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**Datasheet for the decision  
of 27 July 2009**

**Case Number:** T 1465/08 - 3.5.03

**Application Number:** 04737113.3

**Publication Number:** 1743499

**IPC:** H04Q 7/32

**Language of the proceedings:** EN

**Title of invention:**

MOBILE PHONES COMBINED WITH THE WIRELESS TECHNOLOGY USING  
PROTOCOL 802.11

**Applicant:**

Bassi, Giuliano

**Opponent:**

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**Headword:**

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**Relevant legal provisions:**

EPC Art. 122

EPC R. 136(1), (2)

RPBA Art. 15(5)

**Keyword:**

"Request for re-establishment of rights (deemed not to have  
been filed)"

**Decisions cited:**

J 0019/90, T 0315/90, T 0778/00, T 0170/04

**Catchword:**

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Case Number: T 1465/08 - 3.5.03

**D E C I S I O N**  
of the Technical Board of Appeal 3.5.03  
of 27 July 2009

**Appellant:** Bassi, Giuliano  
Via Molinetto 126  
47017 Rocca San Casciano (IT)

**Representative:** -

**Decision under appeal:** Decision of the examining division of the  
European Patent Office posted 26 March 2008  
refusing European patent application  
No. 04737113.3 pursuant to Article 97(2) EPC.

**Composition of the Board:**

**Chairman:** A. S. Clelland  
**Members:** M.-B. Tardo-Dino  
F. van der Voort

## Summary of Facts and Submissions

- I. The appeal is from the decision of the examining division refusing European patent application No. 04737113.3 (publication number EP 1743499) which was originally filed as international application No. PCT/IB2004/002071 (publication number WO 2004/114595 A).
- II. The decision was dated 26 March 2008. The notice of appeal was filed on 28 May 2008 but was not accompanied by the payment of the appeal fee.
- III. According to the written report of a "consultation by telephone" of 15 July 2008, the appellant/applicant in person was informed by the examining division that: no oral proceedings had been summoned; that the appeal fee had not been paid and the time limit for payment had expired; that no grounds of appeal had yet been filed but the time limit was still running; and that the admissibility of the appeal would be decided by the board of appeal.
- IV. The appellant's representative paid the appeal fee on 16 July 2008 and filed the statement of grounds on 4 August 2008. In an accompanying letter it was confirmed that the appeal fee and an additional fee, referred to by the representative as a "surcharge", had been paid.
- V. On 26 September 2008 the board issued a communication noting a loss of rights pursuant to Rule 112(1) EPC and Article 108 EPC, second sentence, because the appeal fee had been paid outside the time limit set by Article 108 EPC.

- VI. With a letter, not dated but received on 25 November 2008, the appellant filed a "General Authorisation" in his own name and a request for re-establishment of rights with respect to the time limit for the payment of the appeal fee, arguing that he could demonstrate that his representative at the time had shown "evident incompetence"; when paying the appeal fee the representative had failed to declare that an additional amount (EUR 560) was paid at the same time as the appeal fee as a "re-establishment tax". It was stated that the representative was not completely aware of the content of Article 108 EPC. The appellant informed the board that he was no longer represented and would defend his case himself. He requested oral proceedings. A further unsigned letter was received from the appellant on 26 January 2009. Its contents are not relevant to the present case.
- VII. On 9 February 2009 the board of appeal issued a communication taking the provisional view that the request for re-establishment of rights was not admissible and even if, for the sake of argument, it were held to be admissible, it would not be allowable.
- VIII. Oral proceedings were held on 10 July 2009. The appellant was assisted by an interpreter he had brought. He requested that his rights be re-established in accordance with Article 122 EPC. He also referred to Articles 113 and 112a EPC in connection with his former representative's behaviour before the examining division and in filing the appeal. The appellant stated in this respect that the representative dealt wrongly with his patent application; it misunderstood his

invention and thus failed to make a good case before the first instance. At the end of the oral proceedings the Chairman announced that the debate was closed and that the decision would be given in writing.

IX. On 20 July 2009, i.e. after the hearing, a fax was received from the appellant.

**Reasons for the Decision:**

1. The fax received after the closure of the debate consists in a personal summary of the oral proceedings by the appellant and is apparently intended as a record of the discussion. It contains nothing which would justify reopening the debate in accordance with Article 15(5) of the Rules of Procedure of the Boards of Appeal. It has therefore been disregarded in the present decision.
  
2. Compliance of the request for re-establishment of rights with the requirements of Article 122 and Rule 136 EPC.
  - 2.1 According to Rule 136 EPC, the request for re-establishment of rights shall be filed within two months of the removal of the cause of non-compliance. The relevant date to be taken into consideration is that at which the appellant should have discovered the error which was the cause of non-compliance, which is not necessarily the date of the communication of loss of rights (see for instance T 315/90 not published in OJ EPO).

- 2.2 With the letter received on 25 November 2008 the appellant filed a "General Authorisation" in his own name and stated that he removed the representative from the procedure, which the board understands as synonymous with withdrawing the representative's authorisation. Accordingly, during the relevant time period and in accordance with Rule 152(8) EPC the representative was the person responsible for the procedural steps with respect to the pending patent application. It was the representative who paid the appeal fee on 16 July 2008 and specified, in the subsequent letter of 4 August 2008 that an additional fee or "surcharge" was also paid. It was thus the representative who was responsible for ensuring that the cause of non-compliance was removed and that a request for re-establishment of rights was filed within the two month period specified by Rule 136 EPC.
- 2.3 The proximity in time between, on the one hand, the telephone enquiry by the appellant in person on 15 July 2008 and, on the other hand, the payments and the accompanying letter of 4 August 2008 from the representative referring to the "surcharge" suggests that the representative's attention was drawn to the failure in the procedure by the applicant at some point between the two dates.
- 2.4 The board concludes from these circumstances that the representative was, at the latest, made aware of the error which was the cause of non-compliance and sought to remove it on 4 August 2008. Thus the time limit for filing the request for re-establishment of rights expired on 6 October 2008 (Rules 134(1) and 136(1) EPC).

- 2.5 As the board pointed out in its communication, the simple fact of paying a fee does not as a rule amount to the filing of a request. This was decided with respect to the analogous case of a filing of an appeal (J 19/90, not published, and T 778/00, OJ EPO 2001, 554). T 778/00 makes it clear that filing an appeal and paying the appeal fee are two separate requirements (see reasons for the decision, point 2.2). Similarly, in the case of a request for re-establishment of rights, the mere payment of the fee does not suffice. Further, Rule 136(2) EPC provides that the request shall state the grounds on which it is based and shall set out the facts on which it relies. A simple payment clearly does not meet these requirements. Whether the additional fee is designated as a "surcharge" or a re-establishment fee does not play any role because it cannot constitute "grounds" in the sense of Rule 136 EPC as mentioned above.
- 2.6 The board observes that the competence of the person responsible for the management of the case is not relevant to the question of whether or not a request for re-establishment of rights pursuant to Article 122 EPC is admissible or deemed to have been filed (see also T 170/04, not published in OJ EPO). The essential point is that, although the representative had managed to remove the cause of non-compliance before the board issued the communication noting a loss of rights pursuant to Rule 112(1) EPC, it did not file the relevant request for re-establishment of rights within the time limit required by Rule 136 EPC.
3. The board accordingly concludes that neither the payment of the additional fee (see point 2.5) nor the

request which was filed outside the two month period (see point 2.6) can be regarded as a complete formal request for re-establishment of rights pursuant to Article 122 EPC and in compliance with Rule 136 EPC. Consequently, the request for re-establishment of rights is deemed not to have been filed. The additional fee which was paid on 16 July 2008 does not therefore relate to a valid request and is therefore to be reimbursed.

4. The appeal fee is also to be reimbursed as the appeal is deemed not to have been filed. For the same reason, the renewal fees and any additional fees which were due after the application was refused, i.e. the renewal fee for the fifth year plus additional fee paid on 25 August 2008 and the renewal fee for the sixth year paid on 17 June 2009, are to be reimbursed.



**Order**

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

1. The request for re-establishment of rights is deemed not to have been filed.
2. The appeal is deemed not to have been filed.
3. The appeal fee and the additional fee paid on 16 July 2008 and the renewal fees paid on 25 August 2008 and 17 June 2009 shall be reimbursed.

The Registrar:

The Chairman:

D. Magliano

A. S. Clelland