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**Datasheet for the decision
of 23 June 2016**

Case Number: T 2554/11 - 3.2.04

Application Number: 02076177.1

Publication Number: 1245150

IPC: A01J5/017, A01J5/007

Language of the proceedings: EN

Title of invention:

A construction for automatically milking animals

Patent Proprietor:

Lely Enterprises AG

Opponents:

DeLaval International AB
WestfaliaSurge GmbH

Headword:

Relevant legal provisions:

EPC Art. 14(4), 54, 100(a), 108
RPBA Art. 13(3)
EPC R. 6(3)
RFees Art. 8

Keyword:

Underpayment of appeal fee

Protection of legitimate expectations (yes)

Deemed filing of the appeal (yes)

Novelty - main and first auxiliary requests (no)

Admission of new auxiliary request 2 (no)

Decisions cited:

T 0595/11, T 1037/11

Catchword:



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Case Number: T 2554/11 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 23 June 2016

Appellant:
(Patent Proprietor)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 26 October 2011
revoking European patent No. 1245150 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman A. de Vries
Members: E. Frank
 T. Bokor

Summary of Facts and Submissions

- I. The appeal lies from the decision of the opposition division, decided in oral proceedings on 12 October 2011 and posted on 26 October 2011 to revoke the European patent No. 1 245 150 pursuant to Article 101(2) EPC. The appellant (proprietor) filed a notice of appeal on 13 December 2011, paying the appeal fee on the same day (for further details in this respect see point III below). The statement of grounds of appeal was submitted on 2 March 2012.
- II. Two oppositions were filed against the patent as a whole and based on Article 100(a) in conjunction with Articles 52(1), 54, and 56, and Article 100(b) in conjunction with Article 83 EPC.

The opposition division held that the patent as granted (main request) and the auxiliary request filed with letter dated 12 September 2011 did not meet the requirements of the EPC, in particular for lack of novelty of claim 1. In its decision the division considered the following prior art, amongst others:

D1 = US 6,073,579
D7 = EP 0 576 086 A2
E1 = WO 99/31967
E8 = EP 0 713 641 B1

- III. The appellant proprietor is Lely Enterprises AG, a legal person registered in Switzerland. The notice of appeal was filed in Dutch, with a simultaneously filed English translation. A debit order for the payment of EUR 944 as appeal fee was enclosed with the notice of appeal.

The file number of the appeal and the fact that it has been referred to the present Board was communicated to the parties with a Communication dated 21 December 2011 (EPO Form 3204) without any further comments. Copies of the grounds of appeal were sent to the respondents (opponent 1 and 2) on 9 March 2012 (EPO Form 3344) by the Registrar of the Board, also without any comments. The respondent opponents 1 and 2 commented on the merits of the appeal with letters dated 4 July 2012 and 2 July 2012, respectively.

The respondent opponent 1 stated by a letter dated and filed 24 April 2015 that it had become aware of the fact that the notice of appeal had been filed in Dutch and a reduced appeal fee paid, though the appellant-proprietor was a Swiss company and thus not entitled to do so. They stated that the appeal was not valid and that the underpayment of the appeal fee meant that the appeal fee was not paid in time. It requested to reject the appeal as inadmissible.

Following a communication from the Board, the appellant commented on the issue of deemed filing in a letter dated 2 June 2015 and filed 3 June 2015, enclosing a notice of appeal in Italian. It also paid an amount of EUR 372, corresponding to 20% of the appeal fee applicable at the time of payment.

A second communication pursuant to Article 15(1) RPBA were issued on 18 May 2016 after an earlier issued summons to attend oral proceedings. The Board expressed its preliminary opinion that concerning the issue of deemed filing, the relevant facts of the case appeared to be the same as in cases T 0595/11 and T 1037/11, so that the Board was inclined to consider the appeal as deemed filed and admissible. The communication further

addressed the substantive issues of insufficiency of disclosure (Article 83 EPC) and novelty (Article 54 EPC).

The respondent opponent 1 commented on the communication by the Board with letter dated 24 May 2016, but only on the issue of novelty. Respondent opponent 2 did not make further written submissions.

