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**Datasheet for the decision
of 16 June 2025**

Case Number: T 1949/22 - 3.4.01

Application Number: 18166313.9

Publication Number: 3395408

IPC: A61N5/10, G06K9/00

Language of the proceedings: EN

Title of invention:

PATIENT MONITORING

Patent Proprietor:

C-rad Positioning AB

Opponent:

Kaminsky, Michel

Headword:

Patient Monitoring System / C-rad Positioning AB

Relevant legal provisions:

EPC R. 111(2), 103(1)(a), 81(1) sentence 1, 124(1)

EPC Art. 113(1), 101(3)

RPBA Art. 11

Keyword:

Appealed decision - sufficiently reasoned (no) - substantial procedural violation (yes)

Reimbursement of appeal fee - substantial procedural violation (yes)

Remittal - fundamental deficiency in first instance proceedings (yes)

Decisions cited:

T 0094/84, T 0798/93, T 0142/95, T 0274/95, T 1536/08,
T 0388/12, G 0001/88, G 0010/91



Beschwerdekammern

Boards of Appeal

Chambres de recours

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0

Case Number: T 1949/22 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 16 June 2025

Appellant:

(Opponent)

Kaminsky, Michel
c/o COHAUSZ & FLORACK
Bleichstr. 14
40211 Düsseldorf (DE)

Representative:

Cohausz & Florack
Patent- & Rechtsanwälte
Partnerschaftsgesellschaft mbB
Bleichstraße 14
40211 Düsseldorf (DE)

Respondent:

(Patent Proprietor)

C-rad Positioning AB
Bredgränd 18
753 20 Uppsala (SE)

Representative:

Barker Brettell Sweden AB
Östermalmsgatan 87B
114 59 Stockholm (SE)

Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
7 June 2022 concerning maintenance of the
European Patent No. 3395408 in amended form.**

Composition of the Board:

Chairman

P. Scriven

Members:

T. Zinke

L. Bühler

Summary of Facts and Submissions

- I. With an interlocutory decision, the Opposition Division held that the patent could be maintained in amended form according to a new main request, filed during oral proceedings before them.
- II. The opponent appealed and requested that the decision be set aside and that the patent be revoked; alternatively, that the case be remitted to the Opposition Division. They also requested reimbursement of the appeal fee and, if the requests for revocation or remittal could not be followed, that oral proceedings be arranged (statement of grounds, section I).
- III. The opponent's request for remittal of the case and reimbursement of the appeal fee is based on an alleged substantial procedural violation before the Opposition Division (statement of grounds, section II).
- IV. In their reply, the proprietor requested that the appeal be dismissed, so that the patent would be maintained in amended form, in accordance with the interlocutory decision of the Opposition Division. They requested oral proceedings, if the Board were not minded to dismiss the appeal (reply to the appeal, section 1). The proprietor also requested remittal of the case to the Opposition Division, if the Board were minded to consider that the opponent's issues of

clarity (Article 84 EPC) or enablement (Article 83 EPC) should be assessed (reply, sections 3.6 and 4.3).

V. In a further submission, the opponent provided further arguments in response to the proprietor's reply.

VI. Claim 1 of the patent in amended form, as found allowable by the Opposition Division reads:

*A patient monitoring system (70) comprising:
a signal processing unit (72) configured to
process a reflection signal, representing
detected light reflected from at least a
portion of a patient (30) to cut off a
portion of said reflection signal
corresponding to detected light reflected
from a patient covering object (32) covering
at least a portion of a surface of said
patient (30) to get a processed reflection
signal corresponding to detected light
reflected from said surface of said patient
(30); and
a patient surface generating unit (76)
configured to generate a signal representing
at least a portion of said surface of said
patient (30) based on said processed
reflection signal, characterized in that it
further comprises:
a threshold determining unit (71) configured
to determine a cut-off threshold value based
on a signal representing a color of a skin of
said patient (30) and a signal representing a
color of said patient covering object (32);*

a patient monitoring unit (78) configured to generate a difference signal based on a comparison between said signal representing said at least a portion of said surface of said patient (30) and a reference signal representing a reference surface; and a source controller (77) connected to said patient monitoring unit (78) and a radiation source (10) configured to irradiate a target volume (35) within said patient (30), said source controller (77) is configured to control irradiation from said radiation source (10) based on said difference signal, wherein said signal processing unit (72) is configured to process said reflection signal based on said cut off threshold value to cut off said portion of said reflection signal corresponding to said detected light reflected from said patient covering object to get said processed reflection signal.

