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Datasheet for the decision of 5 November 2024

Case Number: T 0589/23 - 3.5.06

Application Number: 15738866.1

Publication Number: 3164779

IPC: G06F1/16, G06F3/01, G06F3/0487

Language of the proceedings: EN

Title of invention:
APPLICATION SWAP BASED ON SMART DEVICE POSITION

Applicant:
Nagravision S.A.

Headword:
Flicking motion/NAGRAVISION

Relevant legal provisions:
EPC Art. 56, 123(2)
RPBA 2020 Art. 13

Keyword:
Inventive step - (no)
Amendments - added subject-matter (yes)
Amendment to appeal case - amendment overcomes issues raised (no)

Decisions cited:

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

Beschwerdekammern

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Case Number: T 0589/23 - 3.5.06

D E C I S I O N
of Technical Board of Appeal 3.5.06
of 5 November 2024

Appellant: (Applicant)	Nagravision S.A. 22-24, route de Genève 1033 Cheseaux-sur-Lausanne (CH)
Representative:	Ipside 7-9 Allée Haussmann 33300 Bordeaux Cedex (FR)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 29 November 2022 refusing European patent application No. 15738866.1 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman	M. Müller
Members:	G. Zucka
	B. Müller

Summary of Facts and Submissions

I. The appeal is against the decision by the examining division, dispatched with reasons on 29 November 2022, to refuse European patent application 15738866.1, on the basis that none of the requests satisfied the requirements of Article 56 EPC (inventive step). The following documents cited during the first instance proceedings are referred to in the present decision:

D1: US 8 228 292 B1;
D3: US 2009/088204 A1.

II. A notice of appeal was received on 20 January 2023, the appeal fee being paid on the same date. A statement of grounds of appeal was received on 16 March 2023.

III. The appellant requested that the decision under appeal be set aside and a patent granted on the basis of the main request or one of auxiliary requests 1 or 2 underlying the decision under appeal. The appellant made a conditional request for oral proceedings.

IV. The board issued a summons to oral proceedings. In an annex to the summons, the board set out its preliminary opinion, according to which the appealed decision should be upheld.

V. On 24 September 2024, the appellant filed arguments in response to the summons, together with 3 additional auxiliary requests.

VI. In the course of the oral proceedings, the appellant filed one more auxiliary request and withdrew the main request as well as auxiliary requests 1 and 2.

VII. The appellant requests that the decision under appeal be set aside and a patent be granted on the basis of claims 1 to 11 of auxiliary request 3 or claims 1 to 9 of one of auxiliary requests 4 or 5 filed on 24 September 2024, or on the basis of claims 1 to 11 of auxiliary request 6 filed during the oral proceedings before the board.

The further text on file is:

description pages
3 to 11 as published,
1, 2 and 12 received on 8 April 2021;

drawing sheets
1 to 5 as published.

VIII. Independent claim 1 of the request marked as "auxiliary request 3", presently the highest ranking request, reads as follows:

"A device (10) configured to switch between at least two applications, comprising:
a first application (74);
a second application (76) different from the first application (74);
a user interface (14) configured for displaying the first application (74) or the second application (76);
a controller (18) communicatively connected to the user interface (14), the controller (18) having memory for storing the first application (74) and the second application (76) on the device (10); and
at least one sensing device (16) communicatively connected to the controller (18), the at least one sensing device (16) being configured to detect at least

an orientation and a motion, hereafter flicking motion, of the device (10) belonging to the group comprising jerking, shaking, and tilting the device quickly in a predetermined direction in a three-dimensional space,

wherein the memory is configured to store an association between the first application (74) with at least a first orientation and a first flicking motion within the three dimensional space and to store an association between the second application (76) with at least a second orientation and a second flicking motion within the three-dimensional space and in that the controller (18) is configured to switch from the first application (74) to the second application (76) when the at least one sensing device (16) detects the second orientation after the second flicking motion is detected,

characterized in that, while the user interface (14) displays the first application (74), the detection of the second flicking motion alerts the device (10) of a possible user's desire to switch from the first application (74) to the second application (76), the detection of the second orientation making the device (10) to select and display the second application (76) on the user interface (14)."

IX. Claim 1 of auxiliary request 4 distinguishes itself from that of auxiliary request 3 in that the part after "characterized in that" reads "the second application (76) is running in the background of the smart device (10) in a sleep state when the controller detects the second orientation after the second flicking motion is detected".

X. Claim 1 of auxiliary request 5 combines the features of claim 1 of auxiliary requests 3 and 4.

XI. Claim 1 of auxiliary request 6 distinguishes itself from that of auxiliary request 3 in that the flicking motion is a shaking motion.

XII. The wording of other claims of any request is not relevant for the present decision.

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

Reasons for the Decision

1. *The application*

The aim of the application is to allow a user of a smart device (such as a smartphone) to switch easily between at least two applications, without touching multiple buttons and/or a touch screen (description par. [0004]).

To this end, a given orientation and flicking motion of the device causes a switch from a first to a second application (claim 1).

2. *Clarity (Article 84 EPC)*

The board had raised a number of clarity issues in its summons. The issues were however left aside during the oral proceedings, as the board was able to decide on the appeal without addressing them.

3. *Auxiliary request 3 - inventive step; Article 56 EPC*

3.1 The board holds that D3 constitutes a suitable starting point for an inventive step analysis of the subject-matter of claim 1 of auxiliary request 3.

3.2 D3 discloses a device (media device) configured among other things to switch between at least two applications (par. [0007]: "An operation may include at least one of starting or launching one or more applications, stopping or ending one or more applications...").

The device of D3 comprises a first application and a second application different from the first application (*ibid.*).

The device comprises a user interface (figure 3: 306+310) configured to display the first or the second application.

The device comprises a controller communicatively connected to the user interface, the controller having memory for storing the first and the second application on the device (figure 3: 302+304+320).

At least one sensing device (POM sensor 330) is communicatively connected to the controller, the at least one sensor device being configured to detect, among other things, an orientation and a motion of the device in a three-dimensional space (par. [0005]).

The memory in D3 is configured to store an association between various applications and sensor signals based, among other things, on orientation and motion of the device within the three-dimensional space, and the

controller will switch for instance to a certain application on the basis of a certain signal (par. [0066]).

These findings were not contested by the appellant.

3.3 In addition to associating applications or other items with signals based on certain orientations and/or motions, the device of D3 may also associate them with a signal based on a pattern of movements (par. [0006]). Within the context of D3, a "movement" is meant to include for instance orientation and motion (e.g. see par. [0013]).

The concept of motion disclosed in D3 is a wide one which encompasses a "quick jerking, shaking or tilting motion", and one kind of pattern could be such a motion followed by a given orientation. The difference between the subject-matter of claim 1 and the disclosure of D3 therefore consists in a choice of just that particular pattern, viz. a quick jerking, shaking or tilting motion followed by a given orientation.

The problem solved by choosing such pattern for the device of D3 corresponds to the one mentioned by the appellant in the statement of grounds of appeal (page 6, second paragraph), viz. to minimise unintended application switching due to spurious movements.

3.4 This problem, i.e. the problem of inadvertently initiating an operation of the device, and the need to minimise or eliminate such inadvertent initiation, is also mentioned in D3 (par. [0011], penultimate sentence).

In D3, the problem is solved in a manner different from claim 1, i.e. the user should explicitly interact with a portion of the device while performing a movement pattern that has to be recognised (*ibid.*).

D3 however already mentions in its introductory part (par. [0003]) that physical and visual interactions with the device should be minimised. This will motivate the skilled person to find an alternative for physical interactions also when unintended application switching due to spurious movements should be minimised.

3.5 The skilled person will consult prior art to find a solution to this problem. One such prior art document is D1, which aims to distinguish purposeful input from meaningless general motions without having to interact physically with the device. Reference is made to D1, column 1, lines 33 to 40.

During the oral proceedings, the appellant disputed that this passage discloses the given aim. According to the board, however, the statement in the passage that "it may be difficult for a user to maintain a force on a button" implies that the goal in D1 is to avoid having to press a button (to indicate purposeful input).

The remainder of D1 renders it clear that the problem is solved by the use of movement as a delimiter indicating purposeful input. Column 4, line 37 for instance states that the delimiting motion could be other motions. This means that the idea in D1 is to use motion as a delimiter, instead of pushing a button.

3.6 D1 mentions a "double flip" motion as an example of a motion that can be used as a delimiter before the

motion that constitutes the actual input (see column 1, lines 44 to 55). The document however states (column 4, lines 37 to 41) that other motions can be used, although generally not motions that could be made accidentally by the user.

When applying this teaching to the device of D3, the skilled person will introduce in that device a measure to detect a delimiting motion which occurs before the motion indicating the actual input. Following the teaching of D1, he or she will preferably choose a delimiting motion that would not be made accidentally by the user.

D1 already lists a number of possible motions, e.g. shaking, jerking or waggling (column 5, line 65 to column 6, line 2). The appellant submitted during the oral proceedings that these motions in D1 are only intended to be associated with actual input, therefore excluding their use as delimiter motions. The board however notes that this passage does not mention or imply such exclusion, the only exclusion mentioned in D1 being that delimiting motions should generally not be ones that could be made accidentally (see above).

This means that, when applying the teaching of D1, the skilled person would consider using a non-accidentally occurring version of such a motion as a delimiter, e.g. one that has a certain intensity or frequency or occurs in a certain direction. Shaking the device twice or shaking it in some predefined direction would for instance normally not happen accidentally. The board therefore holds that the skilled person would naturally consider introducing a detection of a delimiting motion chosen from the broadly defined group of "jerking, shaking and tilting" motions.

Apart from this, the board is not aware of a technical advantage which would be provided by the choice of a jerking, shaking or tilting motion as a delimiter, compared to other non-accidental motions which may possibly exist. When asked during the oral proceedings, the appellant could also not mention such advantage.

3.7 The skilled person would then apply the teaching of D1 to the device of D3 without having to make any hardware changes, since that device already includes the necessary sensors. He or she would thereby arrive at the subject-matter of claim 1 of auxiliary request 3 without the need for an inventive step.

3.8 The board therefore concludes that the subject-matter of claim 1 of auxiliary request 3 is not inventive (Article 56 EPC).

4. *Auxiliary requests 4 and 5 - added subject-matter; Article 123(2) EPC*

4.1 Claim 1 of auxiliary requests 4 and 5 specifies that the second application is running in the background of the smart device in a sleep state when the controller detects the second orientation after the second flicking motion is detected.

4.2 During the oral proceedings, the appellant cited par. [0019] and [0030] of the originally filed description and original claim 6 as a basis for this added feature. Paragraph [0019] states that "One or more of the at least two applications [...] may be actively running in the background" and that "To be actively running in the background [...], one or more of the at least two applications may have been

previously activated or selected by the user". It continues to state that "In other words, the at least two applications [...] may be in a sleep state". The skilled person might take these phrases as implying that "running in the background" and being "in a sleep state" are meant to be synonymous. However, the function of the connector "In other words" is ambiguous. It could also refer to the idea that only some ("one or more") of the applications are "activated and selected" and thus "actively running" and that other applications might be in a sleep state.

The board also notes that the skilled person would a priori understand the states of "running" and "sleeping" to be different from each other, and that the term "sleep" occurs only once in the entire application. In particular, neither paragraph [0030] nor original claim 6 mention a sleep state. The board also considers that, referring to a "second application [which is] running in the background" and being "in a sleep state" at least suggests that these are two different requirements, for mentioning two fully synonymous requirements would be redundant.

Therefore, the board concludes that the application as originally filed does not unambiguously disclose applications running in the background *and* being in a sleep state.

4.3 The board consequently holds that auxiliary requests 4 and 5 do not satisfy the requirements of Article 123(2) EPC.

4.4 In passing, the board notes that the appellant, in its letter dated 23 September 2024 (sections 2.2.2 and 3.2.2) did not argue that or why the added feature

would render the subject-matter of claim 1 inventive, instead referring to its previous arguments. The board, on its part, cannot see why a switching mechanism found to be obvious would become non-obvious when applied to switching to applications "running in the background" and/or "in a sleep state".

5. *Auxiliary request 6 - admittance*

Auxiliary request 6 was filed at a very late stage. The appellant suggested that the shaking motion was most clearly distinguished from the double flip motion of D1 and would therefore establish an inventive step of claim 1 vis-à-vis D3 and D1. However, the board cannot see why this should be the case and how it could change the above conclusion on inventive step (see esp. point 3.6), The request is therefore not admitted into the appeal proceedings (Article 13 RPBA).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

L. Stridde M. Müller

Decision electronically authenticated