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**Datasheet for the decision  
of 21 August 2017**

**Case Number:** T 1934/16 - 3.2.06

**Application Number:** 07114328.3

**Publication Number:** 1849446

**IPC:** A61F13/26

**Language of the proceedings:** EN

**Title of invention:**

A tampon applicator

**Patent Proprietor:**

Ontex BVBA

**Opponent:**

Kimberly-Clark Worldwide, Inc.

**Headword:**

**Relevant legal provisions:**

EPC R. 82(2), 82(3), 126(2), 103(1) (a)

**Keyword:**

Delivery of communication under Rule 82(3) (yes), evidence of receipt, substantial procedural violation (no)

**Decisions cited:**

T 0529/09, J 0009/05, J 0018/05

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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Case Number: T 1934/16 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 21 August 2017**

**Appellant:** Ontex BVBA  
(Patent Proprietor) Genthof 5  
9255 Buggenhout (BE)

**Representative:** Brants, Johan P.E.  
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**Respondent:** Kimberly-Clark Worldwide, Inc.  
(Opponent) 2300 Winchester Road  
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**Representative:** Davies, Christopher Robert  
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**Decision under appeal:** **Decision of the opposition division of the  
European Patent Office posted on 14 June 2016  
revoking European patent No. 1849446 pursuant to  
Rule 82(2), (3) EPC.**

**Composition of the Board:**

**Chairman** M. Harrison  
**Members:** T. Rosenblatt  
J. Hoppe

## **Summary of Facts and Submissions**

- I. The appellant (patent proprietor) filed an appeal against the decision of the opposition division revoking European patent No. 1 849 446 for the reason that the proprietor failed to pay the publication fee and failed to file a translation of the amended claims into the two other official languages within due time and did not perform these acts, including payment of a surcharge for late payment of the publication fee, within a period of two months from the notification of a communication to this effect.
  
- II. The patent had been transferred to the appellant, who is registered as the patent proprietor of European patent No. 1 849 446 as of 15 August 2016. The professional representative remained unchanged after the transfer.
  
- III. In an interlocutory decision dispatched in writing on 11 June 2015 the opposition division came to the conclusion that the patent could be maintained in amended form on the basis of a sixth auxiliary request.
  
- IV. After this decision had become final an invitation pursuant to Rule 82(2) EPC was sent to the professional representative of the patent proprietor by letter dispatched on 13 October 2015, requesting the patent proprietor to pay the publication 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. The receipt of this communication was not denied, but the patent proprietor did not perform the above-mentioned acts within the set time limit.

- V. With a registered letter dispatched on 1 March 2016 the opposition division sent out a communication pursuant to Rule 82(3) EPC. 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.
- VI. By decision dispatched on 14 June 2016 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, together with payment of a surcharge for late payment of the printing fee, within a period of two months from the notification of the communication under Rule 82(3) EPC.
- VII. With its notice of appeal filed on 12 August 2016 which also contained the statement of grounds of appeal, the proprietor appealed the decision to revoke the patent. Furthermore it annexed the requested translations of the amended claims and paid the appeal fee, the printing fee together with surcharge, as well as the fee for re-establishment of rights.
- VIII. In the grounds of appeal the appellant requested that the appealed decision be set aside and that the opposition division rectify its decision by way of interlocutory revision. It also requested reimbursement of the appeal fee. Auxiliarily it requested re-establishment of rights and oral proceedings.

IX. The opposition division remitted the appeal to the Boards of Appeal without rectifying its decision.

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

No communication under Rule 82(3) EPC related to the present patent could be found in the representative's files. The representative only became aware of the Rule 82(3) EPC communication upon receipt of the decision dated 14 June 2016. This showed that the appellant had not been duly notified of the time limit under Rule 82(3) EPC. The representative's firm had a carefully designed and monitored system in place to avoid incoming mail being misplaced or handled improperly.

Thus the time limit for filing the translations and for paying the printing fee had not yet started to run. The appealed decision was therefore incorrect and the lack of notification constituted a substantial procedural violation. Therefore reimbursement of the appeal fee was also requested.

XI. The Board initiated an enquiry into whether the letter of 1 March 2016 containing the communication under Rule 82(3) EPC was delivered properly to the representative of the appellant. As a response to this enquiry the Central mailroom of the EPO in The Hague confirmed that the letter with the registered number (barcode) RD18229975NL with reference to the present patent (bearing application number 071143283) was delivered on 4 March 2016 at 09:18 to the appellant's professional representative in Ghent and provided a copy of the delivery entry.

XII. On 14 March 2017 the Board summoned the parties to oral proceedings. In the annex to the summons, the Board informed the parties that according to an enquiry made by the Board, the communication dated 1 March 2016 had been delivered to the appellant's professional representative on 4 March 2016. Therefore the Board took the preliminary view that the communication with the time limit under Rule 82(3) EPC had been duly notified and that the opposition division had not committed a procedural violation. Together with its summons, the Board included copies of a confirmation from the mailroom at The Hague, dated 1 March 2016, with registered number (barcode) and a sheet indicating the mail tracking and delivery from the postal service with date, time and barcode of the delivery.

Furthermore, regarding the auxiliary request for re-establishment of rights, the Board stated its preliminary view that a general statement without specific facts did not satisfy the requirements for a duly substantiated request for re-establishment of rights and, as a consequence, the mere general information given by the appellant was not suitable to show that all due care had been taken in the specific case.

XIII. With letter dated 18 July 2017 the appellant withdrew its auxiliary requests, specifically the auxiliary request for re-establishment of rights and the auxiliary request for oral proceedings, but maintained its main request.

XIV. The respondent (opponent) did not file any reply to the appellant's grounds of appeal. However, both parties informed the Board that they would not attend the oral

proceedings. Nevertheless oral proceedings took place on 21 August 2017.

## **Reasons for the Decision**

1. The appeal is not allowable.

The appealed decision issued by the opposition division was correct. The provisions for the revocation of the patent due to failure to validly comply with the requirements under Rule 82(2) and (3) EPC were satisfied. The opposition division did not commit a procedural violation.

- 1.1 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.

This invitation was dispatched in the present case on 13 October 2015. The appellant did not contest the receipt of this communication. Nevertheless no response from the appellant was received before expiry of the time limit. This has also not been contested.

- 1.2 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.



In the present case, a communication pursuant to Rule 82(3) EPC was sent on 1 March 2016. The letter was addressed to the proprietor's representative.

1.3 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.

1.3.1 Since, in the present case, the appellant denied having received the communication under Rule 82(3) EPC, the EPO has to establish that it reached its destination and the date on which it was delivered (Rule 126(2) EPC).

Following the enquiry in the present case, the letter from 1 March 2016 was found to have been delivered on 4 March 2016 at 09:18 to the law firm of the appellant's representative. The letter with the registered number (barcode) RD18229975NL contains a reference to the patent's application number 071143283 and can therefore be identified.

Even though the appellant had been informed about the result of the enquiry, it did not supply any substantive response to the Board's communication in respect of any facts or arguments calling the result into doubt. In such circumstances, the evidence of the receipt produced by the enquiry is found to be reliable and complete for proving the proper delivery of the letter (see also T 529/09, Reasons point 5).

1.3.2 This also does not contradict the decisions J 9/05 and J 18/05 where a confirmation letter by the postal service was held not to be sufficient, because 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.

In contrast, the appellant stated in the present case, albeit in the context of the now withdrawn request for re-establishment of rights, merely that the representative's law firm had a carefully designed and monitored system in place to avoid incoming mail being misplaced or handled improperly. This general statement without further details or reference to the specific circumstances is not suitable to call into question the evidence that resulted from the enquiry. In the absence of any substantiated facts or evidence to the contrary provided by the appellant, the mere allegation that the letter did not reach it, cannot cast doubt upon the enquiry made.

Therefore the result of the enquiry proves in the present case that the registered letter reached its destination and as the appellant did not submit substantiated details that are apt to demonstrate a different course of events no doubt exists that the letter was duly received by the appellant's representative.

1.4 As a conclusion, it is established that the communication pursuant to Rule 82(3) EPC was actually delivered to the appellant's representative on 4 March 2016. Thus the Board concludes that the appellant had been duly notified of the time limit under Rule 82(3) EPC on 4 March 2016 and the time limit for filing the

translations and for paying the printing fee with surcharge had started to run.

- 1.5 In view of the legal fiction contained in Rule 126(2) EPC, that communication, in this case posted 1 March 2016, is deemed to have been delivered to the addressee on the tenth day following its posting, i.e. on 11 March 2016.
- 1.6 Since the appellant did not perform the acts mentioned in the communication within two months of the notification (11 May 2016), 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 with the appealed decision dated 14 June 2016 under Rule 82(3), second sentence EPC.
2. Since the decision was procedurally correct it also follows that no substantial procedural violation was committed by the opposition division and there is no reason for reimbursing the appeal fee under Rule 103(1) (a) EPC.

The request for reimbursement of the appeal fee is thus refused.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated