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Datasheet for the decision of 26 June 2020

Case Number: T 0891/16 - 3.4.03

Application Number: 04765712.7

Publication Number: 1671284

IPC: G07F17/32

Language of the proceedings: EN

Title of invention:
DOORFRAME FOR GAMING MACHINE

Patent Proprietor:
Novomatic AG

Opponents:
BALLY WULFF Games & Entertainment GmbH
IGT Austria GmbH
adp Gauselmann GmbH

Relevant legal provisions:
EPC Art. 123(2)
RPBA 2020 Art. 13(1), 25(1)

Keyword:

main request - added subject-matter (yes)
auxiliary request 1 - added subject-matter (yes)
late-filed auxiliary request 1a - admitted (no) - article 13(1) RPBA 2020 in combination with article 25(1) RPBA 2020

Decisions cited:

T 1112/08, T 0167/93, T 0461/05, T 0169/83

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Case Number: T 0891/16 - 3.4.03

D E C I S I O N
of Technical Board of Appeal 3.4.03
of 26 June 2020

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Decision under appeal: **Interlocutory decision of the Opposition Division of the European Patent Office posted on 8 March 2016 concerning maintenance of the European Patent No. 1671284 in amended form.**

Composition of the Board:

Chairman G. Eliasson
Members: M. Ley
T. Bokor

Summary of Facts and Submissions

I. The appeals of the appellant-proprietor (hereinafter the proprietor) and of appellant-opponents I and III (hereinafter opponents I and III) concern the opposition division's interlocutory decision to maintain the European Patent EP-B-1 671 284 in amended form based on the proprietor's first Auxiliary Request filed during oral proceedings on 21 January 2016.

Opponent II did not appeal the contested decision and did not make any requests or submissions during the appeal procedure apart from stating that it did not wish to attend the scheduled oral proceedings.

II. In the decision T1112/08 the present Board in a different composition granted the contested patent.

III. In their notices of opposition, all three opponents requested that the disputed patent be revoked in its entirety. The opposition was based on the grounds of Article 100(c) EPC 1973 in combination with Article 123(2) EPC and of Article 100(a) 1973 in combination with Article 56 EPC 1973.

In the opposition proceedings, the proprietor requested to reject the oppositions or to maintain the patent in amended form based on a first Auxiliary Request.

In the interlocutory decision, the opposition division decided that claim 1 as granted did not meet the requirements of Article 123(2) EPC.

IV. The Board gave its preliminary opinion on the various issues in a communication under Article 15(1) RPBA 2020

dated 9 March 2020, issued in preparation for the oral proceedings summoned for 26 June 2020.

V. At the oral proceedings before the Board, the proprietor requested to set aside the contested decision and maintain the patent as granted. Auxiliarily, it requested the dismissal of the appeals of the opponents I and III, i.e. to maintain the patent in an amended form as upheld by the opposition division (Auxiliary Request 1), or further auxiliarily to maintain the patent in an amended form on the basis of Auxiliary Request 1a, filed with a letter dated 22 April 2020.

The proprietor furthermore requested to disregard the observations filed by opponent I on Article 100(c) EPC 1973 in combination with Article 123(2) EPC.

Opponents I and III requested to set aside the contested decision and to revoke the patent. Opponent III requested in a letter dated 25 May 2020 not to admit Auxiliary Request 1a into the procedure.

At the end of the oral proceedings, the chairman announced the Board's decision.

VI. Claim 1 as granted has the following wording (feature numbering of the opposition division):

F Gaming machine comprising
F1 a gaming machine cabinet and
F2 a doorframe (15) attached thereto, further comprising
F3 at least two display monitors (28a, 28b)
F3.1 placed behind said doorframe (15) at an interior side thereof so as to be viewed

through at least one opening (17a, 17b) in said doorframe (15) when said doorframe (15) is in its closed position, wherein

F3.2 said two display monitors (28a, 28b) are positioned one above the other at an obtuse angle relative to each other, and wherein

F3.3 below said two display monitors (28a, 28b) a game control panel (20) is running from one edge of the doorframe (15) to the other, where in [sic]

F3.4 [said] two display monitors (28a, 28b) are affixed to said doorframe (15) in a securely fastened manner and

F4 said doorframe (15) is supported on said gaming machine cabinet by means of a hinge so as to open and close said doorframe together with the two display monitors (28a, 28b) relative to said gaming machine cabinet and

F5 said game control panel (20) is inclined with respect to the two display monitors (28a, 28b) positioned above said game control panel (20).

