

1 UNITED STATES PATENT AND TRADEMARK OFFICE

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3  
4 BEFORE THE BOARD OF PATENT APPEALS  
5 AND INTERFERENCES  
6

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8 *Ex parte* ANTHONY J.M. GARWOOD  
9

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11 Appeal 2008-3555  
12 Application 10/368,933  
13 Technology Center 1700  
14

15  
16 Decided: January 7, 2009  
17

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19 *Before* ANTON W. FETTING, JOSEPH A. FISCHETTI, and BIBHU R.  
20 MOHANTY, *Administrative Patent Judges*.

21  
22 FETTING, *Administrative Patent Judge*.

23  
24  
25 DECISION ON APPEAL  
26 STATEMENT OF THE CASE

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28 Anthony J.M. Garwood (Appellant) seeks review under  
29 35 U.S.C. § 134 of a Final Rejection of claims 44-59, the only claims  
30 pending in the application on appeal.

1 We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b)  
2 (2002).

3  
4 We AFFIRM-IN-PART.

5 The Appellant invented a way for processing and packaging under  
6 conditions of reduced oxygen for substantially decontaminating and  
7 prolonging the shelf life of perishable goods, such as beef. (Specification  
8 1:24 – 2:2).

9 An understanding of the invention can be derived from a reading of  
10 exemplary claims 44, 50, and 56, which are reproduced below [bracketed  
11 matter and some paragraphing added].

12 44. A method for tracking ground meat to an animal from  
13 which the meat was harvested, comprising:  
14 [1] obtaining animal portions having information associated  
15 therewith;  
16 [2] transferring the portions to a conduit, said conduit including  
17 a meat grinder;  
18 [3] measuring the amount of portions entering the conduit;  
19 [4] grinding the portions to provide ground meat;  
20 [5] measuring the amount of ground meat leaving the conduit;  
21 [6] determining via a computer,  
22 when an amount of ground meat leaving the conduit  
23 corresponds to an amount of portions entering the  
24 conduit; and  
25 [7] associating the information with the ground meat leaving  
26 the conduit.

27  
28 50. A method for associating packaged meat with information  
29 about an animal from which the meat is harvested, comprising:  
30 [1] providing an animal having information associated  
31 therewith on a RFID tag;  
32 [2] reading said RFID tag and storing the information in a  
33 computer;  
34 [3] processing the animal into animal portions;

1 [4] transferring the animal portions from location to location;  
2 and  
3 [5] associating the information with the animal portions when  
4 the portions are transferred from location to location.

5  
6 56. A method for associating packaged meat with information  
7 about an animal from which the meat is harvested, comprising:  
8 [1] providing an animal having information associated  
9 therewith;  
10 [2] transferring said information to a location that is accessible  
11 to one or more users of the information;  
12 [3] harvesting meat from the animal;  
13 [4] providing packages containing a mark on each package;  
14 [5] reading the mark on a package and keeping track of said  
15 package before the package is provided with meat; and  
16 [6] placing the meat in the packages to associate packaged meat  
17 with the information about the animal from which the meat is  
18 harvested.

19  
20 This appeal arises from the Examiner's Final Rejection, mailed  
21 October 14, 2004. The Appellant filed an Appeal Brief in support of the  
22 appeal on July 26, 2007. An Examiner's Answer to the Appeal Brief was  
23 mailed on September 27, 2007.

24 PRIOR ART

25 The Examiner relies upon the following prior art:

26	Knosby	US 4,597,495	Jul. 1, 1986
27	Montanari	US 5,478,990	Dec. 26, 1995
28	Card	US 5,804,802	Sep. 8, 1998

29  
30 Aaron Brody & Kenneth Marsh, *The Wiley Encyclopedia of Packaging*  
31 *Technology* 204-205, 650-655, and 674-680 (2nd Ed., 1996).

32  
33 Wayne Gisslen, *Professional Cooking* 14-15 and 34-37  
34 (3rd Ed., 1995).

REJECTIONS

Claims 44-45 and 48-49 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Montanari and Gisslen.

Claims 46 and 47 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Montanari, Gisslen, and Wiley.

Claims 50, 51, 54, and 55 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Montanari and Knosby.

Claims 52 and 53 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Montanari, Knosby, and Wiley.

Claims 56-59 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Montanari and Card.

Claims 44-59 stand rejected under provisional non-statutory obviousness type double patenting.

ISSUES

The issues pertinent to this appeal are

- Whether the Appellant has sustained its burden of showing that the Examiner erred in rejecting claims 44-45 and 48-49 under 35 U.S.C. § 103(a) as unpatentable over Montanari and Gisslen.
- Whether the Appellant has sustained its burden of showing that the Examiner erred in rejecting claims 46 and 47 under 35 U.S.C. § 103(a) as unpatentable over Montanari, Gisslen, and Wiley.
- Whether the Appellant has sustained its burden of showing that the Examiner erred in rejecting claims 50, 51, 54, and 55 under 35 U.S.C. § 103(a) as unpatentable over Montanari and Knosby.

- 1       • Whether the Appellant has sustained its burden of showing that the  
2       Examiner erred in rejecting claims 52 and 53 under 35 U.S.C. §  
3       103(a) as unpatentable over Montanari, Knosby, and Wiley.
- 4       • Whether the Appellant has sustained its burden of showing that the  
5       Examiner erred in rejecting claims 56-59 under 35 U.S.C. § 103(a) as  
6       unpatentable over Montanari and Card.
- 7       • Whether the Appellant has sustained its burden of showing that the  
8       Examiner erred in rejecting claims 44-59 under provisional non-  
9       statutory obviousness type double patenting.

10       The issues pertinent to claims 44-49 turn on whether the art applied  
11       describes or suggests determining via a computer when an amount of ground  
12       meat leaving a grinder conduit corresponds to an amount of portions  
13       entering the conduit. The issues pertinent to claims 50-55 turn on whether  
14       the art applied describes or suggests associating RFID tag information on an  
15       animal with processed animal portions. The issues pertinent to claims 56-59  
16       turn on whether the art applied describes or suggests providing packages for  
17       meat that are pre-marked for tracking.

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#### FACTS PERTINENT TO THE ISSUES

20

The following enumerated Findings of Fact (FF) are believed to be  
21 supported by a preponderance of the evidence.

22

#### *Montanari*

23

01. Montanari is directed to tracking food products such as meat  
24 products through a growing or production process to verify  
25 origination and record production methods, additives and  
26 treatments (Montanari 1:6-11).

- 1           02. Montanari describes a meat fabrication process at a fabrication  
2           plant in which portions from various animals are gathered and  
3           combined (Montanari 5:9-21).
- 4           03. Montanari uses a computer database to maintain the identity  
5           read from tags of a food item subjected to each segment of the  
6           production process (Montanari 8:35-46).
- 7           04. Montanari describes each animal that is to be slaughtered  
8           having an animal tracking number (A-TN) on some tag  
9           (Montanari 9:41-44). After slaughter and quartering, quarter  
10          tracking number tag that duplicate the A-TN tag is generated  
11          (Montanari 13:5-11). The pieces that each quarter are processed  
12          into then have production tracking number tags (P-TN) generated  
13          that are associated with the A-TN and Q-TN (Montanari 14:1-10).
- 14          05. Montanari describes a meat portion container to hold meat  
15          products to be ground identified using a Lot Production  
16          Information Number (L-PIN). Once the meat portion container is  
17          full, the meat portions are fed into a grinder and the resulting  
18          product is collected in a second ground meat container. A L-PIN  
19          tag is generated that is identical to that of the first container and is  
20          attached to the ground meat container. The ground meat container  
21          is then emptied and its contents packaged into individual packages  
22          (Montanari 16:7-19).

23          *Gisslen*

- 24          06. Gisslen is directed to professional cooking (Gisslen: Title).

1           07. Gisslen describes the dangers of bacteria and recommends  
2           keeping bacteria from spreading (Gisslen 15: Protection against  
3           Bacteria).

4           08. Gisslen describes a food grinder for grinding meats by forcing  
5           food through a feed tube into a screw, which pushes food through  
6           holes in a plate, where the food is cut by a rotating blade (Gisslen  
7           36: Attachments for Mixers and Food Chopper).

8           *Knosby*

9           09. Knosby is directed to identifying livestock and their food  
10           (Knosby 1:5-9).

11          10. Knosby's animal carcasses are hung on gambrels (a gambrel is  
12           used by butchers for hanging carcasses by the legs) attached to a  
13           moving trolley line. Each trolley is numbered with a code. Each  
14           carcass is separately numbered with a code. Knosby's system  
15           tracks which trolley contains which carcass (Knosby 1:56 – 2:18).

16          11. Knosby describes several techniques for physically identifying  
17           animals, including radio frequency chips (Knosby 3:46-54).

18          *Wiley*

19          12. Wiley is directed to packaging technology (Wiley:Title).

20          *Card*

21          13. Card is directed to determining the disposition of packages in a  
22           shipping terminal (Card 1:5-8).

23          14. Card describes applying bar codes to items placed inside a bin,  
24           but does not describe applying bar codes to bins themselves (Bard  
25           1:43-47).

26          *Facts Related To The Level Of Skill In The Art*



1           Although a patent applicant is entitled to be his or her own  
2 lexicographer of patent claim terms, in *ex parte* prosecution it must be  
3 within limits. *In re Corr*, 347 F.2d 578, 580 (CCPA 1965). The applicant  
4 must do so by placing such definitions in the Specification with sufficient  
5 clarity to provide a person of ordinary skill in the art with clear and precise  
6 notice of the meaning that is to be construed. *See also In re Paulsen*, 30  
7 F.3d 1475, 1480 (Fed. Cir. 1994) (although an inventor is free to define the  
8 specific terms used to describe the invention, this must be done with  
9 reasonable clarity, deliberateness, and precision; where an inventor chooses  
10 to give terms uncommon meanings, the inventor must set out any  
11 uncommon definition in some manner within the patent disclosure so as to  
12 give one of ordinary skill in the art notice of the change).

13  
14 *Obviousness*

15           A claimed invention is unpatentable if the differences between it and  
16 the prior art are “such that the subject matter as a whole would have been  
17 obvious at the time the invention was made to a person having ordinary skill  
18 in the art.” 35 U.S.C. § 103(a) (2000); *KSR Int’l Co. v. Teleflex Inc.*, 127 S.  
19 Ct. 1727, 1729-30 (2007); *Graham v. John Deere Co.*, 383 U.S. 1, 13-14  
20 (1966).

21           In *Graham*, the Court held that the obviousness analysis is bottomed  
22 on several basic factual inquiries: “[1] the scope and content of the prior art  
23 are to be determined; [(2)] differences between the prior art and the claims at  
24 issue are to be ascertained; and [(3)] the level of ordinary skill in the  
25 pertinent art resolved.” 383 U.S. at 17. *See also KSR Int’l v. Teleflex Inc.*,  
26 127 S. Ct. at 1734. “The combination of familiar elements according to

1 known methods is likely to be obvious when it does no more than yield  
2 predictable results.” *KSR*, at 1739.

3 “When a work is available in one field of endeavor, design incentives  
4 and other market forces can prompt variations of it, either in the same field  
5 or a different one. If a person of ordinary skill can implement a predictable  
6 variation, § 103 likely bars its patentability.” *Id.* at 1740.

7 “For the same reason, if a technique has been used to improve one  
8 device, and a person of ordinary skill in the art would recognize that it would  
9 improve similar devices in the same way, using the technique is obvious  
10 unless its actual application is beyond his or her skill.” *Id.*

11 “Under the correct analysis, any need or problem known in the field  
12 of endeavor at the time of invention and addressed by the patent can provide  
13 a reason for combining the elements in the manner claimed.” *Id.* at 1742.

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15

#### ANALYSIS

16 *Claims 44-45 and 48-49 rejected under 35 U.S.C. § 103(a) as unpatentable*  
17 *over Montanari and Gisslen.*

18

19 The Examiner found that Montanari described all of the limitations of  
20 independent claim 44 except for a conduit grinder structure, for which the  
21 Examiner applied Gisslen, and the determining by a computer step of when  
22 the amount leaving corresponds to an amount entering. The Examiner  
23 inferred from Gisslen’s description of the necessity of keeping bacteria from  
24 spreading that one of ordinary skill would have therefore portioned meat and  
25 weighed it going in and out of the grinding process to isolate portions of  
26 meat (Answer 4-5).



1           Accordingly, we select claim 50 as representative of the group.  
2       37 C.F.R. § 41.37(c)(1)(vii) (2007).

3           The Examiner found that Montanari described the limitations of claim  
4       50 except for applying an RFID tag to the animal, which the Examiner found  
5       described by Knosby. The Appellant contends that there is no motivation or  
6       convincing rationale to combine Montanari and Knosby. The Appellant  
7       contends that Knosby tracks only a whole carcass whereas Montanari tracks  
8       tracking animal parts and that it would alter the mode of operation or be  
9       prohibitive or impossible to physically incorporate Knosby's RFID tags in  
10      Montanari's identifications (Br. 20-23).

11          We disagree with the Appellant. Montanari provides an animal  
12      having information associated therewith on an animal tracking number tag  
13      (FF 04); reads the tag and stores the information in a computer (FF 03);  
14      processes the animal into animal portions while transferring the animal  
15      portions from location to location (FF 02); and associates the information  
16      with the animal portions when the portions are transferred from location to  
17      location (FF 04). Knosby describes using radio frequency tags, of which  
18      RFID tags would be a well known embodiment, for animal tracking tags (FF  
19      11). The Appellant contends one would not replace Montanari's tags with  
20      RFID tags (Br. 21: Bottom ¶). This argument is not well founded.

21          "The test for obviousness is not whether the features of a secondary  
22      reference may be bodily incorporated into the structure of the primary  
23      reference .... Rather, the test is what the combined teachings of those  
24      references would have suggested to those of ordinary skill in the art." *In re*  
25      *Keller*, 642 F.2d 413, 425 (CCPA 1981). *See also In re Sneed*, 710 F.2d  
26      1544, 1550 (Fed. Cir. 1983) ("[I]t is not necessary that the inventions of the

1 references be physically combinable to render obvious the invention under  
2 review."); and *In re Nievelt*, 482 F.2d 965, 968 (CCPA 1973) ("Combining  
3 the *teachings* of references does not involve an ability to combine their  
4 specific structures.").

5         Although Knosby describes radio frequency tags for the animals,  
6 Knosby also describes using other codes such as those on the containers  
7 transporting carcasses and associating the animal and container identifiers  
8 (FF 10). Montanari describes creating additional tags for production  
9 tracking that are related to the original animal tracking tag (FF 04). Nothing  
10 in Montanari or Knosby describe or suggest that the additional tags produced  
11 to track production are necessarily of the same format as the original animal  
12 tracking tag. Since the tags in Montanari are system generated, they may be  
13 in whatever media is most conducive to the fabrication process. The  
14 Appellant appears to take Montanari's description of creating Q-TN tags as  
15 requiring absolute identity of labels (Br. 21:First full ¶). However, closer  
16 reading of Montanari shows it is identity of the number, not the medium,  
17 that is preserved. The Appellant also contends that radio frequency tags are  
18 not easily duplicated (Br. 21:Bottom ¶). But again, identity of the tag media  
19 is not required by Montanari.

20         Further, nothing in claim 50 requires that the animal portion  
21 information be recorded in the same media as the original animal tracking  
22 tag. Therefore, bodily incorporation of Knosby's radio frequency tags into  
23 Montanari's production tags is not an issue.

24         Finally, the Appellant contended there is no rationale provided for  
25 combining the references (Br. 22-23). But the Examiner found that RFID

1 tags described by Knosby were a convenient and efficient mechanism for  
2 storing Montanari's animal tracking number (Answer 7).

3 The Appellant has not sustained its burden of showing that the  
4 Examiner erred in rejecting claims 50, 51, 54, and 55 under 35 U.S.C. §  
5 103(a) as unpatentable over Montanari and Knosby.

6  
7 *Claims 52 and 53 rejected under 35 U.S.C. § 103(a) as unpatentable over*  
8 *Montanari, Knosby, and Wiley.*

9  
10 The Appellant has not separately argued these claims and therefore,  
11 since they depend from claim 50, has not sustained its burden of showing  
12 that the Examiner erred in rejecting claims 52 and 53 under 35 U.S.C. §  
13 103(a) as unpatentable over Montanari, Knosby, and Wiley.

14  
15 *Claims 56-59 rejected under 35 U.S.C. § 103(a) as unpatentable over*  
16 *Montanari and Card.*

17  
18 The Examiner found that Montanari described the limitations of claim  
19 56 except for the pre-marked packages and reading the mark prior to filling  
20 with meat. The Examiner found that Card described tracking marked  
21 packages throughout a distribution system and concluded that Card's  
22 description of using the marks for tracking inventory would have motivated  
23 one of ordinary skill to use Card's marking system to track the inventory of  
24 containers in Montanari (Answer 8-9).

25 The Appellant argues that nothing in either reference suggests  
26 marking the container prior to filling with meat as required by limitations [4]  
27 and [5] of claim 56. We agree with the Appellant. The Examiner refers to  
28 Card 1:43 for support for placing a mark on containers for inventory control.

1 This portion of Card describes marks placed on inventory placed in  
2 containers, not the containers themselves (FF 14). The Examiner found that  
3 applying this technique to the containers themselves would have improved  
4 control over the containers themselves. The Examiner has provided no  
5 evidence, even in the form of official notice, that one of ordinary skill knew  
6 to number the containers in addition to the items in the containers, and has  
7 provided no evidence that there was any reason to apply the cost and  
8 resources to such control over the containers.

9 The Appellant has sustained its burden of showing that the Examiner  
10 erred in rejecting claims 56-59 under 35 U.S.C. § 103(a) as unpatentable  
11 over Montanari and Card.

12

13 *Claims 44-59 rejected under provisional non-statutory obviousness type*  
14 *double patenting.*

15

16 The Examiner rejected claims 44-59 as provisionally unpatentable  
17 under the doctrine of obviousness type double patenting over the claims of  
18 applications 10/769,714; 10/769,677; and 10/769,674 (Answer 10). All  
19 three of these applications stand abandoned for failure to respond to Office  
20 actions mailed March 15, 2007, October 22, 2007, and October 19, 2007  
21 respectively. Thus the provisional rejections are not sustained due to the  
22 abandonment of the applications upon which the rejections are made.

23

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#### CONCLUSIONS OF LAW

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26

27

The art applied does not describe or suggest determining via a  
computer when an amount of ground meat leaving a grinder conduit  
corresponds to an amount of portions entering the conduit. The art applied

1 does describe or suggest associating RFID tag information on an animal with  
2 processed animal portions. The art applied does not describe or suggest  
3 providing packages for meat that are pre-marked for tracking.

4 The Appellant has not sustained its burden of showing that the  
5 Examiner erred in rejecting claims 50-55, but has sustained its burden of  
6 showing that the Examiner erred in rejecting claims 44-49 and 56-59 under  
7 35 U.S.C. § 103(a) as unpatentable over the prior art.

8  
9 **DECISION**

10 To summarize, our decision is as follows:

- 11 • The rejection of claims 44-45 and 48-49 under 35 U.S.C. § 103(a) as  
12 unpatentable over Montanari and Gisslen is not sustained.
- 13 • The rejection of claims 46 and 47 under 35 U.S.C. § 103(a) as  
14 unpatentable over Montanari, Gisslen, and Wiley is not sustained.
- 15 • The rejection of claims 50, 51, 54, and 55 under 35 U.S.C. § 103(a) as  
16 unpatentable over Montanari and Knosby is sustained.
- 17 • The rejection of claims 52 and 53 under 35 U.S.C. § 103(a) as  
18 unpatentable over Montanari, Knosby, and Wiley is sustained.
- 19 • The rejection of claims 56-59 under 35 U.S.C. § 103(a) as  
20 unpatentable over Montanari and Card is not sustained.
- 21 • The rejection of claims 44-59 provisional non-statutory obviousness  
22 type double patenting is not sustained.

23 No time period for taking any subsequent action in connection with  
24 this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2007).

AFFIRMED-IN-PART

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