

EXHIBIT 49

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

APPLE INC.,

Plaintiff,

v.

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.

Case No. 11-cv-01846-LHK
**EXPERT REPORT OF RUSSELL
S. WINER**

****CONFIDENTIAL – CONTAINS MATERIAL DESIGNATED AS HIGHLY
CONFIDENTIAL – ATTORNEYS’ EYES ONLY PURSUANT TO A PROTECTIVE
ORDER****

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1 **I. QUALIFICATIONS**

2 1. I am the William Joyce Professor of Marketing and the Chair of the Marketing
3 Department at the Stern School of Business, New York University (“NYU”). I have been on the
4 faculty of the Stern School of Business since 2003.

5 2. Prior to joining NYU, I was on the faculties of the University of California at
6 Berkeley, Vanderbilt University, and Columbia University. I have also been a visiting faculty
7 member at M.I.T., Stanford University, the Helsinki School of Economics, the University of
8 Tokyo, École Nationale des Ponts et Chaussées, Cranfield School of Management (U.K.), and
9 Henley Management College (U.K.).

10 3. Since 2009, I have been the Dean of the Department of Business Administration at
11 the University of the People, a tuition-free, non-profit, online academic institution with a mission
12 to provide universal access to higher education.

13 4. I received a B.A. in Economics from Union College and an M.S. and Ph.D. in
14 Industrial Administration from Carnegie Mellon University.

15 5. My research, teaching, and consulting work has mainly been focused on consumer
16 choice, marketing research methodology, marketing planning, advertising, and pricing. I have
17 authored over 60 papers and published in top marketing and management journals such as
18 *Journal of Marketing Research*, *Marketing Science*, *Management Science*, and *Journal of*
19 *Consumer Research*.

20 6. I have won several awards for teaching and research over the course of my career.
21 In addition, I am an Inaugural Fellow of the INFORMS Society for Marketing Science (“ISMS”).
22 Because of my lifetime contributions to the practice and research of marketing, I received the
23 2011 American Marketing Association/Irwin/McGraw-Hill Distinguished Marketing Educator
24 Award for Lifetime Achievement in Marketing. From 2007 to 2009, I also served as the
25 Executive Director of the Marketing Science Institute, a nonprofit organization dedicated to
26 bridging the gap between marketing science theory and business practice.

27 7. I have written three books, *Marketing Management*, *Analysis for Marketing*
28 *Planning*, and *Product Management*, and a research monograph, *Pricing*. I have served two

1 terms as the editor of *Journal of Marketing Research*. I am the past co-editor of *Journal of*
2 *Interactive Marketing*. I am also an Associate Editor of *International Journal of Research in*
3 *Marketing*, and the co-editor of the *Review of Marketing Science*. I serve on the editorial boards
4 of *Journal of Marketing*, the *Journal of Marketing Research*, and *Marketing Science*. A copy of
5 my curriculum vitae is attached as Exhibit 1.

6 8. I have also participated in executive education programs around the world and
7 served as advisor to a number of startup companies.

8 9. I have studied and consulted on brands and branding over the course of my 35-
9 year career in marketing. My textbook *Marketing Management*, which is in its fourth edition and
10 is used by leading business schools around the world, includes a chapter focusing on products and
11 branding. I have also taught executive education programs on branding, most recently in Mumbai
12 in January 2012.

13 10. I have provided testimony as an expert witness in the area of marketing, including
14 issues related to brands and branding. A list of my testimony in the past four years is attached as
15 Exhibit 2.

16 **II. ASSIGNMENT AND COMPENSATION**

17 11. I have been asked by counsel for Apple Inc. (“Apple”) to opine on (i) the value of
18 brands generally, (ii) the strength of Apple’s brand specifically, (iii) the importance of design—or
19 the look and feel of products—to the strength of Apple’s brand, and (iv) the harm to Apple’s
20 brand resulting from Samsung’s misappropriation of Apple’s distinctive designs.

21 12. In arriving at my conclusions, I have relied on certain opinions contained in the
22 expert reports of Hal Poret and Kent Van Liere.¹ In addition, I, or Cornerstone Research staff at
23 my supervision and direction, have reviewed other materials identified in Exhibit 3 to this report.

24 13. Documents and other information cited in my report (including exhibits) are
25 illustrative of information I have relied upon in conducting my analysis. According to the

27 ¹ Expert Report of Hal Poret in *Apple Inc. v. Samsung Electronics Co.*, March 22, 2012
28 (“Poret Report”); Expert Report of Kent D. Van Liere, Ph. D., in the *Apple Inc. v. Samsung*
Electronics Co., March 22, 2012 (“Van Liere Report”).

1 schedule set by the Court and/or agreed upon by the parties, I am to provide an expert report on
2 March 22, 2012, which I do herein. My analysis of information provided to date is ongoing and,
3 if allowed by the Court, I may update and supplement my findings and my report to incorporate
4 additional information that I may receive.

5 14. For my work in this matter, I am being compensated at my normal hourly rate of
6 \$625 per hour. Staff at Cornerstone Research have assisted me in preparation of this report.
7 Their billing rates range from \$230 to \$510.

8 15. In the future, I may receive compensation from Cornerstone Research that reflects
9 the work that has been done by Cornerstone Research on this matter. The amount of that
10 compensation cannot be quantified at this time. None of my compensation is contingent upon the
11 conclusions I reach or on the outcome of this matter.

12 **III. APPLE'S ASSERTED TRADE DRESS**

13 16. I understand that the trade dress at issue involves the distinctive shape and
14 appearance of certain Apple products. In particular, the original iPhone trade dress (the "Original
15 iPhone Trade Dress") includes:

- 16 • a rectangular product with four evenly rounded corners;
- 17 • a flat clear surface covering the front of the product;
- 18 • the appearance of a metallic bezel around the flat clear surface;
- 19 • a display screen under the clear surface;
- 20 • under the clear surface, substantial black borders above and below the display
21 screen and narrower black borders on either side of the screen;
- 22 • when the device is on, a matrix of colorful square icons with evenly rounded
23 corners within the display screen; and
- 24 • when the device is on, a bottom dock of colorful square icons with evenly
25 rounded corners set off from the other icons on the display, which does not
26 change as other pages of the user interface are viewed.²

27 ² Apple Inc., v. Samsung Electronics Co., Amended Complaint, U.S. District Court,
28 Northern District of California, Case No: 11-cv-01846-LHK ("Amended Complaint") ¶ 57.

1 17. The iPhone 3G trade dress includes all of the elements of the Original iPhone
2 Trade Dress, plus “when the device is on, a row of small dots on the display screen” (the “iPhone
3 3G Trade Dress”).³ The iPhone 4 trade dress includes all of the elements of the Original iPhone
4 Trade Dress and the iPhone 3G Trade Dress except that it does not have a metallic bezel, but does
5 have a thin metallic band around the outside edge of the iPhone 4, which creates a thin rim
6 adjacent to the face of the phone (the “iPhone 4 Trade Dress”).⁴ The iPhone 4’s profile is also
7 flatter than the previous versions of the iPhone.

8 18. The iPhone trade dress (the “iPhone Trade Dress”) includes the elements that are
9 common to all versions of the iPhone, namely:

- 10 • a rectangular product with four evenly rounded corners;
- 11 • a flat clear surface covering the front of the product;
- 12 • a display screen under the clear surface;
- 13 • under the clear surface, substantial neutral (black and white) borders above and
14 below the display screen and narrower neutral borders on either side of the
15 screen;
- 16 • when the device is on, a matrix of colorful square icons with evenly rounded
17 corners within the display screen; and
- 18 • when the device is on, a bottom dock of colorful square icons with evenly
19 rounded corners set off from the other icons on the display, which does not
20 change as other pages of the user interface are viewed.⁵

21 19. Another Apple product at issue in this case, the iPod touch, builds upon the
22 original iPhone’s appearance and configuration and includes all of the elements of the iPhone
23 Trade Dress.⁶

24
25
26 ³ Amended Complaint ¶¶ 35, 59-60. The iPhone 3G Trade Dress also applies to the
iPhone 3GS. *See* Amended Complaint ¶ 35.

27 ⁴ Amended Complaint ¶¶ 37, 61-62.

28 ⁵ Amended Complaint ¶¶ 63-64.

⁶ Amended Complaint ¶ 41.

1 20. Apple also owns federal trade dress registrations for its iPhone products. The
2 trade dress registered in U.S. Registration No. 3,470,983 consists of the image shown in the
3 registration, where it is described as follows:

4 The color(s) black, blue, brown, brown-gray, gray-green, green,
5 orange, red, silver, tan, white and yellow is/are claimed as a
6 feature of the mark. The mark consists of the configuration of a
7 rectangular handheld mobile digital electronic device with rounded
8 silver edges, a black face, and an array of 16 square icons with
9 rounded edges. The top 12 icons appear on a black background,
10 and the bottom 4 appear on a silver background. The first icon
11 depicts the letters “SMS” in green inside a white speech bubble on
12 a green background; the second icon is white with a thin red stripe
13 at the top; the third icon depicts a sunflower with yellow petals, a
14 brown center, and a green stem in front of a blue sky; the fourth
15 icon depicts a camera lens with a black barrel and blue glass on a
16 silver background; the fifth icon depicts a tan television console
17 with brown knobs and a gray-green screen; the sixth icon depicts a
18 white graph line on a blue background; the seventh icon depicts a
19 map with yellow and orange roads, a pin with a red head, and a
20 red-and- blue road sign with the numeral “280” in white; the
eighth icon depicts an orange sun on a blue background, with the
temperature in white; the ninth icon depicts a white clock with
black and red hands and numerals on a black background; the
tenth icon depicts three brown-gray circles and one orange circle
on a black background with a white border, with the mathematical
symbols for addition, subtraction, multiplication, and the equal
sign displayed in white on the circles; the eleventh icon depicts a
portion of a yellow notepad with blue and red ruling, with brown
binding at the top; the twelfth icon depicts three silver gears over a
thatched black-and-silver background; the thirteenth icon depicts a
white telephone receiver against a green background; the
fourteenth icon depicts a white envelope over a blue sky with
white clouds; the fifteenth icon depicts a white compass with a
white- and-red needle over a blue map; the sixteenth icon depicts
the distinctive configuration of applicant’s media player device in
white over an orange background.⁷

21 21. The trade dress registered in U.S. Registration No. 3,457,218 consists of the image
22 shown in the registration, which is described as follows:

23 The mark consists of the configuration of a rectangular handheld
24 mobile digital electronic device with rounded corners. The matter
shown in broken lines is not part of the mark.⁸

25 22. The trade dress registered in U.S. Registration No. 3,475,327 consists of the image
26 shown in the registration, which is described as follows:

27 ⁷ Amended Complaint ¶¶ 49, 125, Exhibit 16; APLNDC-Y0000182302-182304.

28 ⁸ Amended Complaint ¶¶ 50, 126, Exhibit 17; APLNDC-Y0000182305-182306.

1 The color(s) gray, silver and black is/are claimed as a feature of
2 the mark. The mark consists of the configuration of a handheld
3 mobile digital electronic device. The material shown in dotted
4 lines, namely, the buttons and openings on the device show the
5 position of the mark in relation to the device and are not
6 considered a part of the mark. The color gray appears as a
7 rectangle at the front, center of the device. The color black
8 appears on the front of the device above and below the gray
9 rectangle and on the curved corners of the device. The color silver
10 appears as the outer border and sides of the device. The color
11 white is shown solely to identify placement of the mark and is not
12 claimed as a part of the mark.⁹

13 23. In addition to the trade dress associated with the various generations of the iPhone
14 and iPod touch, the trade dress associated with Apple's tablet computers, namely the iPad and the
15 iPad 2, are also at issue. The iPad trade dress (the "iPad Trade Dress") includes:

- 16 • a rectangular product with four evenly rounded corners;
- 17 • a flat clear surface covering the front of the product;
- 18 • the appearance of a metallic rim around the flat clear surface;
- 19 • a display screen under the clear surface;
- 20 • under the clear surface, substantial neutral (black or white) borders on all sides
21 of the display screen; and
- 22 • when the device is on, a matrix of colorful square icons with evenly rounded
23 corners within the display screen.¹⁰

24 24. The iPad 2 trade dress (the "iPad 2 Trade Dress") at issue includes all of the
25 elements of the iPad Trade Dress.¹¹ The overall appearance of the iPad and iPad 2 provides an
26 extremely thin side profile, making the products appear to be relatively flat when placed on the
27 table.

28 ⁹ Amended Complaint ¶¶ 51, 127, Exhibit 18; APLNDC-Y0000182307-182308.

¹⁰ Amended Complaint ¶¶ 65-66.

¹¹ Amended Complaint ¶¶ 65-68.

1 **IV. BRANDS ARE AMONG A FIRM'S MOST VALUABLE ASSETS**

2 **A. What is a Brand?**

3 25. In its essence, a brand is “a person’s gut feeling about a product, service, or
4 company.”¹² Brands have three primary functions vis-à-vis the consumer.¹³ Brands provide:

5 Navigation: Brands help consumers choose from a plethora of choices and can
6 simplify the purchase decision.¹⁴

7 Reassurance: Brands communicate the intrinsic attributes of the product or service
8 and reassure consumers that they have made the right choice. Therefore, brands
9 serve an important function by shaping consumers’ expectations of a certain level
10 of quality based on their experiences and knowledge about the brand.¹⁵

11 Navigation and reassurance are not unrelated, of course. Expectations about
12 quality, benefits, and value associated with brands help consumers in their
13 purchase decisions, particularly when there is ambiguity or uncertainty in the
14 purchase.¹⁶

15 Engagement: Brands use distinctive imagery, language, and associations to
16 encourage consumers to identify with the brand. Therefore, brands engage
17 consumers on the level of senses and emotions. Brands provide prestige and
18 satisfy consumers’ emotional needs.¹⁷ Brands can also be aspirational and help
19 consumers project their self-image.¹⁸

20 ¹² Marty Neumeier, *The Brand Gap: How to Bridge the Distance Between Business
21 Strategy and Design 2* (Revised ed., Berkeley, CA: Peachpit Press, 2006).

22 ¹³ D. Haigh & J. Knowles (2004), “Brand Valuation: What It Means and Why It
23 Matters,” *Intellectual Asset Management*, Supplement No. 1, 18-21. David Haigh is CEO of
24 Brand Finance Plc, one of the world’s leading brand valuation consultancies. *See*
25 <http://www.brandfinance.com/> and
26 http://www.brandfinance.com/about/board_members/david-haigh; Alina Wheeler, *Designing
27 Brand Identity 2* (3d Ed., Hoboken, NJ: John Wiley & Sons, Inc., 2009).

28 ¹⁴ Russell S. Winer & Ravi Dhar (2011), *Marketing Management* 179 (4th ed., Upper
Saddle River, NJ: Pearson Education 2011) (“Winer & Dhar (2011)”).

¹⁵ Winer & Dhar (2011) 179; Tülin Erdem & Joffre Swait, *Brand Equity as a Signaling
Phenomenon*, 7 *JOURNAL OF CONSUMER PSYCHOLOGY* 131-157 (1998).

¹⁶ Winer & Dhar (2011) 179; A. V. Muthukrishnan, *Decision Ambiguity and Incumbent
Brand Advantage*, 22 *JOURNAL OF CONSUMER RESEARCH*, 98-109 (1995).

¹⁷ Winer & Dhar (2011) 179; A. V. Muthukrishnan, *Decision Ambiguity and Incumbent
Brand Advantage*, 22 *JOURNAL OF CONSUMER RESEARCH* 98-109 (1995).

¹⁸ Kevin Lane Keller, *Strategic Brand Management* 8 (3d ed., Upper Saddle River, NJ:
Pearson Education, 2008) (“Keller (2008)”).

1 26. Therefore, a brand is much more than a product. A strong brand differentiates
2 itself from other brands and stands out in the marketplace. This differentiation may stem from
3 tangible aspects of the underlying product (*e.g.*, differences related to product performance) or
4 intangible, emotional, and symbolic aspects of the brand (*e.g.*, differences related to what the
5 brand represents).¹⁹ Companies that have successful brands create strong *brand identity*.

6 **B. Brand Identity**

7 27. Brand identity is the embodiment of how the company wants its brand to be
8 perceived by the consumer. Companies invest in brand identity because a compelling brand
9 identity makes it easier for consumers to buy the company’s products. Brand identity also makes
10 it easier for a company to sell its products and build brand equity through increased recognition,
11 awareness, and customer loyalty.

12 28. Brand identity can be composed of numerous brand elements. For example, a
13 tagline such as “Think Different” (Apple) is a brand element that is distinctive and memorable to
14 consumers. Distinctive look and feel components are examples of brand elements.

15 29. A compelling brand identity is one that clarifies and focuses the company’s value
16 proposition by building a high level of brand awareness and recognition. An important trigger of
17 brand awareness and recognition is visual identity—identity that is easy to remember and
18 immediately recognizable. The Nike “swoosh” and the Apple logo are examples. Therefore,
19 brand identity strategists manage brand perception by integrating meaning with distinctive visual
20 form. Marketing literature has studied how individuals recognize and interpret sensory stimuli
21 from the clutter of brands to which they are exposed.²⁰

22 ¹⁹ Keller (2008) 5.

23 ²⁰ P. H. Bloch, *Seeking the Ideal Form: Product Design and Consumer Response*, 59
24 JOURNAL OF MARKETING 16-29 (1995); M. E. H. Creusen & J. P. L. Schoormans, *The*
25 *Different Roles of Product Appearance in Consumer Choice*, 22 JOURNAL OF PRODUCT
26 INNOVATION MANAGEMENT 63-81 (2005); J. Josko Brakus, Bernd Schmitt & Lia
27 Zarantonello, *Brand Experience: What Is It? How Is It Measured? Does It Affect Loyalty?*,
28 73 JOURNAL OF MARKETING 52-68 (2009); Philip Kotler & G. Alexander Rath, *Design – A*
Powerful but Neglected Strategic Tool, 5 JOURNAL OF BUSINESS STRATEGY 16-21 (1984);
Robert W. Veryzer, Jr., *Aesthetic Response and the Influence of Design Principles on Product*
Preferences, 20 ADVANCES IN CONSUMER RESEARCH 224-228 (1993); Robert W. Veryzer, Jr.,
A Nonconscious Processing Explanation of Consumer Response to Product Design, 16

1 30. Visual identity is, of course, related not only to logos like the Apple logo but also
2 to the product itself and its packaging. Appearance or aesthetics of the product—the physical
3 product form (*e.g.*, shape, symmetry, texture, etc.)—influence consumers’ purchase decisions as
4 well as their evaluation of a particular brand.²¹ For example, when given a choice between two
5 products that were equal in price and function, target consumers purchase the one that they deem
6 to be more attractive.²² Aesthetically pleasing products “provide sensory pleasure and
7 stimulation.”²³ Finally, product appearance communicates symbolic value (*e.g.*, cool, trendy,
8 cheerful, friendly, valuable, and so on).²⁴

9 31. Therefore, companies spend a lot of time and resources in developing brand
10 identity that has a distinctive “look and feel.” Look and feel is what makes elements of brands
11 proprietary and immediately recognizable. The strongest brands have a look and feel that
12 resonates in the mind of the consumer and sets the brand apart from the clutter of the visual
13 environment. Pentagram, one of the world’s leading design consultancies,²⁵ defines look and feel
14 in the following way: “Look is defined by color, scale, proportion, typography, and motion. Feel
15 is experiential and emotional.”²⁶ Therefore, look and feel is a very important aspect of *brand*

16
17 PSYCHOLOGY & MARKETING 497-522 (1999); Robert W. Veryzer, Jr. & J. W. Hutchinson,
18 *The Influence of Unity and Prototypicality on Aesthetic Responses to New Product Designs*,
19 24 JOURNAL OF CONSUMER RESEARCH 374-394 (1998); Mel Yamamoto & David R. Lambert
20 (1994), *The Impact of Product Aesthetics on the Evaluation of Industrial Products*, 11
21 JOURNAL OF PRODUCT INNOVATION MANAGEMENT 309-324 (1994).

22 ²¹ P. H. Bloch, *Seeking the Ideal Form: Product Design and Consumer Response*, 59
23 JOURNAL OF MARKETING 16-29 (1995). Yamamoto and Lambert show that even for industrial
24 products, appearance has an influence on product preference. See Mel Yamamoto & David R.
25 Lambert, *The Impact of Product Aesthetics on the Evaluation of Industrial Products*, 11
26 JOURNAL OF PRODUCT INNOVATION MANAGEMENT 309-324 (1994).

27 ²² M. E. H. Creusen & J. P. L. Schoormans, *The Different Roles of Product Appearance*
28 *in Consumer Choice*, 22 JOURNAL OF PRODUCT INNOVATION MANAGEMENT 63-81 (2005).

29 ²³ P. H. Bloch, *Seeking the Ideal Form: Product Design and Consumer Response*, 59
30 JOURNAL OF MARKETING 16-29 (1995); M. E. H. Creusen & J. P. L. Schoormans, *The*
31 *Different Roles of Product Appearance in Consumer Choice*, 22 JOURNAL OF PRODUCT
32 INNOVATION MANAGEMENT 63-81 (2005).

33 ²⁴ M. E. H. Creusen & J. P. L. Schoormans, *The Different Roles of Product Appearance*
34 *in Consumer Choice*, 22 JOURNAL OF PRODUCT INNOVATION MANAGEMENT 63-81 (2005).

35 ²⁵ <http://www.pentagram.com/work/#/all/all/newest/>.

36 ²⁶ Alina Wheeler, *Designing Brand Identity* 66 (3d ed. Hoboken, NJ: John Wiley &
37 Sons, Inc. 2009).

1 *image* or how consumers perceive the brand and its connotations. Companies spend enormous
2 sums of money developing a brand image that they hope will have strong, positive, and unique
3 brand associations in the minds of consumers.²⁷

4 **C. Brand Image**

5 32. As noted above, brand image is the perception of the brand and all its connotations
6 in consumers' minds. Brand image is formed by associations that consumers have with the
7 brand; associations are the means by which consumers feel brands satisfy their needs and are
8 often the key sources of brand value.²⁸ Inherent in brand associations are the perceived meaning
9 of the brand in the minds of consumers. The stronger and more unique the brand identity, the
10 stronger are the brand associations and the brand image.²⁹ Brand associations form the building
11 blocks of consumers' attitudes or overall evaluations of a brand as well as a brand's image.

12 33. Consumers' attitudes towards the brand, in turn, lead to brand loyalty and brand
13 activity. Brand activity involves the extent to which the customers use the brand, talk to others
14 about it (*i.e.*, generate "word of mouth"), and seek out brand information.³⁰ Brand value is
15 created when consumers "have a high level of awareness; strong, favorable, and unique brand
16 associations; positive brand attitudes; intense brand attachment and loyalty; and high degree of
17 brand activity."³¹

18 34. Therefore, brand value—or brand equity as it is known in the marketing
19 discipline—is intrinsically tied to brand identity and brand association.³² The power and value of
20 a brand "lies in what customers have learned, felt, seen, and heard about the brand as a result of
21 their experiences over time."³³

22
23 ²⁷ Kevin Lane Keller, (1993), *Conceptualizing, Measuring, and Managing Customer-
Based Brand Equity*, 57 JOURNAL OF MARKETING 1-22 (1993) ("Keller (1993)").

24 ²⁸ Kevin Lane Keller & Donald R. Lehmann, *How Do Brands Create Value*, 12
MARKETING MANAGEMENT 26-31 (2003) ("Keller & Lehmann (2003)").

25 ²⁹ Keller (1993).

26 ³⁰ Keller & Lehmann (2003).

27 ³¹ Keller & Lehmann (2003).

28 ³² Marketers use the term brand equity to refer to the value of a brand
(http://www.marketingpower.com/_layouts/Dictionary.aspx?dLetter=B).

³³ Keller (2008) 48.

1 35. Unauthorized use of brand identity by a competitor reduces brand equity because it
2 dilutes the distinctiveness of the brand identity (from a company’s perspective) and blurs the
3 uniqueness of association (from a consumers’ perspective). Imitation of look and feel, for
4 example, attenuates brand association and reduces brand equity.

5 **D. Benefits of Strong Brands and Brand Equity**

6 36. The value of a brand is measured by its brand equity. Brand equity depends on
7 how well a company develops its brand identity and concomitantly how strong the brand
8 associations are in consumers’ minds. Therefore, brand loyalty, brand awareness, brand
9 associations, and a company’s proprietary assets determine brand equity.³⁴ Of course, the brand’s
10 proprietary assets inform each of the other three factors. A valuable brand (a brand whose brand
11 equity is high) confers enormous benefits to the owner of the brand. These benefits include
12 higher brand awareness in the market, increased marketing communication effectiveness, and
13 positive word-of-mouth created by loyal customers.³⁵ Strong brands also engender prestige and
14 emotional attachment.³⁶ Therefore, strong brands have a significant effect on the bottom-line of a
15 firm.

16 37. The profits generated by strong brands provide the firm with resources to make
17 investments in new products and increases their probability of success in the market.³⁷ In
18 particular, the firm can leverage a strong brand across products (*i.e.*, product line and product
19 category extensions) and markets (*i.e.*, new channels and geographic markets).³⁸

23 ³⁴ David A. Aaker, *Managing Brand Equity* 15-21 (New York, NY: The Free Press,
24 1991) (“Aaker (1991)”).

25 ³⁵ Winer & Dhar (2011) 179-180; Keller & Lehmann (2003); Steve Hoeffler & Kevin
26 Lane Keller, *The Marketing Advantages of Strong Brands*, 10 BRAND MANAGEMENT 421-445
(2003).

26 ³⁶ *See, e.g.*, Aaker (1991) 109-113; Keller (1993); Keller & Lehmann (2003).

27 ³⁷ Aaker (1991) 208-209.

28 ³⁸ Kevin Lane Keller & David R. Lehmann, *Brands and Branding: Research Findings
and Future Priorities*, 25 MARKETING SCIENCE 740-759 (2006).

1 **V. APPLE'S BRAND IS COMPELLING AND VERY STRONG**

2 **A. Apple's Compelling Brand Identity**

3 38. The Apple brand is one of the strongest in the world. This is because Apple has a
4 compelling brand identity. A significant contributor to Apple's compelling brand identity is the
5 look and feel of Apple's products:

6 Apple manages to celebrate creativity and self-expression while,
7 [sic] anticipating consumers' needs and wants and meeting those
8 needs with solutions that are noteworthy for their ease of use and
elegance of design.³⁹

9 39. Apple imbues its products with a look and feel that is an integral element of
10 Apple's brand identity and sets it apart from the rest of its competitors. Numerous articles,
11 technology websites, and marketing and branding consultancies have extolled Apple's look and
12 feel.⁴⁰ For example:

13 Apple's look is always simple and clean and the packaging for the
14 iPad is true to the brand. The art on the cover of the box is a life-
15 size photo of the product inside. No words, no sell copy. Since
16 this is exactly what the customer can't wait to get their hands on,
17 it's the perfect marketing message, building anticipation and
making the product the star. The only other art on the package is
18 the Apple logo and the product name on the sides of the box. The
19 product specs (16GB, 3G, etc.) and copyright are hidden on the
back at the bottom. Nothing gets in the way of the brand.⁴¹

20 ³⁹ "BrandZ Top 100: Most Valuable Global Brands 2010," *Millward Brown Optimor*, at
127.

21 ⁴⁰ See, e.g., "Apple iPhone CNET Editors' Rating," *CNET*, June 30, 2007
22 (http://reviews.cnet.com/smartphones/apple-iphone-16gb-at/4505-6452_7-32851722.html?tag=mncol;lst;1); "Apple's iPhone 4 Lives Up to All Expectations," *PC*
23 *World*, September 9, 2010; "Apple iPod Touch Flash-Based MP3 Player," *PC World*, March
24 21, 2008
25 (http://www.pcworld.com/article/143681/apple_ipod_touch_flashbased_mp3_player.html);
"Miller: Apple's iPad Pleases, But Is It Essential?" *PC Magazine*, April 5, 2010; "iPad 2
26 Review," *Engadget*, March 9, 2011 (www.engadget.com/2011/03/09/ipad-2-review/); "Best
27 Global Brands 2010," *Interbrand*, at 9; "BrandZ Top 100: Most Valuable Global Brands
28 2010," *Millward Brown Optimor*, at 127.

⁴¹ "Branding in the Package: Lessons from Apple's Master Marketers," *Gianfagna*
Strategic Marketing, May 21, 2010
(<http://www.gianfagnamarketing.com/blog/2010/05/21/branding-in-the-package-lessons-from-apples-master-marketers/>).

1 40. When the iPhone was introduced to the market, it was described as “unique,”
2 “cool,” and “sexy” by various industry insiders.⁴² For example, *PC Magazine* commented on its
3 first impressions of the iPhone as follows:

4 The first thing you notice when holding the iPhone is how slim it
5 is and how cool it feels in comparison to other smartphones, which
6 are boxy and often thick. . . . [T]he iPhone will become the gold
7 standard in smartphones, and likely give Apple at least a two-year
8 edge over the competition.”⁴³

9 41. Another article in *PC Magazine* explained that the two reasons the iPhone was
10 “hot” were the successful publicity conducted by Apple, and, more importantly, the uniqueness of
11 the iPhone itself:

12 Clearly, the iPhone is hot, but why? Two reasons, said Jen
13 O’Connell, author of “The Cell Phone Decoder Ring,” a book that
14 helps readers pick a cell phone. First, O’Connell recognizes the
15 power of the publicity machine at Apple, famous these days for its
16 Mac notebook computers and iPod music players. “They give just
17 enough information for people to freak out over it,” said
18 O’Connell, who credits the company as having enough reach to
19 touch her grandmother in Montana. . . . But O’Connell also
20 believes the hype around the iPhone is because of its uniqueness.
21 “This is nothing like anyone else has manufactured before,” she
22 said. “It looks cool and the way you interact with it is cool. I’m
23 drooling at the mouth to get one.”⁴⁴

24 42. *PC Magazine* also said that “[t]he iPhone 3G represents the birth of a new
25 computing platform. It’s also one very cool phone.”⁴⁵

26 43. *CNET News.com* commented that “the iPad is, more than any other product the
27 company has made, the quintessential Apple device.”⁴⁶

28 ⁴² “iPhone Hype Has Gadget Geeks Camping and Drooling,” *PC Magazine*, June 11,
29 2007; “Editor’s Letter: Bloggers, Welcome Aboard,” *InfoWorld Daily News*, June 25, 2007;
30 “I Tried an iPhone; A Chance Meeting Turns into a Rare Opportunity to Touch and Try This
31 One-of-a-Kind Apple Creation,” *PC Magazine*, June 28, 2007.

32 ⁴³ “First Impressions of the Apple iPhone; Steve Jobs Made Some Heady Claims About
33 the iPhone Back in January. Does the Actual Device Live Up to What He Told Us to
34 Expect?” *PC Magazine*, July 2, 2007.

35 ⁴⁴ “iPhone Hype Has Gadget Geeks Camping and Drooling,” *PC Magazine*, June 11,
36 2007.

37 ⁴⁵ “Apple iPhone 3G,” *PC Magazine*, July 11, 2008.

38 ⁴⁶ “iPad Unites Apple’s Media and Mobile Ambitions,” *CNET News.com*, January 28,
39 2010.

1 44. Industry observers have also commented on the link between Apple and the look
2 and feel of its various products. For instance, as the author of an article published in *eWEEK*,
3 described: “My first impression of the iPad when I took it out of the (beautifully packaged) box
4 and plugged it into my MacBook Pro was that it looked and felt like a really big iPod touch.”⁴⁷

5 45. Therefore, there is widespread recognition of the fact that the unique look and feel
6 of the iPhone, the iPad, and the iPod touch makes these products distinctive. This distinctiveness
7 goes to the heart of Apple’s brand identity.

8 46. At the core of brand association is the Apple product itself: how it works and how
9 it looks. According to *Interbrand*, a leading branding consultancy:

10 Apple is a brand that customers immediately understand. They
11 know what they get out of adopting and associating with it. Its
12 products are seen as innovative and creative. In contrast to Dell,
13 which creates products that lack any consistent visual cues,
 Apple’s design is consistent and distinctive – from the clean, silver
 [sic] or smooth white of its laptops to the pocket-size rectangle of
 its iPod or iPhone.⁴⁸

14 Central to the associations consumers form vis-à-vis Apple is its “painstaking attention to detail”
15 in developing the look and feel of Apple products.⁴⁹

16 **B. Apple’s Advertising Strategy**

17 47. Apple carefully promotes a single vision for the brand through its advertising and
18 follows a specific strategy. For instance, the primary focus in all Apple advertising is the product
19 itself. Sissie Twiggs (“Ms. Twiggs”), Apple’s Director of Worldwide Advertising, describes this
20 as “[t]he product is hero, front and center.”⁵⁰ While the advertising can highlight specific features
21 of the product, nothing upstages the product itself. According to Greg Joswiak (“Mr. Joswiak”),
22 Apple’s Vice President, iPhone, iPod and iOS Product Marketing, when Apple promotes its

23 ⁴⁷ “INSIDE MOBILE Becoming Part of the Apple iPad Generation,” *eWEEK*, April 7,
24 2010.

25 ⁴⁸ “Best Global Brands 2010,” *Interbrand*, at 9.

26 ⁴⁹ “Design Thinking and Innovation at Apple,” Harvard Business School Case Study
27 No: 9-609-066, revised March 4, 2010, APLNDC-Y0000134928-134940 at APLNDC-
28 Y0000134931.

29 ⁵⁰ Deposition of Sissie Twiggs on July 27, 2011 (“Twiggs Dep.”) 19:8-11, 97:1-25; *see*
30 *also* Deposition of Tamara Whiteside on February 28, 2012 (“Whiteside Dep.”) 33:24-35:4;
31 Deposition of Stanley Ng on February 21, 2012 (“Ng Dep.”), 64:3-18, 65:11-16.

1 products, the emphasis is on what the product looks like, its beauty, and its materials.⁵¹ Apple's
2 iPhone, iPad, and iPod touch marketing communications specifically identify the "product is
3 hero" approach as part of their guiding principles.⁵²

4 48. Apple is also selective about the choice of medium in which it advertises its
5 products. For example, the iPhone media guidelines specifically advise: that "across all media,
6 ensure quality of placement over cost or quantity."⁵³ Apple's new products are shown publicly
7 for the first time at its own product launch presentations. All of this is typically supported by
8 various television and print advertising campaigns,⁵⁴ outdoor advertising,⁵⁵ and online
9 advertising.⁵⁶ Following the "product is hero" approach, these advertisements prominently
10 feature the product and emphasize the appearance of the product. In addition, Apple pursues
11 product placement opportunities in feature films, talk shows, prime-time network television, and
12 parody news shows.⁵⁷ Apple's marketing programs are well integrated and carefully crafted and
13 implemented to resonate in the strongest possible way with consumers.

15 ⁵¹ Deposition of Greg Joswiak on February 23, 2012 ("Joswiak Dep.") 285:20-287:2.
16 Philip Schiller, Apple's Senior Vice President of Worldwide Product Marketing, states that
17 "[f]or example, when we create our website, one of the first things you'll see when you go
18 look at the iPhone is a beautiful photo of it because how it looks is really tantamount. I think
19 it's one of the most important things, that it's beautiful and the design is something unique
20 and distinctive, and we will show that." See Deposition of Philip Schiller on February 17,
21 2012, 121:16-22; Apple Inc. Schedule 14A filed January 9, 2012, at 16.

22 ⁵² See, e.g., APLNDC0002155318-2155322, at APLNDC0002155320;
23 APLNDC0002155335-2155338, at APLNDC0002155336; APLNDC0002008363-2008405,
24 at APLNDC0002008368-69, APLNDC0002008380; APLNDC0001327374-1327415, at
25 APLNDC0001327376; APLNDC0001335264-1335280, at APLNDC0001335266;
26 APLNDC0002203457-2203482, APLNDC0002203459, APLNDC0002203464; APLNDC-
27 Y0000236364-236370 at APLNDC-Y0000236368; APLNDC0001964084-1964099, at
28 APLNDC0001964087; APLNDC0002027210-2027226, at APLNDC0002027225.

⁵³ APLNDC-Y0000236364-236370 at APLNDC-Y0000236366.

⁵⁴ APLNDC0002190486-2190487; Joswiak Dep. 278:16-24, 279:10-13; Twiggs Dep.
29 25:3-26:13, 35:24-36:7, 38:5-8, 42:9-19.

⁵⁵ APLNDC0002190486-2190487 at APLNDC0002190487; APLNDC0001322875-
30 1323050; Joswiak Dep. 279:10-13; Twiggs Dep. 38:16-39:24, 40:12-23.

⁵⁶ Twiggs Dep. 44:10-13, 49:18-21.

⁵⁷ Deposition of Suzanne Lindbergh on February 28, 2012 ("Lindbergh Dep.") 15:3-
31 17:5. There are several other forms of marketing activity that Apple engages in such as direct
32 marketing sales, public relations, retail marketing, and marketing on Apple.com. See
33 Whiteside Dep. 27:11-18; Twiggs Dep. 50:7-51:1, 203:15, 204:2-7.

1 49. Apple’s product launch presentations, where Apple’s new products are unveiled
2 publicly for the first time, are major worldwide media events.⁵⁸ These events feature the products
3 prominently and generate a tremendous amount of buzz and excitement. For example, BMW’s
4 Chief Executive Officer, Norbert Reithofer, described the palpable public anticipation for the
5 iPad as follows: “[T]he whole world held its breath before the iPad was announced. That’s brand
6 management at its very best.”⁵⁹

7 50. The launch presentation is accompanied by a webpage prominently featuring the
8 product on Apple’s website and various in-store promotions and demonstrations at Apple retail
9 stores.⁶⁰ Apple then engages in a press tour, during which the company shares the product with
10 selected press members and allows these individuals to test and review the products themselves.⁶¹

11 51. As noted above, Apple advertises its products on various television programs.⁶²
12 The company targets specific television shows as opposed to targeting specific television
13 networks.⁶³ The iPhone media guidelines specify that, with respect to television programming,
14 the focus should be on quality programming and environment over ratings.⁶⁴ For example, ads
15 for the iPhone have aired during television programs such as *Late Show with David Letterman*,
16 *How I Met Your Mother*, *The Tonight Show with Jay Leno*, *Gossip Girl*, *NCIS*, *Modern Family*,
17 *So You Think You Can Dance?*, *Parks & Recreation*, *30 Rock*, *Vampire Diaries*, *Bones*, *Saturday*
18 *Night Live*, and *The Simpsons*.⁶⁵ The iPad marketing guidelines similarly state that “across all

19 ⁵⁸ A Harvard Business School case study describes these product launch events as
20 follows: “Products are not rolled out; they are presented to the public by Apple’s
21 management team in periodic extravaganzas” See “Design Thinking and Innovation at
22 Apple,” Harvard Business School Case Study No: 9-609-066, revised March 4, 2010,
APLNDC-Y0000134928-134940 at APLNDC-Y0000134937. See also Joswiak Dep. 277:23-
278:8.

23 ⁵⁹ “World’s Most Admired Companies 2010,” *Fortune Magazine*, available at
<http://money.cnn.com/magazines/fortune/mostadmired/2010/snapshots/670.html>.

24 ⁶⁰ Joswiak Dep. 279:7-279:22.

25 ⁶¹ Joswiak Dep. 278:9-15.

26 ⁶² See *supra* discussion ¶ 48.

27 ⁶³ Joswiak Dep. 295:14-16; Schiller Dep. 94:15-95:3; Twiggs Dep. 42:9-44:7;
Whiteside Dep. 137:1-138:6.

28 ⁶⁴ APLNDC-Y0000236364- 236370 at APLNDC-Y0000236366; see also
APLNDC0002155335-2155338 at APLNDC0002155336.

⁶⁵ See, e.g., APLNDC0001380378; APLNDC0001380392.

1 media, the focus should be on quality of the environment/placement over cost/quantity (e.g.,
2 focus on quality programming over ratings, position in break/title/page/etc.).”⁶⁶ Ads for the iPad
3 have aired during programming such as *Late Night with Jimmy Fallon*, *Glee*, *Modern Family*,
4 *Grey’s Anatomy*, *The Daily Show with Jon Stewart*, *Friday Night Lights*, *Two and a Half Men*,
5 *Hawaii Five-0*, *CSI*, and the NBA Playoffs,⁶⁷ and ads for the iPod touch have aired during
6 programming such as *Gossip Girl*, *Monday Night Football* on ESPN, *Vampire Diaries*, *Scrubs*,
7 *Smallville*, *Saturday Night Live*, college football games on ABC, and college basketball games on
8 CBS.⁶⁸ Furthermore, Apple’s ad campaign titled “There’s an App for That” won an Effie Award
9 in 2010 for effectiveness in marketing consumer electronics.⁶⁹

10 52. In its print advertising, Apple similarly follows a careful strategy.⁷⁰ The iPhone,
11 iPad, and iPod touch marketing guidelines specify that, with respect to print advertising, only
12 high-quality magazines within genres that are contextually relevant to the product and audience
13 should be targeted.⁷¹ For instance, an internal Apple marketing document for the iPhone
14 demonstrates Apple’s desire for the appropriate quality and context for its ads, explaining how a
15 creative titled “Apps in the city” feels out of place in *Newsweek* but fits in *The New Yorker*,
16 despite the quality of each publication’s reputation.⁷² For example, iPhone ads have run in
17 publications such as *The New York Times*, *USA Today*, *The Wall Street Journal*, *Newsweek*, *The*
18 *New Yorker*, *Time*, *The Economist*, *Sports Illustrated*, *The Week*, *Rolling Stone*, and *Food &*

20 ⁶⁶ APLNDC0002145596-APLNDC0002145612, at APLNDC0002145600,
21 APLNDC0002145602.

22 ⁶⁷ See, e.g., APLNDC0001380370; APLNDC0001380389; APLNDC-X0000021159.

23 ⁶⁸ See, e.g., APLNDC-X0000014538-14543; APLND-X0000014544-14549.

24 ⁶⁹ *2010 Effie Awards: Awarding Ideas that Work – The Winners*, 2010,
(http://www.effie.org/downloads/2010_Winners_List_with_trophy.pdf).

25 ⁷⁰ APLNDC0001335342-1335355.

26 ⁷¹ See APLNDC-Y0000236364-236370 at APLNDC-Y0000236367;
27 APLNDC0002145596-APLNDC0002145612, at APLNDC0002145604;
28 APLNDC0001327374-APLNDC0001327415, at APLNDC0001327412; see also
APLNDC0002194282-2194294 at APLNDC0002194286; APLNDC0002155335-2155338 at
APLNDC0002155337; Twigg Dep. 25:2-26:13, 31:1-24; APLNDC0002190486-2190487 at
APLNDC0002190487; APLNDC0001335342-1335355 at APLNDC0001335347.

⁷² APLNDC0001335342-1335355 at APLNDC0001335353.

1 Wine,⁷³ and iPad ads have run in publications such as *The New York Times*, *The Wall Street*
2 *Journal*, *Business Week*, *Fortune*, *Rolling Stone*, *Real Simple*, *Wired*, *Time*, *The Week*,
3 *Entertainment Weekly*, *The New Yorker*, and *Paper*.⁷⁴ In addition, Apple strategically places its
4 magazine advertisements only on back covers or inside the front cover (in the form of a spread),
5 which is consistent with its goal of putting the focus on the product.⁷⁵ Exhibits 4, 5, and 6 are
6 examples of print advertisement copies for different generations of the iPhone, the iPad, and the
7 iPod touch. As is evident in these exhibits, the trade dress elements at issue are often clearly
8 visible in Apple's advertisements for these products.⁷⁶

9 53. Apple also engages in outdoor advertising. This includes transit stops (such as bus
10 shelters or subway stops) and billboards.⁷⁷ Apple's strategy is to focus on high-traffic, high-
11 visibility spots for all of its outdoor advertising.⁷⁸ The iPhone and iPad marketing guidelines
12 specify to target top markets with a mix of large-format/mega-site and street-level units.⁷⁹ The
13 guidelines also recommend to "hand-pick locations as much as possible for clear line-of-site [sic]
14 and traffic considerations."⁸⁰

16 ⁷³ See, e.g., APLNDC-X0000019536; APLNDC-X0000015992; APLNDC-
X0000019858; APLNDC-X0000015016.

17 ⁷⁴ See, e.g., APLNDC-X0000030612; APLNDC-X0000026718-26736; APLNDC-
X0000030646.

18 ⁷⁵ Twiggs Dep. 89:22-25; Whiteside Dep. 52:12-15, 86:20-22, 87:2-5; APLNDC-
19 Y0000236364- 236370 at APLNDC-Y0000236367; APLNDC0001327374-1327415 at
APLNDC0001327412; APLNDC0002194282-2194294 at APLNDC0002194286.

20 ⁷⁶ Ms. Twiggs states in her deposition that, "Apple as a company comes from the design
21 of our products. It's the key to what makes our products distinctive, and that's something that
22 we live with every day, fortunately. . . . As I mention all the time, showing our product as
23 hero, with the design elements in the center of our advertising, is absolutely critical. And
probably like anyone with their own product, they like to show their product as it appears in
the best light possible. And we're fortunate with Apple products in that there are so many
gorgeous design elements to them, there's a lot to show off." See Twiggs Dep. 164:17-165:4.

24 ⁷⁷ See APLNDC0001322875-1323050 for Apple's permanent billboard locations across
the country as of 2012; see also Twiggs Dep. 38:16-39:12.

25 ⁷⁸ Twiggs Dep. 39:13-40:23.

26 ⁷⁹ See APLNDC-Y0000236364- 236370 at APLNDC-Y0000236367;
APLNDC0002145596-APLNDC0002145612, at APLNDC0002145605; see also
27 APLNDC0002155335-2155338 at APLNDC0002155337.

28 ⁸⁰ See APLNDC-Y0000236364- 236370 at APLNDC-Y0000236367; see also
APLNDC0002155335-2155338 at APLNDC0002155337; Twiggs Dep. 39:13-40:23.

1 54. In addition, Apple runs online advertisements for its iPhone, iPad, and iPod touch
2 products. Specifically, Apple uses two types of online advertising: search engine marketing
3 (“SEM”) and display advertising.⁸¹ The former category involves keyword advertising,⁸² and the
4 latter can take the form of advertisements on websites, but Apple does not do “a whole lot of
5 display advertising.”⁸³ The iPhone and iPad marketing guidelines specify that “[a]ll sites [for
6 online display. . . must be of high quality.”⁸⁴

7 55. Lastly, Apple engages in product placement. Product placement involves
8 placement of a firm’s products in different forms of media—such as television, movies, and
9 videogames—where the actors or characters are shown using brand-name products and services.⁸⁵
10 Suzanne Lindbergh (“Ms. Lindbergh”), Director of Buzz Marketing at Apple, states that Apple
11 places its products in talk shows, primetime network television, parody news shows, and feature
12 films.⁸⁶ Unlike most companies, Apple has a policy of not paying for product placement.⁸⁷ In
13 addition, Apple selectively gives away its products for free to key individuals such as
14 Stephen Colbert.⁸⁸

15 ⁸¹ Twiggs Dep. 44:10-13, 49:18-21.

16 ⁸² Twiggs Dep. 44:15-20.

17 ⁸³ Twiggs Dep. 47:1-3; *see, e.g.*, APLNDC-X000007734; APLNDC-X0000007686.

18 ⁸⁴ APLNDC0002145596-APLNDC0002145612, at APLNDC0002145606.

19 ⁸⁵ Winer & Dhar (2011) 30.

20 ⁸⁶ Lindbergh Dep. 9:20-24, 15:3-17:5.

21 ⁸⁷ “Many major marketers pay fees of \$50,000 to \$100,000 and even higher so that their
22 products can make cameo appearances in movies and television, with the exact fee depending
23 on the amount and nature of brand exposure.” *See* Keller (2008) 253. In contrast, Apple will
24 loan the product to the movie or TV program, but will not make a payment. *See* Lindbergh
25 Dep. 47:25-48:11; Joswiak Dep. 284:15-285:3; Whiteside Dep. 30:1-9.

26 ⁸⁸ Lindbergh Dep. 48:12-51:7; *The Colbert Report: Tribute to Steve Jobs*, Comedy
27 Central, October 6, 2011 ([http://www.colbertnation.com/the-colbert-report-
28 videos/399182/october-06-2011/tribute-to-steve-jobs](http://www.colbertnation.com/the-colbert-report-videos/399182/october-06-2011/tribute-to-steve-jobs)). Ms. Lindbergh uses the term
“influencers” to characterize these individuals. In marketing terminology, influencers are
those individuals who have an influence over potential buyers. Celebrities such as famous
athletes, actors, and television personalities are typically included in this category. *See*
American Marketing Association Dictionary, available at
http://www.marketingpower.com/_layouts/Dictionary.aspx?dLetter=B; J. Foxtan *Live Buzz
Marketing*, CONNECTED MARKETING: THE VIRAL, BUZZ AND WORD OF MOUTH REVOLUTION
24-46 (Justin Kirby and Paul Marsden, eds. Oxford, UK: Elsevier, 2006); S. Curran,
Changing the Game, CONNECTED MARKETING: THE VIRAL, BUZZ AND WORD OF MOUTH
REVOLUTION 129-147 (Justin Kirby and Paul Marsden, eds. Oxford, UK: Elsevier, 2006); S.

1 **C. Apple’s Investments in Advertising**

2 56. Apple invests enormous amounts of time, money, and effort to develop, promote,
3 and improve its brand identity. In 2003, Apple spent \$193 million on advertising alone.⁸⁹ By the
4 time Apple introduced the iPhone in 2007, its advertising expenditures increased to \$467
5 million.⁹⁰ Apple’s advertising expenses were almost a billion dollars in 2011 (\$933 million),⁹¹
6 and Apple is one of the 100 largest advertisers in the U.S.⁹² Much of this advertising involves the
7 products at issue. In its 2008 fiscal year, Apple spent almost \$98 million in the U.S. on iPhone
8 advertisements.⁹³ Apple’s advertising in the mobile phone market leads all other phone
9 manufacturers.⁹⁴ Apple’s U.S. advertising expenses for the iPhone increased to approximately
10 \$227 million in fiscal year 2011.⁹⁵ Since the iPhone’s introduction and through the first quarter
11 of its fiscal year 2012, Apple spent a total of \$747 million in the U.S. on iPhone advertisements.⁹⁶
12 Similarly, Apple’s U.S. advertising expenses for the iPad were approximately \$150 million and
13 \$308 million in fiscal years 2010 and 2011, respectively.⁹⁷ Since the iPad’s introduction and
14 through the first quarter of its fiscal year 2012, Apple spent a total of \$536 million in the U.S. on

15 Brown, *Buzz Marketing: the Next Chapter*, CONNECTED MARKETING: THE VIRAL, BUZZ AND
16 WORD OF MOUTH REVOLUTION 208-231 (Justin Kirby and Paul Marsden, eds., Oxford, UK:
17 Elsevier, 2006). The general idea is that when the influencers use these products in their
18 personal lives, their followers might notice the products. This can generate buzz, or strong
19 word-of-mouth, among potential users and lead to increased brand awareness and potentially
20 sales. See Winer & Dhar (2011) 30; S. Brown, *Buzz Marketing: the Next Chapter*,
21 CONNECTED MARKETING: THE VIRAL, BUZZ AND WORD OF MOUTH REVOLUTION 208-231
22 (Justin Kirby & Paul Marsden, eds. Oxford, UK: Elsevier, 2006).

23 ⁸⁹ Apple Computer, Inc. Form 10-K filed December 19, 2003, at 66.

24 ⁹⁰ Apple Inc. Form 10-K filed November 15, 2007, at 64, APLNDC-Y0000135409-
25 135576 at APLNDC-Y0000135476.

26 ⁹¹ Apple Inc. Form 10-K filed October 26, 2011, at 50, APLNDC-Y0000135683-
27 135789 at APLNDC-Y0000135734.

28 ⁹² “How Steve Jobs’ Apple Married Mass Marketing with Unabashed Creativity,”
29 *Advertising Age*, August 29, 2011 (<http://adage.com/article/news/steve-jobs-married-mass-marketing-unabashed-creativity/229487/>), APLNDC-Y0000134910-134911 at APLNDC-
30 Y0000134910.

31 ⁹³ APLNDC-Y0000051623.

