EXCERPT

THE COMPREHENSIVE GUIDE TO ECONOMIC DAMAGES

Edited by

Nancy J. Fannon and Jonathan M. Dunitz

With Jimmy S. Pappas, William Scally, and Steven M. Veenema

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The Comprehensive Guide to Economic Damages

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Chapter 29.
Design Patent Damages

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Chapter 29.
Design Patent Damages

By Richard F. Bero, CPA/ABV, CVA, CLP, and Christopher V. Carani, Esq.[1]

1.0 Introduction

For the period from October 2014 through September 2019, design patent applications grew at an annual compound rate of 5.2%, outpacing utility patents, which grew at a rate of 1.6%.[2] Over the same period, issuances of design patents grew at a higher rate of 5.8%, versus 3.3% for utility patents.[3]

From 2012 through 2015, the number of design patent infringement filings in the United States increased slightly, from 273 cases in 2012 to 300 cases in 2015.[4] From 2015 through 2019, design patent infringement filings dropped from 300 cases in 2015 to 217 cases in 2019.[5] During the same period, as a percentage of total patent infringement filings, design patent filings increased from 5.1% to 6.0%.[6]

2.0 Three Ways to Protect Appearance

Design patents are one of three central means of intellectual property protection for an item's appearance:[7]

1. Copyright—A copyright may include "original works of authorship fixed in any tangible medium of expression."[8] The basic framework of current copyright law was enacted with the Copyright Act of 1976.[9] As stated in the chapter "Lost Profits (and Other Damages) in Trademark and Copyright Cases," United States statute provides recovery of "actual damages and any additional profits of the infringer."[10]

2. Trademark/trade dress—The term "trademark" is defined as "any word, name, symbol, or device or any combination thereof 1) used by a person or 2) which a person has a bona fide intention to use in commerce

1 The authors also wish to thank Bryan Berghauer, director with The BERO Group, for his substantial contributions in developing this chapter.
2 *FY2019 United States Patent and Trademark Office*, Performance and Accountability Report, 166.
3 Ibid.
4 Lex Machina, "Patent Litigation Report," February 2020, 6.
5 Ibid.
6 Lex Machina, "Patent Litigation Report," February 2020, 4.
7 Christopher V. Carani and Dunstan H. Barnes, *United States in Design Rights: Functionality & Scope of Protection 9-50* (Christopher V. Carani, ed., London, Kluwer Law International BV, 1st ed., 2017) ("The appearance of an object or article of manufacture may be protected in the United States under three separate, but sometimes overlapping IP regimes: design patents, trade dress, and copyright. As all three rights aim to protect the outward visual appearance of a product, none protects any underlying functional purposes, qualities or characteristics of the product.")
8 copyright.gov/title17/title17.pdf.
9 Ibid.
10 17 U.S.C. § 504(a).

and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."[11] The Lanham Act, enacted into law in 1946, is the governing statute for trademarks in the United States. It codified modern trademark legislation and established the guidelines for the registration and regulation of trademarks in the United States.[12] As stated in the chapter "Lost Profits (and Other Damages) in Trademark and Copyright Cases," damages can be recovered for plaintiff's actual damages, losses, or "defendant's profits."

3. Design patents—The USPTO defines the subject matter of a design patent as the "design embodied or applied to an article of manufacture (or potion thereof) and *not* the article itself."[13] The statutory basis for design patents is 35 U.S.C. § 171, which was codified in 1952.[14] While it is possible to receive a utility patent and a design patent on the same product, the protection each affords is directed at different aspects of that product.[15]

3.0 Distinguished From Utility Patents

Generally, the difference between a utility patent and a design patent is that a utility patent covers the *use* of an item, whereas a design patent covers its *appearance*.[16]

The statutory basis for utility patents is 35 U.S.C. § 101. Section 101 states:[17]

> Whoever invents any new and useful process, machine, manufacture or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

The statutory basis for design patents is 35 U.S.C. § 171.[18] Section 171 states:[19]

> 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.

Infringement of design patents is decided based on a two-step process: construing the claims and employing the "ordinary observer" test.[20] According to the ordinary observer test:[21]

> If, 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.

11 law.cornell.edu/uscode/text/15/1127.
12 law.cornell.edu/wex/lanham_act.
13 uspto.gov/web/offices/pac/mpep/s1502.html.
14 govinfo.gov/content/pkg/STATUTE-66/pdf/STATUTE-66-Pg792.pdf#page=1.
15 uspto.gov/web/offices/pac/mpep/s1502.html.
16 Ibid.
17 35 U.S.C. § 101.
18 *See* (Christopher V. Carani and Dunstan H. Barnes, 2017), *supra*, (full discussion of the requirements for U.S. design patents); *see also,* Christopher V. Carani and Dunstan H. Barnes, 2017. United States. In: "Designs 2017 A Global Guide," *World Trademark Review,* pp. 123-129.
19 35 U.S.C. § 171(a).
20 *Catalina Lighting, Inc. v. Lamps Plus, Inc*., 295 F.3d 1277, 1286 (Fed. Cir., 2002).
21 Ibid.

4.0 Federal Law Governing Design Patent Infringement Damages

The statutory basis for damages in design patent infringement cases is 35 U.S.C. § 284 (similar to utility patents) *and* 35 U.S.C. § 289. As addressed in the chapter "Patent Infringement Damages: Lost Profits and Royalties," 35 U.S.C. § 284, states:[22]

> Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.

35 U.S.C. § 289 states: [23]

> Whoever during the term of a patent for a design, without license of the owner,
>
> (1) Applies the patented design, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or
>
> (2) Sells or exposes for sale any article of manufacture to which such design or colorable imitation has been applied
>
> Shall be liable to the owner to the extent of his total profit, but not less than $250, recoverable in any United States district court having jurisdiction of the parties.

The law recognizes and distinguishes three general bases for recovery for design patent damages pursuant to Sections 284 and 289: (1) lost profits under 284; (2) reasonable royalty under 284; and (3) infringer's profits under 289.[24] However, in no case can a design patentee recover damages both under Section 284 and infringer's profits under 289 for infringement by the same product.[25]

As addressed in "Patent Infringement Damages: Lost Profits and Royalties," the Federal Circuit has defined lost profits damages as a measure of damages "intended to make the party whole—to compensate the patent holder for profits lost as a result of the infringement. It is not solely a 'but for' test."[26]

The applicability of lost profits to design patent holders versus utility patent holders may differ as "design patent holders may face a puzzling problem when attempting to establish entitlement to lost profits" under the *Panduit* test.[27] Specifically, if the design patent holder must fend off a challenge under Section 171 that the design is not ornamental, the main argument in response (to prove that the design is not dictated solely by function) is to show that there *are* alternative designs.[28] But arguing alternative designs in this context may be at odds with the patent holder's burden under *Panduit*

22 35 U.S.C. § 284.

23 35 U.S.C. § 289.

24 *See, e.g., Polaroid Corp. v. Eastman Kodak Co.*, 16 USPQ2d 1481, 1484 (D. Mass. 1990). (The law recognizes two possible measures of recovery: lost profits or a reasonable royalty; under either method, the purpose is the same: to compensate the patentee for actual injuries.) An "established royalty" is sometimes referred to as a third form of compensatory damages, although it is often characterized as a reasonable royalty (*see, e.g., Compensatory Damages Issues in Patent Infringement Cases: A Handbook for Federal District Court Judges*, law.berkeley.edu/files/bclt_PatentDamages_Ed.pdf, 3-4 (Jan. 2010)). *See also*, 35 U.S.C. § 289.

25 *Braun Inc.*, 975 F.2d at 824 citing *Bergstrom v. Sears, Roebuck and Co.,* 496 F.Supp. 476, 494 (D.Minn.1980) (citing *Henry Hanger & Display Fixture Corp. of America v. Sel-O-Rak Corp.*, 270 F.2d 635 (5th Cir.1959)).

26 *Warsaw Orthopedic, Inc. v. NuVasive, Inc.*, 778 F.3d 1365, 1375 (Fed. Cir. 2015) (citing *Rite-Hite Corp. v. Kelley Co., Inc.*,56 F.3d 1538, 1546 (Fed. Cir.1995) (en banc)).

