

諸外国における意匠の登録要件と効力範囲

米国

(a)新規性 (Novelty)

出願された意匠が

- ・ 合衆国内において知られた、又は用いられた意匠
- ・ 合衆国ないし外国において特許された意匠
- ・ 合衆国ないし外国において刊行物に記載された意匠

とほぼ同一¹である場合には、新規性の要件によって拒絶される。新規性を判断する際は、出願された意匠と引用される意匠について、双方の物品分野が関連する必要はない²。判断主体は平均的な看者 (average observer) であるとされている³。

(b)非自明性 (Nonobviousness)

意匠に新規性が認められても、先行意匠との差異が当業者にとって

¹ In re Bartlett, 300 F.2d 942, 944, 133 USPQ 204,206(CCPA 1962) 「 The degree of difference from the prior art required to establish novelty occurs when the average observer takes the new design for a different, and not a modified, already-existing design. 」
Hupp v. Siroflex of America Inc., 122 F.3d 1456, 43 USPQ2d 1887 (Fed. Cir. 1997) 「 the reference must be identical in all material respects. 」

² In re Glavas, 230 F.2d 447, 450, 109USPQ 50, 52(CCPA 1956) 「 Accordingly, so far as anticipation by a single prior art disclosure is concerned, there can be no question as to nonanalogous art in design cases. 」
Hupp v. Siroflex of America Inc., 122 F.3d 1456, 43 USPQ2d 1887 (Fed. Cir. 1997) 「 The publication must show the same subject matter as that of the patent, and must be identical in all material respects. 」
US Patent & Trademark Office, Manual of Patent Examining Procedure § 1504.02 「 The average observer test does not require that the claimed design and the prior art be form analogous arts when evaluating novelty. In re Glavas, Insofar as the average observer under 35 USC 102 is not charged with knowledge of any art, the issue of analogousness of prior art need not be raised. This distinguishes 35 USC 102 from 35USC 103(a) which requires determination of whether the claimed design would have been obvious to a person of ordinary skill in the art. 」

³ In re Bartlett, 300 F.2d 942, 944, 133 USPQ 204,206(CCPA 1962) 「 The average observer, in our judgment, would inevitably take appellants'design to be a different design from that shown in sweet's catalog and by applicants'tile respectively, are not only easily distinguished by the practiced eye but they make different overall impressions so that purchasers might very well have preferences for one over the other. In short, they do not look alike and the existence of statutory novelty is beyond question. 」
Hupp v. Siroflex of America Inc., 122 F.3d 1456, 43 USPQ2d 1887 (Fed. Cir. 1997) 「 the ceramic floor tile advertised in the Houston newspaper is not identical to Hupp's mold for a concrete walkway, and the record shows no other publication on which the jury might have relied. 」
US Patent & Trademark Office, Manual of Patent Examining Procedure § 1504.02 「 The standard for determining novelty under 35 USC 102 was set forth by the court In re Bartlett 」

自明である場合は非自明性の要件で拒絶される。

非自明性を判断する際は、出願された意匠と引用される意匠について、双方の物品分野が関連する必要がある⁴。判断主体は、通常の技術をもった者（The person of ordinary skill in the art）であり、その分野の通常のデザイナー（An ordinary designer of articles of the type at issue）とされている⁵。

複数の意匠に基づき自明性を判断することについては、最近の判例では消極的である。引例となる意匠は、出願に係る意匠の構成態様の大部分を有していること（Primary reference）が必要であり⁶、観念的なつながりより実際の外観に基づいて決定される⁷。差異点については通常のデザイナーにとって当たり前である⁸か、或いは、関連する物品分野において第2の引例を補助的に付加することによって埋めることができる⁹かによって評価する。

出願人は出願日から3ヶ月以内又は実体審査に関する特許庁からの通知前に、情報開示陳述書（An information disclosure statement）を提出しなければならない。1992年に米国特許商標庁は規則1.97条

⁴ Hupp v. Siroflex of America Inc., 122 F.3d 1456, 43 USPQ2d 1887 (Fed. Cir. 1997) 「The scope of the prior art is not the universe of abstract design and artistic creativity, but designs of the same article of manufacture or of articles sufficiently similar that a person of ordinary skill would look to such articles for their designs.」

⁵ In re Nalbandian, 661 F.2d 1214, 211 USPQ 782 (CCPA 1981) 「We believe it is appropriate to close this schism. Accordingly, with this case we hold that the test of Laverne will no longer be followed. In design cases we will consider the fictitious person identified in s 103 as one of ordinary skill in the art to be the designer of ordinary capability who designs articles of the type presented in the application. This approach is consistent with Graham v. John Deere Co., 383 US 1.86 S.Ct. 684, 15 L.Ed.2d 545(1966), which requires that the level of ordinary skill in the pertinent art be determined.」
In re Borden

⁶ In re Rosen, 673 F.2d 388, 213 USPQ 347 「There must be a reference, a something in existence, the design characteristics of which are basically the same as the claimed design in order to support a holding of obviousness」

⁷ In re Harvey, 12 F.3d 1061, 29 USPQ2d 1206 (Fed.Cir.1993) 「The Board erroneously applied the obviousness standard to the ornamental designs at issue by relying upon the prior art Harvey vase as a design concept rather than as the disclosure of certain visual ornamental features.」

⁸ In re Nalbandian, 661 F.2d 1214, 211 USPQ 782 (CCPA 1981)

⁹ US Patent & Trademark Office, Manual of Patent Examining Procedure § 1504.03 「When a modification to a basic reference involves a change in configuration, both the basic and secondary references must be from analogous arts. In re Graves, The reason for this is two-fold. First, a designer of ordinary skill is only changed with knowledge of art related to that of the claimed design. Second, the ornamental features of the references must be closely related in order for a designer of ordinary skill to have been motivated to have modified one in view of the other.」

を改正して提出を義務づけている。情報開示陳述書には、特許、刊行物その他の情報を列挙しなければならない。

(c)侵害の判断

侵害訴訟の際には、第 1 に、両デザインの全体的な印象が、通常の看者（An ordinary observer）である購買者（A purchaser）が、一方を他方のデザインと間違えて購入してしまうほど近似しており、実質的に同一と言えるかが判断される（Gorham test）¹⁰。

第 2 に、特許されたデザインのうち、先行意匠との比較において新規性のある部分がすべて両デザインに共通しているかが判断される（Point of novelty test）¹¹。この 2 つのテストを満たす場合に侵害がありと判断される。

最近の判例の傾向として、意匠特許で保護される権利範囲は、侵害品がほぼ同一（almost identical）である場合に限定されている。効力範囲が狭く解釈されている理由としては、意匠特許は文章ではなく図面に基づき解釈されるのでほとんど範囲がないこと¹²、意匠特許は製品の形状の装飾的な側面を保護するものであり、技術的な機能を保護することにならないように配慮されていること¹³、クレームされているものの要素毎に比較対照して共通事項や差異点が認定されること¹⁴、マークマン判決¹⁵以後、クレームの解釈は裁判所によって行われることとなり詳細な特定がなされる傾向にあること等があげられる。

欧州

欧州共同体意匠規則における意匠登録の要件は、登録共同体意匠も非登録共同体意匠も同様である。

保護の要件としては、第 1 に、新規（new）であることが必要である（共同体意匠規則第 5 条）。非登録共同体意匠については意匠が公衆に始めて開示された日に、また、登録共同体意匠については出願日に新

¹⁰ Gorham Co. V. White, 81 US 511, 512 (1871) 「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 as observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.

¹¹ Litton systems, Inc., v. Whirlpool corporation 728 F.2d 1423, 221 USPQ 97

¹² In re Mann, 861 F.2d 1581, 8 USPQ2d 2030 (Fed.Cir. 1988)

Berry Sterling Corp. v. Just toys, Inc., 122 F.3d 1396, 43 USPQ2d 1641 (Fed.Cir.1997)

¹³ Oddzon Prods., Inc.v. Just Toys, Inc., 122 F.3d 1396, 43 USPQ2d 1641(Fed.Cir.1997)

¹⁴ Elmer v. ICC Fabricating, Inc., 67 F.3d 1571, 36 USPQ2d 1417 (Fed.Cir.1995)

¹⁵ Markman V. Westview Instruments, Inc., 116 S.Ct. 1384. 38 USPQ2d 1461(1996)

規であることが必要。新規性を喪失するのは、ほとんど同一の意匠に限られる¹⁶。

第2に、独自性(Individual character)を持つことが必要である(共同体意匠規則第6条)。意匠が情報に通じた使用者(Informed user)からみて、すでに存在している意匠とは異なる全体的印象(overall impression)を与えることが必要である。この要件を意匠が満たしているかどうかの判断にあたっては、意匠創作者が当該意匠の創作にあたり享受し得た自由度(degree of freedom)が考慮される。

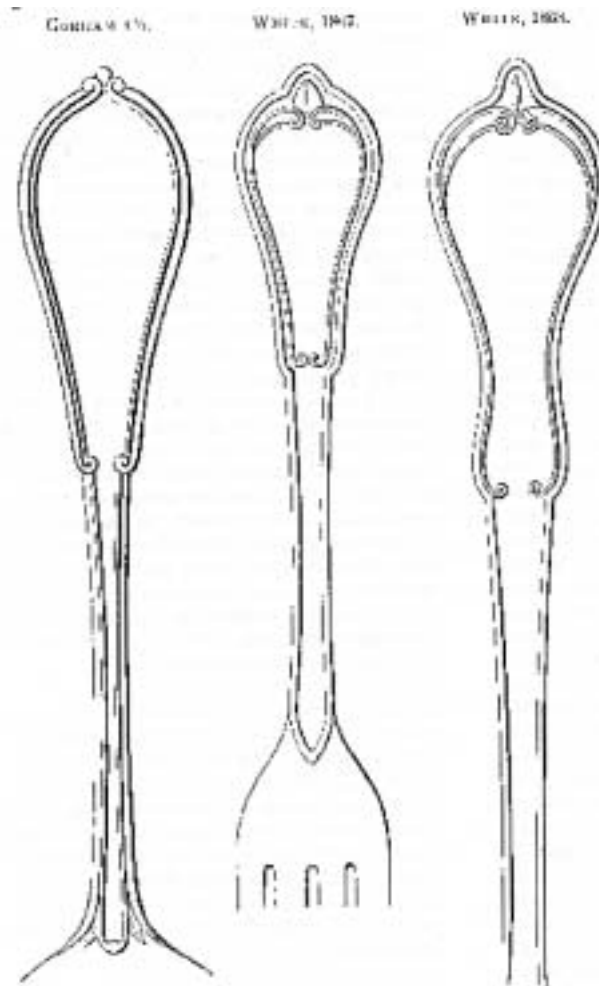
意匠保護の範囲は、情報に通じた使用者にとって異なる全体的印象を与えない意匠を含む(共同体意匠規則第10条)範囲となっている。

出願時に願書に記載された意匠が組み込まれるべき又は適用される製品の表示は、意匠保護の範囲に影響を与えない(共同体意匠規則第36条第2項、第3項)ので、非類似物品まで意匠保護の範囲が及ぶ可能性がある。

¹⁶ 「According to Article 5, novelty is assessed in relation to specific features. A design shall be considered identical to prior art (i.e. not new) if specific features differ only in unimportant details」『European design protection Commentary to Directive and Regulation Proposals』Mario Franzosi Kluwer Law International 1996

米国意匠特許の事例（１）

Gorham Mfg. Co. v. White 81 US (14 Wall) 511 (1872)



ゴーハムの意匠特許（左端）を、ホワイトの実施品（中央及び右端）が侵害したと判断。

古い最高裁判例であるが、現在も意匠権侵害の有無を判断するための判断基準・手法（ゴーハムテスト Gorham Test）となっている。

Gorham & Company patent granted in July, 1861, for new design for handles of tablespoons and forks held infringed.

