



## Featured Article

# Analysis and Practice of "Commonplace Geometric Shapes and Patterns" in Design Patents

Article 2.4 of the Patent Law clearly defines a design patent, in which a "new design" is one of the core criteria for determining whether it is a statutory subject matter of design protection, and is a basic condition for a design to obtain patent protection. It is a common yet controversial issue to conclude that a design is not a new design merely on the ground that it consists of "commonplace geometric shapes and patterns".

Since the fourth amendment to the Patent Law, which came into effect on June 1st, 2021, partial designs have been included as protectable subject matter for design patents, and the number of cases rejected under Article 2.4 of the Patent Law has increased. A common ground for rejection in these cases is that the design sought to be protected does not constitute a new design as it consists of commonplace geometric shapes and patterns.

Hereafter, the identification criteria of commonplace geometric shapes and patterns and the practical approach to determining whether a design constitutes a new design will be analyzed in conjunction with relevant cases.

## I. Legislative Orientation of "New Design"

Article 2.4 of the Patent Law stipulates that: " 'Design' means any new design of the shape, the pattern, or their combination, or the combination of the color with the shape or pattern, of an entire product or a portion thereof, which creates an aesthetic feeling and is fit for industrial application."

As the name implies, a "new design" is either a new design for the entire appearance of a product or a new design for the partial appearance of a product.

According to Article 50.1 of the Implementation Regulations of the Patent Law, the scope of the preliminary examination for design patents explicitly includes the examination of whether a design patent application obviously does not conform to the Article 2.4 of the Patent Law.

According to Section 7.3, Chapter 3, Part I of the Patent Examination Guidelines, titled "Aesthetic New Designs Suitable for Industrial Application", "Article 2.4 of the Patent Law provides a general definition of patentable designs, rather than a specific examination standard for determining whether designs are identical or substantially identical. Therefore, during examination, the examiner generally only needs to judge whether the design sought to be protected meets the general requirements of a new design, based on the

content of the application documents and the common sense of ordinary consumers."

It can be seen that the determination of whether a design constitutes a new design does not require a prior design search, but only needs to be made from the perspective of an ordinary consumer and follow the principle of "overall observation, comprehensive judgment" to exclude obvious non-innovative designs in the product field to which the design belongs. In this way, it can not only improve examination efficiency, but also reduce system operating costs. The "new" in the "new design" and the "new" in the "new technical solution" under the definitions of invention and utility model are both general concepts, which aim to define patentable subject matter attributes, and constitute the definition provisions relating to the protected subject matter at the legislative level, thereby setting the basic threshold for patentability at the subject matter level.

Although the determination of a new design is not the judgment of novelty or obvious difference, which may also be referred to as "novelty and inventiveness" and is regulated by special legal provisions in the Patent Law, a new design constitutes a substantive examination standard in preliminary examination, and is also one of the grounds for invalidation of a design patent.

## II. Applications and Typical Cases of "Commonplace Geometric Shapes and Patterns" in the Judgment of "New Design"

In design examination, rejections based on a finding that the design does not constitute a "new design" and thereby fail to conform to Article 2.4 of the Patent Law are usually rendered by assessing several factors, including whether the design consists of commonplace geometric shapes and patterns in the relevant field, whether it is a simulative design, whether it is a design dictated solely by function, whether it belongs to a product specified by national standards, whether it constitutes obvious plagiarism of existing designs, and whether it directly uses well-known cartoon images. Cases in which designs are rejected for failing to constitute a new design on the ground that they involve "commonplace geometric shapes and patterns" are not uncommon. In particular, following the implementation of the Fourth Amendment to the Patent Law on June 1, 2021, which introduced partial design protection, the issue of whether the scope of partial design protection is overly broad such that it encompasses "commonplace geometric shapes and patterns" has also become a major focus.

In practice, such commonplace geometric shapes and patterns here include, but are not limited to, rectangular boxes, cubes,

cylinders, rectangles, squares, circles, ellipses, dots, grids, simple characters, conventional symbols, and other shapes and patterns lacking distinctive composition.

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The following cases are presented to illustrate the examination criteria applied to "commonplace geometric shapes and patterns" in administrative proceedings, by way of typical invalidation cases.

### **Case 1: Invalidated for failing to constitute a "new design"**

In Invalidation Decision No. 25665 concerning the design patent No. 201330390844.8 entitled "Glass Bottle (550b)", the Panel held that the bottle body of the concerned patent is approximately cylindrical, which is a commonplace shape in the field of glass bottles; the bottle mouth and thread portion of the concerned patent are formed with external threads surrounding the cylindrical surface, which also constitutes a commonplace shape and design in the field of glass bottles. Given that the individual components of the patented glass bottle and the overall design formed by their combination are commonplace, the design does not constitute a new design.



Perspective View

In this case, all components of the product are commonplace shapes and designs in the relevant field, and the overall design formed by their combination has not broken through the commonplace design category. Accordingly, the design is held not be a "new design".

### **Case 2: Invalidated for failing to constitute a "new design"**

In Invalidation Decision No. 23806 concerning the design patent No. 201030181922.X entitled "Packaging Box (Delicious Minced Meat Noodles)", the Panel held that, in relation to packaging box products, from the perspective of the knowledge level and cognitive ability of an ordinary consumer, the cuboid shape constitutes a commonplace design of this kind of products; the overall shape of the patented packaging box is a cuboid, which is a common shape in daily life; the Chinese characters and other content printed on the patented box produce a square, concise and unadorned overall visual effect and belong to traditional fonts; as far as the text layout of the patented packaging box is concerned, the horizontal arrangement of text also constitutes a

commonplace text arrangement; and the national safety certification mark and trademark on the product packaging are standard national icons. Therefore, the design does not constitute a new design.



Perspective View

On the basis of commonplace geometric shapes and patterns, this case merely incorporates designs of simple characters (for example, using standard fonts without any artistic deformation) and conventional arrangements thereof, and fails to reflect any innovative features. Accordingly, the design is held not to constitute a "new design".

### **Case 3: Recognized as a "new design" and held valid**

In Invalidation Decision No. 58612 concerning the design patent No. 202130500215.0 entitled "Waist Belt", the Panel held that although the concerned patent has adopted the design scheme of setting multiple stripes on the belt body, various design variations exist with respect to the specific shape and aspect ratio of the belt body, the specific positions of multiple vertical stripes on the front side of the belt body, the relative positions of vertical

stripes attachable to each other on the front and back sides of the belt body, and whether the belt body is provided with wrapping strips, etc. In the absence of further evidence from the petitioner to prove that the above design constitutes a common geometric pattern in the waist belt field, it is impermissible to deny all design patents relating to waist belts merely on the ground that a plurality of contrasting color stripes are arranged on a strip-shaped carrier. Therefore, the concerned patent conforms to the provisions of Article 2.4 of the Patent Law.



Front View



Back View

In this case, although the shape of the product is a common shape in the art, and the stripe is employed as a conventional design element, it creates a distinct visual impression on the waist belt body through pattern design including the combination ratio, positional relationship, and color matching and so on. Accordingly, the design is held to constitute a "new design."

From the above cases, it can be seen that the standard for a new design is a relatively low threshold. Although a new design may be determined without citing prior designs, this does not preclude corroboration by evidence.

For example, in Case 3, the Panel pointed out that the petitioner who alleged that a design does not constitute a new design may provide additional evidences to prove that the design in question is a common geometric shape in the relevant product field. This approach has also been affirmed in judicial practice.

As another example, in the administrative litigation case where a Beijing-based company sued the China National Intellectual Property Administration (CNIPA) in connection with the invalidation of the design patent No. ZL201330147666.6 after refusing to accept Invalidation Decision No. 26301 (Administrative Judgment (2015) Jing Zhixing Chuzei No. 4619), the court also held that *"the plaintiff's evidence failed to establish that the geometric shapes and patterns of the patented product in question are common to consumers in daily life. Therefore, the patented design complies with the provisions of Article 2.4 of the Patent Law."*

For another example, in the administrative litigation case where Plaintiff Yang refused to accept Invalidation Decision No. 30164 and instituted an administrative lawsuit against the CNIPA in relation to the invalidation of a design patent (Administrative Judgment (2017) Jing 73 Xing Chu No. 545), the court held that: *"The subject patent involves the selection, arrangement, and combination of design elements, and does not constitute a design composed of common geometric shapes*

*and patterns. The evidence submitted by the plaintiff is insufficient to prove that the subject patent is a common design in the relevant field."*

It can thus be seen that where there is a dispute as to whether a design constitutes "commonplace geometric shapes and patterns," it is feasible to adduce evidence to prove the same. However, since a "new design" is the fundamental prerequisite for patent authorization and its examination standard is lower than that of "novelty," caution must still be exercised when relying on evidence to prove such a claim. Specifically, one cannot deny the existence of a "new design" on the ground that the design "lacks novelty," as this approach may be counterproductive and fail to achieve the intended probative purpose.

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Although the above only illustrates the administrative and judicial practice concerning commonplace geometric shapes and patterns in the determination of a new design by using several examples of overall design, attention should be paid to the fact that a partial design is subject to substantially the same criteria as an overall design when determining whether it constitutes a new design.

Based on the definition in the Article 2.4 of the Patent Law, a partial design refers to any new design of the shape, the pattern, or their combination, or the combination of the color with the shape or pattern, of a portion of a product, which creates an

aesthetic feeling and is fit for industrial application.

A partial design is usually illustrated by views in the form of "solid lines indicating the claimed portion and broken lines indicating the unclaimed portion". If the boundary of the solid-lined portion is unclear, or if the design comprises conventional geometric design elements or their simple arrangement and combination, the scope of protection is likely to be deemed broader, such that the design fails to satisfy the requirement of being a "new design".

For example, in a GUI design application for a mobile phone, the claimed portion was a "rectangular screen frame," but the actual innovation resided in the GUI interface. However, since the GUI interface was an unclaimed portion, the CNIPA rejected the application on the ground that the claimed design itself—being a conventional rectangular shape—does not constitute a "new design."

From a practical perspective, the proportion of partial design applications rejected on the ground that they involve common geometric shapes and patterns and thus fail to constitute a new design is significantly higher than that of overall design applications. In other words, if a partial design blindly seeks an excessively broad scope of protection, it may fall into a situation where it is deemed not to qualify as a new design.

### III. Practical Guidance on Disputes over "Commonplace Geometric Shapes and Patterns" in Practice

A "new design" constitutes the fundamental threshold for the grant of design patents in China, and the core determination lies in assessing whether the design features are common or conventional in the specific field of the product. Where a product design, or a portion thereof, falls within the scope of commonplace or customary designs in the relevant field, it does not qualify as a "new design" and therefore does not meet the conditions for patent grant.

Considering whether designs are common or not, examiners usually make presumptive judgments based on the common sense of ordinary consumers in the preliminary examination stage, without giving evidence. In order to improve the success rate of authorization and effectively respond to the examination opinions, applicants need to make forward-looking planning in the application stage.

#### 1. Prejudgment and Risk Avoidance

Prior to preparing a design patent application, the applicant shall assess in advance whether the design sought to be protected merely constitutes a customary design. Simple stacking of purely customary geometric elements shall be

avoided, so as to ensure that the overall or partial design of the product can sufficiently reflect its innovative content and satisfy the requirements for a new design, thereby reducing the risk of rejection on the ground that the design does not constitute a new design at the source.

#### 2. Joint Application and Defensive Planning

In view of the scenario where the overall or partial design claims a relatively broader scope of protection, applicants may consider adopting a multi-level joint application model of "basic design + defensive design(s)". By effectively leveraging the advantages of China's joint application system, i.e., filing one single design application including multiple designs, defensive designs can be additionally constructed by narrowing the scope of protection step by step on the basis of the basic design. This approach serves to spread the risk of application rejection and prevent the entire application from being denied authorization.

#### 3. Addressing "Disputes" with Consideration for Evidence Preparation

In disputes involving the identification of "commonplace designs", it should be noted that the applicant has no chances to modify the original protection scope(s) in the application documents, regardless of

overall design or partial design, but can only give an argumentative reply. This is particularly true for partial design features: any attempt to respond by way of amendment will generally be regarded as going beyond the scope of protection stated in the original application, thus wasting the opportunity to respond.

Such argumentative responses can be advanced from two aspects. On the one hand, the applicant may elaborate on the innovative design features of the claimed design by reference to the filed application documents and the current state of designs in the relevant product field, direct the examiner's attention to the unconventional portions of the design, as well as the innovative aspects reflected in the combination, proportion and positional arrangement of conventional elements, and fully demonstrate that the design creates an overall new visual effect. On the other hand, the applicant may attempt to break away from the mindset of judging without conducting a prior search, overcome the subjective influence of individual cases, and prove that the relevant design content or elements are not widely used in the field by submitting objective evidences such as search reports and industrial reports or the like reflecting the design status of the product field, or that innovation exists in the combination or deformation of design elements, thereby

rebutting the finding of "commonplace" through well-founded reasoning and solid evidences.

#### IV. Overview

With the development of the intellectual property system, China's examination standards for design patents have been gradually improving. In the determination of a new design, although examiners may adopt prima facie presumptions regarding "commonplace geometric shapes and patterns" without prior search, such judgments shall still be made from the perspective of an ordinary consumer and in accordance with the principle of "overall observation and comprehensive judgment", so as to strike a reasonable balance between examination efficiency and the protection of innovation.

In this regard, the applicants should take the initiative to adapt to the stringent examination trend, fully evaluate the design solution prior to filing, and strive to avoid the risk of rejection arising from the mere adoption of customary design elements. The applicants shall also make thorough overall arrangements and strategic planning, so as to ensure effective defense and response based on objective facts and sufficient evidences in the event of disputes.

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Ms. Yan Huang has expertise in patent drafting, patent prosecution, patent reexamination, patent invalidity, patent litigation, patent due diligence and freedom to operate investigation, patent layout, patent analysis, etc., she handled a large number of cases of domestic and foreign clients, and is very experienced in patent legal services in the fields of mechanical engineering and mechanical automation, such as, home appliances, engineering mechanics, automation manufacture, semiconductors, printing facilities, paper apparatuses, medical devices, computer equipment and so forth.