

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ARASHI VISION (U.S.) LLC (D/B/A INSTA360),
Petitioner,

v.

GOPRO, INC.,
Patent Owner.

IPR2024-01434
Patent D789,435 S

Before JENNIFER S. BISK, KIMBERLY MCGRAW, and
ROBERT L. KINDER, *Administrative Patent Judges*.

BISK, *Administrative Patent Judge*.

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

I. INTRODUCTION

A. *Background and Summary*

On September 26, 2024,¹ Arashi Vision (U.S.) LLC (d/b/a Insta360) (“Petitioner”) filed a Petition (Paper 1, “Pet.”) requesting *inter partes* review of the single claim of U.S. Patent No. D789,435 S (Ex. 1001, “the ’435 patent”) pursuant to 35 U.S.C. § 311(a). GoPro, Inc. (“Patent Owner”) filed a Preliminary Response. Paper 8 (“Prelim. Resp.”).

Pursuant to 35 U.S.C. § 314(a), the Director may not authorize an *inter partes* review unless the information in the petition and preliminary response “shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.”

After considering the parties’ arguments and the evidence of record, we determine that Petitioner has not demonstrated a reasonable likelihood that it would prevail in challenging the patentability of the ’435 patent’s claim. Thus, we do not institute an *inter partes* review.

B. *Real Parties-in-Interest*

Petitioner identifies “Arashi Vision Inc. (d/b/a Insta360)” as its only real party-in-interest. Pet. 129. Patent Owner identifies itself, “GoPro, Inc.,” as its only real party-in-interest. Paper 4, 1. Nothing in the record challenges these assertions. *See generally* Pet.; Prelim. Resp.

C. *Related Matters*

Petitioner indicates that Patent Owner asserted the ’435 patent twice. First, on March 29, 2024, Patent Owner filed a complaint in the United

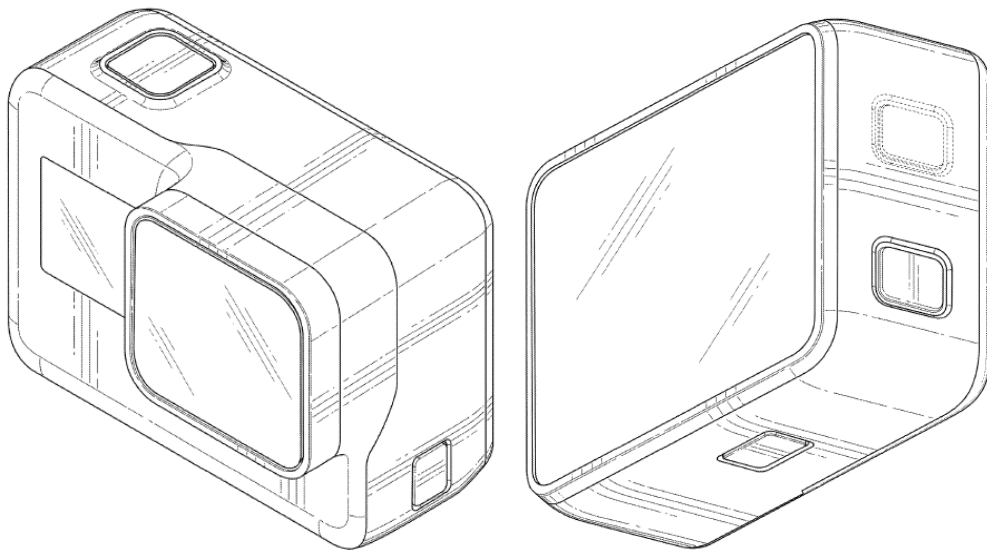
¹ On October 10, 2024, the PTAB accorded the Petition September 26, 2024, as the filing date. Paper 3.

States International Trade Commission (“USITC”). Pet. 129 (citing *In the Matter of Certain Cameras, Camera Systems, and Accessories Used Therewith*, Inv. No. 337-TA-1400 (USITC)). Second, on the same day, Patent Owner initiated a case in the Central District of California against Petitioner. *Id.* (citing *Go Pro, Inc. v. Arashi Vision Inc.*, No. 8:24-cv-00681-HDE-JCV (C.D. Cal.)). Patent Owner agrees. Paper 4, 1.

D. The ’435 Patent

The ’435 patent, titled “CAMERA,” issued June 13, 2017. Ex. 1001, codes (22), (45), (54). The claim recites “[t]he ornamental design for a camera, as shown and described.” *Id.* at code (57).

The ’435 patent includes ten figures. Figures 3 and 4 are reproduced below.



Ex. 1001. Figure 3, above left, is “a front, top, and right side perspective view” and Figure 4, above right, is “a rear, bottom, and left side perspective view” of the claimed camera. *Id.*

E. Asserted Challenges to Patentability

Petitioner refers to five articles, collectively, as “Hero4,” including “Maker²,” “DP Review³,” “Stoilov⁴,” “Gigazine⁵,” and “Amazon⁶” (“the Hero4 articles”).

Petitioner asserts that the ’435 patent is unpatentable based on the following grounds.⁷

² R. Maker, *GoPro Hero4 Silver & Hero4 Black In-Depth Review*, DC Rainmaker (Nov. 1, 2014). Ex. 1004. Petitioner asserts that Maker was archived Nov. 14, 2014. Pet. 15.

³ Digital Photography Review, *GoPro announces Hero4 lineup*, Digital Photography Review (Sept. 29, 2014). Ex. 1006. Petitioner asserts that DP Review was archived Oct. 1, 2014. Pet. 15.

⁴ Stoilov, *GoPro Hero4 Official Specs: 4K/30fps, Built-in Touch Screen, 1080/120fps*, 4K Shooters (Sept. 26, 2014). Ex. 1008. Petitioner asserts that Stoilov was archived Oct. 1, 2014. Pet. 16.

⁵ Gigazine, *I tried 4K shooting with the new “GoPro HERO4” Black and Silver Review*, Gigazine (Oct. 31, 2014). Ex. 1010.

⁶ Amazon, *GoPro Hero4 Silver*, Amazon (Oct. 3, 2014). Ex. 1011. Petitioner asserts that Amazon was archived Oct. 3, 2014. Pet. 16.

⁷ Petitioner styles these rejections as six Grounds. However, based on the table of grounds, the section titles and the corresponding argument, there are a total of at least 24 proposed grounds. *See* Pet. 17–126; Prelim. Resp. 4. We discuss the number of asserted grounds in more detail in Section II.A.

Ground # ⁸	Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
1	1	103 ⁹	Hero4, Huang ¹⁰
1	1	103	Hero4, Heo ¹¹
2	1	103	Gioscia, ¹² Huang
2	1	103	Gioscia, Heo
3	1	103	Chen680, ¹³ Huang
3	1	103	Chen680, Heo
3	1	103	Chen680, Huang, Li ¹⁴
3	1	103	Chen680, Heo, Li
3	1	103	Chen680, Huang, McVicker ¹⁵

⁸This table recites the ground numbers recited in the Petition, which correspond to one ground per primary reference. Although, as noted, we do not agree with Petitioner that there are a total of only six grounds, for convenience and clarity we refer to Petitioner’s title and analyze the grounds by grouping all rejections with the same primary reference together.

⁹ 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 effective filing date is after that date (*See* Section II.B), the AIA version of § 103 applies.

¹⁰ Certified English Translation of Chinese Design Pub. No. 303440022 published November 11, 2015. Ex. 1021. Original can be found in Exhibit 1020.

¹¹ Certified English Translation of Korean Design Pub. No. 300792432 published April 16, 2015. Ex. 1024. Original can be found in Exhibit 1023.

¹² U.S. Patent No. D710,921 issued August 12, 2014. Ex. 1013.

¹³ U.S. Patent No. D750,680 issued March 1, 2016. Ex. 1014.

¹⁴ Certified English Translation of Chinese Utility Model Patent Application Pub. No. 303358967 published September 2, 2015. Ex. 1027. Original can be found in Exhibit 1026.

¹⁵ U.S. Patent No. 9,864,258 issued January 9, 2018. Ex. 1029.

