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Datasheet for the decision of 14 September 2016

Case Number: T 0564/12 - 3.2.04

Application Number: 04749206.1

Publication Number: 1667541

IPC: A24F23/04

Language of the proceedings: EN

Title of invention:
SNUFF-BOX WITH LID

Patent Proprietor:
JTI Snus AB

Opponent:
Swedish Match North Europe AB

Headword:

Relevant legal provisions:
EPC Art. 54, 56

Keyword:
prior use (proven) - Main request (no)
Inventive step - Auxiliary request (no)
Referral to the Enlarged Board of Appeal - (no)

Decisions cited:
T 0474/04, T 0716/06

Catchword:

Europäisches Patentamt
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Case Number: T 0564/12 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 14 September 2016

Appellant: (Patent Proprietor)	JTI Snus AB Box 24 155 104 51 Stockholm (SE)
Representative:	Karl, Christof Bardehle Pagenberg Partnerschaft mbB Patentanwälte, Rechtsanwälte Prinzregentenplatz 7 81675 München (DE)
Appellant: (Opponent)	Swedish Match North Europe AB 118 85 Stockholm (SE)
Representative:	Zacco Sweden AB P.O. Box 5581 114 85 Stockholm (SE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 13 January 2012 concerning maintenance of the European Patent No. 1667541 in amended form.**

Composition of the Board:

Chairman	A. de Vries
Members:	J. Wright
	C. Heath
	E. Frank
	T. Bokor

Summary of Facts and Submissions

I. The appellant-opponent lodged an appeal, received 9 March 2012, against the interlocutory decision of the opposition division posted on 13 January 2012 on the amended form in which European patent no. EP1667541 could be maintained and paid the appeal fee at the same time. The statement setting out the grounds of appeal was filed on 14 May 2012.

The appellant-proprietor also lodged an appeal, received 13 March 2012 against the above interlocutory decision and paid the appeal fee on the same day. The statement setting out the grounds of appeal was filed on 10 May 2012.

II. The opposition was filed against the patent as a whole and based, *inter alia*, on Article 100(a) together with Articles 52(1) and 54(2) EPC for lack of novelty and Article 56 EPC for lack of inventive step. The division held, *inter alia*, that the grounds for opposition (novelty and inventive step) mentioned in Article 100(a) EPC did not prejudice maintenance of the patent as amended according to an auxiliary request, having regard to the following pieces of evidence, amongst others:

Regarding the alleged prior use "Kombilock" (PA);
PA1: model of Kombilock snuff-box
PA2: model of Kombilock packaging
D2: Affidavit of Jonas Jönemark dated 7 March 2007
D3: photos of Kombilock in its packaging
D4: Swedish Match price list, June 2002
D5: Invoice dated 12 May 2003 from Swedish Match to 3:ANS TOBAK & DIVERS

Regarding the alleged prior use "Dubbellock"

PB1: Sample of snuffbox with best before date of 29 January 2007

D9: Press release from Swedish Match, dated 7 April 2003, and its English translation D9 bis

D12: photographs of Dubbellock snuff-box filed as PBnew, with letter received 24 July 2008

D18: photographs of Dubbellock snuff-box, filed with letter received 15 May 2009

Further evidence

D19: Affidavit of Leif Henry Olsson, dated 15 March 2011 together with annexed photos of inter alia Kombilock and Dubbellock

D20: Affidavit of Frank Svandal and its translation, together with annexed photos of inter alia Kombilock and Dubbellock, and invoice dated 29 April 2003 from Swedish Match to Northerner Scandinavia AB

D24: Product specification by Plast-Teknik dated 29 October 1991

D25: Fax dated 25 November 1991 to Bo Carlsen of Gothia Tobak

D26: Invoices dated 4 February 2003, 11 April 2000, 11 May 2000, 13 January 2003 from Nolato Plastteknik to Swedish Match.

D27: excerpt from Swedish Company Register dated 29 September 2011, concerning Nolato Plastteknik AB.

D28: Affidavit of Bo Carlsen with annexed drawings 1-332-1505 (first sheet) and 1-333-1505 (second sheet) and annexed photographs of Kombilock lid and its packaging.

D29: "The Northerner" online shop website page, archived 11 May 2003 by Internet Archive

WaybackMachine, product page "Grovsnus White (Swedish Portion Snus)"

D30: "The Northerner" online shop website page, archived 22 June 2003 by Internet Archive WaybackMachine, product page "Combi lid for Tobacco Snuff Cans"

III. Oral proceedings before the Board were duly held on 14 September 2016.

IV. The appellant-opponent requests the decision under appeal be set aside and the patent be revoked.

The appellant-proprietor requests the decision under appeal be set aside and that the patent be maintained as granted, or in the alternative that the patent be maintained in amended form with claims according to auxiliary request 2, filed on 10 August 2016. The first auxiliary request previously on file was withdrawn during the oral proceedings before the Board.

They further request that the following question be referred to the Enlarged Board of Appeal pursuant to Article 112(1)(a) EPC:

"Whether, if a claim expression in general can have several different meanings, the pertinent meaning has to be determined for claim interpretation, or the expression can be interpreted to have any or even all of these meanings."

V. Claim 1 of the requests relevant for this decision read as follows:

Main request:

"Snuff-box lid having a bottom lid (2) and a cover lid (3), which together define a first enclosed space (11), which is separated from a second enclosed space (13), the first enclosed space (11) being intended for storing used snuff, characterised in that the cover lid (3) is moveably secured to the bottom lid (2) by a hinged joint (4) with end pins (6, 7) which are snapped into corresponding recesses in the bottom lid, whereby the bottom lid (2) forms a tight unit."

Auxiliary request 2:

"A snuff-box (1) comprising a lower part (9, 10), and a snuff-box lid having a bottom lid (2), wherein the lower part (9, 10) is provided with a bottom (10) and a wall (9), said bottom (10) and wall (9) together with the bottom lid (2) defining a lower space (13) for storage of unused snuff, wherein the snuff-box lid further has a cover lid (3), which together with the bottom lid (2) define a first enclosed space (11), which is separated from a second enclosed space, the lower space (13), wherein the bottom lid and the lower part (9,10) of the snuff-box close tight against one another in order to prevent the unused snuff from drying, the first enclosed space (11) being intended for storing used snuff, and wherein the snuff-box is sealed with a band or label in the form of a strip running all around the snuff-box characterised in that the cover lid (3) is moveably secured to the bottom lid (2) by a hinged joint (4) with end pins (6, 7) which are snapped into corresponding recesses in the bottom lid, whereby the bottom lid (2) forms a tight unit".

VI. The appellant proprietor argued as follows:

Prior uses Kombilock and Dubbellock

Admission of prior uses

These should not be admitted since there are doubts as to whether or not they actually took place. Furthermore affidavits D19 and D20 should not be admitted as they are late filed. In view of the doubts about the prior uses, the opposition should have called Mr Bo Carlsen, author of affidavit D28, as a witness, instead of relying on the affidavit D28.

Lack of proof of prior uses

The affidavits D19, D20 and and D28 were written 8 or 9 years after the prior uses are alleged to have taken place. Therefore the authors would not have been able to remember them. The reference number 8810 alleged to correspond to Kombilock and 884 alleged to correspond to the Dubbellock boxes do not prove that they are the same products as the model samples filed for those items. The designs can change, keeping the reference number unchanged. In the case of Kombilock the number will not correspond to the snuff-box but only to the product in the box. The invoice D17 does not prove that articles with reference numbers 8810 or 884 were actually sent, received and/or put on display for sale. The articles could have been put in storage well before being actually displayed for sale. The press release D9 might have been a draft that was never published. It is not proven that the sample of a snuff-box shown in D12 is the same as the sample shown in D9 because D9 discloses no details of the lid other than it being a double lid.

Claim 1 of the main request, novelty

Claim 1 differs from the Kombilock lid, in particular because the feature of recesses into which end pins are snapped is not known. In Kombilock the end pins of the cover lid are snapped into through holes, which are not recesses. Nor does the Kombilock disclose a tight unit as claimed. The tight unit is made up of only the bottom lid as the description makes clear. Here tight means impermeable. The bottom lid of Kombilock has through-holes so it can never be a tight unit.

Claim 1 of auxiliary request 2, inventive step

The sealing band feature of the claim implies that the claimed snuff-box is a distribution snuff-box. The box shown in the Kombilock packaging PA2 is a snuff-box with a retrofitted lid, whereas Dubbellock is a distribution snuff-box, therefore the latter is the closest prior art.

Both Kombilock and Dubbellock were made by the same company, in this case the opponent and market leader. Therefore, instead of a fictitious skilled person, the company in this case is the skilled person. Such a real life situation allows a could-would approach. Theoretically, the opposing company could have developed the claimed snuff-box as a distribution snuff-box product, because they knew Kombilock and Dubbellock, but they did not. Had it been obvious to do so they would have done so. Therefore the subject matter of claim 1 involves an inventive step.

If the skilled person were to start from the Kombilock packaging with its retrofitted lid, the subject matter of claim 1 differs from packaging PA2 at least in that the claimed box has a sealing band. This makes it a distribution box. The problem is to make the box shown

on packaging PA2 a distribution box. The skilled person would never put a sealing band around such an already opened box with its retrofitted lid. Such a band would make no sense since it would prevent snuff from being consumed from the opened box. Furthermore, the Kombilock lid has holes, making it completely unsuitable for distribution, it would never be tight enough. Therefore starting from Kombilock the skilled person would never arrive at the claimed invention.

VII. The appellant-opponent argued as follows:

Prior uses Kombilock and Dubbellock

Admission of prior uses

All the evidence relied upon, including the affidavits D19, D20 and D28 were already admitted in the opposition proceedings, therefore there can be no question of their non-admission.

Lack of proof of prior uses
The affidavits D2, D19, D20 and D28 refer to and are supported by other pieces of evidence which would fill in any memory gaps the authors might have. Therefore they should be accepted as true statements.

The reference numbers of the Kombilock and Dubbellock products are consistently used. In the case of Dubbellock, the European Article Number (EAN) defines the packaging as well as its contents.

Claim 1 of the main request, novelty

The Kombilock lid discloses all features of claim 1. In particular its cover lid has pins which snap into

recesses on the lower lid when seen in the vertical direction. These are still recesses even if holes exist to the side of these recesses. The claim says that the end pins are snapped into the recesses, whereby the bottom lid forms a tight unit. The word "whereby" makes it clear that the tight unit is only formed at this snapping action therefore it must comprise the cover lid as well as the bottom lid, even though the description might be inconsistent with this. Furthermore, the Kombilock lower lid and cover lid form a tight unit, any holes in the lower lid are filled by corresponding parts of the cover lid when closed, so the two make a tight, in the sense of impermeable, unit. They furthermore fit together tightly in that they snap shut.

Claim 1 of auxiliary request 2, inventive step

The subject matter of claim 1 differs from Kombilock snuff-box shown on the packaging PA2 in that it has a sealing band. The concept of a distribution box is purely a commercial status, so should play no role in assessing inventive step. The effect of the band is that it prevents snuff from drying. Achieving this effect by providing a sealing band around the unit is obvious since Dubbellock discloses such a sealing band.

Reasons for the Decision

1. The appeal is admissible.

2. Procedural issues

2.1 Admissibility of the opposition

During the oral proceedings before the Board, the appellant-proprietor withdrew their objection to the admissibility of the opposition. No deficiency is apparent to the Board that might warrant the rejection of the opposition as inadmissible under Rule 77(1) EPC. Therefore the Board concludes that the opposition is admissible.

2.2 Admission of prior uses of Kombilock and Dubbellock

The appellant-proprietor requests the alleged prior uses referred to as Kombilock and Dubbellock not to be admitted as not proven, and in particular the affidavits D19 and D20, filed with the opponent's letter of 15 April 2011, also not to be admitted as late filed (grounds of appeal, page 8, 2nd and 5th paragraph).

2.3 As a matter of principle, such a retroactive non-admission of evidence appears hardly possible, given that the opposition division not only admitted this evidence but also based its decision on this evidence. The evidence cannot therefore now be retroactively excised from the first-instance proceedings. Therefore, the question of their admittance is moot, rather the Board views this request as amounting to a request to disregard the evidence on file with respect to these prior uses.

2.3.1 No arguments are apparent to the Board which would justify the discounting of the evidence in question. As to the affidavit D19 and D20, the opposition division admitted these into the proceedings (decision, reasons point 2, communication dated 4 July 2011 points 1 and 2) as further evidence relating to the alleged prior use. In so doing the opposition division appears to

have properly exercised its discretion, and the Board sees no reason to overrule this. The admission of the affidavits does not appear to have been challenged by the proprietor in written proceedings, whereas their relevance was discussed (see letter of 31 October 2011, page 2). Likewise they appear to have been discussed at the oral proceedings without challenge from the proprietor (see minutes, points 3, 4, 32 and 33).

2.4 Affidavit of Mr Bo Carlsen, D28

The appellant-proprietor states for the first time in their letter of 10 August 2016 (see page 10) that the opposition division should have called Mr Carlsen, author of Affidavit D28, as a witness "in view of the substantiated doubts surrounding the prior uses". However, the appellant-proprietor has not specified any part of Mr Carlsen's affidavit that might be inconsistent or require any verification. Nor is it apparent to the Board that the proprietor provided any reason as to why they doubted the credibility of the affidavit D28 at oral proceedings before the opposition division (minutes, point 4, impugned decision, reasons 3.2.15), which might have warranted calling Mr Carlsen as a witness.

The Board itself sees no such inconsistencies or points requiring verification, nor apparently did the division (see impugned decision reasons 3.2.3 and 3.2.4). Therefore the Board sees neither reason as to why the opposition division should have called Mr Carlsen as a witness nor any reason to do so now, nor any cause to doubt the statements in the affidavit D28, or the credibility of its author. It is noted that the proprietors themselves at no point actually requested

to hear Mr. Carlsen as a witness, neither before the Opposition Division nor before the Board.

2.5 The proprietor pointed to decisions T 0474/04 (OJ EPO 2006,129) and T 0716/06, ostensibly to support their argument that the affidavit can only be accepted when its author is heard as witness. However, the case underlying decision T 0474/04 differs from the present case in the decisive point that there the proprietor expressly requested to hear the author, whose affidavit was used against him. In case T0716/06, an offer to hear a witness was not followed and the case was decided against the party offering the witness, there the opponent. Otherwise T0716/06 explicitly stated that "There is normally no need for the competent department to hear a witness on an alleged prior use, if it does not evaluate differently the facts and arguments brought forward by the Opponent in support of the claimed prior use", Reasons No. 3, fourth paragraph. This decision does not discuss at all what the consequences should be where a proprietor is calling an affidavit into question, and also does not discuss how various possible requests (or merely arguments) from the proprietor could potentially affect the decision whether or not a witness offered by the opponent, i.e. the other party should be heard. Thus the cited cases cannot support the proprietor's position.

2.6 For all these reasons, the Board finds that the alleged prior uses known as Kombilock and Dubbellock and in particular the associated evidence filed in first instance proceedings should not be disregarded in the appeal proceedings (Article 114(2) EPC). Furthermore, absent any substantiated doubts concerning the credibility of the statements made in D28, the Board finds that the contents of the affidavit D28 are not to

be excluded from the totality of the evidence merely because the the Opposition Division decided not to call Mr. Bo Carlsen as a witness.

3. Background of the invention

The invention relates to a snuff-box, in particular its lid (see patent specification, paragraph [0001]). Snuff is sold to consumers in lidded pots. Discarding used snuff in a hygienic and aesthetically satisfactory way is problematic (patent specification, paragraph [0002]). To overcome this drawback, a central idea of the invention is to provide a lid which allows temporary storage of used snuff (see specification, paragraph [0003] and granted claim 1). In the claim this is realized by a cover lid (3) and a bottom lid (2) defining an enclosed space (11), cf. figure 4. The characterizing part of the granted claim is however concerned with the manner in which the cover lid (3) is secured to the bottom lid (2).

4. Main request

4.1 The impugned decision found that the alleged prior uses of the product called Kombilock, a snuff-box lid with its packaging, and the product called Dubbellock, a snuff-box, were prior used by sale and therefore prior art (see decision, reasons, section 3.2). The Board agrees with the decision in this respect.

