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Datasheet for the decision of 8 December 2022

Case Number: T 1005/18 - 3.5.04

Application Number: 05806479.1

Publication Number: 1797719

IPC: H04N7/24

Language of the proceedings: EN

Title of invention:
INTERACTIVE VIDEO COLLABORATION FRAMEWORK

Applicant:
Vectormax Corporation

Headword:

Relevant legal provisions:
EPC Art. 122(1)

Keyword:
Re-establishment of rights - due care on the part of the applicant (no)

Decisions cited:
J 0003/93, T 2120/14

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Catchword:

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Case Number: T 1005/18 - 3.5.04

D E C I S I O N
of Technical Board of Appeal 3.5.04
of 8 December 2022

Appellant: (Applicant)	Vectormax Corporation 4 Dubon Court Farmingdale, NY 11735 (US)
Representative:	Murgitroyd & Company Murgitroyd House 165 - 169 Scotland Street Glasgow G5 8PL (GB)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 30 November 2017 refusing European patent application No. 05806479.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman	B. Müller
Members:	F. Sanahuja
	M. Paci

Summary of Facts and Submissions

I. In its communication under Article 15(1) RPBA of 22 September 2022, the board summarised the facts and submissions and gave its preliminary and non-binding opinion on the case. The communication is reproduced verbatim below (points 1 to 5, points 6 and 7 relating to formalities have been omitted).

1. With a letter of 4 July 2022, the applicant's [European] representative, referring to the EPO's communication pursuant to Rule 112(1) EPC dated 6 May 2022, requested re-establishment of rights in accordance with Article 122 EPC in respect of the application. The representative also paid the fee for re-establishment of rights and the renewal fee in accordance with Rule 51(1) EPC and additional fee in accordance with Rule 51(2) for the 17th year.

2. As to the time limit for filing the request, the representative submitted that, on 4 May 2022, he received a telephone call from the EPO informing him that the application was deemed withdrawn under Article 86(1) EPC for failure to pay the renewal fee for the 17th year and additional fee. Prior to receipt of this communication, it was not realised by the applicant or the representative that the renewal fee and additional fee had not been paid. Thus, the telephone call of 4 May 2022 was considered to be the event by which the applicant became aware of the non-compliance with the deadline. Thus this request was considered to be duly filed by the deadline of 4 July 2022.

By filing the present request, payment of the fee for

re-establishment of rights and the renewal fee and additional fee for the 17th year it was considered that the omitted acts had been "requested" before the end of the period set by Rule 136(1) EPC.

It was also understood that the filing of the present request was within one year from expiry of the unobserved period according to Rule 136(1) EPC.

3. The representative submitted the following grounds and facts for the request.

3.1 Reminders were sent by the representative's law firm to the applicant's US attorney regarding the renewal fee and additional fee, and corresponding reminders were sent by the applicant's US attorney to the applicant.

3.2 The reminders were sent to the applicant at the same time as reminders relating to other patent renewals for the applicant, for patents having the same filing date and same due date for renewal as the present application.

3.3 At the time of the due date of the present application, the applicant was also engaged in simultaneously maintaining patents in multiple global jurisdictions, including Asia, North America and South America.

3.4 In addition, during that period of time, the applicant was intensely engaged in an effort to close several key transactions.

3.5 As a consequence of the combination of these factors, the applicant inadvertently failed to timely instruct payment of the renewal fee and additional fee in

accordance with Rule 51(2) EPC. This failure represented an inadvertent error on the part of the applicant leading to non-payment of the renewal fee and additional fee. This failure was inadvertent and did not represent a desire to relinquish or abandon the applicant's rights to the instant patent.

A corresponding declaration relying on factors 3.3 and 3.4 signed by the applicant's Chief Legal Officer and Chief Executive Officer was enclosed.

It was submitted that all due care was exercised and an isolated mistake led to the non-payment of the 17th year renewal fee and additional fee.

4. The board's preliminary and non-binding view on the prospects of success of the request

4.1 Further to the representative's submissions to this effect, the board considers that the request for re-establishment was timely filed (Rule 136(1) EPC). The further admissibility requirements need not be addressed, given that the board considers the request not to be allowable.

4.2 On the basis of the representative's assertions, the board would consider that both the applicant's representative and US attorney, having reminded the applicant of the due date for paying the 17th year renewal fee and the additional fee exercised all due care required by the circumstances pursuant to Article 122(1) EPC.

4.3 This cannot be said, however, of the applicant itself, a US company, represented by its Chief Legal Officer

and Chief Executive Officer. First, the applicant itself must also exercise all due care (point 4.4 below). Second, the officer's inadvertent failure to timely instruct payment of the fees in issue may have been an isolated mistake on his part, as the European representative asserted. But this isolated mistake committed by the Chief Legal Officer and Chief Executive Officer cannot be excused (see point 4.5 below).

