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**Datasheet for the decision
of 17 November 2016**

Case Number: T 2097/13 - 3.2.08

Application Number: 07120209.7

Publication Number: 1881229

IPC: F16G1/28

Language of the proceedings: EN

Title of invention:

Toothed belt

Applicant:

DAYCO EUROPE S.r.l.

Headword:

Relevant legal provisions:

EPC Art. 123(2)

Keyword:

Amendments - added subject-matter (yes)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 2097/13 - 3.2.08

D E C I S I O N
of Technical Board of Appeal 3.2.08
of 17 November 2016

Appellant: DAYCO EUROPE S.r.l.
(Applicant) Via Papa Leone XIII, 45
Frazione Scalo
66013 Chieti (IT)

Representative: Bergadano, Mirko
Studio Torta S.p.A.
Via Viotti, 9
10121 Torino (IT)

Decision under appeal: **Decision of the Examining Division of the European Patent Office posted on 14 May 2013 refusing European patent application No. 07120209.7 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairwoman P. Acton
Members: M. Alvazzi Delfrate
D. Rogers

Summary of Facts and Submissions

- I. By its decision posted on 14 May 2013 the examining division refused European patent application No. 07120209.7.
- II. The examining division was of the view that claim 1 on file at the time did not comply with the requirements of Article 123(2) EPC, *inter alia* because it did not comprise the feature that the resistant layer consists of a fluorinated polymer plastic with the addition of elastomeric material.
- III. The appellant (applicant) lodged an appeal against that decision in the prescribed form and within the prescribed time limit. In the statement of grounds, dated 10 September 2013 the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims submitted with said statement of grounds. As a precautionary measure it requested oral proceedings.
- IV. In respect of the omitted feature relating to the composition of the resistant layer the appellant suggested to apply the three point test described in the Guidelines H-V, 3.1. Specifically, in the appellant's view:
 - (a) The omitted feature was not explained as essential in the disclosure.
 - (b) The omitted feature was not indispensable, as shown in the appellant's parallel European patent applications 06832887 and 08832957: the resistant layer worked also with a different composition (sulphur molybdenum or graphite or even no anti-friction agent instead of a fluorurate) and with different quantities (as low as 5% of the elastomer quantity). European

patent Application 08832887 had been granted in view of the identical prior art documents and with similar claims directed to the use in oil.

(c) The removal of the omitted feature did not require real modification: whatever the composition was, a resistant layer assured that the oil did not enter into contact with the fabric and thus solved the technical problem at the base of the invention.

V. In a communication dated 9 June 2016 the Board summoned the appellant to oral proceedings and raised several objections, including an objection under Article 123(2) EPC in respect of the omitted feature concerning the composition of the resistant layer.

VI. The appellant did not file any further argument but, with letter dated 31 October 2016 announced that he would not attend the oral proceedings.

VII. Oral proceedings before the Board of appeal were held in the absence of the duly summoned appellant, in accordance with Rule 115(2) EPC, on 17 November 2016.

VIII. The sole independent claim now on file reads as follows:

"Use in direct contact with oil of a toothed belt (1), said toothed belt comprises a body 2 made of elastomeric material, in which a number of longitudinal filiform resistant inserts 3 are embedded, said body 2 features a first face provided with teeth 4 coated by a coating fabric 5 and a second face or back 6 of the belt, said body 2 comprises as main elastomer, or present in over 50% in weight with respect to other elastomers used in the compound, a copolymer formed from a monomer containing nitrile groups and one diene,

the copolymer used is obtained from monomers containing nitrile groups in a percentage of between 33 and 49% in weight with respect to the final copolymer, said belt is used in a timing control system (11, 21, 31) for a motor vehicle, said timing control system comprising a drive pulley (12, 22, 33) rigidly fixed to the drive shaft and at least a first (12a, 23a, 33a) and a second (12b, 23b, 33b) driven pulley said belt is used in a timing control system (11, 21, 31) for a motor vehicle, said timing control system comprising a drive pulley (12, 22, 33) rigidly fixed to the drive shaft and at least a first (12a, 23a, 33a) and a second (12b, 23b, 33b) driven pulley, wherein the toothed belt comprises a resistant layer 8 positioned on the outside of said fabric 5, said resistant layer 8 furthermore comprises a peroxide as vulcanisation agent and said toothed belt is vulcanisate [sic]".

Reasons for the Decision

1. The application as originally filed comprises claim 1 directed to an oil-resistant toothed belt, claim 19 directed to a timing control system comprising an oil-resistant toothed belt, claim 35 directed to the use of a fluorinated plastomer in a resistant layer of a toothed belt and appended dependent claims 2-18, 20-34. In each of claims 1, 19 and 35 the toothed belt comprises a resistant layer comprising a fluorinated plastomer.

Present claim 1, by contrast, recites the resistant layer of the toothed belt, but is silent as to the presence of fluorinated plastomer in said layer.

2. The question to be considered in assessing the allowability of an amendment in view of the requirements of Article 123(2) EPC is what a skilled person would derive directly and unambiguously, using his common general knowledge at the date of filing, from the description, claims and drawings of a European patent application as originally filed.

3. In the present case the problem addressed by the application as originally filed is to obtain a toothed belt that can be used in contact with oil or even partially immersed in oil without affecting the performance of the belt and maintaining the necessary mechanical characteristics of adhesion, resistance to wear and meshing precision (paragraph [0015] of the A-publication). This problem is solved by the toothed belt of originally filed claim 1 (paragraph [0016]), whose resistant layer comprises, as explained above, a fluorinated plastomer. Indeed, in the description as originally filed the resistant layer has always been disclosed as consisting of a fluorinated polymer plastic with the addition of an elastomeric material (paragraph [0034]). No resistant layer with a different composition has been disclosed, nor has the composition ever been defined as representing only a preferred embodiment of the invention. Thus the application as originally filed does not disclose that other compositions of the resistant layer were also possible or that the fluorinated plastomer was not essential.

The fact that other applications (European Patent applications 06832887 and 08832957) disclosed the use of different compositions is immaterial for the issue of the compliance with the requirements of Article

123(2) EPC, since this matter is to be decided only on the basis of the disclosure of the application as originally filed and the common general knowledge of the person skilled in the art at the date of filing.

Therefore, a skilled person would not have derived directly and unambiguously from the originally filed application that also resistant layers without a fluorinated plastomer were to be contemplated.

4. Hence, it is concluded that claim 1 comprises subject-matter which extends beyond the content of the application as originally filed, contrary to the requirements of Article 123(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairwoman:



C. Moser

P. Acton

Decision electronically authenticated