Trials@uspto.gov
571-272-7822

Paper 13
Date: July 14, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CONTENT SQUARE SAS,
Petitioner,

v.

MEDALLIA INC.,
Patent Owner.

IPR2022-00316
Patent 8,886,552 B2

Before MEREDITH C. PETRAVICK, SCOTT A. DANIELS, and FREDERICK C. LANEY, *Administrative Patent Judges.*

DANIELS, *Administrative Patent Judge*.

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

I. INTRODUCTION

Content Square SAS ("Petitioner") filed a Petition requesting *inter partes* review ("IPR") of claims 1–19 of U.S. Patent No. 8,886,552 (Ex. 1001, "the '552 patent"). Paper 2 ("Pet."). Medallia Inc., ("Patent Owner") filed a Preliminary Response to the Petition. Paper 5 ("Prelim. Resp."). After authorization by the Board, Petitioner entered a Reply directed only to discretionary issues raised by Patent Owner in its Preliminary Response. Paper 10 ("Reply"). Patent Owner subsequently submitted a Sur-Reply addressing the same discretionary issues. Paper 11 ("Sur-Reply"). Because, for the reasons below, we deny the Petition on merits, we do not reach these discretionary issues.

Under 35 U.S.C. § 314(a), an *inter partes* review may not be instituted "unless . . . there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." Upon consideration of the arguments and evidence presented by Petitioner and Patent Owner, we are not persuaded that Petitioner has demonstrated a reasonable likelihood that it would prevail in showing the unpatentability of at least one of the challenged claims. *See* 35 U.S.C. § 314(a). Accordingly, we do not institute an *inter partes* review of the challenged claims.

A. Real Parties in Interest

Petitioner states that Content Square SAS is the real party in interest. Pet. 1. Patent Owner states that Medallia Inc., is 100% owned by Medallia Intermediate II, LP which in turn "is beneficially or indirectly owned by Thoma Bravo, L.P." Paper 6, 1.

B. Related Matters

The parties indicate that the '552 patent is at issue in *Medallia Inc. v. Content Square SAS*, 6:21-cv-00532 (W.D. Tx). Pet. 1; Paper 6, 1.

C. The '552 Patent (Ex. 1001)

The '552 patent, titled "Method and System for Online User Feedback on Websites and Software," describes a computerized system for collecting and analyzing user feedback during interaction with a website. Ex. 1001, Abstract. More specifically, and dependent on certain actions taken by the website user, the system automatically generates a structured feedback form and presents the structured form to the user. *Id.* The '552 patent explains that

> [i]t is a particular feature of the present invention that the system provides the website administrator with the ability to generate categorized and nested structured feedback forms to be displayed on the website for the purpose of collecting feedback regarding the user's experience while navigating through a website-based process.

Id. at 6:50–55. Figures 3D–F of the '552 patent illustrating structured feedback forms are reproduced below.

FIG. 3D

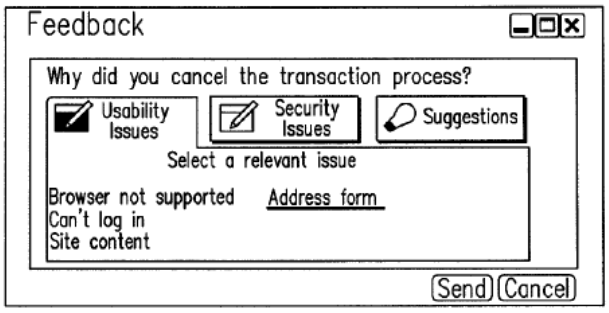


FIG. 3E

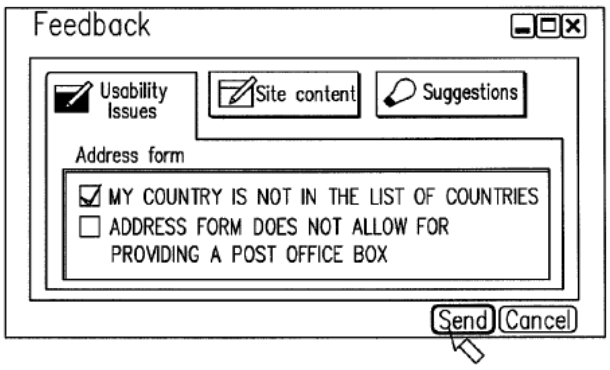
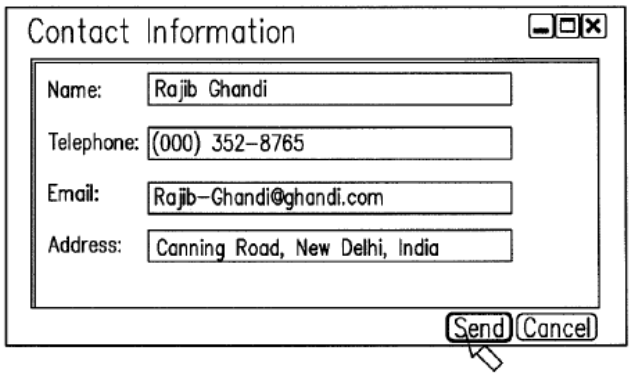


FIG. 3F



Figures 3D–F, above, illustrate nested structured feedback forms permitting a user to provide feedback after the user cancels a business transaction, e.g., such as purchasing books on a website. *Id.* at 6:33–49; Fig. 4. When trying to complete the business transaction, (prior to being presented the structured feedback forms shown in Figures 3D–F, above), "the user attempts to enter an address in India, however the list of countries provided by the web site does not include India. The user thereafter decides to terminate the transaction by clicking on the 'cancel' button." *Id.* at 6:44–47. If the user agrees to provide feedback upon canceling the transaction, the feedback forms in Figures 3D–F are presented to the user. *Id.* at Figs. 3A–C. Any website user feedback entered in the structured feedback forms is collected in order "to provide at least one analysis report based on feedback from a multiplicity of web site users." *Id.* at 1:41–42.

In addition to data collected in the user structured feedback form, claim 1 of the '552 patent recites "a web analytics interfacing functionality operative to interface with a web analytics service and receive web behavior analysis relating to behaviors of the multiplicity of web site users." *Id.* at 10:47–50. Claim 1, as reproduced below, recites limitations [1d]–[1e] that require essentially combining the web behavior analysis with the website user feedback analysis and "producing at least one analysis report that

includes an integration of said received web behavior analysis." *Id.* at 10:53–55.

D. Illustrative Claim

Claims 1, 9, and 19 are independent. Each of claims 2–8 and 10–18 ultimately depend from independent claims 1 and 9 respectively. Claim 1 is reproduced below including certain limitations of importance in [1b] in added italics:[1]

> 1. [1pre] A computer system for collecting and analyzing structured user feedback on websites, said computer system comprising:
>
> [1a] website user structured feedback form generation functionality operative to generate structured feedback forms for providing website user feedback on website user interaction with a website-based process, said structured feedback forms comprising user selectable feedback messages provided in a categorized and nested structure;
>
> [1b] web site user cancellation or abandonment prediction functionality operative to determine, based on a website action of a given user, *that the given user intends to cancel a transaction associated with the website-based process or abandon the web site-based process* and, upon making said determination, automatically present the given user with at least one of the generated website user structured feedback forms or an invitation to enter feedback using at least one of the generated website user structured feedback forms;
>
> [1c] web site user feedback analyzing functionality operative to automatically collect and analyze web site user feedback entered in said structured feedback forms and to provide at least one analysis report based on feedback from a multiplicity of website users, said at least one analysis report

[1] For consistency, we refer to Petitioner's claim reference nomenclature [1 pre]–[1f].

comprising a structured analysis report based on said categorized and nested structure; and

[1d] a web analytics interfacing functionality operative to interface with a web analytics service and receive web behavior analysis relating to behaviors of the multiplicity of web site users;

[1e] wherein, said automatic analysis of website user feedback includes factoring the received web behavior analysis in said automatic analysis and producing at least one analysis report that includes an integration of said received web behavior analysis

[1f] wherein said analyzing functionality is further operative to analyze website user feedback in relation to each of two or more stages in the website-based process separately for each stage, factor into the stage specific analysis web behavior analysis relating to each of the two or more stages and report the results of the analysis in relation to the each of two or more stages separately for each stage.

Ex. 1001, 10:20–62.

E. Prior Art and Asserted Grounds

Petitioner asserts that claims 1–19 would have been unpatentable based on the following grounds:[2]

[2] Petitioner supports its challenges with a Declaration of Ravin Balakrishnan, Ph.D. (Ex. 1002). *See infra*.

Ground	Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
1	1–19	103[3]	Nickerson[4] and Error[5]
2	1–19	103	Nickerson, Error, and Salle[6]

II. ANALYSIS

A. Legal Standard

A patent claim is unpatentable under 35 U.S.C. § 103 if the differences between the claimed subject matter and the prior art are such that the subject matter, as a whole, would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. 35 U.S.C. § 103; *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). "[W]hen a patent claims a structure already known in the prior art that is altered by the mere substitution of one element for another known in the field, the combination must do more than yield a predictable result." *KSR*, 550 U.S. at 416 (citing *United States v. Adams*, 383 U.S. 39, 50–51 (1966)). The question of obviousness is resolved based on underlying factual determinations including: (1) the scope and content of the prior art; (2) any differences between the claimed subject matter and the prior art; (3) the level of ordinary skill in the art; and (4) when in evidence,

[3] The Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) ("AIA"), amended 35 U.S.C. § 103, effective March 16, 2013. Because the '552 patent has an effective filing date before the effective date of the applicable AIA amendments, we refer to the pre-AIA version of § 103.
[4] US Appl'n No. 10/630,426 (pub. Jan. 29, 2004) (Ex. 1005).
[5] US Appl'n No. 11/367,198 (pub. Jul. 6, 2006) (Ex. 1007).
[6] US Appl'n No. 10/378,823 (pub. Sept. 9, 2004) (Ex. 1006).

objective evidence of non-obviousness. *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966).

