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**Datasheet for the decision
of 19 March 2018**

Case Number: T 2131/13 - 3.3.01

Application Number: 05757290.1

Publication Number: 1765932

IPC: C09B67/40, C09B31/068, C10L1/14

Language of the proceedings: EN

Title of invention:
ALIPHATIC HYDROCARBON SOLUBLE RED DYES

Applicant:
United Color Manufacturing Inc.

Headword:
Red dye concentrate/UNITED COLOR

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
Added subject-matter (yes) - all requests

Decisions cited:

Catchword:



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Case Number: T 2131/13 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 19 March 2018

Appellant: United Color Manufacturing Inc.
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Newtown,
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Representative: J A Kemp
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 26 April 2013
refusing European patent application No.
05757290.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

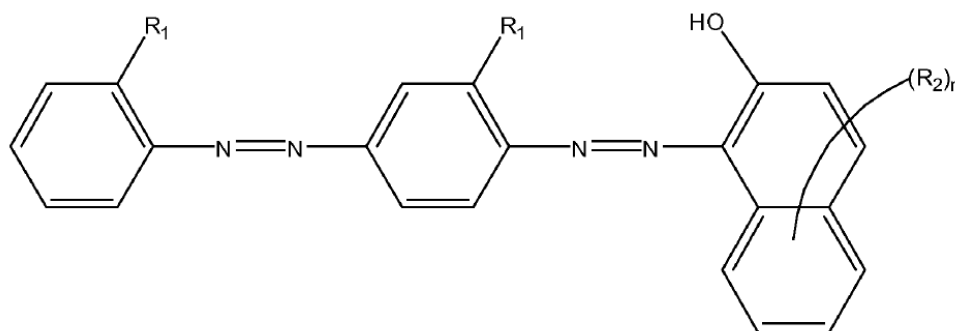
Chairman A. Lindner
Members: J. Molina de Alba
P. de Heij

Summary of Facts and Submissions

- I. The present appeal lies from the decision of the examining division refusing European patent application No. 05757290.1.
- II. In the decision under appeal, the examining division held that the subject-matter in claim 1 of the main request and auxiliary request 1 lacked an inventive step and that claim 1 of auxiliary request 2 added subject-matter.
- III. With the statement of grounds of appeal, the appellant (applicant) requested that the appealed decision be set aside and that a patent be granted on the basis of any of the claim sets filed therewith as main request and auxiliary requests 1 and 2, wherein the main request and auxiliary request 1 were identical to those underlying the appealed decision.

Claim 1 of the main request reads as follows:

" 1. A stable liquid concentrate comprising a dye component comprising an amount of a dye of the formula:



wherein R_1 is an ethyl or isopropyl group and R_2 is an alkyl group of from 6 to 12 carbon atoms and n is a number from 1, 2, or 3;

wherein the stable liquid concentrate contains enough dye component to provide a colorant equivalent to at least a calculated 40% solution of C.I. Solvent Reds 24, 25, or 26 in xylene; and

wherein the dye component is dissolved in either an aliphatic hydrocarbon or an alicyclic hydrocarbon."

Claim 1 of auxiliary request 1 differs from that of the main request in the restrictions that the substituent R_2 is heptyl or nonyl and the aliphatic or alicyclic hydrocarbon is kerosene or n-hexane.

Claim 1 of auxiliary request 2 differs from that of auxiliary request 1 in the further restrictions that R_1 is ethyl and the aliphatic or alicyclic hydrocarbon is kerosene.

- IV. In a communication annexed to the summons to oral proceedings, the board set out its provisional view that claim 1 of all the requests on file added subject-matter and lacked clarity. In addition, the claimed concentrates lacked an inventive step.

With regard to the issue of added subject-matter, the board was of the opinion that the insertion of xylene as the solvent in the reference solutions defined in claim 1 of all the requests was not supported by paragraphs [0010] and [0019], cited by the appellant during the examination proceedings as being the basis in the original application for the amendment (see appellant's letter dated 5 July 2012). In particular,

those paragraphs neither referred to C.I. Solvent Reds 24, 25 or 26 nor disclosed xylene as a solvent for the preparation of reference solutions.

- V. In its reply dated 19 February 2018, the appellant provided new arguments based on the disclosures in paragraphs [0013], [0019] and [0022] of the application as originally filed.

With letter dated 12 March 2018, the appellant withdrew its request for oral proceedings and requested a decision on the state of the file.

- VI. The board went ahead with the oral proceedings, which were held on 19 March 2018 in the absence of the appellant. At the end of the proceedings, the chairman announced the board's decision.

- VII. The appellant's arguments, insofar as they are relevant to the present decision, may be summarised as follows:

The specification of xylene as the solvent in the reference solutions of claim 1 was directly and unambiguously disclosed in paragraphs [0019] and [0022] of the application as filed, especially in the light of paragraph [0013].

On the one hand, paragraphs [0013] and [0019] contraposed the dye concentrates of the invention, based on aliphatic or alicyclic hydrocarbons, to those from the prior art based on xylene. On the other hand, paragraph [0022] defined the dye content of the concentrates of the invention by reference to a calculated 40% solution of C.I. Solvent Reds 24, 25 or 26. Hence, it was clear from those passages that the aim of the invention was to replace xylene with an

aliphatic or alicyclic hydrocarbon in the concentrates of the prior art, and this would have led the skilled person to unambiguously derive that the solvent in the reference solutions was xylene.

VIII. The appellant requested in writing that the decision under appeal be set aside and that a patent be granted on the basis of the main request or alternatively on the basis of auxiliary request 1 or auxiliary request 2, all submitted with the statement of grounds of appeal.

Reasons for the Decision

1. The appeal is admissible.
2. The appellant did not attend the oral proceedings, although it had been duly summoned. Therefore, it has been treated as relying on its written case only (Rule 115(2) EPC and Article 15(3) RPBA).

Taking into consideration that the facts and evidence on which the present decision is based were known to the appellant from the written proceedings and that it had sufficient opportunity to present its comments, the board was in a position to announce a decision at the end of the oral proceedings (Article 15(6) RPBA).

3. *Main request - Added subject-matter (Article 123(2) EPC)*

Claim 1 of the main request is based on claim 13 as originally filed. In the latter, the solvent in the

reference solutions of C.I. Solvent Reds 24, 25 or 26 was not mentioned, while in the former it is specified as being xylene.

Paragraph [0013] in the original application expresses the need that existed in the field of red dyes to replace xylene or aromatic hydrocarbon solvents with aliphatic or alicyclic hydrocarbons. Paragraph [0019] states that said need has been met by using the particular red dyes defined in paragraph [0020], which form stable solutions in aliphatic or alicyclic hydrocarbon solvents. In addition, paragraph [0019] underlines the advantages of using an aliphatic or alicyclic hydrocarbon solvent instead of xylene. Lastly, paragraph [0022] defines the minimum content of red dye in the concentrates of the invention by reference to a calculated 40% solution of C.I. Solvent Reds 24, 25, or 26.

Having regard to the above, none of the passages cited by the appellant explicitly discloses the solvent used in the reference solutions. It therefore needs to be investigated whether the skilled person would have directly and unambiguously derived from the application as filed that said solvent was xylene.

In that respect, the appellant argued that, because the application was aimed at replacing xylene in the concentrates of the prior art, the skilled person would have understood that the solvent in the reference solutions was xylene too.

The board does not find that argument convincing, because the application does not refer exclusively to xylene as the solvent that needs to be replaced; it mentions aromatic hydrocarbons at the same level of

preference as xylene (see e.g. paragraphs [0013] and [0019]). So, following the appellant's reasoning, the skilled person would have likewise understood that the solvent in the reference solutions was an aromatic hydrocarbon other than xylene.

Furthermore, the only passage in the original application that provides some information about the solvents that have been used in the prior art for C.I. Solvent reds 24, 25 or 26 solutions is paragraph [0006], which states that alkyl phenols and aromatic hydrocarbons have been used to dissolve or to enhance the solubility of Solvent Red 24. That paragraph, however, does not mention xylene at all. In addition, paragraph [0007] refers to a 40% solution of C.I. Solvent Red 24, but is silent on the nature of its solvent.

Hence, the application as filed does not establish a clear and unambiguous link between xylene and C.I. Solvent Red 24, let alone C.I. Solvent Reds 25 or 26.

Accordingly, the board concludes that the feature in claim 1 of the main request "*a calculated 40% solution of C.I. Solvent Reds 24, 25 or 26 in xylene*" includes subject-matter which extends beyond the content of the application as originally filed.

4. *Auxiliary requests 1 and 2 - Added subject-matter (Article 123(2) EPC)*

Claim 1 of auxiliary requests 1 and 2 also contains the feature "*a calculated 40% solution of C.I. Solvent Reds 24, 25, or 26 in xylene*". Hence, for the reasons set out in the discussion of the main request, claim 1 of auxiliary requests 1 and 2 also adds subject-matter.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated