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# Design Patents as Theft, Not Just a Fraud on the Public

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# “Property is Theft” - Proudhon

- Menell & Corren: “as the Supreme Court observed in denying copyright protection for a system of accounting (and the associated lined forms), “a surprise and a fraud upon the public” and undermine free competition.
- Design patents take away the public’s right to freely(and independently) make and to copy aesthetic creations, without compensation
- Design patents are a category error, and aesthetics should be protected (if at all) only by protection against *copying, not* freely using without copying
- Design patents prohibit people from repairing their purchased articles, contrary to patent repair rights

# 1842 Act Category Errors

the oath of his or their intention to become a citizen or citizens who by his, her, or their own industry, genius, efforts, and expense, may have invented or produced any new and original design for a manufacture, whether of metal or other material or materials, or any new and original design for the printing of woollen, silk, cotton, or other fabrics, or any new and original design for a bust, statue, or bas relief or composition in alto or basso relievo, or any new and original impression or ornament, or to be placed on any article of manufacture, the same being formed in marble or other material, or any new and useful pattern, or print, or picture, to be either worked into or worked on, or printed or painted or cast or otherwise fixed on, any article of manufacture, or any new and original shape or configuration of any article of manufacture not known or used by others before his, her, or their invention or production thereof, and prior to the time of his, her, or their application for a patent therefor, and who shall desire to obtain an exclusive property or right therein to make, use, and sell and vend the same, or copies of the same, to others, by them to be made, used, and sold, may

# 1870 Act and Useful Confusion

And be it further enacted, That any person who, by his own industry, genius, efforts, and expense, has invented or produced **any new and original design for a manufacture**, bust, statue, alto-relievo, or bas-relief; any **new and original design** for the printing of wool[l]en, silk, cotton, or other fabrics; any new and original impression, ornament, pattern, print or picture, to be printed, painted, cast or otherwise placed on or worked into any article of manufacture; or **any new, useful, and original shape or configuration** of any article of manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication, may, upon payment of the duty required by law, and other due proceedings had the same as in cases of inventions or discoveries, obtain a patent therefor. [R.S. § 4929]

# 1902 Patent Act and the Category of "Article of Manufacture"

Sec. 4929. Any person who has ***invented*** any **new, original, and ornamental design** for an **article of manufacture**, not known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned, **may,** upon payment of the fees required by law and other due proceedings had, the same as in cases of inventions or discoveries covered by section forty-eight hundred and eighty-six, **obtain a patent therefor**."

# Categorical and Doctrinal Errors

- Viewing the scope of protection (and thus of validity) as "substantial similarity" from the perspective of the "ordinary observer" – using a copyright concept for a trademark purpose, using the rhetorical trope of "piracy"
- Protection of machines, or of parts of machines, when only "articles of manufacture" are the things for which ornamental designs are authorized
- Shifting the focus to the (appropriate) viewpoint of the designer of skill in the art because of thexpress legislative command, while preserving the ordinary observer for infringement and novelty

# *In re Zahn* and Partial (and Fragment) Designs

- The Empire aka Judge Rich strikes again!
- Using the rhetorical trope of the dotted line, and overturning Patent Office policy, Judge Rich authorized claims to designs for only parts of objects.
- Dotted lines metaphorically hide the parts of the design of which the claimed design is a part, but design is always perceived as a whole
- This increased protection by reducing the scope of the design, because incorporation into a larger object still infringes

# The results of category confusion: picking the public's wallet

- Because the design patent can now cover only parts (or fragments of parts), similarities of design of parts rather than of the articles of manufacture (or machines) of which they are a part are now considered infringing
- This means that the aftermarket of making a replacement part for repairs, and even the act of reconstructing a broken part, has been converted into infringement
- Rhetorically, this allows the property holders to argue that the public is engaged in theft, when they have stolen the public's right to repair the products that they have purchased

# Legislative Fixes

- The Parts Act - a narrow solution for the most important product repair right and aftermarket
- Professor Menell and Ms. Corren's efforts to clean up functionality doctrine within design Patent Law (and here I think we need abstraction, filtration, and imaginative reconstruction)
- Moving design to sui generis protection (and making clear that protection is for articles and designs as a whole)
- Judge Rich's efforts to move design to the copyright act
- Eliminating design patents (even retrospectively, paying owners for the patents that stole the public's rights in the first place (although as "public franchises" it is not clear that compensation as a constitutional taking is required)

# Conclusions

- **It's a mess**
- **It's not likely to get fixed soon**
- **Professor Menell and Ms. Corren have made a very useful contribution, but it doesn't go nearly far enough and the public deserves much more from us**