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**Datasheet for the decision
of 4 October 2018**

Case Number: T 2169/13 - 3.3.02

Application Number: 02724961.4

Publication Number: 1370136

IPC: A01N25/34, A01N25/10,
A01N51/00, A01N43/653, A01C1/06

Language of the proceedings: EN

Title of invention:

TREATED PLANT SEEDS WITH CONTROLLED RELEASE OF ACTIVE AGENTS

Applicant:

STEPAN COMPANY

Headword:

STEPAN / SEEDS COATING

Relevant legal provisions:

EPC Art. 123(2)

Keyword:

Amendments - added subject-matter (yes)

Decisions cited:

Catchword:



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Case Number: T 2169/13 - 3.3.02

D E C I S I O N
of Technical Board of Appeal 3.3.02
of 4 October 2018

Appellant: STEPAN COMPANY
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted on 17 May 2013
refusing European patent application No.
02724961.4 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman M. O. Müller
Members: M. Maremonti
P. de Heij

Summary of Facts and Submissions

- I. The appeal by the applicant (hereinafter "appellant") lies from the decision of the examining division to refuse the European application No. 02 724 961.4.
- II. The examining division came *inter alia* to the following conclusions on the claim request filed by the appellant on 11 March 2013:
- The claim request complied with Article 123(2) EPC.
 - The claimed subject-matter, however, did not meet the requirements of Article 84 EPC with respect to clarity and support by the description.
 - The subject-matter of claim 1 did not involve an inventive step.
- III. With its statement setting out the grounds of appeal, the appellant contested the reasoning of the examining division and submitted that the subject-matter of claims 1 to 31 as filed on 11 March 2013 was clear and supported by the description. Moreover, it involved an inventive step.
- IV. Independent claim 1 filed on 11 March 2013 reads as follows:
- "1. A method of controlling the release rate of an agricultural active ingredient from a seed treated with the active ingredient, the method comprising the steps of:*
- providing a seed that has been treated with an agricultural active ingredient selected from the group consisting of a growth factor, a growth regulator, or a pesticide;*

applying to the treated seed a film comprising an emulsion of a polymer in a liquid wherein the polymer has a solubility in the liquid at 25°C of less than 5% by weight and wherein the active ingredient has a solubility in the liquid at 20°C of less than 10 g/l; and

curing the film to form a water insoluble polymer coating having a glass transition temperature within the range of from 10°C to 50°C on the surface of the treated seed; wherein the polymer comprises:

- (a) at least one monomer unit derived from an ethylenically unsaturated monomer; and*
- (b) at least one surface active agent unit derived from a polymerizable surface active agent in the form of an amine salt comprising:
 - (i) at least one acid, wherein the acid is a sulfonic acid, a sulfuric acid ester, a carboxylic acid, or a phosphoric acid, or a mixture thereof; and*
 - (ii) at least one nitrogenous base, wherein the nitrogenous base contains at least one nitrogen atom and at least one ethylenically unsaturated moiety; and**

wherein the ethylenically unsaturated monomer and the polymerizable surface active agent have polymerized to form the polymer."

Dependent claims 2 to 28 define specific embodiments of the method of claim 1, claims 29 and 30 are directed to a seed coated by the method of claim 1 and claim 31 to a method of protection of a seed, comprising treating the seed by the method of claim 1.

- V. On 14 June 2018 the Board issued a communication in preparation for the oral proceedings, drawing the

attention of the appellant to salient issues that might possibly be debated at the oral proceedings. In particular, the Board expressed the preliminary opinion that the claimed subject-matter did not appear to have basis in the application as filed, thus contravening Article 123(2) EPC.

- VI. In its reply to the Board's communication dated 4 September 2018, the appellant did not react to the objections raised by the Board but merely communicated that it will not attend the oral proceedings.
- VII. Oral proceedings before the Board were held on 4 October 2018 in the absence of the appellant in accordance with Rule 115(2) EPC and Article 15(3) RPBA.
- VIII. Final Requests

The appellant requested in writing that the decision under appeal be set aside and a patent be granted on the basis of claims 1 to 31 as filed on 11 March 2013 before the examining division.

