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**Datasheet for the decision
of 7 March 2007**

Case Number: T 0177/06 - 3.3.06

Application Number: 97907673.4

Publication Number: 0885279

IPC: C11D 3/00

Language of the proceedings: EN

Title of invention:

Fabric softener composition with improved environmental impact

Patentee:

THE PROCTER & GAMBLE COMPANY

Opponent:

Unilever N.V.

Headword:

Number of perfume ingredients/PROCTER

Relevant legal provisions:

EPC Art. 123(3)

Keyword:

"Extension of scope of protection (main and auxiliary request);
yes"

Decisions cited:

-

Catchword:

-



Case Number: T 0177/06 - 3.3.06

D E C I S I O N
of the Technical Board of Appeal 3.3.06
of 7 March 2007

Appellant:
(Patent proprietor)

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Representative:

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Respondent:
(Opponent)

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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 1 December 2005
revoking European patent No. 0885279 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: P.-P. Bracke
Members: G. Raths
U. Tronser

Summary of Facts and Submissions

- I. This appeal is from the Opposition Division's decision to revoke European patent No. 0 885 279.

Claim 1 of the patent as granted read:

"1. A rinse-added fabric softening composition selected from the group consisting of:

- I. a solid particulate composition comprising:
(A) from 50% to 95% of biodegradable cationic quaternary ammonium fabric softening compound;
(B) from 0.01 % to 15% of an enduring perfume;
(C) optionally, from 0% to 30% of dispersibility modifier; and
(D) optionally, from 0% to 15% of a pH modifier; and

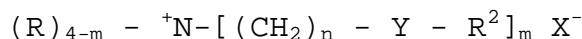
II. a liquid composition comprising:

- (A) from 0.5% to 80% of biodegradable cationic fabric softening compound;
(B) from 0.01% to 10%, preferably from 0.05% to 8%, more preferably from 0.1% to 6%, and even more preferably from 0.15% to 4% of an enduring perfume;
(C) optionally, from 0% to 30% of dispersibility modifier; preferably, wherein the dispersibility modifier affects the viscosity, dispersibility or both
(D) the balance comprising a liquid carrier selected from the group consisting of: water, C₁₋₄ monohydric alcohol; C₂₋₆ polyhydric alcohol; propylene carbonate; liquid polyethylene glycols; and mixtures thereof;

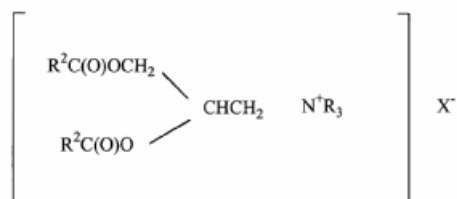
characterized in that

(a) the enduring perfume has at least 70%, preferably at least 75%, and more preferably at least 80%, and even more preferably at least 85%, of enduring perfume ingredients selected from the group consisting of: ingredients having a boiling point of at least 250°C and a ClogP of at least about 3; cis-jasmone; dimethyl benzyl carbonyl acetate; ethyl vanillin; geranyl acetate; alpha-ionone; beta-ionone; gamma-ionone; koavone; lauric aldehyde; methyl dihydrojasmonate; methyl nonyl acetaldehyde; gamma-nonalactone; phenoxy ethyl iso-butyrate; phenyl ethyl dimethyl carbinol; phenyl ethyl dimethyl carbonyl acetate; alpha-methyl-4-(2-methylpropyl)-benzene-propanal; 6-acetyl-1,1,3,4,4,6-hexamethyl tetrahydronaphthalene; undecylenic aldehyde; vanillin; 2,5,5-trimethyl-2-pentyl-cyclopentanone; 2-tert-butylcyclohexanol; verdox; para-tert-butylcyclohexyl acetate; and mixtures thereof, the level of ingredients having a boiling point of at least 250°C and a ClogP of at least 3 being less than 70%, preferably less than 65%, so that the composition with only those ingredients is not an enduring perfume and

(b) the biodegradable cationic fabric softening compound has the formula:



or



wherein: each Y is -O-(O)C- or -C(O)-O-; m is 2 or 3; n is 1 to 4; each R is a C₁-C₆ alkyl group, hydroxyalkyl group, benzyl group, or mixtures thereof; each R² is a C₁₂-C₂₂ hydrocarbyl or substituted hydrocarbyl substituent; and X⁻ is any softener-compatible anion, and the quaternary ammonium compound preferably being derived from C₁₂-C₂₂ fatty acyl groups having an Iodine Value of from greater than 5 to less than 100, a cis/trans isomer weight ratio of greater than 30/70 when the Iodine Value is less than 25, the level of unsaturation of the fatty acyl groups being less than 65% by weight;"

An opposition based on lack of inventive step (Articles 100(a), 56 EPC) and lack of sufficiency of disclosure (Articles 100(b), 83 EPC) was filed against this decision.

During oral proceedings before the Opposition Division the proprietor filed an auxiliary request. The opponent argued that the auxiliary request did not comply with Articles 100(c), 123(2) EPC.

- II. The proprietor (hereinafter the appellant) requested the rejection of the opposition or, alternatively the maintenance of the patent in amended form on the basis of the auxiliary request filed during oral proceedings before the Opposition Division. In its decision the Opposition Division held that the subject-matter of Claim 1 of all the requests did not involve an inventive step.

III. The appellant filed an appeal against this decision and, under cover of the letter dated 7 April 2004 containing the statement of grounds of appeal, a main request being identical to the auxiliary request submitted during oral proceedings held before the Opposition Division on 2 November 2005.

Claim 1 of this main request differed from Claim 1 as granted

in that the passage

"of enduring perfume ingredients selected from the group consisting of: ingredients having a boiling point of at least 250°C and a ClogP of at least about 3"

was replaced with

"of **at least 5** enduring perfume ingredients selected from the group consisting of:

(i) ingredients having a boiling point of at least 250°C and a ClogP of at least 3, namely allyl cyclohexane propionate, ambrettolide, Ambrox DL (dodecahydro-3a,6,6,9a-tetramethyl-naphtho[2,1-b]furan), amyl benzoate, amyl cinnamate, amyl cinnamic aldehyde, amyl cinnamic aldehyde dimethyl acetal, iso-amyl salicylate, aurantiol, benzophenone, benzyl salicylate, iso-butyl quinoline, beta-caryophyllene, cadinene, cedrol, cedryl acetate, cedryl formate, cinnamyl cinnamate, cyclohexyl salicylate, cyclamen aldehyde, dihydro iso-jasmonate, diphenyl methane, diphenyl oxide,

dodecalactone, iso E super, ethylene brassylate, ethyl methyl phenyl glycidate, ethyl undecylenate, exaltolide, galaxolide, geranyl anthranilate, geranyl phenyl acetate, hexadecanolide, hexenyl salicylate, hexyl cinnamic aldehyde, hexyl salicylate, lillial (p-t-bucinal), linalyl benzoate, 2-methoxy naphthalene, gamma-n-methyl ionone, musk indanone, musk ketone, musk tibetine, myristicin, oxahexadecanolide-10, oxahexadecanolide-11, patchouli alcohol, phantolide, phenyl ethyl benzoate, phenylethylphenylacetate, phenyl heptanol, phenyl hexanol, alpha-santalol, thibetolide, delta-undecalactone, gamma-undecalactone, undecavertol (4-methyl-3-decen-5-ol), vetiveryl acetate, yara-yara, ylangene;"

in that

"(ii)" was inserted before "cis-jasmone",

in that

"(Tonalid)" was inserted between "6-acetyl-1,1,3,4,4,6-hexamethyl tetrahydronaphthalene" and "; undecylenic aldehyde",

in that

"(iii)" was inserted between "and" and "mixtures thereof",

in that

"(i)" was inserted between "the level of ingredients" and "having a boiling point of"

and in that

;" at the end of the claim was replaced with".".

IV. In its letter dated 17 August 2006 (page 8, lines 1 to 4) the opponent (hereinafter the respondent) argued that the subject-matter of Claim 1 would contravene Article 123(3) EPC since the scope of protection of Claim 1 of the main request would be broader than that of Claim 1 as granted.

V. Under cover of the letter dated 8 February 2007 the appellant submitted a new main request and a new auxiliary request.

Claim 1 of the new main request differed from Claim 1 of the main request filed with letter of 7 April 2006 in that the word "about" was deleted and the term "at least 5" was replaced with "at least 5 different" and the term "alpha-irone" was inserted between "hexyl salicylate," and ",lilial (p-t-bucinal)".

Claim 1 of the new auxiliary request differed from the new main request in that the passage "ingredients having a boiling point of at least 250°C and a ClogP of at least 3, namely" after "from the group consisting of:(i)" was deleted, "6-acetyl-1,1,3,4,4,6-hexamethyl tetrahydronaphthalene (Tonalid)" was replaced with "Tonalid" and the passage" having a boiling point of at

least 250°C and a ClogP of at least 3" after "(iii) mixtures thereof, the level of ingredients (i)" was deleted.

The appellant pointed to the fact that the indication of the boiling point and ClogP values became superfluous as perfume ingredients were defined by their chemical names.

VI. During oral proceedings, which took place on 7 March 2007, the respondent reiterated the objections under Article 123(3) EPC.

It argued that the number of enduring perfume ingredients defined in Claim 1 as granted by

"the level of ingredients having a boiling point of at least 250°C and a ClogP of at least 3 being less than 70%"

would be superior to the number of enduring perfume ingredients enumerated in the list of Claim 1 of the main and auxiliary request.

According to Claim 1 of the main and auxiliary request, the number of ingredients having a boiling point of at least 250°C and a ClogP of at least 3 had been limited to the ingredients (i) enumerated in the specific list. Therefore, Claim 1 of the main and auxiliary request would allow for further perfume ingredients, the number of which would be superior to that according to Claim 1 as granted.

VII. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or the auxiliary request both submitted under cover of the letter dated 8 February 2007.

The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. *Main request*

1.1 Article 123(3) EPC

1.2 Amendments made during opposition proceedings have to meet the requirements of Article 123(3) EPC i.e. the claims of the patent may not be amended during opposition proceedings in such a way as to extend the protection conferred.

Claim 1 as granted has to be compared to Claim 1 of the main request. Hereinafter only the passages relevant for understanding the present decision are reproduced. (Full text, see points I, III and V).

1.3 Claim 1 as granted reads:

"1. A rinse-added fabric softening composition.....

characterized in that

(a) the enduring perfume has at least 70%, preferably at least 75%, and more preferably at least 80%, and even more preferably at least 85%, of enduring perfume

ingredients selected from the group consisting of:
ingredients having a boiling point of at least 250°C
and a ClogP of at least about 3;

the level of ingredients having a boiling point of at
least 250°C and a ClogP of at least 3 being less than
70%,.....".

1.4 Claim 1 of the main request reads:

"1. A rinse-added fabric softening composition
.....
.....

characterized in that

(a) the enduring perfume has at least
70%.....of at least 5
different enduring perfume ingredients selected from
the group consisting of:

(i) ingredients having a boiling point of at least
250°C and a ClogP of at least 3, namely allyl
cyclohexane propionate, ambrettolide, Ambrox DL
(dodecahydro-3a,6,6,9a-tetramethyl-naphtho[2,1 -
b]furan), amyl benzoate, amyl cinnamate, amyl cinnamic
aldehyde, amyl cinnamic aldehyde dimethyl acetal, iso-
amyl salicylate, aurantiol, benzophenone, benzyl
salicylate, iso-butyl quinoline, beta-caryophyllene,
cadinene, cedrol, cedryl acetate, cedryl formate,
cinnamyl cinnamate, cyclohexyl salicylate, cyclamen
aldehyde, dihydro iso-jasmonate, diphenyl methane,
diphenyl oxide, dodecalactone, iso E super, ethylene
brassyate, ethyl methyl phenyl glycidate, ethyl
undecylenate, exaltolide, galaxolide, geranyl
anthranilate, geranyl phenyl acetate, hexadecanolide,

hexenyl salicylate, hexyl cinnamic aldehyde, hexyl salicylate, alpha-irone, lillial (p-t-bucinal), linalyl benzoate, 2-methoxy naphthalene, gamma-n-methyl ionone, musk indanone, musk ketone, musk tibetine, myristicin, oxahexadecanolide-10, oxahexade-canolide-11, patchouli alcohol, phantolide, phenyl ethyl benzoate, phenylethylphenylacetate, phenyl heptanol, phenyl hexanol, alpha-santalol, thibetolide, delta-undecalactone, gamma-undecalactone, undecavertol (4-methyl-3-decen-5-ol), vetiveryl acetate, yara-yara, ylangene;

.....
 the level of ingredients (i) having a boiling point of at least 250°C and a ClogP of at least 3 being less than 70%.....".

1.5 The question to be answered is whether the amendment to Claim 1 as granted had as a consequence that the extent of protection conferred by Claim 1 of the main request increased or remained unchanged. For this purpose a comparison of scope of protection has to be made between Claim 1 as granted and Claim 1 of the main request.

1.5.1 The enduring perfume of Claim 1 as granted has at least 70% of enduring perfume ingredients selected from the group consisting of:

(α) ingredients having a boiling point of at least 250°C and a ClogP of at least about 3, and

(β) ingredients selected from "cis-jasmone,....para-tert-butylcyclohexyl acetate",

the level of the ingredients (α) being less than 70%.

- 1.5.2 The enduring perfume of Claim 1 of the main request has at least 70% of at least 5 different enduring perfume ingredients selected from the group consisting of:
- (α) ingredients (**i**) having a boiling point of at least 250°C and a ClogP of at least about 3 selected from the specific list of Claim 1,
 - (β) ingredients selected from "cis-jasmone,...para-tert-butylcyclohexyl acetate",
- the level of the ingredients (**i**) being less than 70%.
- 1.5.3 Claim 1 as granted and Claim 1 of the main request allow both for further perfume ingredients since the lower level of enduring perfume ingredients is set at 70%.
- 1.6 When making the comparison between Claim 1 as granted and Claim 1 of the main request, it is the number of perfume ingredients qualifying for the group (α) of enduring perfume ingredients and the number of perfume ingredients which do not qualify for the group (α) which are at stake.

As the number of enduring perfume ingredients qualifying for group (α) of Claim 1 of the main request (i.e. the ingredients explicitly defined in the list starting with allyl cyclohexane propionate and ending with ylangene) is inferior to the number of enduring perfume ingredients of the group (α) according to Claim 1 as granted, the number of perfume ingredients according to Claim 1 of the main request which do not qualify for group (α) is superior to that of Claim 1 as granted.

Consequently, by restricting the number of ingredients meeting the boiling point and ClogP requirements to the specific list of Claim 1 of the main request, the remaining number of perfume ingredients, which may be added, increases in comparison to that of Claim 1 as granted.

Hence, Claim 1 of the main request covers perfume ingredients which were excluded according to Claim 1 as granted.

- 1.7 It follows that Claim 1 of the main request was amended in such a way as to extend the protection conferred. Hence the subject-matter of Claim 1 of the main request contravenes Article 123(3) EPC.

2. *Auxiliary request*

For the purpose of comparison between Claim 1 as granted and Claim 1 of the auxiliary request, attention is drawn to the definition of the group (α) by group (i).

Since the crucial passages in Claim 1 of the auxiliary request to be taken into consideration for assessing whether Claim 1 of the auxiliary request was amended in such a way as to extend the protection conferred correspond to those of Claim 1 of the main request, the reasoning under points 1.1 to 1.7 applies mutatis mutandis to Claim 1 of the auxiliary request.

It follows that the subject-matter of Claim 1 of the auxiliary request contravenes Article 123(3) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Rauh

P.-P. Bracke