The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROLAND DE LA METTRIE
and
FRANCOISE BOUDY

Appeal No. 2005-0241
Application No. 09/904,831

HEARD: February 9, 2005

Before WALTZ, JEFFREY T. SMITH, and PAWLIKOWSKI, Administrative Patent Judges.

PAWLIKOWSKI, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 30 through 34 and 37 through 71.[1]

Claim 30 is representative of the subject matter on appeal, and is set forth below:

30. A composition for the oxidation dyeing of keratin fibres comprising:

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[1] Claim 36 has been indicated as containing allowable subject matter by the examiner. Office Action of Paper No. 8, page 2.

at least one oxidation dye precursor, and

at least one nonionic amphiphilic polymer comprising at least one fatty chain and at least one hydrophilic unit, said at least one nonionic amphiphilic polymer being chosen from:

(1) celluloses modified with groups containing at least one fatty chain, and

(2) hydroxypropyl guars modified with groups containing at least one fatty chain.

Claims 30 through 34 and 37 through 71 stand rejected under 35 U.S.C. § 103 as being obvious over Dubief in view of the International Cosmetic Ingredient Dictionary.

On page 5 of the answer, the examiner has indicated that the rejection of claim 47 under 35 U.S.C. § 112, second paragraph, has been withdrawn.

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

Dubief et al. (Dubief) 5,700,456 Dec. 23, 1997

International Cosmetic Ingredient Dictionary, Fifth Edition, Vol. 1, 1993, pp. 110.

We limit our consideration to claim 30 in this appeal, according to appellants' grouping as set forth on page 4 of the brief and 37 CFR § 1.192 (c)(7)(2003).

OPINION

The examiner's position regarding the obviousness rejection is set forth on pages 3 through 5 of the answer. We refer to the examiner's position therein.

In summary, the examiner's position is that Dubief teaches hair treating compositions which contain at least one ceramide and/or a glycoceramide, and at least one cationic polymer. The examiner states that the compositions of Dubief can contain thickening agents like NATROSOL PLUS®, and that Dubief teaches that the compositions may be used for dyeing of keratinous fibers such as hair, in which case they contain oxidation dyes and/or direct dyes. The examiner relies upon the International Cosmetic Ingredient Dictionary for defining that NATROSOL PLUS® is cetyl- modified hydroxyethyl-cellulose.

Appellants' position begins on page 6 of the brief. Appellants argue that no prima facie case of obviousness has been established. Appellants argue that while the examiner indicates that the compositions of Dubief can be used for oxidative hair dyeing, appellants argue that Dubief's compositions are useful for many purposes. Appellants argue that thickening agents are disclosed as optional additional ingredients, in a different portion of the reference from where indication that the composition can be used for dyeing hair. Brief, page 8. Appellants conclude that therefore "it can hardly be said that there is a suggestion in the cited art to modify Dubief as

proposed by the [e]xaminer by adding, as a thickener to its hair dyeing compositions, cetyl-modified hydoxyethyl cellulose." Brief, page 8.

We are unpersuaded by appellants' position that because the thickening agents are taught in column 8, whereas the composition being used for hair dyeing is taught in column 9, that using a thickener in combination with an oxidative dye composition is therefore not suggested by Dubief. One of ordinary skill in the art would have evaluated Dubief's disclosure as a whole, because a prior art disclosure is not limited to its working examples or to its preferred embodiments. Merck & Co. Inc. v. Biocraft Labs. Inc., 874 F.2d 804, 807, 10 USPQ2d 1843, 1846 (Fed. Cir. 1989); In re Fracalossi, 681 F.2d 792, 794 n.1, 215 USPQ 569, 570 n.1 (CCPA 1982); In re Lamberti, 545 F.2d 747, 750, 192 USPQ 278, 280 (CCPA 1976); In re Boe, 355 F.2d 961, 965, 148 USPQ 507, 510 (CCPA 1966).

On page 8 of the brief, appellants also argue that the thickening agents of Dubief are disclosed via a series of laundry lists. Appellants argue that NATROSOL PLUS® appears in one such laundry list and there is nothing in Dubief that would have motivated one of ordinary skill to use any particular thickener with any given composition. Appellants conclude that thus, to choose one from among the extensive laundry lists is not suggested by Dubief. We disagree. The limited selection taught in Dubief does not rise to the level, for example, as discussed in In re

Baird, 16 F.3d 380, 382, 29 USPQ2d 1550, 1551. In the instant case, to assert (as appellants have done) that Dubief's specific teaching of NATROSOL PLUS® (from the selection of listed thickeners) in combination with an oxidation dye for use in dyeing keratinous fibers (from the selection of uses), is picking and choosing from a myriad of choices, skews what Dubief fairly suggests as a reference.

On pages 9 and 10 of the brief, appellants discuss Example 6 of Dubief. We again emphasize that a prior art disclosure is not limited to its working examples or to its preferred embodiments, but rather, one of ordinary skill in the art would have evaluated the prior art disclosure as a whole. Merck & Co. Inc. v. Biocraft Labs. Inc.; In re Fracalossi; In re Lamberti; In re Boe, supra.

Beginning on page 11 of the Brief, appellants argue that the art is unpredictable, and because it is unpredictable, the art does not provide the necessary reasonable expectation of success in modifying Dubief. Appellants discuss the Pohl patent, the Cohen patent, and the Casperson patent to show the unpredictability of the art. However, for the same reasons that we have determined that Dubief adequately suggests a composition for the oxidation dyeing of keratin fibers comprising the components recited in appellants' claim 30, we are unpersuaded by such argument.

In view of the above, we affirm the 35 U.S.C. § 103 rejection of claims 30 through 34, and 37 through 71 as being obvious over Dubief in view of the International Cosmetic Ingredient Dictionary.

CONCLUSION

The obviousness rejection is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 35 U.S.C. § 1.136(a).

AFFIRMED

THOMAS A. WALTZ Administrative Patent Judge	)
JEFFREY T. SMITH Administrative Patent Judge	) BOARD PATENT) APPEALS) AND) INTERFERENCES
BEVERLY A. PAWLIKOWSKI Administrative Patent Judge	)

BAP:psb

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