- VII. In a communication sent with a summons to oral proceedings, the Board expressed the preliminary opinion (Articles 15(1) and 17(2) RPBA) that the reasons in the decision of the Opposition Division were deficient (Rule 111(2) EPC), and that that was a fundamental deficiency so that the case should be remitted to the Opposition Division (Article 11 RPBA) and the appeal fee reimbursed in full (Rule 103(1)(a) EPC).

VIII. The relevant sections of the preliminary opinion read:

...

Outline of opponent's allegation of a
substantial procedural violation

1. According to the opponent, a substantial procedural violation occurred, since in the decision under appeal the Opposition Division did not deal with the objections of lack of clarity (Article 84 EPC) and of enablement (Article 83 EPC) (statement of grounds, section II).

2. The opponent stated (statement of grounds, paragraph bridging pages 2 and 3):

It becomes clear from the course of the proceedings outlined above, that there was a continued discussion, wherein after each deliberation or new main request, clearly only any additional attacks were discussed. As it is common practice, all the previous attacks, which had either already been overcome in view of the Opposition Division or on which the Opposition Division did not follow the Opponent, were of course not discussed again in detail, as the Opposition Division had already provided their opinion on such previous attacks, which had of course not changed. Nevertheless, all of such previous objections were of course maintained. It is clear from the minutes that none of the objections raised throughout the discussion

were in any way withdrawn. To the contrary, to the recollection of the Opponent and Representative it was always made clear that for procedural efficiency only "additional objections" not decided upon until that point are to be discussed, i.e. that any previous objections were maintained also for the two main requests filed during the oral proceedings. Apart from that it can be noted that it would be against any practical experience that an opponent would not maintain their objection with respect to a further request, which still contains the same feature.

Minutes of the oral proceedings before the Opposition Division

3. The opponent also indicated that they had requested a correction of the minutes of the oral proceedings before the Opposition Division (statement of grounds, page 3, first complete paragraph and Annex 1).

4. The Opposition Division declined the correction of the minutes.

Outline of proprietor's statement to the allegation of substantial procedural violation

5. In their reply to the statement of grounds, the proprietor argued that, during the oral proceedings, the opponent only

raised objections under Art. 100(a) EPC in conjunction with Art. 56 EPC in response to the third amended main request and (reply to statement of grounds, page 2, first paragraph, last sentence):

This means that no objections under Art. 100(b) EPC in conjunction with Art. 83 EPC or any objection under Art. 84 EPC were raised by the opponent against this new main request.

6. The proprietor concluded that no substantial procedural violation occurred and stated further (reply to statement of grounds, page 2, seventh paragraph):

The proprietor is also of the opinion that the right to be heard cannot be regarded as being violated if the opponent no longer maintains objections raised in the oral proceedings against a previous request for another request discussed in the oral proceedings. It is the responsibility of the opponent and of the Opposition Division or the proprietor to express which particular objections that the opponent would raise against the different requests discussed during the oral proceedings. A failure by the opponent to maintain an objection when discussing a new request, and merely raising other objections, does not constitute a violation of the right to be heard.

Summary of the proceedings before the
Opposition Division

7. With the notice of opposition, the opponent invoked grounds for opposition under Articles 100(a), (b), and (c) EPC (see EPO Form 2300 E under section VI (b)) and substantiated each of them in detail.

