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Aktenzeichen / Case Number / N^o du recours : T 162/87 - 3.5.1

Anmeldenummer / Filing No / N^o de la demande : 81 102 541.0

Veröffentlichungs-Nr. / Publication No / N^o de la publication : 0 038 957

Bezeichnung der Erfindung: Rolled core

Title of invention:

Titre de l'invention :

Klassifikation / Classification / Classement : H01F 27/24, H01F 1/12, C22C 38/00

ENTSCHEIDUNG / DECISION
vom / of / du 8 June 1989

Anmelder / Applicant / Demandeur :

Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

Kabushiki Kaisha Toshiba

Einsprechender / Opponent / Opposant :

Vacuumschmelze GmbH
N.V. Philips' Gloeilampenfabrieken

Stichwort / Headword / Référence :

EPÜ / EPC / CBE Article 54 EPC

Schlagwort / Keyword / Mot clé : "Novelty (No)"

Leitsatz / Headnote / Sommaire



Case Number : T 162/87 - 3.5.1

D E C I S I O N
of the Technical Board of Appeal 3.5.1
of 8 June 1989

Appellant :
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Decision under appeal : Decision of the Opposition Division 052 of the European Patent Office dated 6 March 1987 revoking European patent No. 38 957 pursuant to Article 102(1) EPC.

Composition of the Board :

Chairman : P.K.J. van den Berg

Members : Y.J.F. van Henden

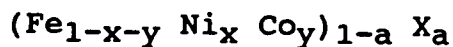
E. Persson

Summary of Facts and Submissions

- I. European patent no. 38957 was granted on 15 February 1984 in response to European patent application no. 81 102 541.0.

The Claims of the patent read (a spelling mistake in Claim 3 being here corrected):

- "1. A rolled core formed by winding a thin body (10) of an amorphous magnetic alloy having positive magnetostriction characteristics, characterized in that said thin body (10) is wound with the surface (12) of smaller surface coarseness of said thin body (10) facing inwards.
2. A rolled core according to Claim 1, wherein said surface (12) of smaller surface coarseness is a surface which has been brought into contact with a solid cooling medium (4) and the other surface (14) is a free surface which has not come in contact with the solid cooling medium (4).
3. A rolled core according to Claim 1, wherein said amorphous magnetic alloy having positive magnetostriction characteristics is represented by the general formula:



wherein X is at least one element selected from the group consisting of P, B, C, Si, Ge, and Al;
 $0.15 \leq a \leq 0.35$; $0 \leq x \leq 0.7$; and $0 \leq y \leq 0.9$."

II. Notices of opposition were filed against the European patent on 12 and 13 November 1984, respectively, requesting the revocation of the patent on the ground that its subject-matter is not patentable within the terms of Articles 52 to 57 EPC. During the opposition procedure, the following documents were submitted:

- 1) US-A-4 116 728
- 2) DE-A-2 553 003
- 3) sworn statement of Mrs I. Müller
- 4) purchase order from Coutant Electronics Limited to Vacuumschmelze GmbH
- 5) internal delivery order of Vacuumschmelze GmbH
- 6) invoice from Vacuumschmelze GmbH to Coutant Electronics Limited
- 7) declaration by Mr P.A. Naastepad dated 20 December 1984
- 8) letter from G.J Verlinde dated 16 July 1979 to Mr Naastepad and Mr Postma
- 9) letter from Dr R. Boll (Vacuumschmelze GmbH) dated 28 May 1979 to Mr K. Ruschmeyer (Volvo)
- 10) provisory data sheet M5509-01 of Vacuumschmelze GmbH with characteristics of Vitrovac 4040 cores
- 11) letter from Mr Camp and Dr Boll (Vacuumschmelze GmbH) dated 22 November 1984 to Philips International B.V.
- 12) letter from Mr Camp dated 12 July 1985 to Philips International B.V.

III. The Opposition Division revoked the patent at the end of oral proceedings held on 28 January 1987 and the written decision was dispatched on 6 March 1987. The stated ground for revocation was that, in consideration of the prior use disclosed by the Opponents, the subject-matter of Claim 1 lacks novelty. This prior use refers to a rolled core product (Vitrovac 4040) of the same kind as covered by the disputed patent which was made available by Respondent I to Respondent II in May 1979 for measurement purpose without

any bar of confidentiality, and which product (10 cores) was delivered in January 1980 by Respondent I to the British firm Coutant Electronics Ltd., Devon, UK.

- IV. The Appellant (Proprietor of the patent) filed a Notice of Appeal against the decision on 8 May 1987 with the payment of the fee, and submitted a Statement of Grounds on 13 July 1987. All the parties requested oral proceedings to be held if they were not to get satisfaction.
- V. In a communication sent on behalf of the Board to the parties with the summons to oral proceedings, the Rapporteur explained the reasons why the probability of the subject-matter of any one of the granted claims to be novel is very small.
- VI. With regard to novelty, the Appellant argued substantially as follows in his Statement of Grounds and at the hearing on 8 June 1989:
- a) In the prior use referred to in Mr P.A. Naastepad's declaration, the cores were wound with the face having been brought into contact with the cooling medium turned inwards, whereas it is the face of smaller coarseness which, according to the invention, is turned inwards. Nevertheless, it is not proven that both surfaces are identical.
 - b) Mr P.A. Nasstepad is an employee of Respondent II (N.V. Philips' Gloeilampenfabrieken), hence in economical dependence of the latter. To a foreign patentee, it would be unacceptable to have his patent destroyed on the strength of a single statement signed by an opponent's employee.

c) It has not been proved whether the rolled cores mentioned in the sworn statement of Mrs I. Müller were delivered to Coutant Electronics Ltd. before the priority date of the patent-in-suit. The revocation is thus based on an assumption, a circumstance that could result in a loss of confidence in the legal validity of European patents.

During the opposition proceedings, the Appellant had also denied the possibility of uncoiling a core after heat treatment without disintegrating its constituent material. The possibility to check which face of the wound ribbon is turned outwards would consequently not exist.

VII. The Respondents did not put forward any additional argument in writing and maintained the view that the subject-matter of the granted claims had already been made available to the public through prior use. During the hearing before the Board on 8 June 1989, which Respondent II did not attend, Respondent I (Vacuumschmelze GmbH) explained that the direction of winding the cores is of no importance, since internal stresses disappear as a consequence of thermal treatment. Respondent I furthermore declared that the properties of the cores depend on numerous other parameters and that the experiments he had performed did not show any difference resulting from said direction of winding.

VIII. The Appellant requested the cancellation of the impugned decision and that the patent be maintained as granted. The Respondents requested that the appeal be dismissed.

Reasons for the Decision

1. The requirements of Articles 106 to 108 and Rule 64 EPC are met. The appeal, therefore, is admissible.
2. The Board shares the views of the Opposition Division as to the allowability of the evidence produced by the Respondents with regard to the alleged prior use of the rolled core in question. As to the conclusions to be drawn from the evidence adduced, the Board takes the view that at least such prior use by Respondent II has actually been proven.
3. This conclusion is furthermore supported by the following considerations.

In his letter dated 28 May 1979, Dr R. Boll refers to a telephone call from Mr K. Ruschmeyer as to a visit of the latter during an exhibition in Hannover. The date of this telephone call being 16 May 1979, there is no reason to doubt that the date of Mr Ruschmeyer's visit is the one mentioned in Mr G.J. Verlinde's letter to Mr P.A. Naastepad and Mr Postma, to wit 9 May 1979. Consequently, and despite the discrepancy observed between the designations of materials, it may be accepted that the rolled core made of the alloy "Vitrovac E 4040 R" mentioned in Dr Boll's letter and the core made of the alloy "Vitrovac 4040 R" mentioned in Mr G.J. Verlinde's letter are the same one. An additional reason therefor is that the correct material designation is found in Mr Naastepad's declaration which concerns the said core, as can be inferred from the references to the said letters of Dr Boll and Mr G.J. Verlinde it contains.

4. The statement of Mr Naastepad reveals that the core made of the amorphous magnetic alloy Vitrovac E 4040 R had positive

magnetostriction characteristics and was wound with the contact surface towards inwards. This information is confirmed by the letter from Mr Camp and Dr Boll to Philips International B.V., which letter furthermore reveals that the contact surface is the one that came into contact with the cooling member.

5. During the oral proceedings held on 28 January 1987 before the Opposition Division, Respondent I explained that, in the designation of the alloy Vitrovac E 4040 R, the letter "R" refers to the form of the hysteresis curve, whereas the number 4040 is an indication that the alloy contains 40% of iron and 40% of nickel. The form of the hysteresis curve being the consequence of a thermal treatment, as appears from the letter of Dr Boll dated 28 May 1979, it may thus be accepted that the constituent material of the core referred to above had the composition and properties mentioned in the sworn statement of Mrs I. Müller.

Said sworn statement reveals that the side of the wound ribbon which did not come into contact with the cooling member is bright. Therefore, and contrary to Appellant's contentions, it is possible to distinguish which side of the ribbon faces outwards without uncoiling the core. Bearing in mind that the bright side of the ribbon is also rougher than the contact side, it thus appears that cores such as defined by Claims 1 and 2 of the patent-in-suit had been made at the priority date of the latter. The same conclusion also applies to Claim 3 of the patent, since the composition given in Mrs I. Müller's statement derives from the formula of said claim by taking (x), (y) and (a) to be respectively 0.5, 0 and 0.2 and by making X to be at least one of the elements B and Si.

6. In this context, the Board further remarks that in view of the state of the art at the priority date there are no circumstances which, from a technical point of view, are capable of casting any doubts on the probability of prior use having taken place to the extent as stated in paragraph 2 above.
7. Their subject-matter lacking novelty, the claims 1-3 of the patent-in-suit are not allowable under Article 52(1) EPC in conjunction with Article 54(1).

Order

For these reasons, it is decided that:

The appeal is dismissed.

The Registrar

The Chairman

S. Fabiani

P.K.J van den Berg