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Datasheet for the decision of 19 July 2007

Case Number: T 0056/06 - 3.2.02

Application Number: 96201221.7

Publication Number: 0743043

IPC: A61B 5/11

Language of the proceedings: EN

Title of invention:
An animal activity meter

Patentee:
MAASLAND N.V.

Opponent:
DeLaval International AB

Headword:
-

Relevant legal provisions:
EPC Art. 100(c), 123(2)

Keyword:
"Added subject-matter (yes)"

Decisions cited:
-

Catchword:
-

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Case Number: T 0056/06 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 19 July 2007

Appellant: (Opponent)
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Decision under appeal:
Interlocutory decision of the Opposition Division of the European Patent Office posted 10 November 2005 concerning maintenance of the European Patent No. 0743043 in amended form.

Composition of the Board:

Chairman: T. Kriner
Members: S. Chowdhury
A. Pignatelli

Summary of Facts and Submissions

I. The appellant (opponent) lodged an appeal against the decision of the opposition division relating to European patent No. 0 743 043. The opposition division had decided that account being taken of the amendments made by the patent proprietor during the opposition proceedings, the patent and the invention to which it related met the requirements of the EPC. The decision was dispatched on 10 November 2005.

The appeal was received on 12 January 2006, and the fee for the appeal was paid on the same day. The statement setting out the grounds of appeal was received on 16 March 2006.

II. The opposition was filed against the whole patent and based on Article 100(a) EPC (lack of novelty and inventive step), Article 100(b) EPC, and Article 100(c) EPC.

III. Oral proceedings were held on 19 July 2007. The following requests were made:

The appellant requested that the decision under appeal be set aside and that European patent No. 0 743 043 be revoked.

The respondent (patent proprietor) requested that the patent be maintained on the basis of claims 1 and 2 of the request filed during the oral proceedings.

IV. Independent claim 1 reads as follows:

"A system for measuring the activity of an animal, said system being provided:
with an animal activity meter (1) in which means (2) for detecting movements made by an animal and for providing signals representing these movements, a transponder (6), and a control circuit (4) for controlling the transponder (6) are incorporated,
with a device (3) for counting movements made by an animal,
with a sensor (8) and a computer (7), said sensor (8) being connected to the computer (7), and
with memory means (5) for recording the count of the counting device,
wherein said transponder (6) and said sensor (8) are suitable for transmitting signals representing the movements made by an animal to the computer (7), said computer (7) being suitable for reading out from said memory means (5) and recording said signals representing the movements made by an animal,
characterized in that said control circuit (4) is suitable for resetting the counting device (3) after a pre-fixed period of time, and suitable for controlling the recording of the count of the counting device (3) in the memory means (5) after the pre-fixed period of time has elapsed, in that said memory means (5) is suitable for storing a series of counts, and in that said animal activity meter (1) is provided with a sensor (9) for measuring the distance to the ground and for inciting a signal indicating that the animal is lying, standing or walking".

Claim 2 is a dependent claim.

V. The parties argued as follows:

Appellant

The features "said computer (7) being suitable for reading out from said memory means (5) and recording said signals representing the movements made by an animal" was not disclosed in the application as originally filed. None of the references to reading out data from the memory, in the application, made a reference to the computer.

The application and Figure 1 clearly showed that data transmission occurred from the activity meter 1 to the sensor 8 and not the other way around. The computer was passive and did not dial up the information.

If there were any ambiguity in an expression then it must be defined in an application. The expression "read out" meant an active retrieval of information by the computer, and this was not disclosed.

Respondent

The application must be construed with a mind willing to understand, not a mind desirous of misunderstanding. Given this, it was implicit from the arrows shown in Figure 1 that for the system to obtain information from the memory the computer must be capable of reading out this information. In the context "read out" was synonymous with "read in".

When an animal approached the sensor 8 the combination of the transponder and the sensor, under control of the computer, caused the information to be read out. As the transponder and the memory were clearly not suitable for performing the read out step, so this must be done by the computer, i.e. it was suitable for reading out the information.

Reasons for the decision

1. The appeal is admissible.

2. Article 100(c) EPC

2.1 The respondent contends that, given that the transponder and the memory are clearly not suitable for performing the read out step, it is implicit that the computer must be capable of doing so and that.

2.2 As a matter of plain language, however, the expressions "read out" and "read in" are not synonymous. Therefore, if the computer is capable of reading information in it does not automatically render is suitable for reading out information. There are different possibilities (set out below in points 2.3 and 2.4, respectively) for reading out the information from the memory, apart from the one favoured by the respondent, that it is the computer which effects the read out (the first possibility), but none of these possibilities is explored in the application.

2.3 The various elements of the claimed system are represented by "black boxes" in the solitary embodiment

described. It is not clear exactly what each box comprises, but it is possible, for example, that the "transponder box" also includes some control device for reading out the information from the memory. This is the second possibility.

2.4 As a third possibility, it is, alternatively, feasible for the data in the memory to be read out under the supervision of the control circuit 4, and indeed, this would appear to be more plausible agent for transferring the data than the computer since the circuit 4 is clearly shown (by means of arrows) as controlling the counting device 3, the memory 5, and the transponder 6. By contrast the computer 7 is not shown as exerting such direct influence on these elements.

Each reference in the application as originally filed to transmitting the information in the memory states that the counts in the memory can be recorded in the computer by means of the transponder and the sensor (see EP-A-0 743 043, column 4, lines 22 to 25, 34 to 36 and 50 to 51, column 5, lines 51 to 54, and claims 1 and 6). Thus, the computer is represented in all these passages as a passive device while the transponder and sensor are presented as the agents for effecting information transfer.

2.5 Therefore, there are at least three possible means for reading out the information from the memory, and it is not implicit that it must be the computer that does so. Thus, there is no direct and unambiguous disclosure, in the application as originally filed, of the contentious features.

2.6 Therefore, claim 1 does not meet the requirement of Article 123(2) EPC.

ORDER

For these reasons, it is decided that:

1. The decision under appeal is set aside.

2. The patent is revoked.

The Registrar The Chairman

A. Vottner T. K. H. Kriner