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**Datasheet for the decision
of 25 May 2021**

Case Number: T 1367/17 - 3.2.04

Application Number: 11701040.5

Publication Number: 2525692

IPC: A47J31/36, B65D85/804,
G06K19/06

Language of the proceedings: EN

Title of invention:

METHOD FOR PROVIDING INFORMATION TO A USER FROM A CAPSULE FOR
THE PREPARATION OF A BEVERAGE USING A CODE

Patent Proprietor:

Société des Produits Nestlé S.A.

Opponents:

Krüger GmbH & Co. KG
Koninklijke Douwe Egberts BV

Headword:

Relevant legal provisions:

EPC Art. 56
EPC R. 76(2) (a), 99(2)

Keyword:

Admissibility of opposition - (yes)

Admissibility of appeal - (yes)

Inventive step - (yes)

Decisions cited:

T 0615/14, T 1311/13, T 0696/02, T 2445/11

Catchword:



Beschwerdekammern

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Case Number: T 1367/17 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 25 May 2021

Appellant: Krüger GmbH & Co. KG
(Opponent 1) Senefelderstr. 44
51469 BERGISCH GLADBACH (DE)

Representative: Kutzenberger Wolff & Partner
Waidmarkt 11
50676 Köln (DE)

Respondent: Société des Produits Nestlé S.A.
(Patent Proprietor) Entre-deux-Villes
1800 Vevey (CH)

Representative: D Young & Co LLP
120 Holborn
London EC1N 2DY (GB)

Party as of right: Koninklijke Douwe Egberts BV
(Opponent 2) Vleutensevaart 35
3532 AD Utrecht (NL)

Representative: V.O.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 12 April 2017
rejecting the opposition filed against European
patent No. 2525692 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman A. de Vries
Members: J. Wright
 C. Heath

Summary of Facts and Submissions

- I. The appeal was filed by the appellant (opponent 1) against the decision of the opposition division to reject the oppositions (of opponents 1 and 2) filed against the patent in suit.
- II. The opposition division decided, amongst other things, that:
- (1) The opposition of the opponent 1 was admissible
 - (2) the subject-matter of the claims as granted involved an inventive step.

In a communication of 21 February 2020 in preparation for oral proceedings, the Board gave a preliminary opinion on the case.

With a letter of 28 May 2020, the opponent 2 (party as of right) informed the Board that it would not attend oral proceedings that had been scheduled. Likewise, in a letter of 18 March 2021, the appellant-opponent 1 announced its intention not to attend the (rescheduled) oral proceedings.

The Board cancelled oral proceedings that had been scheduled and decided the case in written proceedings.

- III. The appellant-opponent 1 requested that that the decision under appeal be set aside and that the patent be revoked.

The respondent (patent proprietor) requested that the the opposition of the appellant-opponent 1 be found inadmissible, in the alternative that the appeal of the opponent 1 be found inadmissible, alternatively that

the case be remitted to the opposition division, or that the appeal be dismissed (patent maintained as granted) or, that the patent be maintained on the basis of auxiliary requests V or VI filed with the reply to the appeal.

The opponent 2, as party as of right, made no requests.

IV. The independent claims of the patent as granted read as follows:

"1. Method for providing information to a user from a capsule for the preparation of a beverage in a beverage producing device (20) comprising providing a capsule with a two-dimensional barcode (7) thereon, capturing at least one image of the barcode via a digital camera (11, 42) and displaying decoded information from said image on a display (12, 41), wherein the capsule comprises a two-dimensional barcode positioned substantially in a central area (8) of a sealing membrane (5)".

"12. System for preparing a beverage from a capsule (1) in a beverage producing device (20) comprising: a capsule comprising a two-dimensional barcode (7), a beverage producing device (20) comprising capsule handling means (21) including a capsule-holder (24) for receiving the capsule (1) therein and identification and control means (9), wherein the identification and control means (9) comprises a digital camera (11) positioned relative to the handling means (21) and configured for capturing an image of the two-dimensional code (7) placed on the capsule and transferring said image or binary information related thereof to a control unit (10) of the identification and control means (9), wherein the identification and

control means (9) further comprises a display (12) for displaying decoded information from said image, wherein said barcode is positioned [sic] substantially in a central area (8) of a sealing membrane (5)".

V. In the present decision, reference is made to the following documents:

D1 : EP2085000 A1
E3 : DE20121494 U1

VI. The appellant-opponent 1's arguments can be summarised as follows: The opposition of the opponent 1 is admissible. The subject matter of claims 1 and 12 as granted lacks inventive step starting from D1 combined with certain Tassimo brand coffee capsules disclosed in the Internet and the skilled person's general knowledge. The subject matter of claims 1 and 12 also lacks inventive step starting from D1 in combination with E3.

VII. The respondent-proprietor's arguments can be summarised as follows: Neither the opponent 1's opposition nor its appeal are admissible. The subject matter of claims 1 and 12 involves an inventive step starting from D1 combined with E3.

VIII. The opponent 2 has made no submissions in appeal.

Reasons for the Decision

1. Admissibility of the opponent 1's opposition and its appeal, admittance of new lines of argument based on Tassimo capsules and request for remittal.

1.1 In its communication in preparation for oral proceedings, the Board gave its preliminary opinion on these issues. In particular the Board stated the following:

1. Admissibility of the first filed opposition

1.1 In the Board's view, the first opposition is admissible.

In accordance with Article 99(1) EPC, a notice of opposition must be filed within nine months of the publication of the mention of grant of a patent. In the interests of legal certainty, the opposition must fulfil certain criteria within this period. Amongst other things, the opponent must be identified in accordance with Rule 76(2) a and Rule 41, paragraph 2(c) EPC.

1.2 In the present case the opposition division (see impugned decision, reasons, point 22.3) state that the notice of opposition raised doubts as to the identity of opponent 1.

1.3 However, the opposition division (impugned decision, points 22.5 and 22.6) goes on to explain that, at the expiry of the opposition period, it was obvious from the documents as filed by the opponent 1 (the notice of opposition, including form 2300 and the accompanying letter containing reasoning) that the opponent was Krüger GmbH & Co. KG, and that the opposition was admissible. This is challenged by the respondent-proprietor.

1.4 In considering whether or not the opposition of opponent 1 is admissible, the Board must decide (in the

absence of any other evidence) whether the form 2300 and accompanying letter did indeed sufficiently identify the opponent 1 at the end of the nine month opposition period. In the Board's view, it did.

1.5 Form 2300 (section III) unambiguously states the opponent as Krüger GmbH & Co. KG. The accompanying letter of 3 December 2014 with reasoning (see page 1, section in bold type) likewise states the opponent to be Krüger GmbH & Co. KG.

In the Board's view, either one of these consistent statements would be sufficient to identify the opponent. Indeed, in its electronic receipt letter of 3 December 2014, the EPO states the opponent 1 to be Krüger GmbH & Co. KG.

The only remaining question is therefore whether the subsequent introductory statement on page 1 of the reasoning ("Gegen das Patent EP2525692B1 wird hiermit namens und im Auftrag der K-fee System GmbH [...] Einspruch erhoben") throws the identity of the opponent into such doubt as to invalidate the consistent statements that it is Krüger GmbH & Co. KG on both form 2300 and the accompanying letter. In the Board's provisional opinion it would not.

Rather, the Board considers that the reader would merely consider the introductory statement to have been a mistake, being, as it is, at odds with both both form 2300 and the remainder of the letter of 3 December 2014.

1.6 By the same token, the Board considers that the reader would understand the reasoning contained in the letter of 3 December 2014 to be filed on behalf of

Krüger GmbH & Co. KG. The letter consistently uses the representative's reference (KRO-14). The prior art documents and their references set out in form 2300 are the same as on pages 2 and 3 of the letter setting out the reasoning. Therefore, the reader will immediately realise that the reasoning set out in the letter is that of the opponent identified on form 2300. In other words, they will not read the reasoning set out in the letter as being made on behalf of a third party (K-fee System GmbH), divorced from both the form 2300 and the introductory part of the same letter as the respondent-proprietor has argued. Therefore, the Board is of the opinion that the opposition of opponent 1 (Krüger GmbH & Co. KG) is admissible.

1.7 In reaching its opinion, the Board does not consider decision T0615/14 to be of particularly relevance. That case concerned the situation where the name stated in form 2300 as the opponent appeared nowhere in the letter setting out the reasoning and was later claimed to be erroneous. The present case is different in that both form 2300 and the letter, at least in the heading section, state the opponent 1 to be Krüger GmbH & Co. KG.

1.8 Nor does the question as to whether the opposition division correctly found that a request for correction under Rule 139 EPC had been made play a role (see impugned decision, points 22.4 to 24). The underlying question in the present case is whether the opposition is admissible and the Board takes the view that it is.

2. Admissibility of of the appeal, admissibility of new lines of argument, remittal

2.1 In opposition proceedings, as derived from the notices of opposition and the impugned decision, the opponents appear to have argued (document references as set out in the reasons of the impugned decision, page 2) that the subject matter of claim 1 lacked inventive step with regard to the following combinations:

*D1 with E1;
D1 with E2;
D1 with E1 and D2;
D2 with E1;
E1 with D1;
E1 with D1 and D2;
E1 with E13 and D1;
E2 with E1;
E2 with E3;
E3 with E13;
E12 with E13;
E14 with E15;
E19 with E20;
E14 with D1;
E16 with D2 or D1; and
E17 and E16 with E15.*

2.2 Now in appeal, the appellant-opponent 1 argues lack of inventive step of claim 1 (grounds of appeal, pages 9 to 14) of the subject matter of claim 1 starting from D1 combined with Tassimo capsules, alleged to have been disclosed in the internet, and the skilled person's general knowledge, or (pages 14 and 15), starting from D1 in combination with E3.

2.3 D1 was cited in opposition as closest prior art and E3 as a combination document; the same passages are also now cited. Therefore it would appear that, apart from the citation of the Tassimo capsules, the new

attacks on the existing ground of lack of inventive step remain substantially within the same legal, factual and evidentiary framework as the opposition. As case law often considers an appeal based on a fresh case concerning the same ground of appeal admissible, see CLBA 9th edition 2019, V.A.2.6.5 a) and b), and as in the present case the framework is not significantly changed, the Board finds the appeal to be admissible.

2.4 The Board sees no reason, and indeed is unaware of a legal provision that allows it to disregard the new lines of argument. However, the citation of the Tassimo capsules is clearly late and subject to the Board's discretion under Art 12(4) RPBA 2007. Given that its date of publication is unclear, and also as it appears to add little to D1's disclosure, which already mentions bar codes on coffee capsules, the Board is inclined not to admit this late filed evidence.

2.5 Finally, as the legal, factual and evidentiary framework has not significantly changed the Board is inclined to decide the case itself, rather than to remit the case.

1.2 In the absence of any comments from the parties on these issues, the Board sees no reason to depart from its preliminary opinion. Therefore, the Board concludes that both the opposition and appeal of the opponent 1 are admissible. Furthermore, the Board decides not to admit the Tassimo brand capsule citation into the proceedings. Therefore, this likewise applies to the appellant-opponent 1's inventive step objection based on the Tassimo brand capsules, first made in the appeal proceedings (cf. grounds of appeal pages 9 to 14). However, the Board decides to admit the appellant-opponent 1's inventive step objections based on D1 with

E1 into the proceedings. Lastly, the Board decides not to remit the case to the opposition division but to decide it itself.

2. Inventive step, claims 1 and 12 as granted, starting from D1 combined with E3

2.1 The invention relates (see published patent specification, paragraph [0001] and granted claim 1), amongst other things, to a method for providing on a display information to a user from a capsule for the preparation of a beverage in beverage dispensing device using a code such as an identification code on the capsule. Further claim 12 is directed at a corresponding system including the capsule with two dimensional bar code, a beverage producing device with capsule holder, digital camera and a display.

2.2 It is not disputed that D1 (see paragraph [0002]) discloses a coffee capsule (pod). Such a capsule contains beverage ingredients and is sealed by a membrane.

The subject matter of claim 1 differs from D1 at least by the claimed method step of providing a capsule having a two-dimensional barcode that is positioned substantially in a central area of the sealing membrane (see appellant-opponent 1's grounds of appeal, page 7, 3rd and 4th paragraphs). The coffee capsule of D1 is disclosed as comprising an optical barcode in general (see paragraph [0018]). Claim 12 likewise defines a capsule with a two-dimensional barcode.

2.3 In its preliminary opinion, the Board commented on this inventive step issue as follows:

3. Inventive Step

3.1 *It appears to be common ground that D1 at least does not disclose a beverage capsule comprising a two dimensional barcode positioned substantially in a central area of a sealing membrane. (see impugned decision, point 38.3).*

According to the patent, such two dimensional barcodes are advantageous because they can be made more compact and can carry more data than a one dimensional barcode (see published patent specification, paragraphs [0027] and [0028]).

3.2 *The question is whether at the priority date the skilled person was familiar with two dimensional barcodes from E3. If so would they then as a matter of obviousness consider placing it centrally. D1 itself (see paragraph [0018]) suggests providing a capsule with a barcode without saying what type it is or where it is.*

3.3 *In this regard the bar code of E3 (see page 8, lines 10 to 22, figure 1a and figure 2a, rings referenced 3 and 9) is essentially one dimensional, albeit arranged as a series of concentric rings rather than the more usual parallel bars. Here the bar code appears to be arranged peripherally with the central area free of code lines.*

2.4 In their letters announcing their non-attendance at the oral proceedings, both the appellant-opponent 1 and opponent 2 (party as of right) refrained from addressing the Board's provisional comments, and in particular did not address the points the Board identified as critical for inventive step (see

communication, sections 3.2 and 3.3). It is therefore incumbent on the Board to do so.

2.5 In principle all barcodes cover a two dimensional area. However, the Board understands a one dimensional barcode to be made up of lines which are read in only one dimension (transversely). On the other hand, as can be inferred from the respondent's submissions (point 4.11 of their reply of 19 December 2017) a two dimensional bar code is a graphical image that stores information both horizontally and vertically, i.e. a matrix pattern which is read in two dimensions. Thus a two dimensional barcode has a particular meaning for the skilled person.

2.6 As explained in its communication, the Board sees the concentric ringed barcode of E3 (see E3, figures 1a and 2a), not as a two dimensional barcode in the sense of claim 1, one capable of carrying more data (cf. published patent specification, paragraph [0028]), but rather a one dimensional barcode that is arranged concentrically. As noted by the respondent (point 4.26 of their reply) it is meant to be read in one direction.

Therefore, the Board determines that, at the priority date, the skilled person did not know of two-dimensional barcodes from E3.

2.7 However obvious it might be for the skilled person to combine the teachings of D1 and E3, since neither document discloses a two-dimensional barcode, the skilled person would not arrive at this feature from that combination. Therefore, the appellant-opponent 1's argument that D1 with E3 would take away inventive step of claim 1 as granted is not convincing.

Nor is this feature evident from the Tassimo capsules, as noted by the respondent, point 4.21 of their reply, as it shows only conventional one-dimensional bar codes on the capsule periphery. Thus, and regardless of the question of its admissibility, even if the Tassimo capsules were considered part of D1, or common general knowledge in its own right, the skilled person would not arrive at the claimed subject-matter. Thus the attack based on D1 alone also fails.

- 2.8 The Board reaches the same conclusion for claim 12 as granted, which likewise requires a capsule to comprise a two-dimensional barcode.
- 2.9 Therefore, the subject matter of claims 1 and 12 of the patent as granted involves an inventive step starting from D1 in combination with E3, or based on D1 alone in combination with common general knowledge.
3. As the Board commented in its communication (see section 4), *"no other lines of argument appear to have been substantiated by the appellant-opponent 1. In this regard, the Board notes that the general reference in its grounds of appeal (page 15) to all the novelty and inventive step objections and arguments made by the opponents in opposition as being included in the appeal proceedings is unspecific.*

According to well established jurisprudence, such a generic reference to submissions in opposition, cannot be retroactively interpreted as expressly specifying particular aspects contained therein (see Case Law of the Boards of Appeal, 9th edition, 2019 (CLBA), V.A. 2.6.4 a), and the decisions cited therein, for example T1311/13, reasons 19).

Absent any further reply from the appellant the Board confirms its provisional view.

4. From the above, the Board concludes that the opponent 1's appeal must be dismissed. Therefore, the respondent-proprietor's auxiliary requests V and VI need not be considered.
5. Procedural matters
 - 5.1 The appellant-opponent 1 and the opponent 2 informed the Board that they would not attend scheduled oral proceedings.
 - 5.2 Following established case law, this is equivalent to a withdrawal of the request for oral proceedings (see CLBA, III.C.4.3.2 and its cited decisions, for example T0696/02, reasons 7.1).
 - 5.3 By the Board's previous communication, the parties were made aware of the critical issues for deciding the case, so that they had sufficient opportunity to take a position thereon, which they did not. The board is thus satisfied that the requirements of Article 113(1) EPC (right to be heard) have been met.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated