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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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*Ex parte* MARY ROSE RICE, DAMIEN REYNOLDS,  
and MARC WEBB

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Appeal 2017-006952  
Application 14/161,135  
Technology Center 2600

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Before JEAN R. HOMERE, ADAM J. PYONIN, and  
KAMRAN JIVANI, *Administrative Patent Judges*.

JIVANI, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants<sup>1</sup> seek our review under 35 U.S.C. § 134(a) of the Examiner's final rejections of claims 1–30. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

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<sup>1</sup> Appellants identify Behr Process Corporation as the real party in interest. App. Br. 3.

## STATEMENT OF THE CASE

The present patent application relates to a distributed system and method for aiding consumers in selecting complementary paint colors.

Spec. ¶ 2.

Claim 1 is reproduced below:

1. A system comprising:

a remote computing device having a display device and an input device; and

a server communicatively coupled to the remote computing device over the Internet, the server having a database including a plurality of colors each in a predetermined relationship with other colors in the database, the predetermined relationship between colors being based on color theory;

wherein the remote computing device is configured to receive a starting paint color for an interior room of a house selected from the plurality of colors via the input device, to determine a plurality of coordinating colors for the starting paint color based on data received from the database, and to display on the display device a color palette including the starting paint color and the plurality of coordinating paint colors, the plurality of coordinating colors including at least one accent color for a decorative item in the interior room of the house.

## THE REJECTIONS

1. Claims 1–9 and 12–20 stand rejected under 35 U.S.C. § 102(a) as anticipated by Turpin et al. (US 2003/0151611 A1, published Aug. 14, 2003).

2. Claims 10, 11, and 21–30 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Turpin and Beretta (US 5,311,212, issued May 10, 1994).

## ANALYSIS

### *Claims 1–9 and 12–20*

Independent claim 1 recites, in relevant part, “to display on the display device a color palette including the starting paint color and the plurality of coordinating paint colors, the plurality of coordinating colors including at least one accent color for a decorative item in the interior room of the house.” According to Appellants, independent claim 12 recites a commensurate limitation and Appellants argue claims 1 and 12 together. App. Br. 15–16 (“Limitations similar to those discussed above with respect to claim 1 are also recited by claim 12. For at least the above reasons, claim 12 likewise defines over Turpin et al.”).

Regarding the scope of the above limitation, the Examiner finds that the term “coordinating colors” is “commonly used in the field.” Ans. 3. The Examiner construes the claimed “at least one accent color” as “some color that is darker or lighter than the primary or starting color.” *Id.* at 4. The Examiner further finds that the claim element, “for a decorative item in the interior room of the house” is a mere statement of intended use. *Id.* More specifically, the Examiner finds that claim 1 “only requires determining the coordinating colors for a selected paint color and display[ing] them.

Applying the colors to the colorable products is just an intended use.” *Id.* at 5.

Appellants contend the Examiner errs in construing the disputed limitation because “claim 1 recites different types of colors, including a paint color and an accent color for a decorative item, *i.e.*, a *non-paint color*. This feature is not an ‘intended use,’ but an intrinsic feature of the colors. In other words, paint colors are inherently different from decorative item colors.” Reply Br. 3.

We are not persuaded by Appellants’ interpretation of the disputed limitation because Appellants’ interpretation is predicated upon a distinction not recited in claim 1 or its dependent claims. Appellants contend that “paint colors are inherently different from decorative item colors” and that, because of this distinction, claim 1 recites “display[ing] a color palette including the starting paint color and the plurality of coordinating colors, the plurality of coordinating colors including at least one accent color for a decorative item in the interior room of the house.” Reply Br. 1–3. Appellants, however, misread the claim language. Claim 1 does not recite a plurality of coordinating colors that constitute “non-paint colors,” distinct from paint colors. Rather, claim 1 recites receiving “a starting paint color,” determining “a plurality of coordinating colors for the starting paint color,” and displaying “a color palette including the starting paint color and *the* plurality of coordinating *paint* colors.” App. Br. 23 (emphasis added). Thus claim 1 requires that the plurality of coordinating colors on the displayed palette must be *paint* colors, not “non-paint colors” as Appellants contend. *Id.* It is this set of coordinating paint colors that must include “at least one accent color for a decorative item in the interior room of the house,” as

recited in claim 1. Claim 1, therefore, does not recite an accent color as distinct from paint colors, but rather requires that the claimed accent color be included within the plurality of coordinating paint colors. *See id.*

Moreover, we are unpersuaded by Appellants' argument because Appellants fail to cite any record evidence in support of their assertion that "paint colors are inherently different from decorative item colors." Reply Br. 3. For instance, Appellants do not cite to any teachings of this purported difference in the Specification. *See id.* Attorney argument cannot substitute for evidence lacking in the record. *In re Pearson*, 494 F.2d 1399, 1405 (CCPA 1974). Indeed, Appellants' Specification discloses the opposite, namely that accent colors can be applied in paint and to other decorative items such as fabrics in a room. Spec. ¶ 56. Further contrary to any purported distinction between paint and "non-paint colors," Appellants' Specification discloses that, "using a spectrophotometer, a customer can 'scan' the color of an item from their house such as tile, fabric, window treatment, pillow, etc." and use this color as the starting paint color or "main color" for the room. *Id.* ¶ 77. Appellants' Specification, therefore, describes colors as interchangeable between paint and other colorable products.

Accordingly, we agree with the Examiner's interpretation of the claim limitation "to display on the display device a color palette including the starting paint color and the plurality of coordinating paint colors, the plurality of coordinating colors including at least one accent color for a decorative item in the interior room of the house." In particular, we agree with the Examiner that the claimed "at least one accent color" encompasses "some color that is darker or lighter than the primary or starting color." *Id.* at 4. We further agree that the claim element, "for a decorative item in the

interior room of the house” is a mere statement of intended use” and that claim 1 “only requires determining the coordinating colors for a selected paint color and display them. Applying the colors to the colorable products is just an intended use.” *Id.* at 4–5.

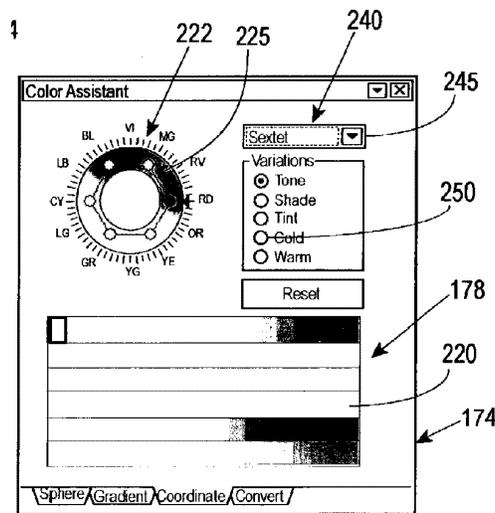
We turn next to the Examiner’s application of the prior art to claims 1–9 and 12–20, as construed above. The Examiner finds Turpin discloses the limitations of independent claims 1 and 12, as well as dependent claims 2–9 and 13–20. With regard to the disputed limitation of claim 1, which Appellants argue together with a similar limitation of claim 12, the Examiner finds Turpin meets the claim limitation because the system of Turpin displays a primary color and coordinating colors “in pictorial form and in two-dimension form in a color coordinates palette 220.” Ans. 4. As a cumulative finding on the claimed intended use of “for a decorative item in the interior room of the house,” the Examiner finds Turpin discloses related colors for shading or highlighting that are darker or lighter, which “may be used as an accent color.” Ans. 4; *see also* Final Act. 4 (citing Turpin ¶¶ 92, 101, 117, 232). The Examiner further finds Turpin discloses “selecting colors for . . . fashion accessories, etc.” *Id.* at 5 (citing Turpin ¶ 101). Finally, with regard to the additional limitations in dependent claims 2–9 and 13–20 claiming particular categories of decorative items (namely, fabric, pieces of furniture, window treatments, tiles, and pillows), the Examiner finds these limitations “are all considered as intended use because there is no technical information provided by the claims so that different decorative items would cause the coordinating colors being determined differently.” *Id.* at 5–6. The Examiner further finds Turpin “mentioned these decorative

items in the interior room of the house.” *Id.* at 6; Final Act. 4–5 (citing Turpin ¶¶ 101, 245, 247, 149, 247).

Appellants contend the Examiner errs because Turpin’s color coordinates palette 220 simply allows for selection of coordinated colors, but does not provide a color palette with a plurality of coordinated colors that include both a starting paint color and at least one accent color for a decorative item in the interior room of a house.” App. Br. 13. Appellants further contend that Turpin “describes a separate embodiment whereby selectable colors for a plurality of colorable products, such as ‘paint, stain, caulk, sealant, concrete, grout, mortar, bricks, pavers, frosting (and other color food items), cosmetics, and roof tiles’ are displayed to the consumer 20.” *Id.* (citing Turpin ¶ 120). According to Appellants, in this embodiment, “[t]he color chart 260 simply allows for a consumer to select a particular type of product, e.g., paint, concrete, etc., and then view available colors for that particular product[, but] does not determine or display coordinated colors across or between product types.” *Id.* at 14.

As to the Examiner’s cumulative findings regarding the claimed accent colors and intended use, Appellants contend the Examiner errs in citing Turpin’s assigning of different colors to shaded and highlighted areas in an image as well as Turpin’s “color swatches” used to “display a selection of brighter and darker colors” to provide “more choices for the consumer.” *Id.* at 15. Finally, Appellants contend the Examiner errs in citing paragraph 101 of Turpin because the disclosure therein is directed to “different types of categories for storing an image file *not coordinating a paint color with an accent color of a decorative item in the interior room of a house.*” Reply Br. 5; *see also* App. Br. 15.

We are not persuaded by Appellants' arguments. As discussed above, the disputed limitation of claim 1 recites merely receiving a starting paint color selected from a plurality of paint colors, determining a plurality of coordinating colors for the starting paint color, and displaying "a color palette including the starting paint color and the plurality of coordinating paint colors," including at least one accent color. The Examiner finds, and we agree, that Turpin meets the claim limitation because the system of Turpin displays a primary color and coordinating colors "in pictorial form and in two-dimension form in a color coordinates palette 220." Ans. 4. Indeed, Turpin discloses in Figure 13 and corresponding paragraph 117:



**Fig. 13**

database of selectable colors 178 can be displayed in pictorial form and in two dimension form in a color coordinates palette 220, such as shown in FIG. 13, whereby one or more coordinated colors are displayed to the consumer 20. The consumer 20 can then select coordinated colors for the color areas 144 to provide a coordinated appearance. In one preferred embodiment, the

color coordinates palette 220 is color coordinated by utilizing a color wheel model 222. The color wheel model 222 can be used to specify a primary color on the color wheel model 222 and send information to the specifier program 56 which the specifier program 56 will utilize to determine a plurality of coordinating colors for the primary color. **The specifier program 56 further indicates the plurality of coordinating colors on the color wheel model 222 and displays the specified primary color and the plurality of coordinating colors in the color coordinates palette 220.**

Turpin ¶¶ 117, Fig. 13 (emphasis added). Thus, contrary to Appellants' arguments, Turpin discloses displaying "a color palette including the starting paint color and the plurality of coordinating paint colors," including at least one accent color. Accordingly, we sustain the Examiner's rejections of independent claims 1 and 12.

Appellants advance no further arguments in support of dependent claims 2–9 and 12–20. Accordingly, for the same reasons discussed above in the context of claims 1 and 12, we sustain the Examiner's rejections of dependent claims 2–9 and 12–20.

*Claims 10, 11, and 21–30*

Each of independent claims 10, 23, and 27 recites, in relevant part, "the database includes a color data structure associated with each color of the plurality of colors, each color data structure including a plurality of coordinating color references each identifying a predetermined coordinating color for the associated color." App. Br. 24–25, 27. Independent claims 23 and 27 recites commensurate limitations. *Id.* at 27–29.

The Examiner finds Beretta's disclosure of color palette database 68, which stores user created color palettes, teaches the recited database

including a color data structure. Final Act. 9 (citing Beretta, 10:17–21). Each palette data structure contains information for a key color and other related colors. *Id.* (citing Beretta, 15:1–19, 16:20–40). The Examiner further finds: “Storing color information in a database and using data structure for storing color information, as well as using a reference to identify other (related) data are all well-known and conventional practice in the field of color selection and coordination. Turpin et al may also use such a practice although not explicitly disclosed.” *Id.* at 9–10.

Appellants contend, *inter alia*, that the Examiner fails to identify in the cited references adequate teaching or suggestion of the claimed color data structure including references to predetermined coordinating colors. App. Br. 18–20; Reply Br. 5–8.

We agree with Appellants. The Examiner reads the disputed limitation on Beretta’s color palette data structure. Final Act. 9–10; Ans. 6–7. Although we agree with the Examiner that Beretta’s individual color palette data structures each contains multiple colors, the disputed limitation of claim 10 requires that each structure is associated with a color and contains “a plurality of coordinating color *references* each identifying a predetermined coordinating color for the associated color.” App. Br. 24–25 (emphasis added). In order to meet this limitation under the Examiner’s rationale, Beretta’s individual color palette data structures each would need to contain references to other color palette data *structures*, not merely information on colors within the same color palette data structure. Stated differently, the disputed claim limitation defines a database containing a color data structure *per color*, with each structure containing *references* to other colors, not colors themselves. The Examiner fails to make such a

finding in the record before us, and instead only refers to the reference's teachings of colors within the *same* data structure. *See* Ans. 6–7 (citing Beretta, 16:49–65). Thus, we are unable to discern adequate disclosure in the cited portions of Beretta meeting this limitation of claim 10. *See* Final Act. 9–10; Ans. 6–7.

Accordingly, we do not sustain the Examiner's 35 U.S.C. § 103(a) rejections of claims 10, 11, and 21–30.

#### DECISION

We affirm the Examiner's rejections of claims 1–9, 12–20, and 23–30.

We reverse the Examiner's rejections of claims 10, 11, and 21–30.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART