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**Datasheet for the decision
of 10 October 2025**

Case Number: T 1147/23 - 3.3.09

Application Number: 16819903.2

Publication Number: 3393441

IPC: A61K8/41, A61Q5/06, A61K8/898

Language of the proceedings: EN

Title of invention:
DYEING COMPOSITION COMPRISING A DIRECT DYE OF TRIARYLMETHANE
STRUCTURE, AND A SILICONE

Patent Proprietor:
L'OREAL

Opponent:
Henkel AG & Co. KGaA

Headword:
Triarylmethane direct dye/HENKEL

Relevant legal provisions:
EPC Art. 114(2), 56

Keyword:

Non-admittance of objections raised at the oral proceedings
before the opposition division - correct exercise of
discretion (no)
Inventive step

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 1147/23 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 10 October 2025

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
25 April 2023 concerning maintenance of the
European Patent No. 3393441 in amended form.**

Composition of the Board:

Chair A. Haderlein
Members: R. Pérez Carlón
L. Basterreix

Summary of Facts and Submissions

- I. The patent proprietor and the opponent appealed the opposition division's decision finding that the patent in amended form as in auxiliary request 1 dated 11 February 2022 complied with the EPC.
- II. The patent proprietor withdrew its appeal.
- III. Notice of opposition had been filed on the grounds of lack of novelty and inventive step (Article 100(a) EPC).
- IV. The following documents are relevant to the present decision:
- D2 WO 2010/097339 A2
 - D4 WO 2015/090804 A1
 - D11 WO 2010/068400 A2
 - D12 EP 1 175 893 A2
 - D13 EP 1 656 967 A1
 - D18 Experimental report
- V. The main request on appeal is the request allowed by the opposition division, titled auxiliary request 1. Claim 1 reads as follows:
- "Composition for dyeing keratin fibres comprising, in a cosmetically acceptable medium:*
- (i) one or more direct dyes of triarylmethane structure,*
 - (ii) one or more amino silicones, and*
 - (iii) one or more surfactants,*
- wherein the pH is less than 5."*

- VI. The opposition division's conclusion that the composition in claim 1 was novel was not contested in appeal.

The opposition division did not admit into the proceedings the opponent's objections of lack of inventive step starting from documents D2 and D4, raised at the oral proceedings before it, and concluded that document D12 was the closest prior art. The claimed composition differed from those in D12 in its pH. The problem underlying the claimed invention was to provide colouring compositions allowing improved colour intensity *L. The claimed solution, characterised by a pH of less than 5, credibly solved that problem in view of the available experimental evidence. The prior art did not teach decreasing pH for enhancing colour intensity, and the claimed solution was thus inventive. The conclusion on inventive step in view of D12 was not contested in appeal.

- VII. Claim 1 of the first auxiliary request, filed as auxiliary request 2 with a letter dated 11 February 2022, has all the features of claim 1 of the main request and, in addition, stipulates that the direct dyes of triarylmethane structure (i) are cationic.

- VIII. The appellant's arguments of relevance to the board's decision were as follows.

The opposition division lacked discretion to disregard inventive step objections starting from documents D2 and D4. Its decision in this respect should thus be reversed.

The composition in claim 1 of the main request differed

from that in example 7 of D2 in its pH. The available experimental evidence was incapable of demonstrating an effect linked to that distinguishing feature, and the sole problem credibly solved was that of providing an alternative dyeing composition. The claimed solution, characterised by a pH of less than 5, would have been obvious to a skilled person in view of D11 and was thus not inventive. The arguments applied analogously to claim 1 of the first auxiliary request.

The claimed composition differed from that in composition E of D4 in the kind of dye (i). The examples in the patent did not demonstrate any effect arising from that technical difference and the sole problem solved was that of providing an alternative. As D4 contemplated dyes of the structure specified in claim 1, the claimed solution would have been obvious to a skilled person and was thus not inventive.

Document D11 was also a suitable starting point as, like the claimed invention, it addressed the issue of imparting colour to hair.

IX. The respondent's arguments were as follows.

The lines of attack on inventive step starting from documents D2 and D4 were new facts which the opposition division could thus disregard.

Only D12 was a suitable starting point for examining inventive step as it was the sole document which, like the claimed invention, focused on triarylmethane dyes, whilst neither D2 nor D4 related to dyes of that kind, and D11 disclosed a conditioner and not a dyeing composition.

If a skilled person were nevertheless to have started from D2, the available evidence proved an improvement in colour intensity linked to the pH, which was not taught or hinted at by the prior art.

If a skilled person were to have started from D4, the examples in the patent demonstrated an enhanced build-up linked to the kind of dyes in (i) of claim 1. The problem underlying the claimed invention was that of providing an improved dyeing composition and the claimed solution, characterised by the nature of the direct dye, would not have been obvious to a skilled person and was thus inventive.

As claim 1 of the first auxiliary request (now main request) required cationic direct dyes of triarylmethane structure and D4 disclosed that those dyes were to be avoided, it solved any outstanding issue in view of D4.

X. The parties' final requests were as follows:

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

The respondent requested that the appeal be dismissed, or that the patent be maintained with the claims filed as auxiliary request 2 with a letter dated 11 February 2022, or with the claims filed as auxiliary request 3 with the reply to the statement of grounds of appeal.

Reasons for the Decision

1. The appeal is admissible.
2. Admissibility of inventive step objections in view of D2 and D4

- 2.1 It was undisputed that the inventive step objections starting from D2 and D4 had been raised for the first time at the oral proceedings in opposition.

The opposition division considered these objections belated and *prima facie* not relevant. For these reasons, the opposition division did not admit them into the proceedings.

- 2.2 It was undisputed that the opposition division's discretion to disregard facts or evidence not submitted in due time is enshrined in Article 114(2) EPC. Article 114(2) EPC is silent on arguments.

In accordance with the case law (see Case Law of the Boards of Appeal, 11th ed. 2025, IV.C.4.6.2), point E.VI.2 of the Guidelines for Examination in the EPO stipulates that new arguments based on facts, evidence and grounds constituting the legal and factual framework of the opposition cannot be disregarded. As a general rule, parties may expect the opposition division to act in accordance with the Guidelines (Guidelines, General Part, point 3, fifth paragraph).

- 2.3 The parties were divided as to whether the objections starting from D2 and D4 were new facts, which the opposition division could have disregarded, or new arguments, meaning that the opposition division lacked

that discretion.

The respondent saw these objections as new facts, as neither D2 nor D4 had been cited against claim 12 as granted, which had the same subject-matter as claim 1 of the main request.

- 2.4 However, the essential technical content of D2 and D4 had been discussed in the context of the novelty of the claimed composition both in the notice of opposition and in the opposition division's annex to the summons to oral proceedings. Thus, the disclosure of D2 and D4 does not constitute a new fact. This means that the inventive step objections in view of D2 or D4 are arguments which are based on facts, evidence and grounds constituting the legal and factual framework of the opposition, which the opposition division lacked the discretion to disregard.

The inventive step objections in view of D2 and D4 are thus admitted into the proceedings.

3. Main request, filed as auxiliary request 1 - inventive step
- 3.1 Claim 1 of the main request relates to a composition for dyeing keratin fibres having a pH of less than 5 and comprising, in a cosmetically acceptable medium
- (i) one or more direct dyes of triarylmethane structure,
 - (ii) one or more amino silicones, and
 - (iii) one or more surfactants.
- 3.2 The respondent argued that, as the aim of the claimed invention was to improve the colouring imparted by triarylmethane dyes, the sole suitable springboard for

examining inventive step was D12, which also related to that kind of dye.

However, the claimed invention seeks dyes leading to good colour development, strong colour, low selectivity and better fastness, in particular to washing (see paragraph [0014] of the contested patent). The board considered documents D4 and D2 to address these issues, for the reasons below.

3.3 Inventive step over document D4

The respondent argued that document D4 was not a suitable starting point for examining inventive step for two reasons. On the one hand, D4 focused on hair combability; on the other, it did not disclose triarylmethane dyes as a class of compounds and thus could not address the problem underlying the claimed invention.

However, the board considers D4 to belong to the same technical field of dyeing compositions and to address the same technical problem of colour intensity (see for example page 2, line 28). Despite not referring to triarylmethane dyes as a group, claim 3 of D4 discloses a number of dyes of that kind.

Thus, the respondent's argument that D4 is an unsuitable starting point because it concerned neither colour intensity nor triarylmethane dyes is not convincing.

3.4 The fourth paragraph on page 9 of D4 discloses that the compositions in D4 provide very intensive colouring. According to the following paragraph, colouring requires an acid environment and the higher the

acidity, the better the hair adhesion. Acidity was limited by toxicological issues. According to the fifth paragraph on page 9, the most preferred pH is between 1.8 and 2.5.

It was undisputed that composition E on page 26 of D4 contains two direct dyes, an amino silicone (Silsoft AX) and surfactants (for example Emulgin B1), has pH=2 and lacks direct dyes of triarylmethane structure.

3.5 Technical problem underlying the invention

The parties had different views on the formulation of the technical problem effectively solved by the claimed invention.

The appellant defined the technical problem as that of providing a composition for dyeing keratin fibres leading to a more intense colouring.

3.6 Solution

The solution to this technical problem is the claimed composition having one or more direct dyes, characterised in that the dye is of triarylmethane structure.

3.7 Success

The respondent relied on Table 5 of the contested patent to demonstrate that triarylmethane dyes were superior in the context of the claimed invention.

Table 5 contains colorimetric values of locks of natural hair dyed with compositions containing either triarylmethane dyes (HC Blue No 15 and Basic Blue No 1)

or Basic Blue 99. The latter is however a naphthoquinone dye and not an azoic dye like those in Example E of D4 (D&C Red 33 and D&C Orange 4). Table 5 thus does not permit a direct comparison with D4 and cannot prove the claimed compositions to be superior, as argued by the respondent.

It is thus not credible that the problem formulated by the respondent is solved by the composition in claim 1.

3.8 Reformulation of the technical problem

In accordance with the case law (see Case Law of the Boards of Appeal, 11th Ed. 2025, I.D.4.3.1), alleged but unsupported advantages cannot be taken into consideration in determining the problem underlying the claimed invention.

As the alleged improvement in terms of higher colour intensity lacks supporting evidence, the technical problem in view of D4 needs to be reformulated as being that of providing a composition for dyeing keratin fibres leading, like those of the prior art, to good colouring.

3.9 It was not disputed that this technical problem is solved by the claimed composition, which is characterised by containing a triarylmethane dye.

3.10 It thus remains to be decided whether the proposed solution would have been obvious to a skilled person in view of the prior art.

Claim 3 of D4 discloses, as equivalents to those in composition E, triarylmethane dyes such as Acid Blue 1, Acid Blue 3 and Acid Green 3, which are preferred dyes

for the claimed invention (see paragraph [0062] of the patent). A skilled person would have considered the dyes in claim 3 of D4 to be obvious alternatives to those in composition E and would thus have arrived at the claimed invention in an obvious manner.

The claimed composition is not inventive (Article 56 EPC) and the respondent's main request is thus not allowable.

4. First auxiliary request, titled auxiliary request 2

4.1 Claim 1 of the first auxiliary request requires the triarylmethane (i) to be cationic.

It was undisputed that this feature has a basis on page 2, line 12, of the application as originally filed and that the amendment does not extend the scope conferred by the patent as granted. The requirements of Article 123 EPC are thus fulfilled.

4.2 D4 as closest prior art

Page 19, line 15, of D4 discloses that the compositions should not contain cationic triarylmethane dyes. D4 in fact only relates to anionic dyes and their colouring properties in an acid environment. It was undisputed that, for this reason alone, the objection of lack of inventive step in view of D4 in point 3.3 above does not apply to the composition in claim 1 of the first auxiliary request. The board sees no reason to differ.

4.3 D2 as closest prior art

4.3.1 It was undisputed that example 7 of D2 contains Basic Blue 26, which is a cationic triarylmethane dye,

aminopropyl dimethicone, which is an amino silicone, and a number of surfactants such as Ceteareth 30. The composition of example 7 has a pH=6.4, which is higher than stipulated by claim 1.

4.3.2 Technical problem underlying the invention

The respondent considered the technical problem underlying the claimed invention to be that of providing a composition for dyeing keratin fibres which increased colouring intensity.

4.3.3 Solution

The solution to this technical problem is the claimed composition, characterised by a pH of less than 5.

4.3.4 Success

The respondent relied on the experimental evidence filed as D18 to demonstrate that the problem of providing more intense colouring had been credibly solved.

D18 compares compositions containing the same components (i), (ii) and (iii) as specified in claim 1 and having pH=3.5 and pH=9. On bleached locks of hair, the acid compositions with pH=3 led to lower L* than the basic ones having pH=9, indicating a darker or more intense colour.

The appellant argued that, unlike the comparative examples of D18, the pH of the composition in D2 was not basic (pH=9) but slightly acidic (pH=6.4). For this reason, the results in D18 could not prove any effect over the composition in D2.

D18 does, however, demonstrate that colour intensity is increased by decreasing pH. In the absence of any experimental evidence to the contrary, any effect achieved over a composition having pH=9 should also be achieved, albeit arguably to a lesser extent, over one having pH=6.4.

It is thus credible that the problem formulated by the respondent is solved by the composition in claim 1.

4.4 It remains to be examined whether the claimed solution would have been obvious in view of the prior art.

According to D2, a suitable pH ranges from 2 to 11, preferably from 5 to 10 (page 18, lines 30 and 31). The appellant argued that this disclosure taught a pH of approximately 5, including slightly less than 5, which would be under the threshold in claim 1. However, D2 does not link the pH to any effect in terms of colour intensity. A skilled person seeking to enhance colouring intensity would have no reason to formulate compositions at a pH around or below 5. This argument is thus not convincing.

The appellant also relied on D13 to conclude that the claimed subject-matter would have been obvious to a skilled person. D13 disclosed compositions for improving hair shine and enhancing colour [0006] preferably having a pH from 2.9 to 3.8 [0008], which could include dyes as specified in claim 1 [0013]. As D2 disclosed shampoos as a suitable embodiment (page 19, line 5), a skilled person would have considered the teaching of D13 to be relevant in the context of D2.

However, the most preferred formulation in D2 is a

dyeing composition in solid form, not a shampoo (page 19, lines 17 and 18). For this reason alone, the appellant's argument is not convincing. In addition, for dermatological reasons, shampoos are rarely basic and, more importantly, D13 does not disclose any link between pH and colouring effect. It thus does not teach the claimed solution.

The claimed composition is thus inventive in view of D2.

4.5 D11 as closest prior art

D11 relates to conditioner compositions allowing some colour deposition after a number of treatment cycles (see page 20, point ii after the heading "Color deposition") without changing original hair colour tone (see page 7, third full paragraph). Thus, D11 is more remote from the claimed invention than any of D2, D4 or D12.

4.6 D12 as closest prior art

The appellant did not contest the opposition division's conclusion on inventive step starting from D12, and the board sees no reason to differ. The claimed composition is thus inventive in view of D12.

4.7 The board thus concludes that the invention in claim 1 of the first auxiliary request involves an inventive step (Article 56 EPC).

4.8 No other objections have been put forward in the context of the first auxiliary request and none is apparent to the board. This request is thus allowable,

and the patent can be maintained in amended form with these claims (Article 101(3) (a) EPC).

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The case is remitted to the opposition division with the order to maintain the patent based on claims 1 to 16 of auxiliary request 2 filed with the letter of 11 February 2022, and a description to be adapted if necessary.

The Registrar:

The Chair:



K. Götz-Wein

A. Haderlein

Decision electronically authenticated