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D E C I S I O N
of 10 January 1997

Case Number: T 0898/96 - 3.4.1

Application Number: 87111690.1

Publication Number: 0258698

IPC: H01L 21/306

Language of the proceedings: EN

Title of invention:
Dry etching method

Applicant:
HITACHI, LTD.

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 108, 109(1)
R. 51(4), 67

Keyword:
"Notice of appeal requests grant of patent with text as previously specified in communication under Rule 51(4)"
"Sufficiently reasoned statement of grounds of appeal"
"Failure to rectify by way of interlocutory revision was a substantial procedural violation but inequitable to refund the appeal fee"

Decisions cited:
-

Catchword:
-



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Boards of Appeal

Chambres de recours

Case Number: T 0898/96 - 3.4.1

D E C I S I O N
of the Technical Board of Appeal 3.4.1
of 10 January 1997

Appellant: HITACHI, LTD.
6, Kanda Surugadai 4-chome
JP - Chiyoda-ku, Tokyo 101 (JP)

Representative: Strehl Schübel-Hopf Groening & Partner
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DE - 80538 München (DE)

Decision under appeal: Decision of the Examining Division of the
European Patent Office dated 2 May 1996 refusing
European patent application No. 87 111 690.1
pursuant to Article 97(1) EPC.

Composition of the Board:

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

Summary of Facts and Submissions

I. During oral proceedings before the Examining Division in relation to this European application, the applicant filed new claims 1 to 7 and pages 6 to 23 of the description and requested the grant of a patent on the basis of these documents, and the Examining Division announced that it intended to grant a patent on that basis. Subsequently, in a communication pursuant to Rule 51(4) EPC dated 25 April 1994, the applicant was asked to approve the specified text.

In a reply dated 5 September 1994 the applicant did not consent to the text of claim 1 as filed during the oral proceedings (and thus did not approve the text as requested), but requested the grant of a patent including a proposed amended text for claim 1.

The Examining Division informed the applicant by letter dated 25 October 1994 that the proposed amendments to claim 1 were not of a minor form and so were not allowable under Rule 86(3) EPC. In reply, the applicant maintained his request to amend claim 1.

In a decision dated 2 May 1996, the Examining Division refused the application under Article 97(1) EPC, on the ground that "there is no text of the application which has been agreed by the applicant and allowed by the Examining Division (Article 113(2) EPC)".

II. A notice of appeal was filed by letter dated 10 July 1996 requesting:

"(1) that the decision be set aside and the patent granted on the basis of the application attached to the communication under Rule 51(4) EPC of 25 April 1994, and

(2) that the Examining Division rectify the decision."

Under the heading "REASON", the letter also stated that:

"The present appeal is substantiated by the fact that the grant of a patent is now requested in a form that was previously allowed (see case T 139/87, OJ 1990, 69)."

Reasons for the Decision

1. This appeal is admissible. In particular, the Board is satisfied that the letter dated 10 July 1996 constituting the notice of appeal also contains a sufficiently reasoned "statement setting out the grounds of appeal" within the meaning of Article 108 EPC. The contents of the letter which are quoted in paragraph II above make it plain that the applicant no longer requests grant of the patent with an amended claim 1 as proposed in the letter dated 5 September 1994, but instead requests grant of the patent with text as specified in the communication under Rule 51(4) EPC dated 25 April 1994.
2. Furthermore the appeal is clearly allowable. There can be no reason why the patent should not be granted with text as specified in the communication under Rule 51(4) EPC, since the applicant has approved such text in the letter dated 10 July 1996.
3. Thus, in the Board's view, the Examining Division should have rectified its decision dated 2 May 1996, pursuant to Article 109(1) EPC (see e.g. Decision T 139/87, OJ EPO 1990, 68). The failure to rectify such decision by way of interlocutory revision was a

substantial procedural violation by the Examining Division, and caused unnecessary extra work and loss of time within the Boards of Appeal in dealing with the case.

However, since the applicant did not approve the text of the application as specified in the communication under Rule 51(4) EPC until he filed an appeal, it would clearly not be equitable to refund the appeal fee under Rule 67 EPC.

Order

For these reasons it is decided that:

1. The decision of the Examining Division dated 2 May 1996 is set aside, and the appeal is allowed.
2. The case is remitted to the Examining Division with an order to grant a patent on the basis of the text specified in the communication under Rule 51(4) EPC dated 25 April 1994.

The Registrar:

The Chairman:

M. Beer

G. D. Paterson

