

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

EARLY WARNING SERVICES, LLC,
Petitioner,
v.

FINTECH INNOVATION ASSOCIATES LLC,
Patent Owner.

PGR2022-00046
Patent D945,453 S

Before KEN B. BARRETT, BART A. GERSTENBLITH, and
ROBERT L. KINDER, *Administrative Patent Judges*.

KINDER, *Administrative Patent Judge*.

DECISION
Granting Institution of Post-Grant Review
35 U.S.C. § 324

I. INTRODUCTION

Early Warning Services, LLC (“Petitioner”) filed a Petition (Paper 1, “Pet.”) requesting post-grant review of the design claim of U.S. Patent No. D945,453 S (Ex. 1001, “the ’453 patent”). Fintech Innovation Associates LLC (“Patent Owner”) has elected not to file a Preliminary Response.

We have authority to determine whether to institute a post-grant review under 35 U.S.C. § 324(a) (2018), which provides that review may not be instituted unless “the information presented in the petition,” if “not rebutted, would demonstrate that it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable.” Applying that standard, for reasons explained below, we grant the Petition and institute a post-grant review of the challenged claim.

A. Real Parties-in-Interest

Petitioner identifies Early Warning Services, LLC as “the only real party in interest.” Pet. 2. Petitioner also identifies “Bank of America, JPMorgan Chase Bank, and PNC Bank” as “customers of Petitioner,” and states that “[f]or conflicts purposes, the following entities have minority interests in Early Warning Services, LLC: Bank of America, JPMorgan Chase Bank, PNC Bank, Wells Fargo Bank, Truist (formerly BB&T), Capital One, and U.S. Bank.” *Id.* at 3.

Patent Owner identifies Fintech Innovation Associates LLC as “the real party in interest” and sole owner of the ’453 patent. Paper 8, 1 (Patent Owner’s Mandatory Notices).

B. Related Matters

The parties identify six district court cases related to this proceeding and involving the '453 patent (Pet. 2–3; Paper 8, 1–2):

- (1) *Fintech Innovation Associates LLC v. PayPal, Inc.*, No. 1:22-cv-01212 (N.D. Ill.) (“the PayPal Litigation”);
- (2) *Fintech Innovation Associates LLC v. PNC Bank, N.A.*, No. 1:22-cv-01214 (N.D. Ill.) (dismissed);
- (3) *Fintech Innovation Associates LLC v. JPMorgan Chase Bank, N.A.*, No. 1:22-cv-01216 (N.D. Ill.);
- (4) *Fintech Innovation Associates LLC v. Bank of America, N.A.*, No. 1:22-cv-01215 (N.D. Ill.);
- (5) *Fintech Innovation Associates LLC v. Samsung Electronics Co., Ltd., and Samsung Electronics America Inc.*, No. 1:22-cv-01213 (N.D. Ill.); and
- (6) *Fintech Innovations Associates LLC V. PNC Bank N.A.*, No. 22-cv-00934 (W.D. Pa.) (dismissed).

