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2016 – Study Question (Designs)

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Requirements for protection of designs

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I. Current law and practice

1) Does your Group's current law provide for an intellectual property right (registered or patented) that specifically protects the outward appearance or ornamentation of an object or article of manufacture?

As set out in the Study Guidelines, copyrights and trademarks are not such rights in the context of this Study Question.

yes

Please explain:

2) If yes, what is this right called? (e.g. registered design, design patent, industrial design, industrial design patent)

References to design below are to be read as references to this right, irrespective of what it is called in your jurisdiction.

Design Patent

3) What are the statutory requirements for such right? Please tick any relevant boxes and explain the basis and application of these requirements.

a) novelty

See Manual of Patent Examination Procedure (MPEP) 1504.02 ("In design patent applications, the factual inquiry in determining anticipation over a prior art reference is the same as in utility patent applications. That is, the reference "must be identical in all material respects." *Hupp v. Siroflex of America Inc.*, 122 F.3d 1456, 43 USPQ2d 1887 (Fed. Cir. 1997).

To find that a design patent is anticipated by another, the jury must find that to an ordinary observer, the claimed design and the other's design are "identical in all material respects.")

AIA 35 U.S.C. § 102:

(a) NOVELTY; PRIOR ART.—A person shall be entitled to a patent unless—

(1) the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention; or

(2) the claimed invention was described in a patent issued under section 151, or in an application for patent published or deemed published under section 122(b), in which the patent or application, as the case may be, names another inventor and was effectively filed before the effective filing date of the claimed invention.

(b) EXCEPTIONS.—

(1) DISCLOSURES MADE 1 YEAR OR LESS BEFORE THE EFFECTIVE FILING DATE OF THE CLAIMED INVENTION.—A disclosure made 1 year or less before the effective filing date of a claimed invention shall not be prior art to the claimed invention under subsection (a)(1) if—

(A) the disclosure was made by the inventor or joint inventor or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor; or

(B) the subject matter disclosed had, before such disclosure, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor.

(2) DISCLOSURES APPEARING IN APPLICATIONS AND PATENTS.—A disclosure shall not be prior art to a claimed invention under subsection (a)(2) if—

(A) the subject matter disclosed was obtained directly or indirectly from the inventor or a joint inventor;

(B) the subject matter disclosed had, before such subject matter was effectively filed under subsection (a)(2), been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor; or

(C) the subject matter disclosed and the claimed invention, not later than the effective filing date of the claimed invention, were owned by the same person or subject to an obligation of assignment to the same person.

(d) PATENTS AND PUBLISHED APPLICATIONS EFFECTIVE AS PRIOR ART.—For purposes of determining whether a patent or application for patent is prior art to a claimed

invention under subsection (a)(2), such patent or application shall be considered to have been effectively filed, with respect to any subject matter described in the patent or application—

(1) if paragraph (2) does not apply, as of the actual filing date of the patent or the application for patent; or

(2) if the patent or application for patent is entitled to claim a right of priority under section 119, 365(a), or 365(b) or to claim the benefit of an earlier filing date under section 120, 121, or 365(c), based upon 1 or more prior filed applications for patent, as of the filing date of the earliest such application that describes the subject matter.

Pre-AIA 35 U.S.C. § 102:

A person shall be entitled to a patent unless —

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or

(c) he has abandoned the invention, or

(d) the invention was first patented or caused to be patented, or was the subject of an inventor's certificate, by the applicant or his legal representatives or assigns in a foreign country prior to the date of the application for patent in this country on an application for patent or inventor's certificate filed more than twelve months before the filing of the application in the United States, or

(e) the invention was described in — (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for the purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language; or

(f) he did not himself invent the subject matter sought to be patented, or

(g)(1) during the course of an interference conducted under section 135 or section 291, another inventor involved therein establishes, to the extent permitted in section 104, that before such person's invention thereof the invention was made by such other inventor and not abandoned, suppressed, or concealed, or (2) before such person's invention thereof, the invention was made in this country by another inventor who had not abandoned, suppressed, or concealed it. In determining priority of invention under this subsection, there shall be considered not only the respective dates of conception and reduction to practice of the invention, but also the reasonable diligence of one who was first to conceive and last to reduce to practice, from a time prior to conception by the other.

b) non-obviousness

"When assessing the potential obviousness of a design patent, a finder of fact employs two distinct steps: first, 'one must find a single reference, a something in existence, the design characteristics of which are basically the same as the claimed design'; second, '[o]nce this primary reference is found, other references may be used to modify it to create a design that has the same overall visual appearance as the claimed design.'... The ultimate inquiry ... is whether the claimed design would have been obvious to a designer of ordinary skill who designs articles of the type involved." *High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 108 USPQ2d 1183, 1192 (Fed. Cir. 2013) (citations omitted).. See also MPEP 1504.03 II. ("As a whole, a design must be compared with something in existence, and not something brought into existence by selecting and combining features from prior art references. See *In re Jennings*, 182 F.2d 207, 86 USPQ 68 (CCPA 1950). The "something in existence" referred to in *Jennings* has been defined as "...a reference... the design characteristics of which are basically the same as the claimed design...." See *In re Rosen*, 673 F.2d 388, 391, 213 USPQ 347, 350 (CCPA 1982) (the primary reference did "...not give the same visual impression..." as the design claimed but had a "...different overall appearance and aesthetic appeal...". ... A rejection under 35 U.S.C. 103 would be appropriate if a designer of ordinary skill would have been motivated to modify a primary reference by deleting features thereof or by interchanging with or adding features from pertinent secondary references. In order for secondary references to be considered, there must be some suggestion in the prior art to modify the basic design with features from the secondary references. See *In re Borden*, 90 F.3d 1570, 1572, 39 USPQ2d 1524, 1526 (Fed. Cir. 1996). The long-standing test for properly combining references has been "...whether they are so related that the appearance of certain ornamental features in one would suggest the application of those features to the other." See *In re Glavas*, 230 F.2d 447, 450, 109 USPQ 50, 52 (CCPA 1956).")

35 U.S.C. § 103:

A patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in section 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains. Patentability shall not be negated by the manner in which the invention was made.

c) inventive step

d) individual character

e) originality

f) aesthetic

g) ornamental

Best Lock Corp. v. Ilco Unican Corp., 94 F.3d 1563, 1566, 40 USPQ2d 1048, 1050 (Fed. Cir. 1996) ("a design patent may be granted for a 'new, original and ornamental design for an article of manufacture.' However, if the design claimed in a design patent is dictated solely by the function of the article of manufacture, the patent is invalid because the design is not ornamental.") citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 148, 9 USPQ2d 1847, 1851 (1989)

See also MPEP 1504.01(c) ("To be patentable, a design must be 'primarily ornamental.' 'In determining whether a design is primarily functional or primarily ornamental the claimed design is viewed in its entirety, for the ultimate question is not the functional or decorative aspect of each separate feature, but the overall appearance of the article, in determining whether the claimed design is dictated by the utilitarian purpose of the article.' See *L. A. Gear Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1123, 25 USPQ2d 1913, 1917 (Fed. Cir. 1993)").

35 U.S.C. § 171:

Whoever 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.

h) other, namely ...

Written Description Requirement

"The necessity for good drawings in a design patent application cannot be overemphasized. As the drawing constitutes the whole disclosure of the design, it is of utmost importance that it be so well executed both as to clarity of showing and completeness that nothing regarding the design is left to conjecture. An insufficient drawing may be fatal to validity (35 U.S.C. § 112, first paragraph)."

Manual of Patent Examining Procedures ("MPEP") § 1503.02

35 U.S.C. § 112:

(a) IN GENERAL The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor or joint inventor of carrying out the invention.

