

Design patents are governed by 35 USC § 171, which states “[w]hoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor, subject to the conditions and requirements of this title.” “Since a design is manifested in appearance, the subject matter of a design patent application may relate to the configuration or shape of an article, to the surface ornamentation applied to an article, or to the combination of configuration and ornamentation.”[\[1\]](#)

Design patents have issued for all kinds of designs on all kinds of articles, everything from the rounded rectangle shape on the front of Apple’s iPhone,[\[2\]](#) to furniture,[\[3\]](#) to desserts,[\[4\]](#) to the look of a website[\[5\]](#), to the Statue of Liberty.[\[6\]](#) While design patents are relatively narrow in scope when compared to utility patents, they also have distinct advantages such as cost (typically less than one-fifth of the cost associated with obtaining a utility patent) and short issuance time (typically 9-12 months instead of 2-3 years).

There is infringement of a design patent if an ordinary observer, familiar with prior art designs, would be deceived into believing that the accused product is the same as the patented design.[\[7\]](#) In the event of litigation, the accused infringer has the burden of calling to the court’s attention any prior art that an ordinary observer is likely to regard as highlighting differences between the claimed and accused design. *Egyptian Goddess*, 543 F.3d at 678-79. The Federal Circuit has observed that “[d]esign patents ... can be used effectively and efficiently to combat knock-off products that can be easily identified by visual inspection alone.” *John Mezzalingua Associates, Inc. v. International Trade Comm’n*, 660 F.3d 1322, 1335 (Fed. Cir. 2011).

Design patents are an underutilized and economical way to ward off competition and copyists while building an IP portfolio for future valuations.

[\[1\]](#) Design Patent Application Guide, Definition of Design.

[\[2\]](#) D618,677.

[3] D717,569.

[4] D571,526.

[5] D599,372.

[6] D11,023.

[7] *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 670-74, 677-79 (Fed. Cir. 2008) (en banc) (relying on *Gorham Co. v. White*, 81 U.S. 511, 528 (1871) (“[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, the first one patented is infringed by the other.”)).