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**Datasheet for the decision
of 2 December 2022**

Case Number: T 0674/19 - 3.5.04

Application Number: 08839649.4

Publication Number: 2200324

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Language of the proceedings: EN

Title of invention:

IMAGE ENCODING DEVICE AND DECODING DEVICE, IMAGE ENCODING
METHOD AND DECODING METHOD, PROGRAM FOR THE DEVICES AND THE
METHODS, AND RECORDING MEDIUM RECORDING PROGRAM

Applicant:

Nippon Telegraph and Telephone Corporation

Headword:

Relevant legal provisions:

EPC Art. 108 sentence 3
EPC R. 99(2), 103(1)(a), 103(3)

Keyword:

Admissibility of appeal - (no)
Reimbursement of appeal fee - (no)

Decisions cited:

T 0502/02, T 1707/07, T 0132/03

Catchword:



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Case Number: T 0674/19 - 3.5.04

D E C I S I O N
of Technical Board of Appeal 3.5.04
of 2 December 2022

Appellant: Nippon Telegraph and Telephone Corporation
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 5 September
2018 refusing European patent application No.
08839649.4 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairwoman B. Willems
Members: F. Sanahuja
T. Karamanli

Summary of Facts and Submissions

- I. The appeal is against the examining division's decision to refuse European patent application No. 08 839 649.4.
- II. In the decision under appeal, the application was refused on the grounds that the subject-matter of independent claims 1, 3, 4 and 6 of the sole request pending at that time did not comply with the requirements of Article 123(2) EPC.

The examining division was of the view that, *inter alia*, the application as originally filed disclosed generating a predicted signal of a pixel by performing specific operations using distinct features involving a distance measure (see the description, paragraph [0057], equation 1). However, claim 1, and similarly claims 3, 4 and 6 of the sole request pending at that time, generalised the generation of a prediction from the gradient and pixel values in a non-specific manner, with some features having been extracted in isolation from an originally disclosed combination of features although there was a structural and functional relationship between the features (see points 2.1.2.1 and 2.1.4 of the decision under appeal).

- III. The applicant ("appellant") filed notice of appeal. With its statement of grounds of appeal, the appellant filed amended claims according to a main request and auxiliary requests 1 to 3.

The appellant requested the "*cancellation of the decision and the grant of the patent on the basis of the main request or on the basis of one of the auxiliary requests 1 to 3*" (see page 1 of the statement

of grounds of appeal). The appellant also requested that the appeal be allowed under Article 109 EPC and that the appeal fee be reimbursed "*under Rule 103-1-a and 2 EPC*" (see page 1 of the notice of appeal).

IV. The board issued a summons to oral proceedings scheduled for 2 December 2022 and a communication under Article 15(1) RPBA 2020 (the "board's communication"). In its communication, the board gave the following preliminary opinion:

- (a) The statement of grounds of appeal appeared not to address the examining division's objection under Article 123(2) EPC in point 2.1.2.1 of the decision under appeal. Hence, it seemed that the appellant had not addressed each of the grounds for refusal. Therefore, the statement of grounds of appeal did not seem to comply with Article 108, third sentence, and Rule 99(2) EPC, and consequently the appeal should be rejected as inadmissible.
- (b) Should the appellant be able to convince the board that the appeal is admissible, the appellant should be prepared to discuss the admittance of the requests filed with the statement of grounds of appeal in view of Article 12(4) RPBA 2007. The board was inclined to exercise its discretionary power under Article 12(4) RPBA 2007 in holding all requests inadmissible.
- (c) The board was minded to refuse the appellant's request that the appeal fee be reimbursed under Rule 103(1)(a) and (3) EPC, which entered into force on 1 April 2020 (see OJ EPO 2020, A5). The appellant was invited to state whether or not it maintained its request for reimbursement of the

appeal fee.

- V. With its reply dated 2 November 2022, the appellant filed a new main request and a new auxiliary request 1, and withdrew its previous auxiliary request 2. The appellant requested that the decision under appeal be set aside and that a European patent be granted on the basis of the new main request or on the basis of the new auxiliary request 1. With a letter dated 8 November 2022, the appellant submitted the remarks it had referred to in its letter dated 2 November 2022.
- VI. In a communication dated 23 November 2022, the board drew the appellant's attention to the fact that the issue to be discussed in the context of the admissibility of the appeal was whether the appellant had addressed with its statement of grounds of appeal the objections raised in point 2.1.2.1 of the decision under appeal.
- VII. With its letter dated 1 December 2022, the appellant informed the board that it would not be attending the oral proceedings scheduled for the following day. However, it did not reply in substance to the board's communication dated 23 November 2022.
- VIII. On 2 December 2022, the board held oral proceedings by video conference in the absence of the appellant.

The chairwoman noted that, according to the file, the appellant's final requests were as follows:

The appellant requested that the decision under appeal be set aside and that a European patent be granted on the basis of the claims of the main request or,

alternatively, on the basis of the claims of auxiliary request 1, both requests filed by letter dated 2 November 2022, or on the basis of the claims of auxiliary request 3 filed with the statement of grounds of appeal. The appellant also requested that the appeal fee be reimbursed "*under Rule 103-1-a and 2 EPC*".

At the end of the oral proceedings, the chairwoman announced the board's decision.

IX. Claim 1 of the **main request** reads as follows:

"An image encoding apparatus for encoding an input image using an intraframe prediction, comprising:

selection means for selecting, for each block to be encoded of which size may be 4x4 or 8x8 in the input image, the optimum combination of a gradient and an intra-frame prediction mode from among combinations of a plurality of input gradient candidates and possible intra-frame prediction modes;

prediction target pixel acquiring means for calculating, for each block to be encoded, a pixel value of each of pixels to be predicted that form each block to be encoded, from a pixel value of a reference pixel and the product of the distance from the reference pixel to each of the pixels to be predicted and the gradient that is selected by the selection means, the pixel value of each of the pixels to be predicted being generated by summing the product of the distance and the gradient with the pixel value of the reference pixel, and the reference pixel being determined by the intra-frame prediction mode that is selected by the selection

means and being referred to by each of the pixels to be predicted;

intraframe-encoding means for intraframe-encoding the block to be encoded based on the pixel values of the pixels to be predicted acquired by the prediction target pixel acquiring means and outputting a prediction residual signal obtained by the intraframe prediction; and

information encoding means for encoding information indicating the size of the gradient and the intra-frame prediction mode that are selected by the selection means and the prediction residual signal and outputting the encoded information that indicated the size of the gradient and the intra-frame prediction mode that are selected by the selection means and the prediction residual signal."

- X. Claim 1 of **auxiliary request 1** differs from claim 1 of the main request in that the following underlined term has been added in line 10:

"the selected gradient that is selected by the selection means"

- XI. Claim 1 of **auxiliary request 3** differs from claim 1 of the main request in that the selection means and the prediction target pixel acquiring means are defined as follows (with additions being underlined and omissions being ~~struck through~~):

"selection means for selecting~~r~~ for each block to be encoded of which size may be 4x4 or 8x8 in the input image~~r~~ the optimum combination of a gradient

and an intra-frame prediction mode from among combinations of a plurality of input gradient candidates and possible intra-frame prediction modes;

prediction target pixel acquiring means for calculating, for each block to be encoded, a pixel value of each of pixels to be predicted that form each block to be encoded, from a pixel value of a reference pixel that is determined by the intra-frame prediction mode that is selected by the selection means and is referred to by each of the pixels to be predicted and the product of the distance from the reference pixel to each of the pixels to be predicted and the selected gradient that is selected by the selection means, ~~the pixel value of each of the pixels to be predicted being generated by summing the product of the distance and the gradient with the pixel value of the reference pixel, and the reference pixel being determined by the intra frame prediction mode that is selected by the selection means and being referred to by each of the pixels to be predicted;~~"

XII. The appellant's arguments, where relevant to the present decision, can be summarised as follows:

(a) Claim 1 of both the main request and auxiliary request 1 filed with the statement of grounds of appeal specified that the pixel value of each of the pixels to be predicted was calculated from the pixel value of the reference pixel, the distance, and the gradient.

