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**Datasheet for the decision
of 24 November 2022**

Case Number: T 2113/18 - 3.4.01

Application Number: 10760166.8

Publication Number: 2475426

IPC: A61N1/39

Language of the proceedings: EN

Title of invention:

AUTOMATED EXTERNAL DEFIBRILLATOR DEVICE WITH INTEGRATED MOBILE
STATION MODEM

Patent Proprietor:

Qualcomm Incorporated

Opponent:

Steinbauer, Florian

Headword:

Automated external defibrillator with integrated modem /
Qualcom Inc.

Relevant legal provisions:

RPBA Art. 12(4), 12(2)
EPC Art. 56

Keyword:

Inventive step - obvious modification

Decisions cited:

T 0501/92



Beschwerdekammern

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Case Number: T 2113/18 - 3.4.01

D E C I S I O N
of Technical Board of Appeal 3.4.01
of 24 November 2022

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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
18 June 2018 concerning maintenance of the
European Patent No. 2475426 in amended form.**

Composition of the Board:

Chairman T. Zinke
Members: P. Fontenay
D. Rogers

Summary of Facts and Submissions

- I. The appeal was filed by the opponent (appellant) against the interlocutory decision of the Opposition Division to maintain European patent 2 475 426 in an amended form according to the patentee's auxiliary request 6.

- II. The opposition was based on the grounds of Article 100(a) EPC (lack of novelty and lack of inventive step).

- III. The Opposition Division concurred with the opponent, that the subject-matter of the main request (patent as granted) lacked novelty in view of document

D1: US-A-2003/0212311.

The Opposition Division further held that auxiliary requests 1 to 5 did not meet the requirements of Article 123(2) EPC. In addition, the subject-matter of claim 1 according to auxiliary request 3 was considered not to involve an inventive step.

Auxiliary request 6 was considered to meet the requirements of Articles 83, 84, 56 and 123(2) and (3) EPC.

- IV. The appellant requested that the impugned decision be set aside and the patent be revoked.

V. In the grounds of appeal, the appellant submitted that the analysis relied upon by the Opposition Division to conclude that the subject-matter of claim 1 of auxiliary request 6 does not contain added subject-matter (Article 123(2) EPC) and does not extend the scope of protection when compared to granted claim 1 (Article 123(3) EPC) were not convincing. Claim 1 resulted from a combination of different embodiments. There was, however, no basis in the original disclosure for combining said embodiments. Moreover, the step of "re-establishing a new communication link" in claim 1 did not necessarily mean that what is re-established is exactly the link that was lost. The claim wording also covered, for example, the establishment of a new communication via Wi-Fi.

VI. The appellant introduced new documents on appeal. In the appellant's view, the subject-matter of claim 1 as maintained (auxiliary request 6) was not new in view of documents

D9: US-A-2008/0058884 or
D10: US-A-2005/0251213.

VII. The view that the claimed subject-matter as maintained is not inventive vis-à-vis D1 was reiterated. Reference was made, in this respect, to document

D8: US-A-2003/0233129

or to the skilled person's general knowledge.

VIII. In reply to the notification of the grounds of appeal, the patentee (respondent) indicated that they considered the patent as maintained in amended form to be allowable and that "...furthermore the previous auxiliary requests are maintained".

IX. In a communication issued pursuant to Article 15(1) RPBA 2020, the parties were informed of the Board's preliminary opinion.

The board underlined that it failed to clearly discern what requests the respondent was actually making with its statement in reply to the notification of the grounds of appeal. In section 21 of the preliminary opinion, the Board indicated how it understood the patentee's requests under the circumstances:

21. The patentee has indicated in their reply to the statement of grounds that the previous auxiliary requests were maintained. This suggests that the former main request is not further pursued. Moreover, the patentee does not contest anything in the Opposition Division's decision. In the light of this and of the prohibition of reformatio in peius, the Board understands the patentee's statement that it maintained the previous auxiliary requests to mean that it requests the appeal to be dismissed (this corresponds to maintenance on the basis of auxiliary request 6), or that the decision be set aside and the patent maintained on the basis of auxiliary request 7.

While the Board did not identify any added subject-matter or extension of the scope of protection in the claims as maintained (former auxiliary request 6), it

observed the following with regard to the new evidence filed by the opponent:

5. Documents D9 and D10 were introduced for the first time with the statement of grounds. They constitute new evidence.

6. The Board acknowledges that the content of D9 is *prima facie* relevant to the novelty of the claimed subject-matter. The board is, therefore, minded to admit D9 into the proceedings.

7. With regard to D10, the board notes it does not mention accessing the internet via the established communication link. The mere possibility, that the communication link could be provided over the internet, does not imply, in the absence of any evidence, that this is the case in D10. While it is suggested in D10 that a communication may be established with an external computer, there is no mention, in this context, of a server. Paragraph [0056], cited by the appellant, suggests some sort of monitoring of the communication link. There is, however, no indication to be found in D10 that the processor in the AED is programmed automatically to re-establish a (new) communication link. The reference to the communication link being re-acquired may result from a communication being initiated by the remote station or from a manual intervention by the user of the AED.

8. Document D10 does not appear, *prima facie*, to be relevant insofar as novelty is concerned. The Board does not intend not [sic] to admit it.

With regard to the issue of inventive step of the subject-matter of claim 1 of auxiliary request 6, the Board's comments read:

9. Document D1 discloses an automatic external defibrillator (AED) comprising:
a processor (306);
a mobile station modem (120, paragraph [0043]) coupled to the processor; and an antenna) coupled to the processor, wherein the processor is configured with processor-executable instructions to perform operations comprising:

- establishing a communication link with a cellular data network via the MSM (paragraph [0043], figures 4-6) and
- accessing an Internet via the established communication link upon activation of the AED (fig. 6 ref. 130);
- accessing a remote server via the internet (fig. 6 ref. 140); and
- communicating an AED activation message (paragraphs [0023] to [0025]) to the remote server via the internet.

10. The claimed subject-matter differs thus from the AED disclosed in D1 in that the processor is further configured for

- monitoring the established communication link to determine if the communication link has been terminated inadvertently, and
- automatically re-establishing a new communication link if it is deemed that the established communication link was terminated inadvertently.

11. *The Board concurs, in this respect, with the analysis of the Opposition Division as reproduced under point 9.2 of the impugned decision.*

12. *In the Board's view, however, the step of "automatically re-establishing a new communication link" does not imply that the same communication link is re-established, as assumed by the opposition Division. This derives from the wording of the feature itself, which does not require re-establishing "the" communication link but refers, on the contrary, to a "new communication link". Moreover, as underlined by the appellant, the very same communication link can hardly be re-established on the internet, where the path defining the communication between two IP addresses changes depending on the session.*

13. *The distinguishing features re-establish an inadvertently terminated communication, thus limiting the adverse consequences for the patient.*

14. *The objective problem solved by the claimed invention may thus be defined as to limit the impact of adverse interruptions.*

15. *Both documents D8 and D9 appear to be relevant in this respect. They disclose AED systems with communication facilities and explicitly suggest monitoring the ability of the communication link to operate satisfactorily (see D8, paragraphs [0055], [0066], [0379], [0381]; D9, paragraphs [0151] to [0159]) and reacting accordingly, e.g. by re-establishing a backup communication link (cf. D8, paragraphs [1167], [1168]; D9 paragraphs [0135] to [0137], [0151] to [0158]).*

16. *It would have been obvious for the skilled person to modify the device of D1 in the light of the teaching provided in either D8 or D9 and to re-establish a communication link between the AED and a remote station if the communication failed.*

17. *Auxiliary request 6 thus does not involve an inventive step (Article 56 EPC).*

The Board further observed that the amendments in the claims according to auxiliary request 7 did not appear to be sufficient to affect the analysis of inventive step, developed with regard to auxiliary request 6.

Concretely, it was stressed in section 20 of the provisional opinion that

20 *[...] The notion of "break of communication" is, namely, to be construed in the context of D1 (paragraphs [1162] as referring to an unintended event affecting the communication link, that is, an event that was initiated neither by the operator of the AED nor by the server. A similar meaning applies to the term "break in communications" as it appears in paragraphs [0137] or [0147] of D9".*

- X. In a response to the provisional opinion of the Board, the opponent contested the Board's view with regard to added subject-matter. It further reiterated the view that D10 was prima facie relevant for the subject-matter defined in auxiliary requests 6 and 7 in that the link referred to was to be understood in the context as a link provided over the internet.

The opponent further stressed that the reply made by the patentee to the statement of grounds neither contained any request to dismiss the appeal and maintain the patent in the amended form nor any request to maintain the patent on the basis of auxiliary request 7. In the opponent's view, there was accordingly no basis to decide on auxiliary request 7.

XI. In their response to the summons, the patentee indicated that neither they nor the representative would attend the oral proceedings. The patentee did not comment on the substance of the Board's preliminary opinion.

XII. Upon re-assessment of the case in view of the oral proceedings, the Board did not identify any reason to substantially depart from its provisional opinion insofar as former auxiliary request 6 was concerned. Moreover, the opponent's submissions as to the absence of basis for the Board to decide on the merits of auxiliary request 7 were persuasive. The oral proceedings were thus cancelled.

XIII. Claim 1 of former auxiliary request 6 (patent as maintained) reads:

*An automatic external Defibrillator, AED, comprising:
a processor;
a mobile station modem, MSM, coupled to the processor;
and
an antenna coupled to the processor,*

wherein the processor is configured with processor-executable instructions to perform operations comprising:
establishing a communication link with a cellular data network via the MSM and accessing an Internet via the established communication link upon activation of the AED;
accessing a remote server via the internet;
communicating an AED activation message to the remote server via the internet;
monitoring the established communication link to determine if the communication link has been terminated inadvertently; and
automatically re-establishing a new communication link if it is determined that the established communication link was terminated inadvertently.

Independent claim 6 according to auxiliary request 6 is directed to the corresponding operating method.

Auxiliary request 7 differs from claim 1 of auxiliary request 6 in that the term "inadvertently" in the penultimate feature of claim 1 was replaced by "by the remote server or by an AED operator" and, in that the terms "terminated inadvertently" in the last feature were replaced by "not terminated by the remote server or by the AED operator". Similar amendments were made in dependent claim 6 of auxiliary request 7 where the term "inadvertently" in the two last method steps was replaced by the terms "by the remote server".

Reasons for the Decision

1. The Board informed the parties of its preliminary opinion in the communication annexed to the summons to

oral proceedings. It was stressed that the subject-matter of claim 1 according to auxiliary request 6 did not involve an inventive step in view of D1, considered as closest prior art, and the teaching conveyed by either D8 or D9.

2. The patentee did neither comment on the various issues addressed in the provisional opinion nor clarified their initial requests as they had been invited to.
3. It is thus considered that the interpretation of the patentee's requests, as set out in the provisional opinion, reflects their true intentions. In particular, the Board's finding that the former main and auxiliary requests 1 to 5 did not form part of the appeal proceedings was not challenged.
4. Upon re-examination of the issue regarding inventive step, the Board did not identify any reason to depart substantially from its preliminary opinion according to which the subject-matter of claim 1 according to auxiliary request 6 does not involve an inventive step (Article 56 EPC).
5. Even though it may be argued, in favour of the patentee, that the re-establishment of a backup link in document D8 is not entirely automatic, since it requires the emergency technician (EMT) to press a button on the portable unit (see D8, paragraph [1167]), the Board maintains its view that the claimed subject-matter is not inventive starting from D1 in view of D8. Reference is made primarily to the Board's analysis as reproduced above. It is furthermore noted that the teaching of D8 focuses on re-establishing a communication link in case of failure of communication in either direction between the portable unit and the

central station (see D8, paragraph [0381]). A full automatisisation is thus considered to be the result of a straightforward interpolation of the teaching conveyed by D8.

6. For the reasons developed in the passage of the provisional opinion reproduced above, the same conclusion regarding lack of inventive step applies starting from document D1 in view of the teaching of D9, where it is explicitly foreseen to continuously try to re-establish a communication link in case of failure (see D9, e.g. paragraphs [0275], [0279], [0284]).
7. The subject-matter of claim 1 of auxiliary request 6 does thus not involve an inventive step in the sense of Article 56 EPC.
8. Independently of the findings of the Board with regard to the absence of inventive step of the subject-matter of the independent claims of auxiliary request 7, the Board notes that the patentee did not provide any arguments as to the why the amendments introduced in said request would address the objections raised by the opponent in the statement of grounds. The amendments in wording do not substantially change the subject-matter of claims 1 and 6.
9. As underlined by the opponent with reference to decision T 501/92, any procedural request made by a party to first instance proceedings before the EPO is not effective or applicable within subsequent appeal proceedings. This approach is in line with the wording of Article 12(4) RPBA 2007 (with reference to Article 12(2) RPBA 2007) which requires the reply to the statement of grounds of appeal to contain a party's complete case.

10. The Board thus decides not to admit auxiliary request 7 in the appeal proceedings (Article 12(4) RPBA 2007).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.

The Registrar:

The Chair:



D. Meyfarth

T. Zinke

Decision electronically authenticated