

# ***U.S. Design Patents: The Path To Meaningful and Sustainable Protection***

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**Partner**

**McAndrews, Held & Malloy, Ltd.**

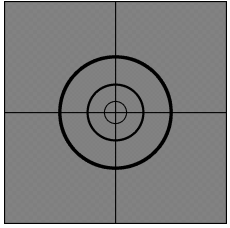
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November 16, 2011

Santiago, Chile



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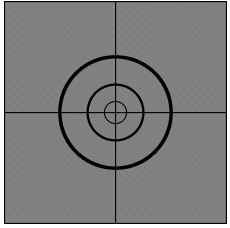


# Focus: U.S. Intellectual Property

1. Patents

2. Trademarks

3. Copyright



# Focus: U.S. Intellectual Property

## 1. Patents

- Utility Patents
- **Design Patents\*\***

## 2. Trademarks (names, logos, etc.)

- **Trade Dress**

## 3. Copyright

- **Visual Art Copyright**



# 3 Ways to Protect Appearance in U.S.

Design Patent\*\*

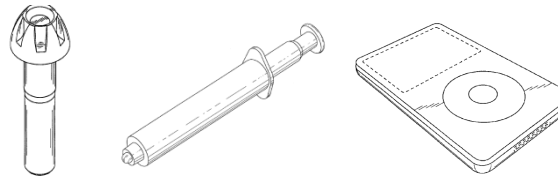
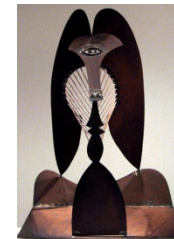
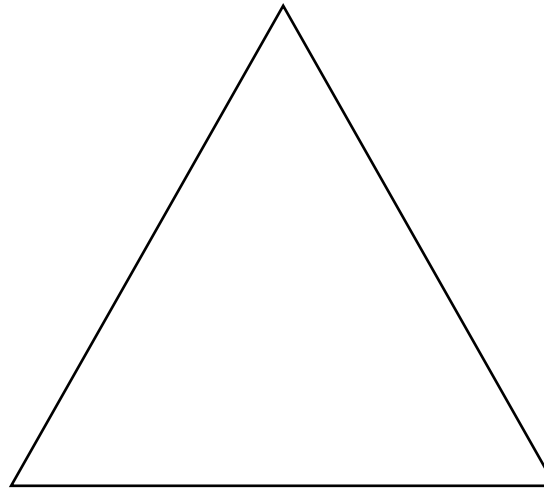


FIG. 1



Trade Dress



Copyright



## TODAY'S DISCUSSION

- 1) Design Patent Enforcement
- 2) Design Patent Protection
  - A) Fundamentals
  - B) Path to Meaningful Protection



# Design Patent Enforcement



# *Gorham v. White*, 81 U.S. 511 (1871)



Gorham's  
Patented Design



White's  
Accused Design



# Infringement – Ordinary Observer Test

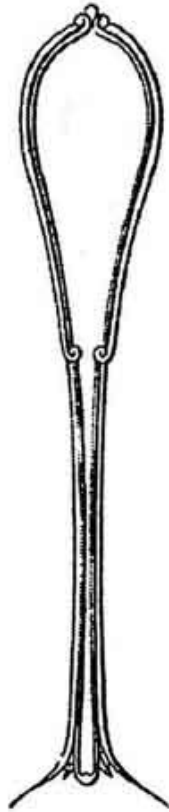
**IF...** “in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.”

*Gorham Co. v. White*, 81 U.S. 511, 528 (1871)  
(emphasis added)





# *Gorham v. White*, 81 U.S. 511 (1871)



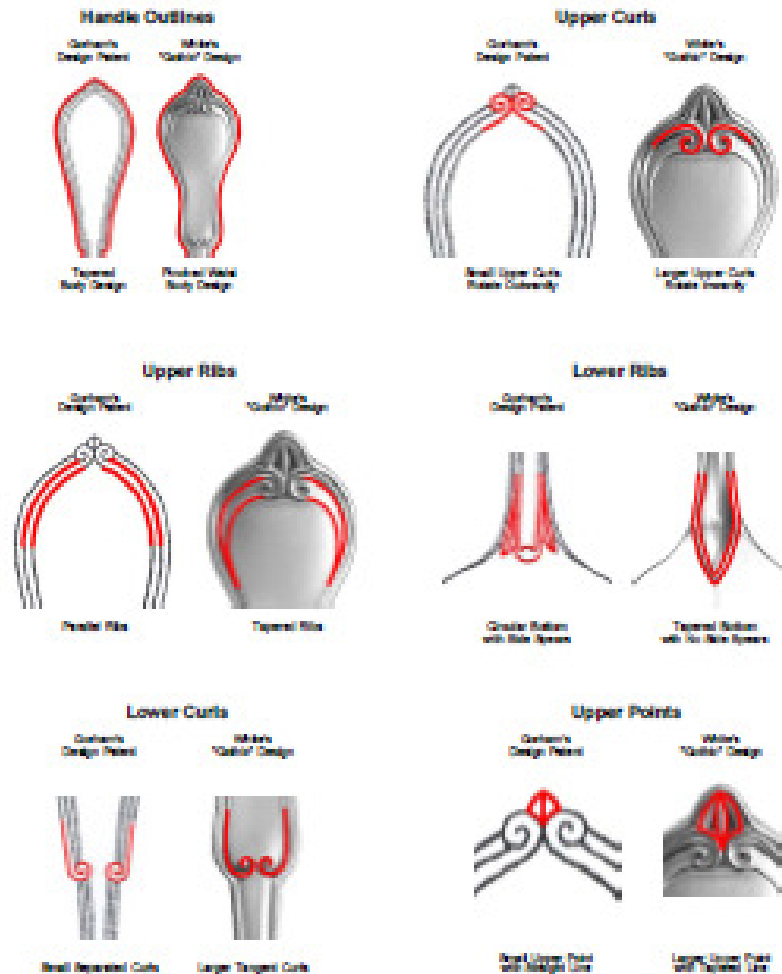
Gorham's  
Patented Design



White's  
Accused Design



# Gorham v. White, 81 U.S. 511 (1871)





# *Gorham v. White*, 81 U.S. 511 (1871)



Gorham's  
Patented Design



White's  
Accused Design



# ***Egyptian Goddess, Inc. v. Swisa,*** 543 F.3d 665 (Fed. Cir. 2008) (*en banc*)



Gorham's  
Patented Design



White's  
Accused Design

**INFRINGEMENT**



# ***Egyptian Goddess, Inc. v. Swisa,*** 543 F.3d 665 (Fed. Cir. 2008) (*en banc*)



Prior Art



Gorham's  
Patented Design



White's  
Accused Design



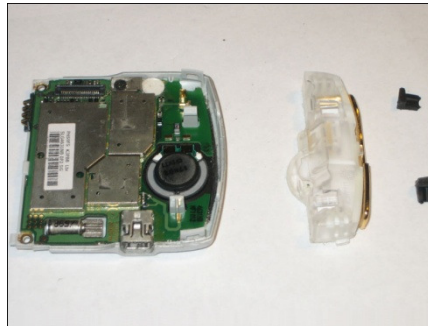
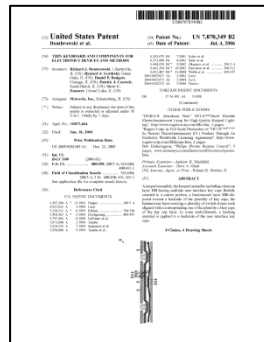
# Design Patent Prosecution



# Utility Patent vs. Design Patents

## Utility Patent

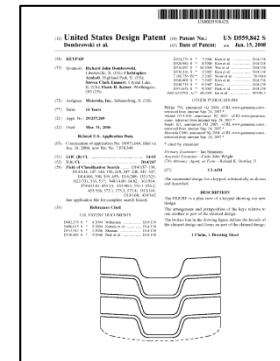
The way it WORKS....



U.S. Patent No. 7,070,349

## Design Patent

The way it LOOKS....



U.S. Patent No. D559,842



# Design Patents Protect

Overall appearance of an article of manufacture





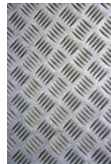


# Design Patents Protect

Overall appearance of an article of manufacture



- Shape



- Surface ornamentation

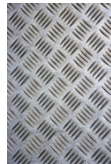


# Design Patents Protect

Overall appearance of an article of manufacture



- Shape



- Surface ornamentation



- Color



# Design Patents: Hard Facts

- Only one claim per design patent
- Duration: 14 years from issuance
- No Maintenance Fees!
- Filing to Issuance 9-12 month avg.



# Rocket Docket

- Request to Expedite “Rocket Docket”
- 37 C.F.R. § 1.155
- Seasonal Goods

US00D380417S

[11] Patent Number: Des. 380,417

[45] Date of Patent: \*\*Jul. 1, 1997

[76] Inventor: Christopher Hardy, 2500 Stockyard Rd., Springfield, Ill. 62072

[\*\*] Term: 14 Years

[21] Appl. No.: 65,718

[22] Filed: May 2, 1997

[51] LOC (6) Cl. 26-01

US00D380417S

United States Patent [19] Patent Number: Des. 380,417  
Hardy [45] Date of Patent: \*\*Jul. 1, 1997

[54] CANDLE HOLDER 4,787,017 11/1988 Vettes 362/161  
4,926,298 5/1990 Zimmerman 362/161  
5,262,929 11/1993 Lemhat

[76] Inventor: Christopher Hardy, 2500 Stockyard Rd., Springfield, Ill. 62072

[\*\*] Term: 14 Years

[21] Appl. No.: 65,718

[22] Filed: May 2, 1997

[51] LOC (6) Cl. 26-01

[52] U.S. Cl. D26/16; D9/43; D11/125; D11/157

[58] Field of Search D26/6, 7, 9, 10, D26/13-15, 20-23; 431/125, 288-292; 362/161-163; D9/43; D11/125, 157

[56] References Cited

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D. 350,406 9/1994 Genoa  
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D. 377,402 1/1997 Perkins  
443,397 12/1890 Mack 362/162  
2,562,192 7/1951 James D11/125  
3,741,711 6/1973 Bryant

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The Horchow Collection, Aug. 1979, p. 48, Item (D), Fastened Clear Acrylic Candlesick Holder.  
The Gallery of Amsterdam, 1984, Item (G), Beveled and Leaded Glass Candle Cluster & Glows.  
Global Design Catalog, Jul. 29, 1991, Classic Cube Candle Holder.  
Illuminations Catalog, Holiday 1996, p. 16, Item (D), Ready-To-Give Candles; Item (E), Good Fortune Candle.

Primary Examiner—Alan P. Douglas  
Assistant Examiner—Robin V. Taylor

[57] CLAIM

The ornamental design for a candle holder, as shown and described.

DESCRIPTION

FIG. 1 is a perspective view of a candle holder showing my new design;  
FIG. 2 is a side view in elevation thereof;  
FIG. 3 is a top view thereof; and  
FIG. 4 is a bottom view thereof.

1 Claim, 2 Drawing Sheets



# Design Patent Requirements

To qualify for a design patent, the design must be:

- **Novel** ( § 102) (1-year bar date applies)
- **Non-obvious** ( § 103)
- **Ornamental** ( § 171)



# ORNAMENTAL? Yes!

(31) United States Design Patent (30) Patent No.: US D459,207 S  
(31) Date of Patent: Jun. 25, 2002

(54) NAME  
(57) Inventor: Choji Miyata, Katsuyuki Miyata (JP)  
(73) Assignee: Yoshida Miyata, Katsuyuki Miyata (JP), a joint venture  
(71) Term: 14 Years  
(21) Appl. No.: 29397,000  
(22) Filed: Jul. 16, 1999  
(86) Foreign Application Priority Data  
Mar. 1, 1999 (JP) ..... 09-008  
(52) U.S. Cl. Cl.: ..... 08/046  
(52) Int. Cl. Cl.: ..... B06B9/00  
(52) Field of Search: ..... 08/397, 411,927, 411,929, 432, 439

(56) References Cited  
Machine Design—The Fastener Book, p. 175, Kerkhof Ltd.—see top right.

FIG. 1 is a top plan view of the drawing of the new design.  
FIG. 2 is a front elevation view thereof.  
FIG. 3 is a bottom view thereof.  
FIG. 4 is a right side elevation view thereof.  
FIG. 5 is a left side elevation view thereof.  
FIG. 6 is a conventional view thereof taken along line A-A in FIG. 1.

1 Claim, 1 Drawing Sheet

(31) United States Design Patent (30) Patent No.: US D464,254 S  
(31) Date of Patent: Oct. 15, 2002

(54) NAME  
(57) Inventor: Bruce Sherman, MITC Co. Co. Inc.  
(73) Assignee: H4 Tools  
(21) Appl. No.: 29370,021  
(22) Filed: Apr. 15, 1999  
(86) Foreign Application Priority Data  
Apr. 15, 1999 (US) ..... 09/021  
(52) U.S. Cl. Cl.: ..... 08/046  
(52) Int. Cl. Cl.: ..... B06B9/00  
(52) Field of Search: ..... 08/397, 411,927, 411,929, 432, 439

(56) References Cited  
Machine Design—The Fastener Book, p. 175, Kerkhof Ltd.—see top right.

FIG. 1 is a top plan view of the drawing of the new design.  
FIG. 2 is a front elevation view thereof.  
FIG. 3 is a bottom view thereof.  
FIG. 4 is a right side elevation view thereof.  
FIG. 5 is a left side elevation view thereof.  
FIG. 6 is a conventional view thereof taken along line A-A in FIG. 1.

1 Claim, 1 Drawing Sheet

(31) United States Design Patent (30) Patent No.: US D466,149 S  
(31) Date of Patent: Apr. 16, 2001

(54) NAME  
(57) Inventor: Choji Miyata, Katsuyuki Miyata (JP)  
(73) Assignee: Yoshida Miyata, Katsuyuki Miyata (JP), a joint venture  
(71) Term: 14 Years  
(21) Appl. No.: 29397,000  
(22) Filed: Jul. 16, 1999  
(86) Foreign Application Priority Data  
Mar. 1, 1999 (JP) ..... 09-008  
(52) U.S. Cl. Cl.: ..... 08/046  
(52) Int. Cl. Cl.: ..... B06B9/00  
(52) Field of Search: ..... 08/397, 411,927, 411,929, 432, 439

(56) References Cited  
Machine Design—The Fastener Book, p. 175, Kerkhof Ltd.—see top right.

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FIG. 5 is a left side elevation view thereof.  
FIG. 6 is a conventional view thereof taken along line A-A in FIG. 1.

1 Claim, 1 Drawing Sheet

(31) United States Design Patent (30) Patent No.: US D496,260 S  
(31) Date of Patent: Sep. 21, 2004

(54) NAME  
(57) Inventor: Albert Echazabal, Franklin, CA (US)  
(73) Assignee: Knott, LLC, Miami, FL (US)  
(71) Term: 14 Years  
(21) Appl. No.: 29396,729  
(22) Filed: Jun. 5, 2004  
(52) U.S. Cl. Cl.: ..... 08/046  
(52) Int. Cl. Cl.: ..... B06B9/00  
(52) Field of Search: ..... 08/397, 411,927, 411,929, 432, 439

(56) References Cited  
Machine Design—The Fastener Book, p. 175, Kerkhof Ltd.—see top right.

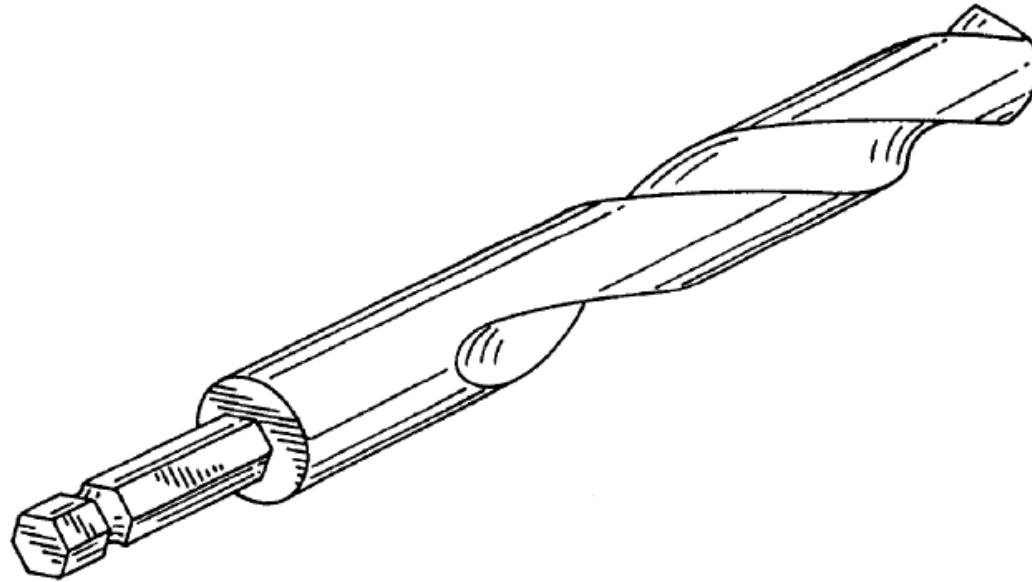
FIG. 1 is a front view of a bolt showing one view design.  
FIG. 2 is a top view of the bolt shown in FIG. 1.  
FIG. 3 is a left side view of the bolt shown in FIG. 1.  
FIG. 4 is a right side view of the bolt shown in FIG. 1.  
FIG. 5 is a top end view of the bolt shown in FIG. 1.  
FIG. 6 is a bottom end view of the bolt shown in FIG. 1.  
FIG. 7 is a top and side perspective view of the bolt shown in FIG. 1.

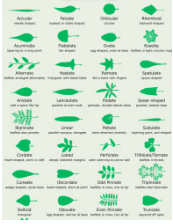
1 Claim, 2 Drawing Sheets

**TEST:** Are there any design choices? Or is the design purely dictated by its function?



# Ornamental?



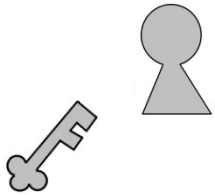


# Alternative designs

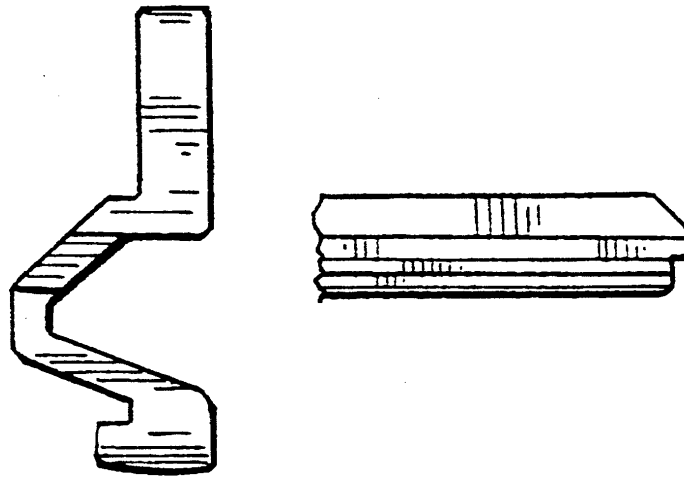
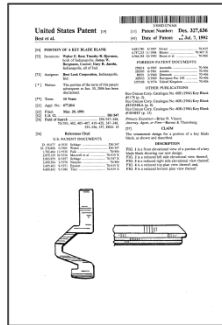


Alternative Designs of Drill Bits



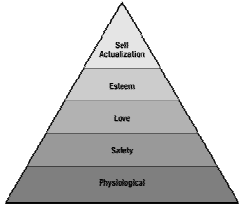


# Example of Design Patent Held to be Invalid



NO “DESIGN” – Why? To fit into the key hole, this is the way the blade must look

*Best Lock Corp. v. Ilco Unican Corp.*, 94 F.3d 1563 (Fed.Cir. 1997)



# Basic Layout of a Design Patent

- Title
- Claim
- Specification

US000491738S1

(12) **United States Design Patent** (10) Patent No.: **US D491,738 S**  
 Vanderminden (45) Date of Patent: **Jun. 22, 2004**

(54) **CAST OUTDOOR CHAIR** D450,468 S \* 11/2001 Caldwell ..... D6376

(75) Inventor: **William M. Vanderminden,** \* cited by examiner  
 Queensbury, NY (US) *Primary Examiner—Gary D. Watson*

(73) Assignee: **Telescope Casual Furniture, Inc.,** (74) *Attorney, Agent, or Firm—Francis C. Hand, Carella, Byrne, Bain et al*  
 Granville, NY (US)

(\*\*\*) Term: **14 Years** (57) **CLAIM**

(21) Appl. No. **291465,198** The ornamental design of a cast outdoor chair, as shown and described.

(22) Filed: **Jun. 24, 2003** **DESCRIPTION**

(51) LOC (7) CL ..... **06-01** FIG. 1 illustrates a perspective front view of a cast outdoor chair in accordance with the invention;

(52) U.S. CL ..... **D6/376; D6/379;** FIG. 2 illustrates a front view of the cast outdoor chair of FIG. 1;

(58) Field of Search ..... **D6/334, 335, 369, D6/370, 374, 376, 379, 380, 500, 501, 502; 297/445.1, 446.1** FIG. 3 illustrates a left side view of the cast outdoor chair of FIG. 1, the right side view of which is a mirror image; FIG. 4 illustrates a back view of the cast outdoor chair of FIG. 1;

(56) **References Cited** FIG. 5 illustrates a top view of the cast outdoor chair of FIG. 1; and, FIG. 6 illustrates a bottom view of the cast outdoor chair of FIG. 1.

U.S. PATENT DOCUMENTS  
 D316,491 S \* 4/1991 Friaier ..... D6379  
 D399,352 S \* 10/1998 Friaier ..... D6369  
 D426,718 S \* 6/2000 Gayload et al. .... D6376  
 D438,975 S \* 6/2000 Gayload et al. .... D6376  
 D446,957 S \* 8/2001 Caldwell ..... D6376

**1 Claim, 6 Drawing Sheets**



# The figures are the claim. “Property Line”

FIG. 1

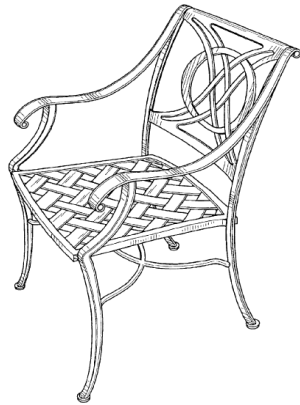


FIG. 2

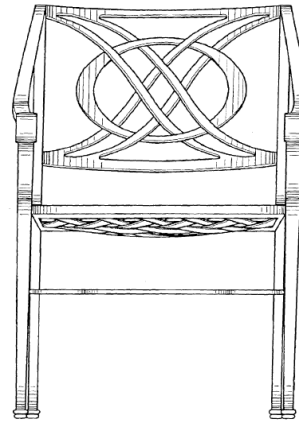


FIG. 3

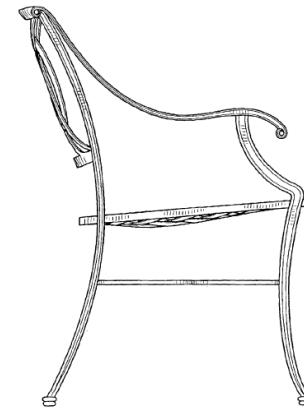


FIG. 4

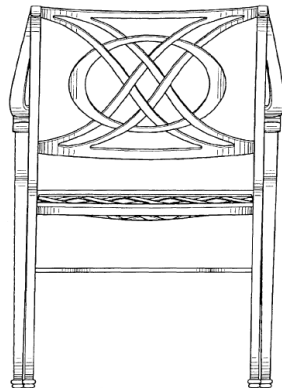


FIG. 5

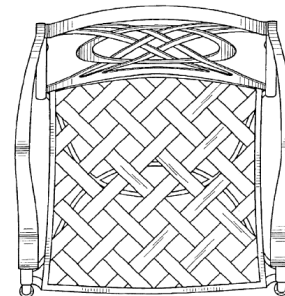
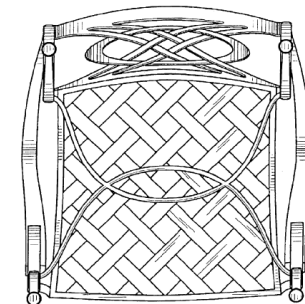
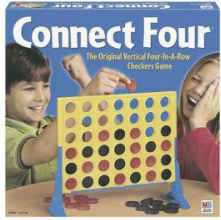


FIG. 6





# 4 WAYS TO INCREASE SCOPE VALUE OF DESIGN PATENTS

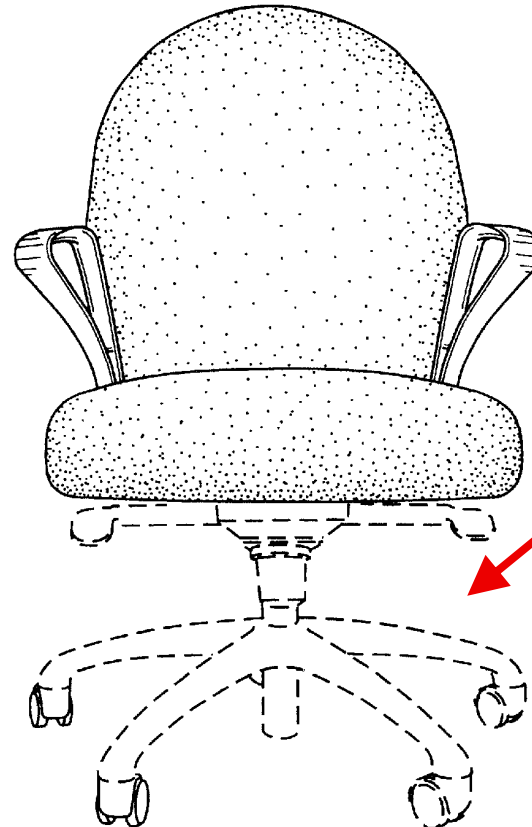
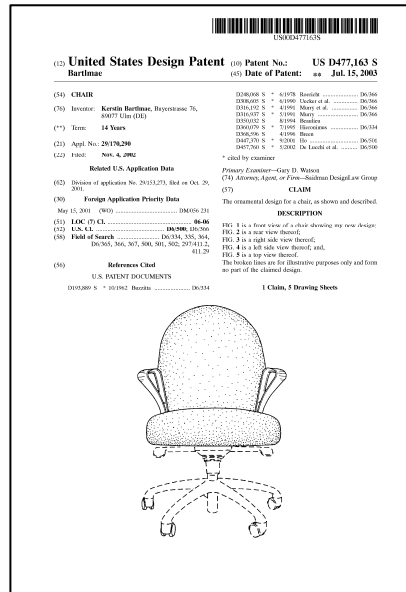
1. Broken Lines (“Dotted Lines”)
2. Indeterminate Break Lines
3. Multiple Embodiments
4. Multiple Applications



# 1. Broken Lines (“Dotted Lines”)



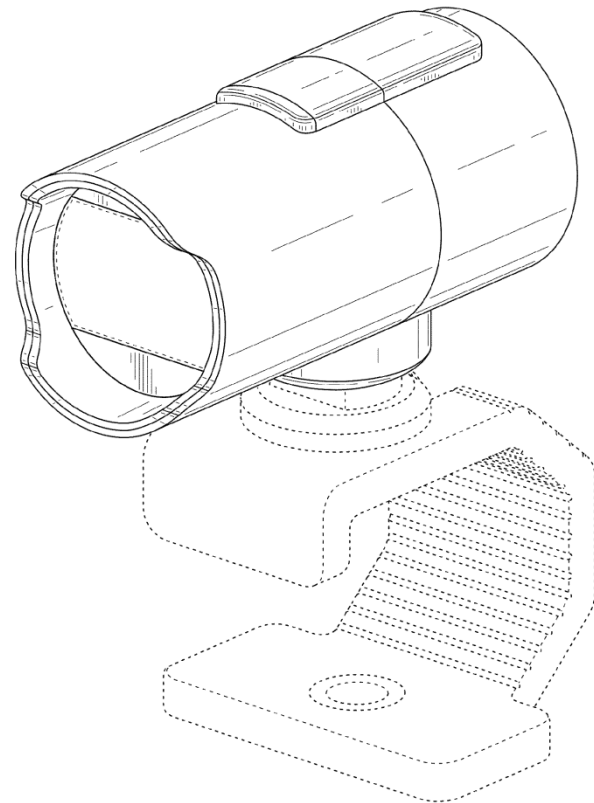
# Adding Scope, Adding Value – Dotted Line Practice



Disclaim  
design of  
legs



# Adding Scope, Adding Value – Dotted Line Practice



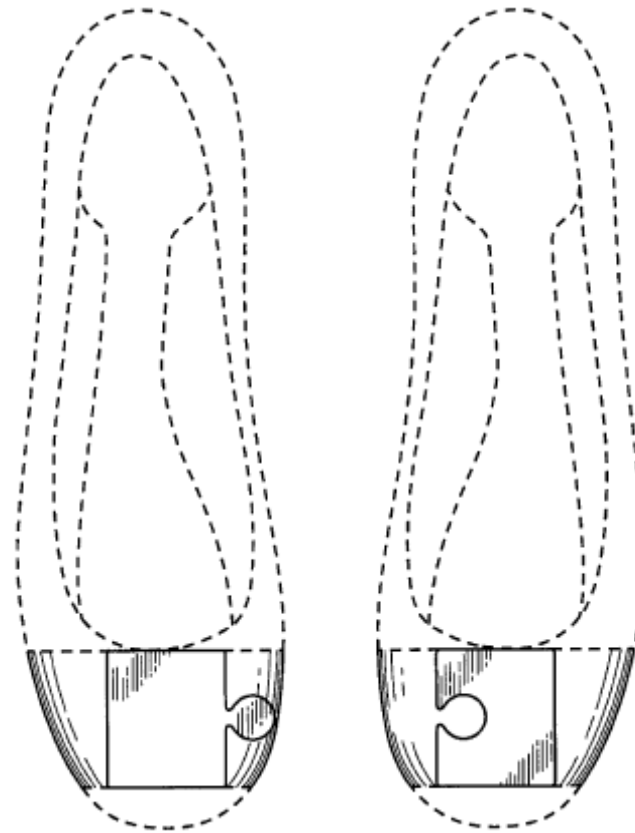
**DISCLAIM  
HARDWARE**

Microsoft Webcam, US Patent D647,937



# Adding Scope, Adding Value – Dotted Line Practice

“Dotted lines form  
no part of the  
claimed design.”



D601335





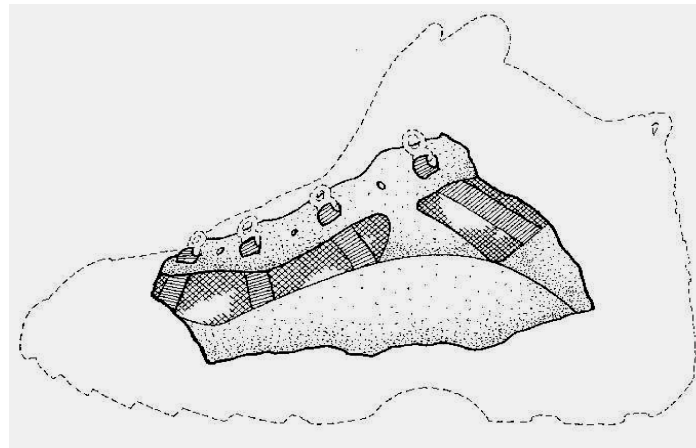
# Adding Scope, Adding Value – Dotted Line Practice



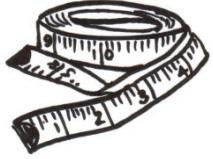
Low-cut Version



Mid-cut Version



Generic Design Patent Claim



## 2. INDETERMINATE BREAK LINES



# Adding Scope, Adding Value – Indeterminate Length

United States Design Patent (35) Patent No. US D993,591 S  
Shelby (35) Date of Patent: Jul. 27, 2010

(31) REFERENCE(S)  
(32) Inventor: Gerald F. Shelby, Phoenix, AZ (US)  
(33) Applicant: Shelby-Patterson Shelby, Inc., Tempe, AZ  
(34) Title: Shelby

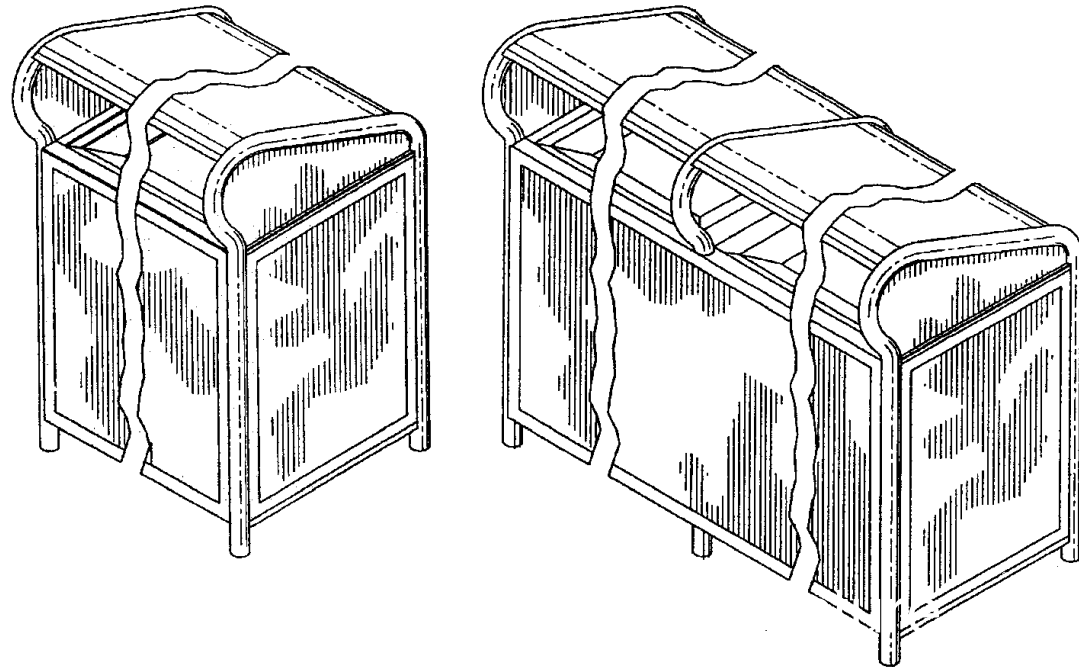
(51) Int. Cl. (2006) 02/01  
(52) U.S. Cl. 15/200  
(54) Field of Invention  
(56) References Cited  
(57) Abstract

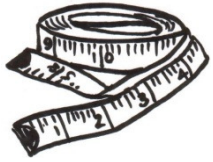
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3,451,299 A 9/1969 Shelby et al.  
3,451,300 A 9/1969 Shelby et al.

1 Claim, 2 Drawing Sheets



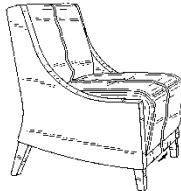


# Adding Scope, Adding Value – Indeterminate Length

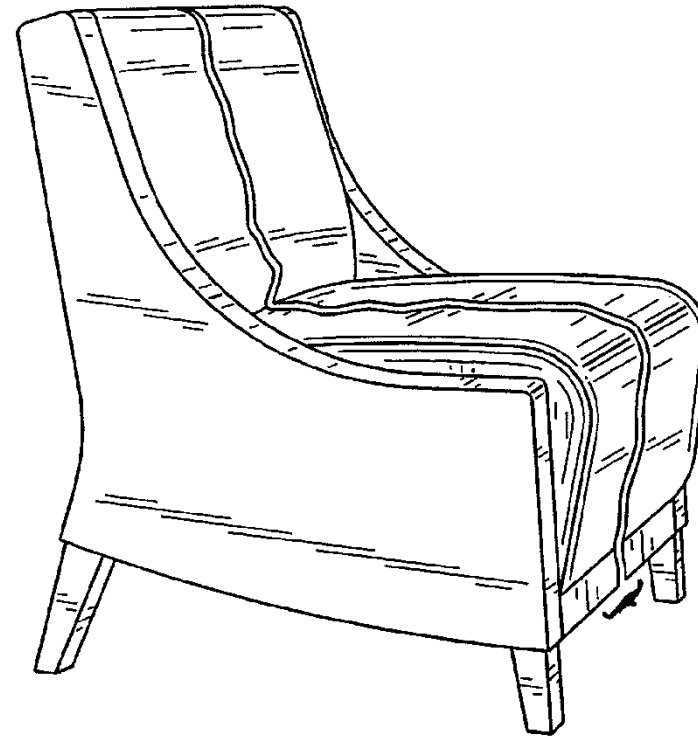
  
 1295858

**United States Design Patent**      Patent No.: **US D565,369 S**  
 Class. of Pat.                              Date of Patent:      Apr. 1, 2008

<p> <b>ABSTRACT</b>            A chair with a curved backrest and a seat. The backrest is formed by a single piece of material that is curved to follow the contour of the backrest. The seat is formed by a single piece of material that is curved to follow the contour of the seat. The chair is supported by four legs.         </p>	<p> <b>CLAIMS</b>            1. A chair comprising:            a backrest formed by a single piece of material that is curved to follow the contour of the backrest;            a seat formed by a single piece of material that is curved to follow the contour of the seat;            and            four legs.         </p>
---	---

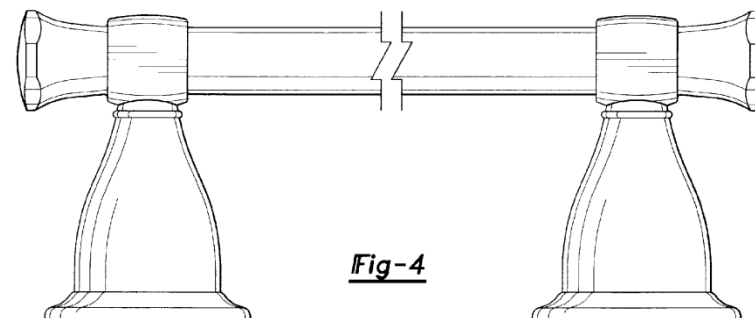
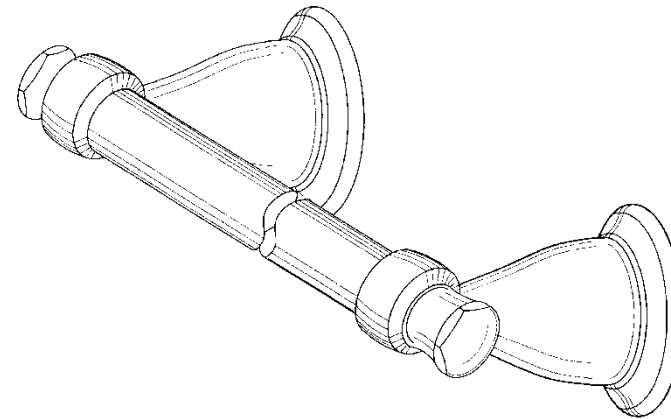
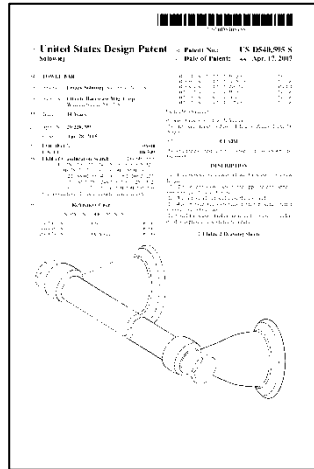


**FIG. 1**  
 A perspective view of the chair of FIG. 1.

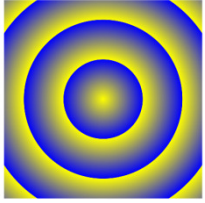




# Adding Scope, Adding Value – Indeterminate Length



**Fig-4**



# Adding Scope, Adding Value – Indeterminate Radial Expansion

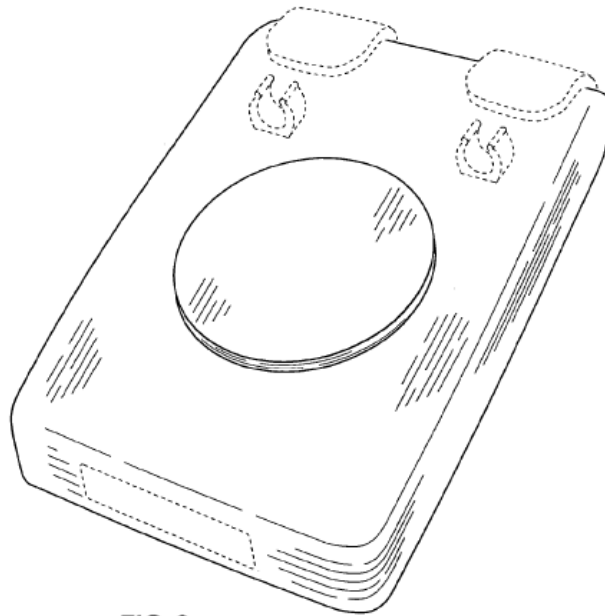
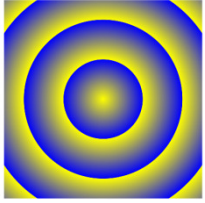


FIG. 3



# Adding Scope, Adding Value – Indeterminate Radial Expansion

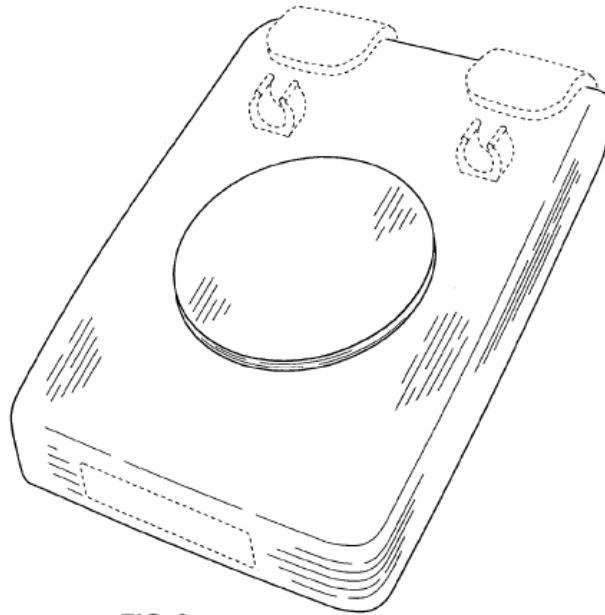


FIG. 3

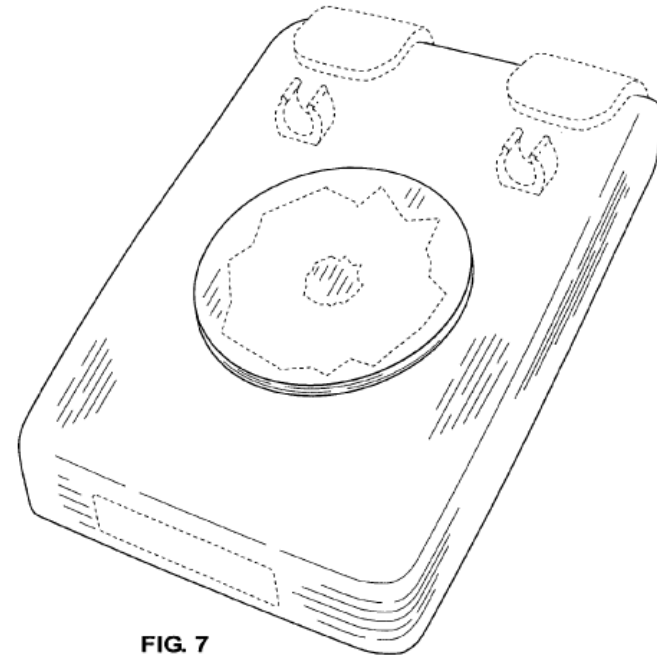


FIG. 7



# 3. MULTIPLE EMBODIMENTS



**2 FOR 1  
TUESDAY!!**

# Adding Scope, Adding Value – Multiple Embodiments

One Application, One Claim – Two Embodiments

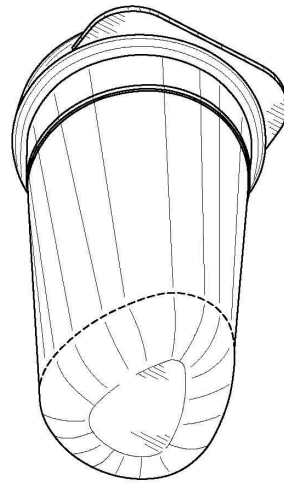


FIG. 7

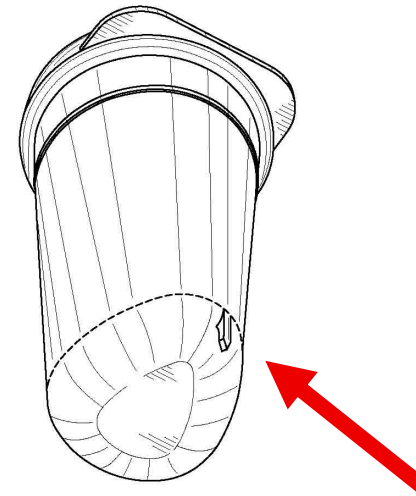
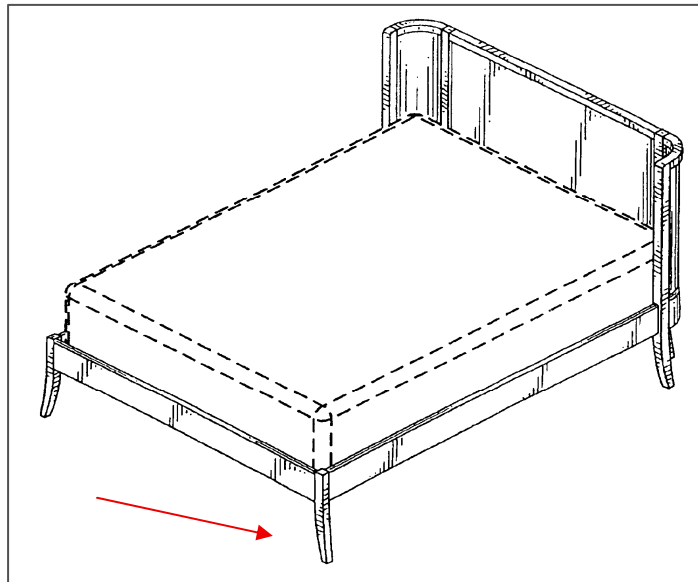


FIG. 14

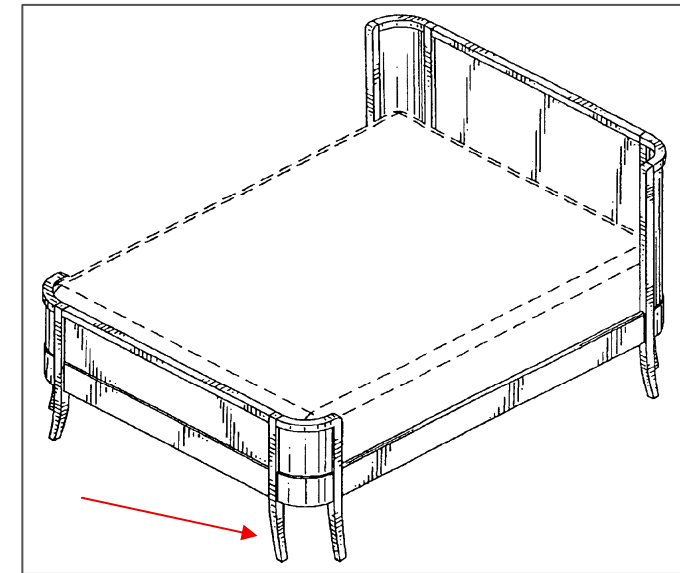
**2 FOR 1  
TUESDAY!!**

# Adding Scope, Adding Value – Multiple Embodiments

One Application, One Claim – But Two Embodiments



First Embodiment



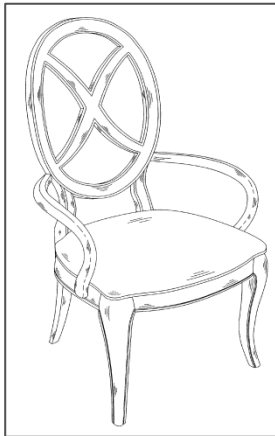
Second Embodiment



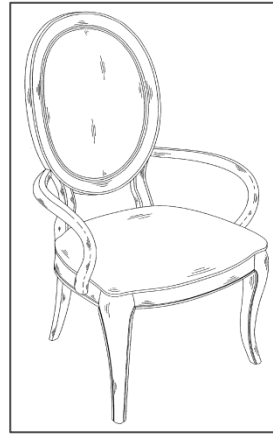
# Adding Scope, Adding Value – Multiple Embodiments



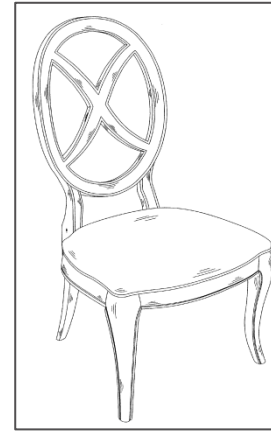
## One Application – Four Embodiments



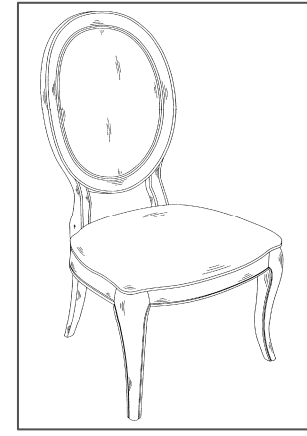
First  
Embodiment



Second  
Embodiment



Third  
Embodiment



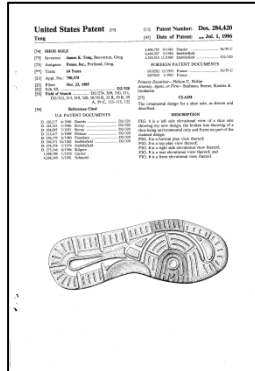
Fourth  
Embodiment



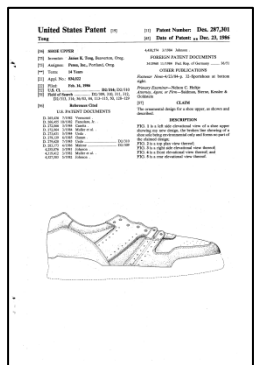
## 4. MULTIPLE APPLICATIONS



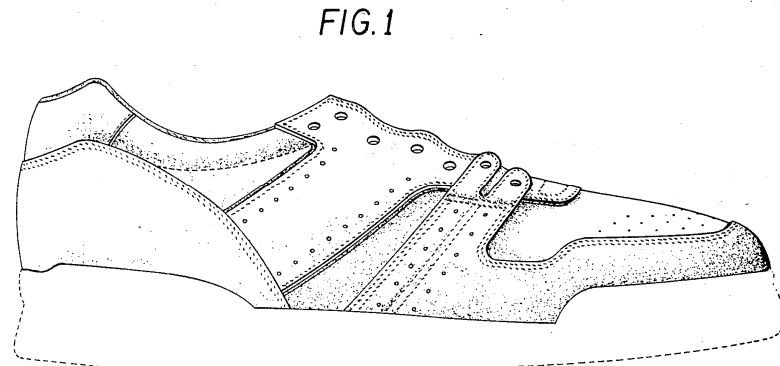
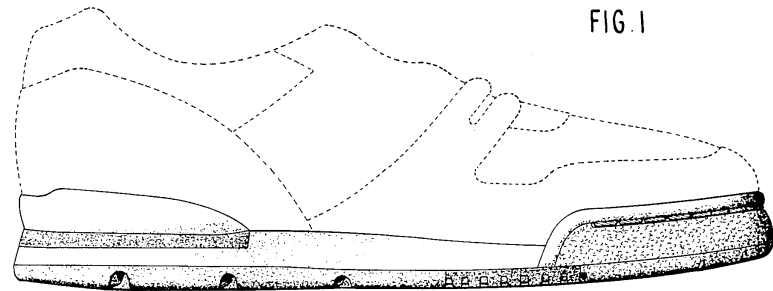
# Multiple Applications – Maximize Coverage



Des. 284,420  
"SHOE SOLE"

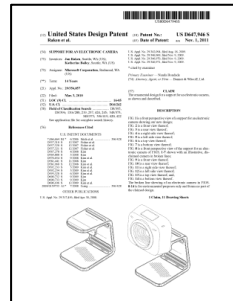


Des. 287,301  
"SHOE UPPER"

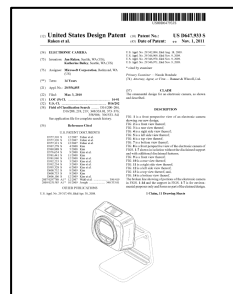
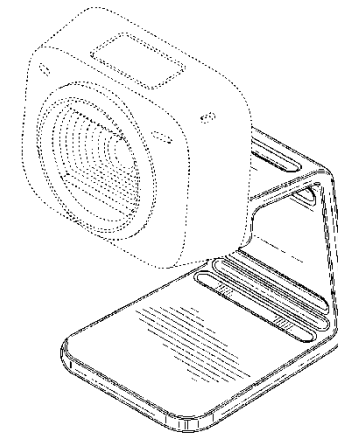




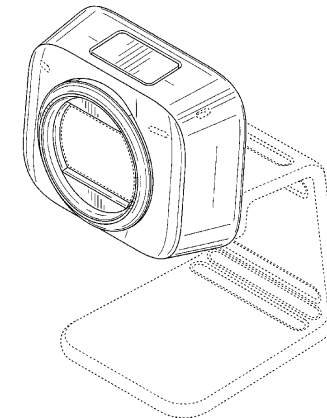
# Multiple Applications – Maximize Coverage



Des. D647,946  
“SUPPORT FOR  
ELECTRONIC  
CAMERA”



Des. D647,933  
“ELECTRONIC  
CAMERA”





# Multiple Applications – Maximize Coverage

D548,744  
(entire device)

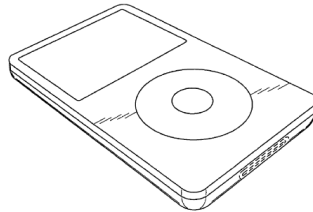


FIG. 1

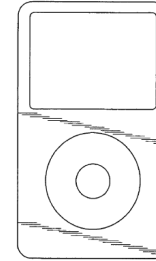


FIG. 2

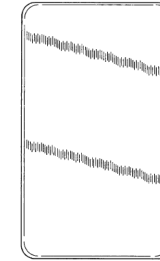


FIG. 3

D562,847  
(no screen, click wheel)

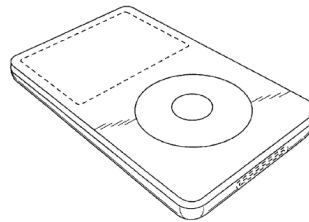


FIG. 1

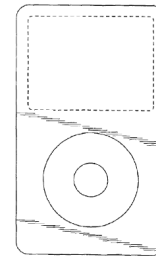


FIG. 2

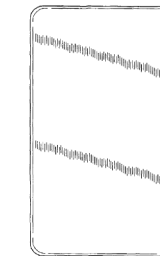


FIG. 3

D562,348  
(screen, no click wheel)

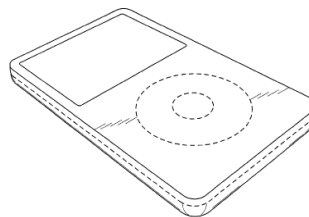


FIG. 1

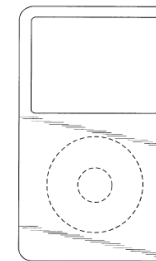


FIG. 2

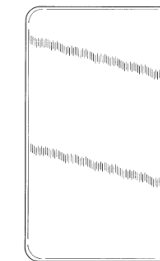


FIG. 3



# Combination of all - Synergistic effect

(1) Dotted Lines, (2) Indeterminate break lines, (3) multiple embodiments

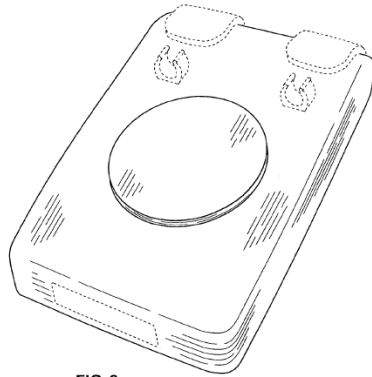


FIG. 3

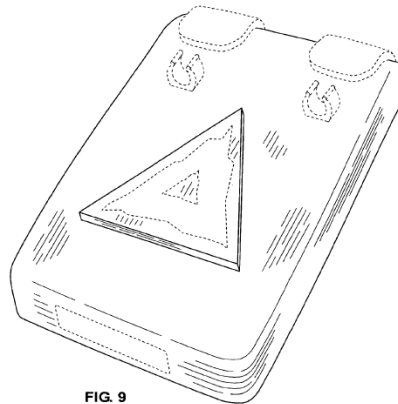


FIG. 9

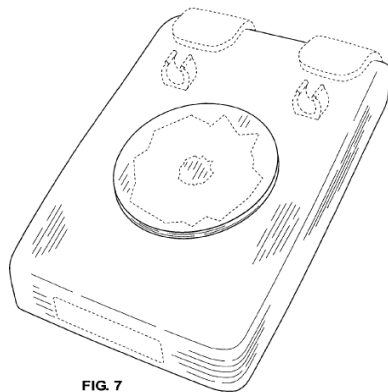


FIG. 7

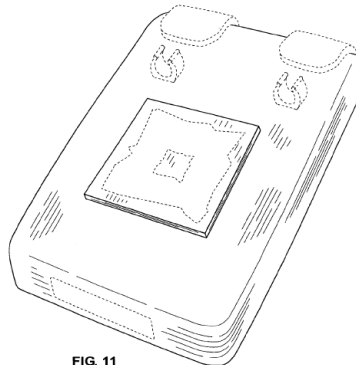


FIG. 11

(4) Multiple application

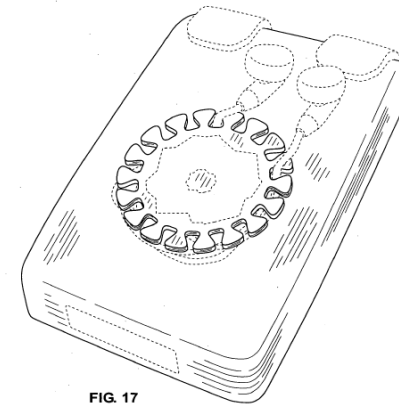


FIG. 17





# Battle Royale...

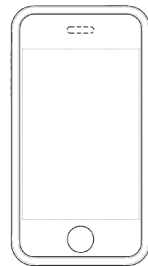




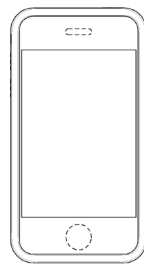
# Apple Inc. v. Samsung Electronics

11-cv-01846 (C.D. Cal)

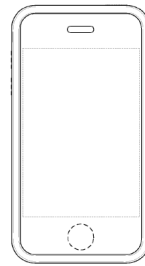
## US D593,087 (6 embodiments)



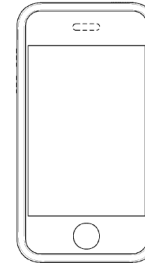
Apple D'087  
Embodiment 1



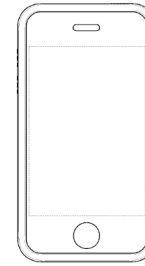
Apple D'087  
Embodiment 2



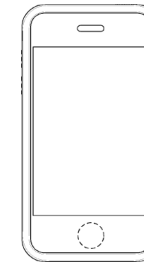
Apple D'087  
Embodiment 3



Apple D'087  
Embodiment 4



Apple D'087  
Embodiment 5



Apple D'087  
Embodiment 6

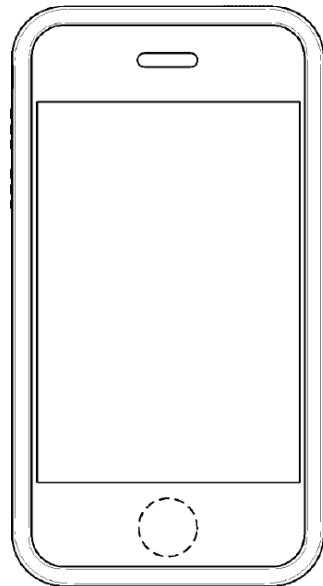
Embodiment	Speaker	Screen Border	Home Button
1	Unclaimed	Unclaimed	Claimed
2	Unclaimed	Claimed	Unclaimed
3	Claimed	Unclaimed	Unclaimed
4	Unclaimed	Claimed	Claimed
5	Claimed	Unclaimed	Claimed
6	Claimed	Claimed	Unclaimed



# ***Apple Inc. v. Samsung Electronics***

**11-cv-01846 (C.D. Cal)**

US D593,087



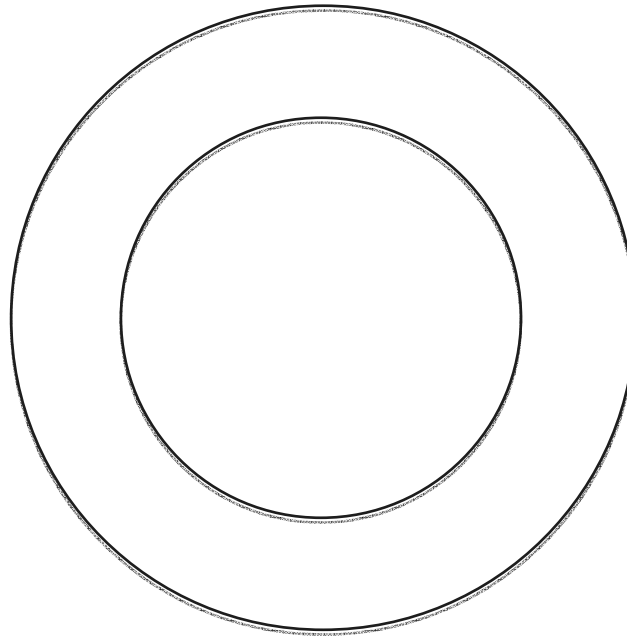
Samsung Galaxy S 4G





# 35 U.S.C. § 112

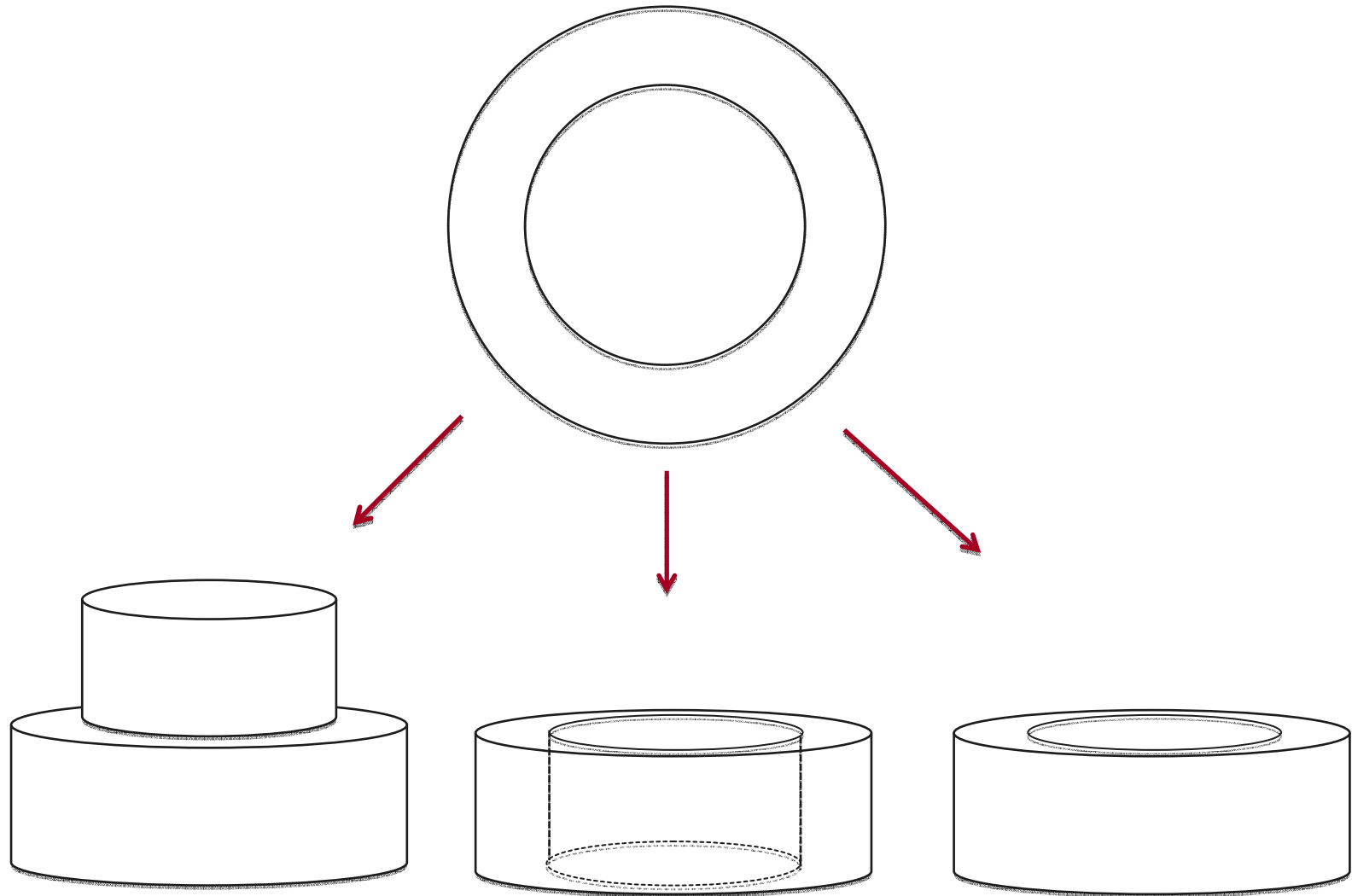
*“Indefiniteness”*





# 35 U.S.C. 112

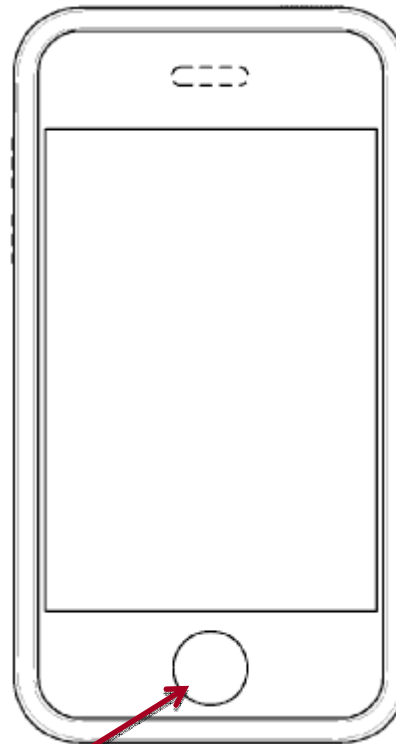
## *“Indefiniteness”*





# 35 U.S.C. 112

## *“Indefiniteness”*

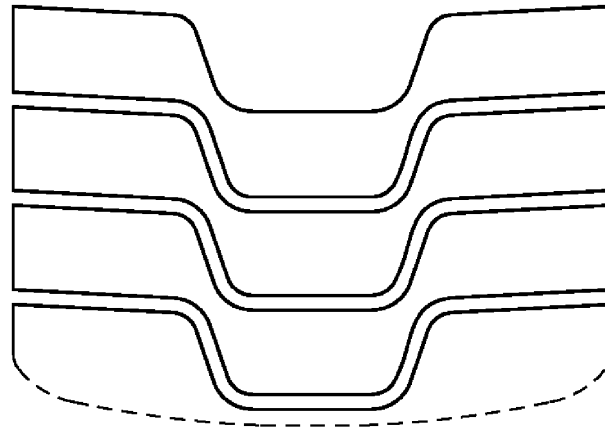


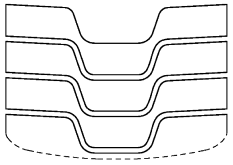
Convex?  
Concave?  
Flat?



# 35 U.S.C. 112

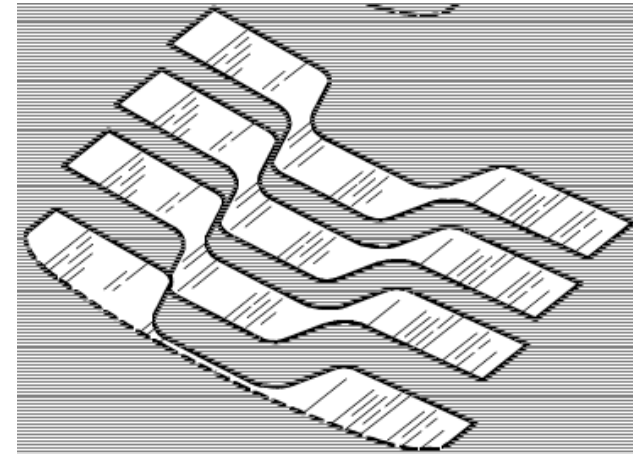
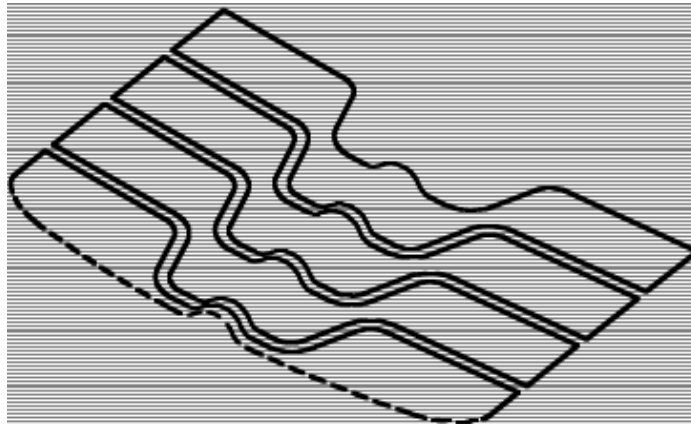
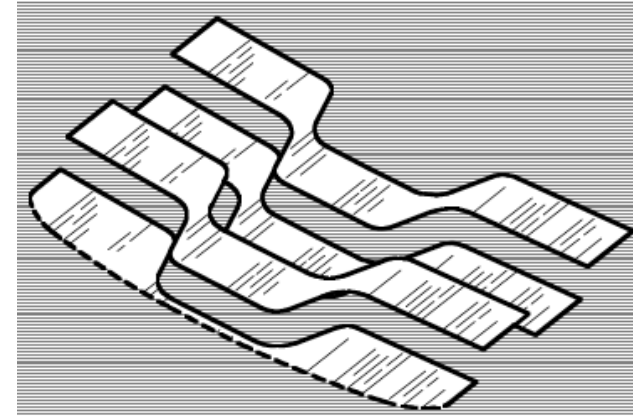
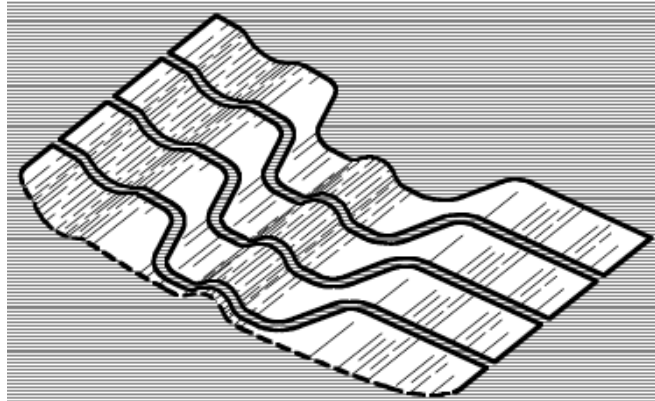
## *“Indefiniteness”*





# 35 U.S.C. 112

## *“Indefiniteness”*





# THANK YOU!



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*Shareholder*

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Christopher Carani, Esq. is a shareholder at the intellectual property law firm of McAndrews, Held & Malloy, Ltd. based in Chicago, Illinois. The focus of Mr. Carani's practice centers on Design Law, which covers design patents, trade dress, and 3D copyrights. He is a nationally recognized in this field, having litigated numerous disputes, lectured and published extensively, counseled clients on a wide range of strategic design protection and enforcement issues, and served as consultant and expert witness in design law cases. He currently chairs the Industrial Design Committee of the American Bar Association ("ABA"). In *Egyptian Goddess*, he authored *amicus* briefs on behalf of the AIPLA at both the petition and *en banc* stages. He also authored *amicus* briefs for AIPLA in *Richardson v. Stanley* and *Lawman v. Winner*.