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**Datasheet for the decision
of 18 June 2021**

Case Number: T 1911/15 - 3.4.02

Application Number: 05000898.6

Publication Number: 1555589

IPC: G05B19/4097

Language of the proceedings: EN

Title of invention:

System and method for generating design data

Patent Proprietor:

EHS Lens Philippines, Inc.

Opponent:

Carl Zeiss Vision International GmbH

Headword:

Relevant legal provisions:

EPC 1973 Art. 54(3), 56

RPBA Art. 12(4)

Keyword:

Late-filed facts - submitted with the statement of grounds of appeal - document could have been filed in first instance proceedings (yes) - admitted (no)

Novelty - (yes)

Inventive step - (yes)

Decisions cited:

T 0724/08

Catchword:



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Case Number: T 1911/15 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 18 June 2021

Appellant: Carl Zeiss Vision International GmbH
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Representative: Glawe, Delfs, Moll
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 27 July 2015 rejecting the opposition filed against European patent No. 1555589 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman R. Bekkering
Members: A. Hornung
 G. Decker

Summary of Facts and Submissions

- I. The opponent appealed against the decision of the opposition division rejecting the opposition against the European patent No. 1 555 589.

Opposition had been filed against the patent as a whole and based on the grounds for opposition of Article 100(a) EPC 1973, together with Articles 54 and 56 EPC 1973, and of Article 100(b) EPC 1973.

The opposition division had found that the grounds for opposition set out in Articles 100(a) and 100(b) EPC 1973 did not prevent the patent from being maintained in unamended form.

- II. Oral proceedings before the board were held on 18 June 2021.

- III. The opponent (appellant) requested that the decision under appeal be set aside and that the patent be revoked.

The patentee (respondent) requested as a main request that the appeal be dismissed. Alternatively, it requested that the decision under appeal be set aside and that a patent be maintained in amended form on the basis of the claims of auxiliary requests 1 to 7 filed with the letter dated 18 April 2016 or on the basis of the claims of auxiliary requests 8 to 10 filed with the letter dated 18 May 2021.

The patentee further requested that documents D18 and D19 not be admitted into the proceedings. Should they be admitted into the proceedings, it requested that the case be remitted to the opposition division for further

prosecution. If the case were to be remitted, it requested a different apportionment of costs.

IV. The following documents will be referred to in the present decision:

- D1: US 6,089,713
- D3: EP 0 809 126 A1
- D4: WO 03/052491 A1
- D8: US 5,886,766
- D19: US 2002/0008846 A1.

V. Independent claim 1 according to the patentee's main request reads as follows (the features of claim 1 are preceded by the numbering F1 to F6 added by the board):

F1: "A generation system of design data for generating design data of an inner surface progressive addition lens which includes a distance portion and a near portion each having different power and a progressive portion whose power progressive by changes between said distance portion and said near portion and in which curvatures for constituting said distance portion, said near portion and said progressive portion are imparted to a progressive surface as an inner surface positioned on the side of an eyeball, said generation system comprising:

F2: a prescription data acquisition unit (121) for acquiring prescription data containing optical characteristics of said inner surface progressive addition lens;

F3: said generation system being characterized in that it further comprises a reference design data storage memory (132) for storing a plurality of reference design data corresponding to

addition power of said inner surface progressive addition lens;

F4: a reference design data selection unit (122) for selecting reference design data from among said plurality of reference design data stored in said reference design data storage memory (132) on the basis of said prescription data acquired by said prescription data acquisition unit; and

F5: an arrange design unit (123) for processing said selected reference design data on the basis of said prescription data;

F6: wherein said reference design data stored in said reference design data storage memory (132) includes a point group having coordinates of lattice points prepared by dividing the progressive surface as a reference into a lattice form."

Independent claim 7 according to the patentee's main request reads as follows:

"A generation method of design data for generating design data of an inner surface progressive addition lens which includes a distance portion and a near portion each having different power and a progressive portion whose power progressive by changes between said distance portion and said near portion and in which curvatures for constituting said distance portion, said near portion and said progressive portion are imparted to a progressive surface as an inner surface positioned on the side of an eyeball, said generation method causing a computer to execute

a prescription data acquisition step (S1) of acquiring prescription data of said inner surface progressive addition lens;

said generation method being characterized in that it causes the computer to execute furthermore

a reference design data selection step (S2) of selecting reference design data from reference design data storage memory (132) storing a plurality of reference design data corresponding to addition power of said inner surface progressive addition lens on the basis of said prescription data; and

an arrange design step (S3) of processing said selected reference design data on the basis of said prescription data;

wherein said reference design data stored in said reference design data storage memory (132) includes a point group having coordinates of lattice points prepared by dividing the progressive surface as a reference into a lattice form."

Reasons for the Decision

1. Admittance of document D19 into the appeal proceedings

The board, exercising its discretion under Article 12(4) RPBA 2007, does not admit document D19 into the proceedings.

- 1.1 D19 was filed for the first time with the opponent's statement of grounds of appeal.

1.2 The opponent presented the following arguments in favour of admitting D19 into the appeal proceedings:

1.2.1 According to the opponent, filing the new document only at this stage of the proceedings was justified "as the first instance decision interprets the claim feature of the opposed patent in a way which was unforeseeable for the opponent/appellant" (statement of grounds of appeal, page 30, point IX.1).

In particular, the opponent was surprised by the following statement of the opposition division: "Feature (iii) (a) [corresponding to feature F3 of claim 1] requires that a plurality of reference design data corresponding to addition power of said inner surface progressive addition lens is stored. This means that a particular set of reference design data must correspond to a particular addition power" (see appealed decision, page 5, point 3.3; emphasis in the original). In view of this statement in the appealed decision, the opponent argued that it became clear only when reading the decision under appeal that the opposition division interpreted feature F3 to mean "as requiring **multiple** reference design data sets for **each** addition power" (statement of grounds of appeal, page 31, point IX.1.1; emphasis in the original). The opponent concluded that, therefore, it had to search a document disclosing also this feature, thereby finding D19.

1.2.2 D19 was highly relevant since it anticipated the subject-matter of claim 1.

In particular, while it was true that D19 did not disclose a single-surface lens design, claim 1 of the patent, contrary to the patentee's assertion, did also not define that both the progressive correction and the prescription

eyesight correction were necessarily provided on the same inner surface of the lens.

1.2.3 D19 was filed without delay at the beginning of the appeal proceedings more than five years before the date of the present oral proceedings. Therefore, the patentee had ample time to react to the introduction of D19.

1.3 The board is not convinced by the opponent's arguments for admitting D19 into the proceeding for the following reasons:

1.3.1 Justification

In the absence of any cogent reason justifying the filing outside the nine-month opposition period, D19 is late-filed. The justification submitted by the opponent according to which it was surprised by the opposition division's claim construction is not comprehensible. Indeed, from the two sentences taken from the appealed decision (page 5, point 3.3), it cannot be deduced that the opposition division interpreted feature F3 so as to require multiple reference design data sets for each addition power. As submitted by the patentee, these two sentences taken from the appealed decision actually mean that the opposition division considered a *particular*, i.e. a single, set of reference design data to correspond to a *particular*, i.e. a single, addition power. In the view of the board, this claim interpretation of the opposition division corresponds to the effective meaning of feature F3 of claim 1. It also corresponds to the interpretation which has been given to feature F3 by both parties and the opposition division throughout the first instance opposition proceedings. The board is therefore not convinced that the appealed decision contained such

surprising information that this alone justified the search for a new prior art document.

1.3.2 Technical relevance

According to the communication annexed to the summons, D19 is prima facie highly relevant, since it appeared to anticipate the subject-matter of claims 1 and 7 of the patent (see communication annexed to the summons, points 7.2 and 9.1).

The patentee submitted arguments according to which D19 was not prima facie highly relevant. A main reason for the patentee was that D19 disclosed a double-side lens design, whereas claim 1 defined a single-side lens design. "These are two different and incompatible types of lens designs, which is why we believe the claims to be novel over the disclosure of D19" (patentee's letter dated 18 May 2021, page 1, third paragraph). Indeed, as disclosed in D19, [0068], the lens of D19 provided eyesight deficiency correction on one lens surface and a multifocal property on the other lens surface, whereas claim 1, on the basis of feature F2 according to which "prescription data containing optical characteristics of said inner surface progressive addition lens" was acquired, defined a lens providing both eyesight deficiency correction and a multifocal property on the same inner lens surface.

The board is not convinced by the patentee's arguments. While it is undisputed that D19 relates to a double-side lens design, the board agrees with the opponent that claim 1 does not define a single-side lens design. Indeed, "acquiring prescription data containing optical characteristics of said inner surface progressive addition lens" means that prescription data of the **lens** in general is acquired, leaving it open whether the prescription data

concerns one or the other surface of the lens or both surfaces.

1.3.3 The fact alone that D19 was filed at the beginning of the appeal proceedings is not a sufficient reason for admitting D19 into the proceedings.

1.3.4 As argued by the patentee during the oral proceedings before the board, D19 should have been well-known to the opponent (Carl Zeiss Vision International GmbH) since the beginning of the opposition proceedings, since the applicant of both documents D19 and D1 was Carl Zeiss and since a patent family member of D1, i.e. EP 0857993, was cited in D19, [0006]. Therefore, the opponent could and should have filed D19 during the nine-month opposition period.

1.3.5 According to Article 12(2) RPBA 2020, "[i]n view of the primary object of the appeal proceedings to review the decision under appeal in a judicial manner, a party's appeal case shall be directed to the requests, facts, objections, arguments and evidence on which the decision under appeal was based". Contrary to Article 12(2) RPBA 2020, the opponent's appeal case is not directed to "evidence on which the decision under appeal was based", since D19 was filed for the first time with the opponent's statement of grounds of appeal.

1.3.6 According to Article 12(4) RPBA 2007, the board has the discretion not to admit prior art documents which could have been presented in the first instance proceedings. Two essential criteria to be applied in exercising the discretion under Article 12(4) RBPA 2007 are, on the one hand, the relevance of the document and, on the other hand, the justification for its late submission. D19 is highly relevant. However, for a late-filed document to be

admitted into the appeal proceedings, it is not always sufficient that it is technically highly relevant. Indeed, if this were the case, an opponent could easily submit a (highly) relevant citation for the first time in the statement setting out the grounds of appeal and expect the citation to be admitted into the appeal proceedings on grounds of relevance (see T 724/08, Reasons 3.4). In the present case, the opponent failed to present any valid and plausible reasons justifying the late filing of the document D19, and the board does not see any, either. On the contrary, the board is of the opinion that D19 could and should have been filed during the first instance opposition proceedings.

1.3.7 For the above reasons, the board exercises its discretion under Article 12(4) RPBA 2007 in not admitting D19 into the proceedings.

2. Novelty in view of D2

The subject-matter of claims 1 and 7 is novel over D2 (Article 54(3) EPC 1973).

2.1 D2 does not anticipate the subject-matter of claims 1 and 7.

2.1.1 As submitted by the patentee during oral proceedings before the board, feature F3 of claim 1 defines reference design data stored in a memory. According to feature F6 of claim 1, said stored reference design data includes a point group having coordinates of lattice points prepared by dividing the progressive surface as a reference into a lattice form. Furthermore, according to feature F5 of claim 1, said reference design data is processed by an arrange design unit. From these features of claim 1, it

follows that the reference design data of claim 1 is stored and processed as lattice points.

2.1.2 D2 does not disclose reference design data stored or processed in the form of lattice points. D2 does not even disclose lattice points as such, prepared by dividing the progressive surface divided as a reference into a lattice form. D2 remains silent about how the reference design data is exactly stored.

2.1.3 Since features F5 and F6 are not disclosed in D2, the subject-matter of claim 1 is novel over D2.

2.1.4 The independent method claim 7 comprises method steps corresponding to features F5 and F6 of claim 1. Therefore, the subject-matter of claim 7 is novel over D2 for reasons corresponding to those given for the subject-matter of claim 1.

2.2 The opponent provided the following counter-arguments:

2.2.1 Concerning feature F5

The opponent argued that the reference design data was processed by applying expression (1) of the patent, expressing the Z coordinate of an arbitrary point P (X, Y, Z) as a function of the X and Y coordinates of the point P (X, Y, Z) and as a function of the mean curvature C_p of the original progressive surface. Since "[e]xpression 1 cannot directly use original progressive surface reference design data stored as point groups P (X, Y, Z)" (statement of grounds of appeal, page 6, last paragraph), the reference design data was not processed in the form of points. Hence, feature F5 of claim 1 had to be interpreted to mean that it "does not require direct use of reference design data [stored as point groups P (X, Y, Z)] in the

arrange design unit" (statement of grounds of appeal, page 7, first paragraph). Since D2, e.g. page 20, lines 13 to 17, disclosed general processing of the reference design data, feature F5 was anticipated by D2 (statement of grounds of appeal, VIII.2).

The board is not convinced by the opponent's arguments. It is clear from features F3 and F6 of claim 1 that the reference design data is stored in a memory and that it includes a point group having coordinates of lattice points. Since feature F5 refers to "said selected reference design data", it is clear that F5 defines processing of the stored reference design data in the form of lattice points.

2.2.2 Concerning feature F6

The opponent, with reference to D2, page 3, lines 13 to 22, page 6, lines 10 to 13, and page 7, lines 13 to 19, submitted that D2 disclosed a reference design data including a point group as defined in feature F6. In order to modify the reference lens of D2 so as to obtain a new progressive lens, "the location of points which are connected so as to define lines having equal power" was modified by "translating the positions of the points" (D2, page 3, lines 13 to 22). More precisely, a morphing function or "morphing process will preferably modify the positions of points having a defined equal power on the surface of the reference lens while substantially maintaining the 'connections' between those points to preserve the character of the peripheral design" (D2, page 7, lines 13 to 19). For the opponent, these points of equal power in D2 corresponded to the point group having coordinates of lattice points of feature F6.

The board is not convinced by the opponent's arguments. As submitted by the patentee during oral proceedings, the passages in D2, cited by the opponent, refer to virtual points of the lens having equal power, merely describing the general effect of a morphing function. From these passages in D2, it cannot be deduced that the reference design data has been actually stored in a memory as lattice points, prepared by dividing the progressive surface as reference into a lattice form. Therefore, feature F6 is novel.

- 2.2.3 Referring to D2, page 6, lines 8 to 16, the opponent argued that the "disclosure in D2 of a CAD data file describing the reference design is therefore a clear disclosure of the representation including a point group of lattice points" (statement of grounds of appeal, page 30, fourth paragraph).

The board is not convinced by this argument. As submitted by the patentee, from the disclosure of D2, page 6, lines 8 to 16, according to which the reference design data of D2 is described by a CAD file, it cannot unambiguously be deduced that the reference design data of D2 is stored as a point group. CAD tools may be "based on vector graphics or surface modeling, such that they do not typically operate on lattices, but rather on mathematical functions" (patentee's letter dated 18 April 2016, page 25, point 4.1).

- 2.2.4 The opponent argued during the oral proceedings that feature F6 merely defines that the reference design data includes a point group and not that it consisted of a point group.

The board does not consider this argument to be relevant since D2 does not disclose any point group.

3. Inventive step

The subject-matter of claims 1 and 7 comprises an inventive step in view of D3 in combination with common general knowledge or with any of the documents D1, D4 and D8 (Article 56 EPC 1973).

3.1 Closest prior art

D3 could be seen to represent the closest prior art. D3 discloses a generation system of design data for an inner surface progressive addition lens according to a process illustrated in the flowchart of figure 13 and described e.g. in column 18, lines 19 to 47. The process consists of a first step ST1 at which "the original progressive refractive surface is sought by parameters meeting the conditions of the user", of a second step ST2 at which "the original toric surface for correcting the user's astigmatism is sought" and of a third step ST3 at which "all the coordinates of the surface on the side of the eye having the vision correcting and astigmatism correcting properties are sought using the results of step ST1 and ST2".

In D3, the reference design data of claim 1 corresponds to the original progressive refractive surface determined at the beginning of the design process during the first step ST1 (D3, column 18, lines 19 to 26; figure 13).

3.2 Distinguishing features

At the oral proceedings before the board, the opponent, contrary to its statement of grounds of appeal, point IV, admitted that D3 did not disclose a stored reference design data forming a starting point for calculating a

final progressive lens. Instead, the design process of D3 starts with the original progressive refractive surface determined during the first step ST1 (D3, column 18, lines 19 to 26; figure 13). As submitted by the patentee in its letter dated 18 April 2016, page 11, first paragraph, and concordant with the preliminary opinion of the board (communication annexed to the summons to the oral proceedings, point 9.2), the original progressive refractive surface used as a starting point in D3 is calculated anew as soon as the user changes and requires specific eyesight corrections.

It follows that at least feature F4 of claim 1, referring to the selection of a reference design data among a plurality of the stored reference design data, is novel in view of D3. This was not disputed by the opponent at the oral proceedings before the board.

Moreover, since the reference design data forms also part of features F3, F5 and F6, the subject-matter of claim 1 differs from the system of D3 in that it comprises features F3 to F6.

3.3 Technical effect and objective technical problem

In view of the patent description, [0006] and [0011], the technical effect provided by the invention is the reduction of "the time necessary for generating the design data (...) in comparison with the prior art in which the design data is generated from the beginning". The objective technical problem solved by the distinguishing features F3 to F6 could be seen to provide a generation system of design data of an inner surface progressive addition lens "capable of quickly generating design data of an inner surface progressive addition lens".

3.4 Solution to the objective technical problem

3.4.1 In view of D3 and common general knowledge

As submitted by the patentee (letter dated 18 April 2016, page 10, point I.C.1; page 16, point I.D.1), "D3 is not even concerned with such object" but with reducing aberrations of progressive lenses due to their addition by providing the progressive refractive surface on the inner side of the lens (column 3, lines 52 to 57 and column 4, lines 14 to 21). In view of the optimisation of the design process not being an object of the invention of D3, it is coherent that D3 discloses no hint towards a solution to the objective technical problem, in particular, not to a solution of using the concept of a plurality of stored reference design data corresponding to addition power of the lens as claimed.

Starting from D3, the skilled person, in order to solve the objective technical problem, would have a number of possibilities for trying to optimise the way of generating design data of an inner surface progressive addition lens, such as starting from a better original progressive refractive surface or optimising the calculation means or techniques. Since D3 teaches a calculation from scratch for each new user, there is no obvious reason for the skilled person to abandon this teaching and to start the calculation from a pre-calculated reference design data while disregarding other possible solutions for solving the objective technical problem.

It follows that the skilled person would not arrive at the claimed subject-matter in view of D3 and common general knowledge.

3.4.2 In view of D3 and D4

As submitted by the patentee in its letter dated 18 April 2016, pages 21 and 22, point I.H, and during the oral proceedings before the board, there is no obvious reason why the skilled person would effectively search and find D4, since D3 does not disclose any hint to the problem of optimising the generation process of design data or to the solution of using stored reference design data. For this reason alone, the subject-matter of claim 1 cannot be rendered obvious in view of D3 and D4.

If, nevertheless, the skilled person were to find and consult D4, they would be taught that the generation system of design data of progressive addition lenses of D4 stores "lens usage information" from a lens wearer and processes the lens usage information to provide a "lifestyle score" such that a relationship between a "lifestyle score" and an ophthalmic lens design feature is established. The process of D4 "initially select[s] a lens design from a pre-existing range of ophthalmic lens designs according to the lifestyle scores" (D4, page 13, lines 10 to 14).

Therefore, as submitted by the patentee, "assuming that the skilled person could (but not would) consider D4 in the light of D3, he/she would store certain design in view of the lifestyle score, but not in correspondence of addition power" as defined in feature F3 of claim 1 (letter dated 18 April 2016, page 22, point I.H).

3.4.3 In view of D3 and D8

As explained in point 3.4.2 above for D4, there is no obvious reason why the skilled person would effectively search and find D8, so that the subject-matter of claim 1 cannot be rendered obvious in view of D3 and D8.

Moreover, D8 is even less relevant than D4 since D8 does not even disclose stored reference design data. Indeed, the "basic specifications", mentioned in column 6, lines 47 to 50 and referred to by the opponent, do not correspond to stored reference design data but simply to general ophthalmic parameters, such as the base curve, the addition power and the refractive power, supplied to a computer.

3.4.4 In view of D3 and D1

As explained in point 3.4.2 above for D4, there is no obvious reason why the skilled person would effectively search and find D1, so that the subject-matter of claim 1 cannot be rendered obvious in view of D3 and D1.

Moreover, the board concurs with the patentee that the method of designing a progressive lens of D1 relates to a method "based on the pre-selection of functions, and is thus remote from the type of solutions disclosed in D3, such that the skilled person would not consider to be technically possible combining their disclosures" (patentee's letter dated 18 April 2016, page 23, first paragraph).

3.4.5 It follows from the above that the subject-matter of claim 1 is not rendered obvious by the available prior art documents.

3.4.6 The independent method claim 7 comprises method steps corresponding to features F1 to F6 of claim 1. Therefore, the subject-matter of claim 7 is not rendered obvious by the available prior art documents for reasons corresponding to those given for the subject-matter of claim 1.

3.5 Opponent's counter-arguments in favour of lack of inventive step

3.5.1 Distinguishing features

The opponent submitted that feature F3 was directed to a generic computer memory being merely suitable for storing a plurality of reference design data. Since D3 implicitly disclosed a computer memory suitable for executing this task, feature F3 was anticipated by D3.

The board is not convinced by this argument but shares the view of the patentee according to which F3 defines a memory which has been specifically programmed to store a plurality of reference design data corresponding to addition power of the lens. Such a memory being specifically programmed is not disclosed in D3.

3.5.2 Technical effect and objective technical problem

According to the opponent, the time needed to carry out "a de novo calculation of reference design progressive surface data will require between 4 and 5 ms (...) which is completely negligible" (statement of grounds of appeal, pages 20 to 23, point VI.3). Therefore, "[t]he actual technical object has to be formulated much more limited, i.e. providing an alternative system for generating design data of an inner surface progressive addition lens which is of similar effectiveness compared to the prior art" (statement of grounds of appeal, page 23, point VI.4).

The board is not convinced by this argument. As explained by the patentee, letter dated 18 April 2016, page 20, point I.E, the actual time saving provided by the

invention corresponds to the time needed for calculating an adequate reference design data and the time saved by using the same reference design data a number of times for various users. Moreover, even a relatively small time saving represents a technical effect to be taken into account when assessing inventive step. It follows that the objective technical problem to be solved as formulated in point 3.3 above is appropriate.

3.5.3 In view of D3 and common general knowledge

The opponent argued that, starting from D3, "[i]t would be an obvious alternative for the skilled person not to delete or discard these recorded coordinates [i.e. the coordinates of the original refractive surface determined in step ST1 of D3] but to reuse the stored reference design data later on for another wearer with similar prescription values" (statement of grounds of appeal, page 23, last paragraph).

The board concurs with the patentee that the original refractive surface is "calculated for the specific user, not only in view of his prescription" (patentee's letter dated 18 April 2016, page 21, point I.G). Therefore, "the lens obtained for one user cannot be reused for another user just because of the same prescription (...); there are no reasons for, and it would be technically incorrect, storing data in correspondence of addition power under the teaching of D3".

3.5.4 In view of D3 in combination with D4, D8 or D1

Assuming that the distinguishing features of claim 1 provided a technical effect of time saving and that the objective technical problem, starting from D3, consisted in how to provide such a time saving, the opponent argued

that the skilled person would have a clear incentive to search for a solution in the prior art. The solution to this problem was well-known in the art and consisted in starting the lens design process from a precalculated reference design. The solution was known from the following prior art documents: D4, page 13, lines 10 to 14; D8, column 6, lines 43 to 50; D1, column 3, lines 35 to 53.

The board is not convinced by these arguments for the reason given in points 3.4.2, 3.4.3 and 3.4.4 above.

4. It follows that independent claims 1 and 7 of the present main request meet the requirements of the EPC and that the patent can be maintained on the basis thereof.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



L. Gabor

R. Bekkering

Decision electronically authenticated