



# Design Patents After Egyptian Goddess

by David J. Torrente



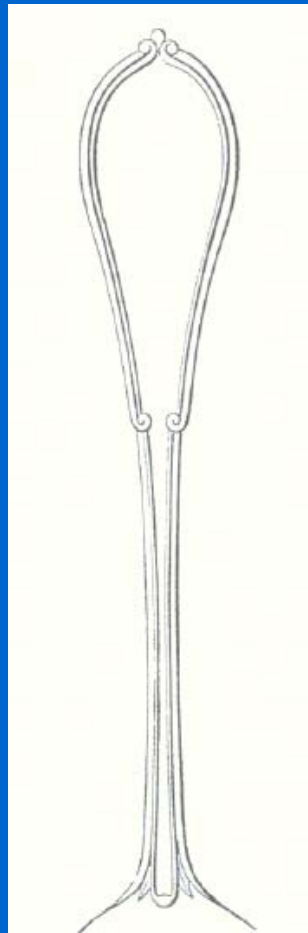


## Prior Design Patent Infringement Landscape

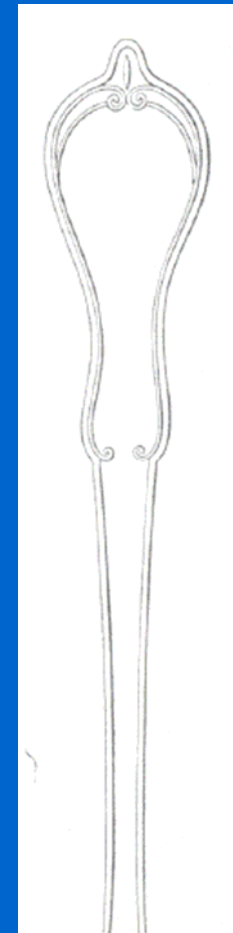
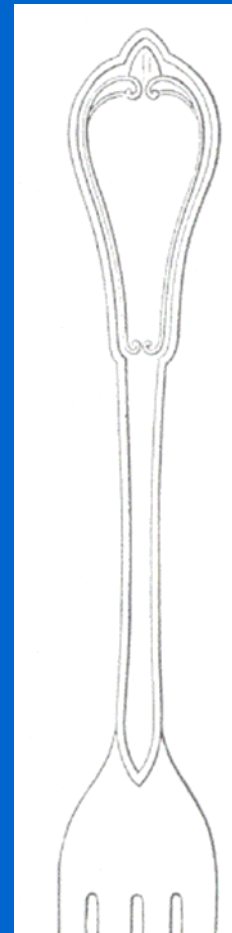
- Gorham Mfg. Co. v. White, 81 US (11 Wall.) 511 (1871)
  - Substantial Similarity: “[I]f, in the eye of the ordinary observer, giving such attention as a purchaser usually gives, two designs are the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.”



# *Gorham v. White* - the Goods



Patented Design



Accused Designs





## Egyptian Goddess *en banc* Holding

- The ‘Point of Novelty’ test from *Litton Systems, Inc. v. Whirlpool Corp.*, 728 F.2d 1423 (Fed. Cir. 1984) is abrogated
- The ‘ordinary observer’ test should be the sole test
- Substantial similarity is viewed in context of the applicable prior art



## Egyptian Goddess *en banc* Holding

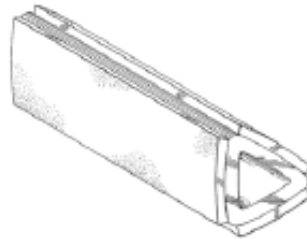
- A verbal construction of the design claim is *discouraged*, but not improper.



