

DESIGN PATENT PERSPECTIVE: Use of Experts in Design Patent Litigation PART 1



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“Do I need an expert?” may be one of the first questions you ask when handling a design patent case. More questions may follow: What issues can an expert testify on? Will the expert testimony satisfy threshold evidentiary and case law requirements? And what foundational matters are needed to make the expert testimony not only admissible, but persuasive as well?

As you research the case law for guidance, you likely will find that judicial opinions on the use of experts in design patent litigation are decidedly mixed. Some courts find expert testimony helpful on such

issues as the scope of the prior art,¹ who the ordinary observer is,² claim interpretation including functionality,³ and the ultimate issue of substantial similarity between the patented and accused designs,⁴ including the issues of dominant visual features⁵ and differences in light of the prior art.⁶

Other courts believe expert witnesses are not needed in design patent cases,⁷ particularly where “no special technological problems are presented.”⁸ Some courts hold that expert testimony cannot create a material issue of fact when it conflicts with the court’s own opinion concerning substantial similarity.⁹ Still other courts consider expert opinion on the perceptions of ordinary observers to be inadmissible under Federal Rules of Evidence 701 and 702.¹⁰ Finally, some courts hold that “while expert testimony may well aid a judge in refining his sense impressions, the function filled by such testimony in more technical matters can generally be satisfactorily discharged by the arguments [of able counsel].”¹¹ Given this diversity of opinion, the issue of experts in design patent cases deserves a careful look.

Litigants typically try to use experts in the liability phase of design patent litigation in two general areas: (1) infringement under the ordinary observer test; and (2) design patent validity and enforceability. Part 1 of this column will discuss general concepts, common misconceptions, and will consider what issues may be appropriate for expert analysis under the ordinary observer test. Part 2 will consider other issues that may be appropriate for expert analysis and will review how courts have treated expert testimony in design patent cases. A future article will cover use of experts on the issue of damages in design patent litigation.

Let’s begin with three preliminary matters. First, although some district courts appear dismissive of expert testimony in design patent cases¹² – particularly if the designs are not complex,¹³ the historical importance of expert testimony in design

patent cases is well established. In *Gorham v. White*,¹⁴ the Supreme Court relied heavily on expert witness testimony to find infringement of a patented silverware handle design. The Court cited testimony from Martin Smith, merchant jeweler dealing in silver spoons and forks for ten years, that “seven out of ten customers who buy silverware would consider [the patented and accused designs] the same.”¹⁵ In *Avia Group Int’l, Inc. v. L.A. Gear Corp.*,¹⁶ an expert declaration helped establish a prima facie case of infringement on summary judgment. And in the only design patent case decided *en banc* by the Federal Circuit, *Egyptian Goddess v. Swisa*,¹⁷ the Court decided the infringement issue primarily by analyzing expert witness declarations in detail.

Second, identification of a consistent and predictable set of expert witness principles in the case law is challenging due to evolving rules, discretionary standards, and different case contexts. For example, *Gorham* and *Avia Group* were decided long before the Supreme Court emphasized the district court’s “gatekeeper” function over proffered expert testimony in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*¹⁸ and *Kumho Tire Co. v. Carmichael*,¹⁹ and before Federal Rule of Evidence 702 was amended in December 2000 to incorporate *Daubert* and *Kumho Tire*.²⁰ While principles do exist, admission of expert testimony remains largely in the discretion of the district court,²¹ and expert testimony may or may not be objected to by the adverse party for various reasons. Further, rulings regarding admissibility of expert witness testimony may depend on whether the context is a motion for preliminary injunction (where evidentiary rules may be relaxed)²², a bench trial (where the gate-keeping function is less important)²³, or a jury trial (where the gate-keeping function takes on a greater significance).²⁴

Third, a number of common misconceptions exist in the case law regarding expert witness testimony. For example, some courts believe that expert testimony may not be appropriate because *Gorham* holds that infringement is determined by an ordinary observer and not by an expert. This was the rationale of the court in *Keystone Retaining Wall Sys. v. Rockwood Retaining Wall, Inc.*,²⁵ a case involving a design for the front face of a retaining wall block. The court stated “[t]he test for infringement of a design patent is to be determined from the

viewpoint of an ordinary observer, not an expert” and “[t]herefore, ‘expert’ opinion from Farber as to whether the front face of the accused Rockwood blocks infringes the ‘560 patent will not be of assistance to the jurors in determining whether the Rockwood blocks are substantially similar to the design described in the ‘560 patent.”²⁶

The court’s statement appears to confuse the standard for determining infringement (ordinary observer) with the standard for determining whether an expert can testify that an ordinary observer likely would be deceived. Authoritative cases hold that a properly qualified expert can express such an opinion.²⁷ Additionally, experts should be able to testify as to whether an “expert” has been or likely will be deceived, under the rationale that if an expert is deceived, a less perceptive ordinary observer likely will be deceived as well.²⁸

A second potential misconception is that expert witness testimony is not needed on the ordinary observer test because a jury comprises “a sampling of ordinary observers [and] does not necessarily require empirical evidence as to whether ordinary observers would be deceived by an accused device’s design.”²⁹ This misconception likely arises from a misunderstanding of what an ordinary observer is and how complex the ordinary observer test has become. Although a jury can be instructed to apply the ordinary observer test, for reasons discussed below, it is rather unlikely that a juror actually will qualify as an ordinary observer in a particular case.

With these preliminaries in mind, we now consider potential issues for expert witness testimony under the ordinary observer infringement test. The current complexity of the infringement test is discussed to provide proper context.

The *Gorham* “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.”³⁰ Four additional legal principles supplement the ordinary observer test. First, comparison between the patented and accused designs is conducted in light of the prior art.³¹ Second, functional design features are “factored out,” or ignored in the comparative analysis.³² Third, design features visible at any time during the normal life of the article of manufacture are considered.³³

Fourth, an ordinary observer is a person who either purchases and uses the article or is otherwise interested in the subject of the design.³⁴

The ordinary observer test is neither a “real world” test nor a purely hypothetical test. Rather, it is a hybrid between the two. This hybrid nature results from design patent law falling between trademark law, where real world consumer behavior and impressions govern, and utility patent law, where appearances matter hardly at all. And since the objective ordinary observer is aware of all relevant prior art and “factors out” design features dictated by function, the objective ordinary observer often *knows more* and *sees less* than a typical real world purchaser. The hybrid nature of the ordinary observer test and its many underlying principles make the test far more complex than may at first appear.

The first phrase is “if in the eye of an ordinary observer.” An ordinary observer is not an expert, but rather an observer “of ordinary acuteness” who brings “to the examination of the article upon which the design has been placed that degree of observation which men of ordinary intelligence give.”³⁵ The Supreme Court makes clear that an ordinary observer is a *purchaser and user* of the article containing the patented design and the purpose of the test is to protect the market the patent was granted to secure.³⁶

Since *Gorham*, courts have broadened the “purchaser and user” concept because there is no requirement that the article with the patented design actually be offered for sale. In *Applied Arts Corp. v. Grand Rapids Metalcraft Corp.*,³⁷ the court stated “[t]he ordinary observer is not any observer, but one who, with less than the trained faculties of the expert, is ‘a purchaser of things of similar design,’ or ‘one interested in the subject.’” Further, when the patented design is only a portion of the article offered for sale, some courts have held that the ordinary observer is the industrial purchaser of the patented portion and not the retail purchaser of the entire finished product.³⁸ A court also has held that when constructing a survey, the “ordinary observer universe” can include end users who did not purchase the patented design, but whose perspective was considered when the purchase was made.³⁹ So the first issue that may require expert or other specialized testimony⁴⁰ under the ordinary observer test is identification of the ordinary observer, including whether they are corporate pur-

chaser, retail consumer, other end users interested in the design, or some combination of the three.

In *Egyptian Goddess*, the Federal Circuit held that when applying the ordinary observer test the patented and accused designs are compared in light of the prior art.⁴¹ This necessarily means that the ordinary observer is aware of all relevant prior art designs and has the presumed ability to distinguish the patented design from the prior art. When the field of prior art is crowded and close to the patented design, then the ordinary observer has a greater ability to distinguish between designs.⁴² Consequently, a second area for expert witness testimony is the nature, scope, and effect of the prior art.

The second phrase of the ordinary observer test is “giving such attention as a purchaser usually gives.” This phrase indicates that the ordinary observer test is not conducted as a sterile academic exercise where two designs are always placed side-by-side and scrutinized closely for differences and similarities. Rather, the test must take into account the nature of the article of manufacture, its cost, value, and other intangibles, and the degree of attention an ordinary purchaser and user usually would give to it.⁴³ Potential expert or other specialized testimony on these issues may include description of what the ordinary observer knows, how they purchase and use the type of article design at issue, whether the patented and accused designs are typically viewed side-by-side during the purchasing decision,⁴⁴ and how much time and attention is spent observing the design.

The next phrase is “two designs are substantially the same.” The phrase portion “substantially the same” is given a particular meaning by the phrase “if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other,” and we will discuss the latter phrase below. But the word “designs” in the phrase deserves special attention. Proper identification of the patented design requires claim construction, and claim construction requires understanding (1) what design features are dictated by function and must be factored out or ignored in the analysis, (2) the meaning of design patent drawing techniques such as broken lines and shading, and (3) the potential effect of prosecution history estoppel on the scope of the claim. Further, proper identification of the visible designs also requires an understanding of how the

articles are used from manufacture to end of article life.⁴⁵

These issues often will require expert testimony regarding the functions performed by various design features, whether a particular design feature is dictated by function (whether functionally equivalent alternative designs exist), the meaning of drafting symbols and design patent drawing techniques, and identification of the design in light of what is visible from manufacture to end of life use.

The next phrase is “if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other.” This phrase is the heart of the ordinary observer test. It provides the standard for determining whether two designs are substantially similar and whether infringement has occurred. The terms “resemblance,” “deceive,” “inducing,” and “supposing” are words of nuance and complexity and indicate that in some comparisons, advanced principles of design perception and visual science may be helpful.

This portion of the test may benefit from expert testimony on how real world purchasers and users typically perceive, distinguish between, interact with, and comment about different available designs. Additional expert testimony may include discussion and application of principles of design perception and visual science and how they affect whether an ordinary observer likely would be deceived by the resemblance between the patented and accused designs. Additionally, experts may be used to construct surveys that gather appropriate empirical evidence on the issue of likely deception.

The final phrase in the ordinary observer test is “the first one patented is infringed by the other,” which provides the legal result and conclusion for the test. Assuming a proper foundation is laid, potential expert testimony may be used to express an opinion on the ultimate issue, which is whether infringement exists under the ordinary observer test.⁴⁶

So we see from this discussion that the ordinary observer test is not the simple comparison some courts might believe it to be. It is set in the context of article purchase and use, but since the article need not be actually offered for sale, the ordinary observer is an objective and hypothetical construction that includes purchasers with differing levels of perceptive ability depending on the article design or portion thereof, and those interested in the subject.

Further, the ordinary observer is aware of all relevant prior art, and the relationship between the patented design and the prior art affects the ability of the ordinary observer to distinguish between designs.

In light of this complexity, it appears to be improper to view a jury as simply a collection of ordinary observers. Indeed, it is highly unlikely that a given juror, absent relevant evidence and proper instruction, will be aware of all relevant prior art and will properly “factor out” functional features when deciding infringement. Although a properly instructed jury can apply the ordinary observer standard to the evidence, it appears to be incorrect to think of a juror as actually being an ordinary observer. Further, due to the issues discussed above, it often will be improper for a court or jury to determine infringement simply by comparing the patented and accused designs in light of the prior art without the aid of additional evidence including expert or other specialized testimony.

In part 2 of this article, we will consider additional issues that may be appropriate for expert analysis in design patent cases, including validity,⁴⁷ enforceability,⁴⁸ inventorship,⁴⁹ indefiniteness,⁵⁰ design patent drafting symbols,⁵¹ and statutory bars.⁵² We also will review and analyze how courts have reacted to expert testimony related to the ordinary observer infringement test and to these additional issues as well.

ENDNOTES

1. See *Sun-Mate Corp. v. Koolatron Corp.*, 2011 U.S. Dist. LEXIS 84726, 15-16 (C.D. Cal. 2011) (“[U]nder the refined ordinary observer test, an expert in the field of the prior art could prove helpful to the trier of fact in determining whether the two designs are substantially similar.”).
2. See *Amerock Corp. v. Unican Sec. Systems Corp.*, 1981 U.S. Dist. LEXIS 17467, 5 (E.D.N.C. 1981) (testimony at trial established that the ordinary observer is the ultimate consumer).
3. See *Arminak & Assocs. v. St.-Gobain Calmar, Inc.*, 424 F. Supp. 2d 1188, 1192 (C.D. Cal. 2006) (court may consider expert testimony when construing claims); see also *c.f. Motorola, Inc. v. Alexander Mfg. Co.*, 786 F. Supp. 808, 812-813 (N.D. Iowa 1991) (in the invalidity context, expert testimony considered on the issue of functionality and whether alternative designs existed); *Martec Engineering Corp. v. Michigan Wheel Co.*, 1972 U.S. Dist. LEXIS 10858, 1-3 (C.D. Cal. 1972) (In invalidity context, court considered it “necessary to have expert testimony in the field of mechanics to make clear whether or not the design of the patented article is dictated by its functional requirements.”).
4. See *Avia Group International, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1565 (Fed. Cir. 1988) (Plaintiff “presented evidence in the form of an expert’s declaration analyzing infringement and deposition testimony of LAG’s president, in

- which he confused LAG’s Thrasher and Avia’s Model 750”); *Mondo Polymers Techs., Inc. v. Monroeville Indus. Moldings, Inc.*, 2009 U.S. Dist. LEXIS 102169, 10-11 (S.D. Ohio 2009) (in addition to court’s own visual comparison, court relied upon expert opinion that designs were substantially similar to deny motion for summary judgment of non-infringement); *Smith Corona Corp. v. Pelikan, Inc.*, 784 F. Supp. 452, 469 (M.D. Tenn. 1992) (court considered expert witness “qualified to render an opinion on the issue of design patent infringement”); *Lakewood Eng’g & Mfg. Co. v. Lasko Metal Prods.*, 2001 U.S. Dist. LEXIS 13491 (N.D. Ill. Aug. 16, 2001) (stating “[t]he Federal Circuit has recognized that expert testimony and testimony by a defendant’s employee are proper evidence upon which a jury could rely in deciding that a design patent has been infringed.”); *Degelman Indus. v. Pro-Tech Welding & Fabrication, Inc.*, 2011 U.S. Dist. LEXIS 147953 (W.D.N.Y. Dec. 23, 2011) (court found that expert’s testimony as an ordinary observer would benefit the trier of fact).
5. See *Spotless Enters. v. A&E Prods. Group L.P.*, 294 F. Supp. 2d 322, 345 (E.D.N.Y. 2003) (expert witness described upswept arms feature as the dominant element of the design).
 6. See *Burger Train Systems, Inc. v. Ballard*, 552 F.2d 1377, 1382 (10th Cir. Okla. 1977) (in granting judgment n.o.v., court accepted expert testimony that only distinguishing feature between patented design and prior art was not contained in accused design).
 7. See, e.g., *Bush Industries, Inc. v. O’Sullivan Industries, Inc.*, 772 F. Supp. 1442, 1450 (D. Del. 1991) (“expert testimony is unnecessary under the ordinary observer prong of the infringement test.”).
 8. *Schwinn Bicycle Co. v. Goodyear Tire & Rubber Co.*, 444 F.2d 295, 297-298 (9th Cir. Cal. 1970) (“There is no such need for expert testimony in litigation involving a design patent of this type where no special technological problems are presented and the legal issues ... are particularly adapted to summary disposition.”); *Flexible Plastics Corp. v. Black Mountain Spring Water, Inc.*, 357 F. Supp. 554 (N.D. Cal. 1972) (citing *Schwinn Bicycle*).
 9. See *HR US LLC v. Mizco Int’l, Inc.*, 2009 U.S. Dist. LEXIS 27056 (E.D.N.Y. Mar. 31, 2009) (“expert testimony submitted by a plaintiff cannot create a material issue of fact where the visual comparison reveals that the alleged infringing product is not substantially similar to the patented design.”); *Lauman Armor Corp. v. Master Lock Co.*, 2004 U.S. Dist. LEXIS 3705, *26 (E.D. Pa. Mar. 11, 2004).
 10. See *Chefn Corp. v. Trudeau Corp.*, 2009 U.S. Dist. LEXIS 47013, *5 (W.D. Wash. June 4, 2009).
 11. *G. B. Lewis Co. v. Gould Products, Inc.*, 436 F.2d 1176, 1179 (2d Cir. N.Y. 1971) (invalidity context); see also *J. G. Furniture Co. v. Litton Business Systems, Inc.*, 436 F. Supp. 380, 384-385 (S.D.N.Y. 1977) (citing *G. B. Lewis Co.*).
 12. See, e.g., *Chefn Corp. v. Trudeau Corp.*, 2009 U.S. Dist. LEXIS 47013 (W.D. Wash. June 4, 2009) (“The declarations are inadmissible under Fed. R. Evid. 702 because expert opinions on ordinary observers’ thoughts or perceptions will not assist the trier of fact.”).
 13. See *Schwinn Bicycle Co. v. Goodyear Tire & Rubber Co.*, 444 F.2d 295, 297-298 (9th Cir. Cal. 1970).
 14. 81 U.S. 511 (1872).
 15. *Id.* at 530.
 16. 853 F.2d 1557 (Fed. Cir. 1988).

