

Publication in the Official Journal Yes / No

File Number: T 111/92 - 3.5.1

Application No.: 86 305 485.4

Publication No.: 0 209 380

Title of invention: Recording and/or reproducing apparatus

Classification: H04N 9/82

INTERLOCUTORY
D E C I S I O N
of 3 August 1992

Applicant: Sony Corporation

Headword:

EPC Art. 108, 122; Rules 78(3), 83(4)

Keyword: "Miscalculation of time limit for grounds of appeal" - "All due care (yes)" - "Proportionality" - "Re-establishment (yes)"



Case Number : T 111/92 - 3.5.1

I N T E R L O C U T O R Y D E C I S I O N
of the Technical Board of Appeal 3.5.1
of 3 August 1992

Appellant : Sony Corporation
7-35 Kitashinagawa 6-chome
Shinagawa-ku
Tokyo 141 (JP)

Representative : Pilch, Adam John Michael
D. Young & Co.
10 Staple Inn
London WC1V 7RD (GB)

Decision under appeal : Decision of Examining Division of the European
Patent Office dated 18 September 1991 refusing
European patent application No. 86 305 485.4
pursuant to Article 97(1) EPC.

Composition of the Board :

Chairman : P.K.J. Van Den Berg
Members : G. Davies
W.B. Oettinger

Summary of Facts and Submissions

- I. Appellant's European patent application No. 86 305 485.4, filed on 16 July 1986 was refused by a decision of the Examining Division of the European Patent Office (EPO) dated 18 September 1991. Notification of the decision to the Appellant is deemed to have been effected on 28 September 1991 (Rule 78(3) EPC).
- II. By letter dated 15 November 1991, received by the EPO by facsimile the same day, the Appellant's representative filed a notice of appeal against this decision. The appeal fee was paid on 18 November 1991. A written statement of grounds of appeal dated 30 January 1992 was received by the EPO by facsimile the same day (confirmed by letter of the same date received on 1 February 1992).
- III. On 27 February 1992, the Registrar of the Boards of Appeal sent the Appellant's representative a communication pursuant to Article 108 and Rule 65(1) EPC pointing out that the written statement setting out the grounds of appeal had not been filed within the prescribed time limit, (which had expired on 28 January 1992,) and drawing his attention to the possibility of filing a request for re-establishment of rights under Article 122 EPC.
- IV. By letter dated 24 March 1992, received by the EPO by facsimile the same day, the Appellant's representative filed an application for re-establishment of rights under Article 122 EPC and paid the corresponding fee.
- V. In support of the application for re-establishment of rights, the Appellant's representative made the following submissions:

The decision of the Examining Division of 18 September 1991 refusing the application for grant of a patent was reported to the applicant's Japanese attorneys.

Instructions to file notice of appeal were received by the applicant's representative on 15 November 1991 with the information that grounds in support of the appeal would follow. Instructions for the grounds of appeal were received on 10 January 1992 but referred to documentation which was not in the representative's possession. That information was requested from the applicant's Japanese attorneys as a matter of urgency by facsimile sent on the same day. Further instructions were received by facsimile on 15 January 1992.

The statement of grounds was then prepared and filed on 30 January 1992 two days late due to an error of calculation of the due date on the part of the representative responsible for the application. It was submitted that that error was the result of an unintentional and isolated mistake within a normally satisfactory system, contrary to the applicant's wishes and had occurred in spite of due care having been exercised in the circumstances.

The applicant's representative had a records and reminder department, one of the functions of which was to enter due dates set by official communications from the EPO. The practice of that department was to calculate such dates from the actual date of the letter rather than from the deemed date of notification under Rule 78(3) EPC. This was to ensure that the additional ten-day period under Rule 78(3) should be made use of only in exceptional circumstances. When it was necessary to rely on the ten-day period, it was the individual representative's responsibility to calculate the actual due date. Each representative also had a personal reminder system operating in parallel with the central system.

The records and reminder department had entered the due dates of 18 November 1991 for filing notice of appeal and payment of the appeal fee and 18 January 1992 for filing the statement of grounds of appeal. The representative responsible had realised between 10 and 15 January, while awaiting instructions from Japan, that the ten-day period under Rule 78(3) EPC was likely to be needed and had mistakenly noted the date of 30 January 1992 as the due date in the file. It was the normal practice of the representative, when relying on the ten-day period, to check the due date each time he received the file for action. However, the same mistaken basis for calculating the due date must have been used. Preparation of the statement of grounds of appeal had been a long and complex task, involving review of several related applications and technical documents and, at the time, the representative had had an unusually heavy workload. Nevertheless, the representative stated that, had he not mistakenly taken the due date to be 30 January 1992, the statement of grounds would have been filed on time by 28 January 1992.

In the meantime, the representative had reviewed all his other current files and had found no similar errors in calculation of due dates.

The applicants had had no intention of allowing the appeal to lapse and the mistake leading to the failure of the representative to file the statement of grounds on time had been outside the control of the applicants.

VI. Oral proceedings under Article 116 EPC were requested should refusal of the application for re-establishment of rights be envisaged.

Reasons for the Decision

1. The application for re-establishment of rights fulfils the conditions laid down in paragraphs (2) and (3) of Article 122 EPC and therefore is admissible.

2. Article 122 EPC provides for an applicant 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 EPO, thereby losing a right or other redress, to have his rights re-established upon application subject to the conditions referred to in paragraph 1, above, being met. It is the established jurisprudence of the Boards of Appeal that Article 122 EPC is intended to ensure that, in appropriate cases, the loss of substantive rights does not result from an isolated procedural mistake within a normally satisfactory system (J 2 and 3/86, OJ EPO 1987, 362).

3. Whether or not a request for re-establishment of rights may be allowed, however, depends on whether or not the Appellant can show that all due care required by the circumstances of the particular case was in fact taken to comply with a time limit. In a case such as the present, a first consideration is whether the system for observing such a time limit can be shown by the party concerned to be normally satisfactory. If a proper reminder system has been instituted by a representative, in order to guard against the consequences of oversight in a busy office, this is itself strong prima facie evidence of the taking of care by the representative (T 130/83 of 8 May 1984, T 869/90 of 15 March 1991 and T 715/91 of 24 March 1992, all unpublished). The Board is satisfied that the system established by the central records and reminder department of the office of the applicant's representative to ensure a proper observance of the various time limits under the

EPC corresponds to reasonable requirements. Furthermore, the system was designed to avoid reliance on the ten-day period provided under Rule 78(3) other than in exceptional circumstances. Established practice was to disregard these ten days in calculating time limits and this practice was followed in this case, the system having set the date of 18 January as the deadline for submitting the grounds of appeal. It was the task of the individual representative then to calculate the final ten-day period should he need to rely upon it. This system also would appear to have worked satisfactorily in the past; the Appellant's representative has stated that he has made no similar errors in calculation of due dates in other cases. As was stated by the Board in T 869/90 (where re-establishment of rights was allowed in similar circumstances), "perhaps with the benefit of hindsight derived from the experience of this case, it is certainly possible to question whether the system used by the representative was as watertight as may be reasonably expected. In particular, the absence of any kind of cross-check on the actions of the representative in question during the final ten days before the deadline is notable. The representative himself appears to have been in effect entirely responsible, during this period, for meeting the time limit for the statement of grounds as well as for drafting it. Nobody is immune from a human error such as occurred in the present case, especially when under pressure to complete the substantive work".

4. In the present case, the Board considers that the mistake in calculating the ten-day period due to human error at a time when the person in question was under pressure was an isolated mistake in an otherwise satisfactory system. The Board has had some doubts as to whether all due care was exercised on behalf of the Appellant during the final ten-day period. The absence of any cross-check in

circumstances similar to the present case might well lead to a finding of lack of due care in future cases. In this connection, however, the Board is satisfied that the error, which occurred for the first time, was due to a genuine miscalculation and not to negligence on the part of the Appellant's representative.

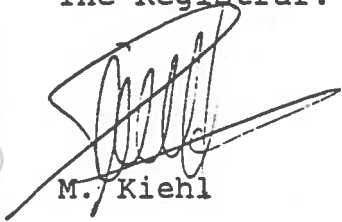
5. In accordance with general principles of law, as applied in the context of administrative law, a procedural means used to achieve a given end (e.g. a sanction following a procedural non-compliance) should be no more than that which is appropriate and necessary to achieve that end; this is commonly referred to as the principle of proportionality. Bearing this principle in mind, the loss of the patent application because of the procedural irregularity which has occurred in the present case would be a severe result. Moreover, the interests of any third party misled in the sense of Article 122(6) EPC by the fact that the statement of grounds of appeal was filed two days late would be protected by Article 122(6) EPC.
6. The Board is satisfied therefore that, in spite of all due care required by the circumstances having been taken by the Appellant, he was unable to observe the time limit for filing the statement of grounds of appeal in this case. The application for re-establishment of rights is allowed.
7. Consequently, the statement of grounds of appeal is deemed to have been filed within the four-month time limit provided by Article 108, third sentence, EPC. Furthermore, the appeal complies with Articles 106 and 107, with Article 108, first and second sentence (cf. paragraph II above), and with Rule 64 EPC and, therefore, is admissible.

Order

For these reasons, it is decided that:


The rights of the appellant are re-established in relation to the filing of the written statement of grounds of appeal.

The Registrar:



M. Kiehl

The Chairman:



P.K.J. Van Den Berg

20 30.07.

3 1. 07. 92

