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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte LAUREN L. ARGO, CRISTIAN BIANCHI, and
JASON S. LAFRENAIS

Appeal 2023-002547
Application 29/732,483
Technology Center 2900

Before DANIEL S. SONG, GEORGE R. HOSKINS, and
CYNTHIA L. MURPHY, *Administrative Patent Judges*.

HOSKINS, *Administrative Patent Judge*.

DECISION ON APPEAL

Pursuant to 35 U.S.C. § 134(a), Appellant¹ appeals from an Examiner's decision rejecting the design claim in this application under 35 U.S.C. § 103 as unpatentable over Leong (U.S. Design Patent No. D836,121 S, issued Dec. 18, 2018) and Gilra (U.S. Patent No. 8,438,495 B1, issued May 7, 2013). We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

¹ We use the word "Appellant" to refer to "applicant" as defined in 37 C.F.R. § 1.42. Appellant identifies Intuitive Surgical Operations, Inc., as the real party in interest. Appeal Br. 1.

CLAIMED SUBJECT MATTER

Appellant claims: “The ornamental design for a DISPLAY SCREEN OR PORTION THEREOF WITH GRAPHICAL USER INTERFACE as shown and described.” Appeal Br. 14 (Claims App.). The claimed design is shown in Figures 1–3. *See* Amendment (filed Dec. 21, 2021) (“Amend.”), 2. Figure 1 is representative, and is reproduced below.

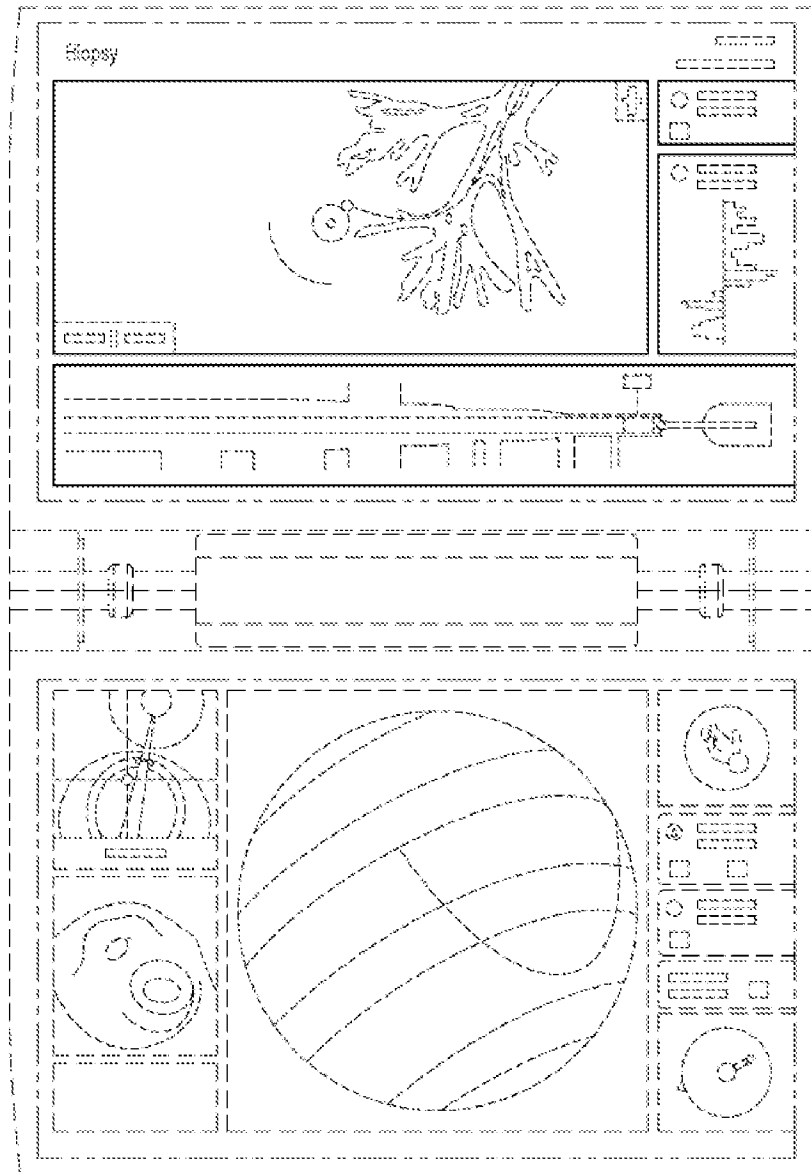
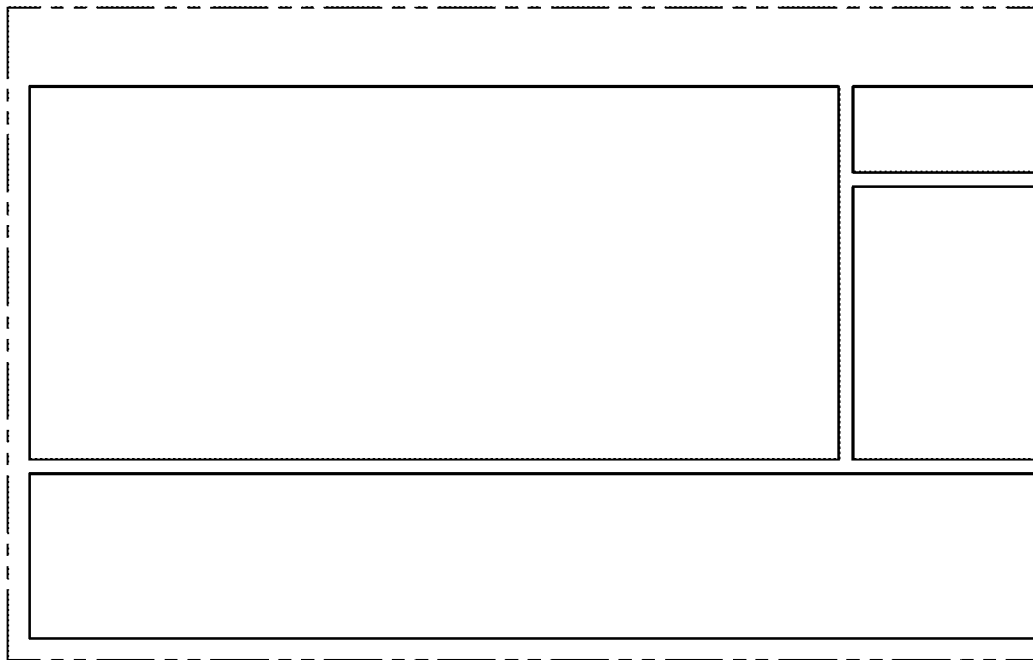


Fig. 1
Appellant's Figure 1.

Figure 1 is a front view of a first embodiment of Appellant's display screen with graphical user interface. *See* Amend. 2. "The outer and central even broken lines and the long-dash/short-dash/short-dash broken lines show a display screen or portion thereof and form no part of the claimed design." *Id.* "The broken lines within the long-dash/short-dash/short-dash broken lines show portions of the graphical user interface that form no part of the claimed design." *Id.*

Thus, the graphical user interface component of Appellant's claim consists of: one rectangle shape defined by four solid lines; and three other rectangular shapes each defined by an upper solid line, a left side solid line, a bottom solid line, and a right side long-dash/short-dash/short-dash broken line. This is seen best in the following excerpt from Appellant's Figure 3:



Appellant's Figure 3 (Excerpt).

Figure 3 is a front view of a second embodiment of Appellant's display screen with graphical user interface, from which we have excerpted the solid line aspects along with the nearest surrounding broken lines. *See* Amend. 2.

OPINION

A. Legal Standards

The recent decision in *LKQ Corp. v. GM Global Tech. Operations LLC*, 102 F.4th 1280 (Fed. Cir. 2024) (en banc), issued after briefing was completed in this appeal.

Pursuant to *LKQ*, the obviousness inquiry asks “whether an ordinary designer in the field to which the claimed design pertains would have been motivated to modify the prior art design ‘to create the same overall visual appearance as the claimed design.’” *LKQ*, 102 F.4th at 1299 (quoting *Campbell Soup, Co. v. Gamon Plus, Inc.*, 10 F.4th 1268, 1275 (Fed. Cir. 2021)). “[T]he motivation to combine . . . need not come from the references themselves,” “[b]ut there must be some record-supported reason (without hindsight) that an ordinary designer in the field of the article of manufacture would have modified the primary reference with the feature(s) from the secondary reference(s) to create the same overall appearance as the claimed design.” *Id.* Factors to consider in this regard include an ordinarily skilled designer’s experience and creativity; market demands and industry customs in the relevant field; and which ornamental features are commonplace in the relevant field. *See id.*

B. Leong

Leong is a United States Design Patent titled “Display Panel with Graphical User Interface with Layered Effect.” Leong, codes (12) & (54). Leong’s Figure 1 is reproduced below.

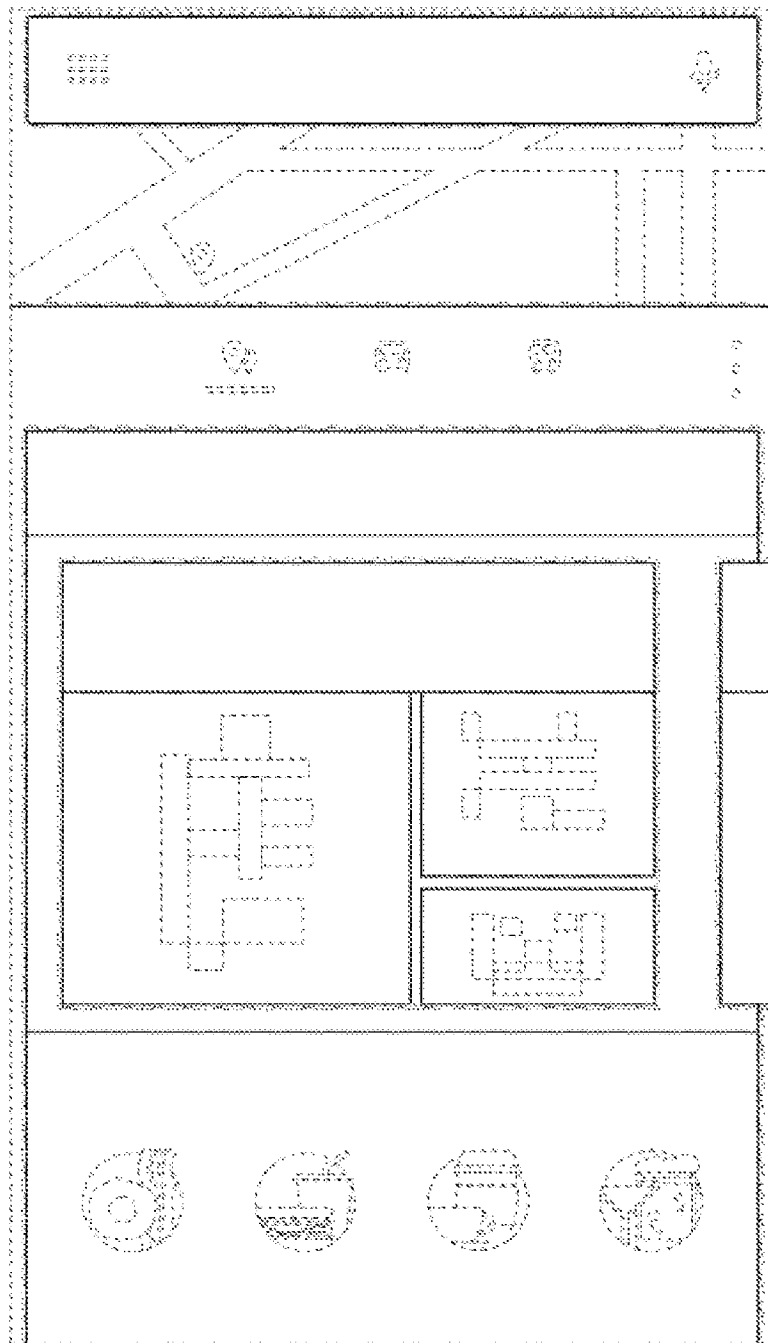
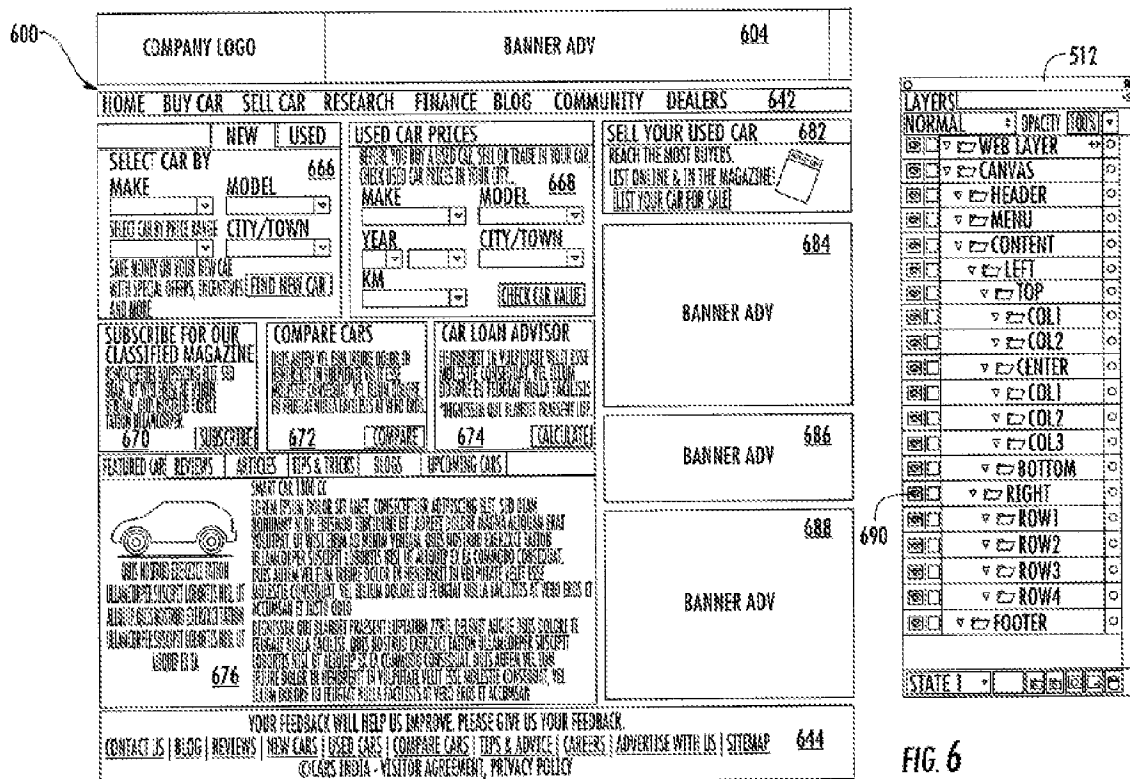


FIG. 1
Leong, Figure 1.

Leong's Figure 1 is "a front view of the first image in a sequence for a display panel with graphical user interface with layered effect." Leong, "DESCRIPTION."

C. Gilra

Gilra is a United States Utility Patent titled “Methods and Systems for Creating Wireframes and Managing Containers.” Gilra, codes (12) & (54). Gilra’s Figure 6 is reproduced below.



Gilra, Figure 6.

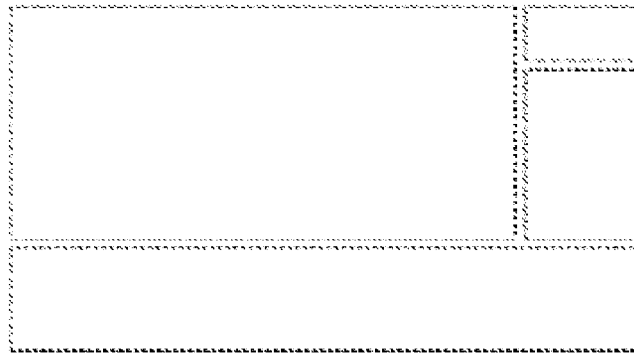
Gilra’s Figure 6 “illustrates an example of using a wireframe for layout and selection of content items of a composite media object.” Gilra, 2:48–50.

