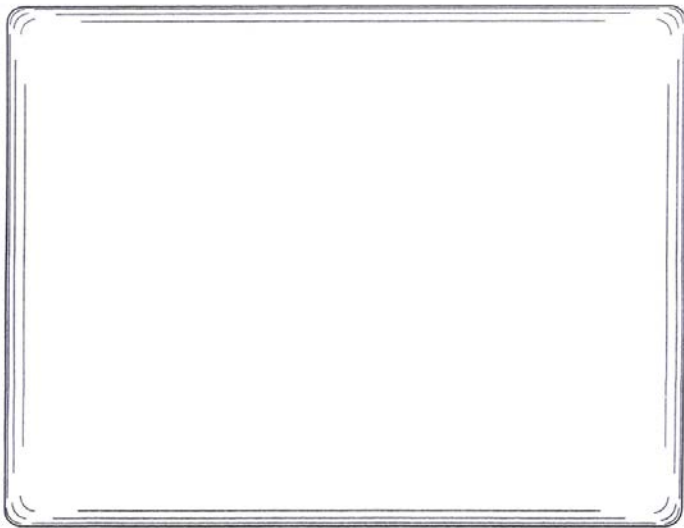
OTHER DIFFERENTIAL ASPECTS PROVIDED BY FORMS.



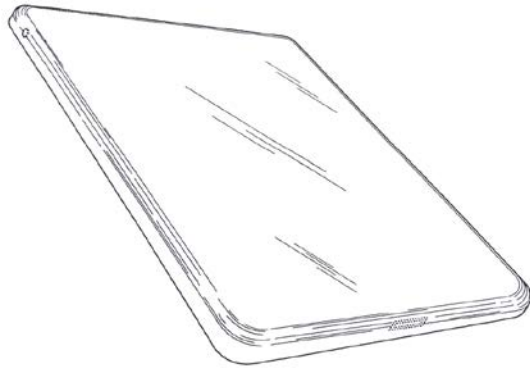


# Same overall impression?

Galaxy Tab 10.1v backside



# Same overall impression?



•0001.2 from RCD



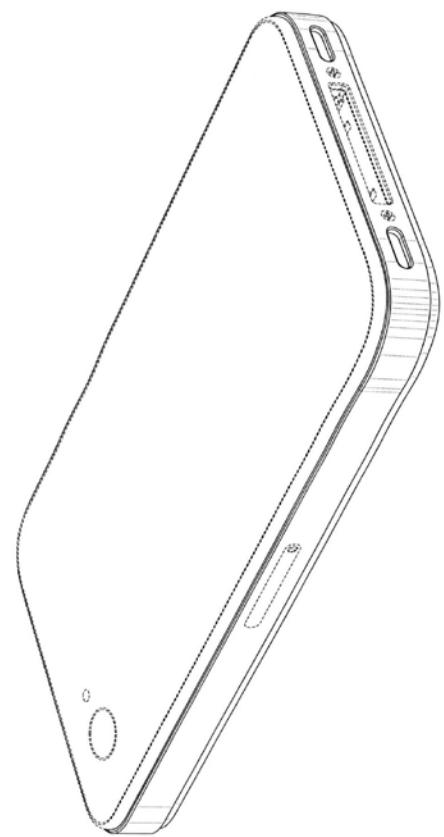
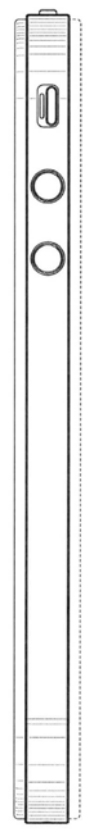
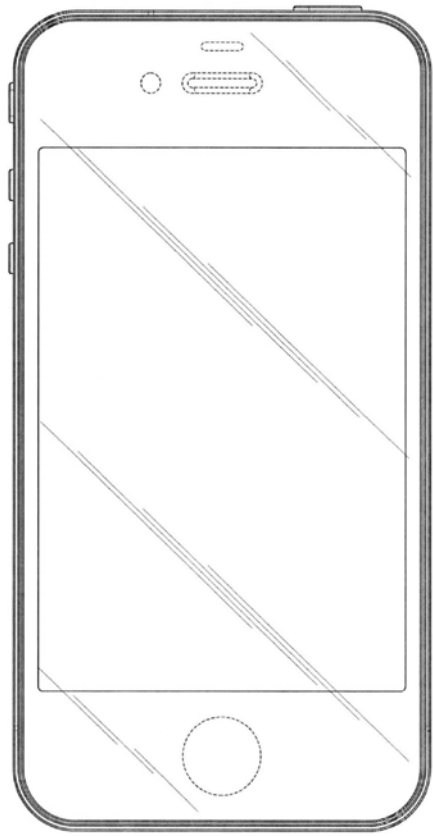
•Backside of Samsung Galaxy Tab  
10.1/8.9

# Same overall impression?

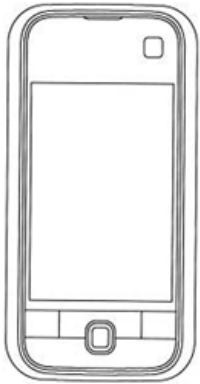
- UK High Court (confirmed in appeal), on the merits:
  - Apple RCD = cool; *the informed user's overall impression of each of the Samsung Galaxy Tablets is the following. From the front they belong to the family which includes the Apple design; but the Samsung products are very thin, almost insubstantial 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*
- CoA The Hague: different overall impression (pending before Supreme Court)
- CoA Düsseldorf interlocutory superseded by UK CoA: 7.7 same overall impression (lower court: no infringement by 10.1)



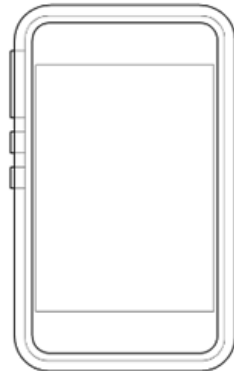
# RCD 1236590-0011 (iPhone 4)



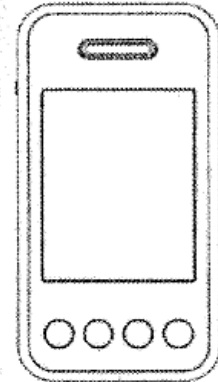
# Prior art Apple's phone RCD's



GM 590831-0001



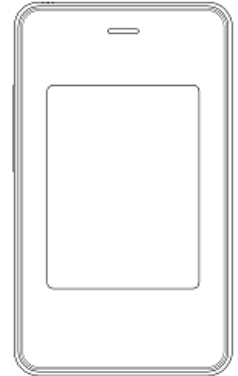
JP 1241383



KR 30-398307



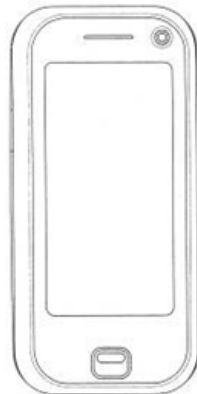
JP 1241638



KR 30-0418547



JP 001235888



RCD 718770-0007



LG Prada



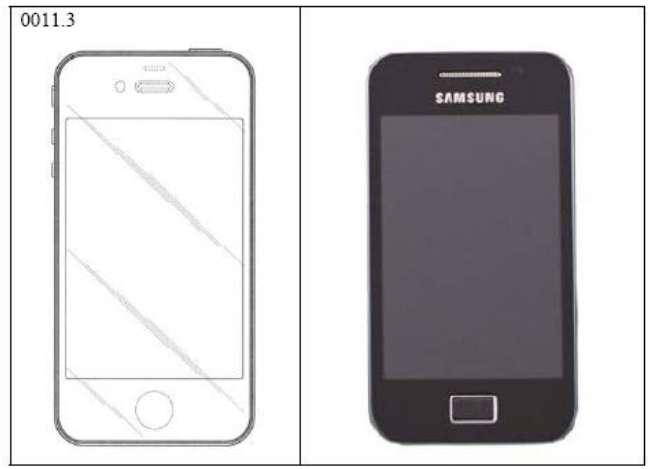
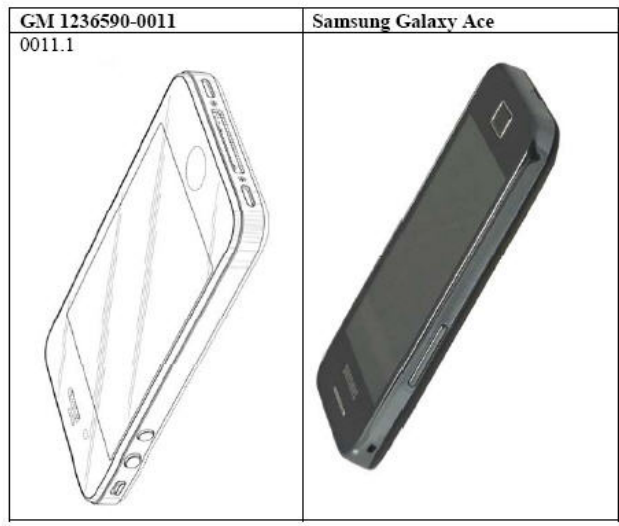
JP D1204221



Bluebird pidion PDA



# Infringement? DC The Hague: no





# Copyright?

- In Dutch case Apple invoked copyright to the designs
- Samsung's defence: art 2(7) Berne Convention prevents copyright protection, since in the country of origin (US) the designs are solely protected by special design legislation
- Copyright protection not further pursued

# Unfair competition

- Apple invoked protection under the *slavish imitation* protection before German and Dutch courts, not further pursued
- Question is whether there is a likelihood of unnecessary confusion between the iPad and iPhone products and the Samsung Tablets and Galaxy phones?



# iPad and iPhone: 3D trade mark?

- Did Apple miss a chance to register the iPad and iPhone as a trade mark?
- under the rules of ECJ on 3D marks, may be difficult, but
- secondary meaning?





**THANKS!**

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