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**Datasheet for the decision
of 5 September 2013**

Case Number: T 0521/10 - 3.5.05

Application Number: 01902035.3

Publication Number: 1257898

IPC: G06F 3/14, H04N 5/445,
H04N 7/14

Language of the proceedings: EN

Title of invention:
Electronic programming guide

Applicant:
JLB Ventures LLC

Headword:
Electronic programming guide/JLB

Relevant legal provisions:
EPC Art. 54(2), 123(2), 128(4)
RPBA Art. 15(3)

Relevant legal provisions (EPC 1973):
EPC Art. 56

Keyword:
"Disclosure by incorporation by reference"
"Priority validly claimed - (no)"
"Added subject-matter - (yes)"
"Novelty - (no)"
"Inventive step - (no)"

Decisions cited:
T 0737/90

Catchword:
see point 3



Case Number: T 0521/10 - 3.5.05

D E C I S I O N
of the Technical Board of Appeal 3.5.05
of 5 September 2013

Appellant: JLB Ventures LLC
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 30 October 2009
refusing European patent application
No. 01902035.3 pursuant to Article 97(2) EPC.

Composition of the Board:

Chair: A. Ritzka
Members: M. Höhn
G. Weiss

Summary of Facts and Submissions

I. This appeal is against the decision of the examining division, posted on 30 October 2009, refusing European patent application No. 01902035.3 on the grounds of Article 123(2) EPC, Article 84 EPC 1973, Article 54(2) EPC and Article 56 EPC 1973, in particular in the light of prior-art documents

D2: WO 99/23831 A2,
D5: WO 98/06219 A1,
D6: WO 99/53688 A2 and
D8: US 5724492 A1.

II. The notice of appeal was received on 4 January 2010. The appeal fee was paid on the same day. The statement setting out the grounds of appeal was received on 2 March 2010. The appellant requested that the appealed decision be set aside and that a patent be granted on the basis of the nine sets of claims filed with the statement setting out the grounds of appeal as the main request and first to eighth auxiliary requests. Oral proceedings were requested on an auxiliary basis.

III. A summons to oral proceedings, to be held on 25 June 2013, was issued on 3 April 2013. In an annex accompanying the summons the board expressed the preliminary opinion that the subject-matter of independent claim 1 of all requests appeared to fulfil neither, the requirements of Article 123(2) EPC, nor those of novelty (Article 54(2) EPC) and inventive step (Article 56 EPC 1973) *inter alia* in view of the disclosure of D9 (WO 00/46680 A1) and D10 (GB 2313246 A). Both documents were introduced into the

proceedings on the board's own motion in accordance with Article 114(1) EPC. Since D9 was cited in the present application, it was considered to be known by the appellant. D10 was related to the proceedings of US 2002/0166122 A1, a family member of D9 having an inventor in common with the present application. The board gave its reasons for the objections and explained why it did not consider the appellant's arguments convincing.

- IV. By communication dated 16 April 2013 the oral proceedings were rescheduled to 5 September 2013.

- V. By letter dated 5 August 2013 the appellant submitted a main request, a first auxiliary request and a second auxiliary request together with further arguments supporting these requests.

- VI. By letter dated 4 September 2013 the board was informed that the appellant would not be represented at the oral proceedings. The board was requested to make a decision on the basis of the written proceedings.

- VII. The appellant requested in writing that the decision under appeal be set aside and that a patent be granted on the basis of one of the three sets of claims filed with letter dated 5 August 2013 as the main request and first and second auxiliary requests. Furthermore, as the letter of 5 August 2013 did not deal with the previous requests, the board proceeded that the main request and the first to eight auxiliary requests submitted with the statement setting out the grounds of appeal filed with letter dated 2 March 2010 were still pending.

VIII. Independent claim 1 according to the main request submitted with letter dated 5 August 2013 reads as follows:

"1. A method comprising:
displaying an electronic programming guide on a screen, said programming guide indicating what programs are being provided on various channels; and
displaying in a window region within said programming guide a plurality of said programs, wherein displaying each of said plurality of said programs comprises:
a) providing a pixel array depicting one of said programs and a video clip previously stored in memory;
b) mapping said pixel array to a geometric surface, said geometric surface forming a shape to assist a viewer in determining what is being shown on said one of said programs; and
c) generating an image of said one of said programs and said video clip by binding said mapped pixel array to said geometric surface,
wherein the geometric surfaces for the said programs correspond to different objects in the window region."

IX. Oral proceedings were held on 5 September 2013 in the absence of the appellant. After due deliberation on the basis of the written submissions, the board announced its decision.

Reasons for the Decision

1. Admissibility

The appeal complies with Articles 106 EPC 1973, 107 EPC and 108 EPC 1973 (see Facts and Submissions, point II above). It is therefore admissible.

2. Non-attendance at oral proceedings

By letter dated 4 September 2013 the board was informed that the appellant would not be represented at the oral proceedings and was requested to make a decision on the basis of the written proceedings. The board therefore considered it expedient to maintain the date set for oral proceedings. No-one attended on behalf of the appellant.

Article 15(3) RPBA stipulates that the board is not obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case.

Hence, the board was in a position to announce a decision at the end of the oral proceedings.

3. Original disclosure and effective filing date

Claim 1 was amended and is now directed to the embodiment disclosed on page 27, line 16 onwards of the published application, i.e. the A1 publication. This is the case for all requests. The enabling disclosure for this embodiment, in particular for the first part of

feature b) and feature c) of claim 1, relies on the content of patent applications WO 00/46680 (D9), US 09/378184 and US 09/378220 incorporated by reference. There is no explicit disclosure of how exactly a pixel array is mapped to a geometric surface and how an image is generated of the program and a video clip by binding the mapped pixel array to the geometric surface.

3.1 The reference to WO 00/46680 (D9) was not present in the priority document of the present application. The board notes that WO 00/46680 was only filed on 2 February 2000, which is later than the claimed priority date of 16 January 2000 for the present application. As far as the subject-matter of claim 1 is based on the disclosure of WO 00/46680, the priority is not validly claimed and the effective filing date of claim 1 is consequently 12 January 2001. Since WO 00/46680 was published on 10 August 2000 it is pertinent prior art against the present application for subject-matter having the filing date as its effective date which is the case for claim 1.

3.2 Incorporated applications US 09/378184 and US 09/378220 do not fulfil the requirements set out in T 737/90 of 9 September 1993 (see Reasons, No. 3) and Case Law of the Boards of Appeal, 7th ed. 2013, II. C. 3.2, pp. 307 and 308 (see also Singer/Stauder, The European Patent Convention, Commentary, 3rd edition, Article 83, No. 34). In order to be validly incorporated according to this case law each document must fulfil the following:

(i) a copy of the document was available to the Office on or before the date of filing of the application; and

(ii) the document was made available to the public no later than on the date of publication of the application under Article 93 EPC.

Neither of the two documents was available to the public on the date of filing of the present application. The only publication available to the EPO originating from US 09/378184 and US 09/378220 is US 2002/0166122 A1, a continuation-in-part application published on 7 November 2002, i.e. later than the publication date 19 July 2001 of the present application.

3.3 It is noted that WO 00/46680 (D9), in contrast to what is stated on page 27, lines 18 and 19 of the published application in suit, does not correspond to US 09/378220, but to US 09/378270 (see field 30, Priority Data on the first page of WO 00/46680), of which the filing date is 20 August 1999, as stated on page 27, lines 20 and 21 of the published application. In the board's view the correct filing date of US 09/378220 is 19 August 1999. It therefore appears that the applicant erroneously referred to US 09/378220, but intended to refer rather to US 09/378270.

3.4 In the annex to the summons to oral proceedings the appellant was invited to provide evidence that the above mentioned requirements were fulfilled for US 09/378184 and US 09/378220, or US 09/378270 respectively (e.g. by having been publicly accessible in the application dossier before the date of publication of the present application and therefore having been made public by analogy with Article 128(4) EPC). However, the appellant did not react to this invitation. No arguments or facts contradicting the

board's reasoning were presented with regard to the aforementioned problems concerning the disclosure and effective filing date. The board takes this as meaning that the appellant accepts the board's reasoning.

- 3.5 For this reason the board concludes that only WO 00/46680 (D9) has been validly incorporated by reference and the subject-matter of claim 1 of all requests, for the reasons given above, only has the filing date of the present application as its effective date, with D9 being prior art relevant to claim 1.

Main request (filed with letter dated 5 August 2013)

4. Article 123(2) EPC

Claim 1 specifies that the geometric surface forms a shape to assist a viewer in determining what is being shown on a program (see feature b). The board agrees with the examining division's objection that this amendment does not comply with the provisions of Article 123(2) EPC (see point 1 of the decision under appeal). The corresponding embodiment in the application as filed lacks a direct and unambiguous disclosure for the fact that the shape assists the viewer in determining what is being shown. It is the description of a program and the motion pictures in the video clip that assist the viewer in determining what is being shown, rather than the shape of the geometric surface. The board does not agree with the appellant's argument that page 27, lines 9 to 21 provides an antecedent basis, because this passage only discloses a polyhedron having the form of a cube of which the shape

does not assist a viewer in determining what is being shown on a program.

The board agrees with the examining division's reasoning that only pictograms may be bound to geometric surfaces forming a shape to assist the viewer in determining what is being shown. The board does not agree with the appellant's argument (see page 2, first paragraph of the statement setting out the grounds of appeal) that video clips as specified in claim 1 could be classified as pictograms in accordance with the specification.

- 4.1 No counter-arguments were presented by the appellant. The board therefore maintains the objection under Article 123(2) EPC contained in the decision under appeal.

First auxiliary request (filed with letter dated 5 August 2013)

5. Article 123(2) EPC

Claim 1 still specifies that the geometric surface forms a shape to assist a viewer in determining what is being shown on a program (see feature b). The requirements of Article 123(2) EPC are therefore not fulfilled for the reasons set out in point 4 above.

Second auxiliary request (filed with letter dated 5 August 2013)

6. Claim 1 of this request does not include the feature that the geometric surface forms a shape to assist a viewer in determining what is being shown on a program.

7. Article 54(2) EPC - Novelty

7.1 D10 is considered to be the closest prior art relevant to claim 1. D10 discloses simultaneously displaying information on a plurality of programs being provided on various channels (see e.g. page 1, lines 8 to 12, figures 1 and 5). D10 further discloses indicating what programs are being provided on various channels by displaying in a window region video images of a plurality of programs (see e.g. page 19, line 17 to page 20, line 7 and figure 5 or 6). The video images for each channel are constantly sampled at intervals and stored in a video image memory (see e.g. page 16, lines 6 to 10 and page 15, line 17 to page 16, line 3; see also page 18, lines 12 to 14; page 25, lines 19 to 25). Hence, D10 discloses providing a pixel array depicting a channel, i.e. a program, and video images, i.e. a video clip according to claim 1.

D10 further discloses a graphics engine for mapping the pixel array to a geometric surface forming a shape (see e.g. figure 5 showing a polyhedron with the shape of a cube) which is meant to assist a viewer in determining what is being shown on different channels. The graphics engine is a three-dimensional image processor with a texture mapping function (see e.g. page 16, line 4 onwards), thereby binding the mapped pixel array to the geometric surface according to claim 1.

Since this method for channel selection disclosed in D10 indicates what programs are being provided on various channels, it is considered to have the function of an electronic programming guide according to claim 1.

7.2 In the board's judgement, the additional feature of claim 1 according to which the geometric surfaces for the programs correspond to different objects in the window region is also disclosed in D10.

According to page 27, lines 16 to 18 of the present application the different sides of a polyhedron forming a cube are considered to be "geometric surfaces" (see line 17). The expression "different objects" in claim 1 is broad and therefore can also be interpreted broadly. The board interprets the corresponding feature to comprise not only different shapes, but also several objects of the same shape being located at different places of the window region. This is in accordance with the embodiment involving a video clip which is based on a polyhedron forming a cube of which the six sides are considered to be different objects with corresponding geometric surfaces (as disclosed on page 27 of the present application) and which has to be regarded as falling under the scope of claim 1.

However, the same concept is disclosed in D10 (see e.g. figure 5 showing a polyhedron with the shape of a cube) wherein every side of the cube is considered to be an object with a geometric surface to which different video pictures corresponding to a program are mapped by binding the pixel array to the geometric surface. D10 hence discloses for a plurality of programs the use of geometric surfaces which correspond to different objects in the window region according to claim 1.

Thus, D10 anticipates the subject-matter of claim 1, which therefore lacks novelty (Article 54(2) EPC).

Main request and second to eighth auxiliary requests (as filed with the statement setting out the grounds of appeal)

8. Article 123(2) EPC

Claim 1 of all these requests specifies that the geometric surface forms a shape to assist a viewer in determining what is being shown on a program. It therefore does not fulfil the requirements of Article 123(2) EPC for the reasons set out in point 4 above.

First auxiliary request (as filed with the statement setting out the grounds of appeal)

9. Claim 1 of this request further specifies the use of a 3D graphics accelerator to generate images of each program and video clip.

Article 56 EPC 1973 - Inventive step

9.1 D10 discloses the use of a graphics engine for mapping the pixel array to a geometric surface forming a shape which is meant to assist a viewer in determining what is being shown on different channels. The graphics engine is a three-dimensional image processor with a texture mapping function (see e.g. page 16, line 4 onwards). The board regards it as an obvious design alternative for the skilled person in the light of the disclosure of a 3D image processor in D10 also to consider the use of such a known 3D graphics accelerator (see e.g. figure 4 of D2) without the need for inventive skills.

The subject-matter of claim 1 of this request is therefore rendered obvious by D10 in the light of the disclosure of D2 or the skilled person's common general knowledge.

- 9.2 The use of a 3D graphics accelerator to generate images of each program and video information was also known from D9 (see also statement on page 27, lines 23 and 24 of the present application).

The board judges that the subject-matter of claim 1 is alternatively rendered obvious by D9. This is in accordance with the disclosure on pages 27 and 28 of the description of the present application that D9 discloses mapping video images depicting menu options onto geometric surfaces using 3D accelerator technology.

When starting from an electronic programming guide, such as that disclosed in D5 (see e.g. figure 1 and abstract), providing information on a plurality of programs and a video window for a particular channel (see e.g. page 7, lines 22 and 23), the objective technical problem underlying features a) to c) of claim 1 is regarded as being to provide video information for more than only one channel in the video window. The solution to this problem according to claim 1 is rendered obvious by D9, which addresses and solves this problem (see e.g. page 1, lines 26 and 27 and page 7, line 4 onwards) by involving the use of a 3D graphics accelerator (see above).

The subject-matter of claim 1 of this request is therefore rendered obvious by a combination of the teachings of D5 and D9.

10. Thus, none of the requests fulfils the requirements of the EPC.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:

K. Götz

A. Ritzka