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**Datasheet for the decision
of 8 December 2022**

Case Number: T 1832/18 - 3.5.04

Application Number: 10817786.6

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Language of the proceedings: EN

Title of invention:
DYNAMIC CONTENT PACKAGING

Applicant:
Comcast Cable Communications LLC

Headword:

Relevant legal provisions:
EPC Art. 123(2)
RPBA 2020 Art. 13(1), 13(2)
EPC R. 106, 124

Keyword:

Main request and first auxiliary request - amendments - added subject-matter (yes)

"New Second Auxiliary Request" and Fourth auxiliary request - amendment to appeal case - amendment overcomes issues raised (no)

"New Third Auxiliary Request" - amendment to appeal case - amendment gives rise to new objections (yes)

Objection under Rule 106 EPC - procedural defects (no)

Minutes of oral proceedings - request to correct minutes - refused

Decisions cited:

T 0468/99, T 0966/99, T 0263/05, T 0317/09, T 1721/07,

T 0433/11

Catchword:



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Case Number: T 1832/18 - 3.5.04

D E C I S I O N
of Technical Board of Appeal 3.5.04
of 8 December 2022

Appellant: Comcast Cable Communications LLC
(Applicant) 1701 John F. Kennedy Blvd.
Philadelphia, Pennsylvania 19103 (US)

Representative: V.O.
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Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 4 January 2018
refusing European patent application
No. 10817786.6 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chair B. Willems
Members: A. Seeger
G. Decker

Summary of Facts and Submissions

- I. The appeal is against the examining division's decision to refuse European patent application No. 10 817 786.6, published as international patent application WO 2011/034956 A2.
- II. The decision under appeal was based on the grounds that claim 1 of what was then the main request and the auxiliary request did not meet the requirements of Articles 84 and 123(2) EPC and the subject-matter of the claims of both requests did not involve an inventive step within the meaning of Article 56 EPC.
- III. The applicant (appellant) filed notice of appeal. With the statement of grounds of appeal, the appellant filed claims according to a new main request and provided arguments to support its opinion that the claims met the requirements of Article 56 EPC.
- IV. The board issued a summons to oral proceedings and a communication under Article 15(1) of the Rules of Procedure of the Boards of Appeal in the 2020 version (RPBA 2020; see OJ EPO 2021, A35). In this communication, the board gave the following preliminary opinion.
- (a) Claim 1 did not meet the requirements of Article 123(2) EPC.
- (b) If the appellant could convince the board that the claimed subject-matter was directly and unambiguously derivable from the application as filed, then it was to be discussed whether the features relating to the requested content being

cached and then retrieved, reformatted and segmented for delivery contributed to inventive step (Article 56 EPC).

V. By letter dated 7 November 2022 the appellant filed amended claims according to a first and a second auxiliary request, indicated a basis for the amendments in the application as filed and submitted arguments to support its opinion that the first auxiliary request should be admitted into the proceedings under Article 13(1) RPBA 2020 and that the claims of all the requests met the requirements of Articles 56 and 123(2) EPC.

VI. On 8 December 2022, oral proceedings before the board were held by videoconference.

During the oral proceedings the appellant filed claims according to a "New Second Auxiliary Request" and a "New Third Auxiliary Request". Furthermore, the appellant made its second auxiliary request filed with the letter dated 7 November 2022 its fourth auxiliary request.

The appellant's final requests were that the decision under appeal be set aside and a European patent be granted on the basis of the claims of the main request filed with the statement of grounds of appeal or, alternatively, on the basis of the claims of the first auxiliary request filed with the letter dated 7 November 2022, or on the basis of the claims of the "New Second Auxiliary Request" or the "New Third Auxiliary Request", both filed during the oral proceedings of 8 December 2022, or on the basis of the claims of the fourth auxiliary request, filed as second

auxiliary request with the letter dated 7 November 2022.

At the end of the oral proceedings, the chair announced the board's decision.

- VII. On 14 December 2022, the minutes of the oral proceedings before the board were issued.
- VIII. By letter dated 16 December 2022, the appellant requested a correction of these minutes of the oral proceedings.
- IX. On 22 December 2022, the board issued a communication informing the appellant that the board did not intend to correct the minutes of the oral proceedings and explaining the reasons why. The appellant was informed that if it wished to comment on this communication, it should do so within one month of its notification.

No reply was received from the appellant within this period.

