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**Datasheet for the decision
of 20 August 2015**

Case Number: T 0169/12 - 3.2.07

Application Number: 05804372.0

Publication Number: 1812211

IPC: B26B21/44

Language of the proceedings: EN

Title of invention:
SHAVING RAZORS AND CARTRIDGES

Patent Proprietor:
The Gillette Company

Opponent:
Edgewell Personal Care Brands, LLC

Headword:

Relevant legal provisions:

EPC Art. 100(b), 54, 56
RPBA Art. 12(4)

Keyword:

Grounds for opposition - insufficiency of disclosure (no)
Novelty - (yes)
Inventive step - (yes)
New lines of attack based on documents not used or substantiated in the opposition proceedings and on new documents - (not admitted)

Decisions cited:

G 0009/91, G 0010/91, T 1067/08, T 0936/10, T 1125/10,
T 1500/10, T 0911/11, T 1400/11

Catchword:



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Case Number: T 0169/12 - 3.2.07

**D E C I S I O N
of Technical Board of Appeal 3.2.07
of 20 August 2015**

Appellant: Edgewell Personal Care Brands, LLC
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 25 November
2011 rejecting the opposition filed against
European patent No. 1812211 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman H. Meinders
Members: H. Hahn
I. Beckedorf

Summary of Facts and Submissions

I. The opposition against European patent 1 812 211 was rejected and the appellant (opponent) filed an appeal against this decision. The appellant requested to set aside the decision under appeal and to revoke the patent in its entirety and as an auxiliary request it requested oral proceedings.

II. Independent claims 1 and 34 of the patent as granted read as follows:

"1. A shaving cartridge (12) comprising: a housing (20) having a front edge and a rear edge; one or more shaving blades (28) between the front edge and the rear edge; a first solid shaving aid portion (31A) in front of said blades and a second solid shaving aid portion (31B) behind said blades for delivery to a user's skin during shaving wherein the first and second shaving aid portions wear away during shaving, characterized in that the first and second shaving aid portions (31A, 31B) are carried by a shaving aid holder (30) mounted on said housing and configured to allow each shaving aid portion to deflect when pressure is applied to a surface of the shaving aid portion during shaving."

"34. A method of shaving comprising: contacting the skin with a razor cartridge (12) comprising: a housing (20) having a front edge and a rear edge; one or more shaving blades (28) between the front edge and the rear edge; and a shaving aid holder (30) mounted on said housing, carrying a first solid shaving aid portion (31A) in front of said blades and carrying a second solid shaving aid portion (31B) behind said blades for delivery to a user's skin during shaving wherein the first and second shaving aid portions wear away during

shaving, characterized in that the shaving aid holder is configured to allow each shaving aid portion to deflect when pressure is applied to a surface of the shaving aid portion during shaving."

III. In the present decision the following documents of the opposition proceedings are cited:

D6 = US-A-4 944 090
D7 = US-A-5 369 885
D8 = US-A-6 145 201
D10 = US-B-6 584 690
D11 = WO-A-2005/058559
D12 = US-A-2004/0181943
D14 = US-B-6 216 345
D15 = US-A-5 134 775
D16 = US-A-5 084 968
D17 = US-A-3 935 639
D18 = GB-A-2 030 909
D19 = US-A-5 056 222
D20 = US-B-6 295 734
D21 = WO-A-2003/90983

while the following documents were submitted by the appellant in the appeal procedure:

D12' = WO-A-2004/082905
D30 = US-A-3 477 127

IV. The opposition had been filed against the patent in its entirety under Article 100(a) EPC, for lack of novelty and inventive step, under Article 100(b) EPC, that the patent does not disclose the invention in a manner sufficiently clear and complete for it to be carried out by the person skilled in the art, and under Article

100(c) EPC, that the patent extends beyond the content of the application as originally filed.

The Opposition Division held that the ground for opposition of Article 100(b) EPC does not hold against the patent in suit and that the ground for opposition of Article 100(c) EPC does not hold against claims 1 and 34 of the patent as granted. The Opposition Division further considered that the subject-matter of claims 1 and 34 of patent as granted (the single request of the patent proprietor) was novel, particularly with respect to D7, D8, D10, D11, and D14. Furthermore, the subject-matter of claims 1 and 34 was considered to involve inventive step with respect to a combination of the teachings of the closest prior art D6 with D15 or D6 with D21 or with respect to a combination of D16 with D6 or of D16 with D17 or D18, or of D19 with D20.

- V. With a communication annexed to the summons to oral proceedings the Board presented its preliminary opinion with respect to claims 1-35 of the patent as granted according to the single request of the respondent (patent proprietor).

The Board remarked amongst others that the ground of opposition under Article 100(c) EPC does not appear to hold against the subject-matter of claims 1 and 34 of the patent as granted. It further appeared that the appellant's argumentation under Article 100(b) EPC cannot hold either.

Taking account of the course of events in the present case it appeared to the Board that the new lines of attack concerning lack of novelty and inventive step as well as the documents D12' and D30, both filed with the

statement setting out the grounds of appeal (statement), would possibly not be admitted into the proceedings in accordance with Article 12(4) RPBA.

Furthermore, concerning novelty it appeared that the subject-matter of claims 1 and 34 of the patent as granted is novel over the available prior art.

Concerning inventive step the Board remarked that taking account of the fact that the appellant has **not** addressed any of the Opposition Division's considerations in the impugned decision concerning inventive step but has **only** presented new objections of lack of inventive step, based on new combinations of documents and/or new documents - which have an admissibility problem - it reviewed the impugned decision on a *prima facie* basis on the issue of inventive step. In that respect, no fault could be found with the conclusions drawn by the Opposition Division in the impugned decision, when starting either from D6, D16 or D19 - which all appeared to represent reasonable starting points for the claimed subject-matter of the patent in suit - as the closest prior art. Therefore the issue of inventive step would be discussed, if at all, taking account of the problem-solution approach based on the distinguishing feature(s) over the closest prior art.

- VI. With letter dated 20 July 2015 the appellant, in reply to the Board's summons, submitted further arguments concerning its objections under Articles 100(a) and 100(b) EPC, the former concerning the admissibility of D12/D12' and the corresponding novelty objections based thereon as well as the novelty objection based on D10 as raised in the statement and its lack of inventive step objection.

- VII. Oral proceedings before the Board were held on 20 August 2015. To start, the appellant withdrew its objection under Article 100(c) EPC. Thereafter the following aspects were discussed with both parties:
- sufficiency of disclosure with respect to claim 1 of the patent as granted with the appellant stating that it did not wish to submit further arguments in respect of its objection under Article 100(b) EPC in addition to what it had submitted in writing,
 - novelty of the subject-matters of claims 1 and 34 of the patent as granted over the disclosure of document D10,
 - admission into the proceedings of the further novelty objection of the appellant in respect of documents D12/D12', raised with the appeal,
 - admission into the proceedings of the inventive step objection of the appellant in respect of document D30, raised with the appeal,
 - admission into the proceedings of the inventive step objection of the appellant starting from the shaving cartridge of document D16 in combination with the teaching of either D6 or D10,
 - inventive step of the subject-matters of claims 1 and 34 of the patent as granted, starting from the shaving cartridge of document D16 in combination with the teaching of either D6 or D10; the appellant additionally argued starting from the cartridge of document D6 taken on its own.
- a) The appellant finally requested that the decision under appeal be set aside and the patent be revoked.
- b) The respondent finally requested that the appeal be dismissed.

At the end of the oral proceedings the Board announced its decision.

VIII. The appellant argued, insofar as relevant for the present decision, essentially as follows:

It disagrees with the contested decision that the thin elastic connecting members 56 shown in Figures 5A-C also allow for a deflection of the two shaving aid portions in any direction. For example, it is absolutely unclear with regard to which direction the connecting members 56 of Figure 5A are elastic. From Figure 5 these connecting members appear to be rather thick so that flexibility is at least questionable and the connecting members 56 will react to lateral forces differently than in case of bending forces from the top. When pushing against one of the shaving aid portions from the side, i.e. parallel to the width dimension of the cartridge, the forces have to be considerable in order to result in a deflection. It is to be noted that claim 1 of the contested patent mentions the pressure which is applied to a surface of the shaving aid portion "during shaving". During shaving such pressure can be applied to the shaving aid portion also from its respective sides e.g. as a result of dynamic friction resulting from the shaving aid portion being moved across the skin during shaving. However, such pressure typically will not be high enough to deflect the shaving aid portion. Nonetheless, this is required according to claim 1 of the contested patent.

The feature "the first and second shaving aid portions (31A, 31B) are carried by a shaving aid holder (30) mounted on said housing and configured to allow each

shaving aid portion to deflect when pressure is applied to a surface of the shaving aid portion during shaving" of claim 1 allows two interpretations. For the first alternative, i.e. that the first and second shaving aid portions themselves are configured to allow each shaving aid portion to deflect, no enablement is provided in the specification of the patent in suit.

Therefore, the invention of the contested patent cannot be carried out by a person skilled in the art so that the patent as a whole has to be revoked.

The razor assembly embodiment of figures 10A to 10C of D10 is novelty destroying for claim 1 since the cartridge 440 is placed within the cartridge receiving portion 438 of the housing (i.e. the base 422) on which the shaving aid is mounted via the compressible foam 481. Consequently, the shaving aid portions of the shaving cake - claim 1 does not exclude that it is made in one body or that said holder has additional functions - are deflectable because according to D10 it is stated to be able to undulate in an effort to conform better to the shaving surface (see column 12, lines 9 to 12).

The reason why the lack of novelty objections were extended to D12/D12' is that the disclosure of D12' was always included in the disclosure of D11, which refers to US Patent application No. 60/455646, due to the statement "the entire content of which is hereby incorporated by reference" (see page 6, lines 6 to 10; and page 16, lines 24 to 26). As D12' claims priority from this particular application the disclosure of D12' was always included in the disclosure of D11. Since D11 was always used for attacking novelty it is admissible to submit lines of argumentation for lack of novelty

based on the written disclosure and the disclosure from the drawings of D11 as well as the whole incorporated disclosure of D12'. Furthermore, D12' is well known to the respondent because it was filed in its name. It is also highly relevant since the embodiment of figure 8 includes two shaving aid composites 758 and 760, each of which includes a shaving aid matrix 762 and exfoliating elements 764 (see D12', page 15, lines 16 and 17). As it is stated that in some embodiments said exfoliating elements can be adjustable (see page 16, lines 23 and 24) said two shaving aid composites shown in Figure 8 in front of and behind the blades are adjustable. For the adjustable exfoliation members reference is made ("incorporated by reference") to D11 and in Figure 10 of D11 such a member is shown with a leaf spring, which makes it clearly deflectable.

D30 was only brought up by the appellant at the appeal stage. It was never discussed during the opposition proceedings that shaving aids are also an issue of electric razors.

The appeal proceedings are not exclusively limited to the attacks made during the opposition proceedings therefore it should be possible to add further attacks based on documents which were already comprised and/or considered in the opposition proceedings. It should be possible to use these documents as a basis for another argumentation. Therefore the lack of inventive step argumentation presented in the grounds of appeal being based on combinations of D16 and D10 or D16 and D6 should be admitted.

D16 discloses a razor blade assembly having shaving aid portions 36 in front of and behind the blades 4 of a razor cartridge which are carried by a common holder

(see Figure 1). Therefore the only difference between the assembly of D16 and the subject-matter of the patent in suit resides in the ability of the two shaving aid portions to be deflected. D10 discloses a floating support of the shaving aid portions so that the objective technical problem in view of the technical effect of the distinguishing feature was to be seen in the light of D10 (see column 12, lines 9 to 12), namely to increase the comfort during shaving. "Deflectable" means that the shaving aid portions can undulate, as mentioned in D10.

A similar conclusion applied to the combination of the teachings of D16 and D6. The latter document discloses in its figures 1 and 2 a deflectable element in front of the blades. However, D6 teaches also that there could be a second flexible element (see column 2, lines 43 to 45). Furthermore, according to the patent in suit (see dependent claim 17) the shaving aid holder could be made integral with the housing, which is exactly as shown by the embodiment of D6.

The skilled person knows how he should combine the teachings of these documents and how he should construct the resulting embodiment, e.g. with leaf springs. The patent in suit itself does not disclose much with respect to the design of the razor cartridge housing.

Also starting from D6 on its own, the skilled person would have no problem in replacing the shaving aid 27 behind the razor blades by a deflectable one as shown for the shaving aid in front of the blades.

Therefore claims 1 and 34 lack inventive step in view of these prior art documents.

IX. The respondent argued, insofar as relevant for the present decision, essentially as follows:

The appellant's objection to sufficiency of disclosure under Article 100(b) EPC is at most a clarity issue. It is clear from the patent in suit in its entirety, e.g. the Figures 3 to 3E, what is deflected during contact of the shaving aid portions with the user's skin.

D10 discloses no cartridge but a shaving assembly, i.e. a complete shaver. The cartridge of D10 has no holder on which the shaving aid is placed. When the housing of the cartridge is just the part around the blades then the feature that the "holder is mounted on the housing" as required by claim 1 is also not fulfilled. The shaving cake of figures 10A-10C is contained in a base and cannot deflect, at most it can make an axial movement. In particular, figure 8 of D10 shows that the shaving aid cake - which does not have two portions - cannot "deflect" when pressure is applied since the movement is restrained in axial direction by the underlying supporting structure 368. There is also no independent deflection of two portions in the shaving aid cake embodiment of figures 10A-10C of D10 as required by the claims of the patent in suit. The term "undulate" of D10 quoted by the appellant clearly does not mean "deflect".

Concerning the introduction of D12/D12' it is an untenable position that any document cited in a quoted document is in fact already in the proceedings or can be introduced without procedural hindrance into the proceedings. Furthermore, the reference is not to D12 or D12' but to provisional application US 60/455646, this document, however, has never been presented; its disclosure need not be identical to D12 or D12'.

D30 was only filed at the appeal stage; it is *prima facie* not relevant since it relates to shaving aids for an electric razor. For that reason alone, it cannot be admitted at this stage into the proceedings.

Concerning the (new) lack of inventive step discussion started by the appellant at the appeal stage the Board should follow the rules of procedure.

The lack of inventive step objections raised by the appellant cannot hold since the teaching of the rigid shaving aids on the razor cartridge of D16 is incompatible with the shaving aid in the of the shaving assembly of D10. The appellant has not shown or explained how the skilled person should implement the shaving aid cake of figures 8/10 of D10 into the razor cartridge of D16. Furthermore, said shaving aid cake of D10 is not deflectable.

Concerning D6 it is remarked that this document does not suggest that the second shaving aid 27 could be flexible. To the contrary, column 2, lines 43 to 45 refers to a "fixedly mounted soluble body at 27" (see Figures 1 and 2). There is no indication in D6 that the second portion, similar to the first portion 8, should be flexibly mounted. Even for the sake of argument it is not known how such an embodiment should be designed starting from either D6 or D16 since also these two teachings are not combinable due to their technical incompatibility.

Therefore the subject-matter of claims 1 and 34 of the patent as granted involves inventive step.

Reasons for the Decision

1. *Sufficiency of disclosure (Article 100(b) EPC)*

The Board considers that the skilled person, when reading the entire disclosure of the patent as granted, would understand what is meant by the definition "configured to allow each shaving aid portion to deflect when pressure is applied to a surface of the shaving aid portion **during shaving**" as contained in claims 1 and 34 of the patent as granted and how a razor with the claimed shaving cartridge is to be used.

First of all, the skilled person is well aware that the surface of a razor cartridge is used to shave and would not attempt to use the edge of the cartridge, which would be considered highly unusual. Consequently, it is clear to the skilled person where force will be applied to the surface of the shaving aid portion when using the cartridge of claim 1 during shaving, in order to result in deflection of the shaving aid portions as described in the description. He is taught by paragraph [0015] and the drawings of figures 3D and 3E what is meant by said deflection of the shaving aid portions 31A and 31B. Furthermore, paragraph [0025] of the patent in suit, in the context of the resilient mounting of the shaving aid portions, explains in considerable detail the nature of the hinges 52 and 54 (see figure 4A) which achieve this deflection. Preferably they can be formed of an elastomeric material (i.e. inherently they have elastic property), and have a thickness from about 0.5 to 2.0 mm. Therefore, they are considered to be thin enough to permit deflection in the direction taught by the patent in suit. Considering that the connecting members 56 may

also be made from said elastomeric material (see paragraph [0026]) it is credible that they may also be somewhat deflected.

The first alternative interpretation (see point VIII) is incorrect, as the term "configured" does not apply to the shaving aid portions, but to the holder.

Therefore the appellant's objections under Article 100(b) EPC cannot hold.

2. *Novelty (Article 54 EPC)*

2.1 In its statement of grounds of appeal the appellant has **not** explained why the impugned decision should be set aside with respect to novelty and the documents as discussed in the decision, apart from a discussion with regard to D10, it "maintains the lack-of-novelty arguments based on D8, D14, and D11".

2.2 It is consistent jurisprudence of the Boards of Appeal that simple references to earlier submissions in opposition do not suffice for the purposes of Article 108, third sentence, EPC (see Case Law of the Boards of Appeal, 7th edition 2013, chapter IV.E.2.6.4) in providing the legal and factual reasons (i.e. the substantiated arguments) for setting aside the impugned decision.

The Board might see an exception to this principle, where the decision simply does not take account of any of the arguments of the appellant based on D8/D14 and D11. However, that is not the case since the decision extensively deals with these documents.

- 2.3 Concerning D10 dealt with in the decision and in the statement setting out the grounds of appeal (statement) the appellant's arguments cannot hold, for the following reasons.
- 2.3.1 The embodiment of the wet shaving **assembly** according to figures 10A-10C of D10 does **not** concur with claim 1 requiring a shaving **cartridge** housing and a shaving aid holder mounted on said housing and being configured to allow each of the first and second shaving aid portion to deflect when pressure is applied to a surface of the shaving aid portion during shaving.
- 2.3.2 First of all, the cartridge of D10 has **no** holder on which the shaving aid is placed. When the cartridge housing is the part around the blades then the feature that the "shaving aid holder is mounted on the housing" as required by claim 1 is not fulfilled since in D10 it is the other way round. In fact the base 422 holding the shaving aid is actually housing the shaving cartridge, i.e. would be its housing. Designating the base as mounted on the part around the blades is not in agreement with reality.
- 2.3.3 Secondly, the shaving cake 448 is a single piece which does **not** "allow **each** of the first and second shaving aid portions to **deflect**". The shaving cake of figures 10A-10C is contained in the base 422 in such a way that it cannot "deflect". This is due to the fact that there is actually only a single shaving aid portion which is made in one solid body which therefore can **only be moved axially**, i.e. it can only "undulate" (see D10, column 12, lines 9 to 12) as a whole if pressure is applied during the shaving operation to its top surface 450.

The embodiment of figures 1-7 of D10, with two separate shaving aid portions cannot be relevant in this respect since these portions make no movement during application of pressure and its teaching is not extended to include "undulation".

The Board remarks in this context that the appellant did not present any counter argument at the oral proceedings with respect to the meaning of the term "to deflect". Consequently, its arguments cannot hold.

2.4 Thus the subject-matter of the claims 1 and 34 as granted is novel over the available prior art, in particular over D8, D11, and D14 as decided in the decision under appeal as well as D10, on appeal.

3. *Admission of new objections into the proceedings (Article 12(4) RPBA)*

Concerning the admission of new objections into the appeal proceedings the Board taking account of the course of events in the present case has the following considerations:

3.1 The opposition had been filed against the patent in suit in its entirety under Articles 100(a) EPC, for lack of novelty and inventive step.

3.1.1 The notice of opposition relied on twenty nine documents and contained arguments with respect to lack of novelty over D7, D8, D10, D11 (either alone or with D12 stated to be incorporated by reference), and D14.

3.1.2 The arguments concerning lack of inventive step were based on combinations of D6 with D15, or a combination

of D16 with either D17 or D18, or a combination of D19 with D20 or vice versa.

- 3.1.3 At the oral proceedings before the Opposition Division the opponent considered D8/D14, D10 and D11 (alone) as novelty destroying. The Opposition Division acknowledged novelty of the subject-matter of claims 1 and 34 as granted over these documents.
- 3.1.4 Concerning inventive step the opponent considered D6 as the closest prior art and argued that the teaching of either D6 alone or when taken in combination with D15 or D21 would make the claimed subject-matter obvious to the person skilled in the art while the patent proprietor argued that none of the combinations of teachings brought forward leads to the subject-matter of claims 1 and 34 of the patent as granted. The Opposition Division then came to its conclusion that the subject-matter of the claims 1 and 34 of the patent involves inventive step.
- 3.1.5 The decision under appeal dealt with the following objections:
- a) lack of novelty based only on D7, D8, D10, D11 (alone or with D12 stated to be incorporated by reference) and D14; and
 - b) lack of inventive step based only on D6 alone, or on combinations of the teachings of D6 and D15; or D19 and D20, or D16 with either D17 or D18.
- 3.2 The appellant filed its appeal against the decision of the Opposition Division to reject the opposition and presented in its statement the following substantiated (see point 2.2 above) objections under Article 100(a) EPC:

- 3.2.1 The subject-matter of claim 1 lacks **novelty** with respect to D10, and **D12/D12' now incorporating by reference D11**.
- 3.2.2 The subject-matter of claim 1 lacks **inventive step** over a combination of the teachings of D16 **and D10**, or a combination of D16 and D6, or of **D30 taken alone** or of **D30** in combination with **D17, D18, or D27**.
- 3.2.3 The objections emphasised above therefore represent new objections compared to those of the preceding opposition proceedings.

No lack of novelty objection had been raised in the opposition proceedings on the basis of D12, let alone on the basis of D12' with D11 being incorporated by reference, and no inventive step objections based on D10 or D12/D12' as the closest prior art had been raised in the opposition proceedings.

- 3.3 Taking account of the aforementioned course of events the Board considers that the appellant has **not** made full use of the opportunities available to it in the opposition proceedings and now intends to file objections which it should have filed in opposition, for the reasons below.

The purpose of the *inter partes* appeal procedure is mainly to give the losing party a possibility to challenge the decision of the Opposition Division on its merits and to obtain a judicial ruling on whether the decision of the Opposition Division is correct (G 9/91 and G 10/91, OJ EPO 1993, 408 and 420, respectively). The appeal proceedings are not about bringing an entirely fresh case; rather the decision of

the Board of Appeal will in principle be taken on the basis of the subject of the dispute in the opposition proceedings. The appeal proceedings are thus largely determined by the factual and legal scope of the preceding opposition proceedings and the parties have only limited scope to amend the subject of the dispute in appeal proceedings.

- 3.4 Documents D12' and D30 and arguments based thereon were submitted by the appellant for the first time with the statement.

In principle this could be allowed, if it is e.g. a normal reaction to a late turn of events in the opposition (oral) proceedings, an exceptional interpretation by the Opposition Division at a late stage or in the decision, or an evident non-allowability in view of the newly cited documents and/or objections.

None of these exceptions is, however, applicable in the present case. The objections are such as to confront the Board with further fresh cases, in particular in the present situation of the claims subject of the decision under appeal being the independent **granted** claims 1 and 34, i.e. without any amendments.

The procedural behaviour of the appellant is comparable with the behaviour of a patent proprietor who has not submitted necessary (auxiliary) requests at the opposition stage which in effect prevented the Opposition Division from giving a reasoned decision on their critical issues. In the present case this would compel the Board either to give a first ruling on those issues or to remit the case to the Opposition Division. This is, however, not in line with the nature of the

appeal proceedings, leading the Board to exercise its powers under Article 12(4) RPBA (compare in this context for example the decisions T 1067/08, points 3 and 5.3 of the reasons; T 936/10, point 9 of the reasons; T 1125/10, points 1.2 and 1.3 of the reasons; T 1500/10; T 911/11; T 1400/11, points 2 to 2.2 and 3.2 of the reasons; all not published in OJ EPO).

3.4.1 Therefore, at the oral proceedings it was discussed with both parties whether the new lines of attack concerning lack of novelty (D12/D12' with D11 being incorporated by reference) and inventive step (D16 and D10, D6 alone, D16 and D6, or starting from D30, D10 or D12/D12') should be admitted.

3.4.2 In this context the Board notes that the appellant in the written procedure only gave the reason that the additional search for D30 was carried out "in view of the misleading and incomplete lack-of-inventive step discussion in the contested decision".

The Board cannot establish such a kind of discussion in the impugned decision, nor that at any time in the proceedings there was a discussion on the exchangeability of shaving aids on electric razors with the same on shaving cartridges, or on the skilled person being working in both fields, transferring teachings from one to the other. D30 and the submissions based on it are therefore not admitted.

3.4.3 Concerning the new novelty attack based on D12/D12' the Board considers that the appellant's arguments, presented for the first time at the oral proceedings, cannot hold either. The consequence would be that any document cited in a prior art document on which substantiated submissions were made in the opposition

proceedings (in this case D11) would form part of the file and could be later simply referred to in the (appeal) proceedings. In this respect, the Board takes recourse to the existing jurisprudence on which documents can later form part of the opposition proceedings, see in this context the Case Law of the Boards of Appeal, 7th edition 2013, chapter IV.C.1.5). There, only the document cited as closest prior art in the patent in suit, has a chance of being accepted when filed (or introduced by the Opposition Division or Board of Appeal) later on in the proceedings.

It is clear that D12 nor D12' fulfil that requirement.

Just as importantly, it is neither D12 nor D12' to which reference was made in D11 but only the provisional application US 60/455646 which D11 actually states to be incorporated by reference into its teaching (see page 6, line 8 and page 16, line 25). A copy of US 60/455646 has never been presented by the appellant.

This novelty objection therefore represents a complete new line of attack at the appeal stage without the right supporting evidence. When asked by the Board at the oral proceedings the appellant did not wish to further argue in this context.

The Board therefore decides that all the objections based on D12/D12', and with it the late-filed document D12', are not admitted into the proceedings.

- 3.4.4 Concerning the new inventive step objections based on D16 and D10, D6 on its own, and D16 and D6 the Board, in view of the appellant's arguments, holds that at least in that respect there exists a link to the

impugned decision wherein D16 and D6 have been considered as closest prior art and as starting points for the person skilled in the art (see point 5 of the reasons). D10 is anyway in the proceedings. Therefore its use in an inventive step attack, starting from D16 does not pose problems either. Therefore, in the present case these new lines of attack are admitted.

4. *Inventive step (Article 56 EPC)*

4.1 The Board reviewed the impugned decision on the issue of inventive step.

In that respect, **no** fault can be found with the conclusion of the presence of inventive step as drawn by the Opposition Division in the impugned decision, when starting either from D6 or D16.

4.2 D16 discloses a razor blade assembly which can be used in either of two directions and which contains a fixedly mounted shaving aid 36 in front of and behind the blades which therefore is not deflectable when pressure is applied during shaving (see column 2, line 50 to column 3, line 46; figures 1-2 and 8). Claims 1 and 34 are thus distinguished from D16 by shaving aid portions which each are deflectable when pressure is applied to a surface of these shaving aid portions during shaving.

4.3 The technical effect of the deflection of the shaving aid portions is on the one hand that the razor can be easily used in hard to reach or confined areas, such as the armpit (axilla) or behind the knee. The deflection also prevents premature wear of the shaving aid portion and discomfort to the user in cases where the user applies excessive pressure during shaving (see patent

in suit, paragraphs [0005] and [0015]). Furthermore, as remarked by the Board at the oral proceedings this deflection influences the curvature of upper surface of the razor cartridge (see patent in suit, Figure 3E). This was not disputed by the appellant at the oral proceedings.

4.4 The objective technical problem to be solved is thus defined as the provision of an improved razor cartridge being comfortable to use and allowing to influence the curvature when pressure is applied during shaving.

4.5 This technical problem is solved by the subject-matter of claims 1 and 34 of the patent as granted.

Contrary to the appellant's arguments this solution is not obvious as follows.

4.6 The appellant argued that the person skilled in the art when starting from the teaching of D16 as the closest prior art and combining it with the teaching of D10 or D6 would arrive at the subject-matter claimed. These arguments cannot hold for the following reasons.

4.6.1 The embodiment according to the Figure 10 of D10 (identically to that of Figure 8) has the effect that the shaving preparation 448 is able to "undulate" in an effort to conform better to the shaving surface (see column 12, lines 9 to 12). Therefore the shaving aid cake 448 (or cake 348) is only suitable for making an **axial movement** of the shaving aid during shaving when pressure is applied (see point 2.3.3 above). Therefore, in case that the skilled person were to incorporate the teaching of this axial movement into the razor assembly of D16 with the fixedly mounted shaving aid portions he

would not arrive at the claimed subject-matter, which requires them to be deflectable. Consequently, he would not solve the aforementioned technical problem.

4.6.2 Furthermore, the teaching of the rigid shaving aids on the razor cartridge of D16 is incompatible with that of the shaving assembly of D10. The appellant at the oral proceedings only stated that it could imagine what should be done by the skilled person but has neither shown nor credibly explained how the skilled person could or should apply the shaving aid cake embodiment according to the Figure 10 of D10 into the limited space in the razor cartridge of document D16.

4.6.3 A similar conclusion - incompatible teachings which even when combined would not result in two deflectable shaving aid portions - applies to the combination of the teaching of the razor cartridge D16 with the teaching of the shaving aid 8 of D6. The shaving aid portion 8 in front of the blades is flexibly mounted on the rear wall of the cartridge, opposite the blades via a flat spring 10. How that can be included in the limited space of the razor cartridge of D16 was not further supported by technical arguments.

4.7 Concerning the appellant's arguments based on D6 alone, the Board considers that this document does neither disclose nor suggest that the fixedly mounted second shaving aid 27 after the blades (see figures 1 and 2; column 1, line 66 to column 2, line 36) could be flexible since column 2, lines 43 to 45 refers to a second or "**fixedly mounted**, soluble body at 27". The Board cannot read this as implying that body 27 can also be deflectable, as body 8. There is no further indication in D6 that the second portion, similar to the first portion 8, should be flexibly mounted.

4.8 Taking account of the above the Board therefore considers that the subject-matter of claims 1 and 34 of the patent as granted involves inventive step.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

H. Meinders

Decision electronically authenticated



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Case Number: T 0169/12 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 23 November 2015 correcting an error in the decision
of 20 August 2015

Appellant: Edgewell Personal Care Brands, LLC
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted on 25 November
2011 rejecting the opposition filed against
European patent No. 1812211 pursuant to Article
101(2) EPC.

Composition of the Board:

Chairman H. Meinders
Members: H. Hahn
I. Beckedorf

In the last paragraph of point 3.4 of decision T 0169/12 the references to the decision "T 936/10, point 9 of the reasons" and decision "T 911/11" are erroneous. The first reference should correctly read "**T 936/09**, point 9 of the reasons" while the second one should correctly read "**R 11/11**".

The Registrar:

The Chairman

G. Nachtigall

H. Meinders