



## 'Design Impact' and 'Association' Surveys Deemed Admissible in Design Patent Infringement Case

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By: Megan R. Mahoney, Matthew George Hartman, Rubén H. Muñoz

A district court recently refused to exclude testimony regarding consumer surveys conducted by a design patent expert, holding instead that the consumer surveys may be probative of how an ordinary observer would view the designs at issue, and thus could assist the factfinder in determining design patent infringement under the ordinary observer test.

The designs at issue involved the appearance of a smartwatch. As part of its infringement case, the patent owner's expert conducted two types of consumer surveys—a design impact survey and an association survey. The design impact survey was intended to assess whether the claimed smartwatch design impacted purchase decisions and asked participants to rank which features would have an effect on the likelihood they would purchase the watch. The association survey was intended to assess whether consumers associated the accused design with the claimed design.

The defendant moved to exclude the surveys, arguing that they did not apply the ordinary observer test for design patent infringement and therefore did not assist the factfinder in determining whether the accused watch was substantially the same as the claimed design. The court disagreed and held that the expert's surveys were not intended to answer the ultimate question of infringement, but instead could be probative of how an ordinary observer would view the designs. As such, the surveys were admissible, and the defendant's challenges to the surveys could be addressed through cross-examination and presentation of contrary evidence.

**Practice Tip:** A party advancing or defending against claims of design patent infringement should consider introducing consumer surveys as evidence of how an ordinary observer would view a design. Such surveys may be admissible, not as evidence of whether the design patent is infringed, but for their probative value on how an ordinary observer views a given design.

*Apple Inc. v. Masimo Corporation et al*, No. 22-1377, D.I. 695 (D. Del. Oct. 10, 2024)

## Categories

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