Internal distribution code:

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

Datasheet for the decision of 16 February 2017

Case Number: T 0704/15 - 3.2.01

Application Number: 08103124.7

Publication Number: 2105362

IPC: B60S1/38

Language of the proceedings: EN

Title of invention:
Wiper blade

Patent Proprietor:
Federal-Mogul S.A.

Opponent:
Valeo Systèmes d'Essuyage

Headword:

Relevant legal provisions:
EPC Art. 54(1), 56, 84, 123(2)

Keyword:
Novelty - main request (no)
Auxiliary request 1 already filed in opposition proceedings - admitted (yes)
Amendments - auxiliary request 1 - allowable (yes)
Inventive step - auxiliary request 1 (yes)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern
Boards of Appeal
Chambres de recours

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 0704/15 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 16 February 2017

Appellant II: (Patent Proprietor)	Federal-Mogul S.A. Avenue Champion 6790 Aubange (BE)
Representative:	Hooiveld, Arjen Jan Winfried Arnold & Siedsma Bezuidenhoutseweg 57 2594 AC The Hague (NL)
Appellant I: (Opponent)	Valeo Systèmes d'Essuyage 8, rue Louis Lormand 78320 Le Mesnil-Saint-Denis (FR)
Representative:	Léveillé, Christophe Valeo Systèmes d'Essuyage Service Propriété Industrielle ZA L'Agiot 8 Rue Louis Lormand CS 90581 La Verrière 78322 Le Mesnil Saint Denis (FR)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 20 February 2015 concerning maintenance of the European Patent No. 2105362 in amended form.**

Composition of the Board:

Chairman	G. Pricolo
Members:	W. Marx
	P. Guntz

Summary of Facts and Submissions

I. The appeals by the opponent (appellant I) and the patent proprietor (appellant II) are directed against the decision of the opposition division to maintain European patent No. 2 105 362 in amended form on the basis of auxiliary request 1 filed during the oral proceedings.

II. In its decision the opposition division held that the subject-matter of granted claim 1 according to the main request lacked novelty over D1 (FR 2 867 738). However, it was found that the subject-matter of claim 1 of auxiliary request 1 fulfilled the requirements of Article 123(2) and of Article 84 EPC and was new over D1 and inventive over D1 in combination with D3 (US 3,414,930).

III. Together with its grounds of appeal dated 25 June 2015 appellant II filed auxiliary requests 1 and 2, the latter corresponding to the form in which the patent was upheld in amended form by the opposition division.

IV. Oral proceedings before the board took place on 16 February 2017.

The appellant I (opponent) requested that the decision under appeal be set aside and that the European patent be revoked.

The appellant II (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, in the alternative, that the patent be maintained in amended form on the basis of one of auxiliary requests 1 or 2 as filed with the grounds of appeal dated 25 June 2015.

V. Claim 1 as granted (main request) reads as follows:

"A windscreen wiper device (1) comprising an elastic, elongated carrier element, as well as an elongated wiper blade (2), which can be placed in abutment with a windscreen to be wiped, which wiper blade (2) includes at least one longitudinal groove (3), in which groove (3) a longitudinal strip (4) of the carrier element is disposed, wherein ends (5) of said longitudinal strip (4) are connected to a respective connecting piece (6), which windscreen wiper device (1) comprises a connecting device (7) for an oscillating arm (8), wherein said wiper blade (2) comprises an elongated upper holding part (12) and an elongated lower wiping part (13) of a flexible material, wherein said holding part (12) holds said longitudinal strip (4), wherein said wiping part (13) comprises a wiping lip (14), wherein said holding part (12) and said wiping part (13) are interconnected by means of a tilting web (15), wherein a noise dampening profile is provided in slits (16) formed between said holding part (12), said wiping part (13) and said tilting web (15), and wherein a width of said noise dampening profile extending in a direction transverse to the longitudinal direction of said wiper blade (2) varies along said longitudinal direction, **characterized in that** said width at the location of said connecting device (7) is larger than said width at the location of said connecting pieces (6)."

Claim 1 of auxiliary request 1 as filed on 25 June 2015 reads as follows (additions to granted claim 1 are underlined, deletions are marked by strike-through):

"A windscreen wiper device (1) comprising an elastic, elongated carrier element, as well as an elongated wiper blade (2), which can be placed in abutment with a windscreen to be wiped, which wiper blade (2) includes at least one longitudinal groove (3), in which groove (3) a longitudinal strip (4) of the carrier element is disposed, wherein ends (5) of said longitudinal strip (4) are connected to a respective connecting piece (6), which windscreen wiper device (1) comprises a connecting device (7) for an oscillating arm (8), wherein said wiper blade (2) comprises an elongated upper holding part (12) and an elongated lower wiping part (13) of a flexible material, wherein said holding part (12) holds said longitudinal strip (4), wherein said wiping part (13) comprises a wiping lip (14), wherein said holding part (12) and said wiping part (13) are interconnected by means of a tilting web (15) ,wherein a noise dampening profile is provided in slits (16) formed between said holding part (12), said wiping part (13) and said tilting web (15), wherein said noise dampening profile in each slit (16) is formed by spaced-apart protrusions (17) extending outwardly from said tilting web (15), **characterized in, that** ~~and wherein a~~ the width of said protrusions (17) of said noise dampening profile extending in a direction transverse to the longitudinal direction of said wiper blade (2) varies along said longitudinal direction, ~~**characterized in that**~~ in the sense that ~~said~~ the width of said protrusions (17) at the location of said connecting device (7) is larger than ~~said~~ the width of said protrusions (17) at the location of said connecting pieces (6)."

VI. Appellant I (opponent) essentially argued as follows:

On a literal interpretation thereof, granted claim 1 (reciting "a width of said noise dampening profile") did not define a measurement of the width of the protrusions, so it lacked novelty over D1. Moreover, the description was silent on how to measure the width of the protrusions and did not require measuring their width at the same height.

Auxiliary request 1 should not be admitted because it had not been the subject of discussion before. In fact, it had been abandoned in first-instance proceedings, so there had been no possibility to present the relevant arguments. Moreover, claim 1 of auxiliary request 1 was not admissible because it did not fulfil the requirements of Article 123(2) EPC and Article 84 EPC. It contained features taken from page 7 of the description which were disclosed only in combination with other features (e.g. a tilting web made of one piece of rubber, see page 6, line 23; an evolving width of the protrusions along the length of the blade, see page 7, lines 20 ff), and there was no basis for changing the term "a width" to "the width". Claim 1 was also ambiguous with regard to where to measure the width of the protrusions.

Claim 1 of auxiliary request 1 did not require the width of the protrusions to be measured at its maximum width or at the same location for each protrusion (as shown on page 7 of the notice of opposition). The relevant change in claim 1 ("a" replaced by "the") did not provide any technical limitation in this respect, so D1 (or further prior art documents mentioned in the written submissions) was still novelty-destroying.

D1 was considered to be the closest prior art document, disclosing the preamble of claim 1 and solving the same technical problem of reducing the noise created when the wiping lip tumbled over at each turning point of its movement. The skilled person knew that the load applied to the blade and the noise level were related to each other, so he would consult D3 which solved, as regards the prior art according to Figure 2, the same technical problem (column 2, lines 35-36). D3 taught to reinforce the structure of the wiper blade by increasing its width at the loaded points, i.e. at the location of the yokes, to compensate for the larger loads applied at this portion of the blade (column 2, lines 44-47). The width of the connecting portion varied depending on the load distributed by the yokes and the manner in which the load was distributed along the structure (column 2, lines 47-51). Although D3 showed a different type of windscreen wiper device (D1: flat-type, D3: yokes), the skilled person would focus only on the structure of the wiper blade which was the same. He knew that the load was applied selectively at the centre by a flat-type wiper arm, whereas the load of the wiper arm of D3 was distributed at the points of connection between the yokes and the wiper blade that were at different locations along the wiper blade (column 1, lines 36-40). D1 explained the advantages of flat-type wiper devices. As a consequence, the skilled person would adapt the wiper blade of D1 by varying the width of the protrusions distributed along the wiper blade according to the teaching of D3, i.e. by increasing the points of contact (dampening web, "protrusions" as claimed) at the location where the load was applied (at the centre). Without the exercise of an inventive step, the skilled person would arrive at a windscreen wiper device according to claim 1.

D3 taken as a whole did not teach away from the claimed solution, but already taught to vary the width of the tilting web. The spaced-apart protrusions of the wiper blade of D1 guaranteed the blade's flexibility. An increase in width of the tilting web led to a reduced flexibility of the blade, so the skilled person would only increase the width of the protrusions, even if D3 taught a continuous variation in width.

VII. The arguments of appellant II (patent proprietor) may be summarised as follows:

D1 showed in Figures 3, 7 and 10 that the configuration or shape of the profile was exactly the same over the length of the blade, so claim 1 as granted was novel over D1. Claim 1 specified that the "noise dampening profile is provided in slits (16) formed between said holding part (12), said wiping part (13) and said tilting web (15)", thus referring to a width of a structure, i.e. to a profile which required some extra material, which was positioned in said slit. The noise dampening profile was defined in relation to the tilting web, such that it did not make technical sense to measure the width of the tilting web to determine the width of the noise dampening profile. It was clear and in line with the disclosure of the patent that the width of the profile, i.e. of the protrusions, were to be compared at the central region and the end regions. In D1, the width of the protrusions provided in the central region and at the ends of the wiper blade did not vary (see Figure 1), so the characterising portion of granted claim 1 was not shown. On the skilled person's understanding of the claim, the same type of measurement of the profile's width was made at different but representative locations, i.e. at the

location of the protrusions (Figure 2(b) showing how to measure the width).

Auxiliary request 1 was filed in the first-instance proceedings on 23 September 2014 in the form of a second auxiliary request. The statement as recorded in point 11 of the the minutes of the first-instance oral proceedings meant that rights were waived to file further auxiliary requests than those already on file. It did not imply that any requests already on file were withdrawn, so the request filed by letter dated 23 September 2014 was on file.

The amendments in claim 1 of auxiliary request 1 were supported by granted claim 3 and page 7, lines 11-19, of the application as filed. Page 7 contained a generic disclosure of claim 3 in combination with a literal disclosure of the term "the width", so no new technical information was given. Claim 1 made clear that the width of the protrusions was measured at the centre and at the location of the end caps of the wiper device. The feature "the width" referred to a specific and comparable width of the protrusions, and not to a width at a randomly chosen location along the protrusions (see application as filed, page 7, lines 14-19; also Figures 2(b) and 3(b)). The width needed to be measured in a consistent way as a representative value, not necessarily as the maximum width.

As the noise dampening profile was defined in claim 1 of auxiliary request 1 to be formed by a plurality of spaced-apart protrusions having a varying width, it was further distinguished from D1 which showed protrusions having the same width along the length of the blade.

The skilled person, in order to solve the problem of how to reduce the reversal noise in the flat-type windscreen wiper device of D1 (with yokeless blade), would not consider D3 relating to a traditional windscreen wiper device wherein the arm was connected to the blade via a plurality of yokes. Additionally, D3 did not relate to the problem of reducing "rattling" or reversal noise, but was directed towards maintaining a specific attack angle of the wiping element (column 1, lines 25-27, lines 40-44; column 2, lines 31-34) and eliminating the defect of water drops remaining on the surface to be wiped (column 2, lines 31-34), so there was no incentive to combine D1 and D3 to solve the above-mentioned problem.

In the event the skilled person consulted D3 and implemented its teaching in D1, D3 did not teach to modify the width of the tilting web. D3 taught to vary the height of the slit in D1 in accordance with the load applied (column 1, lines 50-54), i.e. taught away from the claimed invention, so the skilled person would not arrive at a wiper blade as claimed. Enlarging the connecting portion (or tilting web) was only described in D3 (column 3, lines 7-11) as a prior art feature having drawbacks, without referring to the problem of noise reduction, i.e. it would not be applied to D1.

Even if the skilled person learned from D3 to solve the problem of reversal noise by varying the width of the tilting web, D3 only disclosed to gradually and continuously vary the width of the tilting web in a wiper blade in accordance with the applied load. On the one hand, this teaching was not compatible with D1 which showed protrusions at distinct locations. On the other hand, adapting the wiper blade of D1 using this teaching would result in a wiper blade having a tilting

web with a gradually varying width in accordance with the load distribution on the blade. D3 did not teach to superimpose the varying width profile of the tilting web to the widths of the spaced-apart protrusions provided in D1 in a slit (as alleged by appellant I with hindsight) and to leave the tilting web unchanged. In particular, it would further require to take into consideration the flexibility of the wiper blade.

Reasons for the Decision

1. Novelty of claim 1 as granted (main request)

1.1 The board concurs with the opposition division's finding that the subject-matter of claim 1 as granted lacks novelty in view of the disclosure of document D1.

1.2 It was not disputed that D1 shows a windscreen wiper device as specified in the preamble of claim 1. In particular, D1 discloses (see e.g. Figure 2) a wiper blade comprising an elongated upper holding part (5) and an elongated lower wiping part (7) comprising a wiping lip (8), interconnected by means of a tilting web (6), thus forming slits (9) in which a noise dampening profile is provided. The noise dampening profile (see e.g. Figure 3) is realised by protrusions (10) provided on the tilting web in a direction transverse to the longitudinal direction of the wiper blade.

1.3 The board admits that no change in the width of the protrusions along the longitudinal direction of the wiper blade can be derived from D1. Appellant II referred to Figure 1 of D1, which might show

protrusions at the central region (at the location of the connecting device) and at the end of the wiper blade (at the location of the connecting pieces as claimed), and alleged that the width of these protrusions had to be compared.

However, the wording of claim 1 has a broader meaning and does not refer to a width of protrusions. The term "said width" in the characterising portion of claim 1 refers back to the preamble which only specifies "a width of said noise dampening profile". The board takes the view that the "noise dampening profile" according to claim 1 (which "is provided in slits formed between said holding part, said wiping part and said tilting web") relates to the overall contour or shape of the surfaces inside and along the slits, which includes the tilting web as well as the protrusions. The board does not follow appellant II in that claim 1 specified a profile in relation to - and different from - the tilting web, so that it did not make technical sense to measure the width of the tilting web and that allegedly only the width of the protrusions were to be compared. Claim 1 requires only "a width" of the profile to be measured at two distinct regions of the wiper blade, namely at the location of the connecting device and at the location of the connecting pieces. Without further defining where to measure the width of the profile, the wording of claim 1 does not exclude measuring a width at the location of a protrusion (e.g. at the central region) and a further width at a location of the tilting web where no protrusion is provided (e.g. at the end region). Since the width of the profile at the location of a protrusion at the central region in D1 is larger than the width of the tilting web at the location of the connecting pieces, the characterising feature of claim 1 is known from D1.

1.4 Appellant II also argued that the same type of measurement of the profile's width was made at different but representative locations, in particular at the location of the protrusions, see Figure 2(b). This is not convincing because the description of the contested patent does not contain any definition which might suggest such a restricted interpretation. The scope of protection sought is defined by the wording of a claim, and the description of a preferred embodiment or a figure is not a basis for limiting the claimed subject-matter. Moreover, according to the contested patent, protrusions are only defined in granted claim 3, whereas granted claim 2 still refers to a gradually decreasing width of the noise dampening profile, which does not suggest any representative location for measuring the width. Therefore, the board finds that claim 1 as granted only refers to "regions" where the connecting device and the connecting pieces are situated when referring to a "width at the location of said connecting device" and a "width at the location of said connecting pieces". As argued above, measuring a width in D1 in the central region at the location of a protrusion and outside the location of a protrusion in the end region of the wiper blade is not excluded by the wording of claim 1.

1.5 Thus, the subject-matter of granted claim 1 is not new in view of the disclosure of D1 (Article 54(1) EPC).

2. Auxiliary request 1

2.1 Admission into the appeal proceedings

The board cannot see (see point 11 of the minutes of first-instance oral proceedings) that appellant II has abandoned or withdrawn its auxiliary request 2 which

corresponds to present auxiliary request 1, filed with the grounds of appeal. It can only be concluded from the minutes of first-instance oral proceedings that appellant II had waived its right to file further auxiliary requests in first-instance proceedings. In the absence of any clear, explicit, unambiguous and unconditional waiver of rights as far as the present auxiliary request 1 is concerned, the board sees no reason why auxiliary request 1 - already on file in first-instance proceedings - should not be admitted into the appeal proceedings.

The mere fact that an auxiliary request has not been considered and discussed in opposition proceedings or in the contested decision is no reason for not admitting this request into appeal proceedings. In the present case, the subject of discussion even remains the same as in first-instance proceedings, because the structural features of claim 1 according to auxiliary request 1 are identical to those of claim 1 as maintained in opposition proceedings. In this respect, apart from a rather general statement ("no possibility to present the relevant arguments"), appellant II has not provided any arguments to the contrary.

2.2 Admissibility

2.2.1 Claim 1 of auxiliary request 1 has been amended by including the additional feature of granted claim 3 in the preamble of claim 1 as granted, whereby spaced-apart protrusions of the noise dampening profile are defined. Moreover, the characterising portion now specifies the variation in width of said protrusions as literally disclosed on page 7 of the application as filed (lines 14-19) in combination with the wording of granted claim 3 (lines 11-13).

The subsequent passage on page 7 of the description referring to the embodiment according to Figure 2(b) (lines 20 ff: starting with "More precisely"), in the board's view, merely illustrates the specific example of a width which gradually decreases from the location of the connecting device to the location of the connecting pieces, as expressed by the additional features of granted claim 2, which has not been incorporated into claim 1 of the present auxiliary request 1. Since granted claims 2 and 3 (identical to claims 2 and 3 as filed) are both dependent on claim 1, they are explicitly proposed as specific embodiments which are not inextricably linked to each other. Therefore, the board cannot follow the view of appellant I that a further characterisation of the widths of the protrusions along the wiper blade, as expressed by claim 2 or the corresponding passage on page 7 of the description, is required to fulfil the requirements of Article 123(2) EPC.

2.2.2 Appellant I also alleges that the additional features of claim 1 of auxiliary request 1 (specifying the protrusions) were only disclosed in combination with the feature that the holding part, the wiping part and the tilting web are made in one piece of rubber (see page 6 of the application as filed). However, the board finds that this allegedly missing feature relates to a production aspect of the wiper blade, not to the noise dampening function provided by the protrusions. Moreover, the protrusions are described on page 7 of the application as filed as "extending outwardly from said tilting web", leaving open whether they have to be formed integral with e.g. the tilting web. Therefore, the board cannot see any clear functional or structural relationship that would require to include a further

characterisation of the protrusions being made in one piece of rubber with e.g. the tilting web.

2.2.3 Appellant I raises an objection against the term "the width (of said protrusions of said noise dampening profile)" which replaces the term "a width (of said noise dampening profile)" in granted claim 1. However, the feature "the width of said protrusions" in claim 1 of auxiliary request 1 is literally disclosed in the application as filed on page 7, line 14, so that the board cannot see any violation of Article 123(2) EPC.

In fact, the objection raised concerns clarity of the subject-matter of claim 1. The board considers that by specifying "the width of said protrusions" (instead of "a width of said protrusions"), claim 1 clearly relates, on a reasonable interpretation of the claimed subject-matter, to a representative and consistently measured value of the width of the protrusions along the longitudinal direction of the wiper blade, i.e. such wording excludes a randomly chosen location along the protrusions. Therefore, the amendment of claim 1 does not render the subject-matter of claim 1 unclear.

2.2.4 Appellant I argues that claim 1 does not unambiguously specify where the width of the protrusions has to be measured. Admittedly, the wording of claim 1 does not define in more detail the measurement of the width of the protrusion, e.g. whether a maximum width or an average width has to be determined. However, as argued already previously, the board takes the view that the wording of claim 1 implies that the width of the protrusions is determined consistently by providing comparable values, and the wording of claim 1 is clear enough to fulfil the requirements of Article 84 EPC.

2.2.5 From the above it follows that the amendments provided with auxiliary request 1 comply with the requirements of Article 123(2) and Article 84 EPC.

2.3 Claim 1 - novelty (Article 54(1) EPC)

Claim 1 now specifies a comparison of the widths of protrusions at different locations of the wiper blade, i.e. that the width of protrusions at the location of the connecting device is larger than at the location of the connecting pieces. As argued already above, not only the term "a width" has been replaced by "the width", but also the object of the measurement of the width, which is now the protrusion (instead of the noise dampening profile as in granted claim 1). Contrary to the contention of appellant I, these amendments provide a limitation over granted claim 1, so that the board's line of argument with regard to lack of novelty of granted claim 1 does not apply any more. Moreover, as argued above in respect of clarity, the expression "the width of said protrusions" means a consistent way of measuring the width of protrusions (not necessarily the maximum width) which provides a representative value of the protrusion's width.

A varying width of protrusions along a longitudinal direction of a wiper blade as required by the characterising features of claim 1 of auxiliary request 1 cannot be derived directly and unambiguously from D1, which shows (Figure 3) identical protrusions along the length of the blade. Moreover, appellant I has not provided any substantiation with regard to further prior art showing protrusions of varying width.

The subject-matter of claim 1 is therefore considered new (Article 54(1) EPC).

2.4 Claim 1 - inventive step (Article 56 EPC)

2.4.1 The subject-matter of claim 1 of auxiliary request 1 involves an inventive step (Article 56 EPC).

2.4.2 D1 is considered to be the closest prior art document and shows the features according to the preamble of claim 1. D1 does not show protrusions of varying width in a direction transverse to the longitudinal direction distributed along the length of the wiper blade, so that the characterising feature of claim 1 is not disclosed in D1.

The problem to be solved by the distinguishing features of claim 1 of auxiliary request 1 can be seen in the reduction of the reversal noise when the wiping lip tumbles over at each turning point of its movement in the flat-type windscreen wiper device of D1.

2.4.3 It was already disputed between the parties whether the skilled person would consider at all the teaching of D3 which relates to a traditional windscreen wiper device comprising a plurality of yokes for connecting the wiper arm to the blade and which solved a different problem.

However, even assuming that the skilled person would consult D3, the board finds that the skilled person would not superimpose a varying width profile of the tilting web in accordance with the load applied to the blade, as disclosed in D3 (column 2, lines 44-47), to the widths of the spaced-apart protrusions provided in D1 in a slit, as alleged by appellant I. The only teaching that is derivable from D3 would lead the skilled person to gradually and continuously vary the

width of the tilting web in the wiper blade of D1 in accordance with the applied load.

2.4.4 According to appellant I, the spaced-apart protrusions of the wiper blade guarantee the blade's flexibility, whereas an increase in width of the tilting web has an effect to the contrary, so that the skilled person would only increase the width of the protrusions. However, considering the blade's flexibility would be a further step in optimising the wiper blade resulting from the combination of D1 and D3, having a tilting web of varying width as argued above, which is not considered obvious.

Moreover, assuming that the skilled person would take into consideration the aspect of the flexibility of the blade when starting from the closest prior art known from D1, the teaching of D3 would even teach away from modifying the width of the protrusions. D3 is concerned with maintaining a specific attack angle of the wiping element (column 1, lines 25-27), i.e. maintaining a blade's flexibility over its length, which in prior art arrangements varied due to an unequal load distribution along the wiper blade (see column 1, lines 40-44 and Figure 17). As a solution, D3 proposes to modify the upper and lower walls of a groove in the wiper blade construction (column 1, lines 45-54), i.e. the height of the slit known from D1. Again, in view of the teaching of D3, the skilled person would not arrive at the solution according to the characterising portion of claim 1 of auxiliary request 1.

2.4.5 Therefore, the board comes to the conclusion that the skilled person would not arrive at the subject-matter of claim 1 of auxiliary request 1 without the exercise of an inventive step.

2.5 Dependent claims 2 to 9 concern particular embodiments of claim 1 and are therefore likewise allowable.

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 with the order to maintain the patent in amended form on the basis of the following documents:

   - claims 1 to 9 according to auxiliary request 1, dated 25 June 2015,
   - description columns 1 to 5 filed during the oral proceedings and
   - figures 1 to 4 of the patent as granted.

The Registrar: The Chairman:

A. Vottner G. Pricolo

Decision electronically authenticated