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**OFFICE OF PETITIONS**

In re Patent No. 5,721,377 :  
Issued: February 22, 1996 :  
Application No. 08/681,243 : ON PETITION  
Filed: July 22, 1996 :  
Title: Angular Velocity Sensor :  
with Built-in Limit Stops :

This is a decision on the petition under 37 CFR 1.378(e), filed May 22, 2006 and supplemented on November 14, 2006.<sup>1</sup>

The petition is **DENIED**<sup>2</sup>.

**BACKGROUND**

The patent issued February 24, 1998. The 3.5 year maintenance fee could have been paid from February 24, 2001 to August 24, 2001, or with a surcharge during the period from August 25, 2001 to February 24, 2002. Petitioner did not do so. Accordingly, the patent expired February 25, 2002.

A petition under 37 C.F.R. § 1.378(b) to accept late payment of the maintenance fee was filed February 23, 2006. A decision dismissing the petition under 37 CFR 1.378(b) was mailed March 20, 2006 and is hereby incorporated by reference. A request for information was mailed on September 11, 2006. A supplement to the May 22, 2006 petition was submitted on November 14, 2006.

Petitioners assert that the entire delay was unavoidable since reasonable care was taken to ensure that the first maintenance fee would be paid. Petitioners used the services of Pavis<sup>3</sup> to pay certain annuity and maintenance fees. In using the services of

<sup>1</sup> The required petition fee, while referenced in the petition was not received. Therefore, the required petition fee of \$400.00 has been charged to petitioners' deposit account as authorized.

<sup>2</sup> This decision may be viewed as a final agency action within the meaning of 5 U.S.C. § 704 for purposes of seeking judicial review. See, MPEP 1002.02.

<sup>3</sup> Pavis is used herein to denote both Pavis, SA and Pavis, EG unless otherwise noted.

Pavis, petitioners made available to Pavis relevant patent information in a computer format ("the Bosch patent database"). Pavis was responsible for paying any maintenance fees contained within the Bosch patent database, unless they were informed by Robert Bosch GmbH (the assignee, Bosch) not to pay a specific maintenance fee. The maintenance fee for the above-identified patent was never paid because the above-identified application was never included in the Bosch patent database. Petitioners under 37 CFR 1.378(e) in seeking reconsideration of the decision under 37 CFR 1.378(b) attribute the failure to timely pay the maintenance fee to docketing error.

Petitioners assert that Bosch through April 2005 had approximately 60,000 patents, utility models and related applications worldwide. Petitioners insist Pavis from a period of 2001 to 2005 for Bosch's U.S. patents had a reliability rate of almost 100% for payment of maintenance fees. On or about January 2005, a review with respect to open patent application cases which had been open for several years it was found out by Karl Matz, manager of patent administration for Bosch that the above-identified patent case was still open and that there was no issued patent information for the patent in question. After investigation, it was discovered that the patent's information had not been entered into the Bosch patent database and the patent had expired about three years earlier.

Petitioners insist that the failure to include patent information for the above-identified patent in the Bosch patent database was due to clerical error. Mrs. Barbara Krapf was identified as the person who committed the clerical error. Mrs. Krapf's duties included the administering, supervising, ensuring and/or performing the entry of issued patent information, including the above-identified patent into the Bosch patent database.

Petitioners further state that Mrs. Krapf was experienced and received on-the job training. There were also semi-annual official meetings to review the docketing practices and procedures. There are also informal meetings every month concerning the procedures and practices for maintaining the patent system. Petitioners insist the Bosch patent employees, including Mrs. Krapf were sufficiently trained and experienced. Petitioners make this assertion based upon the reliability statistics of the maintenance fee payment system.

Petitioners state whenever Bosch receives a notice from the responsible attorneys and/or from relevant patent offices about changes in the bibliographic data of a patent or patent application, including the issue date of a patent, an entry is made in the Bosch patent database. Relevant documents such as the issued patent are delivered to the responsible person who then makes the data entry. An input-screen of the Bosch database program for entering the bibliographic patent data into the Bosch database is used to enter such data. After the data is entered a hard-copy datasheet is generated for the file. After review of the data, the folder is then filed in the archive. The data is then transferred to the Pavis annuity service.

Petitioners contend that for the above-identified patent, Ms. Krapf failed to enter the issued patent information into the Bosch database.

#### OPINION

The Director may accept late payment of the maintenance fee if the delay is shown to the satisfaction of the Director to have been "unavoidable."<sup>4</sup> Moreover, a late maintenance fee is considered under the same standard as that for reviving an abandoned application under 35 U.S.C. 133 because 35 U.S.C. 41(c)(1) uses the identical language, i.e., "unavoidable" delay<sup>5</sup>. Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable<sup>6</sup>. Further, decisions on revival are made on a "case-by-case basis, taking all the fact and circumstances into account<sup>7</sup>." Finally, a petition to revive an application as unavoidably abandoned cannot be granted where a petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay<sup>8</sup>.

