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D E C I S I O N
of 28 April 1999

Case Number: T 0540/97 - 3.2.4

Application Number: 92203948.2

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Language of the proceedings: EN

Title of invention:

Depilation apparatus with twisting action

Applicant:

Philips Electronics N.V.

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 69(1), 54, 56

Keyword:

-

Decisions cited:

T 0204/83, T 0056/87

Catchword:

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Boards of Appeal

Chambres de recours

Case Number: T 0540/97 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 28 April 1999

Appellant: Philips Electronics N.V.
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Representative: Cuppens, Hubertus Marinus Maria
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 23 December 1996
refusing European patent application
No. 92 203 948.2 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: C. A. J. Andries
Members: R. E. Gryc
C. Holtz

Summary of Facts and Submissions

- I. The appellant lodged an appeal, received at the EPO on 10 February 1997, against the decision of the Examining Division notified by post on 23 December 1996, refusing European patent application No. 92 203 948.2.

The fee for appeal was paid simultaneously and the written statement setting out the grounds of appeal was filed on 21 April 1997.

- II. The Examining Division held that the subject-matter of Claim 1 submitted to examination did not involve an inventive step (Article 56 EPC) having regard to the state of the art disclosed in document EP-A-0 408 038 (D1), which was cited in the search report together with document US-A-4 575 902 (D2).

In the appealed decision (see section 2.3 of the Reasons), the Examining Division acknowledged that D1 did not disclose the problem of the invention; however, it contended that, as a bonus, said problem would be solved by the skilled person in putting into effect the teaching of D1.

The Examining Division admitted that, when starting from D1, the skilled person is faced with an inconsistent teaching (see the appealed decision: page 2, lines 22, 23) and that, as regards the relative speed of rotation of the elements, no clear teaching can be derived (see the appealed decision: page 4, section 2.1). Nevertheless, the first instance was of the opinion that, in order to put the teaching of D1

into effect, there would be only few alternatives available and the skilled person would arrive at the subject-matter of Claim 1 as the result of the application of normal design procedures (see the appealed decision: page 4, sections 1.4).

III. In his statement of grounds for the appeal, the appellant pointed out that D1 did not explicitly disclose that the depilation apparatus described therein was provided with means for twisting the hairs about their longitudinal axes before the hairs were pulled from the skin as claimed in Claim 1. He contended that D1 suggested that the two elements 3 and 10 were rotating already before the hairs were gripped and continued to rotate after the hairs had been gripped. According to the appellant, these indications did not teach the idea that the first rotary element 3 should not rotate before coming into contact with the second rotary element 10 in order to achieve a hair twisting action. The appellant also argued that the observation in the appealed decision constituted an *ex post facto* analysis in which the Examining Division disputed the inventive step of Claim 1 not exclusively on the basis of the teaching of D1 but used its foreknowledge about the subject matter of Claim 1 to find a way in which a skilled person could arrive at the subject-matter of Claim 1 when putting into effect the teaching of D1. The appellant contended also that, in view of the number of improbable non obvious choices which had to be made in order to arrive at the subject-matter of Claim 1, the skilled person could only by chance have arrived at a hair twisting depilator.

IV. The appellant requests that the decision of the

Examining Division be set aside and a patent be granted on the basis of the application as originally filed.

V. Claim 1 as originally filed reads as follows:

"A depilation apparatus provided with a depilation member having pinching elements for consecutively holding hairs which grow from the skin clamped in and pulling said hairs from the skin, characterized in that the depilation apparatus is provided with means for twisting the hairs about their longitudinal axes before the depilation member pulls the hairs from the skin".

Reasons for the Decision

1. Admissibility of the appeal.

The appeal is admissible

2. *Interpretation of Claim 1 (Article 69(1) EPC)*

The invention resides in the general idea of providing a depilation apparatus, in addition to the pinching elements, with specific means for reducing the pain occurring while the hairs are being pulled from the skin by the pinching elements. In Claim 1, these means have been claimed in a generalised form as "means for twisting the hairs".

In the light of the description and drawings, it appears that said means can be either an auxiliary rotating system providing a different rotating speed

(see the second and third embodiments of the application), or a different number of matching forms between the engaging pinching elements (see the fourth embodiment) or lack of any connection between a driven pinching element and an idle one, the inertiae of the idle element and the sliding friction between the elements when they come into contact being used to twist the hairs (see the first embodiment).

3. *Novelty (Article 54 EPC)*

According to consistent case law of the boards of appeal of the EPO for novelty assessment, a disclosure should always be interpreted in a very restrictive way. Claimed features can only be anticipated by a clear and unmistakable teaching (see for example Decisions T 204/83, OJ EPO 1985, 310, and T 56/87, OJ EPO 1990, 188).

As acknowledged by the first instance in its decision, the teaching of D1 as regards the functioning of the pinching elements of the different disclosed embodiments is not clear and appears even to be inconsistent. Moreover, it should be pointed out that none of the embodiments described in D1 comprises, in addition to the pinching elements, any specific "means for twisting the hairs" in the meaning of the invention (see section 2, above).

In particular, in the first and second embodiments of D1 (see Figures 1 to 6), the so-called "freely rotatable" member (3, 31) is not completely independent from the driven member (10, 32) insofar as said two members are biased apart from each other by the

compression spring (16). Consequently, the nearer said members, the higher the friction between the extremities of the spring and the rotary members (3, 31 and 10, 32) and the stronger the connection between said members.

Therefore, since the compression of the spring (16) and the friction between said spring and the two pinching elements (3, 31 and 10, 32) are nearly at their maximum just before the element (3, 31) is engaged by the element (10, 32), it cannot reasonably be assumed that no rotational movement is transmitted via the spring (16) and that the "freely rotatable" member (3, 31) is not driven by the other pinching member (10, 32).

Whether the rotation speeds of the two members are very different or roughly the same in order to avoid a shock due to the wedging effect when the two bevelled tapering end surfaces (4, 11) come into contact, remains undefined.

In accordance with the above-mentioned case-law, the subject-matter of Claim 1 should be considered as new in the meaning of Article 54 EPC in comparison with the disclosure of D1 and D2, since none of them describes in combination all the features of the apparatus claimed in Claim 1.

4. *The state of the art closest to the invention*

D1 can be considered as disclosing the state of the art closest to the invention at the priority date of the application.

Due to the unclear and equivocal teaching of D1, the apparatus according to Claim 1 differs from this closest state of the art in that, contrary to D1, means for twisting the hairs are explicitly provided.

5. *Problem and solution*

When starting from the state of the art known from D1 and taking into account the above-mentioned difference, the problem to be solved by the person skilled in the art is to improve said known apparatus in such a way that enhanced painless depilation can be obtained (see the application as filed, page 1, 4th paragraph).

According to the invention, such an enhanced depilation is obtained by additional means the function of which is to twist the hairs. The Board is satisfied that the solution described in Claim 1 solves the above-mentioned problem.

6. *Inventive step (Article 56 EPC)*

- 6.1 When examining whether the modification of the closest state of the art along the lines of the claimed solution involves an inventive step, it should first be investigated whether the prior art seen by the skilled person in the light of his general common knowledge would place at his disposal the information considered as essential in order to carry out the invention, i.e. whether each of the combined essential elements for carrying out the invention was already known per se, each of said elements being identified unequivocally in the state of the art by structure and function. Secondly, since there is a priori no reason to gather

together different separate existing elements, it should be investigated whether the state of the art would prompt the skilled person to use said known elements in addition to the already combined elements of the closest prior art in expectation of the improvement for which the skilled person was searching.

Moreover, in line with the established case law of the Boards of Appeal (see in particular the above mentioned decision T 56/87), when investigating inventive step, it is not justified arbitrarily to isolate parts of a prior document from their context in order to derive therefrom a technical information which would be distinct from or even in contradiction with the teaching of said document when seen as a whole.

6.2 In the present case, D1 discloses elements (rotary members 3 and 10) having mating structures (respectively a bevelled tapering edge 11 and a juxtaposed conically tapering end surface 4) which may be able to twist the trapped hairs provided that they are driven at different rotating speeds. However, not only is there no indication in D1 that the speeds of said mating structures remain different when they come into contact, but the terms used in said document to describe the function of these mating structures i.e. "to engage", "to grip", "to clamp", "to trap" and "to pluck" the hair (see for example D1: column 2, lines 5, 6, 28 and 31; column 4, lines 13, 41 and 52; column 5, lines 1, 4, 6, 15, 22 and column 6, lines 17, 19, 23, 42 and 43) do not even suggest giving a twist to the trapped hairs before plucking.

Since, moreover, the other document D2 cited in the

search report also does not disclose elements which twist the hairs before plucking, in the context of the invention said elements cannot be considered as known per se before the priority date. Even if it were assumed that they were known, neither D1 nor D2 gives a hint or clue capable of prompting the skilled person to modify the pinching means of D1 or to add specific elements just to twist the trapped hairs.

6.3 For the foregoing reasons, the Board is convinced that the achievement of an improved depilation apparatus according to the teaching of Claim 1 does not follow plainly and logically from the prior art, as illustrated by D1 and D2, but implies an inventive step within the meaning of Article 56 EPC.

7. Therefore a patent can be granted on the basis of the application as originally filed, as requested by the appellant.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the first instance with the order to grant a patent based on the description (pages 1 to 15), the claims 1 to 13 and the drawings (Figures 1 to 9) of the application as originally filed.

The Registrar:

The Chairman:

N. Maslin

C. Andries