

In T 824/08 the board observed that the rationale of T 371/88 could not be applied in the case at issue since the limiting feature was clear in itself and did not pose any problems when determining the extent of protection conferred by the claim.

2.4.9 Replacement of an inaccurate technical statement in a claim

In T 190/99 the board stated with reference to T 108/91 (OJ 1994, 228) and T 214/91 that the amendment of a granted claim to replace an inaccurate technical statement, which was evidently inconsistent with the totality of the disclosure of the patent, with an accurate statement of the technical features did not infringe Art. 123(3) EPC 1973. The board added that the skilled person, when considering a claim, should rule out interpretations which were illogical or did not make technical sense.

In T 749/03 the respondent (patent proprietor) argued that a situation similar to the one in T 190/99 arose as claim 5 as originally filed would, if taken alone, not make technical sense, and even the simple addition of its features to the features of claim 1 would result in an inadequately defined apparatus. However, by taking into account the whole disclosure of the patent the skilled person might arrive at a technically sensible interpretation of the claim. The board based its reasoning on the approach taken in decision T 371/88 (OJ 1992, 157, summarised in chapter II.E.2.4.8 above), which concerned the admissibility of amending a granted claim to replace a restrictive term with a less restrictive term and defined two conditions: (a) the restrictive term in the granted claim was not so clear in its technical meaning in the given context that it could be used to determine the extent of protection without interpretation by reference to the description and the drawings of the patent; (b) it was quite clear from the description and the drawings of the patent and also from the examination procedure up to grant that the further embodiment belonged to the invention and that it had never been intended to exclude it from the protection conferred by the patent. In the case at hand (T 749/03), having regard to claim 1 alone, the features relating to the second (transmission) grating were perfectly clear in their technical meaning. However, in combination with claim 5 they would only make sense if reference were made to the description and drawings. Therefore requirement (a) was met. Further, there could be no doubt that the applicant had not waived that embodiment. Hence requirement (b) was also met.

In T 1896/11 the appellant had replaced the parameter to be monitored in claim 5 of the patent as granted by a different parameter. According to the appellant, this was done because claim 5 of the granted patent contained an inaccurate technical statement and, since from the description it was clear what was obviously intended, claim 5 could be corrected to reflect this intention (with reference T 108/91), without violating Art. 123(3) EPC. The board disagreed and held that the skilled person would understand claim 5 of the granted patent as it stood and would not have any reason to suspect that it contained an inaccurate technical statement. Moreover, in accordance with G 1/93 (OJ 1994, 541), it was not allowable to replace a technical feature of a patent claim with another technical feature which caused the claim to extend to subject-matter which was not encompassed by the granted claim. As pointed out in T 195/09, in this respect decision T 108/91 had been clearly overruled by G 1/93.