

CASE STUDY

DESIGN PATENT NON-INFRINGEMENT BASED ON THE NEW ORDINARY OBSERVER TEST.

*Arc 'Teryx Equipment, Inc v. Westcomb Outerwear Inc.*¹ is the First District Court Opinion to Apply the New Standard of Design Patent Infringement Set Forth in *Egyptian Goddess, Inc v. Swisa, Inc.*²

INDEX TOPICS: Design Patent Infringement

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Arc'Teryx Equipment, Inc. sued Westcomb Outerwear, Inc. ("Westcomb") for design patent infringement of U.S. Design Patent No. 513,715 (the "'715 Patent") directed to a curvilinear zipper. Westcomb manufactured a jacket that was accused of infringing the '715 Patent.

Westcomb filed a motion for summary judgment of non-infringement of the '715 Patent.³ The district court ruled in favor of Westcomb. First, as instructed by the Federal Circuit in *Egyptian Goddess, Inc. v. Swisa, Inc.*⁴ the district court performed a claim construction analysis by relying on the illustrations set forth in the design patent rather than verbalization of the design. Second, as part of the infringement test, the Court determined that the ordinary observer in the design patent infringement case was an outdoor clothing customer "who is more discerning" than the average retail shopper.⁵

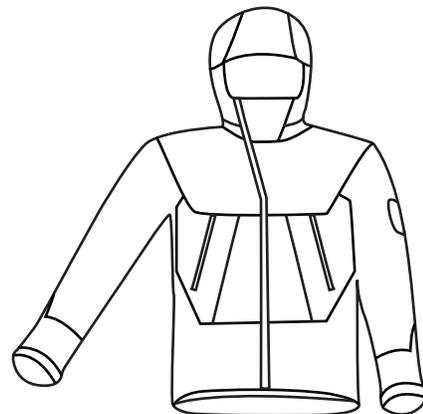


Figure 1 of the '715 Patent

In the application of the ordinary observer test, the district court ruled that there were at least four major visual differences between the patented zipper design and the **{MORE}**

¹ *Arc 'Teryx Equipment, Inc. v. Westcomb Outerwear, Inc.*, No. 2:07-CV-59 TS, 2008 WL 4838131 (D. Utah Nov. 3, 2008).

² 543 F.3d 665 (Fed. Cir. 2008) (*en banc*).

³ *Arc 'Teryx Equipment, Inc.*, 2008 WL 4838141, at *2.

⁴ 543 F.3d 665 (Fed. Cir. 2008) (*en banc*).

⁵ *Arc 'Teryx Equipment, Inc.*, 2008 WL 4838141, at *2.

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accused jacket's zipper.⁶ First, the district court ruled that the ordinary observer would see differences in the sections along length of the patented zipper design versus the accused jacket zipper.⁷ Second, while both the patented zipper design and accused jacket zipper had diagonal length sections, the diagonal sections were in different locations.⁸ Third, the diagonal length section of accused jacket zipper was shorter in length as compared to the diagonal section of the patented zipper design.⁹ Fourth, there were differences in the length of the straight sections of the patented zipper design and the accused jacket zipper.¹⁰ Next, the district court considered the differences in the patented design and accused jacket zipper in the context of the prior art as instructed in *Egyptian Goddess*.¹¹ The district court ruled that the accused jacket zipper was closer to a prior art reference than the patented design.

Hence, the district court ruled that the ordinary observer would not be deceived as required by the new infringement test.¹² Accordingly, the district court granted summary judgment of non-infringement in favor of the defendant, Westcomb Outwear, Inc.¹³

⁶ *Id.* at *3.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Arc 'Teryx Equipment, Inc.*, 2008 WL 4838141, at *3.

¹¹ *Id.*

¹² *Id.*

¹³ *Arc 'Teryx Equipment, Inc.*, 2008 WL 4838141, at *4.

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