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**Datasheet for the decision  
of 8 July 2020**

**Case Number:** T 1363/17 - 3.4.02

**Application Number:** 07831863.1

**Publication Number:** 2192427

**IPC:** G02B5/18, B42D15/00, G09F3/02

**Language of the proceedings:** EN

**Title of invention:**  
INDICATION BODY AND LABELED ARTICLE

**Patent Proprietor:**  
Toppan Printing Co., Ltd.

**Opponent:**  
Leonhard Kurz Stiftung & Co. KG

**Headword:**

**Relevant legal provisions:**  
EPC Art. 123(2), 123(3)  
RPBA Art. 12(2), 12(4)

**Keyword:**

Amendments (Main request, Auxiliary Request Main A, Auxiliary requests 1, 2, 3, 4, 6) - added subject-matter (yes)  
(Auxiliary Request 5) - broadening of claim (yes)  
Late-filed auxiliary requests - admitted (no)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**

**Boards of Appeal**

**Chambres de recours**

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Case Number: T 1363/17 - 3.4.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.4.02**  
**of 8 July 2020**

**Appellant:** Toppan Printing Co., Ltd.  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 31 March 2017  
revoking European patent No. 2192427 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

**Chairwoman** T. Karamanli  
**Members:** C. Kallinger  
F. J. Narganes-Quijano

## **Summary of Facts and Submissions**

- I. The appellant (patent proprietor) lodged an appeal against the decision of the opposition division revoking European patent No. 2 192 427.
- II. With the statement setting out the grounds of appeal dated 8 August 2017, the patent proprietor requested that the decision under appeal be set aside and that the patent be maintained as amended on the basis of the claims according to the main request considered in the contested decision, i.e. the claims according to the Main Request filed with the letter dated 6 December 2016.

As an auxiliary measure, the patent proprietor requested that the decision of the opposition division be set aside and that the patent be maintained as amended according to one of the auxiliary requests in the following order: Main Request A, 1, 1A, 2, 2A, 2B, 2C, 3, 3A, 4, 4A, 4B, 4C, 5, 5A, 5B, 5C, 6, 6A, 6B and 6C.

The sets of claims were filed as follows:

- Auxiliary Requests 1, 2 and 3 with the letter dated 6 December 2016;
- Main Request A and Auxiliary Requests 1A, 2A, 2B, 2C and 3A with the letter dated 25 January 2017; and
- Auxiliary Requests 4, 4A, 4B, 4C, 5, 5A, 5B, 5C, 6, 6A, 6B, and 6C with the grounds of appeal dated 8 August 2017; these requests correspond, respectively, to Auxiliary Requests 8, 8A, 8B, 8C, 9, 9A, 9B, 9C, 10, 10A, 10B and 10C considered in the contested decision.

- III. With the reply to the statement of grounds of appeal the respondent (opponent) requested that the appeal be dismissed, i.e. that the opposition division's decision to revoke the patent be upheld. In addition, the respondent requested that auxiliary requests Main Request A, 1A, 2A, 2B, 2C, 3A, 4A, 4B, 4C, 5A, 5B, 5C, 6A, 6B and 6C not be admitted into the proceedings.
- IV. The board issued a summons to oral proceedings. In its communication under Article 15(1) RPBA dated 16 December 2019, it informed the parties of its preliminary opinion on all the requests on file.
- V. Oral proceedings before the board were held on 8 July 2020.

The parties' final requests were as follows:

The appellant (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained as amended on the basis of the claims according to the Main Request filed with the letter dated 6 December 2016, or, as an auxiliary measure, on the basis of the claims according to one of the auxiliary requests in the following order:

- Main request A filed with the letter dated 25 January 2017,
- Auxiliary Request 1 filed with the letter dated 6 December 2016,
- Auxiliary Request 1A filed with the letter dated 25 January 2017,
- Auxiliary Request 2 filed with the letter dated 6 December 2016,
- Auxiliary Request 2A filed with the letter dated 25 January 2017,

- Auxiliary Request 2B filed with the letter dated 25 January 2017,
- Auxiliary Request 2C filed with the letter dated 25 January 2017,
- Auxiliary Request 3 filed with the letter dated 6 December 2016,
- Auxiliary Request 3A filed with the letter dated 25 January 2017,
- Auxiliary Request 4 filed with the grounds of appeal,
- Auxiliary Request 4A filed with the grounds of appeal,
- Auxiliary Request 4B filed with the grounds of appeal,
- Auxiliary Request 4C filed with the grounds of appeal,
- Auxiliary Request 5 filed with the grounds of appeal,
- Auxiliary Request 5A filed with the grounds of appeal,
- Auxiliary Request 5B filed with the grounds of appeal,
- Auxiliary Request 5C filed with the grounds of appeal,
- Auxiliary Request 6 filed with the grounds of appeal,
- Auxiliary Request 6A filed with the grounds of appeal,
- Auxiliary Request 6B filed with the grounds of appeal, and
- Auxiliary Request 6C filed with the grounds of appeal.

The respondent (opponent) requested that the appeal be dismissed.

VI. Claim 1 of the Main Request reads as follows:

"1. A display (10) characterized by comprising:  
a relief-structured region (12a) as an image-constituting element including an intermediate portion (14c), recessed portions (14a) recessed with respect to the intermediate portion (14c) and protruding portions (14b) protruding from the intermediate portion (14c), the recessed and protruding portions (14a, 14b) being arranged two-dimensionally on one of main surfaces of a light-transmitting layer (11); and  
a reflection layer (13) supported by said one of the main surfaces and covering at least a part of the relief-structured region (12a),  
wherein a center-to-center distance of the recessed portions (14a) and a center-to-center distance of the protruding portions (14b) fall within a range of 200 nm to 500 nm, characterized in that  
said intermediate portion (14c) is a flat surface, and the relief-structured region (12a) has recessed lines (16a) formed by the recessed portions (14a) and protruding lines (16b) formed by the protruding portions (14b), the recessed lines (16a) have almost the same longitudinal direction as that of the protruding lines (16b), and the recessed lines (16a) and the protruding lines (16b) are alternately arranged in a direction (X) crossing the longitudinal direction (Y)."

Claim 1 of Main Request A and of Auxiliary Requests 1, 1A, 2, 2A, 2B, 2C, 3, 3A, 4, 4A, 4B, 4C, 6, 6A, 6B and 6C contains the feature "said intermediate portion (14c) is a flat surface" of claim 1 of the main request. Claim 1 of each of these requests contains further amended features.

Claim 1 of Auxiliary Requests 5, 5A, 5B and 5C does not contain the feature "*said intermediate portion (14c) is a flat surface*" of claim 1 of the main request but includes, among other amended features, the additional feature "*wherein when assuming the level of the intermediate portions (14c) is a flat surface as a reference level, the reference level is positioned lower than the surface of the resist material*".

### **Reasons for the Decision**

1. Main Request - Article 123(2) EPC
- 1.1 The opposition division found that the subject-matter of claim 1 amended according to the Main Request extended beyond the content of the application as filed because the feature that the intermediate portion "*is a flat surface*" was not originally disclosed (Article 123(2) EPC). The opposition division held in particular that that feature could not be derived from Figure 7 because this figure was a purely schematic drawing.
- 1.2 According to the consistent interpretation of Article 123(2) EPC by the Enlarged Board of Appeal, any amendment can only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of the description, claims and drawings as filed (see G 3/89, OJ EPO 1993, 117; G 11/91, OJ EPO 1993, 125; G 2/10, OJ EPO 2012, 376). For the issue of added subject-matter, the board will refer to the English translation of the international application as filed,



which was filed with the EPO upon entry into the regional phase before it.

- 1.3 With respect to the disclosure of the contested feature that the "*intermediate portion (14c) is a flat surface*" the patent proprietor referred to the passage in the application as originally filed (page 15, line 22 to page 16, line 2 of the translation of the originally filed description) which reads:

*"In the master for the relief-structured region 12a formed by the method shown in FIG. 8, the surface of the resist material and the tips of the protruding portions 14b are positioned at the same level. That is, when assuming the level of the intermediate portions 14c is a flat surface as a reference level, the reference level is positioned lower than the surface of the resist material."*

The patent proprietor argued that this passage included a first statement postulating a flat surface which was identical to the level of the intermediate portions and, in addition, a second statement that this flat surface could be regarded as a reference level.

The patent proprietor further argued that in the text of the original application (filed in Japanese), which was the authentic text under Article 14(2) EPC, the original word used would be closer to "*regarding*" than "*assuming*".

The patent proprietor also submitted that, unlike Figures 1, 5, 6, 8 and 9 to 12 (see page 4, lines 5 to 7; page 10, lines 22 to 25; etc.), Figure 7 was not labelled in the description of the application as filed

as "schematic" and, therefore, it clearly disclosed that the intermediate portion 14c was a flat surface.

The patent proprietor further argued that a flat intermediate portion necessarily resulted from the manufacturing process described in Figure 8 and the corresponding passages of the description (see page 14, line 22 to page 16, line 2).

Lastly, the patent proprietor argued that the intermediate portion was part of a triple grating structure and that each of the three portions (protruding, recessed and intermediate) functioned as a separate diffractive structure. Therefore, for the purpose of comparing the claimed subject-matter with the prior art, the intermediate portion could not be considered in isolation but rather had to be interpreted in the context of claim 1 as a whole.

- 1.4 The opponent argued that the application as filed did not disclose that the intermediate portion was a flat surface. In the passage referred to by the patent proprietor (page 15, line 25 to page 16, line 2), the surface mentioned was not a real flat surface but only assumed to be flat for the purpose of providing a reference level. The meaning of this passage was clear to the skilled person and any other interpretation, in particular in the sense that the passage disclosed the intermediate portion as being a flat surface, was artificial.

Furthermore, Figure 7 was not suitable for providing a basis for the feature in claim 1 that the intermediate portion was a flat surface as this figure was only a schematic drawing. This was confirmed by the fact that the representation of the protruding portions shown in

Figure 7 was also only schematic because the protruding portions would in reality not look like they did in this figure.

Lastly, the structure resulting from the manufacturing process as described with reference to Figure 8 (see page 14, line 22 to page 16, line 2) would not result in a structure where the intermediate portion was a flat surface because a flat surface would not be achievable with the disclosed manufacturing methods.

- 1.5 The board concurs with the opponent's line of argument and is not convinced by the arguments brought forward by the patent proprietor for the following reasons:

The passage referred to by the patent proprietor (page 15, line 22 to page 16, line 2) is concerned with defining different levels in the master. It states that the surface of the resist material and the tips of the protruding portions are positioned at the same level, which indicates that this level is above a reference level. This reference level corresponds to the level of the intermediate portion when this portion is assumed to be a flat surface, which implies that the intermediate portion is generally not a flat surface. The board therefore concurs with the opposition division's interpretation of the word "*assuming*".

Furthermore, even if the meaning of the original text filed in Japanese was "*regarding*" rather than "*assuming*", this term implies that the reality is different, i.e. that the intermediate portion is actually not a flat surface.

With respect to Figure 7, the board is of the opinion that, irrespective of whether or not the description of

the application as filed states that the figure is schematic, in the context of the corresponding disclosure the skilled person would interpret the regular geometrical forms shown in Figure 7 to be merely a schematic representation of the reality. They would therefore not directly and unambiguously deduce from Figure 7 that the intermediate portion of the relief-structured region of the display of the invention was a flat surface.

With respect to the manufacturing process shown in Figure 8 and disclosed in the description (see page 14, line 22 to page 16, line 2), the board concludes that the writing of lines L1 to L10 with a laser or electron beam would not result in flat intermediate areas, noting that electron and laser beams generally have Gauss-shaped beam profiles which would produce a corresponding shape in the resultant structures. In the absence of any corresponding disclosure in the application as filed, the patent proprietor's submission during the oral proceedings that it was possible to write the flat surface under consideration with a laser having a specific profile is not persuasive. Furthermore, Figure 8 implies that there is even a fourth portion present in the structure, that is the portion surrounding the protruding portions 14b. Therefore, here again the schematic nature of the drawing does not sufficiently disclose the feature that the intermediate portion is a flat surface, let alone a flat surface which forms part of a triple grating structure.

In relation to the issue of added subject-matter under consideration, the board is not convinced by the patent proprietor's argument that the intermediate portion is part of a triple grating structure, because it relates

to a comparison of the claimed subject-matter with the prior art, and therefore to issues of novelty and inventive step. In any case, a triple grating structure such as that mentioned by the patent proprietor does not imply that the intermediate portion would, in the context of the application as filed, necessarily have a particular shape, let alone a flat shape.

1.6 In conclusion, the board is of the opinion that the feature that the intermediate portion "*is a flat surface*" is not directly and unambiguously derivable from the content of the application as filed. Thus, claim 1 of the Main Request does not meet the requirements of Article 123(2) EPC and, therefore, the Main Request is not allowable.

2. Auxiliary request "Main Request A"

2.1 Admission - Article 12(4) RPBA 2007

2.1.1 In the present case, the statement of grounds of appeal was filed before the date on which the revised version of the Rules of Procedure of the Boards of Appeal (RPBA 2020) entered into force, i.e. 1 January 2020 (see OJ EPO 2019, A63). Thus, in accordance with Article 25(2) RPBA 2020, Article 12(4) to (6) RPBA 2020 does not apply. Instead, Article 12(4) of the Rules of Procedure of the Boards of Appeal in the version of 2007 (RPBA 2007 - see OJ EPO 2007, 536, and EPC, 16th edition, June 2016, pages 601 to 629) continues to apply.

Article 12(4) RPBA 2007 requires the board to take into account everything presented by the parties under Article 12(1) RPBA 2007 if and to the extent it relates to the case under appeal and meets the requirements in

Article 12(2) RPBA 2007. However, according to Article 12(4) RPBA 2007, the board has the discretionary power to hold inadmissible facts, evidence or requests which could have been presented or were not admitted in the first-instance proceedings (see Case Law of the Boards of Appeal of the European Patent Office ("Case Law"), 9th edition 2019, V.A.4.11.1).

- 2.1.2 The opposition division admitted Main Request A into the proceedings because the feature "*semi-spindle shape*" had already been substantiated in the notice of opposition and the request was considered to be a "*bona fide attempt to at least partially overcome objections under Article 123(2) EPC*". Furthermore, with this discretionary decision the opposition division also accommodated its change in opinion (see point 2.3.1 of the decision under appeal).
- 2.1.3 The opponent argued that the opposition division should not have admitted Main Request A into the proceedings because it was late-filed and did not remedy the deficiencies that led to the Main Request not being allowable.
- 2.1.4 The patent proprietor argued that Main Request A was filed in preparation for the oral proceedings before the opposition division in the event that the opposition division changed its mind or the board of appeal overturned the opposition division's decision on the Main Request.
- 2.1.5 Main Request A was admitted into the proceedings by the opposition division, which exercised its discretion under Rule 116 EPC.

2.1.6 It is established case law that the boards of appeal should overrule the way in which a department of first instance exercised its discretion in reaching a decision in a particular case only if they conclude that it did so in accordance with the wrong principles, without taking the right principles into account or in an arbitrary or unreasonable way, thereby exceeding the proper limits of its discretion (see G 7/93, OJ EPO 1994, 775 and Case Law, 9th edition 2019, V.A.3.5.1.b).

In the present case, the board sees no reason to overrule the opposition division's discretionary decision to admit Main Request A into the proceedings. In particular, none of the opponent's arguments leads to the conclusion that the opposition division had exercised its discretion in an unreasonable way or in accordance with the wrong principles.

It follows from the above that the board has no discretionary power under Article 12(4) RPBA 2007 to hold Main Request A inadmissible. In addition, this request has been maintained with the grounds of appeal and has been substantiated. In accordance with Article 12(4) RPBA 2007, Main Request A is therefore to be taken into account by the board.

2.2 Amendments - Article 123(2) EPC

Independent claim 1 of Main Request A also contains the added feature that the intermediate portion "*is a flat surface*". Therefore, for the same reasons as indicated in point 1 above with respect to the Main Request, the requirements of Article 123(2) EPC are not met and Main Request A request is not allowable.

3. Auxiliary Request 1 - Amendments - Article 123(2) EPC

Independent claim 1 of Auxiliary Request 1 also contains the added feature that the intermediate portion "*is a flat surface*". Therefore, for the same reasons as indicated in point 1 above with respect to the Main Request, the requirements of Article 123(2) EPC are not met and Auxiliary Request 1 is not allowable.

4. Auxiliary Requests 2, 3, 4 and 6

4.1 The patent proprietor argued that the features added to claim 1 of Auxiliary Requests 2, 3, 4 and 6 (which corresponded to Auxiliary Requests 2, 3, 8 and 10 considered in the contested decision) further specified the intermediate portion in terms of the way in which it was formed, e.g. by transfer from a master. In particular, the shape of the surface of the intermediate portion was further characterised by features relating to the manufacturing method as illustrated in Figure 8 and the description (see page 14, line 22 to page 16, line 2).

4.2 The opponent argued, *inter alia*, that independent claim 1 of Auxiliary Requests 2, 3, 4 and 6 still contained the added feature that the intermediate portion "*is a flat surface*" and that the additional features incorporated in claim 1 did not change the meaning of the disputed feature relating to the "flat surface", so the requirements of Article 123(2) EPC were not met.

4.3 The board concurs with the opponent's argument: the features incorporated in claim of Auxiliary Requests 2,



3, 4 and 6, and in particular those relating to the manufacture of the structure, have no effect on the technical meaning of the claimed feature "said intermediate portion (14c) is a flat surface", nor do they alter the conclusion that the application as originally filed does not directly and unambiguously disclose that the intermediate portion "*is a flat surface*".

Therefore, for the same reasons as indicated in point 1 above with respect to the Main Request, the requirements of Article 123(2) EPC are not met and, therefore, Auxiliary Requests 2, 3, 4 and 6 are not allowable.

5. Auxiliary Request 5

5.1 In claim 1 of Auxiliary Request 5 (which corresponds to Auxiliary Request 9 considered in the contested decision) the feature that the intermediate portion "*is a flat surface*" has been deleted and replaced by the literally disclosed passage of the application as filed (see page 15, line 25 to page 16, line 2) which reads: "*when assuming the level of the intermediate portions (14c) is a flat surface as a reference level, the reference level is positioned lower than the surface of the resist material*".

5.2 The opponent argued that the deletion of the feature that the intermediate portion "*is a flat surface*" extended the scope of protection of the patent as granted because claim 1 now encompassed displays comprising non-flat intermediate portions. Therefore, this amendment did not meet the requirements of Article 123(3) EPC.

5.3 The patent proprietor referred to its arguments provided for the Main Request and argued that the feature taken from the description disclosed that the intermediate portion was a flat surface. Therefore, the amendment did not extend the scope of protection and the requirements of Article 123(3) EPC were met.

5.4 The board concurs with the opponent's line of argument: deleting the feature that the intermediate portion "*is a flat surface*" extends the scope of protection of claim 1 as granted to cover displays comprising a relief-structured region with an intermediate portion that is not necessarily a flat surface. In particular, for the same reasons as discussed in point 1.4 above, first paragraph, with respect to the Main Request, the feature "*when assuming the level of the intermediate portions (14c) is a flat surface as a reference level, the reference level is positioned lower than the surface of the resist material*" does not imply that the "*intermediate portion (14c) is a flat surface*" and, therefore, incorporating the aforementioned feature into claim 1 cannot restrict the claimed subject-matter to intermediate portions which have a flat surface. As a result, the deletion of the feature that the intermediate portion is a flat surface extends the protection conferred by the patent as granted.

In conclusion, this amendment does not meet the requirements of Article 123(3) EPC and Auxiliary Request 5 is therefore not allowable.

6. Auxiliary Requests 1A, 2A, 2B, 2C, 3A, 4A, 4B, 4C, 5A, 5B, 5C, 6A, 6B and 6C

- 6.1 The patent proprietor argued that the opposition division should have admitted Auxiliary Requests 1A, 2A, 2B, 2C, 3A, 4A, 4B, 4C, 5A, 5B, 5C, 6A, 6B and 6C (which correspond, respectively, to Auxiliary Requests 1A, 2A, 2B, 2C, 3A, 8A, 8B, 8C, 9A, 9B, 9C, 10A, 10B and 10C considered in the decision under appeal) for the same reasons as with Main Request A because the situation was identical and the opposition division should have applied the same discretion when deciding on their admission.
- 6.2 The opponent argued that, in comparison with Main Request A, Auxiliary Requests 1A, 2A, 2B, 2C, 3A, 4A, 4B, 4C, 5A, 5B, 5C, 6A, 6B and 6C contained further amendments, and so the situation was not the same. Therefore, it was not a contradiction if the opposition division's discretionary decision led to a different outcome.
- 6.3 Under Rule 116 EPC, it was at the opposition division's discretion whether or not to admit late-filed amended claims. The opposition division did not admit the auxiliary requests under consideration into the proceedings, reasoning that they were late-filed and did not overcome the objections under Article 123(2) or Article 123(3) EPC considered during the proceedings in respect of the presence or omission of the feature relating to the "flat surface".

The board therefore sees no indication that the opposition division exercised its discretion in an unreasonable way or in accordance with the wrong principles. As the situation was also different from Main Request A in view of the different amendments to the corresponding claim 1, the board also sees no unreasonable or contradictory exercise of discretion.

Under these circumstances, the board sees no reason to overrule the opposition division's discretionary decision not to admit Auxiliary Requests 1A, 2A, 2B, 2C, 3A, 4A, 4B, 4C, 5A, 5B, 5C, 6A, 6B and 6C (corresponding to auxiliary requests 1A, 2A, 2B, 2C, 3A, 8A, 8B, 8C, 9A, 9B, 9C, 10A, 10B and 10C of the contested decision) into the proceedings.

It follows from the above that the board has the discretionary power under Article 12(4) RPBA 2007 to hold Auxiliary Requests 1A, 2A, 2B, 2C, 3A, 4A, 4B, 4C, 5A, 5B, 5C, 6A, 6B and 6C inadmissible. There is no reason to admit these requests into the appeal proceedings because they do not overcome the above-mentioned objections under Article 123(2) (see points 2.2, 3 and 4 above) or Article 123(3) EPC (see point 5 above), as applicable. Thus, the board exercised its discretion under Article 12(4) RPBA 2007 and decided not to admit these auxiliary requests into the appeal proceedings.

7. In view of the above, none of the patent proprietor's requests is allowable. Therefore, the appeal must be dismissed.

## **Order**

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

The appeal is dismissed.

The Registrar:

The Chairwoman:



M. Kiehl

T. Karamanli

Decision electronically authenticated