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D E C I S I O N
of 4 December 1998

Case Number: T 0552/94 - 3.3.1
Application Number: 84305025.3
Publication Number: 0133012
IPC: B41M 5/26
Language of the proceedings: EN

Title of invention:
A sheet for use in heat transfer printing

Patentee:
Dai Nippon Insatsu Kabushiki Kaisha

Opponent:
Agfa-Gevaert N.V.
Dr. Peter Römer
Mitsubishi Kasei Corporation

Headword:
Heat transfer printing/DAI NIPPON

Relevant legal provisions:
EPC Art. 54(3), (4), 87(1), 114, 123(2), (3)

Keyword:
"Late-filed evidence - (not) admitted - dependent on relevance (see point 4 of the reasons)"
"Amended claims - (not) admitted - dependent on appropriateness and necessity (see points 5 and 11 of the reasons)"
"Priority right (no) - not the same invention - omission of all essential features (see point 8 of the reasons)"
"Novelty (no) - anticipation by intermediate document (see point 9 of the reasons)"

Decisions cited:
G 0009/92, G 0003/93, T 0406/86, T 0295/87, T 0789/89,
T 1002/92, T 0039/93, T 1082/93, T 0134/94

Catchword:
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Boards of Appeal

Chambres de recours

Case Number: T 0552/94 - 3.3.1

D E C I S I O N
of the Technical Board of Appeal 3.3.1
of 4 December 1998

Respondent 01: Agfa-Gevaert N.V.
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Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office posted 4 May 1994
concerning maintenance of European patent
No. 0 133 012 in amended form.

Composition of the Board:

Chairman: A. J. Nuss
Members: R. Freimuth
S. C. Perryman

Summary of Facts and Submissions

- I. The Appellant (Proprietor of the patent) lodged an appeal against the interlocutory decision of the Opposition Division posted on 4 Mai 1994 which found that European patent No. 133 012 in the form as amended during opposition proceedings according to the main and the first auxiliary request did not satisfy the requirements of the EPC, but that it could be maintained in the form as amended according to the second auxiliary request.
- II. Notice of Opposition had been filed by the Respondents 1, 2 and 3 (Opponents 1, 2 and 3 respectively), all requesting revocation of the patent in its entirety for lack of novelty and for lack of inventive step (Article 100 a EPC).
- III. The Opposition Division decided that the independent claim 1 of the then pending main request neither disclosed the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art, nor involved an inventive step. The Opposition Division held that the invention was not effective over the whole breadth of that claim. The releasing agents as defined in claim 1 of that request embraced non-hardenable silicone oils, which were proven not to prevent adhesion. Those silicone oils were therefore not suitable for use as releasing agent. Thus, claim 1 covered embodiments which were not suitable for performing the present invention with the consequence that the latter was not disclosed in a manner sufficiently clear and complete to be carried by a person skilled in the art. The Opposition Division held furthermore that the claimed invention was rendered obvious by combining the documents

(1) GB-A-2 106 148,

(15) JP-A-48-79016, considered in the form of its English translation.

The Opposition Division moreover held that the independent claim 1 of the then pending first auxiliary request did not enjoy its claimed priority right. The priority document taught an image-receiving layer comprising first and second regions having very specific different properties. Claim 1 of that request, however, was not restricted thereto, but claimed any type of material to be used in the image-receiving layer. Therefore, the priority right claimed by the patent in suit was found invalid and the filing date to be its effective date. The document

(24) EP-A-163 145,

thereby became state of the art pursuant to Article 54(3) EPC and anticipated the subject-matter of claim 1 of that request. However, the latter was found to be novel vis-à-vis the state of the art in the sense of Article 54(2) EPC represented by the documents (15) and

(28) Ullmanns Enzyklopädie der Techn. Chemie, Vol. 21, pages 530, 531 (1982).

IV. At the oral proceedings before the Board, held on 4 December 1998, the Appellant defended the maintenance of the patent in suit in amended form on the basis of main and first auxiliary requests, both submitted during those oral proceedings and superseding the respective previously submitted requests. Both fresh requests comprised a set of five claims, wherein claims 1 and 3 were independent. Claims 1 and 2 of the main request read as follows:

"1. A sheet for use in heat transfer printing by means of a thermal head or laser beam, comprising a substrate and an image-receiving layer of one or more resins, selected from resins having ester linkage, resins having urethane linkage, resins having amide linkage, resins having urea linkage, and resins having highly polar linkage, which is provided on the substrate and capable of receiving a dye transfer image in accordance with image information generated from an electric signal, characterised in that the image receiving layer contains a dye-permeable releasing agent selected from solid waxes present at from 5 to 50% by weight of the resin; fluorine or phosphate-containing surfactants present at 0.5 to 10% by weight of the resin; and reaction-hardened, catalyst-hardened, or photo-hardened silicone oils present at 0.5 to 30 % by weight of the resin.

2. A sheet as claimed in claim 1, wherein the releasing agent is a reaction-hardened product of an amino-modified silicone and an epoxy-modified silicone."

The differences between the claims according to the main request and those according to the first auxiliary request consisted in amendments related to changing the category of the claims from product claims, directed to a sheet, into use claims. The use claims were directed to the use of a solid wax, fluorine or phosphate-containing surfactant, or reaction-hardened, catalyst-hardened or photo-hardened silicone oil as a dye-permeable releasing agent in an image-receiving sheet, substantially as defined in the main request.

V. The **Appellant** submitted that the redrafted version of the claims according to the main request aimed at overcoming numerous objections raised by the Respondent 1 against the previous main and first

auxiliary requests. The change in category to use claims according to the first auxiliary request was designed to prevent any anticipation in case the documents (24) and (28) were found to destroy the novelty of claims of the main request. Since there had been good reasons for the amendments made, the claims according to the main and the first auxiliary requests should be admitted into the proceedings.

The Appellant argued furthermore that the claims as amended according to either request satisfied the requirements of the EPC essentially for the following reasons:

A. The feature "reaction/catalyst/photo-hardened silicone oil" as amended distinguished the claimed invention from non-hardenable silicone oils. That feature was also clear to the skilled person and not equivalent to a silicone resin, since the latter was highly crosslinked and the crosslinking bonds were formed from siloxane bonds. To back up this view, the Appellant referred additionally to documents

(33) Kagaku Dai Jiten (Chemical Dictionary), Tokyo Kagaku Dojin, Japan, 1989, keywords "silicone resin", "silicone oil";

(34) Kagaku Dai Jiten (Chemical Dictionary), Kyoritsu Shuppan, Japan 1962, keywords "silicone resins", "silicone oils";

(35) Kirk-Othmer, Encyclopedia of Chemical Technology, 2nd edition, Vol. 18, page 246 (1972);

(36) Kobunshi Dictionary (Polymer Dictionary), Polymer Science Society, Japan, Asakura Shoten, 1975, keywords "silicone resins", "silicone oils".

B. There was a second, separate invention in the priority document in respect of the object to prevent fusing together the image-receiving sheet and the heat transfer printing sheet. The solution to this object was found in using hardened silicone oils. The comparative examples 1 and 2 in the priority document supported this separate invention. Therefore the patent in suit had a right to the priority claimed.

C. Since the patent in suit claimed properly priority, document (24) was not state of the art. In case of a decision denying the priority right, that document would become state of the art according to Article 54(3) EPC. However, it disclosed the use of silicone resins which are different to hardened silicone oils as claimed. Thus, even in that case document (24) could not affect novelty.

The late-filed documents (37) and (38) cited by the Respondent 1 (see point VI B below) should not be admitted since they did not form part of the decision under appeal. Moreover, Respondent 1's objections based thereon were not substantiated.

D. The filling material used in the sheets of document (1) was not a releasing agent and had no dye permeability. Document (15) was related to stamp-printing and not to thermal recording as document (1). Both fields of technology were clearly different from each other. Therefore it was not obvious to transfer techniques between

them. Furthermore additional comparative data filed on 3 November 1998 showed the results of tests using hardenable and non-hardenable silicone oils. As evidence for common general knowledge relating to reactive and non-reactive silicone fluids the following document was cited:

(44) Modified Silicone Fluids, catalogue of Shin Etsu K.K., 1991

VI. The Respondent 1 submitted with regard to both requests that they were filed too late in order to be admitted into the proceedings. The amendments carried out on the patent in suit were not a bona fide attempt to meet the objections since the Appellant announced already in his letter dated 7 June 1995 that he intended to vary its requests in the light of the objections raised, without, however, doing so. The Respondent 1 argued, based in essence on the reasons given in the decision under appeal, that the patent in suit with respect to either request was not in accordance with the requirements of the EPC essentially for the following reasons:

A. The feature "reaction/catalyst/photo-hardened silicone oil" used in the claims as amended was not to be clearly distinguished from silicone resins used in the state of the art. To back up this view, the Respondent 1 referred to document

(39) The Chemistry of Organic Film Formers, D. H. Solomon, John Wiley and Sons, 1967, pages 316 to 319.

However, due to this amendment, the invention claimed as amended no longer covered non-hardenable silicone oils. Any previous objection pursuant to Article 100(b) EPC, having been based on non-hardenable silicone oils, was therefore not maintained.

B. The patent in suit as amended was not entitled to the claimed right of priority since the invention of that priority document was not the same as that of the patent in suit. The features, taught in the priority document to be essential, were omitted in the claims of the patent in suit. Contrary to Appellant's allegation, the priority document did not comprise any second, separate invention on which a priority right could be based.

C. Due to that loss of priority, the documents

(37) EP-A-153 880 and

(38) EP-A-133 011,

cited in the letter dated 27 January 1995, became state of the art pursuant to Article 54(3) EPC. Document (37) disclosed a sheet comprising a support on which an image receiving layer was coated containing a hardened product of an amino-modified and an epoxy-modified silicone oil. As a consequence that document destroyed the novelty of the claimed invention. The same conclusion applied to document (38).

Both documents, though being cited for the first time at the beginning of appeal proceedings, were prima facie relevant to the patentability of the patent in suit and should be admitted therefore into the proceedings. The objection based thereon

was substantiated as to its substance as well as to the dates to be effective as set out in Respondent's letter dated 27 January 1995, item (H) on page 10.

- D. During oral proceedings before the Board, any previously raised novelty objection with respect to documents (24) and (28) was explicitly dropped, irrespective of whether or not the feature "reaction/catalyst/photo-hardened silicone oils" used in the claims as amended embraced silicone resins disclosed in document (24).
- VII. The **Respondent 2** never participated actively in the appeal proceedings.
- VIII. The **Respondent 3**, after having made submissions as to the substance and having cited the documents
- (40) JP-A-50/124718, considered in the form of its partial English translation
 - (41) Encyclopedia of Polymer Science and Technology, Vol. 12, pages 531, 532, 553 (1970)
 - (42) Silicone Resin, Kogyo Chosakai 1971, page 148
 - (43) Kirk-Othmer, Encyclopedia of Chemical Technology, 3 rd edition, Vol. 3, page 490 (1978),
- withdrew his opposition on 7 September 1998.
- IX. The Appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or first auxiliary request submitted at the oral proceedings on 4 December 1998.
- The Respondents requested that the appeal be dismissed.

- X. Oral proceedings were held in the absence of the Respondents 2 and 3. At the end of the oral proceedings the decision of the Board was given orally.

Reasons for the Decision

1. The appeal is admissible.

2. *Parties to the appeal*

The Respondent 3's declaration to withdraw his opposition is to be understood as withdrawal from the appeal proceedings. Thus, he ceases to be a party to appeal proceedings as far as the substantive issues are concerned (see decision T 789/89, OJ EPO 1994, 482, points 2.3 and 2.6 of the reasons). The Respondent 2 neither filed any submission in appeal proceedings nor participated in any other way. The Board interprets his abstention as a wish not to be a party to appeal proceedings.

3. *Scope of Appeal*

Since the Proprietor of the patent is the sole Appellant, neither the Board nor any Respondent may challenge the maintenance of the patent in suit as amended in accordance with the interlocutory decision under appeal (see decision G 9/92, OJ EPO 1994, 875, point 14 of the reasons). Thus, the question whether or not the subject-matter claimed in the second auxiliary request, allowed by the Opposition Division in its interlocutory decision, is affected by the reasons set out below, is not a matter to be considered in this appeal, not for the reason that it would not apply to that request, but for the reason that the Board has no power to decide on the second auxiliary request.

4. *Late-filed evidence (Article 114 EPC)*

4.1 Documents (33) and (44) are new evidence submitted for the first time with Appellant's letters dated 12 September 1994 and 3 November 1998, respectively. Document (33) was published in 1989 and document (44) in 1991. The filing date of the patent in suit being 24 July 1984, both documents are postpublished and incapable of being relevant in the assessment of patentability. Thus, these late filed documents are not admitted into the proceedings (Article 114 (2) EPC).

4.2 Documents (34) to (36) and (39) to (43) are new evidence submitted for the first time in appeal proceedings with Appellant's letter dated 12 September 1994, with Respondent 1's letter dated 27 January 1995 and with Respondent 3's letter dated 29 Mai 1995, respectively. They address the matter whether or not the "reaction/catalyst/photo-hardened silicone oil" used in the patent in suit as amended was to be distinguished from silicone resins used in the state of the art. This matter, however, was not relevant to the assessment of novelty (cf. point 9 below). Therefore those documents lack relevance for the decision to be taken, and are not admitted into the proceedings (Article 114 (2) EPC).

4.3 The Appellant's comparative data is new evidence submitted for the first time on 3 November 1998 during appeal proceedings. This evidence is intended to support inventive step of the claimed invention. However, inventive step is not a matter considered in the present decision. Therefore, that evidence lacks relevance for the decision to be taken either, and is not admitted into the proceedings (Article 114 (2) EPC).

4.4 Documents (37) and (38) are new evidence cited for the first time in the Respondent 1's letter dated 27 January 1995 and has so far been relied upon in neither the opposition nor the appeal proceedings. The Appellant objected to their introduction into the appeal proceedings since they did not form part of the decision under appeal.

New evidence should only very exceptionally be admitted into the proceedings before the Boards of Appeal, if it is *prima facie* highly relevant in the sense that it is highly likely to prejudice the maintenance of the European patent in suit (see decisions T 1002/92, OJ EPO 1995, 605, point 3.4 of the reasons; T 39/93, OJ EPO 1997, 134, point 3.1.2 of the reasons). Since document (37) discloses a sheet comprising a support on which an image receiving layer was coated containing a hardened product of an amino-modified and an epoxy-modified silicone oil as does the claimed invention, that document is *prima facie* highly relevant with regard to novelty. The same conclusion applies to document (38).

Appellant's allegation that Respondent 1's objections based on those documents were not substantiated, is not supported by the facts. In Respondent's letter dated 27 January 1995, the objections were substantiated as to their substance and as to the dates to be effective for the patent in suit and for those documents.

Consequently, the Board decides to admit documents (37) and (38) into the appeal proceedings pursuant to Article 114(1) EPC.

Main Request

5. *Admissibility*

The amendments made to the claims as granted are designed to overcome objections raised by the Respondents-Opponents. The Appellant identified those objections in detail with reference to Respondent 1's letter dated 27 January 1995, and the Respondent 1 acknowledged during oral proceedings that the addressed objections were met. Therefore the amendments are considered appropriate and necessary and the Board, in exercising due discretion, admits the set of claims as amended according to the main request into the appeal proceedings (see decisions T 295/87, OJ EPO 1990, 470, point 3 of the reasons; T 406/86, OJ EPO 1989, 302, point 3.1 of the reasons).

6. *Amendments (Article 123 EPC)*

6.1 The Respondent 1 made no objection under Article 123(2) and (3) EPC against the claims as amended and the Board considers that these requirements are indeed satisfied.

6.2 In claim 1 the feature of carrying out the heat transfer printing "by means of a thermal head or laser beam" and of receiving the image on the image receiving layer "in accordance with image information generated from an electrical signal" is supported by page 1, lines 8 to 10 and page 5, line 15 of the application as originally filed. The incorporation of one or more resins in the image receiving layer, which are selected from the specific list indicated in claim 1, is backed up by original page 7, lines 15 to 22 and page 8, line 5 and 6. Page 8, lines 7 and 8 of the application as filed provides a basis for the releasing agents

"solid waxes", "fluorine or phosphate-containing surfactants" and "silicone oils". The amounts of the releasing agents to be used find support on page 8, line 22, page 9, line 10 and page 9, line 33, respectively. The specification of the silicone oils to be "reaction-hardened, catalyst-hardened, or photo-hardened" is supported on original page 9, lines 23 and 24.

Therefore, all the amendments made to claim 1 as granted comply with the requirements of Article 123(2) EPC.

6.3 The amendments of the claims as granted bring about a restriction of the scope of the claims, and therefore of the protection conferred thereby, which is in keeping with the requirements of Article 123(3) EPC.

7. *Insufficiency of the disclosure of the invention (Article 100(b) EPC)*

Although not formally raised by the Respondents-Opponents as a ground in their oppositions, the Opposition Division objected to the patent in suit on this ground in the decision under appeal. However, the insufficiency of the disclosure of the invention was not at issue in this appeal, the Respondent 1 having explicitly accepted during oral proceedings the sufficiency of the disclosure of the invention due to the restrictions made to the claims. The Board is satisfied that the patent in suit as now amended discloses the invention in a manner sufficiently clear and complete to be carried out by a person skilled in the art. Since it was no longer in dispute before the Board, no detailed reasoning needs to be given.

8. *Priority Right (Article 87(1) EPC)*

8.1 The Respondent 1 submitted that document (37) disclosed a sheet as defined in claim 1 of the patent in suit as amended. That document is an intermediate document having a priority date between the priority date claimed by the patent in suit and the filing date thereof. Since the question arises whether document (37) is to be considered state of the art according to Article 54(3) EPC, the matter of whether or not claim 1 of the patent in suit as amended is entitled to claimed right of priority, has to be decided by the Board.

8.2 Pursuant to Article 87(1) EPC, a right of priority may only be enjoyed in respect of the **same invention**. Therefore, in deciding whether claim 1 of the patent in suit as amended is entitled to the claimed priority, it needs to be decided whether in the priority document the same invention is disclosed as in present claim 1.

8.2.1 The priority document aims at providing a heat transferable sheet showing a colour image with continuous gradation, having high density without fading and not adhering to the heat transfer layer of the heat transfer sheet (page 9, second half to page 10, first paragraph).

In order to achieve these objects, the priority document teaches on page 10, line 5 to page 11, line 9 and in its claim 1 to provide a sheet having an image-receiving layer comprising first and second regions having the following four essential features:

- (a) a first region resin having a glass transition temperature of from -100°C to 20°C and polar groups,
- (b) a second region resin having a glass transition temperature of at least 40°C ,
- (c) the first region occupies at least 15 % of the surface of the layer, and
- (d) the first region forms mutually independent islands having a longitudinal length of 0.5 to 200 μm .

The priority document teaches explicitly on page 13, lines 7 to 13 and on page 13, line 26 to page 14, line 3 that these features are essential in the performance of the invention of the priority document, since the stated objects cannot be achieved when working outside of the frame set by these features. When the upper limit of the range of the glass temperature of the first region resin according to feature (a) is exceeded, a clear colour image cannot be obtained. When the glass temperature of the second region resin falls below the lower limit according to feature (b), the resulting colour image fades. On page 14, lines 6 to 11, the priority document puts additionally emphasis on the features (c) and (d). These findings are evidenced by **comparative** examples 1 and 2 on pages 29 to 31, which are outside of the frame of and do not belong to the invention as set out in the priority document. These examples prove indeed that without keeping in with the essential features (a) and (b), the objects aimed at cannot be achieved: the image is significantly distorted and fades, and the developed colour is inadequate.

Thus, at the priority date the objects of the invention set out in the priority document were achieved **only**, if each of the features (a) to (d) was satisfied.

8.2.2 However, since claim 1 omits the four features (a) to (d) taught in the priority document to be mandatory for performing that invention, these features are no longer a prerequisite for the invention as defined in the patent in suit. Thus, claim 1 turns away from the teaching of the priority document and from the nature and character of the invention defined therein. From the omission of the mandatory features it follows that the invention as defined by claim 1 of the patent in suit cannot be the same as that described in the priority document; hence the requirement of Article 87(1) EPC, that the priority right shall be enjoyed only "in respect of the same invention" is not fulfilled (see decisions T 134/94, point 3.2 of the reasons; T 1082/93, points 7.1.2 and 7.1.3 of the reasons, neither published in OJ EPO). Where priority is claimed but cannot be allowed because the essential condition precedent, that the inventions are the same, is not met, there is no right to priority (see decision G 3/93, OJ EPO 1995, 18, point 9 of the reasons).

8.2.3 The Appellant's counterargument that the priority document comprised a second, separate invention as shown by the comparative examples 1 and 2, on which a right of priority could be based, is at variance with the facts. The sole invention comprised in the priority document is explicitly defined on page 9, line 15 as to provide a sheet having a specific structure, i.e. having the features (a) to (d) as set out above, in order to achieve all the objects mentioned in the priority document (cf. point 8.2.1), including that addressed by the Appellant of preventing adhesion. The denotation of the two examples in the priority document as "comparative" examples proves the fact that

these embodiments are in contrast to the invention set out in the priority document. Therefore, they cannot form a basis for any alleged second invention comprised within the priority document.

8.3 For these reasons, in the Board's judgement, independent claim 1 is not entitled to the claimed priority right. The effective date of that claim 1 is then the filing date of the European patent application.

9. *Novelty (Article 54 EPC)*

9.1 Document (37) discloses in example 1 on page 20, line 13 to page 21, line 16 a sheet for use in heat transfer printing by means of a thermal head, comprising a substrate and an image-receiving layer of resins having ester linkages, which is provided on the substrate. The image-receiving layer contains in an amount of 2.5% by weight of the resin the reaction-hardened product of an amino-modified silicone oil and an epoxy-modified silicone oil as releasing agent, which is the preferred embodiment according to dependent claim 2 of the patent in suit. Therefore, document (37) discloses subject-matter which is within the scope of claim 1 of the patent in suit. The Appellant has not contested this finding.

9.2 Nor has the Appellant contested that document (37) has a priority date earlier than the filing date of the patent in suit and that the former is entitled to that earlier priority date. Document (37), which is a European patent application, hence becomes state of the art in the sense of Article 54(3) EPC.

- 9.3 The patent in suit designates the same Contracting States as does document (37), i.e DE, FR, IT and NL, which fulfills the requirements of Article 54(4) EPC.
- 9.4 The Board concludes from the above, that document (37) destroys the novelty of claim 1 of the patent in suit as amended.
- 9.5 In view of lack of novelty with regard to document (37), there is no need for the Board to consider further document (38).
10. In these circumstances, the appeal relating to Appellant's main request must be dismissed for lack of novelty pursuant to Articles 52(1), and 54(3) and (4) EPC.

First Auxiliary Request

11. *Admissibility*

Amendments to the text of a patent as granted is considered admissible in opposition appeal proceedings only if they are necessary and appropriate and intended to meet an objection arising out of grounds of opposition and the issues raised thereby (see decisions T 295/87 loc cit.; T 406/86 loc cit.). That jurisprudence has been condensed in fresh Rule 57 (a) EPC. Whether or not the proposed amendments are admissible into the appeal proceedings is to be decided by the Board in exercising its discretion.

In the present case, the Appellant declared that the change in category from product claims according to the main request to use claims according to the first auxiliary request was designed to prevent any anticipation of the main request by document (24) or (28). The first auxiliary request should therefore be

considered only in the event that those documents were found to destroy the novelty of the main request. Since, however, the documents (24) and (28) were not relevant in the assessment of novelty of the main request (see point 9 above), the amendment made to the claims, i.e. their change of category, is unnecessary and inappropriate, with the consequence that the Board does not admit the first auxiliary request into the appeal proceedings.

Order

For these reasons it is decided that:


The appeal is dismissed.

The Registrar:



E. Görgmeier

The Chairman:



A. Nuss

