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**Datasheet for the decision
of 6 March 2017**

Case Number: T 0751/16 - 3.2.01

Application Number: 05017320.2

Publication Number: 1625971

IPC: B60Q3/04, B60K37/00

Language of the proceedings: EN

Title of invention:

Vehicle interior illumination structure

Patent Proprietor:

Mazda Motor Corporation

Opponent:

Daimler AG

Headword:

Relevant legal provisions:

EPC Art. 54(2), 56

RPBA Art. 13(1)

EPC R. 106

Keyword:

Novelty - (yes)

Inventive step - (yes)

Late-filed submissions - (not admitted)

Obligation to raise objections - objection dismissed

Decisions cited:

G 0004/92, T 1621/09, T 1459/11

Catchword:



Beschwerdekammern
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Case Number: T 0751/16 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 6 March 2017

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 26 January 2016
revoking European patent No. 1625971 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman G. Pricolo
Members: H. Geuss
 S. Fernández de Córdoba

Summary of Facts and Submissions

I. The appeal of the patent proprietor is directed against the decision of the Opposition Division of the European Patent Office posted on 26 January 2016 revoking European patent No. 1625971 pursuant to Article 101(3) (b) EPC.

II. The opposition division held that the subject-matter of claim 1 as granted lacked novelty with regard to document

US 2,966,952 (D4).

III. In its statement of grounds of appeal the appellant argued why the subject-matter of claim 1 as granted was novel and also inventive over D4. In its reply, the respondent (opponent) only argued lack of novelty and inventive step (main and auxiliary requests) on the basis of D4.

IV. The Board issued a communication pursuant to Article 15(1) RPBA on 23 January 2017, in which it was stated i.a. the following:

"1. It seems to the Board that D4 discloses a step portion with a rear edge which seems to be the edge beside the reference sign 36 and a front edge which is the area just below the illumination member, close to the ornament 39.

Consequently, D4 does not disclose an ornament on the step upper surface.

1.1 The effect and the problem to be solved with the ornament seem to be described in paragraph

[0051] of the published application (cf. P[0054] of the patent description).

1.2 It will be discussed during the oral proceedings whether or not this feature (feature f) contributes to inventive step of the subject-matter of claim 1 as granted.

1.3 It is additionally noted that, with respect to the line of argument as submitted by the respondent (which was followed by the opposition division, cf. also the figure on page 3 of the contested decision), the Board holds that - in this case - a skilled person would not consider the illumination member as being adjacent to the front edge."

V. With letter of 8 February 2017 the respondent/opponent filed objections of lack of novelty and inventive step of the subject-matter of claim 1 as granted based on document

DE 100 26 385 A1 (D2).

VI. Oral proceedings were held on 6 March 2017.

The appellant (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained as granted.

The respondent (opponent) requested that the appeal be dismissed. Further, he requested that the case be remitted to the first instance department. The objection under Rule 106 EPC (filed during oral proceedings) was maintained.

VII. The objection under Rule 106 EPC which was submitted in German reads as follows:

"Hiermit wird im Namen der Beschwerdegegnerin Daimler AG beantragt, das Verfahren bezüglich der Prüfung der Neuheit des Gegenstands des Streitpatents EP 1 625 971 B1 gegenüber der D2 an die Einspruchsabteilung zurückzuverweisen, hilfsweise wird beantragt, wird Rüge gemäß Regel 106 EPC erhoben, da nach Ansicht der Beschwerdegegnerin die Gründe von Art. 112a c) und d) (Verstoß gegen gängige Rechtsprechung) EPC vorliegen.

Zur Begründung:

D2 wurde bereits mit der Einlegung des Einspruches eingereicht, und auch ein Neuheitsangriff auf Basis der D2 wurde bereits mit der Einspruchsbegründung vorgetragen.

Die Entscheidung der Einspruchsabteilung begründete sich ausschließlich auf D4. D2 wurde daher nicht behandelt und ist daher auch nicht Gegenstand des mit der Beschwerde angegriffenen Beschlusses.

Eine neue Betrachtungsweise der D2 ergab sich durch die Zwischenentscheidung, indem der Gegenstand des Streitpatents durch die Beschwerdekammer anders interpretiert wurde als durch die Einspruchsabteilung.

Dies [sic] Interpretation betrifft insbesondere das Vorhandensein des Bedienelements an der oberen Stufenoberfläche. Hier wurde zum ersten Mal offenbar, dass auch amtseitig die Auffassung

besteht, dass sich die obere Stufenoberfläche nicht nur bis zur hinteren Kante, sondern weiter nach unten erstreckt bis zur vorderen Kante der unteren Stufenoberfläche. Daraufhin wurde D2 erst recht hochrelevant.

Der Neuheitsangriff wurde daher unmittelbar (!) nach Bekanntwerden dieser Interpretation eingereicht. Zudem ist D2 ist [sic] prima facie hochrelevant für die Neuheit des Gegenstands des Streitpatents (G 10/91)."

VIII. The admittance into the appeal proceedings of the submissions based on D2 was inter alia discussed with the parties during oral proceedings. The respondent expressly accepted that the parties were heard on the admittance into the appeal proceedings of the submissions based on D2 (see minutes of the oral proceedings).

IX. Claim 1 as granted reads as follows (structure of features according to the statement of grounds of appeal, cf. pages 2 et seq., introduced in brackets by the Board):

A vehicle interior illumination structure comprising, in combination, an instrument panel (11) adapted to be installed in a front interior area of a vehicle and adapted to be located on the lower side of a front windshield glass (20) **[a1]**, and a light-guiding illumination member (2) disposed in said instrument panel (11) **[a2]**, said front interior area being defined by the front windshield glass and opposed side window glasses on the rearward side of the front windshield glass **[a3]**, wherein:

said instrument panel is formed with a step portion (S) extending laterally at a height approximately equal to or above that of a mounting portion of a steering wheel shaft to said instrument panel, said step portion (S) being defined in such a manner that a step upper surface (11f) located on the upper side of said step portion and a step lower surface (12f) located on the lower side of said step portion are formed in said instrument panel, and said step upper surface has a rear edge (11p) protruding in the rearward direction of the vehicle relative to a front edge (12p) of said step lower surface **[b]**;

said illumination member (2) is arranged to extend laterally at a position which is adjacent to the front edge (12p) of said step lower surface and capable of preventing illumination light of said illumination member from directly coming within the field of view of a driver sitting in a front seat in the vehicle interior **[c]**;

characterized in that

at least said step upper surface (11f) of said instrument panel has a relatively dark tone **[d]** and

said step upper surface is provided with a manual operation element having a higher degree of visibility than that of said step upper surface (11f) **[e]**; and

wherein a region of said step upper surface (11f) adjacent to said step portion (S) has a given ornament to allow said adjacent region to have a higher degree of visibility than that of the remaining region of said step upper surface **[f]**.

X. The appellant's submissions may be summarized as follows:

The subject-matter of claim 1 as granted is novel and based on inventive step with respect to D4. The subject-matter of the contested claim differs from the disclosure of D4 at least by feature f), relating to an ornament which is placed in the step upper surface region. In this respect, it is noted that the skilled person would not understand the illumination member as being "adjacent" to the front edge of the step lower surface. The problem to be solved is mentioned in the patent specification, namely to increase visibility of the manual operation element and thus avoid a finger-sprain-like accident.

There is no motivation for the skilled person to provide a further chromed strip on the upper bulge. The manual operation elements are sufficiently illuminated, so that a further chromed strip would not improve the visibility, cf. D4, column 3, lines 15 to 23.

Further the skilled person would not provide a wiper switch near the windscreen. This argument is based on hindsight. In fact, D4 teaches the contrary: all switches are placed between two padding bulges to shield the operation elements and to protect the passengers in the case of a collision with the dashboard.

The lines of argument based on D2 and filed with letter of 8 February 2017 should not be admitted into the proceedings since these submissions are late filed. Further, D2 is not relevant since this document does not disclose features c), d) and f).

However, if these lines of argument would be admitted, amended auxiliary requests would be necessary in order

to reply to the change in case put forward by the appellant.

For the same reasons, it is requested not to remit the case to the department of first instance. It is the respondent's responsibility to provide a complete case in time. The situation was clear from the beginning of the appeal proceedings and did not change thereafter.

XI. The respondent's rebuttal was essentially the following:

For the reasons given by the opposition division in the contested decision, the subject-matter of claim 1 as granted is not novel in view of document D4 (cf. the figure on page 3 of the contested decision). In particular, in D4 the illumination member is adjacent to the front edge of the step lower surface. The term "adjacent" is vague and unclear and gives a large room for interpretation. In the situation as shown in figure 2 of D4 the illumination rod 37 has to be regarded as being adjacent to the front edge, which is at the height of the reference sign 40.

Assuming however that feature f), relating to an ornament in the step upper surface, represents a distinguishing feature, it would be obvious for a skilled person to provide it in the structure according to D4. To enhance the visibility in the upper step portion it would namely be obvious to provide a further chromed strip on the step upper surface, near the position of the reference sign 36.

Further, in the early 1960s windscreen wiper switches were mounted in the step upper surface, in the area between the reference signs 44 and 1a. The wiper motor

was just below the dashboard and this location for the wiper switch was chosen for wiring reasons. These switches typically had chromed rings or the like, so that the provision of a wiper switch at this location would result in meeting feature f), i.e. an ornament in the step upper surface. Since the wiper switch is not mentioned in the list of switches between the padding bulges, it is obvious for the skilled person to locate the wiper switch at a well-known position near the windscreen.

The lines of argument based on document D2 should be admitted into the proceedings. Firstly document D2 was mentioned in the notice of opposition and novelty was objected in view of D2 at a very early stage of the proceedings. The opposition division had no reason to decide on D2 since the opposition division held that document D4 was novelty destroying. Since the statement of grounds of appeal did not argue with respect to D2, the respondent had no reason to discuss D2 in the letter of reply.

Furthermore, the lines of argument based on D2 were submitted with letter of 8 February 2017, immediately after the Board's communication. The submissions in this letter constituted a reaction to the communication, since the Board gave the impression that the patentability of claim 1 as granted was no longer questioned in view of D4. So, after a review of the patent specification and of all documents, it was noticed that D2 was highly relevant, since all features of claim 1 were clearly shown. In any case, the introduction of D2 would not open a complete new case, the document being easy to understand and the discussion being very similar to that in respect of D4.

It is requested to remit the case to the first instance

if the Board intends to set aside the first instance decision with respect to D4, which was the central document in the decision of the opposition division. It would be a question of fairness to remit the case back to the first instance so as to examine the patentability of claim 1 as granted in view of D2.

The objection according to Rule 106 EPC was raised because by not remitting the case to the opposition division for examining the case in the light of D2 the respondent's right to be heard was violated.

Reasons for the Decision

1. The appeal is admissible.
2. The subject-matter of claim 1 as granted is novel with regard to document D4. Furthermore, the invention as defined in claim 1 is based on inventive step starting from D4, Articles 54(1) and 56 EPC.
 - 2.1 The subject-matter of claim 1 differs from the vehicle interior illumination structure according to D4 at least by feature f) (see point IX above):

a region of said step upper surface adjacent to said step portion has a given ornament to allow said adjacent region to have a higher degree of visibility than that of the remaining region of said step upper surface.
 - 2.2 The respondent argued, as did the Opposition Division, that the rear edge of the step upper surface is in the area between the reference signs 39 and 3 and the front edge of the step upper surface is at the height of

reference sign 40. The Board takes a different view. According to the wording of the claim (see feature c) in particular), the illumination member (namely the profile rod 37) is arranged to extend laterally at a position which is adjacent to the front edge of the step lower surface. Even though the term "adjacent" is to be interpreted broadly, it still implies that the illumination member is close to the front edge of the step lower surface. In the context of the prior art disclosure (Fig. 2), the distance between the profile rod 37 and the element 40, which allegedly represents the front edge, can only be reasonably considered as having a substantial amount and thus clearly excluding an interpretation of the illumination member being close to the element 40. In fact, in the Board's view, on a sensible reading of claim 1, it can only be said that the step portion, which is defined essentially by the transition between the bulge 1 and the instrument panel 3, has a rear edge which is the edge beside the reference sign 36 and a front edge which is located just below the illumination member, close to the ornament 39. The region of said step upper surface adjacent to said step portion thus can only be seen in a portion of the upper bulge 1 in Fig. 2 of D4, which is deprived of any ornaments.

- 2.3 In accordance with the description of the patent in suit, the distinguishing feature f) has the effect of improving the visibility of the manual operation element disposed on the step upper surface. Thus, even though the upper unit of the instrument panel including the step upper surface has the relatively dark tone, the manual operation element can be visually recognized without any problem to effectively avoid driver's discomfort, for example, due to a finger-sprain-like accident. Accordingly, the problem solved is to prevent

such driver's discomfort.

- 2.4 In an alternative line of argument, the respondent stated that feature f) would represent an obvious measure, because it would be within the skilled person's ordinary knowledge to apply a further ornament strip on the dashboard according to D4 in the region of the upper surface near the reference sign 36, thereby directly arriving at the claimed subject-matter. In fact, ornament strips of chrome or the like are generally known by a skilled person.

The Board sees however no motivation for the skilled person to add a further ornament strip in the region of the padding bulge 1. In the embodiment shown in the figures of D4, the operation elements are all in the instrument panel 3 below the padding bulge 1 (cf. figures 1, 2 and 4, gripping handle 41, ash tray 31) and are indirectly illuminated by the rod type light 37, which throws the light on a light-reflecting strip, namely the chromed strip 39. As a result thereof, so much stray light is produced between the profile rod 37 and the strip 39 that the operation elements, e.g. the gripping handle, are sufficiently illuminated (cf. column 3, lines 15 to 23). A further chromed strip in the upper area, near the reference sign 36, would not improve the visibility of the gripping handle or of any other operation elements and would thus represent a modification devoid of technical significance. There is thus no incentive for the skilled person to provide such measure.

- 2.4.1 Alternatively, the respondent submits that it was obvious to place a further manual operation element, having chromed rings or similar, in the region in front of the rear edge, for example in the area between the

reference signs 44 and 1a. In particular, in the 1960s, wiper switches were arranged in this area for wiring reasons, since the wiper motor was just below the dashboard.

However, in the Board's view the arrangement of further operation elements in the region before the windscreen is contrary to the general teaching of D4, which consists in providing all operation elements, such as actuating knobs, levers, etc., in an instrument panel located between two padding bulges (1) and (2; see Fig. 1; see col. 1, lines 15 to 20 and col. 4, lines 3 to 12), so as to shield the operation elements, respectively to protect the passengers, in the case of an accident. For this reason the respondent's argument is based on hindsight.

3. The submissions concerning lack of novelty and inventive step in view of document D2 are not admitted into the proceedings, Article 13(1) RPBA.
- 3.1 According to Article 12(1) RPBA the appeal proceedings are based on a) the notice of appeal and statement of grounds of appeal and b) any written reply of the respondent to be filed within four months of notification of the grounds of appeal. Article 12(2) RPBA requires that the statement of grounds of appeal and the reply shall contain a party's complete case. They shall set out clearly and concisely the reasons why it is requested that the decision under appeal be reversed, amended or upheld and should specify expressly all the facts, arguments and evidence relied on.

Any amendment to a party's case after it has filed its statement of 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 (Article 13(1) RPBA).

- 3.2 In its notice of opposition the respondent/opponent challenged claim 1 as granted with respect to novelty in view of D2. The opposition division stated in the communication of 12 June 2015 that - regarding D2 - the subject-matter of claim 1 was new. Lack of inventive step was not objected by the opponent/respondent in the first instance proceedings in connection with D2.

In the letter of reply to the statement of grounds of appeal, novelty was objected in view of document D4 and inventive step was objected taking D4 as the closest prior art.

It is only with the letter of 8 February 2017, after receiving the communication of the Board according to Article 15(1) RPBA, that the respondent filed submissions concerning lack of novelty over D2 and lack of inventive step starting from D2. These submissions cannot be seen as a reaction to the communication (see above point IV), as the opinion of the Board in respect of whether some features of the claim are disclosed or not by D4 does not justify raising a case on novelty and inventive step based on another document. The Board, moreover, did not include any element, such as a new interpretation of the features of the claim, which was not already mentioned in the appellant's statement of grounds. The submissions based on D2 are also not justified by the fact the opinion may suggest that the attack starting from D4 is not successful in the Board's preliminary view, as a communication of the

Board to prepare oral proceedings is not an invitation to make further submissions (see e.g. T 1459/11).

Nor can the Board follow the respondent's argument that the objections based on D2 were already in the proceedings since D2 was mentioned in the notice of opposition.

According to the established case law of the Boards of Appeal the appeal proceedings are wholly separate and independent from the proceedings at first instance. This means that the respondent cannot assume that arguments submitted during the proceedings before the opposition division are part of the appeal proceedings.

For this reason the respondent should have presented "the complete case" and should have specified "expressly all the facts, arguments and evidence" in its letter of reply which could challenge the patent even if the first instance decision and consequently the statement of grounds of appeal are not concerned with some of these arguments.

Hence, this amendment to the party's case presented after the Board's communication amounts to a late-filed submission the admittance of which falls under the discretion of the Board (Article 13(1) RPBA). In this context, it has to be emphasised that the inventive step objection starting from D2 is clearly late-filed since it was presented for the first time in the whole proceedings (including the first instance proceedings) with the letter of 8 February 2017, i.e. one month before the date of the oral proceedings.

3.3 Further, the Board considers that the submissions based on D2 represent a fresh case presented at a late stage

of the appeal proceedings which would require a substantially different discussion as compared to the case based on D4.

In particular, when evaluating novelty and inventive step, the Board would be faced for the first time with the technical content of document D2 and the related questions such as for example, whether or not the illumination member extends laterally according to feature c), whether or not the step upper surface has a relatively dark tone (feature d)) and whether or not an ornament in the sense of feature f) is an intrinsic feature of an air inlet grille, all features which presence in D2 has been contested by the patent proprietor/appellant.

- 3.4 Under these circumstances - irrespective of the relevance of D2 - the Board exercised its discretion not to admit the submissions based on D2 into the proceedings in view of the substantial amendment of the case with complex technical issues and for reasons of procedural economy (Article 13(1) RPBA).
4. As a consequence of the Board's decision not to admit the late-filed submissions based on D2, the respondent's request to remit the case to the first instance to examine novelty of the contested invention based on D2 is deprived of significance and thus has to be rejected.
5. The Board dismissed the respondent's objection according to Rule 106 EPC as filed during oral proceedings before the Board of appeal.
- 5.1 During oral proceedings, after the discussion concerning the admittance of the submissions based on

D2, the respondent filed a request to remit the case to the first instance and the objection according to Rule 106 EPC in the case that the remittal to the first instance was not granted.

The respondent stated that document D2 was already filed in first instance proceedings and that the respondent's interpretation of D2 was changed after the communication of the Board. The novelty objection based on D2 was filed immediately (with letter of 8 February 2017) after the communication of the Board.

- 5.2 The reasons for not admitting the submissions based on D2 into the proceedings have been discussed under point 3 et seq. The respondent explicitly stated that he had the opportunity to comment on the admissibility issue during oral proceedings before the Board (see minutes of the oral proceedings). The Board considers that the right to be heard has been respected (Article 113, Article 112a c) EPC).

The reference to "any other fundamental procedural defect" (Article 112a d) EPC) concerns an alleged departure of the Board from the established case law, in particular, from the criterion of prima facie relevance for the admittance of the submissions based on D2. This objection cannot be followed by the Board. The Board exercised its discretion taken into account the criteria established in Article 13(1) RPBA, in particular, the need for procedural economy. In the Board's view the criterion of prima facie relevance does not prevail over the criteria explicitly mentioned in Article 13(1) RPBA.

Further, for the sake of argument since the respondent mentioned that the submissions on D2 are arguments

which are always to be admitted into the proceedings, the view expressed in the decision G4/92 relating to the general admissibility of new arguments in appeal proceedings, has been modified by the amendments of the RPBA introduced with effect from 1 May 2003 (see for example T 1621/09). Thus, the admissibility of new arguments is a matter for the Board's discretion according to Article 13(1) RPBA.

5.3 Thus, the Board cannot identify any deficiency according to Article 112a c) or d) EPC.

Order

For these reasons it is decided that:

- The decision under appeal is set aside.
- The patent is maintained as granted.
- The request to remit the case to the first instance department is dismissed.
- The objection under Rule 106 EPC is dismissed.

The Registrar:

The Chairman:



A. Vottner

G. Pricolo

Decision electronically authenticated