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**Datasheet for the decision
of 4 December 2018**

Case Number: T 0707/14 - 3.3.07

Application Number: 08013904.1

Publication Number: 2025321

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A61Q5/02, A61Q5/12

Language of the proceedings: EN

Title of invention:
Conditioning composition for hair

Patent Proprietor:
Kao Germany GmbH

Opponents:
L'Oréal
Henkel AG & Co. KGaA

Headword:
Conditioning composition/ KAO

Relevant legal provisions:
EPC Art. 56

Keyword:
Inventive step - main and auxiliary requests (no)



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Case Number: T 0707/14 - 3.3.07

D E C I S I O N
of Technical Board of Appeal 3.3.07
of 4 December 2018

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 17 March 2014
revoking European patent No. 2025321 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman J. Riolo
Members: A. Usuelli
 P. Schmitz

Summary of Facts and Submissions

I. Two oppositions had been filed against European patent No. 2 025 321 on the grounds that its subject-matter lacked novelty and inventive step and extended beyond the content of the application as filed. The following documents were among those cited during the opposition proceedings:

D12: WO 94/08557

D13: FR 2 880 801

D14: WO 95/20939

D15: Experimental report

D18: WO 00/06107

II. The appeal of the patent proprietor (hereinafter: the appellant) lies against the decision of the opposition division to revoke the patent. The decision was based on the main request filed on 11 May 2012 and two auxiliary requests filed during the oral proceedings held on 2 December 2013.

Claim 1 of the main request and of auxiliary request 1 read as follows:

"1. Conditioning composition for hair characterized in that, it comprises at least one polyphenol and at least one arylated silicone selected from phenyl methicone, diphenyl dimethicone, diphenylsiloxy phenyl trimethicone, tetramethyl tetraphenyl trisiloxane, triphenyl trimethicone, and pentaphenyl trimethyl trisiloxane."

Claim 1 of auxiliary request 2 differed from claim 1 of the main request in specifying that the polyphenol was selected from *Vitis vinifera*, *Malus domestica*, *Camelia*

sinensis, *Juglans regia*, *Ribes Uva-Crispa*, *Ribes nigrum*, *Ribes rubrum* and *Citrus aurantiifolia* extracts.

III. The opposition division considered that anyone of documents D12, D14 or D18 could be taken as the closest prior art for the assessment of inventive step of the main request and of auxiliary request 1. The difference between the subject-matter of claim 1 and each of these documents was the presence of a polyphenol component. On the basis of trial report D15, the technical problem was the provision of conditioning compositions protecting hair from damaging influences, such as chemical treatments. Document D13 taught the use of polyphenols derived from plants or contained in extracts as protecting agents of keratinous fibers. Accordingly, the skilled person would have been encouraged to include a polyphenol component in the compositions disclosed in the D12, D14 or D18. Hence, the subject-matter of the main request and of auxiliary request 1 did not comply with Article 56 EPC.

As to the subject-matter of auxiliary request 2 the opposition division observed that document D13 suggested *inter alia* the use of green tea extracts as protecting agents for hair. Green tea extracts corresponded to the *Camelia sinensis* extracts recited in claim 1 of auxiliary request 2. Hence, this request 2 did not comply with the requirements of Article 56 EPC either.

IV. In the statement setting out the grounds of appeal filed on 28 July 2014 the appellant defended its case on the basis of the same requests considered in the decision under appeal. It furthermore filed the following document:

D16: Excerpt from Wikipedia: Grüner Tee

- V. Opponent-2 (hereinafter: respondent-2) filed its reply to the patent proprietor's appeal on 27 October 2014. With the same letter it submitted the following document:

D17: Excerpt from Wikipedia: Tee (Pflanze)

- VI. Opponent-1 (respondent-1) did not file any substantial submissions during the appeal proceedings.

- VII. In a communication pursuant to Article 15(1) RPBA issued on 8 October 2018 the Board essentially followed the reasoning in the decision of the opposition division and expressed the preliminary opinion that none of the appellant's requests met the requirements of Article 56 EPC. It further added that the same conclusion would apply also when starting from document D13 as the closest prior art as argued by the appellant.

- VIII. Oral proceedings were held on 4 December 2018. As announced, none of the parties attended these proceedings.

- IX. The appellant's arguments on inventive step can be summarised as follows:

Document D13 was the closest prior art in that it addressed the same problem as the patent in suit, namely the provision of a composition for protecting hair. The technical problem was the provision of a conditioning agent with improved protective effects. This problem was solved by the provision of compositions containing a polyphenol and arylated

silicone derivatives. None of the prior art documents suggested to solve the technical problem by the provision of compositions according to claim 1 of the main request.

The subject-matter of auxiliary request 2 was inventive also on account of the presence of specific plant extract useful as source of polyphenols. None of the prior art documents suggested the preparation of conditioning agents containing such extracts.

- X. The arguments of respondent-2 on inventive step can be summarised as follows:

The closest prior art was represented by documents D12 or D14. Document D13 disclosed the use of polyphenols as protecting agents for hair. It furthermore explained that plant extracts, including green tea extracts could be used as source of polyphenols. Thus, it would have been obvious to the skilled person to add these substances to the compositions of D12 or D14. Accordingly, none of the requests met the requirement of inventive step.

- XI. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request filed on 11 May 2012, or on the basis of auxiliary requests 1 or 2 filed on 2 December 2012.
- XII. Respondent-2 requested that the appeal be dismissed.

Reasons for the Decision

Main request

1. Inventive step

1.1 Closest prior art

1.1.1 The appellant and respondent-2 argued on inventive step starting from different documents as the closest prior art (see points IX and X above). In the following assessment of inventive step the Board accepts, in the appellant's favour, that document D13 is the closest prior art.

1.1.2 The conditioning compositions defined in claim 1 of the main request differ from those disclosed in D13 (e.g. composition 1 of Table 2), in the presence of a polyphenol and an arylated silicone.

1.2 Technical problem

1.2.1 The appellant formulates the technical problem as the provision of conditioning compositions with improved protective effects. However, there are no experimental data that demonstrate the presence of any improvement over the compositions of D13. In this context it is noted that the objective of D13 is to provide compositions that protect the keratin fibers against the action of environmental agents (page 2, lines 23 to 25). The experimental report D15 shows the protective effects against the damaging caused by a treatment of permanent shaping of a composition according to claim 1 containing a *Vitis vinifera* extract. However, in the absence of any comparison with the products of D13, there is no reason to assume that the compositions of

the present requests are more effective in protecting hair. Accordingly, the technical problem is the provision of alternative conditioning compositions.

1.3 Obviousness

- 1.3.1 The hair treating compositions of D13 comprise *inter alia* a protective agent of keratinous fibers (page 2, lines 11 to 16). Polyphenols and plant extracts containing polyphenols are mentioned as suitable protective agents in view of their properties as ozone scavenger (page 6, lines 6 to 10) and antioxidants (page 6, line 51).

Composition 1 of D13 contains benzophenone-4 as protective agent. The skilled person faced with the technical problem of providing an alternative composition would consider obvious to replace benzophenone-4 with e.g. polyphenols or green tea extracts since all these substances are described in D13 as suitable protective agents of keratin fibers.

- 1.3.2 Moreover, D13 indicates on page 16 (lines 17 to 20) that polyarylated silicone derivatives can optionally be present in the conditioning compositions. It is also evident from D12 (page 3, lines 16 to 19), D14 (page 16, lines 11 to 18 and examples I to IV) and D18 (examples 1 and 3 to 6) that these substances are commonly used as components of conditioning compositions. Thus, it would be obvious to the skilled person to modify composition 1 of D13 also by the addition of an aryated silicone.

- 1.4 It follows from the above considerations that the subject-matter of claim 1 of the main request does not comply with the requirements of Article 56 EPC.

Auxiliary request 1

2. Claim 1 of this request is identical to claim 1 of the main request. Thus, auxiliary request 1 is not inventive either.

Auxiliary request 2

3. Claim 1 of auxiliary request 2 specifies that the polyphenol is present in the form of some specific plant extracts such as an extract of *Camelia sinensis*.
 - 3.1 As discussed in point 1.3.1 above, also D13 mentions the possibility of using natural extracts as source of epigallocatechin (i.e. a polyphenol; see page 6, line 9). In particular D13 reports that tea extracts, such as green tea extracts, can be used as a source of protective agents. Document D17 indicates that the term "*Camelia sinensis*" is used as synonym of tea plant. The appellant referred to D16 to argue that *Camelia sinensis* is only a variety of tea plant.

In the Board's view, the question whether the green tea extracts referred to in D13 are identical or not to the *Camelia sinensis* extracts recited in claim 1 of auxiliary request is not a decisive issue because D13 provides in any case a clear teaching as to the possibility of using as protective agents of keratin fibers plant extracts and in particular green tea extracts.

- 3.2 Thus, the subject-matter of auxiliary request 2 does not involve an inventive step either.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:



S. Fabiani

J. Riolo

Decision electronically authenticated