

ORDER
of the Court of Appeal of the Unified Patent Court
issued on 25 September 2024
in the proceedings for the review of the order on provisional measures

HEADNOTE:

1. The Court of Appeal shall decide at its discretion, taking all circumstances into account, whether a submission that was rightly not admitted by the Court of First Instance should be considered in the appeal proceedings.
2. The subject matter of the appeal proceedings in the review of provisional measures is in principle limited to the submissions in the proceedings concerning the order of provisional measures.
3. To ensure legal certainty and the good administration of justice, the Statement of grounds of appeal must be clear and precise to enable the Respondent to prepare the defense with regard to the judgment of the first instance and the Court of Appeal to decide on the appeal. The Court is not obliged to search for and identify in the annexes the grounds on which the appeal may be based. The same applies to written submissions from another procedure.
4. Written submissions submitted only after the closure of the oral hearing on which the decision is based may no longer be taken into account by the Court in its decision.
5. The delay within the meaning of R. 211.4 RoP shall be calculated from the day on which the Applicant became aware, or should have become aware, of the infringement that would enable him, in accordance with R. 206.2 RoP, to file an application for provisional measures with a reasonable prospect of success. Thus, the decisive point in time is when the Applicant has, or should have had, after exercising due diligence, the necessary facts and evidence within the meaning of R. 206.2(d) RoP.
6. Whether there has been an unreasonable delay within the meaning of R. 211.4 RoP depends on the circumstances of the individual case.
7. Irreparable harm is not a necessary condition for rendering an order on provisional measures.
8. R. 263 RoP also applies to applications for the issuing of orders on provisional measures.

KEYWORDS:

- Application for an order on provisional measures
- Consideration in appeal of submissions rightly rejected by the Court of First Instance,
- Subject matter of the appeal proceedings in relation to an application for an order on provisional measures,
- Contents of the Statement of grounds of appeal,
- Novelty,
- Inventive step,
- Written submissions filed after the closure of the oral hearing,
- Urgency,
- Balancing of interests in proceedings concerning an application for granting provisional measures
- Applicability of R. 263 RoP in proceedings concerning provisional measures

APPELLANTS/DEFENDANTS IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE:

- 1. Mammut Sports Group AG, Seon, Switzerland**
- 2. Mammut Sports Group GmbH, Wolfertschwenden, Germany**

both represented by: Attorney-at-law Oliver Jan Jüngst, Attorney-at-law Dr. Moritz Schroeder, law firm Bird & Bird LLP, Düsseldorf, Germany

assisting: Patent Attorney Dr. Felix Harbsmeier, Patent Attorney at Bird & Bird LLP, Düsseldorf, Germany

RESPONDENT/APPLICANT IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE:

Ortovox Sportartikel GmbH, Taufkirchen, Germany

represented by: Attorney-at-law Miriam Kiefer, Attorney-at-law Robert Knaps, law firm Kather Augenstein, Düsseldorf,

assisting: Patent Attorney Michael Siebel, law firm Hofstetter, Schurack & Partner Rechtsanwälte PartG mbB

LANGUAGE OF PROCEEDINGS:

German

PANEL AND DECIDING JUDGES:

Second Panel:

Rian Kalden, Presiding Judge and legally qualified judge

Ingeborg Simonsson, legally qualified judge

Patricia Rombach, legally qualified judge and judge-rapporteur

Eric Augarde, technically qualified judge

Max Tilmann, technically qualified judge

IMPUGNED ORDER OF THE COURT OF FIRST INSTANCE:

- Order of the Local Division Düsseldorf of 9 April 2024
- Reference no. of the Court of First Instance:

Confirming Order (ORD_13918/2024) issued on the application (App_4074/2024 in the main proceedings ACT_589655/2023) for review of the *ex parte* order of 11 December 2023 (ORD_592936/2023);

UPC_CFI_452/2023 (Application for provisional measures)

SUBJECT MATTER OF THE DISPUTE:

Appeal against the confirmation of an Order on provisional measures (R. 220.1 RoP in conjunction with R. 212.3 RoP in conjunction with R. 197.3 and R. 197.4 RoP)

PATENT AT ISSUE:

EP 3 466 498

ORAL HEARING ON:

25 July 2024

FACTS AND REQUESTS:

1. The applicant and respondent on appeal (hereinafter: Ortovox) is seeking interim relief against the respondents and appellants (hereinafter collectively: Mammut) for direct and indirect patent infringement of its European Patent EP 3 466 498 (the patent at issue).
2. The notice of grant of the patent at issue, which was filed on 9 October 2017, was published on 4 December 2019. The patent at issue relates to an avalanche searching device (hereinafter also: LVS device) and a method for operating an avalanche searching device. It is currently in force, among other countries, in the Federal Republic of Germany and in Austria.

3. Claim 1 of the patent reads as follows (...)¹:

Search device for avalanche victims, having a transmitting unit (16) for transmitting at least one transmit signal (18), a receiving unit (16) for receiving at least one transmit signal (30) from at least one further avalanche transceiver (32), and a control device (24) for controlling at least one loudspeaker (22), wherein the control device (24) is designed to control the at least one loudspeaker (22) to output at least one voice message on the basis of at least one event, wherein the at least one event is associated with a search for the at least one further avalanche transceiver (32), wherein the avalanche transceiver (10) has the at least one loudspeaker (22) and the at least one loudspeaker (22) is designed to issue at least one audio signal, characterized in that the at least one audio signal is associated with the search for the at least one further transceiver (32), wherein the control device (24) is designed to control the at least one loudspeaker (22) such that the at least one audio signal during the output of the at least one voice message is suppressed or output with a reduced volume.

4. Claim 13 protects a method for operating a corresponding avalanche transceiver.
5. The first defendant presented an avalanche searching device under the designation "Barryvox S2" at the "ISSW" trade fair in Bend, Oregon (USA) from 8 October 2023 to 13 October 2023. There, it was examined by employees of Ortovox.

¹ Translator's note: as the language of proceedings is German, the following is the English version of the claims contained in the original order.

6. In early November 2023, Ortovox received a notice from a retailer that the "Barryvox S2" could be pre-ordered for the year 2024 via the Mammut Group's B2B platform. According to the general terms and conditions available on that platform, the second defendant is responsible for offers and deliveries to the Federal Republic of Germany and the Republic of Austria (Annex KAP 9).
7. The first defendant also presented the "Barryvox S2" at the "ISPO Munich 2023" trade fair, which took place in Munich from 28 November to 30 November 2023.
8. By letter dated 28 November 2023 (Annex KAP12), Ortovox issued a cease-and-desist letter to Mammut; however it was unsuccessful.
9. Upon Ortovox's application of 1 December 2023, which was supplemented following a notice from the Local Division Düsseldorf, the latter issued an order on 11 December 2023 (ORD_592936/2023) without prior hearing of Mammut, imposing the following provisional measures:
 - I. The defendants (Mammut) are ordered to refrain from:
 1. offering, placing on the market, or using avalanche searching devices in the Federal Republic of Germany and/or the Republic of Austria, or importing or possessing them for these purposes, with at least one transmitting unit for transmitting at least one transmission signal, a receiving unit for receiving at least one transmission signal from at least one further avalanche searching device, and a control device for controlling at least one loudspeaker, wherein the control device is designed to control at least one loudspeaker to output at least one voice message on the basis of at least one event, wherein at least one event is associated with a search for at least one further avalanche searching device, wherein the avalanche searching device has at least one loudspeaker and at least one loudspeaker is designed to issue at least one audio signal, characterized in that at least one audio signal is associated with the search for at least one further transceiver, wherein the control device is designed to control at least one loudspeaker in such a way that at least one audio signal during the output of at least one voice message is suppressed or output with a reduced volume.
 2. offering and/or supplying in the Federal Republic of Germany and/or the Republic of Austria devices that are suitable for carrying out a method for operating an avalanche searching device, for use in the Federal Republic of Germany and/or the Republic of Austria, wherein the method comprises at least the following:
 - a transmitting unit for transmitting at least one transmission signal,
 - a receiving unit for receiving at least one transmission signal output from at least one further avalanche searching device,in which a control device of the avalanche searching device controls at least one loudspeaker, wherein the control device controls at least one loudspeaker in such a way that at least one loudspeaker outputs at least one voice message, wherein at least one loudspeaker is controlled by the control device on the basis of at least one event which is associated with a search for the at least one further avalanche searching device, the avalanche searching device has at least one loudspeaker and at least one loudspeaker outputs at least one audio signal, characterized in that at least one audio signal is associated with the search for at least one further avalanche searching device, wherein the control device controls at least one loudspeaker in such a way that at least one audio signal during the output of at least one voice message is suppressed or output with a reduced volume.

- II. For each individual violation of the foregoing order, the defendants shall pay a penalty (if applicable, repeatedly) to the court in an amount of up to EUR 10,000 per product and/or, in the case of continuous actions such as offers on the Internet, up to EUR 30,000 per day.
 - III. The defendants (Mammut) are ordered to surrender the avalanche victim search devices referred to in item I, as well as devices suitable for carrying out a method for operating an avalanche victim search device, to a bailiff for safekeeping, which shall continue until a final decision has been made on the existence of a destruction claim between the parties or an amicable settlement has been reached.
 - IV. This order is enforceable only if the claimant has provided security in favor of the defendants in the form of a deposit or a bank guarantee in the amount of EUR 500,000.
10. Mammut has filed an application for review pursuant to Rule 212.3, sentence 1, RoP (written submission dated 19 January 2024 [App_3217/2024, App_3259/2024, and App_4074/2024]) and is requesting that the Order of 11 December 2023 be set aside and the application for the granting of provisional measures be dismissed, or, in the alternative, that Mammut be permitted to continue the alleged infringing acts subject to the provision of a security at the discretion of the Court, which should not exceed EUR 500,000. Furthermore, Mammut has requested a provisional award of costs in the amount of EUR 19,858.40, a cost decision against Ortovox, and the provisional enforceability of the order.
 11. Ortovox has opposed the application and requested that the Order of 11 December 2023 be supplemented to the effect that Mammut shall provisionally reimburse Ortovox for costs in the amount of EUR 33,375.70 and bear the costs of the proceedings.
 12. The Local Division Düsseldorf upheld the Order on provisional measures of 11 December 2023 while rejecting Mammut's applications and ordered Mammut to provisionally reimburse Ortovox for costs in the amount of EUR 33,375.70. The Local Division saw no reason to issue a decision that Mammut has to bear the costs² as requested by Ortovox.

Presentation of grounds for the order of the Local Division:

13. The Local Division essentially stated the following as the grounds for its decision:
14. Upon a summary examination, the contested embodiment makes direct use (Claim 1) or indirect use (Claim 13) of the technical teaching of the patent at issue in a literal sense.
15. The person skilled in the art, a graduate engineer (Diplom-Ingenieur) or holder of a master's degree in the field of electrical engineering from a university of applied sciences or higher education institution of applied sciences, with several years of professional experience in the development and design of avalanche victim search devices, would have no reason to restrict the term "audio signal" to specific acoustic signals. There is no indication in the patent at issue to support the distinction made by Mammut between "audio signals" and "audio patterns."
16. It is clear from the overall structure of the claim that an audio signal refers to any acoustic signal associated with a search for another avalanche victim search device, which cannot be classified as a voice signal. In contrast, the patent at issue understands a voice message to be information provided to the searcher in the form of words.

² In the original: „Kostengrundscheidung“

17. The suppression of the audio signal requires that the audio signal is no longer acoustically perceptible. The scope of protection includes both configurations in which the volume of the audio signal is temporarily set to zero and those in which the signal is temporarily no longer generated.
18. There must be a functional association between the control of the loudspeaker by the control device and the suppression of the audio signal or the reduction of its volume. Thus, configurations in which the audio signal and the voice message are output independently of each other without corresponding control of the loudspeaker are not covered by the scope of protection.
19. Statements made by Ortovox during the grant procedure are not to be taken into account in the interpretation of the patent. Such statements could at most have indicative significance as to how the person skilled in the art would understand the relevant feature. The submissions made during the grant procedure do not provide any reason for a divergent interpretation in any case.
20. The contested embodiment makes literal use of the technical teaching of claim 1.
21. The audio patterns used in the contested embodiment are acoustic signals distinct from voice messages and therefore qualify as audio signals within the meaning of the patent at issue.
22. The search devices in dispute have two different signal sources, namely one for acoustic patterns (audio patterns) and the other for acoustic speech, whereby during the operation of the contested embodiment in search mode, only one of the two sources is selected at any one time, and its signal is played through the loudspeaker, while the output of the signal from the other source is deactivated. If the voice message is played in the contested embodiment, the output of the audio signal is therefore omitted. In other words, its generation is temporarily interrupted and thus suppressed within the meaning of the patent at issue. Mammut does not dispute that the selection of a source and the playback of its signal through the loudspeaker are carried out by a control device within the meaning of the patent in dispute.
23. It is undisputed that the "Barryvox S2" displayed at the ISPO trade fair in Munich featured voice output. Even if, at the time of the trade fair, it had not yet been determined in which configuration the "Barryvox S2" would ultimately be brought to market, as claimed by Mammut, the relevant public could assume—at least as long as they received no contrary information—that the final product delivered would essentially correspond to the device exhibited at the trade fair. Apart from that, the "Barryvox S2" could, in any case, already be pre-ordered on the Mammut Group's B2B platform. The order summary submitted by Ortovox also lacks any indication that the "Barryvox S2" is being marketed without its own voice output. There, too, buyers would have no reason to assume that the device in question does not have voice output, unlike the model exhibited and awarded at the trade fair.
24. The use of the contested embodiment likewise requires the application of the method according to claim 13 of the patent. The other requirements for indirect patent infringement are also met, pursuant to Article 26(1) UPCA. In particular, the subjective element of indirect patent infringement is fulfilled.

25. Even if, for the purposes of the present interim proceedings, it could be assumed in favor of Mammut that the "prior right defense" developed under national law could also be invoked before the Unified Patent Court, Mammut could not derive a positive right of use from it in the present case. Even under the principles developed by the Federal Court of Justice, the prior right is granted only to those who use exclusively its teaching and do not make use of additional features that are first taught in the later protective right (BGH, GRUR 2009, 655, 657 para. 27 – Trägerplatte). However, this is precisely the case with the contested embodiment.
26. Likewise, the license defense, which was raised for the first time during the oral hearing, does not succeed. The patent at issue is not covered by the license agreement submitted in excerpts as Annex KAP 36.
27. To the extent that Mammut has made additional submissions on this matter in an unauthorized written submission filed after the close of the oral hearing, such submissions are late and therefore not to be taken into account. The fact that Ortovox only presented the relevant agreement during the oral hearing does not preclude this. Such an approach was prompted by Mammut itself, as it introduced EP 1 577 679 into the proceedings only one day before the oral hearing.
28. The validity of the patent in dispute is secured to the extent required for the granting of provisional measures.
29. The subject matter of claims 1 and 13 is novel compared to WO 2006/051721, which was already considered during the grant procedure and discussed in the description of the patent at issue. In any case, there is no disclosure of the suppression of an audio signal during the output of the voice message. Even if both a buzzer and a loudspeaker are mentioned in the prior art, they are disclosed merely as alternative possibilities for configuring the output device.
30. The subject matter of claim 1 is also novel compared to DE 299 22 217 U1, which was likewise considered during the grant procedure. There is no disclosure of the output of at least one audio signal within the meaning of the patent at issue. An audio signal and a voice signal are not the same according to the technical teaching of the patent in dispute.
31. EP 2 527 011 A1 likewise does not preclude the novelty of claim 1. There is no disclosure of the generation of voice messages within the meaning of the patent at issue. In particular, the audio patterns described in the prior art should not be classified as such.
32. EP 1 577 679 A1 is also not sufficient to significantly call into question the validity of the patent at issue. Why Mammut submitted this document only one day before the oral hearing is not apparent.
33. Apart from that, the document does not anticipate the technical teaching protected by claims 1 and 13 in a manner detrimental to novelty. There is no generation of voice messages within the meaning of the patent at issue. Therefore, no corresponding control device is required.
34. Mammut's submissions are not capable of raising significant doubts about the presence of an inventive step. This applies to the prior art references WO'721, DE'217, EP'011, both individually and in combination with each other, as well as with general technical knowledge.

35. Finally, EP'679, which was introduced into the proceedings late and therefore must be rejected on formal grounds, does not preclude the inventive step. There is neither a sufficient presentation nor any indication of what would motivate the person skilled in the art to modify the solution disclosed there in such a way that a search device would now output both audio signals and voice messages.
36. To the extent that Mammut questions the feasibility of claim 1 due to an allegedly non-enabling disclosure of audio signals and voice messages, this stems from an incorrect interpretation that audio signals and voice messages are always functionally associated with the search for at least one other avalanche victim search device, independently of each other.
37. Mammut fails to meet its burden of proof with the mere general allegation that the patent at issue does not provide an enabling disclosure of "how the control of the loudspeaker should be realized when an ungenerated audio signal is to be suppressed."
38. The Order on provisional measures is necessary to prohibit the continuation of the infringement or at least to prevent a threatened infringement (see Rule 206.2(c) RoP).
39. The Order on the requested provisional measures is urgent. Ortovox has handled the matter with the necessary urgency.
40. Ortovox should not be required to refer to a possible expedited procedure in Switzerland.
41. The Order on provisional measures is also substantively necessary due to the harm that Ortovox faces from the infringing product offer.
42. The balancing of interests also favors Ortovox. To the extent that Mammut claims that an injunction would lead to an irreparable disadvantage, these disadvantages are ultimately only a result of the competitive situation. Given the established infringement of the patent at issue, Mammut has no protectable interest in securing pre-orders that have already been made. For damages resulting from the injunction, Ortovox is obliged to provide compensation in accordance with Rule 213.2 RoP.
43. The reference to alleged third-party interests is irrelevant in this case, as the contested embodiment, according to Mammut's submission, currently only exists as a prototype. The disadvantages in respect of the survival chances of avalanche victims are, at most, theoretical in nature. This is even more true since, with Ortovox's product as well as the predecessor product of the contested embodiment, at least two alternative avalanche victim search devices are in use.
44. The extension of the request regarding the awards of costs is admissible pursuant to R. 263 RoP. In favour of Ortovox, it should be considered that the issue of handling the award of costs in expedited proceedings before the Unified Patent Court has not yet been definitively clarified by the highest courts and has already been handled in different ways. The Local Division rejected Ortovox's request for a fundamental cost decision³ in the expedited proceedings in the *ex parte* order and pointed out the lack of an application for an award of costs. Ortovox responded to

³ Meaning the decision on who has to bear the costs of the proceedings

this observation with a subsequent request for a provisional award of costs. This could not be denied to Ortovox, given their right to be heard.

45. There is no need for a fundamental cost decision in proceedings for the granting of provisional measures, at least when, as in this case, an action on the merits follows the expedited procedure.

Requests of the parties

46. Mammut is appealing this Order. Mammut seeks the annulment of the Order of 11 December 2023, as amended by the Order of 9 April 2024, and continues to pursue the applications made at first instance. Additionally, Mammut requests reimbursement of second-instance costs in the amount of EUR 32,981.80, bringing the total to EUR 52,840.20.

47. Mammut requests that the Statement of defence and the separate counterclaim for revocation in the main proceedings be admitted in the appeal proceedings.

48. Ortovox opposes the appeal and requests:

- I. That the appeal be dismissed,
- II. Alternatively, in the event that the Court of Appeal finds it more likely than not that the patent at issue is valid only to a limited extent, that the Court order that Item I of the Order of 09.04.2024 be amended insofar as it confirms Item I of the Order of 11.12.2023 and now requires the defendants to refrain from
 1. offering, placing on the market, or using avalanche victim search devices in the Federal Republic of Germany and/or the Republic of Austria, or importing or possessing them for these purposes, with at least one transmitting unit for transmitting at least one transmit signal, a receiving unit for receiving at least one transmit signal from at least one further avalanche searching device, and a control device for controlling at least one loudspeaker, wherein the control device is designed to control the at least one loudspeaker to output at least one voice message on the basis of at least one event, wherein the at least one event is associated with the search for the at least one further avalanche searching device, wherein the avalanche searching device has the at least one loudspeaker and the at least one loudspeaker is designed to issue at least one audio signal, characterized in that the at least one audio signal is associated with the search for the at least one further transceiver, wherein the control device is designed to control the at least one loudspeaker such that the at least one audio signal during the output of the at least one voice message is suppressed or output with a reduced volume, wherein the control device is configured to then control the at least one loudspeaker to output the at least one voice message, when the receiving unit detects a change of a received strength and/or a received quality of the transmit signal of the further avalanche searching device and/or detects a change of a direction, from which the transmit signal of the further avalanche searching device originates, or the control device is designed to estimate a distance from the further avalanche searching device by evaluating the transmit signal received by the receiving unit, and to subsequently control the at least one loudspeaker then to output a voice message, when the distance is shorter or an increase of the distance is greater than a predefined threshold value;
 2. offering and/or supplying in the Federal Republic of Germany and/or the Republic of Austria devices that are suitable for carrying out a method for operating an avalanche victim search device, for use in the Federal Republic of Germany and/or the Republic of Austria,

wherein the method comprises at least the following:
a transmitting unit for transmitting at least one transmit signal,
a receiving unit for receiving at least one transmit signal output from at least one further avalanche searching device,
in which a control device of the avalanche searching device controls at least one loudspeaker,
wherein the control device controls the at least one loudspeaker such that the at least one loudspeaker outputs at least one voice message, wherein the at least one loudspeaker is controlled by the control device on the basis of at least one event
which is associated with a search for the at least one further avalanche searching device,
the avalanche searching device has the at least one loudspeaker and the at least one loudspeaker outputs at least one audio signal,
characterized in that
the at least one audio signal is associated with the search for the at least one further transceiver,
wherein the control device is designed to control the at least one loudspeaker such that the at least one audio signal during the output of the at least one voice message is suppressed or output with a reduced volume,
wherein the control device then controls the at least one loudspeaker to output the at least one voice message, when the receiving unit detects a change of a received strength and/or a received quality of the transmit signal of the further avalanche searching device and/or detects a change of a direction, from which the transmit signal of the further avalanche searching device originates,
or the control device estimates a distance from the further avalanche searching device by evaluating the transmit signal received by the receiving unit, and subsequently controls the at least one loudspeaker then to output a voice message, when the distance is shorter or an increase of the distance is greater than a predefined threshold value.

III. In the further alternative, in the event that the Court of Appeal finds it more likely than not that the patent at issue is valid only to a limited extent: to order that Item I of the Order of 09.04.2024 be amended insofar as it confirms Item I of the Order of 11.12.2023 and now requires the defendant to refrain from

1. offering, placing on the market, or using avalanche victim search devices in the Federal Republic of Germany and/or the Republic of Austria, or importing or possessing them for these purposes, with at least one transmitting unit for transmitting at least one transmit signal,
a receiving unit for receiving at least one transmit signal from at least one further avalanche searching device,
and a control device for controlling at least one loudspeaker,
wherein the control device is designed to control the at least one loudspeaker to output at least one voice message on the basis of at least one event,
wherein the at least one event is associated with a search for the at least one further avalanche searching device,
wherein the avalanche searching device has the at least one loudspeaker and the at least one loudspeaker is designed to issue at least one audio signal,
characterized in that
the at least one audio signal is associated with the search for the at least one further transceiver,
wherein the control device is designed to control the at least one loudspeaker such that the at least one audio signal during the output of the at least one voice message is suppressed or output with a reduced volume,
wherein the control device is designed to then control the at least one loudspeaker to output the at least one voice message, when the receiving unit detects a change of a received strength and/or a received quality of the transmit signal of the further avalanche searching device and/or detects a change of a direction, from which the transmit signal of the further avalanche searching device originates.
2. offering and/or supplying in the Federal Republic of Germany and/or the Republic of Austria devices that are suitable for carrying out a method for operating an avalanche victim search device, for use in the Federal Republic of Germany and/or the Republic of Austria,

wherein the method comprises at least the following:
a transmitting unit for transmitting at least one transmit signal,

a receiving unit for receiving at least one transmit signal output from at least one further avalanche searching device,
in which a control device of the avalanche searching device controls at least one loudspeaker,
wherein the control device controls the at least one loudspeaker such that the at least one loudspeaker outputs at least one voice message, wherein the at least one loudspeaker is controlled by the control device on the basis of at least one event
which is associated with a search for the at least one further avalanche searching device,
the avalanche searching device has the at least one loudspeaker and the at least one loudspeaker outputs at least one audio signal,
characterized in that
the at least one audio signal is associated with the search for the at least one further transceiver,
wherein the control device is designed to control the at least one loudspeaker such that the at least one audio signal during the output of the at least one voice message is suppressed or output with a reduced volume,
wherein the control device then controls the at least one loudspeaker to output the at least one voice message, when the receiving unit detects a change of a received strength and/or a received quality of the transmit signal of the further avalanche searching device and/or detects a change of a direction, from which the transmit signal of the further avalanche searching device originates.

