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**Datasheet for the decision
of 13 April 2011**

Case Number: T 1289/10 - 3.5.06

Application Number: 04753910.1

Publication Number: 1627286

IPC: G06F 1/00

Language of the proceedings: EN

Title of invention:

Secure user access subsystem for use in a computer information database system

Applicant:

Belarc, Inc., et al.

Opponent:

-

Headword:

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Relevant legal provisions:

EPC Art. 106, 108, 122
EPC R. 126(2), 131(1), (2), (4), 136

Relevant legal provisions (EPC 1973):

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Keyword:

"Request for re-establishment of rights - not allowable"
"Exercise of all due care on the part of the European representative when providing a contact email address - no"

Decisions cited:

J 0005/80; J 0005/94

Catchword:

If a European representative provides a contact email address for mail that may require immediate action by the representative, then a mail check at the end of the business day, including the quarantine area of the email system, is essential.



Case Number: T 1289/10 - 3.5.06

D E C I S I O N
of the Technical Board of Appeal 3.5.06
of 13 April 2011

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Decision under appeal:

**Decision of the Examining Division of the
European Patent Office posted 8 December 2009
refusing European patent application
No. 04753910.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman: D. H. Rees
Members: W. Sekretaruk
M. Müller

Summary of Facts and Submissions

- I. With its decision announced on 25 November 2009 and posted on 8 December 2009 the examining division refused European patent application Nr. 04 753 910.1. A notice of appeal was received on 22 March 2010, together with the prescribed appeal fee. The time limit for filing an appeal and paying the appeal fee had already expired on 18 February 2010. On 22 March 2010 the appellant requested re-establishment of rights in relation to the right to file an appeal under Article 106 EPC.
- II. The appellant argued that the time limit was missed in spite of all due care having been taken:
The applicant's US attorney and its European representative were well aware of the time limit ending on 18 February 2010. Several emails were exchanged and finally the European representative was instructed to file an appeal. As can be discerned from attachment "A4" of the request for re-establishment a corresponding email was sent on 17 February 2010 at 20.01 hours Central European Time. It was classified as a potential threat and stored in the quarantine area of the European representative's email server. It was found there on 19 February 2010 after the US attorney on 18 February 2010 at 17.43 hours Central European Time had sent a reminder concerning the appeal (attachment "A5"). Unfortunately, at that time the European representative and his team had already had left the office.
- III. The Board issued a communication together with a summons to oral proceedings, during which the request

for re-establishment of rights was to be discussed. In this communication, the Board opined that the aforementioned request seemed to be admissible but not allowable. This was, in essence, due to the fact that all due care seemed not to have been taken in organising the handling of email flagged as a potential threat.

- IV. Oral proceedings before the Board were held on 13 April 2011. The appellant's European representative explained how mail was normally processed in his office. There was a central post room where all incoming mail was checked. On 18 February 2010, two people were in charge as usual. Email was printed on blue paper, date-stamped and put into the paper file. Additionally it was forwarded to the responsible person in an electronic format. The staff in question were well aware of the quarantine area of the email system and the issues arising therefrom. They had access to this quarantine area. The staff concerned were not in a position to recall why they did not check that area on that day. Documents dating from February or before indicating any specific office policy concerning regular checks of the quarantine area of the email system could not be provided.
- V. The applicant requested re-establishment of rights concerning the right to file an appeal.

Reasons for the decision

1. *Applicable version of the EPC*

Article 122 EPC, together with Rule 136 EPC, are applicable in this case (see Articles 1 and 5 of the Decision of the Administrative Council of 28 June 2001 on the transitional provisions under Article 7 of the Act revising the European Patent Convention of 29 November 2000).

2. *Admissibility of the request for re-establishment of rights*

2.1 *Loss of a means of redress*

Under Article 108 EPC, a notice of appeal shall be filed within two months of notification of the decision. It shall not be deemed to have been filed until the fee for appeal has been paid. As the appeal was filed and the appeal fee was paid on 22 March 2010, i.e. after expiry of the time-limits on 18 February 2010 (Rule 126 (2) and Rule 131 (1), (2) and (4) EPC), it has to be rejected as inadmissible if the request for re-establishment is not allowed.

2.2 *Inability to observe the time limit*

The filing of the appeal depended on a pertinent instruction by the applicant. As this instruction was not found in the quarantine area of the email system until after expiry of the time limit the European representative was not able to file the appeal and pay the appeal fee in time.

2.3 *Admissibility of the request*

Under Rule 136 EPC any request for re-establishment of rights shall be filed in writing within two months of the removal of the cause of non-compliance with the period. The request for re-establishment was filed on 22 March 2010, the appellant having known of the missed time limit since 19 February 2010. This request also contained a statement of the grounds on which it was based and the facts on which it relied. An appeal was filed and the appeal fee was paid together with the fee for the request for re-establishment on the same day. Consequently, the request for re-establishment is admissible.

3. *Allowability of the request for re-establishment of rights*

The request is not allowable. At least the European representative could not establish that all due care had been exercised in handling the case.

3.1 *All due care - general remarks*

Both the applicant and its representatives have to take all due care required by the circumstances (see J 5/80, headnote I). All due care required by the circumstances means appropriate conduct by the appellant and its representatives. In this respect it has to be assessed how a competent party or representative would reasonably have acted. As a general rule, a representative acting reasonably would at least take account of known problems and apply known solutions to avoid them.

3.2 *Due care on the part of the European representative*

It is clearly a well-known problem that email filters do not always work reliably. That was not disputed by the appellant. More specifically it is common ground that legitimate mail from time to time is wrongly marked as a possible threat and processed accordingly. In the statement of grounds concerning the request for re-establishment of rights the European representative did not address this issue. As a result it seemed initially that he was not aware of this generally known problem. However in his oral submissions he stated that the staff concerned were well aware of these problems. To remedy them the staff were provided with access to the quarantine area and the instruction to check these filters. It can be left open whether these statements might constitute an inadmissible new case that goes beyond the reasons provided during the time limit for filing grounds in support of the request for re-establishment of rights (see J 5/94, headnote III). In any case they are not sufficient to convince the Board that all due care was exercised by the European representative when providing an email account for the receipt of urgent and important mail. Staff in the mail department should have been instructed about the fact that an urgent email might arrive at any time and could wrongly be classified as a potential threat by the email system. It appears in this case that an instruction to perform a daily check might have been sufficient. By applying this simple measure the wrongly marked email would probably have been detected in time. The Board wishes to clarify that if a European representative provides a contact email address for all kinds of mail, including mail that may require immediate action by the representative, it is essential

to perform a mail check at least at the end of each business day. Given the known problem that legitimate mail from time to time is wrongly marked as a possible threat it is evident that this check must include the quarantine area of the email system.

3.3 *Due care on the part of the American representative and the appellant*

The reasons for missing the time-limit for filing an appeal are at least threefold: There was a lack of appropriate organisation of the handling of mail stored in the quarantine area in the office of the European representative (see pt. 3.2). The email instruction by the American representative was sent very late, whether because he was instructed by the appellant at such a late stage or for other reasons. Also the email reminder by the American representative - apparently the only attempt to confirm whether the first mail was actually received by the European representative - was sent very late, in fact after European office hours. As the appellant cannot even establish that all due care was taken on the part of the European representative it can be left open whether the American attorney, at such a late stage, was well-advised to use email at all to instruct the European representative to file an appeal. However if it is to be used, the potential dangers must clearly be borne in mind. Email was never meant to be an instant messaging medium and indeed email may, under normal circumstances, be delayed for several hours or even days or occasionally even get lost. Given these (well-known) facts, it would appear necessary for the sender of an urgent and important email to check whether it has actually been received in time, possibly

by using a different means of communication, such as the telephone.

Order

For these reasons it is decided that:

1. The request for re-establishment of rights concerning the right to file an appeal is rejected.
2. The appeal is dismissed as inadmissible.

The Registrar

The Chairman

B. Atienza Vivancos

D. H. Rees