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**Datasheet for the decision
of 12 September 2017**

Case Number: T 1340/15 - 3.5.03

Application Number: 07009537.7

Publication Number: 1855439

IPC: H04L29/06, B64F5/00

Language of the proceedings: EN

Title of invention:

Automated delivery of flight data to aircraft cockpit

Patent Proprietor:

The Boeing Company

Opponent:

Airbus SAS / AIRBUS France / AIRBUS UK Limited /
AIRBUS Deutschland GmbH / AIRBUS España S.L

Headword:

Delivery of flight data to aircraft cockpit/BOEING

Relevant legal provisions:

EPC Art. 100 (c), 123 (2)

Keyword:

Admissibility of new ground for opposition pursuant to Article
100(c) EPC (yes)

Added subject-matter - all requests - (yes)

Decisions cited:

G 0010/91

Catchword:



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Case Number: T 1340/15 - 3.5.03

D E C I S I O N
of Technical Board of Appeal 3.5.03
of 12 September 2017

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 4 May 2015**

revoking European patent No. 1855439 pursuant to
Article 101(2) and 101(3) (b) EPC.

Composition of the Board:

Chairman	F. van der Voort
Members:	T. Snell
	S. Fernández de Córdoba

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 1 855 439.

- II. An opposition had originally been filed jointly by several opponents, now respondents (henceforth to be referred to jointly as "the respondent") based on the ground for opposition pursuant to Article 100(a) EPC. The opposition division introduced a new ground for opposition pursuant to Article 100(c) EPC of its own motion, and eventually decided to revoke the patent on the ground that the main request was "not allowable under Article 100(c) EPC", and that auxiliary requests 1 to 6 were "not allowable under Article 123(2) EPC".

- III. In the statement of grounds of appeal, the proprietor (henceforth, "appellant"), requested that the decision under appeal be set aside and that, as its main request, the patent be maintained as granted, i.e. that the opposition be rejected, or, in the alternative, that the patent be maintained in amended form on the basis of the claims of one of seven auxiliary requests, all as filed with the statement of grounds of appeal. Auxiliary requests 1 to 6 corresponded to those refused by the opposition division.

- IV. In a reply to the statement of grounds of appeal, the respondent requested that the appeal be dismissed. Alternatively, the respondent requested that, if the board found Article 123(2) EPC not to be infringed, the case be remitted to the opposition to consider the remaining ground for opposition pursuant to Article 100(a) EPC.

- V. Oral proceedings were conditionally requested by the appellant.
- VI. In a communication accompanying a summons to oral proceedings, the board gave a preliminary opinion that the ground for opposition pursuant to Article 100(c) EPC was admissible. It also gave a preliminary opinion that claim 1 of the main request did not comply with Article 123(2) EPC, raised doubts as to the admissibility of the auxiliary requests in the light of Articles 12(2) and (4) RPBA since the statement of grounds of appeal did not contain any explicit reasoning why the decision of the opposition division should be reversed or amended on the basis of these requests, and, that notwithstanding, considered that claim 1 of these requests did not comply with Article 123(2) EPC either.
- VII. The appellant contested the board's arguments in a written reply received in advance of the oral proceedings and filed a new auxiliary request 8.
- VIII. Oral proceedings were held on 12 September 2017. At the oral proceedings, the respondent withdrew auxiliary requests 1 to 6.

The appellant (patent proprietor) requested that the decision under appeal be set aside and that, as its main request, the opposition be rejected, or, in the alternative, that the patent be maintained in amended form on the basis of the claims of auxiliary request 7, as filed with the statement of grounds of appeal, or auxiliary request 8, as filed with the letter dated 19 July 2017.

The respondent requested that the appeal be dismissed.

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

IX. Claim 1 of the patent reads as follows (main request):

"A method of delivering electronic file updates used in cockpit devices (12) onboard aircraft (10), the electronic file updates including information used by the cockpit devices (12) to aid in piloting the aircraft (10), the information including a cockpit device ID number so that the electronic file updates are only installed in the cockpit devices (12) which are authorized to receive the electronic file updates, comprising the steps of:

(A) storing the electronic file updates at a central location (16);

(B) downloading the electronic file updates to each of a plurality of distribution sites (18);

(C) storing the electronic file updates at the distribution sites (18);

(D) providing information at the distribution sites (18) that identifies the cockpit devices (12) on-board the aircraft (10) in landing areas respectively associated with the distribution sites (18);

(E) reading the electronic file updates stored in step (C); and,

(F) transferring the electronic file updates read in step (E) to the cockpit devices (12)."

X. Claim 1 of auxiliary request 7 is the same as claim 1 of the main request except that the preamble reads as follows:
"A method of delivering electronic file updates used in cockpit devices (12) onboard aircraft (10), which electronic file updates respectively include a cockpit device ID number so that the electronic file updates are only installed in the cockpit devices (12) which are authorized to receive the electronic file updates, the electronic file updates including information used by the cockpit devices (12) to aid in piloting the aircraft (10), comprising the steps of:".

XI. Claim 1 of auxiliary request 8 is the same as claim 1 of the main request except that the preamble reads as follows:

"A method of delivering electronic file updates used in cockpit devices (12) onboard aircraft (10), the electronic file updates including information used by the cockpit devices (12) to aid in piloting the aircraft (10), the information and a list of subscribers, which list of subscribers is maintained at a server (16) of a service provider, including a cockpit device ID number so that the electronic file updates are only installed in the cockpit devices (12) which are authorized to receive the electronic file updates, comprising the steps of:".

Reasons for the Decision

1. *Admissibility of the ground for opposition pursuant to Article 100(c) EPC*

- 1.1 In accordance with case law, an opposition division has the discretionary power to introduce of its own motion a fresh ground for opposition (Article 114(1) EPC). The board's review of this decision is essentially limited to ensuring that the opposition division did not use this power unreasonably.
- 1.2 The opposition division argued in the impugned decision essentially that claim 1 appeared, *prima facie*, to extend beyond the content of the application as filed. It therefore introduced the ground for opposition pursuant to Article 100(c) EPC, citing the Guidelines for Examination D-V 2.2 and G 10/91. It also noted that the features in question were central to the arguments brought forward with respect to the ground for opposition pursuant to Article 100(a) EPC.
- 1.3 The appellant essentially argued in the statement of grounds of appeal that the ground for opposition pursuant to Article 100(c) EPC (based in essence on a non-compliance with Article 123(2) EPC) was not a ground which could have been raised as a result of a "*prima facie*" examination. In the appellant's view, "*prima facie*" was to be understood as "at first glance", and the legal question of whether or not the granted claims were covered by the original disclosure of the application as filed could not be solved *prima facie*, at least not in the present case.
- 1.4 G 10/91 (OJ 1993, 420) cited by the opposition division and the appellant refers to a new ground being exceptionally admissible "in cases where, *prima facie*, there are clear reasons to believe that such grounds are relevant and would in whole or in part prejudice the maintenance of the European patent" (cf. point 16 of the reasons). Therefore, the opposition division

only had to determine if there were, *prima facie*, clear reasons for considering the issue of added subject-matter (cf. Article 123(2) EPC). It follows that the "prima facie" test for admitting the ground for opposition pursuant to Article 100(c) EPC is not to be interpreted so narrowly as meaning that it must be possible to definitively conclude "at first glance" that Article 123(2) EPC is actually infringed. In the present case, in view of the evident ambiguity of the language used in the passage essentially relied on by the appellant for support (i.e. paragraph [0015] of the application as published, as will be discussed below), the opposition division had a valid reason for admitting the new ground, especially as the allegedly infringing features would have likely played a role in connection with novelty and/or inventive step.

- 1.5 Consequently, the board concludes that the opposition division reasonably exercised its discretion when introducing the ground for opposition pursuant to Article 100(c) EPC.

2. *Main request - claim 1 - added subject-matter (Articles 100(c) and 123(2) EPC)*
 - 2.1 In accordance with the established case law of the Boards of Appeal, the test for compliance with Article 123(2) EPC (which applies, *mutatis mutandis*, to Article 100(c) EPC) is that an amendment must be *directly and unambiguously* derivable from the application documents as originally filed.

 - 2.2 Since the board essentially agrees with the reasoning given by the opposition division in the impugned decision, the relevant part of the decision is reproduced here in full:

"13 The opposition division has not been able to identify any passage of the application as filed from which it can be **unambiguously** derived the features: "electronic file updates including information used by the cockpit devices to aid in piloting the aircraft, the information including a cockpit device ID", as defined in the claim 1 of the opposed patent.

13.1 These features were not part of the original claim 1 of the application as filed, and were introduced during the examination proceedings. The patentee referred then to the following paragraph (paragraph [0015] of the application as filed) as providing the necessary basis for the amendment:

"The information updates are generated by a service provider who stores all versions of the update files on a central server 16 that is typically resident in the service provider's premises and serves subscribers over a wide geographic area. The service provider server 16 tracks all changes and revisions in the files so that the service provider always knows which updates are the most current. In addition, the server 16 maintains a list of subscribers to information updates, which includes identification of the specific cockpit devices 12 that have subscribed to the information update service. This

information typically will include a device ID number such as a serial number, name of the aircraft operator, the tail number of the aircraft in which the device 12 is installed, and other similar information that enables the service provider 16 to control the delivery of information updates so that they are only installed in cockpit devices 12 that are authorized to receive the updates." [Board's underlining].

13.2 According to this paragraph the device ID number is part of subscription information associated to the file updates ("In addition, the server maintains a list of subscribers to information updates, which includes identification of the specific cockpit devices... This information [i.e. the list of subscribers to information devices or the identification of the specifics cockpit devices] typically will include a device ID number..."). The subscription list is not described as being part of the electronic file updates, but as additional information kept at the service provider's server. Therefore, although [0015] discloses the presence of device identifiers in the subscription list maintained by the server, these identifiers are not part of the electronic file updates distributed first to the distribution sites (step B) and then to the cockpit devices (step F). [Board's underlining].

13.3 This interpretation is consistent with the embodiments disclosed in paragraphs [0019] - [0021] (of the application as filed) where the device serial numbers are handled independently of the files to be uploaded in the cockpit devices, that is, they are not included in the electronic file updates sent to the cockpit devices.

14 In the opinion of the proprietor the cited paragraph [0015] should be interpreted differently, giving the term information the broadest possible meaning. Thus, according to the proprietor, the sentence "This information typically will include a device ID number..." (C3, L53-54) refers back to "The information updates..." (C3, L43).

14.1 The opposition division cannot follow this line of argumentation. As indicated by the opponent, even if said paragraph [0015] might be open to multiple interpretations, the fact that one of them matches the claim does not mean that the features of claim 1 are unambiguously derivable from the description as filed. Moreover, in view of the grammatical construction of the sentence "In addition, the server maintains a list of subscribers to information updates, which includes identification of the specific cockpit devices" (C3, L50-53), the term "this information" in this passage has to refer to the "list of subscribers to

information updates" and not to the "information updates".

14.2 The applicant arguments regarding the fact that the information updates are sent to the cockpit devices require the presence of the device ID number to enable the delivery of the message is not persuasive. Although such an option would be conceivable other message routing mechanisms could be used. Such a particular use of the device ID number is not unambiguously derivable from the description (see e.g. [0019]-[0021]) and can not provide the necessary basis for the disputed features.

14.3 Moreover, the fact that the device ID numbers are used to control that only authorised devices obtain the updates does not imply the fact that the device ID number is part of the electronic file updates since authorisation is performed at the provider's server before the delivery of the electronic file updates.

14.4 Finally, the fact that different interpretations may be possible does not necessarily imply that the problem at stake is a matter of clarity (Article 84 EPC) as argued by the proprietor. In the view of the division the claim itself is clear, but its features are not unambiguously derivable from the description. The possible existence of multiple interpretations of the original disclosure

some of which would not correspond with the granted claim is rather an indication of lack of compliance with Article 100(c) EPC.

15 In conclusion, the opposition division is of the opinion that the subject-matter of claim 1 of the main request contains information that goes beyond the content of the application as filed. In particular the division does not see any direct and unambiguous disclosure that the information used by the cockpit devices to aid in piloting the aircraft includes a cockpit device ID number.

The Main Request is therefore not allowable under Article 100(c) EPC."

2.3 In the statement of grounds of appeal, the appellant argued that paragraph [0015] of the application as filed (referring to the application as published (EP 1 855 439 A)) was misinterpreted by the opposition division with regard to the meaning of "This information ...". In the appellant's view, the skilled person would understand the reference to "This information" unambiguously as referring to the "information updates". At the oral proceedings, the appellant further explained the reasons for this as follows:

Paragraph [0015] had to be interpreted on a philological-grammatical level and on a technical level. On a grammatical level, it was perfectly logical that "This information ..." did not refer to the preceding sentence but an earlier one, as was the case in paragraph [0018], in which the term "This

information" in the last sentence of the paragraph referred to "information" mentioned several sentences earlier. On a technical level, it should be noted that "This information ..." could not logically refer to the previous sentence, since this sentence included inter alia the name of the aircraft operator which could not possibly be used as identification information to carry out authentication procedures. In accordance with paragraph [0009], it was also important to note that there were several authentication procedures, one of which was linked to the ID (cf. col. 5, lines 12-17). Further, the update information comprised data, and it followed from paragraph [0014], line 33 that the "data" can be ID data, so that the ID data, including the serial number, was unambiguously part of the update information.

2.4 The opposition division and the respondent interpreted paragraph [0015] on the other hand as meaning that "This information ..." clearly referred to the "identification of the specific cockpit devices". The respondent commented that the term "information" was probably used erroneously instead of "identification". In support of this, the respondent argued that if the ID number were really part of the information update, this would suppose implausibly that the server maintained a copy of as many updates as there were cockpit devices.

2.5 The board agrees with the respondent's and the opposition division's interpretation of paragraph [0015], whereby it is not even necessary to speculate whether the wording "This information ..." is erroneous, since identification data is implicitly also information. In paragraph [0015], it is stated that the list of subscribers to information updates includes

identification of the specific cockpit devices. The next sentence then describes in more detail what this [identification] information will typically include. It is linguistically and technically consistent to read these two sentences in combination as they are both concerned with cockpit identification information. Consequently, there is no basis in paragraph [0015] for concluding that "This information .." directly and unambiguously refers to the update information.

2.6 The board also finds that the remainder of the application documents as filed give no support for the appellant's interpretation of paragraph [0015]. With respect to paragraph [0018] referred to by the appellant, the board notes that this concerns different subject-matter and, in any case, in paragraph [0018], the same term "information" is used rather than two different terms "information" and "information updates" as in paragraph [0015]. Paragraph [0018] therefore is not relevant to interpreting paragraph [0015]. As to the argument that the "name of the operator" could not serve as ID information, the board notes that the relevant sentence of paragraph [0015] uses the conjunction "and", not "or", so that the name of the operator is only additional information to the serial ID number. The board also does not consider that either the reference to "authentication procedures" in paragraph [0009] or the disclosure of paragraph [0014] means directly and unambiguously that an authentication procedure using the ID included in the information updates is carried out by the terminal equipment (see below, point 2.8).

2.7 The appellant further argued in the statement of grounds of appeal, referring to paragraph [0019], that "pushing [to the cockpit devices] can only be done if

the airport server 18 knows to which one of the cockpit devices that are in reach the data is to be sent. This is achieved on the bases [sic] of the cockpit device ID numbers included in the information updates, i.e. in the electronic file updates". However, the board does not see any basis in paragraph [0019] (or in paragraph [0021] and Fig. 3) that this is achieved on the basis of the cockpit ID numbers included in the electronic file updates. It follows rather from paragraph [0015] that the server 16 in fact determines from the subscriber list which updates are to be sent to which cockpit devices.

- 2.8 The appellant also argued in the statement of grounds of appeal that the cockpit ID is used in order that the information updates are only installed in cockpit devices that are authorised to receive the updates, whereby, due to the use of dynamic allocation of IP addresses, the invention uses the cockpit ID numbers as identifiers which need to be included in the information sent (board's underlining). However, in the view of the board, authorisation could apparently be achieved in other ways without including the cockpit ID in the information updates (e.g. by checking the authorization in the server before sending the updates). Further, the use of dynamic IP addressing, or network addressing in general (e.g. the appellant does not mention the MAC addresses of the cockpit devices) is outside the scope of the present patent. In any event, the board sees no reason on the basis of the disclosure as filed why the cockpit ID number must inherently be included in the information update, even if this could plausibly help to achieve the effects mentioned by the appellant.

2.9 In the letter of reply to the board's communication, the appellant speculates on whether it is possible to transmit electronic updates without causing the storage of multiple copies of the electronic file (cf. the argument raised by the respondent in point 2.4 above) and argues that this is indeed plausible and straightforward in the context of TCP/IP transmission if the ID is included as a second payload in a data packet. The board however notes that the application contains no basis for such an embodiment. Whether such a scenario is more or less plausible than the one suggested by the respondent is therefore not actually relevant in determining what is directly and unambiguously disclosed in the application as filed, in particular in paragraph [0015].

2.10 The appellant finally argued that paragraph [0015] can be interpreted in different ways. If there are multiple embodiments disclosed, and one of them is claimed, Article 123(2) EPC is not infringed.

The board however observes that an ambiguous passage cannot serve as support for a claim based on one of the possible interpretations unless that interpretation is incontrovertibly supported by other parts of the disclosure. As explained in the foregoing, that is not the case here.

2.11 The board concludes that claim 1 does not comply with Article 123(2) EPC, and that therefore the ground of opposition pursuant to Article 100(c) EPC prejudices the maintenance of the patent as granted. The main request is therefore not allowable.

3. *Auxiliary requests 7 and 8 - claim 1 - Article 123(2) EPC*

3.1 The respective amendments made with respect to granted claim 1 make no contribution to overcoming the objection of lack of compliance with Article 123(2) EPC, since in claim 1 of both requests the undisclosed feature that the cockpit device ID is part of the electronic file updates is still present. The appellant furthermore agreed that these amendments failed to overcome the objection.

3.2 Consequently, auxiliary requests 7 and 8 are not allowable either.

4. *Conclusion*

As there is no allowable request, it follows that the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



L. Stridde

F. van der Voort

Decision electronically authenticated