

**Internal distribution code:**

- (A) [ - ] Publication in OJ
- (B) [ - ] To Chairmen and Members
- (C) [ - ] To Chairmen
- (D) [ X ] No distribution

**Datasheet for the decision  
of 23 April 2021**

**Case Number:** T 1780/17 - 3.5.03

**Application Number:** 14175485.3

**Publication Number:** 2822298

**IPC:** H04R19/00, H04R19/04

**Language of the proceedings:** EN

**Title of invention:**

Gradient micro-electro-mechanical systems (MEMS) microphone

**Applicant:**

Harman International Industries, Inc.

**Headword:**

Gradient MEMS microphone/HARMAN

**Relevant legal provisions:**

EPC Art. 78(1)(c), 121

EPC R. 100(2), 135

RPBA 2020 Art. 13(2)

**Keyword:**

Further processing - (yes): omitted act completed and prescribed fee paid in due time  
Admittance of claim requests filed after expiry of the period set in R. 100(2) EPC communication - all requests (no): no exceptional circumstances and no cogent reasons

**Decisions cited:**

T 1459/11, T 1656/14, T 1722/17, T 1421/20



**Beschwerdekammern**  
**Boards of Appeal**  
**Chambres de recours**

Boards of Appeal of the  
European Patent Office  
Richard-Reitzner-Allee 8  
85540 Haar  
GERMANY  
Tel. +49 (0)89 2399-0  
Fax +49 (0)89 2399-4465

Case Number: T 1780/17 - 3.5.03

**D E C I S I O N**  
**of Technical Board of Appeal 3.5.03**  
**of 23 April 2021**

**Appellant:** Harman International Industries, Inc.  
(Applicant) 400 Atlantic Street, 15th Floor  
Stamford, CT 06901 (US)

**Representative:** Westphal, Mussnug Patentanwälte & Partner mbB  
Werinherstraße 79  
81541 München (DE)

**Decision under appeal:** **Decision of the Examining Division of the  
European Patent Office posted on 6 February 2017  
refusing European patent application  
No. 14175485.3 pursuant to Article 97(2) EPC.**

**Composition of the Board:**

**Chair** K. Bengi-Akyürek  
**Members:** J. Eraso Helguera  
R. Winkelhofer

## **Summary of Facts and Submissions**

- I. The appeal was lodged by the applicant against the decision of the examining division refusing the present European patent application for added subject-matter (Article 123(2) EPC) with respect to a main request and for lack of inventive step (Article 56 EPC) with respect to a first auxiliary request.
- II. In their statement of grounds of appeal, the appellant requested that the decision under appeal be set aside and that a patent be granted on the basis of the claims of any of three requests (**main, first and second auxiliary requests**), all filed with the statement of grounds of appeal.
- III. In a communication under Rule 100(2) EPC of 7 December 2020, the board informed the appellant of its intention to not admit any of the three claim requests on file into the appeal proceedings (Article 12(4) RPBA 2007) and of the lack of allowability of the main request under Article 56 EPC. The board invited the appellant to reply within two months, failing this the application would be deemed to be withdrawn under Rule 100(3) EPC.
- IV. No reply was received within this period.
- V. By communication of 1 March 2021, the board informed the appellant, according to Rule 112(1) EPC, that because of the failure to reply to the board's communication under Rule 100(2) EPC the application was deemed to be withdrawn, and that - subject to Rules 112(2) and 135 EPC - the appeal proceedings were terminated.

VI. On 8 April 2021, the appellant requested further processing and therein responded to the board's communication of 7 December 2020 as follows:

*"... Applicant notes that the Boards of Appeal refuse to admit the amended claims of the main and auxiliary requests as filed on June 12, 2017 into the Appeal proceedings due to the recent changes of the Rules of procedure of the Boards of Appeal.*

*Applicant, therefore, returns to the claims as filed in response to the summons to attend oral proceedings on December 14, 2016 (main request and first auxiliary request), and during Oral Proceedings on January 24, 2017 (second auxiliary request): ... I. Requests ...".*

Additionally, the appellant submitted the following statement under the heading "II. Reasoning":

*"Applicant refers to the argumentation already provided in the written submission of December 14, 2016 in preparation of the Oral Proceedings (for main request and first auxiliary request), as well as during Oral Proceedings of January 24, 2017 (for main request, first auxiliary request, and second auxiliary request). Applicant refrains from repeating the arguments herein and resubmits the documents including the relevant argumentation herewith."*

The appellant appended copies of their submission of 14 December 2016 made during the examination proceedings, and of the minutes of the oral proceedings of 6 February 2017 before the examining division.

- VII. The new **main request** and the new **second auxiliary request** correspond, respectively, to the main request and the first auxiliary request subject to the appealed decision, whereas the new **first auxiliary request** was withdrawn during the oral proceedings before the examining division.

### **Reasons for the Decision**

1. *Request for further processing (Article 121 EPC, Rule 135 EPC)*
  - 1.1 A loss of rights occurring from the failure to reply to a communication, pursuant to Rule 100(2) and (3) EPC, can be remedied with a request for further processing within two months from the communication noting the loss of rights under Rule 112 EPC, provided that the omitted act is complemented within this period (Article 121(1) and (3) in conjunction with Rule 135(1) EPC).
  - 1.2 The omitted act, in the present case, was the reply to the board's communication of 7 December 2020. It was submitted together with the request for further processing, within the time limit therefor. In addition, the prescribed fee relating to the requested further processing was paid in due time in accordance with Rule 135(1) EPC.

Hence, the failure to observe the time limit as originally set is deemed not to have ensued, and the appeal proceedings are to be continued on that basis (Article 121(3) EPC).

2. *Admittance of the pending claim requests into the appeal proceedings (Article 13(2) RPBA 2020)*

2.1 The three claim requests on file were submitted after the expiry of the two-month period specified by the board in a communication under Rule 100(2) EPC.

2.2 Hence, the admittance of those requests is governed by Article 13(2) RPBA 2020, according to which any amendment to a party's appeal case shall, in principle, not be taken into account unless there are exceptional circumstances, which have been justified with cogent reasons by the party concerned.

2.3 Such "exceptional circumstances" have not been invoked by the appellant, at all. The mere fact that the board challenged the admittance into the appeal proceedings of the claim requests filed with the statement of grounds of appeal does not amount as such to "exceptional circumstances" within the meaning of Article 13(2) RPBA 2020. By filing new sets of claims at the outset of the appeal proceedings, the appellant knowingly accepted the possibility that the board exercised its discretion pursuant to Article 12(4) RPBA 2007 to hold inadmissible all the requests which were not subject to the appealed decision. Hence, the negative nature of the board's preliminary opinion does not automatically constitute "exceptional circumstances" that could justify the amendment to the appellant's case at this late stage of the appeal proceedings (see e.g. T 1459/11, Reasons 3.2). Against this background alone, these requests cannot be taken into account.

2.4 Moreover, all these claim requests had already been presented before the examining division, and had later

in the proceedings been replaced by other claim requests, i.e. they had been withdrawn. According to the established jurisprudence of the Boards of Appeal, such claim requests cannot be taken into account if being resubmitted in the appeal proceedings (see e.g. T 1656/14, Reasons 2.4; T 1722/17, Reasons 2; T 1421/20, Reasons 5.4.3).

2.5 Rather, the present claim requests could have been considered by the board at a much earlier stage, had the appellant not willingly decided to replace the main request and the first auxiliary request subject to the impugned decision (now main request and second auxiliary request) and to withdraw the present first auxiliary request already during the examination proceedings. The appellant provided no "cogent reasons" that could justify the return to sets of claims replaced or withdrawn during examination proceedings. In fact, the reply to the board's communication under Rule 100(2) EPC does not contain any arguments on substance as to why the appellant would not share the board's assessment as expressed in that communication.

2.6 For these reasons, the **main request**, the **first auxiliary request** and the **second auxiliary request** are not admitted into the appeal proceedings under Article 13(2) RPBA 2020.

3. As there is no admitted set of claims, the appeal must be dismissed under Article 78(1)(c) EPC.

4. *Decision in written proceedings (Article 116(1) EPC)*

4.1 In their statement of grounds of appeal, the appellant made the following statement:



*"In the event that the Board of Appeal is minded to refuse the application without the opportunity for further written submission, oral proceedings are hereby requested."*

- 4.2 The appellant made in fact a subsequent written submission in reply to the board's communication (cf. point VI above). Their reply contained no further request for oral proceedings before the board.
- 4.3 Since, moreover, the board does not consider holding oral proceedings in the present case to be expedient (cf. Article 116(1) EPC), this decision is handed down in written proceedings (Article 12(8) RPBA 2020).

## **Order**

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

The appeal is dismissed.

The Registrar:

The Chair:



B. Brückner

K. Bengi-Akyürek

Decision electronically authenticated