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Datasheet for the decision of 29 January 2021

Case Number: T 0884/18 - 3.2.04

Application Number: 06846239.9

Publication Number: 1945319

IPC: A63B21/002

Language of the proceedings: EN

Title of invention:
COMBINATION GRIP FOR AN EXERCISE DEVICE

Patent Proprietor:
Fitness Anywhere, LLC.

Opponent:
Variosports GmbH

Headword:

Relevant legal provisions:
EPC Art. 87(1)(b), 56
RPBA 2020 Art. 13(2)

Keyword:
Priority - basis in priority document (no)
Inventive step - (no)
Amendment after summons - exceptional circumstances (no)

Decisions cited:
T 1134/06

Catchword:
Reasons 3, application of Art 13(2) RPBA 2020

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Case Number: T 0884/18 - 3.2.04

D E C I S I O N
of Technical Board of Appeal 3.2.04
of 29 January 2021

Appellant: (Opponent)	Variosports GmbH Halle 57 Eupener Str. 161 50933 Köln (DE)
Representative:	Lohmanns, Bernard Benrather Schlossallee 49-53 40597 Düsseldorf (DE)
Respondent: (Patent Proprietor)	Fitness Anywhere, LLC. 755 Sansome Street San Francisco, CA 94111 (US)
Representative:	Miller, James Lionel Woolverton Kilburn & Strode LLP Lacon London 84 Theobalds Road London WC1X 8NL (GB)
Decision under appeal:	**Decision of the Opposition Division of the European Patent Office posted on 5 February 2018 rejecting the opposition filed against European patent No. 1945319 pursuant to Article 101(2) EPC.**

Composition of the Board:

Chairman	A. de Vries
Members:	G. Martin Gonzalez
	T. Bokor

Summary of Facts and Submissions

I. The appellant-opponent lodged an appeal, received on 4 April 2018, against the decision of the Opposition Division posted on 5 February 2018 rejecting the opposition against European patent No. 1945319 pursuant to Article 101(2) EPC, and simultaneously paid the appeal fee. The statement setting out the grounds of appeal was received on 5 June 2018.

II. Opposition was filed on the ground of Article 100(a) EPC for lack of novelty and lack of inventive step.

The Opposition Division held that the first priority claimed for granted claim 1 was invalid and that the subject-matter of the claim was novel and inventive having regard inter-alia to the following evidence:

(A2) US 734145 P, first priority document

(A4a,b) Screenshots of internet page http://fitnessanywhere.com of 02-04-2006 obtained with The Waybackmachine (https://web.archive.org/web/20060402202332/http://fitnessanywhere.com/)

III. The appellant-opponent requests that the decision under appeal be set aside, and that the European patent No. 1945319 be revoked.

The respondent-proprietor requests maintenance of the patent according to a main request as filed on 18 December 2020 or according to a new main request filed during the oral proceedings of 29 January 2021.

IV. In preparation for oral proceedings the Board issued a communication, dated 18 May 2020, setting out its provisional opinion on the relevant issues.

Oral proceedings by videoconference before the Board were duly held on 29 January 2021.

V. Claim 1 of the relevant requests reads as follows:

(a) Main request as filed on 18 December 2020.

"An exercise apparatus (100) comprising:
an inelastic strap portion (427a) made of a first material and having a first end (421a) including a first loop (425a), formed by continuing said first material through said first loop (425a) and attaching said first material to said inelastic strap portion (427a) by first stitching (2711); and a second loop (2710); and
a hand grip (423a) supported by said first loop (425a) where the handgrip further includes an inner cylindrical portion (803)
where said exercise apparatus is adapted to support the weight of a user of the exercise device by said hand grip, said second loop, or some combination thereof, characterized in that said second loop (2710) is a strap formed from one or more inelastic pieces attached together that form a continuous loop through the cylindrical portion (803)."

(b) New main request as filed on 29 January 2021 during the oral proceedings before the Board.

Claim 1 as in the main request of 18 December 2020 amended to add the following feature (emphasis added by the Board to indicate modified text):

"...characterized in that said second loop (2710) is a strap formed from one or more inelastic pieces attached together that form a continuous loop which is non-removably attached through the cylindrical portion (803)."

VI. The appellant-opponent argued as follows:

The first priority claim (7 November 2005) is invalid. Therefore evidence A4a,b, predating the second priority date and the date of filing, are prior art in the sense of Article 54(2) EPC for claim 1 of the main request. The subject-matter of claim 1 lacks an inventive step in the light of A4a,b. The new main request filed during the oral proceedings is not admissible under Article 13(2) RPBA 2020.

VII. The respondent-proprietor argued as follows:

All priorities are validly claimed for all requests. Thus document A4a,b does not form part of the prior art in the sense of Article 54(2) EPC for claim 1. Even if the priority were considered invalid, claim 1 is new and inventive over the cited prior art. The new main request filed during the oral proceedings is admissible.

Reasons for the Decision

1. The appeal is admissible.

2. Background

The invention relates to exercise devices, and in particular, to grips for an exercise device that can

easily be used in performing a wide variety of exercises, see patent specification paragraph [0001]. The device is generally provided with an inelastic strap attachable to a fixed location such as, for example, a door, allowing the user to exercise using their body weight, see paragraph [0005]. The claimed device is provided with a "combination grip", which combines a hand grip and a foot grip, see figures 17, 18. The user of a combination grip has the choice to exercise as shown, for example, in any one of figures 15A through 15I, 16A or 16B and using either grip, see specification paragraphs [0043]-[0048].

3. New main request filed during oral proceedings before the Board - Admission

3.1 A new main request was filed during the oral proceedings before the Board. This late filed request represents an amendment to the party's case. Its admission is at the discretion of the Board under Article 13(2) RPBA 2020. As the summons to these oral proceedings were issued after the entry into force on 1 January 2020 of the revised version of the Rules of Procedure (and no communication under Rule 100, paragraph 2, was issued), Article 13(2) of this revised version must apply in accordance with the transitional provisions (Article 25(3) RPBA 2020).

Article 13(2) RPBA 2020 stipulates that an amendment to a party’s appeal case made after the expiry of a period specified by the Board in a communication under Rule 100, paragraph 2, EPC or, where such a communication is not issued, after notification of a summons to oral proceedings shall, in principle, not be taken into account unless there are exceptional circumstances,

which have been justified with cogent reasons by the party concerned.

3.2 In the present case, the Board issued the summons to oral proceedings on 13 May 2020. The Board's communication dated 18 May 2020, setting out its preliminary opinion on the relevant issues in preparation for the oral proceedings was not a communication under Rule 100(2) EPC. The parties were not called upon by the Board to file any reply and it did not therefore fix any period for it. Consequently, the submission of the new main request during the oral proceedings before the Board is to be regarded as an amendment to a party's case after the summons to the oral proceedings in the sense of Article 13(2) RPBA 2020.

3.3 The Board has therefore to examine whether the patent proprietor has shown that there were exceptional circumstances that justified their late filing.

With the new main request, the respondent-proprietor amends claim 1 to specify that the second loop "is non-removably attached" to the handgrip. They justify the amendment as a response to the written preliminary opinion of the Board dated 18 May 2020, in respect of invalidity of the priority claim. However, that the omission of this feature in claim 1 invalidated the priority claim had already been concluded by the Opposition Division, see pages 4-5 of the impugned decision. The issue was also explicitly raised and maintained by the appellant-opponent in their grounds of appeal. Moreover, the preliminary opinion of the Board was issued more than 7 months in advance to the date of the oral proceedings. Therefore, the respondent-proprietor has had sufficient time to

respond to this objection by way of amendment well in advance to the oral proceedings. The new main request was furthermore filed at the very beginning of the oral proceedings, so that it is clear that there can have been no new or special or unforeseen circumstances arising during the oral proceedings that might have justified filing such an amendment at this late stage of the proceedings in the sense of Article 13(2) RPBA 2020.

3.4 The respondent-proprietor further submits that this procedural provision entered into force on 1 January 2020, after the date of filing of the appeal and also of the respondent's reply, 18 October 2018, and that therefore strict application of this provision would be harsh.

However, the new rules of procedure including its transitional provisions under Article 25 were publicly known and available already well in advance of their entering into force on the 1 January 2020, which is again well over a year before this new main request was filed. Moreover, in the present case, the Board explicitly brought the attention of the parties in point 7 of its communication dated 18 May 2020 to the applicability of Article 13(2) RPBA 2020 to further submission in the present appeal case, more than 7 months before the oral proceedings. It cannot thus be said that application of the new rules would be surprising for the respondent-proprietor or that they had not had fair warning. Their submissions of 18 December 2020 also demonstrate that the case was still actively pursued.

3.5 The respondent-proprietor also puts forward that the new main request overcomes the outstanding issue of

priority by way of amendment, thereby shortening the discussion in the oral proceedings. It would therefore be prima facie allowable, and would thus meet the criteria previously applied in case law for admission under the Article 13(3) RPBA 2007 (old version). Leaving aside whether this criterion is at all applicable under Article 13(2) RPBA 2020, the new main request is in any case not prima facie allowable. It is not immediately apparent whether this amendment has a basis in the application as filed. The relevant parts of the description, figures 17 and 18 and paragraphs [0082] to [0083] are not identical to the corresponding parts of the priority document (paragraphs [0079] and [0080], figures 27,28) but have been reworked. In particular these passages no longer expressly state that the bottom loop is non-removably attached. It is thus not immediately clear whether the new feature is directly and unambiguously derivable from the application as filed. Thus the new request additionally raises added subject-matter issues in the sense of Article 123(2) EPC.

3.6 In view of the above, the Board decided not to admit the new main request filed during the oral proceedings, Article 13(2) RPBA 2020.

4. Main request filed on 18 December 2020 - Admission

This request has also been filed after the summons to oral proceedings. It is based on the main request of the impugned decision directed at the claims as granted, but where dependent claim 8 has now been deleted. Deletion of dependent claim 8 was meant to restore the claimed priority. However, it does not affect claim 1, which is identical to the granted claim. Consequently, it is of no consequence for the

case of either party, which is directed primarily at claim 1 as granted.

It follows that this amendment does not represent a modification of the factual and legal framework of the debate to date. The Board concludes that it does not represent a change of the respondent-proprietor's case within the meaning of Article 13(2) RPBA 2020.

As otherwise admission of this request was not contested the Board decided to admit the Main Request filed on 18 December 2020 into the proceedings, pursuant to Art 13(2) RPBA 2020.

5. Main request(filed on 18 December 2020) - Priority

The only amendment in this request vis-a-vis the granted claims is the deletion of dependent claim 8.

The respondent-proprietor contests the finding of the Opposition Division for granted claim 1, that holds for claim 1 of this request, that the priority from document A2 with filing date 7 November 2005 (first priority) is invalidly claimed. Different features of granted claim 1 are in dispute.

5.1 The features of claim 1 are based on the specific disclosure of the accessory described in the priority document paragraphs [0079]-[0080] and referred to there as a "combination grip" and shown in figures 27, 28.

5.2 As submitted by the appellant-opponent, paragraph [0079] unambiguously states for the combination grip it describes that the "flexible loop 1710 is non-removably attached to one of the pair of grips 423" Therefore inasmuch as embodiments having a removably attached

second loop fall under the scope of the the contested claim 1, it does not enjoy the right to the first priority of 7 November 2005. This is the case for claim 1, since claim 1 is not so restricted, and thus encompasses also embodiments with a removable second loop within its scope.

5.3 Moreover, the loop of second embodiment of the priority is described as formed from a length of webbing having its ends sewn together, while the contested claim generally requires that the loop is a strap formed from one or more inelastic pieces attached together that forms a continuous loop. Thus embodiments falling under the scope of the claim, where the loop is not closed by sewing its ends together, also do not enjoy the right to the first priority.

The respondent-proprietor submits that the "combination grip" described in the priority document paragraphs [0079]-[0080] and forming the basis for the present claim is "a second embodiment of the foot grip accessory 1700 of FIGS. 17 A-B" described in paragraphs [0072]-[0074]. The disclosure of both embodiments can thus be combined. According to paragraph [0073], last sentence "[I]t is understood that a single length of flexible material according to the present invention can alternatively comprise two or more pieces that are stitched, glued, or otherwise attached to one another". There would thus be a direct disclosure in the priority document of loop ends sewn together also for the second embodiment.

However, it does not appear to be unambiguously derivable for the skilled person when reading the priority document that these particular features may be applied to the embodiment of paragraphs [0079] and

[0080]. The statement in paragraph [0073] identifying different modes of attachment refers to how a removable foot grip accessory 1700 (see figure 17 and 18) can be formed from individual pieces. The alternative embodiment described in paragraph [0079] refers to how the ends of a length of webbing are sewn together to form a non-removable loop. These two passages thus refer to different applications of attachment means, so that it is not immediately apparent to the skilled reader that the one (of paragraph [0073]) can be applied to the other (of paragraph [0079]).

5.4 The above conclusions hold also for the current main request (filed on 18 December 2020). Deleting the dependent claim 8 (the only amendment made in this request) does not affect the scope of independent claim 1, which is unchanged.

Therefore, as also held by the Opposition Division, claim 1 of the main request (filed on 18 December 2020), which corresponds to claim 1 as granted, does not enjoy the right to the claimed first priority date of 7 November 2005, since the priority document does not disclose the same invention as the contested claim, Article 87(1)(b) EPC.

6. Internet evidence A4a/A4b

6.1 As variously stated in case law, the appropriate standard of proof for Internet citations is the "balance of probabilities" and not "beyond reasonable doubt". The conclusions reached in the earlier decision T1134/06 that the stricter standard of proof "beyond reasonable doubt" had to be applied to Internet disclosures has been superseded by more recent case

law, see Case Law of the Boards of Appeal, 9th edition 2019 (CLBA), I.C.3.2.3.c)(i).

6.2 Thus availability to the public is considered to be established on the balance of probabilities by the date stamps on evidence A4a/A4b from the Wayback Machine.

6.3 The respondent-proprietor also submits that according to information available on the WebArchive, the recording date of the images by the Wayback Machine may not always be the same as that of the general HTML page on the date stamp. However, they neither argue that this is in fact the case for A4a/A4b nor have they submitted any evidence to that effect. The Board therefore sees no reason to question the validity of the availability to the public of the whole assembled web page shown in A4a/A4b, including the images, on their date stamp of 2 April 2006. This is before the relevant valid date for claim 1 of the main request, 6 November 2006 (second priority date) or 7 November 2006 (filing date).

6.4 The Board concludes that A4a/A4b is part of the prior art in the sense of Article 54(2) EPC for claim 1 of the main request.

7. Main request (filed on 18 December 2020) - Inventive step

7.1 It is common ground that A4a/A4b can be regarded as a suitable starting point for inventive step. The two images, bearing the same date stamp, appear on the same archived menu web page when hovering over different menu items, and are considered to form a single instance of prior art. A4a/A4b have been submitted in the form of the relevant Web Archive web address, which

on the date of this decision could be and were accessed by the Board, as well as screen shots of the relevant page.

7.2 The apparatus shown in A4a/A4b has a hand grip 423a (see references added by the appellant-opponent to the screen shots) supported by a first loop 425a of light or yellow material above the grips 423a. The skilled person in the art of exercise devices, with relevant textile engineering knowledge, would also immediately recognise the marks at 2711 of A4a/A4b as stitches that close the first loop 425a. While the picture quality of the submitted copies is poor, the picture quality of the images stored in the Wayback Machine web page of A4a/A4b, is sufficient to establish the above conclusion in respect of the stitching marks at 2711.

The images of A4a/A4b also clearly show a second strap loop 2710 attached below the handle 423a and made of dark (black) material.

It can also be inferred directly and unambiguously by the skilled person from the images and text of A4a/A4b, that the first strap and loop 427a,b, 425a,b must be inelastic as in the claimed device. The web page clearly describes the device as a device for bodyweight training ("The New Revolution in Bodyweight Training"). This kind of device employs the user's own weight and gravity to obtain different user-selected resistance levels, as is readily visible from the exercising position of the user depicted on the image of A4a, who is clearly applying his full weight to the device and the upper loops in particular. To the Board this dictates that the upper loops and straps, which must bear the user's weight, are made of inelastic material.

7.3 Close inspection of the images show both upper and lower straps entering the sides of the grip. However, the handgrip material is opaque. Thus, the claimed structure of a hollow handgrip with an inner cylindrical portion and a continuous first loop as well as a continuous second loop passing through it is not unambiguously derivable from the photographs in A4a/ A4b, even if such a structure lends itself to such an arrangement. The second loop 2710 is not shown in use in the images of A4a/A4b but dangles loosely from the grips. Whether it is elastic or inelastic cannot therefore be immediately inferred.

In sum, the following claimed constructional details cannot be derived from A4a/A4b: that the handgrip includes an inner cylindrical portion, that first and second loops are continuous loops passing through it and that the second loop is inelastic.

7.4 The respondent-proprietor has not submitted any particular effect achieved by these differing features. They have also not put forward any combined technical effect achieved by the combination of these differentiating features. Nor are any such effects, combined or not, apparent to the Board, other than that they relate to how the skilled person might realize the features of the devices shown in these images. The general structure and function of the device and grips is readily visible from the images, as is how the skilled person would put them into practice. However, this is not so where it concerns realization of the attachment of the upper and lower straps to the grip, as well as the choice of material of the lower loop, which are not shown or inferable from the images. Consequently, the associated objective technical problem can be formulated as how to realize the lower

strap or loop and the attachment of both loops to the grip.

7.5 The photographs do give some guidance to the skilled person intent on realizing the device, as they show both straps leading into the sides of the cylindrical grip. They would therefore try to find a mode of attachment that replicates this feature. In the Board's view the simplest and most straightforward way that would occur to the skilled person in the present field - a designer of exercise equipment - from their common general knowledge is to realize the grips as hollow with both straps passing through it to form continuous loops.

There may be other conceivable ways of attaching straps to grips so that they lead into its sides, for example with strap ends hooking to fasteners inside and at either end of the otherwise solid grip, as suggested by the respondent proprietor. The Board is however unconvinced that the skilled person, who might consider other options, would adopt such a complex solution in favour of a simple grip arrangement that offers itself so readily from a basic understanding of the function of grip and loops and what they already glean from the photographs. It will be clear to them that the main forces are borne by the loop, which should therefore ideally be of a single length, with the grip normally only providing a handhold. They will also be familiar with many gripping arrangements, not only in exercising equipment but on boats and in playgrounds, in which a separate grip surrounds the load bearing element passing through it. In the light of this common general knowledge, the Board holds that a hollow cylindrical handgrip and continuous first and second loops passing through it, as claimed, would be an obvious choice for

the skilled person when trying to realize a grip with loops leading into both ends as shown in the photographs on A4a/A4b.

7.6 Similarly, the skilled person when trying to realise the second loop is inevitably confronted with the choice of the lower loop material. Here their choices are limited: either elastic or inelastic. In the context of manufacturing the exercise device of A4a,b which because it uses body weight is non-elastic design, see section 7.2 above, the Board holds that the most obvious choice for the skilled person would be an inelastic material also for the shown second loop 423a,b.

7.7 It follows from the above, that the skilled person would arrive at the subject-matter of claim 1 without having to exercise inventive activity. Claim 1 therefore lacks an inventive step in the sense of Article 56 EPC.

8. The Board is thus unable to confirm the conclusion of the decision under appeal that none of the opposition grounds raised against claim 1 as granted. Thus it finds that, taking into consideration the amendments made by the appellant-proprietor in the main request filed 18 December 2020 the patent and the invention to which it relates do not meet the requirement of the Convention. The Board thus revokes the patent pursuant to Article 101(3)(b) EPC.

Order

For these reasons it is decided that:

1. **The decision under appeal is set aside**

2. **The patent is revoked.**

The Registrar: The Chairman:

G. Magouliotis A. de Vries

Decision electronically authenticated