

In The  
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.

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**BRIEF OF *AMICUS CURIAE* FÉDÉRATION INTERNATIONALE  
DES CONSEILS EN PROPRIÉTÉ INDUSTRIELLE (“FICPI”)  
IN SUPPORT OF NEITHER PARTY (SUPPORTING REVERSAL)**

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*Dated: February 5, 2008*

## **CERTIFICATE OF INTEREST**

Counsel for the *amicus curiae* certifies the following:

1. The full name of every party represented by me is: Fédération Internationale Des Conseils En Propriété Industrielle (“FICPI”), Electrolux Home Products, Inc. (“Electrolux”), and NIKE, Inc.
  
2. The name of the real parties in interest represented by me is: FICPI.
  
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 *amicus curiae* now represented by me in the trial court or agency or are expected to appear in this court are:

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## **IDENTITY OF THE *AMICUS CURIAE*, ITS INTERESTS IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE**

Established in 1906, Fédération Internationale Des Conseils En Propriété Industrielle (“FICPI”) is a Switzerland-based international and non-political association of approximately 4,000 intellectual property attorneys from over eighty countries (including the United States). FICPI’s members represent individual design inventors as well as large, medium and small companies. One of the members’ roles is to interface with and advise the design community in the area of design patents/registrations and how to secure protection for design innovation. FICPI supports predictable, balanced global protection of intellectual property rights for designs.

FICPI is one of only two major world organizations that advise the World Intellectual Property Organization (“WIPO”), an intergovernmental organization dedicated to promoting and protecting intellectual property rights worldwide, on all intellectual property matters. WIPO’s 180 member states (including the United States) comprise almost ninety percent of the world’s countries. *See About WIPO*, at <http://www.wipo.int/about-wipo/en/>. As one of the sixteen specialized agencies of the United Nations system of organizations, WIPO administers intellectual property matters recognized by

the U.N.'s member states and twenty-three international treaties concerning intellectual property. *Id.* WIPO works with Member States, including the United States, in the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT) to develop international laws and standards for designs.

Additionally, the WIPO-administered Hague System for the International Registration of Industrial Designs offers a route to industrial designs protection in multiple countries by filing a single application. On December 7, 2007, the U.S. Senate ratified the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs.

FICPI is largely comprised of patent practitioners representing foreign inventors and corporate entities, FICPI is poised to provide the Court the perspective of the international patent community. Because the instant case may significantly affect the way foreign companies operate vis-à-vis their design patent filing strategies, FICPI would like to voice concerns regarding design patent jurisprudence.

Further, there has been a large increase in design patent filings from outside the United States, which account for approximately

44% of all design patent filings. See *USPTO Design Patents Report: January 1977 – December 2006* at A1-1-2, available at <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/design.pdf>.

FICPI therefore has real and substantial interests in fair and balanced design patent rights and in predictable design patent jurisprudence. It seeks a workable test for determining design patent infringement that affords an appropriate scope of protection for design patents. It respectfully submits this brief for the Court's consideration.

On February 4, 2008, the parties to this appeal, Plaintiff-Appellant Egyptian Goddess, Inc., Third Party Defendant Adi Torkiya, and Defendants-Appellees Swisa, Inc. and Dror Swisa, consented to the *amicus curiae* filing this brief.

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## ARGUMENT

### I. **RESPONSE TO QUESTION 1: THE “POINT OF NOVELTY” SHOULD NOT BE A TEST FOR INFRINGEMENT OF A DESIGN PATENT BECAUSE IT INCLUDES INHERENT LOGICAL FLAWS**

The underlying purpose of the point of novelty test is to prevent a finding of design patent infringement where the substantial overall similarity threshold under *Gorham* is met, but where the accused article does not misappropriate the element(s) that made the claimed design novel. However, in the twenty-four years since *Litton Systems, Inc. v. Whirlpool Corp.*<sup>1</sup> formally created the point of novelty test as a separate and distinct infringement test, courts and litigants have identified several inherent flaws in the point of novelty test.

In particular, there are at least three flaws associated with the point of novelty infringement test, including: (1) creating a class of valid design patents with no enforceable scope; (2) providing a framework that in some cases impermissibly reduces design protection to an essential element; and (3) affording design patent protection that is inversely proportional to the amount of overall innovation in a design. All of these flaws share in

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<sup>1</sup> 728 F.2d 1423 (Fed. Cir. 1984).

common the fact that the point of novelty test dissects a patented design into discrete elements, instead of focusing on the design *as a whole*.

