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**Datasheet for the decision
of 28 July 2008**

Case Number: T 1299/05 - 3.5.05

Application Number: 00410088.9

Publication Number: 1178384

IPC: G 06F 1/00

Language of the proceedings: EN

Title of invention:

Dynamic resource control in a processing system

Applicant:

Hewlett-Packard Company

Opponent:

-

Headword:

Dynamic resource control/HEWLETT-PACKARD

Relevant legal provisions:

EPC Art. 123(2)

Relevant legal provisions (EPC 1973):

EPC Art. 83, 84

Keyword:

- Main request - clarity (no); added subject-matter (yes);
sufficiency of disclosure (no).

Decisions cited:

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Catchword:

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Case Number: T 1299/05 - 3.5.05

D E C I S I O N
of the Technical Board of Appeal 3.5.05
of 28 July 2008

Appellant: Hewlett-Packard Company
(a Delaware Corporation)
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Palo Alto, CA 94304 (US)

Representative: Lloyd, Richard Graham
Intellectual Property Section,
Legal Department,
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 12 April 2005
refusing European application No. 00410088.9
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: D. H. Rees
Members: P. Corcoran
G. Weiss

Summary of Facts and Submissions

I. This is an appeal against the decision of the examining division to refuse the European patent application No. 00 410 088.9. published as No. 1 178 384. The decision was announced in oral proceedings held on 8 March 2005 and written reasons were dispatched on 12 April 2005.

The decision under appeal was based on a set of claims 1-16 filed during the oral proceedings

The examining division found that the subject-matter of claims 1 and 9 lacked inventive step in view of the disclosure of:

D1: US 5 940 504,

combined with general knowledge.

II. Notice of appeal was submitted by fax on 22 June 2005 accompanied by a voucher authorising payment of the appeal fee. The statement setting out the grounds of appeal was submitted by fax on 17 August 2005 with an amended set of claims 1 to 20. Precautionary requests for oral proceedings were made in the notice of appeal and in the statement of grounds.

III. In a communication accompanying a summons to oral proceedings to be held on 31 July 2008 the board gave its preliminary opinion that the appeal was not allowable. Formal deficiencies were noted in respect of the appellant's request under Article 84 EPC 1973 and Article 123(2) EPC. The board also raised the question of compliance with the requirements of Article 83 EPC 1973.

It was further indicated that, even if appellant were to succeed in remedying the formal deficiencies in the request, the board was not inclined to acknowledge an inventive step in respect of the claimed subject-matter.

- IV. With a letter of reply submitted by fax on 17 June 2008, the appellant withdrew the request for oral proceedings and requested a decision.
- V. In a written communication dated 26 June 2008, the board notified the appellant of the cancellation of the oral proceedings.
- VI. The appellant has requested that the decision under appeal be set aside and that a patent be granted on the basis of claims 1 to 20 filed with the statement of grounds.

Claim 1 of the appellant's sole request reads as follows:

"A method of controlling the use of a resource by a process (3) in a processing system having a licensing controller (1), comprising:

 providing to the process (3) an inter-process communication (9) with the licence controller (1);

 characterised by the licence controller (1) being operable for repeatedly communicating a licensed work unit rate to the inter-process communication (9) at any time,

 the process (3) repeatedly reading the licensed work unit rate from the inter-process communication and selectively modifying its use of the resource such that the actual work rate unit

of the process does not exceed the licensed work rate unit in the inter-process communication (9)."

Claim 11 reads as follows:

"Apparatus for controlling the use of a resource by at least one process (3) in a processing system, the apparatus comprising a licensing controller (1), the apparatus comprising:

an inter-process communication (9) with the licensing controller (1) for each process (3);

characterised by the licensing controller (1) being arranged for repeatedly communicating a licensed work unit rate for a process (3) to the inter-process communication (9) of that process at any time;

each process (3) being further arranged for repeatedly reading the licensed work unit rate from the inter-process communication and to selectively modify its use of the resource such that the actual work rate unit of the process (3) does not exceed the licensed work unit rate in the inter-process communication (9)."

VII. The further documents on which the appeal is based, i.e. the text of the description and the drawings, are as follows:

Description, pages:

3,4,7,8 as originally filed;

1, 1a received on 8 February 2005 with letter of 8 February 2005;

2,5,6 filed during oral proceedings on 8 March 2005.

Drawings, sheets:

1/2-2/2 received on 17 October 2000 with letter of 5 October 2000.

Reasons for the Decision

1. The appeal is admissible.
2. *Art. 84 EPC 1973*
 - 2.1 The expression "actual work rate unit" used in claims 1 and 11 lacks support by the description. The description uses the expression "work unit rate", (e.g. p.5 l.15-16 and p.7 l.11-16). The correct expression appears to be the latter one as used in the description, in particular because it is consistent with the related expression "licensed work unit rate" which is used in both the claims and description.
 - 2.2 The term "licensed work unit rate" lacks clarity. Taking the description into account, it is understood to correspond to the "allowed use" referred to on p.5 l.23-29 of the description where it is stated that an "allowed use" is computed for a process and that the computed information "may represent a transaction rate, a call rate, or a link number" and that "more generally the computed information is representative of the activity unit or resource unit rate".

However, despite the fact that the term "licensed work unit rate" is used throughout the description, the board cannot identify a disclosure of a specific example of how this quantity is to be computed. While it may be inferred

that the term is intended to denote an allowed level of activity associated with a process, the absence of specific examples showing how it is or might be computed means that, even in the light of the description, the scope of the limitation which is intended in respect of the claimed subject-matter remains unclear.

- 2.3 Claim 11 states in its characterising part that the licence controller is "arranged for repeatedly communicating a licensed work unit rate for a process to the inter-process communication of that process at any time".

The expression "repeatedly communicating" suggests a regular or periodic transmission of data whereas the expression "at any time" suggests random or otherwise irregular transmission. Taken as a whole the specification "repeatedly communicating a licensed work unit rate ... at any time" fails to provide a clear definition of the circumstances under which the licensed work unit rate is communicated. Similar objections apply, *mutatis mutandis*, to the corresponding wording of claim 1.

- 2.4 Claims 1 and 11 specify that the process is arranged to "selectively" modify its use of the resource such that the actual work unit rate does not exceed the licensed work unit rate. In the given context, the limitation implied by the term "selectively" is unclear.

- 2.5 In view of the foregoing, the board considers that claims 1 and 11 lack support and fail to define clearly the matter for which protection is sought in violation of

Article 84 EPC 1973. The sole request is therefore not allowable and the appeal must be dismissed.

3. *Article 123(2) EPC*

3.1 However, the board further notes that claims 1 and 11 have been amended in a manner which introduces subject-matter extending beyond the content of the application as filed.

3.2 Apparatus claim 11 recites in its characterising part that:

(i) the licensing controller is "arranged for repeatedly communicating a licensed work unit rate for a process (3) to the inter-process communication (9) of that process at any time";

and

(ii) each process is "further arranged for repeatedly reading the licensed work unit rate from the inter-process communication and to selectively modify its use of the resource such that the actual work rate unit of the process (3) does not exceed the licensed work unit rate in the inter-process communication (9)."

3.3 The board cannot identify a disclosure in the application as filed of a licensing controller which is "arranged for repeatedly communicating a licensed work unit rate for a process to the inter-process communication of that process at any time".

According to the application as filed, the licensing controller writes data indicative of an "allowed use" (or

"licensed work unit rate") into a shared memory (p.5 1.28-29) and may update this data in response to a determination that the actual work unit rate is higher than the licensed work unit rate or "at any time", (p.5 1.34-38 and p.6 1.4-6).

This does not correspond to a disclosure of "repeatedly communicating a licensed work unit rate for a process ... at any time" as recited in claim 11.

- 3.4 Neither can the board identify a disclosure in the application as filed to the effect that each process is "arranged for repeatedly reading the licensed work unit rate from the inter-process communication".

According to the application as filed, the process may "at any time" read licence information from shared memory, (cf. p.6 1.1-2). This does not correspond to a disclosure of "repeatedly reading the licensed work unit rate from the inter-process communication", as recited in claim 11.

- 3.5 The board is likewise unable to identify a disclosure in the application as filed to the effect that a process is "arranged ... to selectively modify its use of the resource such that the actual work rate unit of the process does not exceed the licensed work unit rate in the inter-process communication".

The wording of the claim in this respect is understood to require that a process modifies its use of a resource so as to prevent the actual work unit rate of the process from exceeding the licensed work unit rate. However, on p.5 1.33-36 of the description as filed it is merely

stated that action may be taken by a process if it is determined that the actual work unit rate is higher than the licensed work unit rate, (cf. step 18, Fig.2). In other words, the cited passage of the description indicates that the process does not modify its actual work rate unit to prevent it exceeding the licensed work unit rate, but rather takes some unspecified "action" if it has been determined that the actual work rate unit exceeds the licensed work unit rate.

Likewise, the rather vague specification on p.6, 1.1-2 of the description as filed that a process "may ... adapt its operation to the licence information read" does not correspond to a disclosure of a process which selectively modifies its use of a resource such that the actual work unit rate of the process does not exceed the licensed work rate unit as recited in claim 11.

3.6 In view of the foregoing the board considers that the subject-matter of claim 11, to the extent that it can be understood, is not clearly and unambiguously derivable from the application as filed. In consequence thereof the amendments to said claim do not comply with the requirements of Article 123(2) EPC. Similar objections apply, *mutatis mutandis*, to claim 1.

4. *Article 83 EPC 1973*

4.1 Without prejudice to the foregoing objections, the board notes that claims 1 and 11 appear to seek protection for an embodiment of the invention in which a process may "adapt its operation to the licence information read" as stated on p.6, 1.1-2 of the description. However, the

board is not satisfied that this embodiment has been disclosed in a manner which meets the requirements deriving from Article 83 and Rule 27 EPC 1973.

4.2 Whereas the description states in a rather perfunctory manner that a process may "adapt its operation to the licence information read", no further, more specific technical teaching is provided in the description in respect of how a process is to "adapt its operation". It thus appears that the description fails to describe in detail at least one way of carrying out the claimed invention contrary to the requirement of Rule 27(1)(e) EPC 1973.

4.3 In view of the foregoing, the board considers that the application fails to disclose the claimed invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art and, hence, does not comply with the requirements of Article 83 EPC 1973.

5. *Observations re. appellant's submissions*

5.1 In the written statement of grounds, the appellant has submitted that the distinguishing features of amended claim 1 over D1 are as follows, (cf. statement of grounds, § 12, p.4):

- (i) the license controller communicating a licensed work unit rate to the inter-process communication;
- (ii) the license controller communicating the licensed work unit rate at any time, and
- (iii) the process adapting its operation to the licensed work unit rate.

5.2 The appellant further argues that D1 does not teach the process selectively modifying its use of the resource such that the actual work rate unit of the process does not exceed the licensed work rate unit transmitted to the inter-process communication by the license controller, (cf. statement of grounds, p.5, § 14).

According to the appellant, in D1 "the licensee system simply works or does not work in response to the datagram from the licensor ...". In contrast thereto, claim 1 as amended "requires that an operating process is operable to vary its work rate in response to a change in the licensed work unit rate transmitted to the inter-process communication".

5.3 As may be inferred from 1. and 2. above, the board finds that there are significant formal deficiencies in respect of the alleged distinguishing features.

5.4 In particular, the board notes that the independent claims of the request do not specify that the license controller communicates the licensed work unit rate at any time but rather specify that the license controller is operable or arranged for "repeatedly communicating a licensed work unit rate ... at any time". This expression is considered unclear as noted in 1.3 above.

5.5 The appellant asserts that claim 1 as amended requires that a process is operable to vary its work rate in response to a change in the licensed work unit rate transmitted to the inter-process communication. However, as discussed in 2.5 above, the board is of the opinion

that there is no identifiable disclosure of a process which is operable to selectively modify its use of a resource as claimed.

5.6 The appellant's submissions concerning the substantive merits of the main request are thus found to rely predominantly on the alleged non-obviousness of specific claim features which, as discussed above, do not comply with the requirements of Article 84 EPC 1973 and Article 123(2) EPC. Features which do not comply with the formal requirements of the EPC cannot provide a basis for establishing the substantive merits of the claimed subject-matter.

6. *Conclusions*

6.1 The objections under Article 84 EPC 1973, Article 123(2) EPC and Article 83 EPC 1973 as set forth in 1., 2. and 3. above were raised by the board in the communication accompanying the summons to oral proceedings. The appellant has neither commented on these objections nor submitted any amendments in response thereto but merely requested a decision.

6.2 In view of the formal deficiencies in the request, the board does not consider it either necessary or appropriate in the present case to give consideration to the question of compliance with the further substantive requirements of the EPC.

6.3 On the basis of the objections set forth in 1. above, the appellant's sole request is not allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

D. Magliano

D. H. Rees