

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

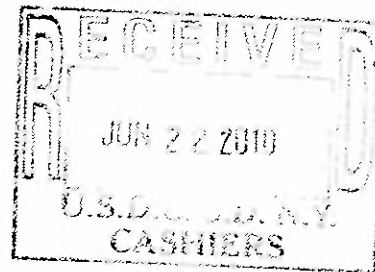
KONINKLIJKE PHILIPS ELECTRONICS  
N.V. and U.S. PHILIPS CORPORATION,

Plaintiffs,

v.

ENTERTAINMENT DISTRIBUTION  
COMPANY (USA) LLC;  
ENTERTAINMENT DISTRIBUTION  
COMPANY; UNIVERSAL MUSIC  
GROUP, INC.; UMG MANUFACTURING  
& LOGISTICS, INC.; and John Does No. 1  
through 100,

Defendants.



Case No. 08-cv-4070 (RGS)

**SECOND AMENDED COMPLAINT**

**This Second Amended Complaint is filed pursuant to the Court's May 11, 2010 Order.**

Plaintiffs Koninklijke Philips Electronics N.V. and U.S. Philips Corporation allege as follows based upon knowledge as to their own acts, and upon information and belief as to all other allegations:

1. This is an action for breach of contract under the laws of the State of New York and, in addition or in the alternative to the breach of contract claim, patent infringement under 35 U.S.C. 271 *et seq.*

**The Parties**

2. Plaintiff Koninklijke Philips Electronics N.V. ("KPEENV") is a corporation organized under the laws of The Netherlands with its principal place of business in Eindhoven, The Netherlands. Plaintiff U.S. Philips Corporation is a corporation organized under the laws of

Delaware with a principal place of business at 3000 Minuteman Road, M/S 109, Andover, MA 01810, and an office at 345 Scarborough Rd., Briarcliff Manor, New York. Plaintiffs Koninklijke Philips Electronics N.V. and U.S. Philips Corporation are collectively referred to as “Philips.”

3. Defendant Entertainment Distribution Company (USA) LLC (“EDC LLC”) is a limited liability company organized under the laws of Delaware with a principal place of business at 825 8<sup>th</sup> Avenue, New York, New York.

4. Defendant Entertainment Distribution Company (“EDC”) is a company organized under the laws of Delaware with a principal place of business at Kings Mountain, Grover, North Carolina.

5. Defendant Universal Music Group, Inc. (“UMG”) is a corporation organized under the laws of Delaware with a principal place of business at 10 Universal City Plaza, Universal City, California.

6. Defendant UMG Manufacturing & Logistics (“UMGML”) is a company organized under the laws of Delaware with a principal place of business at 10 Universal City Plaza, Universal City, California.

7. UMG is the largest customer of EDC.

8. EDC LLC and EDC are sometimes collectively referred to in this Second Amended Complaint as the “EDC Defendants.” The EDC Defendants and UMGML are sometimes collectively referred to in this Second Amended Complaint as the “Replicator Defendants.”

9. Defendants John Doe No. 1 through John Doe No. 100 inclusive are or may be entities related to the Replicator Defendants, or customers or principals of the Replicator Defendants, the identities of which are unknown at this time.

**Jurisdiction and Venue**

10. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1338(a), and 1367(a), and 35 U.S.C. §§ 271 and 281.

11. Venue in this Court is proper under 28 U.S.C. §§ 1391(b) and (c) and 1400(b).

12. This Court has personal jurisdiction over the Replicator Defendants and UMG under the New York Long Arm Statute, N.Y. C.P.L.R. 301, 302, 313 (McKinney 2007) and Fed. R. Civ. P. 4(e)(1).

13. The Replicator Defendants and UMG have committed acts of patent infringement in this judicial district.

14. The Replicator Defendants have irrevocably waived any objections to the jurisdiction, process, and venue of this Court, and to the effectiveness, execution, and enforcement of any order or judgment (including a default judgment) with respect to the Agreements and Side Letters identified in ¶¶ 24-28 of this Second Amended Complaint.

15. The Replicator Defendants and UMG are subject to personal jurisdiction in this district because they purposefully engaged in activities that gave rise to this claim for patent infringement, which were directed at the residents of New York and this judicial district.

16. The Replicator Defendants and UMG voluntarily placed unlicensed CD-Discs (as defined in ¶ 30) into the stream of commerce, conscious that New York and this judicial district were the likely destination of a substantial quantity of those unlicensed CD-Discs.

**Facts Related to Philips**

17. Philips and its related companies have engaged for many years in research and development (“R&D”) of systems in which signals encoded in digital form and stored on a disc are read and reproduced by means of devices using an optical read-out beam.

18. One of the achievements of such R&D efforts was a revolutionary high-fidelity sound storage and reproduction system, known as the Compact Disc Digital Audio System (“CD-Audio System”).

19. Philips and Sony Corporation (“Sony”) developed the Compact Disc Data System (“CD-ROM System”) from the CD-Audio System.

20. Philips and Sony also developed a multi-session CD system, known as the Enhanced Music Compact Disc System (“Enhanced Music CD System” or “CD Extra System”).

21. The CD-Audio System, CD-ROM System, and CD Extra System are referred to collectively in this Second Amended Complaint as the “CD Systems”.

22. U.S. Philips Corporation is the owner by assignment of all right, title, and interest in U.S. Patent No. 5,068,846, entitled “Reflective, Optical Record Carrier,” relating to the CD Systems (“the ‘846 patent”). The ‘846 patent was duly and legally issued by the U.S. Patent and Trademark Office on November 26, 1991, after full and fair examination, and was valid and subsisting in the United States at all times relevant to this action. The ‘846 patent expired on November 26, 2008. A true copy of the ‘846 patent is attached as **Exhibit A**.

23. The CD Systems are defined by “Standard Specifications”, namely, the CD-Audio Standard Specifications, CD-Audio Maxi-Single Standard Specifications, CD-ROM Standard Specifications, CD-ROM-XA Specifications, and the Enhanced Music CD Standard Specifications.

#### **Facts Related to the Replicator Defendants**

24. Effective January 1, 1998, U.S. Philips Corporation and Universal Music and Video Distribution, Inc. (“UMVD”) entered into a “Comprehensive-CD Disc License Agreement” whereby U.S. Philips Corporation granted UMVD rights under certain patents related to CD

Systems for the territory of the United States, its territories, and possessions (the “UMVD Agreement”) (**Exhibit B**).

25. Effective July 1, 2002, Philips and UMGML entered into a “CD Disc Patent License Agreement” whereby Philips granted UMGML worldwide rights under certain Philips and Sony patents related to CD Systems, including for the territory of the United States, its territories, and possessions (the “UMGML Agreement”) (**Exhibit C**).

26. Effective July 1, 2002, Philips and UMGML entered into a “Side Letter” that “constitutes a legally binding and integral part” of the UMGML Agreement. Under the Side Letter, the UMGML Agreement supersedes and replaces the UMVD Agreement (**Exhibit D**).

27. Effective February 5, 2003, Philips and UMGML entered into a letter agreement that amended the UMGML Agreement (the “UMGML Letter Agreement”) (**Exhibit E**).

28. Effective January 3, 2007, Philips and EDC LLC entered into a “CD Disc Patent License Agreement” whereby Philips granted EDC LLC worldwide rights under certain Philips patents related to CD Systems, including for the territory of the United States, its territories, and possessions (the “EDC LLC Agreement”) (**Exhibit F**).

29. In 2005, EDC acquired the CD-Disc manufacturing operations of UMGML and began to pay royalties to Philips under the UMGML Agreement. EDC LLC made such CD-Discs primarily for UMGML. To the extent that UMGML has any independent existence, it is liable for its own acts and omissions that form the basis of Philips’ claims set forth in this Second Amended Complaint. As UMGML’s successor in interest, EDC is liable for UMGML’s acts and omissions that form the basis of Philips’ claims set forth in this Second Amended Complaint. EDC is also liable for its own acts and omissions that form the basis of Philips’ claims set forth in this Second Amended Complaint.

30. The UMGML Agreement and the EDC LLC Agreement identify the Standard Specifications for CD System discs, specifically, “CD-Audio Discs”, “CD-Audio Maxi-Singles”, “CD-ROM Discs”, and Enhanced Music CD Discs/CD Extra Discs. The EDC LLC Agreement also identifies the Standard Specifications for “CD-ROM Disc mode 1”, “CD-ROM Disc mode 2”, “CD-ROM XA Disc sub-mode 1”, “CD-ROM XA Disc sub-mode 2”, “CD Extra Discs”, “CD Extra Discs sub-mode 1”, and “CD Extra Discs sub-mode 2”. Such CD System discs are referred to collectively in this Second Amended Complaint as “CD-Discs”.

31. Paragraph 1.15 of the UMGML Agreement defines “Licensed Product” as “a CD-Audio Disc, a CD-Audio Maxi-Single, a CD-ROM Disc and/or a CD Extra Disc, as correspond with the Licensed Patents selected by Licensee pursuant to Article 1.16, manufactured and/or sold in accordance with the provisions hereof, which has been duly reported and on which the royalties due hereunder are paid in accordance with the provisions of this Agreement.”

32. Paragraph 1.16 of the UMGML Agreement defines “Licensed Patents” as “the patents listed in the relevant Exhibits as selected by Licensee pursuant to” five “Options”, Options A1 through A5. Each Option corresponds to a different type of CD-Disc defined in ¶¶ 1.02 through 1.05 of the UMGML Agreement, made in compliance with the Standard Specifications for each type of CD-Disc defined in ¶¶ 1.06 through 1.09 of the UMGML Agreement. Option A1 states that “Licensee chooses the essential patents listed in Exhibit E1, for the use of any one or more of these patents, exclusively for the manufacture and/or sale of CD-Audio Discs and/or CD-Audio Maxi Singles, which conform to the CD-Audio Standard Specifications.” Using identical language, Options A2 and A3 cover:

Option A2: Exhibits E1 and E2 for CD-ROM Discs conforming to the CD-ROM Standard Specifications;

Option A3: Exhibits E1, E2, and E3 for CD Extra Discs conforming to the Enhanced Music CD Standard Specifications.

Option A4 states that “Licensee chooses, in addition to Option A1 and/or A3 the essential patents listed in Exhibit E4, for the use of any one or more of these patents, exclusively for the manufacture and/or sale of CD-Discs, excluding CD-ROM Discs, containing CD Text information.” Option A5 states that “Licensee chooses the non-essential patents listed in Exhibit E5, for the use of any one or more of these patents, exclusively for the manufacture and/or sale of CD Extra Discs.”

33. Under ¶ 1.16 of the UMGML Agreement, Licensed Patents identified in Exhibit E1 cover all CD-Discs under Options A1 through A4.

34. Paragraph 1.23 of the EDC LLC Agreement defines “Licensed Patents” as “any one or more of the essential patents for the manufacture and/or sale of the various types of CD-Discs”, breaks out such patents into Categories I through III, and incorporates the specific patents listed in Annexes A1 through A8. Under ¶ 1.23 of the EDC LLC Agreement, Licensed Patents identified in Annex A1 cover all CD-Discs, in Categories I through III.

35. Paragraph 1.22 of the EDC LLC Agreement defines “Licensed Product(s)” by eleven “Options”, Options A through K, “as selected by Licensee, manufactured and/or sold in accordance with the provisions hereof, which are duly reported and on which the royalties due hereunder are paid in accordance with the provisions of this Agreement.” Each Option corresponds to a different type of CD-Disc defined in ¶¶ 1.2 through 1.11 of the EDC LLC Agreement, made in compliance with the Standard Specifications for each type of CD-Disc defined in ¶¶ 1.12 through 1.16 of the EDC LLC Agreement. For example, Option A is “CD-Audio Discs and/or CD-Audio Maxi Singles” defined in ¶¶ 1.2 and 1.3, respectively, made in

compliance with the ¶¶ 1.12 and 1.13 Standard Specifications, and Option C is “CD-ROM Discs mode 1” defined in ¶ 1.5, made in compliance with the ¶ 1.14 Standard Specifications.

36. The ‘846 patent was listed in Exhibit E1 of the UMGML Agreement and Annex A1 of the EDC LLC Agreement when the Replicator Defendants signed the UMGML Agreement and the EDC LLC Agreement and at all times relevant to this action, and therefore was a Licensed Patent applicable to all CD-Discs manufactured and/or sold by the Replicator Defendants as defined in Options A1 through A4 of the UMGML Agreement and Options A through K of the EDC LLC Agreement from the dates of the UMGML Agreement and the EDC LLC Agreement until the patent expired on November 26, 2008.

37. Under ¶ 1.16 of the UMGML Agreement and ¶ 1.23 of the EDC LLC Agreement, Philips and the Replicator Defendants agreed that Philips would commission an independent expert to review the patents listed in Exhibits E1 through E4 of the UMGML Agreement and Annexes A1 through A8 of the EDC LLC Agreement to confirm that each patent is “essential” to the manufacture and sale of CD-Discs made according to the Standard Specifications. Philips did so.

38. Under ¶ 1.16 of the UMGML Agreement and ¶ 1.23 of the EDC LLC Agreement, the term “essential” as used in relation to Licensed Patents means “patents, the use of which is necessary (either directly or as a practical matter) for compliance with the Standard Specifications defining the relevant CD System(s).”

