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Aktenzeichen / Case Number / N^o du recours : T 166/87 - 3.3.1

Anmeldenummer / Filing No / N^o de la demande : 83 304 750.9

Veröffentlichungs-Nr. / Publication No / N^o de la publication : 0 104 741

Bezeichnung der Erfindung: Process for growing crystalline material
Title of invention:
Titre de l'invention :

Klassifikation / Classification / Classement : C30B 11/00

ENTSCHEIDUNG / DECISION

vom / of / du 16 May 1988

Anmelder / Applicant / Demandeur : Western Electric Company, Incorporated

Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence :

EPO / EPC / CBE Art. 122

Kennwort / Keyword / Mot clé : Restitutio in integrum

Leitsatz / Headnote / Sommaire

Europäisches
Patentamt
Beschwerdekammern

European Patent
Office
Boards of Appeal

Office européen
des brevets
Chambres de recours



Case Number : T 166/87 - 3.3.1

INTERLOCUTORY DECISION
of the Technical Board of Appeal 3.3.1
of 16 May 1988

Appellant : Western Electric Company, Incorporated
222 Broadway
New York, NY 10038
USA

Representative : Watts, Christopher Malcolm Kelway, Dr.
Western Electric Company Limited
5, Mornington Road
Woodford Green
Essex, IG8 OTU
GB

Decision under appeal : Decision of Examining Division 018 of
the European Patent Office dated
28 January 1987 refusing European
patent application No. 83 304 750.9
pursuant to Article 97(1) EPC

Composition of the Board :

Chairman : K.J.A. Jahn
Members : G.D. Paterson
J.W. Arbouw

Summary of facts and submissions

- I. European patent application No. 83 304 750.9 was filed on 17 August 1983. Following its examination, a Decision dated 28 January 1987 was issued in which the application was refused. A notice of appeal was filed on 24 March 1987, and a statement of grounds of appeal was filed on 30 May 1987. The appeal fee was not paid within two months after the date of notification of the Decision. A communication drawing attention to this was issued on 11 June 1987. By letter dated 19 June 1987 and filed on 24 June 1987 the Appellant filed an application under Article 122 EPC for re-establishment of rights.

- II. In the letter dated 19 June 1987 the representative of the Appellant explained that on 13 March 1987 he had been instructed to file an appeal, which he had duly done. On 26 March 1987 he had been instructed as to the grounds for appeal, and at this point he had noticed that the file did not contain a copy voucher for the appeal fee. Enquiries showed that the appeal fee had not been paid. The application under Article 122 EPC was sent concurrently with payment of the appeal fee and the re-establishment fee on 19 June 1987.

- III. As grounds for re-establishment, the representative explained that in the case of a fee such as an appeal fee, which is a one-off payment and not a routine part of a normal patent application, his normal procedure is to write a note to the Office Manager in manuscript, informing her that the fee is due. The note is attached to the file together with the notice of appeal and the file copy, and after the notice of appeal is signed by the representative, the file is passed to the Office Manager for processing.

The notice of appeal would be drafted in manuscript, and the draft would remain in the file until discarded, usually at a later date.

In the present case the representative believes that after signing the notice of appeal, he must have thrown away the manuscript draft of the notice of appeal, and that the manuscript note instructing payment of the appeal must have been thrown away at the same time. It therefore never reached the Office Manager, and the appeal fee was accordingly not paid.

In response to a communication from the rapporteur, the representative submitted that within a particular office a procedural system can be shown to be sufficiently satisfactory so as to satisfy the requirement of "all due care" either by pointing to the existence of double-cheek arrangements, or by demonstrating that it normally has operated reliably. In the present case the patent department of the Appellant consists of only 7 full-time staff who work in close contact with one another. Evidence was produced to the effect that the procedural system which had been applied for many years was normally satisfactory. Reliance was placed upon Decision J2 and 3/86 "Isolated mistake/Motorola" (OJ EPO 8/1987, page 362) and Decision T287/84 "Re-establishment/Brunswick" (OJ EPO 11/1985, page 333).

Reasons for the Decision

1. The application under Article 122 EPC was filed in due time and form, and is admissible.
2. The question whether a particular arrangement used in a particular office to ensure that procedural acts such as the payment of fees are completed in due time satisfies the requirement of "all due care" in Article 122 EPC must

depend upon the individual circumstances of each case. As the Boards of Appeal have previously observed, in a large firm where a large number of dates have to be monitored at any given time, it is normally to be expected that at least one effective cross-check is built into the system, at least for paying regular fees in relation to patent applications.

However, from the evidence in the present case it can be deduced that the patent department of the Appellant was not only relatively small, but normally worked in an efficient and personal manner. With such an office, employing normally reliable personnel, the Board accepts that a cross-check mechanism, especially in relation to one-off payments such as an appeal fee, could fairly be regarded as superfluous.

The fact that within a particular office, an isolated procedural mistake has occurred, does not mean that the system used in that office is unsatisfactory or unreasonable, such as to show a lack of due care on the part of the applicant. Even if a cross-check mechanism is included in a system employing normally careful and competent personnel, this does not guarantee that a rare human error will not cause non-compliance with a time limit. What has to be decided is whether the system during normal operation is reasonable and normally satisfactory, and therefore such as to establish that the applicant used "all due care required by the circumstances" in his efforts to observe the time limit in question.

In the present case the applicant's "system" was in essence the particular representative in the patent department who was entrusted with the filing and the prosecution of the appeal (together with the supporting secretarial staff and the Office Manager). On this occasion the representative has said that he made a mistake. Nevertheless, having

regard to the particular circumstances and background of the case, the Board is prepared to accept that the applicant's system was a reasonable one even in the absence of any checking mechanism or other clear safeguard in case of error. In the case of an office which normally operates satisfactorily, the extent to which it may be reasonable to provide extra safeguard mechanisms is a matter to be decided in each individual case.

The Board is accordingly satisfied that, in spite of all due care required by the circumstances having been taken by the applicant, he was unable to observe the time limit for paying the appeal fee in this case. The application for re-establishment of rights is therefore allowed.

Order

For these reasons, it is decided that:

The rights of the applicant are re-established in connection with the filing of an admissible appeal, and the notice of appeal in the letter dated 16 March 1987 shall therefore be considered as having been filed within two months after notification of the Decision of the Examining Division dated 28 January 1987.

The Registrar:



The Chairman:

