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D E C I S I O N
of 21 April 2005

Case Number: T 0300/04 - 3.5.1

Application Number: 94120761.5

Publication Number: 0660262

IPC: G06K 19/16

Language of the proceedings: EN

Title of invention:
Transparent hologram seal

Patentee:
Toppan Printing Co., Ltd.

Opponent:
Giesecke & Devrient GmbH

Headword:
Transparent seal/TOPPAN

Relevant legal provisions:
EPC Art. 54, 56, 69, 83, 84, 100(a)(b)(c)
RPBA Art. 10b(1)(3), 11(2)

Keyword:
"Admissibility of appeal - yes"
"Most embodiments outside amended claims - not objectionable under Article 100(b) EPC"
"Adaptation of description to post-grant amendment of claims - necessary under Article 84 EPC"
"Late-filed requests not raising complex issues - admitted"
"Fresh ground for opposition - not admitted into appeal proceedings"
"Postponement of oral proceedings - refused"
"Inventive step - no (all requests)"

Decisions cited:

G 0001/95, T 0659/93, T 0977/94

Catchword:

A party's general desire to be represented by a specific member of an association of representatives is not considered sufficient ground for changing the date for oral proceedings (point 15 of the Reasons).



Case Number: T 0300/04 - 3.5.1

D E C I S I O N
of the Technical Board of Appeal 3.5.1
of 21 April 2005

Appellant: Toppan Printing Co., Ltd.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 23 December 2003
revoking European patent No. 0660262 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: S. V. Steinbrener
Members: K. J. K. Bumés
B. J. Schachenmann

Summary of Facts and Submissions

I. This appeal lies from the Opposition Division's decision to revoke European patent EP-B1-0 660 262 (denoted "B1" hereinafter) *inter alia* for insufficiency and obviousness.

The appellant patentee requests that the decision under appeal be set aside and the patent be maintained in amended form as follows:

- Main request, filed with the grounds of appeal (= main request rejected by the Opposition Division):
Claims 1 to 8 corresponding to granted claims 1 and 3 to 9;
description pages 2 to 26 and 28 of B1 and amended pages 27, 27a;
drawing Figures 1 to 30 of B1.

- First auxiliary request, filed at the oral proceedings:
Claims 1 to 8 corresponding to granted claims 1 and 3 to 9;
description pages 2 and 5 to 28 of B1 and amended pages 3 and 4;
drawing Figures 1 to 30 of B1.

- Second auxiliary request (= auxiliary request filed with the grounds of appeal = second auxiliary request rejected by the Opposition Division):
Claims 1 to 8 corresponding to granted claims 1 and 3 to 9;
description page 2 of B1 and amended pages 3, 4, 27, 27a and 28;

drawing Figures 25 to 30 of B1, renumbered as Figures 1 to 6.

- Third auxiliary request, filed at the oral proceedings:

Claims 1 to 4 corresponding to granted claims 1, 5, 6 and 8;

description page 2 of B1 and amended pages 3, 3a, 4, 27, 28;

drawing Figures 25 to 30 of B1, renumbered as Figures 1 to 6.

Claim 1 of each request is identical to claim 1 as granted (see B1, pages 28/29):

"1. A laminated body comprising:

a reflective base member (60); and

a transparent layer (10) formed on said base member (60),

constructed by a laminated structure of first and second ceramic materials (6; 8) having high and low refraction indices, respectively and being alternately laminated on each other, the first and second ceramic materials being laminated by an evaporation method,

said transparent layer (10) selectively absorbing incident light rays such that a peak wavelength of absorption is shifted in an amount which depends on an angle of incidence of incident light rays, and

the selective absorption causing light emitted from the laminated body to have a color which varies depending on the angle of incident light rays, the color variation being detectable by an optical instrument

characterized in that

said transparent layer (10) is formed in a pattern form including a first portion of the transparent layer having a different number of layers in the laminated structure than a second portion of the transparent layer such that a pattern is formed by contrast between the first and second portions."

II. The respondent opponent requests that the appeal be dismissed or, should the Board be willing to accept the appellant's main request or first or second auxiliary request, that the case be remitted to the first instance for further prosecution. The respondent's prior art objections rely on the following documents:

E1: EP-A-0 165 021 (corresponding to US-A-5 009 486 cited in paragraph 0014 of B1);

E2: Dobrowolski, J.A. et al.: "Research on thin film anticounterfeiting coatings at the National Research Council of Canada", Applied Optics, vol. 28, no. 14 (15 July 1989), pages 2702 to 2717.

III. With a communication dated 11 February 2005, the Board summoned the parties to attend oral proceedings scheduled for 21 April 2005.

The respondent's representative requested (16 February 2005) that the oral proceedings be postponed due to private holidays that he had booked for the calendar week concerned. In view of a long-standing personal representation of his client, the representative argued that he could not delegate the attendance at the oral proceedings to a colleague within his association.

The Board declined to postpone the oral proceedings for the reasons given below (point 15).

IV. Arguments exchanged at the oral proceedings

- (a) As to the main request, the respondent considered the grounds of appeal to be deficient because the appellant had provided only a general opinion rather than any legal or factual reason as to why the impugned decision should be regarded unfounded with respect to the main request. Therefore, the appeal procedure should be confined to the auxiliary requests.

The appellant argued that the Opposition Division's rejection of the main request under Article 100(b) EPC was clearly erroneous in that any inconsistency between claim 1 and the description was objectionable only under Article 84 EPC which, however, was not a ground for opposition to a granted claim such as claim 1. Hence, it was sufficient for the grounds of appeal to state said error and to briefly point out that claim 1 itself enabled the skilled person to manufacture a laminated body as claimed even though most of the embodiments admittedly no longer fell within the definition of said claim. The additional effort of reading unclaimed matter did not prevent the skilled person from carrying out the invention; the Opposition Division itself had issued a preliminary opinion acknowledging the enabling disclosure.

- (b) According to the respondent, Article 84 EPC was applicable because the description had been amended in response to the deletion of granted claim 2 which was occasioned by a ground for opposition as required by

Rule 57a EPC. The amended description was supposed to conform to the amended claim set for clarity, which however was not the case in the main request (with respect to paragraphs 0021 and 0388) and in the first auxiliary request (with respect to paragraph 0388). Moreover, once the embodiments not covered by claim 1 were removed (second auxiliary request), some dependent claims were no longer supported by the amended description; a general one-line statement such as the one given in paragraph 0018 of amended page 3 could not provide support within the meaning of Article 84 EPC.

The appellant addressed those objections by referring to the auxiliary requests comprising amended versions of the description and one reduced set of claims (third auxiliary request). As a general guiding principle, post-grant amendments should be kept to a minimum.

- (c) The respondent objected to the appellant's filing of amended requests at the oral proceedings. The filing was said not to be in response to any new presentation or surprise. Hence, the respondent did not see any reason or excuse for such a late submission and requested that the appellant's additional requests should not be admitted into the proceedings.

The appellant submitted that the amended requests were occasioned by the respondent's shift of argumentation from Article 100(b) EPC to Article 84 EPC newly based on the fact that granted claim 2 had been deleted.

- (d) The respondent asserted that the notice of opposition had implied an objection under Article 100(c) EPC and that the Opposition Division had refrained from dealing

with that objection only because the patent was revoked for different reasons. Therefore, if the Board was to dismiss the Opposition Division's reasons, the case should be remitted to have the Opposition Division examine the patent also for added subject-matter. The patent as granted was said to extend beyond the content of the application as filed in that the ninth embodiment of the application had been given general significance in the introductory portion of the patent [0021], effectively linking the ninth embodiment to other embodiments in a way not disclosed initially.

The appellant considered the Article 100(c) EPC objection as a fresh ground for opposition and refused to have it introduced at the appeal stage. Thus, amendments already present in the B1 specification were held not to be open to objections under Article 100(c) or 123(2) EPC, even where such amendments reappeared in modified requests.

- (e) Before turning to the prior art discussion, the Board asked the appellant to explain the term "absorption" as used in claim 1 because the patent appeared to concern a cancellation of light waves by interference rather than an ordinary absorption of light in materials of the laminated optical body.

The appellant confirmed that while some degree of absorption took place in any kind of optical material, the claimed device mainly relied on interference effects despite the wording of the claim which had to be read in the context of the description and drawings.

- (f) The respondent regarded the general teaching of document E1, in relation to Figure 6 or Figures 16/17 or Figures 18/19, as novelty-defeating with respect to claim 1, bearing in mind the starting point of E1, i.e. US-A-3 858 977 (as summarised on page 1 of E1) which related to optical interference layers having alternating refraction indices, and considering the table of design options presented on page 9 of E1. In particular, any coloured substrate as envisaged by E1 constituted a reflective base member in the terms of claim 1.

The appellant argued that the disclosure of E1 was ambiguous with respect to the structures and materials of its various embodiments. US-A-3 858 977 did not provide patterns in its multilayer interference coatings and, thus, was not a clear starting point for the development presented in E1. The most general teaching of E1 (claim 1) related to a single form-depicting interference layer arranged on a substrate. While additional coatings, each potentially consisting of plural layers, were possible, there was no teaching of alternating layers of two ceramic materials having different refractive indices. In particular, the drawings of E1 should not be over-interpreted, the hatching of Figure 6 was too schematic to define alternating layers of two materials, Figure 17 did not comprise any hatching, and the hatching of Figure 19 was also inconclusive. In addition, the substrate used in E1 might not be reflective, contrary to the base member required by claim 1 and exemplified by an aluminum layer in embodiment 9 (B1, paragraph 0397).

- (g) Even when assuming novelty on the basis of the appellant's analysis of E1, the respondent considered two alternating refraction indices in a multilayer coating to be the skilled person's very first option for implementing an interference filter. US-A-3 858 977 (as presented by E1 itself) or E2 dealt with such alternating multilayer structures and disclosed suitable pairs of optical materials to be used. Moreover, any coloured or mirror-finished (metallised) substrate as envisaged by E1 or a white document surface (E2, Figure 16B) constituted a reflective base member in terms of claim 1.

While Table 1 of E2 described layers having alternating refractive indices, the appellant argued that the skilled person would find the teachings of E1 and E2 incompatible because E2 did not provide any pattern in a multilayer structure in the form of different numbers of layers in different portions of the structure. Absorption layers in the multilayer stack, like in Figure 16C of E2, made the stack opaque, contrary to the requirement for a transparent layer in claim 1. When attached to a black document (E2, Figure 16C), the substrate of the stack was not reflective, also contrary to the requirements of claim 1.

- V. At the end of the oral proceedings, the chairman pronounced the Board's decision.

Reasons for the Decision

1. *Admissibility of the appeal*

1.1 The respondent's submission that the appellant's main request should be disregarded because the grounds of appeal did not sufficiently address the Opposition Division's reasoning against the main request amounts to the legal question of whether an appeal can be inadmissible in part. While the Board has doubts about any concept of partial inadmissibility of an appeal, this question need not be answered in the present case because the Board is satisfied that the grounds of appeal deal adequately with the Opposition Division's reasoning against the main request.

1.2 With respect to the main request, the impugned decision (Reason 3) states generally that the requirement of Article 100(b) EPC is not fulfilled if the description contains not only one passage relating to the claimed invention but, in addition, a number of embodiments described as being according to the invention but not covered by any independent claim. In such a situation, the skilled person is said to be confronted with an undue choice which is not a sufficiently clear directive for carrying out the invention.

However, the decision under appeal fails to specify the pertinence of the above general statement to the facts of the present case. The statement remains a hypothesis rather than being a reasoned objection.

The Board is not aware of any case law foreshadowing the Opposition Division's approach with respect to Article 100(b) EPC. If the Opposition Division had tested its hypothesis against the present case in a specific manner, the appellant might have been in a better position or even obligation to respond more specifically.

- 1.3 The appellant's arguments against the Opposition Division's finding in relation to Article 100(b) EPC are clear: (i) the Opposition Division acknowledged the enabling disclosure in its preliminary opinion; (ii) the appellant considers the definition of claim 1 to be self-explanatory in the light of common general knowledge; (iii) the Opposition apparently assumed an excessively low level of knowledge and ability of a skilled person; and (iv) the Opposition Division probably rejected the main request on a ground other than Article 83 EPC (see grounds of appeal, paragraph bridging pages 1 and 2; page 8, paragraph 4 to page 9, paragraph 2).

Hence, the grounds of appeal provide arguments on the issue of Article 100(b) EPC. It may be added that the brevity of the grounds of appeal corresponds to that of Reason 3 of the impugned decision and thus could hardly be considered inappropriate. The question of whether or not those arguments are successful in the end is not a criterion of admissibility.

- 1.4 The Board thus finds the appeal to be admissible.

2. *Article 100(c) EPC*

2.1 Contrary to the respondent's submission, the Board is not convinced that the notice of opposition included an objection under Article 100(c) EPC. The notice of opposition was filed using Form 2300.1-4 and checking the boxes for lack of novelty, lack of inventive step and lack of enabling disclosure as grounds for opposition on Form 2300.2. An annex to the notice of opposition substantiated those grounds in a clear and structured manner, discussing in turn objections under Articles 83, 54 and 56 EPC. A summarising paragraph at the end of the annex reiterated the basis of the opponent's request for revocation, namely lack of enabling disclosure, lack of novelty or lack of inventive step. The Article 83 EPC discussion referred to decision T 659/93 which is concerned with the relationship between Articles 83 and 84 EPC.

In view of that clear structure of the notice of opposition, the Board holds that the extensive Article 83 EPC discussion which centers on the skilled person's alleged confusion by obsolete embodiments should not be taken for an Article 123(2) EPC objection even where the words "unzulässig verallgemeinert" (generalised in an inadmissible manner) are used. The thrust of the objection is clear from the context of the annex: The disclosure of the patent is said to be confusing in view of its generality which should have been curbed before grant.

2.2 Further, as admitted by the respondent (fax dated 18 April 2005, page 4), the Opposition Division did not deal *ex officio* with the issue of any pre-grant

amendment extending beyond the content of the application as filed.

- 2.3 Hence, any objection to the granted patent under Article 100(c) EPC would constitute a fresh ground for opposition which could be introduced at the appeal stage only with the patentee's consent (G 1/95). However, the appellant patentee has declared his disagreement with such an additional discussion (see point IV.(d), supra).

Therefore, any objection to an alleged extension by the patent as granted beyond the content of the application as filed may not be introduced into these appeal proceedings.

- 2.4 The respondent tried to launch a discussion on the fact that part of the original description of the ninth embodiment has been transferred to the introductory portion [0021] of the patent and thus has obtained the status of a general teaching not actually disclosed in the application as filed. The prominent position of paragraph 0021 is present both in the patent as granted and in the patent as amended in response to the opposition.

It is true that the patent has been further amended during the opposition and appeal procedures and those amendments are open to Article 123 EPC objections. However, pre-grant amendments - such as the insertion of paragraph 0021 in B1 - which have not been objected to under Article 100(c) EPC in the first instance procedure do not become objectionable by post-grant amendments.

Main request

3. According to the main request, the text of paragraph 0021 of B1 is duplicated into the description at page 27 of B1 (between paragraphs 0388 and 0389).

Paragraph 0021 of B1 corresponds to page 28, lines 29 to 36 of the application as published (denoted "A2" hereinafter). The fact that the ceramic layers are designed to form a pattern can be gathered *inter alia* from Experiment 91 in A2 (page 29, lines 21 to 30). Hence, the Board is satisfied that the post-grant amendment meets the requirement of Article 123(2) EPC.

4. *Article 100(b) EPC*

The Opposition Division concurred with the respondent in considering the disclosure of the patent as insufficient because the description contains a number of "embodiments" of the invention which are not, or no longer, covered by any independent claim.

Although it may not be ruled out that this general statement applies to extreme cases, the impugned decision fails to substantiate the pertinence of the statement to the present case. In the Board's view, the laminated body defined in claim 1, in particular the characterising portion thereof, is self-explanatory, and a skilled reader will find out without undue effort that the ninth embodiment of B1 mentions several alternatives, one of which falls within the definition of the claim. The other "embodiments", obsolete by the deletion of granted claim 2, are not detrimental to an

understanding of claim 1; they provide neutral or even helpful background information on the realisation of features of the claimed laminated body.

Thus, it is not apparent to the Board which of the obsolete embodiments would place an undue burden on the skilled person performing the claimed embodiment, or how the presence of unclaimed matter in the description would confuse the skilled person to a disabling extent. Hence, the requirements of Article 100(b) EPC are considered to be met.

5. *Article 84 EPC*

5.1 While not being a ground for opposition to a patent as granted (see Article 100 EPC), Article 84 EPC requires the description of a patent to be harmonised with post-grant amendments, i.e. amendments made to a claim set during an opposition procedure or ensuing appeal procedure.

5.2 In the present case, the appellant deleted granted claim 2 during the opposition procedure in response to a prior art objection. Claim 1 as granted is the only independent claim left.

Like claim 1, granted claim 2 related to a laminated body having a patterned transparent layer (10). However, while claim 1 specifies that the pattern is formed by different numbers of layers (6, 8) in different portions of the transparent layer (10), the pattern according to granted claim 2 was formed by portions of different thicknesses. Therefore, when granted claim 2

was deleted, any reference to thickness patterning should have been omitted.

- 5.3 However, paragraph 0021 of B1 (duplicated between paragraphs 0388 and 0389) still suggests arranging patterns by varying the thickness of the transparent layer:

"According to the present invention, the transparent evaporated layer 10 is formed in a pattern form constructed by a plurality of ceramic layers having different refractive indices which will be described in detail below, and part of the transparent evaporated layer 10 is formed to have a different number of ceramic layers from that of the remaining portion *or the total film thickness thereof is made different from that of the remaining portion*. Such a structure can be obtained by destroying the entire portion or part of the transparent evaporated layer by sputtering, etching or the like *or forming the layer with a larger or smaller film thickness at the time of film formation*. With the above structure, the intensity or position of the spectra of the absorption band and reflection band is changed in part of the transparent evaporated layer." (Emphasis added by the Board.)

- 5.4 In accordance with case law (see decision T 977/94, not reported in OJ EPO), it is fundamental for the patentee to bring the description into line with amended claims. An invention is claimable only to the extent that it is supported by the description. Therefore, when interpreting the claims in the light of the description (Article 69(1) EPC), the main request is not allowable for lack of support and clarity (Article 84 EPC), due

to the aforementioned inconsistency between claim 1 and the description after deletion of granted claim 2 during the opposition proceedings.

- 5.5 Moreover, paragraph 0021 entails a structure in which an "entire portion" of the transparent layer is removed and thus is also in conflict with the appellant's own interpretation that claim 1 requires the pattern of the transparent layer to be formed by different *non-zero* numbers of refractive layers (grounds of appeal, page 5, paragraph 2).

First auxiliary request

6. According to the first auxiliary request, page 27 of B1 is reinstated unamended. Pages 3 and 4 of B1 are amended to reflect that (i) granted claim 2 has been deleted during the opposition procedure and (ii) one of the alternatives mentioned in relation to the ninth embodiment is the only embodiment falling within the definition of claim 1. The Board is satisfied that the post-grant amendments do not contravene Article 123(2) EPC.

7. *Admissibility of the late-filed request*

- 7.1 According to Article 10b(1) of the Rules of Procedure of the Boards of Appeal, the Board has a discretion to admit and consider late-filed requests 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. In particular, amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the Board or

the other party cannot reasonably be expected to deal with without adjournment of the oral proceedings (Article 10b(3) RPBA).

7.2 In the present case, the filing of the first auxiliary request at the oral proceedings did not raise any new issue but clearly aimed to overcome the previous inconsistency objection, the only difference being that in the course of the oral proceedings the respondent's objection turned out to be a plausible attack under Article 84 EPC rather than a hypothetical one under Article 83 EPC. The Board therefore considered the appellant's late response (first auxiliary request) to be justified. The filing of the first auxiliary request did not create any surprising or complex situation to the other party, and the Board was still able to come to a decision at the oral proceedings.

7.3 Therefore, the Board admitted the late-filed first auxiliary request into the proceedings.

8. *Article 84 EPC*

8.1 Embodiments obsolete through the deletion of granted claim 2 have to be removed, or marked as background information, to harmonise the description with the remaining independent claim 1. According to the appellant, claim 1 is based on the understanding that each of the different layered portions forming the patterned transparent layer (10) has at least one layer (6; 8) (see point 5.5 above).

8.2 Paragraph 0021 has been amended to read:

"According to the present invention, the transparent evaporated layer is formed in a pattern form constructed by a plurality of ceramic layers having different refractive indices which will be described in detail below, and part of the transparent evaporated layer is formed to have a different number of ceramic layers from that of the remaining portion. Such a structure can be obtained by destroying part of the transparent evaporated layer by sputtering, etching or the like. With the above structure, the intensity or position of the spectra of the absorption band and reflection band is changed in part of the transparent evaporated layer."

The amendment indeed rules out patterns formed by thickness variations of the transparent layer or by a complete removal of portions of the transparent layer.

8.3 However, as argued by the respondent (see point IV.(b), supra), the unamended paragraph 0388 on page 27 of B1 encompasses a laminated body whose transparent layer (10) is patterned by a layered portion and an excised portion:

"FIG. 25 is a cross sectional view showing the structure of the ninth embodiment. A reflection layer 62, transparent evaporated layer 10 and protection layer 64 are sequentially laminated on a base member 60. *The transparent evaporated layer 10 is partially formed.* The transparent evaporated layer 10 is formed in a pattern form on the base member 60 so that the transparent evaporated layer may be formed on part of the base member and will not be formed in the remaining

portion of the base member." (Emphasis added by the Board.)

Therefore, the first auxiliary request is not allowable under Article 84 EPC, due to the emphasised inconsistency between claim 1 and the description.

Second auxiliary request

9. According to the second auxiliary request, the description of embodiments not covered by claim 1 is deleted (pages 5 to 26 of B1). Figures 1 to 24 of B1 are deleted, and the remaining Figures 25 to 30 of B1 are renumbered as Figures 1 to 6. Pages 3, 4, 27 and 28 of B1 are adapted accordingly.

Paragraph 0021 has been amended like in the first auxiliary request (see point 8.2 above).

Paragraph 0388 on page 27 has been amended to read:
"FIG. 1 is a cross sectional view showing the structure of an embodiment leading to the present invention. A reflection layer 62, transparent evaporated layer 10 and protection layer 64 are sequentially laminated on a base member 60. The transparent evaporated layer 10 is formed in a pattern form on the base member 60 so that the transparent evaporated layer may be formed in a pattern form constructed by a plurality of ceramic layers having different refractive indices, and part of the transparent evaporated layer 10 is formed to have a different number of ceramic layers from that of the remaining portion. Such a structure can be obtained by destroying part of the transparent evaporated layer by sputtering, etching or the like. With the above

structure, the intensity or position of the spectra of the absorption band and reflection band is changed in part of the transparent evaporated layer."

The Board is satisfied that the post-grant amendments do not contravene Article 123(2) EPC.

10. *Article 84 EPC*

10.1 The Board has no doubt that the amended description is consistent with the only independent claim left (claim 1 as granted). In particular, the amended paragraph 0388 no longer mentions patterns formed by thickness variation. Moreover, the amended paragraph 0388 no longer refers to a pattern consisting of a layered portion and a portion where all the layers of the transparent layer have been removed. The same observations apply to amended paragraph 0021 in the introductory portion of the description.

10.2 However, the Board agrees with the respondent (see point IV.(b), supra) that, by deleting Figures 1 to 24 and the related description pages 5 to 26 of B1, the granted dependent claims 3, 4, 7 and 9 have lost their support in the description because the features specified in those claims are described exclusively in relation to the deleted Figures. In particular:

An adhesive layer (16) as specified in claim 3 as granted is described in relation to the deleted Figures 1, 4, 5, 6, 8, 9A, 9B, 11A, 11B and 22 but not in any of the remaining Figures 25 to 30 of B1.

A separation layer (18) as specified in claim 4 as granted is described only in relation to the deleted Figures 4, 5, 6, 8, 9A, 9B, 11A and 11B of B1.

A thin film layer (42) as specified in claim 7 as granted is described only in relation to the deleted Figure 22 of B1.

A print layer (54) as specified in claim 9 as granted is described only in relation to the deleted Figure 23 of B1.

- 10.3 Therefore, the second auxiliary request is not allowable because claims 3, 4, 7 and 9 (numbering according to B1) are not supported by the reduced description, contrary to the requirements of Article 84 EPC.

Third auxiliary request

11. According to the third auxiliary request, only claims 1, 5, 6 and 8 of B1 are retained in the claim set (renumbered as claims 1 to 4). The description of embodiments not covered by claim 1 is deleted (pages 5 to 26 of B1). Figures 1 to 24 of B1 are deleted, and the remaining Figures 25 to 30 of B1 are renumbered as Figures 1 to 6. Amended pages 3, 3a, 4, 27 and 28 are to reflect the deletion of granted claims 2, 3, 4, 7 and 9.

Paragraph 0021 has been amended like in the first auxiliary request (see point 8.2 above).

Paragraph 0388 has been amended to read:

"FIG. 1 is a cross sectional view showing the structure of a laminated body. A reflection layer 62, the transparent evaporated layer 10 and protection layer 64 are sequentially laminated on a base member 60. *The transparent evaporated layer 10 is partially formed.* The transparent evaporated layer 10 is formed in a pattern form on the base member 60 *so that the transparent evaporated layer may be formed on part of the base member and will not be formed in the remaining portion of the base member.*" (Emphasis added by the Board.)

The Board is satisfied that the post-grant amendments do not contravene Article 123(2) EPC.

12. *Admissibility of the late-filed request*

The third auxiliary request was filed at the oral proceedings in response to the respondent's fresh objection (to the second auxiliary request) that the dependent claims 3, 4, 7 and 9 as granted were no longer supported by the description once pages 5 to 26 and Figures 1 to 24 of B1 had been deleted (see point IV.(b), supra).

The appellant's response consisted in deleting said dependent claims.

The respondent's objection and the appellant's amendment did not raise any complex issues and could be dealt with by the parties and the Board within the oral proceedings. The Board therefore admitted the late-filed request into the proceedings.

13. *Article 84 EPC*

13.1 The dependent claims whose support by the description has been called into question by the respondent have been deleted.

13.2 The amended paragraph 0021 of the description no longer mentions patterns formed by thickness variation and no longer refers to a pattern consisting of a layered portion and a portion where the layers of the transparent layer have been entirely removed. Said paragraph is thus consistent with the only independent claim left (claim 1).

13.3 Conversely, the amended paragraph 0388 still refers to a *partially* formed transparent layer (10), i.e. a transparent layer which may be formed on part of the base member and not formed in the remaining portion of the base member.

As that design is inconsistent with the only remaining independent claim as interpreted by the appellant (see points 5.5 and 8.1 above), paragraph 0388 of the amended description contravenes the requirements of Article 84 EPC.

Hence, the appeal must fail already on formal grounds.

14. *Article 100(a) EPC - Inventive step*

14.1 However, had the appellant removed all the abovementioned Article 84 issues caused by the requested post-grant amendments, the appeal would

nevertheless have to be dismissed on the ground of lack of inventive step of the subject-matter of claim 1 which is identical for all the appellant's requests.

- 14.2 In terms of claim 1, the prior art document E1 describes
a laminated body (e.g. Figures 18/19, page 11, lines 4 to 9) comprising:
- a reflective base member (substrate 54 which may be coloured or have a mirror finish, see page 4, lines 14 to 17; page 9, Table, column "Background"); and
 - a transparent layer (56 to 61) formed on said base member (54), constructed by a laminated structure of ceramic materials (page 6, lines 24 to 27) having high and low refraction indices, respectively (page 3, lines 17 to 26), and being laminated on each other, the ceramic materials being laminated by an evaporation method (page 11, lines 16 to 18),
 - said transparent layer (56 to 61) selectively absorbing [i.e. cancelling by interference] incident light rays such that a peak wavelength of absorption is shifted in an amount which depends on an angle of incidence of incident light rays (claim 1; page 6, lines 8 to 19), and
 - the selective absorption causing light emitted from the laminated body to have a color which varies depending on the angle of incident light rays (page 8, lines 26 to 30; Table on page 9), the color variation being detectable by an optical instrument (implicit because the variation is visible, see e.g. page 6, line 18; claim 1),
 - wherein said transparent layer (56 to 61) is formed in a pattern form including a first portion

(triangle) of the transparent layer having a different number of layers in the laminated structure than a second portion (circular disc) of the transparent layer (page 5, lines 1/2; claim 15) such that a pattern is formed by contrast between the first and second portions (page 7, lines 12 to 18).

Similarly, the aforementioned parts of claim 1 can be read on Figure 6 of E1 (substrate 1, interference coatings 16, 2, 18, 2; page 8, lines 8 to 19).

- 14.3 As compared to E1, the laminated body according to claim 1 comprises a distinguishing feature in that the laminated structure comprises *two* ceramic materials (6; 8) which are *alternately* laminated on each other.

The embodiments of E1 are described as having several optical interference coatings (which may each consist of several layers) having different optical characteristics depending *inter alia* on the refractive indices of all the layers of all the overlapping coatings (E1, page 3, lines 17 to 24). However, those coatings or layers are not specified as two such materials alternately laminated on each other.

It is true that the introductory portion of E1 discusses *inter alia* an optical interference filter composed of alternate optical interference layers of two different materials (zinc sulphide and magnesium fluoride), see E1, page 1, paragraph 2 referring to US-A-3 858 977 (Baird et al.). Further, E1 aims to increase the security of those coatings against counterfeiting (E1, page 2, lines 16 to 25). However, the solution taught by E1 (see claims 1 to 15) is specific only in requiring a distinctive shape of the

layers and is not concerned with the number and sequence of materials to be used for the layers; one optical interference layer may be sufficient as long as it is shaped in a distinctive form (E1, claim 1, lines 5 to 7).

Hence, contrary to the respondent's submission, E1 does not anticipate a patterned multi-layer laminated from *two alternating* transparent materials.

- 14.4 An alternate lamination of two ceramic materials allows to achieve an interference filter having complex transmission characteristics while keeping the structure and manufacture of the filter simple.

The objective problem to be solved may thus be formulated as how to implement the patterned interference layers of E1 (Figure 6 or Figure 19) in a simple manner.

- 14.5 While E1 in its most general aspect suggests using a base member with a single form-depicting optical layer (see E1, claim 1), well-known standard structures of interference filters include a simple stack of two alternating materials having two different refractive indices. The introductory portion of E1 mentions such a laminated body in the form of alternate optical interference layers of zinc sulphide and magnesium fluoride (E1, page 1, paragraph 2).

Document E2 (Table I on page 2708) lists laminated optical systems comprising alternating layers of two materials having different refractive indices "n", e.g.

layers 1 to 13 of Figure 4A having refractive indices "n" of 1.933 and 1.450, respectively.

- 14.6 Therefore, it was obvious to a person skilled in the art to use two alternating optical materials of different refractive indices when implementing a patterned interference filter of E1. As the resulting laminated body falls within the definition of claim 1, the claim does not meet the requirement of inventive step (Articles 52(1) and 56 EPC).

Request for postponement of oral proceedings

15. The respondent's request for postponement of the oral proceedings was considered and refused in the light of the Rules of Procedure of the Boards of Appeal (RPBA) and the Notice of the Vice-Presidents Directorates-General 2 and 3 dated 1 September 2000 concerning oral proceedings before the EPO (OJ EPO 2000, 456), referred to as the "Notice" hereinafter.

- 15.1 According to Article 11(2) RPBA, the Board has a discretion to exceptionally allow a change of date for oral proceedings. In exercising its discretion, the Board in particular takes account of the guidelines given to the public in the Notice. In the Board's experience, the organisational problems mentioned in the Notice (points 1.1 and 1.2; notably the booking of rooms) persist and give rise to a strict application of its provisions.

- 15.2 The Notice (point 2.3) lists holidays which have been firmly booked before the summons as a potential serious reason for a representative to request a change of date

for oral proceedings. According to point 2.2 of the Notice, such a request shall be accompanied by a sufficiently substantiated written statement indicating this reason.

Point 2.3 of the Notice has to be balanced against point 2.5 of the Notice: Every request for fixing another date for oral proceedings should contain a statement why another representative within the meaning of Articles 133(3) or 134 EPC cannot substitute the representative prevented from attending the oral proceedings.

- 15.3 The respondent's representative asserted that he had booked holidays, without however providing any documentary evidence.

Regarding point 2.5 of the Notice, he argued that he had been in charge of representing his client in the current field of technology for years and, therefore, the client did not want him to be replaced by another professional representative from the same association.

- 15.4 In the Board's view, the representative's booking of private holidays should have been substantiated in some form. That approach is by no means a sign of personal mistrust but a matter of equal treatment of all requesters.

Further, the present case does not appear to imply special technical difficulties which might prevent the substitution of one representative having an engineering background for another representative of similar background from the same association of

representatives. Nor have any particular technical, factual or legal circumstances (e.g. a parallel infringement or other court action) been asserted which might warrant a different finding.

Therefore, taking account of the Board's workload and the potential organisational strain on the other party, a party's general desire to be represented by a specific member of an association of representatives is not considered sufficient ground for changing the date for oral proceedings. Otherwise the provision according to point 2.5 of the Notice would have hardly any bearing in practice.

15.5 The Board therefore maintained the summons to attend oral proceedings on 21 April 2005.

Order

For these reasons, it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

M. Kiehl

S. V. Steinbrener