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Datasheet for the decision of 9 October 2017

Case Number: T 2450/16 - 3.5.04

Application Number: 01924569.5

Publication Number: 1273174

IPC: H04N7/24, H04N7/52

Language of the proceedings: EN

Title of invention:
Insertion of asynchronous data into a synchronous stream

Applicant:
OpenTV, Inc.

Headword:

Relevant legal provisions:
EPC Art. 106(1), 108, 122(1)
EPC R. 99(1), 101(1), 126(2), 131, 136

Keyword:
Preparing a notice of appeal constituting a routine task in the circumstances (no)
Re-establishment of rights - (no) - all due care (no)

Decisions cited:
T 1465/07, T 1962/08, T 2336/10, J 0013/11

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 2450/16 - 3.5.04

D E C I S I O N
of Technical Board of Appeal 3.5.04
of 9 October 2017

Appellant: (Applicant)	OpenTV, Inc. 275 Sacramento Street San Francisco, CA 94111 (US)
Representative:	Wenger, Joel-Théophile Leman Consulting S.A. Chemin de Précossy 31 1260 Nyon (CH)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 22 June 2016 refusing European patent application No. 01924569.5 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman	C. Kunzelmann
Members:	B. Müller
	R. Gerdes

Summary of Facts and Submissions

I. The applicant requests re-instatement (re-establishment of rights) under Article 122 EPC in respect of the period for filing the notice of appeal against the decision of the examining division dated 22 June 2016 refusing European patent application No. 01 924 569.5.

II. The appeal fee was paid via epoline® on 18 August 2016. The grounds of appeal were filed via epoline® on 7 October 2016. On 13 October 2016 the EPO informed the applicant's representative by telephone that no notice of appeal had been filed.

III. With a letter dated 10 November 2016 and received on the same date, the representative requested re-establishment of rights pursuant to Article 122 EPC and paid the corresponding fee. Together with the letter, the representative submitted facts and arguments regarding the situation that had led to the non-filing of the notice of appeal and the due care that had been exercised. The representative also filed a notice of appeal. The main submissions made in the letter were as follows:

The (precautionary) deadline for filing an appeal of 22 August 2016 (i.e. leaving aside the 10-day notification period) was entered in the database for managing time limits. The applicant's instructions to file an appeal were transmitted immediately to the administrative assistant (dd) in charge of the present file. Following these instructions the appeal fee was paid on 18 August 2016. The deadline "control" database was immediately marked up to the effect that the deadline had been met ("Recours déposé 18 août").

The association of representatives operated a computer-centralised database for managing all time limits, which were entered and checked by two or more administrative assistants. In the present case proper records were set up and checked, as evidenced by a print-out of due dates. Deadline lists were checked routinely by the responsible administrative assistant and her attorney/engineer every week on Friday. The administrative assistant (dd) in charge of the present case had been employed in that capacity since October 2002 and had extensive knowledge of patent formalities, and her work had been thoroughly satisfactory. She had been a very reliable employee. All administrative staff were trained in all aspects of patent procedures and formalities at the EPO through periodic in-house training sessions and practical experience. In dealing with the EPO they used epoline® and were well-trained and experienced in using it. The filing of appeals was rare: in the preceding 12 years only five appeals had been filed at the EPO, including the present one. epoline®, together with standard EPO forms, enabled the administrative staff to handle practically all formalities with the EPO. However, for filing an appeal there was no official form. There was an entry in epoline® for paying the appeal fee; and there were entries for subsequently filed documents in the appeal procedure. But there was no entry in epoline® for filing the notice of appeal.

Once the failure to file a notice of appeal had become known, the assistant immediately realised her error, because she knew from previous experience that a notice of appeal had to be filed. But as the filing of appeals was rare, she had forgotten about this. An entry was erroneously made in the “control” list that the

deadline for filing an appeal had been attended to. As a result, despite routine checks, it did not come to light that the deadline formalities had only been accomplished in part, i.e. by only paying the appeal fee but not filing a notice of appeal.

IV. With a letter of 25 April 2017 the appellant requested acceleration of the re-establishment proceedings.

V. In a communication of 5 July 2017 annexed to the summons to oral proceedings scheduled for 9 October 2017, the board expressed its provisional opinion that the request for re-establishment of rights could not be allowed. This was because the task of preparing a draft notice of appeal to initiate appeal proceedings, at least in the present case, was not a routine task. The representative, in entrusting this task to an assistant, had therefore not exercised the due care required by Article 122(1) EPC. This was independent of whether the assistant was suitable, properly instructed and reasonably supervised.

VI. In a submission in reply of 15 August 2017, the representative maintained that the assistant (dd) who met those three criteria had failed to file the appeal as a result of a misunderstanding of epoline®. Filing a notice of appeal was a relatively simple and straightforward operation. The administrative assistant (dd), who had previously been involved in filing at least one notice of appeal (and making the corresponding fee payment), could be expected to master this operation having done it once and "repeat as necessary". The timely filing of a notice of appeal was a routine task which could be carried out by an administrative assistant working as necessary with a representative at least for the signing of the notice.

In the present case the administrative assistant was clearly instructed to file the appeal within the deadline. She was, however, confronted with completing this task in epoline®, which contained no clear indications concerning the initiation of an appeal procedure, apart from the payment of the appeal fee. Having checked epoline® the representative had in the meantime found under the header "FORMS" a number of forms, including "EP1036E Subsequently filed documents", but no form for initiating an appeal. He discovered that, at least in the then current version of epoline®, there was, in a very extensive list of subsequently filed documents, an isolated entry entitled "Notice of Appeal". However, in the mass of entries, and assuming it was available at the point in time when the assistant (dd) wanted to prepare the filing of an appeal, (dd) did not find any guidance for filing an appeal other than payment of the appeal fee. In paying the appeal fee (dd) went ahead firmly but wrongly believing from epoline® that this was all that was necessary. She therefore wrongly found it superfluous to consult another administrative assistant or an attorney/engineer. This was contrary to the practices of the association of representatives, which required her to consult colleagues to clarify any uncertainty. And this constituted the isolated mistake that had occurred in the present case.

As to the distribution of tasks between a representative and an assistant, the representative submitted that the physical filing of a notice of appeal was typically a simple administrative task that was the duty and responsibility of a trained assistant. The same held true for the preparation and typing of the notice of appeal, which in addition had to be carried out in co-operation with an attorney or

engineer. Checking and signing the notice of appeal was the representative's responsibility.

Moreover, the representative relied on the principle of proportionality. The inadmissibility of the appeal would be totally out of proportion with the non-completion of a formal requirement, i.e. the filing of a notice of appeal, where both the appeal fee had been paid and the grounds of appeal had been filed in due time.

In conclusion, the representative submitted that the applicant, through the association of representatives, had taken all due care required in the circumstances, and that the loss of rights was due to an isolated error in a normally satisfactory system by a trained and experienced administrative assistant and was in no way due to a lack of care by the representative in charge of the file or by any other staff member of the association of representatives.

VII. The board replied with a short communication of 4 September 2017 confirming that the oral proceedings would take place. The board affirmed its position that the filing of the appeal in the present case was not a routine task, which was why the administrative assistant (dd) would have had to be expressly instructed to prepare a notice of appeal for the representative to review and sign (and to pay the appeal fee). The upcoming oral proceedings would probably focus on this issue. As to the suggested application of the principle of proportionality, the board expressed an unfavourable view.

VIII. In a letter of reply of 14 September 2017, the representative announced that the appellant would not

be represented at the oral proceedings. As to the board's suggestion that the administrative assistant (dd) would have had to be expressly instructed to prepare a notice of appeal for the representative to review and sign (and pay the appeal fee), the representative reiterated that (dd) had wrongly believed from epoline® that payment of the appeal fee was enough, had noted that the deadline had been met and had failed to transmit the file to an attorney, although that was the expected practice. Thus the failure to meet the appeal deadline was due to an isolated mistake by (dd).

IX. The board held oral proceedings on 9 October 2017 in the appellant's absence, in accordance with Rule 71(2) EPC 1973 and Article 15(3) RPBA. As announced, the appellant was not represented. The Chairman noted that the appellant had requested in writing re-instatement under Article 122 EPC in respect of the period for filing the notice of appeal. At the end of the oral proceedings, the Chairman announced the board's decision.

Reasons for the Decision

Pursuant to Article 122(1) EPC,

an applicant for ... a European patent who, in spite of all due care required by the circumstances having been taken, was unable to observe a time limit vis-à-vis the European Patent Office shall have his rights re-established upon request if the non-observance of this time limit has the direct consequence of causing ... the loss of any other right or means of redress.

The request for re-establishment of rights of an applicant with a professional representative acting on its behalf is only allowable if both the applicant itself and its representative have met the necessary standard of care (see T 1962/08, Reasons 5.1).

Whether or not these conditions, together with the concomitant requirements of the Implementing Regulations, are met and the request for re-establishment is to be granted (cf. Article 122(2) EPC) is the subject of the reasons for the present decision, which are given below.

1. Whether re-establishment of rights is applicable

1.1 Loss of rights or means of redress

The two-month time limit for filing an appeal (Article 108, first sentence, EPC) expired on 2 September 2016 (Rules 126(2) and 131(1), (2) and (4) EPC). The notice of appeal not having been filed until 10 November 2016, the appeal would have to be rejected as inadmissible (Rule 101(1) EPC), unless the request for re-establishment of rights was granted. The above criterion is therefore met.

1.2 “Unable to observe a time limit”

On the basis of the submissions in the request for re-instatement (see top of page 6), this criterion is considered to also have been met. As submitted, the assistant (dd), after having paid the appeal fee on 18 August 2016, erroneously entered in the “control” list of the database for managing time limits that the deadline for filing an appeal had been attended to. As a consequence, despite routine checks, it did not come to light that the deadline formalities had only been accomplished in part, i.e. by only paying the appeal fee but not filing a notice of appeal. Therefore, the appellant's

representatives were unable to observe the corresponding time limit.

1.3 Re-establishment not ruled out by Rule 136(3) EPC

Rule 136(3) EPC reads as follows:

Re-establishment of rights shall be ruled out in respect of any period for which further processing under Article 121 is available and in respect of the period for requesting re-establishment of rights.

Re-establishment of rights is not ruled out by Rule 136(3) EPC, because further processing under Article 121 EPC is not available in respect of the time limit for filing an appeal laid down in Article 108, first sentence, EPC; see Article 121(4) EPC.

2. Whether the request for re-establishment is admissible

The relevant parts of Rule 136 EPC read as follows:

(1) Any request for re-establishment of rights under Article 122, paragraph 1, shall be filed in writing within two months of the removal of the cause of non-compliance with the period, but at the latest within one year of expiry of the unobserved time limit. ... The request for re-establishment of rights shall not be deemed to have been filed until the prescribed fee has been paid.

(2) The request shall state the grounds on which it is based and shall set out the facts on which it relies. The omitted act shall be completed within the relevant period for filing the request according to paragraph 1.

2.1 Rule 136(1) EPC

The request was filed, and the fee paid, on 10 November 2016 and thus within two months of the telephone call with an EPO employee on 13 October 2016. According to his submissions, that was the date when the representative learnt of the failure to file a notice of appeal, and this very information thus removed

the cause of non-compliance with the period for filing an appeal under Article 106(1) EPC.

The two-month time limit of Rule 136(1) EPC for filing the request has therefore been met, and the request was also filed within one year of expiry of the appeal time limit of 2 September 2016.

2.2 Rule 136(2) EPC

The request of 10 November 2016 stated the grounds and facts for re-establishment and was accompanied by evidence. The omitted act, i.e. the filing of a notice of appeal, was also completed because such notice was attached to the request.

2.3 Conclusion

In the light of the foregoing, the request for re-establishment of rights is admissible.

3. Whether the request for re-establishment is allowable

Pursuant to Article 122(1) EPC, the request will be allowed if the applicant and its representative, in spite of all due care required by the circumstances having been taken, were unable to observe the appeal time limit.

3.1 The principles enunciated in the case law

(In general, see Case Law of the Boards of Appeal of the EPO, 8th edition 2016, section III.E.5, hereinafter referred to as "Case Law".)

- For cases where the cause of non-compliance with a time limit involves some error in the carrying out of the

party's intention to comply with the time limit, the case law has established the criterion that due care is considered to have been taken if non-compliance with the time limit results either from exceptional circumstances or from an isolated mistake within a normally satisfactory monitoring system (Case Law, III.E.5.2).

- An isolated mistake by an assistant that happens in a normally satisfactory system is excusable. The appellant or his representative must plausibly show that a normally effective system for monitoring time limits prescribed by the EPC was established at the relevant time in the office in question (Case Law, III.E.5.4, first paragraph).

- In a large firm where a large number of dates have to be monitored at any given time, it is normally to be expected that at least one effective cross-check is built into the system. The cross-check must be independent of the person responsible for monitoring time limits (Case Law, III.E. 5.4.4, first paragraph).

- It is well established that a professional representative may entrust routine tasks such as noting time limits to an assistant, provided that (i) a suitable person is chosen for that purpose, (ii) he or she is given proper instructions and (iii) the representative exercises reasonable supervision over the work of the assistant (T 2336/10, Reasons 15, quoting from J 5/80, OJ 1981, 343, paragraph 7).

3.2 Applying the case-law principles to the case at hand

The board holds that, at least in the present case, the preparation of a notice of appeal by the representative's assistant (dd) cannot be considered to constitute a routine

task that could rightfully be entrusted to her by a representative.

This is because, in the representative's own words, "filing appeals is a rare occurrence", given that "[o]ver the last 12 years, from memory not more than at most five appeals have been filed at the EPO including the present one" (see the letter of 10 November 2016, page 4, "A historical review"). More specifically, "[a]s attested by Exhibit G, the administrative assistant (dd) was also previously involved in filing **at least one** Notice of Appeal / fee payment" (see the letter of 15 August 2017, page 8, first full paragraph, emphasis added). Exhibit G is a notice of appeal in a different case dated 24 October 2013 showing the initials "dd". In these circumstances, where the representative established the filing of only one notice of appeal nearly three years before the payment of the appeal fee in the present case (on 18 August 2016), it is evident that the assistant (dd) in charge, even if fully meeting the above standard, i.e. being suitable, having been properly instructed and reasonably supervised in her tasks in general, cannot, without clear evidence to the contrary, be assumed to be sufficiently familiar with the requirements surrounding the correct initiation of appeal proceedings before a board of appeal.

While for example noting and monitoring time limits, such as the appeal time limit, and typing and physically filing a notice of appeal may be routine tasks, it would have been the responsibility of the representative in the circumstances to give specific and clear instructions on the filing of an appeal to the assistant. These instructions would have had to include an indication that meeting the appeal deadline required the filing of a notice of appeal and the payment of the appeal fee, both within the appeal time limit. The assistant might then have generated a standard notice of appeal, but in any case the representative would have had to make sure that the contents of

the notice of appeal comprised all the necessary details as mentioned in Rule 99(1) EPC.

The representative submitted that the administrative assistant was clearly instructed to file the appeal within the deadline. She was, however, confronted with completing this task in epoline®, which contained no clear indications concerning the initiation of an appeal procedure, apart from the payment of the appeal fee. In this respect the board notes that epoline® mainly deals with the electronic filing of documents with the EPO. In the board's understanding, it is not an electronic guide supposed to convey knowledge about the right document(s) to file in a given situation. Rather, the use of epoline® presupposes such knowledge. In other words: epoline® could by no means replace the need for the above-mentioned instructions from the representative.

It is therefore only for the sake of completeness that the board will still address the representative's view that the assistant (dd) was indeed entitled to rely on guidance from epoline® in preparing the filing of an appeal.

In this respect, the representative conceded having investigated the various entries in epoline® only after having been induced to make a thorough search by the board's communication annexed to the summons to oral proceedings. In so doing he did find an "isolated entry" entitled "Notice of Appeal" in "a very extensive list of subsequently filed documents". In this respect, the board concludes from the EPO publication "Importing Data into EPO Online Filing", last updated on 16 February 2015, top of page 158 (available at http://docs.epoline.org/onlinefilingdocs/version5/2015/OLF5-08_XMLdata_EN_150216.pdf), that form EP(1038E) (not EP1036E, as the representative submitted) allows applicants to attach different types of document (each type labelled with a document code) to the form, in particular notices of appeal,

which have the document code APPEAL. Thus the board agrees with the representative's assumption that form EP(1038E) and the document code APPEAL for notices of appeal existed when the assistant (dd) paid the appeal fee on 18 August 2016. Had the assistant (dd) been aware of these indications in epoline®, then according to the representative she would have recognised the need to prepare a notice of appeal for him and would have done so.

Concerning the argument that the indications in epoline® were not clear, the board notes that the use of epoline® for filing the notice of appeal was not mandatory. It was within the responsibility of the representative to determine which of the allowable means an assistant should use for filing documents with the EPO. If a decision was taken in the association of representatives to use epoline® generally, even in cases that occur rarely and for which the indications given by epoline® are considered not to be clear enough, then the assistant would have had to be given adequate training on how to find the relevant items provided in epoline®, including those listed in the section "Subsequently filed documents". If epoline® were supposed to provide guidance on the right document(s) to file, as the representative submits, then not having imparted this knowledge to the assistant through corresponding training would constitute a lack of due care on the part of the representative.

In the light of the foregoing considerations, it follows that the applicant's representative did not exercise the due care required by Article 122(1) EPC. As a consequence, it is immaterial whether the requirements embodied in the second and third bullet points at point 3.1 above would be applicable and have been met.

4. Principle of proportionality

With regard to the application of the principle of proportionality in the present context as suggested in the reply to the board's communication annexed to the summons to oral proceedings (see above, point VI, second to last paragraph), the board considers that the older case law referred to in that reply is ill-conceived and therefore of no assistance to the applicant in the case at hand. The board rather concurs with what appears to be the boards' contemporary stance, as embodied in particular in T 1465/07, Reasons 15 (see also J 13/11, point 12).

5. Conclusion

The request for re-establishment of rights in respect of the period for filing the notice of appeal cannot be granted. As a consequence, the appeal is to be rejected as inadmissible pursuant to Rule 101(1) EPC.

Order

For these reasons it is decided that:

1. The request for re-establishment of rights is refused.

2. The appeal is rejected as inadmissible.

The Registrar: The Chairman:

M. Canueto Carbajo C. Kunzelmann

Decision electronically authenticated