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**Datasheet for the decision
of 24 April 2015**

Case Number: T 0542/14 - 3.2.07

Application Number: 05803577.5

Publication Number: 1836111

IPC: B65G1/137, G06Q10/00

Language of the proceedings: EN

Title of invention:

APPARATUS FOR STORING AND FOR INDEPENDENT DISPENSING OF A
PLURALITY OF PACKAGES

Patent Proprietor:

Arx Limited

Opponents:

MEKAPHARM
PHARMAX

Headword:

Relevant legal provisions:

EPC Art. 54

Keyword:

Novelty - (no)

Decisions cited:

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Case Number: T 0542/14 - 3.2.07

**D E C I S I O N
of Technical Board of Appeal 3.2.07
of 24 April 2015**

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(Patent Proprietor)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 6 February 2014
revoking European patent No. 1836111 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman	H. Meinders
Members:	V. Bevilacqua
	G. Weiss

Summary of Facts and Submissions

- I. The patent proprietor lodged an appeal against the decision of the Opposition Division to revoke European patent No. 1 836 111.
- II. Two oppositions had been filed against the patent as a whole. These were based on Article 100(a) (lack of novelty and lack of inventive step) as well as Article 100(b) (insufficient disclosure), and Article 100(c) EPC (inadmissible extension).

The following document, also relevant for the present decision, was cited during opposition proceedings:

D7: WO 99/52796 A1.

- III. The Opposition Division held that due to a lack of novelty of the subject-matter of claim 1 over D7, the ground for opposition of Article 100(a) EPC prejudiced the maintenance of the patent as granted (main request), and that the requirements of Article 84 EPC were not complied with by claim 1 of the auxiliary request.
- IV. Opponent 1 (Respondent I) submitted, in his reply to the statement setting out the grounds of appeal, new documents D15 to D24 to substantiate allegations of prior use, and requested to introduce them into the proceedings.
- V. With a communication annexed to the summons to oral proceedings the Board presented its preliminary opinion according to which the subject matter of claim 1 of all the requests (main request, first and second auxiliary requests) submitted by the appellant with the grounds

of appeal lacked novelty over the content of the disclosure of D7. The Board also raised clarity issues concerning some dependent claims of the auxiliary requests.

The appellant reacted by submitting, with letter of 16 April 2015, an amended version of the first and second auxiliary requests addressing the clarity objections.

VI. Oral proceedings before the Board were held on 24 April 2015.

At the oral proceedings the appellant requested that the decision under appeal be set aside and the patent be maintained in amended form on the basis of the second auxiliary request filed with letter dated 16 April 2015 (main request), or, in the alternative, that the case be remitted to the department of first instance if the documents D15 to D24 are admitted in the proceedings. The main request filed with the statement setting out the grounds of appeal and the first auxiliary request filed with letter dated 16 April 2015 were withdrawn.

Both respondents requested that the appeal be dismissed, or, in the alternative, that if the appeal could not be dismissed, that the documents D15 to D24 be admitted in the proceedings and the case be remitted to the department of first instance only if the taking of evidence be necessary.

The present decision was announced at the end of the oral proceedings.

VII. The wording of claim 1 of the second auxiliary request, on the basis of which the present decision was taken, reads as follows:

An apparatus for storing and dispensing a plurality of packages (28) comprising first (2) and second (12) regions from which packages are dispensed, respectively along a first path for packages from the first region and along a second path for packages from the second region, and a storage and picking device (6), the first region (2) having a plurality of shelves (4) accessible by the storage and picking device (6) and the second region (12) having a plurality of channels (24), each for receiving a plurality of packages and each of which comprises independent ejection means (52), wherein the storage and picking device (6) is adapted to be able to fill the channels (24) in the second region (12); the apparatus further comprising conveying means (30) associated with the second region (12) for removing packages (28) ejected from the second region (12); wherein the channels (24) in the channel region (12) slope towards the front to assist ejection of packages (28) therefrom, the apparatus further comprising, in the lower rear part of the channel region, an output chute (36) for the first region of shelving, said output chute (36) being arranged to deliver packages (28) onto the conveying means (30) of the channel region (12); and wherein the apparatus is arranged such that in use there is at least some overlap within the apparatus between the first path taken by packages (28) dispensed from the first region (2) and the second path taken by packages dispensed from the second region (12).

VIII. The arguments of the appellant are, insofar as relevant for the present decision, as follows.

The term "dispensed" does not indicate a process of extraction of the packages from the shelves or from the channels which happens only within the machine, but relates exclusively to their final delivery to the pharmacy counter.

D7 is not novelty destroying, because in this known device it is not possible to deliver products directly and independently to the pharmacy counter from storage unit (5), because this can only happen from the automatic commissioning unit (2).

None of the storage channels of the commissioning unit (2) of D7 would be regarded as a "chute" by a skilled person, because this would mean that the packages were stored in a chute and a skilled person would never store the packages in a chute, since it has no retaining means.

The extension of the lowermost channel of the commissioning unit of D7 is not limited to the lower rear part of this channel region, which is how the "lower rear part" is to be interpreted.

IX. The arguments of the respondents are, insofar as relevant for the present decision, as follows.

The appellant construes "dispensed" and "chute" in an unjustifiably restrictive way.

The term "dispensed" used in claim 1 should be interpreted broadly as covering any product delivery, and is in particular not to be limited to only the delivery of packages to the pharmacy counter.

The term "chute" should also be interpreted more broadly as defining an element conveying by gravity. It does not exclude a retaining means at the end.

Considerations on how a skilled person would actually use the apparatus of D7 are not relevant when deciding on the novelty of claim 1, which is a product claim.

The indication of intended use did not exclude D7 from the novelty assessment, since the storage and dispensing apparatus of D7 was clearly suitable for that use.

D7 clearly shows that the lowermost channel of the commissioning unit is positioned in the lower rear part of the channel region; this is "included" in the fact that it is entirely below the other channels.

Reasons for the Decision

1. *Content of the disclosure of D7*
 - 1.1 D7 discloses an apparatus (see claim 1 and figures 1 and 9) for storing and dispensing a plurality of packages (7), see figure 10. It comprises first (15) and second (3) regions from which packages are extracted (see page 18, second paragraph for the second region, and page 19, first three paragraphs, showing how packages are extracted from the first region).
 - 1.2 The appellant argues that even if D7 discloses that articles are respectively extracted from the first region and from the second region, this does not amount to a disclosure of the claimed feature that articles are **dispensed** from the first region, because these articles are not delivered directly and independently

to the pharmacy counter, but have to cross the second region (3) first.

He does that by referring to passages of the patent in suit (in particular paragraphs [0003] and [0004]), in which the verb "dispensing" is used in the sense of "delivering to its ultimate destination", which in the present case is the pharmacy counter.

- 1.3 The Board does not follow this interpretation because the description of the patent does not permit such a narrow interpretation of the term "dispensed".

The passage at page 6, starting from line 8 of the original description (see WO 2006/051329, amended during examination into paragraph [0018] of the patent in suit), refers to packages which have been extracted from the respective regions, but have not yet been delivered to the pharmacy counter, by calling them "dispensed packages".

Also at page 26, lines 6 to 16 (corresponding to paragraph [0065] of the patent) the reader finds that a dispensed package is a package which has not yet been delivered on the counter, because this passage states:

*"If further packages are required to make a prescription these may be **dispensed** simultaneously either from the channel module 12 or by means of the arm 6 which can pick a package from the appropriate shelf and place it **onto the output chute** of the channel module. Once all the packages of the prescription have been **dispensed onto the conveyor** this may be operated to carry them to a **delivery chute**" (emphasis added).*

D7 therefore discloses that the packages are "dispensed" (in the broad sense) respectively, from the first and from the second region of the apparatus.

- 1.4 D7 discloses that the packages dispensed from the first region (shelf (15)) follow a first path, because they are moved by the arm (5) towards the entry of the channels (4) of the second region (3), and then follow those channels to be finally ejected therefrom when needed.

Packages from the second region follow a second path, because they simply move within the channels towards the lower end and are finally ejected.

The Board therefore concludes that D7 also discloses the following features of claim 1:

that the packages are dispensed from the first and second regions, respectively along a first path (15, 5, 4), for packages from the first region and along a second path (4) for packages from the second region.

- 1.5 D7 also shows the following features of claim 1:

a storage and picking device (5), and that the first region (15) has a plurality of superposed supporting shelves (see also figures 10, 11, 12; these can be horizontal, see page 6, paragraph 6) accessible by the storage and picking device (5);

that the second region (3) has a plurality of channels (these are all the elements indicated by reference sign 4 in figure 10, with the exception of the lowermost one, see also figure 9), each for receiving a plurality of packages (7, referred to as "stack of articles" in

the description, however the storage and picking device (5) can also deliver single packets: see "Einzelartikel" in page 19, paragraphs 1 to 3) and each of which comprises independent ejection means (page 18, paragraph 2, line 6: "eine Einrichtung zum Anhalten und Ausgeben der Artikel");

that the storage and picking device (5) is adapted to be able to fill the channels (4) in the second region (3, see page 23, paragraph 6);

that the apparatus further comprises conveying means (these means are not mentioned in the description but are clearly visible as such between the two symmetrical second regions (3) in the drawings, see for example the bottom of figure 1 or the central lower portion of figure 9) associated with the second region (3) for removing packages (7) ejected from the second region (3);

that the channels (4) in the channel region (which is the second region (3)) slope towards the front to assist ejection of packages (7) therefrom.

- 1.6 The appellant argues that D7 does not disclose a chute, more in particular that none of the storage channels (4) of the commissioning unit (3) of D7 would be regarded as a chute by a skilled person. A skilled person would never store packages in a chute, as a chute is an inclined surface conveying objects by gravity and has no retaining means.

The Board disagrees: claim 1 being an apparatus claim, the novelty of its subject-matter should be based only upon the distinctive characteristics of the claim, whilst aspects relating to a particular intended use of

this apparatus need only be considered to the extent that a prior known apparatus should be capable of that intended use, if it is to be novelty destroying.

As explained at page 26, paragraph 2 of D7, it is possible that a package inserted into one of the channels (4) of the channel region (3), is immediately ("gleichzeitig") ejected.

This means that this package is not stored in the respective channel, but is directly conveyed downwardly.

The Board therefore judges that this channel (4), being a sloping surface (a slide) conveying packages to a lower level by gravity, is in fact capable of acting as a chute.

In addition to that the Board could not find any passage of the description of the patent in suit supporting the appellant's interpretation of the term "chute", i.e. excluding the presence of any retaining means (see for example paragraph [0013] or [0015]).

- 1.7 The appellant argues that figure 9 of D7 shows that the lowermost channel of the commissioning unit of D7 cannot be considered as extending **only** in the lower **rear** part of the channel region, as required by claim 1.

The Board notes that the formulation of claim 1 does not require that the chute extends exclusively in the lower rear part of the channel region. The lowermost channel (4) depicted in figure 9 is positioned below all the other channels and therefore also extends in the lower rear part of said channel region (3).

This lowermost channel 4 is therefore seen by the Board as a chute for delivering by gravity packages coming from the first region onto the conveying means (positioned in the central part of figure 9) of the channel region (3).

1.8 D7 therefore also discloses the following features of claim 1:

the apparatus further comprising, in the lower rear part of the channel region, an output chute for the first region of shelving, said output chute being arranged to deliver packages onto the conveying means of the channel region.

This apparatus is also clearly arranged such that in use there is at least some overlap within the apparatus between the first path taken by packages dispensed from the first region and the second path taken by packages dispensed from the second region, because in both situations the package move through channels (4) of the second region and reach the common central conveyor.

This overlap is present in this apparatus because the packages dispensed from the first region (15) also have to go through the second region (3) before they finally reach the pharmacy counter and because they have the central conveyor mentioned above in common.

1.9 D7 therefore also discloses the remaining features of claim 1:

wherein the apparatus is arranged such that in use there is at least some overlap within the apparatus between the first path taken by packages (7) dispensed

from the first region (15) and the second path taken by packages dispensed from the second region (3).

2. Lack of novelty

The above discussion brings the Board to the conclusion that the subject-matter of claim 1 of the second auxiliary request lacks novelty over the apparatus as disclosed in D7.

3. Further requests

Since this lack of novelty is sufficient for allowing the main request of the respondents, there is no need to deal with the documents D15-D24 relating to allegations of prior use.

As a consequence of the above it is also not necessary to decide upon the conditional request of the appellant for remittal to the department of first instance.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

H. Meinders

Decision electronically authenticated