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**Datasheet for the decision  
of 11 March 2008**

**Case Number:** T 0469/06 - 3.2.04

**Application Number:** 00420175.2

**Publication Number:** 1080659

**IPC:** A45D 34/04

**Language of the proceedings:** EN

**Title of invention:**

Container-application system for material for the skin

**Patentee:**

HENLOPEN MANUFACTURING CO., INC.

**Opponent:**

GEKA BRUSH GMBH

**Headword:**

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**Relevant legal provisions:**

EPC Art. 100(a)  
EPC R. 115(2)

**Relevant legal provisions (EPC 1973):**

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**Keyword:**

"Inventive step (no)"

**Decisions cited:**

T 0181/82

**Catchword:**

-



Case Number: T 0469/06 - 3.2.04

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.04  
of 11 March 2008

**Appellant:** GEKA BRUSH GMBH  
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**Representative:** Schneck, Herbert  
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**Respondent:** HENLOPEN MANUFACTURING CO., INC.  
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**Representative:** Pigasse, Daniel  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 9 March 2006  
rejecting the opposition filed against European  
patent No. 1080659 pursuant to Article 102(2)  
EPC.

**Composition of the Board:**

**Chairman:** M. Ceyte  
**Members:** C. Scheibling  
T. Bokor

## Summary of Facts and Submissions

I. By its decision dated 9 March 2006 the Opposition Division rejected the opposition. On 25 March 2006 the Appellant (opponent) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 18 July 2006.

II. The patent was opposed on the grounds based on Articles 100(a) EPC (lack of inventive step).

III. The following documents played a role in the present proceedings:

E1: DE-T-696 00 207

E2: US-A-2 442 503

IV. Claim 1 as granted read as follows:

"1. A container-applicator system for material to be applied to the human skin, comprising, in combination, a container (10) for holding a body of the material, said container having an opening (16); a flexible wiper (12) mounted in the opening; and an applicator (11) insertable into and withdrawable from said container through the opening for transporting a quantity of the material from the container and applying the transported quantity of material to a user's skin, the wiper (12) engaging the applicator (11) to remove excess amounts of material therefrom as the applicator is withdrawn through the opening, the applicator being characterized in that it comprises a generally cylindrical elastomeric tip (22, 22', 122, 222, 322, 422) with a long axis, the tip including a distal end portion(28, 38', 128, 228,

328, 428) having a distal extremity (30) with at least one material-holding concavity (32, 132, 232, 332, 432) formed therein, said concavity being cup-shaped (32, 232, 432) or in shape of an elongate cup (332) and said one concavity having a rim (34, 234, 334, 434), said wiper engaging said rim to remove said excess amounts of material."

- V. Oral proceedings took place on 11 March 2008 before the Board of Appeal. Although duly summoned the Respondent did not appear. According to the provisions of Rule 115(2) EPC, the proceedings were continued without him.

The Appellant requested that the decision under appeal be set aside and that the patent be revoked.

He mainly argued as follows:

E1 is the closest prior art and discloses a container-applicator system having all the features of claim 1 except that the applicator comprises a cup-shaped concavity with a rim. The problem to be solved can be seen in proposing an applicator able to apply material more precisely, i.e. defining a sharp line of demarcation. This problem is solved by E2. Therefore it would be obvious for a skilled person to provide the known applicator according to E1 with an applicator tip comprising a concavity as taught by E2, and thus to arrive at a container-applicator system according to claim 1.

The Respondent (patentee) contested the arguments of the Appellant and submitted in writing that the problem is to be seen in providing an applicator which does not

break up during application, is tailored for particular application requirements, and achieves a precise metering of the applied quantities. These problems are neither addressed nor solved by any of E1 or E2. Thus a skilled person would not be prompted to combine the teachings of these documents. Furthermore, the combination of E1 and E2 would not lead at a workable container-applicator system, because the wiper of E1 would not be able to cooperate with an applicator tip as disclosed in E2.

