

**Internal distribution code:**

- (A) [ - ] Publication in OJ  
(B) [ - ] To Chairmen and Members  
(C) [ - ] To Chairmen  
(D) [ X ] No distribution

**Datasheet for the decision  
of 25 June 2019**

**Case Number:** T 0874/17 - 3.3.07

**Application Number:** 09788050.4

**Publication Number:** 2470155

**IPC:** A61K8/19, A61K8/31, A61K8/34,  
A61K8/39, A61K8/55, A61K8/60,  
A61K8/86, A61Q5/04, A61Q5/10

**Language of the proceedings:** EN

**Title of invention:**  
COSMETIC COMPOSITION FOR KERATIN FIBERS

**Patent Proprietor:**  
L'Oréal

**Opponents:**  
Kao Germany GmbH  
Henkel AG & Co. KGaA  
THE PROCTER & GAMBLE COMPANY

**Headword:**  
Cosmetic composition/L'OREAL

**Relevant legal provisions:**  
EPC Art. 123(3)

**Keyword:**

Amendments - broadening of claim (yes)



**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 0874/17 - 3.3.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.07**  
**of 25 June 2019**

**Appellant:** L'Oréal  
(Patent Proprietor) 14, rue Royale  
75008 Paris (FR)

**Representative:** L'Oreal  
Service D.I.P.I.  
9, rue Pierre Dreyfus  
92110 Clichy (FR)

**Respondent:** Kao Germany GmbH  
(Opponent 1) Pfungstädter Str. 98-100  
64297 Darmstadt (DE)

**Respondent:** Henkel AG & Co. KGaA  
(Opponent 2) Henkelstrasse 67  
40589 Düsseldorf (DE)

**Representative:** Henkel AG & Co. KGaA  
CLI Patents  
Z01  
40191 Düsseldorf (DE)

**Respondent:** THE PROCTER & GAMBLE COMPANY  
(Opponent 3) One Procter & Gamble Plaza  
Cincinnati, Ohio 45202 (US)

**Representative:** Simpson, Tobias Rutger  
Mathys & Squire LLP  
The Shard  
32 London Bridge Street  
London SE1 9SG (GB)

**Decision under appeal:**      **Decision of the Opposition Division of the  
European Patent Office posted on 9 February 2017  
revoking European patent No. 2470155 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. European patent No. 2 470 155 was granted on the basis of 14 claims. Independent claim 1 read as follows:

"1. A cosmetic composition for keratin fibers, comprising:

(a) at least one phosphoric surfactant;

(b) at least one non-ionic surfactant;

(c) at least one polyol;

(d) at least one oil in an amount of 4 wt% to 20 wt% relative to the total weight of the composition; and

(e) ammonia."

II. Three oppositions had been filed against the patent on multiple grounds, including that its subject-matter extended beyond the content of the application as filed. The appeal of the patent proprietor (appellant) lies against the decision of the opposition division to revoke the patent. The decision was based on the patent as granted and two auxiliary requests filed during the oral proceedings held on 9 November 2016.

With regard to claim 1 of the patent, the opposition division considered that the feature "at least one oil in an amount of 4 wt% to 20 wt% ... composition" did not have a proper basis on page 9 (lines 7 to 12) of the original application, as argued by the appellant. Hence, the main request did not comply with Article 123(2) EPC. The auxiliary requests were not admitted into the proceedings.

III. In the statement setting out the grounds of appeal the appellant maintained the patent as granted as the main request and submitted an auxiliary request.

IV. In its communication pursuant to Article 15(1) RPBA issued on 14 March 2019 the Board considered that the feature defining the amount of at least one oil in claim 1 as granted did not have a basis in the application as filed. Accordingly, it expressed the opinion that claim 1 as granted did not comply with the requirements of Article 123(2) EPC. The same conclusion applied to the subject-matter of the auxiliary request.

V. By letter of 10 May 2019 the appellant filed a new main request replacing the requests on file.

Claim 1 of this request read as follows:

"1. A cosmetic composition for keratin fibers, comprising:

- (a) at least one phosphoric surfactant;
- (b) at least one non-ionic surfactant;
- (c) at least one polyol;
- (d) at least one oil; and
- (e) ammonia,

wherein the amount of the oil(s) is 4 wt% to 20 wt% relative to the total weight of the composition".

VI. Oral proceedings were held on 25 June 2019. They were not attended by opponents 1 and 2 (respondents 1 and 2), who had informed the Board to this effect.

VII. During the oral proceedings opponent 3 (respondent 3) objected to claim 1 of the main request under Article 123(3) EPC, remarking that it no longer contained the limiting feature "at least one oil in an amount of 4 wt % to 20 wt%" included in claim 1 as granted. It explained that a composition containing a mixture of three oils each in an amount of 2% was covered by claim 1 of the main request but not by the patent as granted.

The appellant pointed out that according to page 9 of the decision under appeal, claim 1 as granted could be interpreted to mean that the composition comprised a mixture of oils in a total amount of 4 wt% to 20 wt%. Under this interpretation, the scope of claim 1 of the main request was not broader than the scope of the patent as granted. Moreover, this interpretation was in line with the general teaching of the original application, in particular with the third paragraph of page 9 of the description. Thus, the subject-matter of the main request did not infringe Article 123(3) EPC.

VIII. 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 by letter of 10 May 2019.

IX. The respondents requested that the appeal be dismissed.

## **Reasons for the Decision**

### Main request

1. Article 123(3) EPC

1.1 The cosmetic composition defined in claim 1 as granted comprises *inter alia* "at least one oil in an amount of 4 wt% to 20 wt% relative to the total weight of the composition" (component (d)).

This means that when a mixture of oils is present in the composition, at least one of them must be present in an amount of 4 wt% to 20 wt% relative to the total weight of the composition. Claim 1 of the main request contains a different limiting feature with regard to

the amount of the oils, namely the requirement that the total amount of the oils present in the composition is within the range of 4 wt% to 20 wt% relative to the total weight of the composition. The new main request does not contain the condition that, when a mixture of oils is present, at least one of them is present in an amount of 4 wt% to 20 wt%.

This results in an extension of the protection conferred by the patent, which can be illustrated with the following example from respondent 3:

Claim 1 of the main request would cover a composition comprising a mixture of three oils A, B and C, each of them present in an amount of 2 wt%, because this composition satisfies the requirement that the total amount of oils is within the range of 4 wt% to 20 wt%, but such a composition would not be covered by the patent as granted because none of the oils A, B and C is present in an amount of 4 wt% to 20 wt%.

- 1.2 The appellant argued that claim 1 of the patent was to be interpreted in the light of page 9 of the original application, according to which the total amount of oils was within the range of 4 wt% to 20 wt%. In this regard it also referred to a statement made by the opposition division on page 9 of its decision that supported this interpretation of claim 1 as granted.
- 1.2.1 However, as discussed above, claim 1 as granted clearly indicates that when a mixture of oils is present, at least one of the oils is within the of range 4 wt% to 20 wt%. This requirement is not the same as that disclosed on page 9 of the original application. In several decisions of the Boards of Appeal it has been affirmed that a discrepancy between the claims and the



description is not a valid reason to ignore the clear linguistic structure of a claim and interpret it differently (see Case Law of the Boards of Appeal of the EPO, 8th edition 2016, II.A.6.3.1).

The fact that claim 1 as granted has a different meaning from the sentence on page 9 of the description does not imply that it lacks clarity. Indeed, the appellant did not provide any reasons to explain why claim 1 as granted should be considered unclear.

- 1.2.2 As to the observation that the opposition division in its decision also considered that claim 1 as granted could be interpreted to mean that the total amount of oils was between 4 wt% and 20 wt%, it is underlined that the Board is not bound by any interpretation of a claim made by the opposition division in its decision. In this respect it is also pointed out that in its communication of 14 March 2019 the Board stated that "claim 1 as granted defines compositions that must comprise at least one oil in an amount of 4 wt% to 20 wt%, and, in view of the term "comprising" at the beginning of the claim, can include further oil(s) in any amount". This interpretation is clearly in contrast with the one proposed by the opposition division and referred to by the appellant. When the appellant submitted the main request (10 May 2019) it was aware of the Board's position.

Thus, the appellant's arguments are not convincing.

- 1.3 Therefore, the Board concludes that the main request does not fulfil the requirements of Article 123(3) EPC.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



B. Atienza Vivancos

J. Riolo

Decision electronically authenticated