

# Design Patent Case Digest

[P.S. Products, Inc., v. Activision Blizzard, Inc.](#)



**Decision Date:** February 21, 2014

**Court:** E.D. Arkansas

**Patents:** [D561,294](#) and [D576,246](#)

**Holding:** Defendants' motion to dismiss GRANTED

## Opinion:

Plaintiffs P.S. Products, Inc. ("P.S.") and Billy Pennington, president of P.S. Products, sued Activision Blizzard, Inc. ("Activision") and its affiliated companies for infringement of U.S. Design Patent No. D561,294 and U.S. Design Patent No. D576,246, each entitled "Stun Gun." In each of these patents the stun gun design resembles a pair of brass knuckles. This design is incorporated in P.S.'s product, the [Zap Blast Knuckle](#), which is capable of producing a 950,000 volt electrical shock when operated by the user.

Activision is one of the largest producers of video games in the world. One of Activision's most successful games is *Call of Duty, Black Ops II*. The game simulates a battlefield environment where the player is tasked with completing tactical missions in a mock conflict. The player may access a multitude of weapons, including "[Combatant Suppression Knuckles](#)" or "[Galvaknuckles](#)." These digitally rendered weapons (icons) were the subject of the dispute.

P.S.'s complaint alleged that the icons of the Combatant Suppression Knuckles and the Galvaknuckles are illegal images that embody the design claimed in the stun gun patents. In response to the complaint, Activision filed a motion to dismiss P.S.'s patent infringement claim for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Activision contended that as a matter of law there was no patent infringement because "no ordinary observer would be deceived into purchasing a video game believing it to be plaintiffs' patented stun gun."

In applying the ordinary observer test the court relied on two similar cases for its analysis. The first case was [Kellman v. Coca-Cola Co.](#), 280 F. Supp. 2d 670 (E.D. Mich. 2003), in which the plaintiffs held a patent for a novelty foam hat in the shape of a wing nut. The plaintiffs sued claiming patent infringement because the defendants' t-shirts and bottle caps contained images of what appeared to be plaintiff's novelty hat. In *Kellman*, the court determined that the fundamental question was whether a design patent can be infringed when the articles of manufacture are so entirely different (i.e. hat versus t-shirt or bottle cap) that no reasonable person would purchase the t-shirt or bottle cap thinking that he or she was purchasing the novelty hat. The *Kellman* court determined that the design of the hat as compared to the

t-shirts and bottle caps was not substantially similar to cause confusion. The court held the patent not infringed, rejecting the plaintiff's attempt to protect the "visual pun" that the novelty hat represents.

The second case was *Vigil v. Walt Disney Co.*, 1998 U.S. Dist. LEXIS 22853 (N.D. Cal. Dec. 1, 1998), *aff'd* 2000 U.S. App. LEXIS 6231 (Fed. Cir. April 5, 2000). In *Vigil*, the plaintiff held a design patent for a hockey stick duck call. The defendant produced a hockey stick key chain. The *Vigil* court rejected the plaintiff's claim of design patent infringement noting that the patented item and the accused item were not even analogous articles of manufacture.

P.S. made several arguments as to why Activision's actions constituted patent infringement. First, P.S. stated that "[o]ne does not escape infringement by using a patented invention for a purpose not contemplated or disclosed by the patentee," that is, simply because the design was used in a digital environment as opposed to on an actual stun gun. The court flatly rejected this argument noting that the only cases cited in support of this proposition were utility patent cases and not design patent cases. Second, P.S. argued that they *could have* obtained a design patent for the digital image of a stun gun had they applied for one. The court summarily dismissed this argument stating that "such a hypothetical is not before the Court." Third, P.S. claims that an ordinary observer "would believe the [Activision] icon is related to and connected and licensed by [P.S.]" The court held that this argument misconstrues the reasonable observer test.

The court went on to hold that "[n]o reasonable person would purchase [Activision's] video game believing that they were purchasing [P.S.'s] stun gun." Because P.S.'s claim fails the ordinary observer test, the claim was deficient as a matter of law and the complaint was dismissed.

If you have any questions or would like additional information on this topic, please contact:

Tracy-Gene G. Durkin, Director  
[tdurkin@skgf.com](mailto:tdurkin@skgf.com)

David K.S. Cornwell, Director  
[davidc@skgf.com](mailto:davidc@skgf.com)

*Special thanks to Associate Steve A. Merrill for his role as a contributing author of this digest.*

© 2014 Sterne, Kessler, Goldstein & Fox P.L.L.C.

**MIND + MUSCLE**