The Respondent requested that the appeal be dismissed, i.e. that the patent be maintained as granted.

### **Reasons for the Decision**

1. The appeal is admissible.
2. *Inventive step:*
  - 2.1 The Respondent alleged that neither E1 nor E2 can be considered as closest prior art.  
However, E1 is the most promising starting point for further development, since it is conceived for the same purpose, i.e. a container-applicator system for the application of liquid or pasty material product (see page 1, first paragraph) and more particularly of cosmetics such as lip rouge (claim 17). Moreover, it has the most technical features in common with the object of claim 1. This document is therefore regarded as the closest prior art.

2.2 E1 (page 1, first, second and fifth paragraphs; Figures 1a, 1b) discloses a container-applicator system for material to be applied to the human skin, comprising, a container (1) for holding a body of the material, said container having an opening; a flexible wiper (5) mounted in the opening; and an applicator (7) insertable into and withdrawable from said container through the opening for transporting a quantity of the material from the container and applying the transported quantity of material to a user's skin, the wiper (5) engaging the applicator (7) to remove excess amounts of material therefrom as the applicator is withdrawn through the opening, the applicator comprising a elastomeric foamed tip (page 8, third paragraph) with a long axis, the tip including a distal end portion having a distal extremity.

2.3 Thus, the container-applicator system according to claim 1 differs from that of E1 in that:

- the tip of the applicator is generally cylindrical,
- the distal extremity is provided with at least one material-holding concavity, which is cup-shaped or in shape of an elongate cup and has a rim,
- the wiper engages the rim to remove the excess amounts of material.

2.4 In paragraph [0003] the patent specification refers to known cosmetic applicators which include twisted-in-wire brushes, brushes with relatively long, soft flexible bristles anchored at one end; swabs and flocked tips. In some instances a flexible elastomeric wiper is mounted in the container opening so as to engage the applicator as the applicator is withdrawn through the opening, for removing excess cosmetic material that may be carried by the applicator.

In paragraph [0004], it is said that while such applicators are generally satisfactory, they have various drawbacks including the possibility that components such as fibres or adhesive may become detached and incorporated in the cosmetic applied to the skin, sometimes causing an allergic reaction. Also the design of the known devices may be more or less difficult to tailor to particular application requirements. In addition while the use of a wiper may prevent grossly excessive quantities of cosmetic material from being transported and applied to the skin, the known applicators do not generally afford the ability to achieve precise metering of individual application quantities.

The specification does not specify that the claimed invention seeks to overcome these disadvantages.

The Respondent submitted that the technical problem underlying the present invention is in essence to achieve precise metering of individual application quantities. In contrast the Appellant submitted that the problem underlying the present invention is in essence to provide an applicator with an improved precision of application.

It is clear that the precision of application and an accurate metering of the amount carried and applied are both essential for a cosmetic applicator, and both may be considered for the purposes of the problem-solution approach, even independently from each other.

Thus starting from E1 as closest prior art, the problem to be solved may be seen in providing an applicator in a

container-applicator system that achieves an improved precision of application as well as a precise metering of the amount material transported and applied to the skin.

2.5 E2 discloses an applicator for applying lip rouge. It comprises two embodiments, both showing an applicator with a concaved surface providing a reservoir for the rouge during application (column 1, lines 21 to 23). In the first embodiment (Figures 1 to 5) the product is transferred into a concavity provided in a generally cylindrical applicator tip by rubbing the corrugated concave surface thereof over the product (column 1, lines 35 to 38). In the second embodiment (Figures 6 to 8) a container-applicator system comprises an automatic feed in form of a cylindrical container provided with a piston to deliver product under pressure to a plurality of ducts which extend inside a generally cylindrical applicator tip and communicate with a concavity provided therein.

2.6 E2 specifically addresses the problem of improving the preciseness of the contour of the areas where the material has been applied, defining a sharp line of demarcation at the border of the treated area (column 2, line 44 to column 3, line 3). This problem is solved by adapting the design of the applicator tip to the particular application by providing a concave surface forming reservoir for the material, surrounded by a rim which allows the material to be accurately applied.

2.7 Accordingly, for a skilled person confronted with an essential part of the problem addressed, namely that of achieving a precise application of the cosmetic product,



it would have been obvious to provide the container-applicator system known from E1 with the applicator tip of E2 and thus to arrive at the invention defined in claim 1.

It is true that E2 does not teach or suggest any way to deal with the other essential part of the problem addressed, namely that of achieving a precise metering of the amount transported and applied by the applicator. However, the combination of E1 and E2 leads to a container-applicator system that also achieves a precise metering: The excess of cosmetic product would be removed by the wiper as the applicator is withdrawn from the container and a metered amount of cosmetic product would remain in the concaved surface forming reservoir.

According to the well established jurisprudence of the Boards of Appeal, if having regard to the state of the art, it would already have been obvious for a skilled person to arrive at the claimed subject-matter, because an advantageous effect could be expected to result from the combination of the teachings of the prior art documents (here, the enhanced precision of application) the claimed subject-matter lacks an inventive step, irrespective of the circumstances that an extra effect is obtained (here, a precise metering of the amount transported), see in particular T 181/82, OJ EPO 1984, 401)

- 2.8 The Respondent argued that even if a skilled person would contemplate providing the container-applicator system of E1 with an applicator tip as shown in E2, he would not arrive at the claimed system.

He contended that the wiper provided in E1 would not be able to engage and cooperate with the rim of the concavity of the tip of the applicator according to E2.

The Board cannot agree with this point of view. In E1 (page 1, paragraph 5) it is indicated that when withdrawing the applicator, the wiper removes any excessive amount of material from it. In E2 the material to be transferred is exclusively contained into the concavity of the tip of the applicator, it is thus clear for a skilled person how the wiper and the applicator tip must cooperate, so that the wiper removes any material not contained in the concavity.

Furthermore, as clearly shown in Figure 5 of E2, the rim of the concavity is in form of a lip edge portion which protrudes and thus, is clearly adapted to cooperate with a wiper presenting an approximately cylindrical orifice as that of E1. The metering thus effected may not be as precise as obtainable with the embodiments in the patent. Nevertheless it will still be a metering as claimed.

The Respondent also argued that the applicator tip of E2 is rigid and therefore, the excess material cannot be correctly wiped off.

This cannot be accepted. The applicator tip of E2 is made of resilient material such as rubber (see column 2, lines 28 to 30). Even if it has the rigidity necessary for easy manipulation (see column 3, lines 17 to 20), as indicated subsequently, in lines 20 to 24, "the element does not spread when pressure is applied, as in case of bristle brushes, although the rim 13 is sufficiently flexible to permit it to follow the lip contour." Furthermore, claim 1 does not require a predetermined

minimal flexibility at all and it would lie within the capability of a skilled person to select the hardness of the rubber forming the applicator tip so as to enable it to cooperate with a wiper.

Finally, in the Respondent's view, any wiper would not be able to wipe off a rim and the wiper of E1 is not specially designed for this purpose.

This point of view cannot be shared either. In E1 the wiper is suitable for wiping off the applicator tip. Thus when modifying the design of this applicator tip, it is clear that the wiper must be adapted to still wipe off the modified applicator tip and if this applicator tip comprises a rim, to wipe off this rim.

In this respect, it is noted that claim 1 does not comprise any specific feature which would render the wiper as claimed specially adapted for wiping off a rim, so as to distinguish it from any other wiper not specially designed for this purpose.

Accordingly, by combining the teaching of E1 with that of E2 a skilled person would arrive at a container-applicator system according to claim 1 without exercising inventive skill.

2.9 Consequently, the subject-matter of claim 1 does not involve an inventive step.

**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