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**Datasheet for the decision
of 16 November 2021**

Case Number: T 1709/17 - 3.3.10

Application Number: 12198009.8

Publication Number: 2745878

IPC: A61Q13/00, A61K8/85

Language of the proceedings: EN

Title of invention:
Cosmetic compositions

Applicant:
Symrise AG

Headword:
Cosmetic compositions/Symrise

Relevant legal provisions:
EPC Art. 56, 111(2)

Keyword:
Inventive step - (yes)
Appeal decision - remittal to the department of first instance
(yes)

Decisions cited:

Catchword:



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Case Number: T 1709/17 - 3.3.10

D E C I S I O N
of Technical Board of Appeal 3.3.10
of 16 November 2021

Appellant: Symrise AG
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Representative: Fabry, Bernd
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 18 May 2017
refusing European patent application No.
12198009.8 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman P. Gryczka
Members: J.-C. Schmid
F. Blumer

Summary of Facts and Submissions

- I. The appeal lies from the decision of the Examining Division refusing European patent application No. 12198009.8 for lack of inventive step.

Claim 1 of the sole request pending before the examining division reads as follows:

"1. A cosmetic composition comprising

- (a) a crosspolymer obtained from copolymerisation of at least two different polyols selected from the group consisting of glycerol, ethylene glycol, propylene glycol, diethylene glycol, dipropylene glycol, pentaerythritol, trimethylpentandiol

and at least one dicarboxylic acid selected from the group consisting of oxalic acid, malonic acid, succinic acid, glutamic acid, adipic acid, pimelic acid, suberic acid, azelaic acid, malic acid, fumaric acid, glutaconic acid, traumatic acid, muconic acid,

and

- (b) at least one fragrance

in a ratio by weight(a:b) of from about 1:99 to about 1:20."

- II. According to the Examining Division, document (5) (WO 2004/010783 A1) was a suitable closest prior art to the invention. This document disclosed insect repellent

compositions comprising an essential oil/fragrance and a film former such as Lexorez 200 to retard evaporation of the essential oil and improve its efficacy. Essential oils were well-known for their ubiquitous use as fragrances/perfumes. Lexorez 200 was a trimethylpentanediol/adipic acid/glycerin crosspolymer. The claimed subject-matter differed from document (5) only by the required weight ratio crosspolymer:flagrance of from 1:99 to 1:20.

The fragrance compositions exemplified in the present application had a weight ratio crosspolymer:flagrance of 5:12. The amount of the crosspolymer present in the prior art compositions exceeded by far the required higher limit of 1:20. These compositions were therefore excluded from the subject-matter of claim 1 of the main request. The objective technical problem was the provision of an alternative composition. Document (5) did not set any restrictions with respect to the ratio of the crosspolymer to the flagrance. Accordingly, the skilled person looking for an alternative composition would have arrived at the claimed subject-matter without the exercise of inventive skill. Consequently, the subject-matter of claims 1 to 12 of the then pending sole request lacked an inventive step over document (5).

III. According to the appellant, document (5) related exclusively to insect repellents, using essential oils as active ingredients. Although the essential oils undoubtedly had olfactory properties, the primary function of the essential oil of the compositions of document (5) was to repel mosquitoes and not to be a perfume. The crosspolymer was present in the composition of document (5) as a film-forming polymer, having the function of preventing water from

deactivating the active agents. Thus, in document (5) it was considered necessary to use film former and fragrance in practically equal amounts in order to produce a film for preserving the repellence activity. The ratio of the film-forming agent to the essential oil was about 5:6, which corresponded to a ratio of 1:1.7, whereas the present invention required the use of a specific polyol/dicarboxylic acid polymers in much lower amounts (1:20 to 1:99) to produce the desired perfume effect.

Starting from a prior art relating to repellence against mosquito, the objective problem could not merely be reduced to the provision of an alternative composition, since the invention aimed at improving the fragrance power of a perfume.

Therefore, the technical problem underlying the invention was to prolong the olfactory perception of the fragrances, both in terms of intensity and olfactory note.

Although olfactory evaluations are subjective, objectivity could be established by having a large number of individuals making evaluating the compositions.

In the experimental report submitted with the letter of 13 January 2021, the tester group consisted of 20 individuals, male as well as female, aged between 20 and 50 years, of different origins and free of cold symptoms that could influence the perception of odours.

Examples 1 to 8 as well as comparative examples VI to V4 related to series of tests in which fragrance

formulation according to the invention were compared to fragrance formulation without the required crosspolymer (control). While the evaluation of the fragrance intensity showed only slight improvement immediately after application, the superiority of the claimed formulations was apparent after 15 as well as after 30 minutes.

The effects were most pronounced with a 99:1 ratio, but were still present at the 20:1 ratio, which was the lower limit according to claim 1. When the ratio was lowered to 15:1, i.e. below the claimed limit, no further benefit was shown.

Examples 9 to 16 as well as the comparative examples V5 to V8 concerned test series comparing different film-forming agents present in various ratios. The results showed that two film forming agents disclosed in document (5) (F3 and F4) were unsuitable as fixatives for perfumes.

To arrive at the claimed subject-matter when starting from document (5), the skilled person had to make two choices, firstly to select the appropriate polymers from a list of about 80 film-forming agents, and secondly to select a weight ratio, which went against the teaching of document (5), in order to solve a problem which was not even not addressed in the document (5).

Accordingly, claims 1 to 12 of the main request fulfilled the requirements of Art. 56 EPC.

- IV. The Appellant requested the decision under appeal be set aside and a patent be granted on the basis of the main request (claim 1 to 12 filed electronically on 6

October 2016 and filed again with the letter dated 13 January 2021), or subsidiarily, on the basis of the auxiliary requests 1 or 2, filed with the letter dated 13 January 2021.

Reasons for the Decision

1. The appeal is admissible.

Main request

claims 1 to 12 filed electronically filed on 6 October 2016 and filed again with a letter dated 13 January 2021.

2. The sole reason for rejecting the application was that the subject-matter of claims 1 to 12 did not fulfil the requirement of inventive step in the light of document (5) alone.
3. Document (5) relates to insect repellent compositions based on natural essential oils (page 1, lines 3 and 4). It is not contested that essential oils inherently possess olfactory properties, but those properties are not addressed in the document.

The repellent compositions of document (5) may comprise a film former to enhance the insect repellency after two hours (page 7, lines 5 to 9). The film former includes the commercial product Lexorez®200, which is a crosspolymer required by claim 1 of the main request (page 7, line 15 to 17).

However, there is no composition exemplified in document (5) comprising the crosspolymer required by present claim 1. The spray formulation (I) disclosed in

document (5) at page 20, lines 5 and 6 and at the bottom of page 29 comprises 5% wtvol (?) of crosspolymer Lexorez®TC8 (Trimethylpentanediol/Adipic acid/Isononanoic acid copolymer). This product is not a crosspolymer required by claim 1 of the main request, since it is not obtained from copolymerization of at least two different polyols (also see page 7, lines 14 and 15).

The amount of the film former agent in the composition is preferably 4% or 5% based on the formulation (see page 9, lines 3 to 5; table 4; Formulations (I) to (V) at pages 29 to 31).

4. According to the appellant, the technical problem underlying the invention is to prolong the olfactory perception of the fragrances.
5. The solution is the formulation of claim 1 of the main request characterized at least by a ratio by weight of the crosspolymer to the fragrance of from about 1:99 to about 1:20.
6. The Appellant submitted a test report with its letter dated 13 January 2021. In this test report, examples 1, 2, 5 and 6 relate to series of tests in which fragrance formulations according to the invention comprising product Lexorez®200 in the claimed ratios of 1:20 and 1:99 are compared to fragrances formulations without the required crosspolymer (control). Lexorez®200 is a Trimethylpentanediol/Adipic acid/glycerin copolymer. The fragrance intensity of the claimed formulations shows a slight improvement over the control composition immediately after application. However, the superiority of the claimed fragrance formulations is clearly apparent after 15 minutes as

well as after 30 minutes, especially at the 1:99 ratio.

Examples 9 to 16 as well as the comparative examples V5 to V8 concerned test series comparing the properties of different film-forming agents disclosed in document (5). The results show that the film forming agents F3 (ANTARON® V216;PVP/Eicosen Copolymer) and F4 (GAFQUAT® HS-100; Polyquaternium-28) are not good fragrance fixatives, in particular since they do not show a long lasting fragrance effect, as does the crosspolymer Lexorez®200 required by claim 1 .

The board is therefore satisfied that the claimed fragrance compositions are solutions to the technical problem of prolongation the olfactory perception of fragrances.

7. Finally, it remains to be decided whether or not the proposed solution to the problem underlying the patent in suit is obvious in the light of document (5)

Document (5) does not relate to fragrance compositions and thus also does not address the problem of the prolongation the olfactory perception of fragrance compositions.

For this simple reason, document (5) cannot give any hint on how to solve the technical problem underlying the patent-in-suit. Therefore the solution of adding the crosspolymer defined in claim 1 in a ratio relative to the fragrance of from 1:20 to 1:99 is not obvious in the light of document (5).

8. Accordingly, the Board comes to the conclusion that the subject-matter of claim 1 of the main request involves an inventive step over document (5) alone.

9. The essential function of an appeal is to review the decision issued by the first-instance department. The decision under appeal was solely based on lack of inventive step over document (5) alone.

However, in the communication dated 12 July 2013, a significant number of objections of lack of novelty were raised. It is not clear from the subsequent communication whether these objections were overcome or whether, as a matter of pragmatism, the Examining Division preferred to concentrate on an objection of lack of inventive step with respect to documents (3) (EP-A-0 989 183) and (5).

Indeed, in the communication dated 8 April 2016, the Examining Division stated that for the sake of conciseness, the following discussion concentrates only on documents (3) and (5) as possible closest prior art documents. Furthermore, it is not apparent from the file whether the objection of lack of inventive step in relation to document (3) raised in the communication dated 12 July 2013 is still existing, as the decision only addresses inventive step by stating that document (5) is a suitable closest prior art to the invention.

Under these circumstances, the Board considers it appropriate to remit the case to the examining division for further prosecution.

Order

For these reasons it is decided that:

1. The appeal under appeal is set aside.
2. The case is remitted to the examining division for further prosecution on the basis of claims 1 to 12 of the main request filed with a letter dated 13 January 2021.

The Registrar:

The Chairman:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated