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D E C I S I O N
of 6 November 2002

Case Number: T 1200/01 - 3.5.2

Application Number: 95103767.0

Publication Number: 0673056

IPC: H01J 37/32

Language of the proceedings: EN

Title of invention:

Plasma processing chamber and method of treating substrates in a plasma processing chamber

Patentee:

Applied Materials, Inc.

Opponent:

Institute of Technological Information, Inc.

Headword:

Night letter-box/APPLIED MATERIALS, INC.

Relevant legal provisions:

EPC Art. 99(1)

Keyword:

"Opposition deemed to have been filed (no)"
"Free evaluation of evidence; concept of filing"

Decisions cited:

G 0003/97, T 0214/83, T 0069/86, T 0243/86, T 0128/87,
T 0702/89, T 0750/94

Catchword:

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Case Number: T 1200/01 - 3.5.2

D E C I S I O N
of the Technical Board of Appeal 3.5.2
of 6 November 2002

Appellant: Institute of Technological Information, Inc.
(Opponent) 2-2, Kitahara 2-chome
Asaka-shi Saitama-ken 351 (JP)

Representative: Hoffmann-Eitle
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Respondent: Applied Materials, Inc.
(Proprietor of the patent) 3050 Bowers Avenue
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California 95054-3299 (US)

Representative: Zimmermann, Gerd Heinrich
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 7 August 2001
deeming the opposition against European patent
No. 0 673 056 not to have been filed.

Composition of the Board:

Chairman: W. J. L. Wheeler
Members: B. J. Schachenmann
R. G. O'Connell
F. Edlinger
P. H. Mühlens

Summary of Facts of Submissions

- I. This is an appeal against the decision of the opposition division dated 7 August 2001 deeming the opposition filed by the appellant against European patent No. 0 673 056 "not to have been filed in due time."
- II. The opposition period expired on Thursday, 17 September 1998. Despite an investigation carried out within the EPO immediately pursuant to a request made by the appellant on 7 October 1998, no trace of a notice of opposition nor of a voucher for payment of fees could be found.
- III. According to the submissions of the appellant in the opposition procedure, the delivery of the notice of opposition had been entrusted to Mr T, a trainee patent attorney, who had inserted an envelope containing the notice of opposition together with a voucher for payment of the opposition fee and two other letters into the night letter-box located at the Corneliusstrasse entrance of the EPO Isar building on the night of 17 September 1998.
- IV. This was confirmed by Mr T in an affidavit dated 14 June 1999 and in his witness testimony before the opposition division. According to his recollection he travelled by car from the appellant's representative's premises to the night letter-box at the Corneliusstrasse at around 10 pm. He opened the flap of the letter-box with one hand, put the envelope with all the documentation in it into the chute, let the flap close behind it and left. He also stated that, on previous occasions, he had had difficulties in

physically inserting an envelope past the flap and into the chute of the letter-box but that this time he did not experience any such difficulty. It appeared to him that it was possible for envelopes inserted into the letter-box not necessarily to travel down the chute and into the letter-box, which raised the possibility of removal by a subsequent deliverer or any other passer-by. These statements were supported by an affidavit of the appellant's representative referring to problems he himself had experienced with the EPO night letter-box on another occasion. In a submission made in the course of the appeal procedure this event was stated to have occurred in January 1996.

V. In the course of the opposition proceedings the appellant requested a copy of the technical drawings of the night letter-box at the Corneliusstrasse, which had been dismantled in the mean time; he also requested an opportunity to interview the night porters and disclosure of the records the latter maintained of checks they made on the night letter-box. Pursuant to these requests inquiries were made of the EPO Building Services and the porters including an inspection of the porters' logbook ("Wachbuch"). These inquiries did not reveal any irregularities on the night of 17 September 1998 and the parties were informed accordingly. As regards the request for copies of the drawings of the night letter-box, the parties were informed that the EPO was not in possession of such drawings.

VI. The respondent proprietor, on the other hand, submitted declarations by two employees from the EPO Building Services and the EPO Inward Post Service respectively stating that it was impossible to remove letters blocked in the transfer zone ("Umschaltbereich") of the

EPO night letter-box from the outside and that they were not aware of mail ever having been removed or lost from the night letter-box.

VII. Based on these facts and the established jurisprudence of the EPO Boards of Appeal (T 128/87, OJ EPO 1989, 406) according to which the onus of proving that a document had been filed was on the filing party, the opposition division found that the opposition could not be deemed to have been filed as no physical trace thereof had been found in the Office.

VIII. In the statement setting out the grounds of appeal and in further submissions the appellant opponent agreed with the opposition division as to the applicable principle of law where a document had allegedly been filed but could not be found in the EPO. However, the opposition division had applied this principle wrongly. If a document could only be deemed filed where physical evidence of this could be identified within the Office, then once no such physical evidence could be found, the matter would be conclusively decided and no purpose would be served in taking of any evidence. What was impossible for the appellant to show was the reason why the EPO could not find the documentation filed by Mr T. However, according to the case law, it was the balance of probability which was decisive, and not the presence or absence of physical evidence within the Office. The evidence of Mr T should therefore be taken into account as proof of filing. This evidence was plausible and not formally challenged as to its accuracy. The requested drawings of the night letter-box could support (or undermine) the plausibility of the statements of Mr T and should therefore be considered if there were still doubts as to his credibility. It was not the

appellant's contention that there was a technical failure of the letter-box that night, but it was plausible, on the background of Mr T's statements, that a third party had removed the item from the immediate interior of the letter-box.

The appellant therefore requested that the decision under appeal be set aside and that the opposition be deemed to have been filed in time.

- IX. The respondent requested that the appeal be dismissed. Indeed, it appeared impossible for the appellant in the present case to provide physical evidence which could prove that the opposition had been filed on the night of 17 September 1998. Equally, it was impossible for the EPO or the patentee to provide any physical evidence that the opposition had not been filed. In such a situation the burden of proof lay with the party doing the filing. However, a mere non-refutable statement that the document had been filed, even if presented in the form of a sworn affidavit, was not sufficient to discharge this burden. The respondent disagreed that the statement by Mr T had not been challenged as there were statements by EPO employees standing in contradiction to the account given by him. A digression from the strict standards of proof set out in the relevant jurisprudence of the EPO Boards of Appeal would lead to loss of legal certainty for the public which would then be confronted with the possibility that a party who failed to meet a time limit could be reinstated into it by means of a mere non-refutable declaration.

Should the Board consider deciding in favour of the appellant and contrary to the established jurisprudence

of the Boards of Appeal the following question should be referred to the Enlarged Board of Appeal: *"Whether a non-refutable assurance given before a body of the EPO in the form of an affidavit or as a testimony (...) is sufficient to prove that a document of which no physical trace can be found within the EPO has been filed in due time with the EPO"*.

X. In a communication of 20 September 2002 the Board pointed to the legal concept of "filing" according to the EPC which was based on the date of receipt of a document at the EPO. The date of receipt was to be considered as the date on which an item was irrevocably in the control of the EPO. An item could not be considered as having been filed as long as it was retractable from the EPO night letter-box - be it by the party itself or by a third party. In such circumstances the risk of non-receipt was still borne by the party who intended to file an item in this way. As the Board had no reason to doubt the appellant's submissions concerning occasional malfunctions of the night letter-box at the Corneliusstrasse, no additional evidence appeared to be necessary to that effect. On the other hand there was no indication that there had been any malfunction on the relevant day.

XI. In response to this communication the appellant referred, at the oral proceedings, which were held on 6 November 2002, to the "Notice from the EPO dated 2 June 1992 concerning the filing of patent applications and other documents" (OJ EPO 1992, 306). According to point 5.6 of the German text of this notice documents posted in an automated mail-box at one of the EPO filing offices "**erhalten den Tag des Einwurfs** als Einreichungstag". From this and the

corresponding French text ("date à laquelle ils ont été glissés dans lesdites boîtes") it followed that the insertion of an item into an EPO letter-box was sufficient for filing even if the item was later removed from the letter-box by a third party. When the flap of the letter-box closed behind the item, it crossed the boundary of the area of control of the EPO with the effect that the responsibility for the further fate of the item was shifted to the EPO. This was all that had to be proved and was exactly what had happened according to the uncontested statements of Mr T. As far as the standard of proof was concerned, decision T 128/87 cited by the respondent was not applicable to the present case since, contrary to the present case, it concerned an action taken outside the EPO for which a non-refutable declaration did not suffice to demonstrate that the action had been performed in time.

Reasons for the Decision

1. The appeal complies with the provisions mentioned in Rule 65(1) EPC and is therefore admissible.

2. The issue in this appeal is whether an opposition of the appellant against the patent referred to above can be deemed to have been filed. According to Article 99(1) EPC, last sentence, this is only the case if the opposition fee has been paid within the opposition period, i.e. by 17 September 1998. As follows from the facts and submissions set out above, no trace of a notice of opposition nor of a voucher for payment of the opposition fee allegedly filed by the appellant on 17 September 1998 has been found within the Office.

3. Concerning the standard of proof to be applied for establishing the receipt of documents not found within the EPO, it is the established jurisprudence of the Boards of Appeal that, even if proof to this effect can seldom lead to absolute certainty, it must at least show to a high degree of probability that the alleged filing took place (T 128/87, OJ EPO 1989, 406 with references to other decisions). In some previous cases it was accepted that this standard was met if there were concrete traces of the item sought which, even if they did not show it for certain, indicated a high probability of the lost document having once been in the Office (see decisions T 243/86 and T 69/86). Nevertheless, any other means of giving evidence, such as witness testimony, could equally be considered in this context. It has to be recalled that proceedings before the EPO follow the principle of the free evaluation of evidence. Laying down firm rules of evidence defining the extent to which certain types of evidence were or were not convincing would conflict with this principle (G 3/97, OJ EPO 1999, 245, point 5 of the reasons). The evaluation of evidence normally should answer the question of what, on the basis of all available evidence, is more likely than not to have happened (see e.g. T 750/94, OJ 1998, 32, point 4 of the reasons).
4. Since, under the EPC, the critical event for compliance with a time limit is the date of receipt of an item at the EPO for which receipt the filing party bears the responsibility (T 702/89, OJ 1994, 472, point 2.2 of the reasons), it follows that the burden of proof that filing has been effected falls on this party. The impossibility of furnishing proof of a higher probability that an item was filed than that it was not

filed, must therefore go against the party doing the filing (T 128/87, points 7 and 8 of the reasons).

5. Thus, in the circumstances of the present case, the question arises whether, on the basis of all the available evidence, the probability that the envelope containing the notice of opposition and a voucher for the opposition fee was filed on 17 September 1998 is greater than that it was not filed. If this question cannot be answered in the affirmative, the opposition must be deemed not to have been filed.

6. In the present proceedings the following evidence produced by the parties and revealed by internal investigations within the EPO is to be considered:
 - 6.1 The appellant, in support of his case, produced an affidavit of Mr T dated 14 June 1999 and corroborated by the latter's testimony as a witness before the opposition division on 12 July 2001 concerning his recollection of what happened on 17 September 1998 (see points III and IV, above). The affidavit includes *inter alia* a copy of the printout of an internal list drawn up by the appellant's representative specifying the items prepared for lodging together in the EPO night letter-box on 17 September 1998 (exhibit CTB 2). A second affidavit by the appellant's representative dated 19 September 2000 refers to another occasion when this representative had experienced problems with the night letter-box at the Corneliusstrasse (point IV, above). In the course of the appeal proceedings copies were filed of replies from patent attorney firms to a circular letter asking for information on the functioning of the night letter-box at the German Patent Office. They refer to occasional malfunctions of

- the EPO night letter-box at the Corneliusstrasse.
- 6.2 The respondent, on the other hand, filed declarations dated 11 July 2001 by employees from the EPO Building Services and the EPO Inward Post Service concerning their experience with the night letter-box at the Corneliusstrasse (see point VI, above).
- 6.3 A report from the EPO Inward Documents Service dated 9 October 1998 refers to internal investigations made in connection with the documents claimed to have been filed on 17 September 1998. In the course of these investigations not only the night letter-box and its proper functioning on 17 September 1998 were checked but also the confirmation-of-receipt forms and empty envelopes collected at the EPO Inward Documents Service. According to this report no trace of the documents in question could be found. According to inquiries made by the opposition division of the EPO Isar Building Services, the two porters on duty on the night from 17 to 18 September 1998 who could be contacted had no recollection of any irregularity. This is confirmed by a copy of the corresponding page from the porters' logbook (see points II and V, above).
7. The Board, when evaluating the evidence referred to above, has no reason to doubt that the affidavit and the oral testimony of Mr T truly reflect his recollection of the events of the 17 September 1998 even if these statements were made more than 8 months after the relevant date. The Board also accepts that according to documentary evidence the envelope in question was produced at the representative's office prior to the alleged moment of filing. On the other hand, the investigations within the EPO and the

statements of the employees of the EPO are fully consistent insofar as they credibly confirm that despite careful search no trace of any of the letters contained in the envelope, including the notice of opposition and its associated fee voucher, could be found within the Office and that, even if occasional malfunctions of the night letter-box had occurred, there was not the least indication of any malfunction or other particular event on the 17 September 1998. In these circumstances, the evidentiary value of the proofs submitted in support of the appellant is at least not higher than that of the investigations made within the EPO. It cannot therefore be concluded that the probability that the envelope containing the notice of opposition was filed on 17 September 1998 is greater than that it was not filed.

8. The appellant argued that the evidence of Mr T was not inconsistent with the evidence of the EPO employees as it was plausible that a third party had removed the envelope from the letter-box after insertion (see points IV and VIII, above). In such a case the envelope should be considered as having been filed (see point XI, above).

However, in the Board's view, it appears very unlikely that an envelope fully inserted into the letter box as asserted by Mr T was subsequently removed by a third party. As confirmed by the responsible employee of the EPO Inward Post Service, no such incident ever occurred during her period of service. The fact that there were occasional malfunctions of the night letter-box not involving the loss of an envelope does not support the plausibility of the appellant's argument, in particular as no malfunction was observed on the relevant day as

confirmed by Mr T. If, on the other hand, the envelope was not fully inserted into the letter-box so that it was still retractable from the outside, it could not be considered as having passed the boundary of the area of control of the EPO. As the date of receipt of a document is the date on which an item is irrevocably in the control of the EPO (see T 214/83, OJ EPO 1985, 10, point 2), it could therefore not be deemed to have been filed if removed later by a third party. This is not inconsistent with point 5.6 of the "Notice from the EPO concerning the filing of patent applications and other documents" (OJ EPO 1992, 306) referred to by the appellant. The latter regulation has the purpose of giving a party the possibility of having the day on which a document is deposited in an automated mail-box at the EPO accorded as the filing date even if it is not processed by the Office on that date. This broad purpose does not extend, however, to providing a solution to narrow, albeit important, hypothetical problems such as the precise definition of when an item has crossed the boundary of the area of control of the EPO.

9. Consequently, the evaluation of the evidence referred to above does not allow the conclusion that there is a higher degree of probability that the alleged filing took place than that it did not take place.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

D. Sauter

W. J. L. Wheeler