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Datasheet for the decision of 11 June 2026

Case Number: T 1414/24 - 3.5.05

Application Number: 20190267.3

Publication Number: 3754520

IPC: H04L29/08, H04L29/12

Language of the proceedings: EN

Title of invention:
METHOD FOR IMPROVING CONTENT FETCHING BY SELECTING TUNNEL DEVICES

Patent Proprietor:
BRIGHT DATA LTD.

Opponent:
oxylabs, UAB

Headword:
Selecting tunnel devices/BRIGHT DATA

Relevant legal provisions:
EPC Art. 84, 76(1), 104(1), 108, 123(3)
EPC R. 99(2)

This datasheet is not part of the Decision
It can be changed at any time and without notice

Keyword:
Divisional application - subject-matter extends beyond the content of the earlier application - main request and auxiliary requests 1 to 3, 3a, 4 to 15, 15a, 16, 17, 17a, 18, 19, 20c-f and 22 to 27 (yes)
Claims - clarity - auxiliary requests 20, 20a1, 20b (no)
Amendments - extension of protection - auxiliary requests 21, 21a-f and 28 to 33 (yes)
Admissibility of appeal - appeal sufficiently substantiated (yes)
Apportionment of costs - not equitable

Decisions cited:
G 0001/24, T 0509/07, T 0767/14, T 1679/17, T 0983/20

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Case Number: T 1414/24 - 3.5.05

D E C I S I O N
of Technical Board of Appeal 3.5.05
of 11 June 2026

Appellant: (Patent Proprietor)	BRIGHT DATA LTD. 3 Hamahshev St. 42507 Netanya (IL)
Representative:	Kurig, Thomas Becker Kurig & Partner Patentanwälte mbB Bavariastraße 7 80336 München (DE)
Appellant: (Opponent)	oxylabs, UAB Svitrigailos g. 32 03230 Vilnius (LT)
Representative:	Marks & Clerk LLP 15 Fetter Lane London EC4A 1BW (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted/ electronically transmitted on 8 October 2024 concerning maintenance of the European Patent No. 3754520 in amended fo rm.**

Composition of the Board:

Chair	E. Konak
Members:	J. Eraso Helguera
	J. Hoppe

Summary of Facts and Submissions

I. This case concerns the respective appeals filed by the proprietor and by the opponent against the decision of the opposition division to maintain the opposed patent as amended in accordance with "auxiliary request 20b" filed during the opposition proceedings.

II. Oral proceedings before the board were held on 11 June 2026. The parties made the following final requests.

The proprietor requested:
1. that an apportionment of costs be ordered with the opponent bearing the proprietor's costs and
2. that the decision under appeal be set aside and the patent be maintained in amended form based on the **main request**
3. or as an auxiliary measure that the patent be maintained in amended form based on one of **auxiliary requests 20, 20a1** or,
4. to reject the opponent's appeal as inadmissible or
5. to dismiss the opponent's appeal, i.e. to maintain the patent in amended form based on **auxiliary request 20b**

or as an auxiliary measure
6. to maintain the patent in amended form based on one of the following requests in the given order:

- **auxiliary request 21**
- **auxiliary requests 28, 33**
- **auxiliary requests 1-3, 3a, 4-14,**
- **auxiliary requests 21a, 21b, 15, 15a, 16, 17, 17a, 18, 19,**
- **auxiliary requests 20c-f, 21c-f, 22-27, 29-32.**

The respective claim requests were filed on the following dates:
- main request: 9 March 2023,
- auxiliary requests 1-6, 8-14, 16-19: 9 March 2023
- auxiliary requests 7, 15, 3a, 15a, 17a, 20, 20b, 21, 21a, 21b: 4 July 2024
- auxiliary request 20a1: 5 September 2024
- auxiliary requests 20c-f, 21c-f, 22-33: 11 June 2025.

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

At the end of the oral proceedings, the board announced its decision.

III. Claim 1 of the **main request** reads as follows:

"A method for fetching by a client device (31a) a content identified by a content identifier from a web server (22b) using tunnel devices (33a-e), for use with a group of tunnel devices and first (72) and second (71) servers that are each connected to the Internet and are each addressable in the Internet using a respective Internet Protocol, IP, address, the second server stores a list of the IP addresses of the tunnel devices in the group, the method comprising:

receiving (151), by the first server from the client device, a request message that comprises the content identifier;

sending (212), by the first server to the second server, a first message that includes a request for the list of IP addresses, in response to the receiving of the request message;

receiving, by the first server from the second server, the list of the IP address, in response to the first message;

selecting (146), by the first server, based on a criterion included in the request message, a tunnel device from the received list of IP addresses;

sending (215), by the first server to the selected tunnel device a second message that comprises the content identifier;

receiving (216), by the first server from the selected tunnel device, the content in response to the second message; and

sending (154), by the first server to the client device, the content received from the selected tunnel device."

Claim 1 of **auxiliary request 1** differs from claim 1 of the main request in the insertion of "available" right before "tunnel devices in the groups".

Claim 1 of **auxiliary request 2** differs from claim 1 of auxiliary request 1 in the insertion of "updates and" right before "stores a list".

Claim 1 of each of **auxiliary requests 3 and 3a** differs from claim 1 of the main request in the insertion of "opening and establishing a connection, by the first server to the selected tunnel device, directly and/or by the second server;" right before "sending (215)".

Claim 1 of each of **auxiliary requests 4, 5, 6, 7 and 8** is the same as claim 1 of the main request.

Claim 1 of **auxiliary request 9** differs from claim 1 of the main request in the addition of ", wherein the first server and the second server are owned, operated, managed, or controlled by a same entity" at the end of the claim.

Claim 1 of **auxiliary request 10** differs from claim 1 of the main request in the addition of ", wherein one or more of the tunnel devices are used primarily for purposes other than serving as tunnel devices, and the tunnelling functionality is executed in the background or when the device is idling from other activities" at the end of the claim.

Claim 1 of **auxiliary request 11** differs from claim 1 of auxiliary request 10 in the insertion of "wherein the tunnel devices are desktop computers, mobile computers, laptop computers, notebook computers, tablet computers, handheld computers, handheld devices, Personal Digital Assistant (PDA) devices, cellular handsets, handheld PDA devices, on-board devices, off-board devices, vehicular devices, or are integrated with corresponding appliances having as primary function food storage, handling, or preparation, environmental control, cleaning, water control, or water heating, or wherein the appliances independently are microwave ovens, electric mixers, stoves, ovens, induction cookers, refrigerators, freezers, food processors, dishwashers, food blenders, beverage makers, coffeemakers, iced-tea makers, HVAC systems, air conditioners, heaters, washing machines, clothes dryer, vacuum cleaners, answering machines, telephone sets, home cinema systems, or HiFi systems, and" right before "wherein one or more of the tunnel devices".

Claim 1 of **auxiliary request 12** differs from claim 1 of the main request in the insertion of "over the Internet":

- right after "from the client device" in the "receiving (151)" step,
- right after "to the second server" in the sending (212) step,

- right after "from the second server" in the "receiving, by the first server" step,
- right after "to the selected tunnel device" in the "sending (215)" step,
- right after "from the selected tunnel device" in the "receiving (216)" step, and
- right after "to the client device" in the "sending (154)" step.

Claim 1 of **auxiliary request 13** differs from claim 1 of the main request in the addition of ", wherein, for each of the tunnel devices in the group, the method comprises:

initiating, by the tunnel device, a connection with the second server, upon connecting to the Internet, upon deciding to server as a tunnel device, or upon having the ability to serve as a tunnel device;

responding, by the second server, to the initiated connection; and

sustaining, by tunnel device and the second server, the connection" at the end of the claim.

Claim 1 of **auxiliary request 14** differs from claim 1 of the main request in the addition of ", wherein the method is for use with a first attribute type,

wherein each of the tunnel devices in the group is associated with a first value of the first attribute type,

wherein the method further comprises, receiving, by the first server from the second server, the first value associated with each of the tunnel devices in the group,

wherein the selecting of the selected tunnel device by the first server is based on the first value associated with the selected tunnel device, and

wherein the method further comprises sending, by each of the tunnel devices in the group to the second server, the respective first value, and receiving and storing, by the second server, the sent first values" at the end of the claim.

Claim 1 of **auxiliary request 15** differs from claim 1 of auxiliary request 12 in:

- the insertion of "enclosed in a first single housing" right after "by a client device (31a)",
- the insertion of ", each of the tunnel devices is enclosed in a respective single housing," right after "a respective Internet Protocol, IP, address",
- the insertion of "an updated" right after "the second server stores",
- the insertion of "and a value relating to an attribute type associated with each tunnel device in the group, the first server manages the fetching using the second server" right after "the IP addresses of the tunnel devices in the group",
- the replacement of "the list of the IP address" by "the full list of the IP addresses or part thereof and the respective associated values," in the "receiving, by the first server" step.

Claim 1 of **auxiliary request 15a** differs from claim 1 of auxiliary request 15 in:

- the insertion of "first" right before "value relating",
- the replacement of "to an attribute type" by "to a first attribute type".

Claim 1 of **auxiliary request 16** differs from claim 1 of auxiliary request 2 in the insertion of "opening and establishing a connection, by the first server to the

selected tunnel device, directly and/or by the second server;" right before "sending (215)".

Claim 1 of each of **auxiliary requests 17 and 17a** reads as follows:

"A method for fetching by a client device (31a) a content identified by a content identifier from a web server (22b) using tunnel devices (33a-e), for use with a group of tunnel devices and first (72) and second (71) servers that are each connected to the Internet and are each addressable in the Internet using a respective Internet Protocol, IP, address, the second server updates and stores a list of the IP addresses of the available tunnel devices in the group, the method comprising:

receiving (151), by the first server from the client device over the Internet, a request message that comprises the content identifier;

sending (212), by the first server to the second server over the Internet, a first message that includes a request for the list of IP addresses, in response to the receiving of the request message;

receiving, by the first server from the second server over the Internet, the list of the IP address, in response to the first message;

selecting (146), by the first server, based on a criterion included in the request message, a tunnel device from the received list of IP addresses;

opening and establishing a connection over the Internet, by the first server to the selected tunnel device, directly and/or by the second server;

sending (215), by the first server to the selected tunnel device over the established connection, a second message that comprises the content identifier;

receiving (216), by the first server from the selected tunnel device over the Internet, the content in response to the second message; and

sending (154), by the first server to the client device over the Internet, the content received from the selected tunnel device,

wherein the first server and the second server are owned, operated, managed, or controlled by a same entity,

wherein the tunnel devices are desktop computers, mobile computers, laptop computers, notebook computers, tablet computers, handheld computers, handheld devices, Personal Digital Assistant (PDA) devices, cellular handsets, handheld PDA devices, on-board devices, off-board devices, vehicular devices, or are integrated with corresponding appliances having as primary function food storage, handling, or preparation, environmental control, cleaning, water control, or water heating, or wherein the appliances independently are microwave ovens, electric mixers, stoves, ovens, induction cookers, refrigerators, freezers, food processors, dishwashers, food blenders, beverage makers, coffeemakers, iced-tea makers, HVAC systems, air conditioners, heaters, washing machines, clothes dryer, vacuum cleaners, answering machines, telephone sets, home cinema systems, or HiFi systems, and

wherein one or more of the tunnel devices are used primarily for purposes other than serving as tunnel devices, and the tunnelling functionality is executed in the background or when the device is idling from other activities."

Claim 1 of **auxiliary request 18** differs from claim 1 of auxiliary request 17 in the addition of ", wherein, for each of the tunnel devices in the group, the method comprises:

initiating, by the tunnel device, a connection with the second server, upon connecting to the Internet, upon deciding to server as a tunnel device, or upon having the ability to serve as a tunnel device;

responding, by the second server, to the initiated connection; and

sustaining, by tunnel device and the second server, the connection" at the end of the claim.

Claim 1 of **auxiliary request 19** differs from claim 1 of auxiliary request 17 in the addition of ", wherein the method is for use with a first attribute type,

wherein each of the tunnel devices in the group is associated with a first value of the first attribute type,

wherein the method further comprises, receiving, by the first server from the second server over the Internet, the first value associated with each of the tunnel devices in the group,

wherein the selecting of the selected tunnel device by the first server is based on the first value associated with the selected tunnel device, and

wherein the method further comprises sending, by each of the tunnel devices in the group to the second server over the Internet, the respective first value, and receiving and storing, by the second server, the sent first values" at the end of the claim.

Claim 1 of each of **auxiliary requests 20, 20a1, 20b, 20c, 20d, 20e and 20f** differs from claim 1 of the main request in:

- the insertion of "and of a first value relating to a first attribute type associated with each tunnel device in the group" right after "the IP addresses of the tunnel devices in the group",

- the replacement of "the list of the IP address" by "the list of the IP addresses and the respective associated values," in the "receiving, by the first server" step.

Claim 1 of each of **auxiliary requests 21, 21a, 21b, 21c, 21d, 21e and 21f** differs from claim 1 of auxiliary request 20 in:

- the replacement of each of the four occurrences of "list" in the claim by "table" and
- the replacement of "and of a first value relating to a first attribute type" by "and of a value relating to an attribute type".

Claim 1 of **auxiliary request 22** differs from claim 1 of auxiliary request 20 in the insertion of "available" right before "tunnel devices in the groups".

Claim 1 of **auxiliary request 23** differs from claim 1 of auxiliary request 22 in the insertion of "updates and" right before "stores a list".

Claim 1 of **auxiliary request 24** differs from claim 1 of auxiliary request 20 in the addition of ", wherein the first server and the second server are owned, operated, managed, or controlled by a same entity" at the end of the claim.

Claim 1 of **auxiliary request 25** differs from claim 1 of auxiliary request 20 in the addition of ", wherein the selecting of the selected tunnel device by the first server is based on the first value associated with the selected tunnel device, and wherein the method further comprising sending, by each of the tunnel devices in the group to the second server, the respective first

value, and receiving and storing, by the second server, the sent first values" at the end of the claim.

Claim 1 of **auxiliary request 26** differs from claim 1 of auxiliary request 25 in the addition of ", wherein the first server and the second server are owned, operated, managed, or controlled by a same entity" at the end of the claim.

Claim 1 of **auxiliary request 27** differs from claim 1 of auxiliary request 26 in the insertion of "available" right before "tunnel devices in the groups" and in the insertion of "updates and" right before "stores a list".

Claim 1 of **auxiliary request 28** differs from claim 1 of auxiliary request 21 in the insertion of "available" right before "tunnel devices in the groups".

Claim 1 of **auxiliary request 29** differs from claim 1 of auxiliary request 28 in the insertion of "updates and" right before "stores a table".

Claim 1 of **auxiliary request 30** differs from claim 1 of auxiliary request 21 in the addition of ", wherein the first server and the second server are owned, operated, managed, or controlled by a same entity" at the end of the claim.

Claim 1 of **auxiliary request 31** differs from claim 1 of auxiliary request 21 and, respectively, claim 1 of **auxiliary request 32** from auxiliary request 30, in the addition of ", wherein the selecting of the selected tunnel device by the first server is based on the first value associated with the selected tunnel device, and wherein the method further comprising sending, by each

of the tunnel devices in the group to the second server, the respective first value, and receiving and storing, by the second server, the sent first values" at the end of the claim.

Claim 1 of **auxiliary request 33** differs from claim 1 of auxiliary request 32 in the insertion of "available" right before "tunnel devices in the groups" and in the insertion of "updates and" right before "stores a table".

Reasons for the Decision

1. MAIN REQUEST

Claim 1 of the **main request** comprises the following limiting features (outline used in the decision under appeal):

1.1 A method for fetching by a client device
1.1.1 a content
1.1.2 identified by a content identifier
1.1.2.1 from a web server
1.1.3 using tunnel devices
1.1.4 for use with a group of tunnel devices and first and second servers
1.1.4.1 that are each connected to the Internet and are each addressable in the Internet using a respective IP address,
1.1.4.2 the second server stores a list of the IP addresses of the tunnel devices in the group, the method comprising:

1.2 receiving, by the first server from the client device, a request message that comprises the content identifier,
1.3 sending, by the first server to the second server, a first message that includes a request for the list of IP addresses, in response to the receiving of the request message;
1.4 receiving, by the first server from the second server, the list of the IP address[es], in response to the first message;
1.5 selecting, by the first server, based on a criterion included in the request message, a tunnel device from the received list of IP addresses;
1.6 sending, by the first server to the selected tunnel device a second message that comprises the content identifier;
1.7 receiving, by the first server from the selected tunnel device, the content in response to the second message;
1.8 sending, by the first server to the client device, the content received from the selected tunnel device.

1.1 Claim 1 - added subject-matter (Article 76(1) EPC)

1.1.1 In Reasons 19.5.5 of the decision under appeal, the opposition division concluded that it could not be directly and unambiguously derived from the earlier application as filed that the "SP server" (i.e. the "first server") requested "a list of IP addresses of the tunnel devices" from the "TB server" (i.e. the "second server"). Thus, **features 1.3 to 1.5** resulted in added subject-matter.

1.1.2 The proprietor submitted that the reference to a part of the list on pages 212 to 214 was already sufficient to clearly and unambiguously disclose that not necessarily the entire table (or information contained therein) needed to be sent to the "SP server". Furthermore, it was clear and unambiguous that a list of IP addresses associated with respective "tunnel devices" - as the one of feature 1.1.4.2 - was already a "list of tunnel devices" as described on pages 212 to 214. Even in the table of Fig. 10, no additional identification was needed for a "tunnel device" other than its IP address.

The "tunnels list" and the "table" in the earlier application as filed were one and the same data structure on page 163. The description identified the IP address as the principal - not merely incidental - identifier of the tunnel devices in the data structure on page 162. The earlier application described this single data structure from two conceptual perspectives: taking the IP addresses as the central concept, as found in the SUMMARY on page 103, or taking the tunnel devices themselves as the central concept, as found on page 157, fourth paragraph. Both formulations referred to the storage performed by the same server (the TB server 71) and to the same data structure (the tunnel list / table). Semantically and technically, they referred to the same entity. Claim 1 of the earlier application as filed unified both perspectives in a hybrid wording, combining both perspectives in a single phrase: "... wherein the first server stores a list of tunnel devices by the IP addresses associated with the tunnel devices in the group, the method comprising ...". In addition, claims 295 and 296 expressly recited both the request and the receive elements. Claim 295 recited that the TB server sent to

the SP server "part of, or whole of, the list of the IP addresses". Claim 296 added that this sending was "preceded by sending a request message by the second server to the first server and receiving the request message by the first server from the second server, and wherein the sending of the part of, or the whole of, the list, is in response to the received request message". Finally, the SUMMARY phrase "a list of the IP addresses associated with the tunnel devices in the group" was, linguistically, a relational structure - not a list of bare strings. Such a list was semantically identical to "a list of tunnel devices each identified by their IP address" and "the IP-address column of table 100 serving as identifier for the row".

As a subsidiary submission, the proprietor argued that the SUMMARY of the earlier application (pages 103 to 151, deleted from the granted EP-Bl patent under Rule 71(3) EPC but present in the earlier application as filed) used the wording "list of (the) IP addresses" on more than a dozen occasions. The SUMMARY thus recognised "the list of the IP addresses" as a list-type object capable of its own sub-structuring (multiple distinct lists). This was the express acknowledgement, in the earlier application, that "list of IP addresses" denoted an independent data object, not a mere paraphrase of some other entity.

1.1.3 The board agrees with the proprietor that the most relevant parts of the earlier application as filed are those embodiments in which the "SP server" - rather than the "TB server" - selects the tunnel device (see e.g. pages 212 to 214 and Figs. 39, 39a and 39b). The question at stake is thus whether the skilled person would directly and unambiguously derive from the "(full

or partial) list of available tunnel devices" disclosed therein the "list of IP addresses" appearing in features 1.3 to 1.5. In that regard, the board agrees with the opposition division and with the opponent that this is not the case. The proprietor's argumentation has shown - at most - that the "tunnel devices" *may* be identified by their corresponding IP addresses and that the "tunnels list" *may be* stored in a "table" in which one of the columns comprises "Tunnel IP Addresses". On the other hand, claim 295 of the earlier application as filed discloses "sending, the first server to the second server, part of, or whole of, the list of the IP addresses", which might be seen to correspond to **feature 1.4**. But none of the parts of the earlier application as filed mentioned by the proprietor - including the "Table Request from SP" at page 213, the "request message" from the SUMMARY OF THE INVENTION and the "request message" from claim 296 - directly and unambiguously discloses "sending ... a first message that includes a request for the list of IP addresses ..." as it appears in **feature 1.3** of claim 1.

1.2 It follows that the **main request** is not allowable under Article 76(1) EPC.

2. PROPRIETOR'S REQUEST TO REJECT THE OPPONENT'S APPEAL AS INADMISSIBLE AND THE REQUEST FOR APPORTIONMENT OF COSTS

The board finds it expedient to assess the request for apportionment of costs and the admissibility of the opponent's appeal together, as the respective arguments of the proprietor are interrelated.

2.1 In its written reply to the opponent's statement of ground of appeal, the proprietor submitted that the extent of the amendments to the opponent's case with

respect to the first-instance proceedings was such that a request to dismiss the opponent's appeal as inadmissible was justified. Also, a request for apportionment of cost was justified, as the proprietor found itself arguing against an almost entirely new case for the first time on appeal without any justification being provided for any of those amendments.

The proprietor further argued that the opponent's appeal lacked the causal relationship to the impugned decision required under Rule 99(2) EPC. In the present case, the opponent's statement of grounds of appeal did not engage with the substantive reasoning of the opposition division in any meaningful way. Instead, the opponent had set forth, for the first time on appeal, entirely new lines of attack against the patent. The lack of a causal relationship between the opponent's grounds of appeal and the reasons given in the decision under appeal was "detrimental to the admissibility of the appeal". The proprietor identified this point in detail on pages 1 to 2 of its reply of 11 June 2025, listing the new lines of attack introduced for the first time in appeal (including, *inter alia*: the late-filed evidence D37-D41; the new lines of attack under Articles 123(2) and 84 EPC; the lines of attack starting from a different embodiment of D5; the lines of attack under Article 56 EPC combining D5 with Dl0; the entirely new lines of attack starting from Dl7 combined with common general knowledge or D10; and the new attacks on novelty/inventive step for the dependent claims). The proprietor accordingly requested that the opponent's appeal be dismissed as inadmissible under Rule 99(2) EPC.

2.2 The board considers the appeal to be sufficiently substantiated to satisfy the requirements of Article 108 EPC, third sentence, and Rule 99(2) EPC.

Article 108, third sentence, of the EPC requires that the appeal be substantiated. Rule 99(2) EPC clarifies this by stipulating that the statement of grounds for appeal must set forth the reasons why the contested decision should be set aside or to what extent it should be amended, and the facts and evidence on which the appeal is based. As correctly set out in decision **T 983/20**, which the proprietor has referred to, the statement of grounds of appeal must therefore present the appellant's arguments so clearly and precisely that the Board of Appeal and the respondent can determine, without conducting their own investigations, on what grounds the contested decision is alleged to be incorrect and on what facts the arguments are based. If the opponent is the appellant, to fulfil this requirement it is sufficient to substantiate one objection which was addressed in the impugned decision and undermines the basis of this decision, (**T 767/14**, Reasons 1.2). With respect to the opposing party's appeal, a single well-reasoned objection is sufficient to call into question the maintenance of the contested patent in its original form or in the form deemed allowable by the opposition division, it is also irrelevant to such an appeal by the opposing party if its arguments regarding other aspects mentioned in the contested decision are insufficient or are filed for the first time in appeal proceedings since the admissibility of the appeal can be assessed only in its entirety (**T 1679/17**, Reasons 1.3; see also **T 509/07**, Reasons 1.4). Hence, a statement of grounds of appeal which is insufficient only with respect to certain objections while others are sufficiently reasoned, does

not preclude the admissibility of the opposing party's appeal.

In the present case, the opponent provided arguments in support of the presence of added subject-matter under Article 76(1) EPC in point 4 of the statement of grounds of appeal, explicitly addressing the findings of the opposition division in Reasons 19.3 to 19.5.9 and 24 of the appealed decision and in Reasons 23 as regards Article 84 EPC. This was not disputed by the proprietor. If these arguments were found to be allowable in the appeal proceedings, the appeal would be successful, i.e. these objections would suffice to challenge the allowability of the request which was found to meet the requirements of the EPC by the opposition division. Since there is no "partial admissibility" of an appeal in the EPC, the proprietor's allegations regarding new evidence and new "lines of attack" are already for this reason irrelevant for the matter of admissibility of the appeal under Article 108 EPC and Rule 99(2) EPC.

2.3 The appellant's request for an allocation of costs is refused because, in exercising its discretion, the board did not consider an allocation of costs to be warranted on grounds of equity.

2.3.1 Pursuant to Article 16(1), first sentence (a) and (e) RPBA, in conjunction with Article 104(1) EPC, the Board of Appeal may, upon request, order that one party bear all or part of the costs of another party. Without limiting the board's discretion, such costs include for example costs incurred by any amendment to a party's appeal case pursuant to Article 13 RPBA and by an abuse of procedure.

Neither the EPC nor the RPBA consider late submissions in appeal to be inadmissible as a matter of principle, but rather provide for a decision on their admittance at the discretion of the board (Article 12, 13 RPBA). This reflects that an amendment is not *per se* objectionable or unreasonable. Against this background, amendments in appeal cannot *in general* justify an apportionment of costs. Rather,additional circumstances, i.e. reasons of equity (Article 104(1) EPC), are required to justify the apportionment of costs in view of late filed submissions. In the present case, such special circumstances are not apparent.

2.3.2 The proprietor asserted that it were confronted with an entire new case which justified an apportionment of costs. In this respect, the proprietor identified several new lines of attack introduced by the opponent for the first time in appeal (see page 2 of the proprietor's reply to the opponent's statement of grounds of appeal).

2.3.3 The proprietor's arguments are not persuasive.
Even if these new submissions were to be regarded as an amendment of the opponent's case pursuant to Article 12(4) RPBA, it needs to be considered that these amendments were filed in the initial phase of the appeal proceedings. Moreover, since most documents were already used as basis for the assessment of either novelty or inventive step in the notice of opposition, the amended attacks cannot be regarded as an entire new case or an abuse of proceedings. As regards documents D37 to D41, these were indeed presented for the first time in the appeal proceedings, but were merely used to reflect common general knowledge. The majority of the further amendments the proprietor complained about were at least closely related to objections and documents

which were already presented in the opposition proceedings. For example, the opponent did not use entirely new documents as closest prior art for the assessment of inventive step in the appeal proceedings but merely relied on those already presented in the opposition proceedings while merely changing the specific combination with other documents that had already been on file or with common general knowledge. Also the objections under Articles 123(2) and 84 EPC which the proprietor considered to be amendments, were at least closely related to the arguments already presented during the opposition proceedings.

Moreover, it needs to be considered that the proprietor itself confronted the opponent with a very high number of requests already during the opposition proceedings and submitted even further requests in the appeal proceedings. In total, the proprietor relied upon almost 50 requests in its written submissions. In view of this high number of requests, the procedural situation was not imbalanced, even if the opponent's submissions were to be regarded as amendments.

2.3.4 In view of this, the board sees no reasons of equity that would justify an extraordinary apportionment of costs. Hence, each party shall bear the costs it has incurred and the proprietor's request for apportionment of costs must be refused (Article 104(1) EPC).

3. AUXILIARY REQUESTS

Claim 1 of the auxiliary requests differs from claim 1 of the main request in, *inter alia*, the following amendments (board's emphasis):

1.1.4.2' the second server stores a list of the IP addresses of the tunnel devices in the group and of a first value relating to a first attribute type associated with each tunnel device in the group

1.4' receiving, by the first server from the second server, the list of IP ~~address~~ addresses and the respective associated values, in response to the first message;

in **auxiliary requests 20, 20a1, 20b-f and 22 to 27.**

1.1.4.2" the second server stores a ~~list~~ table of the IP addresses of the tunnel devices in the group and of a value relating to an attribute type associated with each tunnel device in the group:

1.3" sending, by the first server to the second server, a first message that includes a request for the ~~list~~ table of IP addresses, in response to the receiving of the request message,

1.4" receiving, by the first server from the second server, the ~~list~~ table of IP ~~address~~ addresses and the respective associated values, in response to the first message;

in **auxiliary requests 21, 21a-f and 28 to 33.**

3.1 Claim 1 - added subject-matter (Article 76(1) EPC)

3.1.1 The reasoning set out in point 1.1.3 above applies *mutatis mutandis* to claim 1 of **auxiliary requests 1 to**

3, 3a and 4 to 14. As correctly set out in point 20.1 of the impugned decision, the amendments in these requests do not address, and hence do not remedy, the deficiencies under Article 76(1) EPC as set out for the main request.

3.1.2 Besides, to the extent that **feature 1.4** still relates to "a first message that includes a request for the list of IP addresses", the reasoning given in point 1.1.3 above also applies to claim 1 of at least auxiliary requests 15, 15a, 16, 17, 17a, 18, 19, 20c-f and 22 to 27.

3.2 In summary, at least **auxiliary requests 1 to 3, 3a, 4 to 15, 15a, 16, 17, 17a, 18, 19, 20c-f and 22 to 27** are not allowable under Article 76(1) EPC.

3.3 Claim 1 - clarity (Article 84 EPC)

3.3.1 The board concurs with the opponent in that the amendments carried out in **features 1.1.4.2 and 1.4** prejudice the clarity of claim 1. In particular, in spite of the reference to "the list of the IP addresses and the respective associated values" used in **feature 1.4'**, it is not clear what the "second server" stores, since **feature 1.1.4.2'** does not refer to "respective first values".

3.3.2 The proprietor argued that the second server stored (i) a list of the IP addresses of the tunnel devices in the group, and (ii) for each tunnel device on that list, a first value relating to the first attribute type. The definition of the list itself contained no ambiguity as to what the second server stored. As to the antecedent question between feature 1.4' (receipt) and feature 1.1.4.2' (storage), the proprietor submitted that as,

correctly explained in Reasons 23.2 of the Decision under appeal, no ambiguity in fact existed when the two features were read together in the integrated technical context of the claim. Feature 1.1.4.2' provided that each tunnel device in the group is associated with a first value relating to a first attribute type; the list received by the first server (feature 1.4') therefore necessarily comprised, for each tunnel device on the list, its IP address together with the first value associated with that tunnel device. The plural "respective associated values" (feature 1.4') found its natural antecedent in the singular "a first value ... associated with each tunnel device" (feature 1.1.4.2'), the plural arising naturally from the plurality of tunnel devices in the list. Besides, the antecedent relationship between the storage step in feature 1.1.4.2' and the receipt step in feature 1.4' was not introduced by the amendments to features 1.1.4.2 and 1.4. It was already present in claim 9 as granted, which precluded the board from examining the alleged antecedent ambiguity.

3.3.3 These arguments are not convincing. Firstly, the wording "the respective associated values" does not appear in any of the granted claims. Secondly, the board does not agree that the term "the respectively associated values" of feature 1.4' should be unambiguously interpreted as referring to the respective first values relating to a first attribute type associated with each tunnel device in the group introduced in feature 1.1.4.2' and to those values only. Indeed, the wording of the amended claim allows other interpretations which are just as meaningful from a grammatical and from a technical point of view, e.g. in case there are several values relating to a first attribute type associated with each tunnel device in

the group and/or there are several attribute types associated with each tunnel device in the group. In this regard, the board finds that even though **G 1/24** (see Reasons 18) has established the principle that "*the description and any drawings are always referred to when interpreting the claims, and not just in the case of unclarity or ambiguity*", this cannot be construed to mean that unclarity or ambiguity should be allowed. On the contrary, as the Enlarged Board of Appeal subsequently explained in Reasons 21, "*[t]he correct response to any unclarity in a claim is amendment*."

3.3.4 Thus, at least **auxiliary requests 20, 20a1 and 20b** are not allowable under Article 84 EPC.

3.4 Claim - Extension of the protection the patent confers (Article 123(3) EPC)

3.4.1 The opponent argued that the replacement of "list" by "table" in **auxiliary requests 21, 21a-f and 28 to 33** contravened Article 123(3) EPC because it shifted the protection the patent confers to subject-matter that was not protected by the granted claims.

3.4.2 The proprietor objected that the opponent had not raised this objection in the written procedure and replied that "table" and "list" could be used interchangeable, since a "table" was just a multi-dimensional "list". At the very least, a "table" contained "lists". If anything, the amendments introduced in features 1.1.4.2", 1.3" and 1.4" merely narrowed the protection conferred.

3.4.3 Since the board finds it expedient to examine the requirements of Article 123(3) EPC for these amended

claims *ex officio* (cf. Article 114(1) EPC), the proprietor's objection that the respective objection of the opponent had not been raised in writing, is not relevant. Beyond abstract mathematical considerations as to the general definition of "table" and "list", from a technical point of view a "list of IP addresses [and of a value relating to an attribute type associated with each tunnel device in the group]" and a "table of IP addresses [and of a value relating to an attribute type associated with each tunnel device in the group]" are specific distinct entities which require different technical measures for their implementation. Hence, the patent was amended in such a way as to extend the protection it confers (Article 123(3) EPC).

3.5 In conclusion, at least **auxiliary requests 21, 21a-f and 28 to 33** are not allowable under Article 123(3) EPC.

4. Since there is no allowable claim request on file, the patent must be revoked.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

3. The proprietor's request for apportionment of costs is refused.

The Registrar: The Chair:

B. Brückner E. Konak

Decision electronically authenticated