32 ⁹⁴ See, e.g., OMD0000039 (phones); OMD0000076 (phones); OMD0000004 (tablets);
33 OMD0000011 (tablets).

34 ⁹⁵ APLNDC-Y0000051623.

35 ⁹⁶ APLNDC-Y0000051623.

36 ⁹⁷ APLNDC-Y0000051623.

1 iPad advertisements.⁹⁸ Apple's heavy investments to develop, promote, and improve its brand
2 identity have a concomitant effect on Apple's brand image and brand awareness in consumers'
3 minds.

4 **D. Third-Party Promotion of Apple's Products**

5 57. Consumers form associations with the Apple brand not only through Apple's own
6 advertising but also through independent channels. For instance, following their introductions,
7 Apple's iPhone and iPad products received widespread media coverage in the form of product
8 reviews in major newspapers and technology publications and websites. The products were also
9 featured on the covers of popular magazines and in popular media.

10 58. The iPhone was first announced publicly on January 9, 2007.⁹⁹ But as early as
11 August 2002, *The New York Times* had reported on rumors of an Apple mobile phone.¹⁰⁰ These
12 rumors continued up until the launch of the iPhone¹⁰¹ and Apple's actual announcement received
13 widespread media coverage. Major newspapers ran stories about the iPhone, many of which
14 featured images of the device.¹⁰² Television news programs such as *The Today Show* similarly
15 featured stories about the iPhone, prominently displaying images of the device.¹⁰³

17 ⁹⁸ APLNDC-Y0000051623.

18 ⁹⁹ "Apple Reinvents the Phone with iPhone," *Apple Inc. Press Release*, January 9, 2007
(<http://www.apple.com/pr/library/2007/01/09Apple-Reinvents-the-Phone-with-iPhone.html>).

19 ¹⁰⁰ "Apple's Chief in the Risky Land of the Handhelds," *N.Y. Times*, August 19, 2002
(<http://www.nytimes.com/2002/08/19/business/apple-s-chief-in-the-risky-land-of-the-handhelds.html?pagewanted=all&src=pm>).

21 ¹⁰¹ "Apple's Remarkable Comeback Story," *CNNMoney.com*, March 29, 2006
(http://money.cnn.com/2006/03/29/technology/apple_anniversary/index.htm); "Cool 2 Use:
22 The Gear Hunter: Intelligent Design: Since That First Call, Cell Phones Have Evolved,"
Newsday, April 4, 2006; "Apple Stock Hits New High on Analyst Optimism Over iPod,
23 Possible iPhone," *Associated Press Newswires*, November 21, 2006; "Expert View: We Want
the iPhone!" *PC Magazine*, November 29, 2006
24 (<http://www.pcmag.com/article2/0,2817,2066661,00.asp>).

25 ¹⁰² "Apple Unveils All-in-One iPhone," *S.F. Chronicle*, January 9, 2007; "Apple,
Hoping for Another iPod, Introduces Innovative Cellphone," *N.Y. Times*, January 10, 2007
26 (<http://query.nytimes.com/gst/fullpage.html?res=9C06E1DC1230F933A25752C0A9619C8B63&pagewanted=all>); "Apple Unveils All-in-One iPhone," *USA Today*, January 10, 2007;
27 "Apple Storms Cellphone Field," *Wall St. Journal*, January 10, 2007; "Apple's iPhone: Is It
Worth It?" *Wall St. Journal*, January 10, 2007.

28 ¹⁰³ *The Today Show*, NBC, No Date, APLNDC-X0000358382.

1 59. The iPhone continued to be the subject of press in the five-month period between
2 its announcement and release. Nielsen BuzzMetrics reported that the iPhone was “riding an
3 unprecedented wave of pre-launch conversation,” as there were more than 1.79 million unique
4 visitors to the iPhone website in January 2007 coupled with 870,000 searches for the keyword
5 “iPhone.”¹⁰⁴ Survey results released by M: Metrics on June 15, 2007 found that consumer
6 awareness of the iPhone was high, as 64% of American mobile phone users were aware of the
7 product.¹⁰⁵ In addition, an April 2007 survey by ChangeWave Research showed that 26% of
8 those likely to buy an advanced mobile phone in the next three months were planning to purchase
9 the iPhone.¹⁰⁶ Many news articles discussing the iPhone’s upcoming release included
10 photographs of the phone, often turned on to display the device’s homescreen.¹⁰⁷

11 60. Much hype surrounded the launch of the iPhone itself. According to news reports,
12 people lined up outside the Apple store on Fifth Avenue in New York at least two days before the
13 product went on sale.¹⁰⁸ In the days leading up to and immediately following its release, the
14 iPhone was the subject of product reviews in major publications.¹⁰⁹

15 ¹⁰⁴ “Unprecedented Pre-Launch Buzz Sets High Expectations for iPhone Sales and
16 Satisfaction, Nielsen BuzzMetrics Reports,” *Nielsen BuzzMetrics Press Release*, June 25,
17 2007 (<http://www.marketwire.com/press-release/unprecedented-pre-launch-buzz-sets-high-expectations-iphone-sales-satisfaction-nielsen-745783.htm>).

18 ¹⁰⁵ “M:Metrics: High Awareness, Strong Demand for iPhone Among British and
19 American Mobile Phone Users,” *M:Metrics Press Release via Marketwire News Releases*,
20 June 15, 2007 (<http://finance.boston.com/boston/news/read/2343970/m>).

21 ¹⁰⁶ “Apple iPhone is Top Choice Among Smart-Phone Buyers (Update 1),”
22 *Bloomberg.com*, June 22, 2007
23 (<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVXpexoVPuIg&refer=canada>).

24 ¹⁰⁷ “Apple Buffs Marketing Savvy to a High Shine,” *USA Today*, March 9, 2007
25 (http://www.usatoday.com/tech/techinvestor/industry/2007-03-08-apple-marketing_N.htm);
26 “Cellphone Users Set Their Sights on Apple’s iPhone,” *USA Today*, March 16, 2007
27 (http://www.usatoday.com/tech/products/2007-03-14-cellphone-contracts-iphone_N.htm);
28 “Apple Earnings Only Expected to Grow,” *USA Today*, April 27, 2007
29 (http://www.usatoday.com/tech/techinvestor/corporatenews/2007-04-26-apple-profits_N.htm); “The Informed Reader,” *Wall St. Journal*, May 28, 2007; “Fever Builds for iPhone (Anxiety Too),” *N.Y. Times*, June 4, 2007
30 (<http://www.nytimes.com/2007/06/04/technology/04iphone.html>); “iPhone Set for June 29 Debut,” *USA Today*, June 5, 2007.

31 ¹⁰⁸ See, e.g., “Waiting for the Latest in Wizardry,” *N.Y. Times*, June 27, 2007
32 (<http://www.nytimes.com/2007/06/27/technology/27apple.html>); “iPhone Notebook: People
33 Starting to Fall in Line,” *S.F. Chronicle*, June 28, 2007 (<http://www.sfgate.com/cgi->

1 61. This media coverage often highlighted the distinctive look and feel of the iPhone.
2 Just a few days after the product was announced, David Pogue of *The New York Times* published
3 a “preview” of the product, stating: “As you’d expect of Apple, the iPhone is gorgeous. Its face
4 is shiny black, rimmed by mirror-finish stainless steel. The back is textured aluminum”¹¹⁰
5 Similarly, *Time* magazine described the iPhone as “a typical piece of Ive¹¹¹ design”¹¹² *The*
6 *New York Times* observed that “[t]he iPhone races straight ahead of the pack on aesthetics by
7 looking and feeling gorgeous,”¹¹³ and stated that “Apple is hoping that the distinctive design of
8 the iPhone will disrupt and even re-invent the concept of the mobile handset in the United States
9 and worldwide.”¹¹⁴

10 62. To top off this enormous amount of publicity for the original iPhone, *Time*
11 magazine named the iPhone the “Invention of the Year” for 2007, displaying color images of the
12 phone on the cover of the magazine as well as with the accompanying story, which identified
13
14

15 bin/article.cgi?f=/c/a/2007/06/28/BUG80QN2E01.DTL&ao=all); “Even Apple’s Co-Founder
16 Is Standing in Line for an iPhone,” *S.F. Chronicle*, June 29, 2007 ([http://www.sfgate.com/cgi-](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/29/BAGJNQOEBO4.DTL)
17 [bin/article.cgi?f=/c/a/2007/06/29/BAGJNQOEBO4.DTL](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/29/BAGJNQOEBO4.DTL)); “Gave Up Sleep and Maybe a
18 First-Born, but at Least I Have an iPhone,” *N.Y. Times*, June 30, 2007
19 (<http://www.nytimes.com/2007/06/30/technology/30phone.html>); “Wait ‘Worth It,’ But
Unnecessary,” *S.F. Chronicle*, June 30, 2007 ([http://www.sfgate.com/cgi-](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/30/MNGSCQOVMT1.DTL)
[bin/article.cgi?f=/c/a/2007/06/30/MNGSCQOVMT1.DTL](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/30/MNGSCQOVMT1.DTL)).

20 ¹⁰⁹ “Testing Out the iPhone,” *Wall St. Journal*, June 27, 2007
21 (<http://online.wsj.com/article/SB118289311361649057.html>); “The iPhone Matches Most of
22 Its Hype,” *N.Y. Times*, June 27, 2007
23 (http://www.nytimes.com/2007/06/27/technology/circuits/27pogue.html?_r=1); “Apple’s
iPhone Isn’t Perfect, but It’s Worthy of the Hype,” *USA Today*, June 27, 2007
24 ([http://www.usatoday.com/tech/columnist/edwardbaig/2007-06-26-iphone-](http://www.usatoday.com/tech/columnist/edwardbaig/2007-06-26-iphone-review_N.htm?loc=interstitialskip)
[review_N.htm?loc=interstitialskip](http://www.usatoday.com/tech/columnist/edwardbaig/2007-06-26-iphone-review_N.htm?loc=interstitialskip)).

25 ¹¹⁰ “Apple Waves its Wand at the Phone,” *N.Y. Times*, January 11, 2007
26 (<http://www.nytimes.com/2007/01/11/technology/11pogue.html?pagewanted=all>).

27 ¹¹¹ Jonathan Ive is the Senior Vice President of Apple’s Industrial Design group
28 (<http://www.apple.com/pr/bios/jonathan-ive.html>).

29 ¹¹² “Apple’s New Calling: The iPhone,” *Time*, January 10, 2007
30 (<http://www.time.com/time/business/article/0,8599,1575743,00.html>).

31 ¹¹³ “Does the iPhone Have ‘It’? Early Signs Are Good,” *N.Y. Times*, June 24, 2007
32 (<http://www.nytimes.com/2007/06/22/style/22iht-design25.1.6284070.html>).

33 ¹¹⁴ “Science/Technology: iPhone Launch,” *N.Y. Times*, June 28, 2007.

1 “The iPhone is pretty” as the number one reason that the device “is still the best thing invented
2 this year.”¹¹⁵

3 63. The release of subsequent generations of the iPhone similarly received extensive
4 media coverage. Crowds lined up outside the Moscone Center in San Francisco in anticipation of
5 the rumored unveiling of the iPhone 3G at the Apple Worldwide Developer Conference.¹¹⁶ Major
6 news sources aired or printed high-profile reviews of the iPhone 3G,¹¹⁷ and people again lined up
7 outside Apple stores a day in advance to purchase the device.¹¹⁸ Similar media coverage
8 accompanied the announcement and release of the iPhone 3GS¹¹⁹ and the iPhone 4.¹²⁰ The
9 announcement that the iPhone 4 would be available on Verizon also received significant press.¹²¹

11 ¹¹⁵ “Invention of the Year: the iPhone,” *Time*, November 1, 2007
12 (http://www.time.com/time/specials/2007/article/0,28804,1677329_1678542_1677891,00.htm
13 l). *Time* magazine featured the iPhone on its cover again in its June 15, 2009 issue on Twitter.
14 See *Time*, June 15, 2009.

15 ¹¹⁶ *KGO SF News at 11AM*, ABC 7, June 9, 2008, APLNDC-X0000358416; “Jobs
16 Expected to Ring in Apple’s New iPhone,” *S.F. Chronicle*, June 9, 2008.

17 ¹¹⁷ *Squawk on the Street*, CNBC, No Date, APLNDC-X0000358459; *All Things Digital*,
18 Fox Business, No Date, APLNDC-X0000358463; “Apple’s New iPhone 3G: Still Not
19 Perfect, but Really Close,” *USA Today*, July 10, 2008; “For iPhone, the ‘New Is Relative,’”
20 *N.Y. Times*, July 9, 2008; “Newer, Faster, Cheaper iPhone 3G,” *Wall St. Journal*, July 9,
21 2008.

22 ¹¹⁸ *WBZ News at 6*, CBS, No Date, APLNDC-X0000358467; *News 4 Midday*, NBC 4,
23 No Date, APLNDC-X0000358475; *First @ Four*, NBC 5, No Date, APLNDC-
24 X0000358478; NBC 4 New York, No Date, APLNDC-X0000358480; *KMBC-TV 9 News*,
25 ABC, No Date, APLNDC-X0000358484; *SF 7 Morning News*, ABC, July 11, 2008,
26 APLNDC-X0000358486; CNN, No Date, APLNDC-X0000358505; *Entertainment Tonight*,
27 KRON, July 11, 2008, APLNDC-X0000358507.

28 ¹¹⁹ See, e.g., “iPhone Stars in Apple Show, Supported by Software,” *N.Y. Times*, June 8,
2009; “Apple Unveils Faster iPhone with New Features,” *S.F. Chronicle*, June 9, 2009;
“iPhone 3G S [sic] Cements Apple’s Place at the Top,” *S.F. Chronicle*, June 20, 2009;
Evening News with Katie Couric, CBS, June 8, 2009, APLNDC-X0000358800; *The Kudlow*
Report, CNBC, June 8, 2009, APLNDC-X0000358801; *HLN News*, CNNH, June 8, 2009,
APLNDC-X0000358805; *FOX 25 News at 5*, Fox Boston, June 8, 2009, APLNDC-
X0000358809; *KTVU Channel 2 News at 5*, Fox San Francisco, June 8, 2009, APLNDC-
X0000358811; *ABC 7 Morning News*, ABC San Francisco, June 9, 2009, APLNDC-
X0000358815; *The Early Show*, CBS, June 9, 2009, APLNDC-X0000358816; *ABC Tech*
Bytes, ABC, June 18, 2009, APLNDC-X0000358838; *Worldwide Exchange*, CNBC, June 19,
2009, APLNDC-X0000358864; *Fox Business*, Fox Business Network, June 19, 2009,
APLNDC-X0000358868; *Nightly Business News*, PBS, June 19, 2009, APLNDC-
X0000358869; *CBS4 News at 5PM*, Miami – CBS, June 19, 2009, APLNDC-X0000358876;
WGN Morning News, Chicago – CW, June 19, 2009, APLNDC-X0000358877; *American*
Morning, CNN, June 19, 2009, APLNDC-X0000358880.

1 64. The different generations of the iPhone have also appeared in various forms of
2 popular media. For instance, late-night comedy shows such as *Saturday Night Live*¹²² and *Late*
3 *Night with Conan O'Brien*¹²³ ran parody skits about the original iPhone; episodes of *The Tonight*
4 *Show with Jay Leno*¹²⁴ and *The Colbert Report*¹²⁵ referenced the release of the iPhone 3G; Jimmy
5 Fallon joked about the announcement of the iPhone 3GS on *Late Night with Jimmy Fallon*¹²⁶ and
6 interviewed the editor of *Engadget* about that device;¹²⁷ and David Letterman referenced the
7 iPhone 4 on an episode of *Late Night with David Letterman*.¹²⁸ Various television programs have
8 also included segments that do not explicitly focus on the iPhone yet nonetheless feature the
9 product.¹²⁹

10 65. In part because of its distinctive look and feel, which includes the trade dress at
11 issue, Apple's iPhone has been among the most commercially successful products in the world.
12 After the first iPhone shipped in June 2007, Apple sold one million units in 74 days.¹³⁰
13 Additionally, within three days of launching the iPhone 3G and iPhone 3GS respectively, Apple
14 sold more than one million units of each.¹³¹ Apple sold more than 1.7 million iPhone 4 units in

16 ¹²⁰ "Apple's iPhone 4 Makes its Official Premiere," *San Francisco Chronicle*, June 8,
17 2010; "Apple iPhone 4 Review: No, You Can't Touch It," *Time*, June 28, 2010; ABC News,
18 No Date, APLNDC-X0000359801; ABC7, No Date, APLNDC-X0000359813; ABC7, No
19 Date, APLNDC-X0000359816; APLNDC-X0000359879; *What the Tech?*, NBC 10, No Date,
20 APLNDC-X0000359832; CNN, No Date, APLNDC-X0000359930; Fox 5, No Date,
21 APLNDC-X0000359935; "Huge Lines to Pick Up New iPhone," *San Francisco Chronicle*,
22 June 25, 2010.

23 ¹²¹ See, e.g., "Everything You Need to Know About the Verizon iPhone 4," *Time*,
24 January 11, 2011.

25 ¹²² *Saturday Night Live*, NBC, No Date, APLNDC-X0000358383.

26 ¹²³ APLNDC-X0000358381.

27 ¹²⁴ APLNDC-X0000358444.

28 ¹²⁵ APLNDC-X0000358450.

¹²⁶ APLNDC-X0000358806.

¹²⁷ APLNDC-X0000358835.

¹²⁸ APLNDC-X0000359840.

¹²⁹ APLNDC-X0000358408; APLNDC-X0000358621.

¹³⁰ "Apple Sells One Millionth iPhone," *Apple Inc. Press Release*, September 10, 2007
(<http://www.apple.com/pr/library/2007/09/10Apple-Sells-One-Millionth-iPhone.html>).

¹³¹ "Apple Sells One Million iPhone 3Gs in First Weekend," *Apple Inc. Press Release*,
July 14, 2008 (<http://www.apple.com/pr/library/2008/07/14Apple-Sells-One-Million-iPhone-3Gs-in-First-Weekend.html>); "Apple Sells Over One Million iPhone 3GS Models," *Apple Inc.*

1 the three days following its launch.¹³² In fiscal year 2011 alone, Apple recorded more than \$47
2 billion in net sales revenue for the iPhone and related products and services.¹³³

3 66. An RBC Capital Markets analyst report commented that: “Apple’s iPhone in
4 June 2007 disruptively raised the standard for a new kind of smartphone design and user
5 experience, breaking sales launch records, sparking competitive responses, and defying accepted
6 conventions.”¹³⁴

7 67. Similarly, the announcement that Apple was going to introduce a tablet
8 computer¹³⁵ and the formal launch of the iPad was extensively covered in the press.¹³⁶ Major
9 newspapers and magazines—including *The New York Times*, *The Wall Street Journal*, *Chicago*
10 *Tribune*, *The Washington Post*, *USA Today*, *Mercury News*, and *Time*—ran reviews of the iPad,
11 many of which included photographs of the product.¹³⁷

12 *Press Release*, June 22, 2009 ([http://www.apple.com/pr/library/2009/06/22Apple-Sells-Over-](http://www.apple.com/pr/library/2009/06/22Apple-Sells-Over-One-Million-iPhone-3GS-Models.html)
13 [One-Million-iPhone-3GS-Models.html](http://www.apple.com/pr/library/2009/06/22Apple-Sells-Over-One-Million-iPhone-3GS-Models.html)).

14 ¹³² “iPhone 4 Sales Top 1.7 Million,” *Apple Inc. Press Release*, June 28, 2010
(<http://www.apple.com/pr/library/2010/06/28iPhone-4-Sales-Top-1-7-Million.html>).

15 ¹³³ Apple Inc. Form 10-K filed October 26, 2011, at 30, APLNDC-Y0000135683-
16 135789 at APLNDC-Y0000135714.

17 ¹³⁴ “Wireless Industry Sizing the Global Smartphone Market,” RBC Capital Markets,
18 November 12, 2008, APL-ITC796-0000458644-458703 at APL-ITC796-0000458649.

19 ¹³⁵ “With Its Tablet, Apple Blurs Line Between Devices,” *N.Y. Times*, January 27, 2010
(<http://www.nytimes.com/2010/01/28/technology/companies/28apple.html>); “Apple Takes
20 Big Gamble on New iPad,” *Wall St. Journal*, January 25, 2010
(<http://online.wsj.com/article/SB10001424052748704094304575029230041284668.html>);
21 WBZ, No Date, APLNDC-X0000359282; *Big Apple*, WSVN, No Date, APLNDC-
22 X0000359423; *Top Stories*, CNN, No Date, APLNDC-X0000359585.

23 ¹³⁶ See, e.g., “The iPad’s Big Day,” *N.Y. Times* blog entry, April 3, 2010
(<http://bits.blogs.nytimes.com/2010/04/03/live-blogging-the-ipads-big-day/>); “Buzz Powers
24 iPad Launch, but Will It Be Enough?,” *Wall St. Journal*, April 3, 2010; “Fans Snap Up iPads
25 After Waiting Overnight,” *S.F. Chronicle*, April 4, 2010; “For iPad, Lines but No Shortage,”
26 *Wall St. Journal*, April 5, 2010; *The iPad Is Here: First Look at New Technology*, ABC
27 Good Morning America, No Date, APLNDC-X0000359615.

28 ¹³⁷ “Looking at the iPad From Two Angles,” *N.Y. Times*, March 31, 2010
(<http://www.nytimes.com/2010/04/01/technology/personaltech/01pogue.html>); “Laptop
29 Killer? Pretty Close,” *Wall St. Journal*, April 1, 2010
(<http://online.wsj.com/article/SB10001424052702304252704575155982711410678.html>);
30 “iPad Envy . . . and Hope,” *Chicago Tribune*, April 2, 2010
([http://articles.chicagotribune.com/2010-04-02/news/ct-edit-ipad-20100402_1_ipad-apple-
32 chief-steve-jobs-tablet](http://articles.chicagotribune.com/2010-04-02/news/ct-edit-ipad-20100402_1_ipad-apple-
31 chief-steve-jobs-tablet)); “Apple’s iPad: First Impressions,” *Wash. Post*, April 3, 2010
(http://voices.washingtonpost.com/fasterforward/2010/04/apples_ipad_first_impressions.html
33); Verdict Is in on Apple iPad: It’s a Winner,” *USA Today*, April 2, 2010

1 68. Major magazines also featured the iPad prominently on their cover pages. For
2 instance, *The Economist* featured an image of Steve Jobs holding the iPad prominently on the
3 cover of the January 28, 2010 issue.¹³⁸ And *Newsweek*'s April 5, 2010 issue entitled "What Is So
4 Great About the iPad? Everything." also featured the iPad prominently.¹³⁹

5 69. Furthermore, countless celebrities have been photographed with an iPad, such that
6 it has become "Hollywood's most buzzed about piece of arm candy."¹⁴⁰ And ABC's hit
7 television comedy *Modern Family* had an episode in which one of the primary stories was a main
8 character's attempts to obtain an iPad the day it was released.¹⁴¹ Oprah Winfrey also named the
9 iPad one of her "Ultimate Favorite Things."¹⁴²

10 70. The iPad has also been enormously successful. On the first day of iPad sales
11 alone, Apple sold over 300,000 units.¹⁴³ Within a month, Apple had sold one million devices,¹⁴⁴

15 (http://www.usatoday.com/tech/columnist/edwardbaig/2010-03-31-apple-ipad-review_N.htm); "Curious Customers in Marin Snap Up iPads," *Mercury News*, April 3, 2010
16 (http://www.mercurynews.com/ci_14817081); "Do We Need the iPad?" *Time*, April 1, 2010
17 (<http://www.time.com/time/magazine/article/0,9171,1977106,00.html>).

18 ¹³⁸ The Book of Jobs: Hope, Hype and Apple's iPad, *The Economist*, January 30-
19 February 5, 2010.

20 ¹³⁹ *Newsweek*, April 5, 2010 issue titled "What Is So Great About the iPad?
21 Everything."

22 ¹⁴⁰ "Celebrities Who Love the iPad," *Forbes.com*, June 22, 2010
23 (<http://www.forbes.com/2010/06/22/ipad-cyrus-bieber-technology-celebrities.html>).

24 ¹⁴¹ "iPad Gets Star Turn in Television Comedy," *Wall St. Journal*, April 2, 2010.

25 ¹⁴² "Oprah's Ultimate Favorite Things 2010," *The Oprah Winfrey Show*, November 19,
26 2010 (<http://www.oprah.com/oprahshow/Oprahs-Ultimate-Favorite-Things-2010/2>).

27 ¹⁴³ Apple Sells Over 300,000 iPads First Day," *Apple Inc. Press Release*, April 5, 2010
28 (<http://www.apple.com/pr/library/2010/04/05Apple-Sells-Over-300-000-iPads-First-Day.html>).

¹⁴⁴ "Apple Sells One Million iPads," *Apple Inc. Press Release*, May 3, 2010
(<http://www.apple.com/pr/library/2010/05/03Apple-Sells-One-Million-iPads.html>).

1 and it hit the two million and three million marks within 60 days¹⁴⁵ and in 80 days,¹⁴⁶
2 respectively. During the first quarter of fiscal year 2012, Apple sold 15.43 million iPads.¹⁴⁷

3 **E. Impact of Advertising on Consumers**

4 71. Apple's products have been widely advertised through Apple's own advertising as
5 well as through independent channels. Such advertising has a substantial impact on consumers'
6 purchase decisions, as demonstrated by several market research studies by Apple. For instance, a
7 2010 iPad Buyer Survey study concludes that "[a]ds triggered the desire to own an iPad, while the
8 product features such as being portable/lightweight, Wi-Fi capable, and easy to use were the
9 hooks."¹⁴⁸ In particular, when the surveyed buyers in the U.S. were asked what triggered their
10 decision to acquire an iPad, 44% indicated that they saw the ads and wanted to try the product.¹⁴⁹
11 Similarly, other iPad Tracking Studies conducted in 2010 show that iPad ads were important in
12 triggering the purchase decisions of U.S. buyers.¹⁵⁰

13 72. To summarize: In my opinion, what is noteworthy about Apple's brand identity is
14 that the core strategy focuses on the product itself and its aesthetic presentation to consumers.
15 Apple's brand image is closely tied to the look and feel of the products at issue. This look and
16 feel is distinctive and there is an enormous amount of external validity that it is unique and
17 famous. Therefore, not only have consumers developed brand associations toward the look and
18

19 ¹⁴⁵ "Apple Sells Two Million iPads in Less Than 60 Days," *Apple Inc. Press Release*,
20 May 31, 2010 (<http://www.apple.com/pr/library/2010/05/31Apple-Sells-Two-Million-iPads-in-Less-Than-60-Days.html>).

