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Egyptian Goddess and the Point of Novelty Test

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Point of Novelty Test

- Relatively recent doctrine in design patent infringement cases
 - Most recently in Egyptian Goddess district court decision August, 2007
 - Two tests:
 - Ordinary observer
 - Point of novelty

Ordinary Observer

- Ordinary observer test
 - In the eyes of the ordinary observer, giving such attention as a purchaser normally gives, the two designs are substantially the same ... the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other.

Point of Novelty

- Point of novelty test
 - No matter how similar two designs look, the accused design must appropriate the point of novelty in the patented device which distinguishes it from the prior art

Egyptian Goddess, Inc. v. Swisa, Inc. (Sept. 2008)

- *En banc* decision of Federal Circuit
- Overturns point of novelty test
- Prior art nonetheless still relevant to infringement inquiry
 - "when the claimed and accused designs are not plainly dissimilar, resolution of the question whether the the ordinary observer would consider the two designs to be substantially similar will benefit from comparison of the claimed and accused designs with the prior art."

Egyptian Goddess, Inc. v. Swisa, Inc. (Sept. 2008)

- Thus, consideration of prior art (somewhat analogous to point of novelty considerations) survives as a defensive doctrine in infringement cases.
- Results
 - Strengthening of design patent rights
 - More design cases will go to the jury for application of ordinary observer test

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Thank you.

Any Questions?