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**Datasheet for the decision  
of 15 May 2018**

**Case Number:** T 2299/15 - 3.3.07

**Application Number:** 07798125.6

**Publication Number:** 2032117

**IPC:** A61K8/41, A61Q5/06, A61Q5/12,  
A61Q5/00

**Language of the proceedings:** EN

**Title of invention:**  
Method for inhibiting fading and enhancing color intensity of  
color-treated hair

**Patent Proprietor:**  
Alberto-Culver Company

**Opponent:**  
Henkel AG & Co. KGaA

**Relevant legal provisions:**  
EPC Art. 56

**Keyword:**  
Inventive step - (no)

**Decisions cited:**  
G 0002/88, G 0006/88



**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 2299/15 - 3.3.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.07**  
**of 15 May 2018**

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

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

**Respondent:** Alberto-Culver Company  
(Patent Proprietor) 800 Sylvan Avenue, AG West, S. Wing  
Englewood Cliffs NJ 07632 (US)

**Representative:** Chisem, Janet  
Unilever Patent Group  
Colworth House  
Sharnbrook  
Bedford MK44 1LQ (GB)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 28 October 2015  
rejecting the opposition filed against European  
patent No. 2032117 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman** J. Riolo  
**Members:** A. Usuelli  
Y. Podbielski

## Summary of Facts and Submissions

- I. European patent No. 2 032 117, based on European patent application No. 07798125.6, was granted on the basis of 16 claims.

Independent claim 1 read as follows:

"1. A method for inhibiting color fading in color-treated hair, the method comprising contacting the hair with a composition comprising a carrier and a color fading inhibiting-effective amount of from 0.1 wt% to 15 wt% of a monoalkyl quaternary ammonium salt, which is lauryltrimonium chloride, cocotrimonium chloride, or a combination thereof, wherein the monoalkyl quaternary ammonium salt in the composition inhibits fading of color in the color-treated hair".

- II. An opposition was filed against the patent on the grounds that its subject-matter lacked novelty and inventive step and it was not sufficiently disclosed. The documents cited during the opposition proceedings included the following:

D3: WO 00/07550

- III. By decision posted on 28 October 2015 the opposition division rejected the opposition. The opposition division came *inter alia* to the following conclusions:

- (a) The subject-matter of the patent complied with the requirements of sufficiency of disclosure and novelty.
- (b) Document D3 was the closest prior art for the assessment of inventive step. The composition used

in example 1 of D3 differed from the compositions used in the methods of the patent in that it contained behentrimonium chloride instead of lauryltrimonium chloride or cocotrimonium chloride. The objective technical problem was the provision of an alternative method for inhibiting color fading in color-treated hair or for enhancing the intensity of color achieved by color-treating hair. Neither D3 nor the other cited documents suggested to solve this problem by the use of compositions containing lauryltrimonium chloride or cocotrimonium chloride. The subject-matter of the patent was therefore inventive.

- IV. The opponent (hereinafter: the appellant) lodged an appeal against that decision. In the statement setting out the grounds of appeal filed on 25 February 2016 it contested *inter alia* the conclusion of the opposition division as to the presence of an inventive step.

In its reply filed on 1 July 2016 the patent-proprietor (hereinafter: the respondent) requested to dismiss the appeal.

- V. In a communication pursuant to Article 15(1) RPBA issued on 28 March 2018, the Board commented *inter alia* on inventive step as regards the closest prior art D3. It considered that the method of claim 1 differed from the disclosure of D3 only in the selection of two specific quaternary ammonium salts (lauryltrimonium chloride and cocotrimonium chloride) and defined the technical problem as the provision of an alternative method for inhibiting color fading in color-treated hair. It concluded that the method of claim 1 did not involve an inventive step since it would have been obvious to the skilled person to replace the quaternary

ammonium salt used in the composition of D3 with one of the quaternary ammonium salts recited in claim 1.

- VI. Oral proceedings were held on 15 May 2018. They were not attended by the parties, who had informed the Board accordingly by letters of 14 March 2018 (appellant) and 15 August 2017 (respondent).
- VII. In the statement setting out the grounds of appeal the appellant argued on inventive step starting from D3 as the closest prior art. It observed that example 1 related to a composition to be used for improving fade resistance of colored hair. This composition contained a quaternary ammonium salt, namely behentrimonium chloride. The method of claim 1 of the patent differed from this disclosure in the use of a composition comprising lauryltrimonium chloride or cocotrimonium chloride instead of behentrimonium chloride. The technical problem was the provision of an alternative method for improving fade resistance of hair. D3 described as suitable quaternary ammonium salts a general class of compounds comprising the compound of example 1 as well as the compounds recited in claim 1 of the patent. Accordingly, the skilled person would have considered obvious to replace in example 1 of D3 behentrimonium chloride with lauryltrimonium chloride or cocotrimonium chloride. Hence, the subject-matter of claim 1 did not involve an inventive step.
- VIII. With regard to the requirement of inventive step the respondent, in its reply to the appeal of the opponent, observed that in example 1 of D3 the effect of reducing color fade was provided by the siloxane polymer. The behentrimonium chloride was used as conditioning agent. There was no indication in this document that a quaternary ammonium salt could have any effect on

resistance to color fading. Furthermore there was no hint in D3 to replace in the composition used in example 1 behentrimonium chloride with one of the quaternary ammonium salts recited in claim 1 of the patent. Hence, claim 1 met the requirements of Article 56 EPC.

IX. The appellant requested that the decision under appeal be set aside and that the patent be revoked.

X. The respondent requested that the appeal be dismissed.

### **Reasons for the Decision**

#### Patent as granted - Inventive step

1. Closest prior art

1.1 The Board agrees with the parties in considering document D3 as the closest prior art.

1.2 D3 relates to a method for improving the fade resistance of color treated hair which comprises the application to the hair of a composition containing a polysiloxane compound (page 2, lines 5 to 9). The composition containing said polysiloxane compound is for instance a hair conditioner (see first paragraph of page 28).

Suitable hair conditioners contain, in addition to the polysiloxane, other substances such as a cationic conditioning agent (see paragraph bridging pages 1 and 2). According to the information disclosed on page 3, the preferred conditioning agents are quaternary ammonium salts of formula  $NR_1R_2R_3R_4^+X^-$ .

Hence, D3 describes a method for improving the fade resistance of color treated hair which is based on the use of a composition comprising a polysiloxane compound and a quaternary ammonium salt.

- 1.3 It is not disputed by the parties that the quaternary ammonium salts recited in present claim 1, i.e. lauryltrimonium chloride and cocotrimonium chloride are included in the general formula  $NR_1R_2R_3R_4^+X^-$  of D3.

However, D3 does not mention anywhere lauryltrimonium chloride or cocotrimonium chloride. The hair conditioners exemplified in D3, such as the composition of example 1, contain behentrimonium chloride as quaternary ammonium salt.

Thus, the method of claim 1 is novel over D3 on account of the selection of two specific quaternary ammonium salts, namely lauryltrimonium chloride or cocotrimonium chloride.

- 1.4 In the respondent's opinion, an additional distinguishing feature is to be seen in the fact that according to claim 1 the quaternary ammonium salt is the component that inhibits fading of color in the color-treated hair, whereas in the compositions of D3 the polysiloxane compound is the agent responsible for this effect.

The Board does not share the respondent's position. The feature of claim 1 "...inhibits fading of color in the color-treated hair" defines the function of the quaternary ammonium salt in the context of a method of treating hair. However, the fact of specifying in a given method the "role" of a substance used in the method does not modify the method itself.

In this regard it is noted that the decisions of the Enlarged Board of Appeal G 2/88 and G 6/88, concerning the assessment of novelty of non-medical use claims, are normally interpreted in a restrictive manner, i.e. the principles affirmed in these decisions apply only to claims relating to the use of a known compound for a particular purpose (see Case Law of the Boards of Appeal, 8th edition 2016, I.C.8.1.3).

Hence, the feature defining the function of the quaternary ammonium salt in the method of claim 1 is not regarded as a further distinguishing feature over the disclosure of D3.

2. Technical problem

2.1 The experimental part of the patent shows that compositions containing cocotrimonium chloride or lauryltrimonium chloride afford color fade protection to dyed tresses (see tables 1 to 4 and paragraphs [0032] and [0033]). There are however no experiments comparing the compositions used in the method of claim 1 with the compositions used in D3, such as the composition of example 1.

The technical problem is therefore defined as the provision of an alternative method for inhibiting color fading in color-treated hair.

3. Obviousness

3.1 A skilled person would in principle consider that the method for inhibiting color fading disclosed in D3, based on the use of a hair conditioning composition, could be implemented by using compositions containing



any quaternary ammonium compound covered by the general formula  $NR_1R_2R_3R_4^+X^-$ , including the quaternary ammonium compounds lauryltrimonium chloride or cocotrimonium chloride.

He would therefore consider obvious to replace in the composition of example 1 of D3 behentrimonium chloride with lauryltrimonium chloride or with cocotrimonium chloride.

- 3.2 It follows from the above considerations that the subject-matter of claim 1 does not comply with the requirements of Article 56 EPC.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



B. Atienza Vivancos

J. Riolo

Decision electronically authenticated