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How Much Can Asus, HP, And Others Rip Off Apple's Designs?

BY AUSTIN CARR Wed Dec 14, 2011

Apple's competitors are mimicking the company's designs on everything from tablets to laptops. There's short-term benefit here for consumers looking for inexpensive Apple alternatives this holiday season. But more significantly, it demonstrates how much Steve Jobs's legacy has impacted device makers--and how lost they'd likely be without Jobs's vision.



How explicitly can companies rip off Apple's designs?

That was at the heart of a test posed to Samsung attorney Kathleen Sullivan during an October [courtroom hearing with Apple](#), when a U.S. judge held up two devices, an iPad and Samsung Galaxy Tab, and asked Sullivan, Perry Mason-style, if she could tell them apart.

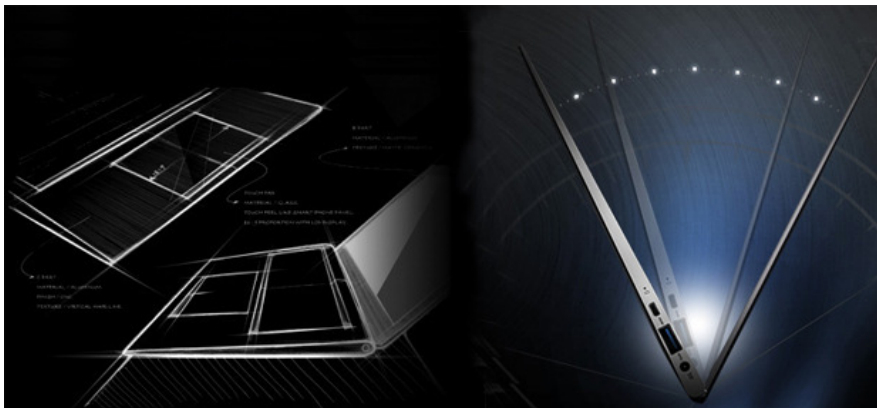
"Not at this distance your honor," said Sullivan, who stood just 10 feet away, according to [Reuters](#).

More and more, Apple's competitors are mimicking the company's designs on everything from tablets to laptops to software. There's short-term benefit here for consumers looking for inexpensive Apple alternatives this holiday season. But more significantly, it demonstrates how much Steve Jobs's legacy has impacted device makers--and how lost they'd likely be without Jobs's vision. As competing devices start to look more like clear Apple knockoffs, the question becomes: How far can these companies push pirating their product designs before Apple pushes back?

Take the recent onslaught of "ultrabooks," a newly minted category of PCs known for Apple-like design. There's the Samsung Series 7 notebook, which Gizmodo's Sam Biddle [immediately dubbed](#) a "Macbook clone." Then came HP's Folio 13, which BoingBoing [coined](#) the "MacBook HP." Then there's Lenovo's u300 IdeaPad, which [even PC World](#) called a "MacBook Air lookalike." And finally there's the Asus Zenbook, which [CNET said](#) "was clearly designed to emulate" the MacBook Air.



It's not simply the design of the products but the marketing they're emulating. Suddenly *design* is *cool*. Asus has promoted its slick "unibody" construction; HP has highlighted the "cool industrial design" of the Folio 13; Lenovo touts its "magnesium alloy" casing. The Zenbook even comes complete with a whole website dedicated to telling the product's [design story](#).



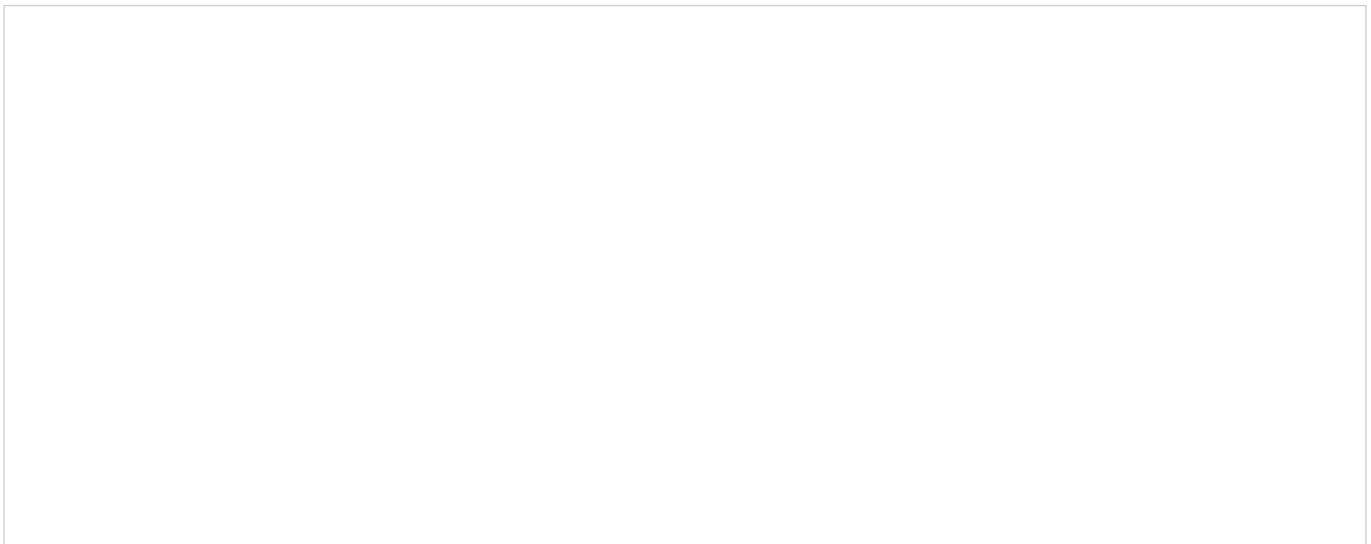
"The Zenbook is a far cry from commodity notebook PCs that are built to simply get the job done," this ultrabook's manifesto reads. "It's an exercise in philosophy, created by people who spend much time and effort to find a balance between technological advancement and better living...It is an initiative to fuse beauty, strength and stability in pure unison, built on new values, and evolved for a new age where finding what's truly important in our lives is more vital than ever. It is the world's first PC that encourages people to seek greater meaning in their interactions with technology, rather than simply offer new gadgets. Simple, subtle but totally sophisticated."



Lenovo, too, aims to tell the IdeaPad's design pedigree. Through a video on YouTube, the company gives consumers an inside look at its Beijing-based design team, which "reimagined the entire laptop experience."



The inspiration? "A bound book," the narrator says, coincidentally one of the inspirations for all of Apple's laptops dating back to the 1991 PowerBook, which eventually became the iBook and then the MacBook.



Marketing aside, Apple's designs have become core to its competitors's product lines. Apple is already engaged in heated legal battles around the world with Samsung and other companies. How far can these competitors legally push copying Apple's designs?

"When I counsel industrial designers, they'll ask, 'How close is too close?'" says Christopher Carani, an IP lawyer with McAndrews, Held & Malloy, Ltd. and the former chair of the Industrial Designs Committee at the American Intellectual Property Law Association. We asked Carani recently to take us through the process. He said there are essentially two relevant areas of design law at play here: trade dress and design patents. Here's how he breaks them down:

FAST COMPANY: How is trade dress relevant to Apple's case?

CHRISTOPHER CARANI: With trade dress, you are very much dealing with customer confusion: To what extent is Apple's product going to be confused to be that of another company's product? The test is whether there is a likelihood of confusion. Now, there's a lot of factors that goes into that. First, Apple has to show that it has a protectable interest. In other words, when people see this particular shape, when they see this particular look, people identify it with a single source. Think about a Coke bottle. You don't even have to see the words "Coca-Cola." When you see that shape, you know it's from a single source, namely Coca-Cola.

In this situation, it has to trigger Apple in people's minds. At this point, it's probably fair to say, just from my own experience. I think about looking at the ads at the bus stops here in Chicago, and they show somebody at a coffee table, in some breakfast scene, and they have a computer open. Often times, they blot out the Apple logo, but nevertheless, the image conjures up at least in my mind the MacBook, MacBook Pro, or MacBook Air. To show that you have a protectable trade dress, you have to

show that it's developed this sort of secondary meaning in people's minds. When people see the design--bingo--I know it's from a single source.

I suppose one difficulty Apple has is that its brand and name are so strong. It's sort of a double-edged sword when you have such a strong mark and logo. Even if HP had something that was very close to an Apple [product], I think the presence of that trademark is going to destroy the likelihood of confusion. If you see "Lenovo" or "Asus" on something, that's going to contradict the confusion. I mean, look at the Apple-Samsung battle going on right now. It's not trade dress that's leading the way in that case. It's the design patents that are leading the way in that case, though [Apple] also made a large trade dress argument.

But there could be some other arguments that Apple could creatively come up with. Say, when people are using [similar] products in the workplace or library, there could be confusion. People might see someone banging on their Asus computer because the thing doesn't work right, and Apple might have disparagement to their own product because people see somebody frustrated using this other product.

Tell us why design patents are leading the way for Apple.

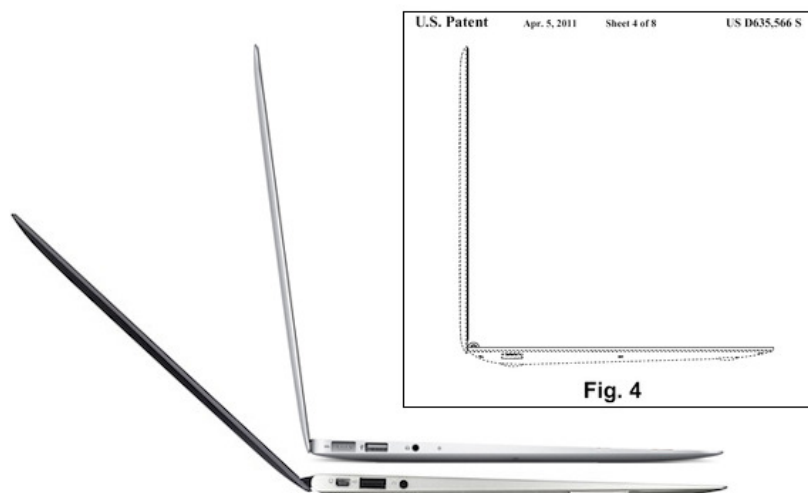
It's not about what Apple's products look like. It's about what Apple's patents look like. If Apple has a design patent just on a side profile [of a product], with a beveled edge going down, and thicker [frame] near the hinge that's thinner at the edge--then that would be what you compare [an accused] product to. You have to compare the patent, and much of this depends on what coverage Apple sought. The analysis is going to be patent to product.

The one other factor that's significant: You need to look at the prior art, or in other words, look at the prior designs. Is a design unique to Apple? Maybe. But you have to look at prior art that circles the globe. You might look at stuff from China or Japan, or art from printed publications or trade journals. There might've been other companies who have had that design. In other words, you can't do your analysis in a vacuum. If someone asks whether I look like you, Austin, I'd have to ask, well, compared to what? Compared to a pack of elephants? Well yes, in that case, you and I look a lot alike. But if it's compared to the rest of the human population, well we probably don't. It's critical to provide this frame of reference.

The first step is to see what Apple has claimed in its design patent. You can have a design patent that only claims the side profile, as opposed to having a design patent that depicts everything--the screen, the keyboard layout, all of the data ports, the shape of the mouse pad--if you put all those things into it, with 16 discrete elements of the design, then you leave a lot of room for competitors--HP or Lenovo--to say, okay, well, we love the side profile, but you know, we're going to rearrange the keys, let's rearrange the shape of the screen, maybe instead of having a square mousepad, let's go with an oval one, instead of having rounded corners, let's go with a triple bevel. You give them a lot of potential areas to design around.

But if you claimed in your design patent just the side profile of the unit, then there's less room. They can't just appropriate that element because they don't have these other areas of divergence in order to differentiate the overall appearance of the item. Because if it's the overall appearance that's claimed, then that is the test. When you ask how close is too close, the test is going to be: look at what's claimed in the patent, compare that to the accused product, do so in view of prior art, and always do so through the eyes and perceptions of an ordinary observer--someone with everyday sensibility--not an expert who is examining with a microscope. That's the test.

Ultimately, it will be up to Apple to demonstrate it has the proper design patent protection, just as it will be up to its competitors to demonstrate prior art--Samsung, creatively, has [already cited](#) the tablet-like devices from Stanley Kubrick's *2001: A Space Odyssey* in its dispute with Apple.



Just clicking through Apple's [wide-ranging design patent portfolio](#), which *The New York Times* has [beautifully compiled](#), it's hard not to notice blatant similarities between competitor products, especially in the area of "ultrabooks."

But due to loose subjectivity related to comparing design, it's unlikely Apple will have an easy time pursuing legal action, especially given the difficulty it's had going up against Samsung.

Perhaps the company can take solace in the fact that, despite copycats, Apple is expected to [dominate the market](#) in 2012, in everything from [tablets](#) to [ultrabooks](#).

[Image: Flickr user [Joost J. Bakker IJmuiden](#)]

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Chris *1 second ago*

It is really sad to see that the design departments of these large companies are being forced to copy Apple. They are absolutely capable to coming up with something original and beautiful. However, often a business executive can only imagine what is currently on the market and will brief the design teams accordingly. These executives should bear the legal costs because they didn't have the guts to put something original on the market...



Alistair AndFriends *Yesterday 09:29 PM*

I'm curious about the 'Trade Dress' argument. Unlike a passive device (Nut, Bolt, even it could be argued, a camera) these are active devices. They are not put on a shelf to be admired. Therefore the iPad is only sold under controlled circumstances - either an Apple store or an Apple branded display table in a mixed retail outlet. There is never, ever, a product from another supplier on that Apple branded display. The devices are always turned on to touch.... because that is what they are for. Every Apple ad always has the device displaying a screen.

I would argue that this is a case of form follows function. What Apple understands very clearly is that an iPad when off is just a black rectangle with a surround. If a Judge were to show me a

whole range of tablets turned off, I would be unable to distinguish between them. But that is not how they are used and that is not how they are displayed to the customer. That is a row of black rectangles.

Turn them on, however, and it is a different matter. Apple laptops even have a glowing Apple icon on the reverse. An Apple IOS tablet has a very different look from an Android device. Turn them on and I CAN tell you which is which from 10 feet. Therefore I wonder if the Judge's question is the right one for this very different type of device.