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Aktenzeichen / Case Number / N° du recours : J 27/87

Anmeldenummer / Filing No / N° de la demande : 86 109 262.5

Veröffentlichungs-Nr. / Publication No / N° de la publication : 0 250 636

Bezeichnung der Erfindung: Improvements in a dispenser for medical
Title of invention: preparations
Titre de l'invention :

Klassifikation / Classification / Classement : A61J 7/00

ENTSCHEIDUNG / DECISION

vom / of / du 3 March 1988

Appellant: Item Development AB

Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence : Inspection of files/ITEM

EPO / EPC / CBE Articles 114, 125 and 128

Kennwort / Keyword / Mot clé : "Inspection of files" - "Examination of facts
by EPO of its own motion not required" -
"Refusal to proceed with appeal which has lost
its purpose"

Leitsatz / Headnote / Sommaire



Case Number : J 27/87

D E C I S I O N
of the Legal Board of Appeal
of 3 March 1988

Appellants: Item Development AB
Stocksund
Sweden

Representative : P. Rostovanyi et al.
AWAPATENT
Bellevuevägen 46
S - 20071 MALMÖ

Decision under appeal : Decision of the Receiving Section
of the European Patent Office
dated 28 August 1987 refusing
inspection of the files of the
European patent application
No. 86 109 262.5

Composition of the Board :

Chairman : P. Ford
Members : O. Bossung
F. Benussi

Summary of Facts and Submissions

- I. On 6 April 1987 the representative of the appellants applied for inspection of the file of European patent application No. 86 109 262.5 under Article 128(2) EPC. In order to try to establish that the applicants for the European patent had invoked rights under the application against the appellants, their representative presented extracts from correspondence in which the applicants' representative asserted that his clients had developed a dosage box for pharmaceutical preparations, which could be manufactured at a considerably lower cost than those available on the market. They had filed a patent application for specific components of the construction in order to ensure continued production in their factory. On request, the applicants' representative notified to the appellant's representative the number of the patent application.

- II. In a communication the Receiving Section stated that the extracts from the correspondence were not considered as proving that the applicants had invoked their rights under the application against the appellants. The appellants' representative answered that the mention of the patent application was made only in order to threaten the appellant.

- III. In a decision dated 28 August 1987, the Receiving Section held that the request pursuant to Article 128(2) EPC was refused, because there was no proof that the applicants for the European patent application had invoked their rights under that application against the appellants.

- IV. The appellants' representative filed the present appeal in time and duly paid the appeal fee. He requested

- (1) that the refusal of 28 August, 1987 by the Receiving Section be set aside and the information asked for from the Receiving Office, that is copies of the European patent application in question, be supplied to him under Article 128, (2) EPC and,
 - (2) that bibliographic data of the kind mentioned in Article 128, (5) EPC, concerning the European patent application in question be supplied to him.
- V. After publication of the European patent application on 7 January 1988, printed copies of the application were immediately sent to the appellants' representative. It was also suggested on behalf of the Board that the appeal was now without purpose and could be withdrawn.
- VI. By letter of 9 February 1988 the appellants' representative asked nevertheless for a decision, the case being of great importance for applicants and third parties to know in what situations Article 128(2) and (5) EPC could be invoked. He stated that, at the outset, he had already asked the applicants in accordance with Article 128(1) EPC to give him voluntarily a copy of the European patent application in question or to consent to inspection of the files. He enclosed extracts from the correspondence, in which the applicants' representative asserted that he was unable to find that the application had been invoked against the appellants. Thus, he could not find any reason to send copies of the application.

Reasons for the Decision

1. The appeal was and is still admissible, the appellant having been adversely affected within the meaning of Article 107 EPC by the decision under appeal.

2. Nevertheless, the files being open for public inspection since 7 January 1988 the first request presented (see IV above) became purposeless on that date and in accordance with general principles of procedural law (Article 125 EPC) the Board will not proceed with an appeal which has lost its purpose.

3. The second request was always unfounded. It is legally impossible for the Receiving Section of the EPO to give information under Article 128(5) EPC as long as provisions under Rule 96(1) EPC are not made. None exist and it is not the task of the Board to make any suggestions in this direction.

4. The only remaining question therefore is, whether the Board could declare, that the Receiving Section was wrong to refuse inspection of the file. This is not at all evident to the Board. It may be that the appellants had the feeling of being threatened by the applicants - a feeling which might be justified in the context of the whole relationship between the parties. But there was no proof of a threat at all before the Receiving Section even though the appellants were given time and opportunity to file evidence on the point. In the circumstances and taking into account the nature of the case, the Receiving Section was not obliged, whether under Article 114(1) EPC or otherwise, to pursue its own enquiries into the relationship between the parties and it was fully justified in refusing inspection of the file on the material available to it.

Order

For these reasons, it is decided that:

The appeal is dismissed.

The Registrar:

(J. Ruckerl)

The Chairman:

(P. Ford)

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