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D E C I S I O N
of 22 June 1998

Case Number: T 0401/97 - 3.2.3
Application Number: 88902673.8
Publication Number: 0351413
IPC: B05D 3/06, B29C 35/08, B29B 13/08

Language of the proceedings: EN

Title of invention:

Method and apparatus for production of three-dimensional objects by photosolidification

Patentee:

Fudim, Efrem V.

Opponent:

EOS GmbH Electro Optical Systems

Headword:

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Relevant legal provisions:

EPC Art. 108
EPC R. 78, 83
RFees Art. 5, 8

Keyword:

"Form of appeal - fee - late payment"

Decisions cited:

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Catchword:

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Case Number: T 0401/97 - 3.2.3

D E C I S I O N
of the Technical Board of Appeal 3.2.3
of 22 June 1998

Appellant: Fudim, Efrem V.
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Respondent: EOS GmbH Electro Optical Systems
(Opponent) Pasinger Straße 2
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Representative: Prüfer, Lutz H., Dipl.-Ing.
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Decision under appeal: Decision of the Opposition Division of the
European Patent Office posted 11 February 1997
revoking European patent No. 0 351 413 pursuant
to Article 102(1) EPC.

Composition of the Board:

Chairman: C. T. Wilson
Members: M. K. S. Aúz Castro
F. E. Brösamle

Summary of Facts and Submissions

- I. The decision of the Opposition Division revoking the patent was posted on 11 February 1997. The notice of appeal against this decision was filed on 11 April 1997 and the appeal fee was entered in a bank account held by the European Patent Office on 2 May 1997.

- II. By a communication of 25 June 1997 the appellant (proprietor of the patent) was informed by the registrar that the appeal fee had not been paid within the time limit prescribed and that, therefore, the appeal was deemed not to have been filed.

- III. By letter of 6 August 1997 the appellant, who has his place of business in the United States of America, acting through his professional representative, submitted that the wiring of the appeal fee had been initiated on 17 April 1997 and payment made to the European Patent Office on 21 April 1997.

However, since this was an international transaction involving three intermediate banks, there had been a mixup in the European Patent Office's account number with a corresponding delay in crediting its account.

The appellant's bank, Guaranty Bank, that had no international division, had by mistake placed the European Patent Office's account number in front of the Dresdner Bank's routing number. On 17 April 1997 local International Bank M&I had directed Credit Suisse First Boston of Frankfurt to pay on 21 April 1997 but providing a wrong account number of the European Patent Office. On 22 April 1997 M&I had directed Credit Suisse to correct the account number, but Credit Suisse instead refunded the payment of 21 April 1997 and made a new payment with the correct number on 29 April 1997.

IV. With communication of 27 August 1997 the Board drew the appellant's attention to the provisions of Article 108 EPC concerning the time limit and form of appeal and to Article 8 of the Rules Relating to Fees which identifies the date to be considered as the date on which payment is made, in particular to its paragraph (3)(a).

V. The appellant alleges that the order given to Credit Suisse First Boston AG of Frankfurt am Main to make the payment was received by the bank on the same day. Since the bank was situated in the Contracting State Germany and the date of the order to pay, 17 April 1997 was within the time limit prescribed by Article 108 EPC the time limit for payment had been observed according to Article 8(3)(a) of the Rules Relating to Fees.

The appellant requests that the notice of appeal be deemed to have been filed.

VI. The respondent (opponent) submits that the notice of

appeal may not be deemed to have been filed because Article 8(3) (a) of the Rules Relating to Fees was not complied with for the following reasons.

The banking establishment to which the appellant gave the order for transfer was not situated in a Contracting State.

The allegation of the appellant that the order for payment was given to Credit Suisse First Boston AG in Germany on 17 April 1997 cannot be followed because the payment according to this order never entered the account of the Office. The second order given by the local bank M&I on 22 April 1997 to Credit Suisse First Boston AG with the correct account number of the Office was outside the time prescribed by Article 8(3)(a) of the Rules Relating to Fees.

Reasons for the Decision

1. Pursuant to Article 108 first sentence EPC a notice of appeal must be filed within two months after the date of notification of the decision appealed from. According to Rule 78(1) EPC decisions indicating a time limit for appeal shall be notified by registered letter. Paragraph (3) of the same provision stipulates that where a notification is effected by registered letter this shall be deemed to be delivered to the addressee on the tenth day following its posting.

This means for the case under consideration that the

two months time limit of Article 108 first sentence EPC started on 22 February and ended on 21 April 1997 (Rule 83(1), (2), (4) EPC).

The notice of appeal as such, filed on 11 April 1997, has, therefore, been filed in time.

2. But Article 108 second sentence EPC prescribes that the notice shall not be deemed to have been filed until after the fee for appeal has been paid.
3. The ways of payment of the fees are enumerated in Article 5 of the Rules Relating to Fees, among them payment or transfer to a bank account held by the Office (paragraph (1)(a)). Article 8 of these Rules fixes the date to be considered as the date on which payment is made. According to its paragraph (1)(a) it is, in the case under consideration, the date on which the amount of the payment or of the transfer is actually entered in a bank account or a giro account held by the Office. This occurred on 2 May 1997, i.e. after the expiry of the time limit stipulated in Article 108 first sentence EPC.
4. In paragraph (3) of Article 8 of the Rules Relating to Fees it is foreseen that where under the provisions of paragraphs (1) and (2) of the Article payment of a fee is not considered to have been made until after the expiry of the period in which it should have been made, it shall be considered that this period has been observed if evidence is provided to the Office that the person who made the payment,

- (a) fulfilled, one of the following conditions **in a Contracting State** within the period within which the payment should have been made:
 - (i) either he effected the payment through a banking establishment or post office,
 - (ii) or he duly gave an order to a banking establishment or a post office to transfer the amount of the payment
 - (iii) or he dispatched a letter with a cheque.

In the case under consideration the order to transfer the amount of the payment was not given in a Contracting State, but in the United States of America. The fact that the order was immediately passed on to another bank and from there to the banking establishment Credit Suisse First Boston AG with its seat in Frankfurt am Main in the Contracting State Germany which received it before the expiry of the time limit, is of no relevance here because the provision refers to the initiation of the payment. The banking establishment with seat in Frankfurt did not receive the order from the appellant but from another bank, whereas the appellant gave his order in a non Contracting State.

The fact that in the course of several transfers from bank to bank a wrong account number of the Office slipped in was in this case certainly a reason why the amount arrived late. But it is not a reason for not applying Article 8(3) of the Rules relating to Fees.

The giving of the preferential treatment according to this provision depends entirely on where the order for payment was given by the person who makes the payment.

5. In the present case, the order to transfer the amount of the appeal fee having been given to a banking establishment in the United States of America the appellant is not entitled to the advantages provided for by Article 8(3)(a) of the Rules Relating to Fees.

6. The appeal fee, therefore, has not been paid within the time limit provided for in Article 108 EPC with the consequence that the appeal is deemed not to have been filed.

Order

For these reasons it is decided that:

1. The appeal is deemed not to have been filed.

2. The reimbursement of the appeal fee is ordered.

The Registrar:

The Chairman:

N. Maslin

C. T. Wilson