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**D E C I S I O N**  
**of 14 May 2003**

**Case Number:** T 0016/01 - 3.3.5

**Application Number:** 94925449.4

**Publication Number:** 0717657

**IPC:** B01F 13/10

**Language of the proceedings:** EN

**Title of invention:**

Method and apparatus for customising facial foundation products

**Patentee:**

FD Management, Inc.

**Opponent:**

L'OREAL

**Headword:**

Facial foundation/FD

**Relevant legal provisions:**

EPC Art. 56

**Keyword:**

"Inventive step - (yes), not obvious without hindsight"

**Decisions cited:**

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**Catchword:**

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Case Number: T 0016/01 - 3.3.5

**D E C I S I O N**  
**of the Technical Board of Appeal 3.3.5**  
**of 14 May 2003**

**Appellant:** FD Management, Inc.  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 31 October 2000  
revoking European patent No. 0 717 657 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** R. K. Spangenberg  
**Members:** G. J. Wassenaar  
M. B. Günzel

## Summary of Facts and Submissions

I. The appeal is from the decision of the Opposition Division to revoke European patent No. 0 717 657, which was granted in response to European patent application No. 94 925 449.4 on the basis of 10 claims, including two independent claims 1 and 7.

Claim 1 as granted read as follows:

"A method for customising a facial foundation at point of sale to a customer comprising:

(i) obtaining a reading of a customer's natural skin coloration by applying a means for measuring coloration in proximity to the skin;

(ii) transmitting the reading to a programmable means for selecting an optimal facial foundation formula by correlating the reading with one of a preprogrammed set of formulas;

(iii) transferring the selected preprogrammed formula as operating instructions to a formulation machine for automatically preparing the formula;

(iv) dosing together to a common dosing chamber within the formulation machine a plurality of cosmetic chemical compositions including at least one pigment, the plurality of compositions being chosen in accordance with information provided by the selected preprogrammed formula; and

(v) delivering into a container the dosed formula to the customer as a facial foundation product,

and comprising the step of assigning an identification mark, preferably in the form of a bar code, to each customised facial foundation product, labelling on the container the mark, and storing the identification within the programmable means to permanently identify the customised facial foundation product with the customer."

Independent claim 7 related to an apparatus for performing the method of claim 1.

II. The patent was revoked on the ground of lack of inventive step (Article 56 EPC), taking into consideration the following documents:

D1: DE-C-4110299

D2: The colour of the skin as analysed by spectrometric methods, Journal of clinical investigation, 1929, vol. 7, pages 559 to 574

D5: EP-A-0 427 497.

The Opposition Division held that starting from D1 the problem underlying the invention was rendering the customer card, storing the product information according to the customer's personal skin properties, unnecessary. The claimed solution to this problem, involving the labelling of the cosmetics container with the product data according to the customer's skin properties, was considered obvious to a skilled person in view of D5.

III. In the statement of the grounds of appeal, the appellant argued that the replacement of a customer's

card with a label on the container was not the only difference with respect to D1 and that the problem addressed by the patent must be seen as to provide an improved method and apparatus for preparing for a specific customer a facial foundation at a point of sale. The improvements were said to be (i) the closer resemblance of the foundation to the customer's skin colouration, (ii) the product being produced quickly and accurately and (iii) refills being obtained simply by returning with the empty container. These advantages were obtained by the combination of features mentioned in claim 1. This combination of features was not obvious to the skilled person. The Opposition Division needed to employ a combination of three non-related documents in their reasoning for lack of inventive step. This alone was a clear indication of hindsight. But even these three citations did not disclose all the features of present claim 1. From the general rule that products for sale should be labelled one could not derive that the customised product should be labelled according to claim 1.

- IV. The respondent argued essentially as follows. The method according to present claim 1 differed from the method disclosed in D1 only in that the cosmetic formulation is a facial foundation product and in that the customer related formula is present as a mark on the product container. The problem underlying the invention could be considered as providing a process and an apparatus for the preparation of a cosmetic product, such as a facial foundation, comprising means for identifying data of the product and the customer on the product container.

For the formulation of a facial foundation product it

was obvious to spectroscopically determine the colour of the skin. In this respect reference was made to D2 and a newly cited document

D8: FR-A-2 669 526.

This document was classified in the IPC as G01J3/46, which classification was also given to the patent in suit.

It was further known in the art (D5) to identify characteristics of a product present in a container, such as its colour, by labelling the container by a code-bar. D5 belonged to a related technical field since it had the same IPC class, B01F 13/10, as the patent in suit. The method according to present claim 1 thus followed in an obvious manner from the state of the art.

- V. The appellant (patentee) requested that the decision under appeal be set aside and that the opposition be rejected, or alternatively that the patent be maintained with the claims according to the auxiliary request as considered in the opposition proceedings.

The respondent (opponent) requested that the appeal be dismissed.

### **Reasons for the Decision**

1. The appeal is admissible.
2. The Opposition Division revoked the patent on the ground of lack of inventive step. The respondent did

not dispute the finding of novelty by the Opposition Division and put forward only arguments with respect to the issue of inventive step. According to the decision under appeal the respondent had withdrawn its original opposition grounds under Article 100(b) and (c) EPC (point 2 of the reasons). The Board concurs with the finding of novelty in the decision under appeal. Under these circumstances the only issue to be decided is that of lack of inventive step.

3. D1 undisputedly represents the closest prior art. It discloses a process for preparing a customized cosmetic formulation by determining relevant skin properties of the customer and formulating the cosmetic components according to an existing program for the skin type and condition corresponding to the measured skin properties. The result of the measurement is recorded on a customer card. For the renewal of the same formulation it is then sufficient to present the card without further skin measurement (column 2, lines 23 to 59, and column 6, line 37 to column 7, line 1). The formulation comprises a basic cosmetic cream composition to which highly concentrated active components, perfumes etc are added (column 5, lines 24 to 35). D1 does not disclose which skin properties are actually measured. It is only indicated that the measuring device comprises a sensor. With respect to the sensor reference is made to DE-OS 37 03 458 (column 2, lines 27 to 30). Said German patent application concerns a medical sensor whereby the light transmission or reflection of a part of the body, in particular the finger, is measured (column 4, line 14 to column 5, line 6).
4. Starting from D1 the problem underlying the invention

can be seen in providing a more reliable method for the repeated sale of a specific customized cosmetic formulation. The expression "reliable" in this respect covers the expressions "accurate and repeatable" used in the patent specification to describe one of the objects of the invention (column 1, lines 48 to 51). The appellant proposes to solve this problem by providing a method for delivering a coloured facial foundation in a container bearing a label comprising a customized identification mark according to claim 1. By attaching the identification mark to the container it is credible that this method is more reliable than the method according to D1 in which the relevant information is stored on a customer card, which is separate from the container and can easily get lost. Thus the Board is satisfied that the method according to claim 1 actually solves the above-mentioned problem.

5. One of the features of claim 1 is to measure the natural skin colouration of the customer. Such a measurement is not disclosed in D1. The Board does not dispute that by reference to DE-OS 37 03 458, D1 comprises the suggestion to measure skin properties by optical means, but that does not imply a measurement of the natural skin colouration. As already indicated under point 3 of the reasons, DE-OS 37 03 458 discloses a diagnosis sensor for measuring reflectance or transmittance of the skin of a part of the body. DE-OS 37 03 458 is silent about skin colouration. The Board further does not dispute that measuring the colouration of the skin or teeth by an optical sensor is in itself known, but these known methods are not related to the above-mentioned problem. In D2 measuring the colour of the skin by spectrophotometry is disclosed as a diagnosis means to establish the health



condition of a patient (page 559). There is no relationship with the preparation of cosmetics. According to D8 a dental restoration composition is prepared taking into account the measurement of the colour of the teeth by a spectrophotometer (see claim 1). The art of dental restoration is, however, rather different from the art of skin cosmetics. The Board does not deny that there are some similarities between D8 and the patent in suit, but these similarities can only be established with hindsight. No such similarity is apparent between the technical teachings of D8 and D1. The same is illustrated by the IPC classification. The subordinate classification of D8, G01J3/46, is the same as the subordinate classification of the patent in suit but D1 and D8 have no IPC classes in common.

6. A further feature of claim 1 is the labelling of the container with an identification mark of the customized product. This is also not disclosed or suggested in D1. The Board does not share the respondent's submission that such a labelling is an obvious alternative to storing the customized information on a customer card. There is no evidence that it was known in the art to label a container with a marking identifying the composition prepared according to the personal constitution of the customer. D5 is a document relating to a process for dispensing liquid colorants into a paint can. Each paint can has attached to it a bar-code label which represents a relocatable memory-address of the computer which stores the colour-formula from that can and other information such as the size of the paint can, type of paint, customer information, as well as other important inventory information (summary on the front page and column 3, lines 15 to 27). D5 does not

disclose what kind of customer information is stored. Considering, however, that the product obtained by the process according to D5 is a paint, it is unlikely that the customer information has anything to do with the personal constitution of the customer as in the patent in suit. Anyhow, there is no evidence available showing that a person trying to solve the present specific technical problem, related solely to the preparation of a cosmetic facial foundation, would have expected to find a solution in the art of paint preparation. In the absence of such evidence the Board cannot accept that it was obvious to combine the teaching of D5 with that of D1. Here again, there are similarities between some technical features disclosed in D5 and those claimed in the patent in suit, as also illustrated by the same IPC class B01F13/10, but there are no similarities at all between the technical teachings of prior art documents D1 and D5. Therefore, a skilled person at the priority date of the patent on suit had no reason to combine the technical teachings of these two documents.

7. For these reasons the Board holds that the solution of the above-mentioned problem according to claim 1 of the patent in suit does not follow in an obvious manner from the prior art relied on by the respondent in the appeal proceedings. The other documents cited during the opposition proceedings are less relevant and do not lead to a different conclusion. Claim 7 relates to an apparatus comprising all the means for performing the method according to claim 1. Such an apparatus is not obvious for the same reasons as given above with respect to claim 1. Claims 2 to 6 and 8 to 10 are dependent upon claim 1 and claim 7 respectively. The inventive step of their subject-matter follows from this dependency.

**Order**

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

1. The decision under appeal is set aside.
2. The opposition is rejected.

The Registrar:

The Chairman:

U. Bultmann

R. Spangenberg