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Datasheet for the decision of 26 October 2011

Case Number: T 1740/10 - 3.2.02

Application Number: 06019323.2

Publication Number: 1764031

IPC: A61B 5/00

Language of the proceedings: EN

Title of invention:
Transillumination having orange color light

Applicant:
Mullani, Nizar

Opponent:
-

Headword:
-

Relevant legal provisions:
EPC Art. 54, 114(2)
RPBA Art. 13(1)

Relevant legal provisions (EPC 1973):
-

Keyword:
"Novelty (no: main, first and second auxiliary requests)"
"Admissibility (no: third auxiliary request)"

Decisions cited:
-

Catchword:
-

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Case Number: T 1740/10 - 3.2.02

D E C I S I O N
of the Technical Board of Appeal 3.2.02
of 26 October 2011

Appellant: (Applicant)
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Representative:
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Decision under appeal:
Decision of the Examining Division of the European Patent Office posted 15 March 2010 refusing European patent application No. 06019323.2 pursuant to Article 97(2) EPC.

Composition of the Board:

Chairman: M. Noël
Members: D. Valle
A. Pignatelli

Summary of Facts and Submissions

I. The appellant (applicant) lodged an appeal by notice filed on 14 May 2010 against the decision of the Examining Division posted on 15 March 2010, to refuse the European patent application No. 06019323.2 on the ground of lack of novelty of its subject-matter. The fee for the appeal was paid on the same day and a statement setting out the grounds of appeal was received on 14 July 2010, along with amended sets of claims.

II. The decision under appeal as well as the present decision are based on document:

D3: US 2005/0168980 A1.

III. The Board forwarded its provisional opinion by communication dated 25 July 2011.

IV. Oral proceedings were held on 26 October 2011.

The appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of claims 1 to 7 of the main request or claims 1 to 6 of the first auxiliary request or claims 1 to 5 of the second auxiliary request, all filed with the statement of grounds of appeal or of claims 1 to 4 of the third auxiliary request filed during the oral proceedings.

V. Claim 1 of the various requests reads as follows:

Main request:

"A transillumination device comprising a housing (12), characterized in that a light source (20) retained by the housing (12), said light source emitting an orange light between 580 and 620 nm."

First auxiliary request:

Claim 1 of the first auxiliary request adds at the end of claim 1 of the main request the following feature:

"wherein said light source (20) is an LED".

Second auxiliary request:

Claim 1 of the second auxiliary request adds at the end of claim 1 of the main request the following feature:

"wherein said light source (20) is able to change colors and also emits a red light".

Third auxiliary request:

"A transillumination device for vein imaging comprising a housing (12), a light source (20) retained by the housing (12), characterized in that said light source is able to change colors and is able to emit both orange light between 580 and 620 nm or red light, wherein the orange light is used for imaging superficial veins and the red light is used for imaging deeper veins."

VI. The appellant argued essentially as follows, in both its oral and written submissions:

Document D3 disclosed a light source emitting a red light at wavelengths between 600 and 640 nm, whereas the subject-matter of claim 1 according to the main request required a light source emitting an orange light between 580 and 620 nm, with a view to allowing enhanced imaging of superficial veins. Therefore, the claimed subject-matter was novel over D3.

The subject-matter of claim 1 of the first auxiliary request further specified that the light source was an LED, and claim 1 of the second auxiliary request that the light source used for emitting orange lights was able to change color and also to emit a red light, and vice versa, in order to allow selection of the appropriate color for imaging superficial or deeper veins. These combinations of features were not known from D3 or any other prior art.

The late filing of the third auxiliary request was caused by the fact that the representative did not receive any instruction from the applicant until shortly before the date of the oral proceedings. This request was further distinguished by the specific uses of the different colors emitted by the light source.

Reasons for the Decision

1. The appeal is admissible.

2. Novelty - main request

D3 discloses (see Figure 5) a transillumination device comprising a light source 24 retained by a housing 12, said light source emitting a red light having a predominant wavelength of substantially between 600 and 640 nm, see abstract and paragraphs [12] and [29].

At first sight the subject-matter of claim 1 appears to differ from the teaching of D3 in that the color of the emitted light is orange instead of red and that the wavelength range is from 580 to 620 nm instead of from 600 to 640 nm. However, the color of the emitted light is not a reliable criterion since the color definitions and the relationships between the colors and the wavelengths vary substantially according to the technical literature taken as the reference for the comparison. For example, the same color spectrum taken from a technical handbook or from a scientific article indicates that the wavelength range of claim 1 corresponds to the colors yellow-orange, and that of D3 to the colors orange-red. It results that the color definition is only approximate, not specific enough to be a limiting feature and not reliable for a proper comparison with the state of the art. Only the wavelengths are accurate and can be considered for a clear definition of the claimed subject-matter and for a reliable comparison with the prior art, whatever the true corresponding color of the emitted light.

As to the wavelengths, the Board observes that the above-mentioned ranges given in claim 1 in suit and in D3 overlap between 600 and 620 nm. In the case of overlapping ranges of claimed subject-matter and the

prior art, the same principles apply for the assessment of novelty as in selection inventions (see Guidelines for Examination, April 2010, C-IV.9.8.(iii)), i.e. novelty is destroyed by an explicitly mentioned end-point of the known range (here 600 nm). Moreover, it is self-evident that the skilled person would seriously contemplate applying the technical teachings of D3 in the range of overlap, since the device of D3 is used, as in the present application, as a trans-illuminating vein locator, and the light emitted within this range is orange, using the same terminology as that defined in the application.

Accordingly, the subject-matter of claim 1 of the main request is not novel with respect to D3, contrary to the requirements of Article 54 EPC.

3. First auxiliary request

The feature added to claim 1 of the first auxiliary request, according to which the light source is an LED, is also known from D3. Accordingly, the subject-matter of claim 1 of the first auxiliary request is not novel over D3 either.

4. Second auxiliary request

Claim 1 of the second auxiliary request contains the additional features that the light source is able to change color and also emits a red light.

In this respect, the Board observes that the only source of light mentioned in the application at issue is an LED. It is well known that an LED emits light

within a predetermined spectral bandwidth and that it cannot change color, since the wavelength range and therefore the available color depend on the specific inorganic semiconductor material used for making the LED. It follows that the feature "said light source is able to change color" cannot be considered in assessing the novelty of the claimed subject-matter, since it simply does not make technical sense. Where different colors are required, different LEDs are necessary, each emitting one specific color. Moreover, said feature finds no support in the application as filed.

The appellant argued that the description mentions at column 1, line 50: "the light source may be fiber optic or LED", thus disclosing that light sources other than LED are envisaged. However, a fiber optic cannot be regarded as a light-emitting source: it is merely a means for transmitting light, not a light source such as an LED (see column 2, line 6).

The remaining feature that the light source "also emits a red light" in not convincing for the same reasons as above, since said light source already emits orange light, i.e. has another wavelength range. Even supposing that the color mentioned in D3 is correctly defined as being a red light for the proposed wavelength range between 600 and 640 nm (see paragraph [29], it remains that the range overlapping (600 to 620 nm) with the claimed range (580 to 620 nm) is said to emit an orange light, following the definition given in the application (see paragraph [7]). In that case, D3 would also disclose a light source emitting an orange light as well as a red light.

Accordingly, the subject-matter of claim 1 of the second auxiliary request is not novel over D3 either.

5. Admissibility of the third auxiliary request

Claim 1 of the third auxiliary request differs from claim 1 of the second auxiliary request essentially in that "the orange light is used for imaging superficial veins and the red light is used for imaging deeper veins", i.e. features related to the use of different colors for different purposes, which, however, does not change the structural combination of the claimed device. Therefore, the same conclusion would still apply as for the second auxiliary request.

Taking further into consideration that the third auxiliary request is filed late, i.e. at the oral proceedings, without justification for its late filing, and that its subject-matter does not appear prima facie capable of overcoming the objections raised against the previous requests, the Board has decided not to admit it into the proceedings, using the discretion conferred on it by Article 114(2) EPC and Article 13(1) RPBA.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

C. Eickhoff M. Noël