Internal distribution code:

(A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [X] No distribution

Datasheet for the decision of 27 August 2019

Case Number: T 2320/15 - 3.2.07

Application Number: 07735227.6

Publication Number: 1998939

IPC: B26B21/22, B26B21/56

Language of the proceedings: EN

Title of invention:
RAZORS

Patent Proprietor:
The Gillette Company LLC

Opponent:
Edgewell Personal Care Brands, LLC

Headword:

Relevant legal provisions:
EPC Art. 54, 56, 83, 123(2)
RPBA Art. 13(1), 13(3)

Keyword:
Late-filed argument - admitted (no)
Late-filed document - admitted (no)
Late-filed auxiliary requests - admitted (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 2320/15 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 27 August 2019

Appellant: (Opponent)	Edgewell Personal Care Brands, LLC 1350 Timberlake Manor Parkway Chesterfield, MO 63017 (US)
Representative:	dompatent von Kreisler Selting Werner - Partnerschaft von Patent- und Rechtsanwälten mbB Deichmannhaus am Dom Bahnhofsvorplatz 1 50667 Köln (DE)
Respondent: (Patent Proprietor)	The Gillette Company LLC One Gillette Park Boston, MA 02127 (US)
Representative:	Hoyng Rokh Monegier LLP Rembrandt Tower, 31st Floor Amstelplein 1 1096 HA Amsterdam (NL)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 16 October 2015 rejecting the opposition filed against European patent No. 1998939 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	I. Beckedorf
Members:	A. Pieracci
	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 to reject the opposition against European patent No. 1 998 939.

II. The opposition was filed against the patent as a whole based on Article 100(a) EPC (lack of novelty and inventive step) and Article 100(b) EPC (insufficiency of disclosure).

III. In the statement setting out the grounds of appeal the appellant (opponent) requested:

> that the decision under appeal be set aside and that European patent No. 1 998 939 be revoked.

IV. In the reply to the statement setting out the grounds of appeal the respondent (patent proprietor) requested:

> that the appeal be dismissed,
> or, alternatively, that, when setting aside the decision under appeal, the patent be maintained in amended form according to auxiliary request 1 submitted with a letter dated 6 July 2016.

V. In the present decision reference is made to the following documents:

D8: US 5 426 851 A;
D21: US 3 835 537 A;
D25: Official Communication of the USPTO dated 13 November 2008 concerning the US application 11/391762 (submitted as D22 with a letter dated 29 July 2019).

VI. In order to prepare for the oral proceedings scheduled at the request of both parties, the Board communicated its preliminary assessment of the case to the parties by means of a communication pursuant to Article 15(1) RPBA dated 20 February 2019. The Board indicated that the subject-matter of claim 1 as granted (main request) appeared not to be new over the disclosure of document D8. The Board indicated that the provision of a preliminary opinion on the auxiliary request 1 was not considered appropriate, since the appellant had not taken a position on the matter.

VII. In a letter dated 29 July 2019 the appellant responded to the Board's communication submitting objections to auxiliary request 1 in view of the requirements of Articles 83, 123(2) and 56 EPC.

VIII. In a letter dated 12 August 2019 the respondent contested the objections of the appellant and objected to the admittance of document D25 into the proceedings.

IX. Oral proceedings before the Board took place on 27 August 2019 during which the respondent filed a new auxiliary request 1 and auxiliary requests 2 to 4.

At the end of the oral proceedings the appellant confirmed its initial requests as final, and the respondent, while withdrawing all other requests, requested

that, when setting aside the decision under appeal, the patent be maintained in amended form on the basis of the set of claims filed as auxiliary request 2 during the oral proceedings, which therefore became the respondent's sole request.

For further details of the oral proceedings reference is made to the minutes thereof.

The decision was given at the end of the oral proceedings.

X. The appellant argues that the objections relating to auxiliary request 1 submitted with the reply to the statement setting out the grounds of appeal should be admitted into the proceedings since they are not too complex to deal with. Auxiliary request 2 was not to be admitted into the proceedings as it was filed late.

The respondent argues that the appellant's objections should not to be admitted since they either raise complex issues or are mere allegations.

The arguments of both parties will be discussed in detail in the reasons for the decision.

XI. Claim 1 of auxiliary request 2 reads (amendments to claim 1 of the patent as granted are underlined):

A razor comprising:
a safety razor blade unit comprising a guard (2), a cap (3), and first (11), second (12) and third (13) blades with parallel sharpened edges located between the guard and cap, the blades having first, second and third tip radii, respectively, the razor characterised in that at least two of the three blades having different tip radii, wherein the first blade is closest to the guard and has a tip radius greater than the tip radius of at least one of the second and third blades; wherein the first blade has a tip radius of from 350 (35.0nm) to 450 angstroms (45.0nm), and the second blade has a tip radius of from 235 (23.5nm) to 295 angstroms (29.5nm).

Reasons for the Decision

1. Admittance into the proceedings of auxiliary request 2

Auxiliary request 2 was filed during the oral proceedings following the discussion about the novelty of the subject-matter of claim 1 of the patent as granted over the content of the disclosure of document D8 and of non-admittance into the proceedings of the appellant's late objections to auxiliary request 1 under Articles 56, 83 and 123(2) EPC.

Claim 1 of auxiliary request 2, when compared with claim 1 of the previous auxiliary request 1, submitted with the reply to the statement setting out the grounds of appeal, contains only two minor changes in the added feature (cf. in point XI. above the underlined portion of claim 1) in that it replaces "secondary" with "second" and "(295nm)" with "(295.5nm)".

These amendments are obvious corrections of the unclear term "secondary" and of a clerical error in the dimension "295nm", which had already been identified at the start of the oral proceedings with the respondent's expressed intention to correct them.

Against this background, the Board exercised its discretion under Article 13(1) and (3) RPBA and admitted auxiliary request 2 into the proceedings.

2. Novelty of the subject-matter of claim 1 (Article 54 EPC)

The appellant explicitly acknowledged, during the oral proceedings, the novelty of the subject-matter of claim 1 according to auxiliary request 2.

The Board concurs with the parties that the added combination of features is not shown in document D8, on which the objection to the lack of the novelty of the subject-matter of claim 1 of the patent as granted was based, and that therefore the subject-matter of claim 1 is new within the meaning of Article 54 EPC.

3. Admittance into the proceedings of the objections to claim 1 according to previous auxiliary request 1

The respondent submitted auxiliary request 1 with the reply to the statement setting out the grounds of appeal dated 6 July 2016.

In a letter dated 29 July 2019 the appellant contested the allowability of auxiliary request 1 in view of the requirements of Article 123(2), 83 and 56 EPC.

Since auxiliary request 2, apart from minor corrections, corresponds to previous auxiliary request 1 submitted with the reply to the statement setting out the grounds of appeal, the objections originally raised by the appellant against that request are understood by the Board to also apply to auxiliary request 2. These objections are therefore discussed in the following.

3.1 The appellant argues that, due to an error, it was not aware that it had not reacted to the filing of previous auxiliary request 1 until it considered the Board's

communication pursuant to Article 15(1) RPBA when reviewing the case.

The appellant argues that the criteria for allowing late-filed objections into the proceedings should depend on the complexity of the disputed subject-matter introduced. Since the objections brought forward are not complex and involve only two pages each and considering that the respondent had one month to deal with them, they should be admitted.

The appellant argues, with respect to the insufficiency of disclosure, that this deficiency is much more evident now, that values of the tip radius are in claim 1, than in the opposition proceedings. No new complex issues are raised, according to the appellant, and no expert opinion is necessary. The appellant also argues that document D25 (a communication of the USPTO refusing a family member of the patent in suit because of lack of sufficient disclosure) should have been known to the respondent already, since it is the owner of the refused US patent application.

With respect to added subject-matter the appellant argues that, although the respondent has indicated a passage in the description which supports the amendment made, it is doubtful that the application as originally filed provides an unambiguous disclosure supporting those amendments, in particular since granted claims 2 and 3 veer in a different direction from the present claim 1.

With respect to inventive step the appellant argues that no specific technical effect should be expected for the claimed tip radii, which indeed represent typical values known to the person skilled in the art,

as evident from D21. Furthermore, the appellant contests that the alleged technical effect is achieved over the entire scope of the claim.

3.2 The respondent contests the admittance into the proceedings of the above objections for the following reasons.

The respondent argues that the above allegation of lack of sufficient disclosure was raised in opposition, but was not re-introduced when filing the appeal.

As it is necessary for the respondent to obtain an independent expert opinion in order to deal with such a complex issue, said objection should not be admitted.

The respondent then contests the objection of added subject-matter as being unsubstantiated, since the basis for the amendments have been indicated and are clearly evident, furthermore they have not been clearly contested.

With respect to inventive step the respondent argues that the problem and solution approach has not been used and that a prior art document indicating how to solve the objective problem underlying the invention has not been cited. The appellant's arguments are thus mere allegations.

3.3 The Board cannot follow the arguments of the appellant and substantially concurs with the respondent for the following reasons.

3.3.1 To wait for the preliminary opinion of the Board, and then, instead of reacting promptly, waiting until a month before the oral proceedings to react to an

auxiliary request filed three years before, as the appellant did, is totally contrary to the very animating principle of the Rules of Procedure, namely that in appeal the case of the parties should be complete at a very early stage.

The reasons given by the appellant for the long period without any response to the submission of previous auxiliary request 1, which the respondent had basically substantiated as support in the application as originally filed and novelty and inventive step (cf. pages 9 and 10 of the reply to the statement setting out the grounds of appeal) are not considered a sufficient justification.

The Board considers this course of action inappropriate, since it has prevented the Board and the respondent from timely dealing with the objections of the appellant with regard to the previous auxiliary request 1 and is thus contrary to the principle of procedural economy.

The non-admittance of the late-filed objections by the appellant under Article 13(1) and (3) RPBA would be warranted for this very reason.

3.3.2 Notwithstanding the aforementioned procedural consideration, the Board does not share the view of the appellant that the objections raised should be admitted as being not complex and easy to deal with.

The objection of insufficiency of disclosure raises a new issue which has not yet been dealt with in the appeal proceedings and which would increase the complexity of the matter of the dispute. The fact that an expert opinion is not necessary remains the opinion

of the appellant; the view of the respondent that this might indeed be the case cannot be disregarded, since it is the one faced with the new objection and having to defend itself.
The Board is thus of the opinion that dealing with the objection of insufficiency at this stage would be contrary to the economy of the procedure and might even require an adjournment of the oral proceedings to deal with properly.

The appellant does not indicate why the passage provided by the respondent would not provide support for the amendments made in claim 1, but argues that it is doubtful whether the subject-matter of claim 1 is unambiguously derivable from the original application documents. The objection to added subject-matter is therefore a blank allegation which remains unsubstantiated. Hence, admitting this objection into the proceedings would also be contrary to the principle of procedural economy.

With regard to inventive step, the appellant argues that no specific technical effect is to be expected due to the choice of the tip radii and that, even assuming that the alleged technical effect can be obtained, this cannot be achieved for the entire scope of claim 1. Also these arguments are not convincing since they are not supported by any evidence and are thus mere allegations which remain unsubstantiated. Therefore, admitting the objection to inventive step into the proceedings would likewise be contrary to the principle of procedural economy.

As a consequence, the relevance of any of the appellant's objections is far from obvious, but rather is highly questionable.

3.4 The Board therefore decides to exercise its discretion by not admitting them into the procedure according to Article 13(1) and (3) RPBA. No other objections than those discussed in the preceding paragraphs have been raised by the appellant with regard to auxiliary request 2.

4. Taking into consideration the parties' requests and submissions, the Board finds that the appellant, having acknowledged the novelty of the claimed subject-matter according to auxiliary request 2, has not admissibly submitted any objection that could and would impede the maintenance of the patent as amended by auxiliary request 2.

5. The description as adapted by the respondent during the oral proceedings was not objected to by the appellant, and the Board considers that the adapted version is sufficient to correspond with the amended claims.

Order

For these reasons it is decided that:

1. **The decision under appeal is set aside.**

2. **The case is remitted to the opposition division with the order to maintain the patent as amended in the following version:**

claims

1 to 8 **filed as auxiliary request 2 during the oral proceedings**

description

pages 2 to 4 **filed during the oral proceedings**

drawings

fig. 1 **of the patent specification.**

The Registrar: The Chairman:

G. Nachtigall I. Beckedorf

Decision electronically authenticated