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D E C I S I O N
of 18 October 1996

Case Number: T 0828/94 - 3.5.1

Application Number: 87201558.1

Publication Number: 0258927

IPC: H04N 9/31

Language of the proceedings: EN

Title of invention:

Display system

Applicant:

NORTH AMERICAN PHILIPS CORPORATION, ET AL

Opponent:

-

Headword:

Re-establishment/Philips

Relevant legal provisions:

EPC Art. 122

Keyword:

"All due case - no"

"Satisfactory monitoring system -no"

"No independent cross-check"

"Technical assistant not properly instructed and supervised"

Decisions cited:

J 0005/80, J 0002/86, J 0003/86, J 0009/86, J 0026/92

Catchword:

A monitoring system for EPO time limits should contain an independent cross-check to prevent the misunderstanding between a representative and a technical assistant from assuring that a notice of appeal will be prepared and filed on time by the other person. Where a misunderstanding is likely to arise as a result of the two being responsible for the same file, the assistant must have clear instructions on how to proceed.



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Boards of Appeal

Chambres de recours

Case Number: T 0828/94 - 3.5.1

D E C I S I O N
of the Technical Board of Appeal 3.5.1
of 18 October 1996

Appellant:

NORTH AMERICAN PHILIPS CORPORATION
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Philips Electronics N. V.
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Representative:

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Prof. Hostlaan 6
NL - 5656 AA Eindhoven (NL)

Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 08 July 1994
refusing European patent application
No. 87 201 558.1 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: P. K. J. Van den Berg
Members: C. Holtz
A. S. Clelland

Summary of Facts and Submissions

- I. The appellant on 7 October 1994 filed a notice of appeal against the decision by the examining division, dated 8 July 1994, by which the patent application was refused.

On the same date the appellant requested re-establishment with regard to the time limit for filing the notice of appeal and paid the appeal and re-establishment fees.

- II. In the request for re-establishment, the appellant explained that the present application was handled by a technical assistant to the representative. This person had worked under the latter's supervision for about 4, 5 years and had sufficient experience in handling most of the cases independently. In difficult cases the technical assistant would still consult the representative, and did so in the present case. The technical assistant felt that the invention claimed in the application was inventive over the state of the art. A statement of grounds was therefore prepared and passed to the representative together with the file containing the decision under appeal for discussion about whether an appeal was justified. This is where a misunderstanding arose. The representative assumed that the technical assistant would file the notice of appeal, whereas the latter had assumed that a consultation could take place before expiry of the time limit for filing a notice of appeal, 8 September 1994. Because the file was kept by the representative the deadline could not be monitored. He thought that the notice of appeal had been filed before 8 September 1994 and that therefore ample time was left to file the grounds of appeal. When he studied the file on 4 October 1994 and discussed it with the technical

assistant it was discovered that no notice of appeal had been filed. - The due dates had been registered accurately by the administrative section and computer reminder lists sent out. The technical assistant had always attended due dates on office communications accurately in the past.

- III. In two communications the Board expressed doubts as to the allowability of the request for re-establishment.
- IV. In response to the communications and in the oral proceedings held on 18 October 1996, the appellant furnished the following further information:

The monitoring system for EPO time limits consisted of entering the due date into a computer system together with an advice date one month prior to this date. The advice date was written in red on top of the front page of the communication. The advice date was a warning for the patent attorney in charge to start his response in time. This system had been in operation for many years and from December 1991 was carried out with a computerised data system. Three computer reminder lists were sent out in the first week of each month, the first containing all cases for which the advice date had not yet expired, the second cases for which the advice date had expired but not the due date, and the third cases for which both dates had passed. These lists were only sent to the person in charge, either a professional representative or a technical assistant, if the latter had been given sole responsibility for the case concerned. The technical assistants were not instructed to pass on information from the lists to the professional representatives, for example to alert them to the fact that a due date was nearing. The assistants were themselves responsible for ensuring that due dates were met in cases for which they received the lists. They could approach any representative in the office,

to have him or her sign a notice of appeal, for example. - In the present case, the technical assistant was solely in charge, which meant that the representative did not receive the computer list for the case. To check for time limits, the representative would have to examine the file on his desk. The technical assistant had prepared a statement of grounds at an early date, and the filing of an appeal was briefly discussed some time in August, probably about a month before expiry of the time limit for the notice of appeal. At that time the representative had much work, so he asked that the file be left with him. He was at that stage informed about the due dates. Subsequently, the technical assistant did not react to the second computer list, relying on the representative to take the necessary steps, as he had the file. The representative also did not react, since he was under the impression that the assistant would attend to the filing of the notice of appeal.

Reasons for the Decision

1. The request for re-establishment is admissible.
2. Although the reason given for the failure to file the notice of appeal on time may very well have been what the representative has explained, namely that there was a misunderstanding between him and his technical assistant, the Board is not satisfied that the monitoring system was adequate enough to be considered meeting the requirement of all due care under Article 122(1) EPC as applied by the Boards of Appeal. Given the size of the representative's office, a proper monitoring system should have contained some form of cross-check (cf J 0009/86 of 17 March 1987 and J 0026/92 of 23 August 1994), for example that someone

would be responsible for checking independently of the representative and the assistant whether any notice of appeal had been filed or was being prepared, and for raising the alarm if no data concerning such a notice - or a decision not to appeal - had been entered into the computer near the due date. In J 0026/92, the system used included complete lists of all time limits for a period of about two months in advance, which were made available to everyone in the office. Further, at least weekly, a representative checked the whole system of time limits and discussed urgent cases with those responsible (*idem*, point IV).

3. Such routines represent a type of independent cross-check, which would have prevented the sort of mistake which happened in the present case. The system used in the present case, on the other hand, seems to have relied exclusively on the conscientiousness of the person responsible for the handling of the file, and presumed that clear instructions had been issued and were followed.
4. No one in the administrative department could take action, since they could not know about whether it was the intention of the representative to file an appeal at all. The representative therefore had the responsibility to inform the assistant about whether there was going to be such an appeal. It seems that in the August meeting he agreed that an appeal should be filed, and that therefore the only matter remaining to resolve was whether the draft grounds of appeal needed any revision. On this point the representative and the assistant have explained that they hoped to be able to file both the notice of appeal and the grounds at the same time. This, together with the fact that the representative kept the file, may have contributed to the false assumption of the assistant that the representative would ensure that the notice of appeal

was filed. It should also be added that if the assistant had been under instruction to file the notice of appeal, the signature of a professional representative would have to have been obtained before such a notice could be filed. In any case, the technical assistant should have had proper instructions always to inform the representative about any action which had not yet been taken, but for which the due date was nearing. Had the assistant approached the representative on this matter, both would have discovered in time that there was a misunderstanding between them. Equally, had the representative exercised reasonable supervision over the assistant, the misunderstanding would also have been resolved in due time (J 0005/80, OJ EPO 1981, 344).

5. As pointed out in J 0002/86 and J 0003/86 (OJ EPO 1987, 362), re-establishment may be allowed, if the appellant succeeds in convincing the Board that the failure to meet a time limit was due to a single mistake in an otherwise satisfactory system. For the reasons given above, the Board is not convinced that the appellant's monitoring system can be considered as being satisfactory. In fact, from the explanations given, it is clear that several lacunae in the patent administration system compounded the original misunderstanding, i.e. that the technical assistant in charge was not supervised well enough and had not been properly instructed, to which was added the lack of an independent cross-check at a date early enough to ensure that a notice could be filed on time, in spite of the misunderstanding.
6. The appellant therefore has not shown all due care required by the circumstances, Article 122(1) EPC. The request for re-establishment cannot therefore be allowed. Hence the appeal is inadmissible.

7. The notice of appeal and the appeal fee having been filed respectively paid only on 7 October 1994, the appeal is deemed not to have been filed and the appeal fee must be reimbursed.

Order

For these reasons it is decided that:

1. The request for re-establishment is refused.
2. The appeal is rejected as being inadmissible.
3. The appeal fee is reimbursed.

The Registrar:

The Chairman:

M. Kiehl

P.K.J. Van den Berg