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D E C I S I O N
of 29 January 2003

Case Number: T 0079/00 - 3.2.4

Application Number: 93106907.4

Publication Number: 0568919

IPC: A44B 18/00

Language of the proceedings: EN

Title of invention:
Surface fastener

Patentee:
YKK CORPORATION

Opponent:
Gottlieb Binder GmbH & Co.

Headword:
-

Relevant legal provisions:
EPC Art. 52(1), 54, 123(2)

Keyword:
"Description - extension of subject-matter - yes"
"Novelty - no"

Decisions cited:
-

Catchword:
-

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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0079/00 - 3.2.4

D E C I S I O N
of the Technical Board of Appeal 3.2.4
of 29 January 2003

Appellant: (Proprietor of the patent)
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Representative:
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Respondent: (Opponent)
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Representative:
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 18 November 1999 revoking European patent No. 0 568 919 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: C. A. J. Andries
Members: M. G. Hatherly
H. Preglau
G. C. Kadner
C. Holtz

Summary of Facts and Submissions

I. European patent No. 0 568 919 was revoked by the opposition division's decision dispatched on 18 November 1999.

The appellant (proprietor) filed an appeal on 17 January 2000, paid the appeal fee simultaneously and then filed the statement of grounds of appeal on 27 March 2000.

II. The following items played a role in the appeal proceedings:

D4	FR-A-1 434 564
"Klettohair"	sample of a woven tape with pink stripes, filed with the notice of opposition
D5	"Fibre Dictionary" published by Shoko Kaikan Publishing Dept. and issued 10 September 1951, page 1278, in Japanese with a translation into English
D6	"Textile Terms and Definitions - Ninth Edition 1991 - The Textile Institute", page 25, definition of "binding thread"
Photograph	filed during the oral proceedings before the board of appeal and entitled "Lockenwicklerband vom 15.07.88" showing an enlargement of a woven tape with blue stripes

III. With the statement of grounds of appeal, the appellant filed a new single claim to replace that deemed unallowable by the opposition division, with the term "fixing threads" replaced by "binding threads" based on a definition in D5. He maintained that neither D4 nor the "Klettohair" sample anticipated or suggested the use of binding threads in the claimed surface fastener.

By reply of 28 September 2000 the respondent (opponent) argued that the amendment of "fixing threads" to "binding threads" was unallowable in view of the definition in D6. Moreover he alleged a second public prior use supported by the offer of witness Mr Werner Zölß.

In the annex to the summons to attend oral proceedings the board provisionally refused the amendment of "fixing threads" to "binding threads". The board commented on the wording of the single claim when compared with the disclosure of D4 and stated that it would be discussed in the oral proceedings whether D4 or the Klettohair product was the more relevant. The board added that it intended to disregard the alleged second public prior use and that it did not appear worthwhile to hear the witness on this subject.

In a reply of 27 December 2002 to the communication the appellant filed a new single claim and amended pages for the patent.

Both parties attended oral proceedings on 29 January 2003.

IV. The single claim reads:

"A surface fastener having a woven tape (1), wherein said tape (1) includes a number of longitudinal locking regions (5) and a number of longitudinal mesh regions (6) alternately arranged across the width, each of said locking regions (5) being woven of weft threads (4), and first and second warp threads (3a, 3b), said second warp threads (3b) forming male or female engaging elements (2), each of said mesh regions (6) including only said weft threads (4),

characterized in that

each of said weft threads (4) is a monofilament and

each said locking region (5) also includes fixing threads (7) extending along opposite longitudinal edges thereof, there being two fixing threads extending along the entire length of each edge of the locking region."

The last two lines 6 and 7 of page 2 of the amended description read:

"To this end, "fixing threads" mentioned in the claim mean two threads changing position right and left every one or more wefts."

V. The appellant requested that the decision under appeal be set aside and that the patent be maintained on the basis of the single claim and the description, both filed with letter of 27 December 2002 (main request) or on the basis of the same documents with the deletion of the last two lines of page 2 of the description filed

with the same letter (auxiliary request).

The respondent requested that the appeal be dismissed.

Reasons for the Decision

1. The appeal is admissible.

2. *Article 123(2) EPC - the description*

2.1 The last two lines of page 2 of the description according to the main request are an explanation of the claim and read:

- "To this end, "fixing threads" mentioned in the claim mean two threads changing position right and left every one or more wefts."

2.2 Lines 22 and 23 of column 2 of the granted patent state that "There are also fixing threads 7 running down either side of the locking region 5" and Figure 2 shows two threads at each side changing position right and left.

However Figure 2 shows a specific configuration of fixing threads changing over at every **fourth** weft. There is no basis in the patent for generalising this specific embodiment of every fourth weft to every one or more wefts.

2.3 Accordingly the amended description according to the main request contravenes Article 123(2) EPC.

2.4 Therefore the main request as a whole cannot be allowed.

2.5 In the auxiliary request the last two lines on page 2 of the description are deleted. Therefore no objection arises under Article 123 EPC.

3. *The history of the arguments based on the Klettohair product*

3.1 In the notice of opposition the respondent argued that claim 1 and the dependent claim 2 as granted were not patentable in view of D4 and the enclosed sample of the Klettohair product.

3.2 Lines 8 to 12 of page 5 of the opposition division's decision state

- "In fact, the structure of the "Klettohair" product and its public availability were not disputed by the patentee during oral proceedings.

  During oral proceedings, the opponent alleged that the prior use product corresponded to the definition of claim 1 according to the request of the patentee, with the exception of the fixing yarns along either side of the locking regions."

Moreover the board pointed out in section 4.2 of the annex to the summons to attend oral proceedings that

- "according to section 5 on page 1 of the minutes of the oral proceedings before the opposition division, in the Klettohair product there are no fixing threads extending along opposite

longitudinal edges of the locking region, the problem of fixing of this region being solved by coating with a finish."

3.3 However the respondent produced a new line of argumentation during the oral proceedings before the board of appeal by filing a photograph entitled "Lockenwicklerband vom 15.07.88" showing an enlargement of a woven tape having, in his view, two longitudinal locking regions with (blue) (first) warp threads and (translucent) (second) warp threads forming engaging elements, the translucent second warp threads bridging three blue first warp threads and being bounded on each side by two blue fixing threads. Accordingly he argued that the subject-matter of the single claim lacked novelty.

3.4 The appellant argued that the respondent was too late in bringing this photograph and the new line of argumentation since fixing threads along the edges of the locking region were the subject of the granted claim 2 and indeed of the single claim refused by the opposition division.

3.5 While the sample of the Klettohair product (with pink stripes) has been agreed to be publicly available prior art, there is no proof on file that the photograph (with blue stripes) is prior art or of a prior art tape. The respondent however maintained that the relevant features could also be seen with a magnifying glass on the Klettohair sample which therefore rendered the surface fastener defined by the single claim not new.

The board therefore disregards the photograph (thus

also overcoming the appellant's objection that it had been filed too late) and relies on the Klettohair sample.

3.6 The board cannot understand why the respondent delayed bringing the new line of argumentation until the oral proceedings and is unconvinced by the respondent's excuse that the delay was due to confusion caused by the appellant's (unsuccessful) attempt to amend the term "fixing threads" to "binding threads".

Nevertheless the board is faced with argumentation which could lead to the claimed surface fastener being found not to be novel.

Moreover the Klettohair sample upon which the argumentation is based was filed with the notice of opposition and even the argumentation was present in section 2.2 on page 5 of the notice of opposition in the attack on the dependent claim 2 of the patent as granted, where the respondent stated that

- "Ferner sind bei diesem Haftband die den Rand der Verriegelungsbereiche bildenden farbigen Fäden als Stützfäden ausgebildet, welche die Verriegelungsbereiche zusammenhalten, also festigen, und welche sich entlang der Längsränder der Verriegelungsbereiche erstrecken."

Claims 1 and 2 of the patent as granted were subsequently combined to arrive at the single claim upon which the opposition division took its decision to revoke the patent and upon which the present single claim is based.

Therefore the board will consider the argumentation and not dismiss it under Article 114(2) EPC.

4. *The single claim of the auxiliary request - novelty*

4.1 Using the words of this claim, the Klettohair sample is a surface fastener having a woven tape, wherein said tape includes a number of longitudinal locking regions (the pink stripes) and a number of longitudinal mesh regions (between the pink stripes) alternately arranged across the width, each of said locking regions being woven of (translucent) weft threads, and (pink) first and (translucent) second warp threads.

In the Klettohair sample the loops formed by the (translucent) second warp threads have been cut thus forming male engaging elements which is one of the two alternatives (male or female engaging elements) set out in the single claim.

Each of the mesh regions of the Klettohair sample includes only said weft threads and it is undisputed that each of said weft threads is a monofilament.

4.2 It can be seen when looking at the Klettohair sample with a magnifying glass that each locking region comprises pink warp threads which are to the left or to the right or between the legs of the translucent warp thread.

The central pink warp threads correspond to the first warp threads of the single claim. The outer pink warp threads correspond to the fixing threads of the single claim because they extend along the edges of the locking region, keep the other threads in place and

moreover change position right and left at every double weft thread.

4.3 Thus, as set out in lines 3 and 4 of the claim, each of said prior art locking regions is woven of weft threads, and (pink) first and (translucent) second warp threads, said (translucent) second warp threads forming male engaging elements.

Moreover, as set out in lines 9 to 11 of the claim, each prior art locking region also includes (pink) fixing threads extending along opposite longitudinal edges thereof, there being two fixing threads extending along the entire length of each edge of the locking region.

4.4 Accordingly the prior art Klettohair sample possesses all the features set out in the single claim of the auxiliary request.

4.5 The appellant argued that the edge threads of the Klettohair sample are first warp threads not fixing threads, there being instead a coating with a finish in order to fix the threads. However the board finds that the edge threads of the Klettohair sample have a fixing function even if there is additional fixing provided by the coating (as also foreseen in the patent in suit in column 2, lines 28 to 30).

4.6 The board notes that, while there are differences between what is shown in Figure 2 of the patent and the Klettohair sample, the claim does not bring out these differences.

4.7 The last two lines of page 2 of the description

according to the main request were found unallowable in the above section 2 but, even if they had been found allowable, would express no difference over the "Klettohair" sample whose edge threads change position right and left periodically i.e. "at every one or more wefts".

4.8 It is true that Figure 2 of the patent shows each fixing thread passing over one weft thread and under the next weft thread so that each weft thread is separately surrounded by the fixing threads whereas in the Klettohair sample each fixing thread passes over more than one weft thread so that groups of weft threads are surrounded by the fixing threads.

Moreover looking at Figure 2 of the patent, the locking region comprises two second warp threads 3b with an additional warp thread therebetween as well as an additional warp thread at each edge between the second warp thread 3b and the fixing threads 7.

However, none of these features is in the single claim (and the appellant declined the respondent's suggestion to amend the single claim to more specifically cover the embodiment of Figure 2 of the patent).

4.9 Accordingly the prior art Klettohair sample destroys the novelty of the subject-matter of the rather generally worded single claim (Articles 52(1) and 54 EPC).

4.10 Therefore the auxiliary request is unallowable.

5. As both requests have been found unallowable, the appeal cannot succeed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar: The Chairman:

G. Magouliotis C. Andries