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D E C I S I O N
of 19 March 2003

Case Number: T 0157/01 - 3.5.1

Application Number: 88908639.3

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G06F 17/60, G06F 19/00

Language of the proceedings: EN

Title of invention:
Shopping cart display system

Patentee:
KLEVER-KART, INC

Opponent:
Wincor Nixdorf GmbH & Co. KG

Headword:
Shopping Cart/KLEVER-KART

Relevant legal provisions:
EPC Art. 56, 113(1), 123(3)
EPC R. 57a

Keyword:
"Inventive step (no)"
"Extension of protection conferred (yes, 3rd auxiliary
request)"
"Denial of right to be heard (no)"

Decisions cited:
G 0002/88

Catchword:
-



Case Number: T 0157/01 - 3.5.1

D E C I S I O N
of the Technical Board of Appeal 3.5.1
of 19 March 2003

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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
5 December 2000 concerning maintenance of
European patent No. 0335931 in amended form.

Composition of the Board:

Chairman: S. V. Steinbrener
Members: R. S. Wibergh
P. Mühlens

Summary of Facts and Submissions

I. This is an appeal by the Patentee against the decision of the Opposition Division finding European patent No. 0 335 931 in amended form to meet the requirements of the EPC.

II. The opposition relied on the following documents:

D1: EP-A-0 170 194

D2: DE-A-35 17 818

and was on the grounds of lack of novelty over D1 and lack of novelty, or at least lack of inventive step, over D2. During the Opposition proceedings the Patentee requested in a letter received on 10 August 2000 that the Patent be maintained as granted and also made 17 auxiliary requests for maintenance of the patent in amended form. After oral proceedings the Opposition Division considered maintenance of the patent on the basis of the 6th auxiliary request to be allowable.

III. The Patentee appealed, requesting that the decision be set aside and that, as a main request, the patent be maintained as granted and, as auxiliary requests, that the patent be maintained in amended form according to the first five auxiliary requests annexed to the decision under appeal. The Appellant (Patentee) furthermore complained that at the oral proceedings before the Opposition Division he had not been allowed to argue in favour of the novelty and inventive step of the 3rd auxiliary request.

IV. Claim 1 according to the main request reads as follows:

"A system for communicating information (3001) relating to a product located in a retail establishment (107) to a prospective customer located in said retail establishment (107) in order to influence the behavior of said customer, wherein the system includes means (514) moveable by said prospective customer about said retail establishment (107) for storing and communicating said information, said system being characterized by triggering means (512) at said retail establishment (107) remote from said moveable information storing and communicating means (514) for automatically triggering said storing and communicating means (514) to communicate said stored information, in a form discernible by a human, to said prospective customer without the assistance of said prospective customer."

V. Claim 1 according to the first auxiliary request reads as follows:

"A system for communicating an advertisement relating to a specific product located in a retail establishment (107) to a prospective customer located in said retail establishment (107) in order to influence the behaviour of said customer, wherein the system includes means (514) moveable by said prospective customer about said retail establishment (107) for storing and communicating said advertisement, said system being characterised by triggering means (512) at said retail establishment (107) remote from said moveable information storing and communicating means (514) for automatically triggering said storing and communicating

means (514) to communicate said stored advertisement, in a form discernible by a human, to said prospective customer without the assistance of said prospective customer, wherein the moveable information storing and communicating means (514) is mounted on a product collecting means (500) moveable by said prospective customer about said retail establishment (107) for collecting products, and said means (512) for automatically triggering operates to trigger said storing and communicating means (514) mounted to said moveable product collecting means (500) based upon the proximity of said moveable product collecting means (500) to said specific product."

VI. Claim 1 according to the second auxiliary request reads as follows:

"A system for communicating a plurality of advertisements each relating to a respective specific product located in a retail establishment (107) to a prospective customer located in said retail establishment (107) in order to influence the behaviour of said customer, wherein the system includes means (514) moveable by said prospective customer about said retail establishment (107) for storing and communicating said advertisements, said system being characterised by triggering means (512) at said retail establishment (107) remote from said moveable information storing and communicating means (514) for automatically triggering said storing and communicating means (514) to communicate said stored advertisements, in a form discernible by a human, to said prospective customer without the assistance of said prospective customer, wherein the moveable information storing and

communicating means (514) is mounted on a product collecting means (500) moveable by said prospective customer about said retail establishment (107) for collecting products, and said means (512) for automatically triggering operates to trigger said storing and communicating means (514) mounted to said moveable product collecting means (500) to communicate each advertisement based upon the proximity of said moveable product collecting means (500) to the respective specific product."

VII. Claim 1 according to the third auxiliary request reads as follows:

"A method of advertising a plurality of specific products located in a retail establishment (107) to a prospective customer located in said retail establishment (107) in order to influence the behaviour of said customer, the method comprising the steps of: providing a moveable information storing and communication means (514) mounted on a product collecting means (500) moveable by said prospective customer about said retail establishment (107) for collecting products;
storing in said moveable information storing and communicating means (514) a plurality of advertisements each relating to a respective one of said specific products;
triggering said moveable information storing and communicating means (514) to communicate each stored advertisement, in a form discernable by a human, to said prospective customer without the assistance of said prospective customer based upon the proximity of

said moveable product collecting means (500) to the respective product."

VIII. Claim 1 according to the fourth auxiliary request reads as follows:

"A method of advertising a plurality of specific products located in a retail establishment (107) to a prospective customer located in said retail establishment (107) in order to influence the behaviour of said customer, the method comprising the steps of: providing a moveable information storing and communicating means (514) mounted on a product collecting means (500) moveable by said prospective customer about said retail establishment (107) for collecting products; storing in said moveable information storing and communicating means (514) a plurality of advertisements each relating to a respective one of said specific products; triggering said moveable information storing and communicating means (514) to communicate each stored advertisement, in a form discernable by a human, to said prospective customer without the assistance of said prospective customer based upon the proximity of said moveable product collecting means (500) to the respective product, the step of triggering further comprising the steps of: providing a plurality of trigger transmitters (512), each trigger transmitter being associated with a respective one of said specific products; locating each trigger transmitter (512) in the vicinity of the respective associated specific product;

transmitting from each trigger transmitter (512) a respective trigger signal;
receiving said trigger signals at said moveable information storing and communicating means (514); and communicating each stored advertisement to said prospective customer in response to receiving a trigger signal of adequate amplitude from the respective trigger transmitter."

IX. Claim 1 according to the fifth auxiliary request reads as follows:

"A system for communicating respective information (3001, 3005, 3007) relating to each specific product of a plurality of products located in a retail establishment (107) to a prospective customer located in said retail establishment (107) in order to influence the behaviour of said customer, wherein the system includes means (514) for storing and communicating said information, said means (514) for storing and communicating said information being mounted on a product collecting means (500) moveable by said prospective customer about said retail establishment (107) for collecting products, said system being characterised by triggering means (512) at said retail establishment (107) remote from said moveable information storing and communicating means (514) for automatically triggering said storing and communicating means (514) to communicate said stored information, in a form discernable by a human, to said prospective customer without the assistance of said prospective customer, the triggering means (512) comprising a plurality of trigger transmitters (512) each being associated with and located in the vicinity

of a respective one of said specific products and each transmitting a respective trigger signal, the means (514) for storing and communicating said information including a trigger signal receiver for receiving said trigger signals and being arranged to communicate to said prospective customer, in response to receiving a trigger signal of adequate amplitude, the respective information relating to the associated one of said specific products."

- X. The Respondent (Opponent) requested that the appeal be dismissed, arguing that, in the light of D1 and D2, the subject-matter of claim 1 of the main and the 1st, 2nd and 5th auxiliary requests lacked novelty, or at least inventive step, and that claim 1 of the 3rd and 4th auxiliary requests had been amended so as to extend the scope of protection, Article 123(3) EPC. The change of category of claim 1 according to the 3rd and 4th auxiliary requests was moreover not occasioned by a ground of opposition, contrary to Rule 57a EPC.
- XI. In view of auxiliary requests by both parties for oral proceedings, the Board issued a summons to oral proceedings, expressing in an annex doubts as to the novelty and inventive step of the subject-matter of claim 1 according to the main and the first, second and fifth auxiliary requests in the light of D1 and D2. As to the third and fourth auxiliary requests, the Board had doubts as to whether a change of category was occasioned by a ground of opposition and stated that, even if it was, the requirements of Article 123 EPC would have to be considered before considering the novelty and inventive step of the claimed subject-matter.

- XII. In a fax received on 13 March 2003 the Appellant announced that he would not be attending the oral proceedings.
- XIII. Oral proceedings were held before the Board on 19 March 2003. As announced, the Appellant was not present. The Respondent reiterated his request that the appeal be dismissed, and argued essentially as follows.

The product selection menus mentioned in D1 constituted information relating to a product. D1 did not explicitly mention trigger means. These were however implicit in the product menus changing automatically depending on the position of the shopping cart. D1 disclosed storage of the information to be displayed on making a menu selection either in the shopping cart itself or in a centralised storage unit connected to the shopping cart by a communications link. Hence the claimed subject-matter lacked novelty over D1. The claimed subject-matter also lacked novelty over D2. Whilst D2 did not disclose a shopping cart, triggering means were explicitly disclosed. Moreover, although D2 related to an exhibition of items which are not for sale, rather than the retail context, this did not affect the features of the system for informing visitors about the exhibits. Furthermore D1 (page 2, line 1) pointed to the applicability of the system to the museum context. The skilled person following this teaching would also draw upon the disclosure of D2, thus arriving at the claimed subject-matter in an obvious manner. Claim 1 according to the 3rd and 4th auxiliary requests did not contain all the features of

granted claim 1, thus extending the scope of protection, contrary to Article 123(3) EPC.

XIV. At the end of the oral proceedings the Board announced its decision.

Reasons for the Decision

The main request

1. *Amendments*

Claim 1 of the main request is the same as claim 1 as granted and thus does not involve any amendments.

2. *Prior art*

2.1 D1 concerns a shopping cart, for use in supermarkets and department stores, capable of displaying information on the products for sale, thus reducing the need for trained shop assistants to answer customer queries. According to page 4, line 3, the system is modular and can be configured to suit the application. The cart comprises decentralised storage means (30 in figure 1), a screen (32) and means for making menu selections (70). The product information is accessed using a hierarchical menu structure (cf figure 1), the currently displayed menu either changing automatically or being triggered according to the position of the cart (page 9, lines 5 to 9; page 14, lines 4 to 8). The product information can either be recalled via a wireless link from a central storage unit or from a decentral storage unit on the cart. Induction loops may

be used to transmit data and power to the cart (page 13, lines 32 to 34).

D1 furthermore points out (page 2, lines 1 to 3) that the described kind of system may also be used to inform visitors to an exhibition about the exhibits.

- 2.2 D2 (figure 1; page 4, line 35 to page 5, line 26) describes the use of transmitters on exhibits in a museum or exhibition to trigger automatically the reproduction of information stored in an apparatus (eg a CD player) carried by a visitor nearing the exhibit. The transmissions are individually coded so that the appropriate piece of information is reproduced for each exhibit.

3. *Inventive step*

- 3.1 Although the subject-matter of claim 1 arguably lacks novelty over D2, in the Board's view it is in any case obvious from the available prior art.
- 3.2 The prior art disclosed in D1 is taken as a starting point. D1 describes a system for communicating information relating to a product located in a retail establishment to a customer. The system includes a trolley provided with a memory for storing the information and a display for communicating it to the customer without his assistance. The Appellant has however argued that D1 does not disclose triggering means as defined in claim 1.

3.3 The Board agrees with the Appellant that D1 is not very clear about the way the correct product information is automatically retrieved from the memory. In this respect the disclosure appears somewhat speculative. However, D1 mentions that the same kind of system could be used in museums or exhibitions to provide visitors with information about the exhibits on display. The skilled person, needing more specific information about the way information can be automatically communicated, would therefore be led also to search in the technical area of information systems intended for museum and exhibition use. He would find D2, which clearly describes triggering means (transmitters near each museum exhibit transmitting coded signals) for automatically triggering storing and communicating means (an apparatus carried by a visitor) to communicate information stored in the apparatus to the visitor. In the context of D1 this arrangement would clearly correspond to each product or product group in the retail establishment being equipped with a transmitter which automatically triggers the memory and display on the trolley to communicate the appropriate product information to the customer. Hence, starting from D1 and adding to it the teaching of D2, the skilled person would arrive at the subject-matter of claim 1 in an obvious manner.

3.4 The Appellant has argued (cf the statement of grounds, paragraph F1) that the skilled person would not have considered D2, since it is not concerned with advertising in retail establishments. The Board does not however accept this reasoning, since the technical problem is seen as finding suitable means for automatically communicating a selection of data, a

problem which does not depend on the information content of the data. D1 provides an explicit link from the retail establishment application to the museum application. Once pointed out, the analogy between the two uses is too obvious to be ignored.

- 3.5 Consequently the subject-matter of claim 1 does not involve an inventive step (Article 56 EPC).

The 1st auxiliary request

4. *Amendments*

Claim 1 according to the first auxiliary request has been restricted with respect to claim 1 as granted by taking up the features of granted claims 4 and 7. The Board sees no reasons for objecting to these amendments under Article 123(2),(3) EPC. Furthermore, the expression "information relating to a product" in the claim as granted has been changed to "an advertisement relating to a specific product". Also this amendment is not objectionable under Article 123 EPC.

5. *Inventive step*

The additional feature that the moveable information storing and communicating means is mounted on a product collecting means is already known from the closest prior art document, D1.

Compared with the main request, the statement that the information communicated to the customer consists of an advertisement does not define the claimed system any further: if the system is capable of communicating

information, ie data, then it is also capable of communicating data in the form of advertisements.

Hence the subject-matter of claim 1 lacks inventive step, Article 56 EPC, for essentially the same reasons as given above for the main request.

The 2nd auxiliary request

6. *Inventive step*

The subject-matter of claim 1 of the 2nd auxiliary request differs from that of the 1st auxiliary request in mentioning "a plurality of advertisements each relating to a respective specific product" rather than "an advertisement relating to a specific product". Again, the alternative wording does not further define the technical features of the claimed system and the subject-matter of claim 1 lacks inventive step, Article 56 EPC.

The 3rd auxiliary request

7. *Amendments*

- 7.1 Claim 1 of the 3rd auxiliary request is directed to a "method of advertising" rather than to a system. Neither the granted patent, nor the original application, contained method claims. The Respondent has argued that this request is inadmissible since the change of category from an apparatus to a method is not occasioned by a ground of opposition, Rule 57a EPC.

The Board takes the view that an amendment to a claim should not be admitted under Rule 57a EPC only if it is immediately clear that it cannot serve to overcome a ground for opposition. In general, the replacement of a product claim by a method claim involving a specific use of that product constitutes a restriction of the claim (cf G 2/88, OJ EPO 1990,093, reasons point 5). A restriction is the usual response to an objection of lack of novelty or inventive step. It may be true that in the present case the purpose of the amendment is somewhat obscured by the Appellant's observation that "claim 1 of the Third Auxiliary Request claims no more than the product (system) of claim 1 as granted when in use" (statement of grounds, paragraph D1.3). This could be taken to mean that the Appellant himself does not regard the amendment as involving an inventive step over prior art also intended for use in a retail establishment. Still, the Appellant is given the benefit of the doubt in this respect and the Board will examine the claim.

7.2 Claim 1 sets out method steps essentially corresponding to the apparatus of the 2nd auxiliary request. It lacks however the following features which are explicitly set out in claim 1 as granted:

(i) the triggering means are located remote from the moveable information storing and communicating means, and

(ii) triggering occurs automatically.

At least the removal of the first feature seems to extend the protection conferred to include methods involving a system in which the triggering means are not "remote" from the moveable information storing and communicating means. For example, the two means could be integrated in one unit, which would hardly correspond to a "remote" relationship in any conventional sense of the word.

Hence claim 1 does not satisfy Article 123(3) EPC.

8. *Inventive step*

It may be added that even if claim 1 were to be amended to avoid offending against Article 123(3) EPC the method would still not be allowable under Articles 52(1) and 56 EPC since it effectively sets out the normal use of the system claimed in the second auxiliary request. It may be true that D1 describes a method for *informing* customers about products rather than "advertising" them. But, as already pointed out, the word "advertising" at most indicates a certain selection of the information to be communicated. It is not a technical restriction of the claimed system.

The 4th auxiliary request

9. *Admissibility*

Claim 1 according to the 4th auxiliary request is also a method claim. For the reasons given above the Board finds the category change admissible under Rule 57a EPC.

10. *Inventive step*

10.1 Claim 1 sets out a method as claimed in the 3rd auxiliary request with the further restrictions that

(i) the triggering means comprise a plurality of trigger transmitters each being associated with and located in the vicinity of a respective one of said specific products and each transmitting a respective trigger signal, and

(ii) the means for storing and communicating said information includes a trigger signal receiver for receiving said trigger signals, and

(iii) the received trigger signals should have an adequate amplitude.

10.2 The first two additional features are known from D2, where each exhibit is provided with a transmitter. The third additional feature is hardly limiting, considering that any information signal on a noisy channel, including the coded signal received by the apparatus worn by the visitors in D2, must have an "adequate" amplitude in order to be detected.

10.3 Hence the subject-matter of the claim lacks an inventive step, Article 56 EPC.

The 5th auxiliary request

11. *Inventive step*

Claim 1 of the 5th auxiliary request, directed to a system, corresponds essentially to the method claim according to the 4th auxiliary request. Its subject-matter does not involve an inventive step, Article 56 EPC, for the reasons already given.

Procedural matters

12. *The Appellant's right to be heard*

The Appellant complained in the grounds of appeal (point D2.3) that during the oral proceedings before the Opposition Division he was not allowed to argue in favour of the novelty and inventive step of the 3rd auxiliary request.

The minutes of the oral proceedings (page 3, points 15 and 16) certainly make no mention of the Patentee being heard on these aspects. The Board can however see no reason why the Patentee should have been heard on these points, since they were not relied upon later in the appealed decision, which in relation to the 3rd auxiliary request is based on Article 123(3) and Rule 57a EPC (reasons, point 21). Moreover, given that the Patentee had made a further 14 requests, it seems entirely reasonable to move on to the next request, as the Opposition Division did, rather than to dwell on a request that had already been found to be not allowable for other reasons. Article 113(1) EPC was not infringed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

M. Kiehl

S. Steinbrener