Internal distribution code:

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

Datasheet for the decision of 11 November 2014

Case Number: T 0502/13 - 3.5.06

Application Number: 03725494.3

Publication Number: 1552357

IPC: G06F1/00

Language of the proceedings: EN

Title of invention:
DYNAMIC MARKUP LANGUAGE

Applicant:
AMBX UK Limited

Headword:
Markup Language/AMBX

Relevant legal provisions:
EPC 1973 Art. 84, 111(1), 113(1)

Keyword:
Claims - clarity (no)

Decisions cited:
G 0010/93

Catchword:

Europäisches Patentamt
European Patent Office
Office européen des brevets

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 0502/13 - 3.5.06

D E C I S I O N
of Technical Board of Appeal 3.5.06
of 11 November 2014

Appellant: (Applicant)	AMBX UK Limited 2-8 Gloucester Road Redhill Surrey RH1 1FH (GB)
Representative:	Turner, Richard Charles 29 Southcourt Avenue Leighton Buzzard Bedforshire LU7 2QD (GB)
Decision under appeal:	**Decision of the Examining Division of the European Patent Office posted on 16 October 2012 refusing European patent application No. 03725494.3 pursuant to Article 97(2) EPC.**

Composition of the Board:

Chairman	M. Müller
Members:	M.-B. Tardo-Dino
	S. Krischer

Summary of Facts and Submissions

I. The appeal lies against the decision of the examining division to refuse European patent application No. 03725494.3 for lack of novelty, Article 54 EPC.

II. The notice of appeal was received on 13 December 2012, the appeal fee being paid on the same day. A statement of grounds of appeal was filed on 18 February 2013. The appellant requested that the decision be set aside and that a European patent be granted based on a sole set of claims 1-10 as filed with the grounds of appeal and the original description and drawings except for page 4 as filed on 29 September 2009.

III. With a summons to oral proceedings, dated 11 June 2014, the board informed the appellant of its preliminary opinion according to which the claims lacked clarity, Article 84 EPC 1973, and, to the extent they could be understood and on a broad interpretation, also an inventive step, Article 56 EPC 1973.

IV. In response to the summons, the appellant did not file either arguments or amendments. In oral proceedings, which took place as scheduled on 11 November 2014, the appellant confirmed its requests as summarized above.

V. After discussion of the board's objections under Article 84 EPC 1973 the appellant requested that the case be remitted to the department of first instance because the purpose of the appeal was only to examine the decision under appeal which, however, had not addressed the clarity issue.

VI. At the end of the oral proceedings the chairman announced the board's decision.

VII. Claim 1 reads as follows:

"A method of generating a markup language document (22) comprising accessing (30) a pool (14) of active markup language fragments (10), processing (32) said fragments (10), with a generator (16), using at least one predetermined factor (18, 20), so that all of the fragments (10) in the pool (14) are processed, discarding any fragment (10) that refers to a variable or conditional for which the generator (16) does not have the requisite information, generating (34) a markup language document (22) from the processed fragments, and accessing the same pool (14) of fragments (10), but using different values and conditionals for the factors (18, 20), thereby obtaining a new markup language document."

Claim 8 concerns a system for generating a markup language document which is claimed in terms closely corresponding to those of claim 1.

Reasons for the Decision

The invention

1. The application in general relates to the problem of making "dynamic content" available to Internet browsers.

1.1 Content such as contained on web pages is typically made available to browsers in the form of documents written in a markup language like HTML. The content in such documents may be "effectively fixed" or "static" in the sense that rendering the document will always yield the same image (see *e.g.* p. 1, 8-20 and 7-10).

This limitation must be addressed if web pages are required to be "dynamic" in the sense that their "content and/or appearance [...] varies with time" (p. 2, lines 1-2 and 12-15). Known solutions to this problem are said to require the provision of "additional functionality" in the client browser (p. 2, 18-20), whereas the application is concerned with providing "a markup language document that is dynamic in content, but does not require any adaptation on the part of the client browser to render that document" (p. 4, lines 4-6).

1.2 The proposed method operates on what are called "active markup fragments": Such fragments are said to be "active in the sense that they refer to content that is dynamic" in depending on certain "variables[s] or conditional[s]" relating to "time and/or context", factors which can be "set [...] by an author [...] or by a suitable computer program" (see p. 4, lines 21-32; p. 5, lines 14-17 and 28-30; p. 6, lines 14-17; Fig. 1). The notion of "context" is not explained further in the description. The description gives a single example of a piece of dynamic content, namely a "fragment" defining the "location" of some "object" to be dependent on an undefined "flag" (see p. 4, lines 27-32).

1.3 The invention proposes a so-called "snapshot generator" which operates on a "pool" of such fragments. It is disclosed that fragments are entered into the pool only on the condition that a parser has ensured compliancy with the used markup language (see p. 5, lines 4-8; Fig. 1). The snapshot generator processes all of the fragments to determine their "actual output" by evaluating the variables or conditional referred to. If the requisite information is not available, the pertinent fragment is said to be "discarded" (see p. 5, lines 28-30). From the fragment processed in this way a mark-

up language document is generated "accordingly" (see p. 5, lines 13-14, p. 6, lines 9-10). How the document is generated is not detailed in the description.

