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Datasheet for the decision of 14 November 2018

Case Number: T 1333/16 - 3.3.01

Application Number: 07762319.7

Publication Number: 2035837

IPC: G01N33/86

Language of the proceedings: EN

Title of invention:
PROTOCOL FOR MONITORING DIRECT THROMBIN INHIBITION

Patent Proprietor:
Cora Healthcare, Inc.

Opponent:
Ponti & Partners, S.L.P.

Headword:
Monitoring Thrombin Inhibition/CORA HEALTHCARE

Relevant legal provisions:
EPC Art. 113(1), 111(1)
EPC R. 103(1)(a)
RPBA Art. 11

Keyword:
Right to be heard - substantial procedural violation (yes)
Reimbursement of appeal fee - (yes)

Decisions cited:
G 0004/92

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

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Case Number: T 1333/16 - 3.3.01

D E C I S I O N
of Technical Board of Appeal 3.3.01
of 14 November 2018

Appellant: (Opponent)	Ponti & Partners, S.L.P. C. Consell de Cent, 322 08007 Barcelona (ES)
Representative:	Ponti & Partners, S.L.P C. de Consell de Cent 322 08007 Barcelona (ES)
Respondent: (Patent Proprietor)	Cora Healthcare, Inc. 6231 West Howard Niles, IL 60714 (US)
Representative:	Rupp, Christian Mitscherlich PartmbB Patent- und Rechtsanwälte Sonnenstraße 33 80331 München (DE)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 4 April 2016 rejecting the opposition filed against European patent No. 2035837 pursuant to Article 101(2) EPC**

Composition of the Board:

Chairman	A. Lindner
Members:	T. Sommerfeld
	L. Bühler

Summary of Facts and Submissions

I. European patent No. 2 035 837 is based on European patent application No. 07762319.7. The mention of the grant of the patent was published on 5 September 2012.

II. An opposition was filed, the opponent requesting revocation of the patent in its entirety pursuant to Article 100(a) EPC for lack of novelty and inventive step, Article 100(b) EPC and Article 100(c) EPC.

III. The documents cited during the proceedings before the opposition division and the board of appeal include the following:

D1 Carroll R et al. 2006, Anesth. Analg. 102:1316-9
D1a Extract of the homepage of the publication "Anesthesia & Analgesia"
D14 Extract from the medical library database of Leibniz-Informationszentrum Lebenswissenschaften
D15 Email statement by the senior managing editor of the journal Anesthesia & Analgesia
D16 Email statement by the senior publisher of Wolters Kluwer

IV. The appeal lies from the decision of the opposition division rejecting the opposition.

V. In its statement of grounds of appeal, the appellant (opponent) requested that the decision under appeal be set aside and that European patent No. 2 035 837 be revoked. Alternatively, it requested that the case be remitted to the opposition division pursuant to Article 11 RPBA in view of a substantial procedural violation or that the case be remitted to the opposition division pursuant to Article 111(1) EPC for further prosecution.

The appellant also requested reimbursement of the appeal fee and submitted documents D14 to D16.

VI. In its letter of reply, the respondent (patentee) requested that the appeal be dismissed. It also filed an auxiliary request.

VII. The parties were summoned to oral proceedings. In the communication accompanying the summons, the board informed the parties of its preliminary opinion that by admitting the respondent's late-filed objection with respect to the publication date of document D1 and at the same time not providing for an adjournment of oral proceedings, the opposition division had *de facto* deprived the appellant of its right to be heard under Article 113(1) EPC. Therefore, fundamental deficiencies had occurred in the opposition proceedings justifying remittal of the case to the opposition division and reimbursement of the appeal fee.

VIII. Oral proceedings were held on 14 November 2018, at the end of which the decision was announced.

IX. The appellant's arguments relevant for the decision can be summarised as follows:

Document D1 had been filed with the notice of opposition, together with document D1a as evidence of its publication date. Neither the respondent nor the opposition division had questioned either the date of publication of D1 or the suitability of D1a as evidence prior to the oral proceedings before the opposition division. The appellant was thus taken by surprise by this new objection at the oral proceedings and was not given adequate opportunity to respond, which would have required the adjournment of the oral proceedings.

X. The respondent's arguments relevant for the decision can be summarised as follows:

The burden of proof for establishing a document as prior art within the meaning of Article 54(2) EPC was on the opponent. The evidence filed by the appellant with its notice of opposition did not establish the publication date of document D1 beyond doubt. Therefore, the appellant had had to expect that the patentee would challenge the publication date of that document. The opposition division thus correctly decided to admit the patentee's objection and the opponent could have provided the additional evidence filed with its statement of grounds of appeal in the proceedings before the opposition division.

