Patents Act 1977 **Opinion Number** **05/26**

OPINION UNDER SECTION 74A

Patent	GB 2604336 B
Proprietor(s)	CASCO Europe Limited
Exclusive Licensee	
Requester	Barker Brettell LLP
Observer(s)	
Date Opinion issued	15 June 2026

The request

1. The comptroller has been requested to issue an opinion regarding the validity of patent GB 2604336 B ("the patent"), specifically whether it lacks novelty or an inventive step in view of a number of prior art documents.

2. Observations have been filed on behalf of the proprietor and observations in reply received from the requester.

Preliminary matters

Timeline

3. The request for an opinion was made on 17 March 2026 (the letter accompanying the request is dated 17 March 2025) and the Office responded with a letter of 25 March 2026 explaining an intention to refuse the request in part since two of the prior art documents referred to in the request had been considered before the grant of the patent. The letter made clear that an opinion could be issued based upon new prior art R2, combined with documents R4 and R5.

4. One document, patent publication US 2017/0290124 A1 or R3 in the request, formed the basis of a novelty objection in an examination report from the Intellectual Property Office ("the Office") dated 11 April 2023. The other document, patent publication US 2015/0116997 A1 or R1 in the request, was cited against an equivalent European patent application and the official letter of 25 March 2026 explained that due account was taken of the document before the examination report of 11 April 2023 was issued by the Intellectual Property Office.

5. The requester responded with a letter dated 24 April 2026 arguing that R1 and R3 should be considered in this opinion. They argued that the proprietor had made

amendments to claim 1 of the equivalent European patent application following an objection based on R1, although as of 24 April 2026 the requester did not know if the amendments had satisfied the European Patent Office. The also argued that R3 should be considered in this opinion as an amendment was made to claim 1 on 13 June 2023, i.e. after the examination report 11 April 2023. If I understand the requester correctly they infer that the examiner must have construed the amended claim incorrectly since an objection relying on R3 was not maintained and they argue this constitutes a new issue. Finally the requester argues that there are new issues in the request regarding the inventive step of claim 1 in light of various combinations of documents R1 and R2, R1 and R4 and R3 and R4.

6. The observations filed on 5 May 2026 on behalf of the proprietor request that R3 be set aside since it was considered pre-grant.

7. The observations in reply of 19 May 2026 from the requester maintain that R3 should be considered for the same reasons offered in their letter of 24 April 2026.

Refusal of the request

The law and case law

8. The law relating to opinions is set out in sections 74A and 74B of the Patents Act and in associated rules 92 to 100 of the Patents Rules 2007. Particularly relevant is

Section 74A(3)

The comptroller shall issue an opinion if requested to do so under subsection (1) above, but shall not do so-

(a) in such circumstances as may be prescribed, or

(b) if for any reason he considers it inappropriate in all the circumstances to do so.

9. As far as I am aware the refusal of an opinion under Section 74A has not been considered by the UK courts, although such refusals have been considered several times in decisions of the Office. These include *Franks Opinion Request* (BL O/289/07) ("*Franks*")[1], *Naylor Opinion Request* (BL O298/07) ("*Naylor*")[2], *Automation Conveyors Limited Opinion Request* (BL O/370/07) ("*Automation Conveyors*")[3] and *Kohn & Associates PLLC Opinion Request* (BL O/310/21) ("*Kohn*")[4] and *E-link Technology Co. Ltd Opinion Request* (BL O/681/21) ("*E-Link*")[5].

10. These decisions are consistent, as the Hearing Officer in *E-Link* put it:

> "*It was always the intention that the opinion service would not be used to repeat or in some way reappraise the examination of the patent performed either in this Office or at the European Office. Rather, the intention was that there should be something new and the request should not simply seek to go*

[1] see https://www.ipo.gov.uk/p-challenge-decision-results/o28907.pdf
[2] see https://www.ipo.gov.uk/p-challenge-decision-results/o29807.pdf
[3] see https://www.ipo.gov.uk/p-challenge-decision-results/o37007.pdf
[4] see https://www.ipo.gov.uk/p-challenge-decision-results/o31021.pdf
[5] see https://www.ipo.gov.uk/p-challenge-decision-results/o68121.pdf

over old ground. The rationale is that a patentee should not be asked to deal again with a question that he has already dealt with to the satisfaction of the Office pre-grant."

11. These decisions are clear that not issuing an opinion because a question had already been considered during the pre-grant examination process should be because the comptroller considers it inappropriate in all the circumstances to do so, as provided by section 74A(3)(b).

12. Although the decisions to which I refer above direct me that it would be inappropriate in all the circumstances to issue an opinion on a question that had already been considered during the pre-grant examination process, the door is not entirely closed on such questions. The Hearing Officer in *Automation Conveyors* did acknowledge "*the possibility that a decision by an examiner to discount a citation might be shown to have been clearly perverse, in the sense that no reasonable person could have reached it. Only in such a case might it be appropriate to reconsider the citation in an opinion as there could be said to be a new argument.*". Later decisions made clear that this would be very much an exceptional circumstance and that, according to the Hearing Officer in *Kohn* "*unless there is a very clear reason not to, one can assume that the examiner will have carried out their role properly in assessing the novelty and inventive step of an application including when they decide not to pursue an objection as the examination process proceeds*".

This request

13. As noted earlier, the document R3 appears as a novelty citation in an examination report from the Office dated 11 April 2023. Following that examination report amendments to the application were filed on 13 June 2023 and subsequently the patent was granted without any further examination reports being issued or any further amendments made. Although they infer that the examiner construed the claim in a manner with which they disagree, I cannot see that the requester has shown that the decision of the examiner not to maintain an objection based on R3 was "*clearly perverse*".

14. The other document, R1 in the request, appears on the search report published as part of a European patent application equivalent to the patent and was cited against that equivalent European patent application. It is clear that the examiner was aware of the published European patent application from the warning regarding potential conflict that they included at the end of their examination report of 11 April 2023. It is routine for patent examiners to consider the search and examination reports relating to such equivalent applications and I have no reason to believe that the examiner failed to do so properly in this case. Once again the requester has not shown that the decision of the examiner not to raise an objection based on those documents, including R1, was "*clearly perverse*". That amendments have been made to the equivalent European patent application subsequent to R1 being cited does not to my mind amount to a demonstration that the decision of the examiner not make an objection based on R1 was "*clearly perverse*".

15. That leaves the question whether the requester has a new argument regarding the inventive step of claim 1 in light of various combinations of documents R1 with R2, R1 with R4 and R3 with R4.

16. It seems from pages 19 and 20 in the request that R4 is used to demonstrate what was commonly known regarding lighting and the circadian rhythms of animals. The request also suggests that this common general knowledge is acknowledged in the patent itself (see the paragraph bridging pages 17 and 18 of the request). An examiner can be assumed to have considered whether the invention claimed was obvious in light of the prior art and a necessary part of that consideration is the question of common general knowledge. In this case the examiner will have considered whether the inventive concept was obvious to the skilled person armed with their common general knowledge in light of either R1 or R3. Hence to my mind combining R1 or R3 with R4 does not raise a new argument.

17. The combination of R2 and R1 is discussed on page 17 of the request. In this context a passage of R1 is quoted in the context of establishing the common general knowledge of the skilled person. This is confirmed on page 13 of the observations in reply and is much like the combination of R2 with either R4 or R5 which the Office has already indicated can form the basis for this opinion.

18. Consequently I decline to issue an opinion on the questions of novelty and inventive step based on documents R1 and R3 raised in the request, except where R1 is argued to illustrate common general knowledge in the context of prior art R2.

19. I note that the Hearing Officer in *Kohn*, having refused a request for an opinion, made the following observation:

> *Given the conclusion I have come to above, I would observe that refusing a request for an opinion does not preclude the requester of an opinion from subsequently seeking revocation of the patent under section 72 of the Act. While such a decision is entirely a matter for Kohn (or indeed any other interested third party) and is not relevant to the present case, it does provide the opportunity for a fresh consideration of the novelty and inventive step of an invention as claimed in a granted patent. I appreciate that this option takes more time and resources and is more expensive than the opinion route, it does provide a legally binding decision as to whether or not the granted patent of interest is valid.*

Publication date of the prior art

20. I shall come to the substance of prior art R2 in due course, but as a preliminary matter I should consider its publication date. The prior art is in fact a product listed on the Amazon website at this location https://www.amazon.co.uk/Kaytee-Critter-Trail-Lighted-Habitat/dp/B01E3WWQES?th=1

21. The request draws my attention to a screenshot of the webpage said to be taken on 6 March 2026 (the screenshot provided is dated 17 March 2026) and a section titled "*Additional Information*" within which appears an entry of 13 April 2016 alongside "*Date First Available*". 2016 is well before the application date of the patent.

22. The observations filed on behalf of the proprietor acknowledge that this means that a product with the Amazon unique identifier (ASIN) B01E3WWQES was listed on 13 April 2016. However, they argue that a seller can change the details of the product to which an ASIN refers. They claim that their searches cannot confirm public

availability of R2 before the application date of the patent.

23. In reply the requester has provided screenshots of archived webpages from other retailers that are said to show the product R2 on sale prior to 25 February 2021.

24. It seems to me that there is some doubt whether the product R2 was on sale via Amazon before 25 February 2021. Based on the evidence available to me I do not believe that I can resolve this doubt. There might also be a question whether the additional screenshots from the requester are observations strictly in reply or are in fact additional evidence. However, I am not required to decide on the validity of the patent, only to provide an opinion. Such an opinion can be conditional and so when I consider R2 below it is on the basis that the product may have been publicly available before 25 February 2021, but that this has not been established.

The patent

25. The application for the patent was filed on 25 February 2021 with the title Veterinary lighting apparatus. The application was published on 7 September 2022 and granted with effect from 22 November 2023.

26. An embodiment of the invention is shown in figures 1 to 7. Figure 1 shows a veterinary lighting apparatus 1 comprising a heat sink 3 on which is mounted a series of LEDs 5. In the embodiment the LEDs are white light LEDs 5a to emit white light having a wavelength of between about 420nm to about 750nm, a second set of red LEDs 5b to emit red light having a wavelength of between about 622nm to about 780nm and a third set of blue/ultra-violet LEDs 5c to emit blue/ultra-violet light in a wavelength of between about 430nm to about 450nm.

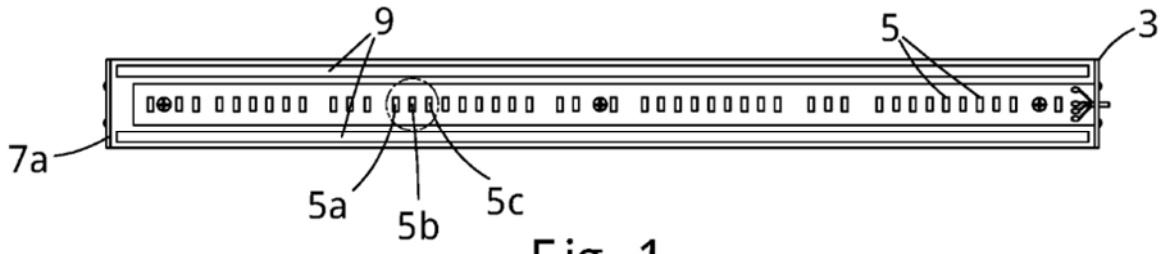

Fig. 1

27. A three-way selector switch 19 allows for manual selection of which LED light source 5a, 5b, 5c is to be turned on. In an alternative embodiment, the required lighting colour can be controlled by a timer so that the required light is automatically switched on. The switch 19 may form part of a housing 25 shown in figure 6, a glass cage having a vinyl outer covering and ventilation holes 26 in the hinged glass door 27. An elongate opening or channel 29 is cut out of the vinyl outer covering on the top surface of the housing 25 and the veterinary lighting apparatus 1 is placed into the channel 29 so that light is emitted into the interior of the housing 25.

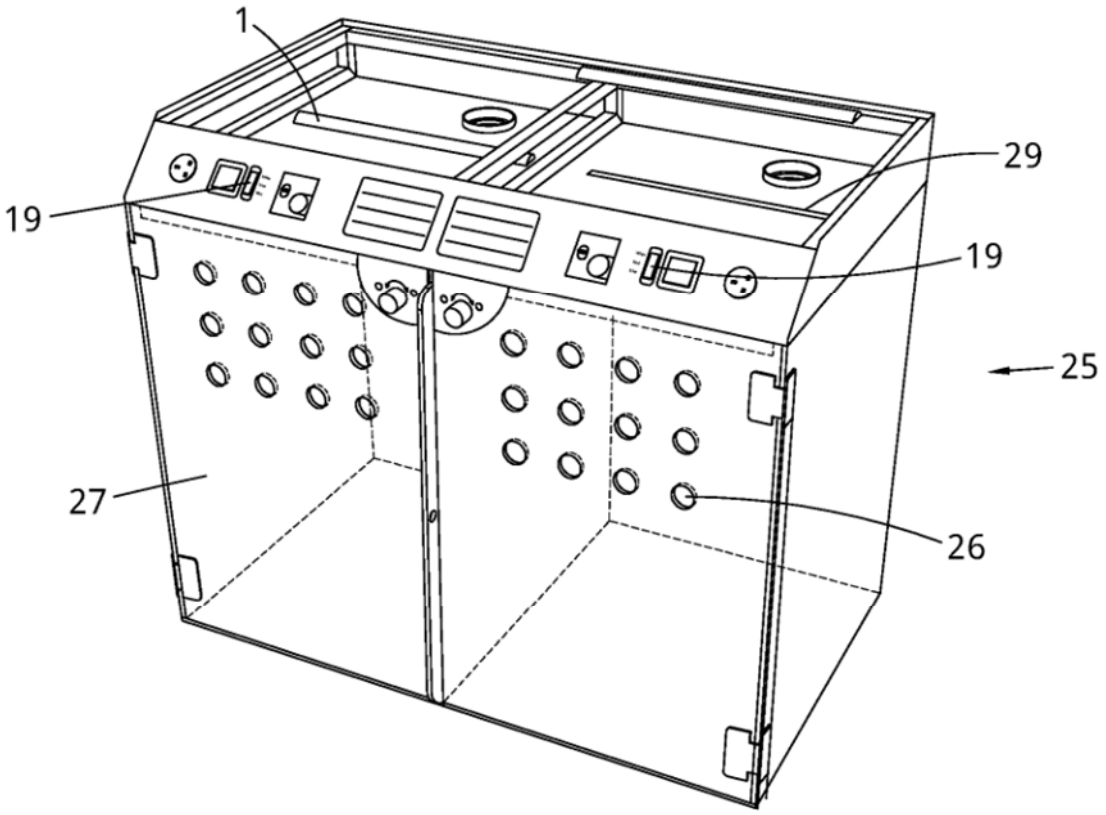

Fig. 6

28. The patent includes one independent apparatus claim, as follows:

> 1. *A veterinary lighting apparatus for the management of clinical habitats for animal care for use with a housing for an animal such as a small mammal, the veterinary lighting apparatus comprising:*
>
> *a heat sink on which are supported a plurality of LEDs for emitting light radiation, wherein the plurality of LEDs comprises at least one white light LED-emitter; at least one blue light LED-emitter; and at least one red light LED-emitter; and*
>
> *an activation means to switch on one or more of the white and/or blue and/or red light LED-emitters;*
>
> *wherein the veterinary lighting apparatus is configured to support the circadian rhythm of the animal such that one white light LED-emitter is switched on during daylight hours and the red light LED-emitter is switched on to allow the animal to be monitored or inspected without using the white light LED-emitter, and wherein the blue light LED-emitter is configured to highlight organic waste.*

29. There is also an independent method claim, claim 25. However, the request only refers to this claim in the context of it being anticipated by document R3. Since I have declined to provide an opinion concerning R3 I shall not consider claim 25.

Claim construction

30. Before considering the documents put forward in the request I will need to construe the claims of the patent following the well known authority on claim construction which is *Kirin-Amgen and others v Hoechst Marion Roussel Limited and others* [2005] RPC 9. This requires that I put a purposive construction on the claims, interpret it in the light of the description and drawings as instructed by Section 125(1) and take account of the Protocol to Article 69 of the EPC. Simply put, I must decide what a person skilled in the art would have understood the patentee to have used the language of the claim to mean.

31. Section 125(1) of the Act states that:

> *For the purposes of this Act an invention for a patent for which an application has been made or for which a patent has been granted shall, unless the context otherwise requires, be taken to be that specified in a claim of the specification of the application or patent, as the case may be, as interpreted by the description and any drawings contained in that specification, and the extent of the protection conferred by a patent or application for a patent shall be determined accordingly.*

32. And the Protocol on the Interpretation of Article 69 of the EPC (which corresponds to section 125(1)) states that:

> *Article 69 should not be interpreted in the sense that the extent of the protection conferred by a European patent is to be understood as that defined by the strict, literal meaning of the wording used in the claims, the description and drawings being employed only for the purpose of resolving an ambiguity found in the claims. Neither should it be interpreted in the sense that the claims serve only as a guideline and that the actual protection conferred may extend to what, from a consideration of the description and drawings by a person skilled in the art, the patentee has contemplated. On the contrary, it is to be interpreted as defining a position between these extremes which combines a fair protection for the patentee with a reasonable degree of certainty for third parties.*

33. The request draws attention to a number of aspects of claim 1. They argue that "*veterinary*", "*for the management of clinical habitats*", "*for animal care for use with a housing*", "*for an animal*" and "*such as a small mammal*" should all be construed as "*suitable for*" requirements. In other words they feel that the apparatus could be used in such ways and the claim is not restricted to being used in the ways specified.

34. Furthermore the request goes on to argue that the final clause of claim 1 beginning "*wherein*" makes no technical contribution to the invention since it requires a user's action and that the clause does not impart any restriction to the claim.

35. In response the observations on behalf of the proprietor argue that the inventive concept claimed is "*a veterinary lighting apparatus for the management of clinical habitats*" and not a lighting apparatus for veterinary applications and as such is a medical/surgical care device. They go onto argue that the final clause of claim 1 establishes a technical purpose for the red and white LED lights, a restriction that the

white and red LED lights cannot be used simultaneously and a technical purpose for the blue LED light. They argue that the device claimed has to achieve these objectives.

36. In their observations in reply the requester acknowledges that a limitation is imparted by the term "*veterinary*" and refers to a passage on page 3 of the patent in this regard. Otherwise they dispute much of what the observations on behalf of the proprietor argue.

37. For my part the passage on page 3 of the patent does seem relevant to the understanding of "*veterinary*" in the context of the patent. The passage is as follows: "*It is understood that the "veterinary" lighting apparatus of the present invention is beneficial for use by veterinary practitioners treating animals, but also has application for pet owners who are caring for animal patients.*".

38. This seems much the same as the various "*suitable for*" requirements to which the observations refer that is "*for the management of clinical habitats*", "*for animal care for use with a housing*", "*for an animal*" and "*such as a small mammal*".

39. As for the final clause of the claim, whilst it might be true that the white LED-emitter might be switched on during daylight and the red LED-emitter might be used without the white LED-emitter, it is not clear that this places any meaningful limitation on the LED-emitters. On the face of it any white LED-emitter could be switched on during daylight and any red LED-emitter could be switched on without the white LED-emitter. I disagree with the proprietor that the claim wording means that the white and red LED lights cannot be used simultaneously. It is not apparent to me for what purpose the red and white LED-emitters might be used together, but the activation means is required to "*switch on one **or more** of the white and/or blue and/or red light LED-emitters*" (my emphasis). As for the blue LED-emitter being configured to highlight organic waste, both the patent and the requester seem to acknowledge that this would be achieved by blue/ultra-violet light with a wavelength of between about 430nm to about 450nm, see the observations in reply and page 9 of the patent.

Inventive step

40. Section 1(1) of the Act reads:

> *A patent may be granted only for an invention in respect of the following conditions are satisfied, that is to say –*
> *(a) the invention is new;*
> *(b) it involves an inventive step…*

41. Section 3 of the Patents Act 1977 states:

> *An invention shall be taken to involve an inventive step if it is not obvious to a person skilled in the art, having regard to any matter which forms part of the state of the art by virtue only of section 2(2) above (and disregarding section 2(3) above).*

42. The requester argues that the claimed invention is not inventive having regard to a

prior art product R2 and common general knowledge, exemplified in some further documents. As noted above I have declined to issue an opinion relating to some parts of the request. To come to an opinion on the matter I shall rely on the principles established in Pozzoli SPA v BDMO SA [2007] EWCA Civ 588, in which the well known Windsurfing steps were reformulated:

> *(1)(a) Identify the notional "person skilled in the art";*
> *(1)(b) Identify the relevant common general knowledge of that person;*
> *(2) Identify the inventive concept of the claim in question or if that cannot readily be done, construe it;*
> *(3) Identify what, if any, differences exist between the matter cited as forming part of the "state of the art" and the inventive concept of the claim or the claim as construed;*
> *(4) Viewed without any knowledge of the alleged invention as claimed, determine whether those differences constitute steps which would have been obvious to the person skilled in the art.*

43. The requester argues that the skilled person would in fact be a team of two people, a first person skilled in lighting systems and their design and production and a second person skilled in the field of animal care and animal housing. The proprietor by contrast believes that no reason has been provided for the first person to consult the second. Since the inventive concept claimed is a veterinary lighting apparatus it seems to me that the skilled team identified by the requester seems reasonable.

44. Turning to the matter of common general knowledge, the team identified by the requester is said by them to understand the use of LEDs for general illumination, the need for heat sinks in LED lighting systems, that white light mimics daylight and that the use of such lighting during daytime and alternative lighting overnight is known. They go on to suggest that the skilled team would also be familiar with animal housings including those with installed lighting and further that the team would understand the impact of lighting on the circadian rhythms of animals. To support their view they quote a passage from the opening section of the patent and a passage from document R1 and also refer to document R4, a paper from 2018 published in the journal Behavioral Neuroscience from the American Psychological Association and entitled *Effects of light at night on laboratory animals and research outcomes*. Although not mentioned explicitly in this part of the request, document R5, a paper entitled *Red light at night permits the nocturnal rise of melatonin production in horses* published in the Veterinary Journal in 2019, is generally argued to show much the same as R4. The formulation of common general knowledge from the requester also seems reasonable to me. The observations from the proprietor do not comment on common general knowledge.

45. The matter cited is the product R2, the Kaytee CritterTrail LED Lighted Habitat shown below. According to the details on the Amazon website the habitat is a cage intended for small animals, hamsters, gerbils or mice. Amongst other features it includes two LED lighted bubble plugs, one on each side of the habitat, one described as blue for anytime use and the other as red for night-time use. There is no mention of a switch on the screenshots provided with the request, although the implication that the LED plugs are used at different times might also imply a switch.

46. The request identifies two differences between R2 and the inventive concept, the inclusion of a heat sink on which the LEDs are supported and the inclusion of a white LED along with the red and blue LEDs.

47. In the addition to the absence of a heat sink and a white LED, the observations on behalf of the proprietor contend that the lighting apparatus of R2 is not veterinary apparatus since a poorly animal would not require the exercise wheel that is included and the environment could not be easily sterilised. They also argue that the lights in R2 are not suitable "*for the management of clinical habitats*" as they do not illuminate the entire habitat. For the same reason the blue LED is said not to be "*configured to highlight organic waste*". Apart from the heat sink and white LED the observations in reply disagree with all this.

48. Clearly it is common ground that the lights of R2 lack the heat sink and white light LED-emitter of claim 1. Since the patent includes "*pet owners who are caring for animal patients*" within the scope of "*veterinary*", I think a skilled reader would understand the bubble plugs of R2 to form veterinary lighting apparatus. Given the scope of "*veterinary*" in this context it seems to me that the bubble plugs would be suitable "*for the management of clinical habitats*". The proprietor provides nothing to substantiate their suggestion that this requirement necessarily requires illumination of the entire habitat. Similarly I do not accept that a blue LED being "*configured to highlight organic waste*" must mean illumination of the entire habitat.

49. So to my mind two differences between R2 and the inventive concept are the inclusion of a white LED along with the red and blue LEDs and the inclusion of a heat sink on which the LEDs are supported. It is worth noting that claim 1 requires all the LEDs to be supported on the same heat sink and in R2 the bubble plugs are

clearly separate components mounted at opposite ends of the habitat.

50. That brings me to the last Pozzoli step, namely viewed without any knowledge of the alleged invention as claimed, do those differences constitute steps which would have been obvious to the person skilled in the art? It should be borne in mind that this person is generally held to be unimaginative, as in the original formulation of the Windsurfing approach.

51. The request asserts that including a white light in apparatus designed for lighting an area requires no degree of invention. This might be true, but it is not the issue here. The question here is whether the unimaginative skilled person would think it obvious to add a white LED to R2. The two LEDs of R2 are described as for use at night and any time and it is not clear to me from the request why the addition of a further LED would have been obvious.

52. The requester points to document R1 as providing evidence that heat sinks formed part of the common general knowledge of the skilled team. What R1 teaches is that some systems which are "*adapted to promote the growth of marine plants and/or animals or terrestrial plants*" have various components including "*one or more circuit boards that each support a plurality of LEDs, a heat dissipation structure for removing heat generated by the operation of the LEDs*" (see paragraph 3 of R1). I take this to mean that a system of multiple LEDs might require a heat dissipation structure. I do not believe that this means the unimaginative addressee presented with R2 would think it obvious to provide a heat dissipation structure for the small LEDs included in the habitat. There is nothing to suggest that the LEDs in R2 require any additional heat dissipation structure. Still less is there any basis to think it would have been obvious to the skilled person that R2 should be rearranged to include a single heatsink supporting all the LEDs.

Opinion

53. In my opinion the invention claimed in the patent involves an inventive step having regard to the product referred to in the request for an opinion as R2 and to the arguments in the request and the observations provided.

Karl Whitfield
Examiner

NOTE

This opinion is not based on the outcome of fully litigated proceedings. Rather, it is based on whatever material the persons requesting the opinion and filing observations have chosen to put before the Office.