

Nos. 19-1435, -1717

In the
United States Court of Appeals
for the
Federal Circuit

SPIGEN KOREA CO., LTD., a Republic of Korea corporation,
Plaintiff – Appellant

v.

ULTRAPROOF, INC., a California corporation,
ULTRAPROOF, INC., a Nevada corporation,
ENDLISS TECHNOLOGY, INC., a California corporation,
Defendants – Cross-Appellants

DOES, 1 through 10, inclusive,
Defendant

*Appeal from the United States District Court for the Central District of California
in Case Nos. 2:16-cv-09185-DOC-DFM, 2:17-cv-01161-DOC-DFM · District Judge David O. Carter*

**APPELLANT’S RESPONSE TO
PETITION FOR PANEL AND EN BANC REHEARING**

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June 22, 2020



CERTIFICATE OF INTEREST

Counsel for Appellant Spigen Korea Co., Ltd certifies the following:

1. The full name of every party or amicus represented by me is:

Spigen Korea Co., Ltd.

2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:

None.

3. Parent corporations and publicly held companies that own 10% or more of stock in the party:

None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Lucem PC: Heedong Chae, Karen Y. Kim, Rae Y. Chung; Law Offices of Richard Kim: Richard Kim.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. See Fed. Cir. R. 47. 4(a)(5) and 47.5(b).:

None

Dated: June 22, 2020

/s/ Joshua D. Curry

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Counsel for Appellant

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ARGUMENT

I. Introduction

This Court should deny Ultraproof’s Petition for panel and en banc rehearing. The Panel’s decision is correct and in accord with this Court’s and the Supreme Court’s precedents, including *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) and *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966).

Ultraproof argues that step one¹ of the test for whether a design patent is obvious should not begin with the factual question of whether there is “a single reference, a something in existence, the design characteristics of which are ***basically the same*** as the claimed design,” because this step is allegedly “too rigid” and has been displaced by the Supreme Court’s decision in *KSR* in favor of a “broader obviousness analysis” that extends to the “outer bounds” of *Graham*.

The “basically the same” test is consistent with 35 U.S.C. § 103, *KSR*, *Graham*, and this Court’s decisions – including the Panel’s decision – holding that obviousness must be assessed by evaluating the invention “as a whole” after determining factually “the content of the prior art, the scope of the patent claim, [] the level of ordinary skill in the art,” and whether secondary considerations of non-obviousness exist (*e.g.*, commercial success, teaching away, and copying). (*See, e.g.*, Opinion at 5-6 (citing *MRC Innovations, Inc. v. Hunter Mfg., LLP*, 747 F.3d

¹ Only step one is at issue in Ultraproof’s Petition. (Pet. at 1.)

1326, 1331 (Fed. Cir. 2014) (citing *KSR*, 550 U.S. at 427 and *Graham*, 383 U.S. at 17)).) Indeed, this Court has continued to apply the “basically the same” test after *KSR* because of this consistency. See, e.g., *MRC*, 474 F.3d at 1331; *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1380-81, 1384-85 (Fed. Cir. 2009); *Campbell Soup Co. v. Gamon Plus, Inc.*, 939 F.3d 1335, 1340 (Fed. Cir. 2019); *Apple, Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314, 1329 (Fed. Cir. 2012).

Although the exact confines of Ultraproof’s proposed “outer bounds” test is somewhat unclear, it is readily apparent that it violates basic tenants of obviousness law and long-standing precedent. Ultraproof’s “outer bounds” analysis permits – and indeed, encourages – application of hindsight bias to stitch together prior art patches into the claimed invention. In fact, Ultraproof’s approach goes even further because it also permits individual elements known in the prior art to be cobbled together into the claimed invention. None of these approaches are permissible. See *Metalcraft of Mayville, Inc. v. Toro Co.*, 848 F.3d 1358, 1367 (Fed. Cir. 2017) (“while we understand that ‘[t]he obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation,’ we also recognize that we cannot allow hindsight bias to be the thread that stitches together prior art patches into something that is the claimed invention”) (quoting *KSR*, 550 U.S. at 419, 421); *In re Borden*, 90 F.3d 1570, 1526 (Fed. Cir. 1996) (“obviousness cannot be based on selecting features from the prior

art and assembling them to form an article similar in appearance to the claimed design”) (*accord. KSR*, 550 U.S. at 418 (“a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.”).)

In any event, changing the scope of the test applied at step one will not change the outcome of this appeal. Under either inquiry – the standard “basically the same” analysis or Ultraproof’s “outer bounds” analysis – there are material disputes of fact that preclude holding the Spigen Design Patents obvious at the summary judgment phase, as the Panel correctly determined. (*See* Opinion at 6.)

II. Reconsideration En Banc Would Not Alter the Outcome of this Appeal

Ultraproof’s argument is premised on the incorrect assumption that a change in the standard used at the first step of the design patent obviousness test would change the outcome of this appeal. Not so. The Panel did not conclude the ‘218 Patent (the primary reference at issue) ***could not*** qualify as a primary reference; *i.e.*, was not, as a factual matter, “basically the same” as the claimed design to a designer of ordinary skill.² (*See* Opinion at 6.) Nor did the Panel conclude that the

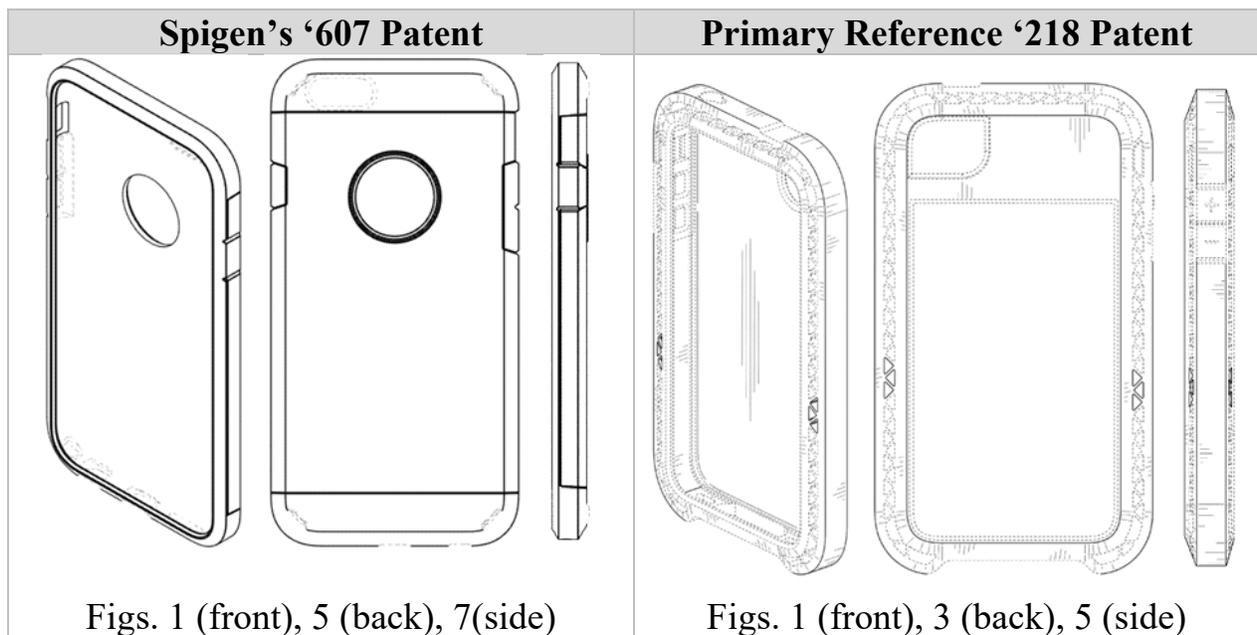
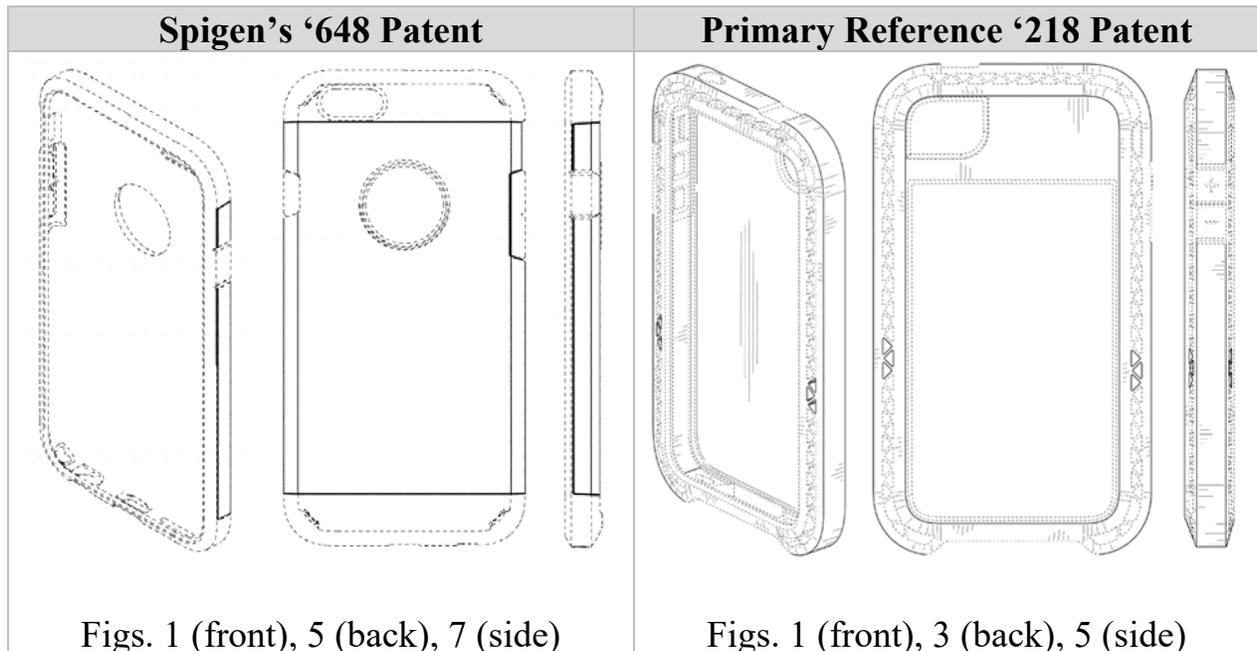
² Ultraproof incorrectly posits “[t]here is virtually no practical difference between” the “substantially the same” test applied under the “ordinary observer” standard to assess infringement and anticipation under § 102, and the “basically the same” test applied under the “ordinary designer” standard at the first factual step of the obviousness test under § 103. (Pet. at 13.) Ultraproof fails to consider the perspectives from which this analysis is conducted. An ordinary ***designer*** is not an ordinary ***observer***. *High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301,

‘218 Patent *could not* be used in any combination to argue that the Spigen Design Patents would be obvious to a designer of ordinary skill. (*See id.*) The Panel, properly applying the summary judgment standard, merely concluded that, based on the evidence presented in this case, there were material factual disputes concerning whether the ‘218 Patent disclosed “basically the same” visual impression as the Spigen Design Patents under the currently accepted standard. (*Id.*) In other words, there were at least disputes of material fact concerning “[t]he underlying factual inquiries” required by *Graham* factor #1 (“the scope and content of the prior art”) and #3 (the “differences between the prior art and the claims at issue”), even under Ultraproof’s proposed “outer bounds” test. *See MRC*, 747 F.3d at 1331 (the *Graham* factors are “factual inquiries”).

The Panel’s correct conclusion that a factual dispute exists – either about whether ordinary designers would view the prior art and claimed designs as “basically the same” (currently accepted standard), or whether ordinary designers would reach different conclusions about the scope and content of the prior art and differences between that prior art and claimed designs under an “outer bound” analysis (Ultraproof’s proposed standard) – is hardly surprising.

1312 & n.2 (Fed. Cir. 2013). The “basically the same” test more broadly encompasses prior art that, while not identical to the claimed design, creates basically the same “overall visual impression” to the eye of an ordinary designer. *See MRC*, 747 F.3d at 1332-33.

A comparison of the '218 Patent and the Spigen Design Patents, as illustrated below, quickly reveals material factual disputes concerning whether they have the "same overall visual appearance" in the eye of an ordinary designer.



Contrary to Ultraproof’s dismissive arguments characterizing the design differences as “minor,” an ordinary designer would immediately see at least 10 key visual, aesthetic differences in design that are either absent from the ‘218 Patent, or different in the Spigen Design Patents – as Spigen’s design expert Mr. Delman explained in detail.³ (*See* Appellant Br. at 35-44 (discussing differences in connection with images).) For example, the ‘218 Patent is a one-part design that has no “outer shell” at all (shown in solid lines above in the ‘648 Patent), discloses no portion of a “frame” (shown in dashed lines above in the ‘648 Patent and solid lines in the ‘607 Patent)⁴ extending above and below the “outer shell,” has no “parting lines” (the two lines formed where the outer “shell intersects” the “frame”) when viewed from the rear, has no hole cut in the rear (much less a circular hole), has no flat surface from the “outer shell” that wraps only partially around from the rear to the side and leaves a portion of the “frame” visible on the side, and has no medium-sized chamfer (beveled edge) at the intersection between the rear surface of the outer shell and the sides. (*Id.* at 35-38.) Overall, the ‘218 Patent is a brutish and bulky design with its wider surfaces and chamfers, but the

³ The conflicting design expert testimony submitted in this case is hardly conclusory, as Ultraproof suggests. (Pet. at 10.). Mr. Delman submitted a detailed 75-page report with several dozen comparison images. (*See* Appx4770-97.) Moreover, “[i]n considering summary judgment on [an obviousness] question the district court can and should take into account expert testimony, which may resolve or keep open certain questions of fact.” *KSR*, 550 U.S. at 427.

⁴ The three Spigen Design Patents each have somewhat different scopes.

claimed design has a streamlined and tough aesthetic. (*Id.*) The ‘218 Patent also has visually distracting triangular elements on its chamfers, unlike the claimed designs which have a clean look without triangular decorations. (*Id.* at 39.) The ‘218 Patent also does not have the trapezoidal elements found around the volume and side buttons of the claimed designs, including the parts of the button designs that extend into the rear chamfer of the claimed designs. (*Id.* at 41, 43.)

Thus, regardless of which test is applied, the conflicting evidence presents material factual questions for a jury to decide before any legal conclusion can be reached about obviousness.⁵ (*See* Opinion at 5 (“One underlying factual issue is whether a prior art design qualifies as a ‘primary reference.’” (citing *High Point*, 730 F.3d at 1311; *Campbell Soup*, 939 F.3d at 1340; *Apple*, 678 F.3d at 1329); *see also Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1323 (Fed. Cir. 2011) (what the prior art discloses is a question of fact); *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1360, 1363, 1366 (Fed. Cir. 2012) (determining the differences between the claimed invention and the prior art presents questions of fact). Accordingly, because summary judgment is only appropriate if all of the *Graham* factors “‘are not in material dispute, and the obviousness of the claim is

⁵ There were also numerous disputes of material fact concerning the other steps of the design patent obviousness test after step one. (*See, e.g.*, Appellant Reply Br. at 14-22 (no secondary reference, no reasons to modify designs, disputes concerning hypothetical design’s appearance and over differences between it and the claimed designs, and strong objective evidence of non-obviousness).)

apparent in light of these factors,” the Panel properly reversed the District Court’s decision finding the Spigen Design Patents obvious as a matter of law. (*See* Opinion at 5 (citing *MRC*, 747 F.3d at 1331 (citing *Graham*, 383 U.S. at 17 and *KSR*, 550 U.S. at 427)).)

III. The “Basically the Same” Analysis is Consistent with *KSR* and § 103

Ultraproof argues step one of the design patent obviousness test conflicts with *KSR* and *Graham* because it begins with an “initial threshold factual question of whether a single reference is ‘basically the same’ as the asserted design.” (Pet. at 7.) Ultraproof says this analysis is “too rigid” and “formulaic,” and argues “[i]t is improper to insert an additional and, at least in this case, unnecessary factual inquiry into [the obviousness] analysis.” Ultraproof is wrong.

The “basically the same” analysis is consistent with *KSR* and *Graham* and, in fact, is deeply rooted in § 103 itself. This is apparent from the text of § 103 and this Court’s explanation of the “basically the same” test after *KSR*.

Under § 103, an invention is only rendered obvious if, based on clear and convincing evidence, “the differences between the claimed invention and the prior art are such that the claimed invention *as a whole* would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill

in the art to which the claimed invention pertains.” 35 U.S.C. § 103;⁶ *see Ethicon Endo-Surgery, Inc. v. Covidien, Inc.*, 796 F.3d 1312, 1328 (Fed. Cir. 2015).

