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**Datasheet for the decision  
of 27 October 2011**

**Case Number:** T 1668/07 - 3.5.04  
**Application Number:** 97917734.2  
**Publication Number:** 0891668  
**IPC:** H04N 5/445, H04N 5/50  
**Language of the proceedings:** EN

**Title of invention:**  
BOOKMARKING TELEVISION PROGRAM AND CHANNEL SELECTIONS

**Patent Proprietor:**  
Irdeto Access B.V.

**Opponent:**  
IGR GmbH & Co. KG

**Headword:**  
-

**Relevant legal provisions:**  
EPC Art. 101(3), 123(2)  
EPC R. 80  
RPBA Art. 13(1)  
EPC Revision Act of 29 November 2000, Article 7  
Decision of the Administrative Council of 28 June 2001 on the  
transitional provisions under Article 7 of the EPC  
Revision Act  
Decision of the Administrative Council of 7 December 2006  
amending the Implementing Regulations to the EPC 2000

**Relevant legal provisions (EPC 1973):**  
EPC Art. 54(1), 56, 84, 100, 107  
EPC R. 64(a), 65(1)(2)

**Keyword:**

"Party to appeal proceedings - change of name - entitlement (yes)"

"Inventive step - no (first to fourth auxiliary requests)"

"Claims - support by description - no (fifth auxiliary request)"

"Inventive step - yes (sixth auxiliary request)"

**Decisions cited:**

G 0004/88, G 0009/91, G 0010/91, G 0002/04, J 0010/07,

T 0533/93, T 0001/97, T 1137/97, T 0097/98, T 0015/01,

T 0956/03

**Catchword:**

If an appellant files an appeal using a new name and without indicating that its name has changed, the requirements of Article 107, first sentence, and Rule 64(a) EPC 1973 are met provided the appellant is identifiable and substantiates its change of name, for entry in the European Patent Register, at the latest upon the board's invitation under Rule 65(2), first sentence, EPC 1973.



Case Number: T 1668/07 - 3.5.04

**D E C I S I O N**  
of the Technical Board of Appeal 3.5.04  
of 27 October 2011

**Appellant:** IGR GmbH & Co. KG  
(Opponent) Bahnstraße 62  
D-40210 Düsseldorf (DE)

**Representative:** Kinnstätter, Klaus  
Maryniok & Eichstädt  
Patentanwälte GbR  
Kuhbergstraße 23  
D-96317 Kronach (DE)

**Respondent:** Irdeto Access B.V.  
(Patent Proprietor) Jupiterstraat 42  
NL-2132 HD Hoofddorp (NL)

**Representative:** Pelly, Jason Charles  
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Verulam Gardens  
70 Gray's Inn Road  
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**Decision under appeal:** Decision of the Opposition Division of the  
European Patent Office posted 2 August 2007  
rejecting the opposition filed against European  
patent No. 0891668 pursuant to Article 102(2)  
EPC 1973.

**Composition of the Board:**

**Chairman:** T. Karamanli  
**Members:** A. Dumont  
M. Paci

## Summary of Facts and Submissions

I. The appeal lies from the decision posted on 2 August 2007 rejecting the opposition against European patent No. EP 0 891 668, which is based on European patent application No. 97 917 734.

II. The opposition was filed by the company Interessengemeinschaft für Rundfunkschutzrechte GmbH Schutzrechtsverwertung & Co. KG, Bahnstraße 62, 40210 Düsseldorf, Germany. The opposition was based on the grounds for opposition under Article 100(a) EPC 1973 (lack of novelty based on Articles 52(1) and 54(1) EPC 1973 and lack of inventive step based on Articles 52(1) and 56 EPC 1973), in reliance on the following prior-art documents:

E1: EP 0 550 911 A1;  
E2: EP 0 575 956 A2;  
E3: EP 0 662 769 A1;  
E4: US 5 477 262 A;  
E5: US 4 706 121 A.

The opponent did not request oral proceedings in the first-instance proceedings.

III. The appealed decision indicates as opponent the company Interessengemeinschaft für Rundfunkschutzrechte GmbH Schutzrechtsverwertung & Co. KG. This decision was issued without oral proceedings or a prior communication to the parties by the opposition division.

IV. On 21 September 2007, the professional representative who had represented the opponent in the first-instance

proceedings filed an appeal in the name of the opponent against the decision of the opposition division dated 2 August 2007. In the notice of appeal the company IGR GmbH & Co. KG, Bahnstraße 62, 40210 Düsseldorf, Germany, was indicated as opponent. Furthermore, the number of the European patent application on which the patent in suit is based and the publication number of the patent in suit were indicated, as was the name of the patent proprietor.

The appeal fee was paid on the same day.

- V. On 30 November 2007, the appellant filed a statement setting out the grounds of appeal, which was accompanied by a copy of an excerpt from the Commercial Register, Düsseldorf, Germany (Auszug aus dem Handelsregister Düsseldorf, Deutschland).

In its statement, the appellant submitted that the company Interessengemeinschaft für Rundfunkschutzrechte GmbH Schutzrechtsverwertung & Co. KG had changed its name into IGR GmbH & Co. KG. This change of name was recorded in the European Patent Register.

- VI. In its reply to the grounds of appeal, the patent proprietor (respondent) defended its patent as granted and requested that the appeal be dismissed.

- VII. In a communication under Article 15(1) RPBA (Rules of Procedure of the Boards of Appeal, OJ EPO 2007, 536), annexed to the summons to oral proceedings, the board expressed its provisional and non-binding opinion with regard to the granted patent.

- VIII. By letter of 22 December 2011, the EPO was informed of a change of the respondent's representative. This amendment was recorded in the European Patent Register.
- IX. With a letter of 26 September 2011, as its new main request, the respondent requested that the appeal be deemed inadmissible under Rule 101(1) and Article 107 EPC because the notice of appeal named the company IGR GmbH & Co. KG as appellant and the evidence for the change of name of the opponent had only been filed after expiry of the two-month period for filing an appeal. The respondent further requested as its first auxiliary request that the patent be maintained unamended and filed amended claims according to its second to fifth auxiliary requests.
- X. Oral proceedings took place on 27 October 2011. The respondent filed new third and sixth auxiliary requests during these oral proceedings.
- XI. The appellant (opponent) requested that the decision under appeal be set aside and that the European patent be revoked.
- XII. The respondent (patentee) requested that the appeal be deemed inadmissible (main request), and, as an auxiliary measure, that the appeal be dismissed (first auxiliary request), or that the decision under appeal be set aside and the patent be maintained in amended form on the basis of the second auxiliary request filed with letter of 26 September 2011, the third auxiliary request filed during the oral proceedings of 27 October 2011, the fourth auxiliary request filed with letter of 26 September 2011, the fifth auxiliary request filed

with letter of 26 September 2011 or the sixth auxiliary request filed during the oral proceedings of 27 October 2011.

XIII. Claim 1 as granted reads as follows:

"An apparatus coupled to broadcast signals and a television set (16) for displaying broadcast programs and channels on a screen of said television set (16), said apparatus comprising means for displaying broadcast programs on selected channels to a viewer;  
means (10) for marking one or more of said channels in response to respective one or more first signals from said viewer; and  
means (21) for storing signals to recall said marked channels  
**characterised in that** the apparatus further comprises means (10) for marking one or more of said programs in response to respective one or more second signals from said viewer,  
means (21) for storing signals to recall said marked programs and  
means for sequentially displaying said marked programs and channels in response to respective one or more third signals from said viewer."

XIV. Claim 1 according to the second auxiliary request reads as follows:

"An apparatus coupled to broadcast signals and a television set (16) for displaying broadcast programs and channels on a screen of said television set (16), said apparatus comprising

means arranged to display broadcast programs on selected channels to a viewer;  
means (10) arranged to mark one or more of said channels in response to respective one or more first signals from said viewer; and  
means (21) arranged to store signals to recall said marked channels  
**characterised in that** the apparatus further comprises means (10) arranged to mark one or more of said programs in response to respective one or more second signals from said viewer,  
means (21) arranged to store signals to recall said marked programs and  
means arranged to sequentially display said marked programs and channels in response to respective one or more third signals from said viewer."

XV. Claim 1 according to the third auxiliary request reads as follows:

"An apparatus coupled to broadcast signals and a television set (16) for displaying broadcast programs and channels on a screen of said television set (16), said apparatus comprising  
means arranged to display broadcast programs on selected channels to a viewer;  
means (10) arranged to mark one or more of said channels, wherein each of said one or more of said channels is marked while said channel is being displayed, in response to respective one or more first signals from said viewer; and  
means (21) arranged to store signals to recall said marked channels  
**characterised in that** the apparatus further comprises



means (10) arranged to mark one or more of said programs, wherein each of said one or more of said programs is marked while said program is being displayed, in response to respective one or more second signals from said viewer,  
means (21) arranged to store signals to recall said marked programs and  
means arranged to sequentially display said marked programs and channels in response to respective one or more third signals from said viewer."

XVI. Claim 1 according to the fourth auxiliary request reads as follows:

"An apparatus coupled to broadcast signals and a television set (16) for displaying broadcast programs and channels on a screen of said television set (16), said apparatus comprising  
means arranged to display broadcast programs on selected channels to a viewer;  
means (10) arranged to mark one or more of said channels in response to respective one or more first signals from said viewer; and  
means (21) arranged to store signals to recall said marked channels  
**characterised in that** the apparatus further comprises  
means (10) arranged to mark one or more of said programs in response to respective one or more second signals from said viewer,  
means (21) arranged to store signals to recall said marked programs and  
means arranged to sequentially display said marked programs and channels in response to respective one or more third signals from said viewer,

wherein said apparatus is further coupled to broadcast electronic program guide information signals and wherein said means (21) arranged to store signals to recall said marked programs removes the signals to recall a marked program responsive to said broadcast electronic program guide information signals indicative of a termination of said marked program."

XVII. Claim 10 according to the fifth auxiliary request reads as follows:

"A method for displaying broadcast programs and channels on a television screen, said method comprising the steps of:

displaying on said television screen broadcast programs on selected channels to a television viewer;

marking one or more of said channels in response to respective one or more first signals from said television viewer; and

storing signals to recall said marked channels,

**characterised by**

marking one or more of said programs in response to respective one or more second signals from said viewer, storing signals to recall said marked programs with the signals to recall said marked channels and

sequentially displaying said marked programs and channels on said television screen in response to respective one or more third signals from said television viewer,

the method further comprising the step of unmarking a marked program or a marked channel in response to a fourth signal from said viewer,

wherein a remote control unit (10) is associated with said viewer, said remote control unit having a first

button (24), and said method further comprises said remote control unit generating first, second, or fourth signals as said first button is asserted sequentially."

XVIII. Claim 1 according to the sixth auxiliary request reads as follows:

"An apparatus coupled to broadcast signals and a television set (16) for displaying broadcast programs and channels on a screen of said television set (16), said apparatus comprising means arranged to display broadcast programs on selected channels to a viewer; means (10) arranged to mark one or more of said channels in response to respective one or more first signals from said viewer; and means (21) arranged to store signals to recall said marked channels **characterised in that** the apparatus further comprises means (10) arranged to mark one or more of said programs in response to respective one or more second signals from said viewer, means (21) arranged to store signals to recall said marked programs and means arranged to sequentially display said marked programs and channels in response to respective one or more third signals from said viewer, said apparatus further comprising means (10) arranged to unmark a marked program or a marked channel in response to a fourth signal from said viewer, said apparatus further comprising a remote control unit (10) associated with said viewer, said remote control unit having a first button (24) and generating first,

second, or fourth signals as said first button is asserted sequentially."

XIX. The reasoning in the decision under appeal may be summarised as follows.

E5 represents the closest prior art. A skilled person would not unambiguously arrive at the subject-matter of the independent claims as granted, particularly at (means for) sequentially displaying said marked programs and channels as set out in the last feature of the independent claims, even if interpreted broadly, when taking account of the prior art E1 to E5. The subject-matter of claim 1 is thus novel and involves an inventive step.

XX. The appellant's arguments, in so far as they are relevant for the present decision, may be summarised as follows.

In the present case, no transfer of opponent status has taken place. The appellant opponent merely changed its name and, therefore, has remained the same legal person during both the first-instance opposition proceedings and the appeal proceedings. Thus Article 107 EPC is complied with. The decisions T 956/03 and T 1137/97, cited by the respondent, relate to a transfer of the opponent status and, therefore, they are not applicable to a change of name. The appeal thus also complies with Article 108 EPC and is admissible.

Granted claim 1 should be interpreted broadly:

- The means of claim 1 are formulated as "means + function", i.e. as means suitable for achieving the function, not as means especially designed to implement the function. In particular the "means for sequentially displaying" in the last paragraph of claim 1 can be read on any television set, which is suitable to display channels or programs sequentially.
  
- A viewer might mark a currently displayed channel or program while viewing it. Although channels and programs are in principle different, the "first signals" and "second signals" according to claim 1 could be the same and the "third signals" would not distinguish between a channel and a program. Moreover, the apparatus does not treat channels and programs differently when the viewer decides to mark them. As a result, a distinction between channels and programs may exist in the viewer's mind but it is purely academic in the context of claim 1.
  
- The sequential display of marked channels or programs is not limited to the viewer repeatedly issuing the same command, and the "respective one or more third signals" might also cover normal commands for successively displaying a program on a corresponding channel.

The subject-matter of granted claim 1 (interpreted broadly) lacks novelty over E3. E3 discloses an apparatus with means for adding (and thus implicitly also marking and storing) channels and programs to a

"like" list according to the viewer's preferences. The apparatus of E3 also comprises means for recalling favourite channels and programs from the personal program guide shown in figure 13M, which anticipates the means for sequentially displaying said marked programs and channels of granted claim 1.

The subject-matter of granted claim 1 (interpreted narrowly) lacks inventive step over a combination of E3 and E4. Navigating step by step through a list of favourite channels in order to sequentially display these channels is known from E4. Filling the gap possibly left in E3 (not mentioning how to use the guide) is thus obvious in view of E4, in order to solve the technical problem of providing an easy way of accessing favourite channels and programs.

The subject-matter of granted claim 1 is also objectionable starting from E5, which discloses an apparatus where the viewer may select favourites listed in a program guide for display.

The second auxiliary request should not be admitted into the appeal proceedings since claims can also be amended in written proceedings. Moreover, the objections with regard to the last feature of granted claim 1 were raised in the notice of opposition and the statement of grounds of appeal. The amendments to claim 1 are not admissible under Rule 80 EPC because they merely serve clarifying purposes, without changing the subject-matter of the claims. Thus the amendments do not contravene Article 123(2) EPC. However, the subject-matter of claim 1 lacks novelty and an inventive step for the same reason as granted claim 1.

The third auxiliary request filed during oral proceedings should not be admitted because the amendments contain added subject-matter and, therefore, contravene Article 123(2) EPC. Furthermore, marking a channel or a program while it is being displayed is known from E4, where the menus are overlaid on the currently-broadcast program. The subject-matter of claim 1 thus also lacks an inventive step over a combination of E3 and E4.

The subject-matter of claim 1 according to the fourth auxiliary request lacks an inventive step over a combination of E3, E4 and common general knowledge, since it is common sense for the skilled person to delete, from a program guide, information which is not relevant any more. This practice is evidenced in E5. Moreover, claim 1 does not say "immediately after" termination of a marked program.

Claim 10 according to the fifth auxiliary request is not supported by the description (Article 84 EPC) in that it allows unmarking independently of marking channels or programs.

Claim 1 according to the sixth auxiliary request infringes Article 123(2) EPC in that it sets out means for unmarking either channels or programs in response to a fourth signal, whereas only unmarking a channel was initially foreseen in the described embodiment. Claim 1 also infringes Article 84 EPC (support by the description) for essentially the same reason.

The subject-matter of claim 1 according to the sixth auxiliary request lacks an inventive step because the additional feature of unmarking a marked entry is trivial and marking/unmarking by sequentially asserting a button on a remote control is well known, for instance from E3 or E5. Using it as an alternative to the menu of E3 or E5 is obvious.

XXI. The respondent's arguments may be summarised as follows.

In the grounds for appeal the appellant informed the EPO for the first time that the opponent had changed its name and provided evidence to support that change of name. Hence the evidence was filed after the two-month period under Article 108 EPC for filing the notice of appeal. It was clear from the decisions T 956/03 and T 1137/97 that the patent proprietor as well as the opposition division and the board of appeal should know the identity of the party that is opposing a patent or that is filing an appeal against a decision from opposition proceedings. Thus there should be procedural certainty as to who are the appropriate parties. In decision T 956/03 (point 6 of the Reasons), it was held that "legal certainty requires that the identity of a party, including a replacement party, be established beyond doubt as soon as possible and that principle cannot be allowed to vary according to the type of transfer or the facts peculiar to one case". Moreover, decision T 956/03 (and the case law to which it refers in point 7 of the Reasons) makes it clear that a transfer of an opposition can only be acknowledged from, at the earliest, the date when adequate evidence to prove the transfer has been filed. Following the reasoning and logic in decision T 956/03,



in the present case, the change of the appellant's name can only be acknowledged as from the date when the evidence for the change was filed with the EPO. Although said evidence could clearly have been filed along with the notice of appeal, it was only filed after the two-month period for filing the notice of appeal under Article 108 EPC. Moreover, since there was no indication of a change of name in the notice of appeal, neither the EPO nor the patent proprietor knew who was filing the appeal. Hence the appeal should be rejected as inadmissible under Article 107 EPC together with Rule 101(1) EPC, because IGR GmbH & Co. KG was not the acknowledged name of the party to the first-instance opposition proceedings when the notice of appeal was filed.

Granted claim 1 should be interpreted as follows:

- Programs and channels are technically different: they are also selected using different commands (first and second signals) in claim 1.
- Programs and channels are also treated differently in the apparatus of claim 1. Storing signals to recall a marked program requires storing other data (for instance a start time and an end time) than storing signals to recall a marked channel (for instance a channel number or frequency). Furthermore, marked programs are automatically removed when the program ends, whereas marked channels are remembered permanently until the viewer removes the mark.

- Marked programs are displayed in response to the third signals only if they are currently broadcast, whereas marked channels are always displayed in response to the third signals.
  
- The third signals are signals generated in response to the viewer pressing a recall button on a remote control, as is apparent from the exemplary embodiment in the description. Interpreted in the light of the description, these signals cause the apparatus to recall the programs and channels marked, by sequentially pressing a button.

E3 discloses an apparatus where a program guide is filtered based on viewer's preferences. The stored data are different from the signals stored in the invention to recall channels and programs. The personal program guide of E3 does not allow a direct selection for sequentially displaying the entries in the guide. E3 thus does not suggest the means according to the last feature of granted claim 1.

E4 discloses a solution of sequentially displaying channels from a favourite list, which channels are in principle permanently broadcast. However, the program guide of E3 contains entries corresponding to programs not being currently broadcast, for instance future programs. Using the teaching of E4 in E3 would require skipping such entries, which is not suggested.

E5 does not disclose or suggest the means according to the last feature of granted claim 1.

The second auxiliary request should be admitted into the appeal proceedings because it contains amendments positively reciting that the various means are "arranged" to carry out their respective function, so that they directly address the question of claim interpretation raised by the appellant in the statement of grounds of appeal in relation to novelty and inventive step. Furthermore, the opposition division directly decided in favour of the respondent without holding oral proceedings and thus without providing the respondent an opportunity for further amendments in the opposition proceedings. The amendments are also not of a purely clarifying nature, since they more positively recite that the various means are actually "arranged" to carry out their respective functions, thereby helping to ensure novelty and inventive step of the invention claimed in claim 1. Hence the subject-matter of claim 1 has changed.

The third auxiliary request filed during oral proceedings should be admitted into the appeal proceedings because it remedies an objection raised by the appellant. The further objection of added subject-matter raised by the appellant against claim 1 thereof is spurious. As regards inventive step, the apparatus of E3, where marking is performed in menus, would have to be modified in a non-obvious manner to arrive at the invention, although video overlay on a displayed program is common general knowledge.

Claim 1 according to the fourth auxiliary request sets out means for removing terminated entries in a form not suggested in E5. In E5 the automatic deletion is postponed by a week after the entry is terminated

whereas, according to the claimed invention, it is done immediately. Hence the subject-matter of claim 1 is inventive.

Independent claims 1 and 10 according to the fifth and sixth auxiliary requests are essentially combinations of granted claims. Thus they are not objectionable under Article 84 EPC or Article 123(2) EPC.

Claim 1 according to the sixth auxiliary request sets out in its last two paragraphs means aiming to mark/unmark channels and programs more easily, quickly and intuitively, which departs from the menu-based options known from E3 or E5 in an inventive manner.

## **Reasons for the Decision**

1. The present decision was taken after the entry into force of the revised European Patent Convention (EPC) on 13 December 2007. At that time, the European patent in suit was already granted. The board has therefore applied the transitional provisions in accordance with Article 7(1), second sentence, of the Revision Act of 29 November 2000 and the decisions of the Administrative Council of 28 June 2001 (Special edition No. 1, OJ EPO 2007, 197) and 7 December 2006 (Special edition No. 1, OJ EPO 2007, 89). Articles and rules of the revised EPC and of the EPC valid until that time are cited in accordance with the citation practice (see the 14th edition of the European Patent Convention, page 6).

2. Admissibility of the appeal

2.1 As far as the admissibility of the present appeal is concerned, the provisions of the EPC 1973 are to be applied, since all the time limits for complying with the conditions for filing an appeal under Article 108 EPC 1973 had expired before the revised EPC entered into force on 13 December 2007 (see also J 10/07, OJ EPO 2008, 567, point 1 of the Reasons).

2.2 It was only in its reply to the board's communication under Article 15(1) RPBA, annexed to the summons to oral proceedings, that the respondent called into question the admissibility of the present appeal and requested as its new main request that the appeal be deemed inadmissible. In the board's view this was a rather late stage of proceedings for raising objections to the admissibility of the present appeal as the facts had not changed since the expiry of the periods for complying with the conditions for filing an appeal. However, the admissibility of an appeal has to be examined *ex officio* at every stage of the appeal proceedings (see also T 15/01, OJ EPO 2006, 153, point 1 of the Reasons). Hence the board has had to consider the respondent's new main request although it was filed long after the periods for filing an appeal had expired and after oral proceedings had been arranged.

2.3 The admissibility of the appeal has been called into question by the respondent with the argument that the notice of appeal was filed on behalf of the company IGR GmbH & Co. KG and the evidence for the change of name of the opponent was only filed after expiry of the

two-month period for filing an appeal and that, therefore, IGR GmbH & Co. KG was not the acknowledged name of the party to the first-instance proceedings when the notice of appeal was filed.

2.4 Article 107, first sentence, EPC 1973 provides that any party to proceedings adversely affected by a decision may appeal. If this requirement is not met, the appeal must be rejected as inadmissible under Rule 65(1) EPC 1973. The board thus has to determine first whether the company IGR GmbH & Co. KG can be regarded at the time of filing its notice of appeal as a party to the first-instance opposition proceedings (whether as original opponent or as successor to the original opponent), and thus, pursuant to Article 107 EPC 1973, a person entitled to appeal the decision of the opposition division.

2.5 The notice of opposition and the decision under appeal indicate as opponent the company Interessengemeinschaft für Rundfunkschutzrechte GmbH Schutzrechtsverwertung & Co. KG. The notice of appeal was filed on behalf of the opponent and the company IGR GmbH & Co. KG was indicated as opponent. In the statement of grounds of appeal the appellant submitted that the company Interessengemeinschaft für Rundfunkschutzrechte GmbH Schutzrechtsverwertung & Co. KG had changed its name to IGR GmbH & Co. KG.

2.6 The board considers that the copy of an excerpt from the Commercial Register filed by the appellant (see point V above) clearly shows that the above-mentioned change of name of the company Interessengemeinschaft für Rundfunkschutzrechte GmbH Schutzrechtsverwertung &

Co. KG was effective under German law as of 9 August 2006, i.e. before the notice of appeal was filed. This has not been contested by the respondent.

A company is a legal person and a mere change of its name does generally not cause a change of its legal personality. In other words a renamed company generally enjoys perpetual succession and does not thereby change its identity. Hence there is generally no transfer of assets from one company to another or universal succession by one company to all the rights and interests of another. In the filed copy of the excerpt from the Commercial Register there is no evidence of anything other than a change of name. Furthermore, the respondent has not asserted otherwise. The board concludes that the change of the opponent's name did not result in the transfer of opposition status to a third party in the present case. Hence the jurisprudence of the Enlarged Board of Appeal (G 4/88, OJ EPO 1989, 480 and G 2/04, OJ EPO 2005, 549) and of the Boards of Appeal (see Case Law of the Boards of Appeal, 6th edition, VII.C.5.1.) on the requirements for the transfer of opponent status does not apply in the present case.

- 2.7 The respondent referred to decisions T 1137/97 of 14 October 2002 and T 956/03 of 19 July 2006. However, it follows from the above that the facts of these cases differ from those of the present case, since they concern the transfer of the opponent status to a third party. In these decisions it was held that a transfer of opposition status can only be acknowledged as from the date when adequate evidence is produced, since it is a principle that a patent proprietor and, as the

case may be, the opposition division or the board of appeal should know the identity of the party opposing a patent. In both cases the appeal was found inadmissible because the entitlement of the transferee to replace the opponent and to appeal could not be established by adequate evidence at the time of filing of the notice of appeal or before the two-month period for filing an appeal expired, respectively. In the present case, however, the legal person which was the opponent in the first-instance opposition proceedings also filed the notice of appeal, using its new name IGR GmbH & Co. KG. Thus there is no doubt that the appellant was entitled to appeal the decision of the opposition division and that the appeal was filed in accordance with Article 107, first sentence, EPC 1973 by the party adversely affected by the appealed decision.

2.8 The respondent further argues that there was no indication in the notice of appeal of a change of the opponent's name and that, therefore, the appellant, using its new name, was not identifiable in the present case. The board thus also has to ascertain whether the notice of appeal contained sufficient information for identification of the appellant within the meaning of Rule 64(a) EPC 1973.

2.9 According to Rule 64(a) EPC 1973 the notice of appeal shall contain the name and address of the appellant in accordance with the provisions of Rule 26(2)(c) EPC 1973. The purpose of this provision is, apart from administrative purposes, to secure the appellant's identification and to allow establishment of whether or not the appeal was filed by a party to the proceedings



within the meaning of Article 107 EPC 1973 (see T 97/98, OJ EPO 2002, 183, point 1.3 of the Reasons).

Deficiencies and omissions regarding the appellant's name or address may be remedied under Rule 65(2), first sentence, EPC 1973 on invitation of the board of appeal, even after expiry of the two-month time limit under Article 108 EPC 1973 (see T 1/97 of 30 March 1999, point 1.1 of the Reasons and T 97/98, loc. cit., point 1.3 of the Reasons).

2.10 However, according to the jurisprudence of the Boards of Appeal, the appellant must be sufficiently identifiable within the period for filing an appeal (see T 533/93 of 24 October 1995, point 1.1 of the Reasons, T 1/97, point 1.1 of the Reasons and T 97/98, loc. cit., point 1.3 of the Reasons). This is the case if "it is possible to derive from the information in the appeal with a sufficient degree of probability, where necessary with the help of other information on file, e.g. as they appear in the impugned decision, by whom the appeal should be considered to have been filed" (T 97/98, loc. cit., point 1.3 of the Reasons; see also T 1/97, point 1.1 of the Reasons and the further decisions cited therein).

2.11 In the present case, the appeal was expressly filed in the name of the (sole) opponent, but in the notice of appeal the company IGR GmbH & Co. KG was indicated as the opponent, which was different from the name of the opponent indicated in the impugned decision and recorded in the European Patent Register at that time. However, in spite of this inconsistency, in the board's judgement the appellant was sufficiently identifiable

within the period for filing an appeal, since, in the notice of appeal, the appellant was clearly referred to as the opponent and the opponent's address, the number of the contested patent and the name and address of the professional representative were the same as those cited in the impugned decision and recorded in the European Patent Register at the time when the appeal was filed.

- 2.12 Accordingly, a deficiency in the indication of the name of the appellant could have been remedied under Rule 65(2), first sentence, EPC 1973 on invitation of the board of appeal, even after expiry of the two-month time limit under Article 108 EPC 1973. Due to the above-mentioned inconsistency in the name of the opponent, the board would normally have issued a communication under Rule 65(2), first sentence, EPC 1973, drawing the appellant's attention to the fact that the appeal appeared at first sight to have been filed in the name of a legal person other than the opponent in the first-instance proceedings and outlining the possible legal consequences depending on the circumstances of the case, which would have to be clarified by the appellant. However, before issuing such a communication, the board was informed of the change of the appellant opponent's name with the appellant's statement of grounds of appeal and the evidence attached thereto (see point V above). Thus it became apparent that the notice of appeal indicated the appellant opponent's correct new name according to the Commercial Register, Düsseldorf, Germany, and that the appellant was not a different legal person from the opponent in the first-instance opposition proceedings (see points 2.6 and 2.7 above). However, since the

opponent had not yet informed the EPO of this change of name, the new opponent's name had not been recorded in the European Patent Register at the time of filing of the appeal. This inconsistency was removed when the entry of the opponent's name in the European Patent Register was updated after receipt of the statement of grounds of appeal. Since the legal situation regarding the appellant's name was clarified and any deficiency regarding the requirements of Rule 64(a) EPC 1973 had been remedied with the update of the European Patent Register, there was no longer a need for a communication from the board under Rule 65(2), first sentence, EPC 1973.

2.13 In view of the above, the original opponent filed the notice of appeal and the requirements of Article 107, first sentence, and Rule 64(a) EPC 1973 are met. The present appeal is also in accordance with Article 106 and 108 as well as Rule 64(b) EPC 1973 and thus admissible.

3. The claims as granted (respondent's first auxiliary request

3.1 Claim interpretation

3.1.1 It is common ground that television programs and channels are in principle different, with programs being typically temporarily broadcast on a television channel.

3.1.2 Claim 1 sets out "means (10) for marking one or more of said channels" and "means (10) for marking one or more of said programs". These means are not limited to means

for marking a channel/program while the channel/program is being displayed.

3.1.3 Claim 1 sets out "means (21) for storing signals to recall said marked channels" and "means (21) for storing signals to recall said marked programs". These means may consist in a single device, for instance a memory, storing all these signals. These stored signals are interpreted as information, for instance data, allowing the apparatus to recall channels and programs, respectively. The information to recall a program may consist in channel information complemented with program start and end times, or in information identifying a program, for instance by its name, without reference to a channel. Such information is regarded by the board as being different from the information to recall a channel. Claim 1 is interpreted as comprising means (21) arranged to store the above distinguishable signals.

3.1.4 Claim 1 sets out "means for sequentially displaying said marked programs and channels in response to... third signals". Although the means are not limited to the particular embodiment described in the patent specification (see for instance paragraph [0023] thereof), the reference to "said marked programs and channels" implies in the board's view that these means cooperate with the other means in claim 1 so that the "third signals" cause the signals stored in the means (21) to be used to recall and display the marked programs or channels.

3.2 Novelty

- 3.2.1 It is not disputed that E3 discloses an apparatus according to the preamble of claim 1, in particular comprising means for marking a channel in response to first signals from said viewer, by adding it to a "like" list.
- 3.2.2 The viewer may also issue "second signals" to add a particular program to the "like" list, by marking it in the list of available programs (see E3, figure 13F and column 12, lines 37 to 51), or directly by adding the currently tuned program to the "like" list (see E3, column 12, lines 6 to 8). This implies that information, or signals, allowing the apparatus to recall this marked program is also stored in the apparatus, for instance as keywords in a viewer's profile (see E3, column 7, lines 37 to 47).

The stored signals are not further specified in granted claim 1. In the case of a program, the signals may in principle consist of any information allowing the intended program to be recalled. Storing a program start time and a program end time is also not implied in granted claim 1, since this information is not indispensable for recalling a program. For instance, such start/end time information is not even useful when recalling a program which is repeatedly broadcast at irregular time intervals. Thus the information stored in the viewer's profile in E3 anticipates the stored signals according to claim 1.

- 3.2.3 The first and second signals from the viewer, to which the means in the apparatus of granted claim 1 are responsive, are not defined further either. They are thus anticipated by any signals issued when the viewer

uses the remote control (30 in figure 1 of E3) when defining the "like" list in E3.

3.2.4 The "like" list of E3 is used to filter the program guide and to display on the television screen a personal program guide matching the viewer's preferences, i.e. a list of favourite channels and programs (see E3, figure 13M and column 13, lines 50 to 56). E3 does not mention whether the viewer may directly recall an entry from the personal program guide, let alone sequentially display the entries from the guide.

3.2.5 As a result, the apparatus of granted claim 1 differs from the apparatus known from E3 only by the means for sequentially displaying said marked programs and channels in response to respective one or more third signals from said viewer, as set out in the last feature of claim 1. The subject-matter of granted claim 1 is thus novel over E3 (Article 54(1) EPC 1973).

### 3.3 Inventive step

3.3.1 A program guide is normally used to access the listed channels and the programs currently broadcast on these channels, in addition to providing information about the programs. E4 discloses a convenient way of using such a guide, by sequentially displaying the items in a favourite list in response to the viewer repeatedly pressing a recall key. The guide contains entries for channels but not for programs (see column 17, lines 52 to 59).

- 3.3.2 The respondent argues that applying the teaching of E4 to E3 would result in sequentially displaying the channels, not the programs listed in the personal program guide. However, the skilled person would readily envisage including the favourite programs, since otherwise an incomplete sequence of favourites would be displayed, although the missing favourite programs would be being currently broadcast (on channels).
- 3.3.3 The guide in E3 is a list also containing entries for favourite programs not being currently broadcast. The respondent argues that applying the teaching of E4 in E3 would require skipping such entries when the user issues the third signals by pressing the recall key. This additional measure is a logical and obvious consequence of the guides being lists of favourites, both in E3 and E4, and of the third signals being instructions, which excludes displaying an (undesired) program currently broadcast on a channel which would otherwise carry a favourite (but not currently broadcast) program.
- 3.3.4 As a result, adding the functionality known from E4 to the program guide of E3 listing such favourite programs and channels is an obvious measure for the skilled person.
- 3.3.5 The subject-matter of granted claim 1 thus lacks an inventive step over a combination of E3 with E4.
- 3.3.6 Consequently, the ground for opposition raised by the appellant under Articles 100(a) and 56 EPC 1973

prejudices the maintenance of the granted patent. The first auxiliary request is accordingly not allowable.

4. Respondent's second auxiliary request

4.1 Article 13(1) RPBA

Article 13(1) RPBA stipulates that any amendment to a party's case after it has filed its grounds of appeal may be admitted and considered at the board's discretion. It further provides that the discretion should be exercised in view of, *inter alia*, the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy.

The second auxiliary request was filed after oral proceedings had been arranged. The amended claims according to the second auxiliary request were filed in reaction to a "means + function" objection raised in the statement of grounds of appeal. It is also true that this objection was raised in opposition proceedings but the opposition division rejected the opposition directly without holding oral proceedings or issuing a communication providing the respondent with an opportunity for further amendments. Hence, in the board's view, although amendments can be filed in written proceedings, there was no reason in the present case for the respondent to file amendments in the first-instance proceedings. Moreover, the amended claims differ from the claims according to the first auxiliary request (i.e. claims as granted) in setting out that the various means are actually especially arranged to perform the function. In the board's view,



these amendments do not raise complex issues. Therefore, the board, exercising its discretion under Article 13(1) RPBA, decided to admit the second auxiliary request into the proceedings.

#### 4.2 Admissibility of the amendments

4.2.1 As set out above, the amended claims according to the second auxiliary request were filed in reaction to a "means + function" objection raised in the statement of grounds of appeal. Thus the amendments directly address the question of claim interpretation raised by the appellant. In the present case, claim interpretation is decisive for determining the subject-matter of the claims. Hence, the amendments can influence the board's decision on novelty and inventive step. Lack of novelty and lack of inventive step are the grounds for opposition under Article 100 EPC 1973 raised by the appellant. Consequently, the amendments are regarded as occasioned by grounds of opposition, as required by Rule 80 EPC. Whether the amendments actually influence the interpretation adopted by the board is a matter of substantive examination, not of admissibility. Therefore, the amendments are admissible in accordance with Rule 80 EPC.

4.2.2 Although the application as originally filed does not contain the expression "arranged to", the board has no doubt that the means described were actually arranged to perform the functions associated with them. Thus the amendments do not infringe Article 123(2) EPC.

#### 4.3 Inventive step

4.3.1 The various means set out in granted claim 1 were interpreted by the board as arranged to perform their respective function (see point 3.1.3 above). As a result, the subject-matter of claim 1 as granted and of claim 1 according to the second auxiliary request is the same.

4.3.2 The subject-matter of claim 1 according to the second auxiliary request thus lacks an inventive step for the same reasons as set out above (point 3.3) with respect to granted claim 1. Hence the second auxiliary request is not allowable because the requirements of Article 56 EPC 1973 are not fulfilled.

5. Respondent's third auxiliary request

5.1 Article 13(1) RPBA

The claims according to the third auxiliary request were filed in direct reaction to the appellant's objection of added subject-matter (Article 123(2) EPC) raised in oral proceedings before the board against the claims of the third auxiliary request previously filed with the letter of 26 September 2011. In the board's view, these amendments do not raise complex issues. Therefore, the board, exercising its discretion under Article 13(1) RPBA, decided to admit the third auxiliary request into the proceedings.

5.2 Admissibility of the amendments

The claims differ from the claims according to the second auxiliary request essentially by setting out that each channel and program is marked while it is

being displayed. Disclosure for these amendments can be found on page 6, lines 9 to 12 of the European patent application on which the present patent is based, as it was originally filed. Hence the amended claims do not contravene Article 123(2) EPC.

### 5.3 Inventive step

5.3.1 E3 discloses an on-screen menu with an option of adding a currently broadcast program to the "like" list ("ADD CURRENT PROGRAM"; see column 12, lines 6 to 8 and figure 13D). It is usual in the art of video interfaces to overlay such menus on a current program while the program is being displayed, so that the viewer can continue viewing the program (see, for instance, E4, column 11, lines 24 to 30).

5.3.2 The board regards it as obvious to foresee a further option of adding a currently broadcast channel to the "like" list, while the channel is being displayed, as an addition to the already present option of adding a channel number, in analogy to the "ADD CURRENT PROGRAM" option.

5.3.3 The respondent argues that the present invention does not use an overlay menu (partially) masking the displayed channel or program when it is marked. However, claim 1 does not exclude the marking using an overlay menu, or while an overlay menu is displayed (see also figures 3A and 3B and paragraphs [0026] and [0027] in the patent in suit). Therefore, this argument does not convince the board.

5.3.4 As a result, the subject-matter of claim 1 according to the third auxiliary request lacks an inventive step over a combination of E3 with E4 and common general knowledge. The third auxiliary request is accordingly not allowable because the requirements of Article 56 EPC 1973 are not fulfilled.

6. Respondent's fourth auxiliary request

6.1 Claim 1 of the fourth auxiliary request differs from claim 1 according to the second auxiliary request essentially by further setting out that the "means (21) arranged to store signals to recall said marked programs removes the signals to recall a marked program responsive to said broadcast electronic program guide information signals indicative of a termination of said marked program".

6.2 This feature solves the technical problem of reducing the size required for the storage means, in particular by preventing it from overflowing. In addition to considerations of memory efficiency, it also contributes to keeping the program guide short and free of undesired or irrelevant entries.

6.3 The skilled person was confronted with these problems in the prior art E3, which foresees an option for the viewer to delete an item manually in the "like" list (see figure 13D). The board regards it as a matter of common sense to complement this manual deletion with an automatic removal of already terminated programs. In the apparatus of E3, which receives electronic program guide information, the most straightforward implementation would be to make the removal of

terminated programs responsive to that information. By way of illustration, similar considerations have led in E5 to automatically removing an entry from a list one week after the entry is terminated, in addition to a manual removal by the viewer (see E5, column 15, lines 40 and 41).

6.4 The respondent argues that E5 discloses the removal of entries from a list in the different context of scheduling several programs of a series, using a purely time-based (one-week) criterion. The board agrees. However, claim 1 leaves it open what kind of programs, and when exactly such programs, are removed after termination. In particular, claim 1 does not set out that programs are removed "immediately after termination". In conclusion the board regards E5 as an illustration (in a slightly different form) of the same considerations underlying both E3 and the present invention, namely reducing the storage requirements and keeping the program guide clean of irrelevant or terminated entries.

6.5 As a result, the subject-matter of claim 1 according to the fourth auxiliary request lacks an inventive step over a combination of E3 with E4 and common general knowledge. The fourth auxiliary request is accordingly not allowable in view of Article 56 EPC 1973.

7. Respondent's fifth auxiliary request

7.1 Independent method claim 10 according to the fifth auxiliary request combines the wording of granted independent method claim 12 and granted dependent claim 16, as well as the wording of granted dependent

- apparatus claim 6, which was dependent on granted apparatus claims 1 and 5.
- 7.2 Thus the amendments of the claims in the appeal proceedings combine features of claims of different categories. Such amendments are to be fully examined as to their compatibility with the requirements of the EPC, in particular the requirement of support by the description under Article 84 EPC 1973 (see G 9/91 and G 10/91, OJ 1993, 408 and 420, point 19 of the Reasons).
- 7.3 A single embodiment is described in the patent specification, in which sequentially pressing the select button on the remote control sequentially toggles between the three stages 'mark program', 'mark channel and unmark program' and 'unmark channel', in that order (see paragraphs [0019] to [0021] in the patent specification).
- 7.4 The board does not interpret the enumeration of the "first, second, or fourth signals" in the last paragraph of claim 10 as defining the order of their generation when the first button is asserted sequentially. Indeed, the order is different in the embodiment, in which program marking (in response to a second signal) takes place before channel marking (in response to a first signal).
- 7.5 Claim 10 leaves it open whether a program or a channel is unmarked in response to a fourth signal. This is not supported in the single embodiment, in which only a marked channel can be unmarked in response to a fourth signal, with the program having been previously unmarked in response to a second signal.

7.6 As a result, amended independent method claim 10 is not supported by the description and it thus infringes Article 84 EPC 1973. The fifth auxiliary request is accordingly not allowable.

8. Respondent's sixth auxiliary request

8.1 Article 13(1) RPBA

8.1.1 The sixth auxiliary request was filed in the oral proceedings and is derived from the fifth auxiliary request, in which method claim 10 was deleted (as were its dependent claims 11 to 20) in reaction to the objection under Article 84 EPC 1973 raised for the first time in the oral proceedings with respect to claim 10 of the fifth auxiliary request. Apparatus claims 1 to 9 are identical to claims 1 to 9 according to the fifth auxiliary request.

8.1.2 Thus the new sixth auxiliary request did not raise additional issues which could not be dealt with in the oral proceedings, and the board, exercising its discretion under Article 13(1) RPBA, decided to admit it into the proceedings.

8.2 Extension of subject-matter and support by the description

8.2.1 The board agrees that, in the described embodiment, the "means arranged to unmark" only unmark a channel (see page 7, lines 3 to 7 corresponding to paragraph [0021] in the patent specification). As a result, the subject-matter of claim 1 is broader than the embodiment

described. However, the wording of the last two paragraphs of claim 1 corresponds to the wording of claims 5 and 6 of the patent specification which were dependent on claim 1, with the immaterial difference of setting out "means arranged to unmark" instead of "means for unmarking" (see also paragraph 3.1.3 above). In other words, claim 1 according to the present sixth auxiliary request thus essentially corresponds to claim 6 (dependent on claims 1 and 5) of the patent specification.

8.3 The objections of extension of subject-matter and lack of support by the description raised by the appellant are not directed or related to the differences between claim 1 of the sixth auxiliary request and claim 6 of the patent specification, as identified and judged immaterial by the board in the foregoing paragraph. Rather, they are directed to a feature (the unmarking of either a channel or a program in response to a fourth signal) already present in claim 5 as granted.

8.3.1 Extension of subject-matter was not raised as a ground for opposition under Article 100(c) EPC 1973 in the opposition proceedings against the claims of the granted patent but was raised for the first time in the appeal proceedings. Hence it is a fresh ground for opposition, which may be considered in the present appeal proceedings only with the approval of the respondent (see G 9/91 and G 10/91, loc. cit., point 18 of the Reasons). The board considers therefore that examining this ground for opposition would unallowably extend the legal framework of the appeal.



8.3.2 The board further considers, in accordance with the established case law of the boards of appeal, that it has no power under Article 101(3) EPC to examine an objection under Article 84 EPC 1973 because this objection does not arise out of amendments made after the grant of the patent but out of a feature already present in a combination of claims as granted (see Case Law of the Boards of Appeal of the EPO, 6th edition, section VII, D.4.2).

8.4 Novelty and inventive step starting from E3

8.4.1 The appellant admits that the subject-matter of claim 1 is novel over the prior art E3.

8.4.2 The features set out in the last two paragraphs of claim 1 solve the problem of providing a different and convenient way for the viewer to provide the signals to interact with the apparatus, when starting from E3 as the closest prior art.

8.4.3 The board agrees with the appellant that sequentially pressing a single button to toggle between functions is a known alternative to pressing different buttons, each dedicated to one of these functions (see for instance E3, column 3, lines 18 to 21; column 8, lines 43 to 46; and column 14, lines 14 and 15).

8.4.4 However, the board is not convinced that the skilled person would envisage opting for this solution in E3, for the following reasons.

In E3, marking and unmarking channels or programs are options offered when the viewer leaves regular

television viewing and enters the menu for setting up the "like" list (see column 11, lines 41 to 45 and figure 13D). A different button on the numeric key pad (34) of the remote control is assigned to each of these options, which buttons are assigned to other functions in other contexts, in particular to channel change in the context of regular television viewing (see figure 1 and column 3, lines 22 to 24). Thus in E3 new functions are attributed to buttons rendered freely assignable due to the change of context. Hence the skilled person is not confronted in E3 with a limited number of keys available to perform a number of functions, as is the case in the present application.

Furthermore, E3 typically discloses toggling between two options (ON/OFF) using a single button. The menu in E3 comprises six related options in the context of setting up the "like" list. Subsuming all these options under a single button would render the operation impractical for the viewer. Consequently, the skilled person aiming to solve the problem underlying the invention would further have either to decide which of the six related options to include in the sequence, or to organize the menu differently. The board regards these further adaptations as going beyond normal design choices, in the absence of a hint in the prior art cited in the present opposition appeal proceedings.

- 8.4.5 In the board's view, the skilled person would thus not arrive at the subject-matter of claim 1 starting from E3.

8.4.6 As a result, the subject-matter of claim 1 according to the sixth auxiliary request involves an inventive step (Article 56 EPC 1973).

8.5 Novelty and inventive step starting from E5

8.5.1 E5 was cited as novelty-destroying in the statement of grounds of appeal. E5 was also regarded as the closest prior art by the opposition division. The appellant, however, did not raise an objection of lack of novelty based on D5 against the sixth auxiliary request.

8.5.2 E5 relates to an apparatus, in which the viewer may restrict a program guide to channels of interest (see for instance column 14, lines 36 to 42), with an additional option of adding a program (or a series) of interest to a schedule (see column 15, lines 21 to 32; column 16, lines 18 to 23). These options are available in two separate setup menus ("PG C Channel Restriction List Setup" and "PG+ Schedule Setup", respectively; see also column 12, lines 31 to 42).

8.5.3 Generating signals to mark a channel or a program or to unmark them, by sequentially asserting a button on the remote control, would require a complete redesign of the menu structure of E5, for instance by merging the separate setup menus. This, however, is not suggested in the prior art cited in the present opposition appeal proceedings.

8.5.4 As a result, the subject-matter of claim 1 according to the sixth auxiliary request involves an inventive step over any combination of the cited prior art starting from E5 (Article 56 EPC 1973)

8.5.5 The appellant's objections starting from documents E1 or E2 rely on an interpretation of claim 1 according to which channels and programs are not distinguished, which interpretation is not endorsed by the board (see the reasons above). Furthermore, these documents are acknowledged by the appellant as being of similar content to E4 and less relevant than E3 or E5. As a result, they do not prejudice the maintenance of the patent in suit.

8.6 In conclusion, the subject-matter of claim 1 according to the sixth auxiliary request is novel and involves an inventive step.

8.7 The appellant raised no objection to dependent claims 2 to 9.

9. In view of the above the sixth auxiliary request is allowable.

## Order

### For these reasons it is decided that:

1. The appeal is admissible.
2. The decision under appeal is set aside.
3. The case is remitted to the first-instance department with the order to maintain the patent in amended form with claims 1 to 9 according to the sixth auxiliary request, filed during the oral proceedings of 27 October 2011, and a description to be adapted.

The Registrar

The Chair

K. Boelicke

T. Karamanli