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Datasheet for the decision of 10 December 2016

Case Number: T 0704/12 - 3.2.04

Application Number: 03774441.4

Publication Number: 1567001

IPC: A01K1/12

Language of the proceedings: EN

Title of invention:
AN APPARATUS FOR DETECTING ANIMALS

Patent Proprietor:
DeLaval Holding AB

Opponents:
WestfaliaSurge GmbH
Octrooibureau Van der Lely N.V.

Headword:

Relevant legal provisions:
EPC Art. 83, 54, 56
RPBA Art. 12(4)

Keyword:
Sufficiency of disclosure (yes)
Novelty and inventive step of claim 1 as upheld (yes)
Admissibility of late filed documents (no)

Decisions cited:

Catchword:

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Case Number: T 0704/12 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 10 December 2016

Appellant: (Opponent 2)	Octrooibureau Van der Lely N.V. Weverskade 110 3147 PA MAASSLUIS (NL)
Representative:	Octrooibureau Van der Lely N.V. Cornelis van der Lelylaan 1 3147 PB Maassluis (NL)
Respondent: (Patent Proprietor)	DeLaval Holding AB P.O. Box 39 147 21 Tumba (SE)
Representative:	Gray, Helen Mary ZACCO GmbH Bayerstrasse 83 80335 München (DE)
Party as of right: (Opponent 1)	WestfaliaSurge GmbH Siemensstr. 25-27 59199 Bönen (DE)
Representative:	Specht, Peter Loesenbeck - Specht - Dantz Patent- und Rechtsanwälte Am Zwinger 2 33602 Bielefeld (DE)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 24 February 2012 concerning maintenance of the European Patent No. 1567001 in amended form.**

Composition of the Board:

Chairman	A. de Vries
Members:	E. Frank
	C. Heath

Summary of Facts and Submissions

I. The appeal lies from the interlocutory decision of the opposition division, posted on 24 February 2012, to maintain the European patent No. 1 567 001 in amended form pursuant to Article 101(3)(a) EPC. The appellant (opponent 2) filed a notice of appeal on 27 March 2012, paying the appeal fee on the same day. The statement of grounds of appeal was submitted on 14 June 2012.

II. Oppositions were filed against the patent as a whole and based on Article 100(a) in conjunction with Articles 52(1), 54, and 56, and Article 100(b) EPC.

The opposition division held that the patent as amended based on claim 1 as filed on 7 March 2008 met the requirements of the EPC. In its decision the division considered the following prior art, amongst others:

D3 = EP 0 561 071 A2
D6 = US 5,673,647
E1 = US 4,745,472
E8 = US 5,483,441

III. During the appeal proceedings the Board considered the following further documents, which were filed with the grounds of appeal:

D7 = WO 99/67631
D8 = US 5,576,949

IV. After a summons to attend oral proceedings, with letter dated 23 August 2016 the appellant opponent 2 withdrew their request for oral proceedings, and requested that a decision be given on the basis of the written submissions in its place. Moreover, with its letter of

5 September 2016, the opponent 1 (party as of right) stated that they would not attend the oral proceedings and also requested that a decision be made based on the written submissions on file. Subsequently, the oral proceedings were cancelled by the Board.

V. The appellant requests that the decision under appeal be set aside and the patent be revoked.

The respondent (proprietor) requests that the appeal be dismissed and oral proceedings be held.

Opponent 1 as party as of right did not make any submissions or further requests.

VI. The wording of claim 1 as upheld reads as follows:

"An apparatus for detecting an animal (1) having a body part (2) and a head part (3), comprising:
an animal passage (4) extending in a transport direction (t), said passage being defined by a first enclosure member (5) and a second enclosure member (6), which members are arranged on a respective side of the passage (4) and extend substantially in parallel to said transport direction (t), and a sensor device (7,8), which is arranged to sense the animal (1) in the passage (4), characterised in that the sensor device (7,8) is arranged to sense a parameter related to the width of the animal (1) seen in a determined direction, at a determined position (p) in the passage (4), and wherein the sensor device (7,8) is arranged to produce a signal when said parameter indicates that the width of the animal (1) is less than a predetermined value at the determined position (p)."

VII. The appellant argued as follows:

The feature "the sensor device is arranged to sense a parameter related to the width" was far too vague and too broad for the skilled to carry out the invention across its entire scope.

Moreover, claim 1 lacked novelty over E1, E8, D3, D6, and late filed D7 and D8. In particular, the known sensor of claim 1 as upheld merely needed to be suitable for the claimed purpose. Thus, E1 implied that the parameter related to the width was sensed at a determined position in the passage. E8 also produced a signal when the width was below a predetermined value. A doorway was disclosed by D3, and any regular doorway had the inherent feature of parallel posts and/or walls, and also the vertical width measurement (height) corresponded to claim 1 as upheld. The apparatus of D6 again was suitable for the purpose of claim 1 as upheld. Finally, D7 disclosed a device which might be used to automatically measure a dimension of an animal, whereas D8 was related to E8. Thus, E7 and D8 were relevant since novelty destroying, and should be admitted into the proceedings.

As for inventive step, claim 1 was obvious when starting from each of E1, E8, D3, D6, D7 and D8, to modify the known sensor devices accordingly. More particularly, when starting from D6, the skilled person would consider to modify the known devices of D6 with the teaching of document D3. Although D3 taught measuring the height it would have been obvious for the skilled person to further modify the teaching to measure the width. Therefore claim 1 lacked an inventive step.

VIII. The respondent argued as follows:

Using the disclosure of the patent as a whole, the skilled person in any case could carry out the invention.

Furthermore, the sensor device of claim 1 generated a signal when said parameter indicated that the width was less than a predetermined value (feature "v", cf. reply to the appeal dated 19 October 2012, p.3/6). None of the prior art arrangements disclosed feature "v". This held also true for D7 and D8. Thus, these late filed documents were not prima facie relevant, and in any case should have been filed earlier, since present claim 1 was on file since March 2010. In sum, claim 1 was novel over the cited prior art, and D7 and D8 should not be admitted into the proceedings.

As regards inventive step, in D6 a video image of animals was obtained, whereas D3 described an arrangement in which objects (people) were identified by measuring height, speed and length and determining that the repective values were within a certain range defined by upper and lower threshold values. However, the video-imaging of D6 would not be replaced by the sensor arrangement of D3, since D3 did not determine a parameter related to the width of the animal at a determined position in the passage. Otherwise the arguments of the appellant were unclear as to how they could support lack of inventive step. Therefore claim 1 involved an inventive step.

Reasons for the Decision

1. The appeal is admissible.

2. Insufficiency of disclosure

In the opinion of the Board, the invention can already be carried out based on the wording of claim 1 alone, i.e. that a parameter related to the width of the animal seen in a determined direction is sensed. In any case the embodiments of the description provide for a sufficiently clear and complete disclosure of the invention. In particular, the description provides ample information as to how the claimed feature "a parameter related to the width of the animal seen in a determined direction" may be carried out. For example, the sensed parameter can be related to the horizontal width of animals of a certain size, i.e. the width seen in a vertical direction. This is one of several possible cross-section sizes of the animal, but width other than horizontal width, for instance vertical width or any width (in a direction) between horizontal and vertical width, may also be sensed, etc., see patent, paragraph 0021, column 5, lines 1-14, paragraph 0022, and figure 1. Moreover, this can be readily put into practice with any suitable sensor well-known in the art, cf. patent, paragraph 0024.

Therefore, the requirements of Article 83 EPC are fulfilled.

3. Novelty

3.1 Novelty of claim 1 is objected to over documents E1, E8, D3, D6, and late filed documents D7 and D8.

3.2 Claim 1 defines a sensor device which is "arranged to produce a signal", i.e. the sensor must invariably produce a signal when the sensed parameter related to the width indicates that the width of the animal is less than a predetermined value. It is not enough that a sensor could be used this way. It must carry out this function because it is so arranged, i.e. configured to do so. This formulation thus implies sensor implemented limitations that enable the sensor to carry out this function.

Apart from D3, see below, none of the prior art on file discloses or reasonably suggests the above sensor function as required by claim 1 or the implicit necessary implemented limitations of the sensor.

3.2.1 E1, see abstract, colu 2, lines 32-50, figure 1, provides outlines of the side and top profile of an animal in the form of video images (TV cameras 18, 19). These outlines form parameters related to the animal's width (linear measurements of its parts or portions, see abstract) seen in a determined direction.

However, E1's sensors do not invariably produce a signal as in claim 1 of the patent. The images of the animal on video tape are subsequently used (somehow) at a data processing center, cf. E1, col. 2 lines 53-56, but there is no suggestion that a signal is generated if the width parameter is less than a predetermined value.

E8, see abstract and column 5, lines 62-65, similarly uses image acquisition to evaluate the traits of an animal by means of various height and width

measurements. However, there is no indication of the production of a signal as in claim 1 of the patent.

D3, see abstract, page 5, lines 37-48, page 7, lines 41-56, page 8, line 54 to page 9,line 9, and figure 1, concerns a person and object recognition system with an optics module 12 placed atop a doorway 32. Doorway 32 does not feature or otherwise imply enclosure members of an animal passage ("doorway 32") extending substantially in parallel with the transport direction. Thus, whether or not the sensor produced signals R1=1 (buffer values D1 to D200 recorded) and R2=1 (buffer values D201 to D400 recorded), (see D3, page 4, lines 42-56, page 7, line 41 to page 8, line 4, and page 9, lines 4-9) when the range relating to the vertical width (= height) of the object is closer than threshold, actually corresponds to the required sensor function of claim 1, can be left undecided by the Board..

D6 describes a chute section 22 with animal passages, e.g. station 36 (see figure 1). The opening and closing of the passages' gates are controlled by position sensors. In station 36 certain external dimensions of each animal are measured by means of a sensor device (video imaging device). However, assuming that "certain external dimensions" in D6 may include a width of the animal, there is in any case no disclosure that a signal is generated if this width is below some threshold, cf. D6, abstract, column 7, lines 11-12 and 26, column 10, lines 23-33, line 58 to column 11, line 3, and column12, lines 28-32, and figure 1.

3.2.2 Late filed documents D7 and D8:

D7 concerns assessing animals by determining whether weight and various sizes are within set ranges. It describes e.g. ultrasonic sensors mounted to opposing side walls of a holding chute, see page 7, lines 26-30, page 11, lines 29-31, and page 12, line 36 to page 13, line 2. However it is not prima facie evident from D7 that a signal is generated if sensed width is below threshold.

D8 like E8 is concerned with animal evaluation by image acquisition using cameras. Prima facie, it does not appear to disclose or suggest generation of a signal as required by claim 1.

Thus, the Board holds that D7 and D8 are not prima facie more relevant than the prior art already on file. Moreover, the respondent proprietor's case has not changed since first instance, and no special reasons to justify the belated filing of D7 and D8 have been presented by the appellant, either upon filing their grounds of appeal or subsequently after the board's communication.

Consequently, the Board decides to exercise its discretion not to admit these additional documents into the proceedings, Article 12(4) RPBA.

3.3 Following from the above, the Board concludes that the subject-matter of claim 1 is novel over the cited prior art and, thus, complies with the requirements of Article 54 EPC.

4. Inventive step

4.1 The only inventive step argument substantiated by the appellant in the grounds of appeal (or indeed

subsequently) starts from D6 in the light of D3 (with reference to D7). This represents the appellant's complete case in the sense of Article 12(2) RPBA as regards inventive step. The Board shall limit its consideration to these facts and evidence, Article 12(4) RPBA.

The apparatus of claim 1 differs from D6's disclosure at least in that the sensor device is arranged to produce a signal when said parameter [related to the width] indicates that the width of the animal is less than a predetermined value at the determined position. In D6 the video-imaging device or scanner in station 36 serves to measure external dimensions of the animal and transmits this data to a computer where it is used to calculate various performance characteristics of the animal, paragraph bridging columns 10 and 11, column 12, lines 20 to 41. There is no indication that sensor generates a signal if sensed width is below threshold.

The underlying problem of this distinguishing feature can be formulated as "how to provide an alternative for detecting an animal with high precision in the animal passage at a determined position", see patent, paragraph 0009.

4.2 In the Board's view, starting from D6, the skilled person faced with this problem would firstly not consider D3, since D3 is not concerned with animal detection and measurement in the animal passage. D3 is rather particularly directed to use in retail stores for generating information on the number of persons in the store at selected time intervals, see D3, page 3, lines 1-6. Secondly, even if he were to consider D3, he would then not apply its teaching as a matter of obviousness to replace the video-imaging device or

scanner of D6 by an optics module or sensor 12 of D3 located above the "station 36" of D6. This is in particular so because they perform rather different functions, the D6 device or scanner collecting data for assessing properties of animals, whereas in D3 the sensed data serves to recognize (detect) persons and classify them as they move past a selected location in order to count them. Nor is there any need in D6 to do so as its device uses electronic identification (EID tags) which simultaneously detects and identifies an animal, cf. column 11, lines 8 to 34.

Therefore, the subject-matter of claim 1 involves an inventive step, in accordance with the requirements of Article 56 EPC.

5. In conclusion, none of the grounds raised by the appellant is well-founded and the appeal must fail. The Board thus confirms the decision under appeal.

As the appellant withdrew their request for oral proceedings, there was no longer any need to hold any. The scheduled oral proceedings were therefore cancelled.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

G. Magouliotis A. de Vries

Decision electronically authenticated