- IV. The oral proceedings were duly held on 23 June 2016.
- V. The appellant requests that the appeal be deemed filed, and that the decision under appeal be set aside and the patent be maintained in an amended form on the basis of the main or first auxiliary requests, both filed with the grounds of appeal, or alternatively on the basis of new auxiliary request 2 filed during the oral proceedings before the Board.

The respondents (opponent I and II) request that the appeal be rejected as deemed not filed or at least be dismissed.

- VI. The wording of claim 1 reads as follows:

Main request

"A construction for automatically milking animals, said construction being provided with a milking robot and a computer which is capable of being connected with a number of measuring instruments which are related to a number of functions of the construction, characterized in that a monitoring program for said functions is installed in the computer, with the aid of which the computer is suitable for determining, on the basis of a

comparison of data from one or more of the measuring instruments with reference data related to said functions, a diagnosis in relation to an anticipated fault in one or more of said functions."

First auxiliary request:

Claim 1 is as in the main request but adds at its end the following text (in italics added by the board):

"... functions, and the computer is programmed such that the diagnosis comprises the anticipated point of time or an anticipated time interval for the malfunction."

New auxiliary request 2:

Claim 1 is as in the first auxiliary request but adds at its end the following text (in italics added by the board):

"... malfunction, and the computer is programmed such that the diagnosis comprises an instruction to avoid the anticipated malfunction, and the instruction comprises a time indication for the action to be taken."

VII. The appellant argued as follows:

Deemed filing of the appeal:

The Office had a duty to check the formalities of the appeal, such as language and appeal fee. The appellant was actually entitled to fee reduction, and merely used the wrong language, instead of Italian. Neither respondents nor third parties had noticed anything wrong for over three years. The *ratio decidendi* of J 14/94 was applicable in the present case. In

particular, the Office itself acted as if everything was in good order. The appellant paid annuities for several years, which the Office accepted. Given the length of the time passed, the well-known principle of statutory limitation was applicable. Even if the appellant could not have expected a warning from the Office still within the time limit for filing the notice of appeal, a warning in good time, sufficiently early for the filing of a request for re-establishment of rights ought to have been given by the Office. Given the duty of the EPO to check formalities, such a warning could have been expected at least within some months after the notification of the impugned decision, essentially within the time limit for the filing of the grounds of appeal, but certainly within one year, in order to permit a request for re-establishment of rights. Further, the relevant facts of the present case were essentially the same as those underlying decision T 0595/11 by the present Board. Therefore, the principle of the protection of legitimate expectations should be applied similarly in favour of the appellant and the appeal should be deemed as filed.

Novelty:

In claim 1 of the patent the malfunction is anticipated, i. e. has not yet occurred. In other words, the fault is approaching, but the machine is still working properly. This is in contrast to the prior art disclosures D1, E1, D7 or D8, where signalling of a detected actually occurring malfunction takes place, and the user has to act immediately to replace or exchange a machine part. See D1, col.2, ln. 58; E1, p. 7, ln. 4-10; D7, col. 1, ln. 33-36; and E8, para 0002 and para 0007. Thus, due to lack of diagnosis of a future malfunction as in claim 1 of the

patent, no (early) actions can be planned by the prior art machines. Consequently claim 1 of the patent produces a first (early) stage signal anticipating a fault, whereas the computers of the prior art produce a second (later) stage "warning" signal in the event that the existence of malfunction is detected and the machine is not working anymore. Such a well-known second stage "warning" signal to replace or repair a faulty part due to existing malfunctions may be additionally provided in the patent, see para 0003, where it is stated that "The invention aims at improving and further automating such a construction.". Thus, claim 1 of the main request is novel over D1, E1, D7 or D8. Since claim 1 of the first auxiliary request now explicitly requires that the diagnosis comprises an anticipated point of time or an anticipated time interval for the malfunction, preventative action can be planned in advance. This is nowhere derivable from the cited prior art and, thus, in any event claim 1 of the first auxiliary request must be considered novel in the light of D1, E1, D7 or D8. It is however conceded that an instruction which comprises a time indication as in claim 1 of the new auxiliary request 2 appears to be *prima facie* derivable from E8, col. 4, ln. 21-27.

