In Defense of Design Patents

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Most commentators believe that the United States design patent system is fundamentally and irreparably flawed. Specifically, they argue that obtaining a design patents is too difficult, too time-consuming, and too expensive. These arguments are difficult to separate from—and, indeed, are often raised with—the argument that designs should be protected by copyright (or a copyright-like *sui generis*) law. The main criticisms of patent protection for designs can be grouped into three broad categories: (1) design is Art and is, therefore, entitled to copyright protection; (2) what designers really need is protection against copying, not a patent-like "monopoly"; and (3) patent requirements are not "appropriate" for designs.

This Article challenges each of these criticisms, arguing that they are unconvincing and tend to obfuscate—rather than answer—the difficult policy questions raised by any design protection scheme. It is beyond dispute that design patent doctrine is, at present, flawed and in need of more thoughtful development. However, these problems are neither irreparable nor an inevitable result of using a patent paradigm to protect designs. Indeed, if properly conceptualized and developed, the design patent system could be more effective than copyright (or a copyright-like *sui generis* regime) in promoting creativity in design without unduly hindering competition.