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D E C I S I O N
of 20 September 2002

Case Number: T 0957/00 - 3.2.4

Application Number: 94931132.8

Publication Number: 0729310

IPC: A45D 19/00

Language of the proceedings: EN

Title of invention:
Hair Clip

Patentee:
Proto, Pasquale

Opponent:
Firma FRI-TECH Palumno & Schneider GbR

Headword:
-

Relevant legal provisions:
EPC Art. 54

Keyword:
"Novelty - yes"

Decisions cited:
T 0465/92

Catchword:
-



Case Number: T 0957/00 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 20 September 2002

Appellant: Proto, Pasquale
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 19 July 2000
revoking European patent No. 0 729 310 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: C. A. J. Andries
Members: T. Kriner
H. Preglau

Summary of Facts and Submissions

- I. The Appellant (Patent Proprietor) lodged an appeal, received at the EPO on 8 September 2000, against the decision of the Opposition Division dispatched on 19 July 2000 concerning the revocation of the European patent No. 0 729 310. The appeal fee was paid simultaneously and the statement setting out the grounds of appeal was received at the EPO on 17 November 2000.
- II. Opposition was filed against the patent as a whole and based on Article 100(a) EPC in conjunction with Articles 52(1), 54(1) and 56 EPC.

In its decision the Opposition Division held that the subject-matter of claim 1 as granted was not new with respect to

D1: US-A-3 692 032

and that the subject-matter of the patent in suit therefore did not satisfy the requirements of Articles 52(1) and 54 EPC.

- III. In addition to D1 the following documents have been cited in the opposition proceedings:

D2: US-A-3 800 811

D3: US-A-5 156 172

E1: US-A-3 543 771

E2: US-A-3 861 405

E3: US-A-2 041 641

E4: US-A-4 144 897

E5: US-A-5 058 609

E6: US-A-1 550 930

E7: US-A-3 247 852

E8: US-A-4 398 549.

IV. The Appellant requested that the appeal be allowed and that the decision of the Opposition Division be overturned.

The Respondent (Opponent) requested that the appeal be rejected and that the patent be revoked in its entirety.

V. Claim 1 of the patent specification reads as follows:

"A clip for use when colouring discrete hair strands which comprises two elongate gripper members (1,2) joined by a hinge (3) and including at their free ends (5) means for selectively connecting one gripper member to the other, the clip being characterised in that each gripper member (1,2) carries a separate strip of flexible impervious material (9)."

VI. In support of his request the Appellant relied essentially on the following submissions:

D1 referred to two discrete species of appliance. While the embodiments described with reference to Figures 2

to 6 were concerned with hair frosting, the embodiments described in Figures 7 and 8 were concerned with hair straightening. The conclusion of the Opposition Division according to which the subject-matter of claim 1 was not new, was based on Figure 8, the only embodiment where the so-called hair isolating means comprised two separate sheets. In accordance with the description these sheets should be formed of fairly rigid material so as to maintain the hair under tension while it was drying. If desired they could be made of perforate material to increase the contact of drying hair with air and thus reduce the drying time. With respect to these characteristics of the two sheets of the hair straightening device according to Figure 8, the skilled person would not conclude that the material employed for the sheets was flexible and impervious. On the contrary, such a conclusion would be in contradiction to the teaching of D1. Since D1 neither explicitly nor implicitly disclosed a clip comprising all features of claim 1, the subject-matter of this claim was new.

VII. The Respondent disputed the views of the Appellant. His arguments can be summarized as follows:

Although the embodiment of the hair dressing appliance of D1 shown in Figure 8 was intended for hair straightening, it was clear from the description that this embodiment was only particularly well adapted for use in hair straightening operations, but not restricted to this use.

When the device according to Figure 8 of D1 was used for hair straightening, the two sheets had to be only rigid enough so as to maintain the hair under tension

while it was drying. Since the rigidity of the material had merely to overcome the restoring force of the hair, the indication that the sheets should be formed of fairly rigid material meant that the material nevertheless could be very flexible. This conclusion was supported by the fact that D1 suggested the use of polyethylene or polyvinylchloride as suitable materials for the sheets, which both enabled the production of flexible sheets.

With respect to the perviousness of the sheets, D1 only stated that the sheets might be made of perforate material, if this was desired. This meant however, that the sheets had to be made of an impervious material, if a perforate material was not desired.

Since the clip shown in Figure 8 of D1 was suitable for use when colouring discrete hair strands and the material of the sheets could be flexible and impervious, the subject-matter of claim 1 was not new over this clip.

Reasons for the Decision

1. The appeal is admissible.
2. *Novelty*
 - 2.1 The disclosure of D1
 - 2.1.1 D1 discloses in its Figures 2 to 6 clips which are particularly well adapted for use when colouring (frosting) discrete hair strands. For this purpose the clips comprise elements for isolating discrete hair

strands. According to the description it is desirable that these elements be formed of a liquid impermeable material which may be flexible (see column 5, lines 28 to 33).

Additionally, D1 discloses in its Figures 7 and 8 clips which are particularly well adapted for use in hair straightening operations. For this purpose the clips comprise sheet members for maintaining the hair in a straight condition.

The sheet members are preferably formed of a rigid material and it is not necessary that they are liquid impermeable (see column 5, lines 54 to 56; column 6, lines 7 to 9 and lines 23 to 26).

Consequently D1 discloses either (in particular in Figure 6)

- a clip for use when colouring discrete hair strands which comprises two elongate gripper members (50, 52) joined by a hinge (16, see Figure 2) and including at their free ends means (18, see Figure 2) for selectively connecting one gripper member to the other, wherein each gripper member carries a separate element (58, 66) of flexible impervious material,

or (in particular in Figure 8)

- a clip which comprises two elongate gripper members (70, 72, see Figure 7) joined by a hinge (74, see Figure 7) and including at their free ends means (76, see Figure 7) for selectively connecting one gripper member to the other,

wherein each gripper member carries a separate strip (84, 86; see column 6, lines 30 to 36).

However, the first embodiment comprises only one separate element in form of a strip -66- (the other one is a bag -58-), and the strips of the second embodiment are not made of a flexible impervious material. On the contrary, with respect to the fact that the second embodiment is not intended for use when colouring discrete hair strands, but rather for use in hair straightening, the skilled person would follow the teaching of D1 according to which the strips of the second embodiment are made of a rigid, pervious material.

- 2.1.2 The Respondent's argumentation according to which the clip shown in Figure 8 of D1 comprises all features of claim 1 is not convincing.

The consistent view in the case law of the Boards of Appeal of the European Patent Organisation is that for an invention to lack novelty its subject-matter must be clearly and directly derivable from the prior art (see eg T 465/92, OJ EPO 1996, 32).

In the present case Figure 8 refers to a hair dressing appliance which is particularly well adapted for use in hair straightening operations (see column 5, lines 54 to 56). However, D1 does not disclose any further use of the appliance shown in Figure 8, let alone the use when colouring discrete hair strands. D1 discloses this use exclusively with respect to the hair dressing appliance shown in Figures 2 to 6. Hence, a clip for use when colouring discrete hair strands is not clearly and directly derivable from the prior art shown in

Figure 8.

Furthermore, it is also not clearly and directly derivable from this prior art that the sheets of the hair dressing appliance according to Figure 8 are made of a flexible and impervious material. Although it is true that polyethylene and polyvinylchloride which are suggested as suitable materials for these sheets (see column 6, lines 26 to 29), may be used for flexible and impervious elements, such a use in the clip shown in Figure 8 is in contradiction to the technical teaching of D1. While the hair isolating elements of the hair dressing appliances which are provided for use in colouring operations (the embodiments according to Figures 2 to 6) are described as being formed of a flexible, impervious material (see column 2, lines 25 to 29, and column 5, lines 28 to 33), the sheets of the clip according to Figure 8 are explicitly described as being formed of a material which preferably should be rigid and perforated (see column 6, lines 7 to 9, lines 18 to 20, lines 23 to 26, and lines 37 to 41). These characteristics are desirable in hair straightening operations in order to maintain the hair in a straight condition while drying and to increase the contact of the drying hair with air (see column 6, lines 18 to 20 and lines 39 to 41). Consequently D1 does not only not clearly and directly disclose the use of a strip of flexible impervious material for the sheets of the clip according to Figure 8, but rather suggests the use of a strip of rigid and pervious material.

2.2 D2 discloses a clip for use when colouring discrete hair strands which comprises two elongate gripper members (8, 10) joined by a hinge (11) and including at

their free ends means (14) for selectively connecting one gripper member to the other.

However, only one of the gripper members is adapted to carry a separate strip (1) of flexible impervious material (see column 4, lines 45 to 47).

- 2.3 D3 refers to a clip (12) for use when colouring discrete hair strands which comprises two elongate gripper members (22, 24) joined by a hinge (25) and including means (26) for selectively connecting one gripper member to the other.

However, only one of the gripper members carries a separate strip (14) of flexible impervious material (see column 4, lines 40 to 43), and the means for selectively connecting one gripper member to the other is not provided at the free ends of the gripper members.

- 2.4 E1 does not refer to a clip for use when colouring discrete hair strands which comprises two elongate gripper members, but to a rod (14) for curling hair and comprising two elongate rod members (14, 17) joined by a hinge (19) and including at their free ends means (23, 24) for selectively connecting one member to the other, wherein each rod member carries a part of a single strip of flexible impervious material (see column 1, lines 66 to 68; column 2, lines 9, 10, and 16 to 18; and column 3, lines 10 to 12).

- 2.5 E2 discloses a clip for use when colouring discrete hair strands which comprises two elongate gripper members (11, 12) joined by a hinge (connection at the end of surfaces 15, 15') and using a separate rubber

band (17) at their free ends for selectively connecting one gripper member to the other, wherein each gripper member carries one end of a strip of flexible impervious material (plastic bag 14).

However, the gripper members do not carry separate strips of this material, but a single bag.

- 2.6 E8 refers to a clip for use when colouring discrete hair strands which comprises two elongate gripper members (12, upper portion of 14 forming the groove 28) joined by a hinge (19) and including at their free ends means (20, 21) for selectively connecting one gripper member to the other.

However, the gripper members do not carry separate strips of flexible impervious material.

- 2.7 All further documents cited during the opposition proceedings are less relevant.

E3 refers to a hair waving device comprising a protector pad (11) which carries two separate strips (13a, 13b).

E4 discloses a hair bleaching compact (20) for sandwiching strands of hair between two halves (21, 22) of the compact.

E5 refers to a sheet (10) for use when colouring discrete hair strands.

E6 shows a bag (B) for use when colouring hair.

E7 refers to an umbilical cord clamp.

2.8 With respect to the above findings, the subject-matter of claim 1 is novel.

3. *Procedural matter*

The Opposition Division rejected the opposed patent exclusively on the ground of lack of novelty of the subject-matter of claim 1. Since this ground is not justified, the case is remitted to the first instance for the further examination of the opposed patent.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution on the basis of the patent as granted.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries