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File Number: T 521/92 - 3.4.1

Application No.: 86 902 263.2

Publication No.: 0 243 374

Title of invention: Electrical excitation circuit for gas lasers

Classification: H01S 3/00

D E C I S I O N
of 22 July 1992

Applicant: Amoco Corporation

Headword:

EPC Article 109

Keyword: "Failure to implement a decision by the Examining Division to rectify its earlier Decision" - "Remittal to first instance for implementation"

Headnote
Catchwords



Case Number : T 521/92 - 3.4.1

D E C I S I O N
of the Technical Board of Appeal 3.4.1
of 22 July 1992

Appellant : Amoco Corporation
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Decision under appeal : Decision of Examining Division 047 of the
European Patent Office dated 2 December 1991
refusing European patent application
No. 86 902 263.2 pursuant to Article 97(1) EPC.

Composition of the Board :

Chairman : G.D. Paterson
Members : R.K. Shukla
U.G. Himmler

Summary of Facts and Submissions

- I. In its Decision dated 2 December 1991, the Examining Division held that Claims 1 and 23 of the European patent application in suit lacked novelty, and the application was therefore refused. In its Decision the Examining Division indicated that allowable independent claims could be based inter alia on the combined subject-matter of Claims 1 and 4, and Claims 23 and 25, as originally filed.

The Applicant appealed, and in the Notice of Appeal it was requested that the Decision of the Examining Division be set aside, and the presently pending Claims 1 to 30 be granted. In the Statement of Grounds of Appeal, however, which were filed on 1 April 1992, the Appellant accepted the Decision of the Examining Division with respect to the previously pending claims, and requested that the application be granted on the basis inter alia of a new independent Claim 1 corresponding to Claims 1 and 4 as originally filed. An amended set of claims was filed and discussed in detail, and interlocutory revision under Article 109 EPC was accordingly requested.

- II. The file was remitted to the Board of Appeal on 15 June 1992. However, in the internal part of the file, EPO Form 2701 contains inter alia a statement as follows: "The decision is to be rectified (Art. 109(1) EPC). Instructions to be given for the preparation of the fair copy of the decision on rectification on Form 2702". The box opposite this statement has been crossed, the words "and prepare AGRA (see 2035)" have been added at the end of the above statement in manuscript, and the Form 2701 has been signed by the three members of the Examining Division who were responsible for the Decision dated 2 December 1991, the Form being dated 29 April 1992.

Reasons for the Decision

1. Article 109(1) provides that "If the department whose decision is contested (here, the Examining Division) considers the appeal to be admissible and well founded, it shall rectify its decision". In the present case it is clear from Form 2701 that the Examining Division decided on 29 April 1992 to rectify its decision.
2. Article 109(2) EPC states that "If the appeal is not allowed within one month after receipt of the statement of grounds, it shall be remitted to the Board of Appeal without delay ...". In the present case, it is clear from Form 2701 that a decision was made on 29 April 1992 to allow the appeal, that is, within the one month period.
3. In the Board's view, when the Examining Division signed Form 2701 on 29 April 1992, the decision to rectify its earlier Decision was a final decision in the sense that thereafter, the decision to rectify under Article 109 EPC could not be changed by the Examining Division (see Decision T 390/86, OJ EPO 1989, 30 and Decision T 212/88, OJ EPO 1992, 28). Consequently, all that remained to be done, as envisaged on the form, was to implement the decision to rectify by notifying the Appellant of such decision to rectify, and by issuing a communication under Rule 51(4) EPC. In the Board's view, it is not necessary under Article 109(2) EPC for such mere implementation of the decision to rectify to be completed within one month after receipt of the statement of grounds.
4. In the above circumstances, the Board is unable to understand why this case was remitted to the Board of Appeal, since it follows from Article 109(2) EPC that if, as in the present case, a decision to rectify is taken and

an appeal is therefore allowed within one month after receipt of the statement of grounds, the Examining Division thereafter had no power to remit the case to the Board of Appeal, and the Board of Appeal has no power to consider the merits of the case.

In view of the delay since 29 April 1992, implementation of the decision to rectify should be carried out as soon as possible.

Order

For the above reasons, it is decided that:

The case is remitted to the Examining Division for implementation of its decision under Article 109(1) EPC dated 29 April 1992 to rectify its Decision dated 2 December 1991.

The Registrar:

The Chairman:

M. Beer

G.D. Paterson