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File Number: T 261/88 - 3.5.2  
Application No.: 81 201 022.1  
Publication No.: 0 045 117  
Title of invention: Apparatus and method for writing a signal information track on a disc  
Classification: G11B 7/00

**D E C I S I O N**  
of 16 February 1993

Applicant: DISCOVISION ASSOCIATES  
Opponent: N.V. Philips' Gloeilampenfabrieken

Headword: -

**EPC** Articles 24, 56 and 111(1); Rule 67

Keyword: "Member of Opposition Division disqualified by partiality (no)" - "Reimbursement of appeal fee (no) - no substantial procedural violation" - "Inventive step (yes) - formulation of the problem contributing to inventive step"

**Headnote**

1. Disqualifying partiality presumes a preconceived attitude on the part of a deciding person (in this case the first Examiner) towards a party (in this case the Patentee) to the case. The fact that the views held on the issues of the case by the Examiner differ from those held by the party is in itself not disqualifying. The remedy to be used in such a situation is the appeal.
2. When considering an allegation of partiality (in this case mainly based on the fact that the Examiner was a former employee of the Opponent in the case), regard must be had to the particular facts of the case (cf. G 5/91). The content of the file must therefore be examined to find out whether there are major deficiencies in the reasoning underlying the decision to such an extent that there is reason to believe that they were the result of a preconceived attitude.
3. When the content of the file does not go beyond a normal discussion between the EPO and a party and there is nothing manifestly unreasonable to be found in the reasoning, disqualifying partiality cannot be concluded.

4. The length of time between the Examiner's last action for his former employer and his first action as Examiner in a particular case to which this employer is a party may be important, since any residual bias which may be caused by this employment would gradually fade away with time. Given the relatively long period of 21 months in this respect, there is no good reason to suspect that the Examiner at the time in question was unduly influenced by his previous employment.



Case Number: T 261/88 - 3.5.2

**D E C I S I O N**  
**of the Technical Board of Appeal 3.5.2**  
**of 16 February 1993**

**Appellant:** DISCOVISION ASSOCIATES  
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**Respondent:** N.V. Philips' Gloeilampenfabrieken  
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**Representative:** Beckers, Hubertus Franciscus Maria  
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**Decision under appeal:** Decision of the Opposition Division of the European Patent Office dated 19 April 1988 revoking European patent No. 0 045 117 pursuant to Article 102(1) EPC.

**Composition of the Board:**

**Chairman:** J.A. van Voorthuizen  
**Members:** W.B. Oettinger  
E.M.C. Holtz



## Summary of Facts and Submissions

I. The Appellant is the proprietor of European patent No. 0 045 117 which was granted on European divisional patent application No. 81 201 022.1, filed on the earlier (parent) application No. 79 300 490.4 (publication No. 0 005 316) having a filing date of 27 March 1979.

The appeal contests the decision of the Opposition Division, following an admissible opposition, to revoke the patent.

II. The opposition, referring to the ground mentioned in Article 100(a) EPC, was based on the following prior art references:

A: J SMPTE, Vol. 83, July 1974, pages 554 to 559, this document being a reprint of a document cited in the patent, column 2, lines 43 to 46,

B: DE-A-2 462 834, a DE-A-document having this number not being in existence and the "corresponding" DE-C-2 462 834 not being prior art, this citation is taken by the Board as meaning DE-A-2 462 514 (which is the published earlier [parent] application of the later [divisional] patent having the cited number),

C: JP-A-53-9101, this document, which had already been considered in the pre-grant proceedings, being interpreted in the light of Patents Abstracts of Japan, Vol. 2,

No. 45 (27 March 1978), page 525 E78, and in the light of an English translation on file.

In the course of the opposition proceedings the following references were cited by the Opponent:

D: US-A-3 579 145 (cited in the Search Report),

E: Optics and Laser Technology, Vol. 9, No. 4 (August 1977), pages 169 to 173 (considered already in the pre-grant proceedings),

and the following reference was cited by the Opposition Division:

F: NL-A-7 709 928,  
this document being interpreted in the light of corresponding US-A-4 162 398 (itself not prior art).

III. Following a communication of the Primary Examiner for the Opposition Division, the Patentee submitted that it might be more appropriate if the Primary Examiner were replaced by a different person because he had prosecuted, as representative of the same Opponent, an opposition against European patent No. 0 011 990 owned by the same Proprietor, that patent being in the same technical field.

In response, the director responsible for the composition of the Opposition Division wrote a letter to the Proprietor rejecting this proposal.

The decision under appeal was then taken by the Division unchanged and the written decision contains no reference to the request for replacement of the Primary Examiner.

- IV. In its decision, the Opposition Division held that, starting from document F and having regard furthermore to A, C and D, the subject-matter of Claim 1, version II filed on 23 February 1988, lacked an inventive step. Claim 1, version I filed on the same day, and Claim 4 as granted were rejected for essentially the same reason, and a similar conclusion was drawn for the dependent claims.
  
- V. In the Statement of Grounds of Appeal, the Appellant, apart from requesting that the decision under appeal be set aside and the patent maintained as amended, filed a request that the appeal fee be refunded because the appointment and continuance of the said Primary Examiner to the Opposition Division constituted a gross procedural violation.
  
- VI. In view of this latter submission, the Board in an interlocutory decision of 28 March 1991, T 261/88 (OJ 1992, 627), referred to the Enlarged Board of Appeal questions on important points of law with regard to the procedure and the principles to be followed in such a case concerning the composition of the Opposition Division.
  
- VII. In its decision of 5 May 1992, G 5/91 (OJ 1992, 617), the Enlarged Board answered these questions as follows:

1. Although Article 24 EPC applies only to members of the Boards of Appeal and of the Enlarged Board of Appeal, the requirement of impartiality applies in principle also to employees of the departments of the first instance of the EPO taking part in decision-making activities affecting the rights of any party.
  
  2. There is no legal basis under the EPC for any separate appeal against an order of a Director of a department of the first instance such as an Opposition Division rejecting an objection to a member of the Division on the ground of suspected partiality. However, the composition of the Opposition Division may be challenged on such a ground on appeal against the final decision of the Division or against any interlocutory decision under Article 106(3) EPC allowing separate appeal.
- VIII. In a communication, the present Board then expressed its provisional view that the facts of the case did not show that the first examiner of the Opposition Division was disqualified by partiality.
- IX. In a further communication, issued pursuant to Article 11(2) Rules of Procedure, the Board expressed its provisional view that, starting from document A as appearing to come nearest to the claimed invention, and taking common knowledge into account, the subject-matter of apparatus Claim 1 (both versions) and method Claim 4 did not seem to involve an inventive step, and that this view was supported by document D.

- X. From what he requested as the Opponent, it follows that the Respondent requests that the appeal be dismissed.

During the appeal proceedings, however, no other response was received from him than that he would not attend the oral proceedings scheduled for 16 February 1993 and that he "withdraws from the proceedings".

- XI. In the oral proceedings, held on 16 February 1993 on the Appellant's auxiliary request, the Appellant filed new Claims 1 to 6, the independent ones of which read as follows:

"1. Apparatus for writing a signal information track, including: a disc (10) having a surface (26) capable of responding to a certain intensity of laser (30) or other radiation (the threshold level) by being converted from having one radiation reflecting characteristic to having a second characteristic; means (44) for modulating in intensity a beam of radiation (29') directed at a local point along the track as the beam moves along the track, the modulation being in accordance with the signal information (16), the modulation bias being controlled to minimize second harmonic distortion, and characterised by a second harmonic detector for generating a signal (268) representing the second harmonic content of the intensity modulated beam (29') at the signal information carrier frequency and a feedback circuit (268) arranged to bias the modulating means (68) in response to the second harmonic signal such that the second harmonic distortion of the modulated writing beam is a minimum.

4. A method of writing a signal information track on a disc (10) having a surface (26) capable of responding to a certain intensity of laser (30) or other radiation (the threshold level) by being converted from having one radiation reflecting characteristic to having a second characteristic in which a beam of radiation (29') directed at a local point along the track is modulated in intensity in accordance with the signal information (16), the modulation bias being controlled to minimize second harmonic distortion characterised in that a signal (268) representing the second harmonic content of the intensity modulated beam (29') at the signal information carrier frequency is fed back (268) to provide a modulating bias level such that the second harmonic distortion of the modulated radiation is a minimum."

XII. Furthermore, the Appellant requested maintenance of the patent in amended form on the basis of the following documents:

Description: columns 1 and 2 and insertion A (one page) to fit in column 2 after line 58, all filed on 16 February 1992, columns 3 to 6 as published;

Claims: 1 to 6 filed on 16 February 1993;

Drawings: sheet 1 to 3 as published.

XIII. In support of this request, the Appellant argued, in essence, as follows:

Document F is not the one coming nearest to the claimed invention.

Document A only discloses an (occasional) manual adjustment of the modulating bias so as to minimise second harmonic distortion created in the cutting process directly on the disc. Nothing in A would give an incentive to consider minimising second harmonic distortion which may already be present in the input signal to the modulator, and to perform this minimisation continuously by a feedback loop. In contrast to known prior art arrangements where it is often sought to maintain the operating point in the linear part of the modulation characteristic, in accordance with the invention the feedback circuit may bias the modulating means so that an operating point in the non-linear part results.

Minimisation of second harmonic distortion, or compensation of a duty cycle deviating from 50%, stemming from the modulator input signal, is not taught by document

D or any of the other pieces of prior art either.

## **Reasons for the Decision**

### 1. *Admissibility*

In the interlocutory decision of 28 March 1991 (cf. paragraph VI), the Board implicitly (by accepting the appeal for consideration) already acknowledged that the appeal is admissible.

2. *The issues*

2.1 Following the state of affairs set out in paragraphs III, V and VII above, the first issue to be decided in the present case is, in effect, whether the decision under appeal was taken by an incorrectly composed Opposition Division; for, should the Board so decide the case must be remitted, without any consideration as to substance, to the first instance for further examination of, and decision on, the opposition by a properly constituted Opposition Division.

In this event, furthermore, the Appellant's request for reimbursement of the appeal fee would have to be allowed.

2.2 If, however, the Board decides the first issue to the contrary, and only then, the next issue to be decided would be whether the claimed subject-matter is patentable and the Appellant's request for maintenance of the patent as amended (paragraph XII) can consequently be allowed.

2.3 Otherwise, the Respondent's request (paragraph X) would have to be allowed.

3. *The Composition of the Opposition Division*

3.1 The Enlarged Board's decision, G 5/91 (cf. point VII above), makes the principle of impartiality applicable also to employees of the departments of the first instance of the EPO taking part in decision making affecting the rights of any party.

The Enlarged Board in the above decision further decided that there is no separate appeal against an order of a Director of a department of the first instance rejecting an objection on partiality and that, if raised on appeal against the final decision of the first instance, this issue has to be decided by the Board responsible for the appeal, since the issue has to be decided on the basis of the particular circumstances of each case. The present Board of Appeal, 3.5.2, must therefore now decide whether or not the first examiner of the Opposition Division is disqualified on the ground of partiality.

3.2 Disqualifying partiality is limited to situations where the opinion of a person responsible for taking decisions affecting the right of parties (e.g. a judge) is swayed by his attitude toward a party. Conversely, such a person would not be disqualified for having a certain tendency or holding a particular view on an issue. To give an example, a patent examiner would not be disqualified merely because he is known to set very high standards for inventive step.

3.3 The present case involves factual questions of degree rather than points of law, cf. G 5/91, point 6, as none of the situations mentioned in Article 24(1) EPC applies and the Appellant only alleges that the examiner was inadvertently partial, this being an inevitable consequence of his previous employment. Furthermore, his partiality would be revealed by manifest errors in judgment appearing in the decision.

The Board has considered the submissions on this point in the Statement of Grounds of Appeal, points 1 to 11

(pages 33 to 36), as well as the correspondence in the course of the proceedings before the Opposition Division, in order to ascertain whether the reasoning underlying the decision under appeal shows major deficiencies to such an extent that there is reason to believe that the first examiner was, either deliberately or inadvertently, trying to "bend" the facts of the case, and that this was done because of a preconceived attitude towards one of the parties to the case.

Without necessarily sharing the views of the first examiner as expressed in his communication of 9 March 1987, in the minutes of the oral proceedings on 23 February 1988, and as endorsed by the other members of the Opposition Division through the decision under appeal, having regard to the points raised by the Appellant, the Board cannot find anything basically and/or conspicuously wrong with his analysis of technical questions. The file does not go outside the framework of a normal discussion between the EPO and an applicant, and there is nothing manifestly unreasonable to be found in the reasoning.