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<sup>4</sup> 35 U.S.C. 41(c)(1).

<sup>5</sup> See, Ray v. Lehman, 55 F3d 606, 608-609, 34 USPQ2d 1786, 1787 (Fed. Cir. 1995) (quoting In re Patent No. 4,409,763, 7 USPQ2d 1798, 1800 (Comm'r Pat. 1988)).

<sup>6</sup> See, Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"; In re Mattullath, 38 App. D.C. 497, 514-515 (D.C. Cir. 1912), Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913).

<sup>7</sup> See, Smith v. Mossinghoff, 671 F.2d 533, 213 USPQ 977, 982 (D.C. Cir. 1982).

<sup>8</sup> See, Haines v. Quigg, 673 F.Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

A delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of "unavoidable" delay, provided it is shown that: (A) the error was the cause of the delay at issue; (B) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; and (C) the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care. See, In re Egbers, 6 USPQ2d 1869, 1872 (Comm'r Pat. 1988), rev 'd on other grounds sub nom., Theodor Groz & Sohne & Ernst Bechert Nadelfabrik KG v. Quigg, 10 USPQ2d 1787 (D.D.C. 1988); In re Katrapat, 6 USPQ2d 1863, 1867-68 (Comm'r Pat. 1988).

Petitioners have failed to establish that the docketing error complained of was the requisite cause of the failure to timely remit the maintenance fee. Petitioners state that the maintenance fee due date for the instant patent was not docketed for action because sometime after the patent was issued, the data was not updated in the Bosch database.

Petitioners have failed to establish that docket error on the part of a clerical staff resulted in the failure to submit the 3.5 year maintenance fee. Petitioners have provided evidence that a system was in place to track and monitor maintenance fee due dates. However, petitioners have failed to establish that the required documents, which would trigger updating the Bosch database were ever provided to Ms. Krapf. Furthermore, petitioners do not even mention when and if the actual issued patent was ever received by Bosch. The clerical functions can only be expected to be relied upon, if Ms. Krapf was directed to enter the information into the Bosch system. Further, insufficient evidence was provided to establish that Ms. Krapf's clerical duties were ever reviewed or supervised and thus there appears to be no checks in place to ensure proper execution of the payment of maintenance fees.

Further, it does not appear that Ms. Krapf has made the investigation of the facts necessary to affirmatively state that the error was hers. In particular, Ms. Krapf states in her declaration at paragraph 5, last sentence: "It is therefore my understanding that the patent information provided by Bosch to Pavis did not include a 'base date' for the '377 Patent of February 24, 1998." The "base date" is the patent issue date in the database. It does not appear that Ms. Krapf is making this

statement from firsthand knowledge and is merely speculating as to the cause of the error.

Finally, petitioners have failed to establish that the employees were sufficiently trained and experienced with regard to the docketing function and performance of the business routine so that reliance upon such employees represented the exercise of due care. The petition and statements provided by Mr. Matz and Ms. Krapf do not provide any specificity regarding the training provided to employees and specifically to Ms. Krapf. Details concerning the specific training and experience of employees were not disclosed. Accordingly, it cannot be found that reliance on employees whose qualifications and degree of supervision are unknown represented the exercise of due care.

It is further noted that there was over a year delay in the submission of the original petition filed on February 23, 2006 and the discovery of the expiration of the patent on January 2005. Petitioners' contention that it was reasonable to investigate the expiration of the patent for over one year before the filing of the original petition, is not well founded.

In view of the totality of the evidence of record, including the exhibits submitted herewith, it cannot be found that the entire time, from the time that the maintenance fee was due until the filing of the instant petition, was unavoidable.

#### DECISION

The prior decision dismissing petition under 37 CFR 1.378(b) to accept the delayed payment of maintenance fee has been reconsidered. For the reasons set forth herein the delay in payment of the maintenance fee cannot be regarded as unavoidable within the meaning of 35 USC 41 and 37 CFR 1.378(b). Accordingly, the offer to pay the delayed maintenance fee will not be accepted and this patent will not be reinstated.

Since this patent will not be reinstated, a refund check covering the maintenance fee and surcharge fee will be forwarded to petitioner.

This file is being forwarded to files repository.

Telephone inquiries concerning this matter may be directed to the Petitions Attorney Charlema Grant at 571-272-3215.

A handwritten signature in cursive script, appearing to read "Charles Pearson", with a long horizontal line extending to the right.

Charles Pearson  
Director  
Office of Petitions