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D E C I S I O N
of 27 March 2006

Case Number: T 0902/05 - 3.2.03

Application Number: 98500195.7

Publication Number: 0900979

IPC: F21V 8/00

Language of the proceedings: EN

Title of invention:
Lighting system

Applicant:
Sanchez Navarro, Francisco

Opponent:

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Headword:

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Relevant legal provisions:
EPC Art. 122

Keyword:
"Re-instatement (no) "

Decisions cited:
J 0005/94, T 0013/82, T 0715/89, T 0324/90, T 0686/97

Catchword:

-



Case Number: T 0902/05 - 3.2.03

D E C I S I O N
of the Technical Board of Appeal 3.2.03
of 27 March 2006

Appellant: Sanchez Navarro, Francisco
Avda. Ancha de Castelar, n 187 - 4 D
E-03690 San Vicente del Raspeig (ES)

Representative: Urizar Anasagasti, José Antonio
Puerto Rico 6A, Bajo
E-28016 Madrid (ES)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 27 January 2005
refusing European application No. 98500195.7
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: U. Krause
Members: K. Garnett
C. Donnelly

Summary of Facts and Submissions

I. In this case, the applicant, Mr Francisco Sánchez Navarro, applies for re-establishment of his rights pursuant to Article 122 EPC. On 21 March 2005 the applicant had filed a notice of appeal against the decision of the Examining Division refusing European Patent application No. 98 500 195.7. The decision had been posted on 27 January 2005 and under Rule 78(2) EPC it was therefore deemed to have been delivered on 6 February 2005.

The last date under Article 108 EPC for the filing of the grounds of appeal, namely 6 June 2005, passed without any grounds being filed. On 22 August 2005 a communication was sent by the Office to the applicant's representative notifying the applicant that it was to be expected that the appeal would be rejected as inadmissible, pursuant to Article 108 EPC in conjunction with Rule 65(1) EPC.

On 21 October 2005, the applicant applied to have his right to appeal re-established, and on the same day filed grounds of appeal and paid the fee for re-establishment of his right.

II. The grounds on which the application was based, and the facts on which he relied, as contained in his representative's letter of 20 October 2005, can be summarised as follows.

On 18 March 2005 a meeting took place between the applicant and his representative with a view to preparation of the grounds of appeal, and on 28 March

2005 the representative told the applicant, first, that the notice of appeal had been filed and, second, that the grounds of appeal would be filed by 27 May 2005 (from other material in the file it appears that the representative was in error about the last date for filing the grounds). On 26 May 2005, the day before the representative apparently believed the time limit for filing the grounds of appeal would expire, the computer system in the representative's office was infected by the Sober P virus, which his firm's existing anti-virus software did not detect. As a result, it is said, access could not be gained to the firm's database. An instruction was therefore given for all the firm's paper files to be reviewed, but owing to the large number of files handled by the firm the file in the present case was not reached "in due time".

It was only when the representative received the communication from the Office dated 22 August 2005 that it was realised that grounds of appeal had not been filed.

III. On 25 November 2005, the Board sent the applicant a communication under Article 10a(1)(c) of the Rules of procedure of the Boards of Appeal setting out the preliminary and non-binding opinion of the Board and drawing attention to various deficiencies in the application. These can be summarised as follows.

There was no evidence establishing when the cause for non-compliance with the time limit for filing the grounds of appeal was first removed, and thus whether the time limit prescribed by Article 122(2) EPC had been met.

In this respect, on the evidence as it then stood, it seemed to be the applicant's case that the representative's computer systems were entirely inoperable from 26 May until some time after receipt of the communication from the Office of 22 August 2005. There was no evidence explaining why it took so long for the systems to be repaired. The Board noted that the file showed that when a similar event had occurred within the representative's firm in 2004, the systems had been repaired within three days.

The applicant was therefore invited (a) to explain why the missed time limit could not have been discovered earlier than 29 August 2005 and (b) to set out the steps which were taken to repair the representative's computer systems and why they were, in this respect, ineffective, and to supply corroborative evidence.

As to the requirement of Article 122(1) EPC that all due care required by the circumstances be taken, the Board pointed out that no reason was given why, in the period between the meeting on 18 March 2005 and 26 May 2005, the representative was unable to complete the grounds and file them. The Board also pointed out that there was no evidence that any system of making regular and secure back-ups of the representative's files existed, and that the Board was therefore likely to infer that no such system was in place. It was indicated that the Board was likely to take the view that the making of such back-up copies was an elementary precaution where electronic files were the only or main source from which relevant information for the prosecution of proceedings could be readily

extracted. The Board went further and indicated that it might come to the conclusion that if, as appeared to be the case, the representative relied entirely on the one computer system for its time limit management, without any alternative checking or back-up system being in place, this of itself would not display the taking of all due care.

In this respect, the Board also noted that much the same thing appeared to have happened to the representative's computer systems in 2004, as a result of which a renewal fee in respect of this application was not paid and re-instatement had to be sought. The Board indicated that it was likely to take the view that at the very least this ought to have alerted the representative to the fact that its existing systems were inadequate and that even a change of the anti-virus system might well not be enough to keep the representative's time limit management systems fully operative, and that alternative systems such as the ones referred to above should be in place.

The representative was therefore invited to set out in detail how the time limit management systems in the representative's office worked at the relevant time, and to submit corroborating evidence.

- IV. On 24 January 2006 the representative replied to the Board's communication. The response can be summarised as follows.

The representative's time limit management system was based on a double check control. The first check was made by the person who inserted data from the paper

file onto the database located in the office's main server. This included such data as deadlines for action to be taken. A supervisor then reviewed the data in the database and prepared a separate list of deadlines in his own personal computer, and used this list to arrange with the departments within the firm to take all necessary actions.

Because of the virus attack, the computer system could not be accessed on 26 May 2005, and the database "once recovered, was not entire and reliable". Because of this, the supervisor ordered a review of all the paper files and asked for any pending action to be reported. The file in the present case was reached on 8 June 2005. The employee in question noted that the last document on the file was a letter to the Office of 28 March 2005 confirming that the appeal fee had been paid and, so far as the employee was concerned, the file appeared "not to have any irregularity." The explanation in the representative's letter of 24 January 2006 continues: "The document of Appeal was saved in the computer of [the attorney concerned], who had prepared this response, with the name of the file 'Appeal filed May 27, 2005' and included in the list of deadlines of the supervisor. Unfortunately neither this document nor the list of deadlines, among other documents, could be opened. Only the title of the file 'Appeal filed May 27, 2005' was recovered and for error was considered as filed and that everything was in order." The representative states that he had spoken to the attorney concerned, but the attorney was unable to remember anything about this particular case.

- V. Also submitted on 24 January 2006 was a letter from the computer systems consultant employed by the representative's firm, the consultant being responsible for the firm's computer systems and for monitoring computer viruses and the like. The consultant confirmed that on 26 May the office's computer systems had been infected by the WIN32/SOBER-P. mass-mailing virus, which the firm's Norton 2005 anti-virus software had been unable to detect. He stated that this software had been installed after the previous attack in 2004. He also outlined various steps which had been taken since this second attack, including the making of regular back-up copies on CD.

Reasons for the Decision

1. Given the evidence which has been provided, the Board has distinct reservations concerning the date when the cause of non-compliance with the time limit for filing grounds of appeal was removed, within the meaning of Article 122(2) EPC, and in particular whether this was only after receipt of the Office's communication of 22 August 2005, as the applicant submits, and not on about 8 June 2005. For the purposes of this application, however, it is not necessary to determine this issue and the Board will assume in the applicant's favour, without deciding, that the removal of the cause of non-compliance occurred on 22 August 2005 and that the application for re-establishment of rights is therefore admissible under Article 122(2) EPC.

2. Article 122(1) EPC requires the applicant to show that he was unable to observe the relevant time limit "in spite of all due care required by the circumstances having been taken." He is also required to state, in the application for re-establishment, the grounds on which the application is based, and to set out the facts on which he relies (see Article 122(3) EPC), although he may subsequently file evidence which establishes these matters. See decision J 5/94 (not reported in the OJ).

3. The Board has been left completely in the dark as to why it was not technically possible between 26 May and 6 June 2005, taking all due care, to recover from the computer systems of the representative's firm sufficient data that would have led to the discovery that the grounds of appeal needed to be filed by 6 June 2005. The applicant was invited by the Board to provide further information about these matters, but has not availed himself of the opportunity to do so. Indeed, the representative's firm's computer systems consultant has remained totally silent on this topic, apart from confirming that the virus was a mass-mailing worm, a fact which does not explain why data was irrecoverable, since this type of virus is not normally harmful in this respect.

4. It must be clear from the facts set out and substantiated in the application that the applicant took all due care required by the circumstances to observe the time limit. See decisions T 13/82, paragraph 3 (OJ 1983, 411) and T 715/89, paragraph 3 (not reported in the OJ). In this respect, it is not in general sufficient merely to assert, as the applicant's

- representative has done, that recovered data "was not entire and reliable", that relevant documents "could not be opened" or that "we were not able to access our database" without providing evidence which substantiates such assertions. An applicant who does so runs the risk of his application being refused on the grounds that he has not discharged the burden of showing that he was unable to observe the relevant time limit in spite of all due care required by the circumstances having been taken.
5. The Board might have been slow to refuse the application solely on this basis without giving the applicant a further opportunity to provide an explanation, but it is clear that it is right to do so for other reasons as well, namely that in a number of respects the representative's time management systems which were in place during the relevant period do not demonstrate the taking of all due required by the circumstances.
6. Whether the systems used in a particular firm, to ensure that procedural acts are completed in due time, fulfil the requirement of the taking of "all due care" will depend upon the individual circumstances of each case: see decision T 324/90 (OJ 1993, 33). In a firm as large as the representative's, the provision of suitable redundant or failsafe systems, with an element of dual control, will usually be an essential component of a normally satisfactory reminder system. See e.g., decision T 686/97, paragraph 8 (not reported in the OJ). The following things can be said about the systems in place in the representative's office at the relevant time:

First, the time management systems in place did not in reality consist of a dual control system at all. The evidence shows that although two entries were made of relevant time limits, only the supervisor had the responsibility to check and instigate the appropriate action as they drew near. There is no evidence of any mechanism to provide a cross-check or control over his actions.

Second, and more fundamentally, the systems and thus the relevant data were in two respects not adequately protected:

- (a) Although two entries were made of relevant time limits, both entries were in electronic form and both, on the evidence, were linked to a central server. All the data was thus at risk in the case of a single, harmful event.
- (b) No back-up system of any form was in place, such a system only being implemented after the May 2005 attack. This was so, even though the earlier attack in 2004 should have demonstrated the vulnerability of the representative's systems.

In a case where an applicant relies solely on electronic means to record and monitor time limits, the regular making of back-up copies, or some equivalent form of securing data, will generally be an elementary precaution.

7. For all these reasons, the Board finds that the applicant has not demonstrated that, in spite of all due care required by the circumstances having been taken, he was unable to observe the time limit for filing the grounds of appeal. The requirements of Article 122(1) EPC are thus not met.

Order

For these reasons it is decided that:

The application for re-instatement of rights is refused.

The Registrar:

The Chairman:

A. Counillon

U. Krause