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**Datasheet for the decision
of 26 February 2010**

Case Number: T 0170/08 - 3.3.01

Application Number: 02715585.2

Publication Number: 1363493

IPC: A01N 31/04

Language of the proceedings: EN

Title of invention:

Method and compositions for disinfecting hard surfaces

Applicant:

Reckitt Benckiser Inc.

Opponent:

-

Headword:

Disinfecting compositions/RECKITT BENCKISER LTD.

Relevant legal provisions:

EPC Art. 123(2)
RPBA Art. 15(6)(3)

Relevant legal provisions (EPC 1973):

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Keyword:

"Main and First Auxiliary Request: Amendments - supported by the application as originally filed (no)"

Decisions cited:

T 0860/00

Catchword:

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Case Number: T 0170/08 - 3.3.01

D E C I S I O N
of the Technical Board of Appeal 3.3.01
of 26 February 2010

Appellant: Reckitt Benckiser Inc.
Morris Corporate Center IV
399 Interpace Parkway
Parsippany, New Jersey 07054 (US)

Representative: Holmes, Jeremy
Reckitt Benckiser
Corporate Services Limited
Legal Department - Patents Group
Dansom Lane
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 16 July 2007
refusing European application No. 02715585.2
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: P. Ranguis
Members: J.-B. Ousset
C.-P. Brandt

Summary of Facts and Submissions

I. The appellant lodged an appeal against the decision of the examining division to refuse the European patent application No. 02 715 585.2

II. The examining division considered that the main and single pending request before it did not fulfil the requirements of Article 54 EPC in view of the disclosure of the documents D1 (EP-A-848 907) and D2 (US-A-4 678 658). Moreover, claim 2 of this request lacked clarity (Article 84 EPC).

III. Against this decision, the appellant filed an appeal and submitted its statement setting out the grounds of appeal. Annexed to this statement, the appellant filed a revised main request and an auxiliary request. It argued as follows:

- It was believed that the main and the auxiliary requests fulfilled the requirements of Article 123(2) EPC. The amount of alcohol had been limited to 50 to 70 weight percent. Claim 1 of the auxiliary request had been amended so that the alcohol of the claimed composition was ethanol.

Claim 1 of the main request read as follows:

"1. A composition for sanitizing and/or disinfecting a hard surface comprising as ingredients essential to providing a sanitizing and/or disinfecting effect sufficient to exhibit a polio virus log reduction of at least 1:

an alcohol selected from the group consisting of methanol, ethanol, n-propanol, isopropanol, n-butanol, benzyl alcohol, and mixtures thereof which is present in an amount of from 50 to 70 weight percent;
an effective amount of a pH modifying agent selected from: alkali metal hydroxides, ammonium hydroxide, Na₄EDTA; tri- or tetraammonium ethylenediaminetetraacetate, tri- or tetrapotassium ethylenediaminetetraacetate, alkali metal carbonates, hydrogen carbonates, alkali metal salts of borate and alkali metal salts of phosphates, such that the pH range of the composition is from 10.0 to 12.0;
and water;
wherein the composition optionally further comprises a component selected from the group consisting of antimicrobials, corrosion inhibitors, perfumes, perfume carriers, solvents, surfactants, propellants, pH buffers, fungicides, film-forming polymers, and anti-oxidants."

Claim 3 of the main request read as follows:

"3. The composition according to claim 2, wherein ethanol is the sole alcohol present in the composition."

Claim 1 of the auxiliary request read as follows:

"1. A composition for sanitizing and/or disinfecting a hard surface comprising as ingredients essential to providing a sanitizing and/or disinfecting effect sufficient to exhibit a polio virus log reduction of at least 1:

an alcohol present in an amount of from 50 to 70 weight percent wherein ethanol is the sole alcohol present in the composition;

an effective amount of a pH modifying agent selected from: alkali metal hydroxides, ammonium hydroxide, Na₄EDTA; tri- or tetraammonium

ethylenediaminetetraacetate, tri- or tetrapotassium ethylenediaminetetraacetate, alkali metal carbonates, hydrogen carbonates, alkali metal salts of borate and alkali metal salts of phosphates, such that the pH range of the composition is from 10.0 to 12.0; and water;

wherein the composition optionally further comprises a component selected from the group consisting of antimicrobials, corrosion inhibitors, perfumes, perfume carriers, solvents, surfactants, propellants, pH buffers, fungicides, film-forming polymers, and anti-oxidants."

IV. In the annex to the summons to oral proceedings, the board raised as a preliminary opinion the following objections under Article 123(2) EPC:

Main request - Added matter

- a) Claim 1 of the main request contains the expression "as ingredients essential to providing a sanitizing and/or disinfecting effect sufficient to exhibit a polio virus log reduction of at least 1". This expression has apparently no counterpart in the description as originally filed.
- b) The technical feature "to 100% weight percent" after the word "water" in the claimed composition

present in the originally filed version of the claims has now been deleted in the present main request. This contravenes the requirements of Article 123(2) EPC.

- c) The expression "wherein the amount of alcohol is inversely proportional to the pH of the composition." was also deleted from the wording of the originally filed set of claims. However, this feature appears to be an essential feature of the invention (see page 4, lines 20 to 21). Such a deletion defines a new subject-matter, which is not directly and unambiguously derivable from the originally filed description.
- d) Claim 3 contains the word "sole" to characterize ethanol, which excludes any other alcohol and thus describes compositions according to claim 1 containing no other alcohol. This amendment has also apparently no basis in the description as originally filed.
- e) The expression in claim 5 "to achieve a polio virus reduction of at least 1" has no basis in the description as originally filed.

First auxiliary request - Added matter

The observations under points a) to e) are also relevant for this request.

- V. The appellant did not take a position in writing on the observations of the board.

- VI. Oral proceedings took place on 26 February 2010 in the absence of the appellant, who confirmed following a phone call from the Registrar that no one would attend the oral proceedings (see the Minutes).
- VII. The appellant requested in writing that the decision under appeal be set aside and a patent be granted either on the basis of the main request or in the alternative on the basis of the auxiliary request, both submitted with the statement setting out the grounds of appeal.
- VIII. At the end of the oral proceedings, the decision of the board was announced.

Reasons for the Decision

1. The appeal is admissible.
2. Absence of the appellant at the oral proceedings before the board
 - 2.1 In accordance with Article 15(3) RPBA (Rules of Procedure of the Boards of Appeal), the board relied for its decision only on the appellant's written submissions set out in the statement of grounds of appeal. The Board was in a position to decide at the conclusion of the oral proceedings, since the case was ready for decision (Article 15(6) RPBA) and the voluntary absence of the appellant is not a reason for delaying a decision (Article 15(3) RPBA).

Main and auxiliary requests

3. Amendments

- 3.1 The board had to examine whether the claimed subject-matter comprises technical information which could not have been deduced directly and unambiguously by the person skilled in the art from the disclosure of the application as originally filed (see T 860/00, point 1.1 of the reasons).
- 3.2 Claim 1 of both requests contains the expression "as ingredients essential to providing a sanitizing and/or disinfecting effect sufficient to exhibit a polio virus log reduction of at least 1". This expression has no counterpart in the description as originally filed. Such an amendment defines a new subject-matter which is not directly and unambiguously derivable from the originally filed description.
- 3.3 The technical feature "to 100% weight percent" after the word "water" present in Claim 1 of the application as originally filed has been deleted in Claim 1 of both requests. However, this feature appears to be an essential feature of the invention (see page 2, line 31). Such a deletion defines a new subject-matter which is not directly and unambiguously derivable from the originally filed description.
- 3.4 The expression "wherein the amount of alcohol is inversely proportional to the pH of the composition." present in Claim 1 as originally filed has been deleted from Claim 1 of both requests. However, this feature appears to be an essential feature of the invention

(see page 4, lines 20 to 21). Such a deletion defines a new subject-matter which is not directly and unambiguously derivable from the originally filed description.

3.5 The compositions claimed in claim 3 of the main request as well as the compositions of claim 1 of the auxiliary request are *inter alia* characterized in that ethanol is the sole alcohol present therein.

3.5.1 Claim 1 as originally filed specifies that the claimed compositions for sanitizing and/or disinfecting hard surfaces must contain a given amount of alcohol (40 to 70 weight percent) selected from among a limited list of alcohols. Moreover, the description of the application as originally filed mentions on page 3, lines 25 to 26 as well as on page 5, lines 20 to 21, that ethanol is the preferred alcohol to be used in the claimed compositions in an amount ranging from 50 to 70 weight percent.

3.5.2 However, there is no indication in the description as originally filed that ethanol must be the **sole** (emphasis added by the board) alcohol present in the claimed compositions. Hence this explicit limitation, not being clearly and unambiguously derivable from the description as originally filed, extends beyond the content of the original disclosure.

3.6 The expression in claim 5 of the main request and claim 3 of the auxiliary request "to achieve a polio virus log reduction of at least 1" has no basis in the description as originally filed. Such an amendment also defines a new subject-matter which is not directly and

unambiguously derivable from the originally filed description.

3.7 The appellant did not comment on these points, which had already been raised by the board in its annex to the summons to oral proceedings. Therefore, the board does not see any reason to depart from its preliminary opinion.

3.8 The main and auxiliary requests do not meet the requirements of Article 123(2) EPC and are to be rejected.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar

The Chairman

B. Atienza Vivancos

P. Ranguis