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**Datasheet for the decision
of 11 June 2013**

Case Number: T 0714/12 - 3.2.06

Application Number: 04796862.3

Publication Number: 1681958

IPC: A46B15/00, A46B13/02

Language of the proceedings: EN

Title of invention:

TOOTHBRUSH WITH ENHANCED CLEANING EFFECTS

Patent Proprietor:

Colgate-Palmolive Company

Opponent:

Braun GmbH

Headword:

Relevant legal provisions:

EPC 1973 Art. 100(c)

EPC Art. 123(2)

Keyword:

Grounds for opposition - added subject-matter (yes)

Amendments - added subject-matter (yes)

Decisions cited:

Catchword:



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Chambres de recours**

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Case Number: T 0714/12 - 3.2.06

**D E C I S I O N
of Technical Board of Appeal 3.2.06
of 11 June 2013**

Appellant: Colgate-Palmolive Company
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 27 January 2012
revoking European patent No. 1681958 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman: K. Garnett
Members: T. Rosenblatt
G. de Crignis

Summary of Facts and Submissions

I. By its decision dated 27 January 2012 the opposition division revoked the European patent No. 1 681 958 because the subject-matter of claim 1 as granted and of the amended claim 1 according to auxiliary requests 1 to 5 was in each case considered to extend beyond the content of the application as filed.

II. Claim 1 of the patent as granted reads as follows:

"A powered toothbrush comprising a handle (1), a cleaning head (3) attached to said handle (11) and having a first end adjacent the handle and a free end, a power source (25), a motor (15), a mechanical vibratory device (10) which causes the cleaning head (3) to vibrate, characterized in that said cleaning head (3) includes a first cleaning/treating element (618) adjacent the first end that is non-movable relative to the first end, a second cleaning/treating element (618) adjacent the free end that is non-movable relative to the free end, and a plurality of third cleaning/treating elements (626) disposed between the first and second cleaning/treating elements (618), wherein each of said plurality of third cleaning/treating elements (626) extends from a support structure having at least a portion (622,624) that is movable relative to the cleaning head (3), and wherein each of said plurality of third cleaning/treating elements (626) is movable independent of any other third cleaning/treating element (626), wherein said second cleaning/treating element (618) includes a tuft that follows at least a portion of a contour of the free end of the cleaning head (3).

The feature

"wherein each of said plurality of third cleaning/treating elements (626) is movable independent of any other third cleaning/treating element (626)"

is referred to in the following as feature "F" and the feature

"wherein said second cleaning/treating element (618) includes a tuft that follows at least a portion of a contour of the free end of the cleaning head (3)"

as feature "G". The combination of the features in the preamble with those of the characterising portion of claim 1 will be referred as feature "H".

- III. Besides other amendments in claim 1 of auxiliary requests 1 to 5, which are nevertheless irrelevant to the present decision, feature "G" has been amended in all these requests to read (amendments highlighted by the Board):

"wherein the distal free end is curved and said second cleaning/treating element (618) includes a tuft having a curved distal side to follow at least a portion of a curved contour of the distal free end of the cleaning head (3)".

- IV. In the following all references to the application as filed are to the international publication pamphlet WO-A-2005/041713 of the corresponding international application underlying the European patent in suit.

- V. The appellant (patent proprietor) filed an appeal against the decision of the opposition division on 27 March 2012 and simultaneously paid the appeal fee. With the letter dated 30 May 2012 the grounds of appeal

were filed together with six sets of claims according to a main request and auxiliary requests 1 to 5, corresponding to those underlying the impugned decision.

- VI. In a communication in preparation for the oral proceedings the Board informed the parties that it preliminarily considered that claim 1 of all requests contained subject-matter extending beyond the content of the application as filed.
- VII. Oral proceedings were held on 11 June 2013, at the end of which the Board announced its decision.
- VIII. The appellant requested that the decision be set aside and the patent be maintained as granted, alternatively on the basis of one of the first to fifth auxiliary requests filed with the statement of grounds of appeal date 30 May 2012.
- IX. The respondent (opponent) requested that the appeal be dismissed.
- X. The arguments of the appellant, as far as relevant to the present decision, may be summarised as follows.
 - a) *With respect to feature "F"*: Claim 1 defined, in singular form, a first and a second cleaning/treating element at respective locations of the cleaning head. Each cleaning/treating element had consequently to be understood as referring to an entire element at a respective location, such as the elements 618 in Figure 8, rather than, for example, to individual bristle strands in a bristle tuft. Claim 3 explicitly defined the cleaning/treating elements as bristle tufts. The

skilled person would consistently have construed the wording of claim 1 in the sense that also each of the plurality of third cleaning/treating elements was an entire element at a respective different location on the cleaning head of the toothbrush. Since the third cleaning/treating elements extended from the support structure, the skilled person would consequently have understood that each of the plurality of third cleaning/treating elements extended from a respective different support structure at different locations. There was no difference between a support structure, as defined in the claim, and a pod as recited in the description on page 8 and in relation to the embodiment of Figures 6 to 9. The passage on page 8, lines 1-3, of the published application disclosed that the movement of the groups of cleaning/treating elements was independent relative to the toothbrush head and to each other. Figures 6 to 9, in combination with the description of the structure of this embodiment on page 15, disclosed that the central group of cleaning/treating elements moved independently from each other. Claim 1, and in particular feature "F", when properly construed by the skilled person, was therefore directly and unambiguously derivable from the application as filed.

- b) *With respect to feature "G"*: Figure 6 disclosed at the free end of the cleaning head a bundle or tuft of bristle strands identified by reference sign 618. The identical element could be seen in Figure 8 with reference number 818. At page 15, lines 13 to 17, it was disclosed that the cleaning/treating elements 618 and 818 may be bristle strands. For

the skilled person the terms "bristle strands" and "tuft" had an identical meaning. From Figure 8 the skilled person would have directly and unambiguously derived that the element 818, being a tuft, followed the curved contour of the free distal end of the cleaning head.

- c) *With respect to feature "H"*: Original claims 1 and 16 recited a toothbrush with a mechanical vibratory device and hence defined implicitly a powered toothbrush. Their respective dependent claims 12 and 22 to 24 defined furthermore those features of the cleaning head which corresponded to the features disclosed in regard to the embodiments of Figures 6 to 11. Consequently claims 12 and 22 to 24 related to a powered toothbrush with the particular features of a cleaning head disclosed in Figures 6 to 11.

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

- a) *With respect to feature "F"*:
The appellant's interpretation of the wording of claim 1 was irrelevant, since according to the description the cleaning/treating elements could also be individual bristle strands, see for example page 15, line 15 and lines 2/3. This was also confirmed by Figures 6 to 9 illustrating a plurality of cleaning/treating elements on each pod, so that a pod could not be equated with a cleaning/treating element. Claim 3 was of no help either, since this claim was introduced during the examination proceedings and had no basis in the application as filed. The passage starting on page 7, line 29 to page 8, line 9 did not disclose

independent movement of one cleaning/treating element of the first central group relative to one other cleaning/treating element of the same first group, rather it stated that the first central group could move independently relative to the toothbrush head and to a different second group of cleaning/treating elements. It further appeared that the statements on page 8, lines 1-9 did not relate at all to the embodiment of Figures 6 to 9, rather they corresponded to the embodiment shown in Figure 13. Even if this passage were to be read in the light of the embodiment of Figures 6 to 9 (see also page 14, line 25 to page 15, line 12), then still an independent movement, as defined by feature "F", was disclosed only in combination with the features of this specific embodiment and there was no direct and unambiguous disclosure of this feature in a manner which would allow it to be taken in isolation from the other features of this embodiment.

b) *With respect to feature "G":*

The patentee had acknowledged that feature "G" had no basis in the description as filed. Figure 8 also did not provide a proper basis for it because the skilled person had no reason to believe that this feature is actually a technical feature of the invention (see T 906/97 as summarised in the Case Law of the Boards of Appeal). Moreover, it could not even be derived from the figure that the second cleaning/treating element included a tuft having a contour that followed the contour of the free end of the cleaning head since the spacing between the element's contour and that of the free end was not consistent, both contours defining

different shapes.

c) *With respect to feature "H":*

The fact that the originally filed independent claims defined a mechanical vibratory device was not sufficient to conclude that the embodiment in Figures 6 to 9 also concerned a powered toothbrush. The description of the application referred in relation to the invention (at several instances) to manual and to powered toothbrushes. The description with regard to Figures 6 to 9 did not refer to any part indicating a powered toothbrush but referred only to a general toothbrush. Comparing the form of the handle shown in these Figures with that of the handles of the toothbrushes shown for example in Figures 1 or 12, which were explicitly disclosed as powered toothbrushes, the skilled person would have concluded that the embodiments in Figures 6 to 9 related to a manual rather than a powered toothbrush.

Reasons for the Decision

1. The appeal is admissible but is not allowable for the reasons given below.

Main request

2. In the impugned decision the opposition division correctly concluded that the subject-matter of claim 1 of the patent as granted extended beyond the content of the application as filed, so that the ground of opposition under Article 100(c) EPC 1973 prejudices the maintenance of the European patent.

- 2.1 It is acknowledged by the appellant that neither the wording of the preamble nor that of the characterising portion of granted claim 1 is explicitly stated in any of the originally filed claims. For the present decision it may be left open whether the controversial feature "H", concerning the combination of the specific features of a powered toothbrush as defined in the preamble of granted claim 1 with those of the specific cleaning head according to its characterising portion, is directly and unambiguously derivable from the application as filed because the Board finds that at least the features "F" and "G" defined in the characterising portion of claim 1 are not.
- 2.2 The appellant indicated as a basis for the features in the characterising portion the originally filed claims 12, 16 and 22 to 24, in combination with the passage of the description from page 7, line 29 to page 8, line 9, and the passage describing the embodiments of Figures 6 to 11, starting on page 14, line 23.
- 2.3 In relation to feature "F", the appellant argued that the skilled person would have construed the expression "cleaning/treating element" in claim 1 consistently as referring to an entire element, such as a tuft of bristles, and not as referring to individual bristle strands, so that it would be clear that each of the plurality of third "entire" cleaning/treating elements would be located on a different (portion of the) support structure. Feature "F" therefore implicitly defined that the respective support structures or portions thereof carried each one "entire" cleaning/treating element of the third plurality and that the support structures would be independently movable from each other, excluding an independent movability of

individual cleaning/treating elements on the support structure at a given location.

The Board cannot accept this limited construction of the claim. The use of the singular form employed with respect to the first and second "cleaning/treating element" 618 with regard to their presence at the respective locations of the two opposing ends of the cleaning head, as well as the alleged identity of the cleaning/treating elements 618 and 818 in Figures 6 and 8, does not exclude the provision of a plurality of first and second cleaning/treating elements at the respective ends of the cleaning head. The description as originally filed discloses on page 14, lines 30/31 that "at least one and preferably a plurality of cleaning/treating elements 618, 818" are included in separate cleaning areas of the head, which cleaning areas correspond to the two ends of the head defined in the claim. An equivalent statement with respect to cleaning/treating elements mounted on flexible pods, corresponding in claim 1 to the third group of cleaning/treating elements extending from the support structure, is found on page 15, lines 2/3. In several other passages of the original description it is stated that the cleaning/treating elements can be bristle strands or (fibre) bristles (note the plural forms; see for example page 15, lines 15, 27/28). The skilled person would therefore understand that a single cleaning/treating element may be a single bristle strand and is not necessarily constituted by an entire bristle tuft. By the statement on page 17, lines 3 to 11, the skilled person is furthermore taught that the term "cleaning/treating elements" is intended to be used in a generic sense, indicating some further examples of cleaning/treating elements. The description of the patent as granted still comprises these

statements, see for example column 11, lines 7/8 and 15 to 17. The term "cleaning/treating element" in claim 1 cannot therefore be understood as referring exclusively to an entire tuft of bristles. Granted dependent claims 3 and 4 do not allow for a different conclusion, since they clearly define only a preferred embodiment of the subject-matter of the broader independent claim. Claim 1 therefore has to be understood so as to cover embodiments in which several of the plurality of third cleaning/treating elements extend at a given location from the support structure, which support structure has at least a portion that is movable relative to the cleaning head and in which, according to feature "F", these cleaning/treating elements at that given location are movable independently of each other in addition to said portion of the support structure being movable relative to the cleaning head.

- 2.4 The only explicit or literal disclosure of an "independent movability" in the entire application as filed is found on page 8, line 1. The passage starting from there reads: *"This overall cleaning is accomplished, for example, by independent movement of at least two groups of cleaning/treating elements relative to the tooth brush head and each other. The first group is a central grouping or "island" of cleaning/treating elements flexibly mounted to the toothbrush head. The second group is preferably fixedly mounted to the toothbrush head in a configuration surrounding at least part of the central grouping..."*. Notwithstanding the fact that this described arrangement of two groups of cleaning/treating elements on the cleaning head does not unambiguously appear to be linked to the specific embodiment of the toothbrush disclosed in Figures 6 to 9 or to the subject-matter defined in originally filed claims 12, 16 and 22-24,

but appears to relate rather to a different embodiment disclosed with respect to Figure 13, this passage only discloses that two groups of cleaning/treating elements are independently movable relative to each other (and to the head). Since groups of cleaning/treating elements are referred to, the skilled person would understand that each group comprises a plurality of cleaning/treating elements. The first group of cleaning/treating elements is flexibly mounted to the toothbrush head, whereas the second group is fixedly mounted to the head. With respect to a relative movement of the individual cleaning/treating elements within this first (or second) group the skilled person cannot derive anything from this passage, let alone that each of the cleaning/treating elements is movable independent of any other of the cleaning/treating elements of the same group.

The preferred embodiments of a cleaning head described with respect to Figures 6 to 11 also do not disclose the ability for independent movement of each of the cleaning/treating elements mounted on a single resilient pod relative to any other cleaning/treating element on this same pod. In this embodiment the cleaning/treating elements 626 and 826, which may be bristle strands, bristles (see for example, page 15, lines 15, 28, page 16, line 22) correspond to the third cleaning/treating elements defined in claim 1. The mushroom-like resilient pods 622, 822, 624, 824 correspond, according to the appellant, to the feature "support structure". However, the Board considers that the skilled person would derive from these embodiments only that cleaning/treating elements (626, 826) extending from one pod move together with the resilient pod, i.e. all cleaning/treating elements on that pod perform a collective movement, be it rotation or

bending (see for example page 15, lines 11/12). The appellant could not indicate any basis in the application as filed from which the skilled person could directly and unambiguously derive that each cleaning/treating element on a pod may perform an independent movement relative to the other cleaning/treating elements on that pod. The Board is also unable to find such basis.

- 2.5 The appellant furthermore acknowledged that the only basis in the application as filed for feature "G" of granted claim 1 was Figure 8. The Board nevertheless concurs with the opposition division and the respondent that this feature may not be directly and unambiguously derived from this drawing. The drawing of the distal end of the toothbrush head is merely a schematical representation of a commonly known shape of a toothbrush head. The skilled person would not have attached any particular attention to the shape or geometry of this configuration. The Board finds also that the skilled person would have had no reason to consider this feature independently of all the other technical features of the cleaning head of the toothbrush shown in this Figure. Moreover, as the respondent pointed out, it may not even be derived unambiguously from this schematical drawing that the oval or elliptical contour of the feature 818 intentionally "follows" the contour of the distal free end of the cleaning head, because the distance between the two contours appears to vary slightly.

- 2.6 The Board concludes that at least features "F" and "G" of granted claim 1 are not directly and unambiguously derivable from the application as originally filed.

Auxiliary requests

3. In regard of the Board's conclusion concerning feature "G" of claim 1 of the main request, the appellant did not present any further argument with respect to the amendments made to the feature "G" in claim 1 of the auxiliary requests. For similar reasons to those stated above, the amendments do not render the amended feature directly and unambiguously derivable from Figure 8. The amendments made therefore do not alter the Board's judgment. The subject-matter of claim 1 of all auxiliary requests is hence considered, at least for this reason, to extend beyond the content of the application as filed, so that none of the auxiliary requests 1 to 5 meets the requirement of Article 123(2) EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



M. H. A. Patin

K. Garnett

Decision electronically authenticated