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**D E C I S I O N**  
of 24 January 2000

**Case Number:** J 0001/97 - 3.1.1

**Application Number:** 90910868.0-2303

**Publication Number:** 444162

**IPC:** E02B 15/04

**Language of the proceedings:** EN

**Title of invention:**

System and apparatus for the mechanical cleaning of water surfaces

**Applicant:**

Ayroldi, Giuseppe

**Opponent:**

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**Headword:**

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**Relevant legal provisions:**

EPC Art. 108, 122(2)

EPC R. 69(1), 78(3)

**Keyword:**

"Appeal fee paid - no"

**Decisions cited:**

J 0003/87

**Catchword:**

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Case Number: J 0001/97 - 3.1.1

**D E C I S I O N**  
of the Legal Board of Appeal 3.1.1  
of 24 January 2000

**Appellant:** Ayroldi, Giuseppe  
Via Guido Zanobini 55  
00175 Roma (IT)

**Representative:** Rocci, Giancarlo  
Studio Legale  
Via V. Veneto n. 96  
00187 Roma (IT)

**Decision under appeal:** Decision of the Examining Division of the European Patent Office posted 2 September 1996 refusing a request for re-establishment of rights with respect to European patent application No. 90 910 868.0.

**Composition of the Board:**

**Chairman:** J.-C. Saisset  
**Members:** A. Lindqvist  
M. Aúz Castro

## Summary of Facts and Submissions

- I. By decision of 2 September 1996 the Examining Division of the European Patent Office refused the applicant's request for re-establishment of rights under Article 122 EPC in respect of European patent application No. 90 910 868.0.
- II. A notice of appeal was filed on 4 November 1996, but the fee for appeal was not paid. The applicant (appellant) was therefore, pursuant to Rule 69(1) EPC, sent a communication of loss of rights dated 6 February 1997, informing him that pursuant to Article 108, second sentence, EPC, the notice of appeal was deemed not to have been filed.
- III. On 7 April 1997 the applicant and appellant filed "an appeal against the decision of the appeal commission to deem as unreceived" the appellant's notice of appeal. This letter was interpreted by the Registrar of the Board as a request for re-establishment of rights with regard to the appellant's failure to pay the appeal fee mentioned above. The registrar informed the appellant on 9 April 1997 that a fee for re-establishment of DM 150,- had to be paid on 16 April 1997 at the latest. The fee was paid on that date.
- IV. On 11 June 1997 a communication was sent to appellant informing him that as the omitted act, i.e. the payment of the appeal fee, had not been completed within the two month period prescribed in Article 122(2) EPC, which period ended on 16 April 1997, re-establishment was not possible.
- V. The appellant's representative answered in letters received on 18 August 1998 and 15 October 1998 that he interpreted the communication as a good sign for the appellant, and that the appellant requested that Article 122 EPC should be applied. The representative also pointed out that he was a civil lawyer not specialized in patent law, and needed information about fees that the

appellant had to pay, and the expiry terms for such payments.

- VI. In a final communication of 9 March 1999 the legal situation concerning the application under consideration was again explained to the appellant's representative. He was informed that under no circumstances the Board saw a possibility of saving the application.

Firstly, as the appellant had failed to pay the appeal fee in time, the appeal had to be considered as not filed.

Secondly, the appellant's representatives attention was drawn to the fact that apparently no annuities had been paid from the seventh year onwards with the effect that the application was deemed to be withdrawn pursuant to Article 86(3) EPC as from 1 February 1997.

Thirdly, the Board informed the appellant's representative that it envisaged to reimburse the restitutio fee, because the registrar's interpretation of the appellant's letter of 7 April 1997 had not been helpful to the appellant.

- VII. In a reply received on 3 May 1999 the representative explained that the appellant acknowledged the errors that had been mentioned in the communications. He asked the Board to take into account that the appellant had suffered from bad health and from the misconduct of a former representative. An explicit request was not filed. Implicitly the appellant's representative was trying to get the appeal admitted.

## Reasons for the Decision

1. According to Article 108 EPC first sentence notice of appeal must be filed in writing at the European Patent Office within two months after the date of notification of the decision. The appellant has complied with this requirement.
2. But pursuant to the second sentence of the same provision the notice of appeal shall not be deemed to have been filed until after the fee for appeal has been paid. The decision of the first instance having been posted on 2 September 1996 and deemed to have been received on 12 September, the two-months time limit for paying the appeal fee expired on 12 November 1996, without the appellant having paid the fee (Rules 78(3), 83(2), (4) EPC).
3. The appellant was informed of this deficiency by communication of 6 February 1997 from the registrar of the Board, upon which the appellant filed his "appeal" of 7 April 1997, interpreted as a request for re-establishment by the registrar of the Board.
4. However, as became apparent in the proceedings no annuities have been paid from the seventh year onwards with the effect that the application is deemed to be withdrawn pursuant to Article 86(3) EPC.

The annuity for the seventh year was due on 31 July 1996 pursuant to Rule 37(1) EPC. The six-month time limit according to Article 86(2) EPC for paying the

renewal fee together with an additional fee expired on 31. January 1997.

5. Therefore, even a successful restitutio could not have saved the application because of lack of payment of the annuities.

The interpretation given by the registrar to the "appeal" of 7 April 1997 was thus not in favour of the appellant and the payment of the fee for re-establishment was the consequence of this erroneous information.

6. The principle of protection of legitimate expectations which governs the procedure before the EPO implies that an applicant must not suffer a disadvantage as a result of having relied on a misleading communication (see decision J 3/87, OJ EPO 1989, 3).

It would constitute "venire contra factum proprium" to interpret the appellant's submissions as a request for re-establishment and make him pay the corresponding fee, although the application was already deemed to be withdrawn. The remedy in the situation is to consider the interpretation not to have been made with the consequence that the fee had been paid without reason and has to be restituted.

**Order**

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

1.       **The appeal is deemed not to have been filed.**
2.       **The reimbursement of the restitutio fee is ordered.**

**The Registrar:**

**The Chairman:**

**M. Beer**

**J.-C. Saisset**