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**Datasheet for the decision
of 27 November 2007**

Case Number: T 0947/05 - 3.3.10

Application Number: 01104674.5

Publication Number: 1175896

IPC: A61K 7/48

Language of the proceedings: EN

Title of invention:

Cosmetic composition suitable for sensitive and reactive skin

Applicant:

ICIM INTERNATIONAL srl

Opponent:

-

Headword:

Cosmetic composition/ICIM INTERNATIONAL

Relevant legal provisions:

-

Relevant legal provisions (EPC 1973):

EPC Art. 123(2)

Keyword:

"Amendments (not allowable) - not unambiguously derivable from application as filed"

Decisions cited:

T 0288/92, T 0680/93

Catchword:

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Case Number: T 0947/05 - 3.3.10

D E C I S I O N
of the Technical Board of Appeal 3.3.10
of 27 November 2007

Appellant: ICIM INTERNATIONAL srl
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Representative: Gislon, Gabriele
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 16 February 2005
refusing European application No. 01104674.5
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: R. Freimuth
Members: J.-C. Schmid
D. S. Rogers

Summary of Facts and Submissions

- I. The appeal lodged on 26 April 2005 lies from the decision of the Examining Division posted on 16 February 2005 refusing European patent application No. 01104674.5 with European publication No. 1175896.
- II. The decision of the Examining Division was based on the sets of claims according to the then pending main and auxiliary requests 1 to 6. The Examining Division found that the claims of the then pending main and auxiliary requests 1 to 4 contravened Article 84 EPC, did not admit the then pending auxiliary request 5 in the examining proceedings and found that the subject-matter of the then pending auxiliary request 6 did not meet the requirement of inventive step (Article 56 EPC).
- III. In reply to a communication dated 16 July 2007 of the Board indicating formal problems in all of the sets of claims filed with the statement of grounds of appeal, the Appellant(Applicant) filed on 30 October 2007 a fresh main request and three auxiliary requests superseding all previous requests.

At the oral proceedings before the Board held on 27 November 2007 the Appellant filed three further auxiliary requests 4 to 6 and withdrew its request for the reimbursement of the appeal fee.

Claim 1 of the main request read as follows:

"1. Cosmetic composition in the form of a fluid or creamy emulsion comprising as the only preservatives

two or more compounds selected in the group consisting of:

0-6% of aliphatic organic acid esters;

0-10% of saturated fatty acids containing 6-15 carbon atoms and unsaturated fatty acids containing 16-18 carbon atoms;

0-3% of aminoacyl derivatives selected in the group consisting of glycine, hydroxyproline, arginine, phenylalanine, lysine optionally conjugated with suitable fatty acids;

0-30% of glycols selected among propylene, butylene and pentylene glycol, polyglycols, glycerine and its derivatives;

0-2% of vegetable derivatives of plants belonging to the caprifoliaceae, liliaceae, mirtaceae, asteraceae and rutaceae families said vegetable derivatives being titrated extracts, active principles, essential oils and mixture thereof;

0-30% of anionic surfactants selected from sodium sarcosinate, sodium dodecylsulphate, alkylaryl sulphonates;

0-10% of amphoteric surfactants selected from alkylamidopropylbetaine, alkylimidazoline, alkylaminopropionates; and

0-20% of cross polymers with osmotic activity which are (C10-C30)alkylcopolymer acrylates, said composition containing less than 0.1 ppm of Nickel."

Claim 1 of auxiliary request 1 differs from claim 1 of the main request only in that the group of "0-6% of aliphatic organic acid esters" is deleted.

Claim 1 of auxiliary request 2 differs from claim 1 of auxiliary request 1 only by the deletion of the feature "said vegetable derivatives being titrated extracts, active principles, essential oils and mixture thereof".

Claim 1 of auxiliary request 3 is directed to the "use of the cosmetic composition", as recited in claim 1 of auxiliary request 2, "for the preparation of a product for the prevention of the onset of redness and/or itching and/or contact allergic dermatitis".

Claim 1 of auxiliary request 4 differs from claim 1 of auxiliary request 2 only in that the expression "comprising as the only preservatives" has been amended into the wording "containing as preservatives" and by the deletion of the features "optionally conjugated with suitable fatty acids" and "0-2% of vegetable derivatives of plants belonging to the caprifoliaceae, liliaceae, mirtaceae, asteraceae and rutaceae families".

Claim 1 of auxiliary request 5 differs from claim 1 of auxiliary request 2 only in that the expression "comprising as the only preservatives" has been amended into the wording "containing as preservatives" and by the deletion of the feature "optionally conjugated with suitable fatty acids".

Claim 1 of auxiliary request 6 differs from claim 1 of auxiliary request 4 only in that the expression "containing as preservatives" has been amended into the wording "preserved by a mixture of".

- IV. The Appellant submitted that the claimed subject-matter as amended was supported by the application as filed.

In particular, the feature that the claimed compositions comprise as the only preservatives two or more compounds from the list indicated in claim 1 was disclosed on pages 4 and 5 of the application as filed.

- V. The Appellant requested that the decision under appeal be set aside and that a patent be granted upon the basis of the main or auxiliary requests 1 to 3, all filed with letter dated 29 October 2007; or auxiliary requests 4 to 6, all submitted at the oral proceedings on 27 November 2007.
- VI. At the end of the oral proceedings the decision of the Board was announced.

Reasons for the Decision

1. The appeal is admissible.

Main and auxiliary requests 1 to 3

2. *Amendments (Article 123(2) EPC)*

Claim 1 is mainly derived from the combination of original claims 1, 3 and 4. Additionally, the feature that the composition comprises "as the only preservatives" two or more compounds from the list indicated in claim 1, has been incorporated into claim 1, thus excluding the presence of any other preservatives from the compositions of claim 1.

- 2.1 In order to determine whether or not an amendment offends against Article 123(2) EPC, it has to be

examined whether technical information has been introduced which a skilled person would not have objectively and unambiguously derived from the application as filed (see decisions T 288/92, point 3.1 of the reasons; T 680/93, point 2 of the reasons; neither published in OJ EPO), either explicitly or implicitly. In this context, implicit disclosure means disclosure which any person skilled in the art would objectively consider as necessarily implied in the explicit content.

- 2.2 The Appellant referred to the second, third and fourth paragraphs of page 4 and to the first paragraph of page 5 of the application as filed as forming the basis for supplementing claim 1 with the feature that the claimed compositions comprise as the only preservatives two or more compounds from the list indicated in claim 1.

The second and third paragraphs of page 4 of the application as filed provide a disclosure of cosmetic compositions wherein particular preservatives are excluded, i.e. those preservatives traditionally used in the field and classified as such by the regulation in force. Thus, those paragraphs do not support the exclusion of any preservative as required in present claim 1 as amended.

The fourth paragraph of page 4 and the first paragraph of page 5 describe those preservatives which are actually used in the claimed composition. There is, however, no disclosure whatsoever in those paragraphs regarding the exclusion of preservatives from the claimed compositions as required in present claim 1.

The Appellant had provided no further support for this feature in the application as filed, and the Board is not aware of any.

Since, thus, the feature "as the only preservatives" in claim 1 has no adequate support in the application as filed, claim 1 of the main request and of auxiliary requests 1 to 3 is amended in such a way that subject-matter extending beyond the content of the application as filed is added, contrary to the requirements of Article 123(2) EPC, with the consequence that the main request and auxiliary requests 1 to 3 are not allowable.

Auxiliary requests 4 to 6

3. *Modifications*

The expression "comprising as the only preservatives", objected to above, has been amended to read "containing as the preservatives" or "preserved by a mixture of".

According to the Appellant, although now using different wordings, the amended claim 1 of these requests still requires that the claimed compositions do not contain any other preservatives than those listed in the claim. Accordingly, the same objection and finding of extending beyond the content of the application as filed therefore also applies to amended claim 1 of the auxiliary requests 4 to 6 which still include the feature that the presence of any other preservatives is excluded from the claimed compositions.

Therefore, the Board arrives at the conclusion that the auxiliary requests 4 to 6 are not allowable and thus must be rejected as well.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

P. Cremona

R. Freimuth