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Arithmetic value OR median value?

Thomas Musmann (Rospatt Osten Pross) · Wednesday, September 2nd, 2015

by Bernward Zollner

In a decision of 20 January 2015 the German Bundesgerichtshof has discussed the validity of the EP 0 964 031 and has confirmed at the end the previous judgement of the Bundespatentgericht by which the patent had been found to be invalid. The reasoning, however, was different: The claim as defended concerned polymeric material and the average size of the dispersed domains. The Bundespatentgericht had taken the position that the average size from 0,2 until less than 1 Micron referred to an arithmetic value although the patent specification did not contain any information as to the determination of the value. This value was anticipated by one of the documents under discussion (also disclosing the other features of the claim). Upon a discussion with the court's expert the Bundesgerichtshof came to the conclusion that the value was not to be understood as arithmetic value but rather as reference to a range which was rendered obvious by the same document on which the first instance had relied. This document did not disclose an arithmetic value but did contain the teaching for the person skilled in the art to determine the size of the dispersed domain to be in the claimed range. Thus the claim was rendered obvious.

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