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**Datasheet for the decision
of 26 March 2014**

Case Number: T 2251/12 - 3.4.03
Application Number: 04758742.3
Publication Number: 1614097
IPC: G09G3/36, G09G3/34, G09G5/00,
G09G5/10
Language of the proceedings: EN

Title of invention:

METHODS FOR DRIVING BISTABLE ELECTRO-OPTIC DISPLAYS

Applicant:

E Ink Corporation

Headword:

Filing of documents by facsimile around midnight

Relevant legal provisions:

EPC Art. 108, 110, 122(1)

EPC R. 100(1), 136(1)

Decision of the President of the European Patent Office dated 12 July 2007 concerning the filing of patent applications and other documents by facsimile

Arrangement for Deposit Accounts - Decision of the President of the European Patent Office dated 31 January 2009 concerning the publication of a revised version of the Arrangements for deposit accounts and their annexes

Keyword:

Admissibility of appeal - statement of grounds - filed within time limit (no)

Re-establishment of rights - request admissible (no)

Decisions cited:

T 0116/00

Catchword:

The technical means of communication operated by the EPO not only must determine the legally effective date, but also the legally effective time in general, i.e. the time stamp of the European Patent Office must be considered as the correct one when it must be decided if a given document was received in time or not



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Case Number: T 2251/12 - 3.4.03

**D E C I S I O N
of Technical Board of Appeal 3.4.03
of 26 March 2014**

Appellant: E Ink Corporation
(Applicant) 733 Concord Avenue
Cambridge, MA 02138-1002 (US)

Representative: Feldkamp, Rainer
Garmischer Strasse 4
80339 München (DE)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 4 May 2012
refusing European patent application No.
04758742.3 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman: G. Eliasson
Members: T. Bokor
R. Bekkering

Summary of Facts and Submissions

- I. The present appeal proceedings concern an appeal against the decision of the Examining Division, announced at the oral proceedings on 19 April 2012 and posted 4 May 2012, refusing European patent application No. 04758742.3.
- II. Notice of appeal was filed by facsimile on 4 July 2012, with instructions to debit the appeal fee from the deposit account of the representative of the appellant. The appeal fee was paid later using the replenishment mechanism for an insufficiently covered account as foreseen by point 6.5 of the Arrangement for Deposit Accounts (ADA), Supplement to OJ EPO, 3/2009, page 5, but with an effective date of 4 July 2012.
- III. Grounds of appeal dated 12 September 2012 and sent by telefax were received in the European Patent Office on 15 September 2012. According to the electronic file, the documents constituting the grounds of appeal were received in two separate transmissions. A six-page transmission containing a cover page and five pages titled "Grounds of Appeal" was received between 00:03:16 and 00:03:57 hours on 15 September 2012, according to the time stamp on the documents generated by the mail system of the EPO. The cover page referred to enclosed claims 1-13, but no such enclosure was attached. Another ten-page transmission containing a cover page, five pages of grounds and three pages of claims 1-13 was received on the same day between 00:07:07 and 00:08:18 hours. The seventh page of this second transmission further contained the cover page of an apparently earlier sent transmission together with its transmission report ("Sendebericht"), indicating the successful transmission of six pages to the fax number of the EPO, with a transmission start time of 14 September,

at 23:58 hours and a transmission time duration of 54 seconds.

- IV. The Registrar of the Board sent a standard communication to the appellant with a posting date of 30 October 2012 (EPO Form 3028), indicating by means of a check-box that the appeal is apparently inadmissible pursuant to Article 108, third sentence, EPC in conjunction with Rule 101(1) EPC, because the written statement of the grounds of appeal was filed out of time.
- V. The representative of the appellant responded to the communication of the Registrar by a telefax dated and received 9 January 2013, and requested a reconsideration of the finding that the grounds were filed out of time, referring to the transmission report of the six-page transmission which proved that the transmission should have been received in time by the EPO. As an auxiliary request, a request for reinstatement of the time limit for filing the grounds of appeal was made. Instructions were given that the fee for reinstatement should be deducted from the deposit account of the representative, and reasons were given for the delayed transmission. It was submitted that the representative personally proceeded to transmit the grounds of appeal by telefax approximately at 23.30 hours on 14 September 2012. However, several transmissions were unsuccessful. Only the fifth transmission appeared to be successfully transmitted, albeit with only a part of the complete grounds. However, based on the transmission report it could be assumed that at least the grounds of appeal reached the EPO in time. In spite of all due care required by the circumstances having been taken, the representative was unable to reach a complete transmission of the grounds of appeal. These events were not foreseeable, so that the request for reinstatement should also be considered as reasoned. The

copy of the cover page with the transmission report indicating the successful transmission of six pages (see point III above) was enclosed.

VI. On 18 January 2013 the accounting department of the EPO informed the representative of the applicant that the deposit account was not covered, so that the instructions to deduct the applicable fee of EUR 610 could not be carried out, but this could be remedied by the procedures as foreseen in the ADA. This communication also stated that the originally intended payment date could be recognised, conditional on the additional payment of an administrative fee. Thereafter a payment of EUR 610 as a fee for re-establishment of rights was recorded in the file, with an effective payment date of 30 January 2013.

VII. A communication of the Board under Rule 100(2) EPC was issued on 30 October 2013. The Board pointed out that according to the file two transmissions of the grounds of appeal reached the EPO, and both were received on the 15 September. No malfunction was recorded in the EPO on that night, and there was no trace of the unsuccessful transmissions. Furthermore, the request for re-establishment of rights was apparently inadmissible. Already the request itself was filed out of time, and the fee was paid even later. Any of these delays had to lead to the rejection of the request for re-establishment of rights as inadmissible. Therefore, the appeal was to be rejected as inadmissible under Article 108, last sentence and Rule 101(1) EPC.

VIII. With letter dated 9 January 2014 the representative of the appellant commented on the points raised in the communication. It was requested to check once more if some parts of the grounds of appeal dated 12 September 2012 may have been received before 23:59:59 hours on 14 September

2012. It was repeated that at least the six-page transmission should have been received in time. The transmission report of the appellant's telefax system showed the transmission duration of this document to be 54 seconds, while on the side of the EPO this was only 41 seconds, as calculated from the time stamps recorded on the documents and also visible in the online file system. The time indication of the fax machine used by the representative reliably and exactly followed the official time base provided by the telephone network and ultimately by the Deutsche Telekom. This system showed +/- 2 seconds tolerance as compared with a time base received over the internet. There was no plausible explanation of the time differences showed by the appellant's system on the one hand and time stamps of the online file inspection system on the other hand. Therefore the Board was requested to check once more if there might have been a cause for these small time differences, in spite of the fact that no malfunction was recorded in the EPO during the night in question.

Reasons for the Decision

1. Pursuant to Article 108, third sentence, EPC, a statement setting out the grounds of appeal shall be filed within four months of notification of the impugned decision, in accordance with the Implementing Regulations. The decision under appeal is dated 4 May 2012. It is deemed to have been notified on 14 May 2012 (Rule 126(2) EPC), so that the time limit for filing the grounds of appeal expired on 14 September 2012.
2. The appellant does not dispute that according to the data available in the file of the EPO, the statement setting out the grounds of appeal has been received in the EPO after the expiry of the applicable time limit. Pursuant to

Rule 101(1) EPC if an appeal does not comply with Articles 106 to 108, Rule 97 or Rule 99, paragraph 1(b) or (c) or paragraph 2 EPC, the Board of Appeal shall reject it as inadmissible, unless any deficiency has been remedied before the relevant period under Article 108 EPC has expired.

3. As stated in the communication of the Board dated 30 October 2013 (see point VII above), the Board has investigated of its own motion whether the four unsuccessful facsimile transmissions which allegedly occurred shortly before midnight on 14 September 2012 are traceable in the mail system of the Office, but the internal enquiry did not reveal any trace of the earlier unsuccessful transmissions. Also, no malfunction was recorded in the Office that night. The Board sees no point in repeating its investigation, also given the fact that in the meanwhile more than one year has passed and it is not to be expected that such an investigation will bring any new insight in the case. The appellant has also not submitted any evidence in support of its four unsuccessful transmissions.
4. The Board has no discretionary powers which could overrule the clear provisions of Rule 101(1) EPC. It is also not in the position to assign an earlier date of receipt to the documents in question.
5. The documents in question were filed by facsimile (telefax). The possibility of filing documents by certain technical means of communication is foreseen by Rule 2(1) EPC, giving the President of the EPO the powers to regulate the applicable details and conditions. For telefax transmissions, these are regulated in the "Decision of the President of the European Patent Office dated 12 July 2007 concerning the filing of patent

applications and other documents by facsimile", Special edition No. 3 OJ EPO 2007, 7, or more recently: Supplementary publication to OJ EPO 1/2014, 93, (hereafter "Decision").

6. The Board considers that the grounds of appeal must be treated as "other documents" for the purposes of the Decision. Article 5(3) of the Decision makes it clear that the date of receipt accorded to other documents filed by facsimile with the various filing offices of the EPO shall be the date on which they were received at the given office. Article 6 of the Decision clarifies that where an attempt to file a document by facsimile has failed, the facsimile shall be deemed not to have been received.

7. The Decision does not address explicitly how the correct time and thereby the time stamp accorded to a document should be determined. However, Article 5(2) of the Decision specifically regulates transmissions extending beyond midnight, and at the latest from this provision it becomes evident that the legislator foresaw that the exact time of a filing of a document may become decisive in determining the legally effective date, as in the present case. From this it follows that the technical means of communication operated by the EPO not only must determine the legally effective date, but also the legally effective time in general, i.e. the time stamp of the European Patent Office must be considered as the correct one when it must be decided if a given document was received in time or not. From this it follows that the EPO must make reasonable efforts to operate a reliable and exact time keeping system. It has not been submitted that this was not the case, and based on the case before it, the Board has no reason to doubt this. Therefore, the Board is unable to accede to the request of the appellant, namely to make further enquiries into the issue of the difference

between the transmission durations or the difference between the time of sending/receipt according to the system of the appellant or the EPO, respectively (see point VIII above). The Board further adds that it does not judge these differences to be extraordinary or inexplicable to an extent that would merit further investigation. Therefore, the Board is bound to consider the time stamp of the EPO as the legally effective time, as explained above (see also T116/00 of 20 December 2001, point 1.3 of the Reasons).

8. Since the grounds of appeal must be considered as filed out of time, the admissibility of the appeal turns on the success of the request for re-establishment of rights. If this request can be granted, the grounds will be treated as if they were timely filed, and the appeal can be examined on the merits. Otherwise the appeal has to be rejected as inadmissible (Article 108 EPC, first sentence in conjunction with Article 110 EPC, first sentence and Rule 101(1) EPC).
9. Pursuant to Rule 136(1) EPC, a request for re-establishment of rights under Article 122(1) EPC shall be filed within two months of the removal of the cause of non-compliance. The request shall not be deemed to have been filed until the prescribed fee has been paid.
10. As explained in the communication of the Board (see point VII above), the two-months' time limit stipulated by Rule 136(1) EPC is triggered by the factual removal of the cause of non-compliance, which is normally the actual receipt (and not the deemed notification) of a relevant communication (settled case law of the Boards of Appeal, see Chapter III.E.3.1.1(a) and (c) CLBA, 7th Edition 2013). Thus in the present case the removal of the cause of non-compliance must have been the receipt of the

Board's communication issued by the Registrar and dated 30 October 2012 (see point IV above), this latter having been received by the appellant's representative on 31 October 2012. Accordingly, the request for re-establishment of rights should have been filed and the applicable fee paid until 31 December 2012 (Rule 136(1) EPC, first and last sentence).

11. According to the file, the fee for the request was not paid until 30 January 2013. Furthermore, the request itself was filed 9 January 2013. Quite independent from each other, both delays must inevitably lead to the rejection of the request for re-establishment of rights as inadmissible. This was also clearly stated in the communication of the Board dated 30 October 2013 (see point VII above). The appellant did not comment in its response (see point VIII above) on the apparent inadmissibility of the request for re-establishment of rights, nor made any further comments to the request.
12. Accordingly, the request for re-establishment of rights must be rejected as inadmissible, which inevitably leads to the same finding on the appeal.

Order

For these reasons it is decided that:

1. The request for re-establishment of rights concerning the time limit for filing the grounds of appeal is rejected as inadmissible.
2. The appeal is rejected as inadmissible.

The Registrar:

The Chairman:



S. Sánchez Chiquero

G. Eliasson

Decision electronically authenticated