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**Datasheet for the decision  
of 26 September 2013**

**Case Number:** T 1708/10 - 3.3.10

**Application Number:** 04750233.1

**Publication Number:** 1613361

**IPC:** A61L9/02, A61L9/03

**Language of the proceedings:** EN

**Title of invention:**

METHOD AND DEVICE FOR IMPROVED SCENT DELIVERY

**Patent Proprietor:**

THE PROCTER & GAMBLE COMPANY

**Opponents:**

Henkel AG & Co. KGaA  
SARA LEE/D.E.  
S.C. Johnson & Son, Inc.

**Headword:**

**Relevant legal provisions:**

EPC Art. 112(1), 123(2)

**Keyword:**

Amendments (not allowable) - combination of features not disclosed  
Referral to the Enlarged Board of Appeal - (no)

**Decisions cited:**

G 0003/98

**Catchword:**



**Beschwerdekammern  
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Case Number: T 1708/10 - 3.3.10

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.10**  
**of 26 September 2013**

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**Decision under appeal:** Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
7 June 2010 concerning maintenance of the  
European Patent No. 1613361 in amended form.

**Composition of the Board:**

**Chairman:** P. Gryczka  
**Members:** J. Mercey  
F. Blumer

## Summary of Facts and Submissions

- I. Appellant I (Patent proprietor) and Appellant II (Opponent 3) lodged appeals against the interlocutory decision of the Opposition Division which found that European patent No. 1 613 361 in amended form met the requirements of the EPC.
- II. Notices of Opposition had been filed by Appellant II, Opponent 1 and Opponent 2 (Parties as of right) requesting revocation of the patent as granted in its entirety on *inter alia* the grounds of lack of novelty and inventive step (Article 100(a) EPC).
- III. The Opposition Division held that the subject-matter of the claims of the then pending main request did not fulfil the requirements of Article 123(2) EPC, whereas that of the then pending auxiliary requests 1 to 3 did. It held that the subject-matter of auxiliary requests 1 and 2 was novel but not inventive, whereas that of auxiliary request 3 was both novel and inventive.
- IV. With letter dated 18 October 2010, Appellant I submitted a main request and auxiliary requests 1 to 21, and with letter dated 18 March 2011, it submitted auxiliary requests 20 and 21 replacing previously filed auxiliary requests 20 and 21. With letter dated 23 August 2013, Appellant I renumbered these requests, requested amendments to two requests and added a further request, which was equivalent to the request maintained by the Opposition Division. Copies of the two amended auxiliary requests 6 and 7 were submitted at the oral proceedings before the Board held on 26 September 2013.

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

"A method of flattening a perfume-release profile from a heated-wick perfume composition-dispensing device wherein the heated-wick perfume composition-dispensing device comprises at least a first and second wick drawing, respectively, from at least a first and second perfume composition reservoir, and the method comprises:

- a1) applying heat to the first wick to achieve a wick temperature sufficient to increase the rate of volatilization of at least one component of the first perfume composition;
  - b1) reducing the heat applied to the first wick to achieve a wick temperature sufficient to decrease the rate of volatilization of the at least one component of the first perfume composition;
  - c1) maintaining the reduced heat applied to the first wick for a time sufficient to allow for back-flow of all or a portion of the components of the first perfume composition, the time being from 17 minutes to 48 hours;
  - a2) applying heat to the second wick to achieve a wick temperature sufficient to increase the rate of volatilization of at least one component of the second perfume composition;
  - b2) reducing the heat applied to the second wick to achieve a wick temperature sufficient to decrease the rate of volatilization of the at least one component of the second perfume composition;
  - c2) maintaining the reduced heat applied to the second wick for a time sufficient to allow for back-flow of at least one component of the second perfume composition, the time being from 17 minutes to 48 hours;
- repeating a1);

and repeating a2)."

Claim 1 of auxiliary requests 2 and 3 differs from claim 1 of the main request in that the time in steps c1) and c2) is 20 minutes to 24 hours.

Claim 1 of auxiliary requests 4 and 5 differs from claim 1 of the main request in that the time in steps c1) and c2) is 45 minutes to 24 hours.

Claim 1 of auxiliary requests 8 and 9 differs from claim 1 of the main request in that the time in steps c1) and c2) is 20 minutes to 24 hours and the period of the increased rate of volatilization in steps a1) and a2) is 30 minutes to 1 hour.

Claim 1 of auxiliary requests 10 and 11 differs from claim 1 of auxiliary request 4 in that the period of the increased volatilization in steps a1) and a2) is 30 minutes to 1 hour.

Claim 1 of auxiliary requests 12 and 13 differs from claim 1 of the main request in that the time in steps c1) and c2) is 20 minutes to 3 hours.

Claim 1 of auxiliary requests 14 and 15 differs from claim 1 of the main request in that the time in steps c1) and c2) is 45 minutes to 3 hours.

Claim 1 of auxiliary requests 16 and 17 differs from claim 1 of auxiliary request 12 in that the period of the increased volatilization in steps a1) and a2) is 30 minutes to 1 hour.

Claim 1 of auxiliary requests 18 and 19 differs from claim 1 of auxiliary request 14 in that the period of

the increased volatilization in steps a1) and a2) is 30 minutes to 1 hour.

Claim 1 of auxiliary requests 6 and 7 reads as follows:

"A method of flattening a perfume-release profile from a heated-wick perfume composition-dispensing device comprising:

- a) applying heat to the wick to achieve a wick temperature sufficient to increase the rate of volatilization of at least one component of the perfume composition, the period of increased volatilization being from 30 minutes to 1 hour;
  - b) reducing the heat to achieve a wick temperature sufficient to decrease the rate of volatilization of the at least one component of the perfume composition;
  - c) maintaining the reduced heat for a time sufficient to allow for back-flow of at least one component of the perfume composition; the time being in the range of 45 minutes to 3 hours; and
- repeating a)."

Claim 1 of auxiliary request 20, said request corresponding to auxiliary request 3 maintained by the Opposition Division, reads as follows:

"A method of flattening a perfume-release profile from a heated-wick perfume composition-dispensing device comprising:

- a) applying heat to the wick to achieve a wick temperature sufficient to increase the rate of volatilization of at least one component of the perfume composition;
- b) reducing the heat to achieve a wick temperature sufficient to decrease the rate of volatilization of the at least one component of the perfume composition;



c) maintaining the reduced heat for a time sufficient to allow for back-flow of at least one component of the perfume composition; and repeating a), wherein the time sufficient to allow for back-flow of all or a portion of the components of the perfume composition is from 17 minutes to 48 hours, and wherein the wick has an average pore size of from 50 microns to 150 microns."

Claim 1 of auxiliary requests 21 and 22 differs from claim 1 of auxiliary request 20 in that the wick has an average pore size of from 50 to 100 microns.

VI. Appellant I submitted that the subject-matter of the claims of all the requests found a basis in the application as filed, such that all amendments fulfilled the requirements of Article 123(2) EPC. More particularly, with regard to claim 1 of the main request and auxiliary requests 1 to 5 and 8 to 19, basis for the time ranges in steps c1) and c2) for maintaining the reduced heat applied to the first and second wicks, respectively, sufficient to allow for back-flow of at least one component of the first and second perfume compositions, respectively, were to be found in paragraphs [015] and [078] of the application as filed. Although neither of these paragraphs specifically disclosed times to be used in devices comprising more than one wick, since the overall teaching of the patent application was that both wicks should be treated similarly, this was sufficient basis for the time ranges in steps c1) and c2) being the same. With regard to claim 1 of auxiliary requests 6 and 7, the basis for the time range for the period of increased volatilization in step a) and for the back-flow in step c) were to be found in paragraphs [077]

and [078] of the application as filed. Since these time ranges were taught in these respective paragraphs as being generally applicable, they could be combined with each other, there being no technical reasons for not combining these. With regard to claim 1 of auxiliary requests 20 to 22, basis for the back-flow time in step c) was to be found in paragraph [015] and for the average pore sizes of the wick was to be found in paragraphs [023] and [095] of the application as filed. Since the teaching with regard to the wick was very general, the pore sizes taught could be combined with any back-flow times.

VII. Appellant II submitted that the subject-matter of all of the requests failed to fulfil the requirements of Article 123(2) EPC. More particularly, with regard to claim 1 of the main request and auxiliary requests 1 to 5 and 8 to 19, there was no basis in the application as filed for specific back-flow time ranges for steps c1) and c2) in a device comprising two wicks, and no teaching that these ranges should be the same. It additionally argued that the "period of decreased emission" referred to in paragraph [078] was not equivalent to the "time sufficient to allow back-flow" and that in any case, paragraph [078] did not apply to two wick systems. With regard to claim 1 of auxiliary requests 6 and 7, there was no basis for the combination of the specific time ranges for the period of increased volatilization in step a) and the back-flow in step c). With regard to claim 1 of auxiliary requests 20 to 22, there was no basis for the combination of the specifically back-flow time range in step c) together with the average pore sizes of the wick.

It also argued that the combination of end points of ranges for the back-flow times and for the average pore

sizes of the wick in claim 1 of some of the requests was not allowable. Appellant II requested that the question of whether end points of specific and general ranges could be interchanged be referred to the Enlarged Board of Appeal.

VIII. Opponent 1 made no submissions as to the substantive issues in this appeal, nor did it file any requests, nor did it attend the oral proceedings before the Board.

Opponent 2 indicated with letter dated 27 August 2010 that it would not be a party to the appeal proceedings.

IX. Appellant I requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or auxiliary requests 1 to 3 filed with letter dated 18 October 2010, or on the basis of auxiliary requests 4 or 5, filed as auxiliary requests 10 and 11 with letter dated 18 October 2010, or on the basis of auxiliary requests 6 or 7 filed during the oral proceedings before the Board, or on the basis of auxiliary requests 8 or 9, filed as auxiliary requests 6 and 7 with letter dated 18 October 2010, or on the basis of auxiliary requests 10 or 11, filed as auxiliary requests 14 and 15 with letter dated 18 October 2010, or on the basis of auxiliary requests 12 or 13, filed as auxiliary requests 4 and 5 with letter dated 18 October 2010, or on the basis of auxiliary requests 14 or 15, filed as auxiliary requests 16 and 17 with letter dated 18 October 2010, or on the basis of auxiliary requests 16 or 17, filed as auxiliary requests 8 and 9 with letter dated 18 October 2010, or on the basis of auxiliary requests 18 or 19 filed with letter dated 18 October 2010, or on the basis of auxiliary request 20 as filed during oral

proceedings before the Opposition Division on 13 April 2010 and as maintained by the Opposition Division, or on the basis of auxiliary requests 21 and 22, filed as auxiliary requests 20 and 21 with letter dated 18 March 2011.

Appellant II requested that the decision under appeal be set aside and that the patent be revoked. It further requested that a question concerning the interpretation of Article 123(2) EPC (see point VII above) be referred to the Enlarged Board of Appeal.

- X. At the end of the oral proceedings, the decision of the Board was announced.

### **Reasons for the Decision**

1. The appeals are admissible.

*Amendments (Article 123(2) EPC)*

*Main request and auxiliary request 1*

2. Claim 1 of the main request and of auxiliary request 1 is derived from original claim 16, wherein a specific time range of 17 minutes to 48 hours for each of steps c1) and c2) has been introduced, namely a time range for maintaining the reduced heat applied to the first wick sufficient to allow for back-flow of at least one component of the first perfume composition in step c1), and a time range for maintaining the reduced heat applied to the second wick sufficient to allow for back-flow of at least one component of the second perfume composition in step c2). Appellant I argued

that basis for each of these time ranges was to be found in paragraph [015] of the application as filed.

- 2.1 Paragraph [015] discloses that according to the inventive methods, the time sufficient to allow for back-flow of all or a portion of the perfume compositions can be within particular ranges, of which 17 minutes is the lower end of one disclosed range and 48 hours the upper range of another. However, there is no disclosure in this paragraph of which time ranges should be chosen when the method uses a device comprising two wicks, i.e. there is no disclosure of which time range should be selected for the first wick and which time range should be selected for the second wick. Since claim 1 requires a specific time range for step c1) and a specific time range for step c2), it must be directly and unambiguously derivable from the application as filed that the range of 17 minutes to 48 hours is to be used in both steps.
- 2.2 The Board holds, however, that there is no disclosure in the application as filed that for a device comprising two wicks, the time range for step c1) should be 17 minutes to 48 hours and the time range for step c2) should be 17 minutes to 48 hours.
- 2.3 Appellant I argued that since the overall teaching of the patent application was that both wicks should be treated similarly, this was sufficient basis for the time ranges in steps c1) and c2) being the same.

However, there is no general teaching that the two wicks should be treated similarly. On the contrary, paragraph [022] discloses that when the perfume module comprises two or more reservoirs, each reservoir comprises a different perfume composition, and

paragraph [089] teaches that when two volatile materials are used, the emission times of each material may be different.

- 2.4 The Board thus concludes that amended claim 1 of each of the main request and of auxiliary request 1 extends beyond the application as filed is added, contrary to the requirements of Article 123(2) EPC. These requests are thus not allowable.

*Auxiliary requests 2 to 5 and 8 to 19*

3. Claim 1 of each of auxiliary requests 2 to 5 and 8 to 19 is also derived from original claim 16, wherein *inter alia* specific time ranges for each of steps c1) and c2) have been introduced, the time range for step c1) always being the same as that for step c2). Appellant I argued that basis for these time ranges was to be found in paragraph [078] of the application as filed.

- 3.1 Paragraph [078] discloses that the period of decreased emission is variable and can range from any particular recited time to any particular recited time in said paragraph, all end points of the time ranges given in auxiliary requests 2 to 5 and 8 to 19 being chosen from said recited times. However, there is no disclosure in this paragraph of which time ranges should be used when the method uses a device comprising two wicks, i.e. there is no disclosure of which time range should be selected for the first wick and which time range should be selected for the second wick. Since claim 1 requires a specific time range for step c1) and a specific time range for step c2), it must be directly and unambiguously derivable from the application as filed that the same time range is to be used in both steps.

However, as argued above in points 2.2 and 2.3 *mutatis mutandis*, there is no such disclosure in the application as filed.

3.2 Since the Board holds that there is no basis for specific time ranges for each of steps c1) and c2), it is not necessary for the Board to comment on the question of whether or not the "period of decreased emission" referred to in paragraph [078] is equivalent to the "time sufficient to allow back-flow", nor whether the specific time ranges may indeed be formed from the times recited in this paragraph.

3.3 The Board thus concludes that amended claim 1 of each of auxiliary requests 2 to 5 and 8 to 19 extends beyond the application as filed is added, contrary to the requirements of Article 123(2) EPC. These requests are thus not allowable.

#### *Auxiliary requests 6 and 7*

4. Claim 1 of auxiliary requests 6 and 7 is derived from original claim 1, wherein a time range of 30 minutes to 1 hour for the period of increased volatilization in step a) and a time range of 45 minutes to 3 hours for maintaining the reduced heat sufficient to allow for back-flow of at least one component of the perfume composition in step c) have been introduced. Appellant I argued that basis for these two specific time ranges was to be found in paragraphs [077] and [078], respectively, of the application as filed.

4.1 However, the feature that in step a) the period of increased volatilization is 30 minutes to 1 hour is chosen from a large number of possibilities disclosed in paragraph [077] and the feature that in step c) the

back-flow time is 20 minutes to 3 hours is chosen from a large number of possibilities disclosed in paragraph [078], no link being made in the description between these two particular chosen ranges. Thus, these two features, namely a time range of 30 minutes to 1 hour for the period of increased volatilization in step a) and a time range of 45 minutes to 3 hours for maintaining the reduced heat sufficient to allow for back-flow of at least one component of the perfume composition in step c), are not originally disclosed in combination.

4.2 Since the Board holds that the range of 30 minutes to 1 hour chosen from paragraph [077] cannot be combined with the range of 45 minutes to 3 hours chosen from paragraph [078], it is again not necessary for the Board to comment on the question of whether or not the "period of decreased emission" referred to in paragraph [078] is equivalent to the "time sufficient to allow back-flow", nor whether the specific time ranges may indeed be formed from the times recited in this paragraph.

4.3 Appellant I argued that since these time ranges were taught in paragraphs [077] and [078] of the application as filed as being generally applicable, they could be combined with each other, there being no technical reasons for not combining these.

Regardless of whether or not there are any technical reasons for not combining these two time ranges, this has no impact on the fact that these two time ranges are not directly and unambiguously disclosed in combination in the application as filed. Features which are disclosed exclusively as two separate embodiments in different sections of the application as filed,



cannot be claimed in combination unless there is a specific link between those two features in the application as filed. This argument of Appellant I must therefore be rejected.

- 4.4 The Board concludes that amended claim 1 of each of auxiliary requests 6 and 7 extends beyond the application as filed is added, contrary to the requirements of Article 123(2) EPC. These requests are thus not allowable.

*Auxiliary requests 20 to 22*

5. Claim 1 of auxiliary requests 20 to 22 is derived from original claim 1, wherein a time range of 17 minutes to 48 hours for maintaining the reduced heat sufficient to allow for back-flow of at least one component of the perfume composition in step c) and average pore size ranges of the wick have been introduced. Appellant I argued that basis for the time range was to be found in paragraph [015] and for the average pore size ranges of the wick in paragraphs [023] and [095] of the application as filed.

- 5.1 However, the feature that in step c) the time is 17 minutes to 48 hours is chosen from paragraph [015] and the feature that the average pore size of the wick is from 50 to 150 microns (auxiliary request 20) or 50 to 100 microns (auxiliary requests 21 and 22) is chosen from paragraph [095], no link being made in the description between these particular selected ranges. Thus, these two features, namely a time range of 17 minutes to 48 hours for maintaining the reduced heat sufficient to allow for back-flow of at least one component of the perfume composition in step c) and the

wick having the particular average pore size ranges specified, are not originally disclosed in combination.

- 5.2 Appellant I argued that since the teaching with regard to the wick was very general, the average pore sizes taught could be combined with any back-flow times.

However, as argued above in point 4.3 *mutatis mutandis*, this has no impact on the fact that the combination of these particular average pore sizes and time range is not directly and unambiguously disclosed in the application as filed. This argument of Appellant I must therefore also be rejected.

- 5.3 The Board concludes that amended claim 1 of each of auxiliary requests 20 to 22 extends beyond the application as filed is added, contrary to the requirements of Article 123(2) EPC. These requests are thus not allowable.

6. *Request for referral to the Enlarged Board of Appeal*

- 6.1 During the course of the appeal proceedings, Appellant II requested referral to the Enlarged Board of Appeal of the question of whether end points of specific and general ranges originally disclosed in an application could be interchanged and Article 123(2) EPC be satisfied.

- 6.2 Leaving aside the question of whether such a question may in fact be a technical and not a legal question as required by Article 112(1) EPC, the answer to this question is not necessary for deciding on the appeal (cf. G 3/98, point 1, OJ EPO 2001, 62), such that the proposed referral in the present case must be refused.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The request for referral of a question to the Enlarged Board of Appeal is refused.

The Registrar:

The Chairman:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated