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Datasheet for the decision of 5 April 2019

Case Number: T 2140/15 - 3.3.06

Application Number: 06789162.2

Publication Number: 1982018

IPC: D21H27/00, A61K8/02, A61Q19/00, B32B5/00, B32B27/12, B32B5/26

Language of the proceedings: EN

Title of invention:
TISSUE PRODUCT HAVING A TRANSFERABLE ADDITIVE COMPOSITION

Patent Proprietor:
KIMBERLY-CLARK WORLDWIDE, INC.

Opponent:
Essity Hygiene and Health Aktiebolag

Headword:
TISSUE PRODUCT/KIMBERLY CLARCK

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
Amendments (all requests) - extension beyond the content of the application as filed (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
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Office européen des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 2140/15 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 5 April 2019

Appellant: (Opponent)	Essity Hygiene and Health Aktiebolag 405 03 Göteborg (SE)
Representative:	Hoffmann Eitle Patent- und Rechtsanwälte PartmbB Arabellastraße 30 81925 München (DE)
Respondent: (Patent Proprietor)	KIMBERLY-CLARK WORLDWIDE, INC. 401 North Lake Street Neenah, WI 54956 (US)
Representative:	Dehns St. Brides House 10 Salisbury Square London EC4Y 8JD (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 3 September 2015 maintaining European Patent No. 1982018 in amended form.**

Composition of the Board:

Chairman	J.-M. Schwaller
Members:	P. Ammendola
	J.Hoppe

Summary of Facts and Submissions

I. The appeal was filed by the opponent (hereinafter "the appellant") against the interlocutory decision of the opposition division to maintain European patent Nr. 1982018 in amended form according to the Main Request, claim 1 of which reads as follows:

"*1. A tissue product in the form of a facial tissue, and comprising:*

a base web (12) containing cellulosic fibers, the base web (12) having a dry bulk density of at least about 2 cc/g, the base web (12) having a first side and a second side;

a target delivery zone (16) located on at least the first side of the base web (12), the target delivery zone (16) comprising a portion of the total surface area of the first side;

an additive composition applied to the target delivery zone (16) on the base web (12);

characterised in that at least the first side of the base web (12) has been modified at least in the target delivery zone (16) in a manner that causes greater amounts of the additive composition [to] (sic) transfer to an opposing surface when the tissue product (10) is wiped against the opposing surface by adhering a polymeric film (28) comprising a polyolefin or a nonwoven web (38) containing synthetic fibers, or by applying a sizing agent, a wax, or a resin, to one side of the base web (22; 32);

wherein the target delivery zone (16) comprises from about 10% to about 60% of the surface area of the first side of the base web (12); and

wherein the base web (12) includes a fold line (72), the target delivery zone (66) being located along the fold line (72) such that the additive composition

is folded onto itself when the base web (12) is folded.".

Hereinafter the feature "*A tissue product in the form of a facial tissue*" (the underlined portion was not present in claim 1 as originally filed) is referred to as **"the disputed amendment"**.

II. In the decision under appeal the opposition division considered the disputed amendment to find its basis on page 1, lines 3-4; page 18, lines 10-11; and page 4, lines 26-27 of the original application.

III. With its grounds of appeal the appellant rejected this finding by stressing that the above passages only disclosed a tissue product which was a facial tissue. Further, the disputed amendment instead included "*... any type of tissue product as long as it has the form of a facial tissue*", but such level of generalisation was not implicitly disclosed in the application as originally filed.

IV. The patent proprietor (hereinafter "the respondent") replied with letter dated 27 May 2016 and submitted that "*The skilled person would understand the statement "a tissue product in the form of a facial tissue" to have its usual meaning in the English language. That is, the tissue product is a facial tissue. [...]. Using this interpretation, the claim does not extend the subject-matter beyond that disclosed in the original specification. See for example page 4, lines 26-27, as well as page 18, lines 10-11 of the application as originally filed*".

The reply was also enclosed with amended sets of claims labelled as First to Third Auxiliary Requests. Each

version of claim 1 according to these auxiliary requests begins with the same wording as maintained claim 1, namely:

"*1. A tissue product in the form of a facial tissue, and comprising:...*".

V. With letter of 31 August 2017 the appellant reiterated its interpretation of disputed amendment as including "any type of tissue product as long as it only has the form of a facial tissue, including for instance household towels or toilet paper".

VI. With letter of 20 December 2018 the respondent announced its absence at the oral proceedings summoned for 5 April 2019.

VII. In a communication to the parties dated 27 February 2019, the board wrote "its non-binding, non-exhaustive and preliminary opinion regarding some of the issues possibly to be discussed at the forthcoming oral proceedings" (see page 1 of the communication). In section 4 thereof, the board stated that a skilled person reading the patent as maintained with a mind willing to understand could only construe the disputed amendment as having substantially the same meaning of the similar expressions used in the following passages of the original application:
- page 4, lines 26 to 27,
- page 11, lines 9 to 11, and
- page 18, lines to 13.

VIII. At the oral proceedings before the board of 5 April 2019, in which the respondent was not represented, the chairman established the requests of the parties to be as follows:

The appellant requested that the decision under appeal be set aside and the patent be revoked.

The respondent requested in writing that the appeal be dismissed (main request) or, in the auxiliary, that the patent be maintained in amended form with the claims according to one of the First to Third Auxiliary Requests filed with the reply to the grounds of appeal, to be taken in their numerical order.

IX. At the hearing the appellant reiterated the argument that the meaning in English language of the disputed amendment was that the claimed tissue had "to have the form" of a facial tissue (and not that it had "to be" a facial tissue as alleged by the respondent).

It also pointed to the reference in the board's preliminary opinion that the skilled person has to construe (also) the meaning of the disputed amendment reading the patent as maintained with a mind willing to understand. The appellant stressed that the aim of the construction of the claim wordings in the context of the remainder of the patent were to only exclude interpretations which were illogical (e.g. because of contrary statements in the specification), or which did not make technical sense.

Instead, in the appellant's view, the disputed amendment "a tissue product having the form of a facial tissue" was broader than the "facial tissue" embodiment of the tissue product of the invention described by the relevant passages of the original application. However, this difference in breadth did not amount to a contradiction. Nor was the appellant's interpretation of the disputed amendment deprived of technical sense.

Indeed, as already mentioned in its letter of 31 August 2017, such interpretation implied that the disputed amendment also embraced, in addition to facial tissues, other tissue products such as e.g. toilet paper, while still excluding further tissue products, such as e.g. diapers.

The appellant confirmed that the same objection under Article 123(2) EPC applied to each version of claim 1 according to the First to Third Auxiliary Requests.

Reasons for the Decision

1. Main Request - Allowability under Article 123(2) EPC of claim 1 as maintained

1.1 As apparent from the parties submissions the controversial point as to the basis in the application as originally filed for the wording of maintained claim 1, is exclusively on the meaning to be attributed to the disputed amendment. It is undisputed that the original application (in particular the passages identified as relevant in the decision under appeal and repeated by the respondent in its reply and by the board in its communication of 27 September 2019, see above) discloses, among other embodiments of the invention's tissue products (as claimed in original claim 1), tissue products that are "*facial tissues*".

1.2 Hence, the issue to be decided is whether the skilled reader of maintained claim 1 would construe the disputed amendment as meaning "a tissue product that is a facial tissue" or as meaning "a tissue product having the form of a facial tissue".

1.3 The board notes preliminarily that the disputed amendment appears confusing to the skilled reader of maintained claim 1, if only for the reason that the disputed amendment uses the language "*in the form of*" followed by a single specification of the possible "form". The board is aware that the expression "in the form of" is sometimes used in patent claims, normally to specify a general term by adding several limiting alternatives - as for example in granted claim 1 of the patent in suit: "*A tissue product in the form of a bath tissue, a facial tissue, a napkin or a paper towel ...*" - but this is not the case of the disputed amendment. For this reason, the board had already acknowledged in its preliminary opinion the need for the skilled person to construe the meaning of such language reading the patent as maintained with a mind willing to understand.

1.4 In accordance to the established jurisprudence of the BoA (see the first two paragraphs of point II.A.6.1 of the Case Law of the BoA, 8th Edition, 2016), this construction of the claim only justifies to rule out interpretations which are illogical or which do not make any technical sense but not to interpret narrowly a broad term.

1.5 It has become apparent to the board during the discussion at the oral proceedings that the appellant's construction of "*a tissue product in the form of a facial tissue*" as meaning "a tissue product having the form of a facial tissue" is neither illogical (*per se* or e.g. because of a contradiction with the remainder of the patent disclosure) nor deprived of a plausible technical meaning.

1.5.1 In particular, the interpretation proposed by the appellant is found broader than the "facial tissue"

embodiment of the tissue product of the invention, undisputedly described by the relevant passages of the original application already repeatedly identified above. This difference in breadth between the claimed subject-matter and the patent specification represents no contradiction and, thus, cannot justify to rule out the broad interpretation of the disputed amendment.

1.5.2 Moreover, as convincingly stressed by the appellant at the hearing, such interpretation - though being vague - is technically meaningful: "a tissue product having the form of a facial tissue" is a definition that embraces, in addition to facial tissues, other tissue products such as e.g. toilet paper, while excluding further tissue products such as e.g. diapers.

1.6 Accordingly, the board comes to the conclusion that the disputed amendment of maintained claim 1 is construed by the skilled reader as meaning "a tissue product having the form of a facial tissue". Hence, the subject-matter of maintained claim 1 is found to include embodiments which were not disclosed originally, such as toilet paper, and so extends beyond that disclosed in the patent application as originally filed.

1.7 Accordingly, maintained claim 1 is found not to comply with the requirements of Article 123(2) EPC and, thus, the patent as maintained is found to contravene the EPC.

2. First to Third Auxiliary Requests

2.1 Since each version of claim 1 according to these requests begins with the same wording as maintained claim 1, the same objection under Article 123(2) EPC

discussed above manifestly also applies to each version of claim 1 according to the First to Third Auxiliary Requests. Hence, none of the remaining amended claims requests is found to comply with the requirements of the EPC either.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chairman:

A. Pinna J.-M. Schwaller

Decision electronically authenticated