The Board was thus unable to find any bias, much less any deliberate "bending" of the material under consideration. It is to be noted that the fact that an examiner interprets substantial issues differently from the applicant is in itself not disqualifying. The instrument of remedy provided for this situation is the appeal, of which the Appellant has availed himself in the present case.

3.4 The length of time that has elapsed from the last date when the examiner acted as representative for the rival company, to the date on which he first acted as examiner in the present case may be of importance, since presumably any residual bias caused by the former employment would gradually fade away with time.

As referred to by the Appellant, the last action taken for the rival company in a technically similar case pending before the EPO was in June 1985 and consisted of informing the Office that the Opponent refrained from oral proceedings. The previous action, in May 1984, by him had been the filing of a notice of opposition (this case later became appeal case T 272/86). As far as the Board has been able to establish, the said person filed oppositions for the rival company in two other technically similar cases (which later became appeal cases T 362/86 and T 318/86) in January and February 1985, respectively. In March 1987 this examiner acted in the present case for the first time.

This means that there elapsed a period of 21 months from his last formal action for the rival company until he first acted as first examiner for the Opposition Division in the present case and more than two years from the last substantive action for the rival company. Given this relatively long time period, there would be no good reason to suspect that the first examiner at the time in question was unduly influenced by his previous employment.

3.5 The Board is thus satisfied that the first examiner of the Opposition Division was not disqualified with

regard to the decision under appeal. Consequently, the decision is legally valid and must be considered in the appellate review having regard to the full merits of the case.

4. *Patentability, in particular inventive step*

As a preliminary point, it is noted that no objection arises in respect of the amendments made, in particular to the independent claims (Article 123(2) and (3) EPC).

The only issue to be decided in respect of substance, is therefore that of patentability (Article 52), more particularly the question whether the subject-matter of the independent claims involves an inventive step (Article 56 EPC), the other requirements such as novelty neither having been questioned nor been in doubt.

- 4.1 According to the decision under appeal, the Opposition Division started from document F when dealing with the question of inventive step. The Board finds, in agreement with the Appellant, that document A is a more convenient starting point, having regard to the fact that the feedback loop in F is neither intended to minimise any second harmonic distortion nor to minimise any deviation of the duty cycle from a nominal 50%.

The line of argumentation taken by the Opposition Division was duly considered in the issue of suspected partiality (paragraph 3.3) but, since the Board will apply its own line of argumentation on the issue of inventive step, no further reference will be made to the Opposition Division's arguments.

4.2 Turning now to the independent claims (cf. paragraph XI), it is noted that while Claim 1 is of the apparatus category, Claim 4 defines the function, in use, of the same apparatus in terms of method steps. More particularly, the step in Claim 4 that "a signal representing the second harmonic content ... is fed back to provide a modulating bias level ..." is to be interpreted as the function of a feedback circuit as defined in Claim 1. Furthermore, such a circuit feeding back a signal representing the second harmonic content necessarily implies that such signal is generated in what can be termed a "second harmonic detector".

The term "controlled" in the preamble of Claim 4 must therefore, as in the preamble of Claim 1, be interpreted as including an automatic control, but not excluding any manual control, or adjustment. For this reason, it suffices, in the following, to consider in detail only Claim 1, any statement made and conclusion drawn for this claim then being applicable to Claim 4 as well.

4.3 An apparatus of the kind defined in the preamble of the independent claim(s) is known from document A. Regarding the last phrase of the preamble, according to document A, page 554, right-hand column, last sentence of the last but one paragraph, the modulation bias is "adjustable" to minimise second harmonic distortion that can be "generated in the cutting process".

Concerning the meaning to be given to these two terms the Board takes the following view:

The word "adjustable" should in accordance with common usage be understood as conveying the notion of varying a physical or mechanical quantity manually from time to time so as to obtain an improved performance. The expression "cutting process" appears in a chapter headed "Mastering" which sums up the different steps involved in preparing a recorded master disc. In this context "cutting process" should be understood to refer to the cutting action performed by the writing beam when impinging on the disc. The minimisation, by bias control, of the second harmonic distortion generated in the cutting process implies that the necessary monitoring of this distortion is done on the reading side (read-while-write or replay). This interpretation would be confirmed by, in particular, page 555, left-hand column, second paragraph, of document A.

4.4 According to the characterising portion(s) of the independent claim(s), the claimed invention differs from this prior art, in essence by two features:

(a) it is the writing beam whose second harmonic content of the information carrier is monitored, and

(b) bias control is automatic by means of a feedback circuit.

4.5 The problem solved by the claimed invention can be understood from the description: the claimed feedback circuit for automatically controlling the modulating bias is used to "compensate for any second harmonic distortion products contained in the video information

input signal which would show up in the modulated light beam" (column 4, lines 58 to 62).

This problem is apparently, and in accordance with the Appellant's submissions, based on the recognition that second harmonic distortion may not only be generated in the radiation beam modulator (optical modulator) as is well known, but may already be present in the input signal to the FM modulator, or be generated in this modulator, as contrasted against any second harmonic distortion generated in the subsequent cutting process on the disc, and that decoupling the minimisation of the former from that of the latter by minimising the former even before the latter is created would have the advantage that the latter can be dealt with independently of the former.

- 4.6 Before proceeding to the question whether, for solving the said problem, it is obvious from the prior art to apply the novel features identified in the independent claims, it should be stated that prior art dealing with duty cycle control of the writing beam is as relevant for the claimed invention as prior art dealing with second harmonic control, for the following reason:

As is typical for the relevant technology (confirmed by virtually all the cited documents), the optical modulator in question switches the radiation beam periodically on and off. A "second harmonic distortion" or a "second harmonic content" of the resulting squarewave signal (cf. e.g. document E, Figure 5, or document C, Figure 1, or document F, Figures 2 and 4) will therefore, according to common knowledge,

effectively show up as a deviation from a 50% duty cycle.

This statement is moreover clearly confirmed by the disclosure in the patent, and the application, itself: The second harmonic detector (261) may be implemented, according to Claim 2 and the embodiment described with reference to Figure 3, as a duty cycle monitor (column 6, lines 24 ff.).

- 4.7 The recognition mentioned in paragraph 4.5, and thus the specific problem solved by the claimed invention, is considered to be novel not only against document A but against any of the other pieces of prior art on file as well:

Document D discloses a feedback loop for controlling the operating point of an optical modulator. In the first of three embodiments (Figure 3), reference is made to a frequency doubling effect at the preferred operating point (A) which in this case is at a minimum of the modulation function (Figure 2); but no conclusion relevant for the problem to be solved by the patent in suit can be drawn from this fact:

In the second embodiment (Figure 4) of D, the preferred operating point (B) is in the most linear region and the criterion for a deviation from this point used for bias control (14) is the phase (42) of a second harmonic content in the modulated beam at a pilot frequency (fp), superimposed on the information signal (13), relative to a reference signal of double the pilot frequency (41). This arrangement may as well have the effect of minimising a second harmonic at the

information bearing modulating signal frequency, if such a harmonic is created in the optical modulator (10) by a shift of the operating point into a non-linear region. However, it is clearly not addressing the problem of including any second harmonic distortion contained in the information input signal (13) in the minimisation process.

The third embodiment (Figure 5) of D, using directly any deviation of the average beam intensity from a reference value for operating point control, is not relevant at all to the present problem.

Document E discloses the use of a signal monitor for checking the correct duty cycle of the modulated beam (page 171, right-hand column, second paragraph, and Figure 4). However, this cannot be interpreted as meaning that it is intended to control the modulating bias so as to minimise any deviation of that duty cycle from 50%. What can be derived from document E is that it is intended to keep, by controlling recording exposure and development, the duty cycle of the recorded signal within a tolerance range of 40 to 60% around a nominal 50% (page 172, last paragraph and page 173, first paragraph).

But, as the Appellant has credibly pointed out by referring to a recording threshold and as follows also from the reference in E to exposure and development, there is no one-to-one relationship between the duty cycle of the modulated writing beam and the duty cycle of the recorded signal on the disc. The duty cycle of the beam for best recording results, therefore, need not be equal to 50%. No hint at the problem identified

above (4.5) of minimising second harmonic distortion in the writing beam in the presence of such distortion in the input modulation signal can be derived from the teaching of document E.

Document C deals with the second harmonic distortion of the recorded signal by using the second harmonic content in the reading beam for controlling a second modulator in the path of the writing beam. Its teaching is therefore similar to that of document A, confirming the interpretation given above (paragraph 4.3) to the expression "in the cutting process". No incentive for considering any problem with a second harmonic distortion of, or content already present in, the modulation input signal can therefore be derived from the teaching of document C either.

Document B is not concerned with any second harmonic distortion or duty cycle control. A stabilising circuit (44) is intended to compensate for any drift in the modulation function; but the criterion is effectively the same as in Figure 5 of document D.

The teaching of document F, using the average beam intensity as criterion for bias control, is again similar to that of document B and Figure 5 of document D, and no incentive for using a second harmonic content as criterion for minimising second harmonic distortion including such distortion stemming from the input modulating signal can therefore be derived from it.

- 4.8 In these circumstances, where the problem to be solved is not only novel, but is not suggested by any of the prior art documents it must be considered as

contributing to the inventive step and it is no longer decisive whether the solution would be obvious, once the problem has been defined.

More specifically, even though the feature (a), found above to be novel against document A, may be considered as being known per se from, for instance, document E (Figure 4), this fact alone does not provide an incentive for applying it in a modulating bias control in such a way that second harmonic distortion including any second harmonic content in the input modulation signal is minimised.

Further, even though the feature (b) as defined above may be considered as being known per se from, for instance, document D, B or F, or as being based on common knowledge, at least its application together with feature (a) for solving the identified novel problem is not to be regarded as obvious.

5. *The amended patent*

5.1 For the above reasons, the subject-matter of the independent Claims 1 and 4 is to be considered as involving an inventive step, and these claims and the claims dependent thereupon are therefore allowable.

5.2 No objection arises, further, in respect of the formal requirements for an amended patent, with a minor exception:

It has been noticed that, when in the first characterising feature of Claim 1 the word "means" was amended to specify this means as a "second harmonic

detector", the reference numeral (261) was, apparently inadvertently, omitted. It is clear from the Appellant's conduct in the appeal proceedings, in particular from the absence of any reasoning for this omission, that any change of presentation of the claimed invention was not thereby intended. The Board therefore considers that the reintroduction of this reference numeral after the expression "second harmonic detector" lies well within the interpretation which the Board is allowed to give to the Appellant's request.

6. *Request for reimbursement of the fee*

Since, for the above reasons (paragraphs 4 and 5), the appeal is to be considered allowable, the first requirement for reimbursement of the appeal fee is met.

However, for the reasons explained in paragraph 3, a substantial procedural violation cannot be considered as having occurred by the appointment and continuance of the Primary Examiner to the Opposition Division; cf. paragraph 3.5.

The second requirement for reimbursement is therefore not met, and the respective request (paragraph V) must therefore be rejected (Rule 67 EPC).

7. *Conclusions*

7.1 From paragraph 3 it follows that remittal for the reason of a wrongly composed Opposition Division (with reimbursement of the appeal fee) is not required.

7.2 Instead, as follows from the considerations on substance, the Appellant's request (XII) for maintenance of the patent as amended is allowable, and the Respondent's request (X) for dismissal of the appeal must be rejected.

7.3 It appears clear from the Respondent's conduct in the appeal proceedings, particularly his latest statement (cf. paragraph X), that he is no longer interested in being informed of any modification of the claims or any other submissions made by the Appellant. Incidentally, the modifications made to the independent claims, as compared with the claims which had been communicated to the Respondent during the appeal proceedings, are only of a formal nature and do not effectively change their subject-matter.

Moreover, the Respondent would have had an opportunity to comment even on these amendments (Article 113(1) EPC), had he participated in the oral proceedings to which he was duly summoned.

Under the circumstances, the issuance of a communication under Rule 58(4) EPC before taking the decision was, in accordance with the Boards' general practice, considered unnecessary.

## Order

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

1. The decision under appeal is set aside.
  
2. The case is remitted to the first instance with the order to maintain the patent as amended on the basis of the documents as mentioned in paragraph XII, with the minor amendment regarding a reference numeral as mentioned in paragraph 5.2.

The Registrar:

The Chairman:

M. Beer

J.A. van Voorthuizen