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**Datasheet for the decision  
of 24 November 2016**

**Case Number:** T 1188/15 - 3.2.06

**Application Number:** 08796705.5

**Publication Number:** 2178404

**IPC:** A41D7/00, A41F9/02, A41D1/08

**Language of the proceedings:** EN

**Title of invention:**  
WATER SHORTS INCORPORATING A STRETCH TEXTILE

**Patent Proprietor:**  
Hurley Phantom C.V.

**Opponents:**  
O'Neill Europe BV  
NA PALI S.A.S./RIP CURL EUROPE S.A.S.

**Headword:**

**Relevant legal provisions:**  
EPC Art. 100(b), 83

**Keyword:**  
Sufficiency of disclosure - main request (no) auxiliary  
requests (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 1188/15 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 24 November 2016**

**Appellant:** Hurley Phantom C.V.  
(Patent Proprietor) Colosseum 1  
1213 NL Hilversum (NL)

**Representative:** Tombling, Adrian George  
Withers & Rogers LLP  
4 More London Riverside  
London SE1 2AU (GB)

**Respondent:** O'Neill Europe BV  
(Opponent 1) 32 Oosteinde  
2361 HE Warmond (NL)

**Representative:** EP&C  
P.O. Box 3241  
2280 GE Rijswijk (NL)

**Respondent:** NA PALI S.A.S./RIP CURL EUROPE S.A.S.  
(Opponent 2) 162, rue Belharra/407 Avenue de la Tuilerie  
64500 Saint-Jean-de-Luz/40150 Soorts-Hossegor  
(FR)

**Representative:** Cabinet Plasseraud  
66, rue de la Chaussée d'Antin  
75440 Paris Cedex 09 (FR)

**Decision under appeal:** **Decision of the Opposition Division of the  
European Patent Office posted on 17 April 2015  
revoking European patent No. 2178404 pursuant to  
Article 101(3) (b) EPC.**

**Composition of the Board:**

<b>Chairman</b>	M. Harrison
<b>Members:</b>	M. Hannam
	E. Kossonakou

## Summary of Facts and Submissions

- I. An appeal was filed by the appellant/patent proprietor against the decision of the opposition division revoking European Patent No. 2 178 404. In its decision it found that the main request and auxiliary requests 1 and 2 met with objections under Article 100(b) EPC / Article 83 EPC.
- II. With its grounds of appeal, the appellant requested that the decision be set aside and compliance with the requirement of sufficiency of disclosure be acknowledged on the basis of the claims of the patent as granted (main request) or alternatively on the basis of one of auxiliary requests 1 or 2. It further requested that the case be remitted to the opposition division for further prosecution.
- III. With letter of 23 September 2016 the appellant filed a third auxiliary request (auxiliary request 3).
- IV. The respondents OI and OII (opponents OI and OII) each requested that the appeal be dismissed.
- V. The following document, referred to by the parties in their submissions, is relevant to the present decision:  
  
C8: A comparative Study on Tensile Strength of Different Weave Structures, IJSRET, Col. 3, Issue 9, December 2014
- VI. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that all of the requests on file appeared to meet with objections

under Article 100(b) EPC / Article 83 EPC.

VII. Oral proceedings were held before the Board on 24 November 2016. The final requests of the parties were as follows:

The appellant requested that

- the decision under appeal be set aside,
- compliance with the requirement of sufficiency of disclosure (Article 100(b) EPC / Article 83 EPC) be acknowledged on the basis of the claims of either the patent as granted (main request) or of one of auxiliary requests 1, 2 (filed with the statement of grounds of appeal of 27 August 2015) or 3 (filed with the submission of 23 September 2016) and
- that the case be remitted to the opposition division for further prosecution in respect of the remaining opposition grounds on the basis of the claim request found to satisfy Article 100(b) EPC / Article 83 EPC.

The respondents each requested that the appeal be dismissed.

VIII. Claim 1 of both the main request and auxiliary request 1 reads as follows:

"An article of apparel (10) comprising:  
a pelvic region (120) for covering a pelvic area (20) of a wearer (100), the pelvic region defining a waistband (22) for extending around a waist of the wearer, the waistband having a first layer that defines a portion of an exterior surface (13) of the apparel, the first layer being formed from a first woven textile (11) that exhibits at least thirty percent stretch prior to tensile failure, and the waistband having a second layer that defines a portion of an interior

surface (14) of the apparel, the second layer being formed from a second woven textile (12) that exhibits less than ten percent stretch prior to tensile failure; and  
a pair of leg regions (30) for covering at least a portion of legs of the wearer, a majority of the exterior surface and the interior surface of the apparel in the leg regions being formed from the first woven textile."

Claim 1 of auxiliary request 2 reads as for claim 1 of the main request with the following feature appended:

"wherein a 502 nylon thread is used to form triple coverstitch seams at seven to eight stitches per 2.54cm (inch) in the article of apparel."

Claim 1 of auxiliary request 3 reads as for claim 1 of the main request with the following feature appended:

"wherein the yarns of the first woven textile are formed from polyester."

IX. The appellant's arguments may be summarised as follows:

The ground for opposition under Article 100(b) EPC did not prejudice maintenance of the patent according to claim 1 of the main request. From an understanding of the function and purpose of the invention, particularly as indicated in lines 48 to 55 of col. 4 of the patent, the skilled person understood that the claimed extension for the second woven textile was along the length of the waistband, as the relatively low stretch in this direction assisted the securing of the apparel to the wearer. The description should also be used, as indicated in Article 69 EPC, to interpret the claims

which would indicate to the skilled reader that extension along the length of the waistband was the direction of interest and thus the direction of measurement claimed; any other interpretation of the patent disclosure would be obtuse. Also, when reading the claim in the context of the description, it was clear that the relative stretch between the first and second woven textiles was of importance rather than the precise limits to the claimed ranges. Moreover, the precise direction of measurement of the claimed woven textiles was unimportant since if the first textile exhibited at least 30% stretch in any direction then it met the requirement of claim 1. Similarly if the second textile exhibited more than 10% stretch in any direction then it failed to meet the requirement of claim 1.

Regarding the auxiliary requests 1 to 3, these were not intended to overcome any objection found prejudicial to the maintenance of the patent under Article 100(b) EPC.

X. The arguments of respondent OI relevant to the present decision may be summarised as follows:

Claim 1 was directed to an article of apparel rather than just a pair of water shorts. The claimed second woven textile was included in only a portion of the waistband; as a result, the argument that claim 1 concerned stretch measurement solely along the length of the waistband was not logical as the second woven textile did not necessarily influence this. The skilled person thus did not know in which direction to measure the stretch as its function was not defined in the patent.



XI. The arguments of respondent OII may be summarised as follows:

It was unclear in which direction to measure the stretch of the claimed first and second woven textiles. C8 showed that measurement in the warp and weft directions produced significantly different stretch results for a woven textile, the skilled person thus not being able to carry out the invention. The first and second textiles were not related and their stretch characteristics were individually defined.

### **Reasons for the Decision**

1. *Main request*

1.1 *Article 100(b) EPC*

The ground for opposition under Article 100(b) EPC prejudices the maintenance of the patent according to the main request (as granted).

1.2 The skilled person is unable to carry out the invention according to the main request at least because no direction of measurement of the claimed stretch prior to tensile failure of the woven textiles is given in claim 1 and, already from common general knowledge, the skilled person is aware that woven textile materials exhibit different stretch behaviour dependent upon the direction of measurement.

1.3 As regards such different stretch behaviour dependent upon measurement direction, C8 is considered, despite being post-published, to provide further evidence for this. This as such was not contested by the appellant.

Taking Table 3 of C8 for example, this compares the percentage extension in the warp and weft directions of different woven textile structures undergoing a grab and a strip test. For the plain weave structure undergoing a strip test, the warp extension in Table 3 is 19.79%, the weft extension being 12.27%, i.e. relative to the 12.27% extension an approximately 60% difference in extension between the two perpendicular measurement directions. This clearly underlines the skilled person's common general knowledge in this regard. In particular, claim 1 defines 'less than ten percent' stretch prior to tensile failure of the second woven textile. Such a difference in extension, resulting solely from the direction of measurement of the textile, would lead the skilled person to be unable to determine whether the invention according to claim 1 had been carried out, unless the direction in which stretch is to be measured is stated.

1.4 As regards the different interpretations between the parties of how the term 'stretch prior to tensile failure' is to be interpreted, no final conclusion as to what defines 'tensile failure' of a textile is required for the present decision. Whether 'tensile failure' is interpreted as when individual yarns of the textile begin to break on the one hand, or when the entire textile ultimately ruptures on the other, the difference in stretch behaviour dependent on the direction of measurement will pervade both interpretations.

1.5 The appellant's argument that the measurement direction of the claimed stretch was clearly along the length of the waistband, and that any other interpretation would be obtuse, is not accepted. Claim 1 itself provides no indication in this respect, with the parameter 'stretch

prior to tensile failure' simply being given range limits of at least thirty percent and less than ten percent, without any indication, even implicit, of the direction in which this is to be measured. The reference to col. 4, lines 48 to 55 of the patent specification referring to securing of the apparel to the individual does not help in this respect, not least as this concerns a particular embodiment of the invention in the form of water shorts (see paragraph [0017]), whereas claim 1 has a far broader scope covering simply an article of apparel with a waistband and a pair of leg regions. As identified also by OI, such an article of apparel could, for example, be an item of night-wear, a pair of trousers with a fly and a drawstring about the waist, or even an all-in-one jumpsuit (a so-called 'onesie') rather than solely a pair of water shorts. Such articles of apparel do not share the need with water shorts of being particularly well secured to the wearer and thus lack the necessity of having limited stretch along the length of the waistband. For the broadly claimed 'article of apparel', therefore, there is no suggestion, explicit or implicit, that the direction of measurement of the stretch should be along the length of the waistband.

- 1.6 The appellant's argument regarding the waistband requiring a low stretch textile in order to assist securing of the article to the wearer is also unconvincing since the low stretch woven textile, according to claim 1, defines merely a portion of an interior surface of the apparel. In other words, a minor portion of the inner surface of the waistband being of the low stretch second woven textile would still satisfy claim 1. Such an embodiment of the claimed invention would not be required to achieve the alleged assisting in securing the apparel to the wearer

since a limitation of the waistband's extension in use would not be realised, yet it would still fall within claim 1.

1.7 The appellant's argument that Article 69 EPC provided a basis for the skilled person to only consider stretch along the length of the waistband is not persuasive. At no time has a question regarding the clear linguistic structure, scope or meaning of the subject-matter of claim 1 been raised which could provide justification for interpretation of this in the light of the description. The Board also sees no difficulty with the meaning of claim 1, the claim simply being of a broad scope, specifically encompassing stretch prior to tensile failure in any direction whatsoever of the first and second woven textile in any article of apparel having the defined features. The skilled person thus has no requirement to interpret the claim in a more limited sense in the light of a specific embodiment of the description to which the claim is not limited, the claim itself imparting a clear and credible technical teaching to the skilled reader.

1.8 It is also noted that, even when considering the embodiment of the description concerning the water shorts, for which reduced stretch (or even non-stretch) along the length of the waistband is allegedly indicated as advantageous, col. 5, lines 28 to 34 indicates a very different advantage of this water shorts embodiment. This relates to high stretch properties of the stretch woven textiles, this providing 'less restriction and a greater freedom of movement' during activity. This stretch allowing greater freedom of movement evidently does not apply solely in the direction of the length of the waistband, but more generally in a multitude of directions to

avoid the textile restricting the wearer's movements. The appellant's contention that implicitly the only direction of stretch measurement is along the length of the waistband is thus, also for this reason, not persuasive.

1.9 The appellant's argument that the precise direction of measurement of the claimed woven textiles is unimportant provided that the individual textiles met the claimed stretch in any one direction is not persuasive. The appellant's argument only holds in the directions of measurement that are found to satisfy the claimed stretch condition. However, the scope of the claim is much broader and covers all directions of measurement, at least both the warp and the weft directions. As found in point 1.3 above with respect to the difference in extension indicated between these two perpendicular measurement directions, the skilled person needs to know in which direction the stretch should be measured. Without this, the measured value of stretch is simply arbitrary such that the skilled person does not know whether the invention has been achieved or not.

1.10 The appellant's argument that it was clear from the description that only the relative stretch between the first and second woven textiles was of importance is also not accepted. First, it is noted that claim 1 includes specific limits to the ranges of stretch prior to tensile failure rather than relative values, i.e. at least thirty percent for the first woven textile and less than ten percent for the second. As it is the claims which define the matter for which protection is sought (Article 84 EPC), it is not accepted that it is simply the relative stretch between the two textiles that is of importance and should be considered. Second,

even if just the relative stretch were considered, this would still not assist the skilled person in knowing in which direction the stretch of the two woven textiles was to be measured. Without such guidance in the patent, the skilled person does not know how to carry out the invention with regard to selecting appropriate woven textiles fulfilling the claimed percent stretch prior to tensile failure.

1.11 In conclusion therefore, the skilled person would be unable to carry out the invention according to claim 1 of the main request at least for the reason that he would not know in which direction to measure the percent stretch prior to tensile failure of the first and second woven textiles. The ground for opposition under Article 100(b) EPC thus prejudices the maintenance of the patent according to the main request.

1.12 The main request is thus not allowable.

2. *Auxiliary request 1*

2.1 The claims of auxiliary request 1 differed from those of the main request solely through an amendment made to dependent claim 6. Claim 1 of this request was identical to that of the main request. The appellant accepted that the same conclusion reached for the main request would thus apply to auxiliary request 1 and presented no further arguments in its defence.

2.2 The invention according to auxiliary request 1 thus fails to meet the requirements of Article 83 EPC such that auxiliary request 1 is not allowable.

3. *Auxiliary requests 2 and 3*

3.1 As regards the amendments made to claim 1 of both auxiliary request 2 and auxiliary request 3, the appellant accepted that these did not result in the requests overcoming the objections under Article 83 EPC found to be prejudicial to the maintenance of the patent for the foregoing requests. The Board also sees no reason to find differently.

3.2 As a consequence, the invention according to auxiliary request 2 and that according to auxiliary request 3 fail to meet the requirements of Article 83 EPC, such that the requests are not allowable.

4. Since none of the appellant's requests is allowable, the appeal is to be dismissed.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:



M. H. A. Patin

M. Harrison

Decision electronically authenticated