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**Datasheet for the decision
of 20 February 2019**

Case Number: R 0006/18

Appeal Number: T 0611/15 - 3.5.02

Application Number: 03736588.9

Publication Number: 1502483

IPC: H05B41/00

Language of the proceedings: EN

Title of invention:
LED dimming controller

Patent Proprietor:
Philips Lighting North America Corporation

Opponents:

- 1) Holdip Limited/E Light Limited/LED Lighting Consultants Limited
- 2) Megaman (UK) Limited/Neonlite International Ltd/ Neonlite Electronic & Lighting (HK) Limited

Headword:
Right to be heard/PHILIPS LIGHTING

Relevant legal provisions:
EPC Art. 112a(2)(c), 113(1)

Keyword:

Petition for review - clearly unallowable
Fundamental violation of right to be heard (no)

Decisions cited:

G 0002/10, R 0001/08, R 0015/12, R 0008/13, R 0016/13,
R 0017/14



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Case Number: R 0006/18

D E C I S I O N
of the Enlarged Board of Appeal
of 20 February 2019

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Decision under review: **Decision of the Technical Board of Appeal 3.5.02
of the European Patent Office of 10 October 2017**

Composition of the Board:

Chairman C. Josefsson
Members: R. Moufang
A. de Vries

Summary of Facts and Submissions

- I. The petition for review concerns the decision T 611/15 of Technical Board of Appeal 3.5.02 (hereinafter: "the Board") which was pronounced in oral proceedings of 10 October 2017, its written reasons being dispatched on 14 February 2018. This decision dealt with appeals of the proprietor of the European patent 1 502 483 (hereinafter: "the patent") and common opponents 1 against the opposition division's interlocutory decision according to which the patent as amended on the basis of the proprietor's eighth auxiliary request - which after withdrawal of higher-ranking requests had become the sole request in the first instance proceedings - fulfilled the requirements of the EPC.

The Board rejected the proprietor's appeal as inadmissible, set the contested decision aside and revoked the patent. It found that the proprietor's main and first auxiliary requests were not admissible in view of the principle of (prohibition of) *reformatio in peius*, that the second auxiliary request which was identical to the sole request before the opposition division did not comply with Article 123(2) EPC for containing added subject-matter; it further decided not to admit the third to fifth auxiliary requests under Article 13(3) RPBA.

- II. Claim 1 of the proprietor's second auxiliary request read as follows:

"An illumination apparatus (200), comprising:

at least one LED (104); and

at least one controller (204) coupled to the at least one LED (104) and configured to provide D.C. power to the at least one LED (104),

wherein the controller is configured to receive, from an A.C. dimmer circuit, an A.C. power-related signal being a dimmer signal output by the dimmer circuit, having portions chopped out of A.C. voltage cycles of a standard A.C. line voltage, and having higher frequency components than the standard A.C. line voltage due to the chopping; and

wherein the controller is configured to provide said D.C. power based on the A.C. power-related signal; characterized in that the at least one controller (204) is configured to filter out said higher frequency components."

III. In their grounds of appeal opponents 1 had maintained that the claims of the request which later became the second auxiliary request did not comply with the requirements of Article 123(2) EPC. The problematic part of claims 1 and 32 of that request was considered to be the combination of the recitations of a) the existence of higher frequency components due to the chopping and b) the filtering out of said higher frequency components. The question of higher frequencies was only discussed at two locations of the application as originally filed, i.e. on page 12, lines 15-25, and page 18, lines 15-26, of the WO publication (= WO 03/096761 A1). However, the original description did not link these two passages together in any way. There was no passage stating said the low pass filter would be there particularly to filter out these components. Furthermore, the application did not suggest filtering out anything. There were no occurrences of terms like "filter out" or "remove" concerning the higher frequencies.

IV. Responding to these objections, the proprietor had maintained that there was no added matter. It referred

inter alia to a passage on page 17, lines 9-14, of the application as support.

- V. In a notice of intervention filed during the appeal proceedings, the intervenors (= common opponents 2) also raised objections of added subject-matter concerning all pending requests, focusing on the same features upon which opponents 1 relied. While the passage on page 1, lines 31-32, described the operation of typical dimmers on the marketplace and the passage on page 12, lines 21-22, explained that such dimmers might introduce "significantly higher frequency components than a typical line voltage", neither of these passages taught any generalised solution to the apparent problem. A specific solution was described in connection with a specific embodiment which included a rectifier, a low pass filter and a DC convertor.
- VI. In its response to the intervention, the proprietor argued against the above objection, referring to several passages of the original application, including a passage on page 14, lines 3-6. There was a clear and unambiguous statement of the invention consistent with the degree of generalisation used in claim 1 of the main request. The proprietor noted that opponents 2 had not raised any additional attack against the specific wording of the second auxiliary request.
- VII. In a communication pursuant to Article 15(1) RBPA dated 19 September 2017 the Board set out its preliminary view on several issues found to be relevant. After summarizing the content of the application as filed and referring to various passages of it, the Board addressed the objection under Article 123(2) EPC. Filtering appeared to be only disclosed in the context that the filter was a low pass filter which filtered

the rectified power-related signal, i.e. the signal provided by the rectifier, before it was fed to a DC converter. Furthermore, the characteristics of the filter were described as being important. It seemed that the omission of these aspects from the independent claims added fresh subject-matter.

