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D E C I S I O N
of 21 May 2004

Case Number: T 0228/01 - 3.3.6
Application Number: 92302452.5
Publication Number: 0507478
IPC: C11D 1/835
Language of the proceedings: EN

Title of invention:
Fabric softening composition

Patentee:
UNILEVER PLC, et al

Opponents:
Henkel Kommanditgesellschaft auf Aktien
PROCTER & GAMBLE E.T.C.

Headword:
Fabric softening composition/UNILEVER

Relevant legal provisions:
EPC Art. 108, 123(2), 54

Keyword:
"Admissibility of the appeal (yes): only one appeal fee due"
"Extension beyond content of the documents as originally filed
of claim 10 according to the main and first to fifth auxiliary
requests (yes)"
"Novelty of sixth to eighth auxiliary requests (no) - no novel
selection"

Decisions cited:
G 0003/99, T 0279/89

Catchword:
-



Case Number: T 0228/01 - 3.3.6

D E C I S I O N
of the Technical Board of Appeal 3.3.6
of 21 May 2004

Appellants:

(Proprietors of the
patent)

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and

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Respondent 01:

(Opponent 01)

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Representative:

-

Respondent 02:
(Opponent 02)

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Representative:

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted 18 December 2000
revoking European patent No. 0507478 pursuant
to Article 102(1) EPC.**

Composition of the Board:

Chairman: P. Krasa
Members: L. Li Voti
J. H. Van Moer

Summary of Facts and Submissions

- I. The present appeal is from the decision of the Opposition Division to revoke the European patent No. 0 507 478, concerning a fabric softening composition containing a non-ionic stabilising agent.
- II. In their notices of opposition the two Opponents sought revocation of the patent on the grounds of Articles 100(a) and 100(c) EPC. An objection on the ground of Article 100(b) EPC was moreover filed by one of the Opponents in regard to the amended requests submitted by the Patent Proprietors.

As regards novelty and inventive step, the following documents were inter alia cited in support of the oppositions:

(1): EP-A-0309052

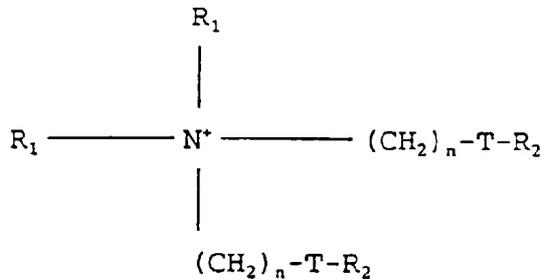
(9): EP-A-0346634

- III. The Patent Proprietors submitted during the opposition proceedings a main request and first to eighth auxiliary requests. The main request and the first to fifth auxiliary requests consisted of a set of 11 claims, whilst the sixth to eighth auxiliary requests consisted of a set of 9 claims each.

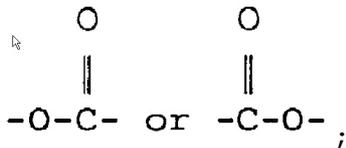
The independent claims 1 and 10 of the **main request** read, respectively, as follows:

"1. An aqueous liquid fabric softening composition comprising a water insoluble cationic fabric softening

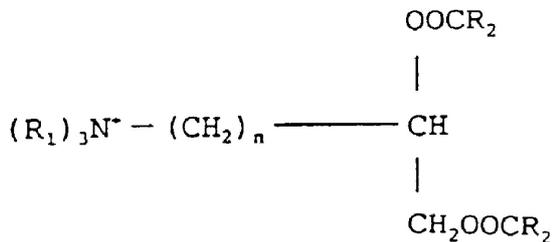
agent and a nonionic stabilising agent characterised in that the water insoluble cationic fabric softening agent is a biodegradable quaternary ammonium material represented either by the formula:



wherein each R₁ group is independently selected from C₁₋₄ alkyl, alkenyl or hydroxyalkyl groups; each R₂ group is independently selected from C₈₋₂₈ alkyl or alkenyl groups; T is



and n is an integer from 0-5,
or by the formula:



wherein R₁, n and R₂ are as defined above, and in that the non-ionic stabilising agent is a linear C₈ to C₂₂ alcohol alkoxyated with 10 to 20 moles of alkylene oxide, or mixtures thereof with a C₁₀ to C₂₀ alcohol."

"10. Use, in an aqueous, liquid fabric softening composition comprising a water insoluble cationic fabric softening agent which is a biodegradable quaternary ammonium material having at least one ester link, of a nonionic stabilising agent which is a linear C₈ to C₂₂ alcohol alkoxyated with 10 to 20 moles of alkylene oxide, or mixtures thereof with a C₁₀ to C₂₀ alcohol in order to improve the stability of the composition below ambient temperature."

Dependent claims 2 to 8 related to particular embodiments of the claimed product, independent claim 9 to a process for making such a product and dependent claim 11 to a particular embodiment of the claimed use.

Claims 1 and 10 of the **first auxiliary request** differed from the respective claims of the main request insofar as the claimed liquid fabric softening composition also comprised **a fatty acid material**.

Claims 1 and 10 of the **second auxiliary request** differed from the respective claims of the first auxiliary request insofar as the nonionic stabilising agent was **no longer a mixture of a linear C₈ to C₂₂ alcohol alkoxyated with 10 to 20 moles of alkylene oxide with a C₁₀ to C₂₀ alcohol**.

Claims 1 and 10 of the **third auxiliary request** differed from the respective claims of the second auxiliary request insofar as **the water insoluble cationic fabric softening agent** used in claim 10 was **as defined in claim 1**.

Claims 1 and 10 of the **fourth auxiliary request** differed from the respective claims of the third auxiliary request insofar as **the fatty acid material was no longer an essential component.**

Claims 1 and 10 of the **fifth auxiliary request** differed from the respective claims of the third auxiliary request insofar as **the fatty acid material was selected from C₈₋₂₄ alkyl and alkenyl monocarboxylic acids and polymers thereof.**

The **sixth, seventh and eighth auxiliary requests** differed from, respectively, the fourth, the second and the fifth auxiliary requests insofar as they **did not contain any longer the use claims 10 and 11.**

IV. In its decision the Opposition Division found *inter alia* that

- the claimed invention complied with the requirements of Article 83 EPC;
- claim 10 of the main request and the corresponding claims of the first to fifth auxiliary requests did not comply with the requirement of Article 123(2) EPC insofar as it contained the wording "in order to improve the stability of the composition below ambient temperature";
- the subject-matter of claim 1 according to the sixth auxiliary request lacked novelty *inter alia* in the light of the teaching of document (1);

- the subject-matter of claim 1 according to the seventh or eighth auxiliary request was novel over the cited prior art, e.g. documents (1) and (9), but lacked an inventive step in the light, e.g., of the teaching of these documents.

V. An appeal was filed against this decision by the Patent Proprietors (Appellants).

The Appellants submitted in the statement of the grounds of appeal inter alia that

- the disputed wording of claim 10 of the main request (and of the corresponding claim of the first to fifth auxiliary requests) did not constitute added subject-matter;
- the subject-matter of claim 1 according to the sixth auxiliary request amounted to a selection from the broader disclosures of the documents of the prior art, e.g. document (1), and was thus novel;
- none of the cited documents dealt with the technical problem addressed in the patent in suit, i.e. the improvement of the storage stability of fabric softening compositions at low temperatures;
- therefore, the subject-matter of claim 1 according to the seventh or eighth auxiliary request was inventive.

VI. The Respondent and Opponent 02 submitted in writing *inter alia* that

- the appeal was inadmissible since it had been lodged jointly by two companies and only one appeal fee had been paid;
- claim 10 of the main request and the corresponding claim of the first to fifth auxiliary requests contravened the requirements of Articles 123(2) EPC for the reasons given in the decision of first instance;
- claim 1 of the sixth auxiliary request lacked novelty *inter alia* in the light of document (1);
- claim 1 of the seventh and eighth auxiliary requests lacked novelty *inter alia* in the light of document (9).

The Respondent and Opponent 01 maintained all the objections put forward at first instance.

VII. The Appellants requested that the decision of first instance be set aside and that the patent be maintained on the basis of the main request or of one of the first to eighth auxiliary requests, all of them filed with the statement of the grounds of appeal and being identical with the respective requests submitted in the course of the opposition proceedings (see point III). The Appellants requested furthermore oral proceedings in case the Board intended to maintain the appealed decision.

Respondent 01 requested that the appeal be dismissed and, auxiliary, oral proceedings.

Respondent 02 requested that the appeal be rejected as being inadmissible and, auxiliary, that the appeal be dismissed and further that oral proceedings be scheduled.

VIII. The Board informed the parties in the communication dated 12 November 2003, and sent as annex to the summons to oral proceedings, that in the light of G 3/99 the Appellants had to pay in the present case only one appeal fee.

IX. The Appellants informed the Board under cover of a letter dated 25 February 2004 that they would not attend the oral proceedings scheduled for 5 March 2004.

The Board informed then the parties that oral proceedings had been cancelled and that the proceedings were to be continued in writing.

Reasons for the Decision

1. *Admissibility of the appeal*

Respondent 02 argued that the appeal was inadmissible since it had been lodged jointly by two companies paying only one appeal fee.

In a communication dated 12 November 2003 as annex to the summons to oral proceedings, the Board had informed the parties that, in the light of G 3/99 (OJ EPO 2002,

347, point 17 of the reasons for the decision), an appeal filed in common has to be dealt as a single appeal filed by a single party and that therefore the Appellants had to pay in the present case only one appeal fee.

The Board concludes that the appeal is thus admissible.

2. *Article 83 EPC*

The Board has no reason to depart from the decision of the first instance that the claimed invention complies with the requirements of Article 83 EPC (see points 1.1 to 1.3.1 on pages 3 and 4 of the grounds for the decision).

Since the appeal fails on other grounds further details are unnecessary.

3. *Article 123(2) EPC*

3.1 Main request

3.1.1 Claim 10 of this request requires that the nonionic stabilising agent is used in the softening composition "in order to improve the stability of the composition below ambient temperature".

The Board agrees with the Appellants that the wording "ambient temperature" would be understood by the skilled person to mean a temperature between 20 and 30°C and that this claim thus relates to the improvement of the stability of the softening compositions below this range of temperatures.

However, the original documents of the application from which the patent in suit has been granted do not contain the same wording used in claim 10.

This has not been disputed by the Appellants.

- 3.1.2 The Board agrees that the original description suggests that "Concentrates and storage stability at low temperatures are however desired by the consumer." (page 2, lines 1 to 2).

Moreover, it is emphasized in the discussion of the results of example 1 that "addition of selected nonionic stabilising agents counteracts destabilisation to give stable concentrated compositions" (see page 9, lines 16 to 24). The stability of the compositions is, however, measured in the example only at ambient temperature and at 5°C (see tables on page 8).

Therefore, it cannot be disputed that the stability of such compositions at 5°C, i.e. at one specific temperature below ambient temperature, is improved.

However, the only further passage in the application as filed of any importance in the present context is the above quoted general and unspecific reference to an undefined low temperature in connection with a consumers' desideratum. This cannot be taken as sufficient support for the use of a nonionic stabilising agent as claimed for improving the stability of the respective composition in the whole range of temperatures below the ambient one, as required by claim 10.

Therefore, claim 10 contravenes the requirements of Article 123(2) EPC.

3.1.3 Since the main request has already to be dismissed on these grounds there is no need to deal with the other objections raised by the Respondents.

3.2 First to fifth auxiliary requests

3.2.1 The Board is satisfied that the claims of these requests comply with the requirements of Article 123(2) EPC.

Since claim 10 of these requests contains the same wording discussed under point 3 above, these requests have also to be dismissed for the same reasons put forward in point 3.1.2 above.

3.3 Sixth to eighth auxiliary request

3.3.1 The Board is satisfied that the claims of these requests comply with the requirements of Article 123(2) EPC.

4. *Novelty*

4.1 Sixth auxiliary request

4.1.1 Claim 1 of this request relates to a fabric softening composition comprising a specific water insoluble cationic fabric softening agent comprising at least one ester group and a nonionic stabilising agent which is a linear C₈ to C₂₂ alcohol alkoxyated with 10 to 20 moles of alkylene oxide.

Document (1) discloses fabric softening compositions comprising the same type of softening agents as that of the disputed claim 1 and a linear alkoxyated alcohol (see e.g. page 3, line 46 to page 4, line 7). This has not been disputed by the Appellants.

Moreover, this document discloses that the most preferred linear alkoxyated alcohols are the C₈₋₁₈ linear fatty alcohols with 1 to 10 moles of ethylene oxide (see page 8, lines 42 to 44).

- 4.1.2 The Board concludes therefore that document (1) teaches the skilled person to use all compounds encompassed by the class of C₈₋₁₈ linear fatty alcohols with 1 to 10 moles of ethylene oxide. In particular it teaches to use not only the specific nonionic surfactants listed on page 8, lines 45 to 54, which compounds comprise less than 10 moles of ethylene oxide, but also a C₈₋₁₈ alkyl fatty alcohol ethoxylated with 10 moles of ethylene oxide, i.e. a nonionic stabilising agent according to claim 1 of the sixth auxiliary request.

Since a compound according to the attacked claim 1 is explicitly disclosed in document (1), the Board agrees with the decision of first instance that the criteria for a selection invention summarised in decision T 279/89 cannot be fulfilled in the present case (see point 1.4 on page 7 of the grounds for the decision and point 4.5 on page 6 of the statement of the grounds of appeal).

Therefore, the subject-matter of said claim 1 lacks novelty.

4.1.3 Since the sixth auxiliary request has already to be dismissed on these grounds there is no need to deal with the other objections raised by the Respondents.

4.2 Seventh auxiliary request

4.2.1 Claim 1 of this request differs from claim 1 of the sixth auxiliary request insofar as the claimed composition must contain a fatty acid material.

The Opposition Division had decided that the claimed subject-matter was novel over document (9).

Respondent 02 maintained, conversely, that this document detracted from the novelty of the claimed subject-matter.

The Appellants acknowledged the decision of the first instance in regard to novelty and did not submit any comments on the Respondent's submissions.

Since this novelty objection had been considered at first instance and the Appellants have renounced to be heard at oral proceedings, the Board concludes that the requirements of Article 113 EPC are not contravened in considering this document for the evaluation of novelty of the claimed subject-matter.

4.2.2 Document (9) discloses in its claim 1 a combination of an ester quat of the type used in the patent in suit and a fatty acid material, which is specified in claim 6 to be a tallow fatty acid. The same teaching, as put forward by Respondent 02, is also contained in the description (see page 2, lines 26 to 34 and page 2, line 48 to page 3, line 1). In particular, this

document teaches that the disclosed products can comprise a nonionic dispersing agent (page 3, lines 55 to 56). Such a nonionic dispersing agent can be a condensation product of 4 to 40, preferably of 4 to 20 moles ethylene oxide and/or propylene oxide with 1 mole of an aliphatic C₁₀₋₂₀ alcohol, as indicated by the Respondent 02 in paragraph 4.2.2 on page 9 of its letter of 16 January 2002 (see also page 4, lines 4 to 6).

Particularly preferred are the condensation products of coconut, tallow or oleyl alcohol with ethylene oxide (page 4, lines 8 to 9).

- 4.2.3 Thus, this document teaches the skilled person to use any of the nonionic dispersing agent of the preferred class of compounds mentioned above and, thus, also a coconut, tallow or oleyl alcohol alkoxyated with 20 moles of ethylene oxide, i.e. one according to claim 1 of the seventh auxiliary request.

The criteria for a selection invention thus cannot apply in the present case (see also points 4.1.1 and 4.1.2 above).

Therefore, the subject-matter of the seventh auxiliary request lacks novelty.

4.3 Eight auxiliary request

- 4.3.1 Claim 1 of this request differs from claim 1 of the seventh auxiliary request insofar as it requires that the fatty acid material is selected from C₈₋₂₄ alkyl and alkenyl monocarboxylic acids and polymers thereof.

Since document (9) discloses compositions comprising tallow fatty acids (see point 4.2.2 above), the subject-matter of claim 1 of this request lacks novelty for the same reasons put forward in points 4.2.2 and 4.2.3 above.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Rauh

P. Krasa