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**Datasheet for the decision  
of 20 September 2017**

**Case Number:** T 2000/16 - 3.5.04

**Application Number:** 00914651.5

**Publication Number:** 1157547

**IPC:** H04N5/445

**Language of the proceedings:** EN

**Title of invention:**

System and method for tailoring television and/or electronic program guide features, such as advertising

**Patent Proprietor:**

Rovi Guides, Inc.

**Opponents:**

Sugisaka, Hiroshi (former opponent)  
Virgin Media Limited

**Headword:**

**Relevant legal provisions:**

EPC Art. 123(2)  
EPC 1973 Art. 100(c)

**Keyword:**

Grounds for opposition - added subject-matter (yes)  
Amendments - added subject-matter (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

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Case Number: T 2000/16 - 3.5.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.04**  
**of 20 September 2017**

**Appellant:** Rovi Guides, Inc.  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 15 June 2016  
revoking European patent No. 1157547 pursuant to  
Articles 101(2) and 101(3) (b) EPC.**

**Composition of the Board:**

**Chairman** C. Kunzelmann  
**Members:** R. Gerdes  
T. Karamanli

## **Summary of Facts and Submissions**

- I. The appeal is against the decision of the opposition division revoking European patent No. 1 157 547, which is based on international application PCT/US00/04375 published as WO 00/49801 A1.
- II. Two opponents opposed the patent. The oppositions were based on the grounds of lack of novelty and inventive step (Articles 100(a) EPC in conjunction with Article 54 and 56 EPC), insufficiency of disclosure (Article 100(b) EPC) and added subject-matter (Article 100(c) EPC). Opponent 1 withdrew its opposition with letter dated 14 March 2014 in the first-instance proceedings.
- III. The opposition division revoked the patent, holding that the subject-matter of claim 1 of the patent as granted (main request) and claim 1 of the second auxiliary request contained subject-matter extending beyond the content of the application as filed. The first auxiliary request was not admitted into the opposition proceedings because it was late-filed and not clearly allowable (Article 114(2) EPC and Rule 116 EPC).
- IV. The patent proprietor (appellant) filed an appeal against this decision. With the statement of grounds of appeal, the appellant submitted claims of a main request and of first and second auxiliary requests that were essentially identical to those underlying the decision under appeal. The appellant maintained its requests presented during the oral proceedings before the opposition division, i.e. rejection of the opposition or maintenance of the patent in amended form

on the basis of the claims of the first or second auxiliary request.

- V. In its letter of reply dated 10 March 2017, opponent 2 (respondent) requested that the appeal be dismissed.
- VI. In a reply dated 18 August 2017 to a communication from the board annexed to the summons to oral proceedings the appellant re-filed the claims filed with the statement of grounds of appeal and provided further arguments concerning clarity and added matter of the claims.
- VII. Oral proceedings were held on 20 September 2017. As announced beforehand, the respondent was not represented at them.
- VIII. The appellant (patent proprietor) requested that the decision under appeal be set aside and that the opposition be rejected (main request), or, in the alternative, that the patent be maintained in amended form on the basis of the claims of the first or second auxiliary request, both requests filed with the letter dated 18 August 2017.
- IX. The Chairman noted that the respondent had requested in writing that the appeal be dismissed.
- X. Claim 1 of the main request (patent as granted) reads as follows:

"A system for customizing an electronic program guide having a display comprising:

means (2) for collecting usage data concerning usage of the electronic program guide;

means for collecting user data of the user;

means (3) for integrating the collected usage and user data to infer a user profile wherein the user profile comprises probability-based character elements associated with the user, which elements each have an assigned probability for the user, the collected usage and user data being expressed as a plurality of probabilistic profile scores, each of these scores defining probabilities for the character elements of the user profile, the plurality of probabilistic profile scores being used to compute the user profile;

means (40) for storing the user profile in a memory local to the electronic program guide;

means (20) for receiving a first data instruction packet containing instructions for operation of the electronic program guide and match criteria;

means (30) for executing the first data instruction packet to analyse the stored user profile according to the match criteria to identify matches between the probability-based character elements of the user profile and the transmitted match criteria;

means for automatically selecting a second data instruction packet responsive to the identified matches; and

means for executing the selected second data instruction packet to customise information displayed in the electronic program guide based on the identified matches."

XI. Claim 1 of the first auxiliary request reads as follows (amendments to claim 1 of the main request are underlined):

"A system for customizing an electronic program guide having a display comprising:

means (2) for collecting usage data concerning usage of the electronic program guide by a user for selecting events to be viewed;

means for collecting user data of the user, wherein the user data is psycho-demographic data and statistical data for each of the selected events;

means (3) for integrating the collected usage and user data to infer a user profile wherein the user profile comprises probability-based character elements associated with the user, which elements each have an assigned probability for the user, the collected usage and user data being expressed as a plurality of probabilistic profile scores, each of these scores being associated with a selected event and defining probabilities for the character elements of the user profile, the plurality of probabilistic profile scores being used to compute the user profile as a running average of the probabilistic profile scores, time weighted by a viewing duration for each of the selected events;

means (40) for storing the user profile in a memory local to the electronic program guide;

means (20) for receiving a first data instruction packet containing instructions for operation of the electronic program guide and match criteria;

means (30) for executing the first data instruction packet to analyse the stored user profile according to the match criteria to identify matches between the probability-based character elements of the user profile and the transmitted match criteria;

means for automatically selecting a second data instruction packet responsive to the identified matches; and

means for executing the selected second data instruction packet to customise information displayed in the electronic program guide based on the identified matches."

XII. Claim 1 of the second auxiliary request reads as follows (amendments to claim 1 of the main request are underlined):

"A system for customizing an electronic program guide having a display comprising:

means (2) for collecting usage data concerning usage of the electronic program guide;

means for collecting user data of the user, the user data consisting of user-provided information where the user declares their gender, age, income bracket, or show preference;

means (3) for integrating the collected usage data and user data to infer a user profile wherein the user profile comprises probability-based character elements associated with the user, which elements each have an assigned probability for the user, the collected usage



data and user data being expressed as a plurality of probabilistic profile scores, each of these scores defining probabilities for the character elements of the user profile, the plurality of probabilistic profile scores being used to compute a running average of the probabilistic profile scores, time weighted by each viewing duration of one or more events viewed by the user, of the user profile;

means (40) for storing the user profile in a memory local to the electronic program guide;

means (20) for receiving a first data instruction packet containing instructions for operation of the electronic program guide and match criteria;

means (30) for executing the first data instruction packet to analyse the stored user profile according to the match criteria to identify matches between the probability-based character elements of the user profile and the transmitted match criteria;

means for automatically selecting a second data instruction packet responsive to the identified matches; and

means for executing the selected second data instruction packet to customise information displayed in the electronic program guide based on the identified matches."

XIII. In the decision under appeal the opposition division held *inter alia* that the original specification of the patent in suit did not provide a direct and unambiguous basis for distinguishing between first and second data instruction packets and their respective contents as

claimed in the patent. In particular, claim 6 as originally filed did not disclose the attribution of first and second instructions to first and second "data instruction packets". The terminology used throughout the application for "packets" was inconsistent, with the result that it was not directly and unambiguously derivable from the application that "data packets" or "instruction packets" of the colour scheme embodiment described on page 22, lines 26 to 33, were "data instruction packets". Further features of claim 1 were not derivable from that embodiment. Also the "advertisement data packet" example of page 21, line 30 to page 22, line 6, could not provide a direct and unambiguous basis for claim 1, since no second data instruction packet was disclosed.

XIV. In summary, neither the embodiments nor original claim 6 disclosed corresponding first and second data instruction packets that operated in the claimed manner (see decision under appeal, Reasons, point 11.5).

XV. The appellant's relevant arguments may be summarised as follows.

The specification in claim 1 of the main request had to be read in the context of the application as a whole. Packets were defined on page 3, lines 6 to 10, of the published application as containing "different types of data, including instructions". They could be used to transmit advertisements in a digital video stream (see page 11, lines 5 and 6). According to the passage on page 19, line 34 to page 20, line 6, a data instruction packet contained instructions to look for a match of an advertisement with the viewer profile. The data instruction packet "precedes the advertisement, is related to, or is attached to the advertisement." The

"advertisement data packet" example on page 21, line 27 to page 22, line 6, disclosed the first and second data instruction packets. The first data instruction packet carried instructions to analyse the viewer profile, whereas the second packet carried the advertisement. Advertisements were not still images but contained instructions to change the display over time (see for example page 22, lines 30 to 33, and original claim 1). Other embodiments that supported this interpretation were the colour scheme embodiment (see page 22, lines 26 to 33) and the football watcher example on page 20, lines 7 to 23. The description also disclosed that the EPG received data instruction packets in series (page 21, lines 19 to 26, i.e. a first and a second data instruction packet). The appellant also referred to claim 7 as originally filed, which specified first and second sets of instructions (see also statement of grounds of appeal, section 2.5 and the letter dated 18 August 2017, point 2.2.2).

With respect to the features pertaining to the first and second data instruction packets in claim 1 of the first and second auxiliary requests, the appellant relied on its arguments brought forward for claim 1 of the main request.

XVI. The respondent essentially argued as follows (see letter dated 10 March 2017, page 5).

The terminology for packets was inconsistent; neither the "advertisement data packet" nor the "instruction packet" of the advertisement embodiment could be considered a "data instruction packet". There was no indication that an "advertisement data packet" contained anything other than data defining an advert. Hence, the skilled person would not have recognised an

"advertisement data packet" as a "second data instruction packet". The advertisement embodiment did not disclose selecting a second data instruction packet responsive to the identified matches as specified in claim 1.

### **Reasons for the Decision**

1. The appeal is admissible.

#### *The invention*

2. The patent in suit relates to targeting information such as advertisements to consumers of audio, video or textual content. Use of a consumer's television receiver and/or an electronic program guide (EPG) is monitored and the monitored data is iteratively integrated with statistical data and a psychodemographic profile of the television viewer to develop a viewer profile (see the application as published, page 1, lines 5 to 26 and page 2, lines 5 to 36).

According to an aspect of the invention, a "core operating system" or "core EPG system" is installed on the television system, which allows tailoring of the EPG system to different tasks such as setup and display according to the user's profile by transmitting different types of data, including instructions to the user's television system. These data and instructions are transmitted in packets to the EPG-equipped television system. As the input "data instruction packets" are received, the core EPG system decodes each data instruction packet and uses the instructions to operate in a certain manner (see page 3, lines 6 to 10 and page 21, lines 16 to 26).

*Main request, added subject-matter*

3. The decision under appeal was based on the finding that Article 100(c) EPC prejudiced the maintenance of the European patent as granted, because it contained subject-matter extending beyond the content of the application as filed. It follows from several rulings of the Enlarged Board of Appeal that the criterion for deciding whether an amendment extends the content of the application as filed is 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 application documents as filed (see for example G 2/10, Reasons, point 4.3).

3.1 Claim 1 specifies (emphasis added by the board)

"...

(a) means (20) for receiving a **first data instruction packet** containing instructions for operation of the electronic program guide and match criteria;

(b) means (30) for executing the first data instruction packet to analyse the stored user profile according to the match criteria to identify matches between the probability-based character elements of the user profile and the transmitted match criteria;

(c) means for automatically selecting a **second data instruction packet** responsive to the identified matches; and

(d) means for executing the selected second data instruction packet to customise information displayed in the electronic program guide based on the identified matches."

3.2 Hence, claim 1 requires means for receiving a first data instruction packet and means for selecting a second data instruction packet, with both means having certain functionality. This functionality imposes certain characteristics on the first and second data instruction packets. In particular, the second data instruction packet is selected in response to identified matches and serves to customise information displayed in the EPG by "executing the selected second data instruction packet". Claim 1 is therefore construed as requiring the second data instruction packet to contain executable instructions.

3.3 The application discloses packets containing "different types of data, including instructions". Advertisements are embedded in the television digital video stream in packet form. A (first) data instruction packet containing match criteria may precede the advertisement, be related to it or be attached to it (see page 3, lines 6 to 10; page 11, lines 5 and 6, and page 19, line 34 to page 20, line 6, of the application as published).

Hence, the application discloses a first data instruction packet containing match criteria (see features (a) and (b) above). The first data instruction packet may be succeeded by packets containing advertisements.

The "advertisement data packet" example on page 21, line 27 to page 22, line 6 refers to a "particular

advertisement data packet" being preceded by an "instruction packet" specifying instructions according to which the system analyses the viewer profile. The board takes the preceding instruction packet to correspond to the "first data instruction packet" of claim 1. However, the board does not share the appellant's view that the "advertisement data packet" of this example corresponds to the "second data instruction packet" of claim 1.

There is no disclosure that the advertisement data packet contains instructions which may be executed to customise information displayed in the electronic program guide (EPG) based on the identified matches. It is not disputed that the advertisement may be destined for display in the EPG. However, there is no need and no indication in the application that instructions are required in this packet to tailor the display of the advertisements. The appellant argued that advertisements were not still images but contained instructions to change the display over time. The board holds that changing a display over time can be achieved by transmitting a video clip but does not necessitate "executing the selected second data instruction packet" as required by claim 1. This view is also confirmed by the fact that the packet containing the advertisement is labelled an "advertisement data packet" and not an "advertisement data instruction packet". The board also does not agree that the term "data instruction packet" would be understood by the skilled person "as merely a label, and thus interchangeable without deviating from the technical disclosure" (see the appellant's letter dated 18 August 2017, point 2.2.2). Actually, the use of the different terms "data packet" and "data instruction packet" is considered to indicate and

distinguish the content of the packets (see for example page 21, lines 27 to 29).

- 3.4 The appellant also referred to the "color scheme embodiment" of page 22, lines 26 to 33 and the "football watcher example" on page 20, lines 7 to 23 of the published application as a basis for claim 1.

The "color scheme embodiment" is directed to customising the display format of the EPG and not to customising the information displayed in the EPG as required by claim 1, feature (d). In addition, the embodiment refers to "data packets associated with instruction packets", which cannot be directly and unambiguously equated with data instruction packets.

According to the "football watcher example" a particular advertisement is transmitted together with "supplemental information that indicates that the advertisement is targeted for, among other criteria, 'football watchers'". Hence, the supplemental information may be regarded as the transmitted match criteria of claim 1. However, there is no distinction between the first and second data instruction packets. Actually, the example is understood such that the advertisement is transmitted together with the match criteria (see page 20, lines 8 to 10).

Moreover, the appellant referred to page 21, lines 19 to 26, of the published application, arguing that it disclosed that the EPG received data instruction packets in series, i.e. a first and a second data instruction packet. This passage refers to "an initial set of data 'instruction' packets" "provided with the television system purchased by the viewer". This initial set of data instruction packets is therefore



not necessarily "received" by the system. The functionality of the subsequently transmitted data instructions packets is not specified, apart from the fact that the packets are decoded and used by the core EPG system "to operate in a certain manner". It can therefore not be taken as directly and unambiguously disclosed that the packets have the functionality required by claim 1.

The appellant also referred to claims 1 and 7 as originally filed, which referred to first and second sets of instructions. The board sees no direct and unambiguous correspondence between "sets of instructions" and "data instruction packets". In addition, the claims refer to the customisation of (the display of) the EPG and not to customising the information displayed in the EPG.

3.5 Hence, there is no direct and unambiguous disclosure in the original application of a second data instruction packet as required by claim 1.

3.6 As a consequence, the subject-matter of claim 1 of the main request extends beyond the content of the application as filed, so that Article 100(c) EPC 1973 prejudices the maintenance of the patent as granted.

*First and second auxiliary request, added subject-matter*

4. Claim 1 of the first auxiliary request and claim 1 of the second auxiliary request have been amended to further specify the usage and user data and to specify how the user profile is determined.

4.1 These amendments do not affect the interpretation of features (a) to (d) (see point 3.1 above) regarding the

claimed subject-matter. The appellant relied on its arguments advanced in respect of claim 1 of the main request. Hence, the board sees no reason to deviate from the line of argument followed in respect of that claim.

- 4.2 It follows that the subject-matter of claim 1 of both the first and second auxiliary requests extends beyond the content of the application as filed. Thus, these claims infringe Article 123(2) EPC.

### *Conclusion*

5. Since none of the appellant's requests is allowable, the appealed decision to revoke the patent is upheld.

### **Order**

#### **For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



K. Boelicke

C. Kunzelmann

Decision electronically authenticated