

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

APPLE INC., A CALIFORNIA CORPORATION,	)	C-11-01846 LHK
	)	
PLAINTIFF,	)	SAN JOSE, CALIFORNIA
	)	OCTOBER 13, 2011
VS.	)	
	)	PAGES 1-104
SAMSUNG ELECTRONICS CO., LTD., A KOREAN BUSINESS ENTITY; SAMSUNG ELECTRONICS AMERICA, INC., A NEW YORK CORPORATION; SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, A DELAWARE LIMITED LIABILITY COMPANY,	)	
	)	
DEFENDANTS.	)	

---

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE LUCY H. KOH  
UNITED STATES DISTRICT JUDGE

APPEARANCES ON NEXT PAGE

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR  
CERTIFICATE NUMBER 9595

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

A P P E A R A N C E S :

FOR PLAINTIFF MORRISON & FOERSTER  
APPLE: BY: HAROLD J. MCELHINNY,  
MICHAEL A. JACOBS, AND  
RICHARD S.J. HUNG  
425 MARKET STREET  
SAN FRANCISCO, CALIFORNIA 94105

FOR COUNTERCLAIMANT WILMER, CUTLER, PICKERING,  
APPLE: HALE AND DORR  
BY: WILLIAM F. LEE  
60 STATE STREET  
BOSTON, MASSACHUSETTS 02109

FOR THE DEFENDANT: QUINN, EMANUEL, URQUHART,  
OLIVER & HEDGES  
BY: KATHLEEN M. SULLIVAN  
51 MADISON AVENUE, 22ND FLOOR  
NEW YORK, NEW YORK 10010  
BY: VICTORIA F. MAROULIS,  
KEVIN P.B. JOHNSON AND  
ANNA T. NEILL  
555 TWIN DOLPHIN DRIVE  
SUITE 560  
REDWOOD SHORES, CALIFORNIA 94065  
BY: MICHAEL T. ZELLER  
865 SOUTH FIGUEROA STREET  
10TH FLOOR  
LOS ANGELES, CALIFORNIA 90017

1 SAN JOSE, CALIFORNIA

OCTOBER 13, 2011

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENEED AND THE  
4 FOLLOWING PROCEEDINGS WERE HELD:)

5 THE CLERK: CALLING FIRST CASE NUMBER  
6 C-11-01846 LHK, APPLE INCORPORATED VERSUS SAMSUNG  
7 ELECTRONICS COMPANY LIMITED, ET AL.

8 COUNSEL COME FORWARD, PLEASE, AND STATE  
9 YOUR APPEARANCES.

10 MR. MCELHINNY: GOOD AFTERNOON, YOUR  
11 HONOR. HAROLD MCELHINNY, WILLIAM LEE, MIKE JACOBS  
12 AND RICH HUNG ON BEHALF OF APPLE CORPORATION.

13 THE COURT: GOOD AFTERNOON.

14 MS. SULLIVAN: GOOD AFTERNOON, YOUR  
15 HONOR. KATHLEEN SULLIVAN HERE ON BEHALF OF  
16 SAMSUNG, TOGETHER WITH MY COLLEAGUES FROM QUINN,  
17 EMANUEL, MICHAEL ZELLER, KEVIN JOHNSON,  
18 VICTORIA MAROULIS, AND ANNA NEILL.

19 THE COURT: OKAY. GOOD AFTERNOON.

20 MR. JOHNSON: GOOD AFTERNOON, YOUR HONOR.

21 THE COURT: SO LET ME ASK HOW YOU WOULD  
22 LIKE TO PROCEED.

23 I, OF COURSE, HAVE MY OWN QUESTIONS FOR  
24 YOU, BUT BASED ON ALL THE TECHNOLOGY YOU'VE  
25 INSTALLED, I ASSUME YOU ALSO HAVE SOME PREPARED

1 PRESENTATIONS. IS THAT CORRECT?

2 MR. MCELHINNY: IT'S NOT OUR TECHNOLOGY,  
3 YOUR HONOR.

4 THE COURT: OKAY. AND HOW DO YOU WANT TO  
5 HANDLE ANY SEALING, NECESSARY SEALING OF THE  
6 COURTROOM?

7 MR. MCELHINNY: OUR -- OUR PRESENTATION,  
8 I THINK, LARGELY DOES NOT DEAL WITH CONFIDENTIAL  
9 INFORMATION, AND TO THE EXTENT THAT IT DOES, I  
10 INTENDED TO DRAW YOUR HONOR'S ATTENTION TO SPECIFIC  
11 EXHIBITS OR DOCUMENTS WITHOUT READING THEM INTO THE  
12 RECORD. THAT WAS HOW I PLANNED TO DO IT.

13 THE COURT: OKAY. WHAT ABOUT FOR  
14 SAMSUNG?

15 MS. SULLIVAN: YOUR HONOR, IF IT'S  
16 ACCEPTABLE TO YOU, WE WOULD LIKE TO MAKE A  
17 PRESENTATION.

18 WE HAVE A SET OF SLIDES. WE WON'T GO  
19 THROUGH THEM ALL, BUT WE'D LIKE TO HIT THE  
20 HIGHLIGHTS WITH YOU AND, OF COURSE, BE OPEN TO YOUR  
21 QUESTIONS AT ANY POINT.

22 BUT IF THAT WERE ACCEPTABLE, WE WOULD  
23 WANT TO SHOW OUR PRESENTATION.

24 THE COURT: WHAT'S THE LENGTH OF THE  
25 PRESENTATION?

1 MS. SULLIVAN: IT'S WAY TOO LONG, YOUR  
2 HONOR, BUT WE ONLY INTEND TO SHOW YOU PORTIONS IT.

3 THE COURT: SO WHAT'S THE ESTIMATED  
4 LENGTH OF THAT PRESENTATION?

5 MS. SULLIVAN: I THINK IF YOU WERE TO  
6 GIVE US -- LET ME CONFER FOR A MOMENT.

7 THE COURT: OKAY.

8 (DISCUSSION OFF THE RECORD BETWEEN  
9 DEFENSE COUNSEL.)

10 MS. SULLIVAN: WE THINK IT CAN BE DONE IN  
11 30 MINUTES.

12 THE COURT: THAT'S A LITTLE BIT LONGER  
13 THAN I'D LIKE, BUT THAT'S FINE.

14 MS. SULLIVAN: OKAY. THANK YOU.

15 AND AS TO YOUR QUESTION ABOUT SEALING,  
16 YOUR HONOR, WE INTEND TO BE CAREFUL NOT TO REFER TO  
17 ANY SEALED DOCUMENT WHILE IN COURT, AND OBVIOUSLY  
18 IF ANY CONFIDENTIAL INFORMATION DOES GET BROACHED,  
19 WE WOULD RESPECTFULLY REQUEST THAT YOUR HONOR CLEAR  
20 THE COURTROOM.

21 THE COURT: OKAY. IT SEEMS LIKE THAT IS  
22 REALLY GOING TO COME UP ONLY IN ANY IRREPARABLE  
23 HARM DISCUSSION. I'LL HAVE SOME QUESTIONS ABOUT  
24 THAT.

25 I GUESS IF YOU ALL CAN BE CAREFUL NOT TO

1 DISCLOSE ANYTHING THAT REQUIRES SEALING, THEN WE  
2 CAN STILL HAVE THAT WITH THE OPEN PUBLIC. OKAY?

3 MR. MCELHINNY: THAT'S FINE, YOUR HONOR.

4 THE COURT: OKAY. I THINK THE MOVING  
5 PARTY SHOULD GO FIRST.

6 MR. MCELHINNY: THANK YOU, YOUR HONOR.

7 I DO HAVE A BINDER FOR THE COURT.

8 THE COURT: OKAY.

9 MR. MCELHINNY: AND YOUR HONOR, I HAVE A  
10 COUPLE FOR YOUR CLERKS IF THAT WOULD BE HELPFUL.

11 THE COURT: OKAY. THANK YOU.

12 (PAUSE IN PROCEEDINGS.)

13 MR. MCELHINNY: THANK YOU, YOUR HONOR.

14 APPLE HAS BROUGHT THIS PRELIMINARY  
15 INJUNCTION, AS YOUR HONOR NOTED, IN ORDER TO  
16 PREVENT THE CONTINUING INFRINGEMENT OF FOUR OF OUR  
17 PATENTS AND TO HALT THE IRREPARABLE HARM WHICH  
18 APPLE IS SUFFERING BETWEEN NOW AND WHEN WE CAN HAVE  
19 THE TRIAL NEXT YEAR.

20 THERE ARE FOUR PATENTS THAT ARE AT ISSUE.  
21 THREE OF THEM ARE DESIGN PATENTS, TWO OF THEM ARE  
22 TELEPHONE PATENTS, AND ONE GOES TO THE TAB PRODUCT.

23 AND THEN WE HAVE A UTILITY PATENT, WHICH  
24 WE CALL THE RUBBER BAND PATENT, OTHER PEOPLE HAVE  
25 CALLED THE BOUNCE PATENT, WHICH GOES TO A LOOK AND

1 FEEL ASPECT OF THE OVERALL VISUAL PERSPECTIVE OF  
2 THE PRODUCT, ALL FOUR OF THE PRODUCTS THAT ARE AT  
3 ISSUE IN THIS MOTION.

4 ON DESIGN PATENTS, THE TEST IS A CLEAR  
5 ONE SET OUT BY THE UNITED STATES SUPREME COURT, THE  
6 WORLD FAMOUS GORHAM TEST THAT I'M SURE YOUR HONOR  
7 KNOWS WELL.

8 IT'S IN THE EYE OF THE ORDINARY OBSERVER,  
9 GIVING SUCH ATTENTION AS A PURCHASER USUALLY GIVES  
10 TO DESIGNS THAT ARE SUBSTANTIALLY THE SAME, IF THE  
11 RESEMBLANCE IS SUCH AS TO DECEIVE SUCH AN OBSERVER,  
12 INDUCING HIM TO PURCHASE ONE SUPPOSING IT TO BE THE  
13 OTHER, THE FIRST ONE PATENTED IS INFRINGED BY THE  
14 OTHER.

15 YOU HAVE DECLARATIONS IN THE RECORD FROM  
16 A NUMBER OF EXPERTS ON THE QUESTION OF INFRINGEMENT  
17 OF THE DESIGN PATENTS AT ISSUE HERE, AND I THINK  
18 THERE ARE SOME IMPORTANT HIGH LEVEL THINGS THAT I  
19 WOULD LIKE TO CALL TO YOUR ATTENTION.

20 SAMSUNG'S EXPERT, A GENTLEMAN BY THE NAME  
21 OF ITAY SHERMAN, CLEARLY APPLIES THE WRONG TEST.

22 IN HIS DECLARATION, HE SAYS THAT HE IS --  
23 HE IS APPLYING SOMETHING WHICH HE CALLS THE  
24 ORDINARY PURCHASER TEST. THAT'S SET OUT  
25 SPECIFICALLY IN HIS DECLARATION. HE SAYS "APPLYING

1 THE ORDINARY PURCHASER TEST," AS OPPOSED TO THE  
2 ORDINARY OBSERVER TEST.

3 HE DOESN'T EXPLAIN THE TEST. HE DOESN'T  
4 EXPLAIN WHAT THE NATURE OF THE TEST IS THAT HE IS  
5 APPLYING.

6 BUT THERE IS CLEARLY, JUST AT THE  
7 BEGINNING, AT LEAST ON MR. SHERMAN'S PART, AN  
8 APPARENT MISUNDERSTANDING ABOUT WHAT THE LEGAL  
9 STANDARD IS THAT THE COURT, AND ULTIMATELY THE  
10 JURY, WILL BE APPLYING.

11 ANOTHER ELEMENT THAT IS CLEAR IS THAT  
12 LIKELIHOOD OF CONFUSION AS TO THE SOURCE OF GOODS  
13 IS NOT AN ELEMENT OF A DESIGN PATENT CASE.

14 AND, AGAIN, MR. SHERMAN IS CONFUSED ABOUT  
15 THIS.

16 HE SPENDS SEVERAL DECLARATIONS -- SEVERAL  
17 PARAGRAPHS OF HIS DECLARATION TALKING ABOUT WHETHER  
18 OR NOT THERE'S LIKELY TO BE ANY CONFUSION IN THE  
19 MARKETPLACE AS TO THE SOURCE.

20 BUT THAT'S NOT THE ELEMENT. THAT'S NOT  
21 THE -- THAT IS NOT AN ELEMENT OF THE CASE. THE  
22 FEDERAL CIRCUIT HAS SAID THAT QUITE CLEARLY IN THE  
23 U-NET CASE, AND OTHERS.

24 THE CONFUSION IS THE CONFUSION BETWEEN  
25 THE DESIGN OF THE CONFUSED -- OF THE ACCUSED



1 PRODUCT AND THE PATENTED DESIGN.

2 CUSTOMER CONFUSION, AS WE SEE IN  
3 TRADEMARK CASES, IS NOT AN ELEMENT HERE.

4 THE COURT: BUT LET ME ASK, THE LANGUAGE  
5 THAT YOU JUST QUOTED DOES SAY, YOU KNOW,  
6 SUBSTANTIAL SIMILARITIES SUCH THAT A CONSUMER WOULD  
7 BE CONFUSED AND WOULD ACTUALLY BE INDUCED TO BUY  
8 SOMETHING THAT THEY THINK IT IS BUT IT'S NOT.

9 MR. MCELHINNY: IT DOES SAY THAT.

10 THE COURT: UM-HUM.

11 MR. MCELHINNY: AND THAT CLEARLY HAS  
12 BEEN, OR AT LEAST AT ONE TIME WAS THE SOURCE OF  
13 SOME CONFUSION AS TO THE ELEMENTS.

14 THE COURT: UM-HUM.

15 MR. MCELHINNY: BUT THAT'S WHY THE  
16 FEDERAL CIRCUIT HAS GONE OUT OF ITS WAY IN SEVERAL  
17 CASES.

18 THE CLEAREST EXPLANATION IS THE UNETTE  
19 CASE BECAUSE THEY ACTUALLY ANSWER YOUR HONOR'S  
20 QUESTION. THAT'S AT 785 F.2D 1026.

21 AND WHAT THEY SAY IS THE QUESTION IS  
22 WHETHER OR NOT A PURCHASER IS LIKELY TO CONFUSE THE  
23 DESIGN OF THE ACCUSED PRODUCT WITH THE PATENTED  
24 DESIGN THINKING THAT THEY ARE -- THAT THEY ARE  
25 OBTAINING SOMETHING THAT WAS LAWFULLY DESIGNED AND

1 NOT, NOT ACTUALLY PREVIOUSLY PATENTED.

2 IT DOES NOT GO TO, IN THIS PARTICULAR  
3 MOTION, IN THIS PARTICULAR CASE, THE QUESTION OF  
4 WHETHER SOMEONE WOULD WALK INTO A STORE AND BUY A  
5 SAMSUNG PRODUCT THINKING THAT THEY WERE BUYING AN  
6 APPLE PRODUCT. THAT IS NOT AN ELEMENT OF ANY OF  
7 THE PATENTS THAT ARE BEFORE -- THE INFRINGEMENT  
8 CLAIMS THAT ARE BEFORE YOUR HONOR.

9 THE COURT: LET ME ASK A QUESTION. THE  
10 PROPOSED ORDER HAS THE GALAXY S 4G AND INFUSE 4G  
11 AND THE GALAXY TAB 10.1 TABLET ALL BEING ENJOINED  
12 FROM BEING SOLD IF THEY EMBODY THE '677, '087 AND  
13 '889, BUT I JUST WANTED TO CLARIFY.

14 YOU'RE ONLY ASSERTING THE '889 AS TO THE  
15 TABLET, AND ONLY ASSERTING THE '677 AND '087 AS TO  
16 THE INFUSE 4 AND THE GALAXY S 4G. IS THAT RIGHT?

17 MR. MCELHINNY: THAT IS CORRECT.

18 THE COURT: OKAY.

19 MR. MCELHINNY: BUT, AGAIN, THERE'S  
20 ANOTHER PHONE THAT GETS LOST IN THE SHUFFLE HERE,  
21 THE DROID CHARGE, AND ON THIS MOTION, WE ARE NOT  
22 ACCUSING IT OF A DESIGN PATENT INFRINGEMENT.

23 BUT WE ARE ACCUSING IT OF INFRINGEMENT OF  
24 THE '381.

25 OTHERWISE WHAT YOUR HONOR SAYS IS EXACTLY

1 CORRECT.

2 THE COURT: IS THE DESIGN PATENT '889  
3 PRIOR ART TO THE OTHER TWO DESIGN PATENTS, THE '677  
4 AND THE '087?

5 MR. MCELHINNY: THEY ARE NOT, YOUR HONOR.

6 THE COURT: OKAY.

7 MR. MCELHINNY: THE OTHER OVERALL LESSONS  
8 THAT THE FEDERAL CIRCUIT TEACHES US -- AND AGAIN,  
9 THESE ARE IMPORTANT -- THE REASON I RAISE THIS IS  
10 NOT TO GIVE YOUR HONOR A TUTORIAL IN PATENT LAW,  
11 I'M SURE YOU HAVE NEITHER THE TIME OR THE NEED FOR  
12 THAT, BUT IT'S BECAUSE THEY ARE THE THEMES THAT RUN  
13 THROUGH SAMSUNG DEFENSE AND THEY ARE ERRONEOUS AS A  
14 MATTER OF LAW.

15 THE OTHER THEME IS THE FEDERAL CIRCUIT  
16 MAKES IT CLEAR THAT IN DETERMINING WHETHER OR NOT  
17 THERE IS INFRINGEMENT, THE ORDINARY OBSERVER IS  
18 REQUIRED TO COMPARE THE ENTIRE DESIGN, TO COMPARE  
19 THE DESIGN AS A WHOLE.

20 THE QUICKSAND OF DEFENSES IS TO TRY TO  
21 LURE THE OBSERVER INTO AN ELEMENT-BY-ELEMENT DESIGN  
22 OR LOOKING AT IT IN TERMS OF CONCEPTS AS OPPOSED TO  
23 ACTUALLY HOLDING UP THE PATENT AND COMPARING THE  
24 DESIGN OF THE ACCUSED PRODUCT.

25 AND THE FEDERAL CIRCUIT HAS, AGAIN, MADE

1 IT CLEAR TIME AFTER TIME THAT -- DIRECTING THE  
2 LOWER COURTS NOT TO GET DRAWN INTO THAT QUICKSAND,  
3 BUT TO DO THE OVERALL ASSESSMENT IN ORDER.

4 AND FINALLY, THE COURT SAYS IN ORDER TO  
5 DETERMINE WHETHER OR NOT THERE'S AN INFRINGEMENT,  
6 OR ALSO FOR INVALIDITY ISSUES, YOU HAVE TO COMPARE  
7 ALL OF THE FIGURES OF EITHER THE PATENT AT ISSUE OR  
8 IN THE ALLEGED PRIOR ART IN ORDER TO DETERMINE  
9 WHETHER OR NOT THE OVERALL DESIGN IS SUBSTANTIALLY  
10 THE SAME AS THAT TO WHICH YOU'RE COMPARING IT.

11 IN YOUR BINDER AT TAB 4, WHAT WE HAVE  
12 LAID OUT, AS SUGGESTED BY THE FEDERAL CIRCUIT --  
13 THE FEDERAL CIRCUIT IN A NUMBER OF CASES SAYS THAT  
14 THE BEST WAY TO GET THIS PICTURE IS TO TAKE A PIECE  
15 OF THE PRIOR ART WHICH THE OTHER SIDE RELIES ON OR  
16 SPENDS A LOT OF TIME TALKING ABOUT, TO COMPARE IT  
17 TO THE PATENTED DESIGN AND THEN TO COMPARE THE  
18 PATENTED DESIGN TO THE ACCUSED PRODUCT.

19 WHAT THE FEDERAL CIRCUIT SAYS IS, BY  
20 DOING THAT, WHAT IT NOVEL ABOUT THE DESIGN  
21 IMMEDIATELY BECOMES CLEAR AND THE TRIER OF FACT CAN  
22 TELL WHETHER OR NOT THE ACCUSED DEVICE IS MORE LIKE  
23 THE PATENT OR ACTUALLY IS MORE LIKE THE PRIOR ART.

24 AND I'M NOT GOING TO RUN THROUGH EACH OF  
25 THESE, BUT WHAT WE HAVE PROVIDED FOR YOUR HONOR IS

1 A SIDE -- A THREE-WAY COMPARISON.

2 THE LG CHOCOLATE IS ONE OF SAMSUNG'S  
3 FAVORITE BECAUSE IT HAS A BLACK SCREEN, AND THEY  
4 TALK ABOUT IT EXTENSIVELY IN THEIR BRIEF, SO WE  
5 HAVE COMPARED THE LG CHOCOLATE TO THE DESIGN, THE  
6 '677, AND TO THE GALAXY 4G.

7 ON THE NEXT PAGE, WE COMPARED THE  
8 CHOCOLATE TO THE '677 AND TO THE INFUSE 4G.

9 AND WHAT WE THINK YOUR HONOR WILL SEE,  
10 AND WE THINK THE TRIER OF FACT WILL SEE, IS THE  
11 SAME THING THAT ALL OF THE ORDINARY OBSERVERS WHO  
12 HAVE EVER LOOKED AT THESE PHONES HAVE CONCLUDED.

13 ONE, THAT THE APPLE DESIGNS, WHEN  
14 MR. JOHNSON AND HIS TEAM BROUGHT THOSE INTO THE  
15 MARKETPLACE, WERE EARTHSHAKINGLY NEW, COMPLETELY  
16 NOVEL.

17 AS ONE OF -- AS ONE OF SAMSUNG'S  
18 WITNESSES SAID, MR. WAGNER, WHO I'LL TALK ABOUT A  
19 LOT, MR. WAGNER SAID ON THE IPAD PATENT, THAT  
20 STEVE JOBS AND APPLE CREATED AN ENTIRELY NEW  
21 PRODUCT CATEGORY WITH THE DESIGN OF THAT PRODUCT.

22 AND AT TAB 1 WE HAVE PUT IN JUST A FEW OF  
23 THE EXCERPTS THAT ARE -- ACTUALLY WE PUT MORE IN  
24 THE RECORD SHOWING BOTH WHAT THE INITIAL REACTION  
25 WAS TO THESE DESIGNS WHEN THEY CAME OUT IN THE

1 PUBLIC, AND THE ACCEPTANCE; AND THEN AT TAB 2, WHAT  
2 THE PUBLIC REACTION WAS WHEN SAMSUNG ISSUED ITS  
3 PRODUCTS AFTER THESE DESIGNS CAME OUT AND WHAT  
4 ORDINARY OBSERVERS IN THE WORLD ACTUALLY SAW AT THE  
5 TIME AND THE REACTIONS THAT THEY HAD.

6 ANOTHER IMPORTANT POINT IS WE HAVE  
7 SUPPORTED OUR CASE WITH, WITH THE TESTIMONY OF  
8 EXPERTS, COOPER WOODRING IS THE ONE, AND  
9 MR. WOODRING OFFERS THE CONCLUSION, AFTER COMPARING  
10 THESE, THAT BASED ON HIS EXPERTISE AND THE NUMBER  
11 OF CASES IN WHICH HE'S TESTIFIED IN HIS  
12 PROFESSIONAL CAREER, THAT AN ORDINARY OBSERVER  
13 WOULD FIND THE DESIGNS TO BE SUBSTANTIALLY  
14 IDENTICAL AS THE ACCUSED DEVICES.

15 THE COURT: WHY DO WE NEED EXPERT  
16 TESTIMONY ON WHAT AN ORDINARY OBSERVER WOULD FIND?  
17 ISN'T THAT SORT OF A CONTRADICTION?

18 MR. MCELHINNY: THE QUESTION -- THE WAY  
19 YOU PHRASED THE QUESTION IS WHETHER OR NOT YOUR  
20 HONOR NEEDS IT.

21 BUT THE ANSWER IS -- I MEAN, IT'S THE  
22 SAME AS A PROFESSIONAL EXPERT. WOULD IT BE HELPFUL  
23 TO HAVE SOMEONE WHO HAS AN EXPERTISE IN DESIGN  
24 DISCUSSING, A, WHETHER THESE DESIGNS ARE NOVEL,  
25 WHAT THE DIFFERENCES ARE AND WHAT THE SIMILARITIES

1 ARE, AND TO BRING, BASED ON EXPERIENCE, WHAT AN  
2 ORDINARY OBSERVER.

3 AND IF YOUR HONOR DOESN'T NEED IT, YOU  
4 DON'T NEED IT.

5 BUT IN TERMS OF PREDICTING, WHICH IS WHAT  
6 WE'RE DOING HERE, PREDICTING WHAT THE RESULT WILL  
7 BE AT TRIAL, WE THINK IT IS HELPFUL BECAUSE IT  
8 BRINGS A PROFESSIONAL VIEW, IN ADDITION TO THESE  
9 NEWSPAPER ARTICLES, WHICH YOUR HONOR MAY OR MAY NOT  
10 CREDIT, OF WHAT PEOPLE IN THE REAL WORLD WHO ARE  
11 INVOLVED IN THESE KINDS OF DECISIONS ACTUALLY  
12 CONCLUDE UPON SEEING THESE OBJECTS.

13 WHAT IS IMPORTANT, HOWEVER, IS THAT THERE  
14 IS NO CONTRADICTORY, THERE IS NO REBUTTAL TESTIMONY  
15 FROM ANYONE AT SAMSUNG.

16 MR. SHERMAN GOES THROUGH AN ANALYSIS,  
17 WHICH I'LL TALK ABOUT IN A MOMENT, BUT MR. SHERMAN  
18 NEVER TELLS YOU, OR OFFERS AN OPINION, NO ONE FROM  
19 SAMSUNG OFFERS AN OPINION THAT SAYS AN ORDINARY  
20 OBSERVER WOULD NOT FIND THESE THINGS SUBSTANTIALLY  
21 IDENTICAL.

22 THAT TESTIMONY FROM SAMSUNG IS NOT IN THE  
23 RECORD BEFORE YOU.

24 WHAT MR. SHERMAN DID, AGAIN, IS  
25 EXACTLY -- VIOLATES ALL OF THE INSTRUCTIONS THAT

1 THE FEDERAL CIRCUIT HAS SET OUT.

2 WHAT MR. SHERMAN DOES IS HE DOES A  
3 CATEGORY-BY-CATEGORY ANALYSIS, AN  
4 ELEMENT-BY-ELEMENT ANALYSIS, AND TRIES TO DEFINE  
5 EVERY ELEMENT OF THIS DESIGN AS FUNCTIONAL SO THAT  
6 HE CAN THEN DISREGARD IT FOR THE PURPOSE OF HIS  
7 ANALYSIS.

8 HE ALSO THEN GOES ON AN  
9 ELEMENT-BY-ELEMENT DESIGN AND TRIES TO TALK ABOUT  
10 WHAT WE THINK ARE TRIVIAL DIFFERENCES IN ELEMENTS,  
11 INDIVIDUAL ELEMENTS.

12 AND, AGAIN, I KNOW YOUR HONOR HAS READ  
13 THESE CASES. IT'S HARD TO COUNT THE NUMBER OF  
14 FEDERAL CIRCUIT CASES THAT HAVE SAID TO DISTRICT  
15 COURTS, "DON'T GO THAT WAY."

16 THEY'RE SAYING, OF COURSE, ANY DESIGN IS  
17 GOING TO HAVE TRIVIAL DIFFERENCES BECAUSE NO ONE IS  
18 GOING TO BE COMPLETELY IDENTICAL, AND IT'S AN ERROR  
19 TO TRY TO LOOK AT THINGS ON A LITTLE  
20 ELEMENT-BY-ELEMENT PIECE BECAUSE WHAT YOU ARE  
21 LOOKING AT IS THE OVERALL DESIGN.

22 ON TOP OF THAT, AGAIN -- I'M PICKING ON  
23 POOR MR. SHERMAN BECAUSE HE'S THE INFRINGEMENT  
24 GUY -- BUT HE USES THE WRONG LEGAL DEFINITION OF  
25 FUNCTION.



1 HE ELIMINATES ALMOST EVERY ELEMENT, EVERY  
2 PART OF ANY OF THESE DESIGNS BECAUSE HE SAYS IT  
3 SERVES A FUNCTION. THE BLACK COVER HIDES WHAT'S  
4 INSIDE. IT SERVES A FUNCTION AND, THEREFORE, IT'S  
5 FUNCTIONAL.

6 THE ROUNDED CORNER STOPS IT FROM GETTING  
7 CAUGHT ON YOUR POCKET AND, THEREFORE, IT'S  
8 FUNCTIONAL AND I DON'T HAVE TO --

9 AND AT THE END OF THE DAY, HE HAS  
10 DETERMINED THAT EVERY LITTLE PIECE OF THIS IS  
11 FUNCTIONAL.

12 BUT THAT IS EXACTLY THE WRONG LEGAL  
13 DEFINITION OF WHAT FUNCTIONAL IS, AND IT'S ONE  
14 THAT'S BEEN REJECTED OVER AND OVER BY THE FEDERAL  
15 CIRCUIT BECAUSE THE FEDERAL CIRCUIT SAYS IT'S  
16 FUNCTIONAL IF THE DESIGN IS DICTATED BY THE USE.

17 THE COURT: I AGREE WITH YOU ON THIS  
18 POINT.

19 MR. MCELHINNY: THANK YOU, YOUR HONOR.

20 THE COURT: SO MOVE ON --

21 MR. MCELHINNY: I'LL MOVE ON.

22 THE COURT: -- TO SOMETHING ELSE.

23 THANK YOU.

24 MR. MCELHINNY: HE ALSO MAKES THE  
25 ARGUMENT WHICH, AGAIN, OUR REBUTTAL EXPERTS REJECT

1       OUT OF HAND, THAT MINIMALISM IS NOT -- AND I'M NOT  
2       GOING TO WASTE MUCH TIME ON THIS, BUT HE SAYS  
3       MINIMALISM IS NOT ENTITLED TO PROTECTION.

4               AGAIN, ANYONE WHO'S BEEN IN DESIGN KNOWS  
5       THAT IT IS 15 TIMES HARDER TO DESIGN SOMETHING THAT  
6       IS SIMPLE AND EASY TO USE AND BEAUTIFUL THAN IT IS  
7       TO DO SOMETHING THAT IS COMPLEX, AND THAT'S  
8       MR. BRESSLER'S DECLARATION THAT WAS SUBMITTED TO  
9       YOU IN RETURN.

10              SO AT THE END OF THE DAY, IF MR. SHERMAN  
11       WAS WRONG ABOUT FUNCTIONAL, IF HE'S WRONG ABOUT HIS  
12       ELEMENT-BY-ELEMENT ANALYSIS, IF HE'S WRONG ABOUT  
13       MINIMALISM, THERE IS NOTHING IN THIS RECORD THAT  
14       APPLIES THE CORRECT STANDARD THAT DISAGREES WITH  
15       THE OVERWHELMING EVIDENCE THAT WE'VE PROVIDED OF  
16       INFRINGEMENT.

17              ON VALIDITY, AGAIN, IT'S A WRONG  
18       ANALYSIS. THE FEDERAL CIRCUIT HAS ABOUT FIVE CASES  
19       THAT SAY WHEN YOU'RE ATTEMPTING TO PROVE  
20       INVALIDITY, WHAT YOU DO IS YOU COME UP WITH A PIECE  
21       OF ART WHICH BECOMES THE -- WHAT THEY CALL THE  
22       BASIC REFERENCE, AND THAT BASIC REFERENCE IS  
23       SUPPOSED TO BE SUBSTANTIALLY IDENTICAL TO YOUR  
24       DESIGN.

25              AND THEN WORKING FROM THAT BASIC

1 REFERENCE, YOU THEN CAN BRING IN AN EXPERT WHO CAN  
2 SAY IT WOULD HAVE BEEN OBVIOUS TO TWEAK THIS OR  
3 TWEAK THAT.

4 YOU WILL NOT FIND IN SAMSUNG'S PLEADINGS  
5 ANYWHERE WHERE THEY HAVE IDENTIFIED ANY PIECE OF  
6 PRIOR ART AS A BASIC REFERENCE TO ANY OF OUR  
7 PATENTS.

8 INSTEAD THEY DO THEY EXACTLY WHAT THE  
9 FEDERAL CIRCUIT IN L.A. GEAR SAID YOU CAN'T DO,  
10 WHICH IS THROW UP A COLLAGE, THROW UP A BUNCH OF  
11 WRITINGS OR PICTURES, STICK THEM UP ON THE WALL AND  
12 SEE IF SOMETHING WILL STICK, OR TRY TO CREATE A  
13 COMPENDIUM OF LITTLE PIECES OF PRIOR ART.

14 THEY NEVER DO THE ANALYSIS THAT THE  
15 FEDERAL CIRCUIT HAS ORDERED AS THE ONLY ANALYSIS  
16 THAT'S CORRECT IN ORDER TO DO AN INVALIDITY  
17 DETERMINATION.

18 THE COURT: WHAT ABOUT THE 1994  
19 KNIGHT-RIDDER?

20 MR. MCELHINNY: THAT'S ON THE TAB.

21 THE COURT: UM-HUM.

22 MR. MCELHINNY: THAT'S ON THE TAB.

23 AND IF YOUR HONOR LOOKS AT -- I'M GOING  
24 TO JUMP A LITTLE BIT AHEAD HERE, BUT IF YOUR HONOR  
25 LOOKS AT THE TAB -- IF YOU LOOK AT TAB 8 OF THE

1 BINDER THAT I GAVE YOU, ON THE FIRST PAGE YOU'LL  
2 SEE A PAGE-BY-PAGE COMPARISON WITH THE '889 PATENT  
3 AND THE 1981 FIDLER PROTOTYPE, AND THEN ON THE NEXT  
4 PAGE YOU'LL SEE THE '889 AND THE 1994 FIDLER  
5 PROTOTYPE.

6 WHAT IS IMMEDIATELY APPARENT, AND  
7 FRANKLY, COULDN'T BE MORE DIFFERENT, AND, IN FACT,  
8 IS WHAT MADE THE IPAD SUCCESSFUL, IS THAT THE  
9 KNIGHT-RIDDER MATERIALS WERE PICTURE FRAMES. THEY  
10 WERE THE STANDARD PRIOR ART FRAMED TABLET. IT'S AN  
11 INSET WITH AN OPAQUE FRAME AROUND THE EDGES.

12 IT WAS WHAT THE MARKET HAD ABSOLUTELY  
13 REJECTED, NO ONE WAS BUYING. IT'S TRUE ABOUT BOTH  
14 OF THESE.

15 IT'S ALSO TRUE THAT THE RIDGE AROUND IT  
16 WAS ASYMMETRICAL, AND IT'S ALSO THE SIDE PROFILE  
17 THAT'S SUBSTANTIALLY DIFFERENT.

18 BUT THERE -- WE'RE NOT QUESTIONING -- IF  
19 YOU LOOK AT -- I'M SORRY.

20 IF YOU LOOK AT TAB 3, WHICH IS WHAT WE  
21 CALL SAMSUNG BEFORE AND AFTER, AND IN EACH OF THE  
22 CASES WE GIVE YOU PICTURES OF WHAT SAMSUNG'S  
23 PRODUCTS LOOKED LIKE BEFORE APPLE'S DESIGNS WERE  
24 PUBLISHED AND ITS PRODUCTS BEGAN TO SHOW UP ON THE  
25 MARKET.

1           AND WE GIVE YOU A PICTURE OF WHAT THEIR  
2           PRODUCTS LOOK LIKE TODAY.

3           AND IF YOU LOOK AT THEIR TABLET PICTURE,  
4           IT'S NOT THAT -- THE OLD ONE IS NOT THAT DIFFERENT  
5           FROM THE KNIGHT-RIDDER. IT'S A FRAMED TABLET,  
6           COMPLETELY UNSUCCESSFUL.

7           WHAT I DIDN'T TALK ABOUT BEFORE BUT I  
8           WANT TO PUT IN HERE IS THE, THE CONCEPT OF  
9           SECONDARY CONSIDERATIONS IN CASE YOUR HONOR NEEDS  
10          TO GET TO THAT POINT.

11          BUT WE HAVE PUT INTO THE RECORD MY  
12          FAVORITE QUOTE. WHEN THE IPAD CAME OUT, THE  
13          NEW YORK TIMES SAID "APPLE IS FOLLOWING THE TABLET  
14          LIKE A" FLAME -- "LIKE A MOTH TO A FLAME AND IT  
15          WILL BE UNSUCCESSFUL." THEY PREDICTED IT WOULD BE  
16          UNSUCCESSFUL.

17          AND NOW, LITERALLY, YOU CANNOT PICK UP A  
18          NEWSPAPER TODAY WITHOUT SEEING THAT THE WORLD --  
19          THE JUDGMENT THAT THE WORLD HAS FINALLY PASSED ON  
20          THESE DESIGNS AND THE DIFFERENCE THAT THEY MAKE IN  
21          THIS PRODUCT.

22          WE CONTINUE. I'VE GOT -- I'M NOT GOING  
23          TO TAKE YOUR TIME UNLESS YOU'VE GOT QUESTIONS.

24          WE DO A SIDE-BY-SIDE COMPARISON. WE GIVE  
25          YOU THE PICTURE FOR EVERY PIECE OF PRIOR ART WHICH

1           THEY DISCUSSED IN THEIR BRIEF, AND I'M PREPARED TO  
2           DISCUSS IT IF YOUR HONOR HAS QUESTIONS, I MAY DO IT  
3           ON REBUTTAL.

4                         THE COURT:   NO.

5                         LET ME ASK YOU, I DIDN'T SEE MUCH, IF  
6           ANY, BRIEFING REGARDING IRREPARABLE HARM IN YOUR  
7           MOVING PAPERS.   WHY IS THAT?

8                         I SAW A LOT IN THE REPLY, BUT NOT A LOT  
9           IN THE MOTION.

10                        MR. MCELHINNY:   FRANKLY, WE -- WELL, WE  
11           THOUGHT WE HAD COVERED IT IN THE MOVING PAPERS.

12                        THE COURT:   UM-HUM.

13                        MR. MCELHINNY:   I MEAN, WE DIDN'T KNOW  
14           WHAT ARGUMENTS WERE GOING TO COME BACK.

15                        THE COURT:   I COULDN'T FIND IT IN THE  
16           MOVING PAPERS.

17                        MR. MCELHINNY:   WELL, I'M SORRY, YOUR  
18           HONOR.

19                        BUT WHAT WE SHOWED WAS THESE COMPANIES  
20           ARE HEAD-TO-HEAD COMPETITORS.

21                        THE COURT:   OKAY.

22                        MR. MCELHINNY:   AND THAT THE DESIGN OF  
23           OUR PRODUCTS IS CRUCIAL TO OUR SUCCESS, THAT WE'VE  
24           INVESTED HUNDREDS OF MILLIONS OF DOLLARS IN  
25           ADVERTISING THAT ACTUALLY DO THE FACE-TO-FACE -- I

1 MEAN THAT ACTUALLY -- WE CALL IT PRODUCT AS HERO,  
2 THAT ACTUALLY ADVERTISE OUR PRODUCTS AS THE DRIVING  
3 FORCE, AND WE SHOWED INFRINGEMENT.

4 AND AS THE CASE WHICH I SENT TO YOUR  
5 HONOR YESTERDAY THAT THE FEDERAL CIRCUIT JUST CAME  
6 DOWN, WHEN YOU HAVE HEAD-TO-HEAD COMPETITORS,  
7 COMPETITION, AND YOU HAVE COMPETING PRODUCTS, AND  
8 YOU HAVE A PRODUCT THAT ELIMINATES DESIGN, THAT'S  
9 WHAT -- THAT IS WHAT IS SO UNFAIR ABOUT THIS, WHICH  
10 IS THAT SAMSUNG HAS ELIMINATED DESIGN AS A BASIS ON  
11 WHICH WE CAN COMPETE WITH OUR HEAD-TO-HEAD  
12 COMPETITOR.

13 AND THAT IS IRREPARABLE HARM.

14 NOW, I CONCEDE THAT OUR IRREPARABLE HARM  
15 CASE GOT A LOT BETTER WHEN WE TOOK MR. WAGNER'S  
16 DEPOSITION, AND I THINK WE BOTH CAN BE PRETTY  
17 CONFIDENT THAT IF MR. WAGNER TESTIFIES AT TRIAL, IT  
18 WILL BE ON OUR SIDE OF THE CASE, BECAUSE WHAT  
19 MR. WAGNER CONCEDED IS THAT WE HAVE HEAD-TO-HEAD  
20 COMPETITION; HE HAS CONCEDED THAT WE LOST MARKET  
21 SHARE; BUT THE MOST IMPORTANT THING THAT HE SAID  
22 THAT JUST, I THINK, IS OPEN AND SHUT HERE, WHICH IS  
23 THAT -- I WANT TO NOT GET INTO CONFIDENTIAL  
24 INFORMATION.

25 A LARGE PERCENTAGE OF THE AMERICAN PUBLIC

1 HAS YET TO CHOOSE A SMART PHONE.

2 AND WHAT HE SAID IS THAT THERE IS A  
3 BATTLE GOING ON BETWEEN THE ANDROID OPERATING  
4 SYSTEM AND THE IOS, AND HE SAID THAT ONCE PEOPLE  
5 MAKE THAT CHOICE, THEY REMAIN LOYAL TO THAT  
6 OPERATING SYSTEM AND THEY ARE LIKELY TO MAKE THEIR  
7 FUTURE PURCHASES IN THAT ENVIRONMENT.

8 AND WHEN HE WAS ASKED THE QUESTION ABOUT  
9 WHETHER OR NOT THEN THERE WAS A DANGER OF LOST  
10 FUTURE SALES, HE ADMITTED THAT THERE WAS.

11 AND THEN, BECAUSE HE'S OBVIOUSLY ON THE  
12 HOOK HERE BECAUSE HE'S GOING TO HAVE TO TESTIFY  
13 THAT ALL THIS IS SPECULATIVE BY THE TIME WE GET TO  
14 TRIAL, HE THEN SAID BUT CALCULATING THAT WILL  
15 DEPEND ON FUTURE UNCERTAINTIES, THE FUTURE  
16 UNCERTAINTY OF THE MARKETPLACE, THE FUTURE  
17 UNCERTAINTY OF WHETHER APPLE CAN MAINTAIN ITS HIGH  
18 LEVEL OF LOYALTY, AND HE LITERALLY DEFINED WHAT THE  
19 FEDERAL CIRCUIT CALLS THE IRREPARABLE INJURY OF  
20 LOST FUTURE SALES.

21 AND THEN NOT FINISHED THERE, HE TESTIFIED  
22 THAT WHEN HE BOUGHT HIS APPLE, HE DIDN'T BUY ONE OF  
23 THEM, HE BOUGHT SIX OF THEM SO THAT HE COULD BUY  
24 THE FACE TIME APPLICATION FOR EVERY MEMBER OF HIS  
25 FAMILY.



1                   AND SO WHAT HE GOT US INTO IS THE AREA OF  
2                   CONVOYED SALES. HE GOT US INTO THE AREA OF  
3                   APPLICATIONS. HE GOT US INTO THE FUTURE  
4                   APPLICATIONS AND THE LOSS OF THAT INCOME, ALL OF  
5                   WHICH -- THERE ARE LITERALLY -- I COULD NOT BE --  
6                   I'M SURE I'LL BE CORRECTED BY THEM AT A MINIMUM,  
7                   BUT THERE COULD NOT BE A MORE TEXTBOOK DEFINITION  
8                   OF IRREPARABLE INJURY IN A PATENT CONTEXT, TWO  
9                   HEAD-TO-HEAD COMPETITORS LOSING CURRENT MARKET  
10                  VALUE, LOSING FUTURE SALES WHICH WILL TURN ON  
11                  SPECULATIVE FUTURE EVENTS IN ORDER TO BE ABLE TO  
12                  VALUE.

13                  AND IN ADDITION, ADDITIONAL AREAS OF  
14                  CONVOYED SALES.

15                  YOU KNOW. YOU'RE AN EXPERIENCED -- I  
16                  MEAN, YOU'VE DONE THIS.

17                  THE COURT: DOESN'T THIS ALL SOUND LIKE  
18                  MONEY, THOUGH? COULDN'T YOU HAVE YOUR EXPERT DO A  
19                  CALCULATION OF WHAT ACCESSORIES COULD BE PURCHASED,  
20                  WHAT OTHER APPLE PRODUCTS MIGHT BE PURCHASED --

21                  MR. MCELHINNY: IT'S A --

22                  THE COURT: -- WHAT DOWNSTREAM FUTURE  
23                  APPLE SMART PHONES --

24                  MR. MCELHINNY: I'M SORRY. THAT'S  
25                  EXACTLY WHAT I WAS ABOUT TO SAY TO YOU, WHICH IS IN

1 THEORY, SOME OF THAT CAN BE VALUED.

2 BUT YOU KNOW THAT WHEN WE GET TO TRIAL,  
3 SAMSUNG'S POSITION WILL BE THAT ALL FUTURE SALES  
4 ARE SPECULATIVE, THAT HOW MANY APPS PEOPLE WOULD  
5 HAVE BOUGHT IN THE FUTURE DEPEND ON WHAT APPS ARE  
6 WRITTEN IN THE FUTURE, WHAT'S AVAILABLE TO THEM,  
7 WHAT THE PRICING IS, AND THAT ALL OF THAT WAS  
8 SPECULATIVE.

9 AND WE WILL BE FIGHTING A BATTLE IN IN  
10 LIMINE MOTIONS AND DAUBERT MOTIONS IN FRONT OF YOUR  
11 HONOR IN WHICH YOU WILL BE DETERMINING THE  
12 BOUNDARIES OF THIS LOST FUTURE INCOME STREAM WHICH  
13 YOU WILL ALLOW US TO RECOVER.

14 BUT THERE WILL BE ELEMENTS OF IT --  
15 MR. WAGNER SAID THERE WILL BE ELEMENTS OF IT THAT  
16 ARE NOT RECOVERABLE UNDER CURRENT DAMAGE LAW IN THE  
17 UNITED STATES.

18 THE COURT: LET ME ASK, IS YOUR CLAIM FOR  
19 IRREPARABLE HARM FOR THE TABLET DESIGN PATENT, THE  
20 '889, IS THAT THE SAME CLAIM OF IRREPARABLE HARM  
21 FOR THE TWO SMART PHONE, THE '087 AND THE '677?

22 MR. MCELHINNY: IT'S THE SAME TYPE --  
23 YES, YOUR HONOR, IT'S THE SAME TYPES OF INJURY.

24 THE COURT: OKAY. I DIDN'T SEE MUCH  
25 IRREPARABLE HARM ARGUMENT, IF ANY, WITH REGARD TO

1 THE '381 UTILITY PATENT. IT SEEMS LIKE YOUR CLAIMS  
2 ARE MORE TOWARDS THE PHYSICAL APPEARANCE, THE  
3 DESIGN, THE BRAND, ET CETERA.

4 DO YOU HAVE ANYTHING WITH REGARD TO THE  
5 UTILITY PATENT?

6 MR. MCELHINNY: YOUR HONOR, NOW I'M --  
7 YESTERDAY WE FILED -- I DON'T WANT TO GET TOO  
8 DEEPLY INTO THIS -- BUT WE FILED A MOTION WITH YOUR  
9 HONOR IN ORDER TO AUGMENT THE RECORD ABOUT  
10 DOCUMENTS THAT WERE PRODUCED TO US UNDER ORDER BY  
11 THE MAGISTRATE JUDGE BECAUSE THEY HADN'T BEEN  
12 PRODUCED THE FIRST TIME AND AFTER THE DATE HE SET,  
13 AND IF YOUR HONOR HAS A CHANCE TO LOOK AT THOSE  
14 DOCUMENTS, THEY GO DIRECTLY TO THIS ISSUE OF THE  
15 '381 PATENT.

16 THEY GO DIRECTLY TO YOUR HONOR'S QUESTION  
17 ABOUT WHY IT'S VALUABLE.

18 THEY GO DIRECTLY TO WHAT IT WAS THAT  
19 SAMSUNG HOPED TO ACCOMPLISH IN THAT ISSUE.

20 AND I WILL NOTE, BECAUSE THIS ALSO TIES  
21 TO THE BALANCE OF THE --

22 THE COURT: BUT YOU'RE CONCEDING, THEN,  
23 THAT WHAT YOU SUBMITTED SO FAR DIDN'T REALLY  
24 ADDRESS IRREPARABLE HARM OF THE '381? I HAVE TO  
25 LOOK AT WHAT YOU FILED YESTERDAY.

1 MR. MCELHINNY: NO. I JUST WANTED TO  
2 MAKE SURE I DIDN'T LOSE THAT BIG POINT.

3 THE COURT: ALL RIGHT.

4 MR. MCELHINNY: I HAVE -- I THINK I HAVE  
5 CONSISTENTLY DESCRIBED TO YOUR HONOR THE FACT THAT  
6 THE NATURE OF THE '381 PATENT IS THAT IT IS A LOOK  
7 AND FEEL PATENT.

8 IT IS A PATENT, LIKE THE DESIGN, THAT  
9 MAKES THE PRODUCT ATTRACTIVE TO A CUSTOMER.

10 AND SO THE EFFECT OF LOSING -- OF LOSING  
11 THE ABILITY TO COMPETE ON THOSE KINDS OF GRAPHICAL  
12 INTERFACE EFFECTS IS THE SAME AS LOSING THE DESIGN  
13 PATENT.

14 I NEED TO SAY ONE MORE THING ABOUT  
15 IRREPARABLE HARM THOUGH.

16 THE COURT: OKAY.

17 MR. MCELHINNY: I DON'T WANT TO HAVE A  
18 HEARING HERE IN WHICH WE DON'T TALK ABOUT CABBAGES,  
19 BECAUSE THE OTHER ELEMENT OF IRREPARABLE HARM IS  
20 SAMSUNG'S COUNSEL HAS TOLD YOU THAT THESE PRODUCTS  
21 WILL NOT BE THE PRODUCTS THAT WILL BE IN THE  
22 MARKETPLACE AT THE TIME WE HAVE A TRIAL. THEY TURN  
23 OVER TOO QUICKLY.

24 IN THE AUSTRALIA HEARING, WHICH YOUR  
25 HONOR MAY HAVE HEARD THE AUSTRALIAN JUDGE BANNED

1 THE -- ISSUED A PRELIMINARY INJUNCTION AND BANNED  
2 THE TABLET FROM AUSTRALIA YESTERDAY.

3 COUNSEL FOR SAMSUNG IN THERE SAID "WE'RE  
4 NOT GOING TO BE FIGHTING ABOUT THE TABLET 1 BY THE  
5 TIME WE GET TO TRIAL IN THIS CASE. WE'RE GOING TO  
6 BE TALKING ABOUT THE 2.1," BECAUSE THESE THINGS  
7 TURN OVER, AS MR. VERHOEVEN SAID WHEN HE USED TO  
8 COME HERE, THAT THEY TURN OVER LIKE CABBAGES.

9 SO PART OF THE IRREPARABLE INJURY HERE,  
10 IN ADDITION TO THE THINGS I'VE GIVEN YOU, IS THAT  
11 THESE PRODUCTS WILL HAVE DONE THEIR DAMAGE AND WE  
12 WILL BE AT TRIAL FIGHTING ABOUT A NEW GENERATION OF  
13 PRODUCTS WHICH WILL HAVE NEW DESIGNS WHICH WE STILL  
14 HAVE NOT YET SEEN.

15 IF WE'RE GOING TO GET A REMEDY AGAINST  
16 THESE PRODUCTS, WE CAN ONLY GET THE REMEDY TODAY  
17 FROM YOU.

18 THE COURT: LET ME ASK IF, FROM APPLE'S  
19 PERSPECTIVE, THERE'S A DIFFERENCE BETWEEN BRAND AND  
20 DESIGN, OR IS IT THE SAME THING FOR APPLE? THEY'RE  
21 LARGELY OVERLAPPING?

22 MR. MCELHINNY: WHAT I WOULD SAY -- THE  
23 HAROLD MCELHINNY ANSWER TO THAT QUESTION ON BEHALF  
24 OF APPLE, IS WE THINK DESIGN DRIVES BRAND.

25 SO DESIGN -- AND, AGAIN, I'M NOT ALONE

1           HERE.   MR. WAGNER SAID THE SAME THING.

2                   DESIGN IS ONE OF THE WAYS THAT APPLE HAS  
3           CARVED OUT THE NAME FOR ITSELF WHICH HAS MADE IT  
4           THE INTERNATIONAL LEADER IN THIS MARKET.

5                   THERE IS -- PEOPLE RECOGNIZE THE DESIGN  
6           AND IDENTIFY IT WITH THE BRAND, WHICH IS, OF  
7           COURSE, THE LAST ELEMENT OF IRREPARABLE INJURY  
8           HERE, WHICH IS IF WE NO LONGER CONTROL THE DESIGNS,  
9           IT DOES UNDERCUT OUR ABILITY TO CONTROL OUR BRAND  
10          IDENTITY AND THAT IS LOSS OF GOODWILL BY  
11          DEFINITION.

12                   THE COURT:   LET ME ASK, FOR THE '381,  
13          WHICH I THINK IS PROBABLY LESS OF WHERE THE FIGHT  
14          IS THAN THE THREE DESIGN PATENTS, DO WE HAVE TO  
15          CONSTRUE "ELECTRONIC DOCUMENT" OR "EDGE OF  
16          ELECTRONIC DOCUMENT"?

17                   MR. MCELHINNY:   I -- I DON'T WANT TO GIVE  
18          YOU THE IMPRESSION THAT THAT'S LESS OF WHERE THE  
19          FIGHT IS.

20                   THE COURT:   UM-HUM.

21                   MR. MCELHINNY:   AT LEAST ON OUR PART.

22                   IT IS -- I MEAN, TO BE CLEAR, DESIGNS ARE  
23          SOMETHING THAT SAMSUNG SHOULD HAVE BEEN DOING ON  
24          ITS OWN.   THEY CAN PUT OUT INFORMATION WITH  
25          DESIGNS.   THEY CAN DO WHATEVER THEY WANT.

1 THE SOFTWARE AND THE GRAPHIC INTERFACE  
2 AND HOW IT IS -- IS A LITTLE BIT HARDER TO DESIGN  
3 AROUND, I THINK, AND IS JUST AS IMPORTANT, EQUALLY  
4 IMPORTANT.

5 SO I DON'T KNOW WHAT I'VE SAID TO GIVE  
6 YOU THE IMPRESSION THAT IT'S NOT AS IMPORTANT. WE  
7 SPEND A LOT OF TIME IN THE BRIEFING --

8 AND NOW I'VE FORGOTTEN YOUR QUESTION.

9 THE COURT: OKAY. WHETHER WE NEED TO  
10 CONSTRUE "ELECTRONIC DOCUMENT" OR "EDGE OF  
11 ELECTRONIC DOCUMENT."

12 MR. MCELHINNY: OUR POSITION ON THAT IS  
13 THAT WE DO NOT.

14 OUR POSITION ON THAT IS THAT IT'S THE  
15 PLAIN USAGE OF THE MEANING OF THOSE DOCUMENTS -- OF  
16 THOSE TERMS.

17 IT WAS NOT -- AS WE POINTED OUT TO YOUR  
18 HONOR WHEN WE SUED NOKIA ON THIS PATENT, NOKIA  
19 DIDN'T THINK IT NEEDED TO BE CONSTRUED.

20 IT WENT INTO RE-EXAMINATION, CAME OUT OF  
21 RE-EXAMINATION WITHOUT ANYBODY HAVING TO ARGUE  
22 ABOUT THE CONSTRUCTION.

23 WHAT IS TRUE IS THAT, YOU KNOW, DESPITE  
24 THE SHOW WE'RE ABOUT TO SEE, THERE IS NOTHING IN  
25 THE PRIOR ART THAT RECOGNIZES THE EDGE OF A

1 DOCUMENT.

2 IF YOU THINK OF THE E-MAIL APPLICATION  
3 WHICH THEY SHOWED WHERE IF IT'S -- THESE ARE ALL  
4 CENTERING DEVICES, AND IF YOU THINK OF THE E-MAIL  
5 APPLICATION THEY SHOWED WHERE IT GOES A LITTLE BIT  
6 OFF THE E-MAIL AND IT'LL SNAP BACK TO CENTER IT,  
7 THAT HAPPENS NO MATTER WHAT NAME ANYPLACE IN THE  
8 LIST IS OFF CENTER.

9 IT DOESN'T HAPPEN AT THE EDGE OF A  
10 DOCUMENT.

11 AND IF YOU GET TO THE EDGE OF THE  
12 DOCUMENT, YOU GO DIRECTLY INTO WHAT THE INVENTOR  
13 CALLED DESERT FOG, THE SAME AS ALL OF THE PRIOR ART  
14 DID, THE SAME -- EXACTLY THE PROBLEM THAT APPLE  
15 RESOLVED AGAINST.

16 AND IF YOU LOOK AT THE TILES APPLICATION  
17 WHERE THEIR EXPERT ARBITRARILY DREW A LINE AROUND  
18 PART OF THE PAGE AND SAID "THIS IS A DOCUMENT" AND  
19 WE ASKED HIM -- HIS ANSWER WAS TWO THINGS. ONE HE  
20 SAID, "TECHNICALLY IT HAS NO MEANING. IF YOU SHOW  
21 ME A RED SQUARE, I COULD SAY THAT'S A THOUSAND  
22 DOCUMENTS."

23 BUT HE ALSO SAID A DOCUMENT IS WHEN  
24 THERE'S NO INFORMATION BEYOND THE EDGE.

25 AND I'M USING HIS DEFINITION THERE, THE



1 APPLICATION AND THE TILES DOES NOT RESPOND.

2 IT'S THE SAME APPLICATION. IT'S A  
3 CENTERING DEVICE. IT NEVER RESPONDS TO THE EDGE OF  
4 A DOCUMENT.

5 SO THE ANSWER IS WE DON'T THINK IT NEEDS  
6 TO BE CONSTRUED. WE THINK EDGE OF A DOCUMENT HAS A  
7 PERFECTLY CLEAR -- WE THINK EVERYONE WILL  
8 UNDERSTAND IT WHEN THEY SEE IT.

9 AND, YOU KNOW, IF YOU USE THE DEFINITION  
10 THAT THERE'S NO INFORMATION BEYOND THE EDGE,  
11 THAT'S, I THINK, WHAT LARGELY WHAT MOST PEOPLE  
12 WOULD SAY ABOUT IT.

13 AND THE PRIOR ART WHICH THEY'VE CITED  
14 DOESN'T GO TO THAT.

15 THE COURT: WHAT IS THE NEXUS THAT WOULD  
16 HAVE TO BE FOUND BETWEEN THE INTELLECTUAL PROPERTY  
17 IN DISPUTE AND THE REASON THAT CONSUMERS ACTUALLY  
18 PURCHASE THE PRODUCT? WHAT -- FOR A PRELIMINARY  
19 INJUNCTION?

20 MR. MCELHINNY: I'M ONLY PAUSING BECAUSE  
21 I WANT TO RESPECT THE CONFIDENTIALITY HERE.

22 THE COURT: UM-HUM.

23 MR. MCELHINNY: IF YOU LOOK AT THE  
24 DOCUMENTS THAT WE FILED WITH YOU YESTERDAY TO  
25 AUGMENT THE RECORD, YOU WILL FIND A DOCUMENT, TWO,

1 THAT DIRECTLY TIE BOTH -- ALL -- THAT DIRECTLY TIE  
2 ALL OF THE PATENTS AT ISSUE HERE TO CONSUMER  
3 DEMAND.

4 BUT IN ADDITION TO THAT, WE OBVIOUSLY --  
5 YOU KNOW, WE SUBMITTED OUR OWN EXPERT DECLARATIONS  
6 WHICH SAY EXACTLY THE SAME THING.

7 THE COURT: BUT WHAT'S THE -- WHAT'S THE  
8 LEGAL STANDARD FOR THAT NEXUS? DOES IT HAVE TO BE  
9 THE REASON WHY PEOPLE ARE BUYING THOSE PRODUCTS, OR  
10 IS IT JUST ENOUGH THAT THEY HAPPEN TO LIKE THAT  
11 AMONGST A NUMBER OF FEATURES? WHAT'S THE REQUIRED  
12 CONNECTION?

13 MR. MCELHINNY: I THINK FOR THIS MOTION,  
14 I DON'T THINK YOUR HONOR NEEDS TO GET THAT FAR.

15 I MEAN, THE ISSUE IS, ARE WE LIKELY TO  
16 WIN AT TRIAL ON INFRINGEMENT AND VALIDITY?

17 AND THEN THE QUESTION IS WHETHER OR NOT  
18 WE'RE SUFFERING IRREPARABLE INJURY.

19 AND I DON'T THINK -- AS A RESULT OF THAT  
20 INFRINGEMENT.

21 BUT, AGAIN -- THIS IS THE BRAUN CASE,  
22 WHICH THE FEDERAL CIRCUIT DECIDED YESTERDAY, WHAT  
23 THEY SAID WAS WHEN THERE ARE TWO PEOPLE IN THE SAME  
24 MARKET COMPETING HEAD-TO-HEAD FOR THE SAME  
25 PRODUCTS, GIVING SOMEONE THE UNFAIR ADVANTAGE OF

1 ALLOWING THEM TO INFRINGE PATENTS IS PRESUMABLY --  
2 THEY DIDN'T SAY IS PRESUMABLY -- BUT THAT IS WHAT  
3 DRIVES THE SALE OF THOSE PRODUCTS.

4 COMING BACK, HOWEVER -- I DON'T WANT TO  
5 HAMMER THIS POINT TOO -- BUT THE DESIGN PATENTS YOU  
6 HAVE, THE DESIGN PATENTS THAT YOU HAVE ARE THE  
7 ICONIC APPLE PATENTS. THEY ARE THE DESIGN OF THE  
8 IPHONE AND THEY ARE THE DESIGN OF THE IPAD.

9 MR. WAGNER SAID THE INTRODUCTION OF THIS  
10 IPAD CREATED A NEW PRODUCT CATEGORY.

11 AGAIN, WE COULDN'T POSSIBLY HAVE PUT  
12 EVERY NEWSPAPER ARTICLE THAT APPEARED IN THE  
13 NEW YORK TIMES AND BUSINESS WEEK AND ALL THE REST  
14 OF THAT WHERE THEY SAY IT WAS THE DESIGN THAT MADE  
15 THE DIFFERENCE.

16 WE HAVE ONE QUOTE HERE, A GREAT ONE FROM  
17 THE NEW YORK TIMES WHERE THEY SAID "APPLE WAVED THE  
18 CINDERELLA WAND OVER THE UTILITARIAN, UGLY PHONE  
19 AND TURNED IT INTO SOMETHING BEAUTIFUL."

20 AND TO ME, AT LEAST, OBVIOUSLY, THAT  
21 SUGGESTS THAT THE DESIGN HERE IS SO CLOSELY TIED,  
22 THE ADVERTISING -- EVEN IN OUR, YOU KNOW, IN OUR  
23 INITIAL PAPERS, THAT'S THE POINT WE MADE, THAT WE  
24 HAVE USED THESE DESIGNS AS THE ELEMENT THAT WE USE  
25 IN OUR MARKETING TO SELL THESE PRODUCTS.

1 I'M GOING TO USE THE REST OF MY TIME FOR  
2 REBUTTAL UNLESS YOUR HONOR HAS ANY OTHER QUESTIONS.

3 THE COURT: NO. THANK YOU.

4 MS. SULLIVAN: YOUR HONOR, MAY I HAND UP  
5 OUR BINDERS?

6 THE COURT: YES, PLEASE.

7 (PAUSE IN PROCEEDINGS.)

8 THE COURT: WELL, WE DEFINITELY WILL NOT  
9 HAVE TIME FOR 249 SLIDES.

10 MS. SULLIVAN: AND YOUR HONOR, WE  
11 DEFINITELY WON'T GO THROUGH THEM.

12 THE COURT: GOOD, THANK YOU.

13 MS. SULLIVAN: YOUR HONOR, I'D JUST LIKE  
14 TO BEGIN, OPPOSING COUNSEL MADE MENTION OF  
15 MR. VERHOEVEN NOT BEING PRESENT.

16 I WANTED TO SIMPLY TELL YOUR HONOR THAT  
17 HE'S IN TRIAL AND SO UNABLE TO BE HERE, SO IT'S MY  
18 PRIVILEGE TO ARGUE FOR SAMSUNG TODAY.

19 YOUR HONOR, I'D LIKE TO TAKE A STEP BACK  
20 AND REMIND US OF WHERE WE ARE. WE'RE IN A  
21 PRELIMINARY INJUNCTION HEARING, AND A PRELIMINARY  
22 INJUNCTION IS AN EXTRAORDINARY STEP, AND IT'S  
23 CERTAINLY NOT WARRANTED HERE WHERE APPLE HAS FAILED  
24 TO MEET ITS BURDEN, HAS FAILED TO SHOW IRREPARABLE  
25 HARM, AS YOUR HONOR NOTED, BARELY EVEN PUTTING IT

1 IN ITS MOVING PAPERS, AND HAS FAILED TO EXPLAIN ITS  
2 UNREASONABLE DELAY.

3 BUT WHAT I MOST WANT TO EMPHASIZE, YOUR  
4 HONOR, IS WHAT THE STANDARD IS ON PRELIMINARY  
5 INJUNCTION REVIEW, AND IT'S CERTAINLY NOT THAT  
6 SAMSUNG MUST PROVE INVALIDITY BY CLEAR AND  
7 CONVINCING EVIDENCE OR PROVE NONINFRINGEMENT.

8 THE STANDARD UNDER NUMEROUS FEDERAL  
9 CIRCUIT CASES, ESPECIALLY ASTRAZENECA, IS THAT WE  
10 MUST SIMPLY SHOW A SUBSTANTIAL QUESTION ON  
11 INFRINGEMENT OR INVALIDITY DEFENSES IN ORDER TO  
12 DEFEAT THE PRELIMINARY INJUNCTION, OR AS THE  
13 FEDERAL CIRCUIT PUT IT IN THE ALTANA DECISION, THE  
14 ISSUE AT THE PRELIMINARY INJUNCTION STAGE IS THE  
15 VULNERABILITY OF THE PATENTS, AND WE'VE AMPLY SHOWN  
16 ENOUGH VULNERABILITY ON BOTH VALIDITY AND  
17 NONINFRINGEMENT TO DEFEAT THE PRELIMINARY  
18 INJUNCTION.

19 I'D LIKE TO BEGIN, YOUR HONOR, WITH THE  
20 DESIGN PATENTS --

21 THE COURT: LET ME STOP YOU A SECOND.

22 EVEN IF YOU DO ESTABLISH A SUBSTANTIAL  
23 QUESTION OF INVALIDITY, THEN IS IT THE PLAINTIFF'S  
24 BURDEN, OR AT LEAST OPPORTUNITY, TO SHOW THAT THERE  
25 IS STILL -- THAT THE PATENT IS LIKELY VALID?

1 SO IT'S NOT JUST ENOUGH TO RAISE THE  
2 SUBSTANTIAL QUESTION OF INVALIDITY. THEY CAN COME  
3 BACK AND THEN SAY, "WELL, WE STILL THINK THAT WE  
4 CAN PROVE THAT THE PATENT IS LIKELY VALID."

5 MS. SULLIVAN: NO, YOUR HONOR. THEY  
6 WOULD HAVE TO SHOW THAT IT IS LIKELY THAT THE  
7 PATENT IS VALID. IT WOULD SHIFT THE BURDEN TO THEM  
8 TO SHOW THAT.

9 THAT'S EXACTLY THE KIND OF THING THAT'S  
10 NOT APPROPRIATE ON A PRELIMINARY INJUNCTION  
11 HEARING.

12 TO THE EXTENT WE NEED TO HAVE CLAIM  
13 CONSTRUCTION, IT SHOULD AWAIT A FULL TRIAL.

14 AND JUST TO RECALL TO YOUR HONOR, OF  
15 COURSE YOU'VE GRANTED APPLE AN EXPEDITED TRIAL.

16 SO THE IDEA THAT A PRELIMINARY INJUNCTION  
17 IS NEEDED BETWEEN NOW AND A TRIAL THAT YOUR HONOR  
18 WILL ENTERTAIN IN A VERY SHORT TIMEFRAME IS REALLY  
19 IMPROPER.

20 BUT THE QUESTION OF -- THE ULTIMATE  
21 QUESTION OF VALIDITY AND INFRINGEMENT CAN BE  
22 DETERMINED AT TRIAL.

23 IF WE RAISE SUBSTANTIAL QUESTIONS, THE  
24 EXACT LANGUAGE IN ASTRAZENECA IS THAT PRELIMINARY  
25 INJUNCTION IS PRECLUDED.

1           BUT IF I COULD TURN FIRST TO THE VALIDITY  
2           OF THE TELEPHONE PATENTS, AND IF WE COULD START  
3           WITH THE PRIOR ART, YOUR HONOR -- AND BY THE WAY, I  
4           JUST WANT TO CORRECT ONE POINT THAT WAS MADE  
5           EARLIER BY OPPOSING COUNSEL.

6           WE DO CLEARLY CLAIM THAT THE '889 PATENT  
7           WAS PRIOR ART FOR THE PHONE DESIGN PATENTS IN  
8           ANSWER TO YOUR HONOR'S EARLIER QUESTION. THE '889  
9           ISSUED IN MAY OF '05 PRIOR TO THE '087 AND '677  
10          CLAIMED INVENTION DATE BY APPLE.

11          BUT JUST GOING TO OTHER PRIOR ART, IF WE  
12          COULD START WITH SLIDE 7, WE SHOW HERE THREE PRIOR  
13          ART FOR THE TELEPHONE PATENTS, THE TELEPHONE DESIGN  
14          PATENTS, THREE JAPANESE PATENTS, THE '317, THE '383  
15          AND THE '638.

