

Internal distribution code:

- (A) Publication in OJ
(B) To Chairmen and Members
(C) To Chairmen

D E C I S I O N
of 15 March 2000

Case Number: T 1194/97 - 3.5.2

Application Number: 91919380.5

Publication Number: 0500927

IPC: G11B 27/10

Language of the proceedings: EN

Title of invention:

Picture retrieval system

Applicant:

Koninklijke Philips Electronics N.V.

Opponent:

-

Headword:

Data structure product/PHILIPS

Relevant legal provisions:

EPC Art. 52(2)(d) and (3), 54, 56, 84
Vienna Convention on the Law of Treaties Art. 31
PCT R. 39.1(v)

Keyword:

"Presentation of information as such - no"
"Clarity - yes"
"Novelty - yes"
"Inventive step - yes"

Decisions cited:

T 0163/85, T 0026/86, T 0378/88, T 1173/97

Headnote:

- I. A record carrier characterised by having functional data recorded thereon is not a presentation of information as such and hence not excluded from patentability by Article 52(2)(d) and (3) EPC (reasons 3.3).

- II. In this context functional data includes a data structure defined in terms (here coded picture line synchronisations, line numbers, and addresses) which inherently comprise the technical features of the system (here read device plus record carrier) in which the record carrier is operative (extending T 163/85, Colour television signal/BBC, OJ EPO 1990, 379).



Europäisches
Patentamt

European
Patent Office

Office européen
des brevets

Beschwerdekammern

Boards of Appeal

Chambres de recours

Case Number: T 1194/97 - 3.5.2

D E C I S I O N
of the Technical Board of Appeal 3.5.2
of 15 March 2000

Appellant: Koninklijke Philips Electronics N.V.
Groenewoudseweg 1
NL-5621 BA Eindhoven (NL)

Representative: Visser, Dr Ir. Derk
INTERNATIONAAL OCTROOIBUREAU B.V.
Prof. Holstlaan 6
NL-5656 AA Eindhoven (NL)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 28 July 1997
refusing European patent application
No. 91 919 380.5 pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: W. J. L. Wheeler
Members: R. G. O'Connell
B. J. Schachenmann

Summary of Facts and Submissions

I. This is an appeal from the refusal by the examining division of European patent application No. 91 919 380.5. The main request then on file was refused for the reasons given in the annex to the communication under Rule 51(4) EPC dated 18 March 1997. The applicant did not approve the text of the auxiliary request as proposed for grant in the communication under Rule 51(4) EPC.

II. The reasons given in the annex to the communication under Rule 51(4) EPC for refusing the main request were *inter alia* that independent claim 4, which was directed to a record carrier on which a coded picture is recorded in a novel format, was not clear, and that the subject-matter of this claim lacked novelty and was excluded from patentability by Article 52(2)(d) and (3) EPC. The following prior art document was referred to:

D1: US-A-4 914 515.

III. Following a telephone interview with the rapporteur the appellant filed amendments to the claims and description. Independent claims 1, 4 and 7 (main request) now read as follows:

1. "A picture retrieval system comprising a record carrier and a read device, a coded picture composed of consecutive coded picture lines being recorded in a contiguous track of the record carrier, which track has been provided with addresses, the read device comprising a read head for reading the recorded coded picture lines by scanning the track, means for moving

the read head to a track portion having a selected address, characterized in that together with the coded picture lines line synchronizations and line numbers have been recorded on the record carrier, each line number specifying the sequence number of the relevant coded picture line in the coded picture, and each line synchronization specifying the beginning of the relevant coded picture line, the coded picture lines having a variable code length, addresses for a number smaller than the total number of coded picture lines of the coded picture being also recorded on the record carrier, which addresses specify where the relevant picture lines have been recorded in the track, the device comprising means for selecting a coded picture line within a selected coded picture, means for reading recorded addresses for a number smaller than the total number of picture lines of the selected picture, means for selecting on the basis of the addresses thus read a track portion situated before the track portion where the recording of the selected coded picture line begins, and means for causing the read head to be moved to the selected track portion, and means for subsequently detecting the read-out of the beginning of the selected coded picture line on the basis of the read-out line numbers and line synchronization."

4. "A record carrier for use in the system as claimed in claim 1, a coded picture composed of consecutive variable length coded picture lines being recorded in a contiguous track of the record carrier, which track has been provided with addresses, characterized in that together with the coded picture lines line synchronizations and line numbers have been recorded on the record carrier, each line number specifying the

sequence number of the relevant coded picture line in the coded picture, and each line synchronization specifying the beginning of the relevant coded picture line, the coded picture lines having a variable code length, addresses for a number smaller than the total number of coded picture lines of the coded picture being also recorded on the record carrier, which addresses specify where the relevant picture lines have been recorded in the track."

7. "A read device for use in the system as claimed in claim 1, the read device comprising a read head for reading the recorded coded picture lines by scanning the track, means for moving the read head to a track portion having a selected address, characterized in that the device comprises means for selecting a coded picture line within a selected coded picture, means for reading the recorded addresses for the number smaller than the total number of picture lines of the selected picture, means for selecting on the basis of the addresses thus read a track portion situated before the track portion where the recording of the selected coded picture line begins, and means for causing the read head to be moved to the selected track portion, and means for subsequently detecting the read-out of the beginning of the selected coded picture line on the basis of the read-out line numbers and line synchronizations."

IV. The appellant's arguments in respect of the refused carrier claim 4 can be summarised as follows:

(i) *Interpretation of Article 52(2)(d) EPC*

- (a) It was important to distinguish between *presentation*, which meant "to bring into the presence of someone, to bring before the public" and *representation* which meant "to serve as a symbol of". The exclusion under Article 52(2)(d) and (3) EPC related to bringing information **directly to a human**. The decisions of the EPO Boards of Appeal referring to this article usually related to this interpretation, eg on a computer screen as in the case T 599/93 dated 4 October 1996, or visible marking of musical keys as in decision T 603/89, Marker/Beattie, OJ EPO 1992, 230. This interpretation was also confirmed by the German text of Article 52(2)(d) EPC: "**die Wiedergabe** von Informationen" (appellant's emphasis).
- (b) In contrast *representation* was a normal technical measure in which a physical signal represented information, eg an electrical charge in a capacitor representing a logical 0 or 1. This complied with the literal meaning of *representation* in that a meaning had been assigned to certain physical parameter values, eg signal values taking the place of one's bank account. Hence, when discussing a technical data processing system, it was automatically assumed that electrical or logical signals represented information. Article 52(2)(d) EPC could not be interpreted as excluding technical matter solely because it was a *representation*.
- (c) It should also be noted that some confusion as to the interpretation of "presentations" was caused

by the Guidelines for examination in the EPO, C-IV, 2.3. There the text of Article 52(2)(d) EPC was paraphrased as: "Any **r**epresentation (appellant's emphasis) of information characterized solely by the content of the information, is not patentable". This broadened interpretation was illustrated by examples, some of which were indeed presentations of information, eg a book or a traffic sign, and others of which were in fact representations of information recorded on a carrier, eg a gramophone record characterised by the musical work and a magnetic tape carrying a computer program were mentioned. Whereas the book may be excluded based on Article 52(2)(d) because it brought its content to a human, the gramophone record should not be excluded under this head since it constituted a carrier comprising physical phenomena to be interpreted by a reading device as symbols. However the gramophone record could be excluded because its contribution to the art was not technical, ie its information content (the musical work) was novel but no technical considerations were involved; cf decision T 769/92, General purpose management system/Sohei, OJ EPO 1995, 525. A further reason for exclusion might be under Article 52(2)(b) EPC, because the musical work could be considered an aesthetic creation. The example of a magnetic computer tape characterized by the data or program recorded should not be excluded under Article 52(2)(d) either, because it was not a presentation of information for a human but a representation of a program readable by a suitable computer. Hence such a tape could only be

excluded under Article 52(2)(c) EPC, whereas a listing of the same computer program on paper might constitute a presentation of information excluded as such by Article 52(2)(d).

- (d) In the record carrier of claim 4 the information about the accessibility of the coded picture was embodied in the picture access data structure, ie a **representation** of information, while the **content** of the information had a technical function. This **representation** of information was not directly usable by a human, but needed to be processed by technical means, ie the reading device, which could interpret the bits in the data structure. Hence Article 52(2)(d) EPC was not applicable to the record carrier of claim 4.

- (ii) *"Invention" within the meaning of Article 52(1) EPC*

- (a) Field of invention - problem and solution

Although the concept of invention used in Article 52(1) EPC was not explicitly defined in a positive sense in the EPC, Rule 27 implied that an invention should relate to a technical field and that the claimed subject-matter should be a solution to a technical problem.

The record carrier according to claim 4 related to the field of picture storage and retrieval. Clearly this was a technical field, because the storage was realized in physical properties of the recording medium which properties were to be

detected by a technical device and to be decoded and displayed by electronic means. The features of the storage and retrieval system were technical in that the retrieval could not be performed by a human and stored pictures could not be accessed directly via his senses. Moreover the production of record carriers and their information content was an industrial activity.

The technical problem to be solved by the invention was to provide "recorded picture data suitable for easy access to any part (ie cut-out) of a picture".

The solution to the problem was the record carrier according to the invention carrying the coded pictures **and the picture access data structure**. This structure clearly was of a technical nature in that its function was to control the operation of the retrieval device; cf decision T 110/90, Editable document form/IBM, OJ EPO 1994, 557, reasons 4, in which a technical nature was credited to printer control characters, because such characters controlled the operation of the printing device.

Hence, the record carrier of claim 4 comprising the picture access data structure was a technical solution to a technical problem and constituted an invention in the sense of Article 52(1) EPC.

- (b) Technical character of the novel feature - the data structure

The novel technical feature of the invention of claim 4 within the meaning of Rule 29(1)(b) EPC was the picture access data structure.

The technical nature of the data structure could in the first place be derived from the fact that the system could not function without a record carrier on which the data structure as specified in claim 4 was recorded. Pictures on such a record carrier could only be reproduced on a device according to claim 7 and, conversely, such a playback device could only exercise its function (fast display of parts of the stored pictures) using such a record carrier. The record carrier embodied the necessary data **structure** and the retrieval device comprised means controlled by this data structure. The essential elements of the inventive subject matter were partly included in the player and partly in the record carrier. So how could the system comprise technical features, and at the same time the record carrier be devoid of any technical feature?

Decision T 163/85, Colour television signal/BBC, OJ EPO 1990, 379 was particularly relevant for classifying the content of the information as technical or non-technical. Reason 2 of the decision was worded as follows (appellant's emphasis):

... the TV signal as claimed could be considered as a presentation of information, which, as such, is excluded from patentability according to Article 52(2)(d) and (3) EPC. However, the TV

signal as claimed seems to be more than a mere presentation of information "as such". In fact, the TV signal as claimed inherently comprises the technical features of the TV system in which it is being used and if it is considered to present information then it represents exactly that kind of information which exhibits the technical features of the system in which it occurs. The Board considers it to be appropriate to distinguish between **two kinds of information**, when discussing its presentation. According to this distinction, a TV system **solely characterised by the information per se, eg moving pictures, modulated upon a standard TV signal**, may fall under the exclusion of Article 52(2)(d) and (3) EPC, but not a TV signal defined in terms which **inherently comprise the technical features of the TV system in which it occurs....**"

The picture storage and retrieval system of the present invention clearly was not characterised by the **information per se**, eg content of still pictures. As with the TV signal the contents of the stored pictures, eg scenery, colours, etc, were irrelevant and not the subject of the invention.

Following T 163/85 the claimed data (information) **structure** inherently comprised the technical features of the picture storage and retrieval system, ie control data for controlling fast retrieval. **This second kind of picture information** occurring in the picture storage and retrieval

system in question clearly had a technical nature.

It should be noted that the board classified the TV signal as a **representation** of information. Hence, the board did grant a carrier characterized by a **representation** of information because its content had a technical function in the TV receiver.

Finally it was to be noted, that no distinction regarding patentability should be made between the claim categories of a **signal** and a **record carrier**. In an (analog) signal a meaning was assigned to (continuous) physical parameters, which assignment constituted the a priori knowledge required for representation, eg an amplitude of an electromagnetic field at a specific moment after some sync pulse was deemed to mean a certain intensity of a pixel on the TV screen. In a digital signal 'frozen' on a record carrier a meaning was assigned to (discrete) physical parameters, eg the reflectivity or lack of reflectivity of a small part of a track on a CD was deemed to mean a specified amount of sound pressure to be reproduced by an audio system. In a signal or a record carrier the data (information) **structure** represented a functional, technical feature.

From each of the above arguments it should be concluded, that the novel data (information) structure according to the invention had a technical nature and therefore was an 'invention' within the meaning of Article 52(1) EPC.

It was also to be noted that the World Trade Organisation (WTO) required its members via the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) to offer protection "for any inventions, whether products or processes, in all fields of technology, provided they are new, involve an inventive step and are capable of industrial application". All contracting states of the EPC were member states of the WTO, so the harmonising effect of the treaty should be taken into consideration by the EPO; cf decision G 5/83, Second medical indication/EISAI, OJ EPO 1985, 64, reasons 5 and 6. The United States Patent and Trademark Office (USPTO) in particular had developed a workable criterion for patentability for record carriers, ie under the condition that the recorded data structure be functional, which clearly covered the present invention. Furthermore, if the record carrier were to be excluded from patentability it would essentially be unprotected, because it would clearly not be covered by copyright law (which basically covered presentations of information which were original creations).

(iii) *Clarity and novelty*

The examining division's finding that claim 4 was not clear and that it lacked novelty resulted from its disregarding the characterising features of the claims, which defined the picture access data structure on the record carrier, on the grounds that this data structure was (a) not technical and (b) ambiguous in the sense that it was capable of

an unlimited number of interpretations. The examining division had come to the wrong conclusion because it had not given due weight to the **function** of the picture access data structure recorded on the record carrier, which was to enable fast access to any selected part of the coded picture, eg for zooming in on a selected area of the picture. In order to enable it to carry out its function the picture access data structure had to be accessed with, ie interpreted by, an appropriate access means, namely the reading device of the picture retrieval system of claim 1. The phrase "for use in the system of claim 1" specified the appropriate interpretation of the picture access data structure realised on the record carrier of claim 4.

V. The appellant's main request is that the decision under appeal be set aside and that a patent be granted on the basis of:

Claims: 1 to 8 (main request) faxed on
29 February 2000;

Description: page 1 with insert page 1a, filed with
letter of 23 October 1995, received
25 October 1995,
pages 2 to 34 and 36 as originally
filed,
page 35 as originally filed but with the
deletion of lines 14 to 19 as per fax of
29 February 2000.

Drawings: sheets 1 to 16, as originally filed.

Reasons for the Decision

1. The appeal is admissible.
2. *Clarity*
 - 2.1 This patent application concerns a two-part picture retrieval system comprising a record carrier and a read device, ie two separate but cooperative articles which may be sold separately, but each of which is specially adapted to implement complementary aspects of the same inventive idea. Claim 1 is directed to the system while claim 4 seeks to protect the record carrier *per se*. In accordance with a standard claiming practice with inventions of this kind - colloquially referred to as "bow and arrow" or "plug and socket" inventions but which will be referred to in this decision as *distributed inventions* - the record carrier of claim 4 is specified as being "for use in the system as claimed in claim 1"; cf Guidelines for examination at the EPO, C-III, 3.3 and 3.7a.
 - 2.2 The board does not completely agree with the examining division's finding in the decision under appeal that the *for use* phrase does not limit claim 4. The standard interpretation in EPO practice (apart from well-defined exceptions such as Article 54(5) EPC) is that *for use* means *suitable for the specified use*. In the present case this means that the record carrier must be readable by the read device specified in claim 1. Although it might appear that claim 4 specifies explicitly all the features of the carrier implied by

readability, in particular the format in which the picture information is recorded, *for use* nevertheless explains by reference to claim 1 how this format is used, ie the rationale underlying the format, and thus clarifies the subject-matter for which protection is sought. Insofar as *for use* excludes interpretations which would be incompatible with this use it limits the claim.

2.3 The examining division also found that claim 4 did not specify unambiguously anything apart from a record carrier with an addressable contiguous track, since the significance of the remaining features (line numbers, coded picture lines and addresses), considered as physical characteristics, was a matter of interpretation and therefore ambiguous and hence unclear since it would not be possible to assess the technical merits on the basis of the record carrier alone. In this connection the examining division pointed to the analogy of the ambiguity of a written word which differs in meaning according to the language of interpretation. If the characterizing features were to be considered as purely logical characteristics the actual physical representation on the medium would not be defined and no additional limitations would be imposed on the carrier.

2.4 The board disagrees with this finding because it fails to take account of the special characteristics of distributed inventions which by their nature involve cooperative articles which may be "ambiguous" or even "meaningless" when considered in isolation. The effect of the *for use* phrase in claim 4, whereby the claim is to be interpreted with reference to the system defined

in claim 1, should not be ignored when examining whether the claim meets the clarity requirement of Article 84 EPC. The line numbers, coded picture lines and addresses and synchronisations of the record carrier of claim 4 are "interpreted" in use by the reading, addressing, selecting and detection means of the read device specified in claim 1 as unambiguously as a sprocket wheel in a camera "interprets" the sprocket holes in a reel of film. It is true that the variety of possible physical implementations of the characterising features of claim 1 makes the claim very general but this simply reflects the fact that the features are specified in functional terms and that consequently the relation between the record and the reader is one of cooperative functionality. The principles governing the permissibility of functional features in claims apply equally to distributed inventions and the resulting combinational generality is not *per se* a symptom of a lack of clarity. In the judgement of the board, the present invention is made at a general functional level and it is therefore appropriate for it to be claimed at that level.

2.5 As is explained below at point 3.3 the characterising features of claim 4 define *functional data* which are materialised in particular physical structures of the record carrier distinguishing the latter from other record carriers not embodying the invention. Thus the claim meets the requirements of Article 84 EPC in that it clearly defines an (ostensibly new) physical entity in functional terms.

3. *Presentations of information as such (Article 52(2)(d) and (3) EPC)*

- 3.1 The examining division interpreted claim 4 as specifying a known record carrier having data stored thereon, said data having no unambiguous technical function, and concluded, with reference to Article 52(2)(d) EPC, that "for the purposes of assessing the technical merits of the record carrier, what is stored on the record carrier is effectively a mere presentation of information". As indicated above, the board regards the examining division's interpretation of claim 4 as a misconstruction of the effect of the *for use* phrase. On a proper construction of this phrase the record carrier of claim 4 has technical functional features - line numbers, coded picture lines and addresses and synchronisations - which are adapted to cooperate with corresponding means in the read device to provide a picture retrieval system.
- 3.2 Although the decision under appeal does not refer to the Guidelines for examination at the EPO in applying Article 52(2)(d) EPC to claim 4, it appears likely that the examining division was reluctant to acknowledge that data recorded on a carrier could constitute technical features in view of the statement in the guidelines at C-IV, 2.3 under the heading "Presentations of information" that "Any representation(sic) of information characterised solely by the content is not patentable" and the examples given there of excluded matter including "magnetic computer tapes characterised by the data or programs recorded".
- 3.3 In decision T 163/85, Colour television signal/BBC, OJ EPO 1990, 379, reasons point 2, the deciding board

considered it appropriate to distinguish between two kinds of information, when discussing its presentation. According to this distinction, a TV signal solely characterised by the information per se, eg moving pictures, modulated upon a standard TV signal, may fall under the exclusion of Article 52(2)(d) and (3) EPC but not a TV signal defined in terms which inherently comprise the technical features of the TV system in which it occurs. The present board regards a record carrier having data recorded thereon as being in this respect analogous to a modulated TV signal and considers it appropriate to distinguish in a corresponding way between data which encodes cognitive content, eg a picture, in a standard manner and *functional data* defined in terms which inherently comprise the technical features of the system (reader plus record carrier) in which the record carrier is operative. The significance of the distinction between functional data and cognitive information content in relation to technical effect and character may be illustrated by the fact that in the present context complete loss of the cognitive content resulting in a humanly meaningless picture like "snow" on a television screen has no effect on the technical working of the system, while loss of functional data will impair the technical operation and in the limit bring the system to a complete halt. In particular the board sees no reason to ascribe less technical character to a synchronisation signal recorded as digital data, eg a predetermined binary string, than to an analog synchronisation signal transmitted or recorded as a pulse having a distinctive shape. Both the binary string and the analog synchronisation pulse could be interpreted in an infinite number of different ways in

other technical or human contexts, but this does not detract from their technical function of synchronisation in the relevant context, in particular when the record carrier of claim 4 is considered in the context of the picture retrieval system of claim 1. The same applies *mutatis mutandis* to the other functional data features recorded on the record carrier.

- 3.4 Applying and extending the ratio decidendi of T 163/85 by analogy, the record carrier of claim 4 is not excluded by Article 52(2)(d) and (3) EPC, since it has functional data recorded thereon, in particular a data structure of picture line synchronisations, line numbers and addresses.
- 3.5 This view of the patentability of a record carrier bearing a functional data structure also follows unpublished decision T 378/88 dated 22 March 1990. Although that decision only decided the issue of novelty, the claim concerned related to a record carrier whose technical features related to the format in which a TV programme had been recorded with technical consequences for the way in which it had to be played back (cf reasons 2.3 and 2.4).
- 3.6 Although in decision T 1173/97, Computer program product/IBM, OJ EPO 1999, 609, the issue was the exclusion of computer programs as such under Article 52(2)(c) and (3) EPC, the observation made in that decision at point 9.4 of the reasons to the effect that the predetermined potential technical effect of a program recorded on a carrier could endow such a product with technical character sufficient to overcome the exclusions under Article 52(2) and (3) EPC is also

regarded by the instant board as lending additional support to the view taken in the present decision in relation to a data structure product.

3.7 Finally, before leaving this point, it appears to the board that insofar as the passage in the Guidelines for examination at the EPO cited at point 3.2 above does not distinguish between presentations of information which are characterised by cognitive content and recordings of information which comprise functional data in the sense of points 3.3 to 3.6 above, the passage concerned extends unduly the exclusion from patentability contained in Article 52(2)(d) and (3) EPC.

3.7.1 In this context the board refers to the entry under *information*, sense 3d, in the Oxford English Dictionary, 2nd edition on compact disc, which includes the following quotation from the seminal publication by Claude E. Shannon and Warren Weaver, *The Mathematical Theory of Communication* (1949): "The word *information*, in this theory, is used in a **special** sense that must not be confused with its **ordinary** usage. In particular, information must not be confused with meaning. In fact, two messages, one of which is heavily loaded with meaning and the other of which is pure nonsense, can be exactly equivalent, from the present (information technology) viewpoint, as regards information. Information in communication theory relates not so much to what you *do* say, as to what you *could* say. That is, information is a measure of one's freedom of choice when one selects a message."

3.7.2 In the last half-century the growth of information

technology has been such that this **special** sense has almost usurped the **ordinary** usage prevailing at the time of drafting of the EPC which nevertheless remains the relevant sense for the interpretation of Article 52(2)(d) and (3) EPC; cf Article 31 Vienna Convention on the Law of Treaties. It is particularly important to note that this **special** sense of information encompasses more than "printed matter" which also conveys information in the **ordinary** (cognitive content) sense. It also encompasses physical interactions within and between machines which do not convey any humanly understandable meaning and are therefore **outside** the original **ordinary** meaning of the term and hence not reasonably interpretable as coming within the exclusion of Article 52(2)(d) and (3) EPC.

3.7.3 The legislative history confirms that the ordinary meaning of the term is the relevant one. The phrase "presentations of information" in Article 52(2)(d) EPC was adopted from PCT Rule 39.1(v), the word "mere" being presumably dropped in view of the "as such" qualification of all Article 52(2) EPC exclusions expressed in Article 52(3) EPC. The records of the PCT Washington Conference 1970, page 572 show that the intention of the provision was to remove from what an International Searching Authority had to search, tables, forms, writing styles and the like; cf Schulte, *Patentgesetz*, 5th edition, page 29, section 3.6. In the view of the board this is subject-matter which merely conveys cognitive or aesthetic content directly to a human.

3.7.4 The only decision of an EPO board of appeal known to the present board which appears to extend the

interpretation of "presentations of information" to include that aspect of the **special** sense of information technology which is outside the **ordinary** usage is T 26/86, X-Ray apparatus / Koch & Sterzel, OJ EPO 1988, 19. According to this decision (reasons 3.3), the electrical signals within a computer were subsumable under "Wiedergabe von Informationen" (German text of Article 52(2)(d) EPC, German being the language of the proceedings in that case) and hence could not in themselves be regarded as a technical effect. However, this observation was made in the context of a discussion of the exclusion of computer programs as such under Article 52(2)(c) and (3) EPC and is strictly *obiter* as far as Article 52(2)(d) EPC is concerned.

4. *Novelty (Article 54 EPC)*

4.1 It is not contested by the appellant that the closest prior art D1 discloses a record carrier having the features specified in the pre-characterising portion of claim 4.

4.2 The examining division's finding of lack of novelty over D1 was based on disregarding the features referred to above as functional data. There is no suggestion in the file that these features, which the board, for the reasons stated above, considers should not be disregarded, are known in combination with the record carrier known from D1. The record carrier as claimed in claim 4 is accordingly new.

4.3 The examining division also took the view that data features could be accidentally anticipated since a given data pattern might arise in so many different

contexts; cf point 2.3 above. Apart from the fact that a mere speculative possibility is not a disclosure of an anticipation and therefore cannot found an objection of lack of novelty, the probability of accidental anticipation of a complete data structure such as is involved in the present invention is so vanishingly small that in practice the present claim would not restrict legitimate unrelated third party activities.

5. *Inventive step (Article 56 EPC)*

The board agrees with the examining division's finding that the system (read device plus record carrier) of claim 1 and the read device of claim 7 each involve an inventive step. It further judges that the record carrier of claim 4 also embodies this inventive teaching in the sense that it would not be obvious for the person skilled in the art to provide the record carrier of D1 with the novel data structure specified in the characterising portion of claim 4 so as to constitute in cooperative use with the read device specified in claim 1 and claim 7 a solution to the problem solved by the system of claim 1. The board concludes therefore that the subject-matter of each of the independent claims 1, 4 and 7 involves an inventive step within the meaning of Article 56 EPC, having regard to the closest prior art D1.

6. In the judgement of the board, the application in accordance with the main request meets the requirements of the EPC.

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 with the order to grant a patent on the basis of:

Claims: 1 to 8 (main request) faxed on
29 February 2000;

Description: page 1 with insert page 1a, filed with
letter of 23 October 1995, received
25 October 1995,
pages 2 to 34 and 36 as originally
filed,
page 35 as originally filed but with the
deletion of lines 14 to 19 as per fax of
29 February 2000.

Drawings: sheets 1 to 16, as originally filed.

The Registrar:

The Chairman:

M. Kiehl

W. J. L. Wheeler