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**Datasheet for the decision
of 15 October 2018**

Case Number: T 0529/14 - 3.2.07

Application Number: 06776875.4

Publication Number: 1917197

IPC: B65D75/58, B29C59/00

Language of the proceedings: EN

Title of invention:

EASY-TO-OPEN PACKAGING COMPRISING A LAMINATE AND PRODUCTION
METHOD OF SAID LAMINATE

Patent Proprietor:

Amcors Flexibles A/S

Opponents:

DRAGOTTI & ASSOCIATI SRL
Huhtamaki Flexible Packaging Germany GmbH & Co. KG

Headword:

Relevant legal provisions:

EPC Art. 56

Keyword:

Inventive step - (no)

Decisions cited:

Catchword:



Beschwerdekammern

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Chambres de recours

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Case Number: T 0529/14 - 3.2.07

D E C I S I O N
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of 15 October 2018

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
8 January 2014 concerning maintenance of the
European Patent No. 1917197 in amended form.**

Composition of the Board:

Chairman I. Beckedorf
Members: K. Poalas
 G. Patton

Summary of Facts and Submissions

- I. The patent proprietor and opponents 1 and 2 lodged each an appeal in the prescribed form and period against the interlocutory decision of the opposition division maintaining European patent No. 1 917 197 in amended form.
- II. Two oppositions had been filed against the patent as a whole based on all grounds for opposition pursuant to Article 100(a) to (c) EPC.
- III. The opposition division found that the subject-matters of the independent claims of auxiliary request 3 filed with letter dated 3 December 2013 met the requirements of the EPC.
- IV. The patent proprietor requested with its statement setting out the ground of appeal
that the decision under appeal be set aside and
that the patent be maintained as granted (main request),
or, in the alternative,
that the patent be maintained in amended form on the basis of one of the sets of claims filed as auxiliary request 0 and auxiliary requests 1 to 4, whereby auxiliary request 3 corresponds to the version of the patent, which the opposition division held to meet the requirements of the EPC.
- V. Each of opponents 1 and 2 requested

that the decision under appeal be set aside and
that the patent be revoked in its entirety.

VI. As far as relevant for the decision, the parties' submissions in respect of the subject-matter claimed in auxiliary request 3 can be summarised as follows, with the details being discussed in the Reasons.

Opponent 2 argued that the subject-matter of claim 1 of auxiliary request 3 did not involve an inventive step in view of *i.a.* the combination of the teachings of E3 (US 4 778 058) and E4 (US 4 217 327). Opponent 1 argued that the subject-matter of claims 1 and 13 of auxiliary request 3 did not involve an inventive step starting from the disclosure of D5 (US 5 878 549).

The patent proprietor defended the patent on the basis of auxiliary request 3 against the opponents' attacks but failed to provide any arguments with respect to the specific lack of inventive step attack of opponent 2 based on the combination of the teachings of E3 and E4.

VII. In its communication annexed to the summons to oral proceedings scheduled for 15 October 2018 the Board stated *i.a.*, that the subject-matter of claim 1 of the auxiliary request 3 is novel and that during the oral proceedings it would have to be especially discussed whether the combination of the teachings of E3 and E4 renders the subject-matter of claim 1 of auxiliary request 3 not inventive, see point 14.1 of said communication.

VIII. With letter dated 10 July 2018 the patent proprietor informed the Board that it would not attend the oral proceedings and explicitly requested that the patent **"be maintained as modified during the oral proceedings dated 10 December 2013"**, *i.e.* as upheld by the opposition division. No comments or arguments concerning the patentability of said request were made

in said letter.

- IX. Both opponents informed the Board (opponent 1 with letter dated 18 July 2018 and opponent 2 with letter dated 10 August 2018) that they would not attend the oral proceedings. No comments were submitted in respect to the above-mentioned communication of the Board.
- X. With registered letter dated 25 September 2018 the Board informed the parties that it considers the patent proprietor's request in its submission dated 10 July 2018 for maintenance of the patent "as modified during the oral proceedings dated 10 December 2013" as the patent proprietor's sole request replacing all its previous requests. In case this would not have been the case, the patent proprietor was asked to clarify the situation as soon as possible.
- XI. Oral proceedings before the Board took place on 15 October 2018 in the absence of the parties. In the absence of a patent proprietor's reaction to the above-mentioned registered letter, the Board saw no reason to change its preliminary opinion with respect to the patent proprietor's sole request on file, see minutes of the oral proceedings.
- XII. The wording of independent claim 1 of the auxiliary request 3, *i.e.* of the patent as upheld by the opposition division, according to the feature's analysis presented in the statement setting out the grounds of appeal of opponent 2 reads as follows:
- "1.1 Easy-to-open packaging (1)
1.2 comprising an easy tearable multilayer laminate (8),
1.3 said laminate comprising at least two polymer

