

Insights: Alerts

Federal Circuit Leaves the "Plainly Dissimilar" Design Patent Test Intact

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Range of Motion Products, LLC v. Armaid Company Inc., No. 2023-2427 (Fed. Cir. Aug. 11, 2026)

Earlier this year, [we examined](#) the divided Federal Circuit panel decision in *Range of Motion Products, LLC v. Armaid Company Inc.*, which affirmed summary judgment of non-infringement of a design patent for a handheld massager. The majority found the accused product plainly dissimilar after accounting for functional features; Chief Judge Moore argued that the ordinary observer issue belonged to the jury.

On August 11, 2026, the Federal Circuit [denied both panel rehearing and rehearing en banc](#), leaving the February panel decision intact. The rehearing opinions sharpened the original disagreement and added a related question: who should decide whether features of a patented design are functional rather than ornamental?

The Court Leaves the Panel Decision Intact

The en banc poll failed. Judge Cunningham, joined by Judge Hughes, concurred in the denial. Chief Judge Moore, joined by Judge Reyna, issued a detailed dissent. Judges Stoll and Stark also dissented, but without opinion; Judge Newman did not participate. Four participating judges therefore publicly disagreed with the denial; Chief Judge Moore and Judge Reyna alone joined the written dissent.

The order is not a new en banc merits decision, and the two-judge concurrence does not speak for the full court. The practical result is clear: the precedential panel opinion and the existing summary judgment framework remain in place.

The Concurrence: 'Plainly Dissimilar' Is Not a Different Test

Judge Cunningham rejected the argument that *Egyptian Goddess* inverted the ordinary observer test established by *Gorham v. White*. In the concurrence's view, substantial similarity necessarily requires considering both similarities and differences, while the overall visual effect remains controlling. The plainly dissimilar formulation simply identifies cases in which no reasonable jury could find infringement.

The concurrence also defended summary judgment when no genuine factual dispute exists. If lower courts draw the line too aggressively, the solution is reversal on appeal, not abandonment of *Egyptian Goddess*.

The concurrence further called this case a poor vehicle for revisiting the test. The district court found the designs plainly dissimilar, but it also performed the three-way comparison contemplated by *Egyptian Goddess* (claimed design, accused design, and prior art) and reached the same result. The panel affirmed on both grounds.

A Second Divide: Whether Functionality Belongs to the Judge or Jury

The concurrence emphasized that design patent infringement follows two steps: the court construes the claim, and the factfinder compares that claim with the accused design. Claim construction may include distinguishing ornamental features from functional ones. Drawing on *Markman* and *Teva*, the concurrence reasoned that claim scope remains a legal question even when subsidiary factual findings are required.

Chief Judge Moore disagreed. Because design patent claims are ordinarily conveyed through drawings, she saw little of the document interpretation rationale for assigning utility patent claim construction to judges. She also emphasized that functionality often turns on outside evidence, including alternative designs, utility patents, marketing materials and testimony, and uses factors treated as factual in other contexts.

The dissent would assign functionality, ornamentality, and substantial similarity to the jury as interconnected parts of infringement. It would not eliminate summary judgment, but Chief Judge Moore argued that a shortcut intended for obvious cases now displaces juries in much closer visual comparisons.

Practical Implications

Summary judgment remains a potent defense. The decision essentially invites accused infringers to seek a summary judgment when the overall designs are sufficiently distinct.

Alternative analyses matter. The district court's direct comparison and three-way prior art comparison supplied independent grounds to affirm. Parties should develop both analyses where the record permits.

Functionality remains a claim scope issue for the court. Judges may evaluate utility patents, alternative designs, and product marketing when deciding which aspects of a design are functional and how those aspects affect claim scope.

The institutional debate is not over. Having four judges dissent shows meaningful disagreement over the ordinary observer framework and the judge-jury boundary.

For design patent owners, the order reinforces the need to document ornamental flexibility and distinguish the claimed design from function-driven constraints. For accused infringers, functionality and visually significant differences remain important tools for narrowing claim scope and seeking early resolution.

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