Insights: Publications

5 Key Takeaways | What You Draw is What You Get

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Kilpatrick's Katie Apsens and Jessica Garcia recently presented a CLE titled, "**Design Patents - From Preparation to the Digital Era.**"

Their five key takeaways include:

1. **Functionality does not foreclose design protection where a design choice was made.** Design patents protect ornamental appearance rather than function, yet most commercially significant products are functional in some respect. The more useful inquiry is often not whether the article serves a purpose, but whether its appearance was dictated solely by function or whether the designer could choose among alternatives. Silhouette, proportion, and visual hierarchy may reflect choices the functional objective did not compel. Where a design choice can be identified, protection may be available even for a highly functional product.
2. **Figures and title together can define the scope of protection**. In a design patent the drawings are the claim, and line conventions operate as claiming tools, with solid lines identifying claimed subject matter and broken lines disclaiming it or supplying context. The claim is also generally understood to be confined to the article identified in the title, so a narrow article may limit the products that can be accused, while a particular article may help distinguish prior art. A useful question is whether coverage would still be desirable if a competitor copied a feature but changed everything around it.
3. **File early, but only once the design is settled.** Design rights are generally first-to-file, and a public disclosure before filing may limit or destroy rights in some jurisdictions. A U.S. design application also cannot claim priority to a provisional, so a provisional utility filing may preserve little for the design disclosed in it. Because visual detail generally cannot be added after filing, it is worth confirming that the key visual features are fixed, and where the design may still change, multiple embodiments may preserve options.
4. **Digital designs may no longer require a display panel, but the title and description carry more weight.** Under the USPTO's March 2026 supplemental guidance, applicants may no longer need to depict a display panel, even in broken lines, provided the title and claim properly identify an article of manufacture. That change may meaningfully expand protection for graphical user interfaces, icons, and projected, virtual reality, and augmented reality designs. The expectation that a claimed design be more than a transient or disembodied image appears to remain, so tying the design to the generating system, in the title and the specification, remains prudent.
5. **Physical and digital versions of a design are often best managed as one portfolio.** Whether a virtual reproduction can infringe a patent claiming a physical article remains unsettled. Applicants concerned about virtual knockoffs may wish to consider defensive pairs, pairing a physical claim for the product with a digital claim for its virtual counterpart.

For more information, please contact:

Katie Apsens, kapsens@ktslaw.com

Jessica Garcia, jegarcia@ktslaw.com

Related People



Kathryn M. Apsens

t 206.626.7719

kapsens@ktslaw.com



Jessica A. Garcia

t 206.626.7706

jegarcia@ktslaw.com