XI. The appellant (opponent) requested that the decision under appeal be set aside and that European patent No. 2035837 be revoked. Alternatively, it requested that the case be remitted to the opposition division pursuant to Article 11 RPBA, in view of a substantial procedural violation, or that the case be remitted to the opposition division pursuant to Article 111(1) EPC for further prosecution. The appellant also requested reimbursement of the appeal fee.

XII. The respondent (patent proprietor) requested that the appeal be dismissed and that the patent be maintained as granted (main request) or, alternatively, that the patent be maintained on the basis of auxiliary request 1 filed with the reply to the statement of grounds of appeal. Alternatively, the respondent requested that the case be remitted to the opposition division.

Reasons for the Decision

1. The appeal is admissible.

2. According to Article 113(1) EPC, decisions of the European Patent Office may only be based on grounds or evidence on which the parties concerned have had an opportunity to present their comments. This article lays down a general procedural principle which applies to all proceedings before the European Patent Office and is designed to ensure the right of the parties to be heard before any adverse decision against them is taken. In *inter partes* proceedings, the right to be heard pursuant to Article 113(1) EPC reflects the fundamental principle that each party should have a proper opportunity to reply to the case presented by an opposing party (G 4/92, OJ EPO 1994, 149). A decision based on grounds or facts on which the party has had no (proper) opportunity to present its comments contravenes Article 113(1) EPC and constitutes a fundamental deficiency under Article 11 RPBA, which may justify remittal of the case to the department of first instance, as well as a substantial procedural violation under Rule 103(1)(a) EPC that may, if equitable, justify the reimbursement of the appeal fee.

3. Documents D1 and D1a were submitted by the appellant with its notice of opposition. The appellant raised objections for lack of novelty of the granted claims vis-à-vis document D1. Neither in the reply to the notice of opposition (dated 8 January 2014) nor in the letter sent on 21 December 2015 in reply to the summons to oral proceedings before the opposition division did the respondent ever challenge the publication date of D1. The respondent's arguments in favour of novelty

over D1 were only that D1 did not disclose a feature of claim 1, namely "obtaining an efficacy of an anti-coagulation hemostasis therapy ..." (letter of 8 January 2014, page 5, second paragraph) and that such a feature could not be considered implicit in D1's disclosure (letter of 21 December 2015, section 5 on pages 4 to 6). Since D1 is authored by, among others, the inventor of the present patent, the respondent should have been aware of any issues with respect to this document, in particular its publication date, at the time of its reply to the notice of opposition.

4. Likewise, in the two official communications sent by the opposition division (the latter accompanying the summons to oral proceedings), the opposition division expressed its preliminary opinion that document D1 was novelty-destroying for the claimed subject-matter and did not raise any questions or objections concerning D1's publication date. Indeed, in the absence of any challenge by the respondent to the evidence filed by the appellant, there was no reason for the opposition division to doubt that document D1 was prior art within the meaning of Article 54(2) EPC.

5. Since the publication date of D1 had not been an issue in the written proceedings up to the oral proceedings, the board agrees with the appellant that the challenge to the conclusiveness of the adduced evidence by the respondent at the oral proceedings before the opposition division could not have been anticipated. In the absence of any doubts raised with respect to the publication date of document D1, the appellant even had a legitimate expectation that it had discharged both its evidentiary and legal burden of proof. For this reason, the board disagrees with the respondent's contention that the appellant bore the legal burden of

proof and should have been prepared to file further evidence.

It is also immediately apparent that an adequate reply to the respondent's late challenge to the appellant's evidence would have required that the appellant be given adequate opportunity to search for and file further evidence (which was done by filing documents D14 to D16 with the statement setting out the grounds of appeal). In the board's judgment, such a search would not have been possible on the day of the oral proceedings. The appellant could therefore not be expected to deal with the respondent's late contestation regarding the publication date of document D1 without an adjournment of the oral proceedings. By admitting the respondent's late objection without giving the appellant an adequate and proper opportunity to reply, the opposition division deprived the appellant of its right to be heard under Article 113(1) EPC. The consequence of the absence of further evidence was that the opposition division decided against the appellant and concluded that D1 was not prior art. Accordingly, the board holds that a substantial procedural violation occurred in the opposition proceedings which affects the decision under appeal. This deficiency justifies that the case be remitted, pursuant to Article 111(1) EPC and Article 11 RPBA, to the opposition division for further prosecution.

6. In view of the circumstances of the present case, the board judges it equitable to reimburse the appeal fee.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the opposition division for further prosecution.

3. The request for reimbursement of the appeal fee is allowed.

The Registrar: The Chairman:

M. Schalow A. Lindner

Decision electronically authenticated