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D E C I S I O N
of 25 June 1997

Case Number: T 0953/96 - 3.3.2

Application Number: 92910487.5

Publication Number: 0581849

IPC: A61K 31/325

Language of the proceedings: EN

Title of invention:

Thiocarbamate sulfoxide composition for deterring ethanol
ingestion

Applicant:

Faiman, Morris D.

Opponent:

-

Headword:

Appeal after grant/FAIMAN

Relevant legal provisions:

EPC Art. 107
EPC R. 65(1)

Keyword:

"Admissibility - adversely affected (no) "

Decisions cited:

T 0850/95

Catchword:

-

Case Number: T 0953/96 - 3.3.2

D E C I S I O N
of the Technical Board of Appeal 3.3.2
of 25 June 1997

Appellant: Faiman, Morris D.
610 West 28th Place
Lawrence, KS 66046 (US)

Representative: Jones, Michael Raymond
Haseltine Lake & Co.
Imperial House
15-19 Kingsway
London WC2B 6UD (GB)

Decision under appeal: Decision of the Examining Division of the
European Patent Office dated 22 August 1996
granting patent application No. 92 910 487.5
pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: P. A. M. Lançon
Members: C. Germinario
J. Van Moer

Summary of facts and submissions

- I. European patent application No. 92 910 437.5 was filed on 13 April 1992.
- II. Notice of intention to grant a patent (communication under Rule 51(4)) was issued on 2 June 1995 and the proposed text for grant was approved except for minor modifications by the patent proprietor on 6 December 1995.
- III. On 1 February 1996 the Examining Division accepted these modifications (communication under Rule 51(6)) and on 22 April 1996 the translations were filed.
- IV. On 22 August 1996 the patent was granted as requested for the designated states and it was announced that the mention of grant would be published on 2 October 1996.
- V. By a fax of 1 October 1996 (16.27 pm) the appellant requested that the Examining Division correct an error in the application by including a set of process claims (Rule 88 EPC).

In the same fax the appellant also said:

"As a precaution I will be filing an appeal later today against the decision to grant as this will have the effect of suspending the effect of the decision pending the appeal."

Simultaneously the appellant requested reestablishment of rights under Article 122 EPC in respect of the rights to file a divisional application and to amend the application under Rule 86(3) EPC.

- VI. A notice of appeal was filed on 1 October 1996, together with a statement of grounds.
- VII. The mention of grant was published on 2 October 1996.
- VIII. Cancellation of the mention of grant was published on 4 December 1996 (in the European Patent Bulletin).
- IX. In a written communication the Board underlined that the appeal appeared to be inadmissible in view of Article 107 EPC, since the decision under appeal had not adversely affected the appellant.
- X. Oral proceedings took place on 25 June 1997.
- XI. The appellant's arguments regarding admissibility can be summarised as follows:
- It was clear from the facts that the approval of the specification was due to an error, since Greece and Spain were designated states from the beginning. T 850/95 is relevant as a precedent where an error was also recognised after approval and issue of the decision to grant and where, at the appeal stage, admissibility with regard to Article 107 EPC was not questioned.
 - The cancellation of the mention of grant raises a question of good faith.

The appellant was not even informed of the cancellation. As a consequence of the cancellation some national offices have refused to continue the proceedings for bringing the patent into effect and, if this appeal is considered inadmissible, the result could be, by expiry of the 3-month time limit, that the appellant would be unable to proceed further in some countries.

Under these circumstances, applying the principle of good faith it is suggested that the appeal should be accepted as admissible.

- In case of inadmissibility, the Board should order that the mention of grant be (re)published at a date after this decision so that the appellant can complete the national procedures.

XII. The requests are:

- that the appeal be accepted as admissible;
- that the correction, i.e. the incorporation in the text for grant of a separate set of process claims, be allowed,
- that the mention of grant be published at a date after the decision (auxiliary request).

Reasons for the decision

1. The question whether there is a right to appeal, having regard to Article 107 EPC, is to be decided by comparing the request submitted to the department of first instance and the decision under appeal at its date of issue.
2. In the present case it is clear from the facts and not even disputed by the appellant that the decision under appeal has granted the patent exactly in the form as requested, i.e. approved, by the appellant.

3. The Board considers that the first instance had no reason to question the appellant's request at the time of the decision.

Essentially, the formulation of requests is the sole responsibility of the party concerned.

The designation of Spain and Greece from the beginning did not necessarily imply that this would be maintained or had to be maintained since the appellant could have had reasons of his own to take other options.

Whether or not an error was in fact made by the appellant is irrelevant to the admissibility issue. With regard to Article 107 EPC, only the content of both request and decision at the time of the latter is relevant and is to be considered.

The Board therefore takes the view that the first instance rightly based its decision on the request as formulated by the party and had no reasons to disregard that request and to consider another one modified in the way now put forward by the appellant.

In T 850/95 the appeal was filed against a decision of the first instance refusing a correction after grant and not against the decision to grant the patent concerned. Therefore this case is irrelevant.

4. Bearing in mind the conditions set out in Article 107 EPC the Board sees no possibility of establishing a legal link between the admissibility of the present appeal and the cancellation of the mention of grant.

The cancellation was published on 4 December 1996 and can therefore have no bearing on the admissibility of the appeal, which is subject to the conditions applying on 22 August 1996, the date of the appealed decision.

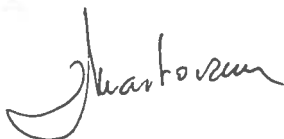
5. Since the appeal does not comply with Article 107 EPC, it must be rejected as inadmissible (Rule 65(1) EPC).
6. As a consequence of inadmissibility, the Board has no power to deal with any of the appellant's subsequent requests.

Order

For these reasons it is decided that:

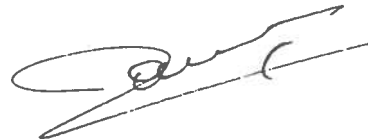
The appeal is rejected as inadmissible.

The Registrar:



P. Martorana

The Chairman:



P. A. M. Lançon



