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**Datasheet for the decision
of 21 July 2017**

Case Number: T 0362/15 - 3.3.01

Application Number: 08709649.1

Publication Number: 2124573

IPC: A01N63/00, A01P7/02, A01P7/04,
A01K67/033

Language of the proceedings: EN

Title of invention:
MITE COMPOSITION

Patent Proprietor:
Certis Europe B.V.

Opponent:
BIOCOLOR S.L.

Headword:
Admissibility/Bicolor S.L.

Relevant legal provisions:
EPC Art. 108
EPC R. 99(1), 99(2), 101(1), 112(1), 126(2), 131(4)
RPBA Art. 12(2)

Keyword:

Admissibility of appeal - (no)

Notification - by registered letter with advice of delivery

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
Chambres de recours

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Case Number: T 0362/15 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 21 July 2017

Appellant: BIOCOLOR S.L.
(Opponent) Avda. Carlos III, n° 381, 2°D
CP04720 Aguadulce, Almeria (Andalucia) (ES)

Respondent: Certis Europe B.V.
(Patent Proprietor) Safariweg 55
3605 MA Maarssen (NL)

Representative: Williams, Andrea
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62-68 Hills Road
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
8 December 2014 concerning maintenance of the
European Patent No. 2124573 in amended form.

Composition of the Board:

Chairman A. Lindner
Members: M. Pregetter
M. Blasi

Summary of Facts and Submissions

- I. The interlocutory decision of the opposition division of 18 November 2014, against which this appeal is directed, was posted on 8 December 2014.
- II. On 22 December 2014, the Office received confirmation from the patent proprietor that the decision had been notified to him on 12 December 2014.
- III. On 13 January 2015, having received no advice of delivery, the EPO issued a communication to the opponent, a Spanish company, asking for acknowledgement of receipt of the opposition division's decision on an attached form (Form 2936).
- IV. By fax of 21 January 2015, the acknowledgement of receipt was returned to the EPO. It was signed by Mr F. González Sampedro ("Mr G.S."), and a date of 15 January 2015 was indicated.
- V. On 12 February 2015, the opponent (appellant) filed notice of appeal. The appeal fee was paid on 20 February 2015.
- VI. On 18 February 2015, the EPO received advice of delivery from the opponent. It showed a stamp of the Spanish postal service of 18 December 2014. The advice of delivery was signed by Mr S. Fernández Castillo ("Mr F.C.").
- VII. On 25 February 2015, the file number was communicated to the parties by the board's registrar.
- VIII. On 13 March 2015, the board's registrar issued a noting of loss of rights pursuant to Rule 112(1) EPC to the

appellant, informing it that the appeal fee had been paid out of time and that the appeal was deemed not to have been filed. The returned advice of delivery showed a postal stamp of 20 March 2015 and was signed by Mr J.L. Castaña Hernández ("Mr C.H").

- IX. On 13 May 2015, the appellant, in a letter signed by Mr G.S., informed the EPO of a change of address and enquired about the status of the appeal, indicating that the appellant had received no further notification after the communication of the file number of 25 February 2015.
- X. By letter of 27 May 2015, received on 28 May 2015, the appellant filed a statement of grounds of appeal. Two patent documents were cited and it was stated [sic] that *"the patent EP 2124573B1 has not the Novelty required to be a Patentable Invention, according to Article 52 EPC"*. Reference was made to the principle *iura novit curia*. Furthermore, it was stated that Mr C.H., the person signing the advice of delivery for the communication of 13 March 2015, was not authorised to receive mail and that, on the date of acknowledgement of receipt, the appellant had already moved to the new address.
- XI. The board issued a first communication which, in view of the existing notification problems, addressed the question of the date of notification of the opposition division's decision to the appellant. The board informed the appellant of its provisional opinion that it considered the appeal either as deemed not to have been filed because of late payment of the appeal fee or as inadmissible, the latter because the appellant's letter received on 13 May 2015 did not meet the requirements for a statement of grounds of appeal and

the letter dated 27 May 2015 had been received after expiry of the relevant time limit. The board invited the appellant to clarify the circumstances of the notification of the opposition division's decision.

- XII. In its first reply, the appellant commented on the nature of its letter of 13 May 2015. Moreover, it submitted *inter alia* that until receipt of the board's communication "*this party had not any knowledge of the decision of the Office to accept the payment of the fees, and consequently, this party is considered not advised about the possibility of submit its statements. So, the procedure, places to this part in defenselessness, as has not been possible to know the position of the Office about the admissibility of the appeal*" [sic].
- XIII. The board issued a second communication in which it pointed out that its earlier communication had not comprised any decision. It set a time limit for the provision of information on the authorisation of Mr F.C. as the person who had signed the advice of delivery on 18 December 2014. It also indicated that the four-month time limit for filing the statement of grounds of appeal and the requirements as to its content were set by law and that the content of the appellant's statement of grounds of appeal did not seem to fulfil the requirement of sufficient substantiation.
- XIV. In its second reply, the appellant submitted that Mr F.C. was not authorised to receive mail on its behalf, and it filed supporting evidence. The submissions contained in the statement of grounds of appeal were confirmed, and it was requested that, if these submissions lacked substantiation, correction should be allowed.

- XV. The appellant requested that the decision under appeal be set aside and that the patent be revoked.
- XVI. In the absence of a request for oral proceedings, the board was able to take its decision following written proceedings.

Reasons for the Decision

1. The board is prevented from taking a decision on the merits of the case as it holds the appeal to be inadmissible.
2. The appeal is inadmissible because no statement of grounds of appeal fulfilling the requirements of Rule 99(2) EPC and Article 12(2) RPBA was received within the four-month time limit provided for pursuant to Article 108, third sentence, EPC.
3. Pursuant to Rule 126(2), last half-sentence, EPC, the opposition division's decision was notified to the appellant on 15 January 2015. This is the date indicated by Mr G.S. on the acknowledgement of receipt.

The notification of 18 December 2014 to Mr F.C. did not have any effect for the appellant. The appellant submitted, and filed supporting evidence, that Mr F.C. who had signed the advice of delivery was not authorised to receive mail on its behalf.

4. An appeal came into existence because, on 12 February 2015, i.e. within the two-month time limit under Article 108, first sentence, EPC, calculated as from 15 January 2015, a notice of appeal fulfilling the requirements of Rule 99(1) EPC was filed and the appeal fee was paid.

The noting of loss of rights pursuant to Rule 112(1) EPC issued by the board's registry on 13 March 2015 and informing the appellant that the appeal fee had been paid out of time was not duly notified to the appellant. In the letter of 13 May 2015, the appellant had indicated that after communication of the appeal number of 25 February 2015, no communication had been received, and in the letter of 27 May 2015 it was stated that *"the communication dated on 13 March 2015, that seems to be received by BIOCOLOR on 20th march, was not"*, because the appellant had already moved to the new address and Mr C.H. was not authorised to receive mail on behalf of the appellant. Accordingly, the board's communication of 13 March 2015 did not entail any further consequences.

5. However, no statement of grounds of appeal fulfilling the requirements of Rule 99(2) EPC and Article 12(2) RPBA was received by Friday, 15 May 2015, the last day of the four-month time limit under Article 108, third sentence, and Rule 131(4) EPC.

5.1 The appellant's letter received on 13 May 2015 does not meet the requirements of Rule 99(2) EPC. It contains no submissions as to why the decision under appeal was to be set aside. The content of this letter is confined to an announcement of a change of address and an enquiry as to the status of the appeal. The appellant agreed, in its reply to the board's first communication in which this issue had been raised, that the letter was indeed an enquiry about the state of the procedure because, at that date, no communication had been received about whether the payment of the appeal fee was accepted.

5.2 The letter dated 27 May 2015, received on 28 May 2015, represented the appellant's statement of grounds of appeal. It was, however, filed outside the four-month time limit set by Article 108, third sentence, EPC.

In addition, and as also indicated in its second communication, the board notes that the content of the appellant's letter likewise does not fulfil the requirements of Rule 99(2) EPC and Article 12(2) RPBA. The very general statement that the claimed subject-matter of the patent lacked novelty in view of the two patent documents cited (see section X above) is a statement which can be considered an indication of the reasons for setting aside the decision impugned within the meaning of Rule 99(2) EPC. However, no facts and arguments were given by the appellant for its conclusion, on the basis of which a reader of the statement of grounds of appeal could understand on what considerations the objection of the alleged lack of novelty is based. Hence, the statement of grounds of appeal lacks substantiation and the requirements of Rule 99(2) EPC and Article 12(2) RPBA are thus not fulfilled.

The appellant's reference, in the statement of grounds of appeal, to the principle of *iura novit curia* does not assist the appellant in this context. This principle means that the court knows the law; but it cannot exempt a party, here the appellant, from the obligation to comply with the legal requirements in the provisions cited above.

6. Concerning the appellant's submissions relating to the circumstance that it had not been advised of the possibility to submit its statements and considered itself "*in defenselessness*", the board notes that the time limits for filing notice of appeal and a statement of grounds of appeal are laid down in Article 108 EPC and operate by application of the law. Accordingly, the start of these time limits is triggered by due notification of the decision under appeal to the party (Article 119, Rules 125 EPC et seqq.), and their expiry is based on calculations in accordance with the applicable provisions of Article 120 and Rules 131 EPC et seqq. Unawareness of this legal mechanism on the part of the party concerned does not have any effect on the running and expiry of these time limits.
7. Therefore, the appeal is to be rejected as inadmissible pursuant to Rule 101(1) EPC.

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible.

The Registrar:

The Chairman:



M. Schalow

A. Lindner

Decision electronically authenticated