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**Datasheet for the decision
of 8 March 2018**

Case Number: T 1279/14 - 3.3.10
Application Number: 09710186.9
Publication Number: 2254544
IPC: A61K8/06, A61K8/81, A61K8/87,
A61K8/90, A61Q19/00, A61Q1/14
Language of the proceedings: EN

Title of invention:

OIL-IN-WATER EMULSION COMPRISING AN AMPHIPHILIC POLYMER

Patent Proprietor:

L'Oréal

Opponents:

THE PROCTER & GAMBLE COMPANY
Akzo Nobel Chemicals International B.V.
Kao Germany GmbH
UNILEVER NV

Headword:

OIL-IN-WATER EMULSION / L'OREAL

Relevant legal provisions:

EPC Art. 56
RPBA Art. 13(3)

Keyword:

Late-filed evidence - adjournment of oral proceedings would
have been required (yes)

Inventive step - (no)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1279/14 - 3.3.10

D E C I S I O N
of Technical Board of Appeal 3.3.10
of 8 March 2018

Appellant:
(Patent Proprietor)

L'Oréal
14, rue Royale
75008 Paris (FR)

Representative:

Prevel, Estelle Nicole
L'Oréal
Service DIPI
9 Rue Pierre Dreyfus
92110 Clichy (FR)

Respondent I:
(Opponent 1)

THE PROCTER & GAMBLE COMPANY
One Procter & Gamble Plaza
Cincinnati, Ohio 45202 (US)

Representative:

Sauvaître, Thibault Bruno
Procter & Gamble Service GmbH
IP Department
Sulzbacher Straße 40-50
65824 Schwalbach am Taunus (DE)

Respondent II:
(Opponent 2)

Akzo Nobel Chemicals International B.V.
Velperweg 76
6824 BM Arnhem (NL)

Representative:

Akzo Nobel Chemicals IP Group
Velperweg 76
6824 BM Arnhem (NL)

Respondent III:
(Opponent 3)

Kao Germany GmbH
Pfungstädter Strasse 92-100
64297 Darmstadt (DE)

Representative:

Grit, Mustafa
Kao Germany GmbH

Pfungstädterstrasse 92-100
64297 Darmstadt (DE)

Respondent IV: UNILEVER NV
(Opponent 4) Weena 455
3013 AL Rotterdam (NL)

Representative: Corsten, Michael Allan
Unilever Patent Group
Olivier van Noortlaan 120
3133 AT Vlaardingen (NL)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 1 April 2014
revoking European patent No. 2254544 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman P. Gryczka
Members: J.-C. Schmid
C. Schmidt

Summary of Facts and Submissions

I. The Appellant (Proprietor of the patent) lodged an appeal against the decision of the Opposition Division revoking European patent No. 2 254 544, independent claim 1 thereof reading as follows:

"1. Composition for topical application in the form of an oil-in-water emulsion comprising an oily phase dispersed in an aqueous phase, **characterized in that** it comprises at least one noncrosslinked amphiphilic polymer, the globules of the said emulsion exhibiting a mean size ranging from 15 to 500 microns and the oily phase being present in an amount of less than 35% by weight, with respect to the total weight of the composition."

II. Notices of opposition were filed by the Respondents I, II, III and IV (opponents (1), (2), (3) and (4) respectively) requesting revocation of the patent-in-suit in its entirety on the grounds of lack of novelty and inventive step (Article 100(a) EPC) and insufficient disclosure (Article 100(b) EPC).

Inter alia the following documents were cited in the opposition proceedings:

- (1) US-A-2006/0120982,
- (3) US-A-2006/0057097,
- (4) US-A-2003/0157047,
- (10) WO-A-03/094874 and

(14) Akiyama et al., "Thickening properties and emulsification mechanisms of new derivatives of polysaccharides in aqueous solution", J. Colloid and Interface Sci., 282, (2005), pages 448 to 457.

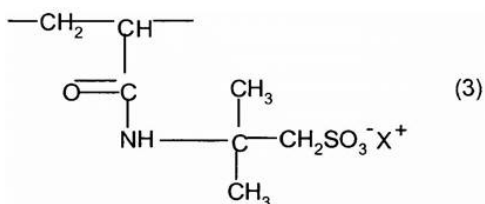
According to the opposition division, the invention was sufficiently disclosed in the patent-in-suit to be carried out by a skilled person in the art. The subject-matter of claim 1 of the patent as granted lacked novelty over documents (1), (3) and (10). With regard to inventive step, document (4) was the closest prior art to the invention. The subject-matter of claim 1 of the then pending auxiliary request differed from the composition of example 7 of document (4) only by the amount of oil. It was not shown that this difference led to a technical effect. Hence, the technical problem underlying the patent-in-suit was the provision of an alternative cosmetic formulation. Document (4) disclosed compositions having less than 35 wt.% oil. Accordingly, the subject-matter of claim 1 of the then pending auxiliary request lack an inventive in the light of document (4).

III. With the statement of the grounds for appeal, the Appellant filed auxiliary requests 1 to 3. Auxiliary request 3 is identical to the then pending auxiliary request which was rejected by the Opposition Division for lack of inventive step.

Claim 1 of auxiliary request 1 differs from claim 1 of the patent as granted in that the non-crosslinked amphiphilic polymer is chosen from

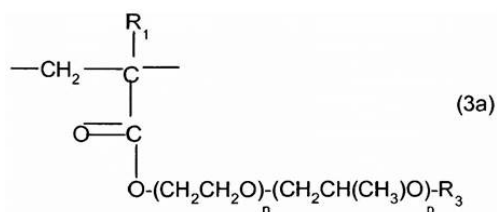
- the polymers comprising:

(a) from 80 to 99 mol% of 2-acrylamido-2-methylpropanesulphonic acid (AMPS) unit of following formula (3):



in which X⁺ is a proton, an alkali metal cation, an alkaline earth metal cation or the ammonium ion;

(b) and from 1 to 20 mol%, preferably from 1 to 15 mol%, of unit of following formula (3a):



in which n and p denote, independently of one another, a number of moles and vary from 0 to 30, preferably from 1 to 20, with the proviso that n + p is less than or equal to 30, preferably less than 25 and better still less than 20; R₁ denotes a hydrogen atom or a linear or branched C₁ -C₆ alkyl (preferably methyl) radical and R₃ denotes a linear or branched alkyl group comprising m carbon atoms ranging from 6 to 30, preferably from 10 to 25;

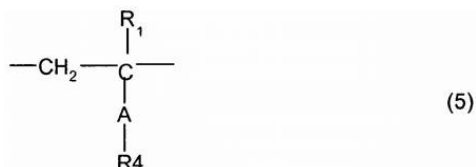
- the polymers derived from (meth)acrylic acid comprising:

(a) from 80 to 99 mol% of (meth)acrylic acid unit of following formula (4):



in which R is H or CH₃ and X⁺ is a proton, an alkali metal cation, an alkaline earth metal cation or the ammonium ion;

(b) and from 1 to 20 mol%, preferably from 1 to 15 mol %, of unit of following formula (5):



in which:

R₁ denotes a hydrogen atom or a linear or branched C₁-C₆ alkyl (preferably methyl) radical,

A denotes an ester or amide group or an oxygen atom, and

R₄ denotes a linear or branched alkyl comprising a number of carbon atoms ranging from 6 to 30, preferably from 10 to 25; and

- cetyl hydroxyethylcelluloses, hydroxypropylmethylcelluloses modified by stearyloxyhydroxypropyl chains to a molar degree of between 0.3 and 0.6%

- starch derivatives modified by fatty chains comprising from 6 to 30 carbon atoms, such as maize starch esterified by octenylsuccinic anhydride in the sodium salt form.

Claim 1 of auxiliary request 2 differs from claim 1 of auxiliary request 1 in that the non-crosslinked amphiphilic polymer is restricted to the copolymers comprising the units of formula (3) and (3'), or the units of formula (4) and (5).

Claim 1 of auxiliary request 3 differs from claim 1 of auxiliary request 1 in that the non-crosslinked

amphiphilic polymer is restricted to the copolymers comprising the units of formula (3) and (3').

The Appellant furthermore filed comparative data, evaluating the cosmetic properties of the claimed compositions.

- IV. In a communication pursuant to Article 15(1) RPBA dated 9 June 2017, the Board reminded the Appellant that it had not taken position on the Respondents' objections regarding the admissibility of the main and auxiliary requests 1 and 2 and that its arguments against the conclusion of the Opposition Division with regard to inventive step might not convince the Board.
- V. With a letter dated 8 December 2017, the Appellant filed a further experimental report in order to show that the claimed compositions have better cosmetic properties than the composition of example 7 of document (4). With a letter dated 16 January 2018, it informed the Board that it would not attend the oral proceedings. With letters dated 12 and 31 January 2018 respectively, Respondents II and IV informed the Board that they would not attend the oral proceedings.
- VI. According to the Appellant, the compositions of the invention differed from the prior art compositions in terms of the average size of the emulsion globules and/or the presence in the composition of a suitably selected non-crosslinked amphiphilic polymer. Therefore, the subject matter of the claims of the patent as granted was novel over the cited prior art.

Document (4) aimed to improve the effectiveness of the cleansing/removal properties of cosmetic compositions, which comprised globules having mean size which could

be within the claimed range or not, and an amphiphilic polymer that could be crosslinked or not. Document (14) disclosed emulsions with an average droplet size of 15 to 500 microns which were stabilized by the association of derivatives of hydrophobic modified polysaccharides and non-crosslinked amphiphilic polymers. The claimed subject-matter differed from the compositions described in document (14) by the choice of the non-crosslinked amphiphilic polymer. Consequently, document (14) had the most technical characteristics in common with the invention, aimed to solve the same technical problem, and hence represented closest prior art to the invention.

The composition of example 7 of document (4) comprised 60 % by weight of the fatty phase (24 % by weight of isopropyl palmitate and 36 % by weight of isododecane). Document (4) on page 1, paragraph [0013], taught that it was preferable to use a non-crosslinked amphiphilic polymer when the composition comprises at least 40 % by weight of the fatty phase. Thus, the teaching of document (4) discouraged the skilled person to move towards a composition comprising less than 35% by weight of fatty phase and a non-crosslinked amphiphilic polymer. The comparative data filed with the letter dated 8 December 2017 showed that the claimed compositions had better cosmetic properties than the composition of example 7 of document (4).

Thus, the skilled person had no reason to choose a non-crosslinked amphiphilic polymer such as those claimed in a composition with an average globule size of between 15 and 500 microns in order to make compositions with better cosmetic properties. Consequently, the claimed subject-matter involved an inventive step.

VII. At the oral proceedings held on 8 March 2018, Respondents I and III requested that the Appellant's late filed experimental report is not admitted into the appeal proceedings. According to the Respondents, the main request (claims of the patent as granted) should not be admitted into the proceedings, since the Appellant acknowledged during the first instance proceedings that the subject-matter of claim 1 as granted lacked novelty and did not present any arguments as to why the decision of the Opposition Division was erroneous in this respect. Auxiliary request 1 and 2 should not be admitted in the appeal proceedings since they corresponded to requests which were withdrawn during the oral proceedings before the Opposition Division. The subject-matter of claim 1 of the main request lacked novelty in view of the documents (1), (3) and (10) for the reasons stated in the appealed decision. With regard to inventive step, document (4) represented the closest prior art. The comparative tests filed by the Appellant with the letter dated 8 December 2017 were not sufficiently detailed and failed to show any improvements for the claimed compositions. In addition they should not be admitted into the proceedings since they were filed only three months before the oral proceedings. It was therefore not possible for the Respondents to experimentally check the data. In the absence of any technical effect associated with the oil content of the composition, the technical problem had to be seen in the provision of further cosmetic compositions. Document (4) taught that the cosmetic compositions comprised from 15 to 60 wt.% of oily phase. The subject-matter of claim 1 of auxiliary request 3 therefore lacked an inventive step in the light of document (4) alone.

VIII. The Appellant requested that the decision under appeal be set aside and that the oppositions be rejected, or subsidiarily, that a patent be maintained on the basis of one of the auxiliary requests 1 to 3 filed with the letter dated 18 July 2014.

The Respondents requested that the appeal be dismissed.

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. *Comparative data filed with the letter dated 8 December 2017: admission*

2.1 With a letter dated 8 December 2017, i.e. only three months before oral proceedings, and three years after the Respondent I and III's replies to the statement of the grounds of appeal, the Appellant filed an experimental report comparing the properties of claimed compositions with respect to the composition of example 7 of document (4).

Respondents I and III requested that this experimental report is not admitted in the appeal proceedings.

2.2 According to Article 13(1) RPBA any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion which should be exercised in view inter alia of the complexity of the new subject-matter submitted, the current state of the proceedings and the need for

procedural economy. In particular, amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the Board or the other party cannot reasonably be expected to deal with without adjournment of the oral proceedings (Article 13(3) RPBA).

2.3 The Board notes that the submissions of 8 December 2017 do not comprise any explanation as to why the comparative report was submitted so late. Furthermore the Appellant has chosen not to attend the oral proceedings, so that it could not provide any explanation as to why the amendments to its case should be admitted into the appeal proceedings. In addition, during the oral proceedings, the Respondents raised some questions about these comparative tests which remained unanswered. Moreover, the Respondents had no practical possibility to respond by submitting their own comparative tests. Thus, admitting the Appellant's experimental report at this stage would have been contrary to a fair and efficient conduct of the proceedings and would have resulted in adjournment of the oral proceedings.

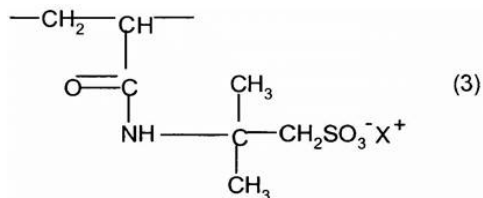
2.4 Already for this reason, the test report cannot be admitted pursuant to Article 13(3) RPBA.

Main request and Auxiliary requests 1 to 3

3. *Inventive step*

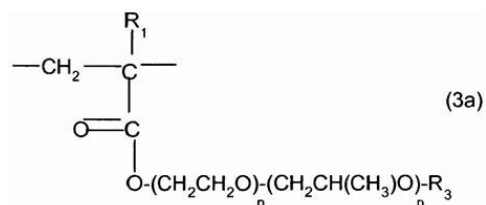
Independent claim 1 of auxiliary request 3 is directed to an embodiment of claim 1 of the main request, wherein the non-crosslinked amphiphilic polymer is chosen from the polymers comprising:

(a) from 80 to 99 mol% of 2-acrylamido-2-methylpropanesulphonic acid (AMPS) unit of following formula (3):



in which X⁺ is a proton, an alkali metal cation, an alkaline earth metal cation or the ammonium ion;

(b) and from 1 to 20 mol%, preferably from 1 to 15 mol %, of unit of following formula (3a):



in which n and p denote, independently of one another, a number of moles and vary from 0 to 30, preferably from 1 to 20, with the proviso that n + p is less than or equal to 30, preferably less than 25 and better still less than 20; R₁ denotes a hydrogen atom or a linear or branched C₁-C₆ alkyl (preferably methyl) radical and R₃ denotes a linear or branched alkyl group comprising m carbon atoms ranging from 6 to 30, preferably from 10 to 25;

In case this embodiment according to auxiliary request 3 lacked inventive step, then the subject-matter of claim 1 of each of the main request and auxiliary requests 1 and 2, which also embraces this embodiment, cannot involve an inventive step either. Thus, the subject-matter of claim 1 of auxiliary request 3 is examined first as to inventive step.

3.1 *Closest prior art*

The patent-in-suit is concerned with the use of oil-in-water emulsions comprising an amphiphilic polymer for caring for, removing makeup from and/or cleaning the skin of the body or face, the hair, the lips and/or the eyes (see page 2, lines 3 to 5). The amphiphilic polymer includes Genapol C-080 (see claim 9 of auxiliary request 3). The amount of the oily phase is less than 35 by weight of the total weight of the composition. The mean size of globules present in the emulsion range from 15 to 500 microns.

Document (4) relates to the use of oil-in-water emulsions comprising a specific amphiphilic polymer for removing make-up from and cleaning the skin, lips and eyes (see page 1, paragraph [0003]; claim 1). The amphiphilic polymer may be a copolymer of AMPS and of C₁₆-C₁₈ alkyl methyl acrylate comprising 8 oxyethylene groups obtained for instance from Genapol T-080 or Genapol C-080 (see claim 29, paragraph [0078] on page 5; examples 5 to 8). The amount of the oily phase ranges from 15 to 60% by weight of the total weight of the composition (see claim 31). The mean size of the oily globules obtained in example 6 and 7 are 20 and 30 µm, respectively, and thus is within the claimed range of 15 to 500 µm. The emulsion of claim 1 of auxiliary request 3 differs from the emulsion disclosed in example 7 of document (4) only on account of lower oil content.

Nevertheless the Appellant argued that document (14) was closer to the invention than document (4). However, this document relates to thickening properties and emulsification mechanism of polysaccharides derivatives in aqueous solutions, and thus does not relate to

cosmetic compositions. Accordingly, document (14) cannot be closer to the invention than document (4).

3.2 *Technical problem underlying the patent-in-suit*

The Appellant stated that the technical problem was the provision of compositions having better cosmetic properties.

3.3 *Solution*

The proposed solution is the composition according to claim 1 of auxiliary request 3 characterized in that the oily phase is present in an amount of less than 35 wt.%.

3.4 *Success*

The results of comparative experiments filed with the statement of the grounds of appeal (annex 2) had already been filed in the first instance proceedings as document (23). The Opposition Division considered that they were not relevant for showing any effect caused by lowering the oil content of the compositions of document (4) (see point 4.5 of the reasons of the decision under appeal). The Appellant has not contested this finding.

The additional Appellant's experimental report of 8 December 2017 is not admitted into the appeal proceedings (see point 2 above).

Accordingly, the alleged improvement of the cosmetic properties lacks the required experimental support. The technical problem proposed by the Appellant (see point 3.2 above) needs to be reformulated in a less ambitious

manner, namely in the provision of alternative cosmetic compositions.

3.5 *Obviousness*

Finally, it remains to be decided whether or not the proposed solution to this objective technical problem is obvious in view of the state of the art, i.e. whether is obvious to provide cosmetic compositions according to claim 1 of auxiliary request 3 having less than 35% wt.% oil content.

Document (4) taught that the oil content of the cosmetic composition ranges from 15 to 60% wt.% (see claim 31). Accordingly, providing cosmetic compositions having the same components as in example 7 of document (4), but with an oil content of less than 35 wt.% lies within the routine activity of the skilled person faced with the problem of providing an alternative cosmetic composition.

The Appellant argued that the skilled person would have no incentive from providing a composition comprising a non-crosslinked amphiphilic polymer with less than 35 wt.% oil phase.

However paragraph [0013] on page 1 of document (4) taught in that it is preferable to use non-crosslinked amphiphilic polymers when the composition comprises at least 40% by weigh of oily phase. This does imply that it is preferable to use crossed amphiphilic polymers when the composition comprises less than 40% by weigh of oily phase. Accordingly, nothing was submitted by the Appellant from which the Board could reasonably conclude that the skilled person would have been discouraged from following the straight teaching of

document (4) regarding to the oil content of the cosmetic compositions disclosed therein. As no specific motivation is required to make an arbitrary choice of a particular embodiment from a host of embodiments in order to provide a mere alternative, the subject-matter of claim 1 lacks an inventive step pursuant to Article 56 EPC in the light of document (4) alone.

3.6 Since the embodiment defined in claim 1 of auxiliary request 3 is encompassed by claim 1 of the main request and claim 1 of auxiliary requests 1 and 2, these requests share the fate of auxiliary request 3 in that they too are not allowable for lack of inventive step pursuant to Article 56 EPC.

4. As a result, the Appellant's main request and auxiliary requests 1 to 3 are not allowable.

It is thus not necessary for the Board to decide on the admissibility into the proceedings of the main request and auxiliary requests 1 and 2, and the issues of novelty with respect to documents (1), (3) and (10) and sufficiency of disclosure.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated