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D E C I S I O N
of 5 July 2004

Case Number: T 0444/03 - 3.2.2

Application Number: 94907750.7

Publication Number: 0688199

IPC: A61F 11/14

Language of the proceedings: EN

Title of invention:
Cover for a sealing ring of an earmuff

Patentee:
Dalloz Safety Aktiebolag

Opponent:
Peltor AB

Headword:
-

Relevant legal provisions:
EPC Art. 116
EPC R. 67

Keyword:
"Substantial procedural violation (yes)"
"Reimbursement of the appeal fee (yes)"

Decisions cited:
-

Catchword:
-

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Case Number: T 0444/03 - 3.2.2

D E C I S I O N
of the Technical Board of Appeal 3.2.2
of 5 July 2004

Appellant: (Opponent)
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Representative:
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Respondent: (Proprietor of the patent)
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Representative:
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Decision under appeal:
Interlocutory decision of the Opposition Division of the European Patent Office posted 24 February 2003 concerning maintenance of European patent No. 0688199 in amended form.

Composition of the Board:

Chairman: T. Kriner
Members: D. Valle
E. J. Dufrasne

Summary of Facts and Submissions

I. The appellant (opponent) filed an appeal on 1 April 2003 against the interlocutory decision of the opposition division posted on 24 February 2003 to confirm the patent in amended form. The fee for the appeal was paid simultaneously and the statement setting out the grounds of appeal was received on 17 June 2003.

II. The decision under appeal stated in sections A03) and A12) that the opponent did not request for oral proceedings.

III. However, in his statement of grounds the appellant complained that with his letter of 6 February 2002 he had requested oral proceedings, and held that the opposition division, not having complied with this request, committed a substantial procedural violation with respect to Article 116 EPC. He subsequently requested the board to consider on this basis the possibility to set aside the decision under appeal and to remit the case to the first instance for further prosecution. Furthermore he requested auxiliarily oral proceedings.

IV. With the letter of 30 June 2003 the appellant filed a copy of his letter of 6 February 2002 and a copy of an acknowledgement of receipt bearing the stamp of the EPO as well as a reference to the concerned patent, and having the date 7 February 2002.

V. The respondent replied with letter of 19 December 2003 arguing that the appellant failed to prove that the letter of 6 February 2002 was actually filed and received by the European patent office and requested auxiliarily oral proceedings in case the board intends not to maintain the patent in accordance with the decision of the opposition division.

VI. With letter of 5 February 2004 the appellant countered that - by filing a copy of the letter and of the receipt - he indeed proved his assertion.

VII. On 1 April 2004 the board issued a communication stating that it intended to set aside the decision under appeal and to remit the case to the first instance for further prosecution, since the decision of the first instance was based on a substantial procedural violation of the right to be heard. Moreover, the board added that oral proceedings did not appear to be necessary, since they could only refer to the procedural violation.

VIII. The appellant answered with letter of 8 April 2004 and agreed to the intended remittal without oral proceedings. Furthermore he requested that the appeal fee be reimbursed.

The respondent did not answer to the board's communication.

Reasons for the Decision

1. The appeal is admissible.

2. Substantial procedural violation of the right to have, upon request, oral proceedings (Article 116(1) EPC)

2.1 The board carried out an internal inquiry at the European patent office on its own motion in order to ascertain whether or not the request for oral proceedings according to the letter of 6 February 2002 has been received by the European patent office. It was established that a letter has been indeed received by the EPO the 7 February 2002, as stated by the appellant and shown by his acknowledgment of receipt (see section IV above). However, in spite of an exhaustive search, the original paper document could not be traced, nor could its content be retrieved with absolute certainty.

Considering however

- that the statement of the appellant about the date of filing of the letter is supported by the objective internal findings,

- that the temporal frame in which the letter has been filed makes the assertion of the appellant credible, according to which the content of the letter was indeed a request for oral proceedings,

- and after having carefully examined the copies of the letter of 6 February 2002 and of the acknowledgment of receipt of 7 February 2002 filed

by the appellant bearing the reference of the concerned patent, the board concludes that the missing letter has to be regarded as a letter containing a request for oral proceedings.

As a consequence, the decision under appeal contains a substantial procedural violation of the right to have oral proceedings upon request (Article 113(1) EPC).

3. *Reimbursement of the appeal fee (Rule 67 EPC)*

The board sees it equitable to order the reimbursement of the appeal fee, since the appeal is allowable and the decision under appeal is based on a substantial procedural violation of the right to be heard.

4. *Oral proceedings*

With respect to the fact that the appellant withdrew his request for oral proceedings (see the letter of 8 April 2003), and the respondent requested oral proceedings only for that case where the board intended not to maintain the patent in accordance with the decision of the opposition division, there was no necessity to hold oral proceedings in the present case.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the first instance for further prosecution.

3. The appeal fee shall be reimbursed.

The Registrar: The Chairman:

V. Commare T. Kriner