Ground # ⁸	Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
3	1	103	Chen680, Heo, McVicker
4	1	103	Wang, ¹⁶ Huang
4	1	103	Wang, Heo
4	1	103	Wang, Huang, Li
4	1	103	Wang, Heo, Li
4	1	103	Wang, Huang, McVicker
4	1	103	Wang, Heo, McVicker
5	1	103	Chen686, ¹⁷ Huang
5	1	103	Chen686, Heo
5	1	103	Chen686, Huang, Li
5	1	103	Chen686, Huang, McVicker
5	1	103	Chen686, Heo, Li
5	1	103	Chen686, Heo, McVicker
6	1	103	Woodman, ¹⁸ Huang
6	1	103	Woodman, Heo

In support of its patentability challenge, Petitioner relies on, *inter alia*, the Declaration of Peter Bressler. Ex. 1002 (“Bressler Decl.”).

A. Law of Obviousness

The Federal Circuit issued an *en banc* decision updating the standards for assessing nonobviousness of design patents under 35 U.S.C. § 103. *LKQ Corp. v. GM Glob. Tech. Operations LLC*, 102 F.4th 1280 (Fed. Cir. 2024)

¹⁶ English Translation of Chinese Pub. No. 204360078 published May 7, 2015. Ex. 1016. Original can be found in Exhibit 1015.

¹⁷ U.S. Patent No. D750,686 issued March 1, 2016. Ex. 1018.

¹⁸ U.S. Patent No. D702,747 issued April 15, 2014. Ex. 1019.

(en banc).¹⁹ In *LKQ*, the Federal Circuit stated that “the *Rosen-Durling* test requirements—that (1) the primary reference be ‘basically the same’ as the challenged design claim; and (2) any secondary references be ‘so related’ to the primary reference that features in one would suggest application of those features to the other—are improperly rigid.” *Id.* at 1293; *see also In re Rosen*, 673 F.2d 388 (CCPA 1982); *Durling v. Spectrum Furniture Co., Inc.*, 101 F.3d 100 (Fed. Cir. 1996). Instead, the Court held that “[i]nvalidity based on obviousness of a patented design is determined [based] on factual criteria similar to those that have been developed as analytical tools for reviewing the validity of a utility patent under § 103, that is, on application of the *Graham* factors.” *LKQ*, 102 F.4th at 1295. According to *Graham*, the question of obviousness is resolved on the basis of 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 skill in the art; and (4) when in evidence, objective evidence of obviousness or nonobviousness, i.e., secondary considerations (“the *Graham* factors”). *See Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966).

¹⁹ In May 2024, the U.S. Patent and Trademark Office (USPTO) published updated guidance on examination instructions for assessing nonobviousness of design patents. *See Updated Guidance and Examination Instructions for Making a Determination of Obviousness in Designs in Light of LKQ Corp. v. GM Global Technology Operations LLC*, available at https://www.uspto.gov/sites/default/files/documents/updated_obviousness_determination_designs_22may2024.pdf (May 22, 2024) (“2024 Updated Guidance”). The Director has instructed that Board decisions addressing obviousness in the design patent context must follow the *LKQ* decision. *See 2024 Updated Guidance*, 3.

In *LKQ*, the Federal Circuit provided guidance as to how to apply the *Graham* factors in assessing nonobviousness of design patents. The Court stated that, in “[a]pplying *Graham* factor one, the fact finder should consider the ‘scope and content of the prior art’ within the knowledge of an ordinary designer in the field of the design.” *LKQ*, 102 F.4th at 1295–96. In applying this factor, “a primary reference must be identified.” *Id.* at 1298. The primary reference is generally the closest prior art that is most visually similar to the claimed design, but does not need to be “‘basically the same’ as the claimed design.” *Id.* at 1294, 1298. According to the Federal Circuit, “[t]he primary reference will typically be in the same field of endeavor as the claimed ornamental design’s article of manufacture, but it need not be, so long as it is analogous art.” *Id.* at 1298.

As to *Graham* factor two, which requires “determining the differences between the prior art designs and the design claim at issue,” the Federal Circuit explains that we are to “compare the visual appearance of the claimed design with prior art designs, albeit from the perspective of an ordinary designer in the field of the article of manufacture.” *Id.*

Under *Graham* factor three, “the level of ordinary skill in the pertinent art [must be] resolved.” *Id.* at 1298–99 (brackets in original). In “the design patent context, . . . ‘a person of ordinary skill in the art to which the invention pertains’ in § 103 [means] that obviousness of a design patent claim is assessed from the viewpoint of an ordinary designer in the field to which the claimed design pertains.” *Id.* at 1299.

Finally, in applying *Graham* factor four, we assess any secondary considerations, such as commercial success, industry praise, and copying.²⁰ *Id.* at 1300.

We analyze the asserted grounds with the above-noted principles in mind.

II. ANALYSIS

“In an [*inter partes* review], the petitioner has the burden from the onset to show with particularity why the patent it challenges is unpatentable.” *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1363 (Fed. Cir. 2016) (citing 35 U.S.C. § 312(a)(3) (requiring *inter partes* review petitions to identify “with particularity . . . the evidence that supports the grounds for the challenge to each claim”)); *see also* 37 C.F.R. § 42.104(b) (requiring a petition for *inter partes* review to identify how the challenged claim is to be construed and where each element of the claim is found in the prior art patents or printed publications relied upon).

“Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor, subject to the conditions and requirements of this title.” 35 U.S.C. § 171(a). These requirements include that the design be novel and nonobvious. 35 U.S.C. §§ 102, 103; *see also* 35 U.S.C. § 171(b) (“The provisions of this title relating to patents for inventions shall apply to patents for designs, except as otherwise provided.”).

²⁰ The present record does not contain any arguments directed to secondary considerations.

A. Discretionary Denial

We are authorized to institute an *inter partes* review where a petition demonstrates a reasonable likelihood that the petitioner would prevail with respect to at least one challenged patent claim. 35 U.S.C. § 314(a). We are never compelled, however, to institute a review. *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1367 (Fed. Cir. 2016). We may exercise our discretion to deny review, for example, where a petition fails to identify “with particularity” the challenges or evidence supporting them. *Id.* at 1363; 35 U.S.C. § 312(a)(3). Our reviewing court describes this particularity requirement as “of the utmost importance.” *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369 (Fed. Cir. 2016). “Even when a petitioner demonstrates a reasonable likelihood” of prevailing with respect to at least one patent claim, institution of review “remains discretionary.” *Adaptics Limited v. Perfect Co.*, IPR2018-01596, Paper- 20 at 17 (PTAB Mar. 6, 2019) (informative).

We agree with Patent Owner that although the Petition purports to raise six grounds of unpatentability, those asserted grounds encompass at least 24 individual challenges.²¹ Prelim. Resp. 4–7. Each primary reference is combined with the secondary references such that each purported ground

²¹ For our analysis, we presume the Petition to raise 24 grounds, as listed in Section I.E. However, we agree with Patent Owner that the Petition is not perfectly clear as to whether the combinations relied upon are true alternative grounds or if they include even more combinations, including, for example, Chen686 with Huang *and* Heo or Li *and* McVicker. Prelim. Resp. 4–5 n.1. To the extent Petitioner intended the panel to consider such combinations, we find the Petition does not adequately present these grounds. We note, however, that inclusion of those additional grounds would not affect our analysis or conclusions.

includes either at least two or six separate grounds. *See* Pet. 41–126. We also agree with Patent Owner that, by collapsing the at least 24 discrete obviousness challenges into six putative grounds, Petitioner makes difficult any meaningful explanation of the individual challenges. *Id.* As explained by Patent Owner, “[d]espite indicating alternatives in the section headings, . . . in the discussion of the grounds, the paired references are often discussed together and relied on for multiple aspects of the claim.” Prelim. Resp. 4.

These deficiencies in analysis raise the question of whether the Petition adequately identifies the number of actual challenges, and evidence supporting each, with the degree of particularity required of petitions in our forum. The Petition does not explain why so many grounds are necessary under the circumstances or why the Board should impose on Patent Owner the burden of defending against so many challenges. *See generally* Pet. An *inter partes* review based on 24 distinct grounds raised against a single claim, supported by analysis lacking in particularity, potentially burdens Patent Owner unduly and makes inefficient use of the Board’s resources. *See* PTAB Consolidated Trial Practice Guide (Nov. 2019),²² 56 (“The AIA was ‘designed to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.’” (quoting H.R. Rep. No. 112–98, pt. 1, at 40 (2011), 2011 U.S.C.C.A.N. 67, 69 (Post grant reviews were meant to be “quick and cost effective alternatives to litigation”))). Because we understand enough of the Petition’s analysis to address each group of asserted grounds on the merits, we decline to exercise our discretion to deny institution based solely on this issue.

²² Available at <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

B. Effective Filing Date

The '435 patent claims priority to applications filed on November 17, 2015, and February 16, 2016. Ex. 1001, code (63). Petitioner relies on the oldest claimed date, November 17, 2015, for purposes of this Petition. Pet. 10–11 (citing Bressler Decl. ¶ 6). Patent Owner agrees. Prelim. Resp. 2.

C. Designer of Ordinary Skill in the Art

We review the grounds of unpatentability in view of the understanding of a designer of ordinary skill in the art at the time of the invention. *LKQ*, 102 F.4th at 1299 (stating “[i]n design cases we will consider the fictitious person identified in § 103 as ‘one of ordinary skill in the art’ to be the designer of ordinary capability who designs articles of the type presented in the application.”) (quoting *In re Nalbandian*, 661 F.2d 1214, 1216 (CCPA 1981)) (citing *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966)).

Petitioner submits that a designer of ordinary skill in the art at the time of the invention would have had “a bachelor’s degree in industrial design or an equivalent field, or two years of experience designing cameras or camera housings.” Pet. 11 (citing Bressler Decl. ¶¶ 22–24). Patent Owner does not dispute this proposed definition. *See generally* Prelim. Resp.

For purposes of this Decision, we adopt Petitioner’s uncontested proposal regarding a designer of ordinary skill in the art. *See* Bressler Decl. ¶¶ 22–24.

D. Claim Construction

In an *inter partes* review proceeding, we construe a claim of a patent “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).” *See* 37 C.F.R.

§ 42.100(b). For design cases, the Federal Circuit holds that tribunals “should not treat the process of claim construction as requiring a detailed verbal description of the claimed design, as would typically be true in the case of utility patents.” *LKQ*, 102 F.4th at 1301 (quoting *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 680 (Fed. Cir. 2008) (en banc)). According to the Federal Circuit, “a design is better represented by an illustration.” *Egyptian Goddess*, 543 F.3d at 679.

In its claim construction section, Petitioner states that the ’435 patent “encompasses a rectangular body with flat faces, a rectangular lens cover extending outward from the front of the body, rectangular buttons/access elements, and rectangles for displays” and “[a]s a whole . . . gives an ordinary designer an overall visual impression of a rectangular design for a camera/camera housing.” Pet. 12 (citing Bressler Decl. ¶¶ 25–26). These descriptions are incredibly general and do not provide an adequate understanding of the overall visual appearance of the claimed design. Moreover, we do not find them helpful in our analysis and, therefore, do not adopt them as a claim construction.

Patent Owner does not explicitly address claim construction. *See generally*, Prelim. Resp.

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; *cf. High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1314–15 (Fed. Cir. 2013) (remanding to the district court, in part, for a “verbal description of the claimed design to evoke a visual image consonant with that design”). We provide the

following description, therefore, not as a claim construction, but simply to point out various features of the claimed camera and its overall visual impression in order to aid our analysis.

The drawings depict a rectangular camera with flat faces and several rectangular features, including, (1) on the front side, a protruding lens²³ on the top right and a smaller display area to the left of the lens, (2) a display area that covers almost the entirety of the rear side, (3) a protruding button centered on the top left, (4) a button centered on the bottom, and (5) a button near the bottom of the left and right sides. *See* Ex. 1001 (“The broken lines depict portions of the camera in which the design is embodied that form no part of the claimed design.”). The overall shape of the claimed camera is rectangular with rounded corners. That same shape, with corners having curves with the same radius, is echoed in the shape of the lens and buttons on each side of the camera. The front view of the camera is dominated by the conspicuous protruding lens, which has top and right edges contiguous with the top and right side of the camera, where the remaining bottom and left side of the protruding lens taper outward as it approaches the camera body to give the appearance of a more uniform surface. Taken together, the design, as a whole, communicates a sleek and modern impression that is rectangular, but not boxy.

²³ For convenience, we refer to the feature on the ’435 patent’s design that appears to be a housing for a lens along with the lens itself as simply the “lens.”

E. The Asserted Prior Art

1. Hero4

Under 35 U.S.C. § 311(b), a petitioner in an *inter partes* review may request to cancel a claim as unpatentable “only on the basis of prior art consisting of patents or printed publications.” The “burden is on the petitioner 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, 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 16 (PTAB Dec. 20, 2019) (precedential); *see also, e.g., Symantec Corp. v. Trustees of Columbia Univ.*, Case No. IPR2015-00371, Paper 13, 5, 9 (PTAB June 17, 2015) (denying institution where the Petition failed to include discussion or cite to evidence sufficient to show that the asserted reference was a prior art printed publication).

Whether a reference qualifies as a “printed publication” involves a case-by-case inquiry into the facts and circumstances surrounding the reference’s disclosure to members of the public. *Acceleration Bay, LLC v. Activision Blizzard Inc.*, 908 F.3d 765, 772 (Fed. Cir. 2018). The key inquiry is whether the reference was made “sufficiently accessible to the public interested in the art” before the effective filing date. *In re Lister*, 583 F.3d 1307, 1311 (Fed. Cir. 2009). While indexing is not required to show that a work is publicly accessible, “some evidence that a person of ordinary skill could have reasonably found the website and then found the reference [(e.g., the specific webpage)] on that website is critical.” *Samsung Elecs. v. Infobridge Pte. Ltd.*, 929 F.3d 1363, 1369 (Fed. Cir. 2019). It is not

sufficient that a webpage simply existed on the critical date. *See Acceleration Bay*, 908 F.3d at 772–74 (affirming Board decision that a reference uploaded to a website was not a printed publication under § 102).

Petitioner asserts that each of the Hero4 articles was publicly available on “well-known, public, searchable” websites that were “intended to reach a wide audience” by at least November 15, 2014. Pet. 17–18 (parentheticals omitted). Mr. Bressler testifies that he is “personally familiar with these websites” and supports Petitioner’s assertion that the websites would have been known to an ordinary designer who “would have located the information posted on these websites with reasonable diligence.” Bressler Decl. ¶ 43. According to Mr. Bressler, “an ordinary designer would have relied on the dates posted on the publications,” which were all before November 15, 2014. *Id.* ¶ 44.

Patent Owner argues that Petitioner fails to sufficiently show that the five articles that make up Hero4 are prior art printed publications available prior to the effective date. Prelim. Resp. 7–14. According to Patent Owner, Mr. Bressler does not testify that he has any personal knowledge of the five articles themselves or their dates of publication. *Id.* at 8. Instead, Mr. Bressler “simply identifies alleged dates of publication provided on the articles themselves.” *Id.* Although Mr. Bressler refers to Wayback Machine affidavits (Exhibits 1005, 1007, 1009, and 1012), because these affidavits were not cited in the brief, Patent Owner asserts they should not be considered. *Id.* at 9 (citing Bressler Decl. ¶ 44). Even if considered, Patent Owner argues that these affidavits are insufficient to prove public accessibility of the documents.

We agree with Patent Owner that, even considering the Wayback Machine affidavits as properly part of the brief, these affidavits are not sufficient to show that each of the five articles making up Hero4 were publicly available prior to November 15, 2014. For example, both Exhibits 1006 and 1011 appear to have different content than the document attached to the corresponding Wayback Machine affidavit. *See* Prelim. Resp. 13.

Specifically, Exhibit 1006 contains links and comments dated subsequent to 2014. Ex. 1006, 2–3 (referencing articles dated July 2024), 9 (comments dated May 2024). This document appears to have been printed from the Internet much more recently than 2014. More significantly, Exhibit 1006 contains high quality color photos, but the attested copy of the allegedly corresponding website is in black and white with grainy photos. *Compare* Ex. 1006 with Ex. 1007 App. A. The difference in content, along with the difference in quality of the photos, makes it difficult to tell if the photographs relied upon by Petitioner in Exhibit 1006 are identical to those in the attested copy.

Similarly, the images shown in Exhibit 1011 and relied upon by Petitioner for its analysis, do not appear to be equivalent to those shown in the attested alleged copy of that website. *Compare, e.g.,* Ex. 1011, 1; Ex. 1012 App. A 5. As noted by Petitioner, the “front View,” relied upon by Petitioner, is shown, if at all, in the attested document as a poor quality thumbnail. Pet. 13 n.5. Also, like Exhibit 1006, Exhibit 1011 contains references to dates subsequent to 2014 (*see* Ex. 1010, 25–26), indicating it is a much more recent printout of the website.

