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**Datasheet for the decision
of 22 February 2021**

Case Number: T 2275/18 - 3.3.10

Application Number: 13796053.0

Publication Number: 2934458

IPC: A61Q19/00, A61K8/35, A61K8/365,
A61K8/37

Language of the proceedings: EN

Title of invention:
EUTECTIC MIXTURES IN PERSONAL CARE COMPOSITIONS

Patent Proprietor:
Unilever N.V.
Unilever PLC

Opponent:
Henkel AG & Co. KGaA

Headword:
EUTECTIC MIXTURES IN PERSONAL CARE COMPOSITIONS/ Unilever

Relevant legal provisions:
EPC Art. 53(c)

Keyword:
Exceptions to patentability - (no)
subject-matter excluded from patentability disclaimed

Decisions cited:

G 0001/03, G 0002/03, G 0001/16

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

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D E C I S I O N
of Technical Board of Appeal 3.3.10
of 22 February 2021

Appellant:
(Patent Proprietor 1)

Unilever N.V.
Weena 455
3013 AL Rotterdam (NL)

Appellant:
(Patent Proprietor 2)

Unilever PLC
Unilever House
100 Victoria Embankment
London, Greater London EC4Y 0DY (GB)

Representative:

Corsten, Michael Allan
Unilever N.V.
Unilever Patent Group
Bronland 14
6708 WH Wageningen (NL)

Respondent:
(Opponent)

Henkel AG & Co. KGaA
Henkelstrasse 67
40589 Düsseldorf (DE)

Representative:

Henkel AG & Co. KGaA
CLI (Patente)
40191 Düsseldorf (DE)

Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
13 July 2018 concerning maintenance of the
European Patent No. 2934458 in amended form.**

Composition of the Board:

Chairman P. Gryczka
Members: J.-C. Schmid
 T. Bokor

Summary of Facts and Submissions

- I. The Appellant (patent proprietor) lodged an appeal against the interlocutory decision of the opposition division which found that claim 14 of the then pending main request filed on 5 April 2018 did not satisfy the requirements of Article 53(c) EPC. According to the opposition division the European patent No. 2 934 458 could only be maintained on the basis of claims 1 to 13 filed as auxiliary request 1 filed with a letter dated 5 April 2018.

Claims 1, 5 and 14 of the then pending main request read as follows:

"1. Active eutectic mixture of butyl methoxydibenzoylmethane and isopropyl myristate wherein the weight ratio of butyl methoxydibenzoylmethane to isopropyl myristate is from 3:7 to 1:15 and wherein the eutectic mixture has a melting point below 15 degrees Celsius, and wherein the mixture further comprises 12-hydroxystearic acid in an amount from 0.1 to 6 wt% by total weight of the mixture."

"5. Personal care composition comprising
i) the active eutectic mixture according to any one of claims 1 to 4, and
ii) a cosmetically acceptable carrier."

"14. A non-therapeutic method of applying to human skin the personal care composition according to any one of claims 5 to 12."

II. The opposition division held that protecting the skin from pathological consequences of exposure to UV radiations was inherently considered to be therapeutic. Total avoidance of exposure to UV radiations could not be achieved. Therefore a personal care composition comprising butyl methoxydibenzoylmethane (BMDM) would have inevitably led to at least some prophylactic effect regarding the pathological consequences of UV exposure. Although the proprietor pointed to hypothetical uses of the composition under total avoidance of exposure to UV, such uses were not disclosed in the patent. The opposition division therefore concluded that claim 14 of the main request, despite the amendment to specify that the method is non therapeutic, encompassed subject-matter that was excluded from patentability under Article 53(c) EPC.

III. According to the Appellant, the opposition division based its objection of non-compliance with Article 53(c) EPC for a method claim concerning the application to human skin of a personal care composition comprising a sunscreen agent on the fact that this application of the sunscreen agent had a prophylactic effect by protecting the skin from harmful UV-radiation, thereby preventing or at least reducing the risk of pathological conditions caused by UV damage.

However, exposure to UV radiation was essential for such a prophylactic effect to occur. Personal care compositions had different purposes and could be applied to different parts of the body. The therapeutic and non-therapeutic application of the personal care composition could be clearly separated depending on the purpose of the application and the part of the body. For example, if the personal care composition was applied in an indoor bathroom to an area of the skin

which is completely dressed before leaving the indoor bathroom, a non-therapeutic situation would occur. Accordingly, claim 14 which was directed to a non-therapeutic method of applying to human skin a personal care composition did not encompass subject-matter excluded from patentability under Article 53(c) EPC.

- IV. According to the Respondent (opponent), applying a composition comprising a UV-A sunscreen agent to human skin must always be regarded as a therapy, since the prophylactic effect against sunburn could not be separated from cosmetic uses. Claim 14 was thus not allowable under Article 53(c) EPC.
- V. With a communication pursuant to Article 15(1) RPBA to prepare the oral proceedings, the Board indicated that the application to human skin of a personal care composition comprising known sunscreen agents, even if these agents have the potential to protect against sunburn, was not necessarily a therapeutic treatment. The Board thus was inclined to read claim 14 to cover only non-therapeutic methods and thus not claiming subject-matter excluded from patentability under Article 53(c) EPC.
- VI. With a letter dated 30 November 2020, the Respondent informed the Board that it would not attend the oral proceeding scheduled 19 October 2021 and withdrew its request for oral proceedings.
- VII. The Appellant (patent proprietor) requested that the decision under appeal be set aside and the patent be maintained on the basis of the main request filed on 12 November 2018.

VIII. The Respondent (opponent) requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

Main request

2. *Scope of the appeal*

As the opponent (Respondent) did not appeal against the interlocutory decision of the opposition division, claims 1 to 13 of the main request, which corresponds to claims 1 to 13 of auxiliary request 1 maintained by the opposition division, do not form part of the present appeal (principle of prohibition of *reformatio in peius*).

Therefore, the sole issue in these appeal proceedings is whether or not claim 14 includes subject-matter excluded from patentability under Article 53 (c) EPC.

3. The introduction in claim 14 of the disclaimer "non-therapeutic" during the opposition proceedings has not been objected to *per se* by the opposition division and the Respondent, even though the wording was not disclosed in the application as filed, nor was the difference between a therapeutic and non-therapeutic application of the method explicitly explained in any other manner.

However, the Board is satisfied that the application contains disclosure wherein applying the composition to human skin may possibly be regarded as therapeutic (in cases of applying sunscreen lotions; see paragraph

[0058]; claim 12), but also disclosure wherein applying the composition to human skin is not therapeutic, neither in view of its main purpose, nor because of any unavoidable side effect (shampoos, hair conditioners, shower gels,... (see paragraph [0057]; claim 11). The disclaimer is necessary for disclaiming subject-matter excluded from patentability. Following decisions G 1/03, G 2/03 (OJ EPO 2004, 413 and 448) and G1/16 (OJ EPO 2018, 70), such undisclosed disclaimers are allowed to disclaim subject-matter excluded from patentability for non-technical reasons. The Board is also satisfied that the disclaimer is appropriately formulated, has no bearing on novelty or inventive step, and is sufficiently clear and concise (G 1/03 and G 2/03 *supra*, Headnote, Points II.2-4).

4. According to Article 53(c) EPC, European patents shall not be granted, *inter alia*, in respect of methods for treatment of the human or animal body by therapy. By therapy is meant a method of bringing a body from a pathological state back into its normal healthy state or a method of preventing a pathological state.

When a method has to be assessed with regard to the exclusion of subject-matter from patenting under Article 53(c) EPC the most important points are the purpose of the method and the inevitable effect(s) of the method at issue.

In the present case, apart from the fact that the wording of the claim excludes therapeutic methods from its scope, no purpose is indicated for the method of claim 14 which only requires the step of applying a personal care composition to human skin.

However, since the claimed method is defined as being non-therapeutic, it must be construed as being directed toward applying the personal care composition to the skin for a non-therapeutic purpose, such as for example a cosmetic treatment, excluding thereby all therapeutic treatments, including cosmetic treatments where a therapeutic effect is inextricably linked. As mentioned above in point 3 such non-therapeutic applications are disclosed in the patent in suit.

5. The Respondent argued that applying a composition comprising a UV-A sunscreen agent to human skin must always be regarded as a therapy, since the prophylactic effect against sunburn could not be separated from cosmetic uses.

However, this approach would imply that even the most natural and common daily activities, such as washing or putting on clothes, would always be considered as therapeutic methods.

Sunscreen agents are active only when exposed to UV radiations. In cases where no prevention against sunburn is needed, for example when the composition is used as a shower gel, applying the composition to the skin cannot be considered as a therapeutic treatment. It should also be noted that the claimed method also covers post-mortem application of the composition to human skin, which obviously cannot be considered as a therapeutic method.

Consequently, it is possible to carry out the method of claim 14 on human skin which is neither in a pathological state nor likely to develop one. Therefore, the Respondent's argument must be rejected.

6. Accordingly, since claim 14 covers only non-therapeutic methods, it does not comprise subject-matter excluded from patenting under Article 53(c) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance with the order to maintain the patent on the basis of claims 1 to 14 of the main request filed with the letter dated 12 November 2018 and a description yet to be adapted.

The Registrar:

The Chairman:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated