



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

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Date
21.03.13

Zeichen/Reference/Référence P 8317/KK/NH	APPR	Anmeldung Nr./Application No./Demande n°/Patent Nr./Patent No./Brevet n° 00932308.0 / 1449238
Anmelder/Applicant/Demandeur/Patentinhaber/Proprietor/Titulaire THE TRUSTEES OF PRINCETON UNIVERSITY, et al		

Appeal number: **T0544/12-3.3.09**

Summons to oral proceedings pursuant to Rule 115(1) EPC

You are hereby summoned to the oral proceedings concerning the above appeal.
The proceedings are scheduled to take place

on 21.11.13 at 9:00 hrs in Room 0132
and on 22.11.13 at 9:00 hrs in Room 0132

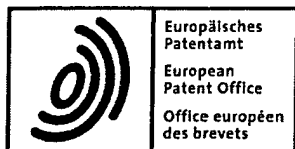
Erhardtstr. 27, 80469 Munich (DE)

The proceedings will be public.

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Composition of the Board

Chairman: W. Sieber

Member: M. O. Müller

Member: K. Garnett

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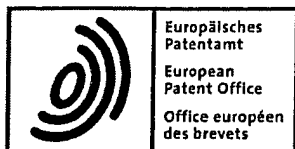
The Registrar M. Canueto Carbajo

Tel.: 089 / 2399 - 3391

- Annex(es): Confirmation of receipt Form 2936
- Communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal
-

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Date
21.03.13

Zeichen/Reference/Référence 313518/JND	OPPO01	Anmeldung Nr./Application No./Demande n°/Patent Nr./Patent No./Brevet n° 00932308.0 / 1449238
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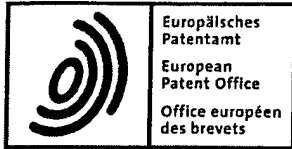
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Date
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Zeichen/Reference/Référence 1449238-eb/cs	OPPO02	Anmeldung Nr./Application No./Demande n°/Patent Nr./Patent No./Brevet n° 00932308.0 / 1449238
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Date
21.03.13

Zeichen/Reference/Référence B65007EP IB/KO	OPPO03	Anmeldung Nr./Application No./Demande n°/Patent Nr./Patent No./Brevet n° 00932308.0 / 1449238
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Chambres de recours

Appeal number:

T 544/12 - 3.3.09

Annex to the summons to oral proceedings
Article 15(1) RPBA



PRO-CORAL

21. 03. 13

Rapporteur M. O. Müller

Annex(es): 12 page(s)

This communication is sent pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA). Any views expressed herein are provisional and are not binding on the board in arriving at its decision.

The communication raises some, but not necessarily all, of the issues that may be considered at the oral proceedings.

This is not an invitation to the parties to make further submissions, unless they consider it necessary to do so. The purpose of this communication is rather to assist the parties in preparing the oral proceedings.

In the present proceedings, all parties, ie opponents I-III and the proprietor appealed.

The appeal has been examined on the basis of the claims of the main request (claims as granted) as well as the first auxiliary request filed by the proprietor by letter of 11 May 2012 and the second to fifth auxiliary requests filed by the proprietor by letter of 18 December 2012.

1. *Document numbering*

As to the documents filed during the opposition proceedings, the numbering as applied by the opposition division (pages 1-4 of its decision) will be applied.

As to the documents filed during the present appeal proceedings, the numbering applied by the parties will be used.

The following additional numbering will be used for documents not numbered so far:

- T1: Letter of Agreement, dated 1 October 2011;
- T2: Declaration of Mr Hitoshi Miura, dated 15 March 2012;
- T3: Partial Business Transfer Agreement, dated 26 March 2009; and
- T4: Report on acquisition of securities concerning outward direct investment, dated 30 October 2007.

2. *Transfer of opposition*

2.1 So far as concerns the appeal by opponent I (Sumation Company Limited, in the following "Sumation") against the decision on the transfer of its opponent status to Sumitomo Chemical Company Co., Ltd (in the following "Sumitomo"), this appears to have no effect on the outcome of the substantive issues in its appeal, the notice of appeal having been filed by Sumitomo with an auxiliary request in the name of Sumation (see G 2/04). It also appears to have no procedural effect as regards the further conduct of appeals as a whole, since both Sumation and Sumitomo continue to be represented by the same representative.

2.2 As to the actual decision on transfer of opponent status, the board tends to agree with opponent I that the opposition division did not apply the correct principles when dealing with the request to recognise

the transfer of opposition status. The relevant issues appear to be:

- (a) Whether the opposition was filed by Sumation in the interests of the "macromolecular organic EL materials business" of Sumation which was later transferred to Sumitomo, and not in the interests of some other company in the "Sumation group";
- (b) Whether the parties to the partial business transfer agreement of 26 March 2009 also intended or agreed that the opposition should be transferred as part of this business;
- (c) Whether, and when, sufficient evidence of the intention to transfer opponent status was filed with the Office, this determining the date when (if at all) the opponent status was actually transferred.

As to (a), this appears not to be in dispute and there seems no reason to doubt the position.

As to (b), the board has some doubts, despite the statements in G 4/88, whether a transfer of the relevant business assets automatically and inevitably has the effect of transferring the opposition. However, it seems that this issue does not need to be addressed in the present case because the board can accept, in the absence of any evidence to the contrary, that it is implicit from the partial business transfer agreement of 26 March 2009 that the parties to that agreement intended and agreed that the status of opponent should be transferred. See T 261/03, point 2.2 of the Reasons.

As to (c), the issue is whether the evidence T1 filed on 25 October 2011 was such as to render it credible, on the balance of probabilities, and after evaluating the documents in a reasonable way and in the light of all the circumstances, that the alleged facts were true (T 261/03, point 3.5.5). On the one hand, a mere assertion of transfer of status will not normally be enough to discharge the burden of proof (T 670/95); on the other the fact that another document might have been a more direct piece of evidence than that submitted does not necessarily mean that the proof actually offered is insufficient (T 273/02, point 2.6).

The evidence T1 filed on 25 October 2011 did not include the actual partial business transfer agreement of 26 March 2009 but only the agreement of 1 October 2011. This recited an agreement to transfer to Sumitomo the business assets of Sumation comprising the research and development and manufacturing operations of its macromolecular organic EL materials business, and that the two parties had concluded a partial business transfer agreement dated 26 March 2009 under which such business assets were in fact transferred as of 1 April 2009. The parties further confirmed in the 25 October 2011 agreement (T1) that the status of Sumation as opponent in the present opposition was transferred as of 1 April 2009.

Overall, the board tends to the view that on the balance of probabilities it is credible, given the evidence T1 which was filed on 25 October 2011, evaluating the agreement of 1 October 2011 in a reasonable way and in the light of all the

circumstances, that the alleged facts were true, even though the partial business transfer agreement of 26 March 2009 was not then filed.

In any event, the partial business transfer agreement of 26 March 2009 was in fact filed with opponent I's notice of appeal on 21 March 2012 as T3. The board takes the notice of appeal as including an implicit further request to recognise the transfer of opponent status if the previous evidence was not considered sufficient. It follows that it appears that as of 21 March 2012 the status of Sumitomo as opponent and appellant can in any event be recognised.

3. *Procedural violation*

The board will proceed on the basis that what opponent I alleges in paragraphs 1.3.1 and 1.3.2 of its statement of grounds of appeal is correct. While there can be no objection to the opposition division seeking its own legal advice, the decision must in the end be taken by the opposition division itself, making up its own mind and having heard and considered the submissions of the parties.

The board considers that it may well have been the case that the division in effect surrendered the decision-making step to a third party and did not give the opponent I an adequate opportunity to respond, and that thus a substantial procedural violation was committed.

Whether, in the event of the appeal being deemed allowable, it would be equitable to reimburse the appeal fee will be decided when the outcome of the

substantive appeal is known. One issue in this event will be whether there was a sufficient causal link between the procedural violation and the overall decision.

4. *Admissibility of documents*

4.1 S1-S9 and D38

These documents were filed during the opposition proceedings and were not admitted by the opposition division. The opponents request in the present appeal proceedings that this decision be set aside and the documents be admitted into the proceedings. This issue will be discussed during the oral proceedings.

4.2 S10 and D42-D44

S10 was filed with the opponent I's statement of grounds of appeal (letter of 23 May 2012). D42 was filed with the opponent II's statement of grounds of appeal (letter of 9 May 2012). D43 and D44 were filed by opponent III with its statement of grounds of appeal (letter of 23 May 2012).

The proprietor requests that these documents not be admitted into the proceedings. This issue will be discussed during the oral proceedings.

Main request

5. *Sufficiency of disclosure*

5.1 Sufficiency of disclosure as regards the organometallic iridium compound

Claim 1 refers to an "electroluminescent layer comprising an emissive layer including an emissive molecule that is a phosphorescent organometallic iridium compound or a phosphorescent organometallic osmium compound". So, claim 1 defines the iridium compound (and osmium compound) in terms of its structure, namely the ligand type (organometallic) and the central atom (iridium) and, in terms of its function, namely as being an emissive phosphorescent molecule.

The first question that needs to be discussed during the oral proceedings is whether every organometallic iridium compound is an emissive phosphorescent molecule. In this respect, in particular D16, D37, D39 and D40 are of relevance.

In case the first question is answered in the negative, the second question that needs to be discussed is whether the skilled person, in view of the opposed patent and the common general knowledge, would know which organometallic iridium compounds are emissive phosphorescent molecules.

5.2 Sufficiency of disclosure as regards the further components/layers of the OLED

Claim 16 refers to an OLED "comprising a heterostructure containing an emissive layer that produces luminescent emission when a voltage is applied across the heterostructure, wherein the emissive layer includes a molecule that is a phosphorescent organometallic iridium compound or a phosphorescent organometallic osmium compound".

The first question that needs to be discussed during the oral proceedings is whether every OLED wherein the emissive layer includes a phosphorescent organometallic iridium or osmium compound produces luminescent emission when a voltage is applied. In this respect, in particular figure 2 of the opposed patent, D42 (if admitted) and S10 (if admitted) seem to be of relevance.

If the first question is answered in the negative, the second question to be discussed is whether the opposed patent or common general knowledge provides sufficient guidance to the skilled person as to which further components/layers have to be chosen in the OLED in order to produce luminescent emission when a voltage is applied.

In this respect, in particular documents D45, D47 and D48 may be of relevance.

6. Novelty

6.1 Novelty in view of D1

D1 discloses OLEDs with an electroluminescent layer containing an osmium complex having cyanide ligands as well as bipyridyl ligands, in which the osmium is linked to the nitrogen atoms of the bipyridyl group.

It is a matter of dispute between the parties whether D1 is novelty-destroying for the osmium alternative of claim 1. In the oral proceedings, it has therefore to be discussed whether the osmium complexes of D1 constitute organometallic molecules as required by claim 1. In this respect, in particular documents D4, D25, D29 and D41 and, if admitted, S1, S3 and S4 are of relevance.

It has further to be discussed whether in view of the reference in the introduction part of D1 to Ir-complexes and to document D9 (reference [5] in D1), D1 in conjunction with D9 is novelty-destroying for the iridium alternative of claim 1. As regards the reference to D9, it has to be discussed *inter alia* whether the iridium complex disclosed in D9 is organometallic. In this respect, documents D4, D29 and D41, and, if admitted, S1, S3 and S4 are of relevance.

6.2 Novelty in view of S7 (translation S8) (if admitted)

S7/S8 (first formula on page 7) discloses an SO_x^- -substituted 8-hydroxyquinoline-iridium complex (for $M = \text{Ir}$).

The first question that has to be discussed during the oral proceedings is whether the iridium compound of S7/S8 is a phosphorescent molecule as required by claim 1. In this respect, S9 seems to be of relevance.

The second question to be discussed during the oral proceedings is whether the iridium compound of S7/S8 is organometallic as required by claim 1. In this respect, documents D4, D29 and D41, and, if admitted, S1, S3 and S4 are of relevance.

6.3 Novelty in view of D6, D17 and D25

D6, D17 and D25 are prior art only if and in so far as the priority of the opposed patent is not valid. The validity of the priority of the opposed patent, in particular of claims 1-15, has therefore to be discussed during the oral proceedings.

If the priority is found not to be valid, it will be discussed whether D6, D17 and D25 disclose the claimed subject-matter. As regards D17, it appears to be of relevance whether the iridium complex disclosed in this document is organometallic and whether it is a phosphorescent emissive molecule.

7. *Inventive step*

7.1 If sufficiency of disclosure and novelty should be acknowledged, inventive step will have to be discussed.

7.2 In the board's preliminary view, in particular D1 or D2 can be considered to represent the closest prior art.

It will have to be discussed (i) what is the distinguishing feature in view of these documents and (ii) what is the technical problem credibly solved by this feature over the entire scope of the claims. As regards the iridium alternative of claim 1, D39, D40, D42 (if admitted), D44 (if admitted), S10 (if admitted), D45 and D46 seem to be of particular relevance. It has then to be discussed whether (iii) in view of the objective technical problem, the claimed solution is obvious over D1 or D2 itself or in combination with eg any of D7, D9, D10, D12 and D38 (if admitted)

Auxiliary requests

8. It will have to be discussed whether the amendments effected in these requests meet the requirements of Articles 123(2), 84 and 123(3) EPC.

As regards the fourth auxiliary request, it appears to be of relevance eg whether the combination of the features "cyclometallated" and "with an aromatic ligand" in claim 1 is disclosed in the application as filed.

As regards the fifth auxiliary request the feature "and further comprising an exciton blocking layer" has been introduced into claim 1. This is contrary to the proprietor's statement on page 4 of its letter dated 18 December 2012 that the feature "wherein the emissive layer is in contact with an exciton blocking layer" has been added. This has to be discussed during the oral proceedings.

9. Furthermore, in the same way as for the main request, sufficiency of disclosure, novelty and inventive step will be discussed.

10. In addition to this, it is to be noted that the fourth and fifth auxiliary requests, having alternative combinations of features, appear to be diverging, rather than converging towards a single more restricted combination of features. In principle, auxiliary requests such as these should be converging if they are to be admissible.

With regard to amendments to a party's case, Articles 12 and 13 of the Rules of Procedure of the Boards of Appeal should be noted.