To constitute infringement of a patent for a design, it is not essential that the appearance should be the same to the eye of an expert. The test of a patent for a design is the eye of an ordinary observer. 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.

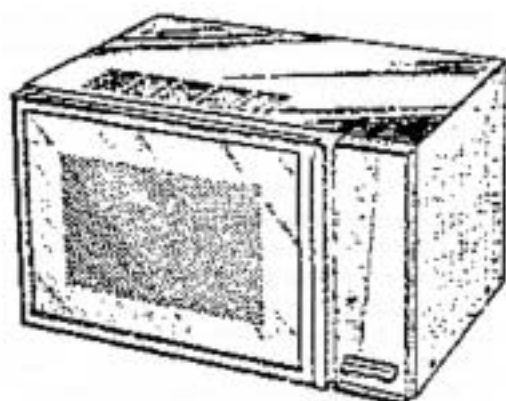
The true test of identity of design must be sameness of appearance; and mere difference of lines in the drawing or sketch, a greater or smaller number of lines, or slight variances in configuration, will not destroy the substantial identity.

The act of congress which authorize the grant of patents for designs contemplate not so much utility as appearance, and that, not an abstract impression or picture, but an aspect given to one of the objects mentioned in the acts. The thing 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 those appearances are produced, but the appearance itself, which attracts attention and calls out favor or dislike. It is the appearance itself, therefore, no matter how caused that is the patentable element.

米国意匠特許の事例 (2)

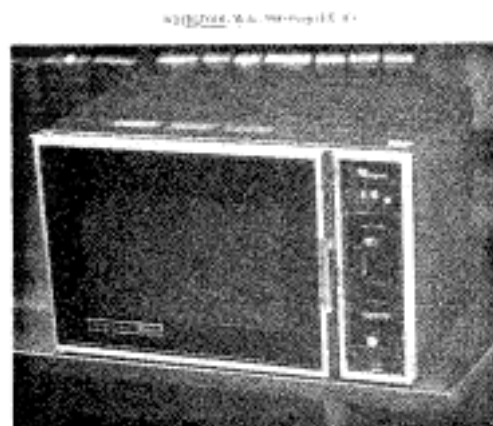
Litton Systems, Inc., v. Whirlpool Corp., 728 F.2d 1423, 1444, 221 USPQ 97, 109 (Fed.Cir.1984)

原告意匠特許 (Litton)



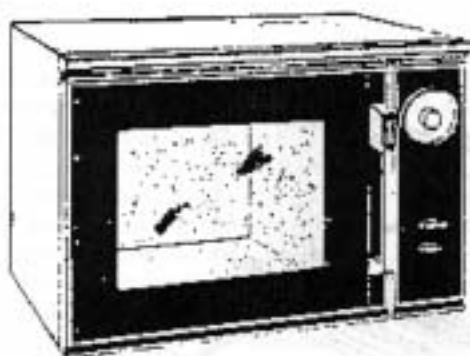
D-226,990
Wolfe, Tapper (5/23/73)
Litton

被告意匠 (Whirlpool)

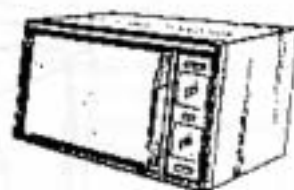


1438

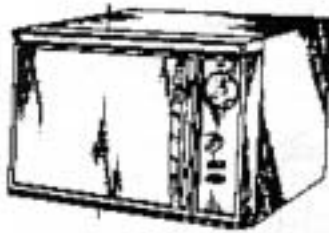
先行意匠



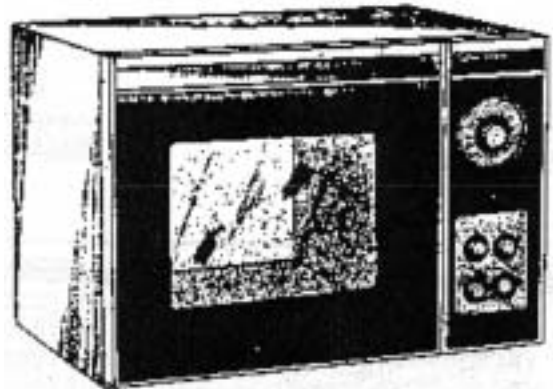
D-228,607
Binzer, Schmitt, Wooding,
Sugunoya and Miyake (10/16/73)
General Electric



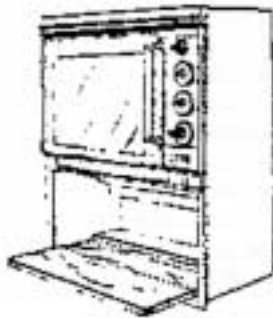
D-228,313
Sugunoya and Miyake
(9/4/73)
Sharp



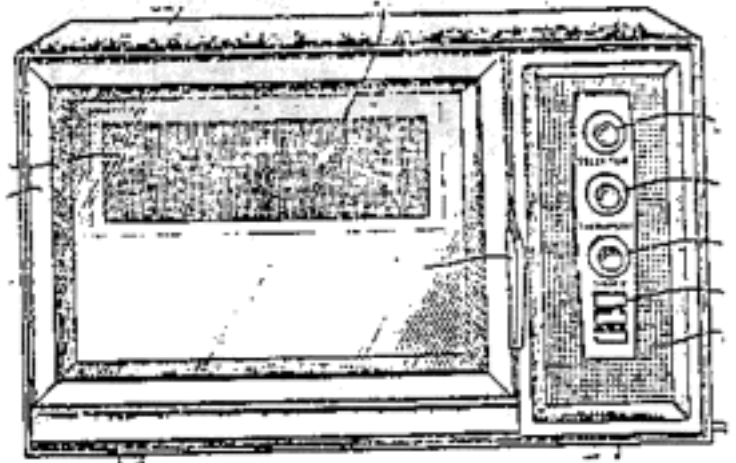
D-225,379
Sugunoya and Miyake
(12/19/72)
Sharp
*1442



D-225,780
Bintzer, Schmitt & Wooding
(1/2/73)
General Electric



D-202,317
Waltman (9/14/65)
Magic Chef



No. 3,321,604
Stecca, Barnes, Dokes, Jarzembaki and Norris
(5/23/67)

意匠特許の効力範囲（侵害の有無）を判断する 2 つめの手法（Point of Novelty Test）を使った代表的な判例。先行意匠との関係で意匠特許が有する新規な箇所（3本のストライプが入っているドアの枠組み、ハンドルがないドア、操作盤の上の解除装置レバー）が被告意匠に含まれていないことから、侵害なしと判断された。

More than one hundred years ago, the Supreme Court established a test for determining infringement of a design patent which, to this day, remains valid. *Gorham Co. v. White*, 81 U.S. (14 Wall.) 511, 20 L. Ed. 731 (1871). This test requires 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 to be the other, the first one patented is infringed by the other.”

For a design patent to be infringed, however, no matter how similar two items look, “the accused device must appropriate the novelty in the patented device which distinguishes it from the prior art.”

That is, even though the court compares two items through the eyes of the ordinary observer, it must nevertheless, to find infringement, attribute their similarity to the novelty which distinguishes the patented device from the prior art. (This “point of novelty” approach applies only to a determination of infringement.

The novelty of the '990 patent consists, in light of our analysis in the previous section on the '990 patent's validity, of the combination on a microwave oven's exterior of a three-stripe door frame, a door without a handle, and a latch release lever on the control panel. The district court expressly found, however, that the Whirlpool design had of none these features.