

Internal distribution code:

- (A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [X] No distribution

**Datasheet for the decision
of 3 June 2015**

Case Number: J 0001/15 - 3.1.01
Application Number: 09762149.4
Publication Number: 2374091
IPC: G06K9/18, G07F7/08, G07D7/00
Language of the proceedings: EN

Title of invention:

ENCRYPTED MARKING AND METHOD FOR SECURING AND CERTIFYING THE
AUTHENTICITY OF A PRODUCT

Applicants:

Keit Ltd.
Zhelev, Zhivko Georgiev
Zhelev, Georgi Zhivkov
Zhelev, Arkadiush
Zhelev, Edvin
Grancharov, Vitan Kanev

Headword:

Communication under Rule 112 (1)- Noting loss of rights-
Appealable decision [no] Appeal rejected as inadmissible

Relevant legal provisions:

EPC Art. 106(1)
EPC R. 112(1), 111(2)

Keyword:

Decisions cited:

J 0015/05

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: J 0001/15 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 3 June 2015

Appellants:
(Applicants)

Keit Ltd.
Zh.k. "Mladost" 3
Bl. 380-parter
1712 Sofia (BG)

Zhelev, Zhivko Georgiev
Zh.k. "Mladost" 4
Bl. 417
Entr. 1
8th floor
1715 Sofia (BG)

Zhelev, Georgi Zhivkov
Zh.k. "Mladost" 4
Bl. 602
Entr. 1
3rd floor, ap. 7
1715 Sofia (BG)

Zhelev, Arkadiush
Zh.k. "Mladost" 2
Bl. 236
Entr. 1
5th floor
Ap. 21
1799 Sofia (BG)

Zhelev, Edvin
47 General Stoletov Str.
Entr. A
5th floor, ap. 25
6000 Stara Zagora (BG)

Grancharov, Vitan Kanev
Zh.k. "Mladost" 3
Bl. 326, entr.3
6th floor, ap. 18
1712 Sofia (BG)

Representative:

Varbanov, Julian Ivanov
J. Varbanov & Partners Ltd.
South Park Complex,
bl. 1, entr. A, 2nd Floor
Sofia 1421 (BG)

Decision under appeal:

**Communication by the Formalities Officer
pursuant to Rule 112(1) EPC on behalf of the
Examining Division of the European Patent Office
dated 3 July 2014**

Composition of the Board:

Chairwoman C. Vallet
Members: M.-B. Tardo-Dino
D. T. Keeling

Summary of Facts and Submissions

- I. European patent application 09762149.4 "*Encrypted Marking and method for securing and certifying the authenticity of a product*" originates from PCT application IB2009 052476 filed on 10 June 2009.
- II. The renewal fee for the fourth year fell due on 30 June 2012.
- III. A formalities officer, acting on behalf of the examining division, issued two separate communications on 3 July 2014:
- a) One communication pursuant to Rule 112(1) EPC informed the applicant of its loss of rights. The European patent application 09762149 was deemed to be withdrawn under Article 86(1) EPC because the renewal fee for the fourth year and the additional fee had not been paid in due time.
- Besides the mentions of the usual means of redress that this communication under Form 2524 contained the examining division wrote: "*Please be informed that the one-year time limit for re-establishment under Rule 136(1) from expiry of the unobserved time limit on 31.12.2012 has expired. This time limit is absolute, even if the noting of loss of rights pursuant to Rule 112(1) EPC had not yet been notified (see J 16/86, J 18/86, J 34/92)*".
- b) The second communication dealt with two communications sent on 20 August 2012 pursuant to Article 94(3) EPC and on 5 February 2013 pursuant to Rule 112(1) EPC. As to these communications the examining division came to the conclusion that

since the EPO could no longer establish that they reached their destination, it had to be assumed under Rule 126(2) EPC that they were deemed not to have been notified. The conclusion was that the reply by the applicant on 3 April 2014 had to be considered as a valid reply and the requests for further processing and for re-establishment of rights had become purposeless. However, the communication in its last paragraph drew the applicant's attention to the separate communication of loss of rights due to the non-payment of renewal fee and the additional fee for the fourth year, namely the notification which is the subject-matter of the present appeal.

- IV. With a letter dated 29 August 2014 the applicant filed a notice of appeal against "the decision dated July 3 2014, noting of loss of rights pursuant to Rule 112(1) EPC".

- V. By a separate letter also dated 29 August 2014 it requested a decision in accordance with Rule 7(3)(a)(i) Rules Relating to Fees, hereinafter RRF, before the department of first instance. By a letter of 2 October 2014 the examining division informed the applicant that further to an internal investigation no trace of payment of the 4th annuity could be found into the European Patent Office bank account. The applicant was invited to enquire with its bank and provide details and evidence regarding the transfer.

- VI. The appellant in response filed documents with a letter of 24 October 2014 which seeks to establish that despite of the payment being initiated in the electronic system of the bank the transfer was not carried out. This procedure is still pending.

VII. In the letter dated 24 October 2014 the appellant, while referring to the notice of appeal, requested the Board of Appeal to "re-establish the rights to the patent application EP 0972149". It argued that the applicant's company initiated the missing payment to the EPO in the amount of 555 Euros in due time, but for an inexplicable reason the bank did not transfer the money to the EPO, as evidenced by the documents on file. The appellant also referred to the complexity of the facts as reported in the second communication of the examining division (point b) above). In particular within the period 2012-2014 there were difficulties in the correspondence between the EPO and the appellant which led to the application being deemed to have been withdrawn.

It confirmed that the appeal proceedings were initiated against the decision of the examining division which considered the application to have been withdrawn due to non-payment of the renewal fee for the fourth year. It concluded by referring to its belief that the complex factual situation met the requirements and conditions for the "restoration of rights" and that the board of appeal would allow the examining division to further proceed.

VIII. With a letter dated 18 December 2014 and received on 2 January 2015 the appellant filed a request for re-establishment of rights. This request concerns the non payment of the 5th annual fee and is addressed to the examining division.

IX. Oral proceedings were not requested.

Reasons for the Decision

The appellant did not request oral proceedings. The board was in a position to make its decision in accordance with Article 12(3) of the Rules of Procedure of the Boards of Appeal, namely on the basis of the documents on file.

1. The scope of the appeal

The appellant filed several documents which call for a clarification of what the subject-matter of the present appeal is.

1.1 It is clear from the notice of appeal that the appeal was intended to be directed against the communication of loss of rights of 3 July 2014.

On 29 October 2014 a document was sent, addressed to the Board of Appeal which corresponds, in the Legal Board's understanding, to the statement of grounds of appeal since it is expressly referred to the the notice of appeal and to the "decision" mentioned in the notice of appeal.

1.2 The appellant in this same statement of grounds mentions other procedural steps taken in parallel, and in the same period of time as the appeal, and also requests to re-establish the rights to the patent application EP09762149.

1.3 It is necessary to clarify that the present appeal cannot concern the request under Rule 7(3) RRF still pending before the department of first instance.

1.4 As to the request for re-establishment of rights dated 18 December 2014 and received on 2 January 2015 it is

not part of the present appeal proceedings. This request concerns the non-payment of the 5th annual fee and is addressed to the examining division.

1.5 Accordingly, what remains before the Legal Board is the appeal against the noting of loss of rights following the non-payment of the 4th annual fee.

2. Admissibility of the appeal

2.1 The board understands that the appellant requests its rights to its application be re-established by way of the present appeal directed against the communication under Rule 112(1) EPC sent by the formalities officer on behalf of the examining division on 3 July 2014.

2.2 Pursuant to Article 106 EPC an appeal shall lie from decisions of the Receiving Section, Examining Divisions, Opposition Divisions and Legal Division.

2.3 A communication by the formalities officer pursuant to Rule 112(1) EPC on behalf of the examining division is not an appealable decision in the sense of Article 106 EPC as already decided in the established case law of the boards of appeal. Such a communication is an intermediate procedural measure that the applicant is entitled to challenge by way of the appropriate means laid down in Rule 112(2) EPC. It is only after this means has been utilised and a decision made on this contestation that the subsequent decision is open to an appeal (see for instance J 15/05 of 29 January 2007).

2.4 In the present case, so far, the examining division has not issued any decision regarding the communication under appeal.

3. Accordingly in so far as the appeal was directed to the communication which was not open to appeal it is rejected as inadmissible.

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible

The Registrar:

The Chairwoman:



C. Eickhoff

C. Vallet

Decision electronically authenticated