

Internal distribution code:

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

**Datasheet for the decision
of 26 February 2015**

Case Number: T 1251/10 - 3.4.01
Application Number: 04761198.3
Publication Number: 1658580
IPC: G06K19/07, G06F19/00, G07F17/32
Language of the proceedings: EN

Title of invention:

SYSTEM AND METHOD FOR FACILITATING RESPONSIBLE BEHAVIOUR

Applicant:

Flanagan, John Thomas

Headword:

Relevant legal provisions:

RPBA Art. 12(2), 13(1)
EPC Art. 84

Keyword:

- late-
filed requests (not admitted in the proceedings : main request
and auxiliary request)
- no authorized request on file

Decisions cited:

T 0314/92, T 1129/97, T 2006/09

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 1251/10 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 26 February 2015

Appellant: Flanagan, John Thomas
(Applicant) Unit 237,
416 St Kilda Road
Melbourne,
Victoria 3004 (AU)

Representative: Harmann, Bernd-Günther
Kaminski Harmann
Patentanwälte AG
Landstrasse 124
9490 Vaduz (LI)

Decision under appeal: **Decision of the Examining Division of the
European Patent Office posted on 16 December
2009 refusing European patent application No.
04761198.3 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman G. Assi
Members: H. Wolfrum
J. Geschwind

Summary of Facts and Submissions

I. European patent application 04 761 198.3 (publication No. EP-A-1 658 580, corresponding to WO-A- 2005/0022453) was refused by a decision of the examining division dispatched on 16 December 2009 for the reason of lack of inventive step (Articles 52(1) and 56 EPC 1973) of the subject-matter of a main request then on file. An auxiliary request had not been admitted into the proceedings.

II. The applicant lodged an appeal against the decision and paid the prescribed fee on 15 February 2010. On 26 April 2010 a statement of grounds of appeal was filed. The appellant requested the grant of a patent on the basis of sets of claims according to a main request and two auxiliary requests. Furthermore, an auxiliary request for oral proceedings was made.

The main request corresponded to the request on which the contested decision was based. The independent claims of the auxiliary requests were complemented by details specifying the configuration of a "*facility for verifying*" "*identification means*" and a "*machine*" in communication with the facility, respectively.

III. On 4 August 2014 the appellant was summoned to oral proceedings.

In a communication annexed to the summons, the Board gave a preliminary opinion in which it addressed inter alia concerns as to added subject-matter (Article 123(2) EPC) and lack of clarity (Article 84 EPC 1973).

IV. In response, the appellant filed by letter of 26 January 2015 new sets of claims according to a main request and an auxiliary request.

V. Oral proceedings were held on 26 February 2015.

The sole point of debate was the question of admission of the new requests into the proceedings. As a result of the discussion, the appellant maintained its requests that the decision under appeal be set aside and a patent be granted on the basis of one of the sets of claims according to the main request and the auxiliary request, both filed with the letter of 26 January 2015.

VI. Independent claims 1 and 17 of the appellant's main request read as follows :

"1. A system for facilitating responsible gambling by a gambler, said system comprising:

an identification means to identify the gambler;

a reader in communication with a gambling facility to read the identification means to verify the identification means, wherein the gambling facility facilitates gambling only once the identification means is verified;

a storage means coupled to be in communication with the gambling facility to store information related to the gambling by the gambler, said information based on monitoring the gambling by the gambler at the gambling facility; and

a modeler module in communication with the storage means to determine a category of gambling for the gambler and to generate a limit, trigger, block or exclusion for the gambler at the gambling facility based on the determination of the category of gambling

for the gambler, the category of gambling determined by comparing the information related to the gambling by the gambler against a model, wherein the model is dynamic in that it relies on information that is monitored and recorded by the system including: up to date information relating to the gambling by the gambler, earlier patterns of gambling by the gambler and earlier patterns of gambling by a distribution of other gamblers; and

the model is based on statistical modelling."

"17. A method for facilitating responsible gambling by a gambler, said method including the steps of:

verifying an identification means identifying the gambler and required to gamble; wherein the identification means must be verified by the gambling facility for the gambler to use the gambling facility using a reader in communication with the gambling facility to read the identification means to verify the identification means;

facilitating gambling via a gambling facility;

storing information related to the gambling by the gambler in a storage means coupled to be in communication with the gambling facility, said information based on monitoring the gambling by the gambler at the gambling facility;

comparing the information related to the gambling by the gambler with a model;

determining a category of gambling for the gambler;

the category of gambling determined by comparing the information related to the gambling by the gambler against a model, wherein

the model is dynamic in that it relies on information that is monitored and recorded by the system including: up to date information relating to the gambling by the gambler, earlier patterns of

gambling by the gambler and earlier patterns of gambling by a distribution of other gamblers; and the model is based on statistical modelling; and generating a limit, trigger, block or exclusion for the gambler at the gambling facility based on the determination of the category of gambling for the gambler."

Claims 2 to 16 and 18 to 32 are dependent claims.

Independent claims 1 and 17 of the auxiliary request differ from respective claim 1 and 17 of the main request by the complement "*and the current psychological understanding of gambling*" added to the feature "*the model is based on statistical modelling*".

Reasons for the Decision

1. In the following reference is made to the provisions of the EPC 2000, which entered into force as of 13 December 2007, unless the former provisions of the EPC 1973 still apply to pending applications.
2. The appeal complies with the requirements of Articles 106 to 108 EPC and Rule 99 EPC and is, therefore, admissible.
3. Admission of the appellant's main request and auxiliary request into the proceedings (Articles 12(2), 13(1) and 13(3) RPBA)
 - 3.1 Both requests were filed after the summons to oral proceedings and one month before the oral proceedings.

Article 12(2) RPBA demands inter alia that the *"statement of grounds of appeal ... shall contain a party's complete case"*.

Article 13(1) RPBA stipulates that *"any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion. The discretion shall be exercised in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy."*

Article 13(3) RPBA complements that *"amendments sought to be made after oral proceedings have been arranged shall not be admitted if they raise issues which the Board or the other party or parties cannot reasonably be expected to deal with without adjournment of the oral proceedings."*

Moreover, the case law of the Boards of Appeal has established a variety of criteria for the admission or rejection of amended claims in appeal proceedings (cf. chapter IV.E.4. of the 7th edition of the *"Case Law of the Boards of Appeal of the European Patent Office"*). Among these criteria are whether the amendments respond to fresh objections raised by the board, whether they overcome previously raised objections and whether they give rise to new problems.

- 3.2 In the present case, the independent claims of the main request and auxiliary request comprise a number of substantive amendments with respect to the versions of the independent claims as defended with the statement setting out the grounds of appeal.

These amendments comprise in particular :

- the definition of a *"reader in combination with a gambling facility"* to read and thus to verify *"the identification means"*;
- the specification that the *"module"* against which the *"modeller module"* compares *"the information related to the gambling by the gambler"* is *"dynamic in that it relies on information that is monitored and recorded by the system including: up to date information relating to the gambling by the gambler, earlier patterns of gambling by the gambler and earlier patterns of gambling by a distribution of other gamblers"*; and
- the requirement that *"the model is based on statistical modelling"*.

3.3 In the appellant's opinion, the requests filed by letter of 26 January 2015 had to be admitted into the proceedings because they responded to objections concerning added subject-matter and lack of clarity which were addressed for the first time in the Board's communication annexed to the summons to the oral proceedings.

The reason why the amendments made became quite detailed lied in the fact that they literally reproduced passages of the application description in order to stick closely to the original disclosure and thereby to avoid any risk of infringement of the requirement of Article 123(2) EPC. Recourse to the original documents had to be possible at any stage of proceedings before the EPO because otherwise a party would be denied an effective right to be heard and a fair conduct of the proceedings, both principles being enshrined in Article 6 ECHR (European Convention on Human Rights).

Furthermore, the amendments did not entail any surprising change in substance because they constituted

merely limitations, albeit substantive, of the subject-matter that was previously claimed. Since these limitations related to the basic elements of the invention and had a clear and unambiguous disclosure in the application description as filed, they had also to be considered as having been encompassed in the search for relevant prior art.

The resulting claim definitions were clear to the skilled person. In particular, it was clear in the technical field at issue what a "model" was and how it was based on statistical modelling. In this context, it was likewise well-established what a static model or a dynamic model was. In addition, the independent claims on file even provided a definition as to how the term "dynamic" was to be understood in the context of the present invention, namely that the model relied on *"information that is monitored and recorded by the system including: up to date information relating to the gambling by the gambler, earlier patterns of gambling by the gambler and earlier patterns of gambling by a distribution of other gamblers"*, exactly as it was explained in the application description. Finally, in the light of Article 69 EPC support as to the correct interpretation of the term "model" could be obtained from Figure 5 of the application.

- 3.4 The appellant's arguments are found unconvincing.
- 3.4.1 First of all, it is to be noted that in particular the amendments listed in point 3.2 above had, up to the appellant's letter of 26 January 2015, never been the subject of any claim in the examination and appeal proceedings.

However, since the amendments in question are of a substantial nature they should have been filed at the very latest with the statement of grounds of appeal (Article 12(2) RPBA).

- 3.4.2 Moreover, the amendments having been absent from the claims on which the European Search Report was drawn up, it has to be presumed that they include unsearched subject-matter.

It is not disputed that the amendments under consideration limit the originally claimed subject-matter, which refers to a categorization of behaviour of an entity on the basis of a comparison with a behaviour model. However, contrary to the appellant's assertion, it cannot be concluded from this fact that specific properties of a model which are mentioned in the description at a single occurrence and only in passing (page 28, lines 8 to 19 of the description as originally filed and published) would normally have been taken into consideration in a properly conducted search and - if existent in the prior art - would have automatically popped up in the search for known systems categorizing an entity's behaviour based on statistical modelling.

Thus, if the appellant's requests were admitted into the proceedings, it cannot be ruled out that, depending on the circumstances, the Board would need to envisage a remittal of the case to the examining division for further prosecution. Such a course of action would however be contrary to the purpose of Art. 13(3) RPBA and would require compelling reasons for justification.

- 3.4.3 The amendments specifically addressed in point 3.2 above cannot be justified as having been occasioned by fresh

objections under Article 123(2) EPC in the Board's communication.

It is correct that the Board raised in its communication of 4 August 2014 objections as to added subject-matter, whereas the examining division had not seen such problems. However, the Board's objections concerned features which are technically unrelated to the amendments presently in question. Notably, the Board saw lack of a proper basis of disclosure for the expressions "*at least some of the stored information*" and "*monitoring actual pursuit of the behaviour*" [emphasis added] in the wording of the independent claims filed with the statement of grounds of appeal. Thus, any amendment beyond the simple deletion of the terms "*at least some*" and "*actual pursuit*" cannot be justified by the Board's concerns addressed in the communication of 4 August 2014.

- 3.4.4 In this communication the Board had also pointed to problems concerning the clarity of the claim definitions. However, the amendments made to the present requests do not address these objections but, instead, add further clarity problems.

Inter alia, the Board doubted that the term "*model*" and phrases analogous to the present expression "*earlier patterns of gambling by a distribution of other gamblers*" had a clear meaning.

The mere reference in the claims to a "*model*" of the behaviour of an entity (such as a gambler) does not allow unambiguously distinguishing this term from observed types of behaviour of the entity (such as the behaviour of "*chasing*" or "*loss of control*" in the case of a gambler). It is not disputed that "*model*" and

"*statistical modelling*" are as such well-known statistical concepts. This is however irrelevant in the circumstances of the present case, the question being whether the statistical evaluation of observed patterns of behaviour of a gambler leading possibly to a categorization such as "*chasing*" or "*loss of control*" could reasonably be said to be based on "*statistical modelling*". It is the appellant's insistence that "*model*" and "*statistical modelling*" meant something else than an individual criterion which provides proof as to the ambiguity of the terms in question.

By the same token, it is not disputed that "*models*" are generally classified as "*dynamic*" or "*static*". However, this does not change the fact that in the present case it is not conceivable that the "*model*" used by the "*modeler module*" when determining the category of a gambler would be "*dynamic*" in the claimed sense of including "*up to date information relating to the gambling by the gambler*", i.e. that the "*model*" would somehow have to be modified by the observed data whilst it serves simultaneously as a reference of comparison.

Moreover, apart from a confusing statement made in passing: "*It is also dynamic in that it relies on up to date information as well as earlier, i.e. historical behaviour patterns.*" (page 28, lines 11 to 13, of the description as filed and published), there is no explanation and thus no support in the description of a model relying on "*up to date information relating to the gambling by the gambler*".

The presentation of concrete examples of models by Figure 5, which was referred to by the appellant as providing a further source of information from which

the meaning of the term "*model*" could be inferred, does not suggest in any way that the models would be "*dynamic*". Besides, as a matter of principle, claim definitions of a patent application have to be clear by themselves, and cannot be given a specific interpretation by virtue of Article 69 EPC in the light of the description or drawings, at least not in pre-grant proceedings (cf. for instance T 0314/92, not published, point 4.1 of the Reasons; T 1129/97, OJ 2001, 273, point 2.1.2 of the Reasons; and T 2006/09, not published, point 4. of the Reasons).

For the sake of completeness, it is added that the phrase "*earlier patterns of gambling by a distribution of other gamblers*" also does not have an unambiguous meaning. Apart from the passage "*Alternatively, the historical behaviour may be that of a distribution of other entities.*" in the description (page 28, lines 14 to 15, of the description as filed and published), there is no further explanation or support in the application. An interpretation by the Board in the sense of an archetypal behaviour of gamblers as it would be experienced for instance by the operators of gambling facilities (e.g. casinos) and eventually used for setting or adapting the rules of gaming was decidedly opposed by the appellant.

- 3.5 In summary it is noted that the appellant's main request and auxiliary request filed on 26 January 2015 do not overcome previously raised objections as to lack of clarity of the claimed subject-matter and even give rise to new clarity objections.

Therefore, in the oral proceedings of 26 February 2015 the Board arrived at the conclusion that Rules 12(2), 13(1) and 13(3) RPBA precluded the admission of the

appellant's requests into the proceedings. The appellant did not submit any further requests.

3.6 Under these circumstances, the appeal has to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



R. Schumacher

G. Assi

Decision electronically authenticated