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**Datasheet for the decision  
of 10 June 2010**

**Case Number:** T 0529/09 - 3.5.03

**Application Number:** 00917490.5

**Publication Number:** 1169886

**IPC:** H04R 25/00

**Language of the proceedings:** EN

**Title of invention:**  
Microphone for a hearing aid

**Patentee:**  
Sonion Nederland B.V.

**Opponent:**  
Siemens Audiologische Technik GmbH

**Headword:**  
Translations of claims/SONION

**Relevant legal provisions:**  
EPC Art. 122(1)  
EPC R. 82(2)(3), 126(2), 136

**Relevant legal provisions (EPC 1973):**

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**Keyword:**  
"Delivery of communication under Rule 82(3) (yes)"  
"Substantial procedural violation (no)"  
"Re-establishment of rights (yes)"

**Decisions cited:**  
G 0001/88, J 0009/05, J 0018/05, T 0030/90, T 0743/05,  
T 0580/06

**Catchword:**

See points 4 to 7.



Case Number: T 0529/09 - 3.5.03

**D E C I S I O N**  
of the Technical Board of Appeal 3.5.03  
of 10 June 2010

**Appellant:** Sonion Nederland B.V.  
(Patent Proprietor) Zekeringstraat 9 A  
NL-1014 BM Amsterdam (NL)

**Representative:** Prins, Adrianus Willem  
Vereenigde Octrooibureaux N.V.  
P.O. Box 87930  
NL-2508 DH Den Haag (NL)

**Respondent:** Siemens Audiologische Technik GmbH  
(Opponent) Gebbertstrasse 125  
D-91058 Erlangen (DE)

**Representative:** Maier, Daniel Oliver  
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Postfach 22 16 34  
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**Decision under appeal:** Decision of the opposition division of the  
European Patent Office posted 29 December 2008  
revoking European patent No. 1169886 pursuant  
to Rule 82(3), second sentence, EPC.

**Composition of the Board:**

**Chairman:** A. S. Clelland  
**Members:** R. Moufang  
F. van der Voort

## **Summary of Facts and Submissions**

- I. The appellant is the proprietor of European patent No. 1 169 886.
- II. In an interlocutory decision dispatched in writing on 18 April 2007 the opposition division came to the conclusion that the patent could be maintained in amended form on the basis of a third auxiliary request.
- III. After this decision had become final, a formalities officer of the EPO sent out an invitation pursuant to Rule 82(2) EPC by registered letter dispatched on 8 April 2008, requesting the patent proprietor to pay the printing fee and to file translations of the amended claims into the two other official languages within a period of three months of notification of the communication. Even though no reference to an advice of delivery is made in the invitation, since both the proprietor's representative and the opponent returned an acknowledgement of its receipt, it is implicit that the registered letter was sent with an advice of delivery. The proprietor did not perform the above-mentioned acts within the set time limit.
- IV. On 8 September 2008, a formalities officer acting for the opposition division sent out a communication pursuant to Rule 82(3) EPC by registered letter. The letter was addressed to the proprietor's representative and contained the information that the omitted acts could still be validly performed within two months of notification of the communication, provided that a surcharge according to Article 2(9) Rules relating to

- Fees was paid. The proprietor did not respond to this communication.
- V. By decision dispatched on 29 December 2008 the opposition division revoked the patent for the reason that the proprietor had failed to pay the printing fee and to file translations of the amended claims into the two other official languages within due time (Rule 82(2), second sentence, EPC) and had not performed these acts within a period of two months from the notification of the communication under Rule 82(3) EPC. This decision is the subject of the present appeal.
- VI. With its notice of appeal filed on 27 February 2009 which also contained the statement of grounds of appeal, the proprietor (appellant) appealed the above decision and requested that the contested decision be set aside and the appeal fee be reimbursed (main request).
- VII. As an auxiliary measure, the notice of appeal contained a request for re-establishment of rights pursuant to Article 122 EPC with respect to the non-observance of the time limit under Rule 82(3) EPC. The translations of the amended claims into German and French were annexed to the notice of appeal. On the same day, the appeal fee, the fee for re-establishment of rights and the printing fee together with the surcharge were paid. The appellant requested that its rights be re-established and the decision be set aside (auxiliary request).
- VIII. The notice of appeal furthermore contained a conditional request for oral proceedings.

IX. The arguments submitted by the appellant with respect to its main request can be summarized as follows:

No communication under Rule 82(3) EPC could be found in the representative's files. This showed that the appellant had not been duly notified of a time limit under Rule 82(3) EPC. Thus the time limit for filing the translations and for paying the printing fee had not yet started to run. The appealed decision was incorrect and the lack of notification constituted a substantial procedural violation.

X. The arguments submitted by the appellant with respect to its auxiliary request can be summarized as follows:

The non-compliance with the time limit under Rule 82(3) EPC occurred in spite of all due care required by the circumstances. The representative's firm had a carefully designed and monitored system in place in order to avoid that incoming mail which triggered deadlines was misplaced or handled improperly. The fact that in the present case the communication under Rule 82(3) EPC had been lost or misplaced must be considered as an isolated excusable incident in a well-functioning system.

XI. Before remitting the case to the board of appeal, the department of first instance initiated an inquiry as to whether the registered letter containing the communication under Rule 82(3) EPC was delivered properly. As a response to this inquiry, the Deutsche Post confirmed that, following an investigation by the foreign mail operator, the letter was delivered on 12 September 2008 to an authorized recipient.

XII. In a communication dispatched on 16 June 2009 the board informed the parties of its preliminary view that the decision under appeal should be set aside, the rights of the appellant be re-established and the request for reimbursement of the appeal fee be refused. The appellant was invited to clarify whether its conditional request for oral proceedings was maintained under these circumstances. The respondent was invited to inform the board whether or not it had any objections against the proposed course of action.

XIII. With a letter dated 25 June 2009, the appellant withdrew its request for oral proceedings on the condition that the board did not take a negative decision concerning the appellant's auxiliary request.

XIV. The respondent did not file any reply to the appellant's grounds of appeal or to the board's communication.

### **Reasons for the decision**

1. The board is satisfied that all requirements for the admissibility of the appeal have been fulfilled.

#### *Main request*

2. When an interlocutory decision relating to the maintenance of a patent in amended form has become final, the EPO sends an invitation to pay the printing fee and to file translations of the claims within a period of three months pursuant to Rule 82(2) EPC (see

G 1/88, OJ EPO 1989, 189, point 7, commenting on Rule 58(5) EPC 1973 as then in force, which corresponds to current Rule 82(3) EPC). This invitation was dispatched in the present case on 8 April 2008 by registered letter with advice of delivery. Since the appellant does not dispute receiving the invitation, the letter is deemed to have been delivered on the tenth day following its posting according to Rule 126(2) EPC, i.e. on 18 April 2008. Consequently the time limit set in the invitation expired on 18 July 2008 (see Rule 131(4) EPC).

3. Rule 82(3) EPC stipulates that, if the acts required under Rule 82(2) EPC are not performed in due time, they may still be performed within two months of a communication concerning the failure to observe the time limit, provided that a surcharge is paid within this period. Otherwise, the patent shall be revoked.
  
4. A communication pursuant to Rule 82(3) EPC was sent out on 8 September 2008 by registered letter. The letter was addressed to the proprietor's representative. According to Rule 126(2) EPC a registered letter is deemed to be delivered to the addressee on the tenth day following its posting, unless it has failed to reach the addressee or has reached him at a later date; in the event of any dispute, it shall be incumbent on the EPO to establish that the letter has reached its destination or to establish the date on which the letter was delivered to the addressee. However, "delivered to the addressee" does not mean that the notification in question has to be actually brought to the attention of the professional representative in person. It suffices that the registered letter is



received by a person authorized to take delivery, e.g. an employee of the representative's office (see T 743/05 of 12 October 2006, point 1.6 of the reasons).

5. In the present case, the Deutsche Post has confirmed that, following an investigation by the foreign mail operator, the letter was delivered on 12 September 2008 to an authorized recipient. After having been informed of this result of the EPO inquiry by a communication of the board, which included a copy of the confirmation letter, the appellant did not submit any further arguments or evidence in order to demonstrate that the Deutsche Post's confirmation failed to establish that the registered letter reached its destination. In these circumstances, the evidence on file has to be regarded as sufficiently reliable and complete for proving the proper delivery of the letter.
  
6. The board is aware of the decisions of the Legal Board of Appeal J 9/05 and J 18/05 of 21 December 2006 where a similarly worded confirmation letter by the Deutsche Post was held not to be sufficient to prove the receipt of an EPO notification. However, in those cases the appellant had filed a considerable amount of counter-evidence and pointed out specific reasons why the letter might not have been received by the representative's office. Thus, there is a significant difference to the present case.
  
7. The board therefore considers it to be established that the communication pursuant to Rule 82(3) EPC was actually delivered to the appellant's representative on 12 September 2008. In view of the legal fiction contained in Rule 126(2) EPC, this communication is

deemed to be delivered to the addressee on the tenth day following its posting (which occurred on 8 September 2008), i.e. on the 18 September 2008. Since the appellant did not perform the acts mentioned in the communication within two months of the notification, it missed the time limit provided for in Rule 82(3), first sentence, EPC. It was thus procedurally correct for the opposition division to revoke the patent in accordance with Rule 82(3), second sentence, EPC. Since no substantial procedural violation was committed by the department of first instance, the board sees no reason for reimbursing the appeal fee. Consequently, the main request has to be refused.

*Auxiliary Request*

8. The request for re-establishment of rights concerning the time limit under Rule 82(3) EPC was submitted in the notice of appeal and forms the basis of the appellant's auxiliary request for setting aside the decision under appeal. Thus, for reasons of procedural efficiency and in the circumstances of the present case, the board considers it appropriate to deal with this request pursuant to Article 111(1) EPC in connection with Rule 136(4) EPC.
  
9. The request is admissible. Given that further processing under Article 121 EPC is not available in opposition proceedings, re-establishment is not ruled out by Rule 136(3) EPC. The appellant filed the reasoned request on 27 February 2009, i.e. within two months of the removal of the cause of non-compliance with the time period under Rule 82(3) EPC, since it has to be assumed that this cause was removed at the

earliest by the actual delivery on 31 December 2008 (according to the advice of delivery) of the decision revoking the patent which was posted on 29 December 2008. On 27 February 2009 the fee for re-establishment was paid and the omitted acts (filing of the translations of the claims into German and French and payment of the printing fee together with the surcharge) were performed.

10. A request for re-establishment is only allowable if the non-observance of the relevant time limit occurred in spite of all due care required by the circumstances having been taken (Article 122(1) EPC). By "all due care" in this context is meant all reasonable care, i.e. the standard of care that the notional reasonably competent patentee, applicant or representative would employ in all the relevant circumstances (see T 30/90 of 13 June 1991, point 3 of the reasons). According to the established case law of the boards of appeal, an isolated mistake in a normally satisfactory system is excusable.
  
11. The appellant's representative has set out the details of his firm's system of processing incoming mail by stating the following:

"All mail that is sent to Vereenigde's main office at Johan de Wittlaan 7, the Hague, including registered letters and Communications received from the EPO, is received centrally by our mail room team. Respective envelopes are opened, and the enclosures are removed. The empty envelopes are collected. To be sure that the envelopes have been properly emptied, once a week, the collected

empty envelopes are checked again for any enclosures.

The received enclosures are sorted first. All Communications received from the European Patent Office are handed over to our Patents Processing & Accounting team (the PPA-section), to be centrally processed. The PPA-section reads the Communications and enters any time limits resulting there-from into our computer system. All entries into our computer system involving time limits are subject to an independent check by a second person of the PPA-section. Each entered time limit is automatically listed on a term list of the representative in charge. Representative and their secretaries check their term lists on a daily basis, to avoid missing time limits.

After having processed a Communication, the PPA-section forwards the Communication to the representative in charge, usually via his secretary. The representative and secretary are therefore notified of each received Communication through different channels, that is, via the information that is present in our computer system, and via the original Communication as such."

12. The board sees no reason to doubt the correctness of these statements and accepts that the representative's firm had a well-functioning and reliable system in place for processing incoming mail and monitoring time limits resulting from communications by the EPO. The fact that in the present case the communication under Rule 82(3) EPC was apparently misplaced (since it did

not reach the representative in charge and the time limit set in it was not entered in the computer system of the firm) has to be regarded as an isolated mistake in an otherwise satisfactory system. While the precise circumstances of the mistake cannot be elucidated any further, this is not a sufficient reason for denying that all due care required by the circumstances has been observed in the present case (see T 580/06 of 1 July 2008, point 2.3.4 of the reasons, concerning a similar situation).

13. The board thus comes to the conclusion that the request for re-establishment of rights concerning the time limit under Rule 82(3) EPC is allowable. This has the consequence that the filing of the translations of the claims and the payment of the printing fee with surcharge have to be regarded as completed in time and that the decision under appeal has to be set aside.

**Order**

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

1. The appellant is re-established in its rights with respect to the time limit under Rule 82(3) EPC.
2. The decision under appeal is set aside.
3. The case is remitted to the department of first instance with the order to maintain the patent in amended form on the basis of the documents specified in the interlocutory decision of the opposition division dispatched in writing on 18 April 2007.

The Registrar:

The Chairman:

D. Magliano

A. S. Clelland