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**Datasheet for the decision
of 19 July 2018**

Case Number: T 1385/14 - 3.2.06

Application Number: 07108950.2

Publication Number: 1994918

IPC: A61F13/15, A61F13/00

Language of the proceedings: EN

Title of invention:

Absorbent article with printed layer

Patent Proprietor:

The Procter & Gamble Company

Opponents:

Essity Hygiene and Health Aktiebolag
Kimberly-Clark Worldwide, Inc.
Unicharm Corporation

Headword:

Relevant legal provisions:

EPC Art. 56, 69, 84, 111(1)

Keyword:

Inventive step - auxiliary request 1 (no) - main request (no)
Remittal to the department of first instance - (no)
Claims - clarity - auxiliary request 2 (no) - interpretation
of ambiguous terms
Amendments - deletion of definition from description -
restriction of claim (no)

Decisions cited:

T 0197/10, T 2221/10

Catchword:



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Case Number: T 1385/14 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 19 July 2018

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 15 April 2014
revoking European patent No. 1994918 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: P. Cipriano
 J. Hoppe

Summary of Facts and Submissions

- I. The appellant (patent proprietor) filed an appeal against the decision of the opposition division to revoke European Patent No. 1 994 918. The opposition division found *inter alia* that the subject-matter of granted claim 1 lacked novelty in view of
- D1 WO 2004/006818 A1
- II. The appellant requested, as a main request, maintenance of the patent as granted, or, in the alternative, according to one of auxiliary requests 1 to 5 filed with its grounds of appeal. If one of the requests defined novel subject-matter, remittal to the opposition division for further prosecution was requested.
- III. The respondents (opponent 1 and opponent 2) each requested that the appeal be dismissed.
- IV. The parties were summoned to oral proceedings before the Board.
- V. In a communication sent in preparation for the oral proceedings, the Board informed the parties of its preliminary opinion on the case, in which it indicated *inter alia* that the subject-matter of claim 1 of the main request seemed to be novel over D1. With regard to inventive step, the Board discussed the technical problem when starting from D1. The Board further indicated that the deletion in the description made by way of auxiliary request 1 did not seem to affect its previous considerations and that the terminology "being printed with a conventional ink printing method" of auxiliary request 2 appeared to lack clarity.

VI. In its letters of 15 December 2017 and of 14 March 2018 the opponent 3 indicated that it would not attend the scheduled oral proceedings.

VII. Oral proceedings were held on 19 July 2018.

The appellant (patent proprietor) finally requested that the decision under appeal be set aside and the patent be maintained as granted,

auxiliarily,

that the patent be maintained in amended form on the basis of the claims of one of the auxiliary requests 1 or 2, in the given order, filed with the grounds of appeal on 22 August 2014,

auxiliarily,

if the Board came to the conclusion that inventive step needed to be assessed, that the case be remitted to the opposition division for further consideration.

The respondents (opponent 1 and opponent 2) requested finally

that the appeal be dismissed.

VIII. Claim 1 of both the main request and auxiliary request 1 reads:

"1. A feminine hygiene article (10) comprising:

i) a topsheet (12) made from nonwoven material or perforated polyolefinic film,

ii) a backsheet (16), and

iii) an absorbent core (14) placed between the topsheet (12) and the backsheet (16),

wherein said core (14) defines a core area (20) on the surface of the topsheet (16), said core area (20) being substantially smaller than the surface of the topsheet (16),

and Wherein (*sic*) said article (10) comprises a printed pattern (22),

said printed pattern (22) being printed on the garment facing side (161) of the backsheet (16), and wherein said printed pattern (22) is visible at least through a portion (21) of the area of the topsheet (12) which is outside the core area (20)."

- IX. Paragraph [0029] of the description of auxiliary request 1 reads (deletions in comparison to the main request are struck out):
- "The printed pattern 22 may be printed on the backsheet layer 16 with any conventional printing method, such as flexo print or roto gravure printing. The printed pattern 22 should be printed with an ink sufficiently strong to be visible through at least a portion of the topsheet 21 of the article outside the core area 20. A black ink may be used, but it may be preferred to use a coloured ink such as pink, violet, green, purple, blue or yellow, or even a combination of different coloured inks. By "printed pattern" we primarily mean a visible pattern obtained by a conventional ink printing method discussed above. ~~The term "printed pattern" also encompasses patterns obtained by less usual techniques but that provide the same or a similar effect, for example it may possible to provide a similar visual effect by heat crimping a plastic nonwoven layer (e.g. backsheet) so that the crimped area, which then becomes translucent, provides a similar visual effect as an ink printed area. For example, if the panty of the user is~~

~~colored, the color of panty will be more visible through the crimped zone."~~

X. Claim 1 of auxiliary request 2 reads:

"1. A feminine hygiene article (10) comprising:

- i) a topsheet (12) made from nonwoven material or perforated polyolefinic film,
- ii) a backsheet (16), and
- iii) an absorbent core (14) placed between the topsheet (12) and the backsheet (16),

wherein said core (14) defines a core area (20) on the surface of the topsheet (16), said core area (20) being substantially smaller than the surface of the topsheet (16),

and wherein said article (10) comprises a printed pattern (22), said printed pattern (22) being printed with a conventional ink printing method on the garment facing side (161) of the backsheet (16),

and wherein said printed pattern (22) is visible at least through a portion (21) of the area of the topsheet (12) which is outside the core area (20)."

XI. The arguments of the appellant relevant to the decision may be summarised as follows:

Request for remittal

Should the subject-matter of claim 1 of the main request be considered novel, remittal to the opposition division should occur, since the new interpretation of claim 1 fundamentally altered the discussion on

inventive step. A discussion on inventive step for this request had never taken place.

Further, the appellant should be allowed to have the case heard at two instances in order to be able to file further auxiliary requests, without being subject to tighter criteria before the Boards.

Main request - inventive step

The subject-matter of claim 1 differed from D1, in that none of the embodiments of D1 disclosed the feature "said printed pattern being printed on the garment facing side of the backsheet". This missing feature led to the objective technical problem of providing a feminine hygiene article with an improved solution to the problem of indicating to the user when the absorbed liquid was approaching the edges of the core, as mentioned in paragraphs [0007] and [0008] of the patent.

Should the Board not agree that such a problem was the objective problem to be solved, it was clear from paragraph [0025] that further potential advantages were provided, such as an increase in visibility of the printed pattern, which could also be used to formulate the objective technical problem.

The skilled person starting from D1 would not arrive at the claimed solution, since page 8, lines 20-25, taught away from changing the position of the printed pattern to the garment facing side of the backsheet. The obvious solution was to make the backsheet more translucent.

Auxiliary request 1 - inventive step

Under Article 69 EPC, the description and the drawings should be used to interpret the claims. The amendment in the description removed the less usual techniques providing similar effects from the various interpretation possibilities for the term "printed pattern", thereby restricting the claim and making its subject-matter inventive.

Auxiliary request 2 - clarity

The introduction of the term "conventional ink printing method" in claim 1 did not render the claim unclear. The skilled person had no difficulty understanding what conventional ink printing methods were, since they were aware of what was a printing and a non-printing technique. D1, page 8, last paragraph, used almost the same expression, which constituted further proof that the term was clear.

XII. The arguments of opponent 1 (respondent 1) relevant to the decision may be summarised as follows:

Should the subject-matter of claim 1 be considered novel, nothing stood against a remittal to the first instance.

Main request - inventive step

Starting from D1, the objective technical problem was to increase the visibility of the printed pattern from the garment-facing side, as was confirmed by paragraph [0025] of the application. The skilled person would thus change the position in order to increase the visibility of the printed pattern. If increased visibility was not accepted as the problem to be solved, the problem merely lay in the selection of a

suitable alternative position for the graphic in D1, which was already hinted at in D1 itself with reference to the prior art cited on page 1.

Auxiliary request 1 - inventive step

The amendment made to the description had no limiting effect on claim 1. Article 69 EPC could not be used to give claim 1 another interpretation. Even if paragraph [0029] of the patent were to be understood as restricting the interpretation of the terminology "printed pattern", such a restricted interpretation would still be directed to "conventional ink printing methods", which would render the claim unclear. The subject-matter of claim 1 therefore did not involve an inventive step.

Auxiliary request 2 - clarity

It was impossible to establish the difference between a conventional and a non-conventional printing method, such that the introduction of the term "conventional ink printing method" in claim 1 rendered it unclear.

XIII. The arguments of opponent 2 (respondent 2) relevant to the decision may be summarised as follows:

Should the subject-matter of claim 1 be considered novel, nothing stood against a remittal to the first instance.