B. Level of Ordinary Skill in the Art

Petitioner, supported by the testimony of Dr. Balakrishnan, proposes that a person of ordinary skill in the art at the time of the '552 patent

> would have possessed at least a bachelor's degree in computer science (or similar degree), and two years of work experience developing software systems for collecting and analyzing user feedback. A person could also have qualified with more formal education and less work experience, or vice versa.

Pet. 7 (citing Ex. 1002 ¶¶ 16–20). Patent Owner does not explicitly address the level of ordinary skill in the art. *See gen.* Prelim. Resp.

On this record, Petitioner's proposed level of ordinary skill in the art is not disputed and is consistent with our review of the technology and descriptions in the '552 patent and the asserted prior art references. *See Okajima v. Bourdeau*, 261 F.3d 1350, 1355 (Fed. Cir. 2001) (explaining that "the level of skill in the art is a prism or lens through which a judge, jury, or the Board views the prior art and the claimed invention"). For purposes of this Decision, we rely on Petitioner's proposed level of ordinary skill in the art.

C. Claim Construction

We interpret a claim "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) (2020). Under this standard, we construe the claim "in accordance with the ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent." *Id.* Furthermore, at this stage in the proceeding, we expressly construe the claims only to the extent necessary to

determine whether to institute *inter partes* review. *See Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co.*, 868 F.3d 1013, 1017 (Fed. Cir. 2017) ("[W]e need only construe terms 'that are in controversy, and only to the extent necessary to resolve the controversy.'" (citing *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999))).

Petitioner asserts that "no express claim constructions are necessary, and Petitioner construes the terms of the '552 Patent according to their pla[i]n and ordinary meaning to a person of ordinary skill in the art ("POSITA") in view of the intrinsic record." Pet. 15. Patent Owner also does not propose any claim construction. *See generally* Prelim. Resp.

The parties do not expressly dispute the meaning of any particular claim term, and our Decision does not turn on the meaning of any specific claim term. Having reviewed the '552 patent's written description, as well as the other provided prior art, and because there is no dispute, it is unnecessary to expressly interpret any specific claim term beyond any implicit interpretations or clarifications as to the plain and ordinary meaning reflected in our analysis below.

D. Ground 1: Claims 1–19 – Alleged Obviousness over Nickerson and Error

On this record, Petitioner has not established a reasonable likelihood of prevailing on its assertion that at least one of claims 1–19 would have been obvious over Nickerson and Error for the reasons explained below.

1. Nickerson (Ex. 1005)

Titled "Providing Substantially Real-Time Access to Collected Information Concerning User Interaction with a Web Page of a Website," Nickerson describes a system for "measuring and reporting on user feedback concerning particular pages associated with a website using one or more

feedback measurement tools that are incorporated into and viewable on the pages. Considering Figure 1 of Nickerson below, Nickerson describes that when viewing a website "[e]ach user 16 may have an opinion, assessment, feeling, or other subjective reaction to each page 28 communicated to the user 16." Ex. 1005 ¶ 38.

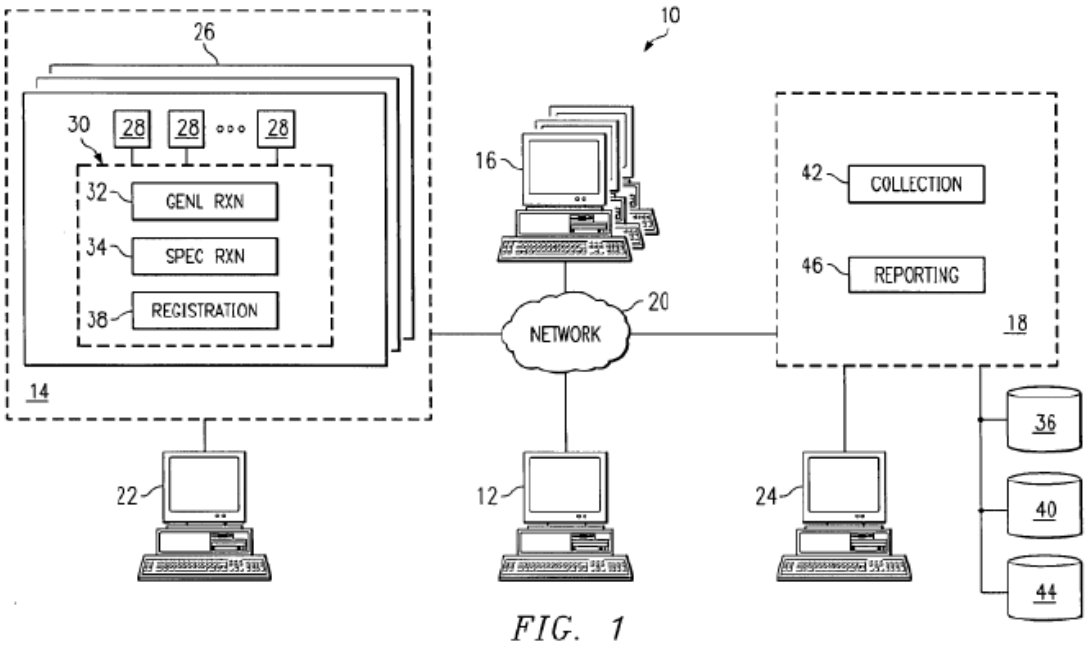


FIG. 1

Nickerson's Figure 1, above, illustrates system 10 including network 20 connecting user 16 with requested website 26 and web pages 28 incorporating tool 30 having general feedback measurement tool 32 and specific feedback measurement tool 34. *Id.* ¶¶ 57–64.

Figures 4 and 5 of Nickerson, illustrating specific and general feedback measurement tools, are reproduced below.

FIG. 4

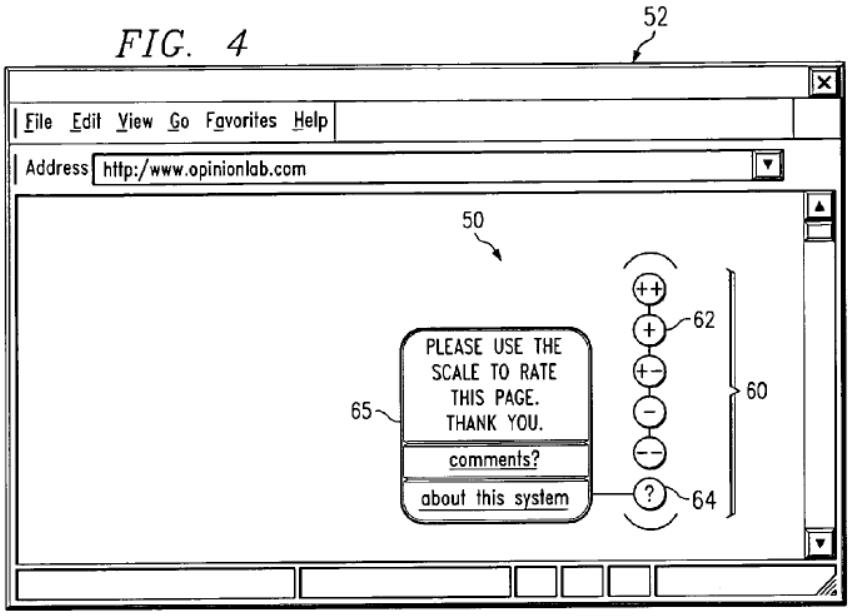


FIG. 5

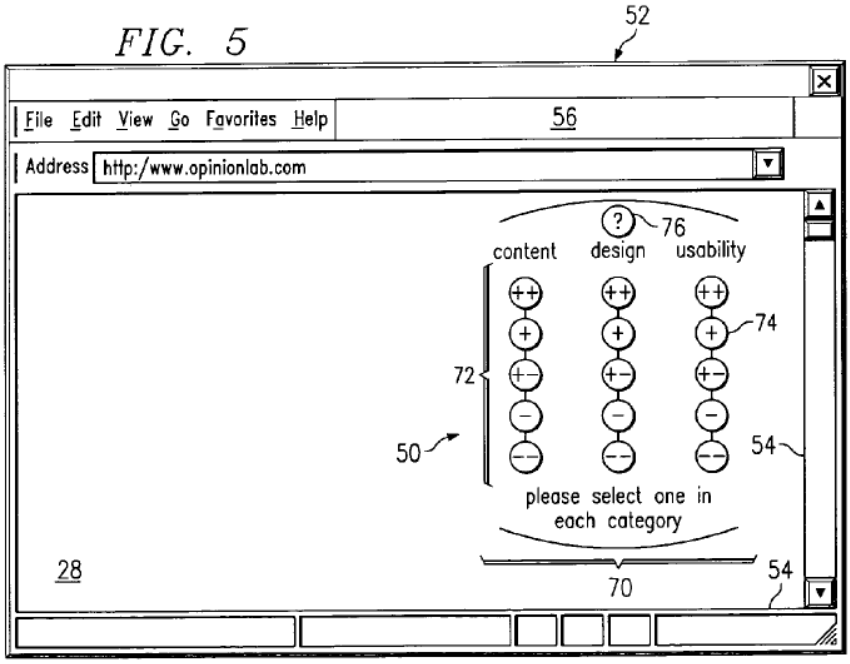


Figure 4 of Nickerson, above, depicts an example of a general user feedback tool including a rating scale 60 for a website viewer to rate the web page. *Id.* ¶ 78. Nickerson's Figure 5 depicts an example of a more specific user feedback tool providing rating scales 72 for each of content, design, and usability categories. *Id.* ¶¶ 18, 19, 76. Nickerson explains that

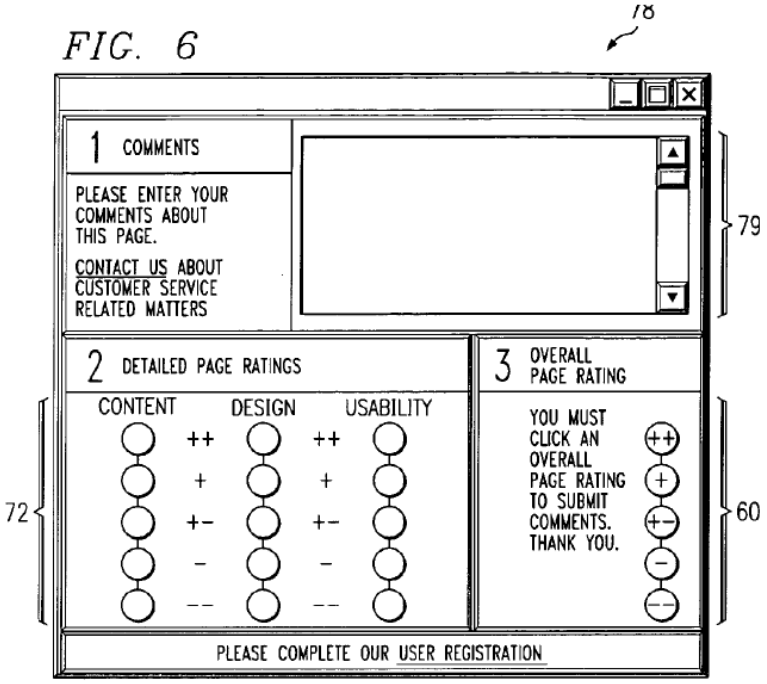
> [a]s multiple users 16 provide feedback concerning pages 28 as they navigate through website 26 according to its topography, a wealth of information concerning pages 28 may be assembled and later provided to owner 12 for use in improving particular pages 28 and thus website 26 as a whole.

Id. ¶ 64.

Nickerson also teaches tool 30 including comment windows permitting the user to provide page-specific comments as feedback. *Id.* ¶ 50. Nickerson explains that "the comment window may automatically appear in response to user 16 accessing web page 28, exiting web page 28, or remaining at web page 28 for at least a certain period of time." *Id.* Additionally, Nickerson describes that the rating scales may be nested in a hierarchical manner, for example "[o]ne or more child rating scales 72 may be nested with respect to a parent rating scale 72 on which child rating scales 72 depend within a hierarchy." *Id.* ¶ 76.

Nickerson's Figure 6 showing a window with both a comment box and rating scales is reproduced below.

FIG. 6



Nickerson's Figure 6, above, illustrates pop-up window 78 including a user feedback tool having comment field 79 as well as rating scales 60 and 72 "for receiving comments or other textual input from user 16 in association with a particular page 28." *Id.* ¶ 78.

2. Error (Exhibit 1007)

Error is titled "Capturing and Presenting Site Visitation Path Data" and relates "to website usage tracking, and more specifically to improved techniques for capturing and presenting site visitation path data." Ex. 1007 ¶ 5. In particular, Error describes how website transactions occur by "a series of steps that are generally represented by web pages: searching for the desired item; selecting the item by putting it in a shopping cart; activating a checkout function; providing shipping and billing information; and indicating final approval." *Id.* ¶ 10.

Error teaches that usage statistics and data, all of which are helpful to a website owner or administrator, can be provided where "[t]he website administrator can identify a series of nodes, or web pages, in a site as checkpoints, and can configure the system of the invention to provide information as to a particular visitation path through the checkpoints." *Id.* ¶ 12. Error's Figure 3 is reproduced below.

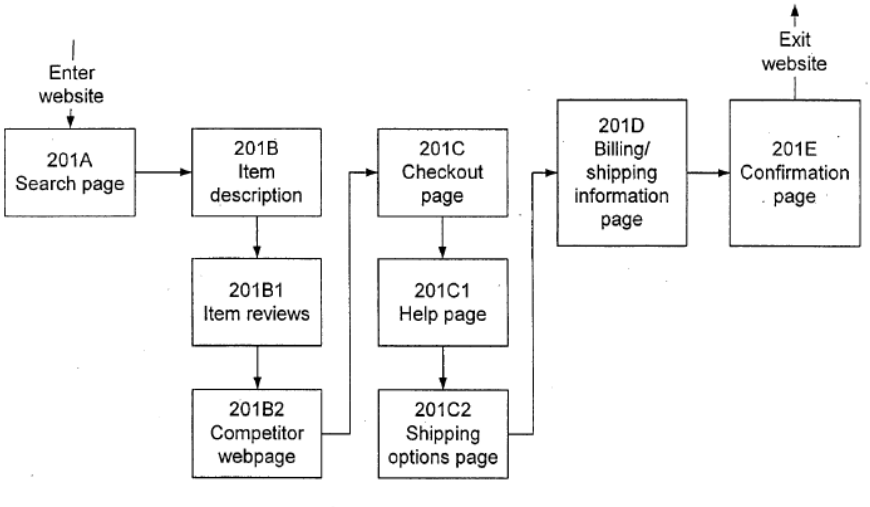


FIG. 3

Figure 3 from Error, above, is a block diagram depicting "a sequence of web pages visited by a user in the course of purchasing an item from an online retailer, including tangential pages," such as competitor webpage 201B2. *Id.* ¶ 17.

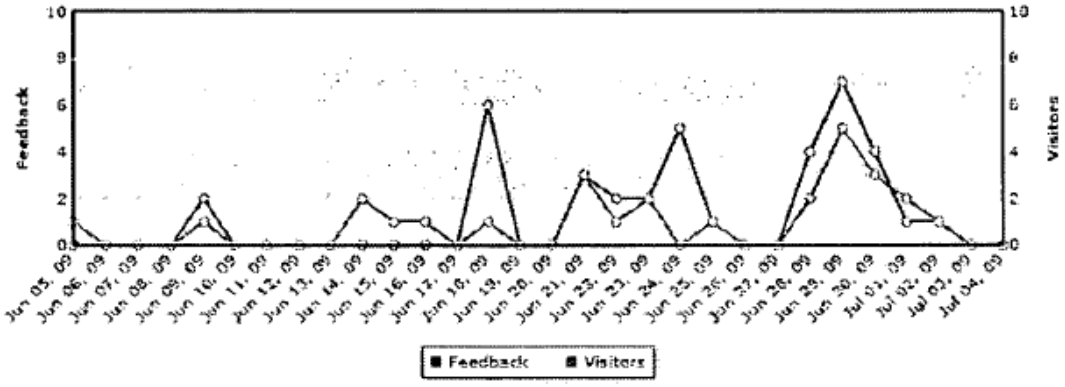
3. The '369 Provisional Application

Although not listed as a prior art reference in the two unpatentability challenges, for several limitations Petitioner relies on U.S. Provisional Application 61/270,369 (Ex. 1004) filed July 7, 2009 ("the '369 Provisional Application") to which the '552 patent claims priority. Pet. 12–14; Ex. 1001, code (60). Petitioner points out that the '369 Provisional Application includes "articles, blog posts, and website screenshots for the "Feedback Analytics" software tool commercialized by the originally-filing assignee, Kampyle, Ltd."[7] *Id.* at 12.

[7] Kampyle, Ltd. filed the '369 Provisional Application in 2009. Assignment data recorded in the USPTO indicates that Kampyle's succeeding corporation is Medallia Digital Ltd., "Medallia Digital Ltd., (f/k/a Kampyle

The disclosure provided in the '369 Provisional Application states, for example, that "[w]e are currently working on combining our Feedback Analytics data with web analytics data." Ex. 1004, 42. The '369 Provisional Application explains further that "[t]his unique combination will enable our customers to benefit from the best of both worlds: the user-subjective data coming from the on-line feedback reported by actual website users, as well as the user-objective data coming from Web analytics." *Id.* The '369 Provisional Application discloses that "[t]he Kampyle — Google Web Analytics integration, which we are announcing today, solves the challenges associated with web analytics while providing the only website feedback solution fully integrated with Google Analytics API." *Id.* at 51.

