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**Datasheet for the decision
of 9 March 2023**

Case Number: T 1193/21 - 3.3.06

Application Number: 16736438.9

Publication Number: 3334817

IPC: C11D17/04, B65D65/46

Language of the proceedings: EN

Title of invention:
WATER-SOLUBLE PACKAGE

Patent Proprietor:
Unilever IP Holdings B.V.
Unilever Global IP Limited

Opponent:
THE PROCTER & GAMBLE COMPANY

Headword:
PRINTED WATER-SOLUBLE PACKAGE/UNILEVER

Relevant legal provisions:
EPC Art. 108, 113(1)
EPC R. 99(2)
RPBA 2020 Art. 12(6)

Keyword:

Admissibility of appeal - indication of the reasons for setting aside the decision (yes)

Late-filed evidence - abuse of procedure (no)

Right to be heard - violation (no)

Decisions cited:

T 0960/15, T 1652/08, T 0572/17, T 2197/11, T 0617/16,

T 2337/16, T 0939/90, T 1019/92, T 2415/09, T 0103/15

Catchword:



Beschwerdekammern

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Case Number: T 1193/21 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 9 March 2023

Appellant: Unilever IP Holdings B.V.
(Patent Proprietor 1) Weena 455
3013 AL Rotterdam (NL)

Appellant: Unilever Global IP Limited
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
17 May 2021 concerning maintenance of the
European Patent No. 3334817 in amended form.**

Composition of the Board:

Chairman J.-M. Schwaller
Members: R. Elsässer
 J. Hoppe

Summary of Facts and Submissions

- I. The appeal of the proprietors lies against the decision of the opposition division to maintain European patent EP 3 334 817 in amended form, based on auxiliary request 1.
- II. In said decision, claim 1 as granted (main request) was found to lack inventive step over **D2** (WO 2014/016144) when taking into account **D10** (WO 2013/158364), **D7** (European Commission, "*COMMISSION REGULATION (EU) No 1297/2014*") and experimental report **D14** - all filed with the grounds of opposition - as well as the second declaration of Miguel Brandt (**D18**) filed four days before the oral proceedings before the opposition division and providing supplemental information with regard to the ink used in **D14**. The opposition division admitted **D18** as well as the first declaration of Miguel Brandt **D11** as prima facie relevant, but not the other late-filed documents, in particular **D16** (WO 2015/148461) and **D17** (coloration analysis).
- III. With their grounds of appeal the appellants contested the above decision on the grounds that the division had not applied the right principles when exercising its discretion to admit **D11** and **D18** and to consider **D14**, and further that it should also have admitted **D16** and **D17**.
- IV. With its reply the opponent contested the admissibility and allowability of the appeal.
- V. At the oral proceedings held on 9 March 2023 the appellants requested that the decision under appeal be

set aside and the patent maintained as granted.

The respondent requested that the appeal be rejected as inadmissible or the appeal be dismissed.

Reasons for the Decision

1. Admissibility of the appeal
 - 1.1 Rule 99(2) EPC stipulates that the statement of grounds of appeal shall indicate the reasons for setting aside the impugned decision.
 - 1.2 The opposition division's finding regarding lack of inventive step of the claims of the main request was based *inter alia* on **D14** supplemented with information provided by document **D18** about the ink used in D14.
 - 1.3 In their statement of grounds of appeal, the appellants explained why **D18** should not have been admitted and concluded that in case **D18** was disregarded by the board the decision regarding the main request was without basis.
 - 1.4 For the board, this reasoning is sufficient under Article 108, 3rd sentence, and Rule 99(2) EPC because in opposition proceedings the burden of proof for identifying a lack of inventive step lies with the opponent. In other words a granted claim is presumed to be inventive unless it is shown that it is not. Since in the current case the appellant identified a break in the chain of arguments that lead to the main request being held non inventive, this reasoning is sufficient for explaining why the contested decision has to be set aside.

1.5 The board therefore concluded that the appeal was admissible.

2. Admittance of **D18**

2.1 The appellants requested not to admit this document although it had been admitted into the proceedings by the opposition division and the decision was based on it.

2.2 The board notes that while under Article 12(6) RPBA 2020 it is possible to admit documents that were not admitted in the first instance proceedings, there is no basis for not admitting such documents in said Article or elsewhere in the RPBA.

In the jurisprudence there is also no consensus as to whether this is possible at all under the EPC. While some boards have decided that, at least in cases of an abuse of discretion, the discretionary decision to admit a document can be overturned even if the decision is based on that document (e.g. T 960/15; T 1652/08; T 572/14 or T 2197/11), other boards have decided differently (e.g. T 617/16, point 1.1.1 of the reasons, and T 2337/16, point 4.2 of the reasons).

2.3 In the current case, this question can remain open because in the board's view, the opposition division exercised its discretion according to the right principles and in a reasonable way.

2.3.1 The division admitted **D18** after having assessed its prima facie relevance (page 5, 2nd paragraph of the decision) which, according to established jurisprudence, is the correct criterion to apply. The appellants did not deny that this is a relevant

criterion when deciding upon its admittance, neither did they contest that **D18** is relevant for the evaluation of **D14** (see point 5 of their submission of 24 February 2023). However they make a distinction between "factual relevance" of a document and its "actual relevance" as follows:

2.3.2 They argued that while **D18** was indeed factually relevant, there was no actual relevance because the document had been filed so late that the division could not reach a conclusion based on the document while still ensuring fair and expedient proceedings. In this context the appellants argued that for late filed experimental evidence, the guiding principle should be that it could only be admitted if the other party could assess it by investigation and replication, but in the appellants' view, this principle had been ignored by the division, and had it been applied, **D18** would not have been admitted because experimental report **D14** became replicable only once the ink used had been identified in **D18**. But since this information was made available only four days before the oral proceedings, this was too late for carrying out counter experiments. In this context, the appellants referred to the Case law of the Boards of Appeal (10th edition, V.A.5.13.5b and IV.C.4.1) and in particular to T 0939/90, reasons 2.

2.4 For the board these arguments are not convincing because first of all, decision T 0939/90 concerns a case in which completely new experimental data were filed shortly before the oral proceedings. The board there confirmed the decision of the opposition division not to admit the material since "its lateness practically precluded the Opponents from countering it

by tests of their own".

The situation in the current case is fundamentally different since experimental report **D14** was filed with the grounds of opposition, and this, if the proprietors had indeed wanted to replicate the experiments, they could have requested the opponent to disclose which ink had been used already with the reply to the opposition. However, no such request had been made. Moreover, in view of paragraph 0047 of the patent, which states that the type of ink is not particularly limited, and further taking into account that the examples of the patent do not disclose which ink had been used either, there was no reason for the opponent to specify the type of ink used in D14.

2.5 During the oral proceedings before the board, the appellants stated that they had decided to deal only with the fundamental deficiencies of D14 instead of presenting all corresponding objections when filing the reply to the notice of opposition. In particular, they explained that they saw no need for any counter experiments at that stage because D14 was seen as very weak evidence for the reasons given in the reply to the opposition.

2.6 However, the board observes that the principles of procedural economy and fairness of the proceedings require a party to present all aspects of its case as soon as possible, in particular in inter parte proceedings, since the parties have a duty to facilitate the swift conduct of the proceedings *inter alia* by submitting all relevant facts, evidence, arguments and requests as early and completely as possible (Case law of the Boards of Appeal, 10th edition, IV.C.4.3.1).

- 2.7 Thus, if a party decides to present an aspect later in the proceedings, it must bear the consequences of this decision. In the current case, it was only with the submission of 28 January 2021 (i.e. one day before the final date for making submissions under Rule 116 EPC and two months before the oral proceedings) that the proprietors disclosed in very general terms that non-aqueous solvent based inks had been used in the experiments of the patent and that they requested the opponent to disclose the type of ink used in **D14**. This information having been provided in D18, its filing thus constitutes a direct response to the request of the proprietors.
- 2.8 The board further notes that the submission of 28 January 2021 does not indicate that the information about the type of ink used in **D14** was needed to replicate these experiments, and even if this had been indicated, there was hardly enough time for replicating them, bearing in mind that the experiments in **D14** involved a storage time of 6 weeks. Thus, had the proprietors in good faith intended to carry out such replicates, their request to disclose the ink used in **D14** should have been filed much earlier since the opposition division raised this issue already in its preliminary opinion. For these reasons, in the board's view, the appellants are at least partly responsible for the late filing of **D18**.
- 2.9 The appellants further argued that it would have been incumbent on the opposition division not to admit **D18** or at least to postpone the proceedings on its own motion, in order to give the proprietor the possibility to replicate the experiments, thereby ensuring that the proceedings were conducted fairly. The appellants held that it was not their duty to request a postponement

because they "could not be expected to accept and accommodate the procedural consequences" of the late filing of **D18**.

2.10 These arguments are however not convincing because from the way the proprietors had conducted the proceedings, the division had no reason to assume that they intended to carry out such experiments. In this context, the board emphasises that experimental evidence filed by one party is by no means always contested with counter experiments by the other party. Therefore and given the circumstances of the case, it could not be expected from the division to postpone the proceedings. Rather, it would have been incumbent on the proprietors to request a postponement in order to carry out replication experiments. However, no such request was made.

2.11 As a matter of fact, there is also no general rule in the jurisprudence that late-filed evidence should only be admitted if there is sufficient time for replication. As set out above, the sole generally accepted criterion is the prima-facie relevance of the evidence. The case law book further elaborates that: "*As to whether and, if so, to what extent opposition divisions can or must consider other criteria too, with the result that even prima facie relevant documents may not be admitted in certain cases, the boards have taken various different approaches*" (Case law of the Boards of Appeal, 10th edition, IV.C.4.5.1).

The current board does not deny that there are cases where the principle relied upon by the appellant can and should be used, for instance in the procedural situation underlying decision T 939/90. However, for the reasons set out above, the current case is

fundamentally different so that the division was correct in merely applying the prima facie criterion.

2.12 It follows from the above considerations that the opposition division exercised its discretion correctly when admitting **D18**, so that there is no basis for excluding this document from the proceedings.

3. Alleged abuse of proceedings

3.1 As a general rule, the late-filing of a document needs to be judged within the context of the development of the case. In the current context, however, no abuse is discernible. As pointed out in T 1019/92, cited by the appellants, the subsequent filing of documents does not constitute an abuse of proceedings in the absence of evidence that this was done for tactical reasons (catchword I), but such tactical reasons are not apparent from the current case.

3.2 The appellants argued in particular that the opponent should have reacted much quicker to their request concerning the identification of the ink used, so that the late filing of this information only a couple of days before the oral proceeding amounted to a procedural abuse.

3.3 In the board's view, however, the proprietors could and should have requested this information much earlier (see above).

Furthermore, as explained by the respondent, the delay for providing the information was caused because they needed to get in touch with the manufacturer of the ink and further get its permission to disclose the information in these proceedings.

3.4 The appellants argued that the name of a commercial ink was not a proprietary information so that there had been no need to ask for permission.

3.5 However, as set out above, the proprietors in their submission of 21 January 2021 did not ask for the name of the ink but for its type, namely whether it was non-aqueous solvent based ink. As this type of information an in particular the content of water and organic solvents is not necessarily known to the user, it is plausible that the opponent needed to contact the supplier.

3.6 It follows from the above considerations and from the reasons set out in point 2. above that the filing of **D18** does not amount to a substantial procedural abuse.

4. Alleged violation of the right to be heard

4.1 The appellants argued that they had not been able to take position on the ground of obviousness involving documents **D14**, **D11** and **D18** together, since the key information about the ink used in **D14** had only been made available (with the filing of **D18**) four days before the oral proceedings. They referred in this respect to T 2415/09 and argued that, without having enough time to perform counter experiments, they could not organise an appropriate defense against the inventive step attack involving these documents.

4.2 The board notes that in the case underlying T 2415/09 the proprietor was faced with a completely new attack, involving new evidence filed only shortly before the oral proceedings. As set out above, the procedural situation in the current case is different so that, basically for the same reasons given in the

discussion regarding admittance of **D18**, the present board has come to the conclusion that the appellants' right to be heard under Article 113(1) EPC has not been violated.

5. Admittance of **D11**

The appellants argued that during opposition proceedings, they ceased to challenge the admissibility of **D11** under the condition that **D16** and **D17** were also admitted. However, as the opposition division did not admit **D16** and **D17**, they should have been heard as regards admittance of **D11**.

For the board, the division's decision to admit **D11** being based on the well-recognised criterion of the prima facie relevance of a document, it does not suffer from an error in the use of discretion. And even if the decision on its admittance had been erroneous, since **D11** has not been used in the decision, it had no impact onto the outcome of the opposition proceedings. So the board sees no reason to overturn this decision of the opposition division.

6. Admittance of **D14**

In the board's opinion, the opposition division was correct in considering **D14** for the following reasons.

6.1 With reference to T 103/15, the appellants argued that the opposition division should not have taken **D14** into account because it was an anonymous technical report.

6.2 This is however not convincing because, while it is true that the author of **D14** was not identified initially, this information has subsequently been

provided in the declarations **D11** and **D18**. In contrast, decision T 103/15 concerned a case where the opponent explicitly refused to disclose the name of the person responsible for the tests. Therefore this decision is not applicable to the current case.

- 6.3 The appellants also argued that the fact that the division found **D11** and **D18** to be prima-facie relevant suggested that it found **D14** unconvincing on its own. However, this conclusion is unfounded because although the division was of the opinion that **D14** was more relevant with the additional information about the ink used provided by **D18**, this does not mean that **D14** alone would have been "unconvincing" without this information. Finally, even if the division saw indeed a problem with **D14** lacking detail, this issue had been rectified by the filing of **D11** and **D18**.
- 6.4 In this context the appellants complained about the opponent bolstering the probative value of **D14** by adding bits of information later on (**D11**, **D18**) but the board notes that the proprietors acted in a similar way, see submissions of 28 January 2021, point 2, and of 2 June 2020, page 13, first paragraph. Therefore the opposition division acted fairly by considering the examples of the patent but also **D14**.
- 6.5 Summing up, it appears that the appellants have conceded that, at least when taken together with **D18**, **D14** is a relevant technical report that can be investigated and replicated (point 5 of the submission of 24 February 2023). Therefore, the crucial issue in these proceedings is rather whether **D18** should have been admitted. As the board answered this question in the affirmative, see above, it was correct and only

logical to also consider **D14**.

7. Admittance and relevance of **D16**

The board concluded that, irrespective of its admittance, **D16** is not suitable to solve the issues which lead to the decision under appeal.

7.1 The appellants argued that the opposition division erred by evaluating **D16** as a prior art rather than a document providing evidence, thus leading to an erroneous decision not to admit **D16** into the proceedings.

7.2 The board notes that it may - according to Article 12(6) RPBA 2020 - admit submissions if the decision not to admit them suffered from an error in the use of discretion or unless the circumstances of the appeal justify their admittance. However, even if the discretionary decision of the opposition division not to admit the document was indeed flawed, as alleged by the appellant, **D16** is not suitable to solve the issues which led to the decision under appeal for the following reasons.

7.2.1 **D14** was filed by the opponent to prove that the quality issues with the printing described in the contested patent were not observed for all ink substrate combinations, so the problem to be solved could not be formulated as to how to overcome these issues.

7.2.2 The proprietors saw a contradiction between the experiments in the patent and those of **D14**, and filed **D16** in order to break the alleged deadlock. The proprietors referred in particular to the paragraph bridging pages 1 and 2 of **D16** which confirmed the

findings of the patent, so that the contradictory evidence reported in **D14** could be disregarded as an unexplained outlier (see appellant's submission of 19 March 2021, par. 22-24). In other words, the proprietors filed **D16** as evidence that the quality issues with the printing were always observed.

7.2.3 However, the board notes that the above passage in **D16** merely states that the printed pouches may abrade with one another, thereby marring the printing, and that the fixing of the ink on the water-soluble substrate can be challenging. In other words, **D16** confirms that problems with the printing occur in some cases but it does not confirm that they always occur. Therefore, it is not possible to disregard **D14** in view of **D16**, and the fact that printing issues may occur in some cases has already been acknowledged by the respondent (see the reply to the appeal, point 7.3). Thus, even if **D16** is taken into account - irrespective of the question of its admittance - it is not relevant for the outcome of the appeal.

8. Admittance and relevance of **D17**

Even if the discretionary decision of the opposition division not to admit this document was indeed flawed, as alleged by the appellant, **D17** is not suitable to solve the issues which led to the decision under appeal.

8.1 The appellants argued that the opposition division relied on an incorrect factual assumption when not admitting **D17**.

8.2 However, similarly to **D16**, **D17** is irrelevant for the outcome of the proceedings for the following reasons:

8.3 **D17** is a coloration analysis of the photos of **D14** and **D15**. The crucial finding in **D17** appears to be that the blue composition of the samples of **D14** shows a color shift from red to blue, while the samples of **D15** show a color shift in the opposite direction. However, **D15** was not admitted by the division so that any reference to the results of **D15** must be disregarded in **D17** as well. As a consequence, the only relevance in **D17** would be that there is a color shift in the samples of **D14**, which is already evident from **D14** itself. Thus, even if **D17** is taken into account - irrespective of the question of its admittance - it is not relevant for the outcome of the appeal.

9. Alleged bias

The appellants were of the opinion that the opposition division's decision to admit **D11** and **D18** but to disregard **D16** and **D17** gave the appearance of a discriminatory treatment and thereby amounted to a procedural violation. However, the board sees no evidence for an unfair treatment of the appellants.

9.1 Firstly, it needs to be noted that among the opponent's numerous late filed documents, the division only admitted **D11** and **D18**, which were both linked to the timely filed experimental report **D14**. **D12a**, which is not controversial, was also admitted, but **D12**, **D13**, **D15** and **D19** (all filed by the opponent) were not. Thus, the division's decisions on admittance as a whole do not a priori give an indication of bias towards the opponent.

9.2 Secondly, an opposition division has to exercise its discretion for each document individually, so that it is not uncommon that a document from one party is admitted while one or more documents of the other party are not. This alone is also not an indication for an unfair treatment of the latter party. Moreover, while the right to be heard needs to be respected, this does not mean that a party has a right to have a document admitted simply because a document from the other party was admitted. Likewise, even if some of the discretionary decisions of the division were indeed flawed, as alleged by the appellant, this would not in itself be sufficient evidence for a discriminatory treatment.

10. The appellants challenged the contested decision only in that **D11** and **D18** should be declared inadmissible, that **D14** should be disregarded and that **D16** and **D17** should be admitted into the proceedings. As the board does not follow either request, the appeal cannot succeed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



A. Pinna

J.-M. Schwaller

Decision electronically authenticated