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**Datasheet for the decision
of 21 December 2022**

Case Number: T 0039/21 - 3.2.01

Application Number: 15725173.7

Publication Number: 3142503

IPC: A24F47/00, A61M15/00, A61L9/03,
A61M15/06, F22B1/28, H05B6/06,
A61M11/04, H05B6/10

Language of the proceedings: EN

Title of invention:
IMPROVED VAPORIZER DEVICE

Patent Proprietor:
Loto Labs, Inc.

Opponent:
Philip Morris Products S.A.

Headword:

Relevant legal provisions:
EPC Art. 123(2), 84, 54, 56
RPBA 2020 Art. 12(4)

Keyword:

Amendments - allowable (yes)

Claims - clarity (yes)

Novelty - (yes)

Inventive step - (yes)

Amendment to case - reasons for submitting amendment in appeal proceedings (yes) - amendment admitted (yes)

Decisions cited:

Catchword:



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Case Number: T 0039/21 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 21 December 2022

Appellant: Loto Labs, Inc.
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 23 November
2020 revoking European patent No. 3142503
pursuant to Article 101(3)(b) EPC.**

Composition of the Board:

Chairman G. Pricolo
Members: M. Geisenhofer
S. Fernández de Córdoba

Summary of Facts and Submissions

- I. The appeal was filed by the patent proprietor (appellant) against the decision of the opposition division to revoke the European patent EP 3 142 503.
- II. The opposition division decided that
- (a) the subject-matter of claim 1 of the main request (patent as granted) lacks novelty over documents

D1 WO 2014/023967 A1 and
D7 WO 2015/177045 A1,

respectively;
 - (b) the subject-matter of claim 1 of auxiliary request 1 also lacks novelty over D1 and D7, respectively;
 - (c) the subject-matter of claim 1 of auxiliary requests 2 and 4 - 7 extended beyond the content of the application as filed; claim 1 of auxiliary request 7 also lacked clarity.
 - (d) Auxiliary request 3 was not admitted.
- III. With letter dated 18 October 2022, the respondent (opponent) withdrew all requests and objections filed in appeal proceedings, including their request for oral proceedings, and stated that they accepted the proprietor's requests, particularly the auxiliary request 3a filed with the statement of grounds of appeal.

IV. Following a communication of the Board pursuant to Rule 100(2) EPC indicating that auxiliary request 3a seemed allowable, the appellant (patent proprietor) requested that the decision under appeal be set aside and that the patent be maintained in amended form on the basis of auxiliary request 3a filed with the statement of grounds of appeal and withdrew all requests ranking higher than auxiliary request 3a previously filed in appeal.

V. Independent claim 1 of the auxiliary request 3a reads as follows:

*"A vaporizer device (100) comprising:
a cartridge (107) configured to hold a vaporizable substance;
a wick element (400, 500, 600) coupled to and located within the cartridge (107), wherein the wick element (400, 500, 600) is configured to contact the vaporizable substance located in the cartridge (107); wherein the wick element (400, 500, 600) comprises a susceptor material,
wherein the cartridge (107) comprises a reservoir, and wherein the wick element (400, 500, 600) is configured to transfer the vaporizable substance from the reservoir (803) based on a capillary action of the wick element (400, 500, 600);
characterized in that the vaporizer further comprises:
an induction heating element (121) inductively coupled to the wick element (400, 500, 600) and not in contact with the wick element (400, 500, 600), wherein the cartridge (107) is positioned such that the induction heating element (121) is around at least a portion of the cartridge (107), and wherein the wick element (400, 500, 600) is at least partially surrounded by the*

*induction heating element (121), wherein the induction heating element (121) is an induction coil; and wherein the wick element is configured to heat the vaporizable substance based on induction heating of the wick element by the induction heating element wherein the induction heating element (121) receives an alternating current and creates an electromagnetic induction field around the wick element (400, 500, 600), and wherein the wick element (400, 500, 600) generates heat based on the electromagnetic induction field wherein the device further comprises a current generating device, a microprocessor (1704) and at least one sensor, wherein the microprocessor is configured to receive information from the sensor and adjust a heating profile applied to the wick element (400, 500, 600) by the induction coil, wherein the sensor is able to detect or calculate:
a pressure at a plurality of locations within the vaporizer device or of the vapor exiting the device;
and/or
a temperature of components of the vaporizer device."*

- VI. The appellant essentially submits that auxiliary request 3a is based on auxiliary request 7 filed during opposition proceedings, however, with further amendments that remedy the objections of added subject-matter and lack of clarity underlying the contested decision. Furthermore, the claimed subject-matter is novel over D1 and/or D7, and inventive starting from D1 as closest prior art.

Reasons for the Decision

Admissibility of auxiliary request 3a

1. As pointed out in the communication of the Board pursuant to Article 15(1) RPBA 2020 dated 10 December 2021 (see point 6), auxiliary request 3a, filed by the appellant with the statement of grounds of appeal and based on auxiliary request 7 filed during opposition proceedings, is a legitimate reaction to the opposition division's decision based on specific objections of added subject-matter raised only during oral proceedings. Furthermore, auxiliary request 3a, as explained herein below, overcomes the objections underlying the decision under appeal.

Under these circumstances, the Board exercises its discretion in the sense of admitting auxiliary request 3a into the appeal proceedings (Article 12(4) RPBA 2020).

Amendments

2. The amendments in claim 1 of auxiliary request 3a comply with the requirements of Article 123(2) EPC.
- 2.1 Claim 1 of the auxiliary request 3a is based on originally filed claims 1, 2, 11, 12 and 14, in combination with paragraphs [0036] and [0043] of the general part of the originally filed description and the description of the embodiment described in paragraphs [0059] and [0060].
- 2.2 The opposition division considered (see point 11.1 of the impugned decision) that auxiliary request 7 did not meet the requirements of Article 123(2) EPC because

there was no basis in the application as filed for the features "wherein the sensor is able to detect or calculate: a pressure at one or more locations within the vaporizer device or of the vapor exiting device" and "a temperature of one or more components or locations within the vaporizer device".

According to the reasoning of the opposition division, paragraphs [0059] and [0060] of the application as filed disclosed the ability of the sensor to detect pressure, but only at a plurality of locations and not (as claimed) at one location. Moreover these passages did not disclose the ability of the sensor to detect a temperature of one component or location (as claimed), but only of several components or locations. Further, these passages did not provide disclosure for an ability of the sensor to measure temperatures "*within*" the vaporizer device, but only "*near the components of*" the device.

- 2.3 As compared to auxiliary request 7 underlying the decision under appeal, in claim 1 of auxiliary request 3a the above-mentioned features are replaced by the features "*wherein the sensor is able to detect or calculate: a pressure at a plurality of locations within the vaporizer device or of the vapor exiting the device; and/or a temperature of components of the vaporizer device*". Accordingly, the objections of the contested decision no longer apply; moreover this wording is recited *expressis verbis* in paragraph [0059] of the application as filed.

Clarity

3. Claim 1 of the auxiliary request 3a is sufficiently clear in the sense of Article 84 EPC.

- 3.1 The opposition division considered (see point 11.4 of the impugned decision) that claim 1 of auxiliary request 7 was not clear because it referred to an "*optimal temperature profile*" which was undefined.

This objection is moot because this expression is no longer present in claim 1 of auxiliary request 3a.

- 3.2 The opposition division further objected that the claim attempted to define the sensor by reference to "*the vapor exiting device*", this being an entity that the claim failed to define. This objection is also moot as the claim now refers to the vapor exiting the device.

Novelty

4. The Board is satisfied that the claimed subject-matter is novel.

In the decision under appeal, novelty was objected in view of D1 and D7 (but for other requests).

- 4.1 Novelty of the subject-matter of claim 1 over D1 must be acknowledged because this document does not disclose the feature that the sensor is able to detect or calculate:

a pressure at a plurality of locations within the vaporizer device or of the vapor exiting the device;
and/or

a temperature of components of the vaporizer device.

- 4.2 Document D7 is also not prejudicial to the novelty of the claimed subject-matter because it does not disclose, in particular, that the microprocessor adjusts a heating profile applied to the wick element

by the induction coil based on the signal of the sensor.

Inventive step

5. Finally, the Board is satisfied that the subject-matter of claim 1 of the auxiliary request 3a complies with the requirements of Article 56 EPC.

5.1 Document D1 is considered to represent the closest prior art since document D7 is prior art under Article 54(3) EPC only.

5.2 The sensor used according to claim 1 allows to adjust the heating profile applied to the wick depending on the substance that is vaporized and such that it fits the user's preferences (cf. paragraph [0060] of the description as originally filed).

5.3 Such an additional adaptation going beyond the adjustment of the current through the induction coil depending on the susceptor material used in the wick element (as disclosed in D1) is not mentioned in any of the documents cited in the present procedure and hence is not obvious.

5.4 Using a sensor being able to detect or calculate a pressure at a plurality of locations within the vaporizer device or of the vapor exiting the device and/or a temperature of components of the vaporizer device must hence be considered to be inventive.

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 with the order to maintain the patent with the following claims and a description to be adapted thereto:

Claims:

No. 1 - 14 according to the auxiliary request 3a filed with the statement of grounds of appeal on 18 March 2021

The Registrar:

The Chairman:



A. Voyé

G. Pricolo

Decision electronically authenticated