

**Internal distribution code:**

- (A) [ - ] Publication in OJ  
(B) [ - ] To Chairmen and Members  
(C) [ - ] To Chairmen  
(D) [ X ] No distribution

**Datasheet for the decision  
of 11 October 2016**

**Case Number:** T 0444/14 - 3.3.07

**Application Number:** 05291976.8

**Publication Number:** 1767185

**IPC:** A61K8/11, A61K8/81, A61Q5/12,  
D06M13/00, A61Q5/02, A61Q5/06,  
A61Q13/00, C11D3/50

**Language of the proceedings:** EN

**Title of invention:**  
Core shell capsules containing an oil or waxy solid

**Patent Proprietor:**  
Takasago International Corporation

**Opponents:**  
Symrise AG  
BASF SE  
Givaudan SA  
International Flavors & Fragrances Inc.  
Henkel AG & Co. KGaA

**Relevant legal provisions:**  
EPC Art. 54

**Keyword:**  
Novelty - main request (yes)



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

European Patent Office  
D-80298 MUNICH  
GERMANY  
Tel. +49 (0) 89 2399-0  
Fax +49 (0) 89 2399-4465

Case Number: T 0444/14 - 3.3.07

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.07**  
**of 11 October 2016**

**Appellant:** Takasago International Corporation  
(Patent Proprietor) 37-1, Kamata 5-chome,  
Ohta-ku  
Tokyo-to 144-8721 (JP)

**Representative:** Nevant, Marc  
Cabinet Beau de Loménie  
158, rue de l'Université  
75340 Paris Cedex 07 (FR)

**Respondent:** Symrise AG  
(Opponent 1) Mühlenfeldstrasse 1  
37603 Holzminden (DE)

**Representative:** Eisenführ Speiser  
Patentanwälte Rechtsanwälte PartGmbB  
Postfach 10 60 78  
28060 Bremen (DE)

**Respondent:** BASF SE  
(Opponent 2) 67056 Ludwigshafen (DE)

**Representative:** Gallasch, Uta  
BASF Schweiz AG  
Klybeckstrasse 141  
4057 Basel (CH)

**Respondent:** Givaudan SA  
(Opponent 3) Chemin de la Parfumerie 5  
1214 Vernier-Genève (CH)

**Representative:** McStea, John Anthony  
Global Patents  
Givaudan Schweiz AG

Ueberlandstrasse 138  
8600 Dübendorf (CH)

**Respondent:** International Flavors & Fragrances Inc.  
(Opponent 4) 521 West 57th Street  
New York, NY 10019 (US)

**Representative:** Lawrence, John  
Barker Brettell LLP  
100 Hagley Road  
Edgbaston  
Birmingham B16 8QQ (GB)

**Respondent:** Henkel AG & Co. KGaA  
(Opponent 5) Henkelstrasse 57  
40589 Düsseldorf (DE)

**Representative:** Henkel AG & Co. KGaA  
CLI Patents  
Z01  
40191 Düsseldorf (DE)

**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
13 December 2013 concerning maintenance of the  
European Patent No. 1767185 in amended form.**

**Composition of the Board:**

**Chairman** J. Riolo  
**Members:** D. Semino  
D. T. Keeling

## Summary of Facts and Submissions

- I. Five notices of opposition were filed in which revocation of European Patent No. 1 767 185 in its entirety was requested.
- II. During opposition proceedings, the following documents *inter alia* were cited:
- P26: US-A-2004/0115091  
P65: WO-A-02/074430  
P72: WO-A-2004/016234  
P82: EP-A-1 533 364
- III. The decision of the opposition division concerning maintenance of the patent in amended form was announced at the oral proceedings on 19 November 2013. It was based on 5 sets of claims filed as main request and as first to third auxiliary requests with letter of 19 September 2013 and as fourth auxiliary request during oral proceedings on 19 November 2013.

Claim 1 of the main request read as follows:

"1. A core shell capsule containing in the core an oil or waxy solid, wherein the oil or waxy solid comprises by weight:

- 60-100% of a perfume composition, which is a mixture of at least two perfume ingredients wherein:
  - a) aldehydes, including alpha beta unsaturated aldehydes constitute 0-20% by weight of the perfume composition;
  - b) primary or secondary amines constitute 0-10% by weight of the perfume composition;
  - c) 0-25% by weight of the perfume composition has  $\text{ClogP} > 4.0$ ;

d) 0-20% by weight of the perfume composition has  $\text{ClogP} > 5.0$ ; and

e) 0-20% by weight of the perfume composition has  $\text{ClogP} < 2.0$

● 0-40% by weight of benefit agents other than perfume ingredients;

wherein the capsule is an aminoplast capsule; and  
wherein  $\text{ClogP}$  is calculated using the CLOGP program available with the Chemoffice Ultra Software version 9."

Claim 1 of the first auxiliary request contained in addition the specification that the aminoplast capsule was "in the form of a dispersion". Claim 1 of the second and third auxiliary requests did not include the specification that the capsule "is an aminoplast capsule" but specified that "the shell is constituted of 50-100% formaldehyde-melamine or formaldehyde-melamine-urea or formaldehyde-urea condensation polymer, or of the corresponding partially etherified formaldehyde condensation polymers, preferably as methyl ethers". Claim 1 of the fourth auxiliary request corresponded to claim 1 of the second (and third) auxiliary request with the amendment of the quantity ranges to "80-100%" for the perfume composition and "0-20%" for the benefit agents.

IV. The decision of the opposition division, as far as relevant to the present decision, can be summarised as follows:

(a) The main request met the requirements of Article 123(2) EPC, was clear and was sufficiently disclosed.

- (b) Claim 1 of the main request was not novel in view of perfume A of document P65 when considering allyl amyl glycollate, citral diethyl acetal, linalool and linalyl acetate (being present at a total quantity of 70.5% by weight and meeting conditions a) to e)) as the perfume composition and litsea cubeba oil and orange oil Brazilian (being present at a total quantity of 29.5% by weight, with orange oil Brazilian containing 95% limonene with a ClogP value greater than 4) as benefit agents. This was in line with the patent specification which foresaw that there were ingredients (including essential oils, such as orange oil Brazilian) which could be classified under the perfume ingredient bucket or under the benefit agent bucket.
- (c) Claim 1 according to the first, second and third auxiliary requests was still not novel over P65, as therein the microcapsules were in the form of a dispersion and the material of the capsule was a polymer made of formaldehyde and melamine.
- (d) The fourth auxiliary request met the requirements of Article 123 EPC, clarity and sufficiency, essentially for the same reasons as given for the main request. The amendment of the quantity of perfume composition to 80-100% by weight of the oil or waxy solid in the core of the core shell capsule resulted in novelty over document P65, since the quantity by weight of the perfume composition in perfume A lay outside the amended range. In addition none of the other many cited documents anticipated the capsule of claim 1 of the fourth auxiliary request.

(e) The capsule of claim 1 as amended in the fourth auxiliary request was inventive over the various documents of the prior art (P26, P65, P72 and P82) which could be considered as equivalent starting points for the analysis of inventive step.

V. The patent proprietor (appellant) lodged an appeal against that decision. With the statement setting out the grounds of appeal the appellant filed twelve sets of claims as main request and as first to eleventh auxiliary requests.

The main request and the first and second auxiliary requests corresponded to the main request and to the first and second auxiliary requests on which the decision was based. Claim 1 of the third auxiliary requests read as follows:

"1. A core shell capsule containing in the core an oil or waxy solid, wherein the oil or waxy solid comprises by weight:

- 80-100% of a perfume composition, which is a mixture of at least two perfume ingredients wherein:

- a) aldehydes, including alpha beta unsaturated aldehydes constitute 0-20% by weight of the perfume composition;

- b) primary or secondary amines constitute 0-10% by weight of the perfume composition;

- c) 0-25% by weight of the perfume composition has  $\text{ClogP} > 4.0$ ;

- d) 0-20% by weight of the perfume composition has  $\text{ClogP} > 5.0$ ; and

- e) 0-20% by weight of the perfume composition has  $\text{ClogP} < 2.0$

- 0-20% by weight of benefit agents other than perfume ingredients;

wherein the capsule is an aminoplast capsule; and wherein ClogP is calculated using the CLOGP program available with the Chemoffice Ultra Software version 9."

- VI. Opponent 1 also filed an appeal, which was, however, withdrawn with letter of 19 September 2014.
- VII. In a communication sent in preparation of oral proceedings, the Board summarised the points to be dealt with, and provided a preliminary view on the issue of novelty supporting the view in the decision under appeal. This resulted in lack of novelty for claim 1 according to the main request and according to the first and second auxiliary requests (points 3 and 4 in the communication), while the amendment in claim 1 of the third auxiliary request conferred novelty on that claim for the same reasons as given in the decision under appeal for the request which was found to meet the requirements of the EPC (point 5).
- VIII. In response to that communication the appellant withdrew, with letter of 22 July 2016, the previous requests and filed three requests as main, first auxiliary and second auxiliary requests, whereby claim 1 of the main request corresponded to claim 1 of the third auxiliary request filed with the statement setting out the grounds of appeal (see point V, above).
- IX. Oral proceedings were held on 11 October 2016.
- X. The arguments of the appellant, as far as relevant to the present decision, can be summarised as follows:

The main request included in claim 1 the amendment in the range of the quantity of perfume composition



(80-100% by weight) which resulted in novelty over P65 being acknowledged by the opposition division. Therefore claim 1 of the main request was novel for the same reasons as in the decision.

XI. The appellant requested that the decision under appeal be set aside and the patent maintained on the basis of one of the three sets of claims corresponding to the main request and the first and second auxiliary requests, as specified by letter of 22 July 2016.

XII. The respondents did not file in this quality any submission, nor any request in appeal.

## **Reasons for the Decision**

### *Main request - novelty*

1. Claim 1 according to the (then) main request and first to third auxiliary requests was found to lack novelty over core shell capsules as disclosed in document P65 including perfume A as disclosed therein. Claim 1 of the current main request contains, however, with respect to those requests the amendment of the quantity of perfume composition of the oil or waxy solid in the core of the core shell capsule to 80-100% by weight, which amendment was acknowledged in the decision under appeal as the critical feature to confer novelty on claim 1 of the fourth auxiliary request. The Board must therefore analyse whether this conclusion of the opposition division can be confirmed.

1.1 Perfume A of P65 comprises 3.0% allyl amyl glycollate, 5.3% citral diethyl acetal, 32.0% linalool, 30.2% linalyl acetate, 3.0% litsea cubeba oil and 26.5%

orange oil Brazilian (paragraph bridging pages 6 and 7 of P65, all percentages are by weight).

- 1.2 It was stated in the decision and not contested by the parties that the ClogP values of the main ingredients of perfume A are 2.58 for allyl amyl glycollate, 4.34 for citral diethyl acetal, 2.75 for linalool, 3.7 for linalyl acetate and that orange oil Brazilian contains 95% of limonene which has a ClogP value greater than 4.
  
- 1.3 The Board concurs with the opposition division that allyl amyl glycollate, citral diethyl acetal, linalool, linalyl acetate are to be considered as the perfume composition of perfume A of P65 while orange oil Brazilian can be classified under the perfume ingredient bucket or under the benefit agent bucket. However, if it is classified as a perfume ingredient, then condition c) of claim 1 of the main request is not met as more than 25% by weight of the perfume composition has a ClogP greater than 4, while if it is considered as a benefit agent, then the quantity of the perfume composition is below 80% by weight of the oil or waxy solid in the capsule contrary to what is required by the amended range of claim 1 (80-100% by weight).
  
- 1.4 In agreement with the decision of the opposition division and with the argument of the appellant, it is therefore concluded that, in view of the amendment of the quantity of perfume composition to 80-100% by weight, the core shell capsule of claim 1 of the main request is novel over the disclosure of document P65.

*Main request - other issues*

2. All other issues were decided in favour of the appellant, once the amendment of the quantity of perfume composition of the oil or waxy solid in the core of the core shell capsule to 80-100% by weight was introduced into claim 1.
  
- 2.1 As the same amendment is made in claim 1 of the current main request and no objection against this request has been raised by the respondents in appeal (who actually in this quality did not file any submission, nor any request), the Board sees no reason to reopen any of the issues which were decided in favour of the appellant by the department of first instance.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent on the basis of the claims of the main request, as specified in the letter of 22 July 2016, and a description to be adapted.

The Registrar:

The Chairman:



S. Fabiani

J. Riolo

Decision electronically authenticated