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**Datasheet for the decision
of 11 February 2015**

Case Number: T 0173/11 - 3.4.03

Application Number: 01993542.8

Publication Number: 1345759

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B32B3/10, B42D15/00, B65D65/28,
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Language of the proceedings: EN

Title of invention:
OPTICAL DISC LABEL CONSTRUCTION

Patent Proprietor:
AVERY DENNISON CORPORATION

Opponent:
Data Becker GmbH & Co. KG.

Headword:

Relevant legal provisions:
EPC 1973 Art. 56, 100(a), 100(c)
EPC Art. 52(1), 123(2)

Keyword:
Inventive step - (yes)

Decisions cited:

Catchword:



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Chambres de recours**

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Case Number: T 0173/11 - 3.4.03

**D E C I S I O N
of Technical Board of Appeal 3.4.03
of 11 February 2015**

Appellant: AVERY DENNISON CORPORATION
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
29 December 2010 concerning maintenance of the
European Patent No. 1345759 in amended form.**

Composition of the Board:

Chairman G. Eliasson
Members: S. Ward
T. Bokor

Summary of Facts and Submissions

- I. This is an appeal by the patent proprietor and sole appellant against the interlocutory decision by the Opposition Division that, account being taken of the amendments made by the proprietor during the opposition proceedings according to the proprietor's then third auxiliary request, European patent No. 1 345 759 and the invention to which it related met the requirements of the EPC.
- II. The patent was opposed in its entirety. The cited grounds of opposition were lack of inventive step and added subject-matter (Articles 100(a), 100(c), 52(1) and 56 EPC).
- III. The following documents cited in the notice of opposition are referred to in this decision:
- D1: WO 98/29313 A1
D2: DE 197 24 648 A1
- IV. Oral proceedings were held in the presence of the appellant-proprietor (hereinafter "the proprietor") and in the absence of the respondent-opponent (hereinafter "the opponent"), the opponent's intention not to attend having previously been stated in writing.

At the end of the oral proceedings held before the Board the proprietor requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of the following main request:

Description: Columns 1-10 as filed in the oral proceedings before the Board, Columns 11-20, 23-30 of the patent specification, Columns 21-22 as filed in the oral proceedings on 1 December 2010;
Claims: 1-30 as filed in the oral proceedings before the Board;
Drawings: Sheets 1/45-43/45, 45/45 of the patent specification, Sheet 44/45 as filed in the oral proceedings on 1 December 2010.

Subsidiarily, the proprietor requested that the patent be maintained on the basis of one of the first to fourth auxiliary requests filed with the statement of grounds of appeal.

The opponent requested in writing that the appeal be dismissed.

V. Claim 1 of the main request reads as follows:

"A label sheet construction, comprising:

a liner sheet (2134);

a facestock (2130) sheet releasably adhered with adhesive to the liner sheet (2134);

at least one weakened facestock separation line (2160, 2166) through the facestock sheet (2130) to the liner sheet (2134) to define at least in substantial part a facestock sheet label (2110, 2114);

at least one tab weakened line through the facestock sheet (2130) to form at least in substantial part a facestock sheet tab (2120, 2124) extending out from the label (2110, 2114); and

the liner sheet (2134) including at least one weakened line through the liner sheet (2134) to the facestock sheet (2130) to form a liner sheet patch (2140, 2144) on a back side of the tab (2120, 2124);

characterized in that:

a portion (2160, 2166) of the at least one weakened facestock separation line and the tab weakened line separates the tab from the label;

the patch (2140, 2144) extends a slight distance onto an edge of the label (2110, 2114) so that the patch overlaps the label by a small overlapping area;

the tab (2120, 2124) and the patch (2140, 2144) together define a handle which a user can grasp without grasping the adhesive to assist in removing the label from the liner sheet (2134) and for positioning the removed label on an applicator surface of a label applicator device (1100, 1260) for a label application procedure; and

the overlapping area and the release value of the adhesive allow the handle to be pulled radially out and away from the removed label to thereby remove the handle from the adhered label along the portion (2160, 2166) of the at least one weakened facestock separation line and tab weakened line separating the tab from the label."

Independent claim 20 of the main request reads as follows:

"A label application method, comprising:

providing a label sheet construction which includes: a liner sheet (2134); a facestock sheet (2130) releasably adhered with adhesive to the liner sheet (2134); at least one weakened facestock separation line through the facestock sheet (2130) to the liner sheet (2134) to define at least in substantial part a facestock sheet label; at least one tab weakened line through the facestock sheet (2130) to form at least in substantial part a facestock sheet tab (2120, 2124) extending out from the label; and the liner sheet (2134) including at least one weakened line through the liner sheet (2134) to the facestock sheet (2130) to form a liner sheet patch (2140, 2144) on a back side of the tab (2120, 2124); the patch (2140, 2144) extending a slight distance onto an edge of the label so that the patch overlaps the label by a small overlapping area; the tab (2120, 2124) and the patch (2140, 2144) together defining a handle; a portion (2160, 2166) of the at least one weakened facestock separation line separating the tab from the label;

grasping the handle and removing the label from the liner sheet (2134);

manipulating the label to an adhered position on a desired surface; and

pulling the handle radially out and away from the label and thereby removing the handle from the adhered label along the portion of the at least one weakened facestock separation line."

VI. In the decision under appeal, the Opposition Division found as follows:

Claim 1 of the granted patent [corresponding to the then main request] included subject-matter which extended beyond the content of the application as filed (Article 100(c) EPC).

The subject-matter of claim 1 of the first auxiliary request [substantially corresponding to claim 1 of the present main request] was distinguished from the closest prior art D1, at least by the feature:

- *"the overlapping area and the release value of the adhesive allow the handle to be pulled radially out and away from the removed label to thereby remove the handle from the adhered label along the portion of the at least one weakened facestock separation line and tab weakened line separating the tab from the label."*

The skilled person was aware that some layman-customers using the labels disclosed in document D1 would attempt to apply labels directly to the compact disks (CDs) in order to avoid the cost of buying an applicator device. When doing this, the handles would lie between the label and the CD surface and therefore could not be removed by "peeling" as intended by D1. The customer would therefore attempt to remove the handles by pulling them out and away from the adhered label, which would not be possible in the case of the labels according to D1.

It would then be obvious to the skilled person in the face of this difficulty to try to make it possible to remove the handles by pulling. By calculation or trial and error the skilled person would determine an appropriate area of overlap and release value of the adhesive to allow this.

Claim 1 of the first auxiliary request did not therefore involve an inventive step in the sense of Article 56 EPC.

VII. The proprietor argued essentially as follows:

Claim 1 of the main request differed from D1 in the feature identified by the Opposition Division (in relation to the then first auxiliary request).

The technical effect of this feature was that the handles (tabs) could be removed after the label had been attached to a substrate (CD), and the principal objective technical problem was to apply a label to a substrate without having to use an applicator.

The handles could be used to manually manipulate the label to an adhered position, and could then subsequently be removed. D1 clearly teaches away from the present invention in so far as it teaches a system wherein the tabs must be removed before the label is applied and hence contamination during positioning of the label could not be avoided due to the fingers of the user coming into contact with the adhesive.

There was nothing in D1, or any of the other available prior art, that would lead the skilled person towards the claimed solution. Nowhere was it suggested that an overlapping area and release value of adhesive may be chosen to allow the tab to be pulled radially out and away from the label.

The Opposition Division's assertion that some laymen-customers would attempt to apply the labels of D1 directly to the CDs in order to avoid buying an

applicator device was pure speculation. The starting point for assessing inventive step must be the disclosure of D1 and not a fictitious assumption about what a layman might try to do with a label of D1. Document D1 made it clear that an applicator was always intended to be used.

Method claim 20 of the main request corresponded substantially to device claim 1 of the the main request.

VIII. During oral proceedings before the Board, the proprietor confirmed that the following summary of the benefits of the invention given by the then applicant in the pre-grant proceedings was also considered to remain valid:

- *"Engineering the slight distance, and the release value of the adhesive in this manner, has the advantage that it allows the handle removal step to be the last stage in the labelling process.*

- *"This has the technical benefit that manual manipulation of the label is possible right up until the point when the label is adhered to the media. Contrastingly, in D1, if the label becomes mis-aligned on the applicator device after the handle portions are removed, it becomes particularly difficult to re-align the label without polluting the adhesive with fingerprints or the like. Furthermore, the 'cant-off movement' required to remove the handle portions, makes mis-alignment during the removal process more likely."*

IX. The opponent's arguments, in so far as they are relevant to the present decision, were essentially as follows:

It was not the case that the handles of document D1 must be pulled off before the adhesion of the label. According to the original application from which the opposed patent was derived, it was the overlapping area and the release value of the adhesive which was critical in allowing the removal of the tabs after the application of the CD label, and it was clear from figure 9e of D1 that the tabs only covered an extremely small fraction of the adhesive surface of the label.

Although the strength of the adhesive used in D1 was not specified, the skilled person could have drawn on the adhesive bonds and regions with differing adhesion disclosed in document D2 to arrive at the adhesive bond between the carrier and the label in D1, and in particular for a reduced adhesive strength in the overlap region. This would allow the removal of the handles in a manner corresponding to the claimed "pulling radially out". Claims 1 and 20 of the main request specified neither the dimensions of the overlapping area nor the adhesive strength.

As the punched tabs in figure 9e of D1 only overlapped with a small fraction of the adhesive area, the handles would only have to be pulled out by a small distance, and it would be irrelevant whether the remainder of the adhesive side of the label was already in contact with the object to which it is to be attached. In fact bonding between the object and the label could have a positive effect on the process of pulling off the handles.

The proprietor's argument that D1 must be seen as disclosing a system comprising a label and an applicator was incorrect. The use of the disclosed applicator merely represented a preferred embodiment.

Furthermore if such a system-oriented approach were adopted in the case of the disclosure of the contested patent, the features for positioning the label on the applicator device, such as notches and holes, would have to be regarded as essential features, but were not included in claims 1 and 20.

The subject-matter of claims 1 and 20 of the main request therefore would arise in an obvious manner from the technical teaching of D1 or a combination of D1 and the knowledge of the skilled person as established in D2.

The other requests were also not allowable.

Reasons for the Decision

1. The appeal is admissible.

As announced in advance, the duly summoned respondent-opponent did not attend the oral proceedings. According to Rule 71(2) EPC 1973, the proceedings could however continue without the opponent. In accordance with Article 15(3) RPBA, the Board relied for its decision only on the opponent's written submissions. The Board was in a position to decide at the conclusion of the oral proceedings, since the case was ready for decision (Article 15(5) and (6) RPBA), and the voluntary absence

of a party was not a reason for delaying a decision (Article 15(3) RPBA).

2. *Main Request: Article 123(2) EPC*

2.1 The features "allow the handle to be pulled radially out and away" (claim 1) or "pulling the handle radially out and away" (claim 20) are not found explicitly in the text of the application as filed. In the case of a circular label, the phrase would clearly mean outwards along a line in the plane of the label intersecting the geometrical centre, which would find a satisfactory basis in the embodiment depicted in figures 64-68.

Although the labels of claims 1 and 20 are not limited to those having a circular shape, the Opposition Division concluded that for non-circular embodiments also the requirements of Article 123(2) EPC were met, as, in the context of the present invention, the term "radial" meant "along a line from some central point". This position was not challenged in the opponent's letter of response and the Board also sees no reason to differ. Hence, and for the avoidance of any doubt, the term "radial" is understood to mean along a line from some central point, the line being essentially *in the plane of the label* (see figures 67 and 68), an interpretation which appears to be implicitly accepted by both parties and by the Opposition Division.

In the response to the statement of the grounds of appeal, the opponent did not raise any objections against the main request on the ground of Article 123(2) EPC, nor was any such objection made in the contested decision against the then first auxiliary request (essentially corresponding to the present main request). The Board also sees no reason to raise

objections in this respect, and is satisfied that the main request meets the requirements of Article 123(2) EPC.

3. *Main Request: Inventive step*

3.1 According to the label sheet construction of claim 1:

- *"the overlapping area and the release value of the adhesive allow the handle to be pulled radially out and away from the removed label to thereby remove the handle from the adhered label along the portion (2160, 2166) of the at least one weakened facestock separation line and tab weakened line separating the tab from the label."*

Document D1 discloses (e.g. figures 9a-9e) a label (12e) having liner sheet patches and facestock tabs (12h) similar to those defined in claim 1. According to D1 (page 19, lines 19-23), the tabs (*Greiflappen*) are removed from the label by a bending and peeling action ("*durch eine Abkanntbewegung von der Etiketle 12e gelöst und abgezogen*"), which implies a pulling direction which is not in the plane of the label, but substantially directed away from it.

There is no disclosure in document D1 of the dimensions of the overlap area or the release value of the adhesive, nor is there any suggestion that the handles could be removed by pulling in a radial direction.

Moreover, the fact that the handles of document D1 may be removed by peeling does not imply that they could also be removed by the claimed method. There is no doubt that the force required to remove an adhered label by peeling back from an adhered area would be

less than that required to remove it by pulling in the plane of the label. Essentially the same point was made by the Opposition Division and has not been disputed. The extra force required to remove a label by pulling in the plane of the label would mean that in many cases the label could not be removed by such a method without damaging or destroying it.

Hence, the feature cited above is seen as representing a clear difference between the subject-matter of claim 1 and the disclosure of document D1.

- 3.2 The statement of the proprietor that a technical effect of the distinguishing feature "is that the tabs can be removed after the label has been attached to a substrate" is considered accurate. By contrast, it would not, in the opinion of the Board, be possible to use the peeling technique disclosed in document D1 *after* the label is attached to the CD.

Both the proprietor and the Opposition Division define essentially the same technical problem (albeit reaching different conclusions concerning inventive step), namely to provide a label which could be applied to a substrate without having to use an applicator. According to the proprietor the handles would be used to manipulate manually the label into adhesion with a substrate, and could then be removed thanks to the distinguishing features of claim 1.

The Board feels somewhat uncomfortable with this formulation of the technical problem for a number of reasons, not least of which is the statement in claim 1 itself that the handle is "for positioning the removed label on an applicator surface of a label applicator device (1100, 1260) for a label application procedure".

The Board accepts that the applicator is not part of the claimed subject-matter, but has been introduced into the claim to define one function of the handle. Nevertheless, the technical problem purportedly solved by a claimed invention should at least be consistent with the claim as a whole. In other words, the combination of the invention defined in the claim and the technical problem which the invention is alleged to solve should present a coherent picture without internal contradictions.

In the present case, linking an invention defined in claim 1 in relation to positioning a label "on an applicator surface of a label applicator device" with a technical problem defined as providing a label which can be applied without using an applicator, seems to the Board to involve just such a contradiction. Consequently, the proposed technical problem is considered unsuitable as it is incongruous with the claimed invention.

- 3.3 The problem referred to above under point VIII, above, and discussed during the oral proceedings, namely allowing manipulation of the label right up until the point when the label is adhered to the substrate, is considered more convincing.

The distinguishing features of claim 1 enable the handles to be pulled off after adhesion, and hence they are available to be used to manipulate the label during the entire pre-adhesion stage. By contrast, the handles of D1 must be removed before adhesion, and any further manipulation or re-alignment required between handle removal and final adhesion could only be performed with

difficulty and with the risk of leaving marks on the adhesive layer.

- 3.4 Starting from the label of document D1 and faced with this problem, the Board does not see why it would be obvious to a skilled person to arrive at a solution corresponding to the distinguishing features of claim 1, nor are the arguments of the opponent considered convincing in this respect.

According to the opponent, the labels of D1 are already designed in a way which would be conducive to radial detachment since, as shown in figure 9e, the tabs 12b only cover a small fraction of the adhesive surface 121 of the label.

The Board is not persuaded. The distinguishing feature of claim 1 relates to the overlapping area *per se*, and not to the fraction of the total adhesive area 121 which the overlapping area represents; the size of the total area covered by adhesive appears to be irrelevant to the issue.

It is, in any event, questionable to what extent inferences may be drawn on the basis of the figures of D1, which are clearly of a schematic nature. Furthermore, even if these figures were taken at face value, figure 9e depicts a significant portion of the tab area being in contact with the adhesive side of the label, and hence there is no justification for inferring that the tabs could be easily adapted for radial detachment (cf. figures 64 and 66 of the contested patent which depict significantly smaller portions of the tabs being in contact with the label).

Moreover, as conceded by the opponent, document D1 is silent concerning the release value of the adhesive. While the Board has no doubt that if a skilled person were to hit upon the idea of selecting the overlapping area and the release value of the adhesive to allow the handle to be radially detached from the label, it would be within the capacity of the skilled person, either using common general knowledge or other prior art disclosures such as document D2, to find a suitable overlap area and an appropriate adhesive. The question, however, is whether it would be obvious to the skilled person to arrive at this idea in the first place, and the Board sees no convincing reason to believe this to be the case.

- 3.5 The subject-matter of claim 1 is therefore judged to involve an inventive step within the meaning of Article 56 EPC. Claim 20 is a corresponding method claim in which the handle is explicitly removed from the adhered label by pulling radially out and away from the label. The subject-matter of claim 20 is therefore judged to involve an inventive step within the meaning of Article 56 EPC for the same reasons as set out in relation to claim 1, *mutatis mutandis*. The remaining claims are dependent on claims 1 and 20. The Board is satisfied that the description has been suitably amended to the claims of the present main request.

In the light of this finding it is not necessary for the Board to consider the further requests.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance with the order to maintain the patent in the following version:

Description:

Columns 1-10 as filed in the oral proceedings before the Board

Columns 11-20, 23-30 of the patent specification

Columns 21-22 as filed in the oral proceedings on 1 December 2010

Claims:

1-30 as filed in the oral proceedings before the Board

Drawings:

Sheets 1/45-43/45, 45/45 of the patent specification

Sheet 44/45 as filed in the oral proceedings on 1 December 2010.

The Registrar:

The Chairman:



S. Sánchez Chiquero

G. Eliasson

Decision electronically authenticated