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**Datasheet for the decision
of 14 April 2016**

Case Number: J 0012/15 - 3.1.01

Application Number: 08754942.4

Publication Number: 2160878

IPC: H04L27/26, H04J13/00

Language of the proceedings: EN

Title of invention:

COMPUTER GENERATED SEQUENCES FOR DOWNLINK AND UPLINK SIGNALS
IN WIRELESS COMMUNICATION SYSTEMS

Patent Proprietor:

Texas Instruments Incorporated

Headword:

Right to oral proceedings; substantial procedural violation
(yes); re-imburement of appeal fee (yes)

Relevant legal provisions:

EPC Art. 113, 121
EPC R. 103

Keyword:

Substantial procedural violation - (yes)

Decisions cited:

T 0019/87, T 0766/90, T 0879/92

Catchword:

An adverse decision issued without granting the aggrieved party's request for oral proceedings must be declared void ab initio and without legal effect. Silence on the part of the appellant cannot be interpreted as withdrawal of the request for oral proceedings - see points 7 and 8 of the Reasons.



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Case Number: J 0012/15 - 3.1.01

D E C I S I O N
of the Legal Board of Appeal 3.1.01
of 14 April 2016

Appellant: Texas Instruments Incorporated
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted on 30 July 2015
rejecting a request for further processing in
respect of European patent application No.
08754942.4.

Composition of the Board:

Chairwoman C. Vallet
Members: D. Rogers
C. Brandt

Summary of Facts and Submissions

I. The appeal is directed against the decision of the Examining Division dated 30 July 2015. This decision rejected a request for further processing in respect of European patent application No. 08 754 942.4.

II. On 9 July 2012 the Examining Division issued a communication pursuant to Rules 70(2) and 70a(2) EPC. This invited the applicant to indicate whether or not it wished to proceed further with its application. At first the applicant indicated that it did not wish to proceed, however it later filed a successful request for further processing and the application proceeded.

III. On 25 July 2013 the Examining Division issued a first communication pursuant to Article 94(3) EPC in which it was stated that the application did not meet the requirements of the EPC. Reasons for this finding were attached.

IV. Following an extension of the time limit for responding and a second successful request for further processing, on 14 May 2014 the applicant filed a response to the Examining Division's 25 July 2013 communication in the form of an amended set of claims.

V. On 13 June 2014 the Examining Division issued a second communication pursuant to Article 94(3) EPC in which it stated that the application did not meet the requirements of the EPC and attached its reasons for reaching this conclusion. These reasons were that, "While the larger part of the claims are considered now in unity ... it is not understandable how the present claim 12 could result in unity with all the preceding claims". The applicant (hereafter "appellant") was given 4 months to file its observations.

VI. On 10 October 2014 the appellant requested an extension of two months for responding to the above named communication.

VII. In a communication dated 15 October 2014 the Examining Division granted a 2 month time extension to replying to its communication pursuant to Rule 132(2) EPC.

VIII. On 20 January 2015 the Examining Division issued a communication noting a loss of rights pursuant to Rule 112(1) EPC, wherein it stated that the European patent application in question was deemed to be withdrawn pursuant to Article 94(4) EPC, because the invitation to file observations on the communication dated 13 June 2014 was not complied with.

IX. On 27 March 2015 the appellant filed a letter, the first line of which states that it is by way of a response to the communication of 13 June 2014. The appellant requested further processing under Article 121 EPC. In this letter the appellant made the following substantive remarks concerning the Examining Division's communication of 13 June 2014:

"...the Applicant respectfully disagrees, especially with regard to claim 12.

It is believed that the invention as currently claimed is both novel and involves and (sic) inventive step in accordance with Articles 54 and 56 EPC, and the claims should be allowable.

Reconsideration of the application is requested, and Oral Proceedings are requested in the event the Examiner is minded to refuse the application".

X. The Examining Division decision of 30 July 2015 rejected the request for further processing and gave the following reasons for its decision:

"1) Under current EPO practice, as decided in the 50th PPC Meeting of 24-25 September 2009, a reply to a communication from the Examining Division without any substantive observations or amendments, does NOT constitute a reply to a communication under Article 94(3) EPC.

