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Datasheet for the decision of 4 September 2014

Case Number: T 1041/12 - 3.3.10

Application Number: 05764128.4

Publication Number: 1758619

IPC: A61L9/14

Language of the proceedings: EN

Title of invention:
METHOD OF FRESHENING AIR

Applicant:
The Procter & Gamble Company

Headword:

Relevant legal provisions:
EPC Art. 84, 123(2)
RPBA Art. 13(1)

Keyword:
Claims - clarity - main request (no)
Amendments - added subject-matter (yes) all auxiliary requests
Late-filed auxiliary request - admitted (no)

Decisions cited:
T 0337/95

Catchword:

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Case Number: T 1041/12 - 3.3.10

D E C I S I O N
of Technical Board of Appeal 3.3.10
of 4 September 2014

Appellant: (Applicant)	The Procter & Gamble Company One Procter & Gamble Plaza Cincinnati, OH 45202 (US)
Representative:	Pierce, Christopher James Hoyng Monegier LLP Rembrandt Tower 31st Floor Amstelplein 1 1096 HA Amsterdam (NL)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 2 December 2011 refusing European patent application No. 05764128.4 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairwoman	J. Mercey
Members:	R. Pérez Carlón
	D. Rogers

Summary of Facts and Submissions

I. The appellant (applicant) lodged an appeal against the decision of the examining division to refuse European patent application No. 05 764 128.

The examining division came to the conclusion that claim 1 of each of the then pending main request and auxiliary requests 1 to 3 was not clear since the claimed method required a property of the container which needed to be determined in a state when said container was full. The state of being full was arbitrarily decided during production and could not be unambiguously determined. It further decided that auxiliary request 4 contained added subject-matter since the lower limit of the flow rate of 0.1 grams/second was only disclosed in combination with the feature that said flow rate was determined by measuring the rate of air freshening composition expelled from a full container for the first 60 seconds of use, which was not a feature of claim 1 of that request.

II. The documents forming part of the examination proceedings included the following:

D1: Council Directive 75/324/EEC of 20 May 1975 on the approximation of the laws of the Member States relating to aerosol dispensers

D2: Commission Directive 2008/47/EC of 8 April 2008

III. Claim 1 of the main request in appeal proceedings, filed under cover of a letter dated 30 March 2012, reads as follows:

"A method of freshening air comprising dispersing an

air freshening composition comprising a malodor counteractant, into the air, wherein said air freshening composition is provided in a container, said container comprising:
a) a propellant comprising a compressed gas, and
b) a dispenser;

wherein said compressed gas is selected from the group consisting of compressed air and nitrogen, and further, wherein said air freshening composition is released from said container at a flow rate of from 0.1 grams/second to 1.5 grams/second, wherein the flow rate is determined by measuring the rate of air freshening composition expelled from a full container for the first 60 seconds of use."

IV. In a communication accompanying the summons to oral proceedings, the board informed the appellant that it was inclined to concur with the reasoning and conclusions of the examining division that the feature "from the full container" lacked clarity.

V. At the beginning of the oral proceedings before the board, which took place on 4 September 2014, the appellant filed new auxiliary requests 1, 2 and 2A. Auxiliary requests 3-8, which were identical to auxiliary requests 1-6 filed under cover of a letter dated 4 August 2014, were also filed at these oral proceedings.

VI. Claim 1 of each of new auxiliary requests 1 and 3-8 contains the requirement that the flow rate of the container suitable for the claimed method is "*of from 0.1 grams/second to 1.5 grams/second*", none of these claims including the feature "*wherein the flow rate is determined by measuring the rate of air freshening*

composition expelled from a full container for the first 60 seconds of use".

The last part of claim 1 of auxiliary request 2 reads as follows:

"wherein said air freshening composition is released from said container at a flow rate of from 0.1 grams/second to 1.5 grams/second, wherein the container is filled with air freshening composition and propellant and wherein the ratio of the air freshening composition to propellant is 60/40 to 70/30 by volume."

Claim 1 of auxiliary request 2A, filed towards the end of the oral proceedings before the board, contains the feature:

"*wherein said air freshening composition is released from said container at a flow rate of from 0.1 grams/second to 1.5 grams/second, wherein the flow rate is determined by measuring the rate of air freshening composition expelled from a full container for the first 60 seconds of use, in which container the ratio of the air freshening composition to propellant is 60/40 to 70/30 by volume."*

VII. The arguments of the appellant relevant for the present decision were the following:

The feature "full container" in claim 1 of the main request was clear. The term "full" in the context of the claimed invention was understood by the skilled reader as referring to the unused, sealed product. Since according to D1 such a product must indicate its net content by weight, the skilled person could easily determine by weighing whether a container was full.

Furthermore, both of documents D1 and D2 explicitly defined the maximum filling level of an aerosol dispenser and every producer would fill such an aerosol to that legal maximum.

The combination of claim 5 as originally filed and the lower limit of the flow rate on page 19, line 32 provided a basis for claim 1 of auxiliary requests 1 and 3-8, which for this reason did not contain added subject-matter.

Claim 1 of auxiliary request 2 included the features that the container was filled with air freshening composition and propellant and that the ratio of said composition to propellant was 60/40 to 70/30, so that the term "full container" became redundant and could be omitted from claim 1 without adding undisclosed subject-matter.

Lastly, auxiliary request 2A clearly solved the issues under Articles 84 and 123(2) EPC raised against the other requests on file and should for this reason be admitted into the proceedings.

VIII. The final requests of the appellant were that the decision under appeal be set aside and that a patent be granted according to the claims of the main request, filed under cover of a letter dated 30 March 2012, or alternatively, upon the basis of the claims of any of auxiliary requests 1, 2, 2A and 3-8, all filed at the oral proceedings before the board, auxiliary requests 3-8 being identical to auxiliary requests 1-6 filed under cover of a letter dated 4 August 2014.

IX. At the end of the oral proceedings, the decision was announced.

Reasons for the Decision

Main request:

1. Amendments, Article 123(2) EPC:

Claim 1 of the main request finds a basis in the combination of claim 5 with the passage on page 19 lines 24-32 of the application as originally filed, which discloses a lower limit for the flow rate of from 0.1 grams/second (line 32), determined by measuring the rate of air freshening composition expelled by a full container for the first 60 seconds of use (lines 26-28).

Claim 1 of the main request fulfils therefore the requirements of Article 123(2) EPC.

2. Clarity, Article 84 EPC:

2.1 Claim 1 of the main request contains the feature "*wherein said air freshening composition is released from said container at a flow rate of from 0.1 grams/second to 1.5 grams/second, wherein the flow rate is determined by measuring the rate of air freshening composition expelled from a full container for the first 60 seconds of use*".

2.2 Article 84 in combination with Rule 43(1) EPC stipulates the requirements that the claims shall be clear and define the matter for which protection is sought in terms of the technical features of the invention. These requirements serve the purpose of

ensuring that the public is not left in any doubt as to which subject-matter is covered by a particular claim and which is not (see T 337/95, OJ EPO 1996, 628, Reasons 2.2 to 2.5).

Claim 1 is directed to a method which requires a container capable of releasing an air freshening composition at a defined flow rate measured from a full container for the first 60 seconds of use.

The key issue to be decided is whether the skilled reader clearly understands what is meant by the feature "from a full container" in claim 1 so that it can be unambiguously determined whether a specific container is capable of releasing an air freshening composition during the "first 60 seconds of use" at the flow rate required by claim 1.

2.2.1 Although a container comprising a compressed gas propellant is always "full" throughout its lifetime, as the propellant fills the whole inner volume of such a container, the board concurs with the examining division and the appellant that this is not the intended use of the term "full" in the context of this patent application.

However, an unambiguous definition of the feature "full container" is, nevertheless, required.

2.2.2 The appellant argued that the term "full" as it would be understood by the skilled reader referred to the unused, sealed product as taken directly from the shelf of a store or from the end of a production line, and that for this reason the feature "full container" was clear. Every commercially available product of this kind must indicate its net content by weight, and the

skilled person could easily determine whether a container was full simply by weighing.

However, which fraction of the net capacity of a specific container is filled in a finished product is a decision taken during its production upon the basis of various considerations which also include marketing and economical issues and within the framework of the relevant legal requirements, such as those of documents D1 and D2. For this reason, the skilled person cannot know *a priori* which filling level of a container corresponds to the state of "full container".

The appellant itself acknowledged during the oral proceedings before the board that a full container could contain 70%, 60% or even 50% of air freshening composition and still be a "full container" in the sense of claim 1. The appellant could not indicate an unambiguous lower limit of air freshening composition below which the container would no longer be regarded as "full".

Thus, the interpretation of full as an unused, sealed product as taken directly from the shelf of a store or from the end of a production line does not provide an unambiguous definition of "full container" which could allow the skilled person to determine whether a specific container is capable of releasing an air freshening composition at the flow rate defined in claim 1.

2.2.3 In a different line of argument, the appellant relied on D1, which is a Directive that sets the maximum fill level of an aerosol dispenser, and argued that every producer would fill a container up to this maximum legal limit.

The board considers, however, that D1 merely sets a maximum volume of the liquid phase in the dispenser with respect to its net capacity in view of safety considerations, but does not oblige producers to fill every container up to such limit. The appellant has failed to provide evidence that a producer would always fill a container up to said maximum and, furthermore, this line of argument is at odds with the statement of the appellant itself that a full container could contain 70%, 60% or even 50% of air freshening composition and be a "full container" in the sense of claim 1.

In addition, such a Directive can be modified (see for example D2, which modifies D1) or even repealed at any later point in time, so that even assuming that every container were to be filled up to the legally allowed maximum, there is no legal certainty that such upper limit would remain constant during the patent term.

2.2.4 The board thus concludes that the feature "from a full container" does not allow the skilled person to unambiguously determine whether a specific container is capable of releasing an air freshening composition at the flow rate defined in claim 1 and thus said claim lacks clarity.

Auxiliary requests 1 and 3-8

3. Amendments, Article 123(2) EPC:

3.1 Claim 1 of each of auxiliary requests 1 and 3-8 contains the feature that the flow rate is "*of from 0.1 grams/second to 1.5 grams/second*", and none of these claims includes the limitation "*wherein the flow rate*

is determined by measuring the rate of air freshening composition expelled from a full container for the first 60 seconds of use".

The appellant submitted that the combination of claim 5 as originally filed and the lower limit of the flow rate on page 19, line 32 provided a basis for claim 1 of auxiliary requests 1 and 3-8.

Claim 5 of the application as originally filed discloses a method of freshening air by dispersing a malodor counteractant, wherein said air freshening composition is released from said container at a flow rate of from about 0.0001 grams/second to about 1.5 grams/second. Thus, claim 5 as originally filed does not disclose the lower limit of the flow rate of 0.1 grams/second defined in claim 1 of auxiliary requests 1 and 3-8.

As a basis for the lower limit of the flow rate of 0.1 grams/second the appellant referred to the passage on page 19, line 32 of the application as originally filed, and argued that such an amendment did not imply any new technical information and merely resulted from the combination of different lower and upper limits.

However, the lower limit of 0.1 grams/second is linked in the cited passage to the method for measuring the flow rate as "determined by measuring the rate of product expelled by a full container of product for the first 60 seconds of use" (see page 19, lines 26-28), whereas such limitation is not a feature of claim 1.

In spite of the lack of clarity of the feature "full container", it is evident that a container containing merely 5% of air freshening composition is by no means

"full" (see point 2.2.1 above). Thus, the feature "full container" implies at least some limitation to the flow rate of the required container, such a limitation, however, not being present in claim 1. In fact claim 1 is also directed to a method in which the requirement that the flow rate of 0,1 grams/second to 1,5 grams/second is fulfilled when the container is close to being empty, which is technical information that could not have been derived by a skilled reader from the application as originally filed.

The appellant has not cited any further passage which could provide the required basis, nor can the board find any such passage.

For these reasons, claim 1 of auxiliary requests 1 and 3-8 contain added subject-matter and thus contravene the requirements of Article 123(2) EPC.

Auxiliary requests 1 and 3-8 are hence not allowable.

Auxiliary request 2:

4. Amendments, Article 123(2) EPC:

4.1 Claim 1 of auxiliary request 2 contains the feature *"wherein said air freshening composition is released from said container at a flow rate of from 0.1 grams/second to 1.5 grams/second, wherein the container is filled with air freshening composition and propellant and wherein the ratio of the air freshening composition to propellant is 60/40 to 70/30 by volume".*

4.2 As indicated above with respect to auxiliary requests 1 and 3 to 8, the flow rate of 0.1 g/s is disclosed in the application as originally filed (page 19, lines

26-28) as being "determined by measuring the rate of product expelled by a full container of product for the first 60 seconds of use".

4.3 The appellant argued that the unclear feature "from a full container" could be omitted in auxiliary request 2 by defining that the ratio of the air freshening composition to propellant was 60/40 to 70/30.

However, claim 1 fails to link the ratio of air freshening composition to propellant of 60/40 to 70/30 defined in claim 1 with a "full container". In fact, this feature appears to define, instead, a requirement of the claimed method of freshening air and not of the conditions for measuring the flow rate. For this reason, the features of claim 1 do not make the limitation "from a full container" redundant so that it could be omitted.

4.4 In addition, claim 1 of auxiliary request 2 does not define the period of time during which the flow rate needs to be measured, whereas the flow rate of 0.1 g/s is only disclosed in the application as originally filed as measured during "the first 60 seconds of use"

4.5 Since claim 1 of auxiliary request 2 does not contain the limitation that the flow rate defined in claim 1 is measured "determined by measuring the rate of product expelled by a full container of product for the first 60 seconds of use", the deficiency under Article 123(2) EPC outlined above with respect to auxiliary requests 1 and 3-8 applies in the same manner to claim 1 of auxiliary request 2. Auxiliary request 2 is hence not allowable.

Auxiliary request 2A:

5. Admissibility:

5.1 Claim 1 of auxiliary request 2A contains the features "*wherein said air freshening composition is released from said container at a flow rate of from 0.1 grams/second to 1.5 grams/second, wherein the flow rate is determined by measuring the rate of air freshening composition expelled from a full container for the first 60 seconds of use, in which container the ratio of the air freshening composition to propellant is 60/40 to 70/30 by volume*".

5.2 Auxiliary request 2A was filed towards the end of the oral proceedings, after the issue of lack of clarity of the feature "from the full container" had been fully discussed, the unclarity of this feature having been one of the reasons for refusal of the application by the examining division, the board having indicated in its communication accompanying the summons to oral proceedings that it concurred with the reasoning and conclusions of the examining division in this respect.

However, claim 1 of auxiliary request 2A still contains said feature, the appellant arguing that this issue was solved by defining that the ratio of the air freshening composition to propellant was 60/40 to 70/30 when the container was full. This additional definition does not, however, *prima facie* overcome this issue of lack of clarity, as claim 1 fails to link the ratio of air freshening composition to propellant of 60/40 to 70/30 with a "full container". In fact, said feature appears to define, instead, a requirement of the claimed method of freshening air, and not of the conditions for measuring the flow rate (see point 4.3 above). For this

reason, the clarity objection to the feature "from a full container" still applies to claim 1 of auxiliary request 2A.

5.3 The purpose of an appeal is mainly to give an adversely affected party the possibility of challenging the decision of the first instance. According to Article 12(2) RPBA, the statement of grounds of appeal shall contain an appellant's complete case. If, at a later stage of the proceedings, the appellant wants other requests to be considered, admission of these requests into the proceedings is a matter of discretion for the board of appeal (Article 13(1) RPBA).

The board considers that claim 1 of auxiliary request 2A cannot solve the outstanding clarity objections, whilst also raising additional issues under Article 123(2) EPC: namely whether the ratios of air freshening composition to propellant in claim 1 are disclosed in the application as originally filed independent of the nature of the air freshening compositions, said ratio being disclosed in the application as originally filed only in combination with a table (see page 26, line 30) in connection with quite specific compositions.

Under these circumstances, the board makes use of its discretion under Article 13(1) RPBA not to admit auxiliary request 2A into the proceedings.

Order

For these reasons it is decided that:

1. The appeal is dismissed.

The Registrar: The Chairwoman:

C. Rodríguez Rodríguez J. Mercey

Decision electronically authenticated