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D E C I S I O N
of 17 October 1994

Case Number: T 0708/93 - 3.4.2
Application Number: 84307484.0
Publication Number: 0146244
IPC: G01B 9/02, G01B 11/00, G01B 11/14
Language of the proceedings: EN

Title of invention:
Optical instrument for measuring displacement

Patentee:
SONY MAGNESCALE INC.

Opponent:
Canon Kabushiki Kaisha

Headword:

Relevant legal provisions:
EPC Art. 106 to 108, 111, 114(2), 123(3), 123(2)
EPC R. 64, 65

Keyword:
"Requests of the Appellant presented as an answer to a communication of the Board within the mentioned period: admissibility (yes)"
"Main request and first to third subsidiary requests: extension of protection (yes)"
"Fourth subsidiary request: additional subject-matter (yes)"
"Fifth subsidiary request: extension of protection (no), additional subject-matter (no)"
"Remittal to the first instance for further prosecution"

Decisions cited:
T 0220/83, T 0169/89, T 0574/91, T 0095/83, T 0153/85,
T 0383/88

Catchword:
-



Case Number: T 0708/93 - 3.4.2

D E C I S I O N
of the Technical Board of Appeal 3.4.2
of 17 October 1994

Appellant:
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office dated 11 May 1993, posted
on 1 June 1993 revoking European patent
No. 0 146 244 pursuant to Article 102(1) EPC.

Composition of the Board:

Chairman: E. Turrini
Members: M. Chomentowski
B. J. Schachenmann

Summary of Facts and Submissions

I. The Appellant is Proprietor of European patent No.0 146 244 (application No.84 307 484.0). Claim 1 in the form as granted reads as follows:

"1. An optical instrument for measuring displacement comprising a movable diffraction grating (3) used as a scale, a light source (1), the light source (1) being a multimode laser, said diffraction grating being illuminated by said light source and producing two or more diffracted beams, means (2, 4-7) for causing said two or more diffracted beams to interfere with each other, and two or more photodetectors (10, 11) for receiving and for detecting said two or more diffracted beams from said causing means (2, 4-7) whereby displacement of said diffraction grating (3) is detected based on variations of the outputs of said two or more photodetectors (10, 11) characterised in that said light source (1) is a multimode semiconductor laser device which has a coherency such as to enable said diffracted beams to interfere with one another only when they have optical path lengths which are substantially equal."

Claims 2 to 5 of the granted patent are dependent claims, whereby Claims 4 and 5 read as follows:

"4. An optical instrument according to claim 1 wherein means are provided which respond to the output of said photodetectors (10, 11) so that the errors in said beam due to the differences in optical path length between said two beams and errors due to light source wavelength variations are maintained less than predetermined values."

"5. An optical instrument for measuring displacement according to claim 4, further comprising means (104) for examining variations in modulation of said output, and means (106) for stopping the measurement in mid-course when said difference between the optical path lengths of said two beams is greater than a predetermined value."

II. The Respondent (Opponent) filed an opposition against the European patent in particular on the grounds that the patent contained matter which was not disclosed originally. The objection concerned mainly the feature of the optical instrument for measuring displacement of the granted Claim 1 that the light source is a multimode semiconductor laser device which has a coherency such as to enable said diffracted beams to interfere with one another only when they have optical path lengths which are substantially equal. Further objections concerned dependent Claim 4, because the means for maintaining errors in the beam less than a predetermined value in response to the photodetector output could not be detected in the original disclosure, and Claim 5 as dependent on Claim 4.

III. The patent, with a new first set of claims (main request) wherein dependent Claim 4 had been amended and a second set of claims (auxiliary request) wherein moreover Claim 1 had been amended, was revoked. The Opposition Division took the view that the feature of Claim 1 mentioned by the Opponent was not derivable from the original patent application.

IV. The Appellant (Proprietor) filed an appeal against this decision. New sets of claims were filed with the written statement of grounds of appeal for overcoming the objection of the Opposition Division having resulted in the revocation of the patent.

V. In the communication accompanying the invitation to oral proceedings which had been requested auxiliarily by both parties, the Board of Appeal expressed the opinion that, as also argued by the Respondent in a written statement, the claims in Appellant's requests appeared to extend the protection conferred by the granted patent because in particular of the amendment deleting the word "only" in Claim 1.

VI. With a letter dated 18 August 1994, the Appellant filed an amended main request and six auxiliary requests and submitted arguments in this respect.

Claim 1 of the **main request** reads as follows:

"1. An optical instrument for measuring displacement comprising a movable diffraction grating (3) used as a scale, a multimode laser light source (1) illuminating said diffraction grating (3) to produce two or more diffracted beams, means (2, 4, 5, 6, 7) for making said light beams diffracted by said diffraction grating interfere with each other, and two or more photodetectors (10, 11) for receiving and for detecting the interfering two or more diffracted beams, in which displacement of said diffraction grating is detected, based on variations of the outputs of said two or more photodetectors (10, 11), characterised in that said light source (1) is a multimode semiconductor laser device having a suitable coherency for making two necessary light beams with equal optical path lengths selectively interfere with each other."

Claim 1 of the **first subsidiary request** includes in substance the additional feature that the two necessary light beams with equal optical path lengths interfere with each other selectively "when said optical path lengths are in a range determined on the basis of the

wavelength (λ) of the light source, the variation of wavelength with temperature ($\delta\lambda$) of the light source, the pitch (P) of the grating and the desired accuracy of measurement".

Claim 1 of the **second subsidiary request** includes in substance, as compared to the main request, the additional feature that the two necessary light beams with equal optical path lengths interfere with each other selectively "and any difference in optical path length between said two diffracted beams which interfere with each other is detected based on variations in the outputs of said outputs of said photodetectors (10, 11)".

In Claim 1 of the **third subsidiary request** the words "and said outputs of said photodetectors are used to adjust the optical path length of said two diffracted beams so as to reduce errors due to said light source wavelength variations and to said optical path length difference" are substituted for the characterising portion of Claim 1 of the main request.

Claim 1 of the **fourth subsidiary request** of said letter request differs slightly from Claim 1 of the granted patent. The claims of the fifth and sixth auxiliary requests comprise further amendments.

VII. With a letter dated 11 October 1994, the Respondent declared that he intended to argue that all the requests, except the fourth auxiliary request, were broadening the scope of protection, and that said last request was not admissible in view of decisions of Boards of Appeal.

VIII. During the oral proceedings of 17 October 1994, the Appellant filed an amended fourth subsidiary request, added a modified version of said amended fourth subsidiary request as fifth subsidiary request whereby the fifth and sixth subsidiary requests in the letter 18 August 1994 were to be renumbered sixth and seventh subsidiary requests, respectively. He requested that the decision under appeal be set aside and that the case be remitted to the Opposition Division for examination of the further grounds of opposition. Claim 1 of the present fourth subsidiary request differs from Claim 1 of the granted patent only by the deletion of a comma between "two or more diffracted beams" and "means (2, 4-7) for causing" and the addition of a comma before "characterised". Claims 2 to 5 are dependent claims. As compared to Claim 4 as granted, present Claim 4 includes the additional feature "to generate alarm and stop signals" after "which respond to the output of said photodetectors (10, 11)" and, moreover, the expression "so that errors due to the differences in optical path length" is substituted for "so that the errors in said beam due to the differences in optical path length" of Claim 4 as granted. Claims 2, 3 and 5 of the present fourth subsidiary request do not differ in substance from the corresponding claims as granted. The present fifth subsidiary request only includes three claims, which are identical with Claims 1 to 3 of the present fourth subsidiary request.

IX. The Appellant submitted the following arguments in support of his requests:

All the requests are admissible because the decisions cited by the Respondent concern only the admissibility in relation with the initial examination of the statement of grounds of appeal; moreover, other decisions allow the Appellant to submit new claims in

due time for answering objections of the Board. The main request and the subsidiary requests 1 and 2 do not extend the protection because the indications that necessary light beams interfere "selectively" when their optical path lengths are "equal" correspond to the indications of the granted Claim 1 that the interference takes place only when the optical path lengths are substantially equal. Claim 1 of the third subsidiary request is based on a combination of the original claims. Concerning dependent Claim 4 of the fourth auxiliary request, it is derivable from the original application and in particular from Fig.16 that the instrument can be used so that errors are maintained less than predetermined values. Claim 1 of the fourth and the fifth subsidiary request is substantially identical with that of the granted patent so that no objection on the ground of extension of protection arises; moreover, since the original application indicates that the laser should have a suitable coherency related to the difference of optical path lengths and that only interference between two beams having small difference between the two optical path lengths can be detected selectively, there is a basis for the features that the light source of the instrument is a multimode semiconductor laser device which has a coherency such as to enable said diffracted beams to interfere with one another only when they have optical path lengths which are substantially equal and, thus, there is no additional subject-matter.

- X. The Respondent requested that the appeal be dismissed and, should the decision under appeal be set aside, that the case be remitted to the Opposition Division for further prosecution. He argued substantially as follows in this respect:

Those requests of the Appellant which are substantially identical with the requests underlying the decision under appeal and the arguments submitted in this respect are not admissible because the legal and factual basis of that decision had not been challenged by the Appellant in the statement of grounds of appeal as required by the Convention and decisions of the Boards of Appeal. The main request and the subsidiary requests 1 to 3 extend the protection because the restricting feature of the granted Claim 1 indicating that the interference takes place only when the optical path lengths are substantially equal has been deleted. Claim 1 of the fourth and the fifth subsidiary request comprises additional subject-matter because, using the strict standard of examination of the matter introduced by amendments of the original application set out in the decision T 383/88 of 1 December 1992, unpublished, there is no direct and unambiguous basis in the original patent application for selecting, for the optical instrument in dispute, a multimode semiconductor laser with regard to its coherency in relation to the interference of diffracted light beams with small differences of optical path lengths. Having regard in particular to this last feature and taking into account the indications in the original application that curves having a much slower variation than the curve of Fig.2 showing the variation of the amplitude of interference signals in relation to the difference between the two optical path lengths of the instrument, it must be concluded that there is no basis for the feature that the interference is detected only for substantially equal path lengths.

Reasons for the Decision

1. *Admissibility of the appeal*

The Respondent did not initially contest the admissibility of the appeal. However, he expressed the view that the Appellant's subsidiary requests submitted after the communication of the Board, i.e. the fourth request of the letter of 18 August 1994 and the submissions in this respect, and the present fourth and fifth subsidiary requests, comprising a main claim substantially identical with a main claim underlying the decision under appeal, were not admissible because the legal and factual basis of that decision had not been challenged in the statement of grounds of appeal, and he requested that they be dismissed as inadmissible. In support of his request, the Respondent cited and commented three decisions of Boards of Appeal concerning the admissibility of appeals. Since the Respondent strenuously argued on the issue of admissibility, since the decisions he has cited in respect of his objection are concerned with this issue and since the particular requests to which he objected on the grounds of admissibility play an important role in the present procedure, this question is dealt with in this paragraph relating to admissibility of the appeal. It is first to be noted that, as convincingly argued by the Appellant, the decisions T 220/83, OJ EPO 1986, 249 (see points III; 1, 4 and 5) and T 169/89 of 23 October 1990, unpublished (see points IV, last paragraph; V; 4 and 5) are insofar irrelevant as they concern cases wherein the statement of grounds of appeal was considered ab initio insufficient in the sense of Article 108, third sentence and Rules 64 and 65(1) EPC and the procedure has led to the appeal being dismissed on this ground. In the circumstances of the present case, however, the

statement of grounds of appeal has not been contested initially by the Respondent in relation to admissibility of the appeal and there has been no reason for the Board to do so. The third decision, i.e. T 574/91 of 3 August 1993, unpublished (see points III; IV, first paragraph; 1.1 to 1.3) concerns a case in which the appeal was limited to a review of the grounds of revocation of the patent in suit. In that case, the statement of grounds of appeal, while arguing that the first instance had missed the point in its decision, did not analyse specifically the decision under appeal, this resulting in said statement being insufficient. Thus, in the absence of specific objections on the part of the Appellant in the notice of appeal and in the statement of grounds of appeal about the particular conclusions of the impugned decision, the Appellant's submissions were interpreted as meaning that he had accepted all conclusions of the first instance, except the conclusion on which the revocation was based. Accordingly, the appeal was considered admissible and the Appellant had been allowed to challenge the conclusions of the first instance on which the revocation was based.

Indeed, as convincingly argued by the Appellant on the basis of the conclusions of the decisions T 095/83, OJ EPO 1985, 75 (see points 1 and 8), T 153/85, OJ EPO, 1988, 1 (see points 1 and 2.1) and T 105/87 of 25 February 1988, unpublished (see point IV, second paragraph and, in the reasons, point 1), the admissibility of the appeal is governed by Articles 106 to 108 and Rule 64 EPC (cf. Rule 65 EPC). If the appeal is admissible, it is examined in accordance with Article 110 EPC. Should the Respondent's objection concern the late filing of the new claims and of the related arguments contained in the letter dated 18 August 1994, the provisions of Article 114(2) EPC rather than those of Article 108 EPC would apply.

However, any objection based on Article 114(2) EPC is irrelevant in that the claims and arguments contained in said letter were filed as a response to the objections contained in the communication of the Board and well within the time limit mentioned therein.

In the decision T 105/87 referred to above, it was stated (see point 1, penultimate paragraph): "The fact that in this particular case the Appellants, for the purpose of the appeal, accepted the conclusions of the Opposition Division and, therefore, did not maintain the claims considered by the first instance, should, of course, not put him in a less favourable situation than if he had disagreed with the Opposition Division and maintained these claims as a main request and presented amended claims only as an alternative request. An opposite view on this point could obviously lead to the result that an Appellant, in order to avoid any formal trouble, artificially would argue against the decision under appeal which would only be detrimental to the interest of providing for an as efficient appeal procedure as possible." In the circumstances of the present case, it is to be noted that the statement of grounds of appeal contains an analysis of the decision under appeal. Following the discussion of the procedure and of the objection under Article 123(2) EPC having led to the impugned decision, the following statement was made: "While we believe this was unjustified, we believe that the objection can be overcome and the proceedings be advanced most efficiently by amending claim 1 to use wording corresponding to that used when the application was originally filed." Therefore, in the present case, the Appellant had not accepted the conclusions of the Opposition Division. Consequently, there are even less reasons than in the case referred to above to exclude the claims on which the impugned decision was based from consideration in the present appeal. Moreover, the

Appellant, facing an objection of extension of the scope of protection during the appeal proceedings, was justified to file in due time a new claim which was adequate for meeting said new objection, even though this claim was identical with a claim having formed the basis of the decision under appeal which he had expressly contested. Thus, the Respondent's request is rejected and the Appellant's present fourth and fifth requests are not disregarded (Art.114(2) EPC). Therefore, the appeal including these present requests is admissible (Art.108 and Rules 64 and 65(1) EPC).

2. *Main request*

As Claim 1 as granted, present Claim 1 concerns an optical instrument for measuring displacement comprising a movable diffraction grating used as a scale, a multimode semiconductor laser light source which illuminates said diffraction grating to produce two or more diffracted beams, and means for causing said two or more diffracted beams to interfere with each other; two or more photodetectors are provided for receiving and for detecting said two or more diffracted beams from said causing means; displacement of said diffraction grating is detected based on variations of the outputs of said two or more photodetectors. However, contrary to Claim 1 as granted, which specifies that the multimode semiconductor laser device has a **coherency such as to enable said diffracted beams to interfere with one another only when they have optical path lengths which are substantially equal**, the instrument of present Claim 1 in particular includes a multimode semiconductor laser device having a **suitable coherency for making two necessary light beams with equal optical path lengths selectively** interfere with each other. Thus, contrary to the instrument of Claim 1 as granted, wherein there is no interference of diffracted beams having optical path

lengths which are not substantially equal, in the instrument of present Claim 1, the only beams which are mentioned are the "two necessary" light beams and nothing is derivable about other light beams. Therefore, according to present Claim 1, other light beams, in particular beams other than the two necessary light beams could also interfere in some unspecified way and this could result in an instrument having capabilities which the instrument of Claim 1 as granted, wherein the multimode semiconductor laser device has a **coherency such** as to enable said diffracted beams to interfere with one another **only** when they have **optical path lengths which are substantially equal**, has not. The Appellant has submitted that the word "selectively" in combination with the other terms of the claim result in the same meaning. This argument is however not convincing because, since neither "selectively" nor "necessary light beams" are defined in the claim, the meaning of said terms cannot be ascertained. Therefore, the claims of the European patent have been amended after grant in such a way as to extend the protection conferred, and this is not allowable (Art.123(3) EPC).

3. *First to third subsidiary requests*

Claim 1 of the first subsidiary request indeed comprises features which, as compared with Claim 1 of the main request, restricts the scope of protection in that sense that the "necessary" light beams of equal optical path length interfere with each other "selectively" only under determined conditions, for instance for optical path lengths in a predetermined range on the basis of particular features such as the wavelength of the light source; however, as mentioned above, this wording does not exclude that light beams which are not necessary could interfere even when they are not "substantially equal". Therefore, the instrument of present Claim 1 of

the first subsidiary request has a wider scope of protection than Claim 1 as granted, which specifies that the multimode semiconductor laser device which has a **coherency such as to enable said diffracted beams to interfere with one another only when they have optical path lengths which are substantially equal**. The second subsidiary request, wherein the detection of differences of optical path lengths is based on variations in the outputs of the outputs of the photodetectors, is even less precise than the first one in this respect. Concerning the third subsidiary request, it is to be noted that it does not even mention any equal or substantially equal optical path lengths. Therefore, these requests are not allowable for the same reasons as the main request (Art.123(3) EPC).

4. *Fourth subsidiary request*

4.1 Present Claim 1 is the only main claim and is substantially identical with Claim 1 as granted; thus, the claims of the European patent have not been amended after grant in such a way as to extend the protection conferred (Art.123(3) EPC). The Respondent has pointed to the feature of present Claim 1 that the laser device has "a coherency such as to enable said diffracted beams to interfere with one another only when they have optical path lengths which are substantially equal" which, in his view, is not directly disclosed by the original application. Taking into account the text location of the original application (see page 8, line 14 to 18) indicated by the Appellant himself, that only interference between two beams having small δl , i.e. small difference between the two optical path lengths, can be detected **selectively**, the Respondent has submitted the following arguments by referring to the original application (see page 6, line 15 to page 8, line 23; Fig.2): said feature of present Claim 1 is to

be understood as meaning that the visibility of the interference fringes goes to zero if the difference of the optical path lengths deviate from being substantially zero; indeed, it is indicated that, in general, visibility of interference fringes in an interferometer is determined by coherency of the light source and by the difference between optical path lengths of the two interfering beams; in this respect, with a mentioned tolerance of δl of about 70 μm , in order that this difference can be monitored it is necessary to use a light source allowing to detect variations in δl of this order of magnitude and moreover having suitable coherency for which visibility does not vary too much for δl smaller than this value, because it is difficult to manipulate the device when it is too sensitive to δl ; when a suitable multimode semiconductor laser device is used according to this invention, these conditions are fulfilled and it is possible to obtain variations in modulation for suitable variations in δl , that is, to detect variations in difference between the two optical path lengths as variations in modulation; present Fig.2 shows the relation between the difference δn and the amplitude modulation of interference signals obtained experimentally by means of a device arranged as indicated in present Fig.1, so that adjustment of the optical path lengths can be effected with fairly high precision; for an optical system having a lower precision, a multimode semiconductor laser device having fewer oscillation modes than that described in relation with the arrangement of Fig.2 can be used, whereby characteristic curves varying more slowly than that shown in Fig.2 are obtained.

Thus, the Respondent's argument can be accepted insofar as it relates to a feature that the laser device has "a coherency such as to enable said diffracted beams to interfere with one another only when they have optical

path lengths which are equal", which indeed is not directly disclosed by the original application. However, the Respondent's argument cannot be accepted when the feature relates to "optical path lengths substantially equal" because, as also derivable from the application as filed (see page 3, lines 1 to 25; page 7, lines 16 to 27 and page 8, lines 14 to 18), with a multimode semiconductor laser device having a suitable coherency, only small δl , thus also δl different from zero, are detected selectively. Concerning the meaning of the word "substantially" in the expression "substantially equal", this is a question of clarity of the claim, which is to be treated at a later stage of the opposition procedure because the patent has been amended (Art.102(3) and 84 EPC), but which is not directly related to the question of additional subject-matter. The same remark arises concerning the Respondent's objection regarding the information on the specific laser semiconductor devices having a suitable coherency for simultaneously avoiding problems due to variations of the wavelength with temperature, allowing some tolerance with respect to small differences of optical path lengths and still allowing visible fringes to adjust the instrument, which is a question of sufficient disclosure of the invention and which is also to be considered during prosecution of the further pending grounds of opposition, in particular under Article 100(b) EPC.

Therefore, although in particular there are indications in the application as filed that "substantially equal" could cover a wide range of optical path length differences, there is however a basis for such wording used in Claim 1. In this respect, the above-mentioned decision T 383/88 (see point 2.2.2) cited by the Respondent sets out that a rigorous standard is considered as being the right one to be used for deciding whether features are directly and unambiguously

disclosed in the original application, or not; for analysing extension beyond the content of the application as filed read in the light of common general knowledge, balance of probability is the wrong standard, i.e. equivalent to "beyond reasonable doubt" is considered as being the right one to apply in such a case because, applying a lower standard could easily lead to undetected abuse by allowing amendments on the basis of ostensibly proven common knowledge; for deciding the allowability under Article 123(2) EPC, the slightest doubt as to the derivability of the amendments from the unamended document rules out the amendment. However, the Respondent's argument based on this decision is insofar not relevant as it concerns cases of unacceptable or acceptable generalisation of originally disclosed features having regard to the extension of the subject-matter, respectively. However, no generalisation of originally disclosed features is at issue in the present case. Indeed, the Respondent has shown that, if "substantially equal" of present Claim 1 were to be understood in a restrictive way, the original application would disclose optical instruments which are not limited to those presently claimed, in particular because, with a suitable coherency of semiconductor lasers, interferences could also be visible and detected with large tolerances for differences of light path lengths. However, since the application as filed stresses the combined importance of the semiconductor laser coherency and of a small difference of light path length δl without specifying the meaning of "small", this argument is not relevant. In addition, the feature of present Claim 1 that the laser device has "a coherency such as to enable said diffracted beams to interfere with one another only when they have optical path lengths which are substantially equal" can also be derived from the application as filed (see page 7, lines 16 to 21 and page 8, lines 14 to 18) by using the

strict standard stressed in the said decision T 383/88. Therefore, there is no additional subject-matter in present Claim 1.

There are no particular objections concerning dependent Claims 2 and 3. However, present Claim 4 is based in part on Claim 4 as granted, and the notice of opposition contains objections against this claim on the basis that **no means** which respond to the output of the photodetectors **so that errors are maintained less than predetermined values** are derivable from the application as filed; during the oral proceedings, the Board made the same objection against the requests containing a similar claim. Present dependent Claim 4 includes, as compared to Claim 4 as granted, the additional feature "to generate alarm and stop signals" after "which respond to the output of said photodetectors (10, 11)"; moreover, the expression "so that errors due to the differences in optical path length" is substituted for "so that the errors in said beam due to the differences in optical path length" of Claim 4 as granted. The Appellant has indicated that, as derivable from Claim 12, Fig.16 and page 8, line 24 to page 9, line 7, as originally filed, detection signals output by the photodetector circuit (101), amplified by the amplifier circuit (102), sampled by the sampling circuit (103) and compared to predetermined values in the comparing circuit (104) are input in the alarm generation circuit (105) and also in the stopping circuit (106), so that errors are maintained less than predetermined values. However, it is to be noted that the alarm generation circuit (105) cannot effectuate stopping of the machine and that an operator operating stopping means is necessary therefor. Moreover, the original Claim 12 mentions that the means for stopping the measurement in middle course when the difference between optical path lengths of the two light beams is greater than a

predetermined value, but there is no information derivable from the original application that the measurement should be stopped as a result of errors due to light source wavelength variations, and the Appellant could not indicate other specific means for this purpose. Therefore, an instrument according to present Claim 4 is not derivable from the application as filed. Incidentally, it is also to be noted that, as also pointed out by the Board during the oral proceedings, present Claim 5 specifies that the optical instrument of Claim 4 further comprises means (104) for examining variations in modulation of the output of the photodetectors and means for stopping the measurement in mid-course when said difference between the optical path lengths of said two beams is greater than a predetermined value. However, since these means are further means as compared to Claim 4, they are derivable as being different from those for maintaining errors. However, further means, in addition to those disclosed in Fig.16, are not derivable from the application as filed. Therefore, the European patent has been amended in such a way that it contains subject-matter which extends beyond the content of the application as filed and, therefore, the request is not allowable (Art.123(2) EPC).

5. *Fifth subsidiary request*

The fifth subsidiary request does not comprise dependent Claims 4 and 5 but, otherwise, is identical with the fourth subsidiary request. Therefore, since the remaining Claims 1 to 3 are found allowable for the reasons mentioned in relation with the fourth subsidiary request, the fifth subsidiary request is allowable (Art.123(3) and (2) EPC).

6. Since the fifth subsidiary request is allowable, further prosecution of the opposition procedure can take place in accordance with the requests of the parties and it is not necessary to take into account the Appellant's sixth and seventh subsidiary requests (Art.111 EPC).

Order

For these reasons it is decided that:

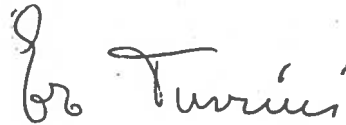
1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division for further prosecution on the basis of auxiliary request number 5 filed during the oral proceedings of 17 October 1994.

The Registrar:



P.Martorana

The Chairman:



E.Turrini

MCH
B.Sch.

