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**Datasheet for the interlocutory decision
of 16 October 2012**

Case Number: T 2347/11 - 3.5.06

Application Number: 05026720.2

Publication Number: 1640847

IPC: G06F 13/42

Language of the proceedings: EN

Title of invention:

Dynamic random access memory (DRAM) semiconductor device

Patentee:

Rambus Inc.

Opponents:

SK hynix Deutschland GmbH
MICRON EUROPE Ltd

Headword:

Dynamic random access memory/RAMBUS

Relevant legal provisions (EPC 1973):

EPC Art. 112(1)(a)

Keyword:

"Enlarged Board - referral (no)"

Decisions cited:

T 0264/84, T 0415/87, T 0068/90, T 0347/90, T 0018/92,
T 0481/96, J 0025/03

Catchword:

The letter of "withdrawal" of an application in this case does not relate unambiguously and without doubt to the present case and thus cannot be understood as withdrawal of the appeal; see reasons, points 2 to 2.5.



Case Number: T 2347/11 - 3.5.06

INTERLOCUTORY DECISION
of the Technical Board of Appeal 3.5.06
of 16 October 2012

Appellant proprietor: Rambus Inc.
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Sunnyvale, CA 94089 (US)

Representative: Eisenführ, Speiser & Partner
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D-20355 Hamburg (DE)

Respondent opponent 1: SK hynix Deutschland GmbH
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Representative: Urner, Peter
ter Meer Steinmeister & Partner GbR
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Respondent opponent 2: MICRON EUROPE Ltd
Micron House
Wellington Business Park
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Representative: Tunstall, Christopher Stephen
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 28 October 2011
revoking European patent No. 1640847 pursuant
to Article 102(1) EPC 1973.

Composition of the Board:

Chairman: D. H. Rees
Members: A. Teale
W. Sekretaruk

Summary of Facts and Submissions

- I. The appeal by the patent proprietor, the sole appellant in these proceedings, is against the decision by the opposition division, dispatched on 28 October 2011, to revoke European patent No. 1 640 847.
- II. In the notice of appeal, received on 9 November 2011, the appellant proprietor requested that the appealed decision be set aside, the oppositions be rejected and that the patent be maintained as granted or in amended form according to one of the auxiliary requests forming the basis of the decision. The appellant proprietor also made an auxiliary request for oral proceedings. The appeal fee was paid on 9 November 2011.
- III. In a statement of grounds of appeal, received on 1 March 2012, the appellant proprietor requested that the oppositions be rejected and the decision set aside. The statement of grounds of appeal was forwarded by the registry of the board to each of respondent opponents 1 and 2, in each case with a communication dated 19 March 2012 stating that "Any reply must be filed within four months of this notification".
- IV. In a letter received on 28 March 2012 (referred to below as "the letter of 28 March 2012") the appellant proprietor, citing its own reference number "RA 942-04EP", "RAMBUS INC." as applicant and the "Number" "1 640 847", made the following declaration:
- "On behalf of the applicant, **for reasons other than patentability**, we hereby **withdraw** the application. Withdrawal of this application is not to be construed

as an admission or any indication that the applicant agrees with or acquiesces to the objections raised during the current examination procedure."

- V. In a letter received on 5 April 2012 the appellant proprietor, referring to the letter of 28 March 2012 (the "attached fax"), stated *inter alia* that "It just came to our attention that the attached fax went into the incorrect file. It was our intention to withdraw the European patent application 07114628.6, which has our reference number RA 932-04EP (and not RA 942-04EP)." The appellant proprietor argued that the content of its letter of 28 March 2012 did not make sense in the present case, since it made several incorrect references to the present procedure. Even if the letter were to be interpreted as a request for revocation in accordance with Article 105a EPC, which had not been its intention and was not in line with the wording of the letter, the request would have to be "deemed not to have been filed" under Rule 93(1) EPC. The appellant proprietor requested that an amended version of the letter dated 28 March 2012 be included in the file relating to European patent application number 07114628.6 and that the letter of 28 March 2012 be ignored in the present procedure. The appellant proprietor also reiterated the request for maintenance of the patent as granted and the auxiliary requests for maintenance of the patent in accordance with one of the auxiliary requests that were subject to the appealed decision and oral proceedings. The appellant proprietor also stated that "No other requests are maintained".

- VI. In a letter received on 8 May 2012 respondent opponent 1 argued that the letter of 28 March 2012 had

to be construed as a declaration by the appellant proprietor that it was no longer interested in maintaining the patent even if, as the appellant proprietor itself had argued, revocation proceedings under Article 105a EPC were not possible during pending opposition proceedings. Revocation proceedings were not even necessary to achieve the appellant proprietor's aim, which could be achieved in a more procedurally economical way by withdrawing the appeal. In particular in cases T 0018/92 and T 0481/96, in which a patent had been revoked by a opposition division, the withdrawal of the application had been regarded by the board in question as a withdrawal of the appeal. In the present case the appellant could not withdraw the "withdrawal of the appeal" because it had been made public online via the European Patent Register, and the public had an interest in being able to rely on such official announcements by the EPO. Moreover third parties would have had no reason to assume that the "withdrawal of the appeal" was an error, since the appellant proprietor's letter used the correct publication number, internal reference and proprietor's name. If the board regarded the appeal as not withdrawn, respondent opponent 1 made auxiliary requests that the appeal be dismissed and that oral proceedings be held. Respondent opponent 1 also requested an indication by the board of whether the appeal was seen as not withdrawn well before the end of the time limit for responding to the statement of grounds of appeal and, if so, to set a new time limit.

VII. In a letter received on 14 May 2012 the appellant proprietor argued *inter alia* that the letter of 28 March 2012 had to be taken at face value. It was not

appropriate to speculate as to what the intended effect of such a declaration might have been, beyond its literal wording. Whilst it was possible to withdraw an application in examination proceedings, an application no longer existed after grant. Furthermore a patent could not be withdrawn by the proprietor; a decision, for instance by an opposition division or a court, was required. It was also unreasonable to assume that the appellant proprietor had made so many errors in the letter of 28 March 2012. A third party would consequently have recognised that the letter did not relate to the present opposition appeal proceedings and was therefore without effect. It was also established case law that declarations by parties had to be clear and unambiguous under the circumstances. In case of doubt concerning a request to revoke the patent the EPO had to satisfy itself what the party's intention was.

VIII. In a letter received on 25 May 2012 respondent opponent 1 argued *inter alia* that the letter of 28 March 2012 could not simply be dismissed as relating to another case. Rather, it had to be construed to make sense in the present proceedings, not only by the other parties to the proceedings but also by the public. Respondent opponent 1 requested a declaration that the appeal proceedings were terminated and made auxiliary requests for the dismissal of the appeal and oral proceedings.

IX. A further submission was received from the appellant proprietor on 1 June 2012, after a summons to oral proceedings from the board had been finalised.

X. In an annex to a summons to oral proceedings, dispatched on 06 June 2012, to be devoted solely to the question of the appellant proprietor's "apparent 'withdrawal' of the application in the letter received on 28 March 2012" the board gave its preliminary view on the procedural situation. In point 3.3 the board discussed six decisions, namely T 0068/90, T 0264/84, T 0415/87, T 0347/90, T 0018/92 and T 0481/96, which had been cited by the parties in their various submissions. The board tended to the view that the appellant proprietor's declaration in the letter of 28 March 2012 was, in the circumstances, contradictory and thus unclear in referring repeatedly to examination proceedings. It seemed unlikely that the declaration was intended to relate to the present procedure or that third parties would have interpreted the declaration in this way. The board was thus of the provisional opinion that the appellant proprietor's declaration had not terminated the appeal proceedings. However the board stated that *prima facie*, particularly in the light of decision T 0018/92, there was uncertainty as to whether the appeal procedure had been terminated by the appellant's declaration. The board consequently cancelled the time limit for respondent opponents 1 and 2 to respond to the statement of grounds of appeal.

