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Datasheet for the decision of 19 October 2016

Case Number: T 1946/15 - 3.2.02

Application Number: 09727905.3

Publication Number: 2262428

IPC: A61B6/02

Language of the proceedings: EN

Title of invention:
FAST TOMOSYNTHESIS SCANNER APPARATUS AND CT-BASED METHOD BASED ON ROTATIONAL STEP-AND-SHOOT IMAGE ACQUISITION WITHOUT FOCAL SPOT MOTION DURING CONTINUOUS TUBE MOVEMENT FOR USE IN CONE-BEAM VOLUME CT MAMMOGRAPHY IMAGING

Patent Proprietor:
Koninklijke Philips N.V.

Opponent:
Gilani, Anwar

Headword:

Relevant legal provisions:
EPC Art. 108, 122(1)

Keyword:
Time limits - Notice of appeal - Filing out of time (yes)
Re-establishment of rights - opponent as appellant (excluded)
Admissibility of appeal - Appeal deemed not to have been filed
Reimbursement of appeal fee (yes)

Decisions cited:
G 0001/86, J 0019/90, T 0210/89, T 0371/92, T 0778/00, T 1325/15

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

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Case Number: T 1946/15 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 19 October 2016

Appellant: (Opponent)	Gilani, Anwar Byron House, Cambridge Business Park Cowley Road Cambridge Cambridgeshire CB4 0WZ (GB)
Representative:	inCompass IP Europe Limited 48 Fitzroy Street London W1T 5BS (GB)
Respondent: (Patent Proprietor)	Koninklijke Philips N.V. High Tech Campus 5 5656 AE Eindhoven (NL)
Representative:	van Velzen, Maaike Mathilde Philips Intellectual Property & Standards High Tech Campus 5 5656 AE Eindhoven (NL)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 26 June 2015 rejecting the opposition filed against European patent No. 2262428 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	E. Dufrasne
Members:	D. Ceccarelli
	M. Stern

Summary of Facts and Submissions

I. The appeal concerns the decision of the Opposition Division dispatched on 26 June 2015 rejecting the opposition against European patent No. 2 262 428.

II. The fee for appeal was paid by the opponent on 25 August 2015. The notice of appeal and the statement setting out the grounds of appeal were received on 4 November 2015. A request for re-establishment of rights was received and the corresponding fee was paid, also on 4 November 2015.

III. In a communication annexed to the summons to oral proceedings dated 1 August 2016, the Board set out its preliminary opinion. It expressed its intention to refuse the request for re-establishment of rights, to deem the appeal not to have been filed and to order the reimbursement of the appeal fee.

IV. Oral proceedings were held on 19 October 2016.

V. The appellant's arguments relevant for the present decision can be summarised as follows.

On 3 November 2015, when starting to prepare the statement of grounds of appeal, the opponent had become aware for the first time that he had inadvertently overlooked filing the notice of appeal. He had then immediately done so, and he had also filed a request for re-establishment of rights in respect of the time limit for filing the notice of appeal.

He was aware of the established jurisprudence, in particular decisions G 1/86 and T 210/89, holding that opponents, unlike patent proprietors, are not entitled

to re-establishment of rights under Article 122 EPC in respect of the two-month period for filing an appeal under Article 108 EPC.

He was however of the opinion that this question could have been decided differently, making no distinction between patent proprietors and opponents and thus allowing opponents too to have their rights re-established in respect of the time limit for filing the notice of appeal. He regarded this distinction as unbalanced and unequal treatment, and particularly unfair given the very short period of two months for filing the notice of appeal. He doubted that such rules were present in the national laws of the Contracting states.

VI. The respondent (patent proprietor)'s arguments are essentially those underlying the reasons for this decision set out below.

VII. The appellant requested that the decision under appeal be set aside and that the patent be revoked.

VIII. The respondent requested that the appeal be deemed not to have been filed.

Reasons for the Decision

1. The first question to be decided is whether an admissible appeal was validly filed.

2. The impugned decision was dispatched on 26 June 2015 and the notice of appeal was received on 4 November 2015. It is not disputed that the notice of appeal was not filed within the two-month period under Article 108 EPC.

3. It is established jurisprudence that merely paying the fee for appeal does not give rise to a validly lodged appeal, in the absence of a notice of appeal filed in due time (J 19/90 of 30 April 1992, Reasons, 1.2.2, T 778/00 of 6 July 2001, Reasons, 2.1 and 2.2, T 371/92 of 2 December 1993, Reasons, 3 and most recently T 1325/15 of 7 June 2016, Reasons, 41 and 42). This is also not disputed.

Re-establishment of rights

4. Therefore, it is necessary for the Board to consider the request for re-establishment of rights.

It is established jurisprudence that opponents are not entitled to re-establishment of rights under Article 122 EPC in respect of the two-month period for filing an appeal under Article 108 EPC (G 1/86 of 24 June 1987, Reasons, 6 and T 210/89 of 20 October 1989).

According to these decisions, re-establishment of rights under Article 122(1) EPC is available to an applicant for or a proprietor of a European patent, as expressly stated in this article. Whilst the wording of this article does not exclude a priori all other parties, the historical documentation relating to the Convention and a comparison of the national laws of the Contracting states suggest that opponents may not have their rights re-established in respect of missed time limits for appealing. This exclusion is justified in particular because their situation is different from that of applicants or proprietors. Having lost their right to appeal, opponents can still pursue actions for revocation before national courts. In contrast, once applicants or proprietors have definitively lost their

possibility to appeal, the limitation or revocation of their patent by the first instance's decision becomes final and the corresponding rights irrevocably lost.

The appellant argued that this question could have been decided differently by making no distinction between patent proprietors and opponents and thus allowing opponents too to have their rights re-established in respect of the time limits for filing the notice of appeal. In the Board's opinion, this unsubstantiated assertion provides no basis for it to reconsider earlier decisions of the Enlarged Board and of the boards of appeal. Furthermore, the Board supports the analysis and the conclusion laid down in the established jurisprudence and sees no reason to depart from it.

The appellant further argued that the exclusion of the opponent from re-establishment of rights in respect of the time limits for filing the notice of appeal constituted unbalanced and unequal treatment. The decisions cited above concluded however that an opponent should not enjoy the same right to restoration under Article 122 EPC as the applicant or proprietor because their respective legal situations were objectively different. Hence, the principle of equality of the parties before the law does not apply in a manner that would enable an opponent to enjoy the same rights as an applicant or a proprietor on this matter (T 210/89, Reasons, 9).

Lastly, the appellant indicated that he doubted that provisions excluding opponents from re-establishment of their right to file an appeal were present in the national laws of the Contracting states. The appellant provided no evidence for this assertion. For that

reason alone, the argument cannot succeed. Furthermore, the Enlarged Board cited Contracting states' provisions supporting its position (G 1/86, Reasons, 5).

The Board therefore concludes that the request for re-establishment of rights is to be refused.

Notice of appeal

5. Without re-establishment of rights, the notice of appeal was not filed in due time under Article 108 EPC.

In the absence of a notice of appeal fulfilling the requirements of Article 108 EPC and in view of the general rule that no distinction is to be made between the late filing and the non-filing of a document, the Board considers that no appeal has ever existed in the present case (T 371/92, Reasons, 3.9, T 778/00, Reasons, 2.2 and T 1325/15, Reasons, 41 and 43).

The Board therefore concludes that the appeal is deemed not to have been filed.

Reimbursement of appeal fee

6. In the absence of an appeal, there is no legal basis for paying the fee involved, which must therefore be reimbursed (T 371/92, Reasons, 6, T 778/00, Reasons 2.2 and T 1325/15, Reasons, 43).

Order

For these reasons it is decided that:

1. The request for re-establishment of rights is refused.

2. The appeal is deemed not to have been filed.

3. Reimbursement of the appeal fee is ordered.

The Registrar: The Chairman:

D. Hampe E. Dufrasne

Decision electronically authenticated