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**Datasheet for the decision
of 10 January 2019**

Case Number: T 2326/15 - 3.2.03

Application Number: 06002827.1

Publication Number: 1817976

IPC: A45D44/02, G06F19/00, G06F17/50

Language of the proceedings: EN

Title of invention:

Methods for simulating custom hair color results and thereby selecting and formulating custom hair coloring compositions

Patent Proprietor:

Noxell Corporation

Opponent:

Henkel AG & Co. KGaA

Headword:

Relevant legal provisions:

EPC Art. 56

Keyword:

Inventive step - non-obvious solution

Decisions cited:

Catchword:



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Case Number: T 2326/15 - 3.2.03

D E C I S I O N
of Technical Board of Appeal 3.2.03
of 10 January 2019

Appellant: Noxell Corporation
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 28 October 2015
revoking European patent No. 1817976 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman G. Ashley
Members: B. Miller
E. Kossonakou

Summary of Facts and Submissions

I. European patent No. 1 817 976 relates to a method for formulating a custom hair coloring composition based on a simulation of the custom hair color result.

II. An opposition was filed against the patent, based on the grounds of Article 100(a) EPC together with Article 56 EPC.

The opposition division decided to revoke the patent pursuant to Articles 101(2) and 101(3) (b) EPC.

This decision was appealed by the proprietor (appellant).

III. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the claims as granted (main request) or of one of the auxiliary requests 1 to 3 filed with the statement setting out the grounds of appeal.

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

IV. The sole independent claim according to the main request reads as follows:

"A method for formulating a custom hair coloring composition which imparts to hair a desired resulting custom hair color and which comprises a mixture of at least two different color shade components selected from a defined collection of different color shade components available for mixing, said method comprising the steps of:

- (a) inputting into a computer system an initial hair color of said hair;
- (b) inputting into a computer system an amount of a first color shade component for adding to said mixture, wherein said first color shade component is selected from said defined collection;
- (c) inputting into said computer system an amount of a second color shade component for adding to said mixture, wherein said second color shade component is selected from said defined collection;
- (d) inputting, optionally, into said computer system an amount of one or more additional color shade components for adding to said mixture, wherein each of said additional color shade components is selected from said defined collection;
- (e) predicting with said computer system a likely resulting custom hair color based on the inputted initial hair color of said hair and the inputted amounts of each of said first, second, and optionally additional, color shade components for adding to said mixture;
- (f) generating with said computer system a visual image representative of said likely resulting custom hair color;
- (g) displaying said visual image representative of said likely resulting custom hair color to simulate said resulting custom hair color;
- (h) performing the method according to steps (a) to (g) to select said desired resulting custom hair color, wherein said desired resulting custom hair color has corresponding inputted and saved amounts of each of said first, second, and optionally additional, color shade components for adding to said mixture;

characterized in

- (i) providing a mixing vessel for containing said mixture;
- (j) dispensing into said mixing vessel an amount of each of said first, second, and optionally additional, color shade components selected from said defined collection according to the inputted and saved amounts of each of said first, second, and optionally additional, color shade components which correspond to said desired resulting custom hair color; and
- (k) mixing the dispensed amounts of said first, second, and optionally additional, color shade components to formulate said custom hair coloring composition, wherein each of said defined collection of different color shade components is in the form of granules, and wherein said step (j) of dispensing is performed with the use of a plurality of dosing devices, each of said plurality of dosing devices corresponding to one of said different color shade components, wherein each of said dosing devices comprises
 - (i) a storage vessel containing said granules,
 - (ii) a dispensing head connected to said storage vessel and having a dispensing opening, and
 - (iii) an actuating means within said dispensing head for controlling dispensing of said granules from said storage vessel and through said dispensing opening."

Claim 2 of the main request relates to a preferred embodiment of the method according to claim 1.

V. State of the art

The following documents cited in the contested decision were cited in the appeal proceedings:

E1: WO 2005/089589 A1;

E2: EP 443 741 A1;

E3: DE 42 33 874 A1;

E4: DE 196 07 220 A1.

VI. The appellant's arguments can be summarised as follows.

Starting from the hair color simulation system described in E1 the skilled person could possibly consider a process as described in E2 in order to manufacture the coloring composition. However, E2 taught the use of liquid hair coloring components. Therefore the process of E2 was not suitable for granules as required by claim 1 without further modifications. E3 and E4 related to a different problem and would not be consulted by the skilled person when aiming at a personalised, custom-made hair coloring composition. None of the cited documents provided an incentive to further modify the process disclosed in E2 in order to make it suitable for mixing and dispensing granules.

Therefore the subject-matter of claim 1 was not obvious when starting from E1.

VII. The respondent's respective arguments can be summarised as follows.

E1 disclosed a hair color simulation system. E2 disclosed an automated manufacturing process for dye compositions. It was obvious to use the manufacturing

process disclosed in E2 after the hair color simulation process described in E1 in order to formulate a custom made hair coloring composition.

E3 and E4 disclosed that it was beneficial to use coloring components in the form of granules when manufacturing a hair colouring composition.

Therefore it was obvious for the skilled person to use granular hair color components in a process resulting from the combination of the teaching of E1 and E2.

- VIII. With the summons to oral proceedings, the Board sent a communication pursuant to Articles 15(1) and 17(2) of the Rules of Procedure of the Boards of Appeal (RPBA) indicating to the parties its preliminary, non-binding opinion on the case.
- IX. With letter dated 4 July 2018 the respondent withdrew its request for oral proceedings and informed the Board that it would not attend the oral proceedings. The request for dismissal of the appeal was maintained, however no further arguments contradicting the Board's preliminary opinion were submitted.
- X. In these circumstances the Board saw no need to revise its preliminary opinion and was thus in a position to decide the case on the basis of the written submissions. The scheduled oral proceedings were therefore cancelled by the Board with the issuance of the present decision.

Reasons for the Decision

1. Article 56 EPC - Main request
 - 1.1 Both parties consider E1 as a suitable starting point for the assessment of inventive step. The Board has no reason to deviate from this assessment, since E1, similar to the contested patent, relates to a method for formulating a custom hair coloring.
 - 1.2 E1 discloses a method for formulating a custom hair coloring composition which imparts to hair a desired custom hair color and which comprises a mixture of at least two different color-shade components (E1: page 3, lines 30 to 31, page 2, lines 20 to 24).

The method according to E1 comprises the steps of

 - a) inputting into a computer system i) an initial hair color of said hair (page 2, lines 18 to 20), ii) an amount of a first color-shade component (page 2, lines 20 to 25) and iii) a second-color shade component (page 2, lines 20 to 25);
 - b) predicting a likely resulting custom hair color (page 4, lines 1 to 3);
 - c) generating and displaying a visual image representative of said likely resulting custom hair color (page 3, lines 33 to 35, page 4, lines 1 to 3).
 - 1.3 It is undisputed by the parties that claim 1 as granted differs from the disclosure in E1 in that

- 1) in step (h) the in-putted amounts of each of said first, second, and optionally additional color shade components for adding to said mixture are saved, and
- 2) the following process steps (i), (j) and (k) are performed:
 - (i) providing a mixing vessel for containing said mixture;
 - (j) dispensing into said mixing vessel an amount of each of said first, second, and optionally additional, color shade components selected from said defined collection according to the inputted and saved amounts of each of said first, second, and optionally additional, colour shade components which correspond to said desired resulting custom hair color; and
 - (k) mixing the dispensed amounts of said first, second, and optionally additional, color shade components to formulate said custom hair coloring composition, wherein each of said defined collection of different color shade components is in the form of granules, and wherein said step (j) of dispensing is performed with the use of a plurality of dosing devices, each of said plurality of dosing devices corresponding to one of said different color shade components, wherein each of said dosing devices comprises
 - (i) a storage vessel containing said granules,
 - (ii) a dispensing head connected to said storage vessel and having a dispensing opening, and
 - (iii) an actuating means within said dispensing head for controlling dispensing of said granules from said storage vessel and through said dispensing opening.

- 1.4 The technical effect of process steps (i), (j) and (k) is that the customer-specific hair coloring composition determined through steps (a) to (h) of claim 1 is actually produced.
- 1.5 Therefore starting from E1 the objective technical problem to be solved can be formulated in general terms as providing an easy automated way of producing the calculated customer-specific hair coloring composition determined by the process of E1.
- 1.6 E2 discloses an automated manufacturing process for formulating a cosmetic product and therefore would be consulted by the skilled person confronted with the underlying problem.

The manufacturing process according to E2 comprises the following steps:

- i) providing a mixing vessel for containing said mixture (E2, page 3, lines 23 to 27) and
- ii) dispensing into said mixing vessel an amount of color shade components (E2, page 3, lines 24 and 25 and page 2, lines 54 and 55).

Both parties agree that the process steps (i), (j) and (k) defined in claim 1 of the contested patent differ from the manufacturing process disclosed in E2 in that the color shade components to be dosed and mixed are in the form of granules, whereas E2 describes on page 2, lines 56 to 57 that "the mixture may be in the form of suspensions, emulsions and solutions".

The teaching of page 2 is consistent with the remaining description of E2, in particular figures 1 to 4 and the

exemplified components in tables I to III, where only liquid components are referred to.

E2 therefore provides no incentive that the device described therein (see figures 1 to 4) can be used for dosing granules.

Furthermore, pumping devices, tubes, valves etc. used for liquids are not necessarily adapted to work with granules. Hence a device which works for liquid components can not equally be used for granules.

Moreover, the reference to possible liquid components in E2 does not provide an incentive to modify the mixing device described therein by making it suitable for mixing granules. Since liquid formulations in general are easy to dose and mix, there is also no inherent motivation for the skilled person to further modify the manufacturing process and device proposed by E2.

Therefore, starting from the simulation process according to E1 and applying subsequently the manufacturing method of E2 the skilled person does not inherently arrive at the subject-matter of claim 1.

The respondent argues in this regard that E3 and E4 demonstrate that it is common practice to use granules as hair coloring components.

The Board accepts that it is known from E3 and E4 that coloring components can be used in the form of granules and that the use of granules has advantages compared to the use of a powder:

E3 (page 2, lines 7 to 12) discloses that hair colors in form of granules do not form dust during use and therefore reduce the risk of allergy.

E4 describes hair colors comprising henna (claim 1) which can be in the form of a powder or granules and which achieve good coloring properties (column 9, line 63 to column 10, line 8).

However, E3 and E4 do not teach that the use of granules has particular advantages over the use of liquids which would motivate the skilled person to further modify the device described in E2 to make it suitable for granules.

Therefore starting from E1 it might be obvious to use an automated mixing method such as described in E2. However, none of the documents cited by the respondent provides any hint to modify the thereby obtained manufacturing process any further by making it suitable for granules.

- 1.7 Therefore the Board reaches the conclusion that the subject-matter of claim 1 of the contested patent is not obvious in view of the cited prior art. The ground of opposition pursuant to Article 100(a) EPC therefore does not prejudice the maintenance of the patent.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent as granted.

The Registrar:

The Chairman:



C. Spira

G. Ashley

Decision electronically authenticated