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**Datasheet for the decision
of 29 August 2012**

Case Number: T 2035/09 - 3.2.02

Application Number: 07007261.6

Publication Number: 1842483

IPC: A61B 3/12

Language of the proceedings: EN

Title of invention:

A fundus observation device with movable fixation target

Applicant:

Kabushiki Kaisha TOPCON

Headword:

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Relevant legal provisions:

EPC Art. 123(2)

Keyword:

"Added subject-matter (no)"

Decisions cited:

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Catchword:

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Case Number: T 2035/09 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 29 August 2012

Appellant:
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 8 April 2009
refusing European patent application
No. 07007261.6 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: E. Dufrasne
Members: M. Stern
C. Körber

Summary of Facts and Submissions

- I. The applicant lodged an appeal against the decision of the Examining Division, dispatched on 8 April 2009, refusing European application No. 07 007 261.6.
- II. The application had been refused on the grounds that claim 1 filed with the applicant's letter dated 25 February 2009 represented a generalisation of the subject-matter as originally filed and consequently did not fulfil the requirements of Article 123(2) EPC.
- III. The notice of appeal was received on 5 June 2009 and the appeal fee was paid on the same day. With the statement setting out the grounds of appeal, received on 7 August 2009, the appellant requested (as a main request) that the Board "revises the final rejection" by the Examining Division and filed four additional sets of claims as auxiliary requests.
- IV. Claim 1 of the main request reads as follows:
- "A fundus observation device comprising:
fixation target projecting part configured to display a fixation target for fixating an eye and configured to project the displayed fixation target onto the a [sic] fundus oculi,
projection position changing part configured to change the display position of said fixation target so as to change the projection position of the fixation target on the fundus oculi,
first image forming part operable to form a 2-dimensional image of the surface of a fundus oculi

with said fixation target projected based on optically captured data;
second image forming part operable to form a tomographic image of a fundus oculi based on data captured by an optical scan;
displaying part configured to display the formed 2-dimensional image; and
operation part configured to specify a position on said displayed 2-dimensional image, wherein said projection position changing part is configured to change the display position of said fixation target to the position specified by said operation part,
wherein when macula area of the fundus oculi is specified by said operation part, said projection position changing part is configured to determine whether or not the formed tomographic image includes a concave portion, extract an image region of which the concave portion is in the central position, about the tomographic image including the concave portion, and instruct said fixation target projection part to project said fixation target onto the position on the fundus oculi based on the extracted image region as the macula area,
wherein said second image forming part is configured to form a new tomographic image to be substantially centered at the concave portion of the fundus oculi of an eye, the eye being fixated by the projected fixation target."

Reasons for the Decision

1. The appeal is admissible.

2. The application concerns an ocular fundus camera which projects a fixation target onto the ocular fundus in order that the eye may stay fixed during examination close to the optical axis of the optical system (paragraphs [0037] and [0038]). The position of the fixation target is displayed (e.g. on an LCD 140; see Figure 1; paragraphs [0065], [0176], [0178], [0188]) and projected onto the ocular fundus using an optical system 120 (Figure 1; paragraphs [0065], [0176]). The image of the eye and the fixation target is formed by part 220 (Figures 7, 10). The user may specify a position of the image by using the fixation target position adjusting switch 310 (shown in Figure 6) and the operation part 240B (Figures 7, 10) to change the display position of the fixation target, and thus the projection position of the fixation target (paragraph [0160]).

3. Claim 1 of the main request contains, inter alia, the following amendments with respect to claim 1 of the application as originally filed (strikethrough text and underlinings indicating, respectively, features deleted from and added to claim 1 as originally filed):
 - (a) "fixation target projecting part [~~including fixation target displaying part and a projection optical system, the fixation target displaying part being~~] configured to display a fixation target for fixating an eye [~~,the projection optical system being~~] and configured to project the displayed fixation target onto the a [sic] fundus oculi", and

 - (b) "projection position changing part configured to change the display position of said fixation target

so as to change the projection position of the fixation target on the fundus oculi, ... [~~said projection position changing part includes~~] operation part configured to specify a position on said displayed 2-dimensional image [~~and changes~~], wherein said projection position changing part is configured to change the display position of said fixation target based on the position specified by said operation part".

4. From the fact that the above struck-through text originally claimed has been dropped from claim 1 of the main request the Examining Division concluded without further reasoning that "claim 1 represents a generalisation of the subject-matter as originally filed", contrary to Article 123(2) EPC (point 2 of the reasons of the decision under appeal).
5. However, with due regard to the content of the entire application as originally filed, the Board finds that the amendments objected to are indeed allowable under Article 123(2) EPC, as explained hereinafter.
 - 5.1 *Regarding the amendments set out in paragraph 3(a) above*

Claim 1 of the main request defines, as in original claim 1, that the "fixation target projecting part" has both the function of *displaying* a fixation target and the function of *projecting* the fixation target onto the fundus oculi, but (in contrast to original claim 1) it does not specify that each of these two functions is performed by different means and that the projecting means is an optical system.

However, for the skilled person reading the original application as a whole it is evident that an element in an ocular fundus observation device with the function of projecting a fixation target onto the fundus oculi is necessarily an optical element or system. Hence, deleting this wording does not lead to a generalisation.

Moreover, since the "fixation target projecting part" has the function not only of *projecting* the fixation target onto the fundus oculi, but also of *displaying* the fixation target, it is also clear that corresponding displaying means (i.e. in the form of some type of display) are implicitly provided in addition to means for projecting the fixation target onto the ocular fundus. It is hence implicit in claim 1 that the two functions are each performed by different means of the fixation target projecting part.

Thus, the amendments in paragraph 3(a) above do not involve a generalisation of subject-matter (let alone an unallowable generalisation).

5.2 *Regarding the amendments set out in paragraph 3(b) above*

Claim 1 of the main request no longer defines the "operation part" as being included in the "projection position changing part" (as in original claim 1).

For this amendment there is however support in the description, insofar as the description presents at least one embodiment in which features identified as the claimed "operation part" are not included in what

constitutes the claimed "projection position changing part".

The description of the application as filed refers to the "projection position changing part" only in paragraph [0040], which presents the summary of the invention (repeating verbatim the text of original claim 1), and in paragraph [0178] which states that "the controlling part 210 is included in one example of the "projection position changing part" relating to the present invention". Moreover, in paragraphs [0125] and [0111] it is explained that the target adjusting switch 310 and the operation part 240B are examples of the "operation part" of the present invention, and that the controlling part 210 controls the movement of the display position of the internal fixation target. The controlling part 210 is thus an embodiment of the "projection position changing part" which is separate from the adjusting switch 310 and the operation part 240B (see also Figures 7 and 10).

Consequently, the amendments in paragraph 3(b) above do not involve an unallowable extension of subject-matter.

6. The impugned decision also makes reference (under point 1 of the reasons) to "grounds given in the communication dated 17 April 2008 according to which the amended claim 1 contains subject-matter which extends beyond the content of the application as filed." It must be assumed that the date in this passage should read "2 September 2008", as the latter is the correct date of the sole communication under Article 94(3) EPC issued during the examination procedure. This communication had raised objections to

the aforementioned amendments as well as to another amendment which is no longer contained in present claim 1.

7. As a consequence, the Board concludes that the amendments to claim 1 objected to in the impugned decision satisfy the requirement of Article 123(2) EPC.
8. Since the Examining Division did not decide on any further aspect beyond those addressed above, the Board finds it appropriate to remit the case to the Examining Division for continuation of the examination procedure (Article 111(1) EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.

The Registrar:

The Chairman:

D. Hampe

E. Dufrasne