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**Datasheet for the decision
of 3 April 2012**

Case Number: T 1416/10 - 3.2.06

Application Number: 03257739.7

Publication Number: 1428924

IPC: D06F37/30

Language of the proceedings: EN

Title of invention:

Drum type washing machine

Applicant:

LG Electronics, Inc.

Opponent:

Daewoo Electronics Corporation

Relevant legal provisions:

EPC 1973 Art. 87(1)

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

RPBA Art. 13(1), Art. 13(3)

Keyword:

Priority (not valid for first claimed priority)

Prior use - availability to the public

Novelty (no)

Auxiliary request (not admitted)

Decisions cited:

T 2043/07, T 1464/05



Case Number: T1416/10 - 3.2.06

D E C I S I O N
of the Technical Board of Appeal 3.2.06
of 3 April 2012

Appellant:
(Patent Proprietor)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted 22 April 2010
revoking European patent No. 1428924 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman: M. Harrison
Members: T. Rosenblatt
R. Menapace

Summary of Facts and Submissions

I. European patent no. 1 428 924 is based on European patent application no. 03 257 739, filed on 9 December 2003, which claims priority from the two earlier Korean applications:

P1: KR 2002078337 of 10 December 2002, and

P2: KR 2003086841 of 2 December 2003.

II. Claim 1 of the European patent as granted is worded as follows:

*"A drum type washing machine comprising:
a tub (2) of plastic having a wall for holding washing water therein and mounting a driving part thereon;
a drum (3) rotatably arranged inside of the tub;
a shaft (4) passed through the tub and connected to the drum for transmission of a driving power from a motor to the drum;
at least one bearing for supporting the shaft;
a rotor (5) engaged to a rear end part of the shaft;
a bearing housing having a bearing supporting part (7a) formed as a sleeve and a stator fastening part (7b) wherein the stator fastening part extends in a radial direction outwardly from the bearing supporting part (7a) with stator fastening holes formed in an exposed part of the stator fastening part,
and a stator (14) mounted on the stator fastening part of the bearing housing with fastening members on an inner side of the rotor to form the motor together with the rotor;
the stator fastening part (7b) is unitary with the bearing supporting part (7a);
characterized in that:*

the bearing supporting part (7a) and stator fastening part (7b) are inserted in the tub rear wall, and the tub and the bearing housing are formed as one unit."

III. With its decision of 22 April 2010, the opposition division revoked the European patent. The opposition division considered that at least the first priority P1 was invalidly claimed because the first feature in the characterising portion of the granted independent claim was not disclosed in this earlier application. As a consequence, the subject-matter of claim 1 was then considered to lack novelty with respect to the public prior use of a washing machine manufactured and sold by the patent proprietor under model number WD-R100C. Among the evidence referred to by the opponent in support of the alleged public prior use, i.e.

A1: printout of LG web page concerning advertising of washing machine model WD-R100C in Korean newspapers,
A2: printout from Internet shopping platform Naver,
A3: printout from Internet site "Wedding 119",
A4 and A5: newspaper advertisements dated 4 October 2003 in two Korean newspapers,
A6: a report on a price survey conducted from 6 to 10 October 2003, for certain consumer products, among them washing machines with the product code WD-R100C, published on the internet site of the "Korea National Council of Consumer Organizations",
A7: printout from LG Customer Service web page,
A8: printout from Internet shopping platform "My Magin MM.co.kr",

Appendix B: a set of photographs documenting the dismantling of one such washing machine bearing a label with a manufacturing month of October 2003,

and

C: a statutory declaration by Su-Hiang Kang concerning the disassembly of the washing machine of appendix B,

the opposition division relied in its decision in particular on Appendices A6 and B.

- IV. The patent proprietor (appellant) filed an appeal against this decision. With the statement of the grounds of appeal the appellant submitted:

Appendix A: a document containing a partial English translation and an exploded view of an internal document of the proprietor pertaining to design changes made to a particular model of washing machine.

- V. In a communication under Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA), the Board stated its preliminary opinion that the impugned decision should be upheld.

- VI. In response to the Board's communication, the appellant filed a submission on 20 March 2012 including two sets of amended claims as first and second auxiliary requests.

- VII. With its submission dated 19 March 2012, the respondent (opponent) filed:

All: a translation into English of some passages from a decision of the Korean Intellectual Property Tribunal, dated 23 April 2008, concerning Korean patent 651980, based on the Korean application referred to as P2 in item I above.

VIII. In the oral proceedings held before the Board of Appeal on 3 April 2012, the appellant also filed:

A12: a copy, in Korean only, of the entire decision of which A11 was an extract.

IX. The appellant requested that the decision under appeal be set aside and that the patent be maintained as granted or, as an auxiliary request, on the basis of the set of 3 claims filed during the oral proceedings.

The respondent requested that the appeal be dismissed.

X. The wording of claim 1 of the sole auxiliary request filed during the oral proceedings is a combination of granted claims 1, 2 and 7 and differs from that of claim 1 as granted in that its entire characterising portion, following the statement "*part (7b) is unitary with the bearing supporting part (7a);*" is replaced by:

"the bearing supporting part (7a) and stator fastening part (7b) are inserted in the tub rear wall, and the tub and the bearing housing are formed as one unit. [sic] characterized in that:

the stator (14) includes;

an annular helical type core (HC) having multiple layers formed by winding a steel plate having tooth portions (151) and a base part (150) in a helix starting from a bottom layer to a top layer, an insulator (144) having the helical type core encapsulated therein,

a coil (142) wound on the tooth portions, and fastening parts (143) formed as a unit with the insulator, having fastening holes projected toward an inside of the helical type core for fastening the stator to the bearing housing. [sic] and

wherein the fastening hole in the fastening part has a metal tube press fit therein."

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

- a) The priority claim to P1 was valid, because the skilled person, equipped with common general knowledge would have found in P1 the first feature of the characterising portion of granted claim 1. The technical drawings in Figures 3 and 4 of P1 disclosed that the features denoted by reference signs 58, 66 and 70 were individual elements which were combined with each other. The pairs of double parallel and equally thick lines under reference sign 66 in the cross-sectional view shown in Figure 3 indicated that the corresponding fastening hole was a tubular element and not a threaded blind hole within a plastic surround. The hatching of the bearing supporting part 70 meant that this was an individual part and the hatching representing the thin plate in the cross-sectional view of Figure 3 indicated again an element separate from element 58. Consequently, P1 disclosed the insertion into the tub rear wall of the bearing supporting part and the stator fastening part by integrating them together with the remaining parts of the tub rear wall, as also expressed in the third paragraph of page 8 of P1.

- b) The prior use had not been established according to the correct standard of proof which was "up to the hilt". In particular, no evidence of a purchase date prior to 2 December 2003 had been provided for the washing machine WD-R100C dismantled by the opponent. The month of

manufacture of this particular machine (October 2003) did not necessarily mean that it had been publicly available prior to the relevant date, since it may have remained in stock for several months. Documents A1 to A8 merely related to the retail prices and showed uncertainties over the release date of the product WD-R100C. They did not provide evidence as to when products under this model number were actually publicly available. The assumption that the washing machine model WD-R100C referred to in A6 was standing in retail outlets and was therefor publicly available before the effective date of the claim was unfounded. Merely obtaining a retail price from a shop did not mean that at the same moment the product was present and available for purchase in the shop; prices were frequently communicated for products only arriving in the shop some time later. Furthermore, there was no evidence that the machines referred in A1 to A8 were identical to the machine dismantled by the opponent. The assumption that machines with a particular model number were identical to machines with the same number but which had been purchased later, was not correct (see also T 2043/07 and T 1464/05), since the skilled person was aware that changes were often made to the internal construction of a manufactured item without changing its model number. Appendix A documented such design changes in a particular model of a washing machine. This was also true in the case of the washing machine with the serial number WD-R100C, where the photographs on page 33 of A12 showed that in the dismantled washing machine which was the subject of the Korean court case, the stator was different to the stator of Appendix B.

- c) The auxiliary request was filed as a reaction to the position which the Board expressed during the oral proceedings on the first and second auxiliary requests filed in preparation for the oral proceedings. The auxiliary request was based on the combination of granted claims 1, 2 and 7 and thereby overcame the objections under Article 123(2) EPC against the former auxiliary requests. The subject-matter of this request did not differ substantially from that of the former requests which could not have been filed before it became clear to the appellant from the communication sent to the parties in preparation for the oral proceedings, that the Board was not inclined to follow the appellant's arguments. Therefore the request should be admitted into the proceedings.

XII. The respondent's arguments may be summarised as follows:

- a) The cross-sectional view shown in Figure 3 of P1 was not consistent with the view shown in Figure 4 thereof. From the description of P1 and the fact that the hatching in Figure 3 was continuous over the relevant parts of 58 and 70, it was clear that the tub and bearing supporting part in Figure 3 constituted a unitary element and not separate parts.
- b) The evidence submitted before the opposition division, in particular A6 and Appendix B, showed that a washing machine with model number WD-R100C was publicly available before the effective priority date of the patent. This was confirmed by the decision of the Korean Intellectual Property

Tribunal (A11) according to which the appellant had agreed that the washing machine WD-R100C had been publicly available prior to 2 December 2003, and there were no circumstances in the present case which might alter these already agreed facts. The dismantled machine of Appendix B, indicated a manufacturing month of October 2003. Washing machines were usually not produced and stored for a long time as this served no useful purpose. As to possible design changes, Appendix A did not show any such change. Also, had a change occurred in the WD-R100C machine, it should have been possible for the appellant to demonstrate that during the relevant time period the product underwent changes that could be relevant for the claims under consideration.

- c) The auxiliary request submitted during the oral proceedings should not be admitted because it introduced new aspects which had not been addressed before.

Reasons for the Decision

Main request

1. Priority

According to Article 87(1)(b) EPC 1973 the right of priority may be claimed only in respect of the same invention. Following the opinion of the Enlarged Board of Appeal in G2/98 (OJ 2001, 413), the requirement of "the same invention" means that the skilled person can derive the subject-matter of the claim in question directly and unambiguously, using common general knowledge, from the previous application as a whole.

In the present case determining whether the same invention is disclosed in P1 involves determining whether or not it is directly and unambiguously derivable from P1 that the bearing supporting part and the stator fastening part, which according to the preamble of claim 1 of the patent in suit have to be unitary with each other, are also "inserted in" the tub rear wall.

- 1.1 As admitted by the appellant, the expression "inserted in" in claim 1 implies that the bearing housing comprising the stator fastening part which is unitary with the bearing supporting part, on the one hand, and the tub rear wall, on the other hand, are two separate elements. In, for example, the preferred embodiments of the patent in suit, the tub rear wall is injection molded around the bearing housing (see [0032] or [0109]).

- 1.2 It is also undisputed that the Korean application P1 does not explicitly disclose the expression "inserted in". At several locations in the (uncontested) English translation of P1 it is stated that the bearing housing 70, corresponding to the bearing supporting part of claim 1 of the patent in suit, and the tub rear wall, are formed as an integrated part (e.g. page 8, lines 14-16 "bearing housing... is formed integrating with the tub rear wall"). This is however not a direct and unambiguous disclosure for the more specific expression "inserted in" used in claim 1 of the patent in suit. "Inserted in" and "integrated" are not synonymous expressions and the description of the patent in suit does not employ them interchangeably either.

Nor do Figures 3 and 4 directly and unambiguously disclose the contested feature. The hatching in Figure 3 running continuously from the bearing housing 70, extending through the "thin plate", as referred to by the appellant and which, in the Board's view, can only be considered as the tub rear wall, to the tub side wall 59, would be understood by the skilled person such that the tub side wall 59, tub rear wall and the bearing housing 70, are formed as a unitary integrated element of continuous material. This is also consistent with the passage on page 8 of the translated description.

Consequently, Figures 3 and 4, taken alone or in combination with the description, do not clearly and unambiguously disclose the first feature in the characterising portion of claim 1 of the patent in suit.

For the subject-matter of claim 1 of the patent, the (first) priority of P1 cannot therefore be validly claimed.

1.3 The appellant's arguments on this matter were not found convincing for the following reasons:

Figures 3 and 4 cannot be considered as correct technical drawings, contrary to what was argued by the appellant. Rather, they are schematic drawings which are not drawn according to accepted principles and norms for technical drawings. In addition, they show several inconsistencies.

For example, if, as submitted by the appellant, the diametrical cut through the tub rear wall depicted in Figure 4 corresponds to the cross-sectional view of the

tub rear wall shown in Figure 3, then, in this latter Figure the unhatched area, delimited by the contour line 58 and the radially extending hatched double line, should either be hatched, indicating a cut through a solid tub rear wall in the elevated segments in Figure 4, or, in case the tub rear wall thickness of the elevated segments in Figure 4 would be the same as in the interposed lower segments, the contour line just mentioned should have been drawn as a double line with hatching inbetween. The unhatched area could also be understood as a front view on the radially extending faces linking together the elevated and lower segments of the tub rear wall seen in Figure 4. Consequently, the area delimited by contour line 58 is at best unclear as is the relation to the elements shown in that area, as for example the fastening holes 66.

If, again as submitted by the appellant, Figure 3 suggested for the fastening holes 66 some form of tubular elements, then, depending on the meaning given to the above discussed delimited area, holes 66 could either be considered as embedded in the rear wall or as freely standing up from it or from some other element. In Figure 4 it cannot be seen whether these fastening holes comprise tubular elements or whether there are blind holes in the elevated segments of the tub rear wall. Also the translated description does not clarify how the fastening holes 66 are designed.

- 1.4 The issue of the validity of the priority claim in regard to P2 need not be pursued further for deciding the present case, as no relevant state of the art falling into the period between the date of priority of P2 and the filing date of the European patent application underlying the patent in suit has been cited.

1.5 The relevant date for the purpose of Article 54(2) EPC in the present decision may therefore be considered as the priority date of P2, i.e. 2 December 2003.

2. Public prior use

2.1 Admissibility of A11 and A12 into the proceedings

The filing of both documents constitutes an amendment to the respective parties' cases which may be admitted at the Board's discretion under Article 13 of the Rules of Procedure of the Boards of Appeal (RPBA). With respect to A11, the appellant did not object to its introduction as long as A12 was also admitted. In regard to A12, the appellant referred exclusively to the photos attached to the judgment. Since the documents did not raise complex issues and since at least A11 was highly relevant, the documents were admitted into the proceedings.

2.2 What has been made available, when and under which circumstances?

2.2.1 It was not disputed by the appellant that the washing machine with the model number WD-R100C dismantled by the respondent as documented by the set of photographs of Appendix B comprises all features of claim 1 of the patent as granted.

2.2.2 It was also not disputed that this dismantled machine was manufactured in October 2003 as may be seen from the printed label on several of these photographs. There is however no evidence on file as to when and under what circumstances this particular dismantled machine was made available to the public. The Board

considers it nevertheless improbable that this washing machine would have have been stored for at least one month by the manufacturer before being delivered to a commercial distributor only after the relevant date, taking into account that machines of this model were already commercially available at that time, as will be shown below.

- 2.2.3 Document A6 is a report on a price survey for a number of consumer products conducted by the Korean National Council of Consumer Organisations. Amongst the products covered by it is the washing machine WD-R100C. According to this report the survey was conducted from 6 to 10 October 2003 to provide consumers with the exact price information for a rational decision in their purchase. It was carried out in a number of department stores located in Seoul, i.e. on the street (pages 1/2 of the translation of A6 list several shopping centres/malls, department stores etc.). Based on this (again uncontested) evidence and in view of the fact that it is indeed the purpose of a department store to have the real product in its showroom in order to allow potential buyers to get a direct impression of the product compared to that from e.g. a catalogue or an internet shopping site, the Board cannot conclude that the same washing machines WD-R100C were delivered to these distributors and were physically standing at least in some of these places for an unconditional sale to the public only at a later point in time. Absent any indication to the contrary, it is hardly conceivable that a survey, such as in A6, conducted by a consumer organisation and intended to assist consumers by demonstrating the price variations amongst specific distributors would select products which were not (yet) available on the market.

Consequently, it has to be concluded that washing machines with model number WD-R100C have been available for public sale with the distributors reported in A6 in the survey period, 6 to 10 October 2003, and thereby available within the meaning of Article 54(2) EPC to the public before the relevant date, that is 2 December 2003.

A11 confirms the conclusions drawn from A6. It contains the following statement made by the deciding body (text in square brackets added by the Board): *...it is acknowledged that the company of the defendant [the appellant in the present case] had manufactured and sold the drum-type washing machine of model name "WD-R100C" before the filing date (December 2, 2003) of the patented invention of the subject case, and there is no dispute between the two parties regarding the subject issue.* Accordingly, the appellant in the present case agreed before the Korean Intellectual Property Tribunal that washing machines with model name WD-R100C were publicly available prior to the second priority date of the patent. The appellant did not contest this statement.

Also the remaining evidence in A1 to A5, A7 and A8, which shows indeed some inconsistencies with respect to "release dates", is not suitable to cast doubt on the conclusions drawn from A6 and confirmed by A11. It appears even that, as far as A1 to A5, A7 and A8 indicate dates of delivery or release ("coming out"), these dates lie clearly before the relevant date of the patent in suit, e.g. A7, a printout from the appellant's Customer Service web page, reports a "Coming-out date" of 11 August 2003. The appellant as the manufacturer of the product constituting the prior

use should have been able to provide convincing evidence for a later release, had this been the case.

The evidence therefore shows beyond any reasonable doubt that washing machines with the model number WD-R100C, were publicly available prior to the relevant date of the patent in suit.

- 2.2.4 The Board accepts that products already on the market may be subject to design changes while keeping their model name or number. In the absence of any evidence to the contrary, the Board is however convinced that within the short period of interest, set by the manufacturing date of the dismantled washing machine in October 2003, the period in which the survey in A6 was conducted, 6 to 10 October 2003, and the relevant date of the patent in suit, 2 December 2003, a design change of the structure of the washing machine with model number WD-R100C in regard to the features defined in claim 1 of the patent in suit, which notably relate to the connection between the drive unit and the tub and hence concern a major structural element of the washing machine design, is excluded beyond all reasonable doubt.

Appendices A and A12 submitted by the appellant to support the allegation of design changes are not suitable to cast doubt on the assumption of an unmodified structure of the machines referred to in A6 and A11 and disclosed in the photographs B. The appellant did not establish a clear link between the content of Appendix A and the relevant features of a washing machine, let alone to features concerning the particular structures and alleged changes in the assembly of motor parts, shaft bearing and tub of the model WD-R100C. The modification pointed out by the

appellant in the photographs of A12 (photos 22 and 23 on page 33) concern only the type of stator core used in the washing machine with model number WD-R100C, which has no impact at all on the mounting design of the stator to the tub rear wall. Indeed, as can be seen from the remaining photographs in A12 (see in particular photos 6 to 18 on pages 30 to 31), the assembly of the drive unit and the tub rear wall is in no way affected by any modification compared to the machine in Appendix B.

If it were the case, as argued by the appellant, that in the short period before the relevant date of the patent a washing machine with the same model number but different assembly of drive unit and tub rear wall was on the market and that the machine shown in Appendix B was not already on the market, which would go completely against normal practice, the appellant as the manufacturer of such product should have clearly been in the position to provide evidence for it. The appellant however provided no evidence to this effect.

In other words, there is no evidence on file which casts doubt on the fact that the machines WD-R100C referred to in A6 or A11 and the one of Appendix B were identical with respect to the features of claim 1.

- 2.2.5 As regards the decision T 2043/07 referred to by the appellant, the Board notes that the facts underlying that decision are different from those of the present case, and further that in that case, as stated by the appellant with regard to the applicable standard of proof, "*it was immaterial which test was to be applied*" and, last but not least, that the appellant (proprietor) in the present case is not adversely

affected by the application of the stricter standard of proof "beyond reasonable doubt".

In T 1464/05, also cited by the appellant, the Board concluded that *although subsequent modifications of the composition cannot be excluded ..., there is no indication that the modifications would have been sufficiently significant to affect the present conclusions*" (Reasons 5.3.1). A similar conclusion was reached by the Board in the present case (see 2.2.4 above), in that no modification of (relevant) features of washing machines with the same model number ("WD-R100C") during the critical period could be established.

2.2.6 In summary, although for the specific washing machine dismantled by the opponent (Appendix B) there is no proof on file that it was indeed available to the public prior to the relevant date of the patent in suit, notwithstanding that it is already highly unlikely that this specific machine manufactured in October 2003 remained with the manufacturer more than one month before being delivered for sale to a distributor, the evidence submitted by the opponent allows to conclude beyond any reasonable doubt that washing machines with the model number WD-R100C, being identical in structure with respect to the features defined in granted claim 1 to those disclosed in Appendix B, were publicly available prior to the relevant date of the patent in suit.

2.3 The public prior use relating to a washing machine with model number WD-R100C as established on the basis of Appendices A6, A11 and B thus forms part of the state of the art according to Article 54(2) EPC.

3. Novelty

Since it was not contested by the appellant that the washing machine with model number WD-R100C constituting the established public prior use, as exemplified in Appendix B, comprises all features of claim 1 of the patent in suit and since the Board finds no reason to conclude otherwise, the subject-matter of claim 1 lacks novelty (Article 54(1) EPC) and the appellant's main request is therefore not allowable.

Auxiliary request

4. Admissibility

4.1 According to Article 13(1) RPBA, any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion. The discretion shall be exercised in view of *inter alia* the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy. Furthermore, according to Article 13(3) RPBA, amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the Board or the other party cannot reasonably be expected to deal with without adjournment of the oral proceedings.

4.2 In the present case the appellant submitted the auxiliary request during the oral proceedings, i.e. at the latest possible stage. Claim 1 according to this request is based on a combination of granted claims 1, 2 and 7. Compared to claim 1 of the main request, the subject-matter has been further limited to define the stator and its specific features. The details of the stator had not been relevant to the assessment of

novelty up to that point in the proceedings. Admittance of the request would thus have resulted in an entirely fresh case requiring the Board and the respondent to address issues which had not been addressed before, such as the evaluation of the differences of the now claimed subject-matter with respect to the available state of the art and the corresponding technical effects. For example, it would have been necessary to discuss and consider whether the feature that the stator core is made of helically wound layers and the feature that the fastening hole in the fastening part has a metal tube press fit therein relate to a single or different technical problem(s). These issues are far too complex to be dealt with for the first time at that very late stage in the procedure without adjournment of the oral proceedings (Articles 13(1) and (3) RPBA).

The auxiliary request was consequently not admitted into the proceedings.

- 4.3 The appellant's reasons for the late filing are not considered persuasive as regards the admissibility of the request. That the subject-matter in substance remained the same as that addressed by at least one of the auxiliary requests submitted in writing in preparation for the oral proceedings and that this former and the present auxiliary requests were filed in response to the opinions given by the Board respectively in its communication and in the oral proceeding are not convincing arguments for admitting the late filed requests in the present case. At the latest upon receipt of the impugned decision, the appellant was fully aware of the reasons for which the patent was revoked and that there was a considerable risk that the patent may remain finally revoked for lack of novelty in view of the prior use. A party

cannot reasonably rely on an assumption that the Board will definitely follow its line of argument and only submit amendments to overcome the pending objections once the Board communicates a preliminary opinion to the contrary. Therefore the appellant should have prepared fallback positions to overcome the novelty objection in the form of auxiliary requests at the latest already when filing the statement of the grounds of appeal.

Nor does the argument that the communication between client and representative was difficult have an impact on the exercise of the Board's discretion in the present case. No particular circumstances have been advanced by the appellant and the Board cannot see any reason how such difficulties could have prevented the filing of an auxiliary request consisting of the combination of granted claims earlier.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. Patin

M. Harrison

Decision electronically authenticated