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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte DANIEL A. GILMOUR

Appeal 2019-001773
Application 15/449,362
Technology Center 3600

Before PHILLIP J. KAUFFMAN, JEREMY M. PLENZLER, and
ALYSSA A. FINAMORE, *Administrative Patent Judges*.

PLENZLER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134(a) of the Examiner's decision rejecting claims 1–20. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM and designate NEW GROUNDS OF REJECTION in accordance with 37 C.F.R. § 41.50(b).

CLAIMED SUBJECT MATTER

Claims 1, 16, and 17 are independent. Claims 2–15 depend from claim 1, and claims 18–20 depend from claim 17. Claim 1 is reproduced below.

1. A shoe rack comprising:
a rigid frame; and
a net defining a plurality of openings, the net being attached to the rigid frame such that the net can be supported by the rigid frame in a substantially planar configuration at an offset dimension from a support surface, the plurality of openings being configured to allow a shoe or pair of shoes to be at least partially positioned within each of the plurality of openings so that the full weight of the shoe or pair of shoes need not be supported by the net and the rigid frame alone but a percentage that is less than 100% of the full weight of the shoe or pair of shoes can be supported by the support surface via contact between the shoe or pair of shoes and the support surface.

REJECTIONS

1. Claims 1, 4–8, 10–15, 17, and 19 are rejected under 35 U.S.C. § 103 as being unpatentable over Otto (EP 2 545 807 A2, published July 12, 2012).¹
2. Claims 2, 3, 9, 16, 18, and 20 are rejected under 35 U.S.C. § 103 as being unpatentable over Otto and Richardson (US 5,613,614, issued Mar. 25, 1997).

¹ References to the text of Otto, unless otherwise indicated, are to a full, machine-generated English-language translation forwarded by the Examiner to Appellant on or about October 30, 2018. A copy of this translation is in the application file.

OPINION

Claims 1, 3–15, 17, 19, and 20

Appellant presents arguments with respect to claims 1 and 17, and does not specifically address dependent claims 3–15, which depend from claim 1, or dependent claims 19 and 20, which depend from claim 17. *See* Appeal Br. 6–7.

With respect to claim 1, the Examiner finds that Otto teaches a shoe rack including “a rigid frame (20, best seen in Figs. 1–15)” and “a net (2) defining a plurality of openings (3) . . . attached to the rigid frame (20) . . . in a substantially planar configuration at an offset dimension (a) from a support surface (W).” Final Act. 2. The Examiner finds that “the plurality of openings (3) [are] configured to allow a shoe (H) or pair of shoes to be at least partially positioned . . . within each of the plurality of openings so that the net at least partially supports the shoe or pair of shoes relative to the support surface.” *Id.* at 2–3. The Examiner acknowledges that “[Otto] does not expressly teach the shoe contacting the support surface (Wall) such that less than 100 [percent of the] weight of the shoe can be supported by the support surface and the net or rigid frame.” *Id.* at 3. The Examiner reasons, however, that such an arrangement would have been obvious. *Id.* The Examiner provides similar findings and reasoning with respect to claim 17, which recites similar limitations, but in the context of a “shoe rack kit.” *Id.* at 5–6.

Appellant’s response to the rejection of claims 1 and 17 concerns only whether the wall in Otto would support a portion of the weight of the shoes. *See* Appeal Br. 7 (“[A] vertical wall cannot support even a small portion of

the weight of a shoe,” and, “[a]s such, [Otto’s] device requires that the full weight of the shoes be supported by the net of the device.”).

Figure 15 of Otto is reproduced below.

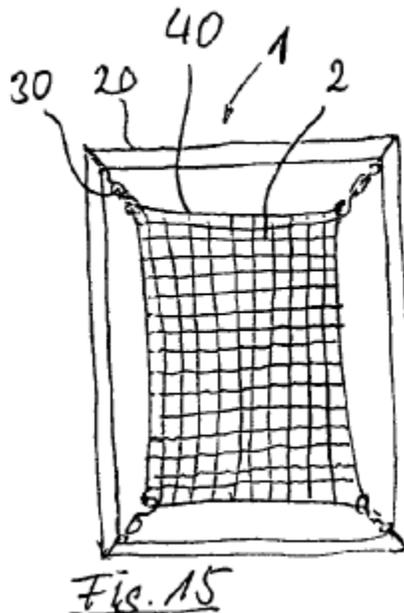


Figure 15 is a top plan view of Otto’s shoe rack (device 1). Otto’s device 1 includes a rigid frame consisting of profile parts 20, and net or mesh arrangement 2. Mesh arrangement 2 defines openings, which are configured to allow a shoe to be at least partially positioned within any one of the plurality of openings. Mesh arrangement 2 is attached to the rigid frame by means of turnbuckles 30. Turnbuckles 30 are adjustable so that mesh arrangement 2 can be stretched within the rigid frame. Otto’s shoe rack may be attached to a wall, ceiling, or floor. The shoe rack may be attached in a vertical, substantially planar configuration at offset dimension a from support surface W . Otto ¶¶ 16, 24, 35, 36, Figs. 2, 13–15. Although not shown in Figure 15, Otto describes the offset as being provided by a

structure including fasteners and spacers. *See, e.g., id.* ¶ 24. Otto also describes its shoe rack being provided as a “kit.” *Id.* ¶ 31.

Otto provides an example with a minimum value for the offset dimension of 10 cm. Otto ¶ 35. Otto later explains that the offset “may be at least 2 cm, but preferably between about 8 cm and 15 cm, most preferably 10 cm.” *Id.* ¶ 41. Otto also describes various mesh sizes. *See id.* ¶ 21 (explaining that “mesh sizes can be used in a wide range,” and providing an example of “mesh sizes in the range of 2 to 10 centimeters, in particular between 2 and 4 centimeters”).

Appellant’s Figure 1 is reproduced below.

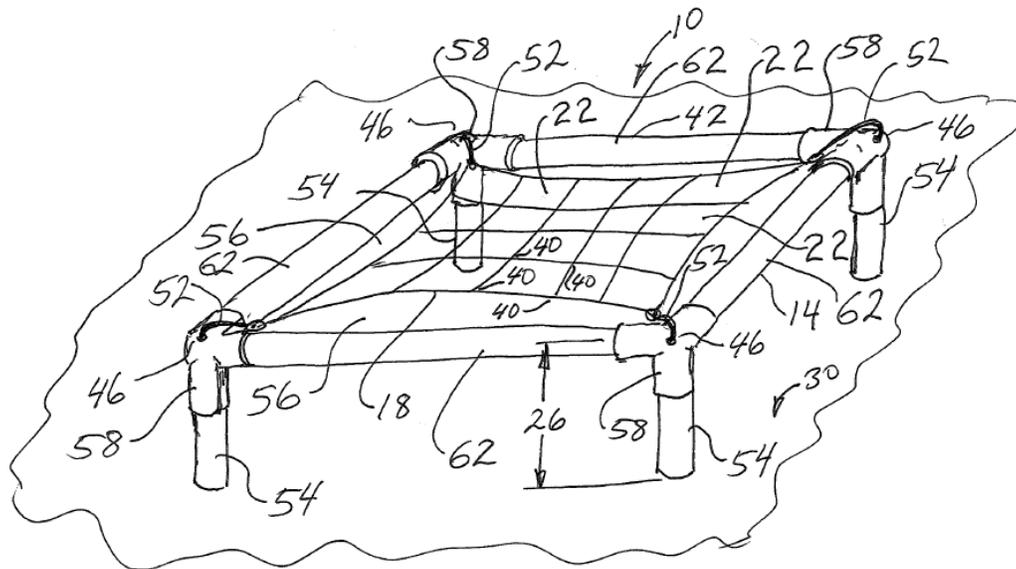


FIG. 1

Figure 1 is a perspective view of Appellant’s shoe rack. Other than orientation of the device, which is not part of the structure of the device, Appellant’s Figure 1 is the same as that shown in Otto’s Figure 15. The

Specification provides an example of “rigid frame 14 . . . with dimensions of about 24 inches by 30 inches” and mesh “sizes . . . vary[ing] such that they contain between about 10 and 40 of the openings 22,” which correspond to mesh sizes of approximately 3 inch to 12 inch (or approximately 7.5 cm to 30 cm) squares. Spec. ¶ 11.² The Specification also explains that “the offset dimension 26 can be set to be between about 4 and 10 inches,” which is approximately 10 cm to 25 cm. *Id.* ¶ 18.

Based on Appellant’s Specification, we know that “openings being configured” (claim 1) or “sized” (claim 17) in the recited manner includes configurations/sizing, such as approximately a 7.5 cm mesh size and a 10 cm offset. Spec. ¶¶ 11, 18. As discussed above, that structure is disclosed in Otto. Otto ¶¶ 21, 35, 41.

Because our explanation of the rejection of claims 1 and 17 differs from that provided by the Examiner, and does not include a need for any modification to Otto’s teachings, we designate our affirmance as a new ground of rejection and change the statutory basis for the rejection to 35 U.S.C. § 102(a)(1), rather than 35 U.S.C. § 103. Designation as a new ground of rejection provides Appellant notice and an opportunity to respond with evidence and arguments to address these differences.

Appellant does not provide argument specifically addressing the Examiner’s rejection of dependent claims 3–15, which depend from claim 1, or dependent claims 19 and 20, which depend from claim 17. Accordingly, we sustain the Examiner’s decision to reject those claims on the bases set

² Appellant’s Specification was amended on Sept. 14, 2017 to correct paragraph numbering starting at the “DETAILED DESCRIPTION” portion. Reference to paragraph numbers herein are to those from that amended Specification unless otherwise noted.

forth in the Final Action (i.e., rejected under 35 U.S.C. § 103 as being unpatentable over Otto or the combined teachings of Otto and Richardson).
Claims 2, 16, and 18

Claim 2 depends from claim 1, and claim 18 depends from claim 17. Claims 2 and 18 each recite that “the net is fully made of an elastic material.” Independent claim 16 recites a shoe arranging apparatus including a net “made of a fully elastic material being attachable to the frame in a stretched configuration such that the net is supported in a plane about horizontally at an offset dimension from a support surface relative to which the frame is configured to rest under the force of gravity alone.”

The Examiner finds that Richardson discloses the use of bungee cord material on a storage rack. Final Act. 6, 8. The Examiner reasons that Otto’s mesh arrangement 2 could have been constructed using bungee cord material “so that [the] openings could be elastic[ally] adapted to support articles of different shapes and sizes.” *Id.* at 7 (providing rationale with respect to claims 2 and 18); *see also id.* at 8 (providing same rationale with respect to claim 16).

Appellant argues that any attempt to construct the mesh arrangement from bungee cord material would have “destroy[ed] the primary purpose of the device,” that is, to display shoes in an orderly, side-by-side manner, because the resulting mesh arrangement would have sagged under the weight of the shoes supported by the device. Appeal Br. 5; Reply Br. 6–7. The argument is not persuasive.

Constructing Otto’s mesh arrangement 2 from bungee cords would not have destroyed the primary purpose of Otto’s device 1. As the Examiner correctly finds, the language of claims 2, 16, and 18 extends to cover mesh

arrangements constructed from cords having a wide range, including low levels, of elasticity. Ans. 6. Furthermore, Otto teaches putting the mesh arrangement 2 under tension, and specifically references stretching mesh arrangement 2. Otto ¶ 36. Such tensioning, particularly when applied to mesh arrangements having low levels of elasticity, would have reduced the degree of sagging once shoes were inserted. Considering the facts as a whole, the Examiner has adequately shown that one of ordinary skill in the art would have had reason to construct the mesh arrangement from bungee cords, despite the likelihood that the mesh arrangement might experience some degree of sag. Because Appellant's argument is not persuasive, we sustain the rejection of claims 2, 16, and 18.

DECISION

We AFFIRM the Examiner's decision to reject claims 1–20.

Pursuant to our authority under 37 C.F.R. § 41.50(b), we designate our affirmance of the Examiner's decision to reject claims 1 and 17 as new grounds of rejection under 35 U.S.C. § 102(a)(1), rather than 35 U.S.C. § 103 as originally rejected by the Examiner.

Section 41.50(b) provides “[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review.” Section 41.50(b) also provides that Appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new grounds of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution*. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both,

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and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner.

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same Record.

Further guidance on responding to a new ground of rejection can be found in the Manual of Patent Examining Procedure § 1214.01.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED; 37 C.F.R. § 41.50(b)