

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today  
(1) was not written for publication in a law journal and  
(2) is not binding precedent of the Board.

Paper No. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte AGATHOS A. EFSTATHIOS

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Appeal No. 98-1858  
Application 08/678,196<sup>1</sup>

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ON BRIEF

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Before CALVERT, COHEN and FRANKFORT, Administrative Patent  
Judges.

FRANKFORT, Administrative Patent Judge.

DECISION ON APPEAL

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<sup>1</sup> Application for patent filed July 12, 1996. According to appellant, the application is a continuation of Application 08/492,896, filed June 20, 1995, abandoned.

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This is a decision on appeal from the examiner's final rejection of claims 1 through 20, all the claims pending in the application.

Appellant's invention is directed to a method of treating valve dysfunction in a human patient by using a marine mammal trileaflet valve (e.g., a marine mammal ventricular outflow valve) as a replacement for the human patient's dysfunctional valve, more specifically, a patient's dysfunctional aortic, mitral, tricuspid, or pulmonary valve. In addition, the invention is directed to a "fixed, marine mammal ventricular outflow valve" (claim 18). Claims 1, 11 and 18 are illustrative of the subject matter on appeal and a copy of those claims may be found in Appendix A of appellant's brief.

The prior art references of record relied upon by the examiner as evidence of obviousness under 35 U.S.C. § 103 are:

Cumming et al. (Cumming)	4,793,344	Dec. 27, 1988
Ross	5,352,240	Oct. 4, 1994

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Claims 1 through 20 stand rejected under 35 U.S.C.  
§ 103 as being unpatentable over Ross in view of Cumming.  
According to the examiner,

Ross discloses the invention substantially as claimed. Ross discloses replacing a dysfunctioning valve in a human patient with an xenograft (animal tissue) heart valve. However, Ross is silent in regards to using a marine mammal xenograft. Cumming et al teaches the use of marine mammal xenografts for corneal tissue replacement (see column 3, lines 13-19). It would have been obvious to one having ordinary skill in the art to have derived a marine mammal xenograft as taught by Cumming et al for the xenograft heart valve of Ross for an ample supply of heart valve tissue and where, for example, other xenografts such as porcine valves are repugnant to a portion of the population due to religious beliefs (answer, pages 2-3).

The full text of the examiner's rejection with regard to the appealed claims and rebuttal to the arguments presented by appellant appears in the examiner's answer (Paper No. 15, mailed April 24, 1997). Rather than reiterate appellant's position on the obviousness issues raised in this appeal, we make reference to the appeal brief (Paper No. 13,

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filed March 31, 1997) for a complete statement of appellant's arguments.

#### OPINION

Having carefully considered appellant's specification and claims, the applied references, and the respective viewpoints of appellant and the examiner, we have reached the conclusion that the examiner's rejection of claims 1 through 20 under 35 U.S.C. § 103 is not well founded and, therefore, will not be sustained.

Like appellant, even if we assume for the sake of argument that Cumming is analogous prior art, we find no teaching, suggestion, or incentive in the applied Ross and Cumming references which would have made it obvious to one of ordinary skill in the art at the time of appellant's invention to use a marine mammal trileaflet valve (e.g., a marine mammal ventricular outflow valve) as a replacement for a human patient's dysfunctional valve, more specifically, a human pa-

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tient's dysfunctional aortic, mitral, tricuspid, or pulmonary valve. As urged by appellant, the examiner's position is clearly based on an improper "obvious to try" approach which attempts to combine the generally unrelated teachings of Ross and Cumming to arrive at the posited obviousness determination under 35 U.S.C.

§ 103. In regard to the examiner's rejection, we generally agree with appellant's arguments as set forth on pages 9 through 18 of the brief.

With respect to independent claim 18, we find nothing in Ross or Cumming which would have been suggestive of a "fixed, marine mammal ventricular outflow valve." However, it appears to us that a complete marine mammal heart which has been preserved in a fixative agent, such as glutaraldehyde, would include a "fixed, marine mammal ventricular outflow valve." In this regard, it is incomprehensible to us that at the time of

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appellant's invention it was unknown to preserve or "fix" a complete marine mammal heart. It would seem prudent for the examiner and appellant to evaluate the scope of claims 18 through 20 in this light. The present application is hereby REMANDED to the examiner for that purpose.

For the foregoing reasons, the decision of the examiner rejecting claims 1 through 20 under 35 U.S.C. § 103 based on the collective teachings of Ross and Cumming is reversed.

REVERSED and REMANDED

	IAN A. CALVERT	)	
	Administrative Patent Judge	)	
		)	
		)	
		)	BOARD OF
PATENT		)	
	IRWIN CHARLES COHEN	)	APPEALS AND
	Administrative Patent Judge	)	INTERFER-
ENCES		)	
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CHARLES E. FRANKFORT            )  
Administrative Patent Judge    )

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