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**Datasheet for the decision
of 6 February 2024**

Case Number: T 1628/21 - 3.2.06

Application Number: 08755445.7

Publication Number: 2150143

IPC: A41D13/00

Language of the proceedings: EN

Title of invention:

ARTICLES OF APPAREL PROVIDING ENHANCED BODY POSITION FEEDBACK

Patent Proprietor:

NIKE Innovate C.V.

Opponent:

ADIDAS AG

Headword:

Relevant legal provisions:

EPC Art. 54, 56, 111(1), 69

EPC Prot. Interpretation Article 69

Keyword:

Novelty - main request (no) - interpretation of claims -
application of Article 69 EPC
Remittal - special reasons for remittal

Decisions cited:

G 0002/88, T 0881/01, T 0058/13, T 0299/09, T 0223/05,
T 1404/05, T 1127/16, T 1473/19, T 1646/12

Catchword:

With regard to the question of compatibility of certain principles of claim interpretation for the purposes of considering novelty or inventive step with Article 69 EPC, reference is made to Reasons 1.1.11 to 1.1.16.

The principle of primacy of the claims seems to exclude the use of the description and drawings for limiting the claims if an interpretation of the claim in the light of common general knowledge already leads to a technically meaningful result. Similarly, the principle, established by case law, according to which "limiting features which are only present in the description and not in the claim cannot be read into a patent claim" is also fully compatible with Article 69 EPC and Article 1 of the Protocol.



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Case Number: T 1628/21 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 6 February 2024

Appellant: ADIDAS AG
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Decision under appeal: **Interlocutory decision of the Opposition
Division of the European Patent Office posted on
9 July 2021 concerning maintenance of the
European Patent No. 2150143 in amended form.**

Composition of the Board:

Chairman M. Harrison
Members: M. Hannam
W. Ungler

Summary of Facts and Submissions

- I. An appeal was filed by the appellant (opponent) against the interlocutory decision of the opposition division in which it found that European patent No. 2 150 143 in an amended form met the requirements of the EPC.
- II. The appellant requested that the decision under appeal be set aside and the patent be revoked.
- III. In its reply to the appeal, the respondent (patent proprietor) requested that the appeal be dismissed, auxiliarily that the case be remitted to the opposition division for further prosecution if any of the auxiliary requests were to be considered, or that the patent be maintained on the basis of one of auxiliary requests 1 to 5 all filed with the reply to the statement of grounds of appeal dated 4 April 2022.
- IV. The following documents, referred to by the appellant in its grounds of appeal, are relevant to the present decision:

A9 JP-A-2004-263362, in an English translation
- V. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that the subject-matter of claim 1 of the main request appeared to lack novelty over A9. It further questioned the presence of an inventive step in each of the auxiliary requests on file.
- VI. With its submission dated 24 January 2024, the appellant *inter alia* argued that the subject-matter of

auxiliary request 1 involved an inventive step, particularly in view of what it saw to be the objective technical problem to be solved when starting from A9.

VII. Oral proceedings were held before the Board on 6 February 2024. At the close of the oral proceedings, the parties' requests were as indicated in points II. and III. above, the appellant further requesting remittal of the case to the opposition division.

VIII. Claim 1 of the main request reads as follows (with added paragraph annotation as used by the opposition division in its decision):

- 0 An article of apparel, comprising:
- 1 a garment structure (200)
 - 1.1 for covering at least a lower back portion of a human torso
 - 1.2 wherein the garment structure includes one or more fabric elements (220), and
 - 1.3 wherein the garment structure is a shirt
 - 1.4 structured and arranged so as to provide a close fit to at least the lower back portion; and characterised by
- 2 a lower back position feedback system (202) engaged with the garment structure at the lower back portion, and

- 2.1 wherein the lower back position feedback system includes at least a first region (208) in the lower back portion having a higher compressive force application capability than a compressive force application capability of the fabric element
- 2.2 making up a largest proportion of the garment structure.

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

Main request

The subject-matter of claim 1 of the main request lacked novelty over A9. The expression 'engaged with' was so broad that a garment structure with an integrally incorporated lower back position feedback system anticipated the subject-matter of claim 1. Resorting to the description for interpretation of the expression 'engaged with' in an effort to draw a distinction to the disclosure in A9 did not alter the objection, not least since there was no lack of clarity in the claim which needed to be resolved.

Auxiliary request 1

The subject-matter of claim 1 of auxiliary request 1 lacked at least inventive step starting from Fig. 2 but also starting from Figs. 6 and 7. If the latter objection was not admitted, remittal to the opposition division was appropriate.

X. The respondent's arguments may be summarised as follows:

Main request

As regards the interpretation of claim 1, this was

directed to an article of apparel comprising a garment structure which was a shirt, the article of apparel further including a lower back position feedback system engaged with the garment structure at the lower back portion. The claimed article of apparel thus included both a garment structure as a shirt and a lower back position feedback system. This was apparent from the structure of claim 1 whereby the semi-colon clearly separated features which were comprised in the article of apparel. The claim should be considered as a whole, from which it was evident that the meaning of 'engage' was for one distinct part to interact with another part, rather than for one part to be inherently and inseparably comprised within the other part. Accordingly, the claim wording required the article of apparel to have both a shirt which covered and provided a close fit to at least the lower back portion of a human torso, and a lower back position feedback system which was engaged with the shirt. This excluded the interpretation that the lower back position feedback system could be an inherent part of the shirt. This understanding was also confirmed by dictionary definitions of the word 'engage'.

As found in T 0881/01, T 0058/13 and T 0299/09, limitations to a claim's interpretation could not be derived from the description. This was however not necessary in the present case, in which the natural meaning of the word 'engage' was for one distinct part to interact with another part, rather than for the one part to be inherently and inseparably comprised within the other part. If one were to consider the description under Article 69 EPC, this supported the respondent's interpretation of the word 'engage' in the context of claim 1.

The subject-matter of claim 1 was therefore novel over A9 as this failed to disclose feature 2 i.e. a lower back position feedback system engaged with the garment structure at the lower back portion. With the feedback system being integral with the garment structure in A9, this could not anticipate claim 1 as the shirt would be unable to provide a close fit to at least the lower back portion (feature 1.4) if the higher contracting pressure section 18B of Fig. 2 were removed.

Auxiliary request 1

The case should be remitted to the opposition division for consideration of auxiliary request 1 to give the parties the opportunity to be heard at two instances. None of the essential questions regarding patentability of this subject-matter had been considered by the opposition division.

Reasons for the Decision

1. *Main request*

1.1 *Interpretation of claim 1*

1.1.1 The issue of contention between the parties regarding interpretation of claim 1 related to how the expression 'engaged with' in feature 2 was to be interpreted.

1.1.2 As a fundamental starting point, the Board sees that a claim should be interpreted as broadly as technically reasonable in the relevant art, in the present case the field of articles of apparel made of textiles/fabrics. With this background, the Board regards the expression 'engaged with' as broad in the sense that it includes

both:

- the lower back position feedback system being an element separate from and attached to the garment structure; and
- the lower back position feedback system being integrally incorporated into the garment structure.

1.1.3 The second interpretation above entails the garment structure being of one piece with the lower back feedback system. The Board can see no reason why the integral incorporation of the lower back feedback system into the garment structure would be a technically unreasonable interpretation of feature 2 of claim 1, i.e. why it should not mean that the lower back feedback system is 'engaged with' the garment structure. Contrary to the respondent's opinion, this is not seen to extend the 'normal reading' of the expression 'engaged with'.

1.1.4 As to the respondent's contention that the claimed article of apparel necessarily included both a garment structure as a shirt and a lower back position feedback system, also the second interpretation of claim 1 above, in which the feedback system is integrally incorporated into the garment structure, satisfies this requirement. Even when integrally incorporated into the garment structure, the lower back position feedback system is identifiable as such. This is because it is structured so as to exhibit a higher compressive force application capability than the fabric element making up a largest proportion of the garment structure (see features 2.1 and 2.2 of claim 1). It is thus inherently the case that the lower back position feedback system would still be identifiable when considering the second interpretation of claim 1. In A9 paragraph [0020] it will be observed that the stretchable material, of

which the entire shirt is made, is referred to as having "sections" with a strong contracting force and a "section" with a low contracting force. It is also noted that, contrary to the respondent's allegation, even with the feedback system integrally incorporated into the garment structure, the garment structure as a shirt is still present and recognisable as such (i.e. when considering the form of the garment of A9 without the high contractibility areas).

- 1.1.5 In further support of its contention in this regard, the respondent referred to the grammatical structure of the claim in which a semi-colon clearly separated features which were comprised in the article of apparel. Whilst this may be one possible reading of the claim wording, this is not the sole reading. Immediately following the semi-colon, the characterising portion of the claim is introduced with the wording 'and characterised by', which can be understood as introducing further limitations to the garment structure comprised in the article of apparel, rather than defining a necessarily "separate" further component. Had the claim been intended to define an article of apparel comprising a garment structure and, additionally, a lower back position feedback system as a separate, non-integrally incorporated element, this could have been unambiguously achieved in the claim with more specific definition of the relationship between these features. Consequently, claim 1 as drafted includes the interpretation that the lower back position feedback system can be an identifiable portion of the garment structure, and thus a structure which can be engaged with the garment structure by being integrally or otherwise incorporated therein.

1.1.6 As to a requirement for the lower back position feedback system to be a separate item from the garment structure with which it is engaged, this is not defined in claim 1. The word 'engaged' does not imply, at least in the context of claim 1, that the two engaged elements must be separate items. It can be accepted that both elements must be identifiable in the article of apparel since they are individually defined with respect to one another, but this is the case also in the second interpretation discussed above and as reasoned in point 1.1.4. The respondent's argument that the claim required the article of apparel to have both a shirt which covered and provided a close fit to at least the lower back portion of a human torso, and a separate lower back position feedback system which was engaged with the shirt is therefore not accepted. Both parties' references to dictionary definitions of the verb 'to engage' in various contexts are also not decisive for how the verb should be understood in the context of articles of apparel made of textiles/fabric. A piece of fabric 'engaged with' another piece of fabric is satisfied both by one being placed on the surface of the other and being bonded together (e.g. stitched or even adhered) as well as their being 'engaged with' each other in the sense of both sections together forming a continuous area of fabric material.

1.1.7 Whilst the expression 'engaged with' in claim 1 is viewed to be broad enough to cover both of the interpretations mentioned above, the Board does not find the expression to be unclear in its context. Consequently there is no need to refer to the description in order to interpret the scope of the claim. This was in fact confirmed by the decisions cited by the respondent in this context (T 881/01, T 58/13 and T 299/09) in which limitations to a claim's

interpretation could not be derived from the description. This is also well established case law of the Boards of Appeal, see *inter alia* T 223/05, T1404/05 and T 1127/16 in which it was held that a technically skilled reader does not normally need any further description-based guidance on claim interpretation, these essentially being read and interpreted on their own merits.

- 1.1.8 The respondent argued further that Article 69 EPC should be used to interpret the meaning of the claim, at least in the general sense which had been referred to in UK case law, with regard to Lord Hoffmann's 2004 judgement in *Kirin-Amgen*. Although no further details were given by the respondent about the exact case or principles referred to, upon questioning by the Chairman this was confirmed by the respondent to essentially be a reference to an approach in UK patent court decisions, according to which the wording of a claim should be understood to mean what the author intended it to mean. Transposing this to the present case, the respondent argued that "engaged with" should be seen to be something distinct from garment structures where one section was integrally incorporated into another. It also argued that several paragraphs of the description used the "engaged with" wording only in relation to separate material pieces being attached to one another rather than being otherwise incorporated.
- 1.1.9 It should be noted at the outset that the Board does not consider it necessary in the present case to analyse *in extenso* the question, controversially discussed in the case law (cf. Case Law of the Boards of Appeal, II.A.6.3.2), of application of Article 69 EPC for the purposes of examining novelty and inventive

step in opposition or opposition appeal proceedings. According to the respondent's line of argument, an application of Article 69 EPC would lead to the term "engaged with" being restrictively interpreted in the sense of certain passages of the description. However, this does not hold true in the present case for several reasons, so that the question of application of Article 69 EPC is not decisive.

- 1.1.10 Firstly, consideration of the passages of the description referred to by the respondent would not lead to its restrictive interpretation of the phrase "engaged with" (cf. points 1.1.17 to 1.1.22 below).
- 1.1.11 Secondly, the respondent's argument implies that an interpretation would only fulfil the requirements of Article 69 EPC if the passages of the description cited by it were used to interpret the term "engaged with" in a restrictive manner. However, the Board cannot agree with this view for the following reasons.
- 1.1.12 The fact that the EPC is based on the principle of primacy of the claims in the determination of the scope of protection is clear from the first sentence of Article 69 EPC ("The extent of the protection conferred by a European patent or a European patent application shall be determined by the claims."; cf. also T 1473/19, Reasons 3.16.1). However, as mentioned in the second sentence of this provision, "the description and drawings shall be used to interpret the claims".
- 1.1.13 In this context, however, it should be emphasised that, according to Article 69 EPC, the claims and the description, including the drawings, do not have the same status. As mentioned in Article 1 of the Protocol to Article 69 EPC, under the principle of primacy of

the patent claims, two "polar" models of interpretation are in principle possible, i.e. an isolated interpretation of the wording of the claims alone on the one hand and an interpretation which understands the wording of the claims merely as a starting point in the context of the overall disclosure on the other.

