



# Design Patents

Industry & Invention  
Patent

Eric E. Johnson

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Assuming other requirements are met, copyright could mostly clearly be claimed over which of the following?

- (A) a novel computer program
- (B) a two-word slogan for a chain of fitness centers
- (C) the shape of a doorknob
- (D) an improvement on the design of a chair
- (E) an idea for how to better defuse conflict in pre-school daycare

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- (B) a two-word slogan for a chain of fitness centers
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- (E) an idea for how to better defuse conflict in pre-school daycare

Assuming other requirements are met, copyright could most clearly be claimed over which of the following?

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- (B) a two-word slogan for a chain of fitness centers
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- (D) an improvement on the design of a chair
- (E) an idea for how to better defuse conflict in pre-school daycare

Chair designs and doorknob shapes are things that are within the domain of design patents.


Note: I've leaned very heavily on Prof. Sarah Burstein's work in putting together the examples and analysis in this slide deck.

## Design patent basics

- Term:
  - 14 years from issuance (pre May 13, 2015 applications)
  - 15 years from issuance (post May 12, 2015 applications)
- Design can include configuration/shape of article, surface ornamentation, or a combination of shape and surface ornamentation.

# Design patent basics

- Claimed with a single claim that references the drawings, e.g.: “The ornamental design for [the article] as shown and described.”
- Design patent numbers have a “D” prefix.



US06D656295S

(12) **United States Design Patent** (11) Patent No.: **US D656,295 S**  
**Tokarz** (45) Date of Patent: **Mar. 20, 2012**

(54) **HEADSTONE ENHANCEMENT** *Primary Examiner*—Michael Pratt  
 (76) Inventor: **Bernard Tokarz**, Blossburg, PA (US) *CA Attorney, Agent, or Firm*—Byzmal, Shidder, Kristine  
 Shidder, BLS Law Group

(\*\*) Term: **14 Years** (57) **CLAIM**  
 (21) Appl. No.: **29366,774** The ornamental design for a headstone enhancement, as  
 (22) Filed: **Apr. 30, 2010** shown and described.

**DESCRIPTION**

**Related U.S. Application Data**

(63) Continuation-in-part of application No. 29323,827,  
 filed on Sep. 2, 2008, now abandoned.

(51) **LOC (9) CL** **25-03**

(52) **U.S. CL.** **D9998**

(58) **Field of Classification Search** D9913, 24;  
 271-8, 14, 27, 30, 52/103, 40124.5,  
 D11/145-163, D25/38, 111

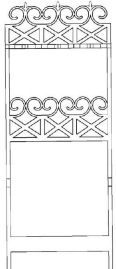
See application file for complete search history.

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\* cited by examiner

**1 Claim, 3 Drawing Sheets**





US00D656295S

(12) **United States Design Patent** (10) **Patent No.:** **US D656,295 S**  
**Tokarz** (45) **Date of Patent:** **\*\* Mar. 20, 2012**

(54) **HEADSTONE ENHANCEMENT**  
(76) Inventor: **Bernard Tokarz**, Blossburg, PA (US)  
(\*) Term: **14 Years**  
(21) Appl. No.: **29/360,774**  
(22) Filed: **Apr. 30, 2010**

*Primary Examiner* — Michael Pratt  
(74) *Attorney, Agent, or Firm* — Blynn L. Shideler; Krisanne Shideler; BLK Law Group

(57) **CLAIM**  
The ornamental design for a headstone enhancement, as shown and described.

**DESCRIPTION**

**Related U.S. Application Data**  
(63) Continuation-in-part of application No. 29/323,827, filed on Sep. 2, 2008, now abandoned.  
(51) **LOC (9) CL** ..... **25-03**  
(52) **U.S. CL** ..... **D99/18**  
(58) **Field of Classification Search** ..... D99/1-24; 27/1-8, 14, 27, 30; 52/103; 40/124.5; D11/143-163; D25/38, 111  
See application file for complete search history.

FIG. 1 is a front view of an ornamental headstone enhancement according to a first embodiment of the present invention; FIG. 2 is a back view of the headstone enhancement of FIG. 1; FIG. 3 is a top plan view of the headstone enhancement of FIG. 1; FIG. 4 is a bottom plan view of the headstone enhancement of FIG. 1; FIG. 5 is a right side view of the headstone enhancement of FIG. 1; FIG. 6 is a left side view of the headstone enhancement of FIG. 1; FIG. 7 is a front view of the headstone enhancement of FIG. 1 positioned in the ground with a headstone illustrated in phantom; and, FIG. 8 is a perspective view of the headstone enhancement of FIG. 1.  
The phantom lines are for purposes of illustrating environmental structure that forms no part of the claimed design.

(56) **References Cited**  
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D545,454 S \* 6/2007 McCarthy ..... D25/53  
2003/0132426 A1 \* 7/2003 Kang ..... 256/22  
**FOREIGN PATENT DOCUMENTS**  
EP 857850 A2 \* 8/1998  
\* cited by examiner

**1 Claim, 3 Drawing Sheets**

(45) **Date of Patent:** **\*\* Mar. 20, 2012**

*Primary Examiner* — Michael Pratt  
(74) *Attorney, Agent, or Firm* — Blynn L. Shideler; Krisanne Shideler; BLK Law Group

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**DESCRIPTION**

FIG. 1 is a front view of an ornamental headstone enhancement according to a first embodiment of the present invention; FIG. 2 is a back view of the headstone enhancement of FIG. 1; FIG. 3 is a top plan view of the headstone enhancement of FIG. 1; FIG. 4 is a bottom plan view of the headstone enhancement of FIG. 1; FIG. 5 is a right side view of the headstone enhancement of FIG. 1;

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The ornamental design for a headstone enhancement, as shown and described.

**DESCRIPTION**

FIG. 1 is a front view of an ornamental headstone enhancement according to a first embodiment of the present invention;

FIG. 2 is a back view of the headstone enhancement of FIG. 1;

FIG. 3 is a top plan view of the headstone enhancement of FIG. 1;

FIG. 4 is a bottom plan view of the headstone enhancement of FIG. 1;

FIG. 5 is a right side view of the headstone enhancement of FIG. 1;

FIG. 1:

3,827,

25-03

099/18

/1-24;

124.5;

8, 111

7.

