Litigants of Design Patent Infringement Beware after Columbia Sportswear Court Decision

3.6.2020

In November 2019, the Federal Circuit (the Court of Appeals for patent litigation cases) decided a case known as *Columbia Sportswear N. Am. v. Seirus Innovative Access., Inc.*, 942 F.3d 1119 (Fed. Cir. 2019) in such a way that makes the analysis identifying design infringement in the fashion industry much more difficult. Essentially, as a result of *Columbia Sportswear*, design patent litigation just got longer and it got more costly based on the requirement that the fact finder (the Jury or the Judge) must make an assessment and comparison of the patent design compared to the alleged infringing design. The Federal Circuit's decision essentially says that the jury/judge as fact-finder must answer whether the "ordinary observer" would find the two designs substantially the same such that a purchaser might buy the alleged infringing design thinking it is the other – this determination is a question of fact.

Recall that a design patent covers the ornamental design of something...in this case an ornamental design of a heat reflective material. In the underlying case, the district court reviewed the two designs side by side and reasoned that "even the most discerning customer would be hard-pressed to notice the differences between Seirus's HeatWave design and Columbia's patented design," calling the difference in pattern, orientation, and the presence of Seirus's logo as "minor differences." *Columbia Sportswear N. Am., Inc. v. Seirus Innovative Accessories*, No. 3:15-CV-00064-HZ, 2015 WL 3986148, at *1 (D. Or. June 29, 2015), *see Summary Judgment Decision*, 202 F. Supp. 3d 1186 and 1192–93. In short, the Federal Circuit determined that the district court got this wrong, that the district court improperly relied on design patent precedent to incorrectly ignore parts of the accused design when the "ordinary observer" test requires determination that an observer would find the "effect of the whole design substantially the same" as the invention.

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While the opinion, in this case, presents additional interesting patent law issues, such as proper identification of the "observer" and the impact and weight given to logos in an alleged infringing design (where use of a logo to avoid infringement is generally futile), the real change to design patent law as a result of this case is that litigation may be more likely to go beyond the summary judgment phase. To win on summary judgment, the moving party must show that as a matter of law, a claim should be dismissed because all of the facts considered in favor of the non-moving party do not establish a question of fact. However, in *Columbia Sportswear*, it appears that "minor differences" are enough even when logos are involved.

While *Columbia Sportswear*, as the name suggests, addressed design patents in the fabric/textile space, other industries are not immune. Tech companies are turning to design patents to protect their products (e.g. apple). Manufacturing companies seeking to protect certain of their designs are also looking to do so based on the ornamental aspects of those designs. In light of *Columbia Sportswear*, even small, seemingly imperceptible differences preclude judgment as a matter of law. Design patent litigants may be forced to wait until a fact finder can make a determination about the similarities of the designs and will now have a tough time concluding a case on summary judgment based on the Ordinary Observer test. Today, litigants tend to engage in expensive, protracted patent litigation as it is and so litigants, especially plaintiffs, must beware in light of *Columbia Sportswear* – the price may have just gone up on design patent litigation.

Whether it is a question about drafting and filing design or utility patent applications, or if you have questions about potential or impending patent litigation, your Butzel attorneys are well-positioned to help you with whatever you need.

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