- VIII. Oral proceedings took place on 10 October 2017. The proprietor and opponents 2 were represented. The Board decided that the patent was to be revoked (see section I above).
- IX. In the written reasons the Board explained why it found the second auxiliary request to infringe Article 123(2) EPC. It stated the following:

"3.2. In the application as filed there is no literal basis for the feature that the controller is configured to 'filter out higher frequency components' that are present in the dimmer signal due to chopping. The question therefore arises whether such filtering by the controller is directly and unambiguously disclosed, at that level of generalisation, in some other way than by literal disclosure.

3.3. The Board is not convinced by the Proprietor's argument that the skilled person would understand from the disclosure at page 14, lines 3 to 6 of 'a controller to appropriately condition an A.C. signal provided by a dimmer circuit so as to provide power to (i.e., 'drive') one or more LEDs of the lighting unit' that the controller was configured to filter out the high frequency components described earlier at page 12, lines 15 to 22 as being present due to chopping by the dimmer. There is no direct and unambiguous link between the conditioning referred to on page 14 and the

filtering-out of the high frequency components referred to on page 12. Furthermore, the disclosure at page 14, lines 6 to 8 suggests that driving the LEDs using any of the variety of techniques listed might well be what was to be understood by appropriately conditioning the AC signal provided by the dimmer circuit so as to drive the LEDs. Moreover, the reference at page 14, lines 10 and 11 to 'various signal conditioning ... functions' supports the Interveners' argument that the expression 'appropriately condition' could well encompass any number of signal conditioning functions other than the filtering-out of high-frequency components. [...]

3.6. The Proprietor was not able to demonstrate any disclosure in the application as filed that gave a direct and unambiguous basis for the controller, at that level of generalisation, being configured to filter out high frequency components present in the dimmer signal due to chopping in the dimmer. [...]"

- X. The petition was filed by the proprietor (hereinafter: "the petitioner") claiming that the Board had fundamentally violated the petitioner's right to be heard.
- XI. The Enlarged Board of Appeal (hereinafter: "the Enlarged Board"), in its composition according to Rule 109(2)(a) EPC, summoned for oral proceedings and informed the petitioner about its preliminary view on some of the relevant issues.
- XII. With a letter dated 21 January 2019 the petitioner submitted further arguments.
- XIII. Oral proceedings before the Enlarged Board took place on 20 February 2019. The petitioner was heard on the

issues it considered to be relevant. At the end of the oral proceedings, the chairman pronounced the Enlarged Board's decision.

XIV. The petitioner requested that

- the decision under review be set aside;
- the proceedings be re-opened; and
- the fee for the petition for review be reimbursed.

XV. The petitioner's submissions made in the petition for review, in its response to the Enlarged Board's communication and in the oral proceedings may be summarized as follows:

XVI. The petitioner's right to be heard had been fundamentally violated. The written reasons of the decision relied on facts and technical interpretations of an expression which were not previously accessible to the petitioner.

- The pivotal point of the decision's finding that the second auxiliary request infringed Article 123(2) EPC was an allegedly missing link between the passages of page 12, lines 15 to 22, and page 14, lines 3 to 6, of the application as originally filed. In order to support this conclusion, the Board heavily relied on further passages on page 14, lines 6 to 8 and 10 to 11, of the application. However, this reasoning came as a complete surprise to the petitioner. Neither the opponents nor the Board had referred to these further passages before, neither in the written nor in the oral proceedings. The statement in the decision that the intervenors had made a corresponding argument was not correct.

- However, decisive factual issues had to be part of the proceedings and the Board had an obligation to direct the parties' attention to such issues if it intended to base a decision on them. Although a board of appeal might arrive at its own interpretation of a certain critical passage in a document, the parties had to have the opportunity to thoroughly discuss that passage.

- The petitioner could not expect that the Board would rely on the above-mentioned undiscussed passages for denying the existence of a link between the conditioning referred to on page 14, lines 3 to 6, and the filtering-out of the high frequency components referred to on page 12. The paragraph on page 14, lines 3-15, constituted the summarizing bracket of the various exemplary and preferred embodiments described thereafter. As a rule, the skilled person construes any feature or preferred embodiment disclosed in the application so as at least not to counter the basic inventive concept, which was in the present case the concept of avoiding any harmful high-frequency voltage components to propagate through a driving circuit up to the actual LED, which could then be damaged or destroyed.

- In its preliminary opinion expressed in a communication according to Article 15(1) RPBA, the Board had correctly acknowledged that the application aimed at solving a specific problem with some prior art solutions for providing power to LED-based lighting systems. This problem was that A.C. signals provided by a dimmer such as an angle modulated dimmer might include significantly higher frequency components than a typical line

voltage. However, the Board's conclusions in its decision could only be understood as implying that the application's disclosure as well as the claim encompassed embodiments that did not achieve the desired technical effect extensively discussed in the application. This new interpretation deviated from the interpretation presented in the preliminary opinion and was an unforeseeable change of the Board's view in the sole reasoning for its negative decision.

- The above procedural deficiency was causal for the decision under review and, since it became only apparent from reading the written grounds for the decision, could not be objected to pursuant to Rule 106 EPC.

Reasons for the Decision

Admissibility of the petition

1. The petitioner is adversely affected by the contested decision revoking the patent. The petition was filed on the ground referred to in Article 112a(2)(c) EPC. The petition therefore complies with the provisions of Article 112a(1) and (2) EPC.
2. The written decision was notified to the petitioner by a registered letter dated 14 February 2018, which was deemed to be delivered on 24 February 2018 (see Rule 126(2) EPC). Since the petition was filed on 23 April 2018 and the corresponding fee was paid on the same day, the petition also complies with Article 112a(4), second and fourth sentences, EPC. The other conditions

in relation to the contents of the petition as laid down in Article 112a(4), first sentence, in conjunction with Rule 107 EPC are also fulfilled.

3. According to Rule 106 EPC a petition under Article 112a(2) (a) to (d) EPC is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the board. However, an exception applies where such objection could not be raised during the appeal proceedings.
4. The petitioner claims that the alleged procedural deficiency only became visible through the written reasons of the decision. Thus, the exception to Rule 106 EPC applies so that the petition has to be regarded as admissible.

Allowability of the petition

Fundamental violation of right to be heard - General principles

5. Decisions of a board of appeal may only be based on grounds or evidence on which the parties have had an opportunity to present their comments (Article 113(1) EPC). This implies that a party may not be taken by surprise by the reasons of the decision, referring to unknown grounds or evidence. "Grounds or evidence" under Article 113(1) EPC is to be understood as the essential legal and factual reasoning on which a decision is based (see also decision R 16/13 of 8 December 2014, reasons 3.3). A party has to have an opportunity to comment on the decisive aspects of the case.

6. On the other hand, the board must be able to draw its own conclusion from the discussion of the grounds put forward (see decisions R 8/13 of 15 September 2015, reasons 2-1; R 16/13, *supra*, reasons 3.3). Thus, the right to be heard does not go so far as to impose a legal obligation on a board to disclose in advance to the parties, how and why, on the basis of the decisive issues under discussion - or at least those foreseeable as the core of the discussion - it will come to its conclusion. This is part of the reasoning given in the written decision (R 1/08 of 15 July 2008, reasons 3.1; R 15/12 of 11 March 2013, reasons 5; R 16/13, *supra*, reasons 3).

Alleged fundamental violation of right to be heard by basing the decision on non-discussed passages of the description

7. The petitioner complains that the decision's finding of added subject-matter with respect to the second auxiliary request was made in violation of its right to be heard. The conclusion that there was no direct and unambiguous link between the conditioning referred to on page 14 and the filtering-out of the high frequency components referred to on page 12 was based on passages of the original description, i.e. on page 14, lines 6 to 8 and 10 to 11, that had never been relied on before by the opponents or the Board. Moreover, the conclusion was highly surprising in view of the Board's preliminary view and the common understanding of the skilled person.
8. When reviewing the Board's reasoning in point 3.3 of its decision (reproduced in section IX above), one might take the view that the analysis of the allegedly non-discussed passages which begins with the adverb "[f]urthermore" and follows the Board's finding of lack

of a direct and unambiguous link, was merely an additional and separate reasoning. In that case it would be questionable whether a causal connection between the alleged violation of the right to be heard and the final decision - which is a prerequisite for finding the violation to be fundamental within the meaning of Article 112a(2)(c) EPC (see R 17/14 of 15 December 2015, reasons 7 and 8) - existed. However, the petitioner argues that the above analysis was the sole actual reasoning why the Board was not convinced of the direct and unambiguous link. For the sake of argument and to the petitioner's benefit, the Enlarged Board adopts this interpretation.

