

Internal distribution code:

- (A) [] Publication in OJ
(B) [] To Chairmen and Members
(C) [X] To Chairmen
(D) [] No distribution

**Datasheet for the decision
of 5 May 2011**

Case Number: T 1782/09 - 3.2.04

Application Number: 05011410.7

Publication Number: 1600197

IPC: A63F 13/00

Language of the proceedings: EN

Title of invention:

Game apparatus and control method therefor

Applicant:

Bandai Co., Ltd., et al

Headword:

-

Relevant legal provisions:

EPC Art. 112(1)a

Relevant legal provisions (EPC 1973):

EPC Art. 56

Keyword:

"Inventive step - all requests (no)"
"Mixture of technical and non-technical features"
"Rules of playing games"
"Referral to the Enlarged Board of Appeal (refused)"

Decisions cited:

G 0003/08, T 0012/08, T 0336/07, T 1543/06, T 0154/04,
T 0641/00

Catchword:

-



Case Number: T 1782/09 - 3.2.04

D E C I S I O N
of the Technical Board of Appeal 3.2.04
of 5 May 2011

Appellant: Bandai Co., Ltd., et al
1-4-8, Komagata
Taito-ku
Tokyo 111-8081 (JP)

Representative: N. Douxchamps c/o
Hoffmann Eitle
Patent- und Rechtsanwälte
Arabellastraße 4
D-81925 München (DE)

Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 28 April 2009
refusing European patent application
No. 05011410.7 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: M. Ceyte
Members: M. Poock
T. Bokor

Summary of Facts and Submissions

- I. On 26 June 2009, the appellant lodged an appeal against the decision of the examining division posted 28 April 2009, refusing the European patent application No. 05 011 410.7 and paid the prescribed fee. The statement of grounds of appeal was received on 25 August 2009.
- II. The examining division held that the claimed subject-matter of the main and three auxiliary requests did not involve an inventive step because it was an obvious modification of the classic "Tetris" computer game rules resulting from the teaching of document US-A-6 458 032 (D1).
- III. Following a communication in which the board voiced its concern about the patentability of the claimed subject-matter, oral proceedings were held on 5 May 2011. At the oral proceedings, the appellant submitted a legal question for referral to the Enlarged Board of Appeal, which reads as follows:
- "In the context of a computer-implemented gaming system, can a feature be regarded as a non-technical feature although the feature cannot exist and be put into practice outside the computer-implemented game system?"
- IV. The appellant requested that the decision under appeal be set aside and the patent be granted on the basis of a main request, or, in the alternative, on the basis of an auxiliary request, both filed with letter of 25 August 2009. It was further requested that the above

quoted legal question be referred to the Enlarged Board of Appeal pursuant to Article 112(1)(a) EPC.

V. Claim 1 of the main request reads as follows:

"A game apparatus having an operation unit (1406) which inputs an operation to a game, a display unit (1405) which displays information associated with the game, and a storage 10 unit (1403) which stores data required to execute the game, the game apparatus comprising: means for generating display data of falling objects (101, 102, 103, 104) which are displayed to fall from an upper portion to a lower portion in a predetermined display area (100) on the display unit (1405), and storing the display data in the storage unit (1403); means for reading out the generated display data of the falling objects from the storage unit (1403), and displaying the falling objects to fall from the upper portion to the lower portion in the predetermined display area (100); and means for, when the falling objects reach a falling stop position in the display area, changing the display data to display the falling objects as stop objects whose falling movement stops, and storing the changed display data in the storage unit (1403), the game apparatus characterized by further comprising: object designating means for designating a predetermined number or less of stop objects in accordance with a designation instruction from the operation unit (1406) and re-arranging means for, when the stop objects are designated, changing the display data of stop objects to rearrange positions of the predetermined number of designated stop objects in accordance with a re-arrange instruction from the

operation unit (1406), and storing the changed display data in the storage unit (1403) wherein:
the object designating means comprises a cursor (106) movable on the display area (100) in accordance with a movement instruction from the operation unit (1406) and having a shape and size to accommodate a plurality of the objects;
the re-arranging means is arranged to perform the processing to re-arrange the positions of the stop objects when the cursor (106) has been positioned to accommodate the predetermined number of stop objects;
and the apparatus further comprises:
means for, when the re-arranged stop objects and stop objects which are located around the re-arranged stop objects form a predetermined combination, changing display data of a plurality of stop objects which match the predetermined combination to display data that express rising objects which rise from the lower portion to the upper portion in the predetermined display area (100) on the display unit (1405), and storing the changed display data in the storage unit (1403); and
means for, when the rising objects reach a predetermined clear position in the display area, changing the display data to clear display of the rising objects;
wherein the re-arranging means is further configured to perform the processing to re-arrange the positions of a plurality of objects accommodated in the cursor among the rising objects."

In claim 1 of the auxiliary request, the last feature was substituted by the following features:

"means for determining whether the re-arranged stop objects and stop objects which are located around the re-arranged stop objects meet a predetermined ignition condition;

means for calculating, when the ignition condition is met, impelling force of rising objects formed by the re-arranged stop objects and the stop objects based on the number of the re-arranged stop objects and the stop objects, the impelling force defining rising distance of the rising objects;

means for changing, when the ignition condition is met, display data of a plurality of stop objects which meet the ignition condition based on the impelling force to display data that express the rising objects which are launched and rise from the lower portion to the upper portion in the predetermined display area on the display unit; and

means for storing the changed display data in the storage unit."

VI. The appellant's arguments may be summarised as follows:

(a) Patentability:

The claimed subject-matter is new and inventive, because document D1 does not disclose the last feature of claim 1 of the main request according to which also rising objects can be re-arranged and the features in claim 1 of the auxiliary request regarding the impelling force of the rising objects.

According to document D1, all objects in the game field rise without relation to the player's actions. In contrast, in the claimed invention, the objects

originally fall down and become stop objects which can be designated and rearranged by a player. Those objects which meet a particular combination condition then become rising objects.

The computation and displaying aspects and processes of the invention are therefore different from those of D1. The visual effects are neither purely abstract nor purely intellectual. They provide more flexibility to a player regarding the objects to select. The usability and visual effects are therefore improved in a particular manner, which constitutes a non-obvious technical solution to a technical problem.

In line with decision T 336/07, rules for playing games constitute a constraint voluntarily agreed upon by the players for playing a game. As such, "a game rule only exists to avoid bending or breaking the game rules to manipulate the structure of the game. The rules only exist to be able to distinguish between a behaviour respecting the rules and, on the other hand, one cheating or transgressing the rules". Therefore, the distinguishing features of claim 1 of these requests do not relate to a modified game rule but constitute a technical configuration of the apparatus, expressed as a technical tool for playing a different game.

(b) Referral to the Enlarged Board of Appeal

The assessment of inventive step is fundamentally dependent on which features are regarded as technical and which features are conversely regarded as non-technical. Non-technical features, to the extent that they do not interact with the technical subject-matter

of the claim for solving a technical problem, i.e. non-technical features "as such", do not provide a technical contribution to the prior art and are thus ignored in assessing novelty and inventive step (T 154/04, point 5 (F)).

It is therefore a point of fundamental importance which criterion is used to distinguish technical and non-technical features appearing in a claim.

In the present case the division of the claimed features into those being technical and those being non-technical is inappropriate because these features cannot exist outside the computer implemented game apparatus, in contrast to, for instance, a computer implemented chess game with modified chess rules.

Reasons for the Decision

1. The appeal is admissible.
2. Main request
 - 2.1 Claim 1 relates to a falling block computer game in which objects or blocks are displayed to fall from an upper portion of a game field towards its lower portion.
 - 2.2 Although document D1 primarily describes a game in which objects are displayed to rise from a lower portion of a game field towards its upper portion (see column 1, lines 39 to 41), it also discloses the reverse movement, i.e. that the objects fall from the

upper to the lower game field (see column 14, lines 5 to 7). Hence, it discloses a falling block game.

The initial setup of the game apparatus is as follows:

New objects are continuously supplied at the upper portion (at the lower portion) of the displayed game field and, together with objects which were already displayed at the position where the new blocks are supplied, then move towards the opposite game field side. When any block reaches the opposite side, the game is over.

The player can designate pairs of the displayed objects to be rearranged (interchanged). Then, when any displayed objects meet a particular combination condition, these blocks are immediately cleared from the display. Objects directly below (or above) will move up (drop down) into the cleared spaces.

2.3 Problem

2.3.1 The subject-matter of claim 1 is distinguished from the apparatus of D1 by its last three features, i.e.:

- means for, when the rearranged stop objects and stop objects which are located around the rearranged stop objects form a predetermined combination, changing display data of a plurality of stop objects which match the predetermined combination to display data that express rising objects which rise from the lower portion to the upper portion in the predetermined display area (100) on the display unit (1405), and storing the

changed display data in the storage unit (1403) (hereinafter referred to as: M1); and

- means for, when the rising objects reach a predetermined clear position in the display area, changing the display data to clear display of the rising objects (hereinafter referred to as: M2);
- wherein the rearranging means is further configured to perform the processing to re-arrange the positions of a plurality of objects accommodated in the cursor among the rising objects (hereinafter referred to as: M3).

2.3.2 These features M1, M2 and M3 include both, technical and non-technical aspects.

- (a) "Game rules" form part of "the regulatory framework agreed between [or with] players concerning conduct, conventions and conditions that are meaningful only in a gaming context (T 0012/08 of 6 February 2009, reasons 4.6; not published in OJ EPO). They govern the conduct and actions of the players during game play (T 336/07 of 11 October 2007, reasons 3.3.1; not published in OJ EPO).

Thus, "games rules" define inter alia the structural setup of the game that allows choice making to occur and determines how the game play evolves from the beginning to its end in response to player actions and decisions.

- (b) Such "games rules" are clearly recognisable in the distinguishing features of claim 1. They specify the setup of the game apparatus and its display

and limit what a player can do in the context of the game:

- Stop objects forming a particular combination are displayed as rising objects,
- rising objects are cleared when they reach a particular clear position in the display area,
- and also rising objects can be re-arranged.

(c) From this it follows that the non-technical aspects of the distinguishing features reflect modified game rules of the D1 computer game and the technical aspects reflect the technical implementation thereof.

2.3.3 Since claim 1 has features including both technical and non-technical aspects, its subject-matter is of "mixed" nature.

(a) In dealing with such "mixed" inventions the board adopts the approach as set out in T 1543/06 of 29 June 2007 (reasons 2, not published in OJ EPO) which is based foremost on T 641/00 (OJ EPO 2003, 352). Thus, only those features that contribute to technical character are to be taken into account when assessing inventive step.

That requirement cannot rely on excluded (non-technical) subject-matter alone, however original that matter might be. The mere technical implementation of something excluded cannot form the basis for inventive step. Decisive for inventive step is the question how excluded subject-matter has been technically implemented,

and whether such implementation is obvious in the light of the prior art. As explained in reasons 2.7 to 2.9 of T 1543/06, such a consideration focuses on any further technical effects associated with implementation of the excluded subject-matter over and above those inherent in the excluded subject-matter itself.

- (b) In the present case, the application and claim 1 do not provide much detail on the specific technical implementation of the modified game rules, except that they are provided in the form of means. With regard to the effects of particular visual effects and new usability stressed by the appellant, the application does not provide any other details showing that they are attributable to the technical implementation of the modified game rules and not to the modified game rules themselves.

Hence, the board is unable to identify any further technical advantages or effects associated with the specific features of implementation over and above the effects and advantages inherent in the modified game rules.

2.3.4 Therefore, the objective technical problem is merely to technically implement the modified game rules on the D1 computer game apparatus.

2.4 Inventive step

2.4.1 With this technical problem, the skilled person can be identified as a software developer specialised in

computer games who is given the task of implementing the modified game rules on the known game apparatus.

2.4.2 Obviousness

- (a) Document D1 discloses stop objects, i.e. objects displayed in the game field, that become rising objects because they are moved upwards by new objects supplied from below (column 6, lines 59 to 65).

Moreover, document D1 also teaches that (stop) objects meeting a predetermined combination condition are cleared (see column 5, lines 10 to 12(step 602 in figure 12 and description column 11, lines 23 to 27) and that either falling or rising objects can be designated and be rearranged by a player (column 9, lines 32 to 34 and column 14, lines 5 to 7).

- (b) In view of this disclosure and the problem stated above, the board has no doubts that it is obvious for the skilled person to technically implement the modified game rules set out above in item 2.3.2(c) on the known game apparatus.

3. Auxiliary request

3.1 Problem

3.1.1 The subject-matter of claim 1 is distinguished from the apparatus of D1 by the following features:

- feature M1 of the main request;

- feature M2 of the main request;
- means for determining whether the re-arranged stop objects and stop objects which are located around the rearranged stop objects meet a predetermined ignition condition (hereinafter A1);
- means for calculating, when the ignition condition is met, impelling force of rising objects formed by the re-arranged stop objects and the stop objects based on the number of the re-arranged stop objects and the stop objects, the impelling force defining rising distance of the rising objects (hereinafter A2);
- means for changing, when the ignition condition is met, display data of a plurality of stop objects which meet the ignition condition based on the impelling force to display data that express the rising objects which are launched and rise from the lower portion to the upper portion in the predetermined display area on the display unit; and means for storing the changed display data in the storage unit (hereinafter A3).

(a) Also in these features M1, M2, A1, A2 and A3 "game rules" are clearly recognisable. They specify the setup of the game apparatus and its display and limit what a player can do in the context of the game:

- Stop objects forming a particular combination are displayed as rising objects,
- rising objects are cleared when they reach a particular clear position in the display area,

- stop objects meeting an ignition condition are displayed as rising objects, the impelling force thereof depends on the number of re-arranged stop objects and stop objects.

 - (b) From this it follows that the non-technical aspects of the distinguishing features reflect modified game rules of the D1 computer game and the technical aspects reflect the technical implementation thereof.
- 3.1.2 For the same reasons as set out above in item 2.3.3, the objective technical problem is thus to technically implement the modified game rules on the D1 computer game apparatus.
- 3.2 Inventive step
- 3.2.1 Since document D1 discloses to determine whether the stop objects meet a predetermined combination condition, the board is convinced that it is also obvious for the skilled person to use this knowledge for the technical implementation of means for determining whether the stop objects meet another condition, i.e. the predetermined ignition condition in feature A1. Also the technical implementation of the game rules underlying features M1, M2, A2 and A3 did not require inventive considerations for the same reasons set out above in item 2.4.2.
4. In summary, the board finds that claim 1 of both requests relates to the technical implementation of excluded matter in the form of game rules. Disregarding any effects and advantages inherent in the game rules

themselves, the board is unable to identify any further technical effects in the particular manner of technical implementation that might render it non-obvious to the skilled person. In conclusion therefore, the board finds that the subject-matter of claim 1 of both requests does not involve an inventive step as required by Articles 52(1) and 56 EPC.

5. Referral to the Enlarged Board of Appeal

5.1 Article 112(1)(a) EPC stipulates that in order to ensure uniform application of the law or if a point of law of fundamental importance arise, the board of appeal shall, ... following a request from a party to the appeal, refer any question to the Enlarged Board of Appeal, if it considers that a decision is required for that purpose.

However, as stated in G 3/08 (reasons 7.2.5; OJ EPO 2011, 10), the boards of appeal are not authorised to consult the Enlarged Board of Appeal whenever they so wish in order to clarify abstract points of law. The question has to be essential to reach a decision on the appeal in question.

Moreover it was stated therein (reasons 10.13.2) that the case law of the boards of appeal regarding computer-implemented inventions, as summarised in T 154/04 (OJ, EPO 2008, 46), is consistent and has a sound legal basis in the Convention.

Item 5 of the reasons of T 154/04 reads:

"(E) For examining patentability of an invention in respect of a claim, the claim must be construed to determine the technical features of the invention, i.e. the features which contribute to the technical character of the invention."

5.2 In the present case, the board distinguished between technical and non-technical aspects of the claimed distinguishing features on the basis of their contribution to the technical character of the invention. Whether, in the context of a computer implemented gaming system, a feature may be regarded as a non-technical feature although the feature cannot exist and be put into practice outside the computer-implemented game system, is not decisive for this assessment.

Put differently, this finding of the board answers the question of the appellant, and implies that features do not become inevitably technical merely because such features only make sense and realistically may only be put into practice in a computer-implemented game system. The board also notes that it was able to arrive at this finding without having to refer the question to the Enlarged Board of Appeal. Furthermore, the board is also not aware of any other decision on this specific point, hence the board is also not aware of any divergence in the jurisprudence, as mentioned above.

An answer of the Enlarged Board of Appeal to the question submitted at the oral proceedings, is thus not necessary for the decision on the present appeal and the request for referral to the Enlarged Board of Appeal must therefore be refused.

Order

For these reasons it is decided that:

1. The request for referral to the Enlarged Board of Appeal is refused.
2. The appeal is dismissed.

The Registrar:

The Chairman:

G. Magouliotis

M. Ceyte