21 ¹⁴⁶ "Apple Sells Three Million iPads in 80 Days," *Apple Inc. Press Release*, June 22,
22 2010 (<http://www.apple.com/pr/library/2010/06/22Apple-Sells-Three-Million-iPads-in-80-Days.html>).

23 ¹⁴⁷ "Apple Reports First Quarter Results," *Apple Inc. Press Release*, January 24, 2012
(<http://www.apple.com/pr/library/2012/01/24Apple-Reports-First-Quarter-Results.html>).

24 ¹⁴⁸ See APLNDC-Y0000023361-23427 at APLNDC-Y0000023362-23363, APLNDC-
Y0000023384.

25 ¹⁴⁹ See APLNDC-Y0000023361-23427 at APLNDC-Y0000023363, APLNDC-
Y0000023385.

26 ¹⁵⁰ See APLNDC-Y0000023428-23578, at APLNDC-Y0000023485 (indicating 22% of
27 U.S. buyers were influenced by ads); APLNDC-Y0000023579-23729 at APLNDC-
Y0000023636 (indicating 23% of U.S. buyers were influenced by ads); APLNDC-
28 Y0000023730-23907, at APLNDC-Y0000023806 (indicating 24% of U.S. buyers were
influenced by the ads).

1 feel of Apple products by experiencing them personally but also by experiencing them via media.
2 In my view, the importance of external validity cannot be overstated; they provide additional,
3 accretive cues with respect to what makes Apple's look and feel distinctive.

4 **VI. APPLE'S BRAND EQUITY IS AMONG THE HIGHEST IN THE WORLD**

5 73. According to *Fortune*:

6 What makes Apple so admired? Product, product, product. This
7 is the company that changed the way we do everything from buy
8 music to design products to engage with the world around us. Its
9 track record for innovation and fierce consumer loyalty translates
10 into tremendous respect across business' highest ranks.¹⁵¹

11 74. At the heart of Apple's products is look and feel. Marc Gobé, president of
12 Emotional Branding, LLC and former CEO of Brandimage (one of the top branding firms in the
13 world), had this to say about Apple:

14 Good design *is* courageous. But apart from its aesthetic value,
15 let's not forget that it represents a long-term investment that can
16 increase a company's value tenfold and over. Can anyone dispute
17 that...Apple's turnaround is design driven?¹⁵²

18 75. Apple's brand rankings and brand value increased significantly since the
19 introduction of the iPhone in 2007, and Apple is now among the top most valuable brands in the
20 world. The increase in Apple's brand value has been attributed, in particular, to the successes of
21 the iPhone and the iPad.

22 76. According to *Millward Brown Optimor's BrandZ* rankings, Apple was the world's
23 most valuable brand in 2011. Since the introduction of the iPhone in 2007, Apple's ranking has
24 increased from number 16 to number 1, while its brand value has increased from \$24.7 billion to
25 \$153.3 billion.¹⁵³ BrandZ has attributed the increase in brand value and ranking to, in part, the
26 iPhone and the iPad:

27 ¹⁵¹ "World's Most Admired Companies 2010," *Fortune*, available at
28 <http://money.cnn.com/magazines/fortune/mostadmired/2010/snapshots/670.html>.

¹⁵² M. Gobé, *Emotional Branding: The New Paradigm for Connecting Brands to People*
119 (New York, NY: Allworth Press, 2009).

¹⁵³ "BrandZ Top 100: Most Valuable Global Brands 2007," *Millward Brown Optimor*,
at 10; "BrandZ Top 100: Most Valuable Global Brands 2011," *Millward Brown Optimor*, at
13.

1 [Apple] earned an 84 percent increase in brand value with
2 successful iterations of existing products like the iPhone, creation
3 of the tablet category with iPad, and anticipation of a broadened
4 strategy making the brand a trifecta of cloud computing, software,
5 and innovative, well-designed devices. ... At the start of last year,
6 few people fretted that their lives felt bereft of a digital gadget
7 smaller than their laptop but larger than their mobile phone. By
8 the end of 2010, however, around 18 million of us owned iPads or
9 other tablets. Apple understood that its customers wanted access
10 to data and images anywhere, anytime, in easy-to-view definition
11 with an easy-to-use touch interface. In a span of a few months, the
12 brand met these needs with the iPad and iPhone 4. Apple trusted
13 that its customers would discover uses for these products that
14 would help organize, simplify or complicate, but mostly improve
15 their lives. This cocreation approach resulted in roughly 350,000
16 Apple apps, and it added value to the product and the brand. ...
17 Apple continued quietly developing a cloud and loudly discovered
18 an empty space in the computing category that it filled with a new
19 device – the iPad.¹⁵⁴

20 77. Similarly in 2010, *Millward Brown Optimor* increased its assessment of Apple’s
21 brand value by 32 percent from the previous year, while stating that

22 [T]his increase is a tribute to the company’s ability to transform
23 itself from an electronics manufacturer into a brand that is central
24 to people’s lives. Apple manages to celebrate creativity and self-
25 expression while, [sic] anticipating consumers’ needs and wants
26 and meeting those needs with solutions that are noteworthy for
27 their ease of use and elegance of design. Apple benefited
28 specifically from the popularity of the iPhone, its 100,000 apps,
and anticipation for the iPad.¹⁵⁵

29 78. From 2007 to 2011, *Interbrand* increased the ranking of Apple’s brand from
30 number 33 to number 8. During the same time period, the value of Apple’s brand as calculated
31 by *Interbrand* increased from \$11.037 billion to \$33.492 billion.¹⁵⁶ Like *BrandZ*, *Interbrand*
32 linked the success of the iPhone and iPad products to the increase in Apple’s brand value and
33 rankings. In 2008, the *Interbrand* report stated:

34 Can anything slow the ascent of Apple? Its ability to identify new
35 customer needs and deliver products of beautiful simplicity and

36 ¹⁵⁴ “BrandZ Top 100: Most Valuable Global Brands 2011,” *Millward Brown Optimor*,
37 at 16, 48, 83.

38 ¹⁵⁵ “BrandZ Top 100: Most Valuable Global Brands 2010,” *Millward Brown Optimor*,
39 at 127.

40 ¹⁵⁶ “Best Global Brands 2007,” *Interbrand*, (<http://www.interbrand.com/en/best-global-brands/best-global-brands-2008/best-global-brands-2007.aspx>); “Best Global Brands 2011,”
41 *Interbrand*, at 20.

1 desirability continue to put it in a league of its own. The latest
2 iPods, iPhone and MacBook Air strike the perfect balance between
coolness and mass appeal¹⁵⁷

3 79. *Interbrand's* 2011 report further underlined the importance of the iPhone and iPad
4 products to the Apple brand:

5 Setting the bar high in its category and beyond, Apple is the icon
6 for great branding meeting great technology to deliver a unique
overall experience, making its giant leap from #17 to #8 in the
7 rankings less than surprising. Consumers continue to follow its
product launches with anticipation and are quick to integrate its
8 sleek products into their lifestyles. Continuing its wave of first-to-
market products, Apple launched the iPad in 2010 creating the
9 new tablet category in the process. Since its launch, young and
old alike have embraced it as a tool, with organizations from
10 education to health to sales coming on board as well. Apple has
even implemented the iPad in its innovative retail spaces as a
11 service tool for customers as they wait in line.¹⁵⁸

12 80. Apple makes the most of the success of the iPhone and iPad to increase its brand
13 value by using what the company calls “logo lockup.” All of Apple’s advertisements for the
14 iPhone and iPad feature the Apple icon next to the name of the product in the ad.¹⁵⁹ According to
15 Ms. Twiggs, this technique allows advertisers to “[lock] . . . two things together, a logo plus
16 something else [such as a company name or product name].”¹⁶⁰ In this instance, the use of the
17 logo “locks” the iPhone and the iPad to the Apple brand. Ms. Twiggs testified that this technique
18 informs consumers as to the company that makes the featured product and is “one of the branding
19 elements” and in general “an important element” of advertising.¹⁶¹ Apple also places its logo on
20 the back of the iPhone further encouraging those who view it to associate the iPhone and its
21 distinct look and feel with the Apple brand.¹⁶²

22 81. To summarize: Apple’s trade dress at issue is an integral part of the look and feel
23 that is so important to Apple’s brand identity. As I have discussed above, Apple has been

24
25 ¹⁵⁷ “Best Global Brands 2008,” *Interbrand*, at 30.

26 ¹⁵⁸ “Best Global Brands 2011,” *Interbrand*, at 20.

27 ¹⁵⁹ Twiggs Dep. 100:2-101:14.

28 ¹⁶⁰ Twiggs Dep. 100:13-19.

¹⁶¹ Twiggs Dep. 101:7-14.

¹⁶² Deposition of Eric Jue on February 24, 2012 (“Jue Dep.”), 132:20-133:8.

1 extraordinarily successful by making its products' look and feel the fulcrum of its branding
2 strategy. In my opinion, a combination of a high degree of innovation and cutting-edge
3 technology and a unique and distinctive look and feel has been instrumental in the branding and
4 concomitant success of the iPhone, iPad, and iPod Touch products.

5 **VII. IMPORTANCE OF THE LOOK AND FEEL OF APPLE PRODUCTS AT ISSUE**
6 **FOR CONSUMERS**

7 82. Market research studies conducted or commissioned by Apple provide insights
8 into how the look and feel of Apple's iPhone, iPad, and iPod touch products impact consumers'
9 attitudes toward the Apple brand and their purchase decisions.

10 83. For example, according to a pre-iPhone launch market study conducted by Apple
11 in May 2007 about the most important reasons to purchase an iPhone, "appearance and design"
12 was the top-ranked reason for those surveyed who were "very/somewhat likely" to purchase an
13 iPhone.¹⁶³

14 84. In an iPhone Owner study conducted by Apple in the U.S. in March-April 2011,
15 when iPhone 3GS and iPhone 4 owners who had considered Android were asked what convinced
16 them to get an iPhone after considering Android, 32% indicated they "liked the physical
17 appearance and design."¹⁶⁴ According to the same study, of the iPhone 3GS and iPhone 4 owners
18 who bought their phones, 46% of those surveyed in the U.S. indicated "physical appearance and
19 design" as one of the "very important" features in their decision to purchase their iPhones.¹⁶⁵

20 85. Similarly, in iPhone Buyer Surveys conducted by Apple during the fourth quarter
21 of Apple's 2010 fiscal year, and the first, second, and third quarters of Apple's 2011 fiscal year,
22 when iPhone 3GS and iPhone 4 buyers were asked to rank the importance of a given list of
23 attributes in their purchase decision, 46% to 50% of those surveyed in the U.S. ranked "attractive
24 appearance and design" as very important (or top box), while 32% to 35% of those surveyed in
25

26 ¹⁶³ APLNDC-Y0000028751-28849 at APLNDC-Y0000028771.

27 ¹⁶⁴ APLNDC-Y0000025024-25147 at APLNDC-Y0000025027, APLNDC-
Y0000025060.

28 ¹⁶⁵ APLNDC-Y0000025024-25147 at APLNDC-Y0000025064.

1 the U.S. ranked “attractive appearance and design” as somewhat important (or second box).¹⁶⁶ In
2 sum, 81% to 82% of those surveyed in the U.S. in these studies ranked “attractive appearance and
3 design” in “top-2 boxes.”¹⁶⁷ The top-2 boxes represent a conventional measure used by
4 companies and in the market research industry.

5 86. Market research conducted by Apple about the iPod touch also provides support
6 for the importance of the look and feel of the product for consumers. For instance, according to
7 an iPod Buyer Survey conducted by Apple during the second quarter of its 2009 fiscal year, when
8 iPod touch buyers were asked to rank the importance of a given list of attributes in their purchase
9 decision, 42% of those surveyed in the U.S. ranked “attractive appearance” as very important.¹⁶⁸
10 Another iPod Buyer Survey, conducted by Apple during the fourth quarter of its 2009 fiscal year,
11 similarly shows that when iPod touch buyers were asked to rank the importance of a given list of
12 attributes in their purchase decision, 37 % of those surveyed in the U.S. ranked “attractive
13 appearance” as very important.¹⁶⁹

14 **VIII. APPLE’S TRADE DRESS IS DISTINCTIVE AND FAMOUS**

15 87. I have been asked to consider whether Apple’s iPhone Trade Dress, iPhone 3G
16 Trade Dress, and iPad Trade Dress have acquired distinctiveness among consumers and potential
17 consumers of smartphones and tablets, which I understand to mean that consumers associate these
18 trade dresses with a particular source. In evaluating whether these trade dresses have acquired
19 distinctiveness, I have been instructed to consider the following factors: the extent and manner of
20

21 ¹⁶⁶ APLNDC-Y0000027256-27340 at APLNDC-Y0000027258, APLNDC-
22 Y0000027277; APLNDC-Y0000027341-27422 at APLNDC-Y0000027343, APLNDC-
23 Y0000027362; APLNDC-Y0000027423-27505 at APLNDC-Y0000027425, APLNDC-
24 Y0000027450; APLNDC-Y0000027506-27599 at APLNDC-Y0000027508, APLNDC-
25 Y0000027572.

26 ¹⁶⁷ APLNDC-Y0000027256-27340 at APLNDC-Y0000027277; APLNDC-
27 Y0000027341-27422 at APLNDC-Y0000027362; APLNDC-Y0000027423-27505 at
28 APLNDC-Y0000027450; APLNDC-Y0000027506-27599 at APLNDC-Y0000027572.

¹⁶⁸ APLNDC-Y0000027807-27941 at APLNDC-Y0000027809, APLNDC-
Y0000027866. Also, 79% of those surveyed in the U.S. ranked “attractive appearance” as
very important or somewhat important. *See* APLNDC-Y0000027865.

¹⁶⁹ APLNDC-Y0000027942-28097 at APLNDC-Y0000027944, APLNDC-
Y0000028014. Also, 75% of those surveyed in the U.S. ranked “attractive appearance” as
very important or somewhat important. *See* APLNDC-Y0000028013.

1 Apple's advertising for the iPhone, iPad, and iPod touch; the length and manner of Apple's use of
2 the trade dresses; actual recognition of the trade dresses; whether Samsung copied Apple's trade
3 dresses; and whether Apple's use of these trade dresses has been exclusive.

4 88. I have also been asked to consider whether Apple's iPhone Trade Dress, iPhone
5 3G Trade Dress, and iPad Trade Dress are famous among the general consuming public. In
6 assessing whether these trade dresses are famous, I have been instructed to consider the following
7 factors: the duration, extent, and geographic reach of advertising and publicity of the trade dress,
8 whether advertised or publicized by the owner or third parties; the amount, volume, and
9 geographic extent of sales of goods or services offered under the trade dress; and the extent of
10 actual recognition of the trade dress. I am not rendering a legal opinion on distinctiveness.
11 However, the factors I have been asked to consider are consistent with the type of information I
12 would consider in assessing whether a branded product (or a group of branded products) is likely
13 to be viewed as having a distinctive look and feel. Similarly, I am not rendering a legal opinion
14 with respect to fame. Factors such as advertising, sales, market recognition, competitor reactions,
15 and exclusivity are consistent with the types of information that would be informative in
16 determining whether the look and feel of a branded product (or a group of branded products) has
17 become famous in the marketplace.

18 89. *Advertising.* As discussed above, Apple has invested significant resources in
19 advertising the iPhone and iPad products.¹⁷⁰ These advertisements generally focus on the
20 products themselves, displaying the elements of the asserted iPhone Trade Dress, iPhone 3G
21 Trade Dress, and iPad Trade Dress.¹⁷¹ Moreover, the iPhone and iPad products have been the
22 subject of extensive press coverage, include numerous product reviews, and have appeared in
23 popular media, such as television shows and movies.¹⁷²

25 ¹⁷⁰ See *supra* Section V.B-C; ¶¶ 106, 142.

26 ¹⁷¹ See *id.*; see, e.g., APLNDC-X0000363655, APLNDC-X0000007455, APLNDC-
27 X0000007699, APLNDC-X0000364248; APLNDC-X0000363682, APLNDC-X0000363702,
28 APLNDC-X0000364115, APLNDC-X0000364307, APLNDC-X0000363862; APLNDC-
X0000363709.

¹⁷² See *supra* Section V.D.

1 90. *Sales.* Both the iPhone and iPad have experienced significant success in the
2 marketplace.¹⁷³ Between late June 2007 and summer 2010, Apple sold 24.9 million original
3 iPhone, iPhone 3G, and iPhone 3GS devices,¹⁷⁴ and between April 2010 and before fall 2010, it
4 sold 4.3 million iPad tablets in the U.S..¹⁷⁵ Between April 2010 and June 2011, Apple sold
5 14.1 million iPad tablets in the U.S.¹⁷⁶ and spent more than \$300 million on advertising the iPad.
6 ¹⁷⁷

7 91. *Actual Recognition.* The surveys from the Poret Report show that 61.0% of
8 respondents associate the iPhone Trade Dress with Apple, 68.0% of respondents associate the
9 iPhone 3G Trade Dress with Apple, and between 57.3% and 75.2% of respondents associate the
10 iPad Trade Dress with Apple.¹⁷⁸ As part of his survey methodology, Mr. Poret also tested
11 “control” devices to determine what percentage of people associated those devices with Apple. A
12 much smaller percentage of respondents associated the control devices with Apple, namely 3.7%
13 of respondents associated the control phone with Apple and between 10.8% and 17% of
14 respondents associated the control tablet computer with Apple.¹⁷⁹

15 92. *Copying.* As discussed below, Samsung’s internal documents support the
16 conclusion that Samsung held up Apple’s iPhone and iPad products as the aspirational models in
17 designing its own smartphone and tablet products, and even made changes to its graphical user
18 interface specifically to make the icons look more like Apple icons, thus demonstrating
19 Samsung’s marketing tactics to create products that looked like Apple products.¹⁸⁰

22 ¹⁷³ See *supra* ¶¶ 65-66, 70; see *infra* ¶ 107, 142.

23 ¹⁷⁴ See ¶ 107.

24 ¹⁷⁵ See *infra* ¶ 142.

25 ¹⁷⁶ APLNDC-Y00000051599-51605, at APLNDC-Y00000051600.

26 ¹⁷⁷ APLNDC-Y0000051623, Apple Inc. Advertising; Q111 Ad Budget Summary,
27 APLNDC00002104534-554, at APLNDC00002104535; Q211 Ad Budget Summary,
28 APLNDC0002788581-588, at APLNDC0002788581; Q311 Ad Budget Summary,
APLNDC0002033979-987, at APLNDC0002033979.

¹⁷⁸ Poret Report at 36, 52, 60-61, 64.

¹⁷⁹ Poret Report at 35-36, 52, 65-66.

¹⁸⁰ See *infra* ¶¶ 132-138.

1 93. *Exclusivity.* I understand that Apple has an industrial design expert in the case,
2 Peter Bressler, who will be opining that no phone looked like the iPhone and no tablet computer
3 looked like the iPad before the launch of the iPhone and iPad, respectively. Accordingly, I am
4 not offering a separate opinion on the issue of the exclusivity of Apple’s use of the iPhone Trade
5 Dress, iPhone 3G Trade Dress, or iPad Trade Dress. For purposes of my analysis, I assume that
6 the relevant trade dresses were substantially exclusively used by Apple when Apple first launched
7 the iPhone and the iPad.

8 94. In light of this evidence, it is my opinion that, from a brand marketing perspective,
9 consumers have formed strong associations with Apple and find the look and feel of the iPhone
10 and the iPad to be distinctive in the marketplace. It is also incontrovertible that the look and feel
11 of these products, which is closely tied to Apple, is famous and contributes to the halo
12 surrounding the tremendous marketing success of the Apple brand.

13 95. I understand that the statute setting forth the elements of a dilution claim uses the
14 language “a mark is famous if it is widely recognized by the general consuming public of the
15 United States.” However, the concept of a “general consuming public” does not have meaningful
16 empirical content from a marketing perspective. This is because companies always target
17 demographic segments *conditional on* factors such as the relevant industry, the nature of the
18 market, the nature of the product offering, and the image the brand seeks to create. Brands do not
19 become successful or famous because companies try to cover every potential consumer in the
20 market. Indeed, careful targeting and positioning is very important in marketing. There may be
21 beneficial spillovers from the core segments being targeted to other segments, but these spillovers
22 only enhance the success and fame of the brand. Of course, a brand cannot credibly have a claim
23 to fame in the market if it is too narrowly focused in a demographic or geographic niche. For
24 example, a University of Rochester varsity logo may have great brand resonance to residents in
25 the Rochester Metropolitan Statistical Area, but that does not give it general fame.

26 96. It is fairly typical in consumer electronics to focus efforts on a broad spectrum of
27 the consumers without necessarily targeting “tail” segments such as young children or the elderly.
28 This is precisely the targeting strategy that Apple and Samsung follow. According to Ms. Twiggs

1 and Ms. Whiteside, Apple’s target demographic includes the age 18 to 49 demographic.¹⁸¹
2 According to Todd Pendleton (“Mr. Pendleton”), Samsung Telecommunication America, LLC’s
3 (“STA”) Chief Marketing Officer for wireless terminals, Samsung’s main demographic is 18 to
4 34 year olds.¹⁸²

5 97. The Poret Report shows that 81% of respondents who were in the 16-24 age group
6 associated the iPhone Trade Dress and the iPhone 3G Trade Dress with Apple, while 67.9% of
7 the respondents in the 25-34 age group, and 60.0% of the respondents in the 35-44 age group
8 associated the trade dresses at issue in this case with Apple.¹⁸³ Therefore, from a marketing and
9 branding perspective, the iPhone and the iPad trade dresses have undoubtedly achieved fame.

10 **IX. SAMSUNG’S INFRINGEMENT OF APPLE’S TRADE DRESS**

11 98. As noted above, a brand can be damaged by a company’s unauthorized use of
12 brand elements that are proprietary to the owner of the brand.¹⁸⁴ I understand that certain of
13 Apple’s claims for relief against Samsung pertain to Samsung’s misappropriation of the
14 distinctive appearance of the iPhone, the iPod touch, and the iPad.¹⁸⁵ I understand that Apple has
15 asserted that this misappropriation constitutes both trade dress infringement and trade dress
16 dilution. In this section of my report, I analyze from a marketing perspective whether the look
17 and feel of the Samsung Galaxy line of smartphones and tablet computer products
18 misappropriates Apple’s proprietary look and feel, taking into consideration certain factors in the
19 “likelihood of confusion” test. I understand that the likelihood of confusion test is the legal
20 standard to analyze Apple’s trade dress infringement claim for relief against Samsung.

21
22
23 ¹⁸¹ See Twiggs Dep. 29:2-19; Whiteside Dep. 134:5-135:24.

24 ¹⁸² Deposition of Todd Pendleton on March 21, 2012 (“Pendleton Rough Dep. Tr.”), 37,
44-45.

25 ¹⁸³ See Poret Report at 51.

26 ¹⁸⁴ See *supra* ¶ 35; see also M. Morrin & J. Jacoby, “Trademark Dilution: Empirical
Measures for an Elusive Concept,” 19 JOURNAL OF PUBLIC POLICY & MARKETING 265-276
(2000).

27 ¹⁸⁵ See *supra* Section IV for a detailed outline of Apple’s asserted trade dress. There are
28 several others claims that Apple asserts against Samsung that are outside the scope of my
assignment.

1 99. I also understand that likelihood of confusion may be assessed by examining eight
2 factors (the “*Sleekcraft* Factors”).¹⁸⁶ While I have not been asked to provide an opinion on the
3 likelihood of confusion between Apple’s products and Samsung’s products, the *Sleekcraft* Factors
4 mirror the types of information that I, as a marketing expert, would consider in assessing whether
5 Samsung’s misappropriation of Apple’s trade dress is likely to affect consumers’ purchasing
6 behavior.

7 100. I have been informed that the *Sleekcraft* Factors are:

- 8
- 9 (a) Strength of the mark;
 - 10 (b) Proximity of the goods;
 - 11 (c) Similarity of the marks;
 - 12 (d) Evidence of actual confusion;
 - 13 (e) Marketing channels used;
 - 14 (f) Types of goods and the degree of care likely to be exercised by the
15 purchaser;
 - 16 (g) Defendant’s intent in selecting the mark; and
 - 17 (h) Likelihood of expansion of the product lines.

18 101. From a marketing perspective, analysis of the above factors pertains not only in
19 the context of purchase (or point-of-sale) confusion but also in the context of post-purchase (or
20 post-sale) confusion. Consumers constantly use Apple’s iPhone, iPad, and iPod touch products in
21 public spaces.¹⁸⁷ As publicly used devices, the iPhone, iPad, and iPod touch trade dress have
22 brand image effects on potential consumers who are not immediate point-of-purchase consumers.
23 Unlike, say, a brand of detergent, which is bought and then used in one’s home, smartphones,
24 tablet computers, and music players are by their nature mobile devices and are regularly seen by
25 others. Therefore, brand image and brand associations are not confined to point-of-purchase
26 situations. Picture the following scenario, which I call the Imitative Scenario: College freshman
27 Jim sees a classmate with a “cool-looking tablet” and tells a friend about it. “Oh, that’s Ellen’s
28 new toy,” says the friend, “She bought it at Best Buy. I’ll send you a link.” The friend (who
knows that it is an iPad) sends a link to Jim (who does not know it is an iPad) and Jim goes onto

¹⁸⁶ See *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-349 (9th. Cir. 1979).

¹⁸⁷ See APLNDC-Y0000024549-24798 at APLNDC-Y0000024574, APLNDC-Y0000024576-24579, APLNDC-Y0000024582, and APLNDC-Y0000024585; APLNDC-Y0000025691-25822 at APLNDC-Y0000025782; APLNDC-Y000023361-23427 at APLNDC-Y000023396.

1 the website and ends up buying a Samsung tablet, which looks almost identical to the iPad. Jim's
2 younger sister then asks for the same Samsung tablet for Christmas. The Imitative Scenario is a
3 direct effect of Samsung's misappropriation of Apple's trade dress: because Samsung has
4 misappropriated Apple's trade dress, the distinctiveness of Apple's trade dress is attenuated, and
5 consumers no longer necessarily associate the look and feel of the iPhone, iPad, and iPod touch
6 solely with Apple.

7 102. There is a further, indirect effect on Apple's brand. As I have shown above, the
8 evidence indicates that consumers gravitate to Apple not only because of the innovative features
9 of the products at issue but also because the products have distinctive aesthetic appeal. When
10 consumers can buy non-Apple products with a similar look and feel, the products at issue lose
11 part of their distinctive aesthetic appeal. As I discuss below, this indirect effect has an additional
12 detrimental impact on Apple's brand equity.

13 103. Below, I separately analyze the *Sleekcraft* Factors for the iPhone's trade dress and
14 the iPad's trade dress.

15 **A. Analysis of *Sleekcraft* Factors—iPhone Trade Dress**

16 *Sleekcraft* Factor 1: Strength of the trade dress¹⁸⁸

17 104. The iPhone and its subsequent generations embody a distinctive look and feel that
18 is recognized by consumers. The same holds true for the iPod touch. Therefore, even though
19 there was competition in the marketplace when the products were launched, in each instance—
20 iPhone, iPhone 3G, iPhone 3GS, iPhone 4, and iPod touch—Apple created a very recognizable
21 look and feel in its products.

22 105. Consumers were made aware of this distinctive look and feel primarily through:
23 (1) their exposure to Apple's marketing activities that prominently feature the different
24 generations of the iPhone and the iPod touch; (2) their exposure to the products via non-Apple
25 sources, such as product reviews, press coverage, and product placements in popular media; and
26 (3) their own experiences with the look and feel of the iPhone and iPod touch products, or those

27 ¹⁸⁸ Because I have been asked to opine on Apple's trade dress, I analyze Apple's iPhone
28 and iPad trade dress, not Apple's trademarks, in terms of the *Sleekcraft* Factors.

1 of their family, friends, neighbors, or colleagues. In this case, there is no question that
2 consumers' exposure to the iPhone and the iPod touch products was extensive before the launch
3 of the first of Samsung's accused products in summer 2010.¹⁸⁹

4 106. By summer 2010, Apple had budgeted \$350 million in advertising the iPhone
5 product in the U.S.¹⁹⁰ Moreover, the iPhone had been featured in numerous national magazine
6 and newspaper articles, including articles in *The New York Times*, *San Francisco Chronicle*, *The*
7 *Wall Street Journal*, and *Time* magazine, including many front page articles and cover articles,
8 such as when *Time* magazine named the iPhone the "Invention of the Year" for 2007.¹⁹¹
9 Furthermore, the iPhone has been featured in countless national television programs and movies,
10 including *American Idol* and *Gossip Girl*, to name two.¹⁹²

11 107. In addition, as explained above, because the iPhone and iPod touch are mobile
12 devices used in public locations, including in parks, airports, cafes, public transit, and restaurants,
13 Apple's own sales contribute to brand associations formed by consumers.¹⁹³ Before the launch of
14 Samsung's accused products in summer 2010, Apple had sold over 24.9 million iPhone devices¹⁹⁴

15
16
17 ¹⁸⁹ See *infra* discussion regarding timeline of release of Apple's iPhone products and
Samsung's Galaxy S line of smartphones ¶ 131.

18 ¹⁹⁰ Q110 Ad Budget Summary, APLNDC0002029745-760, at
19 APLNDC0002029747; Q210 Ad Budget Summary, APLNDC0002029787-796 at
20 APLNDC0002029789; Q310 Ad Budget Summary, APLNDC0002789782-796, at
21 APLNDC0002789784; Q109 Ad Budget Summary, APLNDC0002103760-777; Q209 Ad
22 Budget Summary, APLNDC0002103846-857; Q309 Ad Budget Summary,
23 APLNDC0002140130-141; Q409 Ad Budget Summary, APLNDC0002003327-342; Q108
Ad Budget Summary, APLNDC0002206433-452; Q208 Ad Budget Summary,
24 APLNDC0002788282-301; Q308 Ad Budget Summary, APLNDC0002788514-533; Q408
25 Ad Budget Summary, APLNDC0002103372-388, at APLNDC0002103374; Q307 Ad Budget
26 Summary, APLNDC0002206049-065, at APLNDC0002206050; Q407 Ad Budget Summary,
27 APLNDC0002205710-726, at APLNDC0002205711.

28 ¹⁹¹ See *supra* ¶¶ 57-64.

¹⁹² See *Twiggs Dep.* 42:9-19, 146:1-147:1; APLNDC-X0000014538.

¹⁹³ See APLNDC-Y0000024549-24798 at APLNDC-Y0000024574, APLNDC-
Y0000024576-24579, APLNDC-Y0000024582, and APLNDC-Y0000024585. Mobile
phones, by design, can be and are used at various public locations by consumers.

¹⁹⁴ APLNDC-Y00000051357-362, at APLNDC-Y00000051359-51362; see also Apple
Inc. Form 10-K, filed October 27, 2009, p. 41, APLNDC-Y0000135577-682 at APLNDC-
Y0000135620.

1 and 23.6 million iPod touch devices in the U.S.¹⁹⁵ Apple’s internal market research provides
2 ample evidence about the public use of these products. For instance, according to the August
3 2009 iPod Owner Study, 56% of the surveyed iPod touch owners in the U.S. used the product
4 while exercising; 81% used the product while waiting; 51% used the product while walking; 56%
5 used the product on an airplane; 37% used the product while commuting; 78% used the product
6 once a day or more, and 52 % used the product half an hour or more in one sitting.¹⁹⁶ This type
7 of public use serves as another—very effective—means of promotion for the iPhone and the iPod
8 touch, similar to word-of-mouth brand activity¹⁹⁷ or the effects of “influencers” using a
9 product.¹⁹⁸

10 108. In sum, consumers’ exposure to the iPhone and the iPod touch products, via
11 Apple’s marketing activities, coverage of the products in popular media, through their personal
12 experiences with the products, or their exposure to the products in public spaces, was extensive
13 before the launch of the first of Samsung’s accused products in summer 2010. The trade dress at
14 issue is often clearly displayed in these occasions. In my opinion, after the iPhone launch and
15 before the introduction of the first of the accused Samsung products in July 2010, the look and
16 feel of the iPhone, iPhone 3G, iPhone 3GS, iPhone 4, and iPod touch products from the
17 perspective of the consumers was distinctively “Apple.”

18 109. The Poret Report contains results from a June 2011 survey that shows that the
19 distinctive look of the iPhone remained a strong source identifier for Apple nearly a year after
20 Samsung released the first of its accused products. 68.0% of respondents who were shown a
21 disguised image of an iPhone 3G—with the icons on the face of the phone blurred and the
22 “home” button covered with a sticker—still identified it with Apple, iPhone, or a similar Apple-
23 related product name. 61.0% of respondents who were shown a similarly disguised image of an
24

25 ¹⁹⁵ APLNDC-Y00000051599-605, at APLNDC-Y00000051599, APLNDC-
26 Y00000051600.

27 ¹⁹⁶ See APLNDC-Y0000024549-24798 at APLNDC-Y0000024574, APLNDC-
28 Y0000024576-24579, APLNDC-Y0000024582, and APLNDC-Y0000024585.

¹⁹⁷ See *supra* ¶ 33, 36.

¹⁹⁸ See *supra* note 88.

1 iPhone with the iPhone Trade Dress visible—identified it with Apple, iPhone, or a similar Apple-
2 related product name.¹⁹⁹

3 110. The strength of the iPhone Trade Dress has also been recognized by Samsung’s
4 executives since late 2008. Research conducted by gravitytank on behalf of Samsung in or
5 around late 2008 indicated that the iPhone “sets the standard for screen centric design” and
6 “[c]onsumers...see [Samsung touch phones] as derivative of the iPhone.”²⁰⁰ For example, in
7 internal documents, Samsung executives have acknowledged that the “[t]he look and feel of a
8 product matters most”²⁰¹ and that “iPhone has become the standard.”²⁰² As discussed in detail
9 below,²⁰³ Samsung employees were instructed, through emails or at executive-level meetings, that
10 “[g]oing forward [Samsung’s] comparison standard is Apple[’s] iPhone” and that Samsung “must
11 evaluate [its products] based on the iPhone standards”²⁰⁴ Similarly, a December 2009
12 presentation by McKinsey & Company to Samsung titled “Winning in Smartphones – It’s Now or
13 Never” concluded that Samsung should “[m]atch the iPhone UI within the next 12 months.”²⁰⁵

14 *Sleekcraft* Factor 2: Proximity of the goods

15 111. Apple’s iPhone products and Samsung’s Galaxy line of smartphones are similar in
16 use and in function and directly compete with one another for market share.²⁰⁶ The relevant

17
18 ¹⁹⁹ Poret Report at 7-11, 45, 52, 57.

19 ²⁰⁰ SAMNDCA00191811-191987 at SAMNDCA00191865 and SAMNDCA00191929.
It is my understanding that the gravitytank study was a precursor to the development of the
Galaxy S line of smartphones.

20 ²⁰¹ E-mail from Eun Jung Ko Re: Summary of Executive-Level Meeting Supervised by
21 Head of Division, February 10, 2010, SAMNDCA10247373-10247378 (*See* translation in
Apple’s Appendix of Certified Translations in Support of Opening Expert Reports
22 (“Translations App’x”).

23 ²⁰² E-mail from Eun Jung Ko of Executive-Level Meeting Supervised by Head of
Division, February 10, 2010, SAMNDCA10247373-10247378 (*See* Translations App’x).

24 ²⁰³ *See infra* ¶ 133-137.

25 ²⁰⁴ Email from Won Cheol Chai Re: Report on CEO’s Directives, January 2, 2010,
SAMNDCA10907801-10907802.

26 ²⁰⁵ SAMNDCA10807316-10807387 at SAMNDCA10807358.

27 ²⁰⁶ For instance, in Apple’s May 2011 iPhone Survey, 31% of the iPhone 3GS and
iPhone 4 owners surveyed in the U.S. indicated that they considered or seriously considered
the Samsung branded phones. Note that only individuals who purchased the Apple phones
were included in the sample; it did not include people who considered an iPhone and ended
28 up purchasing a Samsung product. *See* APLNDC-Y0000025024-25147 at APLNDC-

1 products are marketed to the same segments of the population who are prospective (actual, for
2 repeat purchasers) buyers of mobile phones.

3 112. Internal market research conducted by Apple shows that the mobile phone
4 products of the two companies generally compete with each other. For instance, in Apple's
5 iPhone 3G Buyer Surveys—conducted during the fourth quarter of Apple's 2008 fiscal year and
6 the first and second quarters of Apple's 2009 fiscal year—Samsung was listed among the other
7 mobile phone brands the iPhone 3G buyers seriously considered.²⁰⁷ In Apple's iPhone Buyer
8 Surveys conducted during the third and fourth quarters of Apple's 2009 fiscal year, and the first,
9 second, and third quarters of Apple's 2010 fiscal year, Samsung was similarly listed among the
10 other mobile phone brands that the iPhone 3G and iPhone 3GS buyers seriously considered.²⁰⁸ In
11 Apple's iPhone Buyer Surveys conducted during the fourth quarter of 2010 and the first and
12 second quarters of 2011, Samsung was also listed among the other mobile phone brands that the
13 iPhone 3GS and iPhone 4 buyers seriously considered.²⁰⁹ In Apple's iPhone Buyer Survey
14 conducted during the third quarter of 2011, Samsung was again listed among the other
15 smartphone brands the iPhone 3GS and iPhone 4 buyers seriously considered.²¹⁰ In Apple's
16 iPhone Buyer Surveys conducted during the first and second quarters of 2011, for iPhone buyers

18 Y0000025128. Both Apple and Samsung employees have admitted that Apple and
19 Samsung's smartphones compete. Greg Joswiak, Apple's Vice President of iPhone, iPod, and
20 iOS product marketing, identified Samsung among Apple's top competitors in the mobile
21 phone and smartphone markets. *See* Joswiak Dep. 106:19-24, 107:10-108:6.

22 ²⁰⁷ APLNDC-Y0000026173-26256, at APLNDC-Y0000026175, APLNDC-
23 Y0000026202; APLNDC-Y0000026257-26347, at APLNDC-Y0000026259, APLNDC-
24 Y0000026286.

25 ²⁰⁸ APLNDC-Y0000026348-26460, at APLNDC-Y0000026350, APLNDC-
26 Y0000026385; APLNDC-Y0000026461-26573, at APLNDC-Y0000026463, APLNDC-
27 Y0000026498; APLNDC-Y0000026574-26686, at APLNDC-Y0000026576, APLNDC-
28 Y0000026611; APLNDC-Y0000026687-26807, APLNDC-Y0000026689, APLNDC-
Y0000026724; APLNDC-Y0000027136-27255, at APLNDC-Y0000027138, APLNDC-
Y0000027172.

²⁰⁹ APLNDC-Y0000027256-27340 at APLNDC-Y0000027258, APLNDC-
Y0000027299; APLNDC-Y0000027341-27422 at APLNDC-Y0000027343, APLNDC-
Y0000027402; APLNDC-Y0000027423-27505 at APLNDC-Y0000027425, APLNDC-
Y0000027493.

²¹⁰ APLNDC-Y0000027506-27599 at APLNDC-Y0000027508, APLNDC-
Y0000027560.

1 who considered Android phones, Samsung was listed among the Android mobile phone brands
2 the iPhone 3GS and iPhone 4 buyers seriously considered.²¹¹ In Apple's iPhone Buyer Survey
3 conducted during the third quarter of 2011, for iPhone buyers who considered Android
4 smartphones, Samsung was again listed among the Android smartphone brands the iPhone 3GS
5 and iPhone 4 buyers seriously considered.²¹² Lastly, in Apple's May 2011 iPhone Owner study,
6 31% of the iPhone 3GS and iPhone 4 owners surveyed in the U.S. indicated that they considered
7 or seriously considered the Samsung-branded phones.²¹³

8 113. Product reviews for some of the accused Samsung products compare those
9 products directly to Apple products. For example, in a review of the accused Samsung Vibrant
10 phone, the reviewer compared the Vibrant directly to the iPhone, in an article titled: "Samsung
11 Vibrant Looks Like an iPhone, Has Battery Life to Match."²¹⁴ Similarly, in another review, the
12 Galaxy S line of smartphone products was described as "a serious rival to Apple's iPhone."²¹⁵
13 Another review states that the Samsung Galaxy S "[l]ooks like an iPhone" and notes that the
14 "Samsung Galaxy S and iPhone 3G/3GS could very easily have been separated at birth."²¹⁶

15 114. Samsung's internal market research similarly considers the mobile phone products
16 of the two companies as competitors. For instance, a market research study conducted or
17 commissioned by Samsung includes both Apple and Samsung in its results for unaided brand
18 awareness and brand purchase intent for mobile phones.²¹⁷

19 ²¹¹ APLNDC-Y0000027341-27422 at APLNDC-Y0000027343, APLNDC-
20 Y0000027353; APLNDC-Y0000027423-27505 at APLNDC-Y0000027425, APLNDC-
Y0000027436.

21 ²¹² APLNDC-Y0000027506-27599 at APLNDC-Y0000027508, APLNDC-
Y0000027519.

22 ²¹³ APLNDC-Y0000025024-25147 at APLNDC-Y0000025128. Note that only
23 individuals who purchased the phones themselves are included in the sample.

24 ²¹⁴ See, e.g., "Samsung Vibrant Looks Like an iPhone, Has Battery Life to Match,"
Wired, August 16, 2010 (http://www.wired.com/reviews/2010/08/pr_samsung_vibrant/).

25 ²¹⁵ See, e.g., "A Galaxy S Sequel with Big-Screen Ambitions," *Wall St. Journal*,
September 22, 2011; see also Joswiak Dep. 106:19-108:6.

26 ²¹⁶ See, e.g., "Samsung Galaxy S Review," *Techradar.com*, July 20, 2011
27 (<http://www.techradar.com/reviews/phones/mobile-phones/samsung-galaxy-s-689293/review>)
(last visited March 20, 2012).

28 ²¹⁷ See SAMNDCA00526887-526933 at SAMNDCA00526895, SAMNDCA00526899
(See Translations App'x).

1 115. Mr. Pendleton of Samsung stated that “Apple is one of one competitors” and that
2 Samsung competes with Apple, HTC, and Motorola in the smartphone market.²¹⁸ Mr. Pendleton
3 also said that “Apple is the competitor we obviously have our I [sic] on.”²¹⁹

4 116. Moreover, documents created by Samsung in connection with the development of
5 the Galaxy line of smartphones indicate that Samsung viewed its smartphone products as direct
6 competitors to the iPhone. In addition to the gravitytank analysis, McKinsey & Company report,
7 and executive e-mails mentioned above, I have seen a number of documents where Samsung’s
8 designers appear to have focused intensely on the iPhone design, to the point that they analyzed
9 each icon on the iPhone individually, and made specific recommendations for modifications of
10 Samsung’s icons and graphical user interface.²²⁰ It seems clear that Samsung’s own engineers
11 and designers viewed the iPhone as the competition.

12 *Sleekcraft* Factor 3: Similarity of the trade dress

13 117. Apple’s iPhone products and the Samsung Galaxy line of smartphones look
14 strikingly similar. A side-by-side comparison of the images of the iPhone and Galaxy S as shown
15 in the Amended Complaint demonstrates the similarity in the look and feel of these products.²²¹

16 118. The survey evidence from the Van Liere Report illustrates the striking similarity
17 between the look of Samsung Galaxy line of smartphones and that of the iPhone. Over half of
18 respondents (52%) who were shown pictures of a Samsung Galaxy Fascinate phone associated
19 the look and design of the Samsung Galaxy Fascinate with an iPhone, or a phone or product
20 manufactured by Apple. When the same test was carried out with a Samsung Galaxy S II Epic
21 4G Touch phone, over half respondents (51%) also associated the look and design of the
22 Samsung Galaxy S II Epic 4G Touch phone with an iPhone, or a phone or product manufactured
23 by Apple. As with the Poret Report, Dr. Van Liere also tested a “control” device to determine
24 whether it would be associated with Apple. A much smaller percentage of respondents associated
25

26 ²¹⁸ Pendleton Rough Dep. Tr. 34-35.

27 ²¹⁹ *Id.*

28 ²²⁰ See *infra* discussion and notes ¶¶ 132-138.

²²¹ Amended Complaint ¶¶ 94-95.

1 the control device with Apple. Specifically, 14% of respondents associated the control
2 smartphone with Apple.²²²

3 119. The similarities between the two product lines are so apparent that they have been
4 noted by industry observers. When the Galaxy phone was introduced for the first time, many
5 reviewers discussed the fact that the product was physically very similar to the iPhone. Exhibit 7
6 includes a sample of such quotes.

7 120. For example, an article from *Wired* noted how much the Galaxy S Vibrant phone
8 looks like the iPhone:

9 Samsung's latest phone, the Vibrant, has the body of an iPhone and the
10 brains of an Android. The Vibrant's industrial design *is shockingly*
11 *similar* to the iPhone 3G: The rounded curves at the corners, the
12 candybar shape, the glossy, black finish and the chrome-colored
13 metallic border around the display. The Vibrant even has its volume
14 and ringer buttons in almost the same spot as the iPhone 3G. ... [T]he
15 square icons are, again, very similar in their looks to the iPhone 3G's.
16 ... [T]here's little to make the phone notable, apart from its striking
17 similarity to the iPhone.²²³

18 121. Another reviewer noted how even the icons used in the Samsung Galaxy S
19 resemble those of the iPhone: "When I saw pictures of the Galaxy S phones from Samsung, I
20 thought I'd found the perfect successor for shifting off the iPhone. Here was an [sic] phone that
21 had iPhone-like icons, an iPhone-like look but which would work on networks other than
22 AT&T."²²⁴

23 *Sleekcraft* Factor 4: Evidence of actual confusion

24 122. As noted above, the survey evidence from the Van Liere Report indicates that over
25 half of respondents who were shown pictures of a Samsung Galaxy Fascinate phone or a
26 Samsung Galaxy S II Epic 4G Touch phone associated the look and design of those phones with

27 ²²² Van Liere Report at 4-5, 17.

28 ²²³ "First Look: Samsung Vibrant Rips Off iPhone 3G Design," *Wired*, July 15, 2010
(<http://www.wired.com/gadgetlab/2010/07/first-look-samsung-vibrant-rips-off-iphone-3g-design/>) (emphasis added).

²²⁴ "A Tale of Three Android Phones: Droid 2, Samsung Fascinate & Google Nexus S,"
Search Engine Land, January 3, 2011 (<http://searchengineland.com/a-tale-of-three-android-phones-droid-2-samsung-fascinate-google-nexus-s-59870>).

1 an iPhone, or a phone or product manufactured by Apple.²²⁵ I believe that this type of
2 association between the Samsung products and Apple demonstrates that consumers may actually
3 be confused by the look and feel of Samsung's phones.

4 *Sleekcraft* Factor 5: Marketing channels used

5 123. Samsung's Galaxy line of smartphone products is marketed and sold in the same
6 channels as Apple's iPhone products. In fact, Apple's iPhone products are sold side-by-side with
7 the Samsung Galaxy products in many retail situations. Samsung's Galaxy smartphones are
8 available at cellular phone carriers AT&T, Verizon Wireless, and Sprint.²²⁶ Apple's iPhone is
9 also available at AT&T, Verizon Wireless, and Sprint.²²⁷ I personally visited an AT&T store in
10 Manhattan where the iPhones and Samsung Galaxy smartphones were displayed in close
11 proximity, facilitating direct side-by-side comparisons.²²⁸ In addition, Apple and Samsung

13 ²²⁵ Van Liere Report at 4-5, 17.

14 ²²⁶ See, e.g., <http://www.samsung.com/us/mobile/at-t> (AT&T); "AT&T and Samsung
15 Mobile Announce Upcoming Availability of the Samsung Captivate, A Galaxy S
16 Smartphone," *Samsung Press Release*, June 17, 2010
(http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19570&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Samsung+Mobile+Announce+Upcoming+Availability+of+the+Samsung+Captivate);
17 "Samsung Captivate," *PhoneArena.com*, July 18, 2010
(http://www.phonearena.com/phones/Samsung-Captivate_id4676);
18 <http://www.samsung.com/us/mobile/verizon-wireless> (Verizon);). "Samsung Fascinate, A
19 Galaxy S Smartphone, Available on the Verizon Wireless Network," *Samsung Press Release*,
No Date
(http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19541&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=fascinate); Samsung website showing phones available on Sprint, available at
20 <http://www.samsung.com/us/mobile/sprint> (Sprint). The websites for the carriers show both
21 Apple's iPhone products and Samsung's Galaxy products available for purchase. See, e.g.,
22 <http://www.att.com/shop/wireless> (AT&T); <http://www.sprint.com> (Sprint);
23 <http://www.verizonwireless.com> (Verizon).

24 ²²⁷ See, e.g., "Apple Launches iPhone 4S, iOS 5 & iCloud," *Apple Inc. Press Release*,
October 4, 2011, [http://www.apple.com/pr/library/2011/10/04Apple-Launches-iPhone-4S-](http://www.apple.com/pr/library/2011/10/04Apple-Launches-iPhone-4S-iOS-5-iCloud.html)
25 [iOS-5-iCloud.html](http://www.apple.com/pr/library/2011/10/04Apple-Launches-iPhone-4S-iOS-5-iCloud.html); "Verizon Wireless & Apple Team Up to Deliver iPhone 4 on Verizon,"
Apple Inc. Press Release, January 11, 2011,
26 [http://www.apple.com/pr/library/2011/01/11Verizon-Wireless-Apple-Team-Up-to-Deliver-](http://www.apple.com/pr/library/2011/01/11Verizon-Wireless-Apple-Team-Up-to-Deliver-iPhone-4-on-Verizon.html)
iPhone-4-on-Verizon.html; Apple Store iPhone 4S, available at
27 http://store.apple.com/us/browse/home/shop_iphone/family/iphone.

28 ²²⁸ The iPhone 4S and Samsung Galaxy Note were less than 2 feet apart, whereas the
iPhone 4S and the Samsung Galaxy Skyrocket were approximately three feet apart.

1 products can often be displayed side-by-side on the carriers' websites.²²⁹ In-store retailers, such
2 as Best Buy, Target, and Walmart, often group together all of their smartphone products,
3 including Apple iPhone products and Samsung Galaxy products. Online retailers, such as
4 Amazon as well as Best Buy, Radioshack, and Walmart, also feature Samsung's Galaxy line of
5 smartphones and Apple's iPhone products.²³⁰

6 124. Samsung's Galaxy line of smartphones products and Apple's iPhone products are
7 also advertised and marketed through similar media. In 2011, Samsung launched a \$67.1 million
8 advertising campaign for its Galaxy S II that included online, print newspaper, and television
9 advertising components.²³¹ These various media began reaching consumer audiences in
10 February, June, and September 2011, respectively.²³² Of the \$67.1 million spent on the
11 campaign, Samsung allocated \$64.5 million toward television commercials airing on a diverse set
12 of networks, including ABC Family, Fox, BET, Comedy Central, and TBS.²³³ Although a
13 competitive analysis describes Samsung's campaign as "targeting everyone," Samsung elected to
14 air many of its commercials on many of the same shows as Apple.²³⁴ During the months of
15 October, November, and December, Apple and Samsung both featured advertisements for their
16

17 ²²⁹ See, e.g., APLNDC0003039043-3039044 at APLNDC0003039043 (AT&T);
18 APLNDC0003039085-3039114 at APLNDC0003039085-3039088 (AT&T);
19 APLNDC0003039440-3039441 at APLNDC0003039441 (Verizon).

20 ²³⁰ See, e.g., APLNDC0003039036-3039037 at APLNDC0003039036 (Amazon);
21 APLNDC0003038959-3038964 at APLNDC0003038974 (Amazon), APLNDC0003038974-
22 3038981 (Amazon), APLNDC0003039014-3039016 at APLNDC0003039014-3039016
23 (Amazon); APLNDC0003039165-3039167 at APLNDC0003039165 (Best Buy);
24 APLNDC0003039118-3039119 at APLNDC0003039118 (Best Buy); APLNDC0003039128-
25 3039138 at APLNDC0003039128 (Best Buy); APLNDC0003039149-3039164 at
26 APLNDC0003039149, APLNDC0003039151, APLNDC0003039152-53,
27 APLNDC0003039155, APLNDC0003039157-3039160, APLNDC0003039162 (Best Buy);
28 APLNDC0003039187-3039188 at APLNDC0003039187 (Radioshack);
APLNDC0003039191-3039192 at APLNDC0003039191 (Radioshack);
APLNDC0003039195-3039197 at APLNDC0003039195-3039197 (Radioshack); APLNDC-
Y0000151499-151504 at APLNDC-Y0000151499, APLNDC-Y0000151501 (Walmart);
APLNDC-Y0000151490-151491 at APLNDC-Y0000151490 (Walmart).

²³¹ OMD0000039-75 at OMD0000039, OMD0000046.

²³² OMD0000039-75 at OMD0000046.

²³³ OMD0000039-75 at OMD0000046.

²³⁴ OMD0000039-75 at OMD0000046.

1 respective smartphones on *CSI*, *Vampire Diaries*, *The Office*, and *Saturday Night Live*.²³⁵ Not
2 only did Samsung's campaign include many of the same television audiences as Apple's iPhone
3 campaign, some of its television messages directly targeted the hype surrounding Apple's
4 device.²³⁶ Some of the television commercials that aired during this time period specifically
5 questioned the brand loyalty of potential iPhone customers and suggested that the "*next big*
6 *thing*," Samsung's Galaxy S II, is already available.²³⁷

7 125. Mr. Pendleton, Samsung's Chief Marketing Officer for wireless, stated that
8 Samsung runs national campaigns for its smartphone and tablet products.²³⁸

9 *Sleekcraft* Factor 6: Types of goods and the degree of care likely to be exercised
10 by the purchaser

11 126. The degree of care exercised by the purchaser is a function of several factors: the
12 price of the goods, the degree of sophistication of the consumers, and the purchase channel
13 involved (*e.g.*, web, carrier store, independent big-box retailer, aftermarket channels such as
14 eBay, etc.).

15 127. While some of the iPhone models and Samsung Galaxy smartphones are relatively
16 expensive products in terms of retail price, like most smartphones, they generally are sold as part
17 of a contract with a wireless service provider such as Verizon, AT&T or Sprint.²³⁹ The price a
18 consumer pays for a phone is heavily subsidized by the service provider. In some instances, the
19 products are free with a locked-in carrier contract commitment. For example, the iPhone 3GS,

20 ²³⁵ OMD0000039-75 at OMD0000046; APLNDC0002010255-2010279 at
21 APLNDC0002010265-2010267.

22 ²³⁶ OMD0000039-75 at OMD0000046.

23 ²³⁷ "The Next Big Thing - Samsung Galaxy S II (90 sec commercial)," uploaded by
24 samsungmobileusa on November 22, 2011, available at
25 <http://www.youtube.com/watch?v=X4VHzNEWIqA&feature=relmfu>.

26 ²³⁸ See, *e.g.*, Pendleton Rough Dep. Tr. 26-28, 32, 36-37.

27 ²³⁹ For example, see the discussion about low-end iPhones, their pricing, and wireless
28 service provider contracts in Schiller Dep. 366:6-367:12, and Joswiak Dep. 243:2-244:23. In
29 general, most mobile phones sold in the U.S. are sold as part of a contract with a wireless
30 service provider. In January 2011, *Consumer Reports* magazine reported that more than 90
31 percent of its survey respondents' phones were serviced under a contract. See "No-Contract
32 Options Multiply," *Consumer Reports*, January 2011
33 (<http://www.consumerreports.org/cro/magazine-archive/2011/january/electronics/best-cell-plans-and-providers/no-contract-cell-phones/index.htm>).

1 currently the low-end iPhone on the market, is available to AT&T customers signing up for a
2 two-year contract at no cost.²⁴⁰ Therefore, there is wide variation with respect to the degree of
3 care vis-à-vis the price factor.

4 128. Smartphones are becoming ubiquitous and rapidly replacing older-generation
5 phones.²⁴¹ Therefore, there is also likely to be wide variation in the sophistication of consumers.
6 Some are likely to exercise great care while selecting a product, carefully examining the features
7 of the product, its technical performance, and so on. Others are likely to be more impulsive.
8 Similarly, consumers who are led to purchase by the Imitative Scenario described above are less
9 likely to exercise the same degree of care as a sophisticated consumer so long as the infringing
10 product approximates the look and feel of the original.

11 129. Lastly, and as discussed above, there is variation in the purchase channels, with
12 concomitant effects on the degree of care exercised in those channels. For example, a smartphone
13 buyer at a carrier store with attentive staff may have a more involved shopping experience than a
14 consumer under the Imitative Scenario who routinely buys products from a particular website
15 where smartphone offerings are displayed side-by-side or where a particular smartphone is being
16 promoted prominently.

17 130. In sum, while some consumers of smartphone products will be careful in their
18 purchasing decisions, perhaps even doing advance research or consulting with clerks in retail
19 stores about their choices, it cannot be said that all consumers, or even the majority of consumers,
20 will take the same amount of care in their purchasing decisions. This is particularly true for
21 products that are given away for free or at low cost with a carrier contract, and products that are
22 sold online or through mass market retailers like Target and Walmart.

23 *Sleekcraft* Factor 7: Defendant's intent in selecting the trade dress

24
25 ²⁴⁰ Joswiak Dep. 243:2-244:23.

26 ²⁴¹ The NPD Group, a leading market research company, reported that the share of U.S.
27 mobile phone handset sales that were smartphones reached 59 percent in the third quarter of
28 2011, an increase of 13 percentage points since the third quarter of 2010. "As Smartphone
Prices Fall, Retailers Are Leaving Money on the Table," *NPD Group*, November 14, 2011
(https://www.npd.com/wps/portal/npd/us/news/pressreleases/pr_111114a).

1 131. Samsung could not have been unaware of the iPhone Trade Dress and the iPhone
2 3G Trade Dress before its introduction of the Galaxy line of smartphones in the U.S. and it
3 appears to have consciously adopted elements of Apple’s trade dress. In January 2007, Apple
4 unveiled its iPhone and made it available for purchase in June 2007.²⁴² In June 2008, Apple
5 introduced the iPhone 3G, and made it available for purchase in July 2008.²⁴³ Apple introduced
6 and released for purchase the iPhone 3GS in June of 2009.²⁴⁴ Finally, in June 2010, Apple
7 announced and made available the iPhone 4 for purchase.²⁴⁵ As discussed above, each iPhone
8 product was extensively covered in the media, and reviewed by prominent publications both
9 online and in print. Samsung did not unveil its Galaxy S line of phones until March 2010.²⁴⁶ The
10 first version of the phone for the U.S. market was announced in June 2010 and made available for
11 purchase in July 2010.²⁴⁷

12 132. The look and feel of Samsung’s phones was unlike the iPhone until the release of
13 the Galaxy line of smartphones. Early Samsung smartphones almost always featured a keypad.
14 For instance, the early Samsung MM-A800, released in May 2005, featured a sliding design
15 which included a front display screen with navigation controls; releasing the front revealed the
16 “ample keypad.”²⁴⁸ The Samsung SCH-i730, released in July 2005, featured an innovative touch

17 ²⁴² “Apple Reinvents the Phone with iPhone,” *Apple Inc. Press Release*, January 9, 2007
18 (<http://www.apple.com/pr/library/2007/01/09Apple-Reinvents-the-Phone-with-iPhone.html>).

19 ²⁴³ “Apple Introduces the New iPhone 3G,” *Apple Inc. Press Release*, June 9, 2008
20 (<http://www.apple.com/pr/library/2008/06/09Apple-Introduces-the-New-iPhone-3G.html>).

21 ²⁴⁴ “Apple Announces the New iPhone 3GS—The Fastest, Most Powerful iPhone Yet,”
22 *Apple Inc. Press Release*, June 8, 2009 (<http://www.apple.com/pr/library/2009/06/08Apple-Announces-the-New-iPhone-3GS-The-Fastest-Most-Powerful-iPhone-Yet.html>).

23 ²⁴⁵ “Apple Presents iPhone 4,” *Apple Inc. Press Release*, June 7, 2010
24 (<http://www.apple.com/pr/library/2010/06/07Apple-Presents-iPhone-4.html>).

25 ²⁴⁶ “Samsung Galaxy S Keynote & Samsung Mobile Unpacked at CTIA Wireless
26 2010,” *Samsung Press Release*, March 31, 2010
27 (http://www.samsung.com/us/news/newsRead.do?news_seq=18436&page=1).

28 ²⁴⁷ “AT&T and Samsung Mobile Announce Upcoming Availability of the Samsung
Captivate, a Galaxy S Smartphone,” *Samsung Press Release*, June 22, 2010
(http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19514&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=
); PhoneArena.com Samsung Captivate page, available at
http://www.phonearena.com/phones/Samsung-Captivate_id4676).

²⁴⁸ “Samsung MM-A800,” *CNET News.com*, 2005
(http://reviews.cnet.com/Samsung_MM-A800/4505-6454_7-31313308.html).

1 screen but, like the MM-A800, hid a keyboard behind the screen.²⁴⁹ The popular BlackJack line
2 of smartphones also featured prominent keypads. The original BlackJack, released in 2006,
3 hosted a 2.25 inch screen, a variety of navigation keys including “two soft keys, a shortcut to the
4 Today screen, a back button, Talk and End keys, and a four-way directional toggle,” and a full
5 QWERTY keyboard.²⁵⁰ A year later, the BlackJack II was released featuring a sleeker version of
6 the same appearance.²⁵¹ In April 2008, after the release of the iPhone but prior to the introduction
7 of the Galaxy line of phones, Samsung introduced the Access. The appearance, described as
8 “angular” and “ordinary,” included a large 2.25 inch display, a navigation array, a four-way
9 toggle, a keypad, as well as other navigation buttons.²⁵²

10 133. After the introduction of the iPhone, Samsung recognized that the iPhone set the
11 “industry standard.”²⁵³ In an email to UX Executives, dated March 2, 2010, Sungsik Lee of
12 Samsung stated that “CEO Gee Sung Choi strongly criticized Samsung UX’s mindset of ‘clinging
13 to the past generation.’”²⁵⁴ Lee further stated that “[t]his is being interpreted as an instruction to
14 think about and decide all matters from the perspective of the user. (Not suppliers or providers...)
15 The most representative example is obviously the iPhone.”²⁵⁵ Sungsik Lee emphasized that
16 Samsung must “learn the wisdom of the iPhone” and “recognize that [Apple has] already set the
17
18

19 ²⁴⁹ “Samsung SCH-i730,” *CNET News.com*, 2005 (http://reviews.cnet.com/4505-6452_7-31313312.html).

20 ²⁵⁰ “Samsung BlackJack SGH-i607,” *CNET News.com*, November 13, 2006
21 (http://reviews.cnet.com/smartphones/samsung-blackjack-sgh-i607/4505-6452_7-32143267.html).

22 ²⁵¹ “Samsung BlackJack II Review,” *CNET News.com*, December 6, 2007
23 (http://reviews.cnet.com/smartphones/samsung-blackjack-ii-black/4505-6452_7-32717959.html).

24 ²⁵² “Samsung Access SGH-A827,” *CNET News.com*, May 9, 2008
25 (http://reviews.cnet.com/cell-phones/samsung-access-sgh-a827/4505-6454_7-32909896.html).

26 ²⁵³ E-mail from Sungsik Lee Re: To UX Executives..., March 2, 2010,
27 SAMNDCA10247549-10247552 (*See* Translations App’x).

28 ²⁵⁴ E-mail from Sungsik Lee Re: To UX Executives..., March 2, 2010,
SAMNDCA10247549-10247552 (*See* Translations App’x).

²⁵⁵ E-mail from Sungsik Lee Re: To UX Executives..., March 2, 2010,
SAMNDCA10247549-10247552 (*See* Translations App’x).

1 industry standard”²⁵⁶ In another email titled “Report on CEO’s Directives,” Samsung
2 employees were instructed that “[g]oing forward our comparison standard is Apple’s iPhone. In
3 cases of High End products we must evaluate them based on the iPhone standards”²⁵⁷

4 134. In an executive-level meeting held on February 10, 2010, the head of Mobile
5 Communications Division at Samsung stated that the “iPhone has become the standard” and
6 explained that when “both consumers and the industry” consider UX, a Samsung product, “they
7 weigh it against the iPhone.”²⁵⁸ He further stated that when the UX is compared with the iPhone,
8 “it’s a difference between Heaven and Earth.”²⁵⁹ At the same meeting, the division head
9 expressed concern that “[i]nfluential figures outside the company come across the iPhone, and
10 they point out that ‘Samsung is dozing off’” and advised the product designers at Samsung that
11 “[t]he look and feel of a product matters most.”²⁶⁰

12 135. Numerous Samsung internal documents indicate Samsung’s efforts to incorporate
13 certain features of the iPhone, including the iPhone Trade Dress and packaging, into its own
14 products. A Samsung document titled “Design Preference Study” noted that “American
15 consumers are influenced greatly by iPhone design” and that “[t]he rounded shape design has
16 been recognized as a [p]remium and better design due to the influence of the iPhone [s]eries in
17 the last three years.”²⁶¹ The study also noted that “[s]ince the iPhone was introduced, trendy
18 consumers have started to consider its angular and square shaped design as trendy”²⁶²

19 ²⁵⁶ E-mail from Sungsik Lee Re: To UX Executives..., March 2, 2010,
20 SAMNDCA10247549-10247552 (*See* Translations App’x).

21 ²⁵⁷ Email from Won Cheol Chai Re: Report on CEO’s Directives, January 2, 2010,
22 SAMNDCA10907800-10907802 (*See* Translations App’x).

23 ²⁵⁸ E-mail from Eun Jung Ko Re: Summary of Executive-Level Meeting Supervised by
24 Head of Division, February 10, 2010, SAMNDCA10247373-10247378 (*See* Translations
25 App’x); E-mail from Sungsik Lee Re: To UX Executives, March 2, 2010,
26 SAMNDCA10247549-10247552 (*See* Translations App’x).

27 ²⁵⁹ E-mail from Eun Jung Ko Re: Summary of Executive-Level Meeting Supervised by
28 Head of Division, February 10, 2010, SAMNDCA10247373-10247378 (*See* Translations
App’x).

²⁶⁰ E-mail from Eun Jung Ko Re: Summary of Executive-Level Meeting Supervised by
Head of Division, February 10, 2010, SAMNDCA10247373-10247378 (*See* Translations
App’x).

²⁶¹ SAMNDCA00533129-533159 at SAMNDCA00533135 (*See* Translations App’x).

²⁶² SAMNDCA00533129-533159 at SAMNDCA00533135 (*See* Translations App’x).

1 Another Samsung internal document beginning with “instructions from the CEO” instructed
2 Samsung employees to “improve UX, referring to iPhone 3GS,” because “[t]here is a big
3 difference in letter size, font, and clarity compared to iPhone 3GS,” “[l]etter size is weird,” and
4 the existing “[i]cons have too much space and are strange.”²⁶³ Similarly, an email, dated March
5 17, 2010, instructed Samsung employees to “[p]roceed with iPhone/Droid type” for packaging.²⁶⁴
6 In another internal email, dated May 5, 2010, Cheol Hwan Lee, Executive Vice President of
7 Development (Mobile), instructed his colleagues to:

8 Take each of the products that have been released [including
9 iPhone 3GS, iPhone 4, and iPad] and are expected to be released
10 by Apple compare them with our company’s anticipated products,
11 and perform a concrete study of each on their component
12 differences, specification differences, as well as performance,
13 characteristics, and functions for each part (for example, LCD,
14 memory, design, etc.), then formulate response plans, and report
15 back.²⁶⁵

16 136. In addition, several Samsung presentations compare the Samsung products and the
17 iPhone and indicate improvements to the former drawn directly from that comparison. For
18 example, in a side-by-side comparison of the iPhone and S1 (a Samsung product), a product
19 engineering team at Samsung stated that the “Graphical UI [user interface] of the menu icons are
20 monotonous,” and that the iPhone “maximizes a 3 dimensional effect utilizing light and the curve
21 of icon frames is smooth.”²⁶⁶ The engineering team proposed that, in order to improve their
22 product, they also must make use of “effects of light” and “make the edge curve more smooth,”
23 but that they should “[r]emove a feeling that iPhone’s menu icons are copied by differentiating
24 design.”²⁶⁷ Another example is a Samsung presentation discussing recommendations to improve
25 the Galaxy S product line based on the direct comparison of Galaxy S devices with competing
26 smartphones, including the iPhone 4.²⁶⁸

27 ²⁶³ SAMNDCA10249770-10249776 at SAMNDCA10249770 (*See* Translations App’x).

28 ²⁶⁴ E-mail from Kim Ah-young Re: October 3/17 Report Result, March 17, 2010,
 SAMNDCA00507826-507827 (*See* Translations App’x).

²⁶⁵ E-mail from Taemoon Roh Re: Regarding Apple Comparison, May 9, 2010,
 SAMNDCA10911088-10911093 (*See* Translations App’x).

²⁶⁶ SAMNDCA00203880-204010 at SAMNDCA00204010 (*See* Translations App’x).

²⁶⁷ SAMNDCA00203880-204010 at SAMNDCA00204010 (*See* Translations App’x).

²⁶⁸ SAMNDCA00238432-238443.

1 137. Moreover, in Samsung’s Competitor Analysis presentations, the iPhone is
2 described as “a delight to the eye as well as a highly usable device.”²⁶⁹ These presentations
3 contain Samsung’s comparison of “design and layout” features (such as main menu icons, main
4 menu layout, list screen layout, secondary icons, music screens, and browser look) on its phones
5 sold before the introduction of the Galaxy S product line, with those of its competitors, including
6 the iPhone.²⁷⁰ The following iPhone features were included: “[b]ottom docking area of four
7 icons suggests that these are the most used/important apps or features;” “[b]lack background
8 helps colourful icons stand out;” “[i]cons are all-rounded-corner square elements which include a
9 cartoon image or icon;” and “[u]se of multiple colours suggests a fairly open colour palette.”²⁷¹

10 138. Therefore, these internal Samsung documents show that the iPhone was held out as
11 the aspirational model to Samsung designers and engineers, and that Samsung designers and
12 engineers had an incentive to copy the iPhone trade dress.

13 *Sleekcraft* Factor 8: Likelihood of expansion of the product lines

14 139. Because Apple and Samsung products already compete in the smartphone market,
15 *Sleekcraft* Factor 8 is not informative for the purposes of my analysis.

16 **B. Analysis of *Sleekcraft* Factors—iPad Trade Dress**

17 *Sleekcraft* Factor 1: Strength of the trade dress

18 140. Apple’s iPad Trade Dress is inherently distinctive. The tablet computers that
19 existed before the iPad had very dissimilar look and feel.²⁷² Apple created a look and feel in its
20 iPad products that was completely different—commentators have said that Apple created a

21
22 ²⁶⁹SAMNDCA00228887-228933 at SAMNDCA00228894.

23 ²⁷⁰ SAMNDCA00228887-228933; SAMNDCA00228934-228980;
SAMNDCA00229011-229108.

24 ²⁷¹ SAMNDCA00228934-228980 at SAMNDCA00228952, SAMNDCA00228969.

25 ²⁷² “Tablet PC Brings the Simplicity of Pen and Paper to Computing,” *Microsoft Press*
26 *Release*, November 13, 2000 (<http://www.microsoft.com/presspass/features/2000/nov00/11-13tabletpc.msp>); “HP Compaq Tablet PC TC1000 Review,” *CNET Reviews*, November 5,
27 2002 (http://reviews.cnet.com/laptops/hp-compaq-tablet-pc/4505-3121_7-20627295.html#reviewPage1); “Lenovo ThinkPad X61 Tablet PC Review,”
28 *TabletPCReview.com*, June 12, 2007
(<http://www.tabletpcreview.com/default.asp?newsID=868>); *see also supra* discussion in ¶ 162-163.

1 category with the iPad.²⁷³ According to Samsung's own internal market research, when a sample
2 of consumers was asked to provide reasons for purchasing an iPad in a survey without any aid,
3 30% of those considering a Galaxy Tab said "iPad is category leader" as one of the top reasons.²⁷⁴

4 141. As noted above, consumers form brand associations through: (1) their exposure to
5 Apple's marketing activities which prominently feature the iPad products, (2) their exposure to
6 the iPad products via non-Apple sources, such as product reviews, press coverage, and product
7 placements in popular media; and (3) their own experiences with iPad's look and feel, or those of
8 their family, friends, neighbors, or colleagues. Consumers had extensive exposure to the iPad
9 product before the launch of Samsung's first accused tablet device in November 2010.²⁷⁵

10 142. By the end of Apple's fiscal year 2010, Apple had already invested \$149.5 million
11 in advertising the iPad.²⁷⁶ By the end of Apple's fiscal year 2011, Apple had spent approximately
12 \$457 million on advertising the iPad.²⁷⁷ Moreover, the iPad had been featured in various national
13 magazine and newspaper articles, including articles in *The New York Times*, *The Wall Street*
14 *Journal*, *Chicago Tribune*, *The Washington Post*, *USA Today*, *Mercury News*, *Los Angeles Times*,
15 and *Time*, including many front page articles and cover articles, such as stories in *The Economist*
16 and *Newsweek*.²⁷⁸ Furthermore, the iPad has been featured in a wide variety of national television
17 programs and movies, including *Modern Family*, to name just one.²⁷⁹

19 ²⁷³ See, e.g., "Verdict Is in on Apple iPad: It's a Winner," *USA Today*, April 2, 2010
20 ([http://www.usatoday.com/tech/columnist/edwardbaig/2010-03-31-apple-ipad-
review_N.htm](http://www.usatoday.com/tech/columnist/edwardbaig/2010-03-31-apple-ipad-review_N.htm)); "Laptop Killer? Pretty Close," *Wall St. Journal*, April 1, 2010
21 (<http://online.wsj.com/article/SB10001424052702304252704575155982711410678.html>);
22 "Looking at the iPad From Two Angles," *N.Y. Times*, March 31, 2010
23 (<http://www.nytimes.com/2010/04/01/technology/personaltech/01pogue.html>); "As New iPad
Debut Nears, Some See Decline of PCs," *N.Y. Times*, March 5, 2012
24 ([http://www.nytimes.com/2012/03/06/technology/as-new-ipad-debut-nears-some-see-decline-
of-pcs.html](http://www.nytimes.com/2012/03/06/technology/as-new-ipad-debut-nears-some-see-decline-of-pcs.html)).

24 ²⁷⁴ See SAMNDCA00526887-526933 at SAMNDCA00526918 (See Translations
App'x).

25 ²⁷⁵ See ¶ 161 for a discussion of a timeline of product announcements and introductions
26 relevant to Apple and Samsung tablet computers.

26 ²⁷⁶ See APLNDC-Y0000051623.

27 ²⁷⁷ See APLNDC-Y0000051623.

27 ²⁷⁸ See *supra* ¶¶ 67-69.

28 ²⁷⁹ See Lindbergh Dep. 59:6-60:5.

1 143. In addition, as explained above, the iPad is a mobile device used in public
2 locations. For instance, according to an iPad Buying Process survey conducted by Apple, 71%
3 (76%) of the iPad buyers who purchased their iPad at a Best Buy (Apple Retail Store) used or
4 intended to use their iPads at a hotel or airport when traveling; 62% (66%) of the iPad buyers who
5 purchased their iPad at a Best Buy (Apple Retail Store) used or intended to use their iPads at
6 public facilities such as a library; 48% (53%) of the iPad buyers who purchased their iPad at a
7 Best Buy (Apple Retail Store) used or intended to use their iPads at the office; and 38% (41%) of
8 the iPad buyers who purchased their iPad at a Best Buy (Apple Retail Store) used or intended to
9 use their iPads in public outdoor places such as a park.²⁸⁰ As a result, Apple's sales of iPad
10 devices contribute to brand associations formed by consumers. Another iPad Buyer Survey also
11 provided consistent results with 79% of the iPad buyers using or intending to use their iPads at a
12 hotel or airport when traveling, 62% at public facilities, 44% at the office, and 43% at outdoor
13 public spaces.²⁸¹ Before the launch of the first accused Galaxy Tab in November 2010, Apple
14 had sold over 4.3 million iPad tablets in the U.S.²⁸² By the end of June 2011, Apple had sold
15 approximately 14.1 million iPads in the U.S.²⁸³ As mentioned above in connection with the
16 iPhone, this type of public use serves as another—very effective—means of promotion for the
17 iPad.

18 144. As with the iPhone, surveys conducted in June/July 2011 show that the distinctive
19 look of the iPad had become widely associated with Apple prior to November 2010, the time at
20 which Samsung released the first of its accused tablets. 57.3% of respondents who were shown a
21 head-on image of a disguised iPad—with blurred icons and the “home” button covered with a
22 sticker—still identified it with Apple, iPad, or similar Apple-related product name. Similarly,

23 ²⁸⁰ See APL-ITC796-0000489304-489435 at APL-ITC796-0000489396. Individuals
24 surveyed purchased their iPads after the launch of the product and through April, 14, 2010.
25 The presentation is dated May 2010. See APL-ITC796-0000489304-489435 at APL-ITC796-
0000489305-489306. Numbers in parentheses represent the breakdown for survey
26 respondents who purchased their iPads at an Apple Retail Store.

27 ²⁸¹ See APLNDC0001651734-1651806 at APLNDC0001651776. The presentation is
dated August 2010. See APLNDC0001651734-1651806 at APLNDC0001651735.

28 ²⁸² APLNDC-Y00000051599-605, at APLNDC-Y00000051600.

²⁸³ APLNDC-Y00000051599-605, at APLNDC-Y00000051600.

1 75.2% of respondents who were shown an angled view of an iPad, with or without blurred icons,
2 identified it with Apple or Apple products.²⁸⁴ A significantly smaller percentage of respondents
3 who were shown a “control” tablet (with and without similar blurring) identified it with Apple or
4 Apple products. Specifically, 17% of the respondent shown a head-on image of the control tablet
5 identified it with Apple, iPad, or a similar Apple related product name, as did 10.8% of
6 respondents who saw an angled view of the control tablet.

