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Case Number: T 107 / 82

**DECISION**  
of the Technical Board of Appeal 3.2.1  
of 30 November 1983

**Appellants:**

Unilever P.L.C.  
Unilever House, Blackfriars P.O. Box 68  
London EC4 (GB)  
Unilever N.V.  
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Rotterdam (NL)

**Representative:**

Mole, P.G.,  
Unilever P.L.C. Patent Division  
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**Decision under appeal:**

Decision of Examining Division 082  
Office dated 5 February 1982  
application No 79 300 462.3  
EPC

of the European Patent  
refusing European patent  
pursuant to Article 97(1)

**Composition of the Board:**

Chairman: G. Andersson  
Member: P. Ford  
Member: K. Schügerl

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Facts and Submissions

- I. Application No. 79 300 462.3, filed on 22.03.1979 and published under No. 0 004 463, was refused by decision of Examining Division 082 dated 05.02.1982. The decision was based on claims 1 to 8, filed on 19.06.1981, claim 1 reading as follows:

"A pack containing a cleaning powder formulated with a component which adversely affects the stability of a perfume, the inside surface of the pack having been impregnated with a perfume in the region defining the headspace by application from the liquid phase."

The Examining Division held in its decision that the subject matter of claim 1 did not involve an inventive step over the state of the art disclosed in CA-A-971 135 (hereinafter referred to as citation 1).

Furthermore, the Examining Division stated that the problem to be solved was not new in view of the contents of the following documents:

GB-A-1 423 536 - citation 2,  
GB-A-1 398 785 - citation 3,  
GB-A-1 573 406 - citation 4 and  
GB-A-1 277 135 - citation 5.

(The Technical Board of Appeal takes note of the fact that citation 4 was published after the priority date of the application).

II. The applicant lodged an appeal against the decision on 01.04.1982. The appeal fee and the Statement setting out the Grounds of Appeal were received in due time. The Notice of Appeal was filed (in error) in the name of Unilever P.L.C. only but the Statement of Grounds was filed in the name of both appellants and by letter dated 14.01.82 the appellants' representative requested correction of the error and submitted a corrected Notice of Appeal.

III. The grounds for appeal were in essence that citation 1 teaches away from the invention, since that document rejects as unsatisfactory the impregnating of the inside surface of the carton, and that the Examining Division used ex post facto analysis, especially in asserting that the headspace would be the obvious place to apply the perfume.

IV. In the course of the written procedure before the Board, GB-A-1 206 047 (citation 6) and FR-A-2 316 882 (citation 7), both cited in the search report, were introduced as further references. The appellants asserted that these documents did not lead the skilled person to the invention.

#### Reasons for the decision

1. The appeal complies with Articles 106 to 108 EPC.

As originally filed, the Notice of Appeal did not include the name or address of the second-named appellant and was not in accordance with Rule 64(a) EPC. The appellants have, however, duly corrected this deficiency. However, even as corrected the Notice of Appeal does not contain a statement positively identifying the extent to

which amendment or cancellation of the decision is requested. Under these circumstances, the Board has to assume that the Appellant requests the grant of a patent on the same basis as before the Examining Division, that is on the basis of the claims 1 to 8 filed on 19.06.1981 and of the description, pages 1 to 12 as originally filed (see the Decision of the Technical Board of Appeal T 07/81, EPO OJ 1983, 98).

Thus, the appeal can be regarded as being also in accordance with Rule 64(b) EPC; it is therefore admissible.

2. Citation 1 discloses clearly and unmistakably a method for perfuming the content of a pack by applying the perfume to the inside surface (see the passages "... to add the fragrance to the packaging material" (page 2, line 15) and "... by simply applying the perfume to the inside of the carton" (page 3, line 3)). This method is therefore made available to the public by means of a written description (Article 54(2) EPC). The fact that the disclosure is contained in the introductory portion of the description only, is irrelevant. The indication of the background art is no less a disclosure within the meaning of Article 54(2) EPC than the description of the invention itself.
3. The passage following the last cited passage in citation 1, "but the result was that the perfume actually contacted the contents with widely varying degrees of fragrance intensity attaching to different parts of the contents" (page 3, line 5) is an additional information about the disclosed method, which warns the skilled person that the method may have, in some instances, a certain disadvantage. If, in accordance with claim 1 of the

application, only "the region defining the headspace is impregnated with a perfume", the disadvantage of inhomogeneous penetration will be even greater than in the case according to the known method. This shows that the author of the present application considered the disadvantage in question as irrelevant.

4. Such an indication of disadvantages of background art - see also the general remark in citation 1 "prior cartons have not proved entirely satisfactory" (page 3, line 11) - are quite common in patent documents. But these evaluations of a part of the state of the art have to be distinguished clearly from the indications of the technical features of this part of the state of the art themselves. Such evaluations can not negate the disclosure of the technical features to the skilled person. The appellant's assertions that the disclosure of citation 1 rejects the idea of simply applying the perfume to the inside of the carton and that this document teaches away from the invention therefore fail.
5. Citation 7 teaches similarly to citation 1, inter alia the normal method of transferring a perfume to a product, namely the direct deposition of the perfume on the product (citation 7, page 1, line 8, citation 1, page 2, line 8) and also some drawbacks of this method (citation 7, page 1, line 29). In order to overcome these drawbacks, the citation proposes depositing the perfume on the inner surface of a metallised foil which forms the envelope for the products.
6. The skilled person has, therefore, at his disposal two ways of imparting a fragrance to a substance, namely by applying the perfume either to the inner surface of the

container or to the contents themselves. Furthermore, he is aware of the fact that both methods may have their specific advantages and disadvantages. The daily routine work of the skilled person certainly also includes making a deliberate choice between two known methods, having regard to the circumstances, especially to the specific properties of the product to be packed. Such a choice can therefore not be considered as an inventive step or substep. If necessary, the decision can be made by simply trying out the two methods; such elementary experimentation is also part of the skilled person's normal duties.

7. Moreover, in the present case the fact that a perfume may be adversely affected by certain additives to cleaning powder was known before the priority date of the application, as witnessed by citations 3 and 5 (citation 2 and the - after-published - citation 4 do not contain matter relevant to the present case). This known fact, of course, makes the choice even easier.
8. The appellants' assertion that "really reactive bleach precursors" were introduced on the market only just before the priority date of the application is without significance. The problem that a bleaching agent destroys the perfume is clearly stated in the documents cited and the specific nature of the bleaching agent has no bearing on the above-mentioned choice.
9. So far as concerns the feature of claim 1 that the inside surface of the pack in the region defining the headspace should be impregnated by application from the liquid phase, it may be stated first, that citation 1 teaches the application from the liquid phase to a part

of the pack, namely the deformed part 28 (figure 1) or 28a (figure 2). In the latter instance, the locus of application of the perfume lies in the headspace area, the top panel 15 forming the top portion to be removed for opening (page 4, line 12 and page 3, line 19).

10. Citation 6 teaches smearing the inner surface of the closure member of a container (bottle or jar, see page 3, line 23 and page 3, line 100) with a volatile flavourant. In this instance, the contents of the container are out of contact with the flavourant in its liquid phase.
11. The appellants' contention that this document "is not addressed to a skilled person considering the problem of perfuming highly reactive cleaning powder and would not have been considered by him" fails because the state of the art to be considered in assessing the inventive step (Article 56 EPC) is the same as defined in Article 54 (2) EPC, namely an absolute one, without restrictions as to the alleged "addressee" of a document. In the present case, the skilled person is the practitioner in the field of packaging technology; he is presumed to have read and understood citation 6 in the same way as the other citations and stored its contents in his memory.
12. Since both flavourants and perfumes, when applied from the liquid phase on the upper part of the container, will be transferred to the contents of the container by volatilisation, the method of impregnating the contents is in both cases essentially the same, so that it will be obvious to the skilled person to make use of the known idea of applying the substance to be volatilized to the headspace also in the case of a cleaning powder.

13. The appellants' assertion that the skilled man would have rejected the disclosure in question as irrelevant since cleaning powders are not generally sold in bottles or jars having closures, is not acceptable, for it is generally known that cleaning powders are sold in drum-like containers with a separate closure member in the form of a disk with a rim, a form of a container which is very similar to a bottle or a jar. Furthermore, citation 6 discloses also the method in question in claim 11 (page 3, line 100) with reference to a "container having a mouth arranged to be closed by a closure member" in general. But even if there were some difference in the form of the container, this difference could never eliminate the significance of the suggestion that one should choose the inner surface of the cover as the point of application of the substance in the liquid phase.
14. The above analysis yields the same result as the reasoning of the decision under appeal, although, with respect to the feature "in the region defining the headspace", on a different basis. The subject-matter of claim 1 is lacking in inventive step over the prior art; claim 1 is therefore not allowable under the terms of Article 52 (1) and Article 56 EPC.
15. The sub-claims 2-8 are not allowable because they are dependent from a main claim which itself is not allowable and no auxiliary request and no corresponding arguments have been submitted.

#### Order

For these reasons,

it is decided that:

the appeal is dismissed.

The Registrar:

The Chairman: