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**Datasheet for the decision
of 13 March 2008**

Case Number: T 0257/07 - 3.2.04

Application Number: 03701705.0

Publication Number: 1485176

IPC: A63F 13/00

Language of the proceedings: EN

Title of invention:

Virtual IPR system in electronic game environment

Applicant:

Koninklijke Philips Electronics N.V.

Headword:

Restitutio/PHILIPS

Relevant legal provisions:

-

Relevant legal provisions (EPC 1973):

EPC Art. 122

Keyword:

"Late-filed appeal (yes)"
"Sufficiency grounds for restitutio (no)"
"All due care (no)"
"Appeal deemed not to have been filed"
"Reimbursement of appeal fee (yes)"

Decisions cited:

J 0016/82; J 0012/84; J 0002/86; J 0009/86; T 0324/90;
T 0828/94; T 0686/97; T 0261/07

Catchword:

The request for restitutio in integrum as filed within the two months stipulated in Art. 122(2) failed to show that all due care had been taken. The subsequent additions made to the case were filed out of time and could not prove due care, either.



Case Number: T 0257/07 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 13 March 2008

Appellant: Koninklijke Philips Electronics N.V.
Groenewoudseweg 1
NL-5621 BA Eindhoven (NL)

Representative: van der Veer, Johannes Leendert
Philips
Intellectual Property & Standards
P.O. Box 220
NL-5600 AE Eindhoven (NL)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 10 October 2006
refusing European application No. 03701705.0
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: C. Heath
A. de Vries

Summary of Facts and Submissions

- I. Subject of these proceedings is the question whether the applicant (hereinafter appellant) lodged an admissible appeal against the decision of the examination division of 10 October 2006 that refused European patent application No. 03701705.0.
- II. The above-mentioned decision was dispatched to the appellant, Koninklijke Philips Electronics N.V. and duly received by the latter on 16 October 2006.
- III. In a letter received by the European Patent Office on 12 February 2007, the appellant filed a notice of appeal, the grounds of appeal and a request for *restitutio in integrum*. The corresponding fees for appeal and *restitutio* were duly paid.
- IV. The request for *restitutio in integrum* was justified as follows: The case at issue was handled by a trainee of the appellant, Mr T.. Upon receipt of the EPO's decision to refuse the patent application, Mr T. talked to his supervising professional representative, Mr E., and it was agreed that the decision should be appealed. The coversheet of the EPO's decision was stamped with the words "appeal? ja/nee" the "ja" being circled, the "nee" crossed out, and the indication "retour: patent admin" added. The trainee thus sent the decision to appeal directly to the Patent Administration Department. This, however, was the wrong route to take, as is explained in said letter: "The notice of appeal is filed by the trainee or professional representative handling the case and not by the administration. The

actual sending of the notice of appeal is taken care of by the assistant of the trainee or the professional representative, after which a copy of the decision to send a notice of appeal is sent to the administration. As a result the receipt of the decision to send a notice of appeal did not indicate anything out of the ordinary to the Patent Administration." In order to demonstrate that Mr T. had been properly trained and instructed, the appellant pointed to the "Guide for prosecution before the EPO", a manual that in respect of appeals contains the following sentence:

"Filing a notice of appeal is a formal act that is done by an internal Philips IP & S European patent attorney. Reference is made to the PE Manual for various examples applicable to various cases in which an appeal may need to be filed."

The fact that no notice of appeal had been filed with the European Patent Office was discovered by Mr T. on 16 January 2007 in that he noticed that there was no copy of a notice of appeal in the Philips' database.

V. In a communication of 4 April 2007, the board requested further particulars regarding the name of the trainee, the appellant's guidelines for the supervision of trainees and for filing appeals, and proof that it had indeed been the intention to file an appeal. The requested information was furnished by letter of 26 June 2007.

VI. On 16 November 2007, the board sent a summons to oral proceedings and made the following non-binding observations:

Firstly, the evidence presented by the appellant regarding the instructions of trainees did not unambiguously state how an appeal should actually be filed, in particular why it was wrong to file an appeal through the Patent Administration, as was apparently Mr T.'s intention.

Secondly, no mention had been made of any failsafe system that could alert the Patent Administration to the fact that no appeal had been filed despite intention to do so.

VII. As a response to this letter, the appellant on 11 February 2008 filed "further evidence and observations" that differed from the case previously presented in a number of respects:

- (1) As to the instruction of trainees, an excerpt of the "PE manual" was provided. This manual, already mentioned in the previously furnished "Guidelines for prosecution before the EPO", under the heading "EPO (reduction of appeal fee)" *inter alia* stated the following: "Enclosed are examples of notices of appeal. Please be careful in selecting the right one and in instructing your PE assistant as to which one to take and how to supplement them." The PE manual was made available to the trainee when joining the appellant.
- (2) Thus, the proper route to be taken for filing an appeal was via the trainee's assistant, and this was properly explained in the PE manual.

- (3) The Patent Administration of the appellant, headed by a qualified European patent attorney, had set up the so-called IBIS database system for monitoring patent applications. This computer based system contained data of the application as such, of the person in charge and of deadlines to be observed. In the case an application was refused, the Patent Administration inserted an internal deadline for filing an appeal, in this case 10 December 2007. It was then up to the person in charge to decide whether or not to actually file an appeal. If not, this decision was communicated to the Patent Administration, which would thereupon amend the IBIS system in that the case would be closed. If yes, this decision would also be sent to the Patent Administration, which thereupon checked the IBIS system as to whether the time limit for the notice of appeal had indeed been closed and scanned the decision into the system. Further, the due date for filing the grounds of appeal would be added. Should the time limit for filing the notice not have been closed, the Patent Administration Officers would be obliged to remind the PE and his assistant about the open action. In the case at issue, the case was neither closed nor was the decision to appeal registered in the system, as the cover letter of the EPO's decision to refuse the patent application with Mr T.'s written intention to appeal had never reached the Patent Administration, but apparently had gone straight to the paper archive without being scanned and uploaded onto the system. As an annex to the letter of 11 February, a copy of the IBIS database

for this case was attached. It showed that the EPO's decision to reject the application had been entered, that an internal deadline for appeal of 10 December 2006 had been calculated, and that possible reasons for appeal should be dispatched by 12 February 2007.

VIII. In the oral proceedings held before the board on 13 March 2008, the appellant, represented by the European patent attorney Mr S. and the trainee Mr T. further elaborated on the justification for the request for re-establishment of rights. In order to do so, the appellant submitted a 13 page presentation that showed the procedure for filing a notice of appeal, the time line of this particular case, the errors made by the trainee and the ones made subsequently. In particular, Mr T. explained that this was his second appeal case. His first appeal case was taken over from a trainee that had subsequently left Philips before concluding the case. Before leaving, this trainee had done exactly what Mr T. had done in this case, that is, indicate to the Patent Administration that the case should be appealed. However, in this previous case, the Patent Administration had, exceptionally, agreed to handle the formalities in view of the fact that the trainee would leave Philips. Based on this previous experience, Mr T. was convinced that the correct route to take for an appeal was to indicate so to the Patent Administration. And while Mr T. had discussed the details of the grounds of appeal with his supervising European patent attorney, Mr E., no discussion had taken place about how to actually file an appeal.

No arguments were presented why the appellant had not set out the case for *restitutio* in full within the two months period established by Article 122(3) EPC.

As to the internal IBIS system, Mr T. explained that the system had worked satisfactorily in the past, and that Philips hardly ever had to request *restitutio* under Article 122 or further processing under Article 121 EPC. The Patent Administration was responsible for inserting the internal deadlines for filing an appeal in the IBIS system, and any time limits in the system could be inspected for each trainee, but there was no central unit that would alert the persons responsible for any upcoming deadline. Thus, the IBIS monitoring system relied on the responsibility of each trainee or professional representative to actively consult the system for any upcoming deadlines. In the case of trainees there was no additional monitoring of deadlines, either by the trainee assistant, the supervisor or the Patent Administration unit. Only since January 2007, a monthly overview of deadlines was printed out and sent to each trainee. Mr T. himself mentioned that he would check his deadlines every couple of weeks, and that in the particular case at issue, he did not feel any need to do so, as in his view he had taken care of this case by indicating that an appeal should be filed when dispatching the first page of the EPO's decision to the Patent Administration Division. Mr T. first became aware that something had gone wrong when he received no notice that an appeal had been filed, and, upon consulting the IBIS system, discovered that the due date for filing the notice had not been closed, and that there was no scan of the written intention to

appeal in the system. This, however, was only in mid-January 2007.

- IX. The appellant (appellant) requests that the request for *restitutio in integrum* be granted.

Reasons for the Decision

1. The request for *restitutio* is admissible, but not well founded.
 - 1.1 The appealed decision was issued on 10 October 2006, and the appeal period of two months according to Article 108 EPC expired on 20 December 2006, taking into account the 10 days period of postal delay as stipulated by Rule 78(2) EPC. It was only by letter of 15 February 2007 that the appellant submitted a notice of appeal, grounds of appeal, a request for *restitutio* and paid the corresponding fees. Bar a successful request for *restitutio in integrum*, the notice of appeal would have been filed out of time and the appeal fee paid too late.
 - 1.2 According to Article 122(3) EPC, first sentence, an application for *restitutio* must state the grounds of which it is based, and must set out the facts on which it relies. This, according to Article 122(2) EPC must be done within two months from the removal of the cause of non-compliance. The cause of non-compliance - (the misdirection of Mr T.'s intention to file an appeal) - was removed once Mr T. became aware that no appeal had been filed, which according to his own submissions was in mid January. Within the following two months, the

request for *restitutio* was filed, giving reasons why the appeal period was missed despite all due care being taken. At the request of the board, the appellant on 26 June 2007 furnished proof for some of the facts set out in the original request for *restitutio*. It was only by the submissions of 11 February 2008, however, that the appellant qualified certain statements previously made, in particular regarding the role of the trainee's assistant in actually handling the filing of an appeal, and adding new facts that previously went unmentioned, in particular regarding the system for managing files and deadlines (IBIS) as well as the fact that the written decision to appeal did **not** arrive at the Patent Administration. It transpires from these subsequent submissions that the original request for re-establishment of rights gave only an incomplete picture of the reasons for non-compliance of how appeals were filed, and of safeguards against errors made.

- 1.3 When judging the case of *restitutio* in light of the original submissions made within the two-month period stipulated in Article 122(2) EPC, the board finds that there is insufficient evidence of proper instruction of the trainee, and no mention at all of any failsafe system in place. According to the decision of **J 12/84**, OJ EPO 1985, 108, "the representative has to choose for the work a suitable person, properly instructed in the tasks to be performed, and to exercise reasonable supervision of the work" (point 6 of the reasons). Yet, the "Guide for prosecution before the EPO" mentioned by the appellant merely states that a notice of appeal should be filed by a European patent attorney. As the appellant's Patent Administration unit is headed by a European patent attorney, a trainee who sends the

intention to file an appeal to the Patent Administration expecting that an appeal would be filed by this unit does not necessarily deviate from the instructions given to him. Insofar, the board is not convinced that the trainee in this case was properly instructed on how to file an appeal. Furthermore, it is well established case law that the exercise of all due care requires a failsafe system or a system of an effective cross-check, decisions **T 686/97** of 12 May 1998, and **J 9/86** of 17 March 1987. Thus, the request for *restitutio* initially presented within the period stipulated by Article 122(2) EPC failed to show that all due care had been taken. This omission cannot be subsequently remedied by the addition of further facts, as case law would only allow the appellant to "submit further evidence which clarifies the facts which were set out in the application for re-establishment", **J 2/86** OJ EPO 1987, 362, point 2 of the reasons, and **T 261/07** of 27 September 2007, point 2.3 of the reasons. As a result, the appellant within the period stipulated in Article 122(2) has failed to show that all due care has been taken.

2. Even if the appellant had presented all the facts subsequently added in good time, the board would not have been able to grant the request for *restitutio*.
- 2.1 Even taking into account the relevant passages of the PE Manual filed on 11 February 2008, the instruction "Enclosed are examples of notices of appeal. Please be careful in selecting the right one and in instructing your PE assistant as to which one to take and how to supplement them" does not clearly and unambiguously tell the trainee how to file an appeal. The above

quoted passage is hidden in a chapter called "EPO (Reduction of appeal fee)" and fails to bring to the trainee's attention the importance of actually *how* to file an appeal. This impression is reinforced by Mr T.'s submission that due to a previous appeal that was exceptionally handled by the Patent Administration, he had the impression that all appeals should properly be filed in that way. Neither the Guide for prosecution before the EPO, nor the PE Manual are sufficiently explicit in instructing a trainee that under no circumstances, an appeal should be filed through the Patent Administration Unit.

- 2.2 Moreover, the board is not convinced that the system of file management as used by the appellant is a sufficient safeguard against human errors in filing appeals. According to the facts as outlined in the appellant's letter of 11 February 2008, and the submissions made in oral proceedings, deadlines are entered into the IBIS system once a communication is received from the EPO. In the case where the EPO rejects an application, the person in charge is then called upon to decide whether to appeal or not. If it is decided not to appeal, the person in charge would indicate this to the Patent Administration, whereupon the latter would insert into the system the fact that the case is closed. In the case where an appeal is actually filed by the person in charge, the Patent Administration, being notified of such an intention, would then enter the internal deadline for filing the grounds of appeal into the system. However, the IBIS system does not provide for the possibility of inspecting open time limits in general, but only for each person in charge, or for each trainee. Nor does

the system itself actively monitor time limits and alert the person concerned of a time limit's imminent expiry. The system thereby relies entirely on the diligence, as well as the skill and proficiency of the person in charge as to monitor open deadlines. In the case of a trainee, neither the trainee's assistant nor his supervisor, nor the Patent Administration Unit would monitor a trainee's deadlines. Neither would anyone, not even the trainee himself, be alerted once an upcoming deadline was apparently not dealt with by any appropriate action. Yet, "a monitoring system for EPO time limits should contain an independent cross-check to prevent the misunderstanding between a representative and a technical assistant from assuring that a notice of appeal will be prepared and filed on time by the other person", decision **T 828/94** of 18 October 1996, Catchword. Just as in the case **T 828/94** (incidentally concerning the same appellant as here), the system used in the present case "seems to have relied exclusively on the conscientiousness of the person responsible for the handling of the file" (point 3 of the reasons) rather than an *independent cross-check* that necessarily must include either another person or an automated system alerting another person. The fact that a trainee's supervisor would not regularly check a trainee's deadlines further points to a lack of proper supervision.

3. As the request for *restitutio in integrum* is to be refused for the above-mentioned reasons, the appeal of 15 February 2007 was filed out of time, and the appeal fee paid late. In line with decisions **J 16/82** OJ EPO 1983, 262 and **T 324/90** OJ EPO 1993, 33, the appeal is

deemed not to have been filed and the appeal fee is to be reimbursed.

Order

For these reasons it is decided that:

1. The request for *restitutio in integrum* is refused.
2. The appeal is deemed not to have been filed.
3. The appeal fee is reimbursed.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte