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**Datasheet for the decision
of 30 March 2010**

Case Number: T 0991/07 - 3.4.01
Application Number: 03734065.0
Publication Number: 1504283
IPC: G01S 7/40, G01S 13/86
Language of the proceedings: EN

Title of invention:
Method and apparatus for terrain correlation

Patentee:
Honeywell International Inc.

Headword:
-

Relevant legal provisions:
RPBA Art. 15(3)
RPBA Art. 15(6)
EPC Art. 113

Relevant legal provisions (EPC 1973):
EPC Art. 84

Keyword:
"Clarity (no)"
"Absence of the appellant to oral proceedings / right to be heard"

Decisions cited:
G 0002/97, T 1059/04, T 1704/06, T 0823/04, T 0915/02

Catchword:
-



Case Number: T 0991/07 - 3.4.01

D E C I S I O N
of the Technical Board of Appeal 3.4.01
of 30 March 2010

Appellant: Honeywell International Inc.
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Representative: Haley, Stephen
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 9 January 2007
refusing European patent application
No. 03734065.0 pursuant to Article 97(1) EPC
1973.

Composition of the Board:

Chairman: H. Wolfrum
Members: P. Fontenay
K. Garnett

Summary of Facts and Submissions

I. European patent application No. 03 734 065.0 was filed as a PCT application on 13 May 2003 claiming a priority date of 13 May 2002. It was published under No. WO-A-03/096062.

In a decision dated 9 January 2007, the examining division refused the application for lack of inventive step of the subject-matter of claim 1 of the sole request on file.

II. The appellant (applicant) filed a notice of appeal on 6 March 2007 following payment of the prescribed appeal fee on 5 March 2007. The statement setting out the grounds of appeal was filed on 10 May 2007. The appellant requested that the impugned decision be overturned and a patent be granted on the basis of the claims and specification then on file.

In the event that the Board intended to maintain the decision of the examining division, oral proceedings were requested.

III. On 20 November 2009, the Board issued a summons to attend oral proceedings scheduled to take place on 30 March 2010.

In a communication pursuant to Article 15(1) Rules of Procedure of the Boards of Appeal (RPBA) dated 16 December 2009, the Board expressed its provisional opinion with regard to the appellant's request. It was in particular observed that claim 1 did not appear to meet the requirements of Article 84 EPC 1973 as to

clarity. The Board also stressed that the qualification "computer for verifying radar system performance" in independent claim 1 did not define any distinctive feature over prior art systems or computers which provided a measure of the correlation between, firstly, body coordinate values from radar data samples and, secondly, body coordinate values of simulated radar data obtained from a digital terrain elevation map. It was, more specifically, emphasized that such systems would be adapted to the claimed purpose when used with reliable reference data, i.e. reliable terrain elevation data, and thus would have constituted suitable starting points to arrive at the claimed system.

IV. By facsimile dated 26 February 2010, the appellant informed the Board that it would not attend the oral proceedings. A new set of claims 1 to 10 was filed as a new main request, taking into account the observations of the Board in its previous communication with regard to Article 84 EPC 1973. Arguments were also presented which, in the appellant's view, established that the requirements of Article 56 EPC 1973 as to inventive step were met.

V. Claim 1 reads as follows (with emphasis on the differences from claim 1 of the previous request added in bold type by the Board):

"1. A computer for verifying radar system performance, the computer programmed to:

store a global positioning satellite (GPS) file including GPS data samples (306) from a flight test of an aircraft, a radar data file (302) including radar

data samples including radar data test points from the flight test of the aircraft, the radar data test points being time stamped X, Y, and Z body coordinates and an altitude with respect to axes of the aircraft body, each GPS data sample corresponding to one of the radar data test points, and a digital terrain elevation map file (284);

interpolate (312) the stored GPS data samples to generate a GPS data sample that corresponds to every stored radar data sample;

generate a simulated radar file of body coordinate values (314) from the digital terrain elevation map file based on the interpolated GPS data samples; and

compare the body coordinate values (324) from the simulated radar file to the body coordinate values from the radar data test points in order to verify the radar system performance, wherein the computer processes high speed radar data and provides offline processing of real radar data to verify the radar system performance."

Claims 2 to 10 are dependent claims.

VI. This decision is issued after the entry into force of the EPC 2000 on 13 December 2007. Reference is made to the relevant transitional provisions for the amended and new provisions of the EPC, 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.

Where Articles or Rules of the former version of the EPC apply, their citations are followed by the

indication "1973" (cf. office's EPC, Citation practice, pages 4-6).

- VII. Oral proceedings, at the end of which the decision of the Board was announced, took place on 30 March 2010 in the absence of the appellant.

Reasons for the Decision

1. The appeal complies with the requirements of Articles 106 to 108 EPC 1973 and Rule 64 EPC 1973. It is, thus, admissible.
2. *Procedural matters*
 - 2.1 The Board accepts that the objections relating to the lack of clarity, which were raised by the Board in its communication pursuant to Article 15(1) RPBA, have been resolved by the amendments to independent claim 1 filed on 26 February 2010. However, in the Board's judgement, these amendments create new ambiguities as to the claimed subject-matter. Thus, the question arises whether the Board can base a decision on objections which would be new to the appellant, but which could not be communicated to it, due to the fact that it was not present at the oral proceedings, without infringing the appellant's right to be heard (Article 113(1) EPC).
 - 2.2 Article 15(3) RPBA (Supplement to OJ EPO 1/2009, 41) reads: "*The Board shall not be 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". The jurisprudence of the Boards of Appeal has underlined that this provision is to be interpreted in combination with Article 12(2) RPBA, according to which the statement of grounds of appeal shall contain a party's complete case (cf. Singer/Stauder "Europäisches Patentübereinkommen 5th. edition, Article 113, § 42). This approach, however, cannot be taken to extremes, since a party's case may be amended in the course of the appeal proceedings and thus may give rise to new objections to be dealt with as a consequence of these amendments being admitted and considered by the Board in the exercise of its discretionary power (Article 13(1) RPBA).

The Board is nevertheless of the opinion, in line with established case law (cf. e.g. decisions T 823/04, point 1, T 1059/04, point 1, neither of them published), that in such a situation an appellant who has decided not to attend oral proceedings has nonetheless had the opportunity to do so and that the requirements of Article 113 EPC are thus met.

- 2.3 As underlined in decision T 1704/06 (not published), point 7, this approach is corroborated by the explanatory note to Article 15(3) RPBA (former Article 11(3) RPBA), which note reads: "*This provision does not contradict the principle of the right to be heard pursuant to Article 113(1) EPC since that Article only affords the opportunity to be heard and, by absenting itself from the oral proceedings, a party gives up that opportunity*" (cf. CA/133/02, 12 November 2002).

Since it is incumbent on both the EPO and users of the European patent system who are parties to proceedings before it to act in good faith (G 2/97, OJ 1999, 123, point 4.2), a further justification for this approach may be seen in the fact that a party who files substantive amendments to its case and then deliberately absents itself from oral proceedings in order to avoid any adverse decision being reached would infringe this general principle. This would especially be true in situations such as the present, where the appellant had initially requested that oral proceedings be held. The Board further observes that a different conclusion, in particular one that would recognise under such circumstances the need for further exchanges between the board and the appellant before a decision could be taken, might imply that such amendments to a party's case would have to be considered inadmissible under Article 13(1) RPBA as being contrary to the principle of procedural economy.

- 2.4 Consequently, as observed in decision T 1704/06: *"in the situation where an appellant submits new claims after oral proceedings have been arranged but does not attend these proceedings, a board has a number of different options. It can continue the examination in writing, remit the case, grant a patent, or reject the claims as inadmissible. But it can also refuse the new claims for substantive reasons, specifically lack of inventive step, even if the claims have not been discussed before and were filed in good time before the oral proceedings. This will in particular be the case if an examination of these substantive requirements is to be expected in the light of the prevailing legal and factual situation"* (cf. T 1704/06, point 7.6). In the

present situation, the Board stresses that the appellant had to expect that the conformity of the amended claims with the requirements of Article 84 EPC 1973 would be examined (cf. also T 915/02, point 3).

3. *Clarity - Article 84 EPC 1973*

3.1 As a consequence of the amendments made, current claim 1 refers to an "altitude" defined with respect to axes of the aircraft body. It is however stressed that the term "altitude" defines, as a matter of ordinary understanding, the vertical distance separating a point in space from the ground level (or possibly the reference sea level). Since, a distance, contrary to a position, is independent from the actual reference axes considered, the association of the term "altitude" to preferred axes leads to ambiguities as to the actual meaning of this term. The present wording suggests that the radar test points comprise two sets of time-stamped X, Y and Z body coordinates: one corresponding to the closest point on the ground and the second one identifying the position of the point vertically separated from the aircraft. This interpretation would however contradict the ordinary understanding of the term "altitude".

3.2 A further lack of clarity arises from the amendment in claim 1 according to which "the computer processes high speed radar data and provides offline processing of real radar data to verify the radar system performance".

According to Webster's dictionary, the definition of the term "offline" is: "not connected to or served by a system and especially a computer or telecommunications

system; also: done independently of such a system". Applied to current claim 1, this definition suggests that the claimed computer is adapted to carry out the actual processing required to verify the radar data performance without the assistance of any server or any additional computer.

The passage referred to by the appellant on page 15, lines 20-22 of the published PCT application, according to which "*The high speed data collection provides for off line processing of real radar data, off line, using a computer, without the disadvantages of repeated flight tests to adjust radar performance*", suggests that a second computer different from the one processing the real radar data in real time would be involved to verify the radar performance. This passage thus suggests that something like a post-flight implementation is contemplated, as suggested in the preceding paragraph of the description. However, it does not support the indication that the same computer processes high speed radar data and also provides later offline processing of said radar data to verify the radar system performance as now recited in current claim 1. In fact, the paragraph on page 15, lines 8-14 suggests, on the contrary, that it is in situations where the radar system performance is to be verified in real time that the processing means may all be implemented on the aircraft, thus defining *de facto* a single processing system.

For the skilled reader of claim 1 it is therefore impossible to assess what the term "offline" actually refers to.

- 3.3 Hence, independent claim 1 does not meet the requirements of Article 84 EPC 1973 as to clarity.
4. Moreover, the Board is of the opinion that a clarified claim 1 would not have sufficed to define inventive subject-matter (Article 56 EPC 1973). It is considered that the skilled person would have recognised that prior art systems such as for example those disclosed in WO-A-00/02009 (D1) or US-A-5488563 (D2), whose purpose is to check the reliability of information obtained from various sources, would have constituted suitable starting points for verifying radar data performance. The modifications to be carried out in relation to such known systems to arrive at the claimed subject-matter would then be the direct consequence of the need to adapt such systems to said defined purpose.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

R. Schumacher

H. Wolfrum