

Appeal Nos. 20-2344, 21-1019

IN THE
United States Court of Appeals
FOR THE FEDERAL CIRCUIT

CAMPBELL SOUP COMPANY,
CAMPBELL SALES COMPANY,
TRINITY MANUFACTURING, LLC,

Appellants,

v.

GAMON PLUS, INC.,

Appellee.

*On Appeal from the United States Patent
and Trademark Office, Patent Trial and Appeal Board
in Nos. IPR 2017-00091 and IPR 2017-00094,
Entered July 29, 2020*

*The Honorable Bart Alex Gerstenblith
The Honorable Grace Karaffa Obermann
The Honorable Robert L. Kinder*

**GAMON PLUS, INC.'S COMBINED PETITION
FOR REHEARING *EN BANC* AND PANEL REHEARING**

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CERTIFICATE OF INTEREST

Counsel for Appellee, Gamon Plus, Inc., certifies the following:

1. The full name of parties represented by me:

Gamon Plus, Inc.

2. The name of real party in interest (excluding any real party in interest identified in question 3) represented by me is:

Gamon Plus, Inc. (owner of 100% of title in U.S. patents D612,646
and D621,645), and

Gamon International, Inc., its licensed affiliate.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by me are:

None.

4. The names of all law firms and 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:

Edward P. Kelly, Tiajolloff & Kelly LLP.

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):

Gamon Plus, Inc. et al. v. Campbell Soup Company, et al.,

Case No. 15-CV-8940-CRN/YBK

U.S. District Court for the Northern District of Illinois.

September 20, 2021

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**STATEMENT OF COUNSEL
FEDERAL CIRCUIT RULE 35(B)(2)**

Based on my professional judgment, I believe the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedent(s) of this court:

Teva Pharms. Int'l GmbH v. Eli Lilly & Co., 8 F.4th 1349 (Fed. Cir. 2021);

Fox Factory, Inc. v. SRAM, LLC, 944 F.3d 1366 (Fed. Cir. 2019);

In re Huang, 100 F.3d 135 (Fed. Cir. 1996);

Egyptian Goddess, Inc. v. Swisa, Inc., 543 F.3d 665 (Fed. Cir. 2008);

Demaco Corp. v. F. Von Langsdorff Licensing Ltd., 851 F.2d 1387 (Fed.

Cir. 1988); and

Apple Inc. v. Samsung Elecs. Co., 809 F.3d 633 (Fed. Cir. 2015)

Dated: September 20, 2021

/Andrew L. Tiajolloff/
Andrew L. Tiajolloff
TIAJOLOFF & KELLY LLP
Counsel for Appellee Gamon Plus, Inc.

I. INTRODUCTION AND STATEMENT OF THE CASE

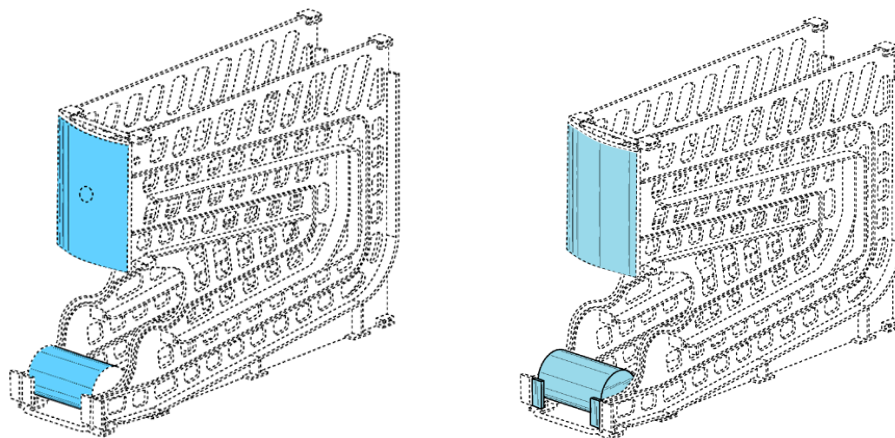
This petition relates to the standards for the presumption nexus and the factual determination of nexus of a claimed invention to commercial success.

Nexus is frequently a critical central issue in assessing secondary considerations of nonobviousness, and the Federal Circuit ruling for which *en banc* review is here requested has departed so far from existing Federal Circuit precedent that, if not corrected, it will create confusion as to presuming nexus or finding nexus-in-fact that will result in incorrect and unfair rulings of invalidity, as has occurred here.

Procedural history

The appeal for which *en banc* review is here sought involves *inter partes* reviews (“IPRs”) of U.S. patent nos. D621,645 and D612,646 (herein “the ‘645 and ‘646 patents”).

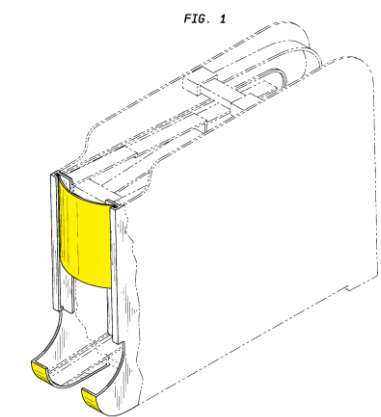
Those patents are design patents claiming a “GRAVITY FEED DISPENSER DISPLAY” set out in the figure of each patent, reproduced below, with the claimed ornamental portion highlighted.



The '645 patent, Appx00160

The '646 patent, Appx00157

A number of obviousness challenges were asserted, the only ones of relevance being those based on U.S. patent no. D405,622 (“Linz”), FIG. 1 of which is reproduced below.



Linz, FIG. 1 (highlighted)

The Linz patent described the claimed design as a DISPLAY RACK, but nowhere showed or described either the type of articles to be displayed or their appearance.

Based on the absence of any showing of a can in Linz, in 2018 the PTAB held the ‘645 and ‘646 patents valid and nonobvious over Linz, but that holding was reversed and remanded. *See Campbell Soup Co. v. Gamon Plus, Inc.*, 939 F.3d 1335, 1342 (Fed. Cir. 2019)(Judge Newman dissenting).

On remand, the PTAB again held the ‘645 and ‘646 patents valid and nonobvious on the grounds that Linz only provided a weak, hindsight-loaded case for obviousness, but that was overcome by a very strong showing of secondary considerations of nonobviousness based on:

- Patent Owner’s sale of about \$30 million of racks providing the patented designs to Appellant Campbell Soup Company;
- increases of 3 – 5% of sales of soup that Campbell Soup attributed to their use of the patented display designs;
- praise of the displays by customers and Campbell Soup itself; and
- the copying of the patented displays by Campbell Soup in its manufacture and widespread use of an estimated 300,000 display racks that Campbell Soup copied from the patented displays.

See, Appx000066, Appx000143; see also Appx001912, Appx001894-95 (reproduced below).



**Campbell Soup 2005 annual report praising Patent Owner displays
Appx001912**



**Displays copied from Patent Owner's designs
by Campbell Soup, Appx0001894, 1895**

The PTAB found nexus to these secondary considerations based on *both* a presumption of nexus *and also* evidentiary proof of nexus based on the purchase, analysis, praise and ultimate misappropriation of the patented designs by Campbell Soup, including independent market studies attributing the appearance of the patented displays with increases of 5.5–13.6% in soup sales. See Appx00039-53; Appx000117-130.

Petitioners again appealed, and the Federal Circuit panel issued a decision reversing the PTAB, and holding the ‘645 and ‘646 patents invalid. See *Campbell Soup Co. v. Gamon Plus, Inc.*, No. 2020-2344, 2021 WL 3671163 (Fed. Cir. Aug. 19, 2021)(the “Panel Ruling”).

The reversal was based on rulings that:

1. the coextensiveness of the patented designs with the commercially successful products that is required for presumption of nexus could not be found here because the products had additional structure beyond what was in the patented designs. *Id.* at *11-12.
2. the finding of nexus linking the commercial success to the “unique characteristics” of the ‘645 and ‘646 patents, which the Court identified as “points-of-novelty” over the prior art, was not supported by the evidence of record. *Id.* at *12-14.

II. POINTS OF LAW OR FACT OVERLOOKED OR MISAPPREHENDED BY THE PANEL.

The following points of law or fact that were overlooked or misapprehended by the Court in its Panel decision:

1. The presumption of nexus of a patent claim to a commercially successful product depends on coextensiveness of the claim with the product, which is to be determined on *a spectrum of gradations of coextensiveness*, and the presumption is not overcome by the mere presence of an unclaimed feature in the product, even if it materially affects the functioning of the product.
2. The “unique characteristics” considered in assessing the existence of nexus of a design patent claim to commercial success are determined based on the claimed design as a visual whole, *not an impermissible “points of novelty”* analysis using differences of the design from prior art.
3. Copying of a commercially successful product is evidence of nexus of the copied design with the commercial success of the product.
4. A finding of invalidity before the PTAB cannot rely on testimony of an Examiner as to the preclusive effect of a prior-art U.S. patent that he himself issued.

III. ARGUMENT

Nexus is a critical issue in virtually every patent case where objective indicia of nonobviousness are asserted.

Presumption of nexus relies on an initial determination of the coextensiveness of the claimed invention with the commercially successful product. Rehearing en banc is needed here because the Panel Ruling relies on a simplistic “is-or-isn’t” test for coextensiveness that is directly contrary to established Federal Circuit precedent that coextensiveness is analyzed on a spectrum of comparative significance of the patented and unpatented parts of the product.

Rehearing is also needed because the Panel Ruling reversed the PTAB’s factual finding of nexus using a “points of novelty” analysis of the patented designs in the guise of a “unique characteristics” analysis of the evidence of nexus to the commercially successful products.

Review should also be granted because the Panel Ruling decision reversed the PTAB factual finding of nexus in spite of the substantial evidence of nexus of record showing widespread copying of the patented design by 300,000 copied devices installed in supermarkets across the U.S.

Finally, the Panel Ruling should be corrected because it permitted the

testimony of the Primary Examiner that issued the Linz patent as to the preclusive effects of that patent as prior art, in violation of U.S. Patent & Trademark Office regulations that prohibit testimony of Examiners regarding matters in which they were involved.

A. If secondary considerations are not present in this case, they are never present.

As a prefatory point, it should be appreciated that, if objective secondary considerations of nonobviousness are not present in this case, they are never present.

The uncontroverted facts are that Patent Owner Gamon developed the patented display solely for the purpose of displaying Campbell Soup cans, and that an initial market study initiated by Campbell Soup concluded that the Patent Owner's displays increased sales of its canned soup by as much as 13.4%.

Appx00047, Appx000124.

Campbell Soup subsequently bought about \$30 million of Patent Owner's display racks (sometimes referred to as "the iQ Maximizer") that provided the appearance of the patented display, and placed those display racks in thousands of supermarkets across America. Appx00048, Appx000125.

Campbell Soup also described the increase of sales of soup attributable to the IQ Maximizer displays, and placed pictures of the displays conspicuously in its

annual reports. *Id.*

Then, in about 2010, Campbell Soup stopped buying the iQ Maximizer from Patent Owner, and bought approximately 300,000 display racks slavishly copied from the original iQ Maximizer from Appellant Trinity Manufacturing, installing them across the U.S. Appx00036, Appx000113.

This set of facts is a textbook scenario for a finding of the secondary consideration of commercial success of the patented designs. A fair and reasonable fact finder could not find otherwise based on this record, and the PTAB held that there were strong secondary considerations of nonobviousness of the ‘645 and ‘646 patents.

On appeal, however, the Panel Ruling rejected the finding of secondary considerations of nonobviousness, and ruled that the ‘645 and ‘646 patents were invalid.

In doing so, the Panel Ruling reversed every fact finding made by the PTAB, and disregarded the well-established law regarding nexus, as well as essential principles of design-patent law and the overwhelming weight of the evidence.

En banc review to correct the Panel Ruling is therefore respectfully requested.

B. The Panel Ruling formulated an incorrect is-or-isn't rule for the coextensiveness required for presumption of nexus that is contrary to the analysis set out in *Teva* and *Fox Factory* of a graduated spectrum of coextensiveness.

The Panel Ruling applied a rule for coextensiveness that is contrary to established Federal Circuit caselaw, and that threatens to eliminate altogether the presumption of nexus with proven commercial success.

The issue of coextensiveness arises in determining whether a nexus of a patent claim to a commercially success product is to be presumed. A presumption of nexus between a patented invention and a commercially successful product applies if it is shown that the asserted objective evidence is tied to a specific product and that “the product embodies the claimed features and *is coextensive with them*”. *Teva Pharms. Int'l GmbH v. Eli Lilly & Co.*, 8 F.4th 1349 (Fed. Cir. 2021)[emphasis added], citing *Polaris Indus., Inc. v. Arctic Cat, Inc.*, 882 F.3d 1056, 1072 (Fed. Cir. 2018). In other words, if coextensiveness of a patent claim with a commercially successful product is shown, the claim is presumed to have commercial success.

