

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GRACO CHILDREN'S PRODUCTS INC.,
Petitioner,

v.

KOLCRAFT ENTERPRISES, INC.,
Patent Owner.

Case IPR2016-00816 (Patent D604,970 S)
Case IPR2016-00826 (Patent D616,231 S)¹

Before KEN B. BARRETT, JOSIAH C. COCKS, and
JENNIFER S. BISK, *Administrative Patent Judges*.

BARRETT, *Administrative Patent Judge*.

DECISION
Institution of *Inter Partes* Review
37 C.F.R. § 42.108

¹This Decision addresses the same legal and factual issues raised in IPR2016-00816 and IPR2016-00826. The patents at issue in both cases are related, and the arguments made by Petitioner largely are the same in both cases. Therefore, we issue one Decision to be entered in each case.

I. INTRODUCTION

Graco Children’s Products Inc. (“Petitioner”) filed a Petition requesting *inter partes* review of the sole claim of U.S. Patent No. D604,970 S (Ex. 1001, “the ’970 patent”). IPR2016-00816, Paper 2 (“Pet.”). Petitioner also filed a Petition requesting *inter partes* review of the sole claim of U.S. Patent No. D616,231 S. IPR2106-00826,² Paper 2. Kolcraft Enterprises, Inc. (Patent Owner) did not file a Preliminary Response to the Petitions. Under 35 U.S.C. § 314, an *inter partes* review may not be instituted “unless . . . the information presented in the petition . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.”

Our factual findings and conclusions at this stage of the proceeding are based on the evidentiary record developed thus far. This is not a final decision as to patentability of claims for which *inter partes* review is instituted. Any final decision would be based on the record as fully developed during trial.

After considering the information presented in each Petition, we are persuaded there is a reasonable likelihood Petitioner would prevail with respect to the claim challenged in each Petition. We institute an *inter partes* review of the challenged claim of the ’970 patent and institute an *inter partes* review of the challenged claim of the ’231 patent.

² For clarity and expediency, we treat IPR2016-00816 as representative of IPR2016-00816 and IPR2016-00826. Unless indicated otherwise, all citations are to IPR2016-00816.

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A. Related Proceedings

One or both parties identify, as a matter involving or related to the '970 patent, *Kolcraft Enterprises, Inc. v. Graco Children's Products Inc.*, No. 1:15-cv-07950 (N.D. Ill.), and as *Inter Partes* Reviews involving the same parties and related patents, IPR2016-00810 (Patent No. D570,621 S), IPR2016-00816 (Patent No. D604,970 S), and IPR2016-00826 (Patent No. D616,231 S). Pet. 2–3; Paper 5.

B. The '970 Patent, the '231 Patent, and the Claims

In an *inter partes* review, claim terms in an unexpired patent are given their broadest reasonable construction in light of the specification of the patent in which they appear. 37 C.F.R. § 42.100(b); *see also Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144–46 (2016). With regard to design patents, it is well-settled that a design is represented better by an illustration than a description. *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 679 (Fed. Cir. 2008) (en banc) (citing *Dobson v. Dornan*, 118 U.S. 10, 14 (1886)). Although preferably a design patent claim is not construed by providing a detailed verbal description, it may be “helpful to point out . . . various features of the claimed design as they relate to the . . . prior art.” *Egyptian Goddess*, 543 F.3d at 679–80; *cf. High Point Design LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1314–15 (Fed. Cir. 2013) (remanding to district court, in part, for a “verbal description of the claimed design to evoke a visual image consonant with that design”).

Both the '970 patent and the '231 patent are titled “Exposed Legs for a Play Yard,” and the claim of the '970 patent recites “[t]he ornamental design for exposed legs for a play yard, as shown and described.” Ex. 1001 (57); IPR2016-00826, Ex. 1001 (57) (“The ornamental design for *the*

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exposed legs for a play yard, as shown and described.” (emphasis added)). The ’231 Patent issued from an application that was a continuation of the application that led to the issuance of the ’970 Patent. IPR2016-00826, Ex. 1001 (63); IPR2016-00816 (21).

The ’970 patent contains seven figures. Figures 1 and 2 of the ’970 patent are reproduced below.

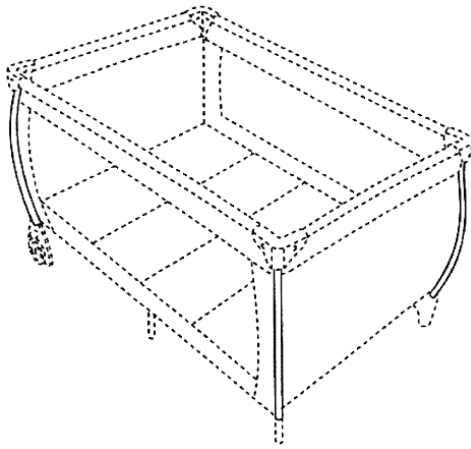


FIG. 1

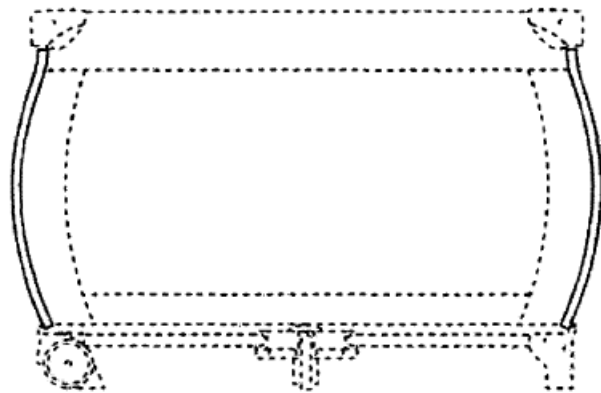


FIG. 2

Figure 1 is “a perspective view of exposed legs for a play yard,” and Figure 2 is “a front view of the design of FIG 1.” IPR2016-00816, Ex. 1001, 1. The description of the ’970 patent states “[t]here is no fabric covering the exposed legs shown in any of FIGS. 1–7.” *Id.* Additionally, “[t]he features shown in broken lines . . . do not form part of the claimed design.” *Id.*

The ’231 patent contains five figures. Figures 1 and 2 of the ’231 patent are reproduced below.

Fig. 1

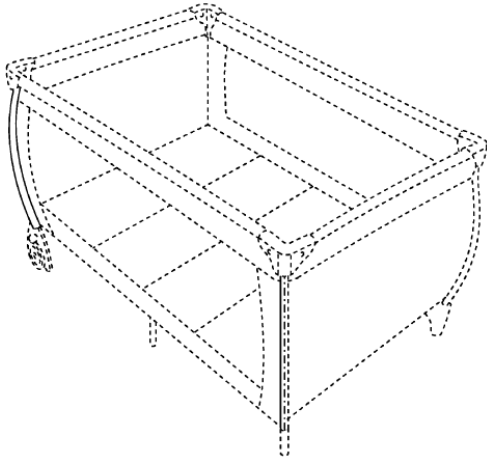


Fig. 2

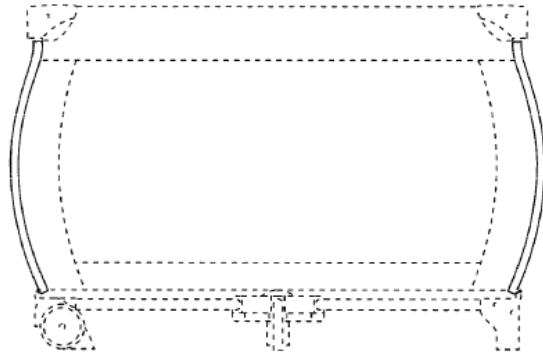


Figure 1 is “a perspective view of a playard with exposed legs,” and Figure 2 is “a front view of the playard of FIG 1.” IPR2016-00826, Ex. 1001, 1. As with the ’970 patent, the ’231 patent indicates that there is “no fabric covering the exposed legs” and similarly indicates that the features in broken lines in the form of only dashes are not part of the claimed design. *Id.* Additionally, the ’231 patent states “[t]he broken line consisting of dashes and dots in FIG. 1 is a boundary line that shows that the claimed design extends to the boundary line.” *Id.*; *see id.*, Fig. 1 (the leg in the foreground with a vertical boundary line on the middle of that leg).

We determine that the following verbal descriptions will be helpful by pointing out “various features of the claimed design as they relate to the . . . prior art.” *Egyptian Goddess*, 543 F.3d at 679–80. In both the ’970 patent and the ’231 patent, the claimed features, those in solid lines, include curved legs that bow outward. *See* Pet. 1 (Petitioner arguing “[t]he figures of the ’970 Patent show a play yard with what appear to be curved legs that bow outward. As shown in Figure 1, the curved legs are depicted in solid lines, and thus are the only features claimed.”). In addition to the pronounced

outwardly bowing legs, Petitioner notes, and we agree, that there is slight outward flaring at the top of the legs. *See* Pet. 23 (Petitioner arguing “Celestina-Krevh shows the legs flaring outward slightly at the top, as do the play yard legs shown in the ’970 Patent’s claimed design.”); *id.* at 22 (citing Ex. 1002 ¶ 119) (“[B]oth designs [of the reference and of the ’970 patent] show legs that bow slightly outward at the top.”).

As mentioned, the ’970 patent and the ’231 patent state that “[t]here is no fabric covering the exposed legs.” Ex. 1001, 1. Petitioner argues that “[t]he broadest reasonable interpretation of ‘no fabric covering’ . . . is not the complete absence of fabric – just that the fabric does not conceal the silhouette or outer contours of the curved legs.” Pet. 13. Petitioner reasons “[a] form-fitting covering, such as paint, a tightly-fitting fabric, or plastic coating, may protect but it does not conceal, and is thus the broader interpretation.” *Id.* We conclude otherwise. It is unreasonably broad to construe “no fabric covering” as encompassing “tightly-fitting fabric [covering].” We determine that, for purposes of this decision, “no fabric covering the . . . legs” simply means what it says—that there is no fabric covering the legs.

For purposes of this decision, we need not reach Petitioner’s arguments (Pet. 12–13) concerning the scope of “exposed.”

Petitioner argues that the claim of the ’231 is indefinite because the figures are allegedly irreconcilable and asserts that construing the claim, therefore, is difficult. IPR2016-00826, Pet. 11–13. Petitioner points out that the front and rear views of the ’231 patent (Figures 2 and 3) show the legs in solid lines thereby indicating that the legs are claimed features, while the side views (Figures 4 and 5) show the legs as unclaimed. *Id.* at 11.

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Petitioner argues that the construction that is both the narrowest and the broadest reasonable is that the claim covers that shown in Figures 2 and 3, asserting that “[a]ny art that would read on what is shown in Figures 2 and 3, would also apply to the remaining figures of the ’231 Patent, including Figure 1.” *Id.* at 12–13.

During the prosecution of the application that led to the ’231 patent, the applicants explained:

The center leg of FIG. 1 has been amended from broken lines to a solid line on the left and the addition of a boundary line (designated by the dashed and dotted broken line) to indicate that the claimed design extends only to the portions of the exposed legs that may be viewed from the front and/or rear views and is not limited to the orientation of the legs.

IPR2016-00628, Ex. 1009, 89.

We do not reach the issue of whether the claim is indefinite. For purposes of this Decision, we compare the cited art against the claimed design as illustrated in all of the figures of the ’231 patent, and conclude that further verbal elaboration of the claim of the ’231 patent is unnecessary.

C. Applied References

Reference			Exhibit No.
Celestina-Krevh	US D448,218 S	Sept. 25, 2001	Ex. 1003
FOLD ’N GO ÉLAN DELUXE CARE CENTER INSTRUCTION MANUAL, Century Products, Aug. 13, 2003 ³ (“the Fold ’N Go Manual”)			Ex. 1004
Gottlieb	US 3,187,352	June 8, 1965	Ex. 1005

³ Petitioner relies on a publication date for the Fold ’N Go Manual of August 17, 2003, based on an internet search, rather than October 2000 as might be implied by the “10/00” printed on the cover. Pet. 40 n.4.

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Reference			Exhibit No.
DeHart	US D500,213 S	Filed June 30, 2003; Issued Dec. 28, 2004	Ex. 1006
Chen '393	US D494,393 S	Filed Jan. 7, 2004; Issued Aug. 17, 2004	Ex. 1007
Hartenstine	US 6,510,570 B2	Jan. 28, 2003	Ex. 1008

Petitioner relies also on the Declarations of Mr. Robert John Anders, dated March 30, 2016, (IPR2016-00816, Ex. 1002) and March 31, 2016, (IPR2016-00826, Ex. 1002) in support of Petitioner's arguments.

D. Asserted Grounds of Unpatentability

Petitioner asserts the following grounds of unpatentability for the claims of the '970 patent and the '231 patent:

Ground	Reference[s]	Basis
1	Celestina-Krevh	§ 102(b)
2	Celestina-Krevh	§ 103(a)
3	Celestina-Krevh in view of Gottlieb	§ 103(a)
4	DeHart	§ 102(e)
5	DeHart	§ 103(a)
6	Chen '393	§ 103(a)
7	Fold 'N Go Manual	§ 102(b)
8	Fold 'N Go Manual	§ 103(a)
9	Fold 'N Go Manual in view of Gottlieb	§ 103(a)
10	Celestina-Krevh in view of Hartenstine	§ 103(a)
11	Fold 'N Go Manual in view of Hartenstine	§ 103(a)

II. ANALYSIS

A. *Principles of Law*

1. *Anticipation*

The test for determining anticipation of a design patent claim is the ordinary observer test. *Int’l Seaway Trading Corp. v. Walgreens Corp.*, 589 F.3d 1233, 1240 (Fed. Cir. 2009). Under the ordinary observer test, a design patent claim is unpatentable if, “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.” *Id.* at 1239 (quoting *Gorham Mfg. Co. v. White*, 81 U.S. 511, 528(1871) (ordinary observer test applied in context of infringement)). “[T]he ordinary observer test requires consideration of the design as a whole” *Id.* at 1243 (citations omitted). “The 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 . . . [and] minor differences cannot prevent a finding of anticipation.” *Id.*

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 and citations omitted). 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

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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, LLC v. Buyers Direct, Inc.*, 730 F.3d 1301, 1311 (Fed. Cir. 2013) (internal quotation and citations omitted). In performing the first step, 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).

B. The Designer of Ordinary Skill

Petitioner’s expert, Mr. Anders, opines:

A designer of ordinary skill in the art relevant to the ’970 Patent would be an industrial designer of ordinary capabilities in the field of consumer product design, including foldable structures. A designer of ordinary skill would also be aware of prior art play yards or play pens, including, but not limited to, working with, designing, or evaluating juvenile products.

Ex. 1002 ¶ 48; *see also* IPR2016-00826, Ex. 1002 ¶ 45 (same for the ’231 patent). For purposes of this decision only, we proceed with the understanding that the designer of ordinary skill is as Mr. Anders asserts.

C. The Grounds of Alleged Anticipation by and Obviousness over Celestina-Krevh and Obviousness over Celestina-Krevh in View of Gottlieb (Grounds 1, 2, & 3)

Petitioner asserts that the claims of the ’970 patent and the ’231 patent are anticipated by Celestina-Krevh (Ex. 1003), would have been obvious over Celestina-Krevh, and would have been obvious over Celestina-Krevh in view of Gottlieb (Ex. 1005). Pet. 18–32. Both of these references and the ground of obviousness over Celestina-Krevh and Gottlieb were before the

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Office during the prosecution of the application that led to the '970 patent. *See* Pet. 5–7; Ex. 1009 (prosecution history), 19, 40, 63–65; Ex. 1010 (decision of the Board of Patent Appeals and Interferences (BPAI)); *see also* IPR2016-00810, Paper 2, 6–8 (Petitioner discussing a related patent's prosecution history involving a rejection based on Celestina-Krevh and Gottlieb). As mentioned, the application that led to the '231 patent was a continuation of the application that led to the '970 patent. Therefore, the two patents share at least that part of the prosecution history pertaining to Celestina-Krevh and Gottlieb.

In determining whether to institute an *inter partes* review, we, acting on behalf of the Director, may take into account whether, and reject a petition to institute on a particular ground because, the same or substantially the same prior art or arguments previously were presented to the Office. 35 U.S.C. § 325(d) (“In determining whether to institute or order a proceeding under [chapter 32], chapter 30, or chapter 31, the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.”). For the reasons that follow, we find that the art and issues underlying the Celestina-Krevh-based grounds in the Petition were considered substantively by the Office during prosecution of the underlying patent application that led to the issuance of the '970 patent and, by extension, the application that led to the '231 patent, and we exercise our discretion to deny institution of review of these two grounds under 35 U.S.C. § 325(d).

Celestina-Krevh is a design patent titled “Curved Legs for a Playard.” Ex. 1003, 1. Illustrative Figure 2 from Celestina-Krevh is shown below.

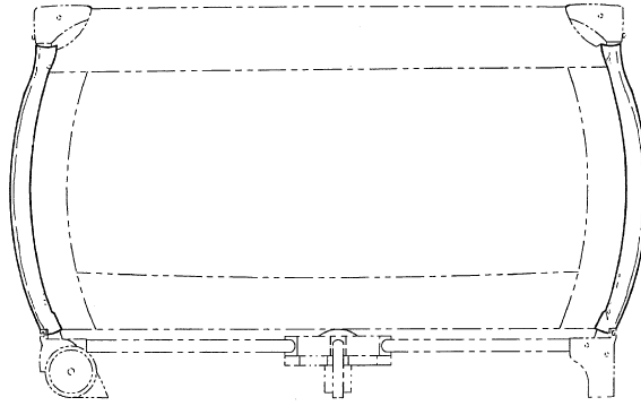


Figure 2 is a front elevation view of curved legs for a play yard. *Id.* For the single-reference obviousness ground, Petitioner argues that any differences such as proportions or widths of the legs would have involved obvious changes. Pet. 29–30. In articulating the other Celestina-Krevh obviousness ground, Petitioner relies on Gottlieb for the disclosure of a play yard with legs isolated from the interior of the play yard due to the netting being spaced away from the legs. *Id.* at 31.

The exposed legs of the claimed designs of the '970 patent and the '231 patent do not have fabric covering the legs. Petitioner asserts that Celestina-Krevh does not disclose a fabric covering the legs.⁴ Pet. 25–27. The issue of whether this assertion is correct was considered by the examiner and was the subject of a decision on appeal by the Board of Patent Appeals and Interferences, the predecessor of the Patent Trial and Appeal Board. Petitioner argues that the examiner and Board were incorrect. Pet. 26.

⁴ For the reasons discussed above regarding the claimed designs of the '970 patent and the '231 patent, we find unpersuasive the alternative argument (Pet. 28–29) that a tight fabric covering anticipates a claimed design having no fabric covering.

During the prosecution that led to the issuance of the '970 patent, the examiner entered an obviousness rejection based on Celestina-Krevh alone⁵ and an obviousness rejection based on the combination of Celestina-Krevh and Gottlieb. Ex. 1009, 19, 40, 63. The matter was fully briefed on appeal to the Board by both the appellant and the examiner. *See id.* at 78 (appeal brief); 120 (examiner's answer); 167 (reply brief). In the Answer, the examiner stated that "all of the figures of Celestina-Krevh show the legs of the play yard completely covered by some sort of decorative fabric or other material." *Id.* at 126. The Board found that the legs in Celestina-Krevh "have what appear to be lengths of fabric wrapped around the legs to cover the legs" and that "[t]he Celestina-Krevh patent discloses and claims only play yard legs which are substantially completely covered in fabric." *Id.* at 193. The Board reversed the examiner, determining that it would not have been obvious to modify Celestina-Krevh, in light of Gottlieb, by removing the covering of the legs. *Id.* at 198–99.

