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Datasheet for the decision of 10 December 2020

Case Number: T 2010/15 - 3.5.04

Application Number: 09175979.5

Publication Number: 2190198

IPC: H04N7/173

Language of the proceedings: EN

Title of invention:
Method and apparatus for delivering video and video-related content at sub-asset level

Applicant:
Comcast Cable Communications, LLC

Headword:

Relevant legal provisions:
EPC Art. 84, 123(2)
RPBA 2020 Art. 13(2)

Keyword:
Amendments - added subject-matter - main request and first auxiliary request (yes)
Claims - clarity - second auxiliary request (no)
Third to eighth auxiliary requests filed after the summons - admitted (no)

Decisions cited:

Catchword:

Europäisches Patentamt
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Beschwerdekammern

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Case Number: T 2010/15 - 3.5.04

D E C I S I O N
of Technical Board of Appeal 3.5.04
of 10 December 2020

Appellant: (Applicant)	Comcast Cable Communications, LLC One Comcast Center Philadelphia, PA 19103 (US)
Representative:	Jaeger, Michael David Withers & Rogers LLP 4 More London Riverside London SE1 2AU (GB)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 18 March 2015 refusing European patent application No. 09175979.5 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman	M. Paci
Members:	B. Willems
	T. Karamanli

Summary of Facts and Submissions

I. The appeal is against the decision of the examining division dated 18 March 2015 refusing European patent application No. 09 175 979.5, which was published as EP 2 190 198 A1.

II. The documents cited in the decision under appeal included the following:

D1: GB 2 448 874 A

D3: US 2008/0133504 A1

III. The decision under appeal was based on the grounds that the subject-matter of claim 1 of the main request and the first auxiliary request then on file extended beyond the disclosure of the application as filed (Article 123(2) EPC) and the subject-matter of claim 1 of the second auxiliary request then on file lacked inventive step over the disclosure of document D3 or the combined disclosures of documents D3 and D1 (Article 56 EPC).

IV. The applicant (hereinafter: appellant) filed notice of appeal. With the statement of grounds of appeal, the appellant submitted arguments rebutting the objections raised in the decision under appeal. It requested that the decision under appeal be set aside and that a European patent be granted on the basis of the claims according to the main request or the first or second auxiliary request which had formed the basis for the decision under appeal. The appellant indicated the basis in the application as filed for the subject-matter of the claims of all requests and set

out why the subject-matter of the independent claims of the second auxiliary request met the requirements of Articles 54 and 56 EPC.

V. On 21 April 2020, a summons to oral proceedings was issued. In a communication under Article 15(1) RPBA 2020 (Rules of Procedure of the Boards of Appeal, OJ EPO 2019, A63) annexed to the summons, the board introduced the following document into the appeal proceedings:

D4: US 2007/0250901 A1

The board gave the following provisional opinion.

- Claim 1 of the main request and the first auxiliary request did not meet the requirements of Article 123(2) EPC because the claimed subject-matter extended beyond the content of the application as filed.

- Claim 1 of none of the requests met the requirements of Article 84 EPC.

- Claim 1 of the second auxiliary request did not meet the requirements of Article 56 EPC because its subject-matter lacked inventive step over the combined disclosures of documents D3 and D1.

- Claim 1 of none of the requests met the requirements of Article 56 EPC because the subject-matter lacked inventive step over the disclosure of D4 combined with the common general knowledge of the person skilled in the art.

VI. By letter dated 5 November 2020, the appellant requested that the oral proceedings scheduled for 10 December 2020 be held by videoconference.

VII. By communication dated 10 November 2020, the registrar of the board informed the appellant that the oral proceedings scheduled for 10 December 2020 would be held by videoconference.

VIII. With its reply dated 10 November 2020, the appellant filed claims according to a main request and first to eighth auxiliary requests, all replacing the previous requests on file. The appellant submitted that the main request and first and second auxiliary requests corresponded to the three requests which had formed the basis for the decision under appeal, apart from a minor correction to the second auxiliary request. It indicated a basis for the amendments in the application as filed and submitted arguments as to why the claims of all requests met the requirements of Articles 56 and 84 EPC. The appellant requested that the decision under appeal be set aside and a European patent be granted on the basis of the claims according to the main request or, alternatively, on the basis of the claims of one of the first to eighth auxiliary requests, all requests filed with its letter dated 10 November 2020.

IX. The board held oral proceedings on 10 December 2020.

The appellant's final requests were that the decision under appeal be set aside and that a European patent be granted on the basis of the claims according to the main request filed by letter dated 10 November 2020 or, alternatively, on the basis of the claims of one of the first to third auxiliary requests filed by letter dated

10 November 2020, or of the fourth auxiliary request filed at the oral proceedings on 10 December 2020, or of one of the fifth to eighth auxiliary requests filed by letter dated 10 November 2020.

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

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

"A method of delivering an ordered list of items of supplemental content to a user, the method comprising the steps of:

receiving, at a server of a network that distributes user-selectable content to users for viewing, a request for a supplemental content search pertaining to a program being viewed by a user, the request including data identifying the program and a current scene being viewed by the user;

upon receiving the request for the supplemental content search, analyzing (303), by the server, data to determine data describing the current scene of the program being viewed by the user at least by analyzing video of the current scene using a video analysis or video recognition process;

determining (307), by the server, user preference data corresponding to the user, the user preference data comprising a record of content selected and consumed by the user that is collected as the user selects and consumes content via the network;

searching (305), by the server, for items of supplemental content based on the data describing the current scene;

creating (305), by the server, a list of the items of supplemental content; and

after the creating step, ordering (309, 311), by the server, the list of the items of supplemental content as a function of the user preference data."

XI. Claim 1 of the first auxiliary request differs from claim 1 of the main request in that after the feature "*creating (305), by the server, a list of the items of supplemental content;*" it reads:

"performing (309) a multi-variable analysis on each item from the list of the items of supplemental content to determine a relevance of each item to the user preference data, at least one variable for the multi-variable analysis being the record of content selected and consumed by the user; and

ordering (311), by the server, the list of the items of supplemental content as a function of the relevance of each item to the user preference data."

XII. Claim 1 of the second auxiliary request reads as follows:

"A method of delivering an ordered list of items of supplemental content to a user, the method comprising the steps of:

receiving, at a server, a request for a supplemental content search pertaining to a program being viewed by

a user, the request including data identifying the program and a current scene being viewed by the user;

upon receiving the request for the supplemental content search, analyzing (303), by the server, data to determine data describing the current scene of the program being viewed by the user;

determining (307), by the server, user preference data corresponding to the user, the user preference data comprising a record of content selected and consumed by the user that is collected as the user selects and consumes content via the network;

searching (305), by the server, for items of supplemental content based on the data describing the current scene;

creating (305), by the server, a list of the items of supplemental content; and

after the creating step, ordering (309, 311), by the server, the list of the items of supplemental content as a function of the user preference data."

XIII. Claim 1 of the third auxiliary request reads as follows:

"A method of delivering an ordered list of items of supplemental content to a user, the method comprising the steps of:

sending, by a server of a network that distributes user-selectable content to users for viewing, a program to be viewed by the user;

receiving, at the server, a request for a supplemental content search pertaining to the program being viewed by the user, the request including data identifying the program and a current scene being viewed by the user;

upon receiving the request for the supplemental content search, performing the following:

determining, by the server, the program and current scene being viewed by the user based on the request and when the request was received;

analyzing (303), by the server, data to determine data describing the current scene of the program being viewed by the user at least by analyzing video of the current scene using a video analysis or video recognition process;

determining (307), by the server, user preference data corresponding to the user, the user preference data comprising a record of content selected and consumed by the user that is collected as the user selects and consumes content via the network;

searching (305), by the server, for items of supplemental content based on the data describing the current scene;

creating (305), by the server, a list of the items of supplemental content; and

after the creating step, ordering (309, 311), by the server, the list of the items of supplemental content as a function of the user preference data."

