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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* SCOTT NELSON and JUSTIN STRAHAN

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Appeal 2020-000073  
Application 15/616,028<sup>1</sup>  
Technology Center 3700

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Before JOSEPH A. FISCHETTI, MICHAEL C. ASTORINO, and  
BRUCE T. WIEDER, *Administrative Patent Judges*.

WIEDER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the Examiner’s final rejection of claims 1–16 and 21–24. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

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<sup>1</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Joovv, Inc. (Appeal Br. 3.)

### CLAIMED SUBJECT MATTER

Appellant states that the “invention relates to a light source for use in therapy, and more particularly for treating a large external surface of a patient with an easy to use hanging apparatus so the light source is adjustable.” (Spec. ¶ 1.)

Claim 1 is the sole independent claim on appeal.<sup>2</sup> It recites:

1. A light therapy system, comprising:
  - a hollow housing having a first surface, a second surface parallel to the first surface and facing opposite the first surface, a first side extending perpendicular between the first surface and the second surface, a second side parallel to the first side and facing opposite the first side, and a first end extending perpendicular between the first surface, the second surface, the first side and the second side, wherein the first surface comprises a plurality of openings;
  - a plurality of light emitting diodes (LEDs) coupled to the hollow housing and arranged in predetermined arrays within the hollow housing so that the plurality of LEDs are substantially aligned with the plurality of openings, wherein no LEDs of the plurality of LEDs emit light having a wavelength of less than at least 600 nm;
  - a plurality of attachment posts coupled to the first end; and
  - a positioning system comprising:
    - a plurality of attachment members detachably coupled to the plurality of attachment posts,
    - a connection member coupled to the plurality of attachment members, and
    - a winching system integrated with the connection member, wherein the winching system is arranged and

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<sup>2</sup> We note that claim 1 as reproduced in the Appeal Brief contains a typographical error not appearing in the claim as amended on December 5, 2018, and as entered by the Examiner in the Final Action mailed March 12, 2019. We reproduce the claim as entered by the Examiner.

configured to adjust a vertical position of the hollow housing.

### REJECTIONS

Claim 13 is rejected under 35 U.S.C. § 112(b) as indefinite for failing to particularly point out and distinctly claim the subject matter which the inventors regard as the invention.

Claims 1, 3, 4, 6–13, 15, 16, and 21–24<sup>3</sup> are rejected under 35 U.S.C. § 103 as unpatentable in view of Kind LED Grow Lights, *K5 Series Instructions*, <https://www.kindledgrowlights.com/pages/k5-setup> (last visited June 18, 2020) (hereinafter “K5 Instructions”), Butler (US 2004/0008523 A1, pub. Jan. 15, 2004), Creative Fish Studio, *Ekostore 6 Watt Multi-color 36 LED Aquarium Light for 5 Gallon Tank*, posted May 13, 2016, <https://www.youtube.com/watch?v=s4FcYd81Pbw> (last visited June 18, 2020) (hereinafter “Fish”).

Claims 2 and 5 are rejected under 35 U.S.C. § 103 as unpatentable in view of K5 Instructions, Butler, Fish, and Huang (US 2015/0307332 A1, pub. Oct. 29, 2015).<sup>4</sup>

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<sup>3</sup> The Examiner states that “[c]laims 1, 3-4, 6-13 and 15-18 is/are rejected under 35 U.S.C. 103.” (Final Action 7.) However, claims 17 and 18 had been cancelled. The discussion following the statement refers to claims 1, 3, 4, 6–13, 15, 16, and 21–24. (*Id.* at 7–19.) We treat the reference to cancelled claims 17 and 18, and the omission of reference to claims 21–24 as harmless error.

<sup>4</sup> The Examiner states that “[c]laim(s) 2 and 5 is/are rejected under 35 U.S.C. 103 as being unpatentable over the modified Instructions in view of Huang.” (Final Action 19.) The Examiner defines the term “Instructions” as referring to K5 Instructions. The Examiner does not define the term “modified Instructions.” However, in view of the discussion in the Final

Claim 14 is rejected under 35 U.S.C. § 103 as unpatentable in view of K5 Instructions, Butler, Fish, and Mouser Electronics, *ENCLOSURE AND RACKS*, <https://www.mouser.com/catalog/catalogusd/648/dload/pdf/ENCLOSECTION.pdf> (last visited June 18, 2020) (hereinafter “Mouser”).<sup>5</sup>

## ANALYSIS

### The § 112(b) rejection

Dependent claim 13 is rejected under § 112(b) because “the second end appears to be claimed as the same thing as the second surface. Therefore the claim does not clearly define the metes and bounds of what is being claimed and is indefinite.” (Final Action 6.) Appellant does not argue against this rejection in the Appeal Brief. We will summarily affirm this rejection.

### The § 103 rejection of claims 1, 3, 4, 6–13, and 16

Obviousness is a legal conclusion involving a determination of underlying facts.

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Action, we understand this term to refer to K5 Instructions modified in view of Butler and Fish. (See Final Action 6–19.)

<sup>5</sup> The Examiner states that “[c]laim 14 is/are rejected under 35 U.S.C. 103 as being unpatentable over Instructions in view of Mouser.” (Final Action 20.) In view of claim 14 depending from claim 1, and claim 1 being rejected over the modified Instructions, we understand claim 14 to be rejected over the modified Instructions in view of Mouser, i.e., rejected over K5 Instructions, Butler, Fish, and Mouser. (See also *id.* at 21 (“combining it with the disclosure from the modified Instructions.”) We treat the omission of “modified” on page 20 of the Final Action as harmless error.

Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented.

*KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007) (quoting *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17–18 (1966)).

With regard to the scope and content of the prior art, the Examiner finds that K5 Instructions “discloses a light therapy lighting system” comprising

a hollow housing having a first surface . . . , a second surface parallel to the first surface and facing opposite the first surface, a first side extending perpendicular between the first surface and the second surface, a second side parallel to the first side and facing opposite the first side.

(Final Action 7.) The Examiner further finds that K5 Instructions discloses “a first end extending perpendicular between the first surface, the second surface, the first side and the second side,” and “wherein the first surface comprises a plurality of openings.” (*Id.* at 7–8.) Additionally, the Examiner finds that K5 Instructions discloses “a plurality of light emitting diodes (LEDs) coupled to the hollow housing and arranged in predetermined arrays within the hollow housing so that the plurality of LEDs are substantially aligned with the plurality of openings,” and “a plurality of attachment posts.” (*Id.* at 8.) K5 Instructions refers to the product as a “complete spectrum grow light” including “a high powered yet efficient mix of 3 and 5 Watt Light Emitting Diodes.” (K5 Instructions 2.)

With regard to the location of the attachment posts disclosed in K5 Instructions, the Examiner provides multiple reasons to modify the K5 Instructions. (Final Action 8.) Under one rationale, the Examiner finds that K5 Instructions “does not explicitly disclose a plurality of attachment posts coupled to the first end.” (*Id.*) Rather, the posts are shown coupled to the second surface. (*See* K5 Instructions 2.) The Examiner then determines that “[t]he posts are known as discussed above and there are only 6 sides on the rectangular surface of the [K5] Instructions device on which to mount,” and that it would have been obvious to try “choosing from a finite number of identified (the 6 sides), predictable solutions (effective hanging), with a reasonable expectation of success.” (Final Action 8–9.) The Examiner determines that a motivation for making the modification is simply the desire to position the device so as to apply light to a target area.

(Answer 23.)

Appellant argues that

any alteration to the device to achieve the vertical hanging claimed invention would be fundamentally contradictory to what is taught by [K5] Instructions. Moreover, there is no motivation or reason for a person having ordinary skill in the art to alter a grow light such that the light would no longer shine down on the plant canopy.

(Appeal Br. 5–6 (footnote omitted).)

In *KSR*, the Supreme Court stated:

Under the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.

••••

When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable

solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense.

*KSR Int'l Co.*, 550 U.S. at 420-21. Additionally, “[t]he combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results.” *Id.* at 416. In short, “[i]f a person of ordinary skill can implement a predictable variation, § 103 likely bars its patentability.” *Id.* at 417. Here, the design need was simply to orient the housing of the device of K5 Instructions so as to apply light to a desired target area.

We agree with the Examiner that there are “a finite number of identified [locations] (the 6 sides), predictable solutions (effective hanging), with a reasonable expectation of success.” (Final Action 9.) Appellant does not persuasively argue why the design need itself did not provide sufficient motivation to make the variation of modifying the position of the post anchors, which provided the predictable result of hanging the housing so as to apply light to the desired target area. Nor does Appellant persuasively argue why the claimed combination of known elements according to known methods that yielded predictable results was not an obvious variation of the device disclosed in K5 Instructions, i.e., that the variation of the device was “the product not of innovation but of ordinary skill and common sense.” *See KSR Int'l Co.*, 550 U.S. at 421.

We are not persuaded that the Examiner erred in rejecting claim 1 under § 103. Claims 3, 4, 6–13, and 16 fall with claim 1. *See* 37 C.F.R. § 41.37(c)(1)(iv).



The § 103 rejection of claim 15

Claim 15 recites: “The light therapy system of claim 14, wherein the first end plate has a plurality of slots positioned in predetermined locations and at least two openings arranged and configured to receive the plurality of *attachment members*.” (Emphasis added.)

The Examiner finds that K5 Instructions discloses “at least two openings arranged and configured to receive the plurality of attachment members ([K5] Instructions page 2 the figures under K5 Over view [sic]; ‘A’ brass hanging anchors are received).” (Final Action 17.) The Examiner also finds that “[t]he skill possessed by an ordinary mechanic acquainted with the business would know of welding, rivets, nut-bolt, press fit and adhesives.” (Answer 23.) In other words, the Examiner determines that it would have been obvious to one of ordinary skill in the art, in view of K5 Instructions, to provide for “using a bolt and nut” as an anchor, and thus for having openings to receive the bolts. (*See id.* at 23–24.)

The Examiner’s determination is directed to openings to receive attachment posts rather than attachment members, as recited in claim 15. Thus, the Examiner does not present a prima facie case with respect to K5 Instructions because the Examiner does not adequately explain why it would have been obvious to modify K5 Instructions to include openings to receive the plurality of attachment members.

We will reverse the Examiner’s rejection of claim 15 under §103.

The § 103 rejections of claims 22–24

Claim 22 recites: “The light therapy system of claim 21, wherein the positioning system is arranged and configured to position the plurality of LEDs to face parallel to a ground surface.”

Claim 23 recites: “The light therapy system of claim 21, wherein the positioning system is arranged and configured to position the plurality of LEDs to face away from a ground surface.”

Claim 24 recites: “The light therapy system of claim 21, wherein the positioning system is arranged and configured to position the first end to face away from a ground surface.”

Claims 22–24 do not specify a particular arrangement and configuration of the positioning system. The claims merely specify a resulting position of the plurality of LEDs or of the first end of the housing. The Examiner finds that the device disclosed in K5 Instructions, modified as discussed above, “is functionally capable of performing th[e] function” of being positioned as recited in claims 22–24. (Final Action 18–19.) Specifically, the Examiner finds that attaching K5 Instructions’ carabineers, i.e., attachment members, in particular configurations results in positioning the device, and thus positioning the plurality of LEDs, in accordance with claims 22–24. (*Id.*)

Appellant argues:

Detaching the carabineers, as well as reattaching them in different locations, fundamentally changes the operation of the grow light device and, as discussed in Group 1, directly contradicts what is taught by [K5] Instructions. A person having ordinary skill in the art would not reasonably contemplate detaching two carabineers so that the device would hang in a vertical manner from the two remaining attached carabineers,

when the purpose of the grow light is to shine light down upon a plant canopy. . . . There is no motivation or reason for a person having ordinary skill in the art to alter a grow light such that the light would no longer shine down on the plant canopy.

(Appeal Br. 7.)

In short, Appellant argues that because the purpose of the grow light of K5 Instructions is to shine down, one would not be motivated to reorient the device. But as discussed above, “[u]nder the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *KSR Int’l Co.*, 550 U.S. at 420. Appellant does not persuasively argue why the need to position the device to face a particular direction did not provide a reason for combining the elements to produce the claimed result.

We are not persuaded that the Examiner erred in rejecting claims 22–24 under § 103.

*The § 103 rejection of claims 2 and 5*

Claim 2 recites: “The light therapy system of claim 1, wherein the winching system is electronically activated.”

Claim 5 recites: “The light therapy system of claim 4, wherein the control panel is arranged and configured to activate the plurality of LEDs, the plurality of fans, and the winching system.”

The Examiner determines that “[c]ombining an electric winch merely makes the process of vertical movement not manual by applying a well-known device in a well-known way which is also safer for the user.”

(Answer 25.)

Appellant argues that

a person having ordinary skill in the art would not reasonably combine a plant grow light, which directs multiple wavelengths [of] light, including UV light, in a downward direction towards the ground, with a winch powered by a motor vehicle to achieve the claimed invention: a vertical hanging light therapy system with an electronic winch operable to adjust the height of the system, and LEDs emitting light of a wavelength of at least 600nm.

(Appeal Br. 8.)

Once again, “[u]nder the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *KSR Int’l Co.*, 550 U.S. at 420. Here, the problem facing the inventors was operation of the integrated winching system to position the lighting device.

To the extent Appellant’s argument is that Huang is not analogous art, we disagree.

Two criteria have evolved for determining whether prior art is analogous: (1) whether the art is from the same field of endeavor, regardless of the problem addressed, and (2) if the reference is not within the field of the inventor’s endeavor, whether the reference still is reasonably pertinent to the particular problem with which the inventor is involved.

*In re Clay*, 966 F.2d 656, 658–59 (Fed. Cir. 1992). The power winch disclosed in Huang is reasonably pertinent to the particular problem with which the inventors were involved, i.e., operation of the winching system.

Appellant does not persuasively argue why the need to operate the winching system does not provide a sufficient reason for combining the elements to produce the claimed result, i.e., an electronically activated winching system.

We are not persuaded that the Examiner erred in rejecting claims 2 and 5 under § 103.

*The § 103 rejection of claim 14*

Claim 14 recites: “The light therapy system of claim 1, wherein the hollow housing is comprised of a hollow extruded core having a first open end and a second open end, a first end plate attached to the first open end, and a second end plate attached to the second open end.”

The Examiner finds that “Mouser teaches wherein the housing is comprised of a hollow extruded core having a first open end and a second open end, a first end plate attached to the first open end, and a second end plate attached to the second open end.” (Final Action 21 (citing Mouser 2114).) The Examiner also finds that the device of K5 “Instructions reference has a metal box.” (Answer 26.) The Examiner determines that it would have been obvious to further modify the device of K5 Instructions

to include an extruded metal housing with end panels because as shown in the non-patent literature numerous housing forms are known and a uniform body with end panels is known in the art and combining it with the disclosure from the modified [K5] Instructions would be obvious to try and would render expected results.

(Final Action 21.)

Appellant

argues that a person having ordinary skill in the art would not reasonably combine a plant grow light, which directs multiple wavelengths of light, including UV light, in a downward direction towards the ground, with a metal box enclosure created by an electronics company to achieve the claimed invention: a vertical hanging light therapy system with a hollow housing, and LEDs emitting light of a wavelength of at least 600 nm.

(Appeal Br. 8.)

As discussed above with regard to claims 2 and 5, “[u]nder the correct analysis, any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed.” *KSR Int’l Co.*, 550 U.S. at 420. Here the problem facing the inventors was housing the lighting device.

To the extent Appellant’s argument is that Mouser is not analogous art, we disagree. The housing disclosed in Mouser is reasonably pertinent to the particular problem with which the inventors were involved, i.e., to house components of the lighting device. *See In re Clay*, 966 F.2d at 658–59. Appellant does not persuasively argue why the need to provide a housing for components of the lighting device does not provide a sufficient reason for combining the elements to produce the claimed result, i.e., to include a housing comprised of a hollow extruded core as disclosed in Mouser. Nor does Appellant argue Examiner error in determining that it would have been obvious to try the extruded metal housing of Mouser.

We are not persuaded that the Examiner erred in rejecting claim 14 under § 103.

CONCLUSION

The Examiner's rejection of claim 13 under 35 U.S.C. § 112(b) is summarily affirmed.

The Examiner's rejections of claims 1–14, 16 and 21–24 under 35 U.S.C. § 103 are affirmed.

The Examiner's rejection of claim 15 under 35 U.S.C. § 103 is reversed.

Specifically:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
13	112(b)	Indefiniteness	13	
1, 3, 4, 6–13, 15, 16, 21–24	103	K5 Instructions, Butler, Fish	1, 3, 4, 6–13, 16, 21–24	15
2, 5	103	K5 Instructions, Butler, Fish, Huang	2, 5	
14	103	K5 Instructions, Butler, Fish, Mouser	14	
<b>Overall Outcome</b>			1–14, 16, 21–24	15

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

AFFIRMED