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**Datasheet for the decision
of 30 November 2007**

Case Number: T 0473/07 - 3.5.01
Application Number: 01309351.3
Publication Number: 1204059
IPC: G06F 17/60, G06F 17/32
Language of the proceedings: EN

Title of invention:
Automated service scheduling system

Applicant:
Harrah's Operating Company Inc.

Opponent:
-

Headword:
Scheduling system / HARRAH'S OPERATING COMPANY

Relevant legal provisions:
-

Relevant legal provisions (EPC 1973):
EPC Art. 108, 122
EPC R. 65(1), 78(2), 85

Keyword:
"All due care taken by representative relying exclusively on a computer program for calculating the time limits for filing an appeal and the statement of grounds of appeal (no)"
"Re-establishment of rights (no)"
"Admissibility of appeal (no)"

Decisions cited:
J 0005/80, J 0016/82, J 0001/07, T 0719/03, T 1561/05,
T 0439/06

Catchword:

Relying exclusively on a time limit generated by a computer program and refraining even from a plausibility check does not meet the all-due-care requirement of Article 122(1) EPC (point 3.4 of the reasons).



Case Number: T 0473/07 - 3.5.01

D E C I S I O N
of the Technical Board of Appeal 3.5.01
of 30 November 2007

Appellant: Harrah's Operating Company Inc.
1 Harrah's Court
Las Vegas, NV 89119-4312 (US)

Representative: McLeish, Nicholas Alistair Maxwell et al.
Boulton Wade Tennant
Verulam Gardens
70 Gray's Inn Road
London WC1X 8BT (GB)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 24 October 2006
refusing European application No. 01309351.3
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: S. Steinbrener
Members: K. Bumès
A. Pignatelli

Summary of Facts and Submissions

- I. By a decision posted on 24 October 2006, the examining division refused European patent application 01309351.3 for lack of inventive step (Article 56 EPC).
- II. On 20 December 2006, the applicant filed a notice of appeal against that decision and requested that the decision be cancelled and that a patent be granted based upon grounds of appeal that would follow in due course.
- III. A statement setting out the grounds of appeal was filed by facsimile letter on 6 March 2007. The appellant requested that the decision under appeal be set aside and a patent be granted on the basis of claims labelled "Main Request" or "Auxiliary Request" as submitted during the first-instance proceedings.
- IV. By a communication dated 2 May 2007, the Board's registrar informed the appellant that the statement of grounds of appeal appeared to have been filed out of time. Therefore, 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.
- V. By a facsimile letter dated 2 July 2007, the appellant applied for re-establishment under Article 122 EPC of the right to file the statement of grounds. The fee for re-establishment of rights was paid on the same day by an enclosed debit order. The appellant's representative argued that he was unable to observe the time limit for filing the grounds of appeal (5 March 2007) in spite of all due care required by the circumstances having been

taken. In the event that the Board was not willing to accept the request for restitution, oral proceedings were requested as a precaution.

VI. Oral proceedings before the Board took place on 30 November 2007. The appellant's representatives, Mr C. and Mr D., portrayed their system for recording and monitoring time limits and explained why the system failed in the specific circumstances of the case.

(a) On receiving a communication from the European Patent Office, the date of the communication is entered into the computerised records system by the law firm's records department together with the dates 2 months and 4 months from that date. The system then calculates the time limits for filing the appeal and the statement of grounds of appeal, including the 10-day notification period (but excluding extensions under Rule 85 EPC).

The computerised system has been set up and tested by a team including another representative of the law firm, Mrs B. Since it was first implemented in December 2003, many tens of thousands of dates have been entered and deadlines calculated by the system without incident. Only the present case brought a programming error to light: the ten days provided for by Rule 78(2) EPC were not added to the mailing date of the refusal decision but to the end of the 4-month period stipulated by Article 108 EPC. The isolated error in the specific program module for calculating the time limit for filing the grounds of appeal from a decision of the examining division went unnoticed for several years because in practice the number of instances when this module was used was very low (e.g. 5 cases out of 6030

European applications currently prosecuted by representatives of the law firm).

- (b) Once the records department has entered the date of a communication and the dates 2 months and 4 months from that date, a clerk prints out a screen shot from the computerised record of the case showing any newly entered dates together with any deadlines calculated from it. The clerk then checks the newly entered dates and highlights them to confirm that the clerk has checked them and sends the print out to the responsible representative along with the associated communication. The representative then further checks the highlighted dates, i.e. the dates entered by the clerk, initials the print out and ticks off the entries on it to indicate that they have been double-checked.

A copy of the print out pertaining to the present case has been annexed (as annex A6) to the appellant's letter of 2 July 2007. As far as the appeal is concerned, the print out shows the following event date and due dates:

"Decision Issued	24-Oct-2006
Appeal Due	24-Dec-2006
Appeal Due + 10 Days	03-Jan-2007
File Statement of Grounds	24-Feb-2007
File Statement of Grounds + 10 Days	06-Mar-2007"

- (c) The dates outputted by the computerised system, i.e. the deadlines calculated automatically from the dates that have been entered manually, are *not* re-calculated by the checking representative.

Mr D. used to re-calculate deadlines scrupulously in

the beginning of the computerised records system but stopped that habit when he noticed that the computer-calculated deadlines matched his own calculations so that he regarded the computerised system as reliable. That confidence was never called into question until the present failure happened. Even if a calendar evaluation may show today, *ex post facto*, that the likelihood of a deadline being miscalculated by the incorrect program module was approx. 15% (namely roughly 50% for decisions notified in the last ten days of a month), it was possible for the law firm not to see any erroneous deadline for years bearing in mind that their number of appeal cases of that type was very low.

Therefore, Mr D. was under the impression that the time limit for filing the statement of grounds of appeal in the present case was 6 March 2007. He began preparing the statement of grounds on 1 March 2007. Due to consultations with the appellant, the actual filing of the statement did not take place until the date which he believed to be the last day of the 4-month period.

- (d) The representatives consider their records system to implement a double check system, as required by the jurisprudence of the Boards of Appeal, in that a qualified representative checks the only potential source of human error (i.e. the dates entered and checked by the records clerks), and the resulting deadlines are then calculated automatically by a computerised system whose rules of calculation have been established by another qualified representative.

In addition, the representatives use a triple reminder

system for watching deadlines that have been stored in their computerised records system.

- (e) In summary, the representatives regard the present failure as a coincidental occurrence in an otherwise reliable records system. Only one of the computerised rules for calculating deadlines contained an isolated inexplicable mistake, and that rule concerned a very rare case. Such an unexpected failure, caused by a coincidence of unlikely factors, cannot be avoided in real-world conditions.

VII. The Board pronounced its decision at the end of the oral proceedings.

Reasons for the decision

1. It is undisputed that the statement of grounds of appeal was filed outside the 4-month period stipulated by Article 108 EPC which expired on Monday 5 March 2007 (considering Rules 78(2) and 85(1) EPC). To avoid the appeal being rejected as inadmissible, the appellant has applied for a re-establishment of rights pursuant to Article 122 EPC.
2. *Admissibility of the application for re-establishment*
 - 2.1 According to Article 122(1) EPC, the applicant for a European patent 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 European Patent Office shall, upon application, have his rights re-established if the non-observance in question has the direct consequence, by virtue of the EPC, of causing

the loss of a means of redress. In the present case, the non-observance of the time limit has the direct consequence that the right to appeal is lost. Article 122 EPC is therefore applicable.

2.2 Under Article 122(2) EPC, the application for re-establishment has to be filed in writing within two months from the removal of the cause of non-compliance with the time limit. In the present case, the application was filed in writing on 2 July 2007, i.e. within two months from the date when the non-compliance with the time limit for filing the statement of grounds had been notified to the appellant (registrar's letter of 2 May 2007). The omitted act must be completed within the same period. In the present case, the omitted act has been completed by the statement of grounds filed on 6 March 2007. The application is only admissible within one year following the expiry of the unobserved time limit. Also this condition is fulfilled in the present case.

2.3 According to Article 122(3) EPC, the application must state the grounds on which it is based and must set out the facts on which it relies. A fee for re-establishment has to be paid. The application for re-establishment filed on 2 July 2007 contained a statement of the grounds for re-establishment and set out the facts on which it relied. The fee for re-establishment was paid on the same date.

2.4 The application for re-establishment thus fulfils the formal requirements laid down in paragraphs 2 and 3 of Article 122 EPC and is therefore admissible.

3. *Allowability of the application for re-establishment*

An application for re-establishment of an applicant which is represented by a professional representative acting on its behalf is only allowable if both the applicant and the representative have taken all due care required by the circumstances.

In the present case, the applicant having relied on a professional representative seems to have met the necessary standard of care. However, the Board holds that the representative did not take all due care required by the circumstances.

- 3.1 Regarding the duties of a representative, the established jurisprudence of the Boards of Appeal recognises that not everything must be done personally by the representative. A representative can delegate tasks to assistants. If this is the case, it is incumbent upon the representative to choose for the work a suitable person, properly instructed in the tasks to be performed, and to exercise reasonable supervision over the work (see J 5/80, OJ EPO 1981, 343; J 16/82, OJ EPO 1983, 262, among many others). If the representative has done this with all due care, then a mistake made by an assistant may not be imputed to the representative when the loss of a time limit derives directly from a mistake made by the assistant. It is then considered that the representative was unable to observe the time limit because an external circumstance (the mistake by the assistant) prevented him.

3.2 However, as stated in decision T 439/06 (OJ EPO 2007, 491, point 10), once the representative gets the file on his desk for his own action, in order to comply with the relevant time limit, responsibility passes over to him in all respects. The administrative system has worked in so far that the file was forwarded to him. Once it is in his area of responsibility, it is recognised in the jurisprudence of the Boards of appeal (see T 719/03 of 14 October 2004; T 1561/05 of 17 October 2006; J 1/07 of 25 July 2007; all not published in OJ EPO; T 439/06, *loc. cit.*) that it belongs to the general duties of the representative to perform his own calculation of time limits, irrespective of the reliability of the assistant.

The time limits laid down in Article 108 EPC for filing an appeal against a refusal decision are absolutely critical since if they are missed the application remains refused because no other ordinary remedy, such as further processing (Article 121 EPC), is available. Therefore, those time limits need specific attention (T 439/06, *loc. cit.*, point 8).

3.3 In more general terms, the Board holds that the specific attention required for appeal time limits and the duty to perform his own calculation of time limits remains with the representative if he receives the file on his desk in time, and cannot be completely delegated from the representative to a support infrastructure, whether this is implemented by human assistants or a computerised records system, because the representative bears the final responsibility for the case.

3.4 A computerised records system may be a useful modern scheduling tool providing organisational benefits. On the other hand, if a recording and monitoring scheme is set up in which the representative checks the recorded time limits only once and the remainder of the scheme depends fully on a correct performance of his initial check, he has to use this opportunity to rule out errors also in respect of automatically calculated time limits.

The representative's practice of checking only the dates entered by his records clerks while relying on the resulting time limits calculated by the computerised system does not rule out errors. Modern real-world offices comprise computerised systems but program deficiencies are also a well-known part of that reality and cannot be absolutely excluded. Even programs which after some time of usage appear to be proven may produce unexpected results in rare constellations of parameters as demonstrated in the present case (although a more comprehensive initial test of the program might have detected the bug). Therefore, relying exclusively on a time limit generated by a computer program and refraining even from a plausibility check does not meet the all-due-care requirement of Article 122(1) EPC.

3.5 In the present case, a plausibility check would have revealed that the computer-generated time limits for filing the notice of appeal ("3-Jan-2007") and the statement of grounds of appeal ("6-Mar-2007") did not correspond to each other, in particular in view of the fact that the computerised system does not consider extensions under Rule 85 EPC. Incidentally, even an

extension by a normal weekend would not explain a difference of three days.

Such a plausibility check should have been carried out by the representative when he checked the dates entered by his records department, or at the latest when he began preparing the grounds of appeal on 1 March 2007.

- 3.6 The representatives have emphasised that the number of appeals from decisions of the examining division is very low in their law firm (e.g. 5 in 6030 cases). That explains why the programming mistake was not detected for several years.

However, the low appeal figure also implies that it would have been easy for the representatives to pay specific attention to the critical time limits of those few cases. Not having done so corroborates the finding that not all due care required by the circumstances has been taken.

While it is understandable that confidence in a computer system can build up, the Board holds that, due to the nature of the responsibility of the representative for the case and due to the fact that it is known that computer programs are prone to errors, all due care requires checking all steps in dealing with the case even when a computer system has been used.

4. The Board judges that in the present case the representative has not taken all due care required by the significance of the time limit for filing the statement of grounds of appeal. Therefore, the application for re-establishment of rights fails.

5. As the statement of grounds of appeal has been filed after expiry of the 4-month term laid down in Article 108 EPC, the Board has to reject the appeal as inadmissible (Rule 65(1) EPC).

Order

For these reasons it is decided that:

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

The Registrar:

The Chairman:

T. Buschek

S. Steinbrener