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**Datasheet for the decision
of 27 April 2018**

Case Number: T 0384/15 - 3.5.03

Application Number: 08766905.7

Publication Number: 2177045

IPC: H04R1/10

Language of the proceedings: EN

Title of invention:

IMPROVED EARPIECE

Patent Proprietor:

Freebit AS

Opponents:

Santarelli SA
Bose GmbH
Bose Limited

Headword:

Earpiece/FREEBIT

Relevant legal provisions:

EPC Art. 105, 111(1), 100(a)
RPBA Art. 13(1)

Keyword:

Admissibility of opposition and interventions - yes (see point 1 of the reasons)

Referral to the Enlarged board of Appeal - no (see point 3 of the reasons)

Remittal - no (see point 4 of the reasons)

Novelty - patent as granted - no (see point 5 of the reasons)

Admissibility of late-filed request - no (see point 6 of the reasons)

Reimbursement of intervener's appeal fee - yes (see point 9 of the reasons)

Decisions cited:

G 0010/91, G 0001/94, G 0003/97, G 0004/97, G 0003/99,
G 0003/04, T 0305/08

Catchword:



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Case Number: T 0384/15 - 3.5.03

D E C I S I O N
of Technical Board of Appeal 3.5.03
of 27 April 2018

Appellant: Santarelli SA
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Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 23 December
2014 rejecting the opposition filed against
European patent No. 2177045 pursuant to Article
101(2) EPC.**

Composition of the Board:

Chairman F. van der Voort

Members: T. Snell

 P. Guntz

Summary of Facts and Submissions

- I. The appeal concerns the decision of the opposition division rejecting the opposition of the opponent Santarelli SA. The grounds for opposition invoked by the opponent were those pursuant to Article 100(a) and (b) EPC.

- II. In the impugned decision, the opposition division held that the invention as claimed in claim 1 of the patent as granted was disclosed sufficiently clearly and completely for a skilled person to carry it out (cf. Article 83 EPC). It also held that the subject-matter of claim 1 was new with respect to the disclosure of either D1 or D2 (= **US 2005/0008180**) respectively and involved an inventive step with respect to the combination of D1 and D2.

- III. In the statement of grounds of appeal, the opponent (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 was not new with respect to document D2, and did not involve an inventive step based on the combination of D1 and D2.

- IV. 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.

- V. Subsequently, an intervention by an assumed infringer, namely Bose GmbH, (hereinafter "first intervener") was filed (cf. Article 105 EPC). The first intervener paid the opposition fee and the appeal fee and requested

that the decision under appeal be set aside and that the patent be revoked in its entirety. It also requested reimbursement of the appeal fee (citing decision G 3/04) and accelerated prosecution.

- VI. The first intervener invoked the grounds for opposition pursuant to Article 100(a), (b) and (c) EPC. With respect to Article 100(a) EPC, it was argued, *inter alia*, that the subject-matter of claim 1 of the granted patent lacked novelty with respect to D1 or D2 and that the subject-matter of claim 1 lacked an inventive step with respect to D1 alone or the combination of D1 and D2.
- VII. In a reply to the notice of intervention, the proprietor requested that the intervention be held inadmissible for the reason that the opponent was a straw man acting for Bose, so that the party behind the opponent and the intervener was one and the same.
- VIII. In a letter of reply, the first intervener stated that "Bose GmbH ... was definitely not a party to the present opposition prior to its intervention". Therefore, it was contended that the intervention was admissible.
- IX. In a summons to oral proceedings the board gave the following preliminary assessment:
- (i) The [first] intervention was admissible;
 - (ii) There was doubt as to whether claim 1 of the patent complied with Article 123(2) EPC (cf. the ground for opposition pursuant to Article 100(c) EPC);

- (iii) The ground for opposition pursuant to Article 100(b) EPC did not appear to prejudice the maintenance of the patent as granted; and
- (iv) The subject-matter of claim 1 did not appear to be new with respect to the disclosure of D2.

X. Together with a reply to the board's communication received on 22 March 2018, the respondent submitted claims of seven auxiliary requests aimed at overcoming the board's objections with respect to Articles 123(2) and 100(c) EPC. The respondent made a plurality of requests, *inter alia*, that the opposition and/or intervention be held inadmissible as a result of an attempt to circumvent the law by abuse of process. The requests set out in the respondent's letter were essentially maintained until the end of the oral proceedings and thus are reproduced below in connection with the respondent's final requests.

XI. Subsequently, a second intervention of an assumed infringer, namely Bose Limited, was filed (hereinafter "second intervener"). The second intervention essentially relied on the same grounds for opposition as the first intervention and both interveners were jointly represented.

XII. Oral proceedings were held on 27 April 2018.

The appellant requested that the decision under appeal be set aside and that the patent be revoked, as did both interveners. The first intervener further requested that its appeal fee be reimbursed.

The respondent's requests made in the letter dated 22 March 2018 were maintained, except that requests concerning "the intervention" applied to both

interventions. The requests as set out in the letter read as follows:

"1.1 We request that the opposition filed by Santarelli be deemed inadmissible.

1.2 Should the Board be unable to accede to the above request, we request that the following question be referred to the Enlarged Board of Appeal in accordance with Article 112(1)(a) EPC: "If evidence clearly indicates that a strawman opponent is acting on behalf of a party who intervenes in opposition proceedings (Art. 105 EPC), is the involvement of the opponent to be regarded as circumventing the law by abuse of procedure (cf. G 3/97 and G 4/97), the consequence of which being that the opposition is inadmissible?".

1.3 Should the Board accede to neither of the above requests, we request that the intervention be deemed inadmissible and that the appeal of the Appellant be dismissed.

1.4 Should the Board deem the intervention to be admissible, we request that the case be remitted to first instance to have all new grounds, facts and evidence examined in order that we be in a position to defend the patent before two instances of jurisdiction.

1.5 Should the Board deem the intervention to be admissible, but wishes to examine whether the decision of first instance is correct in view of the grounds, facts and evidence raised in the Appellant's written statement setting out the grounds of appeal, we request that the Board decides on the correctness of the decision of first instance only on the basis of these grounds, facts and evidence and, if the Board were to

conclude that these do not prejudice the maintenance of the patent, remit the case to first instance to have all new grounds, facts and evidence examined.

1.6 Should the Board nevertheless intend to proceed as laid out in section 19 of its Communication, we request that the appeal of the Appellant be dismissed, that the granted patent be found to fulfil the requirements of Article 123(2) EPC and that the case be remitted to first instance to examine the objections based on the new documents on file cited by the intervener.

1.7 To the extent that the Board were to find that the granted patent contravenes Article 100(c) EPC, First [to] Seventh Auxiliary claim sets are enclosed. To the extent that the Board finds that one of these Auxiliary claim sets overcomes the objections laid out in the Board's Communication, we request that the decision under appeal be set aside and that the case be remitted to first instance to have that Auxiliary claim set examined in view of the objections based on the new documents on file cited by the intervenor."

In addition, as a further auxiliary request, the respondent requested that the patent be maintained in amended form on the basis of "first auxiliary patent claims" as filed during the oral proceedings. This request was to be ranked between requests 1.6 and 1.7.

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

XIII. Claim 1 as granted reads as follows:

"Ear unit for stable fittings in an ear, wherein said ear unit (10) is shaped as a decremental curve, in

that said decremental curve (9) of the outer part of the ear unit (10) corresponds to antihelix (13) of the ear with a surface shaped in such a way that the curve falls along the inner part of the antihelix (13) and is partly positioned under antitragus (3), and that the distance between the ends (5, 8) of the decremental curve is approximately equal to the distance between a first cavity formed under the tragus (4) of the ear and second cavity covered by the lower node (15) of the antihelix of the ear, the upper part of the curve projecting in underneath a flap (2) covering the lower part of the second cavity,

characterized in that said ear unit has a curvature providing an improved attachment **in that** said curvature follows the inner surface of the ear mussel (22) to provide a contact surface, thereby enabling the ear unit to fit closely against the ear mussel when the ear unit (10) is positioned into the ear."

XIV. Claim 1 of the "first auxiliary patent claims" as filed at the oral proceedings is the same as claim 1 as granted, except that the characterising part reads as follows:

"characterized in that said decremental curve of said ear unit has a curvature providing an improved attachment in that said curvature follows the inner surface of the ear mussel (22) to provide a contact surface extending from the first end to the second end of the decremental curve, thereby enabling the ear unit to fit closely against the ear mussel when the ear unit (10) is positioned into the ear."

XV. In view of the board's decision, there is no need to recite the wording of claims of any of the remaining auxiliary requests.

Reasons for the Decision

1. *Admissibility of the opposition and the interventions (cf. respondent's requests 1.1 and 1.3)*

1.1 The respondent argued that there was credible evidence that the opponent Santarelli SA was acting on behalf of one or more divisions of Bose Corporation, but had concealed this relationship. Further, all divisions of Bose, including the assumed infringers and interveners Bose GmbH and Bose Limited, were legally inextricably linked to the Bose Corporation. A requirement for an admissible intervention is that it be filed by a third party. By having chosen to protect its anonymity by filing the opposition in the name of a straw man, the true opponent has availed itself of the possibility of also intervening in the opposition proceedings because it is impossible, at least at first glance, for the EPO or any other party to ascertain whether the interveners are third parties or not. This constituted an abuse of process allowing circumvention of the law as laid out in Article 105(1) EPC. This anonymity also allowed Bose to pick and choose who they might subsequently wish to present as the true opponent, depending on circumstances, which also resulted in an abuse of process. As a consequence, the opposition filed in the name of Santarelli SA must be deemed inadmissible *ex tunc*. In turn, this meant that there were no pending opposition proceedings when the notices of intervention were filed by Bose GmbH and Bose Limited respectively.

It followed that the interventions were also inadmissible.

1.2 The appellant further argued that all divisions, companies and legal entities within the Bose Corporation should be regarded as a group of joint opponents (cf. G 3/99, OJ EPO 2002, 347) with Santarelli SA acting as a common representative. On that basis, Bose GmbH (and by implication Bose Limited) would be one of the joint opponents and thus not able to intervene as a third party.

1.3 The board agrees with the proprietor that an intervener must be a different party to the opponent in order to be a "third party" within the meaning of Article 105(1) EPC. However, the board considers that there is no question that the interveners are "third parties", i.e. different legal entities, with respect to the opponent Santarelli SA whether or not one of Bose GmbH and Bose Limited is the principal instructing Santarelli SA. As stated in G 3/97 (OJ EPO 1999, 245), point 2.1 of the reasons:

"The status of opponent is a procedural status and the basis on which it is obtained is a matter of procedural law. The EPC addresses this in Article 99(1) in conjunction with Article 100, Rules 55 and 56(1) EPC. On this basis, the opponent is the person who fulfils the requirements of the EPC for filing an opposition; in particular, the person must be identifiable (see Rule 55(a) EPC). The EPC does not specify any further formal requirements to be met by the opponent. A person who fulfils the said requirements becomes a party to the opposition proceedings (Article 99(4) EPC). In these proceedings, only his acts are relevant. A third party (the "principal") who has incited the opponent to

file the opposition cannot perform any procedural acts. The question whether the opponent's acts accord with the intentions or instructions of the principal is relevant only to the internal relationship between the latter and the opponent, and has no bearing on the opposition proceedings." (board's underlining).

- 1.4 Although the interveners are "third parties", it still has to be considered whether, by invoking Article 105 EPC, there has been an attempt by the opponent and/or interveners to circumvent the law by abuse of process and thus whether there are grounds for holding the opposition and/or interventions inadmissible.

- 1.5 In decision T 305/08, the opponent-appellant OI was alleged to be the patent department (although had an entirely different name) acting for interveners OII and OIII. The board of appeal in that case noted the evidence which appeared to suggest that OII and OIII belonged to the same group of companies as OI, but found that there was no attempt to circumvent the law by abuse of process. In this respect, the interveners were quite clearly distinct legal entities and were adhering to due process by filing interventions which was only possible by the actions of the respondent-proprietor against them (cf. point 1.5.8 of the reasons).

- 1.6 In the board's view, the same situation exists in the present case. The respondent has produced evidence suggesting a relationship between the appellant and the interveners, but no proof, as admitted by the respondent, that Santarelli SA was acting directly on behalf of either Bose GmbH or Bose Limited. Further, the representatives for the appellant and the interveners expressly denied that this was the case.

