DESIGN PATENT PROSECUTION

DESIGN PATENTS
IN THE MODERN WORLD
<table>
<thead>
<tr>
<th>Organization</th>
<th>Patents By Year of Grant:</th>
<th>Patents By Year of Application:</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>All Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>SONY CORPORATION</td>
<td></td>
<td></td>
<td>172</td>
<td>222</td>
<td>230</td>
<td>182</td>
<td>84</td>
<td>82</td>
<td>3039</td>
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<td>SAMSUNG ELECTRONICS CO., LTD.</td>
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<td>226</td>
<td>185</td>
<td>127</td>
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<td>622</td>
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<td>440</td>
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<td>GOODYEAR TIRE + RUBBER COMPANY</td>
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<td>184</td>
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<td>85</td>
<td>120</td>
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<td>MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.</td>
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<td>HONDA GIKEN KOGYO KABUSHIKI KAISHA (HONDA)</td>
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<td>136</td>
<td>82</td>
<td>58</td>
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Source: http://www.uspto.gov
<table>
<thead>
<tr>
<th>Organization</th>
<th>Patents By Year of Grant</th>
</tr>
</thead>
<tbody>
<tr>
<td>SAMSUNG ELECTRONICS CO., LTD.</td>
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<tr>
<td>MICROSOFT CORPORATION</td>
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<tr>
<td>PROCTER + GAMBLE COMPANY</td>
<td>212</td>
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<tr>
<td>LG ELECTRONICS INC.</td>
<td>183</td>
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<tr>
<td>RESEARCH IN MOTION LIMITED</td>
<td>161</td>
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<tr>
<td>APPLE, INC.</td>
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</tr>
<tr>
<td>TOYOTA JIDOSHA K.K.</td>
<td>139</td>
</tr>
<tr>
<td>FIH (HONG KONG) LIMITED</td>
<td>135</td>
</tr>
<tr>
<td>KONINKLIJKE PHILIPS ELECTRONICS N.V.</td>
<td>123</td>
</tr>
<tr>
<td>NIKE, INC.</td>
<td>122</td>
</tr>
<tr>
<td>SONY CORPORATION</td>
<td>100</td>
</tr>
</tbody>
</table>

Source: http://www.uspto.gov
• Design Patent Scope
  • Ordinary Observer Test
  • Gorham Co. v. White, 81 U.S. 511 (1871)
    • “We hold therefore, that 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.”
• What Is “observed”?
  • “[T]he focus is on the overall ornamental appearance of the claimed design, not selected ornamental features.”
  • All drawing figures in the design patent are used to determine the claimed design.
• Who is the “Ordinary Observer”?
  • One who is “a purchaser of things of similar design” or “one interested in the subject.”
    • *Gorham v. White*, 81 U.S. 511 (1871)
  • The ordinary observer is **not** an expert.
    • *Gorham*, 81 U.S. at 527 (Patent protection would be “destroyed” if infringement could be avoided based on differences “observable by experts.”)
• *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665 (Fed. Cir. 2008) (en banc)
  
  • An ordinary observer with *reasonable familiarity* with the prior art
  
  • An ordinary observer “will attach importance to differences between the claimed design and the prior art depending on the overall effect of those differences on the design.”
Patented 3-Buffer Design  No Infringement

3-Buffer Prior Art  4-Buffer Prior Art
Patentability

- Design must be novel and non-obvious over prior art.
- Anticipation analysis in view of “ordinary observer.”
- Obviousness analysis:
  - Whether obvious to combine prior art in view of the “ordinary designer” where the primary reference is basically the same as the claimed design
  - Are the design references so related that the appearance of certain ornamental features in one would suggest the application of those features to the other?
  - Then determine patentability in view of the “ordinary observer”
"Int’l Seaway Trading Corp. v. Walgreens Corp., 589 F.3d 1233 (Fed. Cir. 2009) (post-Egyptian Goddess)"

- Whether the differences in the insole patterns between the prior (Crocs) art ['789 Patent] and the ['263 Patent] designs bar a finding of anticipation or obviousness.
Use of Phantom or Dashed Lines

Design Patent A

Design Patent B

Hypothetical Design
In re Owens, No. 2012-1261
(Fed. Cir. Mar. 18, 2013)

- Parent application
- Continuation application

Fig. 1

Fig. 2

Fig. 3

this shape created by the boundary line considered new matter
In re Owens, No. 2012-1261
(Fed. Cir. Mar. 18, 2013)

- Example prior design patents from amicus briefing:
In re Owens, No. 2012-1261 (Fed. Cir. Mar. 18, 2013)

- Distinguished In re Daniels, 144 F.3d 1452 (Fed. Cir. 1998)
In our view, the best advice for future applicants was presented in the PTO’s brief, which argued that unclaimed boundary lines typically should satisfy the written description requirement only if they make explicit a boundary that already exists, but was unclaimed, in the original disclosure. Although counsel for the PTO conceded at oral argument that he could not reconcile all past allowances under this standard, he maintained that all future applications will be evaluated according to it.

This rule comports with our understanding of how unclaimed boundary lines generally should affect entitlement to an earlier filing date under § 112, ¶ 1, and § 120.
Functionality


No Infringement
Functionality

United States Patent and Trademark Office

Reg. No. 3,361,597
Registered Jan. 1, 2008

TRADEMARK
PRINCIPAL REGISTER

CHRISTIAN LOUBOUTIN (FRANCE INDIVIDUAL)
24 RUE VICTOR MASSÉ
PARIS, FRANCE 75009

THE MARK CONSISTS OF A LACQUERED RED SOLE ON FOOTWEAR. THE DOTTED LINES ARE NOT PART OF THE MARK BUT ARE INTENDED ONLY TO SHOW PLACEMENT OF THE MARK.
Functionality
Design Patents and Trademarks

iPod Design Patent

iPod TM Registration
Paris Hilton Shoe Litigation

Design-Patent-in-suit

Accused Shoe Designs
Complaint: Causes of Action

- Design Patent Infringement
  - US Patent D579,642 for “Shoe Sock”

- Lanham Act 43(a)
  - “The heart-shaped shoe sock ... is source indicating.”
  - No trademark registration
  - Unregistered trade dress rights
HOW LONG PROTECTION LASTS

- Trade dress: potentially indefinite term w/use in commerce

- Design patents expire in 14 years
  - Enough time to develop secondary meaning?
## Statistics

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Filings</th>
<th>First Action Issued</th>
<th>Allowance Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013 (Oct. -March)</td>
<td>17,520</td>
<td>8,977</td>
<td>90%</td>
</tr>
<tr>
<td>2012</td>
<td>32,258</td>
<td>18,366</td>
<td>90%</td>
</tr>
<tr>
<td>2011</td>
<td>30,247</td>
<td>17,139</td>
<td>89%</td>
</tr>
<tr>
<td>2010</td>
<td>28,577</td>
<td>18,087</td>
<td>88%</td>
</tr>
</tbody>
</table>

Source: USPTO
Allowance Rate

• About 90%

• 2009

Distribution of Design Patent Rejections

- No Rejection 81.6%
- Section 112 13.9%
- Double Patenting 3.7%
- Non-Statutory Subject Matter 0.6%

• Source: Patently-O
• 2009

Source: Patently-O
1504.30  Expedited Examination [R-5]

37 CFR 1.155. Expedited examination of design applications

EXPEDITED EXAMINATION PROCEDURE

Design applications requesting expedited examination and complying with the requirements of 37 CFR 1.155 are examined with priority and undergo expedited processing throughout the entire course of prosecution in the Office, including appeal, if any, to the Board of Patent Appeals and Interferences. All processing is expedited from the date the request is granted.
Design Patent Pendency

2 years

3 years
Average Pendency of Design Patent Applications
Grouped by Month of Issuance

Source: http://www.patentlyo.com/patent/2010/01/design-patent-application-pendency.html
## Statistics – Average Pendency

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>First Action</th>
<th>Total</th>
<th>First Action – Rocket Docket</th>
<th>Total – Rocket Docket</th>
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<td>2012</td>
<td>10.1</td>
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<td>8.0</td>
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<tr>
<td>2011</td>
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<td>13.8</td>
<td>3.5</td>
<td>8.1</td>
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<tr>
<td>2010</td>
<td>8.7</td>
<td>13.9</td>
<td>3.6</td>
<td>8.5</td>
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Source: USPTO
Design Application Backlog

Source: Patently-O
<table>
<thead>
<tr>
<th>Year</th>
<th>Utility</th>
<th>Design</th>
<th>Plant</th>
<th>Reissue</th>
<th>Total</th>
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<tbody>
<tr>
<td>2000</td>
<td>291,653</td>
<td>18,563</td>
<td>786</td>
<td>805</td>
<td>311,807</td>
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<tr>
<td>2001</td>
<td>324,211</td>
<td>18,636</td>
<td>914</td>
<td>956</td>
<td>344,717</td>
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<td>2002</td>
<td>331,580</td>
<td>19,706</td>
<td>1,134</td>
<td>974</td>
<td>353,394</td>
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<td>2003</td>
<td>331,729</td>
<td>21,966</td>
<td>785</td>
<td>938</td>
<td>355,418</td>
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<tr>
<td>2004</td>
<td>353,319</td>
<td>23,457</td>
<td>1,212</td>
<td>996</td>
<td>378,984</td>
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<tr>
<td>2005</td>
<td>381,797</td>
<td>25,304</td>
<td>1,288</td>
<td>1,143</td>
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<td>2006</td>
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<td>25,853</td>
<td>1,204</td>
<td>1,103</td>
<td>445,613</td>
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<td>2007</td>
<td>439,578</td>
<td>26,693</td>
<td>1,002</td>
<td>1,057</td>
<td>468,330</td>
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<td>2008</td>
<td>466,258</td>
<td>28,217</td>
<td>1,331</td>
<td>1,080</td>
<td>496,886</td>
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<tr>
<td>2009</td>
<td>458,901</td>
<td>25,575</td>
<td>988</td>
<td>1,035</td>
<td>486,499</td>
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<td>2010</td>
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<td>28,577</td>
<td>1,013</td>
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<td>30,247</td>
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<td>1,158</td>
<td>537,171</td>
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<tr>
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<td>530,915</td>
<td>32,258</td>
<td>1,181</td>
<td>1,212</td>
<td>565,566</td>
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</table>

¹ FY 2012 data are preliminary and will be finalized in the FY 2013 PAR.
² FY 2011 application data has been updated with final end of year numbers.

Source: http://www.uspto.gov
### Table 29

**End of Year Personnel**

(FY 2008 - FY 2012)

<table>
<thead>
<tr>
<th>Activity</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
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<td><strong>Business</strong></td>
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<td>Patent Business Line</td>
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<td>8,645</td>
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<td>930</td>
<td>862</td>
<td>976</td>
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<tr>
<td><strong>Total USPTO</strong></td>
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<td>9,716</td>
<td>9,507</td>
<td>10,210</td>
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<td>Patent Examiners</td>
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<tr>
<td>Utility, Plant, and Reissue Examiners</td>
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<td>6,145</td>
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<td>Design Examiners</td>
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<td>97</td>
<td>95</td>
<td>104</td>
</tr>
<tr>
<td><strong>Total UPR and Design Examiners</strong></td>
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<td>6,243</td>
<td>6,225</td>
<td>6,780</td>
<td>7,935</td>
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</table>

Source: http://www.uspto.gov
### Table 14A: Ex Parte Reexamination (FY 2008 - FY 2012)

<table>
<thead>
<tr>
<th>Activity</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
<th>2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Filings by discipline, total</td>
<td>680</td>
<td>658</td>
<td>780</td>
<td>759</td>
<td>747</td>
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<tr>
<td>Chemical</td>
<td>138</td>
<td>120</td>
<td>137</td>
<td>143</td>
<td>149</td>
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<tr>
<td>Electrical</td>
<td>305</td>
<td>335</td>
<td>414</td>
<td>395</td>
<td>398</td>
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<tr>
<td>Mechanical</td>
<td>237</td>
<td>203</td>
<td>229</td>
<td>221</td>
<td>192</td>
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<td>Design</td>
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*Represents zero.*

### Table 14B: Inter Partes Reexamination (FY 2008 - FY 2012)

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<th>2010</th>
<th>2011</th>
<th>2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Filings by discipline, total</td>
<td>168</td>
<td>258</td>
<td>281</td>
<td>374</td>
<td>640</td>
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<tr>
<td>Chemical</td>
<td>38</td>
<td>35</td>
<td>45</td>
<td>57</td>
<td>116</td>
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<tr>
<td>Electrical</td>
<td>67</td>
<td>153</td>
<td>174</td>
<td>216</td>
<td>316</td>
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<tr>
<td>Mechanical</td>
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<td>70</td>
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<td>101</td>
<td>204</td>
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<tr>
<td>Design</td>
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<td>-</td>
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<td>-</td>
<td>4</td>
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</table>

*Represents zero.*

Source: http://www.uspto.gov
AIA Enactment Timeline

Day of Enactment
Sept 16, 2011

- Reexamination transition for threshold
- Tax strategies are deemed within prior art
- Best mode
- Human organism prohibition
- OED statute of limitations

10 Days
Sept 26, 2011

- Prioritized Examination
- 15% transition Surcharge

Oct 1, 2011

- Reserve Fund
- Electronic filing incentive

60 Days
Nov 15, 2011

- Inventor’s oath/declaration
- Preissuance submission
- Supplemental examination
- Citation of prior art in a patent file
- Inter partes review
- Post-grant review
- Transitional post-grant review program for covered business method patents

12 Months
Sept 16, 2012

- First inventor to file
- Derivation proceedings
- Repeal of statutory invention registration
- New patent fees
- Micro entity discount

18 Months
Mar 2013
Inventor’s Oath or Declaration

35 U.S.C. 115 and 118
Applicability: Utility, design, patent, and reissue applications filed on or after September 16, 2012
Final Rule:

• Significant changes were made to USPTO practices:
  – Who may file the application
  – Oath/Declaration submission due at time of issue fee payment
  – Each inventor can execute a separate oath/declaration
  – Signed ADS used to obtain critical examination information, such as priority and benefit claims
Inventor’s Oath/Declaration: Forms and Guidance

• AIA Micro Site
  – Quick reference guide
  – FAQs

• USPTO forms and instructions
  – Oath/declaration
  – Substitute statement
  – Power of Attorney
  – Application data sheet
Fee Setting Authority

Final rule published January 18, 2013

Effective March 19, 2013
Policy Considerations

- Foster innovation and access to patent system
  - Keeping front-end fees below cost
  - New 75% micro entity discount

- Facilitate effective administration
  - Application size fees, extension of time fees, and excess claims fees all increased
  - Multipart fees for appeals and contested cases
  - Staged fees for requests for continued examination (RCEs – not available for design patents)
# Patent Fee Schedule

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<th>Fee</th>
<th>Current</th>
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</thead>
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<td>Filing, Search, and Examination</td>
<td>$760</td>
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<tr>
<td>Issue</td>
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<tr>
<td><strong>Total Through Issue</strong></td>
<td><strong>$1,780</strong></td>
</tr>
</tbody>
</table>
## Comparison of Patent Fee Schedules for Appeals

<table>
<thead>
<tr>
<th>Fee</th>
<th>Former</th>
<th>Current</th>
</tr>
</thead>
<tbody>
<tr>
<td>Notice of Appeal</td>
<td>$630</td>
<td>$800</td>
</tr>
<tr>
<td>Filing an Appeal Brief</td>
<td>$630</td>
<td>N/A</td>
</tr>
<tr>
<td>Appeal Forwarding</td>
<td>N/A</td>
<td>$2000</td>
</tr>
<tr>
<td>Total Fees for Filing an Appeal</td>
<td>$1,260</td>
<td>$2,800</td>
</tr>
</tbody>
</table>
• Entitled to a 75% discount on fees for “filing, searching, examining, issuing, appealing, and maintaining” patent applications/patents, but not for fees associated with administrative trials
  – Expedited examination fee for designs - $225.00 for micro entity
First Inventor to File

Effective March 16, 2013

Applies to an application or patent that contains or contained at any time a claim having an effective filing date that is on or after March 16, 2013
AIA: Major Changes

• Converted US system to a first inventor to file system;

• Patents and patent application publications are treated as prior art as of their earliest effective U.S., foreign or international filing dates;

• Eliminated pre-AIA geographic limitation; use or sale may occur anywhere in the world; and

• Commonly owned or joint research agreement patents and patent application publications are treated as being by the same inventive entity for novelty purposes.
### Pre-AIA 35 U.S.C. 102
A person shall be entitled to a patent unless—

<table>
<thead>
<tr>
<th>Clause</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td>the invention was known or used by others in this country, or patented or described in a printed publication in this country or a foreign country, before the invention thereof by the applicant for patent, or</td>
</tr>
<tr>
<td>(b)</td>
<td>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</td>
</tr>
<tr>
<td>(c)</td>
<td>He has abandoned the invention, or</td>
</tr>
<tr>
<td>(d)</td>
<td>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 the United States, or</td>
</tr>
</tbody>
</table>
| (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 than 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. |

### AIA 35 U.S.C. 102
102(a)(1) Abandonment of invention  
102(a)(2) Premature foreign patenting  
101 and 115 Derivation  

### AIA 35 U.S.C. 102 Concordance

- 102(a)(1) Abandonment of invention
- 102(a)(2) Premature foreign patenting
- No corresponding provision Derivation
- No corresponding provision Prior invention by another
### Statutory Framework

<table>
<thead>
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<th>Prior Art (Basis for Rejection)</th>
<th>Exceptions (Not Basis for Rejection)</th>
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<tr>
<td>(A) Grace Period Disclosure by Inventor or Obtained from Inventor</td>
<td></td>
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<tr>
<td>(B) Grace Period Intervening Disclosure by Third Party</td>
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</table>
Applications

- **Filed before March 16, 2013; Priority/Benefit claim before March 16, 2013**
  - No statement required; pre-AIA application

- **Filed after March 16, 2013; Priority/Benefit claim before March 16, 2013**
  - Statement required if the application ever included a claim to an invention having an effective filing date on or after March 16, 2013; Transitional Application

- **Filed after March 16, 2013; no Priority/Benefit before March 16, 2013**
  - No statement required; AIA application
Transitional Application Statement

• Applicant must indicate if the application contains, or contained at any time, a claim having an effective filing date on or after March 16, 2013

• Statement not required if applicant reasonably believes that the application does not, and did not at any time, contain a claim to a claimed invention that has an effective filing date on or after March 16, 2013
AIA Help

- 1-855-HELP-AIA (1-855-435-7242)

- HELPAIA@uspto.gov

- www.uspto.gov/AmericaInventsAct
  - FAQs
  - Videos
  - Reference guide for final rules
Number of Figures in Design Patents

Source: Patently-O
Hague System

- The centralized acquisition, maintenance and management of industrial design rights by filing a single international application for a single international registration in which one or more Contracting Parties are designated.

- Allows right holders to target national, regional or global markets with respect to particular goods

- Cost-effective and efficient, thereby creating opportunities that would not otherwise exist for any enterprise with a limited legal budget, be it small, medium or large.
• Alternative Routes

• National/Regional Route

• Applicant
  • Office A
    • Territory A
  • Office B
    • Territory B
  • Office C
    • Territory C

• International (Hague) Route

• Applicant
  • Territory A
  • Territory B
  • Territory C
Acquisition

- **Direct Filing**
  - International Application

- **Indirect Filing**

- **OFFICE OF CONTRACTING PARTY OF ENTITLEMENT**

- **INTERNATIONAL BUREAU**
  - Formalities Examination
  - International Register
  - Certificate of International Registration
  - Publication (immediate; standard; deferred)

- **OFFICE OF DESIGNATED CONTRACTING PARTY**
  - Substantive Examination

- No Refusal
  - Refusal

- Security Clearance
Thank You