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**D E C I S I O N**  
of 16 December 2004

**Case Number:** T 0736/02 - 3.2.6

**Application Number:** 95922306.6

**Publication Number:** 0767646

**IPC:** A61F 13/15

**Language of the proceedings:** EN

**Title of invention:**

Fluid pervious web exhibiting a surface energy gradient

**Patentee:**

THE PROCTER & GAMBLE COMPANY

**Opponents:**

Kimberly-Clark Worldwide, Inc.  
McNeill-PPC, Inc.

**Headword:**

-

**Relevant legal provisions:**

EPC Art. 123(3)

**Keyword:**

"Amendments - extension of protection (yes)"

**Decisions cited:**

-

**Catchword:**

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Case Number: T 0736/02 - 3.2.6

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.6**  
**of 16 December 2004**

**Appellant:** THE PROCTER & GAMBLE COMPANY  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 17 May 2002  
revoking European patent No. 0767646 pursuant  
to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** H. Meinders  
**Members:** G. Pricolo  
R. T. Menapace

## Summary of Facts and Submissions

- I. The appeal is from the decision of the Opposition Division of 22 April 2002, posted on 17 May 2002, to revoke European patent No. 0 767 646, granted in respect of European patent application No. 95 922 306.6.

Claim 1 as granted reads as follows:

"1. A fluid-pervious web (80) having a first surface (90) and a second surface (85) and exhibiting a multiplicity of apertures (81) said first (90) and said second surfaces being separated from one another by an intermediate portion (83) defined by the sidewalls of the apertures said web being coated on said first surface (90) characterized in that said first surface (90) of said web exhibits a surface energy less than said intermediate portion (83)".

- II. In the decision under appeal the Opposition Division considered that the subject-matter of claim 1 as granted and as amended in accordance with the first to seventh auxiliary request as filed with letter of 21 March 2002 was not novel in the light of the disclosure of document

D1: EP-A-0 195 113.

- III. The appellant (patentee) lodged an appeal, received at the EPO on 18 July 2002, against this decision and paid the appeal fee that same date. The statement setting out the grounds of appeal was received at the EPO on 24 September 2002.

IV. In a communication accompanying the summons to oral proceedings pursuant to Article 11(1) of the Rules of Procedure of the Boards of Appeal the Board expressed the preliminary opinion that since the subject-matter of claim 1 as granted encompassed a web in which the coating was provided only on the top surface thereof it appeared to be not novel over the disclosure in D1 of a web in which the coating was only on the outer body-contacting surface and not on the inner walls of the apertures. As a consequence the decision of the Opposition Division in respect of the main request appeared to be correct.

V. With letter dated 16 November 2004 the appellant withdrew all previous requests and requested that the patent be maintained on the basis of one of the amended sets of claims filed with the letter as main and first to sixth auxiliary requests.

Claim 1 of the main request reads as follows:

"1. A fluid-pervious web (80,200,310) having a first surface (90,205) and a second surface (85,206) and exhibiting a multiplicity of apertures (99,215,319), said first (90,205) and said second (85,206) surfaces being separated from one another by an intermediate portion (83,207) defined by the sidewalls of the apertures (99,215,319), said web (80,200,310) being coated on said first surface (90,205) by a coating (98,210,390), characterized in that said coating (98,210,390) on said first surface (90,205) of said web (80,200,310) extends on a part of said intermediate portion (83,207) and exhibits a surface energy less

than the surface energy of a remaining part of said intermediate portion (83,207)."

Claim 1 according to the first to sixth auxiliary request includes the requirement of claim 1 of the main request that said coating on said first surface of said web extends on a part of said intermediate portion (in claim 1 of the first to fourth and sixth auxiliary request the "part" of the intermediate portion is more specifically referred to as a "first part" of said intermediate portion).

- VI. Oral proceedings, at the end of which the decision of the Board was announced, took place on 16 December 2004.

The appellant maintained the requests made with the letter dated 16 November 2004.

The respondents (opponents) requested that the appeal be dismissed.

- VII. During oral proceedings, the respondents raised objections under Article 123(3) EPC in respect of all requests. These objections can be summarized as follows:

Claim 1 as granted defined that the web was coated on the first surface and that the first surface of the web exhibited a surface energy less than the intermediate portion and thus made clear that the first surface was always co-extensive with the coating and the intermediate portion began where the first surface terminated. The description of the patent in suit, in particular the passages relating to Figure 6, was consistent with this reading of claim 1 which clearly

encompassed embodiments in which the first surface extended into the apertures. Claim 1 according to all requests was no longer restricted to a web in which the first surface was co-extensive with the coating but extended the protection conferred by defining that the coating extended beyond the first surface onto the intermediate portion.

VIII. In respect of these objections, the appellant essentially argued as follows:

Granted claim 1 was not clear because it defined on the one hand that the web was coated on the first surface and on the other hand that the first surface of the web exhibited a surface energy less than the intermediate portion. As a matter of fact, the difference in surface energy could only be present between the coating and the intermediate portion and not between the first surface and the intermediate portion. Because of this lack of clarity, it was necessary to interpret the wording of the claim. In view of the disclosure in the description of the patent in suit, it was clear for the skilled person that the only correct interpretation of claim 1 was that the web had on the one hand an intermediate portion defined by the sidewalls of the apertures which could comprise both a coated and a non-coated portion and on the other hand a first surface which did not extend into the apertures, with a coating thereon. Since claim 1 as amended according to all requests required that the coating extended on the intermediate portion, this amendment did not extend the protection conferred by the patent since the subject-matter of claim 1 was now restricted to a web which had an intermediate portion comprising a coated portion and

claim 1 as granted covered also webs with an intermediate portion which was not coated.

### **Reasons for the Decision**

1. The appeal is admissible.

2. *Main request*

2.1 When reading claim 1 as granted it is clear for the skilled reader that the first surface exhibits a surface energy less than the intermediate portion due to the presence of the coating on the first surface. This is in fact undisputed between the parties. Accordingly, the feature of claim 1 that the first surface exhibits a surface energy less than the intermediate portion read in combination with the feature that the web is coated on the first surface makes clear that the first surface is co-extensive with the coating. Since according to the wording of claim 1 the first surface and the second surface are separated from one another by the intermediate portion, it is clear that the first surface terminates where the intermediate portion begins.

This reading of granted claim 1 is consistent with the description of the patent in suit. Referring for instance to the embodiment of Figure 5, the first surface is identified with the coating 98, which extends into the apertures, the second surface with the lower surface 85 of the web, and the intermediate portion is defined by the sidewalls of the apertures between the first surface and the second surface. In

this respect it is noted that the definition of granted claim 1 according to which the intermediate portion is defined by the sidewalls of the apertures does not necessarily imply that the intermediate portion is defined by the **totality** of the sidewalls of the apertures but encompasses the possibility that it is defined by only **a portion** thereof.

It follows from the above that claim 1 as granted is restricted to a web in which the coating is co-extensive with the first surface and terminates where the intermediate portion begins. Since claim 1 as amended no longer includes this restriction but defines the coating on the first surface of the web as extending on a part of the intermediate portion, it provides protection for subject-matter which was excluded by claim 1 as granted and thereby extends the protection conferred by the patent in suit.

- 2.2 The appellant submitted that granted claim 1 was not clear in view of the inconsistency between the definition that the web was coated on the first surface and the definition that the first surface of the web exhibited a surface energy less than the intermediate portion and as a consequence the wording of claim 1 needed to be interpreted in the light of the description.

In the Board's view the claim does not provide inconsistent or contradictory information which would need interpretation by the description. The claimed subject-matter can in fact be clearly identified in the manner outlined above by applying to the terms of the



claim their ordinary meaning in accordance with the general knowledge of the skilled person.

2.3 In fact, the appellant's alleged lack of clarity is essentially based on the assumption that the first surface of the web is planar, whereby the intermediate portion consists of a non coated portion and a coated portion when the coating extends into the apertures.

However, there is no requirement in claim 1 that the first surface be planar, nor is there any clear basis for such interpretation in the description and drawings of the patent in suit. The appellant referred to Figure 3, which shows a prior art plastic web having first and second surfaces 50, 55 interconnected to one another by sidewall portions 53 which terminate substantially concurrently with one another in the plane 56 of the second surface 55 (column 8, lines 5 to 11 of the patent in suit). Figure 4 similarly shows a web having a planar first surface 90. However, the disclosures of Figures 3 and 4 relate to webs which are not provided with a coating and which cannot therefore form the basis for specifically identifying the first surface as a planar surface in a **coated** web. Moreover, in the webs of Figures 3 and 4 there is provided a sharp edge at the intersection between the first surface and the apertures. For such a web it can be clearly identified where the first surface terminates and where the intermediate portion begins. However, neither the claim nor the description of the patent in suit are restricted to webs having upper planar surfaces and/or apertures with sharp edges. Thus it is not clear where the first surface terminates and where the intermediate portion begins. In particular, in

Figure 11 a web is shown in which the first surface 205 (column 15, lines 47 to 51 of the patent in suit) is not identifiable as a planar surface because it is defined by the upper portions of the curved bundles of fibres forming the nonwoven web. Apertures with rounded edges at the transition with the first surface are moreover shown in Figures 5, 6 and 12 to 14.

2.4 Furthermore, in the passages of the description relating to the embodiment of Figure 6 which shows the coating 98 to extend into the apertures it is disclosed (column 13, lines 30 to 44) that "the first layer 99 of the film which will constitute the first surface of the web is formed of a first material, while the second layer 101 of the film which will constitute the second surface of the web is formed of a second material" and that "the first surface of the finished web is thus comprised of the first material, while the intermediate and lower portions of the finished web are comprised of the second material". By associating the first material to the first surface and the second material to the intermediate portion, this disclosure does not allow an interpretation of the first surface as the top planar surface of the web and the intermediate portion as consisting of a coated and a non-coated portion (i.e. comprising both the first and the second material). In fact, also this disclosure supports the reading of the claim set out in paragraph 2.1 above.

2.5 Further, the appellant agreed that the passage in the patent in suit (column 12, lines 14 to 17) stating: "Alternatively, the surface energy gradient may be discrete or stepped as it extends from the first surface 90 of the web into and through the intermediate

portion 83 of the web" allowed the coating to extend over the intermediate portion.

The Board notes in the first place that the patent in suit does not define what is to be understood as a "discrete" or "stepped" gradient. A normal interpretation for this "discrete gradient" would be "an abrupt change in work of adhesion of the coating over its extension". A "stepped gradient" would then imply a "plurality of abrupt changes in work of adhesion of the coating over its extension.

However, the patent in suit does not provide the skilled person with any disclosure as to how to obtain such changes in the work of adhesion of a single coating extending into apertures.

Therefore, this passage cannot provide support for the appellant's contention that the coating extended over the intermediate portion.

- 2.6 Finally, the embodiments of Figures 5, 6, 10 and 11 could, on first sight, provide a basis for the assumption that the coating extends over the "intermediate portion". According to claim 1 the intermediate portion is defined by the sidewalls of the apertures. The description (column 9, lines 33 to 37; column 15, lines 47 to 58) however defines for these embodiments the sidewall portion 83 and the apertures 215 as starting at the limit of the coated first surface and ending at the second surface. It follows therefore that the intermediate portion starts where the first surface ends.

2.7 For these reasons, the amendments of claim 1 of the main request result in an extension of the protection conferred, contrary to Article 123(3) EPC. The main request is therefore not allowable.

2.8 The appellant submitted that lack of clarity in the claim arose during the examination proceedings because at that time it was not realised that the intermediate portion consisted of a coated portion and a non-coated portion. In this respect the Board notes that pursuant to Article 113(2) EPC it is the applicant who is responsible for the text of the claims and must ensure that they include the essential features of the claimed invention for which protection is sought. Opposition proceedings are not a continuation of the examination proceedings allowing remedy of an *a posteriori* erroneous definition of the subject-matter of a claim, contrary to the requirements of Article 123(3) EPC.

### 3. *Auxiliary requests*

Since claim 1 of all requests includes the requirement of claim 1 of the main request that said coating on said first surface of said web extends on a part of said intermediate portion (a "first part" in accordance with claim 1 of the first to fourth and sixth auxiliary requests is still "a part" of the intermediate portion) it also contravenes Article 123(3) EPC for the reasons set out above.

4. None of the requests being allowable, the appeal is to be dismissed.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:

U. Bultmann

H. Meinders