

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 25

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte GAIL S. BAZZANO

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Appeal No. 95-4713  
Application 07/856,157<sup>1</sup>

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ON BRIEF

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Before WINTERS, WILLIAM F. SMITH and GRON, Administrative Patent Judges.

WINTERS, Administrative Patent Judge.

**DECISION ON APPEAL**

This appeal was taken from the examiner's rejection of claims 1 through 3 and 5 through 16, which are all of the claims remaining in the application.

**REPRESENTATIVE CLAIM**

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<sup>1</sup> Application for patent filed January 21, 1992.

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Claim 1, which is illustrative of the subject matter on appeal, reads as follows:

1. A stable, aqueous retinoid composition for topical application to the skin with slow release of the retinoid and minimal irritancy to the skin, comprising:

(a) an aqueous medium such that the composition is at least about 40 weight percent water;

(b) an amount of retinoid effective for treatment of a skin condition;

(c) an amount of a high molecular weight polyacrylic acid gelling agent neutralized to a pH of about 3 to 7 effective to form a gel and hold said retinoid for slow release in said aqueous medium; and

(d) an amount of antioxidant effective to retard decomposition of said retinoid in said aqueous medium.

#### **THE REFERENCES**

The references relied on by the examiner are:

Marks	4,247,547	Jan. 27, 1981
Vishnupad et al. (Vishnupad)	4,950,475	Aug. 21, 1990

#### **THE ISSUE**

The issue presented for review is whether the examiner erred in rejecting claims 1 through 3 and 5 through 16 under 35 USC § 103 as unpatentable over the combined disclosures of Vishnupad

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and Marks.

#### **DELIBERATIONS**

Our deliberations in this matter have included evaluation and review of the following materials:

(1) The instant specification, including all of the claims on appeal;

(2) Appellant's main Brief and Reply Brief before the Board;

(3) The Examiner's Answer and the communication mailed by the examiner August 1, 1995; and

(4) The above-cited references relied on by the examiner.

On consideration of the record, including the above-listed materials, we reverse the § 103 rejection based on the combined disclosures of Vishnupad and Marks.

#### **DISCUSSION**

The examiner has the initial burden of establishing a prima facie case of obviousness. In an effort to discharge that burden here, the examiner finds that Vishnupad discloses every component of appellant's composition except for the antioxidant recited in claim 1 (d). As stated in the Examiner's Answer, page 3, last paragraph, "[t]he claims differ [from Vishnupad] in the

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recitation of an antioxidant". The thrust of the § 103 rejection is the proposed incorporation of antioxidant in Vishnupad's composition, per the teachings of Marks.

The finding that "[t]he claims differ [from Vishnupad] in the recitation of an antioxidant" (Examiner's Answer, page 3, last paragraph) is clearly erroneous. The examiner does not point to any portion of Vishnupad disclosing the gelling agent recited in claim 1 (c), namely, "a high molecular weight polyacrylic acid gelling agent neutralized to a pH of about 3 to about 7". Furthermore, in the main Brief before the Board, paragraph bridging pages 8 and 9, appellant argues that Vishnupad does not disclose or suggest the specific gelling agent recited in the claims on appeal. The examiner does not come to grips with that argument.

Where, as here, the examiner's rejection under 35 USC § 103 is predicated on a clearly erroneous factual finding, the rejection cannot stand. Accordingly, the rejection of claims 1 through 3 and 5 through 16 under 35 USC § 103 as unpatentable over the combined disclosures of Vishnupad and Marks is reversed.

**REVERSED**

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SHERMAN D. WINTERS	)	
Administrative Patent Judge	)	
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	)	BOARD OF PATENT
WILLIAM F. SMITH	)	
Administrative Patent Judge	)	APPEALS AND
	)	
	)	INTERFERENCES
	)	
TEDDY S. GRON	)	
Administrative Patent Judge	)	

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