Because the point of novelty test flaws are fundamental, the test should be eliminated. The remainder of this section addresses the grounds for rejecting the point of novelty test. A proposed approach to considering prior art through a non-infringement defense is proposed in Section II of this submission.

**A. THE POINT OF NOVELTY TEST CREATES A CLASS OF VALID DESIGN PATENTS WITH NO ENFORCEABLE SCOPE**

Validity of design patents over the prior art is governed by the statutory requirements of novelty and non-obviousness, not by the point of novelty infringement test. 35 U.S.C. §§ 102, 103, 171. Importantly, if a design claim, when viewed as a whole, satisfies 35 U.S.C. §§ 102 and 103 (and other essential statutory criteria), the patent laws mandate that it is entitled to legal protection, and hence must have some legally cognizable scope for purposes of enforcement and determining infringement. 35 U.S.C. §§ 271, 281.

By way of example, assuming that a design patent is valid, an accused article that is an exact copy of the claimed design *must, as a matter of law,*

*always infringe* the asserted design patent. In other words, because it is identical in overall appearance to the patented design, it is necessarily closer in overall appearance to the patented design than to the prior art, and it necessarily misappropriates any and every contribution made by the patented design vis-à-vis the prior art. However, under the point of novelty test, such an article may not necessarily be found to infringe.

Specifically, because the patentee must define a point of novelty as part of its threshold infringement case, the accused infringer can reduce the design patent to having no enforceable scope merely by showing that the selected point of novelty exists (or substantially exists) in the prior art. Notably, the accused infringer's attack on the point of novelty is not a validity attack that must focus on the design as a whole and that requires the accused infringer to prove invalidity by clear and convincing evidence. Instead, upon a mere preponderance of the evidence, and by isolating select elements of a design, the accused infringer can effectively destroy a design patent's enforceable scope.

The facts in *Lawman Armor Corp. v. Winner Int'l, LLC* exemplify this problem. In response to a motion for summary judgment of non-infringement, the patentee identified eight elements of his patented steering

wheel lock design that he defined as specific points of novelty. 437 F.3d 1383, 1384 (Fed. Cir. 2006). The court adopted the accused infringer's point of novelty argument and, in effect, stripped the design patent of all enforceable scope and effectively rendered it unenforceable by identifying each of those features in respective individual prior art designs. *Id.* at 1385-86. In essence, the court converted a valid design patent into one that could never be infringed.

**B. THE POINT OF NOVELTY TEST IMPROPERLY LIMITS DESIGN PATENT RIGHTS BY INTRODUCING AN “ESSENTIAL ELEMENT” REQUIREMENT FOR ALL DESIGN PATENTS**

Most designs do not have a single discernable point of novelty. The overall effects and aesthetic uniqueness that distinguish a design from the prior art may be described in many different ways. Nevertheless, the point of novelty test requires the patentee to define a single point of novelty where there could be many different ways to describe the differences between the design and the prior art.

Because the scope of design protection recited in *Gorham Mfg. v. White*, 81 U.S. 511 (1871), is directed to the *overall appearance* of the design, the point of novelty test is flawed in focusing on a single point of the design. This flaw has at least two impacts.

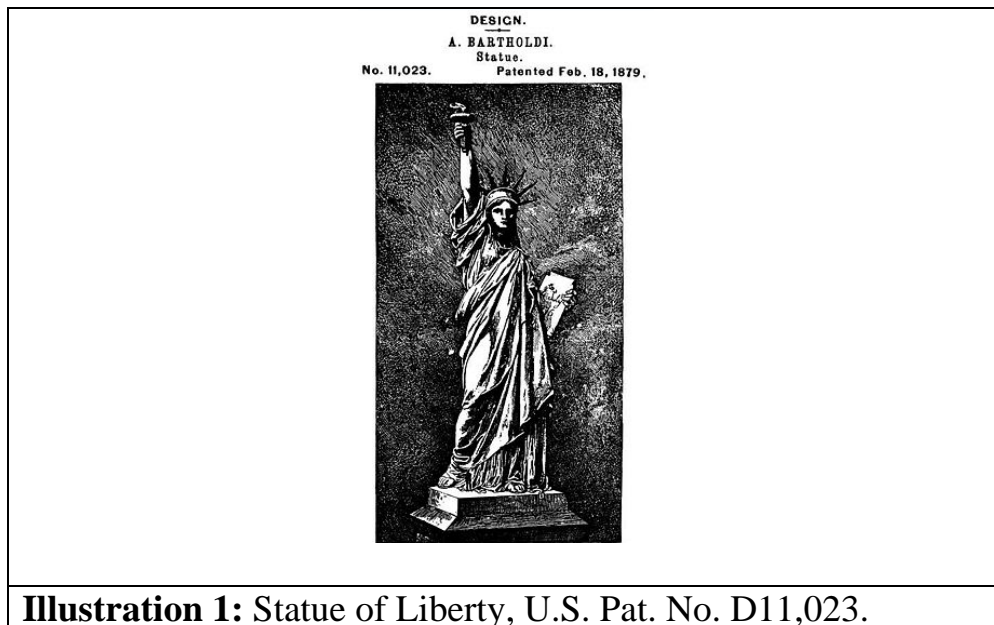
First, because, in practice, the patentee must define a point of novelty as a single design element or a combination of elements, an accused infringer is able to argue non-infringement on a narrow, element-by-element basis. In this way, the point of novelty test strips the patentee of the ability to rely on the appearance of his design as a whole – which is a fundamental tenet of design patent protection grounded in *Gorham*.

Second, because the point of novelty test forces *every* design claim to have a *single critical point*, or *essential element*, regardless of whether the prior art resembles the design or the accused article, it conflicts with the substantial overall similarity test recited in *Gorham*. Specifically, the point of novelty test enables others to exactly copy the remainder of the design except for the “critical point” even though the critical point may not have been necessary to distinguish the patented design from the prior art.

In this way, the point of novelty test discourages design patentees from enforcing their patents, even against clearly infringing articles. This is because an enforcement action will force the patentee to select a single point of novelty for a design where many can exist. By selecting that single point of novelty in a legal proceeding, the patentee creates a blueprint for others to

copy the overall appearance of the patented design while avoiding infringement.

As an example, assume the design in question is the Statue of Liberty shown in Illustration 1 below (originally U.S. Pat. No. D11,023). Also assume the prior art does not closely resemble this design in any way and there are many aspects of this statue that, alone and in combination, distinguish it from the prior art. To enforce this design patent under the current point of novelty framework, the patentee would be required to define a single point of novelty even against an exact duplicate, and even if the prior art does not closely resemble the patented design.





If, for example, the patentee chooses the appearance of the crown as the point of novelty, future competitors can copy the entire patented design except for the selected point of novelty. Put another way, defining a point of novelty permits others to make the exact Statue of Liberty as long as a required threshold of change is made to the crown. In this way, the point of novelty test drastically and inappropriately narrows the enforceable scope of the patent in a way divorced from prior art considerations.

Importantly, the design patentee is in the same quandary if she were to choose any of the other elements as the point of novelty, such as the appearance of the tablet, the torch, the face, the toga wrap, etc. Thus, because the scope of a design is directed to the overall appearance of the design, the current point of novelty test is illogical and unnecessarily limits design patent rights.

**C. THE POINT OF NOVELTY TEST AFFORDS DESIGN PATENT PROTECTION THAT IS INVERSELY PROPORTIONAL TO THE AMOUNT OF OVERALL INNOVATION IN A DESIGN**

Another flaw inherent in the point of novelty test is that it creates inversely proportional protection for design innovation. For highly innovative aesthetic designs where it is common to find many differences from the prior art, the point of novelty might be deemed to be a combination

of many features in view of the many differences. The point of novelty of such a design may comprise a major portion of the design and an accused design could avoid infringement by not appropriating a small part of such a major portion.

However, in designs that are essentially the same as the prior art but have only a small difference with respect to the prior art, the point of novelty would necessarily be directed to that small portion. Accordingly, the point of novelty test requires that more portions of an innovative design need to be copied to result in a finding of infringement than need to be copied for a finding of infringement of a design having a single small novel portion – providing a scope of rights inversely proportional to the amount of a design’s “uniqueness” with respect to the prior art.

Thus, the point of novelty infringement test is inherently flawed and should be rejected.