VIII. The respondents argued as follows:

Deemed filing

Except for the letter of 24 April 2015 (see point III, third paragraph above), the respondents did not submit arguments concerning the deemed filing of the appeal, either in writing or during the oral proceedings.

Novelty:

Neither claim 1 nor the patent describes a "two-step process" to thus produce a first (early) stage signal prior to a fault, as well as a second (later) stage signal due to an existing fault. Moreover, the patent also does not explain how a malfunction is anticipated, i. e. no information as to the "earliness" of the anticipatory nature of claim 1 is given. The patent teaches two ways to achieve the diagnosis of claim 1, either to detect a developing fault or to monitor the amount of use. Thus, also the forewarning signal of the malfunction in D1, col. 2, ln. 8-13, and col. 3, ln. 1-7, when the teat cup liner becomes gradually faulty must be considered signalling a future malfunction, i. e. a diagnosis in relation to an "anticipated fault". This is irrespective of whether or not D1, col. 3, ln. 8-10, also detects existing faults such as a punctured or cracked liner. Therefore claim 1 of the main and first auxiliary requests lacks novelty over D1. Moreover, E1, D7 and D8 also deprive claim 1 of novelty, since malfunctions are likewise anticipated. As to new auxiliary request 2, this request is clearly late filed without reason and moreover is *prima facie* not immediately allowable, cf. E8, col. 4, ln.21-27. Thus, this new request should not be admitted into the proceedings.

Reasons for the Decision

1. Deemed filing and admissibility of the appeal
- 1.1 Pursuant to Article 14(4) EPC, legal persons registered in a Contracting State having an official language other than English, French or German, may file documents which have to be filed within a time limit in an official language of that State (admissible non-EPO language). They shall, however, file a translation in

an official language of the European Patent Office ('Office'). If a document is not filed in the prescribed language, or if any required translation is not filed in due time, the document shall be deemed not to have been filed.

1.2 Pursuant to Article 108 EPC, second sentence, the notice of appeal shall not be deemed to have been filed until the fee for appeal has been paid.

Article 8 RFees, first sentence stipulates that the time limit for payment shall in principle be deemed to have been observed only if the full amount of the fee has been paid in due time. Under Rule 6(3) EPC a reduced appeal fee is payable where a person files an appeal in an admissible non-EPO language under Article 14(4) EPC. In the present case, the time limit for filing the notice of appeal and thereby the time limit for paying the appeal fee expired on 5 January 2012. A reduced appeal fee pursuant to Rule 6(3) EPC was paid on 13 December 2011, and a full appeal fee was paid on 3 June 2015 (see point III, fourth paragraph above).

1.3 It is undisputed that the appellant was not entitled to use Dutch in filing documents with the EPO. It is also undisputed that the filing of the notice of appeal in Dutch did not entitle the appellant to benefit from the fee reduction. Rather, appellant argues that the EPO should recognise the appeal as valid, i. e. as deemed filed, both with regard to the used language and the fee payment, through the application of the principle of the protection of legitimate expectations.

1.4 It appears uncontested by the parties that the relevant facts of the present case concerning the deemed filing of the appeal are very similar to those underlying the decisions T 595/11 of 27 May 2015 and T 1037/11 of 29

June 2015, to which opponent 1 and the proprietor were also party and which were decided by the present Board in the same composition. Also opponent 2 was party to case T 1037/11 (albeit registered with a different name). The written reasons of both decisions were available to the public at least since November 2015. Furthermore, having received the preliminary opinion of the Board (see point VI above) none of the parties provided arguments why the Board should decide differently in the present case. The Board itself has carefully reviewed the facts and concludes that the reasoning given in the cited cases is also applicable in the present case. In particular, explicit reference is made to Nos. 1.1-1.16 of the Reasons in T 595/11 and to Nos. 1.1-1.24 of the Reasons in T 1037/11.

1.5 The differences in the length of time at various stages of the proceedings do not appear to be materially different from those in the cited cases. Here, the time limit of Article 108 EPC for filing the notice of appeal expired on 5th January 2012, while the EPO received the notice of appeal essentially three weeks earlier. Three years and four months have passed before the EPO or the respondents became aware of the deficient fee payment. Other procedural differences exist, but they do not appear to affect the issue of the deficient fee payment. Thus the Board has not identified any relevant fact that would motivate a different decision in the present case.

1.6 Therefore, following decisions T 595/11 and T 1037/11 the Board finds that the Office had a duty to inform the appellant about the deficient fee payment within a reasonable time frame after expiry of the Article 108 EPC time limit but did not do so. The three years and some three months cannot be regarded as a

reasonable time frame. An objective observer relying on the duty of the Office to act within a reasonable time would have concluded that the appeal had been examined for such formalities as the appeal fee and thus also for the correct language in the notice of appeal. In this manner also the appellant could have reasonably expected that fee and language were no longer an issue which could preclude the examination of the appeal on its merits. Its expectations were also legitimate, given that it had legitimate interests in the positive outcome of the appeal and there is no indication in the file that it were or ought to have been subjectively aware of its own error or the fact that the Office also did not discover it.

- 1.7 Having established that legitimate expectations of the appellant arose, the Board also finds that overall less harm is done if the appeal is deemed filed. The Board is aware that this may put the respondents in a worse position, in the sense that they will be prevented from immediately achieving their obvious and legitimate goal, the failure of the appeal, in the sense that the appeal would have failed without regard to its substantive merits.
- 1.8 The Board considers that as far as possible, the consequences of the non-observance of the duty of the Office should not be to the detriment of any party. However, the failure of the Office to check correct fee payment and issue a warning in good time cannot be remedied here without at least one party suffering some disadvantage or detriment.
- 1.9 Weighing up the legitimate interests of both sides and also that of third parties, and considering the overall circumstances of the case, the Board concludes that the

original error might have had serious and inequitable consequences through the Office's failure to discover it. Therefore, it is equitable that the Office's failure is made good and the error is now allowed to be remedied, as far as possible. The Board further considers that the possibility of a real, but otherwise in itself not necessarily decisive setback for a party is more preferable than a certain decisive loss of all rights for another party. Therefore the Board accepts, through the application of the principle of protection of legitimate expectations, that the appeal fee has been timely and fully paid. Similarly, it also accepts that the English translation of the notice of appeal in Dutch was the original notice of appeal. The Board considers that in this manner overall least harm is done to all parties and in the end the appeal can be decided on its merits.

1.10 The Board is satisfied that further criteria of a valid and admissible appeal are fulfilled. The Board concludes that the appeal is deemed to have been filed and admissible.

2. Interpretation of claim 1

2.1 Claim 1 is directed to a construction for automatically milking animals with a milking robot and a computer, wherein the latter is capable of being connected to measuring instruments for various functions. Moreover, a monitoring program is installed in the computer for making a "diagnosis in relation to an anticipated fault in one or more of the functions" by comparing data from one or more of the measuring instruments with reference data.

2.2 The appellant argues that whatever is defined as fault or malfunction, "anticipated" means that the fault has not occurred yet, that is, the machine is still working properly, but a fault is about to occur and the machine will soon malfunction. This first stage signal "anticipating" a fault by the monitoring program of claim 1 may be followed in a later stage by a "warning" signal in the event that an anticipated fault occurs and the machine is malfunctioning, and the existence of a fault is then actually detected. Such a later stage signal to repair or replace a faulty part would be what, according to the patent in para 0003, "[the] invention aims at improving [by] further automating such a construction". From this paragraph the reader would be able to infer that a second "warning of an existing fault" signal may still be produced, i.e. it would suggest a two stage diagnosis.

2.3 However, the Board shares the respondents' view that this differentiation between different stages of earliness is not expressed in either claim 1 or the corresponding patent specification. That the computer might produce a subsequent warning signal for an existing fault after a previously generated early warning diagnosis signal anticipating the fault, i.e. the concept of a two stage diagnosis, is certainly not clearly derivable from the patent. Although it would appear that a malfunction should be identified at an early stage, i. e. not when it is too late and damage has been done, the patent lacks any concrete information as to the degree of "earliness" of the anticipatory diagnosis of a fault as claimed in claim 1.

The Board adds that the terms "fault" and "malfunction" do not have exact definitions and do not imply failure

or breakdown of a machine or component. What constitutes a fault or a malfunction depends upon where a user draws the line between what he perceives as acceptable or proper functioning (of a component or machine) and unacceptable or improper functioning. Thus these terms are themselves to be understood broadly.

2.4 Without concrete information regarding the degree of earliness or precise definitions of terminology, the wording "diagnosis in relation to an anticipated fault" of claim 1 has to be broadly understood as meaning nothing more than measuring and monitoring with the aim of taking preventative, viz. "early" action, that is, intervening before the actual "malfunction" occurs, cf. patent para 0003 and 0006, where again these terms are to be understood broadly. The Board notes that intervention can take the form of a service check and repair or replacement if necessary, see patent, para 0008.

2.5 This broad interpretation of claim 1 is also in line with the general information provided in para 0013 and 0014 of the patent as to what the claimed anticipatory diagnosis may entail, and as to how it may be generated. For example, sensed deviations from reference sound patterns or levels generate a diagnosis which entails the issuing of instructions, such as issuing the warning "check the vacuum pump", or "replace the pulsator within 24 hours". There are also other examples, in particular counting the number of times a component is used with the aid of time sensors or clocks to determine (cumulative) consumption times of components, connection times of teat cups, etc.. Subsequently, the measured runtimes are compared against reference data such as anticipated life or failure-free useful life. When the point of time is

reached at which e. g. 90 % of the useful life of a component has elapsed, a diagnosis is generated which may supply the warning "check within 6 hours condition of component and determine whether it must be replaced...". Thus, as argued by the respondents, the patent in fact teaches at least two different ways to put the diagnosis of claim 1 into practice, namely by detecting a developing fault or by simply monitoring the amount of use and comparing this data to reference data.

3. Novelty - main request

3.1 Document D1 (see abstract, col. 2, ln. 60, to col. 3, ln. 31; col. 3, ln. 60-67, and col. 4, ln. 53-65) monitors teat liner movement of a milking machine and signals malfunction if it senses a deviation (in vacuum level, volume change, or opening and closing times, cf. col. 5, top; col. 7, ln. 5-22) from a predetermined condition. This will generate a message requesting replacement or other signal (see col. 5, ln. 26-29).

3.2 The appellant argues that D1's processor produces a signal to check or replace a teat cup liner in case of a malfunction which is already detected, i. e. when the fault actually occurs, and the user is thus obliged to take immediate action. Hence, D1's diagnosis signal would not be based on a malfunction which has not occurred yet as required by claim 1 of the patent, where the machine is still working properly. Otherwise it is common ground that the remaining features of claim 1 are disclosed by D1.

3.3 It is true that D1 describes detection of an existing malfunction, when the teat cup liner is punctured or cracked and replacement may be initiated immediately,

see D1, col. 3, ln. 8-10. However, the Board concurs with the respondents that D1 is at least also if not mainly concerned with the prevention of possible faults so as to avoid destructive damage: from a contextual reading the term "signalling a malfunction" in col. 3, ln. 2, of D1 is not to be understood as meaning that destructive damage will have occurred and that the machine is no longer functioning or not functioning properly. Rather, it is to be understood in the same broad preventative sense as claim 1. Thus to determine the point of time for replacement of the teat cup liner vacuum level or movement is sensed to determine losses in resiliency, cf. D1, col. 2, ln. 60 to col. 3, ln. 7, and col. 4, ln. 66, to col. 5, ln. 41; col. 7, ln. 10-21. When some threshold (vacuum range p1, p2; time interval t1, t2) is exceeded it is concluded that the quality of the teat cup is unacceptable and a warning signal is generated. There is no indication that the machine is immediately shut down (rather impractical in a milking machine), merely a written message is displayed *requesting* replacement. This implies a safety margin which allows for an interval between issuing the warning and when it is ultimately acted upon. This means that the warning is generated, and thus diagnosis made, in advance of possible destructive failure, i.e. is preventative or anticipatory in the broad sense of claim 1. Thus, the milking machine of D1 is automatically supervised, and an appropriate point of time for earlier replacement of the teat cup liner, i. e. a diagnosis in relation to an "anticipated fault" of the liner, may also be determined, cf. D1, col. 3, ln. 63-67.

- 3.4 Consequently, with the above understanding of claim 1, the disclosure of D1 deprives claim 1 of novelty and, therefore, the subject-matter of claim 1 of the main

request does not comply with the requirements of Article 54 EPC.

3.5 For the sake of completeness, the Board adds that the automatic milking machines with failure monitoring schemes of documents E1, D7 or D8 also anticipate the subject-matter of claim 1 of the main request. In E1 accumulated running time of a variety of components of the milking robot (teat location device, teat cleaning device, gate) is clocked, or number of pulsations are counted, and when they reach a maximum (wear, health requirements) a servicing signal is generated, for liner exchange, adjustment, cleaning or service, see in particular E1, p. 2 ln. 10-11, p. 2, ln. 19 to p. 3, ln. 4, and p. 7, ln. 4-10. In D7 (see col. 9, ln. 10-40) exchangeable parts of the milking machine have sensors checking whether they are functioning adequately (implying a comparison with some stored reference) and generating an error message, possibly with an indication whether the disturbance is serious or not, and whether it requires immediate action, col. 2, ln. 37 to 52, e. g. repair or replacement, col. 9, ln. 30-31. The idea is to act at an early stage of any disturbance, col. 1, ln. 36-37. Finally, in E8, para 0007, deviations of various sensor outputs from an average is used to signal sensor malfunction, which will be repaired at a later stage, see col. 4, ln. 9-27.

3.6 It may be added that these warning systems are - as are most warning systems - inherently preventative. Their main aim and purpose is to avoid destructive failure or breakdown before it occurs. Thus by their very nature they are anticipatory within the broad sense of claim 1.

4. Novelty - first auxiliary request

Claim 1 of the first auxiliary request is further characterized in that the computer is programmed such that the diagnosis "comprises the anticipated point of time or an anticipated time interval for the malfunction" (cf. claim 3 as granted). The patent, much less claim 1, does not explain how exactly the time or interval should be comprised in the diagnosis, and as explained above fails to specify in any way the degree of "earliness" of its anticipatory diagnosis. In any case, in all cited prior art time will enter into the diagnosis of malfunction in some way or other, for example in terms of the necessary safety margin discussed above. Finally, an "anticipated time interval" in the failure diagnosis can also be inferred more specifically from E8, see column 4, lines 21 to 27, where it suggests to continue milking in spite of a defective sensor, but to carry out the repair during designated periods during daytime (as anticipated points in time) for repair. Therefore, the above cited prior art deprives claim 1 of the first auxiliary request of novelty, Article 54 EPC.

5. Admission of new auxiliary request 2

With respect to the first auxiliary request, claim 1 of the new auxiliary request 2 has been further characterized in that the computer is programmed such that the diagnosis comprises an instruction to avoid the anticipated malfunction, and in that the instruction comprises a time indication for the action to be taken (cf. claims 5 and 8 as granted). However, the new request has been submitted at the latest possible point of time, i. e. during the oral proceedings, and no particular reason for its belated

filing is apparent to the Board. Apart from that, after short discussion of its *prima facie* allowability, the appellant, in fact, conceded that document E8, col. 4, ln. 38-45, actually discloses an instruction comprising a time indication for the action to be taken, in the sense that "do not repair the defectiveness now (i. e. during the night)" - "repair it later (i. e. afterwards, during daytime)". Thus, since on the face of it claim 1 of the auxiliary request 2 is not clearly allowable, the Board decides not to admit the request into the proceedings at that late stage, Article 13(3) RPBA.

6. In the light of the above, none of the appellant's requests can be considered allowable or admissible by the Board. The appeal therefore must fail.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated