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**Datasheet for the decision
of 17 April 2018**

Case Number: T 0976/11 - 3.5.05

Application Number: 04256852.7

Publication Number: 1553772

IPC: G06F19/00, H04N7/173,
G06F17/00, F16M11/04

Language of the proceedings: EN

Title of invention:

Interactive system

Applicant:

Hospedia Limited

Headword:

Fast Ethernet/HOSPEDIA

Relevant legal provisions:

RPBA Art. 11
EPC Art. 123(2)
EPC 1973 R. 67

Keyword:

Substantial procedural violation - (yes)
Remittal to the department of first instance - special reasons
for not remitting the case
Amendments - added subject-matter (yes)

Decisions cited:

Catchword:



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Case Number: T 0976/11 - 3.5.05

D E C I S I O N
of Technical Board of Appeal 3.5.05
of 17 April 2018

Appellant: Hospedia Limited
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 10 December
2010 refusing European patent application No.
04256852.7 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chair A. Ritzka
Members: E. Konak
G. Weiss

Summary of Facts and Submissions

I. The appeal is against the decision of the examining division to refuse European patent application No. 04 256 852.7 for lack of inventive step, Article 56 EPC, of the main, first, second and third auxiliary requests and of further auxiliary requests resulting from the deletion of claims 34 to 36 over the following document:

D7: WO 03/014871.

II. With a statement setting out the grounds of appeal, the appellant filed claims 1 to 36 of a main, a first, a second and a third auxiliary request, which correspond to the requests with the same ranking on which the appealed decision is based, and claims 1 to 35 of a fourth auxiliary request. In the event that objections were maintained against claim 34 of the main request, or against the corresponding claim of the auxiliary requests, a further request was made to cancel that claim and its dependent claims from the relevant requests. The appellant requested that the decision be set aside and a patent be granted on the basis of these requests. Oral proceedings were requested as an auxiliary measure. The appellant further made a request for the reimbursement of the appeal fee on the basis that a substantial procedural violation was committed by the examining division.

III. In a communication annexed to the summons to oral proceedings, pursuant to Article 15(1) RPBA, the board gave its preliminary opinion on the appeal. The board informed the appellant that, even though a substantial procedural violation appeared to have been committed, the board did not intend to remit the case to the

examining division, as special reasons presented themselves for not doing so, Article 11 RPBA. In particular, the feature, which was the major point of dispute in the examination proceedings, seemed to violate Articles 123(2), 84, 83 and 56 EPC. The appellant did not reply to this communication.

IV. On 13 April 2018 the appellant withdrew its request for oral proceedings and requested a decision "on the papers". The scheduled oral proceedings were therefore cancelled.

V. Claim 1 of the main request reads as follows:

"A digital system (1) adapted to provide services to a patient in a health care environment (2), and adapted to provide medical/hospital data for that patient to a doctor, paramedic or nurse in the health care environment (2), said services comprising each of telephone, multimedia entertainment comprising at least television and/or films and/or video pictures, internet and e-mail services, the system (1) comprising: a digital network for connecting to a data-content-delivery satellite system (8, 9), and/or a terrestrial data transmitter (10), the or each of which is remote from the health care environment (2); a means (3) to display data, the means comprising a visual display console (3) at the patient's bedside; means (4, 4') operable by a user to select desired data at the bedside, such as said services or said medical/hospital data, and to activate the visual display console;

remote data store means (5), remote from the patient's bedside, adapted to provide the desired data digitally to the visual display console (3) when accessed by the user;

a head end (6), remote from the patient's bedside, having a server comprising a plurality of discrete data servers and a fire wall (7), the discrete data servers comprising a plurality of TV servers; and content streaming from the remote data store means to the visual display console (3) at the patient's bedside;

wherein:

the system (1) is digital and interactive at the visual display console (3) whereby to provide the desired services and medical/hospital data to the user at the visual display console (3); and

the provided services and medical/hospital data are operable or accessible from the head end (6) at the visual display console (3), via a single fast Ethernet network."

VI. Claim 1 of the first auxiliary request is identical to claim 1 of the main request except that "multimedia entertainment comprising at least television and/or films and/or video pictures" in the preamble was replaced by "television".

VII. Claim 1 of the second auxiliary request differs from claim 1 of the main request in that it has the following additional feature:

"the system is adapted to provide access to data for multiple individual patients in particular beds in the health care environment, via the single fast Ethernet network, by the provision of a visual display console as defined above at each of those patients' bedsides in the health care environment."

VIII. Claim 1 of the third auxiliary request differs from claim 1 of the first auxiliary request in that it reads

in its penultimate paragraph as follows (the additions in *italics*):

"the system (1) is digital and interactive at the visual display console (3) whereby to provide the desired services and medical/hospital data to the user at the visual display console (3), *including a range of TV channels viewable in a full screen display, and with multi-media access;* and"

IX. Claim 1 of the fourth auxiliary request reads as follows:

"A health care environment comprising a digital system (1) that is adapted to provide services to patients in the health care environment (2) and medical/hospital data for the patients to their doctors, paramedics or nurses in the health care environment (2), said services comprising each of telephone, television, internet and e-mail services, the system (1) comprising:

a digital network for connecting to a data-content-delivery satellite system (8, 9), and/or a terrestrial data transmitter (10), the or each of which is remote from the health care environment (2);

means (3) to display desired data to users, the means comprising a visual display console (3) at each of the patients' bedsides;

means (4, 4') operable by the users to select the desired data at a user's particular bedside, such as said services or said medical/hospital data, and also to activate the visual display console at that bedside;

remote data store means (5), remote from the patients' bedsides, adapted to provide the desired data digitally to the visual display consoles (3) when accessed by the users;

a head end (6), remote from the patients' bedsides, having a server comprising a plurality of discrete data servers and a fire wall (7), the discrete data servers comprising a plurality of TV servers; and content streaming from the remote data store means to the visual display consoles (3) at the patients' bedsides;

wherein:

the system (1) is digital and interactive at the visual display consoles (3) whereby to provide each user at one of the visual display consoles (3) their desired services and/or medical/hospital data;

the provided services and medical/hospital data are operable or accessible from the head end (6) at the visual display consoles (3), via a single fast Ethernet network; and

the system is adapted to provide simultaneous access to the desired data, including the services and medical/hospital data, to multiple such individual users in the health care environment via the single fast Ethernet network."

Reasons for the Decision

1. Substantial procedural violation
- 1.1 The appellant submits in the statement setting out the grounds of appeal that it was not expecting the examining division to change at the oral proceedings the closest prior art from D1 to D7, in view of the fact that the disclosure on page 9 of D7 is "*technically incorrect*" and would have been "*quickly dismissed*" by the skilled person. It was "*totally unforeseeable*" that a "*wholly misleading*" disclosure could become the closest prior art.

- 1.2 The board however does not agree that the change of the closest prior art alone can constitute a substantial procedural violation. An examining division has the procedural discretion to revise its objection of inventive step, including the choice of the closest prior art, at any stage of the examination proceedings including the oral proceedings. Furthermore, even if one were to assume for the sake of argument that the division's reading of D7 is incorrect, misinterpretation of a document does not constitute a procedural violation (see "Case Law of the Boards of Appeal", Eighth Edition, IV.E.8.4.5, pages 1196 and 1197 of the English version).

- 1.3 It is however a different matter whether the change of the closest prior art was followed by actions safeguarding the appellant's right to be heard under Article 113(1) EPC, i.e. whether the appellant was given an opportunity to present its comments on the examining division's revised inventive step objection.
 - 1.3.1 The board understands from the minutes of the oral proceedings that the appellant challenged the division's new inventive step objection, presented for the first time at the oral proceedings, by arguing that a high number of features of claim 1 of the then main request such as "*use of digital TV, a data content delivery system, a plurality of TV servers, use of a single fast Ethernet, a firewall, a headend, content streaming*" (see the minutes of the oral proceedings, page 1, last paragraph) were not disclosed in the new closest prior art D7.

 - 1.3.2 The examining division thereupon gave a break after which they announced that the division "*concluded that all features not explicitly mentioned in D7 were either*

considered trivial, implicitly contained in the block diagram or relate to problems which could be solved without requiring inventive activity" (see the minutes of the oral proceedings, page 2, first paragraph, and the contested decision, 17.4.4).

1.3.3 Thus, at this point in time, the examining division already closed the discussion on all requests then on file, without hearing the appellant's comments as to which feature, in the appellant's view, established an inventive step over D7 and how. The board further doubts whether the appellant could have ever made such comments, as the appellant had not been informed which of the features it challenged were deemed to be implicit in D7, which features were found to be trivial and why. The division's concluding remark (see the citation in 1.3.2 supra) is a blanket statement merely informing the appellant that the division found the subject-matter of claim 1 to lack an inventive step without providing reasons as to why.

1.4 Therefore the examining division has committed a substantial procedural violation through the violation of the appellant's right to be heard. A violation of the right to be heard constitutes a fundamental deficiency in examination proceedings which would require a remittal of the case to the examining division under Article 11 RPBA, unless special reasons present themselves for not doing so. The board finds that such special reasons exist in the present case and thus decides not to remit the case to the examining division: In particular, the feature of "the provided services and medical/hospital data [being] operable or accessible from the head end at the visual display console, via a single fast Ethernet network", which was the major point of dispute in examination proceedings,

indeed violates Articles 123(2) EPC, for the reasons set out in point 2 below.

2. Added subject-matter, Article 123(2) EPC

2.1 The feature that reads "the provided services and medical/hospital data are operable or accessible from the head end at the visual display console, via a single fast Ethernet network", which is present in claim 1 of all requests on file, was introduced into claim 1 with the amendments filed on 18 September 2009 in examination proceedings.

2.2 There are however only three passages in the application as originally filed which refer to "a single fast Ethernet network":

(i) page 4, penultimate paragraph:

"The system may comprise a single fast Ethernet network."

(ii) page 7, penultimate line:

"... personal computer, operable via the single fast Ethernet network, ..."

(iii) claim 35:

"A system according to any of claims 10 to 34, characterised by comprising a single fast Ethernet network."

2.3 The board is of the view that the only teaching that the skilled person could derive directly and unambiguously from these passages is that the system of the invention comprises "a single fast Ethernet network", and not e.g. zero, two or more fast Ethernet networks, of unspecified structure and functionality,

as part of the system of the invention, with unspecified interaction with the rest of the system. These passages in particular do not provide any teaching as to where in the system of the invention the Fast Ethernet network lies, which services are provided via the Fast Ethernet network or which data is accessible over the Fast Ethernet network.

- 2.4 Therefore, the statement that "the provided services and medical/hospital data are operable or accessible from the head end at the visual display console, via a single fast Ethernet network" in the amendment in question adds subject-matter as it is not directly and unambiguously derivable from the application which of the services listed in the preamble of claim 1 of any of the requests operate over the Fast Ethernet network, and it is further not directly and unambiguously derivable from the application that the Fast Ethernet network of the invention lies between the head end and the visual display console. Thus, claim 1 of any of the requests does not comply with the requirements of Article 123(2) EPC.

3. Reimbursement of the appeal fee

As the appeal is not deemed to be allowable, the request for reimbursement of the appeal fee is refused (Rule 67 EPC 1973).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:



K. Götz-Wein

A. Ritzka

Decision electronically authenticated