U.S. PATENT DOCUMENTS  
5,701,714 A \* 12/1997 Dietrichs ..... 52/665  
D397,888 S \* 9/1998 Teng ..... D6/464  
D545,454 S \* 6/2007 McCarthy ..... D25/53  
2003/0132426 A1 \* 7/2003 Kang ..... 256/22

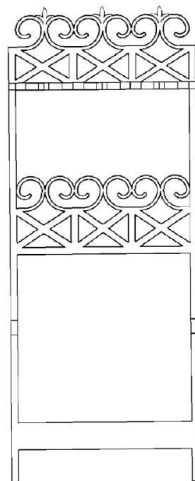
FOREIGN PATENT DOCUMENTS  
EP 857850 A2 \* 8/1998

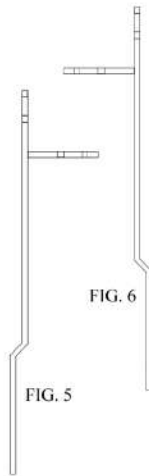
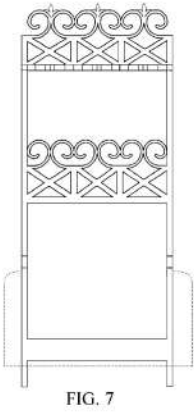
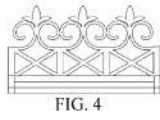
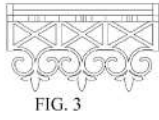
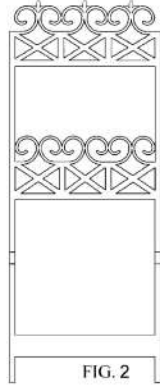
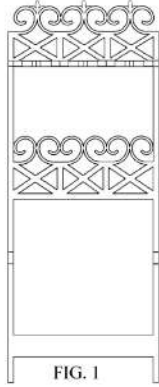
\* cited by examiner

FIG. 7 is a front view of the headstone enhancement of FIG. 1 positioned in the ground with a headstone illustrated in phantom; and,  
FIG. 8 is a perspective view of the headstone enhancement of FIG. 1.

The phantom lines are for purposes of illustrating environmental structure that forms no part of the claimed design.

1 Claim, 3 Drawing Sheets





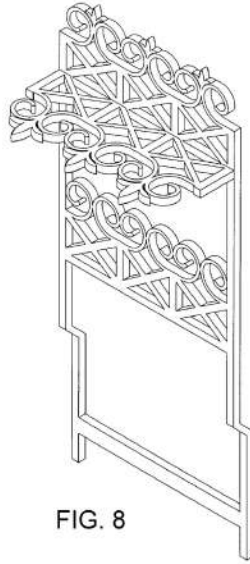


FIG. 8



(12) **United States Design Patent** (10) Patent No.: **US D655,886 S**  
 Kovich et al. (45) Date of Patent: **Mar. 20, 2012**

(54) **SQUARE BOTTOM TACO SHELL**  
 (75) Inventors: **Nicholas D. Kovich**, Minneapolis, MN (US); **Anthony W. Richards**, Poplar, WI (US)  
 (73) Assignee: **General Mills Cereals, Inc.**, Minneapolis, MN (US)  
 (\*\*\*) Term: **14 Years**  
 (21) Appl. No.: **29333,882**  
 (22) Filed: **Mar. 3, 2009**

**Related U.S. Application Data**  
 (60) Division of application No. 29258,095, filed on Oct. 30, 2006, now Pat. No. 7,550,128, which is a continuation of application No. 10,501,298, filed as application No. PCT/US02/06474 on Nov. 14, 2002, now abandoned.  
 (51) **LOC. IN CL.** ..... **01-01**  
 (52) **U.S. CL.** ..... **D1/122**  
 (58) **Field of Classification Search** ..... D1/100-102, D1/105-116, D1-118, D20-130, 196, 197/044; D2/519, 121; D1/2223, 162; D8/346; D1/591; D2/5267, 426/138, 143, 279, 282, 283, 301; 426/514, 211/189  
 See application file for complete search history.

(56) **References Cited**  
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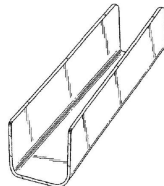
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**Primary Examiner**—Barbara Fox  
 (74) **Attorney, Agent, or Firm**—John A. O'Toole; Dale A. Bjorkman; Kevin J. Hubbard

(57) **CLAIM**  
 The ornamental design for a square bottom taco shell, as shown and described.

**DESCRIPTION**  
 FIG. 1 is a perspective view of a square bottom taco shell of the present design;  
 FIG. 2 is a left side view of the square bottom taco shell of FIG. 1, the right side view being identical thereto; and  
 FIG. 3 is a front view of the square bottom taco shell of FIG. 1, the rear view being identical thereto.

1 Claim, 1 Drawing Sheet







(12) **United States Design Patent** (10) **Patent No.:** **US D655,886 S**  
**Kovich et al.** (45) **Date of Patent:** **\*\* Mar. 20, 2012**

(54) **SQUARE BOTTOM TACO SHELL** 2,274,344 A \* 2/1942 Palmer ..... 229/87.06  
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 (Continued)

(75) Inventors: **Nicholas D. Kovich**, Minneapolis, MN  
 (US); **Anthony W. Richards**, Poplar, WI  
 (US)

(73) Assignee: **General Mills Cereals, Inc.**,  
 Minneapolis, MN (US)

(\*\*) Term: **14 Years**

(21) Appl. No.: **29/333,082**

(22) Filed: **Mar. 3, 2009**

**Related U.S. Application Data**

(60) Division of application No. 29/268,095, filed on Oct. 30, 2006, now Pat. No. Des. 590,126, which is a continuation of application No. 10/501,298, filed as application No. PCT/US02/036474 on Nov. 14, 2002, now abandoned.

(51) **LOC (9) Cl.** ..... **01-01**  
 (52) **U.S. Cl.** ..... **D1/122**  
 (58) **Field of Classification Search** ..... D1/100-102,  
 D1/105-16, 116-118, 120-130, 199; D7/504;  
 D25/119, 121; D12/223, 162; D8/356; D19/91;  
 D23/267; 426/138, 143, 279, 282-283, 391,  
 426/514; 211/189  
 See application file for complete search history.

(56) **References Cited**

U.S. PATENT DOCUMENTS

**OTHER PUBLICATIONS**

Bethlehem Steel Catalog, Copyright 1931; p. 9, extrusion, bottom row.\*

(Continued)

*Primary Examiner* — Barbara Fox

(74) *Attorney, Agent, or Firm* — John A. O'Toole; Dale A. Bjorkman; Kevin J. Hubbard

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The ornamental design for a square bottom taco shell, as shown and described.

**DESCRIPTION**

FIG. 1 is a perspective view of a square bottom taco shell of the present design;

(Continued)

..... **01-01** *Primary Examiner* — Barbara Fox  
 .... **D1/122** (74) *Attorney, Agent, or Firm* — John A. O'Toole; Dale A.  
 1/100-102, Bjorkman; Kevin J. Hubbard  
 9; D7/504

6; D19/91  
 2-283, 391  
 4; 211/189  
 story.

(57) **CLAIM**  
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**DESCRIPTION**

FIG. 1 is a perspective view of a square bottom taco shell of the present design;  
 .... D25/121 FIG. 2 is a left side view of the square bottom taco shell of FIG. 1, the right side view being identical thereto; and, FIG. 3 is a front view of the square bottom taco shell of FIG. 1, the rear view being identical thereto.

..... 72/166

**1 Claim, 1 Drawing Sheet**



1/100-102,  
9; D7/504;  
6; D19/91;  
2-283, 391,  
4; 211/189  
story.

Bjorkman; Kevin J. Hubbard

(57)

**CLAIM**

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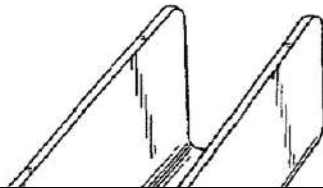
**DESCRIPTION**

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1 Claim, 1 Drawing Sheet

.... D25/12

..... 72/16



(52) U.S. Cl. .... D1/122  
(58) Field of Classification Search ..... D1/100-102,  
D1/105-16, 116-118, 120-130, 199; D7/504;  
D25/119, 121; D12/223, 162; D8/356; D19/91;  
D23/267; 426/138, 143, 279, 282-283, 391,  
426/514; 211/189  
See application file for complete search history.

(56)

**References Cited**

**U.S. PATENT DOCUMENTS**

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2,120,710 A 6/1938 Nieding

(74) Attorney, Agent, or Firm — John A. O'Toole; Dale A. Bjorkman; Kevin J. Hubbard

(57)

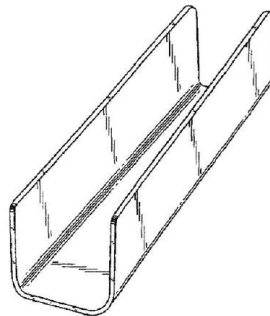
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**DESCRIPTION**

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1 Claim, 1 Drawing Sheet



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U.S. Patent

Mar. 20, 2012

US D655,886 S

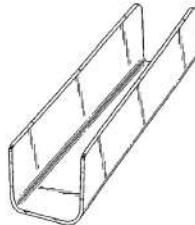


Fig. 1



Fig. 2



Fig. 3

### Design patents compared to utility patents

- Design patent is for an “ornamental design”
- Utility patent is for a “useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof”
- Design patents are much, much easier to get (~90% allowance rate).
- No maintenance fees are required.

### Design patents: Source of law

- Like utility patents, design patent are exclusively a creature of federal law.
- 35 U.S.C. § § 171-173, with § § 102, 103, 112, and other sections being applicable as well

## Design patents enabling provision at § 171

- “Whoever invents any new, original, and ornamental design for an article of manufacture may obtain a patent therefor, subject to the conditions and requirements of this title. The provisions of this title relating to patents for inventions shall apply to patents for designs, except as otherwise provided.”

## Design patents requirements

- novelty ← same as for utility patents
- originality
- nonobviousness ← not much of a limit
- ornamental (not dictated by function)
- on a functional article
- enabling disclosure

for a "plush toy"

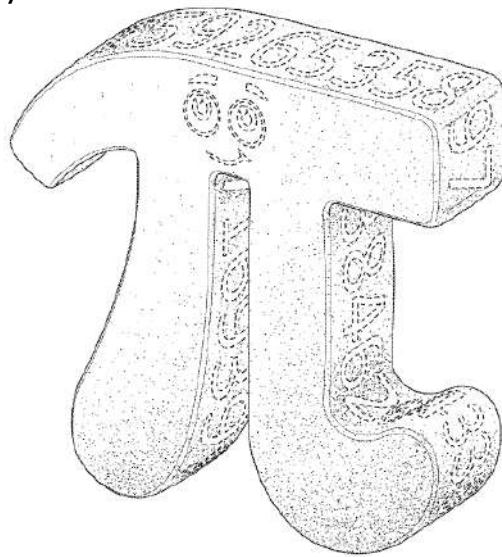


FIG. 1

D724,677

for a "vacuum sweeper handle"



D721,461

for a "bath tub"

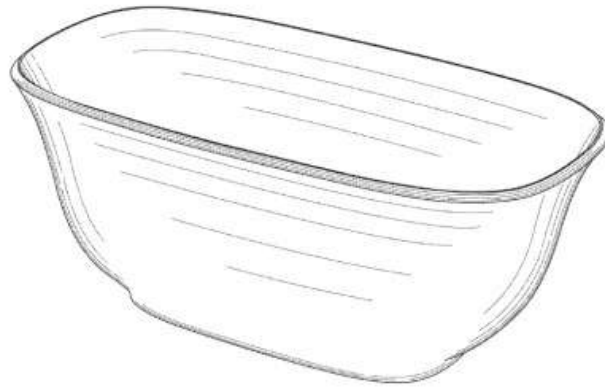


Fig. 2

D724,706

for a "bath tub"

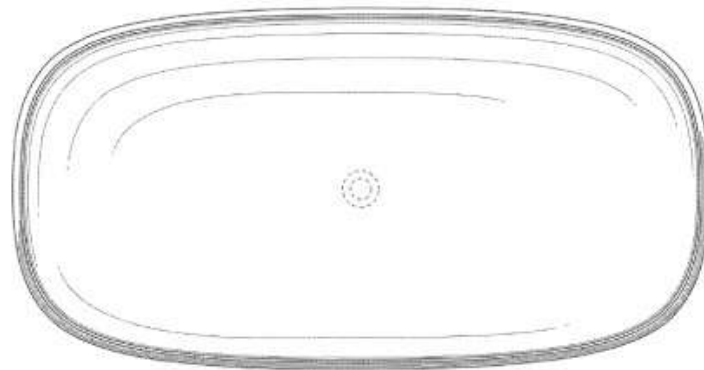


Fig. 6

D724,706

## Nonobviousness in design patents

"[T]he ultimate inquiry under section 103 is whether the claimed design would have been obvious to a designer of ordinary skill who designs articles of the type involved."

– Titan Tire v. Case New Holland, 566 F.3d 1372 (Fed. Cir. 2009)

"To answer this question, a court must first determine whether one of ordinary skill would have combined teachings of the prior art to create the same overall visual appearance as the claimed design. That inquiry involves a two-step process."

– MRC Innovations v. Hunter Mfg., 747 F.3d 1326 (Fed Cir. 2014)

(internal quote and cites omitted)

## Nonobviousness in design patents

### STEP ONE:

"First, the court must identify a single reference, a something in existence, the design characteristics of which are basically the same as the claimed design. The 'basically the same' test requires consideration of the visual impression created by the patented design as a whole. ... [T]he trial court judge may determine almost instinctively whether the two designs create basically the same visual impression, but must communicate the reasoning behind that decision."

– MRC Innovations v. Hunter Mfg., 747 F.3d 1326 (Fed Cir. 2014)

(internal quote and cites omitted)



## Nonobviousness in design patents

### STEP TWO:

“[O]ther secondary references may be used to modify it to create a design that has the same overall visual appearance as the claimed design. These secondary references must be so related to the primary reference that the appearance of certain ornamental features in one would suggest the application of those features to the other.”

– MRC Innovations v. Hunter Mfg., 747 F.3d 1326 (Fed Cir. 2014)

(internal quote, brackets and cites omitted)

## Nonobviousness in design patents

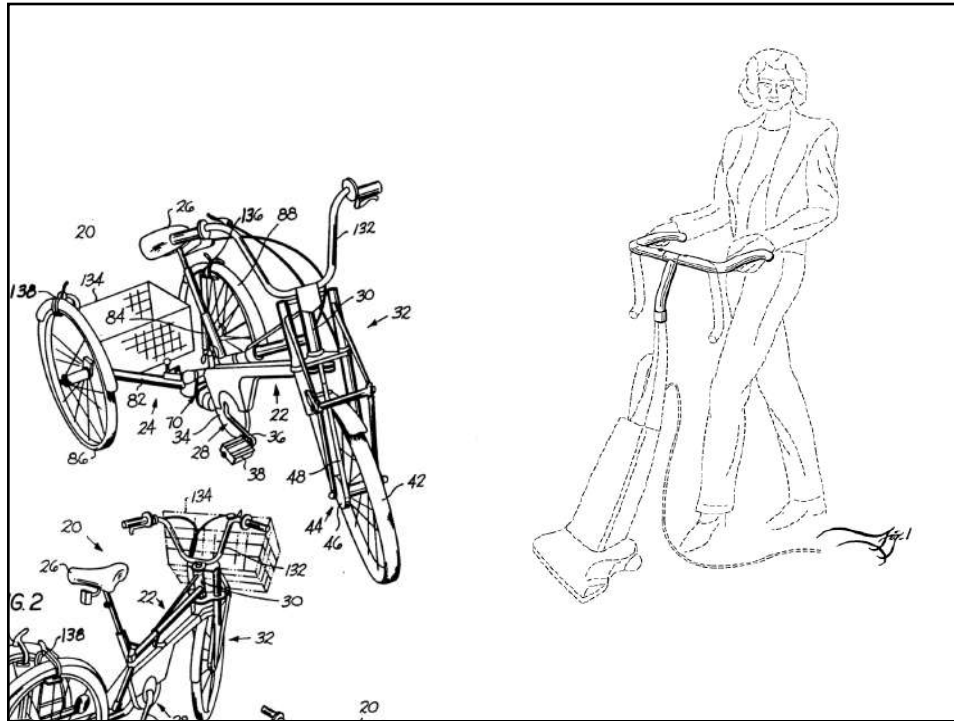
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“The Federal Circuit hasn’t actually reached the second step of this test in a while. That’s because it has been requiring a very high degree of similarity for primary references ... . For a while there, it looked like it was becoming practically impossible to invalidate any design patents under § 103. Now we at least know that it’s still possible. But we don’t have much guidance as to when it’s possible.” Sarah Burstein, 2014

(internal quote, brackets and cites omitted)



(12) **United States Design Patent** (10) **Patent No.:** **US D634,488 S**  
**Cohen** (45) **Date of Patent:** **\*\* Mar. 15, 2011**

(54) **FOOTBALL JERSEY FOR A DOG**

(75) Inventor: **Mark Cohen, Mason, OH (US)**

(73) Assignee: **MRC Innovations, Mason, OH (US)**

(\*\*) Term: **14 Years**

(21) Appl. No.: **29/369,427**

(22) Filed: **Sep. 8, 2010**

(51) **LOC (9) CL** ..... **30-01**

(52) **U.S. CL** ..... **D30/145**

(58) **Field of Classification Search** ..... D30/145,  
D30/144, 151-154; 119/678, 850, 673, 702,  
119/712, 792-798, 758, 760, 769, 770, 784,  
119/815, 818, 856, 863, 864, 905, 907, 802,  
119/857, 865, 725, 771; 52/3; 54/79.4, 79.1,  
54/80.1, 79.2; D3/271.2, 217, 327; 150/154;  
36/111; 604/293; 602/79, 61  
See application file for complete search history.

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(Continued)

Primary Examiner — Susan Moon Lee

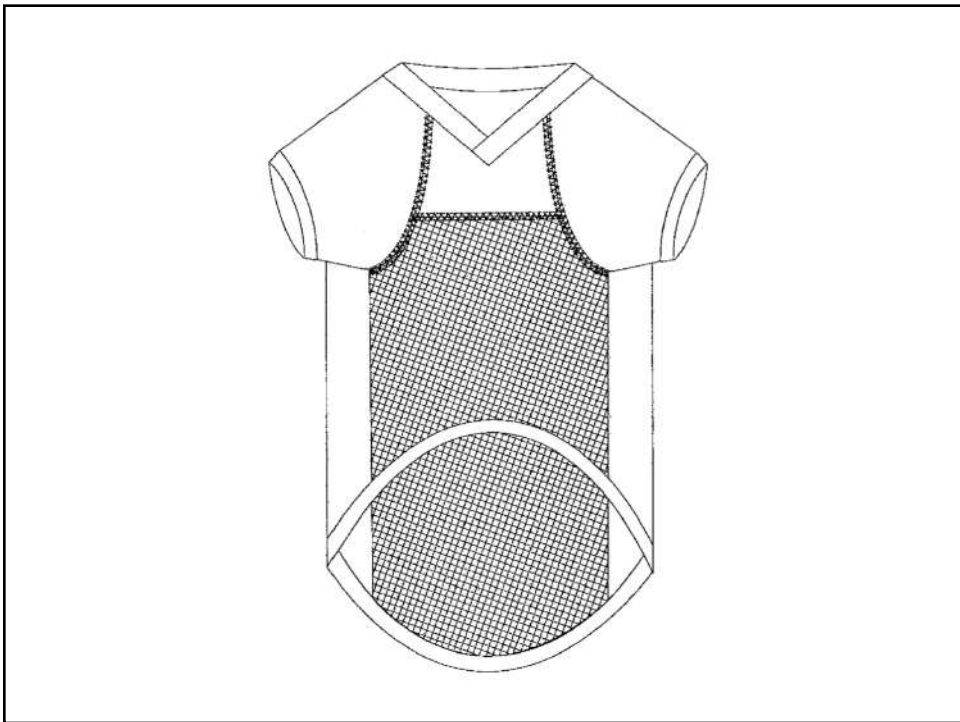
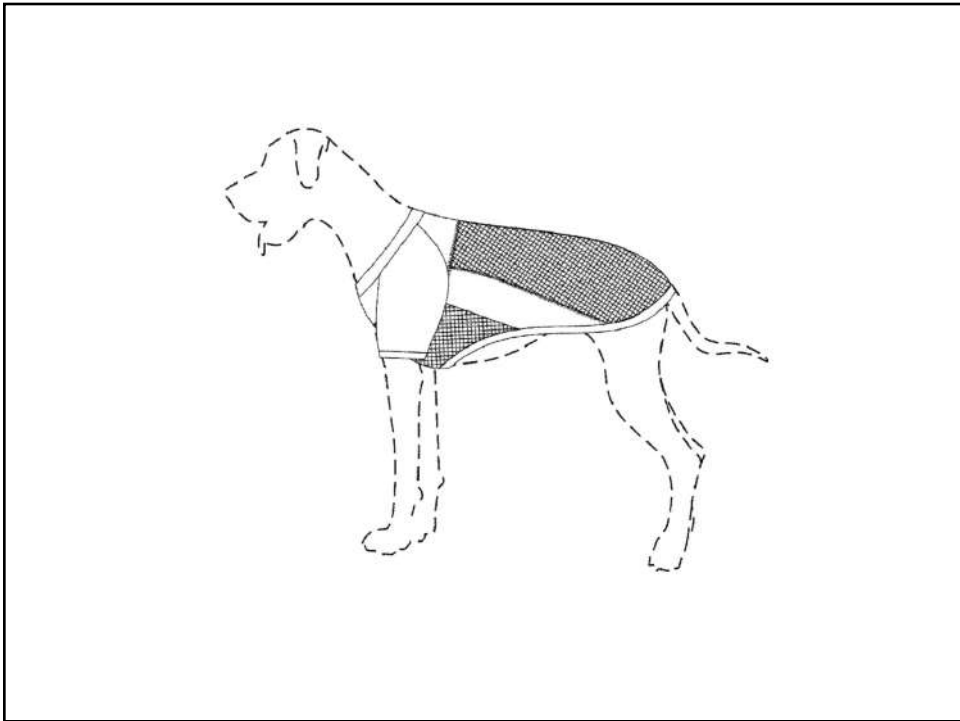
(74) Attorney, Agent, or Firm — Rankin Hill & Clark LLP

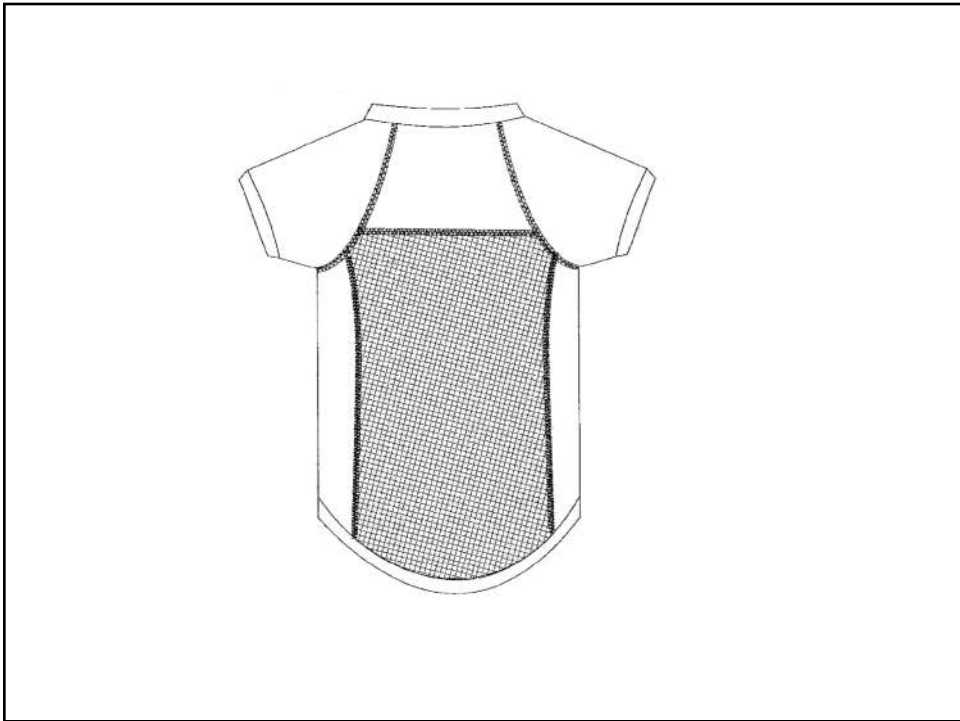
(57) **CLAIM**

I claim the ornamental design for a football jersey for a dog, as shown and described.

**DESCRIPTION**



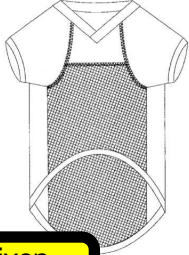


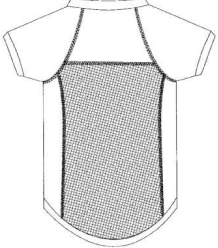
FIG. 1 is a side view of a football jersey for a dog shown in use;  
FIG. 2 is a front elevational view of the football jersey shown in FIG. 1;  
FIG. 3 is a right side elevational view of the football jersey shown in FIG. 1, the left side of the football jersey being a mirror image thereof; and,  
FIG. 4 is a top plan view of the football jersey shown in FIG. 1.





Here are two prior art references: the “V2 jersey” and “Eagles jersey.”



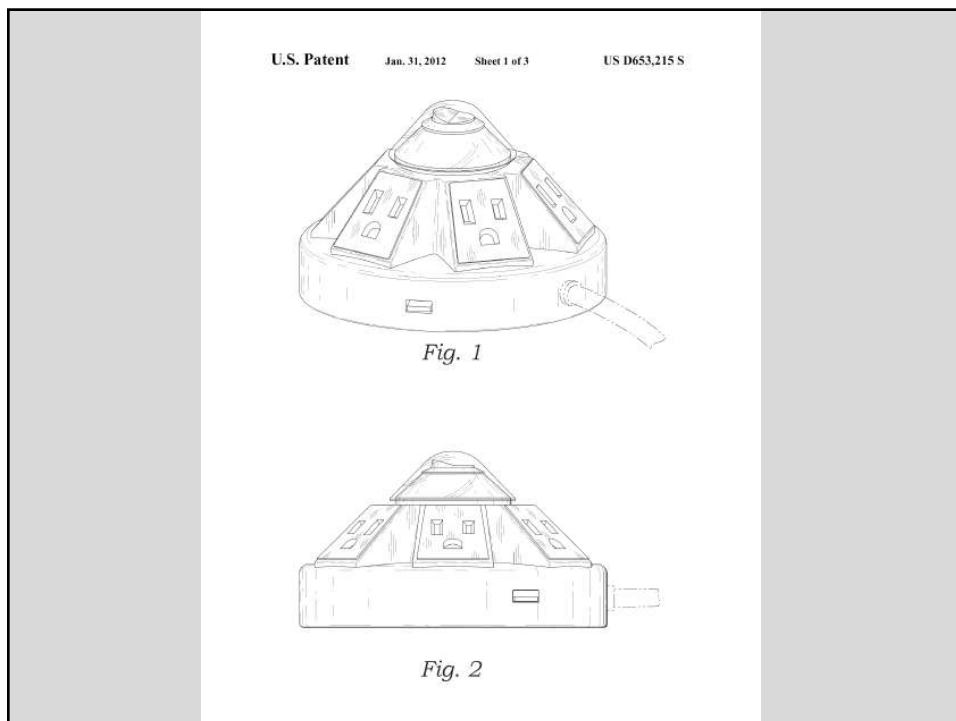
V2 Jersey	Eagles Jersey	
		
<p>Is the drawn jersey ('488) nonobvious given the prior art of the Eagles and V2 jersey?</p>		
		

V2 Jersey	Eagles Jersey	
		
<p>Is the drawn jersey ('488) nonobvious given the prior art of the Eagles and V2 jersey?</p>		
		
<p><b>Held: No, it's obvious.</b> District court used Eagles jersey as primary reference and V2 jersey (and another dog sports jersey) to find the '488 patent obvious. The Federal Circuit affirmed. <i>MRC Innovations v. Hunter Mfg.</i>, 747 F.3d 1326 (Fed Cir. 2014)</p>		

## Design patents – claims and infringement

- Design patent [claims are essentially the drawings](#).
- Infringement involves comparing the accused article to the drawings using the standard of an “ordinary observer” who has access to the prior art.
- “[I]f, in the eye of an [ordinary observer](#), giving [such attention as a purchaser usually gives](#), two designs are [substantially the same](#), if the resemblance is such as to [deceive such an observer, inducing him to purchase one supposing it to be the other](#), the first one patented is infringed by the other.”

– Gorham Mfg. Co. v. White, 81 U.S. 511 (1871); see also Advantek Mktg. v. Shanghai Walk-Long Tools, 898 F.3d 1210 (Fed. Cir. 2018) (quoting)



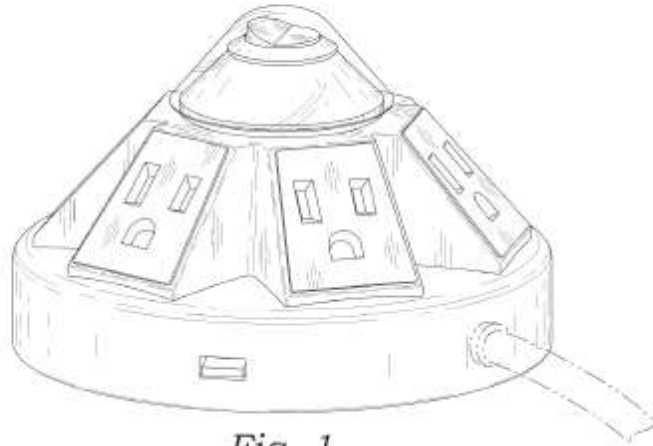
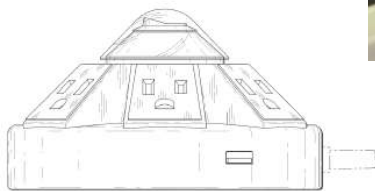
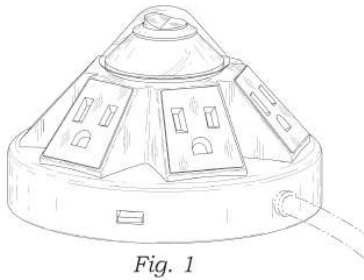


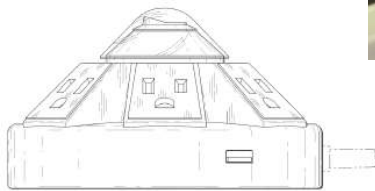
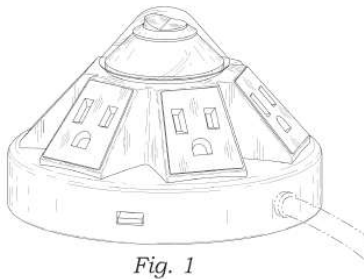
Fig. 1



Does the product on the right infringe the patent on the left?



Does the product on the right infringe the patent on the left?



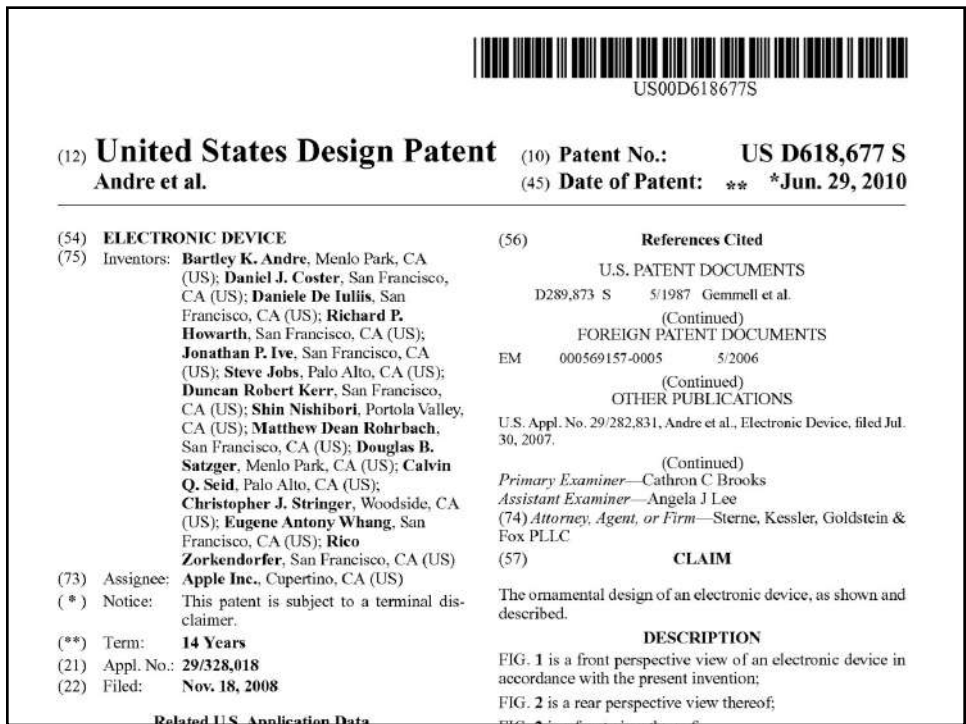
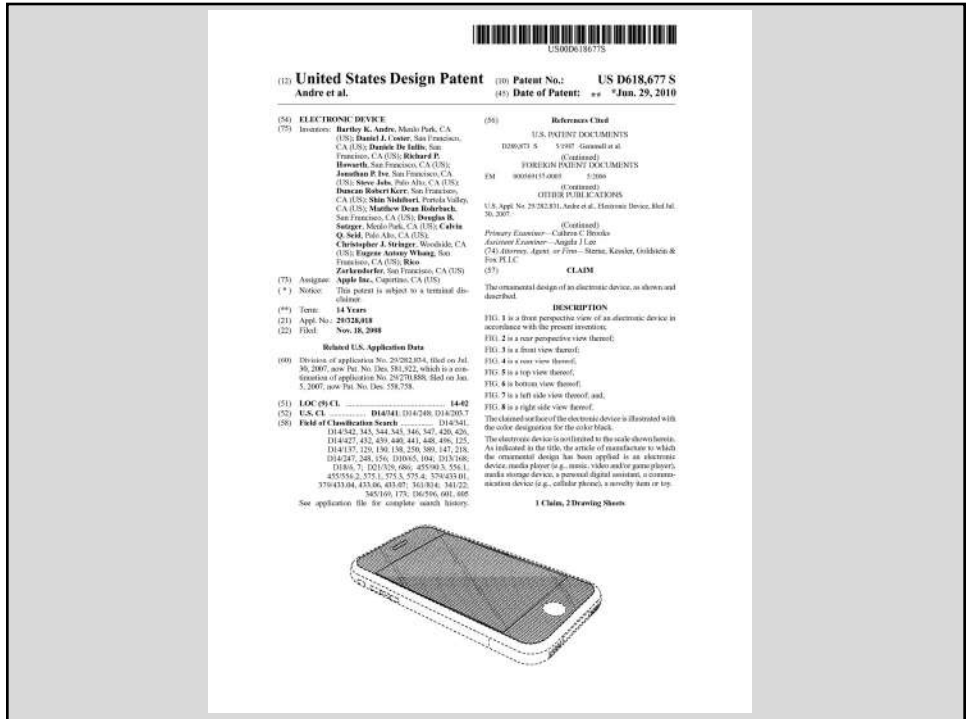
Held: **No**. District court held no infringement by this product of this design patent.





