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Datasheet for the decision of 19 October 2021

Case Number: T 0472/17 - 3.2.02

Application Number: 07253788.9

Publication Number: 1908413

IPC: A61B17/072

Language of the proceedings: EN

Title of invention:
Surgical instrument including a locking assembly

Patent Proprietor:
Covidien LP

Opponent:
ETHICON ENDO-SURGERY, INC.

Headword:

Relevant legal provisions:
EPC Art. 100(c), 100(a), 54, 56
RPBA 2020 Art. 13(2)

Keyword:
Added subject-matter (no)
Novelty - (yes)
Inventive step - (yes)
Amendment after summons - taken into account (no)

Decisions cited:
T 0247/20

Catchword:

Europäisches Patentamt
European Patent Office
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Beschwerdekammern

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Chambres de recours

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Case Number: T 0472/17 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 19 October 2021

Appellant: (Patent Proprietor)	Covidien LP 15 Hampshire Street Mansfield, MA 02048 (US)
Representative:	D Young & Co LLP 120 Holborn London EC1N 2DY (GB)
Appellant: (Opponent)	ETHICON ENDO-SURGERY, INC. 4545 Creek Road Cincinnati, Ohio 45242-2839 (US)
Representative:	Carpmaels & Ransford LLP One Southampton Row London WC1B 5HA (GB)
Decision under appeal:	**Interlocutory decision of the Opposition Division of the European Patent Office posted on 12 December 2016 concerning the maintenance of European Patent No. 1908413 in amended form**

Composition of the Board:

Chairman	M. Alvazzi Delfrate
Members:	D. Ceccarelli
	N. Obrovski

Summary of Facts and Submissions

I. The patent proprietor and the opponent have appealed against the Opposition Division's decision, posted on 12 December 2016, that, account being taken of the amendments according to auxiliary request 9 made by the patent proprietor during the opposition proceedings, European patent No. 1 908 413 and the invention to which it related met the requirements of the EPC.

II. The higher-ranking requests were not allowed for added subject-matter or extension of the scope of protection of independent claim 12.

III. The Board summoned the parties to oral proceedings and sent a preliminary opinion by communication dated 14 December 2020.

IV. By letter dated 19 August 2021 the appellant/opponent ("the opponent") filed comments on the Board's preliminary opinion.

V. Oral proceedings were held on 19 October 2021 by videoconference.

The appellant/patent proprietor ("the proprietor") requested that the decision under appeal be set aside and that the patent be maintained as granted or, in the alternative, on the basis of the claims of one of auxiliary requests 1 to 19, filed with the submission dated 21 April 2017, or one of auxiliary requests 20 to 29, filed with the submission dated 12 September 2017.

The opponent requested that the decision under appeal

be set aside and that the patent be revoked.

VI. The following documents are relevant for this decision:

D1: US-A-5,673,840
D4: EP-A-1 621 146
D5: US-A-5,797,537

VII. Claims 1 and 12 of the patent as granted read as follows:

1. "A surgical instrument (500), comprising:

a handle portion (510) including a movable handle (516);
a body portion (512) extending distally from the handle portion (510) and defining a first longitudinal axis;
an articulating tool assembly (17) defining a second longitudinal axis, the articulating tool assembly (17) being disposed at a distal end of the body portion (512) and being movable from a first position in which the second longitudinal axis is substantially aligned with the first longitudinal axis to at least a second position in which the second longitudinal axis is disposed at an angle to the first longitudinal axis;
the articulating tool assembly (17) including an anvil (20) and a cartridge assembly (18), the anvil (20) and cartridge assembly (18) being movable into approximation with one another by manipulation of the movable handle (516); and
a locking assembly (600) including a member (612) advanceable distally with respect to the body portion (512), the member (612) engaging the articulating tool assembly (17) upon manipulation

of the movable handle (516) to move the anvil (20) and cartridge assembly (18) in approximation with one another, the member (612) engaging the articulating tool assembly (17) to help maintain the articulating tool assembly (17) in its first position."

12. "A disposable loading unit (16) configured for releasable engagement with a surgical instrument, comprising:

a body portion (200) and defining a first longitudinal axis;
an articulating tool assembly (17) disposed distally of the body portion (200) being securable to a distal end of the body portion (200) and defining a second longitudinal axis, the articulating tool assembly (17) being movable from a first position in which the second longitudinal axis is substantially aligned with the first longitudinal axis to a second position in which the second longitudinal axis is disposed at an angle to the first longitudinal axis, the articulation tool assembly (17) including an anvil assembly (20) and a cartridge assembly (18), at least one of which being pivotably moveable with respect to the other; and
a locking assembly (600) including a pivot plate (614) in mechanical cooperation with the articulating tool assembly (17) and a finger (612) in mechanical cooperation with the body portion (200), the pivot plate (614) having at least one slot (616) therein and being securable to a portion of the articulating tool assembly (17), the finger (612) extending distally from a portion of the body portion (200) upon

approximation of said anvil assembly (20) with the cartridge assembly (20) and being engagable [sic] with the at least one slot (616), whereby a predetermined amount of distal movement of the finger (612) with respect to the pivot plate (614) advances the finger (612) at least partially into engagement with the at least one slot (616) to help maintain the articulating tool assembly (17) in its first position."

VIII. The proprietor's arguments, where relevant to the present decision, can be summarised as follows:

Admittance of opponent's submissions

By letter dated 19 August 2021 the opponent had amended its case. The amendments included a new objection of lack of inventive step in relation to claim 1 of the patent as granted on the basis of two different embodiments of D4 (the embodiment depicted in Figures 20 to 27 and the embodiment referred to in paragraph [0097] and depicted in particular in Figures 34 and 35). These amendments to the opponent's case were not to be admitted into the appeal proceedings.

Added subject-matter

The features of the articulating tool assembly including an anvil assembly and a cartridge assembly, at least one of which was pivotably moveable with respect to the other, and of the finger extending distally from a portion of the body portion upon approximation of the anvil assembly with the cartridge assembly in claim 12 of the patent as granted had a basis in particular in paragraphs [0006] and [0071] of the application as filed.

In the context of the application as a whole, the expression "upon approximation of the anvil assembly with the cartridge assembly" meant that the finger extended distally if and only if this approximation occurred. In view of the common general knowledge in the field of medical stapling the claimed disposable loading unit could only be intended for use in combination with a surgical instrument comprising a handle portion. Therefore, the anvil and cartridge assemblies in the claimed disposable loading unit could only be moved into approximation with each other upon manipulation of this handle portion. This was clearly disclosed in the application as filed.

Novelty

In the context of claim 1 of the patent as granted the expression "the member engaging the articulating tool assembly upon manipulation of the movable handle" could only be interpreted as meaning that the manipulation of the movable handle caused the member to engage the articulating tool assembly.

The opponent's novelty objections in view of D1, D4 and D5 were based on an interpretation according to which this expression broadly covered hypothetical embodiments which simply allowed the member to be in a state of engagement with the tool assembly when the movable handle was manipulated.

However, there was nothing in the description of the embodiment of the invention to imply that the member could enter into engagement as claimed without manipulation of the movable handle. The device shown in Figures 21 and 22 did not fall within the scope of

claim 1 of the patent as granted as member 704 did not advance distally upon manipulation of the movable handle.

Moreover, if the claim were considered to cover embodiments with the member being in perpetual engagement with the tool assembly, the expression "upon manipulation of the movable handle" would essentially be disregarded.

Since the opponent's interpretation was wrong, D1, D4 and D5 did not anticipate the subject-matter of claim 1 of the patent as granted as they did not disclose a movable handle causing a member of a locking assembly to engage an articulating tool assembly.

Inventive step

The opponent's objections starting from D1 or D4 in combination with D5 had no merit. In particular, a distinguishing feature between claim 1 of the patent as granted and the surgical instrument disclosed in D1 or in D4 was that a member of a locking assembly engaged a tool assembly upon manipulation of a movable handle of the tool assembly.

