

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(2) is not binding precedent of the Board.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

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte SYUNJI MATSUMURA,  
ISAO TAKADA, TOSHIAKI MIMA  
and  
KAZUO FUKUI

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Appeal No. 1999-1770  
Application 08/750,625<sup>1</sup>

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ON BRIEF

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<sup>1</sup> Application for patent filed December 11, 1996. According to appellants, the application is a National stage application under 37 U.S.C. § 371 of PCT/IB95/00451, filed June 8, 1995.

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Before CALVERT, McQUADE and NASE, Administrative Patent Judges.

CALVERT, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 5 to 15, all the claims remaining in the application.

The appealed claims are drawn to a spraying apparatus for pest control (claims 5 to 8) and a method for controlling pests (claims 9 to 15). They are reproduced in Appendix I of appellants' brief.<sup>2</sup>

The references applied in the rejections outstanding against the appealed claims are:

Arnt	2,814,529	Nov. 26, 1957
Korchak	3,373,762	Mar. 19, 1968
Cunningham et al. (Cunningham)	3,889,881	June 17, 1975
Aki et al. (Aki)	5,063,706	Nov. 12, 1991

Additional prior art applied herein in a rejection pursuant to 37 CFR § 1.196(b) is:

The admitted prior art in the second paragraph on page 1 of appellants' specification (APA).

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<sup>2</sup> We note that in claim 11, line 3, "axle" should be --angle--. This should be corrected in any further prosecution of this case.

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The claims on appeal stand finally rejected as follows:<sup>3</sup>

- (1) Claims 5 and 9, anticipated by Aki, under 35 U.S.C. § 102(b);
- (2) Claims 5, 6, 8 and 9, unpatentable over Cunningham in view of Arnt, under 35 U.S.C. § 103(a);
- (3) Claims 7 and 10 to 15, unpatentable over Cunningham in view of Arnt and Korchak, under 35 U.S.C. § 103(a).

Rejection (1)

Appellants' only argument as to this rejection is (brief, page 3):

Aki does not recite [sic: disclose] a structure wherein there is both a feces floor and feces board and, therefore, does not recognize the problem of applying a pest-control agent in such a structure. None of the drawings in Aki and none of Aki's examples of "relatively closed spaces" (i.e., factories, offices,

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<sup>3</sup> Additional rejections (1) of claims 9 to 15 under 35 U.S.C. § 112, and (2) of claims 5, 7, 9 and 10 under 35 U.S.C. § 102(b), made in the final rejection, have been withdrawn in the examiner's answer.

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warehouses, etc.) can contain both a feces floor and a feces board. The apparatus of Aki, therefore, cannot be said to be positioned above a feces board.

This argument is not well taken because, as the examiner points out on page 8 of the answer, neither claim 5 nor claim 9 recites both a feces floor and a feces board, but rather, both claims recite that the apparatus "is positioned above the higher of a feces floor or a feces board" (emphasis added), and claim 9 also recites applying a pest-control agent "to a feces floor or a feces board" (emphasis added). Since the feces board and feces

floor are claimed in the alternative, and the cattle sheds disclosed by Aki at col. 3, line 15, would have a feces floor, claims 5 and 9 are anticipated. In this regard, we note that for anticipation of claims, all that is required is that the claims "read on" something disclosed in a prior art reference. Celeritas Techs. Ltd. v. Rockwell Int'l Corp., 150 F.3d 1354, 1361, 47 USPQ2d 1516, 1522 (Fed. Cir. 1998), cert. denied, 119 S.Ct. 874 (1999). Here, the spraying apparatus of Aki is

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"positioned above the higher of a feces floor or a feces board," as claimed, because Aki only discloses a feces floor.

Rejection (1) will therefore be sustained.

Rejection (2)

We agree with appellants that it would not have been obvious, in view of Arnt, to modify the spraying apparatus disclosed by Cunningham in the manner proposed by the examiner. Specifically, we do not consider that Arnt's disclosure of a perforated tube would have suggested to one of ordinary skill the substitution of a perforated tube for the nozzle-equipped conduit system 9, 11 of Cunningham, because the thus-modified system would not be able to maintain the system under a positive pressure at all times. Since Cunningham discloses that the

maintenance of such positive pressure is an advantage for enabling immediate production of insecticide (col. 3, lines 25 to 35; col. 7, line 55, to col. 8, line 10), one of ordinary skill would not have been motivated to substitute open

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perforations for the valve-equipped nozzles which allow the positive pressure to be held.

Nevertheless, we consider claims 5 and 9 to be anticipated by Cunningham, under 35 U.S.C. § 102(b). As disclosed by Cunningham, the chicken house, which has hen cages 7 and a feces floor (see "litter pits" in col. 1, line 21), has a plurality of spraying tubes 9, which are affixed to pest-control agent-supplying means 13, etc., and supported by suspending means (col. 4, lines 31 to 33). The spraying tubes are perforated along the longitudinal axis, as claimed, in that the bore of the arm 71 extending to each nozzle 75 (Fig. 3) constitutes a "perforation" in the tube, it being noted that these claims do not exclude the presence of nozzles 75.

Accordingly, since anticipation is the epitome of obviousness, In re Avery, 518 F.2d 1228, 1234, 186 USPQ 161, 166 (CCPA 1975), we will sustain rejection (2) as to claims 5 and 9. However, because the basic thrust of the basis of our affirmance

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differs from that applied by the examiner, we will designate our affirmance as a new ground of rejection pursuant to 37 CFR § 1.196(b) in order to afford appellants a fair opportunity to respond thereto. Cf. In re Meyer, 599 F.2d 1026, 1031, 202 USPQ 175, 179 (CCPA 1979).

Cunningham does not disclose the various dimensions recited in claims 6 and 8.<sup>4</sup> The examiner contends that these would have been obvious as the optimum or workable ranges (answer, pages 5 to 6). However, in the view we take of this case, we do not consider that it would have been obvious to make Cunningham's "perforations" (the bores of tubes 71) the very small size (0.1 to 0.4 mm) recited in these claims, noting that the bore as shown by Cunningham (Figs. 3 and 4) is considerably larger in diameter than nozzle opening 101, which has a disclosed diameter of .007 inches (0.178 mm) (col. 6, lines 44 to 46). The rejection of claims 6 and 8 will not be sustained.

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<sup>4</sup> Since claim 8 is dependent on claim 7, it apparently should have been included under rejection (3), rather than rejection (2). This discrepancy is unimportant in view of the result reached herein.

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Rejection (3)

The examiner asserts as to this rejection (answer, page 6):

Korchak discloses an air-supplying means for supplying compressed air (64). It would have been an obvious substitution of functional equivalents to employ the air-supplying means for supplying compressed air of Korchak in the invention of Cunningham et al. and Arnt. Also, it would have been obvious to a person of ordinary skill in the art at the time the invention was made to employ the air-supplying means for supplying compressed air of Korchak in the invention of Cunningham et al. and Arnt in order to provide means for both evenly distributing the liquid at high pressure and purging the tubes when desired with air to push the undesired matter from the tubes.

In light of our discussion, supra, concerning rejection (2), we do not consider Arnt to be persuasive of obviousness. On the other hand, we conclude that claims 7, 10, 12 and 13 would have been obvious over Cunningham in view of Korchak. As

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discussed above, Cunningham discloses tubes with perforations, as broadly recited. Since Korchak discloses the use of compressed air to purge lines in between different materials to prevent contamination (col. 1, lines 22 to 25; col. 3, line 29, et seq.), it would in our view have been obvious to add a compressed air supply to the spraying tubes of Cunningham to purge the tubes and

prevent contamination between different insecticides. Such a modification of the Cunningham system would have been suggested to one of ordinary skill by Korchak's disclosure of an air purge system, and the obvious advantages to be gained therefrom.

The rejection of claim 11 will not be sustained, since the claimed perforation hole diameters would not have been obvious for use in the Cunningham apparatus. See the previous discussion concerning claims 6 and 8.

The rejection of claims 14 and 15 will not be sustained because the limitations recited in these two claims

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are not disclosed by Cunningham, nor would they have been obvious in view of Arnt or Korchak.

As a result, we will sustain the rejection of claims 7, 10, 12 and 13, but not of claims 11, 14 and 15. As with rejection (2) of claims 5 and 9, supra, the sustained rejection of claims 7, 10, 12 and 13 will be designated a new ground of rejection pursuant to 37 CFR § 1.196(b).

Rejection Pursuant to 37 CFR § 1.196(b)

Pursuant to 37 CFR § 1.196(b), claims 14 and 15 are rejected under 35 U.S.C. § 103(a) as unpatentable over Cunningham

in view of Korchak and APA. The Korchak reference is applied as in rejection (3) above.

Claim 14 recites that the henhouse is a chick type, multistage henhouse. Since the APA discloses that the known henhouse is "usually constructed according to the style of chick type multistage windowless henhouse" (page 1, lines 11 to 13), it would have been obvious to apply the Cunningham

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insecticide spraying system to such a henhouse, since it is disclosed as generally applicable to caged chicken houses (col. 1, line 10).

Claim 15 recites that the pest-control agent "is simultaneously applied to said feces floor and said feces board." In the Cunningham system, it is disclosed that the insecticide, which is atomized into the atmosphere, "condenses on surfaces of the premises" (col. 2, line 66) and gives the beneficial result of "larvae free surfaces in the premises" (col. 3, line 5). As stated in the preceding paragraph, it would have been obvious to utilize the Cunningham system in henhouses generally, and according to the APA, known henhouses have feces boards therein (page 1, lines 18 to 23). Therefore, in using the Cunningham system, the method recited in claim 15 would be performed because the atomized insecticide would condense on the surface of the feces boards as well as on the feces floor.

Conclusion

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The examiner's decision to reject claims 5 and 9 under 35 U.S.C. § 102(b) is affirmed, and his decision to reject claims 5 to 15 under 35 U.S.C. § 103(a) is affirmed as to claims 5, 7, 9, 10, 12 and 13, and reversed as to claims 6, 8, 11, 14 and 15. The affirmance of the rejection of claims 5, 7, 9, 10, 12 and 13 under § 103 is designated as a new ground of rejection pursuant to 37 CFR § 1.196(b). Claims 14 and 15 are rejected pursuant to 37 CFR § 1.196(b).

In addition to affirming the examiner's rejection of one or more claims, this decision contains a new ground of rejection pursuant to 37 CFR § 1.196(b) (amended effective Dec. 1, 1997, by final rule notice, 62 Fed. Reg. 53,131, 53,197 (Oct. 10, 1997), 1203 Off. Gaz. Pat. & Trademark Office 63, 122 (Oct. 21, 1997)). 37 CFR § 1.196(b) provides that "[a] new ground of rejection shall not be considered final for purposes of judicial review."

Regarding any affirmed rejection, 37 CFR § 1.197(b) provides:

(b) Appellant may file a single request for rehearing within two months from the date of the original decision. . . .

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37 CFR § 1.196(b) also provides that the appellants, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of proceedings (37 CFR § 1.197(c)) as to the rejected claims:

(1) Submit an appropriate amendment of the claims so rejected or a showing of facts relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the application will be remanded to the examiner. . . .

(2) Request that the application be reheard under § 1.197(b) by the Board of Patent Appeals and Interferences upon the same record. . . .

Should the appellants elect to prosecute further before the Primary Examiner pursuant to 37 CFR § 1.196(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection, the effective date of the affirmance is deferred until conclusion of the prosecution before the examiner unless, as a mere

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incident to the limited prosecution, the affirmed rejection is overcome.

If the appellants elect prosecution before the examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to

the Board of Patent Appeals and Interferences for final action on the affirmed rejection, including any timely request for rehearing thereof.

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

AFFIRMED-IN-PART - 37 CFR § 1.196(b)

	IAN A. CALVERT	)	
	Administrative Patent Judge	)	
		)	
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PATENT		)	BOARD OF
	JOHN P. McQUADE	)	APPEALS AND



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Michael W. Glynn et al.  
Patent Department  
Ciba-Geigy Corporation  
520 White Plains Road  
P.O. Box 2005  
Tarrytown, NY 10591-9005