

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

Paper No. 19

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARC FRANCOIS THEOPHILE EVERS
and
ROBERTA MARGHERITA ROMANO

Appeal No. 2003-0802
Application No. 09/180,108

ON BRIEF

Before KIMLIN, GARRIS, and TIMM, *Administrative Patent Judges*.
TIMM, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal involves claims 14-20, 22, and 23 which are all the claims pending in the application. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 134.

INTRODUCTION

All the claims stand rejected over prior art. As evidence of unpatentability, the Examiner relies upon the following references:

Labeque et al. (Labeque)	5,580,486	Dec. 3, 1996
Evers et al. (Evers)	5,707,948	Jan. 13, 1998 (filed Feb. 2, 1996)

The specific rejections are as follows:

1. Claims 14, 15, 18-20, 22, and 23 stand rejected under 35 U.S.C. § 102(e) as anticipated by or, in the alternative, under 35 U.S.C. § 103(a) as obvious over Evers.
2. Claims 16 and 17 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Evers in view of Labeque.

Appellants state that claims 16 and 17 as well as claims 22 and 23 should be considered separately from claims 14, 15 and 18-20 (Brief, p. 2). As claims 16 and 17 are the subject of a separate rejection, we will consider those claims separately. We will not consider claims 22 and 23 separately as no separate arguments in accordance with 37 CFR § 1.192(c)(8)(2000) are contained in the Brief. Claims 22 and 23 will, therefore, stand or fall with claim 14, the claim we select to represent the issues on appeal. 37 CFR § 1.192(c)(7)(2000). In consideration of the second rejection, we select claim 16 to represent the issues on appeal.

Claims 14 and 16 read as follows:

14. A hard surface cleaning composition comprising

(c)-a hydrophobic nonionic surfactant of the formula $C_xPO_yEO_{y'}$ H wherein C represents the hydrocarbon chain of an alcohol, wherein x represents the length of the chain and is from 9 to 18, PO represents propoxy groups, EO represents ethoxy groups and y and y' represent, respectively the number of said groups and the sum of y and y' is from 2 to 7; and

(d)-a sulfated anionic surfactant which is an ethoxylated alkyl sulfate wherein the alkyl group contains 12-14 carbon atoms and the degree of ethoxylation is from 1 to 5; and

(b)-a C8-C18 alcohol;

in weight ratios of (c):(b) of from about 5:1 to about 25:1, and of (d):(c) of from about 1:1 to about 1:10.

16. A composition according to Claim 14, which additionally comprises from about 0.5% to about 5% by weight of the total composition, of a builder system comprising a carbonate and a polycarboxylate salt.

We affirm with respect to both rejections for the reasons that follow.

OPINION

Claim 14

Claim 14 is rejected as anticipated, or alternatively obvious, over Evers. As acknowledged by Appellants (Brief, ¶¶ bridging pp. 2 and 3), Evers essentially incorporates a short chain surfactant, i.e., a surfactant with a C_6 - C_{10} alkyl chain, into a cleaning composition used primarily for cleaning hard surfaces (Evers, col. 1, ll. 7-11). The short chain surfactant solves stability problems in the concentrate (Evers, col. 1, ll. 49-63). Evers lists numerous anionic and nonionic short chain surfactants for use in the cleaner (Evers, col. 2, ll. 21-59). Evers also indicates that those short chain surfactants may be used in combination with long chain surfactants (Evers, col. 3, ll. 33-37). The long chain surfactants include those listed as

short chain surfactants but with a C₁₁-C₂₄ alkyl chain (Evers, col. 3, ll. 37-39). Evers also discloses preferred short chain:long chain concentration ratios (Evers, col. 3, ll. 43-49).

The Examiner finds that Evers describes the use of the ingredients (c), (d), and (b) in overlapping concentration ranges (Answer, pp. 3-4). It is, by now, well settled that where the prior art teaches the components of the claim in overlapping ranges a *prima facie* case of obviousness is established. See *In re Peterson*, 315 F.3d 1325, 1329, 65 USPQ2d 1379, 1382 (Fed. Cir. 2003) and the case cited therein.

Appellants argue that they are claiming specific ratios of long chain anionic surfactants to long chain nonionic surfactants to address the problem of imparting shine while keeping the surface streak-free and Evers provides no suggestion or motivation to use such long chain surfactants in such specific ratios (Brief, p. 3). The problem with this argument is that claim 14 is not limited to long chain combinations.

Evers suggests the use of the surfactant combinations meeting the requirements of claim 14, parts (c) and (d). The C₉ and C₁₀ alkyl alkoxyate short chain nonionic surfactants of Evers meet the requirements of part (c) of claim 14 (Evers, col. 2, ll. 60-67). In (c), the carbon chain length can be anywhere from 9 to 18. Evers also suggests the use of the long chain C₁₂-C₁₄ ethoxylated alkyl sulfates of (d) (Evers, col. 2, ll. 31-32 and ll. 41-43 in combination with col. 3, ll. 37-39).

Contrary to the argument of Appellants, Evers also provides a suggestion to use the surfactants in the claimed concentration ratios. Evers discloses a preferred *minimum* ratio of

short chain nonionic surfactants, surfactants (c), to long chain surfactants, surfactants (d), of 1:5 (Evers, col. 3, ll. 47-49). As the ratio is merely a minimum ratio, it indicates that larger amounts of short chain surfactants, including the claimed ratios, can be used (col. 3, ll. 34-35). The evidence supports the Examiner's finding that Evers describes ingredients of the type claimed in overlapping ranges. In fact, the broader ranges of Evers completely encompass the claimed surfactant ratios. In such a situation, the conclusion of *prima facie* obviousness is even more compelling than in cases of mere overlap. *Peterson*, 315 F.3d at 1329-30, 65 USPQ2d at 1382-83.

Moreover, following Appellants' logic that the claim is directed to long chain combinations and Evers is silent with respect to the concentration ratio of long chain mixtures, that fact does not preclude a *prima facie* case of obviousness. On the contrary, the disclosure of Evers indicates that selecting the proper concentration would have required no more than routine experimentation by one of ordinary skill in the art. Such routine experimentation would have been well within the ordinary skill in the art and is a proper basis for a *prima facie* case of obviousness. *See In re Geisler*, 116 F.3d 1465, 1470, 43 USPQ2d 1362, 1365 (Fed. Cir. 1997)(quoting *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955) for the proposition that "it is not inventive to discover the optimum or workable ranges by routine experimentation."). It is well settled that where patentability is predicated upon a change in condition of a prior art process, such as a change in concentration, the burden is on the applicant to establish unobviousness of the process through unexpected results or other evidence of

secondary considerations. *See In re Woodruff*, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936 (Fed. Cir. 1990).

Nor does the fact that Evers is directed to the problem of stabilizing the concentrated cleaning solutions somehow make the composition unobvious. Evers is clearly interested in obtaining a cleaner that will not streak or film but will, instead, provide a good shine. In fact, Evers specifically tests exemplified formulations for filming and streaking (Evers, col. 6, l. 12 to col. 7, l. 2). It would have been obvious to one of ordinary skill in the art to perform these tests and thereby discover the optimum or workable concentrations of the surfactants which will prevent streaking and filming and, thus, provide good shine.

As a final point, we note that Appellants base no arguments upon objective evidence of nonobviousness such as unexpected results. We conclude that the Examiner has established a *prima facie* case of obviousness with respect to the subject matter of claims 14, 15, 18-20, 22, and 23 which has not been sufficiently rebutted by Appellants.

With respect to the portion of the rejection based on 35 U.S.C. § 102(e), we reverse. To anticipate, Evers would need to clearly and unequivocally disclose a composition meeting all the limitations of the claim or direct those skilled in the art to such a composition without any need for picking, choosing, and combining various disclosures not directly related to each other by the teachings of the cited reference. Here, one must make various selections of surfactant combinations and concentrations. Such picking and choosing may be entirely proper in the making of a Section 103, obviousness rejection, where the applicant must be afforded an

opportunity to rebut with objective evidence any inference of obviousness which may arise from the similarity of the subject matter which he claims to the prior art, but it has no place in the making of a Section 102, anticipation rejection. *See In re Arkley*, 455 F.2d 586, 587, 172 USPQ 524, 526 (CCPA 1972).

Appellants include an argument directed to non-entered claim 24 (Brief, p. 5). As this claim was denied entry by the Examiner, it is not on appeal. Nor will we determine whether the denial of entry was proper. Such a matter is petitionable and not under our jurisdiction. 35 U.S.C. §§ 7(b) and 134 (2003); *In re Hengehold*, 440 F.2d 1395, 1404, 169 USPQ 473, 480 (CCPA 1971).

Claim 16

We agree with the Examiner that it would have been obvious to use the builders suggested by Labeque in the composition of Evers (Answer, pp. 5-6). Evers specifically indicates that builders can be included (Evers, col. 3, ll. 50-53). Labeque indicates that carbonates and polycarboxylates are conventional builders (Labeque, col. 13, ll. 25-30 and col. 14, ll. 23-41). Use of one of the conventionally known builders, or a combination thereof, would have been obvious to one of ordinary skill in the art.

Appellants argue that one would not take the longer alkyl chain ethoxylated alkyl sulfates of Labeque for use in the combinations of Evers since Evers teaches directly away from the use of such materials (Brief, p. 5). Evers does not teach away. In fact, Evers indicates that suitable long chain surfactants are those listed in the description of short chain surfactants. The

Examiner found that Evers lists alkyl ether sulfates in the short chain list (Answer, p. 3). That surfactant is an ethoxylated alkyl sulfate and, thus, Evers suggests the use of long chain ethoxylated alkyl sulfates.

Appellants also argue that Labeque does not disclose the specific combination of organic polycarboxylates and carbonates which are the builders of the rejected claims (Brief, p. 5). There is no dispute that Labeque describes both polycarboxylates and carbonates as conventional builders. Using the two conventional builders for that function would have been obvious to one of ordinary skill in the art. *See In re Kerkhoven*, 626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980) (“It is prima facie obvious to combine two compositions each of which is taught by the prior art to be useful for the same purpose, in order to form a third composition which is to be used for the very same purpose.”).

Again, we note that Appellants base no arguments upon objective evidence of non-obviousness such as unexpected results. We conclude that the Examiner has established a *prima facie* case of obviousness with respect to the subject matter of claims 16 and 17 which has not been sufficiently rebutted by Appellants.

CONCLUSION

To summarize, the decision of the Examiner to reject claims 14-20, 22, and 23 under 35 U.S.C. § 103(a) is affirmed. The decision of the Examiner to reject claims 14, 15, 18-20, 22, and 23 under 35 U.S.C. § 102(e) is reversed.

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

AFFIRMED

EDWARD C. KIMLIN)	
Administrative Patent Judge)	
)	
)	
)	
)	BOARD OF PATENT
BRADLEY R. GARRIS)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
)	
)	
)	
CATHERINE TIMM)	
Administrative Patent Judge)	

Appeal No. 2003-0802
Application No. 09/180,108

Page 10

THE PROCTER & GAMBLE COMPANY
INTELLECTUAL PROPERTY DIVISION
WINTON HILL TECHNICAL CENTER - BOX 161
6110 CENTER HILL AVENUE
CINCINNATI, OH 45224