9. In the course of the appeal proceedings, the question as to whether claim 1 of the second auxiliary request contained added subject-matter and therefore failed to comply with the provision of Article 123(2) EPC was discussed by the parties in their written submissions in some detail. The Board dealt with the issue in its communication (see section VII above) and made clear that it had concerns in this respect. The matter was also discussed in the oral proceedings (see page 3, second paragraph, of the minutes).

10. The petitioner acknowledges to have itself referred to the original disclosure on page 14, lines 3 to 6, and to have argued that this passage, when read together with other passages of the description provided a clear and unambiguous basis for the claimed invention (see points III.3 and IV.6. of the petition). The first full paragraph on page 14 of the description consists of four sentences. The first sentence is the passage to which the petitioner had referred. The second sentence runs from line 6 to line 8, the third sentence from line 8 to line 11. Thus, in its written reasons the

Board relied on passages which immediately follow the sentence referred to by the petitioner.

11. It is a general rule of text interpretation that for assessing the meaning of a phrase its context has to be taken into account. Thus, viewed from an objective perspective, it could not come as a surprise that the Board, when deciding whether there was an unambiguous disclosure of the claimed invention, did not only consider the passage *sensu stricto* referred to by the petitioner but also the sentences which directly followed that passage.
12. Furthermore, according to the "gold standard" for assessing compliance with Article 123(2) EPC recognized in the established case law of the boards of appeal (see G 2/10, OJ EPO 2012, 376, reasons 4.3), any amendment to the parts of a European patent application or patent relating to the disclosure can only be made within the limits of what a skilled person would derive directly and unambiguously from **the whole** of these documents as filed. Therefore, parties have to be aware that in general the question of added matter cannot be decided by simply relying on isolated passages of the description but requires a comprehensive analysis of the application documents.
13. The petitioner maintains that the Board's interpretation of the disclosure at page 14, lines 3 to 6, of the description was a major deviation from the assessment made in the preliminary opinion. The Board's conclusions could only be understood as implying that the application's disclosure as well as the claim encompassed embodiments that did not achieve the desired technical effect extensively discussed in the application. This new interpretation was an

unforeseeable change of view by the Board in the sole reasoning for its negative decision.

14. The Enlarged Board is not persuaded by the petitioner's line of argument. In its communication the Board had raised several concerns with respect to the issue of added matter. The petitioner should thus have been prepared to put forward all the arguments it may have had to show that claim 1 of the second auxiliary request did not contain added matter.

15. The Enlarged Board furthermore fails to see why the Board's conclusions were unforeseeable for the petitioner. The Board first stated (see point 3.2 of the reasons, reproduced in section IX above) that in the application as filed there was "no literal basis for the feature that the controller is configured to filter out higher frequency components that are present in the dimmer signal due to chopping". The petitioner does not take issue with this statement. The Board then posed the question "whether such filtering by the controller is directly and unambiguously disclosed, **at that level of generalisation**, in some other way than by literal disclosure" [emphasis added]. Asking this question was already foreshadowed in the Board's preliminary opinion where it had expressed similar doubts with respect to compliance with Articles 100(c) and 123(2) EPC, cf. section 4 of the communication ("filtering is only disclosed in the context that ...") .

16. The Board thereafter, in point 3.3 of the reasons, considered the passage at page 14, lines 3 to 6, of the description. It was the petitioner's argument that the term "to appropriately condition" provided the necessary disclosure of the filtering at the required

level of generalisation. The Board did not agree. It found that this term might also be understood as referring to further features mentioned in the following sentences of the same paragraph. This reasoning does not - contrary to the petitioner's view - imply that the application's disclosure or the claim under scrutiny encompassed embodiments that do not achieve the desired technical effect of the application. It can rather be understood as explaining why the subject-matter of the claim was found not to be originally disclosed **at the required level of generality**.

17. The petitioner further argues that the skilled person would not have understood the critical passage in the same way as the Board did. However, that argument touches upon the substantive merits of the decision which are, as acknowledged by the petitioner itself, outside the competence of the Enlarged Board in review proceedings under Article 112a EPC.

Concluding remarks

18. It follows from the reasons set out above that no fundamental violation of the right to be heard can be established with regard to the petitioner's complaint. Thus, the Enlarged Board unanimously concludes that the petition has to be rejected as clearly unallowable. It also follows that the fee for the petition cannot be reimbursed.

Order

For these reasons it is decided that:

The petition for review is unanimously rejected as clearly unallowable.

The Registrar:

The Chairman:



C. Eickhoff

C. Josefsson

Decision electronically authenticated