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Aktenzeichen / Case Number / N^o du recours : T 73/89 - 3.5.1

Anmeldenummer / Filing No / N^o de la demande : 82 304 717.0

Veröffentlichungs-Nr. / Publication No / N^o de la publication : 74 795

Bezeichnung der Erfindung: Image scanning apparatus and method

Title of invention:

Titre de l'invention :

Klassifikation / Classification / Classement : H04N 1/40

ENTSCHEIDUNG / DECISION

vom / of / du 7 August 1989

Anmelder / Applicant / Demandeur : Xerox Corporation

Patentinhaber / Proprietor of the patent /
Titulaire du brevet :

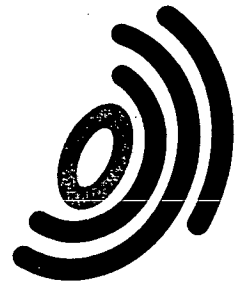
Einsprechender / Opponent / Opposant :

Stichwort / Headword / Référence : Restitutio/Xerox

EPÜ / EPC / CBE Articles 108, 122(1); Rule 65(1)

Schlagwort / Keyword / Mot clé : Restitutio in integrum (refused); due care of
representative not established

Leitsatz / Headnote / Sommaire



Case Number : T 73/89 - 3.5.1

DECISION
of the Technical Board of Appeal 3.5.1
of 7 August 1989

Appellant : Xerox Corporation
Xerox Square - 020
Rochester
New York 14644 (US)

Representative : Goode, Ian Roy
Rank Xerox Ltd.
Patent Department
364 Euston Road
LONDON NW1 3BL (GB)

Decision under appeal : Decision of Examining Division 058
of the European Patent Office
dated 17 August 1988 refusing
European patent application
No. 82 304 717.0 pursuant to
Article 97(1) EPC

Composition of the Board :

Chairman : E. Persson
Members : W.J.L. Wheeler
W. Riewald

Summary of Facts and Submissions

- I. Appellant's European patent application No. 82 304 717.0 was refused by a decision of the Examining Division 058 of the European Patent Office dated 17 August 1988.
- II. By a letter dated 29 September 1988, received at the EPO on 3 October 1988, the Appellant filed a notice of appeal against this decision and paid the appeal fee.
- III. On 21 December 1988, the Appellant sent a telex to the EPO (duly confirmed by a letter received on 24 December 1988) having the following content: "This is to request a two month extension of the time limit for responding to the communication dated 17.08.88 as I am having to consult with the applicant's attorneys in the United States."
- IV. On 4 January 1989 an EPO formalities officer informed the Appellant's Representative by telephone that no statement setting out the grounds of appeal had been received at the EPO within the prescribed time limit, which had expired on 27 December 1988.
- V. In a letter dated 3 February 1989, received at the EPO on 8 February 1989, the Appellant's Representative filed an application for re-establishment of rights. The letter was accompanied by a debit order for the fee for re-establishment of rights and a statement setting out the previously omitted grounds of appeal.
- VI. In support of the application for re-establishment of rights, the Appellant's Representative submitted essentially that the failure to file the grounds of appeal

on time had been unintentional. He had consulted with the instructing attorney in the United States in November 1988, but as a result of more urgent matters he had been unable to take up this case again until December 1988. The resignation of one of the three European Patent Attorneys working in the Appellant's London Patent Department at the end of November had meant that the remaining two had had to deal with the work normally done by three of them. The Appellant's London Patent Department had closed down from 23 December 1988 to 3 January 1989. On 21 December 1988 he had asked his secretary to prepare and send telexes requesting extensions on all those of his cases requiring responses before 3 January 1989, including the present case, because they had mistakenly thought that the time limit concerned was one set by the EPO rather than one fixed by the EPC. They had only realised the mistake when the EPO formalities officer had telephoned. If it had not been for the Christmas holidays, it was probable that the EPO would have notified them of the mistake before 27 December 1988, so that they could have filed the grounds of appeal in time. Despite due care having been taken, as evidenced by their keeping of a diary and their requesting of an extension, an accidental oversight due to pressure of work had led to the time limit not being observed.

- VII. In a communication dated 22 May 1989, the Board informed the Appellant that it was not convinced that all due care had been taken. The general impression given by the telex of 21 December 1988 was that the Appellant was not even aware of the fact that it was an appeal case with which he was dealing. Furthermore, the reason given in that telex, namely that the Appellant's Representative was having to consult with the attorneys in the United States, seemed to be in contradiction with the statement in the letter dated 3 February 1989, according to which the consultation had

already taken place in November 1988. It was questionable, whether the way in which the diary had been kept and used in this case amounted to taking all due care as required by Article 122(1) EPC.

VIII. In a telecopy sent on 21 July 1989 (confirmed by a letter received at the EPO on 26 July 1989) the Appellant's Representative explained that he had indeed been aware, from their diary listing, that the present case was an appeal case, but not that the term was inextensible. They relied on the attorney in charge of the case to check whether an extension is necessary or possible. They had now modified their system to identify, wherever possible, inextensible deadlines in their diary, although it was not immediately apparent from the various types of letters they received from the EPO whether a given term was extensible or not. The fact that a particular communication was concerned with an appeal did not always mean that the term for response was inextensible. He had not checked the files before asking his secretary to request the extensions, due to the pressure of work immediately before the Christmas holiday. The wording used in the telex was a standard form on his secretary's word processor. Normally, the actual words used to request an extension of a term for response would be relatively unimportant, provided the application number and relevant communication were properly identified (as was the case here). The consultation with his United States colleague had already taken place (before the telex was sent). Their diary system worked extremely well if used as intended. His failure to review the case was a "one off" oversight, due to human error under pressure. It was the only error of this kind he had made in more than 20 years of practice.

Reasons for the Decision

1. Since no statement of grounds of appeal was filed within the time limit set by Article 108 and Rule 78(3) EPC, the appeal should be rejected as inadmissible in application of Rule 65(1) EPC unless the application for re-establishment of rights is granted.
2. The application for re-establishment of rights fulfils the conditions laid down in paragraphs (2) and (3) of Article 122 EPC and is therefore admissible.
3. Although the EPO Boards of Appeal recognise that Article 122 EPC is intended to ensure that in appropriate cases the loss of substantive rights does not result from an isolated procedural mistake within a normally satisfactory system (J 2/86, OJ EPO, 1987, 362), this does not mean that they automatically grant every application for re-establishment of rights, whatever the circumstances. This would be contrary to Article 122(1) EPC which makes it a condition for re-establishment of rights that all due care required by the circumstances was taken.
4. Even if the Board accepts that the Appellant had set up a normally satisfactory diary system, it is not persuaded that the way in which the diary was used in the present case amounted to taking all due care required by the circumstances.
5. It appears that the Appellant's Representative was well aware of the danger that time limits could expire during the relatively long time that his office would be closed for the Christmas holiday 1988, and that rights could be lost as a result. It also appears that, in order to work properly, the normally satisfactory diary system required

a qualified attorney to check whether, in any particular case, an extension was necessary or possible. However, it appears that in the present case no such check was made; the Appellant's Representative simply asked his secretary to prepare and send telexes requesting extensions on all those of his cases requiring responses before 3 January 1989, without ascertaining for himself beforehand the nature of the actions required on those cases, or taking into account the possibility that one or more of the time limits might be inextensible. It further appears that after the telex of 21 December 1988 had been prepared he did not check it against the file to see whether its wording was appropriate for the case, or whether the reason given for the requested extension was correct. He appears to be of the opinion that this does not matter. However, if he had checked the file (as was his obligation according to his description of the system in use in the Appellant's London Patent Department), he might have discovered the mistake. As it was, it appears that the telex and the confirming letter were sent off without the Appellant's Representative having looked at the case.

6. The Appellant's Representative has not satisfied the Board that he took all due care required by the circumstances. On the contrary, it appears he took an unjustifiable risk by omitting to check the file in a situation in which he was called upon to do so.
7. Consequently, re-establishment of rights in respect of the time limit for filing the statement of grounds of appeal cannot be granted. Since the Appeal does not comply with Article 108 EPC, it has to be rejected as inadmissible in application of Rule 65(1) EPC.

Order

For these reasons, it is decided that:

1. The application for re-establishment of rights in respect of the time limit for filing the statement of grounds of appeal is refused.
2. The Appeal is rejected as inadmissible.

The Registrar:

The Chairman:

S. Fabiani

E. Persson