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**D E C I S I O N**  
**of 4 August 2005**

**Case Number:** T 0931/03 - 3.2.3

**Application Number:** 98931388.7

**Publication Number:** EP993531

**IPC:** E04F 13/18, B29C 70/44, 70/78,  
E04B 1/74

**Language of the proceedings:** EN

**Title of invention:**  
Moulded Fabric Covers

**Applicant:**  
Interface Inc.

**Opponent:**  
-

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 113(1), 96(2)  
EPC R. 67, 51(2)

**Keyword:**  
"Substantial procedural violation (no)"

**Decisions cited:**  
T 0201/98

**Catchword:**  
-



Case Number: T 0931/03 - 3.2.3

**D E C I S I O N**  
of the Technical Board of Appeal 3.2.3  
of 4 August 2005

**Appellant:**

Interface, Inc.  
2859 Paces Ferry Road  
Suite 2000  
Atlanta  
Georgia 30339 (US)

**Representative:**

Hammeler, Martin Franz  
Phillips & Leigh  
5 Pemberton Row  
London EC4A 3BA

**Decision under appeal:**

Decision of the Opposition Division of the  
European Patent Office posted 27 May 2003  
refusing European application No. 98931388.7  
pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** U. Krause  
**Members:** K. Garnett  
G. Ashley

## Summary of Facts and Submissions

- I. On 18 June 1998 the appellant, Interface Inc., of 2859 Paces Ferry Road, Suite 2000, Atlanta, Georgia 30339, USA, filed European patent application No. 98 931 388.7. The application was filed as an International Patent Application US98/12756 with publication number WO 99/00562, claiming priority from US 08/885,745.
- II. In essence, Claim 1 of the application as originally filed claimed a method for making a moulded fabric cover or treatment whereby (inter alia) a lay-up for the cover was moulded against a shaped tool using a conventional bladder mould. This claim (and others) was amended on entry into the European Regional Phase, such that claim 1 now claimed a method whereby the lay-up was simply moulded against the tool, rather than being bladder moulded.
- III. In both the Preliminary Examination Report dated 30 September 1999 and the Examining Division's communication of 14 June 2002, one of the objections raised concerned the replacement of bladder moulding by moulding. Since the appellant relies on the differences between the reasons given in the communication and the reasons for the Examining Division's eventual decision, it is necessary to set out this part of the communication in full:
- "2. The amendments filed with the letter dated 28.01.2000 introduce subject-matter which extends beyond the content of the application as filed, contrary to Article 123(2) EPC.

2.1 The applicant has replaced the feature "bladder molding" by "molding" in claim 1. The feature "bladder molding" appears only in dependent claim 2. The description has also been modified so that bladder molding is no longer an essential feature of the invention.

However, the application as filed disclosed only methods including the step of bladder molding the lay-up ... and it does no[t] contain any hint that other techniques of common knowledge in that field could be used instead.

Moreover, this feature was explained as essential in the original disclosure of the method according to the invention. Indeed, it is clear from the description ... that bladder molding of the lay-up against a tool is essential to the performance of the invention.

Note that the multi-part mould shown in Figures 32 to 35 with a collapsible tool 48 as suggested on page 12 lines 19 to 21 is disclosed only in combination with bladder 46."

IV. In the usual way, the communication ended by stating:

"Should the claims be maintained in their present form, or with only minor amendments, without submission of convincing arguments about the patentability of their subject matter, the application may be rejected.

(Article 97(1) EPC and Guidelines C-VI, 2.5, 3.2, 4.3)"

V. On 31 October 2002 the appellant responded to the Examiner's communication. The appellant disagreed that the application as filed disclosed only methods which included the step of bladder moulding the lay-up. In outline, it was argued that although bladder moulding was extensively discussed in the specification, it would have been apparent to the skilled person that it was merely the preferred moulding and not the only applicable technique. The submissions ended by saying that although it was believed that the Examiner's outstanding objections had all been addressed, if any objections remained such that refusal of the application was contemplated, a further opportunity to submit additional amendments or arguments was requested. Oral proceedings were not requested.

VI. On 27 May 2003, without further communication with the appellant, the Examining Division issued a decision refusing the application, remaining of the view that new subject matter had been introduced. Again, it is necessary to set out the relevant part of the grounds for the decision in full, underlining those parts of the grounds about which the appellant complains:

"1. Claim 1 does not meet the requirement of Article 123(2) EPC:

1.1 As set out in the International Preliminary Examination Report and in the communication dated 14.06.2002, the applicant has replaced the feature "bladder molding" by "molding" in claim 1. The feature "bladder molding" appears only in dependent claim 2. The description has also been

modified so that bladder molding is no longer an essential feature of the invention.

As a result, protection is also sought for a method wherein the lay-up is molded by a means of a technique other than bladder molding.

However, such an embodiment of the method has not been disclosed originally.

In fact, bladder molding was explained as essential in the original disclosure of the method according to the invention. Indeed, it derives directly and unambiguously from claim 1 as originally filed and from the disclosure of the invention ... that bladder molding of the lay-up against a tool is essential to the performance of this method.

Moreover, the application as filed disclosed only methods including the step of bladder molding the lay-up ... and it does not contain any hint that other techniques of common knowledge in that field could be used instead.

- 1.3 The Applicant argues also that other molding techniques are suggested in the original application, in particular in Figures 32 to 34, on page 12, lines 19 to 21 and in dependent claim 15.

This argumentation cannot be followed.

The multi-part mould shown in Figures 32 to 35 with a collapsible tool 48 as suggested on page 12

lines 19 to 21 is disclosed only in combination with a bladder 46. Original claim 15 is not directed to a method for making a fabric treatment.

1.4 Hence, claim 1 introduces subject matter which extends beyond the content of the application as originally filed (see the Guidelines, C-VI, 5.8a, (1))."

VII. On 25 July 2003 the appellant filed an appeal against the decision, requesting that it be set aside in its entirety. The appellant stated that while it did not agree that the Examining Division's objection was properly taken, nevertheless "in the interests of economy" the appeal was being filed on the basis of amendments to claim 1 which limited the method claims to formation of a moulded fabric treatment by bladder moulding only. The appellant also sought reimbursement of the appeal fee under Rule 67.

VIII. On 22 August 2003 the Examining Division ordered rectification under Article 109(1) and set aside its decision of 27 May 2003. The request for reimbursement of the appeal fee was not allowed and was forwarded to the Board of Appeal for a decision.

IX. No action was taken by the Board of Appeal pending the decision of the Enlarged Board in case G 03/03. Following the decision of the Enlarged Board in that case, the remaining issue in the appeal, namely the request for reimbursement of the appeal fee, was referred to this board.

- X. In its letter of 10 September 2003 in support of this request, the appellant alleged that there had been a substantial procedural violation because although the Examination Division's communication of 14 June 2002 stated that the application *might* be rejected, there was no clear warning that a refusal was in prospect, as contemplated by Guideline C-IV, 4.3 as it then stood. It was said that the communication was not absolutely equivocal, and was in stark contrast to Guideline C-VI, 4.3, which was said to have required that a warning be given that the application would be refused unless further and more convincing arguments or appropriate amendments were forthcoming.
- XI. In its communication dated 18 May 2005, the Board indicated its provisional view that no procedural violation had occurred, essentially on the basis that in the context of the present case such a violation would only have taken place if there had been a violation of the right to be heard under Article 113(1) EPC, and here the decision had been based on grounds on which appellant had both had the opportunity to comment and had indeed commented.
- XII. In its letter of response dated 20 June 2005 the appellant argued that a substantial procedural violation had indeed occurred because the grounds on which the application had been refused contained new reasoning, on which the appellant had not had the opportunity to comment. The appellant identified the passages underlined above as containing reasons or arguments which it said had been raised for the first time in the grounds for the decision, these apparently being in response to the applicant's letter of



31 October 2002. A useful dialogue was in progress and the opportunity to submit further observations or amendments in response to these new grounds was denied by the premature decision to refuse the application. A breach of Article 96(2) and Rule 51(2), as well as Article 113(2), had therefore occurred. In its letter of 31 October 2002 the appellant had indicated its willingness provide additional amendments or observations to resolve any remaining objections. A meeting of minds was therefore by no means impossible.

### **Reasons for the Decision**

1. Rule 67 of the Implementing Regulations of the EPC provides that reimbursement of the appeal fee is to be ordered in the event of interlocutory revision if such reimbursement is equitable by reason of a substantial procedural violation. As decision T 201/98 points out, it is the established jurisprudence of the Boards of Appeal that an examining division does not exceed its discretionary powers by proceeding to an immediate refusal after a first communication, provided that the decision complies with Article 113(1) EPC, i.e. is based on grounds on which the appellant has had an opportunity to present comments (referring to decisions T 84/82 (OJ EPO 1983, 451) and T 300/89 (OJ EPO 1991, 480)).
  
2. As is apparent from the above statement of the facts, in the present case the decision was based on grounds on which the applicant had had an opportunity to comment, and indeed had commented. In its communication of 14 June 2002, the Examining Board had stated its

view that claim 1 introduced subject matter which extended beyond the content of the application as originally filed. In its response to the communication, the applicant maintained the position that the subject matter had not been extended.

3. As to the appellant's argument that Articles 113(1), 96(2) and Rule 51(2) EPC have been violated, the Board does not accept the basic premise of the argument, namely that the Examining Division's grounds for its decision contained new reasons or arguments. The appellant accepts, the above-underlined passages apart, that the grounds for the decision follow the reasoning of the earlier communication. As to the underlined passages, the appellant has not established that they contain new reasons or arguments. Indeed the opposite is the case. Paragraph 1.2 of the grounds repeats that bladder moulding had been explained as essential in the original disclosure, and that other moulding methods had not been disclosed, identifying the relevant places in the original application. Of the passages objected to:

- (a) "However, such an embodiment of the method has not been disclosed originally" is simply a repetition of the original objection, and
- (b) "Indeed, it derives directly and unambiguously from claim 1 as originally filed ..." simply identifies an additional place where the bladder moulding was identified as being an essential part of the invention, and is not a new argument.

4. Paragraph 1.3 of the grounds dealt with the argument, raised in the applicant's letter of 31 October 2002, that other moulding techniques had been suggested in the original application. This was an argument which had been foreshadowed in the earlier communication (see the final paragraph, above). The grounds effectively repeated what had been said in the communication, and the only new passage objected to ("Original claim 15 is not directed to a method for making a fabric treatment") simply deals with the point about claim 15 which had been raised in the applicant's letter, and is not a new reason or argument.
  
5. There was therefore no procedural violation when the Examining Division proceeded to refuse the application without further reference to the applicant.

## **Order**

### **For these reasons it is decided that:**

The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:

A. Counillon

U. Krause