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**Datasheet for the decision  
of 12 December 2014**

**Case Number:** T 1101/14 - 3.5.06

**Application Number:** 08743225.8

**Publication Number:** 2188712

**IPC:** G06F7/00, G06Q30/00

**Language of the proceedings:** EN

**Title of invention:**  
RECOMMENDATION SYSTEMS AND METHODS

**Applicant:**  
Piksel, Inc.

**Headword:**  
Inadmissible appeal/PIKSEL

**Relevant legal provisions:**  
EPC R. 99(2), 136(1)  
EPC Art. 101(1), 108, 122

**Keyword:**  
Admissibility of appeal - appeal sufficiently substantiated (no)  
Re-establishment of rights - all due care (no)

**Decisions cited:**  
T 1095/06

**Catchword:**

A representative who mistakenly signs a statement of grounds of appeal having most of its pages missing must, in the absence of special circumstances which could justify the representative's mistake, be considered not to have taken all due care required by the circumstances (see point 6).



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Case Number: T 1101/14 - 3.5.06

**D E C I S I O N  
of Technical Board of Appeal 3.5.06  
of 12 December 2014**

**Appellant:** Piksel, Inc.  
(Applicant) 26 West 17th Street  
2nd Floor  
New York, NY 1011 (US)

**Representative:** Driver, Virginia Rozanne  
Page White & Farrer  
Bedford House  
John Street  
London WC1N 2BF (GB)

**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 4 December 2013  
refusing European patent application No.  
08743225.8 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** W. Sekretaruk  
**Members:** M. Müller  
A. Teale

## **Summary of Facts and Submissions**

- I. The appeal lies against the decision of the examining division, with reasons dispatched on 4 December 2013, to refuse European patent application No. 08743225.8.
- II. The appellant filed a notice of appeal on 31 January 2014 and paid the appeal fee on the same day. On 11 April 2014, the appellant submitted, electronically, amended claims and description pages according to a main request and auxiliary requests 1-3, accompanied by a letter stating the following:

"In the matter of the Appeal, we enclose herewith the Grounds of Appeal, together with amended description pages and claims in relation to a Main Request and First to Third Auxiliary Requests. We request that the decision of the Examining Division be set aside in its entirety, and that a patent be granted based on the application in the form of the Main Request. If the Appeal Board considers that the Main Request is not permissible, we respectfully request an opinion in relation to the allowability of the First to Third Auxiliary Requests. We request Oral Proceedings in the event that any of the Requests are not considered allowable by the Appeal Board."

No further reasons were received with that submission, nor did the letter contain a list of intended enclosures.

- III. With a summons to oral proceedings, the board informed the appellant of its preliminary opinion that the letter of 11 April 2014, which the board considered to constitute the statement of grounds of appeal, did not indicate the reasons for setting aside the impugned

decision or the extent to which it was to be amended. The board therefore came to the preliminary conclusion that the grounds of appeal did not satisfy the requirements of Rule 99(2) EPC so that the appeal appeared to be inadmissible pursuant to Rule 101(1) EPC. The appellant was also informed that the oral proceedings would be limited to the question of admissibility.

IV. In response to the summons, received on 26 September 2014, the appellant argued that "the Grounds of Appeal which were filed were not the 'full' intended Grounds" and requested re-establishment of the applicant's right in the application under Article 122 EPC in view of the fact that, in spite of all due care required by the circumstances having been taken, the Applicant was unable to observe the deadline for filing the grounds of appeal under Article 108 EPC.

V. In a communication dated 8 October 2014, the board informed the appellant that the request for re-establishment would be dealt with in the planned oral proceedings and raised a number of questions. Since a submission relating to the grounds of appeal was received in time, it appeared questionable whether a time limit had been missed at all and therefore whether the request for re-establishment was admissible. The board also noted that the appellant had, in response to its electronic submission, received an immediate acknowledgement of receipt from which the omission of a separate document containing the grounds of appeal should have been apparent. In view of this it seemed that the cause of non-compliance had been removed directly after transmission and that consequently the request for re-establishment was not filed within the two-month period prescribed by the EPC. Moreover, even if the request for re-establishment had been made in good time, the

presence of the receipt would appear to have a bearing on the assessment of whether all due care required by the circumstances had been taken.

