

The opinion in support of the decision being entered today was not written for publication in a law journal and is not binding precedent of the Board.

Paper No. 24

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HUGO JEAN-MARIE DEMEYERE,
MARC JOHAN DECLERCQ, GAYLE MARIE FRANKENBACH
and ERROL HOFFMAN WAHL

Appeal No. 2003-1914
Application No. 09/485,989

ON BRIEF

Before KIMLIN, WARREN and JEFFREY T. SMITH, Administrative Patent Judges.

KIMLIN, Administrative Patent Judge.

DECISION ON APPEAL

This is an appeal from the final rejection of claims 1, 2 and 14-27. Claim 1 is illustrative:

1. A clear fabric softening composition comprising a fabric softening compound, a principal solvent having a ClogP of from 0.15 to 1.0 and a nonionic alkoxyated surfactant selected from the group consisting of:

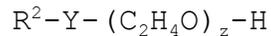
- i)- alkyl or alkylphenol alkoxyated with less than 9 alkoxy moieties;

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ii)- alkylamine alkoxyated with at least 5 alkoxy moieties; and

iii)- block c-polymers [sic, copolymers] obtained by copolymerisation of ethylene oxide and propylene oxide;

iv)- nonionic surfactants of the formula:



wherein R2 is selected from the group consisting of primary, secondary and branched chain alkyl and/or acyl hydrocarbyl groups; primary, secondary and branched chain alkenyl hydrocarbyl groups; and primary secondary and branched chain alkyl- and alkenyl-substituted phenolic hydrocarbyl groups; and wherein Y is O, -C(O)O, and z is less than 9; and

v)- mixtures thereof;

wherein the total level of said nonionic alkoxyated surfactant is less than 10% by weight of the composition.

The examiner relies upon the following references as evidence of obviousness:

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| Billenstein et al. (EP '547) (European patent application) | 0,043,547 | Jan. 13, 1982 |
| Chang (EP '052) (European Patent application) | 0,309,052 | Mar. 29, 1989 |

Appellants' claimed invention is directed to a clear fabric softening composition comprising a softening compound, a principal solvent having a ClogP of from 0.15 to 1.0, and a nonionic alkoxyated surfactant selected from the recited group of compounds. The nonionic alkoxyated surfactant is present in an amount of less than 10% by weight of the composition.

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According to appellants, "[t]he combination of the specific nonionic alkoxyated surfactants with the certain principal solvents provide [sic, provides] clear fabric softening compositions that have improved clarity and stability" (page 2 of Brief, first paragraph).

Appealed claims 1, 2, 14-16, 18-24, 26 and 27 stand rejected under 35 U.S.C. § 103 as being unpatentable over EP '547. Claims 1, 14-18 and 21-26 stand rejected under 35 U.S.C. § 103 as being unpatentable over EP '052.

Appellants submit at page 2 of the Brief that "[c]laims 1-2 and 14-27 stand or fall together." Accordingly, all the appealed claims stand or fall together with claim 1, and we will limit our consideration to the examiner's separate rejections of claim 1.

We have thoroughly reviewed each of appellants' arguments for patentability. However, we are in complete agreement with the examiner that the claimed subject matter would have been obvious to one of ordinary skill in the art within the meaning of § 103 in view of the applied prior art. Accordingly, we will sustain the examiner's rejections for the reasons set forth in the Answer, which we incorporate herein, and we add the following primarily for emphasis.

We consider first the examiner's rejection over EP '547. There is no dispute that the reference, like appellants, discloses a fabric softening composition comprising a fabric softening compound, a principal solvent having a ClogP within the recited range and a nonionic alkoxyated surfactant within the scope of claim 1 on appeal. It is appellants' contention that "[s]ince the compositions of US '737¹ require 5% to 50% of nonionic softener and 5% to 20% of a nonionic dispersing agent, the compositions of US '737 thus require 10% to 70% of nonionic alkoxyated materials" (page 2 of Brief, last sentence). Appellants conclude, therefore, that "US '737 does not teach or suggest a clear fabric softening composition wherein a total level of nonionic alkoxyated surfactant is less than 10%, as presently claimed" (page 3 of Brief, third paragraph). The examiner, however, has effectively refuted this argument by explaining that "appellant has recited the presence of specific alkoxyated materials, and has claimed compositions containing less than 10% of *said* nonionic alkoxyated materials (emphasis added), which is different from a total concentration of less than 10% of *all* nonionic alkoxyated materials" (sentence bridging pages 5 and 6 of Answer). In other words, the examiner

¹ U.S. '737 is the English equivalent of EP '547.

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has properly noted that the concentration limitation present in claim 1 is pertinent to *only* the recited nonionic alkoxyated surfactants, but does not require that the total concentration of all alkoxyated surfactants be less than 10% by weight of the composition. Appellants have not addressed this position of the examiner, nor the examiner's citation of Example 2b of the reference which contains 5% of alkoxyated xylenol and 5% of an alkoxyated amide, which amide "is not recited in applicant's Markush group of nonionic surfactants" (page 6 of Answer, first paragraph).

We now turn to the examiner's rejection over EP '052. Appellants contend that "[t]here is no teaching or suggestion in the description of EP '052 that the resulting particulate softening dispersions are clear and/or translucent nor does the reference include any suggestion or motivation for modifying the disclosed dispersions" (page 4 of Brief, second paragraph). We agree with the examiner's rationale, however, that since the present specification does not provide a definition of the term "clear," it is reasonable to interpret the term as meaning "colorless," "translucent," and "transparent." Since compositions II and III of the reference "contain about 5-8% of colorless ingredients dissolved or dispersed in sub-micron sized

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particles in water," it would appear that such compositions would be colorless and translucent, if not transparent (page 6 of Answer, last paragraph). As noted by the examiner, appellants have "not provided any evidence that 'clear' compositions, by any definition, cannot be made by following the teachings of the reference" (id.).

Appellants also contend that "EP '052 fails to teach the use of a principal solvent having a ClogP within the range recited in Appellants' claims" (page 4 of Brief, third paragraph). However, since there is general correspondence between the linear alkoxyated alcohols of EP '052 described at page 8, lines 42-45, and the C₃C₇ diol alkoxyated derivatives used for appellants' solvent (see claim 19), we find that it is reasonable to conclude, absent evidence to the contrary, that EP '052 discloses solvents having a ClogP within the recited range.

As a final point, we note that appellants base no argument upon objective evidence of nonobviousness, such as unexpected results, which would serve to rebut the prima facie case of obviousness established by the examiner.

In conclusion, based on the foregoing and the reasons well-stated by the examiner, the examiner's decision rejecting the appealed claims is affirmed.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

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| EDWARD C. KIMLIN |) | |
| Administrative Patent Judge |) | |
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| CHARLES F. WARREN |) | BOARD OF PATENT |
| Administrative Patent Judge |) | APPEALS AND |
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| JEFFREY T. SMITH |) | |
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