

## Deckblatt Übersetzung

### Daten der Übersetzung:

Court/Gericht:	Bundesgerichtshof
Date of Decision / Datum der Entscheidung:	2015-02-26
Docket Number / Aktenzeichen:	X ZR 37/13
Name of Decision / Name der Entscheidung:	Bildstrom

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**Arbeitskreis**  
**Patentgerichtswesen**  
in Deutschland e.V.



**FEDERAL COURT OF JUSTICE**  
**IN THE NAME OF THE PEOPLE**  
**JUDGMENT**

X ZR 37/13

Pronounced on:  
26 February 2015  
Wermes  
Judicial Secretary as  
Clerk of the court  
registry

in the patent nullity proceedings

Bildstrom/  
Image stream

EPC Art. 52(2) lit. d; Art. 56

Instructions that relate to the (visual) reproduction of information, but which do not focus on the communication of specific content or its communication in a special presentation, but rather on the presentation of image content in a manner that takes into account the physical conditions of human perception and reception of information and is aimed at enabling, improving or expediently shaping the perception of the information shown by humans in a specific manner in the first place, serve to solve a technical problem by technical means (continuation of Federal Court of Justice, judgment of 26 October 2010 X ZR 47/07, GRUR 2011, 125 Reproduction of topographical information and of 23 April 2013 X ZR 27/12, GRUR 2013, 909 Vehicle navigation system).

Federal Court of Justice, judgment of 26 February 2015 - X ZR 37/13 –  
Federal Patent Court

The X. Civil Senate of the Federal Court of Justice, following the oral hearing on 26 February 2015, attended by the judges Gröning, Dr. Bacher, Hoffmann and Dr. Deichfuß as well as the judge Dr. Kober-Dehm

ruled that:

On appeal by the defendant, the judgment of the 5th Senate (Nullity Senate) of the Federal Patent Court, pronounced on 16 January 2013, is amended.

The action is dismissed.

The costs of the legal dispute shall be borne by the plaintiff.

By operation of law

Facts of the case:

1           The defendant is the owner of European patent 1 474 927 (patent in suit), which was granted with effect for the Federal Republic of Germany, was filed on 12 February 2003, and claims priority from 12 February 2002. The patent in suit relates to a method (claims 1 to 6) and a system (claims 7 to 10) for displaying an image stream.

2           The method language of the subsidiary claims 1 and 7 reads:

"1. A method for displaying an image stream, the method comprising:

receiving images acquired by a swallowable capsule (40), the images forming an original image stream; and displaying simultaneously on a monitor (300) at least two subset image streams, each subset image stream including a separate subset of images from the original image stream.

7. A system for displaying an image stream, the system comprising:

an image storage means (21) for accepting an original image stream; and an image display means (300) for displaying at least two subset image streams, each subset image stream including a separate subset of images from the original image stream, characterized that the at least two subset image streams can be displayed on the image display means (300) simultaneously."

3           Claims 2 to 6 are directly or indirectly related to claim 1, claims 8 to 10 to claim 7. The plaintiff claimed that the subject matter of the patent in suit lacked technicality, was excluded from patent protection and, moreover, was not patentable. The defendant defended the patent in suit as granted and with five auxiliary requests in a limited manner. The Patent Court declared the patent in suit null and void. This is the subject of the defendant's appeal, which continues to seek dismissal of the action. The plaintiff opposes the appeal.

Grounds of the decision:

4           The admissible appeal of the defendant leads to the dismissal of the  
action for annulment with amendment of the contested judgment.

5           I.       The patent in suit concerns a method and a system for the  
representation of image streams.

6           1.       According to the description of the patent in suit, an image stream  
is composed of a sequence of still images. Such an image stream could  
originate from various sources and could be obtained, for example, when an  
ingestible capsule equipped with a camera, as known from US patent 5 604 531  
(D2), captures images of the lumen (or cavity) of an organ, such as the  
gastrointestinal tract, and transmits them to an external recording system as the  
capsule moves through the body. This would allow high numbers of images to  
be collected for viewing and arranged in sequence. An image stream containing  
several thousand frames could be presented to the user for review. The user  
would try to review the image stream quickly and effectively without losing  
important information. The rate at which a user can effectively review an image  
stream is limited by a physiological averaging effect. The value is about 15  
frames per second, but can vary depending on the person of the user and the  
type of image stream.

7           The description of the patent in suit presents several video media control  
and display systems known in the state of the art. It refers to international  
application WO 99/40587 (D3), which discloses a video media control system  
for sending commands to a video storage device to cause a desired position of  
the video. U.S. Patent 4,698,664 (D4) discloses an audiovisual monitoring  
system in which an analog data stream is monitored as a sequence of blocks.  
U.S. Patent 5 697 885 (D1) describes an endoscope for recording and  
displaying temporally sequential images and mechanisms for selecting rigid  
images from the image sequences.

8           2.       With this background, the technical problem is to provide a system  
and method for improved display of an image stream.

- 9           3.     To solve this problem, the patent in suit proposes a method and a system having the following features:

Claim 1:

A method for displaying an image stream comprising the following steps:

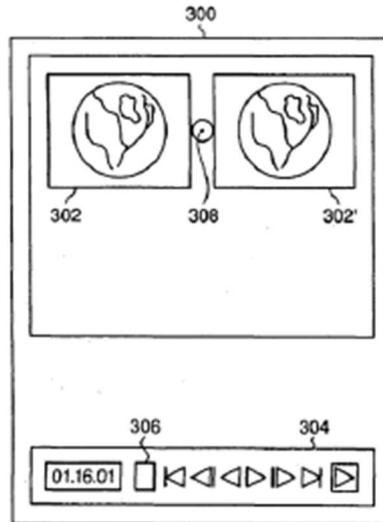
- M1.1 Receiving images captured by an engulfable capsule (40), wherein
- M1.2 said images forming an original image stream, and
- M1.3 simultaneously displaying at least two subset image streams on a monitor (300), wherein
- M1.4 each subset image stream comprising a separate subset of images from the original image stream.

Claim 7:

A system for displaying an image stream comprising:

- M7.1 an image storage means (21) for storing an original image stream,
- M7.2 an image display means (300) for displaying at least two subset image streams.
- M7.3 Each subset image stream contains a separate subset of images from the original image stream.
- M7.4 The at least two subset image streams may be displayed simultaneously on the image display means (300).

- 10           Figure 2 of the patent in suit, shown below, exemplifies the display of the image stream in a multiple image stream mode.



**FIG. 2**

11           4.     Some features require explanation:

12           a)     Claim 1 relates to a method of receiving images captured by a swallowable capsule. In this regard, the description refers in paragraph 2 to D2, which describes such a device. It follows from this that the device is a capsule which is swallowed by the patient and then travels independently through the parts of the body to be examined, without continuous control by medical personnel and without physical connection to the outside. It is true that the description emphasizes several times that obtaining the image stream through a swallowable capsule is treated only by way of example (para. 2, para. 11, para. 22) and that the images can also be acquired by other means, such as a conventional endoscope, stent, catheter, or needle (para. 22). However, these devices are explicitly contrasted with a capsule in paragraph 22 of the description ("...need not be contained in a capsule, but may be contained in any other vehicle suitable for traversing a lumen in a human body, such as an endoscope..."). Accordingly, patent claim 1 relates only to a method for displaying an image stream that has been captured by a swallowable capsule in the sense mentioned. In contrast, patent claim 7 does not contain such a limitation, but leaves open the way in which the original image stream was obtained.

13           b)     The skilled person, a graduate engineer (FH) in electrical engineering working in the field of image processing, transmission and display,

associates an original image stream with an image sequence in which the images are arranged in a specific order. From a technical point of view, an original image stream is not to be understood as an arbitrary collection of individual images, but rather as a predetermined sequence of individual images, in particular ordered in time, such as occurs in film recordings. The ordered sequence of images, when displayed at a corresponding speed, causes the viewer to perceive the image stream as a sensory-uniform film.

14           c)       According to the teaching of the patent in suit, at least two subset image streams are formed from this original image stream, each of which contains a subset of the images of the original image stream. The way in which this separation takes place is left open in principle by the patent in suit (cf. para. 31), but it is clear from the designation as subset image stream that an ordered sequence of the images of the respective subset is maintained. After separation, there may be subsets that do not overlap. This is the case, for example, when frames 1, 3, 5, etc. of the original image stream form one subset, and frames 2, 4, 6, etc. form the other subset (cf. para. 25). However, as subclaim 2 makes clear, cases in which the subsets from which at least two subsets are formed overlap are also covered (cf. para. 31 at the end).

15           d)       According to the teaching of the patent in suit, the display of a subset image stream is to be understood as the successive display of the ordered individual images of which the subset image stream is composed. By the simultaneous display of at least two subset image streams on a monitor it is meant that in different areas of the monitor a more or less rapid sequence of the images is displayed simultaneously in the given order. The patent in suit contrasts - for instance in paragraph 34 - the display of an image stream with the display of single images adjacent to an image stream ("... a still image can be displayed adjacent to the image streams"). In this case, not several (subset) image streams are displayed simultaneously, but one image stream and fixed single images next to it. In contrast, the teaching of the patent in suit is based on the assumption that with the simultaneous display of subset image streams, each consisting of a subset of the entirety of the images of the original image stream, the effectiveness of the evaluation is increased without a loss of quality, even if this may require a certain amount of practice (para. 29).

16 II. The Patent Court gave the following main reasons for its decision:

17 The teaching of subsidiary claims 1 and 7 had a technical character and was not excluded from patentability as a therapeutic treatment method according to Art. 53c EPC. The system according to claim 7 was not new compared to D1 and the method according to claim 1 had been suggested to the skilled person in any case.

18 D1 relates to an endoscope for recording and displaying temporally successive images and thus for displaying an image stream. The image signals obtained by the recording head of the endoscope would be converted to video signals and displayed on a monitor. In particular, an implemented recording device would enable simultaneous viewing of images that had been separated from the temporal sequence of images. With the device described therein, at least two image areas could be displayed simultaneously. Such image reproduction requires that the image stream is divided into at least two subset image streams, each of which contains a separate subset of images from the original image stream. This is done, as shown in Figure 22, by reading out the image stream stored in the image memory frame by frame and extracting individual images and displaying them to the user in the image display areas 367a and 367b, while simultaneously displaying moving images in the image display area 366. Thus, the skilled person would take from D1 a system having all the features of patent claim 7.

19 The method described in D1 differs from the subject matter of claim 1 only in that the received images are not provided by a swallowable capsule. However, the skilled person would take from paragraph 22 of the description of the patent in suit that it was not decisive whether the original image stream was obtained from an endoscopic capsule or by another driving device, such as an endoscope. He recognized that only the received image stream was decisive for the claimed method. Since, in the examination for inventive step, only those instructions were relevant which determined or at least influenced the solution of the technical problem by technical means, the special design of the image acquisition device as a swallowable capsule could therefore be disregarded insofar as it had no influence on the claimed image processing process.

20 Irrespective of this, the in vivo video camera system known from the D2 also fulfills all the requirements for generating an image stream for the claimed image processing method. Thus, the aspect of a swallowable capsule as an image source, which in itself does not contribute to an inventive step, is also obvious to the skilled person.

21 III. This assessment does not withstand review on appeal. The subject matter of patent claim 1 and patent claim 7 is neither anticipated nor suggested by the state of the art.

22 1. The Patent Court correctly assumed that the teaching according to claim 1 is in the technical field and is not subject to patentability exclusion.

23 a) According to the case law of the Federal Court of Justice, a process, the subject matter of which is the processing of procedural steps by means of electronic data processing, already satisfies the technicality requirement (Art. 52 EPC) if it serves the processing, storage or transmission of data by means of a technical device (Federal Court of Justice, judgment of 26 October 2010 X ZR 47/07, GRUR 2011, 125 marginal no. 27 Reproduction of topographical information). It is irrelevant for the technicality requirement whether the subject matter of the patent has non-technical features in addition to technical features and which of these features characterize the claimed teaching. Whether combinations of technical and non-technical features are patentable in an individual case depends - apart from any other relevant exclusion - solely on whether they are new and based on an inventive step (Federal Court of Justice, order of 20 January 2009 X ZB 22/07, GRUR 2009, 479 Steuerungseinrichtung für Untersuchungsmodalitäten; order of 22 April 2010 - Xa ZB 20/08, BGHZ 185, 214 marginal no. 15 et seq. Dynamische Dokumentengenerierung, both on Sec. 1 Patent Act).

24 Accordingly, in the case in dispute a technical teaching is present which is patentable as an invention. Patent claim 1 concerns a method in which images are received, processed and displayed on a monitor in a manner described in more detail. Such a method teaches a certain use of the components of a data processing system including a monitor and thus gives an instruction for technical action. It can only be executed with a technical device and is thus technical in

nature. The fact that the technical components with which the images captured by the swallowable capsule are received and processed are not mentioned in patent claim 1 is harmless, because it is obvious to the skilled person, correctly determined by the Patent Court, that the method requires the use of corresponding components (see Federal Court of Justice, judgment of 24 February 2011 X ZR 121/09, GRUR 2011, 610 marginal no. 16 - Webseitenanzeige).

25           The technicality of the system according to patent claim 7 results without further ado from the fact that the apparatus described therein comprises technical devices by means of which images are recorded, processed and displayed.

26           b)       The subject matter of patent claim 1 is not limited to a program for data processing equipment and is therefore not excluded from patent protection under Art. 52(2) lit. c, (3) EPC. However, due to the exclusion from patentability of computer programs as such, according to the case law of the Federal Court of Justice, only such instructions can regularly establish the patentability of a process which have as their object the solution of a concrete technical problem by technical means (BGHZ 185, 214 para. 21 et seq. - Dynamische Dokumentengenerierung, on Sec. 1(3), (4) Patent Act; Federal Court of Justice, GRUR 2011, 125 para. 30 et seq. Reproduction of topographical information). The teaching according to patent claim 1 satisfies this requirement; it is based on the technical problem of processing the images obtained from an endoscopic capsule and displaying them on a monitor in such a way that the user can evaluate them as efficiently as possible (above I 2). This serves to solve a concrete technical problem by technical means (III 2 b aa (4) below).

27           2.       The subject matter of claim 1 is patentable.

28           a)       Contrary to the plaintiff's view, claim 22 formulated in US patent specification 6 198 483 (D7) does not anticipate the teaching of patent claim 1. There it is admittedly mentioned that a first and a second subset of a plurality of images are displayed simultaneously. In D7, however, the term "subset" has a different technical meaning than in the patent in suit. In D7, it means a subset from the totality of images - such as from a database - which can be accessed

by the data processing system as a whole. However, D7 does not indicate that the totality of these images is an original image stream, i.e., a temporally ordered sequence of images.

29           b)     The Senate is not in a position to conclude that there was a sufficiently concrete suggestion for the skilled person - according to the unanimous opinion of the parties involved - starting from D2 to arrive at the subject matter of the patent in suit.

30           aa)    The Patent Court correctly considered all instructions contained in claim 1, including features M1.3 and M1.4, when examining patentability.

31           (1)    The method according to the invention enables the user, typically a physician, to take in and evaluate the information contained in the ordered sequence of images in the manner conditioned by the presentation of partial image streams. As such, the reproduction of information is not amenable to patent protection (Art. 52(2) lit. d, (3) EPC). However, the patent in suit, with its implementation of the display of subset image streams by technical means, is only superficially concerned with the reproduction of information.

32           (2)    The exclusion of patentability under Art. 52(2) lit. d EPC corresponds to the right to freedom of information and freedom of opinion, which is a fundamental right, and is intended to prevent the monopolization of information by granting patent protection (Benkard/Melullis, EPC, 2nd ed., Art. 52, marginal no. 207). Accordingly, only those instructions are to be disregarded as non-technical in the examination of patentability which relate precisely to the communication of certain contents and thus aim at influencing the human imagination or capacity of understanding (Benkard/Bacher/Melullis, Patent Act, 10th ed., Sec. 1 marginal no. 148; Schulte/Moufang, Patent Act, 9th ed., Sec. 1 marginal no. 126). Instructions concerning the information to be reproduced according to the teaching of the patent can therefore also support the patentability of the teaching according to the invention from the point of view of inventive step only if and to the extent that they determine or at least influence the solution of a technical problem by technical means (Federal Court of Justice, judgment of 23 April 2013 - X ZR 27/12, GRUR 2013, 909 marginal no. 14 - Fahrzeugnavigationssystem).

33           (3)     In accordance with this distinction, the Federal Court of Justice assumed that instructions according to which the audio reproduction in a vehicle navigation system also includes street names are not to be taken into account in the examination for inventive step. In justification, the Senate referred to the fact that these instructions are limited to the specification that and under which conditions street names are to be part of the audio reproduction of driving instructions and thus relate exclusively to the content of the information provided to the user (Federal Court of Justice, GRUR 2013, 909 marginal no. 17 vehicle navigation system). The practice of the Boards of Appeal of the European Patent Office also reflects this distinction. For example, the European Patent Office has ruled that an instruction according to which information about the betting stakes of a particular player is displayed in a device for determining the chances of success in a game of roulette cannot be taken into account (EPO, Technical Board of Appeal, decision of 14 December 2007 T 1704/06, p. 7/8). Instructions to display certain information about the characteristics of a diamond were also considered non-technical (EPO, Technical Board of Appeal, decision of 28 February 2008 T 619/05, p. 7). In the same vein, the UK High Court has considered the instruction to provide the passenger with certain information about the status of an omnibus to be non-technical (Justice Kitchen, High Court, Chancery Division, Patents Court, judgment of 4 November 2005 [2005] EWHC 2417). Furthermore, in the examination for inventive step, such instructions are not to be taken into account according to which certain contents are emphasized by deviations in color, brightness or the like (EPO, Technical Board of Appeal, decision of 4 October 1996 - T 599/93; Federal Patent Court, order of 23 September 2010 17 W (pat) 47/06, in Juris; see also Benkard/Bacher/Melullis, Patent Act, 10th ed, Sec. 1, marginal no. 148; Busse/Keukenschrijver, Patent Act, 7th ed., Sec. 1, marginal no. 68).

34           According to a further decision of the Federal Court of Justice, instructions relating to the selection of a cartographic representation suitable for navigation purposes (coordinate transformation, view from a bird's-eye perspective offset to the rear, determination of the main viewing direction at an acute angle with respect to the earth's surface, reproduction with a solid angle taking into account the instantaneous movement of the vehicle and containing a simulated actual position of the vehicle) are not to be taken into account in the

examination for inventive step. Such instructions are not part of the technical solution, but belong to the selection of a cartographic representation which is expedient for navigation purposes and which is given to the skilled person by the skilled person responsible for this, a cartographer, geographer or geodesist, unless he can already recognize it as expedient himself (see in detail Federal Court of Justice, GRUR 2011, 125 marginal no. 39 Reproduction of topographic information).

35           (4)    The teaching claimed in patent claim 1 is not subject to the exclusion from patentability under Art. 52(2) lit. d, (3) EPC because it is not limited to the reproduction of information as such (Federal Court of Justice, judgment of 19 May 2005 - X ZR 188/01, GRUR 2005, 749, 752 - Aufzeichnungsträger, on Sec. 1 Patent Act). Features M1.3 and M1.4 relate to the problem of how to display an ordered sequence of images - irrespective of their content - in such a way that the user is enabled to grasp them quickly and efficiently. Such instructions, which concern the (visual) reproduction of information, but which do not focus on the communication of certain contents or their communication in a special presentation, but rather on the presentation of image contents in a manner which takes into account the physical conditions of human perception and reception of information and which is aimed at enabling, improving or expediently shaping the perception of the displayed information by humans in a certain manner in the first place, serve to solve a technical problem by technical means and are to be taken into account in the examination for inventive step.

36           bb)   The Patent Court assumed that the teaching of claim 1 was obvious to the skilled person and thus not based on an inventive step. The Senate cannot agree with this.

37           (1)    D2 discloses a system comprising an ingestible capsule for capturing images and devices external to the body for receiving these images and converting them into an image stream. D2 is only peripherally concerned with the display of the images thus obtained. It is to be understood that the images obtained by the camera mounted in the endoscopic capsule can be converted into video data. Figure 6 shows a device with two monitors, one displaying which parts of the digestive tract the endoscopic capsule passes

through and the other displaying an image captured by the capsule. The citations submitted by the plaintiff do not give any suggestion to proceed from D2 to the technical teaching protected in patent claim 1.

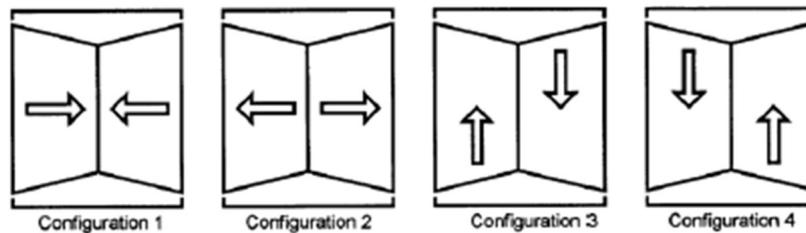
38           (2)    The citation D1 concerns a device - such as an endoscope - for recording and displaying time series images. The device is intended to make it possible to record time series images, for example video recordings such as those obtained during an endoscopic examination, and to observe changes in an object over a period of time with the aid of such images. The image material obtained in this way can be displayed as video, but at the same time it should also be possible to generate and store still images. As an example, D1 deals with the recording of changes in a tumor in the human body when a fluorescent agent is administered, which is absorbed differently by the tumor than by the surrounding tissue. According to the presentation in D1, recording multiple images that allow observation of the change over time is fraught with difficulties because both the observed object and the endoscope can move and change position relative to each other. Against this background, it is desirable to be able to make a comparison of still images with time series images in the language of the patent in suit: with an image stream (Sp. 1, 2). Therefore, the user should be able to view images taken at a time interval from each other simultaneously (Sp. 3, lines 18 to 20). The device comprises an endoscope in the head of which a camera is mounted, an image processing device that converts the images captured by the camera into corresponding electronic signals, and a monitor on which the signal can be displayed as a video as an image stream (Sp. 6 lines 1 to 8 and lines 30 to 44).

39           Figures 6 and 22 of D1 indicate that four images each are displayed simultaneously from the image material obtained by the endoscope. However, contrary to what the Patent Court assumed, the citation does not disclose that the device described therein is capable of simultaneously displaying two subset image streams. This also applies to the description of the third embodiment, which begins in column 19, line 6 of the D1 and is explained by Figures 17 to 23. Figure 22 shows a display with four areas 364, 367a, 367b and 366. As can be seen from the description, image data is first displayed sequentially frame by frame in area 364 (Sp. 21, lines 41 to 46). Then, one image is selected from this

image stream, which is displayed as a still image (Sp. 21, lines 47 to 51). Subsequently, an image stream is displayed only in area 366 (Sp. 21, lines 52 to 54). From this, individual images can be obtained by "freezing", which are shifted into the areas 367a or 367b (Sp. 21, Z. 63 to Sp. 22 Z. 9). So while at first only area 364 shows an image stream, temporally later only area 366 shows an image stream, while the other three areas show only still images and thus no image stream. Thus, simultaneous display of at least two image streams on one monitor is not disclosed by D1. Accordingly, it is described in D1 (Sp. 22, lines 43 ff.) that there is a reference image displaying part 364 and two temporarily selected image displaying parts 367a and 367b, which are contrasted by only one moving picture displaying part 366. Even if the still images displayed in areas 367a and 367b are occasionally exchanged by the user selecting another frame from the image stream displayed in area 366, this does not constitute the display of a subset image stream in the sense explained above. Thus, it cannot be assumed that D1 provides a suggestion for the teaching protected in patent claim 1.

40           (3)     The skilled person also does not receive such a suggestion from US patent specification 6 198 483 (D7).

41           While navigation through a database displayed on the screen - according to D7 - is conventionally done with tree-like structures through which the user moves by scrolling, scrolling or the like, the document proposes to convey the contents of the database to the user by the moving display of information. It is said to have recognized that multiple categories of information displayed simultaneously can be well grasped by the user when the information is set in motion. The simultaneous perception of two or more sets of information increased the speed at which the user could acquire its content (Sp. 2, lines 7 to 9). D7 introduces two basic modes: Bi-mode and Quad-mode. In Bi-Mode for beginners, two quadrants are displayed in perspective for the viewer. The directional flow of the information can be displayed according to the figure 4 of D7 inserted below.



can be set in four main configurations. In configuration 1, the content in the left quadrant flows from left to right and in the right quadrant from right to left; in configuration 2, the image content flows from the center outwards to the left and right respectively; in configurations 3 and 4, the left and right image content flows either from top to bottom and from bottom to top or vice versa (Figure 4 in conjunction with column 6 line 30 ff.). This results in the user recognizing two displays or two input channels. The citation describes it as "wrong" configurations if the flow directions are in each case the same direction, i.e. the left and right quadrant flow upwards or downwards, from left to right or from right to left (Figure 6 in connection with column 6 line 49 ff.).

42 To see in this and in the other embodiment examples a suggestion for the proposals of the patent in suit would be the result of a retrospective consideration with knowledge of the patent in suit. For it is not apparent that the simultaneously displayed image streams are each subset image streams containing a separate subset of images from an original image stream. Even if a database comprises a plurality of individual images or image sequences, no original image stream within the meaning of the patent in suit can be seen therein, which would be divided into subset image streams, because the individual images here are not ordered in a certain sequence, so that in particular also in the case of a rapidly successive reproduction of the images the impression of a film would not be created for the viewer. This also applies insofar as D7 describes as a possible application the running of video clips on surgical procedures with images relating to the respective case scenario in different quadrants. In this way, a student could visually skim a thousand images in a few minutes. In this application example, D7 has the evaluation of medical image content in common with the patent in suit. However, this does not change the fact that D7 involves a different visual exploitation approach than the patent in suit, namely the rapid (rough) sifting of large masses of data. Even if this, like

the teaching of the patent in suit, affects the human visual receptivity, D7 does not provide a sufficiently concrete suggestion for finding the technical teaching of the patent in suit to divide uniform image material in the form of an original image stream in the interest of increased visual evaluability in detail into several subset image streams and to display them simultaneously.

43           The plaintiff did not return to the other objections introduced in the proceedings at first instance, after the Senate had expressed in its introductory remarks that it understands the detailed discussion of D7 in the response to the appeal to mean that it is seen as at least the closest state of the art to the patent in suit.

44           3.       It follows at the same time from the above that the view of the Patent Court that the subject matter of claim 7 is not patentable is not correct.

45           IV.       Accordingly, the judgment under appeal cannot be upheld. The Senate has to decide on the merits of the case because it is ready for decision (Sec. 119(5) sentence 2 Patent Act). The decision on costs is based on Sec. 121(2) Patent Act and Sec. 91(1) Code of Civil Procedure.

Gröning

Bacher

Hoffmann

Deichfuß

Kober-Dehm

Previous instance:

Federal Patent Court, judgment of 16 January 2013 – 5 Ni 7/11 (EP) –