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Bezeichnung der Erfindung: Cheese spreads and process for preparation of the
Title of invention: same
Titre de l'invention :

Klassifikation / Classification / Classement : A23C 19/08

ENTSCHEIDUNG / DECISION

vom / of / du 26 April 1990

Anmelder / Applicant / Demandeur :

Patentinhaber / Proprietor of the patent / CPC International Inc.
Titulaire du brevet : Knorr Nahrungsmittel AG

Einsprechender / Opponent / Opposant : Unilever NV

Stichwort / Headword / Référence : Cheese spreads/CPC

EPÜ / EPC / CBE Articles 56 and 114

Schlagwort / Keyword / Mot clé : "Inventive step (confirmed)"
"Late filed documents"

Leitsatz / Headnote / Sommaire



Case Number : T 559/88 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 26 April 1990

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Decision under appeal : Decision of Opposition Division of the European Patent Office of 28 June 1988, posted on 21 September 1988 rejecting the opposition filed against European patent No. 0 033 635 pursuant to Article 102(2) EPC.

Composition of the Board :

Chairman : P.A.M. Lançon

Members : R.W. Andrews

W. Moser

Summary of Facts and Submissions

- I. The mention of the grant of European patent No. 0 033 635 in respect of European patent application No. 81 300 381.1, filed on 29 January 1981, was announced on 19 December 1984 (cf. Bulletin 84/51). The two independent claims read as follows:

"1. A process for preparing a packaged cheese spread which process comprises

(a) combining a natural cheese with an edible fat, at least one stabilizing agent, water and, optionally, salt;

(b) heating the mass obtained at a temperature of from 125° to 130°C;

(c) agitating the mass at a temperature of from 75° to 85°C and

(d) filling appropriate containers with the mass, characterized in that (1) the sole or major natural cheese ingredient is a fully ripened, natural soft-to-medium cheese, (2) the stabilizing agent is selected from one or more natural gums, gelatine and mixtures thereof, (3) after combining the ingredients, the mass is heated to a temperature of from 125° to 130°C with mixing over a period of a few minutes and then the mass is maintained at that temperature with mixing for from 2 to 10 minutes and (4) the mass is then cooled to a temperature of from 75° to 85°C and homogenized at that temperature.

11. A cheese spread having a shelf-life of at least 12 weeks under normal cold storage conditions comprising a natural cheese, an edible fat, at least one stabilizing agent, water and, optionally, salt characterized in that

the sole or major natural cheese ingredient is a fully ripened, natural soft-to-medium cheese, the stabilizing agent is selected from one or more natural gums, gelatine and mixtures thereof and having approximately 40% total dry substance and from 50% to 60% fat, based on dry substance."

II. On 18 September 1985 a notice of opposition was filed requesting the revocation of the patent on the grounds of lack of novelty, lack of inventive step and insufficient and incomplete disclosure. The opposition was supported, *inter alia*, by:

(4) Cheese and Fermented Milk Foods, F. Kosikowski, pages 290 and 294-296, (1966) and

(7) Handbuch der Lebensmittelchemie, Volume III/1, Tierische Lebensmittel, Milch, Butter, Käse, pages 575-581, 586-589, 598, 599 and 619, (1968).

After expiry of the time allowed for filing notice of opposition the Appellant (Opponent) referred to:

(11) Processed Cheese Manufacture, Dr. A. Meyer, pages 6, 7, 94 and 95, (1973).

III. By a decision delivered orally on 28 June 1988, with written reasons posted on 21 September 1988, the Opposition Division rejected the opposition. The Opposition Division concluded that the proposed solution to the underlying technical problem of providing a cheese spread containing as the sole or major ingredient a fully ripened, soft-to-medium cheese which has a shelf-life of at least 12 weeks and a flavour virtually indistinguishable from the original cheese and a process for its manufacture, was novel and inventive in the light

of the cited prior art. Thus, although the skilled person knows that the properties of a processed cheese are determined by the starting materials, additives and processing steps, the prior art gave no indication that the solution to this technical problem lies in the process conditions and the choice of the specific ingredients. Moreover, it was regarded as surprising that sensitive cheeses, such as Camembert, could be processed under the claimed conditions without the addition of harder cheeses to give products of high quality.

