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**Datasheet for the decision
of 14 December 2015**

Case Number: T 0426/11 - 3.2.05
Application Number: 97941636.9
Publication Number: 0925171
IPC: B29D22/00
Language of the proceedings: EN

Title of invention:

Sampler device having a reinforced compartment and method of packaging sample material

Patent Proprietor:

AKI, Inc.

Opponents:

Klocke Verpackungs-Service GmbH
Beiersdorf AG

Relevant legal provisions:

EPC 1973 Art. 54, 56, 84
EPC Art. 123(2)

Keyword:

Novelty - no (main request and auxiliary request 1)
Amendments - allowable (auxiliary request 2)
Clarity - yes (auxiliary request 2)
Inventive step - yes (auxiliary request 2)



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Chambres de recours**

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Case Number: T 0426/11 - 3.2.05

D E C I S I O N
of Technical Board of Appeal 3.2.05
of 14 December 2015

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Decision under appeal: **Interlocutory decision of the opposition
division of the European Patent Office posted on
16 December 2010 concerning maintenance of the
European Patent No. 0925171 in amended form.**

Composition of the Board:

Chairman	M. Poock
Members:	H. Schram
	J. Geschwind
	S. Bridge
	G. Weiss

Summary of Facts and Submissions

- I. On 25 February 2011 appellant I (patent proprietor) and appellant II (opponent 02) each lodged respective appeals against the interlocutory decision of the opposition division posted 16 December 2010 concerning the maintenance of European patent No. 0 925 171 in amended form. The respective statements setting out the grounds of appeal were filed on 26 and 21 April 2011.

Opponent 01 had also lodged an appeal against said interlocutory decision, but withdrew its appeal with letter of 18 April 2011. It remains a party to the proceedings as of right under Article 107, second sentence, EPC 1973 and is henceforth referred to as the party as of right.

The oppositions had been *inter alia* based on several counts of alleged public prior use of a sampler device of Klocke Verpackungs-Service GmbH in the time period from May to July 1996 (henceforth referred to as "sampler device Klocke"). The opposition division held that the alleged demonstration of the "sampler device Klocke" to potential customers to Parfums Dior Orléans had been under no confidentiality agreement, and had been made available to the public (points 19.9 and 19.10 of the Reasons).

The opposition division held that claim 1 of the main request (claim 1 as granted) was not new with respect to the prior use, and that claim 1 of auxiliary requests 1 and 2 filed on 9 August 2010 did not meet the requirements of Article 123(2) EPC, but that the grounds of opposition under Article 100(a) EPC 1973 (lack of inventive step, Article 56 EPC 1973) did not prejudice the maintenance of the patent on the basis of

claims 1 to 4 of auxiliary request 5 filed during oral proceedings before the opposition division (point 20 to 22 and 25 of the Reasons). Auxiliary requests 3 and 4 filed during oral proceedings were not admitted into the opposition proceedings (points 23 and 24 of the Reasons).

II. Oral proceedings were held before the board of appeal on 14 December 2015. The representative of the party as of right had informed the board on 16 November 2015, that neither he, nor the party as of right, would attend the oral proceedings. During the oral proceedings appellant II withdrew its objection under under Article 100(b) EPC 1973 (insufficiency of disclosure, cf Article 83 EPC 1973).

III. Appellant I requested that the decision under appeal be set aside and that the patent be maintained as granted (main request), or in amended form on the basis of any of the sets of claims filed on 13 October 2015 as auxiliary requests 1, 5 to 12, or the set of claims filed at the oral proceedings as auxiliary request 2, or any of the sets of claims renumbered as auxiliary requests 3 and 4, filed on 13 October 2015 as auxiliary requests 2 and 3, respectively.

Appellant II requested that the appeal of appellant I be dismissed.

The party as of right requested in writing that the decision under appeal be set aside and that the patent be revoked in its entirety.

IV. Claims 1 and 19 of the main request (claims as granted) read as follows:

"1. A sampler device (10) comprising:

an upper compartment layer (20) having sample barrier properties;

a lower compartment layer (30) having sample barrier properties;

a seal (50) attaching the upper compartment layer (20) to the lower compartment layer (30), thereby forming at least one closed compartment (60) for containing sample material (70); and

at least one reinforcement layer (40) conformably attached to at least one of the upper compartment layer (20) and the lower compartment layer (30) to protect the at least one compartment,

wherein the at least one reinforcement layer (40) defines an enclosure which contains substantially all of the at least one compartment (60)."

"19. A method of packaging sample material (70), comprising the steps of:

die cutting a first sheet of substantially rigid pressure sensitive stock to form a plurality of cavities (42) with dimensions defined by said cutting die and the thickness or depth of the first sheet of substantially rigid pressure sensitive stock, wherein the first sheet includes a release liner;

permanently adhering a second flexible sheet of pressure sensitive stock over the first sheet, such that portions of the second flexible sheet substantially conform to the contours of each cavity (42);

placing a plurality of sample material deposits on the second sheet, such that substantially all of each sample material deposit lies within each cavity (42);

placing a third sheet over the second sheet and the plurality of sample material deposits;

sealing the third sheet to the second sheet around each sample material deposit; and die cutting the first, second and third sheets into individual sampler devices (10), such that each sampler device (10) remains attached to the release liner of the first sheet and wherein each sampler device (10) contains a sample material deposit and

wherein the thickness of said first sheet of substantially rigid pressure sensitive stock protects each sampler device (10) from rupture due to compressive forces."

Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the expression "wherein the lower compartment layer is attached to the reinforcement layer such that it conforms to the contours of the reinforcement layer, and" has been added before expression "wherein the ... one compartment (60)", cf the last feature of the claim.

Claim 1 of auxiliary request 2 differs from claim 1 of the main request in that the expression "wherein the lower compartment layer contacts and is securely attached to both the upper surface (46) and the entire sidewall (44) of the reinforcement layer (40), such that the lower compartment layer (30) conforms to the contours of the reinforcement layer (40), and" has been added before the last feature of the claim.

Claim 18 of auxiliary request 2 differs from claim 19 of the main request in that the expression "substantially conform" has been replaced by the expression "conform".

- V. The following document was inter alia referred to in the appeal proceedings:

E21 WO 91/17931.

VI. The arguments of appellant I, in writing and during the oral proceedings, can be summarized as follows:

The expression "conformably attached" in claim 1 of the main request had to be construed - in view of numerous passages in the patent - as meaning that the lower or upper compartment layer conformed to the contours of the reinforcement layer. This was also clear from the term "conformably" itself. The word "conform" stood for "be similar in form" or "having the same general shape" as confirmed by several English dictionaries. This word was derived from the Latin term "conformare", which was a contraction of "con" (together) and "formare" (to form) and meant "having the same form". This also followed from German translations of the term "conformable", which included "gleichförmig [mit]", "entsprechend" and "gemäß". It followed from the above that the wording "reinforcement layer (40) conformably attached to ... the lower compartment layer" had to be interpreted in a narrow sense. Paragraph [0033] of the patent was in accordance with this interpretation.

The sampler of document E21 and the sampler of the alleged prior use were essentially identical and differed significantly from the device claimed in claim 1 of the main request and of auxiliary request 1. Specifically, in the device of the invention, the lower compartment layer was conformably attached to the reinforcement layer. Importantly, the lower compartment layer conformed to the contours of the reinforcement layer. Thus, in the sampler device according to the invention, full advantage was taken of the space of the enclosure, whereas this was not the case in Figure 13

of document E21. It followed that the subject-matter of claim 1 of the main request and of auxiliary request 1 was new.

Claim 1 of auxiliary request 2 required that the lower compartment layer contacted and was securely attached to both the upper surface and the entire sidewall of the reinforcement layer. It followed that both layers had to have the same form. The sidewall of the reinforcement layer mentioned in said claim was the wall that encircled the compartment, not the outer edge of the reinforcement layer. The requirements of Article 84 EPC 1973 and Article 123(2) EPC were thus met.

Document E21 did not suggest or hint that the lower compartment layer and the reinforcement layer should have the same form. The subject-matter of said claim was therefore not obvious to the person skilled in the art and hence involved an inventive step.

VII. The arguments of appellant II, in writing and during the oral proceedings, can be summarized as follows:

According to the patent in suit, it was not required that the reinforcement layer and the lower compartment layer were completely attached, see paragraph [0033], wherein it was stated that "only a portion of the sidewall 44 [of the reinforcement layer] may be attached to the lower compartment layer". It was evident that the wording "conformably attached" did not imply that compartment layer conformed to the contours of the reinforcement layer, since it was stated in said paragraph that "the lower compartment layer 30 may conform less closely to the contours of the reinforcement layer". It could not be derived from the patent that the compartment layer necessarily had to follow the contours of the reinforcement layer, not

even that it had to closely follow said contours. Hence the wording "conformably attached" should be interpreted in a broad sense.

Document E21 disclosed a sampler, wherein the compartment (pocket 115) containing the sample P was located substantially within the enclosure formed by the reinforcement layer ("substrate 102"), a portion of which was conformably attached to the lower compartment layer ("layer 103"). The subject-matter of claim 1 of the main request was therefore not new. The subject-matter of claim 1 of auxiliary request 1 was also not new, since the additional feature that the lower compartment layer conformed to the contours of the reinforcement layer was also present in the sampler known from document E21.

It was an obvious choice for the skilled person starting from document E21 to provide a compartment that snugly fitted in the enclosure defined by the reinforcement layer, since that would maximize the use of available space. The subject-matter of claim 1 of auxiliary request 2 therefore did not involve an inventive step.

Reasons for the Decision

1. At the beginning of the oral proceedings before the board appellant II requested that the appeal of appellant I be dismissed, cf point III above. Since during the oral proceedings appellant II declared that it no longer contested the interlocutory decision of the opposition division, it is concluded that appellant II no longer considered itself adversely

effected by said decision in the sense of Article 107 EPC 1973, and became a respondent to the appeal of appellant I. In the present decision, opponent 02 will continue to be referred to as "appellant II".

MAIN REQUEST

2. *Ground for opposition under Article 100(a) EPC 1973 in combination with Article 54 EPC 1973*

2.1 The invention relates to a sampler device comprising two layers of material for containing sample material in a sealed compartment between them and an integral reinforcement layer for protecting the sample material, all joined together in one unified structure, and to a method of packaging sample material, cf paragraph [0001] of the patent.

The reinforcement layer defines an enclosure which contains substantially the entire sealed compartment, cf claim 1 of the main request. The compartment, which is a kind of cup, may include a peelable seal allowing customers to access its contents. Examples of enclosures defined by the reinforcement layer include a cavity 42 ("cut-out") formed in said layer (cf Figure 2B), an indent 142 formed in said layer (cf Figure 3), or a raised wall 442 formed on said layer (cf Figures 5A, 5B and 5C).

2.2 Interpretation of claim 1 of the main request

2.2.1 Claim 1 of the main request requires that the device comprises "at least one reinforcement layer (40) conformably attached to at least one of the upper compartment layer (20) and the lower compartment layer

(30) to protect the at least one compartment" (emphasis added by the board).

In the light of the patent specification read as a whole, it is clear that the interpretation of the expression "conformably attached" is especially relevant for the question to what degree the upper or lower compartment layer should conform to the contours of the enclosure defined by the reinforcement layer, since the quantity of sample material that may be protected by the reinforcement layer is defined by the dimensions of the enclosure.

Throughout the opposition proceedings and the opposition appeal proceedings a major controversy between the parties was how the expression "conformably attached" in claim 1 of the main request had to be interpreted: in a narrow sense, requiring a high degree of conformity of the two layers, ie upper or lower compartment layer and reinforcement layer, as submitted by appellant I, or in a broad sense as submitted by appellant II, requiring a lesser degree of conformity of the layers.

The interpretation of the expression "conformably attached" is decisive for the outcome of the novelty assessment of the subject-matter of claim 1 of the main request, cf points [2.3](#) and [2.4](#) below. If the board would find that a high degree of conformity is required, said subject-matter would be new, otherwise it would lack novelty.

2.2.2 Appellant II has submitted that the wording of the claim had to be seen in a broad and general sense that the shape of the compartment matched the shape of the

cut-away portion of the reinforcement layer, and relied in particular on paragraph [0033] of the patent.

The first passage of this paragraph reads: "*In alternative embodiments, the lower compartment layer 30 may conform less closely to the contours of the reinforcement layer 40*" (henceforth referred to as passage (i)). At first sight, passage (i) seems to corroborate the position of appellant II.

The next passage (ii) of paragraph [0033] reads: "*In other words, only a portion of the sidewall 44 may be attached to the lower compartment layer 30. In the alternative embodiment shown in FIG. 3, only a portion of the lower compartment layer 130 may be attached to the base support 148*". Again, the first sentence of this passage seems to confirm the position of appellant II.

However, since passages (i) and (ii) mention "alternative embodiments" and in particular to the alternative embodiment shown in Figure 3, they appear to refer to the preceding paragraph [0029] of the patent, the first sentence of which reading "*In the alternative embodiment shown in FIG. 3, there is an indent 142 in the reinforcement layer 140 instead of a cavity extending throughout the entire thickness of the reinforcement layer*". In this alternative embodiment the lower compartment layer 130 is attached to the reinforcement layer 140 such that it conforms to the contours of the indent 142 (column 6, lines 11 to 13), in the same way as in the first embodiment ("cavity embodiment") shown in Figures 1, 2A and 2B, see paragraphs [0025] and [0031] of the patent.

The wording "only a portion" in the first sentence of passage (ii), if it would refer to the indent embodiment shown in Figure 3, does not necessarily imply that the lower compartment layer 30 conforms less closely to the contours of the indent, but merely appears to express that the lower compartment layer is not attached over the whole length of the sidewall 44 of the reinforcement layer. In this respect it may be noticed that the reference sign 44 pertains to the sidewall of the cavity, the height of which corresponds to the thickness of the reinforcement layer, and not to the height of the sidewall of the indent ("depth"), which is smaller. The portion of the reinforcement layer that is not cut away forms a base support 148 (column 6, lines 7 to 10), which is mentioned in the last sentence of passage (ii). The base support 148 shown in Figure 3 reduces the volume of the cut-out. Viewed in this way, the word "contours" in passage (i) may then be understood by a person skilled in the art as referring to the contours of the cut-out, not to the contours of the indent.

It follows that paragraph [0033] of the patent, when read in the context of the preceding paragraphs, does not support the position of appellant II.

- 2.2.3 From the dictionary definitions relied on by appellant I it cannot be ascertained that the wording "conformably attached" in the expression "reinforcement layer (40) conformably attached to ... the lower compartment layer" should mean that the reinforcement layer and the upper or lower compartment layer should have substantially the same shape.

On the contrary, since definitions of the terms "conform", "conformabl-e/y" include "be similar in form

or type" and "having the same general shape", it follows that the shape or contour of the reinforcement layer and of a compartment layer may be similar, but not necessarily identical or substantially identical. In other words, the term "conformably" inherently has a broad meaning. As a result, the degree of conformability falling under the ambit of claim 1 of the main request is broad as well.

2.2.4 Claim 1 of the main request does not require that the reinforcement layer and the upper or lower compartment layer are fully or extensively attached, cf column 6, lines 45 to 47, and column 11, lines 18 to 20. In other words, the reinforcement layer and the upper or lower compartment layer can be said to be "conformably attached" within the meaning of said claim even in locations where they are not physically attached to one another.

2.3 Document E21 discloses (see page 15, line 22 to page 16, line 32, and Figure 13) a package for a liquid sample comprising a substrate 102 of cardboard ("reinforcement layer"), two flexible material layers 103, 104, also called inner and outer flaps ("lower and upper compartment layers") having sample barrier properties, a seal 112 attaching the two flexible material layers 103, 104 together, thereby forming a sealed pocket 115, wherein the substrate 102 defines an enclosure which contains substantially all of the pocket 115.

Since the general shape of the lower flexible material layer 103 within the cut-out broadly corresponds to the shape of the cut-out (cf point [2.2.3](#) above, second paragraph), substrate 102 can be said to be

"conformably attached" to the lower flexible material layer 103 inside the cut-out.

Document E21 thus also discloses that outside the cut-out 116 substrate 102 is conformably attached to the lower flexible material layer 103 to protect pocket 115.

- 2.4 Consequently, the subject-matter of claim 1 of the main request is not new with respect to document E21.

AUXILIARY REQUEST 1

3. *Ground for opposition under Article 100(a) EPC 1973 in combination with Article 56 EPC 1973*

- 3.1 Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the expression "wherein the lower compartment layer is attached to the reinforcement layer such that it conforms to the contours of the reinforcement layer, and" has been added before the last feature of the claim.

A basis for the amendment can be found in the published version of the application as filed on page 4, lines 16 to 18 ("a lower compartment layer attached to the reinforcement layer and conforming to the contours of the sidewall"), page 4, lines 25 to 27 ("such that a portion of the lower compartment layer fits within the cavity and conforms to the contours of the cavity"), page 9, lines 7 to 9 ("the lower compartment layer 130 is attached to the reinforcement layer 140 such that it conforms to the contours of the indent 142"), page 10, lines 17 and 18 ("such that the lower compartment layer 30 closely conforms to the contours of the reinforcement layer 40"), page 15, lines 7 to 9 ("The

lower compartment layer conforms to the contours of at least one of these cavities"), page 15, lines 17 to 19 ("The lower compartment layer 530 conforms to the contours of both reinforcement layers 540, 590"), page 15, line 37 to page 16, line 2 ("such that a portion of the lower compartment layer fits within the cavity and conforms to the contours of the cavity"), and page 17, lines 1 to 3 ("the lower compartment layer 30 is a flexible sheet and will therefore closely follow the contours of the cavity 42 of the first sheet").

- 3.2 The second part of the additional feature, viz "[wherein the lower compartment layer is attached to the reinforcement layer] such that it conforms to the contours of the reinforcement layer" still contains the term "conforms" and is therefore not suitable to define the preceding feature "reinforcement layer (40) conformably attached to ... the lower compartment layer (30)" in a more precise manner, for the same reasons as given in point [2.2.3](#) above.

Since the lower flexible material layer 103 ("compartment layer") of the package for a liquid sample known from document E21 can be said to conform to the contours of the substrate 102 ("reinforcement layer"), the additional feature is also known from said document.

- 3.3 It follows that the subject-matter of claim 1 of auxiliary request 1 is not new with respect to document E21.

AUXILIARY REQUEST 2

4. *Allowability of the amendments, Article 84 EPC 1973 and Article 123(2) EPC*

- 4.1 Claim 1 of auxiliary request 2 differs from claim 1 of the main request in that the expression "wherein the lower compartment layer contacts and is securely attached to both the upper surface (46) and the entire sidewall (44) of the reinforcement layer (40), such that the lower compartment layer (30) conforms to the contours of the reinforcement layer (40), and" has been added before the last feature of the claim.

A basis for the first half-sentence of the amendment can be found on page 9, lines 22 to 25, and on page 16, lines 25 to 28, of the published version of the application as filed. For a basis for the second half-sentence see point [3.1](#) above.

- 4.2 Claim 18 of auxiliary request 2 differs from claim 19 of the main request in that the expression "substantially conform" has been replaced by the expression "conform".

Since the meaning of "substantially conform" includes "conform", the amendment does not introduce subject-matter extending beyond the content of the application as filed.

- 4.3 It follows from the above that claims 1 and 18 of auxiliary request 2 meet the requirements of Article 123(2) EPC.

- 4.4 The board is of the opinion that the person skilled in the art will interpret the notion "entire sidewall of the reinforcement layer" in claim 1 of auxiliary request 2, in the light of the patent specification read as a whole, as pertaining to the entire sidewall of the reinforcement layer *defining the enclosure*, for

example the sidewall of the cavity or of the indent, or the raised wall. Said notion does not necessarily include the *outer* sidewall of a piece of reinforcement layer as submitted by appellant II, since the outer sidewall does not define the enclosure.

With the above interpretation of the term "sidewall" claim 1 of auxiliary request 2 is clear.

The additional feature of claim 2 of auxiliary request 2, viz "wherein at least one reinforcement layer (40) has a sidewall (44) encircling substantially all of at least one compartment (60)" does not contradict claim 1 to which it refers (cf its last feature, viz "wherein the at least one reinforcement layer (40) defines an enclosure which contains substantially all of the at least one compartment (60)").

Said claims thus meet the requirements of Article 84 EPC 1973.

5. *Ground for opposition under Article 100(a) EPC 1973 in combination with Article 56 EPC 1973*

5.1 In the sampler device according to the alleged public prior use of "sampler device Klocke", the lower compartment layer does not contact and is securely attached to both the upper surface and the entire sidewall of the reinforcement layer.

Since the parties agreed on – and the board concurs with them – that the prior use device was comparable to the package for a liquid sample shown in Figure 13 of document E21 and did not come closer to the invention as said package, there is no need to examine whether

the "sampler device Klocke" has been made available to the public before the priority date of the patent.

Document E21 can be considered to represent the closest prior art. The subject-matter of claim 1 of auxiliary request 2 differs from the package for a liquid sample known from document E21 in that "the lower compartment layer contacts and is securely attached to both the upper surface (46) and the entire sidewall (44) of the reinforcement layer (40)".

The distinguishing feature solves the problem of providing a sampler device that maximizes the use of available space per given area and amount of material that can be stored, cf paragraphs [0009], [0015] and [0032] of the patent.

Document E21 teaches (page 5, lines 18 to 22, page 7, line 34, to page 8, line 3, page 10, lines 21 to 35, page 14, lines 11 to 15, page 17, lines 13 to 16, and claim 34) that the total thickness of the protective enclosure is *greater* than the combined thickness of the envelope and the liquid sample, and thus points away from maximizing the use of available space.

For this reason the person skilled in the art would not include the distinguishing feature in the sampler device of document E21.

The subject-matter of claim 1 of auxiliary request 2 therefore involves an inventive step with respect to document E21.

5.2 The subject-matter of claim 18 of auxiliary request 2 is identical to claim 1 of auxiliary request 5 filed during oral proceedings before the opposition division,

except for the deletion of the word "a" in the expression "a pressure sensitive stock" and the deletion of the word "substantially" in the expression "substantially conform".

It may be noticed that the opposition division intended to maintain the patent on the basis of claim 1 of auxiliary request 5. Since appellant II no longer contests the interlocutory decision of the opposition division, the board has no power to examine claim 1 of auxiliary request 5, and this holds *mutatis mutandis* substantially for claim 18 of auxiliary request 2.

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 amended form on the basis of the following documents:

Claims:

Nos. 1 to 20, filed as auxiliary request 2 during oral proceedings before the board;

Description:

Pages 3, 4, 6 and 7 filed during oral proceedings before the board,
Pages 2, 5 and 8 of the patent as granted;

Drawings:

Pages 14 to 22 of the patent as granted.

The Registrar:

The Chairman:



L. Malécot-Grob

M. Poock

Decision electronically authenticated