D5 taught a locking assembly of a surgical instrument which was completely different from the locking assemblies disclosed in D1 and D4. Modifying the latter locking assemblies on the basis of the locking assembly disclosed in D5 required a complete redesign of the instruments from D1 or D4, which would not have been done without hindsight. Moreover, the locking assembly disclosed in D5 did not even include a member that was advanceable distally and that engaged the tool assembly upon manipulation of a movable handle, as defined in

claim 1 of the patent as granted.

The opponent's objection on the basis of D4 alone was not convincing either.

The objective technical problem solved by the distinguishing feature was that of achieving a more precise stapling procedure.

Paragraph [0097] of D4 hinted at automatic disengagement of an articulation lock, which would occur when an articulation control was operated. In contrast, the distinguishing feature of claim 1 of the patent as granted over the embodiment depicted in Figures 20 to 27 of D4 could be considered to be automatic engagement of such a lock when the movable handle was manipulated. Without hindsight D4 gave no reason to believe that the articulation lock needed to be automatically re-engaged after the operation of the articulation control, and therefore it provided no obvious reason for implementing the distinguishing feature in the embodiment in Figures 20 to 27.

IX. The opponent's arguments, where relevant to the present decision, can be summarised as follows:

Admittance of opponent's submissions

The comments provided by letter dated 19 August 2021 were a development of the arguments already submitted in writing before notification of the summons. They did not amount to amendments to the opponent's appeal case and were to be admitted in view of decision T 247/20. The opponent had raised an objection of lack of inventive step on the basis of D4 alone in the statement of grounds.

Added subject-matter

The introduction of the expressions "the articulation tool assembly (17) including an anvil assembly (20) and a cartridge assembly (18), at least one of which being pivotably moveable with respect to the other" and "the finger (612) extending distally from a portion of the body portion (200) upon approximation of said anvil assembly (20) with the cartridge assembly (20)" in claim 12 of the patent as granted added subject-matter.

These two expressions in conjunction required that a precondition of the finger extending distally was approximation of the anvil and the cartridge assemblies. More specifically, the term "upon" made the claim require a distal extension of the finger to be caused by the approximation of the assemblies; however, there was no basis in the application as filed for the distal extension of the finger being responsive to the condition of this approximation. These could be two entirely separate effects according to the application as filed.

Paragraphs [0006] and [0071] of the application as filed, which were cited as a basis by the proprietor, could be understood to disclose that the manipulation of a movable handle was responsible for approximation via one mechanism, and that actuating the movable handle also translated the finger via a different, independent mechanism. While no necessary interaction between the two effects was disclosed, a movable handle for obtaining them was consistently disclosed in the application as filed. The omission of the movable handle from claim 12 also added subject-matter.

Furthermore, claim 12 of the patent as granted encompassed embodiments in which extension of the finger was contingent upon approximation of the anvil and cartridge assemblies, such as an embodiment in which the approximation would take place by pinching the two assemblies, and these embodiments were not disclosed in the application as filed.

Novelty

In claim 1 of the patent as granted the expression "the member engaging the articulating tool assembly upon manipulation of the movable handle" could be interpreted as requiring nothing more than the member to have been in an engaged state when the movable handle was manipulated. Claims 4 and 6 of the patent as granted specified causal progressing engagement of the member upon manipulation of the movable handle and continuous engagement, respectively. Claim 1 had to cover both conditions. Moreover, the proposed interpretation was consistent with the requirement in claim 1 that the member engaging the articulating tool assembly helped maintain the articulating tool assembly in the first position. It was the engagement with the member which helped maintain the articulating tool assembly in its first position. The proposed interpretation was also consistent with all the embodiments of the specification, in particular also the embodiment depicted in Figures 21 and 22.

In view of this claim interpretation, the subject-matter of claim 1 lacked novelty over each of D1, D4 and D5. These documents disclosed articulating instruments each having an articulation lock that was engaged when the anvil and cartridge assembly were approximated by a movable handle.

Inventive step

The subject-matter of claim 1 of the main request was not inventive when starting from D1 or D4.

If these documents were not considered to disclose a member of a locking assembly which engaged a tool assembly upon manipulation of a movable handle of the tool assembly, the person skilled in the art would have understood that whenever it was possible to cause engagement of the locking mechanism, it would have been desirable to do so when the anvil and cartridge were moved into approximation with each other and the instrument was "fired". This was because, when clamping tissue, in view of the significant forces applied during firing, it was not desirable for the tool assembly of an articulated instrument to move out of the chosen plane of articulation. The objective technical problem could be considered to be that of guaranteeing that the articulating tool assembly was locked for firing.

This was confirmed by D5, which disclosed that articulation of a tip of a surgical instrument of the kind disclosed in D1 and D4 should be prevented when the instrument was fired (column 26, lines 46 to 50).

Moreover, starting from the embodiment of the surgical instrument in Figures 20 to 27 of D4, movement of the anvil and the cartridge assembly into approximation with one another occurred when the user energised an actuator. When another actuator was de-energised, which was triggered by a user, articulation of the instrument was locked. The distinguishing feature of claim 1 was that of providing a locking assembly having a member

that engaged the articulation assembly upon manipulation of the movable handle to cause the approximation. Hence, a different trigger caused the locking engagement. This meant that the articulation was locked in tandem with the approximation, which solved the objective technical problem of enabling the user to set the time at which the articulation lock was engaged without risking the instrument being unlocked when approximation occurred.

Paragraph [0097] of D4 disclosed the possibility of having automatic disengagement of the locking mechanism for the articulation. This occurred when the user articulated the instrument. The automatic disengagement implied automatic re-engagement, which would have had to occur once the instrument had been moved to the desired articulation angle. Also in view of the fact that the surgical instrument could not know by itself when the user had finished with the articulation, it would be obvious that this re-engagement was triggered when the user approximated the anvil and the cartridge assembly by manipulation of a movable handle. It was not technically complicated to implement this feature, as it merely required a different control for the application of the electrical signal which triggered the articulation lock.

Reasons for the Decision

1. The invention

The invention as claimed in the patent as granted relates to a surgical instrument (independent claim 1) and to a disposable unit for engagement with a surgical instrument (independent claim 12), both comprising an

anvil assembly and a cartridge assembly. Devices of the kind according to the invention, such as that shown in Figure 1 of the patent reproduced below, are typically used in laparoscopic or endoscopic procedures for splitting tissue and stapling it together.

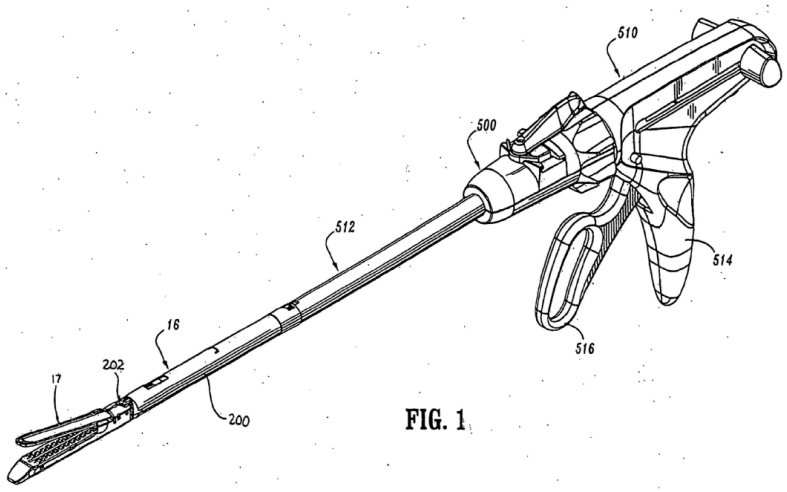

FIG. 1

Generally, the tissue to be treated is first clamped by a tool assembly (17) between an anvil assembly and a cartridge assembly, and is then cut through in a longitudinal direction of these assemblies. At the same time as the tissue is cut, staples are applied at each side of the cut. The cutting and the application of the staples may be performed by manipulating a movable handle (516).

The claimed surgical instrument and disposable unit feature a body portion (200) and an articulating tool assembly (17), which is disposed at a distal end of the body portion and is pivotable with respect to the body portion. The articulating tool assembly comprises the anvil assembly and the cartridge assembly.

The invention focuses on a locking assembly, illustrated in detail in Figure 18 of the patent reproduced below.

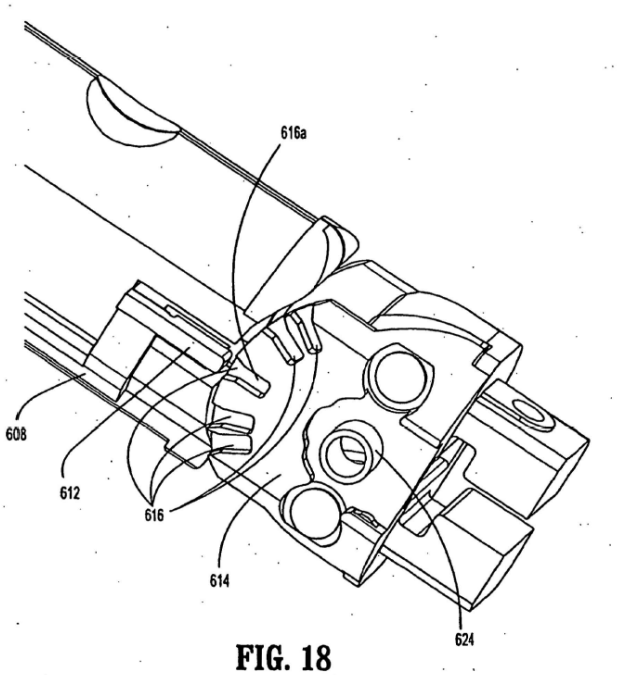

FIG. 18

The locking assembly includes a member (612), which engages the articulating tool assembly upon approximation of the anvil assembly and the cartridge assembly to help maintain the articulating tool assembly in a position aligned with the body portion.

According to the patent, providing a practical way of maintaining the tool assembly in a non-articulated position facilitates the insertion of the articulating tool assembly and (part of) the body portion into a patient's body, through a cannula or a small body incision (paragraphs [0004] and [0005]).

2. Admittance of opponent's submissions

By letter dated 19 August 2021 the opponent filed comments on the Board's preliminary opinion, after the notification of the summons to oral proceedings. The proprietor objected to the admittance of the opponent's

submissions.

Under Article 13(2) RPBA, any amendment to a party's appeal case made after notification of a summons to oral proceedings must, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

The opponent raised an objection of lack of inventive step of claim 1 of the patent as granted on the basis of D4 alone in the statement of grounds of appeal; however, the specific objection on the basis of the combination of the different embodiments illustrated in Figures 20 to 27 and Figures 34 and 35 of D4 was first raised in the letter dated 19 August 2021. Since this objection is not a mere refinement of the arguments already submitted before, decision T 247/20, which considers such a situation, is of no relevance here.

The opponent did not outline any exceptional circumstances for filing the objection after the notification of the summons to oral proceedings.

For these reasons, under Article 13(2) RPBA, the Board decided not to admit the inventive-step objection based on a combination of different embodiments within D4.

3. Added subject-matter

The opponent argued that the combination of the features "the articulation tool assembly (17) including an anvil assembly (20) and a cartridge assembly (18), at least one of which being pivotably moveable with respect to the other" and "the finger (612) extending distally from a portion of the body portion (200) upon

approximation of said anvil assembly (20) with the cartridge assembly (20)" in claim 12 of the patent as granted added subject-matter.

3.1 In its reasoning the opponent referred to embodiments which could be encompassed by the claim; however, what has to be considered is whether the claim contains subject-matter which extends beyond the content of the application as filed, and not what the claim may encompass in terms of its scope of protection.

3.2 As the Opposition Division affirmed in point 2.3 of the impugned decision, the first feature is based in particular on paragraphs [0006] and [0009] (for the anvil assembly and the cartridge assembly being movable with respect to each other and belonging to the articulation tool assembly as part of the claimed disposable loading unit) and on Figures 1, 1A and 2 (for the movement being a pivotal movement) of the application as filed.

3.3 The opponent argued that the two features in conjunction required that a precondition of the finger extending distally was approximation of the anvil assembly and the cartridge assembly. The Board accepts this view insofar as the wording of the claim, in particular the term "upon", means that the finger extension takes place if and only if the anvil assembly and the cartridge assembly are moved into approximation with one another.

However, claim 12 of the patent as granted does not state that the finger extension is responsive to the condition of the approximation of the anvil assembly with the cartridge assembly. Hence, whether or not the application as filed discloses such an association is

of no relevance for the assessment of added subject-matter.

Although claim 12 of the patent as granted is not directed to the surgical instrument in its entirety, but instead to a disposable loading unit "configured for releasable engagement with a surgical instrument", the reference to the surgical instrument implies the suitability of the claimed disposable loading unit for being operated by the surgical instrument. The person skilled in the art knows that, in surgical instruments of the kind to which the invention relates, approximation of the anvil assembly with the cartridge assembly has to be performed with the required precision in order to correctly perform the intended surgical procedure. It is unrealistic that it could be done by manually pinching these assemblies, and instead has to be done by an actuator on the surgical instrument. Therefore, the person skilled in the art implicitly infers the presence of such an actuator in claim 12.

3.4 Paragraph [0071] of the application as filed discloses a surgical instrument with a movable handle, the operation of which causes approximation of the anvil assembly with the cartridge assembly and, at the same time, the distal extension of the finger as defined in the claim:

> "*In operation, upon at least a partial actuation of movable handle 516 (see FIG. 1, for example), pusher 604 is forced distally, e.g., via control rod 520 (see FIG. 11, for example), thus causing distal translation of cam finger 612 at least partially into a slot 616 of pivot plate 614. It is envisioned that actuating movable handle 516 to*

approximate cartridge assembly 18 and an anvil assembly 20 (see FIG. 1A, for example) also functions to translate cam finger 612 distally."

This means that the operation of the movable handle, which causes approximation of the anvil with the cartridge assembly, also causes the finger extension. Hence, paragraph [0071] discloses to the person skilled in the art that the finger extends distally if and only if the anvil assembly and the cartridge assembly are moved into approximation with one another, in particular by manipulation of the movable handle.

3.5 It remains to be assessed whether claim 12 omitting the fact that the movable handle is the actuator intended for performing the approximation and the finger extension results in added subject-matter.

It is true that claim 12 does not stipulate that said actuator is a handle, as disclosed in paragraph [0071]; however, the Board cannot find any teaching in the application as filed that inextricably links this specific form of the actuator, which is only one of those that is routine in the art, with the approximation and the finger extension. The important teaching according to the application as filed is that the approximation, as may be done in the art, results in and takes place at the same time as the finger extension.

Hence, the omission of a reference to a movable handle in claim 12 of the patent as granted does not add subject-matter.

3.6 It follows that the ground for opposition under Article 100(c) EPC raised by the opponent does not

prejudice the maintenance of the patent as granted.

4. Novelty

The opponent raised novelty objections against claim 1 of the patent as granted in view of D1, D4 and D5.

4.1 These objections hinge on the opponent's interpretation of the claim wording "the member engaging the articulating tool assembly upon manipulation of the movable handle ... the member engaging the articulating tool assembly to help maintain the articulating tool assembly in its first position".

The opponent argued that the claim was to be interpreted as merely requiring the member to be in an engaged state (to help maintain the articulating tool assembly in its first position) when the movable handle was manipulated.

The Board's view is that the claim requires the member to engage the articulating tool assembly to help maintain the articulating tool assembly in its first position only if the movable handle is manipulated. In turn, if the movable handle is not manipulated, the member does not engage the articulating tool assembly to help maintain the articulating tool assembly in its first position.

This interpretation, which is consistent with the interpretation of the term "upon" in claim 12, reflects an accepted meaning of this term. Moreover, it is in accordance with the disclosure of the patent in relation to the embodiment of the invention shown in Figures 16 to 20 and described in particular in paragraph [0076]. The purpose of the locking assembly

is to prevent articulation if the movable handle is manipulated and to allow articulation if not. Finally, the term "upon" is also used to describe a similar relationship in another context (paragraph [0074] of the detailed description of the patent). In this paragraph, the term is used to describe the alignment of a cam finger with different slots as a result of different amounts of articulation of the tool assembly.

The opponent's interpretation cannot be accepted because it disregards the context of both the patent as a whole and of claim 1 in particular. The claimed definition of the manipulation of the movable handle in relation to the engagement of the member with the articulating tool assembly would even be devoid of any technical meaning. In isolation, the definition according to which the member engages the articulating tool assembly to help maintain it in its first position implies that the member may be in an engaged state when the movable handle is manipulated.

Dependent claims 4 and 6 do not support the opponent's interpretation. They do not define alternative causal and continuous engagements, but merely limit the subject-matter of independent claim 1 by way of further features such as the member in the form of a finger moving towards a slot (claim 4) and a biasing element for biasing the member towards a pivot plate (claim 6).

As regards the locking assembly illustrated in Figures 21 and 22, referred to by the opponent, this is not described as belonging to the invention. Irrespective of this, such a locking assembly is not covered by claim 1 of the patent as granted, as the proprietor also conceded. It is not unusual that arrangements falling outside the scope of the claims

are illustrated in a patent.

4.2 In view of this interpretation, none of the opponent's novelty objections is convincing.

4.2.1 D4 discloses a surgical instrument with a mechanism for articulating and maintaining in a given position an articulating tool assembly comprising a cartridge assembly and the anvil assembly.

Figure 1, showing the surgical instrument, and Figures 24 and 25, illustrating the mechanism in detail, are reproduced below.

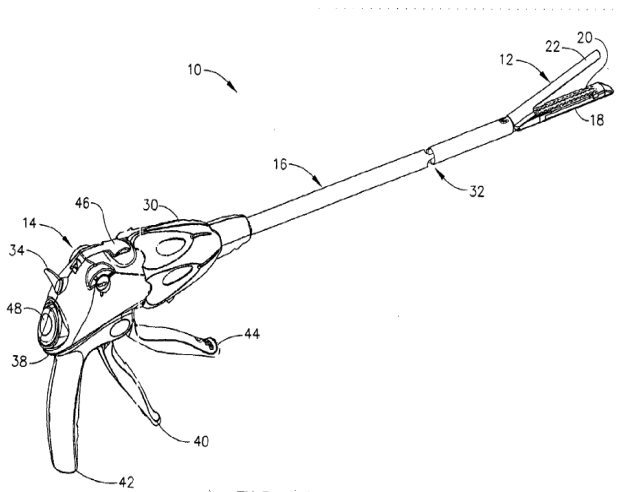

FIG. 1

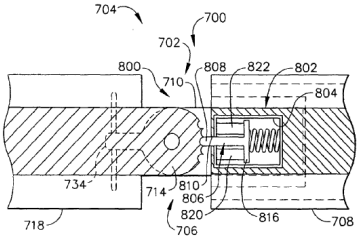

FIG. 24

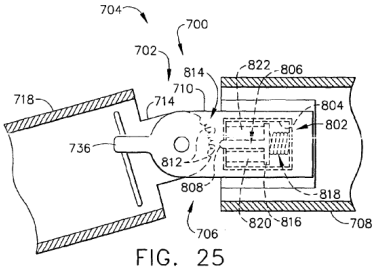

FIG. 25

According to D4 a member in the form of a locking bolt (806) can be advanced distally to come into engagement with one of a plurality of detents (812) of the articulating tool assembly by a compression spring (818). When electrically actuated polymer (EAP) actuators (820, 822) are energised the locking bolt is

retracted to disengage from the detents (paragraph [0090]).

However, manipulation of a movable handle (40) by which the cartridge assembly (20) and the anvil assembly (18) are approximated (paragraph [0064]) has no effect on the advancement or the retraction of the locking bolt.

Hence, D4 does not disclose a member that engages the articulating tool assembly upon manipulation of the movable handle to move the anvil and cartridge assembly in approximation with one another, the member engaging the articulating tool assembly to help maintain the articulating tool assembly in its first (aligned) position, within the meaning of claim 1 of the patent as granted.

It follows that claim 1 of the patent as granted is novel over D4.

4.2.2 D1 discloses a surgical instrument with a mechanism for articulating and maintaining in a given position an articulating tool assembly comprising a cartridge assembly and the anvil assembly similar to that of D4. According to D1 a member advanceable distally can be brought into engagement with one of a plurality of detents of the articulating tool assembly (member 612 and detent 614 in Figures 29 to 29C) either manually or with a biasing spring or another automatic locking device (column 21, lines 10 to 14).

However, manipulation of a movable handle (112, Figure 1) by which the cartridge assembly and the anvil assembly are approximated has no effect on the advancement of member 612.

Hence, D1 does not disclose a member that engages the articulating tool assembly upon manipulation of the movable handle to move the anvil and cartridge assembly in approximation with one another, the member engaging the articulating tool assembly to help maintain the articulating tool assembly in its first (aligned) position, within the meaning of claim 1 of the patent as granted.

It follows that claim 1 of the patent as granted is novel over D1.

4.2.3 D5 discloses a surgical instrument with a mechanism for articulating and maintaining in a given position an articulating tool assembly (Figures 30 to 32). This mechanism comprises a member advanceable distally (124) for controlling the articulation of the operating tip (in particular to maintain it in a first position aligned with an elongate body of the surgical instrument), comprising a receiver (42) for a cartridge assembly and an anvil assembly (46). The member 124 is operated by an articulation slide control (26).

However, manipulation of a movable handle (28, Figure 1, and column 7, lines 42 to 49) by which the cartridge assembly and the anvil assembly are approximated has no effect on the advancement of member 124.

Hence, D5 does not disclose a member that engages the articulating tool assembly upon manipulation of the movable handle to move the anvil and cartridge assembly in approximation with one another, the member engaging the articulating tool assembly to help maintain the articulating tool assembly in its first (aligned) position, within the meaning of claim 1 of the patent

as granted.

It follows that claim 1 of the patent as granted is novel over D5.

4.2.4 In conclusion, the ground for opposition of lack of novelty (Article 54(1) and (2) EPC) under Article 100(a) EPC raised by the opponent does not prejudice the maintenance of the patent as granted.

5. Inventive step

The opponent argued that the subject-matter of claim 1 of the patent as granted lacked an inventive step starting from D1 or D4, taken alone or in combination with D5.

5.1 As explained above, neither D1 nor D4 discloses a member that engages the articulating tool assembly upon manipulation of the movable handle to move the anvil and cartridge assembly in approximation with one another, the member engaging the articulating tool assembly to help maintain the articulating tool assembly in its first (aligned) position, within the meaning of claim 1 of the patent as granted.

The opponent argued that the objective technical problem solved by the distinguishing feature was that of ensuring that the articulating tool assembly was locked when staples were fired.

Even if the person skilled in the art were to seek a solution to this problem, they would not find the distinguishing feature expressly disclosed in any of the cited prior-art documents.

5.2 Turning to the teaching of D5, there is no obvious reason why the person skilled in the art would implement the distinguishing feature in D1 or D4. The arrangement for preventing the articulation when the staples are fired, as disclosed in D5, involves the movable handle 28, which makes it impossible to operate the articulation slide control, i.e. the component by which the articulation can be performed, when the movable handle is in a closed position (column 26, lines 46 to 50). If applied to D1 or D4, such an arrangement would prevent the operation of the respective articulation control elements from these documents, but not the locking of the articulation involving the respective movable members.

5.3 Considering D1 or D4 alone, and in particular the surgical instrument according to Figures 20 to 27 of D4 in view of paragraph [0097] suggesting automatic disengagement of the locking mechanism when a user wishes to perform an articulation by operating a dedicated articulation control element, the opponent essentially argued that automatic (re-)engagement of the locking mechanism was implied or obvious at some point in time.

The Board does not share this view, which is based on hindsight. In particular, without knowledge of the claimed invention, it is perfectly plausible that the member in the form of locking bolt 806 remains in a disengaged state until the locking is manually triggered by the user at the end of the articulation.

5.4 In conclusion, the ground for opposition of lack of inventive step (Article 56 EPC) under Article 100(a) EPC raised by the opponent does not prejudice the maintenance of the patent as granted.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.

2. The patent is maintained as granted.

The Registrar: The Chairman:

D. Hampe M. Alvazzi Delfrate

Decision electronically authenticated