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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* RONALD JOHANNES WILHELMUS KUSTERS

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Appeal 2019-000911  
Application 11/576,163  
Technology Center 1700

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Before JEFFREY B. ROBERTSON, MONTÉ T. SQUIRE, and  
BRIAN D. RANGE, *Administrative Patent Judges*.

SQUIRE, *Administrative Patent Judge*.

DECISION ON APPEAL<sup>1</sup>

Appellant<sup>2</sup> appeals under 35 U.S.C. § 134(a) from the Examiner's decision finally rejecting claims 19, 25, 27, 30, and 31, which are all of the

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<sup>1</sup> In explaining our Decision, we refer to the Specification filed Mar. 28, 2007 (“Spec.”); Final Office Action dated Sept. 28, 2017 (“Final Act.”); Appeal Brief filed June 26, 2018 (“Appeal Br.”); Examiner’s Answer dated Sept. 10, 2018 (“Ans.”); and Reply Brief filed Nov. 9, 2018 (“Reply Brief”).

<sup>2</sup> We use the word “Appellant” to refer to “Applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies SYNOVATION B.V. as the real party in interest. Appeal Br. 2.

claims pending in this application.<sup>3</sup> We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

*The Claimed Subject Matter*

Appellant's disclosure relates to a container for containing tissue, comprising at least one receiving space for tissue and at least one information surface for arranging data, wherein the information can be arranged by means of a laser. Abstract; Spec. 1, 2. According to the Specification, the information surface is manufactured from a material that can be colored by electromagnetic radiation, such as laser radiation. Spec. 2. The Specification further discloses that by making focused use of electromagnetic radiation to arrange data on the information surface, the data are arranged non-erasably in the material. *Id.* at 2; *see also id.* at 2 ("The present invention has for its object to provide a solution for the undesired erasing of data on containers for tissue.").

Claim 19 is illustrative of the claimed subject matter on appeal and is reproduced below from the Claims Appendix to the Appeal Brief:

19. Container for containing tissue material, comprising:

at least one receiving space for tissue material derived from humans, animals or plants, the receiving space comprising a plurality of fluid-access recesses in the form of a grating, through which fluids from outside the container can come into contact with the tissue material

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<sup>3</sup> Claims 1–18, 20–24, 26, and 28 are cancelled. *See* Index of Claims dated Sept. 28, 2017.

within the receiving space and leave the receiving space,  
and

*wherein the entire container is manufactured from an electromagnetic radiation colorable material formed substantially from polyacetal and antimony trioxide, and wherein the electromagnetic radiation colorable material is selectively activatable with electromagnetic radiation from an electromagnetic radiation source comprising a YAG-laser to form an information surface for arranging data comprising at least the source of the tissue material;*

wherein the antimony trioxide makes it possible to absorb the electromagnetic radiation efficiently resulting in an accelerated coloring of the electromagnetic radiation colorable material, and

wherein the data is non-erasable when exposed to repeated chemical treatments with chemicals for fixing and coloring tissue cells.

Appeal Br. 11 (key disputed claim language italicized and bolded).

### *The References*

The Examiner relies on the following prior art references as evidence in rejecting the claims on appeal:

Heninger	US 5,128,528	July 7, 1992
Feng et al. (“Feng”)	US 5,977,514	Nov. 2, 1999
Wessels et al. (“Wessels”)	US 2002/0077380 A1	June 20, 2002
Robertson et al. (“Robertson”)	US 6,518,542 B1	Feb. 11, 2003
McCormick	US 2005/0112031 A1	May 26, 2005

*The Rejections*

On appeal, the Examiner maintains (Ans. 3) the following rejections:

1. Claims 19, 27, 30, and 31 are rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over McCormick, as evidenced by Robertson, in view of Feng and Wessels (“Rejection 1”).<sup>4</sup> Final Act. 3.

2. Claim 25 is rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over McCormick, as evidenced by Robertson, in view of Feng and Wessels as applied above and in further view of Heninger (“Rejection 2”). *Id.* at 7–8.

