

Veröffentlichung im Amtsblatt	J/Nein
Publication in the Official Journal	Yes/No
Publication au Journal Officiel	Oui/Non



Aktenzeichen / Case Number / N^o du recours : T 42/83

Anmeldenummer / Filing No / N^o de la demande : 79 200 449.1

Publikations-Nr. / Publication No / N^o de la publication : 0 008 480

Bezeichnung der Erfindung: Sweetened oral compositions, preferably toothpastes
Title of invention: or mouthwash compositions
Titre de l'invention :

ENTSCHEIDUNG / DECISION
vom / of / du 30 May 1984

Anmelder/Patentinhaber: Procter & Gamble
Applicant/Proprietor of the patent:
Demandeur/Titulaire du brevet :

Stichwort / Headword / Référence :

EPÜ / EPC / CBE Art. 52(1), 56

"Inventive step"

Leitsatz / Headnote / Sommaire

Europäisches
Patentamt
Beschwerdekammern

European Patent
Office
Boards of Appeal

Office européen
des brevets
Chambres de recours



Case Number: T 42/ 83

DECISION
of the Technical Board of Appeal 3.3.1
of 30 May 1984

Appellant: THE PROCTER & GAMBLE COMPANY
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U.S.A.

Representative: Suslic, Lydia
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Decision under appeal: Decision of Examining Division 001 of the European Patent
Office dated 25.10.82 refusing European patent
application No 79200449.1 pursuant to Article 97(1)
EPC

Composition of the Board:

Chairman: D. Cadman
Member: H. Robbers
Member: L. Gotti Porcinari

Summary of facts and submissions

- I. European patent application No. 79 200 449.1, filed on 13.08.1979, published on 05.03.1980 (publication No. 0 008 480), claiming a priority of 24.08.1978, based upon the United States application Serial no. 936 452, was refused by decision of the Examining Division 004 of the European Patent Office, dated 25.10.1982. The subject of the decision was the single claim filed on 14.04.1982, which reads as follows:

A toothpaste composition comprising from 0.01% to 1.0% of a fluorine-containing oral health agent selected from stannous fluoride and sodium fluoride, characterised in that it contains, as sweetening agent, from 0.05% to 0.80% of 6-methyloxathiazinone dioxide or an alkali metal or alkaline earth salt thereof.

- II. The ground for refusal was lack of inventive step having regard to the prior art in Seifen, Öle, Fette, Wachse 102, 243-244 (1976) which reveals the named compound (or Acetosulfam) as a sweetening agent in oral compositions, including toothpastes. The difference between the known and the claimed toothpaste is the content of 0.01% to -1% of stannous fluoride or sodium fluoride.

Since fluoride-containing toothpastes have achieved great commercial value and importance in the last years, the combination of these ingredients was regarded as lying within the scope of the normal progress of technology.

III. On 20.12.1982 the applicant lodged an appeal against the decision, followed by a Statement of Grounds on 17.02.1983. The appeal fee was duly paid. The appellant requests the cancellation of the decision in its entirety.

IV. In his Statement of Grounds the appellant states that the fact that the invention relates to a combination of ingredients separately known in toothpastes is of no consequence for patentability, if firstly the technical problem solved is new and secondly the solution devised is particularly and unexpectedly efficacious.

According to an Affidavit filed on 01.04.1981, the prior art sweetener 3,4-dihydro-1,2,3-oxathiazinone adversely affects the stability of stannous fluoride and sodium fluoride, whereas the 6-methyl substituted compound according to the application is particularly efficacious in preventing fluoride degradation. There is no appreciation in the prior art of the problem of fluoride loss through interaction with the sweetener. The efficaciousness of the 6-methyl substituted compound must accordingly be regarded as unexpected.

Reasons for the decision

1. The appeal complies with Articles 106 - 108 and Rule 64 EPC and is therefore admissible.
2. The pending claim is supported by page 7 lines 10-23 of the original application and does not contain subject-matter which extends beyond the content of the application as filed (Article 123(2) EPC).

3. The state of the art consists of Seifen, Oele, Fette, Wachse 102, 243-244 (1976) which reveals the use of 6-methyl 3.4-dihydro 1.2.3-oxathiazin-4(3H)-one 2,2-dioxide (which is the official name according to the rules of nomenclature) or Acetosulfam (the trade name of the potassium salt) in toothpastes, and also US-A-2 932 606 which discloses the use of 3.4-dihydro 1.2.3-oxathiazin-4(3H)-one in toothpastes, this time especially in toothpastes containing stannous fluoride and sodium fluoride as well. The subject matter of the claim is therefore novel.

4. According to the cited article in Seifen, Oele, Fette, Wachse, Acetosulfam possesses excellent qualities as a component of toothpastes (the term "hervorragend" used cannot be misunderstood). This unambiguous qualification makes its application in all the usual toothpastes obvious. Since the fluorides comprised both belong to the very small group of fluorides which have been accepted by the American Dental Association until now and therefore are of outstanding importance from a commercial point of view, the known toothpastes used in this case certainly are to be considered as usual toothpastes. Just as the Examining Division, the Board takes the view that the subject-matter of the claim is to be regarded as lying within the scope of what can be termed the normal progress of technology. The specific quantities of fluoride as well as sweetener and the qualification of the sweetener as such or as alkali metal or alkaline earth salt are not held to embrace particular embodiments which would justify a different judgement.

5. Although the technical problem which would be raised by the fact that 3,4-dihydro 1,2,3-oxathiazin-4(3H)-one would affect fluoride stability does not have any basis in the prior art and in the application in its initial form - initially the use of the sweetener in toothpastes in general was comprised - it could be accepted as a decisive argument in favour of the appellant if a prejudice against the use of Acetosulfam in fluoride containing toothpastes would be embraced by it.

According to the article in "Seifen, Oele, Fette, Wachse" cited, the specific properties relevant to toothpastes which make Acetosulfam a preferred additive relate to taste, solubility, stability as well as absence of reaction with other ingredients. Fluorides certainly have to be regarded as normal ingredients of toothpastes.

The Board takes the view that even if the fact is neglected that purely structural similarity does not automatically account for a similar behaviour with regard to such a specific property as effect on fluoride stability, on the basis of the last-mentioned property of Acetosulfam, the existence of a prejudice against its use cannot be said to exist.

6. In his reply of 24.01.1984 to the communication of the Board of 18.10.1983, the appellant has cited the decision in case T 39/82. According to this decision, differences in the problems addressed between an application and the prior art must be taken into account in deciding whether it would be obvious to apply a particular measure known in the same specialised field.

The Board takes the view that the situation in the present case is quite different. In case T 39/82 the problems concerned, although in the same broad field i.e. road traffic, applied to equipment within this field with different technological backgrounds, i.e. traffic lights and car spotlights. The problem of fluoride stability as introduced in a later stage of the proceedings in this case still belongs to the field of toothpastes and is a problem which might also arise with regard to other ingredients applied. It cannot be considered as a different problem with respect to the prior art but only as a subordinate problem.

Order

For these reasons

it is decided that:

the appeal against the decision of the Examining Division 001 of the European Patent Office dated 25.10.1982 is dismissed.



J. Koe

D. Cadman