layers

1.4 wherein at least one of said polymer layer comprises a scratched surface (6, 6') forming a scratched polymer layer (11), characterised in that

1.5 said scratched surface (6, 6') comprises a multitude of scratched lines

1.6 parallel to the extrusion direction (2) of said scratched polymer layer (11),

1.7 said scratched polymer layer (11) being embedded inside the laminate (8), and

1.8 an adhesive layer (10, 10') is directly applied on the scratched surface (6, 6') of said layer (11),

1.9 the depth of said scratched lines representing less than 50% of the thickness of said layer (11),

1.10 the scratched lines creating a predetermined tear direction of the packaging (1)".

Reasons for the Decision

1. *Procedural matters*

1.1 In the statement setting out the grounds of appeal the patent proprietor stated in respect to auxiliary request 3 that it **takes note** that "the Opposition Division decided that AR III fulfills the patentability requirements set in the EPC, more particularly the requirements of Art 54, 56, 123(2) and 83". In the impugned decision the opposition division found that the combination of the teaching of D5 as representing the closest prior art with the teaching of any other document in the proceedings does not render the subject-matter of claim 1 of auxiliary request 3 not

inventive.

- 1.2 Opponent 2 argued in the statement setting out the grounds of appeal that *i.a.* the subject-matter of claim 1 of auxiliary request 3 does not involve an inventive step over the combination of the teachings of E3 and E4, see chapters A.I to A.VI and B.II.1.b).bb) of said statement and chapter A.V of the reply to the patent proprietor's statement setting out the grounds of appeal.
- 1.3 Oral proceedings before the Board, which had been scheduled upon the respective auxiliary request by the patent proprietor and opponent 01, took place on 15 October 2018 in the absence of the duly summoned parties in accordance with Article 15(3) RPBA and Rule 115(2) EPC.
- 1.4 The Board's consideration that the patent proprietor's request in its submission dated 10 July 2018 for maintenance of the patent "as modified during the oral proceedings dated 10 December 2013" was the patent proprietor's sole request replacing all its previous requests communicated to the parties with the communication dated 25 September 2018 was not refuted by the patent proprietor until and during the oral proceedings.
- 1.5 The Board considered then during the oral proceedings the parties' final requests as follows:

for the patent proprietor
that the patent be maintained "as modified during
the oral proceedings dated 10 December 2013",
i.e. that the appeals of the opponents be
dismissed;

for opponents 1 and 2

that the decision under appeal be set aside and
that the European patent No. 1 917 197 be revoked.

1.6 The Board notes further that in the present appeal proceedings the only arguments concerning the question whether the combination of the teachings of E3 and E4 renders the subject-matter of claim 1 of auxiliary request 3 (patent proprietor's sole request) not inventive were those of opponent 2 submitted in chapters A.I to A.VI and B.II.1.b).bb) of the statement setting out the grounds of appeal, also referred to in chapter A.V of the opponent 2's reply to the patent proprietor's statement setting out the grounds. These arguments were not refuted by the patent proprietor during the whole appeal proceedings.

2. *Claim 1 of the auxiliary request 3 - Inventive step*

2.1 Concerning the combination of the teachings of E3 and E4 opponent 2 argued as follows:

2.1.1 E3, column 3, lines 46 to 69, discloses an easy-to open package ("pouch 1") of a multilayer plastic laminate film, in which an opening by tearing due to a roughened surface should be facilitated, see features 1.1, 1.2 and 1.3 of the feature analysis.

2.1.2 The roughened surface sections are formed by scratches, see column 3, line 63 and column 4, line 7, whereby the scratches or scratches bearing portions are formed on a polypropylene film, before being bound with a polyethylene film to form a laminate.

2.1.3 In E3, column 4, lines 4 to 6, sandpaper is used for the preparation of said scratches, whereby the

identical abrasive material, namely sandpaper is proposed also in the patent in suit, see claim 11 and column 2, last line.

- 2.1.4 The shape of the scratches introduced into the surface of the processed polymer layer of the laminate is more clearly stated in the description of the alternatively provision of the scratches via a laser beam. In the corresponding passage of E3, column 6, lines 20 to 23, is stated that linear recesses are provided.
- 2.1.5 Thus, the scratches mentioned in E3 for increasing the surface roughness in the roughened surface sections are scratches in the conventional sense, *i.e.* linear depressions on the roughened surface, see features 1.4 and 1.5 of the feature's analysis.
- 2.1.6 This was also to be expected, since the use of means identical with the ones proposed in the patent in suit obviously achieve identical results.
- 2.1.7 As shown in figure 13 and described in column 4, lines 1 to 11, of E3, the scratches in the roughened surface of the laminate sheet are obtained by transporting a sheet in the machine direction over a hard metal roll and by simultaneously pressing a roller provided with sandpaper against the the moving film. The scratches described in E3 are generated in this way.
- 2.1.8 Although it may not be possible to distinguish the claimed subject-matter from those of the prior art on the basis of feature 1.6, the person skilled in the art, due to his expertise and due to the rectilinear shape of the scratch-roughened zones shown in figure 7 of E3, the above text passages of E3 are understood to mean that the scratches described in E3 due to the

workpiece and tool kinematics shown in figure 13 are machined into the surface of the laminate sheet parallel to the direction of earlier extrusion of the roughened surface, see feature 1.6 of the feature's analysis.

- 2.1.9 As expressly stated in column 3, lines 58 and 59, of E3, the scratched roughened area just serves to easily tear the pouch open, which also solves the problem stated in column 2, lines 5-8, of E3. It is further stated in column 2, line 68, to column 3, line 2, of E3, that the roughened areas serve as tearing propellant and thus specify the tear direction of the laminate when the packaging is opened, see feature 1.10 of the feature's analysis.
- 2.1.10 In E3 no relative depth of the scratches or linear recesses introduced by sandpaper or laser beams is disclosed. Since in the patent in suit no beneficial effect is linked to feature 1.9, this is to be considered as a mere dimensional indication. The person skilled in the art would have to provide such a dimensioning anyway without the provision of any advantageous or even surprising effect, see feature 1.9 of the feature analysis. Furthermore, the person skilled in the art seeking to provide film impermeability would find a hint in E4, see column 4, line 66, and column 5, lines 14 to 16, where the scratches only cover about 33% of the total film thickness.
- 2.1.11 The skilled person encounters from E3 that the treatment of a plastic film surface with sandpaper or with laser beams affects the tear properties of the film, see column 2, lines 35 to 43, column 3, lines 60

to 68, column 5, line 67 to column 6, line 2).

- 2.1.12 There the skilled person is taught to fill the scratches created on the surface of the plastic film of E3 with a polymer material, so that the surface actually scratched appears flat from the outside. The skilled person starting from E3 is thus faced with the problem of improving the external appearance of a plastic film while maintaining the improved tear property of said film produced by parallel scratches on the surface of said film.
- 2.1.13 In seeking a solution to this problem the skilled person would encounter E4, which starts from the same technical subject, namely a plastic laminate modified by scratching of a film surface.
- 2.1.14 The skilled person will realize that E4, column 1, lines 46 to 51, deals with exactly the same technical problem with which he is confronted.
- 2.1.15 The skilled person will learn in column 2, lines 12 to 29, of E4, that the scratches done on a plastic film for tear property modification can be healed in various ways without thereby losing the attained advantageous modification of the tear property of the plastic film or laminate.
- 2.1.16 He will learn from E4 that a way to conceal the generated scratches is to laminate on those another plastic film of dissimilar plastic material, see example III, column 7, line 40 to column 8, line 68 (feature 1.7).
- 2.1.17 The person skilled in the art, who knows that he needs a mediating adhesive layer for the lamination of

plastic films made of different plastic materials, will provide this adhesive layer.

- 2.1.18 The skilled person, already knowing from E3 to fill the generated scratches with polymer material, would find support to that in E4, column 3, lines 61 to 68, confirming that that the scratches can be concealed particularly well by application of any suitable substances on the scratched surface.
- 2.1.19 He will therefore apply the required adhesive directly to the scratched layer in accordance with the teachings of both E3 and E4 in order to reduce the conspicuousness of the scratches as much as possible by the adhesive. The skilled person would then laminate the further plastic layer in order to hide the scratches as completely as possible, feature 1.8 of the feature analysis.
- 2.1.20 Therefore, the skilled person starting from E3 and being confronted with the problem to conceal as completely as possible the tear property-modifying scratches of the film provided according to E3 would take into account the corresponding teaching of E4 and would arrive at the subject-matter of claim 1 without the exercise of an inventive activity.
- 2.2 The Board, especially in the absence of any counter-arguments from the patent proprietor, sees no reason for not following the above-mentioned arguments.
- 2.3 Furthermore, in the impugned decision, to which the patent proprietor referred to during the appeal proceedings, it was considered that the only feature of claim 1 on which the presence of an inventive step was based, was the feature 1.8 concerning a direct

application of an adhesive layer on the scratched surface of the layer.

- 2.4 The problem to be solved was seen in the provision of an easy-to-open packaging which would not have air entrapped in the scratched surface. This was solved in the patent in suit by applying adhesive directly on the scratched surface, see paragraph 20, lines 26 to 28. Since none of the documents submitted discusses application of an adhesive this feature was neither hinted nor suggested from these documents.
- 2.5 The Board notes that the patent in suit asserts in paragraph 20 an advantageous effect of immediate application of adhesive to the scratched surface, which is allegedly in the prevention of air bubbles.
- 2.6 This effect was contested by opponent 2 in its generality. Whether air is trapped in the grooves of the scratched surface or not depends not only on the location of the adhesive, but also on the shape of the grooves and the viscosity, the areal basis weight and the volume of the adhesive used. The latter parameters, which are of great significance when air is entrapped in scratches or furrows in a plastic film surface, however, are not addressed at all in the patent in suit, and especially not in claim 1.
- 2.7 The Board follows the above-mentioned reasoning of opponent 2 and considers that the alleged prevention of air bubbles only due to the immediate application of adhesive to the scratched surface cannot be accepted as valid advantageous technical effect.
- 2.8 Furthermore, the Board considers that the patent proprietor's statement that E3 uses indifferently the

words "roughened" and "scratches" so that precise teaching is not derivable, see statement setting out the grounds of appeal, page 3, sixth paragraph, is not correct. E3 defines, see column 3, lines 60 to 65, that due to surface roughening treatment scored or scratch portions are formed on the film treated. This means that E3 discloses the precise teaching that scratches are formed during a roughening treatment.

- 2.9 The patent proprietor argued further, see statement setting out the grounds of appeal, page 4, sixth paragraph, that E4 teaches that embedding a deep cut produced by a knife in a layer in a laminate permits to maintain the tearing properties of the laminate and that this does not render evident that the multitude of scratches of the present invention would maintain such tearing properties. The Board does not agree with said patent proprietor's argument for the following reasons. In column 2, lines 51 to 53 of E4 is stated that "**lines** of weakness are provided in a plastic film by scoring along predetermined **paths** with a knife or **series of knives**", and according to example I the depth of said lines of weakness ("scratches") is 33% (= 2mil / 6mil) of the thickness of the film, whereby the tearing properties are retained, see column 3, lines 22 to 24. This means, that the lines of weakness ("scratches") known from E4 render evident that a packaging disclosing a laminate having a multitude of such embedded scratches can maintain its tearing properties. Given that according to claim 1 the depth of the scratches claimed therein is less than 50% of the thickness of the film and in E4 said depth ratio is 33,3%, the teaching of E4 is also applicable to scratches as claimed in claim 1.

2.10 From the above follows that the subject-matter of claim 1 does not involve an inventive step and it does not fulfil the requirements of Articles 52 and 56 EPC.

In view of this finding, there is no need to discuss the other objections raised by the opponents against auxiliary request 3.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated