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**Datasheet for the decision
of 14 July 2017**

Case Number: T 0532/12 - 3.5.04

Application Number: 05824296.7

Publication Number: 1805991

IPC: H04N7/173, H04N7/24, G06F17/30,
H04L29/06

Language of the proceedings: EN

Title of invention:
Image Scaling Arrangement

Applicant:
Apple Inc.

Headword:

Relevant legal provisions:
EPC Art. 123(2)

Keyword:
Amendments - extension beyond the content of the application
as filed (yes)

Decisions cited:

Catchword:



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Case Number: T 0532/12 - 3.5.04

D E C I S I O N
of Technical Board of Appeal 3.5.04
of 14 July 2017

Appellant: APPLE INC.
(Applicant) 1 Infinite Loop
Cupertino, CA 95014 (US)

Representative: Rooney, John-Paul
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted on 26 October 2011
refusing European patent application
No. 05824296.7 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman C. Kunzelmann
Members: R. Gerdes
T. Karamanli

Summary of Facts and Submissions

I. The appeal is directed against the decision to refuse European patent application No. 05 824 296.7, published as international application WO 2006/047697 A2.

II. The patent application was refused by the examining division on the grounds that claim 1 of the main request contained subject-matter extending beyond the content of the application as filed (Article 123(2) EPC) and that its subject-matter lacked inventive step (Article 56 EPC).

The independent claims of the first auxiliary request then on file were found to lack clarity (Article 84 EPC). In addition, their subject-matter was considered to lack inventive step.

For its finding on inventive step the examining division relied inter alia on document

D6: WO 01/29702 A2.

III. The applicant appealed against this decision and submitted claims of a main request and an auxiliary request with the statement of grounds of appeal. The appellant also requested that the appeal fee be reimbursed.

IV. The board issued a summons to oral proceedings and indicated in a communication annexed to the summons that under Article 12(4) RPBA it might not admit the main request. With respect to the auxiliary request the board expressed doubts as to the clarity of the claims (Article 84 EPC 1973) and the inventive step of the claimed subject-matter (Article 56 EPC 1973). It also

indicated that it could not see that a procedural violation had occurred in the first-instance proceedings.

- V. In response, with a letter dated 28 June 2017, the appellant submitted revised claims 1 to 12 according to a main request, replacing the claims of the previous main and auxiliary requests. With a further letter dated 11 July 2017, the appellant announced that it would not be represented at the oral proceedings before the board.
- VI. Oral proceedings were held before the board on 14 July 2017. As announced, the appellant was not represented at them.

The chairman noted that the appellant had requested in writing that the decision under appeal be set aside and that a patent be granted on the basis of claims 1 to 12 according to the main request filed with the letter dated 28 June 2017.

The chairman also noted that, on page 4 of the letter dated 28 June 2017, the appellant had filed a further request which read as follows: *"We believe that the Board's observation in Section 6.1 may have some merit. Thus, revised claim 1 is filed, which shows that the image may be sent to at least one of two displays. For example, revised claim 1 explicitly states that there are two displays - a first display (610A), which may be native to the portable media device; **and** (ii) a second display (610B), which be external to the portable media device. If the Board maintains this rejection, we request that revised claim 1 is amended to include some or all of the subject matter of revised claims 2 and 3 as the Board sees fit. We ask that this request is*

considered an auxiliary request to the Main Request filed with this letter."

The chairman further noted that the appellant had requested in writing reimbursement of the appeal fee.

