

# Design Patents and Sui Generis Rights

- Design Patent
- Plant Patent
- Plant Variety Protection
- Mask Work Protection
- Vessel Hull Protection



## Design Patent

Industry & Invention

Eric E. Johnson  
ericejohnson.com



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## **Design patent basics**

- **Term:**
  - 14 years from issuance (pre May 13, 2015 applications)
  - 15 years from issuance (post May 12, 2015 applications)
- Design can include configuration/shape of article, surface ornamentation, or a combination of shape and surface ornamentation.

## **Design patent basics**

- Claimed with a single claim that references the drawings: “The ornamental design for [the article] as shown.”
- Design patent numbers have a “D” prefix.

### **Design patents compared to utility patents**

- Design patent is for an “ornamental design”
- Utility patent is for a “useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof”
- Design patents are much, much easier to get.

### **Design patents: Source of law**

- Like utility patents, design patent are exclusively a creature of federal law.
- 35 U.S.C. §§ 171-173, with §§ 102, 103, 112, and other sections being applicable as well

## Design patents enabling provision at §171

- “Whoever invents any new, original, and ornamental design for an article of manufacture may obtain a patent therefor, subject to the conditions and requirements of this title. The provisions of this title relating to patents for inventions shall apply to patents for designs, except as otherwise provided.”

## Design patents requirements

- novelty ← same as for utility patents
- originality
- nonobviousness ← not much of a limit
- ornamental (not dictated by function)
- on a functional article
- enabling disclosure

## Design patents - claims and infringement

- Design patent claims are essentially the drawings.
- Infringement involves comparing the accused article to the drawings.

### some practice ...

Oren, an industrial designer, has created a new desk lamp. It does not work differently than other desk lamps, but it's very exotic and cool looking. What can Oren likely obtain?

- (a) a utility patent, but not a design patent
- ➔ (b) a design patent, but not a utility patent
- (c) both a design patent and a utility patent
- (d) neither a design patent nor a utility patent



# Plant Patent

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ericejohnson.com



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## Plant patents - basics

- Like utility and design patents, issued by USPTO after an application process
- Covers asexually reproduced plants
- Source of law: Plant Patent Act (1930), 35 U.S.C. §§ 161-164
- Duration: 20 year term of protection from filing of application

### **Plant patent - requirements**

- Asexually reproduced (budding, grafting)
- Plant (including macro fungi, but not bacteria)
- Distinct
- Must be clearly distinguishable from other varieties (color, taste, disease resistance)
- New
- Can be invented or discovered if discovered in a cultivated area
- Description requirement is relaxed compared to utility patents

### **Plant patent - infringement**

- In practicality, an infringing plant must be a vegetative descendant of the patented plant
- Not infringement to sell fruit, flowers, seeds, etc.
- Sports (somatic mutants) are non-infringing of the parent patent and are potentially separately patentable



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# Plant Variety Protection

Eric E. Johnson

ericejohnson.com



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## Plant variety protection - basics

- Protects stable sexually reproducing varieties
- Administered through USDA, not PTO
- Source of law: Plant Variety Protection Act (1970), 7 U.S.C. §§ 2321-2582
- Duration: 20 years generally, 25 years for trees and vines



## **Plant variety protection - requirements**

- Sexually reproducing
- Plant (not bacteria, fungi)
- New
- Distinct
- Uniform
- Stable

## **Plant variety protection - infringement**

- Sexual reproduction and selling of seeds is infringement
- Protects against creation of derivative plant lines also
- An exemption allows farmers to save and plant seeds (otherwise, seed sales are infringing)
- A research exemption allows use for breeding to develop a new variety

some practice ...

Kate discovered a new variety of plant in the rain forest. It is an asexually reproducing variety that creates a valuable pharmaceutical compound. What can be obtained to protect it?

- (a) a plant patent, but not a PVPA certificate
- (b) a PVPA certificate, but not a plant patent
- (c) both a plant patent and a PVPA certificate
- ➔ (d) neither a plant patent nor a PVPA certificate



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## Mask Work Protection

Eric E. Johnson

ericejohnson.com



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### **Mask work protection**

- Protects original mask works for making semi-conductor chips
  - A mask work is a two- or three-dimensional layout of an integrated circuit on a semiconductor chip.
- Source of law: Semiconductor Chip Protection Act (1984), 17 U.S.C. §§ 901-914
- Duration: 10 years

### **Mask work protection**

- Administered through Library of Congress Copyright Office
- Must be registered with the Copyright Office for protection to commence.



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# Vessel Hull Protection

Eric E. Johnson

[ericejohnson.com](http://ericejohnson.com)



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## Vessel hull protection - basics

- Protects vessel hulls, plus superstructure, per later amendment
- Source of law: Vessel Hull Design Protection Act (1998), 17 U.S.C. §§ 1301-1332-914
- Duration: 10 years

## Vessel hull protection - requirements

- Must be embodied in an actual vessel hull. (There is no protection for designs existing only in models, drawings, or representations.)
- Staple or commonplace designs cannot be protected.
- Must be registered with the Copyright Office for protection to commence.
- Made-public bar: An application for registration must be filed no later than two years after the hull was publicly exhibited, or distributed or offered to the public for sale with the design owner's consent.

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Eric E. Johnson  
ericejohnson.com

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