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**Datasheet for the decision
of 27 June 2012**

Case Number: T 0294/11 - 3.4.01

Application Number: 03253027.1

Publication Number: 1363137

IPC: G01R 33/565

Language of the proceedings: EN

Title of invention:

Gradient non-linearity compensation in moving table MRI

Applicant:

GE Medical Systems Global Technology Company LLC

Headword:

-

Relevant legal provisions:

EPC Art. 108

EPC R. 99(2), 101(1)

Keyword:

"Admissibility of the appeal (no)"

Decisions cited:

T 0220/83, T 0234/86, T 1709/06, T 1309/05

Catchword:

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Case Number: T 0294/11 - 3.4.01

D E C I S I O N
of the Technical Board of Appeal 3.4.01
of 27 June 2012

Appellant: GE Medical Systems Global Technology Company
(Applicant) LLC
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Wisconsin 53188-1696 (US)

Representative: Bedford, Grant Richard
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 21 September 2010
refusing European application No. 03253027.1
pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: G. Assi
Members: H. Wolfrum
A. Pignatelli

Summary of Facts and Submissions

- I. European patent application 03 253 027.1 (publication No. EP 1 363 137) was refused by a decision of the examining division dispatched on 21 September 2010, on grounds set out in a communication of 14 July 2010 concerning primarily lack of clarity (Article 84 EPC 1973) of the claims and added subject-matter (Article 123(2) EPC) in the sole request then on file. Furthermore, provisional observations as to novelty and inventive step (Articles 54(1) and (2) and 56 EPC 1973) were given.
- II. The applicant lodged an appeal against the decision on 23 November 2010 and paid the prescribed fee on the same day. A statement of grounds of appeal was filed on 28 January 2011.

The appellant requested that the decision under appeal be set aside and a patent be granted on the basis of the set of claims on which the contested decision was based, *ie* claims 1 to 5 filed with letter of 28 June 2010. Moreover, replacement pages 3, 4, 8, 15 and 16 of the description were filed with the statement of grounds.

Furthermore, the appellant alleged a substantial procedural violation on the part of the examining division and requested that the appeal fee be reimbursed.

Also, an auxiliary request for oral proceedings was made.

III. Claim 1 of the appellant's request reads as follows:

"1. A method of correcting gradient non-linearities in moving table MR imaging comprising the steps of:
translating a patient (100) on a movable table (102) within a magnet (106); characterized by:
determining (206) the velocity of the movable table (102);
conditional on motion of the movable table (102) not being constant, continually monitoring (210) the velocity of the movable table (102);
acquiring MR data (208) in a presence of gradient non-linearity;
selecting (212) an amount of data to process per iteration;
reconstructing the selected MR data into an image (214, 216, 218); correcting (220) any warping in the selected MR data;
determining (222) a pixel offset due to motion of the table (102);
shifting (224) the selected MR data by the pixel offset;
and
building-up (226) a final image from the shifted selected MR data."

As regards the issue of clarity, the examining division had questioned, *inter alia*, the purpose and meaning of the steps of determining the velocity, selecting an amount of data, correcting any warping in the selected MR data, and determining a pixel offset.

V. Insofar as the statement of grounds of appeal deals with the Reasons of the contested decision concerning lack of clarity, the following submissions were made:

"In reply to the aforementioned Communication of 14 July 2010, the Applicant considers the Examining Division's submissions relating to clarity, support and added subject matter to be ill-founded. ...

It is respectfully submitted that the claims currently on file would be clear to the skilled man such that they clearly define the subject-matter for which protection is sought whilst simultaneously being clear, concise and supported by the description. For example, various of the steps as claimed are interdependent and must necessarily follow since the results of one process step are essential for the operation of a subsequent process step. This would be clearly understood by the skilled man.

Moreover, it appears that the Examining Division's comments are directed towards encouraging the Applicant to narrow the claims to explicit embodiments of the present invention, without necessarily defining the present invention in a way that would provide a fair degree of protection for the Applicant with a reasonable degree of certainty for third parties. It is thus respectfully submitted that the Examining Division's implied request to limit the claims to the specific embodiments defined in the application violates the principles of the Protocol to Article 69 EPC."

- V. On 21 March 2012 the appellant was summoned to oral proceedings to take place on 27 June 2012.

In an annex accompanying the summons pursuant to Article 15(1) RPBA the board expressed doubts as to whether the statement of grounds of appeal met the

requirements of Article 108 EPC in conjunction with Rule 99(2) EPC. Hence, the admissibility of the appeal would become the sole topic of discussion in the oral proceedings. Moreover, the appellant was informed that only in case the appeal was found admissible would a discussion of the matter of the alleged procedural violation ensue. However, the board was unable to identify any procedural violation in the actions taken by the examining division.

- VI. By facsimile of 28 May 2012 the appellant responded to the board's observations by providing arguments in support of clarity of the claimed subject-matter. Moreover, the appellant expressed its desire to avoid the need to attend the scheduled oral proceedings but maintained expressly its request for oral proceedings should the board not be minded to allow the appeal.

By a communication of the registry dated 13 June 2012 the appellant was informed that the oral proceedings would take place as scheduled.

- VII. Oral proceedings were held on 27 June 2012.

The appellant argued in favour of the admissibility of its appeal. The previous request for grant of a patent was maintained. The request for refund of the appeal fee was withdrawn.

Reasons for the Decision

1. Applicable law

In the light of the entry into force of the EPC 2000, reference is made to Article 7(1), 2nd sentence of the Revision Act of 29 November 2000 ("Act revising the Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973, last revised on 17 December 1991") and the transitional provisions for the amended and new provisions of the EPC (Decision of the Administrative Council of 28 June 2001), from which it may be derived which Articles of the EPC 1973 are still applicable to the present application and which Articles of the EPC 2000 are to apply.

2. Admissibility of the appeal

2.1 Article 108 EPC in conjunction with Rule 99(2) EPC requires that a statement setting out the grounds of appeal is filed which indicates the reasons for setting aside the decision impugned, or the extent to which it is to be amended, and the facts and evidence on which the appeal is based.

In this respect, the jurisprudence of the boards of appeal has developed the general principle that the statement of grounds of appeal should specify the legal or factual reasons on which the request for setting aside the decision is based (see for instance T 220/83 (OJ 1986, 249)). The arguments must be clearly and concisely presented to enable the board to understand immediately why the decision is alleged to be incorrect.

2.2 The contested decision does not contain reasons but only a reference to grounds given in the communication of 14 July 2010 of the examining division. This form of decision is allowed if it is quite clear from the grounds in a previous communication which considerations played a crucial role for the responsible division when it took its decision (see for example T 234/86, OJ 1989, 79, reasons point 5.10). It should not be left up to the party concerned and a board to construct the applicable reasons (see for instance T 1709/06 and T 1309/05).

In the present case, it is clear from the communication dated 14 July 2010 that lack of clarity and the contravention of Article 123(2) EPC were major deficiencies of the application and that these were the reasons for the refusal.

In particular, the examining division's reasoning as to lack of clarity was very elaborated. In fact, the examining division identified for claim 1 on file eighteen separate aspects of lack of clarity. Although some of these aspects may be of minor importance, others apparently concern serious problems.

Thus, the appellant should have explained in its statement setting out the grounds for appeal and within the time limit provided for in Article 108 EPC why the reasoning of the examining division was wrong.

2.3 As far as the appellant's statement of grounds of appeal of 28 January 2011 addresses the ground for refusal of lack of clarity, it provides two brief observations.

The first observation is an assertion that the claims on file were clear to the skilled man. They defined the subject-matter for which protection was sought whilst simultaneously being clear, concise and supported by the description. The assertion is supported by only one concrete argument which refutes the examining division's objection that it was not clear whether the steps in claim 1 were to be carried out in the order in which they are mentioned. In this respect, it is stated that it would be clearly understood by the skilled man that the steps as claimed were interdependent and had necessarily to follow since the results of one process step were essential for the operation of a subsequent process step.

The second observation does not add any concrete reason why the findings in the contested decision would be wrong but constitutes a submission on the part of the appellant that, in violation of the principles of the Protocol to Article 69 EPC, the examining division's comments were directed towards encouraging the applicant to narrow the claims to explicit embodiments of the present invention, without necessarily defining the present invention in a way that would provide a fair degree of protection with a reasonable degree of certainty for third parties.

Thus, with the exception of one aspect, the statement of grounds of appeal fails to explain why any of the other seventeen reasons for lack of clarity contained in the contested decision would be wrong. Consequently, it does not meet the standard for adequate substantiation.

- 2.4 The appellant argued in the oral proceedings that the rulings in the contested decision concerning lack of clarity were fundamentally flawed because the examining

division relied on the wrong test for judging clarity. Instead of properly interpreting the claims in the light of the description, as called for by the Protocol to Article 69 EPC, the division started from non-sensible interpretations of the claim definitions and arrived, on the basis of these free interpretations, at its findings of lack of clarity. In pointing to this key deficiency of the contested decision, the statement of grounds of appeal was sufficiently reasoned.

- 2.5 The appellant's submission is not convincing because it constitutes an argument in support of clarity which was not given in due time, *ie* in the statement of grounds of appeal (Rule 101(1) EPC). Besides, it is doubtful whether it could have been regarded as a sufficient reasoning because it does not address the majority of the clarity objections, which do not rely on any interpretation but directly question the meaning of the claimed definitions.
- 2.6 Furthermore, as far as the contravention of Article 123(2) EPC is concerned, the statement of grounds contains only the assertion that this article was not contravened.

Apart from a statement concerning the claimed step of determining the velocity of the moving table, which addresses point 2.1.1 of the communication of 14 July 2010, none of the other detailed objections of the examining division was dealt with.

- 2.7 It follows from the above considerations that the statement of grounds of appeal filed in the present case amounts to no more than a mere assertion that the contested decision is incorrect, without stating the legal or factual reasons why that decision should be set

aside, and thus does not satisfy the provisions of Article 108 EPC in conjunction with Rule 99(2) EPC.

The appeal is therefore not admissible.

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible.

The Registrar

The Chairman

R. Schumacher

G. Assi