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**Datasheet for the decision
of 29 August 2012**

Case Number: T 2274/11 - 3.5.06

Application Number: 06256109.7

Publication Number: 1793310

IPC: G06F 9/44

Language of the proceedings: EN

Title of invention:

A broadcast receiver and oad download method of the same

Applicant:

LG Electronics Inc.

Headword:

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Relevant legal provisions:

EPC Art. 122

Keyword:

"Re-establishment of rights (no)"

"All due care (denied)"

"Instructions sent on last day of appeal period by e-mail"

Decisions cited:

J 0005/80, J 0004/07; T 0257/07; T 1289/10

Catchword:

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Case Number: T 2274/11 - 3.5.06

D E C I S I O N
of the Technical Board of Appeal 3.5.06
of 29 August 2012

Appellant:
(Applicant)

LG Electronics Inc.
20 Yoido-Dong
Youngdungpo-Gu
Seoul (KR)

Representative:

Camp, Ronald
Kilburn & Strode LLP
20 Red Lion Street
London WC1R 4PJ (GB)

Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 17 March 2011
refusing European patent application
No. 06256109.7 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: D. H. Rees
Members: C. Heath
M. Müller

Summary of Facts and Submissions

- I. With letter dated 26 August 2011, the appellant LG Electronics appealed against the written decision of the examining division dated 17 March 2011, refusing European patent application EP 06256109.7. On the same day, the grounds of appeal and a request for re-establishment of rights were filed. Appeal fee and fee for re-establishment were paid on 30 August 2011. It is uncontested that in order to file an appeal, notice of appeal should have been filed at the latest on 27 May 2011 according to Art. 108 and Rule 126(2) EPC.
- II. According to the submissions made by the appellant with the letter dated 26 August 2011, matters relating to the above application were handled by a European representative in London who in turn received his instructions from a patent law firm in Korea. Communication between the European representative and the Korean law firm was by e-mail. After the application had been refused, the European representative alerted the Korean firm to the refusal and the time limit for filing an appeal with e-mails of 24 March 2011 (acknowledged 25 March 2011), 4 May 2011 (acknowledged 6 May 2011), and 26 May 2011 (not acknowledged before 28 July 2011). Only on 28 July did the Korean firm contact the European representative asking for particulars of the appeal. He then became aware that apparently something had gone wrong and made further enquiries.
- III. As a result thereof, it transpired that the Korean firm on 26 and 27 May had sent two e-mails to the European representative. In the first, of 26 May, it was stated

that "we will forward our instruction to you before the due date of May 27, 2011", no acknowledgement of receipt being requested. The second e-mail was sent on 27 May at 9:06 o'clock Korean time. The Korean law firm wrote that "we would appreciate it if you proceed with this application based on our comments before the due date...Please kindly confirm safe receipt of this e-mail."

The European representative did not receive either of these two e-mails. While the first e-mail of 26 May did not appear in the e-mail records of the representative's firm at all, the second of 27 May was recorded as having arrived somewhere in the representative's office, although it had not arrived in the inbox of the European representative to which all previous e-mails had been addressed. No further information was available any more by the time the error was discovered (28 July 2011), and it is unclear if the e-mail of 27 May was indeed sent with comments, and if so, what comments these were. The appellant also submitted that due to the time difference between the UK and Korea and the corresponding difference in working hours, it would not have been possible for the Korean law firm to telephone in order to confirm receipt.

- IV. Together with the summons to oral proceedings, the Board issued a communication indicating that based on the facts as submitted and in accordance with decision **T 1289/10**, it could not establish that all due care had been taken. The use of e-mails for transmitting time-sensitive information could not be considered appropriate under the circumstances, particularly

without making sure that the e-mail had actually arrived.

V. Subsequently, the appellant, with letter of 16 July 2012, submitted new documents, namely a detailed workflow of the Korean law firm, the name of the person who sent the e-mails on 26 and 27 May 2011, and details of procedure including a statement that this person was meant to send a fax confirmation of the e-mail sent on 27 May, but failed to do so due to feeling unwell. It was the first time that the Board learnt of these circumstances.

VI. Oral proceedings were held on 29 August 2012. Both in writing and in the oral proceedings, the appellant submitted that under the circumstances, all due care had been taken when trying to maintain the deadline of 27 May. E-mails had proven a reliable means of communication between the European and Korean sides, and no hiccups had occurred in the past; the Korean firm had not received any error messages regarding the e-mails sent on 26 and 27 May; although no acknowledgement of receipt had been requested in the case of the first e-mail, or received in the case of the second, this would anyway have been ineffectual, particularly for the e-mail of 27 May, as an acknowledgement of receipt (or the lack thereof) would only have been noticed in Korea too late to be acted upon due to the time difference of eight hours between Korea and the UK; the fact that the e-mail of 27 May was received at the representative's firm, but did not reach his inbox should be qualified as a single and inexplicable incident. At oral proceedings, the Board further enquired about the evidence filed on 16 July

2012, and why despite the fact that the e-mail of 27 May requested confirmation of receipt, the Korean law firm only followed this up on 28 July, although no confirmation of receipt had been sent by the authorised representative. At the end of oral proceedings, the Board gave its decision.

Reasons for the Decision

1. The request for re-establishments of rights was filed within two months of the removal of the cause of non-compliance and is therefore admissible.
2. On the merits of the case, the Board first of all notes that the standard for re-establishment of rights under Art. 122 EPC is not whether there was an intention to do something that was inadvertently omitted, but whether all due care was taken in order to carry out the omitted act. While the Board takes the view that the e-mail of 27 May - even in the absence of any attached instructions - could reasonably be interpreted as instructions to the European representative to file an appeal, no such appeal was actually filed in good time. Unless there is a re-establishment of rights, the appeal therefore has to be deemed not to have been filed and dismissed as inadmissible.
3. In determining whether all due care has been taken, the Board must look not only to the acts of the appellant, but to the acts of all those persons the appellant has asked to act on its behalf, decision **J 5/80**, OJ 1981, 343. This of course applies to the authorised representative, but it also applies to non-authorised

representatives instructed by the appellant, decision **J 4/07** of 7 July 2008.

4. Nothing suggests that the authorised representative has acted other than in an appropriately circumspect and prudent manner. If any criticism can be voiced, it would be concerning the use of e-mails as a means of communication for time-sensitive information, as is further elaborated below.

5. The Board is not convinced that all due care has been exercised by the Korean firm, however. The first point to be dealt with is the use of e-mails in order to transmit important and time-sensitive information. It is recalled that the Korean firm despite repeated reminders chose to send instructions to the European representative only on the last day of the appeal period, and it did so by e-mail without any follow-up telephone call, fax or requesting an acknowledgement of receipt. In its decision **T 1289/10** of 13 April 2011, the Board had to deal with a similar case of re-establishment of rights due to the loss of a time limit for reasons of e-mail communication. In part 3.3 of the reasons, the Board held that

"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."

Where in light of the imminent deadline in connection with a difference in time zones it is no longer possible to verify that an e-mail has indeed reached its destination, be it by telephone, from an acknowledgement of receipt, confirmation fax, etc., this problem appears to be entirely at the risk of the sender. It is of no importance in this context why the Korean firm did not act until such a late stage, be it for its own internal reasons, or be it because it could not obtain instructions from the appellant any earlier. Thus, based on the initial submissions of 26 August 2011, it cannot be established that all due care has been taken in timely instructing the authorised representative.

6. Only after the summons to oral proceedings and the communication by the Board did the appellant furnish further details about the internal organisation of the Korean law firm, and the person in charge of the file. These are late-filed facts that cannot be taken into account when determining whether all due care has been taken (see decision **T 257/07** of 13 August 2008, part 1.3 of the reasons: " 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"). Even if the Board were to take them into account, the late-filed facts would not lead to the conclusion that all

due care had been taken. The late-filed submissions add two facts to the previous case: First, that in time-sensitive cases it was customary for the Korean law firm to send a confirmation fax in addition to the e-mail, and that this should have been done for the e-mail of 27 May. Yet the person who sent the e-mail did not feel well on this day and therefore failed to send such fax. And, second, that the person having sent the e-mail was well-trained and well-supervised and working within a well-organised office.

7. The Board, however, notes two issues that cast doubt on the proper organisation of the Korean law firm's work flow. For one, apparently no contingency plans were in place in case the responsible person having to observe a time limit was absent or fell ill. It appears that no supervisor was alerted or was aware of what had actually been done (the e-mail had been sent), and what still ought to be done (the fax still had to be sent). Doubts about the proper organisation are compounded by the fact that it was only two months later that the Korean law firm enquired as to the state of the appeal even though reception of the e-mail of 27 May had never been acknowledged. For such time-sensitive information, one would have expected that lack of confirmation of receipt should have triggered an immediate alert, and would have made the Korean law firm enquire much earlier about the appeal than only after two months. Irrespective of the admissibility of these late-filed submissions, they fail to show that all due care was taken to make sure that time-sensitive information actually arrived in time, and that the responsible person(s) were supervised in a manner that allowed for proper functioning even in case of illness or absence.

8. Due to the above, the Board is therefore not convinced that all due care had been exercised in meeting the deadline for the appeal, and consequently has to refuse the request for re-establishment of rights, dismiss the appeal as inadmissible and reimburse the appeal fee.

Order

For these reasons it is decided that:

1. The request for re-establishment of rights is refused.
2. The appeal is deemed not to have been filed.

The Registrar

The Chairman

B. Atienza-Vivancos

D. Rees