Reasons for the Decision

The appeal complies with Articles 106 to 108 and Rule 99 EPC and is therefore admissible.

Added subject-matter - Article 123(2) EPC

1. Claim 1 as originally filed reads :

"1. A method of controlling the release rate of an agricultural active ingredient from a seed treated with the active ingredient, the method comprising the steps of:

providing a seed that has been treated with an agricultural active ingredient;
applying to the treated seed a film comprising an emulsion of a polymer in a liquid in which both the agricultural active ingredient and the polymer have low levels of solubility; and
curing the film to form a water insoluble polymer coating on the surface of the treated seed".

2. Claim 1 at issue (IV, *supra*) has been substantially amended as compared with claim 1 as originally filed, *inter alia* by defining

- the solubility of the mentioned polymer;
- the solubility of the mentioned active ingredient;
- the glass transition temperature (hereinafter "Tg") of the polymer coating and
- the nature of the polymer forming the coating.

2.1 As to the polymer forming the coating, the definition of its nature as inserted into claim 1 is not disclosed *expressis verbis* in the application as filed. In fact, the inserted definition derives from the wording of claim 1 of three out of the five documents cited on page 7, lines 6 to 8 of the application as filed, namely WO 98/32773, WO 00/05950 and WO 00/06611.

2.2 The passage mentioned on page 7 of the application as filed recites that "*The polymers derived from unsaturated amine salts that are described in WO 98/32726, WO 98/32773, WO 00/05950, WO 00/06612, and WO 00/06611, to the Stepan Company, are preferred*".

2.3 The Board holds that the incorporation into a claim of features taken from documents acknowledged in the

description of an application could exceptionally be accepted under Article 123(2) EPC only if said acknowledgement pointed to **specific passages** of the cited documents, directly and unambiguously disclosing the features in question.

- 2.4 In the present case, the documents cited on page 7, lines 6 to 8 of the application as filed are referred to in very general terms, without pointing to any specific section of the documents, let alone to claim 1 of those documents. Furthermore, only three of these documents (WO 98/32773, WO 00/05950 and WO 00/06611) contain in their respective claim 1 the wording now present in claim 1 at issue. The other two documents, namely WO 98/32726 and WO 00/06612 do not mention such a wording, at least not in their claim 1. Therefore, both a selection among the cited documents and a selection within the documents has been made.
- 2.5 The Board comes thus to the conclusion that the polymer definition included in claim 1 at issue is not directly and unambiguously disclosed in the application as originally filed, either explicitly or by reference to the cited documents. Already for this reason, the requirements of Article 123(2) EPC are thus not met.
3. Moreover, the polymer definition referred to above has been *combined* in claim 1 at issue with the Tg of the polymer coating defined to lie within the range of from 10°C to 50°C. This feature is disclosed on page 9, line 5 to 7 of the application as filed, as to being a "*preferred*" range of the polymer's Tg within a "*preferred embodiment of the invention*" (see page 8, line 30). First of all, this embodiment includes further preferred options, namely the range of 15°C to 40°C as more preferred range and of 15°C to 25°C as

even more preferred range. Secondly, according to this embodiment the polymer emulsion also includes a "non-migrating" surfactant, which can either be a molecule bound to the polymer (as in claim 1 at issue) or represent a separate entity (see page 8, lines 3-4).

4. Therefore, even considering, *arguendo*, the polymer defined in claim 1 at issue (already resulting from a double selection, see 2.4, *supra*) as to being originally disclosed among other polymers, its combination with the Tg mentioned in claim 1 would represent the result of multiple further selections, for which no direct and unambiguous basis exists in the application as originally filed, contrary to the requirements of Article 123(2) EPC.
5. In the Board's judgement, therefore, claim 1 and claims 2 to 31 referring to it do not comply with Article 123(2) EPC.
6. The above objections under Article 123(2) EPC were already raised by the Board in its communication dated 14 June 2018 (V, *supra*). The appellant did not react to these objections and chose not to attend the oral proceedings instead.

Conclusions

6. The sole claim request of the appellant is not allowable under Article 123(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



N. Maslin

M. O. Müller

Decision electronically authenticated