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**Datasheet for the decision
of 17 September 2009**

Case Number: T 1645/07 - 3.2.02

Application Number: 98944498.9

Publication Number: 1017330

IPC: A61C 7/08

Language of the proceedings: EN

Title of invention:

An appliance adapted to fit many mouth and tooth sizes for orthodontic correction and other uses

Applicant:

Ortho-Tain Inc.

Headword:

-

Relevant legal provisions:

EPC Art. 52(1), 123(2)

Relevant legal provisions (EPC 1973):

EPC Art. 54(1)(2), 84

Keyword:

"Novelty yes (after amendment)"
"Clarity yes (after amendment)"
"New subject-matter (no)"

Decisions cited:

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Catchword:

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Case Number: T 1645/07 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 17 September 2009

Appellant: Ortho-Tain Inc.
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 9 March 2007
refusing European patent application
No. 98944498.9 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: M. Noel
Members: S. Chowdhury
A. Pignatelli

Summary of Facts and Submissions

I. This appeal is against the decision of the examining division dated 9 March 2007 to refuse European patent application No. 98 944 498.9.

The application was refused on the grounds that the multiple independent claims then on file lacked conciseness, the claims were unclear, claim 1 was objectionable under Article 123 (2) EPC, and the subject-matter of claim 1 lacked novelty having regard to D1 (GB-A-2 279 876).

II. On 7 May 2007 the appellant lodged an appeal against the decision and paid the prescribed fee on the same day. On 9 July 2007 a statement of grounds of appeal was filed.

III. The appellant requests that appeal be allowed, based on claims 1-31 filed on 28 August 2009 as the main request, and the case be remitted to the examining division with an order to allow the application to proceed to acceptance.

IV. Claim 1 of the main request reads as follows:

"An orthodontic appliance (10, 100, 110, 210) comprising:
a labial-buccal flange (12) having a generally U-shaped configuration and a generally smooth inner labial surface (26, 34);
a lingual flange (14) also having a generally U-shaped configuration and generally smooth inner lingual surfaces (28, 36) being spaced from the inner labial

surface (26, 34) of the labial-buccal flange (12); an isthmus (16) interconnecting the labial-buccal flange (12) and the lingual flange (14) wherein the isthmus (16) has an upper isthmus surface (30) and a lower isthmus surface (38) wherein the lower isthmus surface is positioned opposite to the upper isthmus surface; a tooth receiving trough (32, 40) defined adjacent the isthmus (16) between the inner labial surfaces (26, 34) and the inner lingual surface (28, 36) for receiving at least one of an upper row of teeth or a lower row of teeth wherein the tooth receiving trough (32, 40) in an incisor area (17) has a width which narrows toward the isthmus (16) and the tooth receiving trough (32, 40) does not have sockets; and one or more lingual extensions (46) that protrude from the lingual flange (14) wherein the lingual extensions (46) have a portion adjacent to the lingual flange (14) and a portion farthest from the lingual flange (14) wherein the portion adjacent to the lingual flange (14) is wider than the portion farthest from the lingual flange (14)".

Claims 2 to 31 are dependent claims.

Reasons for the Decision

1. The appeal is admissible.
2. Article 84 EPC 1973

The decision under appeal stated that the claims were not concise and the expressions "sized to act as a sole means for retaining the orthodontic appliance in a mouth of an individual" and "sufficient to apply pressure against incisors of an individual as said incisors erupt" in claim 1 were unclear.

A single independent claim is now on file, and the above expressions are no longer used in claim 1, so that the examining division's objection under Article 84 EPC 1973 to claim 1 has been met.

3. Article 123 (2) EPC

As compared with original claim 1 present claim 1 includes the feature: "the isthmus (16) has an upper isthmus surface (30) and a lower isthmus surface (38) wherein the lower isthmus surface is positioned opposite to the upper isthmus surface", which feature is supported by Figure 3, for example.

Present claim 1 also includes the feature: "one or more lingual extensions (46) that protrude from the lingual flange (14) wherein the lingual extensions (46) have a portion adjacent to the lingual flange (14) and a portion farthest from the lingual flange (14) wherein the portion adjacent to the lingual flange (14) is wider than the portion farthest from the lingual flange

(14)". This feature is supported by original claim 27 and Figure 1.

In addition, present claim 1 includes the new feature: "the tooth receiving trough does not have sockets". This feature is adequately supported by the application as originally filed, for example on page 8, lines 17 to 22 of WO99/09908.

For these reasons claim 1 is free from objection under Article 123 (2) EPC.

4. Novelty

D1 discloses an orthodontic appliance comprising a labial-buccal flange and a lingual flange, each having a generally U-shaped configuration and a generally smooth inner surface, an isthmus interconnecting the labial-buccal flange and the lingual flange, and a tooth receiving trough defined adjacent the isthmus between the inner labial surfaces and the inner lingual surface for receiving at least one of an upper row of teeth or a lower row of teeth, wherein the tooth receiving trough in an incisor area has a width which narrows toward the isthmus.

An essential feature of D1 is that the tooth receiving trough includes tooth-receiving depressions for receiving a person's teeth. Each embodiment of D1 includes this feature and all the independent claims also define it as an essential feature.

In contrast thereto, claim 1 of the present application requires the trough to be free of such depressions

(sockets). For this reason, at least, the appliance of claim 1 is novel.

5. Further examination

As stated above, claim 1 is free from objection under Articles 84 Article 123 (2) EPC and its subject-matter is novel.

The examining division refused the application, inter alia, on the basis that claim 1 then on file failed to define new subject-matter, but no examination as to the inventive step requirement of Article 52 (1) EPC was undertaken.

For this reason, the Board cannot yet order that the application proceed to grant. Instead, the case is remitted to the department of the first examination for resumption of the examination procedure.

Order

For these reasons, it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar

The Chairman

D. Sauter

M. Noel