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Aktenzeichen / Case Number / N° du recours : T 93/88 - 3.3.1

Anmeldenummer / Filing No / N° de la demande : 82 200 346.3

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Bezeichnung der Erfindung: Spreadable water-in-oil emulsion based on high  
Title of invention: melting butterfat fraction and a liquid oil.  
Titre de l'invention :

Klassifikation / Classification / Classement : A23D 3/00

### ENTSCHEIDUNG / DECISION

vom / of / du 11 August 1988

Anmelder / Applicant / Demandeur :

Patentinhaber / Proprietor of the patent /  
Titulaire du brevet :

Unilever N.V. et al

Einsprechender / Opponent / Opposant :

Krayer, W.D.

Stichwort / Headword / Référence : Oral proceedings/Unilever

EPÜ/EPC/CBE Article 116

Schlagwort / Keyword / Mot clé :

"Request for oral proceedings" - "adverse  
decision issued without oral proceedings" -  
"decision void" - "appeal fee reimbursed".

Leitsatz / Headnote / Sommaire

Europäisches  
Patentamt

Beschwerdekammern

European Patent  
Office

Boards of Appeal

Office européen  
des brevets

Chambres de recours



Case Number : T 93 /88 - 3.3.1

**D E C I S I O N**  
of the Technical Board of Appeal 3.3.1  
of 11 August 1988

**Appellant :**  
(Opponent)

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(Proprietor of the patent)

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**Decision under appeal :**

Decision of Opposition Division of the European  
Patent Office dated 17 December 1987  
rejecting the opposition filed against European  
patent No. 0 063 389 pursuant to Article 102(2)  
EPC.

**Composition of the Board :**

**Chairman :** K. Jahn

**Members :** G.D. Paterson  
F. Antony

## Summary of Facts and Submissions

- I. European patent No. 063 389 was granted on 13 June 1984, Notice of Opposition was filed on 12 March 1985, and contained detailed reasoning in support of the ground of opposition that the subject-matter of the claims did not involve an inventive step and that the patent should be revoked in its entirety. The Patentee filed detailed observations in reply on 24 June 1985, and requested oral proceedings unless the opposition was withdrawn or the patent was maintained with its claims as granted. On 21 November 1985 the Opponent filed detailed observations in reply, and maintained his request that the patent should be revoked in full. He also stated "Unless the Opposition Division decides to definitely revoke the patent, oral proceedings before the Opposition Division are requested" (page 4, last sentence).
  
- II. A summons to oral proceedings on 4 June 1986 was issued on 24 January 1986, and sent to both parties. On 20 May 1986 the Patentee filed a letter which stated "Applicants withdraw their request for oral proceedings and request the board of opposition to take a decision on the basis of the documents on file."
  

On 2 June 1986 the Formalities Section of the Opposition Division informed the parties by telex (confirmed on 3 June 1986) that "the oral proceedings scheduled for 4 June 1986 are cancelled" and that "the procedure will be continued in writing".

  
- III. At the request of the Opposition Division, translations of citations in Dutch were provided by the Opponent in August 1986. A communication pursuant to Article 101(2) EPC was issued on 26 January 1987, in which it was indicated that

the opposition was likely to be rejected. The Opponent was invited to file observations in reply. The Opponent duly filed his observations in reply on 18 June 1987.

- IV. On 17 December 1987 the Opposition Division issued a Decision in writing in which the opposition was rejected. However, no oral proceedings took place before the Opposition Division.
- V. Notice of Appeal was filed on 10 February 1988, and the appeal fee duly paid. On 25 April 1988 a Statement of Grounds of Appeal was filed, which referred to the fact that oral proceedings had been explicitly requested in the letter dated 21 November 1985, but following cancellation of the oral proceedings scheduled for 4 June 1986, no further opportunity for oral proceedings had been provided. The Decision dated 17 December 1987 had therefore been issued without due regard to Article 116 EPC.
- VI. On 25 May 1988 the Board of Appeal issued a Communication to both parties, which proposed that the Decision dated 17 December 1987 should be set aside as void, having regard to the failure of the Opposition Division to appoint oral proceedings as requested by the Opponent before issuing its Decision. Both parties to the appeal replied that they agreed with this proposal.

#### Reasons for the Decision

1. The appeal is admissible.
2. It is quite clear that the sentence of the Appellant's letter dated 21 November 1985 quoted in paragraph I above is a request for oral proceedings under Article 116 EPC,

except in the event that a decision to revoke the patent was issued. It appears from the history of the proceedings set out in paragraphs I to IV above that the failure by the Opposition Division to hold such oral proceedings was not due to an error of interpretation, but to an oversight -albeit a very important oversight.

As pointed out in Decision T 19/87 "Oral proceedings Fujitsu", OJ EPO 7/1988, 268, if on the proper construction of a written communication from a party it constitutes a request for oral proceedings, there is no power to issue an adverse decision without first appointing such oral proceedings. Thus in the present case the Decision of the Opposition Division dated 17 December 1987 must be set aside as void and of no legal effect.

3. Furthermore, in the Board's judgement, the failure by the Opposition Division to hold oral proceedings in response to a clear request by the Appellant, because of an oversight, is necessarily a substantial procedural violation justifying reimbursement of the appeal fee under Rule 67 EPC if this is otherwise equitable. In the present case, in the Board's judgement having regard to the history of the proceedings the Appellant was entitled to an oral hearing before the Decision was issued, and reimbursement of the appeal fee is equitable.

**Order**

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

1. The Decision of the Opposition Division dated 17 December 1987 is set aside.

2. The opposition is remitted to the Opposition Division with the order that oral proceedings under Article 116 EPC shall take place before the Opposition Division decides on the opposition.
  
3. The appeal fee shall be reimbursed to the Appellant.

The Registrar:



The Chairman:



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17.8.88