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**D E C I S I O N**  
**of 8 May 1998**

**Case Number:** T 0148/96 - 3.5.1

**Application Number:** 89109934.3

**Publication Number:** 0344774

**IPC:** H04N 9/79

**Language of the proceedings:** EN

**Title of invention:**

Viedeo signal processing apparatus having function for coloring  
additional image information

**Patentee:**

KABUSHIKI KAISHA TOSHIBA

**Opponent:**

Interessengemeinschaft für Rundfunkschutzrechte E.V.

**Headword:**

Interessengemeinschaft für Rundfunkschutzrechte E.V.

**Relevant legal provisions:**

EPC Art. 108, 110(2), 122  
EPC R. 65(1), (2)

**Keyword:**

"Re-establishment - no"

**Decisions cited:**

G 0001/86, J 0005/80, J 0002/86, J 0003/86, J 0009/86,  
J 0003/88, T 324/90, T 0413/91, T 0828/94

**Catchword:**



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Boards of Appeal

Chambres de recours

Case Number: T 0148/96 - 3.5.1

**D E C I S I O N**  
of the Technical Board of Appeal 3.5.1  
of 8 May 1998

**Appellant:** Interessengemeinschaft  
(Opponent) für Rundfunkschutzrechte E.V.  
Bahnstrasse 62  
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**Representative:** -

**Respondent:** KABUSHIKI KAISHA TOSHIBA  
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**Representative:** Lehn, Werner, Dipl.-Ing.  
Hoffmann, Eitle  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 7 December 1995  
rejecting the opposition filed against European  
patent No. 0 344 774 pursuant to Article 102(2)  
EPC.

**Composition of the Board:**

**Chairman:** P. K. J. van den Berg  
**Members:** G. Davies  
R. Randes

## Summary of Facts and Submissions

- I. The European patent No. 0 344 774, based on European patent application No. 89 109 934.3 claiming priority of 1 June 1988 from Japanese application JP 132617/88 and accorded the filing date of 1 June 1989, was granted on 1 September 1993 (European Patent Bulletin 93/35).
- II. Opposition was filed against the patent by the appellant in the present case. A decision of the Opposition Division of the EPO rejecting the opposition was despatched to the parties on 7 December 1995. Notification of the decision to the parties, including the appellant, is deemed to have been effected on 17 December 1995 (Rule 78(3) EPC).
- III. By letter received by the EPO on 24 January 1996, the appellant filed a notice of appeal against this decision, the appeal fee being paid the same day. On 14 May 1996, the registrar of the boards of appeal sent the appellant 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 17 April 1996,) and drawing the appellant's attention to the possibility of filing a request for re-establishment of rights under Article 122 EPC.
- IV. By letter filed at the EPO on 27 June 1996, the appellant submitted an application for re-establishment of rights under Article 122 EPC, paid the respective fee and filed the missing statement of grounds of appeal. The grounds on which the application for re-establishment of rights was based, and the facts on which it relied, pursuant to Article 122(3), may be summarised as follows:

In the opponent's office, a time-limit book was kept for entering and supervision of deadlines. The entering and meeting of deadlines was the duty of a secretary, who had worked in the office of the opponent since May 1995 and had received training in keeping time limits for a period of three months until the end of July that year from a senior secretary. Thereafter, she was made responsible for keeping the time-limit book under the supervision of the opponent's representative (an in-house patent agent and the manager of the opponent's patent department), who carried out random checks at intervals to make sure that she was correctly maintaining the time-limit book.

When the time limits with regard to the appeal from the decision in the present case were entered in the book, the secretary made a mistake, only entering the time limit for submitting the notice of appeal, no entry being made for the time limit for submitting the statement of grounds of appeal. An unsworn solemn declaration (*Eidesstattliche Versicherung*) to that effect from the secretary in question was attached to the request for re-establishment, saying that the mistake was possibly caused by her having been interrupted by a telephone call while she was entering the time limits in question.

For these reasons, the deadline for filing the statement of grounds of appeal was not met.

The cause of non-compliance with the time limit (Article 122(2)) had been removed on receipt of the communication from the EPO dated 14 May 1996, drawing the opponent's attention to the fact that no grounds of appeal had been filed.

V. The patentee filed observations on 13 November 1996 requesting that the appeal filed by the opponent be rejected either as inadmissible or on the ground that the subject-matter of the patent was in conformity with Article 56 EPC. The patentee further opposed re-establishment of rights on the ground that no due care had been taken by the opponent in the sense of Article 122 EPC, since the secretary who had made the mistake was insufficiently experienced and her training had been inadequate. She had also not been properly supervised. The patentee requested oral proceedings in the case that the Board was unable to accede to its requests.

VI. On 6 December 1996, the Board issued a communication pursuant to Article 110(2) EPC, expressing the preliminary, non-binding view that it was not satisfied that a proper case had been made out under Article 122 for re-establishment of rights and that it was likely therefore that re-establishment of rights would not be allowed and that the appeal would be rejected as inadmissible. The appellant was invited to provide further evidence in support of its request for re-establishment. The opponent replied to that communication, following a request for an extension of time to reply, on 16 April 1997. The Board remained dissatisfied with the evidence submitted and sent a further communication on 4 July 1997 inviting further information concerning the adequacy of the supervision of the work of the secretary concerned as well as the adequacy of her relevant experience and training. Following further requests for extension of time to reply, the opponent replied to the second communication on 15 December 1997. Thereafter, the parties were summoned to oral proceedings.

VII. The additional evidence submitted in the appellant's replies to the Board's communications and at the oral proceedings may be summarised as follows:

The patent department of the opponent was staffed by two full-time and four part-time workers. The department handled approximately 50 oppositions and up to 25 appeals per year. For many years a careful system had been established for monitoring time limits relating to German and European patent applications. All incoming mail was sorted by a secretary; mail pertaining to patent oppositions or appeals (10 to 20 per day) was date stamped and any communication requiring a reply within a time limit was marked with the date(s) of the deadline(s) for reply, the stamp having a space to be filled in marked "Frist bis Termin" (ie deadline). As regards communications from the EPO, the 10-day grace period of Rule 78(3) was disregarded, the time limits being calculated from the date of despatch by the EPO. The deadlines were then immediately entered by the secretary in the time-limit book. The incoming mail was then submitted (without the time limit book) to the representative for information and to check that the deadlines had been noted correctly thereon. The representative relied on the secretary to correctly note the deadlines in the time limit book, but random checks of the deadlines entered therein on a particular day were carried out at intervals by the representative. Similarly, the outgoing post was recorded and the fact that deadlines had been met was also recorded in the time-limit book. The only cross-checking system for time limits consisted of entering the deadlines noted in the time limit book into a computer and circulating a print-out weekly within the office; however, since the

information fed into this system was based on the information entered in the time limit book, the mistake was not picked up.

This system had proved reliable over more than twenty years.

The secretary responsible for missing the deadline in the present case had duly noted the relevant time limits for filing an appeal on the notification of the decision from the EPO, but had failed to enter that relating to the statement of grounds of appeal in the time-limit book. At the time the mistake was made, she had been working for the representative for seven months. In her previous job as secretary and bookkeeper, she had had many years experience of monitoring time limits, albeit not in the field of patents and was considered reliable, punctual and conscientious. When first employed by the opponent, she was given training in EPO time limits and gained daily practical experience working under the supervision of her predecessor, who had 28 years experience in the job. After six weeks, she was considered fully capable of operating the system and after three months took over responsibility therefor, under the supervision of the opponent's representative. Thereafter, for the first two weeks, the representative daily checked the entry of the deadlines in the time-limit book when checking the incoming post; from then until the end of the sixth month, the representative carried out random checks of the entries made on a particular day at two to three week intervals. Thereafter, such checks were made once a month. The secretary had made no other mistake with regard to time limits before or since, having remained in the employment of the opponent.

It was submitted that a representative should be able to rely on a suitably chosen and properly trained secretary; moreover, the system established in the appellant's office was normally satisfactory and reliable and the error in question should be considered an isolated procedural mistake within that system. The office was small and, according to the case law of the boards of appeal, in a small office cross-check mechanisms have been found to be superfluous in certain circumstances (cf. T 166/87 of 16 May 1988).

VIII. The patentee, in a letter filed on 4 September 1997 and at the oral proceedings, objected to the procedure followed by the Board in that, by means of its communications, in the patentee's opinion, it had continued to investigate the facts of the case. It was submitted that Article 122(2) EPC states that an application for re-establishment must be filed in writing within two months from the removal of the cause of non-compliance with the time limit and that Article 122(3) provides that the application must state the grounds on which it is based and must set out the facts on which it relies. It was argued that, according to decision T 324/90 of 13 March 1991, it is the established case law of the boards of appeal of the EPO that the grounds and facts must be filed within the two-month period, whereas evidence, if needed, may be filed later. The patentee considered that the additional information supplied by the appellant in response to the Board's communications of 6 December 1996 and 4 July 1997 and at the oral proceedings was to be considered to represent new facts rather than merely additional evidence; new facts should not be taken into account.

As regards the appellant's case for re-establishment, the patentee argued that, even if the newly-submitted



facts or evidence were to be taken into account, the opponent had not shown that all the due care required by the circumstances had been taken. It was submitted that the secretary had not been sufficiently trained at the time of the mistake and that the mistake had been compounded by the fact that there was no cross-check system in place. A company of the importance of the appellant should have had a cross-check system in place; the representative had not shown all due care by relying so heavily on the secretary responsible. In conclusion, the patentee requested that the appellant's application for re-establishment of rights be refused.

### Reasons for the Decision

1. Under Article 108, third sentence, EPC, a written statement setting out the grounds of appeal must be filed within four months of the date of notification of the decision. In the present case, this period expired on 17 April 1996 (Rule 78(3) EPC).
2. The admissibility of the appeal in this case, therefore, depends on whether re-establishment of rights in respect of the time limit for filing the statement of grounds of appeal is allowed or not.
3. According to the wording of Article 122(1) EPC, only the applicant for or proprietor of a European patent who was unable to observe a time limit vis-à-vis the European Patent Office shall, upon application, have his rights re-established. The Enlarged Board of Appeal, however, held in its decision G 1/86, dated 24 June 1987 (OJ EPO 1987, 447) that an appellant as opponent may also have his rights re-established under Article 122 EPC if he has failed to observe the time limit for filing the statement of grounds of appeal.

Therefore, Article 122 is applicable in the present case.

4. The application for re-establishment of rights complies with the formal requirements laid down in paragraphs (2) and (3) of Article 122 EPC and is admissible.
  
5. The respondent (the patentee) has argued that, according to Article 122(2) and (3), an application for re-establishment must be filed within two months from the removal of the cause of non-compliance with the time limit and "must state the grounds on which it is based and must set out the facts on which it relies" and that, therefore, any new facts submitted by the appellant at a later date should not be taken into account by the Board. In this connection, the Board considers that it is the established case law of the boards of appeal of the European Patent Office that only the grounds and facts must be filed within the two-month period, whereas evidence, if needed, may be filed later ( cf. T 324/90, point 5 of the reasons (OJ EPO 1993, 33)). Article 110(2) EPC empowers the boards of appeal, in the examination of an appeal, to invite the parties, as often as necessary, to file observations on communications from another party or issued by itself. It is therefore the established practice of the boards of appeal, reflected in Article 12 of their rules of procedure, to issue communications asking for further evidence from parties in support of their cases. In the present case, the Board considers that the replies of the appellant to the communications issued by the Board provide nothing more than some additional evidence in support of the grounds and facts set out in its original application for re-establishment and do not represent new grounds or facts. The new evidence has not contributed any substantial new facts to the information before the

Board and is, therefore, taken into account by the Board.

6. Article 122 EPC provides for an applicant who, in spite of all the 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 4, above, being met. It is the established case law of the boards of appeal that, when an applicant is represented by a professional representative, in this case a patent agent working in the opponent's in-house patent department, a request for re-establishment of rights cannot be acceded to unless the representative himself can show that the due care required of the applicant or proprietor by Article 122(1) EPC has been taken. It is incumbent on the representative properly to instruct and to exercise reasonable supervision over the work of any assistant to whom the performance of routine tasks has been entrusted (J 05/80, OJ EPO 1981, 343). Moreover, Article 122 EPC is intended to ensure that loss of rights does not result from an isolated mistake in an otherwise satisfactory system; thus an appellant or its representative must be able to demonstrate that a normally effective system for monitoring time limits prescribed by the EPC was established at the relevant time in the office in question (J 02/86, J 03/86 (OJ EPO 1987, 362)).

7. Inability to observe a time limit as a result of a wrong date inadvertently being entered into a monitoring system is a reason for re-establishment, provided all due care is shown (T 413/91 of 25 June 1992). The requirement of all due care must be judged in view of the situation existing when the time limit

expired. To succeed in a request for re-establishment of rights, the appellant must be able to demonstrate that, at the time the mistake was made, it had such office systems in place as were capable of ensuring that failure to adhere to time limits did not occur (see e.g. J 2 and 3/86 (OJ EPO 1987, 362) and J 9/86 of 17 March 1987 (not published in OJ EPO)). Where an error has been made by an assistant, as in this case, a representative is expected to show that he exercised reasonable care in the choice of his employees, and not only instructed them in detail as to their duties, but also regularly supervised them so as to ensure that their duties were being performed correctly (J 5/80 (OJ 1981, 343)).

- 8.1 It has been submitted that the system established in the appellant's office, and described in paragraphs IV and VII, above, had worked reliably over previous years. The question as to whether a particular system used in a particular firm to ensure that procedural acts such as the filing of statements of grounds of appeal are completed in due time fulfils the requirement of all due care depends on the individual circumstances of each case and, as stated above, must be judged in the light of the situation existing when the time limit expired. The system basically consisted of deadlines to be met being noted on the daily incoming correspondence by a secretary, who at the same time entered the deadlines in a time limit book. The marked-up correspondence was subsequently checked on a daily basis by the representative, but the entries in the time limit book were not checked. No other record, such as entry of deadlines into a computer file or the representative's personal reminder system was used. The entries in the time limit book were not checked daily by the representative; instead, random spot checks were carried out at intervals. The random checking system

employed once a month by the representative at the time of the missed time limit to supervise the correct entry of deadlines in the time-limit book by the secretary does not appear to meet the required standard of at least one effective cross check of time limits being built into the system. Even though the opponent's patent department is comparatively small and, therefore, not expected to have such elaborate systems in place as might be considered necessary in a large firm (cf. T 166/87 of 16 May 1988), it handles a substantial number of oppositions and appeals per year and an effective cross-checking system should have been in place to preclude the possibility of a simple failure by one person to note a time limit in a particular case leading to failure to meet a deadline (cf. J 9/86 of 17 March 1987 and T 828/94 of 18 October 1996). Moreover, this case may be distinguished from the facts in T 166/87 in that there the representative himself was responsible in a small office for noting and meeting time limits in all cases and himself made the mistake considered by the Board to be an isolated mistake in a normally satisfactory system.

- 8.2 The Board is also not satisfied that all due care was taken over the supervision of the secretary responsible for the mistake. At the time of the incident, after seven months experience of the job, she had been put fully in charge of monitoring time limits, subject to a random check once a month by the representative. While the Board is satisfied that the secretary was a suitable person, well qualified for her job, it takes the view that she had not been closely enough supervised. A sensible supervision system for a new employee requires regular supervision, which ought to be effective at least during an educational period of some months, before the employee is left to act on her own (cf. J 3/88 of 19 July 1988). According to the

representative, her training consisted of intensive instruction in the legal background to the job at the start, combined with working under the supervision of an experienced secretary for three months. Thereafter, she was entrusted with monitoring all time limits, subject to the random checks carried out at decreasing intervals by the representative.

8.3 In conclusion, the facts and evidence submitted in support of the application for re-establishment of rights do not indicate that all the due care necessary in the circumstances had been taken to file the statement of grounds in this case in due time.

9. It follows that the appellant's rights cannot be re-established in respect of the failure to meet the time limit for filing the statement of grounds of appeal. Consequently, the appeal has to be rejected as inadmissible (Rule 65(1) EPC).

## Order

### For these reasons it is decided that:

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

The Registrar:

The Chairman:

M. Kiehl

P. K. J. van den Berg