BESCHWERDEKAMMERN DES EUROPÄISCHEN PATENTAMTS

BOARDS OF APPEAL OF THE EUROPEAN PATENT OFFICE

CHAMBRES DE RECOURS DE L'OFFICE EUROPEEN DES BREVETS

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

D E C I S I O N
of 17 September 2003

Case Number: T 0419/02 - 3.3.3

Application Number: 95907451.9

Publication Number: 0741757

IPC: C08J 5/18

Language of the proceedings: EN

Title of invention:
Films and Absorbent Articles Comprising a Biodegradable Polyhydroxyalkanoate Comprising 3-Hydroxybutyrate and 3-Hydroxyhexanoate

Patentee:
THE PROCTER & GAMBLE COMPANY

Opponent:
Metabolix, Inc

Headword:
-

Relevant legal provisions:
EPC Art. 123(2), 123(3)
EPC R. 88

Keyword:
"Amendments - extension of scope of protection (yes)"

Decisions cited:
G 0003/89, G 0001/93, G 0002/95, T 0108/91

Catchword:
-

Europäisches Patentamt | European Patent Office | Office européen des brevets

Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0419/02 - 3.3.3

D E C I S I O N
of the Technical Board of Appeal 3.3.3
of 17 September 2003

Appellant: (Proprietor of the patent)	THE PROCTER & GAMBLE COMPANY One Procter & Gamble Plaza Cincinnati Ohio 45202 (US)
Representative:	Boulinguiez, Didier Cabinet Plasseraud 84, rue d'Amsterdam F-75440 Paris Cedex 09 (FR)
Respondent(s): (Opponent)	Metabolix, Inc 303 Third Street Cambridge MA 02142 (US)
Representative:	Stevens, Ian Edward Eric Potter Clarkson Park View House 58 The Ropewalk Nottingham NG1 5DD (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted 7 March 2002 revoking European patent No. 0741757 pursuant to Article 102(1) EPC.**

Composition of the Board:

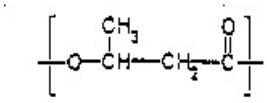
Chairman: R. Young
Members: C. Idez
E. Dufrasne

Summary of Facts and Submissions

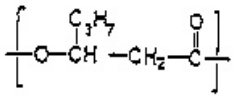
I. The grant of the European patent No. 0 741757 in the name of The Procter & Gamble Company in respect of European patent application No. 95 907 451.9, filed on 13 January 1995 and claiming priority of the US patent application No. 188271 filed on 28 January 1994 was announced on 24 May 2000 (Bulletin 2000/21) on the basis of 7 claims.

Independent Claims 1 and 4 read as follows:

"1. A film comprising a biodegradable copolymer, characterized in that the biodegradable copolymer comprises at least two randomly repeating monomer units wherein the first randomly repeating monomer unit has the structure



the second randomly repeating monomer unit has the structure

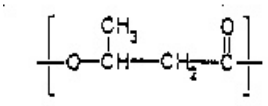


wherein at least 50% of the randomly repeating monomer units have the structure of the first randomly repeating monomer unit and wherein said film has a melt temperature of from 30°C to 160°C and a crystallinity of from 2% to 65% as measured by x-ray diffraction.

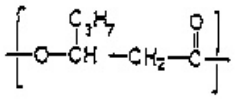
4. An absorbent article comprising:

a) a liquid pervious topsheet;

b) a liquid impervious backsheet comprising a biodegradable copolymer, characterized in that the biodegradable copolymer comprises at least two randomly repeating monomer units wherein the first randomly repeating monomer unit has the structure



the second monomer unit has the structure



said backsheet having a melt temperature of from 30°C to 160°C and a crystallinity of from 2% to 65% as measured by x-ray diffraction; and wherein at least 50% of the random repeating monomer units have the structure of the first randomly repeating monomer unit; and

c) an absorbent core positioned between the topsheet and the backsheet."

Claims 2 to 3, and 5 to 7 were dependent on Claims 1 and 4, respectively.

II. On 22 February 2001, a Notice of Opposition was filed by Metabolix, Inc in which revocation of the patent in its entirety was requested on the grounds of lack of

novelty and lack of inventive step (Article 100(a) EPC), of insufficiency of disclosure (Article 100(b) EPC) and extension of subject-matter (Article 100(c) EPC).

