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Datasheet for the decision of 29 April 2010

Case Number: T 0896/07 - 3.2.05

Application Number: 00202100.4

Publication Number: 1170121

IPC: B41C 1/10

Language of the proceedings: EN

Title of invention:
Direct-to-plate flexographic printing plate precursor

Patentee:
Agfa Graphics N.V.

Opponent:
E.I. DU PONT DE NEMOURS AND COMPANY

Headword:
-

Relevant legal provisions:
EPC Art. 83

Relevant legal provisions (EPC 1973):
-

Keyword:
"Sufficency of Disclosure (yes)"
"Remittal (yes)"

Decisions cited:
-

Catchword:
-

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Case Number: T 0896/07 **-** 3.2.05

D E C I S I O N
of the Technical Board of Appeal 3.2.05
of 29 April 2010

Appellant: (Patent Proprietor)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 26 April 2007 revoking European patent No. 1170121 pursuant to Article 102(1) EPC 1973.**

Composition of the Board:

Chairman: W. Zellhuber
Members: P. Michel
E. Lachacinski

Summary of Facts and Submissions

I. The appellant (patent proprietor) lodged an appeal against the decision of the Opposition Division revoking European Patent No. 1 170 121.

II. The patent in suit was revoked by the Opposition Division on the grounds that the requirement of sufficiency of disclosure (Article 83 EPC) was not satisfied.

III. Oral proceedings were held before the Board of Appeal on 29 April 2010.

The appellant requested that the decision under appeal be set aside and, as a main request, that the patent in suit be maintained as granted, or, as an auxiliary request, that the patent in suit be maintained on the basis of claims 1 to 4, filed as auxiliary request on 24 August 2007.

The respondent (opponent) requested that the appeal be dismissed. He further requested that documents A17 and A18 be admitted into the proceedings.

IV. Claims 1 and 5 as granted (main request) of the appellant read as follows:

"1. Direct-to-plate flexographic printing plate precursor comprising in the order given, a flexible support, a photopolymerizable layer containing an elastomeric binder, an image recording layer comprising a thermoplastic binder and optionally a cover layer **characterised in that** said image recording layer and

said photopolymerizable layer can each be liquefied so that they can be penetrated to a depth of at least 5% at a temperature of 110°C by a ballpoint probe having a diameter of 3 mm, which is subjected to a force of 0.1N."

"5. Method for making a flexographic printing plate comprising the steps of:
- providing a material according to any of the preceding claims;
- optionally removing the cover layer;
- image-wise exposing the image recording layer to form a mask;
- flood exposing the photopolymerizable layer through the mask;
- contacting the mask with an absorbent material
- heating the photopolymerizable layer and the mask while in contact with the absorbent material thereby removing the unexposed areas of the photopolymerizable layer together with the mask."

Claim 1 of the auxiliary request corresponds to claim 5 of the main request, but explicitly incorporates the features of claim 1.

V. The following documents are referred to in the present decision:

A17: Declaration of Mark A. Hackler
A18: Declaration of Bradley K. Taylor
A19: Supplemental Declaration of Mark A. Hackler

VI. The appellant argued substantially as follows in the written and oral procedure:

Claim 1 as granted specifies that the image recording layer and the photopolymerizable layer can each be penetrated to a depth of at least 5% by the defined method. The test method is disclosed in paragraph [0011] of the patent in suit.

The Examples of the patent in suit refer to four samples, all having the same photopolymerizable layer, but different image recording layers. It is thus clear that the values set out in Table 2 refer to the image recording layer. In addition, the Examples provide sufficient information to prepare the image recording layers of samples I to IV of Table 1. Using the method disclosed in the description to measure the penetration depth would reveal that the values of Table 2 are obtained.

Whilst paragraph [0022] refers to an image recording layer having a thickness of 30 µm, the relative penetration depths of Table 2 would be measured using the procedure of paragraph [0011]. In any case, the thickness of the layer does not affect the relative penetration depth, the use of a thicker layer merely enabling a more accurate determination.

The evidence of Mr Hackler (document A17) demonstrates that he was able to determine whether the DPS plates fall within the scope of the claims and thus carry out the penetration test on each layer.

Insofar as there is a lack of clarity in the Examples of the patent in suit, this can be resolved by the skilled person without undue burden.

The person skilled in the art would not consider carrying out a penetration measurement on the layers together, since it is known that a meaningful value can only be obtained for a layer on a hard surface, such as glass.

The invention is thus sufficiently disclosed.

VII. The respondent argued substantially as follows in the written and oral procedure:

It is not clear whether the penetration test of claim 1 should be applied to the image recording layer and the photopolymerizable layer separately or together. Whilst paragraph [0011] of the description appears to suggest that the test should be carried out on the layers separately, this paragraph only refers to the image recording layer.

While the penetration depth of the photopolymerizable layer is specified in claim 1, the Example only provides a single penetration depth for each sample. This suggests that the test was carried out on the layers together.

There is no basis for the interpretation of the appellant that the penetration test is carried out on the layers separately. In addition, the Examples do not provide any penetration values for the photopolymerizable layer.

The invention is thus not sufficiently disclosed.

Reasons for the Decision

Main Request

1. Sufficiency of disclosure

1.1 The flexographic printing plate precursor of claim 1 is characterised in that the image recording layer and the photopolymerizable layer can *each* be liquefied so that they can be penetrated to a depth of at least 5% at a temperature of 110°C by a ballpoint probe having a diameter of 3 mm, which is subjected to a force of 0.1N.

1.2 Thus, in order to establish whether or not a printing plate precursor has the structure specified in claim 1, it is necessary to carry out the specified test on each of the image recording layer and the photopolymerizable layer separately. The submission of the respondent, that the wording of the claim could be construed as referring to a test carried out on the two layers together cannot be accepted.

1.3 In paragraph [0011] of the description, details of the test method are given, the test method being carried out on a 100 µm thick image recording layer *or* photopolymerizable layer coated on a glass support. Whilst the formula provided at the end of this paragraph refers only to the image recording layer, this paragraph provides sufficient disclosure to enable the penetration depth to be determined for the material of each layer. The use of a glass support for each of the layers, as specified at page 3, line 2 of paragraph [0011], means that the test must be carried out on a 100 µm thick image recording layer and a 100 µm thick

photopolymerizable layer separately and not on the two layers together.

1.4 It has been pointed out on behalf of the respondent that Table 2 of the Examples only provides a single value for the relative penetration depth in respect of each sample. However, whilst this may be regarded as being unclear insofar as it is not indicated which layer is being referred to, this lack of clarity would not indicate to the skilled reader that the disclosure of paragraph [0011] should be disregarded. In addition, the Examples provide sufficient information to enable the materials of the image recording layer and the photopolymerizable layer to be prepared. There is nothing which would prevent the materials thus prepared from being subjected to the test method disclosed in paragraph [0011].

1.5 The patent in suit thus discloses the invention forming the subject of claim 1 in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art. The main request of the appellant thus satisfies the requirements of Article 83 EPC.

2. Late filing of documents A17 and A18

2.1 In the decision under appeal, it was decided that there was insufficient evidence that the samples referred to in document A17 were identical to those allegedly available to the public prior to the filing date of the patent in suit. Accordingly, the documents were considered not to be prima facie relevant and were therefore not admitted into the procedure. However, during the present proceedings, a further document,

document A19, was filed, which purportedly deals with this issue. The Board therefore concludes that documents A17, A18 and A19 are admitted into the procedure.

3. Remittal to the department of first instance

3.1 Since the decision under appeal only deals with the issues of the late filing of documents A17 and A18 and sufficiency of disclosure, it is appropriate to remit the case to the department of first instance for further prosecution so as to enable the issues of novelty and inventive step to be considered, if necessary, at two instances.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The case is remitted to the department of first instance for further prosecution.

The Registrar: The Chairman:

D. Meyfarth W. Zellhuber