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File Number: T 253/90 - 3.5.2  
Application No.: 86 303 154.8  
Publication No.: 0 199 603  
Title of invention: Method and apparatus for performing high speed video  
animation

Classification: G11B 27/02

Interlocutory D E C I S I O N  
of 10 June 1991

Applicant: Ampex Corporation

Headword: Restitutio in integrum/AMPEX

EPC Art. 108, 122

Keyword: "Admissibility of appeal (no)" -  
"restitutio in integrum (yes)"

Headnote



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Patentamt

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Office européen  
des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

Case Number : T 253/90 - 3.5.2

Interlocutory D E C I S I O N  
of the Technical Board of Appeal  
of 10 June 1991

**Appellant :** Ampex Corporation  
401 Broadway M.S. 3-35  
Redwood City  
California 94063-3199 (US)

**Representative :** Horton, Andrew  
Felden House, Dower Mews  
High Street  
Berkhamsted  
Hertfordshire HP4 2BL (GB)

**Decision under appeal :** Decision of Examining Division 067 of the  
European Patent Office dated 27 October 1989  
refusing European patent application  
No. 86 303 154.8 pursuant to Article 97(1) EPC.

**Composition of the Board :**

**Chairman :** E. Persson  
**Members :** A. Hagenbucher  
W.J.L. Wheeler

## Summary of Facts and Submissions

- I. European patent application No. 86 303 154.8 was refused by the Examining Division on 27 October 1989 pursuant to Article 97(1) EPC on the grounds of lack of novelty and inventive step. A notice of appeal was filed on 21 December 1989 and the appeal fee paid on the same day. A statement of grounds of appeal was filed by telefax on 9 March 1990 (confirmed in writing by letter of 9 March 1990 which was received on 15 March 1990).
  
- II. By letter dated 13 June 1990 the Registrar of the Board of Appeal informed the Appellant that it appeared that the statement of grounds of appeal had not been filed within the time limit of Article 108 in conjunction with Rule 78(3) EPC, which had expired on 6 March 1990. In response, the Appellant by letter dated 20 August 1990 filed an application for restitutio in integrum under Article 122 EPC in respect of the filing of the statement of grounds of appeal. The fee for such a request was duly paid. However, the Appellant at the same time raised the question, whether restitutio in integrum was necessary, since the grounds of appeal, in the particular circumstances of this case, might effectively be constituted by the Appellant's submissions before the Examining Division on the only issue of substance at stake, namely whether and to what extent a single prior art document anticipated or rendered obvious the claims of the present application.
  
- III. In response to a communication of the Board of 16 October 1990, the Appellant by letter of 24 December 1990 filed, *inter alia*, further observations on the question of admissibility of the appeal and the issue of restitutio in integrum.

IV. At the request of the Appellant oral proceedings were held before the Board on 12 April 1991. At the end of these proceedings, the Appellant requested that the appeal be considered as admissible on the basis of the notice of appeal in combination with his previous submissions before the Examining Division or, alternatively, restitutio in integrum under Article 122 EPC in respect of the filing of the statement of grounds of appeal. The Board reserved its decision.

V. The Appellant's comprehensive written and oral submissions may be summarised as follows:

(a) The question of the admissibility of the appeal

As recognised by the Legal Board of Appeal in its decision J 22/86 (OJ EPO, 1987, 280), the question whether a particular statement alleged to be a statement of grounds of appeal in a particular case meets the minimum requirement of Article 108 EPC can only be decided in the context of the particular case. Furthermore, the context of the particular case would normally include the contents of the decision under appeal. In the present case, it is very apparent from the decision under appeal that only Claims 1, 10 and 11 were rejected and that the fundamental and substantially the only dispute between the Appellant and the Examining Division was whether a single prior art reference had the features alleged by the Examining Division. The decision under appeal specifically refers to the contentions of the Appellant and his communications before the decision was rendered. Furthermore, having in mind the powers of a Board of Appeal under Articles 111 and 114 EPC to examine the facts of a case of its own motion and the recognition given by the Enlarged Board of Appeal

in its decision G 1/86 (OJ EPO, 1987, 447) to the procedural rights of all parties, the Appellant is entitled to rely on his previous submissions before the Examining Division. In these circumstances, the notice of appeal in combination with the Appellant's previous submissions before the Examining Division must be considered to fulfil the minimum requirement of Article 108 EPC in respect of the statement of grounds of appeal. The appeal is therefore to be considered as admissible.

(b) **The request for restitutio in integrum**

The Appellant's Representative's office has a modern computer-based system, known as the Cleveland system, for generating due dates and monitoring compliance with them. This system is generally reckoned to be the most advanced of such office management systems for patent attorneys and is in use in a substantial number of firms. The system has proved exceptionally reliable and on no occasion had a date been previously missed. The system has a display facility by which any user may view the due dates, i.e. the dates for taking action, falling within a selected period. All such due dates are entered as if the period under Rule 78(3) EPC were zero. Thus, a notification dated, as in the present case, 27 October 1989 and prescribing a four-month term for filing a statement of grounds of appeal would have a due date of 27 February 1990. There is also produced each week a hard copy print-out for each attorney listing the due dates falling within the next two weeks. These print-outs are produced every Tuesday. The list of dates identify the relevant cases, the due dates and the general nature of the action required. The system ensures that the relevant

attorney receives the advanced warnings (bring-up dates) in addition to at least two warnings of an imminent due date. In such a case, a further date, computed in accordance with Rule 78(3) EPC, is entered to indicate the last possible date for taking action. Such an entry appears as a special diary entry, which cannot by virtue of the programming of the system be changed and is only finally removed as part of a full audit and maintenance routine, which must be performed under the direct and personal supervision of the responsible European patent attorney. This routine is adopted because it is not possible for the records clerk to ascertain when the final date might be. As is well known, the relevant final term in such circumstances depends on the date of the original communication in accordance with Rule 78(3) and this information is contained in the file of the particular matter.

Due to the fact that the decision by the Examining Division in the present case was based on a document written in 1957, the Appellant's Representative did not consider himself fully competent to reach unaided a fully accurate interpretation of the prior art document and needed therefore assistance. In view of the length of time since 1957, such assistance was hard to find. It was thought that the inventor of the application in suit would be suitable, but it turned out that he had left the applicant corporation. Not fewer than 25 attempts were made to communicate with the inventor but up to the middle of February 1990 no such contact had been established. It became apparent by the 16 February 1990 that the assistance required was not likely to be available and on the 20 February 1990 the Representative discussed the matter at length with his instructing principal,

Mr George B. Almeida of the applicant corporation. It was at that time provisionally agreed that the Representative should proceed to prepare the detailed grounds of appeal on the basis of various comments supplied by Mr Almeida and the Representative's own knowledge and experience, but that there be a further discussion on about the 27 or 28 February 1990 so as to be able to include, or at least have the benefit of the comments of the inventor. A preliminary draft of the written statement was made by 25 February 1990. This consisted of extensive notes on the prior art, the claims of the application and the particular support for them in the description, and further notes on a set of alternative claims. Meanwhile, on 20 February 1990, the due date for filing the statement of grounds of appeal appeared for the second time on the hard copy print-out. This print-out was due for return to the records clerk by 26 February 1990. By then the Representative had checked the file of the present case and fully appreciated that a "final date" entry would have to be made, that is a date computed taking the special provisions of Rule 78(3) EPC into account.

A sudden drop in electricity supply at about 5.00 pm on 26 February 1990 made it necessary to start a normal restoration routine ("fix-up") which, however, could not be completed because of a "fatal system error". The Representative has ultimate responsibility within the office for the records and the reminder system. Although at that time he did not know the true extent of the "fatal system error" he managed to perform a back-up restoration of the system from routinely made copies of the data produced the previous working day and to re-enter all the data which had been entered on 26 February 1990.

This process took much longer than expected and was not completed until about midnight. The last action performed by the Representative before closing down the computer system was to make the special diary entry concerning the time limit for filing the statement of grounds of appeal in the present case. Owing, he believes, to fatigue the Representative then mistakenly entered the final date for the submission of the statement of grounds of appeal as of 9 instead of 6 March 1990. The mistake was not due to an erroneous interpretation of the EPC (Rule 78(3)) by the Representative but simply a mistake in calculation per se.

Thus, the failure to file the statement of grounds of appeal in due time arose from an isolated mistake in procedure within a system that normally operates satisfactorily. The principle of granting *restitutio in integrum* in such circumstances, as established by the Legal Board of Appeal in its decision J 2/86 (OJ EPO 1987, 362), should apply also to this case, which is properly distinguished from other cases, e.g. T 73/89, where *restitutio in integrum* has not been granted.

#### Reasons for the Decision

1. The first question to be decided in the present case is obviously whether or not the appeal is admissible having regard to the requirements of Article 108 EPC. Only if the appeal, as filed, is considered not to be admissible, need the application for *restitutio in integrum* be considered.



2. The problem with regard to the admissibility of the appeal in the present case concerns the requirement of Article 108, third sentence, EPC, that a written statement setting out the grounds of appeal must be filed within four months after the date of notification of the decision by the first instance. Since in the present case the decision by the Examining Division to refuse the application was given on 27 October 1989 and properly notified in accordance with Rule 78 EPC, the time limit for filing the statement of grounds of appeal expired on 6 March 1990. This has not been disputed by the Appellant. Nor has the Appellant contested that the written statement setting out the grounds of appeal actually was filed only on 9 March 1990, i.e. 3 days after the expiry of the time limit of Article 108, third sentence, EPC.
  
3. Nevertheless, the Appellant has submitted that in the circumstances of the present case the requirement of Article 108, third sentence, EPC, should be considered as having been observed. In this respect it has been argued by the Appellant that the notice of appeal, which clearly was filed within the time limit prescribed by Article 108, third sentence, EPC, in conjunction with the written submissions by the Appellant before the Examining Division on the substantive issues of novelty and inventive step should be considered as constituting the written statement of grounds of appeal as required under Article 108 EPC.
  
4. The Appellant's arguments on this issue cannot be followed by the Board. Firstly, it is to be noted that there was no reference in the notice of appeal to any submissions made before the Examining Division. On the contrary, it was explicitly stated in the notice of appeal that a written statement setting out the grounds of appeal would be filed "in due time". Furthermore, the late filed statement of grounds of appeal of 9 March 1990 contained a very

comprehensive reasoning amounting to 13 typed pages. All this shows clearly that the Appellant himself, before he was made aware of the late filing of the statement of grounds of appeal by the communication of the Registrar of the Board of 13 June 1990, never considered that the notice of appeal in conjunction with his previous submissions before the Examining Division would meet the requirement of Article 108, third sentence, EPC for filing a statement of grounds of appeal. Nor is there, from an objective point of view, any support for such an idea. In the jurisprudence of the Boards of Appeal, it has been repeatedly emphasised that in order to comply with the requirement of Article 108, third sentence, EPC, the Appellant must present the legal and/or factual reasons, why the decision of the first instance should be set aside (cf. decisions T 220/83 and T 213/85, OJ EPO 1986, 249 and 1987, 482, respectively). In a decision by the Technical Board of Appeal 3.5.1 of 15 June 1989 in case T 432/88 (published in EPOR 1990, 38), where, in contrast to the present case, in the notice of appeal there was at least a formal reference to what had been submitted in the proceedings before the first instance, this practice was confirmed and the appeal was rejected as inadmissible. As to the reference made by the Appellant to the decision of the Legal Board of Appeal in case J 22/86, the circumstances were clearly distinguished from those of the present case in that the decision of the first instance was wrong in law on a procedural point. In that decision the Board stated that in a wholly exceptional case it may be immediately apparent to the Board of Appeal upon reading the decision under appeal and the statement of grounds of appeal that such decision cannot properly be supported even though the grounds contained in such statement can fairly be described as minimal (point 2, paragraph 3 of the Reasons for the Decision). Obviously, the present case is not such an exceptional case but

rather quite a "normal" one, where the application has been refused by the Examining Division on substantial grounds of lack of novelty and inventive step in the view of certain prior art. Finally, the submission by the Appellant to the effect that the Board, by virtue of Article 114(1) EPC, should investigate the case of its own motion and thereby be able to cure the lack of properly filed grounds of appeal cannot be accepted. Such an approach would clearly be inconsistent with the purpose of the requirement for a statement of grounds of appeal as set out in Article 108 EPC.

5. It follows that, since the appeal as filed does not comply with Article 108, third sentence, EPC, it must be rejected as inadmissible in accordance with Rule 65 EPC, unless the Appellant's application for restitutio in integrum under Article 122 EPC is deemed to be allowable.
  
6. The application for restitutio in integrum complies with the requirements of Article 122(2) and (3) EPC and is thus admissible. As to the substantial requirement of Article 122(1) EPC for all due care required by the circumstances having been taken, the Board is satisfied that the computer based system used by the Appellant's Representative in order to ensure a proper observance of the various time limits under the EPC corresponds to what can reasonably be required. Furthermore, the character of the comprehensive statement of grounds of appeal filed on 9 March 1990, i.e. 3 days after expiration of the time limit of Article 108, third sentence, EPC, clearly supports the submission of the Representative, that he had not merely left the matter of filing the statement of grounds of appeal in the present case to the very last minute but had started preparing such a statement in due time without, however, being able to finalise it due to special difficulties in getting technical advice needed

for the evaluation of a particular prior art document relied upon by the Examining Division in its decision to refuse the application. In these circumstances, the Representative cannot reasonably be blamed for not having filed the statement of grounds of appeal before 26 February 1990, when the computer system was adversely affected by a temporary drop in electricity supply with a subsequent "fatal system error". Although no independent evidence has been produced in respect of this incident, the Board sees no justification for questioning the account given by the Representative, orally and in writing, of what actually happened. Thus, the Board accepts the explanation given by the Representative, that he, having performed a restoration of the computer system between about 5.00 pm and midnight on 26 February 1990, due to a miscalculation entered 9 March 1990 as the final date for the filing of the statement of grounds of appeal instead of 6 March 1990. On the balance of probabilities, it is reasonable to assume that this mistake was related to the unforeseeable and sudden trouble caused by the drop in electricity supply and subsequent "fatal system error" and mainly due to the fatigue of the Representative at the end of the long restoration work performed by him. It might be argued, that the Representative the following day, having taken an appropriate rest, should have made a further check that the data entered by him during the restoration of the computer system were absolutely correct. However, this would seem to go too far and hardly correspond to realities of life. The Board, therefore, considers that the present case has to be judged in the same way as case J 2/86, referred to by the Appellant, according to which Article 122 EPC is intended to ensure that in appropriate cases the loss of substantive rights does not result from an isolated procedural mistake within a normally satisfactory system. Thus, the Board is prepared to accept that the Appellant was unable to

observe the time limit for filing the statement of grounds of appeal in spite of all due care required by the circumstances having been taken. Consequently, the application for restitutio in integrum is allowable and the Appellant shall have his rights in respect of the filing of the statement of grounds of appeal re-established.

**Order**

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

1. The Appellant's request, that the appeal be considered as admissible on the basis of the notice of appeal in combination with his previous submissions before the Examination Division, is rejected.
2. The Appellant is restored in his rights in respect of the filing of the statement of grounds of appeal.

The Registrar:

The Chairman:

M. Kiehl

Eskil Persson