1.4 It is further disclosed that the "snapshot process is repeated as necessary ... as time passes and context changes". The snapshot generator can then "access the same pool [...] of fragments [...] using different variables and conditionals [...] to obtain a new markup language document" (p. 6, lines 13-23).

Clarity, Article 84 EPC 1973

2. Both the claims, in particular claim 1, and the entire application leave undefined a number of terms and notions central for the invention. Specifically, claim 1 does not define what constitutes a "pool" of fragments and how a "markup language document" is "generated" from the "processed fragments". In the latter context, the relevance of processing "all" fragments is unclear as well.

2.1 The appellant argued that the term "pool" had to be interpreted according to its conventional English meaning as used in phrases such as "pooling resources" or "car pool", *i.e.* as a "common supply" of resources from which individual ones can be retrieved and will be returned after use. Further according to conventional meaning the elements in a pool are independent from one another and unordered. Synonyms of "pool" in this sense would be "collection" or "set".

2.2 The board agrees with the appellant in interpreting the term "pool" as claimed to be largely equivalent to "collection", "set" or "supply", noting that this interpretation corresponds also to the term "reservoir"

suggested by the board in the annex to the summons to oral proceedings. Claim 1 leaves open however if and to what extent the individual fragments have to be "independent" of one another. Moreover, the elements of a pool may actually well be ordered (as, *e.g.*, the cars of a car pool may be lined up in a car park) and processed according to that order (say, in a round robin fashion). While the term "pool" itself does not imply such order or ordered processing, neither this term nor the claims as a whole exclude it. Moreover, the board considers that the notions of a "set", "collection", "common supply" or "reservoir" all remain on the mere abstract and logical level, denoting the totality of fragments made available for processing but not implying any detail regarding their implementation. For instance, while individual fragments might be implemented as individual files, they might as well be textual components of one large file within which they remain identifiable *e.g.* by line number. Claim 1 does not specify any detail as to how the pool is to be implemented, nor does the description.

2.3 Claim 1 specifies that the active fragments be processed and that the markup language document be generated "from" the "processed fragments". Claim 1 leaves open however whether all fragments must be processed before the generating can start, in which case the processed fragments would have to be stored in an intermediate data structure such as a "pool of processed fragments", or whether both may be interleaved, *e.g.* by incorporating any fragment into the document being generated immediately after it has been processed.

2.4 The claimed method specifies that a "markup language document" is generated from "processed fragments". This does not imply the "processed fragments" to be part of

the document thus generated as the fragments might be further processed during that generation. Strictly speaking the claimed method also does not limit the generated document to one containing no "active" markup language. After all, an "active markup language fragment" is in particular a "markup language fragment" (see also p. 4, lines 27-32) and can thus be part of a "markup language document". The board notes however that the description discloses that the generated document "can be rendered by a conventional browser, without [...] any modification", which is used to mean that the document contains static content only (see *esp.* p. 4, lines 4-6). And the board further takes the view that the skilled person would understand from the description as a whole that the generated document will *contain* the processed fragments.

2.5 Even on that understanding, however, it remains unclear from claim 1 whether the generated document will be composed of processed fragments only or whether it might contain other material as well, such as static markup language fragments which do not require the claimed processing, let alone how such static content might be handled. The description is also silent on this issue.

2.6 The claimed method refers to "discarding any fragment" for which the relevant "variable or conditional" is not available to the generator. The appellant pointed out during oral proceedings that the generator was claimed (and disclosed, see p. 6, line 14-17) to work repeatedly on the "same pool [...] of fragments" and that, therefore, the term "discarded" could not be construed as "deleted" but should rather be interpreted to mean "put away" and ignored during the remaining "genera-

ting" step of the method. The board accepts the appellant's position in this regard.

3. Claim 1 insist that *all* fragments be processed and the document be *generated from* all fragments so processed unless discarded, but does not specify whether the generated document will *contain* all processed fragments or only some of them.

3.1 On the assumption that the generated document contains some processed fragments only, it is unclear how and when fragments are meant to be selected. Claim 1 does not specify such a selection step nor does the description disclose one. Moreover, it is unclear why *all* fragments are to be processed rather than, say, only the ones needed for the document being generated.

3.2 In the board's view, the following method falls within the ambit of the claim 1: The pool might contain the entirety of markup language fragments that are available for the generation of a variety of web pages, which may be completely different from one another. The dynamic content available for all these web pages would thus be limited to the fragments contained in the pool that happens to be available at a given point in time. The primary purpose of the generator might then be to repeatedly process the pool of fragments so as to keep a pool of processed fragments up-to-date and thus to guarantee that all web pages generated from the processed fragments will also be up-to-date, *i.e.* based on the current time and currently valid context. The appellant called this interpretation by the board "absurd", but did not establish that the claims or the description excluded it. The board is of the opinion that this method constitutes a reasonable interpretation of the wording of claim 1 which is consistent with the de-

scription, even though the description does not specifically support it in detail.

3.3 The appellant argued that the invention was not meant to address the generation of several, completely different documents. Rather, the documents generated from the same pool would be generally similar and could differ *only* to the extent that the active fragments might be processed into different "processed" fragments at different instances due to "different values and conditionals for the [relevant] factors".

3.4 The board considers that, given the lack of detail claimed and disclosed regarding the nature of the "variables and conditionals", it cannot be excluded that at some point the generator has the "requisite information" needed to process *all* active fragments. This might be the case, for instance, if the only relevant variable in a given pool of fragment was time. In such a case no fragment would be discarded and claim 1 would appear to imply that the generated document contained all fragments after processing, albeit in an *unspecified order*. To the board it is unclear how, in this manner, any useful document can be created.

3.5 This notwithstanding, another question arises from the interpretation proposed by the appellant. If the generated documents had to contain all fragments from the pool - after processing - then there would have to be different pools of active fragments for each substantially different document (*e.g.* the homepages of two different companies) to be created. The description, however, contains no hint as to the existence of several such pools or how they might be set up and processed.

3.6 The above clarity concerns notwithstanding, the board considers that also the appellant's interpretation is consistent with the description but is not specifically supported either.

4. The board takes the view that the choice between the above interpretations (esp. in points 3.2 and 3.3-3.5) has a substantial impact on the possible purpose the claimed method (or system) serves, what its intended effects are and in which way it might achieve these purpose and effects. Since the board is further of the opinion that the wording of claim 1 covers (at least) these two interpretations - and, moreover, the very short description contains no basis to prefer one over the other - the undisputably broad and abstract wording of claim 1 causes a lack of clarity of claim 1. This applies, by the same token, of claim 8 as well.

5. The board thus comes to the conclusion that the independent claims are unclear as to the claimed nature of the pool and, in particular, the role the processing of this pool has for and in the context of generating a document and that, at least for this reason, they do not comply with the requirements of Article 84 EPC 1973.

The request for remittal to the department of first instance

6. According to Article 111(1) EPC 1973, the board, in deciding upon the appeal, may exercise any power within the competence of the department which was responsible for the appealed decision or remit the case to that department for further prosecution. As explained *e.g.* in G 10/93 (OJ 1995, 172; headnote and reasons 3 and 5), in *ex parte* proceedings the boards of appeal are restricted neither to examination of the grounds for the

contested decision nor to the facts and evidence on which the decision is based, and can include new grounds in the proceedings. This makes it a matter of discretion of the board, to be exercised in view of the merits of each case, whether and at what point the case is remitted to the department of first instance.

6.1 In the present case, the decision under appeal found claim 1 to lack novelty over a document referred to as D1 and thus D1 to disclose, *inter alia*, the claimed "pool of active markup language fragments". The appeal challenges the decision for this finding in particular (see *e.g.* grounds of appeal, para. bridging pp. 2-3). Apparently, the appellant disagreed with the decision's interpretation of central features of the claims and the allegedly corresponding ones in D1.

6.2 Under these circumstances, the assessment of novelty of the claimed invention vis-à-vis D1 depended on a proper construction and the clarity of the claims, as did the assessment of the merits of the decision under appeal, even though the decision under appeal did not explicitly address Article 84 EPC 1973. Accordingly, the board raised this issue in the annex to the summons to oral proceedings (points 8 and 9). Moreover, the question was extensively discussed during the oral proceedings.

6.3 In passing, the board notes also that the appellant's requests in appeal were not limited to a mere examination of the decision under appeal, as it did not maintain in appeal the set of claims which were subject to the decision but replaced it by substantially amended claims with the statement of grounds of appeal.

6.4 The representative explained that he had received the instructions to attend the oral proceedings only very

shortly before the hearing and therefore did not have sufficient time to consider the objection and to prepare his response. The fact, however, that the period of almost five months between the summons to oral proceedings and the oral proceedings went unused, does not contradict the conclusion that the appellant had sufficient opportunity to present its comments on the board's objections, as required by Article 113(1) EPC 1973, and to consider and present amendments had it so wished.

6.5 The request for remittal was only submitted after the board had already come to its conclusion that claim 1 of the only request on file lacked clarity. However, further prosecution of the case on the basis of a request that had already been found not to be allowable would not have served any purpose except, arguably, to give the appellant the chance to file further requests in order to overcome the board's clarity objections. The appellant did not file or express its intention to file such a request during oral proceedings, nor did it argue why examination by two instances should be considered appropriate for such a potential further request. Under these circumstances, the board could not see any merit in a remittal.

6.6 The board thus exercised its discretion under Article 111(1) EPC 1973 and decided to reject the request for remittal of the case to the department of first instance for further prosecution.

Summary

7. There being no allowable request, the appeal has to be dismissed.

Order

For these reasons it is decided that:

1. The request for remittal to the department of first instance is rejected.
2. The appeal is dismissed.

The Registrar: The Chairman:

B. Atienza Vivancos Martin Müller

Decision electronically authenticated