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**Datasheet for the decision
of 15 June 2023**

Case Number: T 0155/20 - 3.3.10

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Publication Number: 3066171

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Language of the proceedings: EN

Title of invention:
A SUBSTRATE FOR A LABEL LAMINATE, A LABEL LAMINATE AND A
METHOD FOR MANUFACTURING A LABEL LAMINATE

Patent Proprietor:
UPM Raflatac Oy

Opponent:
Avery Dennison Corporation

Headword:

Relevant legal provisions:
EPC Art. 100(c), 54(2), 56
EPC R. 99(2)

Keyword:

Admissibility of appeal - incomplete or incoherent requests

Decisions cited:

Catchword:



Beschwerdekammern

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Case Number: T 0155/20 - 3.3.10

D E C I S I O N
of Technical Board of Appeal 3.3.10
of 15 June 2023

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
6 November 2019 concerning maintenance of the
European Patent No. 3066171 in amended form.**

Composition of the Board:

Chair P. Gryczka
Members: R. Pérez Carlón
T. Bokor

Summary of Facts and Submissions

I. The patent proprietor and the opponent appealed the decision of the opposition division on the maintenance of European patent No. 3 066 171 in the form of the second auxiliary request.

II. Notice of opposition had been filed on grounds including lack of inventive step (Article 100(a) EPC).

III. The following documents are relevant to the present decision:

D1 Developments in Pressure-Sensitive Products,
István Benedek, ed., Taylor and Francis, 2006,
chapters 3 and 5

D2 WO 93/11933 A1

D3 US 2012/0060997 A1

IV. Claim 1 of the patent as granted, which corresponds to the appellant-patent proprietor's main request, reads as follows:

"A release liner for a label laminate, wherein the release liner comprises a substrate comprising propylene block copolymer, and the substrate is uniaxially oriented in a machine direction of the substrate."

Claim 1 of auxiliary request 1.1 further requires that *"a release layer is arranged onto one surface of the substrate"*.

Claim 1 of auxiliary request 4, which precedes auxiliary requests 2 and 3, requires in addition to the

features of claim 1 of the main request that *"an amount of propylene block copolymer is as least 38 wt.%"*.

Claim 1 of auxiliary request 2, which corresponds to the request found allowable by the opposition division, has the features of claim 1 of auxiliary requests 1.1 and 4.

Claim 1 of auxiliary request 3 has the features of claim 1 of the main request and, in addition, requires *"a ratio of 1% secant modulus in machine direction of the substrate to elongation in transverse direction of the substrate is between 2 to 5"*.

Claim 1 of auxiliary request 5 has the features of claim 1 of the main request and, in addition, requires that *"the substrate has a multilayer structure comprising at least a core layer, a first skin layer and a second skin layer, and wherein each of the layers comprises at least 38 wt.% polypropylene block copolymer and at most 60 wt.% of at least one of the following: propylene homopolymer and propylene random copolymer"*.

Claim 1 of auxiliary request 6 requires the oriented substrate to have *"a shrinkage less than 5 % at temperatures below 30 degrees C"*.

Claim 1 of auxiliary request 7 has all the features of claim 1 of auxiliary request 5 and, in addition, requires that *"an elongation of the substrate in a machine direction of the substrate is less than 3% at a tension level between 200 and 1200 N/m"*.

Claim 1 of auxiliary requests 8 to 15 corresponds to claim 1 of the main request and auxiliary requests 1.1,

and 2 to 7, respectively.

V. On inventive step and in the context of claim 1 of the second auxiliary request, the opposition division concluded that the release liner disclosed in document D2 was the closest prior art. The problem underlying the claimed invention was to provide an alternative release liner having good die-cuttability, tear-resistance and dimensional stability. The solution proposed by claim 1 was characterised by the required proportion of polypropylene block copolymer and was not obvious having regard to the prior art.

VI. The appellant-patent proprietor's arguments on inventive step were as follows.

Document D2 was the closest prior art. It disclosed a release liner which was biaxially oriented. The problem underlying the claimed invention was to provide a release liner which enabled a more reliable process under high speed. The claimed liner, characterised by being uniaxially oriented, credibly solved that problem in view of the results in Table 1 of the patent. The claimed solution would not have been obvious for a skilled person in view of the prior art and was thus inventive.

The release liners of claim 1 of all auxiliary requests were inventive at least for the same reasons as the main request.

With respect to the release liner of claim 1 of auxiliary request 4, which required a defined proportion of propylene block copolymer, the appellant-patent proprietor linked this proportion to the tear resistance and die-cutting performance in view of

paragraph [0063] of the patent. The claimed release liner credibly solved thus the problem of providing an improvement, and this solution would not have been obvious for a skilled person. The release liner of claim 1 of auxiliary request 4 was thus inventive.

VII. The appellant-opponent's arguments on the issues relevant for the present decision were as follows.

The appeal of the appellant-patent proprietor should be rejected as inadmissible. The order of the requests was not clear, and the requests on the description were incoherent.

If the claimed release liners were novel over those of D2, this document would be the closest prior art. The problem as formulated by the appellant-patent proprietor represented an amendment of its case and should not be admitted into the appeal proceedings, and the results in Table 1 of the patent did not reflect the effect of the distinguishing feature and did not prove any improvement. For both these reasons, the sole problem which could be considered solved was that of providing an alternative. The claimed solution, characterised by the orientation of the release liner's substrate, would have been obvious in view of D2 or D1 and was thus not inventive. The reasoning did not differ for claim 1 of the auxiliary requests.

VIII. The board informed the parties in a communication dated 17 March 2021 that it was likely to consider the appeal of the patent proprietor admissible and the claimed release liner not inventive.

IX. The parties' final requests were as follows.

The appellant-patent proprietor requested that the decision under appeal be set aside and that the patent be maintained in the form of the main request (patent as granted) or on the basis of any of auxiliary requests 1.1, 4, 2 without deletion of paragraph [63] of the description, and auxiliary requests 2 in combination with the description as allowed by the opposition division (effectively the dismissal of opponent's appeal), or further on the basis of any of auxiliary requests 3, 5 to 15, where the main request and auxiliary requests 1.1 and 2 to 7 were filed with the statement of grounds of appeal dated 13 March 2020, and auxiliary requests 8 to 15 were filed with the reply to the appellant-opponent's grounds of appeal, dated 17 July 2020.

The appellant-opponent requested that the decision under appeal be set aside, the patent be revoked and the appeal of the patent proprietor be rejected as inadmissible.

- X. At the end of the oral proceedings, the decision was announced.

Reasons for the Decision

- 1. Admissibility of the appeals
 - 1.1 The appellant-opponent requested that the appellant-patent proprietor's appeal be rejected as inadmissible.
 - 1.2 The appellant-patent proprietor was adversely affected by the opposition division's decision; it requested that the decision be set aside and that the patent be maintained as granted; and it provided reasons why the opposition division's reasoning on novelty should be

overturned. Its appeal is thus admissible (Articles 107 and 108 EPC).

- 1.3 The appellant-opponent argued that the order of the appellant-patent proprietor's requests was not clear and that the appeal should not be admitted for this reason alone.

However, the appellant-patent proprietor's main request can be identified without doubt, this being the relevant issue. Even if the order of the auxiliary requests were not clear, there is no reason why that should render the appeal as a whole inadmissible. It is settled case law that an appeal cannot be partially admissible, CLBA 10th edition, 2022, V.A.2.6.8.

- 1.4 The appellant-opponent also argued that the requests regarding the patent's description were incoherent. However, this is not a reason to render the appeal inadmissible, either. As long as there is an identifiable request from which the board can establish on what basis the proprietor requests the grant of a patent, it is normally sufficient for recognising a request for the purposes of Rule 99(2) EPC ("the extent to which the impugned decision is to be amended") and as such also sufficient for an admissible appeal. The board observes that it is long-standing and largely undisputed practice of the EPO to allow the proprietor to submit the adapted description only when an allowable claim set has been found. Against this background it is not apparent to the board why an incoherent request concerning the description should have more adverse legal consequences than a non-existing request.

1.5 Both appeals are thus admissible.

Inventive step

2. Claim 1 of the patent as granted relates to a release liner for a label laminate. The release liner comprises a substrate comprising a propylene block copolymer. The substrate is uniaxially oriented in a (the) machine direction.

3. Closest prior art

The opposition division and the parties considered that document D2 was the closest prior art. The board sees no reason to disagree.

D2 discloses release liners having a substrate containing an oriented thermoplastic polymeric substrate layer. The substrate has a layer comprising an ethylene-propylene block copolymer on one side and a release coating on the other (page 3, lines 2 to 6).

The oriented thermoplastic polymeric substrate layer of D2 is preferably made of polyolefin films which are oriented (page 3, lines 23 and 24) preferably biaxially.

The ethylene-propylene block copolymer is coextruded with the polypropylene film of choice, followed by biaxially orienting the combination (page 4, lines 9 to 22).

It was undisputed that only the feature requiring the substrate to be uniaxially oriented could distinguish the claimed release liner from that of D2.

4. Technical problem underlying the invention

The parties had different views on the formulation of the technical problem effectively solved by the claimed invention.

The appellant-patent proprietor argued that the technical problem underlying the claimed invention should be seen in providing a release liner which enabled a more reliable process under high speed.

5. Solution

The solution to this technical problem is the claimed release liner, characterised in that it is uniaxially oriented.

6. Success

6.1 The appellant-patent proprietor relied on the results in Table 1 of the patent to show that the problem as formulated above had been credibly solved by the claimed release liner.

Table 1 of the patent disclosed the 1% secant modulus in the machine direction and the web tension required for 1% elongation in the same direction of five different liners. According to paragraph [0064], the higher the 1% secant modulus, the lower the risk of misplacing the labels during labelling. Since the MDO (machine direction orientation) release liner, which was according to the claimed invention, had a better 1% secant modulus, a process using the claimed release liner was more reliable than that of the prior art.

6.2 The MDO release liner in Table 1 is according to the claimed invention [0063]. It has a monoaxially oriented, three-layer structure. Propylene block copolymer represents either 70 or 68 wt% of the layers, which also contain 30% propylene homopolymer. The thickness of the liner is 36 μm .

The comparative examples are release liners made of tenter frame processed BOPP (biaxially oriented polypropylene) and blown BOPP.

6.3 The issue is whether the BOPP liners in Table 1 differ from those according to the claimed invention only by virtue of the distinguishing feature of the claimed release liner over D2, which is the substrate's orientation.

While the liners of D2 contain, like those of claim 1, propylene block copolymer, the experimental part of the patent does not provide the exact composition of the BOPP, which does not inevitably have to contain propylene block copolymer. For this reason alone, the comparison does not reflect the effect of the distinguishing feature over D2.

In addition, the MDO release liner according to the claimed invention has three layers, and there is no indication of the layer construction of the liners made of BOPP. Also for this reason, the comparison provided cannot show the effect of only the monoaxial orientation.

The board thus agrees with the appellant-opponent that the data in Table 1 cannot show that the distinguishing feature leads to an improvement over the liner of the closest prior art, D2. The problem as formulated by the

appellant-patent proprietor is thus not credibly solved.

7. Reformulation of the technical problem

In accordance with the case law (Case Law of the Boards of Appeal, 10th edition, 2022, I.D.4.3.1), alleged but unsupported advantages cannot be taken into consideration in determining the problem underlying the claimed invention.

As the alleged improvement in terms of a more reliable process lacks the necessary evidence, the technical problem as defined by the appellant-patent proprietor needs to be reformulated as to provide a release liner alternative to those of D2. It was undisputed that the claimed release liner credibly solved that problem.

8. In view of the required reformulation of the problem, it is not necessary to examine whether the more ambitious formulation of the problem put forward by the appellant-patent proprietor in point 4. above could represent an inadmissible amendment of its case, as argued by the appellant-opponent.

9. It thus remains to be decided whether the proposed solution to the objective problem of providing an alternative would have been obvious to a skilled person in view of the prior art.

9.1 D2 discloses release liners containing ethylene-propylene block copolymers oriented by stretching. The oriented release liners of D2 generate less electrostatic potential and can be evenly, unvaryingly transported over rollers during manufacture and use (page 3, lines 12 and 13). Preferably, the oriented

release liners of D2 are biaxially oriented.

Seeking an alternative to the oriented release liners of D2, a skilled person would have considered release liners with another orientation, such as mono-oriented, as suitable too. The claimed solution would thus have been obvious in view of D2 alone.

- 9.2 D1 is a part of a book reflecting the general knowledge in the field before the filing date. The paragraph bridging pages 104 and 105 discloses that the stiffness of polypropylene is greater than that of polyethylene and depends on the molecular orientation. The paragraph concludes by disclosing that films with MDO have outstanding stiffness in that direction and flexibility in the cross direction. These are the properties sought by the claimed release liner according to paragraph [0042] of the patent. Thus, the claimed solution would also have been obvious in view of D1.

The appellant-patent proprietor argued that D1 was a review article with multiple sources, not only one. It was in addition not immediately evident whether the passage on pages 104 and 105 related to polypropylene.

A book such as D1 inevitably compiles a large number of sources which contribute to the knowledge in a field of technology or research. In the current case, it represents the background of the skilled person in the field of the claimed invention.

As explained above, the quoted passage of D1 explicitly relates to polypropylene. Thus, this argument is not convincing.

9.3 The claimed release liner is thus not inventive (Article 56 EPC), and the ground for opposition in Article 100(a) EPC precludes the maintenance of the patent as granted.

10. Auxiliary requests

10.1 It was not disputed that the release liner of D2 has a release layer on one surface. The reasoning on inventive step of the release liner of auxiliary request 1.1 thus does not differ from that of the main request. Auxiliary request 1.1 is not allowable, regardless of its admissibility.

10.2 Claim 1 of auxiliary request 4 requires the amount of propylene block copolymer to be at least 38 wt%. The liner of D2 does not explicitly disclose the proportion of block copolymer in the liner's substrate.

The appellant-patent proprietor argued that paragraph [0053] of the patent disclosed that the proportion of propylene block copolymer was linked to the tear resistance and die-cutting performance of the substrate. The problem underlying the claimed invention should thus be seen as the provision of an improved release liner.

The statement in paragraph [0053] is, however, only an allegation devoid of corroborating experimental evidence. Like in the case of the main request, the problem underlying the invention as claimed in auxiliary request 4 is thus the provision of a release liner alternative to that of D2.

The claimed solution, which is characterised, in addition to being monoaxially oriented, by the

proportion of propylene block copolymer, would also have been obvious for a skilled person. The proportion required by claim 1, absent any effect linked to it, is an arbitrary value which would have been explored by a skilled person seeking an alternative.

The claimed release liner is not inventive (Article 56 EPC), and auxiliary request 4 is thus not allowable.

10.3 Claim 1 of auxiliary request 2 has the features of claim 1 of auxiliary request 4 and requires in addition the claimed release liner to have a release layer on one surface of the substrate. As the release liner of the closest prior art D2 has such a layer too, the reasoning does not differ from that for auxiliary request 4.

Auxiliary request 2 is thus not allowable, regardless of whether it is admissible.

10.4 Auxiliary request 3 requires the substrate of the release liner to have a defined ratio between the 1% secant modulus in the machine direction to elongation in the transverse direction. Auxiliary request 6 requires the oriented substrate to have a shrinkage of less than 5% at temperatures below 30 °C.

In the context of auxiliary request 11 and 14, whose claim 1 corresponds to that of auxiliary requests 3 and 6, the board informed the appellant-patent proprietor in its communication in preparation for oral proceedings that the request was not allowable for a number of reasons. Either the claimed release liner inherently had these properties, in which case the reasoning for inventive step would not differ from that provided for the main request, or the properties could

be achieved only by some materials, on which the patent did not contain sufficient information.

The appellant-patent proprietor did not provide further arguments for these requests, and the board thus sees no reason to depart from its preliminary view. Auxiliary requests 3 and 6 are thus not allowable.

- 10.5 Claim 1 of auxiliary request 5 requires the liner's substrate to have a multilayer structure having at least a core layer, a first layer and a second layer, each layer having at least 38 wt% polypropylene block copolymer and at most 60 wt% of at least one of a homopolymer and a random copolymer.

The board informed the appellants of its preliminary view that absent any technical effect linked to that distinguishing feature and considering that document D2 discloses a multilayer structure too, the skilled person would have used a multilayer system such as that disclosed in D3. The appellant-patent proprietor did not submit further arguments on this, and the board sees no reason to depart from its preliminary view.

Auxiliary request 5 is thus not allowable.

- 10.6 Claim 1 of auxiliary request 7 has the features of claim 1 of auxiliary request 5 and requires in addition the substrate to have an elongation below a threshold set.

In the context of auxiliary request 15, the board informed the parties in its communication in preparation for oral proceedings that the required elongation merely quantified the properties known to be required by a release liner. The appellant-patent

proprietor did not put forward further arguments, and the board sees no reason to depart from its preliminary view.

Auxiliary request 7 is thus not allowable.

10.7 Claim 1 of auxiliary requests 8 to 15 corresponds to claim 1 of the main request, auxiliary request 1.1 and 2 to 7, respectively. Auxiliary requests 8 to 15 are not allowable for the reasons provided above.

11. None of the appellant-patent proprietor's requests is thus allowable.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The patent is revoked.

The Registrar:

The Chair:



L. Malécot-Grob

P. Gryczka

Decision electronically authenticated