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**Datasheet for the decision  
of 14 October 2020**

**Case Number:** T 0257/19 - 3.2.03

**Application Number:** 09840447.8

**Publication Number:** 2400057

**IPC:** E01C15/00

**Language of the proceedings:** EN

**Title of invention:**

CONSTRUCTION AND INSTALLATION OF A WORLD STANDARD RAINBOW  
HIGHWAY MADE OF RAINBOW COLORS AND METHOD THEREOF

**Applicant:**

Kim, Keum Kyu

**Headword:**

**Relevant legal provisions:**

EPC Art. 56

**Keyword:**

Inventive step - (no)

**Decisions cited:**

**Catchword:**



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Case Number: T 0257/19 - 3.2.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.03**  
**of 14 October 2020**

**Appellant:** Kim, Keum Kyu  
(Applicant) 104-702 Siyeong Apt.  
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**Representative:** Mittler, Enrico  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 10 September  
2018 refusing European patent application No.  
09840447.8 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** G. Ashley  
**Members:** V. Bouyssy  
E. Kossonakou

## **Summary of Facts and Submissions**

- I. European patent application No. 09840447.8 (in the following: "the application") was filed as International patent application PCT/KR2009/000914 and published as WO 2010/095771 A1 in Korean. Its translation into English was published by the EPO as EP 2 400 057 A1.
- II. The examining division refused the application because the subject-matter of amended claim 1 filed with letter dated 14 March 2018 lacked an inventive step in the sense of Article 56 EPC.
- III. The applicant (in the following "the appellant") lodged an appeal against this decision in due form and time. In the statement setting out the grounds of appeal (letter dated 3 January 2019), the appellant requested that the decision under appeal be set aside and a patent be granted on the basis of amended claims 1 to 3 filed with letter dated 14 March 2018. The appellant also made a conditional request for oral proceedings.
- IV. With the summons to oral proceedings, the Board sent a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA 2020) indicating its preliminary opinion of the case. In particular, the Board expressed its intention to dismiss the appeal because the subject-matter of independent claim 1 lacked an inventive step (Article 56 EPC) and that of dependent claim 3 could not be derived from the application as filed (Article 123(2) EPC).

V. In response, with letter dated 8 July 2020, the appellant stated that they would not attend the oral proceedings.

**VI. The Board thereupon cancelled the oral proceedings and informed the appellant that the proceedings would be continued in writing.**

VII. Claims of the appellant's sole request

Claim 1 as amended reads as follows (the feature numbering is introduced by the Board for ease of reference):

- (a) A colored structure applicable to a road surface
- (b) to indicate a bicycle riding route along the road, characterized in that
- (c) the structure is formed by seven parallel painted strips of the rainbow colors, which are arranged side-by-side and extend with identical widths in a longitudinal direction along the road.

VIII. Prior art

- (a) In the statement setting out the grounds of appeal, the appellant referred to the following prior art documents which were cited in the International search report:

D1: KR 2004 0065060 A;

D2: KR 10-0689183 B1.

- (b) In the communication pursuant to Article 15(1) RPBA 2020 the Board referred to the following evidence of prior art:

D4: <http://nyc.streetsblog.org/2007/07/12/new-high-visibility-bike-lanes-in-brooklyn/>

IX. The arguments of the appellant, insofar as relevant for the present decision, can be summarised as follows:

The examining division erred in deciding that the subject-matter of claim 1 did not involve an inventive step in the sense of Article 56 EPC when starting from D1 as closest prior art.

D1 discloses a plurality of sections painted along a road, each having a mosaic shape consisting of 4 pieces connected together in zigzags, namely a diagonal line 110, a horizontal line 120, a reverse diagonal line 130 and a vertical line 140. As acknowledged by the examining division, D1 fails to disclose feature (c) of claim 1. Even though the mosaic shapes as disclosed in D1 provide aesthetics they fail to indicate a road direction. Hence, this document does not disclose or suggest features (b) and (c) of the claim. D2 discloses a layer made of rubber placed above the pavement but fails to disclose feature (c).

The claimed invention results in a "New World Standard Rainbow Highway", i.e. a road structure consisting of several parallel painted strips in the colors of a rainbow hung in the sky, namely red, orange, yellow, green, blue, indigo and violet. It is one of the greatest inventions in human history. It has a dream color configuration that is unique and creative and that is something no one has created in any nation in the world. It enables people around the world to readily travel the world by bike and to contribute to the prevention of global warming as well as the achievement of peace in the world. It is applicable to

the road for the torch relay of the Olympic Games in which people around the world participate to celebrate sporting events. The seven colors of the rainbow contain an important message that the global population lives well together. Thus, regardless of people's different religion, culture and ethnicity, peaceful coexistence is possible. Furthermore, if a bike road according to the present invention is internationally applicable, a trip may be built around Russia, Europe, Africa, Australia, South America, Mexico, the U.S., Canada, Alaska from South Korea. This would make it possible to unify eastern and western nations, to contribute to achieving global peace and to realise great philosophy that a unified earth is created.

The claimed invention has already been granted as a patent in South Africa, Russia, Australia and Vietnam and thus has been acknowledged as involving an inventive step in those countries.

## **Reasons for the Decision**

1. Prior art
- 1.1 In the following, when referring to the content of D1, reference is made to the automatic translation of this document into English, as provided by the Korean patent office.
- 1.2 The Board has introduced D4 as evidence of what was prior art at the priority date (Article 114(1) EPC). It belongs to the state of the art according to Article 54(2) EPC because, as shown by the comments made by people, it was published and available to the public before the priority date of the application (18 February 2009). It is highly relevant for assessing

the question of inventive step. Therefore this evidence has been introduced into the appeal proceedings (Article 114(1) EPC).

2. In the communication pursuant to Article 15(1) RPBA 2020, the Board set out and reasoned its intention not to allow the appellant's request as follows (points 8 to 10):

*"8. Inventive step*

*8.1 D1 discloses, in figure 1, a sightseeing road 100 to prevent drowsiness and sleepiness, and to attract foreign tourists (abstract), wherein the road area 101 is divided into four successive painted sections 110, 120, 130 and 140 of different colors, the colors being preferably in the order of the rainbow colors (abstract and paragraph 23). It is apparent in figure 1 that section 140 is formed by five parallel painted strips (paragraph 21) which extend in a longitudinal direction along the road.*

*8.2 The examination division has ruled that the subject-matter of claim 1 differed from the colored structure shown in figure 1 of D1 only in that it is formed by "seven" parallel painted strips "with identical widths", and that these features had only an aesthetic character and did not contribute to the technical character of the invention.*

*8.3 However, the Board shares the appellant's view that D1 fails to disclose a colored structure adapted "to indicate a bicycle riding route along the road" (feature (b)) and "formed by seven parallel painted strips of the rainbow colors, which are arranged side-by-side and extend with identical widths*



*in a longitudinal direction along the road" (feature (c)).*

*8.3.1 D1 does not address the problem of indicating a bicycle route on an existing road, i.e. of creating an on-road lane separate from motor traffic and restricted to bicyclists. In figure 1, the successive sections 110, 120, 130 and 140 cover the full width of the road. Moreover, since the sections are formed by parallel painted strips with different orientations, they together form a zigzag-shaped colored structure which cannot indicate a route for riding a bicycle along the road.*

*8.3.2 The examining division refers to section 140 in figure 1 of D1. However, it covers only a short portion of the route and thus cannot define a bicycle route. Moreover, even though it is stated in D1 that the four sections may be painted in the order of the rainbow colors, there is no hint that the strips of section 140 themselves be in "the rainbow colors". Further, the strips of section 140 are spaced apart (see figure 1) but not "arranged side-by-side".*

*8.4 In the Board's view, the colored structure disclosed in D1 does not form a promising starting point for the assessment of inventive step. In fact, D4 forms a more promising and realistic starting point because it discloses an on-road bicycle lane which anticipates all features recited in the preamble of claim 1. More precisely, D4 discloses, in the terms of claim 1, a colored structure applicable to a road surface to indicate a bicycle riding route along the road (see bike lane painted green).*

8.5 *The subject-matter of claim 1 differs from D4 in that "the structure is formed by seven parallel painted strips of the rainbow colors, which are arranged side-by-side and extend with identical widths in a longitudinal direction along the road" (feature (c)).*

8.6 *It must be decided whether distinguishing feature (c) is a technical feature, i.e. a feature contributing to the creation of an objectively credible technical effect (see e.g. T 1958/13, point 2.2.5 of reasons), or a "non-technical" feature. This is important because it is established case law of the Boards of Appeal that inventive step can only be based on technical features (see Case Law of the Boards of Appeal, 2019, Chapter I.D.9.1.2, pages 214 to 216, in particular landmark decision T 641/00, OJ EPO 2003, 352, headnote I).*

8.7 *The appellant has not indicated, and the Board cannot find, any technical effect associated with distinguishing feature (c):*

8.7.1 *The appellant alleges that this feature results in a dream and harmonious color configuration which is unique and creative and contributes to the achievement of peace in the world, irrespective of people's religion, culture and ethnicity. However, none of these effects constitutes a technical effect. Rather, they relate to an aesthetic appreciation and depend on psychological or other personal factors, such as age, gender, socio-cultural background, education, religious beliefs, ethnic background, and nationality. For instance, a person seeing a bicycle route in rainbow colors might make the connection with a reference to gay or LGBT pride, peace movements, hippie counter-culture, the phrase "Richard Of York Gained*

*Battles In Vain", a left wing indigenist party in Ecuador, the flag of the city of Cusco in Peru, the international co-operative alliance, the Indian spiritual master Meher Baba, the flag of the Jewish Autonomous Oblast in Russia etc. Aesthetic effects are inherently non-technical, as follows from the express exclusion of aesthetic creations from patentability under Article 52(2) (b) EPC.*

*8.7.2 The appellant contends that the claimed invention results in a bicycle route having a standardised and unified shape, thereby allowing people to cycle around the world and thus contributing to the prevention of global warming as well as the unification of eastern and western nations. Similar effects are mentioned in the application (e.g. paragraphs 2, 7 to 9, 18, 20, 29 in EP 2 400 057 A1). However, it is not credible that any of these effects is achieved over the whole range of the claimed invention, in particular because the length of the bicycle route is not defined in claim 1. Moreover, the alleged effects are not directly related to the distinguishing feature over D4. In fact, they could be achieved with a long bike lane painted green as disclosed in this document.*

*8.8 The Board therefore concludes that the distinguishing feature over D4 is a non-technical feature which does not make any technical contribution.*

*8.9 The subject-matter of claim 1 thus does not involve an inventive step in the sense of Article 56 EPC.*

*8.10 The appellant mentions patents granted in South Africa, Russia, Australia and Vietnam for the same invention. However, the grant of a patent in any of*

*these countries is not binding on the EPO in the examination proceedings, let alone on the Board in the appeal proceedings. When reviewing the decision under appeal and exercising the power of the examining division, the Board has to decide on the basis of the EPC, not on the basis of the national law of any of these countries. In addition, it is not apparent that the patent specifications are identical to the application documents as amended.*

9. *In conclusion, the Board is of the preliminary opinion that the appeal should be dismissed.*

10. *Amendments*

10.1 *In a section of the decision under appeal headed "Additional remarks", the examining division stated that the amendments to claim 1 contravened the requirements of Article 123(2) EPC. The Board shares the appellant's view that the undertaken amendments do not introduce subject-matter extending beyond the content of the application as filed (EP 2 400 057 A1). In fact, it follows from paragraphs 5, 23, 45 and 51 and figure 1 that the seven painted strips of the rainbow colors are parallel strips with constant width which extend longitudinally along the road.*

10.2 *However, the Board is not convinced that the subject-matter of dependent claim 3 can be derived from the application as filed. With respect to the specific width of the painted strips, the only information which can be gleaned from the application is that each strip is 300 mm wide while it is 375  $\mu$ m thick (paragraphs 5, 23, 45 and 51 and figure 1)."*

3. In the absence of any counter-arguments submitted by the appellant in response to the Board's preliminary opinion, these conclusions continue to apply. Hence, the appellant's request cannot be allowed.
4. Cancellation of the oral proceedings
  - 4.1 The appellant had requested oral proceedings, albeit conditionally.
  - 4.2 In response to the summons to oral proceedings, the appellant stated that they would not attend them. It is established case law that such a statement should normally be treated as equivalent to a withdrawal of the request for oral proceedings (see Case Law of the Boards of Appeal, 9th edition, 2019, Chapter III.C. 4.3.2, page 620).
  - 4.3 In view of the state of the file, the Board considered it expedient and appropriate to issue a decision on the basis of the appellant's written submissions.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



C. Spira

G. Ashley

Decision electronically authenticated