A Brief History of the Development of Design Patent Protection in the United States

By Thomas B. Hudson *

Designs for articles of manufacture had been the subject matter of statutory protection for many years in European nations before similar laws were enacted in the United States. In France protection was available as early as 1737 and in England in 1787, by the enactment of the statute of 27 Geo. 3, Ch. 38.

Prior to 1842 there were no laws in the United States affording protection to useful articles having a pleasing or ornamental appearance. However, there were on the one hand copyright laws in force giving protection to books, maps, charts, cuts, engravings, prints, and musical compositions; and on the other, patent laws affording protection to new and useful arts, machines, manufactures, and compositions of matter and improvements thereon.

In his report to the 27th Congress, 2d Session, dated February 8, 1841, Commissioner of Patents Ellsworth called attention to the lack of protection for new and original designs and suggested the passage of such an act in the following language:

> The justice and expediency of securing the exclusive benefit of new and original designs for articles of manufacture, both in the fine and useful arts, to the authors and proprietors thereof, for a limited time, are also presented for consideration.
>
> Other nations have granted this privilege, and it has afforded mutual satisfaction alike to the public and to individual applicants. Many who visit the Patent Office learn with astonishment that no protection is given in this country to this class of persons. Competition among manufacturers for the latest patterns prompts to the highest effort to secure improvements, and calls out the inventive genius of our citizens. Such patterns are immediately pirated, at home and abroad. A pattern introduced at Lowell, for instance, with however great labor or cost, may be taken to England in 12 or 14 days, and copied and returned in 20 days more. If protection is given to designers,

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better patterns will, it is believed, be obtained, since the impossibility of concealment at present forbids all expense that can be avoided. It may well be asked if authors can so readily find protection in their labors, and inventors of the mechanical arts so easily secure a patent to reward their efforts, why should not discoverers of designs, the labor and expenditure of which may be far greater, have equal privileges afforded them?

The law, if extended, should embrace alike the protection of new and original designs for a manufacture of metal or other material, or any new and useful design for the printing of woolens, silk, cotton, or other fabric, or for a bust, statue, or bas-relief, or composition in alto or basso-relievo. All this could be effected by simply authorizing the Commissioner to issue patents for these objects, under the same limitations and on the same conditions as govern present action in other cases. The duration of the patent might be *seven* years, and the fee might be *one-half* of the present fee charged to citizens and foreigners, respectively.

As a result of the recommendation of Commissioner Ellsworth, the first Design law was enacted August 29, 1842. Section 3, 5 Stat. at Large 543. Subsequent basic acts are those of March 2, 1861, Section 11, 12 Stat. at Large, 246; July 8, 1870, Sections 71 to 76, 16 Stat. at Large, 198, and May 9, 1902, Section 4929, Revised Statutes. (The laws relating to design patents, in force on June 22, 1874, formed Sections 4929 to 4934 of the Revised Statutes of the United States, adopted and approved as law by Congress on that date). A supplemental act to the statutes relating to suits for patent infringement was passed February 4, 1887 (Ch. 105, 24 Stat. at Large 387) providing an arbitrary minimum amount ($250.00) for damages recoverable for design patent infringement.

The Act of August 29, 1842

This act provided that any citizen, or alien resident in the United States for one year who had taken oath to become a citizen, and who by his industry, genius, efforts and expense may have invented or produced any new and original design for

(1) A manufacture, whether of metal or other mamaterial;

(2) Any new and original design for the printing of woolen, silk, cotton, or other fabrics;
(3) Any new and original design for a bust, statute, bas-relief, composition in alto or basso-relievo;
(4) Any new and original impression or ornament to be placed on any article of manufacture, the same being formed in marble or other material;
(5) Any new and useful pattern, print, or picture to be either worked into or worked on, or printed, painted, cast or otherwise fixed on any article of manufacture;
(6) Any new and original shape or configuration of any article of manufacture;

not known or used by others before his invention or production thereof, and prior to the time of his application for a patent may make application in writing to the Commissioner of Patents who would on due proceeding issue a patent therefor.

Regulations and provisions which applied to obtaining protection of patents were to apply where not inconsistent with the act.

The question has been raised as to why protection for designs was placed in the jurisdiction of the Patent Office under the patent laws instead of affording copyright protection. In this connection, it may be well to note the constitutional authority for copyright and patent protection. Article 1, Section 8 of the Constitution of the United States provides that Congress shall

> have the power to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their writings and discoveries.

Thus, "authors" were to be protected for their "writings" and "inventors" for their "discoveries."

Under this constitutional provision, prior to 1842, copyright laws and patent laws had been enacted, but there was a third class to which no protection was available. This class included manufacture of articles useful in themselves, but to which it was intended to give an

ornamental or pleasing appearance, that fell somewhere between copyright and patent matters. In view of the nature of the subject matter, the same being manufactured articles of commerce as distinguished from purely intellectual products, i.e., writings, maps, charts, etc., it is logical that the needed protection was more closely related to the patent than to the copyright field. Moreover, the suggestion for the law and its basic form came from the Commissioner of Patents. A third reason for providing patent protection rather than copyright protection has been suggested. That is, at the time the law was passed there was no central copyright depository, it being required that two copies of the works to be copyrighted should be deposited with the Clerk of the appropriate District Court. However, it is believed that the first two reasons (1) the nature of the subject matter involved and (2) the source of the original suggestion for the law were the more compelling reasons for providing patent protection.

A search of congressional reports and records of proceedings fails to disclose additional background information as to the particular wording of the Act of August 29, 1842, which required that the design must be "invented or produced" and then enumerated the subject matter to be covered.

Under the 1842 act, 1277 design patents were issued. There are no reported Patent Office decisions and only three litigated cases based on patents issued under this law are of record. They are (1) *Root* v. *Ball,* 4 McLean 177, holding design patent number 34 for a Stove to be infringed; (2) *Sparkman* v. *Higgins,* 1 Blatchf. 205, in which patent number 76 for Floor Oil Cloth was also held infringed, and (3) *Booth* v. *Garrelly,* 1 Blatchf. 247, involving design patent number 139 for Buttons, where the court refused a preliminary injunction because of prior invention by one other than the patentee.

The Act of March 2, 1861

This was essentially the same as the Act of 1842, differing only in the following respects:

(1) In not specifying as patentable subject matter "any new and original design for the printing of woolen, silk, cotton or other fabrics." (This subject matter seems plainly to be included under the head of "any new and useful pattern, print or picture to be either worked into or worked on, or printed, or painted, or cast, or otherwise fixed on any article of manufacture.")

(2) Instead of a fixed term of seven (7) years the grant was to be for three and a half years, seven years, or fourteen years, as the applicant might elect in his petition and upon payment of the required fee. This election had to be made in his original application. He could not do so afterwards by amendment. *Ex parto Mayo,* 1870 C. D. 14.

(3) Provided for a seven year extension upon the same terms and restrictions applicable to extensions of other patents.

The Act of July 7, 1870

The consolidated Patent Act of July 8, 1870, 16 Stat. at Large, 198 repealed and superseded the previous patent laws. Sections 71-76 inclusive, apply to design patents. The subject matter for which design patents could be granted remained essentially the same as under the act of 1861, except that "the printing of woolen, silk, cotton or other fabrics" specified in the Act of 1842, but omitted from the 1861 law, was restored. Other subject matter was defined in more concise language and included everything specified in the 1842 statute. On June 22, 1874, the laws relating to design patents became Sections 4929 to 4934 of the Revised Statutes. These sections are substantially a reprint, in almost the same phraseology, of the Act of 1870. On February 4, 1887, (24 Stat. at Large) the law relating to suits for infringements of patents was supplemented by an act providing the arbitrary minimum amount of $250 as damages for infringement of design patents where for want or failure of proof of actual profits received, nominal damages only could have been recovered.

The presence of the word "useful" in the Statutes and particularly in the 1870 act gave rise to conflicting decisions as to its meaning.

In his treatise on design patents published in 1874, former Commissioner of Patents, Wm. E. Simonds, observed that:

> with the exception of busts, statues, bas-reliefs and compositions in alto or basso relievo, all the things named in the law as constituting patentable subject matter are things designed to give ornamental or pleasing appearance to articles useful in themselves, and irrespective of their artistic excellence, and it is not unreasonable to assume that it was this application of aesthetic ideas or principles to the adornment of useful articles, moving in the minds of the legislators who drafted the laws of 1842 and 1861, that induced them to insert the word "useful" into the text when they named as patentable subject matter "any new and useful pattern, print or picture, to be either worked on, or printed, or painted, or cast, or otherwise fixed on any article of manufacture;" and in the mind of the legislator who drafted the law of 1870, when he named as patentable subject matter "any new, useful, and original shape or configuration of any article of manufacture." All inventions or discoveries having utility as their basis were fully protected by laws other than those relating to designs, and it is not reasonable to suppose that the originators of the design patent acts intended to offer another method of protection to things already protected. It would then seem tolerably plain that the legislators who originated the design patent acts had in mind, the making use of the word "useful," designs for ornament applied to articles capable of serving a useful purpose, and in this sense an ornamental pattern, print, picture, shape, or configuration may be properly termed "useful" in the common acceptation of that word.

In the case of *Ex Parte Parkinson*, 1871 C. D. 251, Commissioner Leggett held that the term "useful" in connection with designs "means adaptation to producing pleasant emotions." This seems to give "useful" a rather uncommon definition and in the opinion of former Commissioner Simonds it appeared

> more reasonable that the draftsman of the law meant an ornamental pattern, print, picture, shape or configuration applied to a useful article.

In *Ex Parte Crane,* 1869 C. D. 7, *Ex Parte Solomon,* 1869 C. D. 56, *Ex Parte Bartholomew,* 1869 C. D. 103 and *Ex Parte Fenno,* 1871 C. D. 52 it was held that utility may form the basis for the grant of a design patent. To the contrary is *Ex Parte Parkinson, supra,* and *Ex Parte Seaman,* 4 O. G. 691.

At about this time the Supreme Court of the United States in *Gorham Mfg. Co.* v. *White,* 2 O. G. 592, 81 U. S. 511, in commenting on the design patent acts said:

> The Acts of Congress which authorize the grant of patents for designs were plainly intended to give encouragement to the decorative arts. They contemplate not so much utility as appearance, and that not an abstract impression or picture, but an aspect given to those objects mentioned in the acts. It is a new and original design for a manufacture, whether of metal or other material; a new and original design for a bust, statue, bas-relief, or composition in alto or basso relievo; a new or original impression or ornament to be placed on any article of manufacture; a new and original design for the printing of woolen, silk, cotton, or other fabrics; a new and useful pattern, print or picture, to be either worked into or on any article of manufacture; or a new original shape or configuration of any article of manufacture. It is one or all of these that the law has in view; and the thing invented or produced, for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture or article to which it may be applied or to which it gives form. The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the public demand for it, and may be a meritorious service to the public. * * * The appearance may be the result of peculiarity of configuration, or of ornament alone, or of both conjointly; but in whatever way produced it is the new thing or product which the patent law regards.

The conflict of opinion as to what was patentable subject matter under the design statutes ranged all the way from Commissioner Leggett's opinion in the Parkinson case where he stated:

> By "article of manufacture," as used in this section (Act of July 8, 1870, Sec. 2), the legislature evidently meant *only* ornamental articles, articles used simply for decorating. (Italics added)

to Commissioner Fisher's statement in *Ex parte Bartholomew, supra,* where he commented on a ruling by the Examiner-in-Chief that the acts of 1842 and 1861 were intended to cover articles making "pretensions to artistic excellence, exclusively" as follows:

> In thus denying that a new "shape or configuration" of an article, whereby utility or convenience is promoted, is the proper subject of a patent, under the acts referred to the office would seem to have involved itself in the absurdity that *if a design is useless it may be patented, whereas if it be useful it is entitled to no protection.* (Italics added).

No definitive decisions have been found in which an interpretation of the words "invented or produced" is given. The decisions generally hold that "invention" is required. Some recognize that a relatively low order of originality is sufficient. *Wooster* v. *Crane,* 2 Fish. P. C. 583, *Untermeyer* v. *Freund et al,* 37 Fed. 342; 47 O. G. 527; 1889 C. D. 424, *Smith* v. *Stewart,* 55 Fed. 481. Other decisions take the opposite view and hold that as high degree of invention is required in design cases as in other patents. *Perry* v. *Haskins,* 11 Fed. 1002, *Western Electric Mfg. Co.,* v. *Odell,* 18 Fed. 321, *Ex Parte Williams,* 58 O. G. 803, 1892 C. D. 23.

One decision went so far as to hold that the words "invented and produced" in the 1870 Act meant,

> the exercise of a higher faculty than would have been indicated by invented alone. *Ex parte Weinberg,* 1871 C. D. 244.

The logic of this statement is not apparent, and particularly so since this statement is preceded in the decision by the observation that the introduction of the word "produced," in connection with the word "invention" was merely to relieve the word of the functional significance that had become so intimately associated with it. No decisions have come to the attention of the writer wherein the Weinberg case interpretation of the word "produced" has been followed or commented upon.

In 1893 the Supreme Court of the United States in *Smith et al* v. *Whitman Saddle Company,* 63 O. G. 912; 1893 C. D. 324; 148 U. S. 674, passed upon the question

of design patentability. The Court quoted the language of Justice Brown in *Northrup* v. *Adams* (12 O. G. 430, 1877 C. D. 322) where he compared the patentability of design and mechanical inventions as follows:

> To entitle a party to the benefit of the act, in either case, there must be originality, and the exercise of the inventive faculty. In the one, there must be novelty and utility; in the other originality and beauty. Mere mechanical skill is insufficient. There must be something akin to genius—an effort of the brain as well as the hand. The adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new role, is not invention.

Mr. Justice Fuller speaking for the Court then defined design invention in the following language:

> The exercise of the inventive or originative faculty is required, and a person cannot be permitted to select an existing form and simply put it to a new use any more than he can be permitted to take a patent for the mere double use of a machine. If, however, the selection and adaptation of an existing form is more than the exercise of the imitative faculty and the result is in effect a new creation the design may be patentable.

However, many subsequent decisions holding invention in design and mechanical patents to be one and the same thing overlook the distinguishing features of the *Gorham,* and *Smith et al* decisions. "Originality and beauty" obviously are distinguishable from " novelty and utility." What is "more than the imitative faculty" and a mere "adaptation of old forms and devices" can be determined on the basis of the examination of the prior art. However, individual courts set their own standards in cases that come before them for decision and without too much regard for Patent Office actions in issuing the grants.

The Act of 1902

In 1882 the Supreme Court of the United States in *Lehnbeuter et al* v. *Holthaus et al,* 21 O. G. 1783, 1882 C. D. 263, 12 Fed. 221, 105 U. S. 94, held that for a design to be patentable, "It is sufficient if it is new and useful."

This decision plus the conflicting rulings on what constituted patentable subject matter under the Act of 1870 prompted Commissioner of Patents F. I. Allen, in 1902 to recommend amendment of the existing statute, section 4929 R. S. In his recommendation Commissioner Allen stated:

> Section 4929, as it stands at the present time, contains the specific statement of a number of different subjects to which designs may be applied. The proposed statute removes all this specific statement, for the reason that as the statute stands it does not include all the subjects which ought to be included, and from the inclusion of a portion it suggests the noninclusion of those not mentioned. It is to be noticed, however, that in spite of this enumeration of subjects of designs the act of February 4, 1887, which furnishes a remedy for infringement of design patents, gives this remedy against those who, without the consent of the owner, apply the design secured to "any article of manufacture," or to those who sell or expose for sale "any article of manufacture to which such design" shall be applied. Therefore, if the remedy is in terms applicable to any article of manufacture, the enabling act means nothing more by enumeration of a lot of different subjects, and they have been for this account removed from the proposed statute.

Elimination of the word "useful" was proposed because of the conflicting interpretation placed upon it by the courts. The Lehnbeuter case holding a design patentable if "new and useful" and the United States Circuit Court of Appeals for the second circuit in *Rowe* v. *Blodgett,* 98 O. G. 1286; 1902 C. D. 583; 112 Fed. 61 holding—

> The term "useful" in relation to design patents means adaptation to producing pleasant emotions.

To overcome this situation it was proposed to substitute the word "artistic" for "useful."

In reporting out the bill (S. 4647) to amend section 4929 R. S., the Committee on Patents suggested and recommended that the word "artistic" be struck out and "ornamental" substituted in lieu thereof. (Senate Report No. 1139, April 15, 1902). In this form the bill was passed.

Accordingly, the present statute authorizing the grant of design patents provides that—

> any person who has invented any new, original, and ornamental design for an article of manufacture, etc.

may obtain a patent therefor. (Section 4929 Revised Statutes, May 9, 1902).

Thus it will be seen that primarily the law was amended to substitute "ornamental" for the word "useful" and to substitute the comprehensive term "article of manufacture" for the previously specified classes of articles. That there was no intent to change the basic meaning of the statute is clear from the statement of Commissioner Allen in *Ex parte Knothe*, 102 O. G. 1294; 1903 C. D. 42, one of the earliest cases to be decided under the new law. In commenting on the previous statute which provided for a design patent upon "any new, useful, and original shape or configuration of any article of manufacture" Commissioner Allen stated:

> The amendment of section 4929 did not change its meaning in this respect, since the substitution of the word "ornamental" for the word "useful" had no further effect than to make clear the proper construction of the statute and to express what was by construction already included in the statute. The word "useful" in the prior statute had given rise to differences of opinion as to the meaning of the law, and some confusion had arisen as to whether functional utility was to be considered in connection with designs. It had finally been settled, however, that designs refer to appearance and not to mechanical utility. (Citing Gorham Mfg. Co. v. White, Ex Parte Parkinson, Western Electric Co. v. Triumph Electric Co., Ex Parte Tournier, and Rowe v. Blodgett).

In commenting further on the purpose of the Act of 1902, Commissioner Allen, in his explanation before the congressional committee, Senate Report No. 1139, *supra*, stated:

> It is thought that if the present bill shall become law the subject of design patents will occupy its proper philosophical position in the field of intellectual production, having upon the one side of it the statute providing protection to mechanical constructions possessing utility of mechanical function, and upon the other

side the copyright law, whereby objects of art are protected, reserving to itself the position of protecting objects of new and artistic quality pertaining however, to commerce, but not justifying their existence upon functional utility. If the design patent does not occupy this position there is no other well defined position for it to take.

It is interesting to note the similarity between the thought embodied in Commissioner Allen's statement and that expressed in Commissioner Ellsworth's proposal for the enactment of the original design law where he said:

It may well be asked if authors can so readily find protection in their labors, and inventors of the mechanical arts so easily secure a patent to reward their efforts why should not discoverers of designs, the labor and expenditure of which may be far greater, have equal privileges afforded them?

This would indicate Commissioner Ellsworth's intention to place design protection in exactly the position specified by Commissioner Allen.

In view of the fact that at the time the Act of 1842 was passed there were already in existence copyright and patent laws, it is difficult to understand the confusion that arose in the interpretation of the law by the courts, in respect to the type of protection afforded by the statute. In his book on "Patents for Designs," Sec. 74, Wm. D. Shoemaker has this to say on the bearing of utility upon ornamentation:

The confusion which has existed in connection with the questions of utility as applied to the design law has arisen from two factors. First, the failure to appreciate that the word (utility) itself has quite distinct and different meanings when applied to the laws governing mechanical patents and when applied to design patents, and secondly, a failure to appreciate that articles may be merely utilitarian in character and, therefore, absolutely devoid of possibility of ornamental characteristics, while other articles may be merely ornamental in character, and devoid of functional utility as it is known in the purely mechanical field, and that between these two classes of articles, there are other articles which may have both utilitarian as well as ornamental characteristics, each in varying degrees.

The immediate effect of the passage of the Act of 1902 was reduction in the number of applications filed for design patents. In 1900 there were filed 2,225 applications and 1,758 patents issued; in 1901 there were 2,361 applications and 1,734 patents. In 1902 the number of applications dropped to 1,170 and issues were reduced to 640; and in 1903, the first full year under the new law, applications received totaled 770 and issues numbered 536.

In commenting on the operation of the Act of 1902 Commissioner Allen, in his annual report for that calendar year stated—

> The operation of the design patent law, which was approved upon the 9th day of May, 1902, has been to decrease by 1,191 the number of applications for design patents, for this law has operated, as it was intended to operate, to make clear the fact that mechanical devices of little importance unaccompanied by the development of new mechanical functions were not to be protected by design patents. These patents are now restricted to those ornamental characteristics of manufactured articles which were intended primarily to be the subject for the application of this law before its employment had been widened beyond its originally intended scope.

That the Act of 1902 apparently continued to have the desired effect of eliminating the issuance of patents for articles whose principal novel features related to mechanical or functional features is evident in a long line of decisions by the office and by the courts. Some of the decisions are *Ex parte Hartshorn,* 1903 C. D. 170, *Ex parte Kern,* 1903 C. D. 292, *Ex parte Bettendorf,* 1907 C. D. 79, *Ex parte Johnson,* 1910 C. D. 192, *Ex parte Beehler,* 1923 C. D. 134, *Ex parte Marsh,* 1924 C. D. 24, *Ex parte McGowen,* 1925 C. D. 39, *Royal Mfg. Co.* v. *Arts Metal Works,* 121 Fed. 128, *Baker* v. *Hughes-Evans Co.,* 270 Fed. 97 (C. C. A.), *Majestic Electric* v. *Westinghouse Electric,* 276 Fed. 676 (C. C. A.), and *North British Rubber Co.* v. *Racine Tire Co.,* 271 Fed. 936 (C. C. A.). However, these cases do not hold a design unpatentable *merely* because the article is functional or utilitarian. On the contrary it is established that a single article may

include both ornamental and useful characteristics, and that both design and mechanical patents may be granted for the same device. *Ex parte Knothe,* 1903 C. D. 42, *Boyle* v. *Russo,* 16 Fed. (2) 666 (C. C. A.), *In re Grigsby,* 5 Fed. (2) 117, 55 App. D. C. 294.

Invention

The basic question of invention in designs was not affected by the change in the law in 1902 and, as has been pointed out above, some courts maintain that a lower order of invention is required and others that the same degree of invention is required in designs as in mechanical patents. The Court of Appeals of the District of Columbia, in reversing the Patent Office, held that a design for an automobile weather shield and glare visor, embodying features which constitute a distinctive characteristic of the article, which is novel, attractive, ornamental, and a distinct departure from the former construction, and which marks an advance in the style of such articles and meets great demand, is patentable. *In re Grigsby, supra.* In this same decision the court also held that the presence of certain structural improvements does not militate against allowance. The office had rejected the application as unpatentable because it was difficult to distinguish applicant's shield from a mechanical patent reference.

In reversing the Examiners-in-Chief in an application for a font of type, Commissioner Moore in *Ex parte Smith,* 1907 C. D. 287, said—

> Where, as in the art of printing, the field of inventive design is limited to modifications of details in predetermined forms of letters and an inventor has succeeded in producing a new font—it is believed that he should be granted the right to a lawful monopoly of his labors for the limited time provided by the design statutes.

To the same effect is *Whiting Mfg. Co.* v. *Alvin Silver Co., Inc.,* 283 Fed. 75 (C. C. A.) which held that the test of invention in designs is the same as in mechanical patents, and invention *depends on the state of the art and*

the room left for invention when the application was filed. This court also held that a design patent should be construed so as to uphold, and not destroy.

The Supreme Court of the United States has not passed upon any phase of the Act of 1902, hence, the leading decisions on infringement and invention in design cases still are *Gorham Mfg. Co.* v. *White* and *Smith et al* v. *Whitman Saddle Co., supra.* In the latter case, although the high court held no infringement and reversed the lower court in this respect, it did not disturb the lower court's definition of invention which was stated in the following terms:

> A mechanic may take the legs of one stove, and the cap of another, and the door of another, and makes a new design which has no element of invention; but it does not follow that the result of the thought of the mechanic who has fused together two diverse shapes, which were made upon different principles, so that new lines and curves and a harmonious and novel whole are produced, which possesses a new grace and which has a utility resultant from the new shape, exhibits no invention.

Ornamentation

The question of what is an ornamental article of manufacture within the meaning of the statute has been the subject of almost as much discussion by the courts under the Act of 1902 as was the interpretation of the word "useful" in the Act of 1870.

The term "ornamental" as used in the design statute indicates an article produced for the purpose of giving it a pleasing appearance to enhance its sale. This appearance may be due to surface design, configuration, or a combination of these elements. *Whiting Mfg. Co.* v. *Alvin Silver Co., Inc.,* 314 O. G. 379, 1923 C. D. 358, 283 Fed. 75 (C. C. A.). The Court of Appeals of the District of Columbia in the decision of *In re Stimpson,* 369 O. G. 731; 1928 C. D. 90; 24 Fed. (2) 1012 stated:

> It is not necessary that the design contemplated by section 4929 should be a work of the fine arts, but it is necessary that the design should be new and original, and either embellished or adorned or distinguished by its grace or symmetry of form.

That it is not necessary for an article covered by design patent protection to be a work of art or used merely for decorative purposes also is well established by other decisions. For example, an Insulator Body was held valid and infringed in *Cline* v. *Horton,* 274 Fed. 728. A Latch Case also was held valid and infringed in *Grand Rapids Refrigerator Co.* v. *Young,* 268 Fed. 986 (C. C. A.). In *Friedley-Voshordt* v. *Reliance Spinning Co.* 241 O. G. 913; 1917 C. D. 103; 238 Fed. 800, a Shower Pan for Lighting Fixtures was declared valid and infringed. A Lamp Post was held valid but not infringed in *Grelle* v. *City of Eugene,* 221 Fed. 68; 137 C. C. A. 18. In *Rousso* v. *Boyle,* 2 F. (2) 299, *Boyle* v. *Rousso,* 16 F. (2) 666 (C. C. A.) and *Rousso* v. *Elco Towel Cabinet Co.* 28 Fed. (2) 300, Design patent 42,398 for a Towel Cabinet was held valid and infringed. Other patents on diverse articles which have been held valid by the courts include a Radiator, a Reflector, a Hatband, a Font of Type, a Neck Scarf, a Dish, a Border Section, a Spoon, Fork or similar article, a Clothes Brush, a Lamp Shade, an Ink Stand, a Knitted Necktie, a Doll (infringed).

In a decision in which two vexing problems of the design law were discussed, i.e., "What is an article of manufacture?" and "What is ornamental?" the Court of Customs and Patent Appeals discussed at length these basic issues. The decision, *In re Koehring,* 393 O. G. 520, 1930 C. D. 130, 37 F. (2) 421 involved an application for a concrete mixer truck body and frame which was held to be patentable, reversing the Office.

As to what is an article of manufacture and what is ornamental, the court stated:

> Upon the proposition as to what is "an article of manufacture," within the meaning of the design law, there have been many decisions of the Patent Office and the courts, some of which are apparently in conflict, but it is readily observable that it has become the settled law that tools and mechanisms which are patentable because of their utilitarian qualities may also be the subject matter for design patents if they possess certain qualities which the law requires.

In our view of the case, the beauty and ornamentation requisite in design patents is not confined to such as may be found in the "aesthetic or fine arts." It is not reasonable to presume that Congress, in basing a patent right upon the ornamentation or beauty of a tool or mechanical device, intended that such beauty and ornamentation should be limited to such as is found in paintings, sculpture, and artistic objects, and which excites the aesthetic sense of artists alone.

In declaring that by enactment of the design patent law, Congress expressed a desire to promote more beauty, grace, and ornamentation in things used, observed, seen, and enjoyed by our people, the courts have not omitted on frequent occasions to mention the fact that such ornamentation as was intended was an element in the salability of the article. *Franklin Knitting Mills, Inc.* v. *Gropper,* 15 F (2) 375 (C. C. A.).

Applicant's design of a truck body and frame for a concrete mixer shows the frame to be so designed as to place the different elements of the whole machine, including the hood, gas tank, mixer, etc., into a more symmetrical and compact whole than was known in the prior art. Aside from this arrangement, which removes much of the unsightliness from the machine, the covering of the motor is made to resemble, in appearance, an automobile hood, and the angular bars and framework of the same are given a rounded or oval appearance. By the plan of assembly of the more or less rounded hood, round gas tank, and rounded frame covers into a compact and more symmetrical whole, an article, possessing more grace and pleasing appearance than existed in the prior art, has been produced. This effect in the design as a whole is ornamental and inventive.

Since it is clear that Congress meant the design patent law to apply to tools and mechanisms of utilitarian character, it follows, we think, that it had in mind the elimination of much of the unsightly repulsiveness that characterizes many machines and mechanical devices which have a tendency to depress rather than excite the aesthetic sense. In this mechanical age, when machines, engines, and various kinds of mechanisms are transported on our public highways and streets and move by their own momentum from place to place, it is certainly not undesirable that some of the unsightliness—and, as frequently occurs, frightfulness of such contrivances be eliminated if possible. To conclude that Congress, in the enactment of the design patent law, had such a result in contemplation is not unreasonable, since such a purpose is in entire harmony with the declared aim of the legislature.

Subsequent to the *Koehring* case the U. S. Court of Customs and Patent Appeals had other occasions to consider the Design Patent Statute and interpret the questions of "ornamentation" and "invention" in reviewing appeals from decisions of the Patent Office.

In re Hormel 420 O. G. 293; 1932 C. D. 311; 56 F. (2d) 672 held a "Container" ornamental and inventive.

In re Muldoon 421 O. G. 8; 1932 C. D. 357; 56 F. (2d) 894, held an "Electric Light Socket" ornamental and inventive.

In re Elliott 446 O. G. 7; 1934 C. D. 340; 69 F. (2d) 658 held a "Show Case for Display Automobile Accessories," ornamental and inventive.

In re Harshberger 440 O. G. 570; 1934 C. D. 126; 67 F. (2d) 925 held "Roofing" ornamental and inventive.

In re Lobl 455 O. G. 746, 1935 C. D. 319; 75 F. (2d) 219 held a "Nasal Inhaler" ornamental and inventive.

In re Horne 472 O. G. 500; 1936 C. D. 542; 83 F. (2d) 692 held "A Child's Climbing Structure," ornamental and inventive.

Importance of Appearance

The *Koehring* decision takes the most realistic approach to the purpose of the design law of any known recent judicial interpretation of the act. It is almost prophetic in nature since it was about this time (1930) that the "eye appeal" of every conceivable type of manufactured article was beginning to be emphasized.

Since that time the public has been extremely conscious of "design" and "appearance" in all manner of things in everyday life. One has only to witness the evolution of the kitchen stove from a crude and cumbersome eyesore to the beautiful modern range which adorns the "up-to-date" kitchen. In the early days of automobile manufacture, little attention was given to the appearance of the fenders, instrument panels or radiators. Today the beauty of these features, irrespective of their mechanical efficiency, is a dominant selling point. The furnace, formerly relegated to an obscure corner of a

dark cellar, has been redesigned and now occupies a conspicuous position in the basement recreation room. The development of designs for bathroom appliances, refrigerator and radio cabinets, display stands, tools, lawn mowers, packing and storing vessels, kitchenware, and countless other articles testifies to the importance placed upon appearance in everyday articles by manufacturers and purchasers. In the field of wearing apparel and textiles in general, appearance has always been a major sales factor.

This public demand for articles having attractive appearances has given rise to substantially a new profession known as "industrial designers." Among the outstanding men in this field are Norman Bel Geddes, Walter Teague, Henry Dreyfuss, Raymond Patten and Raymond Loewy. These men, to be eminently successful, must be a combination artist, engineer and sales manager. They design anything from a steam or an electric locomotive to a can opener. Functionally, these articles may be no more efficient than dozens of old similar articles, yet, almost invariably, the public is willing to pay a higher price for them and the volume of sales due to appearance alone, is far ahead of the older familiar forms.

To introduce a redesigned device, no matter how humble it may be or the price it will bring, requires a substantial financial outlay on the part of the manufacturer for new dies, tools, sales promotions, etc. An outstanding example of the cost of such a change in design is that of the change-over by The Ford Motor Company from the "Model T" car to the "Model A," which involved an expenditure of $43,000,000.00. True, there were major mechanical changes involved, but it is significant to note that there also was a radical change in body design.

The economic value of a new design adequately protected by a limited legal monopoly is not to be underestimated. Nor is the benefit to the public at large to be ignored. Industrial designers have, for example, brought the unsightly early type washing machine from the back

porch and basement to a prominent place in the modern kitchen or laundry room. While these new machines may also be mechanically more efficient, that factor alone has not determined their value to the housewife. The important element of appearance has played its part in this evolution.

It is little wonder then that protection afforded by the design laws is eagerly sought for a wide variety of articles by manufacturers and designers.

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