Petitioner has not provided persuasive reasoning or argument as to why we should revisit the Office's determinations regarding the covering of the legs of Celestina-Krevh or of the obviousness of the claimed design over Celestina-Krevh alone or in combination with Gottlieb. Accordingly, we exercise our discretion under 35 U.S.C. § 325(d) to deny review of the claims of the '970 patent and the '231 patent on the asserted ground of anticipation by Celestina-Krevh, the ground of obviousness over Celestina-

⁵ The examiner withdrew the Celestina-Krevh single-reference obviousness rejection in favor of the rejection of the claim as being obviousness over the combination of Celestina-Krevh and Gottlieb. Ex. 1009, 40.

Krevh, and the asserted ground of obviousness over Celestina-Krevh in view of Gottlieb.

D. The Grounds of Alleged Anticipation by and Obviousness over DeHart (Grounds 4 & 5)

Petitioner asserts that the claims of the '970 patent and the '231 patent are anticipated by or would have been obvious over DeHart (Ex. 1006).

Pet. 32–37. DeHart is a design patent directed to a bassinet. Ex. 1006, 1.

Illustrative Figure 1 is shown below:

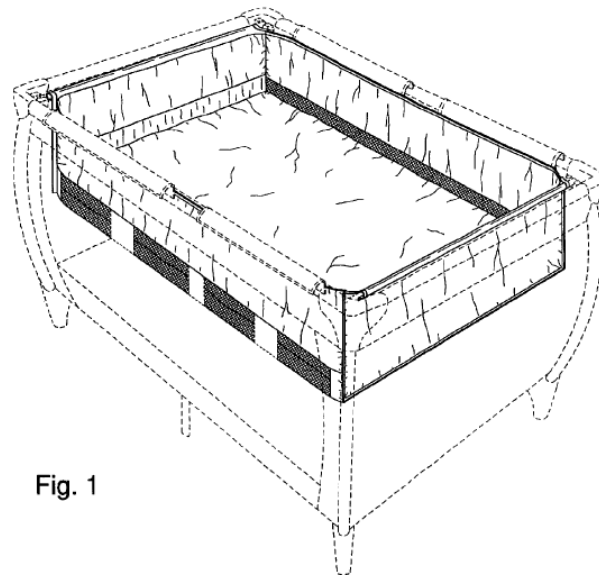


Fig. 1

Figure 1 is a perspective view of a bassinet with ventilation strip. *Id.* As DeHart is directed to the bassinet itself, the only figure of DeHart depicting the play yard is the perspective view of Figure 1. *See id.*, Figs. 1–5.

Petitioner argues that DeHart is anticipatory because it has a substantially similar appearance to that of the claimed design. Pet. 32. We, however, fail to discern, and therefore cannot find, that the legs of DeHart have the top flare of the claimed design.

Petitioner's single-reference obviousness ground (Pet. 35–37) does not cure the deficiencies of the underlying anticipation ground. For

example, Petitioner does not address with any specificity the top flare of the claimed design. Rather, Petitioner asserts “[t]o the extent that there is any disclosure in the ’970 Patent that is not plainly evident from DeHart, DeHart readily suggests minor alterations to one of ordinary skill in the art to arrive at a hypothetical reference.” *Id.* at 35 (citing *In re Carter*, 673 F.2d 1378, 1380 (CCPA 1982); Ex. 1002 ¶ 160). Petitioner then discusses, *inter alia*, the purported obviousness of converting dashed lines into solid lines, of extending the rounded shape to multiple views, and of having each leg to be the same. *Id.* at 35–36. Petitioner, however, does not identify, in its DeHart obviousness ground, the top flare as one of these “minor differences” or explain adequately why one would have found it obvious to perform any “minor alterations” related to the top flare so as to arrive at the claimed design. *Id.* at 35–36.

Accordingly, we find Petitioner has not demonstrated that there is a reasonable likelihood that it would prevail in showing that the challenged claims are anticipated or rendered obvious by DeHart.

E. The Ground of Alleged Obviousness over Chen ’393 (Ground 6)

Petitioner asserts that the claims of the ’970 patent and the ’231 patent would have been obvious over Chen ’393 (Ex. 1007). Pet. 37–39. Chen ’393 is a design patent titled “Top Rail of a Playpen.” Ex. 1007, 1. Figure 1 of Chen ’393 is shown below.