The '369 Provisional Application includes, as reproduced below, the following graph:



The graph, above, appears to provide comparative data for specific website feedback from website users coincident with the number of visitors to the website between June 5, 2009 and July 4, 2009. *Id.* at 99.

Ltd.)." Medallia Digital Ltd. assigned its interest in the '552 patent to Medallia, Inc., in 2018. Ex. 3001.

4. Independent Claim 1

We consider initially, by way of example, the elements of claim 1 and Petitioner's arguments.

a) Petitioner's Arguments

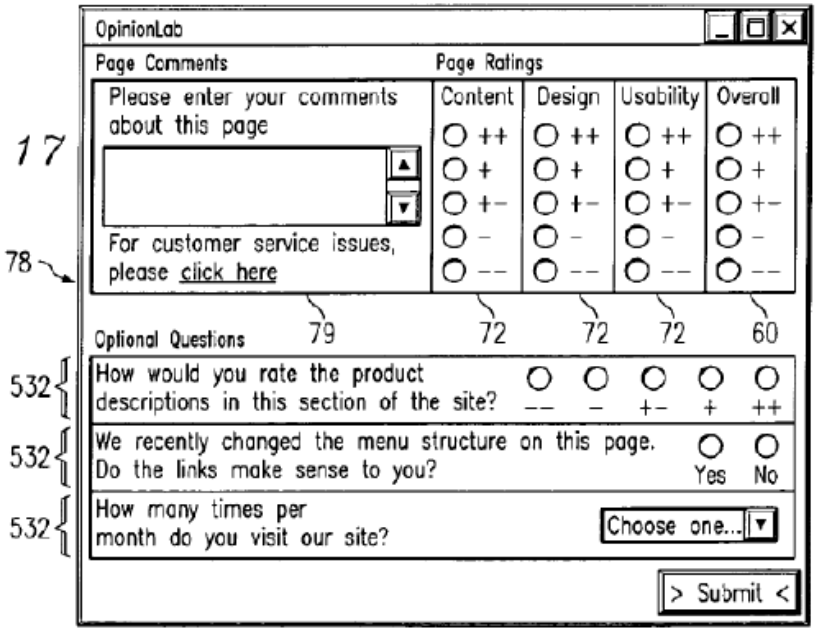
(1) Preamble [1pre] – A computer system for collecting and analyzing structured user feedback on websites

To the extent the preamble of claim 1 is limiting, Petitioner argues that "Nickerson describes a 'system 10 for measuring and reporting on user feedback concerning particular web pages associated with a website using one or more feedback measurement tools that are incorporated into and viewable on the pages.'" Pet. 23 (quoting Ex. 1005 ¶ 34).

(2) Limitation [1a] – website user structured feedback form generation functionality operative to generate structured feedback forms for providing website user feedback on website user interaction with a website-based process, said structured feedback forms comprising user selectable feedback messages provided in a categorized and nested structure;

Petitioner argues that "Nickerson's system collects user feedback via comment windows that list predefined questions and answers." Pet. 25 (citing Ex. 1005 ¶¶ 38, 126, Fig. 17). Petitioner contends that Nickerson's Figure 7, reproduced below, illustrates just such a "structured feedback form" that a website user would interact with, as recited in limitation [1a]. *Id.* at 26.

FIG. 17



Nickerson's Figure 7, above, "illustrates an example pop-up window that includes one or more explicit questions for users." Ex. 1005 ¶ 31. Petitioner argues further that Nickerson discloses presenting to the user the rating scales 72 in a "nested structure," where Nickerson states "a succeeding rating scale 72 might appear only in response to a user 16 providing specific user feedback using a preceding rating scale 72." Pet. 27 (quoting Ex. 1005 ¶ 76).

> *(3) Limitation [1b] – web site user cancellation or abandonment prediction functionality operative to determine, based on a website action of a given user, that the given user intends to cancel a transaction associated with the website-based process or abandon the web site-based process and, upon making said determination, automatically present the given user with at least one of the generated website user structured feedback forms or an invitation to enter feedback*

using at least one of the generated website user structured feedback forms

Petitioner argues that "Nickerson discloses that its 'comment window may **automatically appear** in response to user 16 accessing web page 28, **exiting web page 28**, or remaining at web page 28 for at least a certain period of time or the occurrence of any other suitable event.'" Pet. 32 (citing Ex. 1005 ¶ 50) (alteration in original). Petitioner, relying on testimony from Dr. Balakrishnan, asserts that it would have been obvious to a person of ordinary skill in the art "that there is some functionality in Nickerson's system that determines or otherwise senses that the user is exiting the web page 28 or otherwise abandoning activity on the web page 28, otherwise there would be no way of prompting the comment window to appear." *Id.* (citing Ex. 1002 ¶ 90). Petitioner argues that Nickerson thus makes obvious "**that the given user intends to cancel a transaction associated with the website based process or abandon the website-based process**" as called for in limitation [1b]. *Id.* (citing Ex. 1002 ¶¶ 91–94) (alteration in original).

(4) Limitation [1c] – web site user feedback analyzing functionality operative to automatically collect and analyze web site user feedback entered in said structured feedback forms and to provide at least one analysis report based on feedback from a multiplicity of website users, said at least one analysis report comprising a structured analysis report based on said categorized and nested structure

For limitation [1c], Petitioner argues that Nickerson discloses a server 18 that receives feedback information "including 'the title, URL, start time and date, feedback time and date, **user feedback**, and feedback user identifier.'" Pet. 33 (quoting Ex. 1005 ¶ 63) (alteration in original). Relying

on the testimony of Dr. Balakrishnan, Petitioner argues that Nickerson's process is "automatic, because "[u]ser feedback is therefore forwarded to and received by the server 18 as part of an automated process, and is not initiated by any manual request to forward or receive this information." *Id.* at 34 (citing Ex. 1002 ¶¶ 97–98).

Petitioner argues that Nickerson also provides a structured analysis report based on feedback from multiple users. *Id.* Petitioner points to Nickerson which explains that such reports "are intended to provide the owner 12 with a readily understandable view of feedback concerning a particular page 28, a set of particular pages 28, or website 26 as a whole (considering all pages 28)." *Id.* (quoting Ex. 1005 ¶ 85). Petitioner argues further that a person of ordinary skill in the art would have understood that Nickerson's reports would have been "based on said categorized and nested structure," as claim 1 calls for, because "the feedback data collected from limitation 1[a] . . . is provided in a 'categorized and nested structure.'" *Id.* at 36.

(5) Limitation [1d] – a web analytics interfacing functionality operative to interface with a web analytics service and receive web behavior analysis relating to behaviors of the multiplicity of web site users

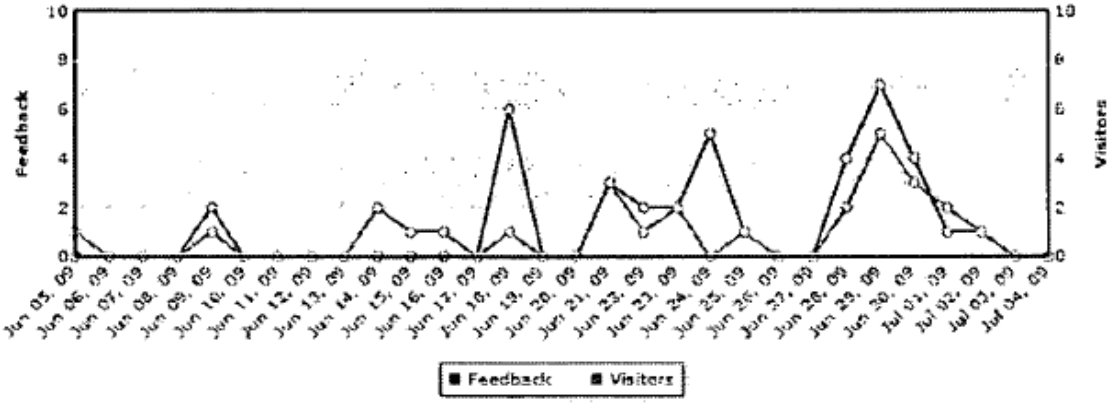
According to Petitioner, only the '369 Provisional Application discloses the "'web analytics' subject matter of this limitation." Pet. 38 (citing Ex. 1003, 76). Petitioner argues that "[a]t least some of the content in the ['369] Provisional Application that discusses this subject matter is prior art." *Id.* Petitioner asserts, for example, that in the '369 Provisional Application "[p]age 42 reads in part: 'We are currently working on combining our Feedback Analytics data with web analytics data.'" *Id.* at 39.

Petitioner's argument is, specifically, that certain portions of the '369 Provisional Application are "evidence showing that integrating web analytics data from a third-party service into feedback systems was known before the '552 Patent's earliest possible priority date. *Id.* (citing Ex. 1002 ¶ 105).

Petitioner argues also that a person of ordinary skill in the art would have understood "that Nickerson's system (e.g., its server 18) includes functionality to interface with the third-party system/service that collects the website traffic." *Id.* at 40 (citing Ex. 1005 ¶ 42). Dr. Balakrishnan testifies that there were well-known web analytics services available on the market, and "[i]n order to correlate the traffic data with the user feedback and generate reports based on the traffic data, Nickerson's system would necessarily have interfacing functionality to connect with the source of the traffic data and to receive such traffic data into Nickerson's system." Ex. 1002 ¶ 111. Dr. Balakrishnan testifies further that "[i]t was common at the time of the '552 Patent to collect and use traffic data associated with users' activity on websites." *Id.* ¶ 112 (citing Ex. 1008 ¶¶ 32, 34, 38, 120).

> *(6) Limitation [1e] – wherein, said automatic analysis of website user feedback includes factoring the received web behavior analysis in said automatic analysis and producing at least one analysis report that includes an integration of said received web behavior analysis*

Petitioner argues that the '369 Provisional Application discloses how web analytics traffic data is integrated with user feedback data into a report. Pet. 41–42 (citing Ex. 1004, 83, 99). Petitioner points to the following graph in the '369 Provisional Application as reproduced below.



The graph, above, illustrates comparative data for specific website feedback from website user's coincident with the number of visitors to the website between June 5, 2009 and July 4, 2009. *Id.* at 99.

Petitioner argues further that Nickerson "states that '[i]t may also be **desirable to present** the traffic data and user feedback data together **in an integrated fashion**… using a single 'dashboard' or other suitable visual display.'" *Id.* at 42 (citing Ex. 1005 ¶ 42) (alteration in original). Dr. Balakrishnan testifies that, considering Nickerson's teachings regarding integration of user feedback data and traffic data, a person of ordinary skill in the art "would have understood or at least found it obvious that correlating these two pieces of data together would have resulted in the reporting server 18 "**factoring**" the traffic data into its analysis because it then becomes a metric that the server 18 can rely on and include in its reporting." Ex. 1002 ¶ 117 (citing Ex. 1005 ¶¶ 42, 115) (alteration in original).

> *(7) Limitation 1[f] – wherein said analyzing functionality is further operative to analyze website user feedback in relation to each of two or more stages in the website-based process separately for each stage, factor into the stage specific analysis web behavior analysis relating to each of the two or more stages and report the*

results of the analysis in relation to the each of two or more stages separately for each stage.

Petitioner argues that the limitation "two or more stages" encompasses different web pages, for instance during the transaction process on a website, and that "Nickerson generally discloses that 'transactions [are] carried out using [a] website', which suggests the use of multiple web pages to perform said transaction." Pet. 43–44 (citing Ex. 1005 ¶ 4) (citation omitted). To the extent that Nickerson is not explicit, Petitioner argues that in Error, "[e]ach web page of the transaction corresponds to a "**stage**" of the transaction because it represents one distinct part of the transaction." *Id.* at 44 (citing Ex. 1007 ¶¶ 10, 38, 39, 91, 97, 134, 149) (alteration in original). Dr. Balakrishnan testifies that Error teaches obtaining user feedback when "the user submits feedback information based on issues that presented on the checkout/shopping cart page/stage." Ex. 1002 ¶ 122. Dr. Balakrishnan testifies further that a person of ordinary skill in the art would have found the references analogous and the combination predictable and straight forward because "Nickerson already discloses website-based transactions and, as I previously discussed, a POSITA would understand those website-based transactions to be performed over multiple web pages. Error merely provides the express disclosure of how to implement those transactions on a page-by-page basis." *Id.* ¶ 123.

b) Patent Owner's Arguments

Patent Owner argues that the asserted references fail to disclose several elements of the '552 patent's claimed invention, and "[t]o make up for these deficiencies, Petitioner argues – without proving – that portions of the '552 patent's provisional application are prior art, and also makes arguments based on hindsight." Prelim. Resp. 26. To this end, Patent

Owner makes four arguments, first that the Petitioner is relying on portions of the '369 Provisional Application "that it has not proven are prior art." *Id*. Second, Patent Owner argues that Nickerson only teaches that a comment or pop-up window occurs when a user "exits a web page" and this is not sufficient to meet limitation [1b]. *Id.* at 27. Third, Patent Owner argues that Petitioner fails to prove that the '369 Provisional Application is sufficient to render obvious limitation [1d]. *Id.* at 29. And fourth, Patent Owner argues that "[b]ecause element [1d] is not taught by the cited prior art . . . element [1e] cannot be taught either in that it relies on element [1d] being present." *Id.* at 30.

Because we find Patent Owner's first and second arguments persuasive, as discussed below, we do not reach the third and fourth arguments.

(1) Whether Petitioner has shown that the '369 Provisional Application qualifies as a prior art printed publication

Patent Owner argues that Petitioner's reference to the '369 Provisional Application for several claim elements is not evidence that integrating web-analytics from a third-party service was known prior to the priority date of the '552 patent. Prelim. Resp. 26. Patent Owner argues specifically that "[t]he Petition fails, however, to "identify, with particularity, evidence sufficient to establish a reasonable likelihood that the [cited portions of the '552 patent's provisional application were] publicly accessible before the critical date of the challenged patent and therefore that there is a reasonable likelihood that it qualifies as a printed publication." *Id.* at 27 (citing *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 at 13, 16 (PTAB Dec. 20, 2019) (precedential)) ("Hulu"). For the

reasons below, we agree with Patent Owner that the Petition does not satisfy the requirement to "identify, with particularity, evidence sufficient to establish a reasonable likelihood that the reference was publicly accessible before the critical date of the challenged patent." *Hulu*, Paper 29 at 13.

Petitioner argues that the '369 Provisional Application, which was filed July 7, 2009, "is a 159-page collection of articles, blog posts, and website screenshots for the 'Feedback Analytics' software tool commercialized by the originally-filing assignee, Kampyle." Pet. 12. Petitioner contends, referring to several examples, that the '369 Provisional Application's disclosure based on these articles, blog posts and websites screenshots, is prior art. *Id.* at 12–13. For example, Petitioner argues that the disclosure at page 27 of the '369 Provisional Application states that "[t]he [feedback] data can also be integrated with Web analytics, allowing you to understand both the 'What' and the 'Why'." *Id.* at 13 (citing Ex. 1004, 27). Petitioner also argues that "the 'web analytics' subject matter of this limitation is disclosed only in the Provisional Application." *Id.* at 38 (citing Ex. 1003, 76).

Petitioner's reliance on the '369 Provisional Application as prior art raises critical questions about what specifically in that application Petitioner is contending is prior art and whether Petitioner has made the necessary showing to establish that it qualifies as prior art?

A petitioner in an *inter partes* review may challenge the claims of a patent "only on the basis of prior art consisting of patents or printed publications." 35 U.S.C. § 311(b) (emphasis added). "[A]t the institution stage, the petition must identify, with particularity, evidence sufficient to establish a reasonable likelihood that [a] reference was publicly accessible before the critical date of the challenged patent and therefore that there is a

reasonable likelihood that it qualifies as a printed publication." *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 at 13 (PTAB Dec. 20, 2019) (precedential).

Petitioner's explanation as to the '369 Provisional Application, including the alleged basis for its status as a prior art printed publication, provides:

> [a]t least some of the content in the Provisional Application that discusses this subject matter is prior art. For example, the content provided on page 42 of the Provisional Application is derived from a blog post published on June 17, 2008, which is more than a year prior to the filing of the Provisional Application.

Pet. 38–39. Petitioner argues further that "[a]n undated blog post shown on pages 5-7 of the Provisional Application provides examples of what 'insights on user behavior' can be provided when 'web-analytics Data' is 'integrate[d]' with 'feedback analytics data.'" *Id.* at 39 (citing Ex.1004, 5). None of Petitioner's evidence, such as it is, is sufficient to show that any of the disclosure in the '369 Provisional Application is prior art.

Public accessibility "has been called the touchstone in determining whether a reference constitutes a 'printed publication' bar under 35 U.S.C. § 102(b)." *Blue Calypso*, 815 F.3d at 1348 (quoting *In re Hall*, 781 F.2d 897, 898–99 (Fed. Cir. 1986)). In *Hulu*, the Precedential Opinion Panel ("POP") rejected the petitioner's argument that a reference necessarily meets "the standard for institution where the reference bears conventional markers of publication, such as a copyright date, edition identifiers, publication by a commercial publisher, and the assignment of an ISBN number." *Hulu*, Paper 29 at 17. Furthermore, the *Hulu* decision states: "We do not hold that any particular indicia per se is sufficient at the institution stage. Rather, the

indicia on the face of a reference, such as printed dates and stamps, are considered as part of the totality of the evidence." *Id.* at 17–18 (citing *Nobel Biocare Servs. AG v. Instradent USA, Inc.*, 903 F.3d 1365, 1377 (Fed. Cir. 2018)).

On the facts and evidence before us, Petitioner relies solely upon one listed date in the '369 Provisional Application for the printed publication status of certain disclosure, stating: "the content provided on page 42 of the Provisional Application is derived from a blog post published on June 17, 2008, which is more than a year prior to the filing of the Provisional Application." Pet. 39. Yet no other evidence or explanation, not even an affidavit from an officer of the Internet Archive, is provided by Petitioner as to why and how the disclosure that Petitioner relies upon would be prior art under §102(b) (pre-AIA). As argued by Patent Owner, the Petition did not include any additional evidence supporting Petitioner's implicit position that certain subject matter disclosed in the '369 Provisional Application was publicly accessible prior to the critical date of the claimed invention. *See* Prelim. Resp. 27 (arguing that "[t]he Petition fails, however, to 'identify, with particularity, evidence sufficient to establish a reasonable likelihood that the [cited portions of the '552 patent's provisional application were] publicly accessible before the critical date of the challenged patent'") (citing *Hulu*). Moreover, Dr. Balakrishnan's testimony relied upon by Petitioner essentially echoes the language in the Petition and does not include any useful testimony in support of Petitioner's contention. *Compare* Ex. 1002 ¶¶ 105, 106 *with* Pet. 38–39.

Numerous Board decisions have held that simply pointing to a date, even a copyright date, is not sufficient at the institution stage to demonstrate public accessibility. *See, e.g., In-Depth Geophysical, Inc. v. ConocoPhillips*

Co., IPR2019-00849, Paper 14 at 10–11 (PTAB Sept. 6, 2019) (informative in relevant part) (stating that a "copyright notice" "sheds virtually no light on whether the document was publicly accessible"); *Microsoft Corp. v. Corel Software, LLC*, IPR2016-01083, Paper 14 at 13–14, 15 (PTAB Dec. 1, 2016) ("The copyright notice, alone, however, sheds virtually no light on whether the document was publicly accessible as of that date, therefore additional evidence is typically necessary to support a showing of public accessibility. . . . Collectively, all of the information provided by Petitioner shows only a copyright notice date and that, alone, is insufficient to support a threshold showing of public accessibility for QuarkXPress."); *see also Laird Techs. Inc. v. A.K. Stamping Co.*, IPR2017-02038, Paper 6 at 10 (PTAB Mar. 14, 2018); *Power Integrations, Inc. v. Semiconductor Components Indus., LLC*, IPR2017-01975, Paper 9 at 12–14 (PTAB Mar. 12, 2018); *Stryker Corp. v. Karl Storz Endoscopy-Am., Inc.*, IPR2015-00677, Paper 15 at 18–19 (PTAB Sept. 2, 2015) (discussing how a copyright notice "does not establish when a document was publicly accessible under patent law").

On the particular facts here, we determine that Petitioner has not satisfied the standard set forth in *Hulu* demonstrating the alleged public accessibility of the cited portions of the '369 Provisional Application. This, however, does not entirely end our inquiry, as Petitioner mainly relies on Nickerson and Error for ground 1 and Nickerson, Error, and Salle for ground 2, without including the '369 Provisional Application in the stated grounds. Pet. 23, 71. Petitioner's challenges appear to rely on the '369 Provisional Application to show that web-analytics functions discussed by Nickerson were widely available prior to the effective filing date of the '552 patent. *See, e.g.,* Pet. 40 (Petitioner arguing that "[a]s disclosed in at least the

Provisional Application, there were numerous web analytics services available on the market prior to the filing date of the '552 Patent that were capable of interfacing with a feedback system.").

Because we determine below that Petitioner has not established that a person of ordinary skill in the art would have understood the cited references alone or in combination disclose or teach all the limitations of claim 1, we do not need to decide if Petitioner's use of the '369 Provisional Application as prior art is fatal to its unpatentability challenges.

> *(2) Whether Nickerson teaches or discloses to a person of ordinary skill in the art, in element [1b], "cancel[ing] a transaction . . . or abandon[ing] the website based process"*

Patent Owner acknowledges that Nickerson teaches website owners receiving "real-time access to user feedback on all pages of their website." Prelim. Resp. 27. Patent Owner argues, however, that Nickerson simply teaches "automatically opening a comment window after a user 'exits a web page.'" *Id.* at 28. Patent Owner's point is that simply exiting a web page, which may occur for many different reasons, is not "prediction functionality" indicating that a user intends to "cancel a transaction . . . or abandon the website based process" as claim 1 requires. *Id.* at 28–29 (Patent Owner arguing *inter alia*, that "[a]t most, a user exiting a webpage might, in some circumstances, indicate the user had an intent to leave the webpage before exiting the webpage."). This is a fair point, as a user might exit a web page after a transaction is successful and complete, or exit during a transaction for reasons not related to canceling the transaction or process, e.g., to add other products to the transaction, and desiring to leave their pending transaction intact. *Id.* at 28.

The '552 patent describes Figure 2 as a "simplified flowchart indicating steps . . . for providing feedback on a user interaction session with *a website-based process*." Ex. 1001, 4:34–37 (emphasis added). Figure 2 illustrating steps for canceling a website-based business transaction process is reproduced below.

FIG. 2

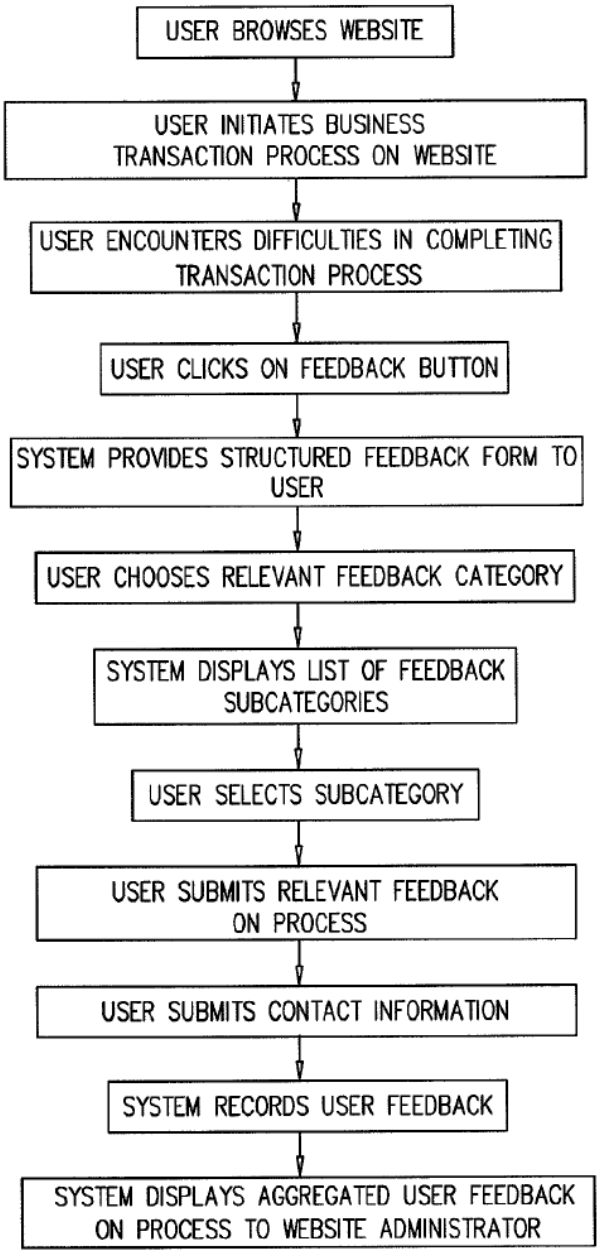


Figure 2 above, is a flow chart illustrating specific steps for "providing feedback on a user interaction session with a website-based process." *Id.* at 6:17–19. The second step, after "user browses website," is "user initiates business transaction process on website." From Figure 2, it is clear that the user is performing certain functionality, i.e. initiating a transaction process, in addition to simply browsing a website. This understanding is consistent with the written description of the '552 patent which states "[a]s seen in FIG. 2, a user browses a website *and* initiates a business transaction process on the website." *Id.* at 6:19–20.

Figures 3A–B of the '552 patent, reproduced below, illustrate a business transaction process occurring on a website.

FIG. 3A

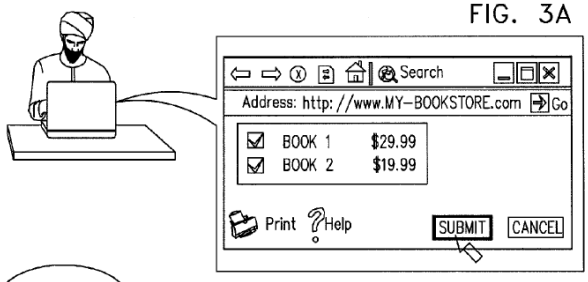


FIG. 3B

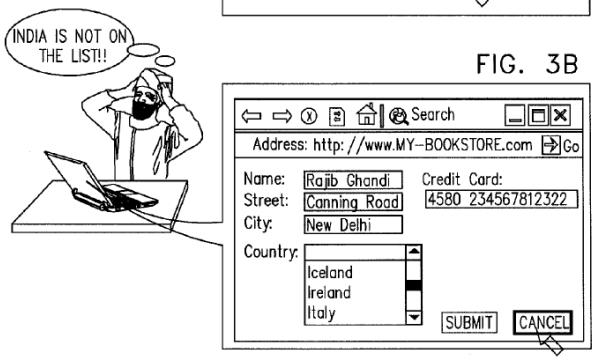
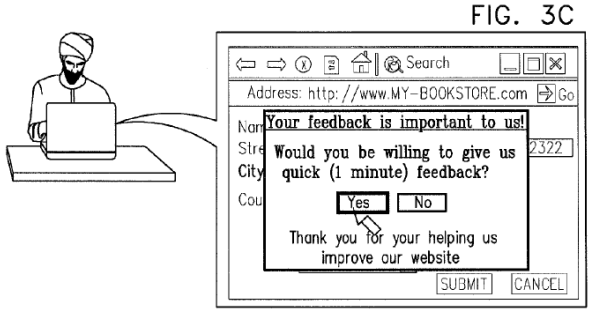


FIG. 3C



Figures 3A–C above, illustrate steps associated with a user canceling a business transaction, i.e., the purchase of two books, (Figs. 3A–B) and being presented with a request (Fig. 3C) to present feedback forms enabling the user to provide feedback on the website-based process. *Id.* at 4:38–41. As the '552 patent explains, when the user determines he cannot complete the book purchase, i.e. that he cannot receive the purchased books in India, "[t]he user therefore decides to terminate the transaction by clicking on the 'cancel' button." *Id.* at 6:46–47; Fig. 3B. In fact, in this example, the user does not even exit the website page, but is provided with the feedback forms superimposed on the website page. *See id.* at 6:47–49 ("As shown in FIG. 3C, upon canceling the transaction, the user is prompted by the system which requests that the user fill in a feedback form.").

Figures 5A–F illustrates a further example, a "structured feedback form for providing feedback on a user interaction session with a computer software installation process." *Id.* at 7:38–40. Figures 5B–C of the '552 patent are reproduced below.

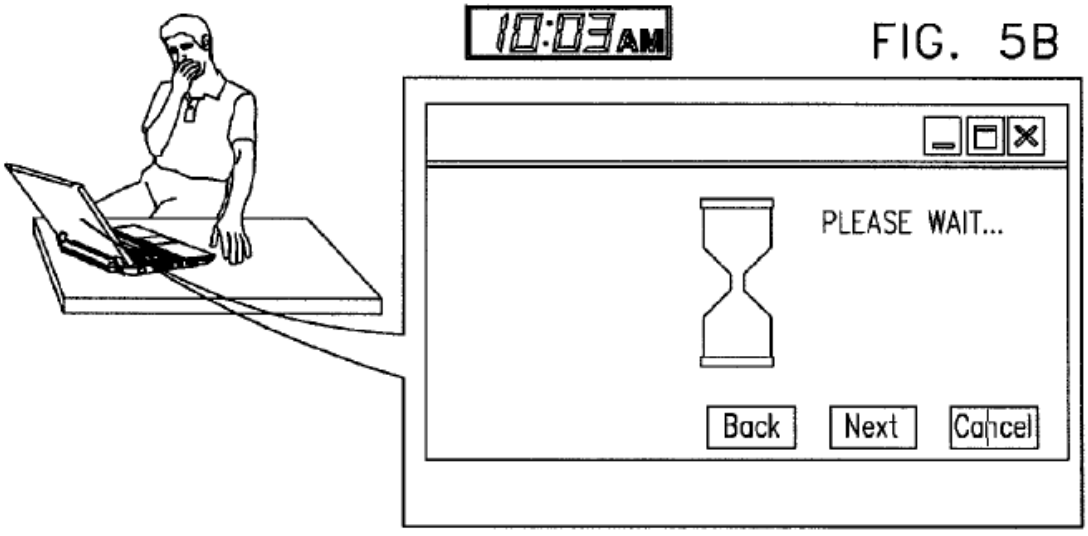


FIG. 5B

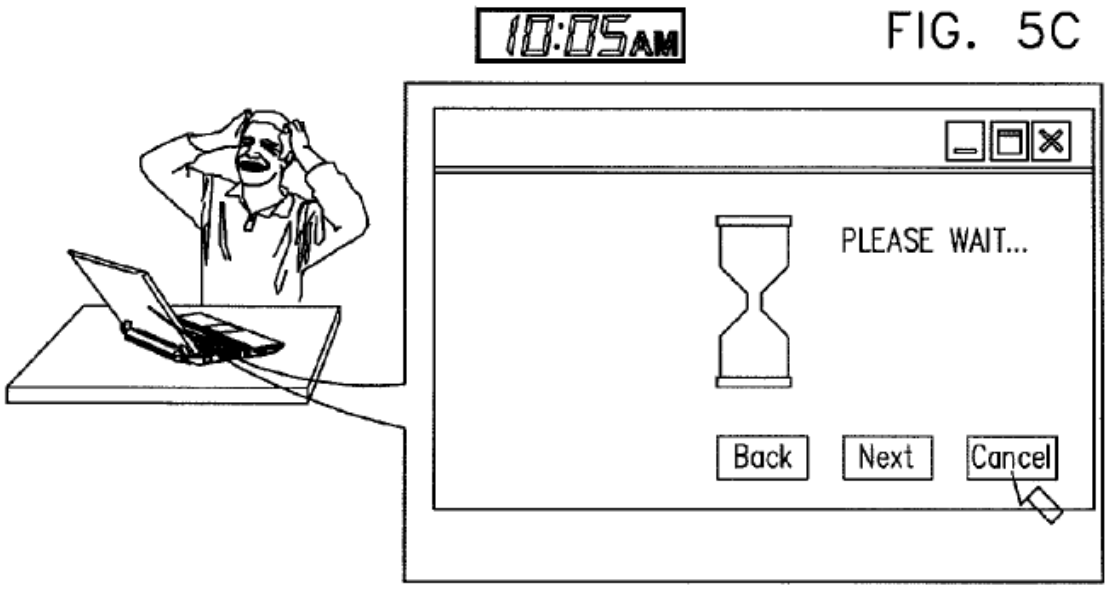


FIG. 5C

Figures 5B and 5C, above, illustrate the frustration a user might experience attempting to install software, and after waiting for several minutes, canceling the software installation. *See id.* at 7:53–55 ("The user therefore decides to terminate the software installation process by clicking on the 'cancel' button."). The '552 patent describes further that

> responsive to the user canceling the software installation process, the user is prompted by the software installation program, which requests that the user fill in a feedback form. Upon agreeing to fill in a feedback from, the system displays to the user a structured feedback form, as seen in FIG. 5E.

Id. at 7:55–60. Figure 5E of the '552 patent is reproduced below.

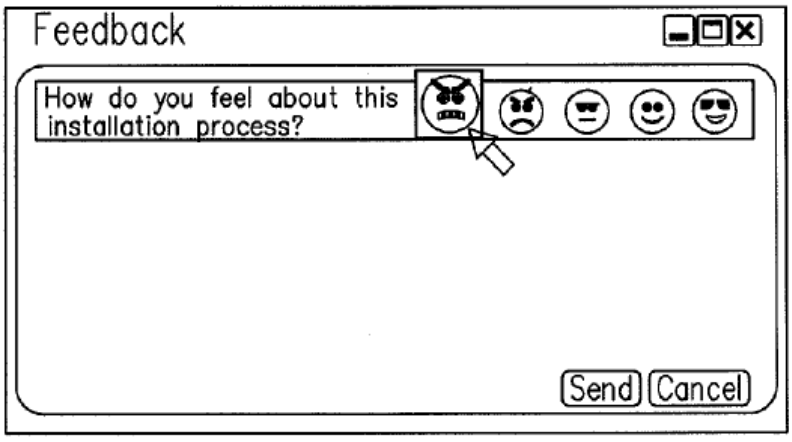


FIG. 5E

Figure 5E, above, depicts a structured feedback form displayed to the user, and the user choosing the angry face icon apparently to convey a lack of appreciation for the speed of the installation process.

The '552 patent consistently refers to "business transactions," "business transaction process," and "installation process," i.e., a software installation process. Ex. 1001, 5:31–44; 6:20–21; 7:16–23; Figs, 2, 4, 6, 7A–F, 8. A transaction or process is always described in the '552 patent as a specific function that occurs in addition to simply surfing the web or browsing a website by clicking in and out of web pages. For example, the '552 patent explains that "a user browses a web site *and* initiates a business transaction process on the website. Upon encountering difficulties in completing the transaction process, the user abandons the transaction." *Id.* at 7:20–23 (emphasis added). With respect to software installation processes, the '552 patent describes that "a user initiates a software installation process using a software installation program." *Id.* at 7:45–46. Importantly, the '552 patent never refers to simply web-browsing, or clicking in and out of web pages, for instance by closing a website window, as a specific "process" or "transaction" or even a prescient condition which initiates the presentation of a structured feedback form to a user.

> Claim 1, limitation [1b] recites in part:
>
> web site user cancellation or abandonment prediction functionality operative to determine, based on a website action of a given user, that the given user intends to *cancel a transaction associated with the website-based process* or *abandon the web site-based process*

Id. at 10:30–34 (emphases added). Reading the claim in light of the specification, it is clear that a "transaction" is a business transaction and that a "website-based process" is, for example, a business transaction process or

software installation process undertaken by a user in addition to web browsing. *See, e.g., id.* at 9:40–42 (the '552 patent describing "a user initiates a software installation process on a computer. However, the installation process fails to complete successfully, and the user chooses to submit feedback to the software vendor.").

Petitioner argues that the '552 patent teaches "leav[ing] a shopping cart page by clicking on the page's exit mechanism[], and, as a result of the action (e.g., manually canceling or leaving the page), a feedback window is automatically provided to the user . . .)". Pet. 30 (citing Ex. 1001, 6:33–49). But this is not entirely accurate. The '552 patent is replete with descriptions and examples that a user must do *more* than simply exit a web page. The citation to which Petitioner refers specifically describes the example in Figures 3A–F, that is, initiating a "business transaction process" and "decid[ing] to terminate the transaction by clicking on the 'cancel' button." Ex. 1001, 6:38–47. In fact, considering Figure 3C, it does not appear that when the transaction is canceled, that the user leaves or exits the transaction web page. Figure 3C, reproduced below, illustrates a structured feedback window overlaid on the transaction page.

FIG. 3C

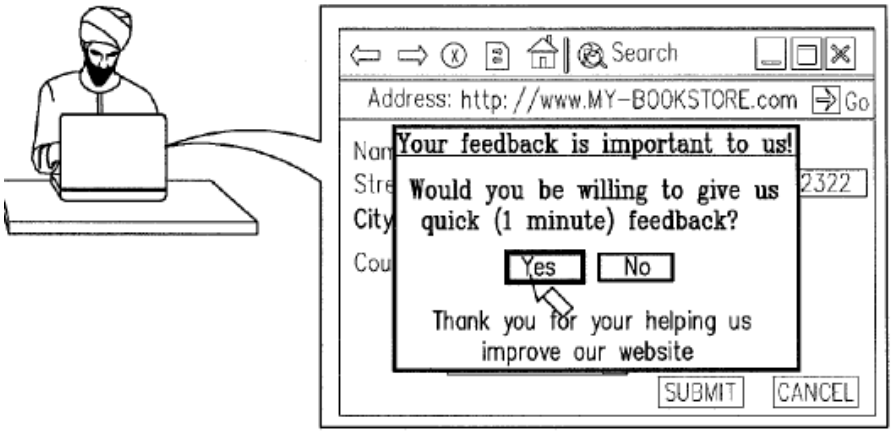


Figure 3C above, illustrates a feedback request window overlaid on the transaction web page. The written description of the '552 patent also does not describe that the business transaction web-page is exited, only that the transaction is canceled. *See, e.g., id.* at 6:47–49 ("upon canceling the transaction, the user is prompted by the system which requests that the user fill in a feedback form.").

Petitioner contends "that limitation 1[b] is satisfied when certain functionality determines, based on an action taken by the user (e.g., pressing "cancel" or actuating an "exit page" function), that the user "intends to cancel" a transaction or "intends… to abandon" a web page, and, as a result of either determination, a feedback window appears." Pet. 31. Based on our review of the '552 patent, we disagree. We find persuasive Patent Owner's position that Petitioner has not pointed out persuasive evidence in Nickerson that automatically appearing feedback forms are presented based on a prediction, or even an actual cancelation or abandonment of a website-based transaction or process. Prelim. Resp. 28.

Petitioner argues that Nickerson discloses a comment window automatically appearing when a user (a) accesses a web page, (b) exits a web page, or (c) remains at a web page for a certain point of time. *Id.* at 32 (citing Ex. 1005 ¶ 50). Yet this is not what the claim requires. As discussed above, the claim requires the additional functionality that the user "cancel a transaction associated with the website-based process or abandon the web site-based process," not simply exit a web page. *Id.* at 10:32–34. Dr. Balakrishnan testifies that

> [a] POSITA would have understood or at least found it obvious from this passage that there is some functionality in Nickerson's system that can at least determine or otherwise sense that the user is exiting the web page 28 or otherwise abandoning activity on

> the web page 28, otherwise there would be no way for these events to trigger the automatic appearance of the comment window.

Ex. 1002 ¶ 90. Dr. Balakrishnan testifies further that "[o]ne well-known way of exiting a web page is to actuate its 'close page' functionality, such as clicking on the 'X' button on the top right side of the graphical user interface in which the webpage is displayed." *Id.* We do not find Dr. Balakrishnan's testimony persuasive that "[w]hen a transaction is website-based, then exiting any web page 28 that is necessary to facilitate the transaction results in the transaction being abandoned and effectively canceled." *Id.* ¶ 91. Moreover, Error discuses that when surfing the web, a user's browsing path is not necessarily linear, and

> users have the ability to move from one page to another by various means, such as: clicking on links within pages; typing in Uniform Resource Locators (URLs); clicking on dedicated buttons in the browser (such as Back, Forward, and Home); or selecting from a list of favorites. In addition, users can open and close new browser windows at will.

Ex. 1007 ¶ 8. Error explains further that "users often take a somewhat wandering approach through pages of a website, including side trips and tangents . . . tangential pages may be part of the same web domain as the linear path, or they may be external to that domain." *Id.* ¶ 9.

Further, we cannot credit Dr. Balakrishnan's testimony that Nickerson's presentation of feedback forms upon closing a web page meets limitation [1b] because it is not supported by sufficient evidence. Dr. Balakrishnan testifies that from Nickerson "[a] POSITA would have understood that the user's act of exiting that 'checkout page' results in the shopping cart being abandoned and effectively cancels the on-going transaction." Ex. 1002 ¶ 91. Based on our reading, this is not an accurate

portrayal of Nickerson. Nickerson states that "the comment window may automatically appear in response to user 16 accessing web page 28, exiting web page 28, or remaining at web page 28 for at least a certain period of time." Ex. 1005 ¶ 50. In our view, Nickerson does not presume that a user exiting a webpage is canceling or abandoning an ongoing website-based business transaction or software installation process. And Dr. Balakrishnan's testimony that "[i]n Nickerson, exiting that transaction page results in a comment window automatically appearing to the user," does not explain sufficiently how or why a person of ordinary skill in the art would have inferred "that the given user intends to cancel a transaction associated with the website-based process or abandon the web site-based process" as recited in claim 1. Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight. 37 C.F.R. § 42.65(a).

The '552 patent has a clear and unequivocal focus on canceling or abandoning a business transaction process or other website-based process such as a software installation, that is, in our view, consistent with the plain and ordinary meaning of claim 1. *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364 (Fed. Cir. 2004) (Claim limitations must be read "in light of the specification as it would be interpreted by one of ordinary skill in the art."). Nowhere in Nickerson or Error do we discern, nor has Petitioner and its declarant shown persuasively, that the cited disclosures teach or disclose to a person of ordinary skill in the art, the functionality of "cancel[ing] a transaction associated with the website-based process or abandon[ing] the web site-based process," as recited in claim 1. Nor does Petitioner's reliance on the testimony of Dr. Balakrishnan relieve our concerns with Nickerson's disclosure, as much of the testimony merely parrots, essentially verbatim,

the arguments in the Petition. *Compare* Ex. 1002 ¶ 90, *with* Pet. 32. Dr. Balakrishnan's declaration does not provide any facts, data, or analysis to support the opinion stated. Merely repeating an argument from the Petition in the declaration of a proposed expert, does not give that argument enhanced probative value. Accordingly, we give the cited evidence of Dr. Balakrishnan's declaration little probative weight.

In the end, because the asserted combination of Nickerson and Error lacks at least the "cancel a transaction associated with the website-based process or abandon the web site-based process" limitation of claim 1, we determine that the Petition fails to support a reasonable likelihood that claim 1 is unpatentable as obvious over Nickerson and Error. And because Petitioner's challenge of dependent claims 2–8 suffers the same deficiency, we likewise determine that Petitioner falls short in demonstrating a reasonable likelihood that those dependent claims are unpatentable as obvious over Nickerson and Error.

5. Claims 9–19

Independent claim 9, as well as independent claim 19, are both method claims, and both include a similarly worded limitation to [1b]. Claims 9 and 19 recite the step of:

> determining, based on a web site action of a given user, that the given user intends to cancel a transaction associated with the website-based process or abandon the website-based process;

Ex. 1001, 11:39–42. For the same reasons as discussed above relative to claim 1, we are not persuaded that the Petition supports a reasonable likelihood that claims 9 and 19 are unpatentable as obvious over Nickerson and Error. Petitioner's challenge of dependent claims 10–18 suffers the same deficiency, and we likewise determine that Petitioner falls short in

demonstrating a reasonable likelihood that those dependent claims are unpatentable as obvious over Nickerson and Error.

E. Ground 2: Claims 1–19 – Alleged Obviousness over Nickerson Error, and Salle

Petitioner explains that "Salle is relied on for the limited purpose of disclosing '**prediction functionality**' for determining if users are having difficulty completing a transaction and intend to cancel or abandon the transaction." Pet. 21 (citing Ex. 1006 ¶ 36) (alteration in original). Petitioner does not allege nor rely on Salle to teach the "cancel a transaction associated with the website-based process or abandon the website-based process" as recited in each of independent claim 1, 9, and 19.

For the same reasons as discussed above relative to claim 1 in view of Nickerson and Error, we are not persuaded that the Petition supports a reasonable likelihood that claims 1, 9, and 19 are unpatentable as obvious over Nickerson, Error, and Salle. Petitioner's challenges of dependent claims 2–8 and 10–18 suffer the same deficiency, and we likewise determine that Petitioner falls short in demonstrating a reasonable likelihood that those dependent claims are unpatentable as obvious over Nickerson, Error, and Salle.

III. CONCLUSION

For the above reasons, we decline to institute *inter partes* review of any of the challenged claims of the '552 patent.

IV. ORDER

Accordingly, it is:

ORDERED that the Petition is denied.

PETITIONER:

Megan Thisse O'Gara
Nicholas J. Gallo
TROUTMAN PEPPER HAMILTON SANDERS LLP
Megan.OGara@Troutman.com
Nicholas.Gallo@Troutman.com

PATENT OWNER:

Daniel B. Ravicher
Ognjan V. Shentov
ZEISLER PLLC
dan@zeisler-law.com