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# Product Protection under Current and Proposed Design Laws

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# PRODUCT PROTECTION UNDER CURRENT AND PROPOSED DESIGN LAWS

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## I. INTRODUCTION

A survey of design patent litigation for the years 1984 and 1985 concluded that the design patentee was unsuccessful in a ratio of about two to one.[1] Moreover, the survey observed that design patents received a very narrow scope of protection, essentially equivalent to that given to copyrights. Where the patents were successfully contested and enforced, actual copying or appropriation of the design was found to exist, and the infringing design would have come within the "substantially similar" test applied in the copyright field.

Yet, to get this modest scope of protection, the patentee has to run a gauntlet of patent hurdles that a copyright applicant need not encounter. The patentee must undergo an arduous examination at the Patent and Trademark Office and convince the examiner that the design is novel, unobvious, ornamental, and not dictated by function. A sobering example in this connection is Design Patent 281,736[2] assigned to KangaROOS U.S.A., entitled "Pocketed Casual Gymnastic and Aerobic Shoe." The design patent involved five generations of continuation-in-part filings and total prosecution time of more than seven years. More than 200 United States and foreign prior art references were cited and made of record.

In comparison to this incredible effort, copyright registrations receive a very cursory review. In copyright matters, the real issue is known in advance to be the activities of the alleged infringer. How did the alleged infringer acquire the item? Did he copy or did he do independent work? Except for very obvious, commonplace, or otherwise unqualified material, the emphasis is on the appropriation process of the right, not the acquisition process. Perhaps the KangaROOS U.S.A. applicant contributed to this complex prosecution, but it is clear that whatever the cause, the system permitted this result. The public is the loser because upon seeing an item in the marketplace, it can virtually never be certain whether the item may be copied, or whether the proprietor will belatedly stagger out of the Patent Office with "surprise" rights.

Since 1985, the perception has been that more design copying is occurring

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1. *Industrial Design Protection*, in 4.1 Am. Intell. Prop. L.A. Selected Legal Papers L1 (1986).
2. *See* Appendix A at 287-89.

inside the United States and even more abroad for products to be sold in the United States. More design patent applications are being filed (thirty-eight percent increase from 1983 to 1987) and more patents are being granted (thirty-one percent increase from 1983 to 1987)[3] as designers increasingly search for some mechanism to abate the tide of copying. Are recent litigants more successful than litigants in the 1984-85 period? In extending the survey of design patent litigation for the years 1986-88, twelve cases have been located with decisions on the merits. Only one of these held the patent valid and infringed.[4] Of the remaining cases, six held the patent invalid,[5] four held the patent was not infringed,[6] and in one case it was not clear whether the patent was invalid or not infringed.[7] *Designs for Leisure, Ltd. v. Murrey & Sons Co.*[8] warrants notice, even though it may not be a final decision, because the District Court for the Central District of California granted a preliminary injunction on a design patent, which is a noteworthy event. The success rate of design patentees is considerably less than the earlier period. On balance, design applicants are filing more and enjoying it less.

Every defense asserted by creative defense counsel in utility patent infringement litigation has been quickly applied in the design patent field. The ugly specter of inequitable conduct invalidated a design patent[9] in *Benchcraft, Inc. v. Broyhill Furniture Industries, Inc.*[10] In *Benchcraft*, the design was found to be unobvious over the same prior art that formed the foundation of the inequitable conduct defense. *Kohler Co. v. Oasis Industries, Inc.*[11] is a reminder that even defenses as hypertechnical as lack of clarity in claiming may be raised to invalidate a design patent.[12] Those who consider the design patent claim as a mere ritualistic reference to the design portrayed in the drawings should review the precedents referred to in *Kohler*. Others who have accelerated design patent application prosecution because someone else is entering the marketplace should remember to cite all known

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3. WORLD INTELLECTUAL PROPERTY ORGANIZATION, INDUSTRIAL PROPERTY STATISTICS (1983 & 1987).
4. Avia Group Int'l, Inc. v. L.A. Gear Cal., Inc., 853 F.2d 1557 (Fed. Cir. 1988).
5. *See* John Thomas Batts, Inc. v. S.O. Textiles Co., 864 F.2d 149 (Fed. Cir. 1988); Mathis v. Spears, 857 F.2d 749 (Fed. Cir. 1988); Benchcraft, Inc. v. Broyhill Furniture Indus., Inc., 681 F. Supp. 1190 (N.D. Miss. 1988); Neo-Art, Inc. v. Hawkeye Distilled Prods. Co., 654 F. Supp. 90 (C.D. Cal. 1987); Pioneer Photo Albums, Inc. v. Holson Co., 654 F. Supp. 87 (C.D. Cal. 1987); Black & Decker, Inc. v. Pittway Corp., 636 F. Supp. 1193 (N.D. Ill. 1986).
6. *See* Lee v. Dayton-Hudson Corp., 838 F.2d 1186 (Fed. Cir. 1988); FMC Corp. v. Hennessy Indus., Inc., 836 F.2d 521 (Fed. Cir. 1987); Oshkosh Truck Corp. v. Lockheed Missles & Space Co., 678 F. Supp. 809 (N.D. Cal. 1987); Black & Decker, Inc. v. North Am. Phillips Corp., 632 F. Supp. 185 (D. Conn. 1986).
7. *See* Norco Prods., Inc. v. Mecca Dev., Inc., 821 F.2d 644 (Fed. Cir. 1987).
8. 9 U.S.P.Q.2d (BNA) 1159 (C.D. Cal. 1985).
9. *See* Appendix A at 290.
10. 681 F. Supp. 1190 (N.D. Miss. 1988).
11. No. 85-C-6525 (N.D. Ill. Feb. 26, 1987) (LEXIS, Genfed library, Dist file).
12. *See* Appendix A at 291.

relevant prior art. Since designs are portrayed quite well pictorially, the design inventor may have a special burden to disclose copious ad copy, catalogues, and trade publications to discharge his burden. Perhaps the seeming overkill of citations by KangaROOS U.S.A. is advisable to assure validity. It is clear that design patentees face every defense devised against utility patents plus the design patent system's own unique disqualifiers of functionality and nonornamentality.

The *Benchcraft* and *Kohler* cases are symptomatic of how in less than a century and a half since its creation, the design patent system has been rendered impotent. The observation that only narrow scope protection equivalent to copyright protection is afforded design patents is not altered by the more recent survey. It is to some extent reinforced by the Court of Appeals for the Federal Circuit in *In re Mann*[13] which stated, in a slightly different context, that "[d]esign patents have almost no scope."[14]

Assuming that the present system did not exist and a proposal was made to devote Patent Office and examiner resources to process 4,000 to 6,000 applications per year, the judicial resources to consider ten to fifteen litigated cases per year, and the attorney and client time spent on those cases to produce a success rate of one in three years, would we create such a system? Furthermore, would we create such a system if it were further observed that a design patentee needs such strong equities to prevail that in all likelihood he would have succeeded in any event under an unfair competition cause of action? The answer is quite clear: It would not be a cost effective system.

However, the design patent system has degenerated to such a point that only a winning counsel could love it, and there were only one or two of those in the last three years. Viewed on a system basis, the design patent is a waste of national resources and a fraud on the public. Furthermore, the system causes some to think that the designer has been properly taken care of in our society, and therefore, they fail to recognize the need to legislatively create a workable system.

## II. COMPETITIVENESS

Much intellectual property legislation has been enacted in recent years to make the United States more competitive with its competitors. Import product protection has been extended to process patents. International Trade Commission proceedings under section 337 of the Tariff Act of 1930[15] have been streamlined. Trademark remedies have been strengthened against those who appropriate names rather than appearances of products. Efforts to raise the international standards for intellectual

13. 861 F.2d 1581 (Fed. Cir. 1988).
14. *Id.* at 1582.
15. 19 U.S.C. § 1337 (1988).

property rights are being pursued in General Agreement on Tariffs and Trade and World Intellectual Property Organization negotiations. A new form of protection has been provided for semiconductor chips. Yet, the designer continues to be ignored.

Several years ago, the salvation of the economy was expected to be the service and new technology industries, and the rust belt was written out of the equation. The conventional wisdom was that the economy was in the advanced stage of losing hard manufacturing items to low-cost overseas manufacturers and that we should devote our energies elsewhere. However, service jobs did not pay at the same high levels as manufacturing jobs, and the new technologies were slow to come on stream. Rather, it was the revived rust belt that supplied most of the real momentum to our economy.

The United States should devote efforts to such projects as superconductivity, structural ceramics for engines, high definition television, and other advanced technologies because, even if the particular project is not achieved, the unexpected fallout will lead to many unforeseen applications that will help put us in the forefront of development and progress. How to do that is a big question if one remembers the targeting fiasco with the synfuels project. There should not be a one-dimensional strategy to redress the trade balance. The big technology projects are for the long-term and are speculative. The United States needs to focus on more basic, pervasive, immediate, and attainable goals to get a solid underpinning for competitiveness. This is where effective design protection comes in.

In the United States, designers are very active in every industry whether it is handicrafts, furniture, automobiles, sports equipment, or construction and farm equipment. Everything in the marketplace except liquids and fungibles has a shape, and liquids and fungibles often come in containers that have shapes. Some of these shapes are without distinction. However, an incredible amount of shapes are new, and if given reasonable protection for a limited time, they could represent a tremendous contribution to American competitiveness and balance of trade with an impact in a much shorter term than the more exotic projects. Moreover, with respect to an infinite number of potential new designs, the United States is much less likely to lose out in racing for the key breakthrough that makes the difference. Although there are undoubtedly other initiatives to pursue in the name of competitiveness, public policy should not ignore this important segment.

Japan's success is a model for the rest of the world. It is not so different from our success. In colonial times, we copied products from the European countries who were more advanced. The open and remote society that developed in the United States enabled us to unleash forces at the individual level that allowed us to surpass the masters just as Japan seems to be doing now.

This lesson is not lost on the rest of the world. The way to succeed is to start with a basic copying society and, as indigenous wealth and skills are

generated, to move up the technology ladder. South Korea and other newly industrialized countries in the Far East are filling the copying niche and are ready to move up.

It is a good thing for more countries to become industrialized and to better their lot. However, what needs to be controlled is the importation into the United States of the "monkey copy" immediately after a new product is introduced into the marketplace. The blurred origins and a look-alike appearance of an item at a low price give the consumer the opportunity to make the assumption that he is getting a bargain. The lower price may reflect lower labor costs, but for slavish copiers, it more likely reflects significantly lower quality with a seriously undercut price/value relationship.

This lower quality is likely for two rather fundamental reasons. First, one who is making a look-alike product is not establishing his own market identity, and poor quality is more apt to reflect adversely on the original manufacturer than on the copier. To build in quality beneath the external surface shape costs money that subtracts from the copier's profit margin. Second, the copier simply is not privy to the internal confidential specifications of the original equipment manufacturer, which are normally maintained as trade secrets. Consequently, it is neither profitable nor possible in the normal case for him to create a replica of equal quality.

There is nothing wrong with the public having cheap substitutes from which to choose, but product differentiation, whenever it is reasonable, ought to be encouraged so that both the original designer and the emulator may more clearly be perceived by the public as standing on their own product quality reputations. The following quotation from Wilson Mizner is a fitting test for this field: "When you steal from one author, it's plagiarism; if you steal from many, it's research."[16] There should be protection for original designers from the plagiarists for a limited time, but we should do it in the narrow copyright framework so that research and new creativity is effectively permitted. It is not only moral to provide designers protection that is not a mere illusion, but it is also in our national interest to do so.

## III. A BETTER DESIGN PROTECTION SYSTEM

The deficiencies of the design patent system have been recognized for a long time. Efforts to correct the system go back to the turn of the century. In more recent times, when the patent system was extensively revised in the 1952 Patent Act,[17] design protection was considered but was set aside so as not to obscure the main effort, which was to provide needed codification of the utility patent law. It was the intention to return to this subject in a more focused way.

16. J. BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 757 (15th ed. 1980).
17. Act of July 19, 1952, ch. 950, 66 Stat. 792-814 (current version at 35 U.S.C. §§ 1-293 (1988)).

More than thirty years ago, legislation was introduced in Congress that would have provided a copyright-like form of protection for industrial designs for a period not to exceed ten years. It was recognized that under such a system, the inapt standard of unobviousness would be avoided, as well as the extensive examination procedure, which was not well geared for fast moving designs. On and off, such legislation has been before Congress ever since. The bills were identified in the 100th Congress as S. 791 and H.R. 1179. Both Houses of Congress held hearings on the design protection, establishing momentum going into the 101st Congress.

The most recent design protection legislation was introduced in the House of Representatives as H.R. 902.[18] Resembling prior proposals very closely, the legislation provided copyright-like protection for a maximum period of ten years. The legislation proposed a registration-type system which, in contrast to the recently enacted Design Right in the United Kingdom, would require that a design registration be filed and a certificate issued, much like a patent. The proposed system would provide greater certainty because the public would be able to search, much in the same manner of patent searches, to determine whether the proprietor intends to assert design rights, rather than having to guess whether the proprietor intends to assert such rights. Identification of a protected design would be encouraged by the use of a notice affixed to the goods which would operate as constructive notice for the purpose of computing damages. In this connection, one would have to apply for a protective design registration within one year of the time the design was made public.

Since a simple and quick copyright registration process is contemplated, it is expected that one would be relatively certain whether proprietorship rights are to be asserted about two years from the time a product is introduced in the market. This is really a "win-win" situation for both the designer and the public. The designer's protection starts immediately upon commercialization of the product, provided that he applies for design protection within the year. The public would know with a relatively high degree of certainty very soon thereafter whether protection is to be sought.

This timely certainty is more procompetitive compared to the uncertain delays in the design patent system and the quite subjective nature of unfair competition claims that tend to make copying a game of Russian roulette. Such legislation should also eliminate the inequitable conduct and specification problems previously mentioned. The sincerest form of flattery was paid to this concept when the advocates of semiconductor chip protection discarded their copyright amendment approach and adopted a sui generis form of protection along the same lines as the design legislation.

In applying the concept to the design field, three issues presented by the legislation need to be clearly understood. These issues are: (1) the

18. H.R. 902, 101st Cong., 1st Sess. (1989).

relationship between the shape of a protectable design and its underlying function; (2) the need for aesthetic or ornamental content; and (3) the treatment given to parts of a utilitarian article otherwise subject to design protection. Each of these issues has been the subject of debate, with more heat than light being shed.

## IV. FUNCTIONALITY

Generally, the province of protecting functional ideas is considered to be the domain of utility patents. Today designs overly dependent on function are considered nonprotectable as design patents, trademarks, copyrights, or under unfair competition theories. The amount of functional poison necessary to kill the protection varies from category to category, and it varies to an even greater degree from judge to judge when litigated. Great uncertainty exists at law for the simple reason that Congress has never given the judiciary useful guidance.

Most of the definitions that have evolved in copyright and trademark law are intended to be restrictive and give wide berth to the area where true blending of form and function occurs, which is the real goal the designer seeks. To be helpful, it is necessary to provide effective and clear protection for designs, to go to the heart of the matter and to give some positive guidance, either in the legislation or its interpretive legislative history, relative to function. When analyzing utilitarian devices, many judges simply cannot go beyond the *Mazer v. Stein*[19] test, under which the design content must be so identifiable as to constitute a work capable of standing alone on its artistic merit when separated, at least conceptually, from the utilitarian article.

A good example of the problem is *Parke v. Milton Industries, Inc.*,[20] involving an air nozzle design.[21] The nozzle, which machine operators clip into their pockets much like a pencil, connects to a shop air hose and is used to clean the machine area and clothing. The district court seemed to recognize the overall distinctiveness of the design, but when analyzing functionality, it found that every part of the nozzle had a purpose and that piece-by-piece, element-by-element, the nozzle was functional. Although it is true that each part of the nozzle had a functional purpose, it is also true that many different designs of air nozzles performing the same function could be created and much arbitrary design content was appropriated as well.

In *Moore v. Stewart*,[22] a different analysis of functionality was applied. In *Moore*, the straight-line design was of a whistle that simulated the sound of a train.[23] At one end, it had multiple openings to create the several tones

19. 347 U.S. 201 (1984).
20. 223 U.S.P.Q. (BNA) 719 (N.D. Ill. 1983).
21. *See* Appendix A at 292.
22. 600 F. Supp. 655 (W.D. Ark. 1985).
23. *See* Appendix A at 293.

necessary for the sound emulation, and the body of the whistle was a rather basic block form shape. The defendant asserted that the design was functional and hence invalid. However, the court noted that the plaintiff had a second design[24] which was of different configuration but still performed the same function. The court concluded that the defendant took not only what he needed to achieve the functional purpose, but also some arbitrary design content.

Therefore, the courts are faced with differentiating between shape that is necessary to perform the underlying function of a device, and shape that embodies other aspects of a device which are not devoid of function, but wherein that function could be just as effectively accomplished by different shapes. As a result, the courts are discriminating between a shape that serves a solely functional purpose in the sense that the function could not be accomplished without that exact form, and an alternative shape that is merely one of many shapes that could be employed. When one has this discretionary choice, necessity stops and copying begins.

Looking at *Moore*, it is easier to conclude that the more fanciful whistle design[25] would meet the test more clearly than the unadorned version,[26] but the result is not troublesome because the defendant had infinite potential design variations from which to choose and differentiate his product from that of Moore. If his whistle tone was different in quality from that of the original design, the public would gain by being able to associate that difference with a differentiated product appearance.

The concept that the design or the specific feature in question must be solely functional, in the sense that suitable alternative shapes must not be available, was carried forward by the Court of Appeals for the Federal Circuit in *Avia Group International, Inc. v. L.A. Gear California, Inc.*[27] Two design patents were asserted in this case, one to a shoe upper[28] and one to a shoe sole.[29] The court of appeals cited with approval the following passages from the lower court decision:

> "If the functional aspect or purpose could be accomplished in many other ways that [sic] is involved in this very design, that fact is enough to destroy the claim that this design is primarily functional. . . ."
>
> . . . .
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> . . . "But every function which [L.A. Gear] says is achieved by one of the component aspects of the sole in this case could be and has been achieved by different components. And that is a

24. *See id.* at 294.
25. *See id.*
26. *See id.* at 293.
27. 853 F.2d 1557 (Fed. Cir. 1988).
28. *See* Appendix A at 295.
29. *See id.* at 296.

very persuasive rationale for the holding that the design overall is not primarily functional."[30]

Similarly, the District Court for the Northern District of Illinois in *John O. Butler Co. v. Block Drug Co.*[31] stated:

> Here the court finds that the Butler design patent is not dictated solely by function. Other designs could easily fulfill the same function. The evidence at trial of Mr. Kostanecki and Dr. Porter established to the court's satisfaction that there were a variety of alternative designs available which would have fulfilled the same function as Butler's design patent.[32]

Section 1002(d) of the proposed design legislation is compatible with this concept by providing: "Protection under this chapter shall not be available for a design that is . . . dictated solely by a utilitarian function of the article that embodies it."[33] Although this proposed statutory language precedes the cases cited above, these cases are useful to infuse meaning into the "solely functional" concept and provide strong reinforcement that this legislative concept is appropriate.

## V. AESTHETIC/ORNAMENTAL REQUIREMENT

Existing United States design patent law requires that a design must be "ornamental."[34] One element of this requirement is the reciprocal of the excessive functionality issue. That is, the statute does not say too much function is fatal. Rather, when a court concludes the design to be primarily functional and hence not protectable, it can rest its decision on the ornamentality requirement by announcing that the design lacks the required degree of ornamentality, and hence is unpatentable or invalid. In the proposed legislation, this is handled both by the exclusion of solely functional designs as previously mentioned and by the standard copyright idea/expression statement that: "[i]n no case does protection for a design under this chapter extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described."[35]

Since the proposed legislation expressly treats this functionality issue while the current design patent law statute does not, the focus should now be on what other purpose the ornamental requirement serves so as to justify its inclusion. Does it mean that discretionary content of the design that goes

30. *Avia*, 853 F.2d at 1563 (citations omitted) (quoting Pensa, Inc. v. L.A. Gear Cal., Inc., 4 U.S.P.Q.2d (BNA) 1016 (C.D. Cal. 1987)).
31. 620 F. Supp. 771 (N.D. Ill. 1985).
32. *Id.* at 777 (citations omitted).
33. H.R. 902, 101st Cong., 1st Sess. § 1002(d) (1989).
34. 35 U.S.C. § 171 (1988).
35. H.R. 902, 101st Cong., 1st Sess. § 1002(g) (1989).

beyond necessary function should appeal to the senses like a painting or sculpture? If so, must the designer follow Pablo Picasso's definition of a painting which states: "Painting isn't an aesthetic operation; it's a form of magic designed as a mediator between this strange hostile world and us, a way of seizing the power by giving form to our terrors as well as our desires."[36]

The law is not nor should create a magic standard for designs any more than it should restore the flash of genius test for patents. Rather than focusing on the baroque and expressions of the inner torment of man, designers should take into account more terrestrial factors such as the efficient blending of form and function, the limitations of human anatomy, and clean lines. The aesthetic dimension of ornamentality is so subjective as to be quite unworkable. In *Plantronics, Inc. v. Roanwell Corp.*,[37] the District Court for the Southern District of New York summed this up well by stating that "in the final analysis, a court's evaluation of the patentability of a design is essentially subjective and personal artistic tastes are unpredictable and inexplicable—one viewer's mural is another's graffiti."[38]

As a practical matter, the Patent and Trademark Office and the courts do a pretty good job of resisting being carried away. Distinctiveness comes closer to expressing the de facto test applied. In *Litton Systems, Inc. v. Whirlpool Corp.*,[39] the Court of Appeals for the Federal Circuit upheld the lower court finding that the design patent in question was valid but reversed on infringement grounds. The design related to a microwave oven with very straight unadorned lines.[40] The oven had a simple rectangular button to depress in order to release the door latch. The court focused on the button as a feature of the protected design and hence contributing to ornamental make-up. Since such a feature was lacking in the alleged infringing device, it formed part of the basis for the noninfringement decision. The District Court for the District of Minnesota in *Wagner Spray Tech Corp. v. Menard, Inc.*[41] upheld a design[42] on a spray gun that was different in appearance from other spray guns but appeared to fall short of more traditional meanings of artistic, aesthetic, or ornamental. In *Kwik-Site Corp. v. Clear View Manufacturing Co.*,[43] the Court of Appeals for the Sixth Circuit upheld a design[44] on a very basic configuration for a mount for a telescopic sight of a rifle. The District Court for the Southern District of Florida in *Selchow & Righter Co. v. Goldex Corp.*[45] upheld a design[46] on what seemed to be a very

36. J. BARTLETT, *supra* note 16, at 774.
37. 403 F. Supp. 138 (S.D.N.Y. 1975).
38. *Id.* at 159-60.
39. 728 F.2d 1423 (Fed. Cir. 1984).
40. *See* Appendix A at 297.
41. 221 U.S.P.Q. (BNA) 226 (D. Minn. 1983).
42. *See* Appendix A at 298.
43. 758 F.2d 167 (6th Cir. 1985).
44. *See* Appendix A at 299.
45. 612 F. Supp. 19 (S.D. Fla. 1985).
46. *See* Appendix A at 300.

common game board arrangement. More recently, the District Court for the Northern District of Illinois in *John O. Butler Co. v. Block Drug Co.*[47] upheld designs[48] on interproximal brushes almost entirely determined by human ergonomics rather than features specially directed to evoke eye appeal.

The United States is not alone in this respect. Japan's law calls for "an aesthetic impression,"[49] but one sees very little of that in the exemplary designs of a bolt,[50] a nut,[51] and a drill bit.[52] The United Kingdom recently enacted a law creating a design right that only requires originality. The law avoids the hypocrisy of looking for an exotic magic quality, but when it is clearly present as in one of Picasso's paintings, one may obtain longer protection under the Registered Designs Act.[53] The French law is similar and the Japanese are considering revising their law to move more in this direction, although considering the bolt, nut, and drill bit, one would hardly think they have to be more basic. The movement in international law is in the direction of shedding the artistic requirement for designs, or at least augmenting design protection with legal concepts that do not require it.

The United States proposed legislation requires that the design be "attractive or distinct to the purchasing or using public."[54] This test is more appropriate for designs. In the case of a high style item, where all could agree that the design is attractive, no more need be said. The distinctiveness requirement is separately stated in the disjunctive so that if all cannot agree that a design is more like a mural than graffiti, one could look to see if it is distinct.

As distinctiveness is a new concept, it could, with proper guidance, be for designs what the long-sought unobviousness standard was for patents in 1952. As some might contend, it is not a totally meaningless word, or at least need not be. The required design difference must be judged in the eyes of the "purchasing or using public." One would assume that the legal evolution of the expression would rule out slight dimensional changes that only the draftsman can appreciate and would require a rather noticeable change from the status quo—a change that purchasers and users could appreciate, recognize, and use to help identify the origin or the quality of the product when compared to others. The showing needed to demonstrate this to a court would not be greatly different than the type of exercises used in trademark law to demonstrate secondary meaning or customer confusion. The legal inquiry in litigation would not extend to whether the distinctive content

47. 620 F. Supp. 771 (N.D. Ill. 1985).
48. *See* Appendix A at 301.
49. Japanese Design Law No. 125 of April 13, 1959 (codified as amended at ch. I, § 2(1)).
50. *See* Appendix A at 302.
51. *See id.* at 303.
52. *See id.* at 304.
53. Registered Designs Act, 1949, 12, 13 & 14 Geo. 6, ch. 88.
54. H.R. 902, 101st Cong., 1st Sess. § 1001(a) (1989).

is Picassoesque. The standard would probably approach the novelty standard in patent law by requiring newness without measuring the qualitative degree of difference.

By using an expression other than novelty, it is the expectation that distinctiveness will develop a meaning more appropriate to the design field than the functional utility patent field. In particular, it is quite often the designer's objective to make a particular utilitarian article look like something else. Thus, the appearance may not be new in the abstract but would be new for the class of product in question.

In *Parke v. Milton Industries, Inc.*,[55] the designer of an air nozzle attempted to simulate a pencil in the nozzle's general appearance.[56] The court held that the appearance of the nozzle was insufficiently new or novel to patentably distinguish it from the shape of a pencil, and it invalidated the design patent on that ground as well. There is a basis in the proposed legislation to reach a different result because the test would be whether "the article," which is the object of protection, is distinct to the public. If the public were asked this question with respect to Parke's nozzle, it would likely have answered in the affirmative.

There are those who do not feel that the law should abandon the ornamentality requirement for designs. This view is likely based on the feeling that the law should not extend intellectual property protection unless a noticeable creative effort has been consciously exercised. While that may seem at first blush to be a compelling point, it ignores the data. As indicated by a number of designs previously referred to, the requirement is unworkable and therefore as often ignored as observed.