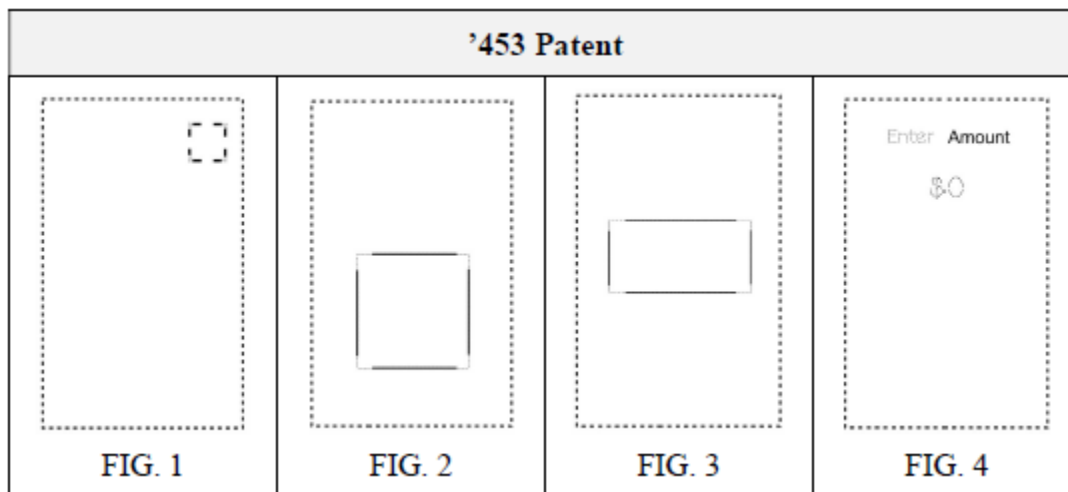
II. BACKGROUND

A. The '453 Patent (Ex. 1001)

The '453 patent is titled “Display Screen Portion with Animated Graphical User Interface.” Ex. 1001, code (54). The design claim of the '453 patent is directed to “[t]he ornamental design for a display screen portion with animated graphical user interface, as shown and described” in four figures set forth in the specification. *Id.* at code (57), Figs. 1–4.

B. The Challenged Design Claim

Petitioner challenges the design claim of the '453 patent, which is described by four figures set forth in the specification. Pet. 8; Ex. 1001, code (57), Figs. 1–4. We reproduce below a composite illustration from the Petition, which shows the four figures of the '453 patent.



Pet. 11. Petitioner’s composite illustration depicts Figures 1 through 4 of the '453 patent, from left to right. *Id.*; *see* Ex. 1001, Figs. 1–4.

Figure 1 is “a front view of a first image of a display screen portion with animated graphical user interface”; Figure 2 is “a front view of a second image thereof”; Figure 3 is “a front view of a third image thereof”; and Figure 4 is “a front view of a fourth image thereof.” *Id.* at code (57) (Description). The '453 patent further indicates:

The appearance of the transitional image sequentially transitions between the images shown in FIGS. 1–4. The process or period in which one image transitions to another image forms no part of the claimed design.

The broken line showing of a portion of a display screen and a computer device in FIGS. 1 through 4 forms no part of the claimed design. The broken and dot line showing of text and portions of the graphical user interface in FIGS. 1 through 4

represents environmental subject matter and forms no part of the claimed design.

Id.

C. Asserted Grounds of Unpatentability

We reproduce the asserted grounds in the following chart.

Claims Challenged	35 U.S.C. § ¹	References
1	102	PayPal ²
1	103	PayPal
1	102/103	Alipay ³
1	102/103	Digital Debit ⁴
1	102/103	Digital Debit ⁵

¹ The Leahy-Smith America Invents Act (“AIA”), Pub. L. No. 112-29, 125 Stat. 284 (2011), amended 35 U.S.C. §§ 102 and 103, effective March 16, 2013. Given that the application from which the ’453 patent issued was filed after this date, the current versions of §§ 102 and 103 apply.

² How To Do It All, *How to use PayPal’s QR codes to GET PAID and to PAY*, YouTube (Apr. 8, 2021), <https://www.youtube.com/watch?v=sLvHol5IQmw&t=13s> (Exs. 1005, 1006). Petitioner asserts a publication date of April 8, 2021. Pet. 13.

³ Silkpay, *How does Alipay work instore via static QR code?*, YouTube (July 17, 2018), <https://www.youtube.com/watch?v=7PFAuRqSKfU> (Exs. 1007, 1008). Petitioner asserts a publication date of July 17, 2018. Pet. 22.

⁴ Digital Debit, *Digital Debit App Preview*, YouTube (Nov. 20, 2017), <https://www.youtube.com/watch?v=tDqvQFJB8GA> (Exs. 1009, 1010). Petitioner asserts a publication date of November 20, 2017. Pet. 28.

⁵ These alternative grounds of anticipation and obviousness based on Digital Debit rely on additional images displayed in Digital Debit. *See* Pet. 77–80.

Claims Challenged	35 U.S.C. § ¹	References
1	102/103	ShopeePay ⁶

Pet. 9.⁷

Petitioner also relies on the declaration of Gonzalo R. Arce, Ph.D. (Ex. 1003) in support of its arguments.

III. ANALYSIS

A. Principles of Law

1. Anticipation

The “ordinary observer” test for anticipation of a design patent is the same as that used for infringement, except that for anticipation, the patented design is compared with the alleged anticipatory reference rather than an accused design. *Int’l Seaway Trading Corp. v. Walgreens Corp.*, 589 F.3d 1233, 1238, 1240 (Fed. Cir. 2009). The ordinary observer test for design patent infringement was first enunciated by the Supreme Court in *Gorham Co. v. White*, 81 U.S. 511 (1871), as follows:

[I]f, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.

⁶ *Scan and Donate to different charity organizations via ShopeePay*, Metropoler.net, <https://www.metropoler.net/scan-and-donate-shopeepay/> (June 25, 2021) (Ex. 1011). Petitioner asserts a publication date of June 25, 2021. Pet. 37.

⁷ Although the Petition sets forth six numbered grounds, Petitioner identifies two distinct statutory bases for each of the third-, fourth-, fifth-, and sixth-numbered grounds. *See* Pet. 9 (identifying §§ 102/103 as the statutory bases for these grounds).

Id. at 528. The ordinary observer test requires the fact finder to consider all of the ornamental features illustrated in the figures that are visible at any time in the “normal use” lifetime of the accused product, i.e., “from the completion of manufacture or assembly until the ultimate destruction, loss, or disappearance of the article.” *Int’l Seaway*, 589 F.3d at 1241. Further, while the ordinary observer test requires consideration of the overall prior art and claimed designs,

[t]he mandated overall comparison is a comparison taking into account significant differences between the two designs, not minor or trivial differences that necessarily exist between any two designs that are not exact copies of one another. Just as “minor differences between a patented design and an accused article’s design cannot, and shall not, prevent a finding of infringement” . . . so too minor differences cannot prevent a finding of anticipation.

Id. at 1243 (citation omitted) (quoting *Litton Sys., Inc. v. Whirlpool Corp.*, 728 F.2d 1423, 1444 (1984)).

2. Obviousness

“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) (internal quotation omitted); *see also High Point Design LLC*, 730 F.3d at 1313; MPEP § 1504.03 (II) (“[T]he proper standard is whether the design would have been obvious to a designer of ordinary skill with the claimed type of article.”).

The 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 and citations omitted).

In performing the first step of the obviousness analysis, 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 omitted).

In the second step, 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 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.*, 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, Inc.*, 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.”).

3. Ordinary Observer and Ordinary Designer

Petitioner asserts that “[t]he ordinary observer for purposes of the ’453 Patent is a purchaser or other user of a mobile device or other device having a display screen for displaying an animated GUI”⁸—for example, “a user of an iPhone or Android smart phone with an application that facilitates a financial transaction.” Pet. 62–63 (citing Ex. 1003 ¶ 102).

Petitioner further asserts that “[t]he designer of ordinary skill would be someone with a background in designing animated GUI’s, such as animated GUI’s that facilitate financial transactions.” *Id.* at 64 (citing Ex. 1003 ¶ 109).

Based on the record before us, we adopt Petitioner’s identification of the ordinary observer and designer of ordinary skill in the art for purposes of this Decision because they are consistent with the disclosures of the asserted prior art references and the ’453 patent, supported by witness testimony, and unopposed by Patent Owner at this juncture.

B. Claim Construction

The ’453 patent claims an “ornamental design for a display screen portion with animated [GUI].” Ex. 1001, code (57). “Petitioner proposes that the ’453 Patent claim should be construed as a display screen portion with an animated graphical user interface displaying a series of images including the elements shown in non-broken lines in FIGS. 1-4,” and “in accordance with its explicit statements that the broken lines and the dot lines ‘form[] no part of the claimed design’ and that ‘[t]he process or period in

⁸ Petitioner refers to a graphical user interface as a GUI.

which one image transitions to another image forms no part of the claimed design.” Pet. 43–44.

For purposes of this Decision, we agree with Petitioner’s proposed construction that the claim encompasses a display screen portion with an animated graphical user interface displaying a series of images including the elements shown in non-broken lines and agree that the broken lines and dot lines in the figures form no part of the claimed design. *See id.*

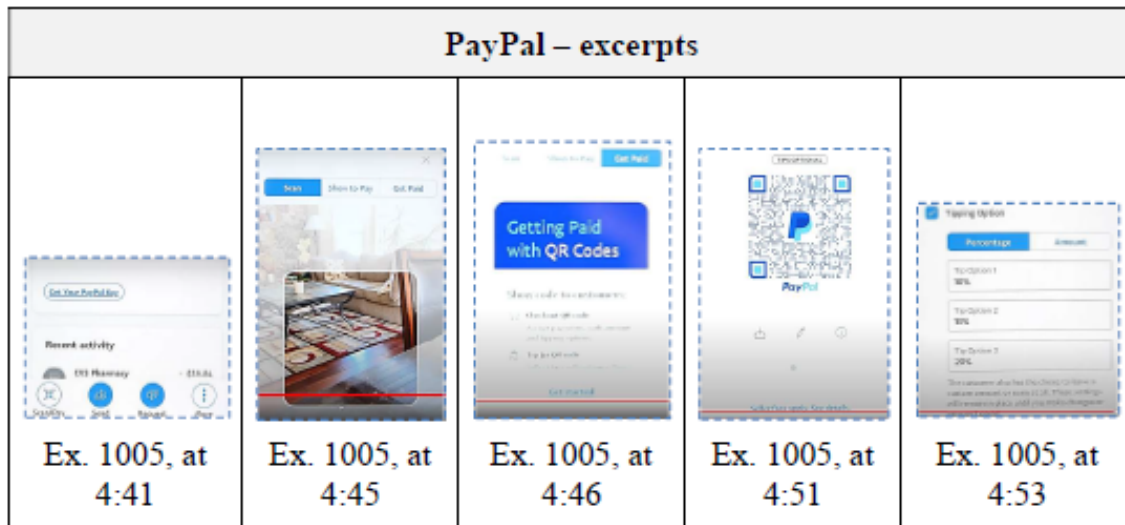
To the extent that the features of the claimed design require further discussion, however, we provide it in our assessment of the challenges, which we turn to next.

C. Anticipation by PayPal

Petitioner contends the ’453 patent claim is anticipated by PayPal. Pet. 65–68. We begin with an overview of PayPal, next examine PayPal’s status as prior art, and then determine whether Petitioner has demonstrated that PayPal more likely than not anticipates the claim of the ’453 patent.

1. Overview of PayPal

PayPal is a video titled “How to use PayPal’s QR codes to GET PAID and to PAY,” posted by “How To Do It All” to YouTube.com on April 8, 2021. Pet. 12–13 (citing Ex. 1005; Ex. 1003 ¶ 26). PayPal demonstrates how a quick response (QR) code-based payment application may be used on a mobile device. *See* Ex. 1005. We reproduce below Petitioner’s composite illustration, which shows a sequence of screenshots excerpted from PayPal.



The illustration above depicts, from left to right, a sequence of screenshots excerpted by Petitioner from PayPal. Pet. 13; Ex. 1005, 4:41–4:53 (referencing video time sequence of the original video). “Starting at 4:41 in the video, PayPal shows an animated GUI on a mobile phone screen transitioning through the [above] five images.” Pet. 13 (citing Ex. 1005, 4:41–4:53; Ex. 1006, 283–95; Ex. 1003 ¶¶ 28–34). “[F]rom the GUI image shown at 4:41 in the video, a user can click the ‘Scan/Pay’ button to transition to the ‘Scan’ image shown at 4:45.” *Id.* (citing Ex. 1005, 4:41–4:45; Ex. 1006, 283–87). “From the ‘Scan’ image at 4:45, the user can click the ‘Get Paid’ button to transition to the ‘Get Paid’ image at 4:46.” *Id.* at 14 (citing Ex. 1005, 4:45–4:46; Ex. 1006, 287–88). “From the ‘Get Paid’ image at 4:46, the user can click the ‘Get started’ text to transition to the QR code image at 4:51.” *Id.* at 15 (citing Ex. 1005, 4:46; Ex. 1006, 288). And, “[f]rom the QR code image at 4:51, the user can click the pencil icon in the center to transition to the ‘Tipping Option’ image shown at 4:53,” which includes the word “Amount.” *Id.* at 15–16 (citing Ex. 1005, 4:51–4:53; Ex. 1006, 293–95).

2. Whether PayPal Qualifies as Prior Art

Petitioner contends PayPal qualifies as prior art because it is both a “printed publication” and “otherwise available to the public.” Pet. 18–22.

Petitioner argues that PayPal qualifies as a “printed publication” prior art because “[t]here is significant and reliable evidence that PayPal is authentic and was publicly accessible as of April 8, 2021.” Pet. 18.

Petitioner explains that PayPal is authentic for several reasons: (1) “[t]he same video was also posted with a corresponding article on CNET’s webpage on April 8, 2021 at 4:00 a.m. PT,” and the PayPal video description links to that article; (2) “Courts have found . . . screen shots more than likely [to] be authentic when [they] remain[] accessible on that public website,” and, here, “PayPal remains posted on YouTube and contains the same screen shots”; and (3) there are other cases in which “Google Custodians of Record have given sworn testimony that the date listed under a YouTube video is the date on which it became available to anyone for viewing,” and, here, “PayPal indicates that it was posted publicly on April 8, 2021.” *Id.* at 18–19.

Petitioner explains that PayPal was publicly accessible because “MPEP § 2128 states that YouTube videos ‘can be sources of prior art, provided the public accessibility requirements . . . are met,’” where “[p]rior art disclosures on the Internet . . . are considered to be publicly available as of the date the item was publicly posted,” and, here, PayPal is a YouTube video that was publicly posted on April 8, 2021 “and has received over 107,000 views,” with “a corresponding April 8, 2021 article posted by CNET [having] linked to this video.” Pet. 20 (citing MPEP § 2128; Ex. 1028). Petitioner also points out that “persons interested and having

ordinary skill in cashless payment applications could locate PayPal exercising reasonabl[e] diligence . . . by searching the Internet for videos concerning QR code payment systems payments,” and that “PayPal has been viewed over 100,000 times, suggesting that PayPal is a well-known payment system and that persons interested and having ordinary skill in cashless payment applications could have easily located PayPal.” *Id.* at 20–21.

Petitioner argues that PayPal qualifies as “otherwise available to the public” prior art because “the U.S. Patent & Trademark Office’s training materials specifically list YouTube videos as prior art that should be considered ‘otherwise available to the public’ under 35 U.S.C. § 102 (a)(1) . . . [,] [a]nd the evidence described above confirms that PayPal was otherwise available to the public as of its publication date of April 8, 2021.” Pet. 21 (citing Ex. 1032, 15).

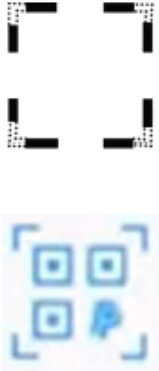
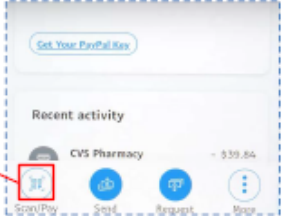
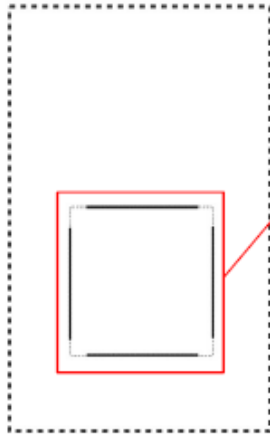
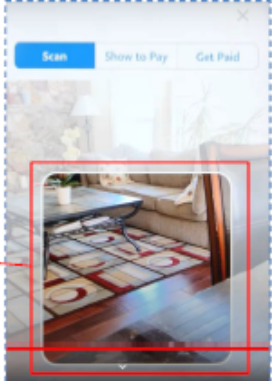
Based on the record before us, we determine it is more likely than not that PayPal qualifies as prior art, either as a printed publication or as otherwise available to the public.

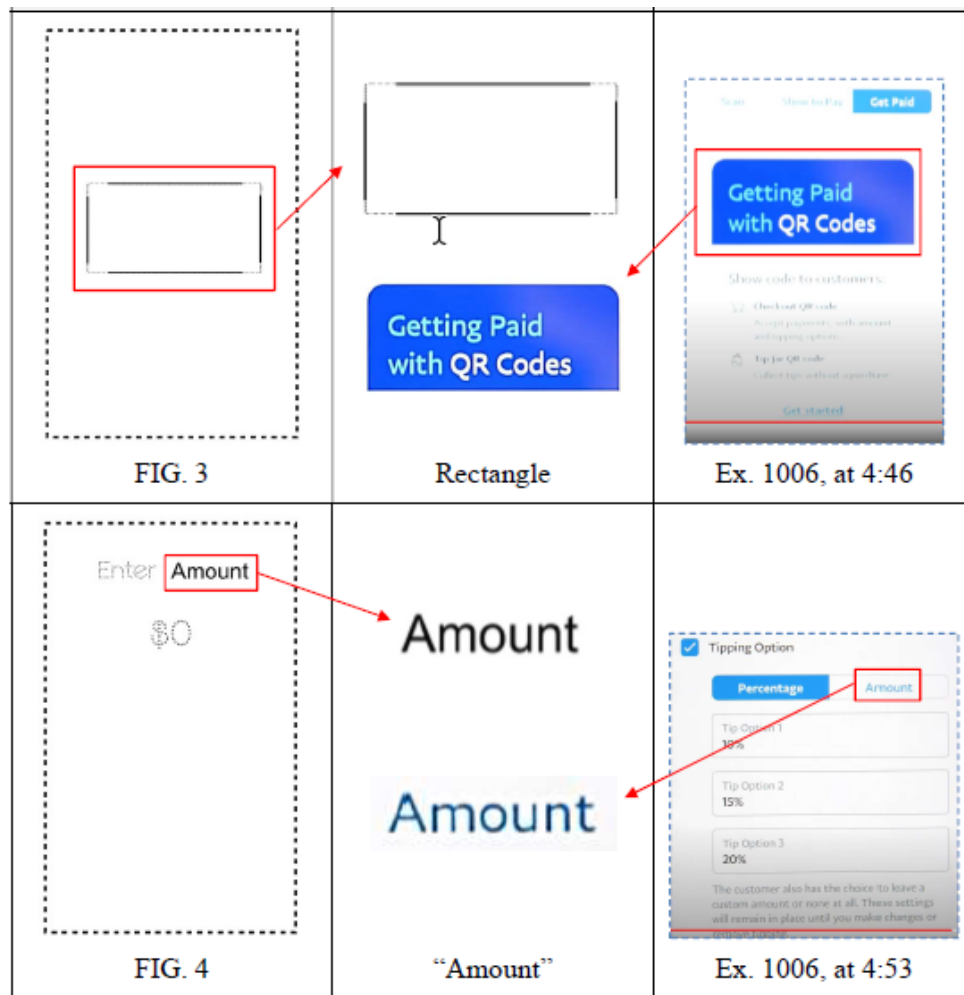
3. PayPal Anticipation Analysis

Petitioner argues that the ’453 patent claim is anticipated by PayPal, which “discloses . . . a display screen that displays an animated GUI that transitions between several images, including an image with **corner brackets**, an image with a **square**, an image with a **rectangle**, and an image with the word ‘**Amount**.’” Pet. 65; *see also id.* at 12–16. Citing Dr. Arce’s testimony, Petitioner asserts that “the PayPal animated GUI has an overall appearance that is substantially the same as the overall appearance of the ’453 Patent’s claimed design,” such that, “[i]n the eye of an ordinary observer, . . . the resemblance would deceive the observer inducing him or

her to purchase one supposing it to be the other.” *Id.* (citing Ex. 1003 ¶¶ 103–109).

Petitioner then provides a chart comparing the ’453 patent’s Figures to excerpts from PayPal, which we reproduce below:

'453 Patent		PayPal (Ex. 1006)
 FIG. 1	 Corner Brackets	 Ex. 1006, at 4:41
 FIG. 2	 Square	 Ex. 1006, at 4:45



Petitioner’s chart above depicts figures of the ’453 patent compared directly to screenshots excerpted from PayPal. Pet. 66–67; *see* Ex. 1003 ¶ 105 (presenting a similar chart). Each row of the chart includes a figure of the ’453 patent in the left column, a screenshot excerpted from PayPal in the right column, and an allegedly common design feature in the middle column. *See* Pet. 66–67. According to Petitioner, “[a]t 4:41 in the video, the PayPal mobile phone GUI displays an image including **four corner brackets**”; “[t]he 4:45 ‘Scan’ image includes a **square**”; “[t]he 4:46 ‘Get Paid’ image includes a **rectangle**”; and “[t]he 4:53 ‘Tipping Option’ image includes the word ‘**Amount.**’” *Id.* at 16 (citing Ex. 1005; Ex. 1006, 283–87).

Having reviewed the evidence in the record before use, including Petitioner's argument and evidence related to PayPal, the chart shown above, and Dr. Arce's expert testimony, Petitioner has sufficiently shown substantial similarity between the '453 patent and PayPal. More specifically, Petitioner has sufficiently shown that:

- (1) PayPal's "Scan/Pay" button (Ex. 1006, 4:41) is substantially the same as Figure 1's four corner brackets;
- (2) PayPal's "Scan" image (Ex. 1006, 4:45) is substantially the same as Figure 2's square;
- (3) PayPal's "Getting Paid with QR Codes" image (Ex. 1006, 4:46) is substantially the same as Figure 3's rectangle; and
- (4) PayPal's display of the word "Amount" on its Tipping Option image (Ex. 1006, 4:53) is substantially the same as Figure 4's "Amount."

See Pet. 66–67; Ex 1003 ¶¶ 103–109. We find Petitioner's contentions persuasive and further determine that Petitioner has properly relied on the disclaimer in the '453 patent that "[t]he broken line showing of a portion of a display screen and a computer device in FIGS. 1 through 4 forms no part of the claimed design." Ex. 1001, code (57) (Description).

Petitioner argues that "[w]hile there are some potential distinctions between PayPal and the figures of the '453 Patent, Patent Owner cannot reasonably assert that they are material to patentability." Pet. 67. For example, Petitioner points out that

while PayPal displays an additional image between the "Rectangle" image at 4:46 and the "Amount" image at 4:53, the same is true for the GUI that Patent Owner has accused of infringement in the PayPal Litigation . . . in apparent reliance on the '453 Patent's statement that "[t]he process or period in which

one image transitions to another image forms no part of the claimed design.”

Id. at 67–68; *see also id.* at 47 (explaining that in the PayPal Litigation, Patent Owner submitted a video of the accused PayPal GUI that includes a series of five images, but skips over one of the images in alleging that *four* of the five images correspond to Figures 1–4 of the ’453 patent); Exs. 1012–1014. Petitioner adds that “while PayPal displays the Corner Brackets, Square, Rectangle, and ‘Amount’ at arguably different relative sizes and positions compared to the ’453 Patent, the same is true for all of the GUI’s Patent Owner has accused of infringement.” Pet. 68; *see also id.* at 48–49 (asserting that, in the PayPal Litigation, the selected images from the accused PayPal GUI “are not all the same as the relative sizes and positions of those elements in the figures of the ’453 Patent”).

We have reviewed the figures of the ’453 patent, and preliminarily construe the claim, for purposes of this Decision, as not precluding intervening images between the claimed design images and determine that the scope of the claim does not require particular sizes or positions of the claimed elements. *See, e.g.*, Ex. 1001, code (57) (“The process or period in which one image transitions to another image forms no part of the claimed design.”).

Having reviewed Petitioner’s argument and evidence, Petitioner has sufficiently shown it is more likely than not that the claimed design and PayPal are substantially the same to the ordinary observer. Further, any minor differences do not prevent a finding of anticipation based on the record before us.

For the reasons above, we determine that Petitioner has shown sufficiently that it is more likely than not that the '453 patent claim is anticipated by PayPal.

D. Obviousness over PayPal

Petitioner next argues that, even if not anticipated, “the '453 Patent would still be invalid as obvious in view of PayPal,” as “[t]he claimed design would have been obvious to a designer of ordinary skill.” Pet. 68–69. In support of its position, Petitioner first asserts that “the relevant portions of PayPal have design characteristics that are basically the same as the claimed design,” so “PayPal . . . qualifies as a primary reference for purposes of Section 103.” *Id.* at 68–69 (citing *MRC Innovations, Inc. v. Hunter Mfg., LLP*, 747 F.3d 1326, 1331 (Fed. Cir. 2014) (quoting *In re Rosen*, 673 F.2d 388, 391 (C.C.P.A. 1982))). Petitioner further contends that “any potential distinctions between PayPal and the '453 Patent’s figures should be viewed as insubstantial, slight, and insignificant, making them insufficient to preserve the validity of the '453 Patent’s claim.” *Id.* at 69 (citing *MRC Innovations*, 673 F.2d at 1335). Petitioner explains that

while PayPal displays the Corner Brackets, Square, Rectangle, and “Amount” at arguably different relative sizes and positions compared to the '453 Patent, it would be obvious to a designer of ordinary skill in the art to make minor adjustments to those relative sizes and positions in the same fashion as presented in the '453 Patent’s figures.

Id. (citing *In re LAMB*, 286 F.2d 610, 611–12 (CCPA 1961)). Petitioner also cites Dr. Arce’s testimony in support of its position. Pet. 69 (citing Ex. 1003 ¶ 109).

Our reasoning above, addressing anticipation by PayPal, also demonstrates how PayPal alone is a design that is basically the same as the

claimed design. Further, any potential minor distinctions noted by Petitioner do not prevent PayPal from being a design that has the same overall visual appearance as the claimed design of the '453 patent. Accordingly, on this record, we determine that Petitioner shows sufficiently that PayPal more likely than not renders the challenged claim unpatentable as obvious.

E. Remaining Unpatentability Challenges

Petitioner advances additional grounds of unpatentability based on other references, namely, Alipay, Digital Debit, and ShopeePay. Pet. 9 (grounds chart), 69–83. At this juncture, Patent Owner has elected not to file a Preliminary Response, so it has not specifically disputed these additional grounds. The nature of the facts in this proceeding recommends reserving determinations on Petitioner's additional grounds at this preliminary stage, and resolving them with the benefit of a full record developed during trial.

In view of our finding that the information presented in the Petition establishes that Petitioner more likely than not would prevail on its assertions that the design claim of the '453 patent is anticipated by and unpatentable over PayPal, we institute a post-grant review of all challenged claims and all grounds presented in the Petition. *See PGS Geophysical AS v. Iancu*, 891 F.3d 1354, 1360 (Fed. Cir. 2018) (indicating that the Board's decision whether to institute an administrative review "require[s] a simple yes-or-no institution choice respecting a petition, embracing all challenges included in the petition").

F. Notices

The Board shall deem waived any issue not raised in a timely-filed response to the Petition, or as permitted in another manner during trial, even

if discussed in this Decision. Nothing in this Decision authorizes Petitioner, in a manner not otherwise permitted by the Board's rules, to supplement the information pertaining to any ground advanced in the Petition. Our findings and conclusions herein are based on the preliminary record developed thus far and are provided for the sole purpose of deciding whether to institute review. Any final written decision will be based on the full trial record.

IV. CONCLUSION

We determine that Petitioner more likely than not would prevail at trial with respect to the design claim challenged in the Petition. Accordingly, we institute a post-grant review of the '453 patent claim.

V. ORDER

It is

ORDERED that, pursuant to 35 U.S.C. § 324, a post-grant review of the '453 patent claim is instituted with respect to all grounds set forth in the Petition; and

FURTHER ORDERED that, pursuant to 35 U.S.C. § 324 and 37 C.F.R. § 42.4, notice is hereby given of the institution of a trial, which will commence on the entry date of this Decision.

PGR2022-00046
Patent D945,453 S

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