

The board, however, stressed that priority could be based only on earlier applications filed by the applicant of the European application or by his predecessor in title. Moreover, only such applications could meet the further requirement, derivable from Art. 87(4) EPC 1973, that an application giving rise to the priority right had to be the first application by the applicant or by his predecessor in title in respect of the invention. The inventor was not relevant. Applications filed by various applicants figured alongside one another as state of the art within the meaning of Art. 54(2) or Art. 54(3) EPC 1973. The board also rejected the respondent's argument that the economic aspect was relevant to the requirements relating to priority and that the two wholly owned subsidiaries of the same parent company were not independent of each other in view of their association through the parent. Legal acts were in principle attributable to the (legal) person who had performed them. Exceptions to this needed a legal basis, which did not exist in the law relating to priority.

In T 788/05 the proprietor had been co-applicant in a previous European application D1 with an earlier priority date than that of the patent in suit. The appellant (opponent) argued that since the proprietor was also designated as applicant in D1, it had to be regarded as the "person" referred to in Art. 87(1) EPC 1973 regardless of the designation in D1 of a second applicant. Since, moreover, the invention was the same in both documents, D1 had to be considered as the first application. Therefore the priority claimed for the application in issue was not valid and D1 was prior art under Art. 54(2) EPC 1973.

The board held that the term "a person" in Art. 87(1) EPC 1973 (or "an applicant" in Art. 88(1) EPC 1973) implied that the applicant was the same for "the first application" (or "previous application" in Art. 88(1) EPC 1973) and for the later application for which a priority right was claimed. In the case of D1, the priority right belonged to the two applicants simultaneously, unless one decided to transfer his right to the other, who then became his successor in title and this before the filing of the later application. No evidence of such a transfer had been submitted. Since the application in issue was only filed by one applicant, D1 could not represent the "first application" within the meaning of Art. 87(1) EPC 1973. The priority date was valid and D1 represented state of the art under Art. 54(3) EPC 1973. The disclaimer introduced during the examination proceedings to restore the novelty of claim 1 vis-à-vis D1 was also accepted by the board.

In T 1933/12 the application underlying the patent was filed by the patent proprietors A1 and A2 and claimed the priority of D0, also filed by A1 and A2. Prior to D0, however, A2 had filed application D1, whose priority was not claimed but which undisputedly disclosed a gearbox drive in accordance with claim 1 in issue. The patent proprietors argued that D1 could not be considered the first application within the meaning of Art. 87 EPC. Since A2 was the sole applicant for D1 there was no identity of applicant with the patent in suit.

The board disagreed. T 788/05, cited by the proprietors, concerned the opposite case, namely multiple applicants for the priority document but only one for the later European filing. For succession in title – as for first filings by multiple applicants but subsequent applications by only one or some of those applicants – it had to be shown that the priority right held jointly by the multiple earlier applicants had been transferred to the sole applicant or the group of applicants (T 382/07). Art. 87(1) EPC did not exclude the (sole) applicant for the first filing sharing his priority right with a third party by filing a subsequent application