



# UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE  
**United States Patent and Trademark Office**  
Address: COMMISSIONER FOR PATENTS  
P.O. Box 1450  
Alexandria, Virginia 22313-1450  
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/830,001	04/23/2004	Michaela Kohut	3321-P25129	7651
13897	7590	09/23/2020	EXAMINER	
Abel Schillinger, LLP 5929 Balcones Drive Suite 300 Austin, TX 78731			LIU, SUE XU	
			ART UNIT	PAPER NUMBER
			1616	
			NOTIFICATION DATE	DELIVERY MODE
			09/23/2020	ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

hmuensterer@abel-ip.com  
mail@Abel-IP.com

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

*Ex parte* MICHAELA KOHUT, STEPHAN RUPPERT, JÖRG KÜTHER,  
MARTIN KAUFFELDT, and OLAF ROHDE

---

Appeal 2019-000798  
Application 10/830,001  
Technology Center 1600

---

Before ERIC B. GRIMES, TAWEN CHANG, and  
JOHN E. SCHNEIDER, *Administrative Patent Judges*.

SCHNEIDER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner's decision to reject claims 95–140.<sup>2</sup> We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART.

---

<sup>1</sup> We use the word Appellant to refer to “applicant” as defined in 37 C.F.R. § 1.42(a). Appellant identifies the real party in interest as Beiersdorf AG. Appeal Br. 3.

<sup>2</sup> A prior decision on appeal affirmed the rejection of the then pending claims. Appeal No. 2015-000021.

### CLAIMED SUBJECT MATTER

The present invention is directed to cosmetic and dermatological cleansing preparations which contain sodium laureth sulfate and/or sodium myreth sulfate, one or more polyacrylates and an oil phase. Spec. ¶ 12.

Claim 95, reproduced below, is illustrative of the claimed subject matter:

95. A cosmetic or dermatological cleansing emulsion comprising:

(a) from 4 % to about 17 % by weight of at least one of sodium laureth sulfate and sodium myreth sulfate;

(b) from about 0.20 % to 0.70 % by weight of one or more polyacrylates selected from anionic homopolymers and anionic copolymers of at least one of acrylic acid, an alkylated acrylic acid and esters thereof;

(c) from 42 % to about 51 % by weight of an oil phase comprising

(i) from 30 % to about 45 % by weight of a paraffin oil,

(ii) from about 0.5 % to 20 % by weight of one or more oils having a polarity of from about 5 to about 50 mN/m and comprising at least one of soybean oil, almond oil, and jojoba oil;

the emulsion having a viscosity of from about 500 to about 3,500 mPa s at 100 s<sup>-1</sup>.

The prior art relied upon by the Examiner is:

Name	Reference	Date
Ruppert et al.	EP 1166722 A1	January 2, 2002

The Examiner has rejected the pending claims under 35 U.S.C. § 103(a) as unpatentable over Ruppert.

### OPINION

#### *Issue*

In rejecting the pending claims the Examiner finds Ruppert is directed to cosmetic or dermatological compositions containing (a) 1–30 wt. % wash-

active-surfactant(s); (b) 35–50 wt.% oil component(s); and (c) 0.2–5 wt.% polyacrylate(s) selected from anionic copolymers selected from homo- and copolymers of acrylic acids, alkylated acrylic acid derivatives and/or their salts. Final Act. 10–11. The Examiner also finds that Ruppert discloses that the surfactant in the emulsion can be sodium laureth sulfate or sodium myreth sulfate. *Id.* With respect to the oil component, the Examiner finds that Ruppert teaches that praffin oil, soy oil, almond oil, or jojoba oil can be used. *Id.* at 11. The Examiner finds that Ruppert teaches that shower bath products typically have a viscosity of from 3,000 to 10,000 mPa·s. *Id.* at 12

Appellant contends that Ruppert neither teaches nor suggests which of the many variables of the compositions disclosed therein should be adjusted in which way in order to arrive at compositions having more desirable properties than those achievable with the compositions specifically disclosed by Ruppert. Appeal Br. 9. Appellant also argues that the exemplified compositions of Ruppert differ significantly from the claimed compositions. *Id.* at 11–13. Appellant argues that it is impossible to know what the viscosities are for the compositions disclosed in Ruppert. *Id.* at 14.

The issue with respect to this rejection is whether the Examiner has established by a preponderance of the evidence that claims 95–140 would have been obvious to one of ordinary skill in the art at the time the invention was made over Ruppert.

### *Findings of Fact*

We adopt as our own the Examiner’s findings and analysis. The following findings are included for emphasis and reference convenience.

FF1. Ruppert discloses cosmetic cleaning compositions comprising: 1 to 30% by weight of one or several washing active tensides selected from the group of tensides having an HLB value of more than 15, 35 to 50% by weight of one or several oil components, 0.2 to 5% by weight of one or several polyacrylates selected from the group formed by anionic homopolymers and/or copolymers of acrylic acid and/or acrylated acrylic acid derivatives as well as their esters, and 5 to 60% by weight of water. Ruppert ¶ 27.

FF2. The tensides used in Ruppert may comprise sodium myreth sulfate and sodium laureth sulfate. Ruppert ¶ 31.

FF3. Ruppert teaches that the oil components can be selected from the group of

branched and straight hydrocarbons and hydrocarbon waxes, silicon oils, dialkyl ethers, the group of saturated or unsaturated, branched or straight alcohols, as well as fatty acid triglycerides, namely triglyceride esters of saturated and/or unsaturated, branched and/or straight alkane carboxylic acids with a chain length of 6 to 24, in particular 12 to 18 C atoms. The fatty acid triglycerides can be selected, for example, from the group of synthetic, semi-synthetic and natural oils, for example, olive oil, sunflower oil, soy oil, peanut oil, rapeseed oil, almond oil, palm oil, coconut oil, palm kernel oil and the like.

Ruppert ¶ 43.

FF4. Ruppert also teaches the use of jojoba oil in the oil phase.

Ruppert ¶ 42.

FF5. The present Specification teaches “Fatty acid triglycerides, in particular soybean oil and/or almond oil, may particularly preferably be

employed according to the invention as oils having a polarity of from about 5 to about 50 mN/m.” Spec. ¶ 61.

FF6. Paraffin oil is among the hydrocarbons that can be used in composition disclosed in Ruppert. Ruppert ¶ 47.

FF7. Ruppert teaches that the amount of polyacrylate in the composition should range from 0.5 to 2 % by weight with from 0.7 to 1.5 % by weight preferred. Ruppert ¶ 57.

FF8. Ruppert teaches that “[w]ashes, and in particular shower baths, have as a rule viscosities of about 3000 to 10,000 mPa·s.” Ruppert ¶ 18.

### *Principles of Law*

[T]he examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability. If that burden is met, the burden of coming forward with evidence or argument shifts to the applicant.

After evidence or argument is submitted by the applicant in response, patentability is determined on the totality of the record, by a preponderance of evidence with due consideration to persuasiveness of argument.

*In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992).

The test of obviousness is “whether the teachings of the prior art, taken as a whole, would have made obvious the claimed invention.” *In re Gorman*, 933 F.2d 982, 986 (Fed. Cir. 1991).

“[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” *In re Aller*, 220 F.2d 454, 456 (CCPA 1955).

“A *prima facie* case of obviousness typically exists when the ranges of a claimed composition overlap the ranges disclosed in the prior art.” *In re Peterson*, 315 F.3d 1325, 1329 (Fed. Cir. 2003).

*Analysis*

Claim 95 is representative of the rejected claims. The subject matter of claim 95 relates to a cosmetic cleansing composition comprising sodium laureth sulfate and/or sodium myreth sulfate, polyacrylates and an oil phase comprising paraffin oil and at least one of soybean oil, almond oil, and jojoba oil.

We agree with the Examiner that the subject matter of claim 95 would have been obvious to one skilled in the art at the time the invention was made over Ruppert. Ruppert discloses a cosmetic cleanser which comprises sodium laureth sulfate and/or sodium myreth sulfate, polyacrylates and an oil phase that can comprise paraffin oil and natural oils such as jojoba oil, almond oil, and soy oil. FF1–7. Ruppert also teaches that washes typically have a viscosity of from 3000 to 10,000 mPa·s. FF8. Although Ruppert does not teach the same ranges of components as recited in the present claims, the ranges overlap. *See* Final Act. 10–12. For example, claim 95 calls for 4 to 17 % by weight of sodium laureth sulfate and sodium myreth sulfate, Appeal Br. 21 (Claims App.) and Ruppert teaches 1 to 30% by weight of one or several washing active tensides (sodium laureth sulfate and sodium myreth sulfate.). FF1 and 2. We agree with the Examiner that it would have been obvious to optimize the various percentages, and the viscosity of the composition, to fit the need or design of one skilled in the art. Final Act. 16.

Appellant argues Ruppert does not teach how one should adjust the different variables of the compositions and does not teach the combination of elements recited in the instant claims. Appeal Br. 9–11. We are unpersuaded. As discussed above, Ruppert teaches all the components of

the claimed composition and the ranges recited in Ruppert overlap with the ranges recited in the instant claims. “[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” *In re Aller*, 220 F.2d at 456.

Appellant next argues that there are significant differences in the examples recited in Ruppert and the claimed compositions. Appeal Br. 11–13. Again we are unpersuaded. The Examiner has not relied solely on the examples of Ruppert in establishing a prima facie case of obviousness but has relied on the teachings of Ruppert as a whole. Ans. 5. As shown above, Ruppert teaches all the elements of the claims.

Appellant goes on to argue that merely demonstrating that various elements of a claim are known in the prior art is insufficient to establish a case of obviousness. Appeal Br. 13–14. Appellant’s argument is not persuasive. Ruppert does not merely disclose the individual elements recited in the instant claims but teaches putting them together in almost the identical manner as the claimed composition. FF1–8. We agree with the Examiner that

Modulating parameters of the formulation was and is a routine practice that would have been obvious to a person of ordinary skill in the art to employ in order to produce a consumer-acceptable product. The ordinary artisan would reasonably have expected success because it was known how to adjust parameters such as viscosity and concentrations of ingredients. Thus, it would have been obvious to one of ordinary skill in the art at the time of the invention to engage in routine experimentation to determine optimal or workable ranges that produced expected results.

Ans. 7.



Appellant contends that the viscosities of the examples in Ruppert are not known and that one skilled in the art would not have been led to the viscosities recited in the claims. Appeal Br. 14. We remain unpersuaded. Ruppert teaches that washes typically have a viscosity of from 3000 to 10,000 mPa·s. FF8. This overlaps with the range recited in the claims.

Appellant contends that Ruppert discloses a large number of different possible oils that can be used and that there is nothing in Ruppert which would lead one skilled in the art to the specific oils recited in the claims. Appeal Br. 16–18. Appellant points out that

with one exception, all of the eight exemplified emulsions of RUPPERT (including those specifically relied upon by the Examiner) contain not more than 20% by weight of mineral oil (paraffin oil) and one of the exemplified emulsions contains 25% by weight of paraffin oil (and also 25% by weight of other oils, significantly outside the corresponding range recited in the instant claims).

*Id.* Appellant’s argument does not persuade us that the rejection is in error. Ruppert explicitly teaches that the oil component may comprise a combination of oils and specifically lists paraffin oil, jojoba oil, soy oil, and almond oil as oils that can be used. FF3–6.

With respect to independent claim 122, Appellant argues that the specific narrower ranges recited in this claim are not taught or suggested by Ruppert. Appeal Br. 19–20. We are unpersuaded. While the ranges recited in the claims are narrower than those taught in Ruppert, there is still significant overlap rendering the claims obvious. *In re Peterson*, 315 F.3d at 1329. The discovery of the optimum ranges does not render the claimed compositions patentable. *In re Aller*, 220 F.2d at 456.

Claims 111, 112, 129 and 134 all include limitations calling for specific ratio of polyacrylates to paraffin oil. Appeal Br. 25, 28, 29 (Claims App.). Appellant contends that Ruppert does not disclose a specific range of ratios and that the highest ratio derived from the examples in 1:31. *Id.* at 18, 21. Appellant contends that ratios calculated from Ruppert are significantly different from those recited in the claims. *Id.*

We agree with Appellant that the subject matter of claims 111, 112, 129, and 134 would not have been obvious to one skilled in the art over Ruppert. The calculated ratios of polyacrylates to paraffin oil in Ruppert range from 1:15 to 1:31. Appeal Br. 18. The ratios recited in claims 111, 112, 129, and 134 range as low as 1:57 to 1:125. Appeal Br. 25, 28, 29. We find that there is no overlap between these ranges and do not find the range to have been prima facie obvious on that basis.

The Examiner contends that the recited ratios would have been arrived at through routine optimization. Final Act. 17–18. The Examiner finds, “A person of ordinary skill in the art would have found it obvious to adjust the amount of the ratio of anionic polyacrylate thickener to paraffin oil in the emulsion in the routine course of optimizing the composition. In particular, the ratio would have been adjusted to modulate the thickness of the formulation and to modulate the cleansing quality.” *Id.*

We are not persuaded by the Examiner’s reasoning. The Examiner does not offer any support for the proposition that the polyacrylates used in Ruppert act as a thickener nor do we discern any such teaching in Ruppert. *See Ruppert* ¶¶ 52–56. Thus we do not agree that one skilled in the art would have been lead to optimize the ratio of polyacrylate to paraffin oil in the manner suggested by the Examiner.

Claims 135–138 depend from claim 134 and would not have been obvious for the same reasons as claim 134.

Appellant has not separately argued the remaining claims, therefore they fall with claims 95 and 122. 37 C.F.R. § 42.37(c)(iv).

### CONCLUSION

We conclude that the Examiner has established by a preponderance of the evidence that the subject matter of claims 95–110, 113–128, 130–133, 139, and 140 would have been obvious over Ruppert under 35 U.S.C. § 103(a). We conclude that the Examiner has not established by a preponderance of the evidence that the subject matter of claims 111, 112, 129, and 134–138 would have been obvious over Ruppert under 35 U.S.C. § 103(a).

### DECISION SUMMARY

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
95–140	103(a)	Ruppert	95–110, 113–128, 130–133, 139, 140	111, 112, 129, 134– 138

Appeal 2019-000798  
Application 10/830,001

TIME PERIOD FOR RESPONSE

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

AFFIRMED-IN-PART