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**Datasheet for the decision  
of 31 July 2007**

**Case Number:** T 0704/05 - 3.4.03

**Application Number:** 96105645.4

**Publication Number:** 0737900

**IPC:** G03G 15/00

**Language of the proceedings:** EN

**Title of invention:**  
Developing apparatus

**Applicant:**  
Sharp Kabushiki Kaisha

**Opponent:**  
-

**Headword:**  
Developer/SHARP

**Relevant legal provisions:**  
EPC Art. 83, 109

**Keyword:**  
"Insufficiency - (no)"

**Decisions cited:**  
-

**Catchword:**  
Decision pursuant to Article 109 EPC not an exercise of  
discretion (reasons 5.3).



Case Number: T 0704/05 - 3.4.03

**D E C I S I O N**  
of the Technical Board of Appeal 3.4.03  
of 31 July 2007

**Appellant:** Sharp Kabushiki Kaisha  
22-22 Nagaike-cho  
Abeno-ku  
Osaka-shi  
Osaka-fu 545-0013 (JP)

**Representative:** Müller, Frithjof E.  
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**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 9 December 2004  
refusing European application No. 96105645.4  
pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** R. G. O'Connell  
**Members:** E. Wolff  
U. Tronser

## Summary of Facts and Submissions

- I. This is an appeal against the refusal of application 96 105 645.4 for insufficiency (Article 83 EPC).
- II. The appellant seeks grant of a patent on the basis of the refused main claim request.

Claim 1 reads:

"A developing apparatus (2) which is equipped with a developer control member (26) for controlling a developer (T) on a developer supporter (16) to a prescribed thickness, and which uses a one-component developer, **characterized in that** said developing apparatus comprises a plurality of recessed sections (32) on a surface of the developer supporter (16), for receiving the developer (T), and that the following relationship is satisfied:

$$3 < \alpha \cdot L1 < 10$$

wherein " $\alpha$ " represents a density of particles of the developer which enter the recessed sections (32) and "L1" represents a nip width between the developer control member (26) and the developer supporter (16)."

- III. The application was refused on the ground that the skilled person could not derive from the application whether the density  $\alpha$  - a line density on dimensional considerations - was measured (azimuthally) along or (axially) perpendicular to the periphery of the

developer supporter and consequently could not carry out the invention.

IV. The appellant argued as follows:

Figure 1B of the application, an enlarged view of the main portion of the developing roller depicted in Figure 1A, clearly showed that the nip width L1 between the developer control member (26) and the developer supporter (16) was measured in the peripheral direction of the developer supporter (16), since Figure 1B showed the outwardly curved peripheral surface of the developer supporter (16) in which the recessed sections (32) were formed and which the developer control member (26) touched along said nip width L1.

#### **Reasons for the decision**

1. The appeal is admissible.
2. *Sufficiency (Article 83 EPC)*

Figure 1B, an enlarged cross-section of the contact between the developing roller 16 and the toner control member 26 of Figure 1A, shows L1 as a length that is measured between the leading edge of a hole 32 just coming into contact with the underside of the toner control member 32 and the point at which the roller ceases to contact that underside. Therefore, as submitted by the appellant, there can be no doubt that L1, defined in claim 1 as being the nip width, is measured azimuthally along the circumference of the developer roller 16. Although it is logically possible

- for  $\alpha$  to be measured along a different direction, eg axially, to that along which L1 is measured such an interpretation would not be the natural interpretation.
3. In the judgement of the board the application complies with Article 83 EPC in respect of the definition of the parameter  $\alpha$ .
  4. Since the examination of the application in respect of the remaining requirements of the EPC has not been started it is appropriate to remit the case pursuant to Article 111(1) EPC.
  5. *Procedural issues*
    - 5.1 In the statement of grounds of appeal, foot of page 3, the appellant applicant appears to suggest that the examining division introduced the pivotal reason for refusal (point III above and point 1.3, second sentence of the decision under appeal) for the first time in the decision itself. Although this important fact was not mentioned in the recital of facts and submissions in the decision under appeal, the board notes that this reason was indeed communicated to the applicant at the oral proceedings held before the examining division (minutes, second sentence), thus giving the applicant an opportunity to comment in compliance with Article 113(1) EPC.
    - 5.2 It also appears from these minutes that the applicant did not contest this reasoning of the examining division at the oral proceedings. On appeal however a refutation was made which the board finds convincing. It follows that the board believes that the examining

division could have set its decision aside by way of interlocutory decision pursuant to Article 109(1) EPC on sight of this refutation, as expressly requested by the appellant applicant.

- 5.3 Given that the examining division is expressly precluded from giving its reasons for not granting interlocutory revision it is not open to the board to criticise this omission. The mandatory but necessarily silent judgement made pursuant to Article 109(1) EPC as to whether an appeal refutes the reasons for a refusal is not an exercise of discretion and *ipso facto* leaves no room for an inquiry as to whether discretion was properly exercised. The board is aware that a number of decisions of the boards of appeal have taken a different view on this point - to the extent of sometimes castigating such omission as a substantial procedural violation - but respectfully suggests that these decisions have not given sufficient weight to the implications of the silence imposed on the examining division by Article 109(2) EPC.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

Registrar

Chair

S. Sánchez Chiquero

R. G. O'Connell