39. The independent expert commissioned by Philips determined that the ‘846 patent was an essential patent and was properly listed in Exhibit E1 of the UMGML Agreement and Annex A1 of the EDC LLC Agreement.

40. The Replicator Defendants selected the following Options:

- a. UMGML: A5
- b. EDC LLC: Options B-J



41. The Replicator Defendants have paid royalties for the manufacture and sale of CD-Audio Discs that conform to the CD-Audio Standard Specifications, even though they did not select Option A1 in the UMGML Agreement or Option A in the EDC LLC Agreement.

42. Under ¶ 2.01 of the UMGML Agreement and ¶ 2.1 of the EDC LLC Agreement, Philips granted to the Replicator Defendants “a non-exclusive, non-transferable license under the Licensed Patents” (listed in the Exhibits and Annexes corresponding to the Options selected by the Replicator Defendants) “to manufacture Licensed Products” “in accordance with the . . . Standard Specifications” set forth in ¶¶ 1.06 through 1.09 of the UMGML Agreement and ¶¶ 1.12 through 1.16 of the EDC LLC Agreement, within the United States and its territories and possessions, “and to sell or otherwise dispose of” “Licensed Products so manufactured in all countries of the world.”

43. Under ¶ 5.02 of the UMGML Agreement, UMGML promised to “pay to Philips a royalty on each Licensed Product sold by Licensee, in which any one or more of the Licensed Patents is (are) used, irrespective of whether such Licensed Patent(s) is (are) used in the country of manufacture, sale or other disposal.”

44. Under ¶ 5.2 of the EDC LLC Agreement, EDC LLC promised to “pay to Philips a royalty for each CD-Disc sold or otherwise disposed of by Licensee, any of Licensee’s Associated Companies [as defined in ¶ 1.25] or an agent of Licensee, in any country where at least one of the Licensed Patents or Non-Asserted Patents [as defined in ¶ 1.24] essential to the type(s) of CD-Discs as selected by Licensee . . . exists.”

45. The ‘846 patent existed in the United States at all times relevant to this action.

46. During the term of the ‘846 patent, CD-Discs that conform to the Standard Specifications could not be made by the Replicator Defendants without using such patent.

47. Because the UMGML Agreement licenses both Philips and Sony patents, Paragraph 5.02 of the UMGML Agreement sets a “Standard Rate” of 3 cents (3¢) royalty per CD-Audio Disc or CD-ROM Disc with an outer diameter greater than 90 mm, 2 cents (2¢) per CD-Audio Disc or CD-ROM Disc with an outer diameter smaller than 90 mm, and 4.5 cents (4.5¢) per CD Extra Disc with an outer diameter greater than 90mm.

48. Because the EDC LLC Agreement licenses only Philips patents, Paragraph 5.2 of the EDC LLC Agreement sets a “Standard Rate” of 2 cents (2¢) royalty per CD-Audio Disc or CD-ROM Disc with an outer diameter greater than 90 mm, 1.35 cents (1.35¢) per CD-Audio Disc or CD-ROM Disc with an outer diameter smaller than 90 mm, and 3 cents (3¢) per CD Extra Disc with an outer diameter greater than 90mm.

49. With respect to CD-Discs sold on or after July 1, 2002, ¶ 5.02 of the UMGML Agreement and the UMGML Letter Agreement set a “Compliance Rate” of 1.75 cents (1.75¢) royalty per CD-Audio Disc or CD-ROM Disc with an outer diameter greater than 90 mm, 1.15 cents (1.15¢) per CD-Audio Disc or CD-ROM Disc with an outer diameter smaller than 90 mm, and 1.75 cents (1.75¢) per CD Extra Disc with an outer diameter greater than 90mm, provided that UMGML met the “Compliance Requirements.”

50. With respect to CD-Discs sold on or after July 1, 2002, ¶ 5.2 of the EDC LLC Agreement sets a “Compliance Rate” of 1.5 cents (1.5¢) royalty per CD-Audio Disc or CD-ROM Disc with an outer diameter greater than 90 mm, 1 cent (1¢) per CD-Audio Disc or CD-ROM Disc with an outer diameter smaller than 90 mm, and 1.5 cents (1.5¢) per CD Extra Disc with an outer diameter greater than 90mm, provided that EDC LLC met the “Compliance Requirements”.

51. To be eligible to pay the Compliance Rates, the Replicator Defendants were required to be in full compliance with their obligations under the UMGML Agreement and the EDC LLC Agreement, and related Side Letters, respectively.

52. Paragraph 5.02 of the UMGML Agreement and ¶ 5.2 of the EDC LLC Agreement further provide that “[i]n the event that Licensee fails to comply at any time with any of its obligations” under such Agreements, “the Standard Rates, as applicable, shall apply to Licensee’s manufacture and sale of CD-Discs instead of the Compliance Rates, as applicable, with immediate effect from”:

a. UMGML Agreement: “the moment of such non-compliance until such moment that Licensee’s non-compliance will have been remedied in full.”

b. EDC LLC Agreement: “the first day of the reporting period to which the occurrence of non-compliance relates until such moment that Philips confirms in writing to Licensee that Licensee’s non-compliance has been remedied in full.”

53. Paragraphs 5.03 and 5.10 of the UMGML Agreement and ¶¶ 5.3 and 5.10 of the EDC LLC Agreement require the Replicator Defendants to submit quarterly “Royalty Reporting Forms” to Philips listing all CD-Discs that they manufacture and sell, and to keep complete and accurate books and records relating to the Replicator Defendants’ manufacture and sale or other disposal of CD-Discs. Paragraphs 5.03 and 5.10 of the UMGML Agreement and ¶¶ 5.3 and 5.10 of the EDC LLC Agreement require the Replicator Defendants to keep accurate books and records relating to the manufacture and sale or other disposal of all CD-Discs that correspond to the types of CD-Discs selected by the Replicator Defendants under the Options set forth in ¶ 1.16 of the UMGML Agreement and ¶ 1.22 of the EDC LLC Agreement, for which at least one Licensed Patent remains in force in any country of the world, and to report such information to

Philips, specifically (1) the quantities of each such selected type of CD-Discs manufactured by the Replicator Defendants, specified per individual type of CD-Disc, (2) the quantities of each such selected type of CD-Discs purchased from other licensed manufacturers, specified per individual type of CD-Disc and, for EDC LLC, per such third party manufacturer, (3) on a per-country basis, specifying per individual type of CD-Disc the quantities of CD-Discs on which royalties are due, and that are sold or otherwise disposed of, or sold to other manufacturers duly licensed by Philips, specifying the identity of the buyers or such other manufacturers and the trademarks used on or in connection with such CD-Discs, as the case may be, and (4) a computation of the royalties due under the Agreement.

54. Under ¶ 5.03 of the UMGML Agreement and ¶ 5.3 of the EDC LLC Agreement, the Replicator Defendants are required to report and pay royalties due to Philips within 30 days after the end of each calendar quarter, and to comply with the other reporting requirements of those provisions.

55. Under ¶ 5.04 of the UMGML Agreement and ¶ 5.4 of the EDC LLC Agreement, the Replicator Defendants are required to pay an “Advance” (as that term is defined in such paragraphs) within 30 days after the end of each calendar quarter with respect to which the Replicator Defendants fail to submit to Philips a timely Royalty Reporting Form (as that term is defined in such agreements) for such quarter.

56. Under ¶ 5.05 of the UMGML Agreement and ¶ 5.5 of the EDC LLC Agreement, the Replicator Defendants are required to submit to Philips no later than 90 days following the end of the Replicator Defendants’ financial year an audit statement confirming that the quarterly royalty statements submitted to Philips for the last four quarterly periods were true, complete, and accurate in every respect.

57. Under ¶ 4.01 of the UMGML Agreement, UMGML may have Licensed Products made for it by third party manufacturers duly licensed by Philips under an agreement similar to the UMGML Agreement.

58. Under ¶ 6.01 of the UMGML Agreement and ¶ 6.1 of the EDC LLC Agreement, UMGML and EDC LLC are required to submit to Philips the details of any acquisitions, transfers, or disposals of their manufacturing equipment used, and for EDC, which is technically capable of being used, for the manufacture of Licensed Products, at the time of such acquisition, transfer, or disposal, and to submit to Philips a yearly report of all adjustments to their manufacturing equipment during the preceding year.

59. Under ¶ 5.1 of the EDC LLC Agreement, EDC LLC was required to pay to Philips a payment of \$5000 upon execution of such agreement.

60. Under ¶ 5.12 (Option B) of the EDC LLC Agreement, EDC LLC was required to report and pay for all CD-Discs selected by EDC LLC under the Options set forth in ¶ 1.22 of such agreement, which EDC LLC made, sold, or otherwise disposed of before January 3, 2007, at the rates set forth in such ¶ 5.12 (Option B), and to submit to Philips within 45 days after executing such agreement an audit statement confirming that its royalty statement identifying such CD-Discs was true, complete, and accurate in every respect.

**Facts Relating to Breach of Contract Claim**

61. The Replicator Defendants selected the following Options:

- a. UMGML: A5
- b. EDC LLC: Options B-J

To be Licensed Products, selected CD-Discs must be manufactured and sold in compliance with the corresponding Standard Specifications and the provisions of the UMGML Agreement and the

EDC LLC Agreement, such sales must be reported to Philips, and royalties for the sale of such CD-Discs must be paid to Philips. For example, a CD-Audio Disc is defined by ¶ 1.02 of the UMGML Agreement and ¶ 1.2 of the EDC LLC Agreement to “mean a Disc [as defined in ¶ 1.01 of the UMGML Agreement and ¶ 1.1 of the EDC LLC Agreement] comprising audio information encoded in digital form, which is optically readable by a CD-Audio Player [as defined in ¶ 1.11 of the UMGML Agreement and ¶ 1.18 of the EDC LLC Agreement] and which conforms to the CD-Audio Standard Specifications [as defined in ¶ 1.06 of the UMGML Agreement and ¶ 1.12 of the EDC LLC Agreement].” Paragraph 1.06 of the UMGML Agreement and ¶ 1.12 of the EDC LLC Agreement defines the CD-Audio Standard Specifications to “mean the specifications for the CD-Audio System [as defined in the second “Whereas” clause of the UMGML Agreement and the EDC LLC Agreement], including” “the Subcode/Control and Display System, Channels R .. W, chapter 5.8, the CD-TEXT mode, as made available, modified or extended from time to time.”

62. Under ¶ 2.01 of the UMGML Agreement and ¶ 2.1 of the EDC LLC Agreement, the Replicator Defendants are licensed only to manufacture selected Licensed Products “**in accordance with the relevant CD Standard Specifications** and to sell or otherwise dispose of” “Licensed Products **so manufactured** in all countries of the world.” (Emphasis added.)

63. Because the ‘846 patent is essential and therefore must be used to make CD-Discs that conform to the Standard Specifications, and existed in the United States at all times relevant to this action, under ¶ 5.02 of the UMGML Agreement and ¶ 5.2 of the EDC LLC Agreement the Replicator Defendants were required to pay Philips either the Standard Rates or the Compliance Rates for each selected CD-Disc sold or otherwise disposed of by the Replicator Defendants in the U.S.

64. Beginning in or about the following calendar quarters, the Replicator Defendants began paying royalties under the UMGML Agreement and the EDC LLC Agreement, according to the Compliance Rates, for the manufacture and sale of selected CD-Discs in the United States:

- a. UMGML: Third Quarter 2002
- b. EDC LLC: First Quarter 2007

65. After the end of the Second Quarter 2005, when EDC acquired CD-Disc manufacturing operations from UMGML, UMGML ceased reporting and paying royalties to Philips under the UMGML Agreement.

66. Beginning with the month of June 2005, EDC began reporting and paying royalties to Philips under the UMGML Agreement and supplying CD-Discs to UMG and/or UMGML.

67. The Replicator Defendants ceased paying royalties for each and every CD-Disc made and sold in the U.S. beginning:

- UMGML: First Quarter 2006
- EDC LLC: First Quarter 2007

68. The Replicator Defendants have continued to make and sell at least 350 million CD-Discs in the U.S., without providing royalty reports and/or paying royalties to Philips for all CD-Discs that they manufactured and/or sold.

69. The CD-Discs made and sold by the Replicator Defendants after they stopped paying royalties to Philips have been and are available for purchase on the open market in the U.S., and within the district.

70. The Replicator Defendants do not contest that the CD-Discs they have made and sold in the U.S. after they stopped paying royalties to Philips comply with the relevant Standard Specifications.

71. The Replicator Defendants have failed to submit quarterly “Royalty Reporting Forms” to Philips listing all CD-Discs that they manufactured and sold, and/or to keep complete and accurate books and records, relating to the Replicator Defendants’ manufacture and sale or other disposal of all CD-Discs in the U.S., as required by ¶¶ 5.03 and 5.10 of the UMGML Agreement and ¶¶ 5.3 and 5.10 of the EDC LLC Agreement.

72. The Replicator Defendants failed to keep accurate books and records relating to the manufacture and sale or other disposal of all CD-Discs that correspond to the types of CD-Discs selected by the Replicator Defendants under the Options set forth in ¶ 1.16 of the UMGML Agreement and ¶ 1.22 of the EDC LLC Agreement, for which at least one Licensed Patent remains in force in any country of the world, and to report such information to Philips, specifically (1) the quantities of each such selected type of CD-Discs manufactured by the Replicator Defendants, specified per individual type of CD-Disc, (2) the quantities of each such selected type of CD-Discs purchased from other licensed manufacturers, specified per individual type of CD-Disc and, for EDC LLC, per such third party manufacturer, (3) on a per-country basis, specifying per individual type of CD-Disc the quantities of CD-Discs on which royalties are due, sold or otherwise disposed of, or sold to other manufacturers duly licensed by Philips, specifying the identity of the buyers and such other manufacturers and the trademarks used on or in connection with such CD-Discs, and (4) a computation of the royalties due under the Agreement, as required by Paragraphs 5.03 and 5.10 of the UMGML Agreement and ¶¶ 5.3 and 5.10 of the EDC LLC Agreement.

73. The Replicator Defendants failed to report and pay royalties due to Philips within 30 days after the end of each calendar quarter, as required by ¶ 5.03 of the UMGML Agreement and ¶ 5.3 of the EDC LLC Agreement. Specifically, UMGML failed to report and pay royalties within 30



days after the end of each calendar quarter beginning with Third Quarter 2003, and EDC LLC failed to report royalties within 30 days after the end of each calendar quarter for at least Second Quarter 2007, First Quarter 2008, Second Quarter 2008, and Third Quarter 2008, and failed to pay royalties within 30 days after the end of First Quarter 2007. UMGML and EDC LLC also failed to comply with the reporting requirements of ¶ 5.03 of the UMGML Agreement and ¶ 5.3 of the EDC LLC Agreement.

74. The Replicator Defendants failed to submit to Philips no later than 90 days following the end of their respective financial years an audit statement confirming that the quarterly royalty statements submitted to Philips for the last four quarterly periods were true, complete, and accurate in every respect, as required by ¶ 5.05 of the UMGML Agreement and ¶ 5.5 of the EDC LLC Agreement.

**Facts Relating to Patent Infringement Claim**

75. The CD-Discs made and sold by the Replicator Defendants and UMG in the U.S. fall within the claims of the '846 patent. Such CD-Discs infringe at least claim 1 of the '846 patent.

76. The Replicator Defendants' license to make and sell selected CD-Discs in the U.S. is contingent upon the Replicator Defendants' reporting and payment of royalties to Philips, as set forth in the Replicator Agreements and Side Letters. Specifically, no CD-Disc is licensed under the Replicator Agreements unless and until the royalty for such CD-Disc is reported and paid to Philips. As set forth in this Second Amended Complaint, the Replicator Defendants are in material breach of the Replicator Agreements.

77. EDC has never been licensed by Philips to make, have made, sell, or import CD-Audio Discs.

78. As set forth in this Second Amended Complaint, the Replicator Defendants and UMG also made and sold CD-Discs covered by the '846 patent in the U.S. without a license and/or without reporting and paying royalties to Philips from the dates set forth in ¶ 67 of this Second Amended Complaint through November 26, 2008.

79. Because the Replicator Defendants have not reported and paid royalties to Philips and are in material breach of the UMGML Agreement and the EDC LLC Agreement, as set forth in this Second Amended Complaint, the selected CD-Discs made and sold by the Replicator Defendants and UMG since the breaches began are not Licensed Products, and are not licensed under the '846 patent, and therefore infringe such patent.

80. The John Doe Defendants acquired, made, used, and/or sold CD-Discs covered by the '846 patent in the U.S. without a license from Philips under the Licensed Patents, and/or without paying royalties to Philips.

**Count I**  
**Breach of Contract**  
**Asserted Against the Replicator Defendants**

81. Plaintiff repeats and realleges each and every allegation set forth in this Second Amended Complaint.

82. The UMGML Agreement and Side Letter and the EDC LLC Agreement are valid and subsisting agreements under New York law between Philips and the Replicator Defendants. Such Agreements and Side Letter are supported by adequate consideration. Neither Philips nor the Replicator Defendants have terminated the UMGML Agreement or Side Letter or the EDC LLC Agreement. KPENV has the right to license the '846 patent.

83. In ¶ 13.06 of the UMGML Agreement and ¶ 12.7 of the EDC LLC Agreement, Philips and the Replicator Defendants agreed that New York law controls the construction of such Agreements.

84. The Replicator Defendants have materially breached the UMGML Agreement and Side Letter and the EDC LLC Agreement by failing to pay royalties on their manufacture and sale of selected CD-Discs, as set forth in this Second Amended Complaint, specifically:

UMGML: from First Quarter 2006 through November 26, 2008;

EDC LLC: from First Quarter 2007 through November 26, 2008.

85. UMG intentionally induced EDC LLC to breach the EDC LLC Agreement.

86. UMGML assigned the UMGML Agreement to EDC without Philips' consent, as required by ¶ 11.01 of the UMGML Agreement. Such unauthorized assignment was a material breach of the UMGML Agreement.

87. The Replicator Defendants further breached the Replicator Agreements and Side Letters as alleged in ¶¶ 71-74 of this Second Amended Complaint.

88. The Replicator Defendants have materially breached the UMGML Agreement and the EDC LLC Agreement and Side Letters in other ways, the details of which are unknown at this time.

89. In view of the Replicator Defendants' breach of the UMGML Agreement and Side Letter and the EDC LLC Agreement, Philips is entitled to receive (a) royalties for the Replicator Defendants' manufacture and sale in the U.S. of CD-Discs at the Standard Rates for First Quarter 2006 through November 26, 2008, and (b) the difference between the Standard Rates and the Compliance Rates for all royalties paid at the Compliance Rates on or after the first day of the

reporting period in which each Replicator Defendant was not in full compliance with all of its obligations under its Replicator Agreement and Side Letter.

90. Under ¶ 5.07 of the UMGML Agreement and ¶ 5.7 of the EDC LLC Agreement, Philips is entitled to interest, accruing at the rate of 2% (two percent) per month, or the maximum amount permitted by applicable law, whichever is lower, on (a) all unpaid royalties, beginning on the first day of the reporting period in which each Replicator Defendant was not in full compliance with all of its obligations under its Replicator Agreement and Side Letter, and (b) the difference between the Standard Rates and the Compliance Rates for all royalties paid at the Compliance Rates on or after the first day of the reporting period in which each Replicator Defendant was not in full compliance with all of its obligations under its Replicator Agreement and Side Letter.

91. Under ¶ 13.04 of the UMGML Agreement and ¶ 12.5 of the EDC LLC Agreement, the Replicator Defendants agreed that neither Philips' failure nor delay in enforcing any provision of such Agreements shall constitute a waiver of such provision or of Philips' right to enforce any provision of such Agreements.

92. Philips has suffered monetary and other damages, in an as-yet-undetermined amount, as the direct and proximate result of the Replicator Defendants' material breach of the UMGML Agreement and Side Letter and the EDC LLC Agreement.

**Count II**  
**Patent Infringement**  
**Asserted Against All Defendants**

93. Plaintiff repeats and realleges each and every allegation set forth in this Second Amended Complaint.

94. In addition or in the alternative to Philips' breach of contract claim, the Replicator Defendants and UMG have infringed, literally and/or under the doctrine of equivalents, the '846 patent by practicing one or more claims of the '846 patent in their manufacture, use, offering for sale, sale, and/or importation of products, and/or by inducing or contributing to the infringement of the '846 patent without a license and/or without paying royalties to Philips, under 35 U.S.C. § 271, including without limitation CD-Audio Discs, through November 26, 2008.

95. The John Doe Defendants have infringed, literally and/or under the doctrine of equivalents, the '846 patent by practicing one or more claims of the '846 patent in their manufacture, use, offering for sale, sale, and/or importation of products, and/or by inducing or contributing to the infringement of the '846 patent, under 35 U.S.C. § 271, through November 26, 2008.

96. The '846 patent was valid and subsisting at all times relevant to this action and is entitled to a presumption of validity under 35 U.S.C. § 282.

97. U.S. Philips Corporation is the assignee of all rights, title, and interest in and to the '846 patent and possesses all rights of recovery under the '846 patent.

98. A Reexamination Request for the '846 patent was filed in the U.S. Patent and Trademark Office on December 8, 2004. Ex Parte Reexamination Certificate No. US 5,068,846 C1 (the "Reexamination Certificate"), confirming the patentability of claims 1 through 7 of the '846 patent, was issued by the U.S. Patent and Trademark Office on September 19, 2006. A true copy of the Reexamination Certificate is attached as **Exhibit G**.

99. The Replicator Defendants and UMG have had knowledge of the '846 patent at all times relevant to this action.

100. The infringement of the '846 patent by the Replicator Defendants and UMG has been and continues to be willful, and therefore Philips is entitled to treble damages under 35 U.S.C. § 284.

101. Philips has suffered monetary and other damages in an as-yet undetermined amount, and irreparable injury, as the direct and proximate result of the infringement of the '846 patent by the Replicator Defendants and UMG.

**Prayer for Relief**

Wherefore, Philips requests that this Court enter judgment in its favor on each and every claim for relief set forth above and award it relief, including but not limited to a judgment and order as follows:

- A. holding the Replicator Defendants jointly and severally liable for breach of contract;
- B. in addition or in the alternative to Philips' breach of contract claim, holding the Replicator Defendants and/or UMG jointly and severally liable for patent infringement;
- C. holding the John Doe Defendants jointly and/or severally liable for patent infringement;
- D. directing the Replicator Defendants and UMG to provide an accounting and to pay to Philips its actual damages for:
  - a. the Replicator Defendants' breach of contract; and/or
  - b. in addition or in the alternative to Philips' breach of contract claim, the Replicator Defendants and UMG's patent infringement, under 35 U.S.C. § 284;
- E. directing the John Doe Defendants to pay to Philips its actual damages for patent infringement, under 35 U.S.C. § 284;
- F. directing the Replicator Defendants to pay:
  - a. unpaid royalties at the Standard Rates for all CD-Discs made, imported, sold, or otherwise disposed of by the Replicator Defendants in the U.S. beginning on the first day of the

reporting period in which each Replicator Defendant was not in full compliance with all of its obligations under its Replicator Agreement and Side Letter, through November 26, 2008; and

b. the difference between the Standard Rates and the Compliance Rates for all royalties paid at the Compliance Rates on or after the first day of the reporting period in which each Replicator Defendant was not in full compliance with all of its obligations under its Replicator Agreement and Side Letter;

G. directing the Replicator Defendants, UMG, and/or the John Doe Defendants to pay Philips' other damages, including but not limited to direct, consequential, indirect, compensatory, and punitive damages;

H. directing the Replicator Defendants to pay interest, at least as follows:

a. on all unpaid royalties, beginning on the first day of the reporting period in which each Replicator Defendant was not in full compliance with all of its obligations under its Replicator Agreement and Side Letter; and

b. on the difference between the Standard Rates and the Compliance Rates for all royalties paid at the Compliance Rates on or after the first day of the reporting period in which each Replicator Defendant was not in full compliance with all of its obligations under its Replicator Agreement and Side Letter;

I. holding that the Replicator Defendants', UMG's, and/or the John Doe Defendants' patent infringement has been and continues to be willful, and trebling Philips' damages;

J. directing the Replicator Defendants, UMG, and/or the John Doe Defendants to pay Philips' attorneys' fees and costs under 35 U.S.C. § 285;

K. directing the Replicator Defendants, UMG, and/or the John Doe Defendants to pay prejudgment and post-judgment interest;

L. providing such other and further relief as this Court deems just and appropriate.

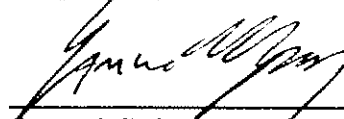


**Jury Trial**

Philips demands a jury trial on all claims set forth in this Second Amended Complaint.

Date: June 21, 2010

Respectfully submitted,



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# **EXHIBIT A**

**United States Patent** [19]

[11] **Patent Number:** **5,068,846**

**Kramer**

[45] **Date of Patent:** **Nov. 26, 1991**

[54] **REFLECTIVE, OPTICAL RECORD CARRIER**

- [75] Inventor: **Pieter Kramer**, Eindhoven, Netherlands
- [73] Assignee: **U.S. Philips Corporation**, New York, N.Y.
- [21] Appl. No.: **858,550**
- [22] Filed: **Apr. 23, 1988**

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**Related U.S. Application Data**

- [63] Continuation of Ser. No. 146,554, May 5, 1980, abandoned, which is a continuation of Ser. No. 949,919, Oct. 10, 1978, abandoned, which is a continuation of Ser. No. 772,914, Feb. 28, 1977, abandoned, which is a continuation of Ser. No. 344,867, Mar. 26, 1973, abandoned.

