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**Datasheet for the decision
of 17 September 2021**

Case Number: T 1564/18 - 3.5.07

Application Number: 09730954.6

Publication Number: 2301038

IPC: G11C29/00

Language of the proceedings: EN

Title of invention:

Programmable memory repair scheme

Applicant:

Rambus Inc.

Headword:

Programmable memory repair scheme/RAMBUS INC.

Relevant legal provisions:

EPC Art. 111(1), 113(1)
EPC R. 103(1) (a)
RPBA 2020 Art. 11

Keyword:

Right to be heard - substantial procedural violation (yes)

Decisions cited:

T 0951/92, T 1898/11, T 0305/14

Catchword:

Since neither the annex to the summons nor any of the previous communications of the examining division contained the essential legal and factual reasons leading to the finding in the appealed decision that claim 1 of the main request lacked novelty over the prior-art device considered for the first time in the novelty assessment of the refusal, and since no reason was given why the amendments made in advance of the oral proceedings held in absentia justified the change to this new closest prior art, the decision was issued in violation of the right to be heard even though the prior-art device on which the refusal was based was disclosed in the same document as a closest prior art considered previously in the examination procedure.



Beschwerdekammern
Boards of Appeal
Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-4465

Case Number: T 1564/18 - 3.5.07

D E C I S I O N
of Technical Board of Appeal 3.5.07
of 17 September 2021

Appellant: Rambus Inc.
(Applicant) 4453 N First Street, Suite 100
San Jose, CA 95134 (US)

Representative: Eisenführ Speiser
Patentanwälte Rechtsanwälte PartGmbB
Johannes-Brahms-Platz 1
20355 Hamburg (DE)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 6 February 2018
refusing European patent application
No. 09730954.6 pursuant to Article 97(2) EPC**

Composition of the Board:

Chair J. Geschwind
Members: C. Barel-Faucheux
P. San-Bento Furtado

Summary of Facts and Submissions

I. The appellant (applicant) filed an appeal against the decision of the examining division refusing European patent application No. 09730954.6, published as international application WO 2009/126812.

II. The contested decision cited *inter alia* the following document:

D6: US 2003/0147291 A1, published on 7 August 2003

The examining division refused the application for lack of novelty of the subject-matter of claim 1 of the main, first auxiliary and second auxiliary requests over the prior-art device disclosed in document D6, paragraphs [0008] to [0040] and Figures 1 and 2, and for lack of inventive step of the subject-matter of claim 1 of the third and fourth auxiliary requests over a combination of that disclosure of document D6 and the common general knowledge of the skilled person.

III. With the statement of grounds of appeal, the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request or, in the alternative, one of the first to fourth auxiliary requests that were the subject of the decision under appeal. It requested reimbursement of the appeal fee since the decision would be "based on new facts", contrary to the requirements of Article 113(1) EPC.

IV. In a communication in preparation for oral proceedings, the board expressed its opinion that the decision had been issued in violation of Article 113(1) EPC, consisting clearly in a substantial procedural

violation for which reimbursement of the appeal fee was equitable (Rule 103(1)(a) EPC). The board intended to set aside the decision under appeal and remit the case to the department of first instance for further prosecution without dealing with the questions of novelty and inventive step. The appellant was asked to clarify whether under these circumstances it withdrew its request for oral proceedings.

V. With a letter of reply, the appellant withdrew its request for oral proceedings, provided that the board remitted the case to the department of first instance for further prosecution.

VI. Claim 1 of the main request reads as follows:

"A semiconductor memory device (110), comprising:

 a plurality of data storage elements (112, 114) including primary data storage elements (112) and one or more redundant data storage elements (114),

 the primary data storage elements (112) having respective addresses for memory access operations; and

 a repair circuit (116) configured to reroute memory access from a primary data storage element having the recognized malfunctioning address to a corresponding redundant data storage element;

 wherein the repair circuit (116) is configured to be programmable by another semiconductor device separate from the memory device (110) to recognize a malfunctioning address of the primary data storage elements (112);

 wherein the repair circuit (116) includes one or more address matching registers (118) that are configured to recognize the malfunctioning address of the primary data storage elements (112);

wherein the repair circuit (116) includes address lines (130) to receive an address of the memory access operations, and

wherein the repair circuit (116) is further configured to use the address lines (130) for programming the address matching registers (118);

wherein the repair circuit (116) uses the address lines (130) in combination with a set pulse signal to program the address matching registers (118); wherein the address matching registers (118) are programmable after the memory device (110) is powered up for the memory access operations and after detecting a failure of one or more of the primary data storage elements (112)".

Reasons for the Decision

1. The appellant argued that the applicant's right to be heard had been violated in the first-instance proceedings, contrary to the provisions of Article 113(1) EPC (statement of grounds of appeal, pages 6 to 8, section II).

History of the use of document D6 by the examining division

2. Document D6 was cited for the first time by the examining division in a communication dated 4 December 2012. In this communication, the invention of document D6 as described in paragraphs [0060] to [0093] and illustrated by Figures 3 to 8 was considered to destroy the novelty of claim 1 then on file.
3. In a further communication dated 10 March 2015, the examining division replied to an argument of the applicant that document D6 did not disclose the feature

"wherein the repair circuit (116) is configured to be programmable by another semiconductor device separate from the memory device (110) to recognize a malfunctioning address of the primary data storage elements (112)" (corresponding to a feature of claim 1 of the present main request). In this communication, the examining division again referred to Figure 3 and cited in particular paragraphs [0063] and [0087] to [0092] of document D6 to support its argument that claim 1 lacked novelty over document D6.

4. In the annex to the summons to attend oral proceedings, the examining division again cited paragraphs [0060] to [0093] and Figures 3 to 8 of document D6 to argue that the subject-matter of claim 1 then on file (filed in electronic form on 22 June 2015) lacked novelty over document D6.
5. In reply to the summons, the applicant submitted the main request and the first to third auxiliary requests on which the decision under appeal is based.
6. During a telephone consultation which took place on 12 January 2018, the applicant was informed that the oral proceedings scheduled for 22 January 2018 would take place and that none of the requests on file seemed to be allowable since the features of the claimed controller were "present in the tester of D6".
7. In a letter dated 18 January 2018, the applicant submitted the fourth auxiliary request and requested that the oral proceedings be cancelled and that the examination be continued in writing. As a further auxiliary request, it requested that the oral proceedings be postponed. The reason invoked was that

"the instructing counsel at the side of the applicant" was seriously ill and could not provide instructions.

8. In a further letter, the requests to cancel or defer the oral proceedings were reiterated. Additionally, the applicant withdrew its "earlier" auxiliary request for oral proceedings and informed the examining division that it would not be represented "during any oral proceedings that would be held nonetheless".
9. Oral proceedings were held as scheduled in the absence of the applicant. The reasons for not cancelling nor postponing the oral proceedings are given in the written decision (decision, points 18 and 19; see also minutes).
10. The decision of the examining division is based on the "conventional art" illustrated by Figures 1 and 2 of document D6 and described in paragraphs [0006] to [0040]. The conventional semiconductor memory device of Figure 1 is presented in document D6 as corresponding to the one disclosed in Korean patent application No. 2000-57067 (see paragraph [0006]).

Procedural violation

11. The appellant objected that neither had this prior art disclosed in document D6 been used in the examining division's line of argument nor had said Korean patent application been cited by the examining division during the entire examination of the application.
12. In support of its objection that its right to be heard had been infringed, the appellant cited decisions T 1898/11, T 305/14, T 951/92, T 1198/97 and J 20/85.

13. For the reasons below, the board concurs with the appellant that the decision does not comply with the provisions of Article 113(1) EPC in accordance with the case law (see for example T 1898/11, reasons 3.2; T 305/14, reasons 2.3; T 951/92, reasons 3, points (v) and (vi)).

14. In the case at hand, the device chosen as closest prior art in the reasoning of the contested decision (the "conventional art" of paragraphs [0006] to [0040] and Figures 1 and 2 of D6) is similar to that chosen in previous communications (the device of paragraphs [0060] to [0093] and Figures 3 to 8 of D6). The devices illustrated in Figures 1 and 3 have a similar architecture and several common features. However, in its reasoning the examining division did not explain why it had changed to a different prior art nor whether it had relied only on features of the first device of Figure 1 also present in the second device of Figure 3.

15. As the appellant had decided not to be present at the oral proceedings, it had relied solely on its written arguments. In such a case, the appellant's right to be heard is not violated if the examining division raises new foreseeable objections against new subject-matter submitted before the oral proceedings, including citing different passages of a document for newly-introduced features. However, in the present case the board cannot recognise such a reason for changing the closest prior art to the disclosure of Figure 1 of document D6. The main request considered in the decision under appeal did not differ significantly from the previous sole request on file (only the expression "and after detecting a failure of one or more of the primary data storage elements (112)" had been added at the end of claim 1), and in its reasoning the examining division

did not justify why it had relied on a different part of document D6.

16. In the telephone consultation in advance of the oral proceedings (see point 6. above), the examining division had had an opportunity to inform the appellant that different closest prior art would be used against the new claims. However, the reference to "the tester of D6" in the minutes of the telephone consultation is too vague to conclude whether the examining division had clearly indicated which passages of the document would be of relevance.

17. In view of the above, the board concludes that neither the annex to the summons nor any of the previous communications of the examining division contained the essential legal and factual reasons leading to the finding in the appealed decision that claim 1 of the main request lacked novelty over the prior art cited for the first time to refuse the application. Moreover, it is not possible to establish from the decision under appeal whether or why the amendments made in advance of the oral proceedings held *in absentia* justified the change to a new closest prior art. The decision was therefore issued in violation of Article 113(1) EPC.

Remittal and reimbursement of the appeal fee

18. In accordance with established case law, and with regard to the circumstances of this case, the violation of the right to be heard by the decision under appeal amounts to a fundamental procedural deficiency and to a special reason for remitting the case for further prosecution (Article 111(1) EPC and Article 11 RPBA 2020). It is also a substantial procedural violation

within the meaning of Rule 103(1) (a) EPC for which full reimbursement of the appeal fee is equitable.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.
3. The appeal fee is to be reimbursed in full.

The Registrar:

The Chair:



S. Lichtenvort

J. Geschwind

Decision electronically authenticated