17. 543 F.3d 665 (Fed. Cir. 2008).
18. 509 U.S. 579 (1993). In *Daubert*, the Supreme Court identified a non-exhaustive list of four factors to assist courts in determining whether an expert's reasoning or methodology is scientifically valid: (1) whether the theory or methodology can be or has been tested; (2) whether it has been subjected to peer review and publication; (3) whether it has a known or potential rate of error; and (4) whether it has been generally accepted within the scientific community. 509 U.S. at 593-94.
19. 526 U.S. 137 (1999). In *Kumho Tire* the Supreme Court held that the gatekeeping function under Rule 702 applies to all expert testimony, regardless of the basis of the expert's knowledge.
20. Fed. R. Evid. 702 states "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."
21. See *General Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) (district court's decision to admit or exclude expert testimony is reviewed under an abuse of discretion standard).
22. See *Apple, Inc. v. Samsung Elecs. Co.*, 2011 U.S. Dist. LEXIS 139049 (N.D. Cal. Dec. 2, 2011) (in ruling on a motion for preliminary injunction, the Court has discretion to consider evidence even if it would be inadmissible at trial).
23. See *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 852 (6th Cir. 2004) ("The 'gatekeeper' doctrine was designed to protect juries and is largely irrelevant in the context of a bench trial.")
24. *Id.*
25. 2001 U.S. Dist. LEXIS 26272 (D. Minn. Oct. 9, 2001).
26. *Id.* at *32.
27. See, e.g. *Gorham v. White*, 81 U.S. 511 (1872) and *Avia Group Int'l, Inc. v. L.A. Gear Corp.*, 853 F.2d 1557 (Fed. Cir. 1988).
28. See *Amini Innovation Corp. v. Anthony California, Inc.*, 2006 U.S. Dist. LEXIS 100800, *29 (C.D. Cal. Sept. 21, 2006) ("If an observer of above average skill was confused, then it is likely that an ordinary observer would also be confused.")
29. *Braun, Inc. v. Dynamics Corp. of America*, 975 F.2d 815, 821 (Fed. Cir. 1992).
30. *Gorham Co. v. White*, 81 U.S. 511, 528 (1872).
31. See *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 676 (Fed. Cir. 2008).
32. See *Richardson v. Stanley Works, Inc.*, 597 F.3d 1288, 1293 (Fed. Cir. 2010).
33. See *Contessa Food Prods. v. Conagra*, 282 F.3d 1370, 1380 (Fed. Cir. 2002).
34. 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).
35. 81 U.S. 511, 528 (1872).
36. *Id.*
37. 67 F.2d 428, 430 (6th Cir. Mich. 1933).
38. See *Arminak & Assocs. v. Saint-Gobain Calmar, Inc.*, 501 F.3d 1314, 1324 (Fed. Cir. 2007).
39. See *Puritan-Bennett Corp. v. Penox Techs., Inc.*, 2004 U.S. Dist. LEXIS 6896 (S.D. Ind. Mar. 2, 2004), *affirmed*, *Puritan-Bennett Corp. v. Penox Techs., Inc.*, 121 Fed. Appx. 397 (Fed. Cir. 2005) (court unwilling to rule as completely irrelevant survey evidence accounting for patients' perspective when purchaser of equipment admitted that patients' needs as communicated through durable medical equipment suppliers was relevant to its decision to purchase an ultra-light portable oxygen unit design).
40. In some instances when the witness knowledge and opinion is based on experience, it may be appropriate to admit the evidence under Federal Rule of Evidence 701 rather than 702. Rule 701 provides "[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.
41. 543 F.3d 665, 676 (Fed. Cir. 2008).
42. *Id.*
43. See, e.g., *Braun, Inc. v. Dynamics Corp. of America*, 975 F.2d 815 (Fed. Cir. 1992) (court held a verdict of infringement was supported because the patented and accused designs were of an inexpensive product that customers typically purchased on impulse and as a result, customers may not have differentiated the designs despite the differences).
44. In *Amerock Corp. v. Unican Sec. Systems Corp.*, 1981 U.S. Dist. LEXIS 17467, 4-7 (E.D.N.C. 1981), the designs involved kitchen cabinet hardware. Testimony at trial established that the hardware consumers generally did not have the opportunity to view different designs of hardware simultaneously. The court stated "[t]herefore, differences between the patented and the accused design that are apparent in a side-by-side comparison will not necessarily dictate a finding of non-infringement." *Id.* at 6.
45. See *Contessa Food Prods., Inc. v. Conagra, Inc.*, 282 F.3d 1370, 1381 (Fed. Cir. 2002).
46. See, e.g., *Smith Corona Corp. v. Pelikan, Inc.*, 784 F. Supp. 452, 469 (M.D. Tenn. 1992) (court found that expert witness "was qualified to render an opinion on the issue of design patent infringement and his opinion would assist the jury on the issue of design infringement.").
47. See *Yokohama Rubber Co. v. Stamford Tyres Int'l PTE LTD*, 2010 U.S. Dist. LEXIS 48671, 14-17 (C.D. Cal. Jan. 19, 2010).
48. See *Eli Lilly & Co. v. Actavis Elizabeth LLC*, 2010 U.S. Dist. LEXIS 47061, 34-35 (D.N.J. May 13, 2010).
49. See *Safco Prods. Co. v. Welcom Prods.*, 2011 U.S. Dist. LEXIS 71941, *90 (D. Minn. July 1, 2011).
50. See *Seed Lighting Design Co. v. Home Depot*, 2005 U.S. Dist. LEXIS 44741 (N.D. Cal. Aug. 3, 2005).
51. See *Elk Corp. v. GAF Bldg. Materials Corp.*, 1997 U.S. Dist. LEXIS 21173, 24-26 (N.D. Tex. Sept. 29, 1997).
52. See *Schreiber Mfg. Co. v. Saft America, Inc.*, 704 F. Supp. 759, 766 (E.D. Mich. 1989).