## VI. PARTS AND CRASH PARTS

Extending design protection to parts of articles is not new. The existing design patent system makes no distinction between a complete article and a part. As some of the debilitating requirements are stripped away so that the protection is effective, at least in the narrow copyright context, to a broader segment of products, this raises the specter that original equipment manufacturers are going to be able to control the replacement part markets for their products.

It is not possible to maintain that a more effective design protection system will not swing the balance to some degree to the original designer. If it did not, it would have no procompetitiveness effect in the context of our current national concern vis-à-vis our foreign competition. Hence it would not be worth doing.

The potential impact is mitigated in part due to the narrow scope of protection afforded copyrights which is aimed more at the pirate than at the

55. 223 U.S.P.Q. (BNA) 719 (N.D. Ill. 1983).
56. *See* Appendix A at 292.

honest designer of an alternate item. Under copyright principles, if one produces the same work, it is not an infringement if done independently without access and derivation from the original work. Nevertheless, it is believed that many new products and many of the component parts of these new articles would be and are considered distinctive to the purchasing and using public. These products would be a larger universe than those that are also collectively unobvious, ornamental, novel, clearly claimed, etc., as required in the patent world. It is clear that special attention should be given to the parts question in order to strike the best balance, and particularly to preserve the viable parts industries in our country that put on the market good competitive parts of their own creation. The legislative proposal does this, but some interpretive principles may be helpful.

A first principle for providing parts protection is that the part must meet all the criteria for protectability as must the more complete article in which it is to be incorporated. That is, the part must be original, it must be attractive or distinct to the public, it cannot be commonplace, and it cannot be solely functional. As there have been some attempts to obscure this in the congressional hearings, it should be clearly noted that advocates of the legislation do not assert that the protection of a part somehow comes along for the ride without meeting these qualifications if one obtains protection on a larger device. The legislation is sufficiently clear in this respect.

A second principle is that the interfit dimensions or shape of a part are to be considered solely functional features and not capable of protection. For example, a Buick in the early fifties had a wrap-around front window such that the perimeter of the window, looking at it alone as a part, was without question distinctive. However, a replacement glass manufacturer would necessarily need to use the same perimeter for a suitable fit, and therefore, such an interfit shape must be classified as solely functional and something the manufacturer could copy.

The famous British Leyland muffler would likely invoke a similar fate. However, one could decide to make a muffler with a distinctive surface ornamentation and perhaps special design edge crimping to set his design apart from others. In that event, he should be permitted to try to build a business by associating in the minds of the public his quality with that shape, and he could facilitate this by noting that his warranty replacements are for his mufflers and not for those of some low quality imitator. This would require an exercise in separating out the functional from the alternative design features. One should be able to copy the muffler pipe fitting shape and dimensions and follow the general envelope shape to the extent necessary to insure that it fits in the available space and can connect to the front and tail pipes. Yet, the distinctive surface configuration and edge crimping ought to be protectable. Again, it is believed this is to be the straightforward interpretation of the solely functional exclusion in the legislation.

Automobile crash parts is a category of parts which needs independent

consideration. Applying the same analysis as applied to the muffler, one would conclude that the mating edge of a fender would be nonprotectable because it would fall in the interfit shape category. However, the fender shape is otherwise capable of many configurations that still retain wheel debris and accomplish the general purpose for which fenders are made. Thus, in theory, one could make a workable alternative design fender of a different shape that would fit up to the car body. However, as a practical matter, it is unlikely that anyone would want such a different looking fender because it would not match the fender that is on the other side of the car.

Poor quality replacements are being made overseas and often end up on automobiles with no indication that anything other than an original quality part has been used. The customer is getting duped and going away with something that may discolor or rust through in short order, and the auto companies are losing parts sales. This issue, perhaps more than any other, has held the progressive legislation hostage.

Certain insurance companies have encouraged companies to copy designs in order to provide a source of cheap replacement parts for the repair shops doing work on vehicles insured by them. The insurance companies contend that the parts they require are lower in cost but of equal or better quality than the original. As a result, the insurance companies have opposed this legislation.

Looking at the auto and insurance industries as both operating within the constraints of their respective competitive environments, it seems that the basic consumer benefit argument of the insurance industry fails. The public does not benefit from an analysis that focuses entirely on the cost of auto insurance to the exclusion of other transportation costs. The consumer makes a capital investment when he buys a car, and in addition, he has certain running and maintenance costs. Collectively, all of these costs, including insurance, minus trade-in value, should be amortized over the life of the vehicle to determine the true yearly cost of transportation. It does not particularly help that equation to transfer money out of the auto company's pocket into that of the insurance companies. Assuming that both will attempt to maintain historical profitability levels, the consumer is simply going to spend more for his next car, and perhaps, his insurance premium will not increase at the same rate it might otherwise would have. The effect may be negative on the consumer's state of mind if he has to accept a crash replacement part that is inferior. Most of the real beneficiaries will be the offshore pirates, and American balance of payments and national competitiveness will be adversely affected.

There are many industries of all sizes from the very small on up that could benefit from effective design protection and could collectively make a major contribution to the trade deficit as a result. We simply cannot subvert these private and national interests for an issue that is not likely to provide a real benefit for the American car owner and that only increases the likelihood he may have to drive around with some inferior parts.

## VII. AN EXAMPLE

The mailbox nut, a very basic part which secures a bolt, demonstrates how protection under the proposed legislation might work when applied to parts. If one accepts this example as one that might reasonably be protected and that provides an acceptable balance between the rights of the original designer and those who might want to supply an alternative, then one would likely be comfortable with the impact of this protection across the board.

Figure 1 in Appendix B illustrates a side view of a segment of a track for a crawler tractor.[57] One link is shown with an attached track shoe that is bolted in place with a bolt which is attached by a nut. In the world of home repair, a bolt and nut are low tech items. That is not true for a tractor undercarriage due to the pounding and adverse environment it must withstand. A track shoe will loosen quickly unless the proper amount of torque is applied that actually induces the right degree of stretch in the bolt. The extremely high reaction force maintained by the nut is distributed in such a way as not to cause stress concentration that would serve to fatigue and crack the supporting link.

Figure 2 in Appendix B gives a projection view of the nut.[58] It is called a mailbox nut because it has a vague resemblance to a roadside-type rural mailbox. When it was introduced, the nut's shape was distinctive, and it became identified as the Caterpillar mailbox nut. It is quite easy to make a look-alike nut of inferior quality because material choice, heat treatment, and hardness are carefully controlled so that the nut itself will not rupture or overly induce stress concentration points in the link against which it bears, and so that it will have the necessary thread strength. The cross sectional view of the nut on the right-hand side has three areas designated with an "I" to indicate that these are critical interfit shapes. At the top, the two areas on either side represent the load bearing areas that need to conform to the mating link surface to distribute the load properly. The inner thread must mate with the corresponding thread of the bolt.

The remaining shape of the nut is discretionary, at least in the sense that alternative shapes could be used while still accomplishing the needed functional result. Figure 3 in Appendix B illustrates two possible acceptable alternative designs.[59] The one on the left has a more boxy shape with arcuate conforming surfaces only in the load bearing region. The design on the right is cylindrical or circular in cross section but would still do the job provided that it was otherwise of good quality and design.

If one were to market one of the alternative designs, he would initially meet some market resistance until he established that it was as good as or better than the original. When he has done that, or when he has at least

57. *See* Appendix B at 305.
58. *See id.* at 306.
59. *See id.* at 307.

demonstrated that if it was not quite as good, the low price still made it the best buy for certain applications, it would be recognized for its own merits. That is a desirable hurdle, and it is the exercise that truly gives the customer a meaningful and recognizable choice. If one starts out copying the mail-box shape, his nut may have no market resistance to overcome, but by the same token, the customer is not alerted that there is anything changed and assumes it is the same or the equivalent when that might be far from the case.

The answer may seem to be the affixing of a trademark so that the customer will always know when he has an original source replacement. However, for vehicles having hundreds of parts, trademarks or trade dress often are not effective. A user usually knows that a vehicle manufacturer sources half or sometimes more of the component parts from other vendors. Some of the outsourced items are designed by the vehicle manufacturer and some are the design of the vendor. If the original part had an affixed trademark and the replacement did not, the likely assumption is still that it is the same or the full equivalent item simply supplied directly rather than through the vehicle manufacturer. This assumption is often assisted by the same part number appearing on both the original and the questionable replacement.

However, in the replacement parts field, appearance dominates over and submerges labeling. Why consider it procompetitive to disarm the purchaser with look-alikes, when simply giving protection for a limited time to the arbitrary content of the article would make such action unnecessary?

# APPENDIX A

## U.S. Patent Dec. 17, 1985 Des. 281,736

[54] **POCKETED CASUAL GYMNASTIC AND AEROBIC SHOE**

[75] Inventor: Robert J. Gamm, St. Louis County, Mo.

[73] Assignee: Kangaroos U.S.A., Inc., St. Louis, Mo.

[**] Term: 14 Years

[21] Appl. No.: 501,657

[22] Filed: Jun. 6, 1983

Related U.S. Application Data

[63] Continuation-in-part of Ser. No. 408,650, Aug. 16, 1982, which is a continuation-in-part of Ser. No. 314,136, Oct. 23, 1981, and a continuation-in-part of Ser. No. 116,279, Jan. 18, 1980, Pat. No. Des. 261,695, which is a continuation-in-part of Ser. No. 938,098, Aug. 30, 1978, abandoned.

[52] U.S. Cl. ..... D2/301; D2/308; D2/314; D2/309

[58] Field of Search ..... D2/301, 300, 282, 293, D2/308, 314, 209, 268; 36/83–84, 10, 136

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*Primary Examiner*—Nelson C. Holtje
*Attorney, Agent, or Firm*—Paul M. Denk

[57] CLAIM

The ornamental design for the pocketed casual gymnastic and aerobic shoe, as shown and described.

DESCRIPTION

FIG. 1 is a left side perspective view of a pocketed casual gymnastic and aerobic shoe showing my new design;
FIG. 2 is a left side elevational view thereof;
FIG. 3 is a right side elevational view thereof;
FIG. 4 is a top plan view thereof;
FIG. 5 is a bottom plan view thereof;
FIG. 6 is a rear elevational view thereof;
FIG. 7 is a front elevational view thereof.

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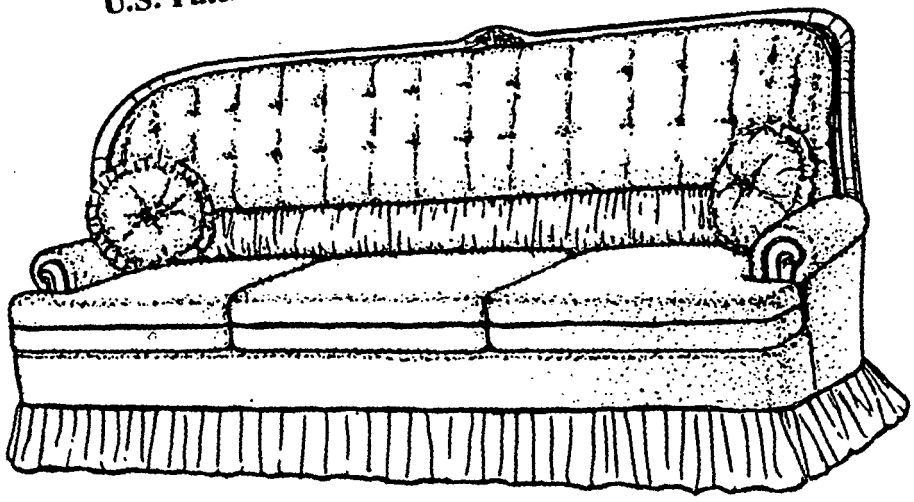

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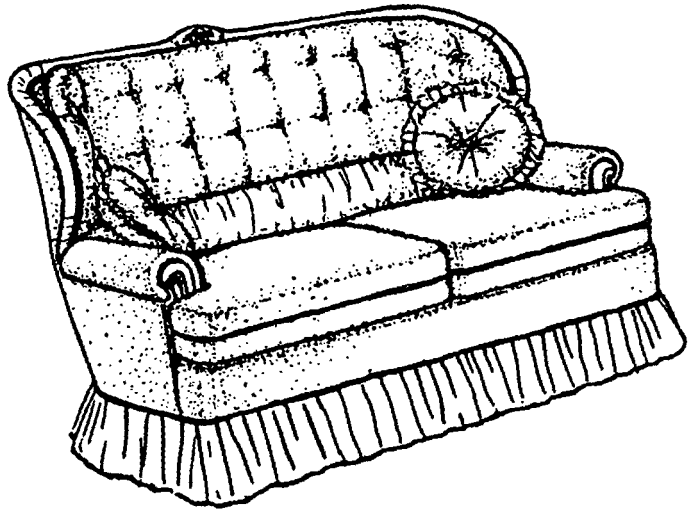
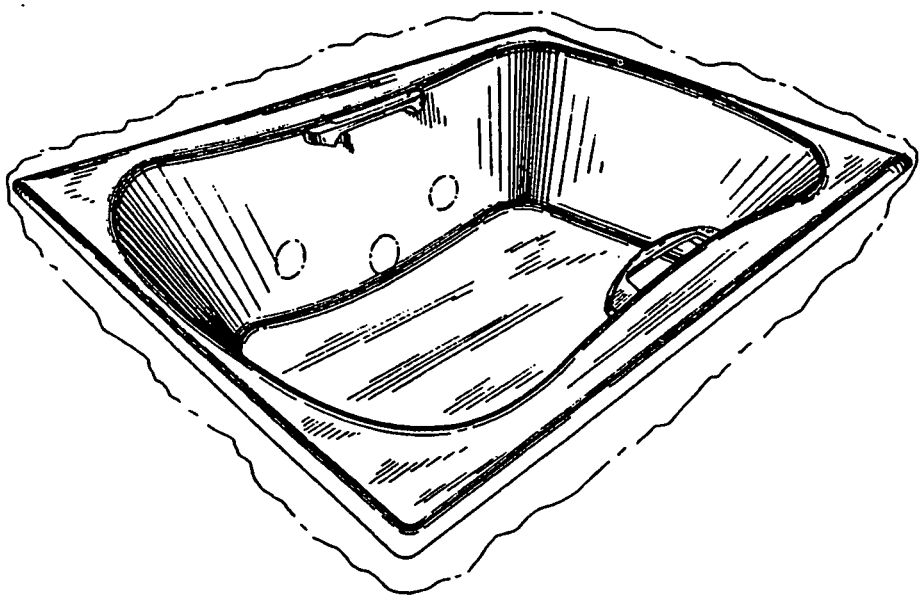


*Figure 1b*

U.S. Patent July 27, 1982 Des. 265,582



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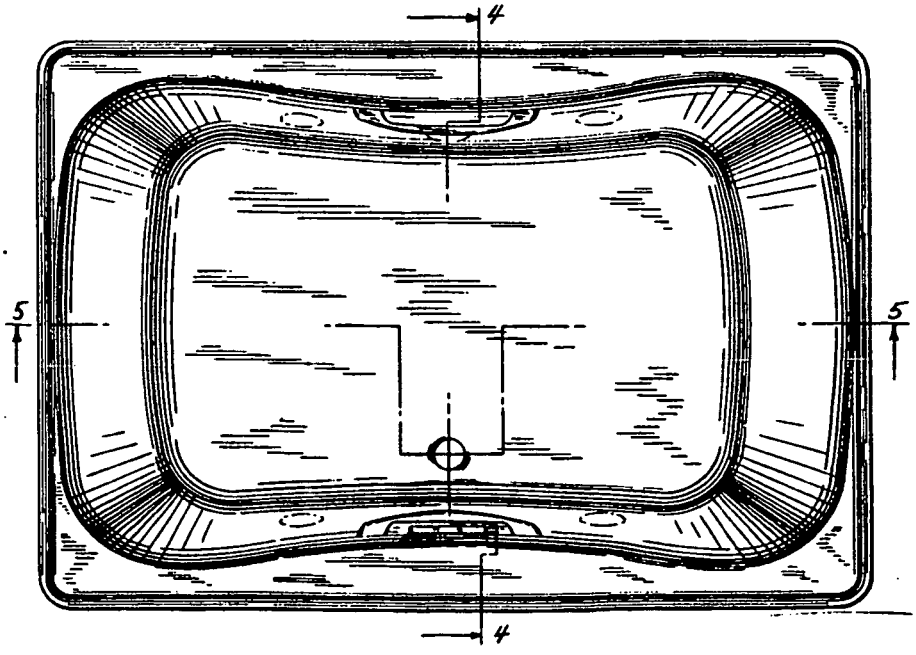


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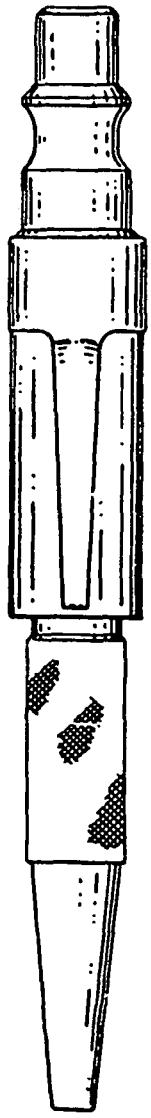

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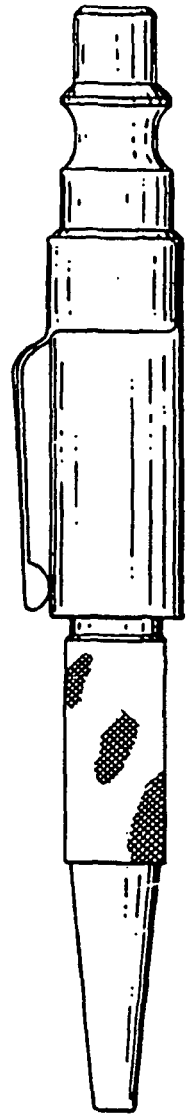

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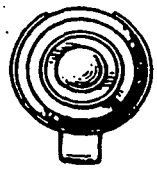

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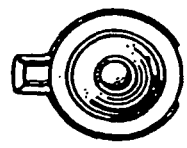


*Figure 3d*

U.S. Patent Mar. 16, 1982 Des. 263,383

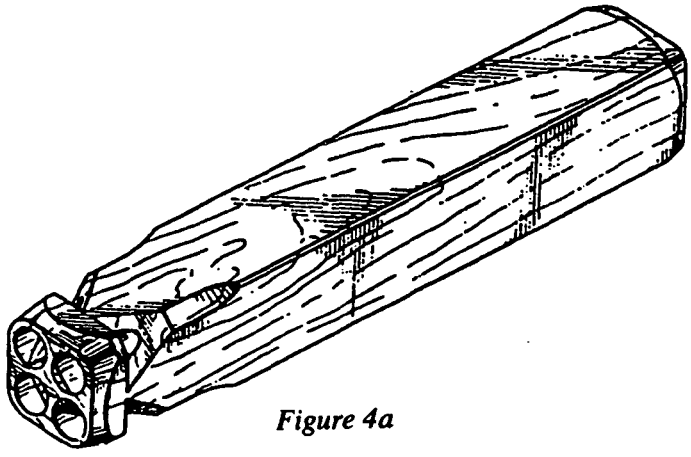


*Figure 4a*

*Figure 4b*

*Figure 4c*

U.S. Patent Mar. 16, 1982 Des. 263,382

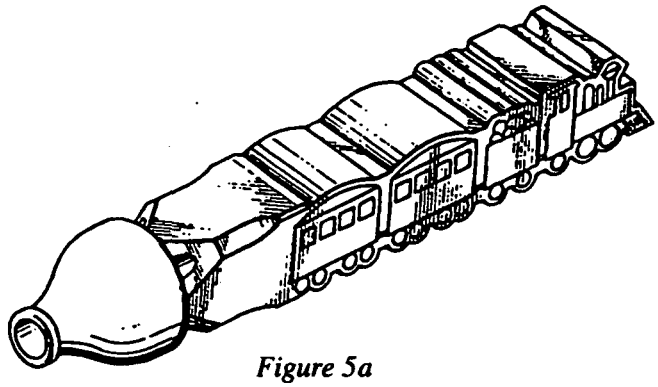
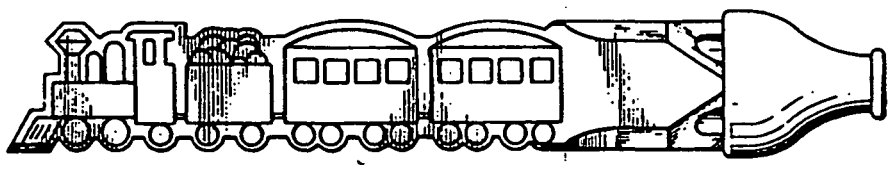


*Figure 5a*

*Figure 5b*



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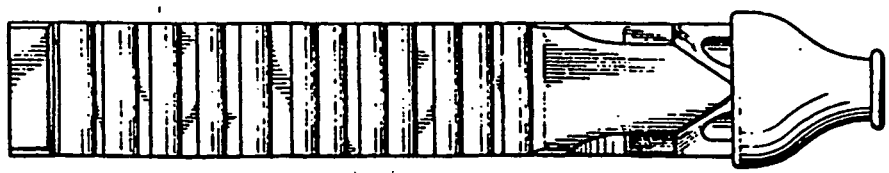


*Figure 5d*

**U.S. Patent** Dec. 23, 1986 **Des. 287,301**

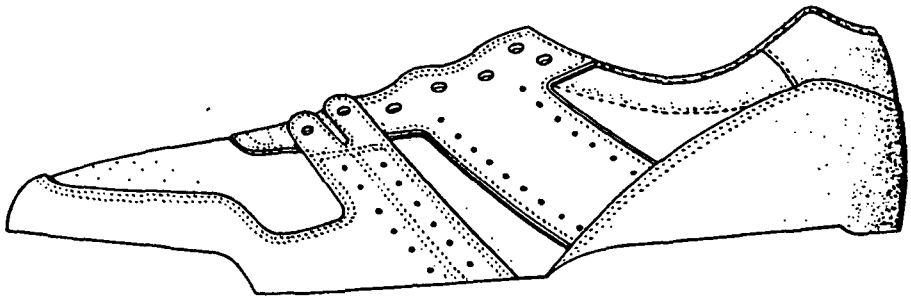


*Figure 6a*

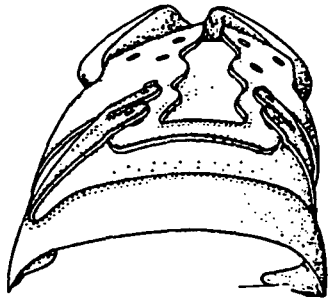


*Figure 6b*

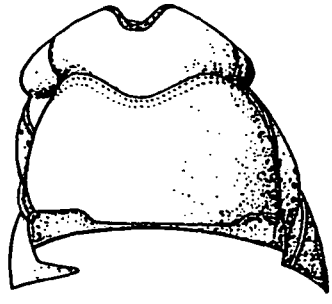


*Figure 6c*

**U.S. Patent** July 1, 1986 **Des. 284,420**

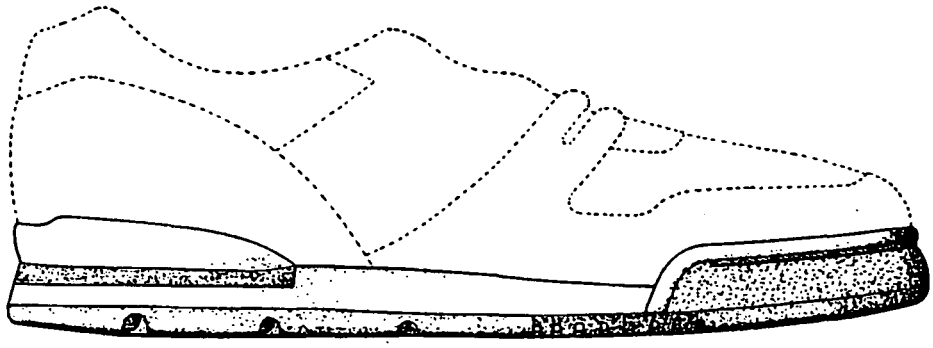


*Figure 7a*

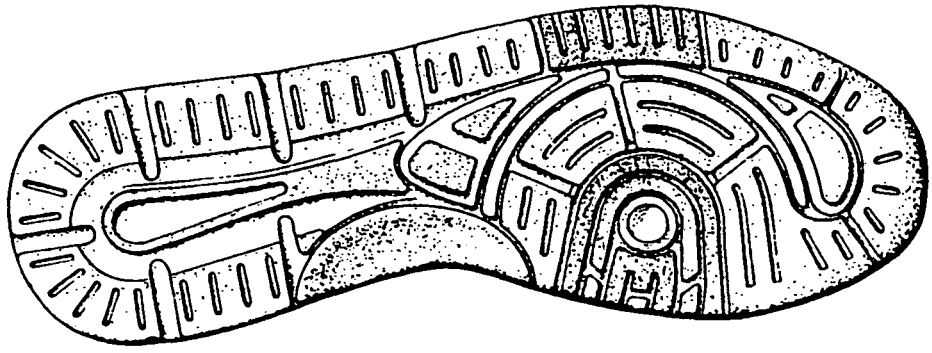


*Figure 7b*

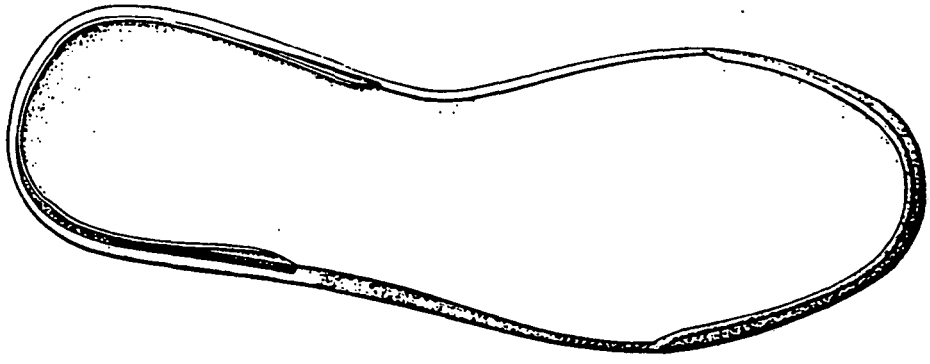


*Figure 7c*

U.S. Patent May 22, 1973 Des. 226,990

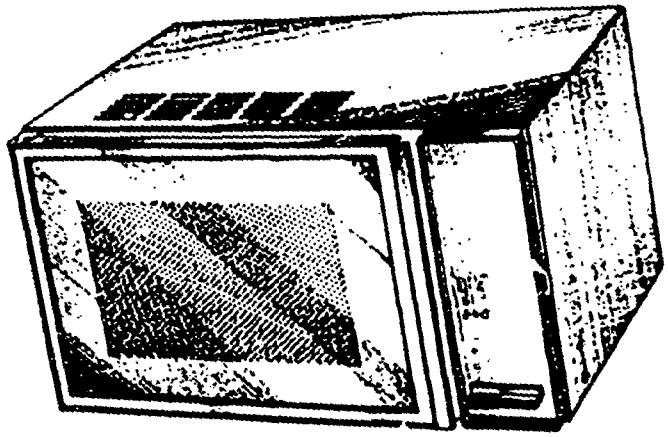


*Figure 8a*

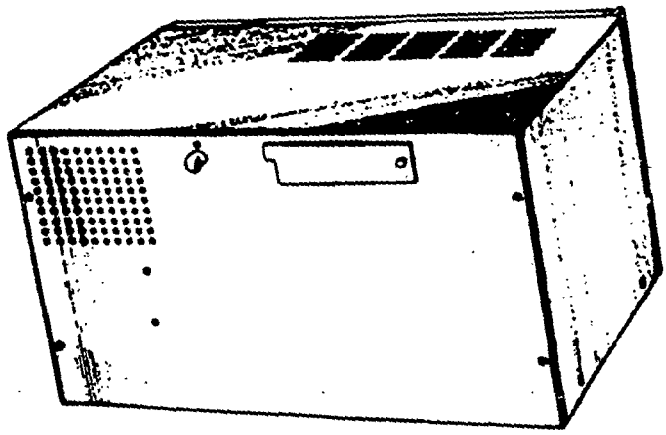


*Figure 8b*

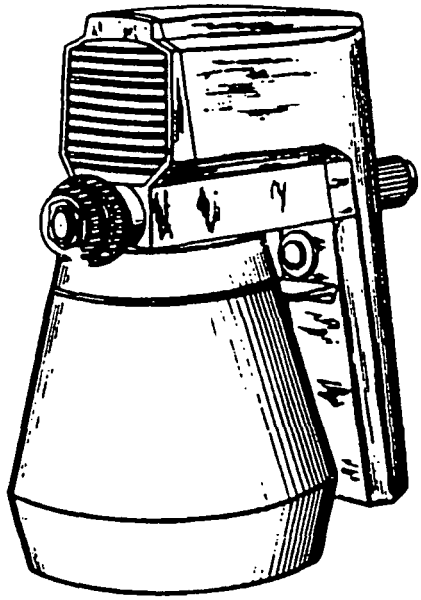


*Figure 9a*

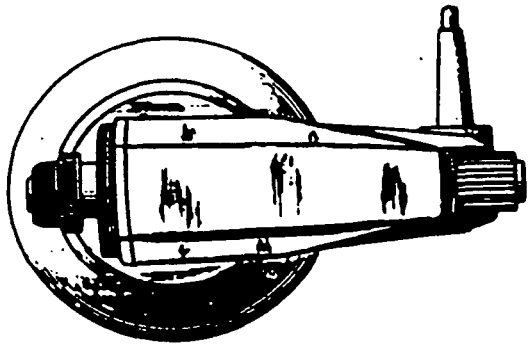


*Figure 9b*

U.S. Patent June 27, 1978 Des. 248,309

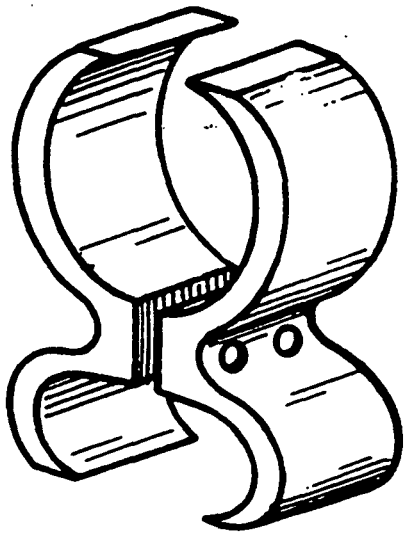


*Figure 10*

U.S. Patent Sept. 27, 1983 Des. 270,741

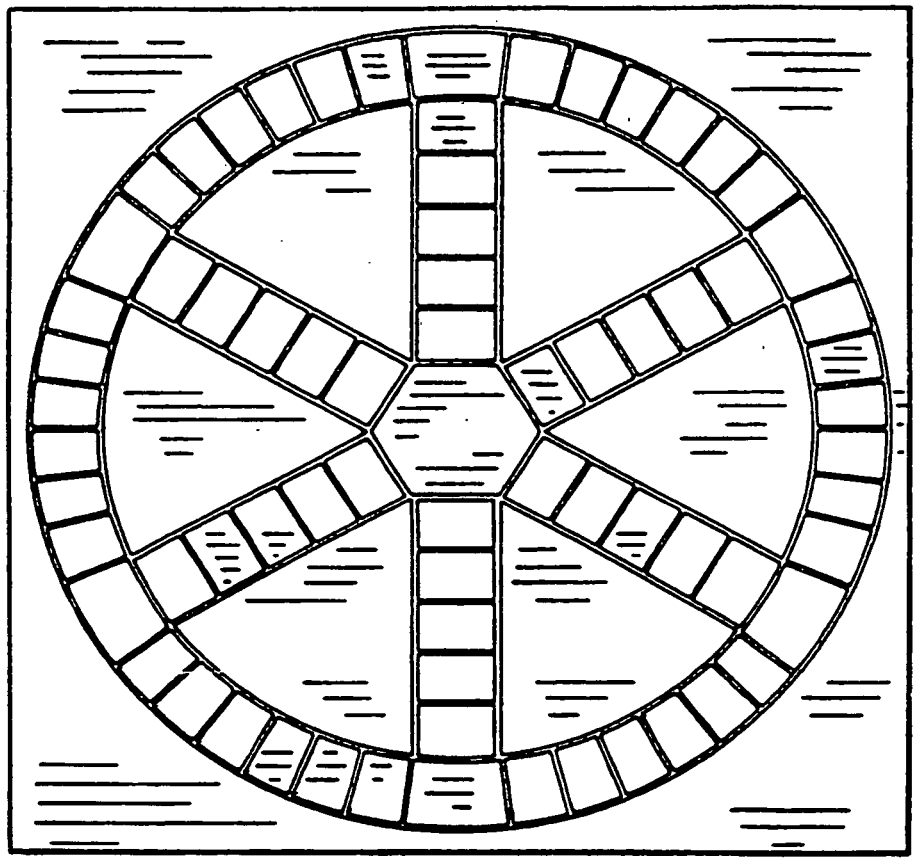


*Figure 11a*

*Figure 11b*

U.S. Patent Dec. 15, 1981 Des. 262,316

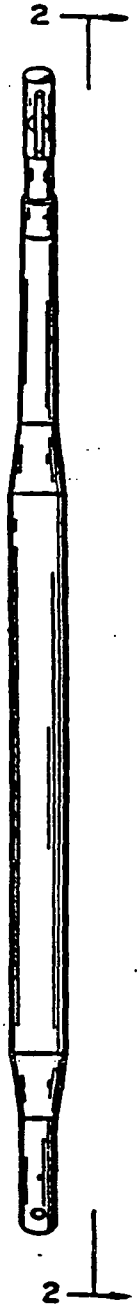



Figure 12b

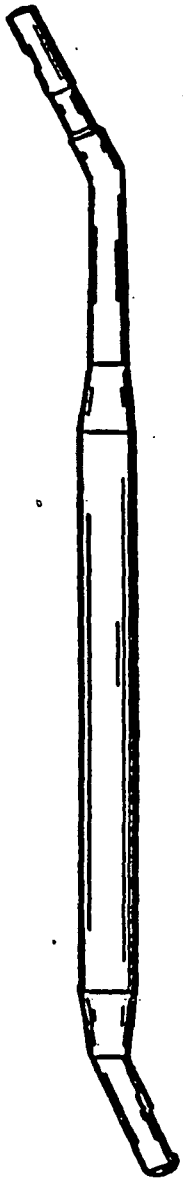


Figure 12a

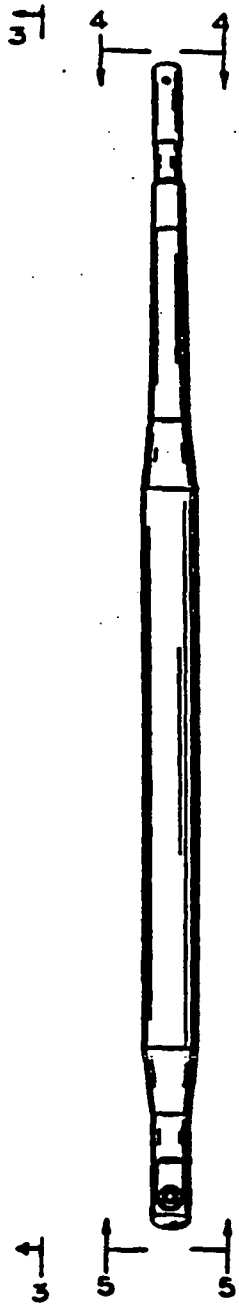



Figure 12c

Figure 12d

Figure 12e

**Japan Patent** July 18, 1983 **Des. 604,804**

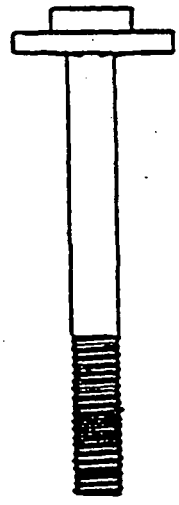


*Figure 13a*

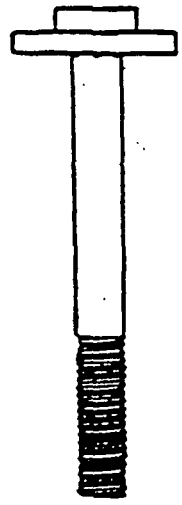


*Figure 13b*

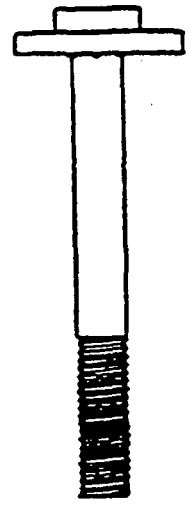


*Figure 13c*

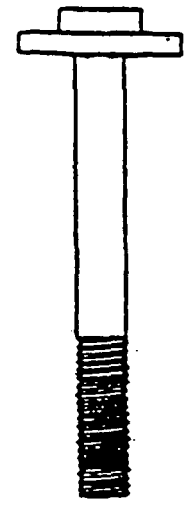


*Figure 13d*

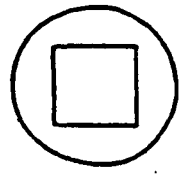


*Figure 13e*

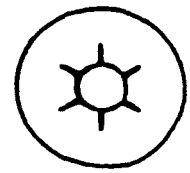


*Figure 13f*

**Japan Patent** Feb. 22, 1986 **Des. 672,722**

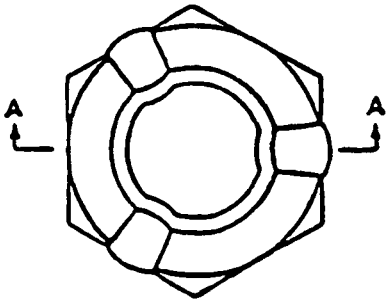



*Figure 14a*

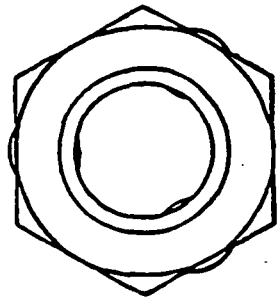


*Figure 14b*

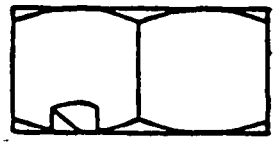


*Figure 14c*

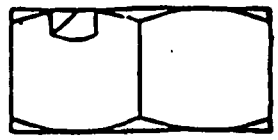


*Figure 14d*

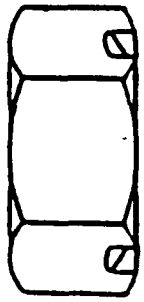


*Figure 14e*

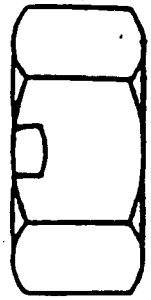


*Figure 14f*

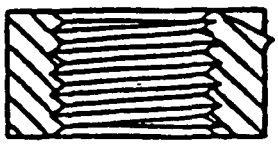


*Figure 14g*

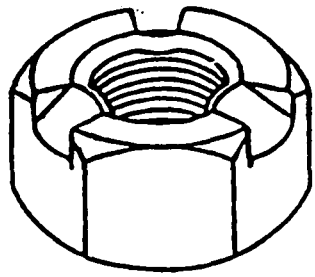


*Figure 14h*

**Japan Patent** Jan. 18, 1986 **Des. 670,374**

*Figure 15a*

*Figure 15b*

*Figure 15c*

*Figure 15d*

*Figure 15e*

*Figure 15f*

## APPENDIX B

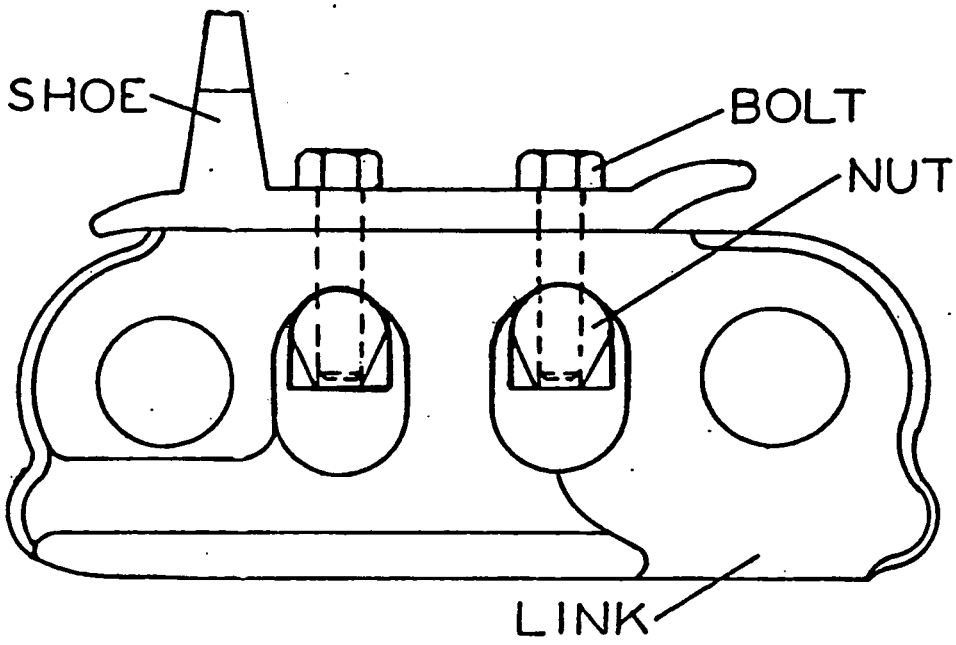



*Figure 1*

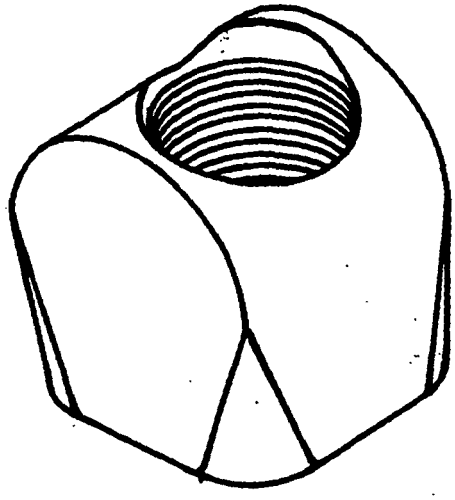


*Figure 2a*

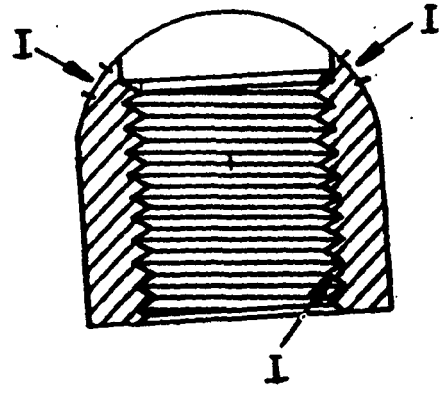
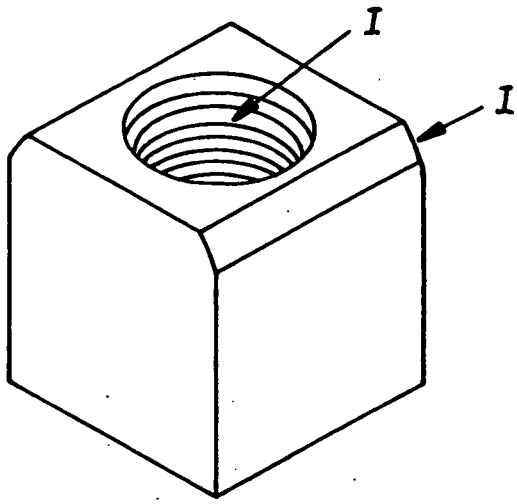



*Figure 2b*

I=INTERFIT SHAPE




ALT.
DESIGNS

*Figure 3a*

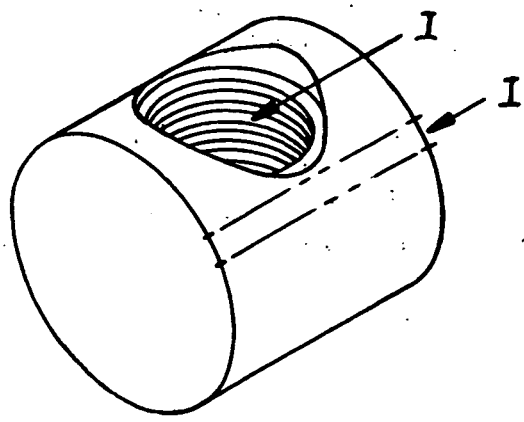



*Figure 3b*