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**Datasheet for the decision
of 20 September 2022**

Case Number: T 1673/19 - 3.2.07

Application Number: 13154162.5

Publication Number: 2765237

IPC: D21G1/00, D21F11/00

Language of the proceedings: EN

Title of invention:

Method for producing a fiber web and production line for producing a fiber web

Patent Proprietor:

Valmet Technologies, Inc.

Opponent:

Andritz Küsters GmbH

Headword:

Relevant legal provisions:

EPC Art. 100(a), 100(b), 56
RPBA Art. 12(4)

Keyword:

Decisions cited:

Catchword:



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Case Number: T 1673/19 - 3.2.07

D E C I S I O N
of Technical Board of Appeal 3.2.07
of 20 September 2022

Appellant: Andritz Küsters GmbH
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Respondent: Valmet Technologies, Inc.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 12 April 2019
rejecting the opposition filed against European
patent No. 2765237 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chairman I. Beckedorf
Members: V. Bevilacqua
A. Pieracci

Summary of Facts and Submissions

- I. The opponent (appellant) lodged an appeal within the prescribed period and in the prescribed form against the decision of the opposition division rejecting the opposition and maintaining European patent No. 2 765 237 as granted, and sought the revocation of the patent in its entirety.
- II. The patent proprietor (respondent) defended the patent as granted in accordance with the decision under appeal or in amended form on the basis of the first to third auxiliary requests filed with the reply to the statement setting out the grounds for appeal.
- III. In preparation for oral proceedings the Board communicated its preliminary assessment of the case by means of a communication pursuant to Article 15(1) RPBA 2020 according to which the appellant had not convincingly demonstrated the incorrectness of the contested decision.
- IV. The appellant reacted with letter of 16 August 2022.

The respondent also reacted, to both the preliminary assessment of the Board and the appellant's letter of 16 August 2022, with letter of 25 August 2022.
- V. Oral proceedings before the Board took place on 20 September 2022.

The appellant finally requested

that the decision under appeal be set aside and

that the patent be revoked.

The respondent finally requested

that the appeal be dismissed, *i.e.* that the patent be maintained as granted (main request); alternatively, when setting aside the decision under appeal, that the patent be maintained in amended form on the basis of one of the sets of claims of the first to third auxiliary requests filed with the reply to the opponent's statement setting out the grounds of appeal.

At the conclusion of the proceedings the decision was announced. Further details of the proceedings can be found in the minutes thereof.

VI. The following evidence, cited in the appealed decision, will be mentioned in the present decision:

D1: WO 00/17446 A1,
D6: DE 298 13 663 U1,
D7: DE 35 42 342 A1,
D8: DE 38 15 463 C2,
D9: DE 698 34 820 T2,
D10: DE 698 28 812 T2.

Also the following evidence, submitted by the appellant with the statement setting out the grounds for appeal, will be mentioned:

D11: DE 10 2005 053 968 A1,
D12: DE 10 2006 051 537 A1,
D13: DE 10 2008 043 727 A1.

VII. The lines of argument of the parties relevant for the present decision are dealt with in detail in the reasons for the decision.

VIII. Claim 1 of the patent as granted reads:

"Method for producing a fiber web (W), in which method the fiber web is produced in a production line comprising a board or paper machine with dryer section (10), a sizer (20) with an after dryer (30), a cooling device (200) with optional moisturizer (100), a precalender (40), a coater (50) with dryer (60), another cooling device (200), a final calender (70) and a reel-up (80), the fiber web (W) is calendered in the precalender and in the final calender (40; 70), in which method the fiber web (W) is cooled before calendering the fiber web (W) in the precalender (40) and in the final calender (70) and in which dwell time between cooling and calendering, which is the time the fiber web (W) run takes from the first point of the cooling device (200) or the moisturizer (100) to the first calendering nip of the precalender (40) or from the first point of the another cooling device (200) to the first calendering nip of the final calender (70), is at least 200 ms, preferably 200 -5000 ms, **characterized in that** temperature of the web coming out from dryer section (10) is 90 - 150 °C, preferably about 95 °C, and solids content of the fiber web is 92 - 96%, that web temperature after drying in after dryer (30) of the sizer (20) is 85 - 90 °C, that the fiber web is cooled to temperature 35 - 55 °C by the web cooler (200) and optionally the moisturizer (100) is used, that low ingoing temperature 30 - 50 °C to the precalender (40) is achieved and advantageously web moisture is adjusted to 6 - 10 %, that in precalender (40) a moisture and temperature gradient precalendering

takes place and in the precalendering used short nip calendering increases the web temperature 10 - 15 °C and ingoing temperature of the web when entering the coater (50) is 45 - 60 °C, that after coating in the coater (50) the fiber web is dried in the dryer (60), after which the temperature of the web is 70 - 120 °C, that before calendering in the final calender (70) the fiber web is cooled by the another cooling device (200), by which the ingoing temperature of the fiber web is reduced to 30 - 55 °C and the temperature of the fiber web after calendering is 50 - 55 °C and the low temperature needed in reeling in the reel-up (80) is provided without further cooling devices as the temperature of the fiber web is 50 - 55 °C after calendering."

Reasons for the Decision

1. D11-D13 - Admissibility
 - 1.1 The respondent requests that documents D11-D13, mentioned in the statement setting out the grounds of appeal for the first time, not be admitted into the proceedings (see pages 5 and 6 of the reply to appeal).
 - 1.2 According to the appellant (see point 5. of the statement of grounds and point 2. of the letter of 16 August 2022) the knowledge of the skilled person was not properly acknowledged by the opposition division, with the consequence that features of claim 1 which were nothing else than well known combinations of standard processing conditions were considered to establish novelty over document D1 and an inventive step starting therefrom. The filing of documents D11 to

D13 was therefore necessary to react to the above lack of proper consideration of the knowledge of a skilled person upon which the appealed decision was based, and to rectify it.

During oral proceedings the appellant additionally submitted that document D11, being acknowledged as relevant prior art in the patent in suit, is already in the proceedings and cannot be excluded therefrom.

D11 gives essential technical information on the features of the characterizing portion of claim 1 of the main request.

The content of the disclosure of D11 is therefore extremely relevant for a discussion of inventive step starting from D1, and should be taken into account during appeal proceedings.

- 1.3 The Board is not convinced by the above argumentation. The question whether or not documents D11 to D13 should be admitted is to be dealt on the basis of Article 12(4) RPBA 2007, which gives the Board discretion not to admit, on appeal, documents that could and should have been presented in the opposition proceedings.

In the present case these documents, and in particular D11, were submitted to raise, for the first time, the new objection that the subject-matter of claim 1 of the patent in suit is not based on inventive step starting from document D1 in combination with each of these additional documents.

The allegation of the appellant contained in point 5 of the statement of grounds of appeal that the knowledge

of the skilled person was not properly acknowledged by the opposition division, and that D11 to D13 were filed to fill this knowledge gap, is not convincing, because the appellant failed to explain why these documents, although being patent documents, should be considered as representing the general knowledge of a skilled person.

According to the established case law (see the Case Law of the Boards of Appeal (CLB), 10th edition 2022, I.C. 2.8.2) common general knowledge normally does not include patent literature and scientific articles.

The argument of the appellant that D11, being mentioned in the patent in suit, is already in the proceedings is also not convincing.

This is because, contrary to what has been put forward by the appellant, and again according to the established case law (CLB, *supra*, IV.C.4.4) a document considered during the examination procedure is not automatically scrutinised in opposition or opposition appeal proceedings, even if it is quoted and acknowledged in the contested European patent.

The Board also notes that the appealed decision was taken on the basis of arguments submitted by the respondent already in reply to the notice of opposition (see letter of 7 February 2018, starting from page 5).

It is therefore not apparent to the Board how the late filing of documents D11 to D13 to question inventive step of the claims as granted could be regarded as a timely and appropriate reaction to the appealed decision.

This is particularly true for D11, as no search was necessary to retrieve this document, which is cited in the patent in suit.

Based on the above the Board agrees with the respondent that the appellant could and should have filed documents D11, D12 and D13 at the outset of opposition proceedings when contesting the patentability of the granted claims.

Therefore, the Board decides, exercising its discretion pursuant to Article 12(4) RPBA 2007, to hold these documents, together with the patentability objections based thereupon, inadmissible.

2. Sufficiency of disclosure (Article 100(b) EPC)
 - 2.1 According to point 2.3 of the reasons of the appealed decision the invention claimed in granted claim 1 was sufficiently disclosed.
 - 2.2 The appellant disagrees (point 1 of the grounds for appeal, point 3. of the letter of 16 August 2022) and reformulates its objection originally raised in the notice of opposition, namely that the skilled person was not able to univocally measure the temperature of the web, by additionally arguing that this was because there was no indication of the cooling time in the claim.

According to the appellant the lack of indication of the cooling time resulted in a lack of sufficiency of disclosure because only the cooling time determined whether the contentious feature "temperature of the web" was to be referred to the web surface only or to the entire thickness of the web

The appealed decision is based on the incorrect and unsubstantiated assumption (decision, point 2.3) that it was within the scope of the skilled person's ability to select the web speed or the distance between the treatment sections in such a way that the claimed temperatures, the desired bulkiness and also proper curl control are achieved at the same time.

As argued during oral proceedings (see also point 1 of the statement of grounds of appeal) the skilled person is not taught how curl control can be achieved when the web is calendered under a temperature gradient. This information is essential because it is known to the skilled person that the presence of a temperature gradient increases curl, as also explained in the introductory portion of the description of the patent in suit (statement of grounds, page 2, fourth paragraph).

Lack of sufficiency of disclosure is also particularly evident from a comparison between claim 1 as originally filed and claim 1 of the main request.

2.3 The Board is not convinced, on the basis of the above arguments, of the incorrectness of the findings of the decision under appeal regarding sufficiency of disclosure.

The appellant has not provided reasons explaining why it was outside the skilled person's ability to select the web speed or the distance between the treatment sections in such a way that the claimed temperature ranges are achieved (appealed decision, reasons, point 2.3).

The argument of the appellant that a skilled person had no guidance on how to achieve curl control cannot be followed by the Board because it is established case law (CLB, *supra*, II.C.3.2) that an objection of lack of sufficiency of disclosure cannot legitimately be based on the argument that the patent does not enable a skilled person to achieve technical effects (such as curl control) which are not defined in the claim.

It is therefore not apparent to the Board, on the basis of the appellant's arguments, who failed to address the above question in its reaction to the preliminary opinion of the Board see point 3. and also during oral proceedings, how the lack of indication of the cooling time could have prevented a skilled person from carrying out the method steps listed in granted claim 1 and related to increasing or reducing the temperature of the web.

As noted by the respondent (reply to the statement setting out the grounds of appeal, page 8, last paragraph) the question whether the feature "web temperature" refers to the surface temperature or not, is not decisive for the purposes of establishing sufficiency of disclosure, because the appellant has not provided any arguments explaining why a skilled person would not be able to detect and determine any web temperature during the several stages of the production line of D1, as already established by the opposition division.

The appellant's argument, submitted during oral proceedings, based on a comparison between claim 1 of the application as originally filed and claim 1 of the main request does also not support the appellant's case on lack of sufficiency of disclosure.

This is because the Board is not convinced by the appellant, who highlighted the differences with the originally filed claim, that the "curl control" was to be considered as an implicit feature of present claim 1 which the skilled person was not able to carry out because it was not sufficiently disclosed.

The appellant has also not presented any serious doubt substantiated by verifiable facts that a person skilled in the art would not be able to carry out the invention as claimed making use of the teaching of the patent in combination with the common general knowledge.

The Board therefore concludes that the appellant, who raised an objection of lack of sufficiency of disclosure, has not discharged the burden of proof linked thereto (see CLB, supra, III.G.5.1.2.c).

As a consequence of the above the Board does not see any reason for deviating from the conclusions of the opposition division on sufficiency of disclosure (appealed decision, point 2.3 of the reasons).

3. Inventive step of claim 1, D1 in combination with the common general knowledge (Articles 100(a) and 56 EPC)
- 3.1 The opposition division acknowledged that the subject-matter of claim 1 of the patent as granted involved an inventive step starting from the method disclosed in D1 and taking the common general knowledge as exemplified by D8-D10 into account (decision, point 3.3).

D1 disclosed a method for producing a fiber web according to the features of the preamble of claim 1. Thus, all the features characterising portion

distinguished the claimed subject-matter from the method of document D1.

These distinguishing features were considered by the opposition division as solving the problem of controlling the curl of a coated fiber web more efficiently due to increased use of drying capacity thereby also providing a method for effectively calendering fiber webs in which high bulkiness is received with less raw stock (see point 3.3 of the reasons of the contested decision, see also [0012] of the patent specification).

Inventive step was acknowledged because none of the documents D8-D10, to which the appellant referred as disclosing the knowledge of the skilled person, taught all the distinguishing features, and in particular because the web temperatures claimed in claim 1 were not to be found in any of these documents (see point 3.3, in particular page 9 of the appealed decision).

3.2 The appellant contests the above assessment as follows.

3.2.1 The opposition division failed to correctly identify the distinguishing features because (see point 4. of the letter of 16 August 2022) there was only the following difference between the subject-matter of claim 1 of the main request and the method disclosed in D1:

"in precalender (40) a moisture and temperature gradient precalendering takes place and in the precalendering used short nip calendering increases the web temperature 10 - 15 °C".

This was because while, as acknowledged in the appealed decision, D1 explicitly mentioned the machines of the preamble of claim 1, the skilled reader of D1 also knew, so the appellant, within which parameter ranges these machines have to be operated to achieve paper of an acceptable quality.

The skilled person knows that (statement of grounds of appeal, point 3):

- it is advantageous to cool the web before calendering (D8, column 3, lines 32-38),
- curl is not a problem if the web is calendered at a temperature below 75°C (D9, [0019]),
- the web after the dryer section inevitably had a solids content of usually 92% to 96%, because the morphology of the web reaches its final shape at solids contents of about 90% (D10, page 4, right-hand column, lines 7-9).

Based on the above it is clear that all the parameters mentioned in the characterizing portion of claim 1, made exception for the web temperature increase of 10-15 °C during precalendering, fall within the normal operating ranges for these machines.

These features should therefore be considered as being implicitly disclosed to a skilled reader of D1.

3.2.2 Starting from D1, the problem to be solved was to achieve good surface smoothing while preserving bulkiness and avoiding curling (statement of grounds, point 2.).

Inventive step was to be denied because this problem was solved by merely specifying standard working

conditions, and in particular temperature ranges which were customary in this technical field and belonged to the knowledge of the skilled person.

In fact, D1 already discloses that the distinguishing feature, namely the temperature and moisture parameters now claimed for the precalendering step, are used in a final calendering step (letter of 16 August 2022, section 4.).

The skilled person was therefore prompted by D1 to also use these processing conditions in the precalender.

The subject-matter of claim 1 of the main request therefore lacks inventive step starting from the method disclosed in D1 and taking the above detailed knowledge of a skilled person (exemplified by D8-D10) into account.

3.3 The Board disagrees.

3.3.1 The appellant has not convincingly demonstrated that the conclusion of the opposition division that all the features of the characterising portion of claim 1 are new over D1 is not correct.

According to the established case law (CLB, *Supra*, I.C. 4.3) a prior art document anticipates the novelty of claimed subject-matter if the latter is directly and unambiguously derivable from that document, including any features implicit to a person skilled in the art.

However, an alleged disclosure can only be considered "implicit" if it is immediately apparent to the skilled person that nothing else than the alleged implicit

feature forms part of the subject-matter disclosed.

Whilst common general knowledge must be taken into account in deciding what is clearly and unambiguously implied by the explicit disclosure of a document, the appellant merely argued that some of the claimed processing parameters are customary, without explaining why the person skilled in the art would inevitably choose these parameters, i.e. objectively consider that these and only these were necessarily implied by the explicit content of document D1.

In addition the Board notes that the argumentation of the appellant is based on the assumption that teachings extracted from three different patent documents would be considered common general knowledge.

However, according to the established case law (see point 2.3 above), common general knowledge does not normally include patent literature.

The appellant failed to provide any explanation as to why, in the present case, an exception to this general principle would apply, and the Board rather concurs with the respondent arguing that the field of technology of the patent in suit is not so new that the technical knowledge is not yet available in reference books, such that the skilled person may derive, as the appellant did, his general knowledge from patent documents (reply to the appeal, page 11).

- 3.3.2 The argumentation of the appellant that the skilled person would be prompted by D1 to use the calendar processing conditions disclosed therein in the precalendar (letter of 16 August 2022, section 4) is also not convincing.

This is because the appellant failed to explain why the disclosure of D1 in relation to temperature and moisture parameters used in the final calendering step should be considered as a teaching prompting the skilled person to use the same processing conditions in a precalendering step.

In addition, the Board notes that this argumentation, even if it were to be followed by the Board, would not be sufficient for showing that the conclusions of the opposition division on inventive step were not correct, because it deals with only one of the distinguishing features identified in the appealed decision.

In this context the Board notes that the primary object of the appeal proceedings is to review the decision under appeal in a judicial manner, and that the appellant's arguments did not specifically address the inventive step assessment made by the opposition division, trying to demonstrate the incorrectness thereof.

As a consequence of the above, the appellant failed to demonstrate that the opposition division did not assess correctly inventive step of granted claim 1 starting from D1 and taking the general knowledge, exemplified by documents D8, D9 and D10, into account.

4. Inventive step of claim 1, D1 in combination with D6 (Articles 100(a) and 56 EPC)

4.1 The appellant contests the finding of the opposition division on inventive step over the combination of the teachings of documents D1 and D6 with the following arguments (grounds of appeal, point 2).

The distinguishing features, in particular those related to how to cool before a calender, were taught by D6, because a web behaved the same in a heated nip, regardless of whether it was in a pre-calender or in a final calender.

According to D6, the temperature before the pre-calender and before the calender were to be chosen to be the same, and to be between 35°C to 55°C and 30°C to 55°C respectively.

In the eyes of a skilled person handling a coated web was not substantially different from handling an uncoated one. The opposition division therefore wrongly considered that teachings coming from D6 were not applicable to the method according to D1.

D9 demonstrated that was general knowledge that the avoidance of curl is achieved by setting temperatures below 85°C to 75°C.

The subject-matter of claim 1 of the main request therefore lacked inventive step over the combination of the teachings of documents D1 and D6.

- 4.2 The Board is not convinced by the above argumentation. The opposition division acknowledged inventive step over the combination of D1 with D6 because D6 was found not to disclose, and therefore not to teach, **all the distinguishing features** of claim 1.

Arguments addressing the issue why the distinguishing features identified in the appealed decision were taught by D6 were neither provided in the statement of

grounds of appeal, nor in the letter of 16 August 2022 (see section 5. thereof).

The appellant argues that the temperature before the pre-calender and before the calender should be the same and also that a skilled person would consider that a teaching coming from D6, related to uncoated paper, is applicable to the method D1.

The appellant also puts forward that as taught by D9, representing the general knowledge of a skilled person, that to avoid curl setting temperatures below 85°C to 75°C was necessary.

These arguments, provided in support of the objection of lack of inventive step over the combination of the teachings of documents D1 and D6 are not followed by the Board. This is because it is not apparent therefrom which passages of D6 teach using all the distinguishing features to achieve good surface smoothing while preserving bulkiness and avoiding curling in the method according to D1.

Therefore, the Board concludes that the appellant failed to demonstrate that the opposition division did not assess correctly inventive step of granted claim 1 starting from D1 and taking the teaching of D6 into account.

5. Inventive step of claim 1, D1 in combination with D7 (Articles 100(a) and 56 EPC)
- 5.1 Inventive step over the combination of the teachings of documents D1 and D7 was acknowledged in the appealed decision also because the features of the characterizing portion of claim 1 were neither disclosed in D1, nor taught by D7 (see point 3.3 of the

appealed decision, in particular page 9, second paragraph thereof).

- 5.2 The appellant (statement of grounds of appeal, point 4) argues that the opposition division disregarded the knowledge of the skilled person and wrongly assessed that it was not known from D7 that the web temperature after drying and after the size press in D7 was 85 - 90°C and that the web was coated.

Drying until the morphology of the web takes its final shape at solids contents of about 90% was a necessary method step in the production of paper.

Temperatures of 85 - 90°C were the standard temperatures that the web necessarily had when leaving a dryer section as well as a size press.

The skilled person would have therefore considered that these features were implicitly disclosed in D7, and the combination of the teachings of D1 and D7 would therefore have comprised them.

- 5.3 The Board is not convinced by the above arguments.

As already discussed in relation to the combination of D1 with D6, the appellant failed to identify which passages of D7 teach all the distinguishing features of claim 1.

In the absence of any explanation as to which passage of document D7 would have taught to use the distinguishing features to achieve good surface smoothing while preserving bulkiness and avoiding curling in the method according to D1, the Board does not see any reason to conclude that the opposition

division did not come to the correct conclusion regarding inventive step starting from D1 and taking the teaching of D7 into account.

6. Claim 6, Inventive step

The appellant argues that analogous objections of lack of inventive step apply to claim 6 (see the statement setting out the grounds of appeal, point 5, last paragraph). The aforementioned findings in points 4 to 5 also apply mutatis mutandis to claim 6 and the Board is thus also not convinced by the arguments of the appellant that its subject-matter lacks an inventive step.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Nachtigall

I. Beckedorf

Decision electronically authenticated