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**Datasheet for the decision  
of 21 August 2018**

**Case Number:** T 0773/14 - 3.5.03

**Application Number:** 01942849.9

**Publication Number:** 1252799

**IPC:** H04R25/00

**Language of the proceedings:** EN

**Title of invention:**

METHOD AND APPARATUS FOR FITTING HEARING AIDS

**Patent Proprietor:**

Starkey Laboratories, Inc.

**Opponent:**

Widex A/S / Oticon A/S

**Headword:**

Method for programming a hearing aid system/STARKEY

**Relevant legal provisions:**

EPC Art. 56

RPBA Art. 13(1), 12(2), 12(4)

**Keyword:**

Inventive step - main request - no - auxiliary request II-B -  
yes

Admissibility of late-filed auxiliary request II-B - yes

**Decisions cited:**

G 0009/91, G 0003/14, T 1634/09

**Catchword:**



**Beschwerdekammern**

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Case Number: T 0773/14 - 3.5.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.03**  
**of 21 August 2018**

**Appellant:** Widex A/S / Oticon A/S  
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**Respondent:** Starkey Laboratories, Inc.  
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**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 31 January 2014  
rejecting the opposition filed against European  
patent No. 1252799 pursuant to Article 101(2)  
EPC.**

**Composition of the Board:**

**Chairman** F. van der Voort  
**Members:** T. Snell  
O. Loizou

## Summary of Facts and Submissions

I. The appeal concerns the decision of the opposition division rejecting the opposition filed by joint opponents GN ReSound A/S, Widex A/S and Oticon A/S. The grounds for opposition invoked by the opponents were those pursuant to Article 100(a) and (b) EPC. GN ReSound A/S withdrew from the group of joint opponents with a letter dated 11 November 2013.

II. The following documents are referred to in this decision:

D4: DE 299 05 172 U1;

D4': DE 297 06 812 U1;

D16: US 5 721 783 A;

D20: "Bluetooth<sup>TM</sup> White Paper", AU-System, January 2000, pages 1 to 25;

D21: "Ericsson Review", No. 4, 1998, pages 147 to 205;

D22: "Handbook for the Palm VII<sup>TM</sup> Organizer", 1998, pages ii to viii and 1 to 294; and

D25: WO 01/52480 A1

III. In the impugned decision, the opposition division held that the ground for opposition pursuant to Article 100(b) EPC was not sufficiently substantiated in the notice of opposition. It further held that the subject-matter of claim 1 was new with respect to the disclosure of D16 and involved an inventive step when starting out from either D16 or D4 as closest prior

art. During the opposition procedure, the proprietor filed six auxiliary requests (auxiliary requests I to VI), but in view of the decision to reject the opposition, there was no need to examine them.

- IV. In the statement of grounds of appeal, the joint opponents (hereinafter "appellant") requested that the decision under appeal be set aside and that the patent be revoked in its entirety. It argued, inter alia, that the disclosure was insufficient and that the subject-matter of claim 1 did not involve an inventive step when starting out from either D16 or D4. In support of its arguments with respect to inventive step, the appellant also filed a number of new documents, inter alia D4', D20, D21 and D22.
- V. In a subsequent submission, the appellant submitted a new document D25 and argued that the subject-matter of claim 1 was not new with respect the disclosure of this document, pursuant to Articles 52(1) and 54(3) EPC.
- VI. In response to the statement of grounds of appeal, the proprietor requested that the patent be maintained in unamended form, i.e., implicitly, that the appeal be dismissed or, in the alternative, that the patent be maintained in amended form on the basis of one of auxiliary requests I to VI, said to be the same as those filed during the opposition procedure.
- VII. In a communication accompanying a summons to oral proceedings dated 6 April 2018, the board inter alia gave the following preliminary assessment:
- (i) The opposition division was justified in not admitting the ground for opposition pursuant to Article 100(b) EPC;

(ii) The subject-matter of claim 1 did not appear to involve an inventive step when starting out from D16, in particular when interpreting the earpiece as the "hearing aid system" referred to in claim 1.

