

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

GM GLOBAL TECHNOLOGY OPERATIONS LLC,
Patent Owner.

IPR2020-00823
Patent D837,105 S

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

DANIELS, *Administrative Patent Judge*.

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

I. INTRODUCTION

A. Background

LKQ Corporation and Keystone Automotive Industries, Inc., (collectively “LKQ”) filed a Petition to institute an *inter partes* review of the claim for a “Vehicle Grille” in U.S. Patent No. D837,105 (Ex. 1001, “the ’105 patent”). Paper 2 (“Pet.”). GM Global Technology Operations LLC (“GM”) filed a Preliminary Response. Paper 6 (“Prelim. Resp.”).

We have authority to determine whether to institute an *inter partes* review under 35 U.S.C. § 314 and 37 C.F.R. § 42.4(a). Upon consideration of the Petition and the Preliminary Response we determine that LKQ has not established a reasonable likelihood of prevailing on the sole design claim challenged in the Petition. For the reasons expressed below, we do not institute an *inter partes* review of the claim of the ’105 patent.

B. Additional Proceedings

The parties identify various other *inter partes* and post grant review proceedings that Petitioner has filed challenging different patents owned by GM. The parties do not state that these other proceedings affect, or would be affected by, this proceeding involving the ’105 patent. Pet. 4–5; Paper 5.

C. The ’105 Patent and Claim

The ’105 patent (Ex. 1001) issued January 24, 2018, and lists GM as the assignee. Ex. 1001, codes (72), (73). The title, “Vehicle Grille,” refers to a front surface of a vehicle grille illustrated in solid lines but with certain unclaimed portions, which appear to be mainly functional attachment points and symbol indicia, shown in dashed lines. *See* 37 C.F.R. § 1.152, *see also* MPEP § 1503.02, subsection III (9th ed. rev. Oct. 2019 June 2020) (“Unclaimed subject matter may be shown in broken lines for the purpose of illustrating the environment in which the article embodying the design is

used. Unclaimed subject matter must be described as forming no part of the claimed design or of a specified embodiment thereof.”).

The '105 design includes Figures 1–5, reproduced below, illustrating the claimed front grille as set forth below.¹

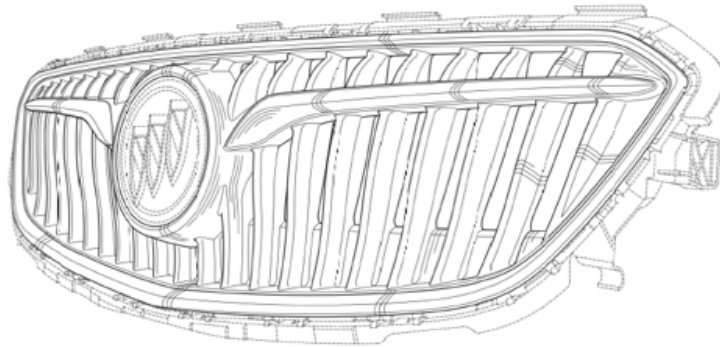


FIG. 1

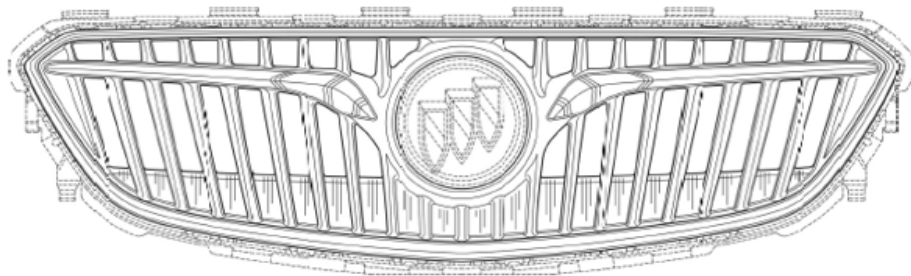


FIG. 2

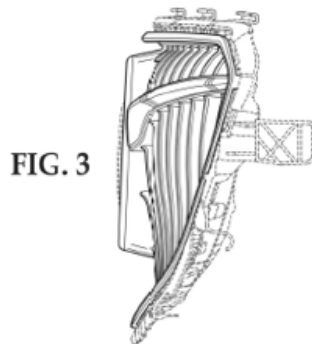


FIG. 3

¹ We refer to the claim, i.e., the vehicle front grille shown in Figures 1–5, also as “the '105 design.”

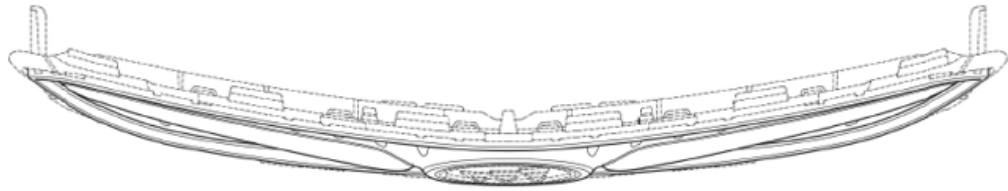


FIG. 4

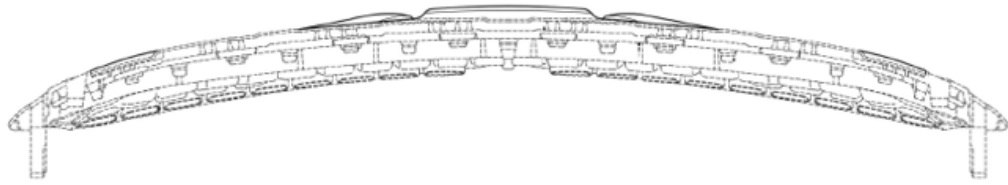


FIG. 5

Ex. 1001. Figures 1–5 above depict, respectively, the following views of the claimed vehicle grille design: a perspective view, a front elevation view, a left side elevation view, a top plan view and a bottom plan view. *Id.*, code (57).

D. Claim Construction

LKQ contends that the claim can be described according to the drawings as shown by the solid lines as

[a] vehicle grille comprising:

a substantially horizontal top portion (blue) of a contoured bezel terminating in a short, slightly downward-pointing diagonal bezel segment (green) at each end, wherein each diagonal bezel segment is approximately 10% of the length of the horizontal top portion;

a substantially longitudinally elongated u-shaped bottom bezel portion (red) extending inwardly and downwardly at an approximate 45-degree angle from the diagonal bezel segments and extending approximately parallel to the top portion along the bottom;

wherein the substantially u-shaped bottom bezel portion further includes a minimum at a center line of the contoured bezel;

wherein the contoured bezel is horizontally convexly curved, and the minimum of the substantially u-shaped bezel bottom portion is forward of the substantially horizontal top portion;

an interior portion of the contoured bezel comprising evenly-spaced, substantially vertical tines that slightly angle towards the minimum and gradually decrease in angle as the tines approach the minimum, with the outermost vertical tines closest to a side edge of the bezel extending to the side edge,

partial tines filling the bottom portion of the voids between the substantially vertical tines, the partial tines extending from the elongated u-shaped bottom bezel portion to approximately 25% a height of the interior portion;

a circular portion horizontally centered in the interior portion of the contoured bezel with a diameter spanning approximately 20% of the overall width of the substantially horizontal top portion; vertically, adjacent to the substantially horizontal top portion wherein the diameter is further approximately 75% of a center height of the interior portion; and, having narrow, substantially horizontal extensions that angle slightly upward, further gradually narrow, are situated approximately 20% of a distance from the substantially horizontal top portion to the substantially u-shaped bottom portion, and extend the entire length of the interior portion, terminating adjacent to where the short, downward-pointing diagonal bezel segments join the elongated u-shaped bezel bottom portion, and

wherein the substantially vertical tines bow forward and increase in thickness of depth from the top of the interior portion to the substantially horizontal extensions, then extend substantially vertically, but slightly rearward, from the narrow, substantially horizontal extensions to the bottom of the interior portion while gradually reducing in thickness of depth.

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Pet. 14–19.

GM argues that LKQ’s claim construction does not present an accurate visual image of the design because it “is based on generic design concepts, rather than addressing the features of the claimed design.” Prelim. Resp. 10 (citing *Vitro Packaging, LLC v. SaverGlass, Inc.*, IPR2015-00947, Paper 13 at 5 (PTAB Sept. 29, 2015)). GM does not provide an explicit alternative construction. *Id.* at 12.

Our observation of the ’105 design is that no verbal description is necessary. “As the Supreme Court has recognized, a design is better represented by an illustration ‘than it could be by any description and a description would probably not be intelligible without the illustration.’” *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679 (Fed. Cir. 2008) (quoting *Dobson v. Dornan*, 118 U.S. 10, 14 (1886)). The overall visual appearance of “a vehicle grille” shown in Figures 1–5 of the ’105 design is clearly exemplified in the drawings. On the record at this stage of the proceeding, the best description of the ornamental features of the ’105 design comes from the drawings themselves. Accordingly, at this stage of the proceeding, we determine that no articulated verbal description is necessary to describe the overall ornamental nature of the ’105 design. And, although we do not undertake a specific claim construction, we acknowledge in our following obviousness analysis relevant design characteristics of the ’105 design, including key similarities and distinctions relative to the prior art. *See MRC Innovations, Inc. v. Hunter Mfg., LLP*, 747 F.3d 1326, 1332 (Fed. Cir. 2014) (Affirming that a verbal claim construction was unnecessary, the Federal Circuit explained that “the district court did not err by failing to provide an express verbal description of the claimed design;

rather, it described the claimed design in the context of comparing it to the prior art.”).

E. The Alleged Grounds of Unpatentability

LKQ contends that the challenged claim is unpatentable under 35 U.S.C. § 103 based on images from a website, www.carbodydesign.com, that LKQ refers to as the “CBD GM Avenir Article” (Ex. 1005), which we refer to in this Decision as “Avenir Article.” Pet. 36. LKQ contends that Avenir Article includes images of a vehicle and front grille that predate the filing of the ’105 patent by more than a year. *Id.* at 36–37. LKQ argues that any differences between the images from Avenir Article and the ’105 design are taught by U.S. Design Patent No. D558,102 (“Lau”) (Ex. 1011) or are *de minimus*. *Id.* at 37.

Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
1	103	Avenir Article ² and Lau ³

LKQ also relies on the Declarations of Jason M. Gandy (Ex. 1003) and Jason C. Hill (Ex. 1004) in support of its arguments.

² Ex. 1005, Buick Avenir Concept, <http://www.carbodydesign.com> (Pet. 21–22) (characterized by Editor-in-Chief of Car Body Design, Mr. Marco Traverso, as “a true and accurate copy of an article posted to Car Body Design titled ‘Buick Avenir Concept.’ This article was posted together with embedded videos and a gallery of images including additional images of the vehicle, sketches, and renderings. I published the article, embedded videos, and accompanying gallery to carbodydesign.com on January 12, 2015.”) (Ex. 1016 ¶ 7).

³ Ex. 1011, U.S. Design Pat. No. D558,102 S, (December 25, 2007) (“Lau”).

II. ANALYSIS

A. Principles of Law

“In addressing a claim of obviousness in a design patent, the ultimate inquiry . . . is whether the claimed design would have been obvious to a designer of ordinary skill who designs articles of the type involved.” *Apple, Inc. v. Samsung Elec. Co.*, 678 F.3d 1314, 1329 (Fed. Cir. 2012) (alteration in original, internal quotation); *see also High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1313 (Fed. Cir. 2013) (“The use of an ‘ordinary observer’ standard to assess the potential obviousness of a design patent runs contrary to the precedent of this court and our predecessor court, under which the obviousness of a design patent must, instead, be assessed from the viewpoint of an ordinary designer.”). This obviousness analysis generally involves two steps: first, “one must find a single reference, a something in existence, the design characteristics of which are basically the same as the claimed design”; second, “once this primary reference is found, other references may be used to modify it to create a design that has the same overall visual appearance as the claimed design.” *High Point Design*, 730 F.3d at 1311 (internal quotation).

The first step has two parts, we must “(1) discern the correct visual impression created by the patented design as a whole; and (2) determine whether there is a single reference that creates basically the same visual impression.” *Id.* at 1312 (internal quotation and citations omitted). In the second step of the obviousness analysis, the primary reference may be modified by secondary references “to create a design that has the same overall visual appearance as the claimed design.” *Id.* at 1311 (internal quotation and citations omitted). However, the “secondary references may only be used to modify the primary reference if they are ‘so related [to the

primary reference] that the appearance of certain ornamental features in one would suggest the application of those features to the other.” *Durling v. Spectrum Furniture Co., Inc.*, 101 F.3d 100, 103 (Fed. Cir. 1996) (alteration in original) (quoting *In re Borden*, 90 F.3d 1570, 1575 (Fed. Cir. 1996)).

When evaluating prior art references for purposes of determining patentability of ornamental designs, the focus must be on actual appearances and specific design characteristics rather than design concepts. *In re Harvey*, 12 F.3d 1061, 1064 (Fed. Cir. 1993); *see also Apple*, 678 F.3d at 1332 (“Rather than looking to the ‘general concept’ of a tablet, the district court should have focused on the distinctive ‘visual appearances’ of the reference and the claimed design.”).

As we have set forth the appropriate claim construction above, notably the drawings imparting the correct visual impression of the ’105 design, that is—the appearance of the vehicle grille in Figures 1–5 themselves, we turn below, to addressing the designer of ordinary skill and the second part of the first step in the obviousness analysis.

B. The Designer of Ordinary Skill

LKQ contends that:

a designer of ordinary skill would be an individual who has at least an undergraduate degree in transportation or automotive design and work experience in the field of transportation or automotive design, or someone who has several years’ work experience in transportation or automotive design.

Pet. 33 (citing Ex. 1003 ¶ 45; Ex. 1004 ¶ 44). GM argues, without citation to evidence, that:

[a] designer of ordinary skill in the art relevant to the ’105 patent would have at least an undergraduate degree in automotive design, or other related industrial design field, with at least two years of relevant practical experience in designing automotive

body parts. An increase in experience could compensate for less education, and an increase in education could likewise compensate for less experience.

Prelim. Resp. 9. The parties do not identify, and we do not discern, any material difference between the parties' proposed definitions. For purposes of this decision and on the record currently before us, which includes testimony by LKQ's witnesses, we adopt LKQ's proposed definition of the ordinary designer. Also, we point out that adopting GM's definition would not alter the outcome of this Decision.

C. Whether the claim of the '105 design is obvious in view of Avenir Article and Lau

LKQ argues that the claim of the '105 design for Vehicle Grille would have been obvious over Avenir Article and Lau. Pet. 36.

1. The Asserted Primary Reference – Avenir Article

LKQ asserts Avenir Article, which includes several images of a front grille on a Buick Avenir concept car, as the initial primary, or *Rosen*, reference.⁴ Pet. 37–38 (citing Ex. 1003 ¶¶ 54–56; Ex. 1004 ¶¶ 57–59). A representative photograph from Avenir Article is reproduced below:⁵

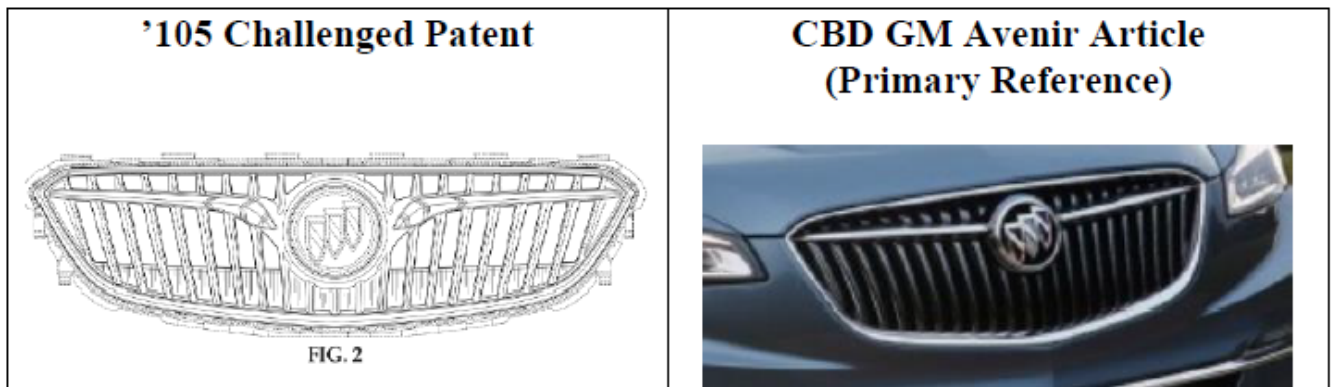
⁴ In the context of design patent law, a proper primary reference for the obviousness analysis is “a reference, a something in existence, the design characteristics of which are basically the same as the claimed design.” *In re Rosen*, 673 F.2d 388, 391 (CCPA 1982).

⁵ Unless otherwise noted, we use “Avenir Article” broadly to refer to the images of the vehicle grille shown in the reference.



The photograph from Avenir Article, above, shows a front perspective view of the 2015 Avenir concept Car.

We reproduce, below, LKQ's visual comparison in its Petition of Figure 2 of the '105 patent and a cropped image from Avenir Article.



Above is LKQ's visual comparison of Figure 2 of the '105 patent on the left, with a cropped image from Avenir Article on the right, depicting a front grille of the Avenir concept car. Pet. 38.

Relying on testimony from its Declarants, Mr. Gandy and Mr. Hill, LKQ argues that these designs share the following elements:

- 1) a substantially horizontal top portion terminating in a short, slightly downward-pointing diagonal bezel segment at each end, wherein each diagonal bezel segment is approximately 10% of the length of the horizontal top portion;

- 2) a substantially longitudinally elongated u-shaped bottom bezel portion extending inwardly and downwardly at an approximate 45-degree angle from the diagonal bezel segments and extending approximately parallel to the top portion along the bottom;
- 3) wherein the substantially u-shaped bottom bezel portion further includes a minimum at a center line of the contoured bezel;
- 4) wherein the contoured bezel is horizontally convexly curved, and the minimum of the substantially u-shaped bezel bottom portion is forward of the substantially horizontal top portion;
- 5) an interior portion of the contoured bezel comprising evenly-spaced, substantially vertical tines that slightly angle towards the minimum and gradually decrease in angle as the tines approach the minimum;
- 6) a circular portion horizontally centered in the interior portion of the contoured bezel with a diameter spanning approximately 20% of the overall width of the substantially horizontal top portion; vertically, adjacent to the substantially horizontal top portion; and, having narrow, substantially horizontal extensions that angle slightly upward from the circular portion and that further gradually narrow, are situated approximately 20% of a distance from the substantially horizontal top portion to the substantially u-shaped bottom portion, and extend the entire length of the interior portion, terminating adjacent to where the short, downward-pointing diagonal bezel segments join the substantially u-shaped bezel bottom portion; and
- 7) wherein the substantially vertical tines bow forward and increase in thickness of depth from the top of the interior portion to the substantially horizontal extensions, then extend substantially vertically, but slightly rearward, from the narrow, horizontal extensions to the bottom of the interior portion while gradually reducing in thickness of depth.

Pet. 38–42 (citing Ex. 1003 ¶ 56; Ex. 1004 ¶ 59).

Acknowledging there are differences, LKQ maintains that Avenir Article, is “a single reference, [is] ‘a something in existence, the design characteristics of which are *basically the same* as the claimed design.’” *Id.*

at 37 (citing *Durling*, 101 F.3d at 103). LKQ argues that there are only four differences:

(1) the tines closest to the side edges (the outermost tines) extend to those side edges in the claimed design; (2) the dimensions of the circular portion; (3) a more pronounced angle where the horizontal extensions in the claimed design meet the circular portion; and (4) the partial tines extending up along the bottom of the claimed design.

Id. at 43. LKQ argues that the first three differences are mainly “*de minimis*,” and with respect to the fourth difference, the “partial tines are purely functional—providing both structural reinforcement to the grille and directing airflow toward the center of the grille—and do not contribute to the ornamental appearance.” *Id.* 45–52 (citing Ex. 1003 ¶ 77; Ex. 1004 ¶ 78).

GM disagrees with LKQ’s portrayal of the claimed design and comparison with Avenir Article, asserting that LKQ has ignored relevant features of the claimed design, arguing that by “focusing instead on design concepts, LKQ fails to analyze the unique overall appearance of the claimed design, and thus fails to represent an accurate visual image of the claimed design.” Prelim. Resp. 17 (citing *LKQ Corp. v. GM Global Tech. Operations LLC*, IPR2020-00062, Paper 14 at 21–22 (PTAB April 16, 2020)). GM argues specifically that by relying on an incomplete description of the claimed design and mischaracterizing certain elements of the claimed design, LKQ “ignores specific features that contribute to the overall shape and dimensions of the claimed design.” *Id.* at 24. According to GM, “for example, the shape of the alleged ‘contoured bezel’ and the three-dimensional nature of the alleged ‘narrow, substantially horizontal

extensions’ . . . distinguish the claimed design from the CBD GM Avenir Article, yet LKQ either offers no analysis or mischaracterizes them.” *Id.*

We have considered the arguments and evidence of record and determine that LKQ has not met the threshold showing necessary to support trial institution with respect to these obviousness grounds. As explained below, we agree with GM that LKQ’s analysis is deficient insofar as it fails to address how prominent features of the claimed design are satisfied by Avenir Article and Lau. We first consider whether Avenir Article is a proper *Rosen* reference, and, as explained immediately below, we determine that it is not.

To determine that a prior art reference is a suitable primary reference; the appearance of the article described in the proposed primary reference must be compared to the claimed design as a whole. *Rosen*, 673 F.2d at 391. In order to construct a suitable overall appearance for the sake of making a forthright comparison, and keeping in mind both parties analyses, we observe and consider, below, several distinct characteristics of the design which draw our attention, most notably, the bezel, the vertical tines, the central circular portion and the horizontal extensions.

a. Bezel

Considering initially the grille profile and bezel surrounding the tines, LKQ argues that the claimed grille includes “a substantially horizontal top portion terminating in a short, slightly downward-pointing diagonal bezel segment at each end,” and below the top portion of the bezel, “a substantially longitudinally elongated u-shaped bottom bezel portion extend[s] inwardly and downwardly at an approximate 45–degree angle from the diagonal bezel segments and extend[s] approximately parallel to the top portion along the bottom.” Pet. 38–39.

GM argues that LKQ's analysis of the bezel does not account for "the shape of the alleged 'contoured bezel'" and the side view of the claimed design as shown in Figure 3. Prelim. Resp. 24. The side view in Figure 3, GM argues, shows the three-dimensional characteristics of the bezel, including "the substantially horizontal line, the substantially vertical line, and the slightly curved line that are only visible from that view." *Id.* at 24–25. GM emphasizes these lines, highlighted in an annotated version of Figure 3 from the '105 patent, reproduced below.

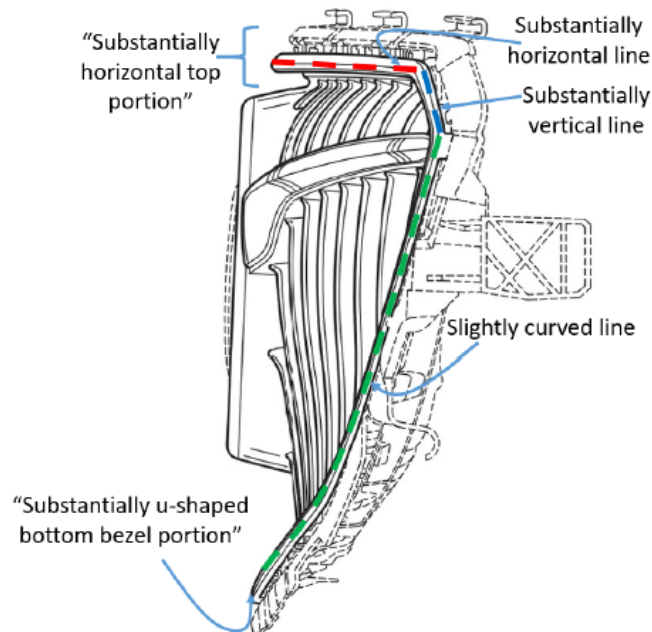
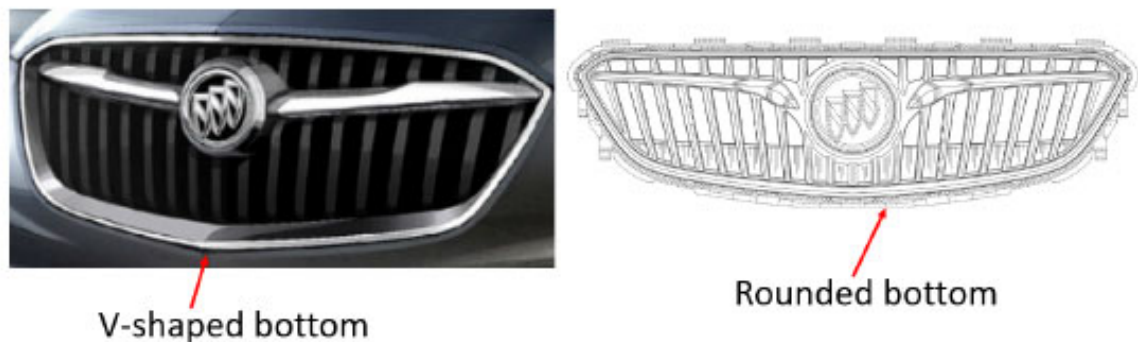


Figure 3 of the '105 patent as annotated by GM to highlight a substantially horizontal line (red), a substantially vertical line (blue), and a slightly curved line (green). *Id.* at 16.

On one hand, GM is correct that neither LKQ nor its Declarants have analyzed sufficiently a side view of the grille shown in the claimed design and in Avenir Article. *Id.* at 15. On the other hand, we are not particularly impressed that these lines in the bezel of the claimed design, which appear to define a contour of a bend or crease in the bezel, are such a unique

characteristic of the design that an ordinary designer would find such lines distinctive. Also, a specific transverse line, apparently indicating a “v-shaped” bottom portion of the bezel in the artist drawing in Avenir Article is different GM argues, from a “u-shaped” bottom portion of the bezel of the claimed design. GM’s comparison of annotated versions of Avenir Article and Figure 2 of the ’105 design is reproduced below.



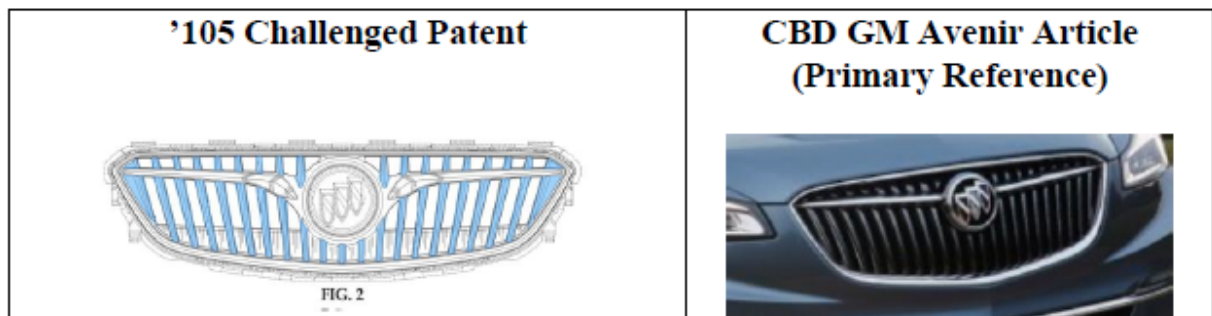
Above is LKQ’s annotated visual comparison of Figure 2 of the ’105 patent on the right, with a cropped image from Avenir Article on the left, depicting a front grille of the Avenir concept car. Pet. 25.

The shading in what appears to be a drawing of the Avenir concept car appears to enhance the importance of the transverse line that GM alleges defines a “v-shaped bottom.” Observing other images in Avenir Article, we are not persuaded that such a transverse line is particularly distinctive, and that such a “v-shaped” bottom bezel would be a sufficient difference in this case to affect a determination by a designer of ordinary skill in the art, when considering the designs as a whole, of whether or not Avenir Article was an appropriate primary reference. Considering these lines which GM points out, as part of the entire design, we find such features of the claimed design to be fairly neutral in terms of whether there is a readily discernable difference sufficient to show that Avenir Article is not, a primary reference. Considering the overall appearance of the designs as a whole, and

comparing the bezels of the claimed design to that in the Avenir Article, we determine that LKQ has shown that an ordinary designer would find the bezels to be similar in profile and appearance.

b. Vertical Tines

Another element of the designs which, at first glance appear similar, is the substantially vertical tines. We reproduce LKQ's comparison of the annotated claimed design and a partial image from Avenir Article below.



Above is LKQ's visual comparison of Figure 2 of the '105 patent on the left with the vertical tines highlighted in blue, and a cropped image from Avenir Article on the right, depicting a front grille of the Avenir concept car. Pet.

41. In both the claimed design and in Avenir Article the tines extend essentially vertically between the lower and upper portions of the bezel.

However, as GM points out, the side view of the claimed design depicts portions of the vertical tines adjacent the upper portion of the bezel where "the 'vertical tines' briefly decrease in thickness of depth near the top of the tines before eventually increasing in thickness of depth." Prelim. Resp. 22.

GM's annotated Figure 3 of the '105 design, below, illustrates these features.

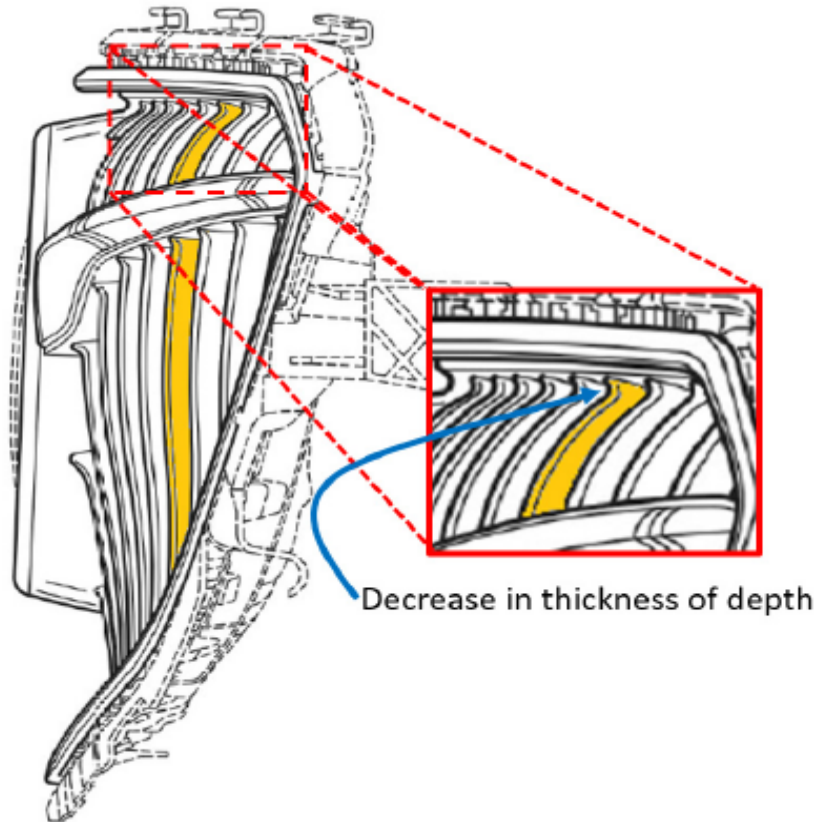


Figure 3 of the '105 patent, above, as annotated by GM to highlight the decrease in thickness of depth of the vertical tines adjacent the bezel. *Id.* at 23.

We agree with GM, that LKQ does not address or sufficiently analyze the side view of either the '105 design, or Avenir Article, and the ornamental appearance of the tines which are not an indistinct feature of the '105 design.⁶ *Id.* at 22. Although there are general similarities in the vertical

⁶ Both LKQ's Declarants base their comparison mainly as to the vertical tines with respect to the front perspective view in Figure 2 of the '105 design, stating that the "vertical tines bow forward and increase in thickness of depth from the top of the interior portion to the substantially horizontal extensions, then extend substantially vertically, but slightly rearward, from the narrow, substantially horizontal extensions to the bottom of the interior

tines between the '105 design and Avenir Article, we are persuaded that a designer of ordinary skill in the art would observe a visually apparent distinction, particularly shown in the side view of Figure 3 of the claimed design, between the overall appearance of the ornamental features of the claimed design and Avenir Article that depends on the shape and contours of the vertical tines. This distinction is not addressed by LKQ or its Declarants.

c. Circular Portion and Horizontal Extensions

Still considering the designs as a whole, the bezel and to a lesser extent the vertical tines, in our opinion, are where any similarities end. In contrast, what stands out based on a reasonable comparison, and would be readily apparent to an ordinary designer, are distinctions between the central circular portions of the designs as well as the dissimilarity between the horizontal extensions on either side of the central circular portion in each design.

Here we consider, from the perspective of an ordinary designer, the circular portion, which in the '105 design is apparently intended by way of dashed lines to encompass the Buick logo indicia, as compared to the smaller circular portion in Avenir Article. Besides a smaller gap in the claimed design between the circular portion and the upper portion of the bezel as GM argues, one can observe that the central circular portion of the claimed design appears significantly proportionally larger in size with respect to the tines and bezel profile, than the circular portion and emblem in Avenir Article.

portion while gradually reducing in thickness of depth.” Ex. 1003 ¶ 40; Ex. 1004 ¶ 39.

In conjunction with the central circular portion, the claimed design includes quite different horizontal extensions, as shown below in GM's annotated Figure 1.

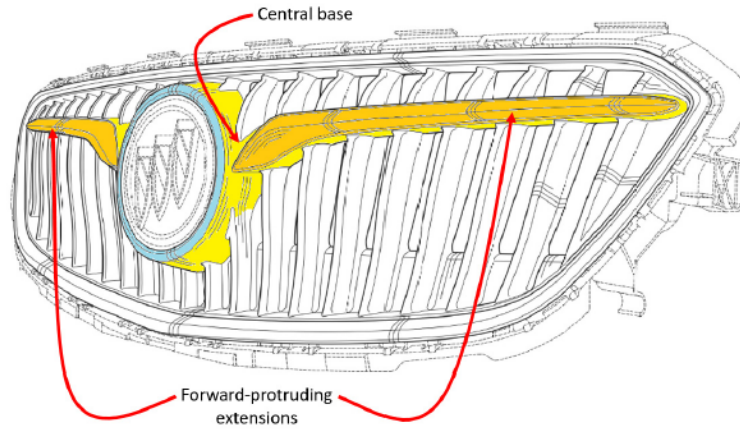


Figure 1 of the '105 patent as annotated by GM to highlight in dark yellow the horizontal extensions of the claimed design. Prelim. Resp. 29. As GM argues, the proximal end of each horizontal extension in the claimed design has a change in angle as it approaches the central circular portion and then tapers to a point adjacent the circular portion. *Id.* at 30–31. Additionally, the claimed design has a line and surface shading along the length of the horizontal extensions that does not appear to be the same as the forward most blade-like surface in the horizontal extensions in the Avenir Article. A cropped image from Avenir Article is reproduced below showing the horizontal extensions of the grille disclosed in Avenir Article.



A cropped image from Avenir Article, above, shows the Avenir concept grille including central circular portion and horizontal extensions. Ex. 1005. The horizontal extensions shown in Avenir Article do not have an angle or taper at the proximal end, and instead extend directly horizontally from the circular portion to a tapering distal end.

LKQ argues that these differences are *de minimis*. Pet. 46–52 (citing Ex. 1003 ¶¶ 64–74; Ex. 1004 ¶¶ 67–76). LKQ contends that simply by making the circle larger, “such a difference of proportion is *de minimis*, and the slight dimension change to the circular portion does not make the claimed design patentable.” *Id.* at 46–47 (citing Ex. 1003 ¶¶ 64–65; Ex. 1004 ¶ 68). LKQ also argues that the difference between the horizontal extensions is *de minimis*, and that “a designer of ordinary skill would have been motivated to change the initial angle of the extensions in order to accommodate a larger emblem in a larger circular portion.” *Id.* at 51 (citing Ex. 1003 ¶ 71; Ex. 1004 ¶ 74).

We are not persuaded that these clearly visible differences in the central circular portion and the horizontal extensions shown in the claimed design, as compared to Avenir Article, would be considered *de minimis* by a designer of ordinary skill in the art. For instance, Mr. Gandy testifies that “a designer of ordinary skill would have been motivated to increase the dimensions of the circular portion of the vehicle grille in order to accommodate a larger emblem in the grille.” Ex. 1003 ¶ 66. This testimony expresses a reason for enlarging the circular portion. It is not, however, persuasive evidence that the larger circle size does not have a significant impact on the overall visual impression of the claimed design. Indeed, the larger central circle and angled horizontal extensions of the claimed design are not, in our view, insignificant or minor aspects of the claim. When

compared to Avenir Article, the claimed central ornamental elements work together in the context of the overall design such that the larger circle and the proximal tapered and angled ends of the horizontal extensions present a proportionally larger and dynamic emblematic element relative to the bezel and vertical tines.

Although both designs are for a vehicle front grille and include a similar bezel profile and generally show vertical tines, the smaller circle and linear blade-like horizontal extensions in Avenir Article do not look like the larger and proportionally dominating central circular portion and horizontal extensions with angled and tapering proximal ends adjacent the circular portion of the claimed design. Add to this the claimed design having vertical tines with decreasing depth portions adjacent the bezel, and thus the claimed design presents a more muscular and dynamic impression than the straight blade-like horizontal extensions and smaller circular portion in Avenir Article.

In light of these differences we are not persuaded that a designer of ordinary skill would have viewed Avenir Article as providing the same visual impression as the claimed design so as to be an appropriate primary reference.

2. The Asserted Secondary Reference – Lau

Even were we to find that Avenir Article was a proper primary reference, which we do not, and that a designer of ordinary skill would have determined that Lau was so related in ornamental appearance to Avenir Article and would suggest the application of those features Avenir Article, the combination still fails to address the conspicuous discrepancies between the designs discussed above. *See In re Carter*, 673 F.2d 1378, 1380 (CCPA 1982) (“The designs of other references may properly be relied upon for

modification of this basic design when the references are ““so related that the appearance of certain ornamental features in one would suggest the application of those features to the other.””).⁷

LKQ acknowledges that the images in Avenir Article do not reveal the partial tines as shown in the claimed design. Pet. 52. LKQ relies on Lau mostly for its disclosure of a vehicle grille and “partial tines” along the bottom of the grille interposed between the substantially vertical tines. *Id.* at 52. We reproduce Petitioner’s annotated figures comparing the claimed design, Avenir Article, and Lau, below.

⁷ Because we determined that Avenir Article was not a sufficient primary reference, we need not make a finding here as to whether a designer of ordinary skill in the art would have combined Avenir Article and Lau. We assume, only for the sake of argument, that the combination is appropriate.

'105 Patent (Challenged Patent)

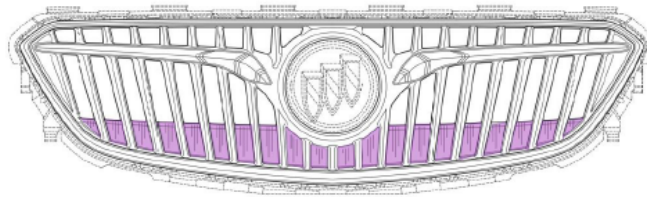
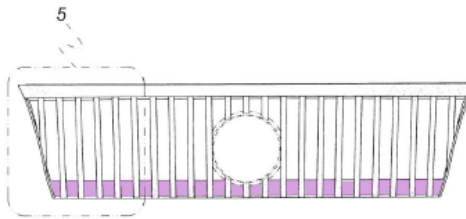


FIG. 2

CBD GM Avenir Article (Primary Reference)



Lau (Secondary Reference)



Above, is LKQ's visual comparison of annotated Figure 2 of the '105 patent, with the partial tines highlighted in purple, a cropped image from Avenir Article depicting a front grille of the Avenir concept car, and Lau Figure 2, with the asserted partial tines highlighted, also in purple. *Id.* at 53. LKQ argues that the combination of Avenir Article and Lau provides “a hypothetical prior art created by slightly modifying the base of the vehicle grilles from the CBD GM Avenir Article . . . with the partial tines of Lau would have an overall appearance that is the same as the '105 Patent.” *Id.* at 54 (citing Ex. 1003 ¶ 80; Ex. 1004 ¶ 82).

Even if a designer of ordinary skill would have modified Avenir Article to include partial tines, Lau does not address the more significant and visually important aspects of the claimed design missing in Avenir Article—

that is the larger central circle portion and the angled tapering horizontal extensions that are distinctive ornamental features of the claimed design. Accordingly, even if the prior art of Avenir Article and Lau can be combined, the combination still fails to render the overall appearance of the claimed design obvious because “it would still be necessary to make several significant changes in the cited prior art designs in order to achieve each of the claimed designs.” *In re Harvey*, 12 F.3d at 1065.

3. Conclusions Regarding the Obviousness Challenge Based on Avenir Article and Lau

On the record before us and for purposes of this decision, we determine that the circular portion, horizontal extensions and shape of the vertical tines contribute to the overall visual impression of the design claimed in the '105 patent. In light of that, we determine that LKQ has not made a threshold showing that Avenir Article is a single reference that creates basically the same visual impression as the claimed design. *High Point Design*, 730 F.3d at 1312.

We further determine on this record, that the circular portion and horizontal extensions as well as the shape of the vertical tines all contribute to the overall visual impression of the claimed design. In light of that, we conclude that even if a designer of ordinary skill were to have combined the Avenir Article and Lau, the result would not be prior art that accounts for the overall visual appearance of the '105 design. *See High Point Design*, 730 F.3d at 1311. For the foregoing reasons, we determine that LKQ has not met its burden of demonstrating a reasonable likelihood that the challenged claim is unpatentable over the Avenir Article in combination with Lau.

III. CONCLUSION

LKQ has not demonstrated that that it is more likely than not that the challenged design claim of the '105 patent is unpatentable based on the challenges presented.

IV. ORDER

For the reasons given, it is

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

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