7 145. The strength of the trade dress has also been recognized by Samsung’s executives.
8 Internal Samsung documents show that Samsung’s executives viewed the iPad as the industry
9 standard in tablet computers.²⁸⁵ I discuss below how Samsung compared its tablets to the iPad,
10 and how improvements to the Samsung’s products were drawn directly from that comparison.²⁸⁶

11 146. In my opinion, there can be no question that after the iPad launch and before the
12 introduction of the first of the accused Samsung Galaxy Tab products in late 2010 (and before the
13 introduction of the Galaxy Tab 10.1 in June 2011), the look and feel of the iPad trade dress was
14 distinctively “Apple.” As with the iPhone and the iPod touch, the iPad had, by that point, become
15 one of the most recognizable products in the U.S. given Apple’s carefully placed advertisements
16 and extensive brand activity.

17 *Sleekcraft* Factor 2: Proximity of the goods

18 147. Apple’s iPad and iPad 2 products and Samsung’s Galaxy line of tablet computers
19 are similar in use and in function and directly compete with one another for market share. The
20 relevant products are marketed to the same segments of the population who are prospective
21 (actual, for repeat purchasers) buyers of tablet computers.

22 148. Internal market research conducted by Samsung and Apple also shows that the
23 tablet computer products of the two companies generally compete with each other. For instance,

24 _____
25 ²⁸⁴ Poret Report at 22-25, 33-34, 46, 60-61, 64-68.

26 ²⁸⁵ For instance, minutes from a Samsung meeting indicate that “Apple has already set
27 the market price (WiFi \$499/3G \$629). We may differentiate but cannot go above [Apple’s]
28 price” and that the attendees realized that Samsung must “emphasize ... graphic [sic] to
compete with iPad 3.” See SAMNDCA10403697-10403698 at SAMNDCA10403697.

²⁸⁶ SAMNDCA10244604-10244639 at SAMNDCA10244608; SAMNDCA00203268-
203420 at SAMNDCA00203401. See *infra* ¶¶ 164-165.

1 a draft of the U.S. Tablet Market Update presentation by Apple contains two pie charts depicting
2 market share of competitors in the U.S. tablet market based on IDC data in the first and second
3 quarters of 2011. Both Apple and Samsung are listed among competitors.²⁸⁷

4 149. In addition, Samsung's internal marketing research includes Apple as the main
5 competition for its Galaxy line of tablet computers. For instance, a Samsung market research
6 document entitled *Samsung Q4 '10 Deep Dive* has a section entitled "How Does the Galaxy Tab
7 Compare to the iPad?"²⁸⁸

8 150. Samsung's executives have acknowledged that the iPad and the Galaxy Tab 10.1
9 compete head-to-head. After the March 2011 product announcement for the iPad 2, Don-Joo Lee,
10 the Executive Vice President of Samsung's mobile division, was quoted as saying that Samsung
11 would have "to improve the parts [of the forthcoming Galaxy Tab 10.1] that are inadequate,"
12 further noting that "Apple made [the iPad 2] very thin."²⁸⁹

13 151. Thus, the Samsung products are perceived as directly competing.²⁹⁰ For instance,
14 *The Wall Street Journal* refers to the products as competitors, noting that "Apple's hot-selling
15 iPad now has its first credible *competitor* in the nascent market for multitouch consumer tablet
16 computers: the Samsung Galaxy Tab."²⁹¹ This is also evident from the comparison of the Apple

18 ²⁸⁷ APLNDC0001430158-1430196 at APLNDC0001430167; APLNDC0001430175.

19 ²⁸⁸ See SAMNDCA00526887-526933 at SAMNDCA00526914-526923 (See
Translations App'x).

20 ²⁸⁹ "Samsung Considers Galaxy Tab 10.1 Overhaul Following iPad 2 Unveiling," *Boy*
Genius Review, March 4, 2011; see also "iPad 2 Sends Galaxy Tab Back to the Drawing
21 Board," *NBCBayArea.com*, May 5, 2011.

22 ²⁹⁰ See, e.g., "It's a Tablet. It's Gorgeous. It's Costly.," *N.Y. Times*, November 10,
2010 (<http://www.nytimes.com/2010/11/11/technology/personaltech/11pogue.html>);
23 "Samsung's Galaxy Tab Is iPad's First Real Rival," *Wall St. Journal*, November 11, 2010
(<http://online.wsj.com/article/SB10001424052748703805004575606580224319038.html>);
24 "Appeal of iPad 2 Is a Matter of Emotions," *N.Y. Times*, March 9, 2011
(<http://www.nytimes.com/2011/03/10/technology/personaltech/10pogue.html>); "A Slender
25 Tablet with Widescreen Ambitions," *Wall St. Journal*, June 15, 2011
(<http://allthingsd.com/20110614/a-slender-tablet-with-widescreen-ambitions/>); see also
26 Deposition of Michael Tchao ("Tchao Dep.") on February 21, 2012, 158:8-20.

27 ²⁹¹ "Samsung's Galaxy Tab Is iPad's First Real Rival," *Wall St. Journal*, November 11,
2010
(<http://online.wsj.com/article/SB10001424052748703805004575606580224319038.html>)
28 (emphasis added).

1 products and Samsung products in product reviews. A product review called the products
2 “rivals,” noting that “the iPad 2 actually costs less than its comparably equipped Android rivals,
3 like the Xoom and the Samsung Galaxy Tab.”²⁹² Referring to Samsung’s Galaxy Tab as a “viable
4 alternative” to the iPad, a product review attempts to answer its own question of “how do the
5 Samsung Galaxy Tab 10.1 and iPad 2 really differ?”²⁹³ A review in *The New York Times* sets
6 forth a number of comparisons.²⁹⁴

7 *Sleekcraft* Factor 3: Similarity of the trade dress

8 152. Apple’s iPad and iPad 2 products and the Samsung Galaxy line of tablet computers
9 look strikingly similar. A side-by-side comparison of the images of the Apple and Samsung
10 tablets shown in the Amended Complaint demonstrates the similarity in the look and feel of these
11 products.²⁹⁵

12 153. As in the case of the iPhone, the survey evidence from the Van Liere Report
13 illustrates the similarity between the look of Samsung Galaxy 10.1 tablet and that of the iPad.
14 When shown a video of a Samsung Galaxy 10.1 tablet, 43% of respondents indicated that the
15 tablet was an iPad or Apple product.²⁹⁶ On the other hand, only 24% of respondents indicated
16 that the “control” tablet was an iPad or Apple product.

17 154. There is also some anecdotal evidence regarding consumers’ confusion between
18 the Apple and Samsung tablets, illustrating the striking similarity between the Apple and
19 Samsung tablets. For example, during his deposition, Sangeun Lee (“Mr. Lee”), head of
20 Samsung’s North America quality issues within the Global CS Team, testified that Samsung
21 received reports that “customers confuse the Galaxy Tab 10.1 for the iPad 2 when they purchase
22 the Galaxy Tab 10.1.”²⁹⁷ Similarly, a Samsung marketing presentation, dated February 2011,

23 ²⁹² “Appeal of iPad 2 Is a Matter of Emotions,” *N.Y. Times*, March 9, 2011
24 (<http://www.nytimes.com/2011/03/10/technology/personaltech/10pogue.html>).

25 ²⁹³ “A Slender Tablet with Widescreen Ambitions,” *Wall St. Journal*, June 15, 2011
26 (<http://allthingsd.com/20110614/a-slender-tablet-with-widescreen-ambitions/>).

27 ²⁹⁴ “It’s a Tablet. It’s Gorgeous. It’s Costly.,” *N.Y. Times*, November 10, 2010
28 (<http://www.nytimes.com/2010/11/11/technology/personaltech/11pogue.html>).

²⁹⁵ Amended Complaint ¶¶ 44, 94, 99, 101.

²⁹⁶ Van Liere Report at 3, 9, 12.

²⁹⁷ Deposition of Sangeun Lee on February 24, 2012 (“Lee Dep.”) 12:25-13:10.

1 stated that “[o]ver half of consumers who recognize the Samsung sponsored Tab TVC [TV
2 commercial] thought it was for Apple, while only 16% thought it was for Samsung.”²⁹⁸ In
3 addition, during a court hearing, when asked by the judge if she could identify which tablet was
4 an iPad and which tablet was a Galaxy Tab, Samsung’s lead counsel, Kathleen Sullivan, said
5 “[n]ot at this distance your honor,’ ... approximately 10 feet from the bench.”²⁹⁹

6 155. The similarities between the two product lines are so apparent that they have been
7 heavily noted by industry observers as well. When the Galaxy Tab tablet was introduced, many
8 reviewers discussed the fact that it was physically very similar to the iPad. Exhibit 8 contains a
9 sample of quotes from various sources. For example, *eWeek* noted that “if mimicry is flattery, the
10 Galaxy Tab has compliments galore for the iPad. . . . Looking like an unlikely offspring between
11 the iPad and the iPhone 4, the Tab has an iPad-like front fascia as well as a camera-equipped back
12 cover similar to the not-yet-released white iPhone. . . . Even the dock connector very closely
13 mimics Apple’s standard pinout.”³⁰⁰ A *PC Magazine* review of the Galaxy Tab 10.1 stated that
14 “[m]ost laymen could easily mistake [the Galaxy Tab 10.1] for an iPad 2.”³⁰¹ A *PCWorld* article
15 stated that the products are so similar, it is hard to tell them apart: “In my hands-on testing, the
16 Tab 10.1 achieved perhaps the best design compliment an Android tablet could hope for—often
17 being mistaken by passers-by (including Apple iPad users) for an iPad 2. The confusion is
18 understandable when you see and hold the Tab 10.1 for the first time.”³⁰²

19 *Sleekcraft* Factor 4: Evidence of actual confusion

20 _____
21 ²⁹⁸ SAMNDCA00526887-526933 at SAMNDCA00526893 (*See* Translations App’x).

22 ²⁹⁹ “US Judge: Samsung’s Products Infringe on Apple Design Patents,” *ArsTechnica*,
23 No Date (<http://arstechnica.com/apple/news/2011/10/samsung-may-face-us-injunction.ars>);
24 “Apple Must Show Patents Valid in Samsung Case: Judge,” *Reuters*, October 14, 2011
([http://www.reuters.com/article/2011/10/14/us-apple-samsung-lawsuit-
idUSTRE79C79C20111014](http://www.reuters.com/article/2011/10/14/us-apple-samsung-lawsuit-idUSTRE79C79C20111014)).

25 ³⁰⁰ “Samsung Galaxy Tab Nods to Apple iPad but Goes Own Way: iFixit,” *eWeek*,
26 November 12, 2010.

27 ³⁰¹ “Unboxing the Samsung Galaxy Tab 10.1; It Doesn’t Run Android 3.1 Yet, But the
28 New Samsung Tablet Gives the iPad 2 A Run for Its Money,” *PC Magazine*, May 10, 2011.

³⁰² “Samsung Galaxy Tab 10.1 Wi-Fi: A Worthy Rival to the iPad 2,” *PCWorld*, June 8,
2011
([http://www.pcworld.com/article/229763/samsung_galaxy_tab_101_wifi_a_worthy_rival_to_](http://www.pcworld.com/article/229763/samsung_galaxy_tab_101_wifi_a_worthy_rival_to_the_ipad_2.html)
[the_ipad_2.html](http://www.pcworld.com/article/229763/samsung_galaxy_tab_101_wifi_a_worthy_rival_to_the_ipad_2.html)).

1 156. As discussed above, the survey evidence from the Van Liere Report demonstrates
2 consumers' confusion between Samsung's Galaxy Tab 10.1 and Apple's iPad products. Based on
3 a post-sale confusion study, after netting out the respondents who indicated that the "control"
4 tablet was an iPad or Apple product, Dr. Van Liere finds that almost 1 in 5 respondents, who were
5 shown a video of a Samsung Galaxy 10.1 tablet, indicated that the tablet was an iPad or Apple
6 product.³⁰³ Before netting out the respondents who indicated that the "control" tablet was an iPad
7 or an Apple product, Dr. Van Liere's survey results show that nearly 2 in 5 respondents who were
8 shown a video of a Samsung Galaxy 10.1 tablet indicated that the tablet was an iPad or Apple
9 product.

10 157. There is anecdotal evidence regarding consumers' confusion between Samsung's
11 Galaxy Tab 10.1 and Apple's iPad 2. During his deposition, Mr. Lee testified that Samsung
12 received reports that "customers confuse the Galaxy Tab 10.1 for the iPad 2 when they purchase
13 the Galaxy Tab 10.1."³⁰⁴ During a "Task Force" study conducted by his team, a Best Buy
14 employee informed them that consumers confused the Galaxy Tab 10.1 and the iPad.³⁰⁵ Mr. Lee
15 stated that he was aware of reports discussing the fact that consumers returned the Galaxy Tab
16 10.1 in exchange for an iPad.³⁰⁶ In summarizing a comment from another report, Mr. Lee
17 testified, "[i]t says here the reason for purchasing P4 [Galaxy Tab 10.1] is—in many cases was
18 because they thought it was the iPad. And most of them do not know well about the product they
19 purchased..."³⁰⁷ In addition, a Samsung marketing presentation, dated February 2011, states
20 "[o]ver half of consumers who recognize the Samsung sponsored Tab TVC [TV commercial]
21 thought it was for Apple, while only 16% thought it was for Samsung."³⁰⁸

22 *Sleekcraft* Factor 5: Marketing channels used
23
24

25 ³⁰³ Van Liere Report at 3, 9, 11.

26 ³⁰⁴ Deposition of Sangeun Lee on February 24, 2012 ("Lee Dep.") 12:25-13:10.

27 ³⁰⁵ Lee Dep. 18:4-19, 21:3-4, 33:22-35:23.

28 ³⁰⁶ Lee Dep. 36:5-12.

³⁰⁷ Lee Dep. 47:24-48:2.

³⁰⁸ SAMNDCA00526887-526933 at SAMNDCA00526893 (*See* Translations App'x).

1 158. Samsung's Galaxy tablet computer products and Apple's iPad products are sold
2 side-by-side in many of the same retail situations. For instance, AT&T and Verizon Wireless
3 both sell Apple's iPad products and Samsung's Galaxy Tab products.³⁰⁹ I personally visited an
4 AT&T store in Manhattan, where the brands were being displayed less than 3 feet apart. Each of
5 these carriers also features the two product lines on their websites.³¹⁰ Similarly, retailers such as
6 Best Buy feature both Samsung and Apple tablets in their stores. Online retailers, such as
7 Amazon as well as Best Buy, Walmart, and Target, also offer both Apple's iPad products and
8 Samsung's Galaxy Tab products on their websites.³¹¹ Moreover, many of these websites allow
9 side-by-side comparisons of the two companies' products.³¹²

10 159. In January 2011, Samsung launched its second major advertising campaign for the
11 Galaxy Tab.³¹³ Over the course of 2011, Samsung's Galaxy Tab and Galaxy Tab 10.1 campaigns
12 were estimated to have spent \$90.1 million on television ads, \$14.7 million on print ads, and \$6.1
13

14
15 ³⁰⁹ "AT&T to Expand Tablet Portfolio with Samsung Galaxy Tab," *Samsung Press*
16 *Release*, September 16, 2010
(http://www.samsung.com/us/news/newsPreviewRead.do?news_seq=19688); "Verizon
17 Wireless Puts Samsung Galaxy Tab in Store in November," *Samsung Press Release*, No Date
([http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19747&rdoPeriod=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19747&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Verizon+Wireless+Puts+Samsung+)
18 [ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19747&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Verizon+Wireless+Puts+Samsung+)
19 [Verizon+Wireless+Puts+Samsung+](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19747&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Verizon+Wireless+Puts+Samsung+)); "Apple Launches iPad," *Apple Inc. Press Release*,
January 27, 2010 (<http://www.apple.com/pr/library/2010/01/27Apple-Launches-iPad.html>);
"Apple Launches iPad 2," *Apple Inc. Press Release*, March 2, 2011
(<http://www.apple.com/pr/library/2011/03/02Apple-Launches-iPad-2.html>).

20 ³¹⁰ See, e.g., APLNDC0003039047-3039048 at APLNDC0003039047 (AT&T);
21 APLNDC0003039061- at APLNDC0003039061 (AT&T); APLNDC0003039447-3039449 at
APLNDC0003039448 (Verizon).

22 ³¹¹ See, e.g., APLNDC0003038965-APLNDC0003038973 at APLNDC0003038965
(Amazon); APLNDC0003039005-APLNDC0003039007 at APLNDC0003039005 (Amazon);
23 APLNDC0003039120-3039123 at APLNDC0003039120-3039123 (Best Buy);
APLNDC0003039145-3039148 at APLNDC0003039145-3039147 (Best Buy);
24 APLNDC0003039174-3039176 at APLNDC0003039174 (Best Buy); APLNDC0003039181-
3039182 at APLNDC0003039181 (Radioshack); APLNDC0003039183-3039184 at
25 APLNDC0003039183 (Radioshack); APLNDC0003039408-3039411 (Target);
APLNDC0003039419-3039423 at APLNDC0003039419 (Target); APLNDC0003039426-
26 APLNDC000303430 at APLNDC0003039429 (Target).

27 ³¹² See, e.g., APLNDC0003039174-3039176 at APLNDC0003039174 (Best Buy);
APLNDC0003039434-3039436 at APLNDC0003039434.

28 ³¹³ OMD0000004-10 at OMD0000007.

1 million on online advertisements.³¹⁴ As was the case with Samsung's Galaxy S II campaign,
2 Samsung targeted many of its tablet advertisements at the same media Apple used to advertise its
3 iPad.³¹⁵ For instance, during the month of January, both Apple and Samsung advertised their
4 tablet devices on *American Idol*, *The Late Late Show with Craig Ferguson*, *Two and a Half Men*,
5 and *Criminal Minds*.³¹⁶ Furthermore, throughout the year, Samsung selected many of the same
6 print media avenues used by Apple. For example, beginning in January 2011 and extending
7 through the end of the year, advertisements for the Galaxy Tab and Tab 10.1 appeared in *Sports*
8 *Illustrated*, *The Wall Street Journal*, *Rolling Stone*, *Time*, *Men's Health*, *The New York Times*,
9 and *Wired*.³¹⁷ Starting as early as January for newspaper media and March for magazine media,
10 Apple ran ads for competing products throughout the year in those same sources.³¹⁸

11 *Sleekcraft* Factor 6: Types of goods and the degree of care likely to be exercised
12 by the purchaser

13 160. As with smartphones, the degree of care exercised by the purchaser is a function of
14 several factors: the price of the goods, the degree of sophistication of the consumers, and the
15 purchase channel involved (*e.g.*, web, carrier store, independent big-box retailer, aftermarket
16 channels such as eBay, etc.). Therefore, the same variances are at play here—the products are
17 bought by both careful consumers and not-so-careful consumers.³¹⁹

18 *Sleekcraft* Factor 7: Defendant's intent in selecting the trade dress

20 _____
21 ³¹⁴ OMD0000004-10 at OMD0000007.

22 ³¹⁵ Todd Pendleton, STA's Chief Marketing Officer for wireless, stated that Samsung
23 runs national campaigns for its smartphone and tablet products. *See, e.g.*, Pendleton Rough
24 Dep. Tr. 26-28, 32, 37-38.

25 ³¹⁶ OMD0000004-10 at OMD0000007; APLNDC-X0000022178; APLNDC-
26 X0000022180; APLNDC-X0000022181.

27 ³¹⁷ OMD0000004-10 at OMD0000007; APLNDC0001545034-1545040 at
28 APLNDC0001545036; APLNDC0002113085-2113091 at APLNDC0002113088.

³¹⁸ APLNDC-X0000037753-37780 at APLNDC-X0000037753-37755;
APLNDC0002034107-2034131 at APLNDC0002034120-2034121; APLNDC-
X0000048915-48924 at APLNDC-X0000048915-48916; APLNDC-X0000039288-39293 at
APLNDC-X0000039288-39290.

³¹⁹ There is some tempering of price variation because tablets generally do not sell at
heavily subsidized prices because of carrier contracts.

1 161. Like the Galaxy S line of phones, the Samsung Galaxy Tab products were
2 announced and introduced after Apple unveiled the iPad in January 2010.³²⁰ Samsung’s first
3 Android tablet, the Galaxy Tab, was unveiled in September 2010, and made available for
4 purchase in the U.S. in November 2010.³²¹ The iPad 2 was announced and released in March
5 2011, whereas the Galaxy Tab 10.1 was introduced in the U.S. in late March 2011, and made
6 available for sale in the U.S. in June 2011.³²²

7 162. Before the introduction of the iPad, no other tablet computer product in the market
8 looked like the iPad. For example, the Microsoft Tablet PC unveiled in 2000 did not have a flat
9 clear surface covering the front, under which was a display screen. One could use Microsoft
10 Tablet PC with a special stylus pen, but it was not a touch-sensitive device.³²³ Compaq

12 ³²⁰ “Apple Launches iPad,” *Apple Inc. Press Release*, January 27, 2010
(<http://www.apple.com/pr/library/2010/01/27Apple-Launches-iPad.html>).

13 ³²¹ “Samsung Mobile Expands Galaxy Product Portfolio with Launch of Samsung
14 Galaxy Tab,” *Samsung Press Release*, September 16, 2010
([http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19537&rdoPeriod=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19537&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Samsung+Mobile+Expands+Galaxy+Product+Portfolio+)
15 [ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19537&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Samsung+Mobile+Expands+Galaxy+Product+Portfolio+)
16 [Samsung+Mobile+Expands+Galaxy+Product+Portfolio+](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19537&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Samsung+Mobile+Expands+Galaxy+Product+Portfolio+)); “Verizon Wireless Puts Samsung
Galaxy Tab in Stores in November,” *Samsung Press Release*, No Date
([http://www.samsung.com/us/news/presskitRead.do?page=5&news_seq=19747&rdoPeriod=](http://www.samsung.com/us/news/presskitRead.do?page=5&news_seq=19747&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy+tab)
17 [ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=](http://www.samsung.com/us/news/presskitRead.do?page=5&news_seq=19747&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy+tab)
18 [galaxy+tab](http://www.samsung.com/us/news/presskitRead.do?page=5&news_seq=19747&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy+tab)).

19 ³²² “Apple Launches iPad 2,” *Apple Inc. Press Release*, March 2, 2011
(<http://www.apple.com/pr/library/2011/03/02Apple-Launches-iPad-2.html>); “Samsung
20 Unveils Galaxy Tab 10.1 and Galaxy Tab 8.9, World’s Thinnest Mobile Tablets,” *Samsung*
Press Release, March 22, 2011
([http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19835&rdoPeriod=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19835&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy+tab+10.1)
21 [ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19835&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy+tab+10.1)
22 [galaxy+tab+10.1](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19835&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy+tab+10.1)); “Samsung Galaxy Tab 10.1, World’s Thinnest Mobile Tablet, Makes
Official Landing in U.S.” *Samsung Press Release*, June 2, 2011
([http://www.samsung.com/us/news/presskitRead.do?page=7&news_seq=19857&rdoPeriod=](http://www.samsung.com/us/news/presskitRead.do?page=7&news_seq=19857&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy)
23 [ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=](http://www.samsung.com/us/news/presskitRead.do?page=7&news_seq=19857&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy)
24 [galaxy](http://www.samsung.com/us/news/presskitRead.do?page=7&news_seq=19857&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy)). The Galaxy Tab 10.1 was unveiled on February 13, 2011. Samsung announced the
new tablet in partnership with Vodafone Group (“Samsung Expands the Samsung Galaxy Tab
25 Range with a 10.1” Entertainment Powerhouse,” *Samsung Press Release*, February 13, 2011
([http://www.samsung.com/us/news/presskitRead.do?page=9&news_seq=19817&rdoPeriod=](http://www.samsung.com/us/news/presskitRead.do?page=9&news_seq=19817&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy)
26 [ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=](http://www.samsung.com/us/news/presskitRead.do?page=9&news_seq=19817&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy)
27 [galaxy](http://www.samsung.com/us/news/presskitRead.do?page=9&news_seq=19817&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy))).

28 ³²³ “Tablet PC Brings the Simplicity of Pen and Paper to Computing,” *Microsoft Press*
Release, November 13, 2000 ([http://www.microsoft.com/presspass/features/2000/nov00/11-](http://www.microsoft.com/presspass/features/2000/nov00/11-13tabletpc.msp)
[13tabletpc.msp](http://www.microsoft.com/presspass/features/2000/nov00/11-13tabletpc.msp))).

1 introduced a tablet called the Compaq TC1000 in 2002. The product was a hybrid tablet that
2 included a detachable keyboard as well as a writing stylus pen.³²⁴ In 2007, the Lenovo X61
3 Tablet PC was introduced. It had a touchscreen and could be used with either a finger or a stylus,
4 but it was attached to a full sized keyboard. The product was more similar to a laptop with a
5 touch-sensitive monitor that could be rotated than a standalone tablet.³²⁵

6 163. Before Apple's introduction of the iPad in 2010, Samsung's tablet products looked
7 very different from its Galaxy Tabs. For example, the Samsung Q1 tablet, introduced in 2006,
8 looked very different from the Galaxy Tab or the iPad.³²⁶ The Q1, which has been described as
9 looking similar to a "pumped-up Sony PSP," featured a touch screen that could be maneuvered by
10 finger or stylus and housed handwriting recognition software. It had a built-in virtual keyboard
11 for typing.³²⁷ To the left of the screen was a flat-headed joystick and on the right was a circular
12 control with four buttons.³²⁸ A later version of the Q1, released in May 2007, featured a split
13 QWERTY keyboard to the sides of the screen.³²⁹

14 164. Much as Samsung compared its phones to the iPhone, it also compared its tablets
15 to the iPad. For example, in a side-by-side comparison of the iPad 2 with a P5 (a Samsung tablet)
16 it was stated that iPad 2 icons are "big and the gap between the applications are ideal" while P5
17 icons are "too small and too close to each other"³³⁰ Another side-by-side comparison is a

18 ³²⁴ "HP Compaq Tablet PC TC1000 Review," *CNET Reviews*, November 5, 2002
19 ([http://reviews.cnet.com/laptops/hp-compaq-tablet-pc/4505-3121_7-
20627295.html#reviewPage1](http://reviews.cnet.com/laptops/hp-compaq-tablet-pc/4505-3121_7-20627295.html#reviewPage1)).

20 ³²⁵ "Lenovo ThinkPad X61 Tablet PC Review," *TabletPCReview.com*, June 12, 2007
21 (<http://www.tabletpcreview.com/default.asp?newsID=868>).

22 ³²⁶ "Samsung Q1 Review," *PC Magazine*, May 1, 2006
23 (<http://www.pcmag.com/article2/0,2817,1955884,00.asp>).

24 ³²⁷ "Samsung Q1," *PC Magazine*, May 1, 2006
25 (<http://www.pcmag.com/article2/0,2817,1955884,00.asp>).

26 ³²⁸ "Samsung Q1," *PC Magazine*, May 1, 2006
27 (<http://www.pcmag.com/article2/0,2817,1955884,00.asp>).

28 ³²⁹ "Samsung Unveils the Q1 Ultra, the Next Stage in the Evolution of Ultra Mobile
Personal Computing," *Samsung Press Release*, May 7, 2007
(http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=3692&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Q1+ultra); "Q1 Ultra Premium UMPC," *Samsung Marketing Material*
(http://www.samsung.com/us/pdf/UMPC_LR.pdf).

³³⁰ SAMNDCA10244604-10244639 at SAMNDCA10244608.

1 presentation summarizing a workshop conducted by HumanCentric (a product design service
2 company) and Samsung, comparing “key applications” (such as home, calendar, contacts, etc.) on
3 the Samsung P1 (another Samsung tablet) to those on the iPad. In order to improve a weakness of
4 P1—that P1 “menu and home screens are separate areas, which can cause confusion to a new
5 user”—it was suggested that “the simplicity of the iPad is good to emulate.”³³¹

6 165. Therefore, these internal Samsung documents show that the iPad was held out as
7 the aspirational model to Samsung designers and engineers.

8 *Sleekcraft* Factor 8: Likelihood of expansion of the product lines

9 166. Because Apple and Samsung products already compete in the tablet computer
10 market, *Sleekcraft* Factor 8 is not informative for the purposes of my analysis.

11 **X. SAMSUNG’S MISAPPROPRIATION OF APPLE’S TRADE DRESS DILUTES**
12 **AND HARMS APPLE’S BRAND**

13 167. In this section, I assess how Samsung’s misappropriation of Apple’s proprietary
14 look and feel harms Apple’s brand. I first analyze how Samsung’s misappropriation dilutes the
15 distinctiveness of Apple’s iPhone Trade Dress and iPhone 3G Trade Dress and, separately, the
16 iPad Trade Dress. I then analyze how Samsung’s misappropriation harms Apple’s brand.

17 168. I understand that “dilution by blurring” is the legal standard to be used to analyze
18 one of Apple’s claims for relief against Samsung that pertain to the trade dress claims at issue. I
19 also understand that dilution by blurring may be assessed by examining six factors set out by the
20 Trademark Dilution Revision Act of 2006.³³² As with the *Sleekcraft* Factors discussed above,
21 while I have not been asked to provide a legal opinion on whether Samsung’s products dilute
22 Apple’s distinctive trade dress, these factors reflect the type of information that I, as a marketing
23 expert, would consider in assessing whether Samsung’s misappropriation of Apple’s trade dress is
24 likely to affect consumers’ perceptions of Apple’s brand and their purchasing behavior.

25 169. The blurring factors are:

27 ³³¹ SAMNDCA00203268-203420 at SAMNDCA00203301.

28 ³³² 15 U.S.C. § 1125(c)(2)(B).

- (i) The degree of similarity between the trade dresses;
- (ii) The degree of inherent or acquired distinctiveness of the famous trade dress;
- (iii) The extent to which the owner of the famous trade dress is engaging in substantially exclusive use of the trade dress;
- (iv) The degree of recognition of the famous trade dress;
- (v) Whether the junior user of the trade dress intended to create an association with the famous trade dress; and
- (vi) Any actual association between the trade dresses.

A. Samsung’s Misappropriation of Apple’s iPhone Trade Dress and iPhone 3G Trade Dress Dilutes the Distinctiveness of Apple’s iPhone Trade Dress and iPhone 3G Trade Dress

Dilution Factor 1: Similarity of the Trade Dresses

170. As discussed above, Samsung’s Galaxy line of smartphones closely resembles Apple’s iPhone Trade Dress and iPhone 3G Trade Dress, as embodied in Apple’s iPhone products.³³³

Dilution Factors 2 & 4: Degree of Acquired Distinctiveness and Recognition of the Trade Dress

171. A brand’s distinctive design can become part of a consumer’s perception of that brand. The designs of Apple’s iPhone products, as shown in the iPhone Trade Dress and iPhone 3G Trade Dress, are unique and distinctive and thus memorable for consumers. These brand perceptions—both on the part of users and non-users (because they are mobile devices that are used publicly)—are confirmed by consumers’ repeated interactions with Apple’s distinctive designs, and make Apple’s iPhone Trade Dress and iPhone 3G Trade Dress recognizable. The marketing literature addresses how distinctive designs reduce consumer confusion in the clutter of brands in the marketplace and make a brand recognizable.

172. Furthermore, the surveys from the Poret Report show that people associate the look of the iPhone Trade Dress and the iPhone 3G Trade Dress with Apple.³³⁴ Those survey results, in combination with Apple’s extensive promotion and sales of iPhone products and third-party press regarding the iPhone products, as discussed above,³³⁵ cause me to believe that there is

³³³ See *supra* ¶¶ 117-120.

³³⁴ Poret Report at 35, 52.

³³⁵ See *supra* ¶¶ 47-70.

1 an extremely high degree of recognition for the iPhone Trade Dress and the iPhone 3G Trade
2 Dress among consumers in the U.S. Separately, Dr. Van Liere's survey shows that a significant
3 percentage of people associate the look of the Samsung Galaxy phones with Apple iPhones or
4 products made by Apple,³³⁶ which also supports the conclusion that the look and feel of the
5 iPhone is recognizable as a source identifier. If it were not recognizable as a source identifier, I
6 would not expect consumers to associate the look-alike Samsung products with Apple. These
7 surveys, taken together with the evidence noted above—the amount and nature of Apple's iPhone
8 advertising, the volume of iPhone sales, anecdotal evidence from consumers and industry
9 observers pertaining to the iPhone's look and feel, widespread media attention—strongly suggest
10 from a marketing perspective that the iPhone look and feel is highly recognizable.³³⁷

11 Dilution Factor 3: Substantially Exclusive Use of the Trade Dress

12 173. As mentioned above, I understand that Apple has an industrial design expert in the
13 case, Peter Bressler, who will be opining that no phone looked like the iPhone before the launch
14 of the iPhone. For purposes of my analysis, I assume that the relevant trade dresses were
15 substantially exclusively used by Apple when Apple first launched the iPhone.

16 Dilution Factor 5: Intent of Junior User to Create Association with the Famous 17 Trade Dress

18 174. Samsung's internal documents, discussed above, show that Samsung viewed the
19 iPhone as the model for a smartphone and intended to create an association with the iPhone
20 because it used iPhone devices as models in its development of the Galaxy smartphones.³³⁸

21 Dilution Factor 6: Actual Association

22 175. Press articles reviewing the Galaxy smartphone products make it clear that the
23 reviewers associate the look and feel of the Galaxy smartphone products with the iPhone.
24 Specifically, an article from *Wired* noted:

26 ³³⁶ Van Liere Report at 4-5.

27 ³³⁷ My opinion is restricted to a marketing perspective vis-à-vis the iPhone. I am not
28 rendering an opinion on the fame of the trade dress from a legal perspective.

³³⁸ See *supra* ¶¶ 132-138.

1 Samsung's latest phone, the Vibrant, has the body of an iPhone and the
2 brains of an Android. The Vibrant's industrial design *is shockingly*
3 *similar* to the iPhone 3G: The rounded curves at the corners, the
4 candybar shape, the glossy, black finish and the chrome-colored
5 metallic border around the display. The Vibrant even has its volume
6 and ringer buttons in almost the same spot as the iPhone 3G. . . . [T]he
7 square icons are, again, very similar in their looks to the iPhone 3G's. .
8 . . [T]here's little to make the phone notable, apart from its striking
9 similarity to the iPhone.³³⁹

10 176. Another reviewer noted how even the icons used in the Samsung Galaxy S
11 resemble those of the iPhone: "When I saw pictures of the Galaxy S phones from Samsung, I
12 thought I'd found the perfect successor for shifting off the iPhone. Here was an [sic] phone that
13 had iPhone-like icons, an iPhone-like look but which would work on networks other than
14 AT&T."³⁴⁰

15 177. If even expert reviewers of smartphone products associate the Galaxy smartphone
16 products with Apple, it is not surprising that consumers reach the same conclusion, and associate
17 the design of the Galaxy smartphone products with Apple. As discussed above, Dr. Van Liere's
18 survey shows that a significant percentage of people associate the look of the Samsung Galaxy
19 phones with Apple iPhones or products made by Apple. Specifically, 52% of respondents who
20 were shown pictures of a Samsung Galaxy Fascinate phone associated the look and design of the
21 Samsung Galaxy Fascinate with an iPhone, or a phone or product manufactured by Apple. When
22 the same test was carried out with a Samsung Galaxy S II Epic 4G Touch phone, 51% of
23 respondents associated the look and design of the Samsung Galaxy S II Epic 4G Touch phone
24 with an iPhone, or a phone or product manufactured by Apple.³⁴¹

25 178. When distinctiveness cues get muddled, as has happened here, brand perception
26 suffers. Samsung's phones at issue, by appropriating Apple's trade dress, muddy the

27 ³³⁹ "First Look: Samsung Vibrant Rips Off iPhone 3G Design," *Wired*, July 15, 2010
28 ([http://www.wired.com/gadgetlab/2010/07/first-look-samsung-vibrant-rips-off-iphone-3g-
design/](http://www.wired.com/gadgetlab/2010/07/first-look-samsung-vibrant-rips-off-iphone-3g-design/)) (emphasis added).

³⁴⁰ "A Tale of Three Android Phones: Droid 2, Samsung Fascinate & Google Nexus S,"
Search Engine Land, January 3, 2011 ([http://searchengineland.com/a-tale-of-three-android-
phones-droid-2-samsung-fascinate-google-nexus-s-59870](http://searchengineland.com/a-tale-of-three-android-phones-droid-2-samsung-fascinate-google-nexus-s-59870)).

³⁴¹ Van Liere Report at 4-5, 17.

1 distinctiveness cues that are inherent in the iPhone Trade Dress and iPhone 3G Trade Dress. As
2 Mr. Joswiak notes:

3 [N]o one made a successful copy of the iPod and it remained very
4 distinctive as far as the gold standard for music players. The iPhone,
5 in the smartphone market, was copied, and as a result, instead of it
6 having that same luxury, if you will, that the iPod had of being very
7 distinctive and alone in the way it looks and what it does, as a
8 marketing professional, the intuition is that some of the differences
there are there – it’s just too easy for a customer to think they’re
getting something very similar to an iPhone, and they buy an
alternative.³⁴²

9 179. It is noteworthy that Samsung’s misappropriation happens both at the level of the
10 constituent elements of the trade dress (*e.g.*, a matrix of colorful square icons with evenly
11 rounded corners within the display screen when the device is turned on) and the overall look and
12 feel that the consumer perceives. The effects on consumers’ brand perceptions is accretive: here,
13 we have a case where Samsung mimics not only the constituent elements of the trade dress but
14 also the overall look and feel by its choice of which elements to appropriate (for example, one can
15 imagine an alternative where the colorful icons were misappropriated but the overall shape was
16 different from that of the iPhone). Given the evidence that I have discussed above showing the
17 striking similarity of Samsung’s products at issue and the iPhone, iPhone 3G, and iPhone 3GS,
18 the accretive effect magnifies the diminution of the distinctiveness of the iPhone Trade Dress and
19 iPhone 3G Trade Dress.

20 **B. Samsung’s Misappropriation of Apple’s iPad Trade Dress Dilutes**
21 **Distinctiveness of Apple’s iPad Trade Dress**

22 Dilution Factor 1: Similarity of the Trade Dresses

23 180. As discussed above, Samsung’s Galaxy tablets closely resemble Apple’s iPad
24 Trade Dress, as embodied in Apple’s iPad and iPad 2 products.³⁴³

25 Dilution Factors 2 & 4: Degree of Acquired Distinctiveness and Recognition of
26 the Trade Dress

27 ³⁴² Joswiak Dep. 274:8-20.

28 ³⁴³ See *supra* ¶¶ 152-155.

1 181. A brand's distinctive look and feel can become part of a consumer's perception of
2 that brand. The designs of Apple's iPad products, as shown in the iPad Trade Dress, are unique
3 and distinctive and thus memorable for consumers. These brand perceptions—both on the part of
4 users and non-users (because they are mobile devices that are used publicly)—are confirmed by
5 consumers' repeated interactions with Apple's distinctive designs, and make Apple's iPad Trade
6 Dress recognizable. A distinctive look and feel reduces consumer confusion amidst the clutter of
7 brands in the marketplace and makes a brand recognizable.

8 182. As discussed above, the Poret Report shows that people associate the look of the
9 iPad Trade Dress with Apple, and that the iPad Trade Dress has a high degree of recognition.³⁴⁴
10 Those survey results, in combination with Apple's extensive promotion and sales of iPad
11 products and third-party press regarding the iPad products, as discussed above,³⁴⁵ cause me to
12 believe that there is a high degree of recognition for the iPad among consumers in the U.S.
13 Separately, Dr. Van Liere's survey shows that a significant number of people associate the look
14 of the Samsung Galaxy 10.1 tablet with Apple iPads or products made by Apple,³⁴⁶ which also
15 supports the conclusion that the look and feel of the iPad serves to identify the source of the
16 product. As noted above, if the overall look and feel of the iPad was not recognizable as a source
17 identifier, I would not expect consumers to associate the Samsung products with Apple. These
18 surveys, taken together with the evidence noted above—the amount and nature of Apple's iPad
19 advertising, the volume of iPad sales, anecdotal evidence from consumers and industry observers
20 pertaining to the iPad's look and feel, and media attention—strongly suggest from a marketing
21 perspective that the iPad look and feel is famous.³⁴⁷

22 Dilution Factor 3: Substantially Exclusive Use of the Trade Dress

23 183. As mentioned above, I understand that Apple has an industrial design expert in the
24 case, Peter Bressler, who will be opining that no tablet computer looked like the iPad prior to the

25 ³⁴⁴ Poret Report at 36, 61, 66.

26 ³⁴⁵ *See supra* ¶¶ 47-55.

27 ³⁴⁶ Van Liere Report at 3.

28 ³⁴⁷ My opinion is restricted to a marketing perspective vis-à-vis the iPhone. I am not
rendering an opinion on the fame of the trade dress from a legal perspective.

1 launch of the iPad. For purposes of my analysis, I assume that the relevant trade dress was
2 substantially exclusively used by Apple when Apple first launched the iPad.

3
4 Dilution Factor 5: Intent of Junior User to Create Association with the Famous
Trade Dress

5 184. Samsung's internal documents, discussed above, show that Samsung viewed the
6 iPad as the model for a tablet, and intended to create an association with the iPad because it used
7 the iPad devices as models in its development of the Galaxy Tab devices.³⁴⁸

8 Dilution Factor 6: Actual Association

9 185. As discussed above, Samsung has received reports that customers have confused
10 the Galaxy Tab 10.1 for the iPad 2 when purchasing the Galaxy Tab 10.1.³⁴⁹ Moreover, an
11 internal Samsung marketing presentation states that many consumers who viewed a Samsung
12 television commercial for the Galaxy Tab mistakenly thought the ad had been an Apple ad.³⁵⁰
13 These instances of actual confusion relating to the source of Samsung's Galaxy Tab products and
14 advertisements support the conclusion that consumers associate Samsung's Galaxy Tab products
15 with the iPad Trade Dress, as embodied in the iPad and iPad 2 products.

16 186. In addition, Dr. Van Liere's survey shows that a significant percentage of people
17 confuse the look of the Samsung Galaxy 10.1 with Apple iPads or products made by Apple.³⁵¹
18 Specifically, 43% of respondents who were shown a video of someone using a Samsung Galaxy
19 Tab 10.1 tablet confused the product for an iPad, or a product manufactured by Apple.
20 Consumers who *confuse* a Samsung product with Apple are clearly *drawing an association*
21 between that product and Apple and are thereby misappropriating the look and feel of the Apple
22 products.

23 187. A *PCWorld* article stated that the products are so similar, it is hard to tell them
24 apart: "In my hands-on testing, the Tab 10.1 achieved perhaps the best design compliment an
25

26 ³⁴⁸ See *supra* ¶¶ 164-165.

27 ³⁴⁹ See *supra* ¶ 157.

28 ³⁵⁰ See *id.*

³⁵¹ Van Liere Report at 3, 9.

1 Android tablet could hope for—often being mistaken by passers-by (including Apple iPad users)
2 for an iPad 2. The confusion is understandable when you see and hold the Tab 10.1 for the first
3 time.”³⁵²

4 188. In sum, Samsung’s misappropriation of Apple’s iPad Trade Dress follows a
5 similar trajectory as its misappropriation of the iPhone Trade Dress and iPhone 3G Trade Dress
6 and has similar effects vis-à-vis reducing the distinctiveness of the iPad’s look and feel. When
7 distinctiveness cues get muddied, as has happened here, brand perception suffers. Samsung’s
8 tablet computers, by misappropriating Apple’s trade dress, muddy the distinctiveness cues that
9 are inherent in the iPad Trade Dress.

10 **C. Diluting the Distinctiveness of Apple’s iPhone Trade Dress, iPhone 3G Trade**
11 **Dress, and iPad Trade Dress Harms Apple’s Brand**

12 189. The value of a brand depends critically on the brand’s image and the underlying
13 brand associations in the minds of consumers. Samsung’s marketing strategy with respect to the
14 products at issue influence purchasing behavior. Specifically, the effect of Samsung’s
15 misappropriation of Apple’s trade dress reduces the distinctiveness of Apple’s trade dress, as
16 described above. From a marketing perspective, this reduces the strength of Apple’s brand
17 because consumers’ brand associations with respect to the Apple brand are weakened.

18 190. As a conceptual matter, the sources of harm to Apple’s brand image are twofold:
19 the first source of harm is Samsung’s general marketing strategy and tactics for the products at
20 issue that involve diminishing the distinctiveness of Apple’s trade dress; the second source of
21 harm occurs via actual consumer experience of Samsung’s knockoff products. As a practical
22 matter, these two sources of harm work together to affect Apple’s brand image.

23 191. An example of the first source of harm is the weakening of Apple’s “coolness”
24 factor that is inherent in the look and feel of the Apple products at issue. Many consumers buy an
25 iPhone or an iPad, in part, because of their aesthetic appeal—they look “cool.” Consumers like

26 ³⁵² “Samsung Galaxy Tab 10.1 Wi-Fi: A Worthy Rival to the iPad 2,” *PCWorld*, June 8,
27 2011
28 (http://www.pcworld.com/article/229763/samsung_galaxy_tab_101_wifi_a_worthy_rival_to_the_ipad_2.html).

1 using these products and consumers like being seen using these products. When other consumers
2 buy imitative, knock-off products, the iPhone loses part of its distinctive “coolness.” Of course,
3 coolness is an example, and the loss of distinctiveness goes beyond the attenuation of the
4 coolness factor. The entire spectrum of brand associations that consumers of the products at issue
5 have vis-à-vis the Apple brand is affected. Weakened brand associations also reduce the
6 emotional attachment consumers have to a brand; emotional attachment, so important in Apple’s
7 marketing, is also a very important driver of Apple’s brand image. In essence, then, Samsung’s
8 misappropriation of Apple’s brand image has an *affective* influence on consumers’ brand
9 associations and this erodes Apple’s brand image.

10 192. An eroded brand image inevitably leads to detrimental effects on Apple’s brand
11 equity. Strong brands provide enormous benefits to firms that own them. Therefore, when
12 brands are harmed, the benefits to the firm that positively affect its bottom line—which include
13 higher brand awareness, greater customer loyalty, increased marketing communication
14 effectiveness, and positive word-of-mouth created by loyal customers³⁵³—are impacted. Reduced
15 brand awareness and lower brand loyalty increases a company’s marketing costs and/or decreases
16 a company’s sales. Lower brand loyalty also leads to fewer recommendations by consumers, and
17 negative word-of-mouth. An eroded brand image also means that the brand no longer commands
18 the same brand image premium. An eroded brand image may also affect the firm’s ability to
19 invest in new products and engage in product expansions. It is noteworthy that an eroded brand
20 image not only impacts the current sales of the infringed products and other branded products
21 (including but not limited to related or ancillary products) but may also result in potential future
22 lost sales of infringed products and other branded products.³⁵⁴

23
24 ³⁵³ Winer & Dhar (2011) 179-180; Keller & Lehmann (2003); Steve Hoeffler & Kevin
Lane Keller, *The Marketing Advantages of Strong Brands*, BRAND MANAGEMENT 10, 421-445
25 (2003).

26 ³⁵⁴ It should be noted that sales of the Apple products at issue are typically accompanied
by sales of various related and ancillary products. For example, according to a 2010 iPad
Usage study, iPad buyers were “heavy users of the App store and iTunes.” See APLNDC-
27 Y0000025823-25934 at APLNDC-Y0000025900-25903, APLNDC-Y0000025905. The
same study also shows that in the survey sample, “roughly 4 in every 5 purchased a case for
28 their iPad.” See APLNDC-Y0000025823-25934 at APLNDC-Y0000025924. In addition,

1 193. There is an additional effect of Samsung’s misappropriation of Apple’s trade
2 dress. By appropriating elements of Apple’s brand image, Samsung’s Galaxy line of smartphones
3 and tablet products may effectively become unauthorized “extensions” of the high-quality Apple
4 brand in consumers’ minds. In essence, this creates the second source of harm discussed above.

5 194. Apple’s relevant products are generally offered at premium price points. In
6 contrast, I understand that head-to-head opening prices for the Samsung products at issue tend to
7 be released at lower price points than those Apple products. Because lower price may signal
8 lower quality,³⁵⁵ this can have a detrimental effect on Apple’s brand image. To the extent that
9 Samsung’s products are experienced differently than Apple’s by consumers, the differentiated
10 and distinctive nature of the “Apple” user experience is diminished. In general, a consistent
11 “Apple” user experience is very important to Apple and is an important part of its success in the
12 marketplace. For example, Babbage, the Science and Technology blog of *The Economist* wrote:

13
14 [Former Apple CEO Steve Jobs] used Apple’s quarterly earnings
15 call to rubbish Google’s claim that its mobile operating system,
16 Android, is far more open than Apple’s. Some apps developed on
17 Android will only work on certain Android-powered phones and
18 not others, he said. The result is a nightmare for consumers and
19 developers, *whereas Apple offers a simpler and more consistent*
20 *experience.*³⁵⁶

21 195. Industry observers agree on the uniqueness and consistency of Apple’s user
22 experience. For instance, according to a UBS Investment Research report, “through its focus on

23 Arthur Rangel (“Mr. Rangel”), Director of Market Research and Analysis at Apple, explained
24 during his deposition that iPhone or iPad buyers may also decide to purchase other Apple
25 products such as a Mac computer. Specifically, Mr. Rangel testified that “in many ways
26 Samsung has affected sales of iPhones or iPads that could lead to [fewer] sales of ...Macs
27 [Apple computers].” See Deposition of Arthur Rangel on March 2, 2012, 10:16-18, 186:3-6.

28 ³⁵⁵ A. R. Rao & K. B. Monroe, *The Effect of Price, Brand Name, and Store Name on
Buyers’ Perceptions of Product Quality: An Integrated Review*, 26 JOURNAL OF MARKETING
RESEARCH 351-357 (1989); A. Wolinsky, “Prices as Signals of Product Quality,” 50 REVIEW
OF ECONOMIC STUDIES 647-658 (1983).

³⁵⁶ “Smartphone Makers Clash,” *The Economist* blog *Babbage*, October 20, 2010
(http://www.economist.com/blogs/babbage/2010/10/smart-phone_makers_clash) (emphasis
added).

1 design, its own distribution through retail stores and its software/hardware ecosystems, Apple is
2 providing unique user experiences that are unrivaled in the digital appliance marketplace.”³⁵⁷

3 196. The diminution of the distinctiveness of the “Apple” user experience also hurts
4 Apple’s brand image and brand equity. The harm to the equity of the brand can be intensified
5 depending on the brand architecture strategy of the firm. Two main strategies are the “branded
6 house” strategy (where most or all of the brands bear the company name) and the “house of
7 brands” strategy (where the company name is usually not present and each individual product has
8 its own, stand-alone brand).³⁵⁸ In a branded house strategy, followed by the likes of Visa, Virgin,
9 and Apple, the exposure to the brand in one context helps the brand’s visibility and enhances
10 consumers’ awareness of the brand in other contexts. Thus, while this strategy can strengthen the
11 brand associations, it can also amplify the potential harm to equity of the brand. Thus, harm to
12 Apple’s brand from Samsung’s misappropriation may be amplified by the fact that Apple follows
13 a branded house strategy.

14 **XI. SUPPLEMENTATION**

15 197. If permitted by the court, I may supplement or amend this report if additional facts
16 and information become available in discovery. In particular, I understand that Samsung’s
17 experts may serve expert reports concerning one or more of the issues addressed in this report.
18 Therefore, I may supplement or amend my report and opinions in response to opinions and
19 assertions made by Samsung’s experts.

20 **XII. EXHIBITS TO BE USED**

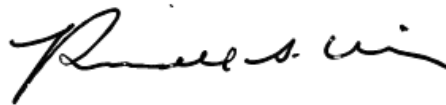
21 198. I anticipate using as Exhibits during trial certain documents and things referenced
22 or cited in this report or accompanying this report. I also anticipate using other demonstrative
23 Exhibits or materials at trial.

25 ³⁵⁷ “AAPL: A Closer Look at the Potential iPhone Ecosystem,” UBS Investment
26 Research, December 12, 2006, APL-ITC796-0000058721-58736 at APL-ITC796-
0000058722.

27 ³⁵⁸ Winer & Dhar (2011) 179-180; David A. Aaker & Erich Joachimsthaler, *The Brand*
28 *Relationship Spectrum: The Key to the Brand Architecture Challenge*, CALIFORNIA
MANAGEMENT REVIEW 42, 8-23 (2000).

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed on March 22, 2012, in New York, New York.



Russell S. Winer