

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LKQ CORPORATION AND
KEYSTONE AUTOMOTIVE INDUSTRIES, INC.,
Petitioner,

v.

GM GLOBAL TECHNOLOGY OPERATIONS LLC,
Patent Owner.

IPR2020-00062
Patent D811,964 S

Before KEN B. BARRETT, SCOTT A. DANIELS, and
ROBERT L. KINDER, *Administrative Patent Judges*.

KINDER, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

LKQ Corporation and Keystone Automotive Industries, Inc. (collectively, “Petitioner”) filed a Petition to institute an *inter partes* review of the claim for a vehicle front upper bumper in U.S. Patent No. D811,964 S (“the ’964 patent”). Paper 2 (“Pet.”). GM Global Technology Operations LLC (“Patent Owner”) filed a Preliminary Response to the Petition. Paper 8 (“Prelim. Resp.”).

Pursuant to our authorization (Paper 10), Petitioner filed a Preliminary Reply (Paper 11) addressing whether Petitioner improperly relied on a vehicle design that itself was not a patent or printed publication.

We have authority to determine whether to institute an *inter partes* review under 35 U.S.C. § 314 and 37 C.F.R. § 42.4(a). Applying the standard set forth in 35 U.S.C. § 314(a), which requires demonstration of a reasonable likelihood that Petitioner would prevail with respect to the challenged claim, we do not institute an *inter partes* review of the challenged claim based on the grounds identified in the Order section of this Decision.

A. *Related Proceedings*

Petitioner filed petitions challenging the patentability of other design patents owned by Patent Owner, but none involving the ’964 patent. Pet. 3–4. Patent Owner also identifies the same proceedings but does not concede they are related. Paper 4.

B. *The ’964 Patent and Claim*

In an *inter partes* review, “a claim of a patent . . . shall be construed using the same claim construction standard that would be used to construe

the claim in a civil action under 35 U.S.C. 282(b).” 37 C.F.R. § 42.100(b) (2019).

With respect to design patents, it is well-settled that a design is represented better by an illustration than a description. *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679 (Fed. Cir. 2008) (en banc) (citing *Dobson v. Dornan*, 118 U.S. 10, 14 (1886)). Although preferably a design patent claim is not construed by providing a detailed verbal description, it may be “helpful to point out . . . various features of the claimed design as they relate to the . . . prior art.” *Egyptian Goddess*, 543 F.3d at 679–80; cf. *High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1314–15 (Fed. Cir. 2013) (remanding to district court, in part, for a “verbal description of the claimed design to evoke a visual image consonant with that design”).

Based on the positions of the parties, and considering the relationship of the prior art to the claimed design, we find it helpful to describe verbally certain features of the claim for purposes of this Decision. See *Egyptian Goddess*, 543 F.3d at 680. We find Patent Owner’s description of the claimed design discussed below to be the most accurate in portraying the ornamental impression of the claimed vehicle front bumper.

The ’964 patent (Ex. 1001) issued March 6, 2018. *Id.* at code (10), (45). The ’964 patent is titled “Vehicle Front Upper Bumper,” and the claim recites “[t]he ornamental design for a vehicle front bumper, as shown and described.” *Id.* at code (54), (57). The claim for the vehicle front upper bumper is represented in four claimed figures. Figures 1–3 are depicted and discussed below.

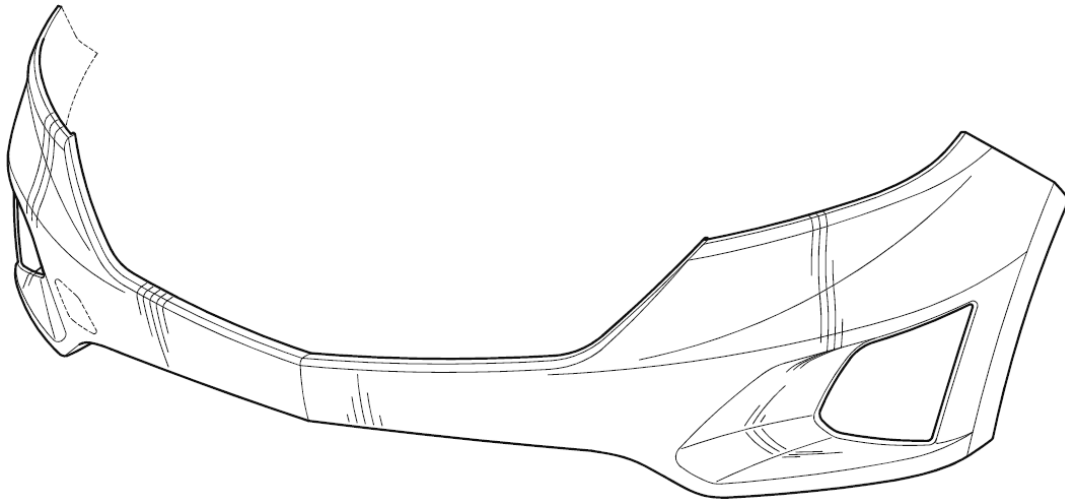


FIG. 1

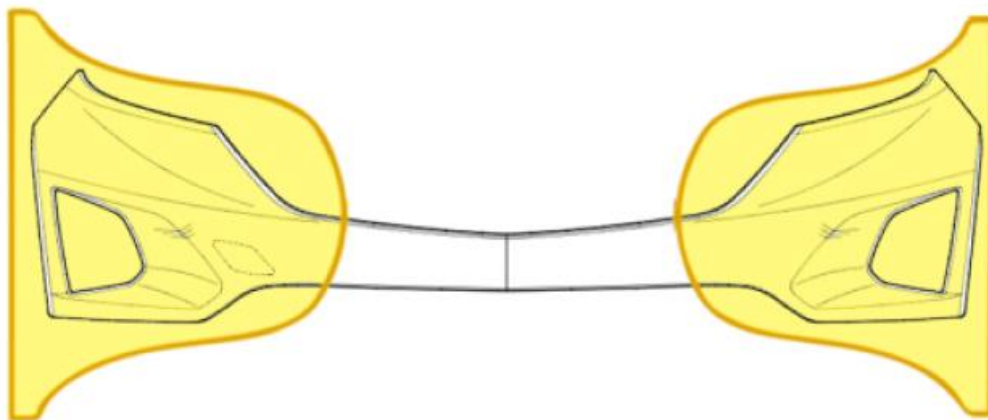
Figure 1 of the '964 patent is a perspective view of a front bumper. *Id.* The '964 patent depicts a vehicle front upper bumper with complex surfaces and sloping top perimeter lines. Prominent depressions and openings on the left and right portions of the bumper highlight the design.

As depicted, most elements in the design are drawn in solid lines, but some portion of the design is illustrated by broken lines. The Description of the invention explains:

In the drawings, the portions shown by broken lines form no part of the claimed design.

Id. at Description. *See* 37 C.F.R. § 1.152; *see also* MPEP § 1503.02, Subsection III, 9th ed. rev. 08.2017 Aug. 2017 (“Unclaimed subject matter may be shown in broken lines for the purpose of illustrating the environment in which the article embodying the design is used. Unclaimed subject matter must be described as forming no part of the claimed design or of a specified embodiment thereof.”).

Petitioner offers a very simplified interpretation of the design claim. Petitioner states that “the design is for a vehicle bumper comprising two parts, an elongated upper section that is primarily flat, and a lower section that appears designed to encircle and hold the vehicle’s grille, lights, vents, and other elements of the front end of the vehicle.” Pet. 11. Referring to annotated Figure 2 of the design (below), Petitioner compresses the intricacies of the right and left section into a generic “bell-like” section, alleging that the invention comprises “a bell-like bulging section on a right side and a left side of the bumper,” and “an inward-facing polygonal-shaped, recessed opening in each bell-like bulging section.” *Id.*



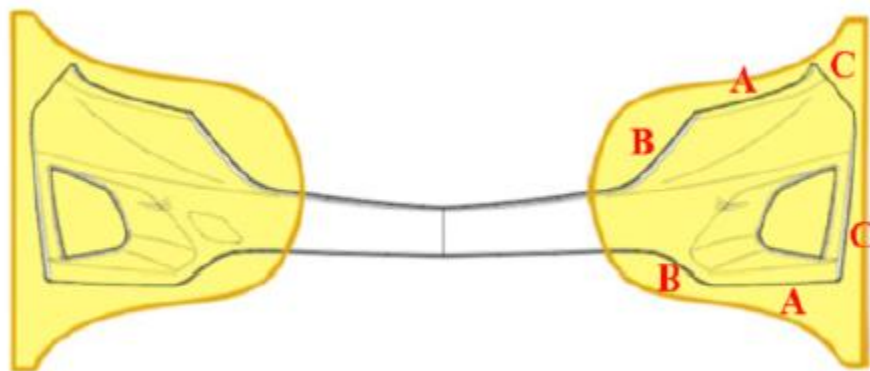
Petitioner’s annotated Figure 2 of the ’646 patent showing highlighted sections of the design on the right and left sides. Pet. 11.

Patent Owner argues that Petitioner’s description of the claimed design in the present Petition ignores features of the claimed design and largely relies on “an overly-general approach” used to draw incomplete and misleading comparisons with the asserted prior art. Prelim. Resp. 1 (the petition “fails to address the design’s claimed features”). Patent Owner contends:

The design includes complex surfaces and sloping top perimeter lines that direct a viewer's focus centrally and evoke an athletic and agile posture. The depressions and openings on left and right portions of the bumper contribute to this appearance, as does the sloped surfaces and lines of the bumper profile when viewed from the side (as shown in FIG. 3, for example).

LKQ ignores these specific features that contribute to the overall appearance of the '964 Patent. For example, LKQ's description fails to accurately convey the perimeter shape and surface contours of the left and right sections of the bumper reflected in the patent. LKQ describes these portions generically as "bell-like bulging sections," but that ignores the nuances of the claimed design, which includes edges and complex surfaces tending to direct a viewer's focus centrally and evoke an athletic and agile posture. As shown below, GM's design—beneath LKQ's yellow bell-shaped annotation—includes top and bottom perimeter edges (A) angled slightly downwards centrally to different degrees, tapering sections (B) that taper to different extents such that the "elongate horizontal portion is located slightly offset towards lower portions of the left and right bumper sections, and outer perimeter surfaces (C) angled in opposite directions, and to differing degrees, relative to vertical.

Prelim. Resp. 15–16.



Patent Owner's annotated Figure 2 with letters A, B, and C added to lines along the figure. Prelim. Resp. 16.

Patent Owner contends that Petitioner’s “generic characterization of these features as ‘bell-like bulging sections’ ignores these features and mischaracterizes the invention.” *Id.* at 16–17. Petitioner also contends that Patent Owner has ignored the significance of “the depressions (shaded below in red) that lead from recessed openings in each of the left and right bumper sections.”

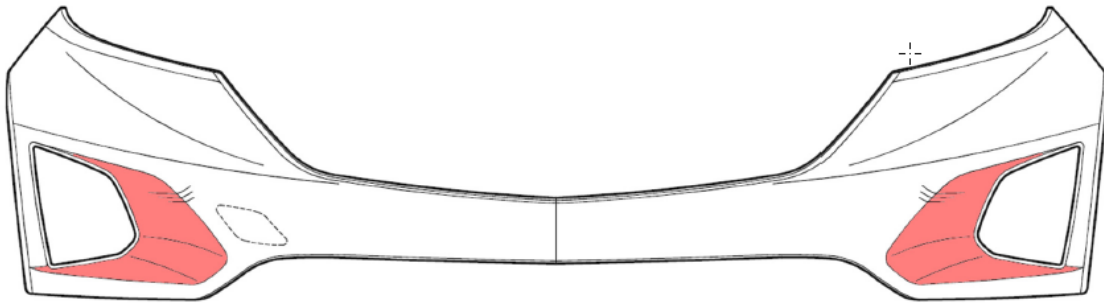


FIG. 2

Patent Owner’s Figure 2 with depressions shaded in red. *Id.* Patent Owner explains that “[t]hese depressions have a relatively extended length compared to the opening, extending centrally and forwardly a distance commensurate with the entire length of the recessed openings,” and further that Petitioner’s “generic characterization as ‘inward-facing polygonal-shaped’ openings additionally fails to acknowledge the relative orientations of the opening/depression, the angles of the top and bottom edges, or the vertical positioning relative to the purported ‘elongated horizontal bar.’” *Id.*

Figure 3 of the ’964 patent, below, depicts the leading portion of the bumper that extends outwardly at a noticeable downward angle from the remainder of the bumper.

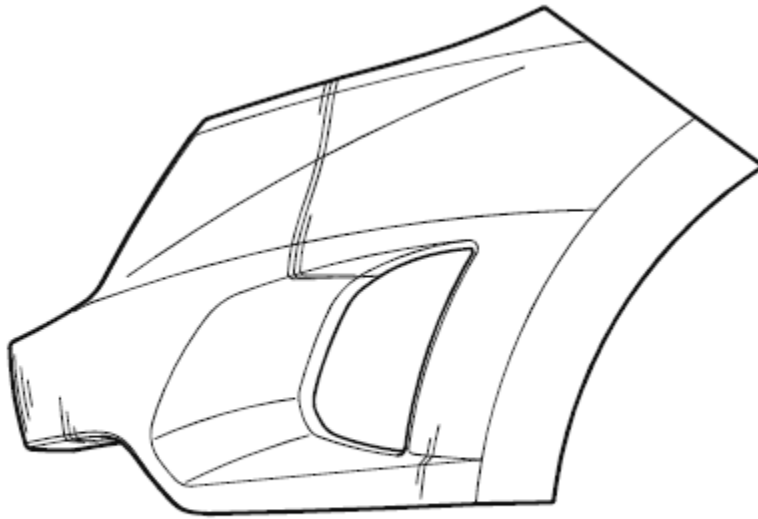


FIG. 3

Figure 3 of the '964 patent showing a side elevational view. Also observable from the side view is a depression having a relatively extended length compared to the opening. The depression area extends forwardly a distance slightly more than the width of the recessed opening shown in this view. The leading portion of the bumper protrudes from the rest of the bumper forwardly with a boxy lip shape that angles downward. Petitioner does not specifically address this view of the claim, nor does Petitioner compare this view or the top plan view of Figure 4 to the prior art. *See* Pet. 7–8 (showing Figures 3 and 4 but with no discussion).

Overall, we determine that a verbal description of the design is helpful in assessing the relevant ornamental features of the vehicle front bumper discussed above, including the complex surfaces and sloping top perimeter lines that direct a viewer's focus centrally. An elongate horizontal portion that is narrow with top angled lines sloping slightly downward extends toward the middle. This central elongate horizontal portion also extends for about half the distance of the bumper. This central elongate horizontal

portion expands into an outward area of each side with complex lines of curvature and a sloping indentation area.

The outward area has perimeter edges angled slightly downwards centrally to different degrees, tapering sections that taper to different extents such that the elongate horizontal portion is located slightly offset towards lower portions of the left and right bumper sections, and outer perimeter surfaces angled in opposite directions, and to differing degrees, relative to vertical. Depressions lead from the recessed openings in each of the left and right bumper sections. These depressions have a relatively extended length compared to the opening, extending centrally and forwardly a distance commensurate with the entire length of the recessed openings. The side view of Figure 3 of the claim depicts a leading portion of the bumper, a boxy lip shape, which extends outwardly at a noticeable downward angle from the remainder of the bumper.

C. References and Other Evidence

The Petition relies on the following alleged prior art references:

1. A web page print out from “NetCarShow.com” depicting the 2015 Ford Edge purportedly retrieved from the “web.archive.org” with an archive date in 2015 (Ex. 1006).
2. A web page print out from “media.ford.com” depicting the 2015 Ford Edge purportedly retrieved from the “web.archive.org” with an archive date in 2014 (Ex. 1007).
3. 2015 Ford Edge brochure, a web page print out from “motorologist.com” purportedly retrieved from the “web.archive.org” with an archive date in 2015 (Ex. 1008).

4. A web page print out from “thetruthaboutcars.com” depicting the 2016 Chevrolet Equinox purportedly retrieved from the “web.archive.org” with an archive date in 2015 (Ex. 1010).

5. U.S. Patent No. D721,305 S, issued Jan. 20, 2015 (Ex. 1009, “George”).

Petitioner supports its challenge with a declaration by James Gandy (Ex. 1003, “the Gandy Declaration”) and a declaration by Jason C. Hill (Ex. 1004, “the Hill Declaration”).

D. The Alleged Grounds of Unpatentability

Petitioner contends that the sole design claim is unpatentable on the following grounds (Pet. 6).¹

Reference(s)/Basis	35 U.S.C. §
“A depiction of the 2015 Ford Edge (Exs. 1006–1008)”	102
“A depiction of the 2015 Ford Edge (Exs. 1006–1008)”	103
“[T]he 2015 Ford Edge in view of Patent Owner’s 2016 Chevrolet Equinox (Ex. 1010)”	103
“U.S. Patent No. D721,305 (‘George’) (Ex.1009)”	102
“U.S. Patent No. D721,305 (‘George’) (Ex.1009)”	103
“George (Ex.1009) in view of the 2016 Chevrolet Equinox (Ex.1010)”	103

Pet. 13–14.

¹ We list the grounds as Petitioner has set forth in its challenges. Pet. 13–14.

II. ANALYSIS

A. *Principles of Law*

1. Anticipation

The “ordinary observer” test for anticipation of a design patent is the same as that used for infringement, except that for anticipation, the patented design is compared with the alleged anticipatory reference rather than an accused design. *Int’l Seaway Trading Corp. v. Walgreens Corp.*, 589 F.3d 1233, 1238, 1240 (Fed. Cir. 2009). The ordinary observer test for design patent infringement was first enunciated by the Supreme Court in *Gorham Co. v. White*, 81 U.S. 511 (1871), as follows:

[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, the first one patented is infringed by the other.

Id. at 528. The ordinary observer test requires the fact finder to consider all of the ornamental features illustrated in the figures that are visible at any time in the “normal use” lifetime of the accused product, i.e., “from the completion of manufacture or assembly until the ultimate destruction, loss, or disappearance of the article.” *Int’l Seaway*, 589 F.3d at 1241. Further, while the ordinary observer test requires consideration of the overall prior art and claimed designs,

[t]he mandated overall comparison is a comparison taking into account significant differences between the two designs, not minor or trivial differences that necessarily exist between any two designs that are not exact copies of one another. Just as “minor differences between a patented design and an accused article’s design cannot, and shall not, prevent a finding of infringement” . . . so too minor differences cannot prevent a finding of anticipation.

Id. at 1243 (citation omitted) (quoting *Litton Sys., Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1444 (Fed. Cir. 1984)).

2. Obviousness

In a challenge to a design patent based on obviousness under 35 U.S.C. § 103, the ultimate inquiry is “whether the claimed design would have been obvious to a designer of ordinary skill who designs articles of the type involved.” *Apple, Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314, 1329 (Fed. Cir. 2012) (quoting *Durling v. Spectrum Furniture Co.*, 101 F.3d 100, 103 (Fed. Cir. 1996)). This obviousness inquiry consists of two steps. *Apple*, 678 F.3d at 1329. In the first step, a primary reference (sometimes referred to as a “*Rosen* reference”) must be found, “the design characteristics of which are basically the same as the claimed design.” *Id.* (quoting *In re Rosen*, 673 F.2d 388, 391 (CCPA 1982)). This first step is itself a two-part inquiry under which “a court must both ‘(1) discern the correct visual impression created by the patented design as a whole; and (2) determine whether there is a single reference that creates ‘basically the same’ visual impression.’” *High Point Design*, 730 F.3d at 1311–12 (quoting *Durling*, 101 F.3d at 103).

In the second step, the primary reference may be modified by secondary references “to create a design that has the same overall visual appearance as the claimed design.” *Id.* at 1311. However, the “secondary references may only be used to modify the primary reference if they are ‘so related [to the primary reference] that the appearance of certain ornamental features in one would suggest the application of those features to the other.’” *Durling*, 101 F.3d at 103 (quoting *In re Borden*, 90 F.3d 1570, 1575 (Fed. Cir. 1996)) (alteration in the original).

B. The Ordinary Observer

The parties offer varied definitions for the ordinary observer.

Petitioner contends “the ordinary observer would be the retail consumer of vehicle front bumpers.” Pet. 31 (citing Ex. 1003 ¶ 35; Ex. 1004 ¶ 26). Neither Petitioner, nor its declarants, further elaborate as to who may qualify as a retail consumer of front bumpers.

Patent Owner argues that “the ordinary observer includes commercial buyers who purchase a replacement bumper to repair a customer’s vehicle, such as repair shop professionals.” Prelim. Resp. 6. Patent Owner notes that Petitioner has admitted in a related proceeding (IPR2020-00065) that “customers for aftermarket automotive parts primarily consist of professional auto body and mechanical repair shops who are knowledgeable about the automotive industry.” *Id.* at 6–7 (quoting IPR2020-00065, Paper 2, 21) (emphasis omitted). Patent Owner points out that “[b]ecause a repair shop buyer reviews and analyzes various products as part of his or her job duties, that buyer is particularly discerning.” *Id.* at 7; Ex. 2001, 4 (“LKQ’s customers for aftermarket automotive parts primarily consist of professional auto body and mechanical repair shops who are knowledgeable about the automotive industry.”).

Patent Owner has presented credible argument and evidence as to why the ordinary observer would be a repair shop professional. Our analysis, however, reaches the same result using either parties’ definition of the ordinary observer. That is say, the evidence on the record before us demonstrates that the asserted prior art designs have such distinct characteristics that either ordinary observer (the retail consumer or the repair shop professional) would not confuse the prior art designs for the design

claimed by the '964 patent. Accordingly, for purposes of our analysis in this proceeding, we adopt Petitioner's understanding of the ordinary observer as the retail consumer of vehicle front bumpers. This ordinary observer would be more discerning than an average person because a vehicle front bumper is an expensive purchase usually made to return a damaged vehicle to original form. Ex. 2001, 10, 13, 14 (Petitioner conveying the importance of automobile repair parts looking the same and noting that purchases are made by informed customers.).

C. The Designer of Ordinary Skill

Petitioner's contends that "a designer of ordinary skill would be an individual who has at least an undergraduate degree in transportation or automotive design and work experience in the field of transportation design, or someone who has several years' work experience in the field of transportation or automotive design." Pet. 29.

Patent Owner responds that "[a] designer of ordinary skill in the art . . . would have at least an undergraduate degree in automotive design, or other related industrial design field, with at least two years of relevant practical experience in designing automotive body parts." Prelim. Resp. 8.

Petitioner's formulation of the designer of ordinary skill in the art is somewhat vague because of the use of terms such as "at least" and "several years' work" without further elaboration. Apart from the use of these vague terms, we find no discernible difference in the parties' formulation of the designer of ordinary skill in the art. For purposes of this Decision, we proceed with the understanding that the designer of ordinary skill is an individual with an undergraduate degree in transportation, automotive, or

industrial design, and with at least two years of relevant practical experience in the field of transportation or automotive design.

D. Grounds of Petition Not Based on Patent or Printed Publications

Patent Owner contends that “[g]rounds 1-3 fail because they are based on a physical vehicle—the ‘2015 Ford Edge’—not ‘patents or printed publications.’” Prelim. Resp. 8–10. Patent Owner also notes that Exhibits 1006–1008 are all distinct documents with unclear publication dates and therefore do not qualify as “printed publications.” *Id.* at 10–11.

Patent Owner’s concerns are well-grounded because the Petition alleges that the claim of the ’964 patent is “anticipated by a depiction of the 2015 Ford Edge.” Pet. 13. Petitioner thereafter cites three Internet web page print outs that show the depiction of the 2015 Ford Edge. The Petition never specifically states that it is relying on any one of these print outs as the sole printed publication – anticipation requires a single reference. In fact, the Petition cites Exhibit 1007 in an attempt to show the design of the 2015 Ford Edge was made publicly available as of June 28, 2014, but then relies on other images of other exhibits (having different purported publication dates) in its discussion of the design of the 2015 Ford Edge. Pet. 31.

In its Petition for Grounds 1–3, Petitioner offers a confusing analysis seemingly relying on the design of an actual vehicle and not a printed publication as the basis for its analysis. Likewise, Petitioner’s declarants offer no clarification and further confuse the analysis by again relying on the 2015 Ford Edge and not a printed publication as the basis for unpatentability. *See* Ex. 1003 ¶¶ 44, 47 (“The 2015 Ford Edge Anticipates the Claim of the ’964 Patent”); Ex. 1004 ¶ 51 (“The 2015 Ford Edge Anticipates the Claim of the ’964 Patent.”).

Petitioner attempts to clarify the record in its Preliminary Reply asserting “Petitioner bases its first two grounds on Ex. 1008, the 2015 Ford Edge brochure, alone.” Paper 11, 2. Petitioner points out that Exhibit 1008 is frequently cited in the Petition and compared to the claim of the ’964 patent. Petitioner also cites to *Hulu, LLC v. Sound View Innovations, LLC*, Case No. IPR2018-01039, Paper 29 (PTAB Dec. 20, 2019), and contends that Petitioner “has additional evidence—the Internet Archive Affidavit—that establishes the public accessibility of [Exhibit] 1008.” *Id.* at 3, n.2.

For purposes of our analysis, we will treat Exhibit 1008 as the primary reference asserted by Petitioner for Grounds 1–3. We also presume, for purposes of our analysis, that Exhibit 1008 was a printed publication published before the priority date of the ’964 patent.

E. Anticipation Based on 2015 Ford Edge (Exs. 1008 and 1009)

We examine Petitioner’s two anticipation grounds, one based on Exhibit 1008 and one based on Exhibit 1009, concurrently. While Exhibit 1008 is a webpage depicting the 2015 Ford Edge, Exhibit 1009 is an issued design patent (“George”) that also depicts, or covers, the 2015 Ford Edge. *See* Pet. 2; Prelim. Resp. 39; Ex. 1003 ¶ 45 (“I understand that its ‘embodiment’ is the 2015 Ford Edge.”). Below, we place page 7 of Exhibit 1008 alongside Figure 3 of George to show the similarity of the two designs.

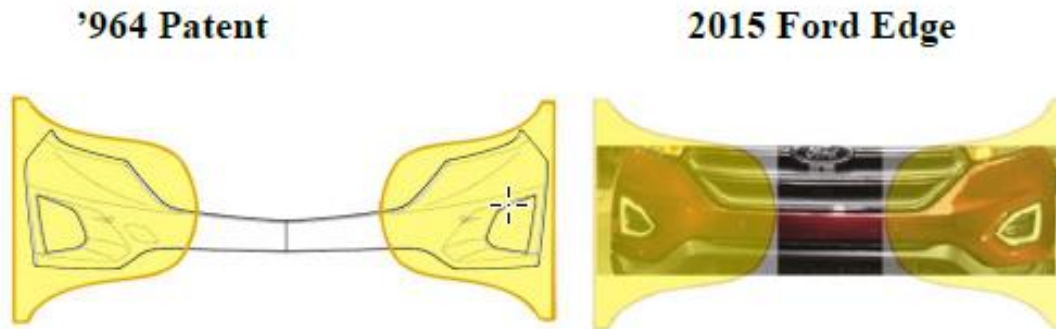


Exhibit 1008 (left) and Exhibit 1009 (right) both showing a front view of the bumper of the 2015 Ford Edge.

Although Petitioner conducts a separate anticipation analysis based on each reference (Pet. 31–37, 44–48), the faults we examine below are equally applicable to both grounds, so we combine our analysis for efficiency.

Petitioner contends that the '964 patent claim is anticipated by the 2015 Ford Edge (Ex. 1008 and George). *Id.* Petitioner argues that to the ordinary observer, the design disclosed by the 2015 Ford Edge is substantially the same as that claimed in the '964 patent, such that the resemblance would deceive such an observer, inducing him to purchase one supposing it to be the other. Pet. 31–37, 44–48.

Petitioner draws a highlighted bell section around the ends of each design as depicted below.



Petitioner's annotated Figure 2 of the '964 patent compared to Exhibit 1008 (2015 Ford Edge) with added highlighting. Pet. 33–34.

Petitioner then alleges that

the '964 Patent and the 2015 Ford Edge share the following design elements: 1) a bell-like bulging section on a left side and a right side of the bumper . . . 2) an inward-facing, polygonal-shaped, recessed opening in each bell-like bulging section . . . 3) an elongated horizontal bar extending across the bumper connecting the left and the right bell-like, bulging sections.

Id. at 34–36.

Patent Owner contends that Petitioner fails to demonstrate that the 2015 Ford Edge anticipates the claimed design. Prelim. Resp. 20, 39. Patent Owner first alleges that Petitioner’s “description of the claimed design is insufficient because it focuses on design ‘concepts’ generic to many vehicle bumpers, rather than addressing the features of the claimed design.” *Id.* at 14. Patent Owner argues that Petitioner’s

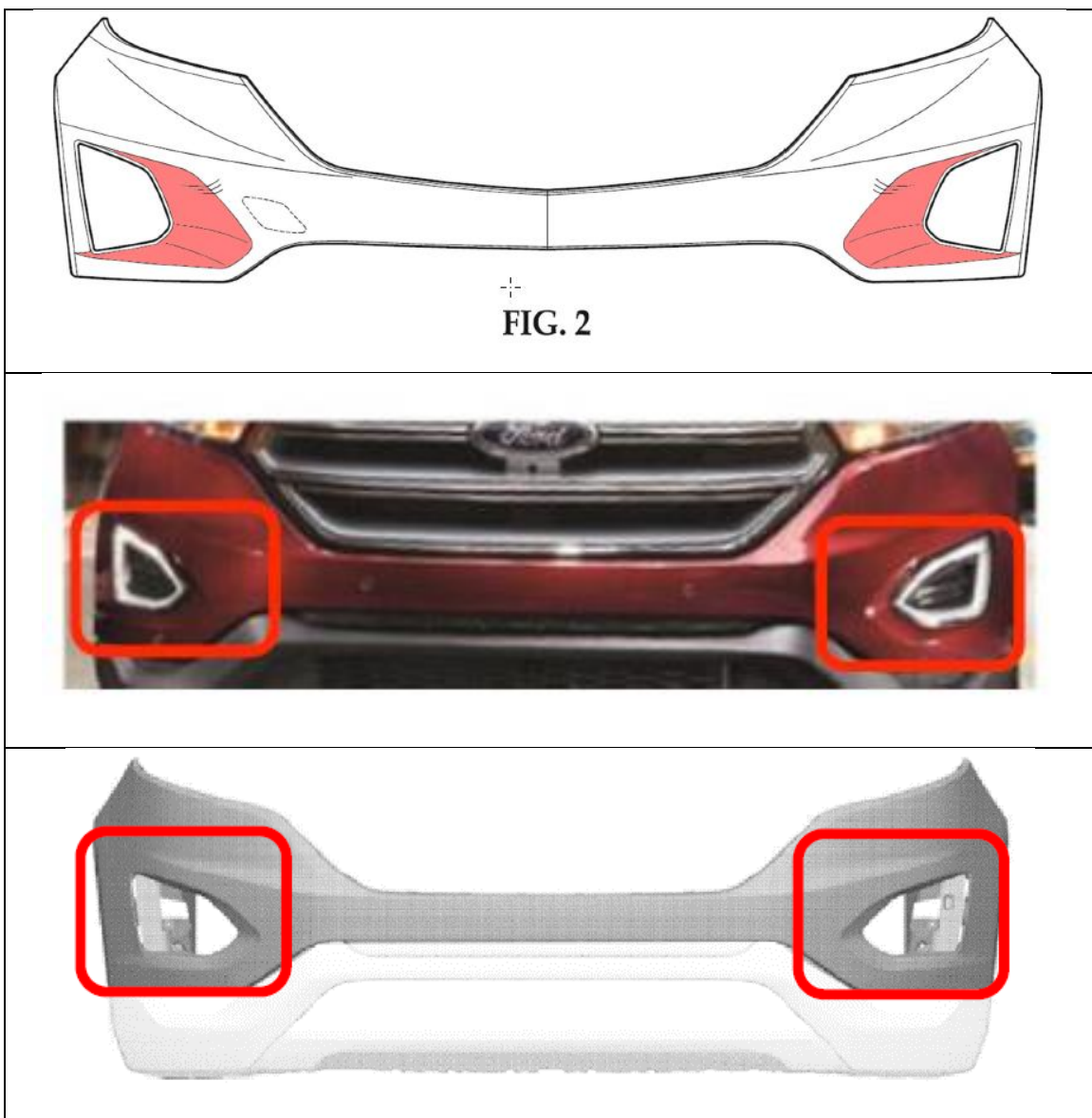
description fails to accurately convey the perimeter shape and surface contours of the left and right sections of the bumper reflected in the patent. LKQ describes these portions generically as ‘bell-like bulging sections,’ but that ignores the nuances of the claimed design, which includes edges and complex surfaces tending to direct a viewer’s focus centrally and evoke an athletic and agile posture.

Id. at 15–16. As detailed below, we agree with Patent Owner’s assessment.

By categorizing the most intricate and complex features of the design in generic terms, for example as a “bell-like bulging section,” Petitioner has avoided detailing the unique features of the design. *See* Pet. 11. Petitioner’s declarants also adopt these generic descriptions verbatim, and, as such, we do not find their testimony useful. *See* Ex. 1003 ¶¶ 33, 50, 72; Ex. 1004 ¶¶ 31, 54, 75. Petitioner’s focus on general design concepts, like a bell-shape, leads to a generic description of a vehicle bumper, rather than presenting an accurate visual image of the claimed design. Petitioner has also avoided discussing the differences between the claimed design and the 2015 Ford Edge (Ex. 1008 and George) by doing the same.

For example, Petitioner fails to address the extended depressions positioned inwardly of the “polygonal-shaped, recessed opening,” the actual appearance of the “polygonal-shaped, recessed opening,” and the

contributions of these features to the overall appearance of the claimed design. *See* Pet. 11–13. As depicted below, the claimed design includes a depression that is substantially elongated and larger compared to the “polygonal-shaped” opening. As also seen below, the “opening” itself has a distinctive shape provided by the angles and dimensions of the edges that define the “opening.” These features are shown in solid lines, and contribute to the overall appearance of the claimed design.

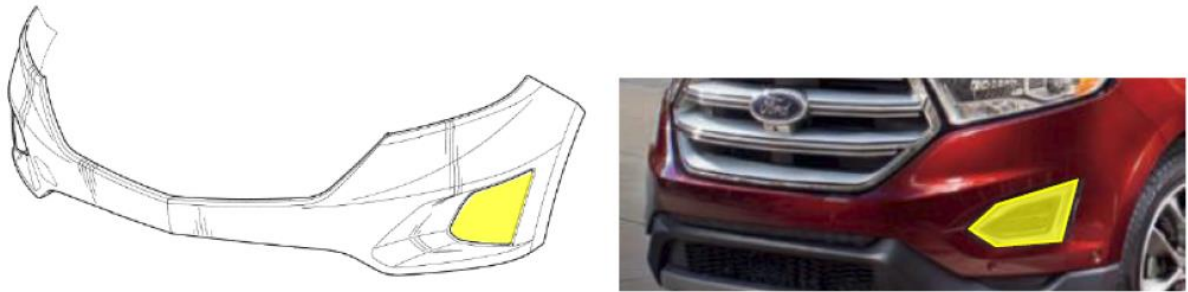


Patent Owner’s annotated Figure 2 of the ’954 patent (top) as compared to

Petitioner's annotated image from Exhibit 1008 (middle) and annotated Figure 3 of George (bottom). Pet. 36, 47; Prelim. Resp. 23.

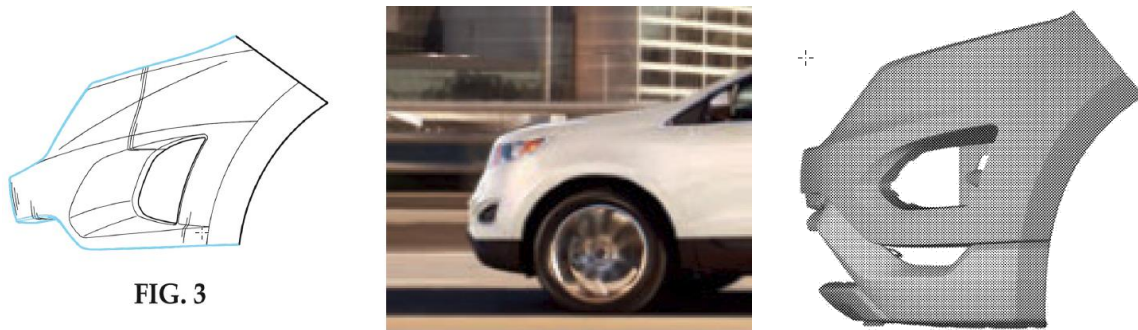
As depicted in Figure 2 of the '964 patent, seen above, the depressions of the claimed design have a relatively extended length compared to the opening, and extend inwardly and forwardly a distance commensurate with the entire length of the recessed openings. Comparatively, this claimed design is in stark contrast to the relative shape and dimensions of the depression of the 2015 Ford Edge, which has a length that is only a fraction of the length of the entire opening, and a shape that is different from the shape of the claimed design. *See* Prelim. Resp. 23–24. As also depicted above, the openings of the '964 patent have smooth, rounded corners; the top edges are angled downwardly from right to left, while the bottom edge is angled upwardly from right to left; and the inner and outer side edges of the opening have a similar angle relative to a vertical direction. *Id.* Further, the claimed design has a tapering/varied height of the elongated center horizontal bar that is not found in the 2015 Ford Edge. *Id.* at 28–30.

In the 2015 Ford Edge, as depicted below, the opening is defined by sharp corners, particularly the arrow-shaped inward side of the opening. *Id.* at 24. Both the top and bottom edges of the opening are angled downwardly from right to left, and inner and outer sides having significantly different angles relative to a vertical direction. *Id.* Petitioner has failed to address these claimed design characteristics.



Petitioner's annotated Figure 1 of the '964 patent (left) compared to Petitioner's annotated figure from Exhibit 1008 (right) both showing a yellow highlight over the opening. Prelim. Resp. 24.

Petitioner's analysis and comparison of the designs is particularly deficient when it comes to the side view. Petitioner ignores the features shown in the invention's side view—Petitioner does not compare the side view shown in Figure 3 to the 2015 Ford Edge at all. *See* Pet. 31–37. Comparison of Figure 3 with the 2015 Ford Edge, as shown below, confirms additional differences not addressed by Petitioner. *See* Prelim. Resp. 25–26.



Petitioner's annotated Figure 3 of the '964 patent (left) compared to Exhibit 1008 (middle) and Figure 5 of George (right).

As shown above in Figure 3, the claimed design includes an outwardly-protruding leading portion, angled noticeably downward. The 2015 Ford Edge does not have such a significant protruding leading portion with a noticeable downward angle. Petitioner also fails to analyze the actual appearance and specific design characteristics of the extended depressions positioned inwardly (to the left in the view of Figure 3 above) of the

“polygonal-shaped, recessed opening,” or of the “openings” themselves. *See* Prelim. Resp. 26. As seen above, the relative dimensions of the depression compared to the openings differ dramatically between the ’964 patent and the 2015 Ford Edge (Exhibit 1008 and George), as plainly visible from the side view comparison above. Again, Petitioner fails to address, or even acknowledge, these significant differences in design characteristics and appearance. Petitioner also fails to compare the top plan view of Figure 4 of the ’964 patent to the prior art designs.

Based on the distinct differences between the designs discussed above and the overall lack of similarity in the overall designs, we are not persuaded an ordinary observer would recognize the designs as substantially the same. Further, we do not believe that the ordinary observer would be deceived to purchase one supposing it to be the other. Accordingly, we determine that Petitioner has failed to establish a reasonable likelihood that the claim of the ’964 patent is anticipated based on Exhibit 1008. Likewise, we determine that Petitioner has failed to establish a reasonable likelihood that the claim of the ’964 patent is anticipated based on George (Exhibit 1009).

F. Obviousness Grounds Based on the 2015 Ford Edge

Petitioner contends the ornamental design for the ’964 patent would have been obvious to a designer of ordinary skill based on four grounds – two based on “the 2015 Ford Edge” (Exhibit 1008) and two based on George (Exhibit 1009). Pet. 13–14. Because, for the reasons discussed below, we disagree that the 2015 Ford Edge and George have basically the same design as the claimed design, and because Petitioner fails to create a design that has the same overall visual appearance as the claimed design, we determine that Petitioner has not demonstrated a reasonable likelihood that the claim of the

'964 patent would have been unpatentable over either reference, alone, or in combination with Exhibit 1010.

Petitioner contends “[t]here is one minor difference between the 2015 Ford Edge and the claimed design.” Pet. 38. Specifically, “[t]he horizontal middle bar of the 2015 Ford Edge has no center bevel whereas the '964 Patent has such a bevel.” *Id.* Petitioner then asserts two obviousness theories, either “the addition of a center bevel is a *de minimis* difference to the overall visual appearance of the design and is an ‘insubstantial change that would have been obvious to a skilled designer,’” or in the alternative, “the single claim of the '964 Patent is unpatentable as obvious over the 2015 Ford Edge in view of Patent Owner’s 2016 Chevrolet Equinox (Ex. 1010).” *Id.* at 38–40.

As for just the center bevel, we agree with Petitioner that this feature is fairly minor to the overall design. However, the substantial differences in the designs discussed above are again ignored by Petitioner. Petitioner’s obviousness theories are based on the flawed premise that there is only one minor difference between the 2015 Ford Edge (Exhibit 1008 and George) and the claimed design. By failing to recognize the actual differences in the designs and offer some theory as to how the primary reference could be modified to ornamentally show those differences, Petitioner’s obviousness grounds fair no better than the anticipation grounds.

As discussed previously regarding anticipation, there are actually multiple readily apparent differences between the claimed design and the 2015 Ford Edge, but Petitioner never acknowledges these differences, much less properly analyzes these features of the claimed design in comparison to the 2015 Ford Edge. We agree with Patent Owner that “the actual

appearance of every single element in Petitioners' characterization of the claimed design—the 'bell-like bulging section,' the 'polygonal-shaped, recessed opening,' and the 'elongated horizontal bar'—would have needed to be modified in order to recreate the claimed design.'" Prelim. Resp. 32. Thus, even if Petitioner's primary *Rosen* references (Exhibit 1008 and George) were altered to incorporate a "center bevel," Petitioner still has not persuasively established why the result would create a design that has the same overall visual appearance as the claimed design. As examined above, the resulting ornamental design would still lack readily apparent features of the claimed design, including a substantially elongated and larger depression relative to the opening, the shape of the opening, the tapering/varied height of the central elongated horizontal bar, including its angled top edges, and the unique protruding profile of the front portion, particularly as viewed from the side.

Accordingly, we determine that Petitioner has failed to establish a reasonable likelihood that the claim of the '964 patent would have been obvious based on: (1) Exhibit 1008 alone, (2) Exhibit 1008 in view of Exhibit 1010, (3) George alone, and (4) George in view of Exhibit 1010.

III. CONCLUSION

We conclude that Petitioner has failed to demonstrate a reasonable likelihood of prevailing with respect to its challenge to the patentability of the '964 patent claim.

IV. ORDER

For the foregoing reasons, it is

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ORDERED that the Petition is *denied* as to the challenged claim of the '964 patent, and no trial is instituted.

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