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**Datasheet for the decision
of 2 February 2012**

Case Number: T 0834/09 - 3.3.05

Application Number: 97923437.4

Publication Number: 904607

IPC: H01M 4/58, C01B 25/26,
C01B 25/45

Language of the proceedings: EN

Title of invention:

Cathode materials for secondary (rechargeable) lithium
batteries

Applicant:

Hydro-Québec

Opponent:

VALENCE TECHNOLOGY, INC.

Headword:

Public availability/HYDRO-QUEBEC

Relevant legal provisions:

EPC Art. 54(1)(2)

Keyword:

"Novelty (no): document publicly available before the priority
date"

Decisions cited:

T 0381/87, T 0444/88, T 0398/90, T 0165/96, T 0314/99,
T 0186/01, T 1081/01, T 1510/06

Catchword:

The reception and date stamping of an incoming document by a
staff member of a public library makes the document available
to the public.



Case Number: T 0834/09 - 3.3.05

DECISION
of the Technical Board of Appeal 3.3.05
of 2 February 2012

Appellant: Hydro-Québec
(Patent Proprietor) 75 René-Lévesque Blvd. West
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Respondent: VALENCE TECHNOLOGY, INC.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 24 February 2009
revoking European patent No. 904607 pursuant to
Article 101(3)(b) EPC.

Composition of the Board:

Chairman: G. Raths
Members: J.-M. Schwaller
S. Hoffmann

Summary of Facts and Submissions

I. This appeal lies from the decision of the opposition division revoking European patent No. 0 904 607 with a claim 1 reading as follows:

"1. A cathode material for a rechargeable electrochemical cell, said cell also comprising an anode and an electrolyte, the cathode comprising a compound having the formula $LiMPO_4$ where M is at least one first-row transition-metal cation selected from the group consisting of Mn, Fe, Ni and Ti, or a combination thereof; and wherein the compound has an ordered olivine structure."

II. In the opposition procedure, the parties agreed that the subject-matter of above claim 1 was disclosed in its entirety in document

D1: A. K. Padhi et al: "*LiFePO₄: A Novel Cathode Material for Rechargeable Lithium Batteries*", The Electrochemical Society, Inc. Meeting Abstracts, Volume 96-1 (Spring Meeting, Los Angeles, Calif., May 5-10, 1996), page 73, Abstract No. 58.

The patent proprietor nevertheless contested that document D1 had been made available to the public before the priority date of the contested patent, i.e. before 23 April 1996.

III. In the contested decision, the opposition division concluded that document D1 was made available to the public before this date because it was proven it had

been received by several libraries well before the above date and electronically catalogued by one of these libraries on 9 April 1996. The opposition division considered that "once an electronic registration took place, respective document was also retrievable for the public, even though it was not shelved".

IV. Among the documents cited in the opposition phase, the following are of relevance for the present decision:

D14: Declaration by Mr. Tony A. Harvell of the University of California Libraries San Diego; 7 July 2006

D19: Affidavit of Mr. Tony A. Harvell of the University of California Libraries San Diego, La Jolla, California, 17 August 2007.

V. With its statement setting out the grounds of appeal, the patent proprietor (hereinafter the "appellant") contested the conclusions of the opposition division, arguing in particular that there was no evidence that D1 was catalogued or shelved, and so made available to the public, before 23 April 1996.

VI. By communication dated 19 November 2009, the opponent (hereinafter the "respondent") argued that it was proven that several libraries received D1 well before the priority date of the patent. The staff of these libraries not being bound by any obligation of secrecy, D1 had thus been made available to the public.

VII. Oral proceedings were held on 2 February 2012 in the presence of both parties.

VIII. The parties' requests were established as follows:

The appellant requested that the decision be set aside and that the case be remitted to the department of first instance for further prosecution.

The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. The main question to be decided in this appeal is whether or not document D1 - which indisputably discloses the subject-matter of claim 1 at issue - was made available to the public before the earliest priority date of the contested patent, i.e. before 23 April 1996.

2. Regarding the public availability of a document received in a library, the jurisprudence of the boards of appeal is as follows:

In T 381/87 (OJ EPO 1990, 213) it was considered that the shelving before the relevant date was evidence enough for establishing the public availability of a document in a public library, regardless of whether any person looked at it or actually knew it was available.

According to other decisions (T 314/99 (sections 5.1 to 5.6 of the reasons) or T 186/01 (section 4. of the reasons)), a document did not become publicly available

by its mere arrival in the archive of a library. Rather the possibility that the public could acquire knowledge or awareness of the existence of a document - for instance by cataloguing - was seen as a precondition of its public availability in the library before the relevant date.

3. In the case at issue, it is uncontested that document D1 was received and date stamped by the University of California Libraries San Diego on 3 April 1996. The statement of Mr Harvell in document D14, items 5) to 8) and the date stamp "Received on: 04-03-1996" visible on the reproduction of the stamped page of the original print of the Meeting Abstracts publication - which includes the abstract D1 - corroborate the reception of document D1 in the aforementioned library well before the earliest priority date of the contested patent.

There is no evidence whatsoever that D1 was shelved before the relevant date, and the evidence from D14 that D1 was catalogued has been contested by the appellant on the basis of D19.

4. The board observes that none of the aforementioned decisions T 381/87, T 314/99 or T 186/01 addressed the question of the public availability of a document by reception and date stamping by a staff member in a public library. This issue and in particular the quality of the staff member as belonging to the public and the possibility for the public to gain access to the information in the document will be focused on hereinafter.

5. As to the question whether a person in charge of the reception and date stamping of a document received by mail in a public library - such as document D1 in the University of California San Diego Libraries - is a member of "the public" within the meaning of Article 54(2) EPC, the board observes the following:

5.1 According to the jurisprudence of the boards of appeal, information is said to be publicly available if only a single member of the public is in a position to gain access to it and understand it, and if there is no obligation to maintain secrecy (T 1081/01, section 5. of the reasons and T 1510/06, section 4.2.1 of the reasons).

Further, according to T 0165/96 (section 1.1.1 of the reasons) which concerned the public availability of technical information drafted in Danish and disclosed in an insert in a minor small-ads newspaper (circulation: 24,000) distributed in the suburbs of Copenhagen, the "public" within the meaning of Article 54(2) EPC did not presuppose a minimum number of people or specific language skills or educational qualifications. It followed that the residents of a Copenhagen suburb were held to represent the public.

In another case (T 0398/90, section 6. of the reasons), a marine engine installed in a ship was held to have been made available to the public because it had been known to the engine room crew.

5.2 For the board, it follows by analogy from the above jurisprudence that the person in charge of the

reception and date stamping of an incoming document at a public library is without any doubt a member of the public - just like the residents of a Copenhagen suburb or the crew working in a ship's engine room - as this staff member is in no way bound by any obligation to maintain secrecy about the publications he/she handles and the content thereof, and after all, his/her very function as a staff member of a public library is to make information available to the public.

6. As to the question relating to the possibility for the public to gain access to the information in said incoming document, it is observed that:
 - 6.1 It is part of the case law of the boards of appeal that the theoretical possibility of having access to information renders it available to the public (T 444/88, point 3.1 of the reasons). In the case at issue, this means that a printed document received by mail at a public library is clearly rendered available to the public, since the staff member in charge of its reception and date stamping is not bound by any obligation to maintain secrecy and is thus free to pass the document on to others - which is precisely his or her job.
 - 6.2 Moreover, in the case of a written disclosure it is irrelevant whether the staff member is a person skilled in the art or not, because the content of a written disclosure can be freely reproduced and distributed even without understanding it. It follows that date stamping an incoming document in a public library is the point of time at which the document is leaving the non-public domain and entering the public domain. Once

placed in the public domain, there is no longer anything that restrains or obstructs access to said information, since the content of the document can be freely reproduced, distributed, transmitted, or otherwise exploited.

- 6.3 It follows that the appellant's argument that the reception and data stamping operation is not open to the "public" is no longer relevant since at least one person - the member staff in charge of the reception and stamping - had free access to the document and could, at least theoretically, have passed the information contained therein on to anybody else.

As stated in the case law cited above, this theoretical possibility of access by at least one person not bound by any explicit or implicit confidentiality agreement is sufficient. Openness to "the public" does not require access to an unlimited number of arbitrary persons (a ship's engine room is certainly not open to the public in that sense).

7. The board therefore concludes from the above reasoning that the action of receiving and date stamping an incoming document in a public library suffices to make a written document available to the public and that a person fulfilling this action can be described as a member of "the public" in the sense of Article 54(2) EPC.
8. In the light of the above findings, the board concludes that document D1 was made available to the public before the priority date of the patent in suit and is thus, according to Article 54(2) EPC, comprised in the

state of the art. It follows that claim 1 of the sole request on file, the subject-matter of which is disclosed in entirety in D1, lacks the requirements of novelty of Article 54 (1) and (2) EPC.

9. Due to the fact that the sole request on file cannot be allowed, the appeal cannot be successful.

Order

For these reasons it is decided that:

The appeal is dismissed

The Registrar:

The Chairman:

C. Vodz

G. Raths