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D E C I S I O N
of 11 April 2001

Case Number: T 0825/98 - 3.5.2

Application Number: 93200519.2

Publication Number: 0560420

IPC: H01K 1/32

Language of the proceedings: EN

Title of invention:

Electric incandescent infrared lamp and method of
manufacturing this lamp

Patentee:

Koninklijke Philips Electronics N.V.

Opponent:

Heraeus Noblelight GmbH

Headword:

-

Relevant legal provisions:

EPC Art. 54, 56, 83

Keyword:

"Claimed subject-matter feasible - yes"

"Novelty - yes"

"Inventive - yes"

Decisions cited:

-

Catchword:

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Case Number: T 0825/98 - 3.5.2

D E C I S I O N
of the Technical Board of Appeal 3.5.2
of 11 April 2001

Appellant: Heraeus Noblelight GmbH
(Opponent) Heraeusstr. 12-14
D-63450 Hanau (DE)

Representative: Kühn, Hans-Christian
Heraeus Holding GmbH
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Heraeusstrasse 12-14
D-63450 Hanau (DE)

Respondent: Koninklijke Philips Electronics N.V.
Proprietor of the patent) Groenewoudseweg 1
5621 BA Eindhoven (NL)

Representative: Rolfes, Johannes Gerardus Albertus
INTERNATIONAAL OCTROOIBUREAU B.V.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 19 June 1998
rejecting the opposition filed against European
patent No. 0 560 420 pursuant to Article 102(2)
EPC.

Composition of the Board:

Chairman: W. J. K. Wheeler
Members: J.-M. Cannard
P. H. Mühlens

Summary of Facts and Submissions

- I. The opponent appealed against the decision of the opposition division rejecting the opposition filed against European patent No. 0 560 420. The patent was opposed to the extent of Claims 1 and 2 only.
- II. Prior art document D1: EP-A-0 429 230 cited in support of the opposition remains relevant to the present appeal.

In addition document D3: GB-A-2 176 587, which is referred to in D1, was considered in the appeal.

- III. Claim 1 of the patent in suit as granted reads as follows:

"An electric incandescent infrared lamp comprising:

a lamp vessel (1) which is closed in a vacuumtight manner and which is made of glass having a SiO₂ content of at least 95% by weight;

an incandescent body (2) arranged in the lamp vessel;

current supply conductors (3) which enter the lamp vessel (1) and are connected to the incandescent body (2);

which lamp emits generated radiation for the major part through a lamp vessel portion to whose glass a colorant has been added,

characterized in that the lamp vessel (1) entirely consists of glass to which a colorant has been added."

Claim 2 is dependent on Claim 1.

- IV. In a communication accompanying a summons to oral proceedings, the Board indicated that it was inclined to the view that the subject-matter of Claim 1 as granted was novel and involved an inventive step over of the cited prior art.
- V. In reply to the communication the opponent withdraw his request for oral proceedings and announced that he would not be represented in the oral proceedings. The oral proceedings were cancelled.
- VI. The arguments of the appellant opponent can be summarised as follows:
- (a) The lamp according to granted Claim 1 was not novel since all the features set out in Claim 1 were disclosed in citation D1, even though they were not all considered to be feasible. Claim 1 did not include any features specifying the existence or feasibility of the lamp. Article 54(2) EPC did not require a document to disclose an existing or feasible thing before it could be considered as being comprised in the state of the art.
- (b) The appealed decision referred to the case law of the EPO. However, T 595/90 was concerned with a different situation in which the novelty of the invention was beyond question; T 26/85 related to novelty of selection inventions. Insofar as that decision was relevant to feasibility, the decisive point therein was whether the teaching in the patent was such that the skilled person could

carry it out.

- (c) According to the case law of the EPO, a patent could be granted for a product whose manufacture was not previously possible. It was doubtful whether this practice could be extended to products which were neither produced by a new patentable method nor new within the meaning of Article 54(1) and (2) EPC. This could result in reversing the burden of the proof in favour of the proprietor of the patent in the course of some national infringement procedures and block research and development.

VII. The arguments of the respondent proprietor can be summarised as follows:

- (a) In order to be novelty destroying, a document cited under Article 54(2) and (3) must contain an enabling disclosure. D1, which explicitly stated that seals at the ends of a lamp vessel made of red coloured high silica material could not be produced, did not destroy the novelty of granted Claim 1.
- (b) The opponent's considerations about possible consequences of the case law of the EPO in some national procedures and to a blocking of research and development were not relevant to the issue of novelty of Claim 1.

VIII. The appellant requested that the decision under appeal be set aside and the patent be revoked.

IX. The respondent requested that the appeal be dismissed

and the patent maintained unamended.

Reasons for the Decision

1. The appeal is admissible.
2. D1 discloses an infrared lamp as defined in the characterising preamble of granted Claim 1. D1 states (column 1, lines 26 to 34) that "As stated in ... UK Patent Application 2176587A, it was not previously possible to **produce a usable product** by using a red coloured high silica material as the main envelope of the lamp since this material which is a very poor absorber of heat cannot be heated to a sufficient temperature either **to produce a seal itself** or to be joined consistently to a clear tube of material of the same glass which can be properly sealed."
 - 2.1 In the view of the Board D1, and in particular the passage quoted above, is to be construed in the light of GB-A-2 176 587 (document D3) to which it refers.
3. D3 acknowledges (page 1, lines 5 to 30) a prior art infrared lamp which comprised a red coloured quartz bulb joined to clear tubes at each end. It is explained there that it is difficult to carry out the joining process since the red coloured glass is a poor absorber of heat and will not readily become sufficiently workable for joining. The teaching disclosed in D3 is an infrared lamp (Figure 1) which comprises a clear bulb housed inside an outer red coloured sleeve to reduce glare. Against this background, D1 repeats that **previously** red coloured high silica material cannot be

heated to a sufficient temperature to be joined consistently to a clear tube of said material, adding that for the same reason said material cannot produce a seal itself. Although the lamp disclosed in D1 (Figure 1; column 3, lines 18 to 42) provides a solution for joining red coloured high silica material to clear tube of said material, the Board was unable to find in D1 any solution for the problem of producing a seal with red coloured high silica material.

4. The appellant has stressed that granted Claim 1 does not include any features specifying the existence or feasibility of the lamp. There is however no doubt that the granted patent satisfies the requirement of Article 83 EPC since it discloses in a manner sufficiently clear and complete a method for carrying out the lamp of the invention. In the view of the Board this implies that the lamp according to granted Claim 1 is feasible and reproducible.
5. Accordingly the lamp defined in granted Claim 1, and more particularly by the characterizing feature which implies the existence of a method for producing a seal in the red coloured material itself, cannot be inferred directly and unequivocally from D1, since this citation states that a seal of a lamp vessel **cannot** be produced with red coloured high silica material (cf point 2 above).
6. The closest prior art is thus formed by the lamps disclosed in D1 (Figure 1; column 3, lines 18 to 42) or D3 (page 1, lines 24 to 30). The claimed lamp differs from the lamps disclosed in D1 and D3 in that its lamp vessel does not comprise any clear tubes at each end, but entirely consists of glass to which a colorant has

been added. Accordingly the subject-matter of granted Claim 1 is novel within the meaning of Article 54 EPC.

7. *Inventive step*

7.1 According to D1 it would be theoretically possible to produce a lamp vessel entirely consisting of the red coloured high silica material if the material of the vessel could be sealed itself. Consequently, starting from D1, the objective problem consists in finding a process for sealing said material itself.

7.2 Such a process is *inter alia* defined in method claim 3 which has not been opposed by the appellant. Moreover the Board was unable to find in any of the cited prior art documents any solution for the problem of producing a seal in coloured high silica material itself.

7.3 Although it was obvious to **want** to produce a lamp according to granted Claim 1, the person skilled in the art **couldn't** do it, because he did not know how to before the present invention was made. The Board therefore concludes that the subject-matter of granted Claim 1 involves an inventive step within the meaning of Article 56 EPC.

8. In the Board's judgement, the grounds of opposition do not prejudice the maintenance of the patent in suit unamended (Article 102(2) EPC). In this situation the appeal is to be dismissed and the appellant's arguments concerning possible consequences of the case law of the EPO in national infringement procedures and blocking of research and development are of no avail.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

A. Counillon

W. J. L. Wheeler