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**Datasheet for the decision  
of 14 September 2009**

**Case Number:** T 1275/07 - 3.4.02

**Application Number:** 01979803.2

**Publication Number:** 1325380

**IPC:** G02B 27/00

**Language of the proceedings:** EN

**Title of invention:**  
Light adjustable aberration conjugator

**Applicant:**  
Calhoun Vision, Inc.

**Opponent:**  
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**Headword:**  
-

**Relevant legal provisions:**  
-

**Relevant legal provisions (EPC 1973):**  
EPC Art. 84

**Keyword:**  
"Clarity (no)"

**Decisions cited:**  
-

**Catchword:**  
-



Case Number: T 1275/07 - 3.4.02

**D E C I S I O N**  
of the Technical Board of Appeal 3.4.02  
of 14 September 2009

**Appellant:**

Calhoun Vision, Inc.  
2555 East Colorado Boulevard  
Suite 400  
Pasadena  
CA 91107 (US)

**Representative:**

Jones, Keith William  
Murgitroyd & Company  
Scotland House  
165-169 Scotland Street  
Glasgow G5 8PL (GB)

**Decision under appeal:**

Decision of the Examining Division of the  
European Patent Office posted 16 March 2007  
refusing European application No. 01979803.2  
pursuant to Article 97(1) EPC 1973.

**Composition of the Board:**

**Chairman:** A. G. Klein  
**Members:** F. J. Narganes-Quijano  
M. J. Vogel

## Summary of Facts and Submissions

I. The appellant (applicant) lodged an appeal against the decision of the examining division to refuse European patent application No. 01979803.2 (filed as International application No. PCT/US01/32092 and published with the International publication No. WO 02/31576) on the grounds that the subject-matter of the claims then on file did not involve an inventive step (Article 56 EPC 1973).

II. With the statement setting out the grounds of appeal the appellant submitted application documents amended according to a main and an auxiliary request and requested setting aside of the contested decision and the grant of a patent. The appellant also requested oral proceedings on an auxiliary basis.

The main request contains a claim 1 and a dependent claim 7 referring back to claim 1, these two claims being worded as follows:

"1. A method for correcting aberrations in an optical system, comprising:  
applying a light adjustable aberration conjugator layer, comprising a first polymer matrix and a refraction modulating composition dispersed therein, to a surface of a component of the system;  
either before or after applying said conjugator layer, determining the nature of the aberration; and  
applying radiation to the conjugator layer such as to modify the refraction of the conjugator layer to compensate for the aberration."

"7. The method of Claim 1 in which the conjugator layer comprises a polymer matrix and a radiation sensitive refraction modulating composition dispersed therein."

The auxiliary request contains a claim 1 and a dependent claim 7 referring back to claim 1, the wording of claim 7 being identical to that of claim 7 of the main request and the wording of claim 1 differing from that of claim 1 of the main request in that the expression "applying radiation to the conjugator layer such as to modify ..." is replaced by the expression "applying radiation to the conjugator layer thereby polymerizing said refraction modulating composition such as to modify ...".

III. In a telephone consultation with the rapporteur of the Board the results of which were dispatched with a communication dated 4 May 2009, the appellant was informed of a series of objections and deficiencies in the application documents amended according to the main request. In particular, the following objection, among others, was raised under Article 84 EPC 1973 with regard to claims 1 and 7 of the main request:

"It is unclear whether dependent claim 7 defines an additional polymer matrix and an additional composition (in which case the features would not appear to be supported by the description) or the same polymer matrix and the same composition already defined in claim 1 (in which case the features would appear to be superfluous) (Article 84 EPC 1973). In addition, the feature according to which the composition is "radiation sensitive" as defined in claim 7 is implicit

- in claim 1 (see features "light adjustable" and "applying radiation [...] to modify the refraction") and in fact constitutes an essential feature of the subject-matter of claim 1 [...] (see paragraphs [0002] and [0017] of the description) and should therefore be specified in [claim 1] (Article 84 EPC 1973)."
- IV. In reply to the aforementioned communication, the appellant informed the Board by letter dated 7 July 2009 that "the applicant does not wish to pursue the present application" and that "the applicant will not be filing comments in response to the notification of 4 May 2009".
- V. In a further telephone consultation with the rapporteur the results of which were dispatched with a communication dated 14 July 2009, the appellant was informed that the objections raised in the communication dated 4 May 2009 with regard to the main request were maintained and that the same objections applied to the auxiliary request. The rapporteur also noted that, in view of the request for oral proceedings formulated by the appellant on an auxiliary basis, oral proceedings would have to be appointed in order to enable the Board to reach a decision.
- VI. In reply to this second communication, the representative of the appellant informed the Board by letter dated 22 July 2009 that the appellant withdrew the request for oral proceedings.
- VII. The sole substantive arguments advanced by the appellant were developed in the statement setting out the grounds of appeal and concerned the issue of lack

of inventive step raised by the examining division. These arguments, however, pre-date, and in addition have no bearing on, the issues subsequently raised under Article 84 EPC 1973 in the aforementioned communications.

### **Reasons for the Decision**

1. The appeal is admissible.
  
2. In the two communications mentioned in points III and V above the appellant was informed of a series of objections and deficiencies in the application documents amended according to the main and the auxiliary request. In particular, the appellant was informed in detail of the preliminary opinion that the subject-matter of claims 1 and 7 of each of the main and the auxiliary requests did not satisfy the requirements of Article 84 EPC 1973 (see points III and V above).

In the course of the proceedings the appellant expressly declined to make substantive submissions in reply to the detailed objections raised and, in addition, withdrew the request for oral proceedings (points IV and VI above). The appellant has therefore not availed itself of the opportunity to reply to the preliminary view expressed in the communications.

After consideration of the issues addressed in the two aforementioned communications and in the absence of any attempt by the appellant to refute or overcome the objections and deficiencies noted in the two

communications, and in particular the objections raised under Article 84 EPC 1973 with regard to claims 1 and 7 of each of the appellant's requests, the Board sees no reason to depart from the preliminary opinion expressed in the aforementioned communications. Accordingly, noting that the appellant has had, and has failed to use, the opportunity to present substantive comments on the objections (Article 113(1) EPC 1973), the Board concludes that claims 1 and 7 of the main and the auxiliary requests of the appellant do not comply with the requirements of Article 84 EPC 1973, and that consequently the requests of the appellant are not allowable. The appeal must therefore be dismissed for the reasons already communicated to the appellant and reproduced in point III above (Rule 66(2)(g) EPC 1973).

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

C. Eickhoff

A. G. Klein