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Federal Court of Justice does not bite into Tooth Cleaning patent: A combination of elements that are adapted so as to jointly serve a certain purpose, is not anticipated by a reference that merely discloses these elements without their functional adaptation

Thorsten Bausch (Hoffmann Eitle) · Friday, July 29th, 2011

The Federal Court of Justice (FCJ) in Germany has held in its recent “Dentalgerätesatz” decision [FCJ.5.4.2011](#) that claim 1 of EP 892 625 is novel since it claimed a new functional adaptation of otherwise known elements to serve a certain purpose. In doing so, the FCJ reversed the first-instance decision of the Federal Patent Court.

The patent protected a set of devices comprising a number of different types of interdental brushes and at least one probe device having several flexible probe elements which have different parameters for the measurement of the approximal accessibility of interdental spaces, the probe elements which have the different parameters being co-ordinated with the different types of interdental brushes so that it is possible to determine directly the correct interdental brush by insertion of the probe device into an interdental space.

Cleaning the spaces between the teeth with the aid of interdental brushes has long been an indispensable part of thorough dental care. However, the widths of the spaces between the teeth vary and in practice it is difficult to determine the optimum size of the interdental brush. The problem underlying the invention is to provide dentists or other consultants with a means to determine the correct interdental brush. The solution is to measure the accessibility of the interdental spaces by a probe device. The correct interdental brush can be directly determined using the results of the measurement.

Plaintiff had contested inter alia the novelty and inventive step of the invention on that grounds that both elements of the claim, i.e. a set of interdental brushes and the probe devices, were state of the art.

With regard to novelty, the Federal Court of Justice considered EP 277 156 which claimed a tooth cleaning device in particular for the cleaning of interdental spaces, but did not mention any measurements of interdental spaces. It further considered US patent 4,959,014 and US patent 5,044,951. Both of these claimed devices for the measurement of interdental spaces for orthodontics purposes, but not for determining the correct interdental brush. The Court added that this purpose cannot be derived by a skilled reader from the content of US 4,959,014 either (referring to its earlier decision “Olanzapin” of 16 December 2008, X ZR 89/07, note 26). Finally, the Court discussed US Patent 5,178,537 concerning a device for the measurement of the depth of

periodontal pockets and EP 584 489 claiming a surgical device for the measurement of a human hollow organ, e.g. the human bowel. Neither of the devices was meant to measure interdental spaces. As a result, none of the cited documents was held to destroy novelty.

The Court also had to decide whether it is sufficient for novelty that a (known) device for the measurement of interdental spaces is used in the (new) function of determining the correct interdental brush from among a (known) series of brushes.

Even though all of the elements of the claim were known per se, the specific purpose of the combination of the known elements, i.e. measuring interdental spaces with the probe device for the determination of the correct interdental brush, was not disclosed in the state of the art. Claim 1 was therefore considered to be novel.

The Court further decided that the invention also involves an inventive step. The person skilled in the art, i.e. an experienced dentist who develops dental hygiene devices, would have realized that for the determination of a correct interdental brush, the interdental spaces must be measured.

However, even if the person skilled in the art considered US 4,959,014 that claims a device for the measurement of interdental spaces and if he were to then combine this with a set of interdental brushes as was presented in a catalogue (assuming that this was published prior to the application), the person skilled in the art would not have been inspired to determine the optimum interdental brush based on a specific result of a probe device. In the court's view, the inventive step was supported by the fact that the invention provides a standardized and reproducible choice of the correct interdental brush.

In summary, the FCJ's decision confirms this court's general trend not to look at a prior art disclosure or a patent from a merely formal point of view ("ticking off feature by feature"), but to look at the technical teaching as a whole and to investigate whether the individual elements are used in combination and, in this case, adapted to each other to serve the claimed purpose. In regard to inventive step, the case was probably a closer one, given that it is perhaps not so far-fetched to use a known probe device for measuring interdental spaces for the purpose to determine which interdental toothbrush has the optimum fit and to then put both of these devices into one set for the consumer.

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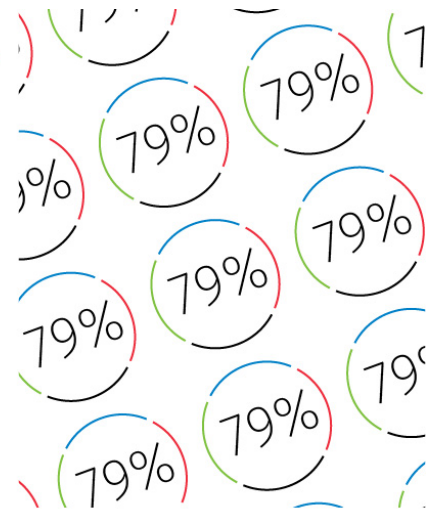
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