XIV. Claim 1 of the fourth auxiliary reads as follows:

"A method of delivering an ordered list of items of supplemental content to a user, the method comprising the steps of:

receiving, at a server, from a user device associated with a user, a request for a supplemental content search pertaining to a program being viewed by the user, the request including data identifying the program and a current scene being viewed by the user;

upon receiving the request for the supplemental content search, analyzing (303), by the server, data to determine data describing the current scene of the program being viewed by the user;

determining (307), by the server, user preference data corresponding to the user, the user preference data comprising a record of content selected and consumed by the user that is collected at the user device as the user selects and consumes content via the network, the record of content being received at the server from the user device;

searching (305), by the server, for items of supplemental content based on the data describing the current scene;

creating (305), by the server, a list of the items of supplemental content; and

after the creating step, ordering (309, 311), by the server, the list of the items of supplemental content as a function of the user preference data."

XV. Claim 1 of the fifth auxiliary request reads as follows:

"A method of delivering an ordered list of items of supplemental content to a user, the method comprising the steps of:

sending, by a server, a program to be viewed by the user;

receiving, at the server, a request for a supplemental content search pertaining to a program being viewed by the user, the request including data identifying the program and a current scene being viewed by the user;

upon receiving the request for the supplemental content search, performing the following:

determining, by the server, the program and current scene being viewed by the user based on the request and when the request was received;

analyzing (303), by the server, data to determine data describing the current scene of the program being viewed by the user;

determining (307), by the server, user preference data corresponding to the user, the user preference data comprising a record of content selected and consumed by the user that is collected as the user selects and consumes content via the network;

searching (305), by the server, for items of supplemental content based on the data describing the current scene;

creating (305), by the server, a list of the items of supplemental content; and

after the creating step, ordering (309, 311), by the server, the list of the items of supplemental content as a function of the user preference data."

XVI. Claim 1 of the sixth and eighth auxiliary requests differ from claim 1 of the third and fifth auxiliary requests, respectively, on account of the following feature:

"searching (305), by the server, for items of supplemental content based on the data describing the current scene, wherein searching (305) for the items of supplemental content comprises performing a search of the world wide web and/or performing a search of a database of content maintained by an operator of the network".

XVII. Claim 1 of the seventh auxiliary request reads as follows:

"A method of delivering an ordered list of items of supplemental content to a user, the method comprising the steps of:

sending, by a server of a network that distributes user-selectable content to users for viewing, a program to be viewed by the user;

receiving, at the server, a request for a supplemental content search pertaining to the program being viewed by the user, the request including data identifying the program and a current scene being viewed by the user;

upon receiving the request for the supplemental content search, performing the following:

determining, by the server, the program and current scene being viewed by the user based on the request and when the request was received;

analyzing (303), by the server, data to determine data describing the current scene of the program being viewed by the user at least by analyzing video of the current scene using a video analysis or video recognition process;

determining (307), by the server, user preference data corresponding to the user, the user preference data comprising a record of content selected and consumed by the user that is collected as the user selects and consumes content via the network;

searching (305), by the server, for items of supplemental content based on the data describing the current scene, wherein searching (305) for the items of supplemental content comprises performing a search of the world wide web and/or performing a search of a database of content maintained by an operator of the network;

creating (305), by the server, a list of the items of supplemental content;

performing (309) a multi-variable analysis on each item from the list of the items of supplemental content to determine a relevance of each item to the user preference data, at least one variable for the multi-variable analysis being the record of content selected and consumed by the user; and

ordering (311), by the server, the list of the items of supplemental content as a function of the relevance of each item to the user preference data."

XVIII. The examining division's arguments, where relevant to the present decision, may be summarised as follows.

It was not directly and unambiguously derivable from the passages indicated by the appellant that the server/headend 101 performed a video analysis of the current scene (see decision under appeal, point 4.1.1.2).

XIX. The appellant's arguments, where relevant to the present decision, may be summarised as follows.

(a) The following passages of the application as filed provided a basis for the claimed subject-matter (see statement of grounds of appeal, pages 1 to 5, the headings "*Feature (1)*" and "*Feature (2)*" and the letter dated 10 November 2020, pages 2 and 3, the heading "*Article 123(2) EPC*"): Figures 1 and 3; paragraphs [0006], [0012], [0014], [0018], [0019] and [0027]; paragraph [0034], first sentence; paragraphs [0036] to [0038] and [0047]; paragraph [0048], first sentence; paragraph [0050]; paragraph [0055], last sentence; paragraph [0057], first sentence; paragraph [0058], third to fifth sentences.

(b) Paragraph [0027] clearly disclosed that the server distributing the content being viewed knew which part of the content was being viewed when the user selected the F-search feature for the content being viewed. Since claim 1 stated that the request included "*data identifying the program and a*

current scene being viewed by the user", the server transmitting the program knew which part of the content was being transmitted and viewed. Therefore, the method simply required an indication from the user device that supplemental content was required (see the letter dated 10 November 2020, pages 2 and 3, the heading "*Article 123(2) EPC*" and pages 3 and 4, the heading "*Clarity*").

(c) It was apparent from paragraph [0034] that the F-search feature was implemented at the server rather than the local device. According to paragraph [0036], the F-search feature automatically detected the context in which it had been invoked. Thus, according to both these paragraphs, the context was detected at the server. Paragraph [0057] also stated that the invention was implemented on a server at a headend. Furthermore, paragraph [0058] disclosed that the context could be determined using video analytics. This meant that the server was capable of analysing video. Thus, the video could be analysed at the server.

(d) It was implicit from paragraphs [0027], [0034] and [0036] that the local device transmitted a channel number and a time stamp. This data identified which frame had been transmitted and provided an easy way to access a stream recorded at the headend.

(e) Paragraph [0048] specifically stated that the video analytics might reside at any reasonable location in the network, such as at a headend or a server. The application as filed did, therefore, directly and unambiguously disclose that the headend and server were reasonable locations for performing the

claimed video analytics (see the letter dated 10 November 2020, pages 2 and 3, the heading "*Article 123(2) EPC*").

(f) In paragraph [0014], the headend server 101 supplied content to the set-top box 106; in paragraph [0018], the set-top box 106 communicated with the headend server 101. According to paragraph [0019], the user interacted with the set-top box via a graphical user interface (GUI). Thus, interaction with the GUI, such as use of the F-search feature, resulted in communication with the headend server (see the letter dated 10 November 2020, pages 2 and 3, the heading "*Article 123(2) EPC*").

(g) It was clear from claim 1 of the second auxiliary request that the server needed preference data, no matter where this data was stored. This data could be acquired from many places, such as from an account held by the user or collected at the local device. This collection of data could be easily implemented. The preference data could contain only one item, i.e. the content being consumed when the F-search was invoked.

(h) The third auxiliary request should be admitted into the proceedings because the amendments were a reaction to the clarity objection and inventive-step objection based on document D4 that were first raised in the board's communication under Article 15(1) RPBA 2020. Moreover, the claims of the third auxiliary request were based on the claims of the main request.

(i) Claim 1 of the third auxiliary request made it clear that the server which sent the program to be viewed was the same server that determined which program and scene were being viewed (see letter dated 10 November 2020, page 9, the heading "*Amendments*"). Claim 1 of the third auxiliary request specified "*sending, by a server [...] a program to be viewed by the user*". Thus, the user was sent a single program. Content consumed by the user was to be understood as content displayed on the user device. Since the server sent a single program to be displayed, the server knew which content the user was consuming.

(j) The amendments made to claim 1 of the fourth auxiliary request were based on paragraphs [0044] and [0048] of the application as filed. According to paragraph [0044], user preference data could be obtained from the user's consumption habits. The skilled person would understand that the server could maintain records of all linear programs consumed by a user or programs viewed by video-on-demand (VOD). The server could only maintain records for linear programs if the local device collected the necessary data. Even for VOD it was inherent that both the server and the user device collected data. Paragraph [0048] disclosed that the equipment for providing the functionality according to the invention might reside at the set-top box.

Reasons for the Decision

1. The appeal is admissible.

2. *Main request and first auxiliary request - added subject-matter (Article 123(2) EPC)*

2.1 According to the Enlarged Board of Appeal's consistent interpretation of Article 123(2) EPC, any amendments can only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of the description, claims and drawings as filed (see decisions G 3/89, OJ EPO 1993, 117; G 11/91, OJ EPO 1993, 125; G 2/10, OJ EPO 2012, 376).

The content of an application must not be considered to be a reservoir from which features pertaining to separate embodiments of the application could be combined in order to artificially create a particular embodiment. In the absence of any pointer to that particular combination, this combined selection of features does not, for the person skilled in the art, emerge clearly and unambiguously from the content of the application as filed (see Case Law of the Boards of Appeal of the European Patent Office, 9th edition 2019 ("Case Law"), II.E.1.6.1).

2.2 Claim 1 of both the main request and the first auxiliary request specifies:

"*receiving, at a server of a network that distributes user-selectable content to users for viewing, a request for a supplemental content search pertaining to a program being viewed by a user, the request including data identifying the program and a current scene being viewed by the user;*

upon receiving the request for the supplemental content search, analyzing (303), by the server, data to determine data describing the current scene of the program being viewed by the user at least by analyzing video of the current scene using a video analysis or video recognition process".

2.3 The appellant indicated the following passages in the application as filed as the basis for the claimed subject-matter (see point XIX(a) above):

Figure 1 and paragraph [0006]: "*Figure 1 is a block diagram of the components of an exemplary cable television network that supports features in accordance with the present invention*".

Paragraph [0012], second sentence: "*Cable network system 100 includes a server, such as a headend 101, that receives content that is to be transmitted to the subscriber locations 102 of the cable network system*".

Paragraph [0027], fourth and fifth sentences: "*When the feature is thus selected, the local device, for instance, sends a signal upstream to a server requesting invocation of the F-Search feature. In response, the server performs a search for supplemental content that pertains to the context of the particular content being consumed by that consumer at that time*".

Paragraph [0034], first sentence: "*As previously noted, the search engine selects and organizes items of supplemental content as a function of both (1) the context in which the F-Search feature was invoked (i.e., the particular program and scene being viewed) and (2) predetermined user preferences*".

Paragraph [0047]: "*The selection of the items of supplemental content based on context also may be performed using any reasonable multi-variable regression equation having as its inputs, for example, any one or more of the aforementioned variables, such as the closed-captioning stream, the video analytics output stream, the audio analytics output stream, the metadata associated with the program, etc*".

Paragraph [0048], first sentence: "*The equipment for providing functionality in accordance with the invention may reside at any reasonable location in the network, such as at a headend or server, at a content management center, or even at the set top box, Web browser, radio receiver, or other device local to the consumer*".

Paragraph [0055], last sentence: "*[...] a cable television operator may insert a F-Search icon into the display during such scenes that, in essence, alerts the user to the availability of particularly interesting supplemental content and/or invites the user to activate the F-Search feature*".

Paragraph [0057], first sentence: "*The invention preferably is implemented primarily or exclusively by software (including appropriate databases) running on a server at a content center, head end or any other content node of the network.*"

Figure 3 and paragraph [0058], third to fifth sentences: "*Next, in step 303, software performs an analysis to determine context, e.g., the nature of the scene currently being displayed. As previously mentioned, this may include a regression analysis of*

the available data about the scene. Such data may include [...] video analytics".

2.4 The board agrees with the examining division that it is not directly and unambiguously derivable from the cited passages that the server/headend 101 performs a video analysis of the current scene (see point XVIII above).

2.4.1 Paragraph [0040] discloses that video analytics software is available which can analyse the visual content of a media stream to determine the context. Reading paragraph [0040] in conjunction with paragraph [0058], the video analytics software analyses the content of the video stream to determine the context of the current stream. The board is not convinced that paragraphs [0048] and [0057] show that the video analysis may be performed at the server that distributes user-selectable content. Reading these paragraphs together, the person skilled in the art would understand that the method may be implemented as software running on either a headend server or a local consumer device, whichever is a "*reasonable location in the network*".

2.4.2 Paragraph [0034] discloses that the search engine selects supplemental content depending on the scene being viewed when the search was invoked. According to paragraph [0036], the F-search feature automatically detects the context in which it was invoked. Neither paragraph hints at where the current scene undergoes video analysis. Therefore, the board has not been persuaded that these two paragraphs show that the context is detected at the server (see point XIX(c) above).

Paragraph [0057] states that the invention is implemented on a server at a content centre, a headend, any other content node of the network or, in some embodiments, at the set-top box. Contrary to the appellant's assertion (see point XIX(c) above), the board is of the opinion that this general statement does not provide a clear and unambiguous basis for claiming that the video analysis is carried out by the same server which distributes the content.

Paragraph [0058] discloses that once the user invokes the F-search feature, software performs an analysis to determine the context. The context is determined by a regression analysis of available data on the scene, including data obtained by video analytics (see also paragraph [0047]). A search is then performed depending on the contextual data. The board is not convinced that the entire method is carried out by the server. The user activates the F-search feature, so at least this step is carried out at the user device. The paragraph does not contain any further hint as to where the disclosed steps are carried out. Therefore, the board has not been persuaded that paragraph [0058] discloses that the server carries out the video analysis (see point XIX(c) above).

2.4.3 The server at the headend can only determine the context of the current scene if video data on the current scene is input into the video analytics software. The server can only perform video analysis on the current scene if it either receives video data on the current scene from the user device or it receives data allowing it to extract video data on the current scene from stored content. Although interaction with the GUI can result in communication with the server (see point XIX(f) above), there is no hint in the

application as filed that video data on the current scene extracted from the stream is sent to the server. Although the person skilled in the art might recognise that a channel number and time stamp provide easy access to a stored copy of the content (see point XIX(d) above), the application as filed does not directly and unambiguously disclose that a channel number and time stamp are sent to the server or that the server stores a copy of the content for the purpose of extracting frames. Therefore, the server at the headend is not a "*reasonable location in the network*" to carry out the video analysis on the current scene.

2.4.4 The board is not convinced that the server distributing the content automatically knows which "*particular content*" is being viewed when the user selects the F-search feature (see point XIX(b) above). There is an inherent time lag between transmitting a frame and receiving the signal requesting the invocation of the F-search feature. Therefore, the frame in the transmission buffer of the server does not necessarily correspond to the frame displayed when the user invoked the F-search feature. Paragraphs [0029] and [0032] disclose that the user can pause the program. If the content is locally buffered during the pause, then, after the pause, the transmitted frame does not correspond to the "*particular content*" being viewed by the user. Thus, the method does not simply require an indication from the user device that supplemental content is required (see point XIX(b) above).

2.4.5 Paragraph [0048] states that the equipment for providing the functionality according to the invention may reside at any reasonable location in the network, such as at a headend or a local device. The equipment for providing the functionality includes at least parts

for determining the context and parts for carrying out the search and providing the list. In view of the arguments set out in point 2.4.3 above, the board is not convinced that the headend as part of the equipment is a reasonable location for carrying out a particular function, i.e. to determine which content is being viewed using video analytics. Therefore, the application as filed does not directly and unambiguously disclose that the headend is a reasonable location for performing the claimed video analytics (see point XIX(e) above).

2.4.6 In sum, the application as filed does not provide a clear and unambiguous basis for the feature that the server/headend 101 performs a video analysis of the current scene.

2.5 In view of the above, claim 1 of both the main request and the first auxiliary request does not meet the requirements of Article 123(2) EPC because the claimed subject-matter extends beyond the content of the application as filed.