Before 2012, many  
considered design patents  
“worthless.”

Then ...



**Related U.S. Application Data**

- (60) Division of application No. 29/282,834, filed on Jul. 30, 2007, now Pat. No. Des. 581,922, which is a continuation of application No. 29/270,888, filed on Jan. 5, 2007, now Pat. No. Des. 558,758.
- (51) **LOC (9) Cl.** ..... **14-02**
- (52) **U.S. Cl.** ..... **D14/341; D14/248; D14/203.7**
- (58) **Field of Classification Search** ..... D14/341, D14/342, 343, 344, 345, 346, 347, 420, 426, D14/427, 432, 439, 440, 441, 448, 496, 125, D14/137, 129, 130, 138, 250, 389, 147, 218, D14/247, 248, 156; D10/65, 104; D13/168; D18/6, 7; D21/329, 686; 455/90.3, 556.1, 455/556.2, 575.1, 575.3, 575.4; 379/433.01, 379/433.04, 433.06, 433.07; 361/814; 341/22; 345/169, 173; D6/596, 601, 605  
See application file for complete search history.

FIG. 3 is a front view thereof;  
FIG. 4 is a rear view thereof;  
FIG. 5 is a top view thereof;  
FIG. 6 is bottom view thereof;  
FIG. 7 is a left side view thereof; and,  
FIG. 8 is a right side view thereof.

The claimed surface of the electronic device is illustrated with the color designation for the color black.

The electronic device is not limited to the scale shown herein. As indicated in the title, the article of manufacture to which the ornamental design has been applied is an electronic device, media player (e.g., music, video and/or game player), media storage device, a personal digital assistant, a communication device (e.g., cellular phone), a novelty item or toy.

**1 Claim, 2 Drawing Sheets**

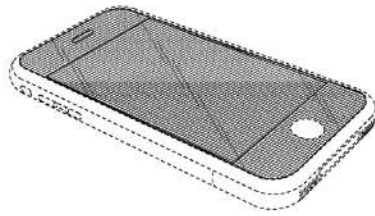
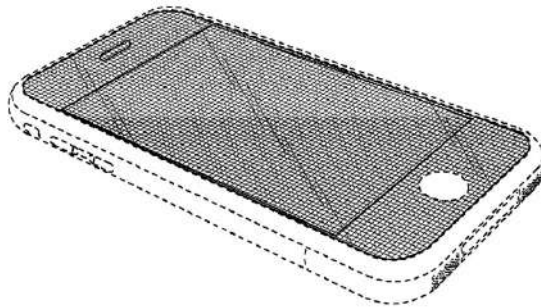


FIG. 1

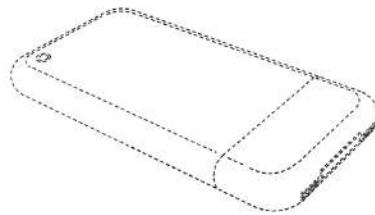
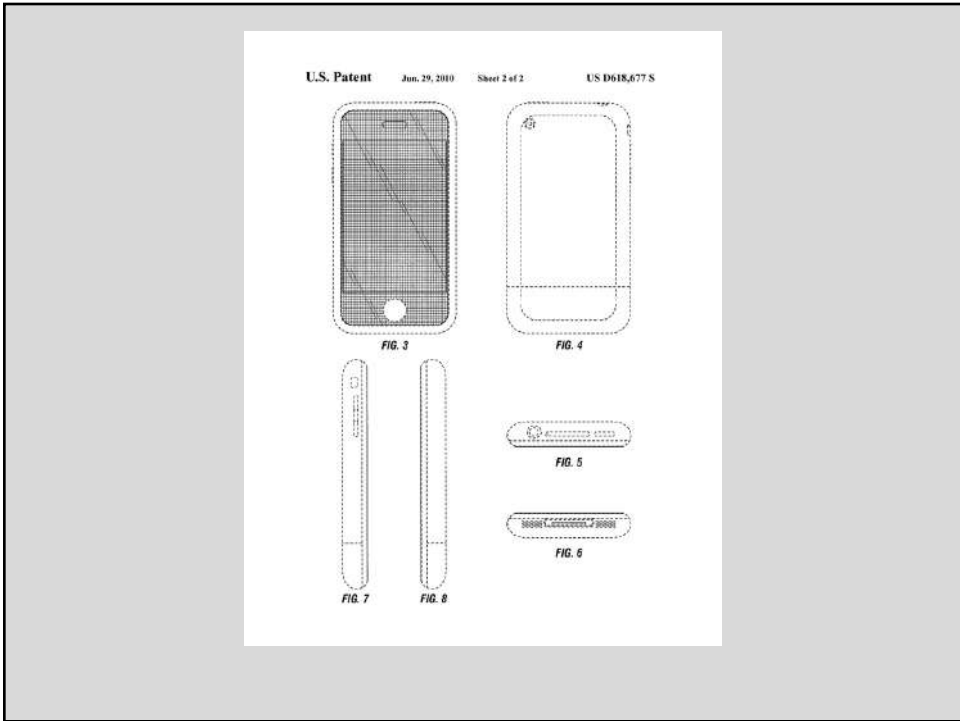


FIG. 2



<p><b>'D677 Patent</b></p> 	
<p><b>'D790 Patent</b></p> 	

**Apple v. Samsung (N.D. Cal 2018) – Apple wins \$533.3 million jury award for design patent infringement. (Cf., Apple awarded \$5.3 million for utility patent infringement in the same suit.)**


**some practice ...**

Oren, an industrial designer, has created a new desk lamp. It does not work differently than other desk lamps, but it's totally different-looking - very exotic and cool in appearance. What can Oren likely obtain?

- (A) a utility patent, but not a design patent
- (B) a design patent, but not a utility patent
- (C) both a design patent and a utility patent
- (D) neither a design patent nor a utility patent
- (E) a mask work registration, but not a patent

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