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**Datasheet for the decision
of 25 November 2019**

Case Number: T 1604/15 - 3.2.07

Application Number: 08701348.8

Publication Number: 2114786

IPC: B65D41/34

Language of the proceedings: EN

Title of invention:

A TAMPER EVIDENT CLOSURE CAP AND A COMBINATION OF THE CAP AND
A CONTAINER NECK

Patent Proprietor:

Obrist Closures Switzerland GmbH

Opponent:

Bericap GmbH & Co. KG

Headword:

Relevant legal provisions:

EPC Art. 54, 56

Keyword:

Novelty - (yes)
Inventive step - (yes)

Decisions cited:

Catchword:



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Case Number: T 1604/15 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 25 November 2019

Appellant: Bericap GmbH & Co. KG
(Opponent) Kirchstrasse 5
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Respondent: Obrist Closures Switzerland GmbH
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 26 June 2015
rejecting the opposition filed against European
patent No. 2114786 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman K. Poalas
Members: V. Bevilacqua
C. Brandt

Summary of Facts and Submissions

I. The appellant (opponent) filed in the prescribed form and within the prescribed time limit an appeal against the decision rejecting the opposition against European patent No. 2 114 786, requesting that the appealed decision be set aside and that the patent be revoked.

II. The patent proprietor (respondent) requested:

that the appeal be dismissed and the patent be maintained as granted (main request), or alternatively, that the decision under appeal be set aside and the patent be maintained in amended form on the basis of one of the sets of claims filed as first to seventh auxiliary requests with the reply to the statement setting out the grounds of appeal.

III. The appellant referred to the following documents, which were also mentioned in the appealed decision:

D1: US 2005/0189312 A1,
D2: US 4 801 030 A,
D3: EP 0 049 876 A1.

IV. Independent **claim 1 of the main request**, corresponding to claim 1 of the patent as granted, reads as follows:

"A closure cap comprising:
- a top panel (102),
- a cylindrical skirt (103) depending from the periphery of the top panel (102) and
- a tamper indicating band, having an upper edge frangibly connected to the open end of the skirt,

wherein the tamper evident band (4; 104; 204; 404; 504) has at its lower edge (6; 106; 506) at least one hingedly connected retaining element (5; 105; 205; 405; 505), preferably an annular band, which extends radially inwardly and towards the top panel (102) when the cap (1; 101; 201; 401; 501) is in the screwed on position,

wherein at least one projection (9; 109; 209; 309; 409; 509) with a closure engagement surface (10; 110; 410) is arranged on at least one of the at least one retaining elements (5; 105; 205; 405; 505), the projection (9; 109; 209; 309; 409; 509) extending radially towards the inside of the cap (1; 101; 201; 401; 501) so as to engage under the engagement surface (20) of a retaining structure (21; 121; 221; 321) arranged on a container neck (125; 225; 325) when the cap (1; 101; 201; 401; 501) is in the screwed on position,

and wherein at least one of the retaining elements (5; 105; 205; 405; 505) has at least one axial extension (7; 107; 207; 407; 507) having an axial length (18) selected such that its free edge (13; 113) extends at least axially above an engagement surface (20) of a retaining structure (21; 121; 221; 321) when the cap (1; 101; 201; 401; 501) is in the screwed on position, the axial distance (11; 111) from the lower edge (6; 106; 506) of the tamper indicating band (4; 104; 204; 404) to the closure engagement surface (10; 110; 410) of the at least one projection (9; 109; 209; 309; 409; 509) being smaller than the axial distance (12; 112) from the lower edge (6; 106; 506) of the tamper indicating band (4; 104; 204; 404) to the free edge (13; 113) of the axial extension (7; 107; 207; 407; 507),

characterised in that at least one anti-rotational element (214; 314; 414; 514) is arranged on at least

one of the at least one axial extension (7; 107; 207; 407; 507), the anti-rotational element (214; 314; 414; 514) being adapted to engage a corresponding element (127; 227; 327) on and/or above the retaining structure (21; 121; 221; 321) in circumferential direction."

The text of the claims of the auxiliary requests is not relevant for the present decision.

- V. Oral proceedings were held on 25 November 2019, during which the factual and legal situation was discussed with the parties. For further details of the course of the oral proceedings, reference is made to the minutes thereof.

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

- VI. The appellant argues essentially as follows.

The subject-matter of claim 1 of the main request lacks novelty over the disclosure of D1.

The disclosure of D2 is very similar to the disclosure of D1. The subject-matter of claim 1 of the main request therefore also lacks novelty over D2.

Even if the feature of the characterizing portion of claim 1 that

"at least one anti-rotational element is arranged on at least one of the at least one axial extension"

is to be considered as not being disclosed in D1 and/or in D2, still the subject-matter of claim 1 of the main request lacks inventive step starting from D3, and taking into consideration the teaching of either D1 or D2.

VII. The respondent argues essentially as follows.

There is no mention whatsoever in D1 and D2, not even implicit, about the presence of anti-rotational elements.

The feature of the characterizing portion of claim 1 that "at least one anti-rotational element is arranged on at least one of the at least one axial extension" is therefore not disclosed in these documents.

As a consequence of the above the subject-matter of claim 1 of the main request is new.

Starting from D3, the subject-matter of claim 1 of the main request is not obvious, because D3, like D1 and D2, also fails to disclose the above-mentioned feature of the characterizing portion of claim 1.

Reasons for the Decision

1. Novelty over D1

1.1 It is common ground between the parties that D1 discloses all the features of the preamble of claim 1 of the main request.

1.2 The appellant argues that D1 also discloses the features of the characterizing portion thereof and in particular that
"at least one anti-rotational element is arranged on at least one of the at least one axial extension".

The appellant acknowledges that there is no explicit mention in D1 of anti-rotational elements, but puts forward that the a skilled person would immediately recognize that the tab extensions 34a disclosed in D1 have an anti-rotational function and are therefore to be considered as being anti-rotational elements.

This is because these tabs are arranged to contact the container shoulder when the closure is removed (see last sentence of paragraph 15 in combination with figure 14 of D1).

These tab extensions 34a are therefore capable to restrict rotation by engaging corresponding elements on and/or above the retaining structure in circumferential direction.

1.3 The Board disagrees.

Looking at D1 (see in particular paragraph 8) a skilled reader only finds the information that these tab extensions 34a serve the purpose of preventing unfolding resulting in a "tiring off" and a loss of tamper evidence.

There is no mention at all in D1 that the tab extensions 34a have an anti-rotational function.

To show the presence of an anti-rotational effect the appellant refers to a combination of the cap of D1 with a container neck having corresponding elements such as those shown in figures 7-9 of the patent in suit.

The interaction between the tab extensions 34a and these corresponding elements is however not directly derivable from D1 itself, because, as acknowledged by the appellant, there are no "corresponding elements" on and/or above the retaining structure of D1.

The Board concludes that such an hypothetical possibility, for which there is no support in the content of D1 at all, cannot result in an implicit disclosure of anti-rotational elements.

In the absence of any anti-rotational element in D1, said document D1 necessarily fails also to disclose the feature of the characterizing portion of claim 1 that "at least one anti-rotational element is arranged on at least one of the at least one axial extension".

As a consequence of the above, the subject-matter of claim 1 is new over the disclosure of D1.

2. D2- Novelty

2.1.1 The appellant argues that in view of the fact that the disclosure of D2 is very similar to the content of the disclosure of D1 its novelty objection based on D1 was to be reformulated, *mutatis mutandis*, taking the disclosure of D2 (see in particular figures 2 and 3 thereof) into account.

The appellant argues in particular that element 30a depicted in figure 3 of D2 is to be considered as an anti-rotational element as defined in the characterizing portion of claim 1 of the patent in suit.

2.1.2 The Board disagrees.

In analogy to what has been discussed above in relation to the disclosure of D1, the Board finds no explicit mention in D2 that the tab extensions 30a have an anti-rotational function.

A skilled reader also does not find an implicit disclosure of anti-rotational elements in D2, for the same reasons discussed above in relation to D1.

Claim 1 is therefore considered as being novel over the content of the disclosure of D2.

3. Inventive step, starting from D3

3.1.1 The appellant argues that the subject-matter of claim 1 lacks inventive step over the combination of the teaching of D3 (taken as the closest prior art) with the teaching of D1 or with the teaching of D2.

This was because D3 explicitly discloses anti rotational elements, but fails to disclose retaining elements having an axial extension, whereby D1 and D2 disclose retaining elements having an axial extension.

3.1.2 The Board disagrees.

The appellant acknowledges (see page 11 of the statement setting out the grounds for appeal) that the closure depicted in figures 11 and 13 of D3 has retaining elements 31, 32, and separated therefrom, anti- rotational elements 31b, 31c (see page 13, lines 20-29 of D3).

D3 clearly fails to disclose that the retaining elements 31, 32 have axial extensions (see figures 11-13).

In fact in D3 only the anti-rotational elements 31c have extensions with an axial length selected such that their free edges extend axially above the engagement surface 23.

D3 therefore fails to disclose the features of the characterizing portion of claim 1 that "at least one anti-rotational element is arranged on at least one of the at least one axial extension".

It is not evident how a skilled person would arrive at the subject-matter of claim 1 by a combination of the teaching of D3 with the teaching of D1 or with the teaching of D2 without having to exercise inventive skills.

Reason therefor is that the above identified distinguishing feature of the subject-matter of claim 1 over the disclosure of D3, is also not disclosed in D1 (see point 1 above) or in D2 (see point 2 above).

Consequently the Board is not convinced by the corresponding appellant's arguments and considers that the subject-matter of claim 1 involves an inventive step.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

K. Poalas

Decision electronically authenticated