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**Datasheet for the decision
of 8 January 2019**

Case Number: T 0076/14 - 3.5.03

Application Number: 04799397.7

Publication Number: 1690144

IPC: G05B19/00

Language of the proceedings: EN

Title of invention:

A method and a system for tracing food items

Patent Proprietor:

Marel hf.

Opponent:

Nordischer Maschinenbau
Rud. Baader GmbH + Co. KG

Headword:

Method and a system for tracing food items/MAREL

Relevant legal provisions:

EPC Art. 54, 56, 123(2)
RPBA Art. 13(1)

Keyword:

Novelty - main request and second auxiliary request (no)
Inventive step - fifth auxiliary request (no)
Added subject-matter - auxiliary requests A and 1A to 7A (yes)
Admissibility of late filed seventh auxiliary request (no)

Decisions cited:

G 0002/10, T 0190/99



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Case Number: T 0076/14 - 3.5.03

D E C I S I O N
of Technical Board of Appeal 3.5.03
of 8 January 2019

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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 7 November 2013
revoking European patent No. 1690144 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman F. van der Voort
Members: A. Madenach
O. Loizou

Summary of Facts and Submissions

- I. The present appeal arises from the decision of the opposition division posted on 7 November 2013 concerning the revocation of European patent No. 1 690 144.
- II. In its decision, the opposition division held that the subject-matter of claims 1 and 12 of the main request, i.e. claims 1 and 12 as granted, and claim 1 of a second auxiliary request was not new (Articles 52(1) and 54 EPC) having regard to the disclosure of E1 (WO 95/10812 A1) and E2 (WO 03/027718 A1).

With respect to first and third to seventh auxiliary requests, the opposition division held that claim 1 of each of these requests did not fulfil the requirements of Article 123(2) and (3) EPC.

- III. With its statement of grounds of appeal, the appellant filed first to sixth auxiliary requests.
- IV. In a communication pursuant to Article 15(1) RPBA accompanying a summons to oral proceedings, the board gave its preliminary opinion and indicated topics for discussion during the scheduled oral proceedings.
- V. With a letter dated 8 November 2018, the appellant filed further auxiliary requests A, 1A to 7A and 7.
- VI. During the oral proceedings before the board, the appellant withdrew the first, third, fourth and sixth auxiliary requests and requested that the decision under appeal be set aside and that the opposition be rejected (main request) or, in the alternative, that the patent be maintained in amended form on the basis

of the claims of one of, and in that order, auxiliary requests A and 1A to 7A filed with the letter dated 8 November 2018, auxiliary requests 2 and 5 filed with the statement of grounds of appeal, and auxiliary request 7 filed with the letter dated 8 November 2018.

The respondent requested that the appeal be dismissed.

After deliberation of the board, the chairman announced the board's decision.

VII. Claim 1 of the main request reads as follows:

"A combined method of information handling and food processing, said method comprising the steps of:

storing a data set of a first type representing origination of an item in memory of a computer system,

conveying the item to process means,

characterised by

separating the item into sub-items by the process means,

selecting sub-items for a batch,

tracing the positions of the item and sub-items by the computer system,

assigning data from the data set of the first type representing the origination of the selected sub-items to the batch,

assigning an identifier to the batch

defining a data set of a second type which comprises the assigned data and the assigned identifier, and

storing the defined data set in the memory of the computer system."

Claim 1 of auxiliary request A differs from claim 1 of the main request essentially in that it comprises the following additional feature:

"tracing the origination of the sub-items in the batch, without labelling of sub-items, on the basis of said step of storing the data set of the first type in the memory of the computer system, said step of tracing the positions of the item and the sub-items and said step of assigning the data from the data set of the first type of the batch".

Claim 1 of auxiliary requests 1A to 7A comprises the same above-quoted additional feature of claim 1 of auxiliary request A.

Claim 1 of the second auxiliary request differs from claim 1 of the main request essentially in that it comprises the following additional feature:

"wherein the batch is formed from sub-items of more than one origination".

Claim 1 of the fifth auxiliary request differs from claim 1 of the second request essentially in that it comprises the following additional feature:

"and where the mix of sub-items is selected under a criterion wherein the number of different originations of the sub-items is within a predetermined range".

Claim 1 of the seventh auxiliary request differs from claim 1 of the main request essentially in that it comprises the following additional features:

"wherein a first type of batches is formed from sub-items of items of a single origination, wherein sub-items of items of one origination are selected repeatedly for batches of the first type until a residual amount of sub-items from that origination is insufficient for filling one batch, wherein a second type of batches is formed from sub-items of items of more than one origination, and wherein the residual amount of sub-items is selected for batches of the second type".

Reasons for the Decision

1. *Main request and second auxiliary request: novelty (Articles 52(1) and 54 EPC)*

Document E2 discloses a method for controlling and authenticating quality and origin (of meat products) by means of electronic tagging, electronic surveillance and positioning of livestock, meat and meat products (claim 1, lines 2-5 and page 1, lines 3-8). It also involves slaughtering an animal and cutting the meat into pieces and packaging the products (claim 1, lines 15-24). It therefore discloses a combined method of information handling and food processing.

The method of E2 includes the step of providing an animal with an electronic tag, comprising communication means and an identification code, and representing through the code a specific location in a network connected database, being updated wirelessly from the tag to at least one receiver connected to position determining means and a time determining means, registering time- and position information related to the animal (claim 1, lines 6-11). This implies, in combination with the controlling of the origin (claim 1, line 1), the storing of a data set of a first type representing origination of an item in the memory of a computer system in which the database resides.

In the method of E2, an item (an animal) is conveyed to processing means (slaughtering) (claim 1, line 15). Further, the item is cut up into pieces of meat and separated into sub-items (i.e. cut-up pieces of meat or meat products) by the processing means which are selected for a batch (i.e. a packaged product) (claim 1, lines 15-24).

Time and positioning information of the item (i.e. the animal) and sub-items (i.e. the cut-up pieces) are communicated to the database of the computer via the respective tags and, hence, their positions are traced by the computer system (claim 1, lines 8-11 and 15-19).

Further, according to E2, each packaged product, i.e. each batch, is provided with a replacement tag registering time and positioning information related to the meat products, i.e. the sub-items in the language of claim 1 (claim 1, lines 20-24). Hence, E2 discloses assigning data from the data set of the first type representing the origination of the selected sub-items to the batch and assigning an identifier to the batch.

The time and positioning information related to the meat products involve the defining of a data set of a second type which comprises the assigned data and the assigned identifier.

Since this data is registered by a receiver (claim 1, lines 20-24), the defined data set is stored in the memory of the computer system.

Further, the code in the tag of each packaged product, i.e. of each batch, represents animal data in accordance with the mixing of meat from different animals in the product (D2, claim 5). Hence, the batch is formed from sub-items of more than one origination.

- 1.1 The appellant argued that in the light of the patent specification as a whole, the feature "tracing the positions of the item and sub-items by the computer system" in claim 1 was to be understood as not involving the tracing, in particular of the sub-items, by means of tags, as was the case in E2.

The board does not accept this argument.

In the present case, the term "tracing" in claim 1 can be understood in a technically sensible and generally known way as involving the use of tags. The board further notes that the patent as a whole does not exclude that tags are used for tracing sub-items. In particular, paragraph [0008] referred to by the appellant, reads:

"Due to the storing of data in memory of the computer system, the tracing of the positions of the item and sub-items of the item and the assigning of data

representing origination of the item to batches of sub-items, it is possible to trace the origination of items in a batch of items even though the sub-items are mixed from items of different originations. Since the data is preserved in the memory of a computer system rather than on labels, the certainty of the origination of items in a food product is highly improved and the process of moving labels and duplicating labels between items and sub items during the processing is eliminated."

The board understands this paragraph to mean that certain data, which relates to data concerning an item (see point 2.4 below), is preserved, but by no means exclusively, in the memory of the computer system. Similarly, the advantage mentioned, i.e. that the process of moving and duplicating of labels between items and sub-items is eliminated, does not necessarily mean that the use of labels, e.g. creating entirely new labels for sub-items, as in D2, is completely excluded.

- 1.2 The appellant further argued that the mixing of meat from different animals in the product as specified in claim 5 of E2 related to an embodiment in which a sausage is the product, as disclosed on page 4, lines 24 to 27, rather than a batch with (identifiable) sub-items.

In the board's view, however, E2 does not require a specific link between, on the one hand, the subject-matter of claims 1 and 5 of E2 and, on the other hand, the particular embodiment of E2 which relates to the production of a sausage (see page 30, line 30, to page 35, line 20) since claim 5 uses a more general wording and directly refers to claim 1. Hence, it is not necessary to further investigate whether or not the

passage on page 4, lines 24 to 27, which relates to the mixing of meat from different animals in the product, specifically relates to the production of sausages, as argued by the appellant.

1.3 The board concludes that the subject-matter of claim 1 of the main request and the second auxiliary request lacks novelty having regard to the disclosure of E2 (Articles 52(1) and 54 EPC). The main request and the second auxiliary request are therefore not allowable.

2. *Auxiliary requests A and 1A to 7A: added subject-matter (Article 123(2) EPC)*

2.1 Claim 1 of auxiliary request A differs from claim 1 of the main request essentially in that it comprises the following additional feature:

"tracing the origination of the sub-items in the batch, without labelling of sub-items, on the basis of said step of storing the data set of the first type in the memory of the computer system, said step of tracing the positions of the item and the sub-items and said step of assigning the data from the data set of the first type of the batch".

2.2 With respect to the feature "tracing the origination of the sub-items in the batch, without labelling of sub-items", the appellant referred to the above-quoted paragraph [0008] of the patent specification, which corresponds to the passage on page 2, lines 22 to 29, of the application as filed. It argued that this passage directly and unambiguously implied the feature "without labelling of sub-items".

2.3 Any amendment to the parts of a European patent application or of a European patent relating to the disclosure (the description, claims and drawings) is subject to the mandatory prohibition on extension laid down in Article 123(2) EPC and can therefore, irrespective of the context of the amendment made, only be made within the limits of what a skilled person would derive directly and unambiguously, using common general knowledge, and seen objectively and relative to the date of filing, from the whole of these documents as filed (G 2/10, OJ EPO 2012, 376, point 4.3 of the reasons).

2.4 In the present case, from the above-quoted passage on page 2 of the application as filed it cannot be directly and unambiguously derived that the tracing is to be carried out without labelling sub-items. There is no direct link between the fact that data is preserved in the memory of the computer system and the labelling or non-labelling of sub-items. In paragraph [0008], the term "data" used in "data is preserved in the memory of a computer system" possibly refers to the step of "storing a data set of a first type representing origination of an item in memory of a computer system" and the step of "assigning data from the data set of the first type representing the origination of the item to the batch" as mentioned in the previous paragraph [0007] (page 2, lines 14 and 15 and 20 and 21, of the application as filed) and to the phrase "the assigning of data representing origination of the item to batches of sub-items" in the previous sentence in paragraph [0008]. The board understands this to mean that the term "data" as used in paragraphs [0007] and [0008] relates to data representing origination of items and assigning data to batches of sub-items, but not as a direct and unambiguous

disclosure of data relating to sub-items and of a tracing of the origination of the sub-items in the batch, without the labelling of sub-items.

Further, even if the term "data" were understood as relating to sub-items, the terminology used in paragraph [0008] does not exclude the use of labels on sub-items. As mentioned before, the preservation of data in the memory of the computer system does not necessarily exclude the preservation of data on labels.

Further, the preservation of data in the memory of the computer system is, according to paragraph [0008], advantageous in order to avoid moving and duplicating labels between items and sub-items. This does not necessarily exclude the use of new labels on sub-items. Paragraph [0006] ("Manual registration of entering food items and labelling of the items ... do not solve the [prior art] problem completely", which was also referred to by the appellant, does not exclude the use of labels either.

- 2.5 For the above reasons, there is no direct and unambiguous disclosure of the feature "tracing the origination of the sub-items in the batch, without labelling of sub-items".
- 2.6 Claim 1 of auxiliary request A does not, therefore, comply with Article 123(2) EPC.
- 2.7 Since claim 1 of each of the auxiliary requests 1A to 7A includes the same feature (see point VII above), none of these requests complies with Article 123(2) EPC. Indeed, the appellant did not provide any further specific arguments in relation to these auxiliary requests.

2.8 Auxiliary requests A and 1A to 7A are therefore not allowable.

3. *Fifth auxiliary request: inventive step (Articles 52(1) and 56 EPC)*

3.1 Claim 1 of the fifth auxiliary request differs from claim 1 of the second request essentially in that it comprises the following additional feature:

"and where the mix of sub-items is selected under a criterion wherein the number of different originations of the sub-items is within a predetermined range".

3.2 For the sake of argument, the board accepts the appellant's formulation of the technical problem to be solved by this feature, namely, how to simplify traceability and reduce the amount of meat to be destroyed in case of contamination whilst still enabling the label-free tracing of sub-items.

3.3 In the board's view, it is common general knowledge that the number of problems arising in a batch containing sub-items of different origins increases with the number of sub-items because the sub-items can contribute in an uncorrelated way to possible problems. Since the sub-items are of different origins, the effort to trace the original problem increases. This was not further contested by the appellant. The solution to this generally known problem consists obviously in limiting the number of different originations to a necessary minimum or, using the language of claim 1, keeping it within a predetermined range, which results in an obvious trade-off between ease of traceability and flexibility in composing a

batch. The reduction of the amount of meat to be destroyed in case of contamination is a direct consequence of the limitation of the number of different originations to a necessary minimum.

The condition "whilst still enabling label-free tracing of sub-items" presupposes that the subject-matter of claim 1 of the fifth auxiliary request relates generally to the label-free tracing of sub-items. This is, however, not the case for the reasons set out above in point 1 in relation to the main and second auxiliary request. Therefore, this condition can be disregarded on examining the issue of an inventive step.

3.4 The appellant argued that, since according to E2 all sub-items were identified by a tag and, hence, were traceable, there was no motivation to limit the number of originations.

If this argument were valid, the technical problem as identified by the appellant would not be the problem solved by the subject-matter of claim 1 of the fifth auxiliary request since traceability at all times is at the core of the invention of the present patent (paragraph [0001]). However, even if sub-items are traceable at all times, the effort involved in tracing them increases with the number of originations. This applies to both the method of E2 and the method of claim 1. Reducing this effort is, however, obvious to the skilled person for the reasons set out above (point 3.3).

3.5 For these reasons, the subject-matter of claim 1 of the fifth auxiliary request does not involve an inventive step (Articles 52(1) and 56 EPC). The fifth auxiliary request is therefore not allowable.

4. *Seventh auxiliary request: admission into the appeal proceedings (Article 13(1) RPBA)*

4.1 Claim 1 of the seventh auxiliary request differs from claim 1 of the main request essentially in that it comprises the following additional features:

"wherein a first type of batches is formed from sub-items of items of a single origination, wherein sub-items of items of one origination are selected repeatedly for batches of the first type until a residual amount of sub-items from that origination is insufficient for filling one batch, wherein a second type of batches is formed from sub-items of items of more than one origination, and wherein the residual amount of sub-items is selected for batches of the second type".

These features, which result from combining claims 2, 3, 4 and 5 of the patent as granted, relate to an optimisation process for the forming of batches on the basis of the origination of sub-items.

4.2 According to Article 13(1) RPBA, any amendment to a party's case after it has filed its grounds of appeal may be admitted and considered at the board's discretion. The discretion shall be exercised in view of inter alia the need for procedural economy.

4.3 In the present case, claim 1 of the seventh auxiliary request, which was filed one month before the oral proceedings before the board, comprises features which for the first time relate to an optimisation process for forming batches on the basis of the origination of sub-items. Since these features were not considered

during the opposition proceedings and are of a complexity which the board was not in a position to consider of its own motion, admitting the request would have required a remittal of the case to the opposition division for further prosecution (Article 111(1) EPC). At such a late stage of the procedure, this would have been contrary to the requirement of procedural economy.

- 4.4 For these reasons, the board decided to not admit the seventh auxiliary request into the proceedings.
5. Since none of the requests is allowable, the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



G. Rauh

F. van der Voort

Decision electronically authenticated