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Datasheet for the decision of 27 April 2012

Case Number: T 1982/09 - 3.5.03

Application Number: 97122843.2

Publication Number: 0851694

IPC: H04Q 7/00, H04Q 7/22, H04B 7/26, H04Q 7/38, H04J 3/16

Language of the proceedings: EN

Title of invention:
Communication method, base station and terminal apparatus

Patent proprietor:
Sony Corporation

Opponent:
Siemens AG

Headword:
Communication method/SONY

Relevant legal provisions:
EPC Art. 56, 107

Keyword:
"Validity of transfer of opponent status (no)"
"Admissibility of purported opponent's appeal (yes)"
"Continuation of the appeal procedure with original opponent (yes)"
"Inventive step (no)"

Decisions cited:
G 0004/88, G 0002/04, T 0009/00, T 1178/04

Catchword:
See point 1 of the reasons

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 1982/09 **-** 3.5.03

D E C I S I O N
of the Technical Board of Appeal 3.5.03
of 27 April 2012

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Decision under appeal: **Interlocutory decision of the opposition division of the European Patent Office posted 6 August 2009 concerning maintenance of European patent No. 0851694 in amended form.**

Composition of the Board:

Chairman: A. S. Clelland
Members: F. van der Voort
R. Moufang

Summary of Facts and Submissions

I. The present decision arises from appeals, filed by the patent proprietor and by Nokia Siemens Networks GmbH & Co. KG, against the decision of the opposition division finding European patent No. 0 851 694 in amended form to meet the requirements of the EPC. The appeals were considered in the same proceedings in accordance with Article 10(1) RPBA.

II. The opposition was filed against the patent as a whole and, *inter alia*, on the ground that the claimed subject-matter did not involve an inventive step (Article 100(a) EPC). In the notice of opposition reference is made, *inter alia*, to the following document:

E1: US 5 208 804 A.

III. The opposition division at least implicitly accepted that the opposition, which was originally filed by Siemens AG, had been validly transferred to Nokia Siemens Networks GmbH & Co. KG (decision under appeal, summary of facts and submissions, point 6, 3rd paragraph, and minutes of the oral proceedings, point 3).

IV. In a first communication the board gave a preliminary view on, *inter alia*, the opponent status of Nokia Siemens Networks GmbH & Co. KG. More specifically, the board expressed the preliminary view that the documents submitted in support of the transfer of opposition did not constitute sufficient evidence in order to conclude

that the transferred business part comprised the technology to which the patent in suit related.

V. In reply, Nokia Siemens Networks GmbH & Co. KG submitted arguments in support of a valid transfer together with further evidence.

The patent proprietor also submitted a reply in response to the board's communication.

VI. The parties were summoned by the board to oral proceedings. In a communication accompanying the summons, the board drew attention to issues to be discussed at the oral proceedings.

VII. In preparation for the oral proceedings the proprietor filed a reply including comments presented in relation to potentially necessary amendments in the claims in order to overcome objections under Articles 84 and 123(2) EPC.

VIII. Oral proceedings were held on 27 April 2012.

In the course of the oral proceedings the proprietor withdrew its appeal as well as the second and third auxiliary requests as filed with the letter dated 11 December 2012. The proprietor requested that the appeal filed by Nokia Siemens Networks GmbH & Co. KG (hereinafter "the appeal") be rejected as inadmissible or be dismissed (main request) or, in the alternative, that the decision under appeal be set aside and the patent be maintained in amended form on the basis of claims 1 to 7 of a first auxiliary request as filed with the letter dated 11 December 2009.

The opponent requested that the decision under appeal be set aside and that the patent be revoked.

At the end of the oral proceedings the board's decision was announced.

IX. Claim 1 of the patent in amended form as found by the opposition division to meet the requirements of the EPC is identical to claim 1 of the main request as filed by the proprietor with the letter dated 11 December 2009 and reads as follows:

"A communication resource allocation method for adapting the transmission capacity of a wireless link between a mobile terminal apparatus (122) and a base station (141) connected to a cellular communication network which uses a multi-carrier transmission technique subdividing the available channel bandwidth into a predefined number of band slots, each band slot being assigned to a certain mobile terminal apparatus (122) upon request, each band slot being formed of a predetermined amount of subcarriers,
wherein a base station (141) allocates physical communication resources (CRs) in form of distinct band slots for a mobile terminal apparatus (122),
characterized by the following steps:

- while a communication is being carried out between said mobile terminal apparatus (122) and said base station (141), an allocation request step (Sl0l, S106) for transmitting an allocation request signal from said mobile terminal apparatus (122) to said base station (141) and

– a resource allocation step (S102, S107+S108) for detecting said allocation request signal by said base station (141), determining unused band slots or occupied band slots to be freed, respectively, allocating a subset of these band slots, which number is adaptively set dependent on the amount of data to be transmitted between the mobile terminal apparatus (122) and the base station (141), to said mobile terminal apparatus (122), and transmitting data about the allocated band slots and the timing at which communication is started in the allocated band slots from said base station (141) to said mobile terminal apparatus (122).".

Claim 1 of the first auxiliary request differs from claim 1 of the main request in that the following feature is added:

"wherein a center frequency of the band slots is changed when the number of allocated band slots is changed".

Reasons for the Decision

1. *Party status and admissibility of the appeal*

1.1 As a matter of principle, the board examines the question of party status *ex officio* before dealing with the substance of the case (cf. G 2/04, OJ EPO 2005, 549, point 3.2.5 of the reasons, and T 1178/04, OJ EPO 2008, 80, points 27, 31 and 34 of the reasons). According to the established case law an opponent status is not

freely transferable. It may however be transferred or assigned to a third party as part of the opponent's business assets, together with the assets in the interests of which the opposition was filed (G 2/04, *loc. cit.*, and G 4/88, OJ EPO 1989, 480). If the technology of the opposed patent concerns different parts of the opponent's business, the status of opponent can pass to a third party only if all these parts are transferred to it (see T 9/00, OJ EPO 2002, 275, point 2 e) of the reasons).

1.2 In the present case, it was common ground between the parties that with effect of 1 October 2006 the original opponent (Siemens AG) transferred its business part "Carrier Networks Geschäft" to Siemens Networks GmbH & Co. KG (statutory declaration dated 3 February 2009) which subsequently changed its name to Nokia Siemens Networks GmbH & Co. KG.

1.3 However, in the board's judgement, the declaration submitted by Nokia Siemens Networks GmbH & Co. KG in support of the transfer of opposition does not constitute sufficient evidence in order to conclude that the transferred business part comprised all of the technology to which the patent in suit relates. More specifically, the term "Carrier Networks" is open to different interpretations and the declaration does not give details of the technological areas covered by the transferred business part. Nor does the further evidence as submitted in reply to the first communication, in which it was confirmed that Siemens AG had transferred "its assets, liabilities and contracts relating to the carrier networks equipment and services business with telecommunication network

operators and service providers of Siemens' communications group (COM) comprising: (a) the mobile networks, fixed networks and carrier services divisions; and (b) the carrier core development and supply chain management carrier networks functional divisions", provide sufficient evident in order to conclude that the transferred business part comprised all of the technology to which the patent in suit relates. In this respect the board notes that the patent in suit is concerned with a communication resource allocation method for adapting the transmission capacity of a wireless link between a mobile terminal apparatus and a base station connected to a cellular communication network. Independent claim 9 as granted is directed to a mobile terminal. Hence, the patent relates, *inter alia*, to business activities in the field of mobile telephones. At the oral proceedings before the board the representative representing both Siemens AG and Nokia Siemens Networks GmbH & Co. KG did not contest that Siemens AG is currently the applicant for or patent proprietor of patents relating to mobile telephones.

1.4 In view of the above the board concludes that the opponent status was not validly transferred. The opposition division thus incorrectly held that Nokia Siemens Networks GmbH & Co. KG was the new opponent and, consequently, the appeal was filed in the wrong name, namely in the name of Nokia Siemens Networks GmbH & Co. KG, instead of in the name of Siemens AG.

1.5 Following T 1178/04 (*loc. cit.*, point 3 of the reasons), the fact that the opposition division's ruling on the issue of opponent status was wrong cannot however mean

that Nokia Siemens Networks GmbH & Co. KG was not a party to the proceedings at the date the notice of appeal was filed. A person is to be regarded as a party for the purpose of Article 107 EPC even if his entitlement to take part in the proceedings is brought into question and such entitlement is the subject-matter of a pending decision. Although he may cease to be a party if it is decided that he is not entitled to take part in the proceedings, this does not mean he never was a party.

1.6 Since there is no dispute that the other requirements of Articles 107 and 108 EPC have been satisfied in this case, it follows that the appeal filed by Nokia Siemens Networks GmbH & Co. KG is admissible.

2. *Procedural consequences*

2.1 The opposition division's view that the opponent status was validly transferred had the consequence that the opposition proceedings were continued with the wrong party, i.e. with Nokia Siemens Networks GmbH & Co. KG instead of the original opponent. These proceedings thus suffered from a major procedural deficiency. According to Article 11 of the Rules of Procedure of the Boards of Appeal (RPBA), a board shall remit a case to the department of first instance if fundamental deficiencies are apparent in the first instance proceedings, unless special reasons present themselves for doing otherwise. Such a remittal was considered necessary in decision T 1178/04 (*loc. cit.*, points 44 and 45 of the reasons) in a situation similar to the present one.

2.2 However, in the board's view, the particular circumstances of the present case, which are summarized in the following, speak against a remittal under Article 11 RPBA. In response to the board's communication accompanying the summons, the appellant's representative explicitly stated that he had been and was still authorized to represent the original opponent and submitted a corresponding authorisation. He had already offered to file such an authorisation in the oral proceedings before the opposition division, when the patent proprietor for the first time questioned the transfer of opponent status. None of the parties argued that the fact that the opposition proceedings were continued with the wrong party had changed the outcome of the proceedings in substance. Any suggestion that the true opponent might not have appealed the decision or might have conducted the appeal proceedings differently would amount to mere speculation and be highly implausible, since the original opponent indeed authorized the representative to represent it in the current appeal proceedings. Moreover, all the parties agreed that a remittal and the ensuing repetition of the first instance proceedings would cause a considerable and undesirable delay in having the case decided by the final instance. Under these circumstances, the true opponent (Siemens AG) is deemed to have acquired the appellant status from Nokia Siemens Networks GmbH & Co. KG as a consequence of the board having decided that the opponent status was not validly transferred to the latter company. Thus, in the present case, there is no need for a remittal on the ground that the appeal was not filed by the true opponent itself.

2.3 The appeal proceedings are therefore continued with Siemens AG as the appellant. Further, since in the course of the oral proceedings the proprietor withdrew its appeal (see point VIII above), the proprietor is party to the appeal proceedings as of right and will hereinafter be referred to as the respondent (Article 107 EPC).

3. *Main request - claim 1 - inventive step*

3.1 In the course of the oral proceedings the respondent proposed an amendment to claim 1 in order to make it clear that in the characterising portion the condition "while a communication is being carried out ..." applies to both the allocation request step and the resource allocation step. Although this proposal was not made the subject of a request in writing, for the sake of argument, the board will interpret claim 1 accordingly.

3.2 Document E1 discloses, using the language of claim 1 of the main request, a communication resource allocation method (col. 2, lines 3 to 21) for adapting the transmission capacity of a wireless link between a mobile terminal apparatus (Fig. 3, subscriber unit or radio 300) and fixed equipment (for example, a remote controller (col. 4, lines 23 to 26)) connected to a communication network (col. 4, lines 65 to 67 ("communication to a remote user or host (not shown)")) which uses a multi-carrier transmission technique subdividing the available channel bandwidth NC into a predefined number of N band slots (col. 4, lines 15 to 18 and lines 30 to 41), each band slot being assigned to a certain mobile terminal apparatus upon request

(col. 4, lines 52 to 57, and col. 5, lines 3 to 5), in which each band slot may be formed of a predetermined amount of subcarriers (col. 5, lines 46 to 50 ("subchannels")). Fig. 4 illustrates a "typical application of the flexible-bandwidth radio" in which the subscriber unit 300 of Fig. 3 is used (col. 2, lines 37 to 39, and col. 4, line 58) and in which reference is made to a central controller 405.

The method disclosed in connection with Figs 3 and 4 includes an allocation request step for transmitting an allocation request signal from the mobile terminal apparatus to a remote controller (central controller 405 in Fig. 4), while a communication is being carried out between the mobile terminal apparatus and the remote user or host (col. 4, lines 52 to 57, and col. 4, line 65, to col. 5, line 14). More specifically, the data application 335 of the subscriber unit 300 dynamically requests an appropriate number of channels from the remote controller. Hence, it is implicit that the allocation request signal is detected by the remote controller and that, since the subscriber unit requests a number of channels, the subscriber unit does not yet know which specific channels will eventually be allocated to the subscriber unit.

3.3 In connection with Figs 3 and 4, E1 does not give details of the processing of the allocation request signal by the remote controller or central controller 405. Nor does E1 disclose the specific location of the remote controller or the central controller 405.

3.4 However, a person skilled in the art, when faced with the problem of implementing the remote controller or central controller 405 as described in connection with Figs 3 and 4 would note that E1 further includes the following general passage at col. 5, line 59, to col. 6, line 3:

> "One method of utilizing a flexible-bandwidth radio, according to the invention, would be for the application to determine a maximum desired bandwidth (say 500 Kbs) and a minimum needed bandwidth (say 64 Kbs). The application would then convey these two limits to the central controller. The controller would start by allocating 64 Kbs and allocating this to the application. The application would then begin using this bandwidth. The controller, however, would continue to search for additional idle bandwidth and, when some becomes available, it would allocate it for the application. In response, the application would use the additional bandwidth upon allocation from the controller."

3.5 Applying the above teaching to the method described with reference to Figs 3 and 4 would thus result in the remote controller or central controller 405, in response to detecting the allocation request signal referred to above, determining unused band slots, allocating to the subscriber unit 300 a subset of these unused band slots, which number is adaptively set dependent on the amount of data to be transmitted between the subscriber unit and the remote user or host. Further, since the data application 335 of the subscriber unit 300 dynamically requests an appropriate

number of channels from the remote controller, rather than specific channels, given that it needs to know which channels can be used upon allocation, it would have been obvious to the skilled person to implement the remote controller such that it transmits to the subscriber unit data about the allocated band slots. For the same reason, if, as disclosed in E1 (col. 5, lines 45 to 54), subchannels defined by the use of time division multiplexing were additionally available as communication resources, the remote controller would additionally transmit data about the allocated time slots in the allocated band slots. In that case, since in response the data application 335 would use the additional time slots upon allocation from the controller (cf. E1, col. 6, lines 1 to 3), it follows that the data about the allocated time slots represents data about the timing at which communication is started in the allocated band slots.

3.6 Hence, in doing so, the skilled person would arrive at a communication resource allocation method, in which the remote controller allocates physical communication resources in form of distinct band slots for a mobile terminal apparatus 300. More specifically, the method would include the step of, while the communication is being carried out between the mobile terminal apparatus 300 and the remote user or host, a resource allocation step for detecting the allocation request signal by the remote controller, determining unused band slots, allocating a subset of these unused band slots, which number is adaptively set dependent on the amount of data to be transmitted between the mobile terminal apparatus 300 and the remote user, to the mobile terminal apparatus 300, and transmitting data about the

allocated band slots and the timing at which communication is started in the allocated band slots from the remote controller to the mobile terminal apparatus 300.

3.7 Further, since E1 generally relates to land mobile radio systems (col. 1, lines 11 to 31, and col. 4, lines 4 to 8, and Fig. 1) and considering that at the priority date it was part of the common general knowledge of the person skilled in the art that a land mobile radio network usually covers different areas or cells, in which each cell is served by a fixed-location base station and in which each mobile telephone in a cell communicates by means of a wireless link via the base station in the cell and via the communication network with a remote user or host, it would have been obvious to the skilled person to implement the communication network disclosed in E1 accordingly. Further, since E1 refers to "mobile to base" and "base to mobile" also in connection with the communication between the subscriber unit and the remote controller (col. 4, lines 15 to 18 and 23 to 29), it would have been obvious to include the remote controller in the base station. This implementation is also in line with Fig. 4, since the central controller 405 is part of the fixed equipment 403 which additionally includes repeaters 1 to M for the communication channels 1 to M, wherein, in a cellular communication network, these repeaters would usually be accommodated in a cellular repeater, i.e. a type of base station.

3.8 The skilled person would therefore, without the exercise of inventive skill, arrive at a method which

includes all the features of claim 1 of the main request.

3.9 In connection with the location of the remote controller or central controller, the respondent referred to the "background of the invention" section in E1 (col. 1, lines 36 to 45) and argued that, since in this section it was clearly mentioned that a "central controller" was responsible for the channel allocation and the invention described in E1 did not change the setup of the system, there would be no hint that the central controller or the remote system controller could be part of or could be equal to a base station.

The board notes however that the section referred to is specifically concerned with a trunked radio system arrangement, whereas the method and radio disclosed in E1 is implicitly not limited to use in this specific arrangement (E1, col. 4, lines 58 to 60, col. 5, lines 37 to 42, and claims 10 and 14). In any case, the section in question does not exclude a trunked radio system arrangement with one base station which includes a central controller.

3.10 The board therefore concludes that the subject-matter of claim 1 of the main request does not meet the requirements of Articles 52(1) and 56 EPC.

4. *First auxiliary request - claim 1 - inventive step*

4.1 Having regard to the disclosure of E1, the additional feature in claim 1 of the first auxiliary request does not contribute to an inventive step either, since the

allocation of additional band slots would normally result in a center frequency defined by the new set of band slots which is different from the center frequency of the previous set. Only by, in the frequency domain, symmetrically adding band slots would the center frequency remain the same. The board notes that these considerations were not contested by the respondent.

4.2 In view of the above and the reasons given at point 3 in respect of claim 1 of the main request, the subject-matter of claim 1 of the first auxiliary request does not meet the requirements of Articles 52(1) and 56 EPC.

5. Since for the reasons set out above the patent and the invention to which it relates, taking into consideration the amendments made by the respondent, do not meet the requirements of Article 52(1) EPC in combination with Article 56 EPC, the patent is to be revoked.

6. In view of the foregoing, it is not necessary to consider any of the further issues set out in the communication accompanying the summons to oral proceedings.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar: The Chairman:

G. Rauh A. S. Clelland