**II. IN LIEU OF THE “POINT OF NOVELTY” TEST, PRIOR ART CAN SUPPORT A 35 U.S.C. § 282 DEFENSE OF NON-INFRINGEMENT WHERE THE ACCUSED ARTICLE IS CLOSER TO THE PRIOR ART THAN IT IS TO THE PATENTED DESIGN**

Although the *amicus curiae* urges this Court to reject the point of novelty test, it believes that prior art should be considered in certain

circumstances to prevent overreaching findings of infringement. Specifically, infringement should not be possible where the overall similarity between a patented design and an accused article shares the same overall similarity that exists between the accused article and a prior art reference, and the accused article is closer to the prior art reference than it is to the patented design.

Thus, the *amicus curiae* proposes that an accused infringer should be able to rely on prior art as part of a non-infringement defense to show that the overall visual impression of its accused design is more substantially similar to the prior art than it is to the asserted patented design. Specifically, the accused infringer should prevail where it can show by a preponderance of the evidence that its accused article is substantially similar to a single, analogous prior art reference and thus that its accused design is more distinguishable from the patented design.

The Court should adopt this approach in lieu of the point of novelty test because it is founded on the defendant's burden of pleading non-infringement under 35 U.S.C. § 282, it is consistent with the statutory presumption of validity, and it is supported by the Supreme Court's decision in *Smith v. Whitman Saddle*, as well as this Court's decision in *Litton*

*Systems v. Whirlpool*. In addition, this approach is both more workable and more equitable than the point of novelty test in litigation, where, at the inception of a lawsuit, the patentee rarely knows the identity of the prior art an accused infringer will discover and rely on during the course of litigation.

In short, the *amicus curiae*'s proposal accomplishes the intended purpose of the point of novelty test, but in a manner more likely to result in predictable and fair uses of prior art to counter allegations of design patent infringement. Thus, for these and the additional reasons that follow, the *amicus curiae* asks the Court to recognize this new application of prior art in lieu of the point of novelty test.

**A. WHERE THE DIFFERENCES DISTINGUISHING A PATENTED DESIGN FROM THE PRIOR ART ARE NOT FOUND IN AN ACCUSED DESIGN, PRIOR ART IS RELEVANT TO NON-INFRINGEMENT**

The point of novelty test and decisions underpinning its development inform us that prior art can be relevant to set boundaries on a design patent's enforceable scope. *Elmer v. ICC Fabricating Inc.*, 67 F.3d 1571, 1577 (Fed. Cir. 1995) (“[U]nless the Gorham standard for finding infringement is met by the accused [device] there is no need for detailed analysis in terms of the prior art.” (quoting *Lee v. Dayton-Hudson Corp.*, 838 F.2d 1186, 1189 n.4 (Fed. Cir. 1988))).

For example, in *Whitman Saddle*, various combinations of prior art saddle designs were well known and the patented saddle design differed from the prior art in only one material respect. *Smith v. Whitman Saddle*, 148 U.S. 674, 680 (1893). In *Litton*, the field was “crowded with many references relating to the design of the same type of appliance” and the patented appliance design differed from the prior art in only a few respects. *Litton Systems, Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1444 (Fed. Cir. 1984), *implicitly overruled on other grounds by Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

Notably, in both cases, the prior art created an overall visual effect close to that of the patented designs, but the patents were not invalidated. Instead, the Supreme Court and this Court reversed findings of infringement. In doing so, the Courts used the prior art to set boundaries on the scope of protection that would be afforded to the patented designs. *Id.* (“Where, as here, a field is crowded with many references...we must construe the range of equivalents very narrowly.”).

Thus, while the point of novelty test should be rejected, the *amicus curiae* submits that the goal of the point of novelty test found in *Whitman*

