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**Datasheet for the decision
of 6 March 2018**

Case Number: T 2343/13 - 3.5.07

Application Number: 10000251.8

Publication Number: 2187396

IPC: G11B27/32, G11B27/34,
G11B27/36, G11B20/10,
G11B27/10, H04N5/85, G11B20/00

Language of the proceedings: EN

Title of invention:

A reproducing apparatus, a reproducing method, a system, a software and a computer-readable recording medium storing the software for prioritizing reproduction control information

Applicant:

Sharp Kabushiki Kaisha

Headword:

Reproducing apparatus III/SHARP

Relevant legal provisions:

EPC Art. 56
RPBA Art. 12(4)

Keyword:

Late-filed request - second to fourth auxiliary requests -
admission (yes)

Inventive step - main and first to third auxiliary requests
(no)

Remittal to the department of first instance - fourth auxiliary
request (yes)

Decisions cited:

G 0007/93, T 1816/11, T 2330/12



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Case Number: T 2343/13 - 3.5.07

D E C I S I O N
of Technical Board of Appeal 3.5.07
of 6 March 2018

Appellant: Sharp Kabushiki Kaisha
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 20 June 2013
refusing European patent application No.
10000251.8 pursuant to Article 97(2) EPC**

Composition of the Board:

Chairman R. Moufang
Members: R. de Man
M. Jaedicke

Summary of Facts and Submissions

- I. The applicant (appellant) appealed against the decision of the Examining Division refusing European patent application No. 10000251.8.
- II. The application was filed in English as a divisional application of European patent application No. 04792222.4 (the parent application), which had been filed as international application PCT/JP2004/014954 and published in Japanese as WO 2005/036544 and in English as EP 1 679 706 A1. It claims the priority of Japanese patent application JP 2003-352932, filed on 10 October 2003, and of six more applications, filed on and after 12 July 2004.
- III. After holding oral proceedings, the Examining Division issued a communication under Rule 71(3) EPC, expressing the intention to grant a patent on the basis of a third auxiliary request. The applicant subsequently disapproved of the proposed text, maintained its main and first auxiliary requests and filed amended second and third auxiliary requests. The Examining Division then resumed the examination proceedings and finally refused the application.
- IV. The decision cited *inter alia* the following documents:

D1: US 2003/161615 A1, published on 28 August 2003; and
D2: WO 2004/019318 A2, published on 4 March 2004.

The Examining Division decided that the subject-matter of claims 1 to 5 of the main request lacked inventive step over document D1. It also held that claim 1 of the first auxiliary request infringed Articles 123(2) and 84 EPC, and it refused to admit the second and

third auxiliary requests into the proceedings under Rule 137(3) EPC. The decision makes no mention of a fourth auxiliary request.

- V. Along with the statement of grounds of appeal, the appellant resubmitted the main and first to third auxiliary requests and filed a fourth auxiliary request corresponding to the text proposed in the Examining Division's communication under Rule 71(3) EPC.
- VI. In a communication accompanying a summons to oral proceedings, the Board *inter alia* expressed the preliminary opinion that the subject-matter of claim 1 of all requests lacked inventive step over either of documents D1 and D2. It also noted that the description appeared to contain matter extending beyond the content of the parent application as filed and suggested that that objection could be overcome by deleting the text on page 94, line 22, to page 95, line 11.
- VII. In its written submissions in preparation for the oral proceedings, the appellant agreed to the Board's suggestion to delete the text on page 94, line 22, to page 95, line 11, of the description and commented on the substantive points raised in the Board's communication. It submitted clean copies of the claims of its requests.
- VIII. Oral proceedings were held on 6 March 2018. At the end of the oral proceedings, the chairman pronounced the Board's decision.
- IX. The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the main request or, in the alternative, on the basis of one of the first to fourth auxiliary requests.

X. Independent claim 1 of the main request reads as follows:

"A reproducing apparatus, comprising:

data acquiring means (50) configured to acquire video data, a program, and program management information of the program;

video reproducing means (20) configured to reproduce the video data;

program executing means (70) configured to (a) execute the program and (b) send, to the video reproducing means, in accordance with the program thus executed, first reproduction control information for controlling reproduction of the video data;

input means (3) configured to receive a reproduction control operation from outside;

characterized by

general control means (80) configured to produce, in accordance with the reproduction control operation received by the input means, second reproduction control information for controlling the reproduction of the video data, and sending the second reproduction control information thus produced to the video reproducing means,

the program management information including a flag (playback_control_mode) indicating whether or not the second reproduction control information is to be sent to the video reproducing means,

the general control means determining, in accordance with the flag, whether or not the second reproduction control information is to be sent to the video reproducing means while the program corresponding to the program management information including the flag is being executed by the program executing means,

in a case where the second reproduction control information is not sent to the video reproducing means, the video reproducing means controlling the reproduction in accordance with the first reproduction control information."

XI. Independent claim 1 of the first auxiliary request reads as follows:

"A reproducing apparatus, comprising:

data acquiring means (50) configured to acquire a first type of content that is processed by a program in accordance with a reproduction control operation from outside or a second type of content that is different from the first type of content and to either acquire video data, a program, and program management information of the program that constitute the first type of content or acquire video data, a program, and program management information of the program that constitute the second type of content;

video reproducing means (20) configured to reproduce the video data;

program executing means (70) configured to (a) execute, in a case where the data acquiring means has acquired the first type of content, the program that constitutes the first type of content and (b) register an interruption process upon receiving, during the reproduction of the video data, a transfer of reproduction control information based on the reproduction control operation from the outside;

input means (3) configured to receive the reproduction control operation from the outside;

characterized by

the video reproducing means either controlling the reproduction of the video data in accordance with reproduction control that the program executing means

carries out in accordance with (i) first reproduction control information obtained when the reproduction control information based on the reproduction control operation received by the input means is transferred to the program executing means and (ii) the program thus executed which constitutes the first type of content, or controlling the reproduction of the video data in accordance with second reproduction control information obtained when the reproduction control information based on the reproduction control operation received by the input means is transferred to the video reproducing means,

in a case where the program that constitutes the first type of content is configured to control the reproduction of the video data in accordance with the first reproduction control information, the program management information of the program including a flag (playback_control_mode) indicating that the reproduction is controlled in accordance with the first reproduction control information, the program management information that constitutes the second type of content including a flag (playback_control_mode) indicating that the reproduction is controlled in accordance with the second reproduction control information,

the reproducing apparatus comprising general control means (80) configured to cause, in accordance with the flag in response to the reproduction control operation received by the input means, the video reproducing means to control the reproduction in accordance with the first reproduction control information or the second reproduction control information while the program corresponding to the program management information including the flag is being executed by the program executing means."

XII. Independent claim 1 of the second auxiliary request differs from claim 1 of the main request in that the text starting with "in a case where ..." has been replaced with:

"in a case where the second reproduction control information is not sent to the video reproducing means when the input means receives the reproduction control operation, the video reproducing means controlling the reproduction in accordance with the first reproduction control information produced by the program executing means in accordance with the reproduction control operation."

XIII. Independent claim 1 of the third auxiliary request differs from claim 1 of the first auxiliary request in that the following text has been inserted before "the reproducing apparatus comprising general control means (80) ...":

"the flag of the first type of content and the flag of the second type of content being identical flags, the flags indicating, depending on a value of the flags, whether the reproduction is controlled in accordance with the first reproduction control information or in accordance with the second reproduction control information,"

XIV. Independent claim 1 of the fourth auxiliary request reads as follows:

"A reproducing apparatus, comprising:
data acquiring means (50) for acquiring video data, a program, and program management information of the program;

video reproducing means (20) for reproducing the video data;

a switching section (90),

program executing means (70) for (a) executing the program and (b) sending, to the switching section (90), in accordance with the program thus executed, first reproduction control information for controlling reproduction of the video data;

and

input means (82) for receiving a reproduction control operation from outside;

general control means (80) for producing, in accordance with the reproduction control operation received by the input means, second reproduction control information for controlling the reproduction of the video data, and sending the second reproduction control information thus produced to the switching section (90),

the program management information including a flag (playback_control_mode) indicating whether or not the second reproduction control information is to be sent to the video reproducing means,

the switching section (90) is configured to be set, in accordance with the flag, whether or not the second reproduction control information is to be sent to the video reproducing means while the program corresponding to the program management information including the flag is being executed by the program executing means,

wherein the switching section (90) is configured such that when the second reproduction control information is not sent to the video reproducing means the switching section (90) sends the first reproduction control information to the video reproducing means (20), the video reproducing means (20) being configured to control the reproduction in accordance with the

first reproduction control information sent by the switching section (90)."

Independent claims 2 to 5 of the fourth auxiliary request are directed to a corresponding method, system, control program and computer-readable medium.

XV. The appellant's arguments where relevant to this decision are discussed in detail below.

Reasons for the Decision

1. The appeal complies with the provisions referred to in Rule 101 EPC and is therefore admissible.
2. *The invention*
 - 2.1 The application relates to a reproducing apparatus for reproducing content, including video data and computer programs. The content is acquired from a content-recording medium such as an optical disk by means of a "data acquiring means". The apparatus includes a "video reproducing means" for reproducing the video data, a "program executing means" for executing the program and "input means" for receiving reproduction-control operations.
 - 2.2 The independent claims of all requests are directed to an improvement of the control of video reproduction. This is explained in paragraphs [0208] to [0219] of the description by reference to two types of content. If the content being reproduced is "video-based content", the user is allowed to directly control reproduction. User input operations are then relayed to the video-reproducing means without being interpreted by the

program being executed. On the other hand, if the content being reproduced is "program-based content", for example a game, the reproduction of video is controlled by the program. In this case, user input operations are not sent to the video-reproducing means, but they may still influence video reproduction as they are processed by the program.

3. *The description*

The Board is aware that the passage on page 94, line 22, to page 95, line 11, of the application as filed ("In cases where ... irrelevant to the program.") may contain a mistranslation of the original PCT application (see decision T 2330/12 of 15 January 2018, reasons 3.1, which deals with another divisional application of the same parent application). Since the appellant has agreed to delete this passage from the description of the application at issue, this potential violation of Article 76(1) EPC has now been removed.

Main request

4. *The invention as defined by claim 1*

Claim 1 of the main request recites a reproducing apparatus which acquires video data, a program and "program management information" of the program.

The apparatus comprises video-reproducing means for reproducing the video data, program-executing means for executing the program and input means for receiving a reproduction-control operation "from outside", e.g. from a user.

Video reproduction is controlled (e.g. started or stopped) on the basis of "reproduction control information". The video-reproducing means can receive "first reproduction control information" from the program-executing means and "second reproduction control information" from the general control means. The general control means produces the second reproduction-control information on the basis of the reproduction-control operation received by the input means.

The program-management information includes a "playback_control_mode" flag indicating whether or not the second reproduction-control information is to be sent to the video-reproducing means when the program corresponding to the program-management information is being executed.

The claim further specifies that video reproduction is controlled in accordance with the first reproduction-control information if the second reproduction-control information is not sent to the video-reproducing means.

5. *Inventive step - Article 56 EPC*

5.1 Although the Examining Division decided that the subject-matter of claims 1 to 5 of the main request lacked inventive step over document D1, the Board finds it more convenient to assess inventive step starting from document D2.

5.2 Claim 1 is based on the "Embodiment 4" section of the description, whereas the content of priority application JP 2003-352932 corresponds to the "Embodiment 1" section (as can be verified by inspecting the English translation of JP 2003-352932

present in the electronic file of the related European patent application No. 10158507.3). The effective date for determining the state of the art under Article 54(2) EPC for the subject-matter of claim 1 is therefore 12 July 2004 or later (see section II above). It follows that document D2 is part of the state of the art for the subject-matter of claim 1. This was not contested by the appellant.

- 5.3 Document D2 discloses a reproducing apparatus comprising means for reading data from a DVD storage medium (Figures 1 and 3; page 5, lines 19 to 23; page 7, line 32, to page 8, line 3). The data comprises video data and a program in the form of a markup document (page 8, lines 1 to 3). The markup document is executed by a "parser & interpreter" component of an "ENAV engine" (page 9, lines 7 to 9; page 10, lines 5 to 22). The video data is reproduced by an "AV playback engine" (page 8, lines 17 to 20). Document D2 further discloses input means in the form of a remote control including various keys for inputting reproduction-control manipulations (Figures 1 and 2; page 6, lines 23 to 25; page 7, lines 10 to 12).
- 5.4 The markup document of document D2 contains first, second and third "event information". The first event information specifies which user input events are, by default, forwarded to the AV playback engine by an "interface handler" component of the ENAV engine (page 8, line 30, to page 9, line 4; page 10, line 29, to page 11, line 2). The second event information specifies whether forwarding such user input events to the AV playback engine is allowed or prohibited (page 9, lines 4 to 6; page 11, lines 2 to 5). The third event information specifies which user input events are passed to the "parser & interpreter"

component for performing an operation corresponding to the user input, independently of whether their forwarding to the AV playback engine is allowed or prohibited (page 9, lines 22 to 27; page 11, lines 6 to 10).

- 5.5 As explained on page 16, line 29, to page 17, line 8, the apparatus of document D2 supports an API command "EnableRCKeyInput()" (sometimes written as "EnableRCKInput()") to be invoked by script language contained in the markup document. This command takes a parameter "x" with value 0 or 1 and either disables (0) or enables (1) the transmission of user input (i.e. of the "second" reproduction-control information) to the AV playback engine. The "second event" is thus realised by means of the "EnableRCKeyInput(0)" command (page 17, lines 13 to 16).
- 5.6 Hence, invoking the "EnableRCKeyInput()" command with parameter value 1 results in user input operations as defined by the first event information being passed - as "second reproduction control information" within the meaning of claim 1 - to the AV playback engine. Invoking the command with parameter value 0 results in these user input operations being prevented from being passed to the AV playback engine.
- 5.7 In either case, the user input operations as defined by the third event information are processed by the "parser & interpreter" component, which in turn issues commands, corresponding to the "first reproduction control information" of claim 1, for transmission to the AV playback engine (page 10, lines 23 to 28; page 16, lines 13 to 18).

5.8 Claim 1 recites "general control means" for converting reproduction-control operations into second reproduction-control information and for determining whether to send the second reproduction-control information to the reproducing means. In document D2, the corresponding functionality is performed by the "interface handler" of the ENAV engine, which also contains the "parser & interpreter" component, which corresponds to the claim's program-executing means.

Since the claim specifies no further details of either the program-executing means or the general control means, this distinction - if a technical difference at all - is insufficient to support an inventive step.

5.9 The apparatus of claim 1 further differs from that of document D2 in that it acquires and uses "program management information" corresponding to the program. The program-management information includes a flag indicating whether or not the second reproduction-control information is to be sent to the video-reproducing means.

In document D2, the program code included in the markup document dynamically sets a flag indicating whether or not the second reproduction-control information is to be sent to the video-reproducing means by invoking an appropriate API command.

In the Board's judgment, the skilled person is well aware that a parameter or flag can be set both dynamically by invoking API commands and statically by hard-coding its value in a data structure associated with the program, each approach having expected advantages and disadvantages. Hence, this

distinguishing feature likewise cannot support an inventive step.

- 5.10 Referring to page 10, line 29, to page 11, line 5, of document D2, the appellant argued that whether an input event was forwarded to the AV playback engine did not depend on the program being executed but on whether the event was a "first event" or a "second event". Document D2 lacked awareness of different types of program or content such as the program-based and video-based content of the application, requiring different degrees of control over video reproduction.

But as explained in point 5.4 above, the terms "first event" and "second event" refer not to specific user input events but to information included in the markup document for setting up how the reproducing apparatus handles user input events. In document D2, the program decides dynamically to what extent the user can directly control video reproduction, in the same way as this is decided statically by the program-management information of the application.

- 5.11 In view of the above, the Board concludes that the subject-matter of claim 1 lacks inventive step over document D2.

First auxiliary request

6. *Inventive step - Article 56 EPC*

- 6.1 Claim 1 of the first auxiliary request adds to claim 1 of the main request that the data acquiring means is configured to acquire a "first type of content" or a "second type of content". The Board interprets this as

meaning that both content types are supported by the claimed reproducing apparatus.

Content of the first type is "processed by a program in accordance with reproduction control information from outside". When such content is reproduced, reproduction is controlled on the basis of "first reproduction control information obtained when the reproduction control information based on the reproduction control operation received by the input means is transferred to the program executing means". In this case, the "playback_control_mode" flag indicates that reproduction is controlled in accordance with the first (and not the second) reproduction-control information.

For content of the second type, the "playback_control_mode" flag indicates that reproduction is controlled in accordance with the second reproduction-control information, which is "obtained when the reproduction control information based on the reproduction control operation received by the input means is transferred to the video reproducing means".

In addition, the program-executing means of claim 1 is configured to "register an interruption process upon receiving, during the reproduction of the video data, a transfer of reproduction control information based on the reproduction control operation from the outside".

6.2 According to the Examining Division's interpretation of claim 1, the "playback_control_mode" flag present in program-management information for the first type of content was a different flag than the "playback_control_mode" flag present in program-management information for the second type of content,

leading it to object to claim 1 both under Article 123(2) EPC and under Article 84 EPC.

In the Board's view, however, the skilled person reading claim 1 understands that both occurrences of "playback_control_mode flag" in claim 1 refer to the same field of the program-management information. Although the wording of claim 1 admittedly is somewhat imperfect, it does not prevent the Board from assessing inventive step.

- 6.3 The apparatus of document D2 is configured for acquiring and processing both a "first type" of content that disables the transmission of user input, i.e. of "second" reproduction-control information, to the AV playback engine and a "second type" of content that enables such transmission (see point 5.5 above).
- 6.4 Whether or not the second reproduction-control information is directly transmitted to the AV playback engine, in document D2 video reproduction is also controlled on the basis of "first" reproduction-control information produced by the "parser & interpreter" component of the ENAV engine in response to user input events defined in the "third event information" (see point 5.7 above). In this context, the Board notes that the present application does not limit control on the basis of the "first" reproduction-control information to the "first type" of content (see paragraph [0193] of the published application).
- 6.5 As to the claimed registration of an "interruption process", at the oral proceedings the appellant did not dispute that this feature is to be understood in the light of paragraphs [0161] and [0162] of the description as meaning that user input events (i.e.

reproduction-control operations "from the outside") are processed at the program-executing means by a previously registered interrupt handler.

The use of interrupts and interrupt handlers for communicating and processing events such as input events was well known at the priority date. In fact, according to paragraph [0044] of the present application the term "interrupt handler" corresponds to callback functions such as Java event listeners. In document D2, user input events are processed by such event listeners or handlers (see e.g. page 10, lines 5 to 28).

- 6.6 Hence, the subject-matter of claim 1 of the first auxiliary request does not involve an inventive step over document D2.

Second auxiliary request

7. *Admission - Article 12(4) RPBA*

- 7.1 The Examining Division refused to admit the second auxiliary request into the first-instance proceedings under Rule 137(3) EPC in view of the time of its filing and because it *prima facie* did not meet the requirements of Article 84 EPC.

- 7.2 Since the request was filed only after the completion of oral proceedings in which the examination proceedings had essentially been brought to a conclusion, in the absence of special circumstances the Examining Division's refusal to admit a newly filed request introducing new features does not amount to an abuse of discretion. Hence, the admission of the second

auxiliary request into the proceedings is now at the Board's discretion under Article 12(4) RPBA.

- 7.3 Although the Board does not find fault with the Examining Division's discretionary decision not to admit the request, it also considers that the non-admission is in itself no reason to treat the second auxiliary request, in respect of its admission under Article 12(4) RPBA, more strictly than if it had been filed for the first time with the statement of grounds of appeal. It would run counter to procedural efficiency if an applicant could increase its chances of having a new request admitted by delaying the filing of that request until after the application has been refused.
- 7.4 The question then arises whether the non-acceptance by the appellant of the text proposed by the Examining Division is a factor weighing against admission of the new request. In this respect, the Board notes first that the appellant was fully entitled to maintain its higher-ranking requests and thus to disapprove of the text proposed in the communication under Rule 137(3) EPC. And it cannot be held against the appellant that, in the course of the first-instance proceedings, it submitted, as an auxiliary request, a text that was found to meet the requirements of the EPC. If it had not filed that text, the Examining Division would have refused the application at the oral proceedings, and it would have been open to the appellant - within the normal limits of Article 12(4) RPBA - to submit, on appeal, amended requests in reaction to the refusal.
- 7.5 In decision G 7/93 (OJ EPO 1994, 775), the Enlarged Board of Appeal held that a board of appeal, in the circumstances of the case it had before it, should

overrule the discretionary decision of the department of first instance only if the latter had exercised its discretion in an unreasonable way or in accordance with the wrong principles. In that case, the examining division had refused to give consent to an amendment of the claims it had proposed for grant. The question before the referring board then was, essentially, whether to overrule the examining division's discretionary decision and give consent to the amendment or to confirm the examining division's decision and, presumably, allow the applicant to revert to the originally proposed text.

7.6 The situation before the Board now is therefore fundamentally different from that considered in decision G 7/93, provided that the filing of the second auxiliary request is to be regarded as a reaction to the negative opinion expressed by the Examining Division on one of the higher-ranking requests considered in the oral proceedings rather than as an amendment of the claims that had been found allowable at the end of those oral proceedings. This is indeed the case: the second auxiliary request corresponds to the then main request with an amendment that seeks to overcome the Examining Division's inventive-step objection.

7.7 As to the Examining Division's second reason for non-admission of the second auxiliary request, namely a *prima facie* lack of clarity, the Board considers that a question relating directly to the compliance of a request with a provision of substantive patent law is to be assessed by the Board itself and that on such a point there is no latitude for deferring to the view of the department of first instance (cf. decision T 1816/11 of 22 November 2016, reasons 2.6).

7.8 Since claim 1 includes only a relatively minor amendment of claim 1 of the main request, the Board exercises its discretion under Article 12(4) RPBA and admits the second auxiliary request into the proceedings.

8. *Inventive step - Article 56 EPC*

8.1 Compared with claim 1 of the main request, claim 1 of the second auxiliary request adds a feature specifying that the first reproduction-control information is produced by the program-executing means in accordance with the reproduction-control operation.

8.2 The Board understands this feature as meaning that the program executed by the program-executing means produces (first) reproduction-control information on the basis of user input operations. This feature is known from document D2, as explained in point 5.7 above.

8.3 The subject-matter of claim 1 of the second auxiliary request therefore lacks inventive step (Article 56 EPC).

Third auxiliary request

9. *Admission - Article 12(4) RPBA*

The third auxiliary request is based on the first auxiliary request with an amendment intended to address the Examining Division's objection of added subject-matter. In view of the same considerations as set out in point 7 above, the Board also admits the third

auxiliary request into the proceedings (Article 12(4) RPBA).

10. *Inventive step - Article 56 EPC*

10.1 Compared with claim 1 of the first auxiliary request, the features added to claim 1 of the third auxiliary request are intended to rule out the Examining Division's interpretation that the "playback_control_mode" flag in the program-management information corresponding to content of the first type could be a different flag than the "playback_control_mode" flag in the program-management information corresponding to content of the second type.

10.2 Since the Board has interpreted claim 1 of the first auxiliary request as intended by the appellant, these added features do not further limit the claimed subject-matter, which therefore still lacks inventive step (Article 56 EPC).

Fourth auxiliary request

11. *Admission - Article 12(4) RPBA*

11.1 The fourth auxiliary request corresponds to the text proposed for grant in the Examining Division's communication under Rule 71(3) EPC. In response to this communication, the appellant expressed its disapproval of the proposed text, maintained its main and first auxiliary requests and submitted amended second and third auxiliary requests. The Examining Division then resumed the examination proceedings and refused the application. In its decision, it made no mention of the fourth auxiliary request.

11.2 The appellant's letters filed after the communication under Rule 71(3) EPC contain no clear indication that the appellant maintained its fourth auxiliary request. The Examining Division apparently assumed that it had been withdrawn; otherwise, it should have referred to the request in its later communication and decision and have mentioned that the applicant had failed to give its approval to it, in accordance with the procedure set out in the Guidelines for Examination in the EPO (the current version of November 2017 explains this procedure in point E-X, 2.9).

11.3 Nevertheless, in the circumstances of the present case the Board accepts that the appellant never had the intention to withdraw the request. It therefore admits the fourth auxiliary request into the proceedings.

12. *Remittal*

12.1 The communication under Rule 71(3) EPC, expressing the Examining Division's intention to grant a patent on the basis of the fourth auxiliary request, does not constitute a decision and therefore is not binding on the EPO.

12.2 In its communication, the Board expressed doubts that the subject-matter of claim 1 involved an inventive step. In particular, it suggested that the features added to the claim merely specified a "switching section" software module defined not by structural features but by its functionality, the functionality already being present in the apparatus according to claim 1 of the higher-ranking requests.

- 12.3 On reconsideration, however, the Board acknowledges that the introduction of the switching section into claim 1 results in a structural change of the apparatus. In particular, the program-executing means now sends the first reproduction-control information to the switching section instead of to the video-reproducing means. The switching section therefore does not merely separate out some of the functionality of the general control means. And at the oral proceedings, the appellant argued that the claimed switching section was more than a software module.
- 12.4 In these circumstances, the Board considers it appropriate to exercise its discretion under Article 111(2) EPC and to remit the case to the Examining Division for further prosecution on the basis of the fourth auxiliary request.
- 12.5 The Board notes that the description still needs to be adapted in view of point 3 above and that the feature of claim 1 reading "the switching section is configured to be set, in accordance with the flag, whether or not the second reproduction control information is to be sent ..." and the corresponding feature of claim 2 may require clarification.

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:



I. Aperribay

R. Moufang

Decision electronically authenticated