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**Datasheet for the decision
of 17 June 2025**

Case Number: T 0585/23 - 3.3.10

Application Number: 13715168.4

Publication Number: 2830584

IPC: A61K8/73, A61K8/41, A61Q5/10,
A61K8/31, A61K8/37, A61K8/92

Language of the proceedings: EN

Title of invention:

COMPOSITION COMPRISING (2,5-DIAMINOPHENYL)ETHANOL AND A
CELLULOSE POLYMER OR CARBOXYLIC ANIONIC POLYMER IN A MEDIUM
RICH IN FATTY SUBSTANCES, DYEING PROCESS AND DEVICE

Patent Proprietor:

L'OREAL

Opponent:

Henkel AG & Co. KGaA

Headword:

Relevant legal provisions:

EPC Art. 56
RPBA Art. 12(4)

Keyword:

Inventive step - (no)

Auxiliary requests - not admitted into the proceedings

Decisions cited:

Catchword:



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D E C I S I O N
of Technical Board of Appeal 3.3.10
of 17 June 2025

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 19 January 2023
revoking European patent No. 2830584 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chair M. Kollmannsberger
Members: R. Pérez Carlón
L. Basterreix

Summary of Facts and Submissions

- I. The patent proprietor (appellant) appealed the decision of the opposition division revoking European patent No. 2 830 584.
- II. Notice of opposition had been filed on grounds including a lack of inventive step (Article 100(a) EPC).
- III. The following documents are relevant to the present decision:

D11	EP 0 667 142 A1
D12	EP 0 727 203 A1
D16	EP 2 198 846 A1

Experimental evidence was filed as D17a and D18.

- IV. Claim 1 of the appellant's main request in the appeal proceedings, which had been filed as auxiliary request 1 with its statement of grounds of appeal and which corresponded to auxiliary request 2 in the opposition division's decision, reads as follows:

"Cosmetic composition comprising:

- a) one or more fatty substances, which are organic compounds that are insoluble in water at ordinary temperature 25°C and at atmospheric pressure (760 mmHg);*
- b) one or more cellulose polymer(s);*
- c) one or more oxidation base(s) chosen from (2,5-diaminophenyl)ethanol and also acid salts thereof or solvates thereof such as hydrates;*
- d) optionally one or more coupler(s);*

*e) one or more basifying agent(s);
f) one or more chemical oxidizing agent(s), preferably hydrogen peroxide; and
the fatty substance content representing in total at least 15% by weight, more particularly at least 20% by weight and more preferentially at least 25% even more particularly at least 30% by weight, more preferentially at least 40% by weight and even more preferentially at least 50% by weight relative to the weight of the composition."*

- V. The opposition division concluded that this subject-matter was novel and that D16 was the closest prior art. It took the view that the claimed composition was characterised by the oxidation base (2,5-diaminophenyl)ethanol specified in feature (c), and would have been obvious to a skilled person, regardless of whether the problem underlying the claimed invention was to provide an alternative composition or an improved composition starting from D16. Thus, the claimed subject-matter was not inventive.
- VI. At the oral proceedings before the board of appeal, which took place on 17 June 2025, the appellant maintained four of its auxiliary requests, all of which had been filed with its statement of grounds of appeal, and withdrew all of its others. The present decision refers to the numbering in the headings of these requests: auxiliary request 1 (now the main request) and auxiliary requests 5 to 8.
- VII. Claim 1 of each of auxiliary requests 5 to 8 stipulates that the claimed composition includes one or more couplers (d) selected from a list of chemicals. Claim 1 of each of auxiliary requests 6 and 8 further

stipulates that the compositions have an alkaline pH value.

VIII. The appellant's arguments were as follows.

Document D16 was the closest prior art. It disclosed all of the features of claim 1 with the exception of the oxidation base (2,5-diaminophenyl)ethanol in feature (c). Starting from the compositions disclosed in D16, the problem of providing an improved dyeing composition that was less selective and more resistant to shampooing and light was credibly solved in view of D17a and D18. The claimed solution, which was characterised by the nature of the oxidation base, would not have been obvious to a skilled person in view of D16, either alone or in combination with D11 or D12. The claimed composition was thus inventive.

Auxiliary requests 5 to 8 were responses to the argument that the claimed composition lacked specific couplers, which had been discussed for the first time at the oral proceedings before the opposition division. These requests should be admitted into the proceedings.

IX. The respondent's arguments were as follows.

D16 was the closest prior art and the problem formulated by the appellant was credibly solved in view of D17a and D18. However, the claimed solution, characterised by the nature of the oxidation base in feature (c), would have been obvious to a skilled person in view of D11 or D12 and was thus not inventive.

Auxiliary requests 5 to 8 should not be admitted into the proceedings as the appellant gave no reason why

these requests could overcome the outstanding issue of a lack of inventive step.

X. In a communication dated 16 October 2024, the board informed the parties of its preliminary view that the subject-matter of auxiliary request 1 did not appear inventive and that auxiliary requests 5 to 8 should not be admitted into the proceedings.

XI. The parties' final requests were as follows.

The appellant requested that the decision under appeal be set aside and that the patent be maintained in amended form with the claim sets filed with its statement of grounds of appeal as auxiliary requests 1, 5, 6, 7 and 8.

The respondent requested that the appeal be dismissed.

XII. At the end of the oral proceedings, the decision was announced.

Reasons for the Decision

1. The appeal is admissible.

Main request

2. The appellant's main request was filed as auxiliary request 1 with the statement of grounds of appeal.

3. Inventive step

Claim 1 relates to a cosmetic composition comprising:
(a) at least 15% by weight of fatty substances

- (b) one or more cellulose polymers
- (c) (2,5-diaminophenyl)ethanol as oxidation base
- (e) one or more basifying agents, and
- (f) one or more oxidising agents.

The claimed composition leads to colourations that are "sparingly selective" and light-fast (see paragraph [0014] of the contested patent).

3.1 Closest prior art

The parties agreed with the opposition division that document D16 came closest to the claimed invention. The board sees no reason to differ.

The parties also agreed that the composition in Example 2 of D16 did not contain (2,5-diaminophenyl)ethanol, which is the oxidation base stipulated in feature (c) of claim 1.

3.2 Problem underlying the claimed invention

According to the patent proprietor, the problem underlying the claimed invention was to provide a cosmetic composition which resulted in less selective dyeing and which was more resistant to light and shampooing.

3.3 Solution

The claimed solution is the composition set out in claim 1, which is characterised in that it contains (2,5-diaminophenyl)ethanol.

3.4 Success of the claimed solution

At the oral proceedings, it was undisputed that the experimental evidence filed as D17a and D18 showed that the problem was credibly solved by the claimed composition.

3.5 It remains to be examined whether the claimed solution would have been obvious to a skilled person in view of the prior art.

3.5.1 Example 2 of D16 discloses a hair-dyeing composition containing more than 20% Vaseline as fatty substance (a), Natrosol Plus 330 CS as cellulose polymer (b), 1-methyl-2,5-diaminobenzene as oxidation base (c), 2,4-diaminophenoxyethanol, m-aminophenol and resorcinol as couplers (d), monoethanolamine as basifying agent (e), and water peroxide as oxidising agent (f).

Document D16 further discloses a number of other chemicals suitable for the invention (see, for example, claim 10). Paragraphs [0304] and [0305] disclose (2,5-diaminophenyl)ethanol as being the preferred oxidation base, although it does not disclose this as being linked to any specific effect.

A skilled person trying to obtain an improved composition would have investigated whether the prior art suggested that any of the components disclosed in D16 led to particularly beneficial properties and would thus have arrived at documents such as D11 and D12.

Document D12 discloses that the oxidation base (2,5-diaminophenyl)ethanol leads to very homogeneous colouring (see, for example, page 2, lines 49 to 52), even in neutral or acidic conditions. A skilled person would thus have considered using this compound as the

oxidation base and therefore would have arrived at the claimed invention without the need for any inventive skill.

Similarly, document D11 discloses that (2,5-diaminophenyl)ethanol in combination with 2-methyl-5-aminophenol, which is a preferred coupler in D16 (see the second compound in paragraph [0328]), leads to non-toxic, resistant colour (page 2, lines 23 to 24), which is weakly selective (page 2, line 35) and is very resistant to shampooing (page 2, line 37). A skilled person seeking an improved composition would therefore have used the combination of the base and coupler in D11 and would thus have arrived at the claimed invention.

The claimed composition is thus not inventive (Article 56 EPC) and auxiliary request 1 is not allowable.

3.6 The appellant argued that a skilled person would not have combined the teaching of documents D16 and D12 for a number of reasons, which, however, are not convincing.

3.6.1 The appellant argued that D12 related to compositions that are particularly effective in neutral or acid conditions (see Example 5), whereas Example 2 in document D16 was basic. A skilled person would not have combined these teachings for this reason alone.

However, neither claim 1 of auxiliary request 1 nor the general disclosure of D16 (see paragraph [0367]) is limited to compositions having a basic pH. Moreover, D12 also discloses compositions having a pH of less than 8 (page 4, first full paragraph) and thus includes

weakly basic compositions.

- 3.6.2 The appellant argued that D12 was silent on resistance to shampooing. For this reason too, a skilled person would not have turned to D12 when seeking to solve the problem underlying the claimed invention.

However, D12 does mention resistance to chemicals (page 2, line 13), among which shampoo is arguably one of the most frequently used. Be that as it may, D12 teaches the claimed solution in order to obtain a less selective colouration, irrespective of whether further effects could also have been achieved.

- 3.6.3 The appellant further argued that the compositions in D12 were more aqueous than the compositions in D16, which had a high fatty substance content. A skilled person would not have combined the teachings of these documents also for this reason.

However, D12 discloses compositions which can be formulated in any form (page 3, lines 48 to 51) and may contain fatty components (see the last two lines on page 3). The high content of fatty substances and the suitability of (2,5-diaminophenyl)ethanol as an oxidation base under such conditions is in any case already disclosed by the closest prior-art document, D16.

- 3.6.4 The appellant also argued that D12 did not disclose that the oxidation base in claim 1 performed better than that of Example 2 of D16. For this reason too, a skilled person would not have arrived at the claimed invention.

However, it is foreseeable that some of the large

number of embodiments in D16 could perform even better than that of Example 2. In order to find which ones could be better, a skilled person would have sought particularly good components in the prior art and thus would have arrived at the claimed solution. This argument is therefore not convincing either.

- 3.7 With respect to the compositions in D11, the appellant argued that they contain less fat, that D11 did not disclose the oxidation base in claim 1 to be the cause of the improvement, that the compositions in D11 required a coupler which was not the one in Example 2 of D16, and that the compositions in D11 and D16 led to different dyeing colours.

These arguments are not convincing for reasons analogous to those already explained above with respect to D12.

Claim 1 does not even require a coupler and the coupler used in D11, 2-methyl-5-aminophenol, is one of the most preferred ones in D16 (see the second compound in paragraph [0328]). Thus, even if a skilled person would arguably only have considered using (2,5-diaminophenyl)ethanol in combination with 2-methyl-2-aminophenol in view of D11, the resulting embodiment would nevertheless be in accordance with claim 1. It is thus irrelevant whether D11 discloses only (2,5-diaminophenyl)ethanol or its combination with 2-methyl-5-aminophenol to be the reason for the disclosed effect.

A skilled person seeking an improvement would have considered applying the teaching of D11 even in the absence of a direct comparison between the coupler in this document and that in claim 1. The good results in

D11 suffice.

The fatty substance content is disclosed by the closest prior-art document D16 and claim 1 is not limited with respect to the colour achievable by the composition. The board fails to see why a skilled person would not have combined D16 with D11 in view of these differences.

Auxiliary requests 5 to 8

4. These requests were filed for the first time with the statement of grounds of appeal. It was undisputed that the requests amend the appellant's case.

Article 12(4) RPBA requires the appellant to provide reasons why any amendment of the claimed subject-matter overcomes the objections raised.

The opposition division did not allow what was then auxiliary request 2, i.e. the main request in the appeal proceedings, for lack of inventive step.

Claim 1 of these requests differ from claim 1 of the main request in the addition of lists of specific couplers present in the composition as component (d). Claim 1 of each of auxiliary requests 6 and 8 additionally defines an alkaline pH value for the composition.

The statement of grounds of appeal merely states that the subject-matter of auxiliary requests 5 to 8 is inventive for the same reasons as those set out with respect to the main request pending at that time (see points 8.3, 9.3, 10.3 and 11.3). The appellant has not explained why the amendments made in auxiliary

requests 5 to 8 should render the claimed subject-matter inventive if the higher-ranked requests were not allowed.

It is not immediately apparent why that should be the case, either.

Thus, the board and the respondent have been left to speculate why the conclusion on inventive step should be different for the subject-matter of auxiliary requests 5 to 8. This runs contrary to the requirements set out in Article 12(4) RPBA.

The board has thus decided not to admit auxiliary requests 5 to 8 into the appeal proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:



C. Rodríguez Rodríguez

M. Kollmannsberger

Decision electronically authenticated