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**Datasheet for the decision  
of 7 June 2011**

**Case Number:** T 1969/08 - 3.5.05

**Application Number:** 02771991.3

**Publication Number:** 1469383

**IPC:** G06F 3/033

**Language of the proceedings:** EN

**Title of invention:**

A touch control display screen with a built-in electromagnet induction layer of septum array grids

**Applicant:**

Taiguen Technology (Shen\_zhen) Co., Ltd., et al

**Headword:**

Touch screen with layered structure/TAIGUEN

**Relevant legal provisions:**

EPC Art. 84, 97(2), 106, 107, 108, 111(1), 113(2), 123(2)  
EPC Rule 100(1), 137(3)  
RPBA Art. 12(2) and (4), 13(1), 15(3) and (6)

**Keyword:**

"Sole request filed after summons for oral proceedings returns to subject-matter abandoned during first-instance proceedings"  
"Non-attendance at oral proceedings"  
"Diverging request *prima facie* clearly allowable (no)"  
"Sole request admissible (no)"

**Decisions cited:**

T 0070/98, T 0979/02, T 0240/04, T 1685/07

**Catchword:**

If a feature objected to as "obscure" by the examining division and omitted from all requests subsequently filed by the applicant is then re-introduced in the claims filed one

month before oral proceedings during the appeal proceedings without commenting on the objection raised earlier against this feature, the board may refuse to admit these claims into the proceedings at its discretion under Article 12(4) RPBA.



Case Number: T 1969/08 - 3.5.05

**D E C I S I O N**  
of the Technical Board of Appeal 3.5.05  
of 7 June 2011

**Appellant:** Taiguen Technology (Shen\_zhen) Co., Ltd.  
23, The third Industrial Park of Xia Village  
Gongming Baoan District  
Shenzen City 518 106 (CN)

**Representative:** Goddar, Heinz J.  
Forrester & Boehmert  
Pettenkoferstraße 20-22  
D-80336 München (DE)

**Decision under appeal:** Decision of the Examining Division of the  
European Patent Office posted 16 May 2008  
refusing European patent application  
No. 02771991.3 pursuant to Article 97(2) EPC.

**Composition of the Board:**

**Chairman:** A. Ritzka  
**Members:** M. Höhn  
F. Blumer

## Summary of Facts and Submissions

I. This appeal is against the decision of the examining division, dispatched on 16 May 2008, refusing European patent application No. 02771991.3 because of lack of inventive step (Articles 52(1) EPC and 56 EPC) having regard to the disclosure of

D1: US 2001/001430 A1,  
D2: EP 0 731 419 A2,  
D3: EP 0 537 458 A1,  
D4: US 5 218 174 A1 and  
D5: US 4 800 240.

II. The notice of appeal was received on 27 June 2008. The appeal fee was paid on the same day. The statement setting out the grounds of appeal was received on 1 September 2008. The appellant requested that the appealed decision be set aside and that a patent be granted on the basis of claims 1 to 4 according to the sole request submitted with the statement setting out the grounds of appeal.

III. A summons to oral proceedings to be held on 7 June 2011 was issued on 23 February 2011. In an annex accompanying the summons the board expressed the preliminary opinion that the subject-matter of claim 1 did not appear to involve an inventive step in the light of the disclosures of D1, D5 and

D6: EP 0 347 725 A2.

Prior-art publication D6 was introduced into the proceedings of the board's own motion in accordance

with Article 114(1) EPC. In addition, the board raised an objection for lack of clarity according to Article 84 EPC against the last feature of claim 1. The board gave its reasons for the objections under Articles 56 and 84 EPC and stated that the appellant's arguments were not convincing.

IV. By letter of 6 May 2011 received on 9 May 2011 the appellant filed a new request comprising claims 1 to 4 which replaced the previously filed request. The appellant deleted the feature of claim 1 objected to under Article 84 EPC and introduced another feature from the description. The appellant indicated passages on which the amendment was said to be based and argued in favour of inventive step of claim 1 that the added feature was disclosed neither in D1 nor in D5 and D6.

V. Independent claim 1 according to the sole request reads as follows:

"1. Touch screen (3) for the use with an operating-pen transmitting an electromagnetic signal, with a built-in membrane antenna array lattice electromagnetic induction layer (4), including at least a display screen (3) and a shell (1, 7); wherein the induction layer (4) is provided at the rear of the display screen (3), the output of the induction layer (4) is connected to an induction control circuit (8), and a display screen control circuit (6) is provided in the shell (1, 7),

characterized by

- a shield layer (5) provided between the induction layer (4) and the control circuit (6);

- a buffering layer (8') provided between the induction layer (4) and the shield layer (5)

- a space provided between the induction layer (4) and the shield layer (5)

wherein said induction layer (4) is an antenna array formed by silver-plasm or a mixture of silver-plasm and carbon-plasm,