XI. On 12 June 2012 a submission was received from the appellant proprietor requesting that oral proceedings not be held solely on the question of its letter of 28 March 2012. If however such oral proceedings were to be held then a change of date was requested, since the representative was also the only person working on another case in which oral proceedings were to be held on 17 October 2012 before the German Federal Patent

Court. A preparatory meeting with the parties in that case was already planned for 16 October 2012.

- XII. In a submission received on 18 June 2012 respondent opponent 1 argued that separate oral proceedings on the question of the letter of 28 March 2012 were required for reasons of procedural economy, since, if the appeal had been withdrawn, respondent opponents 1 and 2 no longer needed to respond to the statement of grounds of appeal. Respondent opponent 1 also argued against changing the date of the oral proceedings and requested that oral proceedings take place on 16 October 2012 and that, if necessary, a new time limit be set for responding to the statement of grounds of appeal.
- XIII. In a communication dated 25 June 2012 the board stated that the appointed date for the oral proceedings was maintained.
- XIV. In a letter received on 14 September 2012 opponent respondent 1 submitted further arguments, citing decision J 0025/03, that the mention of a withdrawal of an application in the European Patent Register had the same function as a publication in the European Patent Bulletin, namely to inform the public. Moreover submissions before the EPO often used incorrect terminology, such as referring to appeal proceedings instead of examination proceedings. Hence there was doubt whether in the letter of 28 March 2012 the expression "examination proceedings" had really been intended, meaning that the letter might indeed have been intended to relate to the present proceedings.

XV. No written submissions were received from respondent opponent 2.

XVI. The oral proceedings, held on 16 October 2012, were attended by the appellant proprietor and respondent opponents 1 and 2.

The appellant proprietor requested that the decision under appeal be set aside and the European patent be maintained as granted or in accordance with one of the auxiliary requests subject to the appealed decision.

Respondent opponent 1 requested a declaration that "the appeal has been withdrawn", or that certain questions, formulated in German (see the minutes of the oral proceedings), be referred to the Enlarged Board of Appeal or the appeal be dismissed or (further) oral proceedings be appointed and a four month time-limit for a reply to the grounds of appeal be set.

Respondent opponent 2 made no requests or substantive submissions during the oral proceedings.

XVII. In the oral proceedings the board pointed out that there was a difference between publishing a submission of a party in the online European Patent Register and publishing the EPO's interpretation of the same submission in the online European Patent Register or European Patent Bulletin.

The appellant proprietor argued that, in order to understand the letter of 28 March 2012 as a withdrawal of the appeal, the term "applicant" had to be understood as "proprietor" (twice), an appeal number

had to be added and the terms "withdraw the application" and "withdrawal of this application" had to be understood as withdrawing the appeal. There was no reason to do so, particularly if one took into account how carefully the appellant proprietor's other submissions, for instance the statement of grounds of appeal, had been worded. Moreover, as the board had not yet issued an opinion on the substance of the case, the reference in the letter to "objections raised during the current examination procedure" did not make sense, even if it were to be understood as referring to a provisional opinion by the board. The case law cited by respondent opponent 1 related to very particular cases, none of which concerned errors of the type in the letter of 28 March 2012. Requests by parties must be clear and unambiguous, otherwise it was the usual practice at the EPO to check with the party. Even if the letter were to be understood as a request for revocation of the patent, such a revocation required a decision by the board and thus did not occur automatically. Moreover the proprietor could change its requests up until the board took its decision. In this case the request made in the letter of 28 March 2012 had been specifically withdrawn. The questions formulated by respondent opponent 1 for referral to the Enlarged Board of Appeal were too general and covered different cases, not all of which were relevant to the present proceedings. Question 1 concerned the understanding of party declarations. As this always depended on the specific circumstances, it did not make sense to refer it to the Enlarged Board of Appeal. Furthermore question 2 did not arise, as the EPO practice was to clarify withdrawals of applications.

Respondent opponent 1 argued that all six decisions cited in point 3.3 of the annex to the summons supported its case in that the board in question first determined the appellant's intention and then considered how this goal could be achieved. If the appellant proprietor was right then the six decisions would not exist. The relevant person through whose eyes the letter of 28 March 2012 had to be interpreted was a third party with no other knowledge of the present case, for instance somebody working for a company that had possibly previously infringed the patent and was checking to see whether the patent still existed. If the appeal proceedings were allowed to continue in spite of the letter of 28 March 2012, then this would amount to a departure from established case law and would, in order to ensure uniform application of the law, require the referral of the questions formulated by respondent opponent 1 to the Enlarged Board of Appeal.

XVIII. At the end of the oral proceedings the chairman announced the board's decision and also that a four month time limit for respondent opponents 1 and 2 to reply to the statement of grounds of appeal would start on 17 October 2012.

Reasons for the Decision

1. *Procedural matters*

1.1 *The cancellation of the first time limit for responding to the statement of grounds of appeal, Rule 100(2) EPC*

- 1.1.1 The four month time limit for respondent opponents 1 and 2 to reply to the statement of grounds of appeal would normally have expired on 30 July 2012. Under Article 12(5) RPBA (Rules of Procedure of the Boards of Appeal, OJ EPO 2007, 536), extension of time limits may exceptionally be allowed in the board's discretion following receipt of a written and reasoned request.
- 1.1.2 In the letter received on 8 May 2012 respondent opponent 1 requested an indication by the board of whether the appeal was seen as not withdrawn well before the end of the time limit for responding to the statement of grounds of appeal and, if so, to set a new time limit.
- 1.1.3 In the annex to the summons to oral proceedings, dated 6 June 2012, the board expressed the provisional view that under the circumstances, and particularly in the light of decision T 0018/92, there was at least *prima facie* uncertainty as to whether the appeal procedure has been terminated by the appellant's declaration in the letter of 28 March 2012. These circumstances were regarded by the board as exceptional in the meaning of Article 12(5) RPBA. In the board's view it would have been unfair and contrary to the principle of procedural economy to have expected respondent opponents 1 and 2 to reply to the statement of grounds of appeal whilst there was at least *prima facie* uncertainty as to whether appeal proceedings were still pending. The board consequently cancelled the time limit for responding to the statement of grounds of appeal.

1.2 *The holding of separate oral proceedings solely on the question of whether the appeal had been withdrawn*

1.2.1 Such separate oral proceedings were specifically requested by respondent opponent 1, while the appellant proprietor requested that they not occur and that all issues be dealt with in a single oral proceedings.

1.2.2 In view of the present case load of the board, it is unlikely that this case would reach the front of the queue for substantive examination by the board, Article 110 EPC, within the next three years, no party to the proceedings having made a request for accelerated processing of this case before the boards of appeal; see OJ EPO 2008, 220.

1.2.3 If the board had allowed the appellant proprietor's request, uncertainty might have remained for at least the next three years as to whether appeal proceedings were still pending in this case. The board regarded such a scenario as unacceptable for the parties to the proceedings, in particular respondent opponents 1 and 2, and third parties and consequently allowed respondent opponent 1's request.

1.3 *The request to change the date of the oral proceedings*

1.3.1 In the letter received on 12 June 2012 the appellant proprietor requested that the date of the oral proceedings, arranged for 16 October 2012, be changed as the representative was also the only person working on another case in which oral proceedings were to be held on 17 October 2012 before the German Federal Patent Court. A preparatory meeting with the parties in

that case was already planned for 16 October 2012. In a letter received on 18 June 2012 respondent opponent 1 requested *inter alia* that the date of the oral proceedings not be changed.

1.3.2 According to point 2.3 of the Notice of the Vice-President of Directorate-General 3 of the European Patent Office dated 16 July 2007 concerning oral proceedings before the boards of appeal of the EPO (OJ EPO 2007, Special edition No. 3, 115), "Every request for fixing another date for oral proceedings should contain a statement why another representative within the meaning of Articles 133(3) or 134 EPC cannot substitute the representative prevented from attending the oral proceedings."

1.3.3 In the present case the board found that the argument by the appellant proprietor's representative that he was the only person working on the present file (and a case before the Bundespatentgericht) was insufficient to demonstrate that no other representative could deal with this matter before the EPO, particularly because, as stated in the annex to the summons to oral proceedings, the oral proceedings did not relate to substantive matters, but rather to the procedural question of whether the appeal procedure has been terminated by the letter of 28 March 2012. To argue this issue alone it would not be necessary to have any knowledge of the substance of the case.

1.3.4 The board consequently decided to allow respondent opponent 1's request not to change the date of the oral proceedings.

1.4 *The new time limit for responding to the statement of grounds of appeal, Rule 100(2) EPC*

1.4.1 As explained below, the board concludes that the appellant proprietor's declaration in the letter of 28 March 2012 did not terminate these appeal proceedings, meaning that appeal proceedings are still pending in this case. Hence, following respondent opponent 1's request, at the end of the oral proceedings the board set a new four month time limit for respondent opponents 1 and 2 to reply to the statement of grounds of appeal, starting the day after the oral proceedings, i.e. on 17 October 2012. The time limit was notified to all parties in the oral proceedings to minimize the delay in the proceedings.

2. *The appellant proprietor's letter received on 28 March 2012*

2.1 It is common ground between the appellant proprietor and respondent opponent 1, and the board agrees, that the letter contains some details which fit the present proceedings and other details which do not. Those details which fit are the appellant proprietor's own reference for this case (RA 942-04EP), a "number" the same as the publication number in this case (1 640 847) and the name of the applicant (RAMBUS INC.). The details in the letter which do not fit are two references to "the application" (instead of the patent), two references to "the applicant" (instead of the proprietor) and "the current examination proceedings" (instead of the current appeal proceedings). The letter also mentions "objections raised" during the current

proceedings, although no objections had been raised by the board.

2.2 The appellant proprietor and respondent opponent 1 differ as to what the consequences of these discrepancies should be. According to the appellant proprietor, the letter of 28 March 2012 must be taken at "face value", leading to the conclusion that it was intended to relate to another file and thus has no effect in this case. According to respondent opponent 1, the letter of 28 March 2012 must be assumed to relate to these proceedings and construed as a declaration that the appellant proprietor is no longer interested in maintenance of the patent, which, in turn, should be construed in the light of the case law as a withdrawal of the appeal, taking immediate effect and being irrevocable, since it has been announced to the public via the online European Patent Register.

2.3 As a preliminary point, the board considers that the fact that EPC 2000 introduced a revocation procedure, Articles 105a-c, is irrelevant to the present case. Such revocation procedure is explicitly excluded while opposition proceedings are pending (Article 105a(2)) and there is nothing in the letter of 28 March 2012 which would give anyone the impression that it was an (incorrect) attempt to invoke this article. It would be known to an interested third party that a proprietor who had lost interest in the patent would have available only the same mechanisms for terminating the procedure as before the introduction of EPC 2000, namely either simply withdrawing the appeal (since the patent was revoked by the opposition division) or

withdrawing consent to the text of the patent in accordance with Article 113(2) EPC.

- 2.4 The board takes the view that, as argued by the appellant, it is established case law that a renunciation of a patent must be unambiguous and free from doubt before it may be acted upon by a division or board (see for example T 0386/01, cited by the appellant). The board considers that the same must be true of a declaration that an appeal is withdrawn. As noted above it is common ground that the letter contains some details which fit the present proceedings and other details which do not. According to respondent opponent 1, the details in the letter which fit the present case, i.e. the minority of the details, are assumed to reflect the author's true intention, whilst the details which do not fit, i.e. the majority of the details, are seen as not reflecting the author's intention and thus requiring interpretation. The board finds that this is not a reasonable approach, since it in effect requires that the board ignore the fact that there are details not fitting the present proceedings. The board finds in fact the opposite approach to be more reasonable, namely that it is likely that the majority of the details in the letter reflect the author's true intention, namely to withdraw a European patent application in a different case. At any rate the board considers that the request is clearly not unambiguous and free from doubt. Had the appellant not sent the second letter of 05 April 2012 it would therefore have been incumbent on the board to enquire as to the true intention of the appellant before taking any action, whether that would have been in the form of a decision or simply closing the procedure. Which of

these two options would have been the correct one is, in the circumstances, irrelevant. The board concludes that the intention of the author of the letter of 28 March 2012 was to withdraw a European patent application in a different case, so that the letter has no effect in this case. The reasoning in the decisions relied upon by respondent opponent 1 and mentioned in the first question for referral to the Enlarged Board of Appeal, namely T 0068/90, T 0264/84, T 0415/87, T 0347/90, T 0018/92 and T 0481/96 (see point 3.3 of the annex to the summons to oral proceedings), does not cause the board to change its assessment of the facts in this case. It is true that in some cases cited by the respondent opponent a statement that the proprietor wishes to "withdraw the application" has been taken as a renunciation of a patent. However this does not contradict the principle that the request must be unambiguous and doubt free. It is clear that this depends on the facts of the individual case. In some of these cases (T 0347/90, T 0068/90, T 0481/96) it is evident from the decision that there were other, clear, indications that the patent "application" referred to was indeed meant to refer to the patent which was the subject of the proceedings. In at least one case, T 0481/96, the board nonetheless checked the request with the proprietor. In two cases, T 0264/84 and T 0415/87, there is no discussion of any surrounding facts. In these cases there is certainly no indication that the board in fact had any doubts as to the proprietor's intention, nor that it would have issued its decision had it had any such doubts.

2.5 This evaluation of the letter of 28 March 2012 also applies to third parties reading the letter in the

online "all documents" part of the European Patent Register. Third parties would also have concluded that the author of the letter of 28 March 2012 had at least possibly intended to withdraw a European patent application in a different case. Thus the third party would also have appreciated that there was not an unambiguous and doubt-free request.

2.6 It follows from the above that the board does not accept respondent opponent 1's argument that the letter must be construed as a withdrawal of the appeal in this case.

2.7 With respect to the online publication of this letter, the board notes as a preliminary that it is not convinced by respondent opponent 1's argument that decisions T 0018/92 and T 0481/96 support the hypothesis that the withdrawal of a European patent application in opposition appeal proceedings is equivalent to the withdrawal of the appeal by the proprietor. On the contrary, these decisions state that, under circumstances where the first instance decision had been to revoke the patent, a request for revocation of the patent had the same effect as the withdrawal of the appeal. In contrast to the situation had the appeal really been withdrawn however, the appeal proceedings did not end as soon as the request for revocation of the patent was made. Instead, the board issued a decision. In T 0018/92 the appellant proprietor requested that the patent be revoked. The board informed the appellant proprietor in writing that the request had the same effect as a withdrawal of the appeal; see reasons, point 4. The board thereupon issued a decision stating that the patent remained

revoked. In case T 0481/96 the appellant proprietor declared that the application was withdrawn. The board in question explained to the appellant proprietor in writing that the board interpreted the request as a request for revocation of the patent, whereupon the appellant proprietor made a request for revocation of the patent. The reasons for the decision cite T 0018/92 and state that the request for revocation of the patent had the same effect as the withdrawal of the appeal. The board decided that the patent remained revoked according to the decision of the first instance. The fact that a request for revocation of the patent had the same effect as the withdrawal of the appeal in these cases stems largely from the nature of the appealed decision. Had the appealed decision been to reject the opposition(s), then these two requests would have had different effects: revocation of the patent, on the one hand, and maintenance of the patent, on the other.

2.8 Further with respect to the publication of the letter, under Article 127 and Rule 143(n) EPC, withdrawals of European patent applications are announced in the form of an entry or "mention" in the European Patent Register, which is publicly available online. This information is also published in the European Patent Bulletin, which is also publicly available online. In the present case, no such announcement was made by the EPO in either the European Patent Register or the European Patent Bulletin. Hence it is not the case that the EPO has publicly announced an official interpretation of the letter of 28 March 2012 which might have led third parties to another conclusion regarding the effect of the letter of 28 March 2012. In

decision J 0025/03, which was relied upon by respondent opponent 1 and is referred to in the third question to be referred to the Enlarged Board of Appeal, a withdrawal of an application had been notified to the public in the form of a mention in the online European Patent Register. For this reason a request for retraction of a letter of withdrawal of the application was not allowed. Since in the present case however the letter of 28 March 2012 is not understood as applying to this case and because no such mention of withdrawal of the application appeared in the European Patent Register or European Patent Bulletin, this decision does not change the board's assessment of the facts in the present case.

3. *The appellant proprietor's subsequent letter received on 5 April 2012*

3.1 It is established EPO practice that requests by parties which are unclear or ambiguous are queried by the EPO with the party to establish the true intention of the party concerned. In the present case, no such query by the EPO was necessary, since the appellant proprietor soon sent a further letter, received on 5 April 2012, clarifying the intention of the submission received on 28 March 2012, namely that the letter of 28 March 2012 had been intended to relate to another case which was still in the examination phase. With the letter received on 5 April 2012 the appellant proprietor filed a corrected withdrawal of the other patent application (No. 07 114 628.6). Whilst actions by the author of the letter of 28 March 2012, subsequent to its receipt by the EPO, have not been taken into account by the board in determining the legal effect of said letter, the

board notes that the author's subsequent actions at least do not contradict the board's understanding of the letter of 28 March 2012.

4. *The questions to be referred to the Enlarged Board of Appeal*

4.1 The questions, formulated by respondent opponent 1 in German (see the minutes of the oral proceedings), are understood by the Board to be as follows in English:

1. How is the interpretation that the patent proprietor's submission of 28 March 2012 is not a declaration that the patent proprietor is no longer interested in the maintenance of the patent in suit consistent with the six decisions cited in point 3.3 of the annex to the summons to oral proceedings?
2. Following the submission of 28 March 2012 and its publication in the online European Patent Register, can the subsequent submission of 5 April 2012 still be considered?
3. If the answer to question 2 is yes, how is this consistent with decision J 0025/03?

4.2 According to Article 112 (1), (1)(a) EPC 1973, in order to ensure uniform application of the law, or if an important point of law arises, the board of appeal shall, during proceedings on a case and either of its own motion or following a request from a party to the appeal, refer any question to the Enlarged Board of Appeal if it considers that a decision is required for

the above purposes. If the board of appeal rejects the request, it shall give the reasons in its final decision.

- 4.3 In the present case, question 1 relates to a question of fact, namely the board's understanding of the letter of 28 March 2012, rather than a question of law. Answers to questions 2 and 3 are not considered to be required (see point 4.2) for a decision in the present case, since the intention of the author of the letter of 28 March 2012 has been determined on the basis of the information given in that letter alone, and no official interpretation of the letter was published by the EPO in either the European Patent Register or the European Patent Bulletin. Hence none of the questions complies with Article 112 EPC 1973.

5. *The remaining requests by respondent opponent 1*

Respondent opponent 1's last two auxiliary requests, namely that the appeal be dismissed or (further) oral proceedings be appointed and a four month time-limit for a reply to the grounds of appeal be set require that the technical issues raised in the statement of grounds of appeal also be considered. Since the oral proceedings of 16 October 2012 were solely to discuss whether the letter of 28 March 2012 had terminated the appeal proceedings and respondent opponents 1 and 2 have not yet responded to the statement of grounds of appeal, the board has not been able to decide on these requests in the present interlocutory decision.

Order

For these reasons it is decided that:

1. The request for issuing a declaration that "the appeal has been withdrawn" is rejected.
2. The request for referral of questions to the Enlarged Board of Appeal is rejected.

The Registrar:

The Chairman:

B. Atienza Vivancos

D. H. Rees