

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

***Amicus Curiae* Brief of Elite Group, Inc. and Sensio, Inc. for *en banc*
Appeal (in Support of Defendants)**

Edward D. Manzo
Cook, Alex, McFarron, Manzo, Cummings & Mehler, Ltd.
200 West Adams St., Suite 2850
Chicago, IL 60606
Telephone: (312) 236-8500
Facsimile: (312) 236-8176
emanzo@cookalex.com
Attorney for *Amici Curiae*

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Egyptian Goddess, Inc. v. Swisa, Inc.

No. 2006-1562

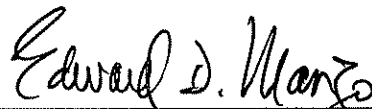
CERTIFICATE OF INTEREST

1. The full name of every party or amicus represented by me is:
Elite Group, Inc. and Sensio, Inc.
2. The names of the real party in interest represented by me are:
Elite Group, Inc. and Sensio, Inc.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of any party represented by me are:

Sensio Company, Star Elite Inc., and Hong & Co.
(none of which is publicly held)

4. There is no such corporation as listed in paragraph 3.
5. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this court are:

Edward D. Manzo
Cook, Alex, McFarron, Manzo, Cummings & Mehler, Ltd.
200 W. Adams Street, Suite 2850
Chicago, IL 60606



Edward D. Manzo

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Relevant Statutes and Regulations

35 U.S.C. §171. Patents for designs

Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefore, subject to the conditions and requirements of this title.

The provisions of this title relating to patents for inventions shall apply to patents for designs, except as otherwise provided.

35 U.S.C. §289. Additional remedy for infringement of design patent

Whoever during the term of a patent for a design, without license of the owner, (1) applies the patented design, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or (2) sells or exposes for sale any article of manufacture to which such design or colorable imitation has been applied shall be liable to the owner to the extent of his total profit, but not less than \$250, recoverable in any United States district court having jurisdiction of the parties.

37 C.F.R. §1.153. (a)

The title of the design must designate the particular article. No description, other than a reference to the drawing, is ordinarily required. The claim shall be in formal terms to the ornamental design for the article (specifying name) as shown, or as shown and described. More than one claim is neither required nor permitted.

Identity of Amicus, Its Interest, and Authority to File

The Elite Group, Inc. (“Elite”) is a Canadian corporation having principal offices in Montreal, Canada. Its constituents supply consumer goods to major retailers throughout North America. Sensio, Inc. (“Sensio”) is one such constituent company, and it supplies kitchen appliances such as panini grills, fajita makers, quesadilla makers, toasters, blenders, mixers, and the like. Companies of the Elite Group regularly encounter design patents in the consumer products fields and need to know the scope of such patents so that infringement can be avoided.

Elite and Sensio are interested in this *en banc* proceeding because of the sharp need for clarity and predictability in interpreting design patents that impact the discount retail industry. They have received consent from the parties to file this amicus brief.

This brief opposes plaintiff’s view that the points of novelty test should be abandoned and that claim construction for design patents should be limited.

Impact of Design Patents on the Discount Retail Industry

A. In the Consumer Merchandise Field, Price and Quality Are Largely Determinative, and Style/Design Is Secondary

Consumers shop at major discount retail stores such as Wal-Mart, Target, Home Depot, and the like because prices are usually lower there. Wal-Mart for example recently had huge advertising campaigns announcing “price roll-backs”

to attract customers. Consumers also consider quality and value, and Elite Group companies provide quality products at value prices.

When two products are roughly equivalent in price and quality, if both are in stock, most consumers will then choose on the basis of style. Indeed, some consumers are willing to pay a bit more for style. Still other consumers are primarily style-driven, but those are not generally the consumers who shop at the large discount retailers.

B. Design Patents Are Used Often in the Consumer Products Field

Because design patents are far less expensive to obtain than utility patents and because they seem to move very quickly through the USPTO, they are well adapted to the consumer product industry. A quick survey of the USPTO database indicates that it granted over 20,000 design patents in 2007, and in January 2008 it granted 2,450 design patents. Many of these appear to be directed to items one might purchase at a discount retailer.

C. Where Margins are Extremely Small, Competition is Stifled Unless Competitors Can Reliably Determine the Scope of IP Rights So They Can Avoid Them

To produce quality goods that can be sold at highly competitive prices, Elite Group companies operate on very small margins. When a patent on a product is discovered or asserted, suppliers often design around it because ornamental features are generally less important than quality and value. Because there are no

claims that articulate differences between the invention and the prior art, and because the USPTO procedures do not require an applicant to identify points of novelty or inventiveness, a supplier must determine the patent scope by other means. In a design patent, sometimes the features are not dramatically different from the prior art. Often, some or all of the differences appear to be functional rather than ornamental.

Despite extensive design-around efforts, disputes often ensue over the scope of the design patent and whether the new design successfully avoids the patent. Even when a competitor has a design-around that seems sufficient under any reasonable view of the patent scope, the lack of clarity in the design patent claim forces competitors to accommodate unreasonably expansive views of patent scope, as patent litigation generally is an uneconomical way to resolve liability issues over low-margin wares. This vagueness stifles legitimate competition. This problem would be diminished, and competition would be more robust, if market participants were able to determine the scope of design patents quickly, economically, and accurately.

ARGUMENT

I. The Scope of a Design Patent Claim is Elusive and Exactly Like an “Omnibus” Claim Prohibited in Utility Patents

The patent statute contains some provisions unique to design patents, 35 U.S.C. §§171, 289, but otherwise requires them to meet the same requirements for utility patents. Section 171 requires the subject matter of a design patent to be: “new,” 35 U.S.C. §171; original, *id.*; novel, 35 U.S.C. §102; non-obvious, 35 U.S.C. §103;¹ covered by a “written description,” 35 U.S.C. §112; enabling, 35 U.S.C. §112; and particularly pointed out and distinctly claimed, 35 U.S.C. §112. As to the claiming requirement, however, 37 CFR 1.153(a) (reproduced *supra* at *iv*) permits only one claim, and its language is standardized. The only basis on which a design patent claim arguably complies with §112 is that the claim is to the design “as shown” or “as shown and described.”

Unless the scope of a design patent is exactly and only what is shown in the drawings, which is not the case due to 35 U.S.C. §289, this reference in the claim to the drawings does little to satisfy the requirement for clarity. Indeed, a design patent claim is exactly the same as an omnibus claim that is prohibited in a utility

¹ The Supreme Court has always demanded a high level of innovation in patents, including design patents. In *Smith et al. v. Whitman Saddle Co.*, 148 U.S. 674, 13 S.Ct. 768 (1893), the Court called for inventiveness in design patents to be more than the work of a mere mechanic; *accord*, *KSR International v. Teleflex*, 127 S.Ct. 1727 (2007).

patent. However, because it is well settled that such claims violate 35 U.S.C. §112, they are expressly prohibited by MPEP 2173.05(r), which states:

Omnibus Claim. Some applications are filed with an omnibus claim which reads as follows: A device substantially as shown and described. This claim should be rejected under 35 U.S.C. 112, second paragraph, because it is indefinite in that it fails to point out what is included or excluded by the claim language. See *Ex parte Fressola*, 27 USPQ2d 1608 (Bd. Pat. App. & Inter. 1993), for a discussion of the history of omnibus claims and an explanation of why omnibus claims do not comply with the requirements of 35 U.S.C. 112, second paragraph.

Ex parte Fressola, cited by the MPEP, states in footnote 1 that the Board's analysis is "limited to claims in utility applications." However, nothing in the patent statute states that design patents need not particularly point out and distinctly claim the invention. Moreover, the guiding principles from *Freesola* are largely applicable to design patents. Certainly the public interest in trying to determine the scope of a design patent is the same. Absent clarification in the file history, the public is left to wonder which aspect(s) of the drawings determine the patent scope and what features are inventive. Clearly the public is at a disadvantage in trying to determine where the dividing line lies between infringement and non-infringement.

II. The Point of Novelty Test Should Be Retained

The preferable course of action would be to change the USPTO requirements so that the public has a mechanism to learn which features

distinguish the invention from prior art. Absent such a change, calling on design patentee plaintiffs to articulate points of novelty is a small step in the right direction, albeit delayed in time. That is, the announcement of the point of novelty occurs after suit is filed rather than during patent prosecution. Even so, eliminating that step would be deleterious to competition.

Moreover, the point of novelty test is consistent with Supreme Court precedent and furthers the public interest in clear delineation of a patent's scope.

A. The Point of Novelty Test is Consistent with the Supreme Court Ruling in *Gorham*

Gorham Co. v. White, 81 U.S. 511 (1871) set forth the ordinary observer test. However, it also spoke generally to the scope of design patents:

And the thing invented or produced, for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture, or article to which it may be applied, or to which it gives form. The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public. It therefore proposes to secure for a limited time to the ingenious producer of those appearances the advantages flowing from them. Manifestly the mode in which those appearances are produced has very little, if anything, to do with giving increased salableness to the article. It is the appearance itself which attracts attention and calls out favor or dislike. It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense. The appearance may be the result of peculiarity of configuration, or of ornament alone, or of both conjointly, but, in whatever way produced, it is the new thing, or product, which the patent law regards. To speak of the invention as a

combination or process, or to treat it as such, is to overlook its peculiarities. [emphasis added]

Gorham, 81 U.S. at 525.

The point of novelty test is consistent with this Supreme Court passage, because it points the fact-finder to “the new thing” which the law regards.

B. The Point of Novelty Test is Consistent with the Supreme Court Ruling in *Smith v. Whitman Saddle*

Two decades after *Gorham*, the Supreme Court decided *Smith et al. v. Whitman Saddle Co.*, 148 U.S. 674, 13 S.Ct. 768 (1893). In that case, the Supreme Court noted that the prior art contained several hundred styles of saddles or saddletrees and that varying them was customary in the trade. The patented design, the Court found, had an old “shape of the front end” so that “the sharp drop of the pommel at the rear seems to constitute what was new and to be material.” 148 U.S. at 682, 13 S.Ct. at 771. The Court explained that without use of the latter feature, there was no infringement.² However, it then added that this “difference was so marked that in our judgment the defendant’s saddle could not be mistaken for the saddle of the complainant.” *Id.* Hence, the Court focused on the novelty that

² *Accord, Elmer v. ICC Fabricating, Inc.*, 67 F.3d 1571 (Fed. Cir. 1995), the DOMINO’S PIZZA sign case, finding no infringement when two specific individual features of the patented design were absent from the accused product. This Court ruled that the accused product lacked these ornamental features and had a substantially different ornamental appearance. 67 F.3d at 1577-78.

distinguished the design as a whole from the prior art combinations.

The Supreme Court did not, however, indicate that the patent owner should bear the burden of proving what novel point or points in the design were adopted by the alleged infringer. In *Gorham*, the Supreme Court required the patentee to show sameness of appearance – that the two designs at issue produced the same effect on a buyer. In *Smith et al.*, the Supreme Court did not discuss the burden nor who bore the risk of loss. The Supreme Court clearly required use of the novel feature that was “material to the design [,] and rendered it patentable as a complete and integral Whole.” The evidence in that case showed non-infringement.

The Supreme Court’s requirement of use of the novel feature for infringement to exist strongly suggests that proving use of the points of novelty should be part of the patentee’s case-in-chief.

C. The Point of Novelty Test is Essential Because A Design Patent Claim Does Not Point Out Novel Features

Design patents are required by 35 U.S.C. §171 to meet the other conditions of the patent statute unless otherwise provided. No portion of the patent statute relieves design patents from particularly pointing out and distinctly claiming invention, which in the case of a design patent is an original, novel, non-obvious design. Because 37 CFR 1.153(a) restricts design patent claims to uniform language, the claim language generally identifies the article of manufacture that

embodies the invention and then says nothing about the defining features of the invention. One must glean this from the figures, file history, and prior art.

As the design patent claim deprives the public of guidance as to what the invention particularly comprises, requiring a design patent owner to identify the specific points of novelty that it considers to be used in the accused article of manufacture is necessary to protect the public interest.

Indeed, just recently this court in *Halliburton Energy Services, Inc. v. M-I LLC*, appeal 2007-1149 (January 25, 2008) commented on the public interest in the precision of patent claims:

35 U.S.C. § 112, ¶ 2 requires that the specification of a patent “conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.” Because claims delineate the patentee’s right to exclude, the patent statute requires that the scope of the claims be sufficiently definite to inform the public of the bounds of the protected invention, i.e., what subject matter is covered by the exclusive rights of the patent. Otherwise, competitors cannot avoid infringement, defeating the public notice function of patent claims. *Athletic Alternatives, Inc. v. Prince Mfg., Inc.*, 73 F.3d 1573, 1581 (Fed. Cir. 1996) (“[T]he primary purpose of the requirement is ‘to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their [respective] rights.’”) (quoting *Gen. Elec. Co. v. Wabash Appliance Corp.*, 304 U.S. 364, 369, (1938)).

Slip opinion at 6.

III. Claim Construction Should Be Required

In a suit for design patent infringement, the trial court should construe the claim. The fact that a design patent contains drawings and no focused claim does not reduce the problem of determining the scope of the patent – it increases it. A jury is in peril of going astray when comparing patent drawings to an accused product unless they have clear guidance from the trial judge as to exactly what the patent protects.

A. The Supreme Court Ruling in Markman Calls for the Court, Not the Jury, to Interpret the Scope of Contested Patent Claims

The Supreme Court in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 116 S.Ct. 1384 (1996) ruled that as between judge and jury, patent claim interpretation is part of the judicial function. In interpreting the scope of a design patent, the trial judge should consider the prosecution history, the prior art, and the features shown in the drawings and produce a clear claim construction for the jury and the parties. While design patents generally do not have language questions about the words or phrases in the claims, they do have prosecution histories and prior art references. This is intrinsic evidence that must be examined to determine the scope of the claim no less in a design patent case than in a utility patent case. Any notion that because design patents are primarily drawings, a jury can evaluate them competently is to cede the claim construction task to the jury.

It is true that in *Markman*, the Supreme Court was considering a utility patent. One might think to distinguish it on that basis. However, the overriding principle is that interpreting the scope of a patent claim is not an issue for the jury. The Supreme Court has already spoken on this issue.

The trial judge must explain to the jury that the role of design patents is to protect ornamentation.³ While this is expected to be covered in jury instructions, it should be referred to in the claim construction, *e.g.*, “The design patent at issue concerns a design for the ornamentation of a [insert name of the article of manufacture] where [describe the drawings].”

This Court has long (and properly) held that the requirement for claim construction extends to design patents⁴ and has cautioned against construing them

³ *Lee v. Dayton Hudson*, 838 F.2d 1186, 1188 (Fed. Cir. 1988) (“... design patent is limited to ornamentation”).

⁴ *Contessa Food Prods. v. ConAgra*, 282 F.3d 1370, 1376 (Fed. Cir. 2002); *Elmer*, 67 F.3d at 1574; *OddzOn Products, Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1404 (Fed. Cir. 1997). In *Durling v. Spectrum Furniture Co.*, 101 F.3d 100, 103 (Fed. Cir. 1996), the Court explained: “Unlike the readily available verbal description of the invention and of the prior art that exists in a utility patent case, a design patent case presents the judge only with visual descriptions. Given the lack of a visual language, *the trial court must first translate these visual descriptions into words - i.e., into a common medium of communication.*^{FN2} From this translation, the parties and appellate courts can discern the internal reasoning employed by the trial court to reach its decision as to whether or not a prior art design is basically the same as the claimed design.”

“^{FN2}. *When properly done, this verbal description should evoke the visual image of the design.*” [emphasis added]

too broadly.⁵ It has said several times that design patents have almost no scope.⁶ This is a further reason for requiring the trial court to construe the claim.

The claim construction should embody these precepts and should be used in determining infringement.⁷ Not only does a comprehensive claim construction assist the jury, but it also assists any appellate review.

Also, it is critical that design patents not prolong patent protection on prior art designs. It would be a travesty to find infringement where the patented design and the allegedly infringing design are similar in appearance only because both use prior art features. Claim construction should help to alleviate this concern.

Further, infringement should not lie where the main reason for any similarity is that primarily functional features are used by the competitor.

⁵ *E.g.*, *Durling*, 101 F.3d at 104 (district court construed the claimed design “too broadly ... The district court’s verbal description of Durling’s claimed design does not evoke a visual image consonant with the claimed design. Instead, the district court’s description merely represents the general concept of a sectional sofa with integrated end tables”); *Contessa*, 282 F.3d at 1377 (district court properly construed the scope of the claimed invention to be its overall ornamental visual impression rather than the broader general design concept); *OddzOn Products*, 122 F.3d at 1406.

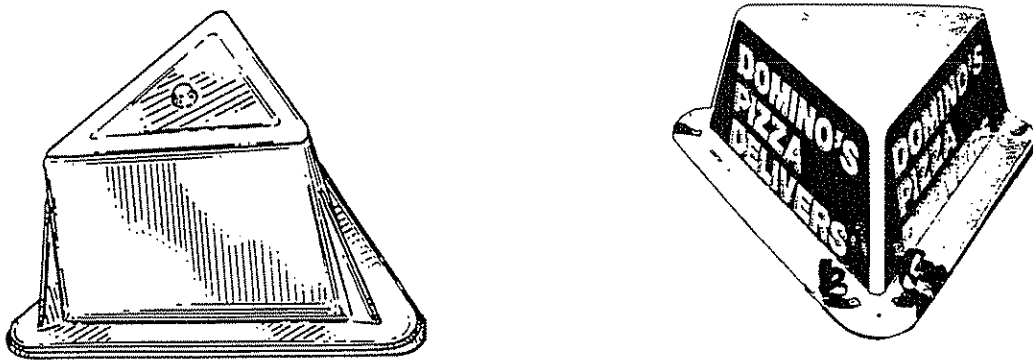
⁶ *Elmer*, 67 F.3d at 1577 (almost no scope); *Unidynamics Corp. v. Automatic Prods. Intl.*, 157 F.3d 1311, 1323 (Fed. Cir. 1998) (almost no scope beyond the drawings); *In re Mann*, 861 F.2d 1581, 1582 (Fed. Cir. 1988) (limited to what is shown in drawings); *cf. Hoop v. Hoop*, 279 F.3d 1004, 1009 (Fed. Cir. 2002).

⁷ *Elmer*, 67 F.3d at 1577 (“Second, the claim as properly construed must be compared to the accused design to determine whether there has been infringement.”).

Protection for functional features falls in the realm of utility patents, not design patents. Indeed, design patents are not substitutes for utility patents. *Lee v. Dayton Hudson*, 838 F.2d at 1189. “A device that copies the utilitarian or functional features of a patented design is not an infringement unless the ornamental aspects are also copied, such that the overall ‘resemblance is such as to deceive.’” *Id.*

B. Claim Construction is Especially Needed When the Designs at Issue are Close

Any notion that a jury is competent to evaluate the scope of a design patent on its own should be dispelled by *Elmer*, where this Court reversed a judgment of infringement rendered on a jury verdict. The patented design and accused DOMINO’S PIZZA sign were as follows:



The Court’s discussion of the patent scope noted that the patented design included a protrusion extending above the sign and triangular vertical ribs along the sign’s side edges. Further, the design patent claim is directed to the design for

a vehicle top sign holder “as shown and described” in the drawings. *Elmer*, 67 F.3d at 1577. Each patent drawing showed a sign having the triangular ribs and upper protrusion, giving the sign a distinctive ornamental appearance.

The patentee urged that these were functional features and not protected. Rejecting this, the Court said the patentee could have omitted these features from its patent drawings but did not and therefore “effectively limited the scope of its patent claim by including those features in it.” *Id.* As no other design was shown in the patent, the Court interpreted “the claim as being limited to a design that includes among its ornamental features triangular vertical ribs and an upper protrusion.” (Hence those would belong in the claim construction.)

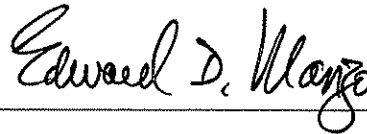
Applying this claim interpretation, the Court concluded that the overall ornamental appearance as shown in the patent drawings “is too different from ICC’s design for an ordinary observer to be induced into purchasing ICC’s product thinking it was [plaintiff’s] design.” *Id.* at 1578. For that reason, the jury verdict of infringement was not supported by substantial evidence.

In *Elmer*, determining the proper scope of the design patent was outcome-determinative. Turning the scope determination over to a jury is asking jurors to assume the role that the Supreme Court has said belongs to judges who are experienced at interpreting patent claims. A lay jury is not trained to handle that interpretive task.

CONCLUSION

The Court should retain the point of novelty test, continue to require trial courts to interpret the scope of the design patent claim, and use the claim construction in determining infringement.

Respectfully submitted,



Edward D. Manzo
COOK, ALEX, MCFARRON, MANZO, CUMMINGS & MEHLER, LTD.
200 West Adams Street, Suite 2850
Chicago, IL 60606
(312) 236-8500
emanzo@cookalex.com
Principal Counsel for Elite Group and Sensio, *Amici Curiae*

CERTIFICATE OF SERVICE

I certify that on February 4, 2008: the original and 30 copies of this brief were sent to the Clerk of the Court by U.S. Mail, first class, postage prepaid, addressed as:

Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, NW
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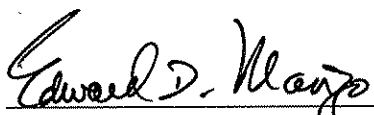
amici by U.S. Mail, first class, postage prepaid, addressed as follows:

Robert G. Oake, Jr.
Oake Law Office
1333 W. McDermott Dr., Suite 200
Allen, TX 75013

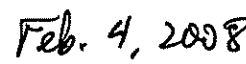
Frederick L. Medlin
Kirkpatrick & Lockhart LLP
2828 N. Harwood St., Suite 1800
Dallas, TX 75201

Christopher V. Carani
McAndrews, Held & Malloy
500 W. Madison St., 34th Floor
Chicago, IL 60661

Christopher B. Roth
Banner & Witcoff, Ltd.
1100 13th St. NW, Suite 1200
Washington DC 20005




Edward D. Manzo



date

CERTIFICATE OF COMPLIANCE

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Edward D. Manzo