

TRANSCRIPT OF PRESENTATION—THE DESIGN PATENT: A SLEEPING GIANT?

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Good afternoon everyone, I am very happy to be here. I am Associate General Counsel at Florida State University (“FSU”). My primary responsibility is to license intellectual property out of the university for the benefit of the public. This includes licensing our inventions and creative works to both existing companies and FSU spinout companies. I also assist faculty with starting companies, which involves a little bit of business law. The type of intellectual property that I would like to focus on today is the design patent. Throughout law school, even studying for the patent bar, design patents were hardly even mentioned as a footnote or a sidebar. First, I am going to go into what a design patent is, what it protects, and what the document looks like. I am going to give some examples, and I will go a little bit into public policy. I will also briefly discuss the test for infringement, damages, and talk about where we can go from there.

So, what is a design patent? A design patent may be obtained for, “any new, original and ornamental design for an article of manufacture.”¹ A design patent protects the nonutilitarian features of an article of manufacture.² In comparison, utilitarian features are protected by a utility patent.³ The word “patent” can be kind of broad. When thinking about patents, many will think of a utility patent and forget about design patents, if they have even heard of them. However, there are two different patents—utility patents *and* design patents—that

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¹ 35 U.S.C. § 171 (2012).

² *See id.*

³ *See id.* § 101.

protect two different features of an article of manufacture. Therefore, patents may specifically relate to the configuration or shape of an article, the surface ornamentation applied to an article, or a combination thereof.⁴ We could get into a debate for hours about ornamentation versus functionality, for, say, the design of an automobile. For example, if you want to protect the features of a Corvette, you must consider that its design might have been made for the purpose of improving the car's aerodynamics, especially because it is a racecar. In the Corvette example, you would want both a utility and a design patent. The utility patent would protect the aerodynamic features of the vehicle. In comparison, a design patent would allow the automobile manufacturer, while probably not in the business of making toy cars or model cars, to license that Corvette design, especially with something as iconic and popular as a Corvette.⁵

The biggest difference between a design patent and a utility patent, as far as the document itself goes, is that the features to be protected in a design patent are not disclosed in the form of written claims. The claims in a design patent, more or less, are the pictures or the drawings of the design patent. Drawings are very important in utility patents, but they are basically the heart of a design. Each design patent has one written claim and one written claim only, and it is form language.⁶ That claim is the ornamental design of the "blank" and you fill in that blank with the article of manufacture that is featured in the drawing.⁷

There are several notable design patents—one of the most notable designs being the Statue of Liberty. This design patent is likely not protecting the actual Statue of Liberty. This was used to protect the articles of manufacture, including little souvenirs (i.e., statuettes of the Statue of Liberty), which I believe were actually sold before the Statue

⁴ Robert S. Katz & Helen H. Minsker, *Trademarks by Design: Combining Design Patents and Trademarks to Protect Your Intellectual Property*, NAT'L L.J., May 1, 2000, at 1, available at http://bannerwitcoff.com/_docs/library/articles/bydesign.pdf.

⁵ Cf. MICHAEL H. JESTER, PATENTS AND TRADEMARKS PLAIN & SIMPLE 94 (2004).

⁶ See 37 C.F.R. § 1.153(a) (2013) (explaining that car companies use design patents to prevent other companies from making toy replicas of their vehicles without a license).

⁷ See *id.*; Dion Bregman & Elizabeth Morris, *Re-Designing Designs*, INTELL. PROP. TODAY, Feb. 2009, at 26, available at <http://www.iptoday.com/articles/2009-2-bregman.asp>.

of Liberty was built to pay for its construction. Similarly, the Coca-Cola bottle is probably one of the more famous design patents. Here you can see where trade dress protection and design patent protection begin to overlap. Trade dress lies in the area of trademark law that protects a brand.⁸ Trade dress identifies the source of goods through the packaging of the product, which in this case is the iconic Coca-Cola bottle. Of recent notoriety is the design patent for Apple's iPhone, which I will refer to later.

But, what *do* we consider a design? Here, we have an example of a cradle for an infant, and this is *designed*. "Design" is the key word because the utilitarian feature of the cradle is already known in the art. What does a cradle do? What is the utilitarian feature of a cradle? Well, a cradle holds an infant. So, then what can we protect? We cannot protect the utilitarian feature, but we can protect the design. Sean Coyne is a technician at the FSU National High Magnetic Field Laboratory. Sean is our go-to guy in the machine shop. Sean took a furniture-making class with one of our interior design graduates, Rachelle McClure. We have a fantastic interior design program at FSU. Sean and Rachelle got together and designed a cradle to be used in women's shelters. Sean and Rachelle visited the women's shelter in Tallahassee to determine what the women there needed, and they noticed that there were a lot of mothers that would come in, and their babies would stay either in their bed or in the car seat on the floor, which can be rather dangerous. So, the two of them came up with a novel cradle design. Remember, from the utilitarian aspect the cradle already holds the infant. It is FSU's cradle *design* that allows the infant to sleep above the parent without the danger of the parent, from, say, rolling over or suffocating the infant. The following image is the actual figure from the design patent, of which I also have a video.⁹

⁸ See Arthur M. Handler & Eileen P. McCarthy, *CONOPCO—Consumer Confusion Remains the Touchstone of Trade Dress Infringement*, 86 TRADEMARK REP. 595, 610 (1996) (explaining that when labels confuse consumers it can cause a trademark infringement lawsuit).

⁹ 'Cradle of Hope' earns patent for FSU creators, FLA. ST. 24/7, <http://news.fsu.edu/Watch-and-Listen/Video-News/News/Cradle-of-Hope-earns-patent-for-FSU-creators> (last visited Nov. 2, 2014).

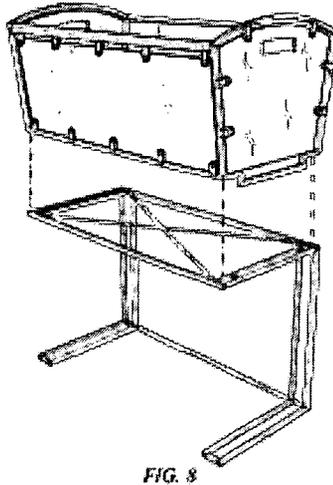


Figure 8, U.S. Patent No. D611,720 S (filed Sept. 17, 2008).

The most interesting thing that I have learned about design patents is that you can protect graphical user interfaces.¹⁰ Graphical user interfaces include the app icons on your phone, specifically the way that the icons are laid out and the way that the icons are designed in color and in shape.¹¹ The mix of icon styles and colors were factors in the *Apple v. Samsung* case, which I will discuss later.¹²

Novel fonts can also be protected via design patents.¹³ In fact,

¹⁰ See Michael Risch, *Functionality and Graphical User Interface Design Patents*, 17 STAN. TECH. L. REV. 53, 54 (2013) (“Modern designers of graphical user interfaces . . . have obtained design patent protection for creative computer software displays.”).

¹¹ See, e.g., U.S. Patent No. D604,305 S (filed June 23, 2007) (containing a design patent on the iconic iPhone display screen).

¹² Mark Nowotarski, *Strong Design Patents: The Power of Color*, IPWATCHDOG (Aug. 6, 2013), <http://www.ipwatchdog.com/2013/08/06/strong-design-patents-the-power-of-color/id=44342/>.

¹³ See William J. Seymour & Andrew W. Torrance, (*R*)evolution in Design Patentable Subject Matter: *The Shifting Meaning of “Article of Manufacture”*, 17 STAN. TECH. L. REV. 183, 205 n.139 (2013) (“[T]ype fonts have enjoyed design patent protection since the days of the first design patent statute.”).

the first design patent ever issued protected a new font.¹⁴ One reason to patent a novel font would be to license that font for someone else to use, perhaps in a trademark. At FSU we have a trademark for our “Unconquered” font—the font that you see in the end zones on our football field. FSU did a deal with Nike over the summer so that we could own this font.¹⁵ This is a good segue into how utility patents, design patents, and trademarks can be used together to protect the manufacturer of a product.

Design patents incentivize us to design articles of manufacture more efficiently. A trademark protects words, phrases, symbols, designs, or a combination thereof, identifying and distinguishing the source of goods or services.¹⁶ Trademarks protect the consumer from confusion by relieving them from the burden of undue research into the products they buy. Articles of manufacture are protected via utility patents, while designs are protected via design patents and the brand in trademarks, or trade dress, which themselves can be a design. For the iPhone example, its function is protected via utility patents, the appearance via design patents, and the name by trademark. This just illustrates where design patents fit into your intellectual property toolbox. It is best, if you have the money and resources, to go ahead and protect as much as you can and in as many different ways as you can.

Next is an example of a graphical user interface. Apple was very savvy. In this case there were 194 screenshots that were submitted to the United States Patent and Trademark Office (“USPTO”) for Apple’s graphical user interface for the iPhone.¹⁷ Apple filed this design patent application six days before iPhones were first sold in June 2007. These screenshots are not considered 194 different design patents but rather *one* design patent, and this design patent is worth \$725

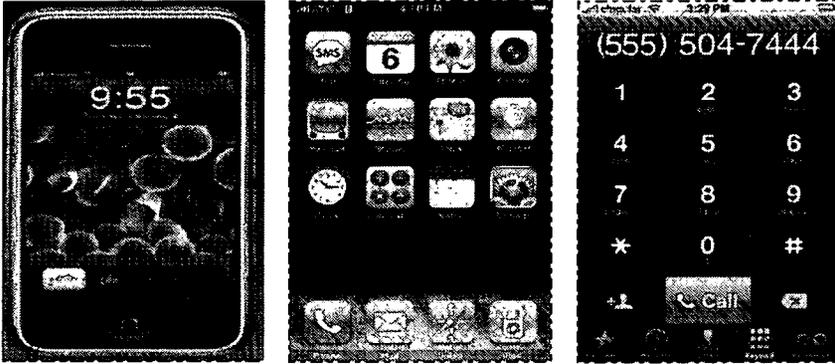
¹⁴ See U.S. Patent No. D1 (issued Nov. 19, 1842).

¹⁵ *Florida State Athletics Unveils Brand Identity*, NIKE (Apr. 11, 2014), <http://nikeinc.com/nike-football/news/florida-state-athletics-unveils-brand-identity>.

¹⁶ *Trademark FAQs*, USPTO, <http://www.uspto.gov/faq/trademarks.jsp> (last modified Mar. 23, 2013).

¹⁷ Graphical User Interface for a Display Screen or Portion Thereof, U.S. Patent No. D604,305 (filed June 23, 2007).

million if you consider the verdict against Samsung.¹⁸ Apple had very good patent attorneys and made its claim for the iPhone as broad as possible. Remember when I said, “fill in the blank” earlier? Apple filled in the blank with an “electronic device.” This was very clever considering there are other electronic devices with a substantially similar design, such as the iPod and the iPad.¹⁹



Figures 1, 4, and 21 from Apple's patent application.

So, where do design patents fit in? There is a method to this madness. Design patents suffer from that “middle child syndrome,” if you will, between its siblings, the utility patent and the trademark. Utility patents, by definition, protect products, processes, machines, compositions of matter, and articles of manufacture.²⁰ The term for utility patents is twenty years from the date of filing.²¹ Again, this is the limited monopoly that you get for basically putting in the time, perhaps even going through Food and Drug Administration approval, and spending the money to innovate. In comparison, a design patent

¹⁸ Amended Verdict Form, *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 WL 10208466 (N.D. Cal. Aug. 24, 2012). The exact total awarded to Apple was \$724,606,347.00. *Id.*

¹⁹ Design patents are not limited to a particular set of dimensions, unless a patent specifically provides them. *See, e.g.*, *PHG Techs., LLC v. St. John Cos.*, 529 F. Supp. 2d 852, 863 (M.D. Tenn. 2007) (citing *Berry Sterling Corp. v. Pescor Plastics, Inc.*, 122 F.3d 1452, 1455 (Fed. Cir. 1997)). The patent only claims what is within the dotted lines in the figures, thus making possible other products using that same design. *See, e.g.*, U.S. Patent No. D604,305 (filed June 23, 2007) (“The broken line showing of a display screen . . . forms no part of the claimed design.”).

²⁰ 35 U.S.C. § 101 (2012).

²¹ *Id.* § 154(a)(2).

protects the ornamental features of an article of manufacture.²² A design patent's term will expire fourteen years from the issue date, not from the date of the filing.²³ Although, the term for a design patent is not as long as the term for a utility patent, without the lag time of the USPTO that was mentioned in an earlier talk this morning, the terms could turn out to be about the same. This is because a design patent grant comes pretty quickly after filing, and you will see just how quickly in a moment.

What is the policy behind a design patent? It is clear that we have innovation incentives for utility patents. We also have a consumer protection mechanism in our trademark law, which also comes back to protect the trademark owner because it covers the good will that they build in their market.²⁴ However, it is primarily a consumer protection mechanism. For design patents, it is "fill in the blank" for a policy, and there is not a lot that is written on design patents in general because they are kind of lost and forgotten. However, some fill in the blank with an innovation incentive. This is because it takes time, effort, money, and a certain amount of expertise to create a design. Comparatively, some fill in the blank with the trademark consumer protection mechanism. However, it is still unclear how design patents protect consumers. Take Apple's design patent for a rectangular electronic device with four rounded corners and a screen, for example. I do not believe there are many consumers who take those features into consideration when deciding which type of smartphone to buy.

Next, I will discuss design patents by the numbers. I promise, these are very simple numbers. Take a look at the number of utility patents that have been issued as of January 1, 2014.²⁵ The first utility patent issued after January 1, 2014, was number 8,621,662.²⁶ In comparison, the first design patent issued after January 1, 2014, was

²² *Id.* § 171.

²³ *Id.* § 173.

²⁴ See 15 U.S.C. § 1125(a)(1) (2012); see also 74 AM. JUR. 2d *Trademarks and Tradenames* § 6 (2014).

²⁵ *Table of Issue Years and Patent Numbers, for Selected Document Types Issued Since 1836*, USPTO (Feb. 3, 2014), <http://www.uspto.gov/web/offices/ac/ido/oeip/tafi/issuyear.pdf>.

²⁶ U.S. Patent No. 8,621,663 (filed June 11, 2008) (issued Jan. 7, 2014).

number 696,836.²⁷ This is why you do not hear a lot about design patents compared to utility patents. Currently, 81.6% of design patent applications are approved without any objection from the USPTO.²⁸ Even more jaw-dropping is that 98% of design patents are eventually approved by the USPTO, compared with an approval rate of only 44% for utility patents.²⁹ Regarding pendency in the USPTO, we are now seeing three to five years for a utility patent.

Regarding cost, design patents cost far less than utility patents. Compare \$20,000 for a utility patent versus a mere \$2,000 for a design patent. These are my estimates based on what we pay at FSU, and typically a design patent takes only about three to six months to issue compared to three to five years for utility patents. For fourteen years of protection for a design patent, versus twenty years of protection for a utility patent, you are still getting a deal. You are getting an even bigger deal considering the cost of a design patent is only 10% of the cost of a utility patent. We do not always pay \$20,000 for each utility patent, but for some inventions in the biomedical area, for example, a medical device, we do. Also, keep in mind that we are a small entity at FSU, and again, these are just my estimates.³⁰ For private companies, patent prosecution fees can be even higher.

Just like a utility patent, when a design patent is issued you are allowed to put the patent number on the product, and you can legally say that it is a patented technology.³¹ This could be important for those seeking investment. Even if you have a design patent application pending, for those three to six months you can legally say your product is “patent pending” or that it is a “patent pending technology.”

²⁷ U.S. Patent No. D696,836 S (filed June 09, 2011).

²⁸ Dennis D. Crouch, *A Trademark Justification for Design Patent Rights*, 24 HARV. J.L. & TECH. 19 (Aug. 10, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1656590.

²⁹ See *id.* at 7, 18.

³⁰ As a nonprofit organization, the FSU Research Foundation, Inc., pays small entity fees for patent applications. See 37 C.F.R. § 1.27(a)(3)(ii)(A), (b) (2014); see also *USPTO Fee Schedule*, USPTO (Jan. 17, 2015), <http://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule>.

³¹ See generally 35 U.S.C. § 287 (2012) (stating that patentees can place the patent number on their product or its packaging in order to put the public on notice that the product is protected by a patent).

Next, I will discuss design patent validity in comparison to utility patent validity. Earlier today, you heard about obviousness and this person of ordinary skill in the art as they relate to utility patents. Professor Robert Holton is a great example of this person of ordinary skill in the art. Dr. Holton invented what is known as Taxol.³² The therapeutic compound in Taxol actually occurs in nature.³³ It was found in a plant in the rainforest.³⁴ Therefore, the therapeutic compound is not patentable subject matter under 35 U.S.C. § 101.³⁵ What FSU did was patent the synthesis method for the therapeutic compound, rather than the compound itself.³⁶ Bristol Myers Squibb licensed the synthesis method from FSU, which brought in \$350 million to the university and a whole lot more to Bristol Myers Squibb.³⁷ Therefore, the person of ordinary skill in the art of chemical synthesis is most likely a chemist with a PhD, like Dr. Holton. Compare this with design patent validity, where obviousness is determined based on what is seen by the eye versus what is already known in the art.³⁸ And this eye belongs to an ordinary designer. A lot of people often confuse a person of ordinary skill in the art and an ordinary designer.

The test for design patentability is the point-of-novelty test. To determine whether a design passes this test, one may also look toward the elements of infringement. There are two elements of design patent infringement. The first element of infringement is satisfied when the accused device is “substantially similar,”³⁹ which is going to be very important to the claimed design under what is referred to as the

³² Leonora LaPeter, *Keep your millions, FSU tells professor*, TAMPA BAY TIMES (Dec. 25, 2005), http://www.sptimes.com/2005/12/25/State/Keep_your_millions__F.shtml.

³³ See Susan R. Morrissey, *Maximizing Returns*, CHEMICAL & ENGINEERING NEWS, Sept. 15, 2003, at 17-20.

³⁴ See *id.*

³⁵ See generally Anthony C. Chen, *Patent Law and the Development of Biotechnology (Part II)*, 2 ASIA PACIFIC BIOTECH NEWS 258, 258 (1998), available at http://www.asiabitech.com/publication/apbn/02/english/preserved-docs/0215/0258_0262.pdf (discussing the difficulty of patenting naturally-occurring substances).

³⁶ See Morrissey, *supra* note 33.

³⁷ LaPeter, *supra* note 32; see Morrissey, *supra* note 33.

³⁸ See *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 670-71 (Fed. Cir. 2008); *Gorham Co. v. White*, 81 U.S. 511, 528 (1871).

³⁹ *Egyptian Goddess*, 543 F.3d at 668.

“ordinary observer test,”⁴⁰ which you will see later. The second element of infringement is satisfied when “the accused device contains substantially the same points of novelty that distinguished the patented design from the prior art.”⁴¹

Regarding the ordinary observer test, all that you need to know is that in the *Egyptian Goddess, Inc. v. Swisa, Inc.* case the U.S. Court of Appeals for the Federal Circuit (“CAFC”) took away the second element of the point of novelty test.⁴² Therefore, we are now left with a test that seems pretty simple because if you take away an element, it is easier to prove infringement. The *Egyptian Goddess* case was probably the biggest change to design patent law. *Egyptian Goddess* alleged that Swisa infringed on a design patent for a nail buffer.⁴³ The CAFC ruled unanimously in an en banc opinion and upheld the district court’s finding of summary judgment, which determined that there was no infringement.⁴⁴ Again, this was a big change. This case came down in 2008 when I was in law school, and everyone interested in intellectual property law was paying attention to this opinion.

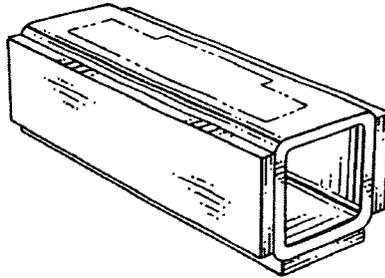


Figure 1, U.S. Patent No. D467,389.

According to the CAFC, the *Egyptian Goddess* nail buffer, the design in question, was patentable over the prior art.⁴⁵ Some nail buffers are, naturally, two-sided, and some are three-sided. Here, we have a three-padded buffer with four sides, or a square buffer. However, the fourth square is not padded. So, what is the point of

⁴⁰ *Id.*

⁴¹ *Id.* (internal quotations omitted).

⁴² *Id.* at 672.

⁴³ *Id.* at 668.

⁴⁴ *Id.* at 682-83.

⁴⁵ *See id.*

novelty for the Egyptian Goddess design? It is that fourth side of the nail file without a buffer.⁴⁶ Regarding infringement, the ordinary observer is actually acting as a purchaser and not a designer.⁴⁷ This best illustrates how infringement is now easier to prove. You no longer have to worry about the point of novelty of the design, which here is that fourth side without a pad. Now, with the ordinary observer test for infringement, all you have to do is simply hold up the buffer with the four-padded sides in one hand, and hold up the buffer with the three-padded sides in the other hand, and ask, “Is this the same product?” to the jury. In other words, the jury will not explicitly be instructed to consider the point of novelty, or that fourth side without a buffer.

The CAFC found that the two nail buffers were not the same product.⁴⁸ In the *Egyptian Goddess* case, before the test for infringement was changed, the jury actually had to construct claims.⁴⁹ When the jury constructed a claim for the nail buffer at trial, they came up with a four-sided nail buffer having buffer pads on three sides, the fourth side without a pad. But the CAFC did not want to get into claim instruction. So again, without that point of novelty, and without this claim instruction, an attorney could just go in front of a jury having no technical background, without even a design background, hold up the two nail buffers, one in each hand, and ask, “Are these the same?” and the jury simply answers either “yes” or “no.” In this case, since the jury said “no,” and the CAFC upheld its verdict in spite of the change to the infringement test, it is difficult to see how this new test makes infringement easier to prove. However, the *Apple v. Samsung* case will.⁵⁰

Apple alleged that Samsung infringed on its utility and design patents for a smartphone.⁵¹ In this case, the jury found that Samsung

⁴⁶ See *id.*

⁴⁷ See *id.* at 670-72. Unlike the test for utility patents, where the person of ordinary skill in the art is both the creator and the “judge” in the test for infringement, for design patents, the designer is removed as the “judge” and replaced with the ordinary observer, or consumer. See *id.* This is a major difference between design and utility patents, and makes infringement easier to prove for design patents.

⁴⁸ See *id.* at 683.

⁴⁹ See *id.* at 679.

⁵⁰ *Apple, Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314 (Fed. Cir. 2012).

⁵¹ *Id.* at 1319.

infringed on Apple's utility and design patents, and the district court awarded \$1.05 billion to Apple.⁵² About three or four of the total patents involved in the *Apple v. Samsung* case were design patents.⁵³ One of the design patents claimed the graphical user interface design that I mentioned earlier. The award was later reduced, but there is going to be a retrial.⁵⁴

So, who cares about design patents? As an engineer, I am going to buy a Dell computer because I want to crunch the numbers. But a lot of consumers do not care about that. A lot of people just want something that looks cool. And here is that company, again, that is famous for design. Apple introduced the iMac, available in assorted colors, when they rebranded themselves in about the early 2000s. So, large, established companies care about design patents, and it is no coincidence that Apple *really* cares.

One of the challenges facing patent law, and design patent law, is how we approach public policy—specifically how to avoid introducing a chilling effect on design while protecting consumers as well. The challenge lies in that it can be argued that designs do not require a lot of effort up front and protecting designs with design patents results in very broad protection, especially for a graphical user interface or the rounded corners of a mobile phone.⁵⁵ What is the consumer being protected from if one smartphone company has a limited monopoly on a handset with rounded corners and a graphical user interface with square icons?

One provision that sets the two different types of patents apart is 35 U.S.C. § 289, which provides for the recovery of an infringer's *total* profits for design patent infringement.⁵⁶ Compare this with only being

⁵² Amended Verdict Form, *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 WL 10208466, (N.D. Cal. Aug. 24, 2012).

⁵³ See *Apple*, 678 F.3d at 1316.

⁵⁴ See Judgment, *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2012 WL 10208466 (N.D. Cal. Mar. 6, 2014).

⁵⁵ See Gene Quinn, *Design Patents: The Under Utilized and Overlooked Patent*, IPWATCHDOG (Dec. 20, 2011), <http://www.ipwatchdog.com/2011/12/20/design-patents-the-under-utilized-and-overlooked-patent/>.

⁵⁶ A person who infringes a design patent "shall be liable to the owner [of the patent] to the extent of his total profit . . ." 35 U.S.C. § 289 (2012).

able to recover a reasonable royalty or your *lost* profits as an owner for utility patent infringement.⁵⁷ So, now we know that design patents are cheaper, issue faster, have a lower chance of rejection, that its owner has a higher chance of succeeding on an infringement claim, and a potentially much greater amount of damages can be recovered for infringement when compared to utility patents.⁵⁸

Knowing this, who might care about design patents now? We have that lovely patent troll from the realm of utility patents that might be coming back to haunt us in the design patent realm. So, if I had to guess, I would say more people will begin to care about design patents, and the upward trend in the number of design patents issued is going to continue.

So, now that the sleeping giant has awakened, where will we go from here? Design patent reform? There is that troublesome word “reform” again. We do not like change in the intellectual property community. In the least, we are not very used to it. In my opinion, the requirements for a design patent are not likely to change anytime soon; although, I would not be surprised if there is an uproar over allowing Apple to protect the rounded corners of a handset. As a competitor, for example, I would not want to put a product out there with sharp corners that could hurt people. The infringement test has just recently changed, but what about the calculation of damages?⁵⁹ I think *that* is what will change next in light of the massive damages awarded to Apple.

But, before we go anywhere, we have to choose a theory; we have to choose a policy. I do not see how we can get out of that before we make any more changes to design patent law. Do we just stick with the innovation incentive that we have come to be so comfortable with regarding utility patents? Consumer protection, which is behind our trademark law, is also likely to come into play, but it is not a good

⁵⁷ See *id.* § 284. See generally Collin B. Harris & Andrew M. Ollis, *Design Patent Damages: An Additional Remedy and Other Considerations*, LANDSLIDE, May-June 2010, at 57, 57-59 (discussing in depth the damages available for design patent infringement).

⁵⁸ See Crouch, *supra* note 28, at 20; Quinn, *supra* note 55.

⁵⁹ Richardson v. Stanley Works, Inc., 597 F.3d 1288, 1293 (Fed Cir. 2010); see Egyptian Goddess, Inc. v. Swisa, Inc., 543 F.3d 665, 678 (Fed. Cir. 2008).

stand-alone theory because it does not necessarily incentivize elegant or efficient design. Should we combine them both or should we create an entirely new theory? Perhaps we can call the new theory “the design incentive.” I believe it will be difficult to not only come up with a design incentive theory, but to have everyone agree on one. However, I believe that we can find a way to protect the consumer *and* the designer. There is not a lot out there on design patents; therefore, it is a great topic to research.