4.2 According to established jurisprudence, in cases of alleged prior use where all evidence in support of the alleged public prior use lies within the power and knowledge of the opponent, while the proprietor has barely any or no access to it at all, it is incumbent upon the opponent to prove the alleged prior use to the

standard of proof "beyond any reasonable doubt", see Case Law of the Boards of Appeal, 8th edition, 2016 (CLBA) III.G.4.3.2, and the decisions cited therein. In particular to establish a prior use to this standard, the questions "what was disclosed", "when", "where" and "under which circumstances" must be answered, see for example T 2010/08.

4.3 Prior use of Kombilock

Kombilock is a retrofit lid for snuff cans. The appellant-opponent has supplied a sample of the Kombilock lid, PA1, together with its packaging PA2. These are as shown in photographs D3.

According to D2, an affidavit of Jonas Jönemark, director of sales at Swedish Match, the Kombilock lid was sold by companies within the Swedish Match group at least since June 2002. D2 makes reference to a Swedish Match price list, D4 (see page 3, third line from bottom, product 8810), photos of Kombilock in its packaging D3, which appear the same as PA1 and PA2, and an invoice, D5 addressed to the company 3:ans, detailing Kombilock with product number 8810.

In particular, D4, D5 and the barcode on the packaging PA2 (see last 4 digits minus the final check digit) consistently give the product number of Kombilock as 8810. The purpose of the European Article Number (EAN) barcode system is to assign a unique number to a product. The Board therefore considers that the Kombilock lid in the various documents is the same lid, not different lids with the same reference number. In the Board's opinion, what is alleged to have been prior sold is therefore clear.

4.4 In the Board's view the circumstances of the alleged prior use, and when it happened, are also proven beyond reasonable doubt by the affidavit D2 and supporting evidence D4 and D5. In particular the invoice D5 documents a sale of Kombilock with product code 8810 to the retailer "3:ANS TOBAK & DIVERS" on 12 May 2003. The Board finds it unlikely that such a mass-market product would be sold to a retailer under secrecy, nor has this been argued. The Board also finds it unlikely that Swedish Match would produce a price list in June 2002 that included products which were not available on the market before the priority date of the patent (August 2003), thus this further corroborates the statements in D2.

4.5 The appellant-opponent has supplied further affidavits, photos and invoices supporting the alleged prior use of Kombilock.

4.5.1 In particular D19, affidavit signed by Leif Henry Olsson of "3:ans Tobak & Diverse" states the company freely sold the Kombilock, as shown in annexed photographs, to consumers prior to August 2003. The photographs look identical to Kombilock PA1 and its packaging PA2. This is supported by a copy of the invoice D5.

4.5.2 Likewise affidavit D20, signed by Frank Svandal, founder of the company "Northerner.com", states that the company sold Kombilock to consumers before August 2003, as shown in annexed photographs. Also annexed are various invoices (8 January 2003, 21 January 2003, 25 March 2003, 3 April 2003 and 29 April 2003) showing that the retailer "Northerner" purchased Kombilock, with reference number 8810, from Swedish Match.

4.5.3 The appellant has also provided an Internet archive screen shot from the Northerner's on line shop, D30, dated 22 June 2003. D30 shows a picture of Kombilock looking identical to the sample PA1, and describing its double lid with space for used loose snuff. The Internet address also contains the number 8810, the same product reference that appears on all the above invoices and in the barcode on packaging PA2.

4.5.4 Moreover, in his affidavit, D28, Bo Carlsen states that he commissioned the company Plast-Teknik (later renamed Nolato, cf. D27) to make the Kombilock lid in 1991, as shown in the annexed photos and drawings. He also states that the design of the lid and its packaging remained unchanged from 1992 to 2006, apart from removal of an embossed name. The Board notes that the photos appear to show the same lid and packaging as PA1 and PA2.

4.5.5 The appellant-opponent has also provided a product specification from the manufacturer of Kombilock (Nolato), D24, and a fax D25 addressed to Bo Carlsen proposing a delivery plan for production of Kombilock with pivoting cover lid, dated 25 November 1991. The appellant-opponent has furthermore filed invoices from Nolato, D26, dated 4 February 2003, 11 April 2000, 11 May 2000 and 13 January 2003. Each invoice being for production of over 15000 pieces of "Kombilock Svenskt Snus Guld", the name appearing embossed on the cover lid of PA1. The invoices are addressed to Swedish Match. Each refers to Bo Carlsen and bears the article number 20150500, thus linking the article to elements of the technical drawing numbers annexed to D28, so corroborating Bo Carlsen's statements in D28. Furthermore, since D24, D25 and D26 all bear Bo

Carlsen's name, his substantial involvement in the development of Kombilock appears evident.

4.5.6 In the Board's opinion, all the evidence paints a consistent picture, proving beyond any reasonable doubt that the Kombilock lid of sample PA1 and its packaging PA2 were prior used by sale.

The name Kombilock, the reference 8810 on invoices D17 and those annexed to D20, together with the affidavit of D28 with its annexed photographs and drawings, show that the same lid, linked also by the barcode EAN number on packaging PA2, was sold to the retailers "Northerner" and "3:ans Tabak & Divers". The Internet archive screen-shot D30 also supports the statement made in D20 that "The Northerner" not only bought Kombilock but furthermore made it available for sale on their web shop on 22 June 2003.

Finally, the affidavit of Bo Carlsen, D28, with its annexes, also supports the alleged prior uses by sale. Not only Bo Carlsen's statement itself confirms sales of the Kombilock lid, but also the Board finds it highly unlikely that "Swedish Match" would have commissioned a new lid in 1991, bought over fifteen thousand of them (cf. D26), at least by April 2000, followed by repeat orders for thousands more, inter alia in May 2000, without having sold one to a customer before August 2003.

4.5.7 As explained above, all the affidavits, D2, D19, D20 and D28 make reference to supporting documents. Thus although there may have been several years between the events described in these statements and the writing of the statements themselves, where the authors' memories might have lapsed, the documents on hand will have

jogged them. In the case of D28, as explained above, Bo Carlsen was actively involved in the development of Kombilock, and nothing suggests that he could not have remembered the milestones of its progression from drawing-board to sold product. The Board therefore finds it convincing that the statements in the affidavits reflect what actually happened and are not rendered doubtful or inaccurate by the time-spans between events.

Therefore the Board considers that the prior use of Kombilock, PA1 and its packaging PA2, by sale, are proven to the necessary standard of proof.

4.6 Prior use of Dubbellock

4.6.1 Dubbellock is a snuff-box. The appellant-opponent has supplied a sample of the dubbellock, PB1, a press release D9, and its translation D9a, which includes photos of two boxes that appear structurally to be the same box as PB1. They have also provided photographs, D12, D18 (also referred to by the parties as PBnew), of a box looking structurally the same as PB1, and bearing a barcode EAN ending in 884 (minus the final check-digit) and a best before date of 4 July 2003. It is therefore clear what is alleged to have been prior used by sale.

4.6.2 D9 also states that the box in question would be introduced into service shops from 7 April 2003 and in everyday trade shops in May of that year. In affidavit D19, Leif Henry Olsson states that "3:ans Tobak & Diverse" offered and sold Grovsnus White portion tobacco in boxes as shown in photos appended thereto, before August 2003. The photos show a box structurally the same as PB1. The statements in D19 are consistent

with invoice D17, dated 12 May 2003 (see 13th entry), which details Grovsnuss White 24 gram, with article number 884, as being sold by Swedish Match to the company 3:ans. The Board therefore considers, from this evidence alone, it is proven that a sale of Dubbellock took place and to whom. As with Kombilock, such mass-market products can hardly have been sold to retailers under secrecy. In any case, D19 states they were sold on to consumers prior to August 2003, likewise corroborated by the press release D9. Therefore the Board finds the circumstances of the sale likewise to be proven.

4.6.3 In addition, affidavit D20 and its annexes prove further sales of Dubbellock. In particular Frank Svandal states that Northerner.com offered, inter alia, Grovsnus White for sale prior to August 2003 in boxes as shown in annexed photos. The photos show a box structurally the same as PB1. To support this statement he also annexes an invoice dated 29 April 2003, showing Grovsnus White, with reference 884, as being sold by Swedish Match to the Northerner. The statements of D20 are further corroborated by screen shot D29, showing the Northerner's on-line shop on 11 May 2003 offering Grovsnus White, with a pictured snuff-box apparently structurally the same as PB1 and describing its double lid. Furthermore, the number 884 appears in the web address for the product.

4.6.4 The Board finds it unlikely that a dated press release apparently taken from an Internet web page, with an address string incorporating the same date, would have been a draft that was never published.

The Board is also not convinced that the article number 884 refers solely to the product and not to the product

with its packaging. It is true that different contents will have a different product reference number, just as the model PB1, which contained "General White" portions has an EAN containing a product reference number 881 (the last four digits of the bar code EAN, minus the final check digit), whereas the "Grovsnus White portions" snuff-box in the photographs D18, invoice D17 and archived web page D29, have a number 884. However, as explained above, the idea of EAN numbers is, inter alia, to assign a unique product identity number to an article. Far from this number merely designating contents it designates the complete assembly of contents and its packaging. In the case of invoice D17, the photos of D12 link this invoice to a particular snuff-box, namely Dubbellock, structurally as PB1.

4.6.5 Although it may be true that D17 in isolation might not prove that an end consumer bought the product with reference 884 from 3:ANS, this does not negate the fact that the evidence shows 3:ANS bought the product before the priority date, and this itself is a public prior use by sale. In any case, given the other evidence, the press release D9, the affidavits D19 and D20, the photographs D12, with best before date 4 July 2003 and the web shop screen shot D29 dated 11 May 2003, the Board also finds it proven beyond any reasonable doubt that end-users were offered Dubbellock before the priority date.

4.6.6 The Board is therefore of the opinion that the prior use by sale of Dubbellock is proven to the necessary standard of proof.

4.7 In summary the Board finds both the prior use of Kombilock and Dubbellock proven beyond any reasonable

doubt and therefore that they are prior art within the meaning of Article 54(2) EPC.

5. Main request

5.1 Novelty of claim 1 vis-à-vis Kombilock

The Kombilock lid is a snuff-box lid, see packaging PA2. As is apparent from the sample PA1 and the photos on its packaging and also shown in various photos (D12, D18, D28) and seen in in the drawings annexed to D28 (first page, cross sections) the lid has a bottom lid and a cover lid which together define a first enclosed space. This first enclosed space is separate from a second enclosed space (that is the space formed when the lid closes a snuff-box lower part, see packaging PA2, front-side photograph). Furthermore the first enclosed space is intended for storing used snuff (see D30, product description). Moreover, the cover lid is moveably secured to the bottom lid by a hinged joint (PA2, photo on front cover and drawings annexed to D28, page 1, small drawings in the bottom right hand corner). The cover lid also has end pins (see for example D28, 2nd photo, the stubby pins protruding from the rectangular part of the cover lid on the left side). These facts are not in dispute.

5.2 The question of novelty turns on whether or not Kombilock discloses the last two claim features, defining that the end pins are snapped into corresponding recesses in the bottom lid, whereby the bottom lid (2) forms a tight unit. In the Board's view, Kombilock discloses both these features.

5.2.1 Starting with the first of these (end pins snapped into corresponding recesses), as can best be seen on the

photos and drawings annexed to D28 (see second photo and drawings, page 1, detail, right hand side along cut B-B), the part of the cover lid making up the hinge has a cylindrical bar from which the end pins extend. Part of the rim of the bottom lid (D28, annexed 3rd photo, lowest part, and annexed drawings, page 2 cut along B-B, detail on right hand side of the page) is sunken and provided with a U-shaped trough for receiving the bar.

5.2.2 When the cover lid is fitted, the bar sits in the trough (see again, D28, annexed drawing page 1, cut B-B, detailed drawing on the right hand side). The end pins, however, do not. They sit in U-shaped indentations, beyond the sunken part of the rim, so that the closed end of each "U" is bounded by the underside of the rim, whilst the open end points downwards (see same drawing page, detail, right hand side, along cut A-A). Thus, in the vertical direction, these two indentations form 2 recesses, each just beyond respective ends of the trough.

5.2.3 Moreover, to mount the cover lid to the bottom lid, the end pins of the cover lid must be snapped into these recesses, it is this action that forms the hinge. Thus the Board considers Kombilock to disclose a hinged joint with end pins which are snapped into corresponding recesses in the bottom lid.

Whilst it may be that a blind-hole bored in a surface might be considered a recess with respect to the surface, whereas a through-hole in the same surface might not, this consideration plays no role in the present case, since, in the vertical direction, the recesses of Kombilock are U shaped, thus closed at one end, not open at each end as a through-hole is. The

Board does not consider a recess need necessarily be closed on all but one side, nor has this been argued.

5.3 Turning now to the last claim feature ("whereby the bottom lid (2) forms a tight unit"), the appellant has argued, with reference to the description paragraph [0005] that the "tight unit" is made up only of the bottom lid and, being tight, this can have no holes, much as a house roof without holes might be described as "tight". The Board disagrees.

5.3.1 The Board first notes that, in accordance with established jurisprudence, the skilled person reads the claim with a mind willing to understand (CLBA II.A. 6.1). Furthermore, where the reading of a claim feature imparts a clear, credible technical teaching to the skilled person, the description may not be used to give a different meaning to a claim feature (see CLBA II.A. 6.3.4, in particular T 1018/02, reasons 3.8).

5.3.2 In the case in hand, giving the term "whereby" its normal meaning, namely "as a result", the last feature of the claim unambiguously defines that the bottom lid forms a tight unit as a result of the end pins being snapped into corresponding recesses in the bottom lid. Thus, leaving aside for the moment how the word "tight" is to be interpreted, the skilled person understands that the unit is formed when the cover lid is snap fitted to the bottom lid. Accordingly, from the words of the claim alone, far from understanding the "tight unit" to consist entirely of the lower lid, the skilled person understands it to comprise both the bottom lid and the cover lid.

5.3.3 It is true that the description, column 1, lines 52 to 55 states that the bottom lid forms a tight unit, and

that the cover lid's hinge function is achieved by snapping pins into recesses. Thus, here, no causal relationship between the snapping action and the forming of the tight unit is hinted at.

However, bearing in mind the jurisprudence mentioned above, that the above part of the description might be interpreted to mean that the bottom lid forms a tight unit independent of the cover lid, is no reason to ignore the clear syntax of the claim and interpret the word "whereby" as "wherein", as the appellant proprietor would wish.

Thus, the Board holds that the qualifier "tight" cannot pertain only to the bottom lid, but to the unit made up of both the bottom lid and the cover lid. In other words the claim is to be interpreted to inter alia define that the cover lid and bottom lid together form a tight unit.

5.3.4 Whether in this feature the word "tight" pertains to the cover lid and bottom lid fitting together securely, whether it qualifies the unit's impermeability, in other words the ability of the cover lid together with the bottom lid to prevent seepage of fluids or contents, or whether it means both, the Board sees no difference between the subject matter of claim 1 and the Kombilock lid in this respect.

In particular the Kombilock cover lid has tabs that fit into elongate holes in the bottom cover to provide a snap-locking device, thus ensuring that the cover lid fits securely, in other words tightly, to the bottom lid (see D28, drawing exhibit A, page 1, top left hand enlarged detail along cut A-A).

Furthermore, in the context of a lid having a compartment for receiving, inter alia, used loose snuff which evidently should not seep out when carried in a pocket (see D30), the Board considers the unit formed by the Kombilock cover lid and bottom lid, must also be tight in the sense of not permitting seepage of its contents when closed. Drawings of kombilock confirm this. They show that the cover lid closely fits to the lower lid, with the pins of the hinge-joint and the tabs of the snap-lock largely closing off openings in the lower lid (see D28, annexed drawings, page 1, three central drawings, and detailed views). Thus, also in this sense of the word tight, Kombilock discloses a tight unit.

5.4 From the above, the Board concludes that the prior use Kombilock lid takes away the novelty of claim 1.

6. Auxiliary request 2, claim 1 (sole auxiliary request)

6.1 The claim defines a snuff-box, in particular with a lower part and a snuff-box lid having all features of claim 1 of the main request.

6.2 Implications of the claim feature "the snuff-box is sealed with a band or label in the form of a strip running all around the snuff-box"

The appellant proprietor has argued that this feature implies that the claimed snuff-box is for distribution purposes only, in other words a box containing snuff as sold to a customer.

6.2.1 In the Board's view, the closing of two halves of a container with a strip running all around the joint is not only applied to containers destined for

distribution, but is generally known. Just as containers destined for distribution, whether full or not, are routinely sealed in this way, so too is it generally known to seal any container with a strip such as sticky tape, for example to post an opened container to a friend. Thus this knowledge is not exclusive to product distribution specialists.

6.2.2 Accordingly, whether or not a snuff-box used for distribution purposes might imply technical features not necessarily found in a box made up of an opened distribution box and a retrofitted lid (cf. Kombilock packaging PA2), that the snuff-box claimed is sealed with a strip, does not imply that it can only be an unopened box of snuff, capable of being stored over a prolonged period commensurate with its commercial distribution to customers. In other words, the Board considers that the sealing strip claim feature does not imply any other (technical) features of the snuff-box, such as qualifying the hinge as being air-tight, nor defining the box, to use the appellant-proprietor's words, as a distribution snuff-box, quite apart from the question what technical features such an essentially non-technical feature may possibly imply.

6.3 Inventive step

6.3.1 The Board first notes that the question of obviousness under Article 56 EPC is always to be judged with reference to the skilled person as the Article requires. Furthermore, the Board is not convinced that, in cases where a company, be it the market leader or not, has access to particular prior art, that company, i.e. its technical knowledge is to be considered as the standard of the skilled person, and nothing else.

In accordance with established jurisprudence, the skilled person will be an expert in a technical field (CLBA, I.D.8.1.1, in particular T 641/00, reasons 8). A company on the other hand is a commercial entity, making decisions based on commercial, as well as technical considerations. While it is true that the company (i.e. its employees) may make non-obvious technical inventions, they may also have a number of good reasons for either not seeking actively to solve any existing or potential problem or at least not to patent (or merely publish) all feasible solutions to such problems. Therefore, in the present case, looking back, the contemplation that the appellant-opponent company, Swedish Match, knew of Kombilock and Dubbellock for several years yet did not arrive at the claimed invention, cannot prove that the invention is non-obvious. In other words the activities of Swedish Match is a poor test of what the skilled person would or would not do as a matter of obviousness, irrespective of the fact that the company could theoretically have developed the claimed snuff-box but apparently did not.

6.3.2 In the present case, the Board will therefore apply the problem and solution approach as it is regularly applied by the departments of the EPO in the course of deciding whether or not claimed subject-matter is obvious in the sense of Art. 56 EPC, from the point of view of the notional skilled person, and not from that of a skilled person tailored to the past activities of Swedish Match.

6.3.3 Choosing the closest prior art

Bearing in mind that the snuff-box claimed is not implicitly a snuff-box destined for distribution (see

above, point 6.2), this consideration may, but needs not play a role in selecting the closest prior art. In accordance with established jurisprudence, the closest prior art is normally a disclosure conceived for the same purpose and having the most relevant technical features in common (see CLBA I.D.3.1).

Both Dubbellock and the Kombilock packaging disclose snuff-boxes with bottom lid and cover lid defining a first enclosed space separate from the second, lower enclosed space for storing unused snuff (see kombilock packaging, Dubbellock photos D18 and press release D9).

A key feature of the claim is that the cover lid is hinged to the bottom lid, indeed, this was the characterising feature of the independent claim as originally filed (see published application, claim 1). The Kombilock lid likewise has a hinge, whereas Dubbellock, with its separate cover lid designed to be completely removed, does not. For this reason, the Board considers the snuff-box shown on the Kombilock packaging PA2, with its retrofitted Kombilock lid, to be the closest prior art.

6.3.4 Following on from the discussion of novelty of the main request, Kombilock discloses all the features of the snuff-box lid. Furthermore, its packaging, PA2, shows, not only the Kombilock lid, but also the lower part of a snuff-box (see PA2, illustrations of Kombilock in use). The lower part has a bottom and a wall (with black band), and contains unused snuff. The bottom and the wall, together with the bottom lid, define a lower space, that is a second enclosed space, separate from the first for storing the unused snuff.

Furthermore, referring again to the reverse side of the packaging, in the Board's opinion the bottom lid and the lower part of the snuff-box must, in the wording of the claim, "close tight against one another in order to prevent the unused snuff from drying".

Since the claimed purpose of the tightness of the closure is to prevent snuff from drying, in other words prevent the passage of water-vapour through the closure, the Board concurs with the appellant-proprietor in considering the word "tight" in this claim feature to be used in relation to impermeability. Furthermore, by qualifying the tightness in terms of preventing unused snuff from drying, the Board considers the degree of impermeability of the claimed closure is at least commensurate with this purpose. Nothing in the description suggests otherwise, the claim feature being derived directly from the description, paragraph [0007].

6.3.5 The Kombilock snuff-box (see PA2), with its lid retrofitted onto the lower part of an existing snuff-box, can be carried by the user for intermittent consumption. Therefore it is implicit that the bottom lid of the Kombilock and the lower part of the opened snuff-box must fit together sufficiently closely as to prevent the unused snuff from drying over a normal period of intermittent consumption. Therefore the Board considers that the box shown on the Kombilock packaging likewise has a lower part that closes tight against the combilock bottom lid in order to prevent the unused snuff from drying.

6.3.6 Accordingly, the subject matter of claim 1 differs from the snuff-box disclosed on the Kombilock packaging only

in that the snuff-box is sealed with a band or label in the form of a strip running all around the snuff-box. Although the black band shown on the Kombilock packaging may well run all around the lower part of the snuff-box, it does not seal it because it does not extend onto the retrofitted Kombilock lid.

6.3.7 According to the patent (see specification, paragraph [0007], first two sentences), the technical effect of the band is to prevent unused snuff from drying. No other effects of the band are described. Furthermore, whether or not such a band might have a tamper-evident sealing effect or labelling effect when used on a snuff-box for distribution, remembering again that the claim is not limited to such distribution snuff-boxes (see point 6.2 above), neither tamper evidence nor labeling of distribution snuff-boxes plays a role in formulating the objective technical problem.

As explained above, Kombilock already goes some way in solving the problem of preventing unused snuff from drying, namely during a period of normal consumption. Therefore, the objective technical problem must be less ambitious than to simply prevent unused snuff from drying. Accordingly, the Board considers the objective technical problem can be formulated as how to modify the snuff-box shown on the Kombilock packaging PA2 to prevent unused snuff from drying for a longer period.

6.3.8 The skilled person, knowing the Dubbellock snuff-box, with a wrap-around sealing band (see for example D18, all photographs), will immediately recognise that the band shields the circumferential joint between the lid and the lower part of the snuff-box, and therefore can but hinder seepage of moisture from the closed snuff-box. Faced with the above problem, they will therefore,

as a matter of obviousness, add a sealing band running all around the Kombilock snuff-box, and thereby arrive at the subject matter of claim 1 without having made an inventive step.

6.3.9 It may be true that such a sealing band would be a hindrance to removing snuff from the box with its retrofitted Kombilock lid. Just as with the Dubbellock sealing band, it would first need to be broken before snuff could be removed. However, the objective technical problem concerns keeping the snuff fresh for a longer period than that of normal consumption for whatever reason, if only for the purpose of sending it in the mail or because the user does not want to immediately consume an opened box of stuff, but would rather store it. With their mind focused on this, the skilled person is not concerned with convenience of opening the snuff-box when it is being consumed. In other words, whether or not a user constantly opens and closes the box as shown on the Kombilock packaging when consuming snuff needs not play a role, as that may not be the skilled person's main concern. In any case the seal can again be broken if the user, after storage or upon receipt, wishes to consume its contents again.

Nor, in the Board's view, is it relevant that Dubbellock is a box destined for distribution whereas Kombilock PA2, one with a retrofitted lid, is not. As explained above, this aspect is not claimed, nor does the skilled person see the band around Dubbellock as something exclusive to containers destined for distribution (see above, point 6.2.1). Rather they simply see it as a band sealing the joint between the lower part and lid of a snuff-box.

7. As the subject matter of claim 1 of the patent as granted (main request) lacks novelty, Article 54(1) with Article 52(1) EPC and as the subject matter of claim 1 of auxiliary request 2 lacks inventive step, Article 56 with Article 52(1) EPC, the Board concludes that all the appellant-proprietor's requests must fail. Pursuant to Articles 101 (2) and 101 (3) (b) EPC, the Board must therefore revoke the patent.

8. Request for referral of a question to the Enlarged Board of Appeal

8.1 Article 112 EPC provides for the possibility of referring questions of law to the Enlarged Board "in order to ensure uniform application of the law or if a point of law of fundamental importance arises" (paragraph (1)). In the present case the Appellant has asked for referral of a question concerning claim expressions having several different meanings (see above, section VI).

8.2 The Board first notes that the jurisprudence concerning interpretation of claims, and thus also the terms therein is well established, see CLBA, II.A.6, and the decisions cited therein. In particular secion II.A. 6.3.3 deals, *inter alia*, with interpretation of ambiguous terms and section II.A.6.3.4 with reading additional features and limitations into the claims. The law in this area appears to be well established and uniformly applied, and the Board does not intend to depart from this. The Board therefore does not see the need to refer the question to the Enlarged Board of Appeal to ensure uniform application of the law.

8.3 Furthermore, in the Board's opinion, no point of law of fundamental importance arises, which would warrant

referral. In particular, in accordance with established jurisprudence, the referred question must not have a merely theoretical significance for the original proceedings which would be the case if the referring board were to reach the same decision regardless of the answer to the referred question, (see CLBA IV.F.2.3.3, and in particular G 3/98, reasons point 1.2.3).

8.3.1 In the present case, the question of different interpretations of a term in the claim arises primarily from the discussion of the term "tight unit" in claim 1 (both requests). In particular it is asked whether it should be interpreted as qualifying the impermeability of the unit or pertains to the unit being securely fitted together (cf. impugned decision, reasons point 3.2.18).

As explained above (see point 5.3.4), the Board finds that the prior art Kombilock discloses both interpretations. Therefore, at best, the above question has merely theoretical significance, but answering it would not change the outcome of the proceedings, namely the Board's opinion on novelty and inventive step vis-à-vis Kombilock.

This is also not changed by the fact that the Board also found that the (implicitly) claimed impermeability did not require a degree of tightness which would exclude any through holes in the lid (see point 5.3.4 above). As such the interpretation of the term "tight unit" does not fully correspond to the (more limited) interpretation as argued by the proprietor, but nevertheless the scope of the disputed feature (the implied impermeability) was determined by way of claim interpretation. Again, the decision of the Board would not have been different if the scope of the feature in

question were seen as extending to other possible interpretations as well, beside the one established by the Board.

8.4 For all these reasons the Board decided not to refer the question to the Enlarged Board of Appeal.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chairman:

L. Malécot-Grob A. de Vries

Decision electronically authenticated