

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

GUIDING PRINCIPLE:

1. The Court of Appeal shall decide at its discretion, taking into account all the 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.
2. The subject matter of the appeal proceedings in the proceedings for the review of provisional measures is generally limited to the submissions made in the proceedings concerning the Order for provisional measures.
3. In order to ensure legal certainty and the proper administration of justice, the grounds of appeal must be sufficiently clear and precise to enable the appellant to prepare a defence to the first instance judgment and the appellate court to decide on the appeal. The court is not obliged to search for and determine the grounds on which the appeal may be based in the annexes. The same applies to documents from other proceedings.
4. Documents submitted after the conclusion of the oral proceedings on which the decision is based may no longer be taken into account by the court in its decision.
5. The period of waiting within the meaning of R.211.4 RoP is to be measured from the day on which the applicant has or should have had such knowledge of the infringement as would enable him to submit an application for provisional measures in accordance with R.206.2 RoP. The relevant point in time is therefore the time at which the applicant has the necessary facts and evidence within the meaning of R.206.2d RoP or should have had the necessary diligence.
6. When an unreasonably long wait within the meaning of R.211.4 RoP exists depends on the circumstances of the individual case.
7. Irreparable damage is not a necessary condition for the Order of provisional measures.
8. R.263 RoP also applies to applications for interim Orders.

KEYWORDS:

- Application for an Order for provisional measures
- Consideration of submissions rightly rejected by the CFI in the appeal instance,
- Subject of the appeal proceedings in the proceedings concerning an application for the ordering of provisional measures,
- Content of the grounds of appeal,
- Novelty,
- inventive activity,
- documents after the conclusion of the oral proceedings,
- Urgency,
- Weighing of interests in proceedings concerning an application for interim measures
- Applicability of R.263 RoP in proceedings for interim orders

APPELLANTS/RESPONDENTS 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 Oliver Jan Jüngst, Attorney Dr Moritz Schroeder,
Law firm Bird & Bird LLP, Düsseldorf, Germany

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

APPELLANT/APPELLEE IN THE MAIN PROCEEDINGS BEFORE THE COURT OF FIRST INSTANCE

Ortovox Sportartikel GmbH, Taufkirchen, Germany

represented by: Miriam Kiefer, lawyer, Robert Knaps, lawyer, Kather Augenstein law firm,
Düsseldorf,

Contributor: Patent attorney Michael Siebel, law firm Hofstetter, Schurack & Partner
Rechtsanwälte PartG mbB

LANGUAGE OF THE PROCEEDINGS:

German

PANELS AND DECIDING JUDGES:

Second panel:

Rian Kalden, presiding judge and legally qualified judge Ingeborg

Simonsson, legally qualified judge

Patricia Rombach, legally qualified judge and rapporteur Eric Augarde,
technically qualified judge

Max Tilmann, technically qualified judge

ORDER OF THE COURT OF FIRST INSTANCE OBJECTED TO:

Order of the Düsseldorf local division dated 9 April 2024

□ Action number of the Court of First Instance:

Confirmatory 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 CASE:

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

DISPOSAL PATENT:

EP 3 466 498

ORAL HEARING ON:

25 July 2024

FACTS AND APPLICATIONS:

1. The defendant and appellant (hereinafter: Ortovox) is bringing an action for interim relief against the defendants and appellants (hereinafter for both: Mammut) for direct and indirect patent infringement of its European patent EP 3 466 498 (injunction patent).
2. The reference to the grant of the provisional patent filed on 9 October 2017 was published on 4 December 2019. The patent relates to an avalanche transceiver (hereinafter also referred to as an avalanche transceiver) and a method for operating an avalanche transceiver. It is currently in force in the Federal Republic of Germany and Austria, among other countries.
3. Claim 1 reads as follows in the language of the proceedings:

Avalanche transceiver, with a transmitting unit (16) for transmitting at least one transmission signal (18), a receiving unit (16) for receiving at least one transmission signal (30) from at least one further avalanche transceiver (32), and with a control device (24) for activating at least one loudspeaker (22),

wherein the control device (24) is designed to control the at least one loudspeaker (22) for outputting at least one voice message as a function 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 output at least one sound signal characterised in that

the at least [one] audio signal is associated with the search for the at least one further avalanche transceiver (32), wherein the control device (24) is designed to control the at least one loudspeaker (22) in such a way that the at least one audio signal is suppressed or output at a reduced volume during the output of the at least one voice message.

4. Patent claim 13 protects a method for operating a corresponding avalanche transceiver.

5. From 8 October 2023 to 13 October 2023, the respondent 1 presented an avalanche transceiver with the registration number "Barryvox S2" at the "ISSW" trade fair in Bend, Oregon (USA). It was examined there by Ortovox employees.
6. At the beginning of November 2023, Ortovox received a notice from a retailer that the "Barryvox S2" could be pre-ordered for 2024 via the B2B platform of the Mammut Group. According to the content of the general terms and conditions to be found there, the defendant 2 is responsible for offers and deliveries to the Federal Republic of Germany and the Republic of Austria (Annex KAP 9).
7. Defendant 1 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. Ortovox sent Mammut an unsuccessful warning letter dated 28 November 2023 (Annex KAP12).
9. Following Ortovox's application of 1 December 2023, which was supplemented after the Düsseldorf local division was informed, the Düsseldorf local division issued an Order of 11 December 2023 (ORD_592936/2023) ordering provisional measures without first hearing Mammut:
 - i. The defendants (Mammut) are ordered to refrain from doing so,
 1. Avalanche transceivers
in the Federal Republic of Germany and/or the Republic of Austria, to offer, place on the market or use, or to import or possess for these purposes, with at least
a transmitter unit for transmitting at least one transmission signal,
a receiver unit for receiving at least one transmission signal from at least one further avalanche transceiver,
and with 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 as a function of at least one event,
wherein the at least one event is associated with a search for the at least one further avalanche transceiver,
wherein the avalanche transceiver has the at least one loudspeaker and the at least one loudspeaker is designed to emit at least one sound signal,
characterised in that
the at least one audio signal is associated with the search for the at least one other avalanche transceiver,
wherein the control device is designed to control the at least one loudspeaker in such a way that the at least one sound signal is suppressed during the output of the at least one voice message or is output at a reduced volume.
 2. Devices used to carry out a procedure for operating an avalanche transceiver.
search device are suitable
in the Federal Republic of Germany and/or the Republic of Austria for use in the Federal Republic of Germany and/or the Republic of Austria, the method comprising at least the following:
a transmitter unit for transmitting at least one transmission signal,
a receiver unit for receiving at least one transmission signal which is emitted by at least one further avalanche transceiver,
in which a control device of the avalanche transceiver controls at least one loudspeaker,
wherein the control device controls the at least one loudspeaker in such a way that the at least one loudspeaker emits at least one voice message, wherein the at least one loudspeaker emits at least one voice message.

loudspeaker is activated by the control device depending on at least one event, which is related to a search for at least one other avalanche transceiver, the avalanche transceiver has at least one loudspeaker and the at least one loudspeaker emits at least one sound signal, characterised in that the at least one audio signal is associated with the search for the at least one other avalanche transceiver, wherein the control device controls the at least one loudspeaker in such a way that the at least one sound signal is suppressed during the output of the at least one voice message or is output at a reduced volume.

- II. For each individual infringement of the above Order, the defendants must pay a penalty payment (which may be repeated) of up to EUR 10,000 per product and/or up to EUR 30,000 per day in the case of continuous offences such as offers on the Internet.
 - III. The defendants (Mammut) are ordered to hand over the avalanche transceivers referred to in section I. or devices suitable for conducting proceedings for the operation of an avalanche transceiver to a bailiff for the purpose of safekeeping, which shall continue until the existence of a claim for destruction has been finally decided between the parties or an amicable settlement has been reached.
 - IV. This Order is only enforceable if the applicant has provided security in favour of the defendants in the form of a deposit or bank guarantee in the amount of EUR 500,000.
10. Mammut has filed an application for review pursuant to R.212.3 sentence 1 RoP (documents dated 19 January 2024 [App_3217/2024, App_3259/2024 and App_4074/2024]) and requested that the Order of 11 December 2023 be revoked and the application for provisional measures be dismissed, or alternatively that Mammut be allowed to continue the alleged infringing acts against the provision of a security deposit at the discretion of the court, which should not exceed EUR 500,000. Furthermore, Mammut has requested a provisional reimbursement of costs in the amount of EUR 19,858.40, a costs decision in favour of Ortovox and the provisional enforceability of the Order.
11. Ortovox opposed the application and requested that the Order be cancelled. 11 December 2023 to the effect that Mammut Ortovox must provisionally reimburse costs in the amount of 33,375.70 euros and bear the costs of the proceedings.
12. The Düsseldorf local division upheld the Order for provisional measures of 11 December 2023, rejecting Mammut's applications, and ordered Mammut to provisionally reimburse Ortovox costs in the amount of EUR 33,375.70. The local division saw no reason for the basic costs order requested by Ortovox.

Reproduction of the reasons for the Order of the local division:

13. In support of its decision, the local division essentially stated:
14. On summary examination, the contested embodiment makes direct (claim 1) or indirect (claim 13) use of the technical teaching of the patent in suit.

15. The person skilled in the art, a graduate engineer or master of electrical engineering with a degree from a university of applied sciences and several years of professional experience in the development and construction of avalanche beacons, has no reason to limit the term "sound signal" to certain acoustic signals. In favour of the distinction made by Mammut between
There is no indication of "sound signals" and "sound patterns" in the patent.
16. It is clear from the overall scheme of the claim that a sound signal is any acoustic signal in connection with the search for another avalanche transceiver, which is not to be qualified as a voice signal. The patent in suit, on the other hand, defines a voice message as information to the searcher in the form of words.
17. Suppression of the sound signal requires that the sound signal is no longer acoustically perceptible. The scope of protection covers both arrangements in which the volume of the sound signal is temporarily set to zero and those in which the signal is temporarily no longer generated.
18. A functional connection is required between the control of the loudspeaker by the control unit and the suppression of the sound signal or the reduction of its volume. Designs in which the sound signal and the voice message are output independently of each other without a corresponding control of the loudspeaker are therefore not covered by the scope of protection.
19. Statements made by Ortovox in the grant proceedings were not to be taken into account in the context of patent interpretation. Such statements could at most have indicative significance as to how the skilled person understood the feature in question. In any case, the statements made in the grant proceedings offered no reason for a different interpretation.
20. The contested embodiment makes use of the technical teaching of patent claim 1 in accordance with the wording.
21. The sound patterns used in the contested embodiment are acoustic signals different from voice messages and thus sound signals within the meaning of the patent in suit.
22. The search devices at issue have two different signal sources, namely one for acoustic patterns (sound patterns) and the other for acoustic speech, whereby only one of the two sources is selected in search mode during the operation of the challenged embodiment and its signal is reproduced via the loudspeaker, while the output of the signal from the other source is deactivated. If the voice message is output in the challenged embodiment, the audio signal is therefore not output. In other words, its generation is temporarily interrupted and thus suppressed within the meaning of the patent in suit. Mammut does not deny that the selection of a source and the reproduction of its signal via the loudspeaker is carried out by a control device within the meaning of the patent in suit.
23. It is undisputed that the "Barryvox S2" shown at the ISPO trade fair in Munich had a voice output. Even if at the time of the trade fair, as claimed by Mammut,

the configuration in which the "Barryvox S2" would ultimately be launched on the market had not yet been determined, the relevant public could assume, at least as long as they did not receive any deviating information, that the product ultimately delivered essentially corresponded to the device that had been exhibited at the trade fair. Apart from that, the "Barryvox S2" could already be pre-ordered on the B2B platform of the Mammut group of companies. The order overview presented by Ortovox also lacks any indication that the "Barryvox S2" is sold without its own voice output. Customers would therefore also have no reason to assume that the device in question - unlike the award-winning model exhibited at the trade fair - does not have a voice output.

24. The use of the attacked embodiment also required the use of the method according to patent claim 13. The further requirements for contributory patent infringement were also met, Art. 26 (1) EPC. In particular, the subjective offence of contributory patent infringement was given.
25. Even if it could be assumed in Mammut's favour in the present summary proceedings that the "objection of earlier right" developed in national law could also be raised before the Unified Patent Court, Mammut could not derive a positive right of use from this in the present case. Even according to the principles developed by the Federal Court of Justice, the earlier right is in any case only available to those who exclusively use its teaching and do not make use of additional features that are only taught in the later property right (Federal Court of Justice, GRUR 2009, 655, 657 para. 27 - carrier plate). However, this is precisely the case with the challenged embodiment.
26. The licence objection raised for the first time at the oral hearing was also not valid. The patent in dispute was not covered by the licence agreement, extracts of which were submitted to the file as Annex KAP 36.
27. To the extent that Mammut had made additional submissions on this topic in an unadmitted document after the end of the oral hearing, these submissions were late and therefore should not be taken into account. The fact that Ortovox did not submit the relevant agreement until the oral hearing does not contradict this. Such an approach would have challenged Mammut itself by introducing EP 1 577 679 into the proceedings only one day before the oral hearing.
28. The legal validity of the patent in dispute was secured to the extent necessary for the Order of provisional measures.
29. The subject-matter of claims 1 and 13 proved to be new compared to WO 2006/051721, which had already been considered in the grant proceedings and recognised in the description of the patent in suit. In any event, there is no disclosure of the suppression of a sound signal during the output of the voice message. Even if both buzzers and loudspeakers were mentioned in the citation, these were only disclosed as alternative ways of designing the output device.
30. Compared to DE 299 22 217 U1, which was also considered in the grant proceedings, the subject-matter of patent claim 1 also proved to be new. There was no disclosure of the output of at least one sound signal within the meaning of the patent in suit. According to the technical teaching of the patent in suit, a sound signal and a voice signal are not the same thing.

31. Nor does EP 2 527 011 A1 oppose the novelty of patent claim 1. There is no disclosure of the generation of voice messages within the meaning of the patent in suit. In particular, the sound patterns described in the citation were not to be classified as such.
32. EP 1 577 679 A1 was also not suitable to significantly call into question the legal validity of the patent in suit. It is not clear why Mammut only submitted this document one day before the oral proceedings.
33. Apart from that, the document did not anticipate the technical teaching protected by patent claims 1 and 13 in a manner prejudicial to novelty. There was no voice output within the meaning of the patent in suit. Therefore, no corresponding control device was required.
34. Mammut's submission was not such as to give rise to significant doubts as to the existence of inventive step. This applies with regard to the citations WO'721, DE'217, EP'011, also in combination with each other and with the general technical knowledge.
35. Finally, EP 679, which was in any case introduced late into the proceedings and therefore rejected on formal grounds alone, did not preclude the inventive step. What reason the skilled person should have for modifying the solution disclosed there to the effect that a search device now emitted both sound signals and voice messages was neither sufficiently submitted nor apparent.
36. To the extent that Mammut casts doubt on the feasibility of patent claim 1 with regard to an allegedly non-executable disclosure of sound signal and voice message, this is based on the incorrect understanding that the sound signal and voice message are always functionally related to the search for at least one further avalanche transceiver independently of each other.
37. Mammut does not meet its burden of proof with the merely general accusation that the patent in suit lacks a detailed disclosure of "how the control of the loudspeaker is to be realised if a non-generated sound signal is to be suppressed".
38. The Order for provisional measures is necessary to prevent the continuation of the infringement or at least to prevent an imminent infringement (see R.206.2 (c) RoP).
39. The Order for the provisional measure applied for was urgent. Ortovox had treated the matter with the necessary urgency.
40. Ortovox does not have to be referred to possible summary proceedings in Switzerland.
41. The Order for provisional measures was also necessary from a factual point of view due to the damage threatened to Ortovox by the infringing product range.

42. The balancing of interests to be carried out is also in favour of Ortovox. Insofar as Mammut claims that an injunction would lead to an irrevocable disadvantage, these disadvantages are ultimately only a consequence of the competitive situation. In view of the established infringement of the patent in dispute, Mammut has no interest worthy of protection in securing advance orders that have already been placed. Ortovox is obliged to pay compensation for damages due to the injunction in accordance with R.213.2 RoP.
43. The reference to the alleged interests of third parties in the present case is in vain because, according to Mammut's submission, the contested design has only existed as a prototype to date. Disadvantages for the chances of survival of avalanche victims are at best of a theoretical nature. This is all the more true since at least two alternative avalanche transceivers are in use with the Ortovox product as well as with the predecessor product of the challenged embodiment.
44. The extension of the application with regard to the reimbursement of costs was admissible pursuant to R.263 RoP. In Ortovox's favour, it should be taken into account that the question of the handling of the reimbursement of costs in summary proceedings before the Unified Patent Court has not yet been clarified by the highest court and has already been handled differently. In the ex parte Order, the local division rejected Ortovox's request for a basic decision on costs in summary proceedings and referred to the lack of an application for reimbursement of costs. Ortovox responded to this reference with the subsequent application for provisional reimbursement of costs. Ortovox could not be denied this from the point of view of the right to be heard.
45. In any case, there is no reason for a basic decision on costs in proceedings for the Order of provisional measures if the summary proceedings - as here - are followed by proceedings on the merits.

Applications by the parties

46. Mammut is appealing against this Order. Mammut seeks the revocation of the Order of 11 December 2023 as amended by the Order of 9 April 2024 and pursues the applications made at first instance. In addition, Mammut is seeking reimbursement of the costs of the second instance in the amount of EUR 32,981.80, totalling EUR 52,840.20.
47. Mammut requests that the statement of defence and the separate counterclaim for annulment on the merits be admitted in the appeal proceedings.
48. Ortovox opposes the appeal and applies:
 - I. Dismiss the appeal,
 - II. Alternatively, in the event that the Court of Appeal considers it to be predominantly probable that the dispositive patent is only valid to a limited extent, order that point I of the Order of 9 April 2024 be revoked insofar as it confirms point I of the Order of 11 December 2023 and that the defendants are now ordered to refrain from
 1. Avalanche transceivers in the Federal Republic of Germany and/or the Republic of Austria, to offer, place on the market or use or to import or possess for these purposes, with at least one transmitter unit for transmitting at least one transmission signal,

a receiver unit for receiving at least one transmission signal from at least one further avalanche transceiver,
and with a control device for controlling at least one loudspeaker,
wherein the control device is designed to control the at least one loudspeaker to emit at least one voice message as a function of at least one event,
whereby the at least one event is associated with the search for the at least one further avalanche transceiver,
wherein the avalanche transceiver has the at least one loudspeaker and the at least one loudspeaker is designed to emit at least one sound signal,
characterised in that
the at least one audio signal is associated with the search for the at least one other avalanche transceiver,
wherein the control device is designed to control the at least one loudspeaker in such a way that the at least one sound signal is suppressed during the output of the at least one voice message or is output at a reduced volume,
wherein the control device is designed to control the at least one loudspeaker for outputting the at least one voice message when the receiving unit detects a change in a received strength and/or a received quality of the transmitted signal of the further avalanche transceiver and/or a change in a direction from which the transmitted signal of the further avalanche transceiver comes, or the control device is designed to estimate a distance from the further avalanche transceiver by evaluating the transmission signal received by the receiving unit, and to control the at least one loudspeaker to output the at least one voice message if the distance is less or an increase in the distance is greater than a predetermined threshold value;

2. Devices suitable for carrying out a method for operating an avalanche transceiver, in the Federal Republic of Germany and/or the Republic of Austria for use in the Federal Republic of Germany and/or the Republic of Austria,

wherein the method comprises at least the following:

a transmitter unit for transmitting at least one transmission signal,
a receiver unit for receiving at least one transmission signal which is emitted by at least one further avalanche transceiver,
in which a control device of the avalanche transceiver controls at least one loudspeaker,
wherein the control device controls the at least one loudspeaker in such a way that the at least one loudspeaker emits at least one voice message, wherein the at least one loudspeaker is controlled by the control device as a function of at least one event,
which is associated with a search for at least one other avalanche transceiver,
the avalanche transceiver has at least one loudspeaker and the at least one loudspeaker emits at least one sound signal,
characterised in that
the at least one audio signal is associated with the search for the at least one other avalanche transceiver,
wherein the control device controls the at least one loudspeaker in such a way that the at least one sound signal is suppressed during the output of the at least one voice message or is output at a reduced volume,
wherein the control device controls the at least one loudspeaker to output the at least one voice message when the receiving unit detects a change in a received strength and/or a received quality of the transmitted signal of the further avalanche transceiver and/or a change in a direction from which the transmitted signal of the further avalanche transceiver comes,
or the control device estimates a distance from the further avalanche transceiver by analysing the transmission signal received from the receiving unit, and then uses the at least one loudspeaker to output the at least one voice message

if the distance is less or an increase in the distance is greater than a predetermined threshold value.

III. furthermore, in the alternative, in the event that the Court of Appeal considers it predominantly probable that the dispositive patent is only valid to a limited extent:
order that point I of the Order of 9 April 2024 be revoked insofar as it confirms point I of the Order of 11 December 2023 and that the defendants are now ordered to refrain from

1. Avalanche transceivers

in the Federal Republic of Germany and/or the Republic of Austria, to offer, place on the market or use or to import or possess for these purposes, with at least one transmitter unit for transmitting at least one transmission signal,
a receiver unit for receiving at least one transmission signal from at least one further avalanche transceiver,

and with 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 as a function of at least one event,
wherein the at least one event is associated with a search for the at least one further avalanche transceiver,

wherein the avalanche transceiver has the at least one loudspeaker and the at least one loudspeaker is designed to emit at least one sound signal,
characterised in that

the at least one audio signal is associated with the search for the at least one other avalanche transceiver,

wherein the control device is designed to control the at least one loudspeaker in such a way that the at least one sound signal is suppressed during the output of the at least one voice message or is output at a reduced volume,

wherein the control device is designed to control the at least one loudspeaker for outputting the at least one voice message when the receiving unit detects a change in a received strength and/or a received quality of the transmitted signal of the further avalanche transceiver and/or a change in a direction from which the transmitted signal of the further avalanche transceiver comes.

2. Devices suitable for carrying out a method for operating an avalanche transceiver,

in the Federal Republic of Germany and/or the Republic of Austria for use in the Federal Republic of Germany and/or the Republic of Austria,

wherein the method comprises at least the following:

a transmitter unit for transmitting at least one transmission signal,

a receiver unit for receiving at least one transmission signal which is emitted by at least one further avalanche transceiver,

in which a control device of the avalanche transceiver controls at least one loudspeaker,

wherein the control device controls the at least one loudspeaker in such a way that the at least one loudspeaker emits at least one voice message, wherein the at least one loudspeaker is controlled by the control device as a function of at least one event,

which is related to a search for at least one other avalanche transceiver,

the avalanche transceiver has at least one loudspeaker and the at least one loudspeaker emits at least one sound signal,

characterised in that

the at least one audio signal is associated with the search for the at least one other avalanche transceiver,

wherein the control device controls the at least one loudspeaker in such a way that the at least one sound signal is suppressed during the output of the at least one voice message or is output at a reduced volume,

wherein the control device controls the at least one loudspeaker for outputting the at least one voice message when the receiving unit detects a change in a received strength and/or a received quality of the transmitted signal of the further avalanche transceiver and/or a change in a direction from which the transmitted signal of the further avalanche transceiver comes

IV. furthermore, in the alternative, in the event that the Court of Appeal considers it predominantly probable that the dispositive patent is only valid to a limited extent:

order that point I of the Order of 9 April 2024 be revoked insofar as it confirms point I of the Order of 11 December 2023 and that the defendants are now ordered to refrain from

1. Avalanche transceivers

in the Federal Republic of Germany and/or the Republic of Austria, to offer, place on the market or use or to import or possess for these purposes, with at least one transmitter unit for transmitting at least one transmission signal,

a receiver unit for receiving at least one transmission signal from at least one further avalanche transceiver,

and with 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 as a function of at least one event,

wherein the at least one event is associated with a search for the at least one further avalanche transceiver,

wherein the avalanche transceiver has the at least one loudspeaker and the at least one loudspeaker is designed to emit at least one sound signal,

characterised in that

the at least one audio signal is associated with the search for the at least one other avalanche transceiver,

wherein the control device is designed to control the at least one loudspeaker in such a way that the at least one sound signal is suppressed during the output of the at least one voice message or is output at a reduced volume,

wherein the control device is designed to estimate a distance from the other avalanche transceiver by analysing the transmission signal received by the receiver unit, and to control the at least one loudspeaker to output the at least one voice message if the distance is less or an increase in the distance is greater than a predetermined threshold value.

2. Devices suitable for carrying out a method for operating an avalanche transceiver,

in the Federal Republic of Germany and/or the Republic of Austria for use in the Federal Republic of Germany and/or the Republic of Austria,

wherein the method comprises at least the following:

a transmitter unit for transmitting at least one transmission signal,

a receiver unit for receiving at least one transmission signal which is emitted by at least one further avalanche transceiver,

in which a control device of the avalanche transceiver controls at least one loudspeaker,

wherein the control device controls the at least one loudspeaker in such a way that the at least one loudspeaker emits at least one voice message, wherein the at least one loudspeaker is controlled by the control device as a function of at least one event,

which is related to a search for at least one other avalanche transceiver,

the avalanche transceiver has at least one loudspeaker and the at least one loudspeaker emits at least one sound signal,

characterised in that

the at least one audio signal is associated with the search for the at least one other avalanche transceiver,

wherein the control device controls the at least one loudspeaker in such a way that the at least one sound signal is suppressed during the output of the at least one voice message or is output at a reduced volume,

wherein the control device estimates a distance from the further avalanche transceiver by analysing the transmission signal received by the receiver unit and then controls the at least one loudspeaker to output the at least one voice message if the distance is less or an increase in the distance is greater than a predetermined threshold value.

- V. order that the defendants,
- a) order the defendant to pay the costs of the entire proceedings concerning provisional measures at first and second instance,
 - b) order the defendant to pay further provisional costs in the amount of EUR 19,858.40.

49. Mammut requests that the auxiliary requests be rejected as inadmissible/unfounded and also opposes the requests for costs.

Factual and legal issues in the appeal proceedings

50. Mammut repeats and expands on the submissions made at first instance and essentially asserts that

51. The interpretation made by the local division was incorrect.

52. Claims 1 and 13 are limited to a modulated sound signal which varies only in volume and whose semantic content is limited to two pieces of information (e.g. true or false). The distinction between an audio signal as mere sound and speech is not only made on the basis of acoustic perception alone, but also on the semantic level. More complex sound patterns that represent concrete instructions (such as go right/left or turn round) are not included.

53. The distinction between sound and voice message is not possible, in particular with regard to Khoisan languages, whistling languages and the Turkish bird language. Insofar as the local division made a distinction on the basis of spoken words, it ignored the fact that the dispositive patent does not provide a basis for such a distinction.

54. The local division came to the conclusion that even a non-existent sound signal could be "suppressed". This was not compatible with the wording of the claim, the description and the general understanding of the term.

55. Mammut continues to assert a lack of feasibility and, repeating and expanding on the other submissions made at first instance, submits, inter alia, that

56. The skilled person is aware that the loudspeaker is a passive component. However, according to the features of claim 1 and the description, it is obviously not the control device that controls the loudspeaker with the sound signal, as is explicitly disclosed for the speech signal, but the loudspeaker is designed to output the sound signal. The skilled person does not obtain any information from the description or the claims as to how a loudspeaker as a passive component should control itself with the audio signal.

57. Mammut repeats and elaborates on the reasons why the citations recognised by the local division are contrary to the novelty of the patent claims at issue.
58. Mammut continues to assert the lack of inventive step with regard to the citations discussed by the local division, repeating and deepening its submissions at first instance. Mammut submits in this regard, inter alia:
59. Avalanche transceivers belong to the group of mobile navigation devices with user guidance. The local division's definition of a skilled person is not convincing. It must be assumed that the skilled person in the field of avalanche transceivers does not fully correspond to the skilled person in the field of mobile navigation devices, but at least knows the functions of the other areas of mobile navigation devices in detail, but in any case also takes into account everyday knowledge, in particular the knowledge of the targeted, automatic highlighting of an audio signal (ducking) in navigation devices in vehicles.
60. With regard to EP 679, it was not apparent to what extent the combination of two embodiments in one device could constitute an inventive step. This was all the more true in view of the fact that paragraph 97 explicitly suggested a combination of functions. Once the suggested combination has been realised, the only question is how sound and speech are output in such a way that they can be understood by the user. It has long been known, particularly from navigation devices, to interrupt other acoustic signals (radio, music) during voice instructions or to play them at a lower volume.
61. With regard to WO'721, it is also true that a mere juxtaposition of two technologies cannot be inventive. This applies all the more since the alternative, alternating use of technical means known to be equivalent does not produce any further technical effect.
62. DE'217 itself draws a comparison between an avalanche transceiver and a navigation device. It is obvious that the skilled person would transfer technologies known from navigation devices to avalanche transceivers for the purpose of their further development and improvement.
63. Contrary to the assumption of the local division, the skilled person would also have reason to combine EP'011 with WO'721 or DE'217, as these use a different technical form of search (by means of position data) than the teaching of EP'011 (direction finding). The combination of audio signals with a voice output is a general improvement for avalanche transceivers regardless of the specific search method used. Furthermore, the local division wrongly assumed that the addition of voice guidance to the avalanche transceiver described in EP'011 was not advantageous.
64. The lack of inventive step was already apparent from the classic avalanche transceiver of US 2006/0148423 described in the patent in suit.
65. The lack of inventive activity is already evident in the justification for the ISPO Award, where there is talk of a long overdue "feature". If a general

expectation for a function, it can hardly be said that it is a patentable invention.

66. With regard to the infringement, Mammut claims, inter alia:
67. In the Order, the local division applied a different understanding of the control device to the question of the alleged infringement versus the assessment of the alleged legal right.
68. The same applies with regard to the term "suppression". If, according to the challenged Order, an alternating emission of two different signals were claimed, the question of solving the alleged problem of overlapping and thus poorer intelligibility per se would not arise. In the challenged Order, the local division, on the other hand, bases the question of the alleged inventive step on the idea of an alleged "interaction" of two different signals or the combination of sound signal and voice message and thus on the fact that two signals are emitted in parallel.
69. In the opinion of the local division, the scope of protection of the patent in suit does not include designs in which the sound signal and the voice message are output independently of each other without the loudspeaker being controlled accordingly. According to this premise, the contested embodiment did not infringe the patent. It was undisputed that the contested embodiment had two signal generators, each of which controlled the loudspeaker independently of the other. The specific technical design was ignored by the local division without justification.
70. Ortovox defends the contested Order, repeating and expanding on its arguments at first instance.

REASONS FOR THE ORDER

71. The appeal is unsuccessful. The confirmation of the Order for provisional measures is justified.
 - A. *No consideration of the statement of defence in the main proceedings and the counterclaim for a declaration of nullity*
72. Only the submissions of the parties in the proceedings for a preliminary injunction are subject to review by the Court of Appeal. Mammut's submissions in the statement of defence in the main proceedings and the separate counterclaim for a declaration of invalidity in the infringement proceedings before the Düsseldorf local division are not to be taken into account in the appeal proceedings.
73. The subject matter of the appeal proceedings is determined in accordance with R.222 RoP. Pursuant to R.222.1 RoP, the applications, facts and evidence and legal arguments submitted by the parties pursuant to 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 refer to the file of the proceedings before the Court of First Instance. Accordingly, the subject matter of the proceedings is limited to the submissions in the proceedings concerning the Order for provisional measures. This does not include the submissions in the main proceedings.

Infringement proceedings and proceedings for an Order for provisional measures concern different proceedings (see UPC Court of Appeal, Order of 26 April 2024, UPC_CoA_500/2023, APL_596892/2023 para. 8).

74. The arguments in the statement of defence in the main proceedings and in the counterclaim for a declaration of invalidity did not become part of the appeal proceedings by virtue of the fact that Mammut referred to them. Pursuant to R.226 (c) RoP, the statement of grounds of appeal must contain the facts and evidence on which the appeal is based pursuant to R.222.1 and 2 RoP. In order to ensure legal certainty and the proper administration of justice, the grounds of appeal must be sufficiently clear and precise to enable the appellant to prepare a defence to the first-instance judgment and the court of appeal to rule on the appeal (see ECJ, 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 determine the grounds on which the appeal may be based in the annexes (see ECJ, judgment of 28 June 2005, Dansk Rørindustri and Others v Commission, C-189/02, ECLI:EU:C:2005:408, paragraphs 97 and 100; judgment of 11 September 2014, Mastercard and Others v Commission, C-382/12 P, ECLI:EU:C:2014:2201, paragraph 41). The same applies to documents from other proceedings.
75. For the above reasons, Mammut's application to allow the arguments in the defence in the main proceedings and in the counterclaim for annulment on appeal must be rejected.

B. Subject matter of claims 1 and 13

1. Subject matter of patent claim 1

a) The patent and its technical background

76. The invention according to the patent relates to an avalanche transceiver (hereinafter also: avalanche transceiver) and a corresponding method. The avalanche transceiver has a transmitter unit for transmitting at least one transmission signal and a receiver unit for receiving a transmission signal from at least one other avalanche transceiver (para. 1).
77. According to the description of the patent in suit, WO 2006/015721 (hereinafter: WO'721, Annex BB1 Supplement 32) already disclosed an avalanche transceiver with an output device which generates stimuli perceptible to the human senses, such as acoustic stimuli in the form of buzzers or loudspeakers. In this avalanche transceiver, a voice output device is provided which guides a user by voice to a person to be located (para. 2).
78. US 2006/0148423 A1 (hereinafter US'423, Annex BB1 Exhibit 34) describes an avalanche transceiver with a display on which, when the avalanche transceiver is in a search mode, directional arrows indicate the direction in which the searcher should move in order to locate a transmitting avalanche transceiver. Furthermore, the distance from the transmitting search device is shown on the display. In addition, the avalanche transceiver has a loudspeaker that emits an audio signal in search mode. The audio signal becomes louder when the searching avalanche transceiver approaches the transmitting avalanche transceiver (para. 3).

79. The patent in suit considers it a disadvantage that, despite the search instructions shown on the display and the audio signal, the search for the transmitting avalanche transceiver is difficult. Particularly in the stressful situation in which the searcher finds himself, paying attention to the information on the display and the audio signal is a considerable challenge.
80. The task of the invention is therefore to provide an avalanche transceiver that simplifies the search for a transmitting avalanche transceiver.

b) Characteristic structure of patent claim 1

81. This task is solved by a device with the following features (German and thus the relevant language of the proceedings and English translation using the classification of features made by the Court of First Instance):

1	Avalanche burial Search device,	Search device for avalanche victims,
1.1	with a transmitting unit (16) for transmitting at least one transmission signal (18),	having a transmitting unit (16) for transmitting at least one transmit signal (18),
1.2	a receiving unit (16) for receiving at least one transmission signal (30) from at least another avalanche transceiver (32),	a receiving unit (16) for receiving at least one transmit signal (30) from at least one further avalanche transceiver (32),
1.3	and with a control device (24) for controlling at least one speaker (22),	and a control device (24) for controlling at least one loudspeaker (22),
2	the control device (24) is designed to control the at least one loudspeaker as a function of at least one event (22) to output at least one voice message,	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	at least one event is associated with a search for at least one other avalanche victim. Search device (32) in connection	wherein the at least one event is associated with a search for the at least one further avalanche transceiver (32),
3	the avalanche transceiver (10) comprises the at least one loudspeaker (22) and the at least one loudspeaker (22) is designed to emit at least one output a sound signal,	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

3.1	at least one sound signal is associated with the search for at least one other avalanche transceiver (32) in connection with	the at least one audio signal is associated with the search for the at least one further transceiver (32),
4.	the control device (24) is designed to control the at least one loudspeaker (22) in such a way that the at least one sound signal is suppressed during the output of the at least one voice message or is output at a reduced volume.	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.

c) Interpretation of the patent claim

(1) Principles

82. 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 para. 73 et seq.; Order of 13 May 2024 - UPC_CoA_1/2024 APL_8/2024 para. 26) according to Art. 69 EPC and the Protocol on its Interpretation (Protocol on Interpretation) the following principles: The patent claim is not only the starting point, but the relevant basis for determining the scope of protection of the European patent. The interpretation of a patent claim does not depend solely on its exact wording in the linguistic sense; rather, the description and the drawings must always be taken into account as explanatory aids for the interpretation and not only be used to eliminate 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 also extends to what, after examination of the description and drawings, appears to be the patent proprietor's request for protection.
83. The patent claim is to be interpreted from the perspective of a person skilled in the art. The local division correctly considered such a person to be a graduate engineer or master's degree in electrical engineering with a degree from a university of applied sciences and several years of professional experience in the development and design of avalanche transceivers. Mammut's objections to this definition relate less to the professional qualification than to the question of what level of knowledge the specialist has. It can be assumed with Mammut that the specialist at least knows the functions of mobile navigation devices in detail.
84. The court based its decision on the following understanding of characteristics:

(1) Characteristics 1.1. and 1.2

According to feature 1.1, the avalanche transceiver has a transmitter unit (16) for transmitting at least one transmission signal (18) and, according to feature 1.2, a receiver unit (16) for receiving at least one transmission signal (30) from at least one other avalanche transceiver (32). The transmitting unit must be designed such that it is suitable for transmitting transmission signals and receiving transmission signals from other avalanche transceivers.

(2) Feature 3.1

85. The avalanche transceiver has at least one loudspeaker which is designed to emit at least one audio signal (feature 3). The audio signal must be associated with the search for the at least one other avalanche transceiver (feature 3.1).
86. For such a connection with the search, a connection between the other search device (feature 1.2) and the sound is required - as the local division correctly based its decision on. This connection is established by the received transmission signal. The person skilled in the art can deduce from feature 1.2 that the received transmission signal is used for the search. It is sufficient for a correlation if, for example, the pitch, amplitude or volume is dependent on the measured field strength of the received transmission signal. Claim 1 does not provide any further specifications as to how this correlation is organised. In particular, features 1.2, 3 and 3.1 do not require that the connection between the audio signal to be emitted and the at least one other avalanche transceiver is established exclusively by varying the volume of the audio signal.
87. The description confirms this understanding. There, the increase in the frequency of the individual beep, the repetition rate of the beeps and their volume as the searching search device approaches the transmitting search device are cited as independent, but also combinable, implementation options for establishing a connection. As an example, the combination of all three properties is described there; for example, the frequency of the individual beeps as well as the repetition rate of the beeps and their volume can increase the closer the searching search device approaches the transmitting search device. (Para. 10 line 49).

(3) Feature 3

88. The local division rightly assumed that the competent skilled person understands a sound signal within the meaning of feature 3 to mean any acoustic signal, provided it is not a speech signal. Since patent claim 1 distinguishes between sound signal (feature 3) and voice message (feature 2) (cf. in particular also feature 4), a signal which reproduces human speech, i.e. words, is not a sound signal.
89. Contrary to Mammut's view, the distinction between sound signal and voice message does not limit the patent claim to a modulated sound signal which varies only in volume and whose semantic content is limited to two pieces of information (e.g. right or wrong). Rather, more complex sound patterns which represent specific instructions (such as go right/left or turn round) are also sound signals within the meaning of features 3, 3.1 and 4. It cannot be inferred from the patent claim that the sound signal and the voice message should differ in terms of their semantic content.

90. Contrary to Mammut's view, the presence of one or more words is a suitable criterion for distinguishing between sound and voice message. Insofar as Mammut refers to Khoisan languages, whistling languages and the Turkish bird language, a distinction between these languages and sounds or sound patterns is also possible in this respect because they also directly reproduce words. As can be seen from the article on the whistling language on La Gomera and El Hierro linked in para. 347 of the grounds of appeal, people have learnt to whistle their language. The fact that the language - as expressed by Mammut (grounds of appeal, para. 348) - merely "comes along in a different sound" does not change the fact that communication takes place directly by means of words and not merely by sound patterns representing words. Moreover, it cannot be assumed that the skilled person bases his understanding of the patent claim on these particular forms of communication.
91. Contrary to Mammut's view, a narrower understanding does not result from feature 3.1. As explained, the feature only requires a connection between the sound and the received transmission signal and does not require that the connection between the sound signal to be emitted and the at least one other avalanche transceiver is established exclusively by varying the volume of the sound signal.

(4) Features 2 and 2.1

92. According to feature 2, the control device is designed to control the at least one loudspeaker (22) to output at least one voice message as a function of at least one event. According to features 2 and 2.1, this event is associated with a search for the at least one further avalanche transceiver.
93. According to the understanding of feature 3.1, feature 2.1 requires a connection between the received transmission signal (feature 1.2) and the event. For example, the loudspeaker is triggered to output the at least one voice message when the receiving unit detects a change in the received strength and/or a received quality of the transmitted signal of the other avalanche transceiver (para. 15).
94. Contrary to Mammut's opinion, the European examiner's decision of 13 April 2018 (Annex BB1, Supplement 31) is not based on a different understanding. The statement contained therein that feature 2 is merely a standard feature of an avalanche transceiver does not in itself say anything about the meaning of the feature. It is therefore not necessary to clarify the question of whether statements made in the grant procedure are to be used for the interpretation of the patent claims.

(5) Feature 4

95. According to feature 4, the control device is designed and thus suitable for controlling the at least one loudspeaker (22) in such a way that the at least one sound signal is suppressed during the output of the at least one voice message or is output at a reduced volume (para. 11). As a result, sound signals do not interfere with the intelligibility of the voice messages, which in turn facilitates the search (para. 3 line 3).
96. While for the second alternative according to feature 4 it is sufficient that the sound signal is output at a reduced volume, which includes a reduction of the volume to a quasi inaudible level, according to the first alternative the sound signal is not output.

An avalanche transceiver in which the audio signals are not generated at all while voice messages are output is therefore also patented.

97. Contrary to Mammut's opinion, common usage does not justify a different understanding. It is true that only something that is present can be suppressed. Since the patent claim requires that at least one sound signal is emitted (feature 3), such a sound signal is also present for a certain period of time. Only "during" the output of the voice message is it to be suppressed according to feature 4. The understanding that it is sufficient for an audio signal to be emitted intermittently during the same search, but that no audio signal is emitted during the output of the voice signal, is confirmed by the fact that, according to the description, the search is to be supported by both the audio signal (column 3, item 5) and the voice message (para. 7, items 14-15), and the suppression of the audio signal merely serves to ensure the intelligibility of the voice message (column 3, item 3).
98. The statements made by Ortovox in the grant proceedings do not lead to a different understanding. It is irrelevant whether, pursuant to Art. 24(1)(c) UPCA in conjunction with Art. 69 EPC, consideration of the grant file in the interpretation is permissible. Contrary to Mammut's opinion, Ortovox did not argue that the sound and speech signals were simultaneous. In this respect, Ortovox merely argued that WO'721 does not disclose that a loudspeaker of an avalanche transceiver is designed to emit both a voice message and at least one sound signal which is associated with the search for the other avalanche transceiver (KAP 14, p. 3). This does not result in a restriction to avalanche transceivers in which audio signals are also generated during the output of voice messages, but rather merely expresses the fact that at least one audio signal supports the search for certain periods of time and a voice message for certain periods of time.
99. The control device is also important in this understanding. In the case in which the sound signal is suppressed by not generating sound signals in the first place, the loudspeaker does not have to be activated to output a sound signal. However, this is not mandatory according to feature 4. The control device serves the purpose of controlling the loudspeaker "*in such a way*" (wording of feature 4) that a voice message and not a sound signal is output via the loudspeaker when a predefined event occurs. It is therefore sufficient that a control device is present which is designed to control the loudspeaker to output a voice message (feature 2) depending on a specific event (feature 2.1) and that this control results in the sound signal either being suppressed or output at a reduced volume (feature 4) during the output of the voice message.
100. As the local division correctly explained, this requires a functional connection between the control of the loudspeaker and the output of the voice message and the suppression or reduction of the volume of the sound signal. Not covered by the patent claim are configurations of the control device in which voice messages and sound signals are output independently of each other, for example in one search mode the output of a sound signal is completely switched off and in another search mode, for example, only voice messages are output but never a sound signal. In combination with features 2.1 and 3.1, this means that whether a sound signal or a voice message is output at a particular time depends on whether the event specified in feature 2.1 has occurred. Only then will the

voice message and is given priority over the audio signal as defined in feature 4.

101. Mammut also argues unsuccessfully that it is not clear to a person skilled in the art how the loudspeaker should be technically controlled if the sound signal is completely interrupted.

102. Since the patent claim does not specify any requirements in this respect, it is also not excluded that the two signals are generated independently of each other by two signal generators. Thus, embodiments in which two signal generators are present which control the loudspeaker separately to output sound signals and voice messages are also covered by the claim if and to the extent that the control of the loudspeaker complies with the specifications in features 3.1, 2.1 and 4.

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

C. Legal existence 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 that it is predominantly probable that the applicant is entitled to initiate proceedings and that the patent will be infringed. Furthermore, the court must not consider it predominantly probable that the patent is not valid (UPC Court of Appeal, Panel 1, Order of 26 February 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. Legal status

105. It is not overwhelmingly probable that the patent 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 claims 1 and 13 is so clearly and completely disclosed that it can be carried out by a person skilled in the art and thus fulfils the requirements of Art. 83 EPC.

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

108. To the extent that Mammut asserts that the skilled person 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 fails to recognise that feature 3 does not require control by the loudspeaker. As can be seen from features 2 and 4, the required control is realised by a control device.

2. *Novelty compared to EP 1 577 679*

109. The subject-matter of claims 1 and 13 is not anticipated by *EP 1 577 679* (*Annex BB2, hereinafter: EP'679*) in a manner prejudicial 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 an Order for provisional measures must be admitted on appeal.

(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 citation *EP'679* as late because it had only been introduced into the proceedings one day before the oral proceedings before the local division. In an obiter dictum, the local division stated that the citation did not anticipate the dispositive patent to the detriment of novelty.

112. It is irrelevant 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, the applications, facts and evidence and legal arguments submitted by the parties pursuant to 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 refer to the file of the proceedings before the Court of First Instance. Pursuant to paragraph 2 of the rule, applications, facts and evidence not submitted by a party during the 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 stipulating that means of attack and defence that were rightly rejected at first instance must remain excluded in appeal proceedings. In particular, such a rule does not arise from Article 73(4) UPCA, which only allows new facts and evidence if this is in accordance with the Rules of Procedure and it could not reasonably be assumed that the party concerned could have submitted these facts and evidence in the proceedings before the Court of First Instance. It can make no 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 preclusion significantly harms the defaulting party, the Court of First Instance's rejection of the submissions by the Court of First Instance would require an explicit rule to bind the Court of Appeal. Therefore, the Court of Appeal decides at its discretion, taking into account 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. In exercising its discretion, the court takes into account in particular whether this new submission could not reasonably have been introduced during the proceedings before the Court of First Instance (a), the relevance of the new submission for the appeal decision (b), the attitude of the other party with regard to the introduction 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.

(1) Exercise of discretion

118. The Court of Appeal exercised its discretion to allow the submissions made on EP'679 in the review proceedings in the appeal 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 the EP'679 citation. The Court of Appeal is in a position to reach a decision on the merits even if the submissions are taken into account.

120. The parties have not lost a factual instance, as the Düsseldorf local division has dealt with the citation in an obiter dictum. Even if the submission had been introduced late at first instance, this does not lead to a delay in the proceedings.

121. The fact that Ortovox had sufficient opportunity in its response to the appeal to present its arguments on this rebuttal and also made use of this opportunity (see General Court, judgment of 22 June 2017, T-236/16 ECLI:EU:T:2017:416 para. 20) speaks in favour of taking the arguments into account in the appeal proceedings.

b) Novelty compared to EP'679

122. EP'679 does not completely anticipate the subject matter of the patent in suit.

(1) Principles of the novelty test

123. The assessment of novelty within the meaning of Art. 54(1) EPC requires the determination of the overall content of the prior publication. It depends on whether the subject-matter of the patent with all its features is directly and clearly disclosed in the citation (see UPC Court of Appeal, Panel 1, Order of 26 February 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 search device for locating a transmitter, in particular an avalanche transceiver (para. 1).

125. According to the explanations in the description, conventional devices for locating by ear (or maximum/minimum field strength) generated an audible search tone at a frequency of about 2 kHz from the transmitted signal at 457 kHz by mixing it down. As the built-in antenna has a pronounced directional characteristic, the direction of the maximum field strength of the buried transmitter can be determined by turning the receiver and searching for the maximum or minimum volume. This technique requires a high level of concentration and practice on the part of the searcher and, especially at greater distances, low ambient noise (para. 4).
126. Devices with several antennas arranged at right angles to each other have been developed to make searching easier, even without practice and in stressful situations. The direction of reception of the transmitted signal can be determined by switching between these antennas (para. 5). In practice, the method has a number of disadvantages (para. 6).
127. A particular challenge for the searcher is when he receives the signals of several buried persons at the same time. Localisation purely by ear requires an extraordinary amount of practice and a complicated search strategy (para. 7).
128. One task is therefore to specify a generic search device which automatically determines the position of the buried victim in a reliable and cost-effective manner (para. 8).
129. Conventional search devices had a search antenna for receiving transmission signals transmitted from the transmitter from the current search direction, signal processing means for processing processing signals from the transmission 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 search device is furthermore proposed to be equipped with a magnetic field sensor which outputs sensor signals relating to the earth's magnetic field to the signal processing device, which are fed to the output unit as a processing signal and assign a fixed search angle relative to the earth's magnetic field to each search direction (para. 11, para. 1).
130. EP'679 emphasises as an essential idea that a search device would ideally work like a radar and constantly rotate the antenna by an angular range, for example 180 degrees. Because the angle at which the antenna is currently positioned is known, a received signal with the respective field strength can be assigned to the current angle of the antenna at any time. However, this is not feasible in practice. After all, the 180 degree rotation is achieved by the person searching holding the device in their hand while walking and swivelling it to the left and right. The problem is then to determine at what angle to an external reference coordinate system the device is located at a given time (para. 12).
131. Information about the search angle could possibly also be obtained by analysing the GPS signal. The relatively high costs of a GPS receiver and the generally insufficient availability of sufficient GPS signals for rescue applications would be an obstacle to this (para. 14).

132. According to the teaching of EP'679, the earth's magnetic field is to be used as such a fixed and permanently available reference coordinate system. This would make it possible to assign the received transmission signal of a transmitter 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 search device according to the invention can be manufactured more cost-effectively (para. 17).
134. The design example in Figure 1 shows an avalanche transceiver designed according to the teachings of EP679. Communication with the user takes place via an illuminated display (10) and two operating buttons (12, 13). The display (10) allows the graphical display of the position of one or more buried victims relative to the user's own location. The device 1 also has a loudspeaker (14) for outputting a synthesised search tone to the user as acoustic feedback and an LED (15), as is known for conventional devices. The loudspeaker (14) and the red LED (15) enabled a conventional search even without using the graphical indication via the display (10) (para. 49).
135. The device (1) is equipped with an externally invisible antenna for transmitting and searching on a search frequency of 457 kHz. The buried victim is automatically located by the natural swivelling movement of the searcher or user. According to the teaching of EP679, however, no manual direction finding is required as with conventional devices. In addition, the illustrated device 1 has a direction finding mode for focussing on the selected buried victim (para. 53).
136. The search process is carried out in such a way that the searcher swivels the device (1) back and forth a few times by approx. 180 degrees after switching from transmit to search mode. The achievable bearing and search accuracy is initially ± 10 degrees. When swivelling, all transmission signals from the transmitters of buried victims within range are detected. Manual direction finding, i.e. holding the device (1) in the direction of the strongest signal, is not necessary.
137. The detected transmitters (22) would be shown on the display (10) according to direction and distance, whereby the scale representation of the distance of the transmitter (22) from the searcher (in the centre of the coordinate field (16), i.e. the crosshairs (23)) would be specified (54) by distance information (24) in metres.
138. The searcher can now focus on the buried victim to be found first and press the "DETECT" button to hide the other 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).

(2) 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 can be seen 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 tone to the user as acoustic feedback and an LED (15), as is known for conventional devices. The loudspeaker (14) and the

red LEDs (15) enable a "conventional search" even without using the graphic display (10) (Par. 49).

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

140. The local division rightly assumed that features 2., 2.1 and 4 are not directly and unambiguously disclosed in EP'679.
141. According to the citation, numerous variations of the search device described there as an example are conceivable (para. 94).
142. In particular, EP'679 proposes to combine this avalanche transceiver with a GPS system, whereby the GPS system provides a true-to-life representation of the terrain. The position of the searcher and the transmission locations detected by the search device, i.e. the presumed locations of the buried victims, are superimposed on the representation of the GPS system. Such a system enables the searcher to intuitively, i.e. quickly, recognise the position of the burial point on the basis of any prominent terrain points that may be present, so that he can locate the burial point with the least possible delay (para. 96).
143. EP'679 further discloses that the search device can alternatively or additionally be combined with 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 terrain (para. 97).
144. As the local division rightly assumed, paragraph 97 refers to an embodiment according to paragraph 96 by stating "alternatively or additionally". This means that "alternatively or in addition" to the true-to-life 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 transceiver in which the control device is designed to control the loudspeaker in such a way that the at least one audio signal is suppressed during the output of the 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 characterised by the fact that the position of the buried person is determined "automatically" (para. 8). Since the search device according to EP'679 makes use of the earth's magnetic field as a reference coordinate system (para. 15), it is possible to graphically display the position of a buried victim relative to one's own location (para. 49). It thus differs from "conventional" devices for localisation by ear (para. 4), which require a high level of concentration and practice on the part of the searcher and, especially at greater distances, low ambient noise (para. 4) and, in the case of simultaneous reception of signals from several buried victims, an extraordinarily high level of practice and a cumbersome search strategy (para. 7). Whereas with "conventional" or conventional devices the search is orientated by the sound along the field lines, with a "search device according to the invention" the position of the buried person relative to his own location is known. From this, 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 from this 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 possible combinations in particular to a search device with the display described in paragraph 49, which graphically indicates the position of one or more spillages relative to its own location. The output unit mentioned in patent claim 1 does not conceptually exclude an output unit for outputting an acoustic signal. However, such embodiments are not directly and unambiguously disclosed in the description of EP'679. Insofar as it is stated in paragraph 49 that the device additionally has 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 from this from the perspective of the skilled person 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 conventional searching within the meaning of paragraph 4.
148. Nor can it be inferred from the other passages in the text and the sub-claims that "the result signals determined according to the invention" can be output by a loudspeaker.
149. Only subclaim 7 further characterises 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 "only" plays back the search tone of the buried person targeted, depending on the distance. The words "only" indicate that after selecting a buried victim by pressing the button (12, "Bearing") for the further search, the search is limited to the selected person. The search tone thus continues to represent only the signal evaluation of the conventional search.
152. Against this background, it follows from paragraph 96 that it is conceivable that a
The only difference is that the "search device according to the invention" can be combined with a GPS system that provides a true-to-life representation of the terrain, except that the display described above is further developed by the true-to-life representation of the terrain. A change to a display of the buried person based on a GPS signal that deviates from 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 the relatively high costs of a GPS receiver and the generally insufficient availability of sufficient GPS signals for rescue applications are an obstacle to obtaining information about the search angle via GPS signals.
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

For the above reasons, it is not proposed to switch to a destination determination by means of absolute GPS data of the destination.

154. "Alternatively or additionally" in paragraph 97 refers to the embodiment described in paragraph 96 of a "search device according to the invention" with a display with a true-to-life representation of the terrain. This means that voice control can take place with or without the natural 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 natural representation of the terrain proposed there, the position of the searcher and the transmitter locations detected by the search device, i.e. the presumed locations of the buried victims, are superimposed on the representation of the GPS system and such a system enables the searcher to intuitively, i.e. quickly, detect the position of the location of the buried victim on the basis of any prominent terrain points that may be present. From this, the skilled person assumes that the acoustic instructions refer to indications of prominent terrain points for the detection of the mooring point.
155. Feature 2.1 is therefore not disclosed. It is not immediately and unambiguously apparent from these explanations that the voice control system controls the loudspeaker to emit a voice message in the event of an event that is associated with a transmission signal received from the other avalanche transceiver.
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 synthesised search tone. As can be seen from the foregoing, the introduction in paragraph 97 "alternatively or additionally" refers solely to the display with lifelike representation of the terrain according to paragraph 96.
157. Even if the person skilled in the art were to directly infer from the publication that the embodiment example according to paragraph 49 is to be combined with voice control, feature 4 would not be disclosed. The avalanche transceiver 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 most disclosed that, depending on the user's selection, either the voice output takes place in one search mode and the output of a sound signal takes place in a search mode that is to be distinguished from it. 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 compared to EP 2 527 011*

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

160. EP'011 relates to an avalanche transceiver which comprises 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 transceiver 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 signalled 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 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 preferably differ in a combination of the parameters tone frequency, repetition rate of individual tones, duration of the individual tones and volume (para. 45).
165. The search and transmission 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 direction of reception determined by the receiving unit can be displayed (para. 64 lines 50-56).
167. EP'011 thus discloses features 1, 1.1 to 1.3 and 3.
168. The local division correctly assumed 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 parameters tone frequency, repetition rate of individual tones, duration of the individual tones and volume (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. Mammut relies unsuccessfully on paragraph 46 of the publication in support of the contrary view. 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 would be the case, for example, if the signal generator were to remain silent, i.e. generate no or an inaudible acoustic signal, if the direction of reception had been assigned to one or more specific solid angle ranges. This does not result in signalling in the form of speech.
170. Insofar as Mammut, referring to the publication DE 10 2014 204 630 (para. 9, Annex BB1/ Supplement 58, hereinafter: DE'630), argues that it is to be assumed according to the general understanding of the skilled person 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 skilled person, it does not follow that the definition there is based on the general understanding of the skilled person.

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 anticipated by WO 2006/051721 (Annex KAP 17 and BB1, Supplement 32, hereinafter: WO'721) in a manner prejudicial to novelty.
172. The teaching according to WO'721 relates to a device and a method for locating persons and objects, in particular an avalanche transceiver (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 localise 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 used 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 metres (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 localisation more difficult (p. 3 lines 6-8). It is therefore a task, on the one hand, to enable more precise and faster localisation of people 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 localisation 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 connected to at least one output device for outputting at least one signal derived from the locating signal. Preferably, the localisation 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. This anticipates features 1, 1.1, 1.2, 1.3, 3 and 3.1.

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

181. The local division correctly did not see a 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 skilled person merely recognises 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 in suit also proves to be new compared to utility model specification DE 299 22 217 (Annex KAP 19 or BB1 Supplement 33, hereinafter DE'217).

185. DE'217 relates to an avalanche transceiver, in particular an avalanche transceiver. DE'217 considers it a disadvantage that the search with the known avalanche transceiver, in which the search is based on the strength of the signal received, which is shown on a display, requires a lot of experience (p. 1 lines 11-17).
186. Against this background, DE'217 has set itself the task of developing a burial search device that enables even inexperienced persons to locate a buried person in the shortest possible time (p.2 para. 4).
187. In contrast to the known avalanche transceivers, the avalanche transceiver according to DE'217 does not use the strength of a signal to determine its position (p. 3 para. 2). The avalanche transceiver according to one embodiment example has a dGPS receiver that receives time and position signals ZP from satellites. At the same time, time and position signals ZP are received from a reference station, which compares a position calculated from the time and position signals ZP with a reference position and sends correction signals K, which correspond to a deviation of the calculated position from the reference position, to the dGPS receiver. The avalanche transceiver has a position calculating device that calculates a centimetre-accurate position of the avalanche transceiver using the time and position signals ZP 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 direction shown until the distance to the buried victim is zero (p. 3 para. 3).
189. In a preferred embodiment, a voice processor is also 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, see also p. 6 para. 4 and patent claim 7).
190. As the local division correctly assumed, 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 case. The output of sound signals is not mentioned in the citation.
191. Mammut argues unsuccessfully that claim 1 discloses generally an output device which outputs determination values. Even if the skilled person, using his specialised knowledge, is able to produce 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 by the citation.
192. The signalling device (34) referred to in claim 8, which emits a conspicuous signal when the first and second position values coincide, 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 skilled person to the signal light (34) of the description, which lights up when the distance to the second avalanche transceiver is less than 1 metre (p. 6, second full paragraph) and thus only discloses a signalling device with an optical signal.

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

6. Inventive activity

194. According to Art. 56 EPC, an invention is considered to involve an inventive step if it is not obvious to a person skilled in the art from the prior art. The local division rightly assumed that it is not predominantly 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 skilled person 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 localisation purely by ear to be disadvantageous (para. 7), the citation therefore proposes automatic position determination (para. 9). The distance and position are adequately determined and shown on a display. Based on EP'679, the skilled person, 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 avalanche transceiver, whereas the search proposed in EP'679 would lead the searcher in a straight line towards the buried victim (possibly with detours to avoid possible obstacles).

b) Based on WO'721

196. It is not apparent that the skilled person, on the basis of WO'721, had any reason to provide the avalanche transceiver device disclosed therein with a control device which, depending on the conditions mentioned in features 2.1, 3.1 and 4, provides alternative control of 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 skilled person endeavouring to simplify the search with a complete teaching that does not require supplementation.

197. Mammut argues without success that the juxtaposition 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 there in claims 7 and 8.

199. It may be that the specialist 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 not disclosed.

d) Starting from EP'011

200. Even on the basis of EP'011, the skilled person had no reason to provide a voice output, as known from WO'721 and DE'217, for an avalanche transceiver 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 assumed.

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 avalanche transceiver

202. Even on the basis of the general avalanche transceiver, it is not overwhelmingly likely that the invention was obvious. Mammut argues unsuccessfully that the avalanche transceiver disclosed in US 2006/0148423 (BB1 Exhibit 34) already contains all the features of the patent in suit, 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 skilled person that directional information from the GPS is displayed by means of voice output. The skilled person refrains from a combination of directional information by GPS and conventional audio signals because the simultaneous use of conventional search and directional information by 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 transceiver of the buried victim, while the directional information via GPS would lead the searcher in a straight line towards the buried victim.

204. Insofar as the language support in the justification for honouring the contested embodiment with the ISPO Award in 2021 as a "long overdue feature"

this does not justify the obviousness of the combination on the priority date, contrary to Mammut's opinion.

II. Direct patent infringement

1. Realisation of the features of claim 1

205. The local division correctly assumed that the "Barryvox S2", insofar as it has a voice output (hereinafter: attacked embodiment), makes use of the technical teaching of patent claim 1 in accordance with the wording.

206. The realisation 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 the output 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 - the loudspeaker is alternatively controlled either with sound signals or with voice messages, feature 4 is also realised.

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 activating 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. Mammut argues unsuccessfully 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, who 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 such an infringement is imminent 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 challenged embodiments constituted an indirect infringement of patent claim 13 pursuant to Art. 26 (2) UPCA. In order to avoid repetition, reference is made to the reasons for the decision of the local division.

IV. No right to use mammoths due to older law

216. The local division correctly assumed that the use of the patent was not allowed because of Mammut's prior right to EP'011.

217. It is not necessary to decide whether such an objection can be raised before the Unified Patent Court. Even according to the principles developed by the Federal Court of Justice, only those who exclusively use the teaching of the earlier right and do not make use of additional features that are only taught by the later property right can invoke it (Federal Court of Justice, GRUR 2009, 655 para. 27 - Trägerplatte). As explained above, not all features of claims 1 and 13 are anticipated in EP'011.

V. Exhaustion

218. The local division rightly assumed that Mammut could not invoke exhaustion with regard to the licence agreement concluded between Mammut GmbH and Ortovox (excerpts submitted as Annex KAP 36).

a) Disposal patent not subject of the licence agreement

219. The licence agreement does not cover the injunction patent 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 document of 15 March 2024 on the scope of the licence agreement, which was submitted after the end of the oral hearing and was not remitted.
221. Documents submitted after the conclusion of the oral proceedings on which the decision is based may no longer be taken into account by the court in its decision. In accordance with R.195.3 RoP in conjunction with R.197.1 sentence 2 and 212.3 RoP, the decision is issued as soon as possible after the conclusion of the oral proceedings (see also R.118.6 sentence 1 and R.118.7 RoP for the main proceedings). If the court deems this appropriate, the decision may be announced orally to the parties at the end of the oral hearing; however, it must be issued in writing as soon as possible thereafter. 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 document is also not admissible on appeal. The submissions in the document dated 15 March 2024 are not relevant (R.222.2 (b) RoP). In view of the clear provision in section 1 and the preamble, the fact that the licence pursuant to section 4 of the agreement also relates 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 challenged embodiments is not an abuse of rights due to the licence agreement relating to other property rights. An abuse of rights could only be considered if the patent for the injunction 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 teaching at issue.

D. Weighing of interests

225. Pursuant to Art. 62(2) UPCA and R.211.3 RoP, the court shall exercise its discretion in weighing the interests of the parties against each other, taking into account in particular the possible prejudice which one of the parties might suffer from the issue of the injunction or the rejection of the application. As the local division correctly assumed, the balancing of interests is in favour of Ortovox.

I. Inappropriate waiting/urgency

226. When weighing up the interests, the court takes into account unreasonable delay in applying for provisional measures in accordance with R.211.4 RoP. This is based on the fact that the patent proprietor demonstrates with such behaviour 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 1 December 2023.

1. Start of the waiting period

228. The period of waiting within the meaning of R.211.4 RoP is to be measured from the day on which the applicant has or should have had such knowledge of the infringement as to enable him to make a promising application for provisional measures pursuant to R.206.2 RoP.

229. With correct reasoning, to which reference is made to avoid repetition, the local division assumed that sufficient knowledge or a need to know did not already exist on 12 October 2023, when employees inspected a prototype of the attacked embodiment at a trade fair in the USA. The decisive factor in this respect is that it was merely one of several prototypes and it could not be assumed with any degree of probability that this prototype in particular would also be offered and sold 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. As a result, Ortovox was able to take a first look at the version on display at the trade fair on 28 November 2024.

2. Duration of the period

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

232. When an unreasonably long wait within the meaning of R.211.4 RoP exists depends on the circumstances of the individual case.

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

234. The fact that the Orders were only served on 21 and 22 December 2023, and thus the pre-Christmas business could not be prevented, as intended by Ortovox, is not a circumstance related to the period of time taken to file the application. Irrespective of this, this period would not be unreasonably long even if all circumstances were taken into account.

II. Balancing of interests

1. Damage

235. The local division correctly assumed that it was justified here to order provisional measures.

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

237. Contrary to Mammut's view, irreparable harm is not a necessary condition for the Order of provisional measures (see ECJ, judgement of 28 April 2022, C-44/21, Phoenix v Harting ECLI:EU:C:2022:309 para. 32). 28 April 2022, C-44/21, Phoenix/Harting ECLI:EU:C:2022:309 para. 32). Art. 62 (2) UPCA and R.211.3 RoP merely refers to possible damage, 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 defendant.
"in particular" if a delay would probably cause irreparable damage to the applicant.
238. It is therefore sufficient that the interests of the patent proprietor in obtaining provisional measures outweigh the interests of the infringer. The fact that the Order was issued by the The fact that the Order was issued ex parte on 11 December 2023 does not justify a different assessment, as the Order contested here was issued in bilateral proceedings.
239. The local division correctly assumed that Ortovox's interests predominated here. Mammut is depriving Ortovox of the market opportunity associated with patent protection by at least threatening to sell a competing product that complies with the patent.
240. The local division rightly took into account that Ortovox is dependent on effective legal protection because an oral hearing in the main proceedings is only to be expected within a year. The distribution of the contested design for the 2024/2025 winter season could not be effectively prevented by a subsequent decision, at least not for an insignificant period of time.
241. Without success, Mammut argues that in the event of an injunction in the main proceedings, the orders would be cancelled and demand would revive. This would mean that Ortovox would have to pre-produce the goods at its own risk in order to cover the demand that would then become available at short notice.
242. In view of the established infringement, Mammut has no interest to the contrary in securing the advance orders already placed.
243. For the above reasons, the local division rightly refused to allow Mammut to perform the infringing acts against security.

2. Law enforcement in Switzerland

244. The local division correctly assumed that Ortovox does not have to refer to possible summary proceedings in Switzerland, with which Mammut could have been prohibited from manufacturing the contested designs. This is because such an injunction would not relate to the acts of use in Germany and Austria at issue here.
245. It can be assumed in favour of Mammut that the ban on production in Switzerland would in fact have led to a cessation of distribution of the challenged designs for a certain period of time (namely until production was switched). It does not follow from this that Ortovox was obliged to take action against the manufacture of the contested designs in Switzerland. In principle, it is the

It is up to the patent proprietor to decide with regard to which acts of use he wishes to claim (urgent) legal protection.

3. Third-party interests

246. Whether third-party interests should be included in the balancing of interests can be left open. Since the contested embodiments are not the only avalanche transceivers with voice support, but Ortovox also sells corresponding devices, the availability of the device is not absolutely necessary 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 either.

5. Penalty and security deposit

248. For the reasons 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 favour 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 must specify the provisional measures requested. According to R.211.1 (d) RoP, this also includes a provisional reimbursement of costs. However, it is possible to apply for authorisation to amend or extend the action in this respect as part of the proceedings to review the Order for provisional measures (R.263 RoP). Ortovox's application to supplement the interim measures with an Order for provisional reimbursement of costs (implicitly) contains an application for the authorisation of such an extension of the action.

251. Pursuant to R.263.2 RoP, subject to paragraph 3, leave to amend or extend the claim will be refused if the party seeking the amendment (or extension) cannot, having regard to all the circumstances, satisfy the court that (a) the amendment in question could not have been made earlier with due diligence and (b) the amendment will not unreasonably interfere with the other party's conduct of the proceedings.

252. Mammut 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 an action within the meaning of this provision. R.263 RoP also applies to applications for Orders for provisional measures. As follows from Art. 32

(1) (c) UPCA, "actions for the adoption of provisional measures" pursuant to Art. 62 UPCA are independent actions (cf. also UPC Court of Appeal, Order of 26 June 2009).

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 amendment or extension concerns the "action" (English language version) or the "demande" (French language version), whereas the corresponding versions of Art. 32 (1) (c) UPCA refer to "actions" or "requests" (French language version).

"les actions" has no meaning because, according to both language versions, R.263 RoP is not limited to the amendment or extension of "claims" or "demande", but also allows "to amend its case" or "de modifier la nature de son affaire", and thus refers to an amendment or extension of the entire subject matter of the dispute.

253. The conditions under which, pursuant to R.263.2 RoP, leave to amend or extend the action is refused are not met. A party who applies for an Order for provisional measures without hearing the other party in accordance with 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 a 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 authorisation 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 on appeal. 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, 26 February 2024 - UPC_CoA_335/2023 App_576355/2023, operative part 7), there is no room for a reimbursement of costs in its favour.

G. Basic cost decision

257. The local division rejected Ortovox's application for a basic decision on costs on the grounds that there was no legal basis for this. This is not true, as a basic decision on costs is also possible in summary proceedings under R.242.1 RoP (see UPC Court of Appeal, Order of 6 August 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 application to order Mammut to pay the costs of the appeal proceedings must be upheld.

ORDER

1. The application to allow the defence and the separate counterclaim for annulment on the merits in the appeal proceedings is rejected.
2. The appeal is dismissed.
3. Ordered that Mammut reimburse the defendant further provisional costs in the amount of €19,858.40.
4. Mammut shall bear the costs of the appeal proceedings.

ISSUED ON:

25 September 2024

NAMES AND SIGNATURES

Rian Kalden

Date:

2024.09.2

5 09:15:44

+02'00'

Presiding Judge Rian Kalden

Åsa

Ingeborg

Simonsson

Digitally signed
by Åsa Ingeborg

Simonsson

Date: 2024.09.25

08:31:44 +02'00'

Legally qualified judge Ingeborg Simonsson

Patricia

Ursula

Rombach

Digitally signed
by Patricia

Ursula Rombach

Date: 2024.09.24

19:57:02 +02'00'

Legally qualified judge and rapporteur Patricia Rombach

Eric, Philippe,
Gilles, Thierry

Augarde

Signature numérique de Eric,
Philippe, Gilles, Thierry

Augarde

Date : 2024.09.24 23:04:18

+02'00'

Technically qualified judge Eric Augarde

Max Wilhelm
Tilman

Digital

signed by
Max Wilhelm Tilman

Date: 2024.09.24

21:04:07 +02'00'

Technically qualified judge Max Tilman