BL O/140/05

24th May 2005

**PATENTS ACT 1977**

APPLICANT Launch Media, Inc.

ISSUE Whether patent application number GB0301315.8 is excluded by section 1(2)

HEARING OFFICER H Jones

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# DECISION

## Introduction

1 International patent application number PCT/US2001/021829, entitled "Online playback system with community bias", was filed in the name of Launch Media, Inc. on 10th July 2001. The international application claims priority from US application numbers US60/217594 and US09/709234 filed on 11th July and 9th November 2000 respectively. The application was searched by the USPTO and published as WO02/05140 A1 on 17th January 2002. An International Preliminary Examination Report was issued in October 2002 on the basis of amended claims filed on 27th August 2002.

2 The application entered the national phase on 21st January 2003 and was re-published as GB2380581 A on 9th April 2003. On entry into the national phase, a further copy of the August 2002 claims was provided as the basis for substantive examination. In his first examination report dated 13th January 2004, the examiner objected that the claims related to a business method and/or a computer program excluded under section 1(2)(c) and that they lacked novelty with regard to the applicant's earlier application published as WO01/35667 A1. Although some minor clarity objections were also raised, the examiner deferred consideration of inventive step until the section 1(2)(c) and novelty issues had been addressed. The applicant's agent responded in a letter dated 13th July 2004 with an amended set of claims that addressed the clarity objections, and argued that the invention had a technical aspect that meant it was not excluded under section 1(2).

3 In a second examination report, the examiner maintained his section 1(2)(c) and novelty objections. The agent responded by identifying the technical aspects of the invention and maintained the view that the invention was patentable. The examiner disagreed, and suggested that a hearing be held to deal with both issues. The agent agreed, and the hearing took place on 3rd May 2005 in which the applicant was represented by Mr Keith Boden of Fry Heath & Spence.

4 At the hearing, it was agreed for the sake of expediency that that the question of novelty be deferred for consideration alongside that of inventive step. The only issue that remains for me to decide here is whether the application is excluded by section 1(2)(c). If I find in the applicant's favour, the application will be referred back to the examiner to consider both novelty and inventive step together.

**The application**

5 The application relates to a system for streaming audio/video data to an individual over the Internet and for establishing a community of individuals based on similar musical tastes. Data streamed to an individual can be determined by the musical tastes of other members of the community. For example, on the basis of an individual's preferences and feedback regarding songs, the online system can determine whether an individual has a preference for music from a particular artist. Other individuals having a similar preference would be regarded as being members of the same community, and data streamed to members of that community would not only contain music from the particular artist but also from other artists preferred by the community. This allows an individual to experience music from unfamiliar artists that individuals having a similar musical taste already enjoy.

6 The application acknowledges that online systems for streaming audio and video data to individuals are known, and refers to the applicant's own LAUNCHcast™ which allows a subscriber to tailor his or her narrowcast audio stream by expressing preferences that are recorded and preserved in an account associated with the subscriber. The term narrowcast is defined as the act of addressing packets of data to an individual computer, as opposed to broadcast where information is transmitted on a wide basis and generally available to anyone with a tuned receiver. Due to the nature of the Internet, the application suggests that narrowcasting is one of the basic and easy ways in which to transmit information packets.

7 The application currently has seven claims, two of which are independent. These claims were submitted as part of the agent's first response dated 13th July 2004. The two independent claims, claims 1 and 6, read as follows:

"1. A method for providing transmission of a data stream according to preferences of a community, the method comprising the steps of:

repeatedly receiving expressed preferences from receivers of content in first data streams arising from a first music-related database including songs and/or music videos;

repeatedly determining a first community from said expressed preferences, said first community having similar expressed preferences for similar content in said first data streams;

repeatedly determining characteristics solely of said expressed preferences of said first community with regard to content in said first data streams to provide determined characteristics;

biasing an individual data stream also arising from said first music-related database according to said determined characteristics so that said individual data stream is biased according to said expressed preferences of said first community; and

transmitting said individual data stream;

whereby said individual data stream continually has more content that said evolving first community likes and less content that said community dislikes without analysis of said content in said first data streams and enabling both said first community and said determined characteristics to change over time according to said expressed preferences of said first community."

6. A method for providing transmission of a data stream according to preferences of a community, the method comprising the steps of:

repeatedly receiving first expressed preferences of a first community having a plurality of members, said first expressed preferences regarding content in first data streams arising from a first music-related database including songs and/or music videos;

repeatedly receiving second expressed preferences of a second community having a plurality of members, said second expressed preferences regarding content in second data streams arising from said first music-related database;

evaluating said second expressed preferences of said second community to provide evaluated second preferences;

repeatedly determining said first community from said second community by means of said evaluated second preferences, with members of said first community having a first preference in common so that said first community arises from a larger second community, said first community being repeatedly determined by having said first preference in common;

repeatedly determining characteristics solely of said first expressed preferences with regard to said first data streams to provide determined characteristics;

biasing an individual data stream arising from said first music-related database according to said determined characteristics so that said individual data stream is biased according to said determined characteristics and so that said individual data stream is biased for positive first expressed preferences of said first community and biased against negative first expressed preferences of said first community; and

transmitting said individual data stream on a voluntary or selectable basis, thereby allowing an individual to receive said individual data stream on a voluntary or selectable basis;

whereby said individual data stream continually has more content that said evolving first community likes and less content that said community dislikes without resort to analysis of said content in said first or second data streams and enabling both said first community and said determined characteristics to change over time according to, respectively, said second expressed preferences of said second community and said first expressed preferences of said first community."

**The law**

8 The examiner has maintained that the claimed invention relates to subject matter excluded from patentability under section 1(2)(c) as a method for doing business and/or a computer program as such. The relevant parts of section 1(2) read:

> *1(2) It is hereby declared that the following (among other things) are not inventions for the purposes of this Act, that is to say, anything which consists of -*
>
> *(a) ....*
> *(b) ....*
> *(c) a scheme, rule or method for performing a mental act, playing a game or doing business, or a program for a computer;*
> *(d) ....*
>
> *but the foregoing provision shall prevent anything from being treated as an invention for the purpose of this Act only to the extent that a patent or application for a patent relates to that thing as such.*

9 These provisions are designated in section 130(7) as being so framed as to have, as nearly as practicable, the same effect as Article 52 of the European Patent Convention (EPC), to which they correspond. I must therefore also have regard to the decisions of the Boards of Appeal of the European Patent Office (EPO) that have been issued under this Article in deciding whether the present invention is patentable.

**Interpretation**

10 It has been established by the Courts that an invention will not be excluded from patentability by the above subsection if it makes a technical contribution, e.g. *Fujitsu Limited's Application* [1997] RPC 608 at page 614. The principles to be applied under UK law in deciding whether an invention makes a technical contribution have been rehearsed repeatedly in various decisions of the comptroller's hearing officers in recent times. These can all be found on the Patent Office website at http://www.patent.gov.uk/patent/legal/decisions/index.htm. For the purpose of this decision, I consider it necessary only to restate the principles I have applied and not their origin.

11 First, it is the substance of the invention which is important rather than the form of claims adopted. Second, whether an invention makes a technical contribution is an issue to be decided on the facts of the individual case. Third, it is desirable that there should be consistency between the Patent Office's and EPO's interpretation of the exclusion in the Patents Act and the EPC. Finally, any doubt over the patentability of the invention should be resolved in favour of the applicants.

12 In deciding whether the present invention is excluded from patentability, I shall consider two specific questions:

- does the invention relate to an excluded category? If yes,
- does the invention make a technical contribution?

**Argument**

13 The examiner has argued that the substance of the invention is the creation of adaptive playlists based on individual and community preferences, and regards this to be a purely intellectual process, implemented by way of computer software, which enhances the service provided by an online music broadcaster. The examiner suggests that this enhanced service is nothing more than a computer implemented business method that is excluded from patentability by section 1(2). At the hearing, Mr Boden did not address the question of whether the invention relates to any of the exclusions set out by section 1(2), but proceeded immediately to argue that the invention makes a technical contribution regardless of any other considerations. Nevertheless, I still need to address the question of whether the invention relates to an excluded category.

14 The examiner suggests that the substance of the invention is the creation of adaptive playlists based on individual and community preferences, and, having reviewed the application, I find that I am in total agreement. The whole thrust of the application is towards providing a more focused and enjoyable experience to a listener based on the listener's own preferences and those of other listeners having a similar musical taste. This enhanced service is facilitated by a networked computer that records and analyses listener feedback to produce a tailored data stream. I have no doubt, therefore, that this invention relates to a computer implemented method for doing business and falls within the exclusions of section 1(2)(c).

15 On the question of whether the invention makes a technical contribution, Mr Boden identified three aspects of the invention that he considered were not only technical in nature but also provided technical solutions to technical problems. The first aspect that Mr Boden identified was the generation of data streams for transmission to a plurality of individuals. Secondly, the data streams are structured in such a way that they have more content that members of a particular community like than dislike. This results in individuals preferring to listen to community data streams than to bespoke narrowcasts, which results in less data traffic passing through a network. Thirdly, the content of a data stream is determined by feedback from listeners and not on any complex analysis by the system. This shifts the burden of selecting content to the individual, thereby reducing the processing requirements of the system.

16 In addressing Mr Boden's first point, i.e. that the generation of data streams for transmission to a plurality of individuals makes a technical contribution, it is clear from the application that generating audio/video data streams for narrowcasting to listeners on the basis of stored preferences is already known. Whilst I am prepared to accept that this aspect of the invention is technical in nature, the fact that the technology is acknowledged as being conventional clearly demonstrates that no technical contribution is being made in this regard.

17 As to Mr Boden's second point, i.e. that data streams are structured in such a way that they have more content that members of a particular community like than dislike, then the answer is not so straightforward. The system creates a community playlist based on preferences set by members of the community and then transmits the data stream to members of the community. The way in which the content is determined is immaterial, but needs to be of sufficient interest to a community of individuals in order to reduce the amount of bespoke narrowcast transmissions. At the hearing, Mr Boden emphasized the need to minimize network traffic over the Internet and argued that the invention was able to achieve this by

transmitting a single narrowcast to members of a community whereas similar systems without such a community facility would need to narrowcast a number of different streams. I think Mr Boden is wrong in this respect, and I am supported in this view by the explanation of narrowcast transmission on page 1 of the application:

"Consequently, when broadcasting occurs on the Internet, it is generally composed of a bundle of narrowcast packets as each one must be individually addressed to the computers of the audience. This is true even though several computers are receiving the same content at the same time. Each computer must be individually addressed even though the packets are identical."

Narrowcasting relies on the addressing of individual packets of data to individual computers, and so the amount of data packets passing through the Internet is determined solely by the number of individuals requesting a data stream. Having a community facility simply means that identical data packets are transmitted to different computers on the network, resulting in exactly the same amount of data transmitted across the Internet, not less.

18 Having discounted Mr Boden's argument regarding bandwidth reduction, what remains of his second point is the creation of a data stream that has more content that members of a particular community like than dislike. In my view, this is more of an organizational problem than a technical difficulty, the solution being provided by way of a computer program that arranges data according to information provided by way of direct feedback from members of the community. As discussed at the hearing, this is not a new problem; it has been faced by radio broadcasters for many years, and the availability of request shows, e.g. based around music genres, has provided a popular solution to such a problem. In view of all of this, I do not consider that the invention makes a technical contribution in this regard.

19 Mr Boden's third point relates to reducing the computing burden in generating the data stream by relying on feedback from listeners rather by carrying out any complex analysis of the actual content. In doing so, Mr Boden is comparing the applicant's own solution to that of a technically complex alternative and concluding that the applicant's solution overcomes a technical problem. I do not consider it right to make such a comparison. The problem is quite straightforward, i.e. the generation of a popular data stream, and the applicant has proposed a fairly intuitive approach for dealing with such a problem, i.e. based on the views of listeners. Simply avoiding a technical solution, which of itself might be regarded as making a technical contribution, does not, in my view, constitute a technical contribution.

20 Having considered Mr Boden's three aspects of the invention in light of the independent claims, the remaining dependent claims and the application as a whole, I have been unable to find any basis for a valid claim making a technical contribution.

**Conclusion**

21 I have been unable to find any technical contribution made by the invention as claimed or

described in the application as filed. The inventions relates to a method for doing business and a computer program and, without making any technical contribution, is excluded from patentability under section 1(2)(c). I therefore refuse the application under section 18(3).

**Appeal**

22 Under the Practice Direction to Part 52 of the Civil Procedure Rules, any appeal must be lodged within 28 days.

**H JONES**
Deputy Director acting for the Comptroller