

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

L'OREAL USA, INC.

Petitioner

v.

BRIGHTEX BIO-PHOTONICS, LLC.

Patent Owner

Case No. IPR2025-00971

U.S. Patent No. 9,542,595

PATENT OWNER'S PRELIMINARY RESPONSE

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I. INTRODUCTION

Patent Owner Brightex Bio-Photonics, LLC (“Brightex” or “Patent Owner”) submits the following Preliminary Response (“Response”) to the Petition (“Pet., p. __”) filed by L’Oreal USA, Inc. (“L’Oreal” or “Petitioner”) on May 15, 2025, requesting inter partes review of claims 1–15 of U.S. Patent No. 9,542,595 (the “Patent” or “’595 Patent”). In addition to the Request for Discretionary Denial filed August 11, 2025 (D.E. No. 7), Patent Owner respectfully requests that the Patent Trial and Appeal Board (“Board” or “P.T.A.B.”) decline institution of the inter partes review of the ’595 Patent because Petitioner has failed to show a reasonable likelihood of prevailing as to any of the claims challenged in the Petition.

II. CLAIM CONSTRUCTION

“Petitioner has not proposed any terms for construction.” Pet. p. 12. Claim construction was ongoing in the District Court at the time of the stay, and the parties both identified claim terms for construction and their respective proposed constructions. SRX 2018. Brightex believes that the failure of the Petitioner to provide any guidance to the Board on the scope of the subject claims further supports Brightex’s request for denial of the present Petition. Petitioner has provided positions on claim construction at the District Court, but its Petition is devoid of any guidance from Petitioner on its belief regarding the scope of the subject claims. Because the Petitioner has provided claim construction positions at the District

Court, the Board should not be put in the position of guessing at what the Petitioner believes is the proper scope of the claims at issue in this matter. The Petitioner's refusal to provide any claim construction for the subject claims (but then argue that certain positions are necessary in the District Court) supports a finding of this Petition's failure to show a reasonable likelihood of prevailing as to any of the claims challenged in the Petition, which supports Brightex's request for denial.

Providing claim construction positions is not Brightex's burden in this matter, and Brightex is prejudiced by the Petitioner's refusal to provide a proposed claim construction position in its Petition. For the purposes of this Preliminary Response, Brightex reserves the right to propose claim constructions of the terms at a later stage, should it become necessary.

III. ARGUMENT: THE PETITION FAILED TO ESTABLISH A REASONABLE LIKELIHOOD OF UNPATENTABILITY FOR ANY OF THE CHALLENGED CLAIMS

L'Oreal makes no anticipation arguments. Pet. p. 3. All four grounds are based upon obviousness. Petitioner asserts three prior art references, in various combinations across the four grounds. These references are U.S. Patent App. Pub. No. 2011/0301441 ("Bandic"), U.S. Patent No. 7,634,103 ("Rubinstenn103") and U.S. Patent App. Pub. No. 2003/0063300 ("Rubinstenn300").

Ground	Claim(s)	Reference(s)
1 (§103)	5, 6, 11	Bandic
2 (§103)	5, 9, 11	Rubinstenn103, Bandic
3 (§103)	1, 2, 3, 4	Rubinstenn103, Rubinstenn300, Bandic
4 (§103)	9, 13, 10, 15, 7, 12, 8, 14	Rubinstenn103, Rubinstenn300, Bandic

Ground 1 does not establish a reasonable likelihood of unpatentability of claims 5, 6, and 11 because Bandic does not concern the simulated application of cosmetic products or their recommendation. As such, Bandic fails to disclose or render obvious the “divided...display[] with a simulated application of a cosmetic product,” and the “cosmetic product is identified at least based on the color space values” limitations. Bandic does not address application or use of a cosmetic product in its approximate one-hundred separate embodiments in the split display application, and Bandic fails to provide any indication of how these one-hundred separate embodiments would function together in a single working embodiment advocated by the Petitioner’s “picking and choosing” of different features from different embodiments. Moreover, the Bandic reference is not a unitary embodiment and the utilization of different embodiments from a 356-page disclosure requires a motivation to combine disparate embodiments of Bandic that Petitioner does not sufficiently provide. Particularly, attempting to combine Bandic’s distinct and separate embodiments with other,

unrelated embodiments would not have been obvious, and the Petitioner fails to provide sufficient justification for doing so.

Grounds 2-4 do not establish a reasonable likelihood of unpatentability for at least the same reasons, as Bandic is relied upon for the above limitations in all grounds.

A. BANDIC (GROUND 1) DOES NOT PROVIDE A REASONABLE LIKELIHOOD OF UNPATENTABILITY.

Petitioner does not sufficiently explain where in Bandic's many disparate embodiments the Examiner's allowed combinations may be found and merely presents cumulative prior art of the nature already considered by the Office in the original prosecution, such as LaForgia. In the notice of allowance mailed on August 31, 2016, the Examiner explained:

The following is an examiner's statement of reasons for allowance: based on applicant's amendment/persuasive arguments, filed on 8/23/16, claims 1-2, 4, 7-10, 12-16 and 18-20 (renumbered as 1-15) are allowed.

L'Oreal EX. 1002, p. 12 (Notice of Allowability). A review of the amendments by the then-Applicant reveals that the Examiner was convinced, for example, that the combination of the color calibration limitation and the simulated application of a cosmetic product limitation in Claim 8 was allowable. *See, e.g.*, 8/23/16 Amendment, p. 2-9 (L'Oreal EX. 1002 at 32-39), including amendments made to Claim 8 as follows:

8. **(Currently amended)** ~~The method of claim 1, further comprising:~~ A method for analyzing a skin of a subject and identifying a cosmetic product for the subject, comprising:

at an electronic device with one or more processors and memory storing one or more programs for execution by the one or more processors:

calibrating colors of a first digital image, wherein the first digital image depicts at least a portion of a face of the subject, and the first digital image includes a plurality of pixels;

displaying the first digital image; and

dividing the display of the first digital image into two sides, wherein one side of the first digital image is displayed with no cosmetic product applied, and one side of the first digital image is displayed with a simulated application of a cosmetic product;

transferring the first digital image; and

transferring information of a cosmetic product, wherein skin pixels in the plurality of pixels are identified, color space values are identified from the skin pixels, and the cosmetic product is identified at least based on the color space values.

8/23/16 Amendment, p. 3-4 (L'Oreal EX. 1002 at 33-34). Claim 8 above issued as Claim 5. Depicted visually, this claimed concept can be seen in Figure 4B of the '595 Patent:



Figure 4B

1. Bandic does not disclose Claim 5, 6, and 11’s “divided...display[] with a simulated application of a cosmetic product” limitations

Claims 5, 6, and 11 each has a limitation requiring the display of the first digital image to be divided, and for one side of the first digital image to be displayed with a simulated application of a cosmetic product. Pet. pp. 24, 34, 35.

Bandic fails, wholly and completely, to teach or render obvious the simulated application of a cosmetic product on a divided display. Petitioner relies on Bandic’s “simulation tools 132,” “algorithm 150 for determining a skin state 158,” and providing a split-display to “also include a split image with the original face on one half and a new simulated output on the other half.” Petition at 24-25. But Bandic does not disclose, teach or suggest the application of a cosmetic product, which means Bandic’s simulation tools (132) have nothing to do with the

‘595 Patent’s cosmetic product *as it would appear on one side of the first digital image*. Bandic at [0423].

Despite this, Petitioner argues “[b]ecause the simulation tool 132 could simulate product usage on the facial image, a POSITA would find it obvious that the simulation could be for a cosmetic product.” Petition at 25. Petitioner simply repeats the same unsupported conclusion in Sonka. *See* EX1003 at ¶ 109 (“A POSITA would find it obvious that product usage simulation could include cosmetic product simulation.”). There is no support for such a conclusion, and citations to a different tool in Bandic (skin type determination tools 130) do not cure this deficiency, nor explain why a POSITA would be motivated to make this augmentation. Bandic does not disclose the simulated application of a cosmetic product.

Bandic mentions “cosmetic” skin health, but that is the intrinsic condition of the skin – not the application of a cosmetic to the external surface of the skin to enhance the skin appearance. *See* Bandic at [0386] (“cosmetic skin health”); [0313] (cosmetic skin “conditions such as moisture, elasticity, firmness, texture, color level ...”); [0392] (cosmetic skin “indications, such as moisture level, firmness, fine lines ...”); [0416] (cosmetic skin “concerns, such as stretch mark progression and diminishment.”); [0432] (cosmetic skin “regimens 118.”) None of these excerpts references the application of a cosmetic to the external surface of the skin. This flaw in Bandic is pervasive and contaminates both the Petition and Sonka’s analysis. As

Bandic is relied upon for this limitation, and Bandic does not concern the simulated application of a cosmetic product, or even cosmetic products in the first instance, ground 1 does not provide a reasonable likelihood of unpatentability for claims 5, 6, and 11.

2. Bandic does not disclose Claim 5, 6, and 11’s “cosmetic product is identified at least based on the color space values” limitations

Claims 5, 6, and 11 each has a limitation requiring the cosmetic product to be identified at least based on the color space values (previously obtained from the skin pixels). Pet. pp. 27, 34, 35. Put simply, this limitation requires a connection between the color space values of a user’s skin and the color of a cosmetic product. *See, e.g.*, ‘595 Patent at 9:55-10:15. The Petition alleges that one or more unspecified embodiments in Bandic determine a skin state. *Id* at p. 29. This can include an evaluation of skin color. But Bandic never discloses identifying a cosmetic product based on color space values, and the Petitioner’s arguments to the contrary are both threadbare and misleading.

Specifically, Petitioner makes two arguments. The first is that “skin state 158 may be used to ‘recommend and design personalized products based on skin health.’ Bandic, ¶ 0388” Pet. p. 29. But Bandic at [0388] states (in relevant part): “Algorithms 150 may be rules-based software and processes to ... recommend and design personalized products based on skin health.” Bandic at [0388]. Regardless, neither

skin state 158 nor skin health disclose, teach or suggest the use of the claimed “color space values” for which to “identify a cosmetic product.” Citations in the Petition to using an unknown algorithm of some type, without any teaching of color space values, is therefore irrelevant.

Petitioner also argues “Bandic also teaches that a POSITA would appreciate that its RGB color analysis ‘may be useful in recommendation of a cosmetic product.’” But Bandic at [0456] (the Petition’s *only* citation to the 356-page Bandic for this argument) is misleading and lacking context. Bandic at [0456] states that the Bandic system classifies skin conditions and disorders, but makes no mention of color space value evaluations. *See also* Bandic at [0456] (unspecified picture evaluation is “useful for classification of other skin characteristics (e.g. elasticity, melanin, oil concentration etc.), melanomas, skin tumors or disorders and the like.”). Even Bandic’s analysis of captured color samples in [0455] does not disclose using RGB color analysis in recommendation of a cosmetic product. Bandic merely discloses that the skin phototype evaluation may be used, and part of that skin phototype evaluation may include a non-specific color analysis.¹

¹ To the extent the Petitioner argues that RGB color analysis is used at some intermittent point in determining the skin phototype, and therefore should be considered as being used in Bandic’s skin care recommendations, Petitioner and Sonka have not provided justification for this modification to the skin phototype determination (using Fig. 58’s 5620, 5630, and 5640 exclusively).

This fact is confirmed by Bandic’s purpose; to determine a skin state and skin health data for recommending a skin treatment (not a recommendation of an application of an external cosmetic product to change the appearance of the skin). This fact is also confirmed by Bandic’s use of the term “skin color,” and its use throughout the specification in determining the users’ skin state 158. *See, e.g.*, Bandic at [0464] (“Broad genetic parameters” such as “skin color” may be collected to determine the “users’ skin state 158.”); [0489] (to “obtain a skin state 158” skin color may be used).

Despite Bandic’s “broad disclosures,” it never discloses or suggests cosmetic products identified based on color space values. Pet. p. 29. Sonka’s unsupported conclusion to the contrary does not suffice. EX 1003 at ¶ 122. As Bandic is relied upon for this limitation, and Bandic does not concern cosmetic products identified based on the color space values, ground 1 does not provide a reasonable likelihood of unpatentability for claims 5, 6, and 11.

3. It Would Not have been Obvious to Modify Bandic, and L’Oreal’s Heavy reliance on its Expert cannot prevail

Petitioner treats the various features of Bandic’s different embodiments as if they are interchangeable with one another without proper support. The Board has previously rejected such an approach. *See, e.g., Abiomed, Inc. v. Maquet Cardiovascular, LLC*, IPR2017-01204, Paper 9 at 11 (PTAB Oct. 23, 2017) (“Petitioner also fails to provide a sufficient rationale to combine the teachings of

Aboul-Hosn's different embodiments. Petitioner simply fails to explain sufficiently *why* one skilled in the art would have found it obvious to combine those teachings").

The Bandic reference does not disclose a single, unitary embodiment based on a cogent disclosure of technology. As shown in the Bandic (SRX 2019) reference, the phrase "certain embodiments" is used 148 times to reference different technology disclosures. The phrase "some embodiments" is used 26 times to reference different technology disclosures. The phrase "an aspect of the invention" is used 34 times to reference different technology disclosures. And the phrase "an exemplary embodiment" is used 18 times to reference different technology disclosures. Petitioner's expert requires 125 pages in its Sonka declaration to tie separate statements regarding different embodiments to argue in favor of a loose patchwork Section 103 obviousness "construct." The need for the Petitioner to submit a 125-page expert declaration in support of its 73-page Petition is evidence of over-reliance on an expert's opinion in this matter.

Overall, the Sonka expert opinion is not focused testimony and does not provide helpful context. There is no teaching in Bandic, or elsewhere, that ties all these different teachings into a coherent disclosure of the subject claims in the '595 Patent, which is why Petitioner must rely heavily on the Sonka expert opinion to provide such suggestions and modifications. Essentially, the Sonka expert

opinion improperly attempts to “fill in the gaps” in the Bandic “patchwork” of different technologies and attempts to paint a much different picture of the Bandic teachings than that are actually disclosed in the reference. And there is a lot of filling to do. For example, the Petition cites, for ground 1, claim 5, limitation “5[pre]” alone, Bandic at ¶¶ 0006, 0053, 0057, 0067, 0293, 0303, 0384, 0388, 0392, 0498, 0466, 0456, 0075. Pet. p. 16-17. Sonka’s mere statement that “[g]iven these disclosures, it is my opinion that a POSITA would understand that Bandic teaches or renders obvious this limitation,” is insufficient. EX1003 at ¶ 87.

This lack of support for combining and modifying the many different embodiments in Bandic worsens when the Petition combines what it identifies as (1) the “initial image” limitation as being taught by Bandic’s Figure 7 (recommendations page for “moisture recovery” products (Pet. p. 24), with (2) the “color space values are identified from the skin pixels” limitation as being taught by *part of* Bandic’s Figure 58 (process for determining a skin phototype), specifically 5832-5840 (Pet. p. 28). Fig. 7 is explained as depicting “a recommendations page of a skin care system,” and that the provided “recommendations for skin care [are] based on a skin state 158 ... and recommend[s] products and regimens that may be effective in achieving a skin care goal.” Bandic at [0114] and [0488], respectively. These are the only two paragraphs which reference Fig. 7 in Bandic. There is no motivation to combine

this embodiment, whose goal is clearly stated as skin care, with anything whose goal is not skin care.

While the Board has indicated that “it is not necessary for an expert to explain every aspect of the prior art” (April 25, 2025 FAQs, Q.21), Petitioners’ expert testimony engages in a limitation-by-limitation recitation of the claims that simply “parrots” the claim language without explanation, and fills shortcomings in the prior art through conclusory statements.² In our case, Petitioner’s expert report does just that – it “parrots” claim language with conclusory assertions.

And the Board indicated that that expert testimony must be “focused ... to provide helpful context or explain terms of art.”³ Petitioners’ 125-page expert

² The PTAB has also found that an expert declaration that merely parrots the petition arguments without providing additional technical detail, analysis, or evidentiary support is entitled to little if any weight. *See Xerox Corp. v. Bytemark, Inc.*, IPR2022-00624, Paper 12 (P.T.A.B. Feb. 10, 2023) (precedential) (according “little weight” to declaration testimony that contains a verbatim restatement of a petition’s conclusory assertions without additional supporting evidence or reasoning); *Facebook, Inc. v. Windy City Innovations, LLC*, 973 F.3d 1321, 1340–41 (Fed. Cir. 2020) (affirming Board decision giving no weight to expert testimony that “merely repeated Petitioner’s argument, nearly verbatim, without citation to the basis for his testimony”); *see also Wowza Media Sys., LLC v. Adobe Sys. Inc.*, IPR2013-00054, Paper 12 at 12 (P.T.A.B. Apr. 8, 2013) (“The Declaration . . . appears, for the most part, simply to track and repeat the arguments for unpatentability presented in the Petition [and] . . . is therefore no more helpful tha[n] the Petition in determining where the challenged recitation is found in the references.”).

³ The PTAB’s April 25, 2025 FAQs about the discretionary denial process expressly states “extensive reliance on expert testimony ... may suggest that the questions are better resolved in an Article III court.” April 25, 2025 FAQs, Q.21. The Board

declaration for a 73-page Petition, however, is not focused testimony and does not provide helpful context. Instead of pointing to a focused teaching or suggestion to combine the different teachings in Bandic, Petitioner L'Oreal relies heavily upon the Sonka expert report to tie loosely connected “embodiments” and “aspects of the invention.”

Even with a 125-page expert report, however, Petitioner still fails to provide a sufficient explanation of where the prior art discloses, teaches or suggests the combination of embodiments, or why the Petitioner’s proposed combination was possible, probable or workable based on the Petitioner’s primary Bandic reference. The Petitioner’s “failure to provide focused expert testimony may weigh against institution.” *Id.* The present Petition is heavily reliant on expert testimony, which suggests that these invalidity arguments are better resolved by the Article III court. Therefore, Petitioner’s heavy reliance on its expert testimony supports a discretionary denial.

For at least these reasons, Petitioner fails to show a reasonable likelihood of prevailing on invalidating the challenged claims based on ground 1.

emphasized the statutory requirement that “petitions [must] be based on prior art patents and printed publications,” as opposed to expert opinions. *Id.*

B. RUBINSTENN103 AND BANDIC (GROUND 2) DOES NOT PROVIDE A REASONABLE LIKELIHOOD OF UNPATENTABILITY.

Understanding the weaknesses of the Bandic reference, Petitioner attempts to combine (this time admittedly) two different embodiments from Rubinstenn103 with Bandic. Ground 2 does not establish a reasonable likelihood of unpatentability of claims 5, 6, and 11 for at least the same reasons as identified above in Section IV(A)(2) (cosmetic product is identified at least based on the color space values). Petitioner still relies on Bandic for this limitation (Pet. p. 50) and Bandic is still deficient for the reasons explained above.

1. Rubinstenn103 does not disclose calibrating colors and it would not be obvious to substitute Bandic's color calibration.

Rubinstenn103 asks a user to manually calibrate the color of an image, and to determine whether this is necessary. Pet. p. 42-43, Rubinstenn103 Fig. 6A. For that reason, this reference does not meet the limitations in claims 5, 6 and 11 because the “calibrating colors of a first digital image” is done “at an electronic device with one or more processors and memory storing one or more programs for execution by the one or more processors.” ‘595 Patent Claim 5. Understanding this, the Petition and Sonka state that Rubinstenn103’s color calibration is flawed and that a POSITA would look to Bandic for a solution. Pet. p. 44; Sonka ¶ 178. This is incorrect, and Bandic’s color calibration is not simply an automated or upgraded version of Rubinstenn103’s manual method.

Rubinstenn103 asks a user to physically hold its hand up to an image displayed on a screen to compare skin colors. Rubinstenn103 at Fig. 7. There is nothing fundamentally wrong or incorrect (at least within Rubinstenn103) with this method of color calibration; but this is not what is covered by the subject claims. Indeed, users may prefer to ensure their skin color is accurately reflected on the display for the purposes of facilitating the three-dimensional facial image and beauty analysis, but this disclosed method does not disclose, teach or suggest the claimed subject matter. And the Petition (and Sonka) merely concludes that a user's perception may be incorrect (essentially a "human error" argument) and lead to incorrect calibration. Pet. p. 44, Sonka ¶ 178. But the Petition never explains how converting the image into device independent values will ensure that the image will ***match the user's skin*** more accurately than a user can. Moreover, Bandic does not use a device to determine independent color space values, as claimed.

Device independent colors are important when you need to compare different images and need to ensure both images are calibrated similarly (*i.e.*, apples to apples). Rubinstenn103 is not focused on skin treatment or specific cosmetic product recommendations, and "generally determines a first cosmetic off a query answered by the subject, but Bandic analyzes the skin pixels..." Sonka at ¶ 154. *See also* Pet. p. 38 ("Rubinstenn103 generally determines a first cosmetic in response to a query answered by the subject.") there is nothing wrong with Rubinstenn103's color

calibration method; the goals of Rubinstenn103 materially differ from those of Bandic and there is no motivation to combine the two references.

2. Rubinstenn103's other Deficiencies

Rubinstenn103 does not include a divided display, and Petitioner merely concludes that such a divided display would be obvious. Pet. p. 46; Sonka ¶¶ 183-187. Sonka attempts to use unanalogous examples within Rubinstenn103 to explain that a POSITA would, of their own accord, divide “a single image instead of displaying just one would be useful for a device with a small screen.” *Id* at ¶ 187. But Rubinstenn103's before and after photos, color calibration method, and facial portion display are not a divided display and would not lead a POSITA to a divided display.

C. RUBINSTENN103 IN VIEW OF RUBINSTENN300 AND BANDIC (GROUND 3) DO NOT PROVIDE A REASONABLE LIKELIHOOD OF UNPATENTABILITY.

Ground 3 adds Rubinstenn300 to address the claim 1 (and dependent claims 2-4) limitations concerning the use (and transfer) of a second digital image for color calibration. The Petition relies on Rubinstenn103 in view of Bandic for the other limitations of claim 1, which are deficient for the reasons explained in Sections A and B above. Additionally, dependent claims 2-4 are patentable through their dependency on claim 1, regardless of their additional individual limitations. Additionally, Ground 3 does not establish a reasonable likelihood of unpatentability of claims 1, 2, 3 and 4 for at least the same reasons as identified above in Section IV(A)(2) (cosmetic product

is identified at least based on the color space values). Petitioner still relies on Bandic for this limitation (Pet. p. 64) and Bandic is still deficient for the reasons explained above.

D. RUBINSTENN103 IN VIEW OF RUBINSTENN300 AND BANDIC (GROUND 4) DOES NOT PROVIDE A REASONABLE LIKELIHOOD OF UNPATENTABILITY.

Ground 4 addresses dependent claims 9, 13, 10, 15, 7, 12, 8, and 4. These dependent claims are patentable at least through their dependency on independent claims 6 and 11, regardless of their additional individual limitations. *See* Section A and B above. As such, Ground 4 does not establish a reasonable likelihood of unpatentability of these dependent claims.

IV. CONCLUSION

For these reasons, Patent Owner Brightex respectfully requests that the Board decline to institute Petitioner's IPR.

Dated: September 15, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Patent Owner certifies that Patent Owner's Preliminary Response Contains 4018 words exclusive of a table of contents, a table of authorities, mandatory notices under § 42.8, a certificate of service or word count, or appendix of exhibits or claim listing, according to Microsoft Word.

Dated: September 15, 2025

Respectfully submitted,

By: /s/ Michael W. Doell

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CERTIFICATE OF SERVICE

I certify that on September 15, 2025, the foregoing PATENT OWNER'S PRELIMINARY RESPONSE has been served on the Petitioners' counsel of record via email, at the following email addresses:

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