# The New Test Applied



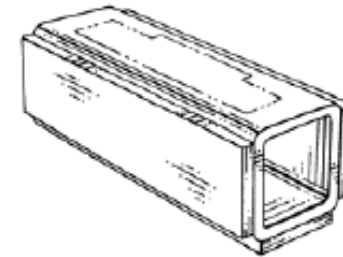
Falley Buffer Block



Nailco Patent



Swisa Buffer



'389 patent

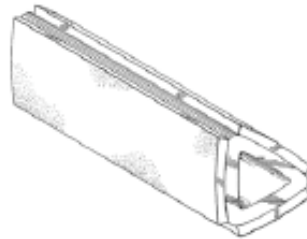
- Despite scuttling the ‘points of novelty’ test that tripped up many design patentees who cleared the ‘ordinary observer’ hurdle... the Court found no infringement



# The New Test Applied



Falley Buffer Block



Nailco



**RESULT:  
SUMMARY JUDGEMENT  
OF NON-INFRINGEMENT  
AFFIRMED**

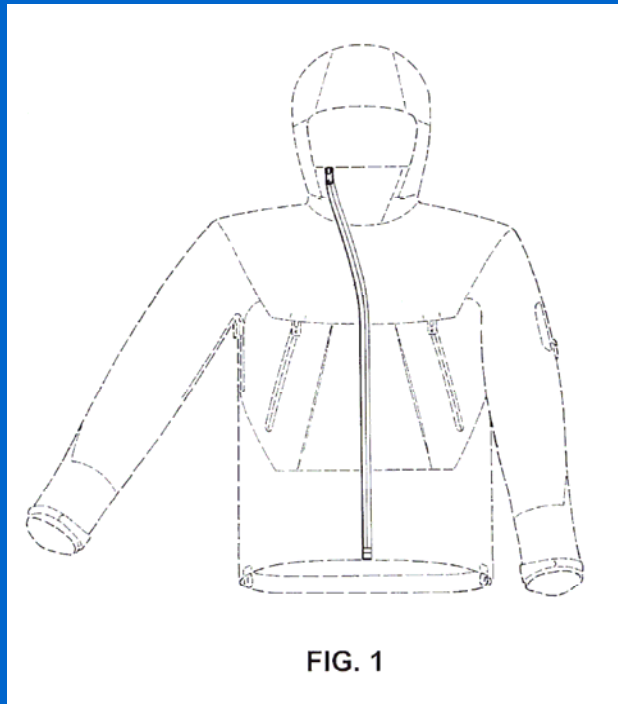
- Despite the 'novelty' test that tripped up many patentees who cleared the 'observer' hurdle... the Court found no infringement



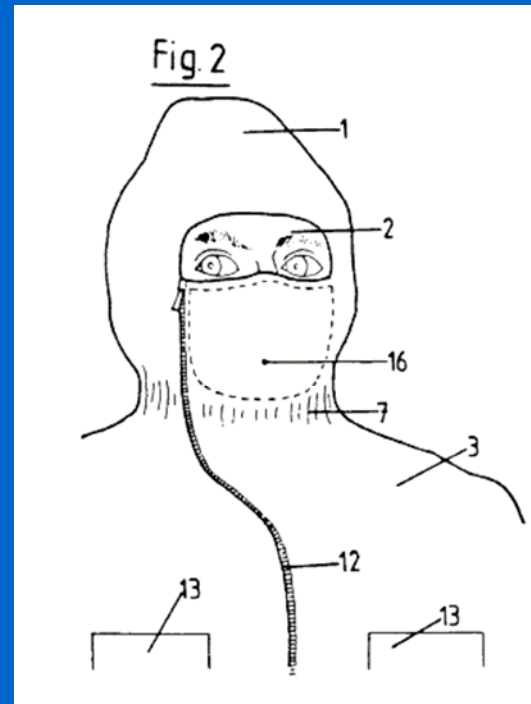


# *Arc'teryx Equ't, Inc., v. Westcomb Outerwear, Inc.*

2008 U.S. Dist. LEXIS 90228; 89 U.S.P.Q.2D 1894 (D. Utah)



Patented Design



Prior Art DE '356



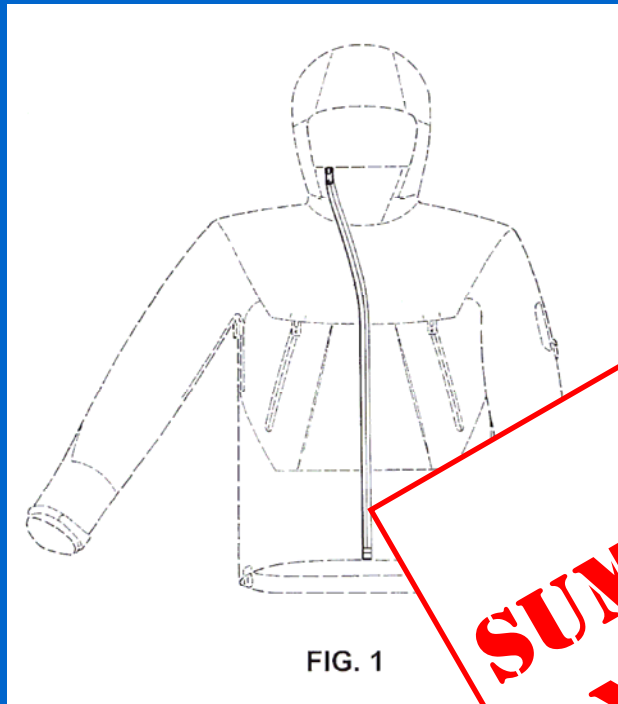
Accused Design





# *Arc'teryx Equ't, Inc., v. Westcomb Outerwear, Inc.*

2008 U.S. Dist. LEXIS 90228; 89 U.S.P.Q.2D 1894 (D. Utah)



Patented Design



Prior Art DE '356



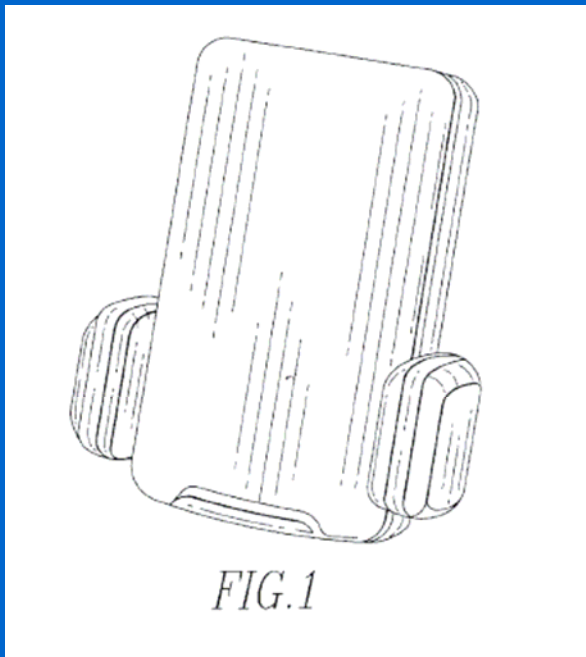
Accused Design

**RESULT:  
SUMMARY JUDGEMENT  
NON-INFRINGEMENT**



*HR U.S. LLC, v. Mizco Int'l, Inc.*

2009 U.S. Dist. LEXIS 27056 (E.D.N.Y., Mar. 31, 2009)



Patented Design



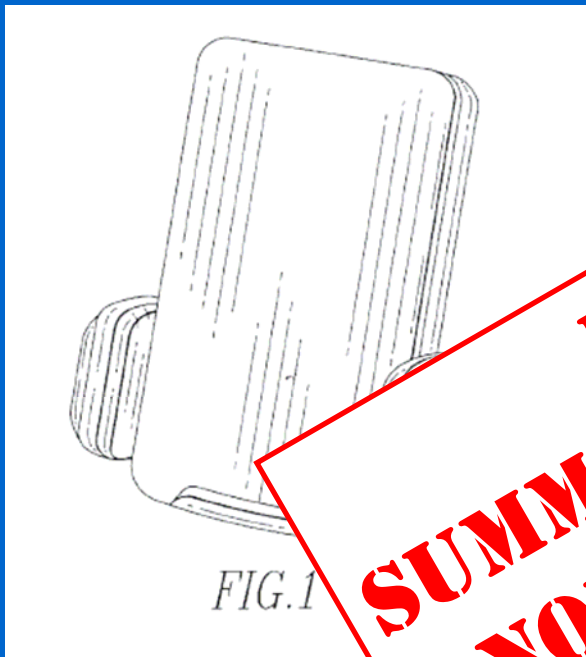
Accused Device



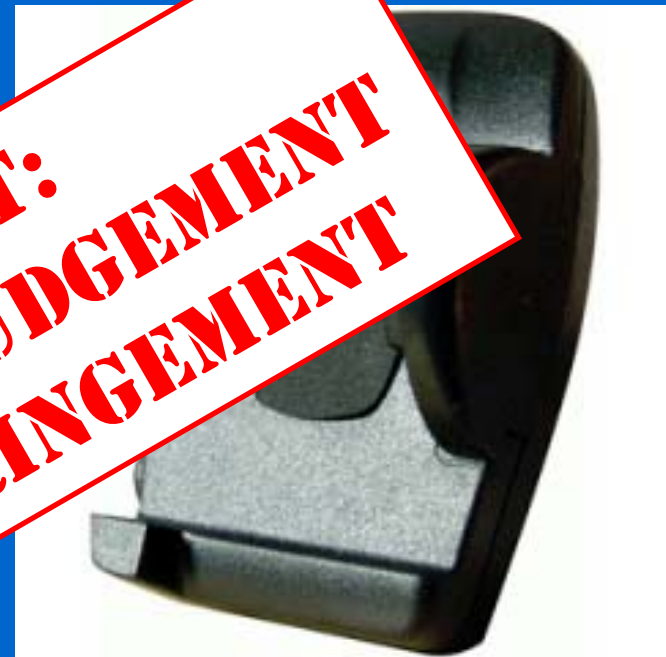


*HR U.S. LLC, v. Mizco Int'l, Inc.*

2009 U.S. Dist. LEXIS 27056 (E.D.N.Y., Mar. 31, 2009)



Patented Design



Accused Device

**RESULT:  
SUMMARY JUDGEMENT  
NON-INFRINGEMENT**



# *Richardson v. Stanley Works, Inc.*

2009 U.S. Dist. LEXIS 32891 (D. Ariz., Apr. 6, 2009)

## Asserted Patent

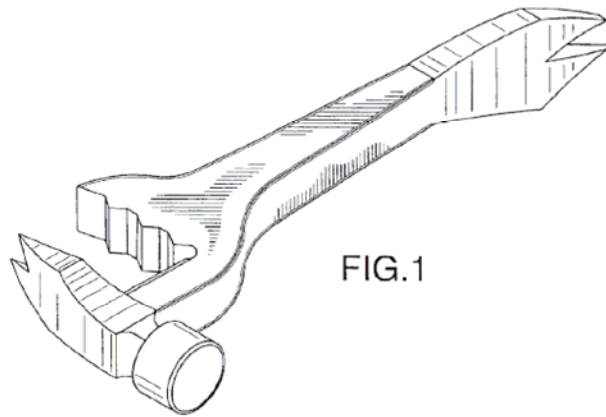


FIG. 1

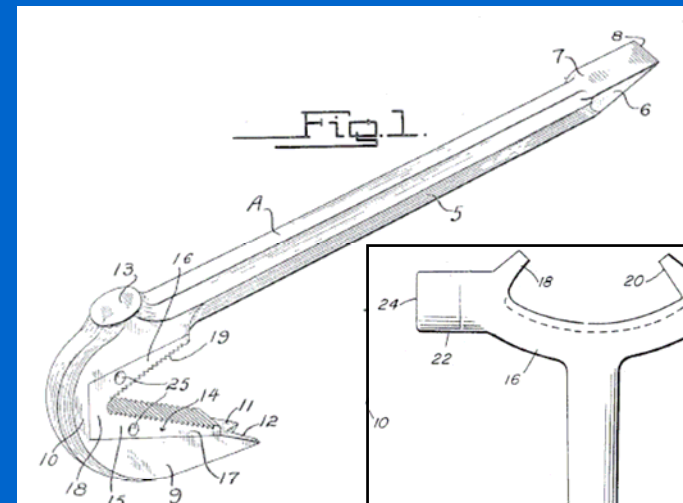


Fig. 1.

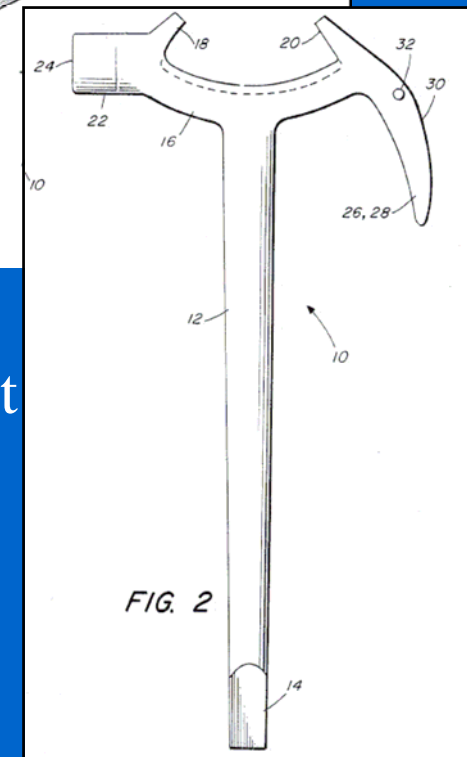


FIG. 2

## Accused Design

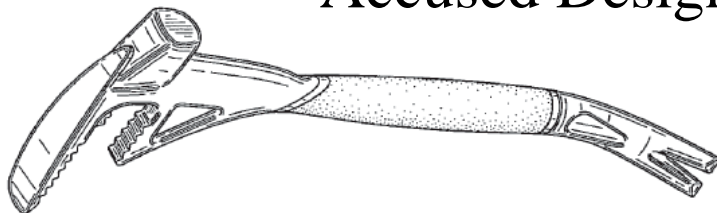


Figure 1

## Sample Prior Art



# *Richardson v. Stanley Works, Inc.*

2009 U.S. Dist. LEXIS 32891 (D. Ariz., Apr. 6, 2009)

Asserted Patent

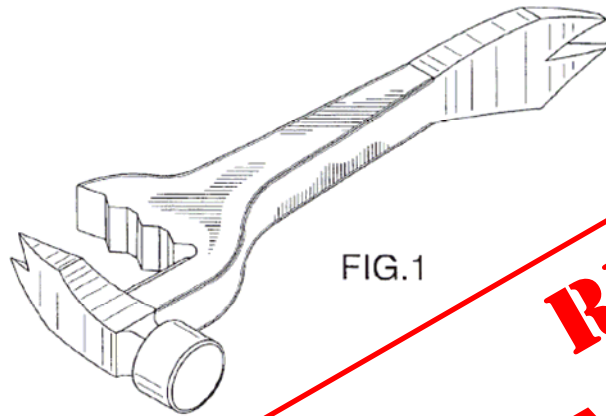


FIG. 1

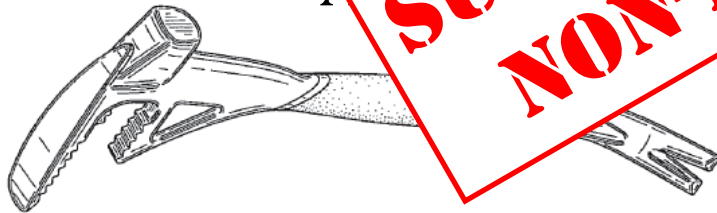


Figure 1

**RESULT:  
SUMMARY JUDGEMENT  
NON-INFRINGEMENT**

Sample  
Prior Art

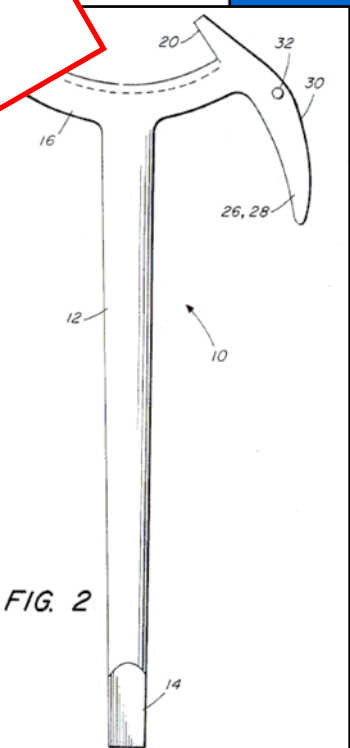
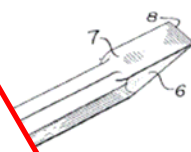
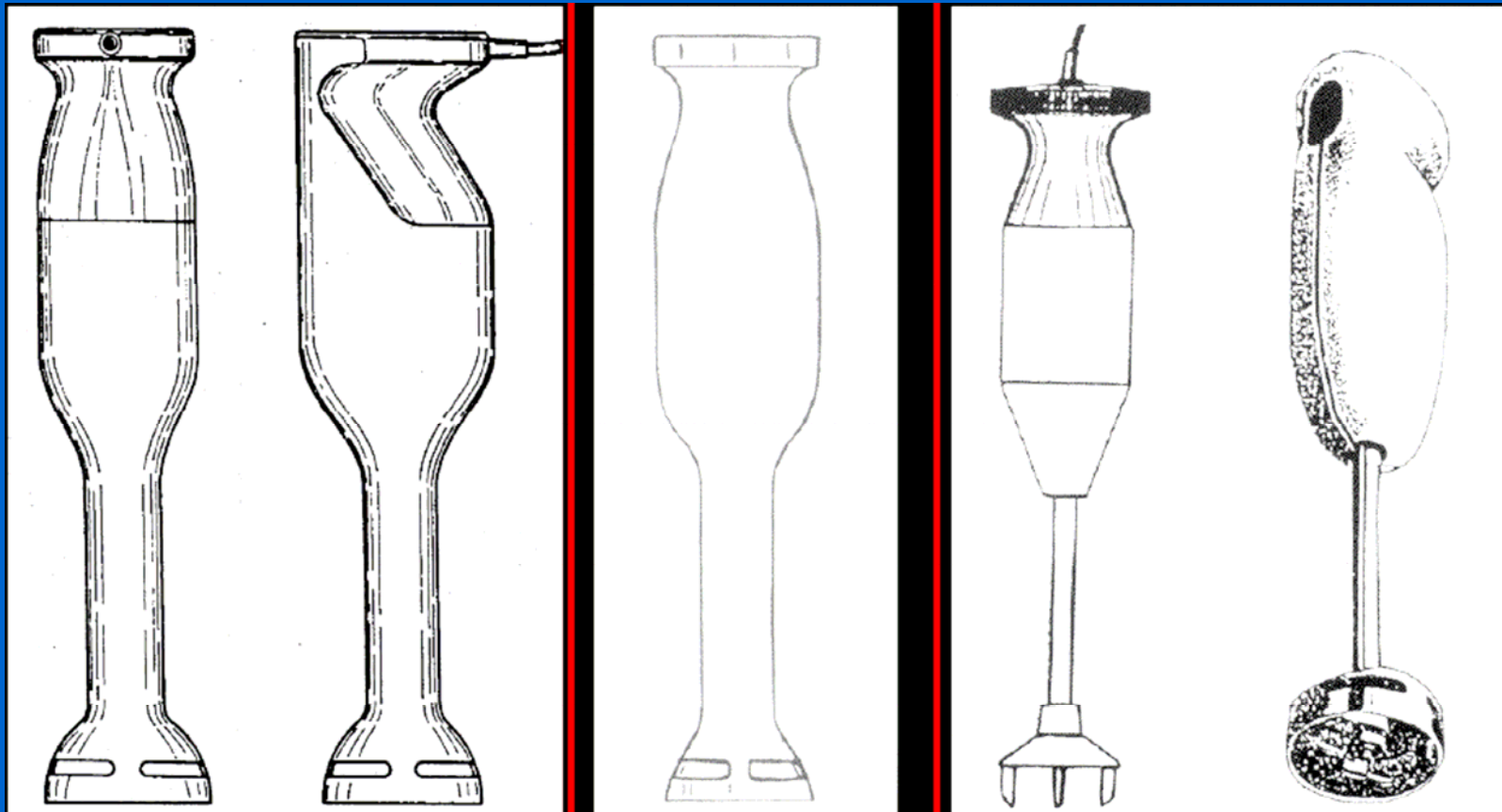


FIG. 2



*Braun Inc. v. Dynamics Corp. of America*  
975 F.2d 815, 24 USPQ2d 1121 (Fed. Cir. 1992)



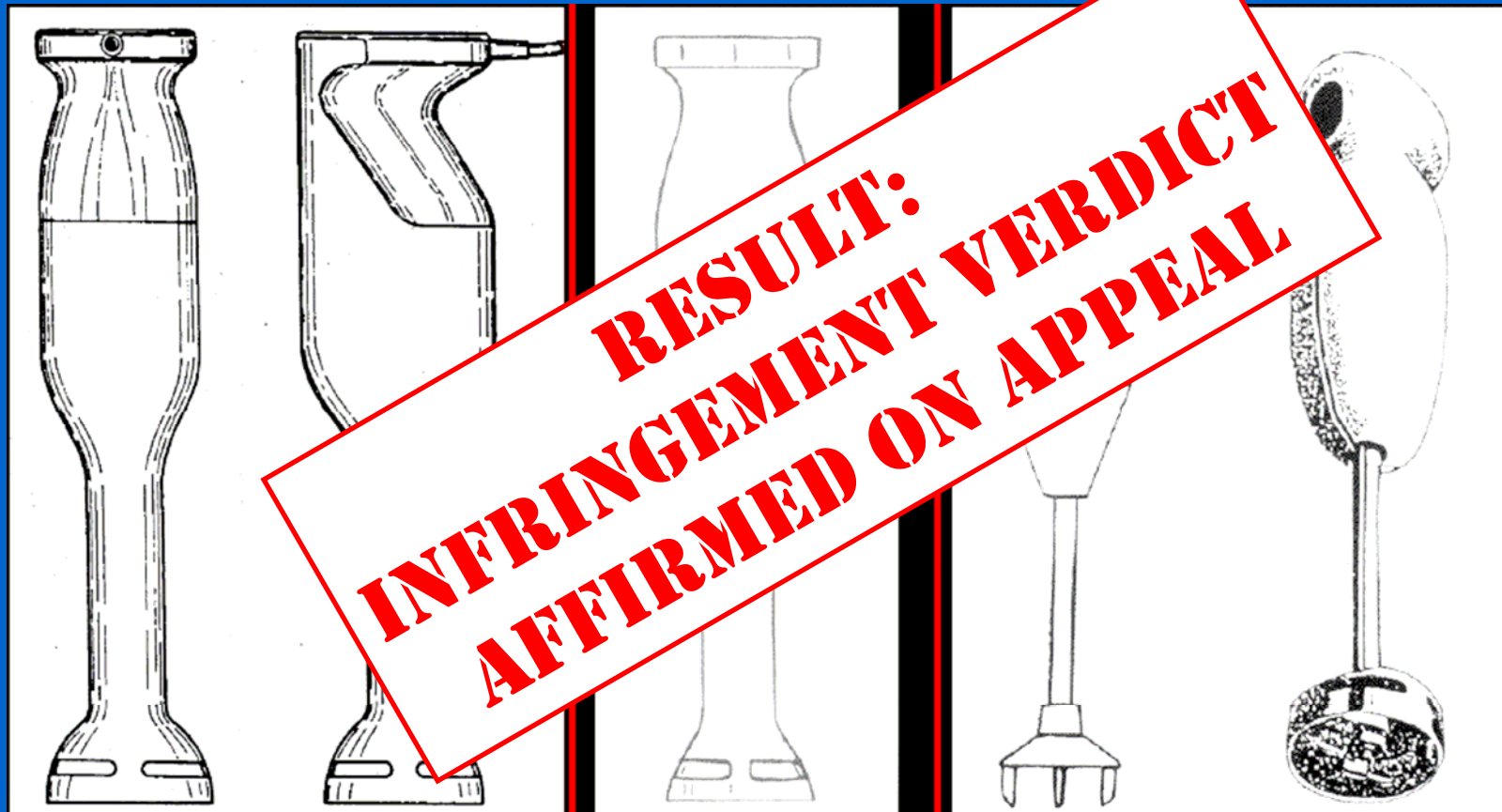
Patented Design

Accused Device

Prior Art



*Braun Inc. v. Dynamics Corp. of America*  
975 F.2d 815, 24 USPQ2d 1121 (Fed. Cir. 1992)



Patented Design

Accused Device

Prior Art