

Design Patents – The Other Patent

By: Keith J. Marcinowski, Patent Agent

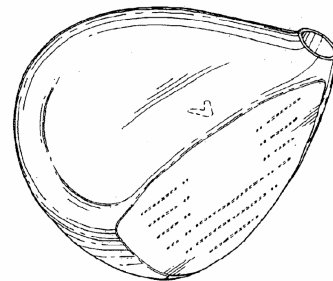
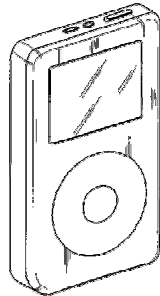
When the general public talks about a “patent,” they are typically referring to a utility patent. Utility patents protect devices, products, machines, processes, and compositions of matter. However, there is “the other patent,” also known as the design patent, that can provide another level of protection and help in the building an intellectual property portfolio.

Utility patents include a detailed technical disclosure along with drawings, if necessary, and one or more claims. The claims list the elements of the invention and establish the boundaries of patent protection. Design patents, by contrast, rely primarily upon drawings to communicate what is protected. A design patent has only one claim. This claim, rather than listing any structure or describing the design in words, generally refers to the drawings as the standard of what is protected. While utility patents can only be obtained for useful inventions, design patents do not focus on utility. The focus of a design patent is on the ornamental design, configuration, improved decorative appearance, or shape of an invention.

Many large companies use design patents to protect the ornamental features of their products. For example, for the period from 1976-2006, the companies listed below obtained large numbers of design patents.

Company Name	Number of Patents
Sony	2,397
Nike	1,640
IBM	736
Colgate-Palmolive	592
Apple Computer	301
Microsoft	297
Kraft Foods	284
Callaway Golf	182

Several examples of products protected by design patents include Apple Computer’s iPod and a Callaway Golf driver:



To qualify for design patent protection, the design must be (1) new in the sense that no single, identical design existed previously; (2) ornamental; and (3) original. The design must also be non-obvious compared to previously existing designs when viewed through

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the eyes of a hypothetical designer skilled in the particular art. Design patents, however, cannot be obtained for ornamental features that are not visible when the product is in use. In general, design patents provide protection for the aesthetically appealing features of a product.

A design patent gives the owner the right to prevent others from making, using, or selling a product that so resembles the patented product that an "ordinary observer" might purchase the infringing article, thinking it was the patented product. The ordinary observer is generally considered to be the retail purchaser of goods of that particular type rather than an expert, who would be less likely to be deceived.

The first step in finding infringement of a design patent to determine what ornamental features of the patented design are not shown in the prior art and whether one or more of these features are shown in the product alleged to infringe. If not, there is no infringement. If one or more of the unique features are shown, then it is necessary to look at both the similarities and differences between the two products and determine if there is sufficient overall similarity such that an ordinary observer would be deceived. If so, infringement exists.

While the scope of protection provided is usually much narrower than utility patents, design patents provide significant protection against direct knock-off products. Design patents are also easier and considerably less expensive to obtain and maintain than utility patents. Companies should regularly consider whether design patents can augment their intellectual property portfolios.

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