Although document (4) discloses processed cheese spreads containing gums and having moisture contents of 44% to 60%, in the absence of any indication of the type of cheese or other ingredients, the teaching of this document would not suggest the proposed solution to the skilled person.

- IV. An appeal was lodged against this decision on 10 November 1988 with payment of the prescribed fee. A statement of grounds of appeal, in which the Appellants cited, for the first time, pages 300 and 379 of document (4) and pages 8, 227 and 230 of document (11), was filed on 20 January 1989. In their statement and during the oral proceedings held on 26 April 1990, the Appellants alleged that the only feature which may serve to distinguish the claimed process from those known in the prior art is the incorporation of a stabilising agent selected from a natural gum and/or gelatine. However, in the light of page 95 of document (11) it was obvious to replace emulsifying salts by natural gums, particularly in view of the sharp increase in the demand for food products free from artificial ingredients even if the resulting products are of inferior quality. Moreover, the claimed stabilising agents are the only available alternative to the conventional emulsifying salts.

The Appellants also argued that, having regard to the prior art, the present invention set out to solve the problems of unsatisfactory shelf-life and consistency of cheese spreads made from fully ripened natural soft-to-medium cheeses. To improve the shelf-life and consistency of the spreads the skilled person would be initially inclined to sterilise the product using the conditions set forth in Claim 1 and incorporate binding agents respectively. Under these circumstances the fact that the resulting cheese spreads have flavours virtually indistinguishable from those of the original, natural cheeses cannot serve to render an obvious process inventive.

Additionally the Appellants contended that although document (7) recommends mild conditions for processing soft cheeses, the presence of natural gums and/or gelatine as binding agents would render the use of more severe conditions feasible since their presence would compensate for any loss of binding by casein.

Finally the Appellants alleged that the claims did not exclude the absence of other stabilising salts.

- V. In their observations in reply and during the oral proceedings, the Respondents denied that features (1) to (4) of Claim 1 belong to the prior art and that pages 227 and 230 of document (11) disclose a cheese spread comprising a major proportion of a fully ripened, natural soft-to-medium cheese. Furthermore, the cheese spreads disclosed in this document would not render the subject-matter of Claim 11 obvious in view of the clear differences between those prior art cheese spreads and the present ones in the absence of any evidence of why the skilled person would have changed these known formulations such that they comply with the requirements of Claim 11.

The Respondents also contended that the invention resides in the combination of conditions used in the process together with the specific ingredients to solve the problem outlined in the contested decision. Moreover, the fact that the product of the claimed process has a flavour virtually indistinguishable from that of the original natural cheese, and not a cardboard-like flavour as would be expected from page 95 of document (11), is a clear indication of inventive step.

The Respondents considered that the Appellants' argument that the author of citation (11) was biased against the use of binding agents was fallacious, since this document was cited by the Appellants and it was not open to them to accept only some of its teaching and, without sound reasons, to disregard the other disclosure of the document.

- VI. The Appellants requested that the decision under appeal be set aside and the patent revoked. The Respondents requested that the appeal be dismissed.
- VII. At the conclusion of the oral proceedings the Board's decision to dismiss the appeal was announced.

Reasons for the Decision

- 1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and is, therefore, allowable.
- 2. The Board has considered whether citation (11) and pages 300 and 379 of document (4), which were filed after expiry of the time allowed for filing notice of opposition, should be disregarded under Article 114(2) EPC. Although the Respondents in their observations in

reply to the grounds of appeal considered that the Appellants should not be allowed to introduce these newly cited references into the proceedings, nevertheless they argued that certain passages in citation (11) lead away from the invention and are, therefore, clearly indicate that the present invention is not obvious from this document.

Under these circumstances the Board is prepared to admit pages 6 to 8, 94 95 227 and 230 of Processed Cheese Manufacture (citation (11)) and pages 300 and 379 of Cheese and Fermented Milk Foods (citation (4)) into the appeal proceedings. Since this belatedly filed evidence mainly serves to confirm the teaching of document (7), the Board considers that there is no need to remit the case to the Opposition Division in order to avoid bypassing one level of jurisdiction (cf. T 273/84, silico-aluminates, OJ EPO 1986, 346, in particular point 6 of the Reasons, and T 253/85 of 10 February 1987 (not published in OJ, EPO)).

- 2.1 During the oral proceedings the Appellants attempted to cite from pages of document (11) other than those originally cited with the justification that the citation of certain pages of this reference was equivalent to citing the whole book. In the Board's judgment, it is clear from the Appellants' letter filed on 27 April 1988, in which citation (11) was mentioned for the first time, that this publication was only cited as additional support for their view that the use of thickening agents as stabilisers in processed cheese was well known before the priority date of the disputed patent. Although cited pages 6 and 7 contain a partial list of the contents of the book, the Board cannot agree that the reference to these two pages is tantamount to citing the whole book in the absence of any indication of the particular relevance of any pages other than those specifically cited. Under

these circumstances and in view of the late stage in the proceedings, the Board cannot allow the introduction of any further pages of citation (11) into the proceedings. Therefore, in the Board's view, if a party wishes to support his arguments by reference to a text book, he should cite all the pages of the book he considers to be relevant to his arguments, since he cannot expect that the Board or the other party to have any knowledge of other parts of the book.

3. The patent in suit relates to a cheese spread having a shelf-life of at least 12 weeks under normal cold storage conditions comprising a fully ripened, natural soft-to-medium cheese as the sole or major natural cheese ingredient, edible fat, water and a natural gum and/or gelatine and having approximately 40% total dry substance and from 50 to 60% fat, based on dry substance and a process for preparing these types of cheeses. The said process comprises combining a fully ripened, natural soft-to-medium cheese with an edible fat, water and a natural gum and/or gelatine, heating the mass thus obtained to 125° to 130°C, holding it at this temperature for 2 to 10 minutes with mixing, cooling the mixture to 75° to 85°C and homogenising it at this temperature.

Citation (7), which comprises selected pages from a chapter of a food chemistry text book, may be considered, in the present circumstances, to represent the closest state of the art. This document discloses the usual process conditions utilised in the manufacture of conventional processed cheese spreads. However, it was found that, if the prior art processes disclosed in this document are fully ripened, natural soft-to-medium cheese, a product having satisfactory shelf-life, consistency and flavour characteristic of the original cheese cannot be successfully obtained.

3.1 In the light of this closest prior art, the technical problem underlying the disputed patent may be seen in providing a cheese spread with the desired consistency containing as the sole or major natural cheese ingredient a fully ripened, natural soft-to-medium cheese which has a shelf-life of at least 12 weeks under normal refrigerator temperatures and the flavour of which is virtually indistinguishable from that of the original cheese and a process for the manufacture of cheese spreads of this type.

3.2 According to the patent in suit these problems are solved by the cheese spread forming the subject-matter of Claim 11 and the process claimed in Claim 1.

In the light of the Examples of the patent in suit which illustrate the preparation of processed cheese spreads having the desired properties containing fully ripened, natural soft-to-medium cheeses, butter, water, natural gums, gelatine and optionally salt, the Board is satisfied that the above-mentioned technical problems are credibly solved.

4. After examination of the cited prior art the Board has reached the conclusion that the claimed subject-matter of the disputed patent is novel. Since novelty is no longer in dispute it is not necessary to consider this matter in detail.

5. It still remains to be examined whether the requirement of inventive step is met by the claimed subject-matter.

Citation (7) is a comprehensive review of the art relating to processed cheese products. Thus, it discloses that processed cheeses may be prepared from soft or hard cheeses (cf. page 577, second paragraph) and may contain

other ingredients such as butter (cf. page 575, first paragraph). Furthermore, it also discloses that binding agents, such as tragacanth or locust bean gum, may be incorporated into processed cheeses provided no emulsifying salts are present (page 619, paragraph f).

However, this citation also refers to the difficulties encountered when using soft cheeses as starting materials for processed cheese manufacture. For example, on page 587, it reports that soft processed cheeses are usually prepared from young Limburger or Camembert, very often blended with more solid types of cheese. Furthermore, it discloses that it is necessary to blend cheeses such as Camembert or blue cheese with younger cheeses (cf. middle of page 588). Therefore, although this document indicates that processed cheeses may contain soft cheeses, in view of the general tenor of its teaching, it must be considered surprising that it was possible to solve the problem of providing a cheese spread of the desirable consistency having a shelf-life of at least 12 weeks at normal refrigerator temperatures comprising, as the sole or major natural cheese ingredient, a fully ripened, natural soft-to-medium cheese, the flavour of which is virtually indistinguishable from the original cheese.

- 5.1 Citation (11) describes a spreadable Camembert processed cheese having 50% fat in dry matter containing young and medium ripe Camembert, Schmelzpack, butter, water and emulsifying salts. Thus, this prior art cheese spread not only avoids the use of fully ripened Camembert but requires that the immature cheese be blended with Schmelzpack and the incorporation of emulsifying salts (cf. page 230). The spreadable cheese disclosed on page 227 of this document contains only 20% fat in dry matter and is clearly irrelevant to the subject-matter of

the present Claim 11. The other disclosure of this citation is concerned with the possibility of employing binding agents in processed cheeses.

Therefore, the teaching of this citation, either alone or combined with that of citation (7), would not provide the skilled person with any incentive to alter the above-mentioned formulation in order to arrive at the processed cheese of Claim 11 and solve one of the problems underlying the patent in suit.

- 5.2 In the Board's judgment, the cited prior art does not provide any indication that would lead the skilled person to the processed cheese forming the subject-matter of Claim 11. Therefore, Claim 11 and dependent Claim 12 are allowable.
- 5.3 Having reached the conclusion that the product claims are allowable, it follows that the process claims insofar as they relate to the preparation of the process cheeses as claimed in Claims 11 and 12 are also allowable. For the following reasons the Board has also concluded that the remaining subject-matter of the process claims involves an inventive step.
- 5.4 Although it may be true that the skilled person faced with the problem of the inadequate shelf-life of a processed cheese would be initially inclined to consider sterilising the product using temperatures in the range specified in the present Claim 1, nevertheless the skilled person would be reluctant to adopt this procedure in view of the teaching of citation (7). Thus, in the middle of page 588 of this document it is emphasised that cheeses, such as Camembert or blue cheese, require mild conditions during the heating and mechanical treatment stages of the process. From the bottom of page 598, the skilled person

would conclude that the expression mild conditions corresponds to melting times of as little as 5 minutes at temperatures below 85°C.

In the continuous process disclosed on page 580 of document (7), sterilisation is achieved by rapidly heating the mixture of processed cheese ingredients to about 130° to 140°C and holding the mass at this temperature for a few seconds. Such a technique avoids any deleterious effects of the heat treatment. In contrast, the present process involves heating the ingredients to 125° to 130°C over a period of a few minutes and holding the mixture in this temperature range for 2 to 10 minutes. From the general teaching of citation (7) with regard to the processing of sensitive soft cheeses, the skilled person would not expect that a cheese spread having a flavour virtually indistinguishable from the original cheese would result from such a treatment.

- 5.5 In the Board's view the expression in the characterising part of Claim 1, "the stabilizing agent is selected from...or mixture thereof" requires that the claim be construed as covering a process in which natural gums and/or gelatine are employed as the only stabilising agents.

The use of natural gums to improve the consistency and stability of processed cheese is disclosed in citation (4) (cf. Table 62 on page 295), citation (7) (cf. top of page 619) and citation (11) (cf. pages 94 and 95). Furthermore, the German Cheese Regulations of 24 June 1965 allow the use of natural gum as stabilisers only in the absence of emulsifying salts (cf. page 619 of document (7) and page 95 of document (11)).

However, according to citation (11) the use of a binding agent to bring about a better and stable consistency results in a product of lower quality which may develop a paste-like texture or "cardboard-like" flavour. Moreover, it is clearly stated in this document that binders can never replace emulsifying salts in the manufacture of true processed cheeses. In the absence of any evidence to the contrary, the Board must give the same weight to all the teaching of this document and cannot take into consideration any possible hidden bias of its author. Thus, the disclosure of citation (11) would discourage the skilled person from employing natural gums and/or gelatine in the manufacture of processed cheese and, in particular, from even contemplating using them as the sole stabilising agent.

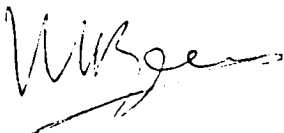
Therefore, although some of the features of Claim 1 are known from the prior art, nevertheless there is no indication in the prior art which would lead the skilled person to the specific process conditions and ingredients necessary to produce a processed cheese spread having the required properties with respect to shelf-like, consistency and flavour. Thus, Claim 1 and dependent Claims 2 to 10 are allowable.

Order

For these reasons, it is decided that:

The appeal is dismissed.

The Registrar:



M. Beer

The Chairman:



P.A.M. Lançon