

COULD A SELECTED PART OF THE PRIOR ART BE „UNREALISTIC”?

By Dr. J. Markó

I would like to draw your attention to a surprising decision of the Board of Appeal No. **T-479/00** of February 15, 2002.

In case of the EP-704,411 (relating to a “process for colouring articles of ceramic material”) an opposition, based on lack of inventive step (Art 56, EPC), was rejected. The opponents cited 12 documents, one of them a book published in 1929 (D10). The Opposition Division was of the opinion that the claimed solution was not obvious in view of the cited documents.

In an appeal, the appellant (opponent 3) maintained the objections raised before the first instance: no inventive step could be identified in the claimed process in view of D8 in combination with D10.

In the Board’s opinion “D10 – although belonging to the state of the art within the meaning of Art. 54 (2) EPC – cannot be regarded as realistic starting point for evaluation of inventive step.” “It is unrealistic to assume that, without hindsight, somebody of average skill in the art of colouring ceramic articles in 1994 would have had the intention to improve a technique which had not received any attention during the last 65 years.”

Comments:

1. As you can see, in this decision it was surprisingly disclosed that a selected part (D10 published in 1929) of the cited prior art - in spite of the fact that it belongs to the state of the art within the meaning of Art. 54 (2) EPC - is “unrealistic”.
2. Maybe that the next exceptions will be the “paper patents” as unrealistic state of art.

What is your opinion in this matter? Your comments would be highly appreciated.

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