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Datasheet for the decision of 25 October 2022

Case Number: T 1240/21 - 3.5.05

Application Number: 13184226.2

Publication Number: 2698698

IPC: G06F3/0485, G06F3/0488

Language of the proceedings: EN

Title of invention:
Touch-screen image scrolling system and method

Patent Proprietor:
Koninklijke Philips N.V.

Opponents:
Google LLC
Microsoft Corporation (opposition withdrawn in 2020)
Molnia, David

Headword:
Time decay I/PHILIPS

Relevant legal provisions:
EPC Art. 100(c), 76(1), 123(2)
RPBA 2020 Art. 13(2), 10(3)

Keyword:

Grounds for opposition - subject-matter extends beyond content of earlier application (yes)
Amendment after summons - exceptional circumstances (no)

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Beschwerdekammern

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Case Number: T 1240/21 - 3.5.05

D E C I S I O N
of Technical Board of Appeal 3.5.05
of 25 October 2022

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Respondent: (Opponent 2 - opposition withdrawn in 2020)	Microsoft Corporation One Microsoft Way Redmond, WA 98052-6399 (US)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted on 19 May 2021 revoking European patent No. 2698698 pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chair A. Ritzka
Members: E. Konak
K. Kerber-Zubrzycka

Summary of Facts and Submissions

I. The patent proprietor (hereinafter "the appellant") appealed the decision of the opposition division to revoke the patent in suit (hereinafter "the patent").

II. The opposition division had decided that the subject-matter of a main request and auxiliary requests I, Ia, II, III, IV, V, 1, 1a, 1b, 1c, 2, 2a, 2b, 2c, 3, 3a, 3b, 3c, 4, 4a, 4b, 4c, 5, 5a, 5b, 5c, 6, 6a, 6b, 6c, 7, 7a, 7b and 7c extended beyond the content of the application as originally filed (Articles 100(c) and 123(2) EPC) and beyond the content of the earlier application as filed (Articles 100(c) and 76(1) EPC). Auxiliary request I' was not admitted into the proceedings.

III. With its statement setting out the grounds of appeal, the appellant maintained the requests underlying the contested decision and filed new auxiliary requests II’, III’, IV’, V’ and VI’. It requested that the decision be set aside and that the patent be maintained based on one of these requests, in the order main request then auxiliary requests I’, 1, 1a, 1b, 1c, I, Ia, II, II’, 2, 2a, 2b, 2c, 3, 3a, 3b, 3c, III, III’, 4, 4a, 4b, 4c, 5, 5a, 5b, 5c, IV, IV’, 6, 6a, 6b, 6c, V, V’, VI’, 7, 7a, 7b and 7c. As an auxiliary measure, it requested oral proceedings. It further requested accelerated processing due to pending infringement proceedings and that the case not be remitted to the opposition division.

IV. The respondents (opponents) requested that the appeal be dismissed and oral proceedings as an auxiliary measure. Opponent 3 further requested that the case be

remitted to the opposition division for further prosecution if any of the appellant's requests were found to overcome the objections under Articles 100(c) EPC.

V. The board granted the appellant's acceleration request (Article 10(3) RPBA) and summoned the parties to oral proceedings. In a communication pursuant to Article 15(1) RPBA, the board gave its preliminary view that the main request did not comply with the provisions of Article 76(1) EPC and that auxiliary requests I', II', III', IV', V' and VI' were not admissible. It noted that the objections under Article 76(1) EPC might be overcome by one of the admissible auxiliary requests and that, if they were, the case would have to be remitted to the opposition division for further prosecution.

VI. Oral proceedings were held before the board. At the oral proceedings, the appellant withdrew auxiliary requests I', 1, 1a, 1b and 1c and filed auxiliary requests Ib and Ic. It indicated the order of its requests as the main request and then auxiliary requests I, Ib, Ic, Ia, II, II', 2, 2a, 2b, 2c, 3, 3a, 3b, 3c, III, III', 4, 4a, 4b, 4c, 5, 5a, 5b, 5c, IV, IV', 6, 6a, 6b, 6c, V, V', VI', 7, 7a, 7b and 7c.

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

"A touch-screen image scrolling system, comprising:
an electronic image display screen (40);
a microprocessor (42) coupled to said display screen (40) to display scrollable data thereon and to receive interactive signals there from;
timer means (43) associated with said microprocessor (42) to provide timing capacity therefore;

a source of scrollable data capable of being displayed on said display screen (40);

finger touch program instructions associated with said microprocessor (42) for sensing the speed and direction of a finger touch contact with said display screen (40); characterized in that

said finger touch program instructions associated with said microprocessor (42) are also designed for sensing the time duration of a finger touch contact with said display screen (40); and in that

said touch-screen image scrolling system further comprises scrolling motion program instructions associated with said microprocessor (42) responsive to said duration of said finger touch contact for,

i) when during a period having a duration which is less than a first predetermined minimum time and greater than a second predetermined minimum time motion of said finger touch contact along the surface of said display screen (40) is sensed, moving said data on said display screen (40) in correspondence with the motion of said finger touch contact, and

ii) following a subsequent separation of said finger touch contact from said display screen (40), converting the sensed speed and direction of motion of said finger touch contact into corresponding initial scrolling motion of said data,

wherein said scrolling motion program instructions further comprise instructions to select an item touched in response to a finger touch of said item

i) during a period having a duration which is less than said first predetermined minimum time, and

ii) while no motion of said finger touch contact is sensed during said period."

Claim 1 of auxiliary request I differs from claim 1 of the main request as follows (with the additions underlined):

"[...]

ii) following a subsequent separation of said finger touch contact from said display screen (40), converting the sensed speed and direction of motion of said finger touch contact into corresponding initial scrolling motion of said data,

time decay program instructions associated with said microprocessor (42) for reducing the rate of scrolling displacement of said data on said display screen (40) at a given rate until motion is terminated;

stopping motion program instructions associated with said microprocessor (42) for terminating scrolling displacement of the image on said screen upon first occurrence of any signal in the group of signals comprising:

(a) a substantially stationary finger touch on the screen enduring for a period longer than a preset minimum time, and

(b) an end-of-scroll signal received from said scroll format data source,

wherein said scrolling motion program instructions further comprise instructions to select an item touched in response to a finger touch of said item

i) during a period having a duration which is less than said first predetermined minimum time, and

ii) while no motion of said finger touch contact is sensed during said period."

Claim 1 of auxiliary request Ib differs from claim 1 of auxiliary request I as follows (with the additions underlined):

"[...]
wherein said scrolling motion program instructions further comprise instructions to select an item touched in response to a finger touch of said item
i) during a period having a duration which is less than said first predetermined minimum time and greater than said second predetermined minimum time, and
ii) while no motion of said finger touch contact is sensed during said period."

Claim 1 of auxiliary request Ic differs from claim 1 of auxiliary request Ib as follows (with the additions underlined):

"[...]
wherein said scrolling motion program instructions further comprise instructions to ignore a finger touch contact and to set the system into a "waiting" status, awaiting further input signals, if no motion of the finger touch contact occurs while the data display is stationary, and the finger touch contact continues for less than said second predetermined minimum time."

All independent claims of lower-ranking requests comprise the features:
"wherein said scrolling motion program instructions further comprise instructions to select an item touched in response to a finger touch of said item
i) during a period having a duration which is less than said first predetermined minimum time, and
ii) while no motion of said finger touch contact is sensed during said period.", some of them in a slightly re-worded version.

The further wording of the claims of the lower-ranking requests is not relevant for the decision.

Reasons for the Decision

1. Main request

1.1 The features of claim 1 of the main request were numbered as follows in the contested decision:

1 A touch-screen image scrolling system, comprising:
1.1 an electronic image display screen (40);
1.2 a microprocessor (42) coupled to said display screen (40) to display scrollable data thereon and to receive interactive signals there from;
1.3 timer means (43) associated with said microprocessor (42) to provide timing capacity therefore;
1.4 a source of scrollable data capable of being displayed on said display screen (40);
1.5 finger touch program instructions associated with said microprocessor (42) for sensing the speed and direction of a finger touch contact with said display screen (40); characterized in that
1.6 said finger touch program instructions associated with said microprocessor (42) are also designed for sensing the time duration of a finger touch contact with said display screen (40); and in that said touch-screen image scrolling system further comprises
1.7 scrolling motion program instructions associated with said microprocessor (42) responsive to said duration of said finger touch contact for,
1.8 i) when during a period having a duration which is less than a first predetermined minimum time and

greater than a second predetermined minimum time motion of said finger touch contact along the surface of said display screen (40) is sensed, moving said data on said display screen (40) in correspondence with the motion of said finger touch contact, and

1.9 ii) following a subsequent separation of said finger touch contact from said display screen (40), converting the sensed speed and direction of motion of said finger touch contact into corresponding initial scrolling motion of said data,

1.10 wherein said scrolling motion program instructions further comprise instructions to select an item touched in response to a finger touch of said item

1.11 i) during a period having a duration which is less than said first predetermined minimum time, and

1.12 ii) while no motion of said finger touch contact is sensed during said period.

1.2 The opposition division's objections under Article 123(2) EPC and Article 76(1) EPC against feature 1.8 of claim 1 cannot be upheld for the following reasons.

1.2.1 The opposition division objected that there were more than two first and second predetermined minimum times and two contradictory teachings in this regard in the application as filed. However, the board agrees with the appellant that although the use of terminology in the application as filed is inconsistent (which would be a clarity issue and thus not a ground for opposition), it is directly and unambiguously derivable from the application as filed that two time thresholds are used for the various gestures described in the application. Given two different time thresholds, as a matter of mathematical fact, one is lower than the other. Careless wording or mixing up the terms used for

these time thresholds cannot reasonably lead the skilled person to believe otherwise.

From the disputed passages of the description, it is clear from the use of the definite article on page 4, line 16 that "the first predetermined minimum time" is the same time threshold as "a predetermined minimum time" mentioned in the first sentence of that paragraph (page 4, lines 11-12). A second time threshold which is lower than this first time threshold is introduced as "a second minimum time" on page 4, line 26. Page 4, line 30 refers to these two time thresholds ("the first predetermined time and the second") being used for the "sticks to the finger" embodiment relevant for feature 1.8 of claim 1. Later, on pages 7-8, using inconsistent terminology, "Embodiment 1" and "Embodiment 2" refer to the lower time threshold as "a first given preset minimum time" and to the higher one as "a second given preset minimum time".

Regarding another disputed passage on page 6, line 2, it is clear from the context of this paragraph, in particular page 5, lines 31-32, that essentially the functions of step 100 are repeated. Therefore, "a predetermined minimum time" in this passage is the same time threshold as "a predetermined minimum time" on page 4, lines 11-12.

1.2.2 The opposition division further objected that "said data" in the wording "moving said data on said display screen" in feature 1.8 may pertain to any piece of data and not necessarily to the entire display, as disclosed on page 5, second paragraph of the earlier application. However, it is clear from the context of feature 1.8 that "said data" refers to the displayed "scrollable data" mentioned in features 1.2 and 1.4 and not to any

piece of data. Since it is the display screen which displays this scrollable data, it is clear from the context that this would not be any different from moving the entire display.

1.3 Nevertheless, claim 1 of the main request does not meet the requirements of Article 76(1) EPC for other reasons.

1.3.1 First, as argued by both opponents, the earlier application does not disclose that the scrolling motion initiated by the separation of the finger in feature 1.9 can continue forever. Instead, all embodiments in the earlier application require the speed of scrolling to be gradually reduced. Therefore, the generalisation in feature 1.9 extends beyond the content of the earlier application as filed (Article 76(1) EPC).

The appellant pointed out at the oral proceedings that page 5, lines 13-17 of the description of the earlier application disclosed reducing the scrolling speed "to any desired, predetermined minimum speed". Likewise, page 5, lines 23-30 disclosed that the scrolling speed can be decreased to "any preset minimum". As a preset/ predetermined minimum speed could also be the same speed as the initial speed, the generalisation in feature 1.9 did not extend beyond the content of the earlier application as filed. However, the board agrees with opponent 3 that the key words in these passages are the verbs "reduced [to any desired, predetermined minimum speed]" and "decreases [... to any preset minimum]". Thus, although the earlier application discloses that the initial speed may be reduced to a non-zero preset minimum, it cannot be directly and unambiguously derived that this preset minimum may be

the same as the initial speed to exclude any reduction in the initial scrolling speed at all.

1.3.2 Second, as opponent 1 convincingly argued at the oral proceedings, feature 1.11 covers the scrolling motion program instructions selecting a touched item also in response to a finger touch having a duration less than the second predetermined minimum time (the lower time threshold according to feature 1.8). However, the earlier application teaches (see page 4, lines 25-28) that such a short touch should be ignored. The appellant argued that this feature had basis in claim 1 of the application as filed, which would have addressed an objection under Article 123(2) EPC, but it was not able to show that the feature of ignoring a short touch was optional in the earlier application.

1.4 Therefore, the main request does not meet the requirements of Article 76(1) EPC.

2. Auxiliary requests other than Ib and Ic

2.1 The board noted at the oral proceedings that no auxiliary request on file provided a remedy to the second objection under Article 76(1) EPC. The appellant did not argue to the contrary.

2.2 Therefore, auxiliary requests other than Ib and Ic do not meet the requirements of Article 76(1) EPC for the reasons given above under point 1.3.2.

3. Admittance of auxiliary requests Ib and Ic

3.1 Any amendment to a party's appeal case made after notification of a summons to oral proceedings must, as a rule, not be taken into account unless there are

exceptional circumstances justified with cogent reasons by the party concerned (Article 13(2) RPBA).

3.2 Auxiliary requests Ib and Ic were filed at the oral proceedings before the board. The appellant argued that they were in response to a new objection against the main request raised by the board for the first time at the oral proceedings, namely the second objection under Article 76(1) EPC discussed above under point 1.3.2. Since this issue was not mentioned in the board's preliminary opinion, it saw no necessity to file requests addressing this objection in addition to the already remarkably high number of auxiliary requests on file. The appellant could not reasonably be expected to anticipate all possible developments. The amendments made in these requests were to address both objections under Article 76(1) EPC, which the board upheld for the main request, and the requests were thus *prima facie* allowable.

3.3 However, the reasons given by the appellant do not belong to exceptional circumstances within the meaning of Article 13(2) RPBA. The objection which the appellant alleges to have been raised by the board at the oral proceedings was already in opponent 1's written reply to the appellant's statement setting out the grounds of appeal (see page 13, second paragraph), dated 4 February 2022, which is part of the basis of the appeal proceedings (Article 12(1)(c) RPBA). Furthermore, as opponent 1 demonstrated at the oral proceedings, the objection in question did not appear for the first time in the proceedings with that letter. Instead, the objection had been raised during the opposition proceedings by opponent 2 in its notice of opposition dated 11 January 2019 (page 9, first and second full paragraphs) and repeated in its letter of

30 October 2019 (see pages 1-2). The appellant's argument that opponent 2 later withdrew its opposition is immaterial, especially as opponent 1 had submitted (see its letter of 15 January 2021, page 5, second paragraph) that it agreed with other opponents' objections in this regard. Therefore, auxiliary requests Ib and Ic could and should have been filed in the opposition proceedings (Article 12(6) RPBA).

3.4 Therefore, since there are no exceptional circumstances justifying the late filing of auxiliary requests Ib and Ic, the board did not admit them into the appeal proceedings (Article 13(2) RPBA).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chair:

K. Götz-Wein A. Ritzka

Decision electronically authenticated