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**Datasheet for the decision
of 23 May 2018**

Case Number: T 0919/14 - 3.2.04

Application Number: 07834554.3

Publication Number: 2073628

IPC: A01K1/12, A01K29/00

Language of the proceedings: EN

Title of invention:

METHOD, SOFTWARE AND COMPUTER FOR MANAGING A GROUP OF DAIRY ANIMALS

Patent Proprietor:

MAASLAND N.V.

Opponent:

DeLaval International AB

Headword:

Relevant legal provisions:

EPC Art. 100(a), 52(2)(c), 54, 100(b), 83
RPBA Art. 15(1)

Keyword:

Novelty - main request (yes)

Sufficiency of disclosure - main request (yes)

Remittal to the department of first instance - (yes)

Decisions cited:

Catchword:



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Case Number: T 0919/14 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 23 May 2018

Appellant:
(Patent Proprietor)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 21 February
2014 revoking European patent No. 2073628
pursuant to Article 101(3) (b) EPC.**

Composition of the Board:

Chairman A. de Vries
Members: J. Wright
C. Schmidt

Summary of Facts and Submissions

- I. The appellant-proprietor lodged an appeal, received 17 April 2014, against the decision of the opposition division posted on 21 February 2014 revoking European patent No. 2073628 pursuant to Article 101(3) (b) EPC. The appeal fee was paid at the same time. The statement setting out the grounds of appeal was filed on 1 July 2014.
- II. Opposition was based on insufficiency of disclosure (Article 100(b) EPC with Article 83 EPC), the subject matter of the patent being not patentable (Article 100(a) with Article 52(2)c EPC) and lack of novelty and inventive step (Article 100(a) EPC together with Articles 52(1), 54 and 56 EPC).

The Opposition Division held, inter alia, that the invention according to claims 8 and 9 as granted was sufficiently disclosed. However, they also held that the opposition ground of lack of novelty (Article 100(a) with Article 54 EPC) prejudiced the maintenance of the patent as granted and according to all the auxiliary requests. They therefore revoked the patent. In their decision, the Opposition Division considered the following document, amongst others:

D1: WO 2004/068940A1

- III. The appellant-proprietor requests as a main request that the decision under appeal be set aside and the patent maintained as granted. Alternatively, they request that the decision under appeal be set aside and the patent be maintained in an amended form, according to the claims of one of auxiliary requests 1 to 5, of which auxiliary requests 1 to 3 were filed on

5 February 2013 and auxiliary requests 4 and 5 were filed with the appellant-proprietor's statement of grounds of appeal.

In their statement of grounds the appellant-proprietor argued as follows:

Regarding the ground for opposition under Article 100(a) with Article 52(2) c EPC, claim 8 refers back to claims 1 to 7 so its subject matter is not merely a non-technical computer programme as such but a mixture of technical and non-technical features.

Regarding the ground for opposition under Article 100 (b) with 83 EPC, claims 8 and 9, the skilled person is a computer and software engineer, therefore they would be able to carry out the invention according to claims 8 and 9.

Regarding the ground for opposition under Article 100(a) with Article 54 EPC, D1 does not take away novelty of claim 1. In particular D1 does not directly and unambiguously disclose the following features: determining the duration of the lactation cycle, determining an insemination frequency and separating a subgroup in a separate area around the beginning of the being dry phase, and placing it out of the area after calving, as claimed.

IV. The respondent-opponent requests that the appeal be dismissed.

In their reply dated 10 November 2014 the respondent-opponent argued as follows:

Regarding the ground for opposition under Article 100(a) with Article 52(2) c EPC, claim 8 is a computer programme as such and therefore excluded from patentability.

Regarding the ground for opposition under Article 100 (b) with 83 EPC, the relevant skilled person for claims 8 and 9 is a dairy farmer. A dairy farmer would not have the specialist knowledge of programming or computers necessary for carrying out the invention according to these claims. Nor does the patent disclose this specialist knowledge.

Regarding the ground for opposition under Article 100(a) with Article 54 EPC, D1 discloses explicitly or implicitly all the steps of claim 1.

The step of choosing the duration of the lactation cycle is inevitably made by the farmer when carrying out the method of D1 since the farmer must decide when to inseminate their cows.

D1 discloses a plurality of subgroups so an insemination frequency as claimed is inherent to D1.

Gestation cows means cows that are being dry. D1 discloses to separate these, so these cows are implicitly separated into a separate area at the beginning of the being dry phase as claimed, and placed out of the area after being dry and calving.

Because the subject matter of claim 1 is not new, that of claims 8 and 9 also lacks novelty for the same reasons.

V. In a summons to oral proceedings pursuant to Rule 115(1) EPC, posted 27 September 2018, the Board informed the parties that oral proceedings were scheduled for 23 May 2018. In a communication to the parties pursuant to Article 15(1) RPBA, posted 5 April 2018, in preparation for the oral proceedings, the Board for the main request (patent as granted) gave a detailed preliminary opinion concerning the contentious issues and arguments presented by the parties, concluding that:

- Regarding the ground for opposition under Article 100(a) with Article 52(2) c EPC, claim 8 itself has overall technical character (following T0258/03), even if it is "mixed" (with both technical and non-technical aspects), so it is not excluded from patentability under Article 52(2) c EPC.
- Regarding the ground for opposition under Article 100 (b) with 83 EPC, the invention according to claims 8 and 9 is sufficiently disclosed for the skilled person to be able to carry it out.
- Regarding the ground for opposition under Article 100(a) with Article 54 EPC, D1 does not take away the novelty of claim 1.
- Should the Board find the subject matter of claim 1 of the main request to be new, they were inclined to exercise their discretion under Article 111(1) EPC and to remit the case to the department of first instance for further prosecution (examination of inventive step).

In a letter received 18 May 2018, the respondent-opponent informed the Board that they would not be attending the oral proceedings scheduled for 23 May 2018. They maintained the position they had already presented in the reply to the appeal, but did not present any new arguments.

In a communication sent by Fax on 22 May 2018, the Board informed the parties that the oral proceedings scheduled for 23 May 2018 were cancelled because, as the respondent-opponent would not be attending the oral proceedings, the Board no longer saw a need to hold oral proceedings.

VI. Claim 1 of the main request is worded as follows:

"Method of managing a group of dairy animals to be milked fully automatically, which dairy animals go through a lactation cycle, wherein the lactation cycle comprises the following phases: calving, inmilking, producing milk, being dry,
which method comprises the following steps:
- dividing the group of dairy animals into subgroups of a plurality of dairy animals,
- determining a chosen duration of the lactation cycle,
- determining an insemination frequency for the whole group, which frequency is the number of insemination sessions per chosen lactation cycle, the number being equal to the number of subgroups,
- determining per subgroup an insemination period within which the dairy animals of the subgroup concerned are inseminated, which insemination period is so short in relation to the duration of the lactation cycle that substantially all dairy animals in the subgroup concerned are inseminated substantially simultaneously and that substantially all dairy animals

in the subgroup concerned go simultaneously through the lactation cycle,

- separating a subgroup of which all animals are pregnant in a separate area, around the beginning of the being dry phase of the subgroup concerned,
- fully automatically milking the dairy animals in the non-separated subgroups by means of at least one milking robot,
- separately milking the dairy animals in the separated subgroup, and
- placing the separated subgroup out of the separate area after being dry and calving".

Claim 8 of the main request is worded as follows:

"Software program comprising program instructions for processing data and supplying information for performing the method according to any one of claims 1 to 7, when the software program is loaded in a computer".

Claim 9 of the main request has the following wording:

"Computer designed to perform the method according to any one of claims 1 to 7".

Reasons for the Decision

1. The appeal is admissible.
2. The parties have made no substantive comments to the preliminary opinion of the Board expressed in their communication of 5 April 2018. Nor does the Board see any reason to deviate from this opinion and the

reasoning given therein. Therefore, for the reasons as set out in its communication of 5th April 2018, sections 1, 2 and 3 respectively, the Board concludes that, in respect of the main request:

- Regarding the ground for opposition under Article 100(a) with Article 52(2) c EPC, claim 8 has overall technical character, so it is not excluded from patentability under Article 52(2) c EPC.
- Regarding the ground for opposition under Article 100 (b) with 83 EPC, the invention according to claims 8 and 9 is sufficiently disclosed for the skilled person to be able to carry it out.
- Regarding the ground for opposition under Article 100(a) with Article 54 EPC, D1 does not take away the novelty of claim 1.

3. In the light of the Board's conclusion that D1 does not take away novelty of claim 1 of the main request, the respondent-opponent's argument that claims 8 and 9 (which refer back to claim 1) lack novelty for the same reasons as apply to claim 1 (cf. reply to appeal, page 23, third paragraph), is moot.

4. Remittal

The parties have not presented any objections to the case being remitted to the department of first instance for further prosecution.

In the light of the Board's positive conclusion in respect of novelty of claim 1 of the main request vis-à-vis D1, and their stated preference for remittal of the case in this event for the reasons set out in the

above communication of 5 April 2018 (see section 4), the Board decides to exercise their discretion under Article 111(1) EPC and to remit the case to the department of first instance for further prosecution, namely, examination of the opposition ground of lack of inventive step, Article 100(a) EPC with Article 56 EPC, on the basis of the claims 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 department of first instance for further prosecution.

The Registrar:

The Chairman:



G. Magouliotis

A. de Vries

Decision electronically authenticated