

REMARKS

Claims 1-16 were pending in the action, with no claims yet allowed. New claims 17 and 18 are currently added. Reconsideration is respectfully requested for the reasons below.

Amendments to the Claims

Claim 1 is amended to recite a *synergistically effective amount*.

The Markush language of claims 7, 8, 9, and 10 is amended to additionally recite *the group consisting of*.

Claim 15 is currently cancelled.

New independent claim 17 is added based on original claim 8.

New independent claim 18 is added based on original claim 10.

The above amendments are made without disclaimer in the interest of advancing prosecution. Entry is respectfully requested.

35 U.S.C. §103

Claims 1-7 and 11-16 were rejected under 35 U.S.C. §103 as being unpatentable over WO 2007/048556 ("Tobler") in view of HCAPLUS abstract 1987:151486, HCAPLUS abstract 1987:419367, and Issac.

Claim 1 is currently amended to recite that the claimed composition comprises a *synergistically effective amount* of a compound of formula I and an azole fungicide. As explained below, the newly added limitation is not disclosed or suggested by the references, nor is any rationale or expectation of success present.

Tobler discloses 2070 specific compounds within the scope of its formula I (30 Tables with 69 compounds each). Tobler discloses that the two thousand and seventy compounds show fungicidal action. Tobler further discloses generally that the compounds of formula I can be combined with fertilizers, herbicides, fungicides and other suitable mixing partners (page 35, lines 10-17, as already mentioned by the Examiner and quoted below).

“The compounds of formula (I) or compositions, comprising a compound of formula (I) as active ingredient and an inert carrier, can be applied to the locus of the plant or plant to be treated, simultaneously or in succession with further compounds. These further compounds can be e.g. fertilizers or micronutrient donors or other preparations which influence the growth of plants. They can also be selective herbicides as well as insecticides, fungicides, bactericides, nematocides, molluscicides or mixtures of several of these preparations, if desired together with further carriers, surfactants or application promoting adjuvants customarily employed in the art of formulation.”

However, no specific combination of active ingredients is disclosed, let alone combinations with specific fungicidally active compound classes or specific fungicides. No properties of the mixtures, let alone a synergistic action is described. Applicant respectfully submits that to pick a specific compound from the specification of Tobler and conclude that the teaching mentioned above suggests the synergistic mixtures according to the present invention is clearly hindsight-induced and therefore improper.

Further, applicant is of the opinion that a combination of the teaching of Tobler with the teaching of any of HCAPLUS abstract 1987:151486, HCAPLUS abstract 1987:419367, or Issac in order to support a §103 rejection of applicant's current claims is improper. No teaching can be found in the disclosure of any of the secondary references that could motivate a person skilled in the art to combine a specifically selected compound from Tobler with myclobutanil to form the currently claimed superior fungicidal mixture with synergistic properties.

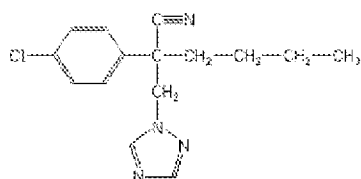
Further still, evidence of nonobviousness for the present application is clearly demonstrated in the biological data described on pages 46 to 75 of the application, as filed, which convincingly show the surprising overadditive effect of the mixtures comprising the compound of formula I and various azoles. The combined references fail to disclose that compounds of formula I according to the present invention show a beneficial synergistic effect when combined with specific mixing partners.

The HCAPLUS abstract 1987:151486, HCAPLUS abstract 1987:419367, and Issac disclose certain advantageous properties of myclobutanil. However, one of the most advantageous properties, the suitability of said compound as a component in a

superior synergistic mixture with specific carboxamide fungicides is neither disclosed nor suggested in said references. Therefore the references represent remote prior art only and are unable to overcome the unexpected results disclosed by applicant.

The Office also expresses some concerns with the scope of data related to azole fungicides. In particular, beginning on page 5 of the instant action the Office provides:

Although there is data for difenoconazole, cyproconazole, epoxiconazole, propiconazole, prothioconazole, tebuconazole, ipconazole, there is no data for the structurally divergent myclobutanil, just to mention one such example:

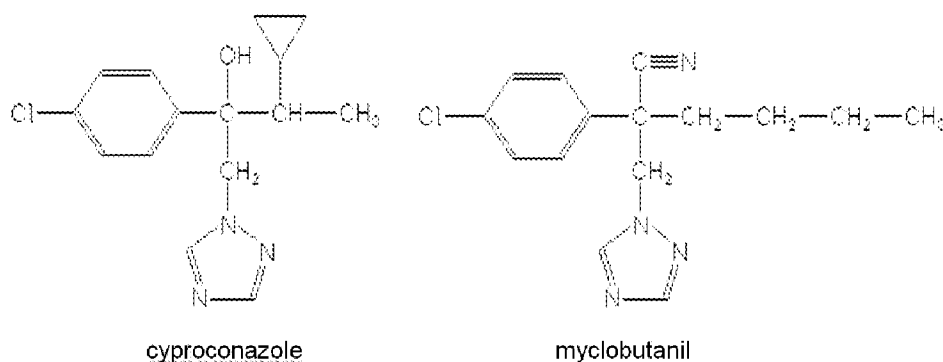


Myclobutanil

The Office goes on to provide on page 6:

Although the combined data as a whole in Tables B3.3, B6.4, B6.5 and B7.2 are sufficient to establish unexpected synergism, the point is that interaction of a structurally divergent compound such as myclobutanil + another active ingredient is not predictable because mixtures and their interaction with each other, pathogens to be controlled, and plant substrates are unpredictable. Evidence of nonobviousness, if any, must be commensurate in scope with that of the claimed subject matter. In re Kulling, 14 USPQ2d 1056, 1058 (Fed. Cir. 1990); In re Lindner, 173 USPQ 356, 358 (CCPA 1972).

First, applicant would like to thank the Office for its indication that Tables B3.3, B6.4, B6.5 and B7.2 contain sufficient data to establish unexpected synergism. Second, applicant respectfully notes that myclobutanil is not so structurally divergent from other azole fungicides, which the Office indicates there is also data for, e.g., cyproconazole. See, for example, the structural comparison of myclobutanil and cyproconazole below:



Indeed, when comparing myclobutanil to cyproconazole, myclobutanil contains a similar 1,2,4-triazole ring; a similar Cl-substituted benzene ring; a similar bridge between the triazole ring and the benzene ring; and a similarly-sized alkyl group (see the right hand side of the molecule above).

Further, MPEP 2145 provides that:

a showing of unexpected results for a single member of a claimed subgenus, or a narrow portion of a claimed range would be sufficient to rebut a *prima facie* case of obviousness if a skilled artisan “could ascertain a trend in the exemplified data that would allow him to reasonably extend the probative value thereof.”

Applicant respectfully submits that the skilled artisan could reasonably extend the probative value of the unexpected data to mixtures containing the myclobutanil. As noted above, myclobutanil is structurally similar to cyproconazole for which unexpected results are clearly demonstrated. The skilled artisan would also readily recognize myclobutanil as a class I sterol biosynthesis inhibitor similar to cyproconazole. In short, based on myclobutanil's structural and functional similarity to other exemplified fungicides, the skilled artisan could reasonably extend the probative value of the exemplified data to mixtures containing the myclobutanil.

For at least these reasons, reconsideration of the instant rejection is respectfully requested.

35 U.S.C. §112

Claims 6-10 and 11-16 were rejected under 35 U.S.C. §112, second paragraph, based on definiteness concerns regarding the Markush language.

Without conceding the point, applicant believes the instant amendments address the Office's concerns and respectfully request reconsideration.

New Claims

New claims 17 and 18 are based on original claims 8 and 10, respectively. Original claims 8 and 10 were allowable but for the 35 U.S.C. §112, second paragraph, rejection above. Because the Office's 35 U.S.C. §112, second paragraph, concerns have been remedied in new claims 17 and 18, they are similarly believed allowable and such indication is respectfully requested.

Objections

Claim 15 is also currently cancelled based on the Office's concerns that claim 15 is a substantial duplicate of claim 13.

Conclusion

For the reasons given above, applicant respectfully submits that all claims are in condition for allowance and requests such action. In the event any outstanding issues remain, applicant encourages the examiner to contact the undersigned.

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