

United States District Court,
C.D. California.

ATLANTIS ENTERPRISES, INC,
Plaintiff.

v.

AVON PRODUCTS, INC., et al,
Defendants.

No. CV 07-3062 ABC (SSX)

April 14, 2008.

Darren S. Enenstein, Richardson and Patel, Los Angeles, CA, for Plaintiff.

Gerard F. Dunne, Gerard F. Dunne Law Offices, New York, NY, for Defendants.

ORDER RE: CLAIM CONSTRUCTION

AUDREY B. COLLINS, District Judge.

Pending before the Court is Plaintiff Atlantis Enterprises, Inc.'s motion for an order construing the claims of United States Patent No. D497, 215 ("215 patent") pursuant to *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed.Cir.1995). The parties timely filed their claim construction briefs and appeared for a hearing on April 14, 2008. Having considered the materials submitted by the parties and the argument of counsel, the Court rules as indicated herein.

I. BACKGROUND

The '215 patent, issued on October 12, 2004, covers the ornamental design of illuminated tweezers. (Compl.para.para. 9-10.) Plaintiff contends that Defendants are selling a product that infringes the design of the '215 patent.

II. LEGAL STANDARD

"A design patent protects the nonfunctional aspects of an ornamental design as shown in the patent." *Elmer v. ICC Fabricating, Inc.*, 67 F.3d 1571, 1577 (Fed.Cir.1995). Whether a design patent claim has been infringed is determined by a two-step process. First the Court must properly construe the claim, as a matter of law, to determine its meaning and scope. *See Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed.Cir.1995) (en banc), *aff'd*, 517 U.S. 370 (1996). Second, the trier of fact must compare the properly construed claim to the accused design to determine whether there has been infringement. *Id.*

At present, the only issue before the Court is the first step of the process: construction of the '215 patent. "[T]he court has the *power and obligation* to construe as a matter of law the meaning of language used in

the patent claim." *Markman*, 52 F.3d at 979 (emphasis added). Design patent construction is very narrow, covering only what is shown in the drawing in the patent. *See In re Mann*, 861 F.2d 1581, 1582 (Fed.Cir.1988) ("Design patents have almost no scope. The claim at bar, as in all design cases, is limited to what is shown in the application drawings."). A design patent only protects the novel, ornamental features of the patented design. *See KeyStone Retaining Wall Sys., Inc. v. Westrock, Inc.*, 997 F.2d 1444, 1450 (Fed.Cir.1993); *Lee v. Dayton-Hudson Corp.*, 838 F.2d 1186, 1188 (Fed.Cir.1988) ("[I]t is the non-functional, design aspects that are pertinent to determinations of infringement.") Where a design contains both functional and non-functional elements, the scope of the claim must be construed in order to identify the non-functional aspects of the design as shown in the patent. *Lee*, 838 F.2d at 1188.

In construing the claims in a design patent, the court must note the ornamental features that produce the overall, ornamental visual impression of the design, not merely define the broader general design concept. *OddzOn Products, Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1405 (Fed.Cir.1997) (approving of district court's identification of the ornamental features that created the "rocket-like" appearance of the design, rather than just noting a "rocket-like" appearance).

III. ANALYSIS

Plaintiff has submitted its patent, which includes seven drawings. Defendant submitted the patent for the prior art, D175,257 ("259 patent"), which includes four drawings. Each party also submitted its proposed claim construction. Defendants' proposed construction is drawn from Plaintiff's proposed construction, but proposes several additional terms and seeks to exclude certain terms Plaintiff proposes. The Court has reviewed the proposed constructions and the '215 patent. The Court finds that the uncontested portions of the proposed construction are correct. The Court will discuss the disputed portions below.

Defendants also refer the Court to interrogatories from an action Plaintiff filed in the Southern District of New York, *Atlantis Enterprises, Inc. v. Adar International, LTD*, Case No. 06-CV-3196 RMB (S.D.N.Y.), in which Plaintiff set forth a construction of the '215 patent that differs in some respects from the construction Plaintiff advances in this case. Defendants urge the Court to estop Plaintiff from arguing inconsistent positions and to bind Plaintiff to the construction it proposed in the New York case. The Court notes that Defendants' legal argument for applying judicial estoppel is not well constructed, nor have Defendants done a good job of supplying the evidentiary basis of this argument. However, the Court need not reach the merits of the estoppel argument because, as discussed below, the Court agrees with Defendants' proposed construction on its merits, simply by reference to the patent itself.

A. The Bullet-Shaped Light Housing

Plaintiff contends that the bullet-shaped light housing should be described as, "A circular cross-section with a bullet shaped housing ending with a light unit." (Pl.'s Br. 4:9-10.) Defendant contends that the housing should be described as, "A circular cross section with a bullet-shaped housing which is provided by the housing being half cone-shaped and half cylinder shaped and ending with a light unit." (Defs.' Br. 11:23-26.) At oral argument, Plaintiff demonstrated that the use of the word "half" is not accurate, and suggested a variation of Defendants' proposal, using the word "part" instead of "half." Defendant suggested stating that the "majority of the length of the bullet-shaped housing tapers," and Plaintiff accepted that construction.

The Court agrees with Defendants' construction and the modifications of that construction offered by both parties. In *OddzOn Products, Inc.*, the Federal Circuit found that the District Court's construction was correct because it did not simply note the "rocket-like" appearance of the design, but rather identified the

ornamental features of the design that gave it a "rocket-like" appearance. *See* OddzOn Products, Inc., 122 F.3d at 1405. Here, to describe the housing simply as bullet-shaped would be inadequate; rather, the Court must describe the features of the housing that creates its bullet shape. The bullet-shaped light housing will therefore be described as follows: "A circular cross-section with a bullet-shaped housing is provided by the housing being part cone-shaped and part cylinder-shaped, in which a majority of the length of the bullet-shaped housing tapers, and ending with a light unit."

