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**Datasheet for the decision
of 8 January 2026**

Case Number: T 0951/24 - 3.3.02

Application Number: 12183832.0

Publication Number: 2574331

IPC: A61K8/87, A61K8/81, A61Q5/10,
A61Q5/06, A61K8/91, A61K8/03

Language of the proceedings: EN

Title of invention:
Method for colouring hair

Patent Proprietor:
Wella Operations US, LLC

Opponent:
L'OREAL

Headword:

Relevant legal provisions:
EPC Art. 83, 56, 114(2)
RPBA 2020 Art. 12(1), 12(2)

Keyword:

Sufficiency of disclosure - (yes)

Inventive step - (yes) - unexpected improvement shown

Late submitted material - document admitted by first instance
(yes)

Late submitted material - correct exercise of discretion (yes)

Decisions cited:

Catchword:



Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 0951/24 - 3.3.02

D E C I S I O N
of Technical Board of Appeal 3.3.02
of 8 January 2026

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 21 May 2024
rejecting the opposition filed against European
patent No. 2574331 pursuant to
Article 101(2) EPC.**

Composition of the Board:

Chairman M. O. Müller
Members: M. Kollmannsberger
M. Blasi

Summary of Facts and Submissions

- I. The opponent appealed the Opposition Division's decision to reject the opposition, Article 101(2) EPC.

- II. The patent deals with a method for hair colouring. The patent proposes a colouring composition having a certain storage modulus and comprising a specific thickener. Such compositions are said to be especially stiff and elastic, providing hold and sculptability to hair fibres coated with the composition.

- III. A composition according to the invention is claimed in claim 10, methods for using it in claims 1 and 11, and a method for its preparation in claim 12. Claim 10 of the patent reads as follows:

"A composition for colouring hair comprising a hair colouring agent, a hydrophobic phase, a hydrophilic phase, a surfactant, and a thickener capable of interacting with the hydrophobic phase and the hydrophilic phase, wherein the composition has a storage modulus of at least 3000 Pa, or at least 3300 Pa, or at least 3500 Pa, or at least 4000 Pa, or at least 4500 Pa, or at least 5000 Pa, measured by frequency sweep at an angular frequency of 0.6 rad/s at 23°C, wherein the thickener is an associative thickening polymer and comprises hydrophobic moieties and hydrophilic moieties; and wherein the associative thickener is selected from the group consisting of Acrylates/Beheneth-25 Methacrylate Copolymer."

IV. The patent was opposed under Articles 100(a) EPC, for lack of novelty (Article 54 EPC) and lack of inventive step (Article 56 EPC), and Articles 100(b) and (c) EPC, for insufficient disclosure and unallowable amendments. The Opposition Division dismissed all objections based on these grounds.

V. Documents relevant for the present decision are the following:

D3: US 2002/0157191 A1

D4: EP 1 961 450 A1

D5: ACULYNTM28 Rheology Modifier / Stabilizer - A very efficient thickener for a wide array of personal care formulations - Rhom & Haas - February 2004

D6: Experimental data filed by the appellant during opposition proceedings, 29 April 2024

VI. The appellant submitted that the patent did not disclose the compositions defined in claim 10 in a sufficient way so that they could be reproduced by the skilled person, Article 100(b) EPC. On the other hand these compositions would have been obvious for a skilled person over D4 as closest prior art document, Articles 100(a) and 56 EPC. The same held for the claims of all the auxiliary requests presented by the respondent (patent proprietor).

The opposition division's findings with respect to novelty (Articles 100(a) and 54 EPC) and unallowable amendments (Article 100(c) EPC) were uncontested in appeal proceedings.

VII. The respondent submitted that the opposition division's decision to reject the opposition was correct.

VIII. Oral proceedings, appointed in accordance with the parties' requests, were held on 8 January 2026. The board had issued a communication under Article 15(1) RPBA on 6 August 2025, containing the board's preliminary opinion on the disputed points.

IX. The parties' requests were the following:

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

The appellant further requested that auxiliary requests 1a to 5a not be admitted into the proceedings and document D6 not be excluded.

The respondent requested that the appeal be dismissed, or alternatively, that the patent be maintained in amended form on the basis of one of the sets of claims of auxiliary requests 1 to 7, as filed during opposition proceedings, or auxiliary requests 1a to 5a, as filed in reply to the statement of grounds of appeal, in the order as indicated at the top of page 2 of the reply to the grounds of appeal.

The respondent further requested that document D6 not be admitted into the proceedings, implying that document D6 be excluded from the appeal proceedings.

- X. The decision was announced at the end of the oral proceedings.

Reasons for the Decision

- 1. The appeal is admissible

- 2. Admittance of D6 - exclusion from the appeal proceedings
 - 2.1 The appellant filed D6 during opposition proceedings. D6 contains experimental results obtained from tests carried out on a composition prepared by the appellant. D6 was admitted by the Opposition Division, see point 2 of the decision, and considered in the decision in the context of sufficiency of disclosure, see point 5.5.

 - 2.2 The respondent requested that this document not be admitted because the Opposition Division's decision to admit D6 suffered from an error in the use of discretion and, therefore, was to be set aside. As the Board understands the request, this should have the consequence that the document be excluded from the appeal proceedings.

 - 2.3 As set out above, the opposition division decided to admit document D6 into the proceedings. Taking account of the principles for reviewing a discretionary decision of an opposition division, namely whether in this decision the correct principles were used in a reasonable way, the Board in the present case considers that the opposition division correctly exercised its discretion to admit D6 under Article 114(2) EPC, despite its late filing. As set out in point 2.5 of the

decision under appeal, the opposition division was of the opinion that the document *prima facie* raised doubts on the sufficient disclosure of the claimed invention, so the document was admitted. *Prima facie* relevance is a correct criterium to be used for exercising the discretion for admittance and no reasons are apparent to the board that this discretion was used in an unreasonable way. It is true that the document, after thorough discussion of its content, in the end turned out to be not relevant in the sense that the opposition division's decision on sufficiency of disclosure was not changed based on its teaching, in spite of its apparent *prima facie* importance. However, this cannot lead to the retroactive finding that there was an error in the use of the Opposition Division's discretion when deciding on the admission of the document, as suggested by the respondent.

- 2.4 The board therefore concludes that the opposition division's decision to admit D6 did not suffer from an error in the use of discretion. The document having been correctly admitted and being part of the decision under appeal, it is also part of the appeal proceedings, see Articles 12(1) and 2 RPBA.
- 2.5 Whether an incorrect exercise of discretion by the Opposition Division would have had an impact on the status of document D6 in appeal proceedings does not need to be considered in this decision.
- 2.6 Hence, the board decided that D6 forms part of the appeal proceedings.

3. The patent

The patent deals with a method for hair colouring. In particular, the patent deals with methods in which only part of the hair is coloured, such as highlighting, which usually need a barrier means (e. g. a foil) in order to separate coloured hair from non coloured hair, see paragraphs [0002] to [0004]. The patent proposes a colouring composition having a certain storage modulus and comprising a specific thickener, see paragraphs [0026], [0027] and [0043] to [0045]. Such compositions are said to be especially stiff and elastic, providing hold and sculptability to hair fibres coated with the composition. The use of barrier means may thus be avoided.

4. Sufficiency of disclosure, Article 100(b) EPC

- 4.1 Claim 10 defines a composition for colouring hair. The composition contains various components defined in a rather generic way and a specific class of thickeners ("*Acrylates/Beheneth-25 Methacrylate Copolymer*"). Moreover, the composition is required to fulfil a rheological parameter, namely a storage modulus of at least 3000 Pa, to be measured under certain conditions.

The appellant's objection was that the skilled person, after having read the patent, was not in a position to prepare such compositions. The appellant argued as follows:

- (a) Paragraph [0045] of the patent, the only passage dealing with the storage modulus, did not explain how compositions having this property may be obtained. From a comparison of inventive examples

[i] and [d] it was clear that not only the amount of thickener was responsible for the storage modulus, but also other components of the composition.

- (b) Apart from the thickener the claim defined components in a vague and broad way, and the description did not contain any instruction on how to choose them in order to arrive at the claimed storage modulus. The storage modulus was a mere result to be achieved, but the skilled person had no information which technical measures were necessary to achieve this result.
- (c) It was not credible that any composition having the ingredients defined in the claim had the storage modulus defined in the claim. This was confirmed by the composition tested in D6, which had a lower storage modulus although all required components were present.
- (d) The two example compositions [d] and [i] shown in the table in paragraph [0103] were not reproducible. They were made by mixing colouring compositions A and C with oxidative compositions III or V and thickening composition 3. However, compositions A, C, III and V were themselves not sufficiently disclosed. In particular, the ingredients of the colour formulations A and C were not described in detail in paragraph [0087], and the percentages of the components for compositions III and V added up to more than 100%.
- (e) Claim 10 required the presence of a hydrophilic phase and a hydrophobic phase. However, according to the patent description, paragraphs [0046] and

[0047], several ingredients, e.g. fatty alcohols, were described as being hydrophobic as well as hydrophilic.

4.2 The opposition division rejected all these arguments, see points 5.2 to 5.5 of the decision under appeal, and also the board considers them to be unconvincing.

4.2.1 Concerning arguments (a) to (c) above, the relevant issue under Article 100(b) EPC is whether the patent provides the skilled person with a sufficiently clear and complete teaching so that compositions having the storage modulus defined in the claim can be prepared.

The Board acknowledges that the claim defines the individual components, with the exception of the thickening polymer, in a rather broad way. However, it is clear to the skilled person that the rheological properties of the composition will be determined essentially by the concentration of the thickener contained therein. The skilled person trying to reproduce the invention would start from the compositions disclosed in the examples, in particular [d] and [i] in experiment 1, paragraph [0103]. These compositions contain 0.86% by weight of the thickener and have a storage modulus in the claimed range. It would not appear surprising to the skilled person that the composition tested in D6 is less stiff and less elastic and thus has a storage modulus below the lower limit of the claimed range since there the thickener is only present in an amount of 0.2% per weight. Even if, as argued by the appellant, also other components may have an influence on the storage modulus, and different compositions may have different storage moduli although they contain the same amount of thickener (like formulations [d] and [i] in experiment 1), the skilled

person would know how to increase the value of this parameter, should it turn out that a specific composition fails. This could simply be achieved by increasing the amount of the thickening polymer.

Specifically to argument (c) above it was undisputed that not all compositions containing the components defined in claim 10 have a storage modulus of more than 3000 Pa. That this cannot be the case is immediately evident to the skilled person already because the claim does not define a concentration limit for the thickener. However, this does not mean that the skilled person cannot prepare compositions as defined in the claim, e. g. by increasing the amount of thickener. It is not required that the storage modulus defined in the claim must always be obtainable independent from the thickener concentration. The skilled person knows that if this concentration is too low a composition according to claim 10 cannot be obtained.

- 4.2.2 Concerning above argument (d) the board acknowledges that these compositions are described in a somewhat generic way, see paragraph [0087] of the patent. However, the thickening formulation is described in detail, see the table at the end of paragraph [0087]. It has not been shown that using the instructions for the preparation of compositions A, C, III and V the skilled person would not arrive at a composition covered by claim 10, i. e. at a composition having a storage modulus of more than 3000 Pa. What has been shown in D6 is that if the amount of thickener is lowered too much compared to the example compositions [d] and [i] the storage modulus defined in claim 10 is not obtained. As set out above, this is what the skilled person would have expected anyway.

The appellant calculated that, taking the maximum amounts of all possible ingredients in developing formulations III and V, paragraph [0087], the amounts sum up to more than 100%, namely 101,6% for formulation III and 107,6% for formulation V. This may be correct, but such a situation is at most unclear and would not have been a hindrance for the skilled person to prepare compositions as defined in claim 10. The skilled person could resolve this discrepancy in various way, e. g. by rescaling the given amounts of the ingredients accordingly.

4.2.3 Concerning above argument (e) the board considers that the skilled person knows how to prepare hydrophilic and hydrophobic phases according to paragraphs [0046] and [0047] of the patent. The skilled person knows that some ingredients described in this paragraph, e.g. fatty alcohols, may end up in either the hydrophobic or the hydrophilic phase, depending on the overall phase composition. This very fact has no bearing on sufficiency of disclosure.

4.2.4 In summary, the skilled person, guided by the example compositions and using the general teaching of the patent with respect to the ingredients to be employed is well in a position to reproduce the compositions defined in claim 10. The claimed invention is therefore sufficiently disclosed and, hence, the ground for opposition under Article 100(b) EPC does not prejudice the maintenance of the patent as granted.

5. Inventive step, Articles 100(a) and 56 EPC

5.1 Closest prior art

D4 deals with thickened hair colouring compositions and proposes a specific thickener to be included in these compositions. D4 was chosen as starting document for the inventive step assessment in the decision under appeal, see point 7.3, and the choice of D4 as a representation of the closest prior art was undisputed between the parties.

It was likewise undisputed that the composition defined in claim 10 differs from the disclosure of D4, in particular from examples 4-6 thereof, in two features, namely

- (i) the nature of the thickening polymer
- (ii) the storage modulus of at least 3000 Pa.

The claim requires an associative thickening polymer, "*Acrylates/Beheneth-25 Methacrylate Copolymer*", which will be referred to in the following also as "*AculynTM 28*", see paragraph [0044] of the patent. In contrast, in D4 "*ViscUp®EZ*" is employed, which is an anionic acrylic copolymer, see paragraph [0008] of D4.

The storage modulus of the hair colouring compositions is not determined in D4. However, as will become apparent from the reasoning below, inventive step of the claimed compositions can already be based on feature (i) alone, i. e. the nature of the thickening polymers, so that distinguishing feature (ii) does not need to be dealt with in detail in this decision.

5.2 Objective technical problem and its solution

5.2.1 Compositions [d] and [i] in experiment 1 of the patent contain the thickener defined in the claim, "AculynTM 28", whereas compositions [b] and [g] of the patent contain "ViscUp®EZ", which is the thickener according to D4. The compositions are tested in experiment 2 with respect to their hold strength. The hold strength is measured as height change of hair tresses treated with the compositions over time and is an indication of the form stability of the treated hair. The results of the hold evaluation are summarised in paragraph [0111] of the patent. From the table it is apparent that compositions [d] and [i] immediately provide a better hold than compositions [b] and [g], meaning that the hair stylist has less problems in separating hair that is contacted with the composition, i. e. hair that is coloured, from hair that is not.

The opposition division acknowledged (see point 7.4 of the decision's reasoning) that these tests establish an improvement of rheological behaviour in compositions according to claim 10 of the patent compared to the compositions disclosed in D4, and that this improvement is occasioned by distinguishing feature (i), i.e. the nature of the polymer.

5.2.2 The appellant submitted three lines of argument why, in its view, the opposition division's conclusion was wrong:

(a) The compositions [d] and [i] on the one hand and [b] and [g] on the other hand did not differ only in the nature of the thickening polymer, but also in the presence/absence of several additives.

- (b) They furthermore differed in the storage modulus.
- (c) The measurement used in the method of experiment 2 was not robust, as could be seen from a comparison with the results in experiment 6, paragraph [0124] of the patent. Thus, this measurement method could anyway not establish any differences in rheological behaviour in a reliable way.

5.2.3 These arguments are not convincing.

- (a) It is true that the thickener compositions 3 and 4, used in compositions [d]/[i] (according to the patent) and [b]/[g] (according to D4), respectively, are not the pure polymers but contain different additives. However, this does not invalidate the conclusions drawn from their comparison.

Firstly, as pointed out by the respondent, the comparative compositions [b]/[g] employ the commercial product "AculynTM 28", in the same way as the compositions disclosed in D4. Thus, in any case these comparative compositions represent the compositions according to D4, and the comparison made is a valid comparison with the disclosure of D4, independent of any possible additives that this product may contain.

Secondly, there is no indication that these additives influence the performance of the polymers with respect to the hold strength of the resulting composition. Taking into account the mixing ratios given in the table in paragraph [0103] these additives (basically solvents and surfactants) are present in such minor amounts that any influence is

unlikely. The Board notes that the colouring compositions (A/C) or the oxidative compositions (III/V) likewise contain solvents and surfactants, and this in much higher amounts than what can be introduced into the final composition by the thickener compositions 3 and 4. Thus, in the absence of any proof in this respect the appellant's allegation is not convincing. Furthermore, as already set out in the decision under appeal, compositions [d]/[i] achieve the higher hold strength using only half of the amount of thickener polymer than the comparative compositions.

- (b) It is true that compositions [d]/[i] have a higher storage modulus than the comparative compositions [b]/[g]. However, as pointed out by the respondent, this is rather a further indication that the use of the thickeners as defined in the patent claims leads to an improvement with respect to D4. The compositions otherwise being identical, the higher storage modulus must be the result of the change of the thickening polymer.
- (c) It is true that the absolute values of the hold strength of compositions [a], [c], [f] and [h] are not the same in experiments 2 and 6, although the same compositions appear to have been tested. However, this does not mean that the test is not reliable. It may be difficult to compare absolute values obtained in different experiments. What counts for a comparison are not so much the absolute values, but the values of the compositions relative to each other. In both experiments 2 and 6 the compositions containing no thickener ([a]/[f]) perform worse than the compositions containing a

thickener ([c]/[h]). Thus, apart from the fact that the tested compositions in example 6 are not according to the claimed invention, as remarked by the respondent, the results of experiments 2 and 6 do not contradict each other.

5.2.4 The choice of the thickening polymer in claim 10 thus leads to an improvement in hold strength of the claimed compositions compared to the compositions disclosed in D4.

5.2.5 For this reason, based on the technical problems mentioned in paragraph [0004] of the patent and on the experimental results considered above the objective technical problem to be solved can be formulated as follows:

How to provide, starting from D4, hair colouring compositions having a better hold for improving hair styling, with reduced risk of colour staining even in the absence of physical barriers between the coloured and uncoloured hair.

The opposition division thus formulated the objective technical problem in a correct manner, point 7.4.3 of the decision under appeal.

5.2.6 In the appellant's view, starting from D4 the objective technical problem merely was the provision of alternative hair colouring compositions. However, this formulation of the objective technical problem does not take account of the effect established by the distinguishing feature of the claim as compared to D4, and is thus not appropriate.

5.2.7 The objective technical problem is solved by the compositions defined in claim 10, which are characterised by the use of the associative thickening polymer, "Acrylates/Beheneth-25 Methacrylate Copolymer", such as "AculynTM 28" used in the examples of the patent.

5.3 Obviousness of the solution

It had to be decided whether the claimed solution to the objective technical problem would have been obvious to the person skilled in the art.

5.3.1 The appellant argued in its statement setting out the grounds of appeal that compositions according to claim 10 of the patent were obvious alternatives to the ones disclosed in D4, since the use of the thickening polymer of claim 10, "AculynTM 28", in hair colouring products was known from D3 and D5. During oral proceedings the appellant argued that this reasoning also applied if one considered the claimed compositions to provide an improved hold compared to the compositions of D4.

5.3.2 In particular, the appellant referred to the rheological properties of the compositions of D3 disclosed in paragraphs [0003], [0005] and [0097], namely to be thick enough to stay on the hair during the colouration procedure without dripping or running. This was achieved by using "AculynTM 28", a polymer according to claim 10. The skilled person would thus have known that this polymer imparts favourable rheological properties on oxidative hair dyeing compositions, and would have expected rheological properties of such compositions to be improved compared to the compositions disclosed in D4.

5.3.3 However, the passages referred to in D3 do not render the claimed compositions obvious solutions to the objective technical problem defined above. As stressed by the respondent, the rheological properties referred to in D3 relate to the viscosity of the colouring compositions, not to the hold of hair treated with these compositions. The skilled person knows that the viscosity of any hair colouring composition must be adjusted in order to avoid it dripping from the hair during the colour development period, so the respective disclosure of D3 is nothing special. D3 did not give the skilled person any hint that the polymers disclosed therein would lead to improved hold, i. e. stiffness, of hair tresses treated with compositions containing "AculynTM 28" compared to the polymers that are used in D4.

5.3.4 The appellant also referred to D5 which is a product data sheet for "AculynTM 28". "AculynTM 28" is presented as a rheology modifier useful for hair colouring compositions, see "applications" on page 2 and "rheology" on page 4. However, like D3, also D5 is silent on its effect on hold strength or storage modulus of corresponding compositions. D5 does not render obvious the solution to the objective technical problem either.

5.3.5 Thus, the claimed solution to the objective technical problem was not obvious to a skilled person.

5.4 The compositions defined in claim 10 of the patent as granted thus involve an inventive step within the meaning of Article 56 EPC. Therefore, also methods for their preparation (claim 12) and methods/uses for colouring hair employing such compositions (claims 1

and 11) involve an inventive step. Hence, the ground for opposition under Article 100(a) and Article 56 EPC does not prejudice the maintenance of the patent as granted.

6. As none of the grounds for opposition invoked by the appellant prejudice the maintenance of the patent as granted, the opposition division was correct in rejecting the opposition, Article 102(2) EPC. The respondent's auxiliary requests for maintenance of the patent in amended form under Article 101(3)(a) EPC do not need to be considered.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



U. Bultmann

M. O. Müller

Decision electronically authenticated