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**Datasheet for the decision
of 31 March 2008**

Case Number: T 1332/05 - 3.4.01

Application Number: 97945307.3

Publication Number: 0931308

IPC: G10H 1/32

Language of the proceedings: EN

Title of invention:

Method and apparatus for simulating a jam session and
instructing a user in how to play the drums

Patentee:

Activision Publishing, Inc.

Opponent:

John Bainbridge

Headword:

-

Relevant legal provisions:

EPC Art. 52(1)

Relevant legal provisions (EPC 1973):

EPC Art. 54(1), 54(2)

Keyword:

"Novelty (no)"

Decisions cited:

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Catchword:

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Case Number: T 1332/05 - 3.4.01

D E C I S I O N
of the Technical Board of Appeal 3.4.01
of 31 March 2008

Appellant:
(Opponent)

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Decision under appeal:

Decision of the Opposition Division of the
European Patent Office posted 27 June 2005
rejecting the opposition filed against European
patent No. 0931308 pursuant to Article 102(2)
EPC 1973.

Composition of the Board:

Chairman: B. Schachenmann
Members: F. Neumann
G. Assi

Summary of Facts and Submissions

I. The appeal lies from the decision of the opposition division rejecting the opposition against European patent number EP 0 931 308.

II. The appellant (opponent) requested that the decision be set aside and that the European patent be revoked in its entirety. The respondent (proprietor) requested that the patent be maintained in its entirety.

Oral proceedings has not been requested by either party.

III. During the appeal procedure, the following documents were referred to:

D2: US-A-5 183 398

D3: US-A-5 491 297.

IV. Independent claim 1 of the contested patent reads as follows:

*"An arcade game machine (100) comprising:
input means (20) adapted for manipulation in use by a user for generating an input;
control means (70) responsive to the input from the input means; and
sound generating means (76,62,63) controlled by the control means;
characterised in that:
the input means is substantially in the form of a musical instrument; and wherein the control means comprises simulating means for simulating a musical performance on the musical instrument by the user whereby the simulating*

means is responsive to the input means to control the sound generating means to generate sounds representative of the musical performance."

Reasons for the Decision

1. In accordance with Article 7(1), 2nd sentence of the Revision Act of 29 November 2000 ("Act revising the Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973, last revised on 17 December 1991"), the revised version of the Convention shall not apply to European patent applications pending at the time of its entry into force, unless otherwise decided by the Administrative Council of the European Patent Organisation. In accordance with the transitional provisions for the amended and new provisions of the EPC (Decision of the Administrative Council of 28 June 2001), Article 52 EPC shall apply to the present application, but not Articles 54(1), 54(2) EPC. Therefore Articles 54(1), 54(2) EPC 1973 continue to apply to the present application.
2. Novelty (Article 52(1) EPC, Article 54(1) EPC 1973, Article 54(2) EPC 1973):
 - 2.1 One of the main issues in dispute before the opposition division was novelty of the subject matter of claim 1 vis-à-vis document D2 or document D3.
 - 2.2 D2 discloses an apparatus for musical instruction comprising:

input means 12', 156 adapted for manipulation in use by a user for generating an input (Figs. 2 and 3; col. 7, lines 34-37 in connection with col. 4, lines 22-34); control means responsive to the input from the input means (Fig. 3; col. 4, lines 35-37; col. 7, lines 62-65; col. 8, lines 55-68); and sound generating means 26', 28', controlled by the control means (Fig. 2; col. 4, lines 64-68; col. 5, lines 21-22; col. 9, lines 14-32); whereby:

the input means is substantially in the form of a musical instrument (col. 4, lines 22-25; col. 10, lines 1-6) and wherein the control means comprises simulating means 118 for simulating a musical performance on the musical instrument by the user whereby the simulating means is responsive to the input means to control the sound generating means to generate sounds representative of the musical performance (Fig. 4; col. 8, line 55 to col. 9, line 48).

The disclosure of these features in D2 has not been contested.

- 2.3 Column 7, lines 51 to 55 of D2 states that "Input/Output Interface 32' may connect to a commercially available computer video arcade game system". This passage therefore discloses an arrangement whereby the musical instruction tool of D2 having the features listed in paragraph 2.1 above is connected to a computer video arcade game system. Thus, D2 provides a direct and unambiguous disclosure of a video arcade game system comprising all features of claim 1 of the contested patent.

2.4 The respondent argued that the main teaching of D2 was that of a learning tool for a musical instrument and that it was entirely inappropriate to incorporate such a learning tool into a machine which would be used in an amusement arcade environment. It was submitted that the aforementioned passage in column 7 of D2 could only mean that the hardware used in existing video arcade game systems could be adapted, or components extracted therefrom, for use in the apparatus of D2. It was argued that D2 contained no suggestion that the learning tool of D2 could be converted to become an arcade game machine.

Similarly, in the impugned decision, the opposition division was of the view that the fact that D2 concerned an "apparatus and method for interactive instruction of a student" excluded its use in a noisy arcade environment and that it could therefore not have been the intention of D2 to suggest that such a learning tool be connected to an arcade game machine.

However, the Board is of the opinion that, as argued by the opponent, the reference in claim 1 to an "arcade game machine" implies nothing about the environment in which the claimed machine will be used. Whilst this term may imply certain constructional features, it does not imply that the machine will, of necessity, be installed and operated in an amusement arcade. Thus, the fact that the atmosphere in amusement arcades is not conducive to learning a musical instrument cannot be seen as a reason for preventing the learning tool of D2 being incorporated into an arcade game system; indeed this very combination is taught by D2 itself.

2.5 The Board therefore considers that all features of claim 1 of the contested patent are known in combination from D2. Claim 1 therefore lacks novelty.

3. Since claim 1 has been found to lack novelty, any submissions made in support of an inventive step, in particular the submissions concerning immediate commercial success, need no longer be considered.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The patent is revoked.

The Registrar

The Chairman

R. Schumacher

B. Schachenmann