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**Datasheet for the decision
of 11 January 2023**

Case Number: T 0920/18 - 3.3.02

Application Number: 11815244.6

Publication Number: 2600713

IPC: A01N25/04, A01N25/12,
A01N25/28, A01N43/40,
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A01N43/90, A01P13/00

Language of the proceedings: EN

Title of invention:

PESTICIDE COMPOSITIONS OF MESO-SIZED PARTICLES WITH ENHANCED
ACTIVITY

Patent Proprietor:

Dow AgroSciences, LLC

Opponent:

Syngenta Crop Protection AG

Headword:

Relevant legal provisions:

EPC Art. 54(3)
EPC R. 103(1)(a)

Keyword:

Novelty

Substantial procedural violation - reimbursement of appeal fee
(no)

Decisions cited:

T 0153/84

Catchword:



Beschwerdekammern

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Case Number: T 0920/18 - 3.3.02

D E C I S I O N
of Technical Board of Appeal 3.3.02
of 11 January 2023

Appellant: Syngenta Crop Protection AG
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Representative: SYNGENTA IP
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Respondent: Dow AgroSciences, LLC
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 12 February
2018 rejecting the opposition filed against
European patent No. 2600713 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman M. O. Müller
Members: P. O'Sullivan
R. Romandini

Summary of Facts and Submissions

I. The appeal of the opponent (hereinafter appellant) lies from the decision of the opposition division according to which the opposition against European patent 2 600 713 was rejected.

According to the contested decision, the subject-matter of granted claim 1 (main request) was *inter alia* novel over document D7.

II. The following documents *inter alia* were cited in opposition proceedings:

D7: WO 2011/017480 A2

D7a: US 61/232,044; priority document of D7

III. With the communication dated 23 March 2022, the parties were summoned to oral proceedings on 2 March 2023.

IV. With letter dated 3 August 2022, the patent proprietor (hereinafter respondent) informed the board that the patent had lapsed in all contracting states.

V. With letter dated 10 August 2022, the appellant withdrew its request for oral proceedings.

VI. With a communication pursuant to Rule 100(2) EPC dated 26 August 2022, the board pursuant to Rule 84(1) EPC invited the appellant to indicate whether it requested continuation of the appeal proceedings.

VII. With letter dated 1 September 2022, the appellant requested that the appeal proceedings be continued on

the basis of the state of the file, and reiterated its withdrawal of the request for oral proceedings.

VIII. The scheduled oral proceedings were cancelled.

IX. Requests relevant to the present proceedings

The appellant requested that the decision under appeal be set aside and that the contested patent be revoked in its entirety. It also requested reimbursement of the appeal fee in accordance with Rule 103(1) (a) EPC.

The respondent did not file any requests in appeal proceedings. Consequently, although the respondent filed auxiliary requests during opposition proceedings, in the absence of a corresponding request, these are not part of the appeal proceedings (Article 12(1) (c) RPBA 2020).

X. The appellant's submissions insofar as relevant to the present decision may be summarised as follows:

Novelty (Articles 100(a) and 54 EPC)

- The subject-matter of contested claim 1 lacked novelty over D7a, the disclosure of which was identical to that of D7

Reimbursement of the appeal fee

- The appeal fee was to be reimbursed in accordance with Rule 103(1) (a) EPC.

Reasons for the Decision

Sole main request (granted claims)

1. Novelty (Articles 100(a) and 54 EPC)
 - 1.1 The state of the art pursuant to Article 54(3) EPC
 - 1.1.1 According to the contested decision, the subject-matter of claim 1 was novel over D7.
 - 1.1.2 The appellant with the statement of grounds of appeal submitted that the subject-matter of claim 1 lacked novelty over **D7a** pursuant to Article 54(3) EPC. D7a is the US priority document of D7. Article 54(3) EPC however only refers to European patent applications, or, by way of Article 153(5) and Rule 165 EPC, to Euro-PCT applications. D7a is thus not comprised within the state of the art pursuant to Article 54(3) EPC, and is not itself relevant for the novelty of contested claim 1.
 - 1.1.3 When addressing lack of novelty in its statement of grounds of appeal, the appellant also referred to D7. As set out in the contested decision, D7, a Euro-PCT application, is at least state of the art pursuant to Article 54(3) EPC. This conclusion was not disputed by the respondent.
 - 1.1.4 Since the appellant not only referred to D7 in relation to its novelty objection, but also stated in its arguments that the relevant sections of D7a were also present in D7 (statement of grounds of appeal, page 6, final paragraph - page 7, second paragraph), the appellant is considered as relying on D7, and not D7a, for the purpose of novelty.

1.2 Novelty - substance

Claim 1 of the patent as granted reads as follows:

"A composition comprising:

*a) a mesoparticle comprised of a poorly water soluble agricultural active ingredient having a volume-average diameter in a range of 30 ±3.0 nm to 500 ±50.0 nm; and
b) an adjuvant,
wherein the agricultural active ingredient has a water solubility of less than 1000 ±100.0 ppm, the mesoparticle is at least one of a mesocapsule and a meso-matrix particle and the adjuvant is a penetrant or a non-ionic surfactant representing a nonylphenol ethoxylate."*

1.2.1 D7 discloses a composition for delivery of a poorly water soluble agricultural active ingredient wherein the active ingredient is at least partially included within the polymer shell of a mesocapsule, the mesocapsule having a volume-average particle diameter between 30 nm and about 500 nm (claim 1). According to claim 8, the active ingredient has a solubility in water of about 1000 ppm or less. According to paragraph [0042] and claim 20, the active ingredient may be dissolved in a solvent which may include *inter alia* petroleum fractions or hydrocarbons, paraffinic oil, vegetable oils and esters of vegetable oils. These solvents include penetrants according to the contested patent (paragraph [0016]).

1.2.2 As can be deduced from the decision of the opposition division, and as set out by the appellant, D7 thus discloses the mesoparticle a) and adjuvant b) as

required by claim 1. This was not disputed by the respondent.

- 1.2.3 Nevertheless, according to the contested decision, the subject-matter of claim 1 was novel over D7 for the reason that the wording of claim 1, by virtue of the penetrant and the particle being listed in two distinct sub-paragraphs, implied that the penetrant was present in the continuous phase (i.e. surrounding the particles). Since in D7 the penetrant was present *inside* the mesocapsule, novelty was established.
- 1.2.4 This conclusion was contested in appeal by the appellant. The board agrees with the appellant's arguments. Contested claim 1 is directed to a composition defined by two separate ingredients, namely a) a mesoparticle which is a mesocapsule comprising a poorly water soluble active ingredient, and b) an adjuvant which is a penetrant. There is no mention in claim 1 of the "continuous phase" referred to by the opposition division in the contested decision.
- 1.2.5 As noted by the appellant, it is standard practice in patent claims to list the various components of a composition as separate sub-paragraphs. There is therefore nothing which can be read into claim 1, neither explicitly nor implicitly, which further defines the penetrant as being excluded from inside the mesocapsule. In particular, by virtue of the "comprising" language employed in claim 1 in defining ingredient a), contested claim 1 includes within its scope an embodiment in which the penetrant is comprised within the mesoparticle. Since it was not disputed that D7 discloses such an embodiment, claim 1 lacks novelty over this document.

The set of claims of the main request (claims as granted) is therefore not allowable.

2. Reimbursement of the appeal fee

2.1 The appellant requested reimbursement of the appeal fee in accordance with Rule 103(1)(a) EPC. To support its request, the appellant submitted that in its preliminary opinion sent with the summons to oral proceedings, the opposition division had indicated that contested claim 1 lacked novelty over D7. However, after hearing the arguments of the parties at oral proceedings, the opposition division unexpectedly reversed its preliminary opinion and concluded in the contested decision that contested claim 1 was novel over D7. The appellant argued that this decision was incorrect, and requested reimbursement of the appeal fee.

2.2 According to Rule 103(1)(a) EPC, the appeal fee shall be reimbursed where the Board of Appeal deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation. In the present case however, the latter requirement is not fulfilled.

2.3 The fact that the opposition division changed its mind after having issued its preliminary opinion does not constitute a procedural violation. If it did, this would imply that once formulated, a preliminary opinion can no longer be changed. This would be diametrically opposed to the very meaning of the term "preliminary" used by the opposition division when issuing its opinion. This approach would furthermore go against the meaning of the term "opinion", which unlike a decision, can be changed at a later stage.

2.4 Furthermore, an error of judgement on substantive issues, such as the present assessment of novelty by the opposition division, is, if anything, an error in substance rather than an error related to a procedural aspect. Such an error of judgement cannot therefore be considered to represent a **procedural** violation (see e.g. Case Law of the Boards of Appeal, 10th Edition, V.A.11.6.1 and T 153/84, reasons 9, final paragraph).

2.5 Since no procedural violation occurred before the opposition division, the request for reimbursement of the appeal fee pursuant to Rule 103(1)(a) EPC is refused.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside
2. The patent is revoked

The Registrar:

The Chairman:



N. Maslin

M. O. Müller

Decision electronically authenticated