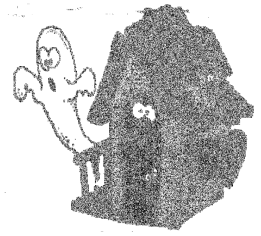




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## “Tip of the Month”

### Design Patents: Stronger Now Than Before!

The Court of Appeals for the Federal Circuit issued an opinion last month in *Egyptian Goddess v. Swisa*, decided 9/22/2008, that upheld the “ordinary observer” test for design patent infringement and did away with the “points of novelty” test.

Design patents protect the ornamental features of useful articles. They are extremely important for companies that produce visually appealing products like The Sharper Image® and Brookstone®. The traditional test for infringement since a Supreme Court case in 1871 had been whether an ordinary observer would be deceived into believing that the infringing article and the patented article had the same design. However, in the past few decades, many court opinions had also adopted a stricter “points of novelty” test. Under the points of novelty test, the design elements of the patented design are compared to those of the prior art. The remaining points of novelty are then compared to the design elements of the allegedly infringing article to see if they were present. If present, the article is infringing.

Over the years, the “points of novelty” test had generated confusion and disagreement as to what constitutes a point of novelty. Minor differences could sometimes result in a finding of no infringement, even where there is substantial similarity in the articles.

The Court in *Egyptian Goddess* determined that, to be infringing, the designs have to be so similar that an ordinary observer familiar with the prior art would be deceived into thinking the accused design is the same as the patented design. In its opinion, the Court emphasized that the ordinary observer had to be familiar with the prior art. That way, the observer’s attention would naturally be drawn to the novel features of the articles more than those of the prior art to make a fair comparison. The “ordinary observer” test tends to draw more things into the web of infringement than the microscope of the “points of novelty” test. It is in this way that design patent law has been strengthened by the *Egyptian Goddess* case.

Applying the test for infringement in the design patent field can be tricky and confusing. If you would like an attorney to review an allegedly infringing situation, please give us a call at 603-668-1971 or write to us at [mailbox@biz-patlaw.com](mailto:mailbox@biz-patlaw.com).

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