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Aktenzeichen / Case Number / N^o du recours : J 15/84

Anmeldenummer / Filing No / N^o de la demande : 80 300 343.3

Veröffentlichungs-Nr. / Publication No / N^o de la publication : 0 001 492

Bezeichnung der Erfindung: Improvements in and relating to noise
Title of invention: blanking circuitry in a radio receiver
Titre de l'invention :

Klassifikation / Classification / Classement : H04B

ENTSCHEIDUNG / DECISION

vom / of / du 4 June 1985

Anmelder / Applicant / Demandeur : MOTOROLA Inc.

~~Patentinhaber / Proprietor of the patent /
Titulaire du brevet :~~

~~Einsprechender / Opponent / Opposant :~~

Stichwort / Headword / Référence :

EPU / EPC / CBE Art. 122; 86 (2)

Leitsatz / Headnote / Sommaire

Europäisches
Patentamt
Beschwerdekammern

European Patent
Office
Boards of Appeal

Office européen
des brevets
Chambres de recours



Case Number: J 15 /84

DECISION
of the Legal Board of Appeal
of 4 June 1985

Appellant: MOTOROLA Inc.
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Illinois 60196
U S A

Representative: L.E. Newens
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Decision under appeal: Decision of the Formalities Section of the Examining
Division of the European Patent Office dated 19 January 1985.

Composition of the Board:

Chairman: R. Singer
Member: F. Benussi
Member: O. Bossung

Summary of Facts and Submissions

- I. The European patent application No. 80 300 343.3, filed on 6 February 1980, was published on 12 November 1980 (publication No. 0 001 492).
- II. By registered letter dated 19 April 1982, the appellant was informed that the third renewal fee had not been paid by the due date (28 February 1982) and that, in accordance with Article 86(2) EPC, payment could be validly made within six months of the due date provided that an additional fee of 10% of the renewal fee was paid. At the same time the appellant was reminded that non-payment of the fees within the time limit entails the legal consequence foreseen by Article 86(3) EPC.
- III. By communication dated 5 October 1982, in accordance with Rule 69(1) EPC, the Formalities Officer informed the appellant that no payment of the third renewal fee and the additional fee had been made within the period of six months prescribed by Article 86(2) EPC which expired on 30 September 1982 and declared that the application for a European patent must be deemed to be withdrawn in accordance with Article 86(1).

Furthermore, the Formalities Officer took the attention of the appellant to the period of two months, which expired on 15 December 1982, to apply for a decision on the matter by the EPO (Rule 69(2)), if the finding was considered inaccurate.

On 20 October 1982, the Formalities Officer by communication pursuant to Rule 51(4) and (5) EPC, informed the appellant of the intention to grant a European patent.

- IV. On 15 November 1982 the appellant paid the fees for grant and printing and on 8 January 1983 the translated claims were received by the EPO.
- V. On 23 February 1983 the appellant asked for *restitutio in integrum* and paid the third renewal fee as well as the fee for *restitutio in integrum* submitting that the failure to pay the renewal fee was the result of a misunderstanding between an American employee of the applicant company transferring the prosecution of the UK and European applications to a British employee of the applicant company who believed that the payment of the renewal fees would remain the responsibility of the American side of the company and that only the further prosecution of the application was being transferred. The appellant filed evidence in support of his application, submitting a copy of the internal note.
- VI. By the decision under appeal given by the Formalities Officer on 19 January 1984, it was held that the application for re-establishment of rights was inadmissible on the grounds that it should have been filed at the latest on 15 December 1982, since in the opinion of the Formalities Officer, the period of two months from the removal of the cause of non-compliance with the time limit prescribed by Article 122(2) EPC, first sentence, had to be calculated from the date of the communication given pursuant to Rule 69(1) EPC. The Formalities Officer considered furthermore that in the present case it had not been shown that "all due care required by the circumstances" had been taken.
- VII. On 16 February 1984, the appellant filed a notice of appeal against the decision of the Formalities Officer dated 19 January 1984 and on 23 May 1984, he filed a statement

setting out the grounds of appeal, accompanied by copies previously submitted in support of the application for re-establishment of rights.

VIII. In the grounds of appeal, the appellant's representative repeated that by agreement with the applicant he was not responsible for the payment of renewal fees concerning any application for patents presented by himself as authorised representative.

The appellant's representative submitted that the reason for the failure to pay the renewal fee was a misunderstanding between employees of the applicant company concerning responsibility for payment of fees and not, as had been apparently assumed by the Formalities Officer, lack of awareness of the time limit.

The appellant submitted further that he had no record of the receipt of the communication from the EPO informing him that the application was deemed withdrawn pursuant to Article 86(3) EPC. The applicant's unawareness arising from the misunderstanding regarding the time limit to be observed would have been increased by the communication pursuant to Rule 51(4) EPC dated 20 October 1982 sent 7 weeks after the patent application had lapsed through non-payment of the renewal fee.

The Board has not been in a position to establish with certainty that any such communication was received by the appellant in spite of the research undertaken with the German postal authorities.

The time limit for any kind of postal investigations pursuant to Article 42 of the "Convention postale universelle" (Rio de Janeiro 26 October 1979) is one year

after the date of posting of the letter and consequently the German postal authorities were unable to furnish the Board with proof of delivery.

Reasons for the Decision

1. The appeal complies with Articles 106 to 108 and Rule 64 EPC and is, therefore, admissible.
2. The question of whether the application for *restitutio in integrum* was made at the right time, i.e. within two months from the removal of the cause of non-compliance with the time limit (Article 122 EPC) was answered by the Formalities Officer in the negative; it held that delivery of the notification under Rule 69(1) dated 5 October 1982 was to be considered as the removal of the cause of non-compliance.
3. However the appellant declared that he was informed by the EPO by telephone only on 22 February 1983 that the renewal fee had not been paid, with consequent loss of rights, and he had no record of receipt of the EPO communication pursuant to Rule 69(1) EPC, dated 5 October 1982.
4. If the EPO is not able to prove that the communication dated 5 October 1982 had been received by the applicant or by the applicant's representative, it is not possible to refer to 15 December 1982 (ten days plus two months calculated in accordance with Rules 78(3) and 83(2) EPC) as the starting point of the two-month period according to Article 122(2) EPC.
5. According to the submissions of the appellant, the two-month time limit began on 22 February 1983. The application for re-establishment of rights which was received on 23 February 1983 was therefore made in due time.

6. The Formalities Officer considered only the question of the admissibility of the application for re-establishment of rights but did not consider the arguments presented by the applicant.
7. In order not to deprive the applicant of his right to a consideration of the grounds for re-establishment of rights in two instances, the Board deems it appropriate to remit the case to the Examining Division for further prosecution.
8. The Formalities Officer has made his decision without establishing that the communication dated 5 October 1982 has reached its destination. That must be considered a substantial procedural violation giving rise to a refund of the appeal fee.

ORDER

For these reasons, it is decided that :

1. The Decision of the Formalities Officer dated 19 January 1984 is set aside.
2. The case is remitted to the Examining Division for further prosecution.
3. Reimbursement of the appeal fee is ordered.

J. B.

R. Singer