

2006-1562

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

EGYPTIAN GODDESS, INC.,

Plaintiff-Appellant,

and

ADI TORKIYA,

Third Party Defendant,

v.

SWISA, INC. and DROR SWISA,

Defendants/Third Party Plaintiffs-
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS IN CASE NO. 3:03-CV-0594
JUDGE DAVID C. GODBEY

**COMBINED PETITION FOR PANEL REHEARING
AND REHEARING EN BANC
OF PLAINTIFF-APPELLANT EGYPTIAN GODDESS, INC.**

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September 11, 2007

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Egyptian Goddess, Inc. v. Swisa, Inc.
2006-1562

CERTIFICATE OF INTEREST

Counsel for Plaintiff-Appellant certifies the following:

1. The full name of every party or amicus represented by me is:

Egyptian Goddess, Inc.
Adi Torkiya

2. The real name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Not Applicable

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Robert G. Oake, Jr., Oake Law Office
Rudolf O. Siegesmund, Siegesmund and Associates

September 11, 2007

Robert G. Oake, Jr.
Attorney for Plaintiff-Appellant

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I. COUNSEL’S STATEMENTS IN ACCORDANCE WITH FED. R. APP. P. 35(B)(2)

A. Based on my professional judgment, I believe the panel decision is contrary to the following decision of the Supreme Court of the United States and the following precedents of this Court:

Graham v. John Deere Co.,
383 U.S. 1 (1966)

Litton Systems, Inc. v. Whirlpool Corp.,
728 F.2d 1423 (Fed. Cir. 1984).

Lawman Armor Corp. v. Winner International, LLC,
437 F.3d 1383 (Fed. Cir. 2006)

In re Leslie,
547 F.2d 116 (CCPA 1977)

In re Blum,
374 F.2d 904 (CCPA 1967)

B. Based on my professional judgment, I believe this appeal requires an answer to one or more precedent setting questions of exceptional importance:

Whether the point of novelty test requires a non-trivial advance over the prior art and whether the non-trivial advance test includes an obviousness-type analysis of the patented design?

Robert G. Oake, Jr.
Attorney for Plaintiff-Appellant

II. POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE COURT

A. The Court erroneously concluded that a putative point of novelty in the '389 Patent that *included* a fourth side without a raised pad was not substantially appropriated in the accused Swisa buffer as a matter of law.

B. The Court erroneously concluded that the point of novelty test requires a non-trivial advance over the prior art and that the non-trivial advance test includes an obviousness-type analysis of the patented design.

III. THE ARGUMENT IN SUPPORT OF A PANEL REHEARING

A. Introduction

This Court held that the point of novelty portion of the two-part design patent infringement test requires a “non-trivial advance” over the prior art. This Court then used this test to reject the combination point of novelty proposed by Egyptian Goddess.¹ The rejection resulted from combining a putative primary reference (the Nailco Buffer) with putative secondary references (prior art nail buffers that were square in cross section), and therefore was in the nature of an obviousness analysis without objective (secondary) considerations.

¹ The proposed point of novelty was (1) an open and hollow body, (2) square cross-section, (3) raised rectangular pads, and (4) exposed corners. Egyptian Goddess acknowledged below and on appeal that a jury possibly could find as a matter of contested fact that the point of novelty included a fourth side without a pad, in which case a fact issue still would exist concerning whether the accused Swisa buffer *substantially* appropriated the point of novelty of the '389 Patent.

This Court also stated that “[t]he district court correctly determined that only if the point of novelty included a fourth side without a raised pad could it even arguably be a non-trivial advance over the prior art.” Opinion at 7. Further, the majority stated that the “Swisa buffers have raised, abrasive pads on *all four* sides” and “[w]hen considering the prior art in the nail buffer field, this difference between the accused design and the patented design cannot be considered minor.” *Id.* The majority concluded that “[s]ince the parties agree that the Swisa buffers do not contain a fourth side without a raised pad, summary judgment of noninfringement was properly granted.” *Id.*

B. This Court Erred by Affirming the Summary Judgment of Non-Infringement

This Court stated that “[t]he district court correctly determined that only if the point of novelty included a fourth side without a raised pad could it even arguably be a non-trivial advance over the prior art.” Opinion at 7. With respect, that is not what the district court determined. In its point of novelty determination, the district court first determined that United States Design Patent No. 416,648 (the "Nailco Patent") disclosed a nail buffer with (1) an open and hollow body, (2) raised rectangular pads, and (3) open corners. *See Egyptian Goddess, Inc. v. Swisa, Inc.*, 2005 U.S. Dist. LEXIS 32931, *6 (D. Tex. 2005) The district court then stated that “[t]he only point of novelty in the D’389 Patent over the Nailco Patent is the addition of the fourth side without a pad, thereby transforming the

equilateral triangular cross-section into a square.” *Id.* The district court then concluded that “[b]ecause the Swisa product does not include the point of novelty of the D'389 Patent -- a fourth side without a pad -- there is no infringement.” *Id.*

Egyptian Goddess pointed out in previous briefing that the district court’s analysis was fatally flawed for two reasons. First, the district court erred by arbitrarily selecting a single piece of prior art and then determining that the subject patent’s point of novelty was the difference with this single piece of prior art. This was error because this Court has held that the point of novelty is determined by comparing the patented design against the entire relevant prior art. *See Catalina Lighting, Inc. v. Lamps Plus, Inc.*, 295 F.3d 1277, 1286-1287 (Fed. Cir. 2002) (“According to the “point of novelty” test, the fact-finder must determine whether the accused design appropriates the points of novelty that distinguish the patented design from the prior art.”). Further, this Court has stated that “[t]he points of novelty relate to differences from prior designs, and are usually determinable based on the prosecution history.” *See Goodyear Tire & Rubber Co. v. Hercules Tire & Rubber Co.*, 162 F.3d 1113, 1118 (Fed. Cir. 1998) (Court determined points of novelty by comparing tread design against multiple prior art references). The district court clearly erred by selecting a single piece of prior art for comparison, particularly because there were other pieces of prior art that the Court should have included in the comparative analysis.

Second, the district court clearly erred by concluding that the point of novelty of the D'389 Patent was “a fourth side without a pad.” This was clear error because, as explained in prior briefing, the prior art contained a nail buffer that had a fourth side without a pad. *See* Principal Brief, page 11.

This Court stated that the district court’s “point of novelty *included* a fourth side without a raised pad.” Opinion at 7. However, the point of novelty identified by the district court did not just *include* a fourth side without a pad, it *was* a fourth side without a pad. This Court’s statement that the “point of novelty *included* a fourth side without a raised pad” avoids the error of the district court. However, it also leaves unresolved the issue of what the *entire* point of novelty actually is (a point of novelty that merely *includes* a fourth side without a raised pad also can include other design elements as well). In prior briefing, Egyptian Goddess acknowledged the possibility that the fact finder (jury in this case) might determine that the point of novelty of the D'389 Patent *included* a fourth side without a raised pad by finding that the point of novelty was (1) an open and hollow body, (2) square cross-section, (3) three raised rectangular pads, and (4) exposed corners. *See* Principal Brief, pages 23, 24.

If by use of the term “*included*” this Court has disagreed with the district court that the point of novelty is *only* the fourth side without a pad, then this case should not have been resolved on summary judgment. Rather, it should be

remanded for a jury to determine what the entire point of novelty is and whether it is substantially appropriated by the accused Swisa buffer. Significantly, even if the jury determines that the point of novelty includes a fourth side without a pad (along with the other design elements proposed by Egyptian Goddess), a fact issue still will exist on whether the Swisa Buffer substantially appropriates the point of novelty of the '389 Patent. This is so because it is the open hollow tube, square in cross section and rectangular in length, with raised multiple buffer pads not covering the corners of the tube that give both the patented design and accused buffer their distinctive (from the prior art) and substantially similar (to each other) overall design appearance. *See* Declaration of Kathleen Eaton. (JA334-JA341). In any event, at a minimum there are fact issues raised with regard to what the point(s) of novelty are in the '389 Patent and whether the point of novelty test has been satisfied under the "substantially the same" standard. Therefore, summary judgment is not appropriate.

IV. THE ARGUMENT IN SUPPORT OF A REHEARING EN BANC

This Court rejected Egyptian Goddess's proposed point of novelty by requiring that the point of novelty be a non-trivial advance over the prior art. Specifically, this Court combined a putative primary reference (the Nailco Buffer) with putative secondary references (prior art nail buffers that were square in cross section). This Court then stated that "[i]n light of the prior art, no reasonable juror

could conclude that EGI's asserted point of novelty constituted a non-trivial advance over the prior art,” and “[t]hus, the district court did not err in rejecting EGI's asserted point of novelty as a matter of law. Opinion at 6.

In a well reasoned dissent, Judge Dyk pointed out at least five major flaws in the majority’s analysis. These were, in sum, that (1) “by conflating the criteria for infringement and obviousness, the test eviscerates the statutory presumption of validity by requiring the patentee to affirmatively prove nonobviousness,” (2) the test is too narrow in that “it applies a special test only to designs which involve a combination of design elements” and too broad “because it extends an obviousness-like test to each point of novelty, not merely the overall design (which is presently the sole focus of the obviousness analysis),” (3) “it is almost impossible to determine whether a particular design feature represents a trivial or substantial advance over the prior art,” (4) “the majority's test is devoid of support in the case law,” and (5) “the majority's test is in fact contrary to several of our cases” such as *Lawman Armor Corp. v. Winner International, LLC*, 437 F.3d 1383 (Fed. Cir. 2006), *In re Leslie*, 547 F.2d 116 (CCPA 1977), and *In re Blum*, 374 F.2d 904, 908, 54 C.C.P.A. 1231 (CCPA 1967). Dissenting Opinion at 2-4.

Egyptian Goddess agrees with the points made in Judge Dyk’s dissent and asserts them herein for an en banc consideration. Egyptian Goddess also makes the following points for consideration by this Court.

As a preliminary matter, Egyptian Goddess acknowledges that the following is not an exhaustive analysis of the point of novelty test or the merits and problems created by the non-trivial advance test.² However, as mentioned by the dissent, the “non-trivial advance” test was not briefed either at the district court level or on appeal. Dissenting Opinion at 1. Since a fifteen page petition for panel rehearing and rehearing en banc cannot effectively substitute for full briefing on the merits of a new and complex issue, Egyptian Goddess will attempt only to provide enough analysis to demonstrate the compelling need for a rehearing en banc.

² The claim of a design patent is the drawing itself and often there is no prosecution history that expressly identifies the design’s point of novelty. An applicant is not required to select or identify a point of novelty during the prosecution process. Therefore, unless there is a challenge to the validity of the patent, frequently the first time that a point of novelty is identified is during the infringement point of novelty test when the patentee is motivated to identify a point of novelty that is contained in the accused device and the accused infringer is motivated to identify a point of novelty that is not contained in the accused device. Currently, there is little objective framework to identify the proper point of novelty other than the general principles that the points of novelty “distinguish the patented design from the prior art,” *Catalina Lighting, Inc., supra*, at 1286-1287, and “[t]he points of novelty relate to differences from prior designs, and are usually determinable based on the prosecution history.” *Goodyear Tire & Rubber Co., supra*, at 1118. The development of a proper objective framework for selecting a point of novelty is a complex issue involving questions such as design element combinations, functionality, and the visual materiality of ornamental design elements in the context of the patented design and the prior art. There is not enough room in these combined petitions to properly address this subject. However, Egyptian Goddess respectfully submits that the majority’s subjective “non-trivial advance” test is not an effective substitute for a needed objective analytical framework.

During oral argument, the principal issue on appeal ultimately seemed to become: What is the purpose of the point of novelty test and how can it be interpreted to achieve its intended purpose? This Court has stated that “[t]he point of novelty test exists because “[s]imilarity of overall appearance is an insufficient basis for a finding of infringement, unless the similarity embraces the points of novelty of the patented design.” *Goodyear Tire & Rubber Co. v. Hercules Tire & Rubber Co.*, 162 F.3d 1113, 1118 (Fed. Cir. 1998). That is a good beginning of an explanation. But why is similarity of overall appearance an insufficient basis for a finding of infringement?

It would seem that an important reason why similarity of overall appearance is insufficient for a finding of infringement is to prevent the ordinary observer test from being satisfied by design elements that, standing alone, would have been unpatentable in light of the prior art. This, in turn, acts as protection that no design already in the prior art can be considered an infringement even though it is substantially similar to the patented design under the ordinary observer test.³

But here is where the complexity begins to arise. What is meant by the term “novelty” in the “point of novelty” phrase? Does it literally mean “novelty,” does

³ Regardless of whether the Court accepts this as the underlying purpose of the point of novelty test, it seems clear that the underlying purpose is *not* to act as a second test for non-obviousness and patentability. Indeed, patentability of the design is determined by examining novelty and non-obviousness through separate and well-developed tests.

it mean “non-obviousness,” or is there a need for another term and concept such as “non-trivial advance”?⁴

If a purpose of the point of novelty test is to prevent prior art designs from being captured by the ordinary observer test, then clearly the point of novelty test should include the concept of novelty. This Court has stated that for a prior art design to defeat novelty under § 102, the prior art design must “show the same subject matter as that of the patent, and must be identical in all material respects.” *Hupp v. Siroflex of Am., Inc.* 122 F.3d 1456, 1461 (Fed. Cir. 1997). If the point of novelty test only means “novelty,” (identical in all material respects) then it is relatively easy to determine whether a selected point of novelty is truly a point of novelty over the prior art.⁵

However, the majority indicated in footnote 3 that the point of novelty should also include the concept of obviousness, at least with regard to combination points of novelty. Opinion at 5. The majority therefore likely believes that another purpose of the point of novelty test is to prevent designs that are obvious in light of the prior art from being captured by the ordinary observer test. Indeed, this is the clear rule in utility patent cases. *See Key Mfg. Group, Inc. v. Microdot,*

⁴ A design must meet three requirements to be patentable. The design must be of patentable subject matter under 35 U.S.C. § 171, novel under § 102, and non-obvious under § 103. Patentable subject matter is not an issue in this appeal.

⁵ The more difficult issue remains how to properly select a point of novelty from a number of potential design element combinations, all of which are in the patented design and all of which may be novel over the prior art. *See* footnote 2, *supra*.

Inc., 925 F.2d 1444, 1449 (Fed. Cir. 1991). Further, this appears to be what is occurring in many design patent cases when the point of novelty is determined to be the same as what made the patented design non-obvious over the prior art.⁶ Dissenting Opinion at 3, 4. In other words, the practical effect of requiring a non-obvious point of novelty over the prior art is that it will not capture designs that are obvious in light of the prior art. However, as stated by Judge Dyk in his dissent: “It is one thing to suggest that a feature that renders a design nonobvious is also a point of novelty.” “It is quite another to hold that a point of novelty cannot exist unless it would also render the design nonobvious.” Dissenting Opinion at 4. Therefore, the difficult issue is whether it is appropriate to require the point of novelty test to include the requirement of non-obviousness.

Egyptian Goddess respectfully submits that for all the reasons stated by Judge Dyk in his dissent, it would be inappropriate to do so. Indeed, the point of novelty test is a part of an infringement test that compares the patented design with the accused design. Although the infringement comparison is made in light of the prior art, the basic comparative analysis is focused on the patented and accused designs. Additionally, a design patent infringement analysis is based only on visual similarities, and a full obviousness analysis includes consideration of non-

⁶ This also occurs because in these cases the first meaningful comparison (with expressed results) of the patented invention with the prior art is the obviousness analysis. “Points of Novelty” are determined in the obviousness analysis and then are used in the infringement “Point of Novelty” test.

visual objective evidence such as commercial success. *See Litton Systems, Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1441 (Fed. Cir. 1984). Further, this Court has indicated that an obviousness analysis is used only to determine patent validity and is not used to determine infringement. *See Lawman Armor Corp. v. Winner International, LLC*, 437 F.3d 1383 (Fed. Cir. 2006); *see also Cf. Litton Systems, supra*, at 1444. This is in part because in determining obviousness the claim must be viewed as a whole, *see Graham v. John Deere Co.*, 383 U.S. 1 (1966), and in determining points of novelty, usually less than the whole design is being considered. Finally, the burden of proof should not be shifted to the patentee to prove non-obviousness. In short, an obviousness analysis of the patented design is not the proper method to prevent designs obvious in light of the prior art from being captured by the ordinary observer test.

The majority likely recognized the above problems - but still wanted to prevent designs obvious in light of the prior art from being captured by the ordinary observer test. The majority's apparent solution was the "non-trivial advance" test, a test both similar to and different from the classic obviousness test. The majority's test is similar to the test for obviousness because it combines a primary reference and secondary references to render the selected putative point of novelty "trivial," and therefore non-existent. However, the test is also different from the classic obviousness test in several important respects.

First, the burden of proof is on the patentee to prove non-triviality rather than on the accused infringer to prove obviousness. Second, there clearly is no requirement to prove that the primary reference is “basically the same” as the patented design, which is an important requirement in design patent obviousness law. See *Durling v. Spectrum Furniture Co.*, 101 F.3d 100, 103 (Fed. Cir. 1996) (“Before one can begin to combine prior art designs, however, one must find a single reference, ‘a something in existence, the design characteristics of which are basically the same as the claimed design.’” (quoting *In re Rosen*, 673 F.2d at 391)). Indeed, if this requirement existed in the non-trivial advance test, the Nailco Patent could not serve as a primary reference because a buffer with a triangular cross section simply is not “basically the same” as a nail buffer with a square cross section. Third, there does not appear to be any analytical framework for determining when it is appropriate to combine secondary references with the primary reference to prove non-triviality.⁷ Fourth, there does not appear to be any objective or secondary evidence of non-obviousness permitted (such as

⁷ This Court has stated that “secondary references may only be used to modify the primary reference if they are ‘so related [to the primary reference] that the appearance of certain ornamental features in one would suggest the application of those features to the other.’” *Durling, supra*, at 103 (citing *In re Borden*, 90 F.3d at 1575). *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (U.S. 2007) may affect this Court’s current test for when secondary references may be combined with a primary reference in an obviousness analysis.

commercial success, copying, unexpected results, failure of others, long felt need, etc.) to establish non-triviality through non-visual means.

In short, many of the important obviousness test safeguards are not present in the non-trivial advance test. Further, the new test appears to lack any principled objective criteria by which a point of novelty is determined to be either trivial or non-trivial. Egyptian Goddess respectfully submits that such lack of safeguards renders the majority's new test fatally flawed in that it leaves the triviality determination up to the subjective judgment of a court which, in the words of the dissent, is "ill suited" for the task. Dissenting Opinion at 3.

In the event the goal of the majority was to prevent designs obvious in light of the prior art from being captured by the ordinary observer test, there appear to be alternative solutions that are better suited for the task than the non-trivial advance test. For example, in the utility patent field, the problem has been solved by establishing limitations on the doctrine of equivalents. One such limitation is that any accused device that is in the prior art or obvious in light of the prior art cannot be an infringing equivalent. See *Key Mfg. Group, supra*, at 1449. As one option of implementing the obviousness portion of this test, this Court has devised the hypothetical claim analysis. Under this analysis, a hypothetical claim is constructed that covers the accused device. *Id.* An obviousness type analysis then is used to determine whether the hypothetical claim is obvious in light of the prior

art. If it is, then the accused device cannot be an equivalent. If it is non-obvious, then it can be an equivalent. *Id.*

A similar test could be used in design patent law - and in this case. The question would be whether the accused Swisa Buffer would be obvious in light of the prior art under the traditional design patent obviousness test. The answer clearly would be “no” because there is no primary reference (excluding the ‘389 Patent) that looks basically the same as the accused Swisa Buffer, i.e., (1) an open and hollow body, (2) four raised rectangular pads, (3) open corners, and (4) square cross section. Since the Swisa buffer is not obvious in light of the prior art, there is no possibility that when applying the traditional point of novelty test, a design obvious in light of the prior art would be captured by the ordinary observer test.

V. Conclusion and Relief Sought

For the foregoing reasons, Egyptian Goddess respectfully requests that their combined petition for panel rehearing and rehearing en banc be granted.

Respectfully submitted this 11th day of September, 2007.

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ADDENDUM

1. Opinion and Dissenting Opinion

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on September 11, 2007, two copies of the foregoing COMBINED PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC of Plaintiff-Appellant were served in compliance with Federal Rules of Appellate Procedure 25 and 40 and Federal Circuit Rules 28(d) and 40 on the attorney listed below *via* United States Mail. Undersigned counsel further certifies that the original and eighteen copies of the foregoing COMBINED PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC of Plaintiff-Appellant were filed in compliance with Federal Rule of Appellate Procedure 25(d)(2) and Federal Circuit Rule 28(d) by overnight FED EX delivery on September 11, 2007, upon the Clerk of the Federal Circuit.

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