Exhibit 1010 is even more problematic as, in addition to including indication that it was captured in 2024 (*see* Ex. 1010, 24), it does not appear to have a corresponding Wayback Machine Affidavit. *See* Bressler Decl. ¶ 44 (discussing Exhibit 1010 without a corresponding citation to a Wayback Machine Affidavit). Patent Owner states that “[a]n attempt to locate the webpage [using the URL listed in Petitioner’s exhibit list] on the Wayback Machine returned a message that ‘This URL has been excluded from the Wayback Machine.’” Prelim. Resp. 12 (citing Ex. 2001).

Based on this record, we find that Petitioner has not met its burden to show that any of the material contained in at least Exhibits 1006, 1010, and 1011 constitute printed publication prior art to the ’435 patent *Jazz Pharms., Inc. v. Amneal Pharms., LLC*, 895 F.3d 1347, 1356 (Fed. Cir. 2018) (“As the IPR petitioner, Amneal had the burden to prove that a particular reference is a printed publication”). Moreover, as noted by Patent Owner, Petitioner does not specifically identify either Exhibit 1004 or Exhibit 1008 as the source of any particular images in presenting the HERO4 ground. *Id.* at 7–8 n.3 (citing Pet. 41–53). Thus, Petitioner has not adequately shown that Exhibits 1004 and 1008 contribute to a finding of obviousness of the claimed invention.

Moreover, even if we were to consider the Hero4 articles proper prior art references, we agree with Patent Owner that Petitioner has not sufficiently explained why or how the Hero4 articles should be combined to create a “something in existence.” Prelim Resp. 20–25 (citing *LKQ*, 102 F.4th at 1298 (explaining that a primary reference needs to be “something in existence—not . . . something that might be brought into existence by selecting individual features from prior art and combining them, particularly where combining them would require modification of every individual

feature’’)). As noted by Patent Owner, the Hero4 articles appear to describe two separate products—Hero4 Black and Hero4 Silver. *Id.*; Ex. 1006, 2 (describing the photo as “HERO4 Black”); Ex. 1011 (naming the product “GoPro HERO4 Silver” and including buttons for two versions “Black Edition” and “Silver Edition”). Petitioner has not shown that these two products are identical. *See* Prelim Resp. 23 (noting differences between the two products).

Even if Hero4 can be considered a single product, the alleged ground for purposes of this proceeding does not rely on the Hero4 product itself, but instead the references depicting the product. *See* 35 U.S.C. § 311(b) (restricting *inter partes* review petitions to proposing grounds “only on the basis of prior art consisting of patents or printed publications”). Petitioner has not even addressed, much less shown a reasonable likelihood of showing, that a person of ordinary skill would have combined these five references, from five different websites, referring to two different versions of the Hero4 product, to create a single primary reference.

Because Petitioner has not sufficiently shown Hero4 to be a qualifying primary reference, we do not further address Petitioner’s Ground 1. Even if we were to address this ground on the merits, our outcome would be the same as set forth below in Section II.F.3 addressing the primary reference of Gioscia. Gioscia, which is also owned by Petitioner, appears to have a very similar design to the camera pictured in the Hero4 articles. *Compare* Pet. 41–53 (discussing the Hero4 proposed ground of rejection and showing the front (*id.* at 42), rear (*id.* at 43), top and left (*id.* at 44–45), right (*id.* at 47), and left (*id.* at 50–51) of Hero4), *with* Pet. 53–69 (discussing the Gioscia proposed ground of rejection and showing the front (*id.* at 54, rear (*id.* at

55), top (*id.* at 62), left (*id.* at 57–58), right (*id.* at 60), and left (*id.* at 66) of Gioscia). Petitioner’s analysis of the Hero4 ground, therefore, suffers from the same deficiencies discussed below with respect to Gioscia.

2. *Remaining Primary References*

In addition to Hero4, the Petition relies on five other primary references—Gioscia, Chen680, Wang, Chen686, and Woodman. Each of these references will be discussed in the obviousness analysis below.

3. *Secondary References*

Petitioner asserts that the D’435 patent would have been obvious over various combinations of the six primary references with four “secondary references,” Huang, Heo, Li, and McVicker. Pet. 33–37, 41–126.

a. *Huang*

Huang, relied upon by Petitioner as a secondary reference, is a Chinese Utility Model Patent application publication titled “Camera,” published November 11, 2015. Ex. 1021, codes (45), (54). All six photos included in Huang are reproduced below.

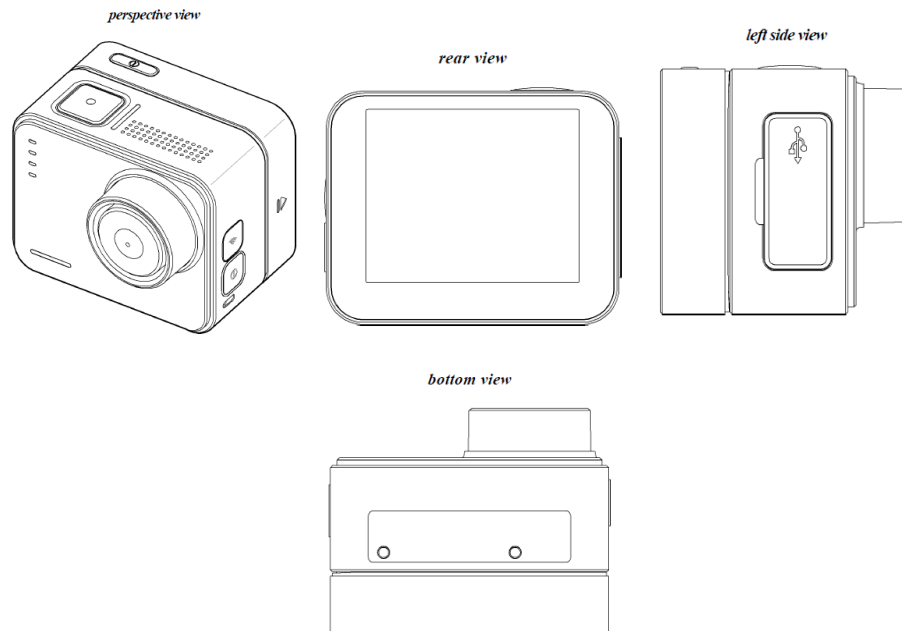


The photo on the top row left is a “front view” of the claimed camera, the photo on the top row middle is a “right view,” the photo on the top row right is a “back view,” the photo on the bottom row left is a “top view,” the photo on the bottom row middle is a “left view,” and the photo on the bottom row right is a “bottom view.”

Petitioner relies on Huang for its inclusion of rectangular buttons on the sides and bottom, a protruding top button, and a rectangular front display. *See, e.g.*, Pet. 33, 45, 64–65, 87, 94.

b. Heo

Heo, relied upon by Petitioner as a secondary reference, is a Korean Design application publication titled “Portable Blackbox,” published April 16, 2015. Ex. 1024, codes (45), (54). Four of the drawings included in Heo are reproduced below.



The photo on the top row left is a “perspective view,” of the claimed design, the photo on the top row middle is a “rear view,” the photo on the top row

right is a “left side view,” and the photo on the bottom row is a “bottom view.”

Petitioner relies on Heo for its inclusion of rectangular buttons on the sides and bottom, a protruding top button, and a rectangular display on the back. *See, e.g.*, Pet. 45, 59, 61, 87.

c. Li

Li, relied upon by Petitioner as a secondary reference, is a Korean Design application publication titled “Portable Blackbox,” published April 16, 2015. Ex. 1024, codes (45), (54). Li is a Chinese Utility Model Patent application publication titled “Sport Camera,” published September 2, 2015. Ex. 1021, codes (45), (54). All six photos included in Li are reproduced below.



The photo on the top row left is a “front view” of the claimed camera, the photo on the top row middle is a “right view,” the photo on the top row right is a “back view,” the photo on the bottom row left is a “top view,” the photo on the bottom row middle is a “left view,” and the photo on the bottom row right is a “bottom view.”

Petitioner relies on Li for its inclusion of a rectangular display on the front and back. *See, e.g.*, Pet. 71, 89.

d. McVicker

McVicker, relied upon by Petitioner as a secondary reference, is a patent titled “SCUBA REGULATOR MOUNT SYSTEM,” issued on January 9, 2018, and filed April 22, 2015. Ex. 1029, codes (22), (45), (54). Figure 2 of McVicker is reproduced below.

