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**Datasheet for the decision  
of 10 January 2025**

**Case Number:** T 2015/22 - 3.3.02

**Application Number:** 17382265.1

**Publication Number:** 3401371

**IPC:** C09D11/00, C09D11/52, B65D81/34

**Language of the proceedings:** EN

**Title of invention:**  
SUSCEPTOR INK COMPOSITIONS FOR MICROWAVEABLE PACKAGES

**Patent Proprietor:**  
INSTITUTO TECNOLÓGICO DEL EMBALAJE, TRANSPORTE  
Y LOGÍSTICA (ITENE)

**Opponent:**  
Sahuquillo Huerta, Jesús

**Headword:**  
SUSCEPTOR INK / MICROWAVE / ITENE

**Relevant legal provisions:**  
EPC Art. 100(a), 54, 56, 100(b)  
RPBA 2020 Art. 12(4), 12(6)  
EPC R. 103(4)(c)

**Keyword:**

Insufficiency of disclosure (no)

Novelty - (yes)

Inventive step - (yes)

Amendment to appeal case - evidence and objections - admitted  
(no)

Reimbursement of appeal fee - (no)

**Decisions cited:**

T 1063/06

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 2015/22 - 3.3.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.02**  
**of 10 January 2025**

**Appellant:** Sahuquillo Huerta, Jesús  
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**Respondent:** INSTITUTO TECNOLÓGICO DEL EMBALAJE, TRANSPORTE  
(Patent Proprietor) Y LOGÍSTICA (ITENE)  
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**Representative:** ZBM Patents - Zea, Barlocchi & Markvardsen  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 15 June 2022  
rejecting the opposition filed against European  
patent No. 3401371 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman** M. O. Müller  
**Members:** M. Maremonti  
B. Burm-Herregodts

## Summary of Facts and Submissions

I. The appeal by the opponent ("appellant") lies from the opposition division's decision to reject the opposition against European patent No. 3 401 371 ("the patent").

II. Claim 1 as granted reads as follows:

*"A susceptor combination comprising:*

*metallic particles;*

*particles of at least two semiconductor materials; and  
one or more alkaline or alkaline earth metal salts."*

III. The opposition was based on the grounds under Article 100(a) and (b) EPC. Reference was made, *inter alia*, to the following documents:

D1: US 4,959,516

D2: WO 91/10337

D3: WO 03/060214 A1

D5: List of semiconductor materials according to  
Wikipedia

D6: WO 2006/063225 A1

D7: US 5,002,826

D8: EP 0 466 361 A1

D9: Experimental report dated 16 November 2018

D10 Additional experimental report

IV. The opposition division came to the following conclusion, *inter alia*:

- none of the grounds for opposition invoked by the opponent prejudiced maintenance of the patent as granted, and
- in particular, the claimed subject-matter was novel in view of the disclosure in documents D2 and D3 and involved an inventive step in view of D2 taken as the closest prior art.

V. In its appeal submissions, the appellant contested the opposition division's reasoning and argued that the subject-matter of claim 1 as granted was insufficiently disclosed, lacked novelty and lacked inventive step. The appellant corroborated its arguments by filing the following new items of evidence (labelled as D11 and D12 by the appellant, new numbering introduced by the board):

A11: Communication issued by the USPTO observing that the claims of US application No. 16/612,374 (family member of the patent) lacked unity of the invention in view of the disclosure in document A12 and the patent proprietor's response to this.

A12: US 5,349,168

VI. The patent proprietor (respondent) rebutted the appellant's arguments maintaining that the grounds for opposition under Article 100(a) and (b) EPC did not prejudice maintenance of the patent as granted. The respondent also contested the admittance of A11 and A12 as well as new novelty and inventive-step objections raised by the appellant (see below).

VII. The parties were summoned to oral proceedings as per their requests. In preparation for the oral proceedings, the board issued a communication under Article 15(1) RPBA dated 23 September 2024. In this communication, the board expressed, *inter alia*, the

preliminary opinion that documents A11 and A12 and the objections related to them should not be admitted and that none of the grounds for opposition invoked by the appellant prejudiced maintenance of the patent as granted.

VIII. By letter dated 6 November 2024, the appellant withdrew its request for oral proceedings and requested a decision in writing according to the documents on file. No arguments contesting the board's preliminary opinion were submitted.

IX. In a subsequent communication, the board cancelled the oral proceedings.

X. Final requests relevant to the decision

The appellant requested that the appealed decision be set aside and that the patent be revoked in its entirety. It further requested that A11 and A12 be admitted into the proceedings. The appellant lastly requested that the appeal fee be reimbursed according to the provisions of Rule 103 EPC.

The respondent requested that the appeal be dismissed, meaning that rejection of the opposition would be confirmed and that the patent would be maintained as granted. The respondent further requested that A11 and A12 as well as the novelty objection in view of A12 and the inventive-step objections based on D2 as closest prior art in combination with any one of A12, D3, D6, D7 and D8 not be admitted.

XI. As regards the parties' submissions that are relevant to the decision, reference is made to them in the reasons for the decision below.

## Reasons for the Decision

Main request - patent as granted - claim 1 - ground for opposition under Article 100(b) EPC - sufficiency of disclosure

1. The appellant submitted that the formulation of claim 1 as granted (point II above) was too broad, since not all metallic particles and not all semiconductor materials were suitable for preparing combinations capable of being used as a susceptor. The appellant referred to silver particles as unsuitable metallic particles, while materials like BaTiO<sub>3</sub>, SrTiO<sub>3</sub> and SiO<sub>2</sub> were unsuitable semiconductors, as confirmed by document D1, column 3, lines 40 to 45. The appellant further referred to the thermal conductivities of the semiconductors disclosed in D5 and D6, which suggested that not all of them were suitable for use in susceptor combinations. Therefore, it was impossible to obtain the same results across the whole claimed scope.

The appellant further argued that, contrary to the opposition division's view, the breadth of the claim was not a matter of clarity but a matter of insufficiency. Although the patent contained some examples of susceptor combinations falling under claim 1 as granted, the disclosure of one way of carrying out an invention was only sufficient if it allowed the invention to be performed over the whole range claimed rather than only for some members of the claimed class of components. Sufficiency of disclosure presupposed that the skilled person might obtain substantially all embodiments falling within the ambit of the claims. In this respect, the appellant referred to several decisions by the Boards of appeal (see the statement of grounds of appeal, page 4). The appellant submitted that there was no need for it to produce

experimental evidence since the insufficiency was self-evident on the basis of thermal properties; for example, manganese particles in combination with BaTiO<sub>3</sub> and SrTiO<sub>3</sub> as semiconductor materials could not be used as a susceptor because such a combination was unable to absorb electromagnetic energy and convert it into heat.

The appellant referred to decision T 1063/06, which explained that an applicant was entitled to claim patent protection only for its actual contribution to the art and not to reserve an unexplored field of research. In the present case, only a few metallic particles and semiconductor materials had been tested in the patent and in the additional items of evidence D9 and D10. For just these few tested combinations, the thermal characteristics varied considerably, especially as regards the maximum temperature achieved upon exposure to microwaves. The variance in the thermal values was very high. In this respect, the appellant referred to the examples in D10: example 6 reported a maximum temperature of 98.55°C, which was too low to cook foodstuffs. In example 9, the maximum temperature was 159.2°C, which was too high and close to the ignition point of paper. Finally, the appellant submitted that only one real experiment with a popcorn bag including a specific susceptor combination was available in D9.

The appellant thus concluded that the scope of claim 1 as granted was too broad and the skilled person was not in a position to put the invention into practice across the whole scope of the claim without exercising inventive skill.

2. The board does not find the appellant's arguments convincing for the following reasons.



- 2.1 The mere fact that a claim is broad is not in itself a ground for considering that claimed subject-matter is not sufficiently disclosed. For a claimed invention to be insufficiently disclosed within the meaning of Article 83 EPC, there must be serious doubts, substantiated by verifiable facts, that the claimed invention cannot be carried out.
- 2.2 As pointed out by the respondent, the patent discloses in table 2 (page 9) an example of a combination suitable for being used as a susceptor. Moreover, paragraphs [0026] to [0031] of the patent disclose further examples of components that are appropriate for forming suitable susceptor combinations in accordance with claim 1 as granted. Additionally, paragraph [0033] of the patent discloses the process used for preparing susceptor combinations as defined in claim 1 as granted. Several combinations according to this teaching of the patent have been prepared and tested for their ability to work as a susceptor; see the experimental evidence provided by the respondent in D9 and D10. Therefore, the board holds that the patent contains sufficient guidance to allow the skilled person to prepare susceptor combinations in accordance with the whole scope of claim 1 as granted.
- 2.3 The appellant alleged that the results reported in D9 and D10 exhibited high variance in the thermal values, particularly in the maximum temperature. In one case, this temperature was too low for cooking foodstuffs; however, the board notes that claim 1 as granted does not require any specific maximum temperature to be achieved by the susceptor combination and claim 1 does not require any particular foodstuff cooking property to be exhibited by the claimed combinations, either.

2.4 As regards the appellant's argument relating to metallic particles and/or semiconductors which would not be suitable for being used in a susceptor combination, the board holds that even if this argument were accepted, a skilled person, based on common general knowledge, as represented e.g. by document D5, would automatically exclude combinations of features that do not make any technical sense, i.e. combinations which are not able to absorb electromagnetic energy and convert it into heat. In this respect, the board also concurs with the respondent's view that the passage of D1 indicated by the appellant actually indicates that the semiconductor materials BaTiO<sub>3</sub>, SrTiO<sub>3</sub> and SiO<sub>2</sub> reduce the ability to heat in the presence of microwave radiation, but not that they are entirely unable to heat, as alleged by the appellant.

2.5 For these reasons, the board concludes that the claimed subject-matter is sufficiently disclosed. The ground for opposition under Article 100(b) EPC does not prejudice maintenance of the patent as granted.

Documents A11 and A12 and appellant's objections related to them - admittance into the proceedings - Article 12(4) and (6) RPBA

3. Documents A11 and A12 were filed by the appellant with the statement of grounds of appeal and the appellant requested that they be admitted. The respondent requested that these documents not be admitted.

3.1 By referring to A11, the appellant raised a new novelty objection in view of A12. Moreover, it also raised a new inventive-step objection involving A12 as a secondary document. The filing of A11 and A12 and the objections related to them constitutes an amendment to the appellant's case within the meaning of Article 12(4) RPBA. Contrary to the provisions of Article 12(4)

RPBA, the appellant has neither identified this amendment nor provided reasons for submitting it in the appeal proceedings. Any such amendment can be admitted only at the board's discretion, exercised in view of the need for procedural economy, *inter alia*.

- 3.2 Had the appellant's new evidence and objections been admitted, new issues in respect of novelty and inventive step of the claimed subject-matter would have had to be addressed on appeal for the first time. This would have been contrary to the need for procedural economy (Article 12(4) RPBA) and the primary object of the appeal proceedings being to review the appealed decision in a judicial manner (Article 12(2) RPBA).
- 3.3 Moreover, under Article 12(6) RPBA, the board should not admit *inter alia* items of evidence and objections which should have been submitted before the opposition division.
- 3.4 As put forward by the respondent, A12 is a family member of document D8 filed by the appellant before the opposition division. The content of the two documents is almost identical. Therefore, the board sees no reason why A12 was not filed in lieu of or in addition to D8 before the opposition division. The same applies to the objections related to A12. Such reasons were not indicated by the appellant, either.
- 3.5 For these reasons, the board decides not to admit A11 and A12 and the objections related to them into the proceedings, pursuant to Article 12(4) and (6) RPBA.

Main request - patent as granted - claim 1 - ground for opposition under Article 100(a) EPC - novelty under Article 54 EPC

4. The appellant raised novelty objections to the subject-matter of claim 1 as granted in view of the disclosures in each of documents D2, D3 and A12.

Document D2

4.1 The appellant argued that D2 disclosed a microwave susceptor material including a microwave active material and an attenuator for heat control. The attenuator was a mineral hydrate capable of absorbing heat and selectively inhibiting overheating during use. As regards the microwave active material, the appellant referred to claim 11 of D2, which disclosed the use of a semiconductor (carbon), metallic particles and microwave active oxides. An embodiment of the active material in claim 11 was disclosed in claim 12 of D2, which mentioned a single list of metals and semiconductors. Among other materials, the metals in claim 2 as granted and the semiconductors in claim 3 as granted were included in the list. As regards the attenuator, possible materials were disclosed in claim 13 of D2, mentioning, among other things, alkaline and alkaline earth metal salts, as required by claim 1 as granted. Therefore, the subject-matter of claim 1 as granted merely represented the selection from a single list of specific elements disclosed in D2 and consequently did not confer novelty. The appellant also referred to page 7, lines 10 to 12 of D2, which disclosed the claimed combination.

4.2 These arguments are not persuasive.

4.2.1 Claims 11 and 12 of D2 disclose possible microwave active particulate materials to be included in the susceptor combinations in D2. According to these

claims, at least one material is selected from a long list of substances covering metallic particles and semiconductors. To arrive at the features of claim 1 as granted, requiring metallic particles and particles of at least two semiconductor materials, the skilled person would have to select three components from the list in claim 12 to be used in combination, and specifically select metallic particles and at least two semiconductors.

4.2.2 The appellant did not indicate any passage in D2 which would directly and unambiguously disclose such a combination of these three components. The passage on page 7, lines 10 to 12, indicated by the appellant, merely discloses carbon to be optionally used together with metallic particles. Such a combination is not in accordance with claim 1 as granted, which requires at least two semiconductors.

4.2.3 As regards the one or more alkaline or alkaline earth metal salts also required by claim 1 as granted, the appellant referred to claim 13 of D2; however, as submitted by the respondent, claim 13 is not dependent on claims 11 or 12. Therefore, claim 13 does not disclose the combination of an alkaline or alkaline earth metal salt with metallic particles and at least two semiconductors. The same applies to page 7, lines 10 to 12 of D2, where no alkaline or alkaline earth metal salts are mentioned.

4.2.4 The board thus concludes that the subject-matter of claim 1 as granted is not directly and unambiguously disclosed in D2.

Document D3

4.3 The appellant submitted that D3 disclosed absorbent composites suitable for exposure to dielectric heating, comprising a superabsorbent material and an energy

receptive additive. The superabsorbent material in D3 included alkali metal salts, e.g. sodium chloride; see page 4. Moreover, examples of energy receptive additives were disclosed on page 8, line 3, to page 9, line 11 of D3 and included titanium oxide and dioxide, carbon black, sulphide semiconductors, silicon carbide, aluminium powder, hydrated salts of e.g. calcium and zinc oxide, to be used alone or in mixtures. Therefore, D3 disclosed in a single list and without limitation the combination of aluminium, carbon black, silicon carbide and sodium chloride, thus anticipating the subject-matter of claim 1 as granted.

4.4 These arguments are not convincing either.

4.4.1 To arrive at the features of claim 1 as granted, which require metallic particles and particles of at least two semiconductor materials, the skilled person would have to select a mixture of three components from the list of possible energy receptive additives disclosed on page 8, line 3, to page 9, line 11 of D3, and specifically select metallic particles and at least two semiconductors. The appellant did not indicate any passage in D3 which would directly and unambiguously disclose such a combination of these three components. On the contrary, as submitted by the respondent, all the examples in D3 (pages 19 and 20) disclose the combination of a superabsorbent material with a single energy receptive additive in the form of either carbon black or graphite, and therefore do not disclose the claimed susceptor combination.

4.4.2 The board thus concludes that D3 does not directly and unambiguously disclose the subject-matter of claim 1 as granted.

Document A12

4.5 As set out above, A12 and the related objections were not admitted into the proceedings. Therefore, the appellant's novelty objection based on this document has to remain unconsidered.

4.6 It follows that the ground for opposition under Article 100(a) in combination with Article 54 EPC does not prejudice maintenance of the patent as granted.

Main request - patent as granted - claim 1 - ground for opposition under Article 100(a) EPC - inventive step under Article 56 EPC

5. Closest prior art

5.1 In accordance with the appealed decision (page 5, point II3.4.1), both parties indicated document D2 as the closest prior art. In view of the disclosure in D2 reported above, the board has no reason to take a different stance.

5.2 In particular, as indicated by the respondent, exemplary susceptor combinations stated in D2 as being in accordance with the invention (examples 1 to 6 on pages 16 and 17) comprise carbon black as the microwave active material and only one attenuator in the form of either a salt or alumina.

6. Distinguishing features

In view of the conclusion on novelty set out above, the subject-matter of claim 1 as granted differs from D2 in that metallic particles and a second semiconductor material are included in the susceptor combination.

7. Objective technical problem

7.1 As regards the technical effects derived from the above-mentioned distinguishing features, the parties

referred to the results reported in the patent as well as in D9 and D10.

- 7.2 In view of the results in D9, the appellant conceded that composition 4 in D9, made in accordance with example 2 of D2, delivered too low a temperature for allowing foodstuffs to be heated. The appellant thus formulated the objective technical problem as the provision of a susceptor combination having improved temperature properties.
- 7.3 The board notes that, according to paragraph [0009] of the patent, the claimed susceptor combination results in an improved time-temperature profile being able to provide effective cooking of the foodstuff with optimal organoleptic properties. As argued by the respondent, this technical effect has been shown to be achieved in the example of the patent (see paragraphs [0084] to [0086]) and in the additional experimental evidence reported in D9 and D10 (see in particular D10, last two pages). In contrast to this, as set out by the respondent, the cooking test carried out in D9 with a susceptor prepared according to example 4 of D2 (composition 3 in D9) had to be stopped due to the ignition of the microwaveable popcorn bag used for the test. This result demonstrated that the susceptor in D2 was not able to efficiently dissipate the heat generated.
- 7.4 Therefore, the board agrees with the formulation of the objective technical problem as proposed by the respondent, namely the provision of a susceptor combination having improved temperature properties, allowing for an improved time-temperature cooking profile while maintaining optimal organoleptic properties.



8. Obviousness of the claimed solution
  - 8.1 As a solution to the above-mentioned objective technical problem, claim 1 as granted proposes the inclusion of metallic particles and a second semiconductor material in the susceptor combination.
  - 8.2 The appellant argued that the subject-matter of claim 1 as granted was obvious in view of the teaching in D1. It submitted that D1 disclosed a susceptor coating including aluminium particles and semiconductor particles. According to column 4, lines 44 and 45 of D1, the semiconductor could be carbon black, titanium carbide, silicon carbide and/or zinc carbide. In view of the "and/or" clause, more than one semiconductor might be used. D1 further disclosed in column 3, lines 26 to 51, that the semiconductors provided a bridging/spacing effect with respect to the metallic particles so that said particles were able to provide a desired controlled localised heating effect without arcing and without significantly detracting from the heating effect. At the same time, the combination of the semiconductor materials with the metallic substances avoided the runaway heating effect that could occur with homogeneous materials such as carbon-black particles, which increased the heating effect. The appellant concluded that D1 thus suggested the combination of metallic particles with carbon black to increase the heating effect and a second semiconductor to prevent arcing without adversely affecting heating. Therefore, the combination of D2 with D1 solved the objective technical problem of improving the temperature properties and rendered the claimed subject-matter obvious.
  - 8.3 The board disagrees for the following reasons.

- 8.3.1 As submitted by the respondent, D1 (column 1, lines 17 to 37; column 5, lines 46 to 48; column 6, lines 21 to 39; column 10, lines 45 to 63) aims to provide a susceptor combination capable of reaching very high temperatures (at least 177°C) that allow baked goods to be browned and crisped within four minutes. In order to achieve this aim, D1 proposes, in examples 1 to 12 (column 8, line 56 to column 12, line 36), the use of a susceptor combination of metallic particles and a single semiconductor material. According to D1 (column 13, lines 27 to 31), this combination is sufficient to result in browning and crisping of foodstuffs. Even more control over thermal runaway is obtained in D1 by replacing the semiconductor with a galvanic alloy, either alone or in combination with an oxidising salt (see examples 14 to 16 in column 13, line 32 to column 14, line 53).
- 8.3.2 Therefore, D1 suggests a different solution to the stated objective technical problem and it does not point towards the use of two different semiconductors, let alone in combination with metallic particles and an alkaline or alkaline earth metal salt.
- 8.4 For these reasons, the board concludes that the subject-matter of claim 1 as granted involves an inventive step when starting from D2 in view of the disclosure in D1 (Article 56 EPC).
- 8.5 It is also noted that the same reasoning would apply even if the formulation of the objective technical problem as proposed by the appellant (see above) were to be adopted.

Further inventive-step objections - admittance into the proceedings - Article 12(4) and (6) RPBA

9. The appellant further argued that the subject-matter of claim 1 as granted was obvious when starting from D2 as the closest prior art in combination with any one of A12, D3 and D6 to D8. The respondent requested that these objections not be admitted into the proceedings.
- 9.1 As regards A12 used as a combination document, as stated above, the board decided not to admit this document and related objections. As a consequence, any objection based on A12 as a combination document has to remain unconsidered.
- 9.2 The objections based on D2 as the closest prior art in combination with any one of D3 and D6 to D8 were not raised before the opposition division (see the minutes of the oral proceedings before the opposition division, page 4, last paragraph).
- 9.3 As a consequence, these objections constitute an amendment to the appellant's case within the meaning of Article 12(4) RPBA. Contrary to the provisions of Article 12(4) RPBA, the appellant has neither identified this amendment nor provided reasons for submitting it in the appeal proceedings. Any such amendment can be admitted only at the board's discretion, exercised in view of the need for procedural economy, *inter alia*.
- 9.4 Had these new objections been admitted, fresh inventive-step issues would have had to be addressed on appeal for the first time. This would have been contrary to the need for procedural economy (Article 12(4) RPBA) and the primary object of the appeal proceedings to review the appealed decision in a judicial manner (Article 12(2) RPBA). The appeal

proceedings should not be used as a continuation of the proceedings before the opposition division.

9.5 Moreover, under Article 12(6) RPBA, the board should not admit, *inter alia*, objections that should have been raised before the opposition division. The board sees no reason why these inventive-step objections were not raised before the opposition division, nor were such reasons indicated by the appellant.

9.6 Therefore, the board decides not to admit the appellant's objections based on D2 as the closest prior art in combination with any one of D3 and D6 to D8 into the proceedings pursuant to Article 12(4) and (6) RPBA.

10. For these reasons, the ground for opposition under Article 100(a) EPC in combination with Article 56 EPC does not prejudice maintenance of the patent as granted.

#### Conclusions

11. None of the appellant's objections is convincing. Therefore, the appeal against the opposition division's decision rejecting the opposition is not allowable, implying that the patent is maintained as granted.

#### Reimbursement of the appeal fee - Rule 103 EPC

12. By letter dated 6 November 2024, the appellant withdrew its request for oral proceedings and requested a reimbursement of the appeal fee according to Rule 103 EPC.

12.1 A reimbursement of the appeal fee in view of the withdrawal of a request for oral proceedings can only be allowed under Rule 103(4)(c) EPC; however, according to Rule 103(4)(c) EPC, the appeal fee shall be reimbursed at 25% "*if any request for oral proceedings is withdrawn **within one month** of notification of the*

*communication issued by the Board of Appeal in preparation for the oral proceedings, and no oral proceedings take place"* (emphasis added by the board).

- 12.2 In the current case, the board issued a communication under Article 15(1) RPBA in preparation for the oral proceedings (which were later cancelled) on 23 September 2024.
- 12.3 It follows that the withdrawal of the request for oral proceedings by the appellant with the letter dated 6 November 2024 was filed well after the time limit of one month stipulated in Rule 103(4) (c) EPC.
- 12.4 For this reason, the appellant's request for reimbursement of the appeal fee has to be refused.

## **Order**

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

1. The appeal is dismissed.
2. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



U. Bultmann

M. O. Müller

Decision electronically authenticated