The *Teva* case expressed the established Federal Circuit rule for determining coextensiveness. Whether a patent claim is coextensive with a commercially successful product is *not* a bright-line determination (as the Panel Ruling incorrectly held), but rather a determination of the degree of correspondence between the product and the patent claim *along a spectrum*, ranging from perfect

or near perfect correspondence to no or very little correspondence. *Id.*, citing *Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1374 (Fed. Cir. 2019). The presumption analysis requires the fact finder to consider the unclaimed features of the stated products *to determine their level of significance and their impact on the correspondence between the claim and the products*. *Id.* at *9, citing *Fox Factory*, 944 F.3d at 1375.

In the IPRs, the PTAB applied the *Fox Factory* spectrum analysis and found that, when the commercially successful product was used as intended, the patented designs was coextensive with its ornamental appearance, and the functional parts were insignificant. See Appx00042, Appx00119.

The Panel Ruling, however, rejected that PTAB determination of coextensiveness, and articulated a bright-line “is-or-isn’t” test for coextensiveness that was in direct conflict with the coextensiveness-spectrum analysis of *Teva* and *Fox Factory*. The Panel Ruling stated:

The question is instead whether unclaimed features are “insignificant,” period. See Fox Factory, 944 F.3d at 1374. ... Because the iQ Maximizer undisputedly includes significant unclaimed functional elements, no reasonable trier of fact could find that the iQ Maximizer is coextensive with the claimed designs.

Panel Ruling at *3–4 [emphasis added].

In other words, the Panel Ruling held that the mere existence of a functional part of the iQ Maximizer that was not ornamental meant that there could be no

presumption of nexus of the design of the ‘645 and ‘646 patents to the commercially successful displays embodying them.

That holding of the Panel Ruling, however, was incorrect, and the specific reasoning of the holding was expressly rejected in *Teva*.

In *Teva*, the PTAB had considered evidence of nexus in an IPR, and had held there, as the Panel Ruling has held here, that, to defeat a presumption of nexus, a patent challenger need only show that an “unclaimed feature materially affects the functioning of the product that is alleged to be coextensive with the claim.” See, *Teva*, 8 F.4th 1349 at *8.

The Federal Circuit in *Teva* rejected that simplistic test for coextensiveness, reasoning that virtually every innovative product inevitably has some unclaimed feature that materially affects its functionality, and those features cannot reasonably be found to destroy the nexus between a claim and the product. *Id.* Applying such a strict requirement for coextensiveness would effectively make the presumption of nexus impossible. *Id.*

The Panel Ruling itself recognized that its “is-or-isn’t” rule of coextensiveness would all but wipe out the presumption of nexus, especially for design patents, observing that “[i]t is ... hard to envision a commercial product that lacks any significant functional features such that it could be coextensive with a design patent claim.” Panel Ruling at *12, n. 1. Indeed, applying the rule of the

Panel Ruling would also eliminate the presumption of nexus not just for patented designs, but also for utility patents as well, for the reasons set out in *Teva* – because virtually every innovative product inevitably has some material unclaimed feature or structure.

The Panel Ruling therefore did not apply the correct Federal Circuit law, and its analysis was not the proper coextensiveness spectrum analysis.

En banc review to correct the Panel Ruling is consequently requested.

C. The PTAB finding of presumption of nexus here would not have been reversed had the correct *Teva/Fox Factory* coextensiveness spectrum analysis been applied.

If the proper *Teva/Fox Factory* coextensiveness spectrum analysis had been applied here to the PTAB Final Written Decisions, there would have been no reversal of the finding of presumption of nexus.

The PTAB here held that the designs of the ‘645 and ‘646 patents were coextensive with the commercially successful products because they represented substantially all of the ornamental appearance of the iQ Maximizer when used to display Campbell Soup cans. *See* Appx000043-44, Appx000120-21. That analysis is consonant with the long-established principle that a design patent is only granted for the visible ornamental appearance of an article as it appears in its intended use. *See*, 35 U.S.C. sec. 171; *see also In re Webb*, 916 F.2d 1553, 1557

(Fed. Cir. 1990) (a patented design must be visible during its use).

In other words, the PTAB held coextensiveness because the claims of the ‘645 and ‘646 patents were as coextensive as possible with the iQ Maximizer, given the permitted subject matter of design patents.

The PTAB further analyzed the other structure of the iQ Maximizer racks not involved in their ornamental appearance, and concluded that any other structure of the products, *i.e.*, the rails and functional part behind the patented display, was insignificant as to the ornamental appearance of the commercially successful displays in their intended use. *See* Appx000043-44, Appx000120-21.

The PTAB’s reasoning is essentially a proper spectrum analysis of coextensiveness that should not be disturbed.¹

For the foregoing reasons, the Panel Ruling reversing the PTAB finding of presumed nexus is inconsistent with the Federal Circuit caselaw regarding presumption of nexus.

¹ It may be noted that despite articulating a reasonable coextensiveness-spectrum standard, both *Teva* and *Fox Factory* ultimately found no coextensiveness in their given fact situations, that does not impact on the present case. In *Fox Factory*, the commercial product included a separate inventive feature that the patentee had stated was “critical”. *Fox Factory*, 944 F.3d at 1374-75. No such statement exists in this case. In *Teva*, the claims were broad, functional-language utility-patent claims. See *Teva* at *9-10. In contrast, the claims here are design patents, which are very narrow. See *Hartco Eng'g, Inc. v. Wang's Int'l, Inc.*, 142 F. App'x 455, 458 (Fed. Cir. 2005) (unpublished).

En banc review and reinstatement of the PTAB finding of the presumption of nexus, and the consequent determination of validity of the ‘645 and ‘646 patents, is respectfully requested.²

D. The Panel Ruling applied a “unique characteristics” analysis to nexus-in-fact that was an impermissible “points of novelty” analysis precluded by *Egyptian Goddess*.

The Panel Ruling also reviewed and rejected the PTAB findings of nexus-in-fact, requiring nexus to “unique characteristics” of the designs of the ‘645 and ‘646 patents, which the Panel Ruling identified as ornamental distinctions of the designs of the ‘645 and ‘646 patents from Linz. *See* Panel Ruling at *12-13. Following that incorrect analysis, the Panel Ruling then held that the evidence of superiority of the patented designs was linked to parts of the patented designs that were found in the prior art, and therefore there was no nexus to the “points of novelty”. *Id.*

Although this reasoning is difficult to follow, at the very least it is apparent that the Panel Ruling determination of “unique characteristics” for nexus based on comparisons of the patented designs to the prior art publication is

² If the correct coextensiveness-spectrum analysis were to require additional comparative analysis of the significance of the designs of the ‘645 and ‘646 patents and the functional structure of the displays, the proper action in this appeal would be to remand to the PTAB for further consideration. *See Ariosa Diagnostics v. Verinata Health, Inc.*, 805 F.3d 1359, 1360 (Fed. Cir. 2015).

improper, because that comparison is irrelevant to nexus. In addition, the Panel Ruling use of the comparison of the claims of the design patents to the prior art was an impermissible “points of novelty” analysis, precluded by *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665 (Fed. Cir. 2008).

The Panel Ruling quite evidently misunderstood the meaning of the term “unique characteristics” relating to a finding of nexus.

That term first appeared in Federal Circuit jurisprudence in *In re Huang*, which held that commercial success “is relevant in the obviousness context only if there is proof that the sales were a direct result of the *unique characteristics* of the claimed invention—as opposed to other economic and commercial factors unrelated to the quality of the patented subject matter.” *In re Huang*, 100 F.3d 135, 140 (Fed. Cir. 1996)[emphasis added].

“Unique characteristics” in a nexus analysis therefore are attributes of the patented design to be compared to other economic and commercial factors. The issue is whether the commercial success of the product is due to its incorporation of the patented design or due to some other factor. The “unique characteristics” are not determined from the comparison of the patented invention to the prior art but by comparison to the reasons for the commercial success of the product.

There was no reason for any reference to the prior art in the Panel Ruling

on nexus, and it was an improper analysis. The Panel Ruling’s point-by-point list of distinctions relative to the prior-art Linz patent of the patented designs was clearly a “point-of-novelty” analysis that was disapproved by the Federal Circuit in *Egyptian Goddess*.

Egyptian Goddess recognized a “point-of-novelty” analysis as an analysis used “to focus on those aspects of a design which render the design different from the prior art”, which should no longer be used in the analysis of a design patent claim. *Egyptian Goddess*, 543 F.3d at 677-78. Rather, the correct analysis of a design patent claim is that it must be viewed “as a whole” with a scope covering “the patented design or a colorable imitation thereof” in the eye of an ordinary observer. *Id.* at 678.

The Federal Circuit case has only referenced “unique characteristics” with respect to design patent obviousness in one case. In *Sealy Tech., LLC v. SSB Mfg. Co.*, 825 F. App’x 801 (Fed. Cir. 2020)(unpublished), the Court required a linkage of the “unique characteristics” of the claimed design to commercial products. There was no “points-of-novelty” expression or reference to the prior art in relation to those “unique characteristics”, and it was clear that the Court considered the “unique characteristics” to simply be “the claimed design” as a whole. *See, e.g., Sealy Tech.* 825 F. App’x at 808 (“briefing does not explain how the commercial success was the direct result *of the claimed design.*”)[emphasis

added]).

The Panel Ruling therefore misapplied the concept of “unique characteristics” to nexus in its analysis, and furthermore applied a disallowed “points-of-novelty” analysis to the designs of the ‘645 and ‘646 patents, in conflict with Federal Circuit precedent.

En banc review to correct these errors is respectfully requested.

E. The PTAB finding of nexus-in-fact here would not have been disturbed if the correct standards from *In re Huang* and *Egyptian Princess* had been applied.

The PTAB made factual findings of nexus of the designs of the ‘645 and ‘646 patents *as a whole, i.e.*, the properly-determined “unique characteristics” of the designs, with the commercial success and praise shown. *See* Appx00044-53, Appx000121-130. Application of the proper standard for determining nexus therefore would result in affirming the finding of nexus.

Specifically, the ornamental appearance of the ‘645 and ‘646 patents as a whole was recognized as linked to the market studies that showed an increase of as much as 13% in sales from use of the patented displays, the sale of \$30 million of patented racks to Campbell Soup for the purpose of selling cans of soup in the patented displays, and the Campbell Soup documents praising the iQ Maximizer, all of which showed photographs of the patented display of Campbell Soup cans

exactly as shown in the ‘645 and ‘646 patents.

Even the Panel Ruling’s reference to a benefit from the label area being 210% larger than the actual can label is only in the context of the patented display designs with a can displayed as seen in both the ‘645 and ‘646 patents. *See* Appx002268, cf. Panel Ruling at *13.

All of the evidence of commercial success therefore supports its linkage with the patented designs as a whole. A fair and reasonable fact finder could not hold otherwise, and *en banc* review is respectfully requested to reinstate the finding of nexus.

F. The Panel Ruling is contrary to Federal Circuit precedent holding that copying is substantial evidence of nexus.

In addition to the above errors, the Panel Ruling finding of lack of substantial evidence for nexus is also inconsistent with Federal Circuit precedent, which has held that copying of a patented feature from a commercially successful product is a *prima facie* showing of a nexus between the patented feature and the commercial success. *See, Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 1392–93 (Fed. Cir. 1988). *See also Apple Inc. v. Samsung Elecs. Co.*, 809 F.3d 633, 643 (Fed. Cir. 2015)(copying relevant to a causal nexus between claim and sales of product).

Copying by Campbell Soup’s manufacture and widespread use of an

estimated 300,000 racks incorporating the patented display design is undisputed here, and it represents substantial evidence of nexus making reversal of the PTAB finding contrary to precedent.

En banc correction of this error is therefore also respectfully requested.

G. The PTAB findings based on testimony of Examiner Gandy should be rejected.

The PTAB here found that the strong objective indicia of nonobviousness overcame a weak and hindsight-loaded case for obviousness based on the testimony of Appellants' expert James Gandy regarding Linz. See Appx00065, Appx00142.

James Gandy, however, was also *the Primary Examiner that had himself issued the Linz patent*. His testimony to the PTAB regarding the preclusive prior-art effect of the Linz patent prosecuted before him was forbidden under U.S. Patent & Trademark Office regulations, and should not have been considered by the PTAB.

Without the Gandy testimony, the challenges based on Linz would necessarily fail, without any reference to the secondary considerations.

The Panel Ruling failed to address this fatal defect. *See* Panel Ruling, *10.

En banc review is respectfully also requested to correct this error.

CONCLUSION

For the above reasons, the Panel Ruling conflicts with Federal Circuit precedent on important issues of nexus and design-patent law. Correction of any one of the incorrect holdings of the Panel Ruling would result in the reinstatement of the PTAB Final Written Decisions and the validity of the '645 and '646 patents.

Rehearing *en banc* is therefore respectfully requested.

Respectfully submitted,

Dated: September 20, 2021

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ADDENDUM

**United States Court of Appeals
for the Federal Circuit**

**CAMPBELL SOUP COMPANY, CAMPBELL SALES
COMPANY, TRINITY MANUFACTURING, LLC,**
Appellants

v.

GAMON PLUS, INC.,
Appellee

2020-2344, 2021-1019

Appeals from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in Nos. IPR2017-
00091, IPR2017-00094.

Decided: August 19, 2021

TRACY ZURZOLO QUINN, Holland & Knight LLP, Phila-
delphia, PA, argued for all appellants. Appellants Camp-
bell Soup Company, Campbell Sales Company also
represented by STEVEN E. JEDLINSKI, Chicago, IL.

MARTIN B. PAVANE, The Davis Firm, Longview, TX, for
appellant Trinity Manufacturing, LLC.

ANDREW L. TIAJOLOFF, Tiajolloff & Kelly LLP, New
York, NY, argued for appellee.

Before MOORE, *Chief Judge*, PROST and STOLL, *Circuit Judges*.

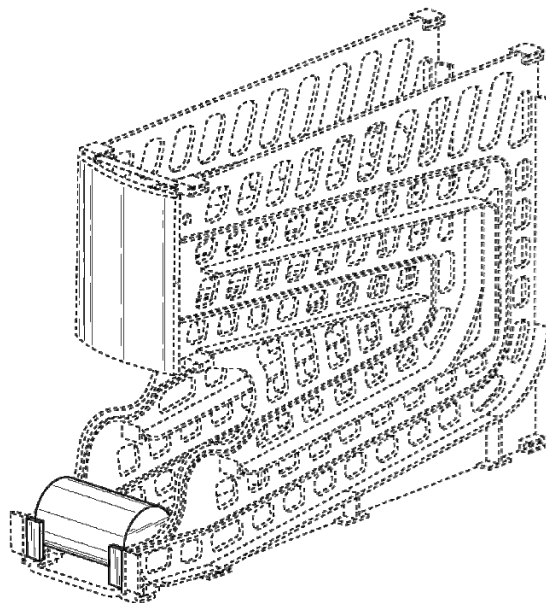
MOORE, *Chief Judge*.

Campbell Soup Company, Campbell Sales Company, and Trinity Manufacturing, LLC (collectively, Appellants) appeal two final written decisions of the Patent Trial and Appeal Board holding that Appellants did not demonstrate the claimed designs of U.S. Design Patent Nos. D612,646 and D621,645 would have been obvious over U.S. Design Patent No. D405,622 (Linz) or U.S. Patent No. 4,909,578 (Abbate). Because the claimed designs would have been obvious over Linz, we reverse.

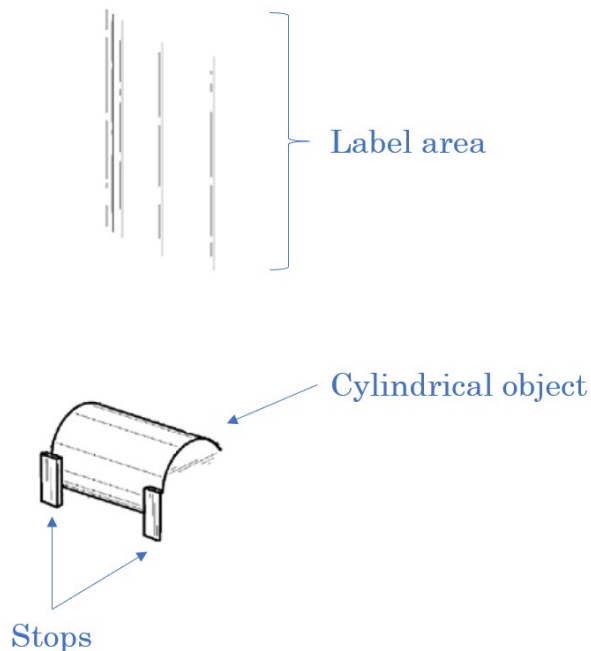
BACKGROUND

A. The Claimed Designs

Gamon Plus, Inc., owns the '646 and '645 patents, which each claim "[t]he ornamental design for a gravity feed dispenser display, as shown and described." J.A. 155; J.A. 158. The sole figure of the '646 patent depicts the following:

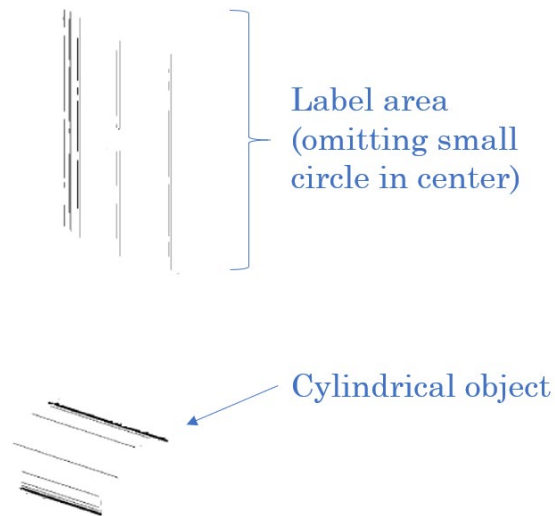


Many features in the above figure are drawn using broken lines, which, consistent with 37 C.F.R. § 1.152, means they “represent the article in which the claimed design is embodied, but . . . form[] no part of the claimed design.” ’646 patent at Description. Omitting those features from the above figure reveals that the ’646 patent’s claimed design is limited to what the parties refer to as the label area, cylindrical object, and stops:



J.A. 1113 (annotations added).

The ’645 patent’s sole figure is nearly identical to the ’646 patent’s figure, differing in only two respects. First, the top and bottom edges of the cylindrical object and the stops are shown in broken lines, which, again, means they “form[] no part of the claimed design.” ’645 patent at Description. Second, there is a small circle, also shown in broken lines, near the middle of the label area. *Id.* at Figure. Omitting these features from the ’645 patent’s figure yields the following:

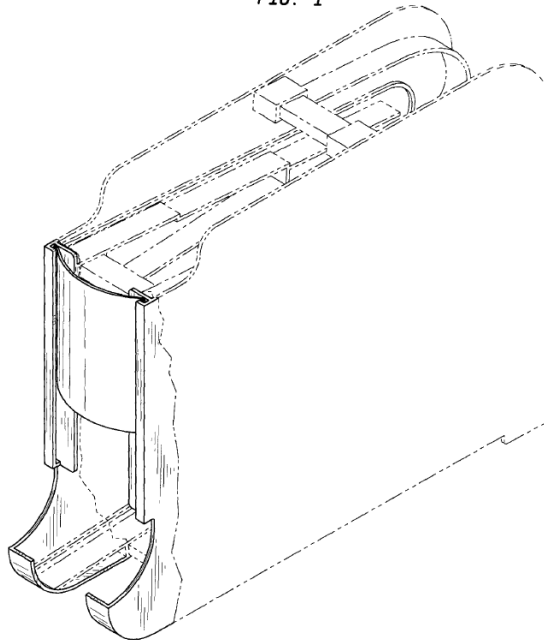


J.A. 357 (annotations added).

B. The Prior Art

Linz discloses and claims a “display rack,” as shown in Figure 1 thereof:

FIG. 1



C. Gamon's Commercial Embodiment

Gamon's commercial embodiment of the claimed designs, called the iQ Maximizer gravity feed dispenser, is shown here:



J.A. 33.

From 2002 to 2009, Gamon sold about \$31 million worth of iQ Maximizers to Campbell. J.A. 14. Campbell installed the iQ Maximizers in about 17,000 stores nationwide. *Id.* In its 10-K reports to the Securities and Exchange Commission, Campbell attributed increased soup sales in part to the iQ Maximizer. *See, e.g.*, J.A. 1892 (“Condensed soup also benefited from the additional installation of gravity-feed shelving systems and increased advertising.”). In an interview for an industry publication, Campbell’s marketing manager for retail development, Jacques Finnel, praised the iQ Maximizer as “more efficient than existing shelving formats.” J.A. 1881. Mr. Finnel called out the dispenser’s label area for “making it easier for consumers to locate specific flavors.” *Id.* And an

internal Campbell marketing study touted the iQ Maximizer, calling it a “[b]reakthrough” and highlighting the “[b]illboard effect” of its label area. J.A. 2268.

In late 2008, Campbell began purchasing gravity feed dispensers from Trinity. J.A. 16. Trinity’s dispensers were similar to Gamon’s iQ Maximizer:



J.A. 35.

D. Procedural History

In 2015, Gamon sued Appellants for patent infringement in the United States District Court for the Northern District of Illinois. *Gamon Plus, Inc. v. Campbell Soup Co.*, No. 15-cv-8940 (N.D. Ill. filed Oct. 8, 2015). Appellants petitioned for *inter partes* review of the '646 and '645 patents on multiple grounds, including that the claimed designs would have been obvious over (1) Linz in view of other references and (2) Abbate in view of Linz or another reference. The Board instituted *inter partes* review on the Linz ground but not on the Abbate ground. *Campbell Soup Co.*

v. Gamon Plus, Inc., IPR2017-00091, 2017 WL 1216049, at *12 (P.T.A.B. Mar. 30, 2017); *Campbell Soup Co. v. Gamon Plus, Inc.*, No. IPR2017-00094, 2017 WL 1216030, at *14 (P.T.A.B. Mar. 30, 2017). In its final written decisions, the Board held that Appellants had failed to prove unpatentability, finding that Linz is not similar enough to the claimed designs to constitute a proper primary reference.

Appellants appealed. We vacated and remanded, reasoning that the “ever-so-slight differences” the Board identified between Linz and the claimed designs did not support its finding that Linz is not a proper primary reference. *Campbell Soup Co. v. Gamon Plus, Inc.*, 939 F.3d 1335, 1340–41 (Fed. Cir. 2019) (*Campbell I*). In addition, we instructed the Board to consider the non-instituted grounds consistent with the Supreme Court’s decision in *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348 (2018).

On remand, the Board again held that Appellants failed to prove unpatentability. It found that Abbate is not a proper primary reference, and it held that the claimed designs would not have been obvious over Linz alone or in combination with other references. The Board reasoned that although Linz alone has the same overall visual appearance as the claimed designs, it is outweighed by objective indicia of nonobviousness, namely: (1) Gamon’s commercial success in selling iQ Maximizers to Campbell; (2) Campbell’s praise of, and commercial success in using, the iQ Maximizer; and (3) Trinity’s copying of the iQ Maximizer. The Board presumed a nexus between those objective indicia and the claimed designs because it found that the iQ Maximizer is coextensive with the claims. The Board also found that Gamon established such a nexus regardless of the presumption.

Appellants again appeal. We have jurisdiction under 28 U.S.C. § 1295(a)(4)(A).

DISCUSSION

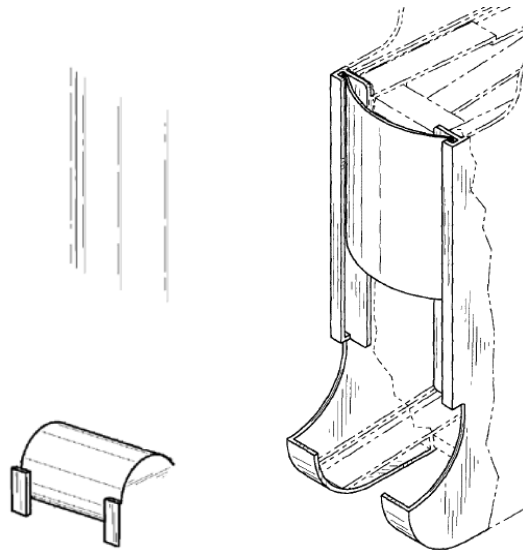
We review the Board’s legal determinations de novo and its factual findings for substantial evidence. *In re Van Os*, 844 F.3d 1359, 1360 (Fed. Cir. 2017). Obviousness is a question of law based on underlying facts. *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc.*, 876 F.3d 1350, 1358 (Fed. Cir. 2017). The obviousness inquiry requires consideration of the four *Graham* factors: (1) the scope and content of the prior art; (2) the differences between the claims and the prior art; (3) the level of ordinary skill in the art; and (4) objective indicia of nonobviousness, such as commercial success, long felt but unsolved needs, and failure of others. *Graham v. John Deere Co.*, 383 U.S. 1, 17–18 (1966).

A. Linz Creates the Same Overall Visual Appearance

In the design patent context, we address the first three *Graham* factors by determining whether a designer of ordinary skill would have combined teachings of the prior art to create “the same overall visual appearance as the claimed design.” *Durling v. Spectrum Furniture Co.*, 101 F.3d 100, 103 (Fed. Cir. 1996). This inquiry proceeds in two steps. First, before the trier of fact can combine prior art references, it must determine whether there exists a “primary reference,” i.e., a single reference that creates “basically the same visual impression” as the claimed design. *Id.* “To be ‘basically the same,’ the designs at issue cannot have ‘substantial differences in the[ir] overall visual appearance[s]’ or require ‘major modifications’; any differences must instead be slight. *Spigen Korea Co. v. Ultraproof, Inc.*, 955 F.3d 1379, 1383 (Fed. Cir. 2020) (alterations in original) (first quoting *Apple, Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314, 1330 (Fed. Cir. 2012); and then quoting *In re Harvey*, 12 F.3d 1061, 1063 (Fed. Cir. 1993)). This is a question of fact. *Id.* Second, if a primary reference exists, the trier of fact must determine whether, using secondary references, an ordinary designer would have

modified the primary reference to create a design that has the same overall visual appearance as the claimed design. *Durling*, 101 F.3d at 103. This, too, is a question of fact. See *MRC Innovations, Inc. v. Hunter Mfg., LLP*, 747 F.3d 1326, 1334–35 (Fed. Cir. 2014).

Here, the Board found Linz alone creates “the same overall visual appearance as the claimed design[s].” J.A. 63; J.A. 140. Substantial evidence supports that finding. The following side-by-side comparison of the ’646 patent’s claimed design (left) and the corresponding portions of Linz’s Figure 1 (right) shows the two are virtually indistinguishable:



J.A. 1113; J.A. 1686.

As the Board found, the Linz design has a label area with a symmetric, convex arcuate shape and a central apex that extends forward. J.A. 19; J.A. 96. It also has a bottom receiving area for receiving and displaying a can below the label area. J.A. 20; J.A. 97. Gamon contends that Linz can only accommodate a can with a smaller diameter than the can depicted in the claimed designs. Appellee’s Br. at 44–46. Gamon further appears to argue that Linz’s can would

come to rest farther rearward than in the claimed designs. *See id.* at 46–48. Those slight differences, however, do not substantially detract from the similarity in overall visual appearances. Indeed, the Board acknowledged those differences and still found that Linz and the claimed designs share the same overall visual appearance. J.A. 61–62; J.A. 138–39. Gamon does not challenge that finding. We therefore discern no reason to disturb the Board’s finding that Linz satisfies the *Durling* test.

B. The Evidence of Commercial Success and Praise
Lacks a Nexus to the Claims

Evidence of objective indicia of nonobviousness must have a nexus to the claims, i.e., “there must be a legally and factually sufficient connection between the evidence and the patented invention.” *Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1373 (Fed. Cir. 2019) (internal quotation marks omitted). Here, the Board found both a presumption of nexus and a nexus-in-fact between the claimed designs and the evidence of commercial success and praise. Substantial evidence does not support either finding.

1. The Presumption of Nexus Does Not Apply

We presume a nexus if the objective indicia evidence is tied to a specific product that is “coextensive” with the claimed invention, meaning that the product “*is* the invention disclosed and claimed.” *Id.* (emphasis in original) (quoting *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.*, 851 F.2d 1387, 1392 (Fed. Cir. 1988)). A product is “essentially the claimed invention” when, for example, “the unclaimed features amount to nothing more than additional insignificant features.” *Id.* at 1374. Whether a product is coextensive with a claimed invention is a question of fact. *Id.* at 1373.

Despite recognizing that “the claimed portions of the display rack do not cover the entire display rack,” J.A. 41, the Board found that Gamon’s iQ Maximizer is coextensive

with the claimed designs. The Board reasoned that “[t]he unclaimed rearward rails and side portions are not prominent ornamental features,” and those portions are, therefore, “insignificant to the ornamental design.” J.A. 42–43 (internal quotation marks omitted). This circular reasoning reflects a misunderstanding of the law. In determining coextensiveness, the question is not whether unclaimed features are insignificant *to a product’s ornamental design*. The question is instead whether unclaimed features are “insignificant,” period. *See Fox Factory*, 944 F.3d at 1374. That is because the purpose of the coextensiveness requirement is to ensure that nexus is presumed only when the product “*is the invention disclosed and claimed.*” *Id.* (emphasis in original). By limiting its analysis to ornamental significance, the Board simply did not answer the relevant question: whether the iQ Maximizer “*is the invention.*”

The Board attempted to distinguish *Fox Factory* because it involved a utility patent, rather than a design patent. J.A. 41. But the coextensiveness requirement does not depend on the type of patent at issue. The Board offered no rationale for taking a different approach in design patent cases, and we do not discern any. Accordingly, we reject the proposition that a product satisfies the coextensiveness requirement in the design patent context merely if its unclaimed features are *ornamentally* insignificant.

Under the correct legal standard, substantial evidence does not support the Board’s finding of coextensiveness. At most, the claims cover only a small portion of the iQ Maximizer: its label area, cylindrical object, and stops. The Board thus correctly recognized that the claims do not cover, for example, the dispenser’s “rearward rails and side portions.” J.A. 42. Gamon does not contest Appellants’ assertion that those and other structures are significant because they facilitate the loading and dispensing of products. *See Appellants’ Br.* at 44–45. Because the iQ Maximizer undisputedly includes significant unclaimed functional elements, no reasonable trier of fact could find

that the iQ Maximizer is coextensive with the claimed designs.¹

2. Gamon Did Not Establish Nexus-in-Fact

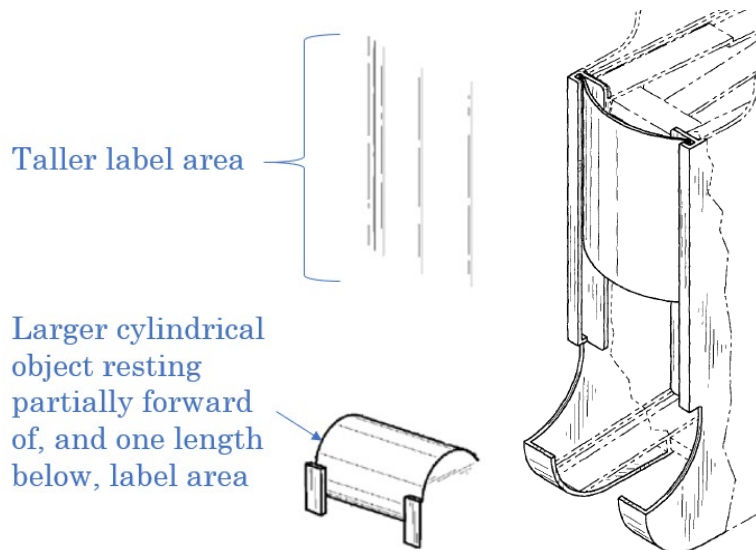
A patentee may establish nexus absent the presumption by showing that the objective indicia are the “direct result of the unique characteristics of the claimed invention,” *Fox Factory*, 944 F.3d at 1373–74 (quoting *In re Huang*, 100 F.3d 135, 140 (Fed. Cir. 1996)), rather than a feature that was “known in the prior art,” *Ormco Corp. v. Align Technology, Inc.*, 463 F.3d 1299, 1312 (Fed. Cir. 2006). Whether a patentee has established nexus is a question of fact. *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1331–32 (Fed. Cir. 2016).

Here, the Board based its nexus finding on evidence that, at best, shows the commercial success and praise of the iQ Maximizer resulted from its incorporation of the claimed label area. *See* J.A. 45–50. For example, with respect to commercial success, the Board cited the internal marketing study in which Campbell (1) credited the label area’s “[b]illboard effect” for improving branding of Campbell’s products and (2) recounted consumers’ feedback about the label area (e.g., “The label makes a difference, it’s like looking at your soup before you eat it.”). J.A. 2268. As for praise, the Board cited the industry publication in which Campbell’s marketing manager for retail development extolled the label area for “making it easier for consumers to locate specific flavors.” J.A. 1881.

But, as the Board found, a display rack with a label area was not new. J.A. 19. The only features the Board

¹ We do not go so far as to hold that the presumption of nexus can never apply in design patent cases. It is, however, hard to envision a commercial product that lacks any significant functional features such that it could be coextensive with a design patent claim.

found that distinguished the claimed designs from the prior art Linz design were: (1) a larger cylindrical object, (2) a resting point of the cylindrical object that is partially forward of the label area, (3) a taller label area that mimics the proportions of the cylindrical object; and (4) spacing equal to one label length between the label and the cylindrical object. J.A. 61–62; J.A. 65.



J.A. 1113; J.A. 1686 (annotations added). Thus, to establish nexus, Gamon needed to present evidence that the commercial success and praise of the iQ Maximizer derived from those “unique characteristics.” *Fox Factory*, 944 F.3d at 1373–74. It failed to do so. Instead, it presented evidence that merely ties commercial success and praise to aspects of the label area that were already present in the prior art. The cited industry publication, for example, highlights only that the label area displays “soup labels printed at twice their normal size.” J.A. 1881. Likewise, the internal Campbell marketing study just notes that the label area is “210% larger” than the product label. J.A. 2268. This is also true of the prior art Linz design. Moreover, the claimed designs do not require any specific size of the label area, or spacing between the can and the

label area, because the patents' figures depict the label area boundaries using broken lines. '646 patent at Figure; '645 patent at Figure.

Gamon relies on the testimony of the named inventor, Terry Johnson, who asserted that the iQ Maximizer's commercial success was due specifically to its label area having "the same proportions as the can." J.A. 1815:3–17. But there is no evidence in the record supporting that self-serving assertion. And again, the size of the label area is not claimed. Accordingly, given the absence of evidence tying any commercial success or praise to the claimed unique characteristics of the iQ Maximizer, substantial evidence does not support a nexus between those objective indicia and the claims.

We reject the Board's view that, in design patent cases, objective indicia need not be linked to the claimed design's unique characteristics. J.A. 58 ("[W]e do not believe that to establish commercial success for a design patent, a patent owner should have to differentiate design features 'that were already known' from those that are purportedly novel."). The Board reasoned that "the invalidity analysis [in design patent cases] focuses on the ornamental design as a whole." *Id.* But the same holds true in utility patent cases, *WBIP*, 829 F.3d at 1331–32 ("[T]he obviousness analysis involves determining whether '*the claimed invention as a whole* would have been obvious.'" (quoting 35 U.S.C. § 103)), and yet we still require a link to the claimed invention's unique characteristics in that context. We therefore hold that, as in the utility patent context, objective indicia must be linked to a design patent claim's unique characteristics.

C. The Evidence of Copying Does Not Overcome Linz

For purposes of this appeal, we assume substantial evidence supports the Board's finding that Trinity copied the unique characteristics of the claimed designs. Even accepting the evidence of copying, we conclude that this alone

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does not overcome the strong evidence of obviousness that Linz provides.

CONCLUSION

Weighing all of the *Graham* factors, including (1) the Board's finding that, from the perspective of a designer of ordinary skill, Linz creates the same overall visual impression as the claimed designs and (2) copying by Trinity of the claimed designs' unique characteristics, we conclude that the claimed designs would have been obvious over Linz. Accordingly, we reverse the Board's decisions holding that Appellants failed to prove unpatentability based on Linz. We have considered Gamon's arguments and find them to be without merit. Because we reverse the Board's decisions as to Linz, we need not reach Appellants' alternative arguments.

REVERSED

CERTIFICATE OF SERVICE

I, Andrew L. Tiajolloff, hereby certify that on September 20, 2021, the foregoing brief was filed using the Court's CM/ECF system and a copy served on the parties' counsel of record via ECF.

Dated: September 20, 2021

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A).
2. This submission contains 3,890 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 35(c)(2).
3. This submission complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Appellate Procedure 28.1(e) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this submission has been prepared in a proportionally-spaced typeface using Microsoft Word in a 14-point Times New Roman font.

Dated: September 20, 2021

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