Main request - inventive step

The differing feature did not provide any technical effect over the closest prior art D1 and thus the objective technical problem was merely to provide an

alternative to the embodiments of D1. Since D1 already disclosed on page 1, last paragraph, a printed pattern on the garment contacting surface of a sanitary napkin, the skilled person would have adapted the absorbent article in D1 and changed the location of the printed pattern to the outside.

Auxiliary request 1 - inventive step

The amendment made to the description had no limiting effect on claim 1. Article 69 EPC could not be used to give the wording another interpretation. A printed pattern carried out using any technique involving printing, even auxiliarily, fell under claim 1. The subject-matter of claim 1 did not involve an inventive step for the same reasons as applied to claim 1 of the main request.

Auxiliary request 2 - clarity

The term "conventional ink printing method" was unclear, since it was impossible to tell the difference between conventional and non-conventional printing methods. In addition, the amendment added a method feature to a product claim, the result of which could not be clearly distinguished in the product.

Reasons for the Decision

1. Main request - novelty

- 1.1 Although the respondents argued that novelty was lacking over D1, the Board concluded that the following feature of claim 1 was not disclosed in D1:

"said printed pattern being printed on the garment facing side of the backsheet".

The appellant did not argue that any of the other features defined in claim 1 were not disclosed by D1 nor could the Board find anything to suggest that this might be the case. The reasons for the Board's conclusion on novelty are however not relevant for the purposes of this decision, since the subject-matter of claim 1 lacks an inventive step, as explained *infra*.

2. Request for remittal

- 2.1 Under Article 111(1) EPC, second sentence, the Board of Appeal may either decide on the appeal or remit the case to the department which was responsible for the decision appealed. The appropriateness of a remittal is decided by the Board on the merits of the particular case. There is no absolute right to have every issue decided upon at two instances. Further, criteria which can be taken into account when deciding on a remittal include the parties' requests, the general interest that proceedings are brought to a close within an appropriate period of time and whether or not there has

been comprehensive assessment of the case during the proceedings.

- 2.2 The appellant argued that the new interpretation of claim 1 would fundamentally alter the discussion on inventive step and that a discussion on inventive step for this request, in particular starting from D1, had never taken place before the opposition division. However, the Board was not persuaded by these arguments that remittal was the correct course of action, since the matter had been extensively discussed in writing. Both notices of opposition from opponents 1 and 3 as well as the reply from the patentee already dealt with inventive step attacks in view of D1 along the lines of the current interpretation of claim 1 and D1.

The summons to attend oral proceedings from the opposition division also discussed D1 in detail and prepared the parties to discuss inventive step under the same premise (i.e. same differing feature) as during the appeal proceedings. Although the opposition division came to a different conclusion on novelty of the main request in the end, the Board finds that there is no fundamental alteration to the discussion on novelty and inventive step and that the same fundamental issues have always been debated from the outset of the opposition proceedings, i.e. whether D1 disclosed the feature "said printed pattern being printed on the garment facing side of the backsheet" or not, and, if so, whether such a feature was obvious in view of D1 alone.

- 2.3 The same applies to the possibility of filing further auxiliary requests. The novelty and inventive step reasoning regarding claim 1 and D1 in this decision follows directly from the one already stated in the

Board's provisional opinion and which (as stated above) had already been under discussion since the beginning of the opposition proceedings. Thus, the appellant had already had ample opportunity in several responses to file auxiliary requests and to present arguments during the whole opposition and appeal procedure relating to the points dealt with in this decision. The Board thus finds that there is no reason to prolong the proceedings further on this issue by remitting the case back.

2.4 Thus the Board, in exercising its discretion under Article 111(1) EPC, found that the case could be dealt with directly and that remittal was not justified. The request for remittal was thus rejected.

3. Main request - inventive step

3.1 Using the problem/solution approach and starting from D1 as the closest prior art when considering the effect of the differing feature (i.e. as mentioned in paragraph 1.1 *supra*) with regard to the objective technical problem solved thereby, the Board does not accept the argument of the appellant that the objective technical problem is the provision of a feminine hygiene article with an improved solution to the problem of indicating to the user when absorbed liquid is approaching the edges of the core (as mentioned in paragraphs [0007] and [0008] of the patent).

The objective technical problem must be formulated taking into account only the technical effect(s) resulting from the distinguishing feature. Paragraphs [0007] and [0008] describe the difficulties associated with the determination of side leakage, i.e. the difficulties for the user to detect when liquid

absorbed by the article is approaching the edges of the core.

The Board finds that this technical problem is however solved in the patent by providing a visual contrast between the core area and the area of the topsheet surrounding it. This contrast is not achieved by the aforementioned differing feature compared to D1, but by the features of providing a printed pattern which is visible at least through a portion of the area of the topsheet and which is outside the core area and on the backsheet. It is irrelevant on which side of the backsheet the pattern is printed to achieve said contrast, as is also clear from paragraphs [0023] and [0024] of the patent. The first sentence of paragraph [0024] states that the provision of the backsheet with a printed pattern produces the contrast; the side on which the pattern is printed is not relevant.

D1 already creates this visual contrast in the same way as the patent (i.e. by a pattern printed on the backsheet visible through the topsheet) as can be seen in Figures 1 and 3 and as described e.g. on page 2, lines 17-22. The user would be able to detect side leakage in D1 in exactly the same way as in the patent. The objective technical problem when starting from D1 is thus not related to the detection of side leakage.

3.2 The appellant argued also that further potential advantages from the differing feature as disclosed in paragraph [0025], such as an increase in visibility of the printed pattern, could be used to formulate the objective technical problem. However, paragraph [0025] mentions only an increase in visibility of the printed pattern "through the release cover" or improved identification when the article is packaged in a bag or

in a box. Since the feminine hygiene article of independent claim 1 does not define a release cover or any other box or bag, these are not part of the claimed invention. Also the skilled person would not consider that the printing of a printed pattern on the garment facing side of the backsheet would provide an effect of increase in visibility over the closest prior art D1.

3.3 The Board thus comes to the conclusion that there is no new technical effect over the closest prior art D1 provided by the differing feature, and that the objective problem solved by the differing feature is simply to provide an alternative position for the printed pattern.

3.4 When looking for alternative solutions, the skilled person starting from D1 would immediately recognise that printing the printed pattern on the garment facing side of the backsheet is one obvious possibility. As stated in D1, page 1, last paragraph, the placement of a pattern on the garment contacting surface is already known for prior art sanitary napkins. In addition, page 8 (see lines 20-25) discloses the beneficial advantages of locating the printed pattern on the body facing surface of the garment contacting layer or on the garment facing surface of the body contacting layer and this is clearly in comparison with the negative effect of placing the pattern in other, albeit non-stated, locations which would allow ink to be in contact with the garment. Thus, whilst a specific location for the printed pattern outside the space between the body contacting layer and the garment contacting layer is not disclosed either explicitly or implicitly, the skilled person infers from this passage that it is possible (albeit less beneficial) to place the printed pattern in other locations of the article and would,

not least due to the disclosure on page 1, last paragraph, have had one possibility (i.e. on the garment contacting surface) immediately available to them.

Thus, faced only with the technical problem of an alternative placement as discussed above under item 3.4, the skilled person would consider this alternative placement (that was already previously known from D1, page 1, last paragraph) and print the printed pattern on the garment contacting surface without requiring an inventive step.

- 3.5 The appellant argued that the skilled person would be led away from the claimed solution by the fact that D1 disclosed the avoidance of ink removal through rubbing by the undergarment by suitable placement, and that the obvious solution, when still following the teaching of D1 and maintaining the graphic away from contact with the undergarment, was to make the backsheet more translucent.

However, claim 1 of the patent does not relate to a type of ink that would rub off against a garment, and it is anyway well known that printed patterns of the prior art can be made with ink that does not rub off against garments (which *per se* was not contested). Thus, faced with the technical problem of an alternative placement discussed above under item 3.4 and taking into consideration that D1, page 8, lines 20-25, deals with the disposition of graphic 65 in the feminine hygiene article, the skilled person would not be deterred from considering a position for the printed pattern outside the space between the body and the garment contacting layer simply because this is

considered a problem when using inks that rub off against a garment.

3.6 The Board also does not accept the argument that changing the material of the backsheet in order to make the sheet more translucent while keeping the printed pattern on the body facing side of the garment contacting layer would be a "more obvious" solution, but even if this were the case, this does not make the solution of putting the pattern on the garment facing side of the backsheet somehow non-obvious. In fact, the appellant's argument relates again to a solution to a different technical problem (i.e. to increase visibility) which the Board already found above under item 3.3 as not being the objective problem. In addition, D1 deals with the position of the graphic and not with any change to the garment contacting layer, and D1, page 9, third paragraph already discloses that the light transmittance should be in the range of 85% to 100%, thus allowing as much light as possible to pass through (i.e. to be as translucent as possible and almost transparent), such that the appellant's suggested more obvious solution lacks technical support in light of the disclosure in D1.

3.7 For the above reasons, the subject-matter of claim 1 is found not to involve an inventive step (Article 100(a) and Article 56 EPC) when starting from D1 and combining this with a pattern for a sanitary napkin known from D1, page 1, last paragraph, in light of the problem to be solved. The main request is thus not allowable.

4. Auxiliary request 1 - inventive step

4.1 The sole amendment carried out by the appellant in auxiliary request 1 with regard to the main request is

the deletion of some passages of paragraph [0029] of the description of the patent.

- 4.2 The appellant argued, citing Article 69 EPC and the corresponding protocol, that the description and the drawings should be used to interpret the claims in a different, more restricted, manner. The amendment in the description allegedly removed the less usual techniques (providing similar effects) from the interpretation possibilities of the term "printed pattern" thereby making the claim more limited and thereby inventive.
- 4.3 The Board does not accept this argument. On the issue of claim interpretation, in accordance with the accepted case law of the Boards of Appeal for the purposes of assessing novelty and inventive step in opposition proceedings (see Case Law Book, 8th edition 2016, II.A.6.3.2), claims which are unambiguous do not need to be reinterpreted in the light of the description and drawings.
- 4.4 The term "printed pattern" is unambiguous for the skilled reader, has a clear technical meaning and encompasses exclusively techniques involving printing. Thus, the skilled reader does not need to use paragraph [0029] of the description to interpret "printed pattern" in a different way. In case of a discrepancy between the claims and the description, the unambiguous claim wording must be interpreted as it would be understood by the person skilled in the art without the help of the description (e.g. decision T 197/10 and T 2221/10, and the Case law of the Boards of Appeal, 8th Edition 2016, II.A.6.3.1, page 290). An attempt to give the term another definition as described in paragraph [0029] would arrive at the illogical interpretation

that the term "printed pattern" should further include patterns created by other techniques not involving printing that "provide the same or similar effect" (an unclear definition *per se*, since it is not clear what such a similar effect would be).

4.5 In addition, the Board would add that even if, as argued by the appellant, Article 69 EPC allowed a new restricted interpretation of printed patterns to be those obtained by "conventional ink printing methods", the term "conventional" does not have a clear meaning (see reasoning under auxiliary request 2 below) and a "printed pattern printed using ink" is already known from the closest prior art starting point D1 when considering inventive step (see page 7, third paragraph, which discloses a graphic 65 printed using ink on the surface of the garment contacting layer).

4.6 Hence the subject-matter of claim 1 of auxiliary request 1 does not involve an inventive step for the same reasons as apply to claim 1 of the main request. Auxiliary request 1 is thus not allowable.

5. Auxiliary request 2 - clarity

5.1 Claim 1 of auxiliary request 2 has been amended to define a printed pattern being printed "with a conventional ink printing method".

5.2 Whilst the skilled person may perhaps be able to tell the difference between certain specific printing and non-printing methods (such as the disclosed heat crimping method), as argued by the appellant, the term "*conventional* ink printing method" does not have an acknowledged meaning and the skilled person does not know which ink printing methods are considered

conventional and non-conventional. The appellant also provided no information as to where any recognised definition of this term might be found. Additionally, no further information is given in the patent, which merely discloses two examples of conventional printing methods in paragraph [0029], to allow the skilled person to establish the difference between a conventional and a non-conventional ink printing method.

5.3 Contrary to the further argument of the appellant, the last paragraph of page 8 of D1 does not give a definition of "conventional ink printing methods" and simply discloses a non-exhaustive list with some printing methods considered either conventional, or technologies known in the art. Thus, this passage also does not define how the term "conventional ink printing methods" should be interpreted so that even when taking this passage into account, it remains unclear for a skilled person which methods are conventional and which ones are not.

5.4 Claim 1 therefore does not meet the requirements of Article 84 EPC such that auxiliary request 2 is not allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated