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Datasheet for the decision of 27 October 2009

Case Number: T 0301/08 - 3.5.03

Application Number: 96903224.2

Publication Number: 0758168

IPC: H04J 13/04

Language of the proceedings: EN

Title of invention:
Variable rate transmitting method, and transmitter and receiver using it

Patentee:
NTT DoCoMo, Inc.

Opponent:
QUALCOMM Incorporated

Headword:
-

Relevant legal provisions:
EPC Art. 123(2)
EPC R. 103(1)(a)

Relevant legal provisions (EPC 1973):
-

Keyword:
"Main and auxiliary request: added subject-matter (yes)"
"Intermediate generalisation"
"Reimbursement of appeal fee (no)"

Decisions cited:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0301/08 **-** 3.5.03

D E C I S I O N
of the Technical Board of Appeal 3.5.03
of 27 October 2009

Appellant: (Patent Proprietor)	NTT DoCoMo, Inc. 11-1, Nagatacho 2-chome Chiyoda-ku Tokyo 100-6150 (JP)
Representative:	Zangs, Rainer E. Hoffmann Eitle Patent- und Rechtsanwälte Arabellastrasse 4 D-81925 München (DE)
Respondent: (Opponent)	QUALCOMM incorporated 5775 Morehouse Drive San Diego CA 92121 (US)
Representative:	Heselberger, Johannes Patent- und Rechtsanwälte Bardehle . Pagenberg . Dost . Altenburg . Geissler Galileiplatz 1 D-81679 München (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted 23 November 2007 concerning maintenance of European patent No. 0758168 in amended form.**

Composition of the Board:

Chairman: A. S. Clelland
Members: B. Noll
M-B. Tardo-Dino

Summary of Facts and Submissions

I. In an interlocutory decision posted 23 November 2007 the opposition division found European patent no. 758168 in amended form according to the claims of a second auxiliary request to meet the requirements of the EPC. With respect to a main request the opposition division held that claims 1, 3, 11, 13, 15 and 19 thereof did not meet the requirements of Article 123(2) EPC. The same was held, mutatis mutandis, in respect of claims 11 and 13 of a first auxiliary request.

II. The patent proprietor lodged an appeal against this decision. In the notice of appeal filed on 1 February 2008 it was requested "*that the refusal of the opposition division to allow the appellant's first auxiliary request be set aside*".

III. With the statement of grounds filed on 3 April 2008 the appellant submitted the following requests:

"*(a) That the Opposition Division's refusal, in the above Interlocutory Decision, of claims 11 and 13 of the proprietor's first auxiliary request be set aside;*

(b) That the patent be maintained with the amendments to the description and claims shown on the attached copy of EP 0758168B marked "Main Appeal Request";

(c) That the appellants be given an opportunity to respond in writing to any observations of the Board of Appeal;

(d) That Oral Proceedings should be held in the event that the Board of Appeal is not prepared to maintain the patent in the form shown in the

attached copy marked "Main Appeal Request" based upon written submissions only;
(e) That in view of a procedural violation by the Opposition Division, the appeal fee should be refunded to the appellant."

IV. The respondent requested that the appeal be dismissed. Conditionally, oral proceedings were requested.

V. In a communication dated 24 July 2009 accompanying a summons to oral proceedings the board expressed its preliminary opinion.

VI. With a further submission of 25 September 2009 the appellant requested that the board "*reschedule the oral proceedings and […] issue new Summons comprising a review of the technical submissions previously made*". This request was refused by the board in a facsimile communication sent on 8 October 2009.

Together with the submission of 25 September 2009 the appellant also filed amended claims 11 and 13 which together with claims 1-10, 12 and 14-26 of the main request formed an auxiliary request.

VII. Claim 11 according to the main request, the claim which was the primary subject of discussion at the oral proceedings, reads as follows:

"A receiver in a code division multiple access system for receiving, at a fixed transmission rate, a signal comprising an interleaved frame of a fixed duration, wherein the frame prior to interleaving includes variable length information

data and an error detecting code of the information data, and further includes a single blank behind the information data and error detecting code in the frame to fill the rest of the frame when the sum of the length of said information data and the length of said error detecting code is less than the length of the frame, said receiver comprising:

a deinterleaver operable to deinterleave the received interleaved frame, so as to reconstruct the frame including said variable length information data, said error detecting code of the information data and said blank placed behind the information data and the error detecting code in the frame;

a demultiplexer (155) for separating the error detecting code and received information data from the deinterleaved frame by assuming a final bit of the received information data;

an error detecting encoder (156) for generating the error detecting code by encoding said received information data; and

a comparator (158) for comparing said generated error detecting code with the received error detecting code separated from the received signal, wherein

the receiver is arranged to decide the received information data is proper information data when said generated error detecting code and said received error detecting code agree with each other."

Claim 11 according to the auxiliary request includes, subsequent to the passage "wherein the frame prior to

interleaving includes variable length information data and an error detecting code of the information data," the additional feature of "the error detecting code inserted at a fixed position relative to the variable length information data".

VIII. Oral proceedings were held on 27 October 2009. At the end of the oral proceedings the board announced its decision.

Reasons for the Decision

1. *The request to reschedule the oral proceedings and issue a new summons*

The appellant's request, made in the letter of 25 September 2009, to reschedule the oral proceedings and issue a new summons, was said to be necessary in view of the appellant's technical submissions. A new summons (which the board understands in the sense of a new communication) would "*enable focussing on the points to be discussed and contribute to an efficient and fair continuation of the proceedings*". At the oral proceedings the appellant's representative explained that the appeal had been taken over from another representative and this had resulted in some change in the focus of the case, which ought to be reflected in the board's considerations.

In the board's view however a change of representative, a matter wholly within the purview of the appellant, does not constitute an adequate reason either for issuing a further communication or for postponing the

oral proceedings. The board observes that there is no requirement derivable from the EPC or Rules which makes a communication prior to oral proceedings mandatory; Article 15(1) RPBA states that the board may send a communication (which the board in fact did, namely the communication attached to the summons informing the parties of its preliminary view). As regards postponement of the oral proceedings, as stated in the "Notice of the Vice—President of Directorate—General 3 of the European Patent Office dated 16 July 2007 concerning oral proceedings before the boards of appeal of the EPO", supplement to OJ EPO 1/2009, 63, serious substantive reasons are necessary for a change of date to be agreed.

The request to reschedule the oral proceedings and issue a new summons was therefore refused.

2. *Main request - added matter (Article 123(2) EPC)*

2.1 The patent concerns the transmission of information at variable rate in a frame structure, each frame having a fixed length and being transmitted at a constant transmission rate. Information of variable length is subjected to cyclic redundancy check (CRC) error detecting encoding and together with the CRC code inserted into the frame. The remainder of the frame, if any, is filled with a blank. The receiver thus receives frames carrying information data of unknown variable length and a CRC code having a known fixed length.

2.2 It was pointed out by the appellant that two types of receivers are disclosed in the application documents as filed:

(a) The first type of receiver, referred to as the "CRC comparison type" by the appellant, is described in the originally filed application on the basis of the embodiments shown in figures 1B, 6B, 9B and 11B; figure 1B shows the most general concept, figure 6B an embodiment for use if the received signal also contains transmission rate information, figure 9B (now deleted) an embodiment for the data in a frame being repeated K times, and figure 11B (also now deleted) combining features of the figure 6B and figure 9B receivers. In embodiments of the first type the error detecting code is separated from the remaining data in the frame by a demultiplexer, the remaining data then being successively CRC encoded and the result being compared with the received CRC code until a match is found, thus identifying the variable length information inserted at the transmitter.

(b) The second type of receiver is called a "division type" by the appellant and is shown in figure 14B of the application as filed. The description states that "*The error detecting circuit 144 shifts the data in each frame bit by bit, successively divides the data by predetermined data, and decides that the error detecting code is detected at the point where the data can be divided. Since the length of the error detecting code is known in advance, the last bit of the transmitted data can be found by identifying the error detecting code. Thus, the transmitted data can be extracted.*" (cf. page 42, lines 17-25 of the application as filed). This is understood by the board as meaning that a portion of the data for which an error detecting code of zero is obtained is assumed by

the receiver as the ensemble of information data of variable length and error detecting code inserted into the frame at the receiver.

2.3 The appellant argued that the order in which the information data and error detecting code is present in the frame is of no importance for the invention, and having the error detecting code at a fixed position in the frame is only a preferred example to improve the reliability of detection.

However, the board notes that the teaching of the application documents as filed makes a clear distinction between receivers of the first and the second type as regards the position of the error detecting code in the frame:

(a) Regarding receivers of the first type it is stated at page 31, lines 16 to 19 that "*the error detecting code and the transmitted data sequence […] are placed at fixed positions in the frame*"; as regards the signal to be received by receivers of the first type it is stated at page 28, lines 27 and 28 that "*The error detecting code is inserted at a fixed position in each frame*".

(b) On the other hand, the second type of receiver is said at page 42, lines 10 to 23 to differ from the first type in that "*The position of the error detecting code in the frame is not specified in this embodiment*".

Accordingly, the person skilled in the art understands from the original disclosure that the error detecting code has to be in a fixed position in each frame in the

signal to be received for the first type of receiver but not for the second type.

2.4 Claim 11 of the main request is directed to the first type of receiver. The signal to be received is specified in the claim as "comprising an interleaved frame of a fixed duration, wherein the frame prior to interleaving includes variable length information data and an error detecting code of the information data". Claim 11 goes on to state that the frame "includes a single blank behind the information data and error detecting code in the frame to fill the rest of the frame when the sum of the length of said information data and the length of said error detecting code is less than the length of the frame". Since as noted above the description consistently states that a signal for a receiver of the first type has an error detecting code with a fixed position, the receiver according to claim 11 is generalized with respect to the original disclosure to the extent that it is not excluded that in the received signal the error detecting code can be at variable positions in the frame.

2.5 The appellant argued that from the disclosure of the general concept at pages 6 to 9 of the originally filed application it was evident that inserting the error detecting code at a fixed position was in no way essential to the invention. In particular, the word *may* in the phrase "*The transmitting side may comprise the step of disposing the error detecting code at a fixed position in the each* [sic] *frame*" at page 9, lines 18 to 20 of the originally filed application would teach the skilled person that inserting the error detecting

code at a fixed position was merely an additional option.

The board does not share this view. As pointed out above (point 2.3) the skilled person would not derive from the specification that inserting the error detecting code at a fixed position is optional in respect of the operation of the first type of receiver.

2.6 For the above reasons the board concludes that the receiver as claimed in claim 11 includes an intermediate generalization and does not therefore comply with the requirements of Article 123(2) EPC.

3. *Auxiliary request - added matter (Article 123(2) EPC)*

3.1 The feature "fixed position relative to the variable length information data" has no explicit basis in the application as filed. The appellant referred to page 28, lines 28 to 30 in connection with figure 2B of the application as originally filed as a basis for the additional feature; it was argued that the error code would inevitably be at a fixed position in relation to the information data if the error detecting code and the information data were arranged as shown in figure 2B.

3.2 In the board's view, the position of the error detecting code in the signal received by the first type of receiver is consistently specified in relation to the frame, and the board cannot find any disclosure in the application as filed which would lead the skilled person to specify the position of the error detecting code in relation to the information data. The added

feature therefore provides additional technical information not derivable from the application documents as filed.

3.3 For this reason the feature added in claim 11 of the auxiliary request constitutes added matter (Article 123(2) EPC).

4. Since neither of the requests is allowable the appeal has to be dismissed, with the consequence that the patent is maintained in amended form on the basis of the second auxiliary request which was found by the opposition division to meet the requirements of the EPC.

5. *The request for refund of the appeal fee*

This request was maintained during the oral proceedings but the appellant only referred to its written submissions.

The appellant asserts that the opposition division committed a procedural violation in that the objection that claims 11 and 13 of the first auxiliary request infringed Article 123(2) EPC was raised for the first time in the course of the oral proceedings before the opposition division and the patent proprietor was not given an adequate opportunity to respond.

Rule 103 (1) (a) EPC requires a precondition for the reimbursement of the appeal fee, namely that the appeal be allowable. In the current case the appeal was found not to be allowable. Moreover, the facts alleged as amounting to a substantial procedural violation are not such that they justify the reimbursement of the appeal

fee irrespective of the first requirement of Rule 103 (1) (a) EPC, for the reasons given below.

The board notes that in the notice of opposition dated 24 August 2005, the paragraph bridging pages 7 and 8 contains the objection that omitting, from independent claim 1, inter alia the limitation of the error detection code being added at a fixed position in each frame, meant that the claim contained subject-matter which extended beyond the content of the application as filed. Thus, the board considers that this objection of added matter was raised for the first time in the notice of opposition. Although the objection was raised by the opponent in connection with claim 1, which is directed to a transmitter, the patent proprietor could reasonably have expected a discussion as to whether omitting this limitation from the claims to the receiver would also constitute added matter.

According to points 8 and 9 of the minutes of the oral proceedings before the opposition division, the oral proceedings were interrupted after raising this objection, apparently to give the proprietor the opportunity to deal with the objection. Furthermore, the board cannot find any subsequent indication in the minutes that the proprietor felt unfairly treated; nor has the correctness of the minutes been challenged by the appellant, which did not raise any objection related to a violation of its right to be heard at the oral proceedings before the opposition division.

For the above reasons the board concludes that the request for reimbursement of the appeal fee must be refused.

Order

For these reasons it is decided that:

1. The appeal is dismissed.

2. The request for reimbursement of the appeal fee is refused.

The Registrar: The Chairman:

D. Magliano A. S. Clelland