UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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QUALTRICS, LLC,
Petitioner,

v.

OPINIONLAB, INC.,
Patent Owner.

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Case IPR2014-00366
Patent 8,041,805 B2

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Before RAMA G. ELLURU, JEREMY M. PLENZLER,
GEORGIANNA W. BRADEN, and CARL M. DEFRANCO,
Administrative Patent Judges.

DEFRANCO, *Administrative Patent Judge.*

FINAL WRITTEN DECISION
35 U.S.C. § 318(a) and 37 C.F.R. § 42.73

I. INTRODUCTION

Qualtrics, LLC, filed a Petition ("Pet.") requesting *inter partes* review of claims 1, 2, 5, 8, 10, 11, 14, 17–19, 22, 25–27, 30, and 33 of U.S. Patent No. 8,041,805 B2 ("the '805 patent"). After considering the Petition, we instituted an *inter partes* review of all the challenged claims on the ground of unpatentability under 35 U.S.C. § 103. After institution, OpinionLab, Inc., the owner of the '805 patent, filed a Patent Owner Response ("PO Resp."), to which Qualtrics filed a Reply ("Reply"). We entertained oral argument from both parties.[1] We have jurisdiction under 35 U.S.C. § 6(c). For the reasons that follow, we determine that Qualtrics has not proven, by preponderant evidence, that any of the challenged claims are unpatentable.

II. BACKGROUND

A. *The '805 Patent*[2]

The '805 patent is directed to a system and method for soliciting and reporting feedback from a user of a commercial website. Ex. 1001, 1:15–19. Typical websites measure a user's reaction to the website *as a whole*. *Id.* at 1:35–56. In contrast, the system of the '805 patent solicits and reports user feedback on a *page-specific* basis by incorporating a "user reaction measurement tool" into each web page of the website. *Id*. at 5:25–36, 11:59–66. The tool appears as a "viewable icon" on each web page and solicits the user's subjective reaction to the particular web page being displayed. *Id*. at 5:37–50, 11:66–12:6, Fig. 2. When the user clicks on the icon, a rating scale and/or a comment box appears within the user's browser

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[1] A transcript ("Tr.") has been entered into the record. Paper 44.

[2] The '805 patent is the subject of concurrent district court actions, *OpinionLab, Inc. v. Qualtrics Labs, Inc.*, No. 1:13-cv-01574 (N.D. Ill.), and *OpinionLab, Inc. v. iPerceptions Inc.*, No. 1:12-cv-05662 (N.D. Ill.). Pet. 2.

window. *Id.* at 5:65–6:21, 12:40–14:10, Figs. 3–6. The rating scale and comment box allow the user to provide subjective reactions to various aspects of the particular web page while remaining at the web page itself. *Id.* at 14:11–18; *compare* Fig. 2 *with* Figs. 3, 5 (depicting icon 50 on web page 28 as being replaced by rating scales 60, 70).

Software associated with the icon operates to collect and store the user's reaction in a database for subsequent reporting to a website owner. *Id.* at 2:6–18. The website owner can generate a report for analyzing and identifying user reactions and feedback related to particular web pages. *Id.* at 15:27–21:54, Figs. 8A, 8B, 9. The report allows the website owner to assess the success of each web page in the eyes of the user community. *Id.* at 13:49–52.

> B.   *The Challenged Claims*

Of the challenged claims, claims 1, 10, 18, and 26 are independent. Claim 1 is representative and recites:

> 1.   One or more computer-readable non-transitory storage media embodying software operable when executed to:
> provide a user-selectable element viewable on each of a plurality of particular web pages of a website upon initial display of a particular web page and soliciting page-specific user feedback concerning the particular web page upon initial display of the particular web page, the user-selectable element appearing identically and behaving consistently on each of the plurality of particular web pages; and
> receive the page-specific user feedback concerning the particular web page for reporting to an interested party, ***the page-specific user feedback concerning the particular webpages having been provided by a user while the user remained at the particular web page***, and the page-specific user feedback comprising one or more page-specific subjective ratings of the particular web page and one or more associated

> page-specific open-ended comments concerning the particular
> web page,
>
> the page specific user feedback allowing the interested
> party to access page-specific subjective ratings and associated
> page-specific open-ended comments across the plurality of
> particular web pages to identify one or more particular web
> pages for which the page-specific user feedback is notable
> relative to page-specific user feedback for other particular web
> pages;
>
> wherein the user-selectable element is viewable within a
> browser window upon initial display of the particular web page
> and remains viewable within the browser window, at least prior
> to the user selection, regardless of user scrolling.

Ex. 1001, 25:40–26:3 (emphasis added).

C. The Instituted Grounds of Unpatentability

In the Preliminary Proceeding,[3] we instituted trial on only one of the

three grounds proposed by Qualtrics, in particular, determining Qualtrics had

a "reasonable likelihood" of proving the challenged claims unpatentable as

obvious over the combined teachings of CustomerSat,[4] Medinets,[5] and

HTML Spec.[6] Dec. to Inst. 12. Having instituted trial under the "reasonable

likelihood" standard of 35 U.S.C. § 314(a), we decide now whether

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[3] A "Preliminary Proceeding," as defined by our rules, "begins with the
filing of a petition for instituting a trial and ends with a written decision as to
whether a trial will be instituted." 37 C.F.R. § 42.2.

[4] *Customer Satisfaction Measurement, Surveys and Market Research by
CustomerSat.com, The Internet Survey Experts*, https://web.archive.org/web/
19980526190826/http:/www. Customersat.com/ (retrieved Nov. 21, 2013
from Internet Archive, Wayback Machine), 1–76 (May 26, 1998) (Ex.
1003).

[5] DAVID MEDINETS, PERL5 BY EXAMPLE: THE EASIEST WAY TO LEARN HOW
TO PROGRAM, Que Corp., 1–66 (1996) (Ex. 1004).

[6] World Wide Web Consortium (W3C), *HTML 4.0 Specification*, Dave
Raggett *et al*. (eds.), 1–366 (Apr. 24, 1998) (Ex. 1014).

Qualtrics has proven unpatentability of the challenged claims by a
"preponderance of the evidence," as required by 35 U.S.C. § 316(e).

III. ANALYSIS

A. Claim Construction

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).   Under this standard,
claim terms generally are given their ordinary and customary meaning, as
understood by one of ordinary skill in the art in the context of the patent's
entire written disclosure. *In re Translogic Tech., Inc*., 504 F.3d 1249, 1257
(Fed. Cir. 2007). However, a "claim term will not receive its ordinary
meaning if the patentee acted as his own lexicographer and clearly set forth a
definition of the disputed claim term in either the specification or
prosecution history." *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359,
1366 (Fed. Cir. 2002). Here, although Qualtrics advances a construction of
several claim terms of the '805 patent (Pet. 6–14), OpinionLab does not
believe that any specific definition is necessary (PO Resp. 4–5 n. 4). We
conclude that the claim terms do not require an express construction in order
to analyze the challenged claims relative to the asserted prior art.

B. The Ground of Obviousness

Our analysis centers on a single limitation of independent claims 1,
10, 18 and 26, one that is common to all of the claims, namely, "page-
specific user feedback . . . having been provided by a user while the user
remained at the particular web page." Qualtrics relies primarily on
CustomerSat's disclosure of "Pop!Up questionnaires" for teaching this

limitation.[7] Pet. 22–23; Reply 1–3. According to Qualtrics, the pop-up questionnaire, or survey, can be displayed "immediately" upon the user clicking on a survey button, and can be viewed "on the particular web page from which it was launched, without requiring the user to navigate to a different page." *Id*. at 23 (citing Ex. 1003, 7); *see also* Reply 1–3 (arguing that CustomerSat "says that a user can be taken . . . to the 'Pop!Up' questionnaire *immediately*").

In response, OpinionLab counters that, although CustomerSat's pop-up questionnaire, or survey, may be displayed immediately after the user clicks on the survey button, it nevertheless "is provided on an entirely separate web page." PO Resp. 19. That CustomerSat discloses the survey button and resulting survey as pop-ups, OpinionLab argues, does not mean that they both pop-up on the *same* web page. *Id*. at 18. In other words, according to OpinionLab, CustomerSat's survey button "is only an *invitation* —there is no teaching or suggestion that this 'pop-up' invitation contains the survey itself." *Id*. (citing Ex. 2002 ¶¶ 41–49).

At the outset, we note that nowhere does CustomerSat describe or depict a pop-up questionnaire on the same web page as the pop-up survey invitation. *See, e.g.*, Ex. 1003, 4, 7, 23. According to CustomerSat, if a user wishes to provide feedback, the user can click on a survey button "at any time to *go to the survey*, or can be *taken to the survey* immediately." *Id*. at 7 (emphases added). That description suggests that the survey itself is in a

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[7] In the Petition, Qualtrics also references CustomerSat's disclosure of a "Feedback" icon as satisfying certain claim limitations. Pet. 16–22. At oral argument, Qualtrics clarified that the "Feedback" icon is "just a link to another page" or "a link to a separate page . . . [t]hat is not the Pop!Up questionnaire." Tr. 9–10.

location different from the survey button. Indeed, the "Feedback and Membership" form depicted in CustomerSat stands alone, by itself, without any display of the web page from which the feedback form was launched, i.e., when the user clicked on the survey button so as to provide feedback. *See, e.g,* Ex. 1003, 4 (depicting the "Feedback and Membership" form). Thus, we are not persuaded that CustomerSat's simple disclosure of the questionnaire as a "Pop!Up" amounts to sufficient evidence that it is provided on the same web page as the survey button.

Moreover, the testimony of the parties' declarants buttresses a finding that the user, in CustomerSat, provides feedback *after being directed to a different web page*, rather than while remaining on the same web page. For instance, we credit the testimony of OpinionLab's declarant, Dr. Michael Shamos, that the underlying source code for CustomerSat's feedback form refers to a web page located at "www.customersat.com/cssurvey.htm," while the source code for the survey button, or invitation, indicates a web page located at "www.customersat.com/cgi-bin/popupadmin." Ex. 2002 ¶ 47 (citing Ex. 1003, 67). Qualtrics's declarant, Mr. John Chisholm, likewise only describes the "popupadmin" code as controlling the survey button, without ever ascribing that code to the survey itself. Ex. 2004, 105:10–107:19. Thus, although CustomerSat's feedback questionnaire may be the target of the survey button, or invitation, it nonetheless "appears on a completely separate webpage from the web page [] which contains [the] pop-up invitation." Ex. 2002 ¶ 47 (declaration of Dr. Shamos).[8]

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[8] As further support, Qualtrics points to a depiction of a feedback form appearing within the same screen, and overlying, a particular web page. Pet. 23. As depicted, however, the feedback form is on a different web page than

Qualtrics faults OpinionLab for reading too much into CustomerSat's disclosure, arguing that "the cited disclosure says nothing about *how* the resulting survey is displayed." Reply 3 (citing Ex. 1003, 7, and Ex. 1027 ¶¶ 14–17). Qualtrics misses the mark, however, because the very crux of the claimed invention is directed at *how* the user feedback is provided, i.e., while the user remains at the particular web page. As such, Qualtrics's admission that CustomerSat does not teach how the survey is displayed— i.e., whether it is on the same page or a different page—hurts, rather than helps, their case.

Qualtrics also argues that "the *unrefuted* testimony of Mr. Chisholm is that Pop!Up questionnaires could be—and, in fact, were— displayed in a pop-up window." Reply 3 (citing Ex. 1027 ¶¶ 18–22). We disagree. OpinionLab's declarant, Dr. Shamos, refutes expressly, and credibly, the testimony of Mr. Chisholm, explaining multiple times that, although the survey questionnaire "could be" displayed in a pop-up window, "there's no suggestion [in CustomerSat] that the questionnaire is showing up in this—popup window." Ex. 1028, 160:24–161:20; *see also id.* at 162:9–11 ("there's no hint . . ."). And, more succinctly, in response to questions about whether clicking on CustomerSat's survey button would turn "the survey invitation into a survey question," and "could it work that way?," Dr. Shamos responded: "You mean is it physically possible that you could mangle the website in that manner? Yes, you certainly could, if you wanted to. *There's no—certainly no hint or suggestion here that it's done that*

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the underlying web page, as evidenced by the different URLs associated with each. *See* Ex. 1005 ¶ 183.

way." *Id*. at 164:23–165:20 (emphasis added). That testimony persuades us that CustomerSat neither teaches providing the survey questionnaire, i.e., feedback form, on the same web page as the survey button, nor would it have suggested as much to a skilled artisan.

Alternatively, Qualtrics relies on Medinets as teaching a "user feedback form" (Ex. 1004, Fig. 21.3) that can be filled out while the user remains at the particular web page from which a "submit button" (*id*., Fig. 21.4) was clicked to summon the feedback form. Pet. 38–39. According to Qualtrics, Medinets teaches that the submit button and feedback form "are both generated using HTML forms," and, from that simple teaching, surmises that they "could be on the same particular web page." *Id*. at 38. In support, Qualtrics proffers the testimony of its declarant, Mr. Chisholm, who likewise speculates that Medinets's submit button and feedback form "could be" on the same particular web page, or the button "could be" set to open the feedback form in a new browser window that would allow the user to remain at the web page. *Id*. at 38–39 (citing Ex. 1005, ¶¶ 184–187).

That the feedback form of Medinets "could be" modified to remain on the same web page as the submit button does not mean that a skilled artisan would have understood Medinets as, in fact, teaching or suggesting such a capability. In fact, when Medinets speaks of the "user feedback form" and the "submit button," we do not discern any teaching or suggestion of them appearing on the same page. *See, e.g.*, Ex. 1004, 60, 62. Indeed, Medinets seems to indicate the opposite, stating that "a user feedback form appears that *automatically knows which page the user was on* when the button was pressed." *Id*. at 60 (emphasis added). That the feedback form stores the

location of the page on which the button was pressed suggests that users are taken to a different page, not that they remain on the same page.

Moreover, Qualtrics's own declarant conceded that the "HTTP addresses," or "URLs," for Medinets's feedback form (Ex. 1004, Fig. 21.3) and submit button (*id.*, Fig. 21.4) "are different," and "I don't think there's anything that discloses the two pages are the same." Ex. 2004, 41:17–43:23. As such, we are not persuaded that Medinets's feedback form is a pop-up that appears on the same page as the submit button, but rather is a different web page. OpinionLab's declarant, Dr. Shamos, likewise corroborates that Medinets's feedback form is a "separate email form which replaces the web page" having the submit button. Ex. 2002 ¶ 68. Thus, the record reflects that both parties' declarants agree that Medinets fails to teach or suggest a feedback form that appears on the same web page as the submit button that launches the feedback form.

Turning now to the third reference of the combination on which we instituted trial, the HTML Spec, Qualtrics argues that it teaches the use of "HTML frames," which purportedly allow a user to provide feedback while remaining at the particular web page. Pet. 44 (citing Ex. 1014, 193–205). In making this argument, however, Qualtrics does not rely solely on the HTML Spec, but points back to the feedback form in Medinets as being "predicated on the use of HTML." *Id.* at 44–45. As discussed above, we are not persuaded by Qualtrics's argument with respect to Medinets, nor are we persuaded that the HTML Spec itself suffices to cure the deficiencies with Medinets. Although the HTML Spec may describe, generally, the advantages of "HTML frames," nowhere does that description, as relied upon by Qualtrics, teach the use of HTML frames for creating a feedback

form for a website. *See* Ex. 1014, 193–205. Even Qualtrics's own declarant conceded that it does not mention using HTML frames "to create a survey to get feedback about a website." *See* Ex. 2004, 59:9–21. As such, Qualtrics's argument with respect to the HTML Spec is no better, more likely less availing, than its arguments with respect to CustomerSat and Medinets.

And, to the extent that Qualtrics may rely on the knowledge of a skilled artisan to fill in the gaps found to exist in the teaching of the HTML Spec, we are not persuaded. *See* Pet. 44–45; Reply 4. In particular, Qualtrics points to the testimony of OpinionLab's declarant, Dr. Shamos, that, "If your question is could one have implemented the invention of the OpinionLab patent *using HTML 4*, the answer is yes." Reply 4 (citing Ex. 1028, 434:20–22) (emphasis added). But that response speaks to the use of HTML, in general, as a possible tool for implementing the claimed invention; it was not about a skilled artisan's understanding of the HTML Spec itself. As shown by testimony that followed immediately from that statement, Dr. Shamos explained, quite aptly, that, "If your question is would one be motivated *by reading the HTML 4 manuals* to make the inventions of the OpinionLab patents, no." *Id*. at 434:22–24 (emphasis added). And, in reasoning that a skilled artisan would not have looked to the HTML Spec for purposes of placing the feedback form in a popup window, he stated, "there's nothing whatsoever to do with collecting feedback or survey information here." *Id*. at 435:1–25. Qualtrics does not offer any rebuttal to that testimony, nor could it, because its own declarant testified similarly, as discussed above. *See* Ex. 2004, 59:9–21.

Thus, after considering the totality of the evidence presented by Qualtrics and OpinionLab, we determine that the preponderance weighs in

favor of showing that neither CustomerSat, Medinets, nor HTML Spec, individually or collectively, would have taught or suggested to a skilled artisan the capability of providing feedback while the user remained at the particular web page from which the feedback was solicited, as required by each of the independent claims. The remaining claims challenged in the Petition, claims 2, 5, 8, 11, 14, 17, 19, 22, 25, 27, 30, and 33, depend, directly or indirectly, from claims 1, 10, 18, and 26, and thus, include the limitation that we determined was lacking from CustomerSat, Medinets, and HTML Spec, as discussed above. Accordingly, we determine that Qualtrics has not demonstrated by preponderant evidence that dependent claims 2, 5, 8, 11, 14, 17, 19, 22, 25, 27, 30, and 33 are unpatentable over the combination of CustomerSat, Medinets, and HTML Spec.

C.   *Qualtrics's Motion to Exclude Evidence*

Qualtrics moves to exclude the opinions of OpinionLab's declarant, Dr. Shamos, for two reasons. Mot. 1 (Paper 36). First, Qualtrics seeks to exclude Dr. Shamos's opinions because he "applied the wrong legal standard in determining the level of ordinary skill." *Id*. at 2. According to Qualtrics, Dr. Shamos "considered *only* the '805 Patent and failed to assess the prior art in the field" in opining on non-obviousness. *Id*. But the only support offered by Qualtrics is its mischaracterization of Dr. Shamos's deposition testimony that he "deemed the prior art 'irrelevant.'" *Id*. at 3. We are not persuaded.

Our review of Dr. Shamos's testimony reveals that he considered the patent specification of the '805 patent in terms of the "field of the invention," the "level of education and background [] needed to understand the specification," and "what one would need to know" in order to

understand not only the claimed invention but also "the prior art that was referenced in the petitions." Ex. 1028, 70:1–19. That he reviewed more than simply the '805 patent, in opining on the level of skill in the art, is likewise confirmed by his declaration, which attests that he "considered the three references" relied on in the Petition, "along with all of its Exhibits" and the "prosecution histories" of patents related to the '805 patent. Ex. 2002 ¶¶ 18, 20.

Moreover, as he further attests, Dr. Shamos opined on the level of skill in the art based on his "education, experience, and training in academia and industry." *Id*. ¶ 31. Because, as a matter of necessity, the knowledge that Dr. Shamos gained in the course of his career, which includes significant experience in the field of "eCommerce" and "public opinion polling" (Ex. 2002 ¶¶ 4–11, 13), would have weighed in his assessment of the level of skill in the art, we are not persuaded by Qualtrics's contention that his opinion was based solely on the '805 patent. As such, we deny Qualtrics's motion to exclude the declaration and deposition testimony of Dr. Shamos with respect to his opinions regarding non-obviousness of the claimed invention.

Qualtrics also seeks to exclude Dr. Shamos's opinions on secondary considerations because they "go beyond his qualifications" and "fail to show the required nexus." Mot. 1. As there was no need for us to reach evidence of secondary considerations, Qualtrics' motion to exclude on that issue is denied as moot.

IV. CONCLUSION

Qualtrics has not proven by preponderant evidence that claims 1, 2, 5, 8, 10, 11, 14, 17–19, 22, 25–27, 30, and 33 are unpatentable under 35 U.S.C.

§ 103 as obvious over CustomerSat, Medinets, and HTML Spec. This is a

Final Written Decision of the Board under 35 U.S.C. § 318(a).

V. ORDER

Accordingly, it is hereby:

ORDERED that claims 1, 2, 5, 8, 10, 11, 14, 17–19, 22, 25–27, 30,

and 33 of the '805 patent have not been proven to be unpatentable by a

preponderance of the evidence;

FURTHER ORDERED that Qualtrics's Motion to Exclude is *denied*;

and

FURTHER ORDERED that any party seeking judicial review of this

Final Written Decision must comply with the notice and service

requirements of 37 C.F.R. § 90.2.

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