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D E C I S I O N
of 21 October 2005

Case Number: T 0259/04 - 3.3.10

Application Number: 94113338.1

Publication Number: 0640335

IPC: A61K 7/13

Language of the proceedings: EN

Title of invention:
Hair coloring composition

Patentee:
Clairol Incorporated

Opponents:
HENKEL KGaA
KPSS-Kao Professional Salon Services GmbH

Headword:
Hair coloring composition/CLAIROL INCORPORATED

Relevant legal provisions:
EPC Art. 123, 56
EPC R. 88

Keyword:
"Amendments (allowable) - no added matter - correction admitted - obvious error - declaratory nature"
"Inventive step (no) - determination of the closest prior art - obvious - no deterrent"

Decisions cited:
G 0003/89, G 0011/91, T 0002/81, T 0270/90, T 0026/01

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0259/04 - 3.3.10

D E C I S I O N
of the Technical Board of Appeal 3.3.10
of 21 October 2005

Appellant: (Opponent I)	HENKEL KGaA VTP (Patente) D-40191 Düsseldorf (DE)
Representative:	-
Party as of right: (Opponent II)	KPSS-Kao Professional Salon Services GmbH Zerninstrasse 10-18 D-64280 Darmstadt (DE)
Representative:	-
Respondent: (Proprietor of the patent)	Clairol Incorporated One Blachley Road Stamford CT 06922 (US)
Representative:	Kinzebach, Werner Patentanwälte Reitstötter, Kinzebach und Partner Postfach 86 06 49 D-81633 München (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted 9 January 2004 rejecting the opposition filed against European patent No. 0640335 pursuant to Article 102(2) EPC.**

Composition of the Board:

Chairman: R. Freimuth
Members: J. Schmid
J. Seitz

Summary of Facts and Submissions

I. The Appellant (Opponent I) lodged an appeal on 17 February 2004 against the decision of the Opposition Division, posted on 9 January 2004, which rejected the oppositions against European patent No. 0 640 335 pursuant to Article 102(2) EPC.

II. Notices of opposition had been filed by the Appellant and the Opponent II, the latter now being Party as of right, requesting revocation of the patent in suit in its entirety on the grounds of Article 100(a) and (b) EPC, in particular on the grounds of lack of sufficient disclosure, of novelty and of inventive step. Inter alia the following documents were submitted in opposition proceedings:

(1) WO-A-92/01438 and

(2) EP-A-0 089 749.

III. The Opposition Division held that the claims in the form as granted satisfied the requirements of the EPC. The Opposition Division found that the invention in the patent in suit was sufficiently disclosed (Article 100(b) EPC), that the documents cited neither destroyed the novelty of, nor rendered obvious, the subject-matter of the patent in suit.

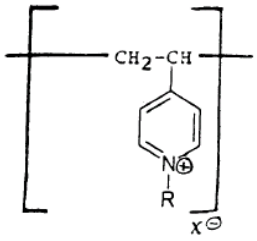
As regards inventive step, the Opposition Division considered that the patent in suit and document (2) conveyed divergent teachings. Therefore the claimed subject-matter provided a non-obvious alternative to

that proposed in document (2) and, thus, involved an inventive step.

IV. At the oral proceedings before the Board held on 21 October 2005 the Respondent (Proprietor of the patent) defended the maintenance of the patent in suit in amended form on the basis of fresh claims 1 to 10, thereby superseding any previous request. Independent claim 1 read as follows:

"A two part aqueous composition for coloring and providing durable conditioning to human hair which forms a gel on mixing of the two parts comprising:

a: an alkaline aqueous lotion having a pH of from 7,5 to 11 containing from 0.005 % by weight to 5 % by weight of at least one primary intermediate and at least one coupler for the formation of oxidation dyes, from 0.1 % to 5 % of a cationic polymer, from 0.5 % to 15 % by weight of an anionic or amphoteric surfactant or mixture thereof, at least 70 % by weight water, 0 to 5 % by weight of an organic solvent, and wherein the cationic polymer forms an insoluble precipitate when mixed with said surfactant in water at a pH above 7 and the precipitate does not readily dissolve upon addition of more of said surfactant and the cationic polymer is selected from quaternary polymers of diallyldialkyl-ammonium salts in which the alkyl groups are the same or different and contain from 1 to 5 carbon atoms, quaternized polyvinylpyridine of the formula



wherein R is alkyl or hydroxyalkyl having 1 to 5 carbon atoms and X is an anion, and polymethacrylamidopropyltrimethyl-ammonium chloride;

b: an aqueous developer having a pH of from about 2 to about 6 containing from 0.5 % by weight to 40 % by weight of a peroxide oxidizer and from 0.1 % by weight to 20 % by weight of an anionic polymer, the anionic polymer being characterized in that it is insoluble in the developer and dissolves in the gel which forms when the lotion and developer are mixed and is selected from copolymers of acrylic acid and acrylic esters".

V. The submissions of the Appellant can be summarized as follows:

The Appellant argued that the amended pH range of 7.5 to 11 in claim 1 contravened Article 123(2) EPC. In this respect, it submitted that there was no direct link between the lower value of 7.5, which was originally the lower limit of a preferred pH range, and the higher pH value of 11, which was the upper limit of another, more general pH range.

Furthermore, it put forward that the requirements of Rule 88 EPC were not met with respect to the

correction of the formula of the polyvinylpyridine in claim 1.

As regards inventive step, the Appellant held that document (1) represented the closest prior art, since it had the same objectives as and the most relevant features in common with the invention. The only difference between the teaching of document (1) and the patent in suit was the reference to hair conditioning, which was approached in a rather general way in document (1). The skilled person faced with the conditioning of the hair would consider document (2) which related to the improvement of that property. That document taught to incorporate particular cationic polymers as defined in claim 1 into the composition in order to achieve durable conditioning.

According to the Appellant the fact that the cationic polymer was selected among those cationic polymers which precipitate in water in the presence of an anionic surfactant did not imply that the cationic polymer was necessarily in the form of a precipitate with the anionic surfactant in component (a) of the claimed compositions requiring the presence of at least 70% by weight of water.

The Appellant therefore concluded that the combination of document (1) with document (2) was obvious and resulted in the claimed invention.

VI. The Respondent indicated that the proposed correction of the error in the formula of claim 1 was obvious for the reason of the closeness of the N^+-group to the 4-position of the phenyl ring.

As regards inventive step, the Respondent argued that document (2) was the closest prior art since it was concerned with the conditioning effect of hair colouring compositions like the present invention. The Respondent submitted that document (1) could not represent the closest prior art since document (1) was concerned with compositions wherein the carrier avoided the formation of lime soaps, achieved the desired viscosity and resulted in the formation of a flowable gel structure.

The technical problem starting from document (2) was the provision of compositions for colouring and providing durable conditioning to human air. This problem was solved by the claimed compositions as apparent from the data of table 2 provided with the letter of 5 May 1998 in examination proceedings.

According to document (2) it was essential that the formation of a reaction product between the cationic polymer and the anionic surfactant should be avoided and that the cationic polymer should be present in dissolved form in the composition and be precipitated only on the hair to produce the desired conditioning effect. This effect was achieved in document (2) by using in the composition a large amount of organic solvent and a limited amount of water in the composition which was considerably below the 70% limit according to the present invention. The Respondent therefore concluded that the skilled person would clearly be prevented in view of the entire teaching of document (2) from using higher amounts of water and lower amounts of solvents in the compositions.

As to a combination of document (2) with document (1), it underlined that document (1) was concerned with effects having nothing to do with the problem underlying the invention. Even if a combination of the teachings of documents (1) and (2) were envisaged, there would be no guidance, neither in document (1) nor in document (2), how to modify the compositions of document (2) in order to solve the present technical problem.

VII. The Party as of right supported the arguments of the Appellant.

VIII. The Appellant requested that the decision under appeal be set aside and that the patent be revoked. The Party as of right supported that request.

The Respondent requested that the appeal be dismissed and that the patent be maintained on the basis of claims 1 to 10 filed during the oral proceedings.

IX. At the end of the oral proceedings the decision of the Board was announced.

Reasons for the Decision

1. The appeal is admissible.

2. *Amendments (Article 123 EPC and Rule 88 EPC)*

2.1 The first amendment to independent claim 1 of the patent in suit as granted consists in restricting the pH range of the lotion (a) from 7 to 11 to 7.5 to 11.

Original claim 1 and page 10, line 2 of the application as filed disclose the general range of 7 to 11 while it is specified on page 10, line 3 of the original application that a pH range of 7.5 to 9.5 is preferred.

Both endpoints of the claimed range of 7.5 and 11 being specifically named in the application as filed, this amendment does not generate any new subject-matter within the meaning of Article 123(2) EPC (see decision T 2/81, OJ EPO 1982, 394, point 3 of the reasons).

2.2 A second amendment consists in restricting the content of organic solvents to a range of 0% to 5% by weight in the lotion. It is supported by the two last lines of the second paragraph of page 18 of the original application.

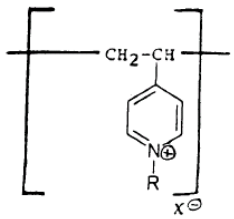
2.3 A third amendment consists in specifying the anionic polymer according to the two first lines of the third paragraph of page 19 of the original application.

2.4 A fourth amendment to independent claim 1 of the patent in suit as granted consists in defining the cationic polymer.

2.4.1 As regards the specification of the cationic polymer to represent particular quaternary polymers of diallyldialkyl-ammonium salts and polymethacrylamidopropyltrimethyl-ammonium chloride, the support for that amendment is found on page 16, lines 1 to 4 of the last paragraph and on page 17, penultimate line of the original application.

2.4.2 *Correction*

2.4.2.1 As regards the specification of the cationic polymer to represent the quaternized polyvinylpyridine of the formula



wherein R is alkyl or hydroxyalkyl having 1 to 5 carbon atoms and X is an anion, the basis of that amendment is found on page 17, third paragraph of the application as filed.

2.4.2.2 The Appellant and the Respondent had divergent views on the matter whether or not that amendment of claim 1 included the correction of an obvious error regarding the formula within the meaning of Rule 88 EPC.

Rule 88, second sentence, EPC governs the present issue where the Respondent submits that an error occurred in the specification of the patent in suit so that its text does not conform to what was intended and where it seeks to correct that error in order to

bring the text into conformity with the intended wording.

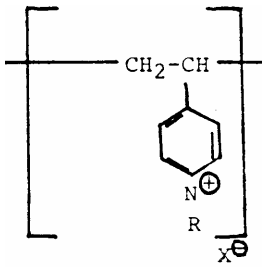
In order for a correction under Rule 88, second sentence, EPC to be allowable in the description or in the claims, it must be established

(a) that an error is in fact present in the document filed with the EPO, and

(b) that the correction of the error is obvious in the sense that it is immediately evident that nothing else would have been intended than what is offered as the correction.

2.4.2.3 With respect to the above requirement (a), the patent in suit must, following an amendment under Article 123 EPC, contain such an obvious error that a skilled person has no doubt that this information is not correct and - considered objectively - cannot be meant to read as such (see opinion G 3/89 and decision G 11/91, OJ EPO 1993, 117 and 125, point 5 of the reasons).

In the present case, the formula



defining the quaternized polyvinylpyridine in the original application makes chemically no sense. Therefore the skilled person has no doubt that this formula is not correct with the consequence that the

above requirement (a) is fulfilled. This finding was not contested by the Appellant and the Party as of right.

2.4.2.4 With respect to the above requirement (b), the prohibition of extension enshrined in Article 123(2) EPC also applies to such a correction. This means that it is essential to determine whether the skilled person would objectively, i.e. directly and unambiguously, have derived the corrected feature from the European patent application as a whole on the date of filing of the application (see opinion G 3/89 and decision G 11/91, *loc. cit.*, points 2 and 6 of the reasons). In the present case, the "4-pyridinium" moiety for the erroneous formula is offered as the correction of the obvious error in the patent in suit (see points IV and 2.4.2.1 above).

The formula which is specifically disclosed on page 17, third paragraph of the application as filed comprises a phenyl ring and a non-bonded N^+-group. The skilled person would therefore immediately realise that the formula should represent a pyridinium moiety in order to reflect correctly the chemical name of the polymer given on original page 17, third paragraph, line 1. Thus, that correction offered is self-evident. This finding was not contested by the Appellant and the Party as of right.

The Board notes that theoretically there are three positions for including the N^+-group into the phenyl ring, i.e. forming a 2-, 3- or 4-pyridinium moiety. However, for the reason of the spatial closeness of the N^+-group to the 4-position of the phenyl ring in

the erroneous formula, there can be no doubts that it was originally a mere misprint and that the 4-position was intended indeed.

For these reasons, in the Board's judgment, the skilled person would directly and unambiguously derive the corrected definition for the formula from the application as filed, and there are no doubts that nothing else was intended than what is proposed as the correction, with the consequence that the above requirement (b) is fulfilled as well.

2.4.2.5 To conclude, the amendment of the formula of the quaternized polyvinylpyridine showing a 4-pyridinium moiety in claim 1 as amended is an allowable correction in the sense of Rule 88, second sentence, EPC.

In accordance with the opinion of the Enlarged Board of Appeal G 3/89 and the decision G 11/91 (*loc. cit.*) such an obvious correction is of strictly declaratory nature and does not infringe the prohibition of extension under Article 123(2) EPC.

2.5 Therefore all the above mentioned amendments to claim 1 as granted comply with the requirements of Article 123(2) EPC.

Since they all restrict the scope of the claims and, thus, of the protection conferred thereby, they do fulfil the requirements of Article 123(3) EPC.

3. *Insufficiency of disclosure of the invention and novelty*

Insufficiency of disclosure of the invention and novelty were no longer at issue in this appeal. The Board is satisfied that the patent in suit discloses the invention in a manner sufficiently clear and complete to be carried out by a person skilled in the art and that the claimed subject-matter is novel over the cited prior art. Although raised as grounds for opposition by the Appellant and the Party as of right, these issues were no longer in dispute before the Board in view of the amendments made to the claims according to the sole pending request. Hence, no detailed reasoning needs to be given.

4. *Inventive step*

4.1 According to the established jurisprudence of the Boards of Appeal it is necessary, in order to assess inventive step, to establish the closest state of the art, to determine in the light thereof the technical problem which the invention addresses and successfully solves, and to examine the obviousness of the claimed solution to this problem in view of the state of the art. This "problem-solution approach" ensures assessing inventive step on an objective basis. In this context, the Boards of Appeal have developed certain criteria that should be adhered to in order to identify the closest state of the art to be treated as the starting point. The crucial criteria are that the "closest prior art" is normally a prior art document disclosing subject-matter conceived for the same purpose as the claimed invention and additionally

having the most relevant technical features, i.e. the essential structural elements, in common.

4.2 The patent in suit is directed to hair colouring compositions comprising two parts, i.e. an aqueous lotion of an oxidative dye precursor and an aqueous developer. The objectives to be achieved as indicated in the patent in suit consist in providing lotions and developers which can be readily formed into a gelled mixture having an appropriate viscosity which imparts inter alia a durable conditioning effect to treated hair (patent specification page 3, lines 45 to 56). In relation to these objectives and to the relevant technical features in common, a selection among documents (1) and (2) must be made as to which is to be considered as the "closest prior art". The Appellant and the Party as of right, on the one hand, and the Respondent, on the other, had divergent views on the matter which of those documents should be treated as the closest prior art.

4.2.1 Document (1), which the Appellant and the Party as of right considered as the closest piece of prior art, relates to hair colouring compositions consisting of an aqueous lotion, comprising an oxidative dye precursor, and an aqueous oxidizing developer which form a gelled mixture having an appropriate viscosity (page 1, lines 1 to 6 and claim 1).

The lotions disclosed in table I on page 9 have a pH value of 10. They contain, according to the uncontested submission of the Appellant,

- 0.31% by weight of primary intermediates (p-phenylenediamine and p-aminophenol),
- couplers for the formation of oxidation dyes (resorcinol, 2,4-dichloro-m-aminophenol, 4-chlororesorcinol),
- about 3.5% by weight of anionic and amphoteric surfactants (salts of fatty acids, Texapon N and Dehyton K),
- 2,15% by weight of an organic solvent (1,2-propylenglycol) and
- far above 70% by weight of water (example 1 contains about 85% by weight of water).

The lotion may also contain other cosmetic additives such as water soluble cationic polymers (page 5, last paragraph).

The developer is an aqueous oxidizing composition which preferably has a pH value of 4 and comprises
- 3 to 10 % by weight of hydroxide peroxide and
- 1 to 5% by weight of an aqueous dispersion of an anionic polymer, namely acryl acid and/or methacryl acid (co)polymers (page 6, lines 1 to 7; table on page 10).

Upon mixture of the lotion and the developer a gel is formed in which the anionic polymer dissolves (page 7, lines 4 to 11).

Thus, document (1) relates to the same purpose and aims at the objectives of the claimed invention, i.e. at hair-colouring and gel-forming compositions. Only a single modification in the lotion of the compositions referred to in that document is required

to arrive at the claimed compositions, i.e. the use of a particular cationic polymer in specific amounts, while the developer of the composition, which is essential to form a gel upon mixing, remains unchanged.

4.2.2 Document (2), which the Respondent considered as the closest piece of prior art, relates to compositions for dyeing hair having long lasting conditioning (page 1, lines 1 to 4) which also represents an objective of the patent in suit.

The compositions disclosed in document (2) include inter alia oxidative dyeing compositions in which a para-component and a coupler are used to form a dye in the presence of an oxidizer or air (page 4, last paragraph). The aqueous lotion has a pH value above 8 (page 16, last paragraph). The lotion of example 1 on page 21 comprises, according to the uncontested submission of the Respondent,

- 0.011% by weight of primary intermediates (p-phenylenediamine and N,N-bis-hydroxyethyl-p-phenylenediamine sulfate),
- couplers for the formation of oxidation dyes (resorcinol, 1-naphthol, 2-methylresorcinol),
- about 7.25% by weight of anionic surfactants (salts of oleic acid, sodium lauryl sulfate),
- 18% by weight of a mixture of ethoxydiglycol, propylene glycol and ethanol,
- 3,6 % by weight of a cationic polymer (Onamer M) and
- about 31.7% by weight of water.

In the description of document (2) the amount of organic solvent is not specified; the sole requirement consists in that the reaction product of the cationic polymer and anionic surfactant is soluble in the aqueous solution.

The developer may be an aqueous solution comprising 6% hydrogen peroxide (page 19, lines 11 and 12) without, however, forming a gel structure when mixing the lotion with the developer.

Thus, document (2) relates to the same purpose and aims also at objectives of the patent in suit, i.e. at hair colouring compositions with long lasting conditioning.

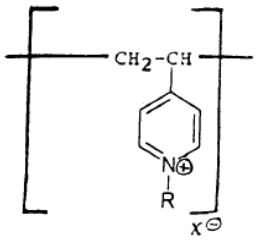
However, there are several modifications required both in the lotion and in the developer to arrive at the claimed compositions, i.e. the use of particular water and solvent concentrations in the compositions, while the developer of the composition lacks the anionic polymer which is essential for the formation of a gel structure.

4.2.3 The Board concludes therefore that document (2) represents prior art which is further away from the patent in suit than document (1).

For these reasons, in the Board's judgment, document (1) represents the prior art closest to the patent in suit and, thus, the starting point in the assessment of inventive step.

4.3 In view of this state of the art, the problem underlying the patent in suit as submitted by all parties during the oral proceedings before the Board is to provide further gel forming hair colouring compositions providing durable conditioning.

4.4 As a solution to this problem, the patent in suit proposes compositions as defined in claim 1 comprising from 0.15 to 5% by weight of a cationic polymer which is selected from quaternary polymers of diallyldialkyl-ammonium salts in which the alkyl groups are the same or different and contain from 1 to 5 carbon atoms, quaternized polyvinylpyridine of the formula



wherein R is alkyl or hydroxyalkyl having 1 to 5 carbon atoms and X is an anion, and polymethacrylamidopropyltrimethyl-ammonium chloride and which cationic polymer forms an insoluble precipitate when mixed with an anionic or amphoteric surfactant in water at a pH above 7 and the precipitate does not readily dissolve upon addition of more of said surfactant (see point IV above).

4.5 Neither the Appellant nor the Party as of right ever disputed that the claimed hair colouring compositions form a gel and achieve durable conditioning; and the Board is not aware of any reason for challenging this finding. Having regard to the data provided with

letter of 5 May 1998 during examination proceedings, the Board is satisfied that the problem underlying the patent in suit has been successfully solved.

Those data show in table 1 that the polymer Merquat 100 (also labelled Polyquat 6), which is a polydimethyldiallyl-ammonium chloride as defined in claim 1, and the polymer Polymaptac, which is a polymethacrylamidopropyltrimethyl-ammonium chloride, meet the further requirement set forth in claim 1, i.e. they are cationic polymers which form an insoluble precipitate when mixed with an anionic or amphoteric surfactant in water at a pH above 7 and the precipitate does not readily dissolve upon addition of more of said surfactant. Furthermore, table 2 shows that hair colouring compositions comprising these cationic polymers have durable conditioning which last 11 or more shampooings before the conditioning is removed.

4.6 Finally, it remains to be decided whether or not the proposed solution to the problem underlying the patent in suit is obvious in view of the cited state of the art.

When starting from the compositions known from document (1), it is a matter of course that the person skilled in the art seeking to provide hair colouring compositions having durable conditioning would turn his attention to that prior art in the field of coloration of hair just dealing with the same technical problem. As a skilled person he would be struck by document (2) which relates to the durability

of conditioning of the hair (page 1, first paragraph, page 2, line 1).

Document (2) teaches that the durability of the conditioning effect is achieved with certain types of cationic polymers (page 5, lines 11 to 13). Cationic polymers qualified in that document as being suitable include quaternium 40, which is a quaternary polymer of dimethyldiallyl-ammonium chloride having the commercial name Merquat-100, which is explicitly characterised as "perform[ing] satisfactorily under the criteria for durable conditioning" (page 9, line 18). This cationic polymer is suitable in the claimed invention as well (see patent specification page 8, line 39).

Document (2) teaches that the particular cationic polymers when used in hair colouring compositions together with an anionic surfactant form upon dilution with water an insoluble conditioning complex on the hair which results in a durable conditioning (see page 9, lines 5 to 10 in combination with page 2, line 8). Since the hair colouring compositions known from the closest document (1) already comprise an anionic surfactant, the skilled person is all the more guided to include a cationic polymer into the compositions in order to achieve durable conditioning.

Document (2) further teaches that suitably the cationic polymer should be present in the lotions in a concentration from 2% to 5% and in the case of Merquat-100 in a concentration of about 2.5% (page 15, lines 11 to 18), which concentrations are within the claimed range.

The Board concludes from the above that the state of the art represented by document (2) gives the person skilled in the art a concrete hint as to how to solve the problem underlying the patent in suit as defined in point 4.3 above of providing durable conditioning, namely by adding into the hair colouring compositions known from the closest prior art document (1), the particular cationic polymers known from document (2) in concentrations within the claimed range thereby arriving at the claimed compositions, i.e. the solution proposed by the patent in suit. In the Board's judgment, it was obvious to try to follow the avenue indicated in the state of the art with a reasonable expectation of success without involving any inventive ingenuity, all the more because the compositions of document (1) may already contain cationic polymers.

4.7 For the following reasons the Board cannot accept the Respondent's argument that the teaching of document (2) and that of the patent in suit were entirely opposite and therefore the skilled person would be deterred from considering document (2) when striving for a solution to the problem underlying the invention.

The Respondent based its argument on the allegation that the cationic polymer and the anionic surfactant formed a precipitate in the lotion (a) of the claimed hair colouring composition whereas the precipitation of a reaction product between the cationic polymer and the anionic surfactant should be avoided pursuant to the teaching of document (2).

4.7.1 Firstly, the Board notes that the Respondent submitted that document (2) represented the closest state of the art and starting point in the assessment of inventive step (see point 4.2.2 above) while the Respondent submitted when assessing obviousness for concluding on inventive step that the skilled person was deterred from applying the teaching of just that document. Thus, the Respondent's submissions as regards document (2) are inconsistent with the consequence that neither can convince the Board.

4.7.2 Secondly, claim 1 of the patent in suit neither indicates the feature that a reaction product between the cationic polymer and the anionic surfactant is formed in lotion (a) of the hair colouring composition, nor does this claim require that a once formed reaction product be in the form of a precipitate.

Nor discloses the description of the patent in suit the presence of such reaction product or precipitate within the lotion.

4.7.3 While acknowledging this finding, the Respondent alleged that the precipitate of the cationic polymer and the anionic surfactant was necessarily and automatically formed in lotion (a), with the consequence that the presence of a precipitate was an implicit feature of claim 1.

However, according to established jurisprudence of the Boards of Appeal, each of the parties to the proceedings carries the burden of proof for the facts it alleges (see e.g. decision T 270/90, OJ EPO 1993, 725, point 2.1 of the reasons; T 26/01, point 3.4 of

the reasons, not published in OJ EPO). If a party, whose arguments rest on these alleged facts, is unable to discharge its onus of proof, this goes to the detriment of that party.

In the present case, to support its allegation the Respondent argued that the cationic polymer was selected to form a precipitate with an anionic or amphoteric surfactant in water at a pH value above 7. However, the Respondent's argument confuses the rule of selection for identifying cationic polymers suitable in the claimed hair colouring composition with the features characterizing lotion (a).

Thus, contrary to the rule for selecting suitable cationic polymers comprising only pure water, lotion (a) comprises up to 5% by weight of solvents and, additionally, other components acting as solvents but labelled differently, e.g. ethanolamine, in a amount of up to 9,5% by weight (see patent specification, examples 2 and 5). Hence, any eventual reaction product of the cationic polymer and the anionic surfactant does not necessarily precipitate in lotion (a) but the cationic polymer and the anionic surfactant remain in solution due to the presence of such a substantial amount of solvents and components acting as such. Therefore the Respondent's allegation that a precipitate is mandatorily present in lotion (a) of claim 1 is devoid of merit.

In the absence of any substantiating facts and corroborating evidence, the Board, thus, considers the Respondent's allegation that the cationic polymer must

be in the form of a precipitate in lotion (a) as a mere speculation what the Board cannot sanction.

4.7.4 Under these circumstances, the Board concludes that the person skilled in the art would not have been deterred from applying the teaching of document (2) to hair colouring compositions known from the closest prior document (1) in order to solve the problem underlying the patent in suit.

4.8 For these reasons, the solution to this problem proposed in claim 1 is obvious in the light of the prior art.

5. As a result, the Respondent's request is not allowable for lack of inventive step pursuant to Article 56 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chairman:

C. Moser R. Freimuth