(iii) Claim 1 of each of the auxiliary requests I to VI had one or more issues with respect to Articles 83, 84 and 56 EPC.

(iv) It would have to be discussed whether the novelty objection under Article 54(3) EPC and based on D25 was a fresh ground for opposition which could only be admitted with the respondent's permission. That notwithstanding, D25 appeared prima facie to be highly relevant.

VIII. Together with a reply to the board's communication, dated 14 August 2018, the respondent (under new representation) submitted claims of five further auxiliary requests II-A, II-B, III-A, V-A and V-B based on combinations of claim 1 of the patent with various dependent claims of the patent. The auxiliary requests were to be taken in the order: I, II-A, II-B, III-A, III, IV, V-A, V-B, V, and VI.

At the same time, the respondent's new representative (appointed on 10 August 2018) requested a postponement of the oral proceedings in order to preserve its right to be heard on the ground that the summons had not been transmitted to the respondent by the former firm of representatives-but-one Schwegman Lundberg Woessner, or to the former firm of representatives Dentons UK and Middle East LLP. These were said to be "two isolated mistakes in otherwise reliably working systems". As a consequence, the respondent only found out about the

summons in July 2018 by dint of being contacted directly by the appellant in order to discuss a possible settlement. If the oral proceedings were not to be rescheduled, at least admittance of the newly-filed auxiliary requests was requested.

IX. In a brief communication from the board, the parties were informed that the date of the oral proceedings was maintained.

X. Oral proceedings were held on 21 August 2018.

The appellant requested that the decision under appeal be set aside and that the patent be revoked.

The respondent requested that the appeal be dismissed or, in the alternative, that the patent be maintained in amended form on the basis of claim 1 of auxiliary request II-B as filed with the letter dated 14 August 2018.

At the end of the oral proceedings, the chairman announced the board's decision.

XI. Claim 1 as granted reads as follows:

"A method comprising:

programming (708) a hearing aid system (102, 602A, 602B, 802A, 802B, 902A, 902B, 1002A, 1002B, 1102A, 1102B, 1102C, 1202A, 1202B, 1302A, 1302B) by a mobile device (106, 606, 806, 906, 1006, 1106, 1206, 1306)

**characterized by**

communicating between the mobile device and the hearing aid system using a wireless short-range network (104),

wherein the hearing aid system can communicate bi-directionally via the short-range network, and the mobile device being a digital cellular telephone adapted to communicate bi-directionally via a long-range wireless network (110, 610, 810, 910, 1010, 1110) including a cellular network,

wherein a server (116, 616, 816, 916, 1016) coupled to the Internet (114, 614, 814, 914, 1014) communicates with the mobile device through the Internet (114, 614, 814, 914, 1014) and the long-range wireless network (110, 610, 810, 910, 1010, 1110)."

XII. Claim 1 of auxiliary request II-B is the same as claim 1 of the main request except that the following wording is added to the end of the claim:

"wherein the method further comprises:

deriving (202) at least one audiological parameter by obtaining data about at least one aural response of a patient;

programming the hearing aid system based on the at least one audiological parameter by a mobile device (106, 606, 806, 906, 1006, 1106, 1206, 1306) so as to tailor (710) an audiological therapy for the patient; and

upgrading (204) a piece of software capable of executing on the hearing aid system based on the at least one audiological parameter, wherein upgrading includes downloading the software by the mobile device."



## **Reasons for the Decision**

1. *The respondent's request for postponement of the oral proceedings*

The board notes that the respondent did not raise this issue again once the board had indicated that the oral proceedings would take place as scheduled and therefore it is unclear whether the request was maintained. That notwithstanding, the summons was duly received by the respondent's former representative-but-one on 19 April 2018, which the respondent confirmed. Malfunctioning internal processes on the side of the respondent are its own responsibility and not a reason to delay the oral proceedings, given that this would negatively impact on procedural efficiency and be unfair to the other party. Furthermore, the respondent was aware of the date of the oral proceedings at the latest in July and thus had ample time to prepare a response, as indeed it did. Consequently, the board saw no reason for granting a postponement of the oral proceedings in order to respect the right to be heard under Article 113(1) EPC.

2. *Main request - claim 1 - inventive step starting out from D16*

- 2.1 The present patent relates to a method for programming a hearing aid system by a mobile device, by which the board understands that the mobile device is active in programming the hearing aid system and not, for example, merely a means to provide a communications path from a network to the hearing aid system. In accordance with claim 1, the mobile device is a "digital cellular telephone", which the board interprets to be a stand-alone device with which a user

is able to make telephone calls via a cellular telephone network in the normal fashion. This means that the mobile device must have a speaker and a microphone, but not that the device must be an off-the-shelf proprietary digital cellular telephone.

2.2 The board considers that D16 represents the closest prior art. In essence, D16 discloses a mobile stand-alone device carried by a user referred to as a "remote processor unit", or RPU, which (in the full-featured embodiment described from col. 6, line 47 ff. and shown in Fig. 9) is able to "program" a separate earpiece worn in the ear via a short-range wireless communication link (cf. col. 7, lines 44-46), in that it is able to amend default parameter settings for nominal and maximum earpiece volume levels stored in the earpiece (cf. col. 22, lines 27-33 and 48-51). The programmable earpiece of D16 is considered to be the "hearing aid system" of claim 1.

2.3 It is further stated in D16 that the RPU can communicate via a cellular mobile telephone network, including providing "normal telephone voice communication" (cf. col. 25, lines 41-50). As regards whether the RPU has a speaker and/or a microphone, it is further stated in col. 24, lines 50-55 that "... the system acts as a "virtual handset" communication aid that replaces a conventional telephone handset in many applications (although users may additionally communicate with a conventional handset or speakerphone in the usual fashion)" (board's underlining). The board understands the underlined passage to mean that the RPU can itself comprise a handset and can thus be used to make telephone calls without requiring the earpiece. In this respect, a conventional handset implicitly comprises a microphone and a speaker. The board

considers that this interpretation is corroborated by a further passage of D16 (col. 23, lines 14-19), which reads: "A[n] auxiliary speaker can be supplied in the RPU 16 as a peripheral 950 device that allows people other than the user to hear the same sounds as those produced by the earpiece speaker 15, if desired (as, e.g., when a person other than the user wishes to use the system's optional cellular telephone capabilities)." (board's underlining). The board concludes that the RPU, when equipped with a supplementary handset, is a "a mobile device which is a digital cellular telephone".

- 2.4 The respondent disputed that the RPU was a digital cellular telephone because a digital cellular telephone was an off-the-shelf proprietary device, which the RPU was not. Further, the RPU did not have either a speaker or a microphone. In order to make telephone calls, it relied on the speaker and microphone of the earpiece, and these were were thus in the "hearing aid system" and not in the RPU, which could therefore not be considered as a cellular telephone. With respect to the reference to a conventional telephone handset (i.e. col. 24, lines 50-55), the respondent argued that this merely meant that the user could make telephone calls using a normal telephone entirely independently of the RPU. With respect to the passage suggesting that other persons may make use of the system's cellular telephone capabilities (i.e. col. 23, lines 14-19), the respondent pointed out that this passage referred only to a speaker and not to a microphone. The respondent argued that a microphone was not necessary because other persons could telephone by making use of the microphone in the earpiece.

2.5 The board finds the respondent's arguments unconvincing. Firstly, claim 1 is not limited to a digital cellular telephone which is an off-the-shelf proprietary device. Secondly, with regard to the respondent's interpretation of the passage in col. 24, lines 50-55, the board sees no sense or logic in the author of D16 pointing out that a user could additionally use another, entirely separate telephone to make calls. The board therefore finds this interpretation implausible. Further, with regard to the passage in col. 23, lines 14-19, although it would indeed be feasible to provide a handset with only a speaker and no microphone to enable other persons to make telephone calls, a handset conventionally has both. Consequently, the board regards the presence of a microphone as implied by the term "conventional telephone handset" (cf. col. 24, line 52). In any case, even if for the sake of argument, the lack of any explicit mention of an auxiliary microphone were held to confer novelty, this feature would not contribute to inventive step since the skilled person would immediately recognise the advantages in not having to rely on the earpiece microphone such as enabling the other persons to stand further away, or being able to make telephone calls even if the communication between the RPU and earpiece were disturbed (cf. col. 22, line 11 ff.).

2.6 The subject-matter of claim 1 therefore differs from the disclosure of D16 in the feature:

"wherein a server (116, 616, 816, 916, 1016) coupled to the Internet (114, 614, 814, 914, 1014) communicates with the mobile device through the Internet (114, 614, 814, 914, 1014) and the long-range wireless network (110, 610, 810, 910, 1010, 1110)."

- 2.7 In D16, the RPU may connect to a remote computer for database access via the secondary wireless link 19 (cf. col. 26, lines 24-43). However, it is not disclosed that the connection is via the Internet or that the remote computer is explicitly a server.
- 2.8 However, at the priority date of the patent, the mobile telephony standard in common use in Europe was GSM. In the second half of the 1990s, GPRS was standardised which enabled digital communication via the cellular infrastructure towards packet networks, including the Internet. WAP browsers were also available on some cellular telephone handsets, although still in early stages of deployment and with limited functionality. 3G telephone networks such as UMTS were in development, but not deployed. Due to their higher bandwidth, 3G networks were envisaged to be able to provide media and other digital services to a mobile phone, inter alia via a connection to the Internet.
- 2.9 Further, the present patent mentions a variety of wireless technologies which are used in connection with a digital cellular network, inter alia GSM, GPRS and UMTS (cf. paragraphs [0027] and [0028]). It follows that at the priority date, the skilled person was acquainted with these wireless technologies. D16 requires a connection based on cellular telephone technology. The skilled person in this field at the priority date would thus without doubt have had the above-mentioned wireless technologies in mind when implementing D16.
- 2.10 In addition, D16 mentions a variety of additional services that can be provided to the RPU in addition to a normal telephone service. In this respect, it is

stated that music can be provided via over-the-telephone services (cf. col. 25, lines 56-59), that electronic mail and fax messages can be received (cf. col. 26, lines 27-30), or that a database could be accessed by connecting to a remote site computer (cf. col. 26, lines 39-43). At least some of these are implicitly digital services (electronic mail reception and data base access), whereby in order to access email, an Internet connection is conventionally required to access a mail server.

2.11 The problem to be solved starting out from D16 can be regarded as how to provide these digital services to the RPU. In order to solve this problem, the skilled person would have considered it obvious based on common general knowledge that the RPU would be adapted to connect to servers on the Internet, e.g. via GPRS.

2.12 The respondent argued essentially that other solutions were possible, e.g. for obtaining electronic mail, than connecting via the Internet. However, in the board's view, even if that is the case, this alone does not render the use of the Internet inventive, since the Internet was at the relevant date the most common way of accessing electronic mail. The respondent's argument is therefore not convincing.

2.13 Consequently, the board concludes that the subject-matter of claim 1 of the main request does not involve an inventive step (Articles 52(1) and 56 EPC).

### 3. *Auxiliary request II-B - admissibility*

3.1 The board notes that auxiliary request II-B was filed by the respondent with its letter dated 14 August 2018 in response to the board's communication. It thus

constitutes an amendment to the respondent's case in the sense of Article 13(1) of the Rules of Procedure of the Boards of Appeal (RPBA). According to this article "Any amendment to a party's case after it has filed its grounds of appeal or reply may be admitted and considered at the Board's discretion". Further, it stipulates that this discretion "shall be exercised in view of inter alia the complexity of the new subject-matter submitted, the current state of the proceedings and the need for procedural economy".

3.2 The board notes that although auxiliary request II-B was filed with the letter dated 14 August 2018, as regards inventive step, this letter effectively contains no proper substantiation explaining how and why claim 1 of this request involves an inventive step, in particular as compared with D16, which would have been required in order to comply with the provisions of Articles 12(2) and (4) RPBA. The board therefore regards the effective filing date for assessing admissibility as being the day of the oral proceedings.

3.3 In accordance with case law, an auxiliary request may be admitted pursuant to Article 13(1) RPBA at a late stage of appeal proceedings if sound reasons exist for filing the request so far into the proceedings, which may be the case when amendments are occasioned by developments during the proceedings, if the request does not extend the scope of discussion as determined by the grounds of appeal and the respondent's reply, it being noted that under Article 12(2) RPBA the grounds of appeal and the reply must contain a party's complete case, and if the request is clearly or obviously allowable, meaning that it must be immediately apparent to the board, with little investigative effort on its part, that the amendments made successfully address the

issues raised without giving rise to new ones (cf. T 1634/09, point 3.2 of the reasons).

- 3.4 As the respondent pointed out, the requests filed with the letter dated 14 August 2018, including auxiliary request II-B, can be seen as having being submitted in response to an interpretation of D16 given by the board in its communication (namely: regarding the earpiece as the "hearing aid system"), which had not hitherto been put forward at any prior stage of the proceedings. The board therefore considers that auxiliary request II-B was filed in response to a development during the appeal proceedings.
- 3.5 The board considers further that the request did not meaningfully extend the discussion beyond the respondent's case as set out in the reply to the statement of grounds of appeal, since most of the added features, including the aspect of downloading software onto the mobile device, were already covered by the existing auxiliary requests II and V, with which auxiliary request II-B could be broadly seen as "convergent". The additional aspect of upgrading software only minimally extended the discussion with respect to these earlier requests.
- 3.6 On a prima facie basis, the board also considered that claim 1 (which is the only claim of the request) appeared to involve an inventive step with respect to D16. Further, since claim 1 was based entirely on a combination of granted claims 1, 3 and 6, prima facie it did not give rise to any other objections either.
- 3.7 The appellant argued (i) that the request was filed "too late", (ii) that it did not follow the development of the proceedings, (iii) that it would require a



discussion of other documents, (iv) that it may entail a broader discussion with respect to common general knowledge, which might require the proceedings to be postponed, and (v) that it was prima facie not allowable because the new subject-matter was anticipated by the "hearing test" of D16.

3.8 Arguments (i) and (ii) have been covered above. As regards arguments (iii) and (iv), the board points out that a discussion of other documents and/or a broader discussion with respect to common general knowledge would potentially have already been necessary in respect of the requests filed earlier. As regards (v), the board considered that the new subject-matter clearly was not anticipated by the hearing test of D16 for reasons given below. The appellant's arguments were therefore found not convincing.

3.9 Consequently, although the request was filed at a very late stage, the board admitted the request to the appeal proceedings (Article 13(1) RPBA).

4. *Auxiliary request II-B - claim 1 - inventive step*

4.1 Claim 1 of auxiliary request II-B requires inter alia that software is executed on the hearing aid system. In D16, the "hearing aid system" is interpreted by the board as the earpiece. However, in D16, the earpiece executes no software. In this respect, the "hearing test program" of D16 referred to by the appellant and described in col. 27, lines 4-24, is executed by the RPU, not by the earpiece.

4.2 The whole concept of D16 is furthermore to remove functionality from the earpiece and to carry out signal enhancement in the RPU, thus keeping the earpiece

simple (cf. col. 2, lines 20-39, and col. 4, lines 55-56). The skilled person has therefore no incentive to enhance the earpiece by providing it with a processor able to execute upgradeable software. Consequently, the board considers that the skilled person starting out from D16 (interpreted such that the hearing aid system is the earpiece), could only arrive at the subject-matter of claim 1 with the benefit of hindsight.

- 4.3 In an alternative interpretation of D16, the "hearing aid system" can be regarded as the combination of the earpiece unit and the RPU, and the "mobile device" as a separate cellular telephone transceiver worn on the wrist or ankle (cf. col. 25, lines 4-10). However, with respect to the requirement of claim 1 that the mobile device is a "digital cellular telephone", there is no suggestion in D16 that the "separate transceiver" would include such elements as a display, a keypad, a microphone and a speaker. This transceiver is therefore not a digital cellular telephone as understood by the board (see above point 2.1). Nor would it be obvious to modify the transceiver such that the user would be able to use it as a stand-alone device for making telephone calls, since this would run counter to the concept of miniaturisation inherent in designing the transceiver to be attached to a wrist or ankle and its location there. Secondly, this transceiver unit would not be a programming unit able to download and upgrade software (e.g. by means of a client program connecting to the Internet), as required by claim 1, but be a non-programming unit merely enabling access to the Internet via the cellular telephone network. In this respect, programming operations and interaction with the user would still reside in the RPU, i.e. in the hearing aid system itself. Consequently, the skilled person

starting out from D16 based on this alternative interpretation would not arrive at the subject-matter of claim 1 either.

- 4.4 The board concludes that claim 1 of auxiliary request II-B involves an inventive step when starting out from D16 (Articles 52(1) and 56 EPC).
- 4.5 The appellant further argued that the skilled person could start out from common general knowledge and apply the teaching of D16 to arrive at the subject-matter of claim 1. In this respect, it was well-known to use a digital cellular telephone as a programming device for programming a range of devices (examples of this were D20, D21 and D22 which were said to describe respectively an electronic door, a calculator for banking operations or an organiser), and to equip the device with a WAP browser for connecting to the Internet. Starting out from such systems, the skilled person would gain the hint from D16 to apply this idea to hearing aids and would thus arrive without inventive skill at the subject-matter of claim 1.
- 4.6 The board however considers that this attack relies essentially on hindsight, especially since at the priority date of the patent, although WAP browsers were available on some cellular telephone handsets, they were in early stages of deployment and had limited functionality (cf. point 2.8 above). Furthermore, it apparently had not been contemplated at the priority date to program either a hearing aid system or similar type of system (the examples given in D20 to D22 are considered to be somewhat remote from the field of hearing aid systems) by using a WAP browser of a digital cellular telephone.

In respect of claim 1 of auxiliary request II-B, the appellant raised no lines of attack based on any other documents, in particular lack of inventive step with respect to D4, D4' and lack of novelty with respect to D25. There is therefore no need for the board to investigate these matters further.

5. *Articles 84, 123(2) and 123(3) EPC*

Since claim 1 of auxiliary request II-B is in terms of its technical features identical to claim 6 as granted, compliance with Article 84 EPC may not be examined (cf. G 3/14, reasons, point 87). Further, the board notes that the ground for opposition pursuant to Article 100(c) EPC was not invoked by the opponent and, indeed, no objections based on this ground were raised by the appellant in respect of claim 1 of auxiliary request II-B. No issue arises either in respect of Article 123(3) EPC (cf. G 9/91, reasons, point 19), since claim 1 of auxiliary request II-B is more limited than claim 1 as granted.

6. *The ground for opposition pursuant to Article 100(b) EPC*

The opposition division effectively did not admit the ground for opposition pursuant to Article 100(b) EPC (cf. point III above). The board gave reasons in its communication (cf. points 6.1 to 6.3 of the communication dated 6 April 2018) as to why it agreed with the opposition division in this respect. At the oral proceedings before the board, the appellant did not pursue this ground for opposition. There is therefore no need to consider this matter further.

7. The board therefore concludes that the ground for opposition as substantiated by the opponent/appellant does not prejudice the maintenance of the patent in amended form on the basis of claim 1 of auxiliary request II-B (which, as noted before, is the only claim of the request) as filed with the letter dated 14 August 2018.

8. *Adaptation of the description*

The description apparently requires adaptation to new claim 1 (e.g. paragraphs [0011] to [0015] of the patent specification). However, the board considers that this matter is best left to the opposition division.

**Order**

**For these reasons it is decided that:**

1. The decision under appeal is set aside.
  
2. The case is remitted to the department of first instance with the order to maintain the patent in amended form on the basis of the claim of auxiliary request II-B as filed with the letter dated 14 August 2018 and a description to be adapted.

The Registrar:

The Chairman:



G. Rauh

F. van der Voort

Decision electronically authenticated