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**Datasheet for the decision
of 20 March 2014**

Case Number: T 1486/10 - 3.5.03
Application Number: 01972435.0
Publication Number: 1319299
IPC: H04L29/06, H04M7/00, H04L12/24,
H04L12/26
Language of the proceedings: EN

Title of invention:

Communication management system for computer network based
telephones

Patent Proprietor:

Nice Systems Ltd.

Opponent:

Graf Software GmbH

Headword:

Communication management system/NICE

Relevant legal provisions:

EPC Art. 56, 99(1), 104(1), 111(1)
EPC R. 77(2)
EPC 1973 R. 55, 56(2), 88

Keyword:

Admissibility of opposition - yes (opponent identifiable)
Inventive step (main request) - yes
Remittal - yes
Apportionment of costs - no

Decisions cited:

G 0003/99, T 0025/85, T 0970/00

Catchword:



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Case Number: T 1486/10 - 3.5.03

D E C I S I O N
of Technical Board of Appeal 3.5.03
of 20 March 2014

Appellant: Nice Systems Ltd.
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Respondent: Graf Software GmbH
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 5 May 2010
revoking European patent No. 1319299 pursuant to
Article 101(2) EPC.**

Composition of the Board:

Chairman: F. van der Voort
Members: T. Snell
M.-B. Tardo-Dino
B. Noll
R. Cramer

Summary of Facts and Submissions

I. This appeal was lodged by the proprietor against the decision of the opposition division revoking European patent No. EP 1319299 on the grounds that the opposition was admissible and that the subject-matter of claim 1 of the granted patent lacked an inventive step (Article 100(a) EPC in combination with Articles 52(1) and 56 EPC) having regard to the disclosures of the following two documents considered in combination:

E6: NiceCLS - Call Logging System - Release 4.1,
User's Manual; NICE Systems Ltd., Israel;

E44: US 6044401 A.

The patent proprietor had argued that the opposition was not admissible because the opponent could not be clearly and unmistakably identified before expiry of the time limit for opposition.

II. In the notice of appeal, the appellant (proprietor) requested that the impugned decision be set aside and that the patent be maintained as granted. In the statement of grounds, the appellant contested the opposition division's findings both with regard to admissibility of the opposition and inventive step.

III. In a response to the notice of appeal, the opponent (respondent) requested that the appeal be dismissed.

Both parties conditionally requested oral proceedings.

IV. In a communication accompanying a summons to attend oral proceedings, the board gave a preliminary opinion that the opposition was admissible.

With regard to inventive step, the board expressed doubts as to whether E6 was a realistic starting point for arriving at the claimed subject-matter.

The board indicated that if it were to find that the subject-matter of the independent claim involved an inventive step having regard to documents E6 and E44, it would likely remit the case to the opposition division for further prosecution.

- V. In a response to the board's communication, the respondent filed two new prior art documents, numbered E50 and E51, both allegedly of high relevance.

The appellant submitted claims of an auxiliary request together with arguments.

Inter alia, the appellant argued that the preliminary opinion of the board concerning the admissibility of the opposition did not consider the whole factual situation and that speculating on the opponent's intention resulted in a wrong application of the test that the identification of the opponent must be clearly and unmistakably derivable from the notice of opposition.

In a further written submission, the appellant requested that E50 and E51 be not admitted to the proceedings at this very late stage and requested that the costs of the proprietor for dealing with the late-filed documents be borne by the respondent (Article 104 EPC).

- VI. Oral proceedings took place on 20 March 2014.

The appellant (patent proprietor) requested that the decision under appeal be set aside and the opposition be rejected either as inadmissible or as unfounded. In the alternative, the appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the auxiliary request as submitted with the letter of 20 February 2014.

It further requested that documents E50 and E51 be not admitted and that a different apportionment of costs be ordered.

The respondent (opponent) requested that the appeal be dismissed, that the auxiliary request be not admitted and that a different apportionment of costs be ordered.

At the end of the oral proceedings, after due deliberation, the chairman announced the board's decision.

VII. Claim 1 of the main request (ie claim 1 of the patent as granted) reads as follows:

"A system (10) for managing a communication session over a computer network (14) that includes a gate keeper (114), the system (10) comprising:
(a) a network connector (16) for connecting to the computer network (14) and for receiving data packets from the computer network (14);
(b) a filtering unit (24) for filtering said data packets, such that said data packets form at least a portion of the communication session and such that said data packets are selected data packets;
(c) a management unit (28) for receiving said selected data packets and for storing said selected data

packets, such that said selected data packets are stored data packets; and

(d) a storage medium (30) for receiving and for storing said stored data packets from said management unit (28), such that said at least a portion of the communication session is stored;

characterized in that said filtering unit (24) accepts said data packets substantially only if said data packets contain data selected from the group consisting of audio data and video data, and **in that** the system further comprises:

(e) a link (160), between the gatekeeper (114) and said management unit (28), for transferring information related to said data packets from the gatekeeper (114) to said management unit (28)".

VIII. In view of the board's decision, the wording of claim 1 of the auxiliary request is not reproduced.

Reasons for the Decision

1. *Admissibility of the opposition*

1.1 The appellant contends that the opposition should be rejected as inadmissible pursuant to Article 99(1) and Rules 55 and 56(1) EPC 1973, because the erroneous designation of the opponent meant that the opponent could not be correctly identified.

1.2 The appellant's arguments can be summarised as follows:

The opposition was filed with the following wording:

"Hiermit wird namens und im Auftrag der Harry Graf Software GmbH, Mainzer Strasse 36, 55411 Bingen am Rhein, Einspruch gegen ... eingelegt." The designation of the opponent thus corresponds neither to the natural

person *Harry Graf* nor to the legal person *Graf Software GmbH*, both mentioned in the telephone directory at the address indicated in the notice of opposition (cf. documents A1 and A4 cited during the opposition procedure). As a result, the opponent cannot be clearly and unmistakably identified, since the opponent could be the natural person "Harry Graf", the legal person "Graf Software GmbH", or the natural and legal persons jointly ("Harry Graf und Graf Software GmbH").

The appellant referred in particular to G 3/99, which states that the opponent has to be determined before expiry of the time limit for opposition (cf. G 3/99, point 12 of the reasons and T 25/85, point 6 of the reasons). The appellant argued that a notice of opposition must be objectively clear, ie it must not require speculation to establish which part of the notice was wrong and what the true intention [of the opponent] was. In the appellant's view, the reasons given in the impugned decision were based purely on speculation. In particular, the decision was partly based on the ground that it was a well-known practice in Germany to include the name of an associate in the company name. However, it could not be assumed that this would be known to persons resident outside Germany such as the present appellant. The appellant submitted also that the board in its preliminary opinion concerning admissibility (cf. point 1 of the communication accompanying the summons) had not correctly applied the test that the opponent must be clearly and unmistakably identifiable.

Accordingly, the decision of the opposition division should be set aside and the opposition be found inadmissible.

- 1.3 The board notes that it is not in dispute that the designation "Harry Graf Software GmbH" is erroneous, because no company of that name existed at the address provided in the notice of opposition.
- 1.4 Further, the board agrees with the appellant that the identity of the opponent must be clear from the notice of opposition without having to speculate as to the true identity of the opponent.
- 1.5 However, in the present case, the board considers that the indication of the opponent as given in the notice of opposition does not fairly allow room for speculation as to the identity of the opponent. In particular, the board considers that the erroneous name "Harry Graf Software GmbH" would not plausibly lead to the opponent's designation being construed as either the natural person "Harry Graf" or as joint opponents "Harry Graf und der Graf Software GmbH" instead of the corrected version "Graf Software GmbH".
- 1.6 In this respect, the wording used in the notice of opposition "*Hiermit wird namens und im Auftrag der Harry Graf Software GmbH, Mainzer Strasse 36, 55411 Bingen am Rhein, Einspruch gegen ... eingelegt*" (board's underlining) would in the board's view lead the reader to immediately conclude that the opponent is a company (GmbH). This is corroborated by the presence of the word "der" (= the) which is grammatically associated with the feminine noun "GmbH" as the genitive case of the definite article. In the board's view, it is implausible that the opponent is not a company, since then both the beginning and the end of the opponent's designation would have been erroneous. In this respect, filing an opposition in the name of a natural person according to the rules of the German

grammar would have resulted in wording which would not include the word "der": "im Auftrag von Harry Graf", or less likely "des Harry Graf".

1.7 It is true that when looking up in the official documents ("Gemeinsames Registerportal der Länder"; cf. document A1 cited in the opposition procedure) in order to check the identity of the opponent one would notice a discrepancy. But irrespective of German naming practices and assuming for the reasons given above that the opponent is a company (GmbH), it would be immediately noticed that a GmbH existed at the given address with almost the same name, ie "Graf Software GmbH". Hence, it would be concluded, without any need to speculate, that the opponent was actually "Graf Software GmbH" (which in the above-cited German sentence would read "... der Graf Software GmbH" following the clause "im Auftrag" (i.e. in the name of) and that the discrepancy (ie the presence of the additional word "Harry") was the result of an error, which is all the more plausible considering that document A2 cited in the opposition procedure indicates Harry Graf as being the founder of the Graf Software GmbH.

1.8 The other possible identity of the opponent proposed by the appellant, ie jointly "Harry Graf und der Graf Software GmbH", in the board's view is simply too far-fetched to be seriously contemplated by the reader.

1.9 The board notes in passing that the European Patent Register gives the opponent's correct designation whereas in the file there is no mention of an amended entry in this respect. Thus the board cannot exclude that the opponent's correct name, ie without "Harry", had been entered into the register by the EPO when the

opposition was filed, which underscores the obviousness of the correction. In its decision, the Opposition Division noted that "Errors in a designation can be corrected pursuant to Rule 88 EPC 1973, first sentence, at any time (T 828/98)" and held that the correct name of the opponent was "Graf Software GmbH" (cf points 2.4 and 2.10). The board additionally notes that the error in question is of the kind which could also have been dealt with under Rule 56(2) EPC 1973 (Rule 77(2) EPC), if the Opposition Division had noted the deficiency and had issued an invitation to remedy it (cf T 219/86, point 8 of the reasons).

1.10 The board concludes that there is no reason to set aside the opposition's division on the basis of this matter. The opposition is therefore admissible, since the other requirements concerning admissibility are met, which is in any case not in dispute.

2. *Main request - claim 1 - novelty and inventive step*

2.1 The patent in suit relates to a system for managing a communication session over a computer network that includes a gatekeeper (also written in the patent as "Gatekeeper" and "gate keeper"). In accordance with case law, terms in the claims should be given their normal meaning in the art. In the board's view, a gatekeeper is commonly understood as being a feature of Voice over IP (VoIP) networks such as those governed by ITU standard H.323. A gatekeeper is typically associated with the functions of providing address translations and access control or bandwidth management for a zone of the network (cf. paragraph [0088] of the patent). As claim 1 includes a gatekeeper, it implicitly relates to VoIP networks.

2.2 In the section of the patent dealing with technical background, it is stated that computer-based logging systems are known which enable a computer to receive voice communication through a hardware connection to the regular telephony network, commonly known as POTS (cf. paragraph [0002]). It is also stated that all current recording solutions are based on the fact that a PBX or a central office utilises a central switching matrix, with all calls being routed via this central matrix (cf. paragraph [0010]).

2.3 As set out in the patent (cf. paragraph [0004]), such existing logging systems are unable to record telephone conversations passed through a LAN or a WAN. It is also not possible to record video with such systems (cf. paragraph [0005]). However, the switching industry is moving towards the IP (Internet Protocol) world (cf. paragraph [0007]). The patent states that a switch matrix is inconsistent with the IP environment (paragraph [0010]).

It therefore follows that the general aim of the present patent is to provide a recording system for recording communication sessions for IP-based audio and video communications.

2.4 *Prior art document E6*

2.4.1 In these appeal proceedings, the respondent maintains its view that E6 represents the closest prior art, which was also the view of the opposition division.

2.4.2 E6 is a user manual for "NiceCLS" which is a computer-based call logging system. The system comprises (cf. page 1-2, Fig. 1-1) a server ("NiceCLS Server") with a data connection (page 1-3, "CTI data link") to a

conventional telephone switch, which may be a PABX (cf. page 1-3). The telephone switch is connected to trunks containing audio data. The trunks are connected to a logger ("NiceLog Logger") which stores the audio data of calls transmitted over the trunks. The NiceCLS Server logs a record of each call using call data obtained via the CTI data link and "transparently links each call record to the call's audio that is recorded, by a NiceLog Voice Logger, in high quality digital format" (cf. page 1-3, lines 11-16). The NiceCLS Server is connected via a LAN to NiceCLS Client Workstations (cf. page 1-6, 1st paragraph). In accordance with Chapter 8, page 8-2, a user at a client workstation can set up a filter for selectively recording calls, although there are no real technical explanations as to how this is implemented.

2.4.3 Hence E6 apparently discloses a prior art system of the type mentioned above in point 2.2, ie a computer-based system for recording calls transmitted over POTS.

2.5 *Main request - claim 1 - novelty*

2.5.1 The respondent argued at the oral proceedings that claim 1 was so broad that its subject-matter lacked novelty with respect to E6.

2.5.2 The respondent's argumentation can be summarised as follows: In the broadest sense, communication via the "trunks" of E6 embraces packet communication over a computer network. In this respect, the trunks could contain ISDN frames, which is a form of packet communication as claimed since there is no requirement in claim 1 for the packets to be IP-based. The NiceLog Logger has a connection to the trunks and thus there has to be a network connector as claimed in claim 1.

The NiceCLS Server is able to select packets for storage and hence is a filtering unit in the sense of claim 1. The NiceLog logger receives and stores selected data packets in a storage medium and hence is both a management unit and a storage medium in the sense of claim 1. Hence, E6 discloses all the features of the preamble.

As regards the characterising part of claim 1, the respondent argued that the NiceCLS Server ("filtering unit") accepts data packets containing audio. The respondent argued further that the telephone switch of E6 is a "gatekeeper" in the sense of claim 1 and that Figure 1-1 disclosed a link from the telephone switch via the NiceCLS Server and LAN to the NiceLog Logger, ie a link as required by claim 1.

The respondent therefore concluded that the subject-matter of claim 1 is not new with respect to the disclosure of E6.

2.5.3 The board however disagrees. As stated above, a gatekeeper in the present context is an entity found in VoIP networks. The telephone switch of a conventional telephone network is therefore not a gatekeeper. Moreover, because the claim includes a gatekeeper, the packets referred to in claim 1 are implicitly audio or video media IP packets. The trunks of E6, even if assumed to contain ISDN frames, do not convey audio or video media IP packets.

2.5.4 The board therefore concludes that the subject-matter of claim 1 is new (Articles 52(1) and 54 EPC).

2.6 *Main request - claim 1 - inventive step*

- 2.6.1 The established method of assessing inventive step is the problem-solution approach. This requires, *inter alia*, determining the closest prior art, identifying the distinguishing features, and determining objectively the problem to be solved. In particular, an *ex-post facto* analysis is to be avoided.
- 2.6.2 In this respect (cf. T 970/00, point 4.1.2 of the reasons), "Any attempt to interpret the disclosure of the closest prior art so as to distort or misrepresent, based on hindsight knowledge of the invention, the proper technical teaching of the disclosure in such a way that it artificially meets specific features recited in the claim under consideration ... must fail, especially as this would risk unfairly and tendentiously concealing the technical contribution of the invention ... and prejudice the subsequent objective determination of the technical problem solved by the claimed invention".
- 2.6.3 Both the opposition division and the respondent considered that document E6 represents the closest prior art and concluded on that basis that the subject-matter of claim 1 lacks an inventive step. The respective argumentation is however not the same, and hence will be considered in turn.
- 2.6.4 As regards the decision of the opposition division, the board considers that the content of E6 has been misrepresented in order to artificially read features of E6 onto the features of claim 1.
- 2.6.5 As already stated, document E6 is a user manual instructing a user how to use "NiceCLS", which is a system for recording calls and for accessing recorded calls. In accordance with the NiceCLS system, calls are

placed over trunks and switched via a telephone switch, evidently of a circuit-switched conventional telephone system (POTS).

2.6.6 Claim 1 on the other hand claims a system for managing a communication session over a computer network. Communication is by means of data packets, which include data packets containing audio and video data. In the opposition division's decision, the LAN connecting the NiceCLS Server and the client workstations in E6 is considered as the "computer network" of claim 1 (cf. page 7 of the decision, 1st paragraph). This LAN computer network however does not convey the communication sessions, and, hence, the corresponding audio and video data packets, but client-server interactions and, implicitly, instructions for controlling the NiceLogger. At the same time the opposition division identified the NiceLogger of Fig. 1-1 as a storage medium for receiving and storing said data packets (board's underlining) (cf. page 7 of the decision, 4th paragraph), which to be consistent, would have to be packets transmitted over the LAN computer network. However, the NiceLogger records audio data transmitted over the trunks (cf. page 1-3, fourth paragraph, "... the call's audio that is recorded, by a NiceLog Voice Logger, in ... digital format").

2.6.7 The opposition division's assessment of E6 with respect to the features of claim 1 is therefore incorrect, resulting in an incorrect determination of the distinguishing features, and, consequently, of the problem to be solved (cf. point 3.3 of the decision).

2.6.8 The respondent argued that the problem to be solved starting out from E6 is to provide a recording system for a VoIP system. In order to solve this problem, the

skilled person would note that the trunks in E6 transport audio signals using ISDN frames, which is already a hint to apply the system of E6 for transporting VoIP packets. In a H.323 VoIP network, the functionality of the telephone switch ("Vermittlung") is carried out by a gatekeeper. It is therefore obvious to replace the telephone switch of E6 by a gatekeeper. The only other modification required is to replace the "NiceLogger" storage medium by a means able to selectively store audio and video packets. Such a means is however known from document E44.

- 2.6.9 The board however considers that this approach is tainted by hindsight. The board notes that the POTS based switching system of E6, even assuming that ISDN frames are transmitted over the audio trunks, is a quite different switching environment to a VoIP based system.
- 2.6.10 Further, the board is unconvinced by the respondent's assertion that the claimed subject-matter would be arrived at straightforwardly by the simple matter of replacing POTS components by VoIP "equivalents". In this respect, although the respondent alleges that there is equivalence between the switching matrix of E6 and a VoIP gatekeeper, the board is of the view that a gatekeeper does not merely carry out equivalent functions to a PABX telephone switch. Firstly, a gatekeeper is involved with signalling protocols but, unlike a PABX switch, not with switching the media packets themselves. In the board's understanding, once a connection is established, media packets do not generally pass via the gatekeeper. Secondly, the gatekeeper's main role is to carry out address translation, in particular to obtain the IP address of

the called party. The switch of a PABX does not carry out an equivalent function.

- 2.6.11 Finally, the board does not consider that the skilled person would obviously combine E6 and E44. E44 discloses a "network sniffer" and an "access sniffer" which examine data streams (packets) in order, in one embodiment, to identify and store data streams meeting predetermined criteria, eg audio and video RTP streams (cf. col. 3, lines 40-43). It is not clear why the skilled person would combine this packet switching component with a POTS based system such as E6. In particular, there is no need to identify audio and video streams in E6, the trunks conveying only audio signals.
- 2.6.12 The board notes further that even if the skilled person were for the sake of argument to somehow combine E6 and E44, he would have no obvious reason to provide a link, between a gatekeeper and a management unit, for transferring information related to said [audio and video] data packets from the gatekeeper to the management unit (cf. claim 1, feature (e)). The purpose of this link (cf. paragraph [0100] of the patent) is to avoid dependence on a particular [VoIP] signalling protocol. Various implementations and advantages are set out in the description in paragraphs [0101] to [0102] of the patent. E44 gives no hint to provide such a feature. Hence, the skilled person would not have arrived at the subject-matter of claim 1.

The board therefore finds that the respondent's arguments are unconvincing.

- 2.6.13 The board considered whether the skilled person would arrive in an obvious way at the invention when starting

out from E44 as closest prior art. In view of the requirement of claim 1 for a link between the gatekeeper and the management unit, which is not suggested by E44, the board concludes that this approach also fails.

2.6.14 The board concludes that the subject-matter of claim 1 involves an inventive step having regard to documents E6 and E44, considered either alone or in combination (Articles 52(1) and 56 EPC).

3. *Remittal*

3.1 The primary purpose of these appeal proceedings, as pointed out in board's communication accompanying the summons, is to examine the correctness of the opposition division's decision. In particular, this concerns the questions of admissibility of the opposition, novelty with respect to the disclosure of E6, and inventive step with respect to the disclosures of E6 and E44.

3.2 In view of the board's finding that these matters do not prejudice the maintenance of the patent, the decision under appeal has to be set aside. However, the board notes that the notice of opposition mentions a large number of other documents not considered in the decision of the opposition division in respect of the ground of opposition under Article 100(a) EPC. The ground of opposition based on Article 100(b) EPC also has not been considered by the opposition division.

In order that these matters, insofar as deemed necessary, can be considered by the opposition division, the board decides to remit the case for further prosecution (Article 111(1) EPC).

4. *Auxiliary request*

As the subject-matter of claim 1 of the main request is new and involves an inventive step with respect to the disclosures of E6 and E44, there is no need to consider the auxiliary request.

5. *Costs*

5.1 Both parties requested a different apportionment of costs under Article 104(1) EPC.

5.2 In accordance with Article 104(1) EPC, "Each party to the opposition proceedings shall bear the costs it has incurred, unless the Opposition Division, for reasons of equity, orders, in accordance with the Implementing Regulations, a different apportionment of costs". This provision applies mutatis mutandis to appeal proceedings (cf. Rule 100(1) EPC).

5.3 The appellant argued that documents E50 and E51 were filed shortly before the oral proceedings. There was no excuse for their filing at this late stage because they had been known to the respondent since 2008. The appellant was forced to study these documents, incurring additional costs, since it had not been known in advance of the oral proceedings whether the documents would be admitted.

The respondent argued that the filing of E50 and E51 was a response to the board's communication.

5.4 The respondent requested reimbursement of costs in view of the late-filing of the auxiliary request.

The appellant argued also that the filing of the auxiliary request was a response to the board's communication, in which an objection based on E44 as closest prior art had been raised for the first time.

5.5 The board notes that neither the late-filing of E50 and E51 nor the late-filing of the auxiliary request affected the outcome of these appeal proceedings. Indeed, neither E50, nor E51, nor the auxiliary request were substantively discussed at the oral proceedings. Hence, the lateness of these submissions in relation to the oral proceedings did not cause additional costs to either party beyond those that would have been incurred had the request or the documents been filed at an earlier stage, eg together with the statement of grounds of appeal or the written reply, respectively.

5.6 Furthermore, the filing of E50 and E51 and the auxiliary request can be seen primarily as a response to the board's communication and therefore as not prima facie constituting an abuse of procedure.

5.7 As the board cannot see that additional costs were incurred only due to the lateness of the submissions, and as there was no clear abuse of procedure, the board considers that there is no basis for ordering a different apportionment of costs in respect of these appeal proceedings. Both requests regarding a different apportionment of costs are therefore rejected.

6. *Admissibility of E50 and E51*

6.1 These documents were filed shortly before the oral proceedings. The appellant requested that the board hold these documents to be inadmissible. The board

however did not deal with the issue of their admissibility for the following reasons:

(i) These documents were not relevant to the matters considered by the board, and consequently immaterial to the board's decision.

(ii) In view of the board's decision to remit the case, it would be premature for the board to consider whether or not these late-filed documents should be excluded from subsequent opposition proceedings, as, inter alia, it is not known whether the documents are prima facie highly relevant. The board considers that this matter is best left to the discretion of the opposition division.

6.2 The appellant's request that the board hold documents E50 and E51 to be inadmissible is therefore rejected.

7. *Conclusion*

The opposition is admissible. However, the ground of opposition under Article 100(a) EPC, insofar as based on lack of novelty with respect to E6 or lack of inventive step with respect to E6 combined with E44, does not prejudice the maintenance of the patent. The decision under appeal is therefore to be set aside and the case to be remitted for further prosecution.

Order

For these reasons it is decided that:

- The decision under appeal is set aside.

- The case is remitted to the opposition division for further prosecution.
- The requests for a different apportionment of costs are rejected.

The Registrar:

The Chairman:



G. Rauh

F. van der Voort

Decision electronically authenticated