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**Datasheet for the decision
of 29 January 2020**

Case Number: T 2227/15 - 3.2.07

Application Number: 09251666.5

Publication Number: 2140987

IPC: B26B19/06, B26B19/20, B26B19/38

Language of the proceedings: EN

Title of invention:
Blade assembly

Patent Proprietor:
Andis Company

Opponent:
Wahl GmbH

Headword:

Relevant legal provisions:

EPC Art. 100(a), 100(c), 116(1)
EPC R. 100(2)
RPBA 2003 Art. 10a(4)
RPBA Art. 12(4), 13, 15(1)
RPBA 2020 Art. 12, 13, 15(8), 24, 25

Keyword:

Late-filed lines of attack - admitted (no)
Amendments - extension beyond the content of the application
as filed (no)
Novelty - (yes)
RPBA 2020 - applicability and transitional provisions
Form of decision - abridged form in respect of one or more
issues

Decisions cited:

T 0258/84, T 0560/89, T 0597/07, T 1687/17

Catchword:

Transitional provisions - applicability of Article 13(1) RPBA
2020 to cases where the summons to oral proceedings were
notified before the entry into force of the RPBA 2020 (see
point 1 of the Reasons)

Form of decision - abridged form in respect of one or more
issues (see point 2 of the Reasons)



Beschwerdekammern

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Case Number: T 2227/15 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 29 January 2020

Appellant: Wahl GmbH
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Respondent: Andis Company
(Patent Proprietor) 1800 Renaissance Boulevard
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Representative: Roberts, Peter David
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 29 September
2015 rejecting the opposition filed against
European patent No. 2140987 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman I. Beckedorf
Members: A. Beckman
V. Bevilacqua

Summary of Facts and Submissions

- I. The opponent lodged an appeal in the prescribed form and within the prescribed time limit against the decision of the opposition division rejecting the opposition against European patent No. 2 140 987.
- II. The opposition had been filed against the patent as a whole based on Article 100(a) and (c) EPC (lack of novelty and inventive step, unallowable extension).
- III. The appellant requested
that the decision under appeal be set aside and
that the European patent No. 2 140 987 be revoked.

The respondent (patent proprietor) requested
that the appeal be dismissed.

- IV. The Board issued a communication pursuant to Article 15(1) RPBA 2007 dated 17 July 2019 (hereinafter: the Board's communication) with its preliminary opinion on the appeal according to which
- the alleged public prior use based on the set of documents D7 to D7.10, filed for the first time in appeal proceedings, was likely not to be admitted,
 - the Board noted that with regard to the grounds of opposition pursuant to Article 100(a) EPC, the appellant provided substantive arguments in respect of novelty only,
 - no incorrectness in the decision under appeal had been convincingly demonstrated by the appellant with regard to the pertinence of the grounds for opposition pursuant to Article 100(a) and (c) EPC
 - concerning lack of novelty of the subject-matter of claim 1 of the patent as granted over the disclosure of document D1 (= DE19708145C1), and

- in respect of the claimed subject-matter according to the patent as granted, and
- the appeal was likely to be dismissed.

V. The appellant responded with letter of 30 December 2019 by filing further documents D8 to D10 regarding the alleged public prior use. The respondent indicated with letter of 28 January 2020 that it would not be attending the forthcoming oral proceedings and requested the dismissal of the appeal and the non-admittance of the appellant's late-filed submissions.

VI. Oral proceedings were held on 29 January 2020 in the absence of the respondent. For details of the oral proceedings, in particular the issues discussed with the appellant, reference is made to the minutes thereof. The order of the present decision was announced at the end of the oral proceedings.

VII. Claim 1 of the patent as granted reads as follows:

"A blade assembly (14) for a hair trimmer (10) having a trimmer body (18) and a motor, the blade assembly comprising;
an upper blade (92) having a forward cutting edge (80);
a lower blade (48) having a forward cutting edge (76) and defining a groove (104);
a support member (60) configured for coupling to the trimmer body (18) and having a protrusion (96), wherein the protrusion is configured to be slidably received in the groove (104) of the lower blade (48),
an actuation member (64) coupled to the lower blade (48) and extending outwardly from the lower blade, wherein the actuation member (64) is positioned between the lower blade (48) and the support member (60);

a biasing member (72) retained by the support member (60) and configured to bias the upper blade (92) against the lower blade (48);
wherein the upper blade (92) is configured to oscillate in a parallel direction relative to the forward edge (76) of the lower blade (48) during operation of the motor;
further wherein the lower blade (48) is configured to move between first and second positions relative to the hair trimmer (10) in a longitudinal direction perpendicular to the forward edge (80) of the upper blade (92) upon movement of the actuation member (64);
and
there is provided a pin (140) that couples the actuation member (64) to the lower blade (48), characterized in that the support member (60) includes a slot (132) and the pin riding within the slot, the first and second positions of the lower blade (48) corresponding to the pin (140) reaching opposite ends of the slot (132) and limiting movement of the lower blade (48) beyond the first and second positions, such that the slot (132) defines a movement distance of the lower blade."

Reasons for the Decision

1. *Revised Rules of Procedure of the Boards of Appeal (RPBA 2020) - Transitional provisions*

The present proceedings are governed by the revised version of the Rules of Procedure which came into force on 1 January 2020 (Articles 24 and 25(1) RPBA 2020), except for Articles 12(4) to (6) and 13(2) RPBA 2020 instead of which Articles 12(4) and 13 RPBA 2007 remain applicable (Article 25(2) and (3) RPBA 2020).

The general applicability of the RPBA 2020 to the present proceedings includes Article 13(1) RPBA 2020, irrespective of the fact that the summons to oral proceedings was notified before 1 January 2020.

This is because Article 25 (2) and (3) RPBA 2020 provides for transitional provisions *only* with regard to Article 12(4) to (6) RPBA 2020 and to Article 13(2) RPBA 2020 respectively, whereas Article 25(1) RPBA 2020 stipulates that *all* other provisions of the revised Rules of Procedure shall apply to any appeal pending on, or filed after, 1 January 2020.

Article 25 RPBA 2020 - both from its unambiguous wording and seen in the context of the RPBA 2020 as a whole, in particular in view of the regulatory and legislative logic of Articles 12 and 13 RPBA 2020 - systematically reflects the structure relating to the admissibility of parties' submissions during appeals proceedings which, according to the RPBA 2020, is characterized by a convergent approach, divided into three different stages.

Article 25(2) and (3) RPBA 2020 is clearly directed to and, by the same token, limited to two narrow exceptions, *i.e.* to provisions governing the parties' submissions made either at the outset of the appeal proceedings marking the first level of the convergent approach (initial stage, see explanatory notes to Article 12(4) RPBA 2020, Supplementary publication 2 - OJ EPO 2020, 46, 56, hereinafter: SP2) or at an advanced stage of the appeal proceedings, which corresponds to the third level of the convergent approach (ultimate stage, see explanatory notes to Article 13(2) RPBA 2020, SP2, *supra*, 60).

Article 13(1) RPBA 2020, however, specifically relates to amendments to a party's case made during the stage of the appeal proceedings in-between the initial stage and the ultimate stage (see explanatory notes to Article 13(1) RPBA 2020, SP2, *supra*, 59).

Hence, excluded from an immediate application of the RPBA 2020 as required by Article 25(1) RPBA 2020 are only those provisions which specifically govern the initial stage and the ultimate stage, *i.e.* the first and the third levels of the convergent approach (Articles 12(4) to (6) and 13(2) RPBA 2020), leaving the intermediate stage, *i.e.* the second level of the convergent approach (Article 13(1) RPBA 2020), to the general rule set out in Article 25(1) RPBA 2020.

As a consequence, Article 13(1) RPBA 2020 is by virtue of Articles 24 and 25(1) RPBA 2020 applicable to any appeal pending on, or filed after, 1 January 2020, *i.e.* independent of when a communication of the Board under Rule 100(2) EPC or a summons to oral proceedings before the Board in accordance with Article 116(1) EPC has been notified.

Thus, where the summons to oral proceedings or a Rule 100(2) EPC communication has been notified before 1 January 2020, Article 13(1) RPBA 2020 applies simultaneously with Article 13(1) and (3) RPBA 2007. Where such notification has been done after that date, solely Article 13 RPBA 2020 applies without exception.

2. *Decision in abridged form*

In accordance with Article 15(8) RPBA 2020, the reasons for the present decision are given in abridged form for those issues in respect of which the Board agrees with

the findings of the opposition division. This clearly does not apply to the appellant's submissions which contain issues on which the impugned decision was not based within the meaning of Article 12(2) RPBA 2020.

The recourse to Article 15(8) RPBA 2020 requires that the Board agrees with the findings and reasoning of the decision under appeal in respect of one or more issues. The Board concludes from this precondition of concurrence with (parts of) the decision under appeal as well as from the legislator's intention (see explanatory notes to Article 15(7) and (8) RPBA 2020, SP2, *supra*, 65 *et seq.*) that in the reasons of the present decision it is possible to refer to those parts of the findings and reasons in the decision under appeal to which it agrees. The Board follows the similar approach of decision T 1687/17 of 9 January 2020 (not published in the OJ EPO).

The Board considers that referring to parts of the publically accessible decision under appeal, and making clear that it fully agrees with and adopts them as its own, is equivalent, but preferable for reasons of procedural economy, to a "copy and paste" or an unnecessary re-phrasing of such parts from the decision under appeal in the Board's decision.

3. *Findings of the appealed decision with which the Board fully agrees*

As explicitly confirmed by the appellant at the oral proceedings before the Board, the appellant's submissions in appeal proceedings concerning the grounds for opposition pursuant to

- Article 100(c) EPC with regard to the issue of added subject-matter, and

- Article 100(a) EPC with regard to the issue of novelty of the subject-matter of claim 1 as granted over the disclosure of D1 correspond entirely to those made during the opposition proceedings.

3.1 *Amendments - Article 100(c) EPC*

3.1.1 *Claim 1*

As far as the appellant contests the findings of the impugned decision concerning the terms used in claim 1 "parallel direction" and "first and second positions" and with regard to features 1.8 and 1.9 according to the feature analysis of claim 1 (see statement of grounds of appeal, point III.1.), the Board indicated under points 8.1 to 8.3 of its communication that it is not convinced by the appellant's argumentation for the reasons given in the appealed decision under point 2 of the Reasons.

3.1.2 *Claims 8 to 12*

With regard to the appellant's argumentation that the features of claims 8 to 12 as granted are not disclosed in the application as originally filed in the claimed combination, the Board noted under point 8.4 of its communication that it cannot share the appellant's view for the reasons given in the appealed decision under point 2 of the Reasons.

3.1.3 As a consequence, the Board fully agrees with the opposition division's findings on the issue of added subject-matter, to which reference is made and which are adopted by the Board, and confirms that the ground of opposition pursuant to Article 100(c) EPC does not hold against the patent as granted.

3.2 *Novelty - Article 100(a) EPC*

3.2.1 *Novelty over the general description in D1*

With regard to the appellant argumentation that the general part of the description of D1 discloses all the features of claim 1 as granted, the Board noted under point 9.1 of its communication that it does not share the appellant's view for the reasons given in the impugned decision under point 3 of the Reasons.

3.2.2 *Novelty over the embodiment of figure 7 of D1*

As far as the appellant contests the findings in the appealed decision that the subject-matter of claim 1 is novel over the disclosure of the embodiment of figure 7 in D1, the Board indicated under point 9.2 of its communication that it does not share the appellant's view for the reasons given in the impugned decision under point 3 of the Reasons.

3.2.3 As a consequence, the Board fully agrees with the opposition division's findings that the claimed subject-matter is novel over the disclosure of D1, to which reference is made and which are adopted by the Board, and insofar confirms that the ground of opposition pursuant to Article 100(a) EPC does not hold against the patent as granted.

4. *Public prior use novelty attack - admittance*

4.1 As the novelty attack based on the alleged public prior use, for which the appellant relies upon D7 to D10, was filed for the first time in appeal proceedings, its admittance is subject to the criteria pursuant to Article 12(4) RPBA 2007. Decisive for the Board is whether there are reasons justifying filing the new line of attack for the first time in appeal.

- 4.2 The appellant argues that the novelty attack based on the alleged public prior use, which stemmed from the appellant itself, could not have been filed earlier due to exceptional computer and operational related problems at Wahl GmbH and Wella GmbH in archiving and retrieving the evidence supporting it.

