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D E C I S I O N
of 14 May 2002

Case Number: T 0123/00 - 3.2.4

Application Number: 94909811.5

Publication Number: 0693889

IPC: A44B 18/00

Language of the proceedings: EN

Title of invention:
Loop fastener material storage/dispensing assembly

Patentee:
MINNESOTA MINING AND MANUFACTURING COMPANY

Opponent:
TAPE INDUSTRIES
Koester GmbH & Co. KG
Corovin GmbH
Avery Dennison Corporation

Headword:
-

Relevant legal provisions:
EPC Art. 84, 100(b), 100(c)

Keyword:
"Novelty and inventive step - yes (third auxiliary request)"

Decisions cited:
T 0572/88, T 0763/89, T 0071/93, T 0312/94

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0123/00 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 14 May 2002

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Decision under appeal: **Interlocutory decision of the Opposition Division of the European Patent Office posted 23 November 1999 concerning maintenance of European patent No. 0 693 889 in amended form.**

Composition of the Board:

Chairman: C. A. J. Andries
Members: M. G. Hatherly
H. Preglau

Summary of Facts and Submissions

I. The opposition division's interlocutory decision that the amended European patent No. 0 693 889 (according to the third auxiliary request presented at the oral proceedings before the opposition division) met the requirements of the EPC was posted on 23 November 1999.

Appellant P (patentee) filed an appeal and paid the appeal fee on 3 February 2000, and filed a statement of grounds on 3 April 2000.

Appellant OI (opponent I) filed an appeal and paid the appeal fee on 31 January 2000, filed a statement of grounds on 31 March 2000 but withdrew the appeal on 6 February 2002, thus becoming party as of right OI.

Appellant OIV (opponent IV) filed an appeal on 27 January 2000, having paid the appeal fee on 26 January 2000, and filed a statement of grounds on 31 March 2000.

II. All parties were summoned to oral proceedings which took place on 14 May 2002 with appellants OIV and P present. The parties as of right OI, OII (opponent II) and OIII (opponent III) were not present but, in accordance with Rule 71(2) EPC, the oral proceedings took place without them.

III. Each of the sets of claims for the various requests of appellant P has two independent claims, firstly an independent apparatus claim and secondly an independent method claim including essentially all the wording of the apparatus claim of the respective set.

IV. The independent apparatus claim 1 of the **main request** (i.e. of the patent as granted) reads:

"A loop fastener material assembly (10) comprising one or more multilayer sheets of loop fastener material for the loop portion of a hook and loop fastener, said loop fastener material comprising in order: (1) a loop layer (14) on its first major surface, said loop layer comprising (a) a multiplicity of flexible loops adapted to be releasably engaged by the complementary hook portion of the hook and loop fastener and (b) a base layer to which said loops are anchored, and (2) a pressure-sensitive adhesive layer (18) on its second major surface;

characterized in that said loop fastener material is arranged in said assembly such that the adhesive layer (18a) of an overlying portion (12a) of said loop fastener material is in direct contact with the loop layer (14b) of an underlying portion (12b) of said loop fastener material, said loops being such that, when said overlying portion of said loop fastener material is removed from said assembly, said loops of said underlying portion are presented in an engagable state."

V. Claim 1 of the **first auxiliary request** is the same as claim 1 of the main request except:

- that it adds thereto the wording

"said sheet optionally comprising a release control agent incorporated into said loops and/or a release control agent applied to the surface of said loops prior to arranging said loop fastener material into said assembly"

- and amends the wording "said loops being such that" near the end of the claim to

  "said loops **and said pressure-sensitive adhesive and said optional release control agent** being such that".

VI. Claim 1 of the **second auxiliary request** is the same as claim 1 of the first auxiliary request except:

- that it adds thereto the wording

  "said loops of said underlying portion are such that they are compressed by said overlying portion when arranged in said assembly"

- and amends the last 12 words of the claim 1 as granted to

  "said loops of said underlying portion are **restored to** an engagable state **after removal of said overlying portion**."

VII. The independent claims of the **third auxiliary request** read:

"1. A loop fastener material assembly (10) comprising one or more multilayer sheets of loop fastener material for the loop portion of a hook and loop fastener, said loop fastener material comprising in order: (1) a loop layer (14) on its first major surface, said loop layer comprising (a) a multiplicity of flexible loops adapted to be releasably engaged by the complementary hook portion of the hook and loop fastener and (b) a base

layer to which said loops are anchored, and (2) a pressure-sensitive adhesive layer (18) on its second major surface; said sheet optionally comprising a release control agent incorporated into said loops and/or a release control agent applied to the surface of said loops prior to arranging said loop fastener material into said assembly; characterized in that said loop fastener material is arranged in said assembly such that the adhesive layer (18a) of an overlying portion (12a) of said loop fastener material is in direct contact with the loop layer (14b) of an underlying portion (12b) of said loop fastener material, said loops of said underlying portion are such that they are compressed by said overlying portion when arranged in said assembly and are presented in an engagable state when said overlying portion is removed from said assembly, said loops and said pressure-sensitive adhesive and said optional release control agent being such that said adhesive layer adheres sufficiently strongly to said loops that when said overlying portion of said loop fastener material is removed from said assembly, said adhesive tends to pull said loops so as to restore them to an engagable state."

"8. A method characterized in that it comprises the steps of:
(1) providing an assembly (10) comprising one or more multilayer sheets of loop fastener material for the loop portion of a hook and loop fastener, wherein said loop fastener material comprises in order: (1) a loop layer (14) on its first major surface, said loop layer comprising (a) a multiplicity of flexible loops (15) adapted to be releasably engaged by the complementary hook portion of the hook and loop fastener and (b) a

base layer, and (2) a pressure-sensitive adhesive layer (18) on its second major surface, said sheet optionally comprising a release control agent incorporated into said loops and/or a release control agent applied to the surface of said loops prior to arranging said loop fastener material into said assembly, wherein said loop fastener material is arranged in said assembly such that the adhesive layer (18a) of an overlying portion (12a) of said loop fastener material is in direct contact with the loop layer (14b) of an underlying portion (12b) of said loop fastener material, said loops of said underlying portion are such that they are compressed by said overlying portion when arranged in said assembly and are presented in an engagable state when said overlying portion is removed from said assembly, said loops and said pressure-sensitive adhesive and said optional release control agent being such that said adhesive layer adheres sufficiently strongly to said loops that when said overlying portion of said loop fastener material is removed from said assembly, said adhesive tends to pull said loops so as to restore them to an engagable state; and (2) removing an overlying portion of said loop fastener material from said assembly such that the adhesive layer of said overlying portion is separated from the loops of said underlying portion, so as to present said loops of said underlying portion in an engagable state."

VIII. The following documents were cited in the appeal proceedings:

A1 Offer from Acker Textilwerk GmbH to Beiersdorf AG dated 26 October 1989

A2 Offer from Acker Textilwerk GmbH to Beiersdorf AG

dated 14 May 1990

A3 Minutes (three pages) by Mr Bollweg of visit from persons of Michels, Rheda to Beiersdorf AG on 13 December 1989

A4 Letter from Beiersdorf AG to Ford-Werke AG dated 17 May 1990

A5 Letter from Beiersdorf AG to Volkswagen AG dated 21 May 1991

A6 Beiersdorf AG provisional product information "tesaband 7182 (später 4606)"

A7 BMW sheet 8 357 831 "Wickelband Polyestervelour" (31 October 1991)

A8 Telefax message (four pages) Beiersdorf UK Limited to Dieter Meltzer of Beiersdorf AG dated 20 December 1991

A9 Debit note from Lisa Dräxlmaier GmbH to Beiersdorf AG in respect of price differential on tesaband 4606 dated 23 November 1992

A10 Affidavit of Eric Bollweg of Beiersdorf AG dated 10 May 1999 (six pages)

B1 Minutes (two pages) of meeting between Velcro Europe SA and Beiersdorf representative dated 20 September 1992

B2 Document from Tybor to Velcro Europe SA dated 12 November 1992

B3 Document from Tybor to Velcro Europe SA dated 12 November 1992

B4 Document from Lamitor SA to Velcro Europe SA dated 5 November 1992

B5 Document from Lamitor SA to Velcro Europe SA dated 20 November 1992

B6 Product Authorisation (four pages) for production by Velcro Europe SA of product Velour PS 07 dated 5 April 1993

B7 Invoice from Velcro Europe SA to Beiersdorf SA for product Velour POLPS07 dated 25 March 1993

B8 Proposal (four pages) from Velcro Europe SA to Ford Halewood/Texacro Ltd presented 29 November - 2 December 1993

B9 Affidavit of Domingo Nadal dated 28 July 1999 and its English translation (four pages)

D1 FR-A-2 610 488

D2 EP-A-0 319 249

D3 Information Disclosure Statement (two pages) filed at the United States Patent and Trademark Office by Minnesota Mining and Manufacturing Company on 27 July 1995 concerning US Application Serial No. 08/374920

D4 US-A-5 605 729 granted on US Patent Application Serial No. 374920, published after the present

priority date

D5A Action on US Patent Application Serial No. 08/374920 by United States Patent and Trademark Office, mailed 17 August 1995 (five pages)

D5B Action on US Patent Application Serial No. 08/374920 by United States Patent and Trademark Office, mailed 20 May 1996 (four pages)

D5C Reply to D5A, from Minnesota Mining and Manufacturing Company, dated 18 December 1995 (six pages)

D5D Reply to D5B, from Minnesota Mining and Manufacturing Company, dated 28 June 1996 (four pages)

D6 US-A-4 994 054

D7 US-A-4 973 513

D8 US-A-4 973 326

D9 US-A-5 066 289

D10 EP-B-0 258 015

D10(F) Translation into French of D10

D11 US-A-4 761 318

D12 US-A-3 849 840

D13 GB-A-1 438 721

R1 EP-A-0 517 275

R2 EP-A-0 211 564

Statement of Dr Leigh E. Wood, 3 pages, undated, filed with appellant P's letter of 27 September 1999

IX. The parties opposing the patent argued in the appeal proceedings that its subject-matter lacked novelty or was not inventive on the basis of two alleged public prior uses, a product marketed by the proprietor himself before the priority date and various published prior art documents, and contravened Articles 83, 84 and 123 EPC.

Appellant P countered the other parties' objections.

X. Appellant P requests that the decision under appeal be set aside and the patent be maintained as granted (main request) or on the basis of the auxiliary requests 1 to 3 filed during the oral proceedings.

Appellant OIV and (in writing) parties as of right OI and OII request that the decision under appeal be set aside and the patent revoked.

Party as of right OIII made no request in the appeal proceedings.

Reasons for the Decision

1. The appeals are admissible.

2. *Explicit disclosure of D8*

2.1 Lines 38 to 52 of column 1 of D8 state that "... hook and loop fasteners ... the mating portions of such fasteners are difficult to attach with pressure-sensitive adhesive in the conventional manner by cutting and applying pressure-sensitive adhesive coated fastener portions from long yardage rolls of supply material. The pressure-sensitive adhesive will adhere to the surface of the fastener material against which it is wound on a roll unless a release coating is provided on the fastener material, which is difficult and impractical, or unless the adhesive is covered by a release liner which must be removed prior to attachment of the fasteners to a garment."

2.2 The skilled person learns from the cited passage that it is "difficult and impractical" to provide a release coating on the fastener material but the board does not consider that the skilled person would conclude that the provision is "impossible".

2.2.1 Three of the examples given by "The Oxford English Dictionary (Second Edition) On Compact Disc - 1994" for the word "impractical" are

- "1947 E. W. F. Feller *Instrument & Control Manual* p. vii, The number of units to be controlled in a single plant all tend to render hand control impractical if not impossible."

- "1962 E. Godfrey *Retail Selling & Organiz.* ii. 21 On a busy ground floor, carpeting would be impractical."

- "1973 *Sci. Amer.* Mar. 113/2 The second calculating method..is too complicated and impractical to

explain here."

In the above examples "impractical" does not mean "impossible".

Sometimes "impractical" is used to mean "impossible". However if the drafter of D8 had intended "impractical" to mean "impossible", then he would not have linked the words "difficult" and "impractical" by the word "and" since something cannot be both difficult **and** impossible.

If the skilled person is in any doubt as to the meaning of the word "impractical" then there remains the word "difficult" and this word clearly does not mean impossible.

2.2.2 Dr Wood, one of the inventors listed on the front page of D8, writes in the second paragraph of section 4 of his statement that "we felt that applying such a release coating onto a hook or loop mechanical fastener would require high coating weights and would be difficult or impractical to accomplish." Thus, even assuming that "impractical" means "impossible", there still remains the alternative of "difficult" so that even Dr Wood does not say that the provision of a release coating on the fastener material was considered impossible.

2.3 Dr Wood writes in the first paragraph of section 4 of his statement that the disclosure of background art in D8 merely relates to their "expectations relative to the application of hook and loop fastener materials on diapers using conventional long yardage tape rolls" and in the second paragraph of section 4 that they "did not

actually attempt to make long yardage rolls of pressure sensitive adhesive coated hook or loop materials with release coatings."

However what counts for the person skilled in the art reading D8 is not the internal development history within the 3M company of fasteners on long yardage rolls. D8 should be read as it would have been read by the person skilled in the art on the publication date of D8.

The board does not consider that the verb "will" is used in the cited passage "The pressure-sensitive adhesive will adhere ... unless ..." to express improbability. Had improbability been intended then the verb "would" would have been used instead of "will". On the contrary, to describe doing something as "difficult and impractical" leads the reader to assume that an attempt has been made to do it and even that the attempt succeeded but that the method would not be repeated because it was difficult or e.g. uneconomic.

2.4 Thus the board finds that lines 38 to 52 of column 1 of D8 disclose to the skilled person two types of roll wound loop/hook fasteners, the first of which has a release coating on the fastener material to prevent adhesion of the pressure-sensitive adhesive to the surface of the fastener material against which it is wound on the roll.

2.5 This disclosure in D8 is clear and explicit, it is not contradicted by the fact that D8 goes on to disclose fasteners with heat sensitive adhesive, and it needs no interpretation in the light of a later document. Thus the board's finding is not inconsistent with decisions

T 572/88, T 763/89, T 71/93 and T 312/94 cited by appellant P.

3. *Claim 1 of the main request (i.e. as granted) - novelty*

3.1 D8 discloses (see section 2.4 above) a loop/hook fastener material assembly in accordance with the first part of claim 1 as granted (page 8, line 20 to the word "material" in line 27).

3.2 The claim concludes with the wording "said loops being such that, when said overlying portion of said loop fastener material is removed from said assembly, said loops of said underlying portion are presented in an engagable state."

3.3 In both D8 and the present invention, the loops are covered by the overlying portion when in the assembly and are presented (i.e. revealed) when the overlying portion is removed.

The opposed patent as granted states that the engagable state is achieved as follows, taken singly or in certain combinations:

- "the loops are such that they can withstand being contacted by the overlying adhesive layer in the assembly substantially without being compressed and are capable of engaging complementary hook fastener material upon being dispensed" - page 2, lines 57 to 59,

- "the loops are warped or compressed by the overlying adhesive layer ... but recover to an "engagable state" ... upon being dispensed" -

page 2, line 59 to page 3, line 3

- "substantially solely as a result of their own inherent properties" - page 3, lines 4 and 5,

- "the recovery of loft may be assisted through interaction with the overlying adhesive layer" - page 3, line 5.

3.4 Lines 38 to 52 of column 1 of D8 do not state whether the loops are presented in an engagable state when the overlying portion is removed but the board considers this to be the only realistic possibility, particularly in the absence of any indication in D8 of a problem of hook to loop engagability.

3.5 It must be remembered that only in certain embodiments of the present patent is the engagable state reached following action by the adhesive of the overlying portion on the underlying loops. In the other embodiments of the present patent the engagable state may be achieved in conventional ways e.g. the loops in the assembly are in an engagable state even while in the assembly but are merely covered by the overlying portion, or the loops are pushed down in the assembly by the overlying portion and spring up of their own accord when the overlying portion is removed. Claim 1 as granted includes all these possibilities. While appellant P considers that the arrangement disclosed by lines 38 to 52 of column 1 of D8 is not workable, claim 1 as granted does not specify any feature to overcome the alleged unworkability and the claim is not restricted so as to avoid what the board considers to be explicitly and implicity disclosed by D8.

3.6 Page 2, lines 39 to 41 of the patent as granted state that "it has been known to brush the loop portion of the loop fastener material to restore to an open condition which will readily engage the complementary hook fastener material".

However the opposition division found on page 10 of its decision that none of the prior art cited in the opposition procedure made any reference either to the problem of loops being presented in a non-engagable state, or to the necessity for an additional step such as brushing. In the appeal proceedings, appellant P has not cast doubt on this finding.

Thus the board does not accept the argument that the loops disclosed by lines 38 to 52 of column 1 of D8 would need to be brushed after being uncovered and that therefore the prior art loops would not be presented in an engagable state.

3.7 Thus the board considers that lines 38 to 52 of column 1 of D8 implicity disclose presentation of the loops in an engagable state when the overlying portion is removed.

3.8 Therefore the board concludes that D8 explicitly and implicitly discloses an arrangement covered by claim 1 of the main request i.e. as granted.

The subject-matter of this claim therefore lacks novelty (Articles 52(1) and 54 EPC) and so is unallowable.

4. Accordingly the main request is dismissed.

5. *The auxiliary requests - amendments*

5.1 The optional wording added to claim 1 as granted to arrive at claim 1 of the first auxiliary request (see section V above) is derived from claim 8 both as originally filed and as granted.

5.2 The amended wording near the end of claim 1 of the first auxiliary request (see section V above) is derived from page 7, line 28 to page 8, line 4 of the originally filed description (page 4, lines 14 to 20 of the description as granted).

5.3 The amendment made to claim 1 of the first auxiliary request to arrive at claim 1 of the second auxiliary request (see section VI above) is derived from claim 2 both as originally filed and as granted.

5.4 The amendments made to claim 1 as granted to arrive at claim 1 of the third auxiliary request are those dealt with in sections 5.1 to 5.3 above and an amendment derived from claim 3 both as originally filed and as granted.

5.5 The amendments restrict claim 1 of each auxiliary request compared with claim 1 as granted.

5.6 Thus there is no objection under Article 123(2) or (3) EPC to the amended claims 1.

5.7 It will be seen later in this decision that the first and second auxiliary requests fail because of their respective claim 1. Therefore the board will not concern itself here with the amendments made to the other claims and to the description to arrive at these

requests.

5.8 Moving to the third auxiliary request, its claim 8 is an independent method claim which is an amended version of the granted claim 11 (originally filed claim 11). The versions of the method claim follows closely the wording of claim 1 of the respective request. Claim 8 of the third auxiliary request is unobjectionable under Article 123 EPC basically for the same reasons as those given for claim 1 of the third auxiliary request (except that claim 8 includes the original and granted claims 12 and 13 not 2 and 3).

5.9 The dependent claims of the third auxiliary request are what remains of the original and granted dependent claims after some of them have been incorporated in the independent claims 1 and 8.

5.10 The description of the third auxiliary request has been amended merely to keep it in line with the claims. The drawings of the third auxiliary request are as originally filed and as granted.

5.11 Thus there are no objections under Article 123 to the version of the patent according to the third auxiliary request.

6. *Claim 1 of the first auxiliary request - novelty*

6.1 While the added wording in this claim (see section V above) defines an optional feature and so cannot contribute to novelty, in any case lines 38 to 52 of column 1 of D8 disclose a release control agent (release coating).

6.2 Regarding the amended wording in claim 1 of the first auxiliary request (see section V above), the board found in section 3.7 above that lines 38 to 52 of column 1 of D8 implicity disclose presentation of the loops in an engagable state when the overlying portion is removed. This can only be due to the properties of D8's loops, pressure-sensitive adhesive and release control agent. Thus these three components are such that the engagable state is achieved.

6.3 Accordingly the subject-matter of claim 1 of the first auxiliary request lacks novelty (Articles 52(1) and 54 EPC) and so is unallowable.

7. Accordingly the first auxiliary request is dismissed.

8. *Claim 1 of the second auxiliary request*

8.1 As set out in section VI above, this claim adds to claim 1 of the first auxiliary request that "said loops of said underlying portion are such that they are compressed by said overlying portion when arranged in said assembly" and concludes that "said loops of said underlying portion are restored to an engagable state after removal of said overlying portion."

