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File Number: T 69/91 - 3.5.1

Application No.: 82 901 057.8

Publication No.: 0 072 854

Title of invention: Banking card for automatic teller machines and the like

Classification: G06K 19/00

D E C I S I O N
of 11 September 1991

Applicant: DREXLER TECHNOLOGY CORPORATION

Headword:

EPC Art. 122

Keyword: "Re-establishment of rights (refused)"
"Lack of knowledge of the European Patent Convention - lack of all
due care"

Headnote



Case Number : T 69/91 - 3.5.1

**D E C I S I O N
of the Technical Board of Appeal 3.5.1
of 11 September 1991**

Appellant : DREXLER TECHNOLOGY CORPORATION
3960 Fabian Way
Palo Alto, CA 94303 (US)

Representative : Barker, Rosemary Anne
MEWBURN ELLIS
Hollins Chambers
64a Bridge Street
Manchester M3 3BA (UK)

Decision under appeal : Decision of Examining Division 066 of the
European Patent Office dated 8 August 1990
refusing European patent application
No. 82 901 057.8 pursuant to Article 97(1) EPC.

Composition of the Board :

Chairman : P.K.J. Van den Berg
Members : R. Randes
F. Benussi

Summary of Facts and Submissions

- I. European patent application No. 82 901 057.8 was filed on 12 February 1982. Following its examination, a decision dated 8 August 1990 was issued in which the application was refused. The reason given for the refusal was that the subject-matter of the claims did not involve an inventive step.

- II. On 10 October 1990 the Appellant filed a Notice of Appeal against that decision. The appeal fee was paid on 11 October 1990.

- III. On 15 February 1991, the Registrar of the Board of Appeal sent to the Appellant a communication pursuant to Article 108 and Rule 65(1) EPC informing him that as the Statement of Grounds had not been filed within the time limit of the four month period provided for in Article 108 EPC it was to be expected that the appeal would be rejected as inadmissible. Appellant's attention was drawn to the remaining possibility of filing an application for re-establishment of rights.

A similar communication had been sent to the Appellant on 5 December 1990 in a related appeal case T 853/90 (European application No. 82 901 056.0).

- IV. On 5 February 1991, the Appellant filed by fax an application for re-establishment of rights in the present appeal case and paid the corresponding fee on 8 February 1991. The statement of Grounds of Appeal was filed on 8 February 1991. In fact when preparing for requesting further processing in the related case T 853/90, he had noted that re-establishment of rights was the correct procedure also in the present appeal.

- V. In the grounds filed in support of the application for re-establishment, the Appellant's Agent (professional Representative) said that "in missing the date for putting in appeal grounds I treated this matter as one where further processing would be available". Moreover he stated that the Appellant in no way was at fault in missing the original due date for the grounds of appeal. The Appellant had relied upon the advice of the Representative and had given the latter instructions to go on with the case.

These grounds given in the application for re-establishment, in this appeal proceedings were identical to the ones given in the application of re-establishment of rights, filed on 5 February in the related appeal procedure T 853/90.

- VI. In a communication pursuant to Article 11(2) of the Rules of Procedure of the Boards of Appeal, dated 10 July 1991, and sent on behalf of the Board in the related appeal case T 853/90, the Rapporteur expressed the opinion that the application for re-establishment of rights complied with the requirements of Article 122(2) and (3) EPC, but it appeared that the requirements of Article 122(1) EPC were not met in that the Appellant had not taken "all due care required by the circumstances". It was noted that the reason given by the professional Representative that led to the said missing of that date (see under V above) could not seriously be considered as a ground on which the application of re-establishment could be based. Additionally it was suggested that the reason given probably indicated that the professional Representative did not have a satisfactory reminding system and that therefore it appeared that the Appellant had not taken "all due care required by the circumstances".

VII. In preparation for oral proceedings set out to be held on 11 September 1991 the Appellant filed a letter on 9 August 1991 together with a sworn declaration giving details of the professional Representative's time-limit monitoring and checking system. The said declaration was identical to the one in appeal case T 853/90.

In the meantime the Board had agreed to hold oral proceedings for both cases at the same time, as the cases were technically related and as the Appellant in both cases applied for re-establishment of rights.

VIII. In the said sworn declaration and said oral proceedings the professional Representative submitted that the reminding system at his Manchester office as well as at the main office in London were satisfactory ones. He explained the different routines and the working tasks of the staff of the Manchester office. In fact in both appeal cases concerned the Manchester office alone was responsible for the monitoring and checking of the time-limits. Also Appellant's US Attorney had fully relied on that checking system and apparently had not had the said applications in his own system. The Representative said that the said system always had worked satisfactory and therefore the mistake made should be considered as an isolated mistake. The Representative pointed out that the system at the Manchester office for both applications had included the treating of the four month period for written grounds of appeal as a date that must be met. However, he said, he had made a mistake he afterwards could not fully explain. His mistake had been to recategorise in the related appeal proceedings (appeal T 853/90) the due date concerned as one to which further processing would apply and also to do so for the present appeal (T 69/91). Yet, in the Notice of Appeal in the related appeal proceedings

(T 853/90), he had emphasised that written grounds were to be produced within the required four-month period. The professional Representative was the senior person at the Manchester office and at that time had been taking special interest in records work and had the ultimate responsibility. The long-time head Records clerk had retired and been replaced by the previous head Accounts clerk who relied on the "correction".

The Representative had been fully aware that the said two applications must be "maintained and fully prosecuted, including traversing the full appeal procedure". From the very beginning he had tried to coordinate the treatment of the said applications and later also the treatment of the corresponding appeals. That was particularly aimed at ultimate oral proceedings being at the same time or consecutive so that only one trip from California to Munich would be required for the US Attorney and the Applicant. Telephone contact between the Representative and the instructing US Attorney had at that time been frequent and had often include reference to progress.

Once the Representative himself had made the said recategorisation of the chronologically first appeal ("related appeal" T 853/90), it was therefore also applied to the present appeal, as these two appeals were tried to be held together. Thus the Representative himself had written on the corresponding chits belonging to the two appeal cases concerned, which chits were attached to the incoming letters, that further processing was allowed, although on the covers of the corresponding dossiers, the correct time limits were given.

The system thus required that the required dates were introduced manually into the system by the staff of the office. A box system (wherein a cross is placed in a box

which indicates a certain measure - e.g a time limit to be held) had never been used, which according to the experience of the Representative would have been still more complicated. The Representative was of the opinion that the staff and he himself were part of the system and that he in fact always had the time limits concerned and the corresponding routines in his head.

Reasons for the Decision

1. Since a Statement of Grounds of Appeal has not been filed within the time limit set by Article 108, taking into account Rule 78(3) EPC, the appeal should be rejected as inadmissible in application of Rule 65(1) EPC, unless the application for re-establishment of rights, filed by the Appellant, is granted.

2. The Registrar's communication informing the Appellant that the Statement of Grounds had not been filed within the four months' period according to Article 108 EPC was dated 15 February 1991 (see under III above).

The Appellant's application for re-establishment of rights was already received on 5 February 1991 (see under IV above), i.e. before the Appellant received the Registrar's communication. Consequently the 5 February 1991 would be the latest possible date of removal of the noncompliance with the time limit of Article 108, third sentence.

However, the Appellant had apparently observed that he had neither filed the grounds of appeal within the required time limit in the present appeal procedure nor in the related appeal procedure (T 853/90) when in the latter proceedings he got the said communication pursuant to Article 108 and Rule 65(1) mentioned under III above.

As has been mentioned above, the Appellant had stated that in treating the two related cases T 853/90 and T 69/91 (the present case) he had all the time tried to hold these cases together, because he thought that a communication or decision in one of the cases also could influence the treatment in the other case. As he tried to coordinate the cases, then particularly he must have observed the time limits set. The Board therefore might consider as date of removal of the cause of noncompliance with the time limit of Article 108, third sentence EPC, the date on which the Appellant in the related appeal case T 853/90 was informed by the Registrar of the possibility to apply for re-establishment of rights. This was done in said communication, dated 5 December 1990 (see under III above), which was sent as registered letter and received at Manchester post-office on 13 December 1990 (confirmed by delivery card).

The Board is satisfied that even if the date of the receipt of the said communication pursuant to Article 108 and Rule 65(1) EPC in related case T 853/90 (at earliest received on 13 December 1990), were considered as the date of removal of the cause of noncompliance, the application for re-establishment would still have been filed within the time limit required by Article 122(2). Since said date of receipt would have been the earliest possible date there is no need for the Board to investigate when actually the cause of non-compliance was removed.

The application for re-establishment of rights therefore fulfils the conditions of Article 122(2) and (3) EPC, when having regard to Rule 78(3) EPC.

3. Article 122(1) EPC, provides, as a prerequisite for the re-establishment of rights, that the Applicant for or the Proprietor of a European patent has taken "all due care required by the circumstances". If an Applicant is represented by a professional Representative the latter also has to show that he has taken all due care required by the circumstances according to the jurisprudence of the Boards of Appeal in conformity with the general principles of representation (Articles 133 and 134 EPC), see J 05/80, OJ EP, 1981, 343.

4. Furthermore, it is noted that, in the Notice of Appeal in present case T 69/91 (filed on 10 October 1990) the Representative writes:

"Whilst efforts here will not be spared to present cases on both applications by the due (four month) date for the other application, it would undoubtedly help avoid presenting arguments in illogical order if the date for that application (82 901 056.0-2210) is extended to correspond with the four month date for this application."

From this paragraph the Board draws the following conclusions:

- a) The Representative was aware of the four months' time limit.
- b) At that time he thought, that this time limit was extensible.
- c) He had not observed that the four months' time limit for the related appeal T 853/90 at that time had expired -he still thought that it was possible to file the Grounds of Appeal within the time limit.

5. The Board notes that in the grounds filed in support of the application for re-establishment (filed on 5 February 1991), the professional Representative admitted that in missing the date for putting in appeal grounds, he treated this matter as one where further processing would be available (see under V above).

Thus the professional Representative confirmed that, as he had submitted in the Notice of Appeal, he had not been aware of the fact that the time limit for the filing of the Grounds of Appeal was not extensible. This was also confirmed in the oral proceedings.

6. In the Board's view, in the present case, non-observance of the time-limit for filing of the Grounds of Appeal was caused merely by lack of knowledge of the Law (here the European Patent Convention) on the part of the professional Representative . As the Disciplinary Board of Appeal already decided, "neither ignorance of the provisions applicable nor a mistake as to the resulting legal position can justify re-establishments of rights. The obligation to take "all due care required by the circumstances" means that persons engaged in proceedings before or involving the European Patent Office must acquaint themselves with the relevant procedural rules" (D 6/82, OJ 1983, 337, 341).

7. The Board is of the opinion that in the present case, the reasons given under 5 and 6 above demonstrate that the requirement of taking "all due care required by the circumstances" has not been fulfilled, and therefore the application of re-establishment of rights must be refused.

8. Under these circumstances there is no need for the Board to consider the professional Representative's reminding system (see under VI and VIII above) and the appeal has to be rejected as inadmissible.

Order

For these reasons, it is decided that:

1. The application for re-establishment of rights is rejected.
2. The appeal is dismissed as inadmissible.

The Registrar:

The Chairman:

M. Beer

P.K.J. van den Berg