BESCHWERDEKAMMERN DES EUROPÄISCHEN PATENTAMTS

BOARDS OF APPEAL OF THE EUROPEAN PATENT OFFICE

CHAMBRES DE RECOURS DE L'OFFICE EUROPEEN DES BREVETS

A		B		C	X

File Number: T 875/90 - 3.4.2

Application No.: 83 630 007.9

Publication No.: 0 084 514

Title of invention: Automated tire measurement apparatus

Classification: G01M 17/02

D E C I S I O N
of 20 January 1993

Applicant: THE GOODYEAR TIRE & RUBBER COMPANY

Opponent: Seichter GmbH

Headword:

EPC Article 54

Keyword: "Public prior use - confirmed"

Europäisches Patentamt | European Patent Office | Office européen des brevets

Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number : T 875/90 - 3.4.2

D E C I S I O N
of the Technical Board of Appeal 3.4.2
of 20 January 1993

Appellant : (Proprietor of the patent)
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Decision under appeal :
Decision of the Opposition Division of the European Patent Office given on 23 April 1990 with written reasons posted on 12 September 1990 revoking European patent No. 0 084 514 pursuant to Article 102(1) EPC.

Composition of the Board :

Chairman : C. Black
Members : W.W.G. Hofmann
C.V. Payraudeau
M. Chomentowski
F. Benussi

Summary of Facts and Submissions

I. The appeal contests the decision of the Opposition Division to revoke the Appellant's European patent No. EP-B-0 084 514.

II. The reason for the revocation was that the subject-matter of Claim 1 according to each of two requests then under consideration was not novel in view of an established public prior use. In arriving at the decision, the Opposition Division relied on evidence given by the witness Michael Sondermann during oral proceedings and supported by document A3 (see paragraph III below).

III. Documents cited in the opposition proceedings are identified by the Board as follows:

A2: Anlage 2 referred to in the notice of opposition and consisting of a red ring binder containing information concerning the products of the firm Dynamic Data Corporation (hereinafter DDC) in the form of an introduction and 12 appendices;

A3: Anlage 3 accompanying the notice of opposition and consisting of two order forms dated 2 November 1981 of the firm Dunlop AG;

A4: Anlage 4 accompanying the notice of opposition and consisting of a letter from the firm Block and Seichter OHG to the firm Continental Gummi-Werke AG containing an offer of tire-testing equipment RFP-1, and a corresponding receipt dated 28 September 1981.

In the course of the appeal proceedings the Board introduced the document:

D1: GB-A-2 072 346, which is referred to in the patent in suit.

IV. In the Grounds for the Appeal, the Appellant argued mainly that the requirements for establishing prior use, e.g. as set out in the Decision T 194/86, had not been met, and that the Opposition Division's decision had been based on oral evidence which depended on the witness recalling what had happened nine years previously. In a preliminary communication the Board expressed the provisional opinion that a system having the features described by the witness is comprised in the state of the art relating to the patent in suit. The Appellant subsequently proposed that the witness be heard again in order to clarify certain points in his testimony and also so that he could be questioned in respect of the subject-matter of the dependent claims of the patent in suit. In the communication accompanying the summons to oral proceedings, the Board indicated its opinion that after two more years the witness's recall of what happened in 1981 would not have improved, and that hearing him again would be unlikely to shed further light on the facts relevant to the decision. This applied also to the Respondent's proposal that three further witnesses, employees of Dunlop at the relevant time, should be heard.

V. At the oral proceedings, the Appellant requested that the decision under appeal be set aside and the patent be maintained in amended form on the basis of Claims 1 to 3 filed during the oral proceedings. The Respondent (Opponent) requested that the appeal be dismissed.

VI. Claim 1 according to the Appellant's request reads as follows:

"Method for inspecting inflated pneumatic tires (119) for irregularities using at least two sensor means (118a, 118b) for generating tire data that are analyzed by an electronic processing unit (140) in order to indicate at least one of a set of multiple conditions of the tire in response to the tire data,
characterized
in that at least two independent tire testing algorithms are stored in the electronic processing unit;
in that the tire data are detected by generating an analog signal;
in that the analogue tire data signals are converted into digital tire data signals by further means (144) of said processing unit (140), representing a plurality of tire dimensional values;
in that said digital tire data signals are stored in a memory;
in that tire data of various combinations of sensor means and of said stored testing algorithms are mixed and matched to indicate different ones of said multiple conditions;
in that for each predetermined sensor means or combination of sensor means a predetermined algorithm or combination of algorithms is selected by an operator; in that the selected combination of algorithm and sensor means is used to generate and analyze tire data in order to obtain a resulting value indicative of the condition of the tire;
in that the resulting value is compared against a limit value to determine whether the tire is acceptable; and in that the comparison of said resulting value against said limit value is used to indicate the acceptability of the tire."

Claims 2 and 3 are dependent on Claim 1.

VII. The Appellant's further submissions in support of his request may be summarised as follows: The witness's testimony does not give a sufficient description of the device which is the subject of the prior use or of its mode of operation. Further, dates mentioned in the testimony and referred to in the decision under appeal are not verified, in particular that of the final report. This final report has moreover not been furnished so that there is no indication of its content, or of who signed it.

The witness stated that the second device did not work in the same way as the first, indicating changes in the mode of operation. It is therefore not clear that the operating instructions contained in Annex 12 of A2 refer to the first device; these could rather refer to the second, different, device.

There is moreover a doubt concerning the impartiality of the witness, because the Respondent appears to have access to internal documents of Dunlop, the witness's employer, suggesting that there is some connection between the two.

The Respondent argued that the evidence of a witness has the same value as written evidence, otherwise there is no point in hearing a witness. In any case, the witness's evidence is corroborated by written evidence (A3). The Respondent further drew attention to the fact that the claim is a process claim, so that internal features of the device are of no consequence. The operation of the device could moreover be seen by car manufacturers and dealers at open door days, when the particularly interesting end inspection of the tires was demonstrated.

VIII. In the course of the oral proceedings, the Respondent presented the further documents:

A5: Procurement request ("Bedarfsmeldung") dated 15 May 1981 which resulted in the first DDC device being ordered;

A6, A7: Procurement requests dated October 1981 (date not completely legible) and corresponding to the order forms A3;

A8: An internal document of Dunlop dated 7 December 1981 containing proposals for alterations to the DDC measuring system.

Reasons for the Decision

1. The appeal is admissible.

2. Claim 1 now under consideration is derived, apart from the feature on lines 18 to 21, from a combination of the features of Claims 1, 2 and 5 of the granted patent, which features have a counterpart in the original application document, so that to this extent no objection under Article 123(2) and (3) EPC arises. The Board has some reservations concerning the remaining feature, linked with the question of clarity of this feature and its interpretation (see paragraph 3 below) but since the appeal fails for other reasons, the question of complete compliance with Article 123 will not be gone into further.

3. As compared with the claims forming the basis of the decision revoking the patent, Claim 1 has been amended to take into account an objection raised by the Board in the communication accompanying the summons to oral proceedings, to the effect that certain features drawn upon by the Appellant in order to emphasise the distinction between the claimed subject-matter and the prior art were not reflected in the wording of the claim.

As a result of the amendments, the expression "mixed and matched" has been introduced into the claim, and according to the claim it is tire data which are mixed and matched (lines 18 to 21). There are three instances of the use of this expression in the description, none of which appear wholly consistent with the wording of the claim. Column 1, lines 58 to 61 states: "There is no convenient and reliable way to mix and match a tracking probe with more than one testing algorithm or vice versa". Column 2, lines 27 to 32 similarly refers to mixing and matching tracking probes and testing algorithms according to test criteria, and column 7, lines 7 to 9 states that Table 2 provides the ability to mix and match types of test algorithms or data analyses with different sensors.

At the oral proceedings the Appellant explained that what was meant was that data from one or more sensors could be associated with one or more algorithms. However, this feature is contained in lines 22 to 24 of Claim 1 so that the matter contained in lines 18 to 21 is adding nothing by way of clear definition.

Nevertheless, on the basis of the Appellant's explanation, the Board is of the opinion that the claim is sufficiently clear for the examination of other aspects of patentability to be carried out.

4. From the minutes of Herr Sondermann's evidence of 23 April 1990, the following emerges: After a visit to DDC by Herr Schaffer of Dunlop (now SP Reifenwerke), Dunlop ordered by telephone on 15 May 1981 from DDC a system described as Bulge Testing Equipment. The date was derived from Dunlop files (see A5), the order was placed without a previous written quotation from DDC and there is no bill or receipt. As a result of Herr Sondermann's experience with the system, Dunlop ordered on 2 November 1981 a fifth

sensor for their existing C-3000 Bulge Testing Equipment and a further C-3000 system (A3, Dunlop's order forms referring to DDC's quotation Nos. 810288 and 810289 of 15 October 1981). Accordingly the Board is satisfied that Dunlop were in possession of a C-3000 system (the first system) before the priority date of the patent in suit.

The Board is moreover satisfied that Dunlop used this system without any obligation of secrecy. It is true that it was ordered and received under somewhat unconventional circumstances, because it was required urgently. However, the fact that Dunlop were able to order a second device under conventional circumstances indicates that the C-3000 system was freely available to the public. In any case, in spite of the "unconventional circumstances" it seems clear that Dunlop actually bought the device, and were not simply sent it by DDC for testing purposes, because on the order forms it is referred to as "our device".

According to Herr Sondermann's testimony, the first device consisted of four sensors, means for adjusting these and a programmed computer. It could measure bulges, depressions and lateral run-out. By moving one of the sensors, radial run-out could also be measured. With the aid of a setting up menu, each sensor could be individually switched on and set, according to which measurement or measurements were to be undertaken. Once set up, the device ran automatically.

It is clear that the programmed computer has to contain stored test algorithms corresponding to the various measurements to be carried out on the tire and also that the analog data obtained from the sensors has to be digitally stored in order to be further processed. Accordingly, in using the first DDC device one is

inevitably carrying out the process steps required by Claim 1. The claim, even as amended, is still presented in broad and general terms so that more detailed description of the mode of operation of the DDC device is not required to attack the claim. The Appellant's objection in this respect in section II of the Grounds for the Appeal ("the detailed remarks ... etc.") is therefore not well founded.

In respect of the foregoing, documents A6 and A7 are seen as a superfluous confirmation of A3. It was not necessary to take A8 into consideration but its content is wholly consistent with the testimony of the witness.

5. The Board has come to this conclusion independently of the operating instructions for the C-3000 device contained in A2, Appendix 12. No date can be ascribed to these instructions so that it cannot be said with certainty that they apply to Dunlop's first C-3000 device. Nevertheless, the Board notes from the introductory pages of A2 that as the DDC systems developed, they were given the numbers 1000, 2000 and 3000 and it seems reasonable to suppose that systems having the same numbers are basically the same. For example, modifications of the C-2000 series have been given numbers such as C-2010, C-2010-3AX and CAGP-100 (a smaller version without digital processing). It therefore appears more likely than not that the instructions for the C-3000 in Annex 12 will apply to Dunlop's first C-3000 device.

Briefly, the C-3000 is a completely automatic system (top of first page) which can measure radial run-out, lateral run-out and detect bulges and depressions, though there is an option permitting operation in a manual mode (point 4). A computer system contains all the circuitry and controlling logic for operating the device (System

Operation) and the section Operator Commands together with Figures 1 and 2 indicates that at least two algorithms are available (one for bulge/depression and the other for peak to peak) in association with a plurality of sensors. Appendix 12 is thus seen as corroborating the above finding that operating Dunlop's first DDC device results in carrying out the process steps of Claim 1.

6. The Appellant has objected that various dates referred to in Herr Sondermann's testimony have not been verified. In the Board's view the only dates that matter are those derived from A3 which prove that a C-3000 system was in the possession of Dunlop before 15 October 1981 and which the Board sees no reason to question. The question of the date of a final report, or of who signed it, is of no significance. All that matters is that a second device, and an addition to the first device, was ordered.

7. The fact that the second device did not behave exactly as the first (page 3 of Herr Sondermann's testimony), this giving rise to a complaint from Dunlop to DDC, is not seen as being of significance, because it is the first device with which we are concerned here. The second device might have merely been defective in some way. In any case it apparently bore the same designation C-3000, so that in all probability it did not otherwise differ materially.

8. The Appellant also questions the impartiality of the witness, because the Respondent appears to have had access to inside information of the witness's employer Dunlop. However, the witness acknowledged that SP Reifenwerke (formerly Dunlop) obtains tire-testing equipment from the Respondent. The Respondent would therefore be expected to know what other types of equipment Dunlop had used and that Dunlop on request, in a situation such as the present

one, would have given the Respondent any necessary information.

9. The Board finds the witness's testimony to be self-consistent and credible. The Board accepts too that the fact that it was his first task on taking up employment with Dunlop to compare the DDC device with others is an aid to his memory of what happened. As regards what he could not remember, this has been acknowledged, for example the fact that he did not remember when the DDC device became known as the C-3000 device. It is however not surprising that the C-3000 device was known to those working with it as the DDC device, since it is to be expected that they would use the simplest designation which identified the device and distinguished it from others. Only the buying department would later require to identify it more accurately.

10. In view of the foregoing it is not necessary to go into the question of whether Claim 1 is patentable over D1.

Order

For these reasons, it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

P. Martorana C. Black

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