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**Datasheet for the decision  
of 03 September 2009**

**Case Number:** T 1365/06 - 3.5.05

**Application Number:** 02738407.2

**Publication Number:** 1428096

**IPC:** G06F 1/00

**Language of the proceedings:** EN

**Title of invention:**

Method and apparatus for selling a software product.

**Applicant:**

Tribeka Limited

**Headword:**

Selling a software product/TRIBEKA

**Relevant legal provisions:**

EPC Art. 123(2)

**Relevant legal provisions (EPC 1973):**

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**Keyword:**

"Amendments - added subject-matter- yes"

**Decisions cited:**

**Catchword:**



Case Number: T 1365/06 - 3.5.05

**DECISION**  
of the Technical Board of Appeal 3.5.05  
of 03 September 2009

**Appellant:** Tribeka Limited  
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London W1U 6UE (GB)

**Representative:** Elkiner, Kaya  
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**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 22 March 2006  
refusing European application No. 02738407.2  
pursuant to Article 97(1) EPC 1973.

**Composition of the Board:**

**Chairman:** D. H. Rees  
**Members:** P. Cretaine  
P. Schmitz

## Summary of Facts and Submissions

I. This appeal is against the decision of the examining division announced in oral proceedings held on 31 January 2006, with reasons dispatched 22 March 2006, refusing European patent application No. 02738407.2 for the reason that the independent claims of each of a main and auxiliary requests did not involve an inventive step according to Article 56 EPC 1973 having regard to the disclosure of

D1: EP 0 653 695.

The examining division appended to the decision under appeal its opinion that claim 1 of each of the requests additionally did not involve an inventive step having regard to the disclosure of either of

D10: JOHN LETTICE: "WinXP Product Activation decoded and analysed", WWW.THEREGISTER.COM, [Online] 10 July 2001, Retrieved from the Internet:  
URL:<http://web.archive.org/web/20010712130653/http://www.theregister.co.uk/content/4/20282.html> [retrieved on 31 January 2006] or

D11: US 6 169 976.

II. In the notice of appeal filed with letter dated 2 and received 5 May 2006, it was requested that the decision to refuse be cancelled. The grant of a patent was requested on the basis of claims 1 to 22 submitted with the statement setting out the grounds of appeal dated and received 31 July 2006. A precautionary

request for oral proceedings was also made. The appeal fee was paid on 10 May 2006.

- III. In a communication accompanying a summons to oral proceedings to be held on 3 September 2009, the board set out its preliminary opinion concerning the appeal and referred to the following further prior art document which it introduced into the proceedings of its own motion

D12: US 5 586 186.

- IV. In said communication, the board expressed its preliminary opinion that the appellant's request was not allowable. In particular, the board expressed the opinion that claim 1, as amended in appeal, did not meet the requirements of Article 123(2) EPC. Moreover, a clarity objection was raised against independent claims 1 and 11. The Board further objected to the independent claims 1 and 11 that their subject-matter was apparently already known from D12 and did not appear to involve an inventive step having regard to the disclosure of any of D1, D10 or D11.

The board further gave its reasons why the appellant's arguments were not convincing.

- V. In a letter dated 26 August 2009 and sent by fax on the same date, the appellant's representative informed the board that he would not be attending the oral proceedings. No submissions or amendments in response to the issues raised by the board were received.

VI. Oral proceedings were held on 3 September 2009 in the absence of the appellant.

After due deliberation on the basis of the submissions and requests dated 31 July 2006, the board announced its decision.

VII. The appellant has requested that the decision under appeal be set aside and that a patent be granted on the basis of the following set of claims:

claims 1-22 as filed with the statement setting out the grounds of appeal.

The further documents on which the appeal is based, i.e. the text of the description and the drawings, are taken to be as follows:

description	pages 1, 4, 5, 7-9	as originally filed,
	page 6	as filed with letter
		of 24 March 2005;
	pages 2, 3, 3a, 3b	as filed with the
		statement setting out
		the grounds of appeal;
drawings sheets	1/1	as originally filed.

VIII. Claim 1 of the appellant's request reads as follows:

"A method of selling software products, comprising:  
(a) manufacturing a plurality of software products, each product (26) comprising a software title stored on a machine-readable medium;  
the method being characterised by:

(b) for each individual manufactured product, generating and storing on the machine-readable medium a unique identifier, for example a licence number;

(c) generating a corresponding unique unlock code without which the said product will not operate;

(d) leaving out the products for sale at a sales outlet (20), while storing the unlock codes separately from the products, each unlock code being stored along with its corresponding unique identifier; and

(d) on purchase of a product at the sales outlet by a customer, checking the unique identifier stored on the machine-readable medium, recovering the corresponding stored unlock code, and supplying the customer with both the product and the unlock code."

## **Reasons for the Decision**

### 1. *Admissibility*

The appeal complies with the provisions of Article 106 to 108 EPC 1973. Therefore it is admissible (see Facts and Submissions, point II).

### 2. *Non-appearance at oral proceedings*

2.1 Neither the appellant nor its representative attended the oral proceedings to which the appellant had been duly summoned, (cf. Facts and Submissions, points III. and V. above).

2.2 In the present case, the board judged that it was appropriate to proceed by holding the oral proceeding as scheduled in the absence of the appellant.

In deciding not to attend the oral proceedings, the appellant chose not to avail itself of the opportunity to present its observations and counter-arguments orally but instead to rely on its written case (Article 15(3) RPBA).

2.3 It is further noted that the appellant did not submit any substantive written response to the issues raised by the board in its communication. Therefore, the appellant's written case corresponds to that presented in the statement setting out the grounds of appeal.

2.4 The appellant could reasonably have expected that during the oral proceedings the board would consider the objections and issues raised in the communication annexed to the summons to oral proceedings. Article 113(1) EPC is therefore satisfied.

3. *Article 123(2) EPC*

3.1 Claim 1 contains two steps with the same designation (d). The last step of claim 1 is renamed (e) in the following analysis for the sake of consistency with the previous steps.

3.2 Claim 1, step (e), defines that, on purchase of the product at the sales outlet by a customer, the unique identifier stored on the machine-readable medium is checked.

The description and claims as originally filed do describe that the unique identifier is stored on the machine-readable medium (page 4, lines 18-20; page 6, line 21; claim 9); however the checking of said unique

identifier **on purchase** is described as being performed solely on a unique identifier which is printed onto the packaging or documentation associated with the product (page 4, lines 22-25: "the sales assistant simply scans the bar code"). Although page 6, lines 19-23 may well implicitly disclose that the shop assistant checks a unique identifier ("unique license number") stored on the machine-readable medium ("burned to the CD"), this passage relates to a "**refund**" on the product and not the "**purchase**". Moreover on page 8, lines 7-8, the wording "The license key never needs to be checked against any data held within the product content", if the term "license key" is interpreted as representing the unlock code for the product, suggests that there is no checking of an identifier "held within the product content", i.e. stored on the machine readable medium, at the time of purchase of the product.

- 3.3 Thus, claim 1 does not comply with the requirements of Article 123(2) EPC. The appellant's sole request is therefore not allowable and the appeal must be dismissed.
  
4. The board notes in addition that the appellant has made no arguments to rebut the board's preliminary opinion expressed in the communication issued with the summons to oral proceedings that the independent claims are not clear and that their subject-matter lacks novelty and an inventive step with respect to various documents. These objections also still apply.



**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:

K. Götz

D. H. Rees