



Food for Thought: Design Patents



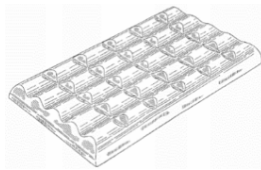
DESIGN PATENTS PROTECT novel and ornamental designs for products or packaging. In the food and beverage industry, design patents can be a vital element of intellectual property protection.

Design patents have long been an underutilized form of IP protection, assumed to be useless and overshadowed by utility patents. But companies monitoring the ongoing *Apple v. Samsung* design patent litigation are wising up: filings and grants of design patents reached a record high in 2017. In the food and beverage space, design patents were filed last year for novel kitchen utensils, cooking appliances, a pizza tray, bottle designs, and packaging for produce. The shape of a whiskey bottle, spiral-cut french fries, and Copper Chef pans were litigated. The luxury candy company Sugarfina asserted its design patents against copycat competitors twice in 2017.

Unlike utility patents that protect the functionality of a product, design patents protect ornamental designs, although it is possible to obtain both types of patents for a product that is both functional and ornamental. A design patent can be useful in the food and beverage industry in a number of ways:

THE PRODUCT

Unique appearance that has no functional purpose*



MARS, Inc.
"Candy Bar"
D593,276 (2009)

THE PRESENTATION

Unique presentation of a product that may or may not have a functional purpose



Blazevich
"Serving Tray with Shrimp"
D404,612 (1999)

THE PACKAGING

Unique presentation/appearance that may or may not have a functional purpose



Société des Produits Nestlé S.A.
"Bottle"
D572,143 (2008)

WHAT ARE THE BENEFITS OF A DESIGN PATENT?

Design patents are helpful in fending off copycat competitors. Design patents should be filed for a variety of product variations and in conjunction with other intellectual property protection (e.g., trade dress).

- **Inexpensive:** Substantially cheaper to obtain than utility patents; no maintenance fees for the life of the patent
- **Quick:** Averages 6-18 months from application to issuance
- **Opportune:** If infringed, design patents in some circumstances could offer a unique type of damage remedy for profits from the sale of the product covered by the design patent

Applying for a design patent on a final product design prior to launch allows the applicant to label the product "Patent Pending"—a warning for would-be competitors. As with all patents, a thorough review of prior art is important to avoid a challenge for invalidity.

HOW IS A DESIGN PATENT DIFFERENT FROM TRADE DRESS?

A design patent does not require that consumers associate a design with a brand or company, while trade dress protection depends upon that. Because consumer recognition of a unique design can take years to establish, trade dress protection may take longer to obtain than design patent protection. For this reason, obtaining a design patent can be a wise first step for a new design while it gains consumer recognition.

For additional information, please contact David Fournier (DFournier@perkinscoie.com, +1.312.324.8643) or Mark Smith (Marksmith@perkinscoie.com, +1.312.324.8474).

* Kraft Foods has over 1,500 design patents covering its various pasta shapes.