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**Datasheet for the decision  
of 26 September 2023**

**Case Number:** T 2285/19 - 3.5.04

**Application Number:** 15783584.4

**Publication Number:** 3136717

**IPC:** H04N5/74, G03B21/10, G09G5/00,  
G09G5/391

**Language of the proceedings:** EN

**Title of invention:**

VIDEO DISPLAY DEVICE, VIDEO PROJECTION DEVICE, DYNAMIC  
ILLUSION PRESENTATION DEVICE, VIDEO GENERATION DEVICE, METHOD  
THEREOF, DATA CONSTRUCT, AND PROGRAM

**Applicant:**

Nippon Telegraph and Telephone Corporation

**Headword:**

**Relevant legal provisions:**

EPC Art. 109(1), 111(1), 123(2)  
EPC R. 103(4)(c)  
RPBA 2020 Art. 11

**Keyword:**

Amendments - allowable (yes)

Remittal - special reasons for remittal

Remittal to the department of first instance - (yes)

Interlocutory revision - department of first instance should have rectified decision (yes)

Reimbursement of appeal fee at 25% - (yes) - request for oral proceedings withdrawn

**Decisions cited:**

T 0139/87, T 0691/18

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 2285/19 - 3.5.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.04**  
**of 26 September 2023**

**Appellant:** Nippon Telegraph and Telephone Corporation  
(Applicant) 5-1, Otemachi 1-chome,  
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Tokyo 100-8116 (JP)

**Representative:** MERH-IP Matias Erny Reichl Hoffmann  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 13 March 2019  
refusing European patent application No.  
15783584.4 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chair** 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. 15 783 584.4.

II. The documents cited in the decision under appeal included the following:

D1 EP 0 052 996 A1

III. The application was refused on the following grounds.

(a) The subject-matter of claims 1 and 6 of the main request and auxiliary requests 1 and 2 extended beyond the content of the application as filed (Article 123(2) EPC).

(b) The subject-matter of claims 1 and 6 of the main request was not new (Article 54 EPC).

IV. The applicant ("appellant") filed notice of appeal. With its statement of grounds of appeal, the appellant filed new sets of amended claims in accordance with a main request and auxiliary request 1. It indicated a basis for the amendments in the application as filed and submitted arguments to support its opinion that the subject-matter of the claims of both requests was new.

The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims according to the main request or, alternatively, according to auxiliary request 1. Moreover, it requested that oral proceedings be held if the board did not consider the main request to be

allowable.

V. A summons to oral proceedings was issued on 26 July 2022. In a communication under Article 15(1) RPBA 2020 dated 22 June 2023, the board expressed, among other things, the following preliminary view.

- (a) The amendments in the claims of the main request overcame the examining division's objection that the subject-matter of claims 1 and 6 of auxiliary request 2, which had formed the basis for the decision under appeal, extended beyond the content of the application as filed.
- (b) The examining division could reasonably have been expected to recognise that the amendments made to the claims of the main request filed with the statement of grounds of appeal overcame the sole ground for refusing auxiliary request 2 on which the decision was based, and should have rectified its decision.
- (c) The board was not in a position to assess whether the subject-matter of the claims of the main request filed with the statement of grounds of appeal met the requirements of patentability. Thus, the board was minded to exercise its discretion under Article 111(1) EPC to remit the case to the department of first instance for further prosecution.

The appellant was invited to comment on the preliminary opinion and to inform the board whether the request for oral proceedings as an auxiliary measure was maintained, since oral proceedings did not appear to be

expedient under the circumstances outlined above.

VI. By letter of reply dated 2 August 2023, the appellant withdrew the request for oral proceedings on condition that the case be remitted to the examining division for further prosecution.

VII. By communication of the Registry dated 28 August 2023 the appellant was informed that the oral proceedings scheduled for 8 December 2023 had been cancelled.

VIII. Independent claim 1 of the main request reads as follows:

"A dynamic illusion presentation device, comprising:

a low temporal frequency component extractor adapted to obtain a static image from an input moving image;

a luminance motion component extractor adapted to obtain a luminance motion component from the input moving image;

an output unit adapted to output the static image and the luminance motion component;

an input unit adapted to receive the static image and the luminance motion component;

an arithmetic unit adapted to add the luminance motion component to each of static components of the static image to obtain a superimposed moving image; and

a display unit adapted to display the superimposed moving image,

characterized in that:

the luminance motion component has a temporal frequency an absolute value of which is equal to or larger than a second value;

the static image includes spatial frequency components which have spatial frequencies absolute values of which are larger than zero, and have a temporal frequency an absolute value of which is equal to or smaller than a first value;

the static image corresponds to a component having a temporal frequency which is zero or approximately zero in several pieces of frames of the moving image;

the luminance motion component corresponds to a luminance component having a temporal frequency an absolute value of which is positive in the plurality of pieces of the frames of the moving image;

the second value is larger than the first value;

the low temporal frequency component extractor is adapted to set temporal average values of each of pixel values of the moving image as each of the static components of the static image; and

the luminance motion component extractor is adapted to subtract, from each luminance component of the identical moving image, each luminance static component which is obtained by time-averaging the luminance component to obtain the luminance motion component."

IX. Independent claim 3 of the main request reads as follows:

"A dynamic illusion presentation method comprising:

a low temporal frequency component extracting step of obtaining a static image from an input moving image;

a luminance motion component extracting step of obtaining a luminance motion component from the input moving image;

an output step of outputting the static image and the luminance motion component;

an input step of receiving the static image and the luminance motion component;

an [sic] computing step of adding the luminance motion component to each of static components of the static image to obtain a superimposed moving image; and

a displaying step of displaying the superimposed moving image,

characterized in that:

the luminance motion component has a temporal frequency an absolute value of which is equal to or larger than a second value;

the static image includes spatial frequency components which have spatial frequencies absolute values of which are larger than zero and have a temporal frequency an absolute value of which is equal to or smaller than a first value;

the static image corresponds to a component having a

temporal frequency which is zero or approximately zero in several pieces of frames of the moving image;

the luminance motion component corresponds to a luminance component having a temporal frequency an absolute value of which is positive in the plurality of pieces of the frames of the moving image;

the second value is larger than the first value;

the low temporal frequency component extracting step sets temporal average values of each of pixel values of the moving image as each of the static components of the static image; and

the luminance motion component extracting step subtracts, from each luminance component of the identical moving image, each luminance static component which is obtained by time-averaging the luminance component to obtain the luminance motion component."

## **Reasons for the Decision**

1. The appeal is admissible.
2. *Main request - Amendments (Article 123(2) EPC)*
  - 2.1 The European patent application may not be amended in such a way that it contains subject-matter which extends beyond the content of the application as filed (Article 123(2) EPC).
  - 2.2 The main request filed with the statement of grounds of appeal is based on auxiliary request 2 on which the decision under appeal was based (see section 2 of the

statement of grounds of appeal). The sole ground for refusing then auxiliary request 2 was objections under Article 123(2) EPC (see point III. above).

The examining division found that the application as filed did not disclose "*an arithmetic unit adapted to add a luminance motion component to an object image*" as specified in claims 1 and 6 of then auxiliary request 2 (see points II.3.1.1 and II.3.1.2, referencing point II.1.1.1, of the decision under appeal). It also stressed that paragraph [0048] of the application as filed, which the appellant indicated as the basis for the arithmetic unit, disclosed (emphasis added by the board) "*an arithmetic unit which add[ed] the luminance motion component to **each of the static components of the image***" (see point II.1.1.1, first to third paragraphs on page 3 of the decision under appeal).

- 2.3 In response to this objection, the appellant filed the amended claims of the main request with the statement of grounds of appeal. Claims 1 and 3 of the main request were based on claims 1 and 6 of auxiliary request 2 on which the decision was based, and specified, among other things, that (emphasis added by the board) "*the arithmetic unit is adapted to add the luminance motion component to **each of static components of the static image***" (see sections 2.1 and 4.1 of the statement of grounds of appeal).

The appellant stated that the amended wording was directly and unambiguously derivable from paragraph [0048] of the original application, as suggested by the examining division. Thus, the amendments to the claims overcame the objections in items II.3.1.1 and II.3.1.2 of the decision under appeal (see section 2.1, last six lines on page 3, and section 4.1, first and third full

paragraphs on page 9 of the statement of grounds of appeal).

The board notes that the arithmetic unit of paragraph [0048] acts on the image  $M_{\text{static}}$ . This image is a static image output by a low temporal frequency component extractor (see paragraph [0045] of the application as filed) as specified in claims 1 and 3 of the main request.

2.4 Therefore, the amendments to the claims of the main request clearly overcome the sole objection raised by the examining division against claims 1 and 6 of auxiliary request 2 on which the decision under appeal was based.

3. *Interlocutory revision (Article 109(1) EPC)*

3.1 Under Article 109(1) EPC, if the department whose decision is contested considers the appeal to be admissible and well founded, it must rectify its decision. Hence, under these conditions, there is no room for discretion of the first-instance department in applying the provision of Article 109(1) EPC to rectify its decision (see also Case Law of the Boards of Appeal of the European Patent Office, 10th edition, 2022, "Case Law", V.A.2.9.2).

An appeal is to be considered well founded within the meaning of Article 109(1) EPC if the main request submitted with the appeal includes amendments which clearly overcome the objections on which the decision relies, such that the examining division could reasonably be expected to recognise this and thus rectify its decision. Other objections which may arise in the main request but which were not the subject of

the contested decision cannot preclude the application of Article 109(1) EPC (see Case Law, V.A.2.9.3; decision T 139/87, OJ EPO 1990, 68, point 4 of the Reasons; decision T 691/18, point 2 of the Reasons).

- 3.2 These principles were also reflected in the Guidelines for Examination in the European Patent Office in the November 2018 edition, in force at the time the decision under appeal was issued (see OJ EPO 2018, A73). See, for instance, chapter E-XII, section 7.1, fourth paragraph:

"The department concerned will rectify its decision if convinced in the light of the grounds of appeal that the appeal is admissible and well founded. This could arise, for example, because: ... (iii) the decision of the department concerned does not appear to be incorrect, but the applicant ... files amendments to the application, which overcome the objections of the decision under appeal (see T 139/87)."

and chapter E-XII, section 7.4.2, first sentence:

"If amendments clearly overcome the grounds for refusal, interlocutory revision is granted even if further new objections arise."

These passages remain unamended in the current edition of the Guidelines for Examination of March 2023.

- 3.3 In view of the board's findings in point 2. above, the examining division could reasonably have been expected to recognise that the amendments made to the claims of the current main request overcame the sole ground for refusing then auxiliary request 2, and should have

rectified its decision.

4. *Remittal (Article 111(1) EPC, Article 11 RPBA 2020)*

4.1 Under Article 111(1) EPC, the board, in deciding upon the appeal, may either exercise any power within the competence of the department which was responsible for the decision appealed or remit the case to that department for further prosecution.

Pursuant to Article 11 RPBA 2020, which applies in the case in hand in accordance with Article 25(1) RPBA 2020, a remittal should be the exception, requiring special reasons for it to be ordered.

4.2 According to case law of the boards of appeal, the primary function of appeal proceedings is to give a judicial decision upon the correctness of a separate earlier decision taken by a department of first instance. Article 12(2) RPBA 2020 now expressly states that the primary object of the appeal proceedings is a judicial review of the decision under appeal.

4.2.1 In the case in hand, the examining division's decision for then auxiliary request 2, on which the current main request is based, was limited to the issue of unallowable amendments (Article 123(2) EPC).

4.2.2 Hence, there is no assessment of novelty or inventive step by the examining division for the subject-matter of the claims of the current main request.

The examining division's conclusion that the subject-matter of claim 1 of the then main request lacked novelty over the disclosure of document D1 was not based on a proper comparison of the features of the

claim with the disclosure of document D1. On the basis of this perfunctory analysis, the board is not in a position to assess whether the subject-matter of the claims of the current main request meets the requirements of patentability.

If the board were not to remit the case, it would have to assess for the first time whether the subject-matter of the independent claims of the current main request was new and involved an inventive step (Articles 54(1) and 56 EPC), which would run counter to the primary object of appeal proceedings (Article 12(2) RPBA 2020).

Moreover, the board doubts that document D1 - the only prior-art document cited in the first-instance proceedings - constitutes a suitable starting point for the assessment of patentability as it does not appear to be concerned with fundamental concepts on which the claimed invention is based (providing an illusion of motion or extracting characteristics of moving images for providing the illusion). Since the examining division did not consider any of the documents cited in the application, the board would even have to determine whether an additional search was necessary.

- 4.3 In the board's view, the circumstances set out in point 4.2 above represent special reasons within the meaning of Article 11 RPBA 2020 for remitting the case.
- 4.4 Consequently, the board exercises its discretion under Article 111(1) EPC to remit the case to the department of first instance for further prosecution.
- 4.5 The appellant withdrew its auxiliary request for oral proceedings on condition that the case be remitted to the examining division for further prosecution.

Therefore, the board is in a position to decide on the case without holding oral proceedings.

5. *Reimbursement of the appeal fee (Rule 103(4)(c) EPC)*

5.1 Under Rule 103(4)(c) EPC, the appeal fee must be reimbursed at 25% if any request for oral proceedings is withdrawn within one month of notification of the communication issued by the board in preparation for the oral proceedings, and no oral proceedings take place.

5.2 The requirements for partial reimbursement of the appeal fee under Rule 103(4)(c) are met in the case in hand since the appellant withdrew its request for oral proceedings within the prescribed period and no oral proceedings took place. Therefore, the appeal fee must be reimbursed at 25%.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The case is remitted to the examining division for further prosecution.
3. The appeal fee is to be reimbursed at 25%.

The Registrar:

The Chair:



K. Boelicke

B. Willems

Decision electronically authenticated