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D E C I S I O N
of 18 April 2005

Case Number: T 0694/03 - 3.2.6

Application Number: 95302029.4

Publication Number: 0711627

IPC: B23K 26/00

Language of the proceedings: EN

Title of invention:

Process for preweakening an automotive trim cover for an air bag deployment opening

Patentee:

TIP ENGINEERING GROUP, INC.

Opponents:

JENOPTIK AG
SAI AUTOMOTIVE SAL GMBH
Johnson Controls GmbH

Headword:

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Relevant legal provisions:

EPC R. 58(1)

Keyword:

"Procedural violation - yes"
"Remittal to the first instance - yes"

Decisions cited:

T 0789/95

Catchword:

-



Case Number: T 0694/03 - 3.2.6

D E C I S I O N
of the Technical Board of Appeal 3.2.6
of 18 April 2005

Appellant:
(Proprietor of the patent) TIP ENGINEERING GROUP, INC.
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Respondents:
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(Opponent 03)

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Representative:

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted 25 April 2003
revoking European patent No. 0711627 pursuant
to Article 102(1) EPC.**

Composition of the Board:

Chairman: P. Alting van Geusau
Members: G. C. Kadner
R. T. Menapace

Summary of Facts and Submissions

- I. The appeal is from the decision of the Opposition Division posted on 25 April 2003 to revoke the European patent No. 0 711 627, granted in respect of European patent application No. 95 302 029.4.
- II. In the decision under appeal the Opposition Division considered that none of the Patentee's requests met the requirements of the EPC.
- III. The Appellant (Patentee) lodged an appeal, received at the EPO on 24 June 2003, against this decision and simultaneously paid the appeal fee. With the statement setting out the grounds of appeal, received at the EPO on 28 August 2003, the Appellant requested to maintain the patent with the claims according to the main request on which the Opposition Division's decision was based. Auxiliarily he requested remittal of the case to the department of first instance and reimbursement of the appeal fee because of a procedural violation, or maintenance of the patent on the basis of two additional auxiliary requests and oral proceedings.
- IV. In a communication dated 17 November 2003 the Board expressed the preliminary opinion that the reasons given by the Appellant in respect of the procedural violation appeared to justify remittal to the department of first instance and reimbursement of the appeal fee. However, since remittal was requested only auxiliarily the main request would first have to be dismissed before a decision on the auxiliary request could be taken. However, if the Board would so decide a

precondition for reimbursement of the appeal fee under Rule 67 EPC would not be fulfilled.

V. With letter dated 16 January 2004 the Appellant changed the order of his requests, so that the main request to set aside the decision under appeal, to remit the case to the first instance and to order reimbursement of the appeal fee became his main request.

VI. Respondent I (Opponent 01) and Respondent III (Opponent 03) requested dismissal of the appeal and opposed remittal to the first instance.

As to oral proceedings Respondent I requested them only in case the Board envisaged allowing one of the Appellant's auxiliary requests, whereas Respondent III requested them without such limitation.

Respondent II (Opponent 02) did not make any submissions.

VII. In its communication accompanying the summons for oral proceedings dated 8 February 2005 the Board maintained its preliminary view that, due to a procedural violation committed during opposition proceedings, remittal to the first instance and reimbursement of the appeal fee was justified.

VIII. After Respondent III had withdrawn his request for oral proceedings by letter dated 15 March 2005, the oral proceedings were cancelled.

IX. In support of his requests the Appellant essentially made the following submissions:

A written submission dated 12 April 2002 by Opponent 03 had not been notified to the Appellant, and consequently he was prevented from arguing against these submissions, to draft new claims in response, and to prepare himself duly for the oral proceedings. The submissions in question comprised 24 pages, and through lack of knowledge of the content of these pages the Appellant was placed at a disadvantage when compared with the position of the Respondents. Thus the Appellant had not been given the same procedural rights as the other parties to the proceedings.

X. The submissions of the Respondents can be summarised as follows:

Respondent I held that, since in his written submission dated 12 April 2002 neither new grounds for opposition nor new documents nor new facts or arguments were brought forward, the Appellant could not have been surprised or placed at a disadvantage during the oral proceedings in opposition.

Respondent III doubted that the Appellant could not have been aware of the submissions in view of the Opposition Division's preliminary opinion sent together with the summons to attend oral proceedings. Hence he saw no reason to remit the case to the first instance.

Reasons for the Decision

1. The appeal is admissible.
2. *Procedural violation*

In line with decision T 789/95 the Board considers the principle that all parties must be accorded the same procedural rights to be infringed where a party did not receive another party's written submissions. This must be assumed to have happened here with the reply (24 pages) of Respondent I in his letter dated 12 April 2002, as the Proprietor denied having received it before the oral proceedings, and the file contained no indication that a copy of this reply had actually been forwarded to him.

It is irrelevant what was the cause for this omission and whether the Proprietor could have discovered it in time, in that as a consequence he was, in contrast to the other parties and the members of the Opposition Division, not aware of this document and its content during the oral proceedings, at the end of which the decision under appeal was given. Under these circumstances the Appellant and his representative were unable to take into account and to react to comprehensive written submissions of an opposing party on core issues dealt with in the decision under appeal through which the Appellant's patent was revoked. This affected the Appellant and his representative not only during the oral proceedings as such, but, as the internal letter dated 5 December 2002 shows, already in the course of the preparations for them, including the representative's letter dated 28 February 2003 with

amended sets of claims submitted in preparation for the oral proceedings. It cannot reasonably be excluded that the decision under appeal was at least indirectly influenced by these circumstances.

Therefore a substantial procedural violation to the disadvantage of the Appellant is established which in the present case also qualifies for reimbursement of the appeal fee in accordance with Rule 67 EPC.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.
3. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:

M. Patin

P. Alting van Geusau