B. The Shape of the Push Button Switch

Plaintiff contends that the push button switch should be described as, "A raised push button switch extending from the bottom 1/3 of the bullet-shaped light housing." (Pl.'s Br. 4:11-12 .) Defendant contends that the push button switch should be described as "A raised push button switch that is circular in cross-sectioned [sic] and round-ended is extending from the bottom 1/3 of the bullet-shaped light housing." (Defs' Br. 11:26-12:2.)

The shape of the push button switch is best illustrated in Figures 3, 4, and 7 of the patent. The drawings depict a push button that is circular in cross section and round-ended. Accordingly, the Court will adopt Defendants' proposed construction of this feature.

C. The Location of the Push Button Switch

Plaintiff's construction omits any description of the push button's location on the light housing. Defendants propose to add, "The push button switch is positioned on the bullet-shaped housing at a location so as to be beneath a prong of the tweezers." (Defs.' Br. 12:4-5.)

The position of the push button switch is depicted in Figure 4 of the patent. That figure shows the profile of the design, and includes dashed lines illustrating the prongs of the tweezers and the position of the push button in relation to the prongs of the tweezers. It is clear that the push button extends from the housing from a position under one of the tweezer's prongs. The claim construction will therefore include the location of the push button beneath a prong of the tweezers.

D. Whether the Battery Cap has a Round End or a Flat End

Plaintiff contends that the battery cap on the end opposite the light unit "rounds" (Pl.'s Br. 4:21); Defendants contend that the battery cap has a flat end. (Defs' Br. 12:9-10.)

Figures 3, 4, and 5 depict three different elevations of the design. Each figure indicates that the end of the battery cap is flat. Figure 6 is a top plan view, showing the top surface of the battery cap. Figure 6 includes a strip of parallel lines illustrating that the top surface has no dimensionality and no texture. This interpretation-that the strip of parallel lines in Figure 6 indicates a flat surface-is supported by comparing Figure 6 with Figure 7, a bottom plan view of the housing starting from the light unit at the apex of the cone. Figure 7 includes several concentric arc shapes, suggestive of the depth of the cone shape evident when viewed from the apex of the cone. If the end of the battery cap had dimensionality-whether convex or concave-Figure 6 would have included concentric arcs to indicate that shape, like Figure 7 has. Instead, Figure 6 includes just a strip of parallel lines. The end of the battery cap is therefore flat. Relatedly, because the battery cap does not end in a point, the Court will accept Defendant's suggestion and use the phrase "end surface" instead of Plaintiff's proposed "end point."

E. Whether the Battery Cap Extends 1/8 of an Inch Beyond the Tweezers' Arms

Plaintiff states that, "The battery cap ... extends approximately 1/8 of an inch beyond the point where the tweezers' arms attach to the bullet-shaped housing, away from the light end." (Pl.'s Br. 4:21-25.) Defendants contends that there is no basis for the 1/8 inch measurement because no dimensions are provided on the drawing.

The Court agrees with Defendants. The drawings in the patent contain no dimensions indicating the length by which the battery cap extends beyond the tweezers' arms. Furthermore, simply measuring the length does not support Plaintiff's construction: from the drawings themselves (which are likely scaled drawings), the battery cap extends more than 1/8 of an inch beyond the tweezer arms. Therefore, the claim construction will not include this measurement.

F. The Knurled Band

Defendants contend that Plaintiff's construction omits a knurled band, and proposes to add a claim for "a knurled band around the portion of the bullet-shaped housing remote from the light source." (Defs' Br. 12:15-19.) Plaintiff contends that its proposed construction does include the knurled surface.

The Court agrees with Defendants. Although Plaintiff's construction refers to the knurled surface of the battery cap, the patent has a thin knurled band depicted in Figures 1-5 that Plaintiff's claim omits. The construction will therefore include a claim for the knurled band.

G. The Court's Modifications

As is evident from the above discussion, the Court will adopt much of Defendants' proposed construction. However, the Court will specify that the "thin band between the battery cap and the light unit end" is also **smooth**, and that the "knurled band around the portion of the bullet shaped housing" is also **thin**. These additional terms accurately describe each band as shown in the figures, and ensure that their similar features and their dissimilar features are properly noted. The Court's construction will also include several minor stylistic modifications of Defendants' proposed construction.

IV. CONCLUSION

Based on the foregoing, the Court construes the '215 patent as follows:

United States Patent No. D497,215 depicts an ornamental design of illuminated tweezers. A circular cross-section with a bullet-shaped housing is provided by the housing being part cone-shaped and part cylinder-shaped, in which a majority of the length of the bullet-shaped housing tapers, and ending with a light unit. A raised push button switch that is circular in cross section and round-ended extends from the bottom 1/3 of the bullet-shaped light housing. The push button switch is positioned on the bullet-shaped housing at a location so as to be beneath a prong of the tweezers. The placement of the light unit is at the apex of the bullet-shaped light housing. The use of a round-ended light as a light source is provided. The battery cap on the end opposite of the light unit extends beyond the point where the tweezers' arms attach to the bullet-shaped light housing, away from the light end. The rounded lateral exterior of the battery cap surface is knurled, and the end surface of the battery cap is flat and smooth. A thin, smooth band between the battery cap and the bullet-shaped housing, and a thin, knurled band around a portion of the bullet-shaped housing remote from the light source, are provided.

SO ORDERED.

C.D.Cal.,2008.

Atlantis Enterprises, Inc. v. Avon Products, Inc.

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