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**Datasheet for the decision
of 17 May 2023**

Case Number: T 0380/21 - 3.5.05

Application Number: 10829743.3

Publication Number: 2500800

IPC: G06F3/041, G06F3/0488,
A63F13/42, A63F13/214

Language of the proceedings: EN

Title of invention:

METHOD FOR CONTROLLING INFORMATION INPUT APPARATUS,
INFORMATION INPUT APPARATUS, PROGRAM, AND INFORMATION STORAGE
MEDIUM

Applicant:

Sony Interactive Entertainment Inc.

Headword:

CONTROLLING INFORMATION INPUT APPARATUS / Sony

Relevant legal provisions:

EPC Art. 54, 56, 123(2)

RPBA 2020 Art. 12, 13

Keyword:

Novelty - main request (no)

Inventive step - auxiliary requests 1 to 12 (no)

Late-filed request - should have been submitted in first-
instance proceedings (yes)

Amendment after summons - exceptional circumstances (no)

Decisions cited:

T 2599/19



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Case Number: T 0380/21 - 3.5.05

D E C I S I O N
of Technical Board of Appeal 3.5.05
of 17 May 2023

Appellant: Sony Interactive Entertainment Inc.
(Applicant) 1-7-1 Konan
Minato-ku
Tokyo 108-0075 (JP)

Representative: Müller Hoffmann & Partner
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted on 7 December 2020
refusing European patent application No.
10829743.3 pursuant to Article 97(2) EPC.

Composition of the Board:

Chair A. Ritzka
Members: N. H. Uhlmann
K. Kerber-Zubrzycka

Summary of Facts and Submissions

- I. The appellant appealed against the examining division's decision refusing the European patent application in suit.
- II. The examining division decided that the main request and auxiliary requests 1 to 12 did not meet the requirements of Article 56 EPC.
- III. The examining division made reference, *inter alia*, to the following documents:
 - D1 WO 95/09402
 - D2 EP 1 882 902
 - D3 US 6 424 338
 - D4 US 2008/168364
 - D5 US 2008/024454 (the number of this document was mentioned in the communication dated 29 January 2019)
- IV. With the statement setting out the grounds of appeal, the appellant maintained the requests underlying the decision under appeal and submitted a further request, auxiliary request 13.
- V. The board summoned the appellant to oral proceedings.

In a communication under Article 15(1) RPBA, the board set out its provisional opinion on the case.
- VI. By letter dated 13 April 2023, the appellant submitted a new version of auxiliary request 13, auxiliary request 14 and further arguments.
- VII. At the oral proceedings, which took place as scheduled, the allowability and admissibility of the requests on file were discussed with the appellant.

VIII. Final requests

The appellant requested that the decision under appeal be set aside and that a patent be granted based on the main request, or on the auxiliary requests 1 to 12, on which the decision under appeal was based, or on auxiliary requests 13 or 14, submitted with letter of 13 April 2023. Auxiliarily, the appellant requested that the case be remitted to the examining division for further prosecution of auxiliary request 13 submitted with letter of 13 April 2023.

IX. Claim 1 of the main request is worded as follows:

"A control method for an information input device, comprising:

a moving distance acquisition step of acquiring, when a user performs a movement operation for moving an object on a detection surface of a touch sensor (12b, 14) for detecting a position of the object on the detection surface, a moving distance of the object exhibited in the movement operation;

an operation mode value acquisition step of acquiring a value regarding an operation mode of the movement operation; and

an operation input amount output step of outputting a value calculated based on the acquired moving distance and the acquired value regarding the operation mode, as an operation input amount exhibited in the movement operation performed by the user,

wherein the operation input amount is utilized to change a viewpoint position set within a virtual three-dimensional space and/or a line-of-sight direction in the virtual three-dimensional space and/or the position

of a user character within the virtual three-dimensional space."

- X. Claim 1 of auxiliary request 1 differs from claim 1 of the main request in that the control method was further specified as follows:

"the control method serving for arranging objects within a virtual three-dimensional space and for rendering an image indicating a state within the virtual three-dimensional space"

- XI. Claim 1 of auxiliary request 2 differs from claim 1 of auxiliary request 1 in that the following wording was deleted:

"viewpoint position set within the virtual three-dimensional space and/or"

- XII. Claim 1 of auxiliary request 3 differs from claim 1 of auxiliary request 1 in that the following wording was deleted:

"and/or the position of a user character within the virtual three-dimensional space"

- XIII. Claim 1 of auxiliary request 4 differs from claim 1 of auxiliary request 3 in that the following wording was deleted:

"viewpoint position set within the virtual three-dimensional space and/or"

- XIV. Claim 1 of auxiliary request 5 differs from claim 1 of auxiliary request 1 in that the following further step was included:

"a display image control step of a display image control section (38) arranging objects within the virtual three-dimensional space, and of rendering an image indicating a state within the virtual

three-dimensional space"

- XV. Claim 1 of auxiliary request 6 differs from claim 1 of auxiliary request 5 in that the following wording was deleted:

"viewpoint position set within the virtual three-dimensional space and/or"

- XVI. Claim 1 of auxiliary request 7 differs from claim 1 of auxiliary request 5 in that the following wording was deleted:

"and/or the position of a user character within the virtual three-dimensional space"

- XVII. Claim 1 of auxiliary request 8 differs from claim 1 of auxiliary request 7 in that the following wording was deleted:

"viewpoint position set within the virtual three-dimensional space and/or"

- XVIII. Claim 1 of auxiliary request 9 differs from claim 1 of auxiliary request 5 in that "arranging objects" was replaced by "arranging a game character object and a background object" and "a user character" was replaced by "the game character".

- XIX. Claim 1 of auxiliary request 10 differs from claim 1 of auxiliary request 9 in that the following wording was deleted:

"viewpoint position set within the virtual three-dimensional space and/or"

- XX. Claim 1 of auxiliary request 11 differs from claim 1 of auxiliary request 9 in that the following wording was deleted:

"and/or the position of the game character within the virtual three-dimensional space"

XXI. Claim 1 of auxiliary request 12 differs from claim 1 of auxiliary request 11 in that the following wording was deleted:

"viewpoint position set within the virtual three-dimensional space and/or"

XXII. Claim 1 of auxiliary request 13 differs from claim 1 of auxiliary request 9 in that the operation mode value acquisition step was further specified by:

"wherein the value regarding the operation mode of the movement operation comprises a value indicating a moving speed of the object exhibited in the movement operation"

and the operation input amount output step was further specified by:

"wherein the operation input amount I is calculated as either the sum of firstly a first predetermined coefficient $A1$ times the acquired moving distance D and secondly a second predetermined coefficient $A2$ times the acquired moving speed V , $I = A1 \times D + A2 \times V$, or as the sum of firstly a first predetermined coefficient $A1$ times the square of the acquired moving distance D and secondly a second predetermined coefficient $A2$ times the square of the acquired moving speed V , $I = A1 \times D^2 + A2 \times V^2$ "

XXIII. Claim 1 of auxiliary request 14 differs from claim 1 of auxiliary request 13 in that the following further wording was included:

"wherein further, the direction of the movement operation performed by the user is acquired and output as the direction specified by the user"

Reasons for the Decision

1. The current application pertains to a method for an information input device. A touch sensor acquires a moving distance of a touch operation on the touch screen. Additionally, an operation mode value is obtained, e.g. pressure on the touch sensor or speed of the movement on the sensor. A value is calculated based on these two inputs. This value is utilised for changing parameters of a virtual three-dimensional space, like a viewpoint position.
2. Document D5 discloses a method for using input from a touch pad which enables a display to be utilised in a three-dimensional manner. Touch positions, movements and pressure on the touch pad are detected and used to control the display.

Main request

3. Patentability
 - 3.1 The appellant argued in the first-instance proceedings that document D1 was not a suitable choice for the closest prior-art document.
 - 3.2 The board considers that document D5 is a better starting point for the assessment of patentability.
 - 3.3 D5 discloses a three-dimensional touch pad input device which allows a display to be used in a three-dimensional manner (see the abstract and paragraph 42).
 - 3.4 D5 discloses detecting moving distance and direction of an object moving along a touch pad (paragraphs 49, 53, 64 and 66). The board notes that in D5 the moving distance and direction are detected via detecting touch positions. This teaching anticipates the claimed moving distance acquisition step. The description of the application as filed also teaches that the moving

distance might be detected via detecting positions (page 3, lines 6 to 11).

3.5 D5 discloses that pressure applied on the touch pad is sensed (paragraph 49 and 64). This anticipates the claimed acquiring of a value regarding an operation mode. The description of the application (page 17, lines 16 to 21) confirms that the pressure may be seen as an operation mode value.

3.6 Furthermore, D5 discloses that the position respectively location detection and the pressure detection take place at the same time (see Figures 5 and 7 and the last sentence in paragraph 50). Paragraphs 62 and 64 disclose similarly that a signal is indicative of a location and an applied pressure and, in accordance with the signal, a cursor traverses the display and, in addition, the display zooms in or out.

3.7 D5 discloses the claimed operation input amount output step.

First, the board notes that the value output by this step, i.e. the operation input amount, is to be interpreted in the context of claim 1. It is used to change the viewpoint position and/or other parameters in a virtual three-dimensional space. Hence, the operation input amount, in general, is a three-component value. The scope of claim 1 might encompass embodiments in which the value is a single real number, as argued by the appellant, but is not so limited. The skilled person would not interpret the claimed value based on a single embodiment but in the broader context of claim 1. Similarly, features in claim 1 cannot be interpreted in a limited manner based on embodiments set out in the description.

Second, claim 1 does not specify the calculation

referred to in this step in any detail.

Third, the first three sentences of paragraph 64 of D5 disclose that the input device 20 produces a signal based on the movement of an object along the input device and the sensed pressure.

3.8 Finally, D5 discloses the "wherein" clause of claim 1.

The zooming in and out (paragraph 64) corresponds to changing a viewpoint position (when zooming in the viewpoint is closer to the objects A, B and C, see also Figures 6A to 6C). The rotation of a graphical object (paragraph 66) similarly corresponds to a change of a viewpoint position. Additionally, the last sentence of paragraph 65 discloses that an object is moved on a display based on the signal produced by the input device. This function corresponds to the changing of the position of a user character as claimed.

3.9 The appellant argued that D5 disclosed a composite input signal but did not disclose a combined output amount or a composite reaction to the signal.

The board notes that claim 1 refers to an "operation input amount" and does not refer to any output amount. Furthermore, according to paragraph 64 of D5, a cursor may be moved and the display 14 may zoom in and out, both reactions being based on the composite signal disclosed in paragraphs 50 and 63.

3.10 In view of the above observations, document D5 discloses all features of the subject-matter of claim 1 of the main request. Hence, the requirements of novelty of Article 54 EPC are not complied with.

Auxiliary request 1

4. Patentability

4.1 Claim 1 of this request adds to claim 1 of the main request:

"the control method serving for arranging objects within a virtual three-dimensional space and for rendering an image indicating a state within the virtual three-dimensional space"

4.2 D5 discloses arranging objects within a virtual three-dimensional space (last sentence of paragraph 65) and rendering an image within the virtual three-dimensional space (paragraph 64).

4.3 The appellant pointed to Figure 6 of D5 and argued that the objects in this figure had a fixed relationship, hence no arranging of objects within a virtual three-dimensional space was disclosed in D5.

The board disagrees. First, claim 1 does not exclude that objects arranged in a virtual three-dimensional space have a fixed relationship. Second, the objects A, B, C and D in Figure 6 are arranged differently in Figures 6A, 6B and 6C. Objects A, B and C are arranged in Figure 6B closer to the observer than in Figure 6C.

4.4 Claim 1 does not specify the significance of the claimed state. Hence, "indicating of state" corresponds to the presentation of information which does not lead to any technical effect.

4.5 For these reasons, the subject-matter of claim 1 does not involve an inventive step under Article 56 EPC.

Auxiliary request 2

5. Patentability

5.1 Claim 1 corresponds to claim 1 of auxiliary request 1 with the feature "change a viewpoint position set within the virtual three-dimensional space" removed.

5.2 The subject-matter of claim 1 does not involve an inventive step for the reasons given for the main request and auxiliary request 1.

Auxiliary request 3

6. Patentability

6.1 Claim 1 corresponds to claim 1 of auxiliary request 1 with the feature "change ... the position of a user character within the virtual three-dimensional space" removed.

6.2 The subject-matter of claim 1 does not involve an inventive step for the reasons given for the main request and auxiliary request 1.

Auxiliary request 4

7. Patentability

7.1 Claim 1 corresponds to claim 1 of auxiliary request 1 with the features "change a viewpoint position set within the virtual three-dimensional space" and "change ... the position of a user character within the virtual three-dimensional space" removed.

7.2 The subject-matter of claim 1 does not involve an inventive step for the reasons given for the main request and auxiliary request 1. Furthermore, the use case for presenting a three-dimensional representation of a house to a user (document D5, paragraph 67)

suggests the feature "change a line-of-sight direction in the virtual three-dimensional space".

Auxiliary request 5

8. Patentability

8.1 Claim 1 corresponds to claim 1 of auxiliary request 1 with the feature:

"display image control step of a display image control section (38) arranging objects within the virtual three-dimensional space, and of rendering an image indicating a state within the virtual three-dimensional space"

added to it.

8.2 The subject-matter of claim 1 does not involve an inventive step for the reasons given for the main request and auxiliary request 1.

Furthermore, the feature added to claim 1 fully corresponds to the feature added to claim 1 of auxiliary request 1 (see point 4.1 above). The wording "the control method serving for arranging objects" in claim 1 of auxiliary requests 1 and 5 conveys teaching equivalent to the wording "display image control step of a display image control section arranging objects".

Auxiliary requests 6 to 8

9. The subject-matter of claim 1 of these requests does not involve an inventive step for the reasons given above for auxiliary requests 2 to 5.

Auxiliary request 9

10. Patentability

10.1 Claim 1 corresponds to claim 1 of auxiliary request 5 and states that a game character object and a background object are arranged within the virtual three-dimensional space. Additionally, claim 1 refers to a "game character" in the penultimate line.

10.2 The subject-matter of claim 1 does not involve an inventive step for the reasons given for the main request and auxiliary request 5.

Furthermore, the fact that a **game character** object and a **background** object are arranged instead of arranging an object corresponds to the presentation of information which does not lead to any additional technical effect. Similarly, changing the position of a **game** character does not lead to any additional technical effect.

Auxiliary requests 10 to 12

11. The subject-matter of claim 1 of these requests does not involve an inventive step for the reasons given above for auxiliary requests 6 to 9.

Auxiliary request 13

12. Admission

12.1 This auxiliary request was filed after the notification of the summons to oral proceedings, thus the provisions of Article 13(2) RPBA apply.

12.2 Amended auxiliary request 13 was submitted by letter of 13 April 2023 and replaced the auxiliary request 13 filed with the statement of grounds. The amendment concerns the correction of an obvious mistyping.

12.3 In its communication under Article 15(1) RPBA, the board stated that it was minded to not admit the then auxiliary request 13 under Article 12(6), second sentence, RPBA. Additionally, the board expressed its view that the then auxiliary request 13 did not appear to meet the requirements of Articles 123(2), 84 and 56 EPC.

12.4 In its letter dated 13 April 2023 and at the oral proceedings, the appellant submitted the following arguments in support of the admission of auxiliary request 13:

- The period of five days between the telephone conversation with the entrusted examiner and the first-instance oral proceedings was insufficient for getting final instructions from the Japanese applicant.
- Only in the oral proceedings themselves did the examining division's way of thinking become clear to the representative.
- It would overburden an applicant if there were no means to react in the form of a single further auxiliary request in appeal proceedings.
- Auxiliary request 13 was *prima facie* patentable.
- The fact that the board needed to use considerations other than those for the main request and auxiliary requests 1 to 12 was an indication that auxiliary request 13 was justified and admissible.
- The examining division disregarded pertinent arguments of the appellant, in particular those on the examples and formulas set out in the description.

12.5 First, the board does not see any exceptional circumstances within the meaning of Article 13(2) RPBA which warranted that auxiliary request 13 be admitted.

Second, under the established case law of the boards, the provisions of Article 13(1) RPBA are likewise applicable to auxiliary request 13. Claim 1 does not, *prima facie*, resolve the issues previously raised by the board in the communication under Article 15(1) RPBA.

Third, under Article 13(1) RPBA, the provisions of Article 12, paragraphs 4 to 6, RPBA apply *mutatis mutandis*. The board maintains its opinion expressed in the communication under Article 15(1) RPBA that the auxiliary request 13 submitted with the statement of grounds, which largely corresponds to current auxiliary request 13, was not to be admitted under Article 12(6), second sentence, RPBA.

12.6 Addressing the arguments of the appellant, the following is noted.

12.6.1 Auxiliary request 13 filed with the statement of grounds would not have been admitted under Article 12(6) RPBA for the following reasons, as set forth in the communication under Article 15(1) RPBA and discussed during the oral proceedings.

The decision under appeal was not based on this request. Hence, it does not meet the requirements of Article 12(2) RPBA and is to be regarded as an amendment of the appeal case (Article 12(4) RPBA).

In the statement of grounds, the appellant did not provide any reasons for submitting auxiliary request 13 in the appeal proceedings, contrary to the provisions of Article 12(4) RPBA.

Features from the description have been added to the independent claims of this request.

After the summons to the first-instance oral proceedings, the appellant submitted on 21 September 2020 auxiliary requests 1 to 12. In a telephone conversation dated 19 November 2020 (minutes dated 24 November 2020), the entrusted examiner informed the appellant that these requests seemed to not be allowable under Article 56 EPC and gave reasons for this. These requests were discussed at the oral proceedings. The application was refused, and the reasons regarding the auxiliary requests are similar to those given in the minutes of the telephone conversation.

In this situation, the board holds that the appellant should have submitted in the first-instance proceedings, and not only on appeal, a request, at least on an auxiliary basis, including an independent claim corresponding to current claim 1 and addressing the arguments set out in the minutes of the telephone conversation if it wanted to have such subject-matter examined by the examining division and this decision reviewed in a judicial manner.

The board is not aware of any circumstances of the appeal case which justified the admittance of auxiliary request 13.

The board recalls that appeal proceedings are not a continuation of first-instance proceedings. The primary object of appeal proceedings is to review the decision under appeal in a judicial manner (Article 12(2) RPBA).

The board notes further that Article 12(6), second sentence, RPBA expresses and codifies the principle that each party should submit all arguments and requests that appear relevant as early as possible to

ensure a fair, speedy and efficient procedure. An appellant is not at liberty to shift its case to the appeal proceedings as it pleases and compel the board either to give a first ruling on critical issues or remit the case to the examining division. Conceding such freedom to an appellant would run counter to orderly and efficient appeal proceedings. This would allow a kind of "forum shopping" which would jeopardise the proper distribution of functions between the departments of first instance and the boards of appeal and be unacceptable for procedural economy generally.

The board does not agree that the examining division disregarded pertinent arguments of the appellant on the examples and formulas set out in the description. In general, features disclosed in the description but not recited in a claim cannot contribute to patentability of the claimed subject-matter.

In view of the currently widely available means of telecommunication, e.g. email, instant messaging and video conferences, the board is not convinced that it was impossible to obtain instructions from the appellant within a period of five days. Furthermore, the appellant confirmed in its letter dated 13 April 2023 that "in the Oral Proceedings, the representative might have some liberties granted by the Applicant".

Even if the examining division's way of thinking became clear to the representative only at the oral proceedings, the professional representative could and should have reacted in the oral proceedings by submitting arguments and amended requests and, if needed, requesting a break to prepare requests.

The board does not accept that it would overburden an applicant if no means to react in the form of a single further auxiliary request in the appeal was available. Under Article 12(2) RPBA, a party's appeal case must be directed, *inter alia*, to the requests on which the decision under appeal was based. In accordance with Article 12(4) RPBA, any additional request on which the decision was not based may be admitted only at the discretion of the board.

12.6.2 The board needed to use considerations other than those for the main request and auxiliary requests 1 to 12 simply because the appellant's submission of amended auxiliary request 13 on appeal added features from the description to the independent claims. It is not an exception but the rule that the board examine compliance of a newly filed request with the procedural and substantive requirements of the EPC and the RPBA. The board did so at the first opportunity in the appeal proceedings.

12.6.3 Claim 1 as amended does not meet the requirements of Article 123(2) EPC.

The appellant argued that the features added to claim 1 were based on the disclosure at the bottom of page 19 and the top of page 20 of the description.

The board notes that the section of the description disclosing the pertinent embodiment begins on page 18, line 7. According to lines 15 to 21 on this page, the direction of movement is additionally acquired and output as a direction specified by the user. The importance of this passage is emphasised by the introductory wording "Note that". The board does not see a basis for omitting these features in claim 1, in particular in view of the utilisation to change parameters in the three-dimensional space.

Finally, it is true that the direction of movement does not play a role in the formulas included in claim 1. However, the description clearly teaches that the direction is acquired in addition to the distance and the speed.

- 12.7 For these reasons, auxiliary request 13 was not admitted into the appeal proceedings under Article 13(2) RPBA.

Auxiliary request 14

13. Admission

- 13.1 This auxiliary request was filed after the notification of the summons to oral proceedings, thus the provisions of Article 13(2) RPBA apply.

- 13.2 With regard to admissibility, the appellant argued in the letter dated 13 April 2023 as follows:

"The independent claims of Auxiliary Request 14 only include a feature that has been named by the Board to be missing in the independent claims of Auxiliary Request 13. (page 18, lines 15 to 21 of the present application, see section 19.2 of the Communication). Hence, since formal objections raised for the first time are addressed, Auxiliary Request 14 should be as admissible as is Auxiliary Request 13."

The appellant submitted further at the oral proceedings that this added-matter objection could not have been foreseen.

- 13.3 The board does not see any exceptional circumstances within the meaning of Article 13(2) RPBA which warranted that auxiliary request 14 be admitted.

First, as explained above, auxiliary request 13 was not admitted.

Second, it is not an exception but the rule that the board examine compliance of a newly filed request with the procedural and substantive requirements of the EPC and the RPBA (see point 12.6.2 above). The board pointing to substantive issues in a request which was eventually not admitted under Article 12(6) RPBA (i.e. auxiliary request 13) cannot serve as a valid justification for the presence of exceptional circumstances (confirming T 2599/19, points 1.1.1 to 1.1.3).

Third, the argument that this added-matter objection could not have been foreseen is not convincing. As a rule, it is to be expected that compliance with Article 123(2) EPC will be checked ex officio (see CLBA 10. edition, 2022, V.A.3.2.3k). Introducing amendments from the description only in appeal proceedings entails a significant risk that objections under Article 123(2) EPC may be raised.

13.4 For these reasons, auxiliary request 14 was not admitted into the appeal proceedings under Article 13(2) RPBA.

Request that the case be remitted to the examining division for further prosecution of auxiliary request 13

14. The appellant argued that the first-instance proceedings were carried out too quickly, thus it requested further discussion of the case before the examining division.

The board notes that auxiliary request 13 was not admitted into the appeal proceedings (see point 12 above). Hence, there is no basis for further prosecution by the department of first instance. Consequently, the board cannot accede to this request.

Conclusion

Since none of the requests is allowable, the appeal must be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chair:



K. Götz-Wein

A. Ritzka

Decision electronically authenticated