16          AND AGAIN, YOUR HONOR, YOU'RE QUITE  
17          RIGHT. THE ORDINARY OBSERVER TEST APPLIES HERE.

18          AND SO WE HAVE EXPERT TESTIMONY, BUT YOUR  
19          HONOR CAN ALSO APPLY YOUR OWN OBSERVATIONS TO THIS.

20          IF WE GO TO SLIDE 11, WHAT I'D LIKE TO DO  
21          IS JUST LIST THE PRIOR ART SIMILARITIES HERE  
22          FEATURE BY FEATURE.

23          RECTANGULAR SHAPE.

24          AND, YOUR HONOR, SLIDE 11 IS A SLIDE THAT  
25          TAKES THE PRIOR ART WE'RE POINTING OUT AND COMPARES

1 IT TO THE TWO TELEPHONE DESIGN PATENTS, THE '087  
2 AND THE '677.

3 BUT YOUR HONOR, IN A NUTSHELL, WHAT'S  
4 HAPPENING HERE IS THAT APPLE IS GOING TO CLAIM A  
5 MONOPOLY RIGHT TO THE DESIGN OVER A RECTANGULAR  
6 SMART PHONE WITH A FLAT SURFACE AND ROUNDED CORNERS  
7 AND A FRONT SURFACE SUBSTANTIALLY FREE OF  
8 ORNAMENTATION.

9 BUT WE'RE GOING TO SEE HOW THAT EXTREMELY  
10 BROAD DESIGN CLAIM WAS IN THE PRIOR ART GOING  
11 FEATURE BY FEATURE.

12 SLIDE 11 SHOWS THAT RECTANGULAR SHAPE WAS  
13 IN THE PRIOR ART IN THE '638 AND THE '383.

14 IF WE GO TO SLIDE 12, YOU'LL SEE FOUR  
15 EVENLY ROUNDED CORNERS, FOUR EVENLY ROUNDED CORNERS  
16 IN THE PRIOR ART, FOUR EVENLY ROUNDED CORNERS IN  
17 THE TWO DESIGN DRAWINGS IN THE '087 AND THE '677.

18 FLIPPING TO THE NEXT SLIDE, 13, A FRONT  
19 SURFACE SUBSTANTIALLY FREE OF ORNAMENTATION.

20 REMEMBER, YOUR HONOR, THE PATENTS DON'T  
21 HAVE THESE WORDS. BUT THESE ARE THE WORDS WE'VE  
22 DRAWN FROM THE APPLE EXPERT, MR. WOODRING'S  
23 DECLARATION.

24 A FRONT SURFACE SUBSTANTIALLY FREE OF  
25 ORNAMENTATION, PRESENT IN ALL THREE OF THE PRIOR



1 JAPANESE PATENTS. NO DIFFERENT FROM THE '087 AND  
2 THE '677 DRAWINGS.

3 NEXT SLIDE, 14, A DISPLAY SCREEN CENTERED  
4 ON THE FRONT SURFACE. THE SAME IN ALL THREE OF THE  
5 PRIOR ART AS IN THE DESIGN DRAWINGS IN THE '087 AND  
6 THE '677.

7 IN THE NEXT SLIDE, SLIDE 15, NARROW  
8 BORDERS ON EITHER SIDE OF THE DISPLAY, SUBSTANTIAL  
9 BORDERS ABOVE AND BELOW THE DISPLAY. THE SAME IN  
10 THE PRIOR ART AS IN THE '087 AND '677.

11 NEXT SLIDE, 16, A ROUNDED HORIZONTAL  
12 SPEAKER SLOT CENTERED ON THE FRONT SURFACE ABOVE  
13 THE DISPLAY SCREEN. PRESENT IN TWO OF THE THREE  
14 PRIOR JAPANESE PATENTS. SAME AS IN THE DRAWINGS  
15 FOR THE '087 AND '677.

16 REMEMBER, THE '087 CLAIMS A BEZEL. THE  
17 '677 DOES NOT.

18 BUT A THIN, UNIFORM BEZEL SURROUNDING THE  
19 FRONT SURFACE. THE SAME IN THE '638 AND THE '383  
20 JAPANESE PATENTS AS IN THE '087.

21 AND FINALLY, IN THE '677, IF YOU PUT THE  
22 '677 SIDE-BY-SIDE WITH THE PRIOR ART AND THE  
23 JAPANESE PATENT FOR THE '638, YOU SEE ALL THOSE  
24 FEATURES THAT MAKE THE '677 OBVIOUS AT THE TIME OF  
25 INVENTION.

1           IT'S THE SAME IF YOU GO TO THE NEXT SLIDE  
2           FOR SLIDE 19 AND TAKE AN ASPECT VIEW. THE IDEA OF  
3           A FLAT, CLEAR SMART PHONE, SAME IN THE PRIOR ART AS  
4           IN THE '677.

5           THE '677 TALKS ABOUT A FLAT -- IT DOESN'T  
6           TALK ABOUT, BUT IT'S BEEN CONSTRUED BY APPLE TO  
7           INVOLVE A FLAT, CLEAR, BLACK COLORED FRONT SURFACE.

8           SAME IN THE PRIOR ART AS IN THE '677.

9           AND THE SHERMAN DECLARATION AT THE BOTTOM  
10          SAYS "CREATING A SMART PHONE WITH A BLACK, FLAT  
11          FRONT SCREEN WOULD HAVE BEEN OBVIOUS TO A DESIGNER  
12          OF MOBILE DEVICES OF ORDINARY SKILL BY JANUARY"  
13          6006 -- SORRY -- "JANUARY 2006."

14          YOUR HONOR, I WON'T BELABOR IT. THE SAME  
15          EXERCISE CAN BE DONE BETWEEN THE PRIOR ART AND THE  
16          '087 PATENT.

17          NOW, I'D LIKE TO PAUSE FOR A MOMENT ON  
18          SLIDE 22 IF I COULD, YOUR HONOR, BECAUSE IN SLIDE  
19          22 YOU'LL SEE THERE WAS ACTUALLY AN ADMISSION BY  
20          MR. WOODRING, AT LEAST IN HIS INITIAL STATEMENT, HE  
21          CHANGED HIS VIEW LATER, BUT MR. WOODRING, APPLE'S  
22          OWN EXPERT, CONCEDED THAT THE JAPANESE PRIOR ART  
23          THAT WE'VE REFERRED YOUR HONOR TO WAS REALLY  
24          SUBSTANTIALLY THE SAME TO THE ORDINARY OBSERVER AS  
25          THE CLAIMED DESIGN PATENTS.

1 IF YOU LOOK AT THE ANSWER, WHAT HE'S --  
2 WHAT HAPPENS IS IN HIS DEPOSITION, HE'S SHOWN  
3 EXHIBIT 67. EXHIBIT 67 IS ONE OF THE PIECES OF  
4 JAPANESE PRIOR ART WE'VE JUST LOOKED AT.

5 HE'S ASKED, IF WE MOVE THE POSITION OF  
6 THE SPEAKER SLOT SO IT'S CLOSER TO THE TOP, WOULD  
7 THAT CHANGE THE OVERALL IMPRESSION?

8 AND HE SAYS NO, I DON'T THINK IT WOULD  
9 CHANGE THE OVERALL IMPRESSION IN THE EYES OF THE  
10 ORDINARY OBSERVER.

11 SO THERE'S AMPLE EVIDENCE TO SHOW THAT  
12 THERE'S PRIOR ART TO INVALIDATE THE TWO TELEPHONE  
13 DESIGN PATENTS.

14 AND OPPOSING COUNSEL SAID, WELL, WE  
15 DIDN'T IDENTIFY A SINGLE REFERENCE.

16 BUT YOUR HONOR, WE'D SUBMIT THAT YOU CAN  
17 TAKE ANY OF THE THREE PRIOR JAPANESE PATENTS AND  
18 TREAT THEM AS THE INVALIDATING REFERENCE, MAKING  
19 THE TELEPHONE DESIGN PATENTS BOTH OBVIOUS.

20 YOUR HONOR, I'D LIKE TO SPEND A LITTLE  
21 TIME NEXT ON WHY, APART FROM INVALIDITY FOR  
22 OBVIOUSNESS, THE DESIGN PATENTS HERE ARE INVALID  
23 BECAUSE THEY'RE FUNCTIONAL AND NOT ORNAMENTAL.

24 AND IF I COULD, YOUR HONOR, I'D JUST LIKE  
25 TO GO BACK TO ONE OF YOUR LAST QUESTIONS. YOU

1 ASKED OPPOSING COUNSEL, WELL, ARE YOU CLAIMING  
2 BRAND IS THE SAME AS DESIGN?

3 AND I THINK I HEARD APPLE SAY YES, BRAND  
4 AND DESIGN, IT'S ALL ONE THING. I KIND OF -- IT'S  
5 A LOOK AND FEEL. "I KNOW IT WHEN I SEE IT" TEST.

6 THAT'S ABSOLUTELY NOT WHAT WE'RE TALKING  
7 ABOUT, YOUR HONOR. "DESIGN" IS A VERY SPECIFIC  
8 TERM OF ART IN PATENT LAW.

9 A DESIGN PATENT IS DISTINGUISHED FROM A  
10 UTILITY PATENT BECAUSE IT APPLIES TO SOMETHING VERY  
11 LIMITED, WHICH IS SIMPLY THE ORNAMENTAL DESIGN OF  
12 AN ARTICLE.

13 RICHARDSON VERSUS STANLEY WORKS, THE  
14 FEDERAL CIRCUIT CASE IN 2010, IS HELPFUL ON THIS  
15 POINT AND ON A NUMBER OF OTHERS.

16 AND RICHARDSON SAYS THAT IF THE PATENTED  
17 DESIGN IS PRIMARILY FUNCTIONAL RATHER THAN  
18 ORNAMENTAL, THE PATENT IS INVALID.

19 SO, YOUR HONOR, WE'VE LOOKED AT THE PRIOR  
20 ART.

21 IF WE COULD NEXT LOOK AT THE FUNCTIONAL  
22 ELEMENTS, THE FUNCTIONAL ELEMENTS OF APPLE'S DESIGN  
23 FEATURES STARTING WITH SLIDE 30.

24 AND I WANT TO BE CLEAR, YOUR HONOR, THAT  
25 RICHARDSON DOES SAY THAT WE SHOULD LOOK AT

1 FUNCTIONAL ELEMENTS ELEMENT BY ELEMENT. IT'S  
2 ESSENTIAL TO CLAIM CONSTRUCTION.

3 WE'RE GOING TO SAY THAT ALL OF THE  
4 ELEMENTS ARE FUNCTIONAL, SO WHEN YOU ADD THEM ALL  
5 UP, YOU GET A FUNCTIONAL TOTALITY OF THE  
6 CIRCUMSTANCES.

7 BUT LET'S GO THROUGH THEM ONE BY ONE.

8 THE RECTANGULAR SHAPE. IT'S BEEN THE  
9 STANDARD SHAPE FOR READING MEDIA SINCE CLAY  
10 TABLETS, PAPER TABLETS, AND CERTAINLY FOR READING  
11 MEDIA AND VIEWING SCREENS ON ALL MODERN MEDIA  
12 DEVICES.

13 IT'S A CONVENIENT SHAPE FOR BEING HELD BY  
14 A HUMAN HAND AND IT FOLLOWS THE FORM OF THE DISPLAY  
15 SCREEN.

16 IF WE GO NEXT TO SLIDE 31, ROUNDED  
17 CORNERS, AVOIDS SNAGS, AVOIDS INJURIES.

18 THERE'S A LITTLE BIT OF RIDICULE FROM  
19 APPLE ON THAT POINT.

20 BUT LET'S THINK ABOUT SOME OTHER ASPECTS  
21 THAT ARE FUNCTIONAL ABOUT ROUNDED CORNERS.

22 REMEMBER THAT THE LAW ON A DESIGN  
23 PATENT'S FUNCTIONALITY ASKS IS THERE AN EFFECT ON  
24 THE COST OR QUALITY OF THE ARTICLE?

25 WELL, THERE IS. ROUNDED CORNERS ARE

1 EASIER TO MANUFACTURE FROM MOLDS AND THEY HAVE  
2 GREATER STRUCTURAL INTEGRITY. THEY WORK BETTER  
3 BECAUSE THEY'RE HARDER TO BREAK THAN SHARP CORNERED  
4 OBJECTS.

5 SLIDE 32. AGAIN, THE SPEAKER IS LOCATED  
6 ON THE UPPER PORTION OF THE FRONT SURFACE.

7 THAT'S FUNCTIONAL. IT ALIGNS THE SPEAKER  
8 WITH THE HUMAN EAR. IT'S THE PLACE WHERE SPEAKERS  
9 HAVE BEEN LOCATED SINCE THE VERY FIRST TELEPHONE  
10 HANDSETS.

11 THE FUNCTIONAL ASPECT ON PAGE 33 IS THE  
12 HORIZONTAL SLOT SHAPE. IT'S FLEXIBLE. IT GIVES  
13 YOU MORE OPTIONS FOR YOUR --

14 THE COURT: BUT HOW ARE -- HOW IS THIS  
15 DESIGN DICTATED BY THE FUNCTIONALITY RATHER THAN  
16 JUST ENHANCING FUNCTIONALITY?

17 MS. SULLIVAN: SO, YOUR HONOR, THAT'S NOT  
18 ACTUALLY THE TEST.

19 APPLE HAS TRIED TO SUGGEST THERE'S  
20 FUNCTIONALITY ONLY IF THERE ARE NO OTHER POSSIBLE  
21 ALTERNATIVES.

22 BUT THE LAW IS CLEAR IN THE FEDERAL  
23 CIRCUIT THAT WHERE A PROPOSED ALTERNATIVE LEADS TO  
24 LESS FUNCTIONALITY, LESS UTILITY, THAT THE  
25 ALTERNATIVE IS NOT A TRUE ALTERNATIVE.

1 IF I COULD JUST FAST FORWARD FOR A MOMENT  
2 TO PAGE 48 OF THE SLIDES, YOUR HONOR, I JUST WANT  
3 TO BE CLEAR ON WHAT THE TEST IS HERE.

4 WE DO NOT HAVE TO PROVE THAT THE FUNCTION  
5 COULD NEVER BE PERFORMED BY AN ALTERNATIVE DESIGN.  
6 THE FEDERAL CIRCUIT'S REJECTED THAT TEST.

7 AND IN PHG TECHNOLOGIES, IT HAS LISTED A  
8 SET OF CONSIDERATIONS FOR FUNCTIONALITY IN WHICH IT  
9 SAYS YOU LOOK TO WHETHER THE PROTECTED DESIGN  
10 REPRESENTS THE BEST DESIGN -- I'M SKIPPING FOR A  
11 MOMENT -- WHETHER THERE ARE CONCOMITANT UTILITY  
12 PATENTS, WHETHER THE ADVERTISING TOUTS FEATURES AS  
13 HAVING UTILITY, WHETHER THERE ARE ELEMENTS IN THE  
14 DESIGN OR AN OVERALL APPEARANCE CLEARLY NOT  
15 DICTATED BY FUNCTION.

16 BUT GO BACK TO THE SECOND ONE, WHICH IS  
17 KEY HERE, WHETHER ALTERNATIVE DESIGNS WOULD  
18 ADVERSELY AFFECT THE UTILITY OF THE SPECIFIED  
19 ARTICLE, WHETHER ALTERNATIVE DESIGNS WOULD  
20 ADVERSELY AFFECT THE UTILITY OF THE SPECIFIED  
21 ARTICLE.

22 AND WHERE THE ALTERNATIVE DESIGNS LEADS  
23 TO HIGHER COST, LESSER QUALITY, HARDER TO USE, THEN  
24 THE ALTERNATIVE DESIGN DOES NOT DEFEAT  
25 FUNCTIONALITY.

1 I WONDER IF I COULD JUST -- IF WE COULD  
2 TAKE ONE MOMENT, YOUR HONOR, I COULD SHOW YOU THIS  
3 WITH RESPECT TO THE TAB PATENT.

4 IF WE GO FORWARD TO -- I THINK WE HAVE AN  
5 ILLUSTRATION OF WHY ALTERNATIVES, THE EXISTENCE OF  
6 AN ALTERNATIVE, IS NOT SUFFICIENT.

7 IF WE COULD GO TO SLIDE 99, WE'LL HAVE AN  
8 AUDIO -- A VIDEO TO PLAY WITH YOU.

9 NOW, YOUR HONOR, I'M GOING AHEAD TO THE  
10 TAB PATENT. REMEMBER, THE TAB, THE CLAIMED -- THE  
11 '889 DESIGN PATENT REFERS TO THE TAB --

12 THE COURT: LET ME ASK YOU A QUESTION ON  
13 THE TAB.

14 TELL ME WHICH ONE IS SAMSUNG AND WHICH  
15 ONE IS APPLE (INDICATING). TELL ME WHICH ONE. I'M  
16 NOT GOING TO SHOW YOU THE BACK. CAN YOU TELL ME?

17 MS. SULLIVAN: NOT AT THIS DISTANCE, YOUR  
18 HONOR.

19 THE COURT: ALL RIGHT. I'LL BRING IT UP  
20 CLOSER.

21 WHICH ONE IS WHICH (INDICATING)? CAN ANY  
22 OF THE SAMSUNG LAWYERS TELL ME, WITHOUT LOOKING AT  
23 THE BACK, WHICH ONE IS SAMSUNG AND WHICH ONE IS  
24 APPLE?

25 MS. SULLIVAN: APPLE ON THE LEFT AS WE



1 FACE YOU.

2 THE COURT: APPLE ON THIS SIDE  
3 (INDICATING)? THAT'S RIGHT.

4 IT TOOK A LONG TIME TO MAKE THAT  
5 DISTINCTION. THERE IS A SIZE DIFFERENCE.

6 BUT ANYWAY, I NOTICE IN THE BRIEFING YOU  
7 HARDLY TOUCHED, REALLY, INFRINGEMENT AS MUCH AND --

8 MS. SULLIVAN: IF WE -- YOUR HONOR, CAN I  
9 JUST FINISH THE POINT ON ALTERNATIVES?

10 THE COURT: GO AHEAD.

11 MS. SULLIVAN: IF WE PLAY THIS FOR YOUR  
12 HONOR BRIEFLY, IT'S A POINT ABOUT ALTERNATIVES.

13 YOU CAN HAVE IT TRIANGULAR -- IF APPLE  
14 SAYS THE RECTANGLE SERVES NO FUNCTION, THE  
15 RECTANGLE IS ALL ABOUT AESTHETIC AND ORNAMENT, THIS  
16 CLIP SHOWS WHY IT'S ALL ABOUT FUNCTION, RECTANGULAR  
17 SHAPE.

18 (WHEREUPON, A VIDEOTAPE WAS PLAYED IN  
19 OPEN COURT OFF THE RECORD.)

20 MS. SULLIVAN: NOW, YOUR HONOR, IT'S AN  
21 ELEMENT -- WE'RE LOOKING TO THE ABSURDITY OF THIS  
22 SKIT FROM THE OFFICE, BUT TO MAKE A SERIOUS POINT,  
23 WHICH IS YOU CAN'T SIMPLY SAY THERE IS AN  
24 ALTERNATIVE OUT THERE, LIKE A TRIANGULAR TAB AS  
25 OPPOSED TO A RECTANGULAR TAB THAT DOESN'T USE THE,

1 THE DESIGN THAT IS CLAIMED TO BE PATENTED.

2 YOU HAVE TO ASK WHETHER IT WOULD REDUCE  
3 THE UTILITY OF THAT PATENT. THAT'S THE TEST IN PHG  
4 TECHNOLOGIES.

5 AND SO WE SUBMIT, YOUR HONOR, THAT THE  
6 MERE ADVERTENCE TO ALTERNATIVES FOR THE TELEPHONE  
7 OR THE TABLET ARE NOT ENOUGH.

8 BUT LET ME TURN TO YOUR HONOR'S QUESTION  
9 ABOUT INFRINGEMENT.

10 THE COURT: OKAY.

11 MS. SULLIVAN: IF WE GO TO PAGE 52, WE'LL  
12 GO BACK -- PAGE 52 OF THE DECK, OUR KEY -- LET ME  
13 START WITH THE LEGAL STANDARD HERE.

14 NOW, AGAIN, INFRINGEMENT IS GOING TO BE  
15 JUDGED BY THE ORDINARY OBSERVER FACTORING OUT THE  
16 PRIOR ART, THAT IS, AWARE OF THE PRIOR ART AND  
17 TAKING PRIOR ART INTO ACCOUNT AND FACTORING OUT ANY  
18 FUNCTIONAL CONSIDERATIONS.

19 AND I JUST NEED TO FOLLOW UP ON YOUR  
20 HONOR'S QUESTIONS TO APPLE'S COUNSEL BEFORE.

21 A COUPLE OF CORRECTIONS.

22 FIRST, THE GORHAM TEST DOES, AS YOUR  
23 HONOR SUGGESTS, ASK WHETHER THERE'S GOING TO BE AN  
24 INDUCEMENT TO THE ORDINARY OBSERVER TO PURCHASE THE  
25 WRONG PRODUCT.

1 THE QUOTE FROM GORHAM IS, "IS THE  
2 ORDINARY OBSERVER GOING TO BE INDUCED TO PURCHASE  
3 ONE BY SUPPOSING IT TO BE THE OTHER?" IS HE GOING  
4 TO BE DECEIVED?

5 SO THE TEST IS WHETHER THE CONSUMER WOULD  
6 BE DECEIVED INTO BUYING ONE RATHER THAN THE OTHER.

7 AND APPLE'S DESIGN WITNESS, MR. SHERMAN,  
8 QUOTED THE PROPER TEST AT PARAGRAPH 14 OF HIS  
9 DECLARATION AND HE DID NOT OPINE ON ORDINARY  
10 PURCHASER. HE OPINED PROPERLY ON THE GORHAM TEST  
11 AND THE ORDINARY OBSERVER TEST.

12 BUT YOUR HONOR, UNDER THAT ORDINARY  
13 OBSERVER TEST, THE KEY POINT THAT WE WANT TO MAKE  
14 TO YOUR HONOR, YOU CAN FLIP THROUGH THESE AT YOUR  
15 LEISURE, BUT WE'VE POINTED OUT THE NUMEROUS  
16 DIFFERENCES BETWEEN THE SAMSUNG PRODUCT AND THE  
17 APPLE DESIGN DRAWINGS THAT SHOW THAT THE  
18 DIFFERENCES ARE NOT MINUTE OR MINOR.

19 APPLE WANTS TO SAY THEY'RE MINUTE OR  
20 MINOR. BUT IN EVERY ASPECT THERE ARE DIFFERENCES  
21 THAT ADD UP WITH THE INFUSE 4G AT THE END.

22 IF YOU GO TO SLIDE 62 WITH A SET OF  
23 DIFFERENCES AS TO SPEAKER LOCATION AND SHAPE AND  
24 PERCEPTIBILITY.

25 BANDS, THE WIDTH OF THE BANDS ABOVE AND

1 BELOW AND ON THE SIDES; THE PRESENCE OF THE  
2 BORDERS; THE ASPECT RATIO; THE PRESENCE OF THE  
3 DESIGN ELEMENTS ON THE FRONT.

4 SO THESE DIFFERENCES ARE NOT MINUTE OR  
5 MINOR.

6 THE SAME IS TRUE FOR THE GALAXY S 4G,  
7 WHICH YOUR HONOR CAN SEE ON THE SUCCEEDING SLIDES  
8 THAT ARE ADDED UP ON PAGE 71.

9 BUT YOU DON'T JUST HAVE TO TAKE IT FROM  
10 SAMSUNG THAT THESE DIFFERENCES ARE NOT MINUTE OR  
11 MINOR.

12 YOU CAN TAKE IT FROM APPLE'S OWN  
13 WITNESSES.

14 AND IF YOU LOOK IN YOUR DECK -- I DON'T  
15 WANT TO REVEAL ANY CONFIDENTIAL INFORMATION, BUT IF  
16 YOU LOOK IN YOUR DECK AT PAGES 74 THROUGH 76,  
17 YOU'LL SEE ADMISSIONS BY APPLE'S OWN DESIGNER THAT  
18 DIFFERENCES WERE SIGNIFICANT BETWEEN THE APPLE  
19 IPHONE AS INTRODUCED AND PRIOR MODELS THAT HAVE  
20 SOME OF THE SAME ELEMENTS AS SAMSUNG'S PHONE.

21 IT CAN'T BE THAT APPLE CAN HAVE IT BOTH  
22 WAYS. IT CAN'T SAY THAT THE DIFFERENCES ARE MAJOR  
23 FOR PURPOSES OF DISTINGUISHING PRIOR ART, BUT MINOR  
24 WHEN IT COMES TO INFRINGEMENT.

25 IT CAN'T SAY THEY'RE MAJOR FOR TALKING

1 ABOUT THEIR OWN PRIOR PRODUCTS, BUT MINOR FOR  
2 PURPOSES OF INFRINGEMENT.

3 WE WOULD SUBMIT THAT THE DIFFERENCES ARE  
4 SIGNIFICANT.

5 AND IN FACT, IF YOU LOOK AT SLIDE 77,  
6 THIS IS A PORTION THAT I AM ALLOWED TO READ IN  
7 COURT, THIS IS MR. WOODRING, APPLE'S DESIGN EXPERT,  
8 WHO COMPARES ONE OF THE JAPANESE PIECES OF PRIOR  
9 ART WE LOOKED AT EARLIER WITH THE '087 PATENT, AND  
10 HERE'S WHAT HE SAYS ABOUT IT.

11 HE COMPARES THE TWO AND HE SAYS, HIGHER  
12 SPEAKER SLOT, SMALLER SPEAKER SLOT, FRONT SURFACE  
13 NOT FLAT, THICKER BEZEL IN PROFILE AND NOT  
14 SUBSTANTIALLY UNIFORM.

15 HE SAID EXTENSIVE MODIFICATIONS OF ONE --  
16 OF THE '638 DESIGN WOULD BE REQUIRED TO MAKE IT  
17 LOOK LIKE THE '087.

18 WELL, WHICH IS THE SAMSUNG PHONE MORE  
19 LIKE?

20 IF YOU LOOK AT THE NEXT PAGE, YOUR HONOR,  
21 PAGE 78, SAMSUNG GALAXY S 4G HAS A HIGHER SPEAKER  
22 SLOT, A WIDER SPEAKER SLOT, A THICKER BEZEL THAT'S  
23 NOT SUBSTANTIALLY UNIFORM.

24 IT LOOKS TO THE ORDINARY OBSERVER A LOT  
25 MORE LIKE THE JAPANESE PRIOR ART THAT MR. WOODRING

1 SAID WOULD REQUIRE EXTENSIVE MODIFICATIONS TO BE  
2 MADE INTO THE '087 DRAWING.

3 SO, YOUR HONOR, WE SUBMIT THAT THERE ARE  
4 EXTENSIVE DIFFERENCES AND NOT MINOR OR MINUTE  
5 DIFFERENCES, BY APPLE'S OWN ADMISSION, BETWEEN THE  
6 PHONES THAT DEFEAT ANY INFRINGEMENT SHOWING.

7 YOU CAN SEE THE VERY SAME THING WITH  
8 RESPECT TO THE TAB PATENTS. I WON'T GO THROUGH  
9 THIS IN DETAIL EXCEPT TO JUST NOTE THAT YOUR HONOR  
10 IS CORRECT THAT WE VIEW THE FIDLER AND BLOOMBERG  
11 TABLETS AS INVALIDATING PRIOR ART WITH RESPECT TO  
12 THE '889 PATENT.

13 DOES YOUR HONOR HAVE ANY INTEREST IN  
14 EXPLORING THE '381 PATENT? I'M CONSCIOUS OF THE  
15 LIMITATIONS OF TIME. INVALIDITY INFRINGEMENT?

16 THE COURT: JUST -- LET ME JUST ASK WITH  
17 REGARD TO THE TWO PHONE DESIGN PATENTS IF SAMSUNG  
18 CONTESTS THE INVENTION DATE. I KNOW THERE WAS A  
19 FOOTNOTE THAT SAID IT WAS CORROBORATED IN APPLE'S  
20 REPLY.

21 MS. SULLIVAN: WE DO NOT CONCEDE THE  
22 INVENTION DATE, YOUR HONOR.

23 THE COURT: OKAY. WHAT DATE DO YOU  
24 BELIEVE IT IS? OR SHOULD BE? NOT APRIL 20TH OF  
25 '06? DO YOU HAVE AN ALTERNATIVE?

1 MS. SULLIVAN: YOUR HONOR, I THINK THAT  
2 TAKES US INTO THE REALM OF CONFIDENTIAL  
3 INFORMATION.

4 THE COURT: OKAY. IS IT SOMEWHERE IN  
5 YOUR DOCUMENTS?

6 MS. SULLIVAN: WE'LL MAKE SURE WE POINT  
7 IT OUT TO YOUR HONOR.

8 THE COURT: OKAY.

9 MS. SULLIVAN: ALL OF THE PRIOR ART THAT  
10 I'VE DESCRIBED, YOUR HONOR, IS -- PRECEDES ANY  
11 CLAIM -- PRECEDES THE CLAIMED INVENTION DATE.

12 THE COURT: I KNOW THERE'S SOME DISPUTE  
13 ABOUT THAT WITH REGARD TO SOME OF THE ART.

14 LET ME JUST ASK THE SAME QUESTION I ASKED  
15 MR. MCELHINNY. WHAT DO YOU THINK THE NEXUS NEEDS  
16 TO BE BETWEEN THE DISPUTED INTELLECTUAL PROPERTY  
17 AND THE REASON THAT CONSUMERS ACTUALLY BUY A  
18 CERTAIN DEVICE FOR A PRELIMINARY INJUNCTION?

19 MS. SULLIVAN: WELL, YOUR HONOR, WE  
20 BELIEVE THAT THE ORDINARY OBSERVER WOULD HAVE TO  
21 PURCHASE THE ALLEGED INFRINGING PRODUCT MISTAKING  
22 IT FOR THE OTHER ONE BASED ON THE DESIGN ELEMENTS,  
23 WHICH WERE THE ORNAMENTAL ELEMENTS, NOT THE  
24 FUNCTIONAL ELEMENTS.

25 AND IN OUR IRREPARABLE HARM SHOWING, YOUR

1 HONOR, WE'VE SHOWN THAT APPLE'S OWN STUDIES SHOW  
2 THAT CONSUMERS DO NOT SWITCH TO ANDROID PHONES FROM  
3 APPLE PHONES AND THAT APPLE'S OWN STUDIES SUGGEST  
4 THAT THE DESIGN AND COLOR IS A TRIVIAL, A TRIVIAL  
5 REASON FOR CONSUMERS TO BUY PHONES.

6 NOW, YOU HEARD MR. MCELHINNY TRY TO AVOID  
7 THE CONSEQUENCE OF THAT STUDY BY SAYING, "WELL,  
8 BRAND, DESIGN, IT'S ALL THE SAME THING."

9 BUT IT'S NOT.

10 TO PREVAIL ON AN INFRINGEMENT CLAIM FOR A  
11 DESIGN PATENT, APPLE WOULD HAVE TO SHOW THAT  
12 CONSUMERS ARE BEING DECEIVED INTO BUYING AN ACCUSED  
13 PHONE, OR AN ACCUSED TABLET RATHER THAN APPLE'S  
14 PRODUCTS BASED ON A CONFUSION ABOUT DESIGN, MEANING  
15 ORNAMENT, NOT FUNCTION.

16 AND YOUR HONOR, THE CORE OF OUR ARGUMENT  
17 IS REALLY THIS: THAT DESIGN PATENT LAW IS NARROW  
18 AND SPECIFIC.

19 IN FACT, RICHARDSON REMINDS US THAT IN A  
20 CROWDED FIELD LIKE THIS ONE, THE DESIGN PATENT MUST  
21 BE CONSTRUED NARROWLY, PRECISELY SO THAT DESIGN  
22 PATENTS CAN'T OVERPROTECT, CAN'T SWALLOW UP A WHOLE  
23 WORLD OF THINGS THAT AREN'T TRULY THE ORNAMENTAL  
24 FEATURES OF A PHONE THAT ARE NOT NECESSARY TO ITS  
25 FUNCTION.



1 WE'VE TRIED TO SHOW YOUR HONOR THAT THE  
2 FEATURES OF THE CLAIMED PATENT, THE DESIGN  
3 FEATURES, ELEMENT BY ELEMENT AND TAKEN AS A WHOLE,  
4 ARE ALL ABOUT FUNCTIONALITY.

5 THEY'RE NOT JUST MORE FUNCTIONAL THAN  
6 ORNAMENTAL. THEY'RE ALL ABOUT FUNCTIONALITY.  
7 THEY'RE ALL ABOUT HOW TO USE A PRODUCT BETTER AND  
8 TO MAKE IT AT LOWER COST AND GREATER QUALITY.

9 AND WHERE THAT'S THE CASE, THE PATENT LAW  
10 SHOULD NOT BE USED TO CREATE A MONOPOLY ON BLACK  
11 FLAT SURFACED MEDIA SCREENS WITH ROUNDED CORNERS IN  
12 WHICH NO ONE ELSE CAN ENTER THE SPACE AND COMPETE,  
13 EVEN IF THE ORNAMENTAL FEATURES OF THEIR PHONES  
14 HAVE MULTIPLE DIFFERENCES FROM THE CLAIMED DESIGN.

15 SO WE THINK THAT YOU DO HAVE TO ASK  
16 WHETHER A PURCHASER WOULD BE DECEIVED INTO BUYING  
17 THE WRONG PHONE BASED ON THE ORNAMENTAL ELEMENTS  
18 RATHER THAN THE FUNCTIONAL ELEMENTS.

19 AND WHEN WE GET TO IRREPARABLE HARM,  
20 WE'LL BE HAPPY TO TALK MORE ABOUT HOW TRIVIAL  
21 DESIGN IS IN APPLE'S OWN STUDIES, DESIGN UNDERSTOOD  
22 AS ORNAMENT IN APPLE'S OWN STUDIES AS A REASON FOR  
23 BUYING A PHONE.

24 THE COURT: LET ME ASK YOU ABOUT  
25 IRREPARABLE HARM.

1                   SO SAMSUNG HAS BEEN ACTUALLY GIVING ITS  
2 TABLETS OUT FOR FREE WITH OTHER PURCHASES OF  
3 SAMSUNG PRODUCTS WHICH, IN MY MIND, ENFORCES THAT  
4 THERE IS SOME PATH DEPENDENCY.

5                   IF YOU GET A SAMSUNG TABLET, THEN YOU'RE  
6 MORE LIKELY TO BUY THE ACCESSORIES, BUY THE  
7 DOWNSTREAM NEXT VERSION OF THE TABLET, THAT YOU'RE  
8 GOING TO MAYBE BUY MORE APPLICATIONS THAT GO WITH  
9 THE SAMSUNG TABLET, AND THAT -- OTHERWISE WHY WOULD  
10 YOU GIVE IT OUT FOR FREE UNLESS YOU THOUGHT THAT  
11 THERE WOULD BE SOME DOWNSTREAM VALUE? BECAUSE  
12 YOU'RE NOT MAKING ANY MONEY SINCE YOU'RE GIVING  
13 THIS FOR FREE.

14                   SO WHAT DO YOU THINK ABOUT THAT PATH  
15 DEPENDENCY ARGUMENT IN TERMS OF ACCESSORIES,  
16 APPLICATIONS, FUTURE PRODUCTS, AND THEN OTHER  
17 PRODUCTS BY THE SAME COMPANY?

18                   MS. SULLIVAN: YOUR HONOR, THAT MAY BE  
19 SO, BUT THAT'S LEGITIMATE COMPETITION.

20                   THAT IS, COMPETITORS WHO ARE NOT  
21 INFRINGING OF ANY PROTECTABLE ELEMENT OF APPLE  
22 PHONES ARE FREE TO TRY TO ATTRACT PURCHASERS AWAY  
23 FROM OLD PHONES, FLIP PHONES AND SO FORTH, AND GET  
24 THEM SET ON THE ANDROID PATH.

25                   BUT WHAT APPLE NEEDS TO SHOW TO SHOW

1 IRREPARABLE HARM IS THAT THERE'S BEEN MARKET SHARE  
2 TAKEN AWAY FROM IT THROUGH THIS ACTIVITY, AND  
3 THAT'S WHAT IT'S FAILED TO PUT IN EVIDENCE.

4 IT FAILED TO PUT ANY EVIDENCE IN,  
5 MEANINGFUL AT ALL, IN THE OPENING PAPERS.

6 WE DON'T THINK IT'S DONE ANY BETTER IN  
7 THE REPLY PAPERS, YOUR HONOR.

8 WE THINK IN PARTICULAR IT FAILED TO  
9 CONSIDER -- LET'S LOOK AT A FEW --

10 THE COURT: LET ME ASK YOU A QUESTION,  
11 THOUGH.

12 ASSUMING -- AND THESE ARE A LOT OF  
13 ASSUMPTIONS THAT ARE NOT NECESSARILY THE CASE  
14 HERE -- ASSUMING THAT THE PATENT WAS VALID,  
15 ASSUMING THERE WAS INFRINGEMENT, IF SOMEONE COULD  
16 PROVE THAT THERE IS SOME PATH DEPENDENCY HERE, IF  
17 THEY LOSE THIS ONE SALE, THEY'RE GOING TO LOSE  
18 SALES OF DOWNSTREAM APPLICATIONS, ACCESSORIES,  
19 THEY'RE GOING TO LOSE THE SALE OF THE NEXT VERSION  
20 OF THE PHONE OR THE TABLET, WOULD THAT --

21 MS. SULLIVAN: I DON'T THINK THAT --

22 THE COURT: WOULD THAT CONSTITUTE  
23 IRREPARABLE HARM?

24 MS. SULLIVAN: IT WOULD NOT BY ITSELF,  
25 YOUR HONOR.

1                   WHAT WOULD HAVE TO BE SHOWN IS THAT  
2                   SAMSUNG IS TAKING MARKET SHARE AWAY FROM APPLE  
3                   RATHER THAN FROM OTHER ANDROID COMPETITORS.

4                   THERE ARE A HOST OF COMPANIES NOW IN THE  
5                   ANDROID SPACE.

6                   AND AS MR. WAGNER'S, OUR ECONOMIC  
7                   EXPERT'S TESTIMONY WAS ASSAILED A MOMENT AGO BY  
8                   APPLE, I THINK IT WAS MISCHARACTERIZED.

9                   MR. WAGNER MADE CLEAR THAT IN A GROWING  
10                  MARKET, MARKET SHARE ANALYSIS CAN BE VERY  
11                  MISLEADING BECAUSE WHAT YOU HAVE TO ASK IS, HAS  
12                  MARKET SHARE BEEN TAKEN AWAY FROM APPLE, NOT -- AND  
13                  THAT'S WHAT APPLE'S ANALYSIS FAILS TO DO. IT FAILS  
14                  TO DISCOUNT THE POSSIBILITY THAT THE PATH  
15                  DEPENDENCY YOUR HONOR DESCRIBED COULD BE HELPING  
16                  SAMSUNG BEAT OUT OTHER RIVALS, WHETHER IT'S HTC OR  
17                  MOTOROLA OR BLACKBERRY.

18                  THE COURT: RIGHT. BUT IT TOOK A LONG  
19                  TIME FOR SAMSUNG ATTORNEYS TO IDENTIFY WHICH ONE  
20                  WAS A SAMSUNG TABLET VERSUS AN APPLE TABLET.

21                  SO IF IT LOOKS THAT SIMILAR, HOW CAN YOU  
22                  NOT ASSUME THAT THIS IS NOT GOING TO BE SOLD AT THE  
23                  EXPENSE OF SOME OTHER ANDROID TABLET THAT DOESN'T  
24                  LOOK LIKE THIS, THAT IT'S GOING TO BE LOOKING LIKE  
25                  AN APPLE TABLET?

1 MS. SULLIVAN: YOUR HONOR, WITH RESPECT,  
2 I'M STANDING FAR AWAY FROM YOU AND YOU COVERED UP  
3 THE BRAND LOGO.

4 THE COURT: NO, THERE'S NO LOGO ON THE  
5 FRONT. I'M SHOWING YOU. THERE'S NO LOGO ON THE  
6 FRONT.

7 MS. SULLIVAN: I'M SORRY.

8 THE COURT: THESE ARE JUST BLACK SCREENS.  
9 I'M AS CLOSE TO YOU AS I CAN GET. I'M AT  
10 THE BENCH, AND UNLESS YOU WANT ME TO COME DOWN TO  
11 THE WELL.

12 THESE ARE SO SIMILAR, I DON'T SEE HOW YOU  
13 CAN SAY THAT IF I PURCHASE ONE OF THESE THAT LOOKS  
14 ALMOST IDENTICAL TO THIS OTHER PRODUCT, THAT I'M  
15 REALLY GOING FOR SOME OTHER ANDROID PRODUCT THAT  
16 LOOKS COMPLETELY DIFFERENT.

17 MS. SULLIVAN: OKAY. WELL, YOUR HONOR, I  
18 DON'T MEAN TO QUIBBLE OVER THE SMALL EXPERIMENT,  
19 BUT THE '889 PATENT IS FOR THE WHOLE DEVICE AND YOU  
20 DIDN'T SHOW US THE BACK, AND THE ORDINARY OBSERVER  
21 IS NOT LIMITED TO THE SENSE OF SIGHT, ESPECIALLY  
22 NOT AT 15 FEET.

23 THE ORDINARY OBSERVER IS ALLOWED TO USE  
24 ALL SENSES, INCLUDING --

25 THE COURT: I DON'T THINK THIS IS 15

1 FEET, BUT YOU CAN LOOK. OF COURSE YOU CAN SEE THE  
2 LOGO.

3 BUT THE BACK, THE SHAPE IS VERY SIMILAR  
4 (INDICATING).

5 I'M SHOWING ALL SIDES NOW, SHOWING THE  
6 SIDE, THE BACK, YOU CAN SHOW HOW IT'S A SLOPED BACK  
7 (INDICATING).

8 YOU CAN SHOW THAT THE -- I'M HOLDING THEM  
9 RIGHT NEXT TO EACH OTHER (INDICATING). THE  
10 THINNESS IS VERY SIMILAR, THE SLOPING ON THE EDGES  
11 IS VERY SIMILAR (INDICATING).

12 MS. SULLIVAN: AND, YOUR HONOR, UNTIL  
13 RECENTLY, APPLE DID NOT EVEN KNOW WHETHER THE  
14 TABLET, IF THE TABLET YOU'RE HOLDING UP NOW,  
15 EMBODIED THE '889 PATENT.

16 IF YOU LOOK AT THE DRAWING, THE '889 IS  
17 DRAWN TO A MUCH GREATER THICKNESS AND, IN FACT,  
18 APPLE DIDN'T CLAIM THAT THE '889 EMBODIED --  
19 SORRY -- DIDN'T CLAIM THAT THE TABLET THAT YOU JUST  
20 HELD UP, THE IPAD, EMBODIED THE '889 PATENT UNTIL  
21 RECENTLY.

22 SO REMEMBER WE'RE FOCUSSING NOT ON THE  
23 PRODUCT, WE'RE FOCUSSING ON THE DRAWING, THE '889  
24 DRAWING.

25 WE THINK THAT OUR TABLET OBVIOUSLY

1 DIFFERS FROM THE DESIGN DRAWING WITH RESPECT TO THE  
2 ELEMENT OF THINNESS THAT YOUR HONOR JUST DESCRIBED.

3 IN FACT, SAMSUNG HAS LONG PRIDED ITSELF  
4 ON MAKING VERY THIN PRODUCTS. THEY'RE A LEADER IN  
5 THAT AREA.

6 YOUR HONOR, I WANT TO GO BACK TO THE  
7 IMPORTANT PIECE HERE, WHICH IS IT IS NOT OUR BURDEN  
8 TO PROVE INVALIDITY BY CLEAR AND CONVINCING  
9 EVIDENCE, AND IT IS NOT OUR BURDEN TO SHOW  
10 NONINFRINGEMENT AT THIS STAGE.

11 WHAT IS OUR BURDEN TO DEFEAT THE  
12 PRELIMINARY INJUNCTION IS TO RAISE SUBSTANTIAL  
13 QUESTIONS, AND THERE CANNOT BE, I THINK, ANY DOUBT  
14 ON THIS RECORD THAT WE RAISED SUBSTANTIAL QUESTIONS  
15 OF INVALIDITY.

16 ON THE '889, YOUR HONOR, YOU ALREADY  
17 REFERRED TO THE FIDLER TABLET, 1994.

18 WE THINK FIDLER AND BLOOMBERG ARE PRIOR  
19 ART INVALIDATING THE '889 PATENT.

20 TABLETS WERE -- RECTANGULAR TABLETS  
21 WERE --

22 THE COURT: I PROBABLY AGREE WITH YOU ON  
23 THE KNIGHT-RIDDER 1994.

24 MS. SULLIVAN: WELL, THEN WE'LL ACCEPT  
25 THAT, YOUR HONOR.

1 THE COURT: BUT LET ME ASK, ISN'T THERE  
2 SOME BRAND DILUTION, THOUGH? IF YOU ARE SELLING  
3 PRODUCTS THAT -- I WOULD SAY ON THESE TABLETS, I  
4 THINK THEY DO INFRINGE.

5 BUT I THINK APPLE HAS A PROBLEM WITH THE  
6 VALIDITY OF THE '889 BASED ON KNIGHT-RIDDER, THE  
7 1981 AND 1994 MORE SPECIFICALLY.

8 BUT ISN'T THERE SOME BRAND DILUTION HERE  
9 THAT'S GOING ON? LIKE WHY SHOULD YOU BE ABLE TO  
10 SELL A PRODUCT THAT LOOKS VIRTUALLY IDENTICAL FOR  
11 MUCH LESS A PRICE, OR GIVE IT AWAY FOR FREE? ISN'T  
12 THERE SOME UNFAIR COMPETITION ASPECT OF THAT?

13 GO AHEAD.

14 MS. SULLIVAN: YOUR HONOR, WE'RE NOT HERE  
15 BEFORE YOU ON UNFAIR COMPETITION.

16 THE COURT: I UNDERSTAND.

17 MS. SULLIVAN: OR TRADEMARK INFRINGEMENT  
18 OR TRADEMARK DILUTION BY -- OR CONFUSION OF SOURCE  
19 CONFUSION OR ORIGIN CONFUSION. WE'RE NOT TALKING  
20 ABOUT THAT PART OF THE CASE HERE.

21 APPLE ELECTED TO SEEK A PRELIMINARY  
22 INJUNCTION ON DESIGN PATENT INFRINGEMENT, AND THE  
23 CONCEPT OF DILUTION IS NOT PART OF DESIGN PATENT  
24 INFRINGEMENT ANALYSIS.

25



1 THE COURT: BUT IT COULD BE PART OF THE  
2 IRREPARABLE HARM IF THERE'S BRAND DILUTION THAT IS  
3 LEADING CONSUMERS TO FEEL LIKE, "LOOK, I CAN GET  
4 THE EXACT IDENTICAL LOOKING PRODUCT THAT HAS THE  
5 SAME FUNCTIONALITY FOR HALF THE PRICE OR FOR FREE,"  
6 THEN ISN'T THAT GOING TO LEAD TO SOME BRAND  
7 DILUTION?

8 MS. SULLIVAN: YOUR HONOR, THERE'S NO  
9 EVIDENCE OF BRAND DILUTION. APPLE HAS NOT PUT IN  
10 ANY EVIDENCE THAT THIS DILUTING EFFECT HAS  
11 HAPPENED.

12 IN FACT, THEIR OWN STUDIES SHOW THAT  
13 APPLE CUSTOMERS ARE EXTRAORDINARILY LOYAL.

14 AND THEY HAVEN'T PROVED THAT MARKET SHARE  
15 HAS BEEN TAKEN AWAY FROM THEM AS OPPOSED TO BEING  
16 TAKEN AWAY FROM OTHER PHONE COMPETITORS.

17 SO WE DON'T THINK YOU CAN WAVE A VAGUE  
18 KIND OF DON'T DO TO APPLE WHAT WAS DONE TO BORDEAUX  
19 WINE, A DIMINISHMENT OF BRAND VALUE. THAT'S NOT  
20 WHAT'S AT ISSUE HERE.

21 ON A PRELIMINARY INJUNCTION, IT'S CLEAR  
22 THAT APPLE HAS TO SHOW EVIDENCE, IT CAN'T RELY ON  
23 ATTORNEY ARGUMENT, AND IT DOESN'T HAVE ANY EVIDENCE  
24 THAT THE BRAND HAS BEEN DILUTED.

25 TO THE CONTRARY. APPLE SALES AND

1 PREORDERS HAVE CONTINUED TO RISE EXPONENTIALLY  
2 WITHOUT REGARD TO THE INTRODUCTION OF THE SAMSUNG  
3 PHONES. THAT'S CLEAR IN THE RECORD.

4 APPLE HAS FAILED TO SHOW THAT THE MARKET  
5 SHARE HAS BEEN TAKEN AWAY AT THE EXPENSE OF APPLE  
6 AS OPPOSED TO OTHER COMPETITORS.

7 AND APPLE'S OWN STUDIES SHOW THAT VERY  
8 FEW CUSTOMERS SWITCH FROM AN APPLE PHONE TO AN  
9 ANDROID PHONE. THAT'S ILLUSTRATED IN YOUR DECK AT  
10 PAGE 209.

11 SO I JUST WANT TO -- I DON'T WANT TO  
12 SUGGEST WE AGREE WITH YOUR HONOR'S DESCRIPTION OF  
13 WHAT WE DO. WE'RE NOT GIVING AWAY THE PHONES FOR  
14 FREE.

15 BUT LET'S JUST GO TO THE MAIN POINT,  
16 WHICH IS IT'S APPLE'S BURDEN TO SHOW EVIDENCE OF  
17 IRREPARABLE HARM.

18 NO, A VAGUE POSSIBILITY OF TRADE DILUTION  
19 IS NOT ENOUGH.

20 BUT, YOUR HONOR, TWO OTHER FEATURES OF  
21 OUR ARGUMENT -- AND THEN I'LL TURN IT OVER TO  
22 MR. JOHNSON FOR ANY QUESTIONS YOU MIGHT HAVE ON  
23 '381 -- TWO OTHER KEY FEATURES OF OUR ARGUMENTS ON  
24 IRREPARABLE HARM ARE UNREASONABLE DELAY AND  
25 COMPENSABILITY WITH MONEY DAMAGES.

1 THE UNREASONABLE DELAY IS CLEAR HERE.  
2 YOUR HONOR HAS MENTIONED IT BEFORE IN THE JUNE  
3 HEARING.

4 THE UNREASONABLE DELAY HERE, WHICH IS  
5 ILLUSTRATED IN THE TIMELINES BEGINNING ON PAGE  
6 220 -- I'M SORRY.

7 IF WE GO BACK AND START WITH THE  
8 TELEPHONES, BEFORE WE GET TO THE BOUNCE BACK  
9 PATENT, THE UNREASONABLE DELAY IS ILLUSTRATED ON  
10 SLIDE 216.

11 IPHONE'S ANNOUNCED IN JANUARY '07. IN  
12 FEBRUARY OF '07, SAMSUNG INTRODUCED -- ANNOUNCES  
13 THE F700, WHICH IS ONE OF THE FIRST PRODUCTS THAT  
14 APPLE SAYS INFRINGED.

15 AGAIN, 50 MONTHS GO BY. SAMSUNG  
16 INTRODUCES, IN MARCH 2010, THE GALAXY I9000; IT  
17 ANNOUNCES IN JUNE OF 2010 THE VIBRANT; IT ANNOUNCES  
18 IN JANUARY OF 2011 THE GALAXY S 4G AND INFUSE 4G.

19 WHEN DOES APPLE FIRST FILE A COMPLAINT?  
20 APRIL OF '11.

21 WHEN DOES IT FIRST FILE A REQUEST FOR A  
22 PRELIMINARY INJUNCTION? JULY OF '11.

23 NOW, IF THE COPYING OF THESE, THE  
24 SUPPOSED COPYING OF THE SUPPOSED DESIGN PATENT  
25 INFRINGEMENT WAS CAUSING IRREPARABLE HARM, WHY A

1 DELAY OF 50 MONTHS AND TWO AND A HALF MONTHS AFTER  
2 YOU FILED A COMPLAINT BEFORE YOU FILE?

3 AND IF YOU FLIP FORWARD TO THE NEXT SLIDE  
4 ON PAGE 217, THE SAME GOES TO THE BOUNCE FEATURE OF  
5 THE '381 PATENT.

6 THERE'S AN E-MAIL WHICH IS POIGNANT TO  
7 REVIEW AT THIS POINT, WHICH IS AN E-MAIL FROM  
8 APPLE'S THEN COO, TIM COOK, TO STEVE JOBS  
9 DESCRIBING SAMSUNG'S GALAXY SI9000 SHOWING THE  
10 BOUNCE FEATURE.

11 AND YET FROM MARCH 2010 TO 4-11, TO APRIL  
12 OF '11, THERE'S 13 MONTHS OF INTERVENING TIME.

13 SO THE DELAY IN FILING IS ALONE ENOUGH TO  
14 DEFEAT ANY SHOWING OF IRREPARABLE HARM HERE.

15 IT'S CLEAR FROM CASES LIKE HIGH TECH AND  
16 OTHER FEDERAL CIRCUIT CASES THAT WHERE THERE'S BEEN  
17 UNREASONABLE DELAY, ANY CLAIM OF IRREPARABLE HARM  
18 IS DEFEATED.

19 AND THE -- A FURTHER POINT IS THAT APPLE  
20 WAITED FROM THE POINT AT WHICH WE BELIEVE IT'S  
21 ESTABLISHED IN THE RECORD NEGOTIATIONS BROKE DOWN  
22 BETWEEN THE COMPANIES, IT WAITED A CONSIDERABLE  
23 PERIOD OF TIME AFTER THAT BEFORE IT FILED THE  
24 COMPLAINT.

25 NOW, LAST ON COMPENSABILITY, YOUR HONOR,

1 YOU RAISED THE POINT, WHY CAN'T THERE BE A SHOWING  
2 OF MONETARY DAMAGES AS TO THE ACCESSORIES?

3 THERE CERTAINLY COULD BE, AND THAT IS THE  
4 ONLY KIND OF COMPENSATION THAT SHOULD BE APPLIED  
5 HERE.

6 THERE'S NO IRREPARABLE HARM THAT CAN'T BE  
7 SOLVED BY MONETARY DAMAGES AS TO LOSS OF ACCESSORY  
8 SALES.

9 BUT, YOUR HONOR, THERE'S ALSO NO REASON  
10 WHY MONETARY COMPENSATION IS NOT ENOUGH TO HANDLE  
11 ANY INFRINGEMENT.

12 THERE IS NONE, AND THE PATENTS ARE  
13 INVALID, BUT IF THERE WERE VALID PATENTS AND THEY  
14 WERE FRINGED, THERE'S NO REASON WHY DAMAGES OR  
15 ROYALTY BEARING LICENSES COULDN'T BE THE MEANS OF  
16 SATISFYING THAT.

17 AND, IN FACT, JUST TO MAKE THE POINTS,  
18 THE THREE KEY POINTS HERE, YOUR HONOR, THE -- APPLE  
19 HAS LICENSED THE '381 PATENT TO IBM AND NOKIA, AND  
20 APPLE HAS OFFERED SAMSUNG A LICENSE,  
21 NOTWITHSTANDING ITS VIEW THAT THE PROPRIETARY  
22 FEATURES OF APPLE PATENTS WERE INVOLVED IN THE  
23 LICENSE, I'M NOT AT LIBERTY TO DISCUSS THE TERMS.

24 NOW, I KNOW THAT APPLE WILL GET UP AND  
25 SAY, "OH, YOU CAN'T MENTION THAT LICENSE OFFER

1 BECAUSE OF RULE 408."

2 BUT THAT'S INCORRECT. WE ARE FREE TO  
3 REMIND YOUR HONOR THAT THE OFFER OF A LICENSE WAS  
4 MADE.

5 WE'RE NOT INTRODUCING THAT FOR THE  
6 PURPOSE OF PROVING LIABILITY, INVALIDITY, OR THE  
7 AMOUNT OF A CLAIM, THAT'S WHAT'S PRECLUDED UNDER  
8 FEDERAL RULE OF EVIDENCE 408, BUT ONLY TO SHOW THAT  
9 ANY INFRINGEMENT CAN BE REMEDIED BY MONEY DAMAGES.

10 AND THE FACT THAT SAMSUNG WAS OFFERED A  
11 LICENSE BY APPLE SHOWS THAT MONETARY COMPENSATION  
12 FOR THE INFRINGEMENT IS SATISFACTORY.

13 SO WE DON'T THINK THERE'S ANYTHING CLOSE  
14 TO A SHOWING OF IRREPARABLE HARM HERE, YOUR HONOR,  
15 ESPECIALLY IN THIS WORLD OF --

16 THE COURT: I AGREE WITH YOU ON THE '381.

17 MS. SULLIVAN: OKAY. DO YOU WANT TO HEAR  
18 ANYTHING ON THE '381 WITH RESPECT TO INVALIDITY  
19 OR -- WE HAVE SOME NEW PRIOR ART THAT MIGHT BE  
20 HELPFUL TO SHOW YOUR HONOR.

21 THE COURT: WELL, JUST TWO QUICK  
22 QUESTIONS: WHETHER -- WHETHER SAMSUNG BELIEVES  
23 THAT WE DO NEED TO CONSTRUE "EDGE OF AN ELECTRONIC  
24 DOCUMENT" OR NOT.

25 MS. SULLIVAN: I'M GOING TO ASK

1 MR. JOHNSON TO ADDRESS THAT.

2 THE COURT: OKAY.

3 MR. JOHNSON: THANK YOU, YOUR HONOR.

4 YES, SAMSUNG BELIEVES "ELECTRONIC  
5 DOCUMENT" AND "EDGE," AS WELL AS "DISPLAY" AND  
6 "TRANSLATING THE FIRST DIRECTION" ACTUALLY NEED TO  
7 BE CONSTRUED, AND THE REASON FOR THAT IS WE'VE  
8 LOCATED -- IN THE SHORT AMOUNT OF TIME THAT THE  
9 MOTION HAS BEEN PENDING, WE LOCATED THREE PIECES OF  
10 PRIOR ART WHICH WE MENTION IN OUR PAPERS, THE  
11 LAUNCHTILE PRIOR ART, WHICH WAS NOT CONSIDERED BY  
12 THE PATENT OFFICE DURING RE-EXAMINATION PROCEEDINGS  
13 BECAUSE IT'S NOT A PRINTED PUBLICATION, WHICH IS  
14 REQUIRED; THE LIRA REFERENCE; THE VAN DEN HOVEN  
15 REFERENCE; AND WE'VE ALSO LOCATED VERY RECENTLY, IN  
16 THE LAST TWO WEEKS, A REFERENCE THAT WE REFER TO AS  
17 THE DIAMONDTOUCH, A TOUCH SCREEN WHICH WAS  
18 DEVELOPED BY MITSUBISHI. AND THAT, AGAIN, IS NOT A  
19 PUBLICATION. WE PUT THAT IN OUR INVALIDITY  
20 CONTENTIONS ON OCTOBER 7TH AND I'M PREPARED TO WALK  
21 YOU THROUGH IT.

22 BUT THE REASON WE BELIEVE THAT THOSE  
23 ELEMENTS, THOSE LIMITATIONS NEED TO BE CONSTRUED IS  
24 BECAUSE WHEN I -- AND IF YOU COULD PUT UP SLIDE  
25 137, PLEASE -- WHEN I DEPOSED APPLE'S EXPERT,

1 DR. BALAKRISHNAN, AND I WALKED HIM THROUGH THE  
2 LAUNCHTILE PRIOR ART AND I ASKED HIM TO COMPARE IT  
3 TO THE CLAIMS OF THE PATENT, HE -- IN THE 20 YEARS  
4 I'VE BEEN DOING THIS, FRANKLY, I'VE NEVER RECEIVED  
5 SUCH CLEAR ADMISSIONS FROM AN EXPERT WHERE HE  
6 WALKED THROUGH AND HE SAID EACH ONE OF THESE  
7 LIMITATIONS WAS PRESENT.

8 TURNING TO SLIDE 137.

9 DOES LAUNCHTILE HAVE A  
10 COMPUTER-IMPLEMENTED METHOD?

11 IT IS A COMPUTER-IMPLEMENTED METHOD.

12 THE NEXT LIMITATION, AT A DEVICE WITH A  
13 TOUCH SCREEN DISPLAY --

14 THE COURT: BUT LET ME ASK YOU SOMETHING.  
15 IF THE COURT ADOPTS APPLE'S CONSTRUCTION OF  
16 "DISPLAY" AND "FIRST DIRECTION," DOES THAT MEAN  
17 THEN YOU CONCEDE INFRINGEMENT?

18 MR. JOHNSON: NO, YOUR HONOR.

19 THE COURT: BECAUSE I'M NOT SURE I'M  
20 BUYING THE FINGER WIGGLING AND NOT BEING ABLE TO GO  
21 IN A STRAIGHT LINE ARGUMENT.

22 MR. JOHNSON: NO, YOUR HONOR.

23 THE COURT: OKAY. WHY IS THAT?

24 MR. JOHNSON: LET ME SAY FIRST OF ALL,  
25 EVEN IF WE -- EVEN IF THE COURT ADOPTS APPLE'S



1 CONSTRUCTION -- AND THE REPLY DECLARATION OF  
2 DR. BALAKRISHNAN HAS A NEW DEFINITION OF  
3 "ELECTRONIC DOCUMENT" THAT WAS NOT PRESENT DURING  
4 HIS DEPOSITION, AND FRANKLY, IT'S NOT IN OUR  
5 OPPOSITION PAPERS BECAUSE IT'S BRAND NEW EVIDENCE  
6 THAT WAS OFFERED FOR THE FIRST TIME IN REPLY, AND I  
7 JUST WANT TO ADDRESS THAT BRIEFLY.

8 IF YOU GO TO SLIDE 152, I ASKED HIM IN  
9 HIS DEPOSITION, IN AUGUST OF 2011, YOU KNOW, WHAT  
10 IS YOUR DEFINITION OF AN ELECTRONIC DOCUMENT?

11 AND HE ANSWERED, "MY DEFINITION OF AN  
12 ELECTRONIC DOCUMENT WOULD BE SOMETHING VISUALLY  
13 REPRESENTABLE ON THE SCREEN THAT HAS A DEFINED SET  
14 OF BOUNDARIES."

15 I ASKED HIM RIGHT AFTER THAT, AN  
16 ELECTRONIC -- SLIDE 153 -- "AN ELECTRONIC DOCUMENT  
17 CAN HAVE A BOUNDARY THAT IS INTERNAL TO THE SCREEN  
18 OR, YOU KNOW, DOESN'T HAVE TO BE AT THE EDGE OF THE  
19 SCREEN, RIGHT?"

20 "SO AS I ANSWERED EARLIER, AND MY OPINION  
21 IS THAT THE BOUNDARY OF THE DOCUMENT, IN THIS CASE,  
22 THIS EDGE IS ONE BOUNDARY OF IT, DOES NOT HAVE TO  
23 MATCH THE EDGE OF THE SCREEN."

24 THAT'S IMPORTANT, BECAUSE WHEN YOU LOOK  
25 AT SLIDE 155 AND YOU LOOK AT LAUNCHTILE'S PRIOR ART

1 AND YOU LOOK AT, FRANKLY, HOW THE PRODUCTS OPERATE,  
2 WHAT YOU SEE IN SLIDE 155 IS HIS DEFINITION IN HIS  
3 DEPOSITION OF AN ELECTRONIC DOCUMENT.

4 THESE ARE BOTH ELECTRONIC DOCUMENTS  
5 ACCORDING TO THE DEPOSITION, THE DEPOSITION  
6 TESTIMONY THAT WE RECEIVED.

7 DR. BALAKRISHNAN AND APPLE RECOGNIZED  
8 THEY HAD A PROBLEM WITH THIS PRIOR ART.

9 SO WHAT DID THEY DO? THEY SUBMITTED A  
10 NEW DEFINITION OF "ELECTRONIC DOCUMENT."

11 AND LET ME SHOW YOU ACTUALLY SLIDE 157.

12 SLIDE 157 -- AND AGAIN, SORRY TO GO  
13 THROUGH THIS, BUT IT'S NOT IN OUR OPPOSITION PAPERS  
14 AND FIRST TIME WE SAW THIS ARGUMENT WAS ON REPLY,  
15 157, I PUT A GRID IN FRONT OF DR. BALAKRISHNAN AND  
16 I ASKED HIM TO DRAW, IF THIS WERE A SCREEN, ARE  
17 THESE ELECTRONIC DOCUMENTS IN THE YELLOW  
18 HIGHLIGHTING ON 157, AND HE SAID YES.

19 AND I ASKED HIM THEN, POINT TO THE EDGE  
20 BEYOND THE ELECTRONIC DOCUMENT.

21 AND HE POINTED TO THE BOXES THAT ARE  
22 LABELED 14 AND 20 HERE AND CIRCLED IN RED ON THE  
23 SLIDE THAT WE SEE HERE.

24 AND HIS TESTIMONY MATCHES THAT. QUOTE,  
25 "SO GIVEN THOSE HYPOTHETICALS, AREA 14 AND 20 WOULD

1 BE BEYOND THE EDGE OF THE DOCUMENT, GIVEN THAT  
2 SCENARIO."

3 WHAT HE DOES IN HIS REPLY DECLARATION IS  
4 HE COMES IN FOR THE VERY FIRST TIME, IN TRYING TO  
5 DISTINGUISH OVER LAUNCHTILE AND IN TRYING TO REFUTE  
6 WHAT PROFESSOR VAN DAM HAS SAID FROM BROWN  
7 UNIVERSITY, DR. BALAKRISHNAN COMES IN AND SAYS --  
8 THIS IS SLIDE 158 -- "THESE INTERNAL LINES CANNOT  
9 BE TREATED AS EDGES BECAUSE THERE IS STILL CONTENT  
10 OUTSIDE OF THE BOUNDARIES THAT THE USER CAN SCROLL  
11 TO."

12 THAT IS A NEW, MORE NARROW DEFINITION OF  
13 "ELECTRONIC DOCUMENT."

14 AND UNDER THIS DEFINITION, YOUR HONOR,  
15 THIS NEW DEFINITION, WE DON'T INFRINGE.

16 AND I'M HAPPY TO WALK THROUGH THE TWO  
17 ARGUMENTS WITH RESPECT TO "DISPLAY," AND ALSO WITH  
18 RESPECT TO "FIRST DIRECTION" IF YOU'D LIKE, IF  
19 YOU -- IF YOU'D FIND THAT INSTRUCTIONAL.

20 THE COURT: NO, THAT'S OKAY. THAT'S  
21 OKAY.

22 MR. JOHNSON: BUT I DO WANT TO MENTION  
23 THE DIAMONDTouch PRIOR ART, BECAUSE THE  
24 DIAMONDTouch PRIOR ART IS SOMETHING THAT WE JUST  
25 LOCATED, WE PUT IT IN OUR INVALIDITY CONTENTIONS.

1 IF YOU TURN TO SLIDE --

2 MR. MCELHINNY: EXCUSE ME, YOUR HONOR.

3 THIS IS NOT IN THE RECORD AND WE HAVE NOT  
4 SEEN IT.

5 MR. JOHNSON: WELL, IT WAS IN OUR  
6 INVALIDITY CONTENTIONS WHICH WE SERVED ON YOU. SO  
7 I -- I ACTUALLY THINK YOU HAVE SEEN IT.

8 MR. MCELHINNY: I'M TALKING ABOUT AS PART  
9 OF THE ARGUMENT FOR THIS.

10 NO ONE HAS BEEN DEPOSED. THIS IS JUST --  
11 IT'S NOT IN THE RECORD THAT'S BEFORE YOU.

12 THE COURT: HOW IS THIS DIFFERENT THAN  
13 WHAT YOU SUBMITTED YESTERDAY?

14 MR. MCELHINNY: THE DIFFERENCE --

15 THE COURT: YOU HAVE NOT PREVIOUSLY SEEN  
16 THIS AT ALL?

17 MR. MCELHINNY: WELL, I PERSONALLY HAVE  
18 NOT SEEN THIS AT ALL.

19 BUT THE DIFFERENCE BETWEEN WHAT WE  
20 SUBMITTED YESTERDAY WAS DOCUMENTS THAT WERE  
21 PRODUCED DURING DISCOVERY BY THE OTHER SIDE  
22 PURSUANT TO COURT ORDER.

23 THIS IS, AS I UNDERSTAND IT -- BECAUSE I  
24 DON'T KNOW ANYTHING ABOUT IT -- BUT IT SOUNDS LIKE  
25 THEY'RE OUT LOOKING FOR -- YOU KNOW, THEY'VE GOT A

1 WINNER CASE BUT THEY'RE OUT LOOKING FOR ADDITIONAL  
2 PRIOR ART AND THEY WANT TO ARGUE IT TO YOU THIS  
3 AFTERNOON FOR THE FIRST TIME.

4 THE COURT: WELL, I'LL JUST SAY, I'M --  
5 AT THIS POINT, I'M GOING TO DENY A PRELIMINARY  
6 INJUNCTION ON THE '381 PATENT, AT A MINIMUM BECAUSE  
7 I DON'T THINK THERE'S BEEN ANY SHOWING OF  
8 IRREPARABLE HARM.

9 SO I DON'T KNOW IF IT'S NECESSARY EVEN TO  
10 GET INTO THIS DISPUTE AT THIS TIME.

11 MR. JOHNSON: OKAY. THEN, YOUR HONOR,  
12 I'LL SIT DOWN UNLESS YOUR HONOR HAS ANY OTHER  
13 SPECIFIC QUESTIONS.

14 THE COURT: NO, NO. THANK YOU.

15 I DON'T THINK APPLE'S EVEN REALLY TRIED  
16 TO MAKE AN IRREPARABLE HARM SHOWING AS TO THE '381  
17 PATENT, SO --

18 MR. JOHNSON: THANK YOU.

19 THE COURT: JUST A FEW MINUTES,  
20 MR. MCELHINNY.

21 LET ME ASK YOU IF YOU AGREE, JUST  
22 LEGALLY, THAT SAMSUNG ONLY NEEDS TO ESTABLISH A  
23 SUBSTANTIAL QUESTION OF INVALIDITY TO DEFEAT  
24 LIKELIHOOD OF SUCCESS ON THE MERITS, OR -- THERE  
25 DOES SEEM TO BE SORT OF UNCLARITY IN THE LAW, OR

1 WHETHER IF THEY MAKE THAT SHOWING, THEN THE MOVING  
2 PARTY CAN COME BACK AND SHOW THAT THERE IS  
3 LIKELIHOOD THAT THE PATENT IS VALID.

