

EXHIBIT

1

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3 --o0o--

4 APPLE INC., a California
5 corporation,

6 Plaintiff,

7 Vs.

Case No. 11-CV-01846-LHK

8 SAMSUNG ELECTRONICS CO., LTD.,
9 a Korean business entity;
10 SAMSUNG ELECTRONICS AMERICA,
11 INC., a New York corporation;
12 SAMSUNG TELECOMMUNICATIONS
13 AMERICA, LLC, a Delaware
14 limited liability company,

15 Defendants.

16 _____/
17 VIDEOTAPED DEPOSITION OF COOPER WOODRING
18 Redwood Shores, California
19 Friday, August 5, 2011
20 (HIGHLY CONFIDENTIAL ATTORNEYS' EYES
21 ONLY PORTIONS BOUND SEPARATELY)

22 Reported By: CAROL S. NYGARD, CSR No. 4018
23 Registered Merit Reporter
24
25

1 August 5, 2011

2 9:46 a.m.

3 Videotaped Deposition of COOPER
4 WOODRING, held at the offices of
5 Quinn Emanuel Urquhart & Sullivan,
6 LLP, 555 Twin Dolphin Drive, Redwood Shores,
7 California, before Carol S. Nygard,
8 A Certified Shorthand Reporter,
9 Registered Merit Reporter.
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A P P E A R A N C E S :

FOR THE PLAINTIFF APPLE, INC.:

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Also Present:

JAKE KROHN, Videographer

NATE SUN

1 element functional, yes.

2 BY MR. ZELLER:

3 Q. I didn't use the word "functional."

4 I used the word "utilitarian."

5 Are you --

6 A. Okay, utilitarian.

7 Q. So you're an expert in that area; is that
8 true?

9 MR. MONACH: Object to form. Asked and
10 answered.

11 You can answer it again.

12 THE WITNESS: From a design view, yes.

13 BY MR. ZELLER:

14 Q. You don't say that anywhere in your
15 declaration; do you?

16 MR. MONACH: Object to form. Best Evidence
17 Rule.

18 THE WITNESS: Let me think about that for a
19 minute.

20 BY MR. ZELLER:

21 Q. Please point out to us where in your
22 declaration you offer yourself as an expert in the
23 functional or utilitarian aspects of mobile phones or
24 tablet computers, or, in fact, offer any opinion on what
25 is or is not functional or utilitarian.

1 MR. MONACH: Object to the form of the
2 question to the extent it mischaracterizes his prior
3 testimony.

4 Object under the Best Evidence Rule that the
5 declaration is the best evidence of what it says, but if
6 you want the witness to go -- to sit here and go through
7 it on the record, he can do so.

8 THE WITNESS: I think the two questions you
9 asked is what -- one, did I include that opinion in my
10 declaration and the answer to that is, no, I don't
11 believe I did, but the prior question was do I consider
12 myself an expert in that, and the answer to that is yes.

13 BY MR. ZELLER:

14 Q. Why does your declaration contain no opinion
15 as to whether or not any elements or features of mobile
16 phones or tablet computers are utilitarian or
17 functional?

18 MR. MONACH: Object to the form of the
19 question, and I don't know that this calls for
20 communications with counsel, but if -- if it calls for
21 communications with counsel other than facts and
22 assumptions, I'd instruct you not to reveal those facts
23 and assumptions.

24 THE WITNESS: I don't think I gave an opinion
25 on that in my declaration because design patents are --

1 are primarily ornamental or they wouldn't have been
2 issued by the Patent Office, so I saw no reason to give
3 an opinion on that.

4 BY MR. ZELLER:

5 Q. Well, focusing on the 889 design patent, when
6 you offered your opinions in the declaration in this
7 case, were you assuming that the elements or features
8 depicted in the design patent were primarily ornamental?

9 A. Yes.

10 Q. And is it also true -- same statement true
11 with respect to the two other design patents that are
12 the subject of your declaration, namely those involving
13 the surface of the -- the phones?

14 A. Yes.

15 Q. So is it true that with respect to utilitarian
16 or functionality --

17 Well, let me rephrase that.

18 Is it true that with respect to functionality
19 of -- any of the design patents that are at issue this
20 is something that you're simply assuming as opposed to
21 something you're offering an opinion on in this case?

22 MR. MONACH: Object to the form of the
23 question to the extent it might be intended to cover
24 rebuttals or replies.

25 The witness has testified to the opinion he's

1 given and hasn't given his opening statement -- his
2 opening declaration and why, but certainly if someone
3 from your side comes and says a feature is functional we
4 reserve the right to respond to that.

5 MR. ZELLER: And I reserve the right to
6 examine him today on any opinion he has or is going to
7 give on functionality.

8 The question is is --

9 MR. MONACH: He may not know what the -- he
10 may not know what opinions he's going to give --

11 MR. ZELLER: Then he's going to have --

12 MR. MONACH: -- until he sees an opinion from
13 the other side, which he's reserved the right to respond
14 to.

15 MR. ZELLER: That's, obviously, completely
16 improper.

17 BY MR. ZELLER:

18 Q. So my question is, are you assuming that the
19 features of the design patents that you describe in your
20 declaration are not functional and primarily ornamental,
21 or are you offering an opinion on that?

22 MR. MONACH: Object to the form of the
23 question.

24 It's ambiguous with respect to whether we're
25 talking about the declaration given or an opinion that

1 he might give in response to other opinions.

2 You can answer.

3 THE WITNESS: I didn't assume that they were
4 primarily ornamental just because the Patent Office says
5 they are, but it is my opinion that they are ornamental.

6 BY MR. ZELLER:

7 Q. And you had that opinion as of the time that
8 you signed this declaration on June 30th, 2011; is that
9 true?

10 A. Yes.

11 Q. So why isn't it in your declaration?

12 MR. MONACH: Objection. Asked and answered.

13 THE WITNESS: I wasn't asked to give that
14 opinion.

15 BY MR. ZELLER:

16 Q. Okay. Well, please tell me the -- first of
17 all, the full basis of the investigation that you
18 undertook to determine whether or not any of the
19 elements or features of the design patents that you
20 discuss in your declaration are primarily functional or
21 primarily ornamental.

22 I want to know everyone you talked to, every
23 piece of literature you reviewed, all the works that you
24 did in advance of signing your declaration and as of the
25 time you formed that opinion.

1 MR. MONACH: I'm going to instruct the witness
2 not to answer with respect to communications he had
3 other than communications revealing facts that he relied
4 on or assumptions that he relied on in giving his
5 declaration.

6 THE WITNESS: It's pretty simple.

7 I examined the three design patents involved
8 and looked at the individual visual features of each and
9 determined that each was ornamental in that its
10 appearance was not dictated by function.

11 BY MR. ZELLER:

12 Q. So you -- you looked at the designed patents.

13 That was the full extent of your basis for
14 your opinion that the elements or features of the design
15 patents that are discussed in your declaration are not
16 functional and instead are primarily ornamental;
17 correct?

18 MR. MONACH: Object to form.

19 THE WITNESS: That's correct.

20 I don't know how one could make that
21 determination unless they the visual features of the
22 design patent.

23 BY MR. ZELLER:

24 Q. You didn't do anything beyond looking at the
25 design patents on their face for that inquiry; true?

1 Q. You've never worked in a carrier storefront?

2 A. No.

3 I testified earlier that I hadn't.

4 Q. You have no expertise at all with carrier
5 storefronts; right?

6 A. I wouldn't agree with that.

7 Q. Please tell me your expertise with carrier
8 storefronts?

9 A. A carrier storefront is a retail operation,
10 and I wouldn't want to limit my testimony to say I don't
11 have any experience in retail operations in that in my
12 decades with J.C. Penney we were involved in -- in
13 designing stores, and storefronts, and interiors, and
14 point of purchase displays, and architecture.

15 So I wouldn't want to say I have no -- no
16 expertise in retail environment.

17 Q. So please tell me your full basis for
18 believing that purchasers of smartphones through carrier
19 storefronts are the same types of purchasers who went to
20 J.C. Penney as of 1986 when you left?

21 MR. MONACH: Object to the form of the
22 question.

23 THE WITNESS: Consumers are consumers.

24 There's certain generalities that we can make
25 about them.

1 In -- in the mid-eighties we had over a
2 million people a day going through J.C. Penney stores.

3 I'm sure some of those same people are -- are
4 buying smartphones in carrier storefronts today.

5 I'm not saying there's a direct correlation.

6 I'm just saying that they're not mutually
7 exclusive.

8 BY MR. ZELLER:

9 Q. Do you believe that consumers have become more
10 sophisticated about technology since 1986?

11 MR. MONACH: Objection. Vague.

12 THE WITNESS: That's a double-edged sword.

13 I could answer "yes," and give you reasons why
14 I believe that.

15 I could also answer that they've become less
16 sophisticated because of the advent of -- of products
17 like the iPhone that reduce our need for the
18 understanding of the -- of technology by providing a
19 simple easy to use product.

20 There's an argument on both sides of that
21 coin.

22 Q. Well, I'm not asking for arguments.

23 Tell me, what empirical data do you have to
24 support that answer you just gave?

25 A. Having designed products where we reduced

1 complexity against a background of more complex products
2 simplified the need for knowledge about technology on
3 the part of the consumer and resulted in a -- what often
4 became a, quote, "best seller" in that category of
5 consumer electronics at J.C. Penney, so there's a basis
6 -- a proven logical analytical basis for my statement.

7 Q. If I -- if I'm hearing you correctly, simply
8 filing the design can increase the ease of -- of use of
9 technology for the consumer; is that right?

10 A. Sure.

11 Q. And is that something you generally believe is
12 true?

13 A. I know it's true.

14 Q. It makes the technology more accessible and
15 easier to use from the consumer perspective?

16 MR. MONACH: Objection. Vague and incomplete
17 hypothetical.

18 THE WITNESS: All of those plus easier to
19 understand.

20 BY MR. ZELLER:

21 Q. And you believe that those are all -- all have
22 been advanced by the iPhone design and the iPad design
23 that's embodied in these design patents; right?

24 MR. MONACH: Object to form.

25 THE WITNESS: I believe both of the products

1 you've just mentioned make the technology more
2 accessible and more transparent and easier to use, which
3 is partly conveyed through the ornamental design.

4 BY MR. ZELLER:

5 Q. Well, whether you call the design "ornamental"
6 or not, just to be clear, what we're talking about is
7 when you say "both the products make the technology more
8 accessible and easier to use," you're talking about the
9 fact that by simplifying the design of the products
10 that's been achieved; right?

11 MR. MONACH: Object to the form of the
12 question.

13 THE WITNESS: Yeah, but we have to be careful
14 when we say "simplifying the design" what we're talking
15 about.

16 I'm not talking about simplifying the --
17 manufacture or something like that, which can also be
18 considered "design."

19 I'm talking about simplifying the ornamental
20 design or the types of design that are protectable by
21 design patent.

22 BY MR. ZELLER:

23 Q. Right.

24 I think we're on the same page.

25 What you're saying is that by simplifying the

1 A. In total?

2 Q. Yes.

3 A. If -- if you tell me that's the case, I
4 wouldn't disagree with it.

5 Q. Directing your attention to paragraph 7, you
6 say here that -- in essence, that you do have experience
7 observing purchasers of consumer electronics; right?

8 A. I did say that.

9 Q. And that in your view qualifies you to testify
10 as an expert as to how an ordinary observer would
11 perceive and evaluate cellular phone and tablet computer
12 designs; correct?

13 A. Yes.

14 Q. And that's -- that's the basis of your -- your
15 expertise that you're claiming in this case; correct?

16 MR. MONACH: Object to the form of the
17 question.

18 THE WITNESS: Yes.

19 BY MR. ZELLER:

20 Q. And then you say, "For example, during my
21 tenure at J.C. Penney it was estimated" and you talk
22 about your experience at J.C. Penney; right?

23 A. I do.

24 Q. And then you say you have personal experience,
25 firsthand experience, observing ordinary purchasers of

1 consumer electronics and that you purchased them
2 yourself and can speak from your own personal
3 experiences; right?

4 A. Yes.

5 Q. Now, other than what you did at J.C. Penney
6 and other than your own personal experiences, do you
7 have any other experience -- that -- in observing
8 purchasers of consumer electronics?

9 A. Nothing more than -- having purchased them
10 myself and observing other people purchasing them
11 probably while I was purchasing them.

12 So, no, nothing more specific than what I've
13 stated here.

14 Q. And just so it's clear then, the entirety of
15 what you're relying upon in order to base your
16 qualification -- your qualifications as an expert to
17 testify as to how an ordinary observer would perceive
18 and evaluate cellular phone and tablet computer designs
19 is based on your work at J.C. Penney, your own personal
20 experience in purchasing consumer electronics, and your
21 seeing others purchasing consumer electronics during the
22 course of the times when you've been purchasing them; is
23 that true?

24 A. And -- and during times when I wasn't
25 purchasing them but maybe visited an Apple Store for a

1 -- to visit a Genius Bar or get an upgrade in software,
2 or whatever, yes.

3 Q. And is that -- is it true that that's then the
4 totality of that experience that you're relying on for
5 that?

6 A. Yes.

7 Q. And I take it from your answer you have, in
8 fact, been in Apple Stores?

9 A. Yes.

10 Q. Is there a particular one you go to?

11 A. Yes.

12 Q. Which one?

13 A. Providence Mall.

14 Q. Not one of the ones in China, I take it?

15 A. They're not really Apple Stores.

16 Q. Just wanted to make sure they were authentic
17 ones.

18 And is it -- have you been to many Apple
19 Stores or is it really that one?

20 A. I've been to several, but not many.

21 Q. And most of your experience is that one in
22 Providence Mall?

23 A. That's -- I've looked at others.

24 That's where I tend to do business, is with
25 that one.

1 Q. In -- during your experiences there in the
2 Apple Store did you think that it was a store that was
3 similar to -- to J.C. Penney when you worked there?

4 MR. MONACH: Object to form.

5 THE WITNESS: Actually, no, I thought it was
6 quite different, and that's probably why J.C. Penney
7 just hired Ron Johnson from Apple as their new CEO.

8 BY MR. ZELLER:

9 Q. You'll agree with me that the retail
10 environment there at J.C. Penney is not similar to the
11 retail environment of the Apple Store?

12 A. I would agree with that.

13 Q. Now, you've talked about how in your
14 declaration and a bit in your testimony here today about
15 your own personal experiences about purchasing consumer
16 electronics.

17 So you've purchased yourself cell phones?

18 A. I have.

19 Q. You, yourself, purchased smartphones?

20 A. I have.

21 Q. Which ones?

22 A. I have a -- an Apple -- 32 gig whatever this
23 is.

24 Q. 3G?

25 A. 3G.

1 This is my second one. First one went
2 overboard.

3 I purchased one for my daughter.

4 I've purchased -- iPads and -- a number of
5 computers.

6 Q. Have you purchased any smartphones by
7 manufacturers other than Apple?

8 A. No.

9 Q. Have you purchased any tablet computers by
10 manufacturers other than Apple?

11 A. No.

12 Q. Do you have any knowledge or information about
13 -- the purchasers of smartphones other than Apple phones
14 in your own personal experience?

15 MR. MONACH: Object to the form of the
16 question.

17 THE WITNESS: Do I have any knowledge of them?
18 If they're in some way different than
19 purchasers of Apple smartphones, I -- I wouldn't be
20 aware of that.

21 BY MR. ZELLER:

22 Q. Do you have any personal experience that gives
23 you knowledge or information about the purchasers of
24 tablet computers by manufacturers other than Apple?

25 A. No, not specifically.

1 Q. As we talked about before, when you were there
2 at J.C. Penney working in the -- what you're saying,
3 this retail environment of J.C. Penney, there were no
4 smartphones or tablet computers that were sold there;
5 right?

6 MR. MONACH: Objection. Asked and answered.

7 THE WITNESS: That's correct.

8 BY MR. ZELLER:

9 Q. What were the kinds of consumer electronic
10 products that were being sold at that time that you're
11 referring to here in your declaration?

12 A. Well, I believe I included some -- an exhibit
13 showing some of the specific designs of them, but it
14 included some quite sophisticated audio equipment,
15 stereo equipment, telephones, radios, CB equipment,
16 television sets, VHS systems in that era.

17 That's about it -- consumer electronics.

18 Q. And I take it those consumer electronics ran a
19 broad range of prices?

20 A. Yes.

21 Q. And I take it that those consumer products ran
22 a broad range of the amount of time and the care that
23 consumers put in to their purchasing decisions of those
24 various products; right?

25 A. I wouldn't characterize it as "a broad range."

1 I'd say it was a --

2 Well, I guess it would be a broad range from
3 the cheapest radio to the most expensive stereo system.

4 Yes, it would be a fairly broad range.

5 Q. Can you tell me how the length of time that
6 the typical consumers spent making the purchasing
7 decisions for these consumer electronic products that
8 you've described there at J.C. Penney compared to the
9 length of time that a typical consumer spends making a
10 purchasing decision for a smartphone?

11 A. The consumer research that we did taught us
12 some broad generalities.

13 For example, we learned that about 70 percent
14 of all consumers who ever buy anything buy it at the
15 first store they go to.

16 So they make a preconceived notion that, you
17 know, pick, your example, if J.C. Penney has the kinds
18 of sheets or the sheet selection that I want to buy, so
19 they go to that one store, and they make a purchase, and
20 because they're predisposed to shop in that one retail
21 environment they've almost already made a decision, and
22 so the individual purchase decision once they get there
23 is far quicker than -- than we are typically aware of.

24 So a purchase decision at J.C. Penney on a --
25 clock radio for \$25 may be two minutes, on an \$800

1 television set it may be five minutes, but it's a lot
2 quicker than we think.

3 Q. In general you do agree that consumers or
4 purchasers put more care in to a decision where they're
5 spending more money rather than less on something?

6 A. In general, yes.

7 Let me revise that answer.

8 In general, yes, but there are obvious
9 exceptions, where -- where just the opposite would be
10 true.

11 Q. Well, you don't have any reason to think
12 that --

13 Are you familiar with the term "impulse
14 purchase"?

15 A. Of course.

16 Q. You don't have any reason to think that
17 smartphones or tablet computers are what people would
18 consider to be impulse purchases; right?

19 MR. MONACH: Object to form.

20 THE WITNESS: Most people wouldn't.

21 A Saudi prince visiting the shopping mall in
22 Dubai may buy a dozen of them as an impulse purchase.

23 So there's always that kind of exception.

24 BY MR. ZELLER:

25 Q. I take it you don't consider the Saudi prince

1 give you a definitive answer to that here today.

2 I will say that it looks suspiciously similar.

3 BY MR. ZELLER:

4 Q. I'm not asking for so-called infringement
5 analysis. I'm asking something factual right now.

6 In paragraph 16 of your declaration you lay
7 out what you consider to be the major design elements of
8 the 677 design patent; right?

9 A. Yes.

10 Q. And I'm simply asking you whether you see in
11 this design that we marked as Exhibit 67 elements that
12 you've listed here in that design, and, if I understand
13 you correctly, you do see in Exhibit 67 all the major
14 design elements of the 677 design patent that you lay
15 out here except for the following: Flat, clear,
16 black-colored and inset; right?

17 MR. MONACH: Object to the form of the
18 question for the reasons previously stated.

19 Objection, asked and answered.

20 Object to the extent it misstates his prior
21 testimony.

22 THE WITNESS: I believe that's correct.

23 BY MR. ZELLER:

24 Q. Directing your attention to paragraph 31 of
25 your declaration, this is where you lay out in

1 subparagraphs A through E what you consider to be the
2 major design elements of the 087 design patent; is that
3 correct?

4 A. Yes.

5 Q. Are the elements that you list here in A as
6 the major design elements also present in the design we
7 marked as Exhibit 67?

8 A. It would appear so.

9 MR. MONACH: Hang on a second.

10 Same objection to this as with the previous
11 line of questioning about the 667, same objection to
12 lack of foundation in light of the witness' prior
13 testimony about what he can and can't glean from this.

14 Incomplete hypothetical.

15 BY MR. ZELLER:

16 Q. You believe that those elements that are
17 described here in A are present in paragraph 31 -- are
18 present in the Exhibit 67 design; correct?

19 MR. MONACH: Same objection.

20 THE WITNESS: It would appear so, yes.

21 BY MR. ZELLER:

22 Q. Focusing then on paragraph 31(b) of your
23 declaration --

24 A. Let me go back to A for a minute.

25 I have -- there's no basis for determining

1 that it's flat

2 Q. Okay. Well, we'll exclude flat then.

3 So with respect to 31(b), the elements that
4 are listed here are present in the Exhibit 67 design with
5 the exception of potentially flat, because, as you say,
6 you can't tell from the design that you have in front of
7 you; right?

8 A. Right.

9 Q. Okay. Then let's focus on paragraph B.

10 Other than the inset description, do you agree
11 that all the other elements that are listed here in
12 paragraph 31(b) of your declaration in describing the
13 087 design patent are present in this design we've
14 marked as Exhibit 67?

15 MR. MONACH: Same objection.

16 THE WITNESS: It would appear so, yes.

17 BY MR. ZELLER:

18 Q. Are the design elements of the 087 design
19 patent listed in paragraph 31(c) of your declaration
20 present?

21 MR. MONACH: Same objection.

22 BY MR. ZELLER:

23 Q. In the Exhibit 67 design?

24 A. Yes, to the extent that we could guess that
25 that racetrack shape opening is a slot, a slot implies

1 that it's open.

2 That -- that -- we can't determine that.

3 Q. If -- if what's reflected here in Exhibit 67
4 is, in fact, a speaker slot, then would you agree with
5 me that the elements listed in paragraph 31(c) are
6 present in Exhibit 67 based on that assumption?

7 A. If that -- if the assumption is correct, then,
8 yes, then it would -- then it would -- yes, the answer
9 would be yes.

10 Q. Focusing then on paragraph 31(d) and the
11 description of the major design elements of the 087
12 design patent, are the elements described here in that
13 subparagraph, D, present in the design that we marked as
14 Exhibit 67?

15 MR. MONACH: Same standing objection. Same
16 objection to lack of foundation and incomplete
17 hypothetical.

18 THE WITNESS: It would appear so.

19 BY MR. ZELLER:

20 Q. And then, focusing on paragraph 31(e), does
21 the portion of your description here where it says about
22 the design patent, the 087 design patent, "a thin
23 continuous bezel surrounding the rectangular front
24 surface that is substantially uniform in appearance,"
25 apply to what's depicted here in the design that we

1 marked as Exhibit 67?

2 MR. MONACH: Same objection. Incomplete
3 hypothetical. Lack of foundation.

4 THE WITNESS: It would appear so, yes.

5 BY MR. ZELLER:

6 Q. And then the end of Subparagraph E says, "And
7 having an inwardly sloping profile."

8 When you're talking about the -- and you're
9 describing the 087 design patent?

10 A. Yes.

11 Q. And if you can please tell me, what do you
12 mean by that, "having an inwardly sloping profile"?

13 A. Well, if you go to Figure 47 or 48 --
14 actually, 45, 6, 7 or 8, the -- the bezel portion in
15 those profile views slopes inwardly toward the -- center
16 of the product.

17 Q. So you're talking about when you can see it in
18 the profile?

19 A. Yes.

20 Q. And it says -- kind of -- more kind of rounded
21 edge?

22 MR. MONACH: Object to form.

23 THE WITNESS: It's slightly rounded, yes, but
24 it generally slopes inwardly.

25 BY MR. ZELLER:

1 Q. Maybe "rounded" wasn't quite the word.

2 It's curved rather than flat?

3 A. It's not flat.

4 Q. How do you know that the slots that are
5 depicted in the 677 and the 087 design patents are --
6 are speaker slots?

7 A. Well, as I testified earlier, technically you
8 don't know that.

9 These patents don't teach you that there's a
10 -- that that's what the function is.

11 They only teach you what the shape is.

12 MR. MONACH: Counsel, we've been going about
13 an hour-and-a-half, I think, and it's almost 5:00, so
14 are you getting close to a break time?

15 MR. ZELLER: Sure.

16 Let me just ask a couple more questions as a
17 follow-up to this.

18 MR. MONACH: Okay. Thank you.

19 BY MR. ZELLER:

20 Q. I think I understand what you're saying in
21 your answer, but you describe the design patents, the
22 087 and the 677 design patents, as having a rounded
23 horizontal speaker slot, and I'm trying to figure out
24 why you picked the word "speaker."

25 A. As we said earlier, we can surmise by -- by

1 looking at the commercial embodiment that that's what
2 that is.

3 As a general rule I prefer to refer to the
4 visual elements of a design by their shape rather than
5 by their function, because, when we refer to it as a
6 "speaker slot," it begins to make it sound like it's
7 functional when, in fact, it's ornamental.

8 Q. So maybe then I'll ask this.

9 So then with respect to this slot shape that's
10 depicted here in Exhibits 7 and -- Exhibit 6, which are
11 the two -- loosely we're calling "the phone surface
12 patents," you agree that the slot shape that's depicted
13 here in Exhibit 67, even though it's somewhat different
14 in size and somewhat different in position, is still
15 substantially the same as the slot shape and design
16 that's depicted here in the two design patents?

17 MR. MONACH: Object to the form of the
18 question.

19 THE WITNESS: I don't believe it would cause
20 it to be a different design.

21 BY MR. ZELLER:

22 Q. And so we're clear then, because I want to
23 make sure we've divorced it from this notion of, you
24 know, what the function of it is as a speaker or
25 something else, so we'll just call it the -- "the slot"

1 here.

2 You'll agree with me that, notwithstanding the
3 differences that you can see here when comparing the
4 design in Exhibit 67 to the designs shown in Exhibits 6
5 and 7, that any of those variations or differences that
6 we've talked about in your view mean that an ordinary
7 observer would still believe that the design in Exhibit
8 67 is substantially the same as the designs depicted in
9 the 087 and the 677 design patents; right?

10 MR. MONACH: Objection. Misstates the prior
11 testimony. Compound. Vague and ambiguous.

12 Incomplete hypothetical. Lack of foundation
13 given the witness' prior testimony about features that
14 could and couldn't be discerned from 67.

15 THE WITNESS: We -- we have made so many
16 assumptions and -- and asked to excuse the fact that,
17 for example, in 677 it claims a black design, and we
18 can't tell if this is black, but if we ignore all of
19 those differences or potential differences, then, yes, I
20 would say it is substantially the same.

21 But -- but as a -- it's a hypothetical
22 comparison that we're -- that you're asking me to make,
23 because we're not comparing apples and apples.

24 BY MR. ZELLER:

25 Q. Well, I think you're misunderstanding my

1 question.

2 Let me try and rephrase it.

3 Let's first focus on the 087 design patent.

4 And I understand you testified that there's
5 certain things about the 67 design patent or the design
6 there that you can't -- you can't necessarily tell, but
7 even assuming that those are different, I want you to
8 assume that those are still differences.

9 In terms of the overall design that's depicted
10 here in Exhibit 67 in your view is it substantially the
11 same as the 087 design in the eyes and from the
12 perspective of the ordinary observer or -- or purchaser?

13 MR. MONACH: Vague and --

14 Hang on a second.

15 Vague and ambiguous. Improper request for
16 opinion based on incomplete hypothetical, lacking
17 foundation, and calling for speculation in light of what
18 you told him and in light of the witness' prior
19 testimony.

20 THE WITNESS: So my answer would have to be
21 it's impossible to make that determination because
22 you're asking me to ignore the fact that the 087 is
23 claiming a flat surface with an inset rectangular
24 display screen and things like that, and I've already
25 testified I can't tell those things about this Exhibit

1 67, so how can I possibly arrive at a conclusion that
2 the ordinary observer would think the designs are
3 substantially the same?

4 I simply can't ignore claimed elements of the
5 087 to -- to --

6 What you're doing is you're eliminating from
7 the 087 the differences between it and the Exhibit 67
8 and then asking me, well, isn't what's left over the
9 same?

10 Well, sure what's left over is the same, but
11 what's left over is not what's claimed.

12 MR. ZELLER: You're, again, not following my
13 question.

14 THE WITNESS: I'm trying.

15 MR. MONACH: Counsel --

16 Counsel, please don't argue with the witness.
17 I mean, you said you had a couple more
18 follow-up questions.

19 MR. ZELLER: I'm trying to understand his
20 answer, and he's not --

21 I think he's not answering my question.

22 MR. MONACH: The answer is quite clear, even
23 though you don't like it.

24 MR. ZELLER: It has nothing to do with like.
25 It has everything to do with the fact he's not answering

1 my question.

2 BY MR. ZELLER:

3 Q. In your view, focusing on the 677 design
4 patent, --

5 A. Now we're switching back to that one?

6 Q. Let's talk about the 677 patent first --

7 A. Okay.

8 Q. -- since that was the one you picked up on now
9 and trying to argue about because -- that surface.

10 So let's -- let's focus on that one for a
11 moment.

12 A. Okay.

13 Q. Now, is it true that if a smartphone
14 manufacturer were to make a smartphone that had all the
15 elements you've listed here in -- from A to D in
16 paragraph 16 of your declaration, but it was different
17 in that it was -- didn't have a flat, clear, black
18 colored, and the display screen wasn't inset, that those
19 differences alone would be sufficient in your view to
20 differentiate that design from the 677 design patent in
21 the eyes of the ordinary observer and purchaser, "yes"
22 or "no"?

23 MR. MONACH: Incomplete hypothetical.

24 Vague and ambiguous. Improper request for
25 opinion testimony or legal conclusion based on

1 do have at hand as an expert to opine on the prior art,
2 what I'd like to know is, do you believe that it was
3 obvious to a designer of ordinary skill in the art back
4 in the time when the design patent, the 677 design
5 patent, was being conceived of, to take the design
6 depicted in Figure 41 and eliminate the bezel?

7 MR. MONACH: Objection. Incomplete
8 hypothetical and calling for a legal conclusion without
9 his having studied this issue.

10 Asked and answered multiple times.

11 THE WITNESS: I would have to, you know, just
12 give you the same answer I did before.

13 It would have been obvious to design a cell
14 phone or a smartphone without a bezel.

15 It would not necessarily have been obvious to,
16 as you put it, "take the design," whatever that means,
17 of the 087, or copy it and eliminate the bezel.

18 That's -- that's not what designers do.

19 Q. It's true that back in the time period when
20 the 677 design patent was being conceived of that it was
21 an obvious design choice to designers of ordinary skill
22 in the art to have smartphone designs that don't have a
23 bezel; right?

24 A. Yes.

25 MR. MONACH: Objection. Asked and answered

1 about four or five times.

2 THE WITNESS: Yeah, there were bezeled phones
3 and there were bezelless phones.

4 BY MR. ZELLER:

5 Q. At one point you wrote or gave a presentation
6 that was called "Design Patents, an Underutilized
7 Competitive Weapon;" correct?

8 A. Yes.

9 Q. Was this something you -- you actually wrote?
10 Was it a speech of some kind?
11 Was it both?

12 A. Let me just refresh my memory and look at my
13 C.V. and see, you know, where and when I did that, and
14 maybe it would refresh my memory.

15 Q. What I'll do is direct your attention to
16 Exhibit 6 of your declaration, which we marked as
17 Exhibit 66.

18 A. Okay.

19 Q. And specifically page 6.

20 A. Okay.

21 Q. And you'll see that you refer to a design --
22 this is the third entry down.

23 It says "Design Management Institute, DMI
24 Annual Conference," and apparently this was in Newport
25 Rhode Island.

1 Do you see that?

2 A. Yes.

3 Q. And that's where this --

4 Whether it was a speech or article we'll find
5 out in here in a minute.

6 But where you delivered something called
7 "Design Patents: An Underutilized Competitive Weapon;"
8 right?

9 A. Yes.

10 Q. And so was that a --

11 Was that something handed out in writing to
12 people?

13 Was it a speech?

14 Was it both?

15 A. It was a presentation with a verbal and visual
16 -- elements.

17 Q. And so there was some kind of written
18 materials that went with it?

19 A. No, I didn't say that.

20 I said it was verbal and visual.

21 I spoke and showed --

22 Q. There were no written materials at all that
23 went with it?

24 A. I probably had notes or an outline at that
25 time.

1 I certainly don't recall having it now. That
2 was what, six -- 11, 14 years ago.

3 Q. Well, did you give that talk on only one
4 occasion?

5 A. I believe I did.

6 Q. Was it --

7 A. Design -- Design Management Institute is
8 different than a typical industrial designer
9 organization.

10 It's the -- it's the management of design, not
11 doing design, and so the -- that presentation was geared
12 more toward global issues of competitive weapons like
13 the South Korean Government, for example, funding and
14 sponsoring students to come study in the United States
15 and go home to South Korea and apply their services
16 there.

17 Q. So we have a clear record on this, you believe
18 that you only gave this talk called "Design Patents: An
19 Undertilized Competitive Weapon" on one occasion?

20 A. That's my recollection.

21 Q. Was the presentation taped in any kind of way?

22 A. I don't generally --

23 It's on very, very rare occasion that I would
24 allow a presentation to be taped.

25 It -- it inhibits the free flow of

1 I, CAROL S. NYGARD, a Certified Shorthand
2 Reporter of the State of California, duly authorized to
3 administer oaths, do hereby certify:

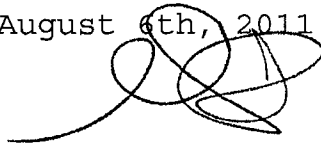
4 That the foregoing proceedings were taken
5 before me at the time and place herein set forth; that
6 any witnesses in the foregoing proceedings, prior to
7 testifying, were duly sworn; that a record of the
8 proceedings was made by me using machine shorthand which
9 was thereafter transcribed under my direction; that the
10 foregoing transcript is a true record of the testimony
11 given.

12 Further, that if the foregoing pertains to the
13 original transcript of a deposition in a Federal Case,
14 before completion of the proceedings review of the
15 transcript was not requested.

16 I further certify I am neither financially
17 interested in the action nor a relative or employee of
18 any attorney or party to this action.

19 IN WITNESS WHEREOF, I have this date
20 subscribed my name:

21 Dated: August 6th, 2011



22
23
24 CAROL S. NYGARD, CSR #4018

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