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**Datasheet for the decision
of 17 July 2018**

Case Number: T 2253/13 - 3.4.03

Application Number: 08164517.8

Publication Number: 2037442

IPC: G09G3/34

Language of the proceedings: EN

Title of invention:

Image display device and method capable of adjusting
brightness

Applicant:

MagnaChip Semiconductor Ltd.

Headword:

Relevant legal provisions:

EPC Art. 108 sentence 3, 122
EPC R. 126(2), 134(1), 136
RPBA Art. 12(4), 15(1)

Keyword:

Re-establishment of rights - (yes)
Late-filed request - admitted (no)

Decisions cited:

T 1062/96

Catchword:



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Case Number: T 2253/13 - 3.4.03

D E C I S I O N
of Technical Board of Appeal 3.4.03
of 17 July 2018

Appellant: MagnaChip Semiconductor Ltd.
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Representative: Regimbeau
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 27 May 2013
refusing European patent application No.
08164517.8 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman G. Eliasson
Members: T. M. Häusser
T. Bokor

Summary of Facts and Submissions

I. The appeal concerns the decision of the examining division dated 27 May 2013 refusing the European patent application No. 08 164 517 for lack of novelty (Article 54 EPC) in relation to the former main request and for lack of inventive step (Article 56 EPC) in relation to the former auxiliary request.

II. In writing the appellant had requested that the decision under appeal be set aside and that a patent be granted on the basis of claims 1-24 of the main request, or alternatively on the basis of claims 1-20 of the auxiliary request, both filed with the notice of appeal dated 22 July 2013 and also with the statement of the grounds of appeal dated 5 October 2013. The appellant further requested re-establishment of rights under Article 122(1) EPC into the time limit for filing the grounds of appeal pursuant to Article 108 EPC, third sentence.

In a communication pursuant to Article 15(1) RPBA the board informed the appellant of its provisional opinion that the main request and the auxiliary request should not be admitted into the appeal proceedings.

Oral proceedings took place before the board in the appellant's absence, of which the board had been informed beforehand.

III. The wording of claim 1 of the main request and of the auxiliary request is as follows (board's labelling "(i)", "(ii)", and "(i)')":

Main request:

"1. An image display device capable of adjusting brightness, the image display device comprising

- a brightness determining unit (220) that determines the brightness of image data, applied from outside, so as to output a backlight selection signal (S1) and a contrast selection signal (S2);
- a backlight control unit (230) that is connected to the brightness determining unit (220) and outputs a backlight driving voltage (Vc) for supplying backlight (212) with brightness corresponding to the backlight selection signal (S1);
- (i) a contrast control unit (240) that is connected to the brightness determining unit (220) and outputs an image output signal (D0) for outputting an image of which the contrast is adjusted to correspond to the contrast selection signal (S2); and
- an image display unit (210) that is connected to the backlight control unit (230) and the contrast control unit (240) and receives the backlight driving voltage (Vc) and the image output signal (D0) so as to display an image in which the brightness of the backlight (212) and the contrast of the image data are simultaneously adjusted,
- (ii) the contrast being adjusted into lower contrast if the brightness of the backlight is higher than a reference backlight brightness."

Auxiliary request:

Claim 1 of the auxiliary request differs from claim 1 of the main request in that feature (i) is replaced by the following feature:

(i)' "a contrast control unit (240) that is connected to the brightness determining unit (220) and outputs an image output signal (D0) for outputting an image of

which the contrast is adjusted to correspond to the contrast selection signal (S2), the contrast control unit (240) comprises a contrast control section (241) and a data drive (242), the contrast control section being composed of first to fifth calculation means (241a-241e) and a contrast calculating means (241f) and adapted to receive the contrast selection signal (S2), to multiply the image data applied from outside by a selective combination of values calculated by the first to fifth calculation means (241a-241e) and to generate an image signal (C2) of which the contrast is adjusted, the selective combination being selected by the contrast selection signal (S2), and the data drive being adapted to convert the image signal (C2) into the image output signal (D0) to display to the outside; and"

IV. The appellant argued essentially as follows:

(a) Request for re-establishment

An appeal against the refusal of the application was duly filed. The time limit for filing the statement of the grounds of appeal expired on 7 October 2013. The appellant had sent the statement of the grounds of appeal by fax to the EPO on that day followed by a mail confirmation letter.

In November 2013 a communication dated 12 November 2013 was received from the Registry of the Boards of Appeals stating that the statement of grounds had been received at the EPO only on 14 October 2013, i. e. after the expiry of the relevant time limit.

However, the non-respect of the time limit of 7 October 2013 was an isolated error by an assistant charged with sending the statement of grounds by fax and mail con-

firmation letter. In fact, the fax was sent on 7 October 2013 but did not go through. The assistant overlooked the "emission" (transmission) report which indicated that the fax had not been successfully sent.

Hence, the time limit for filing the grounds of appeal was not observed in spite of all due care required by the circumstances.

The request for re-establishment of rights under Article 122 EPC was filed with letter dated 10 January 2014, i. e. before the expiry on 22 January 2014 of the two-month period for filing such a request. The reception of the communication of 12 November 2013, deemed to have taken place on 22 November 2013 according to the ten-day rule, constituted the starting point of this period.

(b) Admission of the main request and the auxiliary request

The appellant did not submit any reasons why the main request and the auxiliary request should be admitted into the appeal proceedings.

Reasons for the Decision

1. Request for re-establishment

1.1 The decision to refuse the present patent application was notified by registered letter dated 27 May 2013 and is thus deemed to be delivered on 6 June 2013 (Rule 126(2) EPC).

The appellant duly filed a notice of appeal with letter dated 22 July 2013.

Pursuant to Article 108 EPC, third sentence, the statement setting out the grounds of appeal has to be filed within four months of the notification of the decision. As the expiry date for filing this statement (6 October 2013) falls on a Sunday, the four-month period is extended to Monday, 7 October 2013, in accordance with Rule 134(1) EPC.

Since the statement setting out the grounds of appeal was only received at the EPO on 14 October 2013, i. e. one week after the expiry of the extended four-month period, the appellant did not observe the relevant time limit for filing the grounds of appeal.

- 1.2 The appellant showed that in view of the events - as detailed below - related to the writing and sending of the grounds of appeal, the removal of the cause of non-compliance with the time limit for filing the grounds of appeal was the reception of the board's communication dated 12 November 2013. In that communication it was stated that the grounds of appeal were filed out of time and that the appeal was therefore expected to be rejected as inadmissible.

Within the prescribed two-month period after the date of the removal of the cause of non-compliance the appellant filed - under Article 122 EPC - a request for re-establishment in its rights concerning the time limit for filing the grounds of appeal, stated the grounds on which the request was based and paid the corresponding fee (Rule 136(1) and (2), first sentence EPC). Furthermore, the omitted act was also completed before the expiry of the two-month period as the

grounds of appeal had been received by the EPO on 14 October 2013 (Rule 136(2), second sentence EPC). The request for re-establishment is admissible.

- 1.3 The appellant showed by way of reference to various pieces of evidence relating to e-mails between the appellant, its representative, and the representative's assistant that the statement of grounds of appeal was drafted in time for transmission to the EPO before the expiry of the relevant time limit. The transmission itself was entrusted to the representative's assistant who had been instructed to send the statement by fax followed by a mail confirmation letter. In the board's opinion the representative was entitled to transfer such a routine task to an assistant without infringing all due care in dealing with the filing of the grounds of appeal.

The error leading to the non-observance of the time limit was made on the part of the representative's assistant, who overlooked that the fax transmission was not successful as indicated on the fax report, which was filed as evidence. However, this is considered an excusable isolated mistake by the assistant (see also T 1062/96 of 11 December 1997, Reason 3.2). It could not reasonably be required that an independent cross-check should be performed for checking the fax report when the relevant documents were also sent by confirmation mail and did indeed arrive at the EPO.

Hence, the board is satisfied that the appellant was unable to observe the above time limit in spite of all due care required by the circumstances (Article 122(1) EPC).

- 1.4 In view of the above the appellant can be re-established in its rights concerning the time limit for filing the statement setting out the grounds of appeal under Article 108 EPC, third sentence (Article 122(1) EPC).

Admission of the main request and the auxiliary request

- 1.5 The claims of the main and auxiliary requests, which were filed with the notice of the appeal as well as the letter setting out the grounds of appeal, have been amended compared to the corresponding requests on which the contested decision was based. The board has discretionary power not to admit such requests (Article 12(4) RPBA).
- 1.6 The claims of the main and auxiliary requests presently on file are identical to the claims of the corresponding requests filed during the examination proceedings with the letter dated 28 March 2013.

In a telephone conversation, which took place on 19 April 2013, the examiner raised an added subject-matter objection (Article 123(2) EPC) against feature (ii) of claim 1 of the main and auxiliary requests (see point 1.1 of the minutes of the telephone conversation). The examiner also stated (*ibid.*) that the objection could be overcome by replacing feature (ii) in both requests by the following feature:

(II) "the contrast being adjusted into higher contrast if the brightness of the backlight is lower than a reference backlight brightness".

In a letter sent to the EPO by way of fax transmission on the day of the telephone conversation, i. e. on

19 April 2013, the appellant stated with reference to feature (ii) that "a mistake has been made in the former sets of claims" and filed a new main request and auxiliary request with an amended respective claim 1, in which feature (ii) was indeed replaced by feature (II) as compared with claim 1 of the previous requests. The decision under appeal is based on these requests filed on 19 April 2013.

- 1.7 Hence, the appellant reverted in the appeal proceedings to a previous version of the requests, which had subsequently been replaced by other requests.

From the statement setting out the grounds of appeal it does not emerge whether this was done unintentionally or intentionally.

In any case, if the present requests were filed by mistake, the appellant should have filed the proper requests in response to the board's communication pursuant to Article 15(1) RPBA. In that communication the board expressed its preliminary opinion that the main and auxiliary requests constituted re-submitted requests withdrawn during the examination proceedings and should therefore not be admitted into the appeal proceedings. However, in its reply the appellant merely stated its intention not to attend the scheduled oral proceedings, but did not submit any further requests.

On the other hand, if the present requests were filed intentionally, the board points out that it is settled case law that the Boards of Appeal do not to admit requests that were withdrawn during first instance proceedings (see *Case Law of the Boards of Appeal of the EPO*, 8th edition 2016, section IV.E.4.3.3 c)). Indeed, withdrawal of the present requests during the examina-

tion procedure precluded the issue of a reasoned decision on their merits by the examining division. Reinstating these requests into the appeal proceedings might well compel the board either to give a first ruling on critical issues such as added subject-matter (see point 2.2 above), which runs counter to the purpose of appeal proceedings to review first instance decisions, or to remit the case to the examining division, which is contrary to procedural economy. In order to forestall these unsatisfactory options, Article 12(4) RPBA provides the board with the discretionary power to hold inadmissible requests which could have been presented in the first-instance proceedings (*ibid.*).

1.8 In view of the above the board decided not to admit the main request and the auxiliary request into the appeal proceedings (Article 12(4) RPBA).

2. Conclusion

As the board does not admit the main request and the auxiliary request into the proceedings, there is no admissible request on file on the basis of which a patent could be granted. Consequently, the appeal must fail.

Order

For these reasons it is decided that:

1. The applicant is re-established in his rights concerning the time limit for filing the statement setting out the grounds of appeal under Article 108 EPC, third sentence.
2. The appeal is dismissed.

The Registrar:

The Chairman:



S. Sánchez Chiquero

G. Eliasson

Decision electronically authenticated