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D E C I S I O N
of 6 March 2006

Case Number: T 0047/04 - 3.5.02

Application Number: 95943982.9

Publication Number: 0892971

IPC: G08C 21/00

Language of the proceedings: EN

Title of invention:

Absolute optical position determination

Applicant:

Anoto AB

Opponent:

-

Headword:

-

Relevant legal provisions:

EPC Art. 121

EPC R. 51(6), 67

Keyword:

"Right to submit observations not respected by examining division"

"Procedural violation (yes)"

"Reimbursement of appeal fee"

"Further processing of application - admissible"

Decisions cited:

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Catchword:

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Case Number: T 0047/04 - 3.5.02

D E C I S I O N
of the Technical Board of Appeal 3.5.02
of 6 March 2006

Appellant: Anoto AB
Scheelevägen 19C
S-223 70 Lund (SE)

Representative: Perklev, Karin Cecilia
Anoto Group AB
Scheelevägen 19C
S-223 70 Lund (SE)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 7 August 2003
refusing European application No. 95943982.9
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: W. J. L. Wheeler
Members: J.-M. Cannard
E. Lachacinski

Summary of Facts and Submissions

I. This is an appeal against the decision of the examining division to refuse European patent application No. 95 943 982.9.

II. The relevant history of the case before the first instance may be summarized as follows:

Oral proceedings were held before the examining division on 7 November 2002, at which the examining division announced that it intended to grant a European patent based on the description, pages 1 to 10, and claims 1 to 17, all as filed by the applicant in the oral proceedings, and the drawings, sheets 1/4 to 4/4 as published (WO 97/22959).

A communication under Rule 51(4) EPC was issued on 22 November 2002, informing the applicant of the text in which it was intended to grant the patent. The indicated text was the same as that filed in the oral proceedings except for an amendment concerning the position of "at least one" in line 3 of claim 1.

With a letter dated 15 May 2003, received at the European Patent Office on 21 May 2003, the applicant requested amendments under Rule 86(3) EPC and Rule 88 EPC in accordance with Rule 51(5) EPC. The requested amendments included many changes to the wording of claims 1 to 17 and the addition of extra claims 18 to 20.

- Then, instead of following the procedure laid down by Rule 51(6) EPC, the examining division issued the decision to refuse the application.
- III. In a communication dated 23 September 2005, the Board drew attention to the long history of the case and the exceptionally large number of times the application had been amended. In exercise of its power under Article 111(1) EPC, the Board informed the appellant that it did not consent to the requested amendments because they attempted to broaden the claims and would prolong the examination procedure, and, pursuant to Rule 51(6) EPC, gave the appellant an opportunity to submit observations. The Board also observed that the correction made by the examining division in line 3 of claim 1 appeared to be justified.
- IV. No reply was received within the time limit set for replying to the Board's communication. A communication concerning loss of rights pursuant to Rule 69(1) EPC was issued on 14 December 2005. According to the advice of delivery, the communication was received by the appellant on 2 January 2006.
- V. With a letter dated 13 February 2006, the appellant requested further processing of the application and that a patent be granted based on the text indicated in the communication under Rule 51(4) EPC, and filed translations of the claims into French and German.

Reasons for the Decision

1. The appeal is admissible.
2. The request for further processing was filed in due time in accordance with Article 121(2) EPC, and is admissible.
3. It is clear from the communication under Rule 51(4) EPC that the examining division considered the application met the requirements of the EPC. The Board sees no reason to disagree with this.
4. As appears from paragraph II above, the examining division did not follow the procedure laid down by Rule 51(6) EPC. Because of this, the applicant was forced to file the present appeal in order to obtain his right to submit observations or amendments under Rule 51(6). It is therefore equitable to order 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 with the order to grant a patent in the following version:

Claims 1 to 17; Description, pages 1 to 10; and drawings, sheets 1/4 to 4/4 as enclosed in the communication under Rule 51(4) EPC dated 22 November 2002.

3. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:

U. Bultmann

W. J. L. Wheeler