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**Datasheet for the decision  
of 17 October 2018**

**Case Number:** T 1213/17 - 3.2.02

**Application Number:** 07785745.6

**Publication Number:** 2057407

**IPC:** A61G12/00

**Language of the proceedings:** EN

**Title of invention:**

MEDICAL SURGERY ROOM WITH COLOURED LIGHTING

**Patent Proprietor:**

Chromaviso IP ApS

**Opponent:**

Fagerhults Belysning AB

**Headword:**

**Relevant legal provisions:**

EPC Art. 54(2), 56, 87(1), 89, 111(1), 113(1)  
RPBA Art. 13(1), 13(3)

**Keyword:**

Priority - validity of priority date (no)  
Public prior use (yes) - obligation to maintain secrecy (no)  
Late-filed objection - admitted (yes)  
Appeal decision - remittal to the department of first instance  
(no)  
Inventive step - (no)

**Decisions cited:**

G 0002/98, T 1081/01, T 1309/07, T 1168/09

**Catchword:**



**Beschwerdekammern**  
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Case Number: T 1213/17 - 3.2.02

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.02**  
**of 17 October 2018**

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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
27 January 2017 concerning the maintenance of  
European patent No. 2057407 in amended form**

**Composition of the Board:**

**Chairman** E. Dufrasne  
**Members:** D. Ceccarelli  
P. L. P. Weber  
M. Stern  
L. Bühler

## **Summary of Facts and Submissions**

- I. Both the patent proprietor and the opponent have appealed against the Opposition Division's decision, dispatched on 27 January 2017, that European patent 2 057 407 could be maintained in amended form according to the "new first auxiliary request".
- II. The patent has a date of filing of 21 August 2007 and claims priority of 21 August 2006.
- III. The patent was opposed on the grounds of added subject-matter, insufficiency of disclosure, lack of novelty and lack of inventive step.
- IV. The appellant patent proprietor ("the proprietor") filed notice of appeal on 6 April 2017. The appeal fee was paid the same day. The statement setting out the grounds of appeal was received on 6 June 2017.
- V. The appellant opponent ("the opponent") filed notice of appeal on 6 April 2017. The appeal fee was paid the same day. The statement setting out the grounds of appeal was received on 5 June 2017.
- VI. The following documents are mentioned in the present decision:

P1-E12: "Cyclo 04 DMX New Addition to Martin Architectural Cyclo Series", Internet page "[www.martin-architectural.com/productnews/productnews.asp](http://www.martin-architectural.com/productnews/productnews.asp)" retrieved by the Wayback Machine ("[web.archive.org](http://web.archive.org)") showing a date of availability to the public of 22 March 2006;

P3-E1: "No more working in semi-darkness with narrowed eyes", article interview with Yvonne Hansen,

Nyborg Hospital, Denmark.

VII. The Board summoned the parties to oral proceedings. In the communication accompanying the summons, the Board provided its preliminary opinion on some important issues to be discussed. In particular, under point 4.2, it stated:

*"If it is concluded that the priority claim is not valid, the prior use described in P3-E1 appears to belong to the state of the art. The opponent raised novelty and inventive-step objections based on P3-E1, which would have to be considered."*

VIII. Oral proceedings took place on 17 October 2018.

The proprietor requested that the decision under appeal be set aside and that the patent be maintained as granted (main request) or, alternatively, that the opponent's appeal be dismissed ("new first auxiliary request") or, alternatively, that the patent be maintained on the basis of one of the ninth, the eleventh and the eighteenth auxiliary requests, all filed with the statement of grounds of appeal.

The second to eighth, tenth, twelfth to seventeenth and nineteenth auxiliary requests were withdrawn.

The opponent requested that the decision under appeal be set aside and that the patent be revoked.

IX. Claim 1 of the **main request** reads as follows:

"Method for illuminating a medical surgery or examination room (1) in connection with minimal invasive procedures, where a number of light sources

are in operation in the surgery or examination room, where the light sources generate light with different colours, where the light sources are controlled by at least one computer (12, 208), where the computer (12.208) [sic] regulates the light sources for generating light of different colours, where the following steps of preparation are initially performed for pre-programming the computer (12,208) based on a personnel evaluation of the minimal invasive procedure:

- a) determining the different tasks to be performed before, during and after a surgery or examination in a surgery or examination room,
- b) determining a colour specific effect desired for the personnel performing the specific tasks, characterized in a step of providing the number of light sources in lamps (18,204) and providing a number of lamps (18,204), which each comprises at least three light sources, and that further at least the following steps of preparation are initially performed by pre-programming the processor
- d) [sic] determining the required personnel for each of these\_tasks [sic];
- e) analysing which zone of the room is used for the different tasks identified;
- f) dividing the room into a number of zones (8-10,122-136) depending on the specific tasks and the specific personnel;
- g) assigning a specific colour to each lamp (18,204) of the zones (8-10,122-136) in order to achieve the desired effects; which assigning provides green light behind monitors used by a surgeon during operation, and a red light in a zone behind a surgeon during operation or examination;
- h) illuminating the zones (8-10,122-136) with light

having the respective specific, assigned colours."

Claim 1 of the **new first auxiliary request** corresponds to claim 1 of the main request, where the following wording is added at the end of step g):

"and a white or yellow light in a zone around the equipment used by anesthetists".

Claim 1 of the **ninth auxiliary request** corresponds to claim 1 of the main request, where steps d) to h) are re-numbered to c) to g) respectively and the following wording is added at the end of step b):

"and wherein a step of assigning a specific colour to each of the zones also implies assigning a specific colour temperature to the selected colours".

Claim 1 of the **eleventh auxiliary request** corresponds to claim 1 of the main request, where the following wording is added at the end of step h):

"and whereing [sic] the computerised light control system is provided and functionally connected to a touch screen monitor (14) for displaying a user interface in which a number of icons (16) are provided, the icons (16) being programmed to initiate a pre-programmed setup of the lighting in response to a single press action on the icon".

Claim 1 of the **eighteenth auxiliary request** corresponds to claim 1 of the main request, where steps d) to h) are re-numbered to c) to g) respectively and the following wording is added at the end of step f) (step

g) in the main request):

"and a white or yellow light in a zone around the equipment used by anesthetists, and wherein the pre-programmed setups are dependent on the predetermined position of a monitor configured for displaying the sequence of images from an endoscopic camera during an operation or examination".

X. The proprietor's arguments where relevant to the present decision may be summarised as follows:

*Priority claim*

The priority claim was valid, in particular for the subject-matter of claim 1 of the main request. There was no need for a literal basis of the features of the claim in the priority documents, which implicitly disclosed lamps, each comprising at least three light sources.

Page 5, lines 4 to 9 and page 6, lines 8, 9 and 19 to 21 disclosed that colour mixing inside lamps could be used in order to emit light in different colours. Specifically disclosed colours were green on page 2, lines 9, 10 and 28 to 31 and page 5, lines 6 to 9; red on page 2 lines 31 to 32; white on page 3, lines 4 and 5 and page 6, lines 4 and 5; blue on page 5, lines 19 and 20; and yellow and rose on page 6, lines 4 to 5. Moreover, page 3, lines 11 to 13 disclosed that the colour temperature could be changed. From claim 7 of the priority documents it was also derivable that each lamp could provide light with a large range of different colours and, in particular, those specifically disclosed colours and the different colour



temperatures, which was only possible if at least three light sources were present inside the lamp.

*Availability to the public of the prior use described in P3-E1*

Although P3-E1 reported that a high-tech operating room had been installed and in operation since November 2006 at Nyborg Hospital in Denmark, it was not established when that room and its equipment had been made available to the public. It was accepted that there was no secrecy obligation associated with the sale of the equipment in the room. However, patients, accompanying persons and operating personnel could not be considered as members of the public. Moreover, patients and accompanying persons did not have access to and could not control the equipment installed in the room. It followed that the mere operation of the room did not necessarily make available to the public all the features of the equipment. As far as some of the auxiliary requests were concerned, it was not established that the lighting system in operation in November 2006 at Nyborg Hospital already comprised a white light. The second picture of P3-E1 did not show any white light at all. That light could have been implemented later, after the filing date of the patent.

*Inventive step*

The opponent had argued lack of inventive step starting from the prior use described in P3-E1 for the first time in its submissions dated 17 September 2018. These new objections of lack of inventive step, in particular in view of P1-E12, were new grounds for opposition, which had been filed very late. The Board had to reject them. If the Board found it legitimate to examine those

new grounds, it was requested that the case be remitted to the Opposition Division in order for the proprietor to have its right to be heard respected. The proprietor expected to have the possibility to appeal any decision based on such new grounds.

The prior use disclosed in P3-E1 did not include several of the features of claim 1 of the main request. P3-E1 did not disclose any of the claimed steps of preparation performed for pre-programming the computer. Moreover, there was no disclosure of lamps comprising at least three light sources or of the provision of green light behind monitors used by a surgeon and red light in a zone behind a surgeon. P3-E1 merely mentioned that the area around the surgeon and his screen could be greenish and that the operating nurse had reddish light (third column, third and fifth full sentences). The second picture of P3-E1 did not show red light behind the lead surgeon either. All the distinguishing features of the claimed subject-matter addressed the problem of providing a non-obvious and better alternative to the lighting according to P3-E1. In particular, there was no incentive for the skilled person to implement the lamps disclosed in P1-E12 in the lighting system described in P3-E1.

As far as the new first auxiliary request was concerned, P3-E1 did not disclose that white light was provided in a zone around the equipment used by anaesthetists but in order to see the facial colour of the patient as naturally as possible (third column, fourth full sentence). The equipment used by anaesthetists was, however, spaced apart from the patient.

P3-E1 did not disclose a step of assigning a colour

with a specific colour temperature as defined in claim 1 of the ninth auxiliary request. Inherently, assigning a colour temperature only applied to white light. P3-E1 merely disclosed a white light for the anaesthesiologist and an extra bright white light for cleaning, but did not teach that those white lights were assigned by selecting a specific colour temperature.

P3-E1 did not disclose a touch screen monitor for controlling the lighting placed inside the sterile area as required by claim 1 of the eleventh auxiliary request. That document merely mentioned a control from a main panel (third column, last full sentence).

As far as the eighteenth auxiliary request was concerned, there was no disclosure in P3-E1 of different pre-programmed setups dependent on the predetermined position of a monitor as defined in claim 1. The second picture of P3-E1 did not show that monitors were movable, but only that they were hanging from an arm. This further distinguishing feature addressed the problem of improving the ergonomics of the system, depending on the specific wishes of the surgeon and the particular operation to be carried out, and was not obvious in view of the disclosure of P3-E1. The mention in P3-E1 (third column, eighth full sentence) that the light was flexible was not necessarily related to the position of the monitors. Moreover, in order to achieve optimal lighting for any operation, for right-handed as well as left-handed surgeons, changing the position of the surgical table could also be an option.

XI. The opponent's arguments where relevant to the present decision may be summarised as follows:

*Priority claim*

The priority documents did not directly and unambiguously disclose lamps, each comprising at least three light sources inside the lamp. There was no explicit mention of three light sources in the priority documents. While it was accepted that there was disclosed a plurality of lamps, each lamp capable of providing a large range of different colours by colour mixing, this could technically be achieved with only two light sources of different colours inside the lamp. In particular, there was no disclosure in the priority documents that all lamps had to be the same and that each of them could provide the different colours and colour temperatures specifically disclosed in the various passages mentioned by the proprietor. It followed that the priority claim was not valid for the subject-matter of claim 1 of all requests.

*Availability to the public of the prior use described in P3-E1*

P3-E1 reported that a high-tech operating room had been installed and in operation since November 2006 at Nyborg Hospital in Denmark. Since there was no secrecy in relation to the equipment in the room, every nurse and surgeon operating the room had to be considered a member of the public to whom that equipment had been made available. Moreover, the patients who had been operated on in the room and their accompanying persons could have easily seen how that equipment was operated, since laparoscopic surgery was often carried out with the patient being awake. That was confirmed in the patent in suit, column 3, lines 4 to 6. As far as some of the auxiliary requests were concerned, there was no

reason to believe that the lighting system of P3-E1 did not comprise all the features mentioned in that document from the outset. A high-tech operating room established in November 2006 was described without any mention of later changes or upgrades.

*Inventive step*

The prior use described in P3-E1 had been a basis for a novelty objection since the beginning of the appeal proceedings. Raising an objection of lack of inventive step starting from that prior use did not amount to a fresh ground for opposition. Moreover, P3-E1 originated from the proprietor, who was familiar with it. P1-E12 had also been on file and discussed since the beginning of the appeal proceedings. Additionally, it was only cited as an example of the common general knowledge. It followed that an objection of lack of inventive step based on the combination of the prior use described in P3-E1 and P1-E12 was not surprising for the proprietor, should be admitted, and did not merit remittal to the department of first instance.

The prior use disclosed in P3-E1 comprised all the features of claim 1 of the main request except that each lamp comprised at least three light sources. More specifically, the claimed steps of preparation for pre-programming the computer were inherently present, since P3-E1 explained that different light colours were matched to different personnel activities (third column, second full sentence) in order to obtain certain advantages. P3-E1 specified that a greenish light was provided around a surgeon's screen (third column, third full sentence). If the light was around the screen, it would be in particular behind it, as required by claim 1. Moreover, P3-E1 explained that the

operating nurse had reddish light (third column, fifth full sentence) and, from the patent itself, it was derivable that assisting staff work behind the surgeon in operating rooms as described in P3-E1 (column 3, lines 30 to 31 of the patent). Red light in a zone behind surgeons was also shown in the second picture of P3-E1. Moreover, surgeons normally moved during the operations, so that the provision of red light in a zone close to them necessarily amounted to the provision of such a light behind them at least for some time depending on their movements. Hence, the claim requirement that red light was provided in a zone behind a surgeon was also met by the prior use described in P3-E1.

The provision of lamps, each comprising at least three light sources, addressed the problem of effectively achieving the different light scenarios described in P3-E1.

Since P3-E1 itself stressed the importance of having a flexible, pre-programmable light system (third column, eighth and ninth full sentences), the skilled person would implement commercially available programmable lamps which could provide many different colours, as the one disclosed in P1-E12. Choosing those lamps amounted then to a non-inventive selection amongst other possibilities. Since the lamp disclosed in P1-E12 comprised four different light sources, the subject-matter of claim 1 of the main request would be arrived at in an obvious way.

As far as the new first auxiliary request was concerned, P3-E1 disclosed a white light for an anaesthesiologist (third column, fourth full sentence), in particular to see the facial colour of the patient

as naturally as possible. It was impossible to have white light on the patient's face without also having it also on at least part of the anesthetist's equipment, which was provided at or close to the face. Moreover, P3-E1 even mentioned that the provision of white light was to be able to see well in connection with injection, which clearly involved the use of some equipment. It followed that P3-E1 disclosed the additional feature of claim 1 of the new first auxiliary request. Hence, the subject-matter of that claim lacked inventive step for the same reasons as those explained in relation to the main request.

P3-E1 also disclosed a step of assigning a colour with a specific colour temperature as defined in claim 1 of the ninth auxiliary request. More specifically, P3-E1 disclosed steps of assigning white lights for the anaesthesiologist (third column, fourth full sentence) and for cleaning (third column, sixth full sentence). Since assigning a colour temperature only applied to white light, assigning those white lights inherently resulted in assigning their specific colour temperature. It followed that the subject-matter of claim 1 of the ninth auxiliary request lacked inventive step for the same reasons as those explained in relation to the main request.

P3-E1 specifically disclosed a touch screen for controlling "everything" (first column, third sentence and sentence bridging the fifth and the sixth columns). Clearly, this encompassed the control of the lighting system as required by claim 1 of the eleventh auxiliary request, since the lighting was the main object of P3-E1. The touch screen was even placed in the sterile area, although this was not a claim requirement but was only mentioned in the description of the patent. It

followed that the subject-matter of claim 1 of the eleventh auxiliary request lacked inventive step for the same reasons as those explained in relation to the main request.

As far as the eighteenth auxiliary request was concerned, P3-E1 disclosed a pre-programmed light scenario dependent on the position of the surgeon's monitor (third column, third and ninth full sentences). That monitor was movable, as shown in the second figure of P3-E1. Moreover, P3-E1 disclosed that the light was flexible and could be used for any operation type (third column, eighth full sentence). It was evident that different operation types, or even different right-handed or left-handed surgeons performing the same operation, required different positions of the monitor in the room, since the surgical table was normally screwed to the floor in such rooms. It followed that providing more than one pre-programmed light scenario depending on the position of the monitor was implicit or at least not inventive in view of P3-E1. Hence, the subject-matter of claim 1 of the eighteenth auxiliary request was not inventive either.

### **Reasons for the Decision**

1. The appeals are admissible.
2. The invention

The invention relates to a medical surgery and examination room for minimally invasive procedures and a method for illuminating it. According to the patent, the object of the invention is to improve the lighting conditions for the surgery personnel (paragraph [0006])



who may prefer different light colours depending on the operations and the equipment for which they are specifically responsible. A number of light sources are in operation in the room, generating light with different colours under the control of a computer. The room is divided into a number of zones depending on the specific tasks and personnel and a specific colour is assigned to each zone. More specifically, green light is provided behind monitors used by a surgeon during operation, red light is provided in a zone behind the surgeon during operation or examination, and white or yellow light may be provided in a zone around the equipment used by the anesthetist.

3. Priority claim

- 3.1 The patent has a date of filing of 21 August 2007 and claims priority from European patent application No. 06017355 and a further US application, both having a filing date of 21 August 2006.

Those two applications share the same content. In the following, for ease of reference, that European application as filed is meant when "the priority document" is mentioned.

- 3.2 Under Article 87 (1) EPC, a precondition for enjoying a right of priority is that the application from which priority is claimed is in respect of the same invention.

In opinion G 2/98, the Enlarged Board of Appeal addressed the concept of the same invention in Article 87(1) EPC and concluded that:

*"The requirement for claiming priority of 'the same invention', referred to in Article 87(1) EPC, means that priority of a previous application in respect of a claim in a European patent application in accordance with Article 88 EPC is to be acknowledged only if the skilled person can derive the subject-matter of the claim directly and unambiguously, using common general knowledge, from the previous application as a whole."*

- 3.3 The opponent argued that the priority claim was not valid for the subject-matter of claim 1 of the main request, due in particular to the feature of a number of lamps, each comprising at least three light sources, not present in the priority document.

It has to be established whether the skilled person, using common general knowledge, can directly and unambiguously derive the presence of a number of lamps with three light sources from the priority document. As the proprietor argued, the undisputed lack of a literal basis for that feature does not necessarily result in the loss of priority.

- 3.4 The proprietor mentioned several passages of the priority document from which, in its view, the presence of lamps with three light sources was implicitly disclosed to the skilled person.

The Board agrees with the proprietor that the priority document discloses colour mixing inside lamps for providing a large range of different colours. However, it is a common principle of colour theory that only two light sources of different colours are enough for obtaining a large range of different colours.

The proprietor correctly observed that the priority document disclosed several specific colours and different colour temperatures, and that all of them could not be obtained by mixing only two light sources.

The Board notes that the priority document does not specify that all of these specific colours and different colour temperatures are necessarily obtained by several lamps of exactly the same type. A plurality of lamps, each with light sources of different colours, could be employed. Claim 7 of the priority document, cited by the proprietor in this respect, does not rule out such a possibility. More specifically, the Board does not share the view that when "a number of lamps are provided, each lamp being capable to provide light with a large range of different colours due to mixing of colours inside the lamp" this implies that all lamps are the same and, hence, all are independently capable of providing the disclosed specific colours and different colour temperatures.

Based on these considerations, the Board concludes that the priority document discloses lamps and light scenarios which could be obtained by - but do not necessarily imply - the presence of three light sources inside the lamps. As a result, the skilled person, using common general knowledge, cannot directly and unambiguously derive the presence of a number of lamps with at least three light sources from the priority document.

- 3.5 It follows that the priority claim is not valid for the subject-matter of claim 1 of the main request. Since claim 1 of each of the auxiliary requests contains the same feature of a number of lamps, each comprising at least three light sources, the priority claim is not

valid for the subject-matter of claim 1 of the auxiliary requests either.

Hence, pursuant to Article 89 EPC, the date of filing for the purposes of Article 54(2) EPC, relevant for the assessment of the state of the art for the analysis of novelty and inventive step, is 21 August 2007 for the subject-matter of claim 1 of all requests.

4. Availability to the public of the prior use described in P3-E1

4.1 It is established case law that in order to establish whether an alleged prior use belongs to the state of the art for a claimed invention, the circumstances relating to the "when" and "how" the act of prior use occurred and "what" was made available to the public through that use have to be determined.

P3-E1 is an undated article reporting that a lighting system named "Ergonomic Lighting" had been installed in a high-tech operating room for laparoscopic surgery at Nyborg Hospital in Denmark, and had been in use since November 2006 (first column, first sentence). The article explicitly mentions that the system was from the proprietor of the patent in suit (first column, eighth sentence and last column, last sentence).

4.2 The proprietor argued that although P3-E1 reported that the operating room had been in use since November 2006, it was not established when that room and its equipment had been made available to the public.

According to established case law, information is to be regarded as having been made public even if just one single member of the public is in a position to gain

access to it and understand it, and if there is no obligation to maintain secrecy (e.g. T 1081/01, point 5 of the Reasons; T 1309/07, point 3.2.1 of the Reasons; T 1168/09, point 4.2.1 of the Reasons). As for a possible obligation to maintain secrecy, the proprietor accepted that there was no such obligation associated with the sale of the equipment. Moreover, P3-E1 expressly reports that the operating room "was to be used for demonstrations for interested colleagues from all over Denmark" (first column, third last full sentence). This leads to the conclusion that members of the public were in a position to gain access to the operating room and understand the lighting system. Even some of the patients being operated on may be regarded as members of the public able to understand how the system worked, since the functioning of the lighting system does not involve complex technical considerations and laparoscopic surgery is often carried out with the patient being awake (confirmed by the patent in suit, column 3, lines 4 to 6).

For these reasons, the Board concludes that November 2006, when the use of the operating room started, is the date establishing "when" the act of prior use occurred. The "how" that act was made available to the public is at least through use by the surgical staff at Nyborg Hospital in the presence of patients or other members of the public.

- 4.3 As far as the "what" was made available to the public is concerned, P3-E1 describes the lighting system in some detail, without any mention of upgrades or changes during the time it was used. All the features explained in the article are consistently presented as belonging to the system. Hence, there is neither a reason nor evidence brought forward by the proprietor to support

the assertion that some of those features were implemented later than others.

Therefore, it is the Board's conclusion that all the features of "Ergonomic Lighting" described in P3-E1 constitute "what" was made available to the public through the prior use.

4.4 Those features belong to the state of the art for assessing the novelty and inventive step of the claimed subject-matter according to the proprietor's requests.

5. Inventive step

5.1 The opponent raised an objection of lack of inventive step starting from P3-E1 in combination with P1-E12, the admissibility of which was challenged by the proprietor.

On that account, the proprietor argued that that objection amounted to a new ground for opposition. However, the Board notes that the ground of lack of inventive step had already been raised by the opponent in the notice of opposition dated 8 May 2013, as also mentioned in the impugned decision (point 3). Hence, lack of inventive step is not a new ground for opposition.

Moreover, in the communication accompanying the summons to oral proceedings, the Board pointed out that an objection of lack of inventive step starting from P3-E1 was presented by the opponent in the appeal proceedings, particularly in its statement of grounds of appeal (point 6.5).

The specific objection starting from P3-E1 in

combination with P1-E12 was presented by the opponent for the first time in its submissions dated 17 September 2018. This amounts to an amendment to the opponent's case after the filing of its reply to the proprietor's statement of grounds and after the arrangement of oral proceedings. According to Article 13(1) and (3) RPBA, such an amendment may be admitted at the Board's discretion.

Under Article 13(1) RPBA, the discretion is to be exercised in view of, *inter alia*, the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy. Under Article 13(3) RPBA, the amendment should not be admitted if it raises issues which the Board or the other party cannot reasonably be expected to deal with without adjournment of the oral proceedings. A further relevant criterion, according to the established case law of the boards of appeal, is the *prima facie* relevance of the amendment.

The Board notes that the opponent's new objection could have been presented before. However, its introduction one month in advance of the oral proceedings does not raise complex issues that the Board and the proprietor cannot be reasonably expected to deal with during the oral proceedings. Similar objections based on P3-E1 and P1-E12 have been in the appeal proceedings since the filing of the opponent's statement of grounds. Moreover, in the context of these objections, the passages relevant to the disclosure of the features considered in the opponent's new objection had already been identified and considered (point 6.1.1, sixth paragraph and point 6.5 of the opponent's statement of grounds of appeal). Finally, P3-E1 and P1-E12 only consist of two and one pages respectively.

The new objection is *prima facie* highly relevant since P1-E12 expressly discloses the only feature of claim 1 of the main request that is not anticipated by the prior use described in P3-E1, as shown in more detail below. As a result, its admission also contributes to procedural economy.

For these reasons, the Board admits the new objection of lack of inventive step starting from P3-E1 in combination with P1-E12 under Article 13(1) and (3) RPBA.

- 5.2 The proprietor requested that the case be remitted to the Opposition Division if the new objection is admitted into the proceedings.

Under Article 111(1) EPC, a remittal to the department which was responsible for the decision appealed is at the Board's discretion. There is no absolute right of a party to have every issue decided by two degrees of jurisdiction, as long as the right to be heard according to Article 113(1) EPC is given before the Board.

In the present case, the Board notes that the impugned decision dealt with all the grounds for opposition raised by the opponent, including novelty and inventive step. In particular, it considered the issue of the validity of the priority claim, which is strictly related to the relevance of the new objection.

Moreover, national proceedings on issues of infringement and revocation are pending before the Stockholm District Court/Patent and Market Court in Sweden, on the basis of which the opponent requested accelerated processing before the Board with a letter



dated 1 June 2017.

For these reasons, under Article 111(1) EPC, the Board decides not to remit the case.

### 5.3 Main request

5.3.1 It is common ground that the prior use described in P3-E1 relates to the same technical field of the invention and comprises a number of the features defined in claim 1 of the main request.

5.3.2 More specifically, the prior use according to P3-E1 had made the following claimed features available to the public before the filing of the patent in suit:

a method for illuminating a medical surgery or examination room in connection with minimal invasive procedures (first column, first and fourth sentences), where a number of light sources are in operation in the surgery or examination room, where the light sources generate light with different colours (different zones with different light colours disclosed in the third column, second to seventh full sentences), where the light sources are controlled by at least one computer, where the computer regulates the light sources for generating light of different colours (implicit from the presence of a pre-programmed main panel - third column last full sentence - in the form of a touch screen - first column, third sentence), where the following steps of preparation are initially performed for pre-programming the computer based on a personnel evaluation of the minimal invasive procedure (preparation steps are clearly required for obtaining the pre-programmed main panel mentioned in the third column, last full sentence):

