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**Datasheet for the decision
of 7 December 2021**

Case Number: T 0119/20 - 3.2.01

Application Number: 12822829.3

Publication Number: 2741631

IPC: A45F3/14, F41H1/02, A45F5/02,
A45C13/30

Language of the proceedings: EN

Title of invention:
LIGHT WEIGHT MODULAR POUCH ATTACHMENT SYSTEM

Patent Proprietor:
FirstSpear, LLC

Opponent:
LORENZ SEIDLER GOSSEL
RECHTSANWÄLTE PATENTANWÄLTE
PARTNERSCHAFT mbB

Headword:

Relevant legal provisions:
EPC Art. 100(c), 123(2)
RPBA Art. 12(4)

Keyword:

Main request and auxiliary request 1 - extension beyond the content of the application as filed (yes)
Late-filed auxiliary requests 2 and 3 - admitted - request could have been filed in first instance proceedings (no)
Auxiliary request 2- extension beyond the content of the application as filed (no)

Decisions cited:

G 0002/10

Catchword:



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Case Number: T 0119/20 - 3.2.01

D E C I S I O N
of Technical Board of Appeal 3.2.01
of 7 December 2021

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Decision under appeal:

**Interlocutory decision of the Opposition
Division of the European Patent Office posted on
31 October 2019 concerning maintenance of the
European Patent No. 2741631 in amended form.**

Composition of the Board:

Chairman G. Pricolo
Members: S. Mangin
 A. Jimenez

Summary of Facts and Submissions

- I. The appeal was filed by the appellant (proprietor) against the interlocutory decision of the opposition division finding that, on the basis of the auxiliary request 4, the patent in suit (hereinafter "the patent") met the requirements of the EPC.
- II. The opposition was filed on the ground of Article 100(c) EPC only. The Opposition Division held that while claim 1 of the main request and of auxiliary requests 1-3 extended beyond the content of the application as originally filed, claim 1 of auxiliary request 4 fulfilled the requirements of Article 123(2) EPC.
- III. Oral proceedings were held before the Board on 7 December 2021.
- IV. **The appellant (patent proprietor)** requested that the decision under appeal be set aside and the patent be maintained as granted (main request), or in the alternative that the patent be maintained in amended form on the basis of one of the first to fifth auxiliary requests submitted with the statement of grounds of appeal, the fifth auxiliary request corresponding to the version found allowable by the opposition division.

The respondent (opponent) requested that the appeal be dismissed.
- V. Independent claim 1 of the main request reads as follows:

An attachment system (32), comprising:
a platform (34) having a front side (50), an opposite back side (46), and a plurality of slits (36) through the platform (34) arranged in a predetermined pattern of vertically aligned and spaced apart rows, configured for receiving tabs (54, 72) or straps (26) for attaching at least one holder (28) to the platform (34), wherein the platform (34) is supported by and comprises an element of a carrier (58) configured to be worn on a user's body for carrying the at least one holder (28) at a desired location on the user's body;
characterized by the platform (34) comprising laminated layers (42, 44) bounding and defining the slits (36) and the back side (46) of the platform (34) being disposed in opposing relation to a surface (60) of the carrier (58) or a backing element forming a generally flat pocket (62) therebetween, the platform (34) and the carrier (58) or backing element having generally coextensive peripheral edge portions (64, 66) attached together and bounding and substantially enclosing the flat pocket (62) providing a barrier to entry of particulates thereabout, at least one of the coextensive edge portions (64, 66) being openable to allow insertion of fingers of a hand into the flat pocket (62) to access tabs (54, 72) or straps (26) inserted through the slits (36), the slits (36) being defined and bound by opposing edges (38, 40), respectively, each of the edges (38, 40) bounding the slits (36) comprising a hardened fusion of the laminated layers.

- VI. Claim 1 of the first auxiliary request is based on claim 1 of the main request with the addition of the term "fabric" in "*characterized by the platform (34) comprising laminated fabric layers (42,44)*".

VII. Claim 1 of the second auxiliary request is based on claim 1 of the first auxiliary request with the addition of *"the back side (46) of the platform (34) including a fastening component (48, 56) of a hook and loop fastening system thereon adjacent to the slits (36)"*.

Reasons for the Decision

1. Main request - Added subject-matter of claim 1 - Article 100(c) EPC

The Board confirms the finding of the Opposition Division in the appealed decision, according to which claim 1 extends beyond the content of the application as originally filed.

1.1 The appellant considered inter alia that the deletion of the feature concerning the back side (46) of the platform *"including a fastening component of a hook and loop system thereon adjacent to the slits"* in claim 1 as granted, as compared to claim 1 as originally filed, did not extend the claimed subject-matter beyond the content of the application as originally filed.

a) In particular, the appellant did not consider the fastening component of a hook and loop system to be an essential feature of the invention. Referring to paragraphs [0007] and [0008] of the WO-publication the appellant emphasised that these paragraphs referred to the use of the attributes of a hook and loop fastening system (ease and familiarity of use, and non-metallic construction) and not to the use of such hook and loop fastening system as part of the claimed attachment system. The cited advantageous attributes could also be

achieved by other technical means and not only by hook and loop fasteners.

b) The application disclosed two embodiments, one with the hook and loop fastening system on the back side of the platform, when used with the new style straps or tabs with a mating fastening component, and one basic embodiment without the hook and loop fastening system compatible with the Molle system [0040]-[0046] and figures 3, 12, 15 and 18 of the WO-publication.

c) Paragraphs [0043] and [0054] as well as figures 12 and 18 of the WO-publication taught that no hook and loop fastening component was needed for the intended functioning of the claimed attachment system.

d) Paragraph [0009] disclosed that the platform could be removably attached via snaps or zippers to an outwardly facing surface of the carrier or a backing element. A skilled person would recognise that the affixing of the platform to a backing element described in paragraph [0009] would necessarily lead to an attachment system with a flat pocket between the backside of the platform and the backing element. There was therefore a clear implicit disclosure for the feature "flat pocket" independent of the feature "fastening component of a hook and loop fastening system".

1.2 The Board holds that the deletion of the feature concerning the back side (46) of the platform *"including a fastening component of a hook and loop system thereon adjacent to the slits"* leads to an unallowable intermediate generalisation. This amendment does not comply with the gold standard in that it cannot be derived directly and unambiguously from the

application as filed that the feature can be omitted and thus presents the skilled person with new technical information (see G 2/10).

Claim 1 defines that the attachment system comprises a flat pocket, and the application as filed discloses the provision of a flat pocket only in combination with the use of hook and loop fastening component on the back side of the platform. Indeed according to paragraphs [0010] and [0052] of the WO-publication, the function of the flat pocket is to protect the hook and loop fasteners, to avoid entry of particulates and to reduce the noise generated by detaching the fasteners. The flat pocket is thereby functionally related to the hook and loop fastening system.

Paragraph [0009] of the WO-publication referred to by the appellant cannot form the basis for a disclosure of the flat pocket without a hook and loop fastening component on the back side of the platform. Paragraph [0009] neither discloses the provision of a flat pocket explicitly nor implicitly. Paragraph [0009] discloses that *"The platform can be permanently affixed, e.g., by stitching, or incorporated into the carrier, or removably attached, e.g., via hook and loop fasteners, belts, snaps, zippers, or the like, in covering relation to an outwardly facing surface of the carrier or a backing element such as, but not limited to, a fabric layer or sheet"*. The covering of the platform by the outwardly facing surface of the carrier or a backing element and their attachment disclosed in paragraph [0009] does not result in the provision of a flat pocket as defined in claim 1, *"whereby the platform (34) and the carrier (58) or backing element having generally coextensive peripheral edge portions (64, 66) attached together and bounding and substantially enclosing the flat pocket (62) providing*

a barrier to entry of particulates thereabout" and in paragraphs [0010] and [0052] of the WO-publication. Paragraph [0009] cannot therefore be the basis for removing the fastening component of a hook and loop system.

Furthermore, the fastening component of a hook and loop system at the backside of the platform is described as essential to the invention. The removal of this feature therefore leads to the skilled person being presented with new technical information.

Indeed, the invention sought according to paragraphs [0007] and [0008] of the WO-publication is to provide an attachment system *"that utilizes the advantageous attributes of hook and loop fastening systems, but which overcomes one or more of the known disadvantages thereof set forth above"*.

While paragraphs [0007] and [0008] refer to the attributes of the hook and loop fasteners defined in paragraph [0006], the last sentence of paragraph [0006] refers to the use of hook and loop fasteners themselves: *"as a result, it is still sought to find a manner to use hook and loop type fasteners for attachment of holders and the like, particularly for military carrier applications"*. Therefore paragraphs [0007] and [0008] read in their context cannot be interpreted as alleged by the appellant as referring to the attributes of the hook and loop fasteners only, but should be interpreted in that the invention uses hook and loop type fastening systems.

2. Claim 1 of auxiliary request 1 corresponds to claim 1 of the main request with the addition of the term "fabric". Claim 1 of auxiliary request 1 does not include the back side (46) of the platform *"including a fastening component of a hook and loop system thereon*

adjacent to the slits" and therefore extends beyond the content of the application as originally filed for the same reasons as claim 1 of the main request.

3. Admissibility of auxiliary requests 2 and 3

The Board admitted auxiliary requests 2 and 3 filed together with the statement of grounds of appeal into the appeal proceedings. Auxiliary requests 2 and 3 correspond to auxiliary requests 1 and 2, respectively, filed during opposition proceedings, with the addition of the term "*fabric*" in the expression "*laminated fabric layers*".

3.1 The respondent held that auxiliary requests 2 and 3 should have been filed during the opposition proceedings as the objection of added subject-matter related to the addition of the feature "*the platform comprising laminated layers (42,44) bounding and defining slits (36)*" was raised with the notice of opposition (see page 8 of the notice of opposition, third and fourth full paragraphs).

3.2 The question whether auxiliary requests 2 and 3 should be admitted into the appeal proceedings must be decided on the basis of Article 12(4) RPBA 2007 (Article 25(2) RPBA 2020), which gives the Board discretion not to admit, on appeal, requests that could have been presented in the opposition proceedings.

According to established case law (Case Law of the Board of Appeal V.A.4.11.3 g), amendments, including amended requests, are usually admitted into appeal proceedings if they are justified by the normal development of the proceedings or can under the

circumstances be considered a normal reaction of a losing party.

- 3.3 In the present case the Board considered the filing of auxiliary requests 2 and 3 to be a legitimate and normal reaction to the view of the opposition division holding that the feature "*platform (34) comprising laminated layers (42, 44) bounding and defining the slits (36)*" was originally disclosed only with layers in the form of a "fabric" (reference is made to point 6 of the appealed decision).

As mentioned by the appellant, the objection made to the added feature "*laminated layer*" in the notice of opposition, was only discussed in conjunction with the omitted feature "*fastening component of hook and loop fastening system*". The appellant was only made aware with the appealed decision that the introduction of the feature "*laminated layers*" in itself contravened the requirements of Article 123(2) EPC.

Moreover, auxiliary requests 2 and 3 were filed at the earliest possible stage of the appeal proceedings, namely with the statement of grounds, and the addition of the term "fabric" did not give rise to any procedural complications preventing a discussion of the auxiliary requests at the oral proceedings.

4. Auxiliary request 2

Claim 1 of auxiliary request 2 complies with the requirements of Article 123(2) EPC.

- 4.1 The respondent argued that:

a) In claim 1, the central teaching of the application as filed of providing closely disposed opposing edges of the slits for protecting the fastening component from dirt was completely omitted.

b) The amendment did not remedy the inadmissible isolated addition of the feature of the hardened fusion of the laminated layers at the edges bounding the slits that was originally only disclosed in the context of providing a woven fabric at the front side, see claim 5 and paragraph [0012] of the WO-publication. Also, hardened fusion edges were only disclosed in combination with laser cutting of the edges.

c) The scope of protection conveyed by the term "laminated fabric layers" comprised embodiments in which non-woven fabric was arranged either at the front side or at the back side. This extended beyond the disclosure provided in paragraph [0012] of the application as filed.

d) The description, and in particular the description of the embodiments in paragraph [0025] of figure 5 and paragraph [0027] of figure 7 disclosed the use of a rear fabric of loop pile on the backside of the platform as the essential element of the invention.

4.2 The Board does not agree with the respondent.

4.2.1 The opposing edges (38, 40) of the slits (36) *"disposed sufficiently close together when in a free state, providing a barrier to passage of particulates therebetween"* is disclosed as optional in paragraph [0045] of the WO-publication: *"as an additional advantage, edges 38 and 40 can be cut so as to be very closely or intimately space to serve as a barrier to*

entry or passage of particulate contaminants".

Paragraph [0045] discloses that the slits can be formed in various manner including by knife or die cutting, using a button hole machine or preferably by laser cutting.

The generalisation made regarding the slit is therefore allowable as the skilled person is not presented thereby with new technical information.

- 4.2.2 Furthermore, the addition of the feature "each of the edges (38, 40) bounding the slits (36) comprising a hardened fusion of the laminated layers" does not lead to an unallowable intermediate generalisation. While paragraph [0012] discloses a preferred embodiment comprising a fabric layer laminated to a loop pile fabric comprising edges bounding the slits fused together e.g. using a laser cutting process for forming slits, so as to be hardened, paragraph [0044] discloses various possible laminated fabric layers with slits having bounding edges comprising a hardened fusion of the laminated layers (See paragraph [0045]). It is to be noted that the hardened fusion is not inextricably linked to laser cutting. Indeed paragraph [0012] clearly discloses that laser cutting is a possible process among other for fusing the edges together. Furthermore, the skilled person understands that the fused edges bounding the slits will eventually harden independently of the method used for fusing the edges bounding the slits.

- 4.2.3 Finally while the application as filed foresees in figures 5 and 7 the use of a loop pile fabric at the rear of the laminated fabric layer, the application as a whole foresees more generally a platform comprising laminated fabric layers and including a fastening component of a hook and loop fastening system on the

backside. Reference is made to paragraphs [0010] and claim 1 as originally filed.

5. Both parties agreed that an adaptation of the description to the claims of auxiliary request 2 was not necessary.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division with the order to maintain the patent in the following version:
 - Claims: No 1-13 according to the second auxiliary request filed with the statement of grounds of appeal
 - Description: columns 1-12 of the patent specification
 - Drawings: No 1-19 of the patent specification.

The Registrar:

The Chairman:



A. Voyé

G. Pricolo

Decision electronically authenticated