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D E C I S I O N
of 17 October 2002

Case Number: T 0900/01 - 3.2.4

Application Number: 94910063.0

Publication Number: 0688162

IPC: A01K 1/12

Language of the proceedings: EN

Title of invention:
A method and a device for surveying animal functions

Patentee:
PROLION B.V.

Opponent:
Maasland N.V.

Headword:
-

Relevant legal provisions:
EPC Art. 54, 56, 69, 84, 100, 111(1), 123

Keyword:
"Clarity (main request) (yes)"
"Claim amended so as to extend protection conferred (main request) (no)"
"Added subject-matter (main request) (no)"

Decisions cited:
T 0396/99

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0900/01 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 17 October 2002

Appellant: (Proprietor of the patent)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 31 May 2001 revoking European patent No. 0 688 162 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: C. A. Andries
Members: C. D. Scheibling
H. Preglau

Summary of Facts and Submissions

I By its decision dated 31 May 2001 the Opposition Division revoked the European Patent No. 0 688 162. On 31 July 2001 the appellant (patentee) filed an appeal and paid the appeal fee simultaneously. The statement setting out the grounds of appeal was received on 09 October 2001.

II The patent was opposed on the grounds based on Articles 100(a) (54 and 56), 100(b) and 100(c) EPC. The decision of the Opposition Division solely referred to the ground based on Article 100 (c) (123 (2)) EPC.

III. Oral proceedings took place on 17 October 2002. During these proceedings the appellant filed a new main request based on a new independent claim 1 and new first, second and third auxiliary requests each respectively based on new independent claim 1.

IV. The appellant (patentee) requested that the decision under appeal be set aside and that the patent be maintained on the basis of the main request or of one of the first, second or third auxiliary requests.

The respondent (opponent) requested that the appeal be dismissed.

The Board informed the parties that, should the ground for opposition based on Article 100(c) as well as Article 123 EPC not prejudice the maintenance of the patent, i.e. should claim 1 of one of the requests fulfill the requirements of Articles 100 c) and 123 EPC, it intended to remit the case to the first instance for further prosecution.

The parties agreed with the Board's approach.

V. Independent claim 1 of the main request reads as follows:

"1. Method for surveying animal behaviour by means of an animal manipulating device such as a milking apparatus, in particular a milking robot, wherein a programmable control system is used in order to subject the animal to a predetermined sequence of operations, that is, for instance positioning, applying of teatcups, milking and subsequent or simultaneous feeding and removing the animal, wherein the operations to which the animal is subjected, for instance milking, are programmed in respect of time duration specific per individual animal and that at least one warning signal is generated by the control system if a time duration for a current operation is exceeding or not attaining said programmed specific time duration due to the current behaviour displayed by the animal, in order to detect non function or aberrant functions of the animal".

Independent claim 1 as granted reads:

"1. Method for surveying animal behaviour by means of an animal manipulating device such as a milking apparatus, in particular a milking robot, wherein a programmable control system is used in order to subject the animal to a predetermined sequence of operations, that is, for instance positioning, applying of teat cups, milking and subsequent or simultaneous feeding and removing the animal, with one of the operations to which the animal is subjected, for instance milking, being stored in respect of time for use in the program,

characterized in that the remaining operations to which the animal is subjected and the resultant specific animal behaviour is also stored in respect of time for use in the program and that at least one warning signal is generated by the control system if a time duration determined in the program for a current behaviour is exceeded or not attained, in order to detect non-function or aberrant functions of the animal".

Reasons for the Decision

1. The appeal is admissible.

2. *Interpretation of the independent claim 1 as granted*

2.1 The Board considers that the wording of claim 1 as granted is unclear, so that first of all it has to be determined what the scope of claim 1 as granted is.

2.2 In the light of the patent specification, column 1, lines 39 to 49; column 2, lines 35 to 38 (description of WO-A-94/19931, page 2, lines 4 to 24; page 3, lines 26 to 29) it becomes clear that for each type of operation to which an animal can be subjected a specific predetermined, normally required time to carry out that operation (expected duration) for each specific animal not only has been stored previously in the program, but is afterwards also used to be compared to the time effectively needed when that operation is performed on the given animal. Thus, for one type of operation and one specific animal, only one data (or value) (the predetermined expected time duration) has been stored in the program, which means that according

to the wording of claim 1 as granted neither the effectively measured duration of an operation nor any other additional value or data related to the current behaviour is to be stored in the program.