2) The omitted act was not filed within the time limit set in Article 121 EPC.

3) The request for further processing is therefore rejected".

XI. The appellant filed an appeal against this decision. The arguments of the appellant as set forth in its Grounds of Appeal may be summarised as being that first, the decision of the Examining Division of 30 July 2015 was not reasoned and was therefore contrary to Rule 111(2) EPC; second, the appellant had completed the omitted act by filing its comments under cover of the letter dated 27 March 2015. Although these comments may have been brief, the Appellant had no possibility of giving a more detailed response given that the Examining Division's communication of 13 June 2014 was not itself reasoned.

XII. The Board issued a communication setting out its preliminary, non-binding view on the case. This communication raised the issue of whether the appellant was requesting oral proceedings before the Examining Division only in the case of the Examining Division being minded to reject the application, or also in the case of the Examining Division being minded to reject the request for further processing. In its reply to this communication the appellant stated that its request also covered the case where the Examining Division was minded to refuse the request for further processing.

XIII. The appellant requested that the decision under appeal be set aside and the request for further processing be granted; that a patent based on documents attached to its letter of 15 October 2015 be granted, or alternatively, that the case be remitted to the department of first instance for further processing. In a letter dated 7 April 2016 the appellant stated that it only maintained its request for oral proceedings if its request for setting the decision under appeal aside could not be granted.

Reasons for the Decision

1. The appeal is admissible.

2. In its letter dated 27 March 2015 the appellant requested oral proceedings before the Examining Division in the event that "...the Examiner is minded to refuse the application...". No oral proceedings were held and the Examining Division refused the request for further processing.

3. The Board is of the view that this request for oral proceedings before the Examining Division is open to two interpretations.

4. The first interpretation is that the appellant's request for oral proceedings could be understood to be conditional only on the event that the Examining Division was minded to refuse the application, the appellant not requesting oral proceedings in the event that the Examining Division was minded to refuse the request for further processing.

5. The second interpretation is that the appellant intended its request for oral proceedings also to cover the case where the Examining Division was minded to refuse the request for further processing. In support of this interpretation is the fact that a refusal of further processing in this case would have identical effects to a decision refusing the application. In addition the appellant has confirmed this second interpretation as being its intention.

6. In the light of these factors the Board is of the opinion that the appellant intended its request for oral proceedings before the Examining Division also to cover the case where the Examining Division was minded to refuse the request for further processing.

7. The right of a party to oral proceedings in examination, opposition and appeal procedures is set out in Article 116 EPC. Accordingly, an adverse decision issued without granting the aggrieved party's request for oral proceedings must be declared void ab initio and without legal effect (see T 19/87, OJ EPO 1988, 268, Reasons point 3; T 766/90, Reasons point 2.1; and the "Case Law of the Boards of Appeal", 7th edition 2013, III.C.1, page 501 et seq.).

8. From its examination of the file, the Board has not been able to find a clearly expressed intention on the part of the appellant to withdraw its request for oral proceedings before the Examining Division. Silence on the part of the appellant cannot be interpreted as withdrawal of the request for oral proceedings. The Board therefore currently assumes that this request is still valid and was therefore also valid at the time of the contested decision (see T 879/92, Reasons points 2 and 3; "Case Law of the Boards of Appeal", 7th edition 2013, III.C.2.3, page 506).

9. The decision of the Examining Division dated 30 July 2015 must be set aside as void and of no legal effect. The appellant was entitled to oral proceedings before the Examining Division. Accordingly, the failure by the Examining Division to hold such oral proceedings constituted a substantial procedural violation which justifies the reimbursement of the appeal fee under Rule 103 EPC.

10. In the light of the above finding and the appellant's statement regarding the conditional nature of its request for oral proceedings before the Board, (see point XIII above), there is no reason for oral proceedings before the Board to take place.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for the holding of oral proceedings to consider the appellant's request for further processing set out in its letter of 27 March 2015, and for any subsequent further prosecution.
3. The appeal fee shall be reimbursed in full.

The Registrar:

The Chairwoman:



C. Eickhoff

C. Vallet

Decision electronically authenticated