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**Datasheet for the ancillary decision  
of 7 November 2023**

**Case Number:** T 1213/19 - 3.2.05

**Application Number:** 12724706.2

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**IPC:** B29C67/00

**Language of the proceedings:** EN

**Title of invention:**

Method for producing a three-dimensional object

**Patent Proprietor:**

DWS S.R.L.

**Opponent:**

Formlabs Inc.

**Relevant legal provisions:**

EPC R. 124(1)

RPBA 2020 Art. 6(4)

**Keyword:**

Correction of minutes of oral proceedings (no)

**Decisions cited:**

R 0002/12, R 0006/14, R 0007/17, T 0212/97, T 0642/97,  
T 0468/99, T 0966/99, T 1721/07, T 1735/08, T 1934/14



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**Case Number:** T 1213/19 - 3.2.05

**A N C I L L A R Y   D E C I S I O N**  
**of Technical Board of Appeal 3.2.05**  
**of 7 November 2023**

**Appellant:** Formlabs Inc.  
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**Composition of the Board:**

**Chairman** P. Lanz  
**Members:** A. Bacchin  
T. Vermeulen

## **Summary of Facts and Submissions**

- I. With letter dated 1 February 2023, the respondent (patent proprietor) requested to correct the minutes of the oral proceedings held before the board on 23 September 2022, since they were "deemed not to fulfil the requirements of Rule 124 EPC".
- II. The respondent's request for correction of the minutes of the oral proceedings was filed about 4 months after their issuance to the parties, which was on 30 September 2022, and more than 1 month after issuance of the written decision, which was on 22 December 2022.
- III. In detail, the respondent requests correction of the minutes with regard to the following four passages:
  - (a) paragraph 7 of page 2/6,
  - (b) paragraph 1 of page 4/6,
  - (c) paragraph 6 of page 4/6 and
  - (d) paragraph 4 of page 5/6.
- IV. The respondent submitted that the minutes showed deficiencies with regard to the aspects mentioned, i.e. essential submissions and similarly important procedural statements were missing and incorrectly reflected in the minutes.
- V. The respondent's arguments are substantially as follows:
  - (a) As indicated in paragraph 7 of page 2/6 of the minutes, "[t]he Chairman clarified that the relevant legal basis was Article 13(1) RPBA 2020". However, no punctual legal reference was made. Also

when declaring that none of the decisions cited by the respondent was applicable to the present case in view of the different legal basis (paragraph 2 of page 3/6), the chairman did not provide any legal reference. Thus paragraph 7 of page 2/6 should be re-phrased by deleting ", whereas in accordance with Article 25(2) RPBA 2020, Article 12(4) to (6) RPBA 2020 was not applicable in the present case."

- (b) After having admitted document D8 into the proceedings, during the discussion about admissibility of the auxiliary requests, the respondent stated that the case must be remitted to the first instance to avoid an unappealable decision on a document on which it was decided for the first time, i.e. to give the applicant [sic] the chance to appeal. The decision of the board (page 11, first paragraph), when summarising the respondent's arguments, correctly stated that "[t]he respondent had to be given the opportunity to react to the belated filing of document D8 and amend the claims accordingly. Reference was made to Article 113(1) EPC. If document D8 had been filed in the proceedings before the opposition division, the respondent would have had such an opportunity". However, the minutes, at the first paragraph of page 4/6, only recited that "[a]fter resumption the respondent referred to their request for remittal in order to be able to amend the patent in first-instance proceedings". The passage of the minutes should therefore be amended to state that the remittal was requested in order to avoid an unappealable decision on a document on which it was decided for the first time, i.e. to give the applicant [sic] the chance to appeal, and to state

that reference was made to a potential violation of Article 113(1) EPC.

- (c) With regard to paragraph 6 of page 4/6, and the two-fold request for remittal, the respondent objected to the statement in the minutes that they had acknowledged that the request for remittal had become obsolete with regard to the discussion of document D8 on the merits. They also objected that the subsequent request for remittal was dependent on the admission of the auxiliary requests. Thus the third sentence of that paragraph "The respondent acknowledged that this request ..." had to be amended into "The respondent took note that the Board's position is that this request...". The fourth sentence had to be amended by deleting the condition referred to the auxiliary requests "..., in case they were admitted".
- (d) As was highlighted by the board in section 19 of the reasons for the decision, at the end of the discussion on the admissibility of the auxiliary requests, reference was made to a violation of Article 113(1) EPC. Accordingly, the third full paragraph of page 5/6 of the minutes should be rephrased to indicate that "The respondent made reference to Article 113(1) EPC". The sentence that "The parties had no further comments in this respect" should be deleted.

VI. With a communication pursuant to Rule 100(2) EPC dated 18 July 20203, the parties were informed of the board's provisional opinion on the request for correction of the minutes. The parties did not react to the board's communication.

VII. On 12 October 2023 the appellant (opponent) withdrew its opposition.

## **Reasons for the Decision**

### *Ancillary decision*

1. Since the present request for correction of the minutes was filed after the issuance of the written decision terminating the appeal proceedings, the board deals with it in an decision ancillary to the first one (see T 1735/08 of 27 September 2012 and T 1934/14 of 8 October 2018).

### *Legal framework*

2. Pursuant to Rule 124(1) EPC, minutes of oral proceedings must be drawn up, containing the essentials of the oral proceedings and the relevant statements made by the parties, in particular requests or similarly important procedural statements.

3. According to the case law of the Boards of Appeal ("Case law of the Boards of Appeal of the EPO", 10th edition, July 2022, III.C.7.10.1), Rule 124(1) EPC does not require that the minutes reflect the full arguments of the parties. It is primarily a matter of discretion of the minute-writer to determine what is and what is not "relevant" or "essential" to the oral proceedings in the context of what has to be decided in the appeal proceedings (cf. T 212/97, Reasons 2.2, T 642/97, Reasons 9.3, T 966/99, Reasons 7.2.2 and R 7/17, Reasons 23). While the minutes are meant to contain the procedural acts essential to the outcome of the proceedings, for example the parties' requests and the submission of documents during the oral proceedings,

substantive matters, such as arguments presented by the parties during the oral proceedings are generally not included in the minutes, although they may form part of the board's written decision (see also CA/3/19, Section VI, Explanatory remarks on Article 6(4) RPBA 2020, in Supplementary publication 2 to OJ EPO 2020).

4. Both the provision of Rule 124(1) EPC and of Article 6(4) RPBA 2020 clearly indicate that it is the board's responsibility to decide what must be considered essential for the purpose of drawing up the minutes. This task cannot be transferred to the parties or even to one of them (see also T 1721/07, Reasons 15 and T 468/99, Reasons 1.5).
5. The parties and their representatives can be expected to check the minutes carefully, especially to ensure that nothing was missing, immediately on receipt and to point out any deficiency promptly (cf. R 6/14, Reasons 7).

*Legal basis for admittance of document D8*

6. The respondent is of the view that at the oral proceedings no legal reference was given for the statement that Article 13(1) RPBA 2020 was the legal basis for assessing admittance of document D8 into the proceedings. The respondent further submitted that during the oral proceedings the chairman did not give the legal basis for the finding that the decisions cited by the respondent were not applicable to the present case (see point V. (a) above). Hence, the following correction of paragraph 7 of page 2/6 is requested:

~~*"The Chairman clarified that the relevant legal basis was Article 13(1) RPBA 2020, whereas in accordance with Article 25(2) RPBA 2020, Article 12(4) to (6) RPBA 2020 was not applicable in the present case."*~~

7. According to the board's written notes taken during the oral proceedings and the unanimous recollection of the members of the board, however, the chairman explicitly stated at the beginning of the discussion on the admittance of document D8 that Article 12(4) to (6) RPBA 2020 was not applicable in the present case in view of the transitional provisions of Article 25(2) RPBA 2020. This clarification was triggered by the respondent's written mention of "Art. 12(6) RPBA" after the board had indicated in its preliminary opinion of 27 June 2022 that admittance of document D8 was to be assessed under Article 13(1) RPBA 2020 (see respondent's letters dated 22 July 2022, section 1, and 16 September 2022, section 1). The clarification was made at the oral proceedings in order to correctly set the legal framework of the discussion on the matter. The respondent's assertion that "[n]o punctual legal reference has been made" is therefore not correct.
  
8. In the present case, points 1 to 8, particularly points 2 and 6, of the reasons of the written decision, explain the applicable legal framework corresponding to the so-called second level of the convergent approach of the RPBA 2020 by referring to document CA/3/19, section VI, Explanatory remarks to Article 13(1), second paragraph, first sentence, Supplementary publication 2 to OJ EPO 2020. This reasoning in the decision is therefore based on and fully consistent with the indication in the minutes that at the oral proceedings it was clarified that the legal basis for admittance of document D8 was Article 13(1) RPBA 2020,



rather than Article 12(4) to (6) RPBA 2020 and explains why the respondent's arguments cannot be followed.

*Request for remittal*

9. The respondent's further request to amend the minutes of the oral proceedings relates to the request for remittal to the opposition division in two aspects:

9.1 In a first aspect (see point V. (b) above), the respondent requests that the intention of its request for remittal should be rephrased and a reference to a potential violation of Article 113(1) EPC be included in paragraph 1 of page 4/6, as follows:

**"After resumption the respondent referred to their request for remittal in order to ~~be able to amend the patent in first instance proceedings~~ avoid an unappealable decision on a document on which it is decided for the first time, i.e., to give the applicant the chance to appeal. Reference was made to a potential violation of Article 113(1) EPC."**

9.1.1 This contention is in variance with the board's written notes and the recollection of the members of the board. The members of the board, who took precise note of the various oral submissions made by the parties, have no doubt that the respondent never made any reference to Article 113(1) EPC or to a potential violation of its right to be heard during the whole oral proceedings. In this context it is also noted that the respondent did not raise any objection under Rule 106 EPC at the oral proceedings.

9.1.2 The submission in regard of Article 113(1) EPC made on page 11 of the board's decision merely reflects the written argument presented in the third paragraph on page 4 of the respondent's letter dated 16 September 2022, which reads: "With reference to Article 113(1) EPC it is submitted that a chance to the

patent proprietor has to be provided to allow the patent proprietor the opportunity to comment D8 and amend the patent based on the disclosure of D8".

9.1.3 In the same vein, the board does not recollect any oral submission along the lines of "avoid[ing] an unappealable decision on a document" or being given a "chance to appeal" in case document D8 were admitted. During the oral proceedings the respondent did not bring these arguments, nor did they bring an objection in relation to their right to be heard, neither when the chairman enquired about the precise meaning of the respondent's auxiliary request for remittal (see paragraphs 2 and 3, page 4/6 of the minutes), nor after announcement of the decision to admit document D8 and the explanation concerning its prima facie high relevance for the novelty of claim 1, so that a discussion on novelty could follow straightforwardly (see paragraph 4, page 3/6 of the minutes). In any case, a reference to a potential violation of Article 113(1) EPC had not been submitted explicitly, let alone that it was requested to take such a request into the minutes of the oral proceedings. Instead, at a later stage of the oral proceedings the respondent mentioned the right to be given "the possibility to properly amend the patent before the opposition division" (cf. paragraph 6 of page 4/6 of the minutes).

9.2 In a second aspect (see point V. (c) above), the respondent's request for correction of the minutes with respect to the question of remittal is as follows (paragraph 6 of page 4/6):

*"The respondent stated that the request for remittal was two-fold. On the one hand, remittal had been requested for discussing document D8 and having the possibility to properly amend the patent before the opposition division. The respondent ~~acknowledged~~ took note that the Board's position is that this request for remittal had become obsolete since the reason of the board for admitting document D8 was that the board considered the document prima facie novelty destroying. On the other hand, it was still requested to remit the case to the opposition division in order to discuss the auxiliary requests on file before the opposition division, ~~in case they were admitted~~. In this context, the respondent declared to withdraw auxiliary request 2, as it was not convergent."*

- 9.2.1 The respondent contests that it "acknowledged" that the first of its two-fold request for remittal had become obsolete. Instead, it is requested that the minutes reflect that the respondent merely "took note" thereof.

Also here, the board does not agree. During the discussion on the admittance of the auxiliary requests, the chairman enquired a first time about the precise meaning of the respondent's auxiliary request for remittal, see paragraph 2 of page 4/6 of the minutes. The respondent chose not to expand on this point. Only after a second enquiry of clarification by the chairman, the request for remittal was discussed. The chairman then explained again that the admission of document D8 in view of its *prima facie* novelty-destroying character rendered a remittal to the opposition division to discuss document D8 obsolete. Already before, when the decision of the board to admit document D8 into the proceedings was announced, the chairman had stated that document D8 was regarded as *prima facie* highly relevant for the objection of lack of novelty, (see paragraph 4 of page 3/6 of the minutes). A discussion on novelty with respect to document D8 would thus have been straightforward. The board had already provided a (negative) provisional opinion on the question of novelty of the subject matter of claim 1 over the disclosure of document D8 in its communication under Article 15(1) RPBA 2020, and the parties had already extensively exchanged their

views on that matter. Indeed, when the question of novelty over document D8 was addressed at the oral proceedings "The parties declared not to have further submissions in this respect" (see paragraph 6, page 3/6 of the minutes), which confirms that the parties did not see any need for further discussion on the matter.

- 9.2.2 It is the unanimous recollection of the members of the board, as also confirmed by the above facts, that the respondent did not merely take note, but also assented to the chairman's view that, following admittance of document D8 into the proceedings, the first of its two-fold request for remittal had become obsolete. To state the opposite is not only factually incorrect, but also clearly in contradiction with the course of the oral proceedings.
- 9.2.3 The board notes that the respondent's final requests in paragraph 8 of page 5/6 of the minutes were reformulated in agreement with the respondent to the extent that its auxiliary request for remittal was only conditional on the admittance of any auxiliary request into the proceedings and not on the admission of document D8. This corroborates the respondent's acknowledgement with the chairman's view and, *de facto*, its withdrawal of the auxiliary request for remittal to the opposition division to discuss document D8. It also follows from the formulation of the final requests that a correction consisting in deleting the conditional clause "in case they were admitted" from paragraph 6 of page 4/6 of the minutes does not correctly reflect the course of the oral proceedings. Indeed the respondent has not requested correction of the final requests, as formulated in the minutes.

*Reference to Article 113(1) EPC*

10. Further the respondent requests the following correction in the passage of the minutes indicated under point III. (b) above (paragraph 4 of page 5/6):

~~*"The parties had no further comments in this respect. The respondent made reference to Article 113(1) EPC".*~~

For the same reasons as set out above (see point 9.1), the requested correction cannot be agreed on. This statement contradicts the unanimous recollection of and the notes taken by the members of the board. During the oral proceedings, the respondent made no mention at all of either Article 113(1) EPC or the right to be heard. Hence it could obviously not be indicated in the minutes of the oral proceedings. The only reference to Article 113(1) EPC was made by the respondent in the written proceedings (see respondent's letter of 16 September 2022, third paragraph, page 4). This written argument has been dealt with in the board's written decision (see point 19 of the reasons for the decision), as also indicated by the respondent in their request for correction of the minutes. The fact that the written decision reflects that a party's argument raised in the written proceedings has been duly taken into account, whereas such written argument is not reflected in the minutes is in line with the requirement of Rule 124(1) EPC that the minutes must contain the essentials of the oral proceedings and the relevant statements made by the parties at the oral proceedings (see point 3. above).

- 10.1 Finally, it is also not clear to the board whether the requested correction that "The respondent made reference to Article 113(1) EPC" should be understood

as an objection to a fundamental procedural defect committed by the board at the oral proceedings.

- 10.1.1 If a party is really convinced that a violation of its right to be heard has occurred during the oral proceedings, a relevant objection must be clearly raised as such, so that it will oblige the board to react, and require this to be recorded in the minutes in accordance with Rule 124 EPC, at least at a party's request.

The board points to the fact that it is a party's duty to check whether an objection to a fundamental procedural defect occurring during the oral proceedings has been recognised by the board and will be dealt with, not only when the chairperson confirms the final requests before closing the debate, but at any time when the Board is about to deliberate (see decision R 2/12, Reasons 1.2).

However, irrespective of the judicial requirement set out by the Enlarged Board of Appeal in the above mentioned case R 2/12 not being met by the respondent, according to the board's knowledge and conviction such an objection on the violation of the right to be heard has in contrast to the respondent's submission not explicitly been brought forward by the respondent and for this reason such an objection or "reference" is not mentioned in the minutes.

11. In view of the above, the board concludes that there is no reason for supplementing the minutes as requested by the respondent.

**Order**

**For these reasons it is decided that:**

The request for correction of the minutes of the oral proceedings is refused.

The Registrar:

The Chairman:



N. Schneider

P. Lanz

Decision electronically authenticated