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**Datasheet for the decision
of 23 March 2012**

Case Number: T 0289/11 - 3.5.04

Application Number: 05077272.2

Publication Number: 1613066

IPC: H04N5/445, H04N5/765

Language of the proceedings: EN

Title of invention:

Electronic program guide with digital storage

Patentee:

United Video Properties, Inc.

Opponents:

Idea Guide Limited
Brunner, John Michael Owen
STRAWMAN LIMITED
Virgin Media Limited
ALICE INNOVATION SARL

Headword:

Relevant legal provisions:

EPC 1973 Art. 56, 100(a)

Keyword:

Inventive step - no

Decisions cited:

G 0009/91

Catchword:



Case Number: T0289/11 - 3.5.04

D E C I S I O N
of the Technical Board of Appeal 3.5.04
of 23 March 2012

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted 6 December 2010
revoking European patent No. 1613066 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman: F. Edlinger
Members: C. Kunzelmann
T. Karamanli

Summary of Facts and Submissions

- I. The appeal is against the decision of the opposition division to revoke European patent No. 1 613 066.
- II. The patent had been granted on European patent application No. 05 077 272.2, which was a divisional application from application No. 99 948 321.7. Six opponents O1 to O6 gave notice of opposition to the patent. Opponent O1 withdrew its opposition in the first-instance proceedings. Grounds for opposition were lack of patentability (Article 100(a) EPC in conjunction with Articles 52, 54 and 56 EPC), lack of disclosure (Article 100(b) EPC) and added subject-matter (Article 100(c) EPC). Numerous documents were cited by the opponents in support of their submissions.
- III. In the decision under appeal, the patent was revoked solely for lack of inventive step (Article 100(a) EPC in conjunction with Article 56 EPC) over document O1/D1: Japanese patent publication Hei-10-93905.
- In that decision, the disclosure of O1/D1 was determined using one (O5/D10) of three translations submitted by the opponents.
- IV. The decision under appeal is based on claims 1 to 15 filed with letter of 15 October 2008 (main request), claims 1 to 15 of the patent specification (first auxiliary request) and claims 1 to 13 filed by fax on 11 October 2010 (second and third auxiliary requests).
- Claim 1 of the main request reads as follows:

"A method for transferring programs to a secondary storage device, the method comprising:
using an interactive television program guide implemented on user television equipment to cause a first display in a display screen of at least one program listing related to at least one program;
using the interactive television program guide to enable a user to select a program listing from the at least one displayed program listing;
using the interactive television program guide to cause the program related to the selected program listing to be recorded on a digital storage device;
using the interactive television program guide to cause a second display in the display screen that includes at least one recorded program listing for at least one program recorded on the digital storage device, wherein the at least one recorded program listing includes a recorded program listing for the program recorded on the digital storage device;
using the interactive television program guide to enable the user to select the recorded program listing and to transfer the recorded program from the digital storage device to a secondary storage device; and
using the interactive television program guide to transfer the recorded program from the digital storage device to a secondary storage device."

Claim 1 of the first auxiliary request reads as follows:

"A method for transferring recorded programs using an interactive television program guide implemented on user television equipment, the method comprising:
displaying in a display screen at least one program listing related to at least one program;

enabling a user to select a program entry from the at least one displayed program listing;
recording the selected program related to the at least one displayed program listing on a digital storage device;
displaying at least one recorded program listing for at least one program recorded on the digital storage device, wherein the at least one recorded program listing includes a recorded program entry for the program recorded on the digital storage device;
enabling the user to select the recorded program entry to transfer the recorded program from the digital storage device to a secondary storage device; and
transferring the recorded program from the digital storage device to a secondary storage device."

Claim 1 of the second auxiliary request reads as follows:

"A method for transferring programs to a secondary storage device, the method comprising:
using an interactive television program guide implemented on user television equipment to cause a first display in a display screen of at least one program listing related to at least one program;
using the interactive television program guide to enable a user to select a program listing from the at least one displayed program listing;
using the interactive television program guide to cause the program related to the selected program listing to be recorded on a digital storage device;
using the interactive television program guide to cause a second display in the display screen that includes recorded program listings for programs recorded on the digital storage device, wherein the recorded program

listings include recorded program listings for the programs recorded on the digital storage device; using the interactive television program guide to enable the user to select a sequence of programs recorded on the digital storage device and to transfer the recorded programs from the digital storage device to a secondary storage device; and using the interactive television program guide to transfer the sequence of recorded programs from the digital storage device to a secondary storage device."

Claim 1 of the third auxiliary request reads as follows:

"A method for transferring recorded programs using an interactive television program guide implemented on user television equipment, the method comprising: displaying in a display screen at least one program listing related to at least one program; enabling a user to select a program entry from the at least one displayed program listing; recording the selected program related to the at least one displayed program listing on a digital storage device; displaying recorded program listings for programs recorded on the digital storage device, wherein the recorded program listings include a recorded program entries for the programs recorded on the digital storage device; enabling the user to select the recorded program entries for a sequence of programs recorded on the digital storage device to transfer the recorded programs from the digital storage device to a secondary storage device; and transferring the sequence of recorded programs from the digital storage device to a secondary storage device."

- V. The patentee appealed against the decision of the opposition division and filed a statement of grounds of appeal.
- VI. Respondent opponent O2 filed a response to the statement of grounds of appeal and requested accelerated processing of the appeal. It submitted that accelerated processing had already been requested in the first-instance proceedings and that the patentee had instigated infringement proceedings against opponent O5 in the English courts.
- VII. The appellant requested that the request of respondent opponent O2 for accelerated processing be denied. It submitted that respondent opponent O2 appeared to be a straw man who had no direct interest in the outcome of the proceedings, and had not advanced any ground justifying acceleration of the appeal proceedings.
- VIII. Respondent opponents O3, O4 and O6 did not make any submissions as to the merits of the case and did not file any requests in the appeal proceedings. Respondent opponent O5 submitted that the opposition division had been correct to revoke the patent in its entirety.
- IX. The board issued a communication pursuant to Article 15(1) of the Rules of Procedure of the Boards of Appeal (RPBA), annexed to a summons to oral proceedings dated 20 December 2011. In this communication the board informed the parties that it had decided to grant accelerated processing. It also informed the parties that this procedural decision had been taken in accordance with the principles set out in the notice from the Vice-President Directorate-General 3 dated 17 March 2008 (OJ EPO 2008, 220) and in

view of the reasons given for respondent opponent O2's request, taking particular account of the judgment of the English Court of Appeal (Case No. A3/2010/0158) in national proceedings concerning the present patent.

X. The oral proceedings before the board were held on 23 March 2012. Only the appellant and respondent opponent O2 attended. At the end of the oral proceedings the chairman announced the board's decision.

XI. The parties' final requests were as follows:

The appellant (patent proprietor) requested that the decision under appeal be set aside and the patent maintained with the claims of the main request or one of the auxiliary requests 1 to 3, all as specified in the decision under appeal.

The respondent opponent O2 requested that the appeal be dismissed. The respondent opponent O5 requested implicitly in writing that the appeal be dismissed.

XII. The reasons given in the decision under appeal (as far as they are relevant for the present decision) may be summarised as follows:

O1/D1 disclosed a method wherein an electronic program guide (EPG, i.e. a television program guide in the terminology of claim 1 of the opposed patent) prestored on a DVD-RAM was purchased by a user. The DVD-RAM provided program and index information (such as broadcast date, time and channel) in program and index information recording area 16a. This information allowed the user to control the recording of programs at a user's device. The user could select a program for

recording via a graphical user interface. Recording information (such as recording data and time, recording start position and recording length) for each recording was also provided in area 16a in order to map recordings in a video recording area 16b of the DVD-RAM to index information in area 16a. The index information might be edited by the user, e.g. for creating his own synopsis. In the end, one DVD-RAM might contain program and index information as purchased of programs to be recorded, together with recorded programs and their particular recording details, and post-recording index information edited by the user.

However, the transfer of recorded programs from a first to a secondary storage device using an interactive television program guide could not be clearly and unambiguously derived from the available translations of O1/D1.

The objective technical problem solved by the method of claim 1 of the main request over O1/D1 could be formulated as "how to provide a backup functionality for an EPG" or "how to extend the functionality of an EPG".

The use of a first display and a second display for the purposes of displaying different listings as specified in claim 1 did not relate to functionality which caused a particular technical effect compared with e.g. one display containing all listings.

O1/D1 disclosed the transfer of index information from one storage device to another storage device. It also disclosed that index information stored on a DVD-RAM might relate to post-recording information. O1/D1 further taught that a user might want to record a

series of episodes on one disk, and that the program and the index information should be kept on one disk, so that the user could easily play back a program and be informed about all details related to the program. Thus, in a first approach, whenever a transfer of post-recorded index information was necessary, it was obvious that also the related recorded program would be transferred.

In a second approach, a motivation to transfer a recorded program might be the wish to create a backup copy or a copy for a friend. Confronted with the problem of how to achieve this result, O1/D1 taught that the transfer of index information could be performed as part of the program guide interface. Thus a person skilled in the art would also consider using the program guide interface for transferring the recorded program.

Thus the method of claim 1 did not involve an inventive step in view of the disclosure in O1/D1 and the common general knowledge of a person skilled in the art.

The same reasoning applied to claim 1 of the first auxiliary request.

Concerning claim 1 of the second and third auxiliary requests, the decision under appeal considered that the term "sequence" required that there be a given order of programs. However, this order was not specified in claim 1 of the second and third auxiliary requests. Also, the patent specification left open the extent to which a user might define "organization criteria" and "sorting methods". However, it would have been obvious to transfer the sequence of programs in the order in which the sequence was selected. An obvious way of

enhancing the method of O1/D1 would have been to implement a known file manager functionality as part of the interactive EPG. Known file managers allowed the sorting of stored files in accordance with user selections. Thus a user-defined sequential selection could then be copied or moved to another destination.

Thus the method of claim 1 of the second and third auxiliary requests did not involve an inventive step in view of the disclosure in O1/D1 and the common general knowledge of a person skilled in the art.

XIII. The appellant's arguments may be summarised as follows:

The correctness of the translation O5/D10 was accepted. Indeed the accuracy of the translation highlighted that the disclosure of O1/D1 itself was partly obscure. According to O1/D1, as understood from O5/D10, the disk (16) purchased by the user was loaded into a dedicated disk playback unit (15) which was for reading the prestored information on the disk. A different recording and playback unit (11) was used for recording and playing back programs. The two playback units could be so different as to be incompatible. The index information stored on the disk (16) could be either pre-recording index information (e.g. program title, genre) or post-recording index information (date and time of recording, recording start position, duration of recording). According to O1/D1 the pre-recording index information was read automatically (when loaded in disk playback unit 15) to enable automatic control of recording to a recording medium (loaded in recording and playback unit 11). The EPG data in O1/D1 were not confined to information required to correctly schedule the programs for recording. Instead they included additional data including stills and video clips

(trailers), so that a high storage capacity was needed for the EPG data alone.

The section of O1/D1 concerning editing related only to editing the index data of the EPG data (which included stills and video clips). More specifically this section of O1/D1 dealt with two different scenarios: editing of index data of programs to be recorded and editing of index data of recorded programs. However, recorded programs as such could not be edited.

The (pre-editing and post-editing) index data could be recorded on a single disk. In the particular case of DVD-RAM 16 (having an index recording area 16a and a video recording area 16b) they could be recorded in a part of the index recording area 16a. When (prior to recording a program) the edited index data were recorded on another disk, the edited index information and the data for video clips etc. were transferred to that disk. The index data could also be recorded on multiple disks. For instance, the user could prepare a disk with edited index data for the subsequent recording of multiple episodes of a series on one disk.

However, O1/D1 did not disclose or suggest using the EPG to transfer the recorded program (and corresponding post-recording index data) from one storage device to another. The transfer of programs was not at all envisaged in O1/D1, which was concerned with the process of managing recording, not with the management of recorded programs. Thus O1/D1 was not an appropriate starting point for the assessment of inventive step.

This was confirmed by figures 25 and 26 of O1/D1. At the priority date it was technically not feasible for a single storage device (such as a DVD-RAM) to store a

series of programs, such as the plurality of programs indicated in figures 25 and 26 of O1/D1. Thus the editing described in O1/D1 and illustrated in figures 25 and 26 could not relate to the transfer of recorded programs from a single storage device to another. Figures 25 and 26 showed a log of recording activity, not a directory of recorded programs. These figures did not represent screens of the EPG. According to O1/D1 series of programs were recorded on (not transferred to) multiple disks in a stack, e.g. one disk per genre.

Furthermore, since O1/D1 did not envisage the transfer of recorded programs, the decision under appeal was incorrect when considering the problem of "how to provide a back-up functionality for an EPG". This problem included a pointer towards a transfer. The objective technical problem was "how to extend the functionality of an EPG".

Concerning the main and the first auxiliary requests:

The first approach considered in the decision under appeal was based on the assumption that post-recording index information was transferred. However, according to O1/D1 only pre-recording index information was transferred, never post-recording index information. The second approach considered in the decision under appeal was based on an ex-post analysis. The creation of back-up copies was possible using standard procedures which were part of the common general knowledge, but not using television program guides known at the priority date. Also, O1/D1 was not concerned with copying of recorded programs. If a person skilled in the art had wanted to create copies

of a program recorded with the device described in O1/D1, he would have had to use different equipment.

Concerning the second and third auxiliary requests:

A sequence of programs implied an order of the programs. Thus, since O1/D1 did not envisage the transfer of a single program, it envisaged even less the transfer of an ordered series thereof, in particular the transfer in the order of the selection.

XIV. Respondent opponent O2's arguments may be summarised as follows:

Concerning the appellant's main and first auxiliary requests, O1/D1 disclosed the features of the invention which had been identified in the decision under appeal. Moreover, O1/D1 also disclosed the features of the invention which, according to the decision under appeal, were not disclosed in O1/D1. Thus there was not only lack of inventive step but even lack of novelty over O1/D1. Assuming *arguendo* that the decision under appeal was correct in its assessment as to the features not disclosed in O1/D1, respondent opponent O2 agreed with the reasons given in the decision under appeal that there was lack of inventive step over O1/D1. Concerning the second and third auxiliary requests, the features of a user selecting a sequence of recorded programs and of transferring the sequence were also disclosed in O1/D1.

Reasons for the Decision

1. The appeal is admissible.

2. The purpose of the appeal procedure *inter partes* is mainly to give the losing party the possibility of challenging the decision of the opposition division on its merits (see decision G 9/91 of the Enlarged Board of Appeal, OJ EPO 1993, 408). Thus it is incumbent on the appellant to convince the board that the decision under appeal is incorrect. In the present case, this means that it is the appellant who has to convince the board that the finding of lack of inventive step in the decision under appeal is incorrect.

3. The closest prior art
 - 3.1 It is established jurisprudence that the closest prior art for assessing inventive step is normally a prior-art document disclosing subject-matter conceived for the same purpose or aiming at the same objective as the claimed invention and having the most relevant features in common, i.e. requiring the minimum of structural modifications.

 - 3.2 In the present case, paragraphs [0006] and [0009] of the patent specification specify that the objects of the invention are accomplished by providing an interactive program guide system with digital storage that allows the program guide to be used to provide more advanced features than previously offered by interactive program guide systems. The use of a digital storage device associated with the program guide provides the user with more advanced features than could be performed using an independent analog storage device. The program guide may also provide for the transfer of programs and super programs to other volumes of the digital storage device or to a secondary storage device. The television equipment may be an

- advanced television receiver or personal computer television (PC/TV) (see paragraph [0021]).
- 3.3 O1/D1 too discloses an interactive program guide system. The guide allows simplified programming of recordings because the required data are stored on a digital video disk (DVD-RAM), a removable hard disk (HDD) or another disk and will be read out and used for the recording (see, for instance, paragraphs [0007] to [0014]). The programming of recordings according to O1/D1 is performed *inter alia* by means of a system controller comprising a microprocessor unit (see paragraphs [0087] to [0090]).
- 3.4 Hence both the opposed patent and O1/D1 aim at improving interactive program guides by using the advantages of computer technology. Thus the board finds that O1/D1 qualifies as a starting point for the assessment of inventive step in the present case.
- 3.5 The appellant's argument that O1/D1 could not be used as a starting point for the assessment of inventive step because O1/D1 was not concerned with the transfer of recorded programs did not convince the board.

At the priority date of the opposed patent it was common general knowledge that recorded programs, in principle, could be copied. Furthermore, it was a usual wish of users to create a copy of a recorded program. Whether copying was possible for the user was essentially a question of know-how and of the technical equipment used. Thus a person skilled in the art of interactive television program guides would have been confronted with a user's wish to create a copy of a recorded program. Under these circumstances the board finds that a person skilled in the art, familiar with

the disclosure of O1/D1, would have considered the possibility of copying recorded programs also if they had been recorded using the teaching of O1/D1.

4. The problem to be solved
 - 4.1 For the reason given above the board also finds that the finding in the decision under appeal that the technical problem could be formulated specifically as "how to provide a backup functionality for an EPG" is correct.
 - 4.2 The appellant's argument that the formulation of this specific problem contained a pointer towards the solution did not convince the board. The specific problem formulation given in the decision under appeal reflects the fact that the desired functionality of transferring recorded programs and the availability of technical means for making digital copies thereof were part of the common general knowledge at the priority date (in 1998). Furthermore, it reflects the extension of functionalities of television program guides, in particular the development of the "interactivity" of such guides, resulting from the well-known convergence of the areas of television technology and computer and computer-interface technology before the priority date of the opposed patent (see point 3.3 above).
 - 4.3 The appellant's argument that the objective technical problem was "how to extend the functionality of an EPG" likewise failed to convince the board, because this formulation is so general that it would disregard the indications given in O1/D1 as to how the functionalities of a television program guide can be extended in respect of a simplified recording.

5. The indications given in O1/D1

5.1 It is undisputed that O1/D1 discloses

a method comprising:

using an interactive television program guide implemented on user television equipment to cause a first display in a display screen of at least one program listing related to at least one program; using the interactive television program guide to enable a user to select a program listing from the at least one displayed program listing; and using the interactive television program guide to cause the program related to the selected program listing to be recorded on a digital storage device.

It is also undisputed that O1/D1 discloses a further step of causing a second display in the display screen that includes at least one recorded program listing for at least one program recorded on the digital storage device, wherein the at least one recorded program listing includes a recorded program listing for the program recorded on the digital storage device.

5.2 The method disclosed in O1/D1 is primarily for managing the recording of programs. But the decision under appeal was correct to find that O1/D1 also indicates that a further functionality provided by the television program guide is the possibility of transferring editing results to a different disk or to different disks (see, for instance, paragraphs [0155], [0159] and [0160] of O1/D1). Hence the user can record all episodes of a series on one disk (see paragraph [0160]). The decision under appeal was also correct to find that, when a program is actually recorded, the program and the index information should

be kept on one disk (see paragraph [0163]). A person skilled in the art, starting from the teaching of O1/D1 (in particular the indications given above) and faced with the problem of providing a backup functionality, would have considered copying the program together with the index information to a disk, using the transfer possibilities provided by the television program guide.

5.3 The appellant's argument that in O1/D1 the editing screens (see figures 25, 26) were not screens of the television program guide did not convince the board. O1/D1 specifies in paragraph [0153] that "[w]hen DVD-RAM 16 is placed in an image output device equipped with editing functions, as shown in Fig. 25, the titles of all recorded programmes are automatically displayed on display device (television) 10, arranged by their index information, ...". Since the television program guide with (some of) the index information is pre-stored on DVD-RAM 16 (see, for instance, paragraphs [0025] to [0032]), the editing functions of the image output device make use of the television program guide (in particular the index information).

5.4 The appellant's argument that the system of O1/D1 did not disclose the transfer of recorded programs, and was not even capable of doing so, did not convince the board of the presence of an inventive step. First, this argument is mainly related to novelty: if O1/D1 explicitly specified that the television program guide could be used to transfer editing results including the recorded programs, the discussion would concern novelty and not inventive step. Second, the argument is essentially based on the understanding that a DVD-RAM did not have sufficient capacity to store all the recorded programs given in the lists illustrated in figures 25 and 26 of O1/D1. However, O1/D1 is silent as

to the capacity of the disk (which may be, but need not be, a DVD-RAM) to which the editing results are transferred, and it is also silent as to the storage requirements for the recorded programs. Third, this argument does not give sufficient weight to the indication in paragraph [0163] that "[w]hen playing back edited recorded information on a particular disk, ... a user can easily play back a programme of his choice by selecting the desired programme from the desired menu by using input device 14 such as as remote control, mouse, or keyboard." This is one of the essential functionalities of the system disclosed in O1/D1 and it is desirable not only if the recording takes place on the disk comprising the television program guide as purchased, but also if the editing results are transferred to another disk (see paragraph [0159]). Thus it would have been obvious to a person skilled in the art to have implemented this teaching also on the disk to which the editing results were to be copied. The index information of the purchased television program guide would then have been used to make the selection of the programs to be copied, and the copied index information would have been used when playing back the copied programs.

5.5 Finally, the appellant's argument that, if a transfer was envisaged in O1/D1 then it would not be performed using the television program guide, did not convince the board either. According to O1/D1 the television program guide as purchased provides (some of) the index information which is used to set up the graphic user interface on the television screen (see, for instance, the description of programming a recording in paragraphs [0108] to [0142] and figures 17 to 23). This also applies to the transfer of editing results (see point 5.3 above). Thus it would have been obvious for a

person skilled in the art to use the television program guide also for the transfer of recorded programs.

6. In summary, the appellant's arguments did not convince the board that the decision under appeal is incorrect as far as claim 1 of the main request is concerned. Instead, in view of the above the board finds that, having regard to O1/D1, the method of claim 1 of the appellant's main request was obvious to a person skilled in the art, so that the subject-matter of that claim lacks inventive step and does thus not meet the requirements of Article 56 EPC 1973.
7. It is common ground that there is no material difference in the subject-matter claimed according to the main and first auxiliary requests (see point 6.2 of the decision under appeal), and the board agrees. Thus the board finds that also the method of claim 1 of the first auxiliary request was obvious to a person skilled in the art, for the reasons set out above.
8. It is also common ground that the methods of claim 1 of the second and third auxiliary requests differ in substance from the methods of claim 1 of the main and first auxiliary requests respectively in that a sequence of programs recorded on the digital storage device can be selected in order to transfer this sequence to a secondary storage device (see point 7 of the decision under appeal). Again, the board agrees.
 - 8.1 The decision under appeal is correct that claim 1 of the second and third auxiliary requests do not specify a specific order based on specific recording parameters or the user's sequence of selections.

- 8.2 The appellant's main argument in this respect was that a sequence of programs implied a set order of the programs and thus could not be equated with a plurality of programs. This argument did not convince the board that this "set" order defines a difference over the plurality of programs considered in O1/D1. In the board's view, the sequence of programs specified in claim 1 of the second auxiliary request may have any order but does not necessarily have a particular order which would define a difference over the plurality of programs considered in O1/D1. Furthermore, programs displayed in a program listing of a television program guide are individual items which have an order (or orders) determined by the listing. The selection of the individual programs is also performed in an order, determined, for instance, by a user.
- 8.3 In particular in the case of O1/D1, "if titles selected from the menu display screen are copied into editing screen 88 by dragging them or clicking on them with a mouse and the "Edit" button 89 is then selected, the recorded information is edited and re-recorded in the order in which the titles were copied" (see paragraph [0156] and figures 25 and 26). Thus the method of O1/D1 enables the user to select a sequence of programs recorded on the digital storage device.
- 8.4 The appellant's argument that O1/D1 does not envisage transferring a sequence of recorded programs is not decisive, for the reasons given in points 5.4 and 5.5 above. Moreover, claim 1 of the second and third auxiliary requests does not specify that programs are transferred (and later are accessible) in the order in which they have been selected.

9. Thus the appellant's arguments did not convince the board that the decision under appeal is incorrect as far as claim 1 of the second and third auxiliary requests is concerned.
10. In view of the above, the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



K. Boelicke

F. Edlinger

Decision electronically authenticated