

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opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.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. 15

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KEITH A. JONES, ANTHONY E. WINSTON,
M. STEPHEN LAJOIE and AMY L. JOSEPH

Appeal No. 96-2324
Application No. 08/071,963¹

ON BRIEF

Before WINTERS, DOWNEY and WARREN, Administrative Patent Judges.

WINTERS, Administrative Patent Judge.

DECISION ON APPEAL

This appeal was taken from the examiner's decision rejecting claims 39 through 42. Claim 38, which is the only

¹ Application for patent filed June 7, 1993. According to appellants, this application is a division of Application No. 07/883,422, filed May 12, 1992, now abandoned.

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other claim remaining in the application, stands withdrawn from further consideration by the examiner as directed to a non-elected invention.

Claim 39, which is illustrative of the subject matter on appeal, reads as follows:

39. A fungicide composition which is a dry blend formulation comprising (1) between about 10-80 weight percent of an ingredient selected from the group consisting of alkali metal and ammonium bicarbonates, (2) between about 0.5-20 weight percent of a compatibility enhancing ingredient selected from the group consisting of water-soluble polyhydroxy compounds which are in solid form at a temperature below about 10EC, (3) between about 0.01-10 weight percent of a fungicide ingredient, and (4) between about 1-20 weight percent of a surfactant ingredient, based on the weight of water-insoluble ingredients; wherein the composition contains nitrogen, phosphorus and potassium elements in a ratio which is functional as a fertilizer formulation.

The references relied on by the examiner are:

Duyfjes et al. (Duyfjes)	3,140,977	July 14, 1964
Misato et al. (Misato)	4,599,233	July 8, 1986
Rehberg et al. (Rehberg)	5,174,804	Dec. 29, 1992
Joo et al. (Joo) (Japanese Kokai publication)	53-096319	Aug. 23, 1978
Oosumi (Japanese Kokai publication)	60-153785	Aug. 13, 1985
Van Nostrand Reinhold, <u>Encyclopedia of Chemistry</u> 85 (4th ed., Van Nostrand Reinhold Co. 1984)		
<u>The Merck Index</u> 818-19 (Martha Windholz ed., 10th ed., Merck & Co., Inc. 1983)		

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The issue presented for review is whether the examiner erred in rejecting claims 39 through 42 under 35 U.S.C. § 103 as unpatentable over the combined disclosures of Duyfjes, Misato, Japanese Kokai No. 53-096319, Japanese Kokai No. 60-153785, Rehberg, The Merck Index, and Van Nostrand.

OPINION

We shall not sustain this rejection.

We agree with the examiner that it would have been obvious to arrive at a fungicide composition, which is a dry blend formulation, comprising ingredients (1), (3), and (4) in the proportions recited in claim 39. For the reasons set forth by the examiner, and amply documented by the cited prior art, a fungicide composition which is a dry blend formulation comprising (1) an alkali metal bicarbonate, (3) a triphenyltin fungicide, and (4) a surfactant in the proportions recited in claim 39 would have been obvious within the meaning of 35 U.S.C. § 103. Adding to that composition a compound or compounds which provide nitrogen, phosphorus, and potassium in a ratio functional as a fertilizer formulation also would have been obvious for the reasons expressed by the examiner.

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The weakness in the examiner's position, however, is an inadequate evidentiary foundation to support a conclusion of obviousness of claims reciting ingredient (2). In relevant part, claim 39 defines a fungicide composition which is a dry blend formulation comprising

(2) between about 0.5-20 weight percent of a compatibility enhancing ingredient selected from the group consisting of water-soluble polyhydroxy compounds which are in solid form at a temperature below about 10EC.

Mannitol is exemplary of a compatibility enhancing ingredient meeting the terms of claim 39 (specification, page 7, line 1).

Citing the Merck Index, 10th ed., Monograph No. 5569, and Van Nostrand, page 85, the examiner argues that it would have been obvious to add mannitol to solid fungicidal compositions known in the art, e.g., the fungicidal compositions of Duyfjes, as an anticaking and free-flow agent. We disagree.

Motivation in the prior art to combine references does not have to be identical to that of the applicant to establish obviousness. In re Kemps, 97 F.3d 1427, 1430, 40 USPQ2d 1309, 1311 (Fed. Cir. 1996). Nevertheless, the examiner has the burden of establishing adequate reason, suggestion, or motivation to combine references in such manner to arrive at

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the claimed invention. The examiner has not met that burden here.

The examiner has not established that solid fungicidal compositions known in the art, e.g., the fungicidal compositions of Duyfjes, contain one or more hygroscopic substances and, therefore, require the addition of an anticaking agent to inhibit formation of aggregates and lumps and to ensure a free-flowing characteristic. See Van Nostrand, page 85, right-hand column, first full paragraph. Nor has the examiner established that (1) the prior art suggests the desirability that solid fungicidal compositions be free-flowing; or (2) it was known in the art to add an anticaking agent or agents to solid fungicidal compositions, thus ensuring a free-flow characteristic. Therefore, the examiner has not established an adequate reason, suggestion, or motivation which would support the rejection under 35 U.S.C. § 103.

The examiner states that "solid formulations are known to benefit from the addition of adjuvants such as anticaking agents via retention of free-flowing properties" (Examiner's Answer, page 6, last full paragraph). That statement is

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overly broad and not supported by evidence of record. In contrast, Van Nostrand discloses that

[s]ome products, particularly foods that contain one or more hygroscopic substances, require the addition of an anticaking agent to inhibit formation of aggregates and lumps and thus retain the free-flowing characteristic of the products. [Van Nostrand, page 85, right-hand column, first full paragraph].

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Manifestly, the above-quoted statement from Van Nostrand is more narrow than the broad, unsupported statement in the Examiner's Answer, page 6.

The examiner's decision is reversed.

REVERSED

SHERMAN D. WINTERS)	
Administrative Patent Judge)	
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MARY F. DOWNEY)	BOARD OF PATENT
Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
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