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**Datasheet for the decision  
of 6 June 2014**

**Case Number:** T 0901/10 - 3.5.06

**Application Number:** 99941101.0

**Publication Number:** 1104555

**IPC:** G06F1/00

**Language of the proceedings:** EN

**Title of invention:**

SYSTEM FOR TRACKING END-USER ELECTRONIC CONTENT USAGE

**Applicant:**

Level 3 Communications, LLC

**Headword:**

Tracking electronic content/LEVEL 3

**Relevant legal provisions:**

EPC 1973 Art. 56  
EPC 1973 R. 30, 67  
EPC R. 137(3), 137(4)

**Keyword:**

Substantial procedural violation - (no)  
Amendments - non-  
conformance with Rule 137 (4) EPC not established -  
main request admitted  
Remittal to the department of first instance for further  
prosecution, possibly involving an additional search

**Decisions cited:**

T 0643/00, T 0708/00, T 1394/04, T 0747/06, T 1515/07,  
T 1866/08

**Catchword:**

See points 1.-1.3; 8.-9.3; 13.-13.4



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Case Number: T 0901/10 - 3.5.06

**D E C I S I O N  
of Technical Board of Appeal 3.5.06  
of 6 June 2014**

**Appellant:** Level 3 Communications, LLC  
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Broomfield, CO 80021 (US)

**Representative:** Gwilt, Julia Louise  
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**Decision under appeal:** **Decision of the Examining Division of the European Patent Office posted on 17 November 2009 refusing European patent application No. 99941101.0 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman:** D. Rees  
**Members:** M. Müller  
C. Heath

## Summary of Facts and Submissions

I. The appeal lies against the decision of the examining division, with reasons dispatched on 17 November 2009, to refuse the application pursuant to Article 113 (2) EPC because, after a main and five auxiliary requests had not been admitted under Rules 137 (3) and (4) EPC, there was no agreed and admitted text of the claims. In a section entitled "Obiter Dictum", the examining division argued that the last admitted set of claims lacked an inventive step over the document

D1: WO 97/43717 A1

as an obvious implementation of a business requirement, Article 56 EPC.

II. The file history, insofar as it is relevant for this decision, can be summarized as follows.

a) The International Searching Authority (ISA) performed a Partial International Search and invited the applicant to pay two additional search fees in view of its finding that the original claims covered three inventions vis-à-vis what was later labelled

D2: WO 98/13970 A1.

b) These fees were paid and the International Search Report consequently covered all claims. Also the International Preliminary Examination Report covered all inventions in which the first and second inventions were found to be inventive over D1 and the other available prior art.

c) The application entered the European phase in February 2001. In February 2007, the examining division invited the appellant to elect one invention for further examination. The applicant chose the first invention. In its first substantive communication, the examining division found the claims of the first invention to lack an inventive step over D1 as the obvious implementation of a "business requirement", the "traceability of data distribution".

d) In preparation for oral proceedings the appellant filed claim sets of a main and two auxiliary requests. During the hearing it filed further third to fifth auxiliary request claim sets. The examining division decided not to admit any of these requests, leading to the refusal of the application under Article 113 (2) EPC.

III. A notice of appeal was filed on 12 January 2010, the appeal fee being paid on the same day. A statement of grounds of appeal was received on 19 March 2010, along with which the appellant re-filed the six refused sets of claims according to a main and five auxiliary requests. In the grounds of appeal, the appellant requested that the decision be set aside and a patent be issued on the basis of claims according to the main request or, alternatively, on the basis of any of the auxiliary requests, and that the appeal fee be reimbursed. In the notice of appeal the appellant had requested that the decision be reversed and a patent be granted and, failing that, that oral proceedings be arranged.

IV. With a notice dated 8 May 2014, the board informed the appellant of its intention to set aside the decision, to remit the case to the first instance for further

prosecution and to refuse the request for reimbursement of the appeal fee and inquired whether, under these circumstances, the request for oral proceedings was maintained.

