

• Making sense of the law

# The Unexpected Connection Between Patents and Tableware

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When the term patent is used or mentioned, most people think of high tech advances in computer software, electronics, genetics, pharmaceuticals and the like. If the average person on the street were to be questioned as to whether patents have any connection to tableware, the primary reaction would probably be a strange or puzzled look. Perhaps many, even those working in the various tableware industries - designers, retailers, distributors, even manufacturers - might think patents and tableware have very little in common. This is simply not correct. A new tableware product can indeed be the subject of a patent.

## Utility Versus Design

Patent protection is divided into two types: design patents and utility patents. A utility patent, as the patent statute states, protects "any new and useful process, machine, manufacture or composition of matter, or any new and useful improvements thereof." Therefore, if a new functional style is created for a cake server which has some type of structural advantage as compared to commercially existing designs, a utility patent may be obtained. A utility patent may be suitable for a new type of clasp or

mounting, or an improvement on a cutting edge, or another novel feature with a utilitarian advantage.

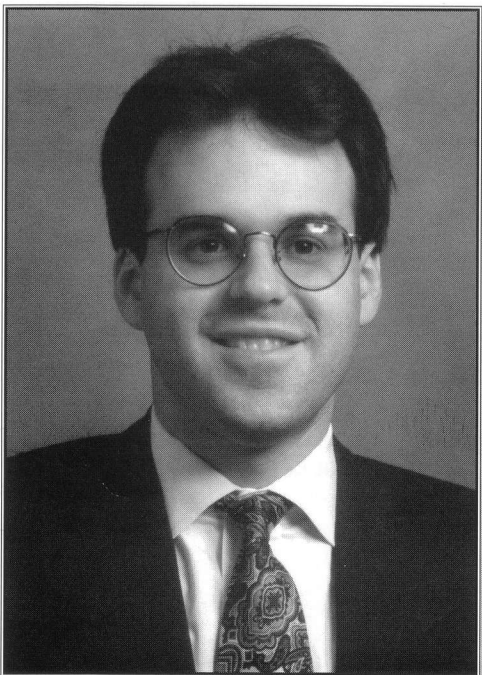
On the other hand, a design patent protects the overall aesthetic appearance of the design, focusing on only how the piece looks or appears - and not how it is made or how it functions. In order to be design-patentable, the design must be both new and sufficiently different when compared with prior designs, whether those prior designs were created by the same designer or another designer.

## Filing for Patent Protection

In order to obtain either design or utility patent protection, an application must be filed in the United States Patent and Trademark Office. In virtually all situations, a designer should use the services of a patent attorney so that the protection obtained is as broad as possible. The patent attorney's input for preparing all utility patent applications is essential — this type of application includes a very detailed description of the product design and how it works, operates and is constructed, as well as a series of what is known as "claims," which legally define, in detailed, descriptive terminology, the scope of protection that is being sought.

For both utility and design patent applications, the application should be filed as soon as the product has become known publicly to others. The laws of the United States state that a patent is not available on a product if that product has been on sale in the United States, or is the subject of a printed publication anywhere in the world, more than one year before the application is filed in the Patent Office.

If either a design or a utility patent application is granted by the Patent Office (located near Washington, D.C. in Arlington, Virginia), then the patent owner will have the right and obligation to mark the patented product with a patent number. Prior to that, and during the entire patent application process, the product can be marked with a "patent pending" notice which indicates to the world that an application is on file and that the owner of the design is taking action towards protecting his idea. This provides a certain scare value and makes many competitors think twice



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about copying any design. The patent application itself remains unavailable to the public until the patent is issued.

### **E-Commerce Developments**

In the past, business identity concepts and practices were not protectable by patents or any other intellectual property. However, with the development of computer operated business systems, and the growth of e-commerce in general, that principle has completely changed. Now, if a novel business concept is tied into a computer program, the web, server system or other electronic mode, patent protection may indeed be available. Many dot.com companies are seeking the advice of patent counsel with respect to whether or not their methods of operating can be protected by patent.

### **What About Infringers?**

If a company unrelated to the patent owner is selling an item of similar design, or with a similar functional element or feature (or is operating a similar business on the web), that item or business should be immediately evaluated by patent counsel so that a decision can be made whether to assert a formal claim for patent infringement. For design patents, if infringement is found, damages are based on the profits of the infringer and its customers. For utility patents, including patents on e-commerce systems, damages are based either on the lost profits of the patent owner or a reasonable royalty rate in the applicable field (in this case, the tableware field).

One problem with asserting patent rights is that most patents take at least a year from the time of filing to receive approval from the Patent Office. Obviously, the delay can be a problem if, during this period, a third party begins copying the design or feature for which patent protection was sought. However, in many circumstances, if infringers are advised that a patent will likely issue, many infringers will think twice about continuing production and/or sale of an infringing product.

### **Why Bother?**

With the launch of any new product line or e-commerce business practice, considerable effort and expenses are obviously incurred. If patent protection is not sought, the new design and/or the improved features enter into the public domain and are freely available for copying by competitors. Since patents are highly respected by most

industries, as well as the courts, it makes sense for the designer or manufacturer of a product, or the creator of a new e-commerce business, to take that extra step, to incur a little bit more initial expense, and file for patent protection (if your attorney thinks such protection is available). Pursuing patent protection not only makes good legal sense, it also makes good business sense.

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