The Patented Design

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Although the design patent system is over 170 years old, the law of design patents is woefully underdeveloped and undertheorized. One particularly important open question has to do with the very nature of the protected subject matter - what, exactly, is "the patented design"? Because this is an open question, it is not clear, for example, whether the use of a claimed shape on a different type of product constitutes infringement. It's also not clear whether visual representations of a product can infringe a design patent. This Article argues that neither of these types of uses should be deemed to be infringing because "the patented design" should be conceptualized as the design as applied to a specific type of product - not as something akin to a copyrighted "work" (a concept this Article will refer to as a "design per se"). Accordingly, designs - even those that are patented - should remain free to be adapted to different types of products. This conclusion is supported by the nature of product design and policy goals including the promotion of the decorative arts and protection of free expression. This analysis is not, however, limited to the precise nature or principles of the U.S. patent system; therefore, this analysis may have important implications for the larger policy debate over how designs should be protected, if at all, using intellectual property laws.

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