- 1.7 The argument that it is impossible for either the EPO or the proprietor to determine whether the interveners are third parties or not is here not relevant, since the board is satisfied that in the present case the interveners are third parties in the sense of being separate legal entities and not being the principal behind the opponent.
- 1.8 The argument that the anonymity created by using a straw man allowed Bose to pick and choose who they might subsequently wish to present as the true opponent, depending on circumstances, is also not convincing. In the present case, neither Bose GmbH nor Bose Limited were apparently involved when the opposition was filed. Bose has not presented anyone as the "true opponent", and indeed has had no need to do so.
- 1.9 The argument that all divisions, companies and legal entities within the Bose Corporation should be regarded as a group of joint opponents (cf. G 3/99) with Santarelli SA acting as a common representative is not convincing either. The opponent in this case is the legal entity which filed the opposition (Santarelli SA). There is no request by either Santarelli SA or Bose GmbH and Bose Limited that the oppositions should be considered as joint oppositions and therefore no basis for considering them as such.
- 1.10 The other requirements set out in Articles 99(1) and 105(1) EPC and Rule 77(1) EPC being met, which was not contested by the respondent, the board concludes that the opposition of Santarelli SA and the interventions by Bose GmbH and Bose Limited are admissible.

2. *Party status of the interveners*

The interveners are treated as opponents in these opposition appeal proceedings (cf. Article 105 EPC).

3. *The respondent's request for referral of a question to the Enlarged Board of Appeal (cf. respondent's request 1.2)*

3.1 The appellant requested, to the extent that the board does not deem Santarelli SA's opposition inadmissible, that the following question be referred to the Enlarged Board of Appeal:

"If evidence clearly indicates that a strawman opponent is acting on behalf of a party who intervenes in opposition proceedings (Art. 105 EPC), is the involvement of the opponent to be regarded as circumventing the law by abuse of procedure (cf. G 3/97 and G 4/97 [OJ EPO 1999, 245 and 270]), the consequence of which being that the opposition is inadmissible?".

3.2 For the reasons given above (cf. points 1.6 and 1.7), the board has concluded that the opponent, even if a strawman, is not acting on behalf of the interveners. Consequently, the board does not need an answer to this question to decide the case. The request for referral is therefore refused.

4. *Request of the respondent for remittal to the department of first instance (cf. respondent's request 1.4)*

4.1 In the case that the board deems the interventions to be admissible, the respondent requested that the case

be admitted to the first instance to have all new grounds, facts and evidence examined in order that they be in a position to defend the patent before two instances of jurisdiction.

- 4.2 In accordance with decision G 1/94 (OJ EPO 1994, 787), "in application of what has been stated by the Enlarged Board in case G 10/91 [OJ EPO 1993, 420] for the exceptional situation of the introduction of new grounds in ordinary appeal proceedings, if a fresh ground for opposition is raised by the intervener, the case should be remitted to the first instance for further prosecution, unless special reasons present themselves for doing otherwise, for example when the Patentee himself does not wish the case to be remitted".
- 4.3 As regards the fresh ground for opposition under Article 100(c) EPC, the respondent stated that it did not wish this ground to be discussed in these appeal proceedings. Further, the respondent argued that the normal sequence of examination was to determine compliance with Articles 83 and 123(2) EPC (cf. the grounds for opposition pursuant to Articles 100(b) and 100(c) EPC) before examining for novelty and inventive step. It followed that the case should be remitted with no discussion of the ground for opposition pursuant to Article 100(a) EPC.
- 4.4 The board agreed with the respondent that there were no special reasons not to remit the case in accordance with G 1/94 as regards the ground for opposition pursuant to Article 100(c) EPC. However, that did not mean that the other grounds for opposition, in particular Article 100(a) EPC, could not be discussed insofar as being within the scope of the opponent's

case presented during the opposition proceedings and decided on by the opposition division. In any case, the respondent considered that claim 1 as granted complied with Articles 83 and 123(2) EPC, so that there was nothing illogical in discussing novelty and/or inventive step within the framework of the original opposition.

4.5 The request for remittal of the case was therefore refused.

5. *Ground for opposition pursuant to Article 100(a) EPC (cf. respondent's request 1.5)*

5.1 *Claim 1 as granted - novelty*

5.1.1 The patent relates to an ear unit which is held in place by structures of the outer part of the ear, in particular the antihelix and the antitragus.

5.1.2 *Remarks on claim interpretation*

(i) It was common ground that the term "decremental curve" is not a term of the art. The respondent argued that the patent was its own dictionary. Claim 1 defined a decremental curve as a curve which falls along the inner part of the antihelix, which in general has a C-shape, like a "banana" or a "bratwurst". The board points out that the same curve might fall along the antihelix of one ear but not of another ear. The only way to interpret this feature is therefore as a curve which has the shape and dimensions which could allow it to fall along the antihelix of an ear. The term "decremental" in itself plausibly suggests a changing curvature, although the respondent disputed the board's interpretation as a curve whose radius increases, i.e.

the degree of curvature decreases, emphasising rather the property of conforming to the shape of a given antihelix.

(ii) The parties agreed that "ear mussel" is a synonym for "ear concha". In the following, these terms are used interchangeably.

(iii) With regard to the wording "said curvature follows the inner surface of the ear mussel (22) to provide a contact surface", the board notes that this embraces a contact surface which only partially follows the inner surface of the mussel/concha. In combination with the wording "fit closely", it follows that the contact surface essentially touches the corresponding surface of the mussel/concha when the ear unit is correctly positioned. The respondent argued that contact had to be along the whole length of the decremental curve, and that points of contact alone would not anticipate this feature. The board however notes that it is not a requirement of claim 1 that contact had to be along the whole length of the decremental curve.

(iv) The opposition division (cf. the decision under appeal, point 5.3) interpreted claim 1 as defining a "pre-existing curvature", stating that "A curvature only formed after insertion into the ear would not be supported by the description". The board disagrees with this restrictive interpretation. The language of claim 1 is not per se unclear (e.g. illogical) such that interpretation by the description would be necessary. In the board's view, claim 1 embraces a curvature formed after insertion in the ear (cf. claim 1, last paragraph, "when the ear unit (10) is positioned into

the ear"), whether or not such an embodiment is supported by the description.

5.1.3 Using the wording of claim 1, the board considers that D2 discloses an ear unit for stable fittings in an ear, wherein

said ear unit is shaped as a decremental curve (see below),

wherein said decremental curve of the outer part of the ear unit corresponds to the antihelix of the ear (cf. paragraphs [0023], [0041], [0081] and Fig. 3)

with a surface shaped in such a way that the curve falls along the inner part of the antihelix (idem)

and is partly positioned under the antitragus (cf. paragraphs [0041], [0042] and [0081]), wherein

the distance between the ends of the decremental curve is approximately equal to the distance between a first cavity formed under the tragus of the ear and a second cavity covered by the lower node of the antihelix of the ear (idem; it is to be assumed that as the anchoring points on the antihelix are apparently the same as in the patent that this relationship will also hold in D2),

the upper part of the curve projecting in underneath a flap ("crus of helix") covering the lower part of the second cavity (idem),

said ear unit has a curvature providing an improved attachment (cf. paragraph [0042] and Fig. 4) in that

said curvature follows the inner surface of the ear mussel ("concha bowl") to provide a contact surface (cf. paragraph [0042]),

thereby enabling the ear unit to fit closely against the ear mussel when the ear unit is positioned into the ear (idem).

5.1.4 At the oral proceedings before the board, the respondent submitted the following main arguments in favour of novelty:

(i) A finding of lack of novelty had to be based on a direct and unambiguous disclosure with the emphasis on unambiguous. In D2, there was no direct and unambiguous disclosure of close contact between the ear unit and the inner surface of the mussel, which was not the wall of the mussel.

(ii) The ear unit of D2 had to be deformed in use (cf. paragraph [0072]). In fact, as the unit was symmetrical about the boss which was placed in the ear canal, without deformation it would not fit in the ear. When deformed, the vertical rib collapsed and the unit bent outwards towards the exterior of the ear, thereby pushing the inner surface of the ear unit away from the mussel.

(iii) In addition, the bulges at the top and bottom of the unit lifted the inner surface of the ear unit away from the mussel.

(iv) D2 might contain vocabulary which hinted at what was claimed, but this was not the same as a clear and unambiguous disclosure of the claimed subject-matter.

5.1.5 In the letter dated 26 August 2015, the respondent submitted the following additional arguments:

(v) D2 disclosed a device using an ear boss entering the ear canal, a feature not required by the patent.

(vi) D2 did not represent an enabling disclosure, since a device as shown, where the distance between the upper detent and the boss and the distance between the lower detent and the boss are the same, could not fit into an ear.

(vii) The device of D2 was made of a polymer. Although it was clear that this would passively conform to the concha, there was no indication that this provided an improved attachment.

(viii) The arcuate rib of D2 was symmetric and therefore could not be a decremental curve.

(ix) There was no clear and unambiguous indication that the arcuate rib followed the inner surface of the ear mussel. Following the "outline of the concha bowl" was quite different from following the inner surface of the ear mussel.

5.1.6 The board finds these arguments unconvincing for the following reasons.

In the first place, in D2, the boss placed in the ear canal is an optional feature (cf. paragraph [0027] and claim 14). This feature therefore plays no role in the assessment of novelty. Further, the ear unit is unambiguously designed for being held in place at least partially by the antihelix (cf. paragraph [0023] ("the earpiece is configured to be captured at least

partially by the antihelix of the ear")). In the board's view, it cannot be doubted that the D-shape of the ear unit of D2, even if symmetrical, would be capable of following the shape of the antihelix of an ear, since the variety of shapes and sizes of the human ear is near infinite. Further, given the capacity of the device to deform, it also cannot be doubted in the board's assessment that the curvature would have the capability to assume the shape of a "decremental curve", if this is to be understood as a changing curvature in the shape of the antihelix. As to whether the ear unit has a second curvature following the inner surface of the mussel, the board sees firstly no difference between the wall of the mussel and the bottom of the mussel, especially as the respondent admitted that there was no clearly defined transition between the two, and secondly notes that D2 explicitly states that "The back side of the ear piece preferably follows the outline of the conchae rim at the back of the conchae bowl. If the conchae bowl is irregular, the earpiece of the present invention will generally conform to fit" (paragraph [0042]) and that "the earpiece conforms to one or more contours of the ear within the conchae" (paragraph [0082]). The board sees here no difference between following an outline of the conchae rim at the back of the concha bowl and "following along the inner surface of the ear mussel" (cf. paragraph [0021] of the description of the patent, board's underlining), which is embraced by the language of claim 1, noting that, in D2, due to the elasticity of the ear cartilage, it is to be assumed that the zone of contact between the back of the device (cf. Fig. 4, "11") and the concha bowl will be a surface and not a mere contact line.

5.1.7 Therefore, the board concludes that the subject-matter of claim 1 as granted is not new with respect to the disclosure of D2 (Articles 52(1) and 54 EPC). The ground for opposition pursuant to Article 100(a) EPC thus prejudices the maintenance of the patent as granted.

6. *"First auxiliary patent claims" filed at the oral proceedings - admissibility*

6.1 This request was filed by the respondent towards the end of the oral proceedings and thus its admissibility is subject to the board's discretion (Article 13(1) RPBA). In general, the boards of appeal do not admit a request filed at such a late stage of the proceedings unless it is prima facie allowable.

6.2 In the board's view, as pointed out by the appellant, the amendments to claim 1 prima facie do not comply with Article 123(2) EPC. In particular, the requirement "to provide a contact surface extending from the first end to the second end of the decremental curve" has no direct and unambiguous basis in the application as filed. The respondent referred to the figures and page 3, lines 31 to 34, of the description of the application as published. However, the figures do not show a contact surface and the passage of the description referred to by the respondent does not contain this amended feature either.

6.3 The board therefore decided not to admit the request.

7. *The auxiliary requests filed on 22 March 2018 (cf. the respondent's request 1.7)*

These requests were conditionally filed should the board decide that claim 1 as granted did not comply with Article 123(2) EPC. As the board did not decide on this issue, there is no basis for considering these requests.

8. *Conclusion*

As there is no allowable request, the patent must be revoked.

9. *Request for reimbursement of the appeal fee by the first intervener*

9.1 The first intervener Bose GmbH has paid both the opposition fee and the appeal fee. At the same time, it requests reimbursement of the appeal fee, citing G 3/04 (OJ EPO 2006, 118).

9.2 In accordance with G 3/04 (cf. point 11 of the reasons), a party which intervenes during opposition appeal proceedings cannot have the status of an appellant. There is therefore no legal basis to pay an appeal fee. The appeal fee is therefore to be reimbursed.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The appeal fee paid by the first intervener is reimbursed.

The Registrar:

The Chairman:



M. Cañueto Carbajo

F. van der Voort

Decision electronically authenticated