

Internal distribution code:

- (A) Publication in OJ
(B) To Chairmen and Members
(C) To Chairmen

D E C I S I O N
of 10 May 1994

Case Number: T 0590/93 - 3.3.1

Application Number: 84304415.7

Publication Number: 0130804

IPC: G03C 1/68

Language of the proceedings: EN

Title of invention:
Photosensitive resin composition

Patentee:
Kogyo Gijutsuin, et al

Opponent:
Wilfried Holl

Headword:
Photosensitive resins/KOGYO

Relevant legal norms:
EPC Art. 99(1), 117(1), 134(1)(7)
EPC R. 55(a)

Keyword:
"Degree of certainty as to Opponent's identity"
"Type of evidence requested"

Decisions cited:
T 0025/85, T 0635/88, G 0001/84, G 0005/83

Headnote:

Evidence relating to an Opponent's personal circumstances is insufficient, in itself, to undermine the credibility of his stated identity under Rule 55(a) EPC. This identity can only be challenged by cogent evidence that another legal/natural person is the true Opponent (point 3 of the Reasons).

Internal distribution code:

- (A) Publication in OJ
(B) To Chairmen and Members
(C) To Chairmen

D E C I S I O N
of 10 May 1994

Case Number: T 0590/93 - 3.3.1

Application Number: 84304415.7

Publication Number: 0130804

IPC: G03C 1/68

Language of the proceedings: EN

Title of invention:

Photosensitive resin composition

Patentee:

Kogyo Gijutsuin, et al

Opponent:

Wilfried Holl

Headword:

Photosensitive resins/KOYO

Relevant legal norms:

EPC Art. 99(1), 117(1), 134(1)(7)

EPC R. 55(a)

Keyword:

"Degree of certainty as to Opponent's identity"

"Type of evidence requested"

Decisions cited:

T 0025/85, T 0635/88, G 0001/84, G 0005/83

Headnote:

follows



Case Number: T 0590/93 - 3.3.1

D E C I S I O N
of the Technical Board of Appeal 3.3.1
of 10 May 1994

Appellant:
(Opponent)

Wilfried Holl
Holdenberger Str. 112
D-47447 Moers (DE)

Representative:

Türk, Gille, Hrabal, Leifert
Brucknerstrasse 20
D-40593 Düsseldorf (DE)

Respondent:
(Proprietor of the patent)

Kogyo Gijutsuin
3-1, Kasumigaseki 1-chome
Chiyoda-ku
Tokyo-to (JP)

Murakami Screen Kabushiki Kaisha
5-3-10, Yokokawa Sumida-ku
Tokyo-to (JP)

Representative:

Laredo, Jack Joseph
Elkington and Fife
Prospect House
8 Pembroke Road
Sevenoaks, Kent TN13 1XR (GB)

Decision under appeal:

Decision of the Opposition Division of the
European Patent Office dated 26 January 1993, with
written reasons posted on 30 April 1993 holding
the opposition filed against European patent
No. 0 130 804 pursuant to Article 102(2) EPC to be
inadmissible.

Composition of the Board:

Chairman: A. Jahn
Members: J. Stephens-Ofner
R. Spangenberg
J. Jonk
J. Saisset

Summary of Facts and Submissions

- I. An opposition against a patent published on 5 February 1989 and standing in the names of Kogyo Gijutsuin and Murakami Screen KK, both Japanese corporations, was filed on 7 November 1989 by a Mr. H, who, as the evidence submitted by the patent proprietors established, was an employee, but not a *Rechtsanwalt*, in a firm of law and tax consultants, having its principal place of business in the Federal Republic of Germany. The opposition was filed in English, and relied solely and exclusively on Japanese citations.
- II. In view of the above circumstances, the Patentees requested that Mr. H should establish his *locus standi* in respect of the subject-matter of the opposed patent. By communication dated 26 August 1991 the Opposition Division informed both parties that the Opponent's identity had been sufficiently established and, further, that *locus standi* was not a specific requirement of the EPC. Nonetheless, and somewhat surprisingly, the Opposition Division on 8 October 1991 invited Mr. H to declare what exactly his status was in relation to the opposition, and subsequently requested him to file a sworn statement pursuant to Article 117(1) EPC, affirming that he had filed the opposition on his own, and not on behalf of some unidentified third party.
- III. Mr. H did not give such an affirmation, relying on the express wording of Article 99(1) EPC, which provides that **any person** may give a notice of opposition to the EPO.
- IV. Subsequently oral proceedings were held, which Mr. H, although duly summoned, did not attend.

- V. In its decision issued orally on 26 January 1993 with written reasons posted on 30 April 1993 the Opposition Division, relying on decisions T 25/85 (OJ EPO 1986, 81) and T 635/88 (OJ EPO 1993, 608) as well as on an earlier decision of the Enlarged Board, namely G 1/84 (OJ EPO 1985, 299), held that the opposition was inadmissible under Article 99(1) and Rule 56(1) EPC. Their decision was in essence based on the proposition of law, derived from the above cases, that where, on the face of the documents available to the EPO, there were legitimate doubts as to whether or not an opponent was really acting on his own behalf, as opposed to representing someone else, then it was up to the opponent to dispel these doubts completely.
- VI. An appeal was filed on 1 July 1993, with the payment of the appropriate fee. In his Statement of Grounds of appeal, filed on 10 September 1993, the Appellant (Opponent) denied that any, let alone any legitimate doubt had been raised by the circumstances of this particular case as to his real identity. In addition, he submitted, relying on G 1/84 cited above, that under the EPC the motives of opponents were irrelevant so that their identity was merely of procedural significance. He further submitted that in accordance with the generally accepted legal principles of evidence in the Contracting States, he who asserted a fact was required to prove it, and that in the present case the Respondent (Patentee) had failed to do so by not identifying the actual Opponent. He therefore requested that the Opposition Division's decision be set aside and that the opposition be held admissible. He also requested that the appeal fee be refunded.
- VII. In his response to the Statement of Grounds of Appeal, the Respondents relied, in the main, on decisions T 635/88, T 25/85 as well as on G 1/84, upon which the

Opposition Division's decision had been based. He submitted that the above decisions as well as decisions T 219/86 and T 10/82 established the proposition of law that Article 99(1) required that the **true** identity of the opponent had to be disclosed at the very outset of the proceedings, and that failure so to do amounted to a deliberate concealment of the facts and therefore to a breach of good faith.

He also relied on Article 125 EPC, submitting that the relevant procedural rules of the United Kingdom, France and Germany precluded the admissible conduct of litigation by proxy or by nominees which, for example in the UK, were tortious acts of "maintenance" or "champerty". Finally, he relied on the express wording of Article 114(1) EPC which provides that the EPO "shall examine the facts of its own motion and not be restricted to the facts, evidence and arguments provided by the parties".

Reasons for the Decision

1. The appeal is admissible.
2. Article 99(1) EPC provides that within nine months from the publication of the mention of the grant of the European patent **any person** may give notice to the European Patent Office of opposition to the European patent granted. Rule 55(a) EPC provides that the notice of opposition **shall** contain the name and address of the Opponent and state where his residence or his principal place of business is located, in accordance with the provisions of Rule 26(2)(c) EPC, which deals with the precise particulars by which such identity needs to be established.

Article 99(1) EPC as well as the Rules giving effect to it are absolutely clear in their terms. There is no apparent or latent ambiguity in them. Accordingly, and upon the principles of interpretation of statutes including the EPC, as set out in G 5/83 (OJ EPO 1985, 64), the provisions of Article 99(1) EPC must be given their plain and literal meaning in the context of the Convention as a whole. It is therefore clear that any person, as opposed to any person **interested**, may oppose a granted European patent. Had the intention of the legislature been different, the Article would no doubt have been drafted to include *locus standi* or some other formulation of relevant interest as a precondition for the admissibility of an opposition.

The absence from the Convention of procedural provisions dealing with oppositions by proxy or through nominees is, in the Board's view deliberate, and cannot therefore create a legal lacuna capable of being filled in, as the Patentee submitted, by Article 125 EPC, even if, which in the Board's view is not here the case, the required degree of general acceptability and recognition in the Contracting States had been established. Accordingly, this limb of the Respondent's argument must fail *in limine*. In this connection, the Board would also wish to observe that insofar as the UK torts of maintenance and champerty are concerned, these are independent causes of action, and are not therefore germane to the issue of admissibility, and that according to the legal practice in Germany (cf. Schulte, Patentgesetz, 5th edition, § 59, marginal numbers 16 and 24), a "man of straw" may file an admissible notice of opposition in his own name, but in the interest of another legal or natural person.

It follows from the above that if an opponent's interests are irrelevant to admissibility, then the nature of these interests, let alone motives, whether

they be fair or unfair, must likewise be irrelevant to the admissibility of an opposition. Indeed this was so decided in G 1/84, page 303, paragraph 3 of "the question put" where the Enlarged Board was asked to decide another point of law, namely, the admissibility of an opposition by the Patent Proprietor himself. It should also be noted that the Enlarged Board in the above case expressly stated that it was not necessary to decide the question of whether an opposition filed in the name of a "man of straw" was or was not admissible in any circumstances and that the Board did not do so (see point 2 of the Reasons, second paragraph). Thus the Respondents' submission that the filing of a notice of opposition by a "man of straw" is inadmissible in the light of the provision of Article 99(1) EPC is not supported by the decision G 1/84. The Enlarged Board of Appeal only mentioned there, *obiter*, that the possibility of an abuse of the opposition procedure might exist, if an opposition were filed by such a "man of straw". However, the Respondents have in the present case not even begun to prove, let alone establish, the presence or the likelihood of any such abuse. Nor can the Board, of its own motion (Art. 114(1) EPC), find any such abuse in the facts of this case.

3. In the Board's judgment, therefore, the crucial question in respect of the admissibility of the present opposition is whether or not the identity of the Opponent had been initially declared (Rule 55(a) EPC) and maintained throughout the **entire** proceedings beyond all reasonable doubt, for both the EPO and the patentee must be certain, on the face of the information provided by the Opponent, as to the Opponent's identity.

In this respect, the Board holds that it follows from the expression "any person" used in Article 99(1) EPC that the EPO is fully entitled to take declarations of

identity at their face value, and is not obliged to make inquiries into an Opponent's real identity by questioning the veracity of his declaration and statements under Rule 55(a) in combination with Rule 26(2)(c) EPC merely on the basis of doubts or suspicions about the veracity of the Opponent's actual declared identity. Furthermore the construction that the Patentees sought to place upon Article 114(1) EPC insofar as that Article requires that the EPO "shall" examine the facts of its own motion, is far too broad a one and has indeed, in another significant context, already been more narrowly construed by the Enlarged Board in its decisions of G 9 and G 10/91, OJ EPO 1993, pp. 408 and 420. Therefore, in the Board's judgment Article 114(1) does not require the Board to examine on its own motion matters raised on the basis of mere allegations and suspicions.

If, however, the veracity of these statements of identity is challenged by another party on the basis of evidence cogent enough to lead to the conclusion that the opponent is not really who he says he is, so that the requirement of Article 99(1) EPC is not met, in the Board's judgment an invitation to the named opponent to provide evidence as to his "true identity", e.g. by a sworn statement, could well be justified.

4. In the Board's judgment, however, such evidence was not submitted in the present case. Instead, the Opposition Division's doubts as to the real identity of the Opponent stemmed merely from the fact that Mr. H was not a person who satisfied either the requirements of Article 134(1) or of Article 134(7) EPC, but was someone who did meet the requirements of Article 133 EPC which provides that natural or legal persons having their residence or principal place of business within the territory of one of the Contracting States may be

represented in proceedings established by the Convention by an employee. Since, as indicated above, interests and motives are irrelevant to the admissibility of an opposition, facts relating to the personal circumstances of an opponent such, for example, as his age, his mental ability, his place of employment, the nature of his employer's business, his mother tongue or his real or apparent lack of commercial interest in the patent being opposed do not constitute cogent enough evidence in the above sense. By contrast, such evidence must include or be based upon facts which demonstrate close to certainty that a particular legal or natural person, other than the named opponent was in truth responsible for the filing of the notice of opposition.

Accordingly, the Board finds upon the evidence before it, that the identity of the Opponent in this case had at all relevant times been established and maintained to a degree of certainty sufficient to meet the requirements of Article 99(1) and Rule 55(a) EPC.

5. This finding does not conflict with decisions T 25/85, T 10/82 or T 216/86, where, in contrast to the present situation, the declarations and statements with respect to the identity of the opponent were manifestly incomplete from the outset or were subsequently amended by the opponent himself.

The same conclusion applies for decision T 635/88. In that case, these declarations and statements were complete from the outset and stood unamended, but the veracity of them was challenged by another party on the basis of evidence cogent enough to lead to the almost certain conclusion that the Opponent was not really who he said he was. Thus, in these exceptional circumstances, "legitimate doubts" in the sense in which this expression was used in decision T 635/88 could

exist, and justify an invitation to the named opponent to provide evidence as to his "true identity", e. g. by a sworn statement.

6. Dealing lastly with the request for the reimbursement of the appeal fee, the Board is not satisfied that any substantial procedural violation (Rule 67 EPC) had taken place, for misinterpretation by the first instance of relevant or even of irrelevant jurisprudence cannot, by itself, be tantamount to a procedural violation let alone to a serious one. Accordingly, the request for reimbursement is refused.

Order


For these reasons, it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division for the examination of the opposition.
3. The request for reimbursement of the appeal fee is refused.

The Registrar:


E. Görgmaier

The Chairman:


A. Jahn