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**Datasheet for the interlocutory decision
of 22 January 2021**

Case Number: T 0444/20 - 3.4.03

Application Number: 14194458.7

Publication Number: 2889858

IPC: G09G3/20

Language of the proceedings: EN

Title of invention:

Display device and method of driving the same

Applicant:

LG Display Co., Ltd.

Headword:

Relevant legal provisions:

EPC Art. 108 sentence 1, 108 sentence 2

EPC R. 139 sentence 1

RFees Art. 2(1) item 11

Keyword:

Admissibility of appeal - full appeal fee paid late
Correction of error - correction introduces what was
originally intended (yes)

Decisions cited:

G 0001/12, G 0001/18, T 2620/18, T 0317/19



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Case Number: T 0444/20 - 3.4.03

I N T E R L O C U T O R Y D E C I S I O N
of Technical Board of Appeal 3.4.03
of 22 January 2021

Appellant: LG Display Co., Ltd.
(Applicant) 128, Yeoui-daero,
Yeongdeungpo-gu
Seoul
150-721 (KR)

Representative: Ter Meer Steinmeister & Partner
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 15 October 2019
refusing European patent application
No. 14194458.7 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman G. Eliasson
Members: S. Ward
G. Decker

Summary of Facts and Submissions

- I. The decision under appeal refusing European patent application No. 14 194 458.7 was posted on 15 October 2019.
- II. On 20 December 2019, the applicant (hereinafter: appellant) filed a notice of appeal in which it indicated that "*[t]he appeal fee in the amount of EUR 1,880.00 is paid via EPO online filing*". Said amount was also indicated in payment form 1038E which accompanied the notice of appeal letter. On that same day, the above amount was debited. However, the correct amount of the appeal fee at the time of filing was EUR 2 255 since the appellant is not entitled to the fee reduction under Article 2(1), item 11, RFees in conjunction with Rule 6(4) and (5) EPC (contrary to the appellant's indication in the "Fees" box of Form 1038E).
- III. In a communication dated 9 January 2020, the EPO informed the appellant that it had paid the reduced fee but had failed to file a declaration that it constituted an entity according to Rule 6(4) and (5) EPC. In this context, the EPO *inter alia* stated that "*[t]he missing amount of xxx EUR may be paid within two months from notification of this communication.*"
- IV. In response to this communication, the appellant paid the remaining appeal fee amount of EUR 375 via EPO Online Filing using Form 1038E on 29 January 2020.
- V. On 20 February 2020, the appellant filed a statement setting out the grounds of appeal.

- VI. In a communication dated 14 April 2020, the board informed the appellant that, due to the insufficient amount indicated in Form 1038E accompanying the notice of appeal, the prescribed appeal fee was not fully paid before expiry of the relevant time limit. This resulted in the appeal being deemed not to have been filed.
- VII. By letter dated 29 April 2020 and received on 30 April 2020, the appellant requested a correction to Form 1038E under Rule 139 EPC. As an auxiliary measure, it requested re-establishment of rights under Article 122(1) EPC in the term for the payment of the appeal fee under Article 108, second sentence, EPC.
- VIII. The board issued a summons to oral proceedings. In a communication under Article 15(1) RPBA 2020, annexed to the summons, the board set out its preliminary opinion that the appellant's requests were not allowable.
- IX. In response to this communication, the appellant provided counter-arguments to the board's preliminary opinion and filed the following requests by letter dated 30 September 2020.
- (a) As a main request, it requested that the amount of EUR 1 880 in the accompanying letter filed on 20 December 2019 be corrected to EUR 2 255 under Rule 139 EPC.
 - (b) As a first auxiliary request, it requested that the appeal be deemed to have been filed due to the timely filing of one of the currently valid appeal fee amounts under Article 108 EPC.
 - (c) As a second auxiliary request, it requested that the appeal be deemed to have been filed due to the

timely paying of the appeal fee under Article 108 EPC, considering the missing amount of EUR 375 as "small amount" and "justified" within the meaning of Article 8, fourth sentence, RFees.

(d) As a third auxiliary request, it requested re-establishment of rights under Article 122(1) EPC in the term for the payment of the appeal fee under Article 108, second sentence, EPC.

X. Oral proceedings were held before the board on 22 January 2021. The appellant's final and sole request was that the amount of EUR 1 880 in the accompanying letter filed on 20 December 2019 be corrected to EUR 2 255 under Rule 139 EPC.

XI. The appellant's arguments relevant to the present decision may be summarised as follows.

(a) When preparing the notice of appeal letter, the appellant's professional representative was well aware that there were two different appeal fee amounts and that the reduced appeal fee did not apply to the appellant. However, as the former sole appeal fee of EUR 1 880 was identical to the then valid reduced appeal fee, he wrongly assumed that he had indicated the correct full amount. This error was then taken over by the professional representative's assistant when filling in the payment form.

(b) The appellant's original intention to pay the full appeal fee could also be inferred from the fact that it submitted no declaration of entitlement to the reduced appeal fee. Moreover, the appellant was a well-known large entity.

Reasons for the Decision

1. The appellant filed a notice of appeal on 20 December 2019, within the two-month time limit prescribed in Article 108, first sentence, EPC, which expired on 2 January 2020 (Rules 126(2), 131(2) and (4), 134(1), first sentence, EPC). However, due to the insufficient amount of EUR 1 880 indicated in Form 1038E accompanying the notice of appeal, the prescribed appeal fee (at the time of filing) of EUR 2 255 for the appellant as large entity was not fully paid before expiry of that time limit. Following the Opinion G 1/18 of the Enlarged Board of Appeal (EBA), OJ EPO 2020, A26, Headnote 1(a), this results in the appeal being deemed not to have been filed.
2. *Correction under Rule 139, first sentence, EPC*
 - 2.1 To change this result, the appellant requested that the amount of EUR 1 880 in the accompanying letter filed on 20 December 2019 be corrected to EUR 2 255 under Rule 139 EPC.
 - 2.2 Under Rule 139, first sentence, EPC linguistic errors, errors of transcription and mistakes in any document filed with the EPO may be corrected on request.
 - 2.3 Following T 317/19, Reasons 2.3 to 2.5, an error in a duly filed form for paying the appeal fee may be corrected under Rule 139, first sentence, EPC.
 - 2.4 In G 1/12, OJ EPO 2014, A114, Reasons 37, the EBA summarised the following principles which the boards of appeal have developed as regards corrections under

Rule 88, first sentence, EPC 1973 (Rule 139, first sentence, EPC).

- (a) The correction must introduce what was originally intended. The possibility of correction cannot be used to enable a person to give effect to a change of mind or development of plans. It is the party's actual rather than ostensible intention which must be considered.
- (b) Where the original intention is not immediately apparent, the requester bears the burden of proof, which must be a heavy one.
- (c) The error to be remedied may be an incorrect statement or an omission.
- (d) The request for correction must be filed without delay.

2.4.1 During oral proceedings before the board, the appellant's professional representative set out in detail how the notice of appeal letter and subsequently payment Form 1038E had been prepared. He did want to pay the full appeal fee, being fully aware that the appellant was a large entity and not entitled to the reduced appeal fee. But, in the notice of appeal letter he indicated the amount of the reduced appeal fee of EUR 1 880, erroneously assuming that this was the correct amount. He evidently confused both amounts, as the reduced amount was identical to the former sole appeal fee amount. His assistant automatically took over this incorrect amount when preparing payment Form 1038E.

2.4.2 The board sees no reason to question the correctness of what the professional representative credibly submitted as regards the above course of action and his original intention.

- (a) At the date of payment, the amount due for the reduced appeal fee under Article 2(1), item 11 RFees was identical to the amount previously due for the appeal fee in all cases (EUR 1 880). The board accepts that this may have given rise to confusion.
- (b) The board also agrees with the appellant's argument that two further facts corroborate the assumption that the appellant originally intended to pay the full appeal fee amount.
 - (i) If the appellant had wished to make use of the reduced appeal fee amount, it is at least probable that it would have filed an explicit declaration to that end. Point 3 of the *"Notice from the EPO dated 18 December 2017 concerning the reduced fee for appeal (Article 108 EPC) for an appeal filed by a natural person or an entity referred to in Rule 6(4) EPC"* (OJ EPO 2018, A5) requires such a declaration.
 - (ii) Secondly, it is evident that the appellant is a well-known large entity which is not entitled to the reduced appeal fee.

2.4.3 Furthermore, the board points to the recent decision T 2620/18 which concerned very similar circumstances. Also in that case the appellant confused the then current reduced appeal fee with the former sole appeal

fee and indicated the incorrect amount of EUR 1 880 both in the notice of appeal letter and in the payment form. According to the board in that case, it was plausible that the appellant was guided by the previously applicable, known fee amount of EUR 1 880 and mistakenly assumed that it was paying the full fee. The present board sees no reason to deviate from that decision.

- 2.4.4 Therefore, the board is satisfied that the correction sought introduces what was originally intended by the appellant (see requirement 2.4(a) above), and that this original intention is immediately apparent. Thus, the strict standard of proof (see requirement 2.4(b) above) does not apply. Also requirement 2.4(c) above is met, as the error to be remedied is an incorrect statement in the payment form.
- 2.4.5 Lastly, the appellant filed its request under Rule 139 EPC merely two weeks after the board's communication which indicated for the first time that the prescribed appeal fee was not validly paid (see points VI and VII above). The board is, therefore, satisfied that the appellant filed its request for correction without delay (see requirement 2.4(d) above).
3. The board concludes that the requirements for the correction requested are met, and thus that the correction is to be allowed. As a consequence, the appeal is retroactively deemed to have been filed, the correction under Rule 139 EPC having effect *ex tunc* (see G 1/12, Reasons 37; T 317/19, Reasons 2.5).
4. At the end of the oral proceedings before the board, the appellant withdrew its auxiliary requests filed by letter of 30 September 2020. Thus, the fee for

requesting re-establishment of rights under Article 122 EPC is to be reimbursed.

Order

For these reasons it is decided that:

1. The request for correction under Rule 139 EPC is allowed.
2. The appeal is deemed to have been filed.
3. The reimbursement of the fee for requesting re-establishment of rights is ordered.

The Registrar:

The Chairman:



S. Sánchez Chiquero

G. Eliasson

Decision electronically authenticated