

Internal distribution code:

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

**Datasheet for the decision
of 12 December 2023**

Case Number: T 0194/20 - 3.2.06

Application Number: 13844406.2

Publication Number: 2874512

IPC: A42B3/08, A42B3/14

Language of the proceedings: EN

Title of invention:
HELMET RETENTION SYSTEM

Patent Proprietor:
Team Wendy, LLC

Opponent:
ABG Intellectual Property Law, S.L.

Headword:

Relevant legal provisions:
EPC Art. 100(c), 123(2), 111(1)
RPBA 2020 Art. 11

Keyword:

Grounds for opposition - added subject-matter (yes)
Amendments - extension beyond the content of the application
as filed (yes)

Decisions cited:

Catchword:



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 0194/20 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 12 December 2023

Appellant: ABG Intellectual Property Law, S.L.
(Opponent) Avenida de Burgos, 16D
Edificio Euomor
28036 Madrid (ES)

Respondent: Team Wendy, LLC
(Patent Proprietor) 17000 Saint Clair Avenue Building 1
Cleveland OH 44110 (US)

Representative: Forresters IP LLP
Skygarden
Erika-Mann-Straße 11
80636 München (DE)

Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 26 November 2019 rejecting the opposition filed against European patent No. 2874512 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: T. Rosenblatt
J. Hoppe

Summary of Facts and Submissions

- I. The appellant (opponent) filed an appeal against the decision of the opposition division rejecting the opposition against European patent No. 2 874 512 (hereinafter "the patent").
- II. With its reply to the appellant's statement of grounds of appeal the respondent submitted arguments and a set of amended claims as a first auxiliary request.
- III. The Board issued a summons to oral proceedings.
- IV. With the letter dated 26 January 2023 the appellant announced its intention not to attend the oral proceedings.
- V. In a subsequent communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA 2020), the Board informed the parties that the opposition ground pursuant to Article 100(c) EPC appeared to prejudice maintenance of the patent. In regard to the respondent's first auxiliary request the Board noted that no substantiation had been provided so that discussion concerning its admittance into the proceedings could be required (Articles 12(3), (5) RPBA 2020).
- VI. Oral proceedings before the Board were held on 12 December 2023 in the absence of the appellant.
- VII. The appellant (opponent) requested in writing that the decision under appeal be set aside and the European patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed (main request) or as an auxiliary measure, to remit the case to the opposition division if the Board admitted auxiliary request 1 into the proceedings for further prosecution or that the patent be maintained in amended form based on auxiliary request 1, filed on 10 July 2019.

VIII. Claim 1 of the patent has the following wording (bold feature numbering in square brackets added by the Board):

"A helmet (200), comprising:
a helmet shell (210);
a retention system (100, 220) attached to the helmet shell (210),
the retention system (220) comprising a rear portion (102, 222) connected to the rear (104) of the helmet shell (210) such that the rear portion (102) is moveable relative to the helmet shell (210),
a pair of side straps (230) extending from the rear portion (222) to right and left temple portions of the helmet shell (210),
a pair of securing members (120, 420) attached to the right and left temple portions of the helmet shell (210), and an adjustment device (114, 232) attached to the rear portion (102) and configured to selectively adjust the length of each of the pair of side straps (230) between the rear portion (102) and the right and left temple portions of the helmet shell (210);
a chin portion (224) configured to receive the chin of a person wearing the helmet (200);
a pair of first chin straps (226) extending from the chin portion (224) to the rear portion (222), wherein the length of each first chin strap (226) between the

chin portion (224) and the rear portion (222) is selectively adjustable; and
a pair of second chin straps (228) extending from the chin portion (224) to right and left temple portions of the helmet shell (210), wherein the length of each second chin strap (228) between the chin portion (224) and the temple portions of the helmet (200) is selectively adjustable;

[**F1**] wherein each of the pair of side straps (230) comprises a strap segment (110, 450, 452) extending from the rear portion (102), and an elongated member (112, 240) movably attached to the strap segment (110) and extending from the adjustment device (114) to one of the securing members (120); and
wherein the securing members (120) movably attach the elongated members (112) to the temple portions of the helmet shell (210); and
wherein the adjustment device (114) is configured to selectively adjust the elongated members (112) to move the strap segments (110) relative to the helmet shell (210) and adjust the length of each of the pair of side straps (230) between the rear portion (102) and the temple portions of the helmet shell (210) by changing a distance between the ends of the strap segments (110) and the securing members (120); and
wherein at least a portion of the pair of side straps (230) are tightened against the right and left sides of the user's head and the rear portion (222) is pulled forward and upward against the rear of the user's head when the elongated members of the side straps (230) are retracted into the adjustment device (232)."

Claim 1 of the first auxiliary request includes the following amendment (highlighting in bold text and bold feature numbering in square brackets added by the Board):

"[F1] wherein each of the pair of side straps (230) comprises a strap segment (110, 450, 452) extending from the rear portion (102), and an elongated member (112, 240) movably attached to the strap segment (110) and extending from **the strap segment (110), through one of the pair of securing members (120, 420) of the helmet, through an attachment portion (122) of the strap segment (110), and to** the adjustment device (114);"

IX. The arguments of the appellant may be summarised as follows:

Main request - Article 100(c) EPC

The feature specifying "an elongated member (112, 240) movably attached to the strap segment (110) and extending from the adjustment device (114) to one of the securing members (120)" had been added to original claim 1. Before the grant of the patent, paragraphs 19 to 22 of the description together with figure 1 were given as a basis for this amendment. However, the specific embodiment disclosed in these paragraphs comprised further features, namely that "the elongated member extends from the strap segment, through a securing member of the helmet, through an attachment portion of the strap segment" which have been omitted, leading to an unallowable intermediate generalisation. The opposition division was moreover wrong to conclude the added feature to be directly and unambiguously derivable from originally filed claims 1, 2 and 4, because claim 4 specified also an additional attachment portion which had been omitted, leading again to a generalisation.

- X. The arguments of the respondent may be summarised as follows:

Main request - Article 100(c) EPC

In the written proceedings, the respondent essentially endorsed the view of the opposition division. The respondent also submitted that the part of the appellant's objection directed to the generalisation of the features deriving from original claim 4 constituted an amendment to its case. No reasons had been given as to why this objection was only submitted at the appeal stage. This argument should thus not have been admitted into the proceedings.

In the oral proceedings before the Board, the respondent relied exclusively on originally filed claims 1 and 2 and the information derived by the skilled person from the drawings as a basis for the contested amendment. The respondent argued in particular that the attachment portion mentioned in originally filed claim 4 was not defined in claims 1 and 2, and thus did not constitute an essential feature. It was clear to the skilled person that the elongated member must extend from the adjustment since otherwise no function would be provided by these components. Therefore the elongated member and the adjustment device must be connected. It was however irrelevant whether some further component was in-between the elongated member and the adjustment device, i.e. whether the elongated member was directly or indirectly attached or connected to the adjustment device in order to be considered as extending from the latter.

First auxiliary request - Remittal

If the Board admitted this request into the proceedings the case should be remitted to the opposition division for thorough consideration of its compatibility with the requirement of Article 123(2) EPC, in particular taking into account that the appellant had not raised any objection to this request.

First auxiliary request - Article 123(2) EPC

The basis and purpose of the amendment to claim 1 was self-explanatory - no further explanation was thus required to substantiate this request - since the amendment corresponded precisely to the wording taken from paragraph 20 of the application as filed and previously considered by the appellant to be missing. The appellant had not argued that any other feature mentioned in paragraphs 19 to 22 was missing. The general part of the disclosure in the application, notably paragraph 4 thereof as well as paragraph 18, made clear that there was no requirement to define the elongated member as being flexible. This property was not essential to the invention and was also not inextricably linked to the presence of an attachment portion.

Reasons for the Decision

Main request - Article 100(c) EPC

1. Contrary to the conclusions reached by the opposition division in the impugned decision, the Board finds that the subject-matter of claim 1 of the patent as granted extends beyond the content of the application as filed. The opposition ground pursuant to Article 100(c) EPC thus prejudices maintenance of the patent.
 - 1.1 In the following, when referring to the application as filed, reference is made to the published international application, WO-A-2014/055722, underlying the patent in suit.
 - 1.2 The feature "an elongated member [...] extending from the adjustment device to one of the securing members" specified in feature [F1] of granted claim 1 (see above point VIII.) can neither be derived directly and unambiguously from the combination of originally filed claims 1, 2 and 4 (as considered by the opposition division) nor from only originally filed claims 1 and 2 in combination with the drawings (as alternatively argued by the respondent).
 - 1.2.1 Claims 1, 2 and 4 of the application as filed read as follows (feature numbering in square brackets added by the Board):

"1. A helmet, comprising:

[M1] a helmet shell; and

[M2] a retention system attached to the helmet shell, the retention system comprising

[M2.1] a rear portion connected to the rear of the helmet shell,

[M2.2] at least one strap extending from the rear portion to a front portion of the helmet shell, and

[M2.3] an adjustment device attached to the rear portion and configured to selectively adjust the length of the strap between the rear portion and the front portion of the helmet shell;

[M2.2.1] wherein the strap comprises a strap segment extending from the rear portion and

[M2.2.2] an elongated member attached to the strap segment and movable relative to the helmet shell; and

[M2.3.1] wherein the adjustment device is configured to selectively adjust the elongated member to move the strap segment relative to the helmet shell and adjust the length of the strap between the rear portion and the front portion of the helmet shell."

"2. The helmet of claim 1, wherein the retention system comprises [M2.4] a securing member attached to the front portion of the helmet shell that movably attaches the elongated member to the helmet shell."

"4. The helmet of claim 2, wherein the strap segment comprises [M2.2.1.1] an attachment portion that movably attaches the elongated member to the strap segment."

1.2.2 According to claims 1 and 2 of the application as filed, the following structure and function is disclosed for the elongated member

- it is attached to a strap segment and movable relative to the helmet shell (claim 1, feature M2.2.2)
- it is selectively adjustable by the adjustment device to move the strap segment (to which it is attached) relative to the helmet shell (claim 1, feature M2.3.1)
- it is movably attached to the front portion (of the helmet shell) by a securing member (claim 2, M2.4).

1.2.3 By the above listed three features M2.2.2, M2.3.1 and M2.4 taken in combination from claims 1 and 2, it is not explicitly specified or directly derivable that the elongated member extends from the adjustment device to a securing member.

1.2.4 The respondent's argument, as well as the reasoning given by the opposition division, the latter however being based additionally on claim 4, are based on the assumption of an implicit disclosure, i.e. that the extension of the elongated member in particular from the adjustment device was a direct, inevitable and logical consequence of the features of claims 1 and 2 (and 4), taking into account also the drawings. However, the Board cannot concur for the following reasons.

The expression "elongated member [...] extending from the adjustment device" in granted claim 1 can only be understood by the skilled person to mean that the elongated member extends directly from the attachment device. Contrary to a term like "connecting", in

respect of which it is frequently argued whether it covers only direct connections or also indirect connections, via an intermediate component, the expression "extending from" would not be understood by the skilled person in the present case to also cover an indirect extension, via any intermediate component between the adjustment device and the elongated member. An elongated member extending - in the sense understood by the skilled person ("directly") - from the adjustment device, as defined by granted claim 1, is however not the necessary and unavoidable consequence of the features specified by claims 1, 2 (and 4). Contrary to the respondent's argument, the Board cannot see, when considering originally filed claims 1 and 2, that the skilled person would exclude the use of an intermediate component between elongated member and the adjustment device, such that this cannot be the basis for the amendment now in the claim. In particular, there is no apparent technical reason which would exclude the use of an intermediate component, for example in the form of an elastic member to balance tension forces, between the elongated member and the adjustment device. The functions defined in original claims 1 and 2 would in no way be impaired by the presence of such additional member.

The Board thus concludes that the feature "an elongated member [...] extending from the adjustment device to one of the securing members" added in feature F1 of granted claim 1 is not directly and unambiguously derivable from claims 1 and 2 of the application as filed.

Although the respondent did not rely anymore on the combination of claims 1, 2 and 4 of the application as filed, the Board notes that the relevant feature is

also not directly and unambiguously derivable from claim 4 of the application as filed for corresponding reasons as set out before, i.e. also the subject-matter of originally filed claim 4 does not directly and unambiguously lead to the conclusion that the elongated member extends from the adjustment device.

The respondent's general reference to the drawings, informing the skilled person allegedly on the extension of the elongated member from the adjustment device, does not alter the Board's conclusion. The drawings disclose many other features linked to the structure and function of the elongated member and the adjustment device, so that such general reference does not allow the added feature to be directly and unambiguously derived in the claimed generality.

- 1.3 Since the respondent did not rely anymore on claim 4 of the application as filed as a basis for the challenged amendment, the question whether the appellant's arguments submitted in the statement of grounds of appeal comprised an unsubstantiated amendment to its case that should not be admitted into the proceedings under Article 12(4) RPBA 2020, did not require a decision. In its communication pursuant to Article 15(1) RPBA 2020, the Board indicated that this line of argument anyway presented merely a development of the case that the appellant-opponent had already made, noting that during the oral proceedings before the opposition division, the respondent-proprietor (seemingly for the first time) chose to rely on claims 1, 2 and 4 as the basis for the challenged amendment. The respondent also did not submit any further comments on this issue.

2. Since the opposition ground pursuant to Article 100(c) EPC prejudices maintenance of the patent, the respondent's main request cannot be allowed.

First auxiliary request - Remittal

3. According to Article 111(1) EPC, the Board may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution. It is clear from this provision that it is up to the Board of Appeal to decide in which form it exercises its competence.
4. Article 11 RPBA 2020 further stipulates that the Board shall not remit a case to the department whose decision was appealed for further prosecution, unless special reasons present themselves for doing so. As a rule, fundamental deficiencies which are apparent in the proceedings before that department constitute such special reasons.
 - 4.1 Fundamental deficiencies in the proceedings before the opposition division are not apparent and have not been alleged to have occurred by the respondent.
 - 4.2 The Board also cannot see special reasons which would justify remittal. The lack of any specific objection under Article 123(2) EPC of the appellant against amended claim 1 of the first auxiliary request and the late stage in the appeal proceedings for a thorough discussion on added subject-matter are no such reasons. Although the appellant had indeed not raised any specific objection under Article 123(2) EPC to this request, it is noted that the appellant did nevertheless object (see pages 3 and 4 of the grounds

of appeal and page 4 of the notice of opposition) to the amendment in the main request being an intermediate generalisation of the embodiment described in paragraphs [0019] to [0022] of the application as filed. Further, the Board should anyway at least be satisfied that the outstanding objection is overcome by the proposed amendment before remitting the case for further prosecution, not least when considering the specific paragraphs cited by the appellant. Also, these passages of the application as filed, which require consideration in this framework, have essentially remained the same throughout the entire proceedings before the Board, so that no fresh case has arisen, even if it might be argued that the Board had questioned *ex-officio* the disclosure of the amended subject-matter specifically in the auxiliary request on the basis of these passages. There is, furthermore, no right of a party to have every single aspect in regard to the issue of added subject-matter decided at two instances.

5. The Board consequently decided not to remit the case to the opposition division.

First auxiliary request - Article 123(2) EPC

6. Irrespective of the question of admittance of the first (and only) auxiliary request into the proceedings, the subject-matter of claim 1 of this request anyway does not meet the requirement of Article 123(2) EPC.

- 6.1 The wording added to claim 1 of the first auxiliary request in feature F1' (see above point VIII.), namely "an elongated member (112, 240) movably attached to the strap segment (110) and extending from **the strap segment (110), through one of the pair of securing**

members (120, 420) of the helmet, through an attachment portion (122) of the strap segment (110), and to the adjustment device (114)" has been derived from the second sentence in paragraph 20 of the application as filed.

6.2 The added wording, despite corresponding to the wording which the appellant specifically considered to have been omitted when original claim 1 had been amended prior to the grant of the patent, is extracted from the description of a specific embodiment disclosed in paragraphs 19 to 22 and illustrated in Figure 1 of the application as filed. In the description of this embodiment, starting in paragraph 19, the elongated member is specifically disclosed as being flexible (see for example the first sentence of paragraph 20). This property of the elongated member is not described as being optional in regard to this specific embodiment. Amended claim 1, however, also covers variants in which the elongated member could be rigid, which is not disclosed in relation to the specific embodiment of Figure 1, described in paragraphs 19 to 22. A rigid elongated member in that embodiment would also simply not work without further substantial modification of the remaining features. The omission of the feature "flexible" when amending claim 1 according to the first auxiliary request thus results in subject-matter which extends beyond the content of the application as filed, contrary to the requirement of Article 123(2) EPC.

6.3 The respondent's arguments in support of the omission of the feature "flexible" are unconvincing. Paragraph 4 of the application as filed, referred to by the respondent in this context, corresponds essentially to the wording of original claim 1 and does not refer to the specific features added to granted and amended

claim 1 which, as acknowledged by the respondent, are derived from the passage of paragraph 20, at least as far as the challenged and amended feature is concerned. The absence of the term "flexible" in paragraph 4 does, therefore, not allow the conclusion to be reached that the elongated member in the specific embodiment relied upon for the amendment is optional. Also the disclosure in paragraph 18 does not alter the Board's conclusion. This paragraph does not explicitly mention the elongated member. Directed to the adjustment of the length of the straps of the retention system between two points, it however makes reference *inter alia* to strap segments and lacing attached to the strap segment. Lacing is furthermore mentioned in the first sentence of paragraph 20 as one option embodying a flexible elongated member. Paragraph 18 therefore rather confirms the Board's previous conclusion.

That the flexibility of the elongated member is not inextricably linked to the attachment portion now specified in amended claim 1 is not relevant. The extension of the elongated member from the adjustment device is not disclosed in the claims as originally filed (see above). This feature can only be understood to be disclosed in the context of the specific embodiment of Figure 1 described in paragraphs 19 to 22. Furthermore, in this embodiment it is considered to be linked inextricably to the flexibility of the elongated member.

7. Since amended claim 1 does not meet the requirement of Article 123(2) EPC, the patent cannot be maintained in the amended form according to the first auxiliary request either.

8. Absent any set of claims which would meet the requirements of the EPC, the request of the appellant to revoke the patent is to be followed (Article 101(3) (b) EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated