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Datasheet for the decision of 16 June 2023

Case Number: T 2542/19 - 3.5.04

Application Number: 14750756.0

Publication Number: 3033888

IPC: H04N21/422, H04N21/4223, H04N21/4415, H04N21/466

Language of the proceedings: EN

Title of invention:
METHOD IN SUPPORT OF VIDEO IMPRESSION ANALYSIS INCLUDING INTERACTIVE COLLECTION OF COMPUTER USER DATA

Applicant:
Realeyes OÜ

Headword:

Relevant legal provisions:
EPC R. 111(2), 103(1)(a)
EPC Art. 111(1), 113(1)
RPBA 2020 Art. 11

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It can be changed at any time and without notice

Keyword:
Appealed decision - sufficiently reasoned (no) - remittal to the department of first instance (yes)
Reimbursement of appeal fee - substantial procedural violation (yes)

Decisions cited:
T 0070/02, G 0010/93

Catchword:

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Case Number: T 2542/19 - 3.5.04

D E C I S I O N
of Technical Board of Appeal 3.5.04
of 16 June 2023

Appellant: (Applicant)	Realeyes OÜ Vahe 15 11615 Tallinn (EE)
Representative:	Mewburn Ellis LLP Aurora Building Counterslip Bristol BS1 6BX (GB)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 10 April 2019 refusing European patent application No. 14750756.0 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. 14 750 756.0, published as international patent application WO 2015/022409 A1.

II. The documents cited in the decision under appeal included the following:

D1: US 2012/0072939 A1

D2: US 2012/0222057 A1

III. The application was refused on the ground that the requirements of Article 52(1) EPC were not met because the subject-matter of claim 1 of the sole request did not involve an inventive step within the meaning of Article 56 EPC in view of the disclosure of either document D1 or document D2.

IV. The applicant (appellant) filed notice of appeal. With the statement of grounds of appeal, the appellant maintained the sole request forming the basis for the decision under appeal. The appellant requested that the decision under appeal be set aside and that a European patent be granted on the basis of the claims of its sole request. It submitted that the decision under appeal was not properly reasoned as required by Rule 111(2) EPC and provided arguments to support its opinion that the claims met the requirements of Article 56 EPC.

V. Summons to oral proceedings and a communication under Article 15(1) RPBA 2020 were issued. In that

communication, the board expressed the preliminary opinion that the decision under appeal did not meet the requirements of Rule 111(2) EPC and that the appellant's right to be heard under Article 113(1) EPC had been infringed during the first-instance proceedings. The board expressed its intention to remit the case to the department of first instance in accordance with Article 111(1) EPC and Article 11 RPBA 2020 and to order a reimbursement of the appeal fee. The appellant was invited to comment on this preliminary opinion and to inform the board whether the appellant maintained its auxiliary request for oral proceedings since oral proceedings did not appear to be expedient under the circumstances outlined above.

VI. By letter dated 30 May 2023, the appellant withdrew its request for oral proceedings.

VII. Claim 1 of the sole request reads as follows:

"A method (200) of collecting behavioural data of a computer user (102) at a client computer (104) during playback of media at the client computer, the client computer (104) being in communication over a network with a remote ad server (114), the method comprising:

receiving (201), at the remote ad server (114) from a video player application (108) running on the client computer (104), a call for a video ad response (112);

sending (202), from the remote ad server (114) to the client computer (104), the video ad response (112), wherein the video ad response (112) is compliant with a Video Ad Standard Template specification;

executing the video ad response in a runtime environment of the video player application (108) running on the client computer,

characterised in that:

the video ad response (112) includes a resource identifier that calls an emotion tracking application (118) from a remote resource store (116), whereby the emotion tracking application (118) is transferred and executed within the runtime environment of the video player application (108), and

the method further includes:

upon receipt by the video player application (118) of an indication that the emotion tracking application (118) is ready, playing back (216), by the video player application (108) or the emotion tracking application (118), media on the client computer; and

collecting (218), by the emotion tracking application (118), behavioural data that comprises information indicative of the computer user's emotional state during the playback of the media."

Reasons for the Decision

1. The appeal is admissible.

2. Sole request - insufficient reasoning for lack of inventive step (Rule 111(2) EPC)

2.1 Under Rule 111(2) EPC, decisions of the European Patent Office which are open to appeal must be reasoned.

The reasoning given in a decision open to appeal has to enable the appellant and the board to examine whether the decision was justified (see Case Law of the Boards of Appeal of the European Patent Office, 10th edition 2022 ("Case Law"), III.K.3.4.1).

A decision should discuss the facts, evidence and arguments which are essential to the decision in detail. It has to contain the logical chain of reasoning which led to the relevant conclusion (see Case Law, III.K.3.4.3).

To give an applicant a fair chance to challenge the findings of the examining division, the latter should identify where in the closest prior-art document each of the features of the claim in suit is disclosed (see e.g. T 70/02, Reasons 6).

2.2 In point 1.1 of the decision under appeal, the examining division held that document D1 disclosed the following features of claim 1:

(a) a method of collecting behavioural data of a computer user at a client computer during playback of media at the client computer, the client computer being in communication over a network with a remote ad server, the method comprising:

(b) executing a video ad response in a runtime environment of the video player application running on the client computer, the video ad response including a resource identifier that calls an emotion tracking application from a remote resource store, whereby the emotion tracking application is transferred and executed within the runtime environment of the video player application, and

upon receipt by the video player application of an indication that the emotion tracking application is ready, playing back, by the video player application or the emotion tracking application, media on the client computer; and collecting, by the emotion tracking application, behavioural data that comprises information indicative of the computer user's emotional state during the playback of the media

For feature a), the examining division referred to D1, paragraph [0001]. For feature b), the examining division referred to D1, paragraphs [0017], [0022] and [0024] (see decision under appeal, paragraph bridging pages 2 and 3).

2.3 Paragraph [0001] of document D1 discloses a "*method for measuring the emotion, mood or reaction of an audience as the audience views an image, video, program, advertisement, presentation, or like visual display*".

This disclosure may be regarded as anticipating the part of feature a) reading "*method of collecting behavioural data of a computer user at a client computer during playback of media at the client computer*".

However, it is not understandable why the examining division considered paragraph [0001] of D1 to disclose a communication between the client computer and a remote ad server.

2.4 Paragraph [0017] of document D1 discloses: "*The terminal network device, such as the set top box 28, is provided with information from a sensor 30 concerning the individual's reaction or emotional response to*

media content as the individual views the media content ... in one contemplated embodiment the sensor 30 is one or more cameras, digital camera, video camera, webcam or other electronic device for capturing a series of still images or streaming video of an individual located in front of the television, computer or like monitor 26 watching the content or programming displayed on the monitor 26"

Paragraph [0022] of document D1 discloses: "*facial analysis or other analysis, can be performed at the physical location of the viewer, such as via the set top box 28, with the results of the analysis transmitted in a return path via network 10 to the audience reaction server 24 or like equipment*"

Paragraph [0024] of document D1 discloses: "*The above arrangements permit the emotional response or responses of each individual (regardless of type of sensor used) to be measured and tracked during the course of the program being viewed*"

These disclosures may be regarded as anticipating the part of feature b) reading "*collecting, by the emotion tracking application, behavioural data that comprises information indicative of the computer user's emotional state during the playback of the media*".

However, it is not understandable why the examining division considered paragraphs [0017], [0022] and [0024] of document D1 to disclose:

- execution of a video ad response in a runtime environment of a video player application

- the video ad response including a resource identifier calling an emotion tracking application from a remote resource store

- the emotion tracking application being transferred and executed within the runtime environment of the video player application

- playing back media upon receipt by the video player application of an indication that the emotion tracking application is ready

2.5 In point 1.2 of the decision under appeal, the examining division held that document D2 disclosed features a) and b) of claim 1 mentioned under point 2.2 above and, in addition, the following feature:

sending, from the remote ad server to the client computer, a video ad response

2.6 For feature a), the examining division referred to D2, claim 1 and Figure 9. For feature b) and the feature quoted under point 2.5 above, the examining division referred to D2, claims 1 to 5 and Figures 1 and 2 (see decision under appeal, page 4, penultimate paragraph).

2.7 Figure 9 of document D2 shows that viewer mental state information is transmitted from a video client machine to an analysis server via the internet.

Claims 1 to 5 disclose that a selected video is embedded within a web-enabled interface such as a web page. The web-enabled interface is then distributed. The web-enabled interface is displayed, the video is played on it, and mental state data is captured while the video is played.

Figure 1 illustrates the method steps defined in claims 1 to 5 and adds steps of aggregating mental state information and recommending a media presentation.

Figure 2 illustrates a situation in which a user watches a video on an electronic display while a video of the user is captured by a webcam and an analysis of affect occurs.

2.8 These passages of document D2 may be regarded as anticipating:

- the part of feature a) reading "*method of collecting behavioural data of a computer user at a client computer during playback of media at the client computer*"

- the part of feature b) reading "*collecting, by the emotion tracking application, behavioural data that comprises information indicative of the computer user's emotional state during the playback of the media*"

2.9 However, it is not understandable why the examining division considered document D2 to disclose a communication between the client computer and a remote ad server.

In document D2, the server with which the video client machine communicates via the internet is an analysis server for the mental state information. Document D2 does not disclose that this server is a "*remote ad server*" in the sense that it sends a video ad response

to the client after having received a corresponding call.

2.10 Moreover, it is not understandable why the examining division considered document D2 to disclose:

- execution of a video ad response in a runtime environment of a video player application

- the video ad response including a resource identifier calling an emotion tracking application from a remote resource store

- the emotion tracking application being transferred and executed within the runtime environment of the video player application

- playing back media upon receipt by the video player application of an indication that the emotion tracking application is ready

2.11 The lack of reasoning why the examining division considered these features of claim 1 to be disclosed by both D1 and D2 is all the more serious as this issue was under debate throughout the proceedings before the examining division (see the appellant's letter dated 12 February 2019, page 6, first full paragraph and the appellant's letter dated 6 December 2017, paragraph bridging pages 2 and 3).

2.12 Furthermore, facts, evidence and arguments provided by the appellant on the technical meaning of a "*video ad response*" (see the appellant's letter dated 6 October 2016, page 1, penultimate paragraph) and a "*runtime environment of a video player application*" (see the appellant's letter dated

12 February 2019, page 3, first paragraph) were not discussed in the decision under appeal.

2.13 In view of the above, the board is of the opinion that the decision under appeal did not provide a proper mapping of the features of claim 1 to the passages of documents D1 and D2. Consequently, the identification of the distinguishing features and all further steps of the objection of lack of inventive step are invalid. Essential facts, evidence and arguments provided by the appellant were not discussed. Therefore, the examining division's reasoning is insufficient to the extent that the board cannot examine whether the decision was justified. Hence, the requirements of Rule 111(2) EPC are not met.

2.14 For the reasons set out in points 2.11 to 2.13 above, the board considers that the appellant's right to be heard under Article 113(1) EPC has at the same time been infringed. In fact, the party's right to be heard encompasses the right to have its comments duly considered (see Case Law, III.B.2.4.2 and III.K.3.4.2), which the examining division failed to do. The infringement of the appellant's right to be heard constitutes a substantial procedural violation (see Case Law, III.B.2.4.2).

3. Remittal to the department of first instance (Article 111(1) EPC and Article 11 RPBA 2020)

3.1 Under Article 111(1), second sentence, EPC, the board, in deciding upon an appeal, may either exercise any power within the competence of the department responsible for the appealed decision or remit the case to that department for further prosecution.

3.2 The board is not in a position to assess, on the basis of the examining division's reasoning, whether the examining division's conclusion that the subject-matter of claim 1 of the sole request lacked inventive step was justified (see section 2. above).

3.3 Thus, if the board were to decide on the substance of the case and not remit the case to the department of first instance, the board would have to carry out a full examination of the application on the patentability requirements. This, however, is the task of the examining division (see decision G 10/93, OJ EPO 1995, 172, point 4 of the Reasons).

3.4 The examining division's deficient examination of inventive step of the sole request, which amounts to a fundamental deficiency in the proceedings before it (see point 2.14 above), constitutes "special reasons" within the meaning of Article 11 RPBA 2020. Therefore, the board exercises its discretion under Article 111(1) EPC in remitting the case to the department of first instance for further prosecution.

4. Reimbursement of the appeal fee (Rule 103(1)(a) EPC)

4.1 Under Rule 103(1)(a) EPC, the appeal fee is reimbursed in full where the board deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation.

4.2 Since the sole objection on which the decision under appeal was based involved a substantial procedural violation (see point 2.14 above), the board finds that the appeal is allowable and that the reimbursement of the appeal fee is equitable.

5. The appellant withdrew its auxiliary request for oral proceedings before the board. Therefore, the board is in a position to decide on the case without holding oral proceedings.

6. Conclusion

As a result of the infringement of Article 113(1) and Rule 111(2) EPC, the board remits the case to the department of first instance in accordance with Article 111(1) EPC and Article 11 RPBA 2020 and orders the reimbursement of the appeal fee.

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.

3. The appeal fee is to be reimbursed.

The Registrar: The Chair:

K. Boelicke B. Willems

Decision electronically authenticated