27 Mark D. Janis, "How Should Damages Be Calculated for Design Patent Infringement?" 37 *Rev. Litig.* 241 (2018).

28 *See Ethicon Endo-Surgery, Inc. v. Covidien, Inc.*, 796 F.3d 1312, 1330-31 (Fed. Cir. 2015) ("We have often focused, however, on the availability of alternative designs as an important—if not dispositive—factor in evaluating the legal functionality of a claimed design.")

to show that there is an "absence of acceptable non-infringing alternatives." It is uncertain whether the analysis for what constitutes an "alternative design" in each of those contexts means the same thing. To the authors' knowledge, no court has addressed this potential issue.

Given the challenges of recovering lost profits for design patent infringement, the two more likely remedies would be a reasonable royalty and infringer's profits. Whereas a reasonable royalty damages methodology "is intended to compensate the patentee for the value of what was taken from him—the patented design,"[29] an infringer's profits methodology contrastingly requires the disgorgement of infringer's profits to the patent holder, such that the infringers retain no profit from their wrong.[30]

5.0 Damages

As stated above, the law recognizes three general bases for recovery for design patents pursuant to Sections 284 and 289.

5.1 § 289 Damages

Section 289 not only states the infringer *"shall be liable to the owner to the extent of his total profit"* (emphasis added), but also sets a floor for those damages, requiring that damages be "not less than $250."[31] It is worth mentioning that an award of the infringer's profits is technically not an award of damages. Historically, an award of profits is an equitable remedy only courts of equity provide. In contrast, an award of damages is compensatory in nature and was provided only by courts of law. Over time, the line between courts of law and equity have been erased, the referencing of an award of profits as a damages award is now common. Nevertheless, some jurists still maintain the distinction, even if only as a matter of semantics.[32]

The amount of infringer's total profit depends on the:[33]

1. Identification of the article of manufacture; and

2. Infringer's total profit made on the article of manufacture.

5.1.1 Article of Manufacture

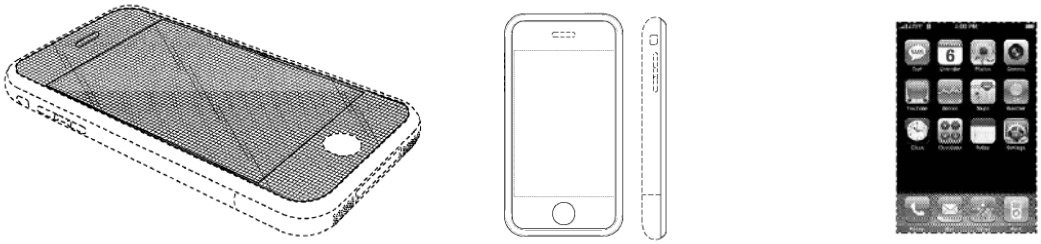
Part 1 of Section 289, as recited above, refers to the "patented design" and "the article of manufacture."[34] To determine the amount of damages to compensate the patent owner for infringing the design, it is inherently necessary to understand both the patented design and the article of manufacture.

Although certain design patents cover an entire product sold, in the case of a multicomponent product, identification of the "article of manufacture" is more difficult with respect to the patented design.[35] As stated in the Supreme Court's *Apple v. Samsung* opinion, in the case of a dinner plate design patent, the product is the article of manufacture versus a partial design on a kitchen oven where the article of manufacture may seem less obvious.[36] The term "article of manufacture" is broad enough to cover both scenarios where the "article of manufacture" is either an entire product or a

29 *Warsaw Orthopedic,* 778 F.3d 1365, 1375 (citing *Aqua Shield v. Inter pool Cover Team*, 774 F. 3d 766, 770 (Fed. Cir. 2014) (quoting *Dowagiac Mfg. Co. v. Minn. Moline Plow Co.*, 235 U.S. 641, 648, 35 S.Ct. 221, 59 L.Ed. 398 (1915)).
30 *Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1448, 46 USPQ2d 1001 (C.A.Fed. (Va.), 1998).
31 35 U.S.C. § 289.
32 *See Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1448, 46 USPQ2d 1001 (C.A.Fed. (Va.), 1998).
33 *Samsung Electronics Co., Ltd., et al. v. Apple Inc.*, 137 S. Ct. 429, 434 (2016).
34 35 U.S.C. § 289.
35 *Samsung*, 137 S. Ct. at 431.
36 *Samsung*, 137 S. Ct. at 432.

piece of a product.[37] Consider the "article of manufacture" in the case of *Apple v. Samsung*, where three asserted design patents were all "partial designs" (i.e., a portion of a larger product):[38]

D'677 D'087 D'305



An understanding of the patented design within the context of defining the "article of manufacture" tends to assist in this analysis, such that the damages can be properly correlated between the patented design and the article of manufacture. However, no exact test for "article of manufacture" has been established and is instead left to the lower courts to decide.[39]

As part of *Apple v. Samsung*, the U.S. Solicitor General for the United States submitted an amicus brief that described a four-factor (or four-consideration) test for identifying the "article of manufacture." The four factors described in the brief include:[40]

1. The scope of the design claimed in the plaintiff's patent, including the drawing and written description, provides insight into which portions of the underlying product the design is intended to cover and how the design relates to the product as a whole.

2. The fact-finder should examine the relative prominence of the design within the product as a whole. If the design is a minor component of the product, like a latch on a refrigerator, or, if the product has many other components unaffected by the design, that fact suggests that the "article" should be the component embodying the design.

3. Relatedly, the fact-finder should consider whether the design is conceptually distinct from the product as a whole. If the product contains other components that embody conceptually distinct innovations, it may be appropriate to conclude that a component is the relevant article.

4. The physical relationship between the patented design and the rest of the product may reveal that the design adheres only to a component of the product. If the design pertains to a component that a user or seller can physically separate from the product as a whole, that fact suggests that the design has been applied to the component alone rather than to the complete product.

After remand from the Supreme Court and the Federal Circuit, the district court overseeing *Apple v. Samsung* embraced the above "four-factor test," summarized each factor in the jury instructions, and instructed the jury to consider such factors when determining the article of manufacture.[41] Based on the above-claimed designs, the jury appears to have

37 Id. at 435.
38 I note the design patents cover the solid lines and not the dotted lines.
39 Id. at 436.
40 *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-cv-01846 (May 18, 2018), ECF No. 3785 at 43.
41 Ibid.

considered the entire phone the article of manufacture.[42] However, the parties ultimately settled their seven-year dispute in June 2018, and the terms of the settlement were not disclosed.

Soon thereafter, in the case of *Columbia Sportsware v. Seirus Innovative Accessories*, the trial court's jury instructions directed the jury to, first, determine the article of manufacture and, second, to calculate the infringer's total profit.[43] The jury instructions indicated while "Columbia bears the initial burden of producing evidence identifying the article of manufacture," Seirus "bears the burden of proving that the article of manufacture is something less than the entire product," consistent with the Samsung decision.[44] The instructions also suggested the article of manufacture "may be the product as a whole or a component of that product" and "if the product as sold to consumer is a multicomponent product then you must use the [4] factors [four-factor test] listed below to determine whether the 'article of manufacture' is the whole product or a component of that product," again, consistent with the *Apple v. Samsung* case.[45]

The jury instructions in *Ford Global Technologies, LLC v. New World Int'l., et al.* also contemplate the four-factor test.[46] With more limited commentary, the jury instructions merely state: "To identify the articles of manufacture, you should consider the following four factors."[47]

In another reference to the four-factor test, in the case of *Nordock v. Systems*, after the case was remanded from the Supreme Court and Federal Circuit, the trial court found the four-factor test to be appropriate.[48] However, while the trial court agreed the four-factor test was appropriate, the court also stated it did not believe the four factors "will always be the only factors relevant to determining the article of manufacture." For example, the court concluded "that how a product is manufactured merits explicit consideration as a factor when attempting to determine what is the relevant article of manufacture." The court also quoted an older case stating, "each design patent must be considered in context and 'considered from all viewpoints, technical, mechanical, popular, and commercial.'"[49]

While a number of courts have embraced the four-factor test for use in their jury instructions, in the case of *Deckers Outdoor Corp. v. Romeo & Juliette*, the jury instructions make no mention of the four-part test for identifying the article of manufacture.[50] Silence could suggest other valid interpretations of arriving at the article of manufacture other than the four-part test contemplated as part of *Apple v. Samsung*.

In a recent article titled "Determining the 'Article of Manufacture' Under 35 U.S.C. § 289," the authors suggest an alternative four-factor test believed to be consistent with statute and legislative intent, while also being fair to each of the litigants. Knowing the default article of manufacture to be the end product sold, unless the infringer proffers something less, the proposed factors include:[51]

1. The visual contribution the patented design made to the overall appearance of the end product the infringer sold, in the eye of an ordinary observer. The more significant the patented design to the end product sold, the more weight given to the end product sold as being the article of manufacture.

42 *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-cv-01846 (Aug. 24, 2012), Amended Verdict Form and *Apple, Inc. v. Samsung Elecs. Co.*, No. 11-cv-01846 (May 18, 2018), Verdict Form.
43 *Columbia Sportswear North America, Inc. v. Seirus Innovative Accessories, Inc.*, No. 3-17-cv-01781 (Sept. 29, 2017) ECF No. 378, Jury Instructions, at 15.
44 Ibid.
45 Ibid.
46 *Ford Global Technologies, LLC v. New World Int'l., et al.*, No. 3:17-CV-3201-N (N.D. Tex 2018) at 16.
47 Ibid.
48 *Nordock, Inc. v. Sys., Inc.*, No. 11-cv-118 (E.D. Wis. Nov. 21, 2017) at 13-14.
49 *Bush & Lane Piano Co.*, 234 F. at 81.
50 *Deckers Outdoor Corp. v. Romeo & Juliette*, No. 15-cv 02812 (C.D. Cal. April 6, 2018) ECF No. 257. As noted, the jury instructions make no mention of the four-part test for identifying the article of manufacture. The article of manufacture and, more generally, damages issues were also not appealed by either party.
51 Elizabeth D. Ferrill, Perry Saidman, Damon Neagle, and Tracy Durkin, "Determining the 'Article of Manufacture' Under 35 U.S.C. § 289."

2. Whether, at the time of the infringement, the patentee or infringer separately sold its proffered articles of manufacture. If the end product sold were multicomponent, and if the proffered article of manufacture were sold separately, this would suggest the proffered article of manufacture Is the relevant article of manufacture.

3. The intent of the infringer in appropriating the patented design. If the infringer intended to take advantage of the patented design in order to sell a competing product, the factor would indicate the end product was the relevant article of manufacture. Alternatively, if the infringer did not intend to simulate the patented design or had no knowledge of the patented design, this would suggest the proffered product to be the relevant article of manufacture.

4. The degree of difficulty in calculating total profit of the proffered articles of manufacture. The easier the calculation to articulate total profit for the proffered article of manufacture, the more likely the proffered article of manufacture is the relevant article of manufacture.

It is notable that the authors' first factor looks to the "visual contribution the patented design made to the overall appearance of the end product." The first factor does not compare the contribution to the *entire end product* (including nonvisual aspects of the end product such as functionality), but rather to the *overall appearance* of the end product. When the design patent claim is directed at all, or nearly all, of the exterior surfaces of the end product, the relevant article of manufacture will likely be the entire end product, irrespective as to whether the end product possesses other functional attributes. For example, if a design patent is directed to the entire exterior surface of a blender, the contribution of the design patent to the overall appearance of the blender is 100%. The entire blender would be the relevant article of manufacture. The profits to be disgorged would be those from the sale of the entire blender, while no apportionment for considerations such as functionality of the innards (e.g., motor, electronics, etc.) would be deducted. While not yet adopted by any courts at the time of this writing, the article's authors' four-factor test nonetheless provides an alternative proposed framework to be considered with a lack of clarity in an evolving area of law.

Both technical and practical sources can provide information to assist in determining and understanding the patented design and the defined article of manufacture. These technical sources may include the court's decisions in the pending case, the patent at issue, and discussions with technical experts and their expert reports. From a practical standpoint, guidance can be found in sources such as the assertions made in deposition testimony, legal briefs, internal documents and correspondence, marketing documents, discussions with company personnel or customers, and independent research, among many potential sources.

The definition of the patented design and the article of manufacture ultimately needs to be consistent with liability issues in the case, such that there is a correlation (rather than a disconnect) between the liability issues and the damages issues. After developing an understanding of the patented design and article of manufacture, an expert can better address the damages analyses.

Ultimately, without a proper definition and understanding of the patented design and the article of manufacture, an expert may be more prone to improperly calculate infringement damages.

5.1.2 Calculating infringer's total profit made on the article of manufacture

As stated earlier, infringer's profits as a damages remedy requires the disgorgement of the infringer's profits to the patent holder, such that the infringers retain no profit from their wrong.[52]

52 *Nike, Inc.*, 138 F.3d at 1448.

In general, the amount of infringer's total profit for patent infringement claims depends on the:[53]

1. Dollar amount generated from sales of the infringing articles of manufacture; and

2. Costs deductible from the sales (revenues).

Infringer's total profits consider the amount of sales generated from the infringing article of manufacture and deductible costs the infringer would have incurred to sell the infringing products, the deductible costs being the burden of the defendant to prove at arriving at a defendant's total profit.[54]

Incremental costs, i.e., direct and indirect costs incurred incrementally with the sales of the article of manufacture, are considered and subtracted from the sales revenue. Direct and indirect costs components including commissions, royalties, customer returns, shrinkage, and attributable indirect expenses can be deducted.[55] Additional costs may also be deducted; however, they must be properly supported by documentary evidence or disclosure.[56]

Calculating and awarding damages based on post-tax profits would leave the infringer in possession of its tax refund and resulting profit. As Section 289 mandates, the infringer *"shall be liable to the owner to the extent of his total profit,"* meaning damages are awarded based on pretax profits.

5.2 No Double Recovery

Under some circumstances, a damages award can include remedies under both Section 284 and Section 289. However, as stated above, in no case can a design patentee recover damages under Section 284 and under Section 289 for the same infringing sales.[57] Such an award would constitute double counting or double recovery. Thus, recovery resulting from a single act of selling under Section 289 or 284 satisfies entitlement under the other. Further, where a single product infringes both a utility patent and a design patent, damages are awarded only for one patent and under one theory of recovery. The patentee will obviously pursue the theory that would yield the highest damage award. For example, in *Catalina Lighting Inc. v. Lamps Plus, Inc*., the plaintiff established infringement of both a utility patent and a design patent. The utility patent damages under Section 284 totaled $660,000, while the design patent damages under Section 289 totaled $767,942. Naturally, the design patent holder pursued the larger amount, which they were ultimately awarded.[58]

5.3 Willfulness

As described in the chapter "Patent Infringement Damages: Lost Profits and Royalties," it is relevant to note Section 284 states: "[T]he court may increase the damages up to three times the amount found or assessed."[59] The court may award enhanced damages when the infringer is found to have willfully infringed the patent. This potential for enhanced damages is left up to the court's discretion and, importantly, is beyond the scope of a financial expert's analysis.

It is relevant to note the Federal Circuit concluded that "profits" recovered under Section 289 are not "damages" and, therefore, cannot be trebled under Section 284. In *Braun Inc. v. Dynamics Corp. of America*, the Federal Circuit found infringer's total profits awarded under Section 289 explicitly precluded a patentee from "twice recover[ing] the profit made from the infringement."[60] The underlining theory is that an award of profits under 289 already is an equitable remedy and thus the additional trebling under Section 284 is not needed to "do equity."

53 Id. at 1447.
54 Ibid.
55 Ibid.
56 Ibid.
57 *Braun Inc.*, 975 F.2d at 824.
58 *See Catalina Lighting Inc. v. Lamps Plus, Inc*., 295 F.3d 1277 (Fed. Cir. 2002).
59 35 U.S.C. § 284 (2012) (emphasis added).
60 *Braun Inc. v. Dynamics Corp. of America,* 775 F.Supp 33, 41 (D. Conn., 1991).

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