Kluwer Patent Blog

Another win for Virgin

Brian Cordery, Emma Muncey (Bristows) · Tuesday, September 22nd, 2015

With the Judges mostly on summer vacation, August and September have given some time for reflection on several decisions from the Patents Courts in July. One of those decisions was another defeat for Rovi against Virgin from the Court of Appeal in **Rovi v Virgin** [2015] EWCA Civ 781. Floyd LJ. gave the leading judgment of a unanimous Court. This is the twelfth patent in a row which Rovi has asserted against Virgin and which has been found to be invalid or revoked by either the English Courts or the EPO.

The judgment itself is relatively succinct and affirms the High Court's decision to revoke Rovi's patent and emphasises that a trial judge does not have to deal with every argument debated during the hearing.

Rovi's patent at issue allowed a user to pause a programme and then resume watching it on a different set-top box (known as "relocation"). At first instance, the Judge held all of the claims in the patent obvious over a single piece of prior art referred to as "DAVIC". DAVIC is a specification prepared by the Digital Audio-Visual Council which defines the minimum tools and behaviour needed by digital audio-visual systems.

Rovi was granted permission to appeal the invalidity of one of two categories of claims in the patent. The relevant category of claims relates to "live feed" being the ordinary broadcast or cable TV services where the time of transmission is chosen by the provider. The other category of claims relates to "video on demand" which refers to the user's ability to play recorded content at a time requested by him. Rovi asserted that the Judge had inter alia: failed to (i) address the individual multiple steps from DAVIC to the invention; (ii) analyse the motivation for taking each of those individual steps; and (iii) conduct a proper *Pozzoli* analysis.

The four individual steps identified by Rovi from DAVIC to the invention were deciding to: (1) add personal video recorders to the system, including live pause; (2) do so at the server (rather than in users' homes); (3) provide live pause by commencing recording when pause is pressed; and (4) enable relocation using live pause. Rovi accepted that steps 1 and 2 were obvious over DAVIC and Floyd LJ quickly dismissed arguments on step 4.

Therefore, Rovi concentrated on step 3, asserting that that step could not be obvious because steps 1 and 2 taught away from it once the motivation of those steps was

considered. It argued that this was because DAVIC teaches recording whole programmes only and, therefore, to commence recording only when pause was pressed would be to: (i) throw away live rewind; and (ii) create multiple user-specific fragments each starting from when pause is pressed by each user. Virgin asserted that DAVIC's teaching of recording whole programmes was not contrary to deciding in a different context (i.e., the pausing of live TV) that the server need only record from the moment of pausing. (DAVIC's context being watching video on demand, live feed and delayed broadcast (watching TV later than it was first broadcast.)) LJ Floyd agreed with Virgin.

Finally, Floyd LJ noted that, although the trial judge had not set out his reasons for rejecting Rovi's arguments in detail, it was clear that he was plainly aware of the *Pozzoli* guidelines. This led him to emphasise that a Judge "*is not required to deal with every argument and evidential dispute which is debated in the course of trial*" as per Lewison LJ in **FAGE v Chobani**.

There is just one appeal left to go. Virgin must be wondering if it can complete a clean sweep…

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