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**Datasheet for the decision
of 5 July 2022**

Case Number: T 1357/19 - 3.2.03

Application Number: 06716779.1

Publication Number: 1861554

IPC: E04B1/82, E04B1/86, G10K11/162,
G10K11/172

Language of the proceedings: EN

Title of invention:
SOUND ABSORBENT

Patent Proprietor:
Deamp AS

Opponent:
Sontech International AB

Headword:

Relevant legal provisions:
EPC Art. 54
RPBA Art. 12(4)

Keyword:

Novelty - main request (no) - auxiliary requests (no)
Late-filed facts - submitted with the statement of grounds of appeal - admitted (no)
Late-filed request - submitted with the statement of grounds of appeal - admitted (no) - request identical to request not admitted in first instance proceedings

Decisions cited:

Catchword:



Beschwerdekammern

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Case Number: T 1357/19 - 3.2.03

D E C I S I O N
of Technical Board of Appeal 3.2.03
of 5 July 2022

Appellant:
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 11 March 2019
revoking European patent No. 1861554 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman C. Herberhold
Members: R. Baltanás y Jorge
E. Kossonakou

Summary of Facts and Submissions

- I. European patent No. EP 1 861 554 relates to a sound absorbent and was opposed on the grounds pursuant to Article 100(a) (together with Articles 54 and 56 EPC), 100(b) and (c) EPC.
- II. The patent proprietor (hereinafter: the "appellant") filed an appeal against the opposition division's decision to revoke the European patent on the grounds of lack of novelty of claim 1 of the main request and of auxiliary requests 1 to 3, as well as not to admit auxiliary requests 1a, 1b, 1c, 2a, 2b, 2c, 3a, 3b and 3c filed on 24 December 2018 and the additional auxiliary request filed during the oral proceedings.
- III. In a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA 2020), the Board set out its preliminary opinion on the case.
- IV. The parties were summoned to oral proceedings scheduled for 29 September 2022.

The opponent (hereinafter: the "respondent") informed the Board by letter dated 8 April 2022 that it would not be attending the oral proceedings.

The appellant informed the Board by letter dated 9 May 2022 that it would not be attending the oral proceedings either.

The oral proceedings were then cancelled and the present decision was issued.

V. Requests

The appellant requested that the decision under appeal be set aside, and that the patent be maintained as granted or in accordance with one of auxiliary requests 1 to 3 discussed in the contested decision, or in accordance with one of auxiliary requests 1a, 1b, 1c, 2a, 2b, 2c, 3a, 3b and 3c filed on 24 December 2018 which were not admitted by the opposition division, or in accordance with the additional auxiliary request filed during the oral proceedings before the opposition division, which was not admitted either.

The respondent requested that the appeal be dismissed, the objection about the public availability of E1 not be admitted, and the auxiliary requests filed on 24 December 2018 and during the oral proceedings before the opposition division not be admitted.

VI. Claim 1 as granted (main request), including the numbering of its features as adopted by the Board, reads as follows:

- M1.1** *Sound absorbent of a hard material,*
- M1.2** *for absorption of acoustic waves by friction of viscous flow, essentially in the frequency range between 100 and 4000 Hz, consisting of:*
- M1.3** *- a panel element (3) having slits (5) there through which are mutually parallel, where the slits (5) have a length L, a width b, and are spaced a distance B from each other as measured from a center line of adjacent slits, and*
- M1.4** *- a rear surface (7) arranged at a distance d from the panel element (3), wherein*
- M1.5** *- the ratio between the Length L and width b is at least 50,*

- M1.6** - the width b is less than 0.4 mm,
- M1.7** - the panel (3) has a thickness t less than 20 mm
- M1.8** characterised in that:
the distance B between adjacent slits (5) is between 5 and 75 mm, and
- M1.9** - the distance d is between 30 and 500 mm.

