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D E C I S I O N
of 29 April 2002

Case Number: T 0655/99 - 3.4.2

Application Number: 92200879.2

Publication Number: 0506202

IPC: G09F 3/02

Language of the proceedings: EN

Title of invention:

Label

Patentee:

EVERY DENNISON CORPORATION

Opponent:

DAVID J INSTANCE LTD.

Headword:

-

Relevant legal provisions:

EPC Art. 114(1)(2), 54(3), 56

Keyword:

"Late submitted document (admitted)"

"Novelty and inventive step (confirmed)"

Decisions cited:

-

Catchword:

-



Case Number: T 0655/99 - 3.4.2

D E C I S I O N
of the Technical Board of Appeal 3.4.2
of 29 April 2002

Appellant: DAVID J INSTANCE LTD.
(Opponent) Foster Road
Ashford Business Park
Sevington
Ashford
Kent TN24 0LQ (GB)

Representative: Jenkins, Peter David
PAGE WHITE & FARRER
54 Doughty Street
London WC1N 2LS (GB)

Respondent: AVERY DENNISON CORPORATION
(Proprietor of the patent) 150 North Orange Grove Boulevard
Pasadena
California 91103 (US)

Representative: Ferguson, Alexander
Octrooibureau Vriesendorp & Gaade
P.O. Box 266
NL-2501 AW Den Haag (NL)

Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office posted 28 April
1999 concerning maintenance of European patent
No. 0 506 202 in amended form.

Composition of the Board:

Chairman: E. Turrini
Members: A. G. Klein
G. E. Weiss

Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the interlocutory decision of the opposition division finding European patent No. 0 506 202 (European patent application number 92200879.2) as amended by the respondent (patent proprietor) during the opposition proceedings to meet the requirements of the EPC.

The opposition filed by the appellant against the patent as a whole was based on the grounds that the subject matter of the patent in suit was not novel and lacked an inventive step (Article 100(a) EPC).

In the interlocutory decision, the opposition division held that the subject matter of the amended claims complied with the requirements of Article 123(2) and (3) EPC and was neither anticipated nor rendered obvious by the available prior art comprising, *inter alia*, the following documents:

A6: US-A-4 711 686

A7: US-A-4 744 591

A21: US-A-4 621 442

A22: EP-A-0 304 242,

and the alleged public prior use of a label, a sample of which was annexed to the opponent's letter dated 1 October 1998:

A9/1: label "Dursban 4, 5 Litres e, DowElanco Limited", reference IP 426/1/1.

II. With the grounds of appeal, the appellant submitted the following further documents in support of its case:

A23: WO-A-92 04704

A24: GB-A-2 247 661.

III. Oral proceedings before the board were held on 29 April 2002.

The appellant requested that the decision under appeal be set aside and that the European patent be revoked.

The respondent for its part requested that the appeal be dismissed and that the patent be maintained in accordance with the interlocutory decision of the opposition division.

IV. Claim 1 of the amended patent on which the contested decision is based reads as follows:

"1. Label (1) for a container having an outer surface, said label having a front edge and a rear edge, said front edge and said rear edge being spaced from one another along a main axis of the label, said label comprising at least one information panel (5) with a front edge and a rear edge spaced from one another along the main axis; a protective sheet (4) for covering the information panel; a base sheet (3) for supporting the information panel, wherein at least a part of the bottom surface of the base sheet is provided with an adhesive for adhesion to a relatively flexible label bearing sheet (2) and the outer surface of the container, respectively, said base sheet having a front edge and a rear edge spaced from one another

along the main axis; a first section (7) of the lower surface of said protective sheet being adhered to the upper surface of the base sheet and a second section (9) of it extends beyond the rear edges of the information panel and the base sheet to the rear edge of the label, at least a portion of the lower surface of the second section (9) of the protective sheet (4) is provided with an adhesive, which enables it to be adhered to and released from the outer surface of the label bearing sheet and container, respectively, on repeated occasions, and wherein the front edge of the protective sheet (4) forms the front edge of the label, characterized in that a fourth section (6) of the protective sheet is positioned between the front edge of the protective sheet (4) and that of the base sheet (3) and is provided, on at least a part of its lower surface, with an adhesive for adhesion to the label bearing sheet (2) and the outer surface of the container, respectively."

Claims 2 to 9 are appended to claim 1.

V. The appellant's arguments in support of its request are essentially the following:

Document A23 is part of the prior art under Articles 54(3) and (4) EPC. The label disclosed in this document with reference to Figures 3 and 4 comprises a folded label portion 58 adhered to a backing 38 of release material by two regions 60 and 62 of adhesive, and a laminar material portion 64 covering the folded label portion and having a front edge region 66 and a rear edge region 68 both adhered to the backing of release material by the two regions 60 and 62 of adhesive, respectively (page 5, line 8 to page 7,

line 18). According to the modification of this embodiment described on page 9, lines 29 to 34, the folded label is adhered "to a self-adhesive support piece carried on a backing of release material rather than to the backing of release material directly", the support piece constituting a base sheet within the meaning of the patent. The skilled person seeking to implement this modification would then incorporate in the label shown in Figure 4 the single support piece disclosed in the document, i.e. the support piece 104 of the embodiment disclosed with reference to Figure 6. This support piece is manufactured by die-cutting a support web on which the folded label portion has been previously applied (page 9, lines 14 to 28), and the preservation of the folded edge of the folded label portion requires the web to be cut beyond the folded edge of the folded label portion. Therefore, the support piece has to extend beyond at least the front, folded side edge of the folded label portion as shown in Figure 6. In addition, since the adhesion regions 60 and 62 of the label shown in Figures 3 and 4 fulfil two functions, namely the adhesion, on the one hand, of the folded label portion and, on the other hand, of the laminar material portion to the backing of release material and since according to the modification described in the document the label portion is adhered to the support piece, in the absence of any teaching to modify the adhesion regions, the second of the functions should be preserved after the modification. This implies that the adhesion region at the side of the folded edge of the label portion shall extend so that the laminar material portion remains adhered to the backing of release material. In the resulting arrangement the adhesion regions 60 and 62 would also adhere the laminar material portion 64 to the support

piece. Therefore, the embodiment disclosed in document A23 with reference to Figures 3 and 4, when modified by the express description with respect to this embodiment on page 9, lines 29 to 34, would result in a label as defined in claim 1 of the contested patent.

With regard to the issue of inventive step, the closest prior art is represented by the label A9/1 which includes all the features of the preamble of claim 1 of the amended patent.

The technical problem solved by the features relative to the fourth section of the claimed label, however, is not related to the security of adhesion between the front edge of the label and the container as was held by the opposition division in its decision. As stated in column 4, lines 21 to 23 of the patent and as acknowledged by the respondent, the effect of the fourth section is the smooth thickness transition over the whole label, the feeding of the label between rollers being then improved by virtue of the smooth transition. Accordingly, the object of the fourth section is simply to provide a smooth thickness transition over the label surface, and in particular at its front edge side.

The solution of extending the protective sheet so as to obtain a smooth thickness transition from the release material across the entire length of the label and back to the release material is, however, obvious. Smoothing out thickness transitions is plainly known in lamination. Furthermore, the skilled person would realize that the problem of the provision of a smooth thickness transition has already been addressed in the design of the label A9/1 and solved by extending the

protective sheet from the base sheet to the whole folded leaflet and then to the backing material, so that by analogy he would further extend the cover sheet of the label A9/1 beyond the front edge of the base sheet to the backing material, this obvious procedure resulting in a fourth section as claimed.

In addition, symmetrical label arrangements comprising an overlamine covering entirely the label, adhered by opposite side edges directly to a release material and providing a smooth, continuous thickness transition between layers of the label having different thickness are known in the art. Thus, the label disclosed in document A22 with reference to Figure 5 comprises a protective sheet portion 21 covering the whole label and extending beyond both opposite sides of the label so as to adhere to a backing of release material 10, resulting in a stepped thickness arrangement with a continuous, smooth transition in thickness at the two opposite side edges of the label. Document A22 addresses in addition the application of the label with automatic machines (column 3, lines 55 to 57) which generally involve feeding mechanisms with rollers.

Document A21 also discloses with reference to Figure 3 a multilaminar label with a plastics overlamine having opposed portions adhered directly to a backing of release material, the arrangement providing a stepwise thickness increase between the backing of release material, up over a leaflet having different thickness and back down to the backing of release material. The labels of document A21 are explicitly said to be capable of manufacture in an automated manner (column 1, last paragraph) and they are also usually applied to a support in such an automated

manner, and no feeding problem arises because of the provision of the extension side portions. Similar label arrangements with a stepwise thickness configuration are also disclosed in documents A6 and A7. Therefore, the provision in the protective sheet of the label A9/1 of a fourth section as claimed is obvious, and the fact that this section enables the label to be fed between rollers does not constitute a surprising effect given the disclosures of documents A21 and A22.

The technical problem solved by the claimed fourth section can also be seen in the improvement of the weathering and moisture resistance of the label A9/1. This problem is explicitly addressed in document A22 (column 4, lines 24 to 29) and solved by the cover sheet extending beyond the entire periphery of the label as shown in Figure 6. Therefore, the application of this teaching to the label A9/1 would result in a label according to the amended claim 1, the subject matter of which does not exclude the protective sheet extending also beyond the lateral side edges of the label orthogonal to the front and the rear side edges.

Alternatively, either one of document A21 or A22 can also be considered as the closest prior art. The distinguishing feature is then the provision of a base sheet. In the case of insecticide or herbicidal containers, however, label base sheets constitute a statutory requirement which guarantees that there is an information displaying base sheet remaining adhered to the container when the label accidentally becomes detached from the container. The incorporation of a base sheet as that shown in label A9/1 in the label disclosed in any of documents A21 or A22 while maintaining the symmetrical smooth thickness

transitional arrangement of the label would then result in a label as claimed. The label A9/1 shows in this respect that there is no prejudice in the art to extend the cover sheet beyond a base sheet, when present.

VI. The respondent argued essentially as follows:

Document A23 suggests a modification of the embodiment disclosed with reference to Figures 3 and 4. However, the scant description of the modification is insufficient to disclose any specific arrangement of the modified label and it does not anticipate the claimed combination of features.

The object of the invention does not relate to the smooth thickness transition of a label in general, but to the effect of the smooth thickness transition specifically provided by the claimed fourth section of the protective sheet. There is no teaching in the prior art as a whole that would, and not simply could, prompt the person skilled in the art to modify the label A9/1 so as to arrive at a label falling within the terms of claim 1. In particular, the prior art is silent as to the effect of the smooth thickness transition over the whole label on the feeding operation of a label through labelling machines. As neither the label A9/1 nor the disclosure of documents A21 and A22 would indicate to a person skilled in the art that some problem may arise, the person skilled in the art would not even consider modifying the prior art labels.

The prior art labels considered by the appellant and showing a prolongation of the cover sheet beyond the folded label portion either have no base sheet, as is the case in documents A21, A22, A6 and A7, or do not

comprise a section of the protective sheet extending beyond the base sheet, as is the case of the label A9/1. In addition, any modification of the protective sheet of the label A9/1 resulting in a symmetrical arrangement as disclosed in documents A21 and A22 would be contrary to the non-symmetrical design of the label A9/1. Accordingly, the front edge smooth thickness transition arrangement of the claimed label is neither disclosed nor suggested by the prior art.

Reasons for the Decision

1. The appeal is admissible
2. *Admissibility of late-filed documents*
 - 2.1 In accordance with Article 114(2) EPC the board has a discretion to disregard facts or evidence which are not submitted in due time by the parties concerned. However, the board should consider under Article 114(1) EPC whether in the present circumstances it is justified to admit documents 21 to 23 into the proceedings at a late stage.
 - 2.2 Document A23 was filed together with the grounds of appeal, which is long after expiry of the opposition period.

As already expressed by the board in its preliminary view set out in the communication accompanying the summons to oral proceedings, in the board's judgment understanding the technical content of the document, as discussed by the appellant in the grounds of appeal, does not provide any difficulty and the respondent, as

a matter of fact, comprehensively commented on the relevance of the document both in its written submissions and at the oral proceedings.

In these circumstances, the board admits document A23 into the appeal proceedings.

- 2.3 The appellant also requested that documents A21 and A22, which were filed during the opposition proceedings after the nine-month opposition period and apparently disregarded by the opposition division (see point 4.3 of the reasons of the contested decision), be taken into consideration. These two documents have actually been discussed during the first instance proceedings and also during the appeal proceedings by both the appellant and the respondent as if they were part of the proceedings and the respondent did not object to these documents being taken into consideration. The board therefore sees no reason for not taking into account these two documents in the present proceedings.

3. *Compliance of the amended patent with the requirements of Articles 123(2) and (3) EPC*

Compliance with the requirements of Articles 123(2) and (3) EPC of the patent documents as amended before the opposition division was not contested by the appellant, and the board is satisfied that no objection arises in this respect.

4. *Novelty*

- 4.1 Document A23 is a Euro-PCT patent application which designates all the contracting states designated in the patent in suit. It was published after the priority

date of the opposed patent, but claims priority from document A24 having a filing date before the priority date of the patent in suit. Thus, document A23 constitutes prior art only within the meaning of Articles 54(3) and (4) EPC.

The appellant has submitted that the embodiment disclosed in document A23 with reference to Figures 3 and 4 and modified as expressly recited on page 9, lines 29 to 34 results in a label comprising all the features of the claimed subject matter.

The label 20 of the embodiment of Figures 3 and 4 of document A23 comprises a folded label 22, 58 constituting an information panel within the meaning of the contested patent. A front and an opposite rear side edge of the folded label are adhered to a backing of release material 38 by means of a first permanent adhesive region 24, 60 and a second resealable adhesive region 26, 62, respectively, both adhesive regions extending beyond the respective side edge of the folded label (page 5, lines 9 to 28 and page 6, lines 19 to 24). The folded label is covered by a portion 64 of a laminar material 42 (page 5, lines 29 to 34) operating as a protective sheet (page 6, lines 33 to 35). A front and an opposite rear side edge 66 and 68 of the laminar material portion extend beyond the front and the rear side edge 70 and 72 of the folded label, respectively, and are adhered to the backing of release material by means of the portions of the first and the second adhesive regions extending beyond the respective side edges of the folded label (page 5, line 34 to page 6, line 2, and page 6, lines 24 to 33).

According to page 9, lines 29 to 34 of document A23,

the label arrangement of Figures 3 and 4 "may be modified by adhering the applied folded label to a self-adhesive support piece carried on a backing of release material rather than to the backing of release material directly". The document, however, fails to specify the constructional arrangement of the support piece with respect to the folded label, the laminar material portion and the adhesive regions resulting from the modification, thus leaving several possibilities open to the person skilled in the art, such as arranging the support piece so that the piece extends beyond the side edges of both the folded label and the laminar material portion or, alternatively, so that the front edge of the piece either comes flush with or lies rearwardly of the front edge 70 of the folded label. In none of these straightforward ways of carrying out the modification suggested in the document, however, would the resulting label arrangement anticipate the claimed fourth and second sections and the claimed first section of the protective sheet, respectively.

The subject matter of claim 1 is therefore novel over the disclosure of document A23 (Articles 52(1) and 54(3) and (4) EPC).

4.2 The novelty of the subject matter of the amended claim 1 with regard to the remaining documents has not been disputed by the appellant.

5. *Inventive step*

5.1 The board concurs with the opposition division and with the parties that the closest prior art is represented by the label A9/1, the alleged public prior use of

which has been neither disputed by the respondent nor challenged by the opposition division.

The label A9/1 comprises an information panel arranged on a base sheet adhered to a label bearing sheet, the label and the base sheet being covered by a protective sheet adhered along a front side edge to the front side edge of the base sheet and adhered along a rear side edge opposite the front side edge to the label bearing sheet, the label including all the features of the characterizing portion of claim 1 of the amended patent. However, contrary to the claimed label, the front side edge of the protective sheet of the label A9/1 does not extend beyond the base sheet, but coincides with the front edge of the base sheet. The claimed label thus differs from the label A9/1 in the features of the characterizing portion of the claim according to which the protective sheet includes a fourth section positioned between the front edge of the protective sheet and the front edge of the base sheet and provided with an adhesive for adhesion to the label bearing sheet.

- 5.2 According to the disclosure of the patent, the above distinguishing feature has the effect of facilitating the passage of the label along the surface of a roller of a labelling machine when the label is fed by its front edge as a leading edge by virtue of the smooth thickness transition at the fourth, front section of the protective sheet adhered to the label bearing sheet (column 4, lines 18 to 23). Therefore, the objective problem solved by the claimed subject matter, as compared to the label A9/1, can be seen as the problem of improving the feeding and transport operation of the label through rollers of a labelling machine when the

label is fed by its front edge.

The board notes in this respect that although the fourth section of the protective sheet of the claimed label certainly provides a smooth thickness transition over the label surface and in particular at its front edge, providing such smooth thickness transition at the front edge of the label cannot itself be taken as the objective problem to be formulated according to the problem-solution approach because such formulation would already partially anticipate the solution as claimed with the risk of hindsight when the state of the art is then assessed in terms of the problem so defined.

- 5.3 The labels disclosed in documents A21 and A22 are constituted by an information panel arranged between a cover sheet and a removable label bearing sheet, the protective sheet extending beyond the opposed front and rear edges of the information panel and being directly adhered to the label bearing sheet by the respective front and rear side edge regions. Documents A6 and A7 also disclose labels having a similar front side label arrangement.

None of the labels of documents A21, A22, A6 and A7, however, comprises a base sheet for supporting the information panel within the meaning of claim 1. Accordingly, the problem of facilitating the passage of the label in a labelling machine poses itself with less acuity because of the absence of such base sheet. The documents do not in any way refer to this problem either, and the single technical function of the extending side portions of the protective sheet adhered to the removable label bearing sheet beyond the edges

of the information panel that can be derived from these documents is to encapsulate the information panel between the protective sheet and the removable label bearing sheet. Since, however, the information panel of the label A9/1 is already encapsulated between the protective sheet and the base sheet removably adhered to the backing sheet, the provision in the label A9/1 of the extended side portions of the protective sheet of any of documents A21, A22, A6 or A7 for the encapsulation purpose they serve in these documents would be plainly superfluous.

For these reasons, the main line of argument of the respondent relying on the label arrangements disclosed in documents A21, A22, A6 and A7 does not provide a convincing argument of lack of inventive step.

- 5.4 According to a second line of argument advanced by the appellant, smoothing out the thickness transitions in a label arrangement by providing an extended covering sheet is well known in the art of lamination and is even apparent from the rear edge portion of the label A9/1 itself. However, the label A9/1 already presents a relatively smooth thickness transition profile and none of the prior art documents discussed by the opponent would suggest the skilled person to envisage further smoothing out the thickness transition profile of the label. In addition, the extension of the rear edge of the protective sheet of the label A9/1 is intended for being grasped by the user and peeled off to uncover the information booklet provided underneath. Since the booklet is designed to be opened only at its rear edge and is folded at its opposite, front side edge, there would be no point in allowing for the protective sheet being peelable also from the front edge by a similar

extension located there.

- 5.5 According to a third line of argument advanced by the appellant, as the protective sheet of the label A9/1 does not extend beyond the front edge of the base sheet, the technical problem solved by the claimed extension can also be seen in improving the weathering and the moisture resistance of the base sheet. This problem has been addressed in document A22 and solved by extending the edges of the protective sheet beyond the entire periphery of the folded label as shown in Figure 6, and the claimed label would then result from the application of this teaching to the label A9/1.

However, the label of document A22 has no base sheet and the weather-resistant arrangement of the protective sheet is taught in the document only as a means for protecting the label information panel by virtue of the width of the protective sheet extending beyond the lateral edges of the information panel (column 4, lines 24 to 29). Since the label information panel of the label A9/1, like that of document A22, is also protected at its front and rear edges against moisture and adverse weather conditions by the first section of the protective sheet adhered to the base sheet and by the second section of the protective sheet adhered to the label bearing sheet or to the container, respectively, applying the teaching of document A22 to the label A9/1 would then at the most lead to extending the lateral side edges of the protective sheet beyond the lateral side edges of the label information panel so as to protect the entire periphery of the information panel, but not to extending the protective sheet beyond the front edge of the base sheet as claimed.

As regards the moisture resistance of the base sheet itself, the upper surface of the front portion of the base sheet of the label A9/1 is overlaid by the protective sheet so that it is only the moisture resistance of the base sheet at its exposed front edge which might be improved by means of the front extension of the protective sheet. The prior art on file, however, does not provide any evidence that the exposed front edge portion of the known labels has ever been identified as a cause for damages by moisture or water, nor that the closest prior art label A9/1 would actually be defective in this respect. In any case, the skilled person could easily have considered simpler and more conventional measures to solve this problem, if any, such as selecting a water resistant material for the base sheet. Therefore, this line of argument cannot convince the board either.

5.6 An alternative line of argument advanced by the appellant consists in starting with the label of either one of documents A21 or A22 as the closest prior art and then considering the incorporation of a base sheet capable of bearing further product information in order to conform to certain statutory requirements imposed in order to warrant identification of the product in the container even after removal or loss of the information panel. The appellant, however, did not submit that these statutory requirements would provide any indication as to how such base sheet should be arranged with respect to the protective sheet and the label information bearing means of the labels disclosed in documents A21 and A22. The skilled person would therefore still be confronted with different design possibilities, the label arrangement already known from the prior art label A9/1 constituting a straightforward

possibility at hand. The appellant did not convincingly demonstrate that the incorporation of a base sheet in the label arrangements disclosed in any of documents A21 and A22 would necessarily result in a label as claimed, rather than e.g. in a label comprising a base sheet extending beyond both the front and the rear edges of the protective sheet, or a base sheet having the front and rear edges coincident respectively with the front and rear edges of either one of the label information panel and the protective sheet, or even a base sheet being shorter than, and covered by the label information panel. Accordingly, this alternative line of argument offered by the appellant cannot be considered persuasive either.

- 5.7 The board therefore concludes that the prior art documents considered in the proceedings neither disclose nor suggest in an obvious way a label information panel arranged between a base sheet and a protective sheet extending beyond the base sheet as defined in claim 1 of the patent as amended. Accordingly, the subject matter of claim 1 and that of dependent claims 2 to 9 which depend therefrom is considered to involve an inventive step within the meaning of Article 56 EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

P. Martorana

E. Turrini