OPINION

Having considered the respective positions advanced by the Examiner and Appellant in light of this appeal record, we affirm the Examiner’s rejections based on the fact-finding and reasoning set forth in the Answer and Final Office Action, which we adopt as our own. We add the following primarily for emphasis.

*Rejection 1*

Appellant argues claims 19, 27, 30, and 31 as a group. Appeal Br. 4. We select independent claim 19 as representative and the remaining claims subject to the Examiner’s rejection stand or fall with claim 19. 37 C.F.R. § 41.37(c)(1)(iv).

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<sup>4</sup> The Examiner’s statement of rejection for Rejection 1 has been corrected to reflect that claim 6 is cancelled.

The Examiner determines that the combination of McCormick, Feng, and Wessels, as evidenced by Robertson, suggests a container satisfying all of the limitations of claim 19 and thus, concludes the combination would have rendered the claim obvious. Final Act. 3–6 (citing McCormick, Abstract, Figs. 1–4, ¶¶ 7, 20, 21; Robertson, Abstract, 4:13–20, 4:55–57; Feng, Abstract, 3:8–11, 3:63–4:15, 4:27–38, 4:39–45, 8:5–21; Wessels, Abstract, ¶¶ 20–22).

Appellant argues the Examiner’s rejection of claim 19 should be reversed because the cited art does not teach or suggest the “wherein the entire container is manufactured from an electromagnetic radiation colorable material” and “wherein the electromagnetic radiation colorable material is selectively activatable with electromagnetic radiation from an electromagnetic radiation source comprising a YAG-laser” recitations of the claim. In particular, Appellant contends McCormick fails to disclose a cassette made of a material that includes an electromagnetic radiation colorable material and that the entire container could be manufactured from electromagnetic radiation colorable material. Appeal Br. 5; *see also* Reply Br. 2 (same).

Appellant’s argument is not persuasive of reversible error because Appellant attacks the references individually rather than the combined teachings of the prior art as a whole. One cannot show non-obviousness by attacking references individually where the rejection is based on a combination of references. *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Appellant’s argument is premised on what Appellant contends McCormick teaches individually, and not the combined teachings of the cited references

as a whole and what the combined teachings would have suggested to one of ordinary skill in the art.

As the Examiner finds (Ans. 4; Final Act. 3–5), McCormick is relied upon in the rejection for teaching a plastic container (cassette 11) for containing a tissue sample (McCormick ¶¶ 2, 7, 20, Figs. 1–4), while the claimed colorant, specific plastic, and use of a YAG laser are disclosed by the other prior art references cited (*see* Robertson 3:13–20 (disclosing “DELFIN” polyacetal plastic); Feng 4:2–6 (disclosing use of “Nd:YAG laser”), 4:27–47 (disclosing that “the laser energy absorbing additive is capable of absorbing light” and the use “commercially available” materials as a colorant), 8:18 (disclosing “polyacetals”); Wessels, Abstract, ¶ 21 (disclosing “adding the antimony trioxide”)).

Appellant further argues the Examiner’s rejection should be reversed because Robertson teaches away from using a YAG laser, as required by the claim. Appeal Br. 5. In particular, Appellant contends Robertson teaches away from using a YAG laser because it is too expensive and that “[f]or cost and efficiency, the laser of choice is CO<sub>2</sub>.” *Id.* at 5 (quoting Robertson 4:13–14). Appellant also contends Robertson teaches away from modifying the cassette material with electromagnetic radiation colorable material to enhance direct laser marking. Reply Br. 3–4 (citing Robertson 1:35–40).

We do not find Appellant’s teaching away arguments persuasive of reversible error in the Examiner’s rejection because Appellant does not identify sufficient evidence to support them, and we will not read into the references a teaching away where no such language exists. *Cf. DyStar Textilfarben GmbH v. C.H. Patrick Co.*, 464 F.3d 1356, 1364 (Fed. Cir. 2006). Although Robertson discloses that “[f]or cost and efficiency, the

laser of choice is CO<sub>2</sub>” (Robertson 4:13–14), such disclosure, without more, does not teach away from using a YAG laser. *See In re Susi*, 440 F.2d 442, 445-46 (CCPA 1971) (explaining disclosure of a particular preferred embodiment does not teach away from a reference’s broader disclosure); *see also In re Mills*, 470 F.2d 649, 651 (CCPA 1972) (stating “[a]ll the disclosures in a reference must be evaluated, including nonpreferred embodiments”). Moreover, as the Examiner correctly points out (Ans. 5), the fact that Robertson may suggest that the use of a CO<sub>2</sub> laser may be more cost effective than using an “NdYAG laser” (*see* Robertson 1:30–35), without more, does not constitute a teaching away. Indeed, it is well-settled that “a lot of extra effort and cost” is not pertinent to a teaching away argument. *Orthopedic Equip. Co., Inc. v. United States*, 702 F.2d 1005, 1013 (Fed. Cir. 1983).

Appellant next argues the Examiner’s rejection should be reversed because there is no reason why one of ordinary skill would have combined the teachings of the cited references to arrive at the claimed invention. Appeal Br. 7–8; Reply Br. 4–5. Appellant contends that, in contrast to the claimed invention, Feng specifically teaches against the use of high contrast marking and there is nothing in Feng that suggests using a radiation absorbing additive would be beneficial in marking a biological tissue container. Appeal Br. 7.

Contrary to what Appellant argues (Appeal Br. 7–8; Final Act. 4–5), we find that the Examiner provides a reasonable basis, which is supported by a preponderance of the evidence in the record, to evince why one of ordinary skill would have combined the teachings of the cited references to arrive at Appellant’s claimed invention. Final Act. 4–7; Ans. 11–12. *See also KSR*

*Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 420 (2007) (explaining that any need or problem known in the art can provide a reason for combining the elements in the manner claimed).

As the Examiner explains (Final Act. 5–6), it would have been obvious to one of ordinary skill to employ the polyacetal and laser absorbing additives as suggested by Robertson and Feng to inexpensively and efficiently produce and custom design light, dark, and/or colored laser marks on McCormick’s plastic cassette. *See* McCormick ¶ 2 (disclosing the use of “plastic cassettes” for maintaining and handling tissue samples), ¶ 7, ¶ 21 (disclosing “face plate **28** adapted for marking identification information”); Robertson 3:11–14 (disclosing “laser marking system **12**” and that “cassette **10** . . . may be made of DELRIN brand plastic”); Feng 3:31–39 (“The methods of the invention are inexpensive and efficient processes for custom design of light, dark and/or colored laser marks on plastics . . .”). *See also* Final Act. 6 (explaining it would have been obvious to one of ordinary skill to have employed Wessels’ additive as the colorant for modified-McCormick’s tissue container in order to provide a polymer composition with good laser writability) (citing Wessels ¶ 20).

Appellant fails to direct us to persuasive evidence or provide an adequate technical explanation to establish why the Examiner’s articulated reasoning lacks a rational underpinning or is otherwise based on some other reversible error. Appellant’s disagreement as to the Examiner’s factual findings regarding what Feng teaches and reasoning for combining the references, without more, is insufficient to establish reversible error. *Cf. SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir.

2006) (“[M]ere statements of disagreement . . . as to the existence of factual disputes do not amount to a developed argument.”).

We do not find Appellant’s contentions that “there is nothing in Wessels . . . suggesting that using a radiation absorbing additive such as antimony trioxide would be beneficial in marking a biological tissue container” (Appeal Br. 8) and “one having ordinary skill in the art would not have been led to add *antimony trioxide*, specifically, to a *biological tissue container* manufactured from *polyacetal*” (Reply Br. 5) persuasive of reversible error based on the fact-finding and well-stated reasoning provided by the Examiner at pages 12–13 of the Answer and page 6 of the Final Office Action.

In particular, we find a preponderance of the evidence supports the Examiner’s finding (Ans. 12–13; Final Act. 6) that Wessels discloses the use of antimony oxide in a polymer composition as an additive for making dark laser markings, and that the polymer composition provides good laser writability. *See* Wessels, Abstract, ¶¶ 20–22. *See also id.* at ¶ 23 (disclosing the prior art invention “relates to a process for applying a dark marking to a light background by radiating an article . . . by means of a laser light in the pattern of the marking” and “[p]referably this is done by means of an Nd:YAG laser”).

As the Examiner explains (Ans. 12–13), although Wessels does not explicitly teach the use of antimony oxide in a polymer composition for a biological tissue container, Wessels does teach using antimony oxide in a polymer composition for use in molded/formed polymer articles (Wessels ¶ 22) and is concerned with solving the same or a similar problem in which Appellant’s claimed invention is concerned, i.e., providing a polymer article

with a surface that can be marked in a manner such that the data written on the surface is readable (*see* Spec. 1 (“The invention relates to a container for containing tissue, comprising at least one receiving space for tissue and at least one information surface for arranging data.”), 2 (“The radiation is preferably concentrated on a small surface area so that the information can be arranged in a high resolution, and a high information density can thus be achieved.”)). *Cf. In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004) (explaining that the proper inquiry for determining whether a reference is analogous art is whether the reference is from the same field of endeavor as the claimed invention or the reference is reasonably pertinent to the problem faced by the inventor).

Thus, contrary to what Appellant argues, we find a preponderance of evidence and sound technical reasoning supports the Examiner’s analysis and determination that it would have been obvious to use Wessels’ antimony oxide material in modified-McCormick’s tissue container in order to provide a polymer composition with good laser writability.

Accordingly, we affirm the Examiner’s rejection of claims 19, 27, 30, and 31 under 35 U.S.C. § 103(a) as obvious over the combination of McCormick, Feng, and Wessels, as evidenced by Robertson.

#### *Rejection 2*

Claim 25 depends from claim 19 and further recites “wherein the container is provided with a reference.” Appeal Br. 11 (Claims Appendix).

The Examiner determines the combination of McCormick, Feng, Wessels, and Heninger, as evidenced by Robertson suggests a container satisfying all of the limitations of claim 25 and concludes the combination would have rendered the claim obvious. Final Act. 7–8.

Appellant argues the Examiner's rejection of claim 25 should be reversed for the same reasons previously presented and discussed above in response to the Examiner's rejection of claim 19 (Rejection 1, stated above). Appeal Br. 9. We do not find this argument persuasive for principally the same reasons discussed above for affirming the Examiner's rejection of claim 19.

Appellant also argues the Examiner's rejection should be reversed because "McCormick is completely silent as to a laser etcher, and . . . as to how the writing surface 37 of the stackable cassette is marked." Appeal Br. 9. This argument is not persuasive of reversible error in the Examiner's rejection because it is conclusory and Appellant does not adequately explain it. *In re De Blauwe*, 736 F.2d 699, 705 (Fed. Cir. 1984); *see also In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (explaining that mere lawyer's arguments or conclusory statements, which are unsupported by concrete factual evidence, are entitled to little probative value).

Appellant's argument is also misplaced because it appears to be premised on what Appellant contends McCormick teaches individually, and not the combined teachings of the cited references as a whole and what the combined teachings would have suggested to one of ordinary skill in the art. *Keller*, 642 F.2d at 425. As the Examiner points out (Ans. 15), the Feng and Wessels references are relied upon in the rejection for teaching or suggesting the method of marking the cassette. *See* Final Act. 5–6.

Moreover, as the Examiner explains (Ans. 15), although the McCormick reference may not explicitly disclose laser etching, the same or similar issues that occur during laser etching would have been reasonably expected by one of ordinary skill to occur during the marking processes of

Feng and Wessels because both references involve using an Nd:YAG laser for making markings on plastic articles. *See* Feng 3:8–11, 4:2–6; Wessels ¶ 23.

Accordingly, we affirm the Examiner’s rejection of claim 25 under 35 U.S.C. § 103(a) as obvious over the combination of McCormick, Feng, Wessels, and Heninger, as evidenced by Robertson.

### CONCLUSION

In summary:

<b>Claim(s) Rejected</b>	<b>Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
19, 27, 30, 31	§ 103(a) McCormick, Robertson, Feng, Wessels	19, 27, 30, 31	
25	§ 103(a) McCormick, Robertson, Feng, Wessels, Heninger	25	
<b>Overall Outcome</b>		19, 25, 27, 30, 31	

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**