

# DESIGN PATENT PERSPECTIVE: Surveys for Design Patent Litigation PART 1



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Surveys are seldom attempted and rarely admitted in design patent infringement cases.<sup>1</sup> Prior to *Egyptian Goddess*,<sup>2</sup> there may have been good reason for that. But in a post-*Egyptian Goddess* world, the value of surveys should be reconsidered. To understand why, let's first explore why surveys are common in trademark and trade dress cases, rare in design patent cases, and then analyze how *Egyptian Goddess* may have changed the landscape.

Part 1 also will identify the biggest challenges in constructing a design patent infringement survey and discuss why most surveys have been rejected. Part 2 will review the general and specific requirements of a design patent infringement survey and consider ways to construct a

survey that might be acceptable to a court and helpful to a jury.

Surveys are common in trademark and trade dress litigation on issues such as likelihood of confusion and secondary meaning.<sup>3</sup> Likelihood of confusion is the standard required to prove trademark infringement.<sup>4</sup> If a consumer likely will be confused as to the origin, sponsorship, or approval of goods or services due to use of an accused mark, then infringement exists.<sup>5</sup> Likelihood of confusion is determined by a list of factors, the most important of which is actual confusion.<sup>6</sup> Actual confusion can be demonstrated by use of appropriate questions in a survey.<sup>7</sup>

Trademark secondary meaning occurs when consumers associate a descriptive trademark with a particular producer or source rather than with the product itself.<sup>8</sup> Although a descriptive term usually is not eligible for trademark protection on the principal register, a descriptive term that has developed secondary meaning may receive protection.<sup>9</sup> A consumer survey often is considered the most important evidence on this issue<sup>10</sup> and the failure to provide survey evidence can be compelling evidence of no secondary meaning.<sup>11</sup>

Survey evidence is important and common in trademark cases because “[s]urveys represent the most scientific means of measuring relevant consumers’ subjective mental associations by attempting to recreate the potential purchasing environment in which a purported trademark or trade dress is found within a given market.”<sup>12</sup> Although courts may form personal subjective opinions on likelihood of confusion and secondary meaning in a trademark case, courts typically yield to competent survey results because judges understand that surveys represent a broader and more accurate indicator of consumer belief and behavior in a purchasing environment.

The ordinary observer test, like the trademark test, is set in the context of a potential purchasing environment. The

ordinary observer test is “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.”<sup>13</sup> (emphasis added). However, unlike trade dress or trademark surveys where the overall market conditions should be replicated,<sup>14</sup> the sole focus in a design patent infringement determination is on comparison of the patented and accused designs in light of the prior art.

For example, in a design patent case, unclaimed labeling of the designs is irrelevant,<sup>15</sup> and it does not matter whether only portions of the design are visible at the time of sale.<sup>16</sup> All aspects of the designs that are visible during the article’s useful life are considered, including all views of the design.<sup>17</sup> A commercial embodiment may only be used for comparison when there is “no significant distinction in design” between the patent drawing and its physical embodiment.<sup>18</sup> And when only a portion of an article of manufacture is claimed, the focus for infringement is only on the claimed portion and not on the entire article.<sup>19</sup> But that is not to say that the marketplace purchasing behavior of an ordinary observer is not considered, because *Gorham* makes clear that the ordinary observer test occurs in the context of a purchasing decision.

Even though design patent infringement is determined through the eyes of an ordinary observer in a purchasing environment, many courts allow (and may prefer) both the court and the jury to step into the role of an ordinary observer and make the infringement decision without any empirical evidence.<sup>20</sup> This usually does not happen in a trademark case, but often happens in a design patent case. Why is that?

Historically speaking, empirical evidence was important in a design patent case. In *Gorham v. White*,<sup>21</sup> a nonjury case, neither the lower court nor the Supreme Court considered themselves to be ordinary observers, but rather relied upon the opinions of many experts who testified whether an ordinary observer was likely to be confused when purchasing silverware. But the importance of empirical evidence suffered a setback in *Braun, Inc. v. Dynamics Corp. of America*,<sup>22</sup> when the Federal Circuit interpreted the *Gorham* opinion in dictum.

