



# 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.
15/346,189	11/08/2016	AMY NICOLE BUENO	CDA-171US	4084
23122	7590	09/03/2020	EXAMINER	
RATNERPRESTIA 2200 Renaissance Blvd Suite 350 King of Prussia, PA 19406			PEEBLES, KATHERINE	
			ART UNIT	PAPER NUMBER
			1617	
			NOTIFICATION DATE	DELIVERY MODE
			09/03/2020	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):

PCorrespondence@ratnerprestia.com

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

*Ex parte* AMY NICOLE BUENO,  
TERRY EUCLAIRE MEYER, and RENIL JOHN ANTHONY

---

Appeal 2020-000755  
Application 15/346,189  
Technology Center 1600

---

Before RICHARD M. LEBOVITZ, DEBORAH KATZ, and  
JOHN A. EVANS, *Administrative Patent Judges*.

LEBOVITZ, *Administrative Patent Judge*.

DECISION ON APPEAL

The Examiner rejected claims 1, 3, 4, 6, 7, and 17–20 under 35 U.S.C. § 103 as obvious and under non-statutory obviousness-type double-patenting. Pursuant to 35 U.S.C. § 134(a), Appellant<sup>1</sup> appeals from the Examiner’s decision to reject the claims. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

---

<sup>1</sup> We use the word “Appellant” to refer to “applicant” as defined in 37 C.F.R. § 1.42. Appellant identifies the real party in interest as Incotech Holding B.V. Appeal Br. 1.

STATEMENT OF THE CASE

Claims 1, 3, 4, 6, 7, and 17–20 stand rejected by the Examiner. Final Office Action (“Final Act.”; dated Apr. 29, 2019). The rejections as follows:

1. Claims 1, 6, and 17–20 under 35 U.S.C. § 103 as obvious in view of Arthur et al. (US 2013/0165487 A1, published June 27, 2013 (“Arthur ’487”), Arthur et al. (US 2009/0143447 A1, published June 4, 2009 (“Arthur ’447”), Kober et al. (US 2004/0102322 A1, published May 27, 2004) (“Kober”), and Reichert et al. (WO 2013/158284 A1, published Oct. 24, 2013) (“Reichert”). Final Act. 3.

2. Claims 3 and 4 under 35 U.S.C. § 103 as obvious in view of Arthur ’487, Arthur ’447, Kober, Reichert, and Reus et al. (US 8,685,886 B2, issued Apr. 1, 2014) (“Reus”). Final Act. 6.

3. Claim 7 under 35 U.S.C. § 103 as obvious in view of Arthur ’487, Arthur ’447, Kober, Reichert, and Lloyd (US 4,149,869, issued Apr. 17, 1979) (“Lloyd”). Final Act. 7.

4. Claims 1, 3, 4, 6, and 17–20 on the ground of non-statutory obviousness-type double-patenting as obvious in view of claims 1–21 of U.S. Patent No. 8,685,886 as evidenced by Kozuki (US 2009/0239750 A1, issued Sept. 24, 2009), Arthur ’487, and Reichert. Final Act. 11.

5. Claim 7 on the ground of non-statutory obviousness-type double patenting as obvious in view of claims 1–21 of U.S. Patent No. 8,685,886 as evidenced by Kozuki, Arthur ’487, Reichert, and Lloyd. Final Act. 14–15.

6. Claims 1, 3, 4, 6, 7, and 17–20 provisionally rejected on the ground of non-statutory obviousness-type double patenting as obvious in view

claims 1–17 of co-pending Application No. 15/774,845 in view of Reus.  
Final Act. 15.

Independent claim 1 is representative and reproduced below:

1. An aqueous seed coating composition comprising a Fischer-Tropsch wax, at least one pigment, an optional surface active agent and one or more biologically active ingredients,  
wherein the wax is in the form of an aqueous emulsion,  
wherein the aqueous seed coating composition comprises 4% by weight or less polymeric binder other than wax, and  
wherein the amount of wax is 5–10 % by weight based on the total weight of the composition.

#### OBVIOUSNESS REJECTIONS

The Examiner found that Arthur '487 describes a seed coat composition comprising Michem Lube 156P, which is carnauba wax emulsion.<sup>2</sup> Final Act. 4. The Examiner acknowledged that Arthur '487 does not disclose a Fischer-Tropsch wax as claimed. *Id.* However, the Examiner found that Reichert discloses that “both carnauba wax and Fischer-Tropsch wax were known in the art as coating substances for seeds that act as lubricants,” which the Examiner identified as the “slip agent[s]” in Arthur '487 and Arthur '447. *Id.* The Examiner determined it would have been obvious to one of ordinary skill in the art at the time the application was filed to use the Fischer-Tropsch wax of Reichert in place of the carnauba wax emulsion of Arthur '487 because the agents “were known to serve the same purpose.” *Id.*

The claim further requires that the wax emulsion is present in the amount of “5–10 % by weight based on the total weight of the composition.”

---

<sup>2</sup> Arthur '447 was cited by the Examiner to establish that the wax in Arthur '487 is carnauba wax.

The Examiner found that Arthur '487 discloses examples of compositions comprising up to 4.4% by weight of composition. Final Act. 5. While the value of 4.4% does not overlap with the claim range, the Examiner found it sufficiently close to render it obvious, citing *Titanium Metals Corporation of America v. Banner*, 778 F.2d 775, 783 (Fed. Cir. 1985), to support this determination. Final Act. 5. The Examiner also found that the value of 4.4% was not an upper limit disclosed by Arthur '487, but rather an example of an amount of wax emulsion that can be present in the seed coating. *Id.* at 8–9. The Examiner stated that this amount would provide a starting point to optimize the concentration of wax in the seed coat composition. *Id.* at 9.

The Examiner also cited Kober as evidence that Arthur '487 made the subject matter of dependent claim 6 obvious to one of ordinary skill in the art. Final Act. 5.

Appellant argues that the Examiner did not provide evidence that it would have been obvious to one of ordinary skill in the art to make a seed coating with the claimed amount of wax. Appeal Br. 4. Appellant also argues that the Examiner just speculates that increasing the amount of the wax would not have a pronounced effect on the formulation. *Id.* Appellant contends that Arthur '447 and Reichert “fail to disclose or suggest an amount of wax is 5-10 % by weight based on the total weight of the composition described therein.” *Id.*

The Examiner responded that Reichert discloses that wax lubricant agents, when used in the seed coating, decrease the emission of seed dust comprising insecticides and pesticides when the seeds are planted. Ans. 17 (citing Reichert ¶ 16). The Examiner also found that Reichert discloses its disclosed seed coating comprising a wax improves seed flow by providing

seed lubricity. *Id.* (citing Reichert ¶ 18). Based on these teachings in Reichert, the Examiner explained that it would have been obvious to one of ordinary skill in the art to optimize the amount of wax (“slip agent” in Arthur ’487 and Arthur ’447; “lubricant” in Reichert) in the seed coating to achieve the desired level of seed dust reduction and lubricity. *Id.* at 18. Appellant did not respond to these findings.

The Examiner’s evidence is sufficient to establish the obviousness of the claimed subject matter.

Reichert establishes that the purpose of using wax in the seed coating is to reduce seed dust and increase lubricity. Reichert applies different amounts of the seed coating to the seed (Reichert ¶ 36), providing a reason to optimize the coating amounts applied to the seed to achieve these desired results. As found by the Examiner, neither Arthur ’487 (*e.g.*, *see* ¶ 70, claim 13) or Reichert impose (*e.g.*, *see* ¶¶ 6, 15) a limit on how much wax is present in the compositions and therefore the specific examples in Arthur ’487, as found by the Examiner, are exemplary, and not restrictive.<sup>3</sup>

---

<sup>3</sup> Arthur ’447 further discloses that, in its seed treatment composition, the slip agent can be present in an amount of 0–5% by weight of the total formulation. Arthur ’447 ¶ 103. This amount overlaps or is close to the claimed amount of 5–10% by weight. It is well established that, when there is a range disclosed in the prior art, and the claimed invention overlaps or falls within that range, there is a presumption of obviousness. *In re Peterson*, 315 F.3d 1325, 1329 (Fed. Cir. 2003); *Iron Grip Barbell Co. v. USA Sports, Inc.*, 392 F.3d 1317, 1322 (Fed. Cir. 2004). Even if the ranges do not precisely overlap, *prima facie* obviousness is established when they “are so close that *prima facie* one skilled in the art would have expected them to have the same properties,” shifting the burden to the applicant to show they are different. *Titanium Metals*, 778 F.2d at 783.

Accordingly, we conclude that Appellant did not demonstrate error in the Examiner's rejection.<sup>4</sup> The obviousness rejection of claim 1 is affirmed. Claims 6 and 17–20 fall with claim 1 because separate reasons for their patentability were not provided. 37 C.F.R. § 41.37(c)(1)(iv).

Appellant did not provide separate arguments for claims 3, 4, and 7 rejected based on additional publications (rejections and 4). These claims fall with claim 1, as well.

#### OBVIOUSNESS-TYPE DOUBLE PATENTING REJECTIONS

Appellant requested that the obvious-type double patenting rejection be held in abeyance until patentable subject matter is indicated. Appeal Br. 5, n.1. However, because the rejections are pending and no substantive arguments were made, we summarily affirm the obviousness-type double-patenting rejections for the reasons set forth by the Examiner.

---

<sup>4</sup> We review appealed rejections for reversible error based on the arguments and evidence Appellant provides for each issue Appellant identifies. 37 C.F.R. § 41.37(c)(1)(iv); *Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential) (cited with approval in *In re Jung*, 637 F.3d 1356, 1365 (Fed. Cir. 2011) (explaining that even if the Examiner had failed to make a prima facie case, “it has long been the Board’s practice to require an applicant to identify the alleged error in the examiner’s rejections”)).

CONCLUSION

In summary:

<b>Claims Rejected</b>	<b>35 U.S.C. §</b>	<b>Reference(s)/Basis</b>	<b>Affirmed</b>	<b>Reversed</b>
1, 6, 17–20	103	Arthur '487, Arthur '447, Kober, Reichert	1, 6, 17–20	
3, 4	103	Arthur '487, Arthur '447, Kober, Reichert, Reus	3, 4	
7	103	Arthur '487, Arthur '447, Kober, Reichert, Lloyd	7	
1, 3, 4, 6, 17–20	101	Obviousness-type double patenting	1, 3, 4, 6, 17–20	
7	101	Obviousness-type double patenting	7	
1, 3, 4, 6, 7, 17–20	101	Obviousness-type double patenting	1, 3, 4, 6, 7, 17–20	
<b>Overall Outcome</b>			1, 3, 4, 6, 7, 17–20	

TIME PERIOD

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

AFFIRMED