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Datasheet for the decision of 11 November 2011

Case Number: T 1417/08 - 3.5.05

Application Number: 05250625.0

Publication Number: 1608116

IPC: H04L 12/56

Language of the proceedings: EN

Title of invention:
Method and apparatus for per-service fault protection and restoration in a packet network

Applicant:
Agere Systems, Inc.

Headword:
Protecting data in a packet network/AGERE

Relevant legal provisions:
RPBA Art. 15(3)

Relevant legal provisions (EPC 1973):
EPC Art. 56, 84

Keyword:
"Inventive step - main and first auxiliary requests (no)"
"Clarity - second auxiliary request (no)"

Decisions cited:
-

Catchword:
-

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Case Number: T 1417/08 - 3.5.05

D E C I S I O N
of the Technical Board of Appeal 3.5.05
of 11 November 2011

Appellant: Agere Systems, Inc.
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Representative: Williams, David John
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Decision under appeal: **Decision of the Examining Division of the European Patent Office posted 3 March 2008 refusing European patent application No. 05250625.0 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman: A. Ritzka
Members: M. Höhn
G. Weiss

Summary of Facts and Submissions

I. This appeal is against the decision of the examining division, dispatched on 3 March 2008, refusing European patent application No. 05250625.0 on the grounds that the claimed subject-matter lacked clarity and inventive step (Articles 56 and 84 EPC) in the light of the prior-art document:

D1: SAKAI Y ET AL: "A METHOD OF PROTECTING HIGH-PRIORITY PACKETS IN VIDEO PACKET TRANSMISSION" ELECTRONICS & COMMUNICATIONS IN JAPAN, PART I - COMMUNICATIONS, SCRIPTA TECHNICA. NEW YORK, US, vol. 76, no. 3, 1 March 1993 (1993-03-01), pages 66-73, ISSN: 8756-6621.

II. The notice of appeal was received on 13 May 2008. The appeal fee was paid on the same day. The statement setting out the grounds of appeal was received on 14 July 2008 (Monday). The appellant requested that the appealed decision be set aside and that a patent be granted on the basis of the sets of claims according to the main request or first or second auxiliary requests on which the decision under appeal is based. Oral proceedings were requested on an auxiliary basis.

III. A summons to oral proceedings on 11 November 2011 was issued on 1 August 2011. In an annex accompanying the summons the board expressed the preliminary opinion that the subject-matter of the independent claims of all requests did not appear to fulfil the requirements of Article 84 EPC and did not appear to involve an inventive step in the light of the disclosure of D1 when combined with the common general knowledge of the

skilled person. The board gave its reasons for the objections and why the appellant's arguments were not convincing.

IV. By letter dated 7 October 2011 the appellant commented on the objections set out in the annex to the summons to oral proceedings and submitted arguments in support of the clarity and inventive step of claims 1 and 4 of the main request.

V. By letter dated 9 November 2011 the appellant's representative informed the board that the applicant would neither attend nor be represented at the oral proceedings. The appellant requested that the board reach a decision taking into account the submissions filed on 7 October 2011.

VI. Independent claim 1 according to the main request reads as follows:

"1. A method for protecting data in a packet network, said method characterised by the steps of:
classifying a received packet based on information in a header portion of said packet, said classifying step employing one or more rules to determine whether said received packet should be protected (430); and
transmitting (470) said received packet on at least two paths (1110, 1120) if said packet classification determines that said received packet should be protected, wherein at least one of said at least two paths is a primary path and at least one of said at least two paths is a secondary path."

Independent claim 4 according to the main request reads as follows:

"4. A method for protecting data in a packet network, said method characterised by the steps of:
classifying (710) a received packet based on information in a header portion of said received packet, said classifying step employing one or more rules to determine whether said received packet is a protected packet having at least one additional version; and
transmitting only one version of said received packet if said packet classification determines that said received packet is a protected packet, wherein one version of said received packet is received on a primary path and said at least one additional version is received on a secondary path, and wherein said transmission is performed via a primary path; and
switching over to a secondary path if a fault is detected on said primary path."

Independent claim 1 of the first auxiliary request is identical to claim 1 according to the main request.

Independent claim 1 of the second auxiliary request is identical to claim 4 according to the main request.

VII. The appellant requested in writing that the decision under appeal be set aside and that a patent be granted on the basis of the set of claims according to the main request or first or second requests filed on 5 February 2008.

VIII. Oral proceedings were held on 11 November 2011 in the absence of the appellant. After due deliberation on the basis of the written submissions in the statement setting out the grounds of appeal, in the letter dated 7 October 2011 and on the basis of the requests, the board announced its decision.

Reasons for the Decision

1. Admissibility

The appeal complies with the provisions of Articles 106 to 108 EPC (see Facts and Submissions, point II above). It is therefore admissible.

2. Non-attendance at oral proceedings

In its letter dated 9 November 2011 the appellant informed the board that the applicant would neither attend nor be represented at the oral proceedings. The board considered it expedient to maintain the date set for oral proceedings. Nobody attended on behalf of the appellant.

Article 15(3) RPBA stipulates that the board is not obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case.

Hence, the board was in a position to announce a decision at the conclusion of the oral proceedings.

Main request

Article 56 EPC 1973 - Inventive step

3. The examining division essentially argued that the subject-matter of claim 1 was obvious in the light of the disclosure of D1 when combined with the skilled person's common general knowledge. D1 disclosed all the

features of claim 1 except that the first path and the copy paths disclosed in D1 had an order in so far as the first path was to be considered a primary path, whereas the copy path was a secondary path. This difference, however, was obvious, since the skilled person would know that transmission paths in a network can be further categorised.

3.1 The appellant essentially counter-argued that D1 disclosed neither classifying a packet using a header (see statement setting out the grounds of appeal, bottom of page 5) as required by claims 1 and 4, nor switching to a secondary path in case of a fault as required according to claim 4.

3.2 In the board's judgment, D1 does indeed disclose a primary and a secondary path. D1 discloses a main path (see e.g. figure 1) which is understood to be the primary path, because this is the preferred path usually chosen for transmission of a packet. There is no technical difference between a "main" path and a "primary" path. D1 further discloses the establishment of N copy paths, i.e. at least a secondary path. Those copy paths have lower priority (see D1, page 66, column 2, last sentence) and are selected in order of the lowest priority (see D1, page 67, section 2.2, item (3)), i.e. are categorised. D1 therefore explicitly teaches the categorisation of the paths used for parallel transmission of a packet which belongs to the non-interrupt, i.e. highest, priority class.

3.3 Claim 1 is distinguished from the disclosure of D1 in that there is no explicit disclosure for using a header of the packet for classifying a packet's priority.

3.4 The appellant argued that marking a packet as high priority as disclosed in D1 was not equivalent to classifying received packets based on information in a header portion of a packet as required according to claims 1 and 4. A packet could be marked as high or low priority using techniques other than a packet header, "as would be apparent to a person of ordinary skill in the art" (see grounds of appeal, page 3, paragraph 3).

The board in principle agrees with the last sentence in the light of the skilled person's common general knowledge, but in the board's judgment this applies equally in the opposite direction. The skilled person knowing such other techniques would certainly also consider the use of packet headers as an obvious alternative. Therefore, the board considers this difference to be at least obvious in the light of the skilled person's common general knowledge.

3.5 The subject-matter of claim 1 is therefore obvious in the light of the disclosure of D1 when combined with the skilled person's common general knowledge.

First auxiliary request

4. Since claim 1 of this request is identical to claim 1 of the main request, its subject-matter is obvious for the same reasons as given in section 3 above.

Second auxiliary request

Article 84 EPC 1973

5. In contrast to the appellant's argument (see grounds of appeal, bottom of page 2 and point 7 of the letter dated 7 October 2011), it is unclear whether the expression "said transmission" in the last feature of claim 1 of this request refers to the step of transmitting, which is interpreted to be the forwarding of the packet to the next node, or to the transmission on which the reception of the two versions of the current packet from the preceding node is based. To "switch over" according to the present application is understood as to select the packet received on the second path for forwarding it, instead of using the packet received on the primary path, because the latter packet or the primary path is defective (e.g. link failure). This interpretation is based for example on paragraphs [0026] and [0029] of the published application. This appears to refer to the selection of either the packet received on the primary or on the secondary path. In the board's judgment, claim 1 can therefore be interpreted according to the second alternative. For this reason the wording of claim 1 of this request lacks clarity.

6. According to the wording of claim 1, the transmitting step requires that both the packet on the primary path and the additional version of the packet on the secondary path "are received". It is switched over to the secondary path "if a fault is detected on said primary path". According to the description, the following is disclosed with regard to such a fault: "in

the event of a network failure, the router can detect the disruption in the primary path 360 and rapidly switch over to the secondary path 370" (emphasis added - see paragraph [0026] of the published application) or "network outage on the primary flow" (emphasis added - see paragraph [0029] of the published application). It is, however, not clear how the packet can be received on the primary path if there is a disruption or link failure on the primary path.

The appellant's argument that the packets are received on the primary path prior to the failure of the primary path (see points 8 and 9 of the letter dated 7 October 2011) does not convince. Data packets arrive continuously and are forwarded without waiting for a check as to whether a failure occurred on the primary path. If a packet has been received on the primary path, there is no reason from a technical point of view for it not to be forwarded, whatever happens to the primary path later. Since a failure on the primary path encompasses a link failure (see afore-mentioned reference to the description), the subject-matter of claim 1 is not clear in the whole range claimed, since it can be interpreted to the effect that a packet is still received on the primary path despite the path having a link failure.

For the afore-mentioned reasons, claim 1 lacks clarity and therefore does not fulfil the requirements of Article 84 EPC 1973.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chair:

K. Götz A. Ritzka