Claim 1 according to Auxiliary Request 1 corresponds to claim 1 as granted with the following additional feature:

F3.2' said two display monitors (28a, 28b) being aligned and coplanar with two obtuse-angled sections (32a-c) of said at least one opening (17c) or two obtuse-angle openings (17a, 17b) in said door frame (15), through which openings (17a, 17b) said two display monitors (28a, 28b) can be viewed, and wherein

Claim 1 according to Auxiliary Request 1a differs from claim 1 according to Auxiliary Request 1, *inter alia*, in that feature F5 reads:

F5* said game control panel (20) is inclined away from the two display monitors (28a, 28b) positioned above said game control panel (20).

VII. The parties' arguments relevant for the present decision can be summarized as follows:

(a) Binding effect of T 1112/08 for the opposition proceedings:

In its statement of grounds of appeal, the proprietor argued that Article 123(2) EPC had been examined in the pre-grant appeal proceedings by the Board of Appeal that held in decision T 1112/08 that the wording of claim 1 as granted complied with Article 123(2) EPC. The opposition division had hence disregarded the ruling of the Board of Appeal without giving convincing reasons. The circumstances to the question of Article 123(2) EPC had not changed between T 1112/08 and the opposition proceedings so that the opposition division should not have deviated from the findings of T 1112/08. The circumstances to the question of Article 123(2) EPC were "fixed by the original application documents", in contrast to the "dynamic question of novelty/inventive step", for which the circumstances might change e.g. due to additional prior art submitted by an opponent during opposition proceedings.

(b) Original basis for feature F3.2

The proprietor argued that the skilled person would not consider the obtuse-angled displays according to feature F3.2 to be inextricably linked to the obtuse-angled doorframe openings or sections. Reference was made to Figures 1 and 5, page 6, last paragraph, page 2, penultimate paragraph, page 5, last paragraph, as well as to the claims of the application as originally filed. Obtuse-angled openings were not necessary for the aim of the obtuse-angled displays, i.e. to "provide for a better viewability". An improved visibility, which was one of the technical problems the invention aimed to solve according to page 2, second paragraph, was achieved by obtuse-angled displays alone and not by obtuse-angled doorframe openings. Hence, the skilled person would understand that obtuse-angled displays had their "own recognisable function" in the same manner as held by T 461/05, Reasons 2.6, and this function was independent from the angle of the door frame openings. In particular, nowhere in the application as originally filed was there any indication that obtuse-angled doorframe openings or sections were necessary for arranging the displays at obtuse angles.

Opponents I and III maintained that there was a functional and structural relationship between the obtuse angled displays and the obtuse-angled doorframe openings. It followed from the disclosure on page 2, penultimate paragraph, Figure 1, page 5, second paragraph, Figure 2, page 5, last paragraph, figures 3 to 5, page 6, first to third paragraphs that the position and orientation of the displays

28a, 28b was exclusively determined by the position and orientation of the openings 17a, 17b, 17c associated thereto. The application as originally filed did not disclose any possibility of arranging the two obtuse-angled displays in any other way.

(c) Original basis for feature F5

Opponent I argued in its statement of grounds of appeal that the application as originally filed did not disclose the game control panel inclined as defined by feature F5. Figure 1 as well as page 5, second paragraph, lines 7 to 10, which had been cited as basis for this feature, disclosed a control panel 20 with a coin slit 22, a banknote slot 24, stake selectors 26 and game initiator means 28, which had all been omitted in claim 1. Neither the claims as originally filed nor Figures 2 to 5 mentioned any particular spatial orientation of the control panel. In its letter dated 26 May 2020 and during oral proceedings, opponent I added that Figure 1 showed that the spatial orientation of control panel 20 was such that elements 22, 24, 26, 28 were easily accessible and operable ("bequem erreichbar und betätigbar"), which concerned the orientation of the "operating panel" 20 relative to the cabinet ("im Wesentlichen parallel zum Gehäuseboden bzw. weg von den vertikal erstreckten Wänden des Gehäuses"), while no importance was given to its orientation with respect to the two monitors 28a and 28b.

In its statement of grounds of appeal, opponent III argued that feature F5 was not disclosed in the application as originally filed and could not be derived from Figure 1. Game console panel 20 was

inclined with respect to the two display monitors 28a, 28b and was oriented substantially horizontally or parallel to the floor surface ("nahezu horizonal bzw. nahezu parallel zur Bodenoberfläche"). In its letter dated 25 May 2020, opponent III added that elements 22, 24, 26 and 28 of control panel were not optional components.

The proprietor requested to disregard the observations filed by the opponent I on Article 100(c) EPC 1973 and Article 123(2) EPC, because the "opponent I did not present this ground during the first instance proceedings" and "starts a fresh line of attack at the stage of appeal".

Moreover, the proprietor argued that a control panel is described on page 1, second paragraph, on page 3, second paragraph in combination with page 2, third paragraph and on page 5, second and third paragraphs. Feature F5 was disclosed in Figure 1. The proprietor also mentioned that drawings are a complete and equivalent source of disclosure for the feature of a claim, following T 169/83, point 3.3.3 of the reasons.

Reasons for the Decision

1. Admissibility

All three appeals are admissible.

2. Main Request

2.1 Binding effect of T 1112/08 for the opposition proceedings

The Board agrees with opponents I and III that a decision of a Board of Appeal in examination proceedings is not binding for an opposition division, because opposition proceedings are separate and distinct from examination proceedings (especially in that different parties are involved) and differ from them in terms of the nature of the public interest involved, see Case Law of the Boards of Appeal, 9th Edition, 2019, V.A.8.1, fourth paragraph and V.A.8.3. At least criteria (e) indicated in T 167/93 is not met in the present case, because the opponents could not have been a party in the examination proceedings. Hence, the opposition division was not bound by decision T 1112/08 in respect of neither Article 123(2) EPC nor Article 56 EPC 1973.

The Board points out that it itself is not bound by decision T 1112/08, although taken by the same Board in a different composition.

This opinion of the Board was also given in the communication of the Board (see point IV above) and was not disputed later by the proprietor.

2.2 Feature F3.2

2.2.1 In the contested decision, see "II. Reasons for the Decision", section 2, the opposition division came to the conclusion that feature F3.2 of claim 1 as granted did not meet the requirements of Article 123(2) EPC, because it required the two display monitors 28a, 28b positioned at an obtuse angle relative to each other without requiring that the openings 17a, 17b resp. the two sections 32a, 32b, 32c of opening 17c were obtuse-angled.

The opponents share this view (see VII(b) above), and the Board agrees. According to the application as originally filed, the gaming machine as defined in claim 1 aims at improving the ease of a player viewing the display monitors, see page 1, second paragraph and page 2, second paragraph. The parties and the Board agree that this improvement is achieved by arranging the display monitors "one above the other at an obtuse angle" (according to feature F3.2), see page 2, second paragraph, lines 11 to 16, page 6, last paragraph, "more pleasurable viewing experience". However, in the case of the claimed gaming machine with the two display monitors "affixed to the doorframe in a securely fastened manner" (feature F3.4), the application makes it clear that the arrangement of obtuse-angled monitors is a direct consequence of obtuse-angles openings 17a, 17b respectively obtuse-angled sections of one opening 17c, see page 2, penultimate paragraph, lines 11 to 13 ("This allows the display means front surface to appear angled towards each other ..."), page 2, last paragraph ("the display means frontal surface facing the same way as the front of the doorframe"), page 5, last paragraph, lines 4 to 7 ("The viewing areas of the display means are angled in accordance with the open

portals 17a and 17b to allow viewing of the display means 28a and 28b ..."). Hence, in the Board's judgment, the penultimate paragraph of page 2 and page 5, last paragraph imply that the display monitors 28a, 28b are obtuse-angled only when the openings 17a, 17b respect the sections 32a of opening 17c are also obtuse-angled. In other words, both features ("obtuse-angled monitors" and "obtuse-angled openings resp. sections") are inextricably linked, contrary to the situation in T 461/05 referred to by the proprietor.

The Board notes that the proprietor itself did not indicate any embodiment having obtuse-angled monitors without obtuse-angled openings/sections. The set of original claims does not define an obtuse angle between display monitors, but rather appears to emphasize the importance of an obtuse angle between sections (claim 2) or between "open portals" (claim 3), i.e. openings. Page 6, lines 9 to 12 states that, in an alternative embodiment, the viewer might "further adjust either display means 28a and 28b by changing the original angle of the display to adjust the viewing angle". From this sentence, the skilled person could possibly derive that the angle between the openings/sections 17a, 17b and the angle between the monitors 28a, 28b would not necessarily be identical. However, the term "original angle" in this sentence could only be understood as a reference to the embodiment shown in figures 1 to 5 with an obtuse angle between the openings 17a, 17b respectively between the sections of opening 17c.

The Board is of the opinion that, in its present wording, claim 1 as granted encompasses embodiments with obtuse-angled monitors and with two openings or with two sections of a single opening presenting an angle different from an obtuse angle, e.g. 0° to 89° or

180°. Such arrangements are neither disclosed in the application as originally filed nor could they be directly and unambiguously derived therefrom.

Hence, the requirements of Article 123(2) EPC are not fulfilled.

2.3 Feature F5

2.3.1 In the contested decision, the opposition division held that feature F5 was disclosed in Figure 1, see point 3.4 of the contested decision. Both opponents I and III have objected against this finding.

2.3.2 The proprietor requested to disregard the observations filed by opponent I on Article 100(c) EPC since opponent I introduced this ground of opposition for the first time with its statement of the grounds of appeal.

2.3.3 The Board observes that it is established case law that multiple admissible oppositions do not initiate a corresponding number of parallel opposition proceedings but only a single one and that each opponent can rely on an opposition ground duly submitted by other opponents and communicated to all parties in accordance with Rule 79(2) EPC respectively Rule 57(2) EPC 1973, both in the opposition proceedings and in any subsequent appeal proceedings, see Case Law of the Boards of Appeal, 9th Edition, 2019, IV.C.2.1.6. In the present case, the notice of opposition filed by opponent III was based, among others, on the ground of opposition under Article 100(c) EPC 1973, and in particular contained reasons why in its view Feature 5 contravened Article 123(2) EPC (see point 4 of the notice of opposition filed by opponent III).

Hence, the observations of opponent I with respect to the ground under Article 100(c) EPC 1973 are not to be disregarded, even if opponent I did not address this ground of opposition in the opposition proceedings.

Regarding feature F5, it appears to be common ground that neither the description nor the set of claims as originally filed describe a particular orientation of a control panel with respect to display monitors, see page 1, second paragraph, lines 4 to 7 for prior art "control panel areas", page 3, second paragraph and page 5, second paragraph, 7 to 13. The only basis could possibly be Figure 1, which shows both a control panel 20 and display monitors 28a and 28b.

The Board agrees with the proprietor that the case law according to T 169/83 shows that the EPC does not prohibit the amendment of claims to include features from drawings, provided the structure and the function of such features were clearly, unmistakably and fully derivable from the drawings by the skilled person and not at odds with the other parts of the disclosure, see Case Law of the Boards of Appeal, 9th Edition, 2019, II.E.1.13.

In the present case, however, the Board is of the opinion that the skilled person would not directly and unambiguously derive from Figure 1 that the game control panel is "inclined with respect to the two display monitors positioned above said game control panel", which includes an inclination in any possible direction (e.g. to the left or the right) and with any possible angle i.e. from °0 up to 180°. From Figure 1, the skilled person does not get any indication that an inclination according to the wording of feature F5 would be of any technical relevance.

Hence, the requirements of Article 123(2) EPC are not fulfilled.

3. Auxiliary Request 1

As claim 1 of Auxiliary Request 1 comprises feature F5, the requirements of Article 123(2) EPC are not met for the reasons given above.

4. Auxiliary Request 1a - admission

The proprietor filed Auxiliary Request 1a with its letter dated 22 April 2020, i.e. after notification of the summons to attend oral proceedings, and stated that amended feature F5* addressed the Board's concern regarding Article 123(2) EPC expressed in its preliminary opinion.

In accordance with Article 25(1) RPBA 2020, Article 13(1) RPBA 2020 is to be applied in the present case. It reads (citing the relevant parts only):

> *Any amendment to a party's appeal case [...] may be admitted only at the discretion of the Board. [...] The Board shall exercise its discretion in view of, inter alia [...] the suitability of the amendment to resolve the issues [...] which were raised by the Board... .*

During oral proceedings the Board gave its opinion that the narrower feature F5* in claim 1 of the auxiliary request 1a does not appear to overcome the objection under Article 123(2) EPC, essentially for the same reasons as for the broader feature F5 as discussed for claim 1 as granted. The proprietor did not comment on

this opinion of the Board. Hence, the Board did not admit Auxiliary Request 1a into the procedure (Articles 13(1) RPBA 2020 in combination with Article 25(1) RPBA 2020).

5. As the ground for opposition of Article 100(c) EPC 1973 prejudices the maintenance of the European patent and as the requirements of Article 123(2) EPC are not met for the proprietor's Auxiliary Request 1, the proprietor's appeal must fail and the opponents' appeals are successful. The patent must be revoked.

Order

For these reasons it is decided that:

The decision under appeal is set aside.

The patent is revoked.

The Registrar: The Chairman:

S. Sánchez Chiquero G. Eliasson

Decision electronically authenticated