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**Datasheet for the decision  
of 19 September 2022**

**Case Number:** T 2715/18 - 3.3.10

**Application Number:** 04750232.3

**Publication Number:** 1613360

**IPC:** A01M1/20, A61L9/14, A61L9/03,  
A61L9/12

**Language of the proceedings:** EN

**Title of invention:**  
SYSTEM FOR EMITTING VOLATILE COMPOSITIONS

**Patent Proprietor:**  
THE PROCTER & GAMBLE COMPANY

**Opponent:**  
Henkel AG & Co. KGaA

**Headword:**

**Relevant legal provisions:**  
EPC Art. 56

**Keyword:**  
Inventive step - all requests (no)

**Decisions cited:**

**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

Case Number: T 2715/18 - 3.3.10

**D E C I S I O N**  
**of Technical Board of Appeal 3.3.10**  
**of 19 September 2022**

**Appellant:** THE PROCTER & GAMBLE COMPANY  
(Patent Proprietor) One Procter & Gamble Plaza  
Cincinnati, OH 45202 (US)

**Representative:** Jump, Timothy John Simon  
Venner Shipley LLP  
200 Aldersgate  
London EC1A 4HD (GB)

**Respondent:** Henkel AG & Co. KGaA  
(Opponent) Henkelstrasse 67  
40589 Düsseldorf (DE)

**Representative:** Wagner Albiger & Partner  
Patentanwälte mbB  
Siegfried-Leopold-Straße 27  
53225 Bonn (DE)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 5 September  
2018 revoking European patent No. 1613360  
pursuant to Articles 101(2) and 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman** P. Gryczka  
**Members:** M. Kollmannsberger  
L. Basterreix

## **Summary of Facts and Submissions**

I. The patentee's appeal lies from the decision of the Opposition Division to revoke European Patent No. 1 613 360 pursuant to Articles 101(2) and 101(3) (b) EPC.

II. Opposition proceedings were based on the grounds under Article 100(a) EPC for lack of inventive step (Article 56 EPC) and Article 100(c) EPC for unallowable extension (Article 123(2) EPC).

In its decision the Opposition Division came to the conclusion that the ground of opposition under Article 100(c) EPC did not prejudice the maintenance of the granted patent. However, it decided that the claims of the granted patent as well as the claims of auxiliary request 3 pending at that time lacked an inventive step over a combination of D1 and D5. Auxiliary requests 1 and 2 were not admitted into the proceedings.

III. Reference is made to the following documents:

D1: WO03/028775 A1

D5: EP 0 295 129 A1

D8: Comparative Experimental Data, 15 January 2019

IV. In its appeal the appellant neither defended the patent as granted nor the requests on file before the Opposition Division.

Instead it requested to maintain the patent in amended form based on the claim set filed as main request together with the grounds of appeal. Additionally two claim sets were filed as auxiliary requests for maintenance of the patent in amended form.

V. Independent claim 1 of the appellant's main request reads as follows:

*"A device for emitting two or more volatile compositions, said device comprising a housing, and a plug at least indirectly joined to said housing, in order to support the housing on an electrical outlet, and said housing contains receptacles for said volatile compositions wherein said two or more volatile compositions comprise a first volatile composition, a second volatile composition, and optionally additional volatile compositions, **characterised in that** said device is configured to emit said first, second, and optional additional volatile compositions in a continuous repeating emission sequence in which the emission of the different volatile compositions automatically alternates between the different volatile compositions in the sequence and wherein in said repeating alternating sequence:*

*(a) the volatile compositions are emitted so that one immediately follows the end of the emission period of the preceding composition, or*

*(b) the volatile compositions are emitted so that there is a gap between the end of the emission period of one volatile composition and the beginning of the emission period of the next volatile composition,*

*and further comprises a timing mechanism which is configured such that said volatile compositions are each alternately emitted during discrete periods that are each greater than 15 minutes and less than or equal to 12 hours."*

Independent claim 1 of auxiliary request 1 contains, at the end of the claim, the following additional features:

*"wherein at least one volatile composition is in a liquid form, and wherein at least one of the volatile compositions is supplied in a container provided with a wick."*

Independent claim 1 of auxiliary request 2 is based on claim 1 of auxiliary request 1 and contains, at the end of the claim, the following additional features:

*"wherein the device further comprises at least one heater wherein said at least one heater surrounds the wick of said container."*

- VI. In its grounds of appeal and in its further submissions during the appeal proceedings the appellant essentially argued that the Opposition Division's finding of obviousness starting from D1 in combination with D5 was incorrect. In particular, while D1 did relate to fragrance dispensing systems this document was silent with regard to emission times, gap times and emission sequence for any fragrance. Yet, the experimental results reported in D8 demonstrated that the chosen emission times result in an increased perception of the emitted scents and in an avoidance of fatigue. D5 would not have been combined with D1 by a skilled person

since it related to a different scale, i. e. complete buildings rather than individual rooms. Even if the combination had been made, the skilled person would not have arrived at anything covered by the claims on file.

- VII. In its reply to the patentee's appeal and in its further submission the respondent defended the Opposition Division's decision to revoke the patent for lack of inventive step. Furthermore it argued that the main and auxiliary requests presented by the appellant should not be admitted into the appeal proceedings, neither should the document D8.
- VIII. On 19 November 2020 the Board issued a communication under Rule 100(2) EPC setting out its preliminary opinion on the merits of the appeal. The preliminary opinion of the Board was that the appeal was likely to be dismissed.
- IX. On 17 June 2021 the Board issued summons to oral proceedings which were to be held on 28 April 2022.
- X. With letter of 6 April 2022 the appellant withdrew its request for oral proceedings.
- XI. The Board thus cancelled the oral proceedings with notification of 14 April 2022.
- XII. The partie's final requests to be decided on are the following:

The appellant requests the impugned decision to be set aside and to maintain the patent in amended form based on the claims of the main request or one of auxiliary requests 1 or 2, all claim sets filed with the statement of grounds of appeal.

The respondent requests the appeal to be dismissed. It also requests not to admit the appellant's main and auxiliary requests into the proceedings. Neither should document D8 be admitted into the appeal proceedings.

### **Reasons for the Decision**

1. The appeal is admissible.
  
2. Decision taken in written proceeding

The appellant withdrew its request for oral proceedings. The respondent's request for oral proceedings is conditional on the Board not revoking the patent based on the written submissions, see its reply to appeal dated 15 May 2019.

Therefore, since the Board decides to revoke the patent this decision can be taken in written proceedings, without oral proceedings. There is no request for oral proceedings by the parties. The Board neither deems oral proceedings to be expedient, Article 116(1) EPC. All parties had the opportunity to present their comments in writing on the grounds on which the decision is taken, Article 113(1) EPC.



3. Admissibility of the appellant's main request into the appeal proceedings

The respondent has requested not to allow the appellant's main request into the proceedings. In its view, this request should have been filed already during opposition proceedings.

Article 12(4) RPBA 2007, which is applicable in the present case following the transitional provisions in Article 25 RPBA 2020, leaves it at the Board's discretion not to admit requests which could have been presented before.

In the view of the Board, the claims of the present main request are a response to the Opposition Division holding the claims of the granted patent to lack an inventive step. In view of the finding, outlined below, that the subject-matter claimed anyway lacks an inventive step no further detailed reasoning is considered necessary in this regard.

4. Inventive step of the appellant's main request, Article 56 EPC
  - 4.1 The Opposition Division decided to revoke the patent for lack of inventive step over D1 in combination with D5. The Board has come to the conclusion that the device defined in claim 1 of the appellant's main request lacks an inventive step even over D1 alone. The reasons are given in the following.
  - 4.2 Closest state of the art is D1

The patent deals with devices for emitting two or more volatile compositions, in particular in order to avoid habituation to a fragrance (see par. [0004]). The device allows for a perception of two different fragrances rather than a blended scent (see par. [0008]).

All parties as well as the Opposition Division have agreed on D1 as representing the closest prior art.

D1 discloses a device for emitting different fragrances. The fragrances are emitted by means of a rotating fan that can switch its rotational direction and ventilates thus two different fragrances into the surrounding (see fig. 1). A time protocol for such a process is illustrated e. g. in fig. 7 and explained on pages 12 and 13.

#### 4.3 Difference of the claim with respect to D1

The Opposition Division has concluded that the device of D1 discloses all the claimed features except for the time periods defined at the end of claim 1.

The appellant argued that D1 included many optional features and did not disclose all relevant features in combination; he referred to the second source of fragrance, the electric power supply and a timing mechanism.

However, the device of fig. 1 clearly shows two sources of fragrance and the fan (11) rotates, which implies some sort of electric power supply. The timing protocol depicted in fig 7 refers to the fan (11) and implies a timing mechanism.

The appellant furthermore argued that D1 failed to disclose a device with a plug joined to the housing in order to support the housing on an electrical outlet. Instead the device of D1 used a battery as a power source. This was apparent from figures 1-6 and the associated description.

However, as correctly brought forward by the respondent D1 does disclose a device with a plug being fixed to an electrical socket in a vertical wall, see figure 41 together with the explanations on page 30, lines 12-21 and page 7, lines 18-20.

The Board thus concludes that the only feature not disclosed in D1 is the time defined at the end of claim 1, i. e. the feature that the emission periods are "*greater than 15 minutes and less or equal to 12 hours*".

#### 4.4 Technical problem to be solved

The appellant filed document D8 and argues that the tests described therein showed a technical effect of the claimed time range, namely that test persons prefer a test protocol with 16 minutes alternating scents to a protocol with 10 minutes alternating scents. For showing an effect of the upper range it is stated that test persons still perceive a scent after 12h.

However, these tests cannot show any improved effect for the time range defined in claim 1. As correctly noted by the respondent, the perception of a scent not only depends on the time range during which it is emitted from a device, but also on other factors, e. g. the room size, which are not defined in claim 1. The appellant submitted that the tests were carried out in

a room size of a typical domestic property. This may be the case, but this does not change the fact that the claim does not contain any limitation regarding the room size, neither explicitly nor implicitly.

Furthermore, no particular effect of the upper limit of the range has been shown compared to any longer time range.

Independent of the question of admissibility of D8 into the proceedings, raised by the respondent, this document does not substantiate any improvements over D1 attributable to the application time range defined in the claim.

Thus, the technical problem to be solved starting from D1 has to be formulated as how to select appropriate emission times for preventing habituation.

- 4.5 D1 already discloses some information on how this may be achieved. The passage on page 12, lines 17ff. mentions that olfactory fatigue may be prevented by means of adjusting the time intervals "mentioned above", i. e. the intervals T2 and T4 which allow for the diffusion of the scents into the room. The appellant has argued that the claim is not directed to these times of diffusion, but on the contrary to the emission times corresponding to T1 and T3 in D1. However, the following passage on page 13 states that also the emission times may be varied depending on the size of the room.

D1 thus already shows the variation of the emission times to have an effect on the perception of the fragrances and on olfactory fatigue. Selecting and adjusting these emission times is thus a matter of

routine optimisation which a skilled person can carry out without the need of any inventive activity.

No secondary document is necessary to arrive at this conclusion.

- 4.6 Thus, starting from D1 the technical problem stated above has been solved in an obvious way. The device defined in claim 1 of the appellant's main request lacks an inventive step.

5. Inventive step of the appellant's auxiliary requests

The independent claims of the auxiliary requests relate to the volatile compositions being in a liquid form, to the composition being supplied in a container with a wick, and to a heater surrounding the wick.

Liquid fragrances supplied in containers with a wick are described in D1, e. g. on page 11, lines 1-15. A heating surrounding the wick is described e. g. in fig. 39 and the corresponding passage in the description on page 29 lines 12ff.

The additional features of claim 1 of the auxiliary requests are already disclosed in the closest prior art document D1. The appellant's arguments in its statement setting out the grounds of appeal relate to these features being absent from D5. However, D5 is not discussed in the present decision.

Thus, notwithstanding any admissibility issues these requests do not provide any additional difference over D1 and thus do not make any inventive contribution. The

inventive step analysis remains the same as the one carried out above for claim 1 of the main request.

6. None of the devices defined in the independent claims of the pending claim sets complies with the provision of Article 56 EPC. Thus, the patent is to be revoked under Article 101(3) (b) EPC.

## **Order**

### **For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



C. Rodríguez Rodríguez

P. Gryczka

Decision electronically authenticated