3. *Second auxiliary request - clarity (Article 84 EPC)*

3.1 If an independent claim contains a feature defined by a result to be achieved which essentially corresponds to the problem underlying the application, the remaining features of the claim have to comprise all essential features necessary for achieving that result (see Case Law, II.A.3.2).

3.2 According to paragraph [0009] of the description, the problem addressed by the invention is how to present optional media content selected depending on the media

asset currently being consumed and the consumer's predicted preferences.

3.3 Claim 1 of the second auxiliary request specifies "*determining (307), by the server, user preference data corresponding to the user, the user preference data comprising a record of content selected and consumed by the user that is collected as the user selects and consumes content via the network*" and "*ordering (309, 311), by the server, the list of items of supplemental content as a function of the user preference data*". Thus, claim 1 specifies a result to be achieved (presenting a list of items based on user preferences) corresponding to the problem addressed by the invention. However, claim 1 of the second auxiliary request does not specify any features for creating a record of content selected and consumed by the user or for making any such record available to the server.

3.4 The board is not convinced that it is irrelevant how the server acquired the preference data or that the skilled person would deem the record of selected and consumed content to be the same as the data identifying the program and scene being viewed by the user when the F-search is invoked (see point XIX(g) above).

The board agrees with the appellant that there are many places from where a server can obtain preference data, such as from a user account or a local device. However, even if the preference data can be obtained from many places and records of the content easily collected, the claim should still specify features relating to the collection of the data in the claimed context (see point XIX(g) above). In a broadcast environment it is not evident that a user has an account which the broadcast server can access to retrieve the preference

data. Similarly, in a VOD environment it is not evident that the server can gain knowledge about all content a user consumes via a network.

3.5 In view of the above, claim 1 of the second auxiliary request does not meet the requirements of Article 84 EPC.

4. *Third to eighth auxiliary requests - admission into the appeal proceedings (Article 13(2) RPBA 2020)*

4.1 In the case in hand, the summons to oral proceedings was notified after the date on which RPBA 2020 entered into force, i.e. 1 January 2020 (Article 24(1) RPBA 2020). Thus, in accordance with Article 25(1) and (3) RPBA 2020, Article 13(2) RPBA 2020 applies to the question of whether to admit the appellant's third to eighth auxiliary requests, which were filed after notification of the summons to oral proceedings and are therefore amendments within the meaning of Article 13(2) RPBA 2020.

4.2 Article 13(2) RPBA 2020 implements the third level of the convergent approach applicable in appeal proceedings (see document CA/3/19, section VI, explanatory remarks on Article 13(2), first paragraph, first sentence; see also Supplementary publication 2, OJ EPO 2020). Article 13(2) RPBA 2020 imposes the most stringent limitations on appeal submissions made at an advanced stage of the proceedings, namely after expiry of a period set by the board of appeal in a communication under Rule 100(2) EPC or, where no such communication is issued, after notification of a summons to oral proceedings (see document CA/3/19, section VI, explanatory remarks on Article 13(2), first paragraph, second sentence). Where an amendment is made

to a party's appeal case at this advanced stage of the proceedings, Article 13(2) RPBA 2020 stipulates that it will, in principle, no longer be taken into account unless the party concerned has shown compelling reasons why the circumstances are exceptional. If such circumstances are shown to exist, the board of appeal may, in exercising its discretion, decide to admit an amendment made to the appeal case at this advanced stage of the proceedings (see document CA/3/19, section VI, explanatory remarks on Article 13(2), third paragraph, last sentence).

4.3 The explanatory remarks on Article 13(2) RPBA 2020 also contain the following guidance: "*At the third level of the convergent approach, the Board may also rely on criteria applicable at the second level of the convergent approach, i.e. as set out in proposed new paragraph 1 of Article 13*" (document CA/3/19, section VI, explanatory remarks on Article 13(2), fourth paragraph). The board takes the view that, at the third level of the convergent approach, the boards of appeal are free to use or not use the criteria set out in Article 13(1) RPBA 2020 when deciding, in exercising their discretion in accordance with Article 13(2) RPBA 2020, whether to admit an amendment made at this stage of the proceedings (see also decisions T 989/15, point 16.2 of the Reasons, and T 954/17, point 3.10 of the Reasons).

4.4 The board accepts the appellant's argument that the board's comments in sections 4 and 7 of its communication under Article 15(1) RPBA 2020 and the board's further arguments when discussing the clarity (Article 84 EPC) of claim 1 of the second auxiliary request at the oral proceedings present exceptional

circumstances within the meaning of Article 13(2) RPBA 2020 (see point XIX(h) above).

However, it is still at the board's discretion to admit the third to eighth auxiliary requests into the appeal proceedings.

4.5 In the case in hand, the board finds it appropriate, when exercising its discretion under Article 13(2) RPBA 2020, to also use criteria set out in Article 13 (1) RPBA 2020, namely whether the appellant has demonstrated that the amendments to its patent application *prima facie* overcome the issues raised by the board and do not give rise to new objections.

4.6 Under Article 13(1) RPBA 2020, where a patent application is amended, the onus is on the appellant to demonstrate why the amendment overcomes the issues raised by the board and why the amendment *prima facie* does not give rise to new objections (see also document CA/3/19, section VI, explanatory remarks on Article 13(1) RPBA 2020, third paragraph). It is not sufficient to demonstrate that the amendment overcomes the objections raised against the request taken as the basis for the amended claims of the new request. Therefore, in this case, it is irrelevant which request allegedly served as a basis for the amendment (see point XIX(h) above).

4.7 The board is not convinced that claim 1 of the third auxiliary request makes it clear that the server sends a single program which is then displayed on the user's device and hence consumed by the user (see point XIX(i) above). In cable television networks, the headend simultaneously broadcasts a plurality of programs (see description, paragraphs [0010] and [0014]). Therefore,

the board is of the opinion that the use of the indefinite article "*a*" in the phrase "*a program to be viewed by the user*" means that the user is sent a number of programs as opposed to only one program. In a broadcast environment, a user selects a program by, for instance, tuning into a channel. Therefore, the server can only create a record of selected programs if the local device transmits data such as the channel number to the server (see also point 2.4.3 above). Claim 1 of the third auxiliary request does not specify any features for collecting such data and providing it to the server.

4.8 As regards the admission of the fifth to eighth auxiliary requests, the appellant referred to the arguments provided for the third auxiliary request.

4.9 In summary, the appellant has not demonstrated that the amendments made to the claims of the third and fifth to eighth auxiliary requests *prima facie* overcome the issues raised by the board with respect to the second auxiliary request.

4.10 Claim 1 of the fourth auxiliary request specifies that "*the user preference data compris[es] a record of content selected and consumed by the user that is collected at the user device as the user selects and consumes content via the network*".

4.11 The appellant has not demonstrated that the amendments made to claim 1 of the fourth auxiliary request *prima facie* do not give rise to new objections.

Paragraph [0044] does not mention the local device. The argument that the skilled person would understand that the media server can only maintain records for linear

programs or VOD programs if the local device collected the necessary data (see point XIX(j) above) is not sufficient to demonstrate that the subject-matter of claim 1 of the fourth auxiliary request is directly and unambiguously derivable from paragraph [0044].

Paragraph [0048] discloses that the equipment for providing the functionality according to the invention may reside at any reasonable location in the network, such as at a headend, a server or a local device. The board is of the opinion that this paragraph does not disclose which location in the network provides which functionality (see also point 2.4.5 above). Therefore, this paragraph does not directly and unambiguously disclose that the local device collects the data (see point XIX(j) above).

4.12 In view of the above, the board exercised its discretion under Article 13(2) RPBA 2020 and decided not to admit the third to eighth auxiliary requests into the appeal proceedings.

5. Since none of the appellant's requests is allowable, the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

K. Boelicke M. Paci

Decision electronically authenticated