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**Datasheet for the decision  
of 20 June 2006**

**Case Number:** T 0120/04 - 3.2.04

**Application Number:** 94301802.8

**Publication Number:** 0615720

**IPC:** A47L 13/17

**Language of the proceedings:** EN

**Title of invention:**

Abrasive hand cleaning article incorporating waterless hand  
cleanser

**Patentee:**

ILLINOIS TOOL WORKS INC.

**Opponent:**

Deb Limited  
Kimberly-Clark Corporation

**Headword:**

Hand cleanser/ILLINOIS

**Relevant legal provisions:**

EPC Art. 52, 56

**Keyword:**

"Public prior use: established (yes)"  
"Lack of novelty (main and first auxiliary requests)"  
"Lack of inventive step (second auxiliary request)"

**Decisions cited:**

T 0097/94

**Catchword:**

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Case Number: T 0120/04 - 3.2.04

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.04  
of 20 June 2006

**Appellant:** Deb Limited  
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**Respondent:** ILLINOIS TOOL WORKS INC.  
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**Representative:** Perry, Robert Edward  
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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted  
26 November 2003 concerning maintenance of the  
European patent No. 0615720 in amended form.

**Composition of the Board:**

**Chairman:** M. Ceyte  
**Members:** P. Petti  
M. B. Tardo-Dino

## Summary of Facts and Submissions

- I. Two oppositions were filed against the European patent No. 615 720. In its interlocutory decision posted on 26 November 2003 the opposition division found that the patent as amended in accordance with auxiliary request 1 filed during oral proceedings before the opposition division met the requirements of the European Patent Convention.

The opposition division found that an alleged public prior use concerning the delivery of wipes, produced by opponent I and called "Swarfega Red Box Workshop Wipes", to P.C.S. Wholesale Motor Factors (hereinafter "PCS") and to Autela Components LTD (hereinafter "Autela") was not sufficiently proven.

- II. On 26 January 2004 opponent I (hereinafter the appellant) lodged an appeal against this decision and simultaneously paid the appeal fee. A statement setting out the grounds of appeal was received on 1 April 2004.

With the statement setting out the grounds of appeal the appellant submitted further evidence relating to the alleged public prior use concerning the "Swarfega Red Box Workshop Wipes" product. In the course of the appeal proceedings the appellant, by letter dated 8 December 2005, also filed five statutory declarations relating to this prior use.

- III. Opponent II who had filed an appeal on 10 February 2004 withdrew his appeal by letter dated 8 March 2004 without filing any statement setting out the grounds of appeal.

- IV. Oral proceedings before the board were held on 20 June 2006.
- V. The appellant requested that the decision under appeal be set aside and the patent be revoked.
- VI. As a main request the patent proprietor (hereinafter respondent) requested that the appeal be dismissed. This implies the maintenance of the patent on the basis of auxiliary request 1 filed during oral proceedings before the opposition division.

Auxiliarily, the respondent requested that the decision under appeal be set aside and the patent be maintained either on the basis of claim 1 filed with the letter dated 19 August 2004 (first auxiliary request) or on the basis of claim 1 filed during the oral proceedings on 20 June 2006 (second auxiliary request).

Claim 1 according to the main request reads as follows:

1. An abrasive hand cleaning article comprising:
  - a substrate presenting two opposed surfaces;
  - an abrasive ingredient permanently attached to or an integral part of one or both of the opposed surfaces; and,
  - absorbed in the substrate, a waterless hand cleanser emulsion comprising water, an organic solvent capable of solubilising greasy, oily soils, and a surfactant;
  - wherein the emulsion comprises 2-40% by weight of the organic solvent; 2-20% by weight of the surfactant; 60-95% by weight water; and 0-8% by weight of inert ingredients;

and

whereby cleansing action is achieved by the emulsion and the abrasive ingredient.

Claim 1 according to the first auxiliary request reads as follows:

1. An abrasive hand cleaning article comprising:  
a substrate presenting two opposed surfaces;  
an abrasive ingredient permanently attached to or an integral part of one or both of the opposed surfaces; and,

absorbed in the substrate, a waterless hand cleanser emulsion comprising water, an organic solvent capable of solubilising greasy, oily soils, and a surfactant;

wherein the emulsion comprises 2-40% by weight of the organic solvent; 2-20% by weight of the surfactant; 60-95% by weight water; and 0-8% by weight of inert ingredients;

wherein the solvent is an aliphatic solvent, dibasic ester, vegetable oil or a glycol ether; and

whereby cleansing action is achieved by the emulsion and the abrasive ingredient.

Claim 1 according to the second auxiliary request reads as follows:

1. An abrasive hand cleaning article comprising:  
a substrate presenting two opposed surfaces;  
an abrasive ingredient permanently attached to one of the opposed surfaces; and,

absorbed in the substrate, a waterless hand cleanser emulsion comprising water, an organic solvent

capable of solubilising greasy, oily soils, and a surfactant;

wherein the emulsion comprises 2-40% by weight of the organic solvent; 2-20% by weight of the surfactant; 60-95% by weight water; and 0-8% by weight of inert ingredients; and

whereby cleansing action is achieved by the emulsion and the abrasive ingredient.

VII. The arguments submitted by the parties during oral proceedings can be summarized as follows:

- (i) The appellant submitted that the "Swarfega Red Box Workshop Wipes" product was sold to the firms PCS and Autela before the priority date of the patent in suit and was therefore a public prior use. The respondent, who did not contest in detail the appellant's arguments, only asserted that the appellant had not established an unbroken chain of evidence relating to such an alleged prior use and that all the facts and evidence as well as the arguments submitted by the appellant during the appeal proceedings might have been submitted with the notice of opposition.
- (ii) With respect to main and first auxiliary requests, the appellant argued that the subject-matter of claim 1 of each of these requests was not novel over this prior use. This was contested by the respondent who essentially argued that the wipe according to the alleged prior use neither comprised a substrate having an abrasive ingredient as

integral part of at least one of its opposed surfaces nor was it an "abrasive hand cleaning article" within the meaning of the patent.

- (iii) With respect to the second auxiliary request, the appellant argued that the subject-matter of the independent claim 1 did not involve an inventive step in view of the combination of the alleged prior use with the teaching of document US-A-4 833 003 (hereinafter US'003). This was contested by the respondent who essentially argued that there was no reason for the skilled person to combine the alleged prior use and document US'003.

### **Reasons for the Decision**

1. The appeal is admissible.
2. *The prior use*

In order to substantiate the alleged prior use, the appellant referred *inter alia* to the following evidence:

- D1: Leaflet "Swarfega RED BOX Workshop Wipes " of DEB (2 pages), whose printing date is 12/92.
- D2: Marketing "mailshot" SWW22R (2 pages), undated;
- D5: Copy of a "Distribution Agreement" between DEB and HYCARE;
- D6: Copy of a document of Hycare Hygiene Products referring to the description and the formulation of SWARFEGA RED BOX LIQUOR (2 pages);
- D8: "Press release" of DEB dated 27 November 1992 (1 page);

- D9: Copy of the invoice No. 3432 of HYCARE to DEB dated 31 December 1992, referring to Order No. 50358 (1 page);
- D10: Copies of a "Delivery receipt" and a "Goods Received Note" referring to Order No. 50358 (2 pages);
- D11: Copies of the invoice No. 348691/A , from DEB to P.C.S, dated 13 January 2003;
- D11a: Copy of the Service Note (Carrier's copy) No. A21314, from DEB to PCS, referring to Invoice No. 348691/A
- D12: Copies of the invoice No. 348614/A01 from DEB to AUTELA, dated 25 January 2003 and referring to Order No. 1845872;
- D12a: Copy of an advice note referring to invoice No. 348614/A01 and to Order No. 1845872;
- D'12: Copy of the invoice No. 348614/A from DEB to AUTELA, dated 13 January 2003 and referring to Order No. 1845872;
- D'12a: Copy of an advice note referring to invoice No. 348614/A00 and to Order No. 1845872;
- D13a: Magazine "Car & Accessory Trader" (CAT), issue of January 1993.
- D16: Copy of the sales record for DEB Industrial Division in January 1993 (1 sheet);
- D17: Copy of the sales record for DEB Automotive Division in January 1993 (1 sheet);
- PLB: Statutory Declaration of Paul Laurence Blount, Marketing Director of DEB Ltd;
- AGH: Statutory Declaration of Andrew Gordon Hunt, Financial Controller of DEB Ltd;
- AAH: Statutory Declaration of Andrew Alistair Holden, Marketing Manager for Healthcare of DEB Ltd.



2.1 Evaluation of the documentary evidence:

- i) According to the invoices D11, D12 and D'12, in January 1993 DEB sold to the firms PCS and Autela products called "Swarfega Workshop Wipes". Those invoices identify the products by the stock code "SWW22R" and refer to them as packaging units of "4x150 wipes". According to the declaration AGH (see point 8), the date shown in the invoices is always the date on which the products were actually dispatched. Documents D11a, D12a and D'12a confirm receipt of the "Swarfega Workshop Wipes" products.

D16 and D17, which are internal documents showing the monthly sales from DEB's Industrial Division and DEB's Automotive Division, also confirm that products referred to as "Swarfega Workshop Wipes" (4 x 150 wipes) were sold in January 1993.

Moreover, the Press Release D8, dated 27 November 1992, refers to products called "Swarfega Red Box Workshop Wipes" (in tubs of 150 wipes) as becoming available in January 1993.

Furthermore, the magazine D13a contains on page 15 the advertisement "The Mobile Washroom" which presents a photograph showing a box carrying the name "Swarfega Red Box Workshop Wipes" and refers to a box containing 150 wipes.

Therefore, the evidence proves without doubt that the "Swarfega Red Box Workshop Wipes" product identified with the code "SWW22R" was made

available to the public in so far as it was sold to PCS and Autela before the priority date of the patent in suit.

- ii) According to the declaration PLB (see points 8 to 11), the stock code "SWW22R" was only used for the "Swarfega Red Box Workshop Wipes" product as shown in documents D1 and D2 which were marketing materials for this product.

According to this declaration, document D2 is a "mail shot" that was sent out to potential customers for the "Swarfega Red Box Workshop Wipes" product. Document D2 contains a photograph, substantially identical with that of the advertisement on page 15 of document D13a, showing a box carrying the name "Swarfega Red Box Workshop Wipes" and identified by the stock code SWW22R. Furthermore, this document indicates that the box contains 150 wipes. This information, in conjunction with the declaration PLB, ties the goods referred to in documents D11, D12 and D'12 with the product referred to in the mail shot D2.

According to document D2, a Swarfega Red Box Workshop Wipe comprises a substrate in the shape of a towel, the substrate being "impregnated with a powerful formulation cleanser", the wipe being suitable for cleaning hands quickly and effectively without water. A first photograph, which is provided with the title "The mobile washroom", shows a box with a wipe projecting through the lid, while a further photograph shows a user rubbing his hands with the wipe between

them. Both photographs represent the wipe in the shape of a towel whose opposed surfaces have a slightly-embossed pattern.

Document D1, a product leaflet printed in December 1992, refers to a tough extra large wipe combined with powerful liquid heavy duty hand cleanser", which "removes oil, grease and grime" acting quickly and effectively without leaving residues on the skin. Moreover, document D1 contains a photograph which is substantially identical to that of document D13a and shows a towel having a slightly-embossed pattern.

Therefore, the board considers it as being proven that the "Swarfega Red Box Workshop Wipes" product sold to the firms PCS and AUTELA before the priority date of the patent in suit comprises a towel, i.e. a substrate presenting two opposed surfaces, and, absorbed in the substrate, a cleanser capable of removing greasy or oily soils, the towel having a surface texture enabling it to produce a scrubbing action on the skin, wherein the cleansing action is achieved not only by the cleanser but also by the surface texture of the towel.

- iii) According to the declarations AAH (see points 5 to 10) and PLB (see points 4 to 7), the "Swarfega Red Box Workshop Wipes" product made by the company Hycare Hygiene Products (hereinafter "Hycare") for DEB was identical to a product previously sold by Hycare under the name "Grimebuster".

This is supported by documents D9 and D10 according to which on 31 December 1992 products called "Swarfega 'Red Box' Wipes" (see D9) or "Swarfega Red Box Workshop Wipes" were sold and delivered by Hycare to DEB.

This is also supported by the Distribution Agreement D5, according to which Hycare gave to DEB exclusive rights to sell any "Hycare heavy duty hand cleansing wipe system for the removal of oil, grease ... and general grime in the U.K." from 27 October 1992 to 30 June 1993, wherein the product "Grimebuster" was withdrawn from sale by Hycare for the period of the agreement. The "Product Specification" in D5 refers to a pail containing 150 wipes, the wipe comprising a towel with a 35 gsm polyester/cotton fabric and to a liquor "as per 'Grimebuster' formulation".

Document D6, a copy of a letter sent by telefax from Hycare to DEB in December 1992, shows the formulation of "Swarfega Red Box Liquor" which is described as a "water-based microemulsion of mild safety solvent containing surfactants ... " comprising 8.0% of "Aliphatic dibasic acid Esters" as "safe, non-toxic solvent", 5.0% of "Nonoxinol-9 nonionic SAA" as "solubiliser/cleanser", 2.0% of "Lauryl ether sulphate (3EO)", 0.1% of a fungicide, 0.02 of a bactericide, 2.0% of "Monopropylene glycol" and balance of water (i.e. 82.88%).

According to declarations PLB (see point 16) and AAH (see point 10), the composition of the "Swarfega Red Box Liquor" referred to in document D6 is that of the liquor component of the "Swarfega Red Box Workshop Wipes" manufactured for DEB by Hycare.

The evidence, thus, shows without doubt that the "Swarfega Red Box Workshop Wipes" product sold to the firms PCS and AUTELA before the priority date of the patent in suit comprises a towel impregnated with a cleanser emulsion comprising 82.88% of water, 8.0% of an organic solvent capable of solubilising greasy, oily soils, 5.0% of a surfactant, wherein the solvent is an aliphatic solvent.

- 2.1.1 The respondent's argument referred to in section VII.(i) above is irrelevant for the evaluation of the evidence submitted by the appellant in so far as it does not challenge the content of the evidence.

This argument appears to relate to the admissibility of the further evidence submitted by the appellant in the course of the appeal proceedings (see section II above, 2nd paragraph).

In the present case, the submission of further evidence with the statement setting out the grounds of appeal has to be considered as a reaction of the appellant to the findings of the department of first instance, while the filing of the statutory declarations by letter dated 8 December 2005 has to be considered as a reply to the objections raised by the

respondent by letter dated 19 August 2004. Therefore, the board does not consider this further evidence as being "not submitted in due time" within the meaning of Article 114 (2) EPC.

The board agrees with the respondent that the additional evidence might have been filed earlier. However, the new evidence filed with the statement of grounds of appeal or even later with letter dated 8 December 2005 represents the missing links of a chain of arguments submitted for the first time with the notice of opposition. As such, this additional evidence is conclusive for the finding of a decision concerning the prior use. Furthermore, the respondent had sufficient time to respond.

2.1.2 According to the jurisprudence of the Boards of Appeal an unbroken chain of evidence relating to the alleged prior use should be established with a degree of certainty which is beyond any reasonable doubt (see e.g. decision T 97/94, OJ EPO 1998, 467). As it is apparent from the above considerations, the evidence submitted in support of the public prior use of the "Swarfega Red Box Workshop Wipes" product meets these requirements.

### 3. *Main and first auxiliary request*

3.1 Having regard to the considerations in section 2.2 above, the "Swarfega Red Box Workshop Wipes" product is a hand cleaning article comprising a substrate presenting two opposed surface and, absorbed in the substrate, a cleanser. Since the surface texture of the towel forming the substrate enables it to produce a scrubbing action on the skin, the article is abrasive

within the meaning of the patent in suit and is to be considered as comprising an abrasive ingredient which is an integral part of both surfaces of the substrate. Moreover, the cleanser is a waterless hand cleanser emulsion whose composition falls within the terms of the cleanser emulsion defined in claim 1 of the main request as well as of the first auxiliary request. Furthermore, the cleanser emulsion comprises an aliphatic solvent as defined by claim 1 of the first auxiliary request.

- 3.2 As to the comparative analysis of the claimed subject-matter with the wipe according to the prior use, the respondent argued that the wipe of the prior use neither is an abrasive article nor has an abrasive ingredient in so far as a 35 gsm cotton or polyester towel, even if it has a perforated or embossed texture, cannot be considered as being abrasive.

The board cannot accept this argument for the following reasons:

- (i) The expression in claim 1 "abrasive hand cleaning article comprising ... an abrasive ingredient permanently attached or an integral part of one or both of the opposed surfaces [of the substrate]" encompasses the wipe according to the prior use which comprises a towel whose abrasive ingredient is an integral part of its opposed surfaces in so far as the texture of the opposed surfaces renders the towel capable of producing a mild scrubbing action on the skin.

(ii) Reference is made in this respect to the patent specification (see page 3, lines 1 to 8) according to which the substrate can be a towel, wherein the abrasive ingredient "comprises a surface texture which enables the towel to produce a mild scrubbing action on the skin in order to remove embedded soil, while not harming the skin by scratching or the like".

3.3 Therefore, the subject-matter of claim 1 of the main request as well as that of claim 1 of the first auxiliary request lack novelty (Article 52 EPC). None of these request can be allowed.

4. *Second auxiliary request*

4.1 Claim 1 of this request differs from the abrasive hand cleaning wipe according to the prior use in that the abrasive ingredient is permanently attached to one of the opposed surfaces of the substrate.

According to the respondent this feature results in providing an article having an abrasive surface for loosening soils from the skin of the hand and a smooth surface for wiping off the soils.

Starting from the two-sided abrasive wipe according to the prior use, the technical problem may be seen in improving the cleaning properties.

4.2 The skilled person confronted with the problem of improving the cleaning properties of a two-sided abrasive cleaning wipe would be encouraged to take into consideration the teaching of US'003 cited in the



patent specification, since this citation proposes in essence the same substrate having an abrasive ingredient permanently attached to its surfaces.

According to this document the abrasive cleaning wipe comprises an abrasive surface layer thermally bonded to a meltdown supporting web, the abrasive layer comprising meltblown fibres and shotty deposits, wherein the abrasive layer can be on one or both sides of the supporting web (see particularly column 1, lines 27 to 33). Furthermore, according to claim 3 of this document the wipe has an abrasive surface layer "only on one side of the supporting web". Thus, document US'003 clearly teaches to provide an abrasive layer which is permanently attached to only one side of the two-sided cleaning wipe.

4.2.1 The skilled reader would immediately realize that the abrasive side of the two-sided cleaning wipe allows loosening of dirt from the surface to be cleaned, while the smooth side is used for removing the dirt loosened by the abrasive side.

4.2.2 Therefore, the skilled person would apply the teaching of document US'003 to the abrasive hand cleaning article according to the prior use and arrive at the claimed invention without exercising any inventive skill.

4.3 The respondent argued that the skilled person has no reason to combine the closest prior art with the teaching of US'003 because this document

- i) relates to a different technical area, in so far as it refers to wipes for cleaning bathroom tubs, and
- ii) does not indicate the advantages (abrasion effect and wiping effect) which can be obtained by a cleaning wipe having only one abrasive surface.

4.3.1 The board cannot accept these arguments for the following reasons:

- i) Document US'003 refers not only to wipes which are particularly useful for cleaning bathrooms fixtures (see column 1, lines 56 to 60; column 3, lines 46 to 49) but also to "baby wipes" (column 1, lines 8 to 12).

In any case, the technical area of wipes for cleaning bathrooms fixtures cannot be considered as being remote from the technical area of hand cleaning articles, especially because document US'003 is cited in the patent specification as well as in the application as originally filed (see EP-A-615 720, page 3, lines 18 to 20: "The abrasive substrate of the preferred embodiment comprises a cloth-like towel similar to that described in U.S. Patent No. 4,833,003 ..., which is herein incorporated by reference in its entirety").

- ii) As explained in section 3.2.1 above, the skilled person would immediately recognize the advantageous effects of a two-sided cleaning

wipe having an abrasive side for loosening soils from the hand and a smooth side for removing the loosened soils.

4.4 Therefore, the subject-matter of claim 1 according to the second auxiliary request does not involve an inventive step as required by Article 56 EPC.

## **Order**

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

1. The decision under appeal is set aside.
2. The patent is revoked

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte