

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 IPR2014-00356

Patent 6,606,581

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**PATENT OWNER OPINIONLAB, INC.'S NOTICE OF APPEAL**

Director of the United States Patent and Trademark Office  
c/o Office of the General Counsel  
Madison Building East, 10B20  
600 Dulany Street  
Alexandria, VA 22314-5793

Notice is hereby given, pursuant to 37 C.F.R. § 90.2(a), that Patent Owner OpinionLab, Inc. (“OpinionLab”) appeals to the United States Court of Appeals for the Federal Circuit from the Final Written Decision entered on July 30, 2015 (Paper 51) (the “Final Written Decision”) by the United States Patent and Trademark Office, Patent Trial and Appeal Board (the “Board”), and from all underlying orders, decisions, rulings, and opinions. A copy of the Final Written Decision is attached.

In accordance with 37 C.F.R. § 90.2(a)(3)(ii), OpinionLab indicates that the issues on appeal include, but are not limited to, the Board’s determination of unpatentability of Claims 1, 2, 7, 8, 13, 17, 19, 20, 25, 26 and 31 of U.S. Patent No. 6,606,581 under 35 U.S.C. § 103, and any findings or determinations supporting or related to those rulings including, without limitation, the Board’s interpretation of the claim language and the Board’s interpretation of the prior art.

Simultaneous with this submission, a copy of this Notice of Appeal is being filed with the Board and three copies of this Notice of Appeal and the required fee are being filed with the Clerk of Court for the United States Court of Appeals for the Federal Circuit.

Dated: September 24, 2015

Respectfully submitted,

By: 

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## CERTIFICATE OF SERVICE

The undersigned certifies that in addition to being filed electronically through the Patent Trial and Appeal Board's Patent Review Processing System (PRPS), the original version of this Notice of Appeal was filed by hand on September 24, 2015 with the Director of the United States Patent and Trademark Office, at the following addresses:

Director of the United States Patent and Trademark Office  
c/o Office of the General Counsel  
Madison Building East, 10B20  
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The undersigned also certifies that three true and correct copies of this Notice of Appeal were filed by hand on September 24, 2015, with the Clerk of Court for the United States Court of Appeals for the Federal Circuit at the following address:

Clerk of Court  
United States Court of Appeals for the Federal Circuit  
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The undersigned also certifies that a true and correct copy of this Notice of Appeal was served on September 24, 2015 on counsel of record for Petitioner Qualtrics LLC by electronic mail (by agreement of the parties) and by courier at the following addresses:

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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QUALTRICS, LLC,  
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OPINIONLAB, INC.,  
Patent Owner.

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Case IPR2014-00356  
Patent 6,606,581 B1

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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.”) for *inter partes* review of claims 1, 2, 7, 8, 13, 17, 19, 20, 25, 26, and 31 of U.S. Patent No. 6,606,581 B1 (“the ’581 patent”). After considering the Petition, we instituted an *inter partes* review of all the challenged claims on grounds of unpatentability under 35 U.S.C. § 103. After institution, OpinionLab, Inc., the owner of the ’581 patent, filed a Patent Owner Response (“PO Resp.”), and Qualtrics, in turn, filed a Reply (“Reply”). We entertained oral argument from both parties.<sup>1</sup> We have jurisdiction under 35 U.S.C. § 6(c). For the reasons that follow, we conclude that Qualtrics has shown, by a preponderance of the evidence, that all the challenged claims are unpatentable.

## II. BACKGROUND

### A. *The ’581 Patent*<sup>2</sup>

The ’581 patent is directed to a system and method for soliciting and reporting feedback from a user of a commercial website. Ex. 1024, 1:23–25. Typical websites measure a user’s reaction to the website *as a whole*. *Id.* at 1:43–58. In contrast, the system of the ’581 patent solicits and reports user feedback on a *page-specific* basis by incorporating a “viewable icon” into each web page of the website. *Id.* at 5:15–19, 11:48–55. The icon, viewable within a user’s browser window, solicits the user’s reaction to the particular web page. *Id.* at 5:49–54, 11:55–58, Fig. 2. When the user clicks on the icon, a rating scale and/or a comment box appears within the user’s browser window. *Id.* at 5:44–67, 12:30–35, Figs. 3–6. The rating scale and comment

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<sup>1</sup> A transcript (“Tr.”) has been entered into the record. Paper 49.

