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**Datasheet for the decision
of 2 December 2010**

Case Number: T 1764/08 - 3.5.04

Application Number: 99960701.3

Publication Number: 1034660

IPC: H04N 7/26

Language of the proceedings: EN

Title of invention:

Motion vector processing

Applicant:

Koninklijke Philips Electronics N.V.

Headword:

-

Relevant legal provisions:

EPC Art. 106, 108, 122(1),(2)

EPC R. 2(1), 99, 101(1), 126(2), 131(4), 136(1)

RPBA Art. 13

Decision of the Administrative Council of 28 June 2001 on the
transitional provisions under Article 7 of the Act revising
the EPC

Art. 1

Act revising the Convention on the Grant of European Patents
Art. 7(1)

Decision of the President of the European Patent Office dated
12 July 2007 concerning the electronic filing of patent
applications and other documents

Art. 2(1), (3), 12, 13

Decision of the President of the European Patent Office dated 12 July 2007 concerning the filing of patent applications and other documents by facsimile

TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights)
Art. 64(2) and 41(2)

Relevant legal provisions (EPC 1973):

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Keyword:

"Admissibility of appeal - grounds of appeal filed via *epoline* (no)"

"Principle of good faith (no)"

"EPO document submission system unnecessarily complicated (no)"

"Re-establishment of rights (no)"

"All due care (no)"

Decisions cited:

G 0002/97; J 0005/80; J 0014/94; T 0324/90; T 0781/04;
T 0991/04; T 0514/05; T 0395/07; T 1090/08

Catchword:

See Sections 9 to 10 and 16 to 21



Case Number: T 1764/08 - 3.5.04

D E C I S I O N
of the Technical Board of Appeal 3.5.04
of 2 December 2010

Appellant: Koninklijke Philips Electronics N.V.
Groenewoudseweg 1
NL-5621 BA Eindhoven (NL)

Representative: Groenendaal, Antonius W.M.
Philips
Intellectual Property & Standards
P.O. Box 220
NL-5600 AE Eindhoven (NL)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 3 April 2008
refusing European patent application
No. 99960701.3 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: F. Edlinger
Members: T. Karamanli
M. Paci

Summary of Facts and Submissions

- I. The present appeal lies from the decision of the examining division, posted on 3 April 2008, to refuse European patent application No. 99 960 701.3, filed as an international application on 24 June 1999.
- II. The notice of appeal was filed by faxed letter on 13 June 2008 and the appeal fee was paid on the same date. The statement of grounds of appeal was filed in electronic form on 13 August 2008 and indicated the name of a professional representative (hereinafter "the appellant's representative") but was not signed. The cover sheet of the EPO form for electronic transmission indicated the electronic signature of another professional representative of the same firm as that of the representative indicated in the statement of grounds of appeal. The cover sheet also contained, immediately above the signature section, the following text:

"Statement

The undersigned hereby declares that the subsequently filed items do NOT contain or are NOT intended to contain any communication relating either an appeal, an opposition, a limitation, a revocation proceeding or any proceedings for review (Special edition No. 3 OJ EPO 2007, A.4. Article 2(3) "Paragraph 1 shall not apply to documents in opposition proceedings, in European patent limitation or revocation proceedings, in appeal proceedings, or in proceedings for review by the Enlarged Board of Appeal of decisions of the boards of appeal.")"

III. In a communication posted on 13 January 2009 the board informed the appellant that, in accordance with Rule 101(1) EPC, the present appeal would have to be rejected as inadmissible since the electronic filing of the statement setting out the grounds of appeal did not comply with Rule 2(1) EPC and Article 2 of the Decision of the President of the European Patent Office dated 12 July 2007 concerning the electronic filing of patent applications and other documents (Special edition No. 3, OJ EPO 2007, A.4.) and that, therefore, the present appeal did not comply with Article 108, third sentence, EPC. The board also noted that, since the electronic filing took place on the very last day of the period laid down in Article 108, third sentence, EPC, the EPO could not have warned the appellant about the formal deficiency in the statement of grounds of appeal before the expiry of said period.

IV. In its reply faxed on 6 March 2009 the appellant acknowledged that, on 13 August 2008, the statement of grounds of appeal was filed via *epoline* and thus not in accordance with the Decision of the President dated 12 July 2007. The appellant filed submissions in support of an admissible appeal.

The appellant also requested re-establishment of rights pursuant to Article 122 EPC as a precautionary measure, stated the grounds on which the request was based and set out the facts on which the request relied. A paper copy of the statement of grounds of appeal was attached to the reply. The fee for re-establishment of rights was paid on the same day.

V. In a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA, OJ EPO 2007, 536) dated 28 June 2010, which was attached to a summons to oral proceedings, the board expressed its provisional and non-binding opinion. In the board's view, according to the principle of good faith, the EPO had no duty to warn the appellant since the statement of grounds of appeal was filed on the very last day of the period specified in Article 108, third sentence, EPC and therefore the present case differed from cases T 781/04, T 991/04, T 395/07 and T 514/05. Regarding the request for re-establishment of rights, the appellant was informed that, taking into account the stated grounds and facts, it seemed very doubtful whether the conduct of the appellant's representative (including any assistant) amounted to the exercise of "all due care required by the circumstances" within the meaning of Article 122(1) EPC. The board also noted that there was no evidence on file in support of the appellant's allegations and reminded the appellant that a party relying on a special set of circumstances was usually obliged to present proof that the facts alleged did indeed occur.

VI. In a reply dated 20 August 2010 the appellant's representative argued that his personal circumstances at the relevant time constituted an exceptional situation in an otherwise satisfactory system, so that he believed that all due care had been applied.

VII. In a further communication pursuant to Article 15(1) RPBA dated 8 October 2010 the board informed the appellant *inter alia* that there were still no submissions or any evidence on file which described a

system in the representative's firm which ensured that mistakes such as had happened in the present case were avoided and that, therefore, the board could not establish whether the electronic filing of the grounds of appeal was an isolated error in an otherwise reliable system in the representative's office.

The board took the view that, at the time of filing of the statement of grounds of appeal, it was clear from the relevant legal provisions and the case law that documents relating to appeal proceedings should not be filed electronically. The board also referred to the text immediately above the signature section of the cover sheet of the statement of grounds of appeal filed on 13 August 2008.

VIII. With a reply dated 1 November 2010 the appellant's representative filed a copy of a letter of his assistant which was dated 1 November 2010 and contained a declaration that it was her mistake that she had sent the statement of grounds of appeal in the present case by *epoline* while she had been aware of the fact that this was not allowed in appeal proceedings. As further evidence that this mistake should have been avoided, he also filed a copy of the minutes of a meeting of 2 March 2005 in the representative's firm.

IX. Oral proceedings were held on 2 December 2010.

The appellant requested that the proceedings be re-established pursuant to Article 122 EPC and that the appeal be accepted as admissible.

X. The appellant's arguments can be summarised as follows:

It was acknowledged that the statement of grounds of appeal was filed electronically. However, the board could not deny that the statement of grounds of appeal had actually been filed, in particular, in view of the internal EPO Form "Processing of an appeal", which was accessible in the *epoline* on-line register and explicitly confirmed *inter alia* that the statement of grounds of appeal had been filed. Moreover the presence of this document in the *epoline* register entitled the appellant to believe that the appeal had been duly filed in view of decision T 781/04.

The appellant should benefit from the favourable considerations applied in decisions T 781/04, T 991/04, T 395/07 and T 514/05 concerning the filing of the notice of appeal or statement of grounds of appeal via *epoline*, contrary to the relevant provisions.

Furthermore, at the relevant time the EPO document submission system was unnecessarily complicated due to the fact that the electronic submission system could not be used for appeal proceedings contrary to the vast majority of submissions to the EPO. Although the EPO was not bound by the TRIPS Agreement, such an unnecessarily complex situation should have been avoided in view of Articles 64(2) and 41(2) TRIPS, according to which patent acquisition procedures should not be unnecessarily complicated.

As far as re-establishment of rights was concerned, at the relevant time the appellant's representative was going through an extremely difficult and exceptional

personal situation which forced him to work at home most of the time and to transfer documents to the assistant via email. However, on 13 August 2008 the appellant's representative was in the office.

The office of the appellant's representative was a big office and to date no other appeal case had gone wrong, at least the appellant's representative had not failed before. In 2008 there were about ten appeals and a few pending opposition cases in the office.

The assistant was a normal secretary who had also received in-house training. She had many years of experience and usually did the filing of "normal" office responses, but also of appeal documents. She was one of two assistants who were working for six to seven professional representatives of the office. She was very accurate. The appellant's representative had been working with her for more than 5 years.

The minutes of the meeting of 2 March 2005 proved that all the assistants were aware of the *epoline* system. It was true that the professional representatives of the firm should know everything about the EPC. However, the secretaries knew that appeal documents were not allowed to be sent via *epoline*. As could also be seen from the evidence on file the assistants were instructed to use fax or regular mail for filing documents in appeal proceedings.

Usually the appellant's representative would send a document via email to the assistant, together with an instruction on how to send that document. The assistant would then format the document and forward it to the

addressee. After the formatting there was no further check by the professional representative. A secretary's feedback on whether she had sent a document was usually given orally and not in writing. If she had a question she would contact the respective professional representative. However, there was no monitoring of the assistant's work by any of the professional representatives. There were also no exceptional arrangements for monitoring foreseen in view of the special personal circumstances of the appellant's representative, which were known within his office.

Concerning the present appeal the appellant's representative finalised the preparations for filing the statement of grounds of appeal in the office and sent the draft statement via email to his assistant without any verbal instructions. The subject line of the email indicated "appeal". However, a copy of said email could not be provided since it could not be found in the office. Due to his special personal circumstances, the appellant's representative could not monitor the follow-up and failed to that extent. Nevertheless it was also a fault of the assistant. From the subject "appeal" indicated in the email, which was sent by the appellant's representative to her, and from the attached draft text, the assistant should have realised that the letter in question concerned appeal proceedings. The assistant had general instructions not to file appeal documents via *epoline* and by acting against these instructions she had made a mistake.

The professional representative whose electronic signature was indicated on the cover sheet of the EPO form for electronic transmission was the manager of the

assistants in the office. He was not physically present in the "neighbourhood" of the office of the appellant's representative.

Reasons for the Decision

1. The present decision has been taken after the revised European Patent Convention (EPC) entered into force on 13 December 2007. At that time, the present European patent application was pending. The board therefore applies the transitional provisions in accordance with Article 7(1), second sentence, of the Revision Act of 29 November 2000 and the decisions of the Administrative Council of 28 June 2001 (Special edition No. 1, OJ EPO 2007, 197) and 7 December 2006 (Special edition No. 1, OJ EPO 2007, 89). Articles and Rules of the revised and former texts of the EPC are cited in accordance with the Citation Practice (see the 14th edition of the European Patent Convention, page 6).

2. The provisions to be applied in the present case with regard to the admissibility of the appeal are those of Articles 106 and 108 and Rules 99 and 101 EPC, and the general provisions of Chapter I of Part I of the EPC Implementing Regulations (in particular Rule 2 EPC), since the time limits for complying with the conditions for filing an appeal started running and expired after the revised EPC entered into force. Accordingly, the time limits for requesting re-establishment of rights started running and expired after the revised EPC entered into force and, therefore, the provisions of Article 122 and Rule 136 EPC apply in the present case

(see Decision of the Administrative Council of 28 June 2001 (supra), Article 1, point 5).

