

**Internal distribution code:**

- (A) [ - ] Publication in OJ  
(B) [ - ] To Chairmen and Members  
(C) [ - ] To Chairmen  
(D) [ X ] No distribution

**Datasheet for the decision  
of 15 September 2016**

**Case Number:** T 0353/14 - 3.4.03

**Application Number:** 07115828.1

**Publication Number:** 1903849

**IPC:** H05K7/20, F28D19/04

**Language of the proceedings:** EN

**Title of invention:**

Apparatus and method for cooling a space in a data center by means of recirculation air

**Patent Proprietor:**

KyotoCooling B.V.

**Opponent:**

MUNTERS EUROPE AB

**Headword:**

**Relevant legal provisions:**

EPC 1973 Art. 54(2)

**Keyword:**

Novelty - internet disclosure - availability to the public (no)

**Decisions cited:**

T 0743/89, T 0253/02, T 0804/05, T 1134/06, T 0286/10,  
T 2227/11

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

European Patent Office  
D-80298 MUNICH  
GERMANY  
Tel. +49 (0) 89 2399-0  
Fax +49 (0) 89 2399-4465

Case Number: T 0353/14 - 3.4.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.4.03**  
**of 15 September 2016**

**Appellant:** MUNTERS EUROPE AB  
(Opponent) Isafjordsgatan 1  
164 26 Kista (SE)

**Representative:** Awapatent AB  
P.O. Box 45086  
104 30 Stockholm (SE)

**Respondent:** KyotoCooling B.V.  
(Patent Proprietor) Algolweg 2  
3821 BH Amersfoort (NL)

**Representative:** V.O.  
P.O. Box 87930  
2508 DH Den Haag (NL)

**Decision under appeal:** **Decision of the Opposition Division of the European Patent Office posted on 6 December 2013 rejecting the opposition filed against European patent No. 1903849 pursuant to Article 101(2) EPC.**

**Composition of the Board:**

**Chairman** G. Eliasson  
**Members:** T. M. Häusser  
C. Heath

## Summary of Facts and Submissions

- I. The appeal of the opponent concerns the decision of the opposition division to reject the opposition filed against the European patent No. EP-B-1 903 849 (Article 101(2) EPC).
- II. The opposition had been filed against the patent as a whole. Grounds of opposition were lack of novelty and lack of inventive step (Articles 100(a), 54(1) and (2), and 56 EPC 1973).
- III. During the oral proceedings before the board the appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed, in the alternative that the decision under appeal be set aside and the patent be maintained on the basis of one of auxiliary requests 1 or 2, both filed with letter dated 25 August 2014.

The respondent also requested that the oral proceedings be postponed in order to prepare a proper response to the new submissions and in order to enable the hearing of witnesses, and that the costs for the present oral proceedings be reimbursed; further, should the oral proceedings not be postponed and should D10 be found to be prior art, that the case be remitted to the department of first instance for further processing.

- IV. Reference is made to the following documents:

D10: N. Rasmussen, *Electrical Efficiency Modeling of Data Centers*, White Paper 113, Rev 2005-1,

- D11: Printout of Internet Archive, WayBack Machine, 12 December 2005, APC, White Papers
- D19: N. Rasmussen, *Electrical Efficiency Modeling of Data Centers*, White Paper #113, Rev 2006-1,
- D25: Printout of email dated 15 January 2014 of Mr. V. Avelar, with annexed copy of document WP113rev1SN1.pdf
- D26: Printout of email dated 10 August 2014 of Mr. V. Avelar
- D27: Printout of Internet Archive, WayBack Machine, 15 January 2007, APC, White Papers
- D28: Printout of Internet Archive, WayBack Machine, 1 January 2008, APC, White Papers
- D29 Titles and abstracts of White Papers 118, 114, 157, and 104 and APC website relating to white papers, retrieved on 13 September 2016,
- Annex I: N. Rasmussen, *Electrical Efficiency Modeling of Data Centers*, White Paper 113, Rev 2005-0,
- Annex II: N. Rasmussen, *Electrical Efficiency Modeling for Data Centers*, White Paper #113, WP 113-0.

V. The parties argued essentially as follows:

(a) Procedural issues

The *appellant* argued that further evidence to prove the public availability of document D10 was filed in view of the decision and the preliminary opinion of the board. The statement of Mr. Avelar was only received on 10 August 2016, i. e. one day before the letter of 11 August 2016, which showed that there was no intention to delay the submission.

The *respondent* argued that the appellant chose to file only limited evidence with the letter setting out the grounds of appeal and filed the further submissions at very late stages of the proceedings. Should the submissions be admitted into the proceedings, the respondent would be unable to properly respond to them and would be precluded from fair proceedings. The respondent might also suffer more severe consequences in losing the patent than the appellant who could still seek revocation of the patent before national courts.

(b) Public availability of document D10

The *appellant* argued that the copyright notice and revision date were equivalent to a printing date on printed matter. Moreover, commercial white papers were meant to indirectly promote the products or services of the publisher, were expensive to produce, and might be topical only for a short time, which were all drivers to release the paper soon after being finalized.

Furthermore, it was not relevant for establishing the date of publication of D10 that the URL from which that document had been downloaded was no longer operable when the opposition division was preparing for the oral proceedings. Moreover, document D10, which was labelled "Rev. 2005-1", needed not be published after the date of first discovery of the "Rev. 2005-0" version (8 December 2006) by the WayBack Machine.

As further proof of the publication of D10, document D25 was submitted which contained a statement by Mr. Avelar that the document "WP113rev1SN1.pdf" was first released on 26 October 2005. Moreover, document D26 was submitted which contained Mr. Avelar's supplementary statements indicating that a link was automatically

created to a document and displayed on the APC website, when the status of that document was changed to "released". A log file for the White Paper 113 was also included in D26 and showed that the title and abstract were entered manually which explained why the title in D11 were not verbatim the same as the title and summary as included in D10 itself. In addition, the image of the document properties of the document with file name "WP113rev1SN1.pdf" was submitted which showed that the file size of that document matched the file size of document "WP-113V1" as reported in D11. This could also be demonstrated by submission of the electronic file. In order to further demonstrate the reliability of the file size as identifier, documents D27 and D28 showing printouts of the WayBack Machine relating to APC white papers of 15 January 2007 and 1 January 2008, respectively, were submitted as well as the images of the document properties of the documents with file names "NRAN-66CK3D\_R1\_EN.pdf" and "Electrical-EfficiencyModelling.pdf".

Finally, the *appellant* argued that the log file showed that Mr. Avelar updated the summary on 3 November 2007 explaining that the abstract and title differed in documents D10 and D11. He also submitted titles and abstracts of four white papers and the corresponding titles and abstracts as retrieved from the APC website in order to show that there was no verbatim match between them, just like for documents D10 and D11.

The *respondent* argued that the copyright notice in D10 had been provided by its author, typically added to the document while it is being drafted, and had no link to a publication date. Document D11 could not support the public availability of D10 as the title, the reference "WP-113V1" and the abstract did not correspond to D10.

The large number of white papers listed in D11 also made it reasonable to assume that there were published versions and versions under construction. It was logical to assume that D10 was a revised version of the version "Rev 2005-0" which the web archive showed to have been published on 8 December 2006.

Mr. Avelar's statement in document D25 only related to the cited document being "first released" on 26 October 2005 but could not support any publication date of document D10 and was also at odds with document D11 in relation to the title and abstract. Furthermore, there is no evidence (e. g. ftp logs) that the document was actually uploaded and that the hyperlink to the document was functioning. The document could also have been further changed, even on the same day as the first release as could be seen by the entries in the log file provided by Mr. Avelar. The indicated file sizes were also an inaccurate identifiers of the corresponding files since they were rounded to the nearest kilobyte.

## **Reasons for the Decision**

1. Procedural issues
  - 1.1 Admission into the proceedings of the appellant's submissions of 11 August 2016 and 13 September 2016 / request for postponement of the oral proceedings

All the submissions effected with the appellant's letters of 11 August 2016 and 13 September 2016 concern the public availability of document D10, which had already been an issue of the appeal proceedings beforehand. Moreover, document D26 concerns a statement by the same employee of Schneider Electric who had



already made the statement of document D25, merely providing more details on how the file "WP113rev1SN1.pdf" was uploaded to the DRL database. The respondent had already been aware of the DRL database from document D25 and could have availed himself of the opportunity to contact Mr. Avelar or Schneider Electric in order to enquire about the publication of the relevant white papers. Documents D27 and D28 are printouts of the WayBack Machine corresponding essentially to document D11, with the difference that they relate to the status of the website of APC White Papers at different dates. Document D29 relates to titles and abstracts of several white papers and the APC website relating to white papers, thus containing information which corresponds to documents D10 and D11.

Moreover, the board sees no intention by the appellant to delay the proceedings, the response of Schneider Electric not being under its control. Finally, the new submissions are not complex and are readily comprehensible and the board saw no reason why the respondent or the board should not be in a position to deal with them at the oral proceedings.

In view of the above the board decided to admit the appellant's submissions of 11 August 2016 and 13 September 2016 into the appeal proceedings and to refuse the respondent's request to postpone the oral proceedings.

1.2 Requests for apportionment of costs and for remittal to the department of first instance

Besides the request that the oral proceedings be postponed the respondent also requested that the costs for

the first oral proceedings before the board be reimbursed. Since the board refused the request that the oral proceedings be postponed, no second oral proceedings were held and there was no need to order the appellant to pay some or all of the respondent's costs. Rather, each party had to bear the costs it had incurred (Article 104(1) EPC and Article 16 RPBA).

Furthermore, the respondent requested that the case be remitted to the department of first instance for further prosecution, should the oral proceedings not be postponed and should document D10 be found to be prior art. Since document D10 was eventually found not to form part of the state of the art for the opposed patent (see point 2 below) the condition of the request was not fulfilled, so that there was no need to deal with this request. In any case, the board saw no reason to remit the case to the department of first instance and was in a position to decide all the relevant issues of the appeal (Article 111(1) EPC 1973).

2. Public availability of document D10
  - 2.1 Distribution as a commercial brochure
    - 2.1.1 In the decision under appeal the opposition division held that APC white papers could not be regarded as commercial pamphlets and that the copyright notice and the revision mark in D10 could not be considered printing dates. The present case differed thus from decisions T743/89, T253/02 and T804/05, which concerned the publication dates of commercial pamphlets (see Reasons 5.2 and 5.8 of the decision).
    - 2.1.2 The appellant argued that the copyright notice and revision date were equivalent to a printing date on

printed matter. Moreover, commercial white papers were meant to indirectly promote the products or services of the publisher, were expensive to produce as the author might be a highly qualified in-house expert, and might be topical only for a short time, which were all drivers to release the paper soon after being finalized.

- 2.1.3 Document D10 relates to the accurate modelling of the electrical efficiency of data centres. In particular, the document aims at improving existing models which overestimate data centre efficiency due to wrong assumptions regarding the efficiency of power and cooling components and the load at which the data center is operating. The heat wheel as a particular cooling device is merely mentioned in passing as a side remark (D10, paragraph bridging pages 5 and 6).

The board agrees with the opposition division in that document D10 cannot be considered a commercial brochure of a company which is intended to inform potential customers about particular products of the company as in cases T743/89, T253/02, and T804/05. Rather, document D10 has the nature of an applied electrical engineering paper. As such, the year 2005 of the copyright notice and the revision mark cannot be regarded as the date of printing of a stack of copies of D10 for their subsequent public distribution.

In view of the above document D10 cannot be considered as having been made available to the public as a commercial brochure before the priority date of the opposed patent.

- 2.2 Availability on the Internet

2.2.1 The opposition division held in the decision under appeal that - on the balance of probabilities - document D10 had not been made available on the Internet before the priority date of the opposed patent.

In particular, the opposition division referred to several variations of document D10, namely document D19 and two further documents annexed to the decision under appeal ("Annex I" and "Annex II").

2.2.2 The appellant argued that document D10 had been made available on the Internet, specifically on the APC website, and referred in particular to document D10 itself, documents D11, D25 to D28 and the properties of D10 and other documents (see point V. (b) above).

The appellant's submissions in this respect can be divided into two main lines of arguments. The first concerns the alleged uploading of document D10 to the APC website, while the second concerns the alleged archiving of D10 on the Wayback Machine.

2.2.3 As indicated above, the opposition division applied the usual standard of proof "balance of probabilities" when assessing whether document D10 had been made available on the Internet before the relevant date. This was not challenged by the parties and is in accordance with EPO practice as described in the Notice of the EPO concerning Internet citations (OJ EPO 8-9/2009, pages 456-462) and the instructions provided in the Guidelines for Examination in the EPO in force at the time (see section G-IV, 7.5; version of September 2013).

The board agrees with the above practice followed by the opposition division, which was also confirmed in the decisions T286/10 and T2227/11 of the Boards of

Appeal (see respective Reason 2). In both of these decisions the conclusion of previous decision T1134/06 that the stricter standard of proof "beyond reasonable doubt" must be applied to Internet disclosures was refuted.

- 2.2.4 With the letter setting out the grounds of appeal the appellant had submitted document D25 concerning the public availability of document D10. Document D25 is a printout of an email dated 15 January 2014 of Mr. Avelar, an employee of Schneider Electric (which had acquired APC in 2007), stating that the file "WP113rev1SN1.pdf" attached to the email was "first released" on 26 October 2005 to the "document reference library" (DRL) database. Annexed to the email printout is a printout of the attached file, which corresponds to document D10.

With the letter of 11 August 2016 the appellant submitted document D26 relating to the printout of a further email dated 10 August 2016 of Mr. Avelar providing more details on the alleged publication of document D10.

From document D26 it emerges that APC maintains an internal database, the document reference library (DRL), which is accessible to employees of APC and contains a wide variety of documents, e. g. white papers and user manuals. When the status of a document in the DRL is changed to "released", a link to the document is automatically created on APC's public website. Once a white paper is released in this way, it is publicly accessible through an APC website (apc.com, whitethpapers.apc.com, apcmedia.com).

Document D26 also contains a log file showing the changes effected in relation to the White Paper 113 of the DRL database. The four documents D10, D19, "Annex I" and "Annex II" cited in the decision under appeal are different versions of White Paper 113, carrying this identifier either as "White Paper 113" or "White Paper #113" on their respective cover pages. The entries of the log file are minimal, containing in many instances only a name and a date, e. g. "Victor Avelar on Jun-6-2005".

- 2.2.5 The opposition division stated in the decision under appeal that it had retrieved the version "Annex I" from the website apcmedia.com and held that it seemed "logical" that D10 bearing the revision notice "Rev 2005-1" was a revised version of "Annex I" bearing the revision notice "Rev 2005-0" (see Reasons 5.6.3 to 5.6.5 of the decision).

The appellant argued that the log file entry "Ramesh Menon on Oct-26-2005 Changed status to Released" corresponded to the publication on the Internet of document D10, which was also the release date stated in document D25 (see point 2.2.4 above). The appellant further referred to the files "NRAN-66CK3D\_R1\_EN.pdf" and "ElectricalEfficiencyModelling.pdf" and the respective images of the document properties and argued that these files related to the versions D19 and "WP113-0" of White Paper 113, which were created by Victor Avelar on 12 January 2007 and by Neil Rasmussen on 3 November 2007, respectively.

The board notes that the four versions D10, D19, "Annex I" and "Annex II" of the White Paper 113 bear the revision notices "Rev 2005-1", "Rev 2006-1", "Rev 2005-0" and "WP113-0", respectively. The appellant did

not provide any indication on the publication of "Annex I" on the APC website, in particular in relation to the log file of White Paper 113. However, the opposition division had retrieved this version from one of APC's websites, so that it must have been published there.

The opposition division's opinion that D10 constitutes a revision of "Annex I" in view of their respective revision notices appears plausible to the board. However, this is at odds with the appellant's assertion that document D10 was "first released" on 26 October 2005 to the DRL database which implies that it was this version which was the *first* to be made available to the public.

Furthermore, Mr. Avelar's statement that the file "WP113rev1SN1.pdf" was "first released" on 26 October 2005 concerns the action of another person, namely Mr. Menon, and was made more than 8 years after that date, i. e. in the email of 15 January 2014, without providing any indication on how this particular file was recovered after so many years and how the link to the log file could be established.

Finally, from the image of the document properties of "WP113-0" (i. e. "Annex II") submitted by the appellant it can be derived that this version of White Paper 113 was authored on 3 November 2007 by Neil Rasmussen, which is not consistent with the corresponding entry in the log file of White Paper 113, where it is indicated that Victor Avelar performed an action on that date ("Victor Avelar on Nov-3-2007"). Neil Rasmussen only performed an action several months later on 31 March 2008 ("Neil Rasmussen on Mar-31-2008").

2.2.6 In view of the above, the board is not convinced that the sequence of events in relation to the uploading of document D10 to the APC website transpired in fact as asserted by the appellant.

Moreover, there are only three entries in the log file of White Paper 113 between the date of first release (26 October 2005) and the priority date of the patent (6 September 2006). In addition, as indicated in the decision under appeal (see Reason 5.6.3), the relevant paragraph concerning the use of a heat wheel in a data center is absent in the version "Annex I". Therefore, the precise sequence of events in relation to the publication of the various versions of White Paper 113 is crucial in the present case.

2.2.7 With respect to the alleged archiving of D10 on the Wayback Machine the opposition division held in the decision under appeal that the title and summary of White Paper 113 as indicated in document D11, a printout of the APC website of 12 December 2005 relating to white papers as archived by the Wayback Machine, was not identical to the title and abstract of document D10. This showed that document D11 did not refer to document D10.

The appellant argued in this respect that the log file of White Paper 113 showed that Mr. Avelar updated the summary on 3 November 2007 and furthermore submitted titles and abstracts of four other white papers and the corresponding titles and abstracts as retrieved from the APC website. Moreover, the image of the document properties of the document "WP113rev1SN1.pdf" showed that its file size matched the file size of document "WP-113V1" as reported in D11.



The board notes that it is well known that links in a website archived by the Wayback Machine may not be preserved or - if intact - may connect to different material than at the time of capture. It is therefore not possible to access, using the Wayback Machine, White Paper 113 as it was available on the APC website at the time of archiving (12 December 2005). Circumstantial evidence has to be used for assessing what document was accessible at the time.

The date of the update of the summary as indicated in the log file of White Paper 113 (3 November 2007) is after the archiving date of document D11 (12 December 2005). Hence, the mismatch in the title and abstract between documents D10 and D11 cannot be due to this update of the summary. Moreover, the appellant did not provide any evidence that the titles and abstracts of White Papers 118, 114, 157, and 104 as submitted with the letter dated 13 September 2016 and the corresponding titles and abstracts indicated on the APC website relate in fact to the same respective documents. They might well relate to different versions of these white papers. Even if one accepted the appellant's assertion that the submitted titles and abstracts of these white papers related to the corresponding links on the APC website, this would at most demonstrate that the titles and abstracts indicated on this website might be inaccurate. However, it would not suffice - in the board's judgment - to refute the opposition division's conclusion that the mismatch between the titles and abstracts of documents D10 and D11 was an indication that document D11 did not refer to document D10.

Finally, the file sizes of the white papers are indicated in document D11 only to the nearest KB. They are

thus unreliable file identifiers. This was illustrated by the respondent when he pointed out entirely different white papers in D11 having nevertheless the same file size. Moreover, the appellant did not provide the file size of "Annex I" which does not contain the relevant paragraph concerning the use of a heat wheel in a data center.

Consequently, the board is not convinced that document D10 was publicly available on the APC website at the time of archiving indicated in document D11 (12 December 2005).

2.2.8 In view of the above the board concludes that document D10 cannot be considered as having been made available on the Internet before the priority date of the opposed patent.

2.3 Conclusion

2.3.1 For the above reasons the above the board comes to the conclusion that document D10 does not form part of the state of the art within the meaning of Article 54(2) EPC 1973.

2.3.2 The appellant challenges the decision under appeal only insofar as the finding of the opposition division in relation to the public availability of document D10 is concerned. Since the board confirms the opposition division's decision in this respect the appeal must fail.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



S. Sánchez Chiquero

G. Eliasson

Decision electronically authenticated