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**Datasheet for the decision
of 17 September 2008**

Case Number: T 1902/06 - 3.2.07

Application Number: 00991236.1

Publication Number: 1242286

IPC: B65D 1/02

Language of the proceedings: EN

Title of invention:

Transparent/translucent bottles containing fluorescent dye in sidewall

Patentee:

Unilever PLC, et al

Opponent:

Henkel AG & Co. KGaA

Headword:

-

Relevant legal provisions:

EPC Art. 56

Relevant legal provisions (EPC 1973):

-

Keyword:

"Requests relating to appeal of proprietor no longer valid after withdrawal of its appeal when appeal of opponent is still pending (reasons, point 1)"

Decisions cited:

-

Catchword:

-



Case Number: T 1902/06 - 3.2.07

DECISION
of the Technical Board of Appeal 3.2.07
of 17 September 2008

Appellant: Henkel AG & Co. KGaA
(Opponent) Patente (VTP)
D-40191 Düsseldorf (DE)

Representative: -

Respondent: Unilever PLC
(Patent Proprietors) Unilever House
Blackfriars
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Unilever N.V.
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Representative: Elliott, Peter William
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
6 November 2006 concerning maintenance of
European patent No. 1242286 in amended form.

Composition of the Board:

Chairman: H. Meinders
Members: P. O'Reilly
I. Beckedorf

Summary of Facts and Submissions

- I. Opposition was filed against European patent No. 1 242 286 as a whole based on Article 100(a) EPC (lack of novelty and lack of inventive step).

The opposition division decided to maintain the patent in amended form. It held that the subject-matter of claim 1 of the main request (maintenance as granted) was not novel, but that the subject-matter of claim 1 of the auxiliary request involved an inventive step.

- II. The appellant (opponent) filed an appeal against that decision.

The proprietor also filed an appeal against that decision. This appeal was subsequently withdrawn with its letter of 15 September 2008. The proprietor remained in the proceedings as respondent.

- III. Oral proceedings were held on 17 September 2008 in the absence of the respondent, who had notified the Board of its absence with said letter of 15 September 2008.

- IV. The appellant requested that the decision under appeal be set aside and that the patent be revoked.

After the respondent (proprietor) withdrew its appeal, it requested in essence, in the written proceedings, that the appeal be dismissed (main request), or that in setting aside the decision under appeal the patent be maintained in amended form on the basis of the set of claims filed with letter of 18 August 2008 (auxiliary request). See also point 1 of the reasons.

V. Claim 1 of each of the main and the auxiliary requests reads as follows:

"1. A transparent or translucent package having a wall wherein said wall includes fluorescent dyes, in combination with contents which include a colorant dye, wherein said package is a bottle, and said wall includes 0.001 to 3 wt-% fluorescent dye."

VI. The documents cited in the present decision are the following:

D2: WO-A-99/53008

D9: Polymer Stabilization, ed. W. Lincoln Hawkins, Wiley-Interscience, 1972, pages 188-197

D10: Skin Protection against ultraviolet light by cotton textiles treated with optical brighteners, D. Reinehr et al, pages 264-276, Proceedings of the Comité Español de la Detergencia, Barcelona, 1996.

VII. The arguments of the appellant may be summarised as follows:

D9 and D10 should be admitted into the proceedings. The documents are *prima facie* relevant since they show that a fluorescent dye was known to absorb UV light and block its transmittance.

D2 is the nearest prior art document and discloses all the features of the package of claim 1 except that it does not disclose a fluorescent dye. The problem to be solved by this feature is to find an alternative protection against UV light to the UV blocker disclosed in D2. Fluorescent dyes are known to absorb UV light and thus to function as UV absorbers. This is evidenced by D9 and D10. It would be obvious to the skilled person that this known property of fluorescent dyes can be used in the wall of the package to absorb UV light and thus to be an alternative to the one used in the package disclosed in D2. No prejudice has been demonstrated against using these dyes in transparent or translucent containers.

VIII. The arguments of the respondent in the written proceedings may be summarised as follows:

D9 and D10 should not be admitted into the proceedings as they are not *prima facie* relevant since they would not be consulted by a packing engineer and do not deal with transparent or translucent packaging or with colorant protection.

In D2 UV blockers are only disclosed in connection with diaminestability, and colorant dyes are not mentioned. According to the International Preliminary Examination Report (IPER) prepared for D2 it was not sure that the problem of protection of the diamine had actually been solved so that the skilled person would not have been motivated to select another UV blocker.

Reasons for the Decision

1. *Requests of the respondent*

- 1.1 With its appeal against the decision to maintain the patent in amended form, the proprietor requested as a main request that the patent be maintained as granted. As an auxiliary request it requested that the patent be maintained in the form in which it was maintained by the opposition division.

With its letter of 18 August 2008 the proprietor confirmed these requests and filed a further request (second auxiliary request) in the form of a set of amended claims in which two dependent claims present in the patent as maintained by the opposition division were deleted.

When the proprietor withdrew its appeal with letter of 15 September 2008 it made no express statement regarding its requests.

- 1.2 The Board notes that the request to maintain the patent as granted was filed with the appeal grounds of the proprietor which confirmed this with its letter of 18 August 2008. The Board understands that this request was a request as part of the appeal of the proprietor so that when the proprietor withdrew its appeal it also in effect withdrew this request.
- 1.3 The Board concludes therefore that the proprietor as respondent requests that the appeal of the opponent be dismissed or as an auxiliary request that the patent be

maintained in amended form based on the set of claims filed with its letter of 18 August 2008.

2. *Admissibility of D9 and D10*

2.1 In its reasons for maintaining the patent in amended form the opposition division indicated that it was not known to use a fluorescent dye to protect the contents of a container from UV radiation (see point 4.6 of reasons). The appellant filed D9 and D10 as a direct response to this finding of the opposition division. It filed these documents at the earliest possible time in the appeal proceedings, i.e. with the appeal grounds. The admission of these documents does not change the legal or factual framework since the appellant had argued as opponent that the skilled person knew that a fluorescent dye could be used to block UV radiation (see page 2 of the minutes of the oral proceedings before the opposition division).

2.2 For these reasons the Board decided to admit these documents into the proceedings. The Board could not accept the argument of the respondent that the documents were concerned with different technical areas to that of the patent since the documents show the general knowledge of the skilled person in the field of the influence of UV light on the contents of transparent packages and bottles.

Main and auxiliary requests

3. *Inventive step*

3.1 The auxiliary request differs from the main request only in that dependent claims 4 and 6 have been deleted and dependent claim 5 has been renumbered as claim 4. Since claim 1 of both requests is the same the following findings regarding inventive step apply to both requests.

3.2 The closest prior art is represented by D2. D2 discloses all the features of claim 1 except that it does not disclose that the bottle wall includes a fluorescent dye. In D2 the bottle wall is disclosed as including a UV blocker in amounts within the range specified in claim 1. The respondent disputed that D2 discloses a colorant dye in the contents of the bottle. However, on page 2, second paragraph it is indicated that the contained formulations are tailored to a colour and in Table 1 there is a specific reference to dyes.

The effect obtained by the fluorescent dye is the same as the UV-blocker proposed by D2. Therefore the problem to be solved by the distinguishing feature of the claim is to find an alternative means to prevent UV light from reaching the contents of the bottle.

The problem is solved by replacing the UV blocker with a fluorescent dye.

3.3 The solution to the problem is obvious to the person skilled in the art. It belongs to the general knowledge of the skilled person in the field of the influence of UV light on the contents of transparent packages and

bottles that a fluorescent dye absorbs UV light. This general knowledge is proven by D9 and D10. D9 explains how fluorescence blocks UV light (see the paragraph bridging pages 195 and 196). D10 when discussing the absorption of UV light for sun protection indicates that a fluorescent whitening agent (optical brightener) functions as a UV absorber (see pages 269 to 270).

The Board notes that in any case it is part of the definition of a fluorescent dye that it absorbs UV light and reemits this as visible light, thus blocking the transmission of UV light.

There is thus no doubt that the skilled person was aware of the fact that a fluorescent dye absorbs UV light and thus blocks its transmission. It has not been demonstrated that there is any prejudice against its use in transparent/translucent packaging or for colorant protection as alleged by the respondent.

The respondent referred to the International Preliminary Examination Report (IPER) which had been established on D2. In that IPER the examiner considered that it had not been proven that it was the diamines in the detergent which were being protected from UV light were actually susceptible to UV light. However, as argued by the appellant, the examiner still accepted that there was some substance which was susceptible to UV light.

- 3.4 Therefore, the subject-matter of claim 1 of each of the main and the auxiliary requests does not involve an inventive step in the sense of 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. Nachtigall

H. Meinders