3. According to Article 108, third sentence, EPC, within four months of notification of the appealed decision, a statement setting out the grounds of appeal has to be filed in accordance with the Implementing Regulations. In the present case the decision under appeal was issued on 3 April 2008 and deemed to be delivered on 13 April 2008. Thus the period specified in Article 108, third sentence, EPC expired on 13 August 2008 (Rules 126(2) and 131(4) EPC). On 13 August 2008, and therefore on the very last day of said period, the statement setting out the grounds of appeal was filed in electronic form.

4. In proceedings before the EPO, documents may be filed by delivery by hand, by post or by technical means of communication (Rule 2(1), first sentence, EPC). The details and conditions and, where appropriate, any special formal or technical requirements for the filing of documents are laid down by the President of the EPO (Rule 2(1), second sentence, EPC). On 13 December 2007, the Decision of the President of the European Patent Office dated 12 July 2007 concerning the electronic filing of patent applications and other documents (Special edition No. 3, OJ EPO 2007, A.4.) entered into force (Article 13 of the afore-mentioned Decision) and previous EPO notices and the previous Decision of the President concerning the electronic filing of patent applications and other documents ceased to have effect (Article 12 of the afore-mentioned Decision).

According to Article 2(3) and (1) of the above-mentioned Decision, documents in appeal proceedings may not be filed in electronic form. Thus the electronic filing of a statement of grounds of appeal was not permitted until 5 March 2009, the date on which the Decision of the President of the European Patent Office dated 26 February 2009 concerning the electronic filing of documents (OJ EPO 2009, 182) entered into force and allowed the electronic filing of documents in appeal proceedings.

5. In view of the above, the electronic filing of the present statement setting out the grounds of appeal does not comply with Rule 2(1) EPC and Article 2 of the above-mentioned Decision of the President dated 12 July 2007. There is no provision in the EPC or in said Decision of the President which stipulates the legal consequence of the impermissible electronic filing of a document in appeal proceedings. The board, however, concludes that the statement of grounds of appeal was not filed in time (see also T 1090/08, Reasons of the decision, point 18) with the consequence that the present appeal does not comply either with Article 108, third sentence, EPC.

6. In the appellant's view it could not be denied that the statement of grounds of appeal had actually been filed, in particular, in view of the internal EPO Form "Processing of an appeal", which was accessible in the *epoline* on-line register and explicitly confirmed *inter alia* that the statement of grounds of appeal had been filed. In addition to that, it was submitted that the presence of this document in the *epoline* register entitled the appellant to believe that the appeal had

been duly filed. The appellant argued that the appeal should be considered admissible on the basis of the principle of good faith.

7. The board notes that, whereas in cases T 781/04, T 991/04, T 395/07 and T 514/05 the notice of appeal was already filed via *epoline*, in the present case the notice of appeal was filed on 13 June 2008 by fax, which was at that date an acceptable means (see Decision of the President of the European Patent Office dated 12 July 2007 concerning the filing of patent applications and other documents by facsimile (Special edition No. 3, OJ EPO 2007, A.3)). Therefore, with the payment of the appeal fee on the same day, the present appeal was in existence as of 13 June 2008. Consequently, as the statement of grounds of appeal was filed via *epoline*, the only possible legal consequence is that, if this statement is treated as not filed, the present appeal would become inadmissible (see also T 1090/08, Reasons of the decision, point 17).

8. According to the jurisprudence of the boards of appeal, the duties of the EPO according to the principle of good faith are limited in that the EPO can only be expected to warn a party of a deficiency if the deficiency is readily identifiable by the EPO and the party can still correct it within the relevant time limit (see for example decision G 2/97, OJ EPO 1999, 123). In the present case, however, the appellant filed its statement setting out the grounds of appeal via *epoline* on 13 August 2008, and therefore on the very last day of the period specified in Article 108, third sentence, EPC. Accordingly, even if the EPO had warned the appellant, the warning would not have

allowed the appellant to re-file the statement of grounds of appeal by an acceptable means within said period. Therefore, under the principle of good faith, there was no duty of the EPO to warn the appellant. To that extent, the present case differs from cases T 781/04, T 991/04, T 514/05 and T 395/07, where the deficiency could have been identified in good time before the expiry of the relevant period.

9. The appellant further submitted that it was led to believe that the appeal had been duly filed because of the information in the *epoline* register and referred to T 781/04.

In decision T 781/04, the board referred to decision J 14/94 (OJ EPO 1995, 824) and found that, since the appellant was misled into believing that the appeal had been duly filed, the principle of good faith demanded that the appellant's error in filing via *epoline* be in principle rectifiable (see T 781/04, Reasons, points 10.4 and 10.5). J 14/94 concerned a case in which a loss of rights due to non-payment of a renewal fee became apparent several years after it had occurred and in the meantime the EPO had led the parties and the public to the legitimate belief that no loss of rights had taken place by continuing the examination procedure after the loss. The Legal Board of Appeal held that if, during a long period of time, the EPO by its conduct leads the parties and the public to the legitimate belief that no loss of rights has taken place, the EPO cannot later refer to a loss of rights which occurred several years previously without offending against the prohibition of "venire contra factum proprium" and therefore contravening the principle of good faith.

In the present case, however, the board informed the appellant about the deficiency in question in its very first communication, posted on 13 January 2009, and therefore a few months after the statement of grounds of appeal was filed via *epoline*. It is the board's view that this period cannot be considered "a long period of time". Moreover the board did not indicate that it had started the examination of the allowability of the present appeal. Hence the board did not behave in such a way that the appellant could legitimately believe that no loss of rights has taken place. Thus decision J 14/94 is not pertinent in the present case. It is true that, in decision T 781/04, the board concluded that the appellant was misled and applied the principles of decision J 14/94. However, as already stated above, the present case differs from the case underlying T 781/04, in which the appellant could have expected a warning since the deficiency could have been identified in good time before the expiry of the relevant period.

10. With regard to the appellant's argument that at the relevant time the EPO document submission system was unnecessarily complicated due to the fact that the electronic submission system could not be used for appeal proceedings contrary to the vast majority of submissions to the EPO, reference is made to the established jurisprudence of the boards of appeal according to which ignorance or an erroneous interpretation of the EPC owing to a mistake of law cannot be excused (see Case Law of the Boards of Appeal, 6th edition, 2010, section VI.E.7.4.2.b)). Moreover it is the board's view that, at the time of filing of the

statement of grounds of appeal, it was clear from the relevant legal provisions and the case law that documents relating to appeal proceedings should not be filed electronically. According to the relevant legal provisions the same applied to documents relating to opposition, limitation, revocation proceedings or any proceedings for review. In this context it is also noted that the wording of the "Statement" on the cover sheet of the statement of grounds of appeal filed on 13 August 2008 (see point II above) contained a clear warning for the appellant that in appeal proceedings documents could not be validly filed in electronic form. Hence the situation was not unnecessarily complicated. Thus there is no need to look into the provisions of the TRIPS Agreement cited by the appellant.

11. In view of the above the board concludes that, because of the electronic filing of the statement setting out the grounds of appeal, the present appeal does not comply with Article 108, third sentence, EPC. Thus, in accordance with Rule 101(1) EPC, the present appeal will have to be rejected as inadmissible, unless the appellant's request for re-establishment of rights is allowed.
12. Regarding the requirements for re-establishment of rights laid down in Article 122 and Rule 136 EPC, the only question is whether or not the conduct of the appellant's representative (including his assistant) amounted to the exercise of "all due care required by the circumstances".
13. According to Article 122(1) EPC an appellant can only have his rights re-established if he was unable to

observe the time limit for filing the statement of grounds of appeal in spite of all due care required by the circumstances having been taken. In accordance with the established jurisprudence of the Boards of Appeal, re-establishment of rights is intended to ensure that an isolated mistake within a normally satisfactory monitoring system does not result in an irrevocable loss of rights. In such a case the relevant party must show that the system normally worked well (see references in Case Law of the Boards of Appeal of the European Patent Office, 6th edition, 2010, VI.E.7.3).

In a case of a culpable error on the part of an assistant, this criterion is considered to be met if the professional representative is able to show that he has chosen for the work a suitable person properly instructed in the tasks to be performed, and that he has himself exercised reasonable supervision over the work (see Case Law of the Boards of Appeal of the European Patent Office, 6th edition, 2010, section VI.E.7.4, and in particular J 5/80, OJ EPO 1981, 343).

14. The question therefore is whether or not the conduct of the appellant's representative amounted to the exercise of "all due care required by the circumstances".

15. Regarding the submissions made and evidence filed by the appellant, an appellant relying on a special set of circumstances is obliged to present proof that the facts alleged have indeed occurred. According to the established jurisprudence, evidence in support of a party's request for re-establishment of rights can, if necessary, be presented after expiry of the two-month period pursuant to Rule 136(1) EPC (see e.g. T 324/90,

- OJ EPO 1993, 33, Reasons of the decision, point 5). In view of this jurisprudence and in the absence of any specific reason against the admission, the board, exercising its discretion under Article 13 RPBA, admitted all the evidence filed by the appellant into the appeal proceedings.
16. However, the board takes the view that the submissions and evidence on file do not indicate that the failure to file the statement of grounds of appeal by an acceptable means within the prescribed period resulted from an isolated mistake within a normally satisfactory system for monitoring the filing of appeals in the firm of the appellant's representative.
17. Taking into account the submissions and evidence on file, the board has difficulty in acknowledging that, at the relevant time in question, the representative's firm had an established system of checks to ensure that mistakes such as happened in the present case were avoided. It appears to the board that, although the assistants were generally instructed to use fax or regular mail for filing documents in appeal proceedings, there was no check or monitoring foreseen in the organisation of the firm as to whether these instructions were followed. It is clear from the representative's submissions that the assistant relied merely on the representative's instructions and, if the assistant did not receive any instruction, she "did what she was used to do, viz. send the letter to the EPO through *epoline*" (see the appellant's letter dated 6 March 2009, page 2). This, however, speaks against a normally satisfactory system for monitoring the filing of appeals.

18. It is also the board's view that filing an admissible appeal is not a routine task, but rather a complicated task which needs clear instructions from the professional representative to his assistant. In the present case, however, there is no evidence on file whether the assistant received instructions from the appellant's representative for sending the statement of grounds of appeal to the EPO, and if so, what instructions. In particular a copy of the email allegedly sent together with the draft statement could not be provided to the board.

19. The board also considers that the assistant's work should have been monitored as far as filing documents in appeal proceedings was concerned since at the relevant time the legal situation differed from that for filing documents in other proceedings before the EPO and the legal consequences for any failure were severe. In the board's view the professional representative whose electronic signature was on the cover sheet should have checked whether the attached document could have validly been sent via *epoline* and should have instructed the assistant accordingly, in particular in view of the exceptional personal circumstances of the appellant's representative, which were known within his office.

20. Finally the board turns to the appellant's argument that no other appeal case had gone wrong. The mere allegation that the present case was the first instance of unintended failure in filing an appeal does not show that all due care was normally observed and does not

prove that a satisfactory system was in place in the representative's office.

21. For the foregoing reasons, the board is not satisfied that "all due care required by the circumstances" was taken in the present case. Thus the requirements of Article 122(1) EPC are not fulfilled and the appellant's request for re-establishment of rights must be rejected in accordance with Article 122(2), second sentence, EPC. Since this request is rejected, the statement of grounds of appeal is deemed not to have been filed within the period provided by Article 108, third sentence, EPC. The appeal must, therefore, be rejected as inadmissible in accordance with Rule 101(1) EPC.

Order

For these reasons it is decided that:

1. The request for re-establishment of rights is rejected.
2. The appeal is rejected as inadmissible.

The Registrar:

The Chairman:

L. Fernández Gómez

F. Edlinger