VI. The appellant provided further arguments in a letter dated 23 October 2014.

VII. The appellant's case, insofar as it is relevant to the present decision, can be summarized as follows.

- a) By 1 April 2014, the appellant and the representative had come to an agreement as to which documents were to be filed as and with the grounds of appeal.
- b) On 11 April 2014, a bundle of documents was prepared for uploading to the electronic filing system including, in particular, a letter relating to the appeal procedure comprising a cover letter and a twelve-page annex containing the actual grounds of appeal.
- c) The procedure normally followed by the representative and her secretary for an electronic filing consisted of five steps:
  - i) The representative would instruct the secretary which documents were to be filed.
  - ii) The secretary would upload these documents to the local end of the electronic filing system.
  - iii) The representative would click through every page of the uploaded documents and, once verified, electronically sign them.
  - iv) The secretary would perform the "send" function of the electronic filing system and

thus have the signed documents transmitted to the EPO.

v) The secretary would receive the electronic receipt of transmission and check whether the documents enclosed for transmission were properly transmitted.

d) This procedure was also followed in the present case. However, two errors occurred. The secretary failed in step ii) to upload the twelve-page annex containing the grounds of appeal, and the representative failed to notice in step iii) that this annex was missing before electronically signing the documents for transmission.

VIII. The oral proceedings were held on 12 December 2014, at the end of which the chairman announced the decision of the board.

## **Reasons for the Decision**

### *The admissibility of the request for re-establishment*

1. According to Article 122(1) EPC, the remedy of re-establishment is available to an applicant or proprietor who was unable to observe a time-limit vis-à-vis the European patent office. Given that a statement of grounds of appeal was received in time on 11 April 2014, it might be considered that no time limit was missed at all.

1.1 The appellant argued that the letter received on 11 April 2014 did not constitute the grounds of appeal. This was obvious from the letter because it referred to grounds of appeal which were meant to be "enclose[d]

herewith" but which were, in fact, not. The appellant also referred to Rule 99(2) EPC which required the statement of grounds of appeal to contain "the reasons for setting aside the decision impugned [...] and the facts and evidence on which the appeal is based" and argued that the submission of 11 April 2014 clearly did not contain reasons, facts or evidence. According to the appellant, therefore, no grounds of appeal were received at all and hence the time limit under Article 108 EPC for filing the grounds of appeal was missed.

1.2 The board is not convinced by the appellant's argument. Rule 99(2) EPC provides that the statement of grounds of appeal "shall indicate the reasons for setting aside the decision impugned, or the extent to which it is to be amended" (emphasis by the board). When an appellant does not maintain the claims as refused but files amended claims, it is *a priori* reasonable to assume that the appellant may not want to challenge the reasons of decision under appeal but rather wants it to be amended. Thus the absence of reasons in the letter of 11 April 2014 does not allow the conclusion that the letter does not constitute grounds of appeal in the sense of Article 108 EPC.

1.3 However, even though something was filed within the appropriate time limit which could be understood to be the statement of grounds of appeal, the board accepts that the submission was incomplete with respect to what was meant to be filed at the time. The appellant pointed out that not admitting the request for re-establishment would, in the present case, be tantamount to denying the appellant its access to the boards of appeal and therefore its only remedy against the decision under appeal, and argued that this would be a dis-



proportional consequence of the representative's procedural slip.

- 1.4 The board agrees with the appellant that Article 122 EPC is intended to provide a remedy for the type of error that occurred in the present case.
  
2. According to Rule 136(1) EPC, the request for re-establishment of rights shall be filed in writing within two months from the removal of the cause of non-compliance with the time limit. According to the jurisprudence of the boards of appeal, the cause of non-compliance is removed on the date on which the person responsible for the application is made aware of the fact that a time limit has not been observed or when the person concerned ought to have noticed the error if all due care had been taken (see Case Law of the Boards of Appeal of the European Patent Office, 7th ed. 2013, III.E.3.1.1 a)).
  - 2.1 The representative argues that she became aware of her error only when she received the board's communication dated 5 August 2014, so that the two months period started at that point.
  
  - 2.2 The statement of grounds of appeal was filed electronically on 11 April 2014. In immediate response to this filing, the appellant received an acknowledgement of receipt for the submitted documents (see also annex G, filed on 26 September 2014). The pertinent list mentions a letter of appeal ("APPEAL-LETT-1.pdf") having merely two pages and, apart from that, only amended claims and description pages. In particular, receipt of a twelve-page document containing a statement of grounds was not acknowledged. The board is of the opinion that the omission would have been directly apparent

to the representative had she checked the acknowledgement of receipt.

2.3 The representative has however argued that she does not - and is not required to - check the electronic acknowledgement of receipt, as this is a secretarial task. She explained that, according to the procedure for electronic filing used in her office, the primary purpose of the acknowledgement of receipt is to confirm that the documents received at the EPO tally with the transmitted ones so that, in the case of a transmission problem, some or all of the documents can be sent again.

2.4 The board considers the electronic filing procedure used in the representative's office and, in particular, the use made of the electronic receipt according to that procedure, to be reasonable. Therefore, the board finds that the date on which the cause of compliance was removed was the date when the representative actually learned from the board's summons to oral proceedings that the statement of grounds had been transmitted incompletely. As the board's summons was posted on 5 August 2014, the appellant's request for re-establishment of rights filed on 26 September 2014 was made within the time-limit prescribed by Rule 136(1) EPC.

3. The request for re-establishment is therefore admissible.

*The allowability of the request for re-establishment*

4. The appellant has argued that, as required by the jurisprudence of the boards of appeal, the secretary was a suitable person, properly supervised in the task to be performed, and that the representative had exercised

reasonable supervision over the secretary's work. Also the representative herself had a hitherto flawless record. Thus, the two errors were uncharacteristic and isolated mistakes in an otherwise secure system. The appellant did not however give any specific reasons as to why the two errors had occurred in the present case.

5. The board has no doubts regarding the professional qualifications of the secretary and no reason to question the quality of her supervision by the representative or the reliability of the filing procedure as described. However, in view of the following, the question of whether the secretary's mistake can be excused need not be decided in the present case.
6. The representative argued that, according to the described procedure, she *clicks through every page* of the documents to be transmitted before she electronically signs them (see point VII c) above, step iii)). This corresponded to leafing through a paper submission page by page before signing it by hand.
  - 6.1 The board agrees that this is a reasonable way of checking whether the representative is signing the right documents. More than that, the board considers that it is the representative's responsibility and obligation to make sure that what is signed is precisely what is meant to be signed.
  - 6.2 The representative argued that she failed to spot the incompleteness in the documents she signed despite exercising all due care as required by the circumstances. The representative thus effectively asked the board, by way of re-establishment, to excuse the representative's mistake of signing the wrong documents.

- 6.3 The representative referred to T 1095/06 in order to support her case. This decision dealt with the question of whether "re-establishment may be possible even in the event of a culpable error on the part of the assistant, 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 exercised reasonable supervision over the work" so that the error can be considered "an isolated error in an otherwise satisfactory system" (see T 1095/06, reasons 5). The decision stated (reasons 6) that the pertinent jurisprudence could not "be extended to everything that can be described as an 'isolated mistake'" and that, specifically, this jurisprudence could not "be relied on to ignore a failure to act by the professional representative himself, unless there are special circumstances which make the failure to act compatible with taking all due care."
- 6.4 The board notes that the representative's error is substantially independent of the specific procedure in place for electronic filing, since it would arise in the same way if the representative worked on her own and without the support of a secretary.
- 6.5 The board need not decide whether the representative's mistake in question is in principle compatible with all due care. It notes however, that the signing of documents is an act that requires particular care on the representative's part, especially when the signature relates to the last legal remedy against an adverse decision as is, in the present case, the appeal against the decision by the examining division to refuse the application. The board therefore considers that signing the wrong documents is incompatible with all due care unless special circumstances are invoked which could

justify the representative's mistake in a particular case, thus following the cited reasons of T 1095/06.

- 6.6 In the absence of such special circumstances the board comes to the conclusion that the representative did not take all due care required by the circumstances in the process of filing the grounds of appeal. The request for re-establishment in the time limit for filing the statement of grounds of appeal is therefore to be refused.

*The admissibility of the appeal*

7. According to Rule 99(2) EPC, the appellant, in the statement of grounds of appeal, shall in particular *indicate the reasons* for setting aside the decision impugned, or the extent to which it is to be amended (emphasis by the board).
- 7.1 The letter of 11 April 2014 contained no reasoning as to the substantive merits of the amended claims. The grounds of appeal do not specify whether the decision is challenged nor, if so, to what extent and why. They also fail to specify whether the amendments made to the claims are meant to overcome the reasons given in the decision or, if they do, why they are deemed sufficient in this respect.
- 7.2 This assessment, communicated to the appellant with the summons to oral proceedings, was not challenged by the appellant either in writing or orally.
- 7.3 Therefore, the board concludes that, due to the absence of any reasons, the letter filed on 11 April 2014 does not satisfy the requirements of Rule 99(2) EPC regar-

ding the grounds of appeal so that the appeal has to be rejected as inadmissible.

## Order

### For these reasons it is decided that:

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

The Registrar:

The Chairman:



B. Atienza Vivancos

W. Sekretaruk

Decision electronically authenticated