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**Datasheet for the decision
of 1 July 2010**

Case Number: T 1493/08 - 3.3.10

Application Number: 01974148.7

Publication Number: 1414395

IPC: A61K 7/40

Language of the proceedings: EN

Title of invention:

Use of cationic surfactants in cosmetic preparations

Applicant:

Laboratorios Miret, S.A.

Headword:

-

Relevant legal provisions:

EPC Art. 54, 56

Keyword:

"Novelty (yes): particular exemplified compositions"

"Inventive step (yes): unexpected improvement made credible"

Decisions cited:

-

Catchword:

-



Case Number: T 1493/08 - 3.3.10

D E C I S I O N
of the Technical Board of Appeal 3.3.10
of 1 July 2010

Appellant: Laboratorios Miret, S.A.
Pol. Industrial Can Parellada
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 11 March 2008
refusing European patent application
No. 01974148.7 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: R. Freimuth
Members: P. Gryczka
F. Blumer

Summary of Facts and Submissions

I. The present appeal lies from the decision of the Examining Division refusing the European patent application N° 01 974 148.7 published under the international publication N° WO 03/013453.

The Examining Division held that the subject-matter of claim 1 of the then pending sole request was not novel in view of the disclosure of document

(1) EP-A- 0 749 960

and did not involve an inventive step when considering this document as the closest prior art or when taking into account the teaching of document

(2) GB-A-1 352 420.

II. At the oral proceedings which took place in front of the Board on 1 July 2010, the Appellant (Applicant) replaced all previously filed sets of claims by one set of the following seven independent claims filed as sole request:

"1. A cosmetic or dermatological composition comprising as a preservative the cationic surfactant ethyl ester of the lauramide of arginine hydrochloride (LAE), with the following formulation of an oil-in-water emulsion (in g):

- Polysorbate 60.....3,00
- Sorbitan stearate.....2,00
- Cetyl alcohol.....1,00

- Paraffinum.....3,00
- Isopropyl mirystate.....3,00
- Caprylic-caproic triglycerides3,00
- Dimethicone.....0,50
- Propylene glycol.....3,00
- Cellulose gum.....0,25
- Carbomer 9400,10
- Triethanolamine.....0,10
- Aqua.....100 c.s.p.

the formulation being completed with 0,20 g of LAE."

"2. A cosmetic or dermatological composition comprising as a preservative the cationic surfactant ethyl ester of the lauramide of arginine hydrochloride (LAE), with the following formulation of an oil-in-water emulsion (in g):

- Stearic acid.....1,70
- Glyceryl stearate S.E.....2,50
- Cetyl alcohol.....1,50
- Paraffinum.....3,00
- Isopropyl myristate.....3,00
- Caprylic-caproic triglycerides.....3,00
- Dimethicone.....0,50
- Propylene glycol.....3,00
- Cellulose gum.....0,50
- Triethanolamine.....1,03
- Aqua.....100 c.s.p.

the formulation being completed with 0,20 g of LAE."

"3. A cosmetic or dermatological composition comprising as a preservative the cationic surfactant ethyl ester

of the lauramide of arginine hydrochloride (LAE), with the following formulation of an oil-in-water emulsion (in g):

- Polysorbate 60.....3,00
- Sorbitan stearate.....2,00
- Cetyl alcohol.....0,75
- Paraffinum.....3,00
- Isopropyl myristate.....2,50
- Caprylic-caproic triglycerides2,00
- Dimethicone.....0,50
- Propylene glycol.....3,00
- Aqua..... 100 c.s.p.

the formulation being completed with 0,20 g of LAE."

"4. A cosmetic or dermatological composition comprising as a preservative the cationic surfactant ethyl ester of the lauramide of arginine hydrochloride (LAE), with the following formulation of an oil-in-water emulsion (in g):

- Glyceryl stearate + PEG 100 stearate.....4,00
- Cetyl alcohol + sodium cetyl sulfate.....2,00
- Caprylic-caproic triglycerides.....4,00
- Isopropyl mirystate.....2,50
- Paraffinum.....2,00
- Dimethicone.....0,50
- Glycerin.....3,00
- Wheat (triticum vulgare) germ protein.....2,00
- Aqua.....100 c.s.p.

the formulation being completed with 0,20 g of LAE."

"5. A cosmetic or dermatological composition comprising as a preservative the cationic surfactant ethyl ester of the lauramide of arginine hydrochloride (LAE), with the following formulation of an oil-in-water emulsion (in g):

- Polysorbate 60..... 3,00
- Sorbitan stearate.....2,00
- Cetyl alcohol.....2,50
- Paraffinum.....2,00
- Caprylic-caproic triglycerides.....2,00
- Ethyl hexyl methoxycinnamate.....5,00
- Benzophenone 3..... 1,00
- Dimethicone.....0,50
- Propylene glycol.....3,00
- Aqua.....100 c.s.p.

the formulation being completed with 0,20 g of LAE."

"6. A cosmetic or dermatological composition comprising as a preservative the cationic surfactant ethyl ester of the lauramide of arginine hydrochloride (LAE), with the following formulation of an oil-in-water emulsion (in g):

- Cetyl Dimethicone copolyol.....3,00
- Isohexadecane.4,00
- Paraffinum.....5,00
- Isopropyl myristate3,00
- Caprylic-caproic triglycerides.....3,00
- Ethyl hexyl methoxycinnamate.....5,00
- Benzophenone 31,00
- Glycerin3,00
- Sodium chloride.....0,50

- Aqua.....100 c.s.p.

the formulation being completed with 0,20 g of LAE."

"7. A cosmetic or dermatological composition comprising as a preservative the cationic surfactant ethyl ester of the lauramide of arginine hydrochloride (LAE), with the following formulation of an water-in-oil emulsion (in g):

- Cetyl Dimethicone copolyol.....3,00
- Isohexadecane.6,00
- Paraffinum.....8,00
- Isopropyl myristate.....6,00
- Caprylic-caproic triglycerides.....4,00
- Glycerin5,00
- Sodium chloride.....0,50
- Aqua.....100 c.s.p.

the formulation being completed with 0,20 g of LAE."

III. The Appellant argued that the amended claims were restricted to examples disclosed in the application as filed and, thus, fulfilled the requirements of Article 123 (2) EPC. The particular compositions claimed were not disclosed in document (1) and were therefore novel. The problem underlying the present invention when considering document (1) as representing the closest prior art was to provide cosmetic preparations with an improved protection against microbiological contamination. The solution to that problem was characterised in that the amount of lipophilic paraffinic compound did not exceed 8% by weight of the claimed composition irrespective of

whether the composition was an-oil-in water or water-in-oil emulsion. Example 3 of the patent application compared to the composition n° 4 of the comparative tests filed in the appeal proceedings showed that this problem was effectively solved by the claimed compositions. None of the prior art documents cited by the Examination Division suggested that the protection against microbiological contamination could be improved when controlling the amount of paraffin compound. Therefore, the claimed subject-matter involved an inventive step.

- IV. The Appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of claims 1 to 7 of the sole request as filed during the oral proceedings before the Board.

- V. At the end of the oral proceedings, the decision of the Board was announced.

Reasons for the Decision

- 1. The appeal is admissible.

- 2. *Amendments*

Amended claims 1 to 7 respectively concern the compositions according to examples 1, 2, 9, 12, 13, 14 and 3 of the application as filed and fulfil therefore the requirements of Article 123(2) EPC.

3. *Novelty*

The claimed subject-matter is restricted to specific compositions requiring the combination of several ingredients in specific amounts. These particular compositions are not disclosed in documents (1) and (2) on which the contested decision is based and are thus novel over that prior art (Article 54 EPC).

4. *Inventive step*

4.1 The present application is directed to cosmetic or dermatological compositions in the form of emulsions comprising as a preservative the cationic surfactant ethyl ester of the lauramide of arginine hydrochloride (LAE). Cosmetic compositions in the form of emulsions comprising also as a preservative LAE are disclosed in document (1), which was considered in the decision under appeal as representing the closest prior art (claims 8, 9 and 10; page 4, lines 1, 2, 8 to 10). The Board considers, in agreement with the Appellant, that this document represents the closest state of the art and, hence, takes it as the starting point for assessing inventive step.

4.2 Having regard to this prior art, the Appellant submitted that the technical problem underlying the present application was to provide cosmetic preparations with an improved protection against microbiological contamination.

4.3 As the solution to this problem, the present application proposes the compositions according to claims 1 to 7 which are characterized in that the

lipophilic compound "paraffinum" does not exceed 8% by weight irrespective of the type of emulsion, i.e. water-in-oil or oil-in-water.

- 4.4 In order to demonstrate that the technical problem as defined above has effectively been solved by the claimed compositions the Appellant relied on the results observed in example 3 of the patent application and compared them to the results achieved with the comparative composition n°4 of the test report filed with the letter dated 18 July 2008. According to example 3 the addition of 0,20 g LEA to 100 g of a composition containing 8% by weight paraffinum decreases the number of colonies of different types of microorganisms whereas no reduction of the number of colonies is observed when adding the same amount of LEA in comparative composition 4 containing 11% by weight of paraffinum (see application, example 3, table 4; test report, composition n°4, page 6/8). This comparison shows that the protection against microbiological contamination is linked to the amount of lipophilic compound in the composition and is in fact improved when decreasing the amount of the lipophilic paraffinum compound to 8% by weight. It is thus credible that the claimed compositions which are characterized in that the lipophilic compound paraffinum does not exceed 8% by weight irrespective of the type of emulsion have an improved protection against microbiological contamination. The Board is thus satisfied that the technical problem as defined above is effectively solved by the claimed compositions.

4.5 It remains to be decided whether or not the proposed solution to the objective technical problem as defined above is obvious in view of the state of the art.

4.6 Whereas document (1) generally describes that ethyl ester of the lauramide of arginine hydrochloride (LAE) acts as an antimicrobial agent in cosmetic and dermatological compositions, it does not give any information with regard to the influence of the amount of lipophilic compound on the efficacy of the protection against microbiological contamination. Thus, document (1) cannot teach that said protection is improved when the amount of paraffinum does not exceed 8% by weight as required by the claimed compositions.

The same applies to document (2) which also describes the antimicrobial effect of lower alkyl esters of aliphatic acyl arginine in cosmetic compositions (claims 1, 12, 13 and 19) but without giving any information on the impact on said antimicrobial effect of the amount of lipophilic compound in the composition.

The Examining Division did not rely on any further documents in the decision under appeal to challenge obviousness. The Board is not aware of any further relevant document and is, thus, satisfied that the state of the art addressed in the proceedings does not render the claimed invention obvious.

4.7 The Board concludes from the above that the subject-matter of claims 1 to 7 of the sole request involves an inventive step within the meaning of Articles 52 (1) and 56 EPC.

5. *Remittal*

Having so decided on the allowability of the amendments under Article 123 (2) EPC and on the issues of novelty and inventive step the Board has not, however, taken a decision on the whole matter, since it remains to be examined whether the terms used in the amended claims to define the ingredients of the claimed compositions satisfy the requirements of Article 84 EPC, in particular whether said terms are trademarks or generic names. In addition, the description remains to be adapted to the amended claims.

Under these circumstances the Board considers it appropriate to exercise the power conferred to it by Article 111 (1) EPC to remit the case to the Examining Division for the purpose of examining these fresh issues.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the department of first instance for further prosecution on the basis of the sole request as filed during oral proceedings before the Board.

The Registrar:

The Chairman:

C. Rodríguez Rodríguez

R. Freimuth