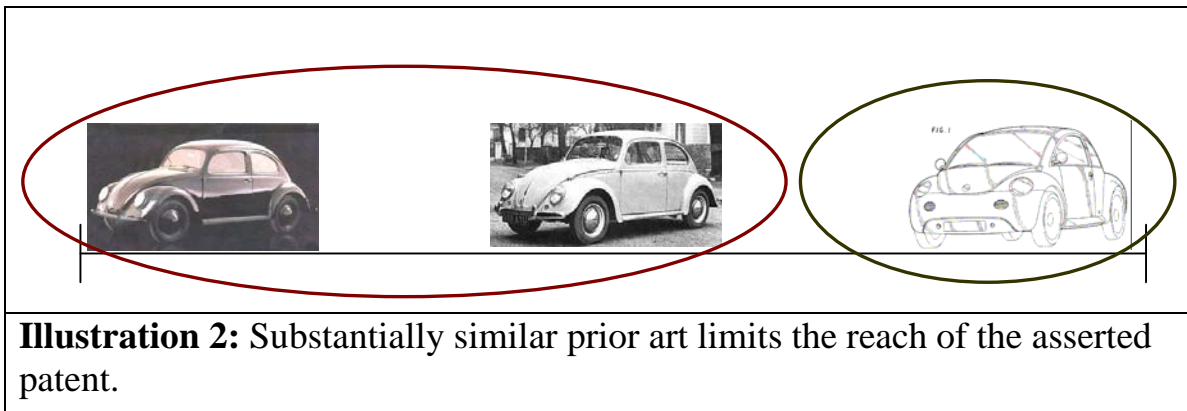
*Saddle* and *Litton* is important and worth preserving, *i.e.*, a patent should not be extended to cover an article that is more substantially similar to the prior art than it is to what is claimed. To that end, an accused infringer should be able to rely on an analogous prior art reference to show that its accused article is non-infringing because it distinguishes itself from the patented design by its higher relative substantial similarity to the prior art.

Importantly, in both *Whitman Saddle* and *Litton*, the Courts considered analogous prior art that was specifically material to illustrating the differences between the patented design, accused design, and the prior art. Similarly, under the *amicus curiae's* proposal, it is incumbent upon the accused infringer to focus on the overall visual impression of one analogous prior art reference to prevail on a prior art based non-infringement defense.

The following illustrations demonstrate how prior art affects a design patent's permissible reach, and thus how an accused infringer might use prior art to support a defense of non-infringement. In each illustration, we assume that the car design shown on the left is well-known prior art, the design shown in the middle is accused of infringement, and the design on the right is an enforceable, patented design (actually, the design at right is

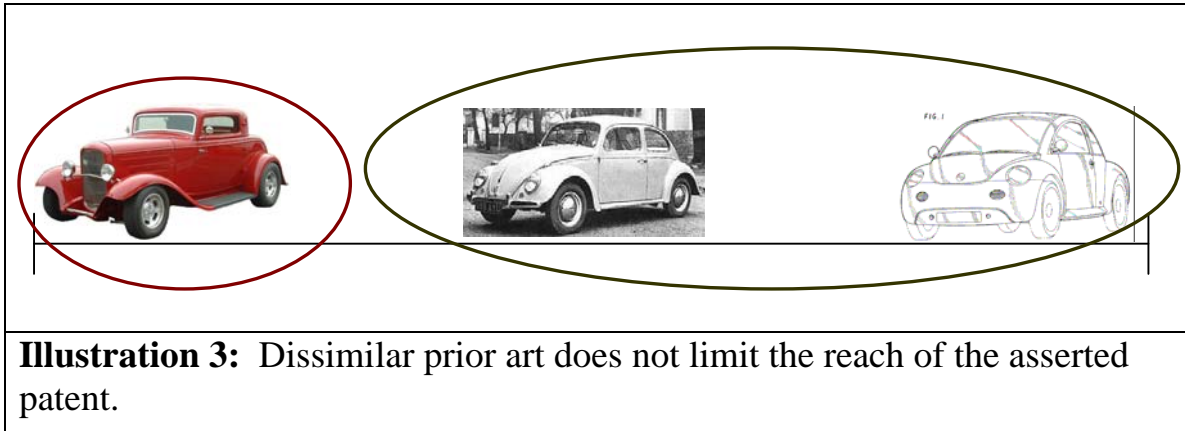
Figure 1 from United States Design Patent No. D367,440, titled “Automobile,” and assigned to Volkswagen AG). We also assume that the accused car is substantially similar to the patented design such that it could be found to be infringing under the *Gorham* test.

As shown in Illustration 2, the defendant should escape infringement because she has introduced prior art showing that her accused car is more substantially similar to the prior art than it is to the patented design.



In contrast, were the accused infringer to rely on the prior art shown in Illustration 3 below, her prior art based non-infringement defense should fail because the prior art design is sufficiently different from the patented design that there is no prior art basis to limit the reach of the design patent with respect to her accused car. Indeed, in this example, the defendant would likely strategically choose *not* to pursue prior-art based non-infringement

arguments because the relative comparisons only serve to illustrate the substantial similarities between the accused article and the patented design.



