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Datasheet for the decision of 25 July 2024

Case Number: T 1892/23 - 3.2.01

Application Number: 15786635.1

Publication Number: 3137345

IPC: B60R19/02, B60R19/18, E04C3/04

Language of the proceedings: EN

Title of invention:
MULTI-STRIP BEAM-FORMING APPARATUS, METHOD, AND BEAM

Patent Proprietor:
Shape Corp.

Opponents:
Kirchhoff Automotive Deutschland GmbH
BMW AG

Headword:

Relevant legal provisions:
EPC Art. 106, 112(1)(a), 113(1), 125
EPC R. 101(1), 103(1), 124
RPBA 2020 Art. 12

Keyword:
Admissibility of appeal - (no)
Correction of minutes of department of first instance -(no)
Reimbursement of appeal fee - (no)
Referral to the Enlarged Board of Appeal - (no)

Decisions cited:
R 0004/18, J 0008/81, T 0934/91, T 0838/92, T 0212/97, T 0231/99, T 0713/02, T 1055/05, T 1721/07, T 0255/22

Catchword:

Europäisches Patentamt
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Case Number: T 1892/23 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 25 July 2024

Appellant: (Patent Proprietor)	Shape Corp. 1900 Hayes Street Grand Haven, MI 49417 (US)
Representative:	Müller Schupfner & Partner Patent- und Rechtsanwaltspartnerschaft mbB (Muc) Bavariaring 11 80336 München (DE)
Respondent: (Opponent 1)	Kirchhoff Automotive Deutschland GmbH Am Eckenbach 10-14 57439 Attendorn (DE)
Representative:	Haverkamp Patentanwälte PartG mbB Gartenstraße 61 58636 Iserlohn (DE)
Respondent: (Opponent 2)	BMW AG Petuelring 130 80788 München (DE)
Representative:	Wittemer, Stefan Bayerische Motoren Werke Aktiengesellschaft Patentabteilung, AJ-5 80788 München (DE)
Decision under appeal:	**Communication of the Opposition Division of the European Patent Office dated 26 August 2021**

Composition of the Board:

Chairman	G. Pricolo
Members:	S. Fernández de Córdoba
	J. J. de Acha González

Summary of Facts and Submissions

I. The present case deals with the appeal of the patent proprietor (in the following the "appellant") which was filed on 25 October 2021 against the communication of the Opposition Division dated 26 August 2021 denying the correction of the minutes of oral proceedings requested by the patent proprietor on 7 June 2021.

II. In the underlying opposition proceedings, the Opposition Division issued an interlocutory decision on 14 May 2021 concerning maintenance of the European patent No. 3 137 345 in amended form. The appeals against this decision had already been decided by the present Board 3.2.01 on 13 November 2023 (under case number T 1018/21).

III. In the present case, the Board issued a communication in preparation for the oral proceedings. The Board was of the preliminary opinion that the appeal was to be rejected as inadmissible.

IV. At the oral proceedings before the Board, the appellant argued essentially in line with its written submissions. The appellant's arguments, where relevant for the present decision, are summarised in the reasons for this decision.

V. The appellant requested that the "decision" under appeal of 26 August 2021 be set aside and the minutes of the oral proceedings be corrected according to the requests of the patent proprietor filed by letter dated 7 June 2021.

Further, it requested reimbursement of the appeal fee under Rule 103(1)(a) EPC and a referral to the Enlarged Board of Appeal under Article 112(1)(a) EPC.

The respondents (opponents 1 and 2) did not comment in writing on this appeal and did not attend the oral proceedings before the Board.

Reasons for the Decision

1. Admissibility of the appeal

1.1 The main argument of the appellant is that the communication dated 26 August 2021 was a decision, which adversely affected the appellant and terminated the proceedings. Thus, an appeal against this decision was admissible.

The appellant considers that the legal situation underlying previous decisions has changed in view of the new Rules of Procedure of the Boards of Appeal 2020 (RPBA), in particular the new Articles 12(1)(a) and 12(4) RPBA. The new Article 12(1)(a) RPBA stated that the appeal proceedings were based, inter alia, on the minutes of any oral proceedings before the department which issued the decision under appeal. The new Article 12(4) RPBA clarified that, in particular, arguments not presented before the first instance were to be regarded as an amendment of the case which might be admitted only at the discretion of the Board. In view of this new legal situation, in particular with respect to "arguments" (not included in the former Article 12(4) of the RPBA 2007), the case law on the question as to whether a correction of the minutes of oral proceedings constituted an appealable decision was obsolete.

Furthermore, the appellant considers that the fact that the second paragraph of the "decision" concerning the correction of the minutes referred to "the division..." indicated that all members of the Opposition Division were involved in the explanations given, so that it was clear that a decision and not a mere communication was taken.

In the appellant's view, this decision terminated the proceedings since, under Article 12(4) RPBA, an argument which was allegedly not raised by the party (because it was not mentioned in the minutes) might be only admitted at the discretion of the Board. Thus, the decision on the correction of the minutes terminated the proceedings, at least for such arguments not considered by the Board in the exercise of its discretion.

Moreover, the right to be heard under Article 113 EPC was infringed, since arguments not recorded in the minutes of the first instance proceedings might not be considered later on by the Board.

The appellant further held that an appeal against a decision rejecting the correction of the minutes should be admissible in order to allow a review of facts and arguments submitted by the party at the oral proceedings but not considered by the first instance. This was in accordance with Article 125 EPC and the principle of the judicial review of administrative decisions.

1.2 The appellant's arguments are not persuasive. The Board considers the established case law of the Boards on what constitutes a decision to be fully applicable and

follows it. According to it, the minutes of oral proceedings and their correction are not decisions in the sense of Article 106 EPC. Reference is made in particular to the decision of the Enlarged Board of Appeal R 4/18 (reasons 11). This established case law has also been confirmed in recent decisions issued under the RPBA 2020, as for example, in T 255/22 (reasons 3.2.1). The Board does not see how these principles can be affected by the alleged changes to Articles 12(1) and (4) RPBA. Procedural issues arising under the RPBA before the Boards as second instance regarding submissions not reflected in the minutes and their possible consideration as an amendment of the case do not convert the minutes of the previous instance (or a communication relating to their correction) into an appealable decision. Thus, there is no reason to consider the consistent case law on the correction of the minutes as obsolete.

1.3 The above mentioned decision R 4/18 (reasons 8 to 11) states the following:

> "According to the case law of the Boards, whether a document constitutes a decision depends upon the substance of its contents rather than its form (see e.g. J 0008/81, OJ 1982, 10, point 3).
>
> The criterion of substance has to be assessed in the procedural context (see T 0713/02, OJ 2006, 267, point 2.1.4). (...)
>
> Another feature of a decision is that it involves a reasoned choice between legally viable alternatives (see T 0934/91, OJ 1994, 184, point 5). This is not the case for minutes of oral proceedings, and any correction thereof, the purpose of which is to

reflect the course of the oral proceedings (see T 0231/99, points 1.1 and 1.2).

The consistent case law of the Boards of Appeal has been that the minutes of oral proceedings, and the correction thereof, are not decisions in the sense of Article 106 EPC (see T 0838/92, point 3; T 0212/97, point 2.2; T 0231/99, points 1.1 and 1.2; CLBA 8th edition 2016, IV.E.2.2.2(b)(viii)). That, in all these cases, a separate formal decision was issued does nothing to alter the conclusion that minutes are not considered to be a decision."

Applying these principles to the present case, the Board considers that the use of the word "division" in the present communication on the correction of the minutes cannot transform such a communication into a decision. In this respect, the Board notes the following:

The competence for drawing up the minutes of oral proceedings is regulated in the EPC. An employee is designated to draw up the minutes (see Rule 124(3) EPC). That employee (i.e. the minutes writer) and the employee who conducted the oral proceedings (i.e. the chairperson) authenticate the minutes by their signatures (Rule 124(3) EPC). This was also the case with the present minutes. The communication concerning the requested correction was also signed by the minutes writer and the chairperson.

The minutes must reflect what the signing employees consider to be a true representation of the essential issues discussed at the oral proceedings (see Rule 124(1) EPC). It is common practice for the minutes to include also the views or conclusions of the Division

(as a whole) on issues raised in the course of the oral proceedings. In the contested communication (see its last paragraph), the persons responsible for the drafting of the minutes confirmed that the minutes correctly reflected what they remembered from the course of the proceedings. As stated in R 4/18 (see above, point 1.3), neither the minutes nor the communication relating to their correction involved a reasoned choice between legally viable alternatives, as in a decision, but merely attempted to reflect the course of the oral proceedings.

The appellant's argument that the refusal to correct the minutes was in fact a decision of the Division, since in the present case the Opposition Division consisted only of the minute writer and the chairperson, because the first examiner allegedly left the oral proceedings for a few minutes, cannot be accepted. According to Article 19(2) EPC, an Opposition Division consists of three technically qualified examiners. The alleged wrong composition, during a few minutes of the oral proceedings, cannot alter the nature of the minutes (and of the refusal to correct them) and does not transform the minutes or the refusal into a decision made by the Opposition Division.

The Board hence finds that the communication dated 26 August 2021 is not a decision. Therefore, the further issues discussed by the appellant, i.e. whether the proceedings were terminated by "the decision" in the sense of Article 106(2) EPC and whether the proprietor was adversely affected (Article 107 EPC), are of no relevance.

1.4 Furthermore, the Board cannot follow the appellant's complaints relating to the right to be heard under

Article 113(1) EPC and to the right to a judicial review of administrative decisions on the basis of Article 125 EPC (see point 1.1 above). Article 113(1) EPC requires that parties be given the opportunity not only to present their comments but also to have those comments considered in the written decision. However, this right does not generally include the right of the parties to have statements recorded in the minutes (see T 1055/05, reasons 5.2) or to decide on or to influence the content of the minutes (T 1721/07, reasons 15, 17). In addition, the Board fails to see how the refusal to correct the minutes could preclude a judicial review of the administrative decision on the opposition. If an essential argument of a party is not reflected in the minutes of the first instance proceedings, and the party has unsuccessfully requested a corresponding correction, but is able to demonstrate in the appeal proceedings that the argument was indeed admissibly raised and maintained, it will not be regarded as an amendment according to Article 12(4), first sentence, RPBA.

1.5 The communication of 26 August 2021 cannot therefore be challenged by an appeal. Consequently, the appeal of the patent proprietor is inadmissible under Article 106(1) EPC in conjunction with Rule 101(1) EPC.

2. Request for reimbursement of the appeal fee

Under Rule 103(1)(a) EPC, a reimbursement of the appeal fee may be ordered if the appeal is allowable. In the present case, the request for reimbursement under Rule 103(1)(a) EPC has to be rejected since the appeal is dismissed as inadmissible.

3. Request for a referral to the Enlarged Board of Appeal

The request for a referral to the Enlarged Board of Appeal under Article 112(1)(a) EPC is rejected. There is no need for a decision of the Enlarged Board of Appeal on this issue. Taking into account the established case law, the Board was able to decide the present case itself without any doubt.

Order

For these reasons it is decided that:

1. The appeal is rejected as inadmissible.

2. The request for reimbursement of the appeal fee is refused.

3. The request for a referral to the Enlarged Board of Appeal is refused.

The Registrar: The Chairman:

M. Schalow G. Pricolo

Decision electronically authenticated