4 MR. MCELHINNY: YES. WE HAVE TWO  
5 POSITIONS ON THIS.

6 THE COURT: OKAY.

7 MR. MCELHINNY: ONE, WE BELIEVE THAT THE  
8 LAW, AS SET OUT BY THE UNITED STATES SUPREME COURT,  
9 IS THAT ALL WE HAVE TO DO TO SHOW THAT IT IS LIKELY  
10 THAT WE WILL WIN ON THE ISSUE OF VALIDITY AT TRIAL  
11 SUBJECT TO THE PRESUMPTIONS THAT WILL BE APPLIED AT  
12 TRIAL, THAT THAT IS OUR BASE POSITION.

13 THE COURT: OKAY.

14 MR. MCELHINNY: HAVING SAID THAT, I  
15 ACKNOWLEDGE, BECAUSE WE'VE SUBMITTED BOTH OF THESE  
16 CASES TO YOUR HONOR, THAT THERE IS CONFUSION IN THE  
17 FEDERAL CIRCUIT LAW, BETWEEN SOME OF THE FEDERAL  
18 CIRCUIT JUDGES WHO BELIEVE THAT THE FEDERAL CIRCUIT  
19 SHOULD BE FOLLOWING THE SUPREME COURT, AND OTHER  
20 CASES THAT SAY, AND YOUR HONOR HAS IT EXACTLY  
21 RIGHT, IT'S THE TITAN TIRE CASE, THAT WE NEED TO  
22 MAKE A SHOWING THAT IT'S LIKELY THAT WE WILL  
23 SUCCEED AT TRIAL.

24 THE -- SAMSUNG CAN COME FORWARD AND RAISE  
25 A SUBSTANTIAL QUESTION, AND THAT WE THEN HAVE THE

1 OPPORTUNITY TO SHOW THAT THAT SUBSTANTIAL QUESTION  
2 LACKS SUBSTANTIAL MERIT. THAT'S TITAN TIRE --  
3 TITAN TIRE IS THE ONE THAT SETS THAT OUT, YOUR  
4 HONOR.

5 THE COURT: I DON'T HAVE ANY MORE  
6 QUESTIONS FOR YOU, SO --

7 MR. MCELHINNY: WHAT I WOULD LIKE TO DO,  
8 JUST IF I -- FIRST, I UNDERSTAND YOUR HONOR'S  
9 POSITION ON THE '381, BUT OF COURSE WE THINK WE  
10 HAVE PROVED IRREPARABLE INJURY AND I WANTED TO  
11 POINT OUT FOR YOUR HONOR THAT --

12 THE COURT: OKAY.

13 MR. MCELHINNY: -- ON INFRINGEMENT,  
14 SAMSUNG HAS MADE NO SHOWING WHATSOEVER OF  
15 INVALIDITY OF THE METHOD CLAIMS, THAT THERE'S NO  
16 ARGUMENT THAT ANY OF THE METHOD CLAIMS WAS  
17 DEMONSTRATED BEFORE THE CRITICAL DATE.

18 THE COURT: OKAY.

19 MR. MCELHINNY: ON -- WHAT I WOULD LIKE  
20 TO DO, ON TWO PRIOR ART PIECES THAT WERE RAISED, I  
21 WOULD LIKE TO SHOW YOU, ON THE PHONE PATENTS AT TAB  
22 5, YOUR HONOR, IN THE BINDER THAT I GAVE YOU --

23 THE COURT: WHY DON'T YOU ADDRESS THE  
24 KNIGHT-RIDDER?

25 MR. MCELHINNY: I WILL. THAT'S WHAT I

1 WAS GOING TO --

2 THE COURT: I THINK THAT INVALIDATES THE  
3 '889, BUT GO AHEAD.

4 MR. MCELHINNY: THAT IS AT TAB -- THAT IS  
5 AT TAB 8, YOUR HONOR, OF OUR BINDER. IT'S THE  
6 SECOND TO LAST PAGE.

7 I ASSUME YOU'RE TALKING ABOUT THE 1994,  
8 IS THAT THE ONE?

9 THE COURT: 1994.

10 MR. MCELHINNY: AND I HAVE TO SAY THAT I  
11 DON'T HAVE IT IN MY BINDER, BUT IN THE RECORD, AT  
12 EXHIBIT D TO THE SHERMAN DECLARATION, SO THE  
13 PICTURES THAT SAMSUNG SUBMITTED, THERE ARE EVEN  
14 BETTER PICTURES BECAUSE THEY SHOW THE EDGE AND THE  
15 BACK UNDER THIS CONCEPT THAT YOU NEED TO LOOK AT  
16 THE FULL SCOPE OF THE DESIGN THAT'S PROVIDED.

17 AND I WANTED TO CALL YOUR ATTENTION TO  
18 PARAGRAPH 45 OF MR. WOODRING'S DEPOSITION WHERE HE  
19 GOES THROUGH LINE BY LINE ON THE SUBSTANTIAL  
20 DIFFERENCES BETWEEN THIS AND THE APPLE IPHONE.

21 BUT IF YOU JUST LOOK AT THE PICTURES, AS  
22 MR. WOODRING LOOKED AT THEM, THE 1994 FIDLER  
23 PROTOTYPE IS NOT FLAT.

24 WHAT IT IS IS IT'S AN INSET GLASS PAGE  
25 SURROUNDED BY A SOLID FRAME.



1 THE JUMPING FROM THESE FRAMES -- I SHOWED  
2 YOU SAMSUNG'S EARLIER TABLETS, BUT THE JUMPING FROM  
3 THE SOLID FRAME OUTSIDE TO A FLAT GLASS SURFACE  
4 LITERALLY HAS BEEN ACKNOWLEDGED AS ONE OF THE  
5 GREATEST JUMPS IN DESIGN IN TABLET PROGRESSION.  
6 THAT IS THE BIG JUMP THAT HAPPENED HERE.

7 SO IT IS NOT A FLAT GLASS -- THE FRONT OF  
8 IT IS NOT TRANSLUCENT BECAUSE IT HAS THIS OPAQUE  
9 FRAME ALL THE WAY AROUND IT.

10 YOU HAVE TO UNDERSTAND THAT THE BAR  
11 THAT'S SHOWN ON THE APPLE '889 PATENT, THE INSIDE  
12 BAR, IS ACTUALLY UNDER THE GLASS. THAT'S WHAT THE  
13 HATCH LINES MEAN.

14 SO IF YOU LOOK AT YOUR IPAD THAT YOU HAD  
15 UP THERE, THE BLACK RIM IS ACTUALLY UNDER THE FLAT  
16 GLASS AND THE FLAT GLASS COVERS THE ENTIRE TOP OF  
17 THE TABLET.

18 THE COURT: WELL, WHY ISN'T THIS DESIGN  
19 OBVIOUS?

20 MR. MCELHINNY: WELL, FOR STARTERS, THERE  
21 IS NO TESTIMONY FROM ANYONE IN THE RECORD --  
22 THERE'S NO TESTIMONY FROM ANYONE IN THE WORLD, YOUR  
23 HONOR, THAT THE DESIGN OF THE IPAD WAS OBVIOUS.

24 BUT THERE IS CERTAINLY NO PERSON OF  
25 ORDINARY SKILL IN THE ART WHO SAID YOU COULD LOOK

1 AT THIS TABLET AND JUST DECIDE TO MAKE IT A FLAT  
2 GLASS PLATE ON THE TOP AND NOT CHANGE THE WORLD.

3 AND IF YOU LOOK AT THE SECONDARY  
4 CONSIDERATIONS, IF YOU LOOK AT THE QUOTES ABOUT  
5 TABLETS ARE DEATH, NO ONE IS BUYING A TABLET UNTIL  
6 THE IPAD CAME OUT, THE SECONDARY CONSIDERATIONS FOR  
7 THE IPAD -- I MEAN, FRANKLY, YOUR HONOR, FOR YOUR  
8 HONOR TO ISSUE AN OPINION THAT SAID THE DESIGN OF  
9 THE IPAD WAS OBVIOUS WOULD BE SURPRISING, I GUESS.

10 BUT IF YOU -- IF YOU GET A CHANCE TO LOOK  
11 AT THE FULL PICTURE, YOU'LL SEE THAT THE BACK OF  
12 THIS FIDLER THING IS NOT A FLAT, SOLID PIECE OF  
13 PLASTIC, EITHER.

14 IN FACT, IT HAS A DOOR WITH FOUR SCREWS.  
15 IT'S GOT THE CLUNKY PORTS.

16 AND THE SIDE HAS THE PORTS -- IF YOU LOOK  
17 AT THE ONE THAT'S IN OUR BINDER, FROM THE SIDE YOU  
18 CAN SEE THAT IT DOESN'T HAVE THE SMOOTH SIDE. IT  
19 HAS NONE OF THE ELEGANCE. IT HAS NONE OF THE  
20 ELEGANCE.

21 WE ARE NOT ARGUING THAT THERE WERE NOT  
22 TABLETS OUT THERE. I SHOWED YOU THE SAMSUNG  
23 TABLETS. BUT THEY WERE ALL LIKE THIS. THEY WERE  
24 ALL BIG CLUNKY FRAMED ITEMS THAT LITERALLY NO ONE  
25 WAS BUYING.

1                   AND THE DIFFERENCE BETWEEN AN IPAD AND AN  
2                   OLD-FASHIONED -- IF YOU LOOK AT -- JUST TAKE A  
3                   KINDLE. THIS IS A KINDLE.

4                   AND IF YOU THINK OF THE DIFFERENCE OF A  
5                   FRAMED THING WITH A GLASS PAGE ON IT, IT IS AN  
6                   ENTIRELY DIFFERENT CONCEPT.

7                   THE COURT: OKAY.

8                   MR. MCELHINNY: JUST ON THE IRREPARABLE  
9                   INJURY, FOR THE RECORD, I WANT TO GIVE YOU  
10                  CITATIONS TO MR. WAGNER'S DEPOSITION, BECAUSE  
11                  WAGNER CONCEDED THAT APPLE IS LOSING MARKET SHARE.

12                  AND THAT IS HO EXHIBIT D, PAGE 174, LINES  
13                  14 TO 19 OF HIS DEPOSITION.

14                  HE ALSO CONCEDED WHAT YOUR HONOR --

15                  THE COURT: BUT DOES HE ACTUALLY -- IS HE  
16                  ABLE TO TIE THAT, THAT THAT MARKET SHARE LOSS IS  
17                  ACTUALLY BECAUSE OF SAMSUNG, OR IS THAT BECAUSE OF  
18                  SOME OF THE OTHER ANDROID PRODUCTS?

19                  MR. MCELHINNY: HE HAS CONCEDED IN HIS --  
20                  THE POSITION HE TOOK IN HIS DEPOSITION IS  
21                  BECAUSE -- ASSUMING THESE PATENTS ARE FRINGED,  
22                  APPLE WILL LOSE SALES. IT HAS ALREADY LOST MARKET  
23                  SHARE BECAUSE THE PRODUCTS ARE IN THE MARKET.

24                  BUT HE THEN SAYS, AS SAMSUNG WOULD SAY,  
25                  THAT THOSE DAMAGES ARE -- WILL BE CALCULABLE AT

1 TRIAL, AND THEN HE GOES INTO THE CROSS-EXAMINATION  
2 THAT I GAVE YOUR HONOR ABOUT THE FUTURE PATH AND  
3 THE PATH DEPENDENCY.

4 HE EXPRESSLY CONCEDES, AGAIN, IT'S  
5 EXHIBIT D TO THE HO -- AT PAGES 154, LINE 22 TO  
6 155, LINE 9, AND 170, LINES 19 TO 171, LINE 6.

7 SO THE QUESTIONS THAT YOUR HONOR HAS  
8 RAISED ARE QUESTIONS THAT WE ASKED THEIR EXPERT AND  
9 WHICH WERE EXPRESSLY CONCEDED.

10 THE COURT: LET ME ASK ANOTHER QUESTION,  
11 AND THIS IS WITH REGARD TO THE DELAY.

12 THERE'S CLEARLY A WAR GOING ON NOW  
13 BETWEEN THE IPHONE OPERATING SYSTEM AND THE ANDROID  
14 OPERATING SYSTEM.

15 IS THIS JUST A BIG PIECE OF THAT OVERALL  
16 NUCLEAR WAR THAT'S HAPPENING, AND IS THAT WHAT'S  
17 SORT OF CONTROLLING SOME OF THE TIMING OF THIS?

18 MR. MCELHINNY: MY -- I DON'T -- THE  
19 ANSWER TO YOUR QUESTION IS IT TAKES TWO SIDES TO  
20 MAKE A WAR, SO I DON'T KNOW THE ANSWER TO ALL OF  
21 THAT.

22 THE COURT: UM-HUM.

23 MR. MCELHINNY: MY PART OF IT -- MY PART  
24 OF IT IS SAMSUNG'S INFRINGEMENT OF OUR PATENTS.

25 BUT ON THE DELAY ISSUE -- ON THE DELAY

1           ISSUE, ONE, WE'VE CITED YOUR HONOR PREVIOUS  
2           DISTRICT COURT CASES THAT MAKE THE POINT THAT IT'S  
3           NOT A FREE PASS. YOU DON'T GET TO KEEP COMING OUT  
4           WITH NEW PRODUCTS.

5                        BUT ON THE QUESTION OF WHETHER  
6           NEGOTIATIONS WERE STILL ONGOING, I CITE YOU TO  
7           EXHIBIT D OF CHIP LUTTON'S REPLY DECLARATION, AND  
8           THERE YOU WILL SEE WHAT SAMSUNG SAID TO US IN A  
9           LETTER WHEN WE FILED THIS LAWSUIT.

10                      THE COURT: BUT THAT ONLY -- THAT DOESN'T  
11           EXPLAIN THE DELAY FROM 2007.

12                      MR. MCELHINNY: THERE IS NO DELAY FROM --  
13           FOR THE PRODUCTS -- ALL OF THE PRODUCTS -- LET'S BE  
14           CLEAR. THE TAB WAS RELEASED AFTER WE FILED THIS  
15           LAWSUIT.

16                      THE COURT: WELL, YOU'RE SAYING THESE  
17           PARTICULAR ITERATIONS.

18                      MR. MCELHINNY: NO, NO. THERE WAS NO  
19           PREVIOUS TAB. THIS IS THE FIRST EVER GALAXY TAB.

20                      THE COURT: LET'S GO TO THE SMART PHONE.

21                      MR. MCELHINNY: THE PHONES --

22                      THE COURT: YOU'RE SAYING THERE WERE NO  
23           PREVIOUS SAMSUNG SMART PHONES THAT APPLE BELIEVES  
24           INFRINGED ITS I.P.

25                      MR. MCELHINNY: NO.

1 THE COURT: OKAY.

2 MR. MCELHINNY: WHAT I AM SAYING IS IF,  
3 FOR VARIOUS REASONS, YOU MAKE A DECISION NOT TO  
4 CHALLENGE A PARTICULAR PRODUCT, THAT DOES NOT GIVE  
5 THE INFRINGER A FOREGOING -- A FREE PASS TO  
6 CONTINUE TO BRING OUT NEW PRODUCTS THAT DO  
7 INFRINGE.

8 AND THAT QUESTION HAS ARISEN TWICE BEFORE  
9 DISTRICT COURTS, AND WE CITED THEM TO YOU, THE  
10 LATRIM CASE AND THE WHISTLER VERSUS DYNASCAN CASE,  
11 AND IN BOTH CASES THEY SAID "WE'RE NOT GOING TO  
12 ENJOIN YOUR OLDER PRODUCTS BECAUSE YOU WAITED TOO  
13 LONG FOR THOSE, BUT THE NEW PRODUCTS ARE NEW AND WE  
14 ARE GOING TO ENJOIN THOSE PRODUCTS."

15 AND THAT TIES IN AGAIN TO THIS IDEA OF  
16 HOW QUICKLY THE PRODUCTS MOVE IN CYCLES THROUGH  
17 THIS WORLD.

18 THE COURT: BUT DOESN'T THAT SORT OF  
19 UNDERMINE YOUR IRREPARABLE HARM ARGUMENT? I THINK  
20 THE CABBAGE THING ACTUALLY UNDERMINES IT BECAUSE  
21 CONSUMERS ARE FICKLE, ESPECIALLY IN ELECTRONICS.  
22 THIS MAY BE BIG TODAY.

23 WHO KNOWS, IN A YEAR, WHAT'S GOING TO BE  
24 THE NEXT BIG THING.

25 MR. MCELHINNY: WELL, SEE, I --

1 THE COURT: DON'T YOU THINK THAT SORT OF  
2 TEMPORAL LIMITATION ACTUALLY UNDERMINES YOUR  
3 IRREPARABLE HARM ARGUMENT?

4 MR. MCELHINNY: WELL, YOU GET TO DECIDE  
5 THIS. I DON'T.

6 THE COURT: UM-HUM.

7 MR. MCELHINNY: BUT I DON'T SEE IT THAT  
8 WAY.

9 THE COURT: OKAY.

10 MR. MCELHINNY: I SEE IT AS THE SUPREME  
11 COURT'S LINE OF ACTIVITY THAT'S CAPABLE OF  
12 REPETITION, BUT AVOIDS REVIEW.

13 IT'S TAKEN US FOUR AND A HALF MONTHS TO  
14 GET TO THIS HEARING.

15 THEY ALREADY ARE ANNOUNCING NEW PRODUCTS.

16 WHEN THOSE PRODUCTS COME OUT, WE WILL SEE  
17 THEM FOR THE FIRST TIME AND WE'LL DECIDE WHETHER OR  
18 NOT WE HAVE TO BRING ACTIONS ABOUT THEM.

19 BUT IN THE MEANTIME, AS MR. MUSIKA AND AS  
20 MR. WAGNER POINTED OUT, IN THE MEANTIME, THESE  
21 PRODUCTS ARE INJURING US.

22 AND, AS YOUR HONOR DEMONSTRATED PRETTY  
23 CLEARLY, THEY ARE INFRINGING THE PATENTS.

24 BUT FOR THE FACT THAT I -- YOU KNOW, YOU  
25 NEED -- I HOPE YOU WILL LOOK MORE CAREFULLY AT THIS

1 KNIGHT-RIDDER THING BECAUSE IT SIMPLY COULDN'T BE  
2 MORE DIFFERENT THAN ANY OF THE APPLE -- IT'S NO  
3 DIFFERENT ACTUALLY FROM THE EARLIER SAMSUNG TABLET  
4 WHICH I SHOWED YOU.

5 THE COURT: OKAY.

6 MR. MCELHINNY: I DID WANT TO SAY, JUST  
7 BRIEFLY, I JUST -- WELL, TWO THINGS.

8 ONE, ON THE PUBLIC POLICY ISSUE, I JUST  
9 WANTED TO MENTION THAT THERE HAS BEEN SOME BRIEFING  
10 ON IT.

11 THE COURTS, WHEN THEY GRANT INJUNCTIONS,  
12 THEY SIMPLY SAY THERE'S A STRONG PUBLIC POLICY IN  
13 ENFORCING INTELLECTUAL PROPERTY.

14 AND THE PROBLEM WITH THAT IN TERMS OF  
15 ORAL ARGUMENT IS THAT SORT OF GIVES THE IDEA OF  
16 SHORT SHRIFT.

17 IN MY LIFETIME, THE UNITED STATES, AS YOU  
18 KNOW, HAS SPENT A LOT OF TIME TRYING TO STRENGTHEN  
19 INTELLECTUAL PROPERTY PROTECTION AROUND THE WORLD,  
20 BECAUSE WE HAVE LEARNED -- WE NO LONGER HAVE A  
21 TELEVISION INDUSTRY IN THIS COUNTRY, BUT WE HAVE  
22 LEARNED THE DIRECT CONNECTION BETWEEN THE  
23 IMPORTANCE OF INTELLECTUAL PROPERTY RIGHTS AND JOBS  
24 AND ECONOMIC SUCCESS AND THE RETURN ON THE  
25 INVESTMENT THAT PEOPLE MAKE.



1 AND I'M NOT ASKING FOR A CHIP.

2 BUT I'M SAYING IF, IN FACT, YOUR HONOR IS  
3 CONVINCED THAT THERE'S INFRINGEMENT --

4 THE COURT: WHICH -- AND I'M CERTAINLY  
5 NOT SAYING THAT I -- I WAS COMMENTING ONLY ON THE  
6 TABLET, NOT COMMENTING ON THE PHONES.

7 MR. MCELHINNY: RIGHT.

8 THE COURT: BUT GO AHEAD.

9 MR. MCELHINNY: I'M SAYING IF YOUR HONOR  
10 IS CONVINCED AND IF YOUR HONOR AGREES WITH US THAT  
11 THERE'S NOT A SUBSTANTIAL QUESTION ON THE  
12 INVALIDITY ISSUE, THERE IS, IN THIS INDUSTRY, AT  
13 THIS TIME, WITH THESE PATENTS, AN INCREDIBLY STRONG  
14 PUBLIC POLICY INTEREST IN TERMS OF ENFORCEMENT.

15 WITH THAT, I HAVE NOTHING MORE FOR YOUR  
16 HONOR.

17 THE COURT: OKAY. GO AHEAD, PLEASE.

18 MS. SULLIVAN: THANK YOU, YOUR HONOR.

19 VERY, VERY BRIEFLY.

20 FIRST ON THE STANDARD OF REVIEW.

21 LET ME JUST READ FROM ASTRAZENECA. "A  
22 PRELIMINARY INJUNCTION SHOULD NOT ISSUE" -- THIS IS  
23 ON PAGE 5 OF SAMSUNG'S OPPOSITION PAPERS -- "A  
24 PRELIMINARY INJUNCTION SHOULD NOT ISSUE IF AN  
25 ALLEGED INFRINGER RAISES A SUBSTANTIAL QUESTION

1 REGARDING EITHER INFRINGEMENT OR VALIDITY, I.E.,  
2 THE ALLEGED INFRINGER ASSERTS AN INFRINGEMENT OR  
3 INVALIDITY DEFENSE THAT THE PATENTEE HAS NOT SHOWN  
4 LACKS SUBSTANTIAL MERIT."

5 SO, YOUR HONOR, THE QUESTION IS NOT AS  
6 MR. MCELHINNY MISCHARACTERIZED IT, WHETHER YOU WILL  
7 RULE THE IPAD OBVIOUS.

8 THAT'S NOT AT STAKE HERE.

9 THE QUESTION IS, HAVE WE RAISED  
10 SUBSTANTIAL QUESTIONS AS TO INVALIDITY BY SHOWING  
11 YOU PRIOR ART ON THE TELEPHONE PATENTS, PRIOR ART  
12 THAT YOUR HONOR HAS ALREADY SAID INVALIDATES THE  
13 TABLET PATENT.

14 AND WE THINK WE'VE CLEARLY RAISED  
15 SUBSTANTIAL QUESTIONS.

16 THEY HAVEN'T SHOWN THAT THEY ARE NOT  
17 SUBSTANTIAL QUESTIONS, AND THAT'S THE ONLY  
18 STANDARD.

19 IT'S NOT WHETHER YOU'RE GOING TO RULE.

20 SECONDLY, ON THE '889 PATENT, YOUR HONOR,  
21 MR. MCELHINNY JUST GOT UP AND SAID LOOK AT THE 1995  
22 FIDLER TABLET. IT'S NOT FLAT.