- which is printed on two surfaces of the insulation membrane (55) or printed on one surface of the insulation membrane (55) with two layers of said insulation membrane (55) overlying each other, wherein said insulation membrane (55) is made of film material; and

- which is arranged along the X, Y axes, the antenna of the X direction and the antenna of the Y direction forming the grid of the antenna array, the area enclosed by each lattice unit constituting one induction cell (53) for detecting the electromagnetic signal of the operating-pen, wherein two or more induction layers are overlaid together, the induction cells (53) on each induction layer are set to interlace each other, and the interval sizes of the said induction cells on respective layers are different; wherein components of the induction control circuit (8) are mounted on a printed substrate (500) which is separated from the induction layer (4), the output of the antenna array of the induction layer (4) is connected to the corresponding input terminal (511') on the printed substrate (500) by means of pressure-connection, plug-in connection or welding-connection."

VI. By a letter sent by fax on 23 May 2011 the appellant was informed that its letter of 6 May 2011 was signed by a person who was not a professional representative

but a legal practitioner entitled to represent clients in proceedings before the EPO under Article 134(8) EPC subject to providing the EPO with a valid power of attorney. Since the board was not aware of any individual or general authorisation applicable to the present proceedings, the signature of an unauthorised person was regarded as a missing signature and the appellant's letter of 6 May 2011 was deemed not to be signed. The appellant was invited in accordance with Rule 50 EPC to have said letter duly signed by an authorised representative or to provide a valid signed authorisation.

- VII. On 26 May 2011 the EPO received the appellant's letter of 6 May 2011 duly signed by an authorised professional representative.
- VIII. By another letter of 26 May 2011, received on 27 May 2011, the board was informed that the applicant had decided not to attend the oral proceedings.
- IX. The appellant requested in writing that the decision under appeal be set aside and that a patent be granted on the basis of the sole request / main request (claims 1-4) as filed with letter dated 6 May 2011 (re-filed with letter dated 23 May 2011).
- X. Oral proceedings were held on 7 June 2011 in the absence of the appellant. After due deliberation on the basis of the written submissions in the statement setting out the grounds of appeal, in the letter of 6 May 2011 and on the basis of the request, the board announced its decision.

## **Reasons for the Decision**

### 1. *Admissibility*

The appeal complies with the provisions of Articles 106 to 108 EPC (see Facts and Submissions, point II above). It is therefore admissible.

### 2. *Non-attendance at oral proceedings*

By letter of 26 May 2011 received on 27 May 2011 the board was informed that the appellant would not be attending the oral proceedings. The board considered it expedient to maintain the date set for oral proceedings. Nobody attended the hearing on behalf of the appellant.

Article 15(3) RPBA stipulates that the board is not obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case.

In the present case, the board was in a position to announce a decision at the conclusion of the oral proceedings as foreseen by Article 15(6) RPBA.

### 3. *Admissibility of the request filed with letter of 6 May 2011*

By letter of 6 May 2011, i.e. after the summons for oral proceedings, the appellant filed a new request comprising claims 1 to 4 which replaced the previously filed request (see letter of 6 May 2011, page 1, first



paragraph and page 4, point 3 "It is respectfully requested to base further examination on the amended set claims ..."). The appellant amended claim 1 by deleting the last feature of claim 1 objected to under Article 84 EPC and introduced from the description the feature that the induction layer is an antenna array

"formed by silver-plasm or a mixture of silver-plasm and carbon-plasm",

which had not been claimed in the appeal proceedings before.

- 3.1 In the communication annexed to the summons to oral proceedings, the appellant was advised that any amendments to its case would have to be examined for compliance with the requirements of the EPC, including *inter alia* their admissibility. In the board's judgement, the appellant was forewarned and could therefore have foreseen that any new request might be subject to examination of its admissibility. By not attending the proceedings the appellant effectively chose not to avail itself of the opportunity to present comments orally before the board but instead to rely on its written case (cf. Article 15(3) RPBA).
  
- 3.2 According to Rule 137(3) EPC in its original version applicable to the present case (see Article 2(2) of the decision of the Administrative Council of 25 March 2009 amending the Implementing Regulations to the EPC, OJ EPO 2009, 299), "after receipt of the first communication from the Examining Division, the applicant may, of his own volition, amend once the description, claims and drawings, provided that the

amendment is filed at the same time as the reply to the communication. No further amendment may be made without the consent of the Examining Division". By virtue of Article 111(1) and Rule 100(1) EPC, these provisions are also applicable *mutatis mutandis* to appeal proceedings. According to Article 12(4) RPBA, requests which could have been presented or were not admitted in the first-instance proceedings can be held inadmissible by the board. The board notes that a claim referring to the same feature was objected to by the examining division under Article 84 EPC as being obscure (see the communication dated 21 July 2006, point 2.7). The examining division further argued that the expressions "silver-plasm" and "carbon-plasm" could not be clarified without infringing the requirements of Article 123(2) EPC and the corresponding features should therefore be removed.

Apparently, the applicant chose to follow this recommendation, since it no longer prosecuted any claim directed to such a feature in the first-instance proceedings. The board interprets this behaviour as abandoning the corresponding subject-matter. According to Article 12(4) RPBA as referred to above, the board therefore has discretion not to admit such a request which the appellant returns to late in the appeal proceedings.

- 3.3 Article 12(2) RPBA stipulates that the statement of grounds of appeal shall contain a party's complete case. According to Article 13(1) RPBA, any amendment to a party's case after it has filed its grounds of appeal may be admitted and considered at the board's discretion. The discretion is to be exercised, *inter*

*alia*, in the light of the current state of the proceedings.

In the present case, the appellant re-introduced abandoned subject-matter even after oral proceedings had been arranged, and therefore at a very late stage of the proceedings.

- 3.4 In addition, according to the established case law of the boards of appeal it is relevant, with respect to the admissibility of new claims during appeal proceedings, whether the respective versions of the sets of claims converge or diverge, i.e. whether the claimed subject-matter of the independent claims of a main request goes in the same direction and further specifies the same alleged inventive aspect (see e.g. T 1685/07, point 6.5; T 0240/04, point 16).

In the present case, claim 1 filed with letter of 6 May 2011 specifies features which do not constitute a further limitation of claim 1 of the preceding request on which the annex to the summons for oral proceedings was based and which specified

"wherein said output of the antenna array of the induction layer (4) is positioned between a hard sheet (600) and a printed substrate (500); a buffering layer (8') is provided between the hard sheet (600) and the output of the antenna array; the hard sheet (600), the buffering layer (8') and the output of the antenna array are overlaid on the printed substrate (500) by means of the screwing-conjunction; the output of the antenna array is connected with corresponding input terminal (511')".

Instead of amending and further specifying this aspect of the different layers of the structure of the touch screen, the appellant amended claim 1 by replacing this feature by the following aspect

"wherein said induction layer (4) is an antenna array formed by silver-plasm or a mixture of silver-plasm and carbon-plasm".

It thus went in a different direction, specifying the material of one of those layers instead.

The added feature of amended independent claim 1 therefore concerns a technical problem (reduction of cost, see appellant's letter of 6 May 2011, page 3, paragraph 5) which is only remotely related to the original one linked to the deleted feature (improving the sensitivity of the structure).

- 3.5 By filing, at a very late stage, a new set of claims directed to abandoned subject-matter which is not substantially identical to that of the previous request and is therefore a diverging request (see point 3.4 above) and not attending the oral proceedings, the appellant waived the opportunity of discussing its case. To admit a new request in those circumstances would practically give appellants the opportunity to compel a remittal to the department of first instance as they pleased, which would run counter to the principle of procedural economy.

Therefore, and since the appellant did not provide any reasons or arguments as to why the objections raised by

the examining division against the re-introduced feature were wrong or had been overcome, the board has to decide on the admissibility of the new request by using the criterion of whether amended claim 1 would be *prima facie* clearly allowable under the EPC (see T 0979/02, points 3.2 and 3.3 and T 0070/98, points 2.1 to 2.5).

- 3.6 The appellant did not present any argument with regard to the objections raised in the communication dated 21 July 2006 against the feature re-introduced in claim 1 with the letter of 6 May 2011. In the board's judgement these objections are justified and therefore *prima facie* have not been overcome by the appellant.

The board considers the expressions "silver-plasm" and "carbon-plasm" to be unclear, rendering the features "antenna array" and "induction layer" unclear. An unclear feature, however, cannot contribute to the inventive step of the claimed subject-matter. In contrast to the appellant's argument, the added feature therefore cannot render the claimed subject-matter inventive over the prior-art on file.

In addition, the board considers the added feature to be in contradiction to the rest of the wording of claim 1 which still specifies that the induction layer is "printed" on the insulation membrane. It is ambiguous to say that "silver-plasm or a mixture of silver-plasm and carbon-plasm" can be "printed" on an insulation membrane. The board interprets the term "printed" in claim 1 to refer to printed circuit technology which, however, is in contrast to the use of "silver-plasm" or "carbon-plasm".

For these reasons, amended claim 1 of the sole request on file lacks clarity under Article 84 EPC and its subject-matter is not considered to be *prima facie* clearly allowable under the EPC.

4. For the afore-mentioned several reasons, the board refuses its consent under Rule 137(3) EPC and decides not to admit the request filed with letter of 6 May 2011 into the appeal proceedings.
5. Since this request now held inadmissible replaced the previous request, there is no longer any request to consider, and the application has to be refused under Articles 97(2) and 113(2) EPC on the basis that the application contains no claims to which the applicant has agreed and the appeal must be dismissed.

## **Order**

### **For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chair:

K. Götz

A. Ritzka