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Datasheet for the decision of 25 March 2025

Case Number: T 1993/22 - 3.3.06

Application Number: 14860353.3

Publication Number: 3068861

IPC: C11D3/386, C11D3/10, C11D3/22, C11D3/30, C11D3/32, C11D3/37, C11D3/384

Language of the proceedings: EN

Title of invention:
MULTIUSE, ENZYMATIC DETERGENT AND METHODS OF STABILIZING A USE SOLUTION

Patent Proprietor:
Ecolab USA Inc.

Opponent:
Unilever PLC/ Unilever IP Holdings B.V./
Unilever Global IP Limited

Headword:
Ecolab/Stabilized Use Solution

Relevant legal provisions:
EPC Art. 123(2)
RPBA 2020 Art. 13(2)

Keyword:
Amendments - extension beyond the content of the application as filed (yes)
Amendment after summons - exceptional circumstances (no)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

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Case Number: T 1993/22 - 3.3.06

D E C I S I O N
of Technical Board of Appeal 3.3.06
of 25 March 2025

Appellant: (Patent Proprietor)	Ecolab USA Inc. 1 Ecolab Place St. Paul, MN 55102 (US)
Representative:	Godemeyer Blum Lenze Patentanwälte Partnerschaft mbB - werkpatent An den Gärten 7 51491 Overath (DE)
Respondent: (Opponent)	Unilever PLC/ Unilever IP Holdings B.V./ Unilever Global IP Limited Unilever House 100 Victoria Embankment London EC4Y 0DY (GB)
Representative:	van Benthum, Wilhelmus A. J. Unilever Patent Group Bronland 14 6708 WH Wageningen (NL)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 22 June 2022 revoking European patent No. 3068861 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman	J.-M. Schwaller
Members:	R. Elsässer
	O. Loizou

Summary of Facts and Submissions

I. The patent proprietor appealed the decision of the opposition division to revoke the patent under the grounds that the main, first, second and fourth auxiliary requests lacked an inventive step under Article 56 EPC and the third auxiliary request did not meet the requirements of Article 123(3) EPC.

II. With the grounds of appeal, the appellant resubmitted the four auxiliary requests on which the decision was based as well as the declaration of Wendy Lo (**D28**) already filed in the first instance proceedings with a letter dated 23 March 2022.

III. With its reply, the opponent and respondent *inter alia* argued that granted claim 5 and the corresponding claims of the auxiliary requests contained added subject-matter, and so extended beyond the content of the application as filed, so that none of the requests on file met the requirements of Article 123(2) EPC.

IV. In reply to the board's preliminary opinion, the appellant filed with a letter dated 25 February 2025 further auxiliary requests 5 to 9 as well as **additional experimental details** to example 5 of the patent and to the experiments discussed in declaration **D28.**

V. In a further submission, the respondent requested under Article 13(2) RPBA not to admit these new data and new auxiliary requests.

VI. At the oral proceedings held on 25 March 2025, the final requests of the parties were the following:

The appellant requested as a main request that the decision under appeal be set aside and the opposition be rejected; in the alternative, that the patent be maintained in amended form on the basis of the claims of one of auxiliary requests 1 to 4 filed with the statement of grounds of appeal, or of one of auxiliary requests 5 to 9 filed with letter dated 25 February 2025.

The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. Main request - Article 123(2) EPC

1.1 Granted claim 5, with highlighted amendments compared to claim 9 as filed, reads as follows:

"5. A stabilized multi-use detergent use solution composition produced by the process comprising: providing a detergent use composition comprising: an alkali metal carbonate alkalinity source; a protease enzyme; either an amine, amide, polyamide and/or polyamine stabilizing agent or a polysaccharide stabilizing agent; and water, wherein said detergent use composition is provided in one or more solid ~~and/or liquid~~ compositions to generate said use ~~composition~~ solution; contacting the solid detergent composition with a diluent to generate an aqueous use solution; wherein said use solution has an alkaline pH of at least 9; wherein said protease retains enzymatic activity in said use solution for at least 20 minutes at temperatures between about 65-80°C, wherein said stabilizing agent is a gelatin or an amylose and/or amylopectin-containing starch, ***and wherein said use composition comprises between 60 wt-% and 85 wt-%***

alkali metal carbonate actives, between 5 wt-% and 20 wt-% water, between 0.1 wt-% and 5 wt-% protease enzyme, and between 0.1 wt-% and 10 wt% stabilizing agent actives and between 1 wt-% and 25 wt-% additional functional ingredients."

1.2 The board finds that the features in bold and underlined have no basis in the application as filed. In this respect, the appellant referred to the "fourth exemplary range" on page 9 of the description as filed, but this passage does not disclose the content of alkali metal carbonate actives, as requested in claim 5 at issue.

1.3 The board observes that the expressions "*wt-% alkali metal carbonates*" (as expressed in said fourth exemplary range) and "*wt-% alkali metal carbonate actives*" (as defined in claim 5 at issue) do not have the same meaning, because the term "actives" refers in general to a pure compound without consideration of any inert substances or impurities which generally are present, for instance, in a commercial compound. This meaning of the term "actives" is furthermore explicitly confirmed on page 8, line 22-25 of the application as filed.

Thus, taking as an example a commercially available alkali metal carbonate with a purity of 95%, a composition containing 100g of this alkali metal carbonate would only contain 95g alkali metal carbonate actives.

It follows that the disclosure on page 9 referred to by the appellant does not support the feature added to claim 5, namely a content of from 60-85 wt-% of alkali

metal carbonate actives.

1.4 The appellant further argued that in the general context of a patent, an amount or weight range of a compound always relates to the active amount of the compound, so that the term "actives" would only make sense if commercial products were described which might contain other ingredients. This was however neither the case for the claims of the opposed patent nor for the ranges disclosed on page 9 of the application as filed, so that there was no difference for the skilled reader between a claim defining a composition comprising 60 to 85 wt.-% sodium carbonate or 60 to 85 wt.-% sodium carbonate actives. In essence, the terms "wt-%" and "wt-% actives" were used synonymously in the application, including for the ranges mentioned on page 9, and this interpretation was backed up by claims 6 and 13 as filed, which were basically directed to the same subject matter but referred to the content of "actives" only in the case of claim 13 and only for some of the ingredients mentioned.

1.5 The board however sees neither an indication in the application as filed nor any other compelling reason to assume that the terms "wt-%" and "wt-% actives" are used synonymously or interchangeably in the application as filed, so that without such an indication, the disclosure of the application as filed must be taken at face value, meaning that different terms denote different things so that the disclosure of a range "60-85 wt-%" is not synonymous with, and so does not support, the range "60-85 wt-% actives".

The board has noted that several terms which are used interchangeably with the term "percent by weight actives" are listed on page 8, line 22-25, but "percent

by weight" or "wt-%" is not mentioned there. Thus, if the authors of the application as filed intended to use both terms synonymously, this should have been mentioned therein.

The argument that information about the proportion of a compound in a composition would always be given with regard to the amount of active compound is not convincing, let alone backed up by any evidence. The board agrees with the appellant that it makes more sense to indicate the amount of a compound as actives, rather than the amount of the gross compound containing e.g. impurities, but the latter is also possible.

It follows from the above considerations that there is no direct and unambiguous basis in the application as filed for the assumption that the disclosure of an alkali carbonate content given as "wt-%" can be read as a content of "wt-% actives".

1.6 The appellant also referred to claims 6 and 13 as filed, but this argument is not convincing either since these claims relate to different things, namely claim 6 relates to and provides details about the solid detergent composition of claim 1, whereas claim 13 relates to a liquid use solution obtained by contacting a solid composition with a diluent. The motivation of the authors of the application behind the decision to define the amounts of some of the compounds as actives only in claim 13 but not in claim 6 is not clear, but the mere fact that there is an unexplained inconsistency in this regard cannot be taken as a direct and unambiguous disclosure that both terms are equivalent and interchangeable.

1.7 Basically the same reasons apply to the range of stabilising agents, which is also disclosed only as wt-%, and not as wt-% actives as in claim 5 at issue.

1.8 It follows that the subject-matter of claim 5 of the main request is not directly and unambiguously disclosed in the application as filed and therefore is not allowable under Article 123(2) EPC.

2. Auxiliary requests 1-4

As each of these requests contains the same features as the one discussed for the main request, they do not meet the requirement of Article 123(2) EPC either.

3. Auxiliary requests 5-9

3.1 Auxiliary requests 5 to 8 correspond to the main and first to third auxiliary requests, respectively, with granted claim 5 or the respective claim derived therefrom being deleted.

Auxiliary request 9 corresponds to auxiliary request 7 with an additional amendment in claim 1.

3.2 With respect to auxiliary requests 5 to 8 the appellant argued that a request that differed from existing ones merely by the deletion of some claims did not constitute an amendment of a party's case, so that Article 13(2) RPBA did not apply.

The board observes that there is plethora of case law on this issue, with each case having been decided upon their own specific facts and submissions (Case Law of the Boards of Appeal, 10th Edition, V.A.4.d)), but the board finds itself in agreement with the line of

jurisprudence presented e.g. in T 2091/18, points 3 and 4 of the reasons, which holds that the deletion of one or more independent claims constitutes an amendment in the sense of Article 13(2) RPBA.

3.3 One factor frequently considered when assessing whether a deletion of claims amounted to an amendment was whether it would require a fresh discussion on novelty or inventive step, or instead, whether the deletion would merely reduce the complexity of the proceedings by eliminating one of the matters in dispute. A corresponding argument was made by the appellant in the case at hand, arguing that the patent was essentially revoked by the opposition division under Article 56 EPC. This objection was at the core of the appeal and should now be discussed in the context of the newly filed requests to which the objection under Article 123(2) EPC did no longer apply.

This argument is not convincing because, after having received the board's preliminary opinion, the appellant did not only file the new auxiliary requests 5-8 but also submitted new facts to be considered in the context of the assessment of inventive step. These new facts, their admittance into the proceedings and the arguments based thereon were not and did not have to be considered by the board in the context of the higher ranking requests, but would have to be discussed for the first time now in the context of the new auxiliary requests 5-8. Therefore, in the concrete procedural situation of the case at hand, the new requests do not merely reduce the complexity of the case but necessitate the evaluation of new facts and the beginning of a new discussion.

3.4 If follows from the above considerations that auxiliary requests 5-8 are considered to be amendments to the appellant's appeal case.

3.5 As to auxiliary request 9, this is undisputedly an amendment to the appellant's case, at least due to the amendments in claim 1.

3.6 Since all these requests were filed after the notification of the communication under Article 15(1) RPBA, their admittance into the proceedings is governed by Article 13(2) RPBA which stipulates that requests filed at this stage of the procedure shall in principle not be taken into account, unless there are exceptional circumstances which have been justified with cogent reasons by the party concerned.

3.7 In the case at hand, the board does not see any exceptional circumstances because the objection under Article 123(2) EPC against granted claim 5 had already been discussed at the first instance proceedings and was raised again in pages 10 and 11 of the respondents' reply to the grounds of appeal, so that the appellant could - and should - have filed the requests dealing with this objection at the latest after the respondent's reply but before the board issued its preliminary opinion.

The same applies to the amendment to claim 1 in auxiliary request 9 which, in addition to the deletion of claim 5, addresses the decision of the opposition division against auxiliary request 3 (point 4 of the decision), so that this request should have been filed with the grounds of appeal.

3.8 The appellant argued that it was unreasonable to expect from a patent proprietor to file auxiliary requests dealing with all the objections, because this would lead to an unreasonable number of diverging requests.

However, for the case at hand, the board does not see that a timely reaction of the patent proprietor to all relevant objections would have been impractical or would have led to an excessive amount of requests. To the contrary this is quite an ordinary course of events to follow.

3.9 For these reasons, the board has exercised its discretion under Article 13(2) RPBA not to admit auxiliary requests 5-9 as it found no exceptional circumstances justified with cogent reasons.

4. With the main and auxiliary requests 1-4 not being allowable, and auxiliary requests 5-9 not being admissible, the proprietor's appeal does not succeed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

A. Wille J.-M. Schwaller

Decision electronically authenticated