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Case Number: T 2191/15 - 3.3.06

Application Number: 08787323.8

Publication Number: 2188364

IPC: C11D17/00, C11D3/37, C11D3/50

Language of the proceedings: EN

Title of invention:
FABRIC TREATMENT COMPOSITIONS

Patent Proprietors:
1) Unilever PLC
2) Unilever N.V.

Opponent:
The Procter & Gamble Company

Headword:
Fabric Treatment Composition/Unilever

Relevant legal provisions:
EPC Art. 56

Keyword:
Inventive step - (no) - Main Request (yes) First Auxiliary Request

Decisions cited:

Catchword:

Europäisches Patentamt
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Beschwerdekammern

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Case Number: T 2191/15 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 26 July 2018

Appellant: (Opponent)	The Procter & Gamble Company One Procter & Gamble Plaza Cincinnatti, Ohio 45202 (US)
Representative:	Gill Jennings & Every LLP The Broadgate Tower 20 Primrose Street London EC2A 2ES (GB)
Respondent: (Patent Proprietor 1)	Unilever PLC Unilever House 100 Victoria Embankment London EC4Y 0DY (GB)
Respondent: (Patent Proprietor 2)	Unilever N.V. Weena 455 3013 AL Rotterdam (NL)
Representative:	Webster, Jeremy Mark Mewburn Ellis LLP City Tower 40 Basinghall Street London EC2V 5DE (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 28 September 2015 rejecting the opposition filed against European patent No. 2188364 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	L. Li Voti
Members:	G. Santavicca
	C. Heath

Summary of Facts and Submissions

I. The appeal lies from the decision of the Opposition Division of the European Patent Office posted on 28 September 2015 rejecting the opposition filed against European patent No. 2 188 364 pursuant to Article 101(2) EPC.

II. Independent Claims 1, 8 and 10 according to the patent as granted read respectively as follows:

"*1. A laundry treatment composition which comprises:*
a) anionic and/or nonionic surfactant or a cationic fabric conditioner and
b) particles comprising a benefit agent, said particles being bound to a non-cationic deposition aid which is substantive to polyester
wherein:
i) the non-cationic deposition aid is a polymer derivable from carboxylic acids and polyols, and,
ii) the particles comprise a shell comprising said polyester-substantive deposition aid and a core comprising one or more perfume components."

"*8. A method for producing a composition as claimed in any preceding claim which comprises the step of covalently linking or co-polymerising phthalate containing polymer which is substantive to polyester to a particle comprising a perfume.*"

"*10. A method for treating polyester textile articles which comprise laundering the articles in the presence of a composition according to any one of claims 1-8 [sic]*".

Dependent claims 2 to 7 and 9 relate to particular embodiments of the claimed composition or method.

III. The patent as a whole was opposed on the grounds of lack of novelty and inventive step (Article 100(a) EPC) as well as added subject-matter (Article 100(c) EPC).
The following items of evidence were *inter alia* relied upon:
D1: W0 94/19448 A1; and,
D3: US 4,081,384.

IV. In the decision under appeal, the Opposition Division *inter alia* came to the following findings:
(1) Claim 1 as granted did not contravene the requirements of Article 123(2) EPC.
(2) The claimed subject-matter was novel over D1.
(3) Document D3 (e.g. Example II) disclosed the closest prior art for assessing inventive step.
(3.1) D3, taken alone, did not hint at the claimed subject-matter, even if the technical problem was seen in the provision of an alternative solution.
(3.2) D1 did not provide any disclosure which could supplement D3 towards the claimed solution.
Thus, the grounds of opposition did not prejudice the maintenance of the patent.

V. With its statement setting out the grounds of appeal (dated 28 January 2016), the Appellant contested the findings in the decision under appeal and maintained the following grounds/objections:
- Claim 1 defined subject-matter extending beyond the content of the application as filed.
- Its subject-matter lacked novelty over D1.
- As to inventive step over D3 taken as the closest prior art, the claimed invention was a mere, obvious alternative.

- Thus, the patent should be revoked.

VI. With its response (dated 10 June 2016) to the statement, the Respondent requested to reject (dismiss) the appeal (Main Request) and filed four sets of amended claims as First to Fourth Auxiliary Requests.

The set of claims according the First Auxiliary Request differs from that as granted only insofar as its Claim 1, compared to Claim 1 as granted (Point II, supra), comprises the following amendment (made apparent by the Board):

"*1. A laundry treatment composition which comprises:*
.... and
b) particles comprising a benefit agent, said particles being bound to a non cationic deposition aid which is substantive to polyester ***by means of a covalent bond or entanglement***
wherein:
...."

The Respondent *inter alia* maintained that D3 would not lead the skilled person towards the claimed subject-matter. It argued that this conclusion applied *a fortiori* to the subject-matter of Claim 1 of the First Auxiliary Request, which, compared to Claim 1 as granted, was limited by specification of how the deposition aid was bound to the particles, thus further distinguished from D3.

VII. In a communication in preparation for oral proceedings, dated 28 June 2018, the Board indicated its preliminary opinion, *inter alia*,
- that Claim 1 as granted appeared to be fairly based on the application as filed, so that the ground of

opposition under Article 100(c) EPC did not appear to prejudice maintenance of the patent as granted,
- that D1 did not appear to directly, nor implicitly, and unambiguously disclose a laundry composition as defined in Claim 1 at issue, so that its subject-matter appeared to be novel, and
- that, as regards inventive step,
-- D3 was the closest prior art,
-- no comparative example over D3 was available for showing any improvement,
-- the problem effectively solved had to be formulated less ambitiously, as the provision of a further laundry treatment composition for acceptable deposition of benefit agents to polyester fabrics, and
-- if the feature of Claim 1 "*a shell comprising said polyester-substantive deposition aid*" encompassed an embodiment wherein the shell consisted of polyester-substantive deposition aid, as taught by D3, the invention could be seen to lack an inventive step.

VIII. Oral proceedings took place on 26 July 2018. The discussion focused on the construction of Claim 1 as granted (Main Request) and on the inventive step of its subject-matter. As regards the First Auxiliary Request, the Appellant only maintained the objection that the subject-matter of Claim 1 thereof still lacked an inventive step over D3 as the closest prior art.

IX. The final requests of the parties were as follows:
- The Appellant (Opponent) requested that the decision under appeal be set aside and that the patent be revoked in its entirety.
- The Respondent (Patent Proprietors) requested that the appeal be dismissed (Main Request) or, auxiliarily, that the patent be maintained in amended form on the

basis of any of the First to Fourth Auxiliary Requests, all filed with letter dated 10 June 2016.

X. The arguments of the Appellant of relevance for the present decision can be summarised as follows:

Main request (patent as granted)

Construction of Claim 1

The key feature to be considered for the construction of Claim 1 was already defined in Claim 1 as originally filed, i.e. "*particles being bound to a ... deposition aid*". This feature was clear and encompassed any type of bonding, hence could not be limiting in any way over the cited prior art, such as D3. The addition of the feature "*shell comprising said... deposition aid*" did not render the claim clearer in respect of the type of bond involved, so that the shell might also consist of deposition aid. This construction of the feature of Claim 1 "*shell comprising said... deposition aid*" was not only based on plain language, but was also backed up by the application as originally filed, which disclosed for instance that the deposition aid might be a swollen polymer layer at the particle surface (paragraph [0042]) and that "the perfume may be encapsulated alone" (paragraph [0055]). Hence, that the deposition aid made the shell, or that common growth of shell and deposition aid was preferred (e.g. paragraphs [0041] and [0057], Example 2). This construction showed that the argument of the Respondent that the deposition aid and the particle were still separate, identifiable components was not founded. Hence, in view of the term "*bound*", particles and deposition aid were not separately identifiable. As regards the term "*deposition aid*", it was not more than a label in this

respect, as the extent of fulfillment of the relevant function was open. Moreover, the layer of deposition aid mentioned in paragraph [0042] of the patent could be just as smooth as the shell of D3. Thus, the deposition aid associated with the shell could be the last layer of the shell or the shell itself and did not necessarily extend outside of the shell thereby forming "hairy" particles.

Inventive step

As to inventive step over D3, no effect whatsoever across the whole breadth of Claim 1 was shown in the patent. Moreover, no further evidence was provided that any bonding of the deposition aid to the particles provided any kind of benefit. Thus, the technical problem was the provision of a mere alternative which was obvious in view of D3/Example II, disclosing core/ shell particles wherein the shell was made of a polyester-substantive deposition aid and the disclosure of D3 that perfumes could be contained in the core.

First Auxiliary Request

Construction of Claim 1

The feature "*covalently bonded*" of Claim 1 according to the First Auxiliary Request was only a product-by-process feature, implying the obtention of a compound which was different from the starting components. Thereby, Claim 1 still did not, not even implicitly, define a "hairy" particle. The latter construction was only disclosed as a preferred embodiment in the patent (paragraph [0041]), and was merely encompassed by Claim 1. In fact, Claim 1 did not specify a bonding on the surface of the particle, and actually still encompassed

total entanglement/covalently bonding of the deposition aid within the shell.

Inventive step

The technical problem invoked by the Respondent was based on the assumption that Claim 1 according to the First Auxiliary Request defined a "hairy" particle as described in the patent. This was contested. Moreover, D3 too was concerned with deposition of a benefit agent on the fabric, whereby the material of the shell, a polyester, caused the deposition of that agent. In the absence of any comparison with D3, the only technical problem solved across the breadth of Claim 1 was the provision of an alternative composition. However, starting from D3, it was obvious to the skilled person to envisage as an alternative to e.g. entangle the polyester deposition aid with the particle surface material.
Thus, the claimed alternative composition was obvious.

XI. The arguments of the Respondent of relevance for the present decision can be summarised as follows:

Construction of Claim 1

Claim 1 specified two elements, the particles and the polyester-substantive deposition aid which had to be able to fulfil its function. The deposition aid in fact boosted the deposition of the particles compared to particles not comprising it. As apparent from paragraphs [0040] and [0041] of the patent, the bond between these elements should lead to "hairy" particles permitting better deposition and better retention of perfume on the treated surface. Even in presence of a chemical attachment, such as a covalent bond, the shell

and the deposition aid would still be distinct components. The term "*comprise*" of Claim 1 should thus not be interpreted to extend to "*consisting of*". Hence, as it is clear from paragraphs [0040] and [0041] of the patent, the deposition aid was bonded to the shell or entangled therein, i.e. entrapped. Nevertheless, part of the deposition aid was free to extend outside the surface, so that the surface of the particle was not smooth, but "hairy". This hairy structure, which enhanced deposition, was, at least for most embodiments, implicitly defined in Claim 1 and was the result of the described bonding or entanglement in the patent. Hence, at least these "hairy" structures obtained with a non-cationic polyester being substantive to polyester distinguished the claimed subject-matter from the prior art, e.g. D3. Moreover, even the allegedly "smooth" embodiment described in paragraph [0042] of the patent (swollen polymer layer) was different from the subject-matter disclosed in D3.

Inventive step

As to inventive step over D3 taken as the closest prior art, even if the technical problem were the least ambitious, the claimed composition comprising hairy perfume encapsulated particles could not be obvious over D3, as the particles of the composition of D3 were smooth. Moreover, their shell was not necessarily made of a polyester-substantive deposition aid, as a polyamide shell was rather preferred according to D3. Therefore, the appeal should be dismissed.

First Auxiliary Request

Amendments

The amendments were mentioned *verbatim* in the application as filed, in combination with the description of the bond between deposition aid and particles in the application as filed (page 11, lines 28-29). Thus, Claim 1 complied with the requirement of Article 123(2) EPC.

Construction of Claim 1

Claim 1 according to the First Auxiliary Request specified that the deposition aid was attached to the shell by covalent bonding or entanglement. Covalent bonding did not mean that thereby the particle (shell) was formed of deposition aid, as in D3, but that a deposition aid was bound to an already formed particle. Total entanglement within the shell, as alleged by the Appellant, was excluded, as in such a particle the entangled polyester would otherwise not act as deposition aid. Therefore, Claim 1 implied *a fortiori* a "hairy" particle structure.

Inventive step

The closest prior art was disclosed by D3. The alleged lack of comparison between the invention and D3 was not decisive, as the particle of D3 had a smooth shell surface, and was different from a "hairy" particle as claimed. A particle having a "hairy" structure made by the deposition aid extending outside the shell required *inter alia* the use of less deposition aid, compared to D3, hence was also cost advantageous, and reduced the repellency between particle and fabric to be treated. The technical problem was to provide a laundry treatment composition which allowed a higher proportion of perfume to be deposited and retained on polyester fabrics during a cleaning cycle, and which gave greater

flexibility and cost savings in term of deposition aid material used to deliver the perfume to the fabric.
D3 disclosed a very specific process of preparation of the particles, whereby the polyester shell was formed at the interface to encapsulate the benefit agent. No covalent bond between the deposition aid and the material of the shell was thereby obtained.
As D3 did not suggest covalently binding or entangling a polyester-substantive non-cationic deposition aid to an encapsulated particle containing perfume, but rather to add more unencapsulated benefit agent together with the particles, the skilled person could not obviously arrive at a composition according to Claim 1 at issue, not even if the problem were less ambitiously formulated as the provision of an alternative composition.
Therefore, D3 would not lead the skilled person towards the claimed composition, which consequently was not obvious.

Reasons for the Decision

Main Request

Construction of Claim 1

1. Claim 1 as granted (Main Request) *inter alia* contains the following features:

"*1. A laundry treatment composition which comprises ...*
...
b) particles ...., said particles being bound to a non-cationic deposition aid which is substantive to polyester ...

wherein ....
ii) the particles comprise a shell comprising said polyester-substantive deposition aid and a core comprising ..."

1.1 It is apparent from the case history (grounds of added subject-matter and novelty) that the proper interpretation of the underlined features is of utmost importance. The Board's position is as follows:

1.2 The general principles applicable in the construction of the claims are established in the case law of the Boards of Appeal of the EPO (7th edition, II.A.6.1, 6.3.1, 6.3.4, 6.3.6), in particular the skilled person, when considering a claim, should rule out interpretations which are illogical or which do not make technical sense, thus should construe the claim with a mind willing to understand.
For the Board, the application of this criterion implies that embodiments wherein the deposition aid is completely buried within the shell do not make technical sense, as no aid to the deposition can be displayed thereby. Hence, the deposition aid should (at least partly) be located at the particle surface.

1.3 The features of Claim 1 comprise only conventional terms of art providing the following unambiguous technical teaching to the skilled reader:

1.3.1 The feature "*said particles being bound to a non-cationic deposition aid which is substantive to polyester ...*" implies that each particle is bound (no matter how) to a non-cationic (i.e. which carries no positive charge in the washing medium) deposition aid (a substance favouring deposition of the benefit agent), the deposition aid being substantive to

polyester (i.e. having affinity with polyester fibres/ fabrics). The deposition aid is an integral part of the particles.

1.3.2 The feature "*the particles comprise a shell comprising said polyester-substantive deposition aid and a core*" defines both:
- the structure of the particles, i.e. their core/shell structure, namely a core comprising the benefit agent (perfume) surrounded/protected by a shell; and
- the presence of the deposition aid in the shell.

1.3.3 It follows from the above that Claim 1 makes clear that the deposition aid is bound (anyhow, i.e. chemically, such as ionic or covalent bonding, physically, such as by adsorption, or mechanically, such as by entanglement) to the particles and is present in the shell of the particles. Hence, the deposition aid is also an integral part of the shell.

1.4 The question which arises, as indicated in the Board's communication, is related to the breadth of the feature "*a shell comprising said polyester-substantive deposition aid*", in particular because it appears to encompass a shell or an over-shell entirely made of deposition aid. This construed breadth is also apparent from the disclosure.

1.5 According to the disclosure of the patent in suit, the feature "*a shell comprising said polyester-substantive deposition aid*" encompasses a number of different embodiments, in which the deposition aid is differently comprised in the shell, for instance:
- (paragraph [0018], first sentence) "It is preferred that the nonionic or anionic deposition aid is added to

the polymerisation mixture only after a shell has at least in part been formed",
- (paragraph [0039]) "the deposition aid is attached to the preformed particles",
- (paragraph [0040], first sentence) the deposition aid is bound to the particle by means of a covalent bond, entanglement or strong adsorption",
- (paragraph [0040], last sentence) "part of the deposition aid is entrapped and bound in the polymer matrix of the particle, whilst the remainder is free to extend into the aqueous phase",
- (paragraph [0041], first sentence) "the deposition aid is preferably mainly attached to the particle surface and is not, to any significant extent, distributed throughout the internal bulk of the particle",
- (paragraph [0042), last two clauses) "a polymer attaches to the particle surface in multiple places" and "the deposition aid may be in the form of a swollen polymer layer at the particle surface",
- (paragraph [0057], first sentence) "the process of preparation of the particles is preferably a two-step process in which the first step forms a capsule around the benefit agent and the second step applies a coating to the capsule which includes the deposition aid.".

1.6 For the Board, it is clear from the overall content of the passages cited, in particular the passages in paragraphs [0042] and [0057], that the particles are not necessarily "hairy", i.e. that the deposition aid does not necessarily extend outside of the shell and that the shell may contain at least a layer made of deposition aid. Therefore, the particles may also be "smooth".

1.6.1 For these reasons the Board could not see any reason for interpreting the term "comprise" in a more restrictive manner as excluding embodiments wherein the shell is made of deposition aid.

1.6.2 Such an embodiment would in fact also comply with all the conditions exposed above in that the deposition aid is bonded to and is integral part of the particle and of the shell and, being present also on the surface of the particles, would make it substantive to polyester.

1.7 Consequently, for the Board, a shell consisting of deposition aid is not excluded from the wording of Claim 1 at issue.

Inventive step

2. The invention concerns fabric treatment compositions comprising particles containing perfume as a benefit agent and a deposition aid, for delivery of the benefit agent, which is perfume, to the fabric during its laundering (paragraph [0001]).

2.1 According to the decision under appeal, D3 discloses the closest prior art for assessing inventive step.

2.2 The Board, considering the similarities in D3 (Column 1, lines 64-68) in terms of problem addressed with the patent in suit (paragraph [0008]) has no reason to take another stance thereon.

2.3 The Board has no reason either to deviate from its preliminary opinion indicated in the communication in preparation for oral proceedings, that the subject-matter of Claim 1 as granted is obvious over D3 taken alone, for the following reasons:

2.3.1 As stated above (Point 1.7), a shell consisting of deposition aid is not excluded from Claim 1 at issue.

2.3.2 Example II of D3 discloses the preparation of capsules having an inner core of an antistat/softener DTDMAC (a benefit agent) and an outer wall of a phthalate polyester (obtained by the reaction between terephthalic acid chloride and resorcin).

The Board is convinced that such a phthalate polyester is a non-cationic polyester-substantive deposition aid according to Claim 1 at issue (see *infra*).

Therefore, this product differs from the subject-matter of Claim 1 at issue only insofar as it does not comprise perfumes in the core.

However, according to D3 (Column 8, lines 51-53), further benefit agents, *inter alia* perfumes, can be included in either of the reaction solutions used in preparing the capsules.

2.3.3 Moreover, example IV of D3 concerns the assessment of the static effect on a fabric blend, including polyester/cotton fabric, hence the affinity thereof to the particles washed and conditioned with a composition according to D3. That composition however includes the capsules of Example I, the shell of which is made of polyamide. The results in Column 10 show that these particles have affinity to the conditioned fabrics.

2.3.4 D3 does not give any particular preference for polyamide over e.g. polyester and lists (column 7, lines 32-35) these polymers as equivalent embodiments for the shell of the disclosed particles, so that it is

plausible to assume that, as argued by the Appellant, also the capsules of Example II are similarly substantive to e.g. polyester/cotton.

2.3.5 Thus, the claimed composition with a shell consisting of polyester-substantive deposition aid is obvious over the disclosure of D3, as the skilled person would arrive at the claimed subject-matter by merely implementing the explicit teaching of D3, e.g. by including perfumes in the antistat/softener solution (DTDMAC) making the core of the capsules of example II.

2.4 Therefore, the Board has no reason to depart from its preliminary opinion expressed in its communication that the claimed subject-matter lacks an inventive step over D3 taken alone.

2.5 Consequently, the ground of opposition under Article 100(a) (lack of an inventive step) prejudices maintenance of the patent as granted.

2.6 The Main Request is not allowable.

First Auxiliary Request

Admissibility

3. The Admissibility of First Auxiliary Request is not at stake.

Amendments (Articles 100(c) and 123(2) EPC)

4. In the decision under appeal, the Opposition Division found that the claims as granted were based on the application as filed and that the ground of opposition

under Article 100(c) EPC did not prejudice maintenance of the patent as granted.

4.1 In its statement, the Appellant however maintained that the subject-matter of the claims as granted extended beyond the content of the application as originally filed. In particular, Claim 1 did not limit the type of bonding in combination with the feature requiring that the deposition aid was comprised in the shell and, allegedly, went beyond the only originally disclosed embodiment in this respect, which required "entanglement" as the type of bonding.

4.2 In its communication in preparation for oral proceedings, the Board held instead that Claim 1 as granted was fairly based on the application as originally filed, so that the ground of opposition under Article 100(c) EPC did not prejudice maintenance of the patent as granted.

4.3 At the oral proceedings before the Board, the Appellant raised no objection under Article 123(2) EPC against the (amended) subject-matter of Claim 1 according to the First Auxiliary Request.

4.4 The Board thus maintains its preliminary opinion expressed in its communication. Additionally, it remarks the following:

4.5 Claim 1 according to the First Auxiliary Request, compared to the Claim 1 as granted, additionally comprises the features "*by means of covalent bond or entanglement*".

4.6 This feature is disclosed in the application as originally filed (page 11, lines 29-30) in connection

with the general description of the bonding between the deposition aid and the particles, hence as generally applicable, to all specific embodiments thereof.

4.7 Therefore, the Board holds Claim 1 according to the First Auxiliary Request to be fairly based on the application as filed and to comply with the requirements of Article 123(2) EPC.

Construction of amended Claim 1

5. The feature of Claim 1 "*a shell comprising said polyester-substantive deposition aid*", taken in combination with the feature "*particle being bound to a non-cationic deposition aid which is substantive to polyester by means of a covalent bond or entanglement*" implies that a covalent bonding is formed between the shell (material) and the deposition aid (material), or that the deposition aid is merely entangled with the shell. Hence, the new feature implies the presence of distinct components/materials for shell and deposition aid, which are bound to or entangled with, but present as separate components. Hence, the shell can no longer consist of polyester-substantive deposition aid, as disclosed by D3.

Novelty

6. At the oral proceedings before the Board, the Appellant did not raise any objection against novelty of the claimed subject-matter. As the Board had already expressed its opinion that the subject-matter of Claim 1 as granted was novel, this finding applies a fortiori to Claim 1 at issue.

Inventive step

6.1 Both parties considered D3 as representing the closest prior art. The Board thus also still considers D3 to be the closest prior art for assessing inventive step according to the problem-solution approach.

6.2 Hence, D3, in particular its disclosure relating to the use of phthalate polyester as shell coating material, such as in its Example II, is the closest prior art embodiment for assessing inventive step.

7. The technical problem to be solved

According to the Respondent, the objective technical problem was to provide a laundry treatment composition which allows a higher proportion of perfume to be deposited and retained on polyester fabrics during a cleaning cycle, thus which can give greater flexibility and cost savings in term of deposition aid material used to deliver the perfume to the the fabric.

8. The solution

8.1 The patent in suit proposes as a solution thereto, namely a laundry treatment composition which is characterised by the features:

"*particle being bound to a non-cationic deposition aid which is substantive to polyester by means of a covalent bond or entanglement*
wherein
i) the non-cationic deposition aid is a polymer derivable from dicarboxylic acids and polyols"
and
"*the particles comprise a shell comprising said polyester-substantive deposition aid* ".

9. Success of the solution

9.1.1 No comparative example over D3/example II is available showing any improvement.

9.1.2 Thus, it has not been shown that the significantly enhanced deposition invoked by the Respondent and mentioned in the application as filed, if accepted as proven, is actually achieved across the whole breadth of Claim 1 at issue and over D3.

9.1.3 Consequently, for the Board, the problem effectively solved should be formulated less ambitiously, as the provision of further laundry treatment composition for acceptable deposition of benefit agents (perfumes) to polyester fabrics.

10. Obviousness

10.1 over D3

10.1.1 Example II of D3 discloses the preparation of capsules having an inner core of an antistat/softener and an outer wall (shell) made of a phthalate polyester (obtained by the reaction between terephthalic acid chloride and resorcin). The formation of the polyester shell takes place at the interface between antistat and deposition aid as explained in D3 (column 8, lines 22-29). Hence, D3 does not disclose the presence in the shell of the deposition aid and of another material constituting the shell and also it does not disclose a covalent bonding between shell material and deposition aid or an entanglement of the deposition aid, but only a physical bonding between polyester shell and antistat core.

10.1.2 D3 does not contain either any suggestion to bind a polyester-substantive deposition aid to a shell by covalent bond, nor to entangle it with the shell, let alone by leaving part of it pendant, such as to form a hairy particle.

10.1.3 The Appellant did not bring any evidence that such a way of bonding of a deposition aid to the particle would belong to common general knowledge.

10.1.4 Hence, for the Board, D3 does not contain any teaching that would have prompted the skilled person, first to depart from the teaching of D3 to form a shell **consisting of** deposition aid and to make instead a shell wherein the deposition aid is covalently bonded to or entangled with the shell material.

10.1.5 Therefore, the Board comes to the conclusion that the claimed subject-matter is not obvious over D3, alone or in combination with common general knowledge.

10.2 Further prior art

Further prior art has not been invoked.

11. The subject-matter of independent Claims 8 and 10 concerning, respectively, a method for producing a composition of Claim 1, or a method for treating polyester textile articles involving the use of such a composition, involve thus also necessarily an inventive step. The same applies to the dependent claims.

Conclusion

12. The First Auxiliary Request complies with the EPC.

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 with the order to maintain the patent in the form of the First Auxiliary Request filed with letter dated 10 June 2016 and a description to be adapted thereto.

The Registrar: The Chairman:

D. Magliano L. Li Voti

Decision electronically authenticated