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D E C I S I O N
of 15 June 2005

Case Number: T 1200/03 - 3.3.7

Application Number: 00927700.5

Publication Number: 1208262

IPC: D06M 11/83

Language of the proceedings: EN

Title of invention:

An article of clothing having antibacterial, antifungal, and antiyeast properties

Applicant:

The Cupron Corporation

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 54, 84, 123(2)

Keyword:

"Novelty - (no) (main and second auxiliary request)"
"Product-by-process format - allowable (no) - first auxiliary request"

Decisions cited:

T 0666/89, T 0150/82, G 0005/83

Catchword:

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Case Number: T 1200/03 - 3.3.7

D E C I S I O N
of the Technical Board of Appeal 3.3.7
of 15 June 2005

Appellant: The Cupron Corporation
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 17 July 2003
refusing European application No. 00927700.5
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: R. E. Teschemacher
Members: G. Santavicca
P. A. Gryczka

Summary of Facts and Submissions

I. European patent application 00 927 700.0 originates from international patent application PCT/IL00/00290 filed on 22 May 2000 (published as WO-A-00/75415), claiming a priority of 7 June 1999 in the USA based on application US 09/327,400. The international application as filed contained 13 claims. Independent Claim 1 read as follows:

"1. An article of clothing having antibacterial, antifungal, and antiyeast properties, comprising at least a panel of a metallized textile fabric, said textile fabric including fibers selected from the group consisting of natural fibers, synthetic cellulosic fibers, regenerated protein fibers, acrylic fibers, polyolefin fibers, polyurethane fibers, vinyl fibers, and blends thereof, and having a plating including an antibacterial, antifungal and antiyeast effective amount of at least one oxidant cationic species of copper."

Dependent claims 2 to 13 concerned preferred embodiments of the article according to Claim 1.

II. In a decision posted on 17 July 2003, the Examining Division refused the application. That decision was based on a set of amended claims 1 to 19 enclosed in the applicants' letter dated 21 January 2003. Amended independent Claims 1 and 19 read as follows:

"1. An article of clothing having antibacterial, antifungal, and antiyeast properties, comprising at least a panel of a textile fabric, said textile fabric

including fibers selected from the group consisting of natural fibers, synthetic cellulosic fibers, regenerated protein fibers, acrylic fibers, polyolefin fibers, polyurethane fibers, vinyl fibers, and blends thereof, said fibers having been treated to include at least one cationic species of copper directly bonded to the fibers".

"19. A yarn having antibacterial, antifungal and antiyeast properties for use in an article of clothing according to claim 14 comprising plated and unplated fibers selected from the group consisting of natural fibers, synthetic cellulosic fibers, regenerated protein fibers, acrylic fibers, polyolefin fibers, polyurethane fibers, vinyl fibers, and blends thereof, said plated fibers having a plating of at least one cationic species of copper produced by a first step of soaking said fibers in a solution of a low-oxidation state reductant cation, then in a solution of noble metal cations to produce activated nucleation sites on the fibers; followed by a third step of introduction of a reducing agent and a copper salt, in close proximity to the activated fibers, to produce copper cations, which plate the fibers with a cationic species of copper to provide the same with said antibacterial, antifungal and antiyeast properties."

Dependent claims 2 to 13 were identical to original claims 2 to 13, whereas claims 14 to 18 were new.

The Examining Division held that:

- (a) The amended claims fulfilled the requirements of Article 123(2) EPC.

(b) Example 2, which exemplified an embodiment of the invention underlying the application in cause, differed from Example 1, which reproduced a method for preparing a metallized fabric according to prior art D1 (WO-A-98/06508), in that a yarn had been used instead of a cotton fabric. However, the application in cause did not disclose how this difference could produce an ionic form of copper rather than metallic copper as taught by D1, nor which process parameters had to be changed to obtain an ionic copper plating. Since the treatment of a yarn did not necessarily involve a greater exposure to air than the treatment of a fabric, the arguments submitted by the applicants, who saw a difference in that respect, were not convincing. Further, the application in cause did not teach how to avoid a complete reduction of Cu^{++} to Cu when following the instructions of Example 2. Therefore, the alleged invention was not sufficiently disclosed (Article 83 EPC).

(c) Consequently, the application was refused.

III. On 16 September 2003, the applicants lodged an appeal against that decision, the fee for appeal being paid on the same day. In their statement setting out the grounds of appeal, received on 17 November 2003, the appellants enclosed two documents, which did not carry any publication dates, namely:

D3: E.P.G. Gohl et al., "An explanation of Fibre Properties", Textile Science, 2nd Edition,

Chapter 6, Dying and Printing, pages 12-14, 18, 20-21; and,

D4: E.R. Trotman, Dyeing and Chemical Technology of Textile Fibres, 6th Ed., pages 176, 179, 430, 431.

IV. On 16 March 2005, in an annex to the summons to oral proceedings, the Board gave a preliminary view on the issues to be addressed during the oral proceedings.

In a letter dated 13 May 2005, the appellants enclosed a set of amended Claims 1 to 14 as the main request as well as a set of further amended Claims 1 to 14 as the auxiliary request, which should replace the request on file. In a further letter, dated 16 May 2005, the appellants submitted arguments on novelty and inventive step.

V. Oral proceedings were held on 15 June 2005. The appellants submitted a further amended set of claims 1 to 14 replacing the previous main request and a set of claims 1 to 14 as the second auxiliary request.

Claim 1 in the three versions reads as follows:

Main request

"1. An article of clothing having antibacterial, antifungal, and antiyeast properties, comprising at least a panel of a metallized textile fabric, said textile fabric including fibers selected from the group consisting of natural fibers, synthetic cellulosic fibers, regenerated protein fibers, acrylic fibers, polyolefin fibers, polyurethane fibers, vinyl fibers,

and blends thereof, and having a plating including an antibacterial, antifungal and antiyeast effective amount of at least one **copper oxide selected from CuO and Cu₂O, wherein the plating is directly bonded to the fibers.**".

First auxiliary request

"1. An article of clothing having antibacterial, antifungal, and antiyeast properties, comprising at least a panel of a metallized textile fabric, said textile fabric including fibers selected from the group consisting of natural fibers, synthetic cellulosic fibers, regenerated protein fibers, acrylic fibers, polyolefin fibers, polyurethane fibers, vinyl fibers, and blends thereof, and having a plating **obtainable by directly bonding** an antibacterial, antifungal and antiyeast effective amount of at least one oxidant cationic species of copper **to said fibers, wherein said plating is of at least one copper oxide selected from CuO and Cu₂O.**".

Second auxiliary request

"1. **Use of a** textile fabric including fibers selected from the group consisting of natural fibers, synthetic cellulosic fibers, regenerated protein fibers, acrylic fibers, polyolefin fibers, polyurethane fibers, vinyl fibers, and blends thereof, and having a plating including an antibacterial, antifungal and antiyeast effective amount of at least one **copper oxide selected from CuO and Cu₂O, wherein the plating is directly bonded to the fibers, to provide an article of clothing having antibacterial, antifungal, and antiyeast**

properties comprising at least a panel of said metallized textile fabric."

The three requests contain a new dependent Claim 14.

VI. The appellants have argued essentially as follows:

(a) Compared to the claims as filed, amended Claims 1 to 14 according to the main request contained two amendments:

(ii) In Claim 1, the amendment clarified the nature of the copper species in the plating and made explicit the direct bonding between plating and fibres. The deletion of the term "oxidant" should not raise any objections, since the copper bound to the oxygen of the fibres was no longer an oxidant.

(iii) The second amendment, i.e. new dependent Claim 14, related to an embodiment in which the textile fabric was made from a yarn that had been spun from a mixture of the treated fibres of Claim 1 and untreated fibres.

Since the amendments to the claims of the main request were based on original Claims 1 to 13 and on the description as filed, they were allowable.

(b) As to sufficiency of the disclosure, the application, in particular Example 2 thereof, dealt with copper oxides being formed on fibres. These oxides were essential to achieve the antibacterial, antifungal and antiyeast properties

of the coating. Other forms of copper, such as metallic copper, could not be excluded but were not essential. Although the application did not disclose a detailed method for treating fibres, it nevertheless provided the information to the skilled person that it was essential to produce a copper oxide plating on the fibres to have said antibacterial, antifungal and antiyeast properties. Thus, the question arising under Article 83 EPC was whether the skilled person would be able to produce such a plating.

Example 2 differed from Example 1 in the use of yarns instead of fabrics. The skilled person knew that fibres in form of yarns, in view of their form and loose structure, were normally left floating on the surface of a bath, such that the solution penetrated into their body, whereby the fibres were subsequently squeezed to release any gas. Hence, the skilled person, when trying to obtain a desired coating on yarns instead of on fabrics, e.g. in Example 2, would not use the procedure of Example 1, which was comparative and dealt with a fabric submersed in a bath to obtain a metallic copper plating, which was not desired according to the teaching of the present application. The skilled person would rather use a treatment system that ensured the formation of a copper oxide plating on the fibres. In particular, the skilled person knew that, for directly bonding a plating of copper oxide on the fibres, it was essential to use a treatment system that removed gases from the fibres, e.g. the hydrogen gas by-product generated by the interaction of water

present in the salt solution with the -OH groups present on the surface of the fibres as taught by D3. Further, standard dyeing systems suitable for delivering a cationic plating onto fibres were also known, e.g. from D4. Therefore, the skilled person would carry out Example 2 using a suitable fibre treatment system and would readily be able to recognize from the colour of the plating whether it was cationic or metallic copper. Any further deposition of copper oxide on a layer of copper oxide already formed would not bind directly to the fibres but would simply come off as a dust. Although the ratio of the copper oxides was normally 70% cupric to 30% cuprous, other ratios exhibiting the desired effect were also possible. Finally, electroless plating had been known for 150 years. Hence, if common general knowledge was taken into account, the skilled person was able to carry out the claimed subject-matter, which consequently was not open to any objections under Article 83 EPC.

- (c) As regards novelty of the subject-matter of Claim 1 according to the main request, the appellants pointed to the following:
- (i) D1 disclosed how to obtain a metallic copper plating in Example 1 and a silver oxide plating in Example 2, both on a swatch of cotton fabric.
 - (ii) D1 mentioned that copper oxide was acaricide, zinc oxide was fungicide and silver metal was bactericide. Thus, when D1 mentioned

garments such as sockets having bactericidal and fungicidal properties, it referred to garments plated with zinc oxide or silver metal. Hence, when D1 mentioned articles for inhibiting infections such as athletes foot and jock itch, it did not refer to garments that contained any textiles plated with copper oxides.

- (iii) Since neither the metallic copper plating of Example 1 nor the silver oxide plating of Example 2 of D1 were effective as antibacterial agents, the cotton swatches produced according to the examples of D1 did not possess antibacterial, antifungal and antiyeast properties.
 - (iv) Hence, D1 did not disclose that copper oxides plating or any articles of clothing plated with copper oxides had antibacterial, antifungal and antiyeast properties.
 - (v) Therefore, D1 did not anticipate the claimed subject-matter.
- (d) As to inventive step, D1 was the closest prior art and the problem to be solved was the provision of textile fibres for an article of clothing carrying a plating of metal oxides having antibacterial, antifungal and antiyeast properties. That problem had been solved according to the present invention by using a plating of cupric and cuprous oxides. D1 did not suggest that the desired properties would be attained by such a plating. Therefore,

the claimed-subject matter involved an inventive step.

- (e) Claim 1 of the first auxiliary request made more explicit the presence of a direct bond between the plating and the fibres, which was supported by the original application. As to sufficiency, novelty and inventive step, the arguments for the main request applied *mutatis mutandis* to the auxiliary request.
- (f) The subject-matter of Claim 1 according to the second auxiliary request concerned a use, namely the use of textiles plated with copper oxides to provide an article of clothing having antibacterial, antifungal and antiyeast properties. Since this use was neither disclosed nor suggested in D1, it was novel and involved an inventive step.

VII. The appellants requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request as submitted at the oral proceedings, alternatively on the basis of the first auxiliary request submitted by letter of 13 May 2005, or of the second auxiliary request submitted during the oral proceedings.

Reasons for the Decision

1. The appeal is admissible.

Main request

2. *Amendments*

- 2.1 Compared to the claims as filed, the claims of the main request contain the following amendments:

- (a) In Claim 1, the feature "oxidant cationic species of copper" has been replaced by the feature "copper oxide selected from CuO and Cu₂O wherein the plating is directly bonded to the fibers"; and,

- (b) New dependent Claim 14.

- 2.2 The amendment to Claim 1 has a basis in the description as filed, compare page 5, lines 21 to 25.

- 2.3 Additional Claim 14 has a basis on page 5, lines 26 to 28.

- 2.4 Hence, the application has not been amended in such a way that it contains subject-matter which extends beyond the content of the application as filed (Article 123(2) EPC).

- 2.5 The amendment to Claim 1 removes any objections under Article 84 EPC which could arise against the feature "oxidant cationic species of copper" of Claim 1 as filed, as mentioned in the communication of the Board.

2.6 Therefore, the main request is admissible.

3. *Sufficiency of the disclosure*

3.1 An invention is sufficiently disclosed within the meaning of Article 83 EPC if a person skilled in the art can carry it out on the basis of the information provided in the application as filed in the light of common general knowledge.

3.2 The grounds on which the Examining Division refused the application are based on the reasons that the fibres of the claimed article of clothing were plated with cationic species of copper instead of metallic copper as disclosed in D1, and that the application did not teach how to prevent a complete reduction to metallic copper when following the instructions of Example 2, which is the only example of the application illustrating the preparation of the claimed article of clothing.

3.3 Claim 1 according to the main request no longer requires the presence of any "cationic species of copper directly bonded to the fibres" but a plating directly bonded to the fibres and including at least one copper oxide selected from cupric and cuprous oxides.

3.4 Hence, it should be established whether the skilled person following the instructions of Example 2 can obtain an article which is plated as claimed.

3.5 The prior art referred to in the present application is essentially based on two documents:

- (a) WO-A-98/06508, filed on 6 August 1997 and claiming a priority of 9 August 1996 based on US 08/693,656; and,
- (b) WO-A-98/06509 (i.e. D1), filed on 9 August 1997 and claiming a priority of 9 August 1997 based on US 08/693,657.

These two documents are parallel international applications, whereby WO-A-98/06508 concerns a metallized textile and D1 concerns applications of a metallized textile.

The teachings of both documents are incorporated in the present application by reference (page 1, second paragraph). Also, it is apparent from the priority document of the present application (compare page 1, second paragraph), that the present application is in fact a continuation-in-part of both the WO-A-98/06508 and the D1 documents referred to above. Therefore, the present application, WO-A-98/06508 and D1 pertain to the same family, are referred to in the present application and may be taken into account to assess sufficiency.

- 3.6 Example 1 of the present application is a repetition of Example 1 of WO-A-98/06508, apart from the size of the fabric (250x250 cm) and the configuration of the bath, which is not mentioned in Example 1 of WO-A-98/06508. Example 1 of WO-A-98/06508 is identical to Example 1 of WO-A-98/06509 (D1). Hence, Example 1 of the present application is a repetition of Example 1 of D1, apart from the size of the fabric (250x250 cm) and the configuration of the bath.

Although the impugned decision mentions WO-A-98/06508 as D1, the International Preliminary Examination report drawn by the first examiner of the Examining Division and the previous communications of the Examining Division in fact identify WO-A-98/06509 as D1. In the present decision, D1 corresponds to WO-A-98/06509, unless otherwise indicated.

- 3.7 In Example 1 of the present application, an activated fabric and formaldehyde (a reducing agent) are added to a dilute basic CuSO_4 solution, which was prepared by dissolving CuSO_4 and NaOH (in approximately equal weight proportions), a chelating agent, and polyethylene glycol in water. The activated fabric is added under a pure oxygen atmosphere and removed after 2 to 10 minutes. The reduction of Cu^{++} by the formaldehyde provides a layer of copper tightly and intimately bonded to the fibres of the cotton fabric, which layer has the colour of metallic copper. The particular configuration of the bath is chosen to prevent any contacts between parts of the fabric as well as for permitting the escape of gas from the chemical reactions taking place on the fibres (page 6, last paragraph, and page 7, first paragraph).

In Example 2, the procedure of Example 1 was reproduced on a yarn, instead of a fabric. No further particulars are given, e.g. any different chemical reactants or any particular configuration of the bath other than that of Example 1.

- 3.8 If a yarn was treated in exactly the same manner as the fabric of Example 1, the skilled person would expect

that the same kind of copper is coated on a fabric and on a yarn. In fact, the applicants argued that the resulting copper oxide plating was the result of the application of a fibre treatment system, instead of a fabric treatment system, which different procedure had unfortunately not been mentioned in Example 2, but which would inevitably be apparent to the skilled person. According to the appellants, it was known that if the procedure of Example 1 was applied to fibres, they would become entangled.

3.9 To back their arguments, the appellants have produced documents D3 and D4. However, these documents are not dated. Further, they refer to the art of dyeing, which is not mentioned in the present application. Hence, these documents cannot be taken into account for assessing the sufficiency of the disclosure of the present application.

3.10 Despite the missing reference to a fibre treatment system in the present application, the information contained in D1 can be taken into account to assess the sufficiency of the disclosure of the present application (Point 3.5, *supra*).

3.11 D1, extensively referred to in the present application, in particular in its Example 1, *inter alia* mentions that:

"After these oxidant cations (*inter alia* Cu^{++}) are plated on the textile, the metal plating may be processed further, for example, by oxidation to the oxide. This oxidation is most conveniently effected simply by exposing the metallized textile to air. The

metallized textiles and the oxide-plated textiles thus produced are characterized in that their metal or metal oxide plating is bonded directly to the fibers."

(page 6, lines 16 to 21).

3.12 According to this statement, even if a metal plating was obtained firstly, that plating could be processed further to obtain, by oxidation, an oxide-plating on the fibres. Exposure to air would be sufficient.

3.13 It has not become apparent that the consequences of that passage do not apply to a fibre plated according to Example 2 of the application under examination.

3.14 Therefore, the attainment of a plating directly bonded to fibres and including copper oxides selected from cupric and cuprous oxides is sufficiently disclosed in the present application (Article 83 EPC).

4. *Novelty*

4.1 D1 discloses a process comprising the steps of:

(a) providing a metallized textile, said metallized textile comprising:

(i) a textile including fibers selected from the group consisting of natural fibers, synthetic cellulosic fibers, regenerated protein fibers, acrylic fibers, polyolefin fibers, polyurethane fibers, vynil fibers, and blends thereof, and

(ii) a plating including materials selected from the group consisting of metals and metal oxides,

said metallized textile characterized in that said plating is bonded directly to said fibers; and

(b) incorporating said metallized textile in an article of manufacture (Claim 1).

- 4.1.1 In the context of D1, the term "textile" includes fibers, yarns spun from those fibers, and woven, knit, and non-woven fabrics made of those yarns (page 5, lines 6 to 9). Hence, the products resulting from the process of Claim 1 of D1, *inter alia* include fibres, yarns and fabrics plated with metal oxides and incorporated in an article of manufacture.
- 4.1.2 Regarding the nature of the metal plating, D1 teaches the use of any of the cations: Cu^{++} , Ag^+ , Zn^{++} and Ni^{++} (page 6, lines 10 to 12). Further, D1 describes how to obtain a copper plating on the fibres of a fabric in Example 1.
- 4.1.3 D1 exemplifies the use of copper for obtaining a plating having the colour of copper metal (Example 1) and the use of silver for obtaining a plating of silver oxide (Example 2). However, according to the established practice (Case Law of the Boards of Appeal of the EPO, 4th edition, 2001, I.C.2.7, in particular T 666/89, OJ EPO 1993,495, Reasons, point 5), not only the examples of a document should be regarded as state of the art but also the whole content of a citation should be considered when deciding on the question of

novelty. In applying this principle, the evaluation has therefore not to be confined merely to a comparison of the claimed subject-matter with the examples of D1, but has to extend to all the information contained in the earlier document. Hence, it has to be established what has actually been made available to the skilled person reading the specification of D1.

- 4.1.4 According to D1, the metal plating may be processed further, for example, by oxidation to the oxide, which oxidation is most conveniently effected simply by exposing the metallized textile to air (page 6, lines 16 to 19). The oxide-plated textiles thus produced are characterized in that their metal oxide plating is bonded directly to the textile fibres (page 6, last sentence). This inevitable consequence directly and unambiguously applies to the products obtained from the process defined in Claim 1 and to that obtained from Example 1 of D1. Thus, D1 unambiguously makes available fabrics plated with copper oxide, the plating being directly bonded to the fibres, the fabric being incorporated in an article of manufacture.
- 4.1.5 D1 also discloses that said article of manufacture can be a garment, which can be a fungicide (Claim 4) garment (Claim 5) or a bactericide (Claim 7) garment (Claim 8). The application of the treated fibres in an article of clothing such as a garment is also mentioned in the description, in particular in connection with socks which inhibit infections such as athletes foot and jock itch (page 7, lines 3 to 5). In particular, D1 exemplifies a fabric which is plated with copper (Example 1), which when in contact with air would

- inevitably lead to an amount of copper oxides. In view of the specific mention of the use of copper oxide as an acaricide, D1 makes available cloths plated with copper oxides.
- 4.1.6 However, D1 does not expressly indicate that a fabric plated with copper oxide has fungicide and bactericide properties. Copper oxide is only mentioned as an acaricide (page 1, line 16), whereas zinc oxide is mentioned as a fungicide and silver metal as a bactericide (page 2, lines 7 to 9).
- 4.1.7 The appellants argued that since D1 did not disclose that copper oxides imparted antifungal, antibacterial and antiyeast properties, the claimed subject-matter which was defined by those properties was novel.
- 4.1.8 Claim 1 of the present application concerns a product *per se*, having particular properties. D1 makes available an article with all the structural features of the article defined in Claim 1, without mentioning the fungicidal and bactericidal properties thereof.
- 4.1.9 According to a statement in the description of the present application: "While the metallized fabrics produced according to said publications (i.e. WO-A-98/06508 and D1) (reference added by the Board) are effective acaricides, it has now been found that they are also effective in preventing and/or treating bacterial, fungal and yeast infections which afflict various parts of the human body and that therefore the incorporation of at least a panel of a metallized textile material in an article of clothing can have extremely beneficial effect" (compare page 4, lines 19

to 23). Thus, as also acknowledged in the present application, the fungicidal and bactericidal properties of the claimed article are further properties of the article disclosed by D1.

4.1.10 Noticing that a known product also has the properties of being antifungal, antibacterial and antiyeast is a mere discovery of further properties of that product. However, the discovery of further properties of a known product does not render the known product novel, apart from the exception for medicaments foreseen in Article 54(5) EPC, because their use would be a method excluded under Article 52(4) EPC (Case Law, *supra*, I.C.5, in particular G 5/83 (OJ 1985, 64)). In the present case, Claim 1 does not concern a composition of matter as a medicament.

4.1.11 It follows from the above analysis, that the whole disclosure of D1 inevitably makes available an article of clothing as defined in Claim 1 according to the main request, which consequently is not novel.

First auxiliary request

5. *Amendments*

5.1 Compared to Claim 1 as filed, Claim 1 of the first auxiliary request *inter alia* contains the following amendment: "... having a plating **obtainable by directly bonding ...**".

5.2 Hence, Claim 1 according to first auxiliary request is drawn up as a product-by process claim.

5.3 However, claims for products defined in terms of processes for their preparation (i.e. "product-by-process" claims) are admissible if the products fulfil the requirements for patentability and there is no other information available which could have enabled the applicant to define the product satisfactorily by reference to its compositions, structure of some other testable parameter (Case Law, *supra*, I.B.6, in particular landmark decision T 150/82 in OJ 1984, 309).

5.4 In the present case, it is apparent from the claims of the main request, in particular from the dependent claims, that the article of clothing to be protected can be defined by structural features without recurring to any processes for their preparation.

5.5 Consequently, the first auxiliary request is not admissible (Article 84 EPC).

5.6 Hence, there is no need to examine whether the requirements under Article 123(2) EPC are fulfilled.

Second auxiliary request

6. *Amendments*

6.1 Compared to Claim 1 as filed, Claim 1 according to the second auxiliary request no longer relates to an article of clothing *per se* but concerns the use of a textile fabric plated with copper oxides to provide an article of clothing having antibacterial, antifungal and antiyeast properties comprising at least a panel of said metallized textile fabric.

6.2 Although it is not clear whether the drafting "use of ... to provide... an article ... having ..." is something different from a process of manufacture of the product, it may be left undecided whether the requirements of Article 84 EPC are fulfilled, since the assessment of novelty (Point 7, *infra*) leads to the same result as for the subject-matter claimed in the main request.

7. *Novelty*

7.1 D1 discloses fibres, yarns and fabrics plated with metal oxides, *inter alia* copper, which can be used in articles of manufacture such as cloths and garments.

7.2 As said above, the mere discovery that the fabrics coated with copper oxides have antibacterial, antifungal and antiyeast properties, does not render the known fabrics novel.

7.3 Further, the steps of manufacture defined in Claim 1 of the second auxiliary request are also known from D1. Also, these steps do not result in any products having a different constitution than the product previously defined in Claim 1 according to the main request and found to be known from D1, despite their further properties.

7.4 According to the case law, apart from processes for manufacturing medicaments useful for novel pharmaceutical applications (Case Law, *supra*, in particular G 5/83, OJ 1985,64), a process for manufacturing a product cannot be made new by the

properties the product has (Case Law, *supra*, I.C.5.3.1 (g) (h)).

7.5 Therefore, the subject-matter of Claim 1 according to the second auxiliary request is not novel either.

7.6 Consequently, the second auxiliary request is not allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

C. Eickhoff

R. Teschemacher