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**Datasheet for the decision
of 6 November 2009**

Case Number: T 1689/07 - 3.3.10

Application Number: 04101870.6

Publication Number: 1591131

IPC: A61L 15/56

Language of the proceedings: EN

Title of invention:
Colour-changing absorbent article

Applicant:
THE PROCTER & GAMBLE COMPANY

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 52(1)(2)b(3)

Keyword:
"Aesthetic creation (no): invention achieves a technical effect - claimed subject-matter is *per se* not an aesthetic creation"

Decisions cited:
-

Catchword:
-



Case Number: T 1689/07 - 3.3.10

D E C I S I O N
of the Technical Board of Appeal 3.3.10
of 6 November 2009

Appellant:

THE PROCTER & GAMBLE COMPANY
One Procter & Gamble Plaza
Cincinnati
Ohio 45202 (US)

Representative:

Briatore, Andrea
Procter & Gamble Service GmbH
D-65823 Schwalbach am Taunus (DE)

Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 2 April 2007
refusing European application No. 04101870.6
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: R. Freimuth
Members: P. Gryczka
F. Blumer

Summary of Facts and Submissions

- I. The present appeal lies from the decision of the Examining Division posted on 2 April 2007 refusing the European patent application N° 04 101 870.6 published under the publication N° EP 1591131.

Claim 1 of the main request underlying the contested decision (present main request) reads as follows:

"1. Absorbent article for feminine hygiene comprising at least one active region, wherein said active region constitutes at least a portion of said article and is provided with a colour change material, wherein said colour change material changes colour in response to an external stimulus and wherein the colour change is noticeable from outside said article, characterized in that said stimulus is selected from at least one of change of temperature, exertion of pressure and exposure to light and in that said colour change material is selected from a thermochromic material, a piezochromic material, a photochromic material and combination thereof."

Claim 1 of the auxiliary request underlying the contested decision differs therefrom in that the article "also comprises a fragrance encapsulated in microcapsules selected from water soluble microcapsules, microcapsules which melt at body heat and microcapsules which are ruptureable under pressure, so to release a perfume simultaneously to said colour change."

II. The Examining Division held that the subject-matter of the application differed from the closest prior art illustrated by document

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by the type of external stimulus which induced the colour change of the article. Although this distinguishing feature was of technical nature, the sole effect linked to it was aesthetic, i.e. to render the article more pleasant to use. Hence, the claimed article was an aesthetic creation excluded from patentability in view of Article 52(2)(b) EPC. In addition, since the sole feature distinguishing the claimed article from the prior art had a non-technical effect, no objective problem of technical nature was solved by the invention with the consequence that the claimed article did not involve an inventive step within the meaning of Article 56 EPC. Since these objections applied to the then pending main request and auxiliary request, the application had to be refused.

III. With a letter dated 2 August 2007 the Appellant (Applicant) filed as main request a set of 7 claims corresponding to the main request underlying the decision under appeal and a set of 4 claims as fresh auxiliary request.

Claim 1 of the auxiliary request differs from claim 1 of the main request in that the external stimulus is restricted to a "change of temperature" and the colour change material is restricted to "a thermochromic material".

IV. The Appellant argued that the article according to claim 1 of the main request differed from those disclosed in the closest prior art document (4) in that they contained a different colour changing material, namely a thermochromic, photochromic or piezochromic material. This distinguishing feature had the effect that the article changed colour in response to pressure, temperature or light. Since this colour change was induced by a precise external stimulus it could be used to provide indications on the article status. Therefore, the effect achieved by the invention was of technical nature and contributed to solve one or more technical problems. For these reasons, the claimed subject-matter was not an aesthetic creation and involved an inventive step.

V. The Appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of claims 1 to 7 of the main request underlying the decision under appeal, alternatively on the basis of claims 1 to 4 of the auxiliary request filed with the letter dated 2 August 2007, or that the case be remitted to the department of first instance for further examination. The Appellant requested oral proceedings only in the case the Board does not allow one of these requests (Appellant's letter dated 2 October 2009).

Reasons for the Decision

1. The appeal is admissible.

Main request

2. *Patentable inventions - aesthetic creations (Article 52(2)b) and (3) EPC).*

- 2.1 Claim 1 defines an absorbent article for feminine hygiene *inter alia* by the feature requiring that it is provided with a colour change material selected from a thermochromic material, a piezochromic material, a photochromic material and combination thereof.

The Examining Division came to the conclusion that the claimed article was an aesthetic creation since this technical feature distinguishing the claimed article from the closest prior art had solely an aesthetic effect, namely to render the article more pleasant to use.

- 2.2 The article claimed is as such a technical product. The effect linked to the incorporation in the article of the colour change material is a change of colour induced by an external stimulus on the article, namely a change of temperature, an exertion of pressure and/or an exposure to light (see application as filed page 1, first paragraph). Such a change of colour, which can also be described as a modification of the light absorption by the article, is a technical effect that can be measured by technical means, e.g. a colorimeter. Whether the final aim of the technical effect achieved by the claimed absorbent i.e. the colour change, is

only aesthetic, what the Appellant denies, has no impact on the technical nature of the claimed absorbent article itself. It is in fact common practice that inventions such as dyes or hair colouring compositions, although having only an aesthetic goal, are nevertheless patentable inventions in the sense of Article 52 EPC since the claimed absorbent for feminine hygiene, as dyes and hair colouring compositions, are not *per se* aesthetic creations.

Therefore, the Board arrives at the conclusion that the absorbent article according to claim 1 is not an aesthetic creation *per se* in the sense of Article 52(2)b) and (3) EPC, and thus a patentable invention within the meaning of Article 52(1) EPC.

3. *Inventive step (Article 56 EPC).*

The Examining Division denied the presence of an inventive step essentially since it considered that the claimed article was an aesthetic creation, achieved an aesthetic effect and thus, did not solve an objective problem of technical nature.

However, since the claimed article is not an aesthetic creation and since the effect achieved by it is indeed a technical effect (see point 2 above), the objection of the Examining Division cannot hold and the assessment of inventive step has to be examined on a new basis.

4. *Remittal*

Having so decided, the Board has not, however, taken a decision on the whole matter, since the decision under appeal does not deal, *inter alia*, with the conformity of amendments carried out to the claims with the requirements of Article 123(2) EPC. In addition, the assessment of inventive step has to be carried out taking into account the conclusions reached by the Board in the present decision. Under these circumstances the Board considers it appropriate to exercise the power conferred to it by Article 111(1) EPC to remit the case to the Examining Division for the purpose of examining *inter alia* these fresh issues.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance for further prosecution on the basis of claims 1 to 7 underlying the decision under appeal (main request).

The Registrar:

The Chairman:

C. Rodríguez Rodríguez

R. Freimuth