In *Braun*, a case involving hand held electric blender designs, the jury found infringement. The defendant argued on appeal that the verdict was not supported by substantial evidence because the only evidence was the patented design and the blenders themselves. According to defendant, in the absence of a statistical survey or other empirical evidence, the jury as a matter of law could not find infringement.

The Federal Circuit disagreed. The court first noted that defendant did not raise the lack of empirical evidence issue before the district court and therefore could not raise it for the first time on appeal. But the court went further in dictum and made the following five points:

- (1) “Nothing in *Gorham* suggests that, in finding design patent infringement, a trier of fact may not as a matter of law rely exclusively or primarily on a visual comparison of the patented design, as well as the device that embodies the design, and the accused device’s design;”
- (2) “It is true that in *Gorham* ... the U.S. Supreme Court found design patent infringement and in doing so relied in part on empirical and testimonial evidence that ordinary observers would be likely to mistake one product for another;”
- (3) “However, in *Gorham*, the Supreme Court did not state, or suggest, that a panel of jurors was anything other than a panel of ordinary observers capable of making a factual determination as to whether they would be deceived by an accused device’s design similarity to a patented design;”
- (4) “Simply put, a jury, comprised of a sampling of ordinary observers, does not necessarily require empirical evidence as to whether ordinary observers would be deceived by an accused device’s design;” and
- (5) “The desirability of or necessity for presentation of such evidence might vary depending on the circumstances of a particular case.”<sup>23</sup>

This dictum from *Braun* has never been critically examined and now is generally accepted and used by courts to dismiss the importance of empirical evidence, including surveys, in a design patent case.<sup>24</sup> A thorough analysis of this dictum deserves a separate article, but two quick points can be made here. First, regarding point

(3), the *Gorham* case was a non-jury case. The Supreme Court never mentioned jurors and never stated or suggested that a jury was a panel of ordinary observers under the *Gorham* ordinary observer test. The failure of the Supreme Court to make a statement regarding something not at issue appears not to be a strong reason to infer the opposite.

Second, case law discussing surveys conducted under the ordinary observer test, sparse though it is, appears to be inconsistent with the *Braun* dictum. The initial requirement of an admissible survey under the ordinary observer test is selection of a representative sample from an appropriate universe of respondents.<sup>25</sup> This sample includes those who have purchased the article embodying the design or those who are interested in the subject.<sup>26</sup> Depending on the design, selection of an entire panel of jurors who have either purchased the article or are interested in the subject of the design is unlikely. For example, in February 2012, the two reported design patent decisions involved numerical sparklers and a ball chair.<sup>27</sup> It seems inappropriate to consider a panel of jurors as ordinary observers when the panel likely would not even qualify as a representative sample of an appropriate survey universe.

*Braun* also dealt a setback to design patent survey analysis by asserting that empirical evidence was more important in trademark and trade dress infringement cases than in design patent infringement cases because, according to the *Braun* court, “design patent infringement ... does not concern itself with the broad issue of consumer behavior in the marketplace.”<sup>28</sup> The rationale underlying this statement was that the inquiry in trademark infringement cases was confusion as to source, and since trademark holders must have progressed to the point of selling their products, consumer behavior in the marketplace was a highly relevant factor in determining infringement. Conversely, the court reasoned, since a patented design need never have been placed on an article of manufacture and actually sold for design patent infringement to occur, there was no compelling need for empirical evidence of consumer behavior. This reasoning is suspect in light of the Supreme Court’s instruction in *Gorham* that the ordinary observer test is set in the context of the purchasing environment. And now that *Egyptian Goddess* has reset the entire focus on the ordinary observer

purchaser, the *Braun* rationale is weakened further still.

Lack of critical analysis of *Braun* may have resulted from Federal Circuit case law regarding the test for infringement. As discussed in previous columns regarding the design patent infringement test, the Federal Circuit split the test into two distinct steps – the ordinary observer test and the point of novelty test.<sup>29</sup> Under the former ordinary observer test, the patented and accused designs were compared against each other for substantial similarity.<sup>30</sup> If substantial similarity was found, then the point of novelty test was applied, which asked whether the similarity was due to the particular novelty of the claimed design.<sup>31</sup>

Since the first step of the test was applied in a vacuum – without considering the prior art – the qualifications of an “ordinary observer” may not have seemed important. Additionally, because the point of novelty test was (i) in effect a legalistic test involving novelty over the prior art and (ii) often was the main battleground for determining infringement, the question of whether a jury qualified as a group of ordinary observers was not the center of debate.

But all that may have changed when the Federal Circuit eliminated the separate point of novelty test. In *Egyptian Goddess*, the Federal Circuit held that the *Gorham* ordinary observer test was the *sole* test for infringement and that the ordinary observer compared the patented and accused designs in light of the prior art.<sup>32</sup> This meant that the ordinary observer had knowledge of all relevant prior art and the presumed ability to distinguish between the patented design and prior art designs. This in turn led to at least two effects of the prior art on the ordinary observer’s perceptive ability, both of which were identified in *Egyptian Goddess*. First, “[w]hen the differences between the claimed and accused designs are viewed in light of the prior art, the attention of the hypothetical ordinary observer may be drawn to those aspects of the claimed design that differ from the prior art.”<sup>33</sup> Second, when the patented design is close to the prior art and the prior art is crowded, the ordinary observer has a greater ability to notice smaller differences between the patented design and the prior art.<sup>34</sup> This ability gives the ordinary observer a greater ability to notice smaller differences between the patented and accused designs.

The increased presumed knowledge and now relative perceptive abilities of the

objective ordinary observer have brought into serious question whether a court and jury can serve as ordinary observers who can make infringement determinations just as well with or without empirical evidence. Although a court and jury can become familiar with the relevant prior art in a courtroom setting and then compare the patented and accused designs, their mental associations, visual impressions, and subjective conclusions are likely quite different from those who actually purchase the product and who are interested in the article of manufacture apart from the litigation. Why?

The courtroom is an artificial environment where participants know that the differences and similarities in design are the primary focus of attention. Jurors (and judges) likely go into the comparative process with a keener ability to distinguish between designs because they are looking for differences. A side by side comparison of designs in a courtroom is far different than a purchasing environment where the ordinary observer is “giving such attention as a purchaser usually gives” and where consumers’ minds undergo such complex mental processes as “prefer[ing] the simplest valid interpretation of a configuration,” “hav[ing] a bias to perceive objects as coherent wholes, rather than as separable parts,” “tend[ing] to regularize, not particularize,” and “not carry[ing] design details in memory.”<sup>35</sup>

Unless a judge or juror purchased and used the subject article or had a past interest in it, they may not attach any particular meaning to various design features. But a real life purchaser and user may attach different levels of meaning to different design features depending on the user’s experience and the different functions of the design features (each of which may have a different level of functional significance). In visual science this concept is known as “meaningfulness” (how important particular design components are to the observer).<sup>36</sup>

Ordinary observer purchasers also may have other related designs of articles held somewhere in their minds due to their purchasing experience and general interest in the subject. This may trigger “interference,” which is confusion due to the memory of other related visual patterns.<sup>37</sup> The courtroom-educated judge or jury likely will not experience such interference due to their narrow focus on the patented and accused design and closely related prior art.

Finally, other visual science concepts such as “inference” (the difficulty of distinguishing between what is remembered and what is inferred)<sup>38</sup> may be at work in the mind of the true ordinary observer purchaser. This complex mental phenomenon likely will not be present in the minds of the court and jury due to the relatively simplistic way the infringement determination is set up with limited information and no realistic time intervals set between observance of prior art, the patented design, and the accused design.

In short, it appears that the best way, post-*Egyptian Goddess*, to get a close approximation of whether an ordinary observer purchaser would be deceived by an accused design is to conduct a scientific survey with a representative sample of an appropriate universe of respondents selected – those who have purchased articles with the same or similar designs and those interested in the subject. Trademark law recognizes the importance of surveys, and now that the Federal Circuit has placed the proper emphasis back on the mind of the ordinary observer purchaser with the comparison made in light of the prior art, design patent law should recognize the importance of surveys as well.

What are the primary challenges to overcome when constructing a design patent infringement survey and why have the courts usually rejected such surveys? First, the comparison must be made in light of the relevant prior art.<sup>39</sup> This is necessary to prevent prior art designs and designs substantially similar to the prior art from being captured as infringements.<sup>40</sup> The prior art requirement makes a survey difficult because the typical real world purchaser (and potential survey participant) likely is not familiar with all relevant prior art designs. For that reason, appropriate prior art must be identified and the survey participants must be educated on the prior art. Note that litigants may disagree on what the prior art includes, and to the extent the survey improperly includes or omits relevant prior art, its probative value likely will be significantly affected.

Second, before the patented and accused designs are compared, the functional aspects of the patented design must be “factored out.”<sup>41</sup> This process assures that only overall visual impressions created by ornamental features are compared. If they are not, then it will be unclear whether the perceived similarity is based in part on

the functional features and the survey will be considered fatally flawed. But “factoring out” complicates survey construction because (i) a real world purchaser does not factor out functional features of designs, (ii) it is challenging to properly factor out design elements in a survey comparison, and (iii) it may be hard to predict in advance what features will be considered functional by a court or jury.

In *OddzOn Products v. Just Toys*,<sup>42</sup> the survey questions failed to distinguish between the protected ornamental features and the unprotected functional features of a football shaped tossing ball with tail and fins. The court rejected the survey, stating “[t]he survey fails to establish a link between the similarity reported by [the survey] respondents and the patented ornamental aspects of the design.”<sup>43</sup> The court also stated the survey did not ask the respondents whether they believed that there was overall similarity apart from the fact that both the design and the accused products were essentially footballs with tails and fins. So for purposes of a design patent infringement survey, the proper functional/ornamental distinctions must be incorporated into the survey, either by prescient prediction or by waiting for a legal ruling or factual finding. Care must be exercised - because if the wrong features are factored out or left in, the survey likely will be rejected.

Surveys also have been rejected in design patent cases for failure to identify the proper universe,<sup>44</sup> failure to ask proper questions,<sup>45</sup> and failure to offer proper articles for comparison.<sup>46</sup> In part 2, we will review the general and specific requirements of a design patent infringement survey. We also will consider ways to overcome the prior art and functionality challenges, and to construct a survey that should be acceptable to a court and helpful to a jury. 

## ENDNOTES

1. It appears that just over ten cases to date substantively address survey principles in design patent infringement cases. See, e.g., *OddzOn Prods. v. Just Toys*, 122 F.3d 1396 (Fed. Cir. 1997); *Competitive Edge, Inc. v. Staples, Inc.*, 763 F. Supp. 2d 997 (N.D. Ill. 2010); *Puritan-Bennett Corp. v. Penox Techs., Inc.*, 2004 U.S. Dist. LEXIS 6896 (S.D. Ind. Mar. 2, 2004); *Spotless Enters. v. A&E Prods. Group L.P.*, 294 F. Supp. 2d 322 (E.D.N.Y. 2003); *Minka Lighting, Inc. v. Craftmade Int’l, Inc.*, 2002 U.S. Dist. LEXIS 8693 (N.D. Tex. May 15, 2002); *Moen Inc. v. Foremost Int’l Trading*, 38 F. Supp. 2d 680 (N.D. Ill. 1999); *Am. Harvest, Inc. v. Icon Health & Fitness, Inc.*,

1997 U.S. Dist. LEXIS 24146 (D. Minn. June 16, 1997); *National Presto Indus. v. Dazey Corp.*, 1995 U.S. Dist. LEXIS 13642 (N.D. Ill. Sept. 18, 1995); *Brainard v. Custom Chrome*, 872 F. Supp. 39 (W.D.N.Y. 1994); *Black & Decker, Inc. v. Pitway Corp.*, 636 F. Supp. 1193 (N.D. Ill. 1986); *John O. Butler Co. v. Block Drug Co.*, 620 F. Supp. 771 (N.D. Ill. 1985). It appears a survey was admitted and relied on for a finding of infringement in only one of these cases. Unfortunately, the survey protocol in that case was not explained. See *John O. Butler Co. v. Block Drug Co.*, 620 F. Supp. 771 (N.D. Ill. 1985).

2. 543 F.3d 665 (Fed. Cir. 2008).
3. See *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 312 (6th Cir. Mich. 2001).
4. See 15 U.S.C.A. § 1114(1) (West 1997 & Supp. 2004); *id.* § 1125(a) (West 1998); *Scott Fetzer Co. v. House of Vacuums, Inc.*, 381 F.3d 477, 483 (5th Cir. Tex. 2004).
5. *Id.*
6. See *George & Co., LLC v. Imagination Entm't Ltd.*, 575 F.3d 383, 398 (4th Cir. Va. 2009).
7. *Id.*
8. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 851 n. 11, (1982).
9. See *First Bank v. First Bank Sys.*, 84 F.3d 1040, 1045 (8th Cir. Iowa 1996) (“A descriptive trademark is the weakest protectable mark and requires proof that the mark has acquired secondary meaning.”).
10. See *Pebble Beach Co. v. Tour 18 I*, 942 F. Supp. 1513, 1560 (S.D. Tex. 1996) (“Survey evidence is the most direct and persuasive way of establishing secondary meaning.” [citing] *Zatarains*, 698 F.2d at 795”).
11. See *Investacorp, Inc. v. Arabian Investment Banking Corp.*, 722 F. Supp. 719, 723-24 (S.D. Fla. 1989) (plaintiff’s failure to provide survey evidence is compelling evidence of no secondary meaning).
12. See Robert H. Thornburg, *Trademark Survey Evidence; Review of Current Trends in the Ninth Circuit*, 21 Santa Clara Computer & High Tech. L. J. 715 (2005) (citing 5 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 32:158 (4<sup>th</sup> ed. 2003)).
13. *Gorham v. White*, 81 U.S. 511, 528 (1871).
14. See 5 McCarthy on Trademarks § 32:163 at 32-237 (4th ed. 1999) (“the closer the survey methods mirror the situation in which the ordinary person would encounter the trademark, the greater the evidentiary weight of the survey results”); see also *Coherent, Inc. v. Coherent Technologies, Inc.*, 935 F.2d 1122, 1126 (10th Cir. 1991) (rejecting survey that did not mimic market conditions).
15. See *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1126 (Fed. Cir. 1993); see also *Whittar Industries, Ltd. v. Superior Industries International, Inc.*, 230 USPQ 68, 70 (C.D. Calif. 1986) (“the fact that the defendant has prominently displayed its name on the [the accused article] and package cannot vindicate this copying.”).
16. See *Contessa Food Prods. v. Conagra*, 282 F.3d 1370, 1379 (Fed. Cir. 2002)
17. See *Arminak & Assocs. v. Saint-Gobain Calmar, Inc.*, 501 F.3d 1314, 1323 (Fed. Cir. 2007) (“the ordinary observer test requires ... the comparing of the accused and patented designs from all views included in the design patent, not simply

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- those views a retail customer seeking to buy would likely see when viewing the product at the point of sale.”).
18. *Lee v. Dayton-Hudson Corp.*, 838 F.2d 1186, 1189 (Fed. Cir. 1988).
  19. See *Metrokane, Inc. v. Wine Enthusiast*, 185 F. Supp. 2d 321, 329 (S.D.N.Y. 2002).
  20. See, e.g., *Minka Lighting, Inc. v. Craftmade Int'l, Inc.*, 93 Fed. Appx. 214, 217 (Fed. Cir. 2004); *Hosley Int'l Trading Corp. v. K Mart Corp.*, 237 F. Supp. 2d 907 (N.D. Ill. 2002); *Minka Lighting, Inc. v. Craftmade Int'l, Inc.*, 2002 U.S. Dist. LEXIS 8693, 13-17 (N.D. Tex. May 15, 2002).
  21. 81 U.S. 511 (1871).
  22. 975 F.2d 815 (Fed. Cir. 1992).
  23. 975 F.2d at 821.
  24. See, e.g., *Minka Lighting, Inc. v. Craftmade Int'l, Inc.*, 93 Fed. Appx. 214, 217 (Fed. Cir. 2004); *Hosley Int'l Trading Corp. v. K Mart Corp.*, 237 F. Supp. 2d 907 (N.D. Ill. 2002).
  25. See *Competitive Edge, Inc. v. Staples, Inc.*, 763 F. Supp. 2d 997, 1008 (N.D. Ill. 2010).
  26. See *Arminak & Assocs. v. St.-Gobain Calmar, Inc.*, 424 F. Supp. 2d 1188 (C.D. Cal. 2006); *Applied Arts Corp. v. Grand Rapids Metalcraft Corp.*, 67 F.2d 428, 430 (6th Cir. Mich. 1933); *Puritan-Bennet Corp. v. Penox Technologies Inc.*, 2004 U.S. Dist. LEXIS 6896, 2004 WL 866618 (S.D. Ind., March 2, 2004).
  27. See *Unique Industries, Inc. v. 965207 Alberta, LTD*, 2012 U.S. Dist. LEXIS 19621 (D.D.C. Feb. 16, 2012) (numerical sparklers); *Famosa, Corp. v. Gaiam, Inc.*, 2012 U.S. Dist. LEXIS 22437 (S.D.N.Y. Feb 22, 2012) (ball chair).
  28. 975 F.2d at 828.

29. See Oake, *Design Patent Perspective: The Ordinary Observer Test – Part 2*, Intellectual Property Today (August 2011); see also *Egyptian Goddess v. Swisa*, 543 F.3d 665, 671 (Fed. Cir. 2008) (en banc).
30. *Id.*
31. *Id.*
32. 543 F.3d at 678.
33. *Id.* at 676.
34. *Id.*
35. Jerre B. Swann and Michael J. Tarr, *Configuration Protection Harmonized*, 94 Trademark Rep. 1182, 1190-1192 (2004).
36. See Nickerson and Adams, *Long-Term Memory for a Common Object*, Cognitive Psychology 287-307 (1979).
37. *Id.*
38. *Id.*
39. See *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 678 (Fed. Cir. 2008).
40. *Id.*
41. See *Richardson v. Stanley Works, Inc.*, 597 F.3d 1288, 1293, 1294 (Fed. Cir. 2010).
42. 122 F.3d 1396, 1400-1407 (Fed. Cir. 1997).
43. *Id.* at 1406.
44. See, e.g., *Competitive Edge, Inc. v. Staples, Inc.*, 763 F. Supp. 2d 997, 1008 (N.D. Ill. 2010).
45. See, e.g., *Minka Lighting, Inc. v. Craftmade Int'l, Inc.*, 2002 U.S. Dist. LEXIS 8693, 13-17 (N.D. Tex. May 15, 2002); *Am. Harvest, Inc. v. Icon Health & Fitness, Inc.*, 1997 U.S. Dist. LEXIS 24146, 18-20 (D. Minn. June 16, 1997).
46. See, e.g., *Spotless Enters. v. A&E Prods. Group L.P.*, 294 F. Supp. 2d 322, 347 (E.D.N.Y. 2003).