



Reference nos:
APL_8/2024
UPC_CoA_1/2024

Order
of the Court of Appeal of the Unified Patent Court
issued on 13 May 2024
in the proceedings for provisional measures
concerning EP 3883277

HEADNOTE

Claim features must always be interpreted in the light of the claim as a whole.

KEYWORDS

Appeal; Application for provisional measures; Claim construction; Extent of protection; Infringement

APPELLANT/APPLICANT IN THE PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE

VusionGroup SA (vormals SES-imagotag SA)

55 Place Nelson Mandela, 92000 Nanterre, France

Represented by Dr. Jochen Herr, attorney-at-law and European patent attorney, Alexandre Hoffmann, European patent attorney, and Daniel Seitz, attorney-at-law, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP

RESPONDENTS/DEFENDANTS IN THE PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE

1. **Hanshow Technology Co. Ltd**

1288 Kanghe Road, 314031, Jiaxing City, Xiuzhou District, Zhejiang Province, China

2. **Hanshow Germany GmbH**

Ria-Thiele-Straße 2a, 40549 Düsseldorf, Germany

3. **Hanshow France SAS**

88 Rue du Dôme, 92100, Boulogne-Billancourt, France

4. **Hanshow Netherlands B.V.**

Transformatorweg 86, 1014 AK, Amsterdam, The Netherlands

Represented by Roland Küppers, LL.M., attorney-at-law, and Dr Alexander Rubusch, LL.M., attorney-at-law, Taylor Wessing PartGmbB

PATENT AT ISSUE

EP 3883277

PANEL AND DECIDING JUDGES

First panel

Klaus Grabinski, President of the Court of Appeal

Françoise Barutel, Legally qualified Judge

Peter Blok, Legally qualified judge and judge-rapporteur

Eric Augarde, Technically qualified judge

Klaus Loibner, Technically qualified judge

LANGUAGE OF PROCEEDINGS

German

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE

- Order of the Court of First Instance of the Unified Patent Court, Local division Munich, of 20 December 2023
- Reference numbers attributed by the Court of First Instance:
 - UPC_CFI_292/2023
 - ACT_567009/2023
 - ORD_596193/2023

DATE OF THE ORAL HEARING:

27 March 2024

FACTS AND REQUESTS

The Appellant

1. The Applicant and Appellant (hereinafter: the Appellant) is a world leader in the field of electronic labels. It was founded in 1992.
2. The Appellant is the registered proprietor of European patent with unitary effect EP 3883277 (hereinafter: the patent at issue).

- At the annual general meeting on 23 June 2023, it was decided to change the Appellant's company name from 'SES-imagotag SA' to 'VusionGroup SA'. The name change was entered in the European Patent Register on 22 March 2024.

The patent at issue

- The patent at issue is a divisional of European patent application 12762019.3 which is based on PCT-application WO 2013/153290 A1. The grant was published on 9 August 2023. The unitary effect was registered on 4 September 2023. On 6 October 2023 Hanshow Germany filed a statement for revocation at the Paris seat of the Central Division of the UPC (UPC_CFI_360/2023, ACT_578871/2023).
- The patent at issue relates to the display of information, in particular price information in a sales area by means of labels (patent at issue, paragraph [0002]).
- According to the description of the patent at issue, the need to display up-to-date information has led to the installation, in numerous sales areas, of electronic labels having a screen on which the display of information is remotely controlled (patent at issue, paragraph [0003]).
- The usefulness of such systems for display at sites such as supermarkets, hypermarkets or any other sales area, is essentially to allow consumers to be presented with a price for each item on sale, this price reliably corresponding to the price such as indicated in the central file of the site i.e. to the price such as will effectively be charged at the check-out (patent at issue, paragraph [0004]).
- Another advantage of these known systems is to allow automated price changes to be made within much shorter time periods than with manual display, for example for special offer periods (patent at issue, paragraph [0005]).
- Electronic label systems, although they are tending to become increasingly more sophisticated over time, nonetheless remain relatively rigid regarding the different display possibilities, and regarding the spatial and time organization of these various possibilities (patent at issue, paragraph [0007]).
- In the view of this, the problem underlying the patent at issue is to provide means for providing consumers with spatially located information complementing the information already visually available in a sales area (patent at issue, paragraph [0015]).
- According to claim 1 of the patent at issue, this problem is to be solved by the following product (original French language and translation, using the numbering added by the Court of First Instance):

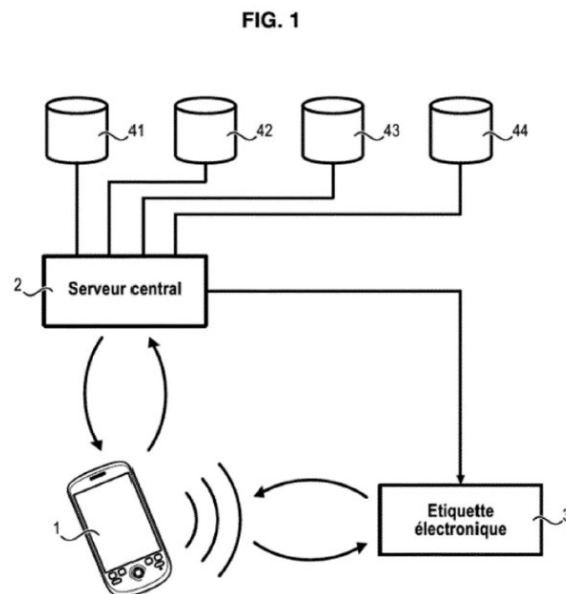
	FR	EN
1.	Étiquette électronique (3) pour surface de vente munie d'une série d'étiquettes électroniques (3) répartie,	Electronic label (3) for sales area with a series of distributed electronic labels (3),

1.1.	chaque étiquette électronique (3) étant identifiée par un unique identifiant d'étiquette qui lui est propre, comprenant:	each electronic label (3) being identified by a unique label identifier specific to it, comprising:
2.	un module de communication radiofréquence (32) configuré pour recevoir en provenance d'un serveur central (2) des données représentatives d'informations relatives à un article;	a radio frequency communication module (32) configured to receive from a central server (2) data representative of information relating to an article;
3.	une mémoire (33) pour stocker lesdites données représentatives d'informations relatives à un article;	a memory (33) to store said data representative of information relating to an article;
4.	un écran d'affichage (31) configuré pour afficher lesdites informations relatives à un article;	a display screen (31) configured to display said information relating to an article;
5.	un microcontrôleur (34) configuré pour commander l'affichage desdites informations relatives à un article sur l'écran d'affichage (31);	a microcontroller (34) configured to control the display of said information relating to an article on the display screen (31);
6.	un boîtier (30);	a case (30);
7.	une carte de circuit imprimé (35) logée dans le boîtier (30) du côté de la face arrière du boîtier et	a printed circuit board (35) housed in the case (30) on the side of the back of the case and
7.1.	sur laquelle sont disposés le module de communication radiofréquence (32), la mémoire (33) et le microcontrôleur (34);	on which are arranged the radio frequency communication module (32), the memory (33) and the microcontroller (34);
8.	un périphérique radiofréquence (36) apte à établir une communication (S1) par radiofréquence avec un terminal mobile (1) et à communiquer audit terminal mobile l'identifiant de l'étiquette électronique,	a radio frequency device (36) capable of establishing a communication (S1) by radio frequency with a mobile terminal (1) and communicating to said mobile terminal the identifier of the electronic label,
8.1.	le périphérique radiofréquence (36) comprenant une antenne (38) et une puce électronique (37) de type NFC ou RFID,	the radio frequency device (36) comprising an antenna (38) and an electronic chip (37) of NFC or RFID type,
8.2.	la communication (S1) par radiofréquence entre le périphérique	the communication (S1) by radio frequency between the radio

	radiofréquence (36) et le terminal mobile (1) étant établie par communication NFC ou RFID,	frequency device (36) and the mobile terminal (1) being established by NFC or RFID communication,
8.3.	la puce électronique (37) du périphérique radiofréquence étant disposée sur la carte de circuit imprimé (35) et	the electronic chip (37) of the radio frequency device being disposed on the printed circuit board (35) and
8.4.	l'antenne (38) du périphérique radiofréquence étant disposée sur ou dans le boîtier du côté de la face avant de ladite étiquette électronique.	the antenna (38) of the radio frequency device being disposed on or in the housing on the side of the front of said electronic label (3).

12. According to the Appellant, the electronic label of claim 1 solves the aforementioned technical problem by facilitating reliable communication with a mobile terminal, for example a smartphone, on which further spatially located information can be displayed. Due to this additional provision of information via a mobile terminal, the information provided to the consumer is no longer limited to the information shown on the display of the electronic label.

13. Figure 1 of the patent at issue shows the communication of an electronic label (3) with the central server (2) as well as the mobile terminal (1):



14. The information to be displayed on the electronic label, for example the price of an article, is transmitted from the central server to the electronic label (see in particular claim features 2 to 5).

15. The electronic label additionally allows for reliable communication with a mobile terminal 1, such as a smartphone (see in particular features 8 to 8.4). In order to provide further information, the electronic label transmits its identifier to the mobile terminal (see in particular

feature 8), which is then capable of retrieving further information on the label or the associated article from the central server with this identifier.

The Respondents

16. The Defendants and Respondents (hereinafter: the Respondents) are part of the Hanshow Group, which was founded in China in 2012 and is active in the field of electronic shelf labels. Respondent 1) is the parent company of the Hanshow Group. Respondents 2), 3) and 4) are subsidiaries based in Germany, France and the Netherlands.

The requests

17. In its application for provisional measures the Appellant requested in summary:
- i) ordering the Respondents to refrain from infringing claim 1 and 3 of the patent at issue on the territory of the 17 UPC Member States,
 - ii) an interim award of costs of €11,000,
 - iii) a penalty of €250,000 in case of non-compliance with the injunction, and
 - iv) that the order be provisionally enforceable.
18. The Appellant submitted that the Respondents offer and sell the following products (hereinafter: the contested products) within the territory of the UPC member states:
- Nebular series with the model designations
 - Nebular-350(F) with the FCC IDs: 2AYMH-NEBULAR-350B, 2AYMH-NEBULAR-350D, 2AYMH-NEBULAR-350T,
 - Nebular-266(F), Nebular-213(F) and Nebular-290 with the FCC ID: 2AYMH-NEBULAR-213K,
 - Nebular-750 with the FCC ID: 2AYMH-NEBULAR-750,
 - Nebular Plus-266 with the FCC ID: 2AYMH-NEBULARP-266,
 - Stellar series with the model designation
 - Stellar Plus-266, Stellar Pro-266Q and Stellar Pro-266QO with the FCC ID: 2AYMH-STELLARPQ-266.
- The Appellant argued that offering and selling the contested products constitutes a direct and literal infringement of claims 1 and 3 of the patent at issue.
19. The Respondents requested that the Court:
- i) reject the Application for provisional measures,
 - ii) order the Appellant to pay the costs of the proceedings, including the costs incurred by filing a protective letter,
 - iii) declare the Order immediately enforceable.
20. The Respondents submitted that claim features 1.1, 7 and 8.4 are not realized in the contested products and that the Appellant has not proven that the Respondents offered and marketed these products within UPC territory after the grant of the patent at issue. In addition, they argued that the patent at issue contains added matter and that the claimed subject-matter is not novel or at least obvious.

The Order of the Court of First Instance

21. In the impugned order, the Court of First Instance:
- i) dismissed the application for provisional measures,

- ii) declared that the Appellant must pay the costs of the proceedings and the other costs of the Respondents, including the costs incurred by filing the protective letter, up to a maximum of € 200,000.00,
- iii) set the value of the action at € 2,000,000.00.

22. The Court of First Instance was not satisfied with a sufficient degree of certainty that the contested products infringe the patent at issue. The reasoning of the Court of First Instance can be summarized as follows:

- The spatial arrangement of the printed circuit board with the electronic chip on the one hand and the antenna on the other hand should not be considered separately but in context. The patent claim is obviously an attempt to capture the technically existing interaction between chip and antenna by the spatial arrangement of both components.
- The original version of the claim, which according to the Court of First Instance can be used as an aid to interpretation in relation to amendments made during the grant procedure, already established a direct connection between the chip arranged on the printed circuit board and the antenna. The original version of the claim was formulated thus that the chip arranged on the printed circuit board and the antenna should be at a distance from each other ("*...à distance de...*"). The technical purpose of the spacing was to limit interference.
- According to the wording of the claim as granted, the antenna and the printed circuit board are to be arranged effectively diametrically opposite each other. The patent claim defines the position (arrangement) of these two components in space (housing) and thus indirectly in spatial relation to each other; the relevant reference basis for the arrangement is in each case the housing of the electronic label with its sides and the surfaces of these. Both claim features refer to these. It follows from the spatial delimitation made in this way that a component to be assigned to the side of the front surface of the electronic label cannot at the same time be assigned to the side of the back of the housing – and vice versa.
- In the labels with the type designation "Nebular-350 Y-N" at least a considerable part of the antenna rests on the upper section of the inside of the back of the housing.
- This means that at least a substantial part of the antenna must be assigned to the surface of the back of the housing.
- Insofar as the antenna is to be assigned to the back of the housing, it cannot at the same time be arranged on the side of the front surface of the electronic label. Therefore, if at least a substantial part of the antenna can be assigned to the back of the housing, an infringement cannot be established. The same conclusion applies to the other contested products.

The requests at appeal

23. In the statement of appeal, the Appellant requests, in summary, to set aside the order of the Court of First Instance and to grant the requests as stated in its application for provisional measures. The Appellant claims the reimbursement of costs in respect of the entire proceedings at first instance and appeal, and an interim award of costs of the appeal proceedings.

24. The Appellant's grounds of appeal can be summarized as follows:

- The impugned order is based on an incorrect interpretation of claim features 7 and 8.4. Claim 1 does not require a specific distance between the printed circuit board and the antenna. A person skilled in the art will deduce from the interaction of features 7 and 8.4 that the antenna is to be arranged in relation to the printed circuit board in such a way that the antenna – as

seen from the direction of the front of the label – should not be arranged behind the printed circuit board.

- The Court of First Instance inadmissibly uses the prosecution history of the patent at issue as an aid to interpretation. Even if the prosecution history could be taken into account, it confirms that the antenna should be arranged separate from the chip arranged on the printed circuit board only to the extent that transmission through the circuit board is avoided.

- The view of the Court of First Instance that, according to the patent claim, a component which is to be assigned to the side of the front surface of the electronic label cannot at the same time be assigned to the side of the back of the housing – and vice versa – is incorrect.

- If the patent claim is interpreted correctly, the labels with the type designation "Nebular-350" are within the scope of protection of the patent at issue.

- Furthermore, even on the basis of the erroneous interpretation of the Court of First Instance, the electronic labels with the type designations Nebular-266, Nebular-213, Nebular-290, Nebular-750 and Stellar Pro-266 are within the scope of protection.

25. The Respondents request that the appeal be rejected, and that the Appellant be ordered to bear the further costs of the proceedings. The Respondents defend the finding of the Court of First Instance that their products are outside the scope of protection of the patent at issue and refer to the other objections that they brought forward in the proceedings at first instance.

GROUNDS FOR THE ORDER

Principles for claim interpretation

26. In its order in the 10X and Harvard/Nanostring case (UPC_CoA_335/2023 App_576355/2023), the UPC Court of Appeal has adopted the following standard for the interpretation of patent claims.

- i. The UPC Court of Appeal proceeds from the following principles in accordance with Art. 69 of the Convention on the Grant of European Patents (EPC) and the Protocol on its Interpretation.
- ii. The patent claim is not only the starting point, but the decisive basis for determining the protective scope of the European patent.
- iii. The interpretation of a patent claim does not depend solely on the strict, literal meaning of the wording used. Rather, the description and the drawings must always be used as explanatory aids for the interpretation of the patent claim and not only to resolve any ambiguities in the patent claim.
- iv. However, this does not mean that the patent claim serves only as a guideline and that its subject-matter may extend to what, from a consideration of the description and drawings, the patent proprietor has contemplated.
- v. The patent claim is to be interpreted from the point of view of a person skilled in the art.
- vi. In applying these principles, the aim is to combine adequate protection for the patent proprietor with sufficient legal certainty for third parties.

- vii. These principles for the interpretation of a patent claim apply equally to the assessment of the infringement and the validity of a European patent. This follows from the function of the patent claims, which under the European Patent Convention serve to define the scope of protection of the patent under Art. 69 EPC and thus the rights of the patent proprietor in the designated Contracting States under Art. 64 EPC, taking into account the conditions for patentability under Art. 52 to 57 EPC.

Claim interpretation

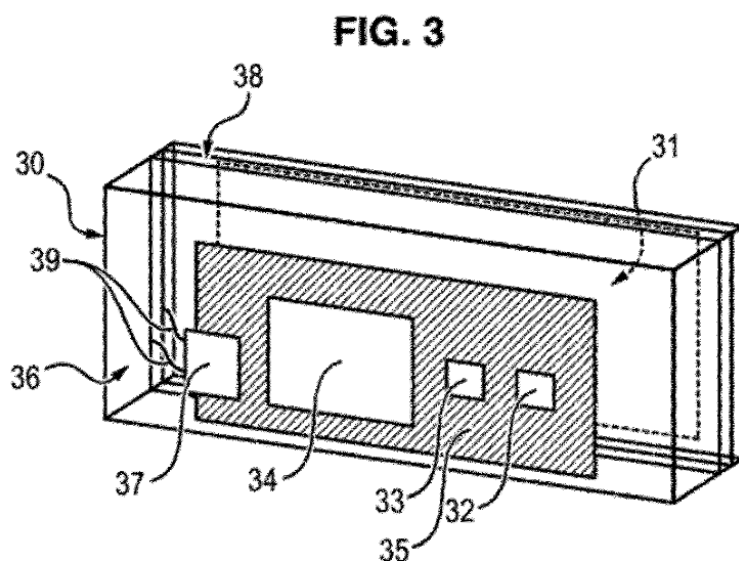
27. Applying these principles for claim interpretation, the Court of Appeal construes claim feature 8.4 (the antenna (38) of the radio frequency device being disposed on or in the case on the side of the front of said electronic label) as follows.
28. As is undisputed by the parties and rightly held by the Court of First Instance, the person skilled in the art is a graduate engineer with multiple years of experience in the development and construction of electronic labels with RFID/NFC-functionality.
29. Claim feature 8.4 should be read in conjunction with claim features 7 and 8.3. Claim features must always be interpreted in the light of the claim as a whole. Moreover, these features all relate specifically to the arrangement of components of the electronic label with respect to the label's case:
 - Feature 7: *a printed circuit board (35) housed in the case (30) on the side of the back of the case;*
 - Feature 8.3: *the electronic chip (37) of the radio frequency device being disposed on the printed circuit board (35);*
 - Feature 8.4: *the antenna (38) of the radio frequency device being disposed on or in the housing on the side of the front of said electronic label.*These features teach the skilled person that the chip and antenna of the radio frequency device should not be placed in the same location in or on the case. The chip should be arranged on the printed circuit board on the side of the back of the case; the antenna on or in the case on the side of the front. In light of this, the person skilled in the art will understand that feature 8.4 requires that the antenna is disposed on or in the case at a location more to the front of the electronic label than the printed circuit board with the chip on it.
30. This interpretation is confirmed by paragraphs [0034] to [0040] of the description of the patent at issue. Paragraph [0034] teaches to arrange the chip and the antenna of the radio frequency device in different places on or in the case of the electronic label. The chip is arranged on the printed circuit board on the side of the back of the label, whereas the antenna is arranged on or in the case on the side of the front (paragraph [0035]). The subsequent paragraphs explain that, on the one hand, placing both the antenna and the chip on the front is undesirable, as it is detrimental to maximizing the display surface of the display screen (paragraph [0036]). On the other hand, positioning the antenna on the back next to the chip would reduce the reading distance and readability, since this would then have to be done through the display screen and the electromagnetic disturbances induced by the printed circuit board (paragraph [0038]). In conclusion, the description teaches again to separate the antenna from the chip (paragraph [0039]), the chip being arranged on the printed circuit board and the antenna being integrated

in the plastic casing, towards the front of the casing, preferably around the display screen (paragraph [0040]).

31. Given this interpretation, the Court of First Instance was right to conclude that claim features 7 and 8.4 exclude that the printed circuit board and the antenna are positioned in the same plane. The person skilled in the art will understand that, in combination, these claim features require that the antenna is positioned more towards the front of the electronic chip than the printed circuit board.
32. In addition, claim feature 8.4 requires that the antenna is not placed behind the display screen in the sense of claim feature 4. The description indicates that the side of the front of the electronic label in the sense of claim feature 8.4 is the plane of the display screen. Paragraph [0036] teaches that placing both the antenna and the chip on the front side of the label is undesirable, as it is detrimental to maximizing the display surface of the display screen. The description thus assumes that the front of the label is the place where the display screen is positioned, otherwise placing the antenna and the chip on the front side of the electronic label would not conflict with the object of maximizing the display screen. Furthermore, the description teaches that placing the antenna on the back of the label is disadvantageous, since in that position the antenna has to transmit and receive through the display screen (paragraph [0038]) and that, therefore, the antenna should be placed towards the front side of the case, and preferably around the display screen (paragraph [0040]). That suggests that if the antenna is placed on the front side of the electronic label, the display screen does not obstruct the antenna and the communication between the radio frequency device and the mobile terminal, since in that configuration the antenna is not placed behind the display screen.
33. The Court of Appeal rejects the Appellant's argument that claim feature 8.4 only requires that the antenna is not placed behind the printed circuit board. The claim interpretation put forward by the Appellant would imply that claim feature 8.4 is also met if the antenna and the printed circuit board are in the same plane. Such an interpretation is not compatible with the wording of the patent claim and is also contrary to the description, which explicitly teaches the skilled person in paragraph [0038] not to position the antenna and the printed circuit board (on which the chip is located) next to each other.
34. In this context the Appellant submits that not placing the antenna behind the printed circuit board is sufficient to prevent the antenna from transmitting and receiving through the printed circuit board. That argument may be correct, but it does not follow that the claim interpretation the Appellant advances is right. Paragraph [0038] is not concerned merely with the shielding effect which would be caused by placing the antenna behind the printed circuit board. Paragraph [0038] teaches that the antenna should not transmit and receive through *the electromagnetic disturbances* induced by the printed circuit board. Those electromagnetic disturbances are not limited to the outline of the printed circuit board. A person skilled in the art will know, on the basis of their common general knowledge, that the mere presence of a printed circuit board in the vicinity of the antenna will have an adverse effect on the operation of the antenna (D. Ciudad, P. Cobos Arribas, P. Sanchez and C. Aroca, *RFID in Metal Environments: An Overview on Low (LF) and Ultra Low (ULF) Frequency Systems*, In: C. Turcu, *Radio Frequency Identification Fundamentals and Applications, Design Methods and Solutions*, 2010, Exhibit TW 41, §2.2.2). This is because the metal parts of the printed circuit board will interfere with the magnetic field and cause not only a shielding effect but also a “detuning effect”, i.e. the metal will produce a drift of the working frequency. That detuning effect will

also occur if the antenna and the printed circuit board are placed next to each other in the same plane. The effect can be avoided or reduced by positioning the two elements on different sides of the case of the electronic label. For that reason, claim feature 8.4 should be interpreted to mean that the antenna is positioned more to the front of the electronic label than the printed circuit board.

35. The Appellant's argument that claim 1 does not require a specific position of the antenna in relation to the display is unfounded. The term "the side of the front" in claim feature 8.4 should be interpreted in light of the description and the common general knowledge of a person skilled in the art. As the Court of Appeal established above, an antenna located behind the screen is not on the side of the front within the meaning of claim feature 8.4. The Court of Appeal also rejects the Appellant's assertion that the patent at issue presents the position of the antenna in relation to the display screen as merely a preferred embodiment. Paragraph [0038] of the description presents sending and receiving through the display screen as a problem that the claimed invention generally aims to solve, rather than as an advantage of a preferred embodiment. What the patent at issue does present as a preferred embodiment and specifically claims in claim 2 is integrating the antenna into the case around a reserve housing the display screen. However, placing the antenna on the side of the front of the electronic label, in the sense of not behind the display screen, can also be achieved by configurations other than that of the preferred embodiment, for example by placing the antenna in the case next to the display screen or by placing the antenna on the front surface of the case.
36. Contrary to what the Appellant suggests, the following Figure 3 of the patent at issue does not show an electronic label in which the antenna is placed behind the display screen.



Also in view of the explanation of Figure 3 in the description [0026 ff.], the person skilled in the art will understand that Figure 3 shows the preferred embodiment described in paragraph [0040] in which the antenna is integrated into the case around a reserve housing the display screen. The person skilled in the art will also understand that in this embodiment the display screen is not just in the plane of the dotted line. The description explicitly indicates that a display screen typically has a thickness of 1 centimeter. The person skilled in the art will therefore consider the dotted line to be the front edge of the reserve housing the display screen, with the reserve extending inwards to accommodate the thickness of the display

screen and with the antenna (38) therefore placed around that recess in accordance with the preferred embodiment described in paragraph [0040] and claimed in claim 2.

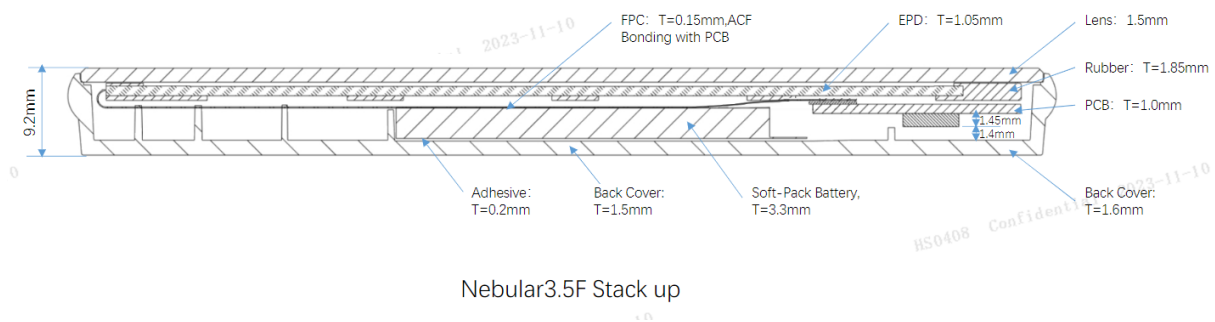
37. The interpretation of claim feature 8.4 given above is based on the wording of the claim, read in the light of the description and drawings from the perspective of a person skilled in the art based on their common general knowledge, without having regard to the prosecution history of the patent. The parts of the European Patent Office examination file cited by the parties do not shed any new light on this interpretation. Therefore, the Court of Appeal in this case does not need to address the question whether the prosecution history can be taken into account when determining the scope of protection of a European patent.

Contested products not within scope of protection

38. In its order in the 10X and Harvard/Nanostring case (UPC_CoA_335/2023 App_576355/2023), the UPC Court of Appeal ruled that a sufficient degree of certainty within the meaning of R. 211.2 of the Rules of Procedure of the UPC (hereinafter: RoP), in conjunction with Art. 62(4) UPCA requires that the Court consider it on the balance of probabilities at least more likely than not that the patent is infringed. Applying this standard, the Court of Appeal considers that, on the basis of the submissions of the parties and the evidence available in these summary proceedings, there is not a sufficient degree of certainty that the Respondents have infringed the patent at issue with the contested products.

39. Firstly, it is not in dispute that in all the contested products, the antenna of the radiofrequency device is positioned behind the display screen. For that reason alone, these products fall outside the scope of claim 1 of the patent at issue, since claim feature 8.4 excludes the antenna being disposed behind the display screen (see above paragraph 32).

40. Secondly, claim feature 8.4 requires the antenna to be positioned more to the front of the electronic label than the printed circuit board (see above paragraphs 29 et seq.) The Court of Appeal is not convinced that the contested products meet this requirement. The Appellant has made its submissions primarily with reference to the Nebular 350 model. The following technical drawing submitted by the Respondents (Exhibit TW 42) shows in this model that the flexible printed circuit (FPC) with the antenna is positioned at the same level as the plate of the printed circuit board (PCB), and therefore not further to the front than the printed circuit board.



The evidence submitted by the Appellant, including the deposited samples and the following photograph of the Nebular 350 in its unfolded state, does not provide sufficient evidence that the antenna is in fact positioned more towards the front.



On the basis of this photo, it cannot be established that in the closed position, the antenna (fitted within the orange foil) is positioned more to the front of the label than the printed circuit board (the black element on the top right). This is all the more impossible to establish since it is not in dispute that i) the antenna is attached to the back of the orange foil and ii) the flexible foil will be pressed towards the back of the label in the closed position.

41. The Appellant's submission that in the Respondents' products the printed circuit board is located in a recess in the back of the enclosure, while the antenna lies on top of the batteries, cannot result in a different assessment. Due to this recess, the printed circuit board can extend further to the back of the case than the antenna. However, this does not alter the fact that the antenna and the front part of the relatively thick printed circuit board lie next to each other in the same plane and that, therefore, the product is not within the scope of protection of claim 1.
42. The Appellant has also failed to establish that the batteries push the antenna further to the front of the electronic label than the printed circuit board. The Appellant's submission that the batteries protrude further towards the display screen than the printed circuit board has been refuted by the Respondents with reference to the technical drawings of the labels. For instance, the drawing of the Nebular 350 presented in paragraph 40 above shows that the front side of the battery is further towards the back of the label than the front side of the printed circuit board, namely 5 mm from the back for the batteries, compared to 5.45 mm for the printed circuit board. Furthermore, the drawings only show the plate of the printed circuit board and not the elements of the printed circuit board mounted on it, such as circuits and resistors, which protrude even further towards the front of the label.
43. The same assessment applies to the other contested products, namely the various models of the Nebular-266, Nebular-213, Nebular-290, Nebular-750 and Stellar Pro-266. Similarly for those products, the photographs submitted by the Appellant do not demonstrate that the antenna is positioned more to the front of the electronic label than the printed circuit board, and the technical drawings submitted by the Respondents refute the Appellant's claim that, in the model in which the antenna lies on the batteries, the batteries protrude further towards the display screen than the front parts of the printed circuit board.
44. It follows that the contested products do not fall within the scope of protection of claim 1 of the patent as not all of the claim features have been realized. This implies that the Appellant's argument that claim 3 of the patent at issue is infringed also fails, as claim 3 is dependent on claim 1.

45. Given that, assessed on the basis of the balance of probabilities, none of the contested products fall within the scope of protection of the patent at issue, it can be left open whether it is more likely than not that the Respondents offer or market each of those products within the territory of UPC Member States.

Conclusion

46. Given that, assessed on the basis of the balance of probabilities, the Respondents' products do not fall within the scope of protection of the patent at issue, the Court of First Instance was right to reject the application for provisional measures and correctly held that the Appellant should bear the costs of the proceedings at first instance. The Court of Appeal therefore rejects the appeal.

47. As the unsuccessful party, the Appellant is required to bear the costs of the appeal proceedings.

ORDER

1. The appeal is rejected.
2. The Appellant is required to bear the costs of the appeal proceedings.

This order was issued on 13 May 2024.

Klaus Grabinki President of the Court of Appeal	
Françoise Barutel Legally qualified judge	
Peter Blok Legally qualified judge and judge-rapporteur	
Eric Augarde Technically qualified judge	
Klaus Loibner Technically qualified judge	
Eurico Igreja Employee of the Registry	