VII. Claim 1 of the main request reads as follows (additions to claim 1 of the auxiliary request submitted with the statement of grounds of appeal underlined, deletions indicated by strike-through):

"A portable media device (504) capable of viewing images, the portable media device comprising:

a storage device (604) containing downloaded image data; and

a processor (602) configured to supply at least a portion of the downloaded image data to a first display (610A,~~—~~) and a second display (610B);

the portable media device being characterised in that: the downloaded image data includes a plurality of image collections;

each image collection includes a plurality of differently formatted images based on a respective original image;

within each image collection, the differently formatted images have different image profiles to one another;

each image profile comprises a set of attributes defining characteristics for a respective one of the differently formatted images, the set comprising:
a Rotation attribute describing a degree of rotation for the respective one of the differently formatted images,

a ColorAdjustment attribute describing a color adjustment for the respective one of the differently formatted images, and

a GammaAdjustment attribute describing a gamma correction for the respective one of the differently formatted images;

the processor is configured to send the image profiles to a host device that is to supply the downloaded image data;

at least one of the image profiles is based on the capabilities of the portable media device; and

at least one other of the image profiles corresponds to a display format associated with another image using device through which the portable media device can present images."

VIII. In the decision under appeal, in the context of a discussion of the technical problem, which was formulated as "how to provide the images from an external source to a portable multimedia device necessary for a photo browsing functionality matching the capabilities of an internal or an external display", the examining division stated that "D6 (p.1, lines 24-29) clearly presents the use of thumbnails as means for selecting an image for larger display as conventional art", see Reasons, section 1.2, page 5, fourth and fifth paragraphs.

IX. The appellant's arguments, as far as they are relevant to the present decision, may be summarised as follows:

Regarding the additional features of claim 1 submitted with letter of 28 June 2017, the appellant stated: "Explicit support for each of the attributes in revised claim 1 is found on pages 9-10 of Int. Pub. No. WO 2006/047697", see page 4 of that letter, second paragraph.

The appellant requested reimbursement of the appeal fee because "in sections 1.2, 2.2.1 and 2.2.2, the decision to refuse this application relies on D6 as exemplifying the common general knowledge even though D6 is a patent document rather than an extract from an encyclopaedia, a basic textbook, or the like" (see statement of grounds of appeal, page 1).

Reasons for the Decision

1. The appeal is admissible.

The board admitted the main request into the appeal proceedings as a reaction to the board's communication annexed to the summons (see point V above).

Non-attendance of the appellant at the oral proceedings

2. The duly summoned appellant did not attend the oral proceedings. In accordance with Rule 71(2) EPC 1973, however, the proceedings were allowed to continue in its absence.

The appellant filed the amended claims with letter of 28 June 2017 shortly before the oral proceedings on 14 July 2017. By choosing not to attend the oral proceedings, the appellant decided to rely solely on its written submissions. It was to be expected that the amended claims would have to be examined for compliance with the requirements of the EPC, in particular with regard to Article 123(2) EPC.

In addition, the board is not obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any

party duly summoned who may then be treated as relying only on its written case (Article 15(3) RPBA).

At the conclusion of the oral proceedings, the board was in a position to take a decision since the case was ready for decision (Article 15(5) and (6) RPBA), and the appellant's voluntary absence was not a reason for delaying the decision (Article 15(3) RPBA).

Main request

Added subject-matter, Article 123(2) EPC

3. Claim 1 contains the additional feature "a GammaAdjustment attribute describing a gamma correction for the respective one of the differently formatted images".

3.1 The appellant cited pages 9 to 10 of the international application as published as a basis for that amendment. The passages relating to the GammaAdjustment attribute read as follows:

"The image profile generally includes a list of keys or attributes which define the qualities or characteristics of each image. The keys or attributes may include for example FormatID, RenderWidth, RenderHeight, DisplayWidth, DisplayHeight, PixelFormat, Sizing, BackColor, Rotation, ScanFormat, ColorAdjustment, GammaAdjustment, and the like."

"GammaAdjustment describes whether a gamma correction needs to be applied to the image (e.g., brightness). If not supplied, no correction is done."

In addition, claim 8 of the international application as published relates to the GammaAdjustment attribute:

"The method as recited in claim 1 wherein the image profiles include a list of keys that define the characteristics of the image, the keys including FormatID, RenderWidth, RenderHeight, DisplayWidth, DisplayHeight, PixelFormat, Sizing, BackColor, Rotation, ScanFormat, ColorAdjustment and GammaAdjustment."

- 3.2 The board interprets the additional feature of claim 1 such that the GammaAdjustment attribute describes a gamma correction, i.e. it specifies a value of a gamma adjustment/correction to be applied to the image. In contrast, according to the description, the GammaAdjustment attribute "describes whether a gamma correction needs to be applied to the image" (underlining added by the board). Whether a gamma correction needs to be applied may be signalled by a Boolean variable indicating a yes/no choice. This is not the same as the description of the gamma correction itself, but only an indication of the necessity of a gamma correction.
- 3.3 Hence, the specification of the GammaAdjustment attribute has been shifted from its original meaning in such a way that claim 1 contains subject-matter which a person skilled in the art would not derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the application as filed. Thus the application has been amended in such a way that it contains subject-matter which extends beyond the content of the application as filed. This is contrary to Article 123(2) EPC.

- 3.4 In view of the above, the appellant's main request is not allowable for lack of compliance with Article 123(2) EPC.

Auxiliary request

4. The appellant requested that "revised claim 1 is amended to include some or all of the subject matter of revised claims 2 and 3 as the Board sees fit" if the objection of "Section 6.1" of the summons was maintained in view of the amended claims (see point VI above).
- 4.1 The board's objection raised under Article 84 EPC 1973 in the communication annexed to the summons, Section 6.1, concerned the question of whether or not claim 1 of the auxiliary request filed with the statement of grounds of appeal required a display as part of the portable media device. This objection was not causal for the rejection of the amended claims according to the main request. Hence for this reason alone the appellant's "auxiliary request" need not be considered.
- 4.2 Moreover, it is noted that the board is bound by Article 113(2) EPC to decide upon the European patent application only in the text submitted to it, or agreed, by the applicant. In the present case, the auxiliary request does not contain the text of corresponding claims, nor can the appellant's statement be regarded as an unconditional agreement to any text on file.
- 4.3 Hence, the appellant's auxiliary request is not allowable.

5. Since none of the appellant's requests is allowable, the appeal is to be dismissed.

Reimbursement of the appeal fee, Rule 67 EPC 1973

6. Since the appeal is not allowable, the request for reimbursement of the appeal fee cannot be allowed (Rule 67 EPC 1973, which corresponds to Rule 103(1)(a) EPC).
7. In addition, the board notes that the appellant's allegation of a procedural violation before the department of first instance is not convincing.
 - 7.1 The appellant requested reimbursement of the appeal fee because the decision under appeal "relies on D6 as exemplifying the common general knowledge even though D6 is a patent document rather than an extract from an encyclopaedia, a basic textbook, or the like" (see statement of grounds of appeal, page 1, and points VIII and IX above).
 - 7.2 According to established jurisprudence of the boards of appeal the assertion that something was part of the common general knowledge only needs to be proved if challenged by a party (see Case Law of the Boards of Appeal of the European Patent Office, 8th edition 2016, section I.D.8.3, cf. in particular decisions T 766/91, Reasons, points 8.1 and 8.2, and T 939/92, Reasons, point 2.3). It is not evident from the file that in the proceedings before the examining division the appellant contested that document D6 exemplified common general knowledge.
 - 7.3 Moreover, if the provisions of Article 54(2) EPC 1973 or of Article 56 EPC 1973 were incorrectly interpreted

by the examining division, such "an error in the application of the law" would not constitute a procedural violation (see Case Law of the Boards of Appeal of the European Patent Office, 8th edition 2016, section IV.E.8.4.5).

7.4 In view of the above, the request for reimbursement of the appeal fee is to be refused.

Order

For these reasons it is decided that:

1. The appeal is dismissed.
2. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairman:



K. Boelicke

C. Kunzelmann

Decision electronically authenticated