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**Datasheet for the decision
of 6 February 2009**

Case Number: T 0012/08 - 3.2.04

Application Number: 00116115.7

Publication Number: 1078664

IPC: A63F 13/10

Language of the proceedings: EN

Title of invention:
Game machine and storage medium therefor

Applicant:
Nintendo Co., Ltd., et al

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 52(1), 52(2)(c), 56

Relevant legal provisions (EPC 1973):
-

Keyword:
"Inventive step (yes)"
"Rules for playing games"

Decisions cited:
T 1173/97, T 0641/00, T 0258/03, T 1543/06, T 0336/07

Catchword:
-

Case Number: T 0012/08 **-** 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 6 February 2009

Appellant: Nintendo Co., Ltd.
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Decision under appeal: **Decision of the Examining Division of the**
                           European Patent Office posted 14 August 2007
                           refusing European application No. 00116115.7
                           pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: A. de Vries
                 T. Bokor

Summary of Facts and Submissions

I.   The Appellant lodged an appeal, received at the EPO on
        24 October 2007, against the decision of the Examining
        Division posted 14 August 2007, refusing the European
        patent application No. 00 116 115.7, and simultaneously
        paid the appeal fee. The statement of grounds was
        received 4 December 2007.

        The Examining Division held that the application did
        not meet the requirements of Articles 52(1) and 56 EPC,
        as the claimed invention concerned the obvious
        implementation of subject-matter excluded under
        Article 52(2)(c) EPC and thus lacked inventive step.
        The following documents were cited among others:

        D2: US-A-5 267 734
        D3: EP-A-0 781 580
        D4: US-A-7 735 741

II.   In a communication dated 16 July 2008 and a telephone
        conversation of 15 September 2008 the Board drew the
        appellant's attention to an apparent lack of clarity in
        the wording of the independent claims and a
        consequential lack of novelty of these claims' subject-
        matter. It added that if duly clarified the subject-
        matter of these claims appeared both novel and
        inventive.

III.   In response the Appellant filed a new main request with
        accordingly amended claims and description pages
        received at the EPO on 16 October 2008. He requests
        that the decision under appeal be set aside and a
        patent be granted based on claims and description in

accordance with this request. The appellant also
requests oral proceedings, should the Board not intend
to grant a patent.

IV.   The wording of the independent claims of the main
        request is as follows:

"1. A game machine (GBP) of a type that a player
object is moved on a map to encounter a character (R),
comprising:
program storage means (11) for storing a game program;
clock means (14) for clocking at least a time;
operation means (22) actuated by a player for operating
the player object; and
processing means (23, 26) for executing said program to
vary a displayed image based on the operation of said
operation means (22),
characterized in that
the game program storage means (11) stores a program
for varying a probability (A, B1-B7) for a character
(PN1—PN7) whether to appear on the game map based on
time information (H) of said clock means, wherein the
probability (A, B1-B7) for the character (PN1-PN7)
whether to appear on the game map depends on whether
the time measured by the clock means (]4) is at a time
or within a time zone determined by said program.."

"15. A medium (100) on which a game program for
controlling a game machine (GBP) of a type that a
player object is moved on a map to encounter with a
character (R) is stored, said game program for making
said game machine to execute the operation comprising:
a step (S7) of clocking a time;

a step (S1) of detecting an operation of the player
object by a player;
a step (S3) of varying a display image based on said
detected operation of the player object;
characterized in that the method further comprises:
a step (S7-S19) of varying a probability (A,B1-B7) for
a character (PN1—PN7) whether to appear on the game map
based on said clocked time, wherein the probability (A,
B1-B7) for the character (PN1-PN7) whether to appear on
the game map depends on whether the time measured by
the clock means (14) is at a time or within a time zone
determined by said program."

Reasons for the Decision

1.   The appeal is admissible.

2.   *Allowability of amendments under Article 123(2) EPC*

       Claims 1 combines as filed claims 1 and 2 while
       rewording its final lines to clarify that appearance
       probability depends on time as indicated on originally
       filed description page 18, lines 11 to 22. Similar
       amendments are made to claim 4 based on original
       claim 7 which rephrases the invention in terms of a
       medium and the game program stored thereon.

       The Board concludes that the amendments in particular
       to claims 1 and 4 do not infringe Article 123(2) EPC.

3.   *Background*

        The invention concerns a gaming machine of the type
        wherein a player object is moved on a map and
        encounters game characters. In the main example, see
        page 2, 1st paragraph, the video game Pokémon® the idea
        is to capture and collect the various characters with
        different attributes, and to train them to compete
        against other such characters. Encounters are governed
        by chance, in that characters appear according to an
        "appearance probability" (which varies from character
        to character). To further increase this element of
        unpredictability of the game, and thereby hold a
        player's interest longer, the invention as defined in
        the final, characterizing features of independent
        claims 1 and 4 in essence proposes varying this
        appearance probability, i.e. the chance of an encounter
        with time. This is realized by a program (in the game
        program storage) which varies the appearance
        probability of a character in response to measured time,
        such that it depends on whether that time is at a time
        or within a time zone set in the program.

4.   *Novelty and Inventive Step*

4.1   The above idea of varying an appearance probability
        with time as realized above is not known from any of
        the cited prior art, as also acknowledged in the
        decision under appeal (page 4, third paragraph). The
        claimed gaming machine and game program storage medium
        are thus indisputably novel.

4.2   The above features are also the sole distinctive
        features over the manifestly known, standard Pokémon®
        game console, which the Board considers as the nearest
        prior art for assessing inventive step. That such a
        gaming console includes as standard features a
        processor with internal clock for executing the game
        program and controlling the game display, program
        storage and player controls, behoves no comment.

4.3   These differences, by which the appearance probability
        is made time dependent, have the effect of reducing the
        predictability of the machine generated chance
        encounters, see as filed description page 5, line 23,
        to page 6, line 22. This effect is over and above the
        general (non-technical) aim of chance encounters per se,
        which within the gaming context serves to hold a
        player's interest and increase it's amusement value.
        The problem addressed by the differing features can be
        formulated accordingly, as *how to modify the gaming
        device or game program such that it generates
        encounters in a less predictable manner.*

4.4   The Board adds that both the solution and the problem
        it solves have clear technical character. The solution
        is essentially in the form of a software program
        interacting with a clock, and effectively constitutes a
        form of time dependent (pseudo)random event (or number)
        generator. Following the approach adopted in T 1173/97
        (OJ EPO 1999, 609) the software produces the further
        technical effect of generating a random event and is
        thus not excluded from patentability as it is technical.
        Moreover, and following further T 258/03 (OJ EPO 2004,
        575) the interaction with a clock as technical means
        also bestows technical character. On both counts the

claimed (computer) program implemented (pseudo)random
event generator can be regarded as technical.

Similarly, the problem of reducing predictability in a
random event generator, itself of technical character,
for this reason soundly resides in the technical domain.

4.5   Time variability is well-known and documented in gaming
        devices such as video game consoles. It appears in many
        aspects, not least in the way attributes of objects,
        characters or scenery are made to vary with time, such
        as in the example, cited in the decision, of the ghosts
        in PacMan® that start to blink after a certain amount
        of time , or (more sophisticated) the growing healing
        powers of a magic plant in D3. It is also used to
        modulate player interaction, see D2, where play is only
        possible during a schedule of time slots.

        The citations concerning random event generation on the
        other hand lack a time dependency in the event
        generation, see D4 where the evasive movement of tanks
        or artillery batteries is determined by a random number,
        or the arcade game Frogger (cited in the decision)
        where a lady frog or fly appear randomly during game
        play.

        None of these examples thus show or suggest use of time
        as variable in generating random events, in particular
        by making the appearance probability time dependent as
        claimed. Nor does the Board have reason to believe it
        is generally known to reduce predictability of an event
        (generated by a machine or otherwise) by making the
        likelihood of its occurrence time dependent. It
        therefore concludes that the claimed time dependency of

0232.D

the appearance probability as encoded in the stored
game program involves an inventive step.

4.6   The Board does not subscribe to the view put forward in
        the decision that the idea of making chance encounters
        depend on time is a game rule, which is itself excluded
        from patentability and has been implemented in
        straightforward manner. "Game rule" is interpreted by
        the Board in its generally accepted, more classical
        sense - as this would have been understood by the
        framers of the EPC at the time of framing - as forming
        part of "the regulatory framework agreed between [or
        with] players concerning conduct, conventions and
        conditions that are meaningful only in a gaming context
        [and which, as such] is a purely mental, abstract
        construct", see T 336/07, reasons 3.3.1. In other words,
        they form the abstract formal structure of a game
        describing the interplay between player actions and the
        choices offered within the game. In the present case
        the underlying condition that chance encounters occur
        within the game is a game rule in the classical sense.

4.6.1   The claimed solution, however, is not so much concerned
        with this rule per se, as with the particular manner in
        which it is realized, namely the way in which the
        events are generated. This is not intended to be known,
        much less explicitly agreed to by a player, as this
        would in fact defeat the stated purpose of making
        encounters less predictable. For this reason alone the
        claimed features cannot be representative of a game
        rule in the classical sense.

4.6.2   Nor does the Board consider the way in which the time
        dependent chance encounters are generated to derive
        from a game rule in some wider sense, that is as a
        condition or regulation that governs the internal as
        well as the external, explicit workings of the game.
        Modern computer implemented (or digital) gaming systems
        are characterized by a high degree of complexity and
        interactivity, they have strong narrative elements that
        are fluid and adaptive with characters and game
        scenarios evolving continuously during game play. Many
        of these aspects - such as narrative - are essentially
        conceptual in nature, relating to abstract and thus
        inherently non-technical schemes, which in their own
        right fall short of the basic prerequisite of
        technicality to be patentable. Such aspects and their
        straightforward implementation by computer would, the
        Board agrees, fail patentability requirements in the
        same manner as subject-matter excluded in
        Article 52(2)(c) EPC, (see e.g. T 641/00 (OJ EPO 2003,
        352) or T 1543/06, reasons 2).

4.6.3   The Board is however unable to identify such a game
        rule pertaining, say, to the inner logic of the game
        that might underlie the claimed time dependency of the
        appearance probability. That a similar dependency could
        have been achieved with dice, a watch and a probability
        table linking times to dice outcomes, as argued in the
        decision under appeal, merely demonstrates an
        alternative technical way of realizing the time
        dependent chance encounters (though by no means
        equivalent, as it would be visible to the player). It
        does not prove that the introduction of a time
        dependency is per se the expression of a game rule. By
        analogy, rolling dice is not of itself a game rule, but

rather a technical (if well-known) method and means (the dice) of generating numbers randomly; moving pieces on a board by the number rolled with dice in a game of snakes and ladders clearly is the corresponding game rule.

4.6.4   For the same reasons, varying the probability by which a character is made to appear in a game depending on time is *innately* technical. It relates to the purely technical problem of realizing - or rather simulating - in the physical world, the key game concept of chance, and cannot be seen severed from the real world.

5.   The description having been adapted to the new claims, the application as amended now meets all the requirements of the EPC.

Order

For these reasons it is decided that:

1.   The decision under appeal is set aside.

2.   The case is remitted to the department of first
        instance with order to grant a patent in the following
        version:

        Description: Pages 1 - 5, 10 - 33 as originally filed
                        Pages 6 - 9, 34 as filed with letter of
                        16 October 2008

        Claims: No. 1 - 4 filed with letter of 16
                        October 2008

        Figures: Sheets 1/13 - 13/13 as originally filed

The Registrar   The Chairman

G. Magouliotis   M. Ceyte

0232.D