- V. With letter dated 28 May 2014 the appellant confirmed that "all requests as currently on file [were] maintained". "For the avoidance of doubt", however, the appellant declared it to be "acceptable to forego oral proceedings before the Appeal Board at this stage, if the application is remitted to the Examining Division as set out in the communication" of the board dated 8 May 2014. The maintained request for oral proceedings would, in case of a remittal, "apply to an opportunity for Oral Proceedings before the Examining Division", and further, if "Appeal proceedings became necessary after remission to the Examining Division", "to an opportunity for Oral Proceedings before the Appeal Board at that stage."
- VI. Independent claims 1 and 14 according to the main request read as follows:

"1. A method operable in an electronic content distribution system (100) comprising an electronic clearinghouse (105) that enables securely providing data (113) to a user device (109), the electronic clearinghouse being capable of communicating with said user device (109), the method comprising:  
(A) said content provider (101):  
(a1) encrypting said data with a symmetric key (623) to generate encrypted data; and  
(a2) encrypting said symmetric key with a second encryption key (621) to generate an encrypted symmetric key, said second encryption key having a corresponding second decryption key, wherein the second encryption

key is a public key of the electronic clearinghouse (105) and the second decryption key is a corresponding private key of the electronic clearinghouse;

(a3) providing usage conditions (517) for said data;

(a4) providing said encrypted data to a content hosting site (111), and

(a5) providing said usage conditions (517) and said encrypted symmetric key to an electronic digital content store (103);

(B) the electronic digital content store (103) providing transaction data (640) including store usage conditions (519) for said data;

(C) transferring the encrypted symmetric key and the transaction conditions (640) from the electronic digital content store (103) to the user device (109);

(D) the user device (109) transferring (i) the encrypted symmetric key, and (ii) the store usage conditions (519) from the user device (109) to an electronic clearinghouse (105) that possesses said second decryption key;

(E) said electronic clearinghouse (105) verifying:

(i) that the store usage conditions (519) are consistent with the usage conditions (517) for said data set by the content provider (101); and,

based at least in part upon said verifying, if said verifying is successful, said electronic clearinghouse (105):

(e1) decrypting the encrypted symmetric key to obtain said symmetric key; and

(e2) re-encrypting the symmetric key with a third encryption key, said third encryption key having a corresponding third decryption key, wherein the third encryption key is a public key of the user device, and said third decryption key is a corresponding private key of the user device; and

(e3) transferring the re-encrypted symmetric key to the user device. [sic]

(F) decrypting the encrypted data obtained from said content hosting site (111) in the user device (109).

14. An electronic content distribution system comprising an electronic clearinghouse (105) that enables securely providing data (113) to a user device (109), the electronic clearinghouse being capable of communicating with a user device (109), the system comprising:

means at a content provider (101) for encrypting data with a symmetric key (623) to generate encrypted data; means for encrypting said symmetric key with a second encryption key (621) to generate an [sic] symmetric key, said second encryption key having a corresponding second decryption key,

wherein the second encryption key is a public key of the electronic clearinghouse (105) and the second decryption key is a corresponding private key of the electronic clearinghouse;

means for transferring the encrypted data from a content hosting site (111) to the user device (109); means for providing usage conditions (517) for said data;

means for providing said usage conditions (517) and said encrypted symmetric key to an electronic digital content store (103);

means for the electronic digital content store (103) providing store usage conditions (519) for said data; means for transferring the encrypted symmetric key and said store usage conditions (519) from a from an [sic] electronic digital content store (103) to the user device; and

means for transferring (i) the encrypted symmetric key, and (ii) the store usage conditions (519) from the



user device (109) to a clearinghouse (105) that possesses said second decryption key;  
means for receiving at said clearinghouse (105) the encrypted symmetric key, and (ii) the store usage conditions (519) from the user device;  
means at said electronic clearinghouse (105) for verifying that the store usage conditions (519) are consistent with the usage conditions (517) for said data set by the content provider (101); and  
means at said electronic clearinghouse (105) for, based upon verifying performed by said means for verifying, if said verifying is successful:  
decrypting the encrypted symmetric key to obtain said symmetric key; and  
re-encrypting the symmetric key with a third encryption key, said third encryption key having a corresponding third decryption key, wherein the third encryption key is a public key of the user device, and said third decryption key is a corresponding private key of the user device; and  
transferring the re-encrypted symmetric key to the user device."

The wording of the claims according to the auxiliary requests is of no importance for the board's decision.

## **Reasons for the Decision**

### *The request for oral proceedings*

1. In its letter dated 28 May 2014 the appellant first stated that all requests on file were maintained, the request for oral proceedings included. Then it explained that oral proceedings before the board of appeal "at this stage" could be foregone, but that the

- request would "apply" to the examining division after remittal or to a future board of appeal in a further appeal case.
- 1.1 The board interprets the appellant's requests as follows: The request for oral proceedings before the board of appeal in the present appeal proceedings is withdrawn on condition that the case is remitted to the first instance for further prosecution, but it is requested to hold oral proceedings in the subsequent examination proceedings before the competent body, be it the examining division or a future board of appeal.
  - 1.2 With the withdrawal of the request for oral proceedings in the present appeal proceedings, the board of appeal is in a position to remit the case without holding oral proceedings.
  - 1.3 The appellant should be aware, however, that a request for oral proceedings before the examining division or a future board of appeal cannot be made at this stage. As explained in decision T 1866/08 (reasons 10), it is established jurisprudence of the boards of appeal that the appeal procedure is separate from the examination procedure; as a consequence, a request for oral proceedings to be held before the examining division made during the appeal proceedings will have to be filed again before the examining division. *A fortiori*, a request for oral proceedings in a possible further appeal proceedings in the future will have to be requested again during these appeal proceedings.

*The invention*

2. The invention relates to secure distribution of content over a network of computers based on an interaction be-

- tween, especially, one or more content providers, electronic stores, end user devices and electronic clearing houses (see figs. 5 and 6).
- 2.1 The content providers (p. 13, no. 1) define "metadata", especially "usage conditions" (p. 13, lines 20-22 and 27-28), to apply to the provided content, encrypt the content with a symmetric key and make the encrypted content and the metadata available to the electronic stores. The symmetric encryption key is made available to a clearing house, itself encrypted with the public key of that clearing house (see *e.g.* original claim 7).
  - 2.2 End users, at their "end user devices", may request to use a piece of content from an electronic store (see p. 14, no. 2) which delivers the requested content to the customer (p. 14, lines 14-16) along with the usage conditions. The store is responsible for authorizing the clearing house to release the decryption key (p. 14, lines 22-23; p. 31, lines 6-11), *e.g.* after the customer has paid for the requested service.
  - 2.3 Finally, the end user contacts the clearing house and requests the "decryption key for the content" (p. 15, 2nd par.). The clearing house validates the integrity and authenticity of the information in the request, verifies that the request was authorized and checks the usage conditions requested by the end user against those specified by the content provider (p. 15, lines 14-15; p. 25, lines 2-5).
  - 2.4 Only once these checks are successful is the decryption key sent to the end user (p. 15, lines 17-19), this time re-encrypted with the end user's public key (see *e.g.* p. 25, lines 6-8). The end user having thus

obtained both content and symmetric key can now decrypt and access the content.

- 2.5 The description stresses that the invention is "for tracking usage of content data" (p. 5, lines 19-30), that the clearing house provides the "record keeping for all transactions" (p. 15, lines 10 and 20) and regularly "transmits summary transaction reports" (p. 31, lines 12-14), but the clearing house is also responsible for "licensing authorization" (p. 15, line 10). It is explained that the symmetric key, encrypted with the public key of the clearing house, "can be transmitted anywhere without compr[om]ising the security of the content" since only the clearing house, a trusted entity, can decrypt it (p. 23, lines 21-25; p. 28, lines 19-20). It is disclosed that the clearing house may also "handle the billing" (p. 44, lines 5-8). It is further explained that the clearing house allows content to be distributed before the release date for the sale which can, at the release date, be immediately opened "without having to conten[d] for bandwidth and download time" on that date (when there is likely to be high demand; see p. 55, lines 8-14).

*The prior art referred to*

3. The decision refers only to a short passage in D1 which discloses that data is encrypted using a symmetric encryption key (e.g. DES), that this key is encrypted using the recipient's public key and that the encrypted DES key will be sent to the recipient along with the encrypted data (see D1, p. 32, lines 15-24 and decision, reasons 30.1). This passage is part of a section within D1 entitled "Public Key and Digital Signature Technology" (p. 30 ff.) which explains "conventional

cryptography", i.e. what was considered to be common knowledge in public key cryptography at the time.

4. In the decision (reasons 31), D2 was only referred to with respect to the dependent claims and only cursorily. D2 also was the basis of the ISA's unity assessment and is mentioned in the corresponding invitation to pay additional search fees as disclosing a clearing house which is able to provide encrypted data to a system. Apart from that, D2 did not play a significant role during examination.

*Rules 137 (3) EPC and 137 (4) EPC pre-2010*

5. The examining division considered that "prima facie" the added references to "usage conditions" in the claims of, in particular, the main request contravened Rule 137 (4) EPC pre-2010 and, on this basis, used their discretion under Rule 137 (3) EPC not to admit the main request (see decision under appeal, esp. reasons 12 and 17).
  - 5.1 More specifically, the examining division pointed out that none of the claims of the first invention as originally filed referred to the feature "usage conditions" (reasons 13, 2nd par.) and argued with reference to the search examiner's summary of the first invention (in the invitation to pay additional fees) that the first invention "related to securely providing data using encryption key and is not related in any way to the feature 'usage conditions'" (reasons 14.1). Specifically, the term "authorization" referred to in original claim 9, which was part of the first group of claims, had to be construed as "payment authorization" rather than more broadly so as to subsume "usage conditions" (reasons 15.2). The examining division further

argued that this feature rather related to the second invention searched (reasons 14.2). It was concluded that "the amendments relate[d] to subject-matter of a non-unitary invention which the applicant chose not to continue with" and "to unsearched subject-matter, Rule 137 (4) EPC" and therefore did not give its consent to the amendments pursuant to Rule 137 (3) EPC.

5.2 Essentially the same reasoning was used for some of the auxiliary requests, which are, however, not relevant for the present decision.

6. The board considers the following.

*Rule 137 (4) EPC*

7. It is a matter of fact that "usage conditions" were not mentioned in any of the original claims 1-9 of the first invention.

7.1 Claim 9 does not specify the nature of the "authorization for the data" to be performed prior to transmission. In the description it is disclosed that the electronic digital content store "is responsible for authorizing" the clearing house to release the decryption key and "authorizes the download" of the content (p. 14, lines 21-26). The clearing house verifies that a received request was so authorized (see p. 15, lines 13-14). It is disclosed that, normally, the store performs the "financial settlement" (p. 22, line 23; p. 24, lines 21-26), notwithstanding the fact that also the clearing house "may handle the billing" (p. 44, line 8). It is also clear from the description that the store will give its authorization only once the requested content was paid for (p. 24, line 27). Notably, however, the "credit card authorization" and "payment

authorization" (p. 24, line 21; p. 29, line 10) it may receive in the process must be distinguished from the "authorization" it eventually gives. The store is however disclosed to also "assist with" a few other things including "metadata extraction, secondary usage conditions, SC packaging, and tracking" (see p. 14, lines 16-20). The board thus agrees with the decision that the "authorization" checked according to claim 9 will in particular depend on the financial settlement, but disagrees that the term "authorization" must be construed as mere "payment authorization".

7.2 On the other hand, it is disclosed that the clearing house verifies compliance with the usage conditions (p. 11, lines 19-21; p. 15, lines 11-15) in addition to and separately from verifying the authorization. Therefore, the description also does not justify the conclusion that "authorization for the data" as claimed subsumes usage conditions.

7.3 On this account, the board also notes that original claim 9 depended on original claim 7 which specified a system by an unclear reference to "said method" comprising certain steps to be performed by a clearing house. In the board's view this has the consequence that claim 9, when it specifies the system to "further compris[e] authorization for the data", does not unambiguously imply this "authorization" to take place at the clearing house. Rather, the language of claims 7 and 9 does not exclude the reading that the claimed authorization refers to that given by the store to the clearing house and which also precedes any content transmission to the end user at the "second system".

8. The board agrees with the appellant that an individual feature may be disclosed to be relevant for several

inventions which lack unity amongst themselves (grounds of appeal, p. 6, 2nd par.). The fact that the feature "usage conditions" was originally part of the second invention claimed but not mentioned in any of the claims of the first invention is not *per se* sufficient to establish that the incorporation of that feature into the first invention causes a lack of unity.

9. The appellant refers to T 708/00 and T 643/00 to argue that for "amendments that only limit the claims, there is no room for [a non-unity] objection" (grounds of appeal, p. 7, 2nd par.).
  - 9.1 In its headnote III, decision T 708/00 states that "[a] subsequent amendment to limit the subject-matter of the main claim by additional features disclosed in the application as filed does not generally affect the notion of unity of invention under either Rule 86(4) or Rule 46(1) EPC.". The board notes that this sentence sets out a general rule to which there may however be exceptions. Also T 643/00 (reasons 3) in stating "[t]he amendments to the claims, however, only narrowed the scope of the original claims 1 and 5 without introducing any alternative solutions so that the subject-matter of the amended claims cannot be nor include 'other inventions' within the meaning of Rule 46(1) EPC" allows for amendments which do introduce alternative solutions and thus warrant a different conclusion. In decision T 1394/04 (reasons 5) such a situation is specifically described as follows: "[I]t may occur that the description of the application contains a further general inventive concept, distinct from that underlying the main claim and its dependent claims, if any, but not clearly identified or declared as such in the description. In such a case, if the subject-matter of the main claim based on the first inventive concept had



to be amended, on account of lack of novelty resulting from too broad terms used in the wording, any amendment of the claim pertaining exclusively to said further inventive concept could justify an objection of lack of unity 'a posteriori'."

9.2 An objection under Rule 137 (4) EPC is, therefore, not in principle unfounded simply because the amendment in question was a limitation of the main claim - or one of the main claims, as the case may be; notably in the present case the first invention contained three independent claims, namely original claims 1, 2 and 7.

9.3 Specifically, the board considers that a lack of unity cannot ensue between a claim and that claim amended by incorporation of a new feature, *i.e.* between a claim having feature A and an amended version having features A and B, but possibly between the so-amended claim and a previous dependent claim with a different special technical feature (see Rule 30 EPC 1973), *i.e.* between the amended claim with features A and B and the previous dependent claim with features A and C.

10. It must, therefore, be determined, whether amended claim 1 according to the main request lacks unity with original claims 1-9 according to the first invention.

10.1 Amended claim 1 incorporates all the features of the originally claimed first invention except those of original claims 6 and 9, comprising, respectively, "confirming that the data was paid" and "authorization for the data prior to transferring the ... data". Both of these features relate to controlling the release of the "first decrypting key" and thus the access to the encrypted content. The new feature of claim 1 about the clearing house verifying "usage conditions" as a pre-

condition for decrypting, re-encrypting and transferring the symmetric, first decryption key relates to a similar kind of transmission control.

- 10.2 The board thus is of the opinion that no lack of unity arises between amended claim 1 of the main request and any of the claims of the first invention due to the incorporation of the features relating to "usage conditions" into claim 1.

*Rule 137 (3) EPC*

11. The examining division exercised their discretion not to admit the new requests in view of their findings under Rule 137 (4) EPC.

- 11.1 While the board disagrees with the finding that the amendment contravenes Rule 137 (4) EPC, the observations made by the examining division are not entirely without merit: As already mentioned, the "usage conditions" had not been originally claimed. The board also agrees that the usage conditions do not specify the handling (*i.e.* decryption/re-encryption) of the first decryption key (see decision, reasons 16.7).

- 11.2 The board however notes that all independent claims 1, 2 and 7 of the first group of inventions relate to the clearing house. In the first system overview given by the description (p. 10, line 15 ff.), main functions of the clearing house are disclosed to be the transmission of the (re-)encrypted decryption key and the validation and verification of a number of preconditions for that transmission, the latter including the verification of the usage conditions (p. 15, lines 14-15).

11.3 The board thus concurs with the appellant that the introduction of the pertinent feature is a reasonable reaction of the applicant to the inventive step objection raised by the examining division.

11.4 The board therefore admits the present main request into the procedure.

*Scope of the search*

12. The examining division stated that amended claim 1 of the main request was not searched. The board agrees with the appellant that, to the extent that this is the case, an additional search has to be carried out now (see grounds of appeal, p. 7, lines 4-7).

*Substantial procedural violation and  
Reimbursement of the appeal fee*

13. The appellant requested the reimbursement of the appeal fee since "proper conduct of the examination proceedings would have avoided the necessity of an appeal" (see grounds of appeal last page, point VII). In view of Rule 67 EPC 1973, the board understands the appellant to imply that the way in which the examining division had applied Rules 137 (3) and (4) EPC amounted to a substantial procedural violation. The following reasons were given:

- a) Rejection of the amendments, which directly responded to objections raised by the examining division, as late - under Rule 137 (3) EPC - was inappropriate, in particular after the examination of an application has suffered undue delays (grounds of appeal, p. 3, 3rd par.).

- b) The way the examining division applied Rule 137 (4) EPC was incorrect and coloured by their preconceived view on the invention (grounds of appeal, par. bridging pp. 7-8).
  - c) Instead of not admitting the requests the examining division should have had an additional search carried out. Not doing this although it was manifestly necessary was a substantial procedural violation according to T 1515/07 and T 747/06 (grounds of appeal, p. 7, 1st par.).
- 13.1 Re. a) The appellant refers to the fact that after the application had entered the European phase no examination report was issued for six years, and even this only after the applicant had expressly requested accelerated examination. The board agrees with the appellant that this is an undesirably long delay. The board disagrees however that such delays, undesirable as they may be, oblige the examining division to be more lenient in applying Rule 137 (3) EPC.
- 13.2 Re. b) The examining division provided detailed reasons for its decision not to admit the auxiliary requests under Rule 137 (3) and (4) EPC, and the applicant was heard on these during oral proceedings. That the board has come to a different conclusion on this issue constitutes a difference in judgment rather than an error of procedure. The board therefore cannot see that the examining division has committed a substantial procedural violation by applying Rules 137 (3) and (4) inappropriately.
- 13.3 Re. c) The decisions cited by the appellant are not pertinent in the present case. In T 1515/07, the board decided about a case in which no search had initially

been carried out. Later on, the examining division had conceded a particular feature to constitute a technical solution to a technical problem but not carried out an additional search for the sake of expediency due to their finding that the invention lacked an inventive step already in view of prior art cited in the application. In the case at issue in T 747/06, independent claims 1 and 25 were searched as a first invention but none of the dependent claims. The board found that this distinction was wrong and that at least some of the dependent claims should have been searched as part of the first invention mentioned in the claims. Furthermore, the refusal of the examining division to perform an additional search in this situation - so as to complete the initial search - was found to constitute a substantial procedural violation. Neither of these cases warrants the conclusion for the present case that the examining division should have performed an additional search on a claim which was amended by an unsearched feature and which the examining division decided *ipso facto* not to admit. The question of whether or not an additional search has to be carried out for amended sets of claims only arises if and when these claims are admitted.

13.4 The board comes to the conclusion that the examining division has not committed a substantial procedural violation.

14. As a consequence, the appeal fee cannot be reimbursed (see Rule 67 EPC 1973).

*Article 56 EPC 1973 over D1*

15. In a section entitled "obiter dictum" the decision referred to the "last admitted set of claims ... dated

24 September 2008" which it argued to lack an inventive step over D1.

- 15.1 The decision found (reasons 30.1 and 30.2) that "the subject-matter of [the independent claims], insofar as understood in the light of the description, differ[ed] from the disclosure in D1 in that
- (i) the encrypted data is sent from a content hosting site ... to the user data system (109),
  - (ii) there is further comprised a clearinghouse 105 which is exclusively capable of decrypting the encrypted first symmetric key 6233 ... for the user data system."
- 15.2 According to the decision (reasons 30.4, 1st par.), difference (i) is "one of the two obvious options", namely whether the "encrypted key" and the "encrypted data" are sent to the user "by the same or by two entities". The skilled person would choose between them "in accordance to circumstances" and, furthermore, "which entity sends which information is dependent on the business requirement of the system (e.g. who is paid for doing what)."
- 15.3 With regard to difference (ii), it is argued that a clearing house is an obvious implementation of the "business requirement that the decryption of the encrypted first symmetric key ... is securely traceable to the content provider" (reasons 30.4, 2nd par.).
16. In the board's view, amended claim 1 of the main request differs from D1, especially the cited passage on page 32, lines 15-24, in the following ways:

- a) The existence of a clearing house (step E), especially one which checks usage conditions and controls the eventual release of the symmetric decryption key (steps i) and e3));
- b) the separate distribution of the data and the key, directly to the end user respectively via the clearing house;
- c) the encryption of the symmetric key with the key of the clearing house and its re-encryption on release; and
- d) the usage conditions being transferred to the user and then forwarded to the clearing house to be verified against the usage conditions "set by the content provider" (steps B) and E) i)).

16.1 The analysis of the decision under appeal is therefore incomplete with regard to the amended claims of the main request: Difference (ii) reflects the control of the clearing house over the release of the symmetric decryption key. Difference (i), in combination with difference (ii), corresponds to above-mentioned difference b). Not addressed are the differences relating to the feature "usage conditions", namely a) insofar as it relates to the clearing house checking the usage conditions and difference d), but also difference c) is not addressed.

16.2 As regards difference (ii) the board further notes the following: At the clearing house, the encrypted symmetric decryption key is first decrypted and then re-encrypted for the end user device. While this decryption may be "traced" at the clearing house, the clearing house seems unable to trace the eventual decryp-

tion of the re-encrypted symmetric key at the user device. Moreover, if it were not for the clearing house, the symmetric key would not have to be encrypted and re-encrypted in the first place: An encryption with the public key of the end user device would suffice. Hence, the board does not follow the reasoning in the decision that the clearing house serves to make "decryption of the encrypted first symmetric key ... traceable" and is an obvious implementation to achieve this effect.

16.3 Finally, the examining division has argued that the feature "usage conditions" has not been searched. Since the board decides to admit the main request now, an additional search has to be performed.

17. From the foregoing, the board concludes that the independent claims of the main request have not been exhaustively assessed for inventive step yet. The board therefore exercises its discretion under Article 111 (1) EPC and remits the case to the first instance for further prosecution.



## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The request for reimbursement of the appeal fee is refused.
3. The case is remitted to the department of first instance for further prosecution on the basis of the main request as filed with the grounds of appeal.

The Registrar:

The Chairman:



B. Atienza Vivancos

D. Rees

Decision electronically authenticated