<sup>2</sup> The ’581 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.

box allow the user to provide subjective reactions to various aspects of the particular web page. *Id.* at 5:59–64, 12:36–46.

Software associated with the icon operates to collect and store the user’s reaction in a database for subsequent reporting to a website owner or manager. *Id.* at 2:7–14. The website owner can generate a report for analyzing and identifying user reactions and feedback related to particular web pages of the website. *Id.* at 16:36–21:54, 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 13:39–42.

*B. The Challenged Claims*

Qualtrics challenges the patentability of claims 1, 2, 7, 8, 13, 17, 19, 20, 25, 26, and 31 of the ’581 patent. Pet. 7–50. Claims 1 and 19 are independent, with the principal difference being that claim 1 is directed to a “system” for measuring page-specific user feedback, whereas claim 19 is directed to a “method” for doing the same. *Id.* at 27:32–58. In particular, claim 1 recites:

1. A system for measuring page-specific user feedback concerning each of a plurality of particular web pages of a website, the system comprising:

an icon viewable on each of the plurality of particular web pages of the website independent of input from a user subsequent to the user accessing the particular web page, the icon soliciting page-specific user feedback concerning a particular web page from the user independent of input from the user subsequent to the user accessing the particular web page, the icon appearing identically and behaving consistently on each of the plurality of particular web pages; and

software associated with the icon and operable to receive the page-specific user feedback concerning the particular web page for reporting to a website owner, the page-specific user



feedback comprising one or more page-specific subjective ratings of the particular web page as a whole and one or more associated page-specific open-ended comments concerning the particular web page,

the page-specific user feedback allowing the website owner to access page-specific subjective user ratings and associated page-specific open-ended comments across the plurality of particular web pages of the website to identify one or more particular web pages of the website for which the page-specific user feedback is notable relative to page-specific user feedback for other particular web pages of the website.

Ex. 1024, 25:43–26:2.

C. *The Instituted Grounds of Unpatentability*

In the Preliminary Proceeding,<sup>3</sup> we instituted trial on two grounds, namely, (1) there was a reasonable likelihood that claims 1, 2, 7, 8, 17, 19, 20, 25, and 26 would be proven unpatentable as obvious over the combined teachings of CustomerSat<sup>4</sup> and Medinets<sup>5</sup>; and (2) there was a reasonable likelihood that claims 13 and 31 would be proven unpatentable as obvious over the combined teachings of CustomerSat, Medinets, and HTML Spec.<sup>6</sup> Dec. to Inst. 11. Having instituted trial, we now decide whether the

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<sup>3</sup> 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.

<sup>4</sup> *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).

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

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

challenged claims have been proven unpatentable by a preponderance of the evidence. *See* 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 '581 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 Grounds of Obviousness

##### 1. Claims 1, 2, 7, 8, 17, 19, 20, 25, and 26

Claims 1 and 19, the two independent claims at issue, recite common limitations that are central to our analysis: *first*, an icon viewable on each web page of the website for "soliciting page-specific user feedback," and *second*, software associated with the icon for "reporting to a website owner"

the page-specific feedback in order to identify web pages for which the page-specific user feedback is “notable” relative to other web pages.

Qualtrics relies on each of CustomerSat and Medinets as individually teaching a feedback icon that solicits a website user’s reaction to specific web pages. Pet. 35–36. With respect to CustomerSat, Qualtrics points to its disclosure of a “Pop!Up” icon that invites a user to provide feedback about different sections of the web site. *Id.* at 19–22 (citing Ex. 1003 at 7 (“Feedback on different sections of your Web site can be gathered by using Pop!Up on multiple pages of the site”)). And, with respect to Medinets, Qualtrics points to its teaching of a “Send a comment to the webmaster” icon, which summons a “Web Page” feedback form when a user clicks on the icon. *Id.* at 36 (citing Ex. 1004 at 60–62).

Qualtrics also relies on each of CustomerSat and Medinets as teaching a reporting capability that analyzes the page-specific user feedback and identifies particular web pages for which feedback is noteworthy. Pet. 27 (citing Ex. 1003 at 7, 18, 25, 36); *id.* at 38–40 (referencing Medinets’s disclosure of storing the feedback information and tracking “which Web pages generate the most feedback”). As a reason to combine, Qualtrics contends that both references “address the same problem: the solicitation of feedback from users of a web page” and “address this problem in the same manner: presenting an icon to a web pages user [and] presenting a survey (or ‘comment form’) to users clicking on this icon, . . . and storing user responses for analytical and reporting purposes.” *Id.* at 32–34; *see also id.* at 41 (further rationalizing the combination).

OpinionLab counters that neither CustomerSat nor Medinets teaches soliciting “page-specific user feedback,” as required by claims 1 and 19. PO

Resp. 13–18. According to Opinion Lab, the “Pop!Up” icon taught by CustomerSat takes the user to a questionnaire relating to “website-level issues, not web page-specific issues,” and thus, only solicits feedback on the “website *as a whole*.” *Id.* at 8–10, 15; *see also id.* at 26 (arguing that CustomerSat’s “feedback invitations [are] for high-level, website-wide feedback”). And, although OpinionLab acknowledges that Medinets solicits feedback on a page-specific basis, it disputes that Medinets allows the website owner “to compare *the substance* of the feedback between particular web pages.” *Id.* at 12–13, 17–18. As such, OpinionLab contends that even if a skilled artisan was motivated to combine the teachings of CustomerSat and Medinets, the combination fails to “teach or suggest the ability of the website owner to: (i) access that page-specific user feedback; or (ii) identify user feedback for any particular web pages that is notable relative to others.” *Id.* at 14.

We disagree with OpinionLab’s view of CustomerSat and Medinets. That CustomerSat may solicit feedback about the website as a whole does not diminish its *additional* teaching of soliciting feedback on a narrower, more definitive basis. For instance, CustomerSat explains that “Feedback on *different sections* of [the] Web site can be gathered by using Pop!Up on multiple pages of the site.” Ex. 1003, 7 (emphasis added). That disclosure suggests that “sections” of the website are broken down into web pages. Indeed, CustomerSat correlates the feedback icon with specific web pages: “What is the URL of the exact page of your web site on which you would like survey invitations to popup?” *Id.* at 8. And, although CustomerSat’s icon may prompt users to respond to questions about the website as a whole, it also prompts users to answer “more targeted questions” relating to specific

“sections” of the website. Ex. 1005 ¶ 44. For example, CustomerSat discloses that the user may be asked: “Which sections of the web site did you visit?” “Which one section . . . did you like best?” “Which one section . . . did you find most useful?” Ex. 1003, 10.

According to CustomerSat’s declarant, Mr. John Chisholm, a skilled artisan would have understood CustomerSat’s use of the term “section” as defining “a particular web page, a portion of a web page, or combination of several web pages, depending on the design of the website and the surveyor’s preference.” Ex. 1005 ¶ 44. As such, Mr. Chisholm testified that a skilled artisan would have understood CustomerSat’s discussion of soliciting user feedback about various “sections” of the website to encompass “comments concerning one or more particular *pages* of the website.” *Id.* ¶ 179. OpinionLab’s declarant, Dr. Michael Shamos, never addresses CustomerSat’s disclosure of soliciting feedback about “sections” of the website, nor does he dispute Mr. Chisholm’s understanding of CustomerSat’s use of that term. *See* Ex. 2002 ¶¶ 41, 42, 81. We credit the testimony of Mr. Chisholm, and, thus, find that CustomerSat suggests the solicitation of “page-specific user feedback,” as required by claims 1 and 19.

Even assuming *arguendo* that CustomerSat does not explicitly teach gathering feedback on a “page-specific” basis, Qualtrics argues that Medinets nonetheless teaches this limitation. Pet. 32–41. As taught by Medinets, “[o]ne of the hallmarks of a professional Web site” is that “*every page* has . . . a way to provide feedback.” Ex. 1004, 60 (emphasis added). Medinets then describes a scenario in which “the user clicks a button and a user feedback form appears that automatically knows *which page* the user was on when the button was pressed.” *Id.* (emphasis added). Significantly,

Medinets calls the feedback form a “*Web Page Comment Form*” and states that it “will be customized to each *Web page*.” *Id.* at 60–61 (emphases added). From these express teachings, we find that a skilled artisan would have understood that clicking-on Medinets’s icon permits the user to provide feedback about specific web pages. The same skilled artisan would have known, from Medinets’s express teaching of a “Web Page” feedback icon, that CustomerSat’s feedback icon could be tailored to solicit page-specific, as opposed to section-specific, feedback. As such, we determine that CustomerSat, as modified by Medinets, satisfies the “soliciting page-specific user feedback” limitation of claims 1 and 19.

Turning to the “reporting” limitation of claims 1 and 19, we find that CustomerSat teaches the capability of analyzing and reporting user feedback on a page-specific basis to a website manager. As taught by CustomerSat, the “Pop!Up” icon, which solicits feedback, “can be combined with CustomerSat.com’s *real-time reporting capability* to view charts, tables and comments from web site visitors instantly!” Ex. 1003, 7 (emphasis added). User feedback, according to CustomerSat, is “collected, tabulated, and reported” to a website manager (*id.* at 36) through the use of common analytical tools such as: “Frequency distributions and statistics by question,” “Segmentation,” “Cross-tabs,” “Correlations between Attributes and Overall Satisfaction,” and “Regression Analysis” (*id.* at 25). CustomerSat explains, in language somewhat similar to that of claims 1 and 19, that these analytical tools allow the website manager “to identify the attributes that most contribute (or detract from) overall customer satisfaction.” *Id.* at 18.

Although OpinionLab acknowledges CustomerSat's extensive discussion of a reporting capability, OpinionLab contends that neither CustomerSat nor Medinets includes the ability to access and compare feedback "across" particular web pages so as to identify web pages having "notable" feedback, as required by claims 1 and 19. PO Resp. 11, 14. We disagree. As discussed above, CustomerSat teaches that users respond to questions about specific "sections" of the website. Ex. 1003, 7, 10. Those user responses are then tabulated and analyzed by various methods, such as segmentation, cross-tabs, and correlations, to help the website manager "identify which attributes are potentially the strongest drivers of overall satisfaction, which attributes are most strongly correlated with each other, [and] the specific group or groups of attributes which are the best predictors of overall satisfaction." *Id.* at 25–26. As a matter of common sense, identifying the best and worst attributes of a website based on feedback about various "sections" would suggest a comparison across web pages, particularly when "sections" would have been understood to include specific web pages, as discussed above.

Indeed, Qualtrics's declarant, Mr. Chisholm, testified a skilled artisan would have understood that CustomerSat's analytical tools—segmentation, cross-tabs, and correlations— "allow for the analysis of user satisfaction by (among other variables) *the web page* from which user feedback was solicited." Ex. 1005 ¶ 185 (emphasis added). OpinionLab's declarant, Dr. Shamos, likewise agreed that a skilled artisan would have recognized that CustomerSat's analytical tools can be used to assess feedback on a page-specific basis. Ex. 1029, 377:8–378:4 ("If somebody were familiar with these tools and told 'I have some page-specific data, could you use these

tools to analyze them, I think the answer is yes.”). As such, Opinion Lab does not persuade us that CustomerSat lacks a comparison of feedback “across” specific web pages, as required by claims 1 and 19. Instead, we find that a skilled artisan would have understood CustomerSat’s analysis of feedback from various “sections” of the website as encompassing a comparison of feedback “across” particular web pages.

Moreover, we agree with Qualtrics that Medinets teaches the ability to identify and report page-specific feedback that is “notable” relative to other web pages, as required by claims 1 and 19. Pet. 38–41. Specifically, Medinets teaches a software program script that “stores the feedback information into a database . . . to track the comments and *see which Web pages generate the most feedback.*” Ex. 1004, 64 (emphasis added). According to Qualtrics’s declarant, a skilled artisan would have understood that Medinets’s tracking the *amount* of feedback for a given web page is one way to determine whether that feedback is “notable” relative to other web pages. Ex. 1028 ¶¶ 14–17.

OpinionLab’s declarant likewise agreed that web pages generating a large amount of feedback represent “notable” feedback. *See, e.g.*, Ex. 1029, 180:20–23 (“if you’re tracking user reaction to your site, if a lot of people comment on something, that means it probably ought to get your attention”); *id.* at 183:24–184:1 (“if anything is generating a significant user response, you’re interested in what was that response and why”); *id.* at 304:1–7 (“Now, if I’m the complaint department at Walmart, I’m interested in looking at the pages that are generating the most complaints. I’m not interested in -- in web pages that generate one complaint. And so determining web pages that are notable with respect to other web pages is



something that I would expect Walmart to want and use”). Given the consistency of both parties’ declarants as to what constitutes “notable” feedback, we find that a skilled artisan would have understood Medinets’s disclosure of tracking and reporting web pages that “generate the most feedback” as teaching the identity and reporting of “notable” feedback, as required by claims 1 and 19.<sup>7</sup>

In rationalizing the combination of CustomerSat and Medinets, Qualtrics asserts, and we agree, that both references address the same problem (“the solicitation of feedback from users of a web page”) and in the same manner (“presenting an icon to a web page user . . . , presenting a survey (or ‘comment form’) to users clicking on this icon, . . . and storing user responses for analytical and reporting purposes” ). Pet. 32–33. OpinionLab, in turn, contends that the references are not directed to the same problem of “web page feedback,” but “are distinct” because CustomerSat is directed to a “high-level, website-wide survey functionality.” PO Resp. 24–26. But OpinionLab defines the problem addressed by CustomerSat in too narrow a fashion. As discussed above, CustomerSat is concerned with gathering feedback about “different sections” of a website, and not just the website as a whole. *See* Ex. 1003, 7; *see also id.* at 10 (“Which one section of the web site did you like best? . . . Which one section did you find most useful?”). And, although CustomerSat may only describe

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<sup>7</sup> We reject OpinionLab’s assertion that claims 1 and 19 require that the “substance,” rather than the amount, of feedback be “notable.” PO Resp. 17–18. In its Patent Owner Response, OpinionLab equates “notable” feedback to the “number of ratings” and the amount of “high negative feedback” for a web page. *See* PO Resp. 6 (describing “notable” feedback as “the number of ratings for page 128” in the exemplary report of Fig. 8A of the ’581 patent).

gathering feedback in terms of a “section” of the website, Medinets clarifies that the section of a website, on which feedback may be gathered, includes a “Web Page.” *See* Ex. 1004, 60. Thus, we find that a skilled artisan would have had reason to combine the teachings of CustomerSat and Medinets because: (1) they both speak to a feedback icon for gathering user reactions on a more specific basis than simply the website as a whole; and (2) they are both concerned with analyzing and reporting that specific feedback to a website manager.<sup>8</sup>

We are also not persuaded by OpinionLab’s attempt to focus on CustomerSat and Medinets individually, rather than collectively. *See, e.g.,* PO Resp. 27 (“CustomerSat is directed to . . . , while Medinets is directed to . . . .”). When the section-specific feedback capability of CustomerSat is modified to solicit feedback not only with respect to “sections” of the website but also “web pages,” as taught by Medinets, the resultant combination would have rendered obvious a website feedback system that is capable of soliciting and reporting user feedback on a “page-specific” basis, as called for by claims 1 and 19. Thus, we conclude that a preponderance of the evidence shows that a skilled artisan would have considered the subject matter of claims 1 and 19 obvious in view of the combined teachings of CustomerSat and Medinets.

OpinionLab does not respond to Qualtrics’s contentions regarding dependent claims 2, 7, 8, 17, 20, 25, and 26, specifically. We have reviewed

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<sup>8</sup> OpinionLab’s declarant likewise agreed “there’s no difference between this [Medinets] and what CustomerSat did, which is on every page there’s a feedback link. When you click the feedback link you get a form that applies to the entire website. But you can invoke it from any page.” Ex. 1029, 196:11–15.

the portions of CustomerSat and Medinets that Qualtrics relies upon for teaching each of these dependent limitations, and are persuaded by Qualtrics's contentions. Accordingly, we conclude that a preponderance of the evidence supports Qualtrics's challenge of these dependent claims as unpatentable for obviousness over the combined teachings of CustomerSat and Medinets.

2. *Claims 13 and 31*

Qualtrics argues that claims 13 and 31 are unpatentable over the combination of CustomerSat, Medinets, and HTML Spec. Pet. 43–45. Claim 13, as well as claim 31, call for the feedback icon to “remain[] viewable in the browser window *in response to the user scrolling* to a previously unviewable portion of the particular web page.” Ex. 1024, 26:43–47, 28:34–40 (emphasis added). For this limitation, Qualtrics relies on the HTML Spec, contending that it teaches a “common way for website owners to control the display of ‘elements’ comprising a web page” while the user views the entire web page. *Id.* at 43. Specifically, the HTML Spec teaches a “navigating” technique that “offer[s] designers a way to keep certain information visible, *while other views are scrolled.*” Ex. 1014, 193 (emphasis added). According to Qualtrics, “it would have been obvious” for a skilled artisan to keep the icon taught by CustomerSat and Medinets viewable during user scrolling in light of the teaching of the HTML Spec. Pet. 44–45 (citing Ex. 1005 ¶ 203).

OpinionLab does not dispute Qualtrics's reliance on the HTML Spec for teaching the “scrolling” limitation of claims 13 and 31. Instead, OpinionLab makes the same argument in support of claims 13 and 31 as it does for claims 1 and 19, contending that HTML Spec is “completely silent

regarding *any* feedback or reporting capability.” PO Resp. 29; *see also id.* at 18–19 (arguing that HTML Spec is “deficient in any teaching or suggestion of page-specific feedback and reporting strategies”). But, as discussed above, Qualtrics relies on CustomerSat and Medinets, not HTML Spec, for teaching the capabilities of page-specific feedback and reporting.

By instituting trial, we determined Qualtrics had presented credible evidence of a reasonable likelihood that claims 13 and 31 were unpatentable. Dec. to Inst. 9–11. But rather than address Qualtrics’s specific application of the HTML Spec *against claims 13 and 31*, OpinionLab is silent. Our rules instruct that the patent owner response “must include a statement identifying material facts in dispute. Any material fact not specifically denied may be considered admitted.” 37 C.F.R. § 42.23(a). Thus, once trial is instituted, the patent owner should address the material facts raised in the petition that jeopardize patentability of any challenged claims, or risk conceding all arguments as to those claims. Here, we are unable to discern that OpinionLab articulates any meaningful rebuttal to Qualtrics’s material proof of unpatentability of claims 13 and 31 separately from claims 1 and 19. Absent any rebuttal from OpinionLab as to claims 13 and 31, we will not scour the record to locate evidence supporting patentability. Perfunctory or undeveloped arguments are waived. Thus, we are left to consider only the evidence of record as presented by Qualtrics.

After considering Qualtrics’s evidence and arguments with respect to claims 13 and 31, *and without the benefit of any meaningful rebuttal from OpinionLab*, we find that a skilled artisan would have known of the HTML scrolling technique taught by the HTML Spec and would have considered keeping the feedback icon of Customer and Medinets viewable during user

scrolling as an obvious way to increase user feedback. *See* Ex. 1005 ¶¶ 163–165. Accordingly, we determine that claims 13 and 31 would have been unpatentable for obviousness over CustomerSat, Medinets, and HTML Spec.

3. *Secondary Considerations*

OpinionLab submits evidence of secondary considerations of non-obviousness, arguing specifically that commercial success, industry praise, and copying demonstrate that the challenged claims would not have been obvious to a skilled artisan. PO Resp. 31–43.

a. *Commercial Success*

As evidence of commercial success, OpinionLab contends that the user feedback system embodying the claimed invention “is utilized by an extensive list of customers, including nearly half of Fortune 50 organizations” and has “already been ‘adopted by hundreds of brands and implemented on more than 6,500 websites worldwide.’” *Id.* at 38–39 (quoting Ex. 2017). We are not persuaded by these contentions. Evidence of commercial success is only significant if there is a nexus between the claimed invention and the commercial success. Here, OpinionLab argues, generally, that a nexus is presumed “when a marketed product is coextensive with the asserted claims.” *Id.* at 32 (citation omitted). As evidence that commercial success of its product is *coextensive* with the claimed invention, OpinionLab points us to a “’581 Patent marking” on its product. *Id.* at 32–33. That patent marking, however, is only an assertion by OpinionLab that some feature of the marked product embodies some claim of the ’581 patent. Such a bare assertion does not constitute sufficient proof that the product is coextensive with the invention claimed in the ’581 patent. This is particularly so given the fact that the product is marked with

approximately twenty patent numbers, which suggests that the product may include features outside the scope of the invention claimed in the '581 patent. *See* Ex. 2002 ¶ 86 (identifying, at the bottom of the displayed web page, twenty U.S. and Canadian patents); *see also* Ex. 1028 ¶ 31 (confirming the same).

In any event, to show commercial success, OpinionLab must prove that its sales to Fortune 50 companies were a direct result of the unique characteristics of the claimed invention, and not economic and commercial factors unrelated to the '581 patent, which OpinionLab has not attempted to do. *See In re Applied Materials, Inc.*, 692 F.3d 1289, 1299–1300 (Fed. Cir. 2012). Even if OpinionLab's marketed product includes the claimed invention, OpinionLab fails to explain how it relates to the purported commercial success, other than summarily alleging its product includes the limitations of claims 1 and 19. *See* PO Resp. 32–39. Although OpinionLab provides examples of the product embodying the page-specific features of claims 1 and 19 and contends that those features are “utilized by an extensive list of customers” and that its “customer list has continued to grow,” it does not tie that customer growth to the specific features of the claimed invention. *Id.* at 38–39. Accordingly, we are not persuaded by OpinionLab's assertions of commercial success.

*b. Industry Praise*

OpinionLab contends that it has “received widespread industry recognition and praise for the claimed technology as demonstrated in the many articles written on OpinionLab's page-specific user feedback solution.” *Id.* at 40. As with commercial success, however, evidence of industry praise is only relevant if directed to the merits of the claimed

invention. Here, OpinionLab proffers a number of industry articles, pointing to praise it received about its “[+] feedback symbol” and “iconic image of a rotating plus/minus sign.” *Id.* (citing Exs. 2017–2020). But, on its face, that praise pertains to the use of a plus/minus symbol as a feedback icon; it says nothing about the claimed capability of soliciting and reporting page-specific user feedback. *See also* Ex. 1028 ¶ 30 (“the purported examples mainly relate to OpinionLab’s [+] trademark symbol”). Thus, because OpinionLab’s evidence of “industry praise” is not tied to the claimed invention, we are not persuaded that it indicates non-obviousness.

*c. Copying*

OpinionLab also contends “there is strong evidence of copying by others of OpinionLab’s page-specific user feedback solution covered by the ’581 Patent claims.” *Id.* at 41. In support, OpinionLab proffers its “Initial Infringement Contentions” (Ex. 1008) from a related district court action, that purport to show “how each element of the challenged claims are present in [Qualtrics’s] system.” *Id.* Copying, however, “requires evidence of *efforts to replicate a specific product.*” *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1246 (Fed. Cir. 2010) (emphasis added). Here, OpinionLab’s only evidence is its subjective belief of how the claims read on an accused product. *See* PO Resp. 41–42 (citing Ex. 1008). No evidence is offered of actual efforts undertaken by Qualtrics, or any other company, to copy a product embodying the claimed invention. Thus, we are not persuaded by OpinionLab’s proof of copying.

*4. Conclusion*

Qualtrics has proven by a preponderance of the evidence that claims 1, 2, 7, 8, 17, 19, 20, 25, and 26 are unpatentable under 35 U.S.C. § 103 as

obvious over CustomerSat and Medinets, and that claims 13 and 31 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).

*C. Qualtrics's Motion to Exclude Evidence*

Qualtrics seeks to exclude portions of the declaration and deposition testimony of OpinionLab's declarant, Dr. Shamos. Mot. 1 (Paper 42). Without excluding this evidence, we have determined that Qualtrics has demonstrated the unpatentability of the challenged claims. Thus, the motion to exclude is moot. Further, Qualtrics's arguments go to the weight to be accorded the evidence. *See* Mot. 2–10. We are capable of determining and assigning appropriate weight to the evidence. For these reasons, we *deny* Qualtrics's motion to exclude.

IV. ORDER

Accordingly, it is hereby:

ORDERED that claims 1, 2, 7, 8, 13, 17, 19, 20, 25, 26, and 31 of the '581 patent are held unpatentable;

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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