Under the *amicus curiae*'s proposal – consistent with 35 U.S.C. § 282 and Supreme Court precedent – relating the visual impression of an analogous prior art reference to the accused article and the patented design provides a defensive check on the enforceable scope of the asserted patent, while not directly impacting the validity of the patent. Thus, if prior art is to be considered in evaluating design patent infringement, the *amicus curiae*'s approach should be used in lieu of the point of novelty test.

**B. 35 U.S.C. § 282 AND PRACTICAL REALITIES OF LITIGATION SUPPORT ADOPTION OF A PRIOR ART BASED DEFENSE OF NON-INFRINGEMENT**

Because patent non-infringement must be pleaded as a defense, it is appropriate to place the burden of producing prior art and establishing its



relevance to alleged non-infringement on the accused infringer. 35 U.S.C. § 282. In addition, placing the burden on the defendant, rather than on the plaintiff as was customary under the point of novelty test, is more consistent with the statutory presumption of validity afforded to design patents. *See* 35 U.S.C. § 282; *Rosco, Inc. v. Mirror Lite Co.*, 304 F.3d 1373, 1377-78 (Fed. Cir. 2002).

Importantly, placing the burden on defendant also remedies a practical problem with the point of novelty test. In litigation, the point of novelty test often results in design patent litigants playing a game of “gotcha” where the patentee crafts an elaborate point of novelty attempting to avoid the most relevant prior art that it was aware of when it filed suit. Inevitably, however, an accused infringer discovers prior art that was not previously known to the patentee. When the accused infringer discloses this ‘new’ prior art, judicial and litigation resources are wasted sorting out the potential consequences. The *amicus curiae*’s proposal eliminates the burden on the patentee to stake out a point of novelty and instead requires the accused infringer to establish the relevance of prior art in the first instance.

In sum, by affording an accused infringer the opportunity to show that the accused design is more substantially similar to an analogous prior art

reference, this Court can maintain a check on overreaching findings of infringement, while making design patent litigation more predictable and less prone to gamesmanship.

### **III. RESPONSE TO QUESTION 3: A LIMITED CLAIM CONSTRUCTION SHOULD APPLY TO DESIGN PATENTS**

#### **A. CLAIM CONSTRUCTION SHOULD BE LIMITED TO AN EXPLANATION OF HOW TO CONDUCT THE ORDINARY OBSERVER COMPARISON**

Courts should apply a limited claim construction to interpret design patents. The limited claim construction should essentially be an explanation of how to understand design patent drawings in view of the various design patent drafting conventions, and in view of descriptions in the specification or statements made during prosecution of the design patent. Thereafter, juries should be instructed on how to compare the drawings to the accused article using the ordinary observer test.<sup>2</sup>

In particular, courts should instruct juries that design patents cover the ornamental designs shown in the design patent drawings, and that all of the

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<sup>2</sup> Although this brief urges the Court to adopt a claim construction process that does not involve verbalizing the design elements covered by a design patent claim, that does not mean to suggest that all design patent infringement issues must be submitted to a jury as a matter of law. Indeed, the same summary judgment principles applicable when courts issues *Markman* rulings, apply with equal force to the proposed claim construction process described in this section.

drawings must be evaluated to determine the overall appearance of the patented design. *Contessa Food Prods. Inc. v. Conagra, Inc.*, 282 F.3d 1370, 1376-78 (Fed. Cir. 2002) (explaining that a design patent’s scope “encompasses ‘its visual appearance as a whole,’” and that all drawings must be considered).

In some cases, drafting conventions, descriptions in the specification, and the patent’s prosecution history may impact a design patent’s claim scope. By way of example, the jury should be instructed that features in solid lines must be considered, whereas features shown in broken lines cannot be considered. If necessary, other design patent drafting conventions should be explained, such as stippling or line shading commonly used to depict surface shape. *See, e.g., Colgate-Palmolive Co. v. Ranir, L.L.C.*, No. 06-417, 2007 U.S. Dist. LEXIS 55258, at \*13-\*16 (D. Del. July 31, 2007).

A design patent may also include details in the written description that help to clarify the depiction of the design in the figures and those details and their impact should be appropriately explained. Finally, if disclaimers or other statements were made during prosecution of the application leading to the patent, courts should explain the disclaimer and its impact on the ordinary observer test.

Once the court has explained how to understand the patent drawings, the jury should be instructed to compare each of the drawings in a design patent to the accused product to determine:

[I]f, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other . . .

*Gorham Mfg. v. White*, 81 U.S. 511, 528 (1871).

In sum, courts should perform design patent claim construction only to the extent necessary to explain general principles of design law, including drawing conventions, details in the specification, and disclaimers made during prosecution. Then, the jury should be instructed to apply the *Gorham* ordinary observer test.

**B. EXTENSIVE VERBALIZATION OF THE DESIGN ELEMENTS IS UNNECESSARY, MAY LEAD TO JUROR CONFUSION, AND IS COSTLY**

Verbalizing design patent claims using a *Markman* process akin to utility patent claim construction is unnecessary and is likely to confuse the jury.

The essence of a utility patent claim is the words in the claim. The claim language forms a “word picture” of the invention. The words must be

defined in the claim construction process to enable the fact finder to conduct an element-by-element comparison of the word picture with the accused device to determine whether there is infringement. Thus, in the utility patent context, it is both desirable and necessary to define the meaning of the claim terms to form a word picture during the claim construction process.

Unlike utility patents, design patent claims do not contain word pictures. The words in the claim primarily or exclusively refer to the drawings or figures because the essence of a design patent lies in the *appearance* of the design as a whole, as shown in the patent drawings. Because of the emphasis on the appearance of the design as a whole, it is improper to conduct an element-by-element analysis, or line-by-line comparison of the accused article and the patented design. *Contessa*, 282 F.3d at 1378-79. Consequently, in the design patent context, it is unnecessary to verbalize the meaning of a design patent claim. The overall appearance of the design is best determined with reference to the design patent drawings.

In addition to being unnecessary, verbalizing the design elements may lead to juror confusion. Although sometimes words can define design

elements with clarity, it is difficult, if not impossible, to describe with clarity the “meaning” of the patented design as a whole. Indeed, verbalization of the design elements often can lead to certain elements being emphasized to the exclusion of others, all because of the word choice made by the court during the claim construction process. The jury may be confused and erroneously believe that emphasis should be given to certain design elements, while at the same time being instructed to focus on the overall appearance of the design as shown in the drawings.

The current practice of verbalizing design patent claim constructions also leads to unnecessary costs. Litigants spend inordinate amounts of time, money, and judicial resources arguing over the verbalization process, and particularly the language the court should use to describe the patented design. Because the drawings should be the controlling consideration, infringement should be evaluated by determining whether the overall appearance of the claimed design and the accused article are substantially similar.

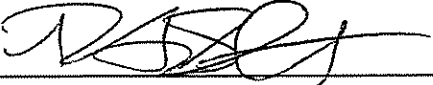
## **CONCLUSION**

For the reasons set forth above, the *amicus curiae* respectfully submits that (1) the point of novelty should no longer be a test for design patent

infringement, (2) in place of the point of novelty infringement test, this Court should recognize a prior art based defense of non-infringement, and (3) claim construction in design patent cases should be limited to explaining how to conduct the ordinary observer test.

Respectfully submitted,  
**Fédération Internationale Des Conseils  
En Propriété Industrielle**

Dated: February 5, 2008

By:  \_\_\_\_\_

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## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 5th day of February, 2008, I hand-filed the original and 30 copies of the foregoing **BRIEF OF *AMICUS CURIAE*** **FÉDÉRATION INTERNATIONALE DES CONSEILS EN PROPRIÉTÉ INDUSTRIELLE (“FICPI”)** with the Clerk’s Office of the United States Court of Appeals for the Federal Circuit, and further certify that I served, via UPS Next Day Air Transportation, two copies of the foregoing Brief on each of the following counsel of record:

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The necessary filing and service were performed in accordance with the instructions given me by counsel in this case.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that **BRIEF OF *AMICUS CURIAE* FÉDÉRATION INTERNATIONALE DES CONSEILS EN PROPRIÉTÉ INDUSTRIELLE (“FICPI”)** complies with the page limitation and type-volume limitations of F.R.App.P. 29(d) and Fed.Cir.R. 35(g).

February 5, 2008



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