The expression "stored in respect of time for use in the program" has to be understood in relation with the feature "programmable control system".
This implies to the Board, that the above mentioned specific, predetermined, expected time durations are stored in a control system and are used to be compared with actual (current) measured values.

2.3 Therefore, the following passage of claim 1 as granted which reads "wherein a programmable control system is used in order to subject the animal to a predetermined sequence of operations, ... , with one of the operations to which the animal is subjected, for instance milking, being stored in respect of time for use in the program, characterized in that the remaining operations to which the animal is subjected and the resultant specific animal behaviour is also stored in respect of time for use in the program" has to be interpreted as meaning that:

- firstly, each animal is subjected to more than one operation, since claim 1 refers to "one operation" on the one hand and to "the remaining operations" on the other hand and since the indications "a predetermined sequence of operations" as well as "one" and "remaining" neither imply a specific number of operations, nor specific kinds or types of operations involved (the types of operation indicated in the claim being only optional due to the words "for instance"), and

- secondly, for each type of operation to which a specific animal can be subjected, solely one predetermined (expected) time duration has been programmed previously (i.e. stored to be used in a program).

This interpretation was acknowledged by the appellant (patentee) as being the sole intended and disclosed one.

2.4 The respondent argued however that in the above passage, the characterizing part of claim 1 as granted indicated two data to be stored, i.e. the "remaining operations to which the animal is subjected" on the one hand and "the resultant specific animal behaviour" on the other hand, which both had to be "stored in respect of time for use in the program". The respondent furthermore stated that the expression "the resultant specific animal behaviour" represents a current and not a previously predetermined value. These interpretations cannot be accepted by the Board because said interpretations would be in contradiction not only with the passages of the description of the patent as granted cited above, but also with the expressions "... is also stored ..." and "current behaviour" also being present in claim 1 as granted. Indeed apart the fact that the expression "is also stored" implies due to the presence of the word "is" normally one data (and not two data, which would call for the expression "are also stored"), the data implied by the expression "resultant specific animal behaviour" has to be different from the data implied by the expression "current behaviour" which is also present in claim 1 as granted and which suggests the behaviour of an animal during the time said animal is subjected to the operation, and which

cannot be considered as being equal to the already programmed expected time duration resulting from the behaviour of that animal.

2.5 In this respect the Board wants to emphasize that when considering a claim, a skilled person should rule out interpretations which are illogical or which do not make technical sense. He should try to arrive at an interpretation of the claim which is technically sensible and takes into account the whole disclosure of the patent (Article 69 EPC). The patent must be construed by a mind willing to understand not a mind desirous of misunderstanding (T 396/99, ultimate paragraph of section 3.5).

2.6 Finally, claim 1 as granted comprises the expression "a warning signal is generated ... if a time duration determined in the program for a current behaviour is exceeded or not attained". It is clear from the description of the patent as granted (column 1, lines 39 to 53) that the warning signal is generated if an expected, predetermined time duration previously stored in the program for a type of operation to which a specific animal can be subjected is exceeded or not attained by the actual measurement of the time duration when the animal involved is subjected to that operation. Therefore, a person skilled in the art willing to arrive at an interpretation which is logical and which makes technical sense, would automatically consider that said "time duration" in the above expression is a predetermined, expected and stored time duration for a specific animal and a specific operation and that said time duration is used to be compared to the actual duration of that type operation to which said animal is subjected, which actual duration depends

of course of the animal's present behaviour.

3. *Main request - amendments*

3.1 Claim 1 of the main request refers to a "method for surveying animal behaviour..." whereas claim 1 of WO-A-94/19931 referred to a "method for surveying animal functions ...".
The respondent argued that surveying a "behaviour" is different from surveying a "function". However, in the Board's view, this specific change of the word "function" into "behaviour" does neither explicitly nor implicitly modify the subject-matter of claim 1, i.e. any of the method steps claimed, nor does it modify the result to be obtained as defined in the last feature of claim 1, so that the scope of the claim remains is this specific case strictly the same, regardless of the possible difference between the words "function" and "behaviour".

3.2 The passage of the claim as granted which read "with one of the operations to which the animal is subjected, for instance milking, being stored in respect of time for use in the program, characterized in that the remaining operations to which the animal is subjected and the resultant specific animal behaviour is also stored in respect of time for use in the program" was amended to read "wherein the operations to which the animal is subjected, for instance milking, are programmed in respect of time duration specific per individual animal".

3.2.1 The respondent argued that the claim as granted disclosed a specific operation on the one hand and the remaining operations on the other hand and that

therefore when regrouping said operations it should read "all operations" and not "the operations". The Board however cannot accept this argument. In claim 1 of WO-A-94/19931 it was stated "the operations to which the animal is subjected ...". This feature was split in the claim as granted into "one operation" and "the remaining operations". Now these separate operations are regrouped again to read "the operations ...". Thus, the expression "the operations" does not contravene Article 123 (2) EPC.

Furthermore, the Board cannot see in this case a difference between the expression "all the operations" and "the operations", since the only information which could have been deduced from claim 1 as granted in this respect (one - remaining) was solely the feature that each animal is subjected to more than one operation, as already explained in section 2.3 above. The same information is however also given in claim 1 of the present main request due to the presence of the expression "the operations" and "sequence of operations" so that the amendments made in this respect do not extend the protection conferred (Article 123 (3) EPC).

3.2.2 The respondent further argued that the expression "programmed in respect of time duration" contravenes Article 123 EPC since "programmed" does not mean "stored" and "time" is different from "time duration".

Claim 1 of the main request refers to "programmed in respect of time duration specific per individual animal", which in view of the description of the patent in suit and in view of the "programmable control system" implies that a specific value for the time

duration for a specific operation and for a specific animal is to be used in a program, i.e. that it is always present to be used when needed namely stored to be used in the program.

The Board therefore is of the opinion that "programmed" in the meaning of the patent in suit means "stored in the program" since it is not clear to the Board how it should be possible to have something "programmed in respect of time duration" without having said time duration stored in the program.

The respondent also objected to the change of the word "time" into "time duration". Although the Board agrees with the respondent that the word "time" can designate as well a duration as the moment at which a definite event occurs, it is clear that solely a "time duration" was meant, from the description of the patent in suit (column 1, lines 39 to 45) and from WO-A-94/19931 as originally filed in the Dutch language, wherein the term "tijdsduur" was used, which was afterwards translated by the term "time" in the publication in the English language.

The Board therefore comes to the conclusion that for these amendments there was a clear basis in WO-A-94/19931 and that they did not extend the protection conferred.

3.2.3 Finally the respondent objected that in the claim as granted a time duration was determined in the program "for a current behaviour" whereas in claim 1 of the main request it is stated "if a time duration for a current operation is exceeding or not attaining said programmed specific time duration due to the current

behaviour displayed by the animal" and that consequently, the time duration was no longer determined by the program and no longer related to the behaviour but to an operation.

The Board notes that claim 1 as granted does not state "a time duration is determined by the program" but "a time duration determined **in** the program" which means that the time duration is not calculated by the program as "is determined by" would imply, but that it is stored in advance in the program in the sense of "in advance fixedly stored in the program". The use of the word "operation" instead of "behaviour" only expresses what a skilled person would have normally understood when reading "behaviour" in the context of the patent in suit (see also section 2.6, above).

3.3 Thus, the Board considers that claim 1 of the main request expresses more clearly what a skilled person would have understood when reading claim 1 as granted in the light of the description and that the subject-matter of claim 1 of the main request meets the requirements of Articles 84, 100(c), 123(2) and (3) EPC.

4. *Auxiliary requests*

Since claim 1 corresponding to the main request is found to satisfy the requirements of Articles 84, 100(c) and 123 EPC, there is no need to examine the auxiliary requests.

5. *Remittal*

Thus, owing the fact that the Opposition Division did

not comment on the further grounds for opposition raised by the respondent (opponent), the case is remitted to the first instance, according to the provisions of Article 111(1) EPC for further prosecution on the basis of the main request.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The case is remitted to the first instance for further prosecution on the basis of the main request comprising

Claims	No.1 as filed during oral proceedings No. 2 to 4 as granted,
Description	columns 1 and 2 as filed with letter of 25 September 2002. columns 3 and 4 as granted,
Drawings	sheet 1/1 as granted.

The Registrar: The Chairman:

G. Magouliotis C. Andries