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**Datasheet for the decision
of 2 May 2017**

Case Number: T 0297/13 - 3.2.03

Application Number: 05720834.0

Publication Number: 1723876

IPC: A47C7/74, B60N2/00

Language of the proceedings: EN

Title of invention:

AIR CONDITIONED SEAT DEVICE AND AIR CONDITIONING SYSTEM USING
THE SAME

Patent Proprietor:

Panasonic Corporation

Opponent:

Gentherm GmbH

Headword:

Relevant legal provisions:

RPBA Art. 11, 12(2), 12(4), 13(1)

EPC Art. 111(1), 113(1), 114(2)

EPC R. 111(2)

Keyword:

Substantial procedural violation - appealed decision
sufficiently reasoned (no)
Late-filed document - admitted (yes)
Remittal to the department of first instance - (yes)
Apportionment of future costs - to be decided

Decisions cited:

T 0369/08, T 1282/08

Catchword:



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Case Number: T 0297/13 - 3.2.03

D E C I S I O N
of Technical Board of Appeal 3.2.03
of 2 May 2017

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Decision under appeal: **Interlocutory decision of the Opposition**
Division of the European Patent Office posted on
3 December 2012 concerning maintenance of the
European Patent No. 1723876 in amended form.

Composition of the Board:

Chairman G. Ashley
Members: V. Bouyssy
D. Prietzel-Funk

Summary of Facts and Submissions

- I. European patent No 1 723 876 (in the following: "the patent") concerns an air conditioned seat device.
- II. The patent as a whole was opposed on two grounds of Article 100(a) EPC (lack of novelty and lack of inventive step).
- III. The opposition division decided that the patent as amended on the basis of the main request before it met the requirements of the EPC.
- IV. This interlocutory decision was appealed by the opponent (in the following, "appellant").
- V. With the summons to oral proceedings, the Board sent a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA) indicating its preliminary opinion of the case.
- VI. Oral proceedings before the Board were held on 2 May 2017.
- VII. Requests

The appellant requested that the decision under appeal be set aside and the patent be revoked.

The patent proprietor (in the following, "respondent") requested that the appeal be dismissed, alternatively that the decision under appeal be set aside and the patent be maintained on the basis of one of the first and second auxiliary requests filed with letter dated 23 July 2013.

VIII. Claim 1 of the main request as found allowable by the opposition division

Independent device claim 1 as amended is directed to the following subject-matter (the feature numbering is introduced by the Board for ease of reference; compared with claim 1 as granted, added passages are indicated in bold, deleted passages in strike-through):

- (a) An air conditioned seat device (10), comprising:
 - (b) a support member (11) including a first duct (13) through which air passes;
 - (c) a first air blower (14) configured to take in air from an outside and pass the air through the first duct (13);
 - (d) a skin (26, 26B, 26C) configured to pass the air sent from the first air blower (14), the skin (26, 26B, 26C) forming a seating surface (26E);
 - (e) a sponge-like air layer member (21)
 - (e1) capable of volume deformation,
 - (e2) configured to temporarily and uniformly store the air supplied from the first duct (13) to form an air layer,
 - (e3) the air layer member (21) being provided between the support member (11) and the skin (26, 26B, 26C),
 - (e4) said air layer member (21) being positioned in an air flow path from said first duct to openings ~~(22A)~~ **(26A)**, whereby air flows through said air layer member (21); ~~and~~
- characterized in that
- (f) **said seat device (10) further comprises** an air-impermeable~~7~~ sheet member (22) ~~covers~~ **covering** the air layer member (21),
 - (f1) the sheet member being provided with air flow-out opening (22A) configured to induce the

air to flow out from the air layer,
(f2) wherein said air layer (21) member faces said
first duct (13).

Independent system claim 36 is directed to an air
conditioning system comprising an air conditioned seat
device as defined in claim 1.

IX. Cited evidence

In the statement setting out the grounds of appeal, and
in the reply to it, the parties relied among others on
the following prior art documents which were filed in
the opposition proceedings and are cited in the
decision under appeal:

D1: DE 103 13 013 A1
D5: US 5 597 200 A
D7: US 2003/0039298 A1

In addition, the appellant relied on the following
documents filed with the statement of grounds of
appeal:

D1-1: US 6 848 742 B1
D8: US 5 924 766 A
D9: US 2005/0066505 A1
D9-1: DE 11 2004 001 692 T5

With letter dated 30 July 2014, the appellant filed the
following prior art document:

D10: US2003/0197404 A1

X. The arguments of the parties, insofar as relevant for the present decision, can be summarised as follows:

(a) Consideration of D1-1, D8, D9, D9-1 in the proceedings

The respondent requested that documents D8, D9 and D9-1 be disregarded because they could have been presented in the opposition proceedings and were not *prima facie* relevant.

The appellant submitted that documents D8 and D9 were cited in parallel examination proceedings before the USPTO and thus were already known to the respondent. Documents D1-1 and D9-1 were family members of D1 and D9, in English and German respectively.

(b) Admissibility of D10 in the proceedings

Appellant's case:

D10 was found in an additional search carried out in response to the respondent's reply to the grounds of appeal. It clearly anticipated the claimed subject-matter and thus should not be ignored.

Respondent's case:

Document D10 should not be admitted in the proceedings because it had been submitted far too late. Indeed, it could have been found and cited earlier, and nothing justified such late submission, especially in view of the fact that no amendment to the claims had been introduced by the respondent.

Moreover, D10 was not relevant for the questions of novelty and inventive step because it did disclose features (a), (b), (e) and (e2) of claim 1, for the following reasons.

D10 relates to a portable seat pad assembly that lies on an existing low-end vehicle seat (see paragraphs 6 and 17 and figures 4 and 5 of D10), and not to a high-end seat as required by feature (a) of claim 1.

It is apparent from the drawings of the patent that the "support member" as defined in feature (b) is the framework (11) of the seat. In D1, the layer 20 is not the framework of the seat, but the lower surface layer of the seat pad 12.

The term "sponge-like" in feature (e) must be construed as meaning that the air layer member is an open-celled foam which is elastic in all directions. The second inner layer 22 disclosed in D10 does not have the required elasticity because it has top and bottom layers of netting 32 and 40 and semi-rigid threads 42 extending in-between. Hence, layer 22 does not form a sponge-like layer in the sense of the claim.

Finally, D10 does not disclose that the air supplied from the fan 26 is "uniformly" stored in layer 22, as required by feature (e2). On the contrary, fan 26 being attached to an end of the pad 12, it is unlikely that the air be distributed uniformly in layer 22.

(c) Main request - Interpretation of claim 1

The appellant submitted that it did not clearly follow from the wording of feature (f) of claim 1 how the air-impermeable sheet member is positioned in the seat

device, and whether it is a separate part of the claimed seat device or not. In light of the translations of granted claim 1 into German and French, feature (f) could be construed in a broad manner (see "luftundurchlässiges Flächenteil" and "élément de feuille imperméable"). For instance, the air-impermeable sheet member could be an air-impermeable portion of the skin forming the seating surface, alternatively a coating of the skin.

The respondent argued that it was clear from the wording of claim 1 that the air-impermeable sheet member (feature (f)) was separate from, and in addition to, the skin (feature (d)).

(d) Main request - Novelty over D1, D5 and D8

Appellant's case:

The subject-matter of claim 1 is anticipated by the vehicle seats disclosed in D1, D5 and D8, for the following reasons.

D1 discloses, in figures 1 and 2, an air conditioned seat device 200 comprising:

- a support member 221 including a duct 314, 324 through which air passes;
- an air blower 310, 320 configured to take in air from an outside and pass the air through the duct;
- a fabric skin 210 which is configured to pass the air sent from the air blower (paragraph 16) and forms a seating surface;
- a layer member 222, 223 which is made of polyurethane and has high air permeability (paragraphs 3 and 18) and thus is implicitly a sponge-like air layer capable of volume deformation

- and adapted to temporarily and uniformly store the air supplied from the duct to form an air layer, member 222, 223 being provided between support member 221 and skin 210 and positioned in an air flow path from duct 314, 324 to the ventilation holes formed in fabric skin 210, whereby air flows through member 222, 223 (paragraph 36, figure 1);
- a air-impermeable sheet member formed by a backing material, e.g. resin, coating the fabric of the skin (paragraph 16), which coating covers member 222, 223 and is provided with air flow-out opening configured to induce the air to flow out from the air layer, said air layer member facing said duct.

D8 discloses, in figures 1 and 5, an air conditioned seat device 1 comprising:

- a support member 33 including a duct 14, 15 through which air passes;
- an air blower 12 configured to take in air from an outside and pass the air through the duct 14, 15;
- a skin 5, 6 configured to pass the air sent from the air blower and forming a seating surface;
- cushion pads 35 and 43 made of urethane foam and respectively covered with air-permeable cover pads 36 and 44, pads 35 and 36 and pads 43 and 44 respectively forming a sponge-like air layer member capable of volume deformation and adapted to temporarily and uniformly store the air supplied from the duct to form an air layer, wherein the air layer member is provided between the support member and the skin, and positioned in an air flow path from the duct to air holes 7 holes formed in skin 5, 6;
- a air-impermeable sheet member formed by the non-perforated part of skin 5, 6, which covers member 35, 36, 43, 44 and is provided with air flow-out

opening configured to induce the air to flow out from the air layer, wherein said air layer member faces the duct.

For the objection of lack of novelty in light of D5, reference is made to the notice of opposition.

Respondent's case:

In the opposition proceedings, D1 was used only for an objection of lack of inventive step, starting from D7 as closest prior art. The new novelty objection based on D1 should be disregarded because it could, and indeed should, have been raised in the opposition proceedings.

Moreover, the subject-matter of claim 1 is novel over D1 because features (e2) and (f) to (f2) cannot be derived from it. With respect to feature (e2), the two pads 222 and 223 disclosed in D1 are not configured to "uniformly store the air supplied from the first duct to form an air layer". Pad 222 comprises through holes 201c for passing the air and this implies that the air is not uniformly stored within pad 222. There is no information regarding uniform filling of the air within cover pad 223; on the contrary, the arrows in figure 1 of D1 indicate that the air has a straight path through the pad. It follows from feature (f2) that the air layer member must be a single layer provided between the support member and the skin. This feature is not disclosed in D1, since two distinct air layers 222 and 223 are provided between the support member and the skin, whereby the air exiting from the duct first crosses pad 222 and then cover pad 223. Finally, D1 does not disclose any air-impermeable sheet member as required in features (f) and (f1). The skin 210 of D1

does not constitute such an air-impermeable sheet member.

For the same reasons, the subject-matter of claim 1 is novel over D8 because it fails to disclose any of features (e2) and (f) to (f2). Neither the pair of pads 35 and 36 nor the pair of pads 43 and 44 forms a single air layer member as defined in feature (e2) and (f2). The outer cover 5 or 6 forms a skin in the sense of feature (d), but not an air-impermeable sheet member as required by features (f) and (f1).

With respect to D5, reference is made to the submissions made in opposition and to the decision of the opposition division that claim 1 is novel over D5.

(e) Substantial procedural violation

The appellant submitted that the contested decision had not been sufficiently reasoned and this amounted to a substantial procedural violation. In fact, the decision under appeal dealt only with novelty and inventive step objections based on D5 and D6, but remained silent on the inventive step objection based on the combination of D7 and D1, which was raised in the notice of opposition. Even though this objection was not discussed in the oral proceedings before the opposition division, it was relevant for deciding on the amended claims and thus should have been addressed by the decision in order to be complete.

The respondent argued that, during the oral proceedings before the opposition division, the appellant had not mentioned the objection of lack of inventive step based on the combination of D7 and D1 and thus voluntarily abandoned this objection.

(f) Apportionment of costs

The respondent requested that all costs arising for the respondent in the future opposition proceedings after remittal be awarded against the appellant, since it was responsible for the late filing of D10 and the remittal.

Reasons for the Decision

1. Consideration of D1-1, D8, D9, D9-1 in the proceedings
 - 1.1 The respondent requested the Board not to admit documents D8 and D9 into the proceedings because they were late-filed and lack relevance.
 - 1.2 However, the Board sees no reason to disregard D8 and D9. These documents were filed in direct reaction to the evaluation of novelty and inventive step in the appealed decision. Since the opposition division did not express its preliminary opinion in the annex to the summons to oral proceedings, the appellant had no knowledge of the opinion of the opposition division and thus no objective reason to introduce D8 and D9 at an earlier stage into the opposition proceedings. Thus, D8 and D9 are not excluded from the proceedings, notwithstanding their relevance.
 - 1.3 The contents of D1-1 and D9-1 are no more relevant than those of D1 and D9. For this reason, the Board has decided not to take D1-1 and D9-1 into further consideration.

2. Admission of D10 in the proceedings
- 2.1 The appellant filed D10 in response to the respondent's reply to the grounds of appeal.
- 2.2 The filing of D10 is very belated, and the factual situation of the case had not changed during the appeal proceedings. In fact, D10 could arguably have been filed in the opposition proceedings or, at the very least, with the appeal grounds.
- 2.3 However, the content of D10 is *prima facie* highly relevant for the questions of novelty and potentially inventive step.

In fact, the figures of D10 disclose an air conditioned vehicle seat which seems to comprise, in the terms of claim 1:

- a support member (lower surface layer 20) including a duct (opening 28) through which air passes;
- an air blower (fan 26) configured to take in air from an outside and pass the air through the duct;
- a skin forming a seating surface (upper surface area 14 formed of fabric or perforated leather) and configured to pass the air sent from the blower;
- a sponge-like air layer member (expanded, porous porous second inner layer 22 in paragraph 19), which is placed between the support member and the skin, is capable of volume deformation ("this porous layer is preferably a spring-like cushion" in paragraph 6) and is configured to store temporarily and uniformly the air supplied from the duct to form an air layer (see paragraph 22, which states that it ensures air flow in all directions); the air flows in a path through the air layer member (22), from the duct (28) to openings (32);

- an air-impermeable sheet member (first inner layer 16 of non-porous material), which faces the duct (28) and covers the air layer member (22), and is provided with air flow-out openings (32) configured to induce the air to flow out from the air layer.

In particular, the expanded, porous inner layer 22 seems to be adapted to provide a spring-like cushion for an occupant while ensuring airflow in all directions even when the seat is occupied (paragraphs 6 and 22 of D10).

2.4 For this reason, exercising its discretion under Article 114(2) EPC and Article 13(1) RPBA, the Board has decided to admit D10 into the proceedings.

3. Remittal

3.1 In the communication pursuant to Article 15(1) RPBA the Board indicated its intention to remit the case to the opposition division as follows:

"Should the Board decide that D10 should be taken into consideration, a completely new case arises. The Board would therefore be inclined to consider a remittal to the opposition division so that the respondent would have the opportunity to defend its patent against this extremely late-filed new evidence as if it had been filed in the opposition proceedings and, should it be adversely effected by the opposition division's decision, have the opportunity to appeal (Article 111(1) EPC)".

3.2 In the oral proceedings, after the Board's decision to admit D10, both parties requested remittal of the case to the opposition division.

- 3.3 The Board sees no reason to revise its opinion. It thus exercises its discretionary power under Article 111(1) EPC to remit the case to the opposition division for further prosecution on the basis of D10.
4. Since the case is remitted, the Board refrains from taking a final decision on whether or not D10 anticipates the subject-matter of claim 1, as argued by the appellant.
5. However, before remitting the case and for the sake of procedural efficiency, the Board will decide upon a number of issues which are disputed by the parties, namely the interpretation of claim 1, the novelty of the claimed subject-matter with respect to D1, D5 and D8, and the alleged substantial procedural violation.
6. Main request - Interpretation of claim 1
 - 6.1 The interpretation of feature (f) of claim 1 is disputed by the parties.
 - 6.2 On a normal reading, this feature clearly requires that the air-impermeable sheet member be in addition to the elements already defined in the preamble of claim 1, namely the support member, the first air blower, the skin and the sponge-like air layer member. In addition, this is in conformity with the teaching in the description and drawings (see air-impermeable sheet member 22).
 - 6.3 In this respect, the wording of the translations of granted claim 1 into German and French as filed under Rule 71(3) EPC is immaterial because these translations are not legally binding but are only for information

(Article 70(1) EPC; Guidelines for Examination, November 2016, A-VII, 8).

7. Main request - Novelty over D1, D5 and D8
- 7.1 The appellant argues that the subject-matter of claim 1 is anticipated by the vehicle seats disclosed in D1, D5 and D8.
- 7.2 D1 was cited in the notice of opposition but the novelty attack based on D1 has been raised for the first time in the grounds of appeal. This attack could have been presented in the opposition proceedings and appears to lack relevance, as D1 fails to disclose features (e2), (f) and (f1) of claim 1, for the following reasons.

In the seat device of D1, a plurality of through holes 201c is formed within placed pad 222 of the seat cushion 200a. In use, the air passes through the placed pad 222, the cover pad 223 and the cover 210 and blows toward user's hip and thigh, as shown by dotted arrows in figure 1. Further, the air passes through the holes 201c and blows toward the user through cover 210, as shown by solid arrows in figure 1. However, it cannot be derived from D1 that, in the seat cushion 200a, the pads 222 and 223 are configured to "uniformly store" the air supplied from duct 314 and to form an air layer (feature (e2)). The same holds true for the backrest 200b, wherein cover pad 223 comprises a plurality of through holes 201c (see figure 1). Finally, D1 does not disclose an air-impermeable sheet member as required in features (f) and (f1).

For these reasons, the Board has decided to disregard the new novelty attack based on D1 (Article 12(4) RPBA).

- 7.3 The Board sees no reason to disregard the new novelty attack based on D8, in particular because it constitutes a legitimate reaction to the decision of the opposition division on the question of novelty and it does not raise new complex issues. The opposition division held that neither D5 nor D6 discloses a air-impermeable sheet member as required in claim 1. The appellant submits that this feature is anticipated by the skin 5, 6 as disclosed in D8.

However, D8 fails to disclose an air-impermeable sheet member as required in features (f) and (f1), which is separate from and in addition to the skin 5, 6.

Moreover, D8 does not disclose feature (e2) for the following reasons. In the seat device of D8, the seating section 2 includes a cushion pad 35 and an air-permeable cover pad 36 surrounding the cushion pad 35. The cushion pad 35 has a plurality of vent holes 35a communicating with the air discharge holes 14b of the first air duct 14. Similarly, the backrest 3 of the seat includes a cushion pad 43 and an air-permeable cover pad 44 surrounding the cushion pad 43, whereby the cushion pad 43 has a plurality of vent holes 43a communicating with the air discharge holes 15b of the second air duct 15. In the seating section, the air, having passed through the vent holes 35a, is directed through the cover pad 36 and is let out through the air holes 7 in the skin 5 (column 4, lines 9 to 12 and figure 1). Similarly, in the backrest, the air, having passed through the vent holes 43a, is directed through the cover pad 44 and is let out through the air holes 7

in the skin 6 (column 4, lines 14 to 18 and figure 1). Contrary to the appellant's view, it cannot be derived from D8 that the pads 35 and 36 of the seating section, or the pads 43 and 44 of the backrest, are configured to "uniformly store" the air supplied from the respective duct to form an air layer.

7.4 With respect to D5, the appellant simply referred to the arguments presented in the notice of opposition. Such general reference is not in accordance with Article 12(2) RPBA since it does not explain why the decision of the opposition division on this matter is wrong. In addition, the Board sees no reason to depart from the decision of the opposition division that D5 fails to disclose an air-impermeable sheet member as defined in claim 1 (features (f) and (f1)).

8. Lack of reasoning

8.1 In the letter setting out the grounds of appeal the appellant stated that its attack against inventive step in light of D1 and D7 had not been dealt with in the opposition division's decision.

8.2 According to the file, in the notice of opposition, the appellant raised an objection of lack of inventive step against claim 1 as granted, starting from D7 as closest prior art and combining it with D1.

8.3 It follows from the minutes of the oral proceedings before the opposition division that, when discussing the inventive step of claim 1 as amended according to the main request, the appellant did not present the original attack based on D7 and D1 but instead raised of its own motion a new attack starting from D5 as

closest prior and combining it with D6 (in the minutes see point 8).

8.4 However, contrary to the respondent's view, it cannot be inferred from the file or from the minutes, that the appellant had abandoned or withdrawn its original attack on inventive step based on D7 and D1 during the opposition proceedings.

8.5 In view of the amendments undertaken in claim 1, this attack was still relevant and the opposition division should have considered it and, if found not convincing, should have provided the reasons for dismissing it.

8.6 This will have to be addressed by the opposition division in the further proceedings if necessary.

9. Apportionment of costs

9.1 The appellant, in filing D10 at a very late stage, has failed to exercise all due care required by the circumstances. Indeed, the piecemeal submission of evidence is not particularly conducive to the principles of economy and efficiency guiding all procedures before the EPO, as affirmed in particular by the Rules of Procedure of the Boards of Appeal.

9.2 The late filing of D10 has in effect resulted in an entirely new case being presented at a late stage of the appeal proceedings, with the consequence that a further procedure before the opposition division, and possibly the Board, is required.

9.3 For reasons of equity, an apportionment of the future costs caused by the late filing of D10 should be accorded in favour of the respondent.

9.4 However, the Board is not in possession of the necessary facts at this stage to decide upon an apportionment of the costs in the subsequent proceedings, of which the course and outcome can only be speculated upon (see Case Law of the Boards of Appeal, 8th edition, 2016, IV.C.6.3.3-a), in particular T 369/08, point 7.12 of the reasons and T 1282/08, point 22 of the reasons).

9.5 Thus, it is incumbent upon the opposition division in its further prosecution of the case following remittal, to consider and decide upon the issue of apportionment of costs in the light of the facts and requests before it, in accordance with the power conferred upon it by Article 104(1) EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.
3. The decision on the respondent's request for apportionment of costs will be taken at a later stage.

The Registrar:

The Chairman:



C. Spira

G. Ashley

Decision electronically authenticated