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**Datasheet for the decision  
of 3 August 2006**

**Case Number:** J 0013/05 - 3.1.01

**Application Number:** 02022014.1

**Publication Number:** 1523025

**IPC:** H01J 1/312

**Language of the proceedings:** EN

**Title of invention:**  
Field emission-type electron source

**Applicant:**  
MATSUSHITA ELECTRIC WORKS, LTD.

**Opponent:**

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**Headword:**

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**Relevant legal provisions:**

EPC Art. 80, 120  
EPC R. 84a, 85(5)

**Keyword:**

"Change of the filing date - no"  
"Observation of the priority period - no"

**Decisions cited:**

G 0002/97, J 0018/86, J 0004/87, J 0011/88, J 0003/90,  
T 0905/90, J 0001/93, J 0027/94, J 0025/95, J 0018/96

**Catchword:**

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Case Number: J 0013/05 - 3.1.01

**D E C I S I O N**  
of the Legal Board of Appeal 3.1.01  
of 3 August 2006

**Appellant:** MATSUSHITA ELECTRIC WORKS, LTD.  
1048, Oaza-Kadoma  
Kadoma-shi, Osaka (JP)

**Representative:** Dallmeyer, Georg  
Patentanwälte  
von Kreisler-Selting-Werner  
Postfach 10 22 41  
D-50462 Köln (DE)

**Decision under appeal:** Decision of the Receiving Section of the  
European Patent Office of 1 March 2005.

**Composition of the Board:**

**Chairman:** B. Günzel  
**Members:** U. Tronser  
D. Rogers

## Summary of Facts and Submissions

- I. This appeal has been lodged against the decision of the European Patent Office that the filing date of the European patent application is 1 October 2002 and that the priority claimed on the basis of the earliest previous application cannot be acknowledged.
- II. Patent application EP 02022014.1, which claims 25 September 2001 as the earliest priority date, was delivered to "Deutsche Post Euro Express" (formerly "Express Post") on 23 September 2002 but was not received by the European Patent Office until 1 October 2002.

Following receipt of the communication that 1 October 2002 was the filing date of the European patent application, the appellant's representative requested, by letter dated 11 October 2002, that the date of receipt of the patent application be reset to 24 September 2002. He submitted that the patent application had been delivered on 23 September 2002 to one of the delivery services generally recognised by the Decision of the President of the European Patent Office dated 11 December 1998 concerning the application of Rule 84a EPC on the late receipt of documents. On 24 September 2002, the delivery status had been checked on the internet. According to the "Track & Trace/Sendungshistorie", the application had been delivered in Munich on 24 September 2002. Therefore, the representative assumed that the package had been delivered to the European Patent Office on that day. However, the application had been delivered to the wrong address and it was therefore delivered a

second time, this time to the European Patent Office, on 1 October 2002, i.e. seven days after the intended day of delivery.

By communication of the European Patent Office dated 12 November 2002, the representative was informed that Rule 84a EPC could not be applied because the application had been delivered to the delivery service less than five days before expiry of the 12-month period prescribed in Article 87(1) EPC.

In further letters, the representative put forward his line of arguments based on, *inter alia*, the principles of good faith and equal treatment of applicants and representatives not residing at a seat of the European Patent Office with those able to deliver their postage by hand to the European Patent Office and, furthermore, submitted that Rule 85(5) EPC should be applied, this latter argument being based on decisions of the German Federal Administrative Court.

III. On 1 March 2005, the European Patent Office decided that the filing date was 1 October 2002 and that the priority claimed on the basis of the earliest previous application could not be acknowledged. The reasons for this finding were essentially as follows:

- Documents complying with Article 80 EPC had not been received by the European Patent Office until 1 October 2002. Under the EPC, it was not permissible to accord the application in question a different filing date.

- The priority application had been filed on 25 September 2001. Under Rule 83(4) EPC, the 12-month

priority period prescribed by Article 87(1) EPC had expired on 25 September 2002.

- There was no legal remedy in the event of failure to comply with that time limit. The time limit was explicitly excluded from the scope of Article 122 EPC by the provisions of its paragraph (5). Moreover, since the time limit for claiming priority was not a time limit to be determined by the European Patent Office, Article 121 EPC was likewise inapplicable.

