BESCHWERDEKAMMERN DES EUROPÄISCHEN PATENTAMTS

BOARDS OF APPEAL OF THE EUROPEAN PATENT OFFICE

CHAMBRES DE RECOURS DE L'OFFICE EUROPEEN DES BREVETS

Publication in the Official Journal Yes / ~~No~~

File Number: T 473/91 - 3.5.1

Application No.: 84 304 471.0

Publication No.: 0 130 815

Title of invention: Noise reduction circuit and method

Classification: H03G 9/02

INTERLOCUTORY DECISION
of 9 April 1992

Applicant: WEGENER COMMUNICATIONS, INC.

Headword: Jurisdiction/WEGENER

EPC Articles 106, 108, 109, 122 EPC

Keyword: "Final decision terminating proceedings - jurisdiction over request for restitutio in integrum into the time limit for notice of appeal"

Headnote

Headnote follows

Europäisches Patentamt | European Patent Office | Office européen des brevets

Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number : T 473/91 - 3.5.1

INTERLOCUTORY DECISION
of the Technical Board of Appeal 3.5.1
of 9 April 1992

Appellant :

WEGENER COMMUNICATIONS, INC.
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Georgia 30092 (US)

Representative :

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Decision under appeal :

Decision of Examining Division of the European Patent Office dated 18 May 1988 refusing European patent application No. 84 304 471.0 pursuant to Article 97(1) EPC.

Composition of the Board :

Chairman : P.K.J. van den Berg
Members : E.M.C. Holtz
W.B. Oettinger

Summary of Facts and Submissions

I. This decision concerns the competence of the first instance to decide matters of restitutio in integrum under Article 122 EPC into the time limit for submission of the notice of appeal as required under Article 108 EPC. It further goes on to decide the issue of restitutio itself and the admissibility of the appeal.

II. A decision to refuse European patent application No. 84 304 471.0 was issued by the Examining Division of the EPO on 18 May 1988. On 19 July 1988 an appeal fee was paid, followed on 29 July by a notice of appeal, dated 19 July 1988. The envelope holding the notice of appeal was postmarked London 22 July 1988.

III. On being advised in a telephone conversation on 14 September 1988 by an employee of the Examining Division that the notice of appeal had been received too late, the Appellants requested restitutio in integrum under Article 122 EPC in a letter received by the EPO on 16 September 1988. The fee for restitutio was paid on the same date. The Appellants claimed that they had despatched the letter containing the notice of appeal already on 19 July 1988 from London, i.e. at such a time for them to assume that the letter would arrive in Munich well within the two month period for notice of appeal, which lapsed on 28 July 1988. Therefore, they had shown all due care under Article 122 EPC. To this letter was attached a Statement of Grounds.

IV. In letters received by the EPO on 11 January and 13 December 1989, respectively, the Appellants enquired about their pending request for restitutio. On 3 June 1991, they enquired again via telecopy, seeking

information on the status of their request and the application.

V. On 14 June 1991, a Formalities Officer of Directorate General 2, EPO, took a decision to re-establish the Appellants into their rights. The appeal was remitted to the Boards of Appeal, Directorate General 3, and received there on 2 July 1991.

VI. Upon a communication from the Board of Appeal, the Appellants in a letter received on 5 November 1991 reserved their right to dispute the jurisdiction of the Board with regard to the restitutio issue. With regard to the allowability of the request for restitutio the Appellants argued in essence that it was virtually impossible after more than three years to establish what had in fact happened, and that, had the point of due care been raised at the time of the filing of their request for restitutio, investigations may have revealed the reason for the noted discrepancy between the date of the letter (19 July 1988) and the postmark on the envelope (22 July 1988).

Reasons for the Decision

1. Jurisdiction

1.1 Before an appeal can be examined on its merits, it must have been found admissible. The question of admissibility of the appeal is expressly a matter for the Boards of Appeal to decide, Article 110(1) EPC in conjunction with Rule 65(1) EPC.

1.2 In the system for Appellate review by a separate higher instance, as foreseen by the EPC in accordance with the

principle of devolutive legal remedy, a final decision (as distinct from a decision that is no longer appealable as a result of the time for appeal having lapsed) by a lower instance effectively severs the case from that instance, insofar as the decision has settled all pending issues on their merits. Also interlocutory decisions could be final in this sense, namely if they are appealable by special decree (see Article 106(3) EPC (in fine)), e.g. according to the long established practice of the EPO where in effect all substantial wishes have been dealt with by the decision, but some administrative and procedural issues are still outstanding, such as the filing of translation. According to this principle, an appeal is to be reviewed by the next higher instance, in this case by the Boards of Appeal, and the lower instance no longer has jurisdiction over that case. According to Article 122(4) EPC, the department competent to decide on the omitted act is competent to decide on the request for restitutio.

1.3 As an exception from the principle of devolutive legal remedy Article 109 EPC gives provisions for rectification by the first instance. The power to rectify could seem to countermand this principle, since rectification presupposes that the appeal is admissible. This provision must, however, being an exception from the system of devolutive appeals (i.e. where cases on appeal pass from one body to another, separate one), be construed narrowly. It should be noted that rectification is not a second instance review of the decision. Further, in all cases where the lower instance has decided not to rectify, the Boards of Appeal would consider the admissibility issue without exception before going on to consider the appeal on its merits.

The limited period of one month provided by Article 109(2) EPC for rectification, practically excludes the

possibility that a decision on restitutio requests could be taken in time, even in the unlikely event that the first instance would be prepared to allow it immediately without any further communication to and from the Appellant. Therefore, Article 109 cannot have been designed to empower the first instance to decide issues of restitutio.

A narrow interpretation of Article 109 EPC means that the condition of admissibility for rectification would cover only those situations where the appeal in and of itself immediately meets the conditions laid down in Articles 106 to 108 and Rule 64 EPC. The department of first instance is thus not empowered to decide on the matter, if this necessitates any decision on a preconditional procedural question (see also Singer, Europäisches Patentübereinkommen, 1989, p. 452: "Die Abhilfemöglichkeit ist nur gedacht für Beschwerden, deren Zulässigkeit ...... sofort festgestellt werden kann", the possibility to rectify is only foreseen for appeals whose admissibility ... can be immediately established). Not even where the department of first instance would be prepared to rectify its own decision would there be any exception to the main principle.

An indication to support the above necessary effect of the fundamental principle of devolutive legal remedy is that the decision to reinstate the Appellants could not be joined to the file of the first instance, the final decision of the case already adjudicated on 18 May 1988 logically having to be the last document of that file. Consequently, all documentation received or created by the EPO after that date had to be included in the Board of Appeal file.

1.4 The Board's conclusion is thus that the admissibility question under Article 109 EPC only falls under the jurisdiction of the department of first instance when this question can be decided immediately on the basis of the appeal submissions themselves (Notice of Appeal and Statement of Grounds, date of payment of the appeal fee). Consequently, the Appellate instance has exclusive jurisdiction over a request for restitutio into a time limit relating to the appeal itself (Article 108 EPC). The same instance then decides the admissibility issue accordingly (Article 110(1) EPC in conjunction with Rule 65(1) EPC).

1.5 In a recent decision, another Board of Appeal has referred to circumstances similar to the ones in the present case, but without discussing possible effects thereof, thereby implying that it had approved of the decision by the first instance in that case to reinstate the Appellant (T 317/89 - 3.2.3 of 10 July 1991, not intended for publication, point III and IV). As the issue of jurisdiction was never raised in that case, the conclusion drawn in the present case cannot be said to lead to a non-uniform application of the law. Therefore, and above all because the appeal was delayed for almost three years in the department of first instance, the Board has found it necessary in the interest of the Appellant to take a decision in the matter, rather than referring a question on this issue to the Enlarged Board under Article 112 EPC.

2. Restitutio in integrum

2.1 As the outcome of the admissibility issue is dependent on the outcome of the issue of restitutio in integrum, the request for restitutio consequently has to be decided by the Board of Appeal.

The request for restitutio and the fee therefor having been received in accordance with Article 122(2) and (3) EPC, it is admissible.

2.2 It remains to be decided whether the request is allowable with regard to the requirement of due care under Article 122(1) EPC. In this respect it is to be noted that, whereas the Appellants claim to have posted their notice of appeal on 19 July 1988, the envelope is postmarked 22 July 1988.

There is always a certain amount of discretion in deciding what constitutes due care under Article 122 EPC. One possible yard-stick could be to use the ten day rule (Rule 78(3) EPC) and from it construe a principle, which would provide that all due care would have been proven, if a letter was posted at least ten days before the lapse of the time limit in question. On the other hand, such a principle would lead to an unnecessarily rigid rule, possibly discriminating certain geographical locations, and could therefore not be of any assistance in dealing with the due care issue with regard to expected delivery times.

As in T 81/83 - 3.2.1 of 21 November 1983, point 3 (not published), the Board would refer to what would normally be sufficient for the document in question to reach the EPO on time. In that case a letter posted in Milan, Italy, on 11 April confirming a notice of appeal by telex, only reached the EPO on 28 April (after 17 days) or seven days too late.

In the present case, given that the letter was actually posted on the date of the postmark - 22 July - there would in effect have been only four working days left (22 July being a Friday) for it to reach Munich on time. In fact,

it arrived in five days. Later deliveries in the present case show varying results. One letter dated 6 January 1989 was received on 11 January, another dated 6 December 1989 was received on 13 December and a letter dated 12 June 1991 was received on 14 June, i.e. 5, 7 and 2 days later, respectively, if assumed that the postmark date tallied with the posting date. A review of delivery times at the stage of the first instance examination also reveals varying results, ranging from 1 to 7 days. This means that any conclusions based upon such "statistics" would amount to mere speculation.

As rightly observed by the Appellants, it would be almost impossible after more than three years to establish what actually happened. In view of the long delay of almost three years before the first instance responded to the request for restitutio, the Board considers it justified to find for the Appellants on this issue. Due care is therefore held to have been observed. The Board of Appeal thus considers the request for re-establishment to be allowable. Consequently, the Notice of Appeal is held to have been filed on time.

2.3 As the appeal also complies with the further requirements of Article 108 EPC with regard to payment of the appeal fee and submission of a Statement of Grounds, as well as with Rule 64 EPC, it is admissible.

Order

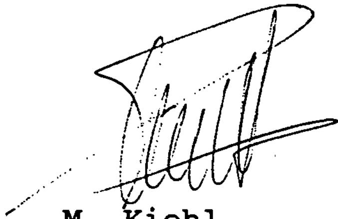
For these reasons, it is decided that:

1. The decision of 14 June 1991 to reinstate the Appellants under Article 122(4) EPC into their rights is declared null and void.

2. The Appellants are reinstated pursuant to Article 122 EPC into their right of appeal against the decision of 18 May 1988 to refuse European patent application No. 84 304 471.0.

3. The appeal is admissible.

The Registrar:



M. Kiehl

The Chairman:

P.K.J. van den Berg

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