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**Datasheet for the decision
of 13 February 2008**

Case Number: T 0318/06 - 3.4.01
Application Number: 01303853.4
Publication Number: 1205766
IPC: G01T 1/11
Language of the proceedings: EN

Title of invention:

Method and device for recording polarized electromagnetic radiation of inactivated strain of pathogenic microorganisms onto a crystal, method and device for changing activity of strain of pathogenic microorganisms, method for eliminating strain of pathogenic microorganisms from human or animal organism

Applicant:

PETRENKO, Sergei Ivanovich

Headword:

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Relevant legal provisions:

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Relevant legal provisions (EPC 1973):

EPC Art. 83
EPC R. 115(2)
RPBA Art. 15(3)

Keyword:

"Sufficiency of disclosure (no)"

Decisions cited:

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Catchword:

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Case Number: T 0318/06 - 3.4.01

D E C I S I O N
of the Technical Board of Appeal 3.4.01
of 13 February 2008

Appellant: PETRENKO, Sergei Ivanovich
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Representative: Boeckh, Tobias
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Decision under appeal: Decision of the Examining Division of the
European Patent Office posted 22 September 2005
refusing European application No. 01303853.4
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: B. Schachenmann
Members: H. Wolfrum
F. Neumann

Summary of Facts and Submissions

- I. European patent application 01 303 853.4 (publication No. 1 205 766) was refused by a decision of the examining division dispatched on 22 September 2005, on the ground of insufficiency of disclosure (Article 83 EPC 1973) and lack of susceptibility of industrial application (Article 57 EPC 1973) of the application.
- II. The applicant lodged an appeal against the decision on 7 November 2005. The prescribed fee was paid on 9 November 2005. On 2 February 2006 a statement of grounds of appeal was filed.
- III. On 21 September 2007 the appellant was summoned to oral proceedings to take place on 13 February 2008.

In a communication dated 15 October 2007 the Board provided a preliminary assessment of the case and, *inter alia*, indicated that it did not find fault with the reasoning given in the contested decision.
- IV. The appellant did not respond to the Board's communication. Its representative informed the Board by facsimile of 11 February 2008 that he, and all other European patent attorneys in his firm, had resigned their representation and gave an address of a new representative to whom all further communications should be sent and who would be representing the appellant at the oral proceedings.
- V. Oral proceedings were held on 13 February 2008 in the absence of the appellant and any representative.

On the same day, the new representative gave notice by facsimile that his firm had taken over the representation.

VI. The appellant has requested in writing that the decision under appeal be set aside and the case be remitted to the examining division for grant of a patent on the basis of claims 1 to 17 filed with a letter dated 12 October 2004 or, at least, that the decision under appeal be set aside with respect to the findings concerning Articles 83 and 57 EPC 1973.

VII. Claim 1 on file reads as follows:

"1. A method for recording polarized electromagnetic radiation of an inactivated strain (16) of pathogenic microorganisms, characterized in that

a strain of pathogenic microorganisms deposited in a vessel (2) is acted on with an extreme agent selected from the group consisting of ultraviolet radiation with a wavelength within the limits of from 0.1 to 0.3 μm for a period of time t of from 10 to 300 sec, viruses and toxic substances,

during the action the strain of pathogenic microorganisms is converted from an active state to an inactivated state, wherein the potential on a cellular shell of the microorganism and the conformation of membrane and transmembrane molecules positioned on this shell change,

the strain of inactivated pathogenic microorganisms is placed directly adjacent to a means (3) for recording and reproducing a spectrum of radiation of biological cells,

at least one cycle of changing the temperature of the means for recording and reproducing a spectrum of radiation of biological cells within the range of from

10 °C to 400 °C is carried out and while the temperature on said means for recording and reproducing a spectrum of radiation of biological cells is changing, polarized electromagnetic radiation with a wavelength in the range of from 3 μm to 10 mm of the inactivated strain of pathogenic microorganisms is recorded, wherein stable energetic states are formed on the means (3) for recording and reproducing a spectrum of radiation of biological cells, by means of which the means for recording and reproducing a spectrum of radiation of biological cells is capable of radiating similar polarized electromagnetic waves during subsequent cycles of changes of its temperature."

Further independent claims refer, without exception, to methods and devices making use of a means for recording and reproducing a spectrum of radiation of biological cells that is capable of radiating polarized electromagnetic waves similar to the ones which were recorded, such as claim 7, which is directed to "*A method for changing the activity of a strain (16) of pathogenic microorganisms*", claim 8, which concerns "*A device for recording polarized electromagnetic radiation of an inactivated strain of pathogenic microorganisms*", claim 13, which relates to "*A device for changing the activity of a strain of pathogenic microorganisms*", and claim 17, which refers to "*A method for eliminating a strain of pathogenic microorganisms from the organism of a human being or animal*".

Reasons for the Decision

1. In the following, reference is made to the provisions of the EPC 2000, which entered into force as of 13 December 2007, unless the former provisions of the EPC 1973 still apply to pending applications.
2. The appeal complies with the requirements of Articles 106 to 108 and Rule 64 EPC 1973 and is, therefore, admissible.
3. *Sufficiency of disclosure (Article 83 EPC 1973)*
 - 3.1 The invention according to present claim 1 seeks to record polarized electromagnetic radiation allegedly arising from inactivated pathogenic microorganisms by means of a means for recording and reproducing a spectrum of radiation of biological cells.
 - 3.2 The examining division rightly pointed out that it was not credible that cells of microorganisms of whatever nature would emit electromagnetic radiation as a polarized wave, nor were means conceivable which would be capable of preserving a polarized state and spectrum of absorbed electromagnetic radiation.
 - 3.3 In the statement setting out the grounds of appeal, the appellant basically argued that cells of microorganisms showed an electric field gradient at its plasma membrane which led to a polarization of the membrane's proteins which would thus emit polarized electromagnetic waves.

As regards the operation of means for recording and reproducing a spectrum of radiation of biological cells, experimental proof existed for liquid crystals. For

instance, fidelity of reproduction of absorbed electromagnetic radiation was confirmed by diagnoses of patients by comparison of the effect of ampouled nosodes and liquid crystals on which electromagnetic radiation of said nosodes had been recorded.

Finally, the spectrum of radiation emitted from biological cells comprised, as any non-polarized electromagnetic radiation, a multitude of linearly-polarized waves which in turn originated from two right-polarized and left-polarized waves of one frequency and one amplitude emitted from the cells of the inactivated pathogenic microorganisms.

3.4 The appellant's arguments have been found unconvincing.

The processes and effects in respect of recording and reproducing of polarized electromagnetic radiation from an inactivated strain of pathogenic microorganisms as claimed and discussed in the application documents as well as the explanations given in the statement of grounds of appeal are indeed unfathomable in that they contravene well established principles of physics and observations in the field of spectroscopy.

Notwithstanding serious doubts as to the existence of the alleged spontaneous biophotonic radiation from inactivated strains of pathogenic microorganisms, it is to be noted that any radiation which would be emanating from any kind of biological cells could only be due to naturally stochastic events leading to a spontaneous emission of photons. However, as a matter of principle, photons spontaneously emitted from a radiation source are not correlated with each other and thus cannot form a

polarized electromagnetic wave, in any physically meaningful interpretation of the term "polarized". In fact, the theory developed in the application and further described in the statement of the grounds of appeal in order to render plausible the polarized nature of the biophotonic radiation is apparently based on a fundamental misunderstanding as regards two different concepts of "polarization" used in physics, in that it confuses a static polarization of matter due to a static electric field (allegedly occurring at the cell membranes of inactivated strains of pathogenic microorganisms), on the one hand, and a geometric polarization which a wave of a high frequency electromagnetic radiation (ie an ensemble of photons) may possess.

Moreover, no physical mechanism is known which would allow to preserve coherence between absorption of any type of electromagnetic radiation by any available kind of ordinary material (and specifically the crystal materials mentioned in the application or the liquid crystal material referred to in the statement of the grounds of appeal) and a delayed reemission of radiation by such material, as it is alleged for the "*means for recording and reproducing a spectrum of radiation of biological cells*". Thus, even if, at the time of absorption by any kind of ordinary matter, radiation may have possessed a particular state of polarization, any conceivable kind of reemitted radiation (ie from stable or metastable excited states of such matter, be it due for instance to fluorescence, phosphorescence or thermoluminescence) would neither be polarized nor would it reflect the spectral composition of the absorbed radiation (but rather the properties of the electronic system of the absorbing material).

3.5 To sum up, the technical difficulties which a skilled person faces when attempting to record a non-existing physical phenomenon, ie the polarization of radiation spontaneously emitted by biological cells, a phenomenon, moreover, which, if it existed, could not, as a matter of principle, be stored and reproduced by available physical means, let alone the materials disclosed in the present application, are insurmountable, given the fact that the notional skilled person can master only technology which exists and obeys the laws of physics.

Therefore, the Board has arrived at the conclusion that the technical information provided by the application documents as a whole do not enable a skilled person to practically implement the claimed subject-matter.

4. In conclusion, the appellant's request is not allowable.

5. *Procedural matters*

5.1 Rule 115(2) EPC states that "if a party duly summoned to oral proceedings before the European Patent Office does not appear as summoned, the proceedings may continue without that party". Accordingly, Article 15(3) RPBA assesses that "the Board shall not be obliged to delay any step in the proceedings, including its decision, by reason only of the absence at the oral proceedings of any party duly summoned who may then be treated as relying only on its written case."

5.2 In the present case, the appellant had been duly summoned more than four months before the oral proceedings. The Board had no information that the fact that the appellant

was not represented at the oral proceedings would have been occasioned by a change of representation which had taken place very shortly before the oral proceedings at the appellant's initiative. At any rate, since the appellant himself bears full responsibility for this course of actions, the Board, based on Rule 115(2) EPC and Article 15(3) RPBA, has seen no reason to postpone the oral proceedings nor to abstain from deciding the case because of the appellant's absence.

Order

For these reasons it has been decided that:

The appeal is dismissed.

The Registrar

The Chairman

R. Schumacher

B. Schachenmann