23 WELL, IN SOME SENSE, IT'S ABSURD FOR US  
24 TO BE ARGUING ON A PRELIMINARY INJUNCTION WHETHER  
25 IT IS FLAT OR NOT. THAT'S FOR A JURY TO DECIDE.

1                   BUT IF YOU LOOK ON PAGE 87 OF OUR SLIDES,  
2                   YOUR HONOR, YOU'LL SEE HE LEFT OUT THE 1997 FIDLER  
3                   TABLET AND THE 2003 BLOOMBERG TABLET WHICH ARE  
4                   FLAT, WHICH ARE PRIOR ART THAT IS FLAT AND THAT  
5                   RENDER THE '889 PATENT OBVIOUS.

6                   AND IN FACT, FIDLER ALSO TESTIFIED THAT  
7                   THE 1981 AND 1997 TABLETS WERE FLAT. SO THAT'S ON  
8                   FLATNESS.

9                   SO WE THINK YOUR HONOR WOULD BE CORRECT  
10                  TO RULE AT THIS POINT THAT WE'VE RAISED SUBSTANTIAL  
11                  QUESTIONS OF WHETHER THERE'S INVALIDATING PRIOR ART  
12                  ON THE '889 PATENT THAT WAS FLAT.

13                  THIRD, ON THE -- I'D LIKE TO RETURN TO  
14                  YOUR HONOR'S POINT ON IRREPARABLE HARM, JUST A FEW  
15                  POINTS.

16                  ON IRREPARABLE HARM, YOUR HONOR RAISED A  
17                  QUESTION WHETHER TRADE DILUTION COULDN'T BE A FORM  
18                  OF IRREPARABLE HARM HERE.

19                  BUT I'D LIKE TO REFER YOUR HONOR TO THE  
20                  TESTIMONY OF SISSIE TWIGGS, THIS IS WHO APPLE PUT  
21                  FORWARD AS ITS HEAD OF ADVERTISING, AND SHE WAS  
22                  ASKED DIRECTLY, THIS IS ON PAGES 207 AND 208, DO  
23                  YOU BELIEVE YOU LOST ANY CUSTOMERS?

24                  THERE ARE PROBABLY A FEW.

25                  DO YOU HAVE ANY EVIDENCE OR ARE YOU JUST

1 SPECULATING?

2 I DON'T HAVE ANY EVIDENCE. MY GUESS IS  
3 THAT WE LOST SOME CUSTOMERS.

4 THAT IS YOUR GUESS, NOT SUPPORTED BY ANY  
5 INFORMATION?

6 I DON'T HAVE THE SALES FIGURES.

7 BUT CRUCIALLY ON TRADE DILUTION, THE NEXT  
8 SLIDE, 208, GIVES YOU YOUR ANSWER. APPLE DOESN'T  
9 HAVE PROOF OF TRADE DILUTION.

10 DO YOU HAVE ANY EVIDENCE OF EROSION OF  
11 APPLE'S DISTINCTIVENESS IN CUSTOMERS' MINDS AS A  
12 RESULT OF SAMSUNG'S PHONES?

13 I DON'T HAVE ANY EVIDENCE.

14 SO WITH RESPECT, WE DON'T THINK THE TRADE  
15 DILUTION ARGUMENT, EVEN IF IT WERE THEORETICALLY  
16 POSSIBLE, HAS BEEN REMOTELY MADE OUT BY THE  
17 EVIDENCE THAT APPLE'S PRODUCED.

18 ON IRREPARABLE HARM, I MENTIONED EARLIER,  
19 YOUR HONOR, THAT APPLE'S OWN STUDIES SHOW THAT  
20 SHIFT FROM APPLE TO ANDROID HAS NOT BEEN PROVED.

21 APPLE HASN'T SHOWN IT'S LOST MARKET SHARE  
22 FROM APPLE TO ANDROID PHONES.

23 I MENTIONED TO YOU THAT THERE WAS  
24 EVIDENCE FROM APPLE'S OWN STUDIES THAT THE PERCENT  
25 SHARE OF ANDROID USERS WHO SWITCHED FROM APPLE IS

1 TRIVIAL TO THE VANISHING POINT.

2 I JUST WANT TO POINT OUT TO YOUR HONOR,  
3 IT'S CONFIDENTIAL, BUT IT'S AT SLIDE 209.

4 AND APPLE'S OWN STUDIES SHOWING THAT  
5 DESIGN AS OPPOSED TO BRAND DIDN'T MATTER IS ON  
6 SLIDE 210.

7 FINALLY, YOUR HONOR, ON IRREPARABLE HARM,  
8 JUST A COUPLE OF MORE POINTS.

9 I WOULD LIKE TO POINT YOUR HONOR TO  
10 CONFIDENTIAL SLIDE 213, WHICH SHOWS THAT  
11 MR. MCELHINNY HAS MISCHARACTERIZED MR. WAGNER'S  
12 TESTIMONY.

13 MR. WAGNER DID NOT ADMIT THAT SAMSUNG HAD  
14 STOLEN APPLE'S SHARE OF THE TABLET MARKET.

15 AND ALSO WITH RESPECT TO COMPENSABILITY,  
16 I JUST WANT TO REFER YOUR HONOR TO CONFIDENTIAL  
17 SLIDE 228 WHICH SHOWS THAT, IN FACT, MONETARY  
18 COMPENSATION WAS -- OR NEGOTIATION OF A LICENSE WAS  
19 A FORM OF OFFER FROM APPLE TO SAMSUNG.

20 I CAN'T, OF COURSE, DISCUSS THE TERMS,  
21 BUT THE IDEA THAT YOU NEED TO BRING A PRELIMINARY  
22 INJUNCTION ACTION WHICH YOU'VE DISCUSSED ROYALTIES  
23 IS SELF-DEFEATING.

24 AND YOUR HONOR, IT'S STRIKING. YOU  
25 MENTIONED THAT THIS IS ONE PHASE OF A WAR BETWEEN

1 THE TWO COMPANIES.

2 BUT THE IMPORTANT POINT FOR TODAY'S  
3 HEARING, WHICH IS A PRELIMINARY INJUNCTION HEARING,  
4 IS THAT APPLE HAS NOT SOUGHT A PRELIMINARY  
5 INJUNCTION AGAINST ALL OF THE OTHER SUPPOSED  
6 COPYISTS OF IPHONES.

7 IT SINGLED SAMSUNG OUT WITHOUT THE  
8 EVIDENCE TO SUPPORT A PRELIMINARY INJUNCTION  
9 REQUEST.

10 AND FINALLY, YOUR HONOR, JUST ONE QUICK  
11 CORRECTION, GOING BACK TO THE TAB FOR A MINUTE.

12 MR. MCELHINNY INCORRECTLY SAID THAT THE  
13 GALAXY TAB 10.1 WAS OUR FIRST TABLET RELEASED IN  
14 JUNE OF 2011.

15 THAT'S NOT TRUE.

16 THE GALAXY TAB WAS ANNOUNCED IN  
17 SEPTEMBER 2010, WHICH WAS BEFORE THE MARCH 2011  
18 RELEASE OF THE -- ANNOUNCEMENT OF THE IPAD2 OR  
19 MARCH 11TH, 2011 RELEASE OF THE IPAD2.

20 SO THAT'S SIMPLY NOT CORRECT.

21 SO, YOUR HONOR, IN SUM, WHAT WE'RE SAYING  
22 TODAY ON THE DESIGN PATENTS, AND YOUR HONOR HAS  
23 ALREADY PERHAPS DISPOSED OF '381 AND WE HOPE WILL  
24 DISPOSE OF THE TAB PATENT BECAUSE OF THE PRIOR ART,  
25 BUT ON THE TELEPHONE PATENTS, WE THINK WE'VE RAISED

1 SUBSTANTIAL QUESTIONS ON BOTH INVALIDITY AND  
2 INFRINGEMENT.

3 WE THINK WE'VE GIVEN YOU PRIOR ART IN THE  
4 JAPANESE PATENTS, YOU CAN LOOK AT IT. WE THINK  
5 WE'VE GIVEN YOU PLENTY OF DIFFERENCES TO RAISE A  
6 SUBSTANTIAL QUESTION OF INFRINGEMENT.

7 WE'D LIKE YOUR HONOR TO REVIEW THE RECORD  
8 AND SEE THAT APPLE CALLS THESE DIFFERENCES MINUTE  
9 OR MINOR FOR PURPOSES OF DISTINGUISHING PRIOR ART,  
10 BUT THEN CALLS THEM MAJOR WHEN IT COMES TO WHETHER  
11 OR NOT WE'VE INFRINGED.

12 SO THE -- I'M SORRY -- CALLS THEM MINOR  
13 WITH RESPECT TO INFRINGEMENT AND MAJOR WITH RESPECT  
14 TO THE PRIOR ART.

15 BUT THE KEY POINT, YOUR HONOR, IS THAT TO  
16 ISSUE A PRELIMINARY INJUNCTION IN THIS CASE WOULD  
17 TAKE DESIGN PATENT INTO A NEW AREA IT'S NEVER GONE  
18 BEFORE, A VEHICLE FOR MONOPOLIZING A CONCEPT, THE  
19 CONCEPT OF A BLACK RECTANGULAR FLAT SCREEN DEVICE  
20 FOR INTERACTING SMOOTHLY ON A FLAT SURFACE WITH  
21 MEDIA IN A WAY THAT IS -- THAT INVOLVES CERTAIN  
22 FEATURES LIKE NARROW BORDERS AND ROUNDED CORNERS,  
23 TO BE ABLE TO PATENT A CONCEPT THROUGH A DESIGN  
24 PATENT WOULD BE IMPROPER, AND IF I -- IF YOU LOOK  
25 AT NOTHING ELSE IN THE SLIDES, YOUR HONOR, I HOPE

1 YOU'LL LOOK AT THE TESTIMONY OF APPLE'S OWN  
2 DESIGNER, MR. IVE. MR. IVE -- SORRY, IT'S NOT  
3 TESTIMONY. IT'S A STATEMENT IN THE PUBLIC DOMAIN  
4 OF MR. IVE.

5 HE SAYS THAT WHAT APPLE DOES -- COULD I  
6 HAVE THE NUMBER OF THAT SLIDE, PLEASE?

7 MAYBE WE COULD CLOSE WITH THIS SLIDE AND  
8 THE AUDIO OF THE IVE SLIDE.

9 I'M SORRY. DO YOU --

10 YOUR HONOR, IF WE COULD JUST CLOSE WITH  
11 THIS, THIS IS MR. IVE.

12 (WHEREUPON, A VIDEOTAPE WAS PLAYED IN  
13 OPEN COURT OFF THE RECORD.)

14 MS. SULLIVAN: "EVERYTHING DEFERS TO THE  
15 DISPLAY. WHAT WE'RE DOING IS GETTING DESIGN OUT OF  
16 THE WAY."

17 APPLE HAS NOT SHOWN THAT ANYONE BUYS AN  
18 IPHONE BECAUSE OF ITS ROUNDED CORNERS OR ITS  
19 APPEARANCE OR ORNAMENTAL FEATURES. THAT'S WHAT'S  
20 PROTECTED BY A DESIGN PATENT.

21 THEY BUY AN IPHONE IN ORDER TO GET DESIGN  
22 OUT OF THE WAY, BECAUSE EVERYTHING DEFERS TO THE  
23 DISPLAY, MEANING THE FEATURES THAT ENABLE YOU TO  
24 INTERACT WITH THE MEDIA YOU SEE ON THE IPHONE.

25 IT IS -- IT WOULD BE UNPRECEDENTED TO



1 HOLD THAT THERE'S A DESIGN PATENT PRODUCT -- DESIGN  
2 PATENT PROTECTION FOR A PRODUCT IN WHICH WE TRIED  
3 TO GET DESIGN OUT OF THE WAY.

4 AND RESPECTFULLY, WE REQUEST THAT YOU  
5 DENY THE PRELIMINARY INJUNCTION AS TO THE TELEPHONE  
6 PATENTS, AS WELL AS TO THE '889 AND THE '381  
7 PATENTS FOR THE REASONS WE'VE ALREADY GIVEN.

8 IF THERE ARE NO FURTHER QUESTIONS, YOUR  
9 HONOR?

10 THE COURT: NO.

11 MR. MCELHINNY: I JUST HAVE ONE RECORD  
12 THING, YOUR HONOR. I WON'T ARGUE IT.

13 BUT ON THE QUESTION OF WHETHER OR NOT  
14 THERE'S EVER BEEN A DISCUSSION ABOUT LICENSING  
15 DESIGN PATENTS, I WOULD CITE YOUR HONOR TO OUR  
16 REPLY BRIEF AT PAGE 28, LINES 7 THROUGH 10, WHICH  
17 HAVE CITATIONS FROM BOTH SIDES.

18 THANK YOU, YOUR HONOR.

19 THE COURT: ALL RIGHT. THANK YOU ALL  
20 VERY MUCH.

21 I AM GOING TO REVIEW EVERYTHING FURTHER.  
22 ANYTHING I'VE STATED TODAY IS REALLY JUST SORT OF  
23 TENTATIVE THOUGHTS BASED ON WHAT I'VE REVIEWED AND  
24 ANALYZED SO FAR. BUT I HOPE TO ISSUE AN ORDER  
25 FAIRLY PROMPTLY.

1           OKAY.    THANK YOU ALL.

2           MR. MCELHINNY:    THANK YOU, YOUR HONOR.

3           THE COURT:    LET'S TAKE -- I HAVE TWO MORE  
4           CASES.    LET'S TAKE A 15 MINUTE BREAK, AND THANK YOU  
5           FOR YOUR PATIENCE FOR MY OTHER CASES.

6           MS. SULLIVAN:   YOUR HONOR, JUST AS A  
7           HOUSEKEEPING MATTER, WOULD YOU LIKE US TO LODGE  
8           THINGS NOW, LODGE DEPOSITIONS OR ANY OTHER  
9           EVIDENCE, WOULD YOU LIKE US TO LODGE THAT NOW AND  
10          TAKE CARE OF IT?

11          MR. JOHNSON:   OR YOUR HONOR, IF WE COULD  
12          DO IT BY TOMORROW, FOR EXAMPLE?

13          THE COURT:    I ACTUALLY WAS NOT WELCOMING  
14          MORE DOCUMENTATION.   I THINK YOU'VE GIVEN ME  
15          PROBABLY IN TOTAL, WHAT, ABOUT EIGHT BOXES?   I  
16          THINK IT'S BEEN SUFFICIENTLY BRIEFED.

17          MR. JOHNSON:   THERE WAS SOME DEPOSITION  
18          TESTIMONY, FOR EXAMPLE, THAT WE PUT IN OUR SLIDES.

19          WOULD YOUR HONOR -- WHICH WAS NOT PART OF  
20          OUR OPPOSITION PAPERS SINCE THEY WERE FILED BACK IN  
21          AUGUST.

22          AND SO WHEN THE ISSUES WERE RAISED IN THE  
23          REPLY AND WE ADDRESSED THEM TODAY -- IT'S JUST TO  
24          REFER TO -- TO LODGE ITEMS THAT WE REFERRED TO  
25          DURING TODAY'S ORAL HEARING.

1 THE COURT: IS THERE ANY OBJECTION?

2 MR. MCELHINNY: THERE'S NO OBJECTION TO  
3 THAT, YOUR HONOR.

4 THE COURT: ALL RIGHT.

5 MR. MCELHINNY: OKAY, YES, THEN I CHANGE  
6 MY MIND. YES, I'M --

7 THE COURT: NO, NO, I'M NOT ASKING YOU TO  
8 OBJECT.

9 I'M JUST TRYING TO THINK OF WHEN CAN THAT  
10 BE DONE? I WOULD LIKE, BASICALLY, THE EVIDENCE  
11 PORTION OF THIS TO CLOSE QUICKLY SO THAT I CAN  
12 REVIEW EVERYTHING FULLY.

13 MR. JOHNSON: BY TOMORROW?

14 THE COURT: OKAY. ALL RIGHT.

15 NOW, DO YOU HAVE ANY OBJECTIONS TO WHAT  
16 APPLE FILED YESTERDAY?

17 MR. JOHNSON: WE SUBMITTED A PAPER AFTER  
18 THEY SUBMITTED THEIR PAPER SAYING THAT, TO THE  
19 EXTENT THAT THEY BE GIVEN THE OPPORTUNITY TO  
20 AUGMENT THE RECORD, WE WANTED THE OPPORTUNITY TO  
21 AUGMENT, OR AT LEAST FILE A SURREPLY AND EXPLAIN  
22 WHAT THOSE DOCUMENTS SAY, BECAUSE THEY'RE  
23 MISCHARACTERIZING WHAT THOSE DOCUMENTS SAY.

24 BUT MOST OF THOSE DOCUMENTS GO TO THE  
25 '381 PATENT, FRANKLY, YOUR HONOR, AND IF YOU'RE

1 GOING TO DENY THE MOTION ON THE '381 PATENT, THEN  
2 I'M NOT SURE WE NEED A SURREPLY VIS-A-VIS THE '381  
3 PATENT. SO THAT COULD ELIMINATE A DOCUMENT.

4 THE COURT: OKAY. WELL, I REALLY DON'T  
5 WANT ANY FURTHER BRIEFING ON THIS.

6 I DO WANT TO GET TO THE RIGHT ANSWER AND  
7 I APPRECIATE ADDITIONAL INFORMATION, BUT BOTH SIDES  
8 HAVE VERY, VERY THOROUGHLY AND ABUNDANTLY BRIEFED  
9 THIS, SO I -- AT THIS POINT, I DON'T WANT TO HAVE  
10 ANY FURTHER REPLIES, SURREPLIES, SUR-SURREPLIES OR  
11 ANYTHING ELSE.

12 GO AHEAD AND FILE THE SUPPLEMENTAL  
13 MATERIALS YOU JUST REFERENCED TOMORROW, AND I'M  
14 GOING TO ASSUME THAT'S GOING TO BE THE END OF THE  
15 BRIEFING ON THAT.

16 MR. MCELHINNY: AND JUST SO I KNOW WHAT  
17 THEY'RE LODGING, IS IT THE ACTUAL DEPOSITION  
18 TRANSCRIPTS THAT THEY CITED IN THEIR SLIDES?

19 MR. JOHNSON: IT'S JUST THE EVIDENCE,  
20 YES.

21 THE COURT: ALL RIGHT.

22 MR. MCELHINNY: I -- I'M SORRY. I HEARD  
23 HIM TO SAY DEPOSITION TRANSCRIPTS WHEN HE FIRST  
24 ASKED. I DON'T KNOW WHETHER THEIR EVIDENCE IS IN  
25 THESE 255 PAGES OF SLIDES.

1 MR. JOHNSON: I --

2 THE COURT: WHAT ELSE DO YOU WANT TO  
3 LODGE TOMORROW?

4 MR. JOHNSON: WELL, I MEAN, TO PRESERVE  
5 THE RECORD, I GUESS I WOULD ALSO OFFER -- MAKE AN  
6 OFFER OF PROOF WITH RESPECT TO THE ADDITIONAL PRIOR  
7 ART WE OFFERED ON THE NEW PRIOR ART IN THE '381 OF  
8 DIAMONDTOUCH.

9 HOWEVER, LIKE I SAID, IF YOUR HONOR IS  
10 INCLINED TO DENY THAT, THEN I DON'T NEED TO DO THAT  
11 AT THIS POINT.

12 WHAT I WAS LOOKING TO DO WAS JUST PUT IN  
13 THE DEPOSITION TESTIMONY THAT RELATES TO ISSUES  
14 THAT WERE IN APPLE'S REPLY BRIEF AND SO TO COMPLETE  
15 THE RECORD, FRANKLY. SO THAT'S THE NATURE OF THE  
16 EVIDENCE.

17 MR. MCELHINNY: THAT -- I'M SORRY. THEN  
18 I DO OBJECT TO THAT BECAUSE THAT'S NOT -- THAT'S  
19 NOT DEPOSITION TRANSCRIPTS THAT WERE READ TO YOUR  
20 HONOR. THAT'S A BLANK CHECK.

21 I DON'T KNOW WHAT EVIDENCE THEY FEEL THEY  
22 NEED TO COMPLETE THE RECORD.

23 MR. JOHNSON: NO. THEY WERE READ TO YOUR  
24 HONOR, YES.

25 FOR EXAMPLE, DR. BALAKRISHNAN'S TESTIMONY

1 THAT I REFERRED TO AND READ, THAT WAS NOT PART OF  
2 OUR OPPOSITION PAPERS THAT WE FILED.

3 THERE WAS TESTIMONY FROM DR. WAGNER THAT  
4 WAS IN THEIR REPLY BRIEF, WHICH WE WOULD --  
5 PROFESSOR SULLIVAN REFERRED TO.

6 SO IT'S JUST LODGING THAT WITHOUT ANY  
7 BRIEF. WE DON'T NEED A BRIEF.

8 THE COURT: ALL RIGHT. THIS IS WHAT I  
9 WANT YOU TO DO. I WANT LEAD TRIAL COUNSEL TO MEET  
10 AND CONFER IN PERSON TOMORROW AND SHOW EACH OTHER  
11 WHATEVER ELSE YOU ARE GOING TO FILE. IT NEEDS TO  
12 BE EXTREMELY LIMITED.

13 AND IF YOU CAN COME TO AN AGREEMENT, THEN  
14 FILE IT BY THE END OF THE DAY TOMORROW.

15 IF YOU CANNOT COME TO AN AGREEMENT, THEN  
16 BY MONDAY I WANT YOU TO LODGE WHATEVER ELSE YOU  
17 WANT TO FILE WITH THE COURT WITH SOME EXPLANATION  
18 AS TO WHY YOU WANT IT, WHY IT WASN'T PREVIOUSLY  
19 PROVIDED, I WANT TO KNOW THAT IT WAS JUST RECENTLY  
20 PRODUCED OR RECENTLY TAKEN AS A DEPOSITION.

21 AND THEN WITH THE PRELIMINARY INJUNCTION  
22 ORDER, I'LL JUST RULE ON THOSE OBJECTIONS.

23 MR. MCELHINNY: THANK YOU, YOUR HONOR.

24 MR. JOHNSON: THANK YOU, YOUR HONOR.

25 THE COURT: OKAY? BUT EACH OF THESE

1 MEMOS, EACH SIDE WILL ONLY GET ONE TO EITHER OBJECT  
2 TO THE OTHER SIDE AND TO ADVOCATE FOR ANY  
3 ADDITIONAL YOU WANT IS TWO PAGES MAXIMUM. OKAY?

4 MS. SULLIVAN: UNDERSTOOD. THANK YOU.

5 MR. MCELHINNY: THANK YOU, YOUR HONOR.

6 THE COURT: ALL RIGHT. AND THAT'LL BE  
7 FILED ON MONDAY.

8 ALL RIGHT. THANK YOU.

9 MR. MCELHINNY: THANK YOU, YOUR HONOR.

10 MS. SULLIVAN: THANK YOU, YOUR HONOR.

11 (WHEREUPON, THE PROCEEDINGS IN THIS  
12 MATTER WERE CONCLUDED.)

13

14

15

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT  
REPORTER OF THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH  
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY  
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,  
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND  
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS  
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS  
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED  
TRANSCRIPTION TO THE BEST OF MY ABILITY.

/s/

\_\_\_\_\_  
LEE-ANNE SHORTRIDGE, CSR, CRR  
CERTIFICATE NUMBER 9595