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**Datasheet for the decision
of 17 March 2023**

Case Number: T 0774/21 - 3.3.09

Application Number: 18192387.1

Publication Number: 3443950

IPC: A61K8/40, A61Q13/00, C11B9/00,
C11D3/00

Language of the proceedings: EN

Title of invention:
A FRAGRANCE COMPOSITION

Applicant:
Symrise AG

Headword:
A fragrance composition/SYMRISE

Relevant legal provisions:
RPBA 2020 Art. 13(2)

Keyword:
Amendment after summons - taken into account (no)



Beschwerdekammern

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Case Number: T 0774/21 - 3.3.09

D E C I S I O N
of Technical Board of Appeal 3.3.09
of 17 March 2023

Appellant: Symrise AG
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37603 Holzminden Niedersachsen (DE)

Representative: Fabry, Bernd
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 10 February
2021 refusing European patent application No.
18192387.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman A. Haderlein
Members: F. Rinaldi
F. Blumer

Summary of Facts and Submissions

- I. This decision concerns the appeal filed by the applicant (appellant) against the examining division's decision to refuse the European patent application.
- II. The claim requests underlying the decision under appeal were a main request and an auxiliary request. Both included a sole claim. The claim of the main request was directed to a fragrance composition comprising:
- (a) at least one nitrile selected from a first list
 - (b) at least one solvent selected from a second list
 - (c) at least one natural or synthetic perfume
- and the feature "wherein compounds (a) and (b) are present in a ratio by weight of from 10:1 to 1:10."
- In the claim of the auxiliary request, the composition was not restricted to being a fragrance composition.
- III. In the decision under appeal, the examining decision set out that in the earlier application as filed there was no disclosure of a ratio by weight of compounds (a) and (b) in combination with compound (c). In addition, compound (c) overlapped with compounds (a) and (b). Thus, a skilled person would not have considered that the ratio by weight of compounds (a) and (b) was conserved in compositions which included compound (c).
- IV. With its statement setting out the grounds of appeal, the appellant re-submitted the two requests underlying the decision, with a typographic error being corrected. Furthermore, it contested the decision and argued that the examining division erred in several points.

V. In its communication under Article 15(1) RPBA 2020, the board explained its preliminary opinion that:

- the examining division's reasoning appeared to be conclusive and convincing
- none of the points raised by the appellant appeared to be convincing
- the conclusion drawn for the claim of the main request appeared to apply also to the claim of the auxiliary request
- in conclusion, none of the appellant's requests appeared to be allowable, and the appeal would have to be dismissed

VI. In reply to the communication, by letter dated 2 January 2023, the appellant replaced the pending claim requests by filing a main request and two auxiliary requests. It argued that, in its view, the amendments were based on the application as filed.

VII. In a letter dated 15 March 2023, the appellant requested that a decision be taken based on the state of the file.

VIII. Claim requests filed by letter dated 2 January 2023

The main request encompasses two claims.

Compared to the claims of the replaced requests (see points II and IV above), claim 1 of the main request is directed to a detergent composition and is further restricted in that the at least one natural or synthetic perfume is different from component (a).

Compared to the claims of the replaced requests (see points II and IV above), claim 2 of the main request is directed to a cosmetic composition, the at least one natural perfume is selected from a list of specified plant extracts, and the synthetic perfume is selected from a list of specified compounds.

Auxiliary request 1 encompasses solely claim 1 of the main request filed by letter of 2 January 2023.

Auxiliary request 2 encompasses solely claim 2 of the main request filed by letter of 2 January 2023.

- IX. The appellant's final requests are that the decision under appeal be set aside and that the case be remitted to the examining division for further prosecution on the basis of any of the main request and auxiliary requests 1 and 2, all filed by letter dated 2 January 2023.

Reasons for the Decision

1. The current decision is based on the main request and auxiliary requests 1 and 2, all filed with the letter of 2 January 2023. These requests were filed after the notification of a summons to oral proceedings.
2. These requests concern an amendment to the appellant's case.
3. Under Article 13(2) RPBA 2020 such an amendment must, as a rule, not be taken into account unless there are

exceptional circumstances justified with cogent reasons by the party concerned.

4. The appellant has neither referred to exceptional circumstances nor presented cogent reasons for filing the amendments only at this stage of the appeal. Its submissions merely explain why, in its view, the amended claim requests were supported by the application documents as filed.
5. The board does not recognise that there may be exceptional circumstances, let alone cogent reasons for filing the amendments. The contrary is true. The board's communication essentially confirmed the examining division's reasoning. Clearly, a board agreeing with a decision under appeal cannot be regarded as exceptional circumstances. Therefore, such a situation does not justify late-filed amendments to the claim requests.
6. On this basis alone, none of the requests filed by letter dated 2 January 2023 are admitted into the proceedings (Article 13(2) RPBA 2020).
7. For completeness, it is also observed that the amendments are not *prima facie* allowable.
 - 7.1 As to claim 1 of the main request, the feature that the at least one natural or synthetic perfume is different from component (a) has no direct and unambiguous basis in the (earlier) application as filed.
 - 7.1.1 The appellant argued that the amendment was simply a clarification.

- 7.1.2 However, amendments not only have to be clear. They have to be directly and unambiguously derivable from the application as filed. If the application under scrutiny is a divisional application, the amendment must be directly and unambiguously derivable also from the earlier application as filed.
- 7.1.3 In the decision under appeal, the opposition division explicitly explained and concluded that "[t]here is no basis to interpret (c) as different to (a) or (b)" (Reasons, point 10.1.1).
- 7.1.4 In view of this, the amendment in claim 1 manifestly clashes with the conclusions in the decision under appeal. Rather than resolving an issue, the amendment introduces aspects already dealt with and set aside in the decision.
- 7.1.5 The same applies to claim 1 of auxiliary request 1.
- 7.2 As to claim 2 of the main request and auxiliary request 2, similar considerations apply. For example, it is not possible to determine whether the at least one natural perfume selected from the long list of specified plant extracts overlaps with any of the compounds listed under (a) and (b). Such an assessment simply cannot be made *prima facie*.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. Schalow

A. Haderlein

Decision electronically authenticated