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**D E C I S I O N**  
**of 22 April 2002**

**Case Number:** T 0726/00 - 3.2.4

**Application Number:** 95903019.8

**Publication Number:** 0730421

**IPC:** A47B 77/02

**Language of the proceedings:** EN

**Title of invention:**

A method for improving a working top and a covering top to be used thereby

**Patentee:**

ALMANOVA WERKMEUBEL INDUSTRIE B.V.

**Opponent:**

van Erven Goirle B.V.

**Headword:**

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**Relevant legal provisions:**

EPC Art. 56, 113(1)  
EPC R. 58(4), 67, 71(2)

**Keyword:**

"Inventive step - yes"  
"Reimbursement of appeal fee - no"

**Decisions cited:**

T 0210/90

**Catchword:**

-



**Case Number:** T 0726/00 - 3.2.4

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.4**  
**of 22 April 2002**

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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 8 May 2000 revoking  
European patent No. 0 730 421 pursuant to  
Article 102(1) EPC.

**Composition of the Board:**

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

## Summary of Facts and Submissions

- I. European patent No.0 730 421 was revoked by the opposition division's decision dispatched on 8 May 2000.

The appellant (proprietor) filed an appeal on 5 July 2000, paid the appeal fee simultaneously and then filed the statement of grounds of appeal on 16 August 2000.

- II. The respondent (opponent) was not present at the oral proceedings that took place on 22 April 2002, having announced by letter of 16 April 2002 that he would not attend. In accordance with Rule 71(2) EPC, the oral proceedings took place without him.

During the oral proceedings the appellant presented a new version of the patent documents as the single request.

During the appeal proceedings the respondent maintained in general terms the arguments made before the opposition division.

The appellant countered these arguments and added that the opposition division, by basing its decision on arguments on which he had had no opportunity to comment (Article 113(1) EPC), had committed a substantial procedural violation justifying a reimbursement of the appeal fee (Rule 67 EPC).

- III. Claim 1 of the single request reads:

"A method for improving a working top in an existing

kitchen, characterized in that on top of the existing working top there is fitted a rigid unitary covering top (1) with a front side and a back side, the covering top (1) forming an integral structure and comprising a horizontal part (4-6) having a rear edge at the back side of the covering top, to be directed towards a wall, a covering edge (2) at the front side and a water barrier (3) provided near the transition between said horizontal part (4-6) and said covering edge (2) whereby the covering top (1) is fitted in such a way, that the horizontal part (4-6) of said covering top (1) extends over at least substantially the entire upper surface of the working top and a covering edge (2) of said covering top (1) engages over the front edge of the existing working top, whereby the covering top (1) is attached to the working top by means of a suitable adhesive."

IV. The following prior art was listed in the opposition division's decision:

- D1 US-A-3 606 508
- D2 GB-A-822 960
- D3 US-A-4 091 155
- D4 US-A-3 554 140
- D5 US-A-3 583 337
- D6 US-A-2 688 523
- D7 US-A-4 073 384
- D8 GB-A-2 094 140
- D9 US-A-5 348 384

D10 A Fax from Almanova Werkmeubel Industrie B.V. to Pfleiderer Sekretariaat, one page, 4 June 1993

D11 B Fax from Pfleiderer Industrie to Mr W. van Erven, one page, 27 July 1993

- D12 C Discussion report of visit of Mr W. van Erven to Almanova, one page, 24 August 1993
- D13 D Discussion report of telephone call between Mr W. van Erven and Mr F. van Kuyk of Almanova, one page, 21 September 1993
- D14 E Drawing of van Erven, one page, 7 December 1993

V. The appellant requests that the opposition division's decision revoking the patent be set aside and that the patent be maintained on the basis of the request as filed during the oral proceedings:

- claims 1 to 3 filed during the oral proceedings,
- columns 1 to 3 of the description also filed during the oral proceedings, and
- Figures 1 and 2 as granted.

The appellant moreover requests that the appeal fee be reimbursed.

The respondent requests that the appeal be dismissed.

### **Reasons for the decision**

1. The appeal is admissible.
2. *Articles 100(b), 83, 84 and 69 EPC*
  - 2.1 The respondent argued in the notice of opposition that the patent application and the patent specification did not disclose the invention in a manner sufficiently

clear and complete to be carried out by a person skilled in the art (Articles 100(b) and 83 EPC), citing documents A to E (denoted D10 to D14 respectively by the opposition division in its decision).

The opposition division explained in section B.2 on pages 4 and 5 of its decision why it did not share the respondent's standpoint.

- 2.2 The respondent also argued in the notice of opposition that claim 1 as granted did not sufficiently indicate the extent of protection.

The opposition division explained in section B.3 on page 5 of its decision that Article 100 EPC did "not specify that Articles 69 or 84 EPC may constitute a ground for opposition."

- 2.3 In the letter of 26 February 2001, the respondent stated that he maintained the arguments submitted in the notice of opposition. However at no time in the appeal proceedings has the respondent given any reason whatsoever for doubting the findings of the opposition division in its decision on disclosure of invention and extent of protection.

- 2.4 The board agrees with the opposition division's findings on disclosure of invention and extent of protection, and sees no reason to comment further on topics in which the respondent has apparently lost interest.

3. *Amendments - Article 123 EPC*

- 3.1 The present claim 1 contains the entire wording of

claim 1 as granted and the following additional features:

- the covering top (1) has a front side, based on page 2, lines 15 and 16 of WO-A-95/14408 (column 2, lines 24 and 25 of the patent as granted),
- the covering top (1) has a back side, based on Figures 1 and 2 of both WO-A-95/14408 and the patent as granted,
- the horizontal part (4-6) has a rear edge at the back side of the covering top, to be directed towards a wall, based on page 3, lines 20 and 21 and Figure 2 of WO-A-95/14408 (column 3, lines 18 to 20 and Figure 2 of the patent as granted), and
- the covering edge (2) is at the front side, based on page 2, lines 15 and 16 of WO-A-95/14408 (column 2, lines 24 and 25 of the patent as granted).

3.2 Thus there is no objection to the present claim 1 under Article 123(2) EPC and, since the amendments restrict the scope of the claim compared to that as granted, there is no objection under Article 123(3) EPC either.

3.3 The wording of the present claims 2 and 3 is identical to that of the granted claims 2 and 3.

3.4 To arrive at the present description, the description as granted has merely been brought into line with the present claims and clerical errors corrected.

3.5 The drawings are the same as those granted.

3.6 Thus the present version of the patent does not contravene Article 123 EPC.

4. *Claim 1 - novelty*

4.1 D1 discloses a method of making a counter top (see column 1, lines 28 and 29). D2 discloses a method of constructing work tops e.g. for kitchen furniture (see claim 4 and page 1, lines 11 to 14).

However the method of the present claim 1 is directed to putting a new covering top over an existing working top and neither D1 nor D2 discloses this.

Also D6, D8 and D9 do not disclose this.

4.2 The present claim 1 specifies "a water barrier (3) provided near the transition between said horizontal part (4-6) and said covering edge (2)" but none of D3 to D5, D7 and D8 discloses this.

4.3 Therefore, the subject-matter of the present claim 1 is novel over the cited public prior art (Articles 52(1) and 54 EPC).

5. *Comments on the method of claim 1*

5.1 The at first sight minor changes in wording to the granted claim 1 (see section 3.1 above) result in a major change in the method according to the present claim 1.

5.2 In addition to the feature of "a covering edge (2) at



the front side" which "engages over the front edge of the existing working top" (which was already in the granted claim 1), it is now explained that the covering top 1 used in the method has a back side, that the horizontal part 4-6 has a rear edge at this back side and that this rear edge is to be directed towards a wall. Further the covering top 1 has a front side and the covering edge 2 is at this front side.

5.3 This construction of covering top makes it possible to provide a covering top of a standard size (e.g. 3 m long and 640 mm wide). Either prior to delivery to the "existing kitchen" or in said "existing kitchen", this standard size covering top can be cut to the desired length and width (e.g. some metres long and 600 mm wide). The adaptation of the standard width to the width actually required in the existing kitchen is achieved by cutting at the rear edge of the horizontal part 4-6. The cut rear edge is directed towards a wall while the covering edge 2 at the front side remains uncut.

6. D3

6.1 The opposition division found that it was obvious to the skilled person to modify the method disclosed by D3 using the teachings of D1 and so to arrive at the method set out in claim 1 as granted.

6.2 Indeed D3 deals with applying a work top to a new or existing support structure (see column 1, lines 5 and 6). An example given in lines 15 to 17 of column 3 is a "contoured work top 10 ... to provide a new work surface on an old desk 22 as shown in FIGS. 2 and 3."

A further example given in line 3 of column 4 is "kitchen counter tops" and so D3 discloses, using the words of the present claim 1, a method for improving a working top in an existing kitchen.

The particular embodiment shown in Figure 1 of the present opposed patent is an assembly of various components, namely fibreboard 5, upper plate 4 and top layer 6 and is described in the present claim 1 as "an integral structure". The work top 10 of D3 is also an assembly, this time of sheets, ribs and strips welded together (see column 2, lines 30, 42, 55 and 56). Thus also the prior art top of D3 is "an integral structure".

Referring to the final part of the present claim 1, also in D3 it can be seen in Figures 2 and 3 of D3 that the work top 10 extends over the entire upper surface of the pre-existing working top and in lines 24 to 28 of column 3 that the work top 10 can be glued to hold it down.

6.3 Figure 3 of D3 shows the new work top being applied to a free standing desk 22 and lines 21 to 24 of column 3 explain that "The side walls 20 hide the old desk top 21 and hold the work top 10 in position cooperating with the four peripheral edges 27 of the desk top 21 to prevent the work top 10 from sliding around."

These parts of D3 thus disclose a work top with four side walls.

6.4 However claim 1 of D3 defines a work top with two spaced apart sheets without mentioning side walls. Side walls are first mentioned in claim 2 of D3, namely

"side walls of structural material joined to edges of the flat sheet and bent downwards beyond the second sheet adapted to retain the work top in place on a supporting structure."

The board concludes from these two claims that the side walls in D3 are optional, this being borne out by the remainder of D3. Lines 45 to 50 of column 1 mention that "It is another purpose of the present invention to provide work tops ... which need not be fastened to support structures, but which have side walls extending down below the top surface of the support structure and thus retain the work top in place." Lines 2 and 3 of column 2 state that "In another embodiment side walls of structural material are included".

6.5 Accordingly D3 discloses a new work top either with **four** side walls or with **no** side walls (i.e. no walls at all, no lateral side walls, no front wall and no back wall).

6.6 In order to carry out the method of the present claim 1, sections 5.2 and 5.3 above explain that it is necessary that

- firstly, the covering top has a covering edge at the front side to engage over the front edge of the existing working top, and
- secondly, the horizontal part has a rear edge at the back side and that this rear edge is to be directed towards a wall (so that the width can be adapted by cutting at the rear edge of the horizontal part).

- 6.7 However neither of the alternatives of the new work top of D3 is intended to be placed against a wall, they are for placement on a existing top that is free standing.

Thus while the D3 alternative of a work top with no side walls might be cuttable at the rear to adapt the width, it does not have the necessary covering edge at the front side.

On the other hand, the D3 alternative of a work top with four side walls cannot be cut at the rear to adapt the width without removing the side wall at the rear. This would not be obvious since it would change the work top in a fundamental way and moreover, according to column 3, lines 21 to 24, "The side walls 20 ... hold the work top 10 in position cooperating with the **four** peripheral edges 27 of the desk top 21 to prevent the work top 10 from sliding around."

- 6.8 Thus the board does not find it obvious to proceed from the teaching of D3 to the method defined by the present claim 1.

Even further, the board considers that, because D3 concerns free standing work tops, it is an inappropriate starting point for assessing inventive step of the method defined by the present claim 1 which concerns work tops abutting a wall.

7. *D1 and D2*

- 7.1 Although D1 and D2 disclose work tops, neither discloses putting such a work top over an existing working top. However either document, in the board's view, could be taken as a starting point for assessing

inventive step of the present method. Once it had been realised that it was desirable to put a new work top over an old work top, the problem would remain of designing the work top of D1 or D2 in such a way as to make installation easier.

7.2 Figure 1 of D1 shows a counter top 10 with a horizontal section 12, a water barrier at 20 and a front trim strip 22. It could be imagined that the front of this counter top could be fitted over an existing kitchen top. However at the back of the horizontal section 12 there is an upright section 14 and a rear trim strip 26. Thus the width of the counter top could not be adapted to the width of an existing kitchen top without destroying the upright section 14 and rear trim strip 26. Moreover the horizontal section could not be adapted in width on its own and then affixed to the upright section 14 and rear trim strip 26 because all the components of the counter top are integral by virtue of the plastic laminate 30.

7.3 Thus it would not be obvious for the skilled person to use the counter top of D1 to carry out the method of the present claim 1.

7.4 The arguments and finding in sections 7.2 and 7.3 above apply mutatis mutandis to D2.

8. *D4 and D5*

8.1 D4 concerns a supplemental, replaceable table top 30 superimposed on a primary top 12 (see column 2, lines 1 to 3 and Figure 1) and detachably secured thereto by angle members 44.

The abstract of D4 states that "A pair of angle members extend along opposite sides of the replaceable table top" and indeed this is what is shown on Figure 1. Moreover claim 1 of D4 specifies "clamp means ... extending along opposite sides of said base member", see column 3, lines 16 and 17.

- 8.2 Thus the replaceable table top of D4 would not be suitable for use in the method of claim 1 which requires a top with a covering edge (e.g. the angle member 44 of D4) at the front side to engage over the front edge of the existing working top but must remain cuttable at the back side so that the width of the top can be adapted.

The board cannot see that it would be obvious for the skilled person to omit one of the angle members 44 since these are a significant feature of the invention (see column 2, lines 13 to 16 and claim 1, column 3, lines 16 and 17) and without them the replaceable table top 30 would not be held down on the primary top 12.

Moreover the most important aspect of the invention of D4 is that the supplemental table top 30 be replaceable, thus leading away from the requirement at the end of the present claim 1 that "the covering top (1) is attached to the working top by means of a suitable adhesive."

- 8.3 D5 concerns a replacement top 10 mounted on an existing table or desk top 14, see column 2, lines 13 to 15 and Figure 1. The replacement top 10 has a frame 20 which "includes opposite end members 34 as well as opposite edge members 36 ... substantially in complete contact with the end surfaces 24 and edge surfaces 26 of the

top 12 to prevent lateral displacement of the top 10", see column 2, lines 28 to 36.

8.4 Thus, because this replacement top 10 of D5 has four depending sides, for similar reasons to those given in section 8.2 above it would not be suitable for use in the method of claim 1 and it would not be obvious to adapt it to make it suitable.

8.5 Thus D4 and D5 would not lead the skilled person in an obvious way to the method of claim 1.

9. *Other prior art documents*

D6 to D9 were cited by the respondent only against dependent claims and like the other documents on file from the examination proceedings are no more relevant than the citations already discussed in this decision.

10. The board can see no way that the prior art documents on file, taken singly or in combination, could lead the skilled person in an obvious way to the method set out in the present claim 1.

11. Claim 1 is therefore allowable as are dependent claims 2 and 3 and the present description and drawings.

The patent can therefore be maintained in the present version.

12. *Reimbursement of the appeal fee*

12.1 The appellant maintains that the respondent in the notice of opposition merely stated that claims 1 and 4

lacked inventive step in the light of the combination of D1 and D3 but presented no argumentation therefor.

The appellant continues that the opposition division revoked the patent for lack of inventive step from a combination of the teachings of D3 and D1, without giving a preliminary opinion and without holding oral proceedings.

Therefore, states the appellant, the opposition division, by basing its decision on arguments on which he had had no opportunity to comment (Article 113(1) EPC), had committed a substantial procedural violation justifying reimbursement of the appeal fee (Rule 67 EPC).

- 12.2 The second half of page 4 of the respondent's notice of opposition sets out two differences of the method of claim 1 over D3. The first difference, namely that D3 does not mention an existing kitchen, is discussed. For the second difference, concerning a water barrier, the respondent states that such a water barrier is normal for a kitchen work top.

Then lines 1 and 2 of page 5 of the notice of opposition states that claim 1 is obvious when combining D3 with D1.

The reader would thus turn to D1. He could not fail to see the similarities between the counter top shown in Figure 1 and what is disclosed by D3 and what is claimed by claim 1. Even with a cursory glance at Figure 1 of D1, he would see a water barrier at 20.

Thus the reader would appreciate that D1 fills the gap



in the teaching of D3.

- 12.3 The opposition division's reasoning in its decision on this relatively easy-to-understand invention concerning combining D3 and D1 to arrive at the method of claim 1 follows acceptably closely the respondent's reasoning in the notice of opposition.

Therefore the opposition division was entitled to decide the opposition directly without a first action.

The opposition division's finding that the method of claim was non-inventive sufficed to revoke the patent, whether or not the reasoning concerning claim 4 was fully based on the respondent's submissions need not be examined.

- 12.4 Since the board does not consider that the opposition division committed a substantial procedural violation, reimbursement of the appeal fee under Rule 67 EPC is not justified.

13. The respondent's deliberate decision to refrain from being present at the oral proceedings before the board is to be regarded as being tantamount to a tacit abandoning of his right to present comments pursuant to Article 113(1) and Rule 58(4) EPC.

No communication pursuant to Rule 58(4) EPC is therefore to be sent to the parties (see T 210/90, section 9).

**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 on the basis of the request as filed during the oral proceedings:
  - claims 1 to 3 filed during the oral proceedings,
  - columns 1 to 3 of the description also filed during the oral proceedings, and
  - Figures 1 and 2 as granted.
3. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:

G. Magouliotis

C. Andries