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**Datasheet for the decision
of 14 March 2023**

Case Number: T 2001/18 - 3.2.01

Application Number: 11170040.7

Publication Number: 2366416

IPC: A61M5/34

Language of the proceedings: EN

Title of invention:

Injection Device

Patent Proprietor:

Cilag GmbH International

Opponent:

Gill Jennings & Every LLP

Headword:

Relevant legal provisions:

EPC Art. 52(1), 54, 56

Keyword:

Novelty - main request (yes)

Inventive step - main request (yes) - non-obvious combination
of known features

Decisions cited:

Catchword:



Beschwerdekammern

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Chambres de recours

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Case Number: T 2001/18 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 14 March 2023

Appellant: Gill Jennings & Every LLP
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Representative: Gill Jennings & Every LLP
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Respondent: Cilag GmbH International
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 7 June 2018
rejecting the opposition filed against European
patent No. 2366416 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman G. Pricolo
Members: V. Vinci
S. Fernández de Córdoba

Summary of Facts and Submissions

- I. The appeal filed by the appellant (opponent) is directed against the decision of the opposition division to reject the opposition and maintain the European patent No. 2 366 416 as granted.

In its decision the opposition division held that the grounds for opposition under Articles 100(a) in combination with Articles 54 and 56 EPC, 100(b) and 100(c) EPC were not prejudicial to the maintenance of the patent as granted. Novelty and inventive step within the meaning of Articles 52(1), 54 and 56 EPC respectively were assessed, among other documents, over the following prior art:

D2: US-A-5704911

D6: US-A-4194505

- II. With the communication according to Article 15(1) RPBA dated 1 July 2022 the Board informed the parties of its preliminary assessment of the case.

Oral proceedings pursuant to Article 116 EPC were held before the Board on 14 March 2023 by videoconference.

- III. The appellant (opponent) requested that the decision under appeal be set aside and that the patent be revoked.

The respondent (patent proprietor) requested that the appeal be dismissed (main request) or, in the alternative, that the patent be maintained on the basis of the 1st to 4th auxiliary requests filed with the

reply to the statement of grounds of appeal.

IV. Independent claim 1 as granted reads as follows (labelling according to the contested decision):

1.1 *"An injection device (110) comprising:*

1.2 *a housing (112) adapted to receive a syringe (114) having a discharge nozzle;*

1.3 *a drive that is acted upon and in turn acts upon the syringe;*

1.4 *a trigger (300) movable from a rest position, in which it causes the drive to be retained, to an active position, in which it no longer causes the drive to be so retained, thus allowing the syringe contents to be discharged through the discharge nozzle; and*

1.5 *an interlock member (310) movable between a locking position, at which it prevents movement of the trigger from its rest position to its active position, and a releasing position, at which it allows movement of the trigger from its rest position to its active position, the device having an indicator to show that it has been used, activating upon said trigger moving to an active position,*

characterised in that

1.6 *the trigger (300) and the interlock member (310) include a projection (312) and an aperture (314), the projection being in register with the aperture when the interlock member is in its releasing position, but not otherwise, thus allowing the trigger to move from its rest position to its active position by movement of the*

projection into the aperture;

1.7 wherein the interlock member (310) comprises a primary member (119), the locking position of the interlock member is one in which the primary member (119) projects from a discharge opening (128) within the housing (112) and the releasing position is one in which the primary member (119) does not project from the discharge opening (128) or projects from it to a lesser extent."

Reasons for the Decision

MAIN REQUEST - PATENT AS GRANTED

Novelty: Articles 52(1) and 54 EPC

1. The subject-matter of claim 1 as granted is novel within the meaning of Articles 52(1) and 54 EPC as stated in the decision under appeal.
- 1.1 The appellant (opponent) contested the conclusion of the opposition division for the the reason that it was based on a too narrow interpretation of the term "aperture" of feature 1.6 of claim 1 as granted as meaning a through-hole or through-opening, and maintained that the disclosure of D2 was prejudicial to novelty of the independent claim. The respondent (patent proprietor) was conversely of the opinion that not only feature 1.6, but also features 1.2 and 1.7 of claim 1 as granted, which were not assessed in respect of D2 in the decision under appeal, were not directly and unambiguously derivable from this prior art document.

1.2 The appellant (opponent) argued that a recess like the one provided on the lower surface of the trigger lever (54,54') of the injection device shown in Figures 5, 5a and 6 of D2 equally fell within the meaning that a person skilled in the art would confer to the term "aperture" used in feature 1.6 of claim 1 as granted. The appellant (opponent) also pointed out that the terms "aperture" and "recess" did not indicate two mere functionally equivalent but inherently distinguished technical features, as asserted by the opposition division, but that these terms had the same identical technical meaning and were thus interchangeable in language. In support of this assertion the appellant (opponent) drew the attention to document D6 in which the through-hole shown for example in figure 2 was referred in column 3, line 57 as a "hole or recess (98)". The appellant (opponent) concluded that the recess (73,73') of the trigger lever (54,54') of the injector of document D2 was an "aperture" according to feature 1.6 within the common meaning that a skilled person assigned to this term and therefore, contrary to the assessment of the opposition division, the patent as granted lacked novelty over D2.

1.3 These arguments are not convincing for the following reasons:

The Board concurs with the opposition division and the respondent (patent proprietor) that according to a common sense of interpretation the term "aperture" is understood by a person skilled in the art as meaning:

an opening extending from one side to the another side of the material in which is provided and which is fully surrounded by the material.

The respondent (patent proprietor) provided in this regard a fitting example, namely an open window, which meets indeed the above definition. This is not the case of the recess (73,73') formed in the lower surface of the trigger lever (54,54') of the injector of document D2 because it does not fully extend through the trigger in a vertical direction. The circumstance that a single piece of prior art, i.e. document D6, describes a through-hole as a hole or recess does not sufficiently support the view of the appellant (opponent) that the "recess" disclosed in D2 would be considered as an "aperture". What counts is that the feature called "recess" in D2 is not a through hole, or an aperture.

- 1.4 The appellant (opponent) submitted a second line of argument based on an allegedly possible alternative interpretation of the technical content of D2. By referring to two illustrative sketches presented at the oral proceedings, the appellant (opponent) argued that a cut-out located at the perimetral edge of a two-dimensional figure, for example a thin sheet of material, represented an aperture according to the narrow interpretation adopted by the opposition division in the decision under appeal. It was further explained that the same applied to the linear groove resulting from a three-dimensional development of said two-dimensional figure in a direction perpendicular to the plane thereof. In view of the above the appellant (opponent) concluded that the recess (73,73'), when seen from the side, resulted in an aperture fully extending from the first lateral surface to the second lateral surface of the trigger lever (54,54'), i.e in an aperture fulfilling the narrow definition adopted by the opposition division. In response to the argument of the respondent (patent proprietor) that the person

skilled in the art would implicitly derive from the wording of feature 1.6 of claim 1 the limitation that the aperture was machined into the lower surface of the trigger lever body and extended perpendicularly thereto, the appellant (opponent) objected that this limitation was not derivable from the wording of the claim.

- 1.5 Also this line of argument submitted by the appellant (opponent) is not convincing for the following reasons:

When looking at the trigger lever (54,54') of the injector according to D2 from the side, it is evident that the alleged aperture resulting from the intersection of the recess (73,73') with the lateral surface of the trigger lever (54,54B), is not fully surrounded by material but, contrary to the definition provided under point 1.3 above, has an open side facing the housing of the injection device.

- 1.6 For the reasons given above, the Board concurs with the respondent (patent proprietor) that the person skilled in the art looking at D2 understands the recess (73,73') as a "groove" crossing the trigger from one side to the other and not as an "aperture" in the technical meaning that a person skilled in the art would commonly confer to this term.

- 1.7 Therefore, at least for this reason, the Board does not see any reason to deviate from the positive assessment of novelty of the opposition division.

- 1.8 The pending matter of debate of whether features 1.2 and 1.7 of claim 1 as granted are directly and unambiguously derivable from D2, as asserted by the appellant (opponent) or not, as held by the respondent

(patent proprietor), does not need to be decided because, as it will be explained below, the subject-matter of claim 1 as granted is not rendered obvious by the cited prior art in view of the distinguishing feature 1.6 alone.

Inventive Step: Articles 52(1) and 56 EPC

2. The subject-matter of claim 1 as granted involves an inventive step within the meaning of Articles 52(1) and 56 EPC as stated in the decision under appeal.

2.1 The appellant (opponent) contested this conclusion of the opposition division and submitted following lines of inventive step attack:

D2 in combination with common general knowledge

2.2 There is agreement that, starting from D2 as closest prior art, the problem underlying the contested patent has to be seen in the provision of an alternative interlock mechanism in this known injection device.

2.3 The appellant (opponent) argued that an aperture, for example a trough-hole or trough-opening, represented a well known possible alternative to the recess (73,73') of the injector of D2 because it could also be easily registered with the projection (66,66') of the interlock member (68,68') in such way to unlock the trigger lever (54,54'). The appellant (opponent) also put forward that according to established case law of the boards of appeal the skilled person did not require inventive skill to replace a feature of a prior art device with an equivalent feature resulting from a selection from well known alternatives and this in particular when no advantage was achieved, as it was

clearly the case here. It was also stressed that, on the contrary, the person skilled in the art readily recognized some advantages in the use of an aperture instead of a recess and was thus motivated in carrying out the replacement. In this respect it was explained that, contrary to the allegations of the opposition division and the respondent (patent proprietor), replacing the recess (73,73') with an aperture did not cause any weakening of the trigger lever (54,54'), but exactly the opposite since machining a recess throughout the entire trigger lever width entailed more material removal compared with the machining of an aperture having a comparatively reduced width. Furthermore, the appellant (opponent) argued that, contrary to the assertion of the respondent (patent proprietor), there was no evidence in D2 that the recess (73,73') and the protrusion (66,66') of the interlock member (68,68') were meant to come in abutment upon activation of the injection device thereby providing a stop limiting the rotation of the trigger lever, whereby the absence of a corresponding abutment surface facing the projection (66,66') or the interlock member (68,68') resulting from the replacement of the recess (73,73') with an aperture, did not cause any malfunctioning. Finally, it was alleged that the replacement of the recess (73,73') with an aperture did not necessarily require to modify the height of the protrusion of the interlock member (66,66') of D2 as instead alleged by the opposition division and the respondent (patent proprietor). The appellant (opponent) concluded that, contrary to the arguments provided by the opposition division, no major modifications of the injector of D2 were required that could discourage the person skilled in the art from replacing the recess (73,73') with an aperture, thereby achieving the subject-matter of claim 1 as granted

which thus lacked inventive step.

2.4 The arguments submitted by the appellant (opponent) are not convincing for the following reasons:

2.5 In order to correctly assess inventive step, it is necessary to answer the question of whether it would be obvious for the person skilled in the art to modify the injector of D2 by replacing the recess (73,73') with an aperture. As correctly pointed out by the respondent (patent proprietor), the injection device according to D2 is equipped with a second safety mechanism disclosed in column 12, line 46 onwards in combination with Figures 3 to 5. This additional safety mechanism, when in locked position, prevents inadvertent actuation of the trigger lever (54). The second safety mechanism essentially consists of a *"manual safety ring 74"* mounted coaxially with the housing beneath the trigger lever (54) and *"a tongue (76)"* integral with the manual safety ring (74). As explained in the passage cited above, when the safety ring is manually rotated in a first direction about its axis from the unlocked position shown in Figure 3 to the locked position shown in Figures 4 and 5, the tongue (76) is also angularly moved and reaches a position beneath the trigger and registered with the recess (see Figure 5). In this position the tongue (76) is interposed between the trigger lever and the housing, thereby preventing accidental depression of the trigger lever. When the safety ring is manually rotated back in the other direction, i.e. from the locked position shown in Figures 4 and 5 to the unlocked position shown Figure 3, the tongue (76) is removed from the recess and it does no longer prevent depression of the trigger toward the housing. Positioning of the tongue beneath the trigger and in registration with the recess to reach

the locked position shown in Figure 5 as well its reinstatement in the unlocked position shown Figure 3 is rendered possible by the presence of a recess which is open on both sides thereby allowing to insert/interpose the tongue (76) between the trigger level and the housing and conversely to disengage the tongue (76) from the recess and return it in the unlocked position. This functionality would not be possible if the recess would be replaced by an aperture because the latter, in view of the fact that it is closed on all sides, could not allow to move/insert the tongue (76) between the trigger lever (54) and the housing or its return to the unlocked position upon rotation of the safety ring. The Board observes that the above consideration applies irrespective of the apparent contradiction between Figures 4 and 5 regarding the axial position of the tongue (66) with respect to the tongue (76). The only relevant information is that the tongue (76) in the locked position is located beneath the trigger lever and in registration with the recess as it is clearly derivable from Figure 5. Furthermore, as correctly pointed out by the respondent (patent proprietor), D2 clearly states that although not shown in the embodiment in Figure 5a, the safety ring (74) is not optional, but it is provided in both the embodiments disclosed in D2 (see column 12, lines 46-49). In view of the above the Board concurs with the respondent (patent proprietor) that the person skilled in the art readily recognizes that the use of an aperture instead of a recess is incompatible with the functionality of the additional safety mechanism mandatorily provided in the injector of D2 and would disregard the possibility to replace the recess (73,73') with an aperture because this modification would be against the safety concept of the injector according to D2 which mandatorily foresees two safety mechanisms. Moreover, as

convincingly argued by the respondent (patent proprietor), the possibility to provide in addition to the recess also an aperture interacting with the projection (66,66') of the interlock member (68,68') of the first safety mechanism would have the only effect to complicate the construction without providing any further advantage. Therefore also this modification would be ruled out by the person skilled in the art.

2.6 The appellant (opponent) argued that it was in principle possible to imagine axially positioning the tongue (76) and shaping the lower surface on the trigger lever in such a way as to render the recess unnecessary. This would open the way to the provision of an aperture instead of a recess.

2.7 However, also these arguments are not convincing because they are based on speculations not supported by the actual disclosure of D2 and hence on a hindsight knowledge of the solution according to the invention. This approach cannot be adopted to question inventive step.

D2 in combination with D6

2.8 The admissibility of this line of argument was objected by the respondent (patent proprietor) for the reason that it was not substantiated with the grounds of appeal, but at a later stage of the appeal proceedings.

2.9 The appellant (opponent) put forward that the interlock mechanism of the injector disclosed in D6 comprised an interlock member consisting of a pin (90) provided in the trigger lever (80) suitable to be registered with an aperture (98) provided in the housing when the interlock mechanism is in the unlocked position (see

for example Figure 2). It was argued that this document proved that it would be obvious to use an aperture in the form of a trough-hole instead of a recess in a similar interlock mechanism according to only distinguishing feature 1.6, whereby the teachings of D2 and D6 in combination rendered obvious the subject-matter of claim 1 as granted.

2.10 Irrespective of the assessment of the admissibility issue raised by the respondent (patent proprietor), the Board considers also this line of inventive step attack not convincing for the following reason:

2.11 The alleged contribution of document D6 only consists in the teaching that an aperture can in principle replace a recess in an interlock mechanism of the kind at stake. However, the reasoning presented above in respect of the first line of attack, i.e. that the use of an aperture instead of a recess in the particular injector of D2 is incompatible with the presence of the second safety mechanism so that the person skilled in the art would disregard this alternative solution, still applies in full to the combination of D2 with D6 which cannot thus convince for the same reasons.

2.12 As no further inventive step attacks have been presented by the appellant (opponent), the positive assessment of inventive step of the opposition division is hereby confirmed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



A. Voyé

G. Pricolo

Decision electronically authenticated