4.4 The applicant itself must also exercise all due care. In this context the board draws attention to the following excerpt from the EPO publication "Case Law of the Boards of Appeal of the European Patent Office", 10th edition 2022 (hereinafter: "Case Law"), section III.E.5.5.1 which reads:

> In J 3/93 the Legal Board ruled that the duty to exercise all due care stipulated by Art. 122 EPC 1973 applied first and foremost to the applicant and then, by virtue of the delegation implicit in his appointment, to the professional representative authorised to represent the applicant before the EPO. The fact that the representative had acted correctly did not exempt his client from suffering the consequences of his own mistakes, or even negligence (see also J 16/93, J 17/03, J 1/07, J 1/13).
>
> See also the summary of T 381/93 of 12 August 1994 in the same section of the Case Law.

In case J 3/93 the applicant had not reacted to two letters by the professional representative reminding the applicant of a risk of loss of rights. Similarly, in the case in hand, the applicant had not heeded reminders by its US attorney.

4.5 An isolated mistake by a senior executive of a company, such as the Chief Legal Officer and Chief Executive

Officer in this case, may in principle not be excused. This finding was made in T 2120/14 and summarised in the same section of the Case Law:

In T 2120/14 the board found the examining division's finding of lack of due care by the applicant to be justified in the circumstances, in which the observance of a time limit depended entirely on a single person who, in view of his impending extensive workload and travel, did not take the necessary precautions to ensure that the time limit could be met in case he was prevented from giving timely instructions. The board held that it was clear from the *travaux préparatoires* to Art. 122 EPC that the **possibility of excusing the negligence** of an employee who normally carries out his work in a satisfactory manner was **not intended to be extended to the applicant** or its professional representative (see R 18/13). In the case in hand it was an **executive of the company** who had failed to exercise all due care, who the board found was acting on behalf of the appellant. (Emphasis added.)

In the case in hand it was not "impending extensive workload and travel", which allegedly led to the failure to timely instruct to pay the 17th year renewal fee and the additional fee, but the "combination of the factors" set out above, according to the representative those in point 3.2 to 3.4, or, according to the Chief Legal Officer and Chief Executive Officer, the factors in points 3.3 and 3.4, i.e.
- patent renewals for other patents with the same filing and renewal dates (3.2),
- simultaneously maintaining patents in multiple global jurisdictions (3.3) and
- being intensely engaged in an effort to close several key transactions (3.4).

In this board's view it can be expected from a Chief Legal Officer and Chief Executive Officer to take precautions to avoid being prevented from missing time limits due to this combination of factors, e.g. by assigning part of the tasks to an employee. There is no

apparent need for the Chief Legal Officer and Chief Executive Officer in this case to deal with patent renewals himself.
This applies at least in the absence of any assertions having been made of the presence of "exceptional circumstances" in the meaning of the case law as summarised in section III.E.5.3 of the publication "Case Law".

5. In the light of the above, it is to be expected that the request for re-establishment of rights will be refused.

…

[end of the communication under Article 15(1) RPBA, with points 6 and 7 omitted]

II. In a letter of 5 December 2022, the European representative informed the EPO that he would not be attending the oral proceedings via videoconference on 8 December 2022 in connection with the application.

III. Oral proceedings were held as scheduled. At their end, the Chairman announced the board's decision.

Reasons for the Decision

1. The applicant's (European) representative requested "re-establishment of rights in accordance with Article 122 EPC of the ... application", thus requesting by implication that the non-observance of

the time limit for paying the renewal fee for the 17th year and the additional fee be undone and those fees be deemed to have been paid in time.

2. In its communication under Article 15(1) RPBA reproduced verbatim nearly in its entirety above, the board, in particular, had drawn attention to the case law according to which the applicant itself, a US company, represented by its Chief Legal Officer and Chief Executive Officer, had to exercise all due care; see point 4 of the communication. For the reasons given in that point, however, the board preliminarily found that the applicant so represented had not exercised all due care.

3. The applicant's representative made no comments, in his letter of 5 December 2022 or otherwise, on the board's preliminary findings made in its aforementioned communication. Nor has any other response been received thereto. The board sees no reason to depart from those findings, which therefore now become final.

As a consequence, the request for re-establishment of rights in respect of the application (see point 1 of the Reasons above) must be refused.

Order

For these reasons it is decided that:

The request for re-establishment of rights is refused.

The Registrar: The Chairman:

K. Boelicke B. Müller

Decision electronically authenticated