D. The Final Office Action

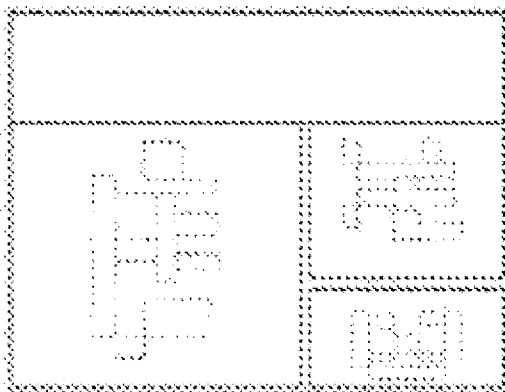
The Examiner rejects Appellant’s claim under 35 U.S.C. § 103 as unpatentable over Leong and Gilra. See Final Act. 2–5.

The Examiner relies on Leong as a “primary reference [having] design characteristics which are basically the same as [Appellant’s] claimed design.” *Id.* at 2. To demonstrate this, the Examiner provides the following

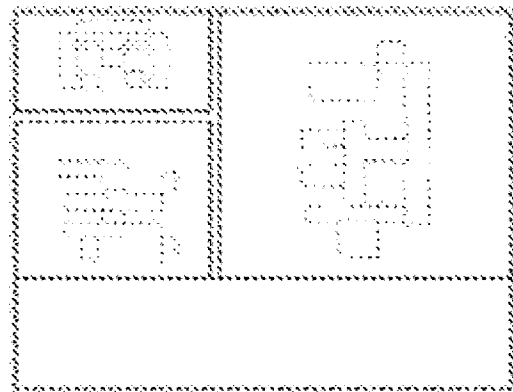
visual comparison of Appellant’s claimed design (top row) with a portion of Leong’s graphical user interface display (bottom row). *See id.* at 2–3.



Appellant’s Claimed Design.



**Leong, Figure 1 (Excerpt)
(Native Orientation).**



**Leong, Figure 1 (Excerpt)
(Rotated 180°).**

Here, the Examiner compares the solid line definition of Appellant’s claimed design (top row) with an excerpt from Leong’s Figure 1 (bottom row) in its native orientation (at left) and as “rotated 180 degrees” (at right). *Id.* Based on this comparison, the Examiner finds Leong’s graphical user interface comprises, like Appellant’s claimed design, “an elongated rectangle, a shorter and taller rectangle, and two smaller rectangles (one smaller than the other) aligned on one side.” *Id.* at 2. The Examiner also determines “[w]hether the two smallest rectangles are shown on the right [as in Appellant’s claim] or left side [as in Leong’s Figure 1 when rotated 180°] is

a de minimis difference and well within the knowledge of one skilled in the art.” *Id.* at 3.

The Examiner concludes Leong differs from Appellant’s claimed design in that Leong “does not show the small space between the elongated rectangle and the other two rectangles aligned along one long edge.” *Id.* The Examiner finds Gilra’s Figure 6 “shows a small space between the elongated rectangle and the other two rectangles aligned along one long edge.” *Id.* The Examiner determines “[i]t would have been obvious to a designer of ordinary skill . . . to have modified [Leong] by providing a small space between the elongated rectangle and the two rectangles that are aligned with one long edge as shown by [Gilra] to meet the overall appearance of the claimed design.” *Id.* In particular: “This modification of the primary reference in light of the secondary reference is proper because the applied references are so related that the appearance of features shown in one would suggest the application of those features to the other.” *Id.* at 3–4 (citing, *inter alia*, *In re Rosen*, 673 F.2d 388 (CCPA 1982)).

E. The Appeal Brief

Appellant objects to the Examiner’s focus on certain features of Leong’s Figure 1 (which Appellant describes as “truncating” the figure), as well as the Examiner’s rotation of Leong’s Figure 1 by 180°, as improper attempts to make Leong’s design resemble Appellant’s claimed design. Appeal Br. 3–9.

Appellant also argues that, even assuming the Examiner’s foregoing consideration of Leong’s Figure 1 is proper, the end result still exhibits design characteristics that are not “basically the same” as the claimed design

to qualify Leong as a primary reference per the *Rosen* test for obviousness. *See id.* at 9 (citing *Durling v. Spectrum Furniture Co. Inc.*, 101 F.3d 100, 103 (Fed. Cir. 1996); *Rosen*, 673 F.2d at 391). Appellant asserts the two designs differ in that: (a) Appellant’s design has a small space between all four of the rectangles, which Leong’s design lacks between the elongated rectangle and its two adjacent rectangles; (b) Appellant’s claimed design has the two smallest rectangles on the right side of the design, whereas Leong’s design has them on the left side; and (c) the various rectangles have “differing proportions.” *Id.* at 9–10.

F. The Examiner’s Answer

The Examiner’s Answer defends the rejection’s consideration of Leong’s Figure 1. *See* Ans. 6–12.

The Examiner further maintains the end result of that consideration “has design characteristics which are basically the same as [Appellant’s] claimed design.” *Id.* at 3, 12–13. Those characteristics, according to the Examiner, are: “a long, horizontally oriented rectangle, two smaller rectangles along one edge (the upper small rectangle is shorter than the other), and a fourth rectangle that is the same height as the two stacked smaller rectangles,” wherein “[t]he width of the two stacked rectangles and the fourth rectangle align with the length of the longer rectangle” to “form[] an overall rectangular shape.” *Id.* at 3–4, 13. Further according to the Examiner, “the position of the rectangles are the same” in Leong’s Figure 1 and Appellant’s claim. *Id.* at 12.

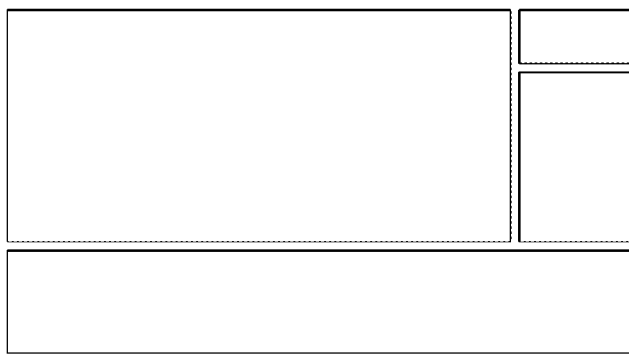
G. Appellant's Reply Brief

In reply, Appellant continues to object to the Examiner's consideration of Leong's Figure 1. *See* Reply Br. 3–7.

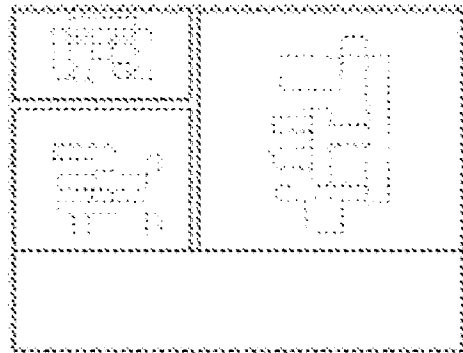
Appellant also attacks the Examiner's determination that the end result of that consideration has design characteristics which are basically the same as Appellant's claimed design. *See id.* at 7–8. Appellant particularly objects to the Examiner's finding in the Answer that “the position of the rectangles are the same” in Leong's Figure 1 and Appellant's claim. Ans. 12; *see* Reply Br. 8.

H. Analysis and Conclusion

Firstly, we conclude that the end result of the Examiner's consideration of Leong's Figure 1 materially differs from Appellant's claimed design. We reproduce below an excerpt of Appellant's Figure 3 (on the left), and the end result of the Examiner's consideration of Leong's Figure 1 (on the right).



**Appellant's Figure 3
(Excerpt).**



**Leong's Figure 1
(Excerpt, Rotated 180°).**

Appellant's Figure 3 (at left) is a front view of Appellant's claimed graphical user interface design consisting of four rectangles, and Leong's Figure 1 (at right) is a front view of a portion of Leong's graphical interface

design consisting of four rectangles. We find that the arrangement of the top three rectangles in the respective designs is materially different — in Appellant’s claim the two smallest rectangles are disposed at the right side of the arrangement, and in Leong’s design the two smallest rectangles are disposed at the left side of the arrangement.

We cannot sustain the Examiner’s dismissal of this difference as being *de minimis*.² See Final Act. 3. Appellant’s claim is directed to a specific arrangement of four rectangle shapes on a graphical user interface, and nothing more. In that simple context, rearranging three of the four rectangles is a significant difference, not a *de minimis* difference.

Secondly, per *LKQ*, obviousness requires articulation of “some record-supported reason (without hindsight) that an ordinary designer in the field of [graphical user interfaces] would have modified [Leong] . . . to create the same overall appearance as the claimed design.” *LKQ*, 102 F.4th at 1299–1300. For the reasons provided above, the end result of the Examiner’s consideration of Leong’s Figure 1 does not have “the same overall appearance” as Appellant’s claimed design, per *LKQ*. Moreover, the rejection on appeal does not articulate any reasoning as to why an ordinary designer would have been motivated to modify that end result by rearranging the top three rectangles to correspond to the arrangement of Appellant’s claimed design. Instead, the Examiner relies solely on the *de minimis* doctrine in this regard, which we cannot sustain as described above.

² As defined in *Black’s Law Dictionary* (6th Ed. 1990), the “De minimis doctrine” provides that “[t]he law does not care for, or take notice of, very small or trifling matters” and “[t]he law does not concern itself about trifles.”

The Examiner cites *In re Stevens*, 173 F.2d 1015 (CCPA 1949), as holding that “[o]bvious changes in arrangement and proportioning are no more patentable in one case than in the other.” Ans. 12. However, in *Stevens*, the court found that “[t]he over-all appearance of appellant’s [rotary] brush does not differ substantially from the [prior art] brush,” in part because “[t]he exact proportioning of the cylinder, the size of the brush tufts, and the provision or omission of a driving pulley or of a gap in the row of tufts, are matters involving ordinary skill only.” *Stevens*, 173 F.2d at 1015 (emphasis added). In the present case, by contrast, the overall appearance of the four rectangles in Appellant’s claimed graphical user interface design differs substantially from the end result of the Examiner’s consideration of Leong’s Figure 1, as discussed above.

For the reasons provided above, we *reverse* the Examiner’s rejection of Appellant’s design claim under 35 U.S.C. § 103 as unpatentable over Leong and Gilra. We do not reach the remaining issues argued.

CONCLUSION

We *reverse* the Examiner’s rejection of Appellant’s design claim as unpatentable over Leong and Gilra.

Claim(s) Rejected	35 U.S.C. §	Reference(s)/ Basis	Affirmed	Reversed
1	103	Leong, Gilra		1

REVERSED

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD**

In re application of:	§	
Lauren L. Argo et al.	§	Group Art Unit: 2917
	§	
Application No.: 29/732,483	§	Examiner: Melanie H. Tung
	§	
Filing Date: April 24, 2020	§	Confirmation No.: 5266
	§	
For: DISPLAY SCREEN OR PORTION	§	Docket No.: P06170-US-CON
THEREOF WITH GRAPHICAL	§	(70228.745US02)
USER INTERFACE	§	

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REPLY BRIEF UNDER 37 C.F.R. § 41.41

Appellant submits this Reply Brief in Reply to the Examiner's Answer filed on March 30, 2023, with respect to the above-identified patent application. Appellant respectfully requests that the present appeal be considered based on the arguments as set forth in both the Appeal Brief and this Reply Brief.

The appeal forwarding fee has been provided for by credit card separately but concurrently herewith. If any additional fees are necessary, the Commissioner is hereby authorized to charge those fees to Haynes and Boone, LLP's Deposit Account No. 08-1394.

TABLE OF CONTENTS

STATUS OF THE CLAIM.....	3
ARGUMENT	3
CONCLUSION.....	9