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D E C I S I O N
of 11 September 2001

Case Number: T 0940/96 - 3.3.2

Application Number: 89311852.1

Publication Number: 0375149

IPC: A01N 35/02

Language of the proceedings: EN

Title of invention:
Virucidal low toxicity compositions

Patentee:
WAVE ENERGY SYSTEMS, INC.

Opponent:
Henkel Kommanditgesellschaft auf Aktien

Headword:
Virucidal/WAVE ENERGY SYSTEMS

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
"Allowability of amendments to the claims - no"
"Subject-matter extending beyond the content of the
applications as originally filed"

Decisions cited:
-

Catchword:
-



Case Number: T 0940/96 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 11 September 2001

Appellant: WAVE ENERGY SYSTEMS, INC.
(Proprietor of the patent) One Riverway
Suite 1700
Houston
Texas 77056 (US)

Representative: McCall, John Douglas
W.P. THOMPSON & CO.
Coopers Building
Church Street
Liverpool L1 3AB (GB)

Respondent: Henkel
(Opponent) Kommanditgesellschaft auf Aktien
TFP / Patentabteilung
D-40191 Düsseldorf (DE)

Representative: -

Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 31 July 1996
revoking European patent No. 0 375 149 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: P. A. M. Lançon
Members: U. Oswald
S. U. Hoffmann

Summary of Facts and Submissions

- I. European patent No. 375 149, based on application No. 89 311 852.1 was granted on the basis of 18 claims.
- II. Opposition was filed against the granted patent by the Respondent (Opponent) alleging lack of inventive step under Article 100(a) EPC.
- III. In its decision dated 31 July 1996 the Opposition Division revoked the patent under Article 102(1) EPC for lack of inventive step.
- IV. The Appellant (Proprietor) lodged an appeal against that decision and filed on 28 November 1996 as its only request a set of amended claims 1 to 7 annexed to the statements of grounds of appeal. Claim 1 reads as follows:

"1. The use of a phenol-free composition for de-activating viruses on an animate or inanimate surface, which comprises:

- (a) a solvent consisting of water or a lower alkanol;
- (b) a dialdehyde containing from 2 to 6 carbon atoms;
- (c) an anionic surfactant with a negatively-charged hydrophilic group selected from the group consisting of alkyl sulfates, alkyl sulfonates, alcohol sulfates, alkyl aryl sulfonates, dialkyl sulfosuccinates and mixtures thereof;
- (d) buffer salts in sufficient amounts to stabilize the pH of the composition inside the range of from 4 to 7.4,

wherein the ratio by weight of anionic surfactant to dialdehyde is from 1:4 to 10:11 and wherein the amount of anionic surfactant is from 0.0005% (w/v) to 0.001%

(w/v),

the deactivation on an animate surface being for the purpose of cleansing."

- V. The Respondent (Opponent) objected to the amendments under Article 123(2) EPC and argued that the claimed subject matter did not involve an inventive step.

- VI. In a communication dated 9 May 2000 the Board commented inter alia that amended claims 1, 4 and 6 appeared not to meet the requirements of Articles 123(2) EPC.

- VII. The Appellant did not take position on this communication.

- VIII. On 15 January 2001 the Board issued a summons to attend oral proceedings pursuant to Rule 71(1) EPC.

- IX. In reply to the summons the Appellant indicated in a letter dated 5 February 2001 that he would not be represented at the oral proceedings and would expect a written decision in due course.

Later, in a the letter dated 13 February 2001, the Appellant withdrew his request for oral proceedings.

- X. On 15 February 2001 the Board issued a notification of cancellation of the oral proceedings.

- XI. The Appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the set of claims filed on 28 November 1996.

The Respondent requested that the appeal be dismissed and that the patent be revoked.

Reasons for the Decision

1. The appeal is admissible
2. Claim 1 as amended contains an upper limit of the amount of anionic surfactant of 0.001% (w/v) (see point IV above).

The amount of 0.001% (w/v) anionic surfactant, however, finds a basis in the application as originally filed only in combination with the use of the specific anionic surfactant sodium dodecyl sulfate (see page 6, lines 19 to 24, page 13, lines 14, 24 and 30 as well as page 14, line 16). Moreover, the application as originally filed discloses the use of 0.001% (w/v) sodium dodecyl sulfate in **compositions** for deactivating viruses only in combination with glutaraldehyde as one of the other components forming the composition.

In the absence of any teaching in the application as originally filed showing that the amount of 0.001% (w/v) anionic surfactant can be used with any type or class of anionic surfactants other than sodium dodecyl sulfate and in combination with any other dialdehyde than glutaraldehyde containing 2 to 6 carbon atoms, the Board can only conclude that claim 1 of the set of claims 1 to 7, which form the only request on file, does not meet the requirements of Article 123(2) EPC.

3. Since the only request on file must be refused for the reasons set out above, there is no need to refer to the other objections under Article 123(2) EPC to amended claim 1 and to claims 4 and 6 raised in the communication dated 9 May 2000.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

A. Townend

P. A. M. Lançon