- X. Claim 1 of the main request reads as follows:

"A method of dynamic content delivery in a network, the method comprising:
receiving (601), by a processor, a content request from a requesting device (102);
determining (603) a geographic location of the requesting device (102);
generating a list of a plurality of content packagers (303) in the network, wherein each content packager of the plurality of content packagers caches content associated with the content request, and

wherein the content packagers (303) cache the content in a universal file format;
ranking the list based on the geographic location of the requesting device (102);
selecting a content packager of the plurality of content packagers (303) based on the ranked list, a device type of the requesting device, and based on a geographical proximity of the requesting device to the plurality of content packagers (303); and
causing packaging and delivery of the content in a second format different from the universal file format via the selected content packager of the plurality of content packagers (303) to the requesting device, wherein packaging comprises reformatting and segmenting the content, and wherein reformatting the content is based on the device type."

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

"A method of dynamic content delivery in a network, the network comprising a plurality of content packagers (303), wherein each content packager of the plurality of content packagers is associated with a content cache (402, 405, 407) for caching content at an output of said content packager, the method comprising: receiving (601), by a processor, a content request from a requesting device (102);
determining (603) a geographic location and a device profile of the requesting device (102), wherein the device profile is determined from received device type information from the content request or requesting device (102);
determining, by the processor, a content delivery route, and determine if the requested content resides in cache located on the content delivery route,

including generating a list of content packagers of the plurality of content packagers (303) that include the content associated with the content request in cache; selecting a content packager of the plurality of content packagers (303) based on a device type of the requesting device, and based on a geographical proximity of the requesting device to the plurality of content packagers (303); and if the requested content is not stored in cache along the content delivery route, causing packaging and delivery of the content via the selected content packager of the plurality of content packagers (303) to the requesting device, wherein packaging comprises reformatting and segmenting the content from a universal file format to a second format different from the universal file format, and wherein reformatting the content is based on the device type."

XII. Claim 1 of the "New Second Auxiliary Request" reads as follows (features deleted compared with claim 1 of the first auxiliary request are ~~struck through~~):

"A method of dynamic content delivery in a network, the network comprising a plurality of content packagers (303), wherein each content packager of the plurality of content packagers is associated with a content cache (402, 405, 407) for caching content at an output of said content packager, the method comprising: receiving (601), by a processor, a content request from a requesting device (102); determining (603) a geographic location and a device profile of the requesting device (102), wherein the device profile is determined from received device type information from the content request or requesting device (102);

determining, by the processor, a content delivery route, and determine if the requested content resides in cache located on the content delivery route, ~~including generating a list of content packagers of the plurality of content packagers (303) that include the content associated with the content request in cache;~~ selecting a content packager of the plurality of content packagers (303) based on a device type of the requesting device, and based on a geographical proximity of the requesting device to the plurality of content packagers (303); and if the requested content is not stored in cache along the content delivery route, causing packaging and delivery of the content via the selected content packager of the plurality of content packagers (303) to the requesting device, wherein packaging comprises reformatting and segmenting the content from a universal file format to a second format different from the universal file format, and wherein reformatting the content is based on the device type."

XIII. Claim 1 of the "New Third Auxiliary Request" reads as follows (features added compared with claim 1 of the "New Second Auxiliary Request" are underlined and deleted features are ~~struck through~~):

"A method of dynamic content delivery in a network, the network comprising a plurality of content packagers (303), wherein each content packager of the plurality of content packagers is associated with a content cache (402, 405, 407) for caching content at an output of said content packager, the method comprising: receiving (601), by a processor, a content request from a requesting device (102); determining (603) a geographic location and a device profile of the requesting device (102), wherein the

device profile is determined from received device type information from the content request or requesting device (102);

determining, by the processor, a content delivery route, and determine if the requested content resides in cache located on the content delivery route,; [sic] selecting a content packager of the plurality of content packagers (303) based on a device type of the requesting device, ~~and based on a geographical proximity of the requesting device to the plurality of content packagers (303)~~ wherein the content packager is selected using a location resolution server to determine location information of the requesting device and to use the location information to determine an optimal content packager and streaming server 306 to complete content delivery; and

if the requested content is not stored in cache along the content delivery route, causing packaging and delivery of the content via the selected content packager of the plurality of content packagers (303) to the requesting device, wherein packaging comprises reformatting and segmenting the content from a universal file format to a second format different from the universal file format, and wherein reformatting the content is based on the device type."

XIV. Claim 1 of the fourth auxiliary request reads as follows (features added compared with claim 1 of the first auxiliary request are underlined and deleted features are ~~struck through~~):

"A method of dynamic content delivery of video content in a network, the network comprising a plurality of content packagers (303), wherein each content packager of the plurality of content packagers is associated with a content cache (402, 405, 407) for caching

content at an output of said content packager, the method comprising:

receiving (601), by a processor, a content request from a requesting device (102);

determining (603) a geographic location and a device profile of the requesting device (102), wherein the device profile is determined from received device type information from the content request or requesting device (102);

determining, by the processor, a content delivery route, and determine if the requested content resides in cache located on the content delivery route, including generating a list of content packagers of the plurality of content packagers (303) that include the content associated with the content request in cache; selecting a content packager of the plurality of content packagers (303) based on a device type of the requesting device, and based on a geographical proximity of the requesting device to the plurality of content packagers (303); and

if the requested content is not stored in cache along the content delivery route, causing packaging and delivery of the content via the selected content packager of the plurality of content packagers (303) to the requesting device, wherein packaging comprises reformatting and segmenting the content from a universal file format to a second format different from the universal file format, and wherein ~~reformatting the content is based on the device type~~ the content is reformatted into a device format needed by the requesting device for using the content on the requesting device."

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

Main request

The amended features of claim 1 that a list of content packagers was generated and "*ranking the list based on the geographic location of the requesting device (102)*" had a basis in paragraphs [57] and [59] of the application as originally filed.

All auxiliary requests

The amended feature of claim 1 reading "*determining, by the processor, a content delivery route, and determine if the requested content resides in cache located on the content delivery route, including generating a list of content packagers of the plurality of content packagers (303) that include the content associated with the content request in cache*" had a basis in paragraphs [58] and [59] and in step 607 of Figure 6 of the application as originally filed.

The amended feature of claim 1 reading "*selecting a content packager of the plurality of content packagers (303) ... based on a geographical proximity of the requesting device to the plurality of content packagers (303)*" was based on paragraphs [05], [40] and [47] of the application as originally filed.

The board's objection under Article 123(2) EPC against the feature of claim 1 of the first auxiliary request "*selecting a content packager of the plurality of content packagers (303) ... based on a geographical proximity of the requesting device to the plurality of content packagers (303)*" should be withdrawn because the board had stated in point 3.2.1 of its preliminary opinion that said feature had a basis in paragraph [57] of the application as originally filed. As a

consequence, the second auxiliary request should be admitted into the proceedings because it overcame the objections raised by the board.

Request for correction of the minutes of the oral proceedings

The minutes had to be corrected because they did not correctly reflect the content of the appellant's request under Rule 106 EPC.

Reasons for the Decision

1. The appeal is admissible.
2. Main request - added subject-matter (Article 123(2) EPC)
 - 2.1 According to the consistent interpretation of Article 123(2) EPC by the Enlarged Board of Appeal, any amendment can only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of the description, claims and drawings as originally filed (see Case Law of the Boards of Appeal of the European Patent Office, 10th edition 2022 ("Case Law"), II.E.1.3.1).
 - 2.2 In the following, all references to the application as originally filed are to the international application published as WO 2011/034956 A2.
 - 2.3 Claim 1 has been amended to specify that a list of content packagers is generated and that "*ranking the*

list [is] based on the geographic location of the requesting device (102)".

- 2.4 Paragraph [59] of the application as originally filed discloses: *"a discovery process may include generating a list of content packagers throughout a network system that includes the requested content in cache. In an embodiment, the list may be ranked and evaluated for fulfilling different client content requests"*.

However, this paragraph does not disclose that ranking the list is *"based on the geographic location of the requesting device"*.

- 2.5 The appellant argued that paragraph [03] of the application as originally filed disclosed the general aim of preventing the same content from being stored in numerous different formats. Furthermore, paragraph [57] of the application as originally filed provided the context of geographical proximity between a requesting device and a content packager. It was thus implicit that the ranking of content packagers in paragraph [59] of the application as originally filed was based on a geographical location of the requesting device.

- 2.6 The board is not convinced by these arguments for the following reasons.

- 2.6.1 Paragraph [57] discloses that *"geographical proximity of a requesting device to a determined content packager may be determined to use as a factor in selecting a content delivery route"*.

This paragraph thus describes a situation in which a content packager has already been determined and a content delivery route is to be selected.

This situation is different from that described in paragraph [59] where a list of multiple content packagers is ranked, i.e. a suitable content packager is still to be found.

Hence, it cannot be directly and unambiguously derived that the same criterion ("*geographical proximity*") must necessarily be used in this different situation.

2.6.2 Moreover, paragraph [57] discloses the "*geographical proximity*" of a requesting device to a determined content packager as a factor while claim 1 specifies that the list of content packagers is ranked on the basis of the "*geographic location*" of the requesting device (emphasis added by the board).

Whereas "*geographical proximity*" hints at a distance, a ranking on the basis of "*geographic location*" is not necessarily characterised by a distance.

Hence, the claimed criterion of ranking content packagers on the basis of a "*geographic location*" of the requesting device cannot be directly and unambiguously derived from the criterion of "*geographical proximity*" disclosed in paragraph [57].

2.7 For these reasons, the board finds that the amended feature of claim 1 quoted under point 2.3 above introduces subject-matter which extends beyond the content of the application as originally filed. Hence, the requirements of Article 123(2) EPC are not met.

3. First auxiliary request - admittance
(Article 13(2) RPBA 2020)

- 3.1 The first auxiliary request was filed after the notification of the summons to oral proceedings. Hence, this auxiliary request is an amendment within the meaning of Article 13(2) RPBA 2020.
- 3.2 The board raised new objections under Article 123(2) EPC for the first time in the communication under Article 15(1) RPBA 2020. In response to this communication, the appellant filed the first auxiliary request with the aim of overcoming these new objections. This represents an exceptional circumstance within the meaning of Article 13(2) RPBA 2020. Exercising its discretion under this provision, the board thus decided to admit the first auxiliary request into the appeal proceedings.
4. First auxiliary request - added subject-matter (Article 123(2) EPC)
 - 4.1 Claim 1 includes the following amended feature:
"determining, by the processor, a content delivery route, and determine if the requested content resides in cache located on the content delivery route, including generating a list of content packagers of the plurality of content packagers (303) that include the content associated with the content request in cache".
 - 4.2 As a basis for this amended feature the appellant referred to paragraphs [58] and [59] of the application as originally filed.
 - 4.3 Paragraph [58] of the originally filed application discloses: *"a discovery process may be executed to determine if the requested content resides in cache located on a determined content delivery route. If the requested content is stored in cache along a determined*

content delivery route, then the discovered content may be delivered to the requesting device from cache. However, if the requested content is not stored along the content delivery route, then the process may continue to retrieve and package requested content".

Paragraph [59] of the originally filed application discloses: *"In an alternative embodiment, the discovery process may include other cache not located on the content delivery path. In an embodiment, a discovery process may include generating a list of content packagers throughout a network system that includes the requested content in cache".*

- 4.4 Paragraph [58] relates to an embodiment where the requested content resides in a cache located on a determined content delivery route. In this embodiment there is no disclosure of generating a list of content packagers.

Paragraph [59] relates to an alternative embodiment in which the requested content does not reside in a cache located on the content delivery path, so other caches throughout a network system are included in the discovery process. It is only in this alternative embodiment that a list of content packagers is generated.

- 4.5 Hence, the board finds that the amended feature of claim 1 quoted under point 4.1 above has no basis in the application as originally filed because it combines disclosures of different, disjunct embodiments, namely the disclosures of *"the requested content resides in cache located on the content delivery route"* and *"generating a list of content packagers"*.

4.6 The appellant submitted that both paragraphs [58] and [59] related to step 607 in Figure 6 of the application as originally filed.

It argued that the statement "*if the requested content is not stored along the content delivery route*" at the end of paragraph [58] should be understood to mean that the steps set out in paragraph [59] would be executed if the requested content was not stored along the delivery route.

4.7 The board is not convinced by these arguments for the following reasons.

Step 607 in Figure 6 reads "*Determine if requested content is stored in cache*". This step leaves it open whether a cache storing the requested content is on a content delivery route (as presupposed in paragraph [58]) or off the content delivery route (as presupposed in paragraph [59]). However, this does not mean that the different disclosures of paragraphs [58] and [59] can be combined.

Furthermore, paragraph [58] unambiguously discloses what should happen if the requested content is not stored along the content delivery route, namely "*then the process may continue to retrieve and package requested content*". Hence, in the embodiment of paragraph [58] no other caches outside the content delivery path are searched for, but rather the requested content is retrieved and packaged.

4.8 In addition, claim 1 includes the following amended feature: "*selecting a content packager of the plurality of content packagers (303) ... based on a geographical*

proximity of the requesting device to the plurality of content packagers (303)".

- 4.9 According to Figure 6, steps 604 and 605, and paragraphs [54] and [55], the content delivery route may be determined before or after a content packager has been determined. Paragraph [57] discloses that "*geographical proximity of a requesting device to a determined content packager may be determined to use as a factor in selecting a content delivery route*" (emphasis added). Hence, paragraph [57] relates to a situation in which a content packager has already been determined and a content delivery route is to be selected on the basis of geographical proximity. Therefore, this disclosure cannot be a basis for the feature quoted under point 4.8 above in which a content packager is selected on the basis of geographical proximity.
- 4.10 It is true that the board, contrary to the reasoning given in point 4.9 above, had indicated in point 3.2.1 of its communication under Article 15(1) RPBA 2020 that the disclosure in paragraph [57] might be regarded as a basis for the feature reproduced in point 4.8 above. However, as expressly emphasised in point 1 of the communication and in line with Articles 15(1), fifth sentence, and 17(2) RPBA 2020, the comments in this communication merely expressed the board's preliminary and non-binding opinion. This was also emphasised by the board throughout the oral proceedings. Therefore, the appellant could not have had any legitimate expectation that the board would not deviate from its preliminary opinion. By the same token, the principle of procedural economy did not stop the board deviating from its preliminary opinion on substantial issues in the course of the proceedings, as the board may always

examine of its own motion whether the patent application complies with the requirements of the EPC (see Article 114(1) EPC). Consequently, the board was entitled, at any time before the final decision, to deviate from its preliminary opinion, provided that the appellant was given the opportunity under Article 113(1) EPC to comment on any matter raised. During the discussion of added matter for claim 1 of the first auxiliary request, the board raised the issue set out in points 4.8 and 4.9 above and the appellant was given ample opportunity to comment. It was in this context that the appellant also submitted its further arguments as discussed in point 4.12 below. Moreover, when this board deviated from its preliminary opinion and raised a new objection during the oral proceedings, the appellant was given the opportunity to file new requests to overcome these objections. This is exactly what the appellant did by filing the "New Second Auxiliary Request" and the "New Third Auxiliary Request" (see points 6. and 7. below).

- 4.11 The appellant further criticised that during the oral proceedings the board did not raise the objection discussed above in points 4.8 and 4.9 at an earlier stage in relation to the main request even though claim 1 of this request also contained the feature in question. However, as explained to the appellant during the oral proceedings, the board is not obliged to examine every possible objection that could be raised against a claim. Contrary to the appellant's assertion, this would be at odds with the principle of procedural economy. Rather, for a request to be held unallowable, it suffices that one single objection prejudices the grant of a patent. In line with this principle, the board discussed the allowability of the main request

with regard (only) to a different feature of claim 1 of the main request (see points 2.3 to 2.7 above).

- 4.12 As a further basis for the feature quoted under point 4.8 above, the appellant referred to paragraphs [05], [40], and [47] of the application as originally filed.

Paragraph [05] discloses that *"a device location and profile of a requesting device may be determined. Based on the requesting device location and profile, at least one content packager may be determined"*.

Paragraph [40] discloses that *"a location resolution server 314 may contain geographic identification information for the various servers 306/307, termination servers 310, packagers 303, and other components in the system, and may be configured to determine which device(s) are closest geographically to a requesting user device"*.

Paragraph [47] discloses: *"Location resolution server 314 may be configured to determine location information for a particular user device. For example, location resolution server 314 may determine a requesting location for a user device requesting content delivery. The determined location of the requesting device may be used to determine an optimal content packager 303 and streaming server 306 to complete content delivery."*

- 4.13 The appellant argued that paragraphs [40] and [47] referred to the same location resolution server 314. Hence, the person skilled in the art would have understood the passage in paragraph [47] reading *"[t]he determined location of the requesting device may be*

used to determine an optimal content packager" as referring to the passage in paragraph [40] reading "determine which device(s) are closest geographically to a requesting user device". These passages together thus provided a basis for selecting a content packager out of a plurality of content packagers on the basis of a geographical proximity of the requesting device to the plurality of content packagers.

- 4.14 The board is not convinced by these arguments for the following reasons.

The requesting user device and the content packagers are devices on a network. As set out in the description (paragraph [17]), the devices on any such network may be connected by coaxial cables, optical fibres or in a wireless manner. Within the framework of networks, the person skilled in the art would have understood the determination of an optimal content packager on the basis of the location of the requesting device to refer to a number of network properties, such as the number of intermediate nodes or latency or quality of service on a possible route between the requesting device and the selected packager. These properties are not necessarily directly related to geographical proximity.

Therefore, the person skilled in the art would not have directly and unambiguously derived that the determination of an optimal content packager on the basis of the location of the requesting device disclosed in paragraph [47] was to be based on which content packager was closest to the requesting device.

- 4.15 Therefore, the board finds that the feature quoted under point 4.8 above has no basis in the application as originally filed.

4.16 In view of the findings under points 4.5 and 4.15, claim 1 of the first auxiliary request does not meet the requirements of Article 123(2) EPC.

5. Objection under Rule 106 EPC

5.1 During the oral proceedings before the board, the appellant orally raised the following objection under Rule 106 EPC.

"Claim 1 of the main request filed with the statement of grounds of appeal contained the feature '*selecting a content packager of the plurality of content packagers (303) ... based on a geographical proximity of the requesting device to the plurality of content packagers (303)*'. In point 3.2.1, fourth and fifth paragraphs, of its communication under Article 15(1) RPBA 2020, the board had stated that paragraph [57] of the application as filed constituted a basis for this feature. Consequently, the appellant had not amended this feature in its first auxiliary request filed in response to the preliminary opinion of the board. During the oral proceedings, to the surprise of the appellant the board changed its opinion in this regard and claimed that there was no basis for the above-mentioned feature. This objection, however, was not raised by the board in relation to the main request but for the first time in relation to the first auxiliary request. The appellant was obliged to react to this change of mind of the board and had to file amended claims, in order to overcome this new objection. At the same time, under the RPBA, the appellant must comply with the principle of procedural economy. The appellant is of the opinion that for reasons of procedural economy, the board should not have raised the objection

regarding the feature in question for the first auxiliary request and the subsequent requests, because it had not been raised in relation to the main request. Further, raising this objection was also against the principle of legitimate expectations. The appellant therefore requires the board to withdraw this objection."

The appellant refused to follow the board's recommendation to file the objection under Rule 106 EPC in writing. Therefore, the board formulated a précis of the appellant's oral statements, wrote it down and read it to the appellant's representative, who explicitly confirmed that the board had correctly formulated the objection under Rule 106 EPC.

5.2 According to Rule 106 EPC "*a petition under Article 112a, paragraph 2(a) to (d), is only admissible where an objection in respect of the procedural defect was raised during the appeal proceedings and dismissed by the Board of Appeal, except where such objection could not be raised during the appeal proceedings*".

5.3 As explained to the appellant during the oral proceedings, the board cannot identify any procedural defect listed in Article 112a(2) (a) to (d) EPC for the following reasons.

(a) The circumstances set out in Article 112a(2) (a) and (b) EPC are obviously not present in the case in hand.

(b) Article 112a(2) (d) EPC relates to Rule 104 EPC. However, oral proceedings were held and the board decided on all of the appellant's requests.

(c) Under Article 112a(2)(c) EPC, a fundamental violation of Article 113 EPC (in this case the appellant's right to be heard under Article 113(1) EPC) had to have occurred. However, the appellant did not invoke any such violation with its objection under Rule 106 EPC. In any case, the appellant was heard on the relevant objection under Article 123(2) EPC and the deviation from the board's preliminary opinion; see points 4.10 to 4.13 above. The alleged violations of the principles of procedural economy and legitimate expectations (which did not actually occur; see points 4.10 and 4.11 above) have no bearing on the appellant's right to be heard.

5.4 In view of the above, the board dismissed the appellant's objection under Rule 106 EPC.

6. "New Second Auxiliary Request" - admittance (Article 13 RPBA 2020)

6.1 The "New Second Auxiliary Request" was filed during the oral proceedings before the board, i.e. after the notification of the summons to oral proceedings. This auxiliary request is therefore an amendment within the meaning of Article 13(2) RPBA 2020.

