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**Datasheet for the decision  
of 15 September 2014**

**Case Number:** T 0649/13 - 3.2.04  
**Application Number:** 08737542.4  
**Publication Number:** 2111139  
**IPC:** A47C17/00, A47C27/00, B68G7/06,  
A47C5/00, B68G1/00  
**Language of the proceedings:** EN

**Title of invention:**  
SYSTEM FOR TRANSFERRING FILL MATERIAL

**Applicant:**  
Ambient Lounge Ltd

**Headword:**  
Re-establishment of rights (restitutio in integrum) into the  
period for paying the annuity while an appeal is pending:  
Board of Appeal competent to decide such request (yes)  
Request granted (no)

**Relevant legal provisions:**

**Keyword:**

**Decisions cited:**

**Catchword:**  
Re-establishment of rights (restitutio in integrum)  
Competence of the Boards of Appeal (yes)



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Case Number: T 0649/13 - 3.2.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.04**  
**of 15 September 2014**

**Appellant:** Ambient Lounge Ltd  
(Applicant) 8 Roya Crt.  
Mt. Martha, Victoria 3934 (AU)

**Representative:** Johansson, Lars-Erik  
Hynell Patenttjänst AB  
Patron Carls väg 2  
683 40 Uddeholm (SE)

**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 18 January 2013  
refusing European patent application No.  
08737542.4 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** C. Heath  
**Members:** J. Wright  
  
E. Frank

## **Summary of Facts and Submissions**

I. Application no. 08737542.4 (subsequently EP 2111139) was refused by written decision of the examination division dated 18 January 2013. On 5 March 2013, the applicant via its European representative filed a notice and grounds appeal, and paid the corresponding appeal fee. Inter alia, a request for oral proceedings was made.

II. On 4 April 2013, the applicant, again via its European representative, received a notice from the Office drawing attention to the fact that the 6th annuity, due on 28 February 2013, had not been paid, but could still be paid with a surcharge until the last day of August 2013.

III. On 30 August 2013 the representative informed the applicant that urgent action was required to maintain the patent application, and that payment should be made by the following day. Although the applicant's written answer on 31 August in the late afternoon was rather non-committal, the representative paid the annuity on the same evening after a further telephone conversation with his client. Mistakenly, however, the surcharge was not paid.

IV. According to the representative's submissions, on 25 September 2013, he received "information from Patrafee that the application EP 2111139 has lapsed due to insufficient payment of the annuity." Patrafee is a Swedish organisation that, inter alia, deals with the management of renewal fees.

V. On 16 December 2013, the applicant made a reasoned request for re-establishment of rights and paid both the fee for such request, and the surcharge for the belated payment of the 6th annuity. According to the representative's submissions, the person who had paid the annuity on 31 August 2013 was a very

experienced and reliable paralegal who had inexplicably forgotten to pay the surcharge as well.

VI. In its summons to oral proceedings scheduled for 15 September 2014, the Board as a preliminary point indicated that while it held itself competent to decide about the issue of re-establishment of rights in accordance with decision T 555/08, such request appeared to be filed out of time.

VII. In its latest submission dated 8 August 2014, the applicant's representative indicated that he would not attend oral proceedings, and in addition withdrew the request for oral proceedings.

VIII. Oral proceedings were held as scheduled on 15 September 2014 in the absence of the appellant, at the end of which a decision was announced.

### **Reasons for the Decision**

1. This is a case for the re-establishment of rights (restitutio in integrum) into the period of time for paying the 6th annuity (with surcharge) for European patent application 08737542.4 (subsequently EP 2111139). This annuity had to be paid by 31 August 2013, a point in time when the appeal against the refusal of the application was pending before the Boards of Appeal. As the surcharge for the 6th annuity was not paid, the annuity is deemed not to have been paid at all. Bar a re-establishment of rights regarding the period for paying the annuity, the application is deemed withdrawn, thereby also terminating these appeal proceedings.

2. The Board in this case first has to establish whether it is competent to deal with the request for re-establishment of rights, or whether the examining (or any other) division of the office should do so. In academic writings, it is sometimes opined that the department of first instance rather than the Boards of Appeal should decide about such request: Benkhard/Schäfers, EPÜ Kommentar, 2nd ed., Art. 122 note 129; P. Hövelmann, Die isolierte Wiedereinsetzung, Mitteilungen der deutschen Patentanwälte 1997, 237. Hövelmann bases his view on the clear separation between the German Patent Office and the Federal Patent Court, a consideration that is not relevant for the EPO. Decisions **T 555/08** of 4 June 2013, **T 708/08** of 3 December 2010 and **T 1935/08** of 17 December 2010 considered that the Boards were competent to deal with the issue.

3.1 In the case at issue, it appears that no notice under Rule 112(1) EPC (loss of rights due to the non-payment of the annuity) has been sent. Rather, the loss of rights has been brought to the appellant's attention by a third party. No rule can be found in the provisions of Arts. 15 - 21 EPC that would allocate a case of re-establishment related to a loss of rights by law (in contrast to the loss of rights due to a decision) to any specific department of the Office. However, based on Art. 21 EPC ("The Boards of Appeal shall be responsible for the examination of appeals"), case law has developed the rule that issues that arise during appeal proceedings by their nature belong to the exclusive competence of the Boards of Appeal. This was first so held in the decision **T 473/91**, OJ EPO 1993, 630 para. 1.2, and further developed by case law that specified exceptions to this general rule, e.g. the correction of the first-instance protocol (**T 1198/97** of 5 March 2001), or the correction of obvious errors in first-instance decisions (**G 8/95**, OJ EPO 1986, 481, para. 3.4). What can be deduced from these decisions is the general competence of the Boards of Appeal during the appeal phase, unless specific reasons call for the competence of the first instance. Another exception

stipulated by law is the interlocutory revision according to Art. 109 EPC.

3.2 The interest in maintaining the unity of the application expressed in the above-mentioned decision **T 473/91**, as well as in decision **J 29/94** (decision of reasons 10 March 1997 point 1.2.1 of the reasons), speaks in favour of the Board being competent to handle all issues that arise during the appeal phase and that are intrinsically linked to the appeal proceedings as such. Case **T 473/91** has affirmed this for a re-establishment request regarding a loss of rights due to the late filing of the appeal. Missing the appeal period means that no appeal proceedings are commenced. In the case at issue, a loss of rights due to the non-payment of annuities automatically terminates the appeal proceedings. The issue of whether or not an appeal is pending is therefore directly linked to a request for re-establishment of rights regarding failure to pay the annuity made at the appeal stage.

3.3 The Board thus takes the view that it has jurisdiction to decide over the request for re-establishment of rights (restitutio in integrum) according to Art. 111(1st paragraph, second sentence) EPC.

4. According to Rule 136(1) EPC, a request for re-establishment of rights has to be made within two months of the "removal of the cause of non-compliance", generally understood as the date the applicant has become aware that things went wrong. In the case at issue, the act that led the application to lapse was the failure to pay the surcharge fee. According to his own submission, the applicant's representative became aware thereof on 25 September 2013. The request for re-establishment, however, was filed only on 16 December 2013, in other words more than two months after the removal of the cause of non-compliance. The request was therefore filed out of time, a defect that according to Art. 122(4) EPC cannot be remedied.

5. The request therefore has to be dismissed as inadmissible. As a consequence, the patent application has lapsed, and the corresponding appeal proceedings are thereby terminated.

6. As the request for re-establishment of rights was filed out of time, the corresponding fee has been paid without cause and has to be refunded. The same holds true for the payment of the sixth annuity, and the surcharge fee, as at the time of payment the patent application had already lapsed, and the purpose these payments were meant to achieve - maintenance of the patent - could no longer be achieved. The same holds true for any annuities that were subsequently paid.

**Order**

**For these reasons it is decided that:**

1. *The request for re-establishment of rights is refused as inadmissible.*
2. *The appeal proceedings are terminated.*
3. *The fee for the request of a re-establishment of rights (610 Euro), the surcharge fee for the 6th annuity (497.50), the renewal fee for the 6th year (995 Euro) and all subsequently paid annuities are to be re-imbursed.*

The Registrar:

The Chairman:



G. Magouliotis

C. Heath

Decision electronically authenticated