- IV. In the further alternative, in the event that the Court of Appeal finds it more likely than not that the patent at issue is valid only to a limited extent: to order that Item I of the Order of 09.04.2024 be amended insofar as it confirms Item I of the Order of 11.12.2023 and now requires the defendant to refrain from
1. offering, placing on the market, or using avalanche victim search devices in the Federal Republic of Germany and/or the Republic of Austria, or importing or possessing them for these purposes, with at least one transmitting unit for transmitting at least one transmit signal,
a receiving unit for receiving at least one transmit signal from at least one further avalanche searching device, and a control device for controlling at least one loudspeaker,
wherein the control device is designed to control the at least one loudspeaker to output at least one voice message on the basis of at least one event,
wherein the at least one event is associated with a search for the at least one further avalanche searching device,
wherein the avalanche searching device has the at least one loudspeaker and the at least one loudspeaker is designed to issue at least one audio signal,
characterized in that
the at least one audio signal is associated with the search for the at least one further transceiver,
wherein the control device is designed to control the at least one loudspeaker such that the at least one audio signal during the output of the at least one voice message is suppressed or output with a reduced volume,
wherein the control device is designed to estimate a distance from the further avalanche searching device by evaluating the transmit signal received by the receiving unit, and to subsequently control the at least one loudspeaker then to output a voice message, when the distance is shorter or an increase of the distance is greater than a predefined threshold value.
 2. offering and/or supplying in the Federal Republic of Germany and/or the Republic of Austria devices that are suitable for carrying out a method for operating an avalanche victim search device, for use in the Federal Republic of Germany and/or the Republic of Austria,

wherein the method comprises at least the following:

a transmitting unit for transmitting at least one transmit signal,
a receiving unit for receiving at least one transmit signal output from at least one further avalanche searching device,
in which a control device of the avalanche searching device controls at least one loudspeaker, wherein the control device controls the at least one loudspeaker such that the at least one loudspeaker outputs at least one voice message, wherein the at least one loudspeaker is controlled by the control device on the basis of at least one event
which is associated with a search for the at least one further avalanche searching device,
the avalanche searching device has the at least one loudspeaker and the at least one loudspeaker outputs at least one audio signal,

characterized in that

the at least one audio signal is associated with the search for the at least one further transceiver, wherein the control device is designed to control the at least one loudspeaker such that the at least one audio signal during the output of the at least one voice message is suppressed or output with a reduced volume,

wherein the control device estimates a distance from the further avalanche searching device by evaluating the transmit signal received by the receiving unit, and subsequently controls the at least one loudspeaker then to output a voice message, when the distance is shorter or an increase of the distance is greater than a predefined threshold value.

- V. that the defendant be ordered,
 - a) to bear the costs of the entire proceedings for provisional measures in the first and second instances,
 - b) to reimburse the defendant additional provisional costs in the amount of EUR 19,858.40.

49. Mammut asks that the auxiliary requests be rejected as inadmissible/without merit and also opposes the cost claims.

Factual and legal points of issue in the appeal proceedings

50. Mammut reiterates and expands upon the arguments made at first instance and essentially makes the following assertions:

51. The interpretation made by the Local Division is incorrect.

52. Claims 1 and 13 are limited to a modulated audio signal, which varies only in volume and whose semantic content is restricted to two pieces of information (e.g. correct or incorrect). The distinction between an audio signal as a mere tone and speech is not made solely based on acoustic perception, but also on the semantic level. More complex audio patterns, which represent specific instructions (such as "turn right/left" or "turn around"), are not included.

53. The distinction between a tone and a voice message is not possible, particularly with regard to Khoisan languages, whistling languages, and the Turkish bird language. To the extent that the Local Division made a distinction based on spoken words, it overlooks the fact that the patent at issue does not provide a basis for such a distinction.

54. The Local Division concludes that even a non-existent audio signal can be "suppressed". This is not consistent with the wording of the claim, the description, and the general understanding of the term.

55. Mammut reasserts the lack of sufficient disclosure and, by reiterating and expanding upon its earlier submissions at first instance, contends, among other things:

56. It is known to the person skilled in the art that the loudspeaker is a passive component. According to the features of claim 1 and the description, it is clearly not the control device that controls the loudspeaker with the audio signal, as explicitly disclosed for the voice signal, but rather the loudspeaker is designed to output the audio signal. The person skilled in the art receives no indication from the description or the claims as to how a loudspeaker, as a passive component, is to be controlled by the audio signal.

57. Mammut reiterates and elaborates on the reasons why the prior art considered by the Local Division opposes the novelty of the patent claims in dispute.

58. Mammut reiterates and expands on its first-instance submissions, continuing to assert the lack of inventive step in light of the prior art discussed by the Local Division. Mammut argues, among other things:
59. Avalanche victim search devices fall within the category of mobile navigation devices with user guidance. The definition of the person skilled in the art provided by the Local Division is not convincing. It may be assumed that the person skilled in the art in the field of avalanche victim search devices is not fully identical to the person skilled in the art in the field of mobile navigation devices. However, at the very least, they would be well-acquainted with the functions of other areas of mobile navigation devices and, in any case, would take into account everyday knowledge, particularly the understanding of the targeted, automatic emphasis of an audio signal (ducking) in vehicle navigation devices.
60. With regard to EP'679, it is not apparent how the combination of two embodiments in one device could constitute an inventive step. This is even more true considering that in paragraph 97, the combination of the functions is explicitly suggested. Once the suggested combination has been implemented, the only question that remains is how the audio and speech would be output in such a way that they are understandable to the user.
It has been well known for a long time, especially in navigation devices, to interrupt or lower the volume of other acoustic signals (radio, music) during voice instructions.
61. The same applies to WO'721, in that simply combining two technologies cannot constitute an inventive step. This is all the more true, as the alternative, alternating application of technically equivalent means does not produce any additional technical effect.
62. DE'217 itself makes a comparison between an avalanche victim search device and a navigation device. It is obvious that the person skilled in the art would transfer technologies known from navigation devices to avalanche victim search devices for the purpose of their further development and improvement.
63. Contrary to what the Local Division assumed, there is also good reason for the person skilled in the art to combine EP'011 with WO'721 or DE'217, as these employ a different technical form of search (using position data) compared to the teaching of EP'011 (directional search). The combination of audio signals with voice output is a general improvement for avalanche victim search devices, regardless of the specific search method used. Furthermore, the Local Division wrongly assumes that the addition of voice guidance to the avalanche victim search device described in EP'011 would not be advantageous.
64. The lack of inventive step is evident already from the classic avalanche victim search device described in the patent at issue, namely US 2006/0148423.
65. The lack of inventive step is already evident in the reasoning for the ISPO Award, where it is described as a long-overdue "feature." If there is a general expectation for a function, it can hardly be said that it constitutes a patentable invention.
66. With regard to the infringement, Mammut contends, among other things:

67. In the order, the Local Division applies a different understanding of the control device with regard to the alleged infringement compared to its assessment of the alleged legal validity.
68. The same applies with regard to the term "suppressing". If, according to the contested order, the alternating emission of two different signals were claimed, the question of solving the alleged problem of overlap and thus reduced intelligibility would not arise in itself. In the contested order, the Local Division, with regard to the question of the alleged inventive step, focuses on the concept of an alleged "interaction" between two different signals, or the combination of an audio signal and a voice message, and thus on the idea that two signals would be output simultaneously.
69. In the opinion of the Local Division, the scope of protection of the patent at issue does not cover configurations in which the audio signal and the voice message are output independently of each other, without the corresponding control of the loudspeaker. Based on this assumption, the contested embodiment does not constitute an infringement. It is undisputed that the contested embodiment has two signal generators, each of which independently controls the loudspeaker. The Local Division disregards the specific technical implementation without providing any justification.
70. Ortovox defends the contested order by reiterating and elaborating on its first-instance submissions.

GROUND FOR THE ORDER

71. The appeal is unsuccessful. The confirmation of the Order on provisional measures was made correctly.
 - A. *No consideration of the submissions in the Statement of defence in the main proceedings and in the counterclaim for revocation.*
72. The Court of Appeal's review is limited to the submissions of the parties in the proceedings concerning the order of a provisional measures. Mammut's submissions in the Statement of defence in the main proceedings and the separate counterclaim for revocation in the infringement proceedings before the Local Division Düsseldorf are not to be considered in the appeal proceedings.
73. The subject matter of the appeal proceedings is determined by Rule 222 RoP. According to Rule 222.1 RoP, the requests, facts, evidence, and arguments presented by the parties in accordance with Rules 221, 225, 226, 236, and 238, subject to paragraph 2 constitute the subject matter of the proceedings before the Court of Appeal. The Court of Appeal shall consult the file of the proceedings before the Court of First Instance. Subsequently, the subject matter of the proceedings is limited to the submissions made in the proceedings concerning the Order on provisional measures. This does not include the submissions made in the main proceedings. Infringement proceedings and proceedings for the granting of provisional measures involve different procedures (see UPC Court of Appeal, Order of 26 April 2024, UPC_CoA_500/2023, APL_596892/2023, para. 8).

74. The submissions in the Statement of defence in the main proceedings and in the counterclaim for revocation have not become part of the appeal proceedings simply because Mammut referred to them. According to R. 226(c) RoP, the Statement of grounds of appeal must include the facts and evidence on which the appeal is based, in accordance with Rules 222.1 and 2 RoP. To ensure legal certainty and the good administration of justice, the Statement of grounds of appeal must be clear and precise to enable the respondent to prepare the defense with regard to the judgment of the first instance and the Court of Appeal to decide on the appeal (see CJEU, Judgment of 11 September 2014, Mastercard and Others v Commission, C-382/12 P, ECLI:EU:C:2014:2201, para. 41). The Court is not obliged to search for and identify the grounds on which the appeal may be based in the annexes (see CJEU, Judgment of 28 June 2005, Dansk Rørindustri and Others v Commission, C-189/02, ECLI:EU:C:2005:408, paras. 97 and 100; Judgment of 11 September 2014, Mastercard and Others v Commission, C-382/12 P, ECLI:EU:C:2014:2201, para. 41). The same applies to written submissions from another proceeding.
75. For the reasons stated above, Mammut's request to admit the submissions in the Statement of defence in the main proceedings and the counterclaim for revocation in the appeal proceedings is to be rejected.

B. Subject matter of claims 1 and 13

1. Subject matter of claim 1

a) The Patent and its technical background

76. The invention according to the patent at issue relates to an avalanche victim search device (hereinafter also: LVS device) and a corresponding method. The LVS device comprises a transmitting unit for transmitting at least one transmit signal and a receiving unit for receiving a transmit signal from at least one further LVS device (para. 1).
77. According to the description of the patent at issue, an LVS device with an output device, which generates stimuli perceptible to human senses, such as acoustic stimuli in the form of buzzers or loudspeakers, was already known from WO 2006/015721 (hereinafter: WO'721, Annex BB1, Attachment 32). This LVS device is equipped with a voice output device, which guides a user to a person to be detected in a voiced controlled manner (para. 2).
78. US 2006/0148423 A1 (hereinafter US'423, Annex BB1, Attachment 34) describes an LVS device having a display on which, when the LVS device is in a search mode, direction arrows indicate in which direction a searcher should move in order to find a transmitting avalanche searching device. Furthermore, the distance from the transmitting search device is displayed on the screen. In addition, the LVS device has a loudspeaker which outputs an audio signal in the search mode. This audio signal becomes louder as the avalanche searching transceiver approaches the LVS device (para. 3).
79. The patent at issue considers it disadvantageous that, despite the search instructions displayed on the screen and the audio signal, the search for the transmitting LVS device remains difficult. Especially in the stressful situation the searcher finds themselves in, paying attention to the instructions on the display and the audio signal poses a significant challenge.

80. The objective of the invention is therefore to provide an LVS device that simplifies the search for a transmitting LVS device.

b) Feature structure of claim 1

81. This objective is achieved by a device with the following features (German, and thus the applicable procedural language, and English translation using the feature structure established by the Court of First Instance):

1.	Lawinen-Verschütteten-Suchgerät,	Search device for avalanche victims,
1.1.	mit einer Sendeeinheit (16) zum Senden wenigstens eines Sendesignals (18),	having a transmitting unit (16) for transmitting at least one transmit signal (18),
1.2	einer Empfangseinheit (16) zum Empfangen wenigstens eines Sendesignals (30) von wenigstens einem weiteren Lawinen-Verschütteten-Suchgerät (32),	a receiving unit (16) for receiving at least one transmit signal (30) from at least one further avalanche searching device (32),
1.3	und mit einer Steuerungseinrichtung (24) zum Ansteuern wenigstens eines Lautsprechers (22),	and a control device (24) for controlling at least one loudspeaker (22),
2	die Steuerungseinrichtung (24) ist dazu ausgebildet, in Abhängigkeit von wenigstens einem Ereignis den wenigstens einen Lautsprecher (22) zum Ausgeben zumindest einer Sprachnachricht anzusteuern,	the control device (24) is designed to control the at least one loudspeaker (22) to output at least one voice message on the basis of at least one event,
2.1.	das wenigstens eine Ereignis steht mit einer Suche nach dem wenigstens einen weiteren Lawinen-Verschütteten-Suchgerät (32) in Zusammenhang	wherein the at least one event is associated with a search for the at least one further avalanche searching device (32),
3	das Lawinen-Verschütteten-Suchgerät (10) weist den wenigstens einen Lautsprecher (22) auf und der wenigstens eine Lautsprecher (22) ist dazu ausgebildet, wenigstens ein Tonsignal auszugeben,	the avalanche searching device (10) has the at least one loudspeaker (22) and the at least one loudspeaker (22) is designed to issue at least one audio signal
3.1	das wenigstens eine Tonsignal steht mit der Suche nach dem wenigstens einen weiteren Lawinen-Verschütteten-Suchgerät (32) in Zusammenhang	the at least one audio signal is associated with the search for the at least one further transceiver (32),

4.	die Steuerungseinrichtung (24) ist dazu ausgebildet, den wenigstens einen Lautsprecher (22) derart anzusteuern, dass das wenigstens eine Tonsignal während des Ausgebens der zumindest einen Sprachnachricht unterdrückt wird oder mit einer verringerten Lautstärke ausgegeben wird.	the control device (24) is designed to control the at least one loudspeaker (22) such that the at least one audio signal during the output of the at least one voice message is suppressed or output with a reduced volume.
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c) Interpretation of the patent claims

(1) Principles

82. The interpretation of the claims and their features is governed, according to the case law of the UPC Court of Appeal (Order of 26 February 2024 – UPC_CoA_335/2023 App_576355/2023, NanoString Technologies et al. v 10x Genomics et al., GRUR 2024, paras. 73 et seq.; Order of 13 May 2024 – UPC_CoA_1/2024 APL_8/2024, para. 26), by the following principles under Article 69 EPC and the Protocol on its interpretation (Interpretation Protocol): The patent claim is not only the starting point but also the decisive basis for determining the protective scope of the European patent. The interpretation of a patent claim does not solely depend on the strict, literal meaning of the wording used; rather, the description and 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. However, this does not mean that the patent claim merely serves as a guideline and that its subject matter extends to what, after examination of the description and drawings appears to be the subject-matter for which the patent proprietor seeks protection.
83. The patent claim is to be interpreted from the point of view of a person skilled in the art. The Local Division correctly considered a graduate engineer or holder of a master's degree in the field of electrical engineering from a university of applied sciences or higher education institution of applied sciences, with several years of professional experience in the development and design of LVS devices, as the person skilled in the art. Mammut's objections to this definition relate less to the professional qualification and more to the question of what level of knowledge the person skilled in the art possesses. It can be assumed, in agreement with Mammut, that the person skilled in the art is at least thoroughly familiar with the functions of mobile navigation devices.
84. The court bases its decision on the following understanding of the features:

(1) Features 1.1 and 1.2

85. The LVS device, according to feature 1.1, comprises a transmitting unit (16) for transmitting at least one transmit signal (18), and according to feature 1.2, a receiving unit (16) for receiving at least one transmit signal (30) from at least one further LVS device (32). The transmitting unit must be designed in such a way that it is capable of transmitting transmit signals and receiving transmit signals from other LVS devices.

(2) Feature 3.1

85. The LVS device comprises at least one loudspeaker, which is designed to issue at least one audio signal (feature 3). The audio signal must be associated with the search for at least one further LVS device (feature 3.1).
86. For such an association with the search, as the Local Division correctly based its decision on, an association between the other search device (feature 1.2) and the audio signal is required. This association is established through the received transmit signal. The person skilled in the art deduces from feature 1.2 that the received transmit signal is used for the search. It is sufficient for an association to exist if, for example, the pitch, amplitude, or volume of the audio signal depends on the measured field strength of the received transmit signal. Claim 1 does not specify further details on how this association is designed. In particular, features 1.2, 3, and 3.1 do not require that the association between the audio signal to be output and the at least one other LVS device is established solely through a variation in the volume of the audio signal.
87. The description confirms this understanding. There, the increase in frequency of the individual beeps, the repetition rate of the beeps, and their volume in the case of the approaching search device towards the transmitting search device are listed as independent but also combinable ways of establishing an association. An example is provided there, describing the combination of all three properties; for example, the frequency of the individual beep and the repetition rate of the beeps and their volume may increase as the searching device approaches the search device. (Para. 10, line 49).

(3) Feature 3

88. The Local Division correctly assumed that the person skilled in the art understands any acoustic signal, within the meaning of feature 3, as an audio signal, provided it is not a voice signal. Since claim 1 distinguishes between an audio signal (feature 3) and a voice message (feature 2) (see, in particular, feature 4), a signal that reproduces human speech, i.e., words, is not considered an audio signal.
89. Contrary to Mammut's view, the distinction between an audio signal and a voice message does not result in a limitation of the patent claim to a modulated audio signal that only varies in volume and whose semantic content is limited to two pieces of information (e.g. correct or incorrect). Rather, more complex audio patterns that represent specific instructions (such as "turn right/left" or "turn around") are also considered audio signals within the meaning of features 3, 3.1, and 4. The patent claim does not suggest that the audio signal and the voice message are meant to differ in their semantic content.
90. Contrary to Mammut's view, the presence of one or more words is a suitable distinguishing criterion for differentiating between an audio signal and a voice message. To the extent that Mammut refers to Khoisan languages, whistling languages, and the Turkish bird language, a distinction between these languages and sounds or sound patterns is possible because they also directly reproduce words. As can be inferred from the article linked in para. 347 of the Statement of grounds of appeal regarding the whistled language on La Gomera and El Hierro, people have learned to whistle their language. That the language – as expressed by Mammut (Statement of

grounds of appeal, para. 348) – merely "comes in a different sound" does not change the fact that communication takes place directly through words and not merely through sound patterns representing words. Moreover, it cannot be assumed that the person skilled in the art bases their understanding of the patent claim on these special forms of communication.

91. A narrower interpretation does not result from feature 3.1, contrary to Mammut's view. As stated, the feature merely requires an association between sound and the received transmit signal and does not further require that the association between the output audio signal and at least one other LVS device is established exclusively through a variation in the volume of the audio signal.

(4) Features 2 and 2.1

92. The control device is designed, according to feature 2, to activate at least one speaker (22) to output at least one voice message depending on at least one event. The audio signal must be associated with the search for at least one further LVS device (feature 3.1).
93. According to the interpretation of feature 3.1, feature 2.1 requires an association between the received transmit signal (feature 1.2) and the event. For example, the loudspeaker is designed to output the at least one voice message, when the receiving unit detects a change of the received strength and/or the received quality of the transmit signal from the further LVS device (para. 15).
94. No differing interpretation underlies the European examiner's notice of 13 April 2018 (Annex BB1, Appendix 31), contrary to Mammut's view. The statement contained therein, that feature 2 is merely a standard feature of an LVS device, does not in itself indicate anything about the significance of the feature. Therefore, it is not necessary to clarify whether statements made during the grant procedure can be used for the interpretation of the patent claims.

(5) Feature 4

95. According to feature 4, the control device is designed and thus capable of controlling the at least one speaker (22) in such a way that the at least one audio signal is either suppressed or output at a reduced volume during the output of at least one voice message (para. 11). As a result, audio signals do not interfere with the intelligibility of voice messages, which in turn facilitates the search (col. 3, line 3).
96. While for the second alternative according to feature 4 it is sufficient that the audio signal is output at a reduced volume, which includes a reduction to almost inaudible levels, the first alternative involves no output of the audio signal at all.
Accordingly, a patent-compliant LVS device is also one in which the audio signals are not generated at all while voice messages are being output.
97. Contrary to Mammut's view, common usage of language does not justify a different understanding. It is true that only something that exists can be suppressed. Since the patent claim requires that at least one audio signal is output (feature 3), such an audio signal is also present at least intermittently. Only "during" the output of the voice message should it be suppressed according to feature 4. The understanding that it is sufficient for an audio signal to be output intermittently during the same search, while no audio signals are output during the

output of the voice signal, is confirmed by the fact that, according to the description, the search is intended to be supported both by the audio signal (column 3, line 5) and by the voice message (paragraph 7, lines 14-15), and that the suppression of the audio signal merely serves to ensure the intelligibility of the voice message (column 3, line 3).

98. The statements made by Ortovox during the grant procedure do not lead to a different interpretation. It may remain undecided whether, according to Article 24(1)(c) UPCA in conjunction with Article 69 EPC, the consideration of the grant file is permissible for interpretation. Contrary to Mammut's opinion, Ortovox did not argue that the audio and the voice signals were simultaneous. In that regard, Ortovox merely argued that WO'721 does not disclose that a loudspeaker of an LVS device is designed to emit both a voice message and at least one audio signal associated with the search for the other LVS device (KAP 14, p. 3). This does not result in a restriction to LVS devices, in which audio signals are also generated during the output of voice messages but merely expresses the fact that at least one audio signal intermittently supports the search and one voice message intermittently supports the search.
99. Even with this interpretation, the control device remains significant. In the case where the suppression of the audio signal occurs by not generating audio signals at all, it is not necessary to control the speaker for the output of an audio signal. However, this is also not mandatory according to feature 4. The control device serves the purpose of controlling the speaker "such" (wording of feature 4) that a voice message is output and no audio signal is emitted through the loudspeaker due to the occurrence of a predefined event. Thus, it is sufficient that a control device is present, which is designed to control the loudspeaker to output a voice message (feature 2) on the basis of a specific event (feature 2.1), and that this control results in the audio signal being either suppressed or output at a reduced volume during the output of the voice message (feature 4).
100. As the Local Division has correctly stated, a functional association is therefore required between the control of the loudspeaker, the output of the voice message, and the suppression or reduction of the volume of the audio signal. Configurations of the control device in which voice messages and audio signals are output independently of each other are not covered by the patent claim. This includes, for example, cases where the output of an audio signal is completely deactivated in one search mode, and in another search mode, only voice messages are output, but never an audio signal. When considered together with features 2.1 and 3.1, the following conclusion can be drawn: Whether an audio signal or a voice message is output at a given time depends on whether the event specified in feature 2.1 has occurred. Only then is a voice message output and given priority over the audio signal in accordance with feature 4.
101. Thus, Mammut unsuccessfully argues that it is not apparent to the person skilled in the art how the control of the loudspeaker should technically occur if the audio signal is completely interrupted.
102. Since the patent claim does not provide any specifications in this regard, it is also not excluded that the two signals are generated independently by two signal generators. Thus, embodiments in which there are two signal generators that separately activate the loudspeaker to output audio signals and voice messages are also covered by the claim, provided that the control of the loudspeaker satisfies the requirements of features 3.1, 2.1, and 4.

103. The features of the method protected by claim 13 correspond to those of claim 1. Its subject matter is therefore subject to the same assessment as that of patent claim 1.

C. Validity and infringement

104. According to the case law of the UPC Court of Appeal, the Order for provisional measures pursuant to R.211.2 RoP in conjunction with Art. 62 para. 1 UPCA requires a sufficient degree of certainty that the Applicant is entitled to commence proceedings and that the patent is being infringed. Furthermore, the Court must not consider it more likely than not that the patent is not valid (UPC Court of Appeal, Panel 1, Order of February 26, 2024 - UPC_CoA_335/2023 App_576355/2023, NanoString Technologies et al./10x Genomics et al, p. 30, GRUR 2024, 527 para. 91- 92). The Local Division rightly affirmed these requirements.

I. Validity

105. It is not more likely than not that the patent at issue in the version of claims 1 and 13 is invalid.

1. Sufficient disclosure (Art. 83 EPC)

106. There is no substantial doubt that the invention according to patent claims 1 and 13 is disclosed in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art and thus the requirements of Art. 83 EPC are met.

107. It follows from the above that, if the patent claims are understood correctly, there is no lack of disclosure for carrying out the invention regarding the control of the loudspeaker and a distinguishing criterion for the delimitation of voice message and sound signal.

108. Insofar as Mammut asserts that the person skilled in the art does not obtain any indication from the description or the claims as to how a loudspeaker as a passive component should control itself with the sound signal, it is misunderstood that feature 3 does not require control by the loudspeaker. As can be seen from features 2 and 4, the required control is accomplished by a control device.

2. Novelty over EP 1 577 679

109. The subject-matter of claims 1 and 13 is not anticipated by EP 1 577 679 (*Appendix BB2, hereinafter: EP'679*) in a manner detrimental to novelty.

a) Admission of the submission on EP'679 made in the review proceedings

110. EP'679 and the submissions made in this regard in the proceedings for provisional measures shall be admitted in the appeal proceedings.

(1) The Court of Appeal is not bound by the preclusion decision of the Court of First Instance

111. The Local Division rejected the submission on EP'679 as late because it had only been introduced into the proceedings one day before the oral hearing before the Local Division. In an *obiter dictum*, the Local Division stated that the citation did not anticipate the patent at issue to the detriment of novelty.

112. It is not decisive whether the Local Division was right not to admit the submission. The Court

of Appeal exercised its discretion to admit the submission in the appeal proceedings.

113. The subject matter of the appeal proceedings is determined in accordance with R.222 RoP. Pursuant to R.222.1 RoP, requests, facts, evidence and arguments submitted by the parties under Rules 221, 225, 226, 236 and 238 shall, subject to paragraph 2, constitute the subject-matter of the proceedings before the Court of Appeal. The Court of Appeal shall consult the file of the proceedings before the Court of First Instance. Pursuant to paragraph 2 of said Rule, requests, facts and evidence which have not been submitted by a party during proceedings before the Court of First Instance may be disregarded by the Court of Appeal.

114. Neither the UPCA nor the Rules of Procedure contain a provision expressly stating that means of attack and defense which were rightly rejected at first instance must remain excluded in appeal proceedings. In particular, such provision does not arise from Art. 73(4) UPCA, which only allows new facts and new evidence if this is in accordance with the Rules of Procedure and where the submission thereof by the party concerned could not reasonably have been expected during proceedings before the Court of First Instance. It cannot make a difference whether the party fearing rejection due to delay refrains from making the submission or whether a party's submission was rightly rejected due to delay.

115. As a preclusion significantly harms the defaulting party, the Court of Appeal would need an explicit rule to be bound by the rejection of the submission by the Court of First Instance. Therefore, the Court of Appeal decides at its discretion, considering all circumstances, whether an argument that was rightly not admitted by the Court of First Instance is to be taken into account in the appeal proceedings.

116. R.222.2 RoP also speaks in favour of the Court of Appeal exercising its own discretion. When exercising discretion, the Court shall in particular take into account whether this new submission could not reasonably have been made during proceedings before the Court of First Instance (a), the relevance of the new submission for the decision on the appeal (b), the position of the other party regarding the lodging of new submissions (c).

117. R.222.2 RoP does not apply to facts presented at first instance. However, there is no difference in substance between facts that were not submitted in the first instance and those that were submitted in the first instance but not admitted due to delay.

(2) Exercise of discretion

118. The Court of Appeal exercised its discretion in the appeal proceedings to allow the submissions made on EP'679 in the review proceedings. In doing so, the Court of Appeal was guided by the following circumstances:

119. The proceedings are not delayed by the consideration of the submissions on EP'679. The Court of Appeal is in a position to make a Decision on the merits even if the submissions are taken into account.

120. The parties do not lose a fact-finding instance because the Local Division Düsseldorf dealt with the citation in an *obiter dictum*. Even if the submission had been introduced late in the first instance, this would not lead to a delay in the proceedings.

121. The fact that Ortovox had sufficient opportunity in the Statement of response to present its arguments on this citation and also made use of this opportunity (see CFI, judgment of 22 June

2017, T-236/16 ECLI:EU:T:2017:416 para. 20) speaks in favour of taking the submissions into account in the appeal proceedings.

b) Novelty over (the disclosure in) EP'679

122. EP'679 does not completely disclose the subject matter of the patent at issue.

(1) Principles of the novelty test

123. The assessment of novelty within the meaning of Art. 54(1) EPC requires that the disclosure of the prior publication must be considered as a whole. It depends on whether the subject-matter of the patent at issue with all its features is directly and unambiguously disclosed in the citation (see UPC Court of Appeal, Panel 1, Order of February 26, 2024 - UPC_CoA_335/2023 App_576355/2023, NanoString Technologies et al./10x Genomics et al, p. 33 GRUR 2024, 527 para. 102).

(2) Description of EP'679

124. The invention according to EP'679 relates to a searching device for locating a transmitter, in particular LVS devices (para. 1).

125. According to the explanations in the description, for auditory (or maximum/minimum field strength) location, conventional devices generate an audible search tone from the transmit signal at 457 kHz by down-mixing at a frequency of about 2 kHz. Since the built-in antenna has a pronounced directional characteristic, the direction of the maximum field strength of the dissipated transmitter can be determined by rotating the receiver and searching for the maximum volume or minimum. This technique requires high concentration, exercise by the examiners, and low ambient noise, especially at longer distances (para. 4).

126. In order to simplify the search by the examiner even without exercise and in stress situations, devices having a plurality of antennas arranged at right angles to one another have been developed. By switching between these antennas, the reception direction of the transmission signal can be determined (para. 5). This method has a number of disadvantages in practice (para. 6).

127. A particular challenge for the searcher is when he receives the signals of a plurality of convolutes simultaneously. The localization purely according to hearing here requires an extraordinarily large amount of training and a cumbersome search strategy (para. 7).

128. The object of the invention is therefore to specify a search device of the generic type which automatically determines the position of at least one spill in a reliable and cost-effective manner (para. 8).

129. Conventional search devices had a search antenna for receiving transmitter signals from the transmitter from current search directions, signal processing means for generating processing signals from the transmitter signals, and an output unit to which the processing signals are supplied for outputting result signals representing the processing signals to the user (para. 10). According to EP'679, such a searching device further comprises a magnetic field sensor which outputs sensor signals relating to the earth's magnetic field to the signal processing device, which are supplied as a processing signal to the output unit and assign a fixed searching angle relative to the earth's magnetic field to each searching direction (para. 11, para. 1).

130. An important idea of EP'679 is that a search device ideally operates like a radar and the antenna is continuously operated around an angle range, for example 180 degrees, would rotate. Because it is known in which angle the antenna is at a straight line, a received signal with the respective field strength can be assigned to the instantaneous angle of the antenna at any time. This is, of course, not feasible in practice. Nevertheless, the 180 degree rotation is achieved by the searching person holding the device in his hand while walking and pivoting it to the left and right, a procedure as is known in the application of searching devices according to the prior art. The problem is then to determine at which angle to an external reference coordinate system the device is at a given time (para. 12).
131. Information about the search angle could also be obtained from the evaluation of the GPS signal under certain circumstances. This is opposed by the relatively high costs of a GPS receiver and the generally inadequate availability of sufficient GPS signals for rescue applications (para. 14).
132. According to EP'679, the earth's magnetic field is used as such a fixed and permanently available reference coordinate system. This allows the received transmitter signal of a transmitter to be assigned to a fixed search angle at any time (para. 15).
133. In addition, magnetic field sensors with an accuracy of 1 degree are less expensive than a GPS receiver, so that the inventive searching device can be manufactured more cost-effectively (para. 17).
134. Figure 1 shows an exemplary embodiment of a searching device 1 designed according to EP679 for use as a LVS device. Communication with the user takes place via an illuminated display 10 and two operating buttons 12, 13. The display 10 allows the position of one or more buried persons relative to the own location to be graphically displayed. The device 1 additionally has a loudspeaker 14 for outputting a synthetically generated search sound to the user as acoustic feedback and an LED 15, as is known for conventional devices. The loudspeaker 14 and the red LED 15 enable a conventional search even without using the graphic display via the display 10 (para. 49).
135. The apparatus 1 is equipped with an antenna for transmitting and searching at a search frequency of 457 kHz, which antenna is not visible to the outside. The buried victim is automatically located based on the natural panning movement of the searcher or user. However, according to EP679, no manual bearing is required as in conventional devices. In addition, the illustrated device 1 has a bearing mode for concentration on a selected waste (para. 53).
136. A search operation is performed in such a way that the searcher swings the device 1 back and forth a few times by approximately 180 degrees after switching from transmission to search mode. The attainable bearing or search accuracy is at the beginning +/-10 degrees. During the panning, all transmission signals or transmitter signals of the transmitters of avalanche victims who are within range are detected. A manual bearing, i.e. the holding of the device 1 in the direction of the strongest signal, is not required.
137. The detected transmitters 22 are displayed on the display 10 according to direction and distance, wherein the material representation of the distance of the transmitter 22 from the search end (in the center of the coordinate field 16, i.e. of the reticle 23) is rendered more accurate by distance information 24 in meters.

138. The searcher can now focus on the buried person by searching the buried person to be found first and by pressing the "FILE" button 12 and masking out the further transmitters 22. During the search process, distance information 24 and position information 22 are constantly adapted to the current position of the searcher (para. 55).

(3) Disclosure of features 1, 1.1, 1.2, 1.3 and features 3 and 3.1

139. Features 1, 1.1, 1.2, 1.3 and features 3 and 3.1 are thus directly and unambiguously disclosed. As is clear, in particular, from paragraph 49 of the description, the search device according to the invention can "additionally" have a loudspeaker (14) for outputting a synthetically generated search sound to the user as acoustic feedback and an LED (15), as is known for conventional devices. The loudspeaker (14) and the red LED (15) enable a "conventional search" even without using the graphic display via the display (10) (para. 49).

(4) No direct and clear disclosure of features 2, 2.1 and 4

140. The Local Division rightly stated that features 2., 2.1 and 4 are not directly and unambiguously disclosed in EP'679.

141. According to the citation, numerous modifications of the search device described there by way of example are conceivable (para. 94).

142. In particular, EP'679 proposes to combine this LVS device with a GPS system. The GPS system provides a conformal representation of the terrain. The view point of the searcher and the transmitter locations detected by the searching device, i.e. the presumed lying points of the casts, are superimposed on the representation of the GPS system. Such a system enables the examiner to intuitively, i.e. quickly, grasp the position of the reclining point on the basis of any prominent terrain points that may be present, so that he can search the reclining point with the smallest possible delay (para. 96).

143. EP'679 further discloses that, alternatively or additionally, the searching device can be combined with a voice control, as is known, for example, from GPS systems for motor vehicles. In this case, the searcher receives acoustic instructions, for example in the form of a voice generated by the search device. This allows the searcher to concentrate on the area (para. 97).

144. As the Local Division rightly affirmed, paragraph 97, by stating "alternatively or additionally", refers to an embodiment according to paragraph 96. This means that "alternatively or additionally" to the realistic representation of the terrain, acoustic instructions can be issued, for example in the form of a voice generated by the search device.

145. This does not directly and unambiguously disclose an avalanche searching device in which the control device is designed to control the loudspeaker in such a way that at least one audio signal is suppressed during the output of at least one voice message or is output at a lower volume.

146. The possible combinations described in paragraphs 94 to 97 relate to a "search device according to the invention" (paragraph 97). This is characterized by the fact that the position of the buried person is "automatically" determined (para. 8). Since the search device according to EP'679 uses the earth's magnetic field as a reference coordinate system (para. 15), it is possible to graphically display the position of one or more buried persons relative to the own location (para. 49). It thus differs from "conventional" devices for auditory location (para. 4),

which require high concentration, exercise by the examiners, and low ambient noise, especially at longer distances (para. 4), as well as, in the case of simultaneous reception of signals of a plurality of convolutes, an extraordinarily large amount of training and a cumbersome search strategy (para. 7). Whereas with "traditional" or conventional devices the search is based on the sound of the field lines, the position of the buried victim relative to his own location is known with a "search device according to the invention". Hereof, the person skilled in the art understands that the advantages of a "search device according to the invention" lie precisely in the fact that it does not require the output of a sound signal.

147. It follows that the search device proposed in EP'679 is not intended to output the associated result signals via a loudspeaker. The person skilled in the art thus relates the reference to the combination possibilities in particular to a search device with the display described in paragraph 49, which graphically shows the position of one or more buried persons relative to one's own location. The output unit mentioned in patent claim 1 does not conceptually exclude an output unit for outputting an acoustic signal. However, the description of EP'679 does not directly and unambiguously disclose such embodiments. Insofar as it is stated in paragraph 49 that the device has additionally a loudspeaker for outputting a synthetically generated search tone to the user as acoustic feedback and an LED, as is known for conventional devices, it can only be inferred hereof, from the point of view of a person skilled in the art, that a search device according to EP'679 can additionally be equipped with a conventional search function or search mode, whereby the output of the "result signals determined according to the invention" (cf. patent claim 1) continues to take place via the display. The search tone known from the prior art is only used for the conventional search within the meaning of paragraph 4.
148. Furthermore, it cannot be inferred from the other text passages nor the sub-claims that "the result signals determined according to the invention" can be output by a loudspeaker.
149. Only subclaim 7 further defines the output unit and again relates only to a graphic output (para. 92, Fig. 3).
150. While it is described for the LED that it is used to support the search for targets at close range (para. 56), there is no corresponding information regarding the loudspeaker.
151. Such indications do not arise from paragraph 65 either, according to which the loudspeaker reproduces the search tone of target cast "only" in a distance-dependent manner. The word "only" indicates that after selecting a buried person by pressing the key (12, "File") for further searching, the search is reduced to the data of the target buried person. The search tone thus continues to represent only the signal evaluation of the conventional search.
152. In this context, paragraph 96, according to which it is conceivable that a "search device according to the invention" can be combined with a GPS system that provides a conformal representation of the terrain, only states that the display described above is further developed by the conformal representation of the terrain. A change to a representation of the spill based on a GPS signal, as opposed to the described position determination using the earth's magnetic field, cannot be inferred from paragraph 96. This would also contradict the statements in paragraph 14, according to which obtaining information about the search angle via GPS signals is prevented by the relatively high costs of a GPS receiver and the generally inadequate availability of sufficient GPS signals for rescue applications.

153. Insofar as paragraph 97 proposes an alternative or additional combination with voice control, as is known, for example, from GPS systems for motor vehicles, it follows from the abovementioned reasons that a change to a destination determination by means of absolute GPS data of the destination is not proposed.
154. "Alternatively or additionally" in paragraph 97 refers to the embodiment of a "search device according to the invention" described in paragraph 96 with a display with a conformal representation of the terrain. This means that voice control can take place with or without the conformal representation of the terrain on the display. Paragraph 97 does not contain any further details on how the voice control is designed. It merely refers to acoustic instructions, for example in the form of a voice generated by the search device. However, the person skilled in the art will also read paragraph 96 in connection with the preceding statements, according to which, in the conformal representation of the terrain, the view point of the searcher and the transmitter locations detected by the searching device, i.e. the presumed lying points of the casts, are superimposed on the representation of the GPS system and such a system enables the examiner to intuitively, i.e. quickly, grasp the position of the reclining point on the basis of any prominent terrain points that may be present. From this, the person skilled in the art assumes that the acoustic instructions refer to indications of prominent terrain points for the detection of the reclining point.
155. Thus, feature 2.1 is not disclosed. It is not immediately and unambiguously apparent from these explanations that the voice control system controls the loudspeaker to output a voice message in the case of an event that is associated with a transmission signal received from the other avalanche searching device.
156. Feature 4 is also not disclosed. EP'679 does not disclose a combination of the embodiment described in paragraph 49, in which the device has, in addition to the illuminated display, a loudspeaker for emitting a synthetically generated search tone. As is clear from the above, the introduction in paragraph 97 "alternatively or additionally" refers solely to the display with realistic representation of the terrain according to paragraph 96.
157. Even if the person skilled in the art would directly infer from the printed document that the embodiment according to paragraph 49 is to be combined with voice control, feature 4 would not be disclosed. The avalanche searching device would then have voice control, a display and a loudspeaker for outputting the search tone. However, since the loudspeaker is only intended to enable a conventional search even without using the graphic display (para. 49), it is at best disclosed that, depending on the user's selection, either the voice output takes place in a search mode, or the output of the sound signal takes place in a search mode which is to be distinguished from the former one. Since these two search modes cannot be activated simultaneously, a functional relationship between the activation of the loudspeaker and the output of the voice message and the suppression or reduction of the volume of the sound signal by a control device according to feature 4 is not disclosed.
158. No other assessment results for patent claim 13.

3. *Novelty over (the disclosure in) EP 2 527 011*

159. EP 2 527 011 (Appendix KAP 18, hereinafter: EP'011) also does not anticipate either patent claim 1 or patent claim 13 in a manner detrimental to novelty.

160. EP'011 relates to an avalanche searching device comprising a receiver unit for determining a receiving device of a transmitted signal, a processing unit and an acoustic signal generator (para. 1). The description considers it a disadvantage that the search for a buried victim requires a lot of time and practice with the known search and transmission devices. Based on this, EP'011 sets itself the task of facilitating the search process (para. 9).
161. This task is to be solved by an avalanche searching device in which the direction of reception can be assigned by the processing unit to one of at least two solid angle ranges around the search and transmission device, whereby one of at least two sound patterns can be generated by the acoustic signal generator depending on the solid angle range assigned to the direction of reception (para. 10). The term solid angle range refers to a part of the space around the search and transmitting device, for example in the form of spherical sectors emanating from the device and open to the outside (para. 12).
162. According to the description of EP'011, this has the advantage that the direction of reception of the transmitted signal is acoustically signaled to the searcher with the accuracy of a solid angle range. As a result, the searcher can be guided by the acoustic signal (sound pattern) and does not have to concentrate primarily on a visual display (para. 14).
163. Furthermore, this has the advantage that the acoustic signal is not simply, as previously known, proportional to the strength of the received transmitted signal and to the orientation of the receiving antenna to the direction of reception of the transmitted signal (para. 16).
164. According to the explanations in EP'011, the tone patterns primarily differ in a combination of the features consisting of tone frequency, repetition rate of individual tones, duration of the individual tones and loudness (para. 45).
165. The search and transmitting device shown in Figure 1 comprises an acoustic signal generator with a loudspeaker (2) (para. 55 lines 38 f.). Furthermore, the search and transmitting device 1 comprises a transmitting unit by means of which a transmitting signal can be transmitted when the search and transmitting device (1) is in transmitting mode (para. 55 lines 50-54). Furthermore, the search and transmitting device (1) comprises a receiving unit (para. 56).
166. In a further embodiment example (Figure 3), the search and transmitting device (51) comprises an optical display (58) in which the receiving direction determined by the receiving unit can be displayed (para. 64 lines 50-56).
167. Thus, EP'011 discloses features 1, 1.1 to 1.3 and 3.
168. The Local Division correctly stated that a voice message within the meaning of features 2, 2.1 and 4 is not disclosed. The sound patterns described in EP'011 consist exclusively of tones and differ in a combination of the features consisting of tone frequency, repetition rate of individual tones, duration of the individual tones and loudness (para. 45 lines 1-41). Instructions in the form of spoken words are not described there. Rather, the searcher should be able to read the direction of reception "intuitively" from the sound pattern generated by the signal generator (para. 45 lines 54-56).
169. In support of the contrary view, Mammut unsuccessfully invokes paragraph 46 of the publication. According to this, the term sound pattern should also be understood to mean an empty or silent or inaudible sound pattern that does not include any sounds. This is the case,

for example, if the signal generator is to remain silent, i.e. produce no signal or an inaudible acoustic signal, if the direction of reception has been assigned to one or more specific solid angle ranges. This does not result in signaling in the form of speech.

170. Insofar as Mammut asserts, with reference to the publication DE 10 2014 204 630 (para. 9, Appendix BB1/Appendix 58, hereinafter: DE'630), that it is to be assumed according to the general understanding of the person skilled in the art that a sound pattern comprises all types of signals that can be output via the loudspeakers of a headphone, i.e. also spoken language, there is no definition of "sound patterns" there, only acoustic source signals are defined. Since there is no reference to the general understanding of the person skilled in the art, it does not result from this that the definition given there is based on the general understanding of the person skilled in the art.

4. Novelty compared to WO 2006/051721

171. The Local Division correctly assumed that the subject matter of patent claims 1 and 13 was not disclosed in WO 2006/051721 (Appendix KAP 17 and BB1, Supplement 32, hereinafter: WO'721) in a manner detrimental to novelty.

172. WO'721 relates to a device and a method for locating persons and objects, in particular an avalanche searching device (p. 1, lines 11-13).

173. With conventional devices, where the receiving device detects the received frequency pulses, the optimum procedure for searching is difficult to learn. Less technically experienced users, in particular, often find it difficult to quickly locate a buried victim, especially in a stressful situation (p. 2 lines 10-20).

174. This problem has led to further developments. Two or three antennas are now for reception. This makes it possible to calculate a direction in the locator and simplify the search process. In addition, current locators display the distance to a transmitter in meters (p. 2 lines 21-26).

175. Despite the multiple receiving antennas, even today's devices do not always work reliably, which is mainly due to the physical laws underlying the mode of operation and the chosen search method (p. 2 lines 28-31).

176. If several people are buried together, signals from different transmitters are sometimes received simultaneously, which makes localization more difficult (p. 3 lines 6-8). It is therefore a task, on the one hand, to enable more precise and faster localization of persons and objects and, on the other hand, to make it possible to integrate additional useful functions, such as the output of navigation data (p. 3 lines 11-15).

177. The disclosed device provides at least one first sub-unit comprising at least one first receiving device and at least one first transmitting device, wherein the first receiving device is adapted to receive at least one position signal, and wherein the first transmitting device transmits at least one positioning signal at least temporarily. The positioning signal contains at least one piece of information derived from the position signal (p. 4 lines 6-14).

178. In this device, a second sub-unit is provided which has at least one second receiving device, the second receiving device being suitable at least for receiving the locating signal and being signal-connected to at least one output device for outputting at least one signal derived from the locating signal. Preferably, the locating signal is taken from a group of signals which contains

electromagnetic signals and thus also optical signals, as well as sound signals, but preferably radio signals (p.4 lines 15-23; cf. also p.11 lines 27-30).

179. Features 1, 1.1, 1.2, 1.3, 3 and 3.1 are thus disclosed.

180. Although the citation also discloses a device with a voice output within the meaning of features 2 and 2.1, a device additionally comprising features 3, 3.1 and 4 is not disclosed.

181. The Local Division correctly stated that there was no disclosure of voice messages and sound signals in the statements in WO'721, according to which output device is understood to mean any device which produces stimuli perceptible to the human senses, such as preferably optical stimuli in the form of optical displays and/or acoustic stimuli in the form of buzzers or loudspeakers (p.5 lines 16-19). This discloses an output device that can generate optical "and/or" acoustic stimuli. However, it is not directly and unambiguously disclosed that these acoustic stimuli can be generated by both a buzzer and a loudspeaker, so that both sound signals and voice messages can be generated (either in parallel or alternatively). In this respect, only "buzzers or loudspeakers" (emphasis added by the court) are mentioned.

182. Contrary to Mammut's opinion, the use of the plural for the buzzers and loudspeakers does not make it clear that different signals can be output simultaneously. The person skilled in the art merely recognizes this as an indication that there are a variety of specific designs for optical displays, screens, buzzers or loudspeakers.

183. Nothing else applies to the explanations on page 11, lines 21 to 30, according to which the information could be output on the (...) output device by means of appropriately assigned signals, symbols or characters. Preferably, the information would be displayed on optical displays (...). However, cost-saving embodiments with LED direction arrows and LED distance scales are also conceivable. In convenient embodiments of the device according to the invention, a voice output device is provided which guides the user by voice to the person or object to be located. It can only be inferred from this that an output device with visual display or one with visual and acoustic output is possible.

5. Novelty compared to DE 299 22 217

184. The appeal also unsuccessfully challenges the Local Division's view that the patent at issue further proves to be new compared to the utility model specification DE 299 22 217 (Appendix KAP 19 or BB1 Supplement 33, hereinafter DE'217).

185. DE'217 concerns a searching device, in particular a LVS device. DE'217 considers it a disadvantage that the search with the known LVS device, in which the search is based on the strength of the signal received, which is shown on a display, requires a great deal of experience (p. 1 lines 11-17).

186. Against this background, DE'217 has set itself the task of developing a searching device that will enable even inexperienced persons to find a buried person in the shortest possible time (p.2 para. 4).

187. In contrast to the known searching devices, the searching device according to DE'217 does not use the strength of a signal to determine the position (p. 3 para. 2). The searching device according to one embodiment example has a dGPS receiver that receives ZP time and position signals from satellites. At the same time, ZP time and position signals are received from a

reference station, which compares a position calculated from the ZP time and position signals with a reference position and sends K correction signals, which correspond to a deviation of the calculated position from the reference position, to the dGPS receiver. The searching device has a position calculating device that calculates a centimeter-accurate position of the searching device using the ZP time and position signals from the satellites 16 and the correction signals K (p. 3/4).

188. For example, the distance and direction to the buried victim could be shown on a display so that the searcher only has to move in the indicated direction until the distance to the buried victim is zero (p. 3 para. 3).

189. In a preferred embodiment, a voice processor is additionally provided, which outputs the direction and distance to the buried victim, preferably via headphones. This embodiment has the advantage that the searcher has both hands free when searching for a buried victim, which is particularly advantageous in large masses of snow (p. 3 para. 4, cf. also p.6 para. 4 and patent claim 7).

190. As the Local Division correctly considered, the disclosure of the output of at least one sound signal within the meaning of features 3, 3.1 and 4 is thus lacking in any event. The output of sound signals is not mentioned in the citation.

191. Without success, Mammut argues that claim 1 generally discloses an output device which outputs determination values. Even if the person skilled in the art, using his common knowledge, is able to make output units falling within claim 1 other than those directly described in the citation, it does not follow that all such output units are directly and unambiguously disclosed in the citation.

192. The signaling device (34) referred to in claim 8, which emits a conspicuous signal when the first and second position values match, also does not disclose the output of at least one sound signal. The wording of claim 8 leaves open the signal form of the conspicuous signal. Reference sign (34) leads the person skilled in the art to the signal light (34) of the description, which lights up when the distance to the second searching device is less than 1 meter (p. 6 second full paragraph) and thus discloses only a signal device with an optical signal.

193. Features 2 and 2.1 are also not disclosed. It is not disclosed that the output of the voice message is dependent on a specific event in connection with the search.

6. Inventive step

194. According to Art. 56 EPC, an invention shall be considered as involving an inventive step if, having regard to the state of the art, it is not obvious to a person skilled in the art. The Local Division rightly assumed that it is not overwhelmingly probable that the subject-matter of claims 1 and 13 will prove not to involve an inventive step.

a) Inventive step based on EP'679

195. Based on EP'679, the person skilled in the art had no reason to consider sound signals in the sense of the feature 3.1 together with voice messages to display search results. EP'679 considers localization purely according to hearing to be disadvantageous (para. 7), the citation therefore proposes automatic positioning (para. 9). The distance and position are adequately determined

and shown on a display. Based on EP'679, the person skilled in the art who is faced with the task of simplifying the search is led away from the use of sound signals. This also follows from the fact that the simultaneous use of conventional search and the search proposed in EP'679 could lead to contradictory results, which could confuse the searcher. Indeed, the conventional search would lead the searcher on a curved path along the magnetic field lines generated by the buried victim's LVS device, whereas the search proposed in EP'679 would lead the searcher in a straight line towards the buried victim (if necessary, with detours to avoid possible obstacles).

b) Based on WO'721

196. It is not apparent that the person skilled in the art had reason, based on WO'721, to provide the LVS device disclosed therein with a control device which, depending on the conditions mentioned in features 2.1, 3.1 and 4, alternatively controls the loudspeaker with voice messages and sound signals. As explained, the citation discloses the buzzer and loudspeaker as alternatives, not as a combination. The text passage on page 11, lines 21 to 30 describes the voice output device as a particularly convenient further development and therefore provides the person skilled in the art seeking to simplify the search with a self-contained teaching that does not require supplementation.

197. Mammut argues without success that the consecutive use of two known technologies (voice guidance and guidance by the sound signal) cannot constitute an inventive step, all the more so as no further technical effect is produced by the alternative, alternating use of technical means known to be equivalent. It is not necessary to decide whether such a further technical effect is required for an inventive step. Contrary to Mammut's view, the combination of sound signals and voice guidance has a technical effect that goes beyond the individual features. By outputting at least one voice message, the search guided by the sound signals is additionally supported (para. 8). The dependence of the output of the voice message on at least one event makes it possible to make the voice output dependent on certain search situations (para. 13).

c) Based on DE'217

198. A different assessment does not arise with regard to DE'217 either. Mammut argues unsuccessfully that a combination of voice messages and sound signals is provided in claims 7 and 8.

199. It may be that the person skilled in the art considers a signal tone for the conspicuous signal instead of a signal light. However, it makes no sense to suppress this sound signal when outputting the voice message or to output it at a reduced volume, since it must be a conspicuous sound signal. In any event, feature 4 is thus not disclosed.

d) Based on EP'011

200. Also based on EP'011, the person skilled in the art had no reason to provide a voice output, as known from WO'721 and DE'217, in an avalanche searching device in addition to the output of sound patterns disclosed there. The sound patterns, which vary according to the solid angle, enable the user to be adequately guided, as the Local Division rightly stated.

201. Moreover, there is no reason to combine EP'011 with WO'721 or DE'217 - as the Local Division also rightly pointed out - because the search in the latter two documents is based on GPS-supported position signals, which make a fixed assignment of certain sound patterns to certain vectors, as provided for in EP'011, unnecessary.

e) Based on the classic LVS device

202. Even on the basis of the general LVS device, it is not overwhelmingly likely that the invention was obvious. Mammut argues without success that the LVS device disclosed in US 2006/0148423 (BB1 Exhibit 34) already contains all the features of the patent at issue, with the exception of the combination of audio signals and voice messages and the regulation of the relationship between these two audio sources. Since there was no corresponding suggestion from the prior art, this combination of features was not obvious.
203. Nor does such a suggestion arise from the knowledge of the person skilled in the art that directional information from the GPS is displayed by means of voice output. The person skilled in the art refrains from combining directional information by means of GPS and conventional audio signals because the simultaneous use of conventional search and directional information by means of GPS could lead to contradictory results, which would not simplify the search but would confuse the searcher. The conventional search would lead the searcher on a curved path along the magnetic field lines generated by the avalanche searching device of the buried victim, while the directional information via GPS would lead the searcher in a straight line to the buried victim.
204. Insofar as the language support is described as a "long overdue feature" in the justification for the ISPO Award in 2021 for the contested embodiment, this does not justify the obviousness of the combination on the priority date, contrary to Mammut's opinion.

II. Direct patent infringement

1. Realization of the features of claim 1

205. The Local Division correctly stated that the "Barryvox S2", insofar as it has a voice output (hereinafter: the contested embodiment), makes use of the technical teaching of patent claim 1 in the literal sense.
206. Realization of feature group 1 as well as features 2 and 2.1 is rightly not in dispute between the parties.
207. Contrary to Mammut's view, the contested embodiments also make use of features 3, 3.1 and 4.
208. The patterns of the "Barryvox S2", which have voice support, contain two different signal sources, one for acoustic patterns (sound patterns) and the other for acoustic speech. While the device is operating in search mode, one of the two sources is temporarily selected and played back via the loudspeaker. The output of the sound patterns is completely stopped while a voice message is being output. It is switched from one signal generator to a completely independent second signal generator, so that the signal generator of the acoustic patterns is deactivated during the output of the acoustic speech, but is active before and after the output of the acoustic speech ("switched"). The generation of the audio signal is completely suspended while the voice message is being generated and output.
209. As explained, sound patterns are sound signals within the meaning of patent claim 1.

210. Since during operation of the device in the same search mode - i.e. without any further user input being required - an alternative control of the loudspeaker takes place either with sound signals or with voice messages, feature 4 is also realized.

211. Insofar as Mammut asserts that there is no control device for the activation that accesses both signals (sound or speech), since either one or the other signal generator is active, it is sufficient for the above-mentioned reasons for patent infringement that the activation of the signal generators causes the output of the sound or speech signals in accordance with the specifications in features 2.1, 3.1 and 4. In particular, by only one of the two signal generators at a time, it is excluded that the sound signal and voice message are output simultaneously.

2. Infringement (Art. 62 para. 1 UPCA)

212. Without success, Mammut claims that there is no such thing as "the" Barryvox S2, as there are different versions, at least in the test phase.

213. According to the findings of the Local Division, which are not contested in this respect, it is undisputed that one of the prototypes is equipped with voice support and that such a device was exhibited at the ISPO trade fair in Munich. This is also evidenced by the fact that the voice output is expressly mentioned in the justification for the ISPO award. Against this background, the Local Division rightly assumed that from the point of view of the relevant public, which can order a Barryvox S2 on the Internet, at least as long as they do not receive any deviating information, the product ultimately delivered essentially corresponds to the device that was exhibited at the trade fair.

214. It is not necessary to decide whether the acts of offering on the Internet relate to this prototype. It is sufficient for the provisional measures to be issued that there is a threat of infringement in Germany and Austria (Art. 62 (1) UPCA). This can be assumed on the basis of the trade fair appearance in Munich and the possibility of ordering the Barryvox S2 on the Internet.

III. Indirect patent infringement

215. The Local Division also rightly assumed that the offer of the contested embodiments constituted an indirect infringement of patent claim 13 pursuant to Art. 26 (2) UPCA. To avoid repetition, reference is made to the grounds of the Local Division's Decision.

IV. No right to use Mammut's device due to older law

216. The Local Division correctly held that the use of the patent was not allowed because of Mammut's prior right to EP'011.

217. There is no need for a Decision as to whether such an objection can be raised before the Unified Patent Court. Also according to the principles developed by the Federal Court of Justice, the earlier right can only be invoked by those who exclusively use its teaching and do not make use of additional features which are only taught by the later property right (BGH, GRUR 2009, 655 para. 27 - Trägerplatte). As explained above, EP'011 does not anticipate all the features of claims 1 and 13.

V. Exhaustion

218. The Local Division correctly assumed that Mammut could not invoke exhaustion with regard to the license agreement concluded between Mammut GmbH and Ortovox (excerpts submitted as Appendix KAP 36).

a) Patent at issue not subject of the license agreement

219. The license agreement does not cover the patent at issue for the reasons stated by the Local Division, to which reference is made in order to avoid repetition.

b) Preclusion of further submissions

220. The Local Division rightly disregarded Mammut's submissions in the statement of 15 March 2024 on the scope of the license agreement, which was submitted without leave after the end of the oral hearing.

221. Submissions lodged after the conclusion of the oral hearing on which the decision is based may no longer be taken into account by the court in its decision. Pursuant to R.195.3 RoP in conjunction with R.197.1 sentence 2 and 212.3 RoP, the decision shall be given as soon as possible after the closure of the oral hearing (see also R.118.6 sentence 1 and R.118.7 RoP for the main proceedings). If the court deems appropriate, the decision may be given orally to the parties at the end of the oral hearing but shall as soon as practicable thereafter be given in writing. This means that the basis for the decision can only be the written and oral submissions made before the end of the last oral hearing.

222. The statement is also not admissible in appeal proceedings. The arguments in the statement of March 15, 2024 are not relevant (R.222.2 (b) RoP). In view of the clear provision in clause 1 and the preamble, the fact that the license pursuant to Clause 4 of the agreement is also to relate to successor models of the "Pulse Barryvox" does not mean that modifications that make use of patents other than those mentioned are licensed.

VI. Abuse of rights

223. Contrary to Mammut's opinion, the action against the distribution of the contested embodiments is not an abuse of rights because of the license agreement relating to other property rights. An abuse of rights could only be considered if the patent at issue did not make use of additional features that go beyond the subject matter of the licensed property rights.

224. However, as explained above, EP'679 does not fully disclose the patent at issue.

D. Weighing of interests

225. Pursuant to Art. 62 (2) UPCA and R.211.3 RoP, the Court shall have the discretion to weigh up the interests of the parties and in particular to take into account the potential harm for either of the parties resulting from the granting or the refusal of the injunction. As the Local Division correctly assumed, the balancing of interests is in favour of Ortovox.

I. Unreasonable waiting/urgency

226. When weighing up the interests, the Court shall have regard to any unreasonable delay in seeking provisional measures in accordance with R.211.4 RoP. This is based on the fact that the

patent proprietor shows with such behavior that the enforcement of his rights is not urgent for him. In such a case, provisional legal protection is not required.

227. The Local Division correctly assumed that Ortovox did not wait unreasonably long with the application for provisional measures of December 1, 2023.

1. Start of the delay

228. The delay within the meaning of R.211.4 RoP shall be calculated from the day on which the Applicant became aware, or should have become aware, of the infringement that would enable him, in accordance with R.206.2 RoP, to file an application for provisional measures with a reasonable prospect of success.

229. With correct reasoning, to which reference is made to avoid repetition, the Local Division held that sufficient knowledge or a need to know did not already exist on October 12, 2023, when employees inspected a prototype of the contested embodiment at a trade fair in the USA. The decisive factor in this respect is that it was only one prototype of several and it could not be assumed with some probability that this very prototype would also be offered and distributed in Austria and Germany.

230. This situation had not changed when Ortovox was informed by a retailer at the beginning of November 2023 that the "Barryvox S2" could be pre-ordered for 2024. Accordingly, Ortovox was first allowed to look at the version on display at the trade fair on November 28, 2024.

2. Length of time

231. Ortovox did not wait unreasonably long with the application.

232. Whether there has been an unreasonably delay within the meaning of Rule 211.4 RoP depends on the circumstances of the individual case.

233. After Ortovox first became aware of an imminent patent infringement on November 28, 2023, Ortovox did not wait unreasonably long with the application of December 1, 2023, Ortovox rather filed it quickly.

234. The fact that the Orders were not served until December 21 and 22, 2023, respectively, and thus the pre-Christmas business, as intended by Ortovox, could not be prevented, is not a circumstance related to the period taken until the application was filed. Irrespective of this, even when considering all the circumstances, this period would not be unreasonably long.

II. Balancing of interests

1. Harm

235. The Local Division correctly held that it is justified here to order provisional measures.

236. Mammut argues unsuccessfully that Ortovox is only pursuing monetary interests which can be adequately satisfied by compensation.

237. Contrary to Mammut's opinion, irreparable harm is not a necessary condition for rendering an order on of provisional measures (see CJEU Judgment of 28 April 2022, Phoenix/Harting, C-44/21, ECLI:EU:C:2022:309, para. 32). Art. 62 (2) UPCA and R.211.3 RoP merely refer to potential harm, which must be taken into account when weighing up interests. Even R.212.1 RoP, which permits an *ex parte* Order, does not necessarily require irreparable harm. Accordingly, the Court can order provisional measures without first hearing the Respondent, "in particular" if a delay is likely to cause irreparable harm to the Applicant.
238. It is therefore sufficient that the interests of the patent proprietor in the issuance of provisional measures outweigh the interests of the infringer. The fact that the Order of December 11, 2023 was issued by *ex parte* does not justify a different assessment, since the contested order was issued in bilateral proceedings.
239. The Local Division correctly assumed that Ortovox's interests prevailed. By at least threatening to sell a patentable competitor product, Mammut is depriving Ortovox of the market opportunity associated with patent protection.
240. The Local Division rightly took into consideration that Ortovox is dependent on effective legal protection because an oral hearing in the main proceedings can only be expected within a year. The distribution of the contested embodiment for the 2024/2025 winter season could not be effectively prevented by a subsequent decision, at least for a not insignificant period of time.
241. Without success, Mammut argues that in the event of an injunction in the main proceedings, the orders would be canceled and demand would revive. This would mean that Ortovox would have to pre-produce the goods at its own risk to cover the demand that would then become available at short notice.
242. In view of the infringement established, Mammut has no interest to the contrary in securing the advance orders already placed.
243. For the foregoing reasons, the Local Division correctly refused to allow Mammut to perform the infringing acts in exchange for security.

2. *Law enforcement in Switzerland*

244. The Local Division correctly held that Ortovox does not have to refer to possible summary proceedings in Switzerland, with which Mammut could have been prohibited from manufacturing the contested embodiments. Such an injunction would not apply to the infringement actions in Germany and Austria in question here.
245. It can be assumed in favor of Mammut that the manufacturing ban in Switzerland would have led to a *de facto* cessation of distribution of the contested embodiments for a certain period of time (namely until the change in production). It does not follow from this that Ortovox was required to take action against the manufacture of the contested embodiments in Switzerland. In principle, it is up to the patent proprietor to decide which acts of use he wishes to claim (urgent) legal protection for.

3. *Third party interests*

246. Whether third-party interests are to be included in the balancing of interests can be left open. Since the contested embodiments are not the only LVS devices with voice support, but Ortovox

also sells corresponding devices, the availability of the device is not mandatory to improve the survival rate of avalanche victims.

4. Publication

247. For the reasons set out above, the seizure order issued by the Local Division pursuant to Art. 62(3) UPCA in conjunction with R.211.1(b) RoP is not objectionable.

5. Penalty payment and security

248. For the reasons set out in the contested order, to which reference is made in order to avoid repetition, there are also no objections to the threatened penalty payment and the security ordered.

E. Provisional reimbursement of costs in favor of Ortovox

249. As a result, the Local Division rightly awarded Ortovox reimbursement of costs as an interim measure pursuant to R.211.1 (d) RoP.

250. The fact that Ortovox filed the application for reimbursement of costs for the first time in the proceedings for review of the Order for Provisional Measures does not preclude this. However, pursuant to R.206.2 (b) RoP, the application for provisional measures shall contain an indication of the provisional measures which are being requested. According to R.211.1 (d) RoP, this also includes an interim award of costs. However, it is possible to apply for leave to change the claim or to amend the case in the proceedings for review of the order for provisional measures (R.263 RoP). Ortovox's application to supplement the interim measures with an order for provisional reimbursement of costs contains (implicitly) an application for admission of such an amendment of the case.

251. Pursuant to R.263.2 RoP, subject to paragraph 3, leave to change the claim or to amend the case shall not be granted if, all circumstances considered, the party seeking the amendment (or change) cannot satisfy the Court that (a) the amendment in question could not have been made with reasonable diligence at an earlier stage; and (b) the amendment will not unreasonably hinder the other party in the conduct of its action.

252. Mammüt argues unsuccessfully that R.263 RoP does not apply to applications for provisional reimbursement of costs in proceedings for interim relief because this is not a "Klageänderung" within the meaning of this provision. R.263 RoP also applies to applications for the issuing of orders on provisional measures. As follows from Art. 32 (1) (c) UPCA, "actions for provisional measures" under Art. 62 UPCA are independent actions (see also UPC Court of Appeal, Order of 26 April 2024, UPC_CoA_500/2023, APL_596892/2023, para. 8). The fact that, according to the wording of the English and French language versions of R.263.1 RoP, the change or amendment concerns the "claim or case" (English language version) or the "demande" (French language version), whereas the corresponding versions of Art. 32 (1) (c) UPCA refer to "actions" or "les actions", is of no significance because, according to both language versions, R.263 RoP is not limited to the change or amendment of "claims" or "demande", but also allows "to amend its case" or "de modifier la nature de son affaire", and thus refers to a change or an amendment of the entire subject matter of the dispute.

253. The conditions under which leave to change the claim or amend the case is refused pursuant to R.263.2 RoP are not met. A party who applies for an Order for provisional measures without

hearing the other party pursuant to R.206.3 RoP is usually interested in the court deciding on the matter as soon as possible. It therefore regularly has an interest in ensuring that neither it nor the court has to calculate the costs. Against this background, it is generally not a breach of due diligence if the application for provisional reimbursement of costs is deferred in these cases and only filed in the proceedings for review of the order for provisional measures. This is expedient, as review proceedings can lead to further costs that could be taken into account in the application that is then filed.

254. Mammut is not hindered by the subsequent admission of the provisional reimbursement of costs. Mammut already had the opportunity to comment on the application for provisional reimbursement of costs in the proceedings before the Court of First Instance.

255. As Ortovox has incurred further costs as a result of the appeal proceedings, the amount of the provisional reimbursement of costs must be adjusted as requested by Ortovox. Contrary to Mammut's view, the application must be allowed in the appeal proceedings. Since Ortovox could not assume with certainty that the Decision at first instance would be the subject of appeal proceedings, it was appropriate to file this application only in the appeal proceedings (see R.222.2 (b) RoP).

F. Reimbursement of costs in favour of Mammut

256. Since Mammut, as the unsuccessful party, has to bear the costs of the proceedings (Art. 69 para. 1 RoP, UPC Court of Appeal, of February 26, 2024 - UPC_CoA_335/2023 App_576355/2023, operative part 7), there is no room for a reimbursement of costs in its favour.

G. Cost decision

257. The Local Division rejected Ortovox's request for a cost decision on the grounds that there was no legal basis for this. This is not the case, as a cost decision is also possible in summary proceedings under R.242.1 RoP (see UPC Court of Appeal, Order of August 6, 2024, UPC_CoA_335/2024, App_22399/2024, para. 29). However, since Ortovox has not lodged an appeal in this respect, this decision must be accepted.

258. On the other hand, Ortovox's request that Mammut be ordered to pay the costs of the appeal proceedings must be granted.

ORDER

1. The application to admit the Statement of defence and the separate counterclaim for revocation on the merits in the appeal proceedings is rejected.
2. The Appeal is rejected.
3. The Court orders Mammut to reimburse the Ortovox further interim costs in the amount of €19,858.40
4. The Cour orders Mammut to pay the costs of the appeal proceedings.

ISSUED ON:

September 25, 2024