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**Datasheet for the decision  
of 28 February 2023**

**Case Number:** T 0044/21 - 3.5.05

**Application Number:** 06735297.1

**Publication Number:** 1869601

**IPC:** G06F19/00

**Language of the proceedings:** EN

**Title of invention:**

METHOD OF ANALYZING CELL STRUCTURES AND THEIR COMPONENTS

**Applicant:**

Intelligent Virus Imaging Inc.

**Headword:**

Maturity stage/INTELLIGENTVIRUSIMAGING

**Relevant legal provisions:**

RPBA 2020 Art. 13(2)

EPC Art. 123(2)

EPC R. 103(4)(c)

**Keyword:**

Amendment to appeal case - exercise of discretion

Amendment after summons - cogent reasons (no)

Amendments - added subject-matter (yes)



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Case Number: T 0044/21 - 3.5.05

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.05**  
**of 28 February 2023**

**Appellant:** Intelligent Virus Imaging Inc.  
(Applicant) Fasth Law Offices  
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**Representative:** Boco IP Oy Ab  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 7 October 2020  
refusing European patent application No.  
06735297.1 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chair** A. Ritzka  
**Members:** E. Konak  
K. Kerber-Zubrzycka

## **Summary of Facts and Submissions**

- I. The appeal is against the examining division's decision to refuse the application on the grounds that the subject-matter of claim 1 of the sole request then on file did not meet the requirements of Article 56 EPC.
- II. With its statement setting out its grounds of appeal, the appellant filed a new main request and a new auxiliary request 1 and re-filed the request on which the contested decision is based as auxiliary request 2. It requested that the decision be set aside and that a patent be granted on the basis of one of these requests. It further requested oral proceedings as an auxiliary measure.
- III. The board summoned the appellant to oral proceedings. In its preliminary opinion pursuant to Article 15(1) RPBA, dated 24 November 2022, the board informed the appellant that it did not intend to admit the main request. Regarding the auxiliary requests, the board raised objections under Articles 123(2), 84 and 56 EPC.
- IV. In a letter dated 20 December 2022, the appellant withdrew its request for oral proceedings and requested the board to decide in written proceedings. The appellant further informed the board that it would send a response to the preliminary opinion.

The board informed the appellant that the oral proceedings were maintained as scheduled.

With a letter dated 19 January 2023, the appellant filed a new main request and re-filed auxiliary request 1 filed with the statement setting out the grounds of

appeal. It requested that the decision under appeal be set aside and that a patent be granted on the basis of the new main request, or that the case be remitted to the examining division for further examination of the new main request. As an auxiliary request, it requested that a patent be granted on the basis of auxiliary request 1.

With a letter dated 23 February 2023, the appellant informed the board that it would not attend the oral proceedings. It requested a decision based on its response dated 19 January 2023.

The scheduled oral proceedings were thus cancelled.

V. Claim 1 of the new main request reads as follows:

"A method of analyzing virus particles, comprising:  
providing a cell (14) containing a plurality of virus particles (16);  
taking a first image (20) of a first virus particle (22) and a second image (32) of a second virus particle (34),  
characterizing the first virus particle as being in a first maturity stage and the second particle to be in a second maturity stage;  
the first virus particle (22) and the second virus particle (34) being linearly deformed making the virus particles look slightly like ellipses rather than circles;  
fitting an ellipse to the viral virus particle, and using principal radii and orientation of the ellipse to determine the deformation and to make an inverse deformation by transforming pixel positions from said images to produce pictures, where the virus particles are circular,

transforming the pictures to a first gray scale profile (24) visualized as a curve profile, and to a second gray scale profile (36) visualized as a curve profile; saving the first gray-scale profile (24) as a first template; saving the second gray-scale profile (36) as a second template; identifying a third particle in a third image; transforming the third image to a third gray scale profile visualized as a curve profile; and comparing the third gray-scale profile to the first and second templates to determine a maturity stage of the third particle."

Claim 1 of auxiliary request 1 reads as follows:

"A method of analyzing virus particles, comprising: providing a cell (14) containing a plurality of particles (16); taking a first image (20) of a first virus particle (22) and a second image (32) of a second virus particle (34), the first virus particle (22) and the second virus particle (34) having a linear deformation making the particles look like ellipses; characterizing the first virus particle as being in a first maturity stage and the second particle to be in a second maturity stage; identifying a third particle in a third image; fitting an ellipse to each particle; using principal radii and orientation of the ellipse to determine the deformation and to make an inverse deformation of the virus particles by transformation of pixel positions to produce images wherein the virus particle structures are circular; transforming the first image (20) to a first gray scale profile (24) visualized as a curve profile;

transforming the second image (32) to a second gray scale profile (36) visualized as a curve profile; transforming the third image to a third gray scale profile; saving the first gray-scale profile (24) as a first template; saving the second gray-scale profile (36) as a second template; and comparing the third gray-scale profile to the first and second templates to determine a maturity stage of the third particle."

## **Reasons for the Decision**

1. Admission of the requests
  - 1.1 In view of the primary object of the appeal proceedings being to review the decision under appeal in a judicial manner, an appellant's appeal case must be directed to the requests on which the decision under appeal was based (Article 12(2) RPBA). Any part of an appellant's appeal case which does not meet this requirement is to be regarded as an amendment, unless the appellant demonstrates that this part was admissibly raised and maintained in the proceedings leading to the decision under appeal. Any such amendment may be admitted only at the discretion of the board. The appellant should provide reasons for submitting the amendments in the appeal proceedings (Article 12(4) RPBA).
  - 1.2 In the present case, the contested decision is not based on the requests on file. These requests were not raised and maintained in the examination proceedings. Therefore, they are amendments within the meaning of

Article 12(2) and (4) RPBA, which can only be admitted at the discretion of the board.

- 1.3 Auxiliary request 1 differs from the request on which the contested decision is based merely in terms of a corrected reference sign. Therefore, the board has admitted this request.
- 1.4 The board informed the appellant in its preliminary opinion that it would not admit the main request filed with the statement setting out the grounds of appeal since a new feature from the description had been added to claim 1 and the appellant had not provided any reasons for submitting such an amendment in the appeal proceedings. The new feature in question was the text "[transforming the third image to a third gray scale profile] visualized as a curve profile".

The appellant did not comment on this in its reply to the board's preliminary opinion. Instead, it filed a new main request and argued that the new main request was filed to address the new objections (under Articles 123(2) and 84 EPC) raised by the board with regard to the requests that were then auxiliary requests 1 and 2.

Any amendment to an appellant's appeal case made after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the appellant (Article 13(2) RPBA).

Claim 1 of the new main request has the same feature as the main request filed with the statement setting out the grounds of appeal, namely "transforming the third image to a third gray scale profile visualized as

a curve profile". Therefore, the new main request is indeed based on the main request filed with the statement setting out the grounds of appeal, which the board had found inadmissible. The objections that the board had raised against other requests cannot justify the filing of an amended request based on a request that the board had found inadmissible.

For these reasons, the board does not admit the new main request into the proceedings.

2. Auxiliary request 1

2.1 Claim 1 of auxiliary request 1 was amended during the examination proceedings to state that "the first virus particle (22) and the second virus particle (34) [have] a linear deformation making the particles look like ellipses". As a basis for this amendment, the appellant cited page 4, line 5 *ff.*, of the description as filed. This passage reads as follows: "The virus particles 16 are often linearly deformed making the virus particles look slightly like ellipses rather than circles." Therefore, the application as filed discloses addressing a linear deformation which is only in comparison to a circle slightly like an ellipse. The generalisation of this linear deformation to include any shape "like ellipses" extends beyond the content of the application as filed and therefore does not fulfil the requirements of Article 123(2) EPC.

2.2 The board had raised this objection in its preliminary opinion. In reply, the appellant argued that the word "ellipse" was clear, even if it was not compared to a circle, and thus the objected amendment did not contain subject-matter extending beyond the content of the application as filed. However, the board had not



objected to the clarity of the word "ellipse" under Article 84 EPC. Moreover, the board cannot see any link between the clarity of the word "ellipse" and its added-matter objection.

2.3 Therefore, auxiliary request 1 does not meet the requirements of Article 123(2) EPC.

3. Partial reimbursement of the appeal fee

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

3.2 In this case, the communication in preparation for oral proceedings was dispatched on 24 November 2022. The withdrawal of the request for oral proceedings was received on 20 December 2022, i.e. within the time limit established in Rule 103(4)(c) EPC, and no oral proceedings took place. Thus, the appeal fee can be reimbursed at 25%.

## Order

### For these reasons it is decided that:

The appeal is dismissed.

The appeal fee is reimbursed at 25%.

The Registrar:

The Chair:



K. Götz-Wein

A. Ritzka

Decision electronically authenticated