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D E C I S I O N
of 23 March 1995

Case Number: T 1016/93 - 3.2.1
Application Number: 85304985.6
Publication Number: 0169693
IPC: B60K 31/02
Language of the proceedings: EN

Title of invention:
Automatic speed control systems

Patentee:
ECONOCRUISE LIMITED

Opponent:
Robert Bosch GmbH

Headword:
-

Relevant legal provisions:
EPC Art. 54, 104(1), 114(2)

Keyword:
"Late submitted material - evidence admitted (yes)"
"Apportionment of costs (no)"
"Novelty (no)"

Decisions cited:
G 0004/92, T 0156/84, T 0164/89, T 0273/84, T 0326/87,
T 0611/90

Catchword:
1. If it is apparent that a newly cited document is relevant to the decision to be taken it has to be admitted into the proceedings (point 3.4, see also T 0164/89).
2. If the Appellant's reasons for the late citing of a document do not point towards negligence or other circumstances that would amount to an abuse of procedure there is no reason of equity which would justify an apportionment of costs in the Respondent's favour (point 3.6).



Case Number: T 1016/93 - 3.2.1

D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 23 March 1995

Appellant:
(Opponent) Robert Bosch GmbH
Postfach 30 02 20
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Representative:

Respondent:
(Proprietor of the patent) ECONOCRUISE LIMITED
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Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office announced on
23 April 1993, with written reasons posted on
3 August 1993, concerning maintenance of European
patent No. 0 169 693 in amended form.

Composition of the Board:

Chairman: F. A. Gumbel
Members: P. Alting van Geusau
B. J. Schachenmann

Summary of Facts and Submissions

- I. European patent No. 0 169 693 was granted with effect from 28 August 1991 on the basis of European patent application No. 85 304 985.6, filed on 12 July 1985.
- II. The Appellant (Opponent) filed an opposition against the European patent on the grounds that the subject-matter of the patent lacked novelty or an inventive step having regard in particular to the prior art disclosed in:
- D1: US-A-4 046 213
D2: IEEE Transactions on Industrial Electronics,
Vol. IE-30, No. 2, May 1983, pages 108 to 113,
D3: DE-B-2 609 843
- III. By decision announced at oral proceedings held on 23 April 1993, with written reasons posted on 3 August 1993, the Opposition Division maintained the patent in amended form on the basis of an auxiliary request filed on 23 April 1993.

Claim 1 of this request reads:

"1. A vehicle speed control system for controlling a vehicle to run at a selectable desired ground speed, comprising a main memory (32) for storing a signal representing the desired speed, a comparator (28) for comparing a signal representing the actual ground speed with the value of the stored signal so as to produce an error signal dependent on any difference between the compared speeds, an output device (34, 35) responsive to the error signal for controlling the vehicle in dependence thereon so as to adjust its speed in a manner tending to reduce the error signal to zero, and a disabling device activatable either by means of an OFF-

switch (145) or by other means dependent on the operation of the vehicle to render the system inoperative to affect the power of the engine,

characterised in that the disabling device includes a smoothing device which responds to activation of the disabling device by the OFF-switch (145) by reducing the power of the engine at a finite rate of predetermined value so as to avoid an immediate and abrupt reduction in actual ground speed, otherwise said disabling device activated by said other means produces an abrupt deceleration of the vehicle speed."

The Opposition Division held the view that the cited prior art did neither disclose the underlying problem to be solved by the subject-matter of Claim 1, which was considered to relate to avoidance of an immediate and abrupt reduction of the ground speed in case the cruise control was switched off, nor give any suggestion to its solution as set out in the characterising clause of Claim 1.

- IV. The Appellant (Opponent) filed a notice of appeal against this decision on 6 September 1993 and paid the appeal fee the same day. He requested revocation of the patent in its entirety.

The Statement of Grounds of Appeal was filed on 7 December 1993.

- V. In response to the appeal the Respondent maintained that an inventive step existed in the system of Claim 1 as accepted by the Opposition Division.

VI. In response to an official letter dated 26 September 1994 summoning the parties to oral proceedings, as were requested by both parties, the Appellant cited in his letter dated 22 February 1995 a further document

D4: VDO Querschnitt 2, Tempostat E, May 1979, VDO Adolf Schindling AG, pages 3 to 17.

In the Appellant's view this document destroyed novelty, or at least inventive step, of the subject-matter of Claim 1 allowed by the Opposition Division.

VII. With telecopy dated 22 March 1995 the Respondent's representative informed the Board that the Respondent had declined to give him the authority to attend the appeal hearing.

It was submitted that to wait until so close to the oral proceedings before presenting additional material constituted an abuse of procedure which by virtue of Article 114(2) EPC should be sanctioned by disregarding the new document.

Moreover, contacts with the Appellant would suggest that an amicable settlement was possible and therefore, in case the Board should decide to admit the additionally cited document, a short extension should be allowed in the interest of both parties.

It was further observed that the Appellants had directed their remarks in their accompanying letter dated 22 February 1995 "specifically to Claim 1 only of the patent but yet requested that the patent be revoked in its entirety" even though no arguments of any substance were directed to the remaining claims.

So far as the Appellants' specific comments were concerned in relation to D4 the Appellants failed to set out what specific features of the pre-characterising clause were known from this prior art and also in respect of the characterising features the Appellant failed to point out in their written submissions how the new evidence presented these specific features.

Since, in accordance with the opinion G 4/92 of the Enlarged Board of Appeal a decision against a party who has been duly summoned to appear at oral proceedings may not be based on facts put forward for the first time during the oral proceedings the new evidence should be considered "only on its face value".

By implication the Respondent requested dismissal of the appeal.

VIII. Oral proceedings took place on 23 March 1995. The Respondent was as previously announced not present and the proceedings were continued without him in accordance with Rule 71(2) EPC.

IX. In support of his request the Appellant relied essentially on the following submissions:

The newly cited document D4, which was found accidentally during a further search in the Appellant's documentation when preparing for the oral proceedings, related to a vehicle speed control system comprising the full combination of features of present Claim 1.

The features of the pre-characterising part of Claim 1 were disclosed by the circuits shown in Figures 13 and 2 of this document. The fact that the known control comprised a comparator follows from the discussion of the "Regelverstärker" on page 12.

In section 4 on page 13 the disabling features of the automatic speed control were described, which in accordance with section 4.1 comprised two ways of response, i.e. a smooth reduction of the engine power in case the OFF-switch of the vehicle speed control was actuated or an abrupt reduction of the power and thus ground speed when disabling was caused by braking or actuation of the clutch pedal.

Therefore the subject-matter claimed in Claim 1 lacked novelty and was not patentable.

Reasons for the Decision

1. The appeal complies with the requirements of Articles 106 to 108 and Rules 1(1) and 64 EPC. It is admissible.
2. *Amendments*
 - 2.1 The Opposition Division maintained the patent in amended form on the basis of Claims 1 to 17 of the auxiliary request filed at the oral proceedings dated 23 April 1993. During the appeal proceedings the Respondent did not present any further amendments to these claims. The Board will therefore consider the case on the basis of these claims (Article 113(2) EPC).
 - 2.2 Claim 1 is based on the granted Claim 7 or original Claim 8, respectively, with further features taken from the description to be found in column 7, lines 39 to column 8, line 4 of the patent, corresponding to page 17, last paragraph to page 18, second paragraph of the originally filed description.

Dependent Claims 2 to 17 are essentially repetitions of the granted Claims 8 to 23, corresponding to the originally filed Claims 12 to 27, respectively.

There is therefore no objection under Article 123(2) or (3) EPC to the present set of claims.

3. *Procedural considerations*

3.1 Document D4 was cited a long time after the 9 month period stipulated in Article 99 EPC even though the Appellant could have mentioned it earlier than in fact he did. It was therefore not submitted in due time. When deciding whether it should nevertheless be admitted under Article 114(1) EPC the circumstances of the late filing and the relevance of the document to the decision to be taken must be considered (see in particular T 156/84, OJ EPO 1988, 372)

3.2 In the present case the Appellant's submissions concerning D4 were received on 23 February 1995, thus four weeks in advance of the oral proceedings scheduled for 23 March 1995. According to the Respondent's statements in his telefax dated 22 March 1995 these submissions were received by him on 6 March 1995.

As a reason for the late citing of D4 the Appellant stated that this non-patent document was found accidentally during an additional search in the Appellant's documentation carried out in response to further discussions with colleagues during preparation work for the oral proceedings.

3.3 Although not filed immediately with the Statement of Grounds of Appeal it cannot be considered an abuse of proceedings that the Appellant, being faced with substantial amendment of the subject-matter of the

granted patent during the opposition proceedings and having done an initial but unsuccessful search for the subject-matter of the new Claim 1, did not stop his search but sought to find more relevant evidence. The Appellant credibly asserted that the newly discovered document was communicated to the Board and the Respondent without delay.

Furthermore, in the opinion of the Board, the new document was cited sufficiently early in advance of the date of oral proceedings so as to give the Respondent sufficient time to consider the document and determine its relevance. The period cannot, in the present circumstances be considered unreasonable short because the document is in one of the official languages of the EPO and is not difficult to understand or otherwise obscure.

After consideration of the document sufficient time remained for the Respondent to file auxiliary requests or, for example, a reasoned request for adjournment of the oral proceedings and remittal of the case to the first instance.

This possibility was not used although the new document cited was prima facie highly relevant since it appeared to deprive the subject-matter of Claim 1 of its novelty.

- 3.4 Only with telefax dated 22 March 1995, which was handed over to the Board on the day of the oral proceedings, the Respondent announced his intention not to attend the oral proceedings and requested to disregard the new document for reasons of abuse of procedure. The alleged abuse was substantiated solely by the late filing of the document. He also requested an extension of time to come to an amicable settlement with the Appellant.

As is already set out above, the Board cannot see an abuse of procedure to the late citing of D4. Considering further that it is immediately apparent to the skilled person that this new prior art is more relevant than the documents already on file, it has to be admitted into the proceedings (see also T 164/89, not published, point 2).

At the oral proceedings the Appellant confirmed that the Respondent had contacted him. However, he stated that he preferred to continue the appeal proceedings. The Board therefore sees no valid reason to delay the proceedings and give the Respondent additional time for further discussion of the case with the Appellant.

- 3.5 If a document is relied upon for the first time during the appeal proceedings and it is admitted because it is relevant, in accordance with the jurisprudence of the Boards the case is normally to be remitted to the department of first instance so as to make it possible for the new evidence to be examined at two levels of jurisdiction and to avoid one of these being by passed (see for example T 273/84, OJ EPO 1986, 346).

However, it is to be noted that in the present case the Respondent did neither request remittal to the first instance nor gave proof of any willingness for further amendment of the subject-matter claimed even though as will be apparent from the following paragraph of the present decision, the subject-matter of Claim 1 clearly lacks novelty vis-a-vis the disclosure of D4.

In the Board's opinion, if lack of novelty is immediately apparent so that no other conclusion could be arrived at by the first instance and no attempt was made by the Respondent to file amended claims suitable to at least cast some doubts on this conclusion, the

public interest in a speedy and streamlined procedure takes precedence over a possible interest of the Respondent to have this issue examined at two levels of jurisdiction.

Under these circumstances the Board considers that it should make use of its discretion under Article 111(1) EPC and exercise its power to decide the appeal on the basis of the present requests and not to remit the case to the first instance.

- 3.6 In a number of appeal Board decisions it has been decided that the late filing of a relevant document by one party, without giving any convincing explanation for the late introduction of the document, normally calls for an apportionment of costs (Article 104(1) EPC) in the other party's favour (see for example T 326/87, OJ EPO 1992, 522, reasons point 2.3 and T 611/90, OJ EPO 1993, 50, reasons point 5).

However, in the present case the Appellant's reasons for the late citing (see point 3.2 supra) do not point towards negligence or circumstances that would amount to an abuse of procedure.

Furthermore, no request for apportionment of cost was filed by the Respondent and, in the absence of any counterarguments, the Board sees no reasons of equity which would justify an apportionment of costs in the Respondent's favour.

4. *Novelty*

- 4.1 The newly cited D4 discloses a vehicle speed control system for automatically controlling the vehicle to run at a selectable desired ground speed ("Geschwindigkeitsregler"), which comprises a memory

("Digitalspeicher" in Figure 13) for storing a signal representing the desired vehicle speed (see page 12 section "Speicher"), a comparator for comparing a signal representing the actual ground speed ("Istwert") with the value of the stored signal ("Sollwert") so as to produce an error signal dependent on any difference between the compared speeds and an output device responsive to the error signal for controlling the vehicle in dependence thereon so as to adjust its speed in a manner tending to reduce the error signal to zero (see Figure 13 and page 12 section "Regelverstärker").

In section 4 on page 13 of D4, the disabling features of this automatic speed control are described, which in accordance with section 4.1 comprises two ways of response, i.e. a smooth reduction of the engine power by smooth driving of the throttle motor to the idling position in case the OFF-switch of the vehicle speed control is actuated or an abrupt reduction of the power and thus also of the ground speed, when disabling is caused by braking or actuation of the clutch pedal.

4.2 At the oral proceedings it was discussed whether the definition in Claim 1 of the reduction of engine power "at a finite rate of predetermined value" in response to the actuation of the OFF-switch, could substantiate a difference between the subject-matter of the Claim 1 and the system according to D4.

However, in accordance with the disclosure in column 7, line 58 to column 8, line 4 of the patent this feature is considered to describe nothing more than a smooth driving of the actuator to a lower throttle setting so as to smoothly reducing the engine power and in this respect essentially corresponds to the function disclosed in D4 (see in particular page 13, section "Motorischer Rücklauf in Leerlaufposition").

4.3 In the telefax dated 22 March 1995 the Respondent submitted that the Appellant had failed to point out in its written submissions how the new evidence disclosed the specific features of Claim 1. Furthermore, since in accordance with the opinion G 4/92 new evidence may not be considered unless it has been previously notified to the party, the document D4 should be considered only "on its face value".

However it should be noted in this context that the restrictions set out in the opinion G 4/92 (OJ EPO 1994, 192) relate to new facts and evidence rather than to new arguments put forward during the oral proceedings. In this respect the conditions of Article 113 EPC in case a duly summoned party does not appear at oral proceedings as specifically referred to in G 4/92 (OJ EPO 1994, 192) are met in the present case.

It is also to be noted that already in its written submissions the Appellant not only pointed out that the pre-characterising features were known from D4, in particular when considering the circuits shown in Figures 13 and 2, but also indicated the references in the specific paragraphs of D4 where the characterising features of Claim 1 (see in particular page 2, first paragraph of the response) are disclosed.

The Respondent's allegations of insufficiency of the Appellant's submissions on lack of novelty cannot therefore be followed.

4.4 In view of the above assessments it is concluded that a control system having all the features specified in Claim 1 is known from the vehicle speed control system disclosed in D4. As a consequence Claim 1 lacks novelty and therefore cannot form the basis for maintenance of the patent in amended form.

Order

For these reasons it is decided that:

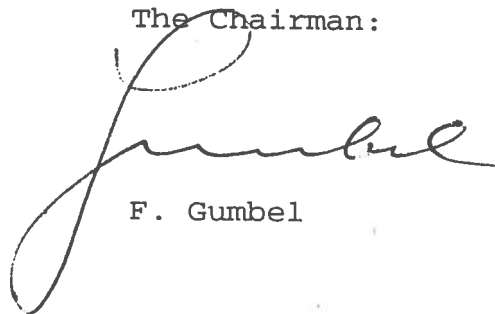
1. The decision of the Opposition Division is set aside.
2. The European patent No. 0 169 693 is revoked.

The Registrar:



S. Fabiani

The Chairman:



F. Gumbel

