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Datasheet for the decision of 28 March 2014

Case Number: T 1346/10 - 3.5.06

Application Number: 02739695.1

Publication Number: 1399796

IPC: G06F1/00

Language of the proceedings: EN

Title of invention:
METHOD AND APPARATUS FOR TRACKING STATUS OF RESOURCE IN A SYSTEM FOR MANAGING USE OF THE RESOURCES

Patent Proprietor:
ContentGuard Holdings, Inc.

Opponents:
VODAFONE GROUP PLC
Nokia Corporation

Headword:
Tracking Resource Status/CONTENTGUARD

Relevant legal provisions:
EPC 1973 Art. 56

Keyword:
Inventive step - after amendment

Decisions cited:
T 0789/89, G 0010/91, T 1002/92

Catchword:

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Case Number: T 1346/10 - 3.5.06

D E C I S I O N
of Technical Board of Appeal 3.5.06
of 28 March 2014

Appellant: (Patent Proprietor)	ContentGuard Holdings, Inc. 103 Foulk Road, Suite 200-M Wilmington, Delaware 19803 (US)
Representative:	Grünecker, Kinkeldey, Stockmair & Schwanhäusser Leopoldstrasse 4 80802 München (DE)
Appellant: (Opponent 1)	VODAFONE GROUP PLC VODAFONE HOUSE THE CONNECTION NEWBURY, BERKSHIRE RG14 2FN (GB)
Representative:	Hoyles, Matthew Thomas Vodafone Group Services Ltd. Group Legal and Corporate Secretariat One Kingdom Street, 5th floor Paddington Central London W2 6BY (GB)

Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 20 April 2010 concerning maintenance of the European Patent No. 1399796 in amended form.**

Composition of the Board:

Chairman:	D. Rees
Members:	M. Müller
	M.-B. Tardo-Dino

Summary of Facts and Submissions

I. The appeal lies against the interlocutory decision of the opposition division, with reasons dispatched on 20 April 2010, to maintain European patent no. 1399796 in amended form. The decision under appeal referred in particular to the documents

E1: EP 0840194 and
E2: EP 0818748

and argued that the amended claims according to the then auxiliary request 1 met the requirements of the EPC, especially those of Articles 123 (2) and (3) EPC, Article 54 (1) and (2) EPC 1973 and Article 56 EPC 1973 in view of E1 and E2, whereas claim 1 of the granted patent on which the then main request was based lacked an inventive step over E1.

II. Two oppositions had been filed against the patent, by Vodafone Group PLC and Nokia Corporation, respectively, but the opposition of Nokia was withdrawn already before the decision by the opposition division issued. For grounds for opposition, Vodafone relied only on Article 100 (a) EPC 1973, arguing that the matter claimed in the patent as granted was not new and did not show an inventive step over, *inter alia*, E1 and E2, Articles 54 and 56 EPC 1973.

III. Appeals were filed by both the remaining opponent Vodafone and the proprietor.

IV. The opponent's notice of appeal was filed on 21 June 2010, the appeal fee being paid on the same day, and a statement of grounds of appeal was received on 26 August 2010. The appellant/opponent requested

that the decision under appeal be set aside and the patent be revoked in its entirety. It requested that the following new document be admitted into the procedure:

E5: B. Stroustrup, "The C++ Programming Language", Addison-Wesley, 1991, excerpts from several pages, esp. pp. 30-31, 314-315, 416-417, and 512-513,

and raised objections under Article 123 (2) EPC (Article 100 (c) EPC 1973) and under Article 56 EPC 1973 in view of E1 and E2 (Article 100 (a) EPC 1973). With respect to the latter, it argued that the problem addressed by the maintained claims was non-technical in nature and that the claimed solution was obvious in view only of common general knowledge in the art; reference to G 3/08 was made in this regard. It further argued that both present requests violated Article 123 (2) EPC due to the amendments after grant.

V. The proprietor's notice of appeal was filed on 30 June 2010, the appeal fee being paid on the same day, and a statement of grounds of appeal was received on 30 August 2010. The appellant/proprietor requested that the decision be set aside and the patent be maintained on the basis of claims 1-17 according to a main request or claims 1-15 according to an auxiliary request as filed with the grounds of appeal, in combination with the documents as maintained by the opposition division, *i.e.*:

description, pages
3-16 of the patent specification
2 as filed during on 14 December 2009
drawings, sheets
1-7 of the patent specification

It further requested that the late filed document E5 not be admitted because it could have already been filed during the examination procedure, and submitted that the objection under Article 123 (2) EPC pursuant to Article 100 (c) EPC constituted a new ground for opposition which should not be admitted either.

VI. With letters dated 8 March 2013 and 10 April 2013, respectively, Vodafone withdrew their appeal and their opposition.

VII. With a summons to oral proceedings, the board informed the appellant/proprietor (henceforth simply "appellant") of its preliminary opinion. The board tended to agree with the appellant that the objection under Article 123 (2) EPC and Article 100 (c) EPC 1973 constituted a fresh ground for opposition which should not be admitted against the proprietor's wish, but also that it was wrong in substance. The board however raised an objection of its own under Article 123 (2) EPC against a new feature of the claims as introduced with the grounds of appeal. The board tended to consider that it was not necessary to introduce E5 into the procedure and to agree with the appellant that the new argument that the subject-matter of the patent was not technical should not be admitted either. Further, the board indicated on which questions the assessment of inventive step in view of E1 seemed to turn, Article 56 EPC 1973.

VIII. In response to the summons, with letter dated 28 February 2014, the appellant filed six new sets of claims 1-17 as auxiliary requests.

IX. Oral proceedings were held on 28 March 2014.

X. During the oral proceedings, the appellant explained that the first auxiliary request, if admitted, was to replace the pending main request. When the board indicated that it would admit the first auxiliary request, the appellant withdrew the pending main request and confirmed its requests that the patent be maintained based on claims 1-17 according to any of the six requests as filed with letter of 28 February 2014, in combination with the description and drawings as maintained by the opposition division.

XI. Claims 1 and 10 according to the main request, filed as auxiliary request 1 on 28 February 2014, reads as follows:

"1. A system for managing a protected resource (100) in a system for granting access to the protected resource (100) in accordance with usage rights, said usage rights including state variables (84) indicating a status of an associated protected resource (100), said system comprising:

a protected resource (100) associated with a usage right specifying a plurality of permitted manners of use for the protected resource (100), where a state of the usage right is defined at least in part by a state variable corresponding to one of the plurality of permitted manners of use for the protected resource (100);

a resource control device coupled to said resource to control use of said resource by enforcing the usage right, said enforcing comprises evaluating said usage right;

a remote state controller operative to track a value of the state variable; and

an interface framework operative to receive a message related to said state variable from said

resource control device, load said remote state controller, and instruct said remote state controller to manipulate the value of the state variable in accordance with said message; wherein

said usage rights further including a method specification (86) specifying how values of said state variables (84) can be obtained, said method specification including a location where the values of said sate [sic] variables are stored, said location being said remote state controller, or including a communication protocol to communicate with said remote state controller.

10. A method for managing a protected resource (100) in a system for granting access to the protected resource (100) in accordance with usage rights, said usage rights including a state variable indicating a status of an associated protected resource (100), said method comprising:

transmitting a message related to the state variable from a resource control device to an interface framework, said resource control device being coupled to said protected resource (100) to control use of said protected resource (100) by enforcing the usage right specifying a plurality of permitted manners of use for the protected resource (100), where a state of the usage right is defined at least in part by the state variable corresponding to one of the plurality of permitted manners of use for the protected resource (100), said enforcing comprises evaluating said usage right;

loading into said framework a remote state controller operative to track the value of the state variable; and

instructing said remote state controller to manipulate a value of the state variable in accordance with said message; wherein

said usage rights further including a method specification (86) specifying how values of said state variables (84) can be obtained, said method specification including a location where the values of said sate [sic] variables are stored, said location being said remote state controller, or including a communication protocol to communicate with said remote state controller."

In view of the board's decision, the wording of the claims according to the further auxiliary requests is irrelevant.

XII. At the end of the oral proceedings, the chairman announced the decision of the board.

Reasons for the Decision

Procedural situation

1. Since Vodaphone has withdrawn its appeal the proprietor is the sole appellant and the former opponent Vodafone has ceased to be party in the appeal proceedings as far as the substantive issues are concerned (see T 789/89, headnote).

The late filed requests

2. In the annex to the summons, the board questioned that the then pending claims supported the appellant's allegation "that the state controller is remote from the usage rights expression" and addressed the breadth of

the claimed step of "enforcing". The board also expressed its preliminary view that the last feature of the pending independent claims constituted added subject matter, Article 123 (2) EPC. Thus the amendments made to the claims of what was filed as first auxiliary request on 28 February 2014, namely explicitly specifying the state controllers to be "remote", the "enforcing" to comprise "evaluating [a] usage right" and the deletion of said last feature, are apparently made in direct response to the board's concerns raised in the summons. Since they also do not introduce any inappropriate complexity the board exercises its discretion under Rule 13 (1) RPBA and admits this first auxiliary request into the procedure. Consequently, it replaces the main request according to the appellant's request. No decision about admission of the further auxiliary requests is required.

The invention

3. The patent generally relates to the specification and management of digital usage rights which regulate the access to and use of a protected resource according to certain, potentially dynamic conditions: For instance, the right to use a protected resource may be limited to a number of times or to a specified period of time, or it may be granted only if no other users are logged into the pertinent network at the same time (see pars. 18, 19 and 61 of the published application). The status of these conditions is tracked by so-called "state variables" (see pars. 19 and 35).

3.1 It is described that a user operates within a client environment from which a protected resource is accessed or used, for instance via some software application such as a rendering engine installed on the client (see

pars. 21 and 24; fig. 1, no. 12 and 30). In order to access a protected resource, say to view a protected document on the client screen, a request is issued (par. 38, lines 4-6; par. 40, lines 3-7; and par. 41, lines 1-2).

3.2 Access to the protected resource is controlled by a so-called "state manager" (see fig. 1, no. 40) comprising, *inter alia*, a "condition validator" 44 and a "resource manager" 42. The condition validator monitors the conditions regulating individual usage rights and the current values of the state values of these rights and interacts with the resource manager to control access to the protected resource, especially notifying it when access is no longer allowed (pars. 22 and 48).

3.3 The state manager also comprises a so called "state of rights framework" 20 which provides an API to what are called "state controllers" 22 (see par. 49). Each state controller is a component that manages the state of a given state variable, *i.e.* allows its value to be queried or updated (see *e.g.* par. 50). Where a state variable is actually stored and how it may be accessed is encapsulated in the corresponding state controller and state variables can only be accessed through the pertinent state controllers. That is, the location of the state variables is "transparent" to the state of rights framework (*loc. cit.*). The state of rights framework will, in response to a request, "determine what state controller is responsible for [a] request and then locate, authenticate and load that specific state controller 22 and pass the request to the state controller 22 for processing" (par. 58). The location of the state controller itself or the communication protocol required to communicate is specified in the usage rights (see par. 34). It is specifically disclosed that a

state controller may be "local or remote" (*loc. cit.*; see also par. 34, lines 7-12; and par. 51); in the given context this must mean local or remote relative to the state of rights framework.

4. Original independent claims 1 and 9 already referred to a "resource control device coupled to [a] resource" and to an "interface framework operative to receive a message related to [a] state variable from said resource [control] device" and to act on it. Literally, this language was not contained anywhere in the body of the patent specification except in the section entitled "summary of the invention" but was maintained in the independent claims as granted and in the present independent claims.

4.1 In the board's view, the skilled person would interpret the claimed term "resource control device" as the "client" device 30 which, according to figure 1, is also "coupled" to a resource and take the claimed "interface framework" to mean the "state of rights framework" and its API, *i.e.* application programming interface (see esp. par. 58). Furthermore, the skilled person would understand the "message", claimed to be "from [the] resource [control] device" and to be "related to the state variable", to be part of the condition validation process, noting that the condition validator 44 is described *inter alia* to manage the state of the rights" (see par. 22), and therefore be bound to conclude that at least this part of the state manager had to be local to the resource control device, *i.e.* the client.

4.2 The board notes that this is consistent with the description which discloses that, in general, the various components can be "combined or segregated as hardware and/or software modules and devices in any manner" and

"be stored on the same device or on different devices" (pars. 65 and 66).

Added subject matter

5. The independent claims according to the main request have been limited over the independent claims as granted by specifying that the state controllers are "remote" and that "said enforcing comprises evaluating said usage right". The former is disclosed in paragraphs 34 and 58 of the application as originally filed, and the latter is disclosed in the original application in paragraph 45 in combination with the fact that, according to the above interpretation, the condition validation is claimed to be located at the client, *i.e.* the resource control device. The board is thus satisfied that these amendments conform with Article 123 (2) and (3) EPC.

6. The independent claims as maintained in opposition (and, in fact, as granted) contained the following feature which was not originally claimed, namely that the "method specification includ[e] a location where the values of said s[t]ate variables are stored or including a communication protocol to communicate with said state controller". With regard to this feature, the former opponent Vodafone argued that the original application discloses only the method specification to comprise location *and* (rather than: or) communication protocol so that claim 1 as maintained in opposition went beyond the content of the application as originally filed.

6.1 Article 100 (c) had not been invoked as a ground for opposition by the former opponent Vodafone. While it had been invoked by the other former opponent Nokia,

this specific objection of added subject matter was not raised. Moreover, Nokia had withdrawn its opposition and did not participate in the oral proceedings before the opposition division. During these oral proceedings, the opposition division treated added subject matter as a fresh ground for opposition and decided not to admit it into the procedure (see minutes, p. 2, lines 15-18). Consequently, the decision under appeal did not address added subject matter of the granted claims as a ground for opposition. Under these circumstances, the board has to treat the above objection as a fresh ground for opposition which, since the proprietor disagrees with its introduction, has to be dismissed in accordance with G 10/91 (headnote 3 and grounds 18). It is therefore irrelevant that the board also tends to agree with the appellant/proprietor in substance, as set out in the summons (see point 7.2).

The prior art

7. E1 discloses a system allowing only authorized users to access a protected resource, for example a DVD, according to certain usage rights which specify certain "manners of use" (free play mode, charged mode, limited-attached play; see abstract). This permission is negotiated between the user's client and one of possibly several servers (see fig. 1, nos. 2 and 8; p. 3, line 7).

7.1 The rights are expressed in a so-called "distribution descriptor" which, *inter alia*, defines the "terms-of-use" (TOU) for the entire volume or for individual applications on the volume (see fig. 4, nos. 34-35, fig. 23). The terms of use can include "use-limiting factors" such as an expiration date, a use period or a maximal number of accesses (see p. 5, lines 21-37;

p. 10, lines 26-28). These rights are expressed on the "volume" (*e.g.* the DVD) and thus read and accessed by the client (the DVD player; fig. 1, no. 2), even though they may also be kept in a server "from the beginning" (p. 10, lines 22-23).

7.2 To enforce the rights, some kind of meter is necessary (calendar, usage meter, access count). These are stored on a server (see *e.g.* p. 6, lines 36-43; and fig. 1, no. 8). Also the maintenance of the meters and the "enforcement" of the rights is under the control of a server. When a server receives a service request (see e.g. p. 6, line 54), it will retrieve the relevant meter value and check whether the request can be granted (see *e.g.* p. 10, lines 11-16). Eventually, the meters are also updated at the server side (see *e.g.* p. 7, lines 20-28).

8. E2 discloses a system for regulating access to a protected resource, esp. a software product (col. 3, line 26-30), via what is called a "battery". This term is used metaphorically, the "virtual battery" (col. 3, lines 11-13) representing the notion that the allowed use of the resource is limited and how much. The "battery value" may be implemented as a counter which is decreased over time or according to use, *i.e.* when the battery is "discharged", but which may also be increased by some form of "charging" (see col. 3, lines 14-25; figs. 1 and 3). The battery regulates only the use of some "manners of use", others are unlimited (see "target functions", "non-target functions", col. 9, lines 26-39). The check whether a function is allowed is performed by an "operation management program" (see also col. 8, lines 40-57), and so is the charging process, which uses a so-called "battery value management means" (col. 8, lines 20-39; col. 2, line 58 - col. 3,

line 5 and col. 3, lines 31-34). While the "managed software product" and the "management software" may be "separate", both are maintained at the user's machine (see fig. 3, nos. 18, 36, 38; col. 7, lines 28-31).

9. E5 is an excerpt (several individual pages) of a standard textbook on C++ meant to establish that message queries to obtain variable values are common knowledge. As such value queries are not contained in the independent claims of the main request, E5 is not relevant for the present decision. A decision on whether to admit E5 is thus also not required.

Inventive step

10. The former opponent Vodafone argued, *inter alia*, that "the underlying objective problem addressed by the maintained claims is non-technical in nature" and suggested that, therefore and in view of G 3/08, their matter lacks an inventive step in view of common knowledge alone. This approach was not contained in the grounds for opposition and results in a new legal and factual framework which was only sketched in the submission by the former opponent. The board thus agrees with the appellant that this approach is not to be admitted in accordance with the case law in T 1002/92 (headnote 2).

11. It has always been common ground between the parties to start the assessment of inventive step from document E1. The board concurs that this is a suitable choice.

11.1 The board agrees with the decision under appeal in finding the following:

The client of E1 constitutes a "resource control device" in that it acts according to a message from the server to allow or prohibit access to the protected resource (see E1, p. 10, lines 14-16). This amounts to "enforcing the usage right" in a broad sense. The server of E1 runs a "state controller" insofar as it comprises software accessing and manipulating the (values of) state variables stored at the server. Moreover, the server is remote from the client, *i.e.* it is known from E1 that the state controller is remote from the resource control device.

The server of E1 provides some kind of "interface framework" defining and managing the exchange of DRM messages between client and server.

The "distribution descriptor" of E1 (see fig. 4) comprises the server public key, and the EEPROM further comprises (see p. 5, line 16) the server ID and the server network address (p. 6, lines 44-47). Hence, E1 discloses that at the client side a "method specification" is stored specifying both the location of the state variables (the server = the location of the state controller) and how to communicate with it (via which encryption keys).

11.2 E1 does not disclose however

a) that the remote state controller is loaded when it is needed, more specifically that the "interface framework ... load [the needed] state controller",

b) while at the same time the evaluation of the usage rights is performed at the resource control device, *i.e.* at the client.

11.3 In the system of E1, all clients have to negotiate with a server whether the requested resource may be accessed. If too many clients communicate with one server at the same time, response times may suffer. The board considers that having the client evaluate the user's rights contributes to a better load balancing by unburdening the server.

11.4 The board notes that E1 anticipates the provision of several servers, apparently as an alternative way of addressing possible server overload. Nonetheless, the board considers that, in general, it would have been an obvious option for the skilled person to improve load balancing to move work from the server to the client.

11.5 However, instead of moving the entire rights management to the client, the claimed invention specifies to keep the state controllers, and thus the handling of the state variables, remote from the evaluation of the usage rights. In the board's view this contributes to security in reducing the risk that a fraudulent user at a client circumvents the rights enforcement by manipulating the state variables. Furthermore it means that the value of state variables can be changed at the server, without requiring any "push" mechanism to communicate the change to the client. In commercial terms the (in itself non-technical) desire to do this might arise because for example a content provider might want to give a "bonus", in terms of a number of accesses or additional time.

11.6 The board thus considers that differences a) and b) in combination can be considered to solve the problem of an improved load balancing while maintaining control and safety of state variables.

11.7 The board is of the opinion that E1 does not suggest to split the evaluation of rights and the handling of the state variables in this manner. Neither does E2 suggest this as it discloses that the battery value management is stored and run at the client computer.

11.8 The board therefore comes to the conclusion that the subject-matter according to claims 1 and 10 shows the required inventive step over E1 and E2, Article 56 EPC 1973.

12. The decision under appeal states it to be "obvious for a person skilled in the art to load a state controller when it is needed" without however elaborating on this argument further or citing any document to establish it. In view of the board's finding above, this question did not have to be discussed during oral proceedings and was left open.

Adaptation of the description

13. The board notes that the description has not yet been adapted to the amended claims. For instance, it is now an obligatory feature of the invention for the "state controller" to be remote and no longer merely an option as disclosed in paragraph 58 of the description. And the location of functions at devices in the invention as now claimed is not as free as paragraphs 65 (last sentence) and 66 state. The appellant agreed to postpone the adaptation of the description to the prosecution after remittal.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside

2. The case is remitted to the opposition division with the order to maintain the patent on the basis of the main request corresponding to the auxiliary request 1 as filed with the letter of 28 February 2014 and to adapt the description.

The Registrar: The Chairman:

B. Atienza Vivancos D. Rees

Decision electronically authenticated