

**Internal distribution code:**

- (A) [ ] Publication in OJ  
(B) [ ] To Chairmen and Members  
(C) [X] To Chairmen  
(D) [ ] No distribution

**Datasheet for the decision  
of 31 May 2012**

**Case Number:** T 0819/08 - 3.3.10  
**Application Number:** 04750232.3  
**Publication Number:** 1613360  
**IPC:** A61L 9/02, A61L 9/14  
**Language of the proceedings:** EN

**Title of invention:**  
System for emitting volatile compositions

**Applicant:**  
THE PROCTER & GAMBLE COMPANY

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 54

**Keyword:**  
"Novelty (yes)"  
"Remittal"

**Decisions cited:**  
G 0010/93

**Catchword:**  
-



Case Number: T 0819/08 - 3.3.10

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.10  
of 31 May 2012

**Appellant:**  
(Applicant)

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

**Representative:**

Samuels, Lucy Alice  
Gill Jennings & Every LLP  
The Broadgate Tower  
20 Primrose Street  
London EC2A 2ES (GB)

**Decision under appeal:**

Decision of the Examining Division of the  
European Patent Office posted 29 November 2007  
refusing European patent application  
No. 04750232.3 pursuant to Article 97(1) EPC  
1973.

**Composition of the Board:**

**Chairman:** P. Gryczka  
**Members:** J.-C. Schmid  
F. Blumer

## Summary of Facts and Submissions

- I. The appeal lies from a decision of the Examining Division refusing European patent application No. 04750232.3 (International publication No. WO 2004/093928).
- II. The sole reason for refusing the then pending main request in the decision under appeal was lack of novelty of the device according to claim 1 over document

(6) GB-A-2 352 180.

According to the Examining Division, the feature "a timing mechanism which is configured such that the volatile compositions are each emitted during a period that is greater than 15 minutes and less than or equal to 48 hours" defining the device according to claim 1 of the then pending main request was disclosed in document (6), since this document described a device having control means such that the heating means for emitting the volatile compositions were operated for a "short period of time", preferably up to 15 minutes. Furthermore, document (6) disclosed that "two or more compositions may be pulsed by the use of periodic heating means to the two compositions". This encompassed that both composition were not emitted at the same time and hence the device was configured to emit the different compositions alternatively as required by claim 1 of the then pending main request. The Examining Division furthermore found that claim 1 of the then pending auxiliary requests 1 and 2 did not meet the requirements of Article 123(2) EPC.

III. During the oral proceedings held before the Board on 31 May 2012, the Appellant filed a new main request, claim 1 thereof reading as follows:

"1. The device for emitting two or more volatile compositions, said device comprising a housing, and a plug at least indirectly joined to said housing, in order to support the housing on an electrical outlet, and said housing contains receptacles for said volatile compositions wherein said two or more volatile compositions comprise a first volatile composition, a second volatile composition, and optionally additional volatile compositions, wherein said device is configured to emit said first, second, and optional additional volatile compositions in a continuous repeating emission sequence in which the emission of the different volatile compositions automatically alternates between the different volatile compositions in the sequence and wherein in said repeating alternating sequence:

- (a) the volatile compositions are emitted so that one immediately follows the end of the emission period of the preceding composition, or
  - (b) the volatile compositions are emitted so that there is a gap between the end of the emission period of one volatile composition and the beginning of the emission period of the next volatile composition, or
  - (c) the volatile compositions are emitted so that there is an overlap in the emission period of one volatile composition and the emission period of the next volatile composition,
- and further comprises timing mechanism which is configured such that said volatile compositions are

each alternately emitted during discrete periods that are each greater than 15 minutes and less than or equal to 48 hours."

IV. According to the Appellant, there was no disclosure in document (6) of the configuration required by the device according to claim 1 of the application, i.e. allowing that the volatile compositions were emitted in an alternating sequence and were each emitted for more than 15 minutes. Claim 1 clearly required that the emission of one composition was followed by the emission of a different composition and hence excluded the option where emission of one composition was directly followed by a further emission of the same composition. The Examining Division's conclusion that the sole embodiment excluded by the claimed feature requiring that "the emission of the different volatile compositions alternates between the different volatile composition" was that two compositions cannot be emitted periodically at the same time, was incorrect. Document (6) did not disclose the emission of volatile compositions in alternating repeating emission sequences as required by claim 1. Furthermore claim 1 required each compositions being emitted for a time of greater than 15 minutes. Also this feature was not disclosed in document (6).

The subject-matter of the claim 1 was therefore novel over document (6).

V. The Appellant requested that the decision under appeal be set aside and that the case be remitted to the department of first instance on the basis of the claims of the main request filed during the oral proceedings

before the Board, or subsidiarily, on the basis of one of the auxiliary requests 1 to 5 filed with letter dated 30 April 2012.

VI. At the end of the oral proceedings the decision of the Board was announced.

### **Reasons for the Decision**

1. The appeal is admissible.
2. *Scope of examination on appeal*

Proceedings before the Boards of Appeal in ex-parte cases are primarily concerned with examining the contested decision (see decision G 10/93, OJ EPO 1995, 172, points 4 and 5 of the reasons), other possible objections normally being left to the Examining Division to consider after a referral back, so that the Appellant has the opportunity for these to be considered without loss of an instance.

In the decision under appeal, the reasons for rejecting the application were lack of novelty of claim 1 of the then pending main request over document (6) and non-compliance of claim 1 of the then pending auxiliary requests 1 and 2 with the requirements of Article 123(2) EPC. The Board, thus, restricts itself to examine whether the fresh independent claim 1 meets the formal requirement of Article 123(2) EPC and whether the decision of the Examining Division to reject the application for lack of novelty over document (6) holds good for the new claim 1.

*Main request*

3. *Amendments*

Claim 1 of the main request is based on original claim 16 wherein the device further comprises timing mechanism which is configured such that said volatile compositions are each alternately emitted during discrete periods that are each greater than 15 minutes and less than or equal to 48 hours as disclosed in original claim 24 and page 6, lines 11 to 13 of the application as filed. That the continuous emission sequence is repeating is disclosed on page 4, line 27 of the application as filed, and that it is selected from the three options introduced in claim 1 is disclosed on page 6, last paragraph of the application as filed.

Hence, claim 1 satisfies the requirement of Article 123(2) EPC.

4. *Novelty*

The general principle consistently applied by the Boards of Appeal for concluding lack of novelty is that there must be a direct and unambiguous disclosure in the state of the art which would inevitably lead the skilled person to subject-matter falling within the scope of what is claimed.

Document (6) discloses a device for emitting two or more fragrance compositions, at least one of which is supplied periodically (page 1, line 35 to page 2,

line 4). The device has control means which are configured to heat the volatile compositions for a "short period of time", preferably up to 15 minutes (page 5, line 29 to page 6, line 9).

Document (6) does however not disclose a device which is configured such that said volatile compositions are each alternately emitted during discrete periods that are each greater than 15 minutes and less than or equal to 48 hours as required in claim 1. First, there is no disclosure in document (6) of control means configured to emit a volatile composition during a period **greater than** 15 minutes, let alone to emit **each** volatile composition during that period. Furthermore there is no disclosure in document (6) of an emission sequence wherein volatile compositions are each **alternately** emitted during discrete periods.

The Examining Division held that document (6) disclosed an emission sequence wherein the emission of the different volatile compositions automatically alternated, since this emission sequence was covered by the general disclosure of document (6). However, a specific embodiment is not anticipated by the mere fact that it is covered by a more general disclosure. In the present case there is no specific disclosure in document (6) of a sequence wherein volatile compositions are each alternately emitted during discrete periods.

Consequently, the Board comes to the conclusion that document (6) does not disclose a device which is configured to alternately emit each volatile compositions during discrete periods that are each



greater than 15 minutes and less than or equal to 48 hours, with the consequence that the Examining Division's argumentation concerning lack of novelty with respect to document (6) in the appealed decision cannot stand.

5. *Remittal*

Having so decided, the Board has not, however, taken a decision on the whole matter since the decision under appeal dealt solely with the issue of novelty with respect to document (6).

Under these circumstances, the examination not having been concluded, the Board considers it appropriate to exercise the power conferred on it by Article 111(1), second sentence, second alternative, EPC to remit the case to the Examining Division for further prosecution.

**Order**

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

1. The decision under appeal is set aside.
  
2. The case is remitted to the department of first instance for further prosecution on the basis of the main request as filed during the oral proceedings before the Board.

The Registrar:

The Chairman:

C. Rodríguez Rodríguez

P. Gryczka