The objections were supported *inter alia* by the following documents:

D1: Koyabashi, G. et al, "Biosynthesis and Characterization of Poly(3-hydroxybutyrate-co-3-hydroxyhexanoate) from Oils and Fats by Aeronomas sp.OL-338 and Aeronomas sp.FA-440", Abstracts of the 3rd International Scientific Workshop on Biodegradable Plastics and Polymers; November 9 (Tuesday)- 11 (Thursday) 1993; and

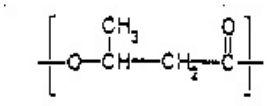
D1A: Koyabashi, G. et al, "Biosynthesis and Characterization of Poly(3-hydroxybutyrate-co-3-hydroxyhexanoate) from Oils and Fats by Aeronomas sp.OL-338 and Aeronomas sp.FA-440", Biodegradable Plastics and Polymers; 1994, pages 410-416.

III. By a decision announced orally on 14 February 2002 and issued in writing on 7 March 2002, the Opposition Division revoked the patent.

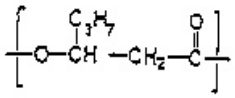
IV. The decision of the Opposition Division was based on claims 1 to 7 as granted as main request, on Claims 1 to 7 as submitted with letter dated 6 February 2002 as first auxiliary request and on Claims 1 to 7 as submitted during the oral proceedings of 14 February 2002 as second auxiliary request.

Independent Claims 1 and 4 of the first auxiliary request read as follows:

"1. A film comprising a biodegradable copolymer, characterized in that the biodegradable copolymer comprises at least two randomly repeating monomer units wherein the first randomly repeating monomer unit has the structure



the second randomly repeating monomer unit has the structure



wherein at least 50% of the randomly repeating monomer units have the structure of the first randomly repeating monomer unit and wherein said copolymer has a melt temperature of from 30°C to 160°C and a crystallinity of from 2% to 65% as measured by x-ray diffraction, and wherein said film has:

- a machine direction modulus defined such that it has a 1% secant-type modulus above 6.895×10^8 dynes/cm^2 and below 6.895×10^9 dynes/cm^2 and;
- a 60°C modulus of at least 5.52×10^7 dynes/cm^2.

4. An absorbent article comprising:

a) a liquid pervious topsheet;

b) a liquid impervious backsheet comprising a biodegradable (sic) according to Claim 1.

c) an absorbent core positioned between the topsheet and the backsheet."

Claim 1 of the second auxiliary request differed from Claim 1 of the main request in that it had been indicated that the copolymer and the film had melt temperature of from 30°C to 160°C and a crystallinity of from 2% to 65% as measured by x-ray diffraction.

Independent Claim 4 corresponded to Claim 4 of the first auxiliary request.

The Opposition Division revoked the patent on the grounds that the main request and the second auxiliary request violated the requirements of Article 123(2) EPC and that the first auxiliary contravened Article 123(3) EPC.

According to the decision, Claims 1 and 4 of the main request contained the features that the claimed film had a melt temperature of from 30°C to 160°C and a crystallinity of from 2 to 65% as measured by X-ray diffraction, which were not directly and unambiguously derivable from the application as originally filed.

Concerning the first auxiliary request, the Opposition Division came to the conclusion that the deletion in Claims 1 and 4 of the features that the claimed film had a melt temperature of from 30°C to 160°C and a crystallinity of from 2 to 65% as measured by x-ray diffraction resulted in a broader scope of protection than that of the granted patent.

Concerning the second auxiliary request in which the features that the claimed film had a melt temperature of from 30°C to 160°C and a crystallinity of from 2 to 65% as measured by x-ray diffraction had been reintroduced in Claims 1 and 4, the Opposition Division stated that this feature could not, as argued by the Patent Proprietor in view of the decision G 1/93 (OJ EPO, 1994, 541), be considered as a restriction of the scope of protection, which did not provide a technical contribution to the claimed invention, since it was clear from the patent that the melt temperature of the film itself provided a technical contribution.

V. A Notice of Appeal was filed on the 25 April 2002 by the Appellant (Patent Proprietor) with simultaneous payment of the prescribed fee. With the Statement of Grounds of Appeal filed on 5 July 2002, the Appellant maintained its main request, and submitted a new auxiliary request. It argued essentially as follows:

(i) Concerning the main request:

(i.1) The passages on page 16, lines 14 to 22 and page 5, lines 1 to 3, demonstrated that the amendments made during the Examining procedure, i.e. indicating that the claimed film had a melt temperature of from 30°C to 160°C and a crystallinity of from 2 to 65% as measured by x-ray diffraction, did not add subject matter which extended beyond the content of the application as filed.

(i.2) The ranges of melt temperature and crystallinity mentioned for the copolymers were selected to allow the easy processing into films. It thus followed that the

melt temperature and the crystallinity of the film must fall within this range.

(i.3) In fact, the melt temperature and the crystallinity of the film must simply fall within the claimed ranges without being identical to those of the copolymer used for its manufacture. The presence of further components in the film or the use of further process steps would not affect the end result that the film exhibited a crystallinity and a melt temperature within the ranges specified in Claim 1.

(ii) Concerning the auxiliary request:

(ii.1) This request corresponded to the second auxiliary request submitted at the oral proceedings of 14 February 2002.

(ii.2) The adding before grant of an undisclosed feature which limited the scope of protection conferred by the patent as granted would not be contrary to Article 123(2) EPC if said features merely excluded protection for parts of the subject-matter of the claimed invention as covered by the application as filed.

(ii.3) In the present case the claims would have been limited to films comprising copolymers having specific melt temperature and crystallinity and being further limited to films having a melt temperature and a crystallinity in the same ranges.

(ii.4) The technical contribution was brought by the specific selection of the copolymers. The further

limitation in relation to the melt temperature and the crystallinity of the films brought no technical contribution, since the films were limited to having a crystallinity and a melt temperature within the ranges specified for the copolymers.

(ii.5) Thus, this further limitation qualified under the case law G 1/93 as an amendment which did not contravene Article 123(2) EPC.

VI. With its letter dated 19 November 2002, the Respondent filed the following documents:

D9: Avella et al " Poly-D-(-)(3-hydroxybutyrate)/ polyethylene oxide) blends: phase diagram, thermal and crystallization behaviour", Polymer, 1988, Volume 29, October pages 1731 to 1737; and

D10: L.A. Utracki "Polymer Alloys and Blends", Hanser Publishers, 1989, page 60.

It also argued essentially as follows:

(i) Concerning the main request:

(i.1) The passage on page 16, lines 14 to 22 referred only to the copolymers not to the films.

(i.2) It could not provide a support for the feature that the claimed film had a melt temperature of from 30°C to 160°C and a crystallinity of from 2 to 65% as measured by x-ray diffraction.

(i.3) Specifying the melt temperature and the crystallinity of one of the starting products used in the manufacture of a product, regardless of what other components the product contained and how the product was produced, did not mean that the product itself would have the same properties.

(i.4) This was also well known to the skilled person (cf. D9 and D10).

(i.5) The Appellant had argued that the other ingredients and the other steps used did not affect the end result. However, the end result is clearly a film or an absorbent article. This end result did not exclude components, such as plasticizers, which altered the melt temperature and the crystallinity of the copolymer.

(i.6) Thus, the main request did not comply with Article 123(2) EPC.

(ii) Concerning the auxiliary request:

(ii.1) The Claims of the auxiliary request still contained the feature that the claimed film had a melt temperature of from 30°C to 160°C and a crystallinity of from 2 to 65% as measured by x-ray diffraction. Thus, for the same reasons as the main request, it did not comply with Article 123(2) EPC.

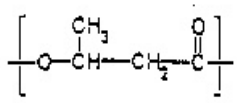
(ii.2) The Appellant could not also rely on the decision G 1/93, since the physical properties of the films provided a technical contribution.

VII. In a communication dated 14 May 2003 and annexed to a summons to Oral Proceedings the Rapporteur presented its provisional view concerning the allowability of the main and the auxiliary request under Article 123(2) EPC.

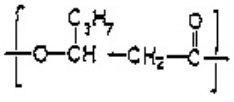
VIII. With its letter dated 22 July 2003, the Appellant submitted a set of 7 claims as new main request.

Independent Claims 1 and 4 read as follows:

"1. A film comprising a biodegradable copolymer, characterized in that the biodegradable copolymer comprises at least two randomly repeating monomer units wherein the first randomly repeating monomer unit has the structure



the second randomly repeating monomer unit has the structure



wherein at least 50% of the randomly repeating monomer units have the structure of the first randomly repeating monomer unit and wherein said biodegradable copolymer has a melt temperature of from 30°C to 160°C and a crystallinity of from 2% to 65% as measured by x-ray diffraction.

4. An absorbent article comprising:
a) a liquid pervious topsheet;
b) a liquid impervious backsheet comprising a biodegradable copolymer, according to Claim 1, and
c) an absorbent core positioned between the topsheet and the backsheet."

Claims 2 to 3 and 5 to 7 are dependent on Claims 1 and 4, respectively.

In its letter the Appellant argued essentially as follows:

(i) The claims of the new main request corresponded substantially to those as granted, but Claim 1 had been amended to indicate the melt temperature and the crystallinity of the copolymer and not of the film.

(ii) It was clear from the application documents as filed that the melt temperature and the crystallinity indicated in Claim 1 as granted were obviously those of the copolymers and not those of the film.

(iii) Thus, an obvious error had been made during the examination of the application.

(iv) In view of the decision T 108/91 (OJ EPO, 1994, 228), an amendment to a granted claim to replace an inaccurate technical statement which was evidently inconsistent with the totality of the disclosure of the patent, by an accurate statement of the technical features involved did not infringe Article 123(3) EPC.

(v) Thus, the replacement of the melt temperature and the crystallinity of the film by those of the copolymers would not be contrary to Article 123(3) EPC.

IX. Oral proceedings were held on 17 September 2003. At the oral proceedings, the Appellant, while relying in substance to the submissions made in its letter dated 22 July 2003, presented additional arguments which may be summarized as follows:

(1) The feature in Claims 1 and 4 that the copolymer had a melt temperature of from 30°C to 160°C and a crystallinity of from 2 to 65% as measured by x-ray diffraction indication of the melt temperature, was supported by the passage on page 16, lines 14 to 22 of the application as originally filed. Thus, these Claims met the requirements of Article 123(2) EPC.

(2) It was conceded that the Appellant had made an error when drafting the claims, on which the grant of the patent was based.

(3) It was, however clear, that the reference in the granted Claims 1 and 4 to the melt temperature and the crystallinity of the film was an inaccurate technical statement, which was inconsistent with the disclosure of the patent, as shown by:

(3.1) a list of the properties of the film appearing on page 8, lines 13 to 28 of the application as filed which mentioned neither its melt temperature nor its crystallinity,

(3.2) a statement on page 11, lines 1 to 4 that temperatures up to 60°C might be experienced during storage or shipping, which showed that the melt temperature indicated for the film in Claim 1 was not consistent with the requirements set out for the films during storage or shipping, and

(3.3) the fact that the only reference to a melt temperature of from 30°C to 160°C and a crystallinity of from 2 to 65% as measured by x-ray diffraction in the application as filed was to be found on page 16, lines 14 to 22, which, however, only dealt with the melt temperature and the crystallinity of the copolymer.

(4) Third parties would not have been misled by the wording of the granted Claims 1 and 4, and would have understood that what was defined in granted Claims 1 and 4 could not be that for which protection was sought.

(5) In that respect, the Respondent (Opponent), which could be considered as the most interested third party had indeed read the granted claims as containing the reference to the melt temperature and the crystallinity of the copolymers and not of the films, as shown by its submissions in the paragraphs 3.1 (cf. points (e) and (f) thereof), 8.6, and 12.1 of its Notice of Opposition filed on 22 February 2001.

(6) It was thus clear that the facts of the present case were comparable to those of the case dealt in the decision T 108/91. The amendment made in the new main request amounted to the replacement of an inaccurate

technical statement by an accurate statement of the technical features involved. Thus, in line with the decision T 108/91, this amendment would not infringe Article 123(3) EPC.

The Respondent, while relying on its previous submissions, presented additional arguments which may be summarized as follows:

(a) It was clear that the properties of the films were not necessarily those of the copolymer. Thus, the amendment made in Claims 1 and 4 of the new main request resulted in a broadening of the scope of protection.

(b) Third parties would indeed be affected by the amendment made, since now the claims would cover a film having a melt temperature of 165°C or a crystallinity above 65%.

(c) As stated in the decision G 1/93, the ultimate responsibility for any amendment of a patent application remained that of the Applicant. The fact that such an amendment might lead to the risk for the Applicant of being caught in an inescapable trap and of losing everything could not override the interests of the public.

(d) The patent (cf. page 8, line 58 to page 9, line 7) merely disclosed that the copolymers should preferably exhibit a melt temperature of from 30°C to 160°C and a crystallinity of from 2% to 65%. These preferable features were not inconsistent with the essential

features set out in granted Claim 1 for the melt temperature and the crystallinity of the film.

(e) The Patent Proprietor had clearly relied on the properties of the film (crystallinity, melt temperature) in its argumentation against the objection of lack of novelty over the prior art cited, i.e. D1 and D1A (cf. letter of 10 July 2001 of the Patentee; page 1, "presentation of the invention"; page 6, lines 1 to 3).

(f) Furthermore, the inventor (Mr Isao Noda) had stated in his declaration annexed to the letter dated 6 February 2002 of the Patentee, that the properties of the copolymers (melt temperature, crystallinity) were directly transposable to those of the claimed films.

(g) Thus, the properties indicated in granted Claim 1 for the films could not be considered as evidently inconsistent with the disclosure of the patent. Thus, the present case was different from that of T 108/91.

(h) The position of the Appellant had changed during the course of the proceedings. While at the beginning the melt temperature and the crystallinity of the claimed films were considered as unambiguously deriving from the original disclosure, they were further seen as having no technical meaning, and now finally as resulting from an obvious error.

(i) There was however no obvious error in granted Claim 1 and requesting the correction of an error under Rule 88 EPC at this stage of the proceedings would amount to an abuse of proceedings.

(j) Furthermore, the correction proposed would lead to an extension of scope of protection. However, according to the Respondent relying on its interpretation of the decision G 2/95 (OJ EPO, 1996, 555) correction of errors must also meet the requirements of Article 123(3) EPC.

X. The Appellant requested that the decision under appeal be set aside, and the patent be maintained according to the Claims 1 to 7 headed "new main request" and filed the letter of 22 July 2003.

The Respondent requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

Main request

2. Wording of Claim 1

2.1 Claim 1 differs from Claim 1 as granted in that the reference to the melt temperature and to the crystallinity of the claimed film has been deleted and that it has been replaced by the indication of the melt temperature and the crystallinity of the copolymer used in the manufacture of the film.

2.2 Allowability of the modification in Claim 1:

2.2.1 Article 123(2) EPC

(i) Claim 1 is supported by Claim 1 as originally filed in combination with the passage on page 16, lines 14 to 22 of the application as originally filed which define the characteristics of the copolymer for the purpose of film processing.

(ii) It thus follows from the above that Claim 1 meets the requirements of Article 123(2) EPC.

2.2.2 Article 123(3) EPC

(i) The question of the allowability of the amendment made in Claim 1 under Article 123(3) EPC boils down to the questions:

(i.1) as to whether the crystallinity and the melt temperature of the films are inevitably in the same ranges as those defined for the polyhydroxyalkanoate copolymers which have been used for their manufacture, or

(i.2) as to whether, in view of the decision T 108/91, the replacement of the melt temperature and the crystallinity of the films by the melt temperature and the crystallinity of the copolymer used for their manufacture represented the replacement of an inaccurate technical statement, which was evidently inconsistent with the totality of the patent, by an accurate statement of the technical features involved.

(ii) Concerning question (i.1) it is evident that the crystallinity of a film is not only dependent on the

crystallinity of the copolymer used in the film processing but also on the film processing conditions such as processing temperature, cooling rate or stretching ratio.

(iii) Furthermore in view of the expression "a film comprising a biodegradable copolymer" used in Claim 1 it is also clear that the copolymer can be mixed with other thermoplastic materials (cf. page 13, lines 11 to 14 of the application as filed) so that the crystallinity and the melt temperature of the film will also be dependent on the properties of the other thermoplastic resins added.

(iv) Thus, it is evident that a film comprising a copolymer having a melt temperature of 30°C to 160°C and a crystallinity of 2 to 65% will not inevitably exhibit a melt temperature of from 30°C to 160°c and a crystallinity of from 2 to 65%.

(v) By way of consequence, the answer to the first question must be negative.

(vi) Concerning question (i.2), the crucial criterion set out in T 108/91 for the allowability under Article 123(3) EPC of an amendment of a granted claim replacing an inaccurate technical statement is that the inaccurate technical statement must be evidently inconsistent with the totality of the disclosure of the patent.

(vii) In the Board's view this presupposes that the person skilled in the art will immediately recognize that the statement to be replaced in the claim is technically

inconsistent with the totality of disclosure of the patent.

(viii) While it is true that there is no formal counterpart in the description of the patent for the indication of the melt temperature and the crystallinity of the film, this, alone, does not necessarily imply that the statement in the granted claim is evidently technically inconsistent with the totality of the disclosure of the patent.

(ix) In this connection, while in granted Claim 1, the melt temperature and the crystallinity of the film are presented as essential features of the invention, the values of the melt temperature and of the crystallinity of the copolymer are merely presented as preferred features in the description of the patent (cf. page 8, line 58 to page 9, line 7), so that there is no immediately evident technical inconsistency between these features. For the same reasons, the same conclusion applies for the particularly preferred features of the films mentioned on page 5, lines 35 to 45 of the patent (cf. also section IX (3.1); above)

(x) Nor could a technical inconsistency arise in view of the statement on page 6, lines 44 to 48 of the patent (cf. also section IX (3.2) above) that under specific storage or shipping conditions it would be important for the backsheets to retain their integrity at temperature over 60°C, since, in view of the range of melting temperature of the claimed film (i.e. from 30°C to 160°C), the granted Claim 1 would inevitably encompass films meeting these additional but not essential requirements.

(xi) It is further noted by the Board that the inventor, Mr Isao Noda, has stated in his declaration annexed to the letter of 6 February 2003 of the Appellant that the melt temperature and the crystallinity of the copolymer are directly transposable to those of the films. Thus, if no inconsistency was apparent for such a technically qualified person (the inventor), it can hardly be argued that the alleged inconsistency would have been immediately evident for the skilled person who is an artisan of normal skill.

(xii) It thus follows that the second question must also be answered negatively.

(xiii) As a consequence from the above, the modification made in Claim 1 of the main request contravenes Article 123(3) EPC.

2.3 When trying to justify the replacement of the melt temperature and the crystallinity of the film by those of the copolymer, the Appellant has submitted that the former statement was the result of an obvious error made during the examination of the application but has at no point presented a request for a correction under Rule 88 EPC.

2.4 Nevertheless, the Board deems it appropriate to deal with the allowabilty of the modification, if it would have been presented as a correction under Rule 88 EPC, to the extent that this issue was a subject of discussion at the oral proceedings (cf. section IX (j), above).

2.5 Rule 88 EPC.

2.5.1 The Respondent has submitted that a correction in a granted claim must also meet the requirements of Article 123(3) EPC and has referred in that respect to the decision G 2/95.

2.5.2 In the Board's view, the reference made by the Respondent to the decision G 2/95 is not appropriate, since the latter only relates to the allowability of the substitution of complete documents forming an **application** by way of a correction under Rule 88 EPC.

2.5.3 Decision G 2/95, however, refers to the Opinion G 3/89 (OJ EPO, 1993, 117), which indeed deals with the correction of the parts of a European patent application or **of a European patent.**

2.5.4 According to the Opinion G 3/89, a correction is a special case involving an amendment within the meaning of Article 123 EPC (cf. point 1 of the reasons for the Opinion).

2.5.5 As further stated in G 3/89 (point 4 of the reasons for the Opinion), since a correction admissible under Rule 88, second sentence, EPC is of strictly declaratory nature (i.e. the corrected information merely expresses what the skilled person would have derive from the whole European patent application as filed), it does not infringe Article 123(2) EPC. The Opinion does not, however, make any explicit reference to Article 123(3) EPC.

2.5.6 As pointed out in G 3/89 (points 5 and 6 of the reasons for the Opinion), a correction under Rule 88, second sentence, EPC is allowable when:

(i) there is such an obvious error that a skilled person is in no doubt that this information is not correct and, considered objectively, cannot be meant to read as such; and

(ii) it is immediately evident that nothing else would have been intended than what is offered as the correction.

2.5.7 In the present case, although the person skilled in the art may discover a lack of support in the description for the features concerning the melt temperature and the crystallinity of the film incorporated in granted Claim 1, this lack of support is not necessarily an indication for an error in Claim 1.

2.5.8 On the one hand these features are not inconsistent with the remaining part of granted Claim 1 and, on the other hand, as shown above in points 2.2.2(ix), 2.2.2(x) and 2.2.2(xi), not evidently (i.e. obviously) inconsistent with the disclosure of the patent.

2.5.9 Thus, it is doubtful whether Claim 1 contains an obvious error, and for this reason alone a correction would be ruled out (cf. G 3/89, point 5 of the reasons for the Opinion).

2.5.10 Summing up, the modification made in Claim 1 of the main request contravenes Article 123(3) EPC and, even if considered as a correction it would not fulfil the

requirements for correction of an error under Rule 88 EPC.

3. It thus follows that Claim 1 and, hence, the main request as a whole are not allowable.

4. Since the main request, which is the only request of the Appellant, is not allowable, the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

E. Görgmaier R. Young