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**Datasheet for the decision  
of 9 March 2017**

**Case Number:** T 0478/13 - 3.5.03

**Application Number:** 01968511.4

**Publication Number:** 1317839

**IPC:** H04L29/06

**Language of the proceedings:** EN

**Title of invention:**

Apparatus and method for selectively encrypting the payload portion of multimedia data sent over a network

**Patent Proprietor:**

Google Inc.

**Opponent:**

Talbot-Ponsonby, Daniel Frederick

**Headword:**

Selectively encrypting a payload portion/GOOGLE

**Relevant legal provisions:**

EPC Art. 100(c), 123(2), 111(1), 113(1)  
RPBA Art. 13(1), 15(3)

**Keyword:**

Added subject-matter (no)

Remittal (yes)

Absence of respondent at oral proceedings - right to be heard  
(yes)

Admissibility of request filed at oral proceedings (yes, prima  
facie allowable)

**Decisions cited:**

G 0003/14, T 0083/97

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
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Case Number: T 0478/13 - 3.5.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.03**  
**of 9 March 2017**

**Appellant:** Google Inc.  
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**Representative:** Betten & Resch  
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**Respondent:** Talbot-Ponsonby, Daniel Frederick  
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**Representative:** Brunner, John Michael Owen  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted on 13 December  
2012 revoking European patent No. 1317839  
pursuant to Article 101(3)(b) EPC.

**Composition of the Board:**

<b>Chairman</b>	F. van der Voort
<b>Members:</b>	T. Snell
	O. Loizou

## **Summary of Facts and Submissions**

- I. This appeal was lodged by the proprietor (henceforth, appellant) against the decision of the opposition division revoking European patent No. EP 1 317 839 on the ground that the subject-matter of the independent claims of a main request and of five auxiliary requests did not comply with Article 123(2) EPC (cf. Article 100(c) EPC). A sixth auxiliary request was not admitted to the opposition procedure.
  
- II. Oppositions had originally been filed by opponent 1 (Daniel Frederick Talbot-Ponsonby) and opponent 2 (Nagravision SA), both citing the grounds for opposition pursuant to Article 100(a), (b) and (c) EPC. Opponent 2 withdrew its opposition during these appeal proceedings and is therefore no longer party to the proceedings. Opponent 1 is therefore the sole respondent.
  
- III. In the statement of grounds of appeal, the appellant requested as a main request that the decision be set aside and that the case be remitted to the opposition division for further prosecution. The appellant also filed claims of six auxiliary requests 1 to 6.

In a response to the appeal, the respondent requested that the appeal be dismissed. The respondent further requested, should the board find that Article 123(2) EPC was not infringed, that the case be not remitted and that the board consider the other grounds for opposition raised in the notices of opposition.

Both parties conditionally requested oral proceedings.

- IV. In a communication accompanying a summons to attend oral proceedings, the board raised matters concerned with Article 123(2) and (3) EPC and Article 84 EPC. Further, the board observed that if a request were found to comply with Article 123(2) and (3) EPC and Article 84 EPC, it intended to remit the case to the opposition division.
- V. The respondent informed the board with a letter dated 9 January 2017 that it would not be represented at the oral proceedings. It made no substantive reply to the board's communication.
- VI. In a response to the board's communication, the appellant, with a letter dated 9 February 2017, filed claims of new first and second auxiliary requests and requested that the previous auxiliary requests be renumbered as auxiliary requests 3 to 8.
- VII. Oral proceedings took place on 9 March 2017 in the presence of the appellant.

Following a discussion of the issues, the appellant filed claims of a new main request which replaced all previous requests.

The appellant requested that the decision under appeal be set aside and that the case be remitted to the department of first instance for further prosecution on the basis of the claims of the main request filed during the oral proceedings.

On the basis of its written submissions, the respondent requested that the appeal be dismissed.

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

VIII. The main request includes two independent claims, i.e. claims 1 and 17.

Claim 1 reads as follows:

"An apparatus (110) for selectively encrypting data for transmission over a network (130) between a server (120) and a client (140), the apparatus comprising:

means for parsing data into a payload portion and a non-payload portion,

means for encrypting the payload portion of the data; and

means for combining the encrypted payload portion of the data with the non-payload portion of the data, characterized in that:

the means for encrypting is arranged to recognise data having a predefined data type in the payload portion in order to determine if the payload portion is to be encrypted, and, if recognised, to encrypt only said recognised data, and

the non-payload portion of the data includes more than routing information."

Claim 17 reads as follows:

"A method for selectively encrypting data received from a data source, the data including payload and non-payload portions which differ from each other in at least one characteristic, the received data to be subsequently sent over a network to a client, the method comprising:

parsing the received data into portions including the payload and non-payload portions;

recognising data having a predefined data type in the payload portion to determine if the payload portion is to be encrypted, and, if recognised, encrypting only said recognised data in the payload portion of the received data; and

sending the received data including the encrypted payload portion and the non-payload portion of the received data over the network to the client."

### **Reasons for the Decision**

1. *Admissibility of the request filed at the oral proceedings*

The appellant filed claims of a new main request at the oral proceedings in response to the discussion with the board. The board admitted the request using its discretion under Article 13(1) RPBA. In exercising its discretion, the board took into account that the request was closely based on a previous request (namely auxiliary request 4 filed with the statement of grounds of appeal) and that the amendments were straightforward to understand and *prima facie* overcame the objections previously raised by the board and the respondent. Furthermore, the appellant contributed to procedural efficiency by withdrawing all previous requests.

2. *Absence of the respondent at the oral proceedings - right to be heard*

The board is not obliged to delay its decision merely by reason of the absence of a party at oral proceedings, who may then be treated as relying on its written case (Article 15(3) RPBA). In the present case, the right to be heard pursuant to Article 113(1) EPC was respected even though a new request was filed at



the oral proceedings, since it was based on matters which the absent party could reasonably have expected to be discussed.

3. *Claim 1 - Article 123(2) EPC*

3.1 The application as filed includes the following passage on page 6, lines 18 to 25, of the description (referring to the application as published, WO 02/21761 A) with underlining and comment in square brackets by the board:

"The present invention solves the above and other problems by providing an apparatus, system and method that parse and selectively encrypt different portions of the data in real-time, decrypt the encrypted data in real-time and pass the data to a media player on a client computer or other network capable device. In particular, there is provided an encryption bridge [EB] that examines, parses and selectively encrypts only the payload (e. g. Media content) portion of the data, leaving the non-payload portion [e.g. the header] intact such that the data can cross firewalls, proxies and NATs without the firewalls, proxies or NATs having to be modified to accommodate the encrypted data."

3.2 The preamble of present claim 1 is based on claim 1 as filed, amended to define that the first portion is a payload portion and the second portion is a non-payload portion, as is disclosed in the above-mentioned passage.

3.3 The characterising portion of claim 1 is essentially based on the above-mentioned general concept of selectively encrypting only the payload, taken in

combination with the passage on page 6, lines 25 to 30, which reads as follows:

"The invention ensures that it does not encrypt the portion of the data stream that firewalls, proxies, and NATs require to properly deliver the data to the intended recipients (e. g. Client computer). Thus, if the encryption unit does not see a data type that it specifically recognizes, then it ignores it, but if the encryption unit sees a data type that it does recognize (e.g. Multimedia content), then it selectively encrypts only the recognized portion of the data stream."  
(board's underlining)

It follows from the last clause of this passage that only recognised data, e.g. multimedia data, is encrypted. Further, it is inherent from the passage on page 6, lines 18 to 25, mentioned above, that only recognised data in the payload portion is encrypted.

3.4 The remaining difference between, on the one hand, present claim 1 and, on the other hand, claim 1 as filed and the above-cited passages is that the term "data type" has been amended to "data having a predefined data type", and the recognised data [portion] is defined to be said data [having a predefined data type]. This clarifies that the means for encryption recognises the "data type" by examining the data, e.g. multimedia data on the basis of its format, and that this same data is then encrypted. With respect to Article 123(2) EPC, it has to be examined whether this clarification is supported by the application as filed.

3.5 The board judges this to be the case. As was noted above, it is clear that recognised data according to

type, e.g. multimedia data, is encrypted, that is "data having a predefined type" (N.B. the presence of the term "predefined" here, which was not used in the application as filed, does not add subject-matter because it is implicit that something first has to be defined before it can be recognised). When the above-cited passage on page 6, lines 27 to 30, is read as a whole, the only interpretation of the feature "if the encryption unit sees a data type" which makes sense is that the "data type" which is seen, i.e. recognised, is actually data having a certain type, whereby the recognised data is the same data which is later encrypted. This interpretation is further corroborated by the passage on page 11, lines 4 to 5, which reads:

"Selectivity of the data to be encrypted is based on the format of the data sent, which the EB recognizes and responds to appropriately".

It remains to be said that there is no basis in the description of the patent for interpreting the term "data type", which was already used in claim 1 as granted, in any other way.

- 3.6 The objections raised by the opposition division and the respondent with respect to Article 123(2) EPC all concern other versions of the claim and are not relevant to the present discussion.
- 3.7 The board concludes that claim 1 complies with Article 123(2) EPC.
- 4. *Claim 1 - Article 123(3) EPC*
- 4.1 The amendments with respect to claim 1 as granted concern additions which result in a limitation of the

scope of protection. Consequently, claim 1 complies with Article 123(3) EPC.

5. *Claim 1 - Article 84 EPC*

The amendments introduced with respect to claim 1 as granted (which are the only aspects to be examined in respect of Article 84 EPC, cf. G 3/14, OJ 2015, 102) are considered to be clear and thus to comply with Article 84 EPC. In this respect, the term "data having a predefined data type" does not introduce any further lack of clarity not already inherent in the term "data type" used in claim 1 as granted. On the contrary, clarity is actually improved.

6. *Claim 17 - Article 123(2) EPC*

6.1 Claim 17 is a method claim corresponding to claim 1 with the exception that there is no feature corresponding to the feature of claim 1: "the non-payload portion of the data includes more than routing information". The basis for this omission is claim 17 of the application as filed.

6.2 In view of the above and the reasons set out in respect of claim 1 (cf. point 3), claim 17 also complies with Article 123(2) EPC.

7. *Claim 17 - Articles 123(3) and 84 EPC*

The comments given in respect of claim 1 (cf. points 4 and 5) apply, mutatis mutandis, to claim 17.

8. *Dependent claims 2 to 16 and 18 to 34*

The board sees no reason to object to these claims on the grounds of Article 123(2) or (3) EPC or Article 84 EPC.

9. *Remittal*

9.1 It follows from the above that the ground for opposition pursuant to Article 100(c) does not prejudice the maintenance of the patent in amended form. However, the grounds for opposition pursuant to Article 100(a) and (b) EPC have not yet been examined.

9.2 In its reply to the statement of grounds of appeal, the respondent requested that the case be not remitted and that the board decided on the other grounds for opposition, arguing that the patent proprietor had no absolute right to have an issue decided on by two instances, citing decision T 83/97. In the respondent's view, the fact that no new facts or evidence had been submitted [in these appeal proceedings] concerning the grounds under Article 100(a) and (b) EPC meant that the board could readily come to a decision on these matters in the interest of procedural efficiency.

9.3 The board set out in its communication accompanying the summons to oral proceedings why it did not agree with the respondent. The board stated that although there was no absolute right to two instances of jurisdiction, T 83/97, which was cited by the respondent, made clear that remittal was the long-standing practice of the boards of appeal, and remittal was even the course of action decided on in that case. Furthermore, in the present case, it would have been procedurally inefficient to consider the grounds for opposition under Article 100(a) and (b) EPC without there being claims on file which seemed likely to comply with

Article 123(2) EPC. The board then informed the parties that if it were to find that one of the requests on file complied with Article 84 EPC and Article 123(2) and (3) EPC, it intended to remit the case to the opposition division for further prosecution.

9.4 As the respondent did not reply to the board's communication and did not attend the oral proceedings, the board sees no reason to take a different course of action than remittal, given that a request complying with Articles 84 and 123 EPC is now on file. In any case, it would now not be possible to consider the other grounds for opposition without delaying the decision, which would be contrary to Article 15(6) RPBA.

9.5 It follows that the case is to be remitted to the opposition division for examination of the remaining grounds for opposition (Article 111(1) EPC).

## **Order**

### **For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution on the basis of the claims of the new main request filed during oral proceedings.

The Registrar:

The Chairman:



G. Rauh

F. van der Voort

Decision electronically authenticated