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**Datasheet for the decision
of 30 June 2023**

Case Number: T 0433/19 - 3.2.02

Application Number: 05820999.0

Publication Number: 1824440

IPC: A61H19/00

Language of the proceedings: EN

Title of invention:

ELECTRO-MECHANICAL SEXUAL STIMULATION DEVICE

Patent Proprietor:

WOW Tech Canada Ltd.

Opponents:

EIS GmbH
Sonoma Internet GmbH

Headword:

Relevant legal provisions:

EPC Art. 100(c)
RPBA 2020 Art. 13(2)

Keyword:

Amendments - added subject-matter (yes)

Amendment after summons - exceptional circumstances (no)

Decisions cited:

Catchword:



Beschwerdekammern

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Chambres de recours

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Case Number: T 0433/19 - 3.2.02

D E C I S I O N
of Technical Board of Appeal 3.2.02
of 30 June 2023

Appellant:
(Opponent 2)

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Decision under appeal:

**Decision of the Opposition Division of the
European Patent Office posted on 4 December 2018
rejecting the opposition filed against European
patent No. 1824440 pursuant to Article 101(2)
EPC.**

Composition of the Board:

Chair	D. Ceccarelli
Members:	A. Martinez Möller
	N. Obrovski

Summary of Facts and Submissions

I. The appeal is directed against the decision of the Opposition Division rejecting the opposition against European patent No. 1824440.

II. Oral proceedings before the board took place on 30 June 2023. In accordance with Rule 115(2) EPC and Article 15(3) RPBA, the proceedings took place in the absence of the party as of right/opponent 3, which had submitted that it would not be represented at the oral proceedings.

Appellant/opponent 2 requested that the decision under appeal be set aside and that the patent be revoked.

The respondent/patent proprietor requested that the appeal be dismissed and that the patent be maintained as granted. In the alternative, the respondent requested that the patent be maintained on the basis of auxiliary request I or III, both filed on 30 May 2023.

III. The party as of right/opponent 3 made no substantive submissions on appeal.

IV. Claim 1 of the main request reads as follows:

"A sexual stimulation device comprising:
an inner arm (1) dimensioned for insertion into a vagina;
an outer arm dimensioned to contact the clitoral area when said inner arm (1) is inserted in the vagina, said outer arm defining a clitoral pad (4); and

a resilient U-shaped member (3) connecting the inner and outer arms;

characterized in that

said resilient member (3) is thin and narrow to permit sexual intercourse when said inner arm (1) is inserted in the vagina, and said inner and outer arms taper toward said resilient member (3) such that said device is dimensioned to be worn by a female during intercourse;

the device is generally C-shaped when in a relaxed state;

wherein, during use, the C-shape of the device is opened up such that the device is generally L-shaped and resulting pressure from the inner arm (1) on the anterior surface of the vagina and from the clitoral pad (4) on the clitoral area keeps the device in place when worn by a female during intercourse."

Compared with claim 1 of the main request, claim 1 of auxiliary request I includes the following amendment (highlighting added by the board):

"an inner arm (1) dimensioned for insertion into a vagina, to contact the wall of the vagina at or near the G-spot,"

Compared with claim 1 of auxiliary request I, claim 1 of auxiliary request III includes the following amendment (highlighting added by the board):

"resulting pressure from the inner arm (1) on the G-spot ~~anterior surface~~ of the vagina"

V. The following documents are relevant to this decision:

D11g: JP2005288079A, English machine translation JPO
INPIT

S1: Wikipedia's entry for "G-spot", as last modified
on 27 November 2016, 22:28

VI. The appellant's arguments relevant to the present
decision can be summarised as follows.

Main request - added subject-matter

Claim 1 as originally filed required that the inner arm
was dimensioned to contact the wall of the vagina at or
near the G-spot. This feature had been removed, and
instead claim 1 recited "resulting pressure from the
inner arm (1) on the anterior surface of the vagina".
However, the application as originally filed only
disclosed contact and pressure at or near the G-spot,
which was a specific area within the anterior surface
of the vagina, as confirmed by the application as
filed, D11g and S1. Pressure on the anterior surface of
the vagina did not necessarily imply contact at or near
the G-spot, so the amendment resulted in added subject-
matter.

Auxiliary requests I and III - admittance

The requests had been filed late and should not be
admitted. The objection of added subject-matter
relating to the G-spot had been raised with the notice
of opposition, so the proprietor should have addressed
it earlier.

VII. The respondent's arguments relevant to the present
decision can be summarised as follows.

Main request - added subject-matter

The person skilled in the art understood that the expression "at or near the G-spot" covered the complete anterior surface of the vagina, as indicated in Wikipedia's German entry on the G-spot ("Gräfenberg-Zone") and on the appellant's website/online shop. Paragraph [0003] of D11g taught that the G-spot was an erogenous zone on the vaginal front wall. Due to the limited size of the anterior wall, any location on the anterior wall would be at or near the G-spot. Applying pressure on the anterior surface was thus equivalent to applying pressure at or near the G-spot. Moreover, for the pressure of the device's inner arm on the anterior surface of the vagina to keep the device in place, the inner arm had to be inserted a few centimetres into the vagina. The inner arm thus necessarily contacted the anterior wall of the vagina at or near the G-spot, so the functional feature was inherently present.

Auxiliary requests I and III - admittance

Auxiliary requests I and III should be admitted. Many objections of added subject-matter had been raised with the notice of opposition. The auxiliary requests addressed the issue ultimately found to be relevant by incorporating a functional feature present in original claim 1. Moreover, the amendment had no impact on the assessment of the prior art. Under such circumstances, in accordance with T 988/17, auxiliary requests I and III should be admitted into the appeal proceedings.

Reasons for the Decision

1. The patent

The patent relates to the field of sexual paraphernalia, in particular to a sexual stimulation device dimensioned to be worn by a female during intercourse. The device is intended to provide stimulation simultaneously to three distinct effective genital stimulation areas, namely the clitoris, G-spot and vagina (see paragraphs [0001] to [0002] and [0007] of the patent specification).

The device as defined in claim 1 comprises an inner arm, an outer arm and a resilient U-shaped member connecting both arms. The inner arm is dimensioned for insertion into a vagina, and the outer arm is dimensioned to contact the clitoral area when the inner arm is inserted in the vagina. During use, the device's shape is opened up and the resulting pressure from the inner arm on the anterior surface of the vagina and from the clitoral pad on the clitoral area keeps the device in place when worn by a female during intercourse.

A perspective view of an embodiment is provided in Figure 1 of the patent specification reproduced below.

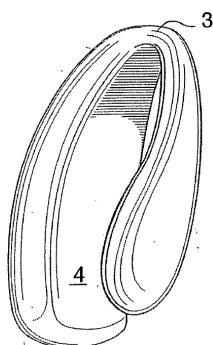


FIG. 1

2. Main request (patent as granted) - added subject-matter
- 2.1 Claim 1 as originally filed comprised the feature "an inner arm dimensioned for insertion into a vagina, to contact the wall of the vagina at or near the G-spot". In claim 1 as granted, the wording "to contact the wall of the vagina at or near the G-spot" has been deleted from that feature. It is disputed whether claim 1 as granted comprises added subject-matter due to that deletion.
- 2.2 The application as filed defines the G-spot as "a nerve reflex area inside the vagina, along the anterior surface" (see page 1, second paragraph, last sentence), thus teaching that the G-spot is an area located on the anterior surface of the vagina. Further pieces of evidence referred to by the parties also describe the G-spot as an erogenous area located a few centimetres up the anterior/front vaginal wall (see D11g, paragraph [0003] and S1, first paragraph, second sentence).
- 2.3 In the written submissions, the respondent referred to what it indicated as passages from the German-language version of the Wikipedia entry on the G-spot ("Gräfenberg-Zone") and the appellant's website. Based on these references, the respondent argued that "at or near the G-spot" had to be equated to "on the anterior surface of the vagina". However, the passages referred to by the respondent do not support that. Rather, the person skilled in the art derives instead from the Wikipedia entry that the G-spot is an erogenous zone on the anterior vaginal wall ("von einer 'erogenen Zone in der vorderen Vaginalwand, ...") and from the appellant's website only that it is an erogenous zone within the vagina ("Kurz gesagt handelt es sich beim G-

Punkt um eine besonders erogene Zone im Inneren Deiner Vagina"). Hence, these submissions do not lead to an interpretation of the term "G-spot" different from what already follows from the application as filed.

- 2.4 For assessing whether claim 1 comprises added subject-matter, the term "G-spot" is thus to be regarded as referring to an area covering only a portion of the anterior surface of the vagina. The uncertainty about the exact size and location of this area is not decisive in this respect.
- 2.5 Claim 1 as granted comprises the added limitation "... resulting pressure from the inner arm on the anterior surface of the vagina and from the clitoral pad on the clitoral area keeps the device in place ..." (emphasis added by the board). The respondent argued that pressure from the inner arm on the anterior surface of the vagina to keep the device in place necessarily implied that the inner arm would contact the wall of the vagina "at or near the G-spot".
- 2.6 However, claim 1 does not specify where on the anterior surface pressure is exerted by the inner arm. Claim 1 thus leaves it open whether the pressure is exerted "at or near the G-spot" or on another location of the anterior surface. The respondent's argument that due to the limited size of the anterior surface of the vagina, any point on it will be near the G-spot is not convincing. Due to the even smaller size occupied by the G-spot and the relative nature of the term "near" (i.e. the smaller the objects of reference are themselves, the shorter the distance between them that can still be understood as "near" is), not any point of the anterior surface is necessarily to be regarded as being near the G-spot. The claim requirement that the

pressure contributes to hold the device in place does not lead to a different conclusion since pressure to hold the device may be, for example, applied at a location which is further within the anterior surface than the G-spot and not necessarily near it. Hence, the subject-matter of claim 1 is not limited to devices where the inner arm is dimensioned for insertion into a vagina "to contact the wall of the vagina at or near the G-spot".

2.7 While the application as filed stresses the importance of the application of pressure "at or near the G-spot" (claim 1 and page 2, lines 6 and 7), according to claim 1 of the patent as granted, the application of pressure at this location is merely optional. This presents the person skilled in the art with different technical information. For this reason, the subject-matter of claim 1 of the patent as granted extends beyond the content of the application as filed (Article 100(c) EPC).

3. Auxiliary requests I and III - admittance

3.1 Auxiliary requests I and III constitute an amendment to the respondent's appeal case after notification of a summons to oral proceedings. Under Article 13(2) RPBA, these requests must, in principle, not be taken into account unless there are exceptional circumstances justified with cogent reasons by the respondent.

3.2 The respondent argued that the numerous objections of added subject-matter raised with the notice of opposition and the consistently positive opinion by the opposition division on all objections did not render it necessary to file auxiliary requests addressing these objections. Firstly, the board notes that on appeal

only four objections of added subject-matter were raised by the appellant. Secondly, it lies in the very nature of appeal proceedings at the EPO that a board may reach a different conclusion than the department of first instance on an issue under dispute. Hence, the mere fact that a board finds an objection - which had been raised and discussed in the opposition proceedings - convincing that the opposition division did not does not represent exceptional circumstances.

3.3 The respondent further argued that the feature added to claim 1 was present in original claim 1. This is, however, in itself not sufficient for the admittance of auxiliary requests I and III in view of Article 13(2) RPBA, which prescribes that exceptional circumstances for any amendment to the respondent's appeal case be present. Moreover, the respondent's remarks on the alleged lack of impact of the claim amendments on the assessment of patentability in view of the prior art are speculative.

3.4 There are thus no exceptional circumstances within the meaning of Article 13(2) RPBA. The board thus decided not to admit auxiliary requests I and III into the proceedings.

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:



A. Chavinier-Tomsic

D. Ceccarelli

Decision electronically authenticated