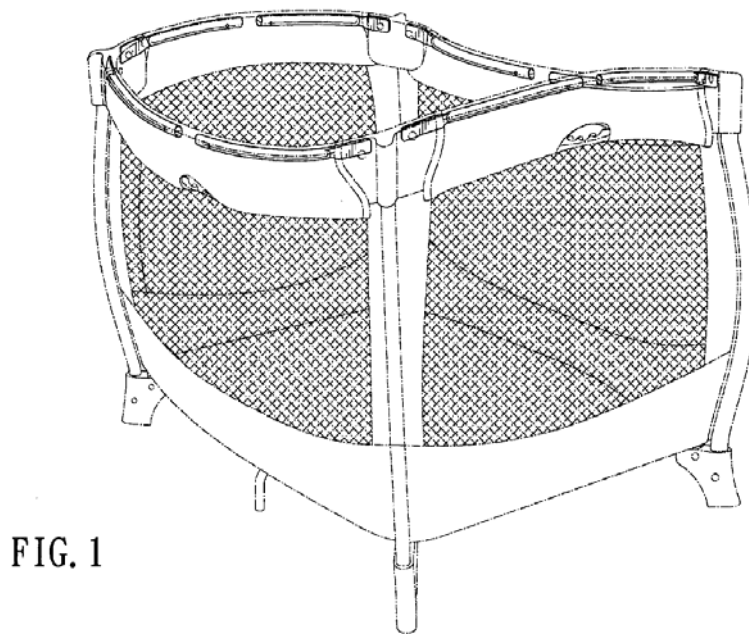
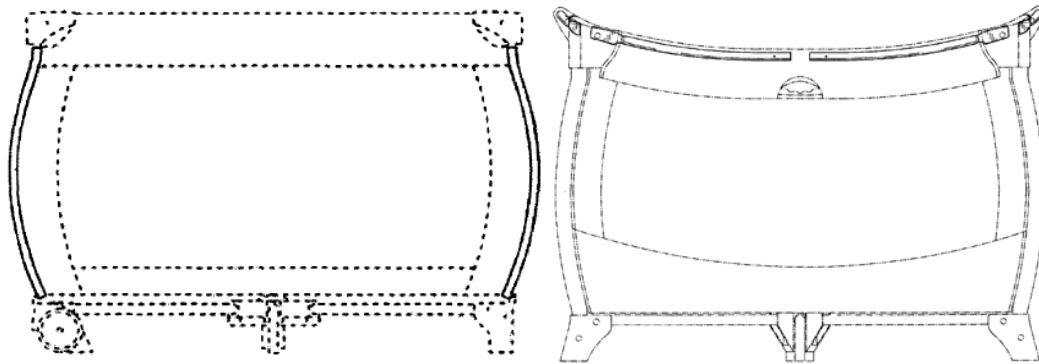


Figure 1 is a perspective view of an embodiment of Chen '393. *Id.*

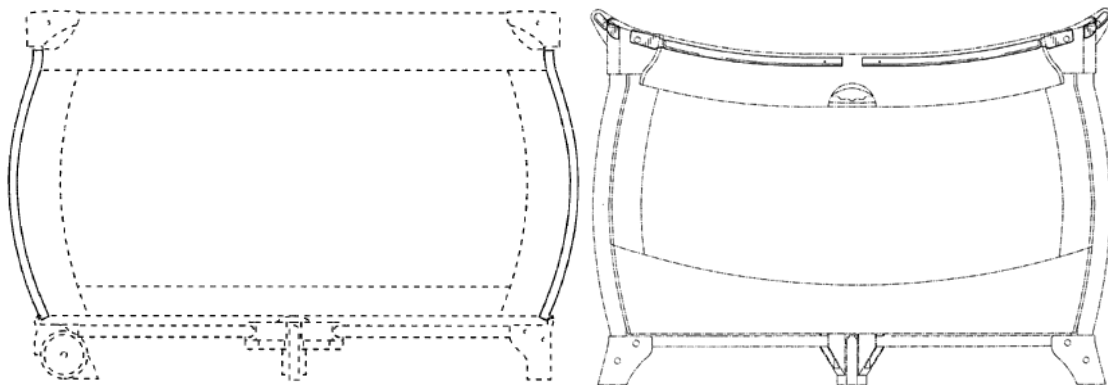
Petitioner argues that Chen '393 discloses the same overall visual impression and, to the extent there are any differences between Chen '393 and the claimed design, the differences are *de minimus*, and asserts that Chen '393 “readily suggests minor alterations to one of ordinary skill in the art to arrive at a hypothetical reference [the same as the claimed design].” Pet. 37, 39. Petitioner provides side-by-side comparisons of Chen '393 and the claimed design (*id.* at 38) and relies on the testimony of Mr. Anders (*id.* at 38–39; Ex. 1002 ¶¶ 166–172).

Below is a side-by-side comparison of illustrative views of the design of the '970 patent and of Chen '393:



The figure above, on the left, is Figure 2 of the '970 patent and is a front view of the claimed design. Ex. 1001, 1. The figure above, on the right, is Figure 2 of Chen '393 showing a front elevational view. Ex. 1007, 1.

Below is a side-by-side comparison of illustrative views of the design of the '231 patent and of Chen '393:



The figure above, on the left, is Figure 2 of the '231 patent and is a front view of the claimed design. IPR2016-00826, Ex. 1001, 1. The figure above, on the right, is Figure 2 of Chen '393 showing a front elevational view. Ex. 1007, 1.

We have reviewed Petitioner's arguments⁶ and evidence and are persuaded on the present record that Petitioner has shown a reasonable

⁶ We recognize that at least the purported perspective view of the '231 patent in Petitioner's side-by-side comparison appears to not be of the claimed

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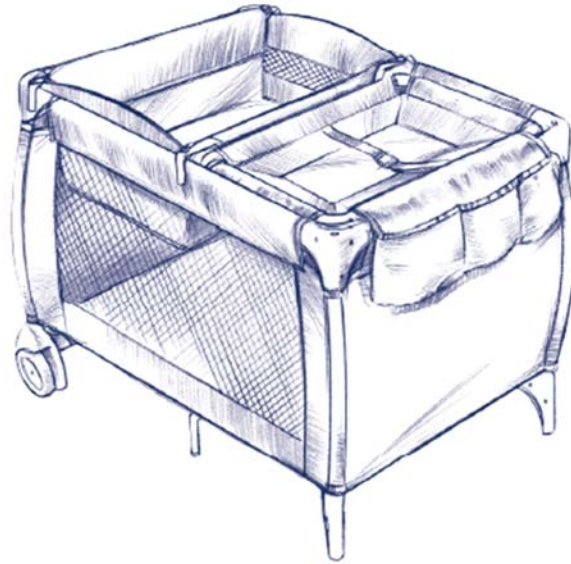
likelihood of establishing the claimed designs of the '970 patent and of the '231 patent would have been obvious over Chen '393.

F. The Grounds of Alleged Anticipation by the Fold 'N Go Manual, Obviousness over the Fold 'N Go Manual, and Obviousness over the Fold 'N Go Manual in View of Gottlieb (Grounds 7, 8, & 9)

Petitioner asserts that the claims of the '970 patent and the '231 patent are anticipated by and would have been obvious over the Fold 'N Go Manual. Pet. 40–45. Petitioner also asserts that the claimed designs would have been obvious over the Fold 'N Go Manual in light of Gottlieb. *Id.* at 45.

The Fold 'N Go Manual is a document containing several drawings of a device that may be used as a play yard or bassinet. Ex. 1004, *passim*. We understand Petitioner to rely on the perspective views on the front page and page 3 of the Fold 'N Go Manual. Pet. 41–44 (reproducing all or portions of the drawings on those pages); *but see* Ex. 1002 ¶ 191 (Mr. Anders reproducing drawings from page 10 of the Fold 'N Go Manual). An illustrative drawing from the Fold 'N Go Manual is shown below.

design of the '231 patent. IPR2016-00826, Pet. 40 (showing three legs in solid lines). In performing our analysis, we compare the figures of the '231 patent and Chen '393.



The above-figure, from the cover page of the Fold 'N Go Manual, is a perspective view of the Fold 'N Go èlan Deluxe Care Center. Ex. 1004. For purposes of comparison of the Fold 'N Go Manual with the claimed design of the '970 patent, Petitioner provides the following figure:



Front Pg.	Fig. 2
Fold 'N	'970
Go Manual	Patent

Pet. 42. The figure above is, on the left, a portion of a drawing from the front page of the Fold 'N Go Manual showing a leg and, on the right, a portion of Figure 2 of the '970 patent (front view, Ex. 1001, 1) also showing a leg. Petitioner, apparently referring to the side-by-side figure immediately

above, argues that shading at the top and bottom of the leg indicates inward curvature. Pet. 42 (citing Ex. 1002 ¶ 181). Even if we could find that the single leg of the Fold 'N Go Manual depicted above has the top flare of the claimed designs, we cannot make that finding with respect to each claimed overall design. Petitioner and its expert seemingly limit their review to the rightmost leg in the perspective drawing while failing to address the leftmost leg (the one with the wheel) or the legs in the figure of page 3 of the Fold 'N Go Manual (see Pet. 44), which lack any apparent flare at the top. Because we are not persuaded that the Fold 'N Go Manual discloses a design substantially the same as the claimed designs having a top flare, we need not reach Petitioner's implied argument that the legs of the Fold 'N Go Manual do not have a fabric covering.⁷ Pet. 42–43 (arguing that the legs lack discernable texture or surface treatment thus indicating unconcealed legs, and offering an alternative argument in the event that the Board finds the legs to be fabric covered).

Petitioner's articulation of the single-reference obviousness ground based on the Fold 'N Go Manual (Pet. 44) and of the ground of obviousness over the combination of the Fold 'N Go Manual and Gottlieb (*id.* at 45) do not cure the underlying defect of the Fold 'N Go Manual anticipation ground. Even if we were persuaded by Petitioner's argument (*id.*) that it would have been obvious, in light of Gottlieb, to remove any fabric from the legs of the Fold 'N Go Manual, Petitioner does not explain adequately why

⁷ We note, however, that the leg in foreground of the perspective view on the front page of the Fold 'N Go Manual appears, at the top of the leg, to have some kind of covering over a leg.

it would have been obvious to add a top flare to the legs of the Fold 'N Go Manual so as to result in a design having the same overall appearance as the claimed designs. *See id.* at 45.

We find Petitioner has not demonstrated that there is a reasonable likelihood that it would prevail in showing that the challenged claims are anticipated or rendered obvious by the Fold 'N Go Manual or rendered obviousness by the combination of the Fold 'N Go Manual and Gottlieb.

G. The Grounds of Alleged Obviousness over Celestina-Krevh in View of Hartenstine, and Obviousness over the Fold 'N Go Manual in View of Hartenstine (Grounds 10 & 11)

Petitioner asserts that the claims of the '970 patent and of the '231 patent would have been obvious over Celestina-Krevh in view of Hartenstine and would have been obvious over the Fold 'N Go Manual in view of Hartenstine. Pet. 46–49. Celestina-Krevh and the Fold 'N Go Manual have been discussed above. Hartenstine discloses “a playard having corner panels to isolate the legs of the playard from the interior space of the playard.” Ex. 1008, 1:5–7. Figure 10 of Hartenstine is included in the Petition (Pet. 46) and is shown below.

FIG.10

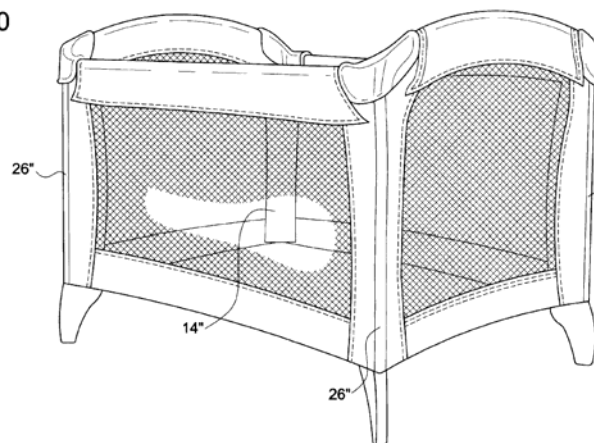


Figure 10 is “a perspective view of a playard having a corner panel [of one embodiment of Hartenstine].” Ex. 1008, 2:37–39.

For both subject grounds, Petitioner argues that Hartenstine teaches leaving legs of a play yard uncovered and maintains that one would have found it obvious, based on this teaching, to remove any fabric material from the legs of the respective primary reference. Pet. 46–47, 48. As to the purported teaching of Hartenstine, Petitioner asserts:

Hartenstine’s specification also discloses extending fabric panels interior to the legs so as to isolate the play yard legs from the interior space. ([Ex. 1008] at 2:67–3:10.) Spacing Hartenstine’s corner panels (14) inwardly away from the legs leaves the legs uncovered by the corner panels. (*Id.*, Fig. 4.)

Pet. 47; *see id.* at 46–47 (quoting from Ex. 1008, 4:54–56, which refers to isolating the legs from the interior). We are not persuaded.

The purpose of Hartenstine’s flexible corner panels 14, which effectively are inserts spanning the two adjacent side panel portions 12, is to isolate the legs from the interior space so that a child cannot accidentally come into contact with a rigid leg. Ex. 1008, 2:67–3:10. It does not follow necessarily that adding a panel internally results in the removal of covering externally, i.e. from the legs. Further, Hartenstein repeatedly refers to the side panels wrapping or hugging the legs. *E.g., id.* at 1:62 (“a side panel wrapped around the four legs”), 3:65–67 (the side panel “hugs or wraps around each leg 26 of the playard frame.”). Hartenstein’s Figure 6, reproduced below, shows side panel portions 12A and 12B “hugging or wrapping the leg 26.” *Id.* at 4:8–15.

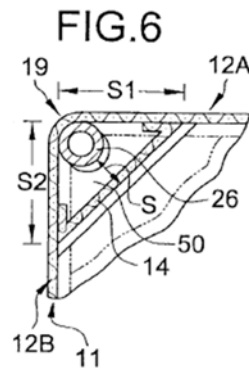


Figure 6 of Hartenstein “is an enlarged top view in cross-section of a corner area of the playard.” *Id.* at 2:27–28.

Petitioner’s obviousness grounds are based on a flawed factual underpinning. Accordingly, we find Petitioner has not demonstrated that there is a reasonable likelihood that it would prevail in showing that the challenged claims are rendered obvious by Celestina-Krevh in view of Hartenstein or rendered obvious by the Fold ’N Go Manual in view of Hartenstein.

III. CONCLUSION

We determine Petitioner has demonstrated a reasonable likelihood of establishing the unpatentability of the claim of the ’970 patent and the claim of the ’231 patent. This is a decision to institute an *inter partes* review under 35 U.S.C. § 314. The Board has not made a final determination on the patentability of the challenged claim.

IV. ORDER

For the foregoing reasons, it is

ORDERED that, pursuant to 35 U.S.C. § 314, *inter partes* review is instituted as to the claim of the ’970 patent on the ground of obviousness under 35 U.S.C. § 103(a) over Chen ’393;

IPR2016-00816 (Patent D604,970 S)

IPR2016-00826 (Patent D616,231 S)

FURTHER ORDERED that, pursuant to 35 U.S.C. § 314, *inter partes* review is instituted as to the claim of the '231 patent on the ground of obviousness under 35 U.S.C. § 103(a) over Chen '393;

FURTHER ORDERED that *inter partes* review is commenced on the entry date of this Order, and pursuant to 35 U.S.C. § 314(c) and 37 C.F.R. § 42.4, notice is hereby given of the institution of a trial; and

FURTHER ORDERED that the trial is limited to the grounds of unpatentability listed above, and no other grounds of unpatentability are authorized for *inter partes* review.

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