(b) CONCLUSION.—The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the inventor or a joint inventor regards as the invention

4) Does your Group's current law deny design protection to a design with an appearance that is dictated solely by its function?

yes

Please explain:

5) If yes, what are the relevant factors to determine whether or not a design is deemed unprotectable as being functional? Please tick any relevant boxes and explain as applicable:

a) whether the overall appearance is dictated solely by its technical function

Best Lock Corp. v. Ilco Unican Corp., 94 F.3d 1563, 1566, 40 USPQ2d 1048, 1050 (Fed. Cir. 1996) ("If the design claimed in a design patent is dictated solely by the function of the article of manufacture, the patent is invalid because the design is not ornamental.") citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 148, 9 USPQ2d 1847, 1851 (1989)

b) whether each portion of the overall appearance is dictated solely by its technical function

c) the availability of alternative appearances that can obtain the same functional result

See *Rosco, Inc. v. Mirror Lite Co.*, 304 F.3d 1373, 1378 (Fed.Cir. 2002) (“[I]f other designs could produce the same or similar functional capabilities, the design of the article in question is likely ornamental, not functional.”); *Best Lock*, 94 F.3d at 1566 (same)

See *Ethicon Endo-Surgery, Inc. v. Covidien*, 796 F.3d 1312, 115 USPQ2d 1880 (Fed. Cir. 2015) "For functionality purposes, 'it is relevant whether functional considerations demand only this particular design or whether other designs could be used, such that the choice of design is made for primarily aesthetic, non-functional purposes,'" quoting *Hupp v. Siroflex of Am., Inc.*, 122 F.3d 1456, 1462 (Fed. Cir. 1997). (“... the availability of alternative designs is an important—if not dispositive—factor in evaluating the legal functionality of a claimed design. For example, the district court in *L.A. Gear* referenced the evidence of many alternative designs that accomplished the same functionality associated with the underlying athletic sneaker. 988 F.2d at 1123.”)

See MPEP 1504.01(c) IV. (“[E]vidence may be presented showing possible alternative designs which could have served the same function indicating that the appearance of the claimed design was not purely dictated by function. See *L.A. Gear Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 25 USPQ2d 1913 (Fed. Cir. 1993).”)

d) the need to achieve the product's technical function was the only relevant factor when the design in question was selected

e) other, namely ...

6) Does your Group's current law deny design protection to any portions (e.g. a "feature", "element") of the overall design that are deemed functional?

no

Please explain:

All portions of the design’s **appearance**, as claimed in the drawings, are part of the overall claimed design. In contrast, any underlying functional purposes, qualities or characteristics are not part of the scope of protection for a claimed design. (i.e. whether a hinge actually swivels or a scissor actually cuts). More specifically, the scope of the design claim is limited to the ornamental aspects of functional portions, including the portion's spatial relationship to other aspects of the design, relative size, orientation and location.

See, e.g., *Elmer v. ICC Fabricating, Inc.*, 67 F. 3d 1571 (Fed. Cir. 1995) (holding that even if the rib and protrusion were “functional,” those portions were shown in solid lines in the design patent drawings and thus part of the claimed design.)

7) If yes, what are the relevant factors to determine whether or not a portion is deemed functional? Please tick any relevant boxes and explain as applicable:

a) whether the overall appearance is dictated solely by its technical function

b) the availability of alternative appearances for the portion to obtain the same functional result

c) the need to achieve the product's technical function was the only relevant factor when the portion in question was selected

d) other, namely ...

8) What is the effect on the scope of protection of a design with one or more functional portions? Please tick any relevant boxes and explain as applicable:

a) any portions deemed functional will not be taken into account when assessing infringement

b) any portions deemed functional will not be taken into account when assessing validity

c) any portions deemed functional will not be taken into account separately when assessing infringement, but can play a role in the overall comparison

d) any portions deemed functional will not be taken into account separately when assessing validity, but may play a role in the overall comparison

e) no effect (e.g. so long as the overall appearance is not dictated solely by its technical function, all portions of the design are included in the scope of protection, irrespective as to whether any portions may be functional)

f) the Group's current law is unsettled

g) other, namely ...

Any underlying functional purposes, qualities or characteristics are not part of the claimed design. In other words, whether a zipper actually zips or a hinge actually swivels is not relevant when considering the scope of protection for a design patent claim. See *Lee v. Dayton-Hudson Corp.*, 838 F.2d 1186, 1188 (Fed. Cir. 1988) (holding that design patents are directed to ornamental features of an article of manufacture and “do not and cannot include claims to the structural or functional aspects of the article.”) The scope of a patented design is affected by functional features even if its appearance is not solely or primarily dictated by function. *Oddz On Products v. Just Toys Inc.*, 122 F.3d 1396, 1460 (Fed. Cir. 1997).

In *Richardson v. Stanley Works, Inc.*, 597 F.3d 1288, 93 USPQ2d 1937, 1939. the Court of Appeals for the Federal Circuit held that the accused product (below right) was not substantially similar to the patented design (below left).

The Federal Circuit in *Ethicon Endo-Surgery, Inc. v. Covidien*, 796 F.3d 1312 (Fed. Cir. 2015), referring to the facts of *Richardson*, clarified that the functional portions are not “factored out” of the claim scope. Instead, the scope of the design claim is limited to the “ornamental aspects of functional elements.” With respect to the *Richardson* design, the Federal Circuit found::

In particular, the scope of the claim encompassed, among other ornamental aspects, the shape of the hammer head, the diamond-shaped flare of the crowbar and the top of the jaw, the rounded neck, the undecorated handle, and the orientation of the crowbar relative to the head of the tool (which was not driven by functional considerations, unlike the orientation of the hammer head and crowbar at opposite ends of the handle)

With respect to the design patent in *Ethicon*, the Federal Circuit made clear that although

the design had functional characteristics, no portion of the appearance was factored out of the claimed design.

The Court stated that the patent claims the overall appearance of the ornamental designs of the “U”-shaped trigger, the fluted torque knob, and the rounded activation button, with the torque knob and the button positioned relative to the trigger.

The Federal Circuit in *Sport Dimension, Inc. v. Coleman Co.*, No. 2015-1553, 2016 WL 1567151 (Fed. Cir. Apr. 19, 2016) affirmed the logic of *Ethicon* that eliminating design features merely because they perform a function is contrary to law, in that it would “fail to account for the particular ornamentation of the claimed design”. Moreover, the Court emphasized that “eliminating structural elements from the claim [improperly converts] the claim scope of the design patent from one that covers the overall ornamentation to one that covers individual elements.”

It is notable that even if a feature is said to be functional, it still carries with it other information including its spatial relationship to other aspects of the design, including relative size, orientation and location. By way of example, while each of the following has a different appearance, if you were to eliminate the functional portion, each would all have the same

claimed scope. The point being is that a design is more than just a portion, rather it is the relationship among all of the portions with one another. You cannot surgically remove a portion without impacting the remainder.

II. Policy considerations and possible improvements to your current law

9) How can the following aspects of your Group's current law be improved, if at all?

a) the definition or meaning of a "design"

1) Many national laws state that a design right can protect shape, surface ornamentation or a combination thereof. There is much confusion as to how an applicant claims just shape. There appears to be an unwritten understanding that a line drawing without surface ornamentation is directed to only shape and not surface ornamentation. This however has created confusion in several cases. See *Apple v. Samsung* (issue of whether Apple's design patents affirmatively claimed the absence of surface ornamentation); *UK Trunk* decision (does a suitcase claimed in black & white cover a suitcase having animal-themed surface ornamentation)

2) It would be helpful to make clear that a design patent protects only overall visual *appearance*. It does not protect any underlying functionality of the article of

manufacture. In other words, whether a zipper actually zips or a hinge actually swivels is of no moment when considering the scope of protection for a design patent claim. All that matters is the *appearance* of the zipper and the *appearance* of the hinge.

3) All **claimed** portions of the design, whether old/new, functional/ornamental, significant/insignificant, form part of the scope of protection. Whatever the applicant included in the design claim, is what the claim covers. There should be no *post hac* effort to remove any portions from the claimed overall design.

4) A design patent protects the combination of all of the depicted portions. There are no rights afforded to any of the individual features in isolation. This is similar to a utility patent in that for a utility patent claim directed at A+B+C+D, there is no right to exclude provided for just element D, for example. The right to exclude is for the combination, and only the combination.

b) the requirements for protection of a design

It would be helpful to make clear why there is an "ornamental" requirement, and why it has been defined as satisfied as long as the design is "not dictated solely by function." It is generally understood that the reason for the requirement is to encourage innovation in design; further, the standard of "not dictated solely by function" is used to prevent the monopolization of a functional idea via a design patent.

c) the treatment of functionality in the sense described in paragraph 14) of the Study Guidelines or aspects of such functionality

Not applicable

10) Are there any other policy considerations and/or proposals for improvement to your current law falling within the scope of this Study Question?

no

Please explain:

Not applicable

III. Proposals for harmonisation

11) Does your Group consider that harmonisation in the three areas in question 9) above is desirable?

If yes to some but not all of those three areas, please state in relation to which of the areas your Group considers harmonisation is desirable.

If yes in relation to any of those areas, please respond to the following questions without regard to your Group's current law.

Even if no in relation to any of those areas, please address the following questions to the extent your Group considers your Group's current law could be improved.

yes

Please explain:

12) Should there be harmonisation of the definition of an intellectual property right that specifically protects the outward appearance or ornamentation of an object or article of manufacture?

yes

Please explain:

Yes. While it is recognized that perfect harmonization might not be achievable, the achievement of a level of harmonization found in utility patent law would be a worthy goal.

[Note: Harmonization is not considered desirable with respect to related rights acquired by the use of the design in trade if it possesses distinctiveness and consumer recognition, e.g., trade dress rights for a beverage bottle design, which can be protectable as a 3-dimensional trademark. Principles of unfair competition, as well as the plain language of our federal trademark statute, recognize protection for the trade dress of a product or its packaging, which may or may not be protectable as a trademark or a design. There is extensive developed jurisprudence for each of these concepts that serve complementary functions and would be difficult to harmonize.]

13) If so, what should that right be called?

“Design Patent” or “Design Right”

14) What should the requirements for such right be? Please tick any relevant boxes and explain the basis and application of these requirements:

a) novelty

A prior art reference must be identical in all material respects to anticipate the claimed design.

b) non-obviousness

To find obviousness, a single reference must have design characteristics which are basically the same as the claimed design. Once this primary reference is found, other references related to the primary reference may be used to modify the primary reference to create a design that has the same overall visual appearance as the claimed design.

c) inventive step

d) individual character

e) originality

f) aesthetic

g) ornamental

If the design is dictated solely by the function of the article of manufacture, the patent is invalid because the design is not ornamental

h) other, namely ...

It is important for applicants to clearly depict their designs so that the public understands the metes and bounds of the right. The drawings should be so well executed both as to clarity of showing and completeness that nothing regarding the design is left to conjecture.

15) Should design protection be denied to a design with an appearance that is dictated solely by its function?

yes

Please explain:

This is a necessary requirement because it prevents a design patent from being used to monopolize a functional idea. (*i.e.* if there is only one shape that can achieve a particular function, *e.g.* a ball bearing), a design right protecting that shape would also be a *de facto* monopoly over the underlying function.). In most cases, however, designs that are dictated by function do have an ornamental appearance that can be protected, so the word “solely” in the question is very important.

16) If yes, what should the relevant factors be to determine whether or not a design is deemed unprotectable as being functional? Please tick any relevant boxes and explain as applicable:

a) whether the overall appearance is dictated solely by its technical function

If the design is dictated *solely* by the function of the article of manufacture, the patent is invalid because the design is not ornamental.

b) whether each portion of the overall appearance is dictated solely by its technical function

c) the availability of alternative appearances that can obtain the same functional result

If there are alternative designs that can achieve the substantially same functional result, a design is not dictated solely by function. In other words, as long as there are alternative designs, there is no concern that providing a design patent on the design would provide a monopoly over the functional idea.

d) the need to achieve the product's technical function was the only relevant factor when the design in question was selected

e) other, namely ...

17) Should design protection be denied to any portions (e.g. a "feature", "element") of the overall design that are deemed functional?

no

Please explain:

No. All visual aspects of the claimed design should remain part of the scope of protection.

A design patent only protects the overall appearance of the design as depicted in the drawings; it does not protect functional qualities or general design concepts. As noted by the Federal Circuit in *Sport Dimension, Inc. v. Coleman Co.*, No. 2015-1553, 2016 WL 1567151 (Fed. Cir. Apr. 19, 2016): "eliminating structural elements from the claim [improperly converts] the claim scope of the design patent from one that covers the overall ornamentation to one that covers individual elements."

18) If yes, what should the relevant factors be to determine whether a portion of a design is functional? Please tick any relevant boxes and explain as applicable:

a) whether the overall appearance is dictated solely by its technical function

b) the availability of alternative appearances for the portion to obtain the same functional result

c) the need to achieve the product's technical function was the only relevant factor when the portion in question was selected

d) other, namely ...

19) What should the effect be on the scope of protection of a design with one or more functional portions? Please tick any relevant boxes and explain as applicable:

a) any portions deemed functional will not be taken into account when assessing infringement

b) any portions deemed functional will not be taken into account when assessing validity

- c) any portions deemed functional will not be taken into account separately when assessing infringement, but can play a role in the overall comparison
- d) any portions deemed functional will not be taken into account separately when assessing validity, but may play a role in the overall comparison
- e) no effect (e.g. so long as the overall appearance is not dictated solely by its technical function, all portions of the design are included in the scope of protection, irrespective as to whether any portions may be functional)
- f) the Group's current law is unsettled
- g) other, namely ...

Functional portions should not be factored out of the claim scope. Instead, the scope of the design claim should be limited to the ornamental aspects of functional portions.

- 20) If your answer to question 11) is no, is it your Group's view that a (registered or patented) intellectual property right that specifically protects the outward appearance or ornamentation of an object or article of manufacture should not be available at all?
- 21) If yes, why?
- 22) If your answer to question 11) is no in relation to some but not all of the three areas set out in question 9) above, please state why your Group does not consider that harmonisation in that area(s) is desirable.
- 23) Please comment on any additional issues concerning any aspect of the definition and requirements for protection of designs, or the role of functionality, you consider relevant to this Study Question.

Please indicate which industry sector views are included in part “**III. Proposals for harmonization**” of this form:

Summary

The questionnaire for the design question addresses two topics, (1) the gatekeeper subject matter eligibility provision of “ornamental” for design protection under 35 U.S.C. § 171 (the analogous provision for utility patents being “useful” under 35 U.S.C. § 101), and (2) whether/how to separate out any functional aspects from protection (perhaps as part of claim construction).

1. Statutory-Functionality

With respect to issue 1, U.S. courts largely, and rightfully, have coalesced around the “dictated solely by” standard for determining whether a design claim passes muster under the subject matter eligibility provision requiring a design to be “ornamental.” 35 U.S.C. § 171 Under the “dictated solely by” standard, a design is deemed ornamental so long as the overall appearance of the claimed design is

not “dictated solely by” its function.” An example of an appearance solely dictated by function is a ball bearing. If the entire appearance was preordained by the functional requirements, then nothing was “designed” and no design patent should grant.

2. Claim Construction-Functionality

Design patents do not protect functional attributes, concepts, qualities or characteristics of the underlying article of manufacture to which the claimed design is applied. That said, design patents do protect all claimed visual aspects claimed in the drawings. Accordingly, no visual aspects of the claimed design should be excised from the design claim under the guise of being “functional.” In other words, the visual appearance of a hinge shown in a design patent is part of claim even though the fact that it swivels is not.