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**Datasheet for the decision
of 25 January 2019**

Case Number: T 1469/15 - 3.2.04

Application Number: 07117585.5

Publication Number: 1972363

IPC: A63F13/211, A63F13/219,
A63F13/24

Language of the proceedings: EN

Title of invention:
Game operating device

Patent Proprietor:
Nintendo Co., Ltd.

Opponents:
Bigben Interactive SA
Datel Direct Ltd

Headword:

Relevant legal provisions:
EPC Art. 76(1), 123(2), 56

Keyword:
Amendments - intermediate generalisation (no)
Inventive step - (yes)

Decisions cited:

G 0002/10, T 0570/91

Catchword:



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Case Number: T 1469/15 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 25 January 2019

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
22 May 2015 concerning maintenance of the
European Patent No. 1972363 in amended form.**

Composition of the Board:

Chairman A. de Vries
Members: J. Wright
W. Van der Eijk

Summary of Facts and Submissions

- I. The appellant-opponent I lodged an appeal, received 22 July 2015, against the interlocutory decision of the opposition division of the European Patent Office posted on 22 May 2015 concerning maintenance of the European Patent No. 1972363 in amended form. The appeal fee was paid at the same time. The statement setting out the grounds was received on 29 September 2015.
- II. Two oppositions were filed against the patent as a whole and based, *inter alia*, on Article 100(a) together with Articles 52(1) and 56 EPC for lack of inventive step. Opponent II withdrew their opposition on 25 April 2014.

The opposition division held that the patent as amended according to the main request met all the requirements of the EPC. In particular, the division found that claim 1 of the main request did not add subject matter extending beyond the application as filed or the parent application, Articles 123(2) and 76(1) EPC. Furthermore, they found that the subject matter of claim 1 as amended involved an inventive step, Article 56 EPC, having regard to the following documents, amongst others:

G4 : JP2005/063230 A and its translation into English
G7 : EP0848226 A2
G12 : WO97/09101 A1
G16 : FR2847689 A1
G18 : WO2004/047011 A2

- III. Oral proceedings were duly held on 25 January 2019.

- IV. The appellant-opponent I requested that the decision under appeal be set aside and that the European patent No. 1972363 be revoked.

The respondent-proprietor requested that the appeal be dismissed and the patent thus be maintained as upheld by the opposition division (main request) or, alternatively, maintained on the basis of an auxiliary request, filed with letter of 21 December 2018.

- V. Claim 1 of the main request (as maintained) reads as follows:

"A game operating device, comprising:
a longitudinal housing (12);
a first operating portion (247-26) provided on a first plane (20) of said housing (12) along a longitudinal direction at one end in the longitudinal direction;
a second operating portion (142, 28) provided on a second plane (22) opposed to said first plane (20) of said housing (12) at a position corresponding to said first operating portion (26);
a holding portion (18) formed in a direction of the other end along said longitudinal direction of said housing (12) from said second operating portion (142, 28);
at least one of an acceleration sensor (68) and a gyro sensor provided within said holding portion (18) of said housing (12);
an infrared imaging means (56) provided in said housing at the front end of said housing (12); and
an output means (66, 70, 72) for outputting information detected by said at least one of an acceleration sensor (68) and a gyro sensor as an operating signal, together with an operating signal from at least one of said

first operating portion (26) and said second operating portion (142, 28)".

VI. The appellant-opponent I argued as follows:

Claim 1 of the main request (as maintained) adds subject matter extending beyond the parent application and the application as filed. Claiming an infrared imaging means (feature 1g) without the front wall of the housing represents an inadmissible intermediate generalisation. Nor is there a basis for the acceleration sensor/gyro sensor and output means features 1f and 1h.

The subject matter of claim 1 as maintained lacks inventive step starting from G4 in combination with G7, with or without the general teaching of G16. It would be obvious to modify the controller of G4 by adding an infrared imaging means, as disclosed in G7.

Likewise the subject matter of claim 1 as maintained lacks inventive step starting from G18 in combination with G12. G18 discloses a camera. A camera can detect infrared radiation therefore G18 discloses an infrared imaging means.

VII. The respondent-proprietor argued as follows:

Claim 1 as maintained neither adds subject matter extending beyond the parent application nor beyond the application as filed. The infrared imaging means is not originally disclosed as structurally or functionally related to the front wall of the housing.

The subject matter of claim 1 as maintained involves an inventive step starting from G4 in combination with G7,

with or without the general teaching of G16. The skilled person would not add the infrared imaging means of G7 to the device of G4 because G4's device is a simple mouse for controlling a cursor, not for aiming at a target.

Likewise the subject matter of claim 1 as maintained lacks inventive step starting from G18 in combination with G12. G18 discloses a camera for detecting visible light not infrared light as claimed.

Reasons for the Decision

1. The appeal is admissible.
2. Background

The patent relates to a game operating device (see published patent specification, paragraph [0001]). Claim 1 as maintained defines, amongst other things, that the device has an infrared imaging means.

3. Added subject matter, Article 100(c) with 123(2) and 76(1) EPC, main request (as maintained)
- 3.1 In deciding the question of allowability of amendments under Article 123(2) EPC, the Board, following well established practice (see Case Law of the Boards of Appeal, 8th edition, 2016 (CLBA), II.E.1.2.1 and the decisions cited therein), must consider whether the amendments in question are directly and unambiguously derivable by the skilled person from the application filed, using normal reading skills and, where necessary, taking account of their general knowledge.

This is the "gold" standard according to which amendments are assessed (see G2/10, reasons 4.3).

3.2 Furthermore (see CLBA, II.E.1.7 and the decisions cited therein), according to established case law, it will normally not be allowable to base an amended claim on the extraction of isolated features from a set of features originally disclosed only in combination, e.g. a specific embodiment in the description. Such an amendment results in an "intermediate generalisation". An intermediate generalisation is justified only in the absence of any clearly recognisable functional or structural relationship among the features of the specific combination or if the extracted feature is not inextricably linked with those features.

3.3 The same principles apply vis-a-vis the original parent application where a patent results from a divisional application, Article 76(1) EPC (see CLBA II.F.2.1).

3.4 In the present case, the patent results from a divisional application (published as EP1972363) of a parent application EP 06155077 (published as EP 1757343). The description and drawings of parent and divisional applications as filed are the same. In this section, unless stated otherwise, references are to the parent application as filed.

3.5 The appellant-opponent I has argued that the following features of claim 1 represent intermediate generalisations vis-à-vis the parent application :

- at least one of an acceleration sensor and a gyro sensor provided within said holding portion of said housing, referred to as feature 1f.

- an output means for outputting information detected by said at least one of an acceleration sensor and a gyro sensor as an operating signal, together with an operating signal from at least one of said first operating portion and said second operating portion, referred to as feature 1h.
- an infrared imaging means (56) provided in said housing at the front end of said housing (12), referred to as feature 1g.

3.6 In a communication from the Board in preparation for the oral proceedings, dated 6 August 2018, the Board gave a preliminary opinion that claim 1 did not add subject matter. Regarding features 1f and 1h (see sections 2.1.1 and 2.3), the Board stated the following:

"2.1.1 Features 1f and 1h

The appellant-opponent I argues that the features 1f and 1h are only originally disclosed in a functional and structural relationship with those features of claim 11 of the parent application that have not been claimed, in particular position and/or attitude determining means - providing position and or attitude information that is output by the output means and that it is these position/attitude determining means that include the at least one of acceleration sensor and gyro-sensor (as specified in parent application, claim 12). Furthermore, that the acceleration sensor and gyro-sensor are only disclosed as forming a position / and or attitude signal when treated in a certain way (by means of non-claimed features, see parent application, paragraphs [0077] to [0078]), and that these are only disclosed as being output by further means that have not been claimed, such as a particular

antenna and wireless module for outputting weak radio signals (see parent application, paragraphs [0084] and [0092]).

In the Board's view these features have a basis in the parent application, in particular the description and drawings.

The Board first notes that feature 1h relates, inter alia, to "outputting information detected by said at least one of an acceleration sensor and a gyro sensor as an operating signal". In the Board's view, this does not mean that the information is raw untreated data. Rather, already the wording "as an operating signal" suggests it is processed in some way. In any case it is not excluded.

A first described embodiment (see paragraphs [0075] to [0082]) comprises an accelerometer (see for example column 15, lines 27 to 29.

The description explains (see paragraphs [0077] and [0078]) that an accelerometer can be used with an additional processor 66 to determine tilt, attitude or position of the housing 12. Furthermore that a (e.g. embedded) processor can convert the detected acceleration signal to, inter alia, a corresponding tilt angle when the acceleration sensor is intended to detect static acceleration.

Paragraph [0079] goes on to explain that information on the position and/or attitude is output "through conversion of the acceleration signal output from the acceleration sensor 68". Here the only input concerned is from the acceleration sensor. Thus, throughout the description of this embodiment the skilled person is

presented with the idea that what should be output is a (converted) acceleration signal. Nor is this idea structurally or functionally linked to other features. Although, for example, the processor 66 can be used (see figure 8) a different processor could also be used (column 16, lines 14 or 15). Nor in any case are any details of a processor or of processing disclosed. Thus the concept of outputting information detected by an acceleration sensor is not structurally or functionally linked to any other particular feature that has not been claimed.

In a further embodiment (see paragraph [0083]) "the acceleration sensor 68 may be replaced with a gyro sensor of any suitable technology...". Therefore the above also applies when a gyro-sensor is used.

The description (see paragraphs [0084]) goes on to explain how the signal is output. There (with operating signals from operating portions) the signal that is output is referred to as "acceleration data (acceleration signal) from the acceleration sensor 68...". Thus the skilled person is again directly and unambiguously presented with the idea that information detected by the acceleration sensor is output.

Nor does the skilled person read this concept as functionally or structurally linked to the layout or position of the particular antenna used or the kind of radio waves transmitted (weak or otherwise). The skilled person knows that the information content of an output signal is independent of the hardware (antenna), or the modulating signal (inter alia its strength) used to output it.

Finally, as already touched on, throughout the application, this acceleration information is output

together with an operating signal from at least one of first and second operating portions (see for example paragraphs [0079] and [0084] again).

Thus, in the Board's provisional opinion, there is a direct and unambiguous disclosure for the features 1f and 1h in the description of the parent application as filed (Article 76(1) EPC).

...

2.3 The above amendments of claim 1 have a basis in the description of the parent application and thus the requirements of Article 76(1) EPC appear to be satisfied. Since, furthermore, the description of the application as filed is identical, the requirements of Article 123(2) EPC likewise appear to be satisfied".

3.7 Following the Board's communication, the appellant-opponent I did not comment on features 1f and 1h, either in writing or at the oral proceedings. In the light of this, the Board sees no reason to deviate from the above preliminary opinion regarding these features. Therefore, the Board concludes that features 1f and 1h do not add subject matter extending beyond the parent application or the application as filed.

3.8 Feature 1g (infrared imaging means provided in said housing at the front end of said housing)

3.8.1 Feature 1g is not derivable from the parent application's claim set, which makes no mention of an imaging means. However, in the Board's opinion, the feature has a basis in the parent application's description and drawings. Furthermore, since these parts of the parent application are the same in the application as filed (see A2 publication), the feature likewise has a basis in the application as filed for

the same reasons. In the following, references are to the parent application.

- 3.8.2 It appears not to be disputed that a game controller having infrared imaging means, as such, is originally disclosed, nor indeed that it is located at the front end of the device. At oral proceedings before the Board it was also no longer disputed that the parent and application as filed disclose the infrared imaging means to be *in* the housing, cf. column 3, lines 41 to 45 and figure 7; Figures 1A, 2A, 2B, 2C and 2D, 3, 4, 5, 7, 27A, 27B, 27C and 27D, 30 and 31.

However, the appellant-opponent I has argued that there is no disclosure for this feature *without* the front wall of the housing. From this they conclude that the claim represents an inadmissible intermediate generalisation.

- 3.8.3 In the Board's view, the feature of the infrared imaging means being *in* the housing is not originally disclosed inextricably (functionally and structurally) linked with the front wall of the housing. Thus, contrary to the appellant-opponent I's view, the Board considers it justified to amend claim 1 such that the infrared imaging means is *in* the housing without also including the feature of the front wall of the housing.

The infrared imaging means arrangement within the housing can best be seen in figure 7. From the figure alone, the skilled person learns nothing of any functional or structural interaction between the front wall of the housing and the infrared imaging means 56. At most the figure shows a semi-circular cut out of the wall which is compatible with the circular form of the

imaging means. However, since claim 1 does not assign the imaging means 56 any particular form, this observation plays no role. Nor is any functional relationship discernible from figure 7. The imaging means 56 merely extends as far as the front wall. Furthermore, the description of figure 7 (see paragraph [0086]) does not mention the front wall. Therefore the skilled person attributes no particular significance to the front wall of the controller housing in relation to the imaging means 56.

The same goes for the rest of the description. Nowhere is the front wall of the housing mentioned, still less how the imaging means might be arranged with respect to the front wall.

Finally, turning to where the infrared imaging means is first mentioned (paragraph [0066] with figures 1 and 2), it is true that there the infrared imaging device [means] is said to be "arranged on a front-end surface 52...of the housing 12...". To understand this statement, the skilled person will turn to the drawings described. As best seen in figure 1A and 2A, the front end wall and the infrared imaging means appear to be flush. However this does not mean that therefore the IR imaging means must necessarily be configured in the front wall, as the skilled person readily recognises from their knowledge of IR imaging devices and arrangements. From this knowledge and their understanding of the invention they understand that the IR means must be positioned at the front end of the device, and that this is exemplified in figure 7 and other figures. They might recognise from figure 7 and other figures that it is useful for at least part of the means (the aperture or lens) to be as forward as possible, even mounted in the front wall, not however

that its functioning depends on that specific location. Much less are they able to infer from this or any other figure some close relationship, functional or structural, between the imaging means and its location specifically in or at the front wall.

- 3.8.4 From the above, the Board sees no structural or functional relationship between the infrared imaging means as claimed and the front wall of the housing. Therefore, the Board concludes it justified to claim the infrared imaging means without the front wall of the housing.
- 3.8.5 This conclusion is not invalidated by the appellant-opponent I's observation that the claim covers a non-disclosed hypothetical embodiment in which the infrared imaging means could be arranged at the front end of the housing and entirely behind the front wall of the housing. However, the question is not whether or not a specific hypothetical embodiment, which all agree is not originally disclosed, falls within the scope of claim 1. The relevant question when assessing compliance with Art 76(1) or Art 123(2) is whether an amendment adds new subject-matter, i.e. new information. In the present case the Board holds that claiming an IR imaging means without the front wall does not present the skilled person with anything that they can not already infer from the parent or application as filed using their common general knowledge.
- 3.9 Since the descriptions and figures of both the parent application and the application as filed are the same, the above findings also apply when considering added subject matter of claim 1 with respect to the application as filed.

3.10 For the above reasons, the Board confirms the impugned decision in its finding that claim 1 of the main request does not add subject matter extending beyond the parent application and the application as filed.

4. Inventive step, main request, claim 1

4.1 In the Board's view, the combinations of documents with which the appellant-opponent I has challenged claim 1 in appeal (G4 with G7 with or without G16's general teaching or G18 with G12) do not take away inventive step of claim 1.

4.2 If these combinations were to take away inventive step, they would have to render feature 1g obvious (irrespective of the obviousness of other claim features). In the Board's view, they do not.

4.3 The Board will first consider the meaning of the term "infrared imaging means". The usual meaning (see OED) of "infrared" is "lying beyond the red end of the visible spectrum: the epithet of electromagnetic radiation (and of the part of the spectrum containing it) which has a wavelength greater than that of red light (about 0.7-0.8 microns) and (in modern use) less than that of the shortest microwaves (of the order of 1000 microns, i.e. 1 mm.); it is invisible, and most of the radiation from bodies below red heat is emitted in this form".

Thus the skilled person understands infrared radiation to be the non-visible radiation emitted by hot bodies. When the skilled person reads "infrared imaging means" they therefore understand that the means is arranged to make an image of this non-visible radiation. Nothing in

the description suggests otherwise. The infrared imaging device is explained (see paragraphs [0089] and [0090]) as having a filter permeable to infrared rays only. Accordingly (see column 19, lines 10 to 12), "the imaging device 56 generates image data through detection of infrared rays alone". An IR imaging means thus predominantly or exclusively produces images in the IR spectrum. This is the usual meaning given to the term.

In this regard, the skilled person does not interpret the feature differently because the patent discloses (see paragraph [0090]) that the imaging may be a CMOS sensor device or charge coupled device CCD. Such devices can undoubtedly, through the use of suitable filters, be used in the visible spectrum. However, as already explained, such an arrangement is neither claimed nor disclosed in the description. Rather, only an infrared imaging means is claimed and described and this makes an image of only invisible infrared light.

4.4 Inventive step starting from G4

4.4.1 G4 discloses (see abstract and paragraph [0001] with figure 13 and claim 1) a hand-held remote control input device for controlling, for example, a personal computer. Thus it can operate a game so it is a game operating device.

4.4.2 G4's device (see paragraph [0001]) is used to select items, such as files from an item selection [menu] screen. To this end (see paragraphs [0006] and [0007]), the device has a slider for moving the cursor. There is also a means of detecting the attitude of the casing for turning pages and scrolling. The description explains this attitude detector in detail (see

paragraphs [0008], [0026] and [0032] with figures 11 and 12). It comprises a steel ball 33 which rolls against and shorts a set of 4 switch contacts 34. In this way it detects non-zero inclination in four directions (up, down, right, left). This information (see paragraph [0032] with figure 13) is sent to the screen as a command signal for turning a page, scrolling items and the like. These are typical mouse functions, therefore, in the Board's view, G4's remote control operating device is indeed a kind of mouse.

4.4.3 It is not disputed that G4 does not disclose an infrared imaging means. G4's mouse only has one optical device (see figure 5, reference 6) and this sends rather than receives optical command signals (see paragraph [0029], middle, with figure 15), so it is not an imaging means.

4.4.4 Applying the problem and solution approach, the Board must first identify the technical effect of feature 1g and then define the objective technical problem.

The impugned decision (see reasons, point 37.3) found the effect of feature 1g (infrared imaging means) to be to locate the relative orientation of the game operating device relative to infrared LEDs. From this the decision derived the problem as to devise a way how to locate the orientation of the game operating device with respect to the infrared LEDs. In the Board's view, this problem contains pointers to the solution because it introduces infrared LED markers, which are not known from G4, which can but hint at providing infrared detection means. Therefore a broader problem must be formulated.

The function of the infrared imaging means is explained in the published patent specification, paragraphs [0094] to [0096]. The player faces a screen near which infrared LED markers are set up. The imaging means images these. This image is then processed to identify the positions of the markers in the image. When the player moves the controller these positions change and this can be used to generate an operation signal. The patent explains this allows "coordinate direct input and rotational input to the screen". In other words, the overall effects of providing the infrared imaging means is to enable the game controller to generate command inputs controlling what happens on the screen (how the game progresses) based on how the user manipulates the controller in space (changing coordinates, rotating).

In this respect the Board does not agree with the appellant-opponent I's argument that no such effect is derivable from feature 1g because the claim (see its last feature) does not define generating or sending any operating [command] signals derived from the infrared imaging means. The effect identified by the Board is the enablement of generating command signals, and this is true regardless of whether the claim defines the generation or sending of such signals.

- 4.4.5 G4 already proposes a way of generating command signals by rotating the controller (see above, section 4.4.2, inclination switch 33, 34). Therefore, in the Board's view, the objective technical problem can be expressed as how to modify the game controller of G4 to enable generating a *further* command signal derived from how the user manipulates the controller in space.

- 4.4.6 Presented with the problem developed above (further command signal), the Board is of the opinion that it would not be obvious for the skilled person to add an infrared imaging means to the mouse of G4.
- 4.4.7 In accordance with established jurisprudence (see Case Law of the Boards of Appeal, 8th edition, 2016 (CLBA) and the decisions cited, in particular T570/91, reasons 4.4 and 4.5), although a person skilled in the art is completely free in choosing a starting point, they are then bound by that choice.
- 4.4.8 In the present case, G4's controller is a mouse, used in the air rather than on a surface, but nevertheless a mouse. The environment it operates in has no infrared markers. The only marker G4 discloses is the cursor on the screen (see abstract and paragraph [0036] figure 17, reference 43). Furthermore (see again paragraphs [0001], [0007] and [0037] and figure 17), as with any mouse, only the position of the cursor on the screen has spatial significance. Where the mouse is with respect to the screen is irrelevant. It is from this prior art that the skilled person considers the objective technical problem, and they are therefore bound by this scenario of a mouse moving a cursor, scrolling lists and turning pages.
- 4.4.9 What ever way the skilled person might consider solving the problem posed (further command signals derivable by manipulating the controller in space), in the absence of infrared markers or any other infrared emitting means in the environment in which G4's controller is to be used, the skilled person would not introduce an infrared imaging means suitable for detecting such markers. By the same token, in the absence of any significance of the spatial relationship between user

and screen in G4, the Board holds that it would not be obvious for the skilled person to add means for detecting this relationship, let alone means involving infrared imaging.

4.4.10 Nor, in the Board's view, would the skilled person's knowledge of G7 and G16 lead to a different result. G7 (see title, abstract, column 3, lines 40 to column 4, line 1 and column 4, lines 15 to 41 with figures 1 and 2) discloses a model gun for a shooting game machine. The gun has an infrared imaging means 25 for imaging infrared light sources 14, 15 arranged above a display monitor. The user manipulates the gun to aim at a target and pulls the trigger to fire at a target. Neither action would make any sense in a mouse that moves a cursor across a screen and selects items, such as that of G4. Put differently, the skilled person would not consider adding either capability to G4's mouse. Therefore the skilled person would not combine the teachings of G4 and G7 as a matter of obviousness. This finding applies equally to the combination of G4 with G7 in the light of G16, submitted in writing as prejudicial to inventive step.

4.5 Inventive step starting from G18 combined with G12

4.5.1 G18 discloses (see abstract and figure 1 and page 14, lines 14 and 15) a game operating device. In the Board's view, the device does not comprise an infrared imaging means as claimed. As already explained (see section 4.3), an infrared imaging means generates an image of only (non-visible) infrared light. G18 does not disclose such a means. The only imaging means G18 discloses is a camera on its front end (page 2, lines 16 to 25, page 8, lines 9 to 31 with figure 1, camera 102). The camera captures pictures of objects pointed

to by the user (page 8, lines 14 to 21). The objects are then identified by a processor. For example (see page 9, lines 12 to 22), the user can point to a cupboard drawer or the refrigerator and user defined actions associated with these items, such as ordering a beer for the fridge can result. To identify items, the camera must see the items (for example their shape and colour), therefore the camera is a visible light imaging means, not infrared as claimed.

4.5.2 G18 also discloses (page 12, line 27 to page 13, line 12) identifying objects and rooms by providing flashing LEDs or room localising beacons that the operating device should recognise. If the camera is to recognise these (see page 13, lines 4 to 5), they must emit [visible] light (since the camera detects visible light). Although, in the same passage, G18 proposes using beacons emitting electromagnetic radiation, nothing suggests this radiation is infrared radiation, let alone that this radiation should be detected by a further [infrared] imaging means.

4.5.3 The Board concludes that G18 does not disclose an infrared imaging means.

4.5.4 G12 discloses (see abstract and figure 4) a hand-held mouse, similar to that of G4. However, the mouse has no imaging means, let alone an infrared imaging means. Nor has this been argued. Rather (see page 5, lines 1 to 4), its only optical device is an infrared LED 26 for sending not receiving signals to operate the computer.

4.5.5 Since neither G18 nor G12 discloses an infrared imaging means as claimed, the Board holds that their combined teaching (however obvious that combination might be)

would not lead the skilled person to an infrared imaging means as defined in claim 1 (feature 1g).

4.6 Therefore, appellant-opponent I's arguments have not demonstrated that claim 1 lacks inventive step.

5. For the above reasons, the arguments presented by the appellant-opponent I have not convinced the Board that the impugned decision (see page 41, point 46.5) was wrong in finding the claims of the present main request to meet the requirements of the EPC. It follows from this that the Board must dismiss the appeal.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated