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**D E C I S I O N**  
**of 4 February 2002**

**Case Number:** T 1109/01 - 3.2.7

**Application Number:** 97952625.8

**Publication Number:** 0954410

**IPC:** B24D 3/28

**Language of the proceedings:** EN

**Title of invention:**

Production of patterned abrasive surfaces

**Applicant:**

NORTON COMPANY

**Opponent:**

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**Headword:**

-

**Relevant legal provisions:**

EPC Art. 113

EPC R. 67

**Keyword:**

"Violation of the right to be heard (yes)";

"reimbursement of the appeal fee (yes)"

**Decisions cited:**

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**Catchword:**

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Boards of Appeal

Chambres de recours

**Case Number:** T 1109/01 - 3.2.7

**D E C I S I O N**  
**of the Technical Board of Appeal 3.2.7**  
**of 4 February 2002**

**Appellant:** NORTON COMPANY  
1 New Bond Street  
Box No. 15138  
Worcester  
Massachusetts 01615-0138 (US)

**Representative:** Richebourg, Michel François  
Cabinet Michel Richebourg  
"Le Clos du Golf"  
69, rue Saint-Simon  
F-42000 Saint Etienne (FR)

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 14 May 2001  
refusing European patent application  
No. 97 952 625.8 pursuant to Article 97(1) EPC.

**Composition of the Board:**

**Chairman:** R. Burkhart  
**Members:** J. H. P. Willems  
H. E. Felgenhauer

## **Summary of Facts and Submissions**

- I. The appellant (applicant) lodged an appeal against the decision of the Examining Division of 14 May 2001, refusing the European patent application No. 97 952 625.8.
- II. In a first official communication dated 29 September 2000 the Examining Division with reference to the IPER of 12 April 1999, found that process claim 1 lacked clarity and that product claim 14 was not novel.
- III. With his reply dated 14 December 2000 the applicant filed a clarified claim 1 and disputed the objection of the Examining Division concerning the novelty of claim 14.
- IV. With letter dated 31 January 2001 the applicant was summoned to oral proceedings, scheduled on 3 May 2001. According to the decision under appeal, in the annex to the summons the argumentation of the Examining Division regarding the lack of novelty of claim 14 was once again presented.
- V. With fax of 10 April 2001 the applicant requested the cancellation of the oral proceedings, objecting to the costs of such proceedings, and announced that he would be providing a detailed response to the arguments of the Examining Division as presented in the summons to the oral proceedings as soon as possible.
- VI. The Examining Division did not communicate to the applicant a reaction to this request. The oral proceedings took place as scheduled on 3 May 2001 without the presence of the applicant. At the end of

the oral proceedings the Examining Division announced its decision to refuse the application.

VII. On 7 May 2001 the applicant commented by fax on the argumentation of the Examining Division regarding the novelty of claim 14.

VIII. On 14 May 2001 the decision under appeal was sent to the applicant.

IX. The appellant requests the setting aside of the decision under appeal and a further discussion of the application.

Furthermore the appellant requests the refund of the appeal fee.

### **Reasons for the Decision**

1. The appeal is admissible.
2. The appeal is also allowable.
3. Although the decision under appeal mentions that the appellant had sent notification on 10 April 2001 that he would not be attending the oral proceedings, no such notification is in the file.
4. The fax of the appellant of 10 April 2001, that is in the file, does not contain a notification that he would not be attending oral proceedings but a request to cancel oral proceedings and to allow further discussion in writing.

5. As far as can be seen from the file the Examining Division never reacted on this request, with the result that the oral proceedings took place without the presence of the appellant.
6. In the view of the Board this constitutes a clear and serious procedural violation of the right of the appellant to be heard as guaranteed by Article 113 of the European Patent Convention.
7. This violation requires the setting aside of the decision under appeal and justifies the reimbursement of the appeal fee (Rule 67 EPC).

## **Order**

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

1. The decision under appeal is set aside and the case is remitted to the first instance with the order to reopen the substantial examination of the application.
2. Reimbursement of the appeal fee to the appellant is ordered.

The Registrar:

The Chairman:

L. Martinuzzi

A. Burkhart