- There had been no local interruption or subsequent dislocation of the mail service due to a war, revolution, civil disorder, strike, natural calamity, or other like reason, as was required by Rule 85(5) EPC, in the present case. The representative's opinion that the terms "natural calamity, or other like reason" in Rule 85(5) EPC and "natural events or other unavoidable coincidences" in the old version of Section 233, paragraph 1, of the German Zivilprozessordnung (Code of Civil Procedure, "ZPO") were equivalent, could not be followed. The German ZPO was not applicable to the present case. Furthermore, whilst a delay in delivery due to the fact that the package, which contained 24 documents, had been delivered to the wrong address could be deemed to be an unavoidable coincidence within the meaning of the old version of Section 233, paragraph 1, ZPO, it did not cause an interruption or subsequent dislocation of the mail service within the meaning of Rule 85(5) EPC, which was not concerned with the question whether or not the applicant was unable to observe the time limit.

- Nor could the legal fiction under Rule 84a EPC be applied for the reasons already indicated in the communication dated 12 November 2002.
  
  - The decision of the President of the European Patent Office of 11 December 1998 laid down the conditions for deeming a document to be received in due time under Rule 84a EPC but did not include any recommendation of the European Patent Office as to the use of a particular courier service for the mailing of letters.
  
  - According to the case law of the boards of appeal, the principle of good faith governed relations between the European Patent Office and the parties to proceedings before it. There was no basis, however, for the suggestion that the principle of good faith applied to relations between the applicant and a third party. It was the applicant's responsibility to ensure that applications and other documents were filed at the European Patent Office in due time.
  
  - Contrary to the statements of the representative, the European Patent Office confirmed by telephone the receipt of letters and facsimiles. Furthermore, since 8 December 2000, European patent applications could also be filed online. In that case, the applicant received an acknowledgement of receipt during the submission session. Therefore, the argument of discrimination of applicants and representatives not residing at a seat of the European Patent Office also had to be rejected.
- IV. On 2 May 2005, the appellant filed an appeal and paid the prescribed appeal fee. In its statement of the

grounds of appeal, filed on 1 July 2005, the appellant argued as follows:

With regard to the applicability of Rule 85(5) EPC, it had to be noted that the mail service had been interrupted from 24 September 2002 to 1 October 2002 because the mail package was delivered on 24 September 2002 to a building next to the European Patent Office, where it remained unnoticed for a period of several days. The delivery by the courier service to the mail address had therefore been interrupted and was not resumed by the courier service until 1 October 2002. Consequently, there had been no second delivery but an interrupted delivery by the courier service.

That interruption had been caused by an "other like reason" within the meaning of Rule 85(5) EPC. Since the batch of mail items included 24 documents, the present case was not just an individual case but rather a random circle of 24 legal persons had been affected by the legal disadvantages of the interrupted mail service. The failure in the delivery process in the present case was an unavoidable event and was at least similar to an interruption of the mail service on account of a local strike and identical in terms of its effects.

The principle of protection of legitimate expectations had to be extended to recommendations issued by the European Patent Office. If a decision of the President of the European Patent Office made reference to specific delivery services, it expressed that the European Patent Office had confidence in those delivery services.

With regard to documents mailed by the postal service or by courier, it was often the case that no information could be obtained from the European Patent Office by telephone the next day, so that one could not rely on such telephone confirmation actually being given.

With regard to the argument concerning electronic filing: in September 2002, electronic filing would not yet have guaranteed safe receipt of the patent application.

Also a filing by telex transmission, which would have involved massive costs given the large number of documents filed at the European Patent Office by the representative's law firm, was by no means 100% reliable, since corresponding information from the European Patent Office either could not be obtained at all or was very vague.

V. By a communication annexed to the summons for oral proceedings, which were requested as an auxiliary measure, the appellant was informed of the provisional opinion of the Board as to why the appeal could not succeed.

VI. At the end of the oral proceedings the appellant requested:

That the decision of the Receiving Section dated 1 March 2005 be set aside, that 24 September 2002 be allotted as the filing date of European patent application No. 02 022 014.1 and that the claimed



priority of the earlier Japanese patent application JP 290335 be acknowledged as being effective.

### **Reasons for the decision**

1. The appeal complies with Articles 106 to 108 EPC and Rule 64 EPC and is therefore admissible.
2. Request that the European patent application be accorded the filing date of 24 September 2002.

The filing date of a European patent application is the date of actual receipt of documents meeting the requirements of Article 80 EPC by the European Patent Office or one of the authorities specified in Article 75(1) EPC. Since the European Patent Office did not receive such documents until 1 October 2002, the European Patent Office rightly marked the documents with that date and not 24 September 2002 as the date of filing (see Rule 24(2) EPC) and thus rightly set that filing date in the contested decision.

It is not permissible under the provisions in the EPC to bring the filing date forward (see J 4/87, OJ 1988, 172; J 18/86, OJ 1988, 165). Even where the requirements for an extension of the priority period under either Rule 84a or Rule 85 EPC are satisfied, this does not lead to a change of the filing date. Rather, a legal fiction applies that the period has been observed, even though the filing date is in fact later than the expiry of the priority period (see Singer/Stauder, EPC, 2nd edn., Article 80, item 23).

3. Request that the European patent application be accorded the claimed priority of 24 September 2001.

Since the earlier application the priority of which is claimed was filed on 24 September 2001 and the filing date of 1 October 2002 therefore fell after expiry of the 12-month period to be observed under Article 87(1) EPC, priority can be claimed effectively only if the conditions are met under which a European patent application may be deemed to have been filed within the priority period.

- 3.1 Under Rule 84a EPC in conjunction with Article 1 of the Decision of the President of the European Patent Office dated 11 December 1998 concerning the application of Rule 84a EPC on the late receipt of documents (OJ 1999, 45, 46), a document is deemed to have been received in due time if it was posted or delivered to one of the delivery services recognised by the decision five days before expiry of the relevant time limit. Those requirements are not met in the present case.
- 3.2 Nor can there be any question of an extension of the priority period under Rule 85 EPC because, again, the relevant requirements are not met.

Whereas Rule 84a EPC serves the purpose of limiting the risk of delays in the postal service for senders who are not resident in one of the locations of the EPO points of receipt and are unable to hand documents in directly at an EPO filing office and, therefore, provides for a fiction that the time limit has been observed in individual cases (see Singer/Stauder, *ibid.*, Article 120, item 65), Rule 85 EPC deals with

extensions of the time limit which may generally be granted (see also the wording of Article 120(a) EPC).

Rule 85(1) EPC thus provides for an extension of the time limit to the next working day where the last day of the period is one on which the European Patent Office is not open for the receipt of documents.

Rule 85(2) and (3) EPC provides for an extension of the time limit in cases in which there is a general interruption or dislocation in the delivery of mail in a contracting state or between a contracting state and the European Patent Office. Under the third sentence of Rule 85(2) EPC, the duration of such an interruption or dislocation shall be as stated by the President. Such a statement did not happen in this case.

Rule 85(4) EPC governs extensions in cases in which the exceptional occurrences referred to interrupt or dislocate the proper functioning of the European Patent Office with the result that any communication from the Office to parties concerning the expiry of a time limit is delayed. The present case does not involve such circumstances.

Finally, under Rule 85(5) EPC, evidence may be offered that on any of the ten days preceding the day of expiration of a time limit, the mail service was interrupted or subsequently dislocated on account of war, revolution, civil disorder, strike, natural calamity or other like reason in the place where the party or his representative resides or has his place of business. Where such evidence can be produced, a

document received late is deemed to have been received in due time, provided that the mailing was effected within five days of the mail service being resumed.

Rule 85(5) EPC was inserted into the EPC following the events of 11 September 2001, with retrospective effect from that date, by decision of the Administrative Council dated 18 October 2001 (OJ 2001, 491) because the legal remedies available at that time, particularly those relating to the time limits specified in the EPC for which - as in the case of the priority period - no extension is possible, were inadequate to protect applicants affected from a loss of rights on account of the expiry of time limits.

Unlike the preceding paragraphs of Rule 85 EPC, Rule 85(5) EPC was drafted so as to place the burden of proof on the party asserting a general interruption or dislocation of the mail service, because, although Rule 85(2) EPC already made it possible to extend the time limit in the event of a general interruption or dislocation of the mail service, it was restricted to an interruption in the contracting states or between the contracting states and the European Patent Office. However, because the view was taken that only for the contracting states could the European Patent Office be sure of obtaining the information necessary to enable the President to announce a general interruption or dislocation, it was decided not to extend Rule 85(2) EPC to postal interruptions outside those states and to introduce a paragraph 5 corresponding to Rule 82.2 PCT and placing the burden of proof on the party (see CA/144/01, Part I, I. Introduction, particularly

point 3). Rule 85(5) EPC also applies to interruptions of the mail service in a contracting state.

The appellant has not put forward any facts which would support a finding that there was an interruption or dislocation of the postal service in the sense of Rule 85(5) EPC.

In the oral proceedings, the Board drew the appellant's attention to the fact, not addressed in the proceedings so far, that, even according to its own submissions, the dislocation of the delivery process on which its submissions are based did not occur in the place in which its representative has its place of business but rather at the European Patent Office's seat in Munich. However, according to the wording and objective of Rule 85(5) EPC, the rule requires that the general interruption or dislocation of the postal service arise at the place of despatch, not of receipt.

Moreover, the nature of the dislocation of the delivery on which the appellant bases its submissions does not meet the conditions imposed in Rule 85(5) EPC for the creation of a fiction that the priority period has been observed.

It was not the result of war, revolution, civil disorder, strike (in the sense of a collective cessation of work) or natural calamity. The appellant has neither argued the contrary nor maintained in the oral proceedings its argument relating to the term "strike".

The requirement of another "like reason" in Rule 85(5) EPC must be interpreted in the light of the purpose of the provision and of Article 120(a) EPC, according to which the Implementing Regulations are to specify the conditions under which time limits may be extended because the postal services are generally interrupted or subsequently dislocated.

As is suggested by the wording of Rule 85(5) EPC and confirmed by its legislative history as set out above, that rule supplements Rule 85(2) EPC and likewise relates to cases in which there is a general interruption or subsequent dislocation of the m a i l s e r v i c e on account of the events it specifies (in the German version: "der Postdienst ... unterbrochen oder im Anschluss an eine solche Unterbrechung gestört war"; in the French version: "le service postal a été interrompu ou perturbé par suite de cette interruption") and therefore, like Rule 85(2) EPC, Rule 85(5) EPC requires that more than one person using the mail service be affected or be theoretically capable of being affected by the interruption or dislocation, even if a merely minor or geographically limited interruption may be sufficient (established case law of the boards of appeal, see J 11/88, OJ 1989, 433; J 3/90, OJ 1991, 550; J 1/93, not published). However, the delay in the mailing process caused by the failure to deliver the package with the number 97 9231 6682 0 DE to the right address affected just one sender, namely the appellant's representative (see, in particular, J 1/93, point 2.1 ff of the reasons: loss of one of four mail bags of a private delivery service is not a general interruption within the meaning of Rule 85(2) EPC).

The Board fully recognises the significant adverse effect for the appellant's representative of the fact that a large number of clients (specifically: 24) have been affected by the failure by an employee of the delivery service engaged to deliver a single package to the right address and the package's remaining undiscovered by the wrong recipient for seven days. Nevertheless, it must be stressed that the time limit may be extended only under the conditions specified in Rule 85(5) EPC and that the European Patent Office has no discretion to grant such an extension.

The decisions of the German Federal Administrative Court cited by the appellant and relating to the interpretation of "force majeure" within the meaning of European Community law do not permit a different conclusion. According to those decisions, "force majeure" is a general term of Community law intended to prevent hardship arising from the application of provisions on time limits and penalties in cases involving special circumstances and thus to ensure compliance with the principle of proportionality in individual cases (see BVerwG 3 C 27.03 of 29 April 2004, p. 3).

However, the Federal Administrative Court expressly refrained from answering the question whether delivery services which, unlike the German postal service, have no monopoly must be treated as equivalent to the latter service. Moreover, it can be inferred from that court's judgment (*ibid.*, p. 3, end of point 16) that, even under Community law, exceptions to the legal consequences of a failure to observe time limits on

account of "force majeure" may be made only if they are provided for in Community law. Moreover, whilst Article 122(5) EPC expressly rules out re-establishment in respect of a priority period which has not been observed, the whole point of introducing Rules 84a and 85 EPC was to prevent hardship ensuing from the application of that article. The appellant has not submitted any argument to the effect that the drafters of the EPC have failed to comply with any obligation to prevent unjustifiable hardship arising from the exclusion under Article 122(5) EPC or that there are special circumstances which mean that, despite the failure to comply with the requirements of Rules 84a and 85 EPC, an unjustifiable prejudice will be suffered in this particular case, in breach of the principle of proportionality.

3.3 The EPC takes account of the aim of equal treatment of applicants and representatives not having their place of residence or business in one of the places where the European Patent Office is located and therefore unable to hand their documents in directly in Rule 84a EPC and the President's decision of 11 December 1998 on that rule and renders the creation of a fiction of observance of the time limit subject to the conditions laid down in those provisions (see *Singer/Stauder*, *ibid.*, Article 120, item 6). Those conditions are not satisfied in the present case. The appellant therefore cannot argue that the claimed priority must be acknowledged on the grounds of equal treatment.

3.4 Application of the principle of good faith (protection of legitimate expectations) in the present case would lead neither to accordance of an earlier filing date



nor to an extension of the priority period. (With respect to the conditions under which an application may be deemed properly filed on the grounds of a legitimate expectation and can thus be accorded a filing date, see J 18/96, OJ 1998, 403.) In accordance with that principle, which also applies to proceedings before the European Patent Office, the measures taken by the European Patent Office must not violate the reasonable expectations of parties to such proceedings (see G 2/97, OJ 1999, 123, with references to the established case law). Legitimate expectations to be protected in accordance with that principle can be derived by a party only from the following categories of information provided by the European Patent Office:

- (a) information issued by the EPO in an individual case (e.g. communications)
- (b) information contained in official EPO announcements of general applicability (e.g. Guidelines)
- (c) established practice of departments of the EPO and
- (d) decisions of the Enlarged Board of Appeal

(see T 905/90, OJ 1994, 306; J 27/94, OJ 1995, 831; J 25/95, not published).

In the confirmation certificate issued by the European Patent Office for the European patent application, 1 October 2002 is marked as the filing date and, in further communications relating to the present application procedure, the European Patent Office

likewise left no room for doubt that it regarded the claimed priority as invalid on account of the failure to comply with the time limit. This means that the present case is not one falling under category (a) above, such as that which was the subject of the decision in J 18/96.

The decision of the President of the European Patent Office dated 11 December 1998 on the application of Rule 84a EPC may be regarded as an announcement of the kind referred to in (b) above. However, in addition to specifying in Article 2 the mail services generally recognised by the European Patent Office under Rule 84a EPC, the President laid down in Articles 1 and 3 additional requirements for an extension of the time limit under Rule 84a EPC which were not met in the present case owing to the appellant's late sending of the application documents to its representative.

The idea that the European Patent Office intended to protect applicants and parties who have failed to meet the requirements of Rule 84a EPC in conjunction with the President's decision on that rule dated 11 December 1998 from the risks of mailing merely because they engaged one of the delivery services recognised in Article 2 of the decision runs counter to the wording of the President's decision and cannot be accepted.

Should the appellant's allegation that it was impossible to obtain from the EPO an acknowledgement of receipt of the application documents on the date of receipt be an attempt to claim that the applicants were compelled to use recognised delivery services and that the European Patent Office should therefore protect

them against the risks of mailing, the Board has already pointed out in the oral proceedings that, in accordance with point 6.3 of the Notice from the European Patent Office dated 2 June 1992 concerning the filing of patent applications and other documents (OJ 1992, 306), prompt confirmation of receipt can be ensured if the request and evidence of payment of the administrative fee or a debit order is enclosed with the documents or transmitted at the same time and if the postal, telex or fax address to which the receipt is to be sent is also given. This still applies today (see Notice from the European Patent Office dated 6 December 2004 concerning the filing of patent applications and other documents, OJ 2005, 44).

- 3.5 Since Article 122(5) EPC rules out re-establishment in respect of the priority period which the appellant failed to observe and the non-observance of that period cannot otherwise be remedied, the appeal must fail.

## **Order**

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

The appeal is dismissed.

Registrar:

Chairwoman:

P. Cremona

B. Günzel