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# *Design Patent Reissue Practice*

*A Practitioner's Guide to 35 U.S.C. § 251*

Robert G. Oake, Jr.

## PREVIEW EDITION

This preview contains the Overview, the practice checklist of dos and don'ts, and Parts 1 and 2 of the complete 109-page ProGuide.

A guide to the remaining parts appears on the final page.

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# About the Speaker



**Robert G. Oake, Jr.** is the founder of Oake Law Office, PLLC, where he focuses on design patent litigation and prosecution. He is a registered patent attorney, board certified in patent litigation by the National Board of Trial Advocacy, and holds a Master of Laws in Patent and Intellectual Property Law. He served as lead counsel for Egyptian Goddess in *Egyptian Goddess, Inc. v. Swisa, Inc.* and maintains the Design Patent Pro Website.

Design Patent Reissue Practice  
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## Overview

This ProGuide addresses design patent reissue practice, a statutory corrective procedure under 35 U.S.C. § 251 that allows a patentee to correct certain errors in an issued design patent. The proceeding is comparatively rare. Since January 2020, more than two hundred forty thousand design patents have issued in the United States while only about one hundred thirty design reissue patents have issued during that same period. The infrequency, however, understates the strategic importance of the procedure. Reissue is among the few mechanisms by which the scope of an issued design patent may be corrected or even broadened, and in the right circumstances that correction can preserve substantial enforcement value when competitors begin to design around the patent.

This ProGuide is organized into four substantive areas. The first addresses the legal framework that governs reissue, including the statutory basis under § 251, the kinds of errors that qualify for reissue, and the practical reality that the entire claim is reexamined when reissue is filed. The second addresses the mechanics of preparing and filing a reissue application, including drawing corrections, specification amendments, marking conventions, and the declaration requirements that frequently determine whether a reissue application reaches allowance. The third addresses procedural and strategic issues that arise once the foundational filing is on file, including broadening reissues, the recapture doctrine, continuation reissue practice, and the procedure for protecting a segregable design alongside the original. The fourth addresses the practical consequences of filing a reissue, including intervening rights, damages limitations, post-issuance obligations, and the litigation implications of the reissue prosecution record.

Three principles run throughout the material that follows and bear emphasis at the outset. First, every reissue application must be grounded in a clearly identified statutory error. The error must have existed at the time the original patent issued, must be identified with particularity in the declaration, and must be of a kind that § 251 recognizes. A reissue application without a qualifying error has no statutory foundation. Second, the correction must remain within the bounds of the original disclosure. No new matter may be introduced, and subject matter that was surrendered during the original prosecution to obtain allowance generally cannot be recaptured through reissue. Third, the practitioner should evaluate the enforcement and litigation consequences of reissue before filing. Intervening rights, prosecution history disclaimer, and damages limitations can substantially constrain the practical value of even a properly executed correction.

The strategic value of reissue, where the procedure is well-suited to the problem, is best illustrated by a simple example. Consider a design patent for a chair where the original drawings show the entire chair in solid lines, including the backrest, the seat, and the legs. Because each

element appears in solid lines, each is part of the claimed design. If competitors begin to avoid infringement by changing the shape of the legs while copying the distinctive backrest and seat, the patentee may consider a broadening reissue that converts the chair legs from solid lines to broken lines. That change disclaims the legs as part of the claimed design and refocuses the claim on the ornamental appearance of the backrest and seat. Fewer features are required for infringement, and the claim covers a wider range of designs that incorporate the distinctive backrest and seat configuration. The example is straightforward in concept, but the strict statutory and procedural rules that govern even this seemingly simple correction occupy much of the analysis that follows.

Several practical realities raise the cost of getting a reissue wrong. Any broadened scope sought through reissue cannot be enforced until the reissue patent actually issues. Reissue does not extend the patent term, so prosecution delay shortens the remaining life of the patent. The design patent rocket docket was permanently eliminated in August 2025, and the USPTO's Accelerated Examination guidance excludes reissue applications from eligibility, so the principal mechanisms for compressing examination are no longer available. Design reissue applications are also published shortly after filing, which gives competitors early visibility into the corrections being pursued. Of the design reissue patents that have issued since January 2020, more than seventy-six percent received a non-final rejection, an Ex Parte Quayle action, or both during prosecution. The cost of an incomplete or defective filing is therefore meaningfully higher today than it once was, and the disciplined preparation that this ProGuide describes is a practical necessity rather than a counsel of perfection.

### Quick Reference Guide

DO:

1. Do identify a specific and correctable error under § 251. The declaration must clearly articulate what rendered the patent wholly or partly inoperative or invalid. General statements are insufficient.
2. Do draft the reissue declaration after finalizing the proposed amendments. The declaration must correspond precisely to the corrections being made.
3. Do ensure the proposed correction is fully supported by the originally filed disclosure. Reissue cannot introduce new matter.
4. Do analyze whether the correction broadens the visual scope of the design. Removing shading, converting solid lines to broken lines, altering boundary relationships, or changing the article designation may constitute broadening.
5. Do file broadening reissues within two years of the original patent's issuance. The two-year period is strict and jurisdictional.

6. Do evaluate whether a supplemental declaration is sufficient or whether a new declaration is required. If the original declaration is defective or the operative error has changed, a new declaration is necessary.
7. Do ensure all amendments are made relative to the patent as originally issued. Each response must stand independently and clearly show changes.
8. Do use proper reissue marking format. Use single brackets for deletions and underline for additions in accordance with reissue practice.
9. Do obtain the written consent of all assignees and a § 3.73(c) ownership showing whenever the patent is assigned. Entire-interest ownership is required only for an assignee to sign the declaration in lieu of the inventors, not for consent itself.
10. Do evaluate prosecution history implications before narrowing. Reissue amendments and arguments may create estoppel or disclaimer effects.
11. Do consider divisional reissue practice when restriction is imposed.  
Filing a divisional reissue may preserve the correction of non-elected embodiments.
12. Do confirm that the declared error remains operative throughout prosecution. If prosecution developments eliminate the originally identified error, update the declaration.

#### DON'T:

1. Don't use reissue as a vehicle for redesigning the invention. Reissue corrects errors; it does not permit strategic recharacterization beyond the original disclosure.
2. Don't rely on vague or conclusory statements in the declaration. Statements such as "the patent issued with errors" are insufficient without specificity.
3. Don't attempt to introduce new embodiments not shown in the original drawings. New matter cannot be cured by declaration.
4. Don't assume drawing changes are merely formal. Minor visual changes may materially broaden or narrow scope.
5. Don't file a broadening reissue after the two-year window has expired. Late broadening is barred regardless of intent.
6. Don't assume a supplemental declaration cures every defect. If the original declaration was jurisdictionally defective, a new declaration is required.
7. Don't promise to correct the declaration later. The application cannot proceed to allowance without a compliant declaration on file.

8. Don't ignore restriction consequences. An elected group containing only the original claim may eliminate the declared error.
9. Don't assume examiner-identified drawing defects automatically qualify as § 251 errors. Confirm that the defect renders the patent partly inoperative or invalid.
10. Don't make inconsistent amendments to the title, claim, and drawings. All components must remain internally consistent.
11. Don't overlook third-party reliance considerations. Broadening reissue can affect enforcement strategy and potential intervening rights.
12. Don't treat reissue prosecution casually. It creates a new prosecution history that may later define the scope of enforcement.

## 1. Introduction and Theory

A design patent reissue application is not a continuation of ordinary prosecution. It is a statutory corrective proceeding governed strictly by 35 U.S.C. § 251. The purpose of reissue is to correct an error in an issued patent that renders the patent wholly or partly inoperative or invalid. It is not a mechanism to refine strategy, improve drafting style, modernize language, or recharacterize the invention after issuance. Reissue is corrective in nature, jurisdictional in structure, and narrow in permissible scope.

In design practice, the “claim” is inseparable from the drawings. The single claim incorporates the visual disclosure. As a result, most design reissue errors arise from the drawings themselves, from the written figure descriptions, from broken-line characterizations, from boundary relationships, or from claiming more or less of the visual design than the patentee had a right to claim. Because scope in design patents is defined visually, even subtle graphical adjustments may constitute a broadening or narrowing change. The reissue statute therefore operates in design practice with particular sensitivity.

The threshold requirement is the existence of at least one specific, correctable error. The error must have existed at the time the patent issued. It must render the patent partly inoperative or invalid. It must be identified with particularity in the declaration. And it must be capable of correction without introducing new matter. Absent a qualifying error, the USPTO lacks authority to process the application.

In practice, the most common design reissue errors fall into several categories. First, drawing errors, including inconsistent solid and broken line usage, inaccurate surface shading, omission of a boundary that was clearly present but unclaimed, or inconsistency between figures. Second, specification errors, including inaccurate broken-line feature statements, misidentified view types, incomplete transitional descriptions in GUI designs, or purely formal inconsistencies in figure descriptions. Third, claiming more or less than the patentee had a right to claim, most commonly by over-claiming features in solid lines that should have been disclaimed, or by failing to claim a patentably distinct segregable embodiment disclosed in the original drawings.

Broadening reissue in design practice requires special attention. Converting solid lines to broken lines, removing shading, deleting boundary-defining lines, or altering article designation can enlarge visual scope. Any such broadening must be pursued within two years of the original patent grant. That two-year limitation is statutory and jurisdictional. After expiration, only non-broadening corrections are permitted.

Equally important is internal consistency. The declaration, specification amendments, drawing replacements, and remarks must all identify and correct the same operative error. If prosecution developments eliminate or alter the originally stated error, for example, through restriction practice or withdrawal of embodiments, the declaration must be updated. A reissue application cannot proceed on an obsolete or inapplicable error statement.

Reissue also creates a new prosecution history. Arguments made to justify narrowing amendments may later operate as disclaimer. Broadening changes may trigger intervening rights. Formal specification corrections may influence claim interpretation. The corrective act of reissue therefore carries substantive downstream consequences.

For these reasons, design reissue practice demands disciplined analysis before filing. The practitioner must first identify the specific statutory error. Then determine whether the correction broadens or narrows scope. Then confirm support in the original disclosure. Then ensure compliance with marking conventions, drawing replacement rules, declaration requirements, and ownership formalities. Only after that analysis should the reissue filing package be assembled. Reissue is a statutory remedy. The application must reflect that corrective purpose in both substance and form.

#### Practice Note on Pre-AIA and Post-AIA: Declaration Requirements in Design Reissue Applications.

The America Invents Act (AIA), signed into law on September 16, 2011, made several changes to the reissue declaration requirements under 35 U.S.C. § 251 and the implementing regulations at 37 C.F.R. §§ 1.63 and 1.175. These changes took effect on September 16, 2012. Because the AIA transition rules are keyed to the filing date of the reissue application itself, and because design patents with pre-AIA original filing dates may remain in force for years after the AIA's effective date, practitioners must understand which set of requirements applies and why. For an explanation of these changes, *see* section 5.24.

All references in this ProGuide to statutory requirements are intended to apply under the current version of 35 U.S.C. § 251 unless expressly noted otherwise.

## 2. Recommended Form

Because reissue is jurisdictional and corrective in nature, the safest practice is to structure the application in a disciplined and complete manner at filing. Design reissue applications frequently generate early objections not because the correction is improper, but because the filing

package is incomplete, internally inconsistent, or procedurally disorganized. The recommended form below integrates both substantive correction structure and required filing components.

## 2.1 Overall Structural Framework

A properly prepared design reissue application should contain the following components, presented in an organized and internally consistent manner:

1. Transmittal – Reissue Application
2. Application Data Sheet (ADS)
3. Power of Attorney (if required)
4. Assignee Consent and Showing of Ownership under 37 C.F.R. §§ 1.172(a), 3.73(c) (if the patent is assigned)
5. Reissue Oath or Declaration
6. Preliminary Amendment (including specification amendments, drawing amendments, and remarks)
7. Replacement Drawing Sheets (if applicable)

Each of these components serves a distinct function. Omission or inconsistency in any one can delay examination.

## 2.2 Reissue Oath or Declaration (Jurisdictional Core)

The reissue declaration is the legal foundation of the application. It must:

1. Identify the patent number and issue date;
2. State that the patent is wholly or partly inoperative or invalid;
3. Specifically identify the correctable error;
4. Confirm that no new matter is introduced.

The declaration must correspond precisely to the correction being made. It should be drafted after finalizing the proposed amendments to ensure alignment. If the patent has been assigned, the written consent of all assignees under § 1.172(a) and a § 3.73(c) ownership showing must accompany the application, regardless of whether the assignee signs the declaration. *See* Section 2.5.

## 2.3 Preliminary Amendment (Corrective Structure)

In most design reissues, the application is filed with a Preliminary Amendment containing all proposed corrections relative to the patent as originally issued. The Preliminary Amendment typically includes three parts:

### (a) Amendments to the Specification

These may include:

1. Reissue introductory statement
2. Marked title correction (if required and supported)
3. Marked changes to figure descriptions
4. Conforming amendments throughout the specification
5. Identification of corrected error language

All deletions must appear in brackets. All additions must be underlined. Amendments must be shown relative to the patent as originally issued and not relative to prior amendments.

#### (b) Amendments to the Drawings

If drawings are corrected:

1. Entire figures must be replaced;
2. Replacement sheets must be properly labeled;
3. Shading, broken lines, and boundary definitions must remain consistent across views;
4. The change must not introduce new matter.

Because design scope is visual, even minor drawing adjustments must be evaluated for broadening implications.

#### (c) Remarks

Remarks should:

1. Identify the error being corrected;
2. Explain how the amendments cure the defect;
3. Clarify whether the reissue is broadening or narrowing;
4. Confirm compliance with § 251 and § 132.

Remarks should remain corrective and not attempt strategic redesign.

### 2.4 Drawings (Replacement Sheets)

Corrected drawings must comply fully with design drawing standards. The safest practice is:

1. Replace entire sheets rather than partial figures;
2. Confirm consistent surface shading;
3. Verify broken-line usage is uniform;
4. Ensure figure descriptions correspond exactly to the drawings.

Visual consistency is critical in design reissue practice.

### 2.5 Assignee Consent and Showing of Ownership (37 C.F.R. §§ 1.172(a), 3.73(c))

Where the patent has been assigned, two distinct assignee obligations attach, and both are required regardless of who executes the reissue declaration:

1. Written consent of all assignees. Under § 1.172(a), the application must be accompanied by the written consent of all assignees currently owning an undivided interest in the patent. The consent confirms that every party with a proprietary interest agrees to subject the patent to reissue. Without it, the application is defective.
2. Showing of ownership. Each consenting assignee must establish its ownership by a submission under § 3.73(c), supported by objective evidence of assignment. An incomplete ownership showing renders the consent, and, where the assignee also signs the declaration, the execution of that declaration, defective.

These obligations are separate from the question of who may execute the declaration under § 1.175(c). The consent runs from all assignees owning an undivided interest. Entire-interest ownership is required only for an assignee to execute the declaration in lieu of the inventors, and only in the circumstances permitted by § 1.175(c). An assignee may therefore be obligated to consent under § 1.172(a) yet be unable to sign the declaration for a broadening reissue. The full interplay is addressed in Section 3.21. Where the patent has not been assigned, the application should affirmatively state that the patent is not assigned.

## 2.6 Transmittal – Reissue Application

The transmittal should:

1. Identify the application as a reissue;
2. Identify the patent being reissued;
3. Indicate whether the application seeks to enlarge scope;
4. Include required fees.

If broadening is sought, filing within two years of issuance must be confirmed.

## 2.7 Application Data Sheet (ADS)

The ADS should:

1. Identify inventors;
2. Identify assignee (if applicable);
3. Re-state any domestic benefit claim and any foreign or domestic priority claim;
4. Provide correspondence address.

Bibliographic data must match the original patent unless correction is part of the reissue. Benefit and priority claims do not carry over from the original patent into the reissue application. Any claim for domestic benefit under 35 U.S.C. § 120, or for foreign or domestic priority under 35 U.S.C. § 119, must be affirmatively re-made in the reissue ADS in compliance with 37 C.F.R.

§§ 1.78 and 1.55. A claim is not preserved merely because it appears on the face of the patent. *dc* MPEP § 1417.

## 2.8 Power of Attorney

If representation differs from the original patent, a new Power of Attorney must be filed. If representation is unchanged, confirm that the original power remains effective.

## 2.9 Internal Consistency Review

Before filing, confirm consistency across:

1. Title
2. Claim
3. Figure descriptions
4. Drawings
5. Declaration
6. ADS
7. Assignee consent (§ 1.172(a))
8. Ownership statement (§ 3.73(c))

Design reissue applications often encounter early formal objections due to cross-document inconsistencies.

## 2.10 General Drafting Principles

The safest reissue format adheres to four principles:

1. Minimal correction necessary to cure the identified error.
2. No expansion beyond the original disclosure.
3. Precise marking relative to the patent as issued.
4. Complete internal consistency across all filing components.

Reissue is corrective. The form of the application should reflect that disciplined purpose.

## 3. Rules and Guidance for Reissue Applications

### 3.1 A Reissue Application Must Identify At least One Specific Error

35 U.S.C. § 251; 37 C.F.R. § 1.175(a)

A reissue application must specifically identify at least one error in the original patent that renders it wholly or partly inoperative or invalid. The error must be identified with particularity and a general statement that the patent is partly inoperative without explaining why is insufficient. The declaration must explain what was claimed incorrectly, why that was

## ABOUT THE COMPLETE EDITION

# Design Patent Reissue Practice

*A Practitioner's Guide to 35 U.S.C. § 251 — by Robert G. Oake, Jr.*

You have been reading a preview. It contains the Overview, the practice checklist of dos and don'ts, Part 1 (Introduction and Theory), and Part 2 (Recommended Form) in full. The complete ProGuide runs 109 pages, organized into five parts:

### 1. Introduction and Theory

The statutory framework of § 251: what errors qualify for reissue, the corrective nature of the proceeding, and the principles that govern every application.

### 2. Recommended Form

A component-by-component structure for the filing package — declaration, preliminary amendment, replacement drawings, assignee consent, ADS, and internal consistency review. Included in this preview.

### 3. Rules and Guidance for Reissue Applications

Sixty-six numbered rules governing error identification, declarations, new matter, broadening, drawing amendments, marking conventions, priority, and disclosure duties — each with statutory, regulatory, and case authority.

### 4. Application of the Rules in Cases and Prosecutions

Thirty-one annotated real USPTO design reissue prosecutions showing how the rules operate in practice — defective declarations, supplemental filings, recapture screening, and how each defect was cured (or proved fatal).

### 5. Practice and Enforcement Notes

Twenty-eight practice topics: restriction and divisional reissue, recapture, intervening rights, GUI and animated designs, PTAB interaction, certificates of correction, appeals, and international portfolio considerations.

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