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**Datasheet for the decision
of 11 October 2006**

Case Number: T 0127/04 - 3.5.03

Application Number: 01308076.7

Publication Number: 1202474

IPC: H04B 10/10

Language of the proceedings: EN

Title of invention:

Point-to-multipoint free-space wireless optical communication system

Applicant:

LUCENT TECHNOLOGIES INC.

Opponent:

-

Headword:

Optical communication system/LUCENT

Relevant legal provisions:

EPC Art. 84, 113(1)

EPC R. 71(2)

Keyword:

"Clarity - no"

"Oral proceedings held in absence of appellant"

Decisions cited:

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Catchword:

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Case Number: T 0127/04 - 3.5.03

D E C I S I O N
of the Technical Board of Appeal 3.5.03
of 11 October 2006

Appellant: LUCENT TECHNOLOGIES INC.
600 Mountain Avenue
Murray Hill, New Jersey 07974-0636 (US)

Representative: Sarup, David Alexander
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Decision under appeal: Decision of the examining division of the
European Patent Office posted 22 September 2003
refusing European application No. 01308076.7
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: A. S. Clelland
Members: F. van der Voort
M.-B. Tardo-Dino

Summary of Facts and Submissions

- I. This appeal is against the decision of the examining division refusing European patent application No. 01308076.7 (publication number EP 1202474 A).
- II. With the statement of grounds of appeal the appellant filed a new claim 14 and, by way of an auxiliary request, a set of claims 1 to 14. The appellant also submitted arguments in support of the appeal.
- III. In a communication accompanying a summons to oral proceedings the board gave a preliminary opinion in which objections under Article 84 EPC were raised. Further, it was noted that if the appellant's interpretation of claim 1, according to which the remote telescopes are not part of the claimed system, were followed, the subject-matter of claim 1 appeared to lack novelty having regard to the disclosure of D1 (US 5 060 304 A).
- IV. In response to the board's communication, the appellant submitted further arguments and requested that the impugned decision be set aside and that a patent be granted on the basis of claims 1 to 13 as filed with the letter dated 1 April 2003 and claim 14 as filed with the statement of grounds of appeal (main request) or, alternatively, on the basis of claims 1 to 14 of the auxiliary request. The appellant subsequently informed the board that it would not attend the oral proceedings and requested that they be cancelled and that the procedure be continued in writing.

V. In a communication the board informed the appellant that the request to cancel the oral proceedings could not be granted and that the date fixed for the oral proceedings was maintained. Reasons were given.

VI. Oral proceedings were held on 11 October 2006 in the absence of the appellant. After deliberation, the board's decision was announced at the end of the oral proceedings.

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

"1. A wireless communications system, comprising at least one optical telescope having an aspherical mirror, wherein a fiber array comprised of at least two fibers is positioned at a focal plane of said optical telescope, each of said fibers being in optical communication with a different remote telescope."

Claim 1 of the auxiliary request is identical to claim 1 of the main request, except for the last feature being replaced by "each of said fibers configured to be in optical communication with a different remote telescope" (underlining by the board).

Reasons for the Decision

1. *Procedural matters*

1.1 The board considered it to be expedient to hold oral proceedings for reasons of procedural economy (Article 116(1) EPC). Since the appellant did not give any reasons in support of his request to cancel the

scheduled oral proceedings and the board did not see any reason for cancelling them, the request to cancel the oral proceedings and, consequently, the request to continue in writing were refused and the oral proceedings were held in the absence of the appellant pursuant to Rule 71(2) EPC.

1.2 The board is satisfied that the present decision complies with the requirements of Article 113(1) EPC, since in the communication accompanying the summons to oral proceedings the objection under Article 84 EPC as discussed below in respect of claim 1 of each of the requests was already raised, so that the appellant had an opportunity to present comments on it.

2. *Article 84 EPC - claim 1 of the main request*

2.1 Claim 1 of the main request does not meet the requirements of Article 84 EPC due to a lack of clarity for the following reasons:

2.2 The board notes that a system is claimed, comprising at least one optical telescope having specified characteristics including a fiber array comprised of at least two fibers positioned at a focal plane of the telescope, each of these fibers "being in optical communication" with a different remote telescope.

2.3 In the board's view, the phrase "each of these fibers being in optical communication with a different remote telescope" makes the claim unclear in that it can be understood in various different ways:

i) One possible interpretation is that what is being claimed is a system comprising three telescopes, namely the at least one optical telescope and at least two remote telescopes, in which the fibers of the at least one optical telescope are trained on the remote telescopes. This the appellant denies, stating that the remote telescopes are not elements of the claim.

ii) Another possible interpretation is that the claim is directed to the system including the at least one telescope only, in which the above-mentioned phrase defines constructional features of the fibers in terms of their function, i.e. each of the fibers is capable of (or suitable for) being in optical communication with a different remote telescope or, putting the same in different words, each of the fibers is adapted to be, when in use, in optical communication with a different remote telescope. The appellant disagrees and argues that a claim referring to fibers **capable of** communicating with different remote telescopes is of different scope to a claim with fibers **being in** optical communication with a different remote telescope, as required by the claim.

iii) Yet another possible interpretation is that the claim is a disguised method claim directed to the use of, i.e. a method of using, the at least one optical telescope and the remote telescopes such that, as a result, each of the fibers is in optical communication with a different remote telescope. However, according to the appellant the claim is to be understood as an apparatus claim.

iv) The appellant rather argued that the claim is to be understood as claiming a system comprising a single telescope in use, i.e. in communication with remote telescopes. The board understands this as yet another interpretation of the claim, according to which the claim is directed to a system including the at least one optical telescope in a specific working state, i.e. being in optical communication with a different remote telescope. In the board's view, this working state would however make the presence of the remote telescopes a necessary feature of the system in order to define the matter for which protection is sought. As said before, the appellant denies this, stating that the claim does not define the remote telescopes as part of the system.

2.4 Since the claim can be understood in various ways, it is not possible for the addressee to determine the matter for which protection is sought. The claim is therefore unclear and the main request cannot be allowed.

3. *Article 84 EPC - claim 1 of the auxiliary request*

3.1 Claim 1 of the auxiliary request differs from claim 1 of the main request only in that "being in optical communication" is replaced by "configured to be in communication". The board understands this wording as an attempt to define constructional features of the fibers in terms of a functional feature, cf. point 2.3 ii) above. However, it remains unclear whether or not the remote telescope(s) are part of the claimed system. Hence, the claim remains unclear.

Further, in the present case, the phrase "configured to be" gives rise to a further lack of clarity in that it is not clear which constructional feature(s) of the fibers, if any, is or are implied by the functional feature. The appellant argued that a person of ordinary skill would recognise the constructional features implied by the cited phrase. For example, an appropriate positioning of the fibers within the focal plane would allow each of the fibers to be in optical communication with a remote telescope. The board does not find this argument convincing, since the fibers are defined as positioned at the focal plane of the optical telescope and therefore are capable of communicating with a different remote telescope under the appropriate circumstances as determined by, e.g., the position and movement of the remote telescopes, the point in time and duration of the optical communication, the extent to which the aspherical mirror is adjustable, the frequencies which can be detected, etc. These circumstances are however not part of the matter for which protection is sought in terms of the technical features of the claimed system. The above phrase does not therefore necessarily imply a particular configuration of the fibers.

3.2 For these reasons, claim 1 of the auxiliary request does not meet the requirements of Article 84 EPC. The auxiliary request is thus not allowable.

4. In view of the foregoing, it is not necessary to consider the further objection of lack of novelty as set out in the communication accompanying the summons to oral proceedings.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

D. Magliano

A. S. Clelland