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**Datasheet for the decision
of 6 December 2022**

Case Number: T 1485/19 - 3.5.04

Application Number: 13706334.3

Publication Number: 2810248

IPC: G06T5/50

Language of the proceedings: EN

Title of invention:

FILTERING SYSTEMS AND METHODS FOR SUPPRESSION OF NON-
STATIONARY REVERBERATION IN ULTRASOUND IMAGES

Applicant:

University of Washington through its Center for
Commercialization
Mirabilis Medica Inc.

Headword:

Relevant legal provisions:

EPC R. 103

Keyword:

Withdrawal of appeal when application no longer pending
Reimbursement of the appeal fee in part (no)

Decisions cited:

J 0004/11, T 1402/13

Catchword:



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Case Number: T 1485/19 - 3.5.04

D E C I S I O N
of Technical Board of Appeal 3.5.04
of 6 December 2022

Appellant: University of Washington through its Center for
(Applicant 1) Commercialization
4311 11th Avenue NE
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Seattle, WA 98105 (US)

Appellant: Mirabilis Medica Inc.
(Applicant 2) 18706 North Creek Parkway, Suite 110
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Representative: Forresters IP LLP
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 28 November
2018 refusing European patent application
No. 13706334.3 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairwoman B. Willems
Members: B. Müller
M. Paci

Summary of Facts and Submissions

- I. Appeal had been filed against the refusal of European patent application number 13 706 334.3.
- II. In a communication of 7 October 2021, the EPO noted a loss of rights pursuant to Rule 112(1) EPC. In that communication it was stated that the European patent application was deemed to be withdrawn under Article 86(1) EPC. The renewal fee for the ninth year and the additional fee had "not been paid in due time / not been paid in full in due time." Several pertinent means of redress were mentioned in the communication.
- III. In its letter dated 27 October 2021, the appellant requested a refund of the appeal fee at 75% pursuant to Rule 103(2) EPC, "[s]ince the present application is deemed withdrawn."
- IV. In a communication of 3 December 2021, the board expressed the following preliminary view:

...at present, the appellant is **not entitled to any reimbursement** under Rule 103 EPC, **because it has not withdrawn its appeal** in the meaning of that provision.

The legal consequences of an application being deemed to be withdrawn pursuant to Article 86(1), third sentence, EPC, cannot be equalled to those of a withdrawal of the appeal in the meaning of Rule 103 EPC. In this context, the board draws the appellant's attention to the decision in case **T 1402/13 [of 31 May 2016], in particular points 5 and 6.**

The finding of the EPO that the application is deemed to be withdrawn could only be undone if one of the **means of redress mentioned in the communication under Rule 112 EPC** were filed and had success. The fact that these means are available does not mean that the

application continues to be pending; see J 4/11 (OJ EPO 2012, 516).

In case the appellant files any means of redress and if such means has success, the appellant may proceed to withdrawing the appeal. Any reimbursement of the appeal fee will then be governed by the various detailed provisions of Rule 103 EPC.

(Emphasis added.)

V. In a letter of 6 January 2022, the appellant wrote:

We hereby withdraw the appeal filed in connection with the present application.

We request a 75% refund of the appeal fee pursuant to Rule 103(2) EPC.

VI. Further to this letter, the board, on 28 February 2022, issued another communication (hereinafter: "the second communication") *inter alia* referring again to point 6 of T 1402/13 of 31 May 2016 and reproducing it in pertinent part (that part being identical with catchword 3):

...[I]n order to claim entitlement to reimbursement under Rule 103(2) EPC, the appellant is required, **at a time when its application is still pending**, to make a procedural declaration that leaves no doubt that **withdrawal** of the appeal is intended. This has not been the case here... (Emphasis added.)

As to the reasons for this conclusion the board referred again to point 5 of T 1402/13.

The board repeated that the EPO's finding that the application was deemed to be withdrawn could only be undone if one of the means of redress mentioned in the communication under Rule 112(1) EPC were filed and had success. The board specified those means as follows:

(i) Request for a decision (Rule 112(2) EPC)

- (ii) Re-establishment of rights (Article 122 EPC)
- (iii) Request under Article 7(3) and (4) of the Rules relating to Fees.

The board then noted that the appellant had, at the point in time of issuance of its second communication, not filed any of these means of redress. It followed that, at that point in time, the application that had been under appeal was not pending. This in turn meant that the appellant's withdrawal of the application of 6 January 2022, at that point in time, had no object. In the absence of a valid withdrawal of the application, the requirements of Rule 103 EPC were not met so that reimbursement under any of the provisions of that rule could, at that point in time, not be ordered.

The board invited the appellant to file observations in reply to its second communication within a period of two months of its notification. In the event that no reply was received within this period, the board announced that it would proceed to issue a decision.

Reasons for the Decision

1. Within the period of time set for a reply to the board's second communication (point VI above), the appellant submitted no such reply. Nor has it furnished a reply subsequent to that period.
2. Furthermore, the appellant has not filed any of the means of redress mentioned in the communication under Rule 112(1) EPC (*ibid.*). All the corresponding time limits have expired. This includes the time limit for filing a request for re-establishment of rights under Article 122(1) EPC. Pursuant to Rule 136(1) EPC:

Any request for re-establishment of rights under Article 122, paragraph 1, shall be filed in writing within two months of the removal of the cause of non-compliance with the period, but at the latest within one year of expiry of the unobserved time limit.

The cause for non-compliance with the time limit for paying the renewal fee in issue was removed at the latest on 7 October 2021 when the communication under Rule 112(1) EPC was notified. The one-year period mentioned in Rule 136(1) EPC has now in any case come to an end.

3. In the light of the foregoing, the board sees no reasons why it should depart from the view that it expressed in its two communications of 3 December 2021 and 28 February 2022, the contents of which have been set out in points IV and VI above. As a consequence, the views expressed in those communications become final.
4. Accordingly, the appellant not having withdrawn the appeal against the refusal of the application during the pendency of the application, it is not entitled to reimbursement of the appeal fee in any amount under the provisions of Rule 103 EPC. The appellant's request for reimbursement of the appeal fee in the amount of 75% pursuant to Rule 103(2) EPC must therefore be refused.

Order

For these reasons it is decided that:

The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairwoman:



K. Boelicke

B. Willems

Decision electronically authenticated