VII. Claim 1 of the first auxiliary request is identical to claim 1 of the main request, apart from the addition of feature M1.10 at the end of the claim:

- M1.10** , wherein said panel (3) and rear surface (7) define an essentially confined space

VIII. Claim 1 of the second auxiliary request is identical to claim 1 of the first auxiliary request, apart from the addition of feature M1.9' between features M1.9 and M1.10:

- M1.9'** - the slits are manufactured by use of laser, and

IX. Claim 1 of the third auxiliary request is identical to claim 1 of the second auxiliary request, apart from the addition of feature M1.9" between features M1.9 and M1.9':

- M1.9"** - the panel (3) has a perforation level of less than 3%,

X. The series 1a-3c of auxiliary requests filed on 24 December 2018 are respectively based on each of auxiliary requests 1-3, with feature M1.10 having been supplemented with additional features as follows:

For each series, version "a" adds the feature (marked in bold) "essentially **open-sided** confined space", version "b" adds the feature "essentially **open-sided washable** confined space", and version "c" adds the feature "essentially **open-sided high-pressure washable** confined space".

- XI. Claim 1 of the further auxiliary request filed during the oral proceedings in opposition corresponds to claim 1 of auxiliary request 1, with the following amendment in feature M1.2 (emphasis added):

"Sound absorbent of a hard material, for absorption of acoustic waves by friction of viscous flow in a room essentially in the frequency range between ..."

- XII. Prior art

The following document has been cited, both in the statement setting out the grounds of appeal and during the opposition proceedings, and is relevant to this decision:

E1: Brüssau, Michael: "Hochdämmendes schallabsorbierendes Regiefenster", Diplomarbeit im Studiengang Bauphysik der Fachhochschule für Technik (FHT), Stuttgart, October 1994 - January 1995; pages 1-39, images 1-58, tables 1-3 and Annex

- XIII. The appellant's arguments can be summarised as follows:

Public availability of E1

Document E1 was not publicly available before the priority date. The public availability of E1 before the

priority date had not been substantiated by the opponent, and consequently it should not have been regarded as prior art.

Novelty of the main request

Document E1 did not concern reducing sound intensity **within a room** by stopping reflections, but reducing sound intensity transmission between adjacent rooms. Claim 1 was directed to a "sound absorbent" for reducing sound intensity by viscous flow within a room (i.e. by stopping reflections). Therefore, even if the panel of E1 was suitable for stopping sound reflections, it was not disclosed for that purpose. In this respect, E1 was not relevant to novelty.

Novelty of auxiliary request 1

E1 showed a sound dampening plate provided with micro slits and arranged at a distance from a rear surface, the arrangement being framed. In E1, the space between the plate and rear surface of E1 was fully confined, not "essentially confined" as claimed. The interpretation of the statement on page 6 of the published patent application, lines 2 to 4 was wrong, since the wording "essentially confined" should have been taken to mean "partially confined" and the wording "at least defined by..." should have been taken to mean that in some embodiments the space was defined only by the panel element and rear surface, whilst in other embodiments the space was defined by the panel element and rear surface in combination with other components. In this respect, claim 1 of auxiliary request 1 was directed specifically to those embodiments in which the space was defined only by the panel element and rear surface.

Novelty of auxiliary requests 2 and 3

The appellant disagreed with the findings of the opposition division and maintained its "previous arguments in this respect".

Admittance of the auxiliary requests filed on
24 December 2018

The admission of late-filed requests should have been assessed using the "clear allowability" test, i.e. whether it was immediately apparent that the amendments met the requirements of added subject-matter, clarity, convergence and patentability. In particular, none of the additional features were disclosed in E1. Since the requests were clearly allowable, they should have been admitted into the proceedings.

Admittance of the auxiliary request filed during the
oral proceedings

This late-filed request too met the criterion of "clear allowability" and should equally have been admitted by the opposition division.

XIV. The respondent's arguments can be summarised as follows:

Public availability of E1

The patent proprietor only raised the point about public availability of E1 during the oral proceedings before the opposition division, and actively withdrew this objection during the same oral proceedings (cf. minutes, page 3, point 5.4, first sentence).

Consequently, the appellant's objection as to E1's public availability was to be dismissed, since it was late-filed during the opposition proceedings and also actively withdrawn at that same stage.

Novelty of the main request

Claim 1 as granted was not explicitly directed to a sound absorbent for reducing sound intensity by viscous flow **within a room** by stopping reflections. Moreover, the measurements performed in E1 disclosed that a high absorption factor of the "Vorsatzschale" was achieved, corresponding to high damping of reflections.

Novelty of auxiliary request 1

The space of E1 was "essentially confined", since the panel element was provided with slits. The expression "essentially confined" was so broad that it included all sizes of access openings to the space between the panel (element) and the rear surface. The fact that the sound absorbent can be washed did not exclude the presence of a side wall or a frame. Consequently the expression "essentially confined space" included open side walls as well as side frames, since this was what the skilled reader would conclude from the patent as a whole.

Novelty of auxiliary request 2

E1 stated on page 11, first paragraph that the slits were made by use of laser. Consequently, claim 1 in accordance with the second auxiliary request was not novel over E1.

Novelty of auxiliary request 3

E1 disclosed on page 25 that the perforation level is 1.9%, i.e. less than 3%. Consequently, claim 1 of the third auxiliary request lacked novelty over E1.

Admittance of the auxiliary requests filed on
24 December 2018

The opposition division's decision not to allow auxiliary requests 1a, 1b, 1c, 2a, 2b, 2c, 3a, 3b and 3c into the proceedings was to be upheld, since:

- they were filed too late and were not based on granted claims;
- they were presented in a "pick and mix approach";
- the appellant had not provided arguments in support of the claims of these requests in the statement setting out the grounds of appeal.

Admittance of the auxiliary request filed during the
oral proceedings

The opposition division's decision to allow the additional auxiliary request into the proceedings was to be reversed (*sic*, although according to the impugned decision point 32 and the minutes point 12.4 the auxiliary request filed during the oral proceedings was **not** admitted by the opposition division), since:

it was filed during the oral proceedings, and was not based on granted claims, and was thus too late;

it presented a "pick and mix approach", since it added to the first auxiliary request and not the third auxiliary request;

the then-opponent was not allowed by the opposition division to submit any arguments whatsoever during the oral proceedings, this last fact not having been mentioned in the minutes.

Reasons for the Decision

1. The revised RPBA 2020 entered into force on 1 January 2020. Subject to the transitional provisions (Article 25 RPBA 2020), the revised version also applies to appeals pending on the date of entry into force.

In the present case the statement of grounds of appeal was filed before 1 January 2020 and the reply thereto was filed in due time. Thus Article 12(4) to (6) RPBA 2020 does not apply, and instead Article 12(4) RPBA 2007 applies to both the grounds of appeal and the reply (Article 25(2) RPBA 2020).

2. Public availability of E1 - Article 12(4) RPBA 2007

The appellant argued for the first time at the oral proceedings during opposition that document E1 was not publicly available before the priority date, only to withdraw the objection as soon as the chairman remarked that it was late-filed (see points 5.2 to 5.4 of the minutes).

According to Art. 12(4) RPBA 2007 the Board has the power to hold inadmissible facts, evidence or requests

which could have been presented or were not admitted in the first-instance proceedings.

To allow a party to **reintroduce** a request or an objection which not only could have been, but was indeed, presented and then explicitly withdrawn during the first-instance proceedings, thus impeding the opponent from commenting on it and depriving the opposition division of the possibility of deciding on it, goes against the main purpose of appeal proceedings, which is to **review** decisions taken at first instance in a judicial manner (see, by analogy, Case Law of the Boards of Appeal, ninth edition ["Case Law"], V.A.4.11.3.f)).

The Board thus exercises its discretion according to Article 12(4) RPBA 2007 in not taking into account the objection as to the (date of) public availability of E1.

3. Main request - Novelty of claim 1 with regard to E1 - Article 100(a) in conjunction with Article 54 EPC

- 3.1 It is uncontested that E1 discloses features M1.3 to M1.9 of claim 1.

E1 discloses:

A panel element ("Vorsatzschale") having slits (see e.g. page 11, first paragraph) there through which are mutually parallel (see Figure 4), where the slits have a length L, a width b, and are spaced a distance B from each other as measured from a center line of adjacent slits (see Figure 4),

and a rear surface (see Figure 26, "Aufbau F" and "Aufbau G") arranged at a distance d from the panel element (see Figure 26),

wherein the ratio between the length L and width b is at least 50 (see page 11, first paragraph, where a length of 1110 mm and a width of 300 μm , i.e. 0.3 mm, is mentioned),

the width b is less than 0.4 mm ($0.3 \text{ mm} < 0.4 \text{ mm}$),

the panel has a thickness t less than 20 mm (see page 11, first paragraph, where a thickness of 3 mm is disclosed),

the distance B between adjacent slits is between 5 and 75 mm (see page 11, first paragraph, where a distance of 16 mm is disclosed, thus falling within the claimed range),

and the distance d is between 30 and 500 mm (see e.g. Figure 38 corresponding to "Aufbau F" of Figure 26, where a distance of 7.5 cm - i.e. 75 mm - is disclosed).

3.2 Features M1.1 and M1.2

Due to its construction, the panel element of E1 inevitably absorbs acoustic waves by friction of viscous flow, see E1, page 11, point 3.1.1 "Wirkungsweise", explicitly referring to sound absorption ("Schallabsorber") by exactly this effect (point 3.1.1, last sentence: "...vor allem durch viskose Reibung der Luftteilchen aneinander, ..."). The panel absorbs frequencies between 125 and (at least) 3150 Hz (see Figs. 38 and 39 of E1), i.e. falling

within the frequency range claimed. Furthermore, the sound absorbent is made of a hard material (see the materials in the annex of E1 - "Anlage" - and on page 10, last paragraph, where wood, foam and extruded acrylic glass are disclosed).

Consequently, E1 discloses a "sound absorbent of a hard material, for absorption of acoustic waves by friction of viscous flow, essentially in the frequency range between 100 and 4000 Hz" as defined in features M1.1 and M1.2.

The appellant argued that E1 did not concern reducing sound intensity **within a room** by stopping reflections, but reducing sound intensity transmission between adjacent rooms.

Firstly, these features are not part of the claim. Secondly, stopping reflections and thus reducing sound intensity within the room is an inevitable consequence of the structure of the panel element of E1, which is thus suitable for stopping reflections and reducing sound reflections within the room (in this context, see also point 5.3 of E1, first paragraph, or the last three paragraphs of point 6). Nothing more than this is claimed.

- 3.3 Since the use for reducing sound intensity within a room by stopping reflections cannot represent a difference between E1 and the claimed invention, no reason can be ascertained to set aside the conclusions of the opposition division concerning novelty of claim 1 of the main request.

Therefore the Board concludes that the subject-matter of claim 1 is not novel over E1 (Article 54 EPC).

4. Auxiliary request 1 - Novelty of claim 1 with regard to E1

The appellant submitted that E1 showed a space between the plate and rear surface of E1 which was fully confined, not "essentially confined" as claimed. The appellant relied on an interpretation of the statement on page 6 of the published patent application, lines 2 to 4 according to which claim 1 of auxiliary request 1 was directed specifically to those embodiments in which the space was defined only by the panel element and rear surface.

The Board is not persuaded by these arguments.

Firstly, added feature M1.10 (said panel and rear surface define an essentially confined space) does not require interpretation in the light of the description, since it is clear that the claim encompasses embodiments wherein the "essentially confined space" can be defined by the panel and the rear surface alone or in cooperation with other elements.

Furthermore, due to the slits **in the panel** of E1, which partially open the confinement, **the panel** and the rear surface define an "essentially confined space". The Board concurs with the respondent that the expression "essentially confined" is so broad that it encompasses all sizes of access openings to the space between the panel and the rear surface. Since the panel provides the openings which result in the definition of an "essentially confined space" in cooperation with the rear surface, M1.10 is shown in E1 even if the appellant's interpretation were to be accepted.

In view of the above, added feature M1.10 cannot restore the novelty of claim 1 over E1 (Article 54 EPC).

5. Auxiliary request 2 - Novelty of claim 1 with regard to E1

Document E1 discloses that the slits are manufactured by use of laser (page 11, first sentence: "Die Vorsatzschale .. wurde horizontal mit einem Schneide-Laser geschlitzt").

This was not disputed by the appellant.

Consequently, feature M1.9' is also shown in E1, and claim 1 lacks novelty over this document (Article 54 EPC).

6. Auxiliary request 3 - Novelty of claim 1 with regard to E1

The panel according to E1 has a perforation level of 1.9% (page 25, point 5.1, "Kenndaten der bei diesen Untersuchungen benutzten mikroperforiert-geschlitzten Platte", Perforationsgrad Sigma), i.e. below the 3% upper perforation level claimed in added feature M1.9".

This was not contested by the appellant either.

Consequently, the subject-matter of claim 1 of auxiliary request 3 is not novel over E1 (Article 54 EPC).

7. Auxiliary requests filed on 24 December 2018 - Article 12(4) RPBA 2007

Auxiliary requests 1a, 1b, 1c, 2a, 2b, 2c, 3a, 3b and 3c were filed on 24 December 2018, i.e. almost one month after the final date for making written submissions under Rule 116 EPC (29 November 2018).

The opposition division decided not to admit them because they were late-filed and were not a reaction to an unexpected development of the procedure, and because they introduced *prima facie* new problems in connection with Article 123(2) EPC. The new problems were set out in detail in the decision.

The appellant did not provide any arguments as to why the discretionary decision of the opposition division was taken in accordance with the wrong principles, without taking the right principles into account, or in an arbitrary or unreasonable way, thereby exceeding the proper limits of its discretion. In these circumstances the Board sees no reason to overrule the way in which the opposition division exercised its discretion in reaching a decision (see point 30.1. of the decision under appeal), in accordance with well-established case law (see Case Law, V.A.3.5.1.b)).

More specifically, the amended feature "open-sided ... confined space" has no clear and unambiguous basis in the application as filed. Figure 1 is explicitly referred to as "a principle drawing of a sound absorbent" such that the absence of a side confinement cannot be derived from the drawing in a clear and unambiguous manner. Likewise, there is no clear and unambiguous disclosure of a "washable space".

The Board thus holds auxiliary requests 1a, 1b, 1c, 2a, 2b, 2c, 3a, 3b and 3c inadmissible in accordance with Article 12(4) RPBA 2007.

8. Additional auxiliary request filed during the oral proceedings before the opposition division - Article 12(4) RPBA 2007

An additional auxiliary request was filed during the oral proceedings before the opposition division.

The opposition division decided **not** to admit this additional auxiliary request since - *prima facie* - it rendered claim 1 unclear and did not solve the novelty objection with regard to E1.

As in the case of the auxiliary requests filed on 24 December 2018, the appellant did not provide any arguments as to why the discretionary decision of the opposition division was taken in accordance with the wrong principles, without taking the right principles into account, or in an arbitrary or unreasonable way, thereby exceeding the proper limits of its discretion. In particular the *prima facie* assessment that the amendment cannot establish novelty is correct. As discussed in points 3.2 and 3.3. above, stopping reflections and thus reducing sound intensity **within the room** is an inevitable consequence of the structure of the panel element of E1.

Consequently, the Board does not take the additional auxiliary request into consideration in its discretion in accordance with Article 12(4) RPBA 2007.

9. In the absence of an allowable request, the patent cannot be maintained.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



C. Spira

C. Herberhold

Decision electronically authenticated