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**Datasheet for the decision  
of 5 February 2015**

**Case Number:** T 2264/13 - 3.3.09

**Application Number:** 05812567.5

**Publication Number:** 1799047

**IPC:** A23K1/18, A23K1/16, A23P1/12,  
A23L1/29

**Language of the proceedings:** EN

**Title of invention:**  
REGIMENS AND METHODS ADAPTED FOR A JUVENILE PET

**Applicant:**  
The Procter & Gamble Company

**Headword:**

**Relevant legal provisions:**  
EPC Art. 56

**Keyword:**  
Inventive step - (no, all requests)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
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Case Number: T 2264/13 - 3.3.09

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.09**  
**of 5 February 2015**

**Appellant:** The Procter & Gamble Company  
(Applicant) One Procter & Gamble Plaza  
Cincinnati, OH 45202 (US)

**Representative:** Cabinet Plasseraud  
52, rue de la Victoire  
75440 Paris Cedex 09 (FR)

**Decision under appeal:** **Decision of the Examining Division of the European Patent Office posted on 6 June 2013 refusing European patent application No. 05812567.5 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** M. O. Müller  
**Members:** J. Jardón Álvarez  
E. Kossonakou

## Summary of Facts and Submissions

I. This appeal lies from the decision of the examining division posted on 6 June 2013 refusing European patent application No. 05 812 567.5

II. The decision was based on a main and a first auxiliary request, both filed with letter dated 23 April 2013. The set of claims of the main request consisted of two claims reading as follows:

"1. A non-therapeutic method of administering a pet food comprising:

(a) orally administering to a juvenile pet a first pet food during a first period of time; and

(b) orally administering to the juvenile pet a second pet food during a second period of time;

wherein the first pet food exhibits at least one visually distinctive characteristic relative to the second pet food,

wherein at least one visually distinctive

characteristic is selected from the group consisting of shape, size and color, and

wherein the first pet food and the second pet food each comprise extruded kibble."

"2. First and second pet foods for use in therapy, wherein said therapy comprises:

(a) orally administering to a juvenile pet a first pet food during a first period of time; and

(b) orally administering to the juvenile pet a second pet food during a second period of time;

wherein the first pet food exhibits at least one visually distinctive characteristic relative to the second pet food,

wherein at least one visually distinctive characteristic is selected from the group consisting of shape, size and color, and wherein the first pet food and the second pet food each comprise extruded kibble."

The first auxiliary request was limited to claim 1 of the main request.

III. The examining division refused the application because in its opinion the subject-matter of claim 1 of both requests lacked inventive step in view of the disclosure of document D7:

D7: B.T. Hunter, "Specialized Pet Foods Abound. That Special Diet for Fido, Fluffy", Consumers' Research, May 1999, pages 24 to 27.

The examining division agreed with the applicant that D7 represented the closest prior-art document and that the technical problem to be solved by the invention was the provision of products for juvenile pets having visual cues to show the owner that the evolving dietary requirements of the juvenile pets were taken into account. The examining division denied an inventive step essentially because it was well known in the art that extruded pet foods for young pets should preferably be made of small pieces, and that this is not needed for older (thus: larger) pets.

IV. On 5 July 2013 the applicant (in the following: the appellant) filed a notice of appeal and on the same day paid the appeal fee. The statement setting out the grounds of appeal was filed on 16 October 2013.

In the statement of grounds of appeal the appellant requested that the decision under appeal be set aside and that a patent be granted based on the claims of the main request or, subsidiarily, on the basis of the claims of any of the first to third auxiliary requests, all filed with the statement of grounds of appeal.

The claims of the main request and the first auxiliary request are identical to the corresponding requests before the examining division (see point II above). The claims of the second auxiliary request are based on the claims of the main request, but with the size having been deleted as one of the visually distinctive characteristics. The only claim of the third auxiliary request is identical to claim 1 of the second auxiliary request.

- V. On 29 September 2014 the board dispatched a summons to oral proceedings. In the annexed communication the board indicated the points to be discussed during the oral proceedings. The board also gave the preliminary view that the subject-matter of claim 1 of all requests lacked inventive step and that the appeal was likely to be dismissed.
- VI. On 5 February 2015 oral proceedings were held before the board in the absence of the appellant. It had informed the board by letter dated 30 January 2015 that it would not attend the oral proceedings.
- VII. The arguments presented by the appellant in its written submissions may be summarised as follows:
- The examining division had stated that it was well known in the art that extruded pet food for young pets should be made of small pieces, but that this

was not needed for older (thus: larger) pets. However the examining division had not established why the small pieces for young pets would not be suitable for older (but still juvenile) pets. None of the prior-art documents provided any incentive for doing so. In fact, the prior art documents were silent concerning the administration during the youth of the pet, the visually distinctive characteristics of the foods (such as shape, colour and size) and the form of the extruded kibble. Therefore claim 1 of the main request and of the first auxiliary request was inventive.

- The same reasoning applied to claim 1 of each of the second and of the third auxiliary requests, which was limited to one visually distinctive characteristic selected from the group consisting of shape and colour.

VIII. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims according to the main request, alternatively, on the basis of the claims of any of the first to third auxiliary requests, all as filed on 16 October 2013 with the statement of grounds of appeal.

## Reasons for the Decision

1. The appeal is admissible.

### MAIN REQUEST AND AUXILIARY REQUESTS 1 TO 3

2. *Inventive step (Article 56 EPC)*

2.1 Claim 1 of the main and first auxiliary requests is identical and it is directed to a non-therapeutic method of administering a pet food comprising the following features:

- (i) (a) orally administering to a juvenile pet a first pet food during a first period of time; and
- (ii) (b) orally administering to the juvenile pet a second pet food during a second period of time;
- (iii) wherein the first pet food exhibits at least one visually distinctive characteristic relative to the second pet food,
- (iv) wherein at least one visually distinctive characteristic is selected from the group consisting of shape, size and colour, and
- (v) wherein the first pet food and the second pet food each comprise extruded kibble.

Claim 1 of the second auxiliary request differs from claim 1 of the main request only in that in feature (iv) the "size" has been deleted as one of the possible visually distinctive characteristics. Claim 1 of the third auxiliary request is identical to claim 1 of the second auxiliary request.

2.2 Closest prior art

2.2.1 The board agrees with the examining division and the appellant that D7 represents the closest prior art. In this document it is disclosed that it is already known to formulate pet foods, like human food products, for different life stages for puppies, kittens, mature animals and "senior" animals (page 25, left-hand column, first paragraph). Moreover there are also known products offered for intermittent supplementary feeding only (page 26, left-hand column, last full paragraph), and products offered for only a brief time daily (page 27, left-hand column, penultimate paragraph of the item "Special Cat Food").

2.2.2 It is not disclosed in D7 that the various products exhibit at least one visually distinctive characteristic selected from the group consisting of shape, size and colour.

2.3 Problem and solution

2.3.1 As stated in the second paragraph of page 1 of the application, similar to human infants, juvenile pets experience various growth stages up to the age of about 2 years requiring different types of food. According to the application (last paragraph of page 1), if such different diets are not visually distinctive in any manner, the owner of the pet may foster concerns over the differences in the diets and may view the diets as either radically different or not different in any respect (see also D7, last paragraph of page 27).

2.3.2 Accordingly, in view of D7, the problem to be solved by the patent application would be to provide products for



juvenile pets that avoid such drawbacks, allowing the pet owner to distinguish the diets and therefore showing that the evolving dietary requirements of the juvenile pets are taken into account.

2.4 The solution to this problem proposed by the application is the claimed method wherein the pet foods are visually distinguished by shape, size and/or colour (claim 1, features (iii) and (iv)). By this measure the pet owner is assured that he/she is giving the correct food to the pet. The board is satisfied that this problem has been credibly solved by the claimed method.

2.5 Obviousness

2.5.1 It remains to be considered whether this solution is obvious or not. In the board's judgement the claimed solution is indeed obvious in view of D7 and the common general knowledge of the skilled person for the following reasons.

2.5.2 As already indicated in the appealed decision, and this was not disputed by the appellant, it was well known in the field before the priority date of the present application to use small pieces for young (smaller) pets and that these are no longer necessary as soon as the pets grow. The pet owner is visually taught by the different sizes of the pellets that they are appropriate for younger and older pets, respectively.

2.5.3 Therefore, no inventive step can be seen in the claimed administration of smaller kibbles for younger pets and larger kibbles for older pets in order to distinguish diets.

- 2.5.4 Similar considerations apply for the other visually distinctive characteristics covered by the claim, namely the colour and the shape.
- 2.5.5 These embodiments also lack inventive step because it is within the common technical knowledge of the skilled person to use different colours or shapes to visually distinguish between different (albeit related) products. Different colours have been commonly used before the priority date of the present application in the food and therapy fields to identify products with different compositions (cf. medicaments, for instance, contraceptive pill) or to distinguish between different products of a brand by providing each product with a different colour packaging.
- 2.5.6 In view of this general knowledge in the field, the board considers it to be straightforward and thus obvious to provide pet foods with a distinctive size, shape and/or colour in order to solve the above-mentioned problem, namely to allow the pet owner to distinguish between diets.
- 2.5.7 Nor can the board accept the appellant's further argument that an inventive step should be acknowledged because the cited prior-art documents do not suggest the claimed subject-matter. As explained above, the board denies an inventive step starting from D7 in combination with the common technical knowledge of the skilled person in the field. Thus, no further document is necessary.
- 2.5.8 For these reasons, the subject-matter of claim 1 of all requests does not involve an inventive step.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



M. Cañueto Carbajo

M. O. Müller

Decision electronically authenticated