

No. 2023-2138

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

**NORTH STAR TECHNOLOGY INTERNATIONAL LTD., NORTH STAR
TECHNOLOGY LTD.,**

Plaintiffs-Appellants,

v.

LATHAM POOL PRODUCTS, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the
Eastern District of Tennessee, Case No. 3:19-cv-120-KAC-DCP

**CORRECTED BRIEF OF *AMICUS CURIAE* INSTITUTE FOR DESIGN
SCIENCE AND PUBLIC POLICY IN SUPPORT OF PLAINTIFFS-
APPELLANTS' COMBINED PETITION FOR REHEARING AND
REHEARING EN BANC**

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July 11, 2025

CERTIFICATE OF INTEREST

Counsel for amicus curiae Institute for Design Science and Public Policy
certifies the following:

1. Represented Entities. Fed. Cir. R. 47.4(a)(1). Provide the full names of all entities represented by undersigned counsel in this case.

Institute for Design Science and Public Policy

2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2). Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

None.

3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3). Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.

None.

4. Legal Representatives. Fed. Cir. R. 47.4(a)(4). List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court.

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5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

N/A (amicus/movant).

6. Organizational Victims and Bankruptcy Cases. Fed. Cir. R. 47.4(a)(6).

Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees).

None.

Dated: July 11, 2025

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus Curiae Institute for Design Science and Public Policy (“IDSPP”) is an independent, non-profit professional organization founded in 2011 to support the integration of design science and design intellectual property rights. IDSPP’s efforts focus on tracking and supporting critical design research trends relevant to advancing design intellectual property rights in the United States and globally.

IDSPP has an interest in the outcome of this matter based on its longstanding commitment to design rights issues. More specifically, IDSPP has an interest in ensuring that the *Gorham* test for design patent infringement is administered fairly and consistently.

IDSPP has no stake in any of the parties to this litigation or the result of this case.

IDSPP submits this brief with the consent of counsel for Plaintiffs-Appellants North Star Technology International LTD. and North Star Technology LTD.

No party or party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; no person or entity other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

The facts of this case are presented in the Petitioner’s brief. IDSPP has no interest in, and takes no position concerning, the ultimate outcome of this case – namely whether infringement should be found.

Based on the results of an empirical study conducted by IDSPP, the meaning of the term “plainly dissimilar” is highly likely to be misinterpreted by district courts and juries. This result, combined with a lack of guidance from this Court on the meaning of the term “plainly dissimilar” will lead to incorrect outcomes in design patent infringement cases. Therefore, additional guidance from the Court is needed to ensure accurate and consistent application of the *Gorham* ordinary observer test.

ARGUMENT

I. ORIGIN OF THE “PLAINLY DISSIMILAR” LANGUAGE AND APPLICATION TO THE ORDINARY OBSERVER TEST

Under the ordinary observer test, infringement is found “[i]f, 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.” *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 670 (Fed. Cir. 2008) (*en banc*) (quoting *Gorham Mfg. Co. v. White*, 81 U.S. (14 Wall.) 511, 528 (1871)). The hypothetical “ordinary observer” is deemed to have knowledge of the prior art. *Id.* at 676. The prior art can be instructive to the ordinary observer in that his/her attention “will be drawn to

those aspects of the claimed design that differ from the prior art.” *Id.* In addition, when the claimed design is close to the prior art, “small differences between the accused design and the claimed design are likely to be important to the eye of the hypothetical ordinary observer.” *Id.*

In further explaining the *Gorham* test in *Egyptian Goddess*, the court stated that:

"In some instances, the claimed design and the accused design will be sufficiently distinct that it will be clear without more that the patentee has not met its burden of proving the two designs would appear "substantially the same" to the ordinary observer, as required by *Gorham*. In other instances, when the claimed and accused designs are not plainly dissimilar, resolution of the question whether the ordinary observer would consider the two designs to be substantially the same will benefit from a comparison of the claimed and accused designs with the prior art, as in many of the cases discussed above and in the case at bar. Where there are many examples of similar prior art designs, as in a case such as *Whitman Saddle*, differences between the claimed and accused designs that might not be noticeable in the abstract can become significant to the hypothetical ordinary observer who is conversant with the prior art." *Id.* at 678 (underlining added).

This language did not establish a stand-alone infringement test. It merely clarified that, in clear-cut cases, non-infringement can be found without consideration of the prior art. In the context of summary judgment, this means that (a) the differences are so substantial that there could be no infringement even if the claimed design and

the prior art are not close in overall appearance and (b) the differences are so substantial that no reasonable juror could find infringement.

II. THE TERM “PLAINLY DISSIMILAR” IS BEING MISINTERPRETED AND ADDITIONAL GUIDANCE IS NEEDED

Neither *Egyptian Goddess* nor any subsequent decision by this Court has provided any guidance or examples to assist district courts or juries in determining what degree of dissimilarity required for an accused product to be “plainly dissimilar” to the claimed design. IDSPP has been concerned that this lack of guidance is resulting in inconsistent application of the *Gorham* test by the courts. Accordingly, IDSPP conducted a study (the “Study”) to determine the extent to which “ordinary observers” would accurately understand the meaning of the term “plainly dissimilar”. A memorandum of Study is submitted herewith as Exhibit A.

The Study presented a large sample of subjects (i.e., ordinary observers) with claimed designs of US design patents and accused products that have previously been determined to infringe a respective one of the claimed designs. The claimed designs and accused products were those at issue in *Gorham Mfg. Co. v. White* (accused products referred to herein and in the Study as “Gorham v. White 1867” and “Gorham v. White 1868”) and *Samsung Elecs. Co. v. Apple Inc.*, 137 S.Ct. 429, 196 L.Ed.2d 363 (2016) (accused product referred to herein and in the Study as “Apple v. Samsung”). Among other questions, each subject was asked if each accused product was “plainly dissimilar” to the asserted claimed design. In each

case, a clear majority of subjects concluded that the accused product was “plainly dissimilar” to the claimed design – 72% for *Gorham v. White* 1867, 74% for *Gorham v. White* 1868, and 62% for *Apple v. Samsung*.

The results of the Study show a clear disconnect between the Court’s intended meaning of the term “plainly dissimilar” in the context of the *Gorham* test and interpretation of this term by ordinary consumers. As explained above, the Court intended the term “plainly dissimilar” to mean that the differences between the claimed design and the accused product are so substantial that the court or jury may conclude that they are not “substantially the same” without consideration of the prior art. Yet, a clear majority of the subjects of the Study concluded that the same accused products were “plainly dissimilar” to the asserted claimed designs. This disconnect demonstrates the need for the Court to provide additional guidance concerning the nature of the differences necessary to support a finding that the accused product is “plainly dissimilar” to the claimed design.

CONCLUSION

For the reasons cited herein, this Court should grant the petition for rehearing *en banc* to provide additional guidance on the meaning of the term “plainly dissimilar” in the context of the *Gorham* ordinary observer test.

Dated: July 11, 2025

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

The undersigned hereby certifies that the foregoing brief complies with the relevant type-volume limitations of the Federal Rules of Appellate Procedure and Federal Circuit rules because:

1. The brief has been prepared using a proportionally-spaced typeface and includes 1,174 words.

2. The brief has been prepared using Microsoft Word for Office 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: July 11, 2025

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EXHIBIT A

Mauro Usability Science

Founded 1975 / Certified Human Factors Engineering Professionals

DRAFT/ WIP

**Scientifically Valid Research Supporting Rejection of Alternative
Wording for Legal Test in Design Infringement Summary
Judgement Rulings (Re: North Star v. Latham Case)**

Draft Memo / Confidential

Date: 5/2/2025

Version: 1.0

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CMorley@MauroUsabilityScience.Com

Background and Objectives: As noted in the recent postings by Perry Saidman Esq. and other recent rulings, the North Star vs. Latham case is deeply concerning as it may have a massive negative impact on the future of design patent enforcement. Based on this concern, planning is in process to field a number of amicus briefs seeking a rehearing of the matter. At the core of the recent ruling is the judge's use of textual descriptions for ruling on possible infringement that differ from the ordinary observer test textual description. Of specific concern, among others, is the question of whether or not the court is objectively producing biased decision-making outcomes by using test terms different than what is utilized by a jury of ordinary observers. At the heart of the issue is the question, does a judge's use of the terms "sufficiently distinct" or "plainly dissimilar" result in a different outcome when compared to a large sample of representative ordinary observers (consumers / jury members) which must, by law, employ the terms "substantially the same"?

Based on a large field of research from neuroscience and linguistics known technically as Linguistic Relativity¹, it is well understood that seemingly small differences in textual content and structure can and do have a major impact on interpretation and decision-making. The authors have extensive background in these fields of study and identified possible problems with the use of different textual infringement test descriptions by judges and juries as a source of confusion and bias in assessing infringement. To that end, we conducted a scientifically valid study to examine this issue. The following is a summary of findings.

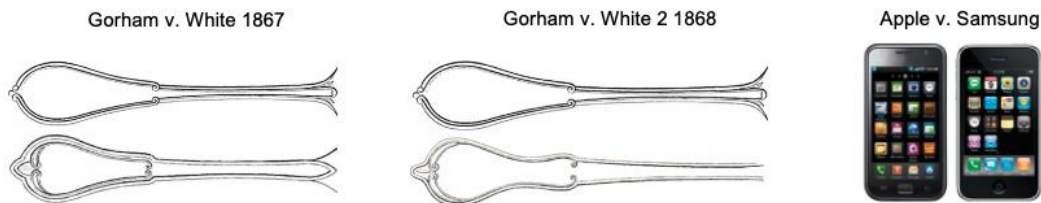
Introduction of Study: During validation of the Empirical Ordinary Observer Test² (EOOT), a modern neuroscience-based ordinary observer test now accepted by the court, we executed supplemental research examining the current summary judgment methodology and whether the test for summary judgment, i.e. the terms "sufficiently distinct" or "plainly dissimilar" utilized by judges, produces different outcomes than when the test for infringement is made using the traditional ordinary observer test of "substantially the same" employed by juries. The EOOT methodology was created and validated using modern neuroscience theory and practice. The formal objective of the EOOT was to reduce well understood variation in infringement decision-

¹ **Linguistic Relativity:** Our perceptions are relative to the language used to describe such perceptions. Terms used to assess designs may affect similarity/different determination and related infringement outcome

² https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3620088

making by judges and juries using large-sample consumer research and advanced statistical analysis. The EOOT produces statistically valid judgements on substantial similarity by a large sample of consumers, thus dramatically improving litigation reliability. The EOOT has been utilized recently by major corporations in design IP litigation.

Methodology: Utilizing the EOOT framework, a large sample of ordinary observers (consumers), $n = 900^3$, was presented design pairs previously determined to be infringing in major design patent infringement cases. We specifically chose as our reference cases the two most important design patent infringement judgements in history, where infringement was found and unquestioned. The selected cases were *Gorham v. White* and *Apple v. Samsung*. Utilizing the EOOT survey tool and the exact art submitted to the court in each case, participants were screened, validated, and then asked a series of questions focused on whether the two designs were *plainly dissimilar* or *not plainly dissimilar* in terms of overall visual design. These are the terms utilized by judges in summary judgement proceedings. Since we knew the historical outcome of these cases, the study examined the research question: “*Does the use of different textual infringement tests impact outcomes?*”. The answer goes to the heart of the North Star vs. Latham appeal.



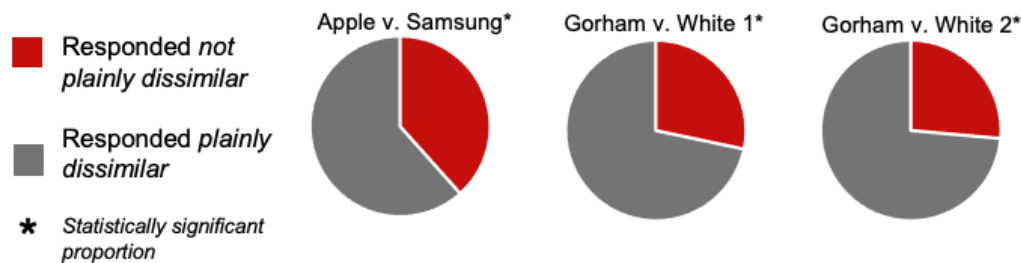
Summary of Findings: For *Gorham v. White* 1867, *Gorham v. White* 1868, and *Apple v. Samsung* design pairs, a statistically significant proportion of participants (binomial proportions test; $p < .05$) reported that the designs were *plainly dissimilar*. Specifically, for *Gorham v. White* 1867, 72% of participants responded that the

³ Note: Because of the way the EOOT is designed not all 900 ordinary observers participated in this portion of the validation study. However, the number of respondents was large enough to power the required statistical model for the study.

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designs were plainly dissimilar. For *Gorham v. White* 1868, 74% of participants responded that the designs were plainly dissimilar. For *Apple v. Samsung*, 62% of participants responded that the designs were plainly dissimilar. What the data shows is that if either case had been based on the use of “plainly dissimilar”, the designs would have been found non-infringing. The charts below illustrate the data. The landmark case of *Gorham vs. White* would have been ruled as non-infringing. The same is also true for *Apple vs. Samsung*. In our research, we also show that the use of only one decision-maker at summary judgment is highly likely to produce spurious and biased data when compared to the same analysis by a jury. Furthermore, the study also contains extensive data on why allowing one judge to make infringement decisions is likely leading in large measure to the wide variation in litigation outcomes. The data from this study can be applied to amicus for this case. At its core the data show that use of different textual formats for testing infringement do in fact result in different outcomes.



Implications: These data reveal that the summary judgment test and ordinary observer test may yield different infringement outcomes. *Gorham v. White* 1867, *Gorham v. White* 1868, and *Apple v. Samsung* were found to be *infringing* based on the outcomes of the respective cases. However, our data suggests that when such designs are subjected to the summary judgment test (i.e., plainly dissimilar), they are found to be *not infringing*.

Notably, the participants in our study were sampled to be ordinary observers / representative consumers of the product. Judges were not sampled. Regardless, it can be assumed that, like ordinary observers, judges exhibit a distribution of design sensitivity (e.g., as measured by Centrality of Visual Products Aesthetics scale). That is, judges are not necessarily more or less discerning than the ordinary observer. Thus, a large group of judges and a large group of ordinary observers may exhibit a similar sampling of design sensitivities, allowing us to argue that findings from our ordinary observer sample may be representative of decision-making from judges. Regardless, the findings of our study seriously put into question the validity of the summary judgment test.

In summary, in relation to *North Star v. Latham*, we believe our research findings support that, at a minimum, the case should have gone to jury so that the patented and accused design could be subjected to the ordinary observer test, which our data indicate may yield a different outcome than the summary judgment test.