8. The argumentation with regard to Article 100(b) EPC was based on four arguments (notice of opposition, section V):

(a) The subject-matter of the independent claims covered signal processing of waves of any arbitrary wavelength or frequency. There was no disclosure, however, of how extremely low frequency (ELF) waves, mentioned in the specification in paragraph [0030], could be used to embody the invention. Thus, the patent lacked relevant information as to how the invention could be carried out over the whole width of the ranges defined in the claims.

(b) The independent claims covered embodiments, in which no information was given to distinguish between the reflection responses of the skin and the covering object, in order to determine a cut-off threshold. There was no disclosure how the defined system could distinguish the reflection responses before having determined this threshold.

(c) There was no disclosure that the process of cutting off a portion of a reflection signal could be realized in any of possible domains. In particular, it was not disclosed how it could be realized in the time or frequency domains. Only a disclosure for cutting off in the position space was given.

(d) With regard to dependent claims 6 and 10, it was not disclosed how a patient covering object in an image could be identified only based on an image of the patient (i.e. without any information about the patient covering object) and vice versa.

9. In reply to the notice of opposition, the proprietor argued against these objections and filed amended claim sets for auxiliary requests 1 to 3.

10. In a communication sent with a summons to oral proceedings, the Opposition Division, with regard to the main request, discussed these objections and agreed with the opponent concerning point (a) with regard to method claim 15, but not to system claim 1 and computer program claim 16. They also did not agree with points (b), (c), or (d) (summons, points 9 to 9.10). With regard to auxiliary request 1, the Opposition Division was of the preliminary and non-binding opinion that it would meet the requirements of the EPC, provided that an adapted description was provided (summons, point 15). In particular, the Opposition Division considered that the amendments to

the claims overcame the objections under Articles 100(b) and 83 EPC (summons, point 15.9).

11. In reply to the summons, the opponent provided counter-arguments to the Opposition Division's preliminary opinion with regard to points (a), (b), and (c) (response to summons, section I) with regard to the main request. When discussing auxiliary requests 1 to 3 (response to summons, section IV), no explicit reference was made to sufficiency of disclosure. With regard to auxiliary request 1, the opponent raised an objection of lack of clarity (Article 84 EPC) at least to independent claims 14 and 15, since the term "tone" did not appear to be a recognized technical term and could refer, for example, to the luminance of an object, to its lightness, or to reflected light intensity (response to summons, page 9, second paragraph). The opponent raised other objections in this reply, but they are not relevant to this communication.

12. With its reply to the summons, the proprietor filed amended claims sets for a new, (first) amended main request and for thirteen auxiliary request. With regard to the first amended main request, they argued that it corresponded to former auxiliary request 1, for which a positive preliminary opinion had already been given by the Opposition Division. The objections with regard to point (a) were overcome by the

amendments made. In particular, the independent claims now defined

that the reflection signal represents detected light reflected from at least a portion of a patient and that the cut-off threshold value is determined based on a signal representing a color or tone of a skin of the patient and a signal representing a color or tone of the patient covering object. The claims therefore no longer encompass the use of extremely low frequency (ELF) waves or indeed waves of any arbitrary wavelength of frequency. Furthermore, the claims no longer encompass any reflection response of the skin or of the patient covering object.

(proprietor's reply to the summons, section IV.a). On points (b) to (d), they provided arguments as to why they did not show a lack of sufficient disclosure (proprietor's reply to summons, sections IV.b to IV.d).

13. During oral proceedings before the Opposition Division, the opponent provided arguments as to why the amendments to the first amended main request did not overcome their objections of insufficient disclosure (minutes, sections 2 to 2.4). In particular, they argued that the amendments did not overcome the arguments with regard to point (a), since neither the introduction of "light" instead of "wave" nor the introduction of "color" or "tone" addressed this deficiency. In addition, the opponent

addressed points (b) and (d), already raised, and referred to their previous, written arguments.

14. According to the minutes of the oral proceedings, after a break for deliberations, the chairman announced the conclusion of the Opposition Division that claim 1 of the first amended main request is sufficiently disclosed (minutes, point 3).

15. Subsequently, clarity was discussed with the parties. The minutes state:

3.3 After a break for deliberations, the chairman announced the conclusion of the OD, that the MR does not meet the requirements of Art. 84 EPC, whereby the introduction of the unclear term "tone" creates an unambiguity [sic] in the independent claims 14 and 15 that leads to a lack of conciseness. Since according to the chairman none of auxiliary requests on file appeared to overcome the clarity objection, the proprietor was asked how he would like to proceed. The proprietor replied that he would like to file an amended set of claims based on the MR on file, and remove claims 14-16.

4 The chairman stated that for the sake of procedural efficiency, the proprietor could file the new request later and opened the floor for discussing novelty of claim 1 of the MR on file.

The Board understands that "ambiguity" was meant, rather than "unambiguity".

16. Then, novelty of the first amended main request was discussed and the Opposition Division concluded that claim 1 lacked novelty.

17. The proprietor filed a second amended main request, based on the first amended main request, wherein the term "tone", and the method claims were deleted (minutes, section 5).

18. After a discussion with the parties, the Opposition Division accepted the second amended main request into the proceedings, but concluded that it lacked novelty (minutes, sections 5.1 to 5.4).

19. Then, the proprietor submitted a third amended main request, based on auxiliary request 10, wherein the term "tone" and the method claims had been deleted (minutes, section 6).

20. The parties discussed inventive step of the third amended main request (minutes, sections 6.1 to 6.3).

21. Then, the chairman announced that claim 1 of the third amended main request involved an inventive step, and that the Opposition Division intended to maintain the patent in amended form, after receiving an adapted description. After a break, the proprietor

submitted an adapted description, whereupon the chairman asked the parties if the proceedings had run well in a technical sense, which was acknowledged; and the chairman announced the decision of the Opposition Division, that in view of the amendments made during oral proceedings, the third amended main request met the requirements of the EPC, so that the patent was maintained in amended form according to this third amended main request.

22. In the decision, the Opposition Division provided reasons with regard to admissibility of the opposition (decision, II. Reasons for the decision, section 10), admission of document D12 into the proceedings (sections 11 to 11.3), and inventive step of the third amended main request (sections 13 to 15.2).

23. The opponent requested a correction of the minutes and stated (correction request, page 3, first full paragraph):

It is thus respectfully requested to clarify in the minutes, that for the two new main requests filed during the oral proceedings only additional objections are discussed, which have not yet been discussed so far and that the previous objections with respect to sufficiency and clarity have been maintained by the Opponent.

24. The Opposition Division refused the correction of the minutes and stated:

The minutes already contain the essentials of the oral proceedings and correctly reflect the relevant statements of the parties. No objections under Articles 83 or 84 EPC were raised against the modified version of the main request based on which the interlocutory decision is based. The Opponent did not express that sufficiency and clarity objections discussed previously for a different version of the claims were maintained against the modified main request. The minutes cannot be therefore corrected as requested by the Opponent to include what they considered to be implicitly understood, namely that "the Opponent maintained his previous objection regarding sufficiency and clarity" against the modified version of the main request.

Preliminary opinion of the Board

25. The obligation to provide adequate reasoning in a decision, in accordance with Rule 111(2) EPC, is closely linked to the principle of the right to be heard (Article 113(1) EPC). A failure to do so is a substantial procedural violation justifying the reimbursement of the fee for appeal (cf. Case Law of the Boards of Appeal (CLBA), 10th edition, section V.A.11.6.9, in particular T 142/95). Substantial procedural

violations are fundamental deficiencies which, as a rule, are special reasons for remitting the case to the Opposition Division under Article 11 RPBA.

26. When only dealing, in the decision under appeal, with the question of inventive step for the third amended main request, the Opposition Division committed substantial procedural violations, because they did not provide an adequate reasoning with regard to other objections raised during the opposition proceedings, which is against Rule 81(1), first sentence EPC and Article 101(3) EPC (cf. CLBA, 10th edition, section V.A.9.4.4 b)).

27. Rule 81(1), first sentence EPC reads:

The Opposition Division shall examine those grounds for opposition which are invoked in the opponent's statement under Rule 76, paragraph 2(c).

28. As discussed above, in the opponent's notice of appeal - which is the statement under Rule 76, paragraph 2(c) EPC - the opponent raised grounds for opposition under Articles 100(a), (b), and (c) EPC.

29. According to the documents on file, the opponent never withdrew any of their grounds for opposition during opposition proceedings.

30. It is established jurisprudence of the Boards of Appeal that in the case of a

decision to reject an opposition both the grounds for opposition and the facts and evidence put forward in support of these grounds must be fully taken into account by the Opposition Division (see T 94/84, section 10.3, cited in approval in T 1536/08, section 2.1, and CLBA, 10th edition, section III.B. 2.4.5).

31. The Opposition Division, in their refusal to correct the minutes, and the proprietor, in their reply to the statement of grounds, seem to interpret the discussion during oral proceedings about a possible lack of inventive step of the third amended main request that the opponent had withdrawn their other grounds of opposition.

32. In T 274/95 (headnote 1., section 1.(a)) it was held that if a properly substantiated ground of opposition was not maintained by the opponent (there: by a statement to that effect was made by the opponent during oral proceedings), the Opposition Division was under no obligation to consider this ground further. In this decision it was undisputed that the opponent withdrew the ground of opposition under Article 100(c) EPC during the oral proceedings (T 274/95, section 1.(a)).

33. In the Board's view, a withdrawal of a ground of opposition has to be done unambiguously, either by an explicit withdrawal or by a party's behaviour or procedural step during the proceedings that

made its intention unequivocal, as it was decided with regard to withdrawals of requests (G 1/88, section 2.4; T 388/12, section 4.2; cf. CLBA, 10th edition, section III.I.5) or withdrawal of an opposition (T 798/93, section 2, CLBA, 10th edition, III.Q.3.1).

34. There is no hint to any explicit withdrawal of a ground for opposition.

35. There is also no hint to an unequivocal behaviour of the opponent that could lead to the assumption that any of the grounds for opposition were withdrawn. The opponent did not dispute that they did not discuss any other ground of opposition with regard to the third amended main request during oral proceedings. But their argumentation that they did not discuss the other grounds of opposition again, after the Opposition Division had already concluded about them for former pending main requests, is persuasive. That a party does not raise an issue that has already been concluded for each new amended main request that was filed, can not be considered an unequivocal behaviour meaning that these grounds for opposition are withdrawn. It is a sensible approach to enhance procedural expediency.

36. In addition, the way the chair of the Opposition Division directed the discussions and the admission of several amended main requests, which overcame the ground for opposition previously found to prejudice the

maintenance of the patent, leaves no doubt that the discussion following admitting the requests was restricted to objections that had not been addressed or considered previously. Thus, the opponent's understanding of the course of the discussion is perfectly justified and there is no room for any contention that the opponent should have explicitly maintained those grounds on which the Opposition Division had found in favour of the proprietor.

37. If the Opposition Division was not certain, whether any of the grounds of opposition was withdrawn, they should have asked for clarification and minuted the statement (Rule 124(1) EPC). In particular, when considering that withdrawing a ground for opposition would mean that the opponent no longer can invoke such ground on appeal the Opposition Division should not have simply assumed such a far-reaching procedural statement.

38. Providing only a reasoning on inventive step for the third amended main request in the decision also does not conform with Article 101(3) EPC, which also amounts to a substantial procedural violation.

39. Article 101(3) EPC reads:

If the Opposition Division is of the opinion that, taking into consideration the amendments made by the proprietor of the European patent during the opposition

proceedings, the patent and the invention to which it relates

- (a) meet the requirements of this Convention, it shall decide to maintain the patent as amended, provided that the conditions laid down in the Implementing Regulations are fulfilled;
- (b) do not meet the requirements of this Convention, it shall revoke the patent.

40. Hence, when amendments are made and the patent is maintained as amended, the Opposition Division has to verify whether "the requirements of this Convention" are met or not. This is also confirmed by decision G 10/91 (point 19):

In order to avoid any misunderstanding, it should finally be confirmed that in case of amendments of the claims or other parts of the patent in the course of opposition or appeal proceedings, such amendments are to be fully examined as to their compatibility with the requirements of the EPC (e.g. with regard to the provisions of Article 123(2) and (3) EPC).

41. Among the requirements of the EPC to be verified are the provisions of Article 123(2) and (3) EPC, Article 84 EPC, Article 83 EPC and Articles 52 to 57 EPC and Rule 80 EPC.

42. As mentioned, from these requirements only the reasons for inventive step can be found in the decision. From the minutes it is clear that the other requirements were

discussed during oral proceedings when discussing formerly filed other main requests and that - probably - the Opposition Division had verified these requirements. But this is not enough. The verification with its result and reasoning has to be included in the decision, because otherwise these results and reasoning cannot be understood by the parties or the public, and it cannot be reviewed during appeal proceedings (see CLBA, 10th edition, section III.K.3.4.1). This is particularly important for those provisions, that were discussed in detail during the opposition proceedings - where the Opposition Division is aware of contentious issues - as for the provisions of Article 83 and 84 EPC in the present case.

43. Since the reasons in the decision of the Opposition Division are deficient (Rule 111(2) EPC), and this is a fundamental deficiency, the case will be remitted to the Opposition Division (Article 11 RPBA) (cf. CLBA, 10th edition, section V.A.9.4.4 b)).

Reimbursement of the appeal fee

44. Since a substantial procedural violation occurred before the Opposition Division, which is also the main reason for the appeal, reimbursement of the appeal fee in full is envisaged (Rule 103(1)(a) EPC).

Conclusion

45. The decision of the Opposition Division should be set aside.

46. The case should be remitted to the Opposition Division for further prosecution.

47. The appeal fee should be reimbursed in full (Rule 103(1)(a) EPC).

Further steps

48. In the event that the respondent (proprietor), in the light of the aforementioned preliminary conclusion, and the Board's intention to remit the case to the Opposition Division for further prosecution, withdraw their auxiliary request for oral proceedings, a decision concerning the remittal of the case to the Opposition Division for further prosecution and the reimbursement of the appeal fee could be issued in writing, within a short period of time.

49. Should the respondent wish to withdraw their request for oral proceedings, they are asked to inform the Board accordingly as soon as possible, to allow the proceedings to be continued without undue delay.

IX. After notification of this communication, the proprietor withdrew their request for oral proceedings:

...

The respondent (proprietor) hereby withdraws our auxiliary request for oral proceedings in response to the Summons to attend oral proceedings.

- X. No substantive submission was made, by any of the parties, subsequent to the Board's communication.
- XI. The oral proceedings were cancelled.

Reasons for the Decision

- 1. The communication, as reproduced above in its relevant parts, expressed and explained the Board's preliminary opinion.
- 2. Neither party contested or otherwise commented on the preliminary opinion. Both had the opportunity of doing so.
- 3. The proprietor withdrew their request for oral proceedings, and the condition for the opponents' request for oral proceedings is not met. Consequently, there is no need to hold oral proceedings and this decision is handed down after a wholly written procedure (Article 12(8) RPBA).
- 4. The Board does not see any reason to depart from its preliminary opinion.

5. The Board concludes that the reasons in the Opposition Division's decision are deficient (Rule 111(2) EPC), that this is a fundamental deficiency, that the case is to be remitted to the Opposition Division (Article 11 RPBA), and that the appeal fee is to be reimbursed in full (Rule 103(1) (a) EPC).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Opposition Division for further prosecution.
3. The appeal fee is reimbursed in full (Rule 103(1) (a) EPC) .

The Registrar:

The Chairman:



T. Buschek

P. Scriven

Decision electronically authenticated