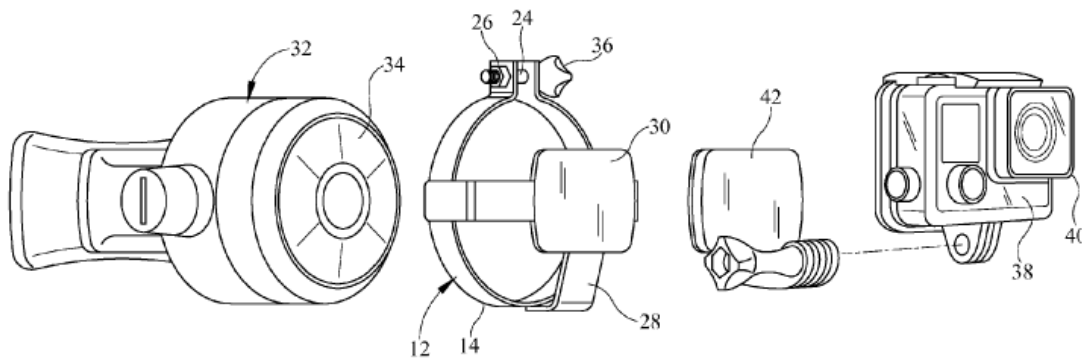


Figure 2, above, “is an exploded perspective view” of “the present invention mounted onto the SCUBA demand regulator.” Ex. 1029, 2:39–42. Petitioner relies solely on the rightmost portion of Figure 2, reproducing only the portion of the figure showing camera 38 and waterproof case 40 and referring to it as “McVicker Left and Front View.” Pet. 73, 88, 90, 100.

Petitioner relies on McVicker for its inclusion of a rectangular display on the front and a protruding top button. *See, e.g.*, Pet. 71, 87.

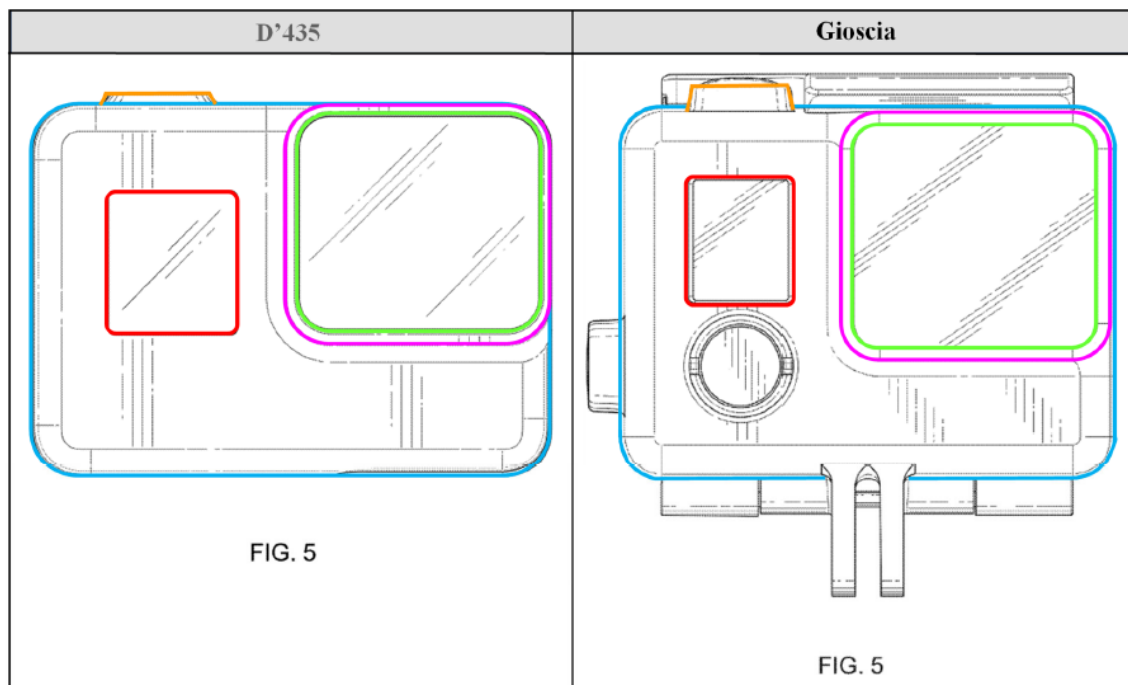
F. Obviousness

1. Petitioner’s Annotated Figures

As noted above in Sections I.E and II.A, Petitioner styles the Petition as proposing six grounds, one for each of the asserted primary references,

but we interpret the Petition as containing at least 24 distinct grounds. Nonetheless, consistent with the briefing, we will discuss the grounds grouped by primary reference.

Petitioner explains the proposed rejections by comparing each of the six sides of the claimed design to the corresponding side of the primary reference in turn. Pet. 41–126. For each side, Petitioner creates a figure comprising an annotated version of a figure from the '435 patent next to an annotated version of the corresponding figure from the primary reference. For example, Petitioner's annotated figure for the front view of the '435 patent compared to the front view of Gioscia is reproduced below.



Id. at 54. In this example, Petitioner describes the annotations as showing “a rectangular body with flat faces,” highlighted in blue, “a rectangle for display that is flush with the front face,” highlighted in red, “a top button protrusion,” highlighted in orange, and “a rectangular lens cover,”

highlighted in pink, “having an inner rectangle within,” highlighted in green. *Id.* at 53.

Patent Owner argues that Petitioner systematically ignores the primary references’ claimed visual designs as a whole and uses the annotated figures “[t]o try to draw attention away from the appearance” of the actual designs of the primary references. Prelim. Resp. 39. We do not find Petitioner’s annotated figures to be particularly helpful in comparing the overall visual effect of the designs because they fail to take into account the overall visual impression of the design on which they are based. We, therefore, do not rely on Petitioner’s annotated figures in our analysis.

2. *Ground 5: Chen686*

We begin our analysis by looking at Petitioner’s Ground 5, which relies on Chen686 as the primary reference. We find that, of the five primary references we analyze, Chen686 is the most similar to the claimed design. Chen686 is also the only primary reference that shows a design for a camera as opposed to a design for a transparent housing for a camera.²⁴ *See* Ex. 1013, 1014, 1019 (each claiming a “CAMERA HOUSING”); Ex. 1016 (stating it is directed to “a GORPO sport camera heat dissipation protection housing provided with a push-pull rear cover”).

Chen686 is a design patent titled “CAMERA,” issued on March 1, 2016. Ex. 1018, codes (45), (54). Figures 1, 3, 4 and 7 of Chen686 are reproduced below.

²⁴ For purposes of this Decision, we assume that camera housings are analogous art to the claimed camera. Patent Owner does not argue to the contrary. *See generally* Pet.

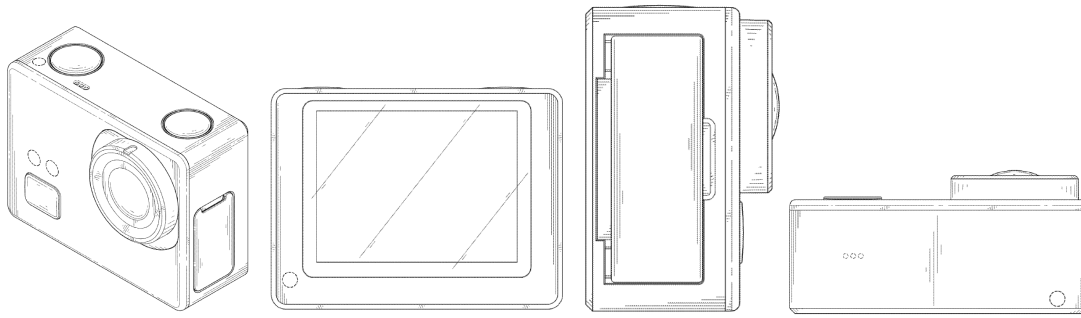


Figure 1, above left, “is a front, top, and right side perspective view of a camera.” Figure 3, above second, “is a rear elevational view,” Figure 4, above third, “is a left side elevation view,” and Figure 7, above right, “is a bottom plan view.”

Petitioner states that Chen686 “alone or in combination with Huang, Heo, and/or McVicker^[25] is ‘visually similar to’” the ’435 patent. Pet. 98. Petitioner compares Chen686 and the claimed design by focusing on various features that are shown on each side of the camera. *Id.* at 98–112. For example, when comparing the front sides of the designs, Petitioner states that both have “a rectangular body with flat faces” that includes a front side with “a small rectangle near the left side that is flush with the front face.” *Id.* at 98. Petitioner also notes some of the differences between certain elements of the two designs. *Id.* at 98–112. For example, Petitioner notes that, on the front, the claimed design shows “a rectangular lens cover extending outward from the body” while the lens in Chen686 is round. *Id.* at 99. Petitioner

²⁵ This is an example of the confusion over what grounds, exactly, are asserted. The title of this section is “Obvious Over Chen686 and Huang; Chen686 and Heo; Chen686, Huang, and Li; Chen686, Heo, and Li; Chen686, Huang, and McVicker; or Chen686, Heo, and McVicker,” which is consistent with our table of grounds in Section I.E. Pet. 98. However, the first sentence of the analysis does not mention Li at all and asserts Chen686 “in combination with Huang, Heo, and/or McVicker,” which implies a ground that includes both Huang and Heo with or without McVicker.

relies on “Huang/McVicker” as showing a rectangular lens cover extending outward from the body,” stating that “an ordinary designer would have been motivated to include a rectangular lens cover because it was known [to improve] image quality.” *Id.* (citing Bressler Decl. ¶ 165; Ex. 1030, 1; Ex. 1031, 6).

Patent Owner argues that Petitioner’s “failure to consider the overall visual appearances of both the claim and the cited art is fatal.” Prelim. Resp. 18 (quoting *In re Harvey*, 12 F.3d 1061, 1065 (Fed. Cir. 1993) (“[T]he Board erred in its determination of obviousness because it improperly compared the visual impressions of selected, separate features of prior art designs to claimed designs, rather than visual impression of designs as a whole.”)). According to Patent Owner, “Petitioner has not identified any prior art reference that is visually similar in overall appearance to the claimed design, as required in the first *Graham* factor, and has ignored differences between the claimed design and the cited primary references, a requirement of the second *Graham* factor.” *Id.*

We agree with Patent Owner that Petitioner has failed in applying the *Graham* factors. First, we agree with Patent Owner that Petitioner fails to sufficiently address how its asserted primary reference, Chen686, is visually similar in overall appearance to the claimed design. As noted above, Petitioner does not clearly address the overall visual appearance of either the claimed design or Chen686. *See* Pet. 98–112. Instead, the Petition improperly focuses on individual design concepts rather than overall visual appearance. *Id.* at 41–126.

More specifically, Petitioner appears to have selectively chosen certain design features (for example, the use of rectangular buttons) to

address while deliberately ignoring other design features (for example, the dimensions and corner curves of those buttons as well as their position on the body of the camera). *See LKQ*, 102 F.4th at 1298 (stating that the primary reference must “not [be] something that might be brought into existence by selecting individual features from prior art and combining them, particularly where combining them would require modification of every individual feature”) (quoting *In re Jennings*, 182 F.2d 207, 208 (CCPA 1950)). This selective use of discrete design characteristics suggests that the analysis is driven by a hindsight reconstruction of the invention rather than the objective teachings of the references.

When viewed side by side, the appearance of Chen686 and the claimed design appear significantly different. Figure 3 of the claimed invention and Figure 1 of Chen686 are reproduced below for comparison.

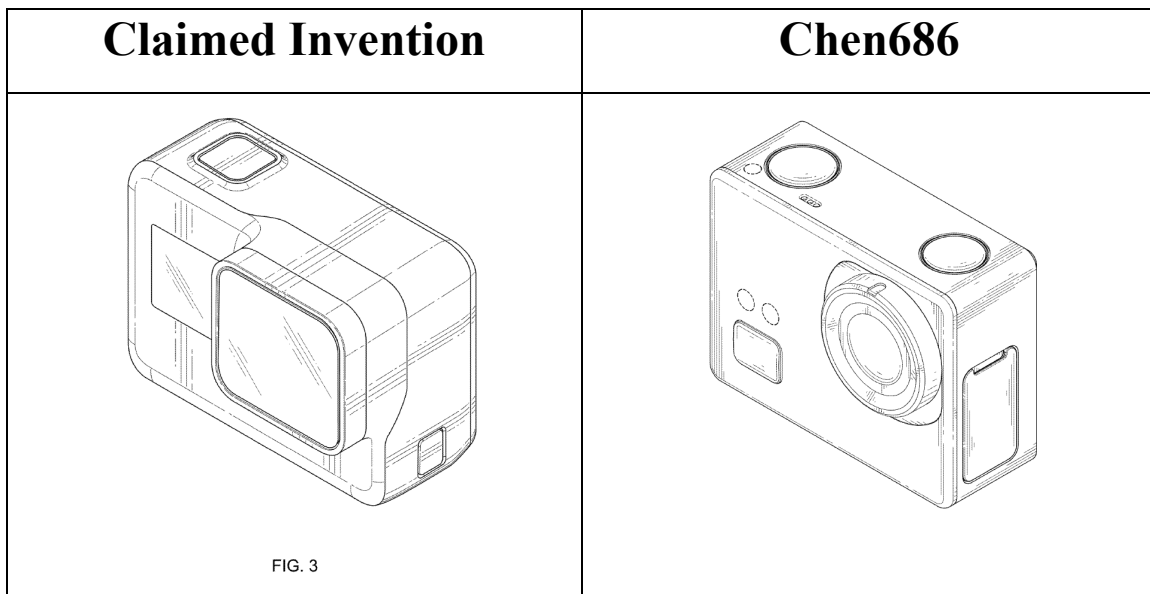


Figure 3 of the claimed invention, above left, “is a front, top, and right side perspective view” of the claimed camera. Ex. 1001. Figure 1 of Chen686 “is

a front, top, and right side perspective view” of Chen686’s camera.
Ex. 1018.

Looking at the two figures side-by-side makes evident significant differences in the overall visual appearance of the two cameras, including the shape and positioning of the lens and all buttons and display features. Taken together, we find the overall impression of Chen686’s camera is rigid and boxlike. It gives a very different overall visual impression when compared to the tapered regions surrounding the buttons, the protruding lens that is contiguous with the top and right of the camera body and the tapered regions on the bottom and left sides of the protruding lens, as well as the more rounded corners of the camera body and the collected features that contribute to the sleek impression of the claimed design. Petitioner does not address these differences in overall visual impression and does not identify why Chen686’s camera is visually similar in overall appearance such that it qualifies as a primary reference.

Second, we agree that Petitioner has failed to address all the differences between the claimed design and the Chen686. For example, even looking at the elements highlighted by the Petition, Petitioner still does not address every difference between the front sides of the two designs, including that the small rectangle to the left of the lens is of different size and dimensions, has rounded corners with different radii, and is located in a different position on the body of the camera. *See* Pet. 98–101. Petitioner’s comparison of the five other sides of the Chen686 and the claimed design suffers from similar deficiencies. *See* Pet. 101–112.

Finally, Petitioner also does not sufficiently explain why a designer of ordinary skill would modify Chen686 with any of the secondary references

to achieve the overall visual impression of the claimed design. For example, Petitioner relies on Huang’s rectangular buttons without explaining why or how a designer of ordinary skill would have modified Huang’s buttons—which are square with fairly sharp corners, to be the same shape as the buttons of the claimed invention, which are longer than they are tall with more rounded corners. *See* Pet. 101–112. Similarly, Petitioner relies on Huang’s, as well as McVicker’s, rectangular lens cover, neither of which have the same shape or size as the corresponding feature on the D’435 patent. Pet. 99–101. Even if a designer of ordinary skill would have had reason to change the circular lens cover of Chen866 to a rectangular cover, Petitioner does not explain why or how a designer of ordinary skill would have modified either Huang or McVicker’s rectangular lens cover to arrive at the corresponding feature of the ’435 patent. Thus, we are not persuaded that the modifications proposed by Petitioner would result in “the same overall visual appearance as the claimed design.” *LKQ*, 102 F.4th at 1299.

Accordingly, we agree with Patent Owner that Petitioner has not shown that Chen686, alone or in combination with the various secondary references, teaches or suggests a camera having the same overall visual appearance of the claimed design. Thus, we determine that Petitioner has not demonstrated a reasonable likelihood that it would prevail in challenging the patentability of the ’435 patent’s claim over Chen686 and the asserted secondary references.

3. *Ground 2: Gioscia*

Gioscia is a design patent titled “CAMERA HOUSING,” issued on August 12, 2014. Ex. 1013, codes (45), (54). Figures 1, 3, and 10 of Gioscia are reproduced below.

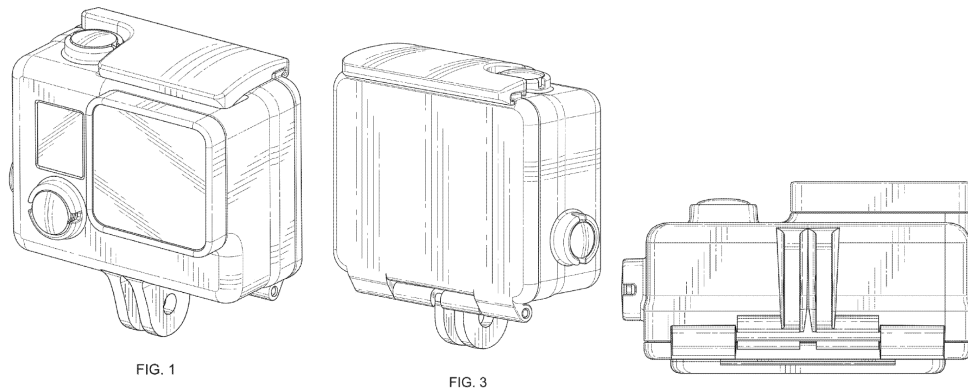


Figure 1, above left, “is a front, top, and right side perspective view of a camera housing showing our new design.” Figure 3, above middle, “is a back, top[,] and left side perspective view,” and Figure 10, above right, “is a bottom plan view.”

This ground suffers from the same deficiencies as the Chen686 ground described above in Section II.F.2. Here, the differences in the overall visual impression of the two designs is even more noticeable. Figure 3 of the claimed invention and Figure 1 of Gioscia are reproduced below for comparison.

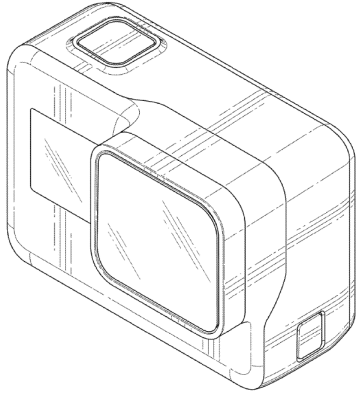
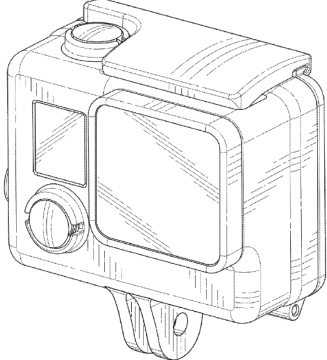
Claimed Invention	Gioscia
 <p data-bbox="500 758 553 779">FIG. 3</p>	 <p data-bbox="1081 705 1135 726">FIG. 1</p>

Figure 3 of the claimed invention, above left, “is a front, top, and right side perspective view” of the claimed camera. Ex. 1001. Figure 1 of Gioscia “is a front, top, and right side perspective view” of Gioscia’s camera. Ex. 1013.

Looking at the two figures side-by-side shows the significant differences in the design are conspicuous, including the addition, in Gioscia, of a top closure and bottom mount, and the different shapes of all buttons as well as and display features. In addition, the number of buttons on the front and right side of the cameras are different. Taken together, we find the overall impression of Gioscia’s camera as compared to the ’435 patent’s camera is significantly different. Petitioner has not shown how Huang or Heo remedy these deficiencies. *See, e.g.*, Pet. 54–55 (relying on Heo for its back display, but failing to address the differences in shape and size between the back display of Heo and the ’435 patent), 55–69 (relying on, *inter alia*, Huang and Heo’s rectangular buttons, but failing to address the differences between buttons of the asserted art and those of the ’435 patent).

We agree with Patent Owner that Petitioner has not properly shown that Gioscia, alone or in combination with the various secondary references,

teaches or suggests a camera having the same overall visual appearance of the claimed design. As with the Chen686 ground, we also find that Petitioner has ignored the differences between the claimed design and Gioscia and has not shown how the secondary references remedy these deficiencies.

Thus, we determine that Petitioner has not demonstrated a reasonable likelihood that it would prevail in challenging the patentability of the '435 patent's claim over Gioscia and the asserted secondary references.

4. *Ground 3: Chen680*

Chen680 is a design patent titled "CAMERA HOUSING," issued on March 1, 2016. Ex. 1014, codes (45), (54). Figures 1, 3, 4 and 7 of Chen680 are reproduced below.

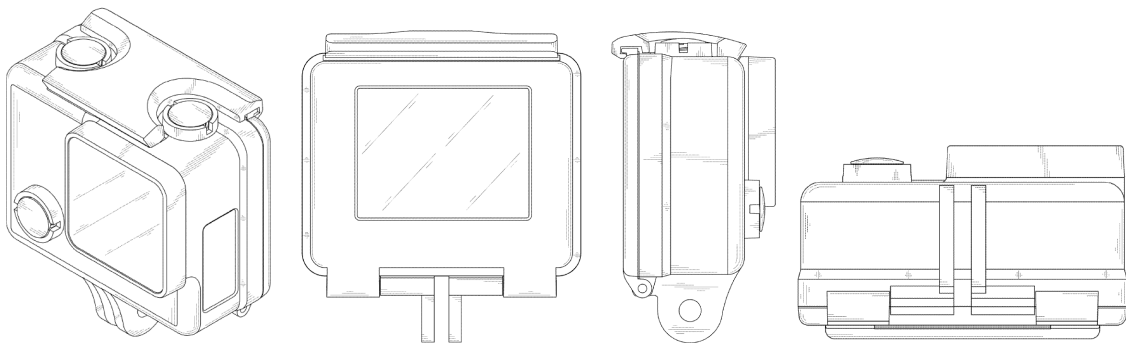


Figure 1, above left, "is a front, top, and right side perspective view of a camera housing showing our new design." Figure 3, above middle left, "is a rear elevational view," Figure 4, above middle right, "is a left side elevational view," and Figure 7, above right, "is a bottom plan view."

This ground suffers from the same deficiencies as the Chen686 ground described above in Section II.F.2 and Gioscia in Section II.F.3. Here, the overall visual impression of the two designs is similar to that described above for Gioscia. Figure 3 of the claimed invention and Figure 1 of Chen680 are reproduced below for comparison.

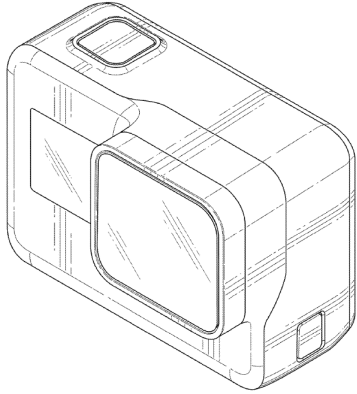
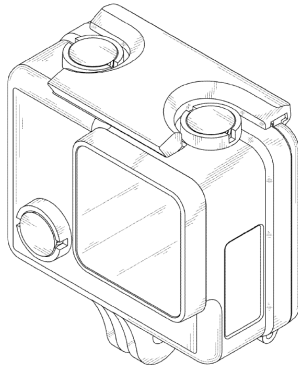
Claimed Invention	Chen680
 <p>FIG. 3</p>	 <p>FIG. 1</p>

Figure 3 of the claimed invention, above left “is a front, top, and right side perspective view” of the claimed camera. Ex. 1001. Figure 1 of Chen680 “is a front, top, and right side perspective view” of Chen680’s camera.

Ex. 1014.

Similar to Gioscia, Chen680’s camera includes a top closure and bottom mount not included in the claimed design, and has different shapes of all buttons and display features. In addition, the number of features on the front and top side of the two designs are different. Taken together, we find the overall impression of Chen680’s camera as compared to the ’435 camera is significantly different.

We agree with Patent Owner that Petitioner has not properly shown that Chen680, alone or in combination with the various secondary references, teaches or suggests a camera having the same overall visual appearance of the claimed design. As with the Chen686 ground, we also find that Petitioner has ignored differences between the claimed design and Chen680.

Thus, we determine that Petitioner has not demonstrated a reasonable

likelihood that it would prevail in challenging the patentability of the '435 patent's claim over Chen680 and the asserted secondary references.

5. *Ground 4: Wang*

Wang is a Chinese Utility Model Patent application publication titled “GORPO sport camera heat dissipation protection housing provided with push-pull rear cover,” published on May 27, 2015. Ex. 1016, codes (45), (54). Figures 1, 5, 6, and 7 of Wang are reproduced below.

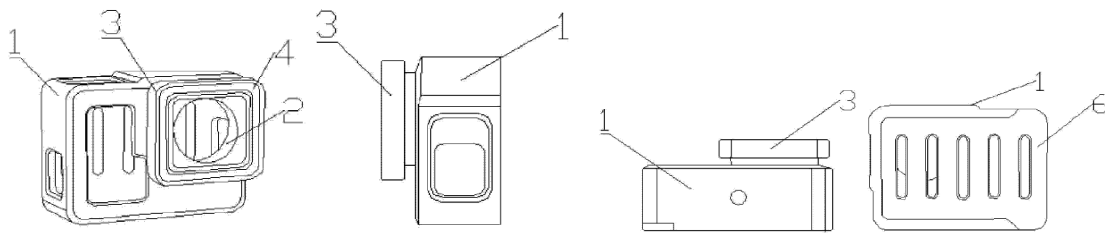


Figure 1, above left, “is a schematic structural diagram of the GORPO sport camera heat dissipation protection housing provided with a push-pull rear cover.” Figure 5, above middle left, “is a right view,” Figure 6, above middle right, “is a bottom view,” and Figure 7, above right, “is a rear view.”

This ground suffers from the same deficiencies as the Chen686 ground described above in Section II.F.2. Figure 3 of the claimed invention and Figure 1 of Wang are reproduced below for comparison.

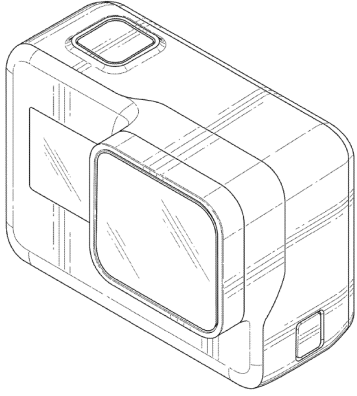
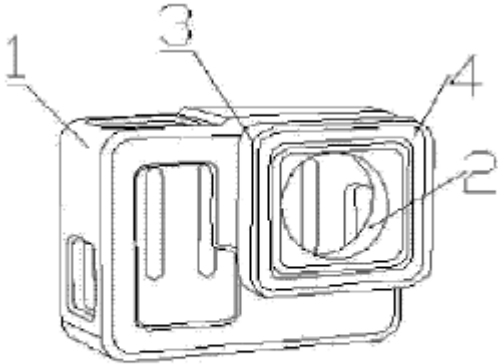
Claimed Invention	Wang
 <p data-bbox="500 758 553 779">FIG. 3</p>	 <p data-bbox="1057 758 1195 800">FIG. 1</p>

Figure 3 of the claimed invention, above left, “is a front, top, and right side perspective view” of the claimed camera. Ex. 1001. Figure 1 of Wang “is a schematic structural diagram of the GORPO sport camera heat dissipation protection housing provided with a push-pull rear cover.” Ex. 1016 ¶ 14.

Wang includes a significantly different back view with several vertical vents. In addition, the display on the front side of the cameras are different. Taken together, we find the overall impression of Wang’s camera as compared to the ’435 patent’s camera is significantly different.

We agree with Patent Owner that Petitioner has not properly shown that Wang, alone or in combination with the various secondary references, teaches or suggests a camera having the same overall visual appearance of the claimed design. As with the Chen686 ground, we also find that Petitioner has ignored differences between the claimed design and Wang.

Thus, we determine that Petitioner has not demonstrated a reasonable likelihood that it would prevail in challenging the patentability of the ’435 patent’s claim over Wang and the asserted secondary references.

6. *Ground 6: Woodman*

Woodman is a design patent titled “CAMERA HOUSING,” issued on April 15, 2014. Ex. 1019, codes (45), (54). Figures 1 and 4 of Woodman are reproduced below.

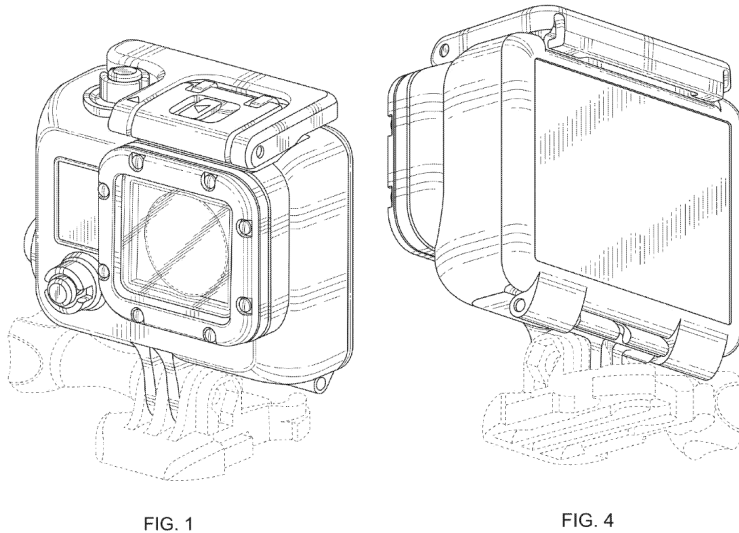


Figure 1, above left, “is a front, top, and right side perspective view of a camera housing showing our new design.” Figure 4, above right, “is a back, bottom and right side perspective view.”

This ground suffers from the same deficiencies as the Chen686 ground described above in Section II.F.2, Gioscia in Section II.F.3, Chen680 in Section II.F.4, and Wang in Section II.F.5. Here, the overall visual impression of the two designs is even more stark. Figure 3 of the claimed invention and Figure 1 of Woodman are reproduced below for comparison.

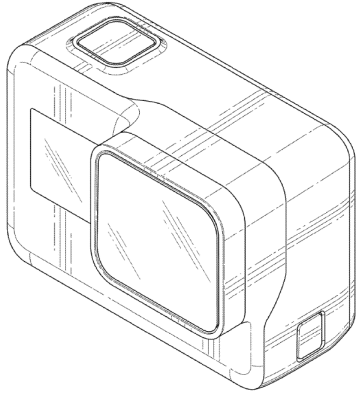
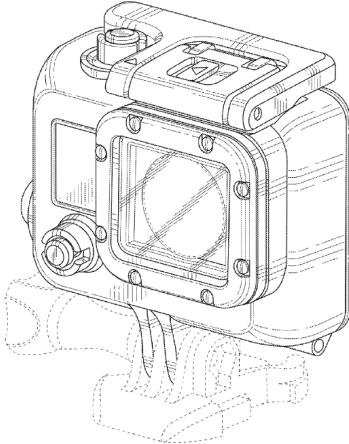
Claimed Invention	Woodman
 <p>FIG. 3</p>	 <p>FIG. 1</p>

Figure 3 of the claimed invention, above left, “is a front, top, and right side perspective view” of the claimed camera. Ex. 1001. Figure 1 of Woodman “is a front, top, and right side perspective view” of Woodman’s camera. Ex. 1019.

Similar to Gioscia and Chen680, Woodman’s camera includes a top closure and bottom mount not included in the claimed design, and has different shapes of all buttons and display features. In addition, the number of features on the front, top, and right sides of the cameras are different. Taken together, we find the overall impression of Woodman’s camera as compared to the ’435 patent’s camera is significantly different.

We agree with Patent Owner that Petitioner has not properly shown that Woodman, alone or in combination with the various secondary references, teaches or suggests a camera having the same overall visual appearance of the claimed design. As with the Chen686 ground, we also find that Petitioner has ignored differences between the claimed design and Woodman.

Thus, we determine that Petitioner has not demonstrated a reasonable likelihood that it would prevail in challenging the patentability of the '435 patent's claim over Woodman and the asserted secondary references.

III. CONCLUSION

For the reasons set forth above, we determine that Petitioner has not shown a reasonable likelihood that it would prevail with respect to the claimed design of the '435 patent.

IV. ORDER

Accordingly, it is:

ORDERED that the Petition is *denied* and no trial is instituted.

IPR2024-01434
Patent D789,435 S

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