[30] **Foreign Application Priority Data**

Sep. 2, 1972 [NL] Netherlands ..... 7211999

- [51] Int. Cl.<sup>5</sup> ..... **G11B 7/24; H04N 5/85**
- [52] U.S. Cl. .... **369/275.1; 358/342; 369/275.5; 369/109**
- [58] Field of Search ..... **358/342; 365/113, 120; 369/275, 109, 93-94, 125, 107, 111, 275.1, 275.4, 275.5, 275**

[56] **References Cited**

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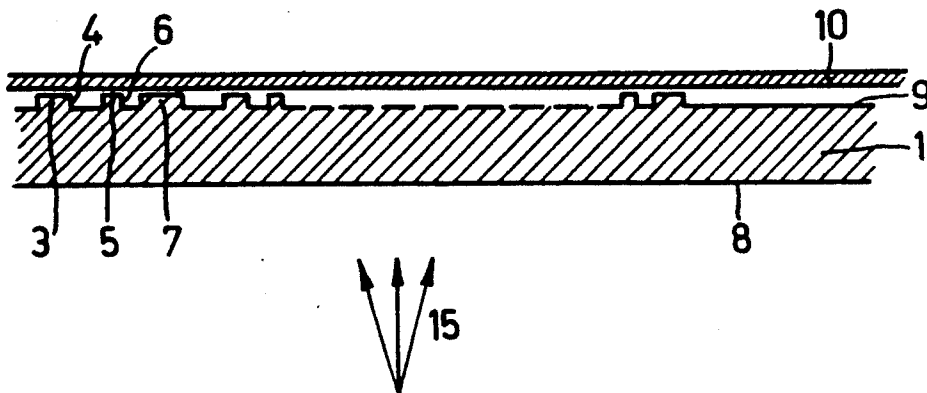
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*Primary Examiner*—Robert Weinhardt  
*Attorney, Agent, or Firm*—Algy Tamoshunas; Leroy Eason

[57] **ABSTRACT**

A record carrier for information, for example video and/or audio information, in the form of a disk-shaped carrier substrate provided with an optical structure in accordance with the information is described. By making the optical structure radiation-reflecting and the substrate radiation-transmitting, whilst the surface of the substrate more remote from the optical structure forms both the entrance face and the exit face for the read radiation, and by coating a surface of the optical structure more remote from the substrate with an additional layer, a simple record carrier is obtained which is well protected against dust particles and damage.

**7 Claims, 3 Drawing Sheets**



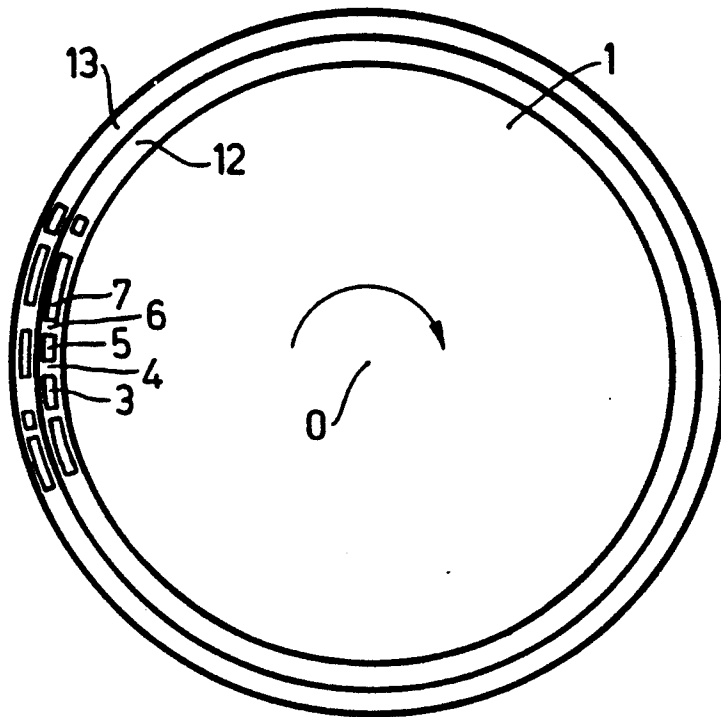


Fig. 1

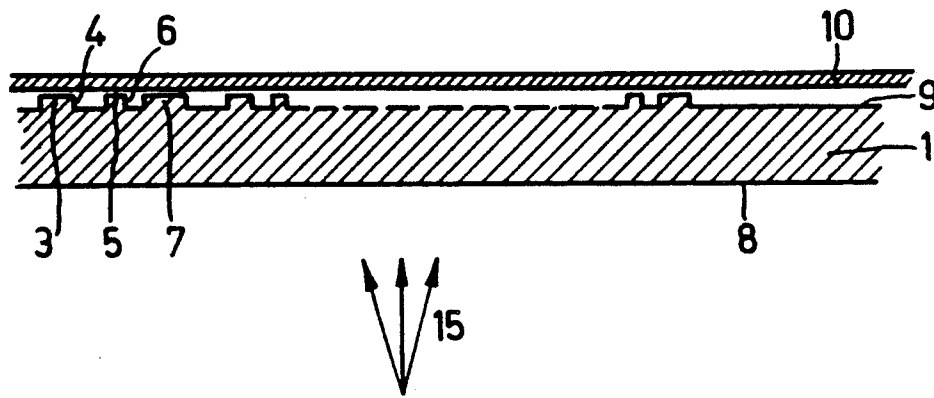


Fig. 2

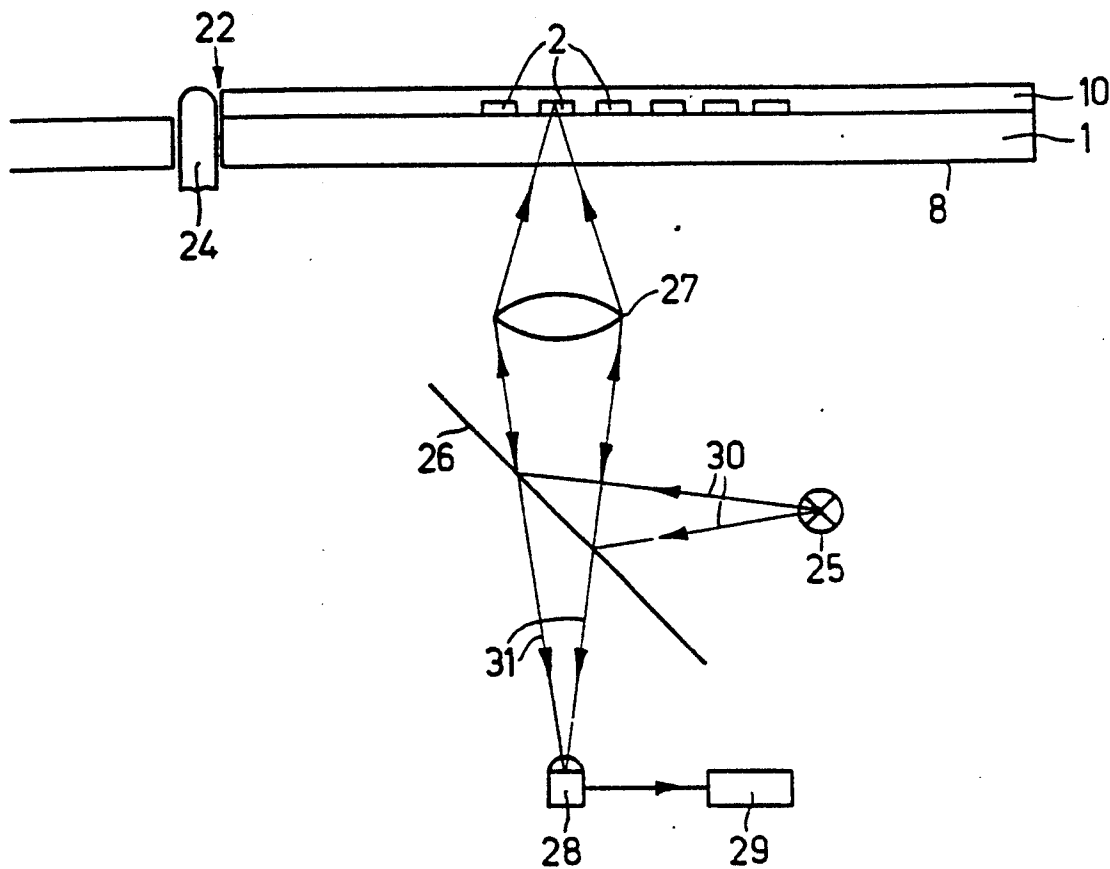


Fig. 3

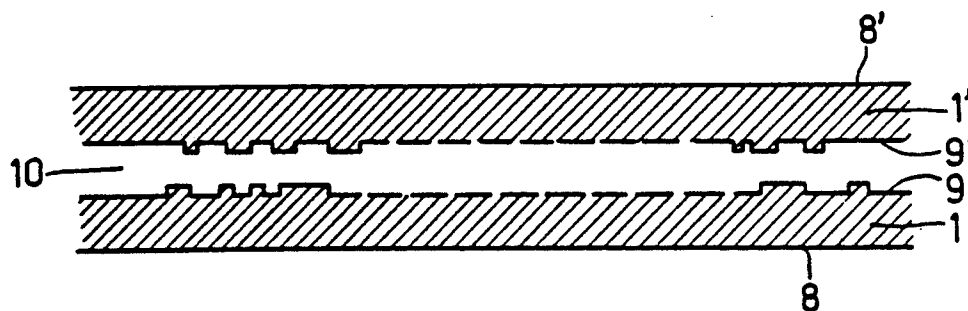
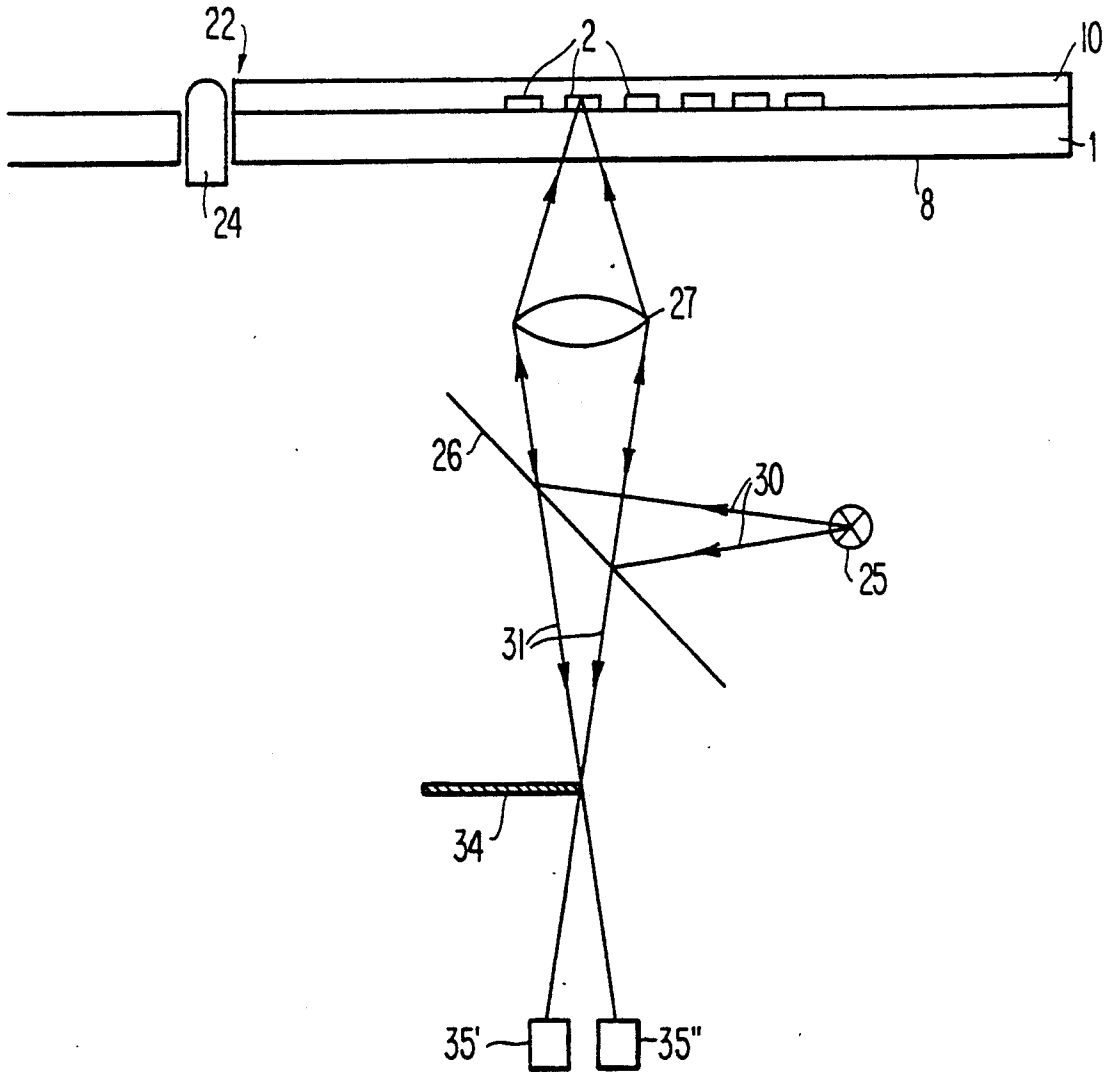


Fig. 4



**FIG. 5**