Many of this Court’s design patent decisions issued after *KSR* have, just as the Panel did here, recited the four underlying factual factors from *Graham* and the ultimate legal question of “whether the claimed design would have been obvious to a designer of ordinary skill who designs articles of the type involved.” (Opinion at 5 (citing *MRC*, 747 F.3d at 1331 and *Titan Tire*, 566 F.3d at 1380-81 (both citing *KSR*, 550 U.S. at 427 and *Graham*, 383 U.S. at 17)).) This Court’s decisions then proceed to explain that, in design patent cases, the first question to resolve in the obviousness analysis is whether – as factual matter – there exists “a single reference, ‘a something in existence, the design characteristics of which are basically the same as the claimed design.’” *MRC*, 747 F.3d at 1331 (quoting *In re Rosen*, 673 F.2d 388, 391 (C.C.P.A. 1982) and *Durling v. Spectrum Furniture Co.*, 101 F.3d 100, 103 (Fed. Cir. 1996)).

The “basically the same” test is used because, consistent with § 103 and *KSR*, this test “requires consideration of the ‘visual impression created by the patented design *as a whole*.’” *Id.* (quoting *Durling*, 101 F.3d at 103). This analysis is consistent with *KSR*’s admonition that: “A patent composed of several elements

⁶ All emphasis in quotations has been added unless otherwise noted.

is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.” *KSR*, 550 U.S. at 418.

This Court also has reaffirmed several times after *KSR* the applicability of the well-established rule that design patent obviousness begins with finding one, single prior art reference that – as a factual matter – is “basically the same” as the claimed design. *See MRC*, 747 F.3d at 1331; *Titan Tire*, 566 F.3d at 1380-81; *see also Campbell Soup*, 939 F.3d at 1340; *Apple*, 678 F.3d at 1329.

The U.S. Patent and Trademark Office (“PTO”) has taken the same position. The PTO has argued that, because “the ‘overall visual appearance’ inquiry required in the design patent context is, by its nature, subjective and requires stricter methods for avoiding hindsight bias,” the “basically the same” analysis continues to apply at the first step of the design patent obviousness inquiry after *KSR*. *See* Brief of PTO at *25-27, *Vanguard Identification Sys. v. Kappos*, 407 F. App’x 479 (Fed. Cir. 2011) (affirming PTO patent obviousness decision requiring primary reference that was “basically the same” as the claimed design), *brief available at* 2010 U.S. Fed. Cir. Briefs LEXIS 562.

The PTAB has reached the same conclusion as well. *See Johns Manville Corp. v. Knauf Insulation, Inc.*, IPR2015-1453, 2017 Pat. App. LEXIS 3419 at *63-64 (PTAB Jan. 11, 2017) (concluding the “basically the same” test is consistent with *Graham* and *KSR*); *Lowe’s Home Centers, LLC v. Maureen Reddy*,

No. IPR2015-306, 2016 Pat. App. LEXIS 1909, *26-27 (PTAB March 30, 2016) (discussing *KSR* and then proceeding to apply “basically the same” test).

Finally, contrary to Ultraproof’s assertion, prominent commentators – including Sarah Burstein in the article Ultraproof miscited in its Petition (Pet. at 7 n.2) – have concluded that the “basically the same” test should be retained:

it has been argued that the Federal Circuit’s primary reference requirement may be too rigid to survive *KSR*. It is true that, in *KSR*, the Court disapproved of “rigid preventative rules that deny factfinders recourse to common sense” in evaluating issues of nonobviousness. But the Court did not disapprove of rigidity, per se; rather, it disapproved of rigidity that “denies factfinders recourse to common sense.” In many cases, requiring a primary reference will not do so. Therefore, it is not necessary to wholly abandon the primary reference requirement. ***And, because it plays such a valuable role in properly focusing the § 103 inquiry, the primary reference requirement should be retained as a general rule.***

Sarah Burstein, *Visual Invention*, 16 Lewis & Clark L. Rev. 169, 200 (2012) (footnotes omitted). Paul Morgan’s Patently-O blog post⁷ asks “Has anyone suggested any reason why *KSR* does not apply to design patent § 103 analysis?,” but fails to appreciate that the “basically the same” analysis is consistent with *KSR*, as discussed above, and – significantly – does not provide any reason to explain why the “basically the same” analysis conflicts with *KSR*.

⁷ Paul Morgan, *Design Patents §103 – Obvious to Whom and As Compared to What?*, PATENTLYO guest blog post (2014), available at <https://patentlyo.com/patent/2014/09/§103-obvious-compared.html>.

IV. Ultraproof’s Proposed “Outer Bounds” Analysis Conflicts with *KSR*

While Ultraproof does not say precisely how its “outer bounds” analysis would function, it is clear from Ultraproof’s examples that its “outer bounds” analysis is incompatible with *KSR* and well-established obviousness rules.

A. Improper Hindsight Bias and Reconstruction

Ultraproof argues that because the ‘218 Patent (alleged primary reference) and ‘209 Patent (alleged secondary reference), were actually known to and considered by the inventor, the step of objectively determining as a factual matter whether a hypothetical ordinary designer would have considered either reference to disclose “basically the same” designs as the claimed designs serves “no purpose.” (Pet. at 14.) Ultraproof’s Petition repeats this argument no less than seven times. For example, both of the “points of law or fact overlooked” that Ultraproof identifies expressly suggest that a hindsight-based obviousness test should be adopted: (a) “[t]he Court failed to appreciate the inventor’s implicit admission that the ‘218 patent is a suitable primary reference in his conception drawing” and (b) “[t]he Court misapprehended the effect of having the inventor’s actual references he considered in conceiving the patented design” (*Id.* at 2.) Ultraproof then urges reliance on the inventor’s “own statements and knowledge . . . to inform th[e] ordinary creativity” that a hypothetical ordinary designer is

charged with having. (*Id.* at 4.) Urging adoption of this approach continues as an overarching theme throughout Ultraproof’s Petition. (*See id.* at 5, 7, 12-13, 14.)

Ultraproof is incorrect. The obviousness approach it urges adoption of is infected with hindsight bias. Section 103, the Supreme Court, and this Court have each specifically rejected any use of hindsight bias to judge obviousness.

The Supreme Court – in *KSR* no less – has consistently said “[obviousness] analysis is **objective**.” *KSR*, 550 U.S. at 406 (citing *Graham*, 383 U.S. at 17-18). For this reason, “[t]he inventor’s own path itself never leads to a conclusion of obviousness; that is hindsight. What matters is the path that the person of ordinary skill in the art would have followed, as evidenced by the pertinent prior art.” *Millennium Pharms., Inc. v. Sandoz Inc.*, 862 F.3d 1356, 1367 (Fed. Cir. 2017); *Otsuka Pharm. Co., Ltd. v. Sandoz, Inc.*, 678 F.3d 1280, 1296 (Fed. Cir. 2012).

Indeed and contrary to Ultraproof’s argument, § 103 specifically excludes considering how the inventor created the invention to assess obviousness: “Patentability shall not be negated by the manner in which the invention was made.” *Id.*; *see Millennium Pharms.*, 862 F.3d at 1367 (citing e.g. *In re Kratz*, 592 F.2d 1169, 1175 (C.C.P.A. 1979)). “[T]he path that leads an inventor to the invention is expressly made irrelevant to patentability by statute.” *Life Techs., Inc. v. Clontech Labs., Inc.*, 224 F.3d 1320, 1325 (Fed. Cir. 2000).

Numerous decisions – again, including *KSR* itself – repeatedly emphasize the importance of avoiding exactly the kind of hindsight Ultraproof would inject into the test for design patent obviousness. *See, e.g., KSR*, 550 U.S. at 412 (“A factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning.” (citing *Graham*, 383 U.S. at 36 (warning against a “temptation to read into the prior art the teachings of the invention in issue” and instructing courts to “guard against slipping into use of hindsight” (quoting *Monroe Auto Equip. Co. v. Heckethorn Mfg. & Supply Co.*, 332 F.2d 406, 412 (6th Cir. 1964)))); *Metalcraft*, 848 F.3d at 1367; *Polaris Indus. v. Arctic Cat, Inc.*, 882 F.3d 1056, 1068 (Fed. Cir. 2018) (“We have observed that ‘the prejudice of hindsight bias’ often overlooks that the ‘genius of invention is often a combination of known elements which in hindsight seems preordained.’” (quoting *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 711 F.3d 1348, 1368 (Fed. Cir. 2013))).

Instead, “[t]he invention must be viewed not with the blueprint drawn by the inventor, but in the state of the art that existed at the time.” *Interconnect Planning Corp. v. Feil*, 774 F.2d 1132, 1138 (Fed. Cir. 1985). And “[i]t is impermissible to use the claimed invention as an instruction manual or ‘template’ to pieced together the teachings of the prior art so that the claimed invention is rendered obvious.” *In*

re Fritch, 972 F.2d 1260, 1266 (Fed. Cir. 1992). *See also In re Hyon*, 679 F.3d 1363, 1370-71 (Fed. Cir. 2012) (same).

Finally, Ultraproof fails to appreciate that the inventor was doing something ***non-obvious*** by selecting other designs to frame the problem to be solved:

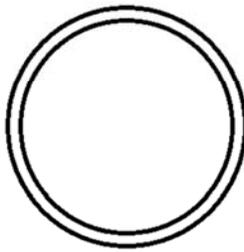
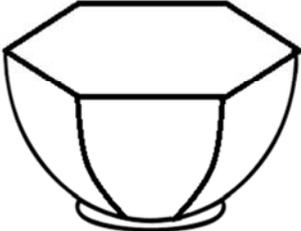
Often, the inventive contribution lies in defining the problem in a new revelatory way. Once the problem is defined, the solution might well be obvious; ***but the problem remains non-obvious***. If courts invalidated patents simply because the problems described in the specifications bore obvious solutions, a significant percentage of existing patents would vanish. Such an analysis almost invites hindsight bias. An important check to hindsight bias is assessing patents not only for the solutions they teach, but also for the problems that the solutions are directed toward.

Datcard Sys. v. PacsGear, Inc., No. 10-cv-1288, 2013 U.S. Dist. LEXIS 197979, at *8-9 (C.D. Cal. Apr. 1, 2013), *aff'd* 550 Fed. Appx. 895 (Fed. Cir. 2014). “Too often the obviousness analysis is framed as an inquiry into whether a person of skill, with two (and only two) references sitting on the table in front of him, would have [created the invention]. The real question is whether that skilled artisan would have plucked one reference out of the sea of prior art [] and combined it with conventional [] elements to address some need present in the field” *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1337 (Fed. Cir. 2016).

B. Cobbling Together Inventions from Individual Pieces of Prior Art

Ultraproof’s “outer bounds” analysis also violates another cardinal rule of obviousness analysis by permitting an invention to be deemed obvious if its

individual constituent parts are each found separately in the prior art, but the invention as a whole is not. (Pet. at 11.) Under Ultraproof’s approach, an ordinary designer is free to steal a little bit of “this” from Reference A, a little bit of “that” from Reference B, and some of “these” from Reference C, to arrive at the claimed design as shown in the illustration below from page 11 of the Petition:

| Reference A | Reference B | Reference C | Hypothetical Design Patent |
|--|---|--|--|
|  |  |  |  |

But under this Court’s and the Supreme Court’s precedent, “a patent composed of several elements is not proved obvious merely by demonstrating that each of its elements was, independently, known in the prior art.” *KSR*, 550 U.S. at 418. Indeed, a “finding of obviousness cannot be based on selecting features from the prior art and assembling them to form an article similar in appearance to the claimed design.” *In re Borden*, 90 F.3d at 1526; *accord. KSR*, 550 U.S. at 418. The patented design “must be compared with something in existence, not with something that might be brought into existence by selecting individual features

from prior art and combining them.” *In re Borden*, 90 F.3d at 1526 (quoting *In re Jennings*, 182 F.2d at 208 (C.C.P.A. 1950)).

V. Conclusion

The Panel’s decision was correct. The “basically the same” analysis is consistent with *KSR* and the Patent Act’s purposes, and the “outer bounds” obviousness analysis Ultraproof proposes is impermissibly out of the bounds set by § 103 and *KSR*. Changing the test also will not change the result in this appeal. Ultraproof’s Petition should be denied.

Dated: June 22, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system which will issue an electronic notification of filing to all counsel of record.

Dated: June 22, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Circuit Rule 35(e)(5) because this brief contains 3,896 words, excluding the parts of the brief exempted by Federal Circuit Rule 35(c)(2).

Dated: June 22, 2020

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