I. INTRODUCTION

The United States Court of Appeals for the Federal Circuit overturned design patent precedent in its en banc decision in *Egyptian Goddess, Inc. v. Swisa Inc.*\(^1\) Prior to *Egyptian Goddess*, courts had been applying a two-prong test to determine design patent infringement. *Egyptian Goddess* eliminated one of those prongs: the point of novelty test.\(^2\) The Federal Circuit in *Egyptian Goddess* instead only focused on one test, the ordinary observer test, to determine design patent infringement.\(^3\) The Federal Circuit not only held the ordinary observer test to be the sole test in determining design patent infringement but also modified this test.\(^4\)

This recent development discusses the rejection of the point of novelty test and the modification of the ordinary observer test in *Egyptian Goddess*.\(^5\) Part II briefly overviews design patent law prior to *Egyptian Goddess*, focusing on the evolution of the two-prong test of design patent infringement. Part III discusses the facts and analysis of *Egyptian Goddess*. Part IV reviews case law post-*Egyptian Goddess* and comments on the effects of *Egyptian Goddess* on design patent infringement law. Part V provides concluding remarks on the future of design patent law post-*Egyptian Goddess*.

II. DESIGN PATENT LAW PRE-*EGYPTIAN GODDESS*

Prior to *Egyptian Goddess*, design patent holders were required to satisfy two separate tests in order to succeed in a design patent infringement claim: the ordinary-observer test and the point of novelty test. This Part discusses the framework of the aforementioned tests.

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\(^*\) J.D., University of Illinois College of Law, 2010; B.A., Political Science and Spanish, University of Illinois at Urbana-Champaign, 2007.

2. Id. at 678.
3. Id.
4. Id.
5. Id. at 672.
A. Ordinary Observer Test

The Supreme Court in *Gorham Co. v. White* established the ordinary observer test. In *Gorham*, the Court held “that if in the eye of an ordinary observer” the accused design and the patented design are “substantially the same” design patent infringement has occurred. The Supreme Court further defined “substantially the same” as a resemblance so similar between the accused design and the patented design that it would “deceive such an observer, inducing him to purchase one supposing it to be the other.” The Court also rejected the contention that an ordinary observer was an expert in design patents. In other words, the accused product must appear the same as the patented product to an ordinary consumer to establish design patent infringement.

The Supreme Court modified the ordinary observer test, twenty years after *Gorham*, in *Smith v. Whitman Saddle Co.* by comparing the accused design not only to the patented design but also to prior art. In *Whitman Saddle*, the Supreme Court was comparing the design of two saddles. The accused saddle was a combination of two known saddles. The back of the accused saddle, or cantle, was substantially similar to a “Jenifer” cantle while the front was substantially similar to a “Granger” saddle. The patented saddle was also a combination of the “Jenifer” cantle and the “Granger” saddle. The only difference between the accused and the patented design was at the front of the saddle. The accused saddle had a “slight curved drop at the rear of the pommel,” which was typical of a Granger saddle. In contrast, the patented saddle had a sharp drop at the rear of the pommel.

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7. *Id.* at 528.
8. *Id.*
9. *Id.* at 527.
11. *Id.* at 675.
12. *Id.* at 680.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 682.
17. *Id.* at 681–82.
Fig. 1 Patented Saddle Design

In performing the ordinary observer test, the Court compared the designs to prior art noting that “there were several hundred styles of saddles or saddle-trees belonging to prior art, and that it was customary for saddlers to vary the shape and appearance of saddle-trees in numerous ways.” The Court believed that the combination of the known cantle and the known saddle, thus, was not patentable. However, since on the patented saddle there was a difference in the design of the pommel, this part of the design was new and material. Therefore, the design was patentable. In contrast to the patented design, the accused design continued the slight curved drop of the “Granger” saddle. The Court held that the difference of the drop of the pommel was “so marked” that an ordinary observer could not mistake the accused saddle with the patented saddle.

The take away point from Whitman, thus, was the comparison of the accused design and the patented design to prior art in determining whether or not the two designs were “substantially similar” in “the eye of the ordinary observer.” As a result, prior art appeared to be a second factor to consider in the ordinary observer analysis.

B. Point of Novelty Test

The Federal Circuit added an additional test to design patent infringement in Litton Systems, Inc. v. Whirlpool Corp.: the point of novelty test. Under

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18. Id. at 677 (citing U.S. Patent No. 10,844 figs.1 & 2 (filed Sept. 2, 1878)).
19. Id. at 681.
20. Id.
21. Id. at 682.
22. Id.
23. Id.
24. Id.
25. See id. at 680–82 (discussing the comparison of the two saddle designs in the context of the ordinary observer).
26. 728 F.2d 1423, 1444 (Fed. Cir. 1984).
the point of novelty test, the patent holder must prove that the accused design "appropriate[s] the novelty in the patented device which distinguishes from the prior art." In other words, under the point of novelty test, the patent holder must show a point of novelty in its design compared to prior art that was appropriated by the accused design. Thus, the patent holder has the burden of proof under the point of novelty test.

For example, in Litton, the Federal Circuit looked to points of novelty in Litton’s patented microwave oven design from the prior art of microwave ovens and conventional ovens to determine whether Whirlpool’s accused design infringed upon the patented design.

![Litton's Patented Design](image.png)

Fig. 2 Litton’s Patented Design

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27. Id.
28. Id.
After comparing the patented design to the prior art, the Federal Circuit noted three points of novelty: “a three-stripe door frame, a door without a handle, and a latch release lever on the control panel.” The Federal Circuit then looked to see if the accused design appropriated these features. The Court found that the accused design had none of these features. Thus, the Federal Circuit held that the accused design did not infringe the patented design.

After Litton, the Federal Circuit subsequently clarified that the ordinary observer and point of novelty tests were distinct tests that both needed to be satisfied in order to prove infringement.

The point of novelty test creates an additional burden on the patent holder to protect his patent. Not only does a patent holder need to prove that the accused design appropriated these features.
cused device is “substantially similar” to the patented device under the ordinary observer test, but also that the patented device is distinguishable from prior art.36

In addition to the point of novelty test being burdensome on the patent holder, the point of novelty test also brought confusion to design patent infringement claims. Confusion arose in situations when a design patent had numerous points of novelty or when the point of novelty in the design patent was the combination of features that had been used in prior art. This confusion led to inconsistency in district court decisions concerning when a feature was considered a point of novelty.

III. EGYPTIAN GODDESS V. SWISA

As mentioned in the previous Part, the point of novelty test resulted in burdens to the patent holder and confusion over design patent infringement claims. The Federal Circuit attempted to resolve this issue in Egyptian Goddess by rejecting the point of novelty test altogether and modifying the ordinary observer test.37 This Part provides background information for the Egyptian Goddess case, and also discusses how the Federal Circuit resolved the negative effects of the point of novelty test in Egyptian Goddess.

A. Background of Egyptian Goddess

Egyptian Goddess, Inc. (“EGI”) claimed design patent infringement against Swisa, Inc. and Dror Swisa (“Swisa”) on its fingernail buffer design.38 EGI’s patented nail buffer design had a hollow, rectangular shape with square cross-sections and raised buffing pads on three of its four sides.39 The accused nail buffer design by Swisa also had a hollow, rectangular shape with square cross-sections, but instead of having raised buffing pads on three of its four sides, the Swisa design had raised buffing pads on all four of its sides.40

36. Id.
39. Id. at *2.
40. Id.
The case was first heard before the United States District Court of the Northern District of Texas on Swisa’s motion for summary judgment against EGI’s claims for design patent infringement. The district court applied both the ordinary observer test and the point of novelty test. EGI claimed that the point of novelty in its patented design, which distinguished it from prior art, was the combination of four elements: an open and hollow body, a square cross section, raised rectangular pads, and exposed corners. However, the district court held that the combination of these elements in the patented design was substantially similar to a nail buffer design from prior art, the Nailco Patent. The Nailco Patent from prior art combined all of these elements, except the square cross section. Instead, the prior art was in the shape of an equilateral triangle. Thus, the district court held that the combination of the elements did not constitute a point of novelty. Instead, the district court held that the point of novelty was the fourth side without a pad, which transformed the nail buffer from a triangle to a square.

43. Egyptian Goddess III, 543 F.3d at 681.
45. Id. at *1–2.
46. Id. at *2.
47. Id.
48. Id.
49. Id.
50. Id.
51. Id.
Then, the district court applied the ordinary observer test to that point of novelty. The district court reasoned that the fourth side with a pad in the accused design was not substantially similar to a fourth side without a pad in the patented design. As a result, the accused design failed the ordinary observer test. The district court granted Swisa’s motion for summary judgment finding no infringement.

EGI appealed the case to the Federal Circuit. The Federal Circuit affirmed the district court’s holding and applied both the point of novelty test and the ordinary observer test. The Federal Circuit held that the combination of the four elements in EGI’s patented design was not a point of novelty since a prior art patent contained all the elements, except the square body. The Federal Circuit further held that the square body was “trivial,” and thus, did not constitute a point of novelty. The Federal Circuit also affirmed the district court’s reasoning that a fourth side with a pad was not substantially similar to a fourth side without a pad, and thus, affirmed the district court’s grant of summary judgment.

The Federal Circuit then granted a rehearing en banc and asked the parties to brief the following issues:

1) Whether the point of novelty test should continue to be used to determine design patent infringement?
2) Whether the “non-trivial advance test” should be adopted to qualify a design feature as a point of novelty?
3) How to administer the point of novelty test?
4) Whether formal claim construction should be performed for design patent claims so that the district court will issue a detailed verbal description of the claimed design?

In regards to the construction question, the Federal Circuit in its en banc decision held that it was within the court’s discretion whether or not to issue a detailed verbal description of the patented design. Most importantly, the Federal Circuit held that “the ‘ordinary observer’ test should be the sole test for determining whether a design patent has been infringed.” Thus, the Federal Circuit rejected the point of novelty test and precluded the remaining questions of administering the point of novelty test.

The Federal Circuit also modified the ordinary observer test by qualifying

52. Id.
53. Id.
54. Id.
55. Id.
56. Egyptian Goddess, Inc. v. Swisa, Inc. (Egyptian Goddess II), 498 F.3d 1354, 1355 (Fed. Cir. 2007).
57. Id. at 1356–59.
58. Id. at 1358.
59. Id.
60. Id. at 1358–59.
62. Id. at 679.
63. Id. at 678.
64. Id.
the “ordinary observer” as one who is “familiar with the prior art.”\textsuperscript{65} The Federal Circuit’s reasoning to its rejection of the point of novelty test is discussed in further detail in the following section. EGI appealed the Federal Circuit’s holding to the Supreme Court, but the Supreme Court denied petition of certiorari for \textit{Egyptian Goddess}.\textsuperscript{66}

\textbf{B. Federal Circuit’s Analysis}

As mentioned in the previous section, the Federal Circuit rejected the point of novelty test and instead modified the ordinary observer test to be “whether an ordinary observer, familiar with the prior art, would be deceived into thinking that the accused design was the same as the patented design.”\textsuperscript{67} In arriving at this conclusion, the Federal Circuit noted several reasons why the point of novelty test should be rejected.

First, the Federal Circuit asserted that the point of novelty test was difficult to apply in complex design infringement cases, especially when a patented design had several different features that could be points of novelty.\textsuperscript{68} In these circumstances, the court would lose focus.\textsuperscript{69} Instead of determining whether or not the accused design infringed the overall patented design, the court would debate whether or not the accused design appropriated a feature of the patented design.\textsuperscript{70} The Federal Circuit then held that the ordinary observer test would prevent this confusion as the focus would be on the overall appearance of the patented and accused designs.\textsuperscript{71} Thus, the focus would not be on single features of the designs but instead on whether or not the accused design was “deceptively similar” overall to the patented design.\textsuperscript{72}

Second, the Federal Circuit noted another area of confusion that resulted from the point of novelty test: the combination of features from prior art.\textsuperscript{73} Confusion arose over whether or not the combination of features constituted a point of novelty.\textsuperscript{74} Again, the Federal Circuit held that the ordinary observer test would avoid this confusion.\textsuperscript{75} The Federal Circuit asserted that because the focus of the ordinary observer test was on the overall appearance of the accused and patented design, the Court did not have to decide whether or not a combination of features per se resulted in infringement.\textsuperscript{76} Instead, if the patented design’s combination of features appeared substantially similar to the accused design, the court would find infringement.\textsuperscript{77} However, if the patented
design’s combination of features was not substantially similar to the accused design, no infringement would be found.\(^\text{78}\)

Third, the Federal Circuit held that the point of novelty test presented “a risk of assigning exaggerated importance” to a small difference between the accused and patented designs.\(^\text{79}\) This small difference could constitute a point of novelty under the point of novelty test, even though the accused and patented designs were substantially similar.\(^\text{80}\) Again, the Federal Circuit held that under the ordinary observer test the focus would be on the overall appearance of the designs, not trivial aspects of the design.\(^\text{81}\)

In addition to rejecting the point of novelty test, the Federal Circuit also modified the ordinary observer test. Previously, an ordinary observer was not an expert but an ordinary purchaser of the item in dispute.\(^\text{82}\) Now, the ordinary observer is an ordinary purchaser “familiar with the prior art.”\(^\text{83}\) Furthermore, the Federal Circuit shifted the burden of comparing the prior art to the patented design from the patentee to the accused infringer as a defense to infringement.\(^\text{84}\) Previously, under the point of novelty test, the patent holder had the burden to distinguish his patented design from the prior art in addition to having the burden to prove his patented design was substantially similar to the accused design.\(^\text{85}\) Now, under the modified ordinary observer test, the patentee only has the burden to prove the accused design is substantially similar to the patented design, and the accused infringer can raise the prior art as a defense and thus has the burden to produce the prior art.\(^\text{86}\)

Also, the Federal Circuit commented on the application of the modified ordinary observer test. First, the Federal Circuit briefly mentioned a three-way visual comparison that was discussed in the amici briefs: “Several of the amici make essentially the same point, referring to the proper approach as calling for a three-way visual comparison between the patented design, the accused design, and the closest prior art.”\(^\text{87}\)

After noting this three-way visual comparison, the Federal Circuit later in its opinion appeared to make a distinction between when to use prior art for comparison and when it is not necessary:

In some instances, the claimed design and the accused design will be sufficiently distinct that it will be clear without more that the patentee has not met its burden of proving the two designs would appear “substantially the same” to the ordinary observer . . . In other instances, when the claimed and accused designs are not plainly dissimilar, resolution of the question whether the ordinary observer would consider

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78. Id.
79. Id. at 677.
80. Id.
81. Id.
82. Gorham Co. v. White, 81 U.S. 511, 528 (1872).
83. Egyptian Goddess III, 543 F.3d at 672.
84. Id. at 678–79.
86. Egyptian Goddess III, 543 F.3d at 678–79.
87. Id. at 672.
the two designs to be substantially the same will benefit from a comparison of the claimed and accused designs with the prior art, as in many of the cases discussed above and in the case at bar.\textsuperscript{88}

According to the Federal Circuit opinion it appeared that when the accused design and patented design are “sufficiently distinct,” the court will find no design patent infringement, and the court will not need to compare the two designs to prior art.\textsuperscript{89} In contrast, if the two designs are not “plainly dissimilar,” then the court will then compare the two designs to the prior art.\textsuperscript{90}

These two comments on the application of the modified ordinary observer have been noted by district courts.\textsuperscript{91} The district courts’ attention to these comments is discussed further in the subsequent Part.

In applying the modified ordinary observer test in \textit{Egyptian Goddess}, the Federal Circuit compared four nail buffers: the accused Swisa buffer, the patented EGI buffer, and two prior art buffers, the Nailco buffer and the Falley Buffer.\textsuperscript{92} The court then turned to the expert testimony.\textsuperscript{93} According to EGI’s expert, the presence of a hollow tube, square cross section, rectangular length, and raised pads on the sides of the buffer on both the Swisa and the EGI designs would “confuse an ordinary observer into purchasing the accused buffer thinking it to be the patented buffer design.”\textsuperscript{94} The EGI expert also stated that the presence of an additional buffer pad did not “greatly alter” the appearance of the Swisa design from the EGI design.\textsuperscript{95}

In contrast, the Swisa expert focused on the Swisa buffer’s fourth side with an abrasive pad.\textsuperscript{96} The Swisa expert relied on the Nailco Buffer, the Falley Buffer, and catalogs showing three-sided and four-sided buffer blocks to emphasize that the “number of sides with abrasi[ve] surface on them would be important to purchasers because it determine[d] whether a buffer [was] a ‘three way buffer’ or a ‘four way buffer.’”\textsuperscript{97}

After analyzing the testimony of both the EGI and Swisa experts, the Federal Circuit held that the patentee, EGI, did not meet its burden.\textsuperscript{98} According to the Federal Circuit, EGI failed to show how the accused design was closer to the patented design than to the prior art, specifically the Nailco buffer.\textsuperscript{99} Thus, the court held that “[i]n light of the similarity of the prior art buffers to the accused buffer . . . no reasonable fact-finder could find that EGI met its burden of showing . . . that an ordinary observer, taking account the prior

\textsuperscript{88} Id. at 678.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} See infra notes 104–119 and accompanying text (discussing how districts courts have applied the modified ordinary observer test).
\textsuperscript{92} \textit{Egyptian Goddess III}, 543 F.3d at 680–81.
\textsuperscript{93} Id. at 681–82.
\textsuperscript{94} Id. at 681.
\textsuperscript{95} Id.
\textsuperscript{96} Id. at 681–82.
\textsuperscript{97} Id. at 682.
\textsuperscript{98} Id.
\textsuperscript{99} Id.
art, would believe the accused design to be the same as the patented design." The Federal Circuit affirmed the district court’s holding that “a fourth side without a pad is not substantially the same as a fourth side with a pad.” The Federal Circuit further noted that in the nail buffer industry a buffer with “raised, abrasive pads on all four sides” would not be “considered minor.” Thus, the Federal Circuit affirmed the district court’s finding but used the modified ordinary observer test in its analysis.

IV. POST-EGYPTIAN GODDESS

Since Egyptian Goddess had been decided, there has been confusion over applying the modified ordinary observer test. This Part discusses the variety of interpretations of the modified ordinary observer test taken by the Federal Circuit and the district courts.

A. Federal Circuit’s Interpretation

The Federal Circuit has yet to apply Egyptian Goddess to design patent infringement claims. However, recently the Federal Circuit extended Egyptian Goddess to anticipation defense claims of design patent infringement.

In International Seaway Trading Corp. v. Walgreens Corp., the Federal Circuit held that the point of novelty test was rejected and the modified ordinary observer test, as defined in Egyptian Goddess, was the sole test in determining anticipation claims. In International Seaway, the Federal Circuit was comparing two Croc patents to determine anticipation. In applying the modified ordinary observer test, the Federal Circuit looked to the insole and to exterior features of the clog, including “the number and arrangement of the circular openings . . . and rectangular cut-outs . . . on the clog, the shape of the toe portion . . . and the raised pattern of the outsole of the clog.”

100. Id.
101. Id. (internal citation omitted).
102. Id. at 683 (citing Egyptian Goddess II, 498 F.3d 1354, 1358 (Fed. Cir. 2007)).
103. Id. at 683.
104. Under anticipation claims, a patent is denied to a design when the design already exists in prior art. 35 U.S.C. §§ 102, 103(a) (2000). In other words, each element of the design is known or has been used in other patented designs. Oney v. Ratliff, 182 F.3d 893, 895 (Fed. Cir. 1999).
105. 589 F.3d 1233 (Fed. Cir. 2009).
106. Id. at 1240.
107. Id. at 1236–37.
108. Id. at 1242–43.
The Federal Circuit held that the exterior features of the patent were “insufficient to preclude . . . anticipation” because they did not change “the overall visual impression” of the clog. However, in regards to the insole, the Federal Circuit held that this feature was not an insignificant difference. Thus, the court affirmed the district court’s ruling on the exterior features of the clog but vacated and remanded the issue of the insoles to the district court.

Although the Federal Circuit consistently referred to the overall appearance of the designs, the court focused on a single feature of the design, the insole, in reaching its holding on anticipation. By focusing on a single feature, the dissent in International Seaway noted that this ran into the same problem as the point of novelty test. Instead of focusing on the differences of the design as a whole, the design had been appropriated into features. This raises the question of whether there is a difference between the rejected point of novelty test and the “new” modified ordinary observer test.

B. District Courts’ Interpretation

Although the Federal Circuit has not yet applied Egyptian Goddess to design infringement claims, district courts have followed Egyptian Goddess precedent and applied the modified ordinary observer test as the sole test to de-

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111. Int’l Seaway Trading Corp., 589 F.3d at 1243.
112. Id.
113. Id. at 1244.
114. Id. at 1242–44.
115. Id. at 1245 (Clevenger, J., dissenting).
116. Id.
termine design patent infringement. However, district courts have varied in their interpretation of *Egyptian Goddess*.

One such interpretation is a two-level infringement analysis. The Southern District Court of New York in *Wing Shing Products Co. Ltd., v. Sunbeam Products, Inc.* developed this analysis by relying on the distinction raised in *Egyptian Goddess* concerning when the prior art may or may not be a factor in determining infringement. As mentioned previously, *Egyptian Goddess* appeared to make a distinction between times when the patented design and the accused design were “sufficiently distinct” and times when the designs were “not plainly dissimilar.” Applying this distinction, *Wing Shing Products* concluded that level one of the analysis determined “if comparison to the prior art is even necessary” and level two “account[ed] for prior art in less obvious cases.” In other words, under the first level of analysis, the accused design was only compared to the patented design. If the two designs were found “sufficiently distinct,” then the court would find no design patent infringement. However, if the two designs were “not plainly dissimilar,” then the court would move to the second level of the analysis and compare the accused design and the patented design to the prior art.

According to recent district court opinions, when to stop at the first level of design patent infringement analysis or when to continue to the second level of analysis appears to depend on the judge’s discretion. Courts have tended to complete both levels of analysis to determine design patent infringement when there is a “great number of similar prior art designs.” For example, in *Wing Shing Products*, the district court went through both levels of analysis in determining design patent infringement of coffee makers even though the court initially concluded that the designs were “so plainly dissimilar, that even without considering any prior art, no reasonable fact finder could conclude that they would appear 'substantially the same' to an ordinary observer” because of the “cluttered world of the drip-coffeemakers.”

Another interpretation is not to separate the levels of analysis but to complete one three-way visual comparison of the patented design, the accused design, and prior art. This comparison was briefly mentioned in *Egyptian God-

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118. See id. at 360 (explaining both steps of the process of determining infringements).


120. Wing Shing Prods., 665 F. Supp. 2d at 362.

121. Id.

122. Id.

123. Id.


125. Minka Lighting, Inc., 2009 WL 691594, at *6, *8–9 (Patent No. 515 and Patent No.052). See, e.g., Wing Shing Prods., 665 F. Supp. 2d at 362 (“Here, however, in the cluttered world of the drip-coffeemakers, it seems senseless to attempt to determine whether the ordinary observer would confuse two design without looking to the prior art for a point of reference.”).

and identified in Apple’s Amicus Curiae to *Egyptian Goddess*.

Unlike the two-level infringement analysis interpretation, under the three way visual comparison, district courts do not look to the “sufficiently distinct” and “not plainly dissimilar” language in *Egyptian Goddess*. Instead, the courts look to the nail buffer analysis in *Egyptian Goddess*, where the Federal Circuit compared the patented design, the accused design, and the closest prior art in determining that the accused nail buffer design did not infringe upon the patented design.

District courts have looked to the nail buffer analysis in *Egyptian Goddess* to complete this three-way comparison. For example, the Northern District Court of Ohio completed a three-way comparison to determine whether or not an accused gutter filter design infringed upon the plaintiff’s patented design.

Similarly, the District Court of Arizona did a three-way visual comparison of the accused, patented, and prior art of climbing and carpentry tool designs. Under the three-way visual comparison, not only is there one analysis instead of two separate levels of analysis to determine design patent infringement, but also design patent infringement is not based on comparing the accused and the patented design alone.

### C. Implications of *Egyptian Goddess* on Design Patent Infringement

With the rejection of the point of novelty test, *Egyptian Goddess* has strengthened the design rights of patent holders by shifting some of the burden to the accused infringer and by looking at the overall appearance of the designs to determine infringement.

No longer does the patent holder have the burden to prove that the patented design differs from the prior art. With the ordinary observer test, the patent holder only has the burden of proving the accused design patent is substantially similar to the patented design. Under *Egyptian Goddess*, the burden of proof of comparing the patented design to the prior art lies on the accused design patent infringer as a defense to infringement. As a result, the modified observer test shifts the burden of comparison to prior art from the patent holder to the accused infringer. Therefore, it is easier for the patent

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134. *Egyptian Goddess III*, 543 F.3d at 678.
135. Id. at 678–79.
136. Id.
holder to assert their design patent rights.\textsuperscript{138}

In addition to shifting the burden of proof to the accused infringer, under the ordinary observer test, design patent infringement is determined by the overall appearance of the patented design to the accused design.\textsuperscript{139} Under the modified ordinary observer test, the focus is on whether the patented design and accused design are substantially similar and not to specific points of novelty.\textsuperscript{140} Thus, no longer will the accused infringer be able to evade infringement by relying on trivial points of novelty to differentiate his design from the patented design.\textsuperscript{141} This again strengthens the right of the patent holder as manufacturers, inventors, or distributors of new designs will not be able to market new designs that have minimal changes to the patented design.\textsuperscript{142}

However, Egyptian Goddess has also led to uncertainty for manufacturers, inventors, or distributors of new designs as it is more difficult to determine whether a new design infringes on a patented design because of the inconsistency of the courts’ application of the modified ordinary observer test and the subjectivity of the modified ordinary observer test.\textsuperscript{143}

Egyptian Goddess has resulted in confusion among the district courts over the application of the modified ordinary observer test. This has further resulted in inconsistencies over the application of the modified ordinary observer test.\textsuperscript{144} As discussed in the above section, some districts have applied a two-level infringement analysis, which in some instances would result in a comparison solely between the patented design and the accused design based on the judge’s discretion.\textsuperscript{145} In contrast, other districts have applied one three-way visual comparison of the patented design, accused design, and prior art.\textsuperscript{146} Under the two-level infringement analysis, the accused design holder may raise two separate arguments: 1) the accused design and patented design are “sufficiently distinct”; and 2) the accused design and patented design are “plainly dissimilar” in light of the prior art.\textsuperscript{147} On the other hand, under the three-way visual comparison, only one comparison is made between the accused design, patented design, and prior art.\textsuperscript{148} The three-way visual comparison thus limits the arguments that can be raised by the accused design holder.\textsuperscript{149} Therefore, manufacturers, distributors, and inventors of new designs must note both applications and any other future applications under Egyptian Goddess, and they will need to exercise greater caution to avoid patent infringement litigation.

The district courts’ interpretations of Egyptian Goddess raise another issue. The modified ordinary observer test, in comparison to the point of novelty

\begin{itemize}
\item \textsuperscript{138} Kugler & Mueller, supra note 134, at 73; Hanovice, supra note 134, at *4.
\item \textsuperscript{139} Egyptian Goddess III, 543 F.3d at 677.
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Id.; Kugler & Mueller, supra note 134, at 74.
\item \textsuperscript{142} Kugler & Mueller, supra note 134, at 74.
\item \textsuperscript{143} See supra notes 117–32 and accompanying text.
\item \textsuperscript{144} See supra notes 117–32 and accompanying text.
\item \textsuperscript{145} See supra notes 117–32 and accompanying text.
\item \textsuperscript{146} See supra notes 117–32 and accompanying text.
\item \textsuperscript{147} See supra notes 117–32 and accompanying text.
\item \textsuperscript{148} See supra notes 117–32 and accompanying text.
\item \textsuperscript{149} See supra notes 117–32 and accompanying text.
\end{itemize}
test, is extremely fact sensitive. Under the point of novelty test, the trier of fact looked to specific features that differentiated the patented design from the prior art and then looked to see if these features were appropriated by the accused design. By looking to specific features, the analysis behind design patent infringement was more objective than merely looking to see if the ordinary observer would find the two designs substantially similar. In contrast, under the modified observer test, the trier of fact looks to the overall appearance of the accused design and the patented design in comparison to the prior art to determine infringement. Thus, it is within the discretion of the trier of fact whether under the totality of the two designs, the designs are substantially similar. Since each design is distinct, the determination of patent design infringement is subjective. The analysis is fact-sensitive and is determined on a case-by-case basis. Thus, manufactures, inventors, or distributors of new products cannot rely on past design patent infringement case law to determine whether their design is susceptible to design patent infringement litigation. Instead, they will need to exercise greater caution in assessing whether their product has the potential to infringe a patented design.

Finally, the Federal Circuit’s holding in International Seaway raises red flags for both the patent holder and manufactures of new designs of whether the Federal Circuit is in fact rolling the point of novelty test into the modified ordinary observer test. Under the modified observer test, prior art still plays an important role in determining design patent infringement as the ordinary observer is “familiar with the prior art.” Furthermore, in International Seaway, the Federal Circuit appropriated the patented design into single features as it historically had under the point of novelty test. In addition, the Federal Circuit remanded one single feature of the design to the district court, not the overall appearance of the design, to determine anticipation. Thus, the Court’s focus and reliance on single features of a design appears to include point of novelty analysis into the modified observer test. By rolling one test into the other, the argument can be raised whether there has actually been any substantive change to design patent infringement litigation. However, even if the court does focus on single features, the burden of proof still has been shifted to the accused infringer to draw similarities between the patented de-

151. See supra notes 26–36 and accompanying text.
152. Id.
153. ARNOLD & PORTER LLP, supra note 151, at 1.
154. Id.
155. See supra notes 105–16 and accompanying text (summarizing the court’s opinion in International Seaway).
156. Egyptian Goddess III, 543 F.3d 665, 672 (Fed. Cir. 2008).
157. See supra notes 105–16 and accompanying text (summarizing the court’s opinion in International Seaway).
158. Id.
159. Id.
sign and the prior art. This shift alone changes the state of patent infringement litigation as it eases the burden for patent owners to enforce their design patent rights.

V. CONCLUSION

*Egyptian Goddess* does appear to have strengthened design patent holders rights by shifting some of the burden from the patent holder to the accused infringer. In addition, the new modified observer test appears to have cleared up some of the confusion over the application of design patent law by focusing on the overall appearance of the designs.

However, although *Egyptian Goddess* did resolve some issues with design patent infringement law, new issues have arisen for new design holders as there is discrepancy among the district courts over applying the modified ordinary observer test. This inconsistency among the district courts has led to uncertainty over new designs. The resolution of this issue will depend on future Federal Circuit design patent infringement case law, specifically the Federal Circuit’s application of the modified ordinary observer test. Currently, manufacturers, distributors and inventors of new design patents need to be more cautious to avoid design patent infringement litigation.

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161. *Id.*