6.2 Under Article 13(2) RPBA 2020, any amendment to a party's appeal case after notification of a summons to oral proceedings is, in principle, not to be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

In exercising its discretion under Article 13(2) RPBA 2020, the board may also rely on criteria

applicable at the second level of the convergent approach, i.e. those set out in Article 13(1) RPBA 2020 (see Case Law, V.A.4.5.9 and document CA/3/19, section VI, explanatory remarks on Article 13(2), fourth paragraph).

- 6.3 Under Article 13(1) RPBA 2020, the onus is on the appellant to demonstrate that any amendment overcomes, prima facie, the issues raised by the board and does not give rise to new objections (see document CA/3/19, section VI, explanatory remarks on Article 13(1), third paragraph).
- 6.4 Claim 1 of the "New Second Auxiliary Request" contains the feature quoted under point 4.8 above, which the board found to contravene the requirements of Article 123(2) EPC. Therefore, the amendments to claim 1 of the "New Second Auxiliary Request", prima facie, do not overcome this issue raised by the board.
- 6.5 The appellant had no counter-arguments in this respect, apart from requesting that the objection raised against the first auxiliary request be withdrawn (see point XV. above).
- 6.6 Hence, the board exercised its discretion under Article 13(2) RPBA 2020, using the criteria of Article 13(1) RPBA 2020, and did not admit the "New Second Auxiliary Request" into the appeal proceedings.
7. "New Third Auxiliary Request" - admittance (Article 13(2) RPBA 2020)
- 7.1 The "New Third Auxiliary Request" was filed during the oral proceedings before the board, i.e. after the notification of the summons to oral proceedings. This

auxiliary request is therefore an amendment within the meaning of Article 13(2) RPBA 2020.

- 7.2 As with the "New Second Auxiliary Request", the board may exercise its discretion under Article 13(2) RPBA 2020 using the criteria of Article 13(1) RPBA 2020 (see point 6.2 above).
- 7.3 Under Article 13(1) RPBA 2020, the onus is on the appellant to demonstrate that any amendment overcomes, *prima facie*, the issues raised by the board and does not give rise to new objections (see document CA/3/19, section VI, explanatory remarks on Article 13(1), third paragraph).
- 7.4 Claim 1 of the "New Third Auxiliary Request" contains the following amended feature: *"selecting a content packager of the plurality of content packagers (303) based on a device type of the requesting device, wherein the content packager is selected using a location resolution server to determine location information of the requesting device and to use the location information to determine an optimal content packager and streaming server 306 to complete content delivery"*.
- 7.5 Claim 1 of the "New Third Auxiliary Request" also specifies *"determining a geographic location and a device profile of the requesting device"*.
- 7.6 Claim 1 thus gives rise to a new objection under Article 84 EPC because it is not clear whether the determined *"location information of the requesting device"* is the same as or different from the determined *"geographic location ... of the requesting device"*.

- 7.7 Therefore, the appellant did not demonstrate that the amendments to claim 1 of the "New Third Auxiliary Request" do not give rise to new objections.
- 7.8 In view of the above, the board exercised its discretion under Article 13(2) RPBA 2020, using the criteria of Article 13(1) RPBA 2020, and did not admit the "New Third Auxiliary Request" into the appeal proceedings.
8. Fourth auxiliary request - admittance (Article 13(2) RPBA 2020)
- 8.1 The fourth auxiliary request was filed after the notification of the summons to oral proceedings. Hence, this auxiliary request is an amendment within the meaning of Article 13(2) RPBA 2020.
- 8.2 As with the "New Second Auxiliary Request", the board may exercise its discretion under Article 13(2) RPBA 2020 using the criteria of Article 13(1) RPBA 2020 (see point 6.2 above).
- 8.3 Claim 1 of the fourth auxiliary request contains the same amended features as objected to under Article 123(2) EPC for claim 1 of the first auxiliary request (see points 4.1 to 4.15 above).
- 8.4 Therefore, the amendments in claim 1 of the fourth auxiliary request, prima facie, do not overcome these issues raised by the board.
- 8.5 The appellant had no counter-arguments in this respect.
- 8.6 Hence, the board exercised its discretion under Article 13(2) RPBA 2020, using the criteria of

Article 13(1) RPBA 2020, and did not admit the fourth auxiliary request into the appeal proceedings.

9. Conclusion on the claim requests

The main request and the first auxiliary request are not allowable because claim 1 in neither request meets the requirements of Article 123(2) EPC. The "New Second Auxiliary Request", the "New Third Auxiliary Request" and the fourth auxiliary request were not admitted into the appeal proceedings. Since none of the appellant's requests is allowable, the appeal must be dismissed.

10. Request for correction of the minutes of the oral proceedings

10.1 The appellant submitted that the paragraph bridging pages 3 and 4 of the minutes (reproduced in point 5.1 above) did not correctly reflect the content of the appellant's request under Rule 106 EPC. Consequently, the minutes did not meet the requirements of Rule 124 EPC (see point XV. above).

10.2 More specifically, the appellant submitted that the board's course of action during the oral proceedings, as described in the objection under Rule 106 EPC, violated not only the principles of procedural economy and legitimate expectations, but also the appellant's right to be heard under Article 113(1) EPC. However, the minutes did not contain any reference to the latter even though its alleged violation was discussed during the oral proceedings. The reasons under Article 112a(2) (a) to (e) EPC had been discussed, after which the appellant filed its objection under Rule 106 EPC on the basis of Article 112a(2) (c) EPC.

- 10.3 The appellant reasoned that by omitting the ground under Article 112a(2)(c) EPC from the minutes, the board deprived the appellant of the possibility to request a petition for review under Article 112a EPC. This in itself constituted a violation of the appellant's right to be heard.
- 10.4 Under Rule 124(1) EPC, minutes of oral proceedings must contain "the essentials of the oral proceedings" and "the relevant statements made by the parties". It is within the discretion of the minute-writer or the board what is considered "essential" or "relevant" (see T 468/99, Reasons 1.5; T 966/99, Reasons 7.2.2). What constitutes "the essentials of the oral proceedings" or "the relevant statements made by the parties" has to be determined by reference to what the board has to decide on (see T 966/99, Reasons 7.2.2; T 263/05, Reasons 8.5; T 317/09, Reasons 8).
- 10.5 Rule 124(3) EPC further stipulates that the minutes are to be authenticated by the employee responsible for drawing them up and by the employee who conducted the oral proceedings. The EPC contains no provisions providing for a party's right to have the minutes corrected.
- 10.6 It follows that preparing the minutes of oral proceedings before the boards is a task that is entrusted only to the boards and which cannot be transferred or delegated, in whole or in part, to the parties; no single party can be permitted to decide on or influence the content of the minutes (see T 1721/07, Reasons 15; T 433/11, Reasons 80).
- 10.7 Of course, parties are free to suggest a correction of the minutes if they are of the opinion that the minutes

do not comply with Rule 124(1) EPC. However, there is no obligation on the boards to make any such correction.

10.8 The appellant's contention set out in point 10.2 above is inconsistent with the board members' recollection of the events and their handwritten notes. Rather, the board is positive that the course of events was as follows.

10.9 The appellant's professional representative announced that it intended to raise an objection under Rule 106 EPC. To avoid any later discussions about the content of the objection, the board asked the representative to file the objection in writing. However, the representative refused to do so.

10.10 Consequently, the chair announced that the board would note down the orally raised objection and then read it back to the representative so they could confirm the correctness of the board's précis of the objection.

10.11 Subsequently this procedure was carried out. After the legal member had read the first version of the objection to the representative, they wished to add that the board's course of action was also contrary to the principle of legitimate expectations. The board added a sentence to that effect and read it again to the representative, who then confirmed that the board had correctly précised the appellant's objection under Rule 106 EPC. It is this very text which the board recorded in the minutes. At no point in time during the procedure of formulating the objection did the representative explicitly mention a violation of the appellant's right to be heard.

10.12 After the representative had confirmed that the board had correctly reproduced the objection under Rule 106 EPC, the legal member announced that the board dismissed the objection. They then gave reasons for the dismissal, going through Article 112a(2) (a) to (d) EPC as the possible grounds for an objection under Rule 106 EPC and explaining why the requirements set out in these provisions were not met in the circumstances invoked by the appellant. The appellant's right to be heard under Article 113(1) EPC was mentioned in the context of Article 112a(2) (c) EPC. The legal member explained why the circumstances presented in the appellant's objection under Rule 106 EPC did not constitute a violation of the appellant's right to be heard.

10.13 In view of the above, the appellant's request for correction of the minutes of the oral proceedings is refused.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:



K. Boelicke

B. Willems

Decision electronically authenticated