8.2 Thus claim 1 of the second auxiliary request excludes incompressible loops (which are engagable before being part of the assembly, become unengagable not because of a change of shape but merely by being covered by the overlying portion, and become engagable again after the overlying portion is removed).

8.3 However the board does not consider that incompressible loops would be normal in the field of hook and loop

fasteners. Indeed appellant P explained in the oral proceedings that he was not aware of rolled up loop fastener material with incompressible loops in the prior art but that a certain degree of compressibility would be expected.

8.4 Thus, while lines 38 to 52 of column 1 of D8 do not specify whether the known loops are incompressible or compressible, the latter - even if not the only possibility - would at least be an obvious choice for the skilled person. As set out in section 3.7 above, the cited passage in D8 implicity discloses presentation of the loops in an engagable state when the overlying portion is removed. This can only be achieved - if the loops are compressed when wound in the roll - if the loops are restored (i.e. regain their shape at least to a certain extent) when unrolled.

8.5 Thus claim 1 of the second auxiliary request is not allowable because its subject-matter is not inventive (Articles 52(1) and 56 EPC).

9. Thus the second auxiliary request is dismissed.

10. *Claim 1 of the third auxiliary request*

10.1 The essential difference between claim 1 of the second auxiliary request and that of the third auxiliary request is that of "said loops and said pressure-sensitive adhesive and said optional release control agent being such that **said adhesive layer adheres sufficiently strongly to said loops** that when said overlying portion of said loop fastener material is removed from said assembly, **said adhesive tends to pull said loops so as to restore them to an engagable**

state."

10.2 Claim 1 of the third auxiliary request has been objected to in the appeal proceedings under Article 100(b) EPC (Article 83 EPC - sufficiency of disclosure) basically with the argument that the claim does not sufficiently identify the type of loop, the type of adhesive and the type of optional release control agent needed to achieve the desired result.

The board considers however that, with the information in the patent specification at his fingertips, the skilled person would be able to choose, with an acceptable amount of trial and error, the two (or optionally three) variables such that when put together, the desired result is achieved.

10.3 Claim 1 of the third auxiliary request has also been objected to in the appeal proceedings under Article 84 EPC (clarity). An objection to an amended claim under Article 84 EPC may only be considered when the alleged deficiency is a consequence of the amendments. In the present case the objection is impermissible since claim 1 of the third auxiliary request is effectively the same as claims 1 to 3 as granted, a combination already present in the granted patent whose claim 3 included claims 1 and 2 by reference.

11. *Claim 1 of the third auxiliary request - novelty and inventive step versus D8*

11.1 Lines 46 to 51 of column 1 of D8 state that "The pressure-sensitive adhesive will adhere to the surface of the fastener material against which it is wound on a roll unless a release coating is provided on the

fastener material ... or unless the adhesive is covered by a release liner".

11.2 Thus D8 does not disclose using the adhesive layer to adhere sufficiently strongly to the loops so as to pull them into an engagable state. So the claimed subject-matter is novel over the disclosure of D8.

11.3 Moreover, D8 teaches against adhesion and therefore leads away from the present invention which is therefore not obvious when starting from the disclosure of D8.

The board cannot accept the argument that the prejudice in D8 no longer existed at the present priority date because by then D9 had been published, for the reason that D9 did not disclose the problem of adherence of the pressure-sensitive adhesive to the surface of the fastener material itself.

12. *Alleged public prior uses - Beiersdorf AG and Velcro Europe S.A.*

12.1 Appellant OIV argues that the subject-matter claimed in appellant P's requests is not patentable in view of two alleged public prior uses, namely

- firstly that Beiersdorf AG sold and delivered German manufactured Tesaband 4606 to Lisa Dräxlmaier GmbH on 16 November 1992 (supported by documents A1 to A10 and B9, in particular by A9); and

- secondly that Velcro Europe S.A. sold Velcro manufactured Tesaband 4606 to Beiersdorf S.A. on 25 March 1993 (supported by documents A10 and B1 to B9, in particular by B7).

12.2 Both alleged public prior uses concern tapes with a velour on one major surface and an adhesive on the other. Some of the cited documents A1 to A10 and B1 to B9 are acknowledged by appellant OIV to be internal documents intended to illustrate the history of development of the tapes and not to prove public disclosure.

The board notes that what was allegedly produced, what was allegedly proposed for production and what is now produced is not a single, unchanged tape but tapes bearing different names and numbers (Tesaband 7182 and 4606 - see A6; and Velour PS 07 - see B6), from different manufacturers (Beiersdorf AG and Velcro Europe S.A.) and with different constructions (rubber based adhesive and water based acrylic pressure sensitive adhesive - see A10, section 13; without liner - see A6, maybe with liner - see A8, page 1, last paragraph; different velours - see B9, section 9).

12.3 On the basis of the disclosure of D8, the board has already decided that the subject-matter of claim 1 of the main request and of claim 1 of the first auxiliary request is not new and that of claim 1 of the second auxiliary request is not inventive. Therefore these requests were dismissed as a whole, see sections 4, 7 and 9 above.

Therefore, as far as these requests are concerned, it is unnecessary for the board to decide whether the

alleged public prior uses are proven and, if so, whether also they render the subject-matter of these requests unallowable.

Instead the board can move straight on to the third auxiliary request.

12.4 Even when considering this third auxiliary request, it will be seen from the reasons below that the board does not need to decide whether appellant OIV has sufficiently proved that Tesaband 4606 was sold to Lisa Dräxlmaier GmbH on 16 November 1992 or to Beiersdorf S.A. on 25 March 1993, what the construction of each sold Tesaband 4606 was, and whether each sale was a normal sale with no secrecy requirements being imposed on the purchaser.

Instead the board will continue by examining what the consequences would be if appellant OIV's allegations were correct.

12.5 The tapes were intended for various uses such as wrapping cables, see A5, section 1, paragraph 3 and B6, the section entitled "Field of Use". In these uses, at least before the priority date, the tapes were used on their own i.e. not with a mating component to make up a hook and loop fastener. Mr Bollweg states in section 14 of A10 that "the Tesaband 4606 product .. was attached to the body of the door by means of hook material patches" but he is relying on B8 which concerns an event more than seven months after the priority date. Moreover B8 clearly indicated that it is only a proposal (at this already too late time) to change the current system in the future (at an even more late time) by a loop tape attached to CFM22 hooks. Mr Nadal

writes in section 8 of B9 that "the loop fabric becomes in an engagable state for successfully receiving a hook (Velcro part) component" but his use of the present tense implies that he is writing of what was done in 1999, there is no evidence that this was the practice before the priority date.

12.6 However appellant OIV argues that the tapes, even if not intended to be one half of a hook and loop fastener, nevertheless had all the features of the claimed subject-matter, namely a **loop** fastener material assembly on its own without the mating **hook** fastener.

12.7 Since claim 1 of the third auxiliary request specifies "(1) a loop layer (14) on its first major surface, said loop layer comprising (a) a multiplicity of flexible loops" it would need to be proven that the allegedly sold tapes also comprised loops suitable for loop-hook fastening.

However the documents A1 to A9 and B1 to B7 do not mention loops. Some of these documents mention velour but, as appellant OIV stated during the oral proceedings, velour need not necessarily consist of loops e.g. intact, uncut loops.

The lack of information on this topic in the documents may be due to loops being unimportant on the alleged sale dates since the tapes were not intended to be one half of a hook and loop fastener.

Mr Bollweg states in section 3 of A10 that "Tesaband 4606 ... comprised a loop material" and Mr Nadal states in section 8 of B9 that "Tesaband 4606 is a loop fabric (brushed fabric - velour). However they are writing in

1999, long after the priority date, and they give no documentary evidence that the allegedly sold tapes comprised loops. Even hearing these persons as witnesses would not overcome this lack of documentary evidence. B8 mentions "loop tape" but does not specify whether this loop tape is Tesaband 4606 and anyway was written more than seven months after the priority date and still further concerned a proposal (i.e. not something that had actually been done even at the time B8 was written, still less before the priority date). Furthermore when describing the current system, B8 only indicates the use of "tape" whereas the proposed changes indicate "loop tape" thereby suggesting that loops were not present in the then current system and were only proposed long after the priority date of the present patent.

12.8 Moreover there is no disclosure in documents A1 to A9 and B1 to B7 (and not even in A10, B8 and B9) that the adhesive layer adhered sufficiently strongly to the loops as to tend to pull them to restore them to an engagable state when the tapes were unwound. Indeed the last paragraph of page 1 of A8 states that "if we can increase the adhesion we may have to use a liner" which implies that a strong adhesion of adhesive to loops was to be avoided.

It must be remembered that the loops of the tapes of these alleged public prior uses (if indeed they had loops) were not intended for engagement with hooks and it has not been proven that it was realised before the priority date that these tapes could be attached with hooks, see section 12.5 above.

Therefore, at least before the priority date, the

skilled person looking at the above mentioned alleged public prior uses had no interest in restoring hooks to an engagable state because he had no idea that they were to engage anything.

12.9 The board moreover sees no verifiable evidence from the parties that the loops of the allegedly sold tapes were aided to an engagable state when the tapes were unwound, by means of the adhesive.

12.10 Accordingly the board does not find that the Beiersdorf AG and Velcro Europe S.A. alleged public prior uses destroy the novelty of the subject-matter of claim 1 of the third auxiliary request.

12.11 Before the priority date, the skilled person would not have considered these allegedly sold tapes as a starting point for a hook and loop fastener. As originally conceived, the tapes were generically different from the loop portion of a hook and loop fastener. The idea that they might be used as such came much later, see section 12.5 above.

Thus these allegedly sold tapes, on their own or in combination with any prior art document, would not lead the skilled person in an obvious way to the subject-matter of claim 1 of the third auxiliary request.

13. *D3, D4 and D5A to D5D*

13.1 In D3 appellant P admits that there was a material on the market prior to the present priority date, having hooks on one major surface and pressure sensitive adhesive on the other, wound on itself in roll form such that the hooks and adhesive were in contact.

D4 is the USA patent (corresponding to the present opposed patent) which resulted from the application to which D3 refers. D5A to D5D are the letters to and from the United States Patent and Trademark Office concerning D3.

13.2 These documents D3 and D5A to D5D thus concern the hook material part of a hook and loop fastener. There is nothing in these documents or in the marketed hook fastener which would suggest both to change the hook fastener (normally more rigid than the loop fastener) into a loop fastener and to select the components of the resultant loop fastener such that the adhesive adhered sufficiently strongly to the loops as to tend to pull them to restore them to an engagable state when the material was disassembled.

13.3 These documents thus destroy neither the novelty or the inventive step of the subject-matter of claim 1 of the third auxiliary request.

14. *Other cited documents and combination of teachings from the prior art*

14.1 D2 is the equivalent of D8 which was discussed starting in section 2 above.

14.2 D1 (and its equivalent D6), D7, D9 to D13, R1 and R2 provide no hint to the skilled person to provide a loop fastener (of a hook and loop fastener) whose adhesive adheres sufficiently strongly to the underlying loops when in the assembled state that the adhesive tends to pull the loops to restore them to an engagable state when the material is disassembled.

14.3 The board can see no way that the cited prior art (including the alleged public prior uses (see section 12) and the acknowledged marketed product (see section 13)) taken singly or in combination with the other prior art cited during the appeal proceedings could lead the skilled person in an obvious way to the subject-matter of claim 1 of the third auxiliary request.

15. Claim 1 of the third auxiliary request is therefore allowable, as is the independent method claim 8 for basically the same reasons. Claims 2 to 7 and 9 to 13, dependent on claims 1 and 8 respectively, are also allowable.

The patent can therefore be maintained in the version according to the third auxiliary request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the first instance with the order to maintain the patent in the following version:

- claims 1 and 8 of the third auxiliary request as filed during the oral proceedings,

- claims 2 to 7 and 9 to 13 as maintained by the Opposition Division,

- description pages 2 to 8 as maintained by the Opposition Division, and

- drawings Figures 1 to 3 as maintained by the opposition division.

The Registrar: The Chairman:

G. Magouliotis C. Andries