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**Datasheet for the decision
of 22 July 2009**

Case Number: R 0007/09 - 3.1.00
Appeal Number: T 0027/07 - 3.2.02
Application Number: 99115093.9
Publication Number: 0978251
IPC: A61B 1/12
Language of the proceedings: EN

Title of invention:
Endoscope capable of being autoclaved

Patentee:
Olympus Corporation

Opponent:
HOYA CORPORATION

Headword:
-

Relevant legal provisions:
EPC Art. 112a, 113(1)
EPC R. 79(1), 100(1), 106, 107, 109(2), 110, 126(2)

Relevant legal provisions (EPC 1973):
-

Keyword:
"Petition for review - allowable: fundamental violation of Article 113 EPC (statement setting out the grounds of appeal never notified to respondent/patent proprietor)"

Decisions cited:
-
EPA Form 3030 06.03
C1520.D

Catchword:

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Case Number: R 0007/09

D E C I S I O N
of the Enlarged Board of Appeal
of 22 July 2009

Other Party:
(Opponent)

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Decision under review:

**Decision of the Technical Board of Appeal
3.2.02 of the European Patent Office of
20 February 2009.**

Composition of the Board:

Chairman: P. Messerli
Members: R. Menapace
W. Zellhuber
S. Perryman
M.-B. Tardo-Dino

Summary of Facts and Submissions

- I. The petition for review concerns decision T 27/07 of Board of Appeal 3.2.02 revoking European patent No. 0 987 251.
- II. The proceedings preceding said decision can be summarised as follows:
- (i) On 2 January 2007 the opponent filed a notice of appeal against the decision of the opposition division posted on 9 November 2006 to reject the opposition against the above mentioned patent. EPO Form 3204 "Commencement of Proceedings [T 27/07] before the Board of Appeal [3.2.02]" with annexed copy of the notice of appeal was sent to the patent proprietor's representative and was received by him on 15 January 2007.
 - (ii) On 19 March 2007 the opponent filed the statement setting out the grounds of appeal. The responsible Registrar prepared a communication dated 27.03.07 addressed to the proprietor's representative, which read: "Please find enclosed a copy of the statement setting out the grounds of appeal. **Any reply must be filed within four months of this notification**". A copy of that communication and, previously, of the statement of grounds was entered in the (electronic) file.
 - (iii) By official letters dated 12.06.08 and 18.06.08 the proprietor's representative was informed that the opponent had been merged into one

HOYA Corporation and that the ensuing transfer of status as opponent was considered permissible.

(iv) As the patent proprietor (respondent) did not submit any reply and the opponent had asked for oral proceedings only as an auxiliary request, on 20 February 2008 the Board of Appeal took the decision under review. A copy of it was notified to the proprietor's representative on 19 March 2009.

III. On 3 April 2009 the proprietor filed a petition for review under Article 112a EPC and paid the prescribed fee.

In support of the petition the proprietor (henceforth: "the petitioner") argued that contrary to Article 113 EPC he had not been given the opportunity to be heard in the appeal proceedings preceding the decision under review, because (as had been already been put forward as a possibility in a letter dated 25 March 2009 of the petitioner's representative) the communication of 27 March 2007 transmitting a copy of the statement of the grounds of appeal and setting a term for reply (see point II.(ii), above) had not reached the representative's office, to which it should have been sent by registered letter. Thus, the petitioner had not been informed of the grounds of the appeal or the time limit for response, and no submissions or request for oral proceedings had been made by him. In consequence the petitioner had not been given the opportunity to be heard in those proceedings, contrary to Article 113 EPC, so that Article 112a(2)(c) EPC was met.

A detailed description of the processing of registered letters from the EPO in the representative's office was given in the reasons for the petition, accompanied by written evidence including a sworn statement ("Eidesstattliche Versicherung") of the representative's secretary.

The petitioner requested that the Enlarged Board of Appeal set aside Decision T 27/07 and re-open proceedings before the Board of Appeal, and that the petition fee be refunded according to Rule 110 EPC.

IV. Upon inquiry about the notification of the critical communication dated 27 March 2007, the Enlarged Board of Appeal was informed by the Supervisor of the EPO Mailroom Munich that no record of dispatch for that communication could be located.

V. Thereupon, the Enlarged Board submitted the petition to the Enlarged Board in its composition under Rule 109(2)(b) EPC for decision. The Enlarged Board's communication of 18 May 2009 informed the parties thereof as well as of the result of the inquiry (Point IV, above) and of the preliminary view of the Enlarged Board, and stated that any submission concerning the petition for review should be filed within a non-extendable period of one month from notification of that communication. There was no substantive response from the parties.

Reasons for the Decision

Admissibility of the petition for review, formal requirements

1. In accordance with the provisions of Article 112a(4) EPC, the petition concerning the decision of 20 February 2009 was filed and the prescribed fee was duly paid on 3 April 2009, that is within two months of notification of the decision under review.

The requirements of Rule 107 EPC in respect of the content of the petition for review have been met.

The requirement pursuant Rule 106 EPC is fulfilled in that the petitioner asserts a fundamental violation of Article 113(1) EPC due to the fact that he first learned about the reasons of the decision under review when it was notified to him.

Hence, the petition is admissible.

Allowability of the petition for review

2. Since the Office was not able to establish delivery of the critical communication within the meaning of Rule 126(2) EPC and in the absence of any evidence to the contrary, the opponent's (appellant's) statement setting out the grounds of appeal must be considered not to have been communicated to the petitioner as prescribed by Rule 100(1) in conjunction with Rule 79(1) EPC.
3. There is also no indication whatsoever that the petitioner or his representative actually learned about

the statement of the grounds of appeal and the invitation to comment on them within four months in another way, e.g. by a courtesy copy from the opponent or by file inspection.

4. As no other communication or further submissions relating to the merits of the case were made in the (exclusively written) proceedings leading up to the decision under review, the petitioner was unaware of the grounds on which that decision of the Board of Appeal revoking his patent was based.

5. It is true that the statement of the grounds and the communication of 27 March 2007 were readily available to the public and, thus, also to the petitioner shortly after filing or dispatch, respectively, by way of electronic file inspection. However, this opportunity has no bearing on the right of parties to proceedings before the EPO, including appeal proceedings, to be individually and specifically informed by the Office as prescribed in the EPC, e.g. by Rule 100(1) in conjunction with Rule 79(1) EPC. The parties must be able to rely on the Office complying with the relevant provisions of the EPC and, at least for the purposes of Article 113(1) EPC, they and their representatives have no duty to monitor the proceedings themselves by regularly inspecting the electronic file.

6. It follows that in the appeal proceedings under consideration the petitioner had, within the meaning of Article 113(1) EPC, no opportunity at all to comment on the grounds for the decision under review which objectively came as a total surprise to him, both as to its timing and its content. This qualifies as a

fundamental violation of Article 113 EPC pursuant to Article 112a(2)(c) EPC, so that the petition and the request for re-imbusement of the fee for the petition for review (Rule 110 EPC) have to be allowed.

7. The question of whether the (deemed) failure of notification would equally qualify as a fundamental violation of Article 113 within the meaning of Article 112a(2)(c) EPC if the petitioner had learned about the communication (see point 3, *supra*) does not fall to be decided in the present case.

Order

For these reasons it is decided that:

1. The decision under review is set aside and the proceedings before the Board of Appeal 3.2.02 are re-opened.
2. Reimbursement of the fee for the petition for review is ordered.

The Registrar:

The Chairman:

W. Roepstorff

P. Messerli