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**Datasheet for the decision
of 26 February 2015**

Case Number: T 1463/14 - 3.2.07

Application Number: 09816634.1

Publication Number: 2326564

IPC: B65D41/00, B65D51/24

Language of the proceedings: EN

Title of invention:

BOTTLE CAP

Applicant:

International IP Holdings LLC

Headword:

Relevant legal provisions:

EPC Art. 123(2)

EPC R. 115(2)

RPBA Art. 15(3)

Keyword:

Amendments (all requests) - allowable (no)

Decisions cited:

T 1704/06

Catchword:



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Chambres de recours**

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Case Number: T 1463/14 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 26 February 2015

Appellant:
(Applicant)

International IP Holdings LLC
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Bloomfield Hills, MI 48304 (US)

Representative:

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Decision under appeal:

**Decision of the Examining Division of the
European Patent Office posted on 30 April 2014
refusing European patent application No.
09816634.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman H. Meinders
Members: K. Poalas
I. Beckedorf

Summary of Facts and Submissions

- I. The appellant (applicant) lodged an appeal against the decision of the Examining Division refusing European patent application 09 816 634.1.
- II. In its decision, the Examining Division held that the claims 1 of the then main and auxiliary request contravene the requirements of Article 123(2) EPC.
- III. In its statement with its grounds of appeal the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of one of the sets of claims filed with letter of 17 June 2014 as main request and as first to fourth auxiliary requests. As an auxiliary measure it requested oral proceedings.
- IV. In its communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA) dated 3 November 2014, annexed to the summons for oral proceedings set for 26 February 2015, the Board gave its provisional opinion concerning the presence of unallowable amendment in claim 1 according to all requests. The corresponding part of said communication reads as follows:

*"3. Claim 1 according to all requests has over claim 1 as originally filed, the additional feature that the **top wall** has a **thickness** that **decreases** towards the center of the top wall.*

*3.1 The Board notes in this respect that there is no reference in the originally filed description or in the originally filed claims to the **thickness** of the top wall and/or whether its aspect changes towards the*

center of the top wall. In the originally filed application there is only textual reference to the **thickness** of the **inner skirt** 26, see page 4, line 6 and to the **thickness** of the **rim** 28, see page 6, lines 8 to 9. Otherwise, there is only textual references to the "**concave**" or "**generally concave**" shape of the **top face** 14, see page 5, lines 10 and 27, page 6, line 13, and also to the "**concavity**" of the **top wall** 12, see page 5, line 22. In the originally filed claims 1, 2, 11 and 20 references are to be found to "**concave**" or "**generally concave**" **top wall**. Nowhere is there a textual reference to the relation between the top wall 14 and bottom face 16.

3.2 The only indication in the originally filed application of a particular **thickness** of the top wall towards its center can be found only in figures 4 and 5. These figures are cross-sectional views of a bottle cap illustrated in an exemplary representation in which the top face 14 seems to have a "**generally concave**" shape and the thickness of the top wall seems to **decrease continuously** towards the center of the top wall starting from the root of the rim 28.

3.3 However, the drawings are clearly being mentioned as not necessarily being to scale "and some features may be exaggerated or minimized to show details of particular components", see page 2, lines 18, 19. Further: "[t]herefore, specific structural and functional details disclosed therein are not to be interpreted as limiting". Both these references make it clear that the presently added limiting features to the claims 1 of all requests cannot be based on the drawings. There is also no hint whatsoever in the description itself that the decreasing **thickness** of the top wall towards its center was actually meant to be a

feature of this invention, since only the concavity of the top surface is discussed, but nothing is said about the bottom face 16.

3.4 There is also no hint in the originally filed application that these structural details can be singled out from the other features of the bottle cap shown in figures 4 and 5.

3.5 Where the drawings are schematic at the present case, the constant jurisprudence of the Boards of Appeal is, fortunately for the appellant, quite strict, see Case Law of the Boards of Appeal, 7th edition 2013, II.E.1.5, in particular from page 396 onwards.

3.6 As a consequence, the claims 1 of all requests seem to violate the requirements of Article 123(2) EPC".

- V. The appellant's submission dated 20 February 2015 consisted of only one sentence informing the Board that it will not be attending the oral proceedings.

- VI. Oral proceedings before the Board took place as scheduled on 26 February 2015. Since the duly summoned appellant did not attend, the oral proceedings were continued without the appellant according to Rule 115(2) EPC and Article 15(3) RPBA.

Reasons for the Decision

1. Although the appellant did not attend the oral proceedings, the principle of the right to be heard pursuant to Article 113(1) EPC is observed since that Article only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity (see the explanatory note to Article 15(3) RPBA cited in T 1704/06, not published in OJ EPO, see also the Case Law of the Boards of Appeal, 7th edition 2013, section IV.E.4.2.3.c)).
2. *Amendments (claims 1 of all requests) - Article 123(2) EPC*
 - 2.1 Under points 3 and 3.1 to 3.6 of its above-mentioned communication the Board stated why it considers that the claims 1 of all requests do not comply with the requirements of Article 123(2) EPC, see point IV above.
 - 2.2 The above-mentioned preliminary finding of the Board has not been commented on nor has it been contested by the appellant during the appeal proceedings, see point V above.
 - 2.3 Under these circumstances, the Board - having once again taken into consideration all the relevant aspects concerning said issue - sees no reason to deviate from its above-mentioned finding.
 - 2.4 As a consequence, the claims 1 of all requests violate the requirements of Article 123(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

H. Meinders

Decision electronically authenticated