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**Datasheet for the decision  
of 21 February 2018**

**Case Number:** T 2355/12 - 3.5.04

**Application Number:** 01964712.2

**Publication Number:** 1275253

**IPC:** H04N7/173

**Language of the proceedings:** EN

**Title of invention:**

SYSTEMS AND METHODS FOR IMPROVED AUDIENCE MEASURING

**Applicant:**

Rovi Guides, Inc.

**Headword:**

**Relevant legal provisions:**

EPC 1973 Art. 54, 111(1)

**Keyword:**

Claims - interpretation of ambiguous terms

Novelty - main request (yes)

Remittal to the department of first instance - (yes)

**Decisions cited:**

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 2355/12 - 3.5.04

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.04**  
**of 21 February 2018**

**Appellant:** Rovi Guides, Inc.  
(Applicant) 2160 Gold Street  
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**Representative:** Pisani, Diana Jean  
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**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 4 July 2012  
refusing European patent application  
No. 01964712.2 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chairman** C. Kunzelmann  
**Members:** B. Willems  
G. Decker

## **Summary of Facts and Submissions**

- I. The appeal is against the decision of the examining division dated 4 July 2012 refusing European patent application No. 01964712.2, which was published as international application WO 01/76248 A2.
- II. The documents cited in the decision under appeal included the following:

D4: US 5 872 588 A (Aras et al.) (16 February 1999)
- III. The application was refused on the grounds that the subject-matter of claim 1 of the main and first to third auxiliary requests lacked novelty over the disclosure of D4 (Article 54 EPC) and the subject-matter of claim 1 of the second auxiliary request extended beyond the disclosure of the application as filed (Article 123(2) EPC).
- IV. The applicant filed an appeal requesting that this decision be set aside. With the statement of grounds of appeal, the appellant re-filed the claims according to the main request underlying the decision under appeal and filed amended claims according to first and second auxiliary requests and requested that a patent be granted on the basis of these claims. It provided arguments as to why the subject-matter of the claims met the requirements of Articles 54 and 56 EPC. The board notes that in the statement of grounds the appellant refers to the "minutes" [sic] when commenting on arguments set out in the decision under appeal.

V. Claim 1 of the main request reads as follows:

"A method for measuring audience size information based on playbacks of a recorded program comprising:  
recording a program on user equipment of a plurality of audience members;  
receiving indications of playbacks of the recorded program from the plurality of audience members;  
updating the audience size information for the recorded program in response to said receiving;  
providing the updated audience size information to at least one user within an interactive television application".

VI. The examining division's objections relevant to the present decision may be summarised as follows:

(a) Claim 1 referred to "*recording a program on user equipment of a plurality of audience members*". The term "*user equipment*" might be construed to mean equipment in common use by a plurality of audience members such as a central playback facility and recording media in a VOD (Video On Demand) distribution system (see decision, Reasons 2.1.2), or as referring to the ensemble of end user devices at the audience members' homes (see decision, Reasons 2.1.3).

Document D4, column 7, disclosed AVMs (audio-visual material) coded with a unique AVI (audio-visual identifier) which permitted monitoring the viewing of particular AVMs or sub-portions thereof in the context of an interactive television system. The AVI might be embedded in an AVM on a VCR tape (D4, column 11, lines 47 to 49) or embedded or pre-embedded in a broadcast or VOD AVM (D4,

column 7, lines 44 to 47; column 23, lines 28 to 38). The fact that AVM content was stored at VOD central playback facilities implied that *"it was recorded at some point in time"*. Moreover, the system of D4 was *"set up to deal with AVIs in AVMs played back from VCR tapes"*. Hence *"user equipment"* in accordance with points 2.1.2 and 2.1.3 of the decision under appeal was disclosed (see decision, Reasons 2.1.4).

- (b) Document D4 disclosed determining how many home stations were tuned in using information collected by a BCC (behaviour collection centre). This determination constituted providing an updated audience size (see decision, Reasons 2.1.5).
- (c) Document *"D4 is set within an interactive television context [...] and the determination of how many home stations were tuned in thus constitutes a particular interactive television application"* (see decision, Reasons 2.1.5).
- (d) Advertisers were users of the interactive television system. Moreover, subscribers seeing *"which and how often particular content was viewed at their home [...] are effectively provided with home audience sizes"* (see decision, Reasons 2.2.4).

VII. The appellant's arguments relevant to the present decision may be summarised as follows:

- (a) The examining division had previously acknowledged in the summons to oral proceedings that D4 did not disclose *"recording a program on user equipment of a plurality of audience members"* (see statement of grounds of appeal, page 2, penultimate paragraph).

In contrast, the examining division suggested in the decision under appeal that "*AVM content storage somewhere implies it was recorded at some point*". However, this was not a disclosure of recording a program on user equipment of a plurality of audience members, the indications of playback of the recorded program being received from this user equipment (see statement of grounds of appeal, page 2, last paragraph).

- (b) D4 did not disclose "*updating audience size information [...] in response to receiving the indications*" (see statement of grounds of appeal, page 3, second full paragraph). Contrary to the division's statement that "*within the VOD capable system of D4, AVI counts will integrate over time and updating of the counts is inherent to the system of D4*", D4 did not teach how the AVI counts were handled. The skilled person might "*rather assume that only a single snap shots of statistics is available on each system start up*".
- (c) Advertisers were not "*a user within an interactive television application*". A subscriber reviewing what AVMs were presented could not access updated audience size information. Instead, he could only review what AVMs were presented on his home station and the associated cost (see statement of grounds of appeal, page 3, last paragraph to page 4, second full paragraph).
- (d) Document D4 did not suggest the "*use of playbacks to determine any [...] ensemble measure*". In particular, D4 did not suggest collecting playbacks from users to determine audience size (see

statement of grounds of appeal, page 4, penultimate paragraph).

## **Reasons for the Decision**

1. The appeal is admissible.
2. *Interpretation of claim 1 of the main request*
  - 2.1 Claim 1 specifies "*recording a program on user equipment*".
  - 2.2 The board does not share the examining division's view that "user equipment" might be construed to mean "*a central playback facility and recording media in a VOD (Video On Demand) distribution system*" (see point VI(a), first option, above).

Rather, the board agrees with the division's interpretation that the term "user equipment" refers to "*end user devices at the audience members' homes*" (see point VI(a), second option, above).

This interpretation is confirmed by the description of the present application, page 18, lines 27 to 33:

*"User television equipment 200 of FIG. 3 receives video or a digital video stream and data from distribution facility 180 (FIG. 2a), such as a program distribution facility or some other suitable distribution facility, at input 250."*

This passage and Figures 2a to 2e clearly distinguish between user (television) equipment and a distribution facility.



Moreover, page 18, lines 3 to 10 discloses that "[a]udience information may be transmitted from each user television equipment 200 to distribution facility 180 [... ] accumulated at distribution facility 180 [..., and] the accumulated audience information [may be distributed] to user television equipment 200". If the "user equipment" were part of the distribution system, this phrase would be nonsensical.

Thus, in the context of the present application, the "user equipment" is not part of the distribution system.

- 2.3 The application consistently refers to a "user" operating "user equipment", for instance, to tune "set-top box 260 to a desired television channel" (page 18, lines 27 to 34), or to instruct the application implemented on interactive television program guide equipment to generate a main menu (page 23, lines 26 to 30). Furthermore, the "audience information may be overlaid onto the program the user is watching [... or] displayed when a user selects a program listing from a guidance application" (page 25, lines 6 to 9).

It is immediately evident from the quoted passages that, in the present application, the term "user" does not refer to an advertiser but to a person using the "user equipment", for instance, a subscriber.

- 2.4 Moreover, the board agrees with the appellant that the subscriber reviewing what AVMs have been presented on his user equipment "in no way constitutes [...] providing the updated audience size information" to the subscriber (statement of grounds of appeal, page 4, first full paragraph). The term "audience size" is normally used as an indication of the number of viewers

watching (or having watched) a particular program. Figure 12 clearly illustrates that in the present application the term "audience size" has its normal meaning.

- 2.5 However, in claim 1 the phrase "*updating the audience size information ... in response to said receiving [of playback indications]*" does not imply any particular technical manner of determining the number of viewers taking into account the received indications. The phrase simply means that the received indications "*may be used when calculating the [...] audience of the program*" (see description, the paragraph bridging pages 36 and 37).

3. *Main request - novelty (Article 54 EPC 1973)*

- 3.1 Document D4 discloses a method for measuring audience size information based on playbacks of a recorded program comprising:

receiving indications of playbacks of the recorded program from the plurality of audience members (column 11, lines 47 to 49: "*AVI information may embedded in a VCR Tape and information obtained from the tape can be collected and reported by the home station*" and column 12, lines 40 to 45: "*The behavior collection and reporting mechanisms operate to capture subscriber behavior by collecting (i.e., storing and/or transmitting) the AVI information associated with the audio-visual material presented at each subscriber's home station and reporting this information to one or more behavior collection centers*");

updating audience size information in response to the received information (column 26, lines 44 to 48: "*Using*

*information collected at the BCCs [... to determine] how many home stations were tuned in to [...] particular advertisements");*

providing the updated audience size information to advertisers (column 26, lines 44 to 48: "*Advertisers can determine how many home stations were tuned in to their particular advertisements*").

3.2 The board agrees with the appellant that document D4 does not disclose "*recording a program on user equipment*". Although D4, column 11, lines 47 to 49 discloses that "*the AVI information may embedded in a VCR Tape and information obtained from the tape can be collected and reported by the home station*", this does not imply that the program with the AVI had been previously recorded using the user equipment. At the publication date of D4, it was common practice to distribute audio-visual material by renting out or selling VCR tapes with recorded material. Thus, playing back audio-visual material from a tape does not imply that this material had been previously recorded using user equipment.

3.3 Contrary to the appellant (see point VII(d) above), the board is of the opinion that, in view of column 11, lines 47 to 49 and column 12, lines 40 to 45 (see quotations in point 3.1 above), the passage on column 26, lines 44 to 48 ("*how many home stations were tuned in to [...] advertisements*") refers to both being tuned to a channel broadcasting advertisements and playing back advertisements from a tape.

However, the board agrees with the appellant that D4 does not disclose providing updated audience information to a user (see point VII(c) above).

Document D4, column 26, lines 44 to 48 discloses providing information to advertisers about "*how many home stations were tuned in to [...] advertisements*". The board shares the appellant's view that advertisers are not users within the meaning of the present application (see point 2.3 above).

3.4 The examining division also argued (see point VII(d) above) that the paragraph bridging columns 23 and 24 ("*information supplied by the extend AVI fields [...] may also be stored in additional columns of the BCT. The subscriber could then review what AVMs were presented on the home station and their associated cost*") disclosed presenting audience information to the user. However, the BCT (behaviour capture table) is stored in the monitor or home station controller (see Figures 15 to 17 and the description of the home station in columns 24 to 26). Thus, the passage referred to by the examining division discloses that the user can view locally stored information, but it does not disclose that data stored in the BCTs is centrally collected and (statistically) processed and the result returned to the user terminal.

3.5 As the board could not identify in document D4 any passages more pertinent to the question of novelty of the subject-matter of claim 1, it concludes that the subject-matter of claim 1 is new over the disclosure of D4 within the meaning of Article 54 EPC 1973.

#### 4. *Further prosecution*

4.1 According to Article 111(1) EPC 1973, the board, in deciding upon the appeal, may exercise any power within the competence of the department which was responsible

for the appealed decision or remit the case to that department for further prosecution.

- 4.2 The examining division based its novelty objection on an interpretation of claim 1 which conformed neither to the normal meaning of the terms used nor to the description of the present application (see section 2 above).
- 4.3 Thus, if the board decided not to remit the case to the department of first instance, it would have to carry out a full examination of the application as to patentability requirements on the basis of the correct interpretation of the claims. This is the task of the examining division (see point 4 of the reasons for the decision of the Enlarged Board of Appeal G 10/93, OJ EPO 1995, 172). In particular, to assess inventive step, the board would have to elaborate whether upon proper interpretation of "*recording a program on user equipment*" and "*providing the updated audience size information to at least one user*" the subject-matter of claim 1 met the requirements of Article 56 EPC 1973. Since none of the documents cited in the first-instance proceedings disclosed fundamental concepts underlying the claimed invention, such as user equipment for recording and reproducing a program with embedded identification codes (see, for instance, WO 94/11989 A1) or centrally processing data uploaded by user terminals and returning the result of the processing to the terminals (see, for instance, WO 98/31114 A1), the board would even have to determine whether an additional search was necessary.

4.4 Under these circumstances, and in spite of the long duration of the proceedings thus far, the board exercises its discretion under Article 111(1) EPC 1973 in remitting the case to the department of first instance for further prosecution.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chairman:



K. Boelicke

C. Kunzelmann

Decision electronically authenticated