Claim 1 of auxiliary requests 2 and 3 specified that the pixel value of each of the pixels to be

predicted was calculated from the pixel value of the reference pixel and the product of the distance and the gradient.

- (b) The main request and auxiliary request 1 filed with the letter dated 2 November 2022 dealt with all of the reasons for the refusal of the patent application, i.e. they addressed all of the objections of the examining division under Article 123(2) EPC, in particular the objection in point 2.1.2.1 of the decision under appeal (see the section entitled "*1) Admissibility of the appeal (see section 3 of the Preliminary Opinion)*" of the letter dated 8 November 2022). Hence, the appeal should be considered admissible.

Reasons for the Decision

1. *Decision during oral proceedings*

- 1.1 By letter dated 1 December 2022, the appellant informed the board that it would not be attending the oral proceedings scheduled for 2 December 2022. In the present case, the board has not interpreted this statement as a withdrawal of the appellant's request for oral proceedings.

In such a case, the board has discretion under Article 116(1), first sentence, EPC to either maintain the date of the oral proceedings, in order to announce a decision at the oral proceedings, or to cancel the oral proceedings and issue a decision based on written proceedings, taking into account the appellant's right to be heard under Article 113(1) EPC.

- 1.2 In the present case, the board considered holding oral proceedings to be appropriate in order to close the debate and to announce a decision at the oral proceedings.
- 1.3 By not attending the oral proceedings, the appellant effectively chose not to avail itself of the opportunity to present its observations and counter-arguments orally but instead to rely on its written submissions. The board was in a position to announce its decision at the conclusion of the oral proceedings, as provided for in Article 15(6) RPBA 2020. The reasons on which this decision was based do not constitute a departure from grounds or evidence previously put forward, which would require that the appellant be given a further opportunity to comment. Therefore, the appellant's right to be heard under Article 113(1) EPC has been observed.

2. *Admissibility of the appeal*

- 2.1 In the statement of grounds of appeal, an appellant should indicate its reasons for requesting the decision under appeal to be set aside, or the extent to which it is to be amended, as well as the facts and evidence on which the appeal is based (Article 108, third sentence, and Rule 99(2) EPC). If the appeal does not comply with Article 108, third sentence, and Rule 99(2) EPC, the board must reject it as inadmissible, unless any deficiency has been remedied before the four-month time limit under Article 108, third sentence, EPC has expired (Rule 101(1) EPC).

If there are several independent reasons to refuse the application in the decision and at least one of those

reasons was not addressed in the statement of grounds of appeal, then the requirements of Rule 99(2) EPC have not been met (see Case Law of the Boards of Appeal of the European Patent Office, 10th edn., 2022, "Case Law", V.A.2.6.3 c)).

For an appeal to be admissible, the statement of grounds of appeal must enable the board to understand immediately why the decision under appeal is incorrect and on what facts the appellant is basing its arguments, without first having to make investigations of its own (see Case Law, V.A.2.6.3 a)).

In accordance with the jurisprudence of the boards of appeal (see Case Law, V.A.2.6.4 c) ii)), even if the statement of grounds of appeal does not state any specific reason why the decision under appeal is contested, an appeal against a refusal decision may be sufficiently reasoned if it is based on new amended claims filed with the statement of grounds of appeal that obviously call the decision under appeal into question (see, e.g., T 132/03, Reasons 2.2, T 502/02, Reasons 5 and T 1707/07, Reasons 11 and 12).

- 2.2 In its statement of grounds of appeal, the appellant did not provide any reasons why the examining division's conclusions in point 2.1.2.1 of the decision under appeal were contested (see point II., second paragraph, above). That is, the appellant did not address the examining division's objection that claims 1, 3, 4 and 6 of the sole request pending at that time generalised in a non-allowable manner the specific operations of multiplying the gradient with the distance from a reference pixel to a pixel of the block to be encoded and summing the result with the value of the reference pixel.

Furthermore, the appellant did not put forward any arguments as to why the statement of grounds of appeal itself, which had been filed within the four-month time limit under Article 108, third sentence, EPC, or the claim requests, which had also been filed within the four-month time limit under Article 108, third sentence, EPC, would meet the requirements of Article 108, third sentence, and Rule 99(2) EPC. In particular, none of the comments submitted by the appellant in its replies dated 2 and 8 November 2022 identify those parts of the statement of grounds of appeal which address the objections raised in point 2.1.2.1 of the decision under appeal.

2.3 Moreover, the amendments in the main request and in auxiliary request 1 filed with the statement of grounds of appeal do not address the objected generalisation of the specific operations, and the amendments in auxiliary requests 2 and 3 filed with the statement of grounds of appeal address the issue of the multiplication but not that of the summing (see point XII.(a) above). Hence, the claims of all of the requests filed with the statement of grounds of appeal specify the non-allowable generalisation objected to in point 2.1.2.1 of the decision under appeal. Thus, the mere act of filing these amended claims with the statement of grounds of appeal does not call into question the reasons for the refusal set out in point 2.1.2.1 of the decision under appeal (see point 2.1, fourth paragraph, above).

2.4 The appellant appears to be of the view that the appeal complies with Article 108, third sentence, EPC and should be considered admissible because the amended claims of the main request and auxiliary request 1

submitted with its letter dated 2 November 2022 addressed all of the reasons for the refusal of the patent application (see point XII.(b) above).

However, amended claims submitted only after the four-month time limit under Article 108, third sentence, EPC for filing the statement of grounds of appeal are irrelevant for assessing the admissibility of the appeal (see point 2.1 above). They cannot therefore remedy any deficiencies of the statement of grounds of appeal.

- 2.5 Since the statement of grounds of appeal does not address all of the examining division's objections under Article 123(2) EPC (see point II., second paragraph, above) and hence fails to address each of the grounds for refusal, the board concludes that the statement of grounds of appeal does not comply with Article 108, third sentence, and Rule 99(2) EPC. Therefore, the appeal must be rejected as inadmissible.

3. *Reimbursement of the appeal fee - Rule 103 EPC*

- 3.1 In its notice of appeal dated 2 November 2018, the appellant requested that the appeal fee be reimbursed "*under Rule 103-1-a and 2 EPC*".

The board notes that at that time Rule 103 EPC in the version according to the decision of the Administrative Council CA/D 16/13 of 13 December 2013 (see OJ EPO 2014, A3) was in force. In the meantime, an amended version of Rule 103 EPC entered into force on 1 April 2020 (see the decision of the Administrative Council CA/D 14/19 of 12 December 2019, OJ EPO 2020, A5). Since the present appeal was pending on 1 April 2020, Rule 103 EPC as amended applies (see

Article 2 of the decision CA/D 14/19) with respect to the issue of the reimbursement of the appeal fee.

The board further notes that the wording of Rule 103(1)(a) EPC is identical in both versions of Rule 103 EPC and that the former version of Rule 103(2) EPC largely corresponds to the current version of Rule 103(3) EPC.

3.2 The question as to whether, and to what extent, the appeal fee must be reimbursed depends on whether the respective requirements of the applicable provisions of Rule 103 EPC are fulfilled.

3.3 The appellant's request that the appeal fee be reimbursed under Rule 103(1)(a) and (3) EPC must be refused for the following reasons:

3.3.1 According to Rule 103(1)(a) EPC, the appeal fee is to be reimbursed in full in the event of interlocutory revision or where the board deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation.

In the case in hand, the board has concluded that the appeal is to be rejected as inadmissible and hence it cannot be deemed to be allowable. Consequently, the appeal fee cannot be reimbursed under Rule 103(1)(a) EPC.

3.3.2 Moreover, the appellant did not withdraw its appeal. Thus, the appeal fee cannot be reimbursed in accordance with the provisions of Rule 103(3) EPC (which largely correspond to the former version of Rule 103(2) EPC).

3.4 None of the requirements of the remaining provisions for reimbursement under Rule 103 EPC are fulfilled.

3.5 In view of the above, the request for reimbursement of the appeal fee must be refused.

Order

For these reasons it is decided that:

1. The appeal is rejected as inadmissible.
2. The request for reimbursement of the appeal fee is refused.

The Registrar:

The Chairwoman:



K. Boelicke

B. Willems

Decision electronically authenticated