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Anmeldenummer / Filing No / N° de la demande : 83 105 399.6
Veröffentlichungs-Nr. / Publication No / N° de la publication : 96351
Bezeichnung der Erfindung: Pilferproof Cap
Title of invention:
Titre de l'invention :
Klassifikation / Classification / Classement : B 65 D 41/34

ENTSCHEIDUNG / DECISION
vom / of / du 29 November 1985

Anmelder / Applicant / Demandeur : Consumers Glass

~~Patentinhaber / Proprietor of the patent /
Titulaire du brevet :~~

~~Einsprechender / Opponent / Opposant :~~

Stichwort / Headword / Référence : Late request for correction/Consumers glass

Rule 88
EPU / EPC / CBE
Correction of mistakes - late request
- non-payment of designation fee"
"Protection of third parties"

Leitsatz / Headnote / Sommaire

1. A mistake in a designation of a Contracting State may be corrected in accordance with Rule 88 EPC only if a request has been made for correction sufficiently early for a warning to be included in the publication of the application so that third parties can rely on the application as filed (following former Decisions).
2. If the designation fee for a State was paid, neither within the time limit under Article 79 (2) nor within the period of grace under Rule 85a EPC together with the surcharge, such failure cannot be corrected on the basis of and in conjunction with the correction of an error according to Rule 88 first sentence EPC.

**Europäisches
Patentamt**
Beschwerdekammern

**European Patent
Office**
Boards of Appeal

**Office européen
des brevets**
Chambres de recours



Case Number: J 21/84

DECISION
of the Legal Board of Appeal

of 29 November 1985

Appellant:

**Consumers Glass Company Ltd.
703 Evans Avenue
Etobicoke
Ontario M9C 5A6
CANADA**

Representative:

**Kuhnen & Wacker Patentanwälte
Schneeggstraße 3-5
Postfach 1729
D-8050 Freising
DEUTSCHLAND**

Decision under appeal:

**Decision of the Receiving Section of the
European Patent Office of 27 June 1984 refusing
the request of correction of a mistake made in
designating States in a European patent
application.**

Composition of the Board:

Chairman: R. Singer
Member: F. Benussi
Member: O. Bossung

Summary of Facts and Submissions

I On 31 May 1983 a professional representative before the EPO, acting on the written instructions (letter dated 19 May 1983) of a Canadian patent agent representing the Applicant, filed in the latter's name a European patent application bearing number 83 105 399.6.

The application claimed priority from a Canadian national application made on 3 June 1982.

II By telex dated 29 June 1983 the European representative informed the Applicant's Canadian patent agent that in the absence of instructions as to which Contracting States were to be designated he had designated all of them and that the due date for payment of the relevant fees was 30 June 1983.

III On 29 June 1983 the Canadian patent agent's secretary sent a telex to the European representative, indicating the States to be designated, viz. Belgium, the Federal Republic of Germany, the United Kingdom, the Netherlands and Switzerland.

IV On 30 June 1983 the European representative paid five designation fees for the above-mentioned Contracting States. By letter of 29. July 1983 he indicated the States whose designations should be considered withdrawn, mentioning expressly France.

V After some correspondence the Receiving Section confirmed, on 28 September 1983, that under Article 91(4) EPC the designations of France, Italy, Luxembourg, Austria and Sweden were deemed withdrawn.

J 21/84

In application of Rule 89 EPC the decision given on 29 November 1985 is hereby to be corrected as follows:

page 4, line 17/18, replace
"jurisdiction" by "jurisprudence".

The Registrar:


J. Rückerl

The Chairman:


P. Ford



Europäisches
Patentamt
Beschwerdekammern

European Patent
Office
Boards of Appeal

Office européen
des brevets
Chambres de recours



Case Number: J 21/84

DECISION of 21 March 1986
correcting errors in the decision of the Legal Board of Appeal
of 29 November 1985

Appellant: Consumers Glass Company Ltd
703 Evans Avenue
Etobicoke
Ontario M9C 5A6
Canada

Representative: Kuhnen & Wacker Patentanwälte
Schneeggstraße 3-5
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D-8050 Freising
Deutschland

Composition of the Board:

Chairman: P. Ford
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- VI On 21 December 1983 the European patent application was published showing Belgium, the Federal Republic of Germany, the United Kingdom, the Netherlands and Switzerland as designated States.
- VII On 20 March 1984 the European representative informed the European Patent Office by letter that his Canadian colleague had not learned until 27 February 1984 that the designation of France had been omitted, at the same time filing a request for correction to the designations together with a sworn affidavit by the Canadian patent agent to the effect that the latter had given precise instructions to his secretary on 29 June 1983 for the designation of the following States: Belgium, the Federal Republic of Germany, France, the United Kingdom, the Netherlands and Switzerland.
- Owing to an error or oversight on the part of his secretary, France was not included among the States to be designated in the telex dated 29 June 1983.
- VIII On 27 June 1984 the Receiving Section issued the contested decision, refusing the request for correction on the grounds that it had been filed only after publication of the application and that a decision in favour of the request would lead to legal uncertainty and loss of potential rights for third parties.
- IX The Appellant's representative filed an appeal against that decision, together with a Statement of Grounds, both of which were received in September 1984, requesting that the decision be revoked and that the designated States be corrected under Rule 88 EPC to include the designation of France. The appeal fee was duly paid on 6 September 1984.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and is therefore admissible.
2. It is a main argument of the Appellant that the express withdrawal of France in his letter of 29 July 1983 could be corrected.
3. Correcting a mistake in the designation of States under Rule 88 EPC is a question that has already been considered in other cases. In the cases J 08/80, OJ EPO 1980, 293; J 04/80, OJ EPO 1980, 351 and J 12/80, OJ EPO 1981, 143, correction of States was allowed. The request was made in a very short time after filing of the European patent application and therefore in ample time before its publication. This fact had been emphasized in the Decisions mentioned.
4. In the Decision J 03/81, OJ EPO 1982, 100, it has been held that in the Euro-PCT application concerned a request for correction of States is clearly late, and cannot be allowed because it has been made after the application has been published. The reason is, that it should be possible to add in the application as published a warning to third parties that a request for correction of States has been made.

As the public interest is the same in the case of European patent applications this principle is not limited to Euro-PCT applications. Moreover, this principle does not only apply to correction of States in general but also insofar as correction of priority claims is requested, see e.g. the Decisions J 04/82, OJ EPO 1982, 385; J 03/82, OJ EPO 1983, 171; J 14/82, OJ EPO 1983, 121.

5. It is true and has been mentioned in the communication of the Board to the appellant that the Legal Board of Appeal, in the first phase of its decision-making, has allowed correction of errors (designation of States and priorities) after the application has been published (J 12/80, OJ EPO 1981, 143; J 03/82, OJ EPO 1983, 171).

But in all these applications the request for correction had been presented early enough to enable publication of a warning together with the application. That this had not been done, was caused by the uncertainty of the Office as to how to proceed at that time.

In these Decisions the danger existing for the public due to the absence of a warning had to be balanced against the injustice caused to the applicant. At the time, when these Decisions had been rendered, the legal situation and the practice of the EPO were not clear.

But this situation has changed on the basis of the jurisdiction of the Boards of Appeal concerning the correction of errors and the practice followed by the EPO. At present, it is generally known among the users of the European patent system that they can rely in principle on the fact that after publication of a European patent application no other State will be added by way of correction.

6. Irrespective of whether correction of the error mentioned could be allowed, the loss of rights has occurred, according to Article 91(4) EPC, because payment of the corresponding designation fee for France has not been effected within the time limit of Article 79(2) EPC or Rule 85a EPC.
7. It must be stressed in the present case that in contrast to the cases mentioned in paragraph 3 where correction was allowed, the designation fee for France has not been paid within the time limits mentioned above.

Thus in the present case even if Rule 88 EPC could have been applied to the designation which is purported to be missing, because the corresponding designation fee was not duly paid, such failure cannot be corrected.

8. An omitted payment does not fall within Rule 88 (1) EPC since it is not a linguistic error, nor an error of transcription, nor a "mistake in any document". The omission of the payment, although related to the failure to designate France, is a separate fact that cannot be remedied.
9. Finally, it should be stated that the possibility of restitution of rights in respect of the time limit for payment of the designation fees is expressly excluded by Article 122(5) EPC (cf. J 18/82 OJ EPO 1983, 441). This express provision cannot be set aside by Rule 88 EPC. In this respect the Article of the Convention takes precedence (see Article 164 (2) EPC).

Order

For these reasons, it is decided that:

The Appeal against the Decision of the Receiving Section of the European Patent Office dated 27 June 1984 is rejected.

The Registrar:

J. Rückerl

The Chairman:

R. Singer