The Board cannot accept the appellant's argumentation, since the archiving of evidence supporting the alleged public prior use lay completely within the sphere of the appellant. Hence, the Board is not convinced that the asserted problems arising only from the appellant itself justify the late filing.

- 4.3 The appellant further relied upon T 560/89 (OJ EPO 1992, 725) and T 258/84 (OJ EPO 1987, 119) arguing that its late-filed submissions should be admitted.

The Board cannot share the appellant's view. As the aforementioned decisions were issued several years before entry into force of the Rules of Procedure of the Boards of Appeal 2003 by which the provision equivalent to Article 12(4) RPBA 2007 was first introduced (Article 10a(4) RPBA 2003, OJ EPO 2003, 61), the Board notes that both decisions are not pertinent in the present case for evaluating admittance of the novelty attack pursuant to Article 12(4) RPBA 2007.

- 4.4 As explained in the Board's communication (point 5), the Board is not able to identify any new surprising element in the minutes of the oral proceedings before the opposition division or in the impugned decision that could justify submitting the alleged public prior use after opposition proceedings, since the patentability of the subject-matter of claim 1 as granted was already discussed in the written phase of

the opposition proceedings (see notice of opposition dated 30 January 2014, points II., IV. and V.; annex to the summons to attend oral proceedings before the opposition division dated 9 December 2014, point 5.2).

As a consequence of that, submitting the public prior use novelty attack for the first time in appeal proceedings is not justified. For these reasons, the new novelty attack is not admitted into the appeal proceedings pursuant to Article 12(4) RPBA 2007.

- 4.5 The appellant requested not to admit into the proceedings the respondent's request not to admit the appellant's late-filed submissions as being late-filed.

The Board does not see a procedural need for taking position on said appellant's request for the purpose of arriving at the present decision. As the admittance of the appellant's late-filed submissions depends on the Board's discretion under Article 12(4) RPBA 2007, as outlined above, a corresponding request by the respondent is not required.

5. *Inventive step attack - admittance*

- 5.1 The appellant intended for the first time at the oral proceedings before the Board to argue against inventive step of the claimed subject-matter based on the teaching of D1 in combination with the common general technical knowledge of the person skilled in the art. The appellant relied upon T 597/07 (not published in the OJ EPO) and put forward that a specific substantiation of the ground of lack of inventive step would have contradicted its attack in respect of lack of novelty. Thus, the attack on lack of inventive step could not have been presented earlier.

5.2 The Board cannot share the appellant's view. As explained in the Board's communication (point 6), the Board considers the appellant's general submissions with regard to inventive step of the claimed subject-matter as unsubstantiated and does not take them into consideration, since these submissions did not constitute the party's complete case within the meaning of Article 12(2) RPBA 2007, corresponding to Article 12(3) RPBA 2020, for being taken into account in accordance with Article 12(4) RPBA 2007.

In its reply to the Board's communication, the appellant neither provided substantiated arguments nor comments on the preliminary opinion of the Board in this regard. Even after having been informed by said communication about the Board's preliminary opinion, the appellant did not present any substantiated argumentation regarding the lack of inventive step until the oral proceedings.

Thus, in the Board's view, the respondent had every reason to believe that a lack of inventive step objection was no longer pursued by the appellant. Therefore, it could not be expected that the respondent would have foreseen the objection of lack of inventive step based on the combination of the teaching of D1 with the common general technical knowledge and have prepared counter-arguments in this respect.

5.3 Considering all the circumstances of the present case, the Board concludes that admitting into the proceedings the line of argument relating to lack of inventive step of the claimed subject-matter would not only substantially add to and considerably change the complexity of the matter to be discussed and decided

upon, but would be contrary to the need for procedural economy and would take the respondent by surprise.

5.4 Consequently, applying Article 13(1) RPBA 2020 as well as Article 13 RPBA 2007, in particular Article 13(1) and (3) RPBA 2007, the Board does not admit into the appeal proceedings the appellant's inventive step attack based on the combination of the teaching of D1 as the closest prior with the common general technical knowledge of the person skilled in the art.

6. Since the appellant confirmed at the oral proceedings that there were no other objections to the patent as granted, the Board finds that the appellant has failed to demonstrate in a convincing manner the incorrectness of the decision under appeal.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated