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**Datasheet for the decision
of 16 December 2019**

Case Number: T 1492/17 - 3.4.02

Application Number: 99948188.0

Publication Number: 1114310

IPC: G01N23/223, G01V5/00

Language of the proceedings: EN

Title of invention:

X-RAY FLUORESCENCE ELEMENTAL ANALYZER

Patent Proprietor:

Katz, Elisabeth

Opponent:

Epiroc Rock Drills Aktiebolag

Headword:

Relevant legal provisions:

EPC R. 84(1), 100(1)
EPC 1973 R. 60(1)

Keyword:

Lapse of patent in all designated states - continuation of
appeal proceedings (no)

Decisions cited:

G 0001/90, T 0607/00, T 0708/01, T 1557/08, T 0520/10,
T 2536/10

Catchword:



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Case Number: T 1492/17 - 3.4.02

D E C I S I O N
of Technical Board of Appeal 3.4.02
of 16 December 2019

Appellant: Katz, Elisabeth
(Patent Proprietor) Ahornweg 8
72226 Simmersfeld (DE)

Representative: Schön, Thilo
Patentanwaltskanzlei Thilo Schön
Schwarzwaldstrasse 1A
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Respondent: Epiroc Rock Drills Aktiebolag
(Opponent) 701 91 Örebro (SE)

Representative: Seppo Laine Oy
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted on
9 May 2017 concerning maintenance of the
European Patent No. 1114310 in amended form.

Composition of the Board:

Chairman R. Bekkering
Members: G. Decker
H. von Gronau

Summary of Facts and Submissions

- I. The patent proprietor and the opponent appealed against the decision of the opposition division of 9 May 2017 maintaining European patent No. 1 114 310 in amended form.
- II. The patent has meanwhile lapsed in all designated Contracting States. By communication of the board of 27 September 2019, the attention of the parties was drawn to Rule 84(1) EPC and both appellants were asked to indicate within a period of two months whether they wanted the appeal proceedings to be continued.
- III. By letter dated 4 November 2019, the appellant-opponent withdrew its appeal. The appellant-patent proprietor (hereinafter "the appellant") did not reply to the communication within the given period.

Reasons for the Decision

1. Pursuant to Rule 84(1) EPC, if a European patent has lapsed with effect for all the designated Contracting States, opposition proceedings may be continued at the request of the opponent filed within two months of a communication from the European Patent Office informing it of the lapse. According to Rule 100(1) EPC, this also applies in appeal proceedings following opposition proceedings.
2. However, if - as in the present case - the patent proprietor is the appellant, it would be inappropriate

to allow the opponent (respondent) to decide whether the appeal proceedings should be continued. For this reason, according to the established case law of the boards of appeal, Rule 84(1) EPC has to be applied *mutatis mutandis* in such opposition appeal proceedings so that it is the appellant-patent proprietor who can request that the appeal proceedings be continued (see, for instance, decisions T 708/01, Reasons 1; T 1557/08; T 520/10, Reasons 1; T 2536/10, Reasons 1).

3. Rules 84(1), 100(1) EPC in their direct application provide for a possible continuation of the opposition or appeal proceedings if the opponent requests so. In the absence of such a request, the opposition or appeal proceedings have to be closed (see G 1/90, OJ EPO 1991, 275, Reasons 7: Rule 60(1) EPC 1973 is a "special case of suspension" of the opposition proceedings; T 607/00, Reasons 2: "there is no legal basis for a continuation of the appeal proceedings"). The same legal consequence is valid if Rule 84(1) EPC is applied *mutatis mutandis* in the present circumstances, see point 2 above.
4. Consequently, since no such request has been filed by the appellant, the appeal proceedings are terminated by decision of the board.

Order

For these reasons it is decided that:

The appeal proceedings are terminated.

The Registrar:

The Chairman:



M. Kiehl

R. Bekkering

Decision electronically authenticated