

Internal distribution code:

- (A) [-] Publication in OJ
(B) [-] To Chairmen and Members
(C) [-] To Chairmen
(D) [X] No distribution

**Datasheet for the decision
of 7 November 2013**

Case Number: T 0681/10 - 3.2.06
Application Number: 01201819.8
Publication Number: 1160367
IPC: D04H3/03, D04H3/16
Language of the proceedings: EN

Title of invention:

Matting of low density thermoplastic material and high voids index, and a device and process for its production

Patent Proprietor:

Officine Maccaferri S.p.A.

Opponents:

FARE' S.p.A.
TEMA - TECHNOLOGIES AND MATERIALS SRL

Headword:

Relevant legal provisions:

EPC 1973 Art. 54, 84

Keyword:

Novelty - public prior use (yes)
Claims - clarity - auxiliary request (no)

Decisions cited:

Catchword:



**Beschwerdekammern
Boards of Appeal
Chambres de recours**

European Patent Office
D-80298 MUNICH
GERMANY
Tel. +49 (0) 89 2399-0
Fax +49 (0) 89 2399-4465

Case Number: T 0681/10 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 7 November 2013

Appellant: Officine Maccaferri S.p.A.
(Patent Proprietor) Via Kennedy, 10
40069 Zola Predosa (BO) (IT)

Representative: Provvisionato, Paolo
Provvisionato & Co S.r.l.
Piazza di Porta Mascarella 7
40126 Bologna (IT)

Respondent: FARE' S.p.A.
(Opponent 1) Via Pastrengo, 31/33
I-21054 Fagnano Olona
Varese (IT)

Representative: Gislon, Gabriele
Marietti, Gislon e Trupiano S.r.l.
Via Larga 16
20122 Milano (IT)

Respondent: TEMA - TECHNOLOGIES AND MATERIALS SRL
(Opponent 2) Via dell'Industria, 21
Z.I., San Giacomo
31029 Vittorio Veneto (TV) (IT)

Representative: Tetzner, Volkmar
Anwaltskanzlei Dr. Tetzner
Van-Gogh-Strasse 3
D-81479 München (DE)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 18 February
2010 revoking European patent No. 1160367
pursuant to Article 101(3) (b) EPC.**

Composition of the Board:

Chairman: M. Harrison
Members: T. Rosenblatt
W. Sekretaruk

Summary of Facts and Submissions

- I. European patent No. 1 160 367 was granted based on an application filed on 15 May 2001 by "Italdreni S.R.L". It was granted, after several name changes, to "Greenvision Ambiente S.p.A".
- II. By way of its decision dated 18 February 2010, the opposition division revoked the patent.
- III. The opposition division found *inter alia* that the patent could not be maintained as granted since the subject-matter of independent claim 1 was considered to lack novelty in view of a public prior use constituted by the following evidence:

E9: copy of a photograph showing a product labelled ITALGRIMP G20PP,
E10a: copy of order no. 203 from Bermüller & Co GmbH to Italdreni S.r.l, dated 2.2.1999,
E10b: copy of invoice no. 222, from Italdreni S.r.l. to Beco/Bermüller & Co GmbH, dated 15.2.1999.
- IV. With letter received by the European Patent Office on 29 March 2010, the appellant (proprietor) filed an appeal against this decision. The appeal fee was paid on 26 March 2010. The grounds of appeal were submitted with letter dated 17 June 2010 and received by the Office on 18 June 2010.
- V. After filing the grounds of appeal, the ownership of the patent was transferred to "Officine Maccaferri S.p.A".

- VI. In reply to the grounds of appeal the respondents (opponents 1 and 2) submitted in addition to their arguments *inter alia*
- E10c: "Declaration in Lieu of Oath", dated 23 November 2010, signed by Rudolf Bermüller.
- VII. In preparation for the oral proceedings before the Board, the Board informed the parties of its preliminary opinion on the case. In respect of the appellant's only auxiliary requests (requests numbered 5 and 6), the Board noted that numerous amendments had been made including typing and punctuation mistakes, as well as deletions, which would require discussion in view of their allowability under *inter alia* Article 84 EPC 1973. It was also stated by the Board that the points noted with respect to the independent claims of the main request still appeared relevant to the respective claims of the auxiliary requests.
- VIII. With its letter dated 7 October 2013 respondent 1 submitted further arguments as well as a colour version of E9.
- IX. Oral proceedings were held before the Board on 7 November 2013 in the absence of the appellant and of respondent 2, as notified in advance to the Board.
- X. The appellant requested in the written procedure that the decision under appeal be set aside and the European patent be maintained as granted or be maintained on the basis of one of the auxiliary requests 5 or 6, filed with the letter dated 17 June 2010.
- XI. Respondent 1 requested that the appeal be dismissed.

Respondent 2 requested in the written procedure that the appeal be dismissed.

XII. Independent claims 1 and 10 of the patent as granted have the following wording:

"1. Matting of interlaced and entangled filaments of low-density thermoplastic material, the matting having a high voids index and comprising a plurality of hollow protuberances arranged in several parallel rows, characterised in that at least a part of said protuberances presents at least one open portion, defined by non-interlaced filaments, such as to create a chamber for receiving the material with which the matting is intended to be covered.

10. A process for producing matting of interlaced and entangled filaments of low-density thermoplastic material according to claim 1, comprising the steps of extruding a thermoplastic material through the die and collecting the vertically falling extruded filaments on a translating surface provided with a plurality of profiled projections having at least one portion inclined to the direction of movement of the surface at the moment of impact by the filament, characterised in that the vector V_R which expresses the relative velocity of the vertically falling filament, resulting from the difference between the vector V_C , namely the velocity of the vertical fall of the filament, and the vector V_P , namely the velocity of translation of the inclined portion, to said inclined portion is directed against said inclined portion with an angle equal to zero or at a negative angle such that said inclined portion does not encounter the falling filaments."

Independent claim 1 of **auxiliary request 5** corresponds in substance to granted claim 1, except for commas after the expressions "*in several parallel rows*", "*one open portion*" and "*non-interlaced filaments*" as well as the full stop at the end of the claim being omitted.

The wording of the single independent claim of **auxiliary request 6** is based on granted independent claim 10, whereby however the beginning of its preamble reads as follows:

"1. A process for producing matting of entangled filaments of low density thermoplastic material according to claim 1, comprising the steps of extruding a thermoplastic material through a die and collecting..."

XIII. The arguments of the appellant presented in the grounds of appeal, as far as relevant to the present decision, may be summarised as follows:

- a) The standard of proof applied by the opposition division, i.e. on the balance of probabilities, was not in line with the decisions of the Boards of appeal (see T 750/94, T 97/94). The chain of evidence offered by the opponents to substantiate the prior use was not complete, because the specific product "ITALGRIMP G20PP" seen in E9 was not quoted in the invoices. The product codes were different and it should be assumed that a very large number of products with different characteristics were quoted as ITALGRIMP or PP or G20. Due to the history of the Italdreni/Greenvision company, it was quite impossible to obtain information about the product from the company; this information could only be obtained

from BeCo/Bermüller Company, which presented however the same difficulties for the respondent as for the appellant.

- b) The opposition division was correct in seeing in E9 a matting of interlaced and entangled filaments comprising a plurality of hollow protuberances arranged in several parallel rows. The clear portions seen in E9 were typical of prior art mattings and extended all over the inclined sides of the protuberances. However E9 did not disclose protuberances having at least one portion defined by non-interlaced filaments, since there were no filaments present in the open portions.

The appellant did not make any comments in regard to auxiliary requests 5 and 6; these were simply attached to the grounds of the appeal and cited by the appellant as forming part of its set of requests.

The appellant submitted no comments in reply to the Board's preliminary opinion nor to the submissions of the respondents.

XIV. The arguments of the respondents made in their written submissions, as far as relevant to the present decision, may be summarised as follows:

- a) The public prior use documented by E9, E10a and E10b was complemented by the declaration in lieu of oath by Mr. Bermüller. The company Bermüller & Co GmbH (BeCo) ordered on 2.2.1999 (order no. 203, E10a) from Italdreni S.r.l Geotecnica a product called "Beco Krallmatte G20PP". Italdreni had delivered the ordered product which was called "ITALGRIMP G20" by them. The delivery was

documented by Italdreni's invoice of 15 February 1999 (E10b), which was linked to BeCo's order no. 203 as could be seen on the second page of the invoice. E10c confirmed this chain of events and the link to the product shown in E9 was also established.

- b) The clear portions in E9 represented the open portions formed at the side portions of the protuberances. In the magnified details of the original coloured photograph underlying the copy of E9 non-interlaced filaments could be seen in the clear, i.e. open portions, of the protuberances (letter of respondent 1 of 7 October 2013).

During the oral proceedings respondent 1 went into more detail on its argument contained in the letter of 7 October 2013 with regard to the magnified sections of E9 as follows:

- c) In claim 1, the expression "*at least one open portion, defined by non-interlaced filaments*" could be construed in different ways. The term "*defined*" could imply that the non-interlaced filaments run over an open portion or that they delimit its border. The expression "*non-interlaced filaments*" should be broadly understood to mean that somewhere in such an open portion there were sections of filaments which were not at all or only loosely interlaced, as distinct from other portions of the matting made up of interlaced filaments in which, due to the method of their manufacture, they were densely or completely interlaced. Such interpretation of the feature was also in line with the matting shown in Figure 1 of

the patent in suit which represented an embodiment of the invention; no difference could be perceived between the matting of this Figure and that of E9.

Reasons for the Decision

1. The appeal is admissible.

Main request

2. E9, E10a, E10b, E10c - Article 54(2) EPC 1973
 - 2.1 It was not disputed that the patent proprietor, at the moment of the filing of the appeal, was the manufacturer of the products shown in E9 and mentioned in the invoice E10b and that the product mentioned in E10b had been unconditionally sold and delivered to BeCo before the relevant date of the patent in suit. In the declaration in lieu of oath, E10c, the managing director of BeCo, Mr. Bermüller, declared that the products on the photo E9 and those in E10b concerning the unconditional sale in 1999 were identical. This declaration directly responds to the appellant's assertion that the product shown in E9 and that mentioned in E10b were not necessarily identical, which the appellant alleged to be the case due to different product codes. The Board finds that the appearance of the letters "PP" in the invoice E10b and on the photo, E9, at different locations in the product codes, respectively "PP ITALGRIMP G20" and "ITALGRIMP G20PP", provides no indication that a difference in the product is present. Nor has any evidence been provided that the product did undergo any changes. The appellant's mere statement in this respect that, due to the company history, it was not possible anymore to obtain

information from inside the company is not considered sufficient to overcome the lack of support for its mere assertion that the product might have undergone changes.

- 2.2 In the absence of any counter-argument to the above considerations, notified to the appellant by the Board in its communication in preparation for the oral proceedings, which could cast any real doubt on the documentary evidence in the form of E9, E10a/b/c, the Board is convinced beyond reasonable doubt (thereby applying an even stricter standard of proof compared to that applied by the opposition division in the appealed decision), that a matting having the features shown in E9 was made available to the public before the date of filing of the patent in suit by an unconditional sale, and is therefore comprised in the prior art according to Article 54(2) EPC 1973.

3. Article 54(1) EPC 1973

- 3.1 The Board considers that the subject-matter of claim 1 lacks novelty in view of the matting disclosed in E9 for the following reasons.

- 3.2 First, the appellant acknowledged in its written submissions that the features defined in the claim's preamble were disclosed in E9. The Board also sees no reason to find differently. The appellant further explicitly acknowledged that the clear portions shown in E9 corresponded to the inclined sides of the protuberances. The Board again also sees no reason to find differently on this matter. The only feature the appellant disputed as being disclosed in E9 was "*at least one open portion, defined by non-interlaced filaments*". According to the appellant, no portion

visible in E9 had non-interlaced filaments. However, the Board does not accept this argument.

3.3 On the contrary, and as an initial comment, the Board agrees with the construction of the claim as made by respondent 1 (see item XIV c) above) concerning the contested feature. It also corresponds to what is disclosed in Figure 1 of the patent in suit, illustrating an embodiment of the invention showing in the clear portions filaments running therethrough, some of which are not interlaced at all, some being loosely interlaced. Similarly, the magnified details of the coloured version of the photo E9, submitted in the letter of 7 October 2013, each representing a magnification of a clear, i.e. open portion of a selected protuberance, show individual filaments running through a respective open portion, which filaments are either not interlaced at all or only loosely entangled to some other filament. Consequently the Board concludes that E9 discloses a matting also having the contested feature. It may also be noted that the appellant has not contested that the further feature defined at the end of claim 1, i.e. "*such as to create a chamber ... to be covered*" is disclosed in E9 and the Board also sees no reason to find that this feature is not present.

3.4 The Board thus concludes that E9 discloses all features defined in claim 1.

4. The subject-matter of claim 1 thus contravenes Article 54 EPC 1973, whereby maintenance of the patent is prejudiced (Articles 100(a) EPC 1973 and 101(2) EPC). Therefore the appellant's main request is not allowable.

Auxiliary requests 5 and 6

5. Claim 1 of auxiliary request 5 corresponds, except for some minor typographical changes, to claim 1 as granted. Substantively it is the same. Thus, for the same reasons as given above for the main request, auxiliary request 5 is also not allowable.

6. Claim 1 of auxiliary request 6 corresponds essentially to granted independent claim 10. However, the expression "*according to claim 1*" has been maintained in the claim, despite the claim itself being claim 1. Since, even when considering only the aspect of the dependency of the claim upon itself, the claim lacks clarity (Article 84 EPC 1973), it is evident that the patent cannot be maintained with these claims. Auxiliary request 6 is consequently also not allowable.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



P. Martorana

M. Harrison

Decision electronically authenticated