determining the different tasks to be performed before, during and after a surgery or examination in a surgery or examination room (soothing the patient before surgery, cleaning after surgery and tasks during surgery inherent from the presence of the surgeon, the anaesthesiologist and the operating nurse as mentioned in the third column, third to seventh full sentences), determining a colour specific effect desired for the personnel performing the specific tasks (third column, second full sentence), providing a number of lamps (the lamps shown in the second picture of P3-E1), with the following steps of preparation being initially performed by pre-programming the processor: determining the required personnel for each of these tasks (the personnel mentioned in the third column, third to fifth full sentences and, inherently, the personnel accompanying the patient and needed for cleaning according to the third column, sixth and seventh full sentences), analysing which zone of the room is used for the different tasks identified, dividing the room into a number of zones depending on the specific tasks and the specific personnel and assigning a specific colour to each lamp of the zones in order to achieve the desired effects (inherent to provide each function with its own zone colour as disclosed in the third column, second full sentence), which assigning provides green light behind monitors used by a surgeon during operation (third column, third full sentence and second picture), and a red light in a zone behind a surgeon during operation or examination (third column, fifth full sentence and second picture), illuminating the zones with light having the respective specific, assigned colours (third column, second to

seventh full sentences).

- 5.3.3 The proprietor argued that the prior use did not comprise the claimed steps of preparation. However, as specifically pointed out above, these steps are inherent otherwise the pre-programmed system as described in P3-E1 could not be obtained.

The proprietor further argued that the prior use did not disclose the provision of green light behind monitors used by a surgeon or red light in a zone behind a surgeon. However, P3-E1 expressly mentions that the area around a surgeon's screen is greenish for bringing out the contrasts on the screen (third column, third full sentence). If an area **around** the screen is to be greenish, i.e. illuminated with green light, **a part behind** the screen must necessarily be illuminated with the same green light. This is indeed consistent with what is shown in the second picture of P3-E1, in which an area around more than one monitor used by a surgeon during an operation is illuminated with green light. In the same picture a zone illuminated with red light in the background is also visible, which is consistent with the disclosure of the provision of reddish light for the operating nurse, as expressly mentioned in the third column, fifth full sentence. This zone illuminated with red light appears to be behind a surgeon in the picture. Regardless, the mere presence of such a zone in the background of an operating room inherently results in the provision of red light in a zone behind a surgeon for at least some time, since surgeons move during operations, as also pointed out by the opponent.

For these reasons, the Board shares the opponent's view that the only distinguishing feature of the subject-

matter of claim 1 of the main request over the prior use described in P3-E1 is that each of a number of lamps comprises at least three light sources.

- 5.3.4 The presence of three light sources in each of those lamps makes it possible to obtain virtually all visible colours with only one lamp.

Hence, starting from the prior use described in P3-E1, the distinguishing feature addresses the objective technical problem of effectively and flexibly achieving the light scenario disclosed in that document.

The problem formulated by the proprietor, i.e. providing an alternative to the lighting according to P3-E1 is not appropriate: P3-E1 does not disclose any such lighting as it is silent about the technical details of the light sources employed for providing the light scenario it proposes.

- 5.3.5 As the opponent pointed out, for the prior use disclosed in P3-E1, it is important to have a flexible, pre-programmable light system (third column, eighth and ninth full sentences of P3-E1). Hence, the skilled person wanting to provide the light scenario described in P3-E1 would have to choose appropriate light sources, in particular those light sources which are pre-programmable and flexible.

P1-E12 discloses a commercially available programmable lamp of the most flexible kind, capable of generating all colours or white light of any colour temperature (second paragraph).

Hence, P1-E12 discloses exactly the kind of light sources the skilled person would look for, based on the

disclosure of the prior use according to P3-E1.

For these reasons, providing a plurality of lamps of the kind according to P1-E12 as the number of lamps disclosed by the prior use according to P3-E1 is an obvious measure for the skilled person. Since the lamp according to P1-E12 comprises four light sources (RGBW), the subject-matter of claim 1 of the main request would be arrived at in an obvious way.

5.3.6 It follows that the patent cannot be maintained on the basis of the main request for lack of inventive step of the subject-matter of claim 1 (Article 56 EPC).

5.4 New first auxiliary request

5.4.1 Compared with claim 1 of the main request, claim 1 of the new first auxiliary request further specifies that a white or yellow light is provided in a zone around the equipment used by anesthetists.

This feature is known from the prior use according to P3-E1. In particular, in the third column, fourth sentence of that document, it is specified that "the anaesthesiologist has white light in order to be able to see well in connection with injection and in order to see the facial colour of the patient as naturally as possible".

The proprietor's argument that the patient was spaced apart from the equipment used by anesthetists in a surgery room is not accepted, since some of the equipment, such as respiratory tubes, is necessarily by the patient. Moreover, a zone "around the equipment" as defined in the claim includes the space where the anesthetists normally operate. Hence, the explicit

disclosure in P3-E1 that the anesthetist has white light anticipates that claimed feature.

- 5.4.2 It follows that, for the same reasons as apply to the main request, the patent cannot be maintained on the basis of the new first auxiliary request for lack of inventive step of the subject-matter of claim 1 (Article 56 EPC).

5.5 Ninth auxiliary request

- 5.5.1 Compared with claim 1 of the main request, claim 1 of the ninth auxiliary request further specifies that a step of assigning a specific colour to each of the zones also implies assigning a specific colour temperature to the selected colours.

However, assigning a specific colour inherently results in the assignment of the colour temperature of that specific colour. In particular, as far as white light is concerned, assigning a white light to a zone of the anaesthesiologist or for cleaning as described in P3-E1 inherently results in the assignment of the colour temperature of that specific assigned light.

The proprietor's argument that those white lights were not assigned by selecting a specific colour temperature is beside the point, since the claim does not define by means of which colour parameters the colours are materially obtained but rather only prescribes that specific colours with their colour temperatures are assigned to zones of a surgery or examination room.

- 5.5.2 Since the additional feature of claim 1 of the ninth auxiliary request is known from the prior use according to P3-E1, for the same reasons as apply to the main

request the patent cannot be maintained on the basis of the ninth auxiliary request for lack of inventive step of the subject-matter of claim 1 (Article 56 EPC).

## 5.6 Eleventh auxiliary request

- 5.6.1 Compared with claim 1 of the main request, claim 1 of the eleventh auxiliary request further specifies that a computerised light control system is provided and functionally connected to a touch screen monitor for displaying a user interface in which a number of icons are provided, the icons being programmed to initiate a pre-programmed setup of the lighting in response to a single press action on the icon.

As the opponent pointed out, P3-E1 describes a touch screen for controlling every technical function of the high-tech operating room (first column, third sentence and sentence bridging the fifth and the sixth columns). Clearly, this encompasses the control of the pre-programmed lighting (third column, ninth full sentence), which is the main object of P3-E1. Touch screens inherently involve the display of a number of icons responsive to a - most obviously - single press action on each icon.

- 5.6.2 It follows that, for the same reasons as apply to the main request, the patent cannot be maintained on the basis of the eleventh auxiliary request for lack of inventive step of the subject-matter of claim 1 (Article 56 EPC).

## 5.7 Eighteenth auxiliary request

- 5.7.1 Compared with claim 1 of the new first auxiliary request, claim 1 of the eighteenth auxiliary request

further specifies that pre-programmed setups are dependent on the predetermined position of a monitor configured for displaying the sequence of images from an endoscopic camera during an operation or examination.

Clearly, P3-E1 discloses at least one pre-programmed light scenario dependent on the predetermined position of the surgeon's monitor (third column, third and ninth full sentences). Such a monitor inherently displays the sequence of images from an endoscopic camera during an operation since it is employed in a room for laparoscopic surgery (first column, first sentence).

The Board agrees with the proprietor that P3-E1 does not describe different pre-programmed setups dependent on the predetermined position of the monitor. However, as the opponent pointed out, P3-E1 describes that the lighting system in use in the operating room was flexible and could be used for any operation type (third column, eighth full sentence).

Different operation types, particularly when performed by both right-handed and left-handed surgeons, obviously require different positions of the monitor in relation to the position of the surgical table.

The proprietor argued that the position of the surgical table could be changed in the room while maintaining a single pre-programmed light setup. The Board sees this as a merely theoretical option: changing the position of the surgical table would require the movement of virtually all the equipment in the room as the surgical table is the central element in a surgery room.

It follows that, in order to provide a flexible



lighting system for different operation types, as described in P3-E1, different pre-programmed light scenarios depending on the changing position of the surgeon's monitor with respect to a fixed surgical table - and hence in the room - are an obvious measure.

5.7.2 It follows that, also in view of the reasons applying to the new first auxiliary request, the patent cannot be maintained on the basis of the eighteenth auxiliary request for lack of inventive step of the subject-matter of claim 1 (Article 56 EPC).

6. Since none of the proprietor's requests are allowable, the patent has to be revoked.

## Order

### **For these reasons it is decided that:**

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chairman:



D. Hampe

E. Dufrasne

Decision electronically authenticated