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**Datasheet for the decision
of 12 November 2024**

Case Number: T 0363/23 - 3.2.04

Application Number: 19178055.0

Publication Number: 3578037

IPC: A01G18/62, A01G18/20, A01G18/69

Language of the proceedings: EN

Title of invention:
DEVICE FOR GROWING MUSHROOMS

Patent Proprietor:
Lemmen, Jacobus Alexander Jozef
Van Doremaele, Marcus Gerardus Maria

Opponent:
MUZZROOM BV

Headword:

Relevant legal provisions:
EPC Art. 100(a)
RPBA 2020 Art. 12(4), 12(6), 13(2)

Keyword:

Grounds for opposition - lack of patentability (no)
Amendment to case - reasons for submitting amendment in appeal proceedings (no) - admitted (no)
Late-filed evidence - should have been submitted in first-instance proceedings (yes) - admitted (no)
Amendment after notification of Art. 15(1) RPBA communication - exceptional circumstances (no)

Decisions cited:

Catchword:



Beschwerdekammern
Boards of Appeal
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Case Number: T 0363/23 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 12 November 2024

Appellant:

(Opponent)

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Respondent:

(Patent Proprietor 2)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 21 December
2022 rejecting the opposition filed against
European patent No. 3578037 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman G. Martin Gonzalez
Members: J. Wright
 M. Millet

Summary of Facts and Submissions

- I. The appeal was filed by the appellant opponent against the decision of the opposition division to reject their opposition.
- II. The opposition division held *inter alia* that granted claim 1 involved an inventive step starting from E4 in combination with common general knowledge, E3 or E5.
- III. In preparation for oral proceedings the board issued a communication setting out its provisional opinion on the relevant issues.

Oral proceedings before the Board were held by videoconference on 12 November 2024.

- IV. The appellant opponent requests that the decision under appeal be set aside and that the patent be revoked.

The respondent proprietors request that the appeal be dismissed and the patent be maintained as granted, in the alternative that the patent be maintained in amended form on the basis of one of auxiliary requests 1 to 16 filed on 11 September 2024.

- V. Independent claim 1 of the main request (as granted) reads as follows

"Device (1) for growing mushrooms (2), comprising:
- a shelving (3),
- arranged for supporting beds (4) for holding casing soil (5) and compost on a pulling net,
- said beds (4) for holding casing soil and compost on a pulling net;

wherein

- the beds (4) are placed at a mutual distance above each other;

characterized in that

- the beds (4) are mutually movable, wherein the displacement between the first and the second position requires a displacement of the first bed (4) only, between at least:

- a first position, wherein a second bed supported above a first bed (4) at least partially impedes the accessibility of the first bed in a direction perpendicular to the plane in which the first bed (4) extends; and

- a second position in which at least a larger part of the first bed (4) is free approachable from a direction perpendicular to the plane in which the first bed (4) extends than in the first position;

wherein

there is at least one pair of beds (4) at the same height supported by the shelving, which beds extend parallel to each other, wherein the pair of beds (4) at or essentially at the same height are rotatable in the opposite direction, characterized in that the side of the bed (4) that faces a bed at the same level goes upward when the bed is rotated and the side of the bed (4) that faces to the outside of the shelving goes down when the bed (4) is rotated."

VI. In the present decision, reference is made to the following documents (the documents listed here as E8 through E10 differ from those designated E8 through E10 in the appealed decision):

(E3) CN 203985152 U

(E3a) Translation of E3

- (E4) Gerben Straatsma et al: "Nieuwe methode voor de handmatige oogst van champignons", 1 January 2007.
- (E4a) Translation of E4
- (E5) US 2018/042192 A1
- (E8) EP 1 358 792 A2
- (E9) CN 205648463 U
- (E10) KR 10-0899347 B1
- (E11) US 2015/0351329 A1
- (E12) Roestel, A.J.J. van et al: "Nieuwe oogstmethoden voor champignons", Wageningen: Praktijkonderzoek Plant & Omgeving B.V - \ 2005
- (E12a) Translation of E12
- (E13) Roestel, A.J.J. van et al: "Vermindering van de fysieke belasting tijdens de oogst van champignons - Een vergelijking van handmatige oogstmethoden", Wageningen: Praktijkonderzoek Plant & Omgeving B.V - PPO Nr 2005-6.
- (E13a) Translation of E13

VII. The parties' arguments relevant to the decision are discussed in detail in the Reasons for the Decision.

Reasons for the Decision

1. The appeal is admissible.
2. Background

The invention concerns a mushroom-growing device with shelving supporting compost beds. Traditionally, these beds are placed one above the other at distances where upper beds hinder access to lower beds, requiring harvesters to stoop. The invention improves accessibility by making the beds movable, allowing better reach to the beds without stooping, see patent specification paras 0001-0006.

The claimed device involves bed rotation or tilting. It includes at least one pair of parallel back-to-back beds at the same height, rotatable in opposite directions. This design allows beds to be half the size for easier picking or the same size with less shelving, see paras 0014, 0017.

3. Main request - Inventive step, Article 100(c) EPC

3.1 The appellant opponent challenges the opposition division's conclusion that granted claim 1 involves an inventive step when starting from E4, in combination with either common general knowledge, E3, or E5.

It is common ground that E4 is a suitable starting point for assessing inventive step. E4 discloses a device for growing mushrooms comprising shelving to support beds holding casing soil and compost on a pulling net. The beds are rotatable, facilitating efficient handling, as shown in Fig. 8 on page 20 of E4.

3.2 The claimed device differs from E4's, at least in that it includes one pair of parallel beds at the same height, supported by the shelving and rotatable in opposite directions. This configuration allows the beds to be either half the size for easier picking or the same size while requiring less shelving to support the same bed surface (see para. 0017 of the specification). Contrary to the appellant's argument, this effect is achieved for a wider range of bed sizes than the one mentioned in paragraph 0017, which is only mentioned there as an example.

3.3 The associated technical problem can thus be formulated as improving handling efficiency or increasing space efficiency. The appellant, however, formulates the problem as "how to allow harvesting mushrooms from both sides of the rack", which the Board regards as incorrect. This formulation includes a pointer to the solution, a situation to be avoided (see Case Law of the Boards of Appeal, 10th edition 2022 (CLBA), I.D. 4.2.1). Additionally, the problem should normally start from the one described in the contested patent (see CLBA, I.D.4.2.2).

3.4 The appellant argues that even with the more general formulation of the problem - how to improve handling or space efficiency - the skilled person would straightforwardly solve it by placing two E4 shelving arrangements back-to-back, as illustrated in the figure on page 8 of their grounds. They assert that this configuration, known from common general knowledge, allows access from both sides, improving handling. According to the appellant, the further step of coupling the two back-to-back shelvings to form a single rack would be routine design practice for the skilled person, as exemplified in several prior art documents. The skilled person would thus arrive at the claimed subject matter without requiring an inventive step.

The appellant further contends that the teachings of E3 or E5 would also prompt the skilled person to this solution. E3 shows workers accessing shelving from both sides (see Fig. 3), while E5 addresses efficient material handling and teaches shelving with two columns of vertically stacked cultivation beds (see Fig. 1 and paras. 0003-0004). Drawing on these teachings, the

skilled person would find it obvious to arrange two E4 shelving systems back-to-back as a single structure.

3.5 As regards the common general knowledge of the person skilled in the art, it is undisputed that the skilled person is an engineer involved in designing apparatuses for cultivating mushrooms, whose routine tasks include addressing handling and space efficiency issues. The Board acknowledges that arranging known shelving systems back-to-back to optimise indoor space is an obvious possibility for such a skilled person. Coupling adjacent shelving arrangements would also fall within their routine skills and basic common general knowledge.

3.6 The Board therefore agrees with the appellant opponent that the skilled person, when tasked with optimising a known shelving system for handling or space efficiency, might consider placing two systems back-to-back. Similarly, the teachings of E3 or E5 might prompt the skilled person to consider such an arrangement, as such. However, in the Board's opinion, the skilled person would reject the idea of applying this to the system disclosed in Fig. 8 of E4. Such a back-to-back arrangement is incompatible with the structure of Fig. 8, as argued by the respondent proprietor and discussed during the oral proceedings.

Each single bed in Fig. 8 of E4 is designed to be harvested from both sides. This is evident from the posture and arm reach of the operator depicted in Fig. 8, which shows that one side of the bed is not fully accessible without ergonomic challenges. The dimensions of the operator model in Fig. 8 are purposefully scaled to reflect real human proportions (see E4, section 3.2.2, "Model Picker"). Further, the table accompanying

Fig. 8 identifies problem 1, "it is not possible to harvest simultaneously from both sides of the bed," and proposes solution 1A, "maintaining a different work sequence," implying that harvesting must occur from both sides.

3.7 In an alternative argumentation during oral proceedings, the appellant argued that the skilled person, seeking to optimise vertical space efficiency, might reduce the distance between vertical beds, thereby increasing their number. This would necessitate narrower beds to maintain ergonomic accessibility. At some point, the bed width would become such that harvesting from only one side is feasible. To avoid losing horizontal bed surface, the skilled person would double up the beds horizontally, arriving at the claimed subject matter. The appellant contended that double beds on the same horizontal plane and opposite positions are known from E3, E5, and common general knowledge.

3.8 The Board does not dispute that shelving systems with horizontally paired beds may be part of common general knowledge. However, in the Board's view, the appellant's reasoning amounts to an ex post facto analysis. The argument chains a series of developments that, while individually plausible, rely on hindsight knowledge of the patent. It conveniently portrays a one-way path devoid of alternative solutions. In the Board's view, however, this is not the case; rather, it represents a series of targeted choices that, without the benefit of hindsight, cannot be considered obvious for the skilled person.

For instance, E4 itself presents alternative solutions for optimising vertical space, such as liftable beds

with worm wheels (p. 14) or cables (p. 16), which do not require narrowing the bed width. As argued by the respondent proprietors during the oral proceedings, the skilled person might abandon the rotating mechanism for narrower beds, as it would no longer be necessary. Additionally, it is unclear why the skilled person, without hindsight knowledge of the present patent, would determine that the optimum bed width precisely corresponds to the width allowing harvesting from only one side.

3.9 In conclusion, the Board is not convinced by the appellant's arguments that claim 1 lacks an inventive step starting from E4 in combination with common general knowledge, E3, or E5, and confirms the conclusions of the opposition division.

4. Admissibility E8-E11

4.1 In their statement of grounds of appeal the appellant opponent inter alia challenged inventive step also based on combinations and arguments involving new documents E8-E11. At the oral proceedings before the Board, they merely referred to their written submissions.

4.2 Regarding this issue, in its communication, section 5.1, the Board noted the following:

"In their statement of grounds of appeal against the decision to reject the opposition the appellant opponent inter alia challenges inventive step based on combinations involving new documents E8 and E9, in particular starting from E4 in combination with E9 and all objections starting from E8, and cites new documents E9, E10 and E11 as evidence of common general

knowledge (see page 9, first paragraph of the grounds of appeal). These parts of their appeal case are not directed to objections, arguments and evidence on which the decision under appeal is based and thus represent amendments to their appeal case in the sense of Art 12(4) RPBA. Admission of such amendments, including the admission of new evidence, is at the discretion of the Board. Here the Board notes that these amendments have neither been identified as such, nor have reasons been given why these amendments have only been submitted for the first time in appeal, Art. 12(4) RPBA. Furthermore, these new objections and evidence should have been presented during the proceedings before the opposition division, as they pertain to the granted claims discussed there. No circumstances appear to justify their admittance at the appeal stage, according to Art 12(6) RPBA. The Board is therefore inclined not to admit these amendments, i.e. the new evidence and further objections to inventive step."

4.3 Absent any further submissions from the appellant opponent the Board saw no reason to change its point of view. It thus did not admit new documents E8-E11 and associated objections into the appeal proceedings, Art 12(4) RPBA and Art 12(6) RPBA.

5. Admissibility E12, E13

5.1 With their letter of 6 November 2024, the appellant opponent filed new documents E12 and E13 and further associated arguments for lack of inventive step of granted claim 1. These were filed after the Board's written preliminary opinion of 18 July 2024, the provisions of Art 13(2) RPBA apply. According to Art 13(2) RPBA, such documents shall, in principle, not be taken into account unless there are exceptional

circumstances, which have been justified with cogent reasons by the party concerned.

5.2 The Board is not convinced by the argument that E13 was in the proceedings from the beginning of the opposition proceedings since it is referenced in E4. While it is true that E13 is mentioned in E4 (e.g., in section 1, first and sixth paragraphs, and section 3.2.5 referencing Van Roestel et al., 2005), neither the document itself, the cited references, nor its contents were explicitly presented to the Board or the other party before. Therefore, E13 constitutes new evidence, and the provisions of Art. 13(2) RPBA apply.

5.3 The appellant further argues that late-filed evidence supporting common general knowledge should be admissible if such knowledge is disputed. They claim an exceptional circumstance arises from section 6.5 of the Board's communication, which noted that patent documents typically do not demonstrate common general knowledge. E12 and E13 are presented as evidence to support such knowledge.

However, as explained above, the Board does not dispute the alleged common general knowledge (see points 3.5 and 3.8 above). Consequently, the exceptional circumstances alleged by the appellant opponent do not exist.

5.4 In the absence of any exceptional circumstances under Art. 13(2) RPBA, the Board decided not to admit evidence E12 and E13 into the appeal proceedings.

6. All objections raised by the appellant opponent have either been deemed inadmissible or have failed to convince the Board. Consequently, their appeal fails.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Magouliotis

G. Martin Gonzalez

Decision electronically authenticated