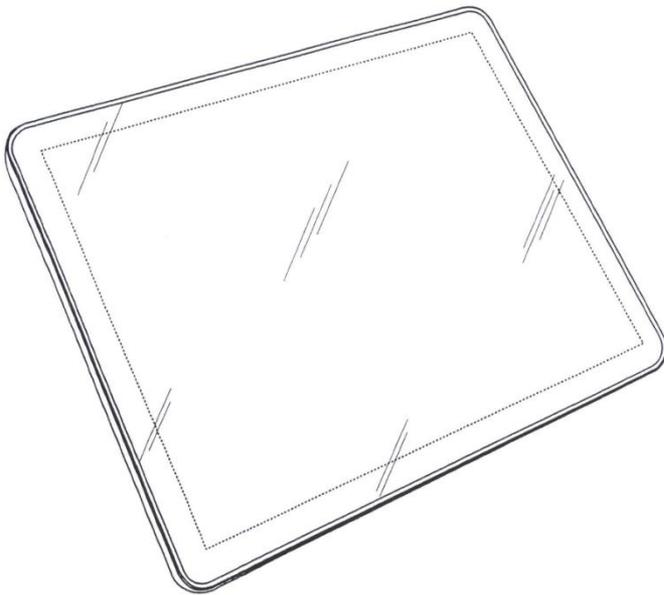


Design law as a weapon in the smartphone wars on the EU battleground

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Battle of the tablets: *Apple v. Samsung* in Europe



RCD 000181607-0001
(front image)



Galaxy Tab 10.1

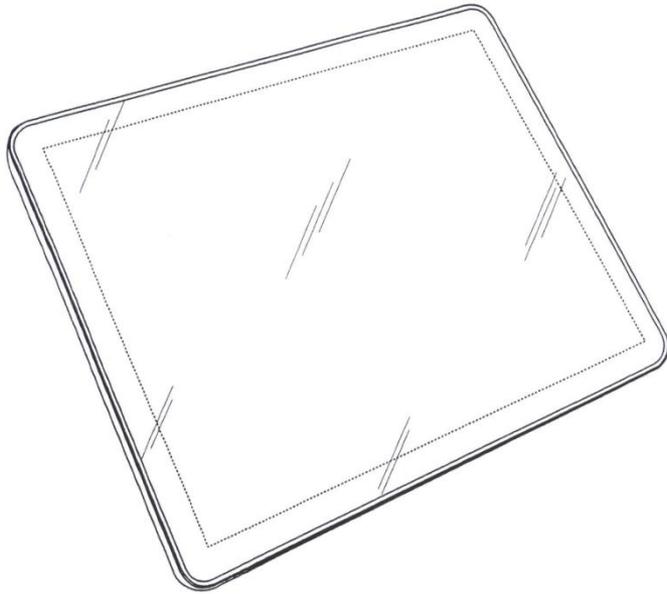
EU decisions in the design battle



- Courts in the Netherlands:
 - 24 Aug. 2011: Galaxy Tab 10.1 did not infringe the asserted RCD
 - 24 Jan. 2012: Judgment upheld on appeal
 - 16 Jan. 2013: Court followed the prior UK judgments
- Courts in Germany:
 - 9 Sep. 2011: A pan-European preliminary injunction on Galaxy Tab 10.1
 - 24 Oct. 2011: A pan-European injunction ex. Germany on Galaxy Tab 7.7
 - 25 Nov. 2011: Apple’s main action commenced (claims re the RCD withdrawn)
 - 24 Jul. 2012: A pan-European interim injunction on Galaxy Tab 7.7
- Courts in the UK:
 - 9 Jul. 2012: Galaxy Tab 7.7, 8.9 and 10.1 did not infringe the RCD; a “publicity” order
 - 18 Oct. 2012: Judgment upheld

Infringement test and informed user under Regulation 6/2002

- Does the design produce on the informed user a different overall impression?
- Who is the informed user?
- CJEU, *Grupo Promer*, C-281/10P
- Somewhere between average consumer and sectoral expert (more observant than the trade mark consumer)
- Is a user not a designer, but a user interested in the products
- Knows design corpus and features in the relevant sector
- Shows a relatively high degree of attention when using the products, but does not observe in details minimal differences



RCD 000181607-0001
(front image)

« A flat transparent surface
without any ornamentation
covering the front face of the
device up to the rim »



Galaxy Tab 10.1

Tiny speaker grille and
camera hole on top

Name of Samsung below
(thus orientation for tablet)



RCD 000181607-0001
(rear image)

V.

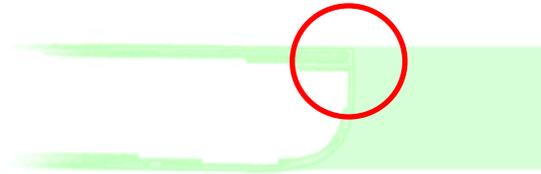


Galaxy Tab 10.1 / 8.9



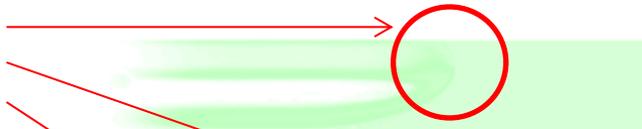
Galaxy Tab 7.7

“crisp edge”



RCID '807
thickness = Y

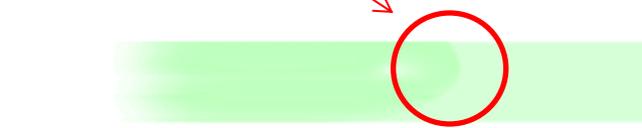
“curves
a little
outward
before
curving
back in
and under”



SGT 7.7
thickness approx. (0.74)Y



SGT 8.9
thickness approx. (0.67)Y



SGT 10.1
thickness approx. (0.65)Y

Informed user's knowledge and experience of the design corpus

- *[T]o the informed user ... these [front] screens do not stand out to anything like the same extent. ... The user who is particularly observant and is informed about the design corpus reacts to the Apple design by recognizing the front view as one of a familiar type. From the front both the Apple design and the Samsung tablets look like members of the same, pre-existing family. As a result, the significance of that similarity overall is much reduced and the informed user's attention to the differences at the back and sides will be enhanced considerably.*
- *“ the Samsung products are very thin, almost insubstantial members of that family with unusual details on the back. They do not have the same understated and extreme simplicity which is possessed by the Apple design. They are not as cool. The overall impression produced is different.”*

EU cumulation of design and copyright



- CJEU, *Flos*, C-168/09
 - National law cannot refuse copyright protection for designs if they meet copyright requirements, even if previously in public domain
 - Copyright subsists for the duration of its own term
- Copyright protection for the shape of IT products (for ex. iPods in Belgium)
- Possible collision between design and copyright
 - Subject matter, conditions of protection, ownership split and...
 - Infringement test

Infringement under copyright

- In the Dutch case, Apple claimed copyright protection to its designs:
 - Samsung’s defense: reciprocity rule (art. 2(7) Berne Convention); no copyright protection in the US, thus not in the NL
 - Applicable between non-EU entities (>< CJEU, *Heyraud*, C-28/04)
 - Copyright protection not pursued any further
- Very different infringement test than in the design context: comparison between two products
 - Consequences

Battle of the tablets:

Apple v. Samsung is also about GUIs

- In the Netherlands, Apple asserted its RCD 000748694-0003 against the screen display of the Galaxy (denied)



v.



Protecting GUIs as Community design

- Apple: RCD 00748694-001 to 57 for various icons (for class 14 subclass 04)



Name of owner: Apple Inc.
Filing date: 28/06/2007
Locarno class-subclass: 14.04
Verbal element:
Indication of the product: Graphical user interfaces
Status: Invalidity procedure pending

4  000748694-0004



Name of owner: Apple Inc.
Filing date: 28/06/2007
Locarno class-subclass: 14.04
Verbal element: SMS
Indication of the product: Icons
Status: Registered and fully published (A1)

5  000748694-0005



Name of owner: Apple Inc.
Filing date: 28/06/2007
Locarno class-subclass: 14.04
Verbal element: TUESDAY 9
Indication of the product: Icons
Status: Registered and fully published (A1)

6  000748694-0006



Name of owner: Apple Inc.
Filing date: 28/06/2007
Locarno class-subclass: 14.04
Verbal element:
Indication of the product: Icons
Status: Registered and fully published (A1)

Copyright protection for GUIs: CJEU, C-393/09, *BeSoft/Softwarová*

- A GUI is not a form of expression of a computer program because it is not a code “enabling a computer to perform its task” (§ 38)
- Thus it is not protected under the (now codified) 91/250 Software Directive
- Nevertheless, it can be protected by copyright as a work under the 2001/29 Directive
 - As a graphic or audiovisual work (national case law on computer games)
 - if the GUI is its author’s own intellectual creation

Final thoughts

- IP protection should apply where innovation is taking place
- Balancing the need to protect product shapes and the need for a vibrant competition on the smartphone market
- Today, screen-design is an area where huge investments are made
- Several systems do exist throughout the world to protect screen displays and icons
- The EU approach combines the protection by the Community design and by copyright, which presents several advantages

Thank you for your attention!

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