- 1.1.14 The established case law of the Boards of Appeal does not favour either of these "polar" models of interpretation, but something lying between these poles. In decision G 2/88, Reasons 4, the Enlarged Board of Appeal already stated that the "object of the Protocol is clearly to avoid too much emphasis on the literal wording of the claims when considered in isolation from the remainder of the text of the patent in which they appear; and also to avoid too much emphasis upon the general inventive concept disclosed in the text of the patent as compared to the relevant prior art, without sufficient regard also to the wording of the claims as a means of definition."
- 1.1.15 The Board wishes to note that - in line with established case law - it also sees no reason to avoid using a course between the two poles of interpretation of the claim in the present case. The interpretation of the disputed word sequence "engaged with" is not a matter of an isolated interpretation of only the wording of the claim in the sense of a purely linguistic consideration of the same, rather the feature must be interpreted in the light of general knowledge of the person skilled in the technical field concerned. This first requires an identification of the technical field resulting from the overall disclosure of the patent in order to determine the person skilled in that specific field. Furthermore, the general knowledge of the skilled person ensures that the

technical context in which the claims are situated is taken into account when interpreting the claims (see also T 1646/12, Reasons 2.1).

- 1.1.16 The question then arises as to the extent to which the description and drawings can be used to interpret the claims. Neither Article 69 nor its Protocol explicitly addresses this topic. Nevertheless, the principle of primacy of the claims seems to exclude the use of the description and drawings for limiting the claims if an interpretation of the claim in the light of common general knowledge already leads to a technically meaningful result. Similarly, the principle, established by case law, according to which "limiting features which are only present in the description and not in the claim cannot be read into a patent claim" is also fully compatible with Article 69 EPC and Article 1 of the Protocol (cf. T 1473/19, Reasons 3.16.1).
- 1.1.17 As stated above, the Board finds that there is no reason, when reading claim 1 and interpreting it in relation to the field of technology with which it is concerned, for the skilled person to exclude other equally technically sensible and credible meanings of the claim, particularly in the field of textiles where it is known that sections of material can be separately added, produced, or otherwise incorporated into articles of apparel. Further, claim 1 is a product claim, not a method, and nothing in the claim defines two temporally pre-existing components which must later be joined together (see e.g. points 1.1.5 and 1.1.6 above). It is merely required that these defined structures are identifiable.
- 1.1.18 That said, in regard to point 1.1.15 above, the description itself is of course not without any

function when considering the patent. When referring to the description, the reader is informed *inter alia* of the technology involved and the background used by the skilled person in understanding the patent, as well as prescribing particular embodiments of interest. The claims are thus not to be seen in a pure vacuum, but, having regard to the description, in the context of the area of technology addressed by the patent.

Nevertheless the description should not normally be used to derive possible limitations to claim scope; it is the purpose of the claims and indeed the wording of the claims themselves which define a certain scope and thus the protection sought. It may be that the reader is presented with specific definitions in the description in cases where terminology in the claims is e.g. unusual or where special meanings are attributed. However such definitions, if relevant for validity, should normally be included in the claims, for example where the normal meaning of a term in the claim is no longer intended.

- 1.1.19 How such a definition might be presented in the description and whether it might have a special significance for the scope of the claim in a particular case, is however of no relevance in the case at hand since there is no such definition of "engaged with" in the description. Instead, in the paragraphs mentioned by the respondent, the references are far more general. For example, "Section A" of the description, in paragraph [0024] in column 4, lines 54 to 56, starts by referring to "separately engaged ... feedback systems", which are then further described. In paragraph [0028] it is stated that "Body position feedback systems according to examples of this invention may be engaged with the garment structure in any suitable or desired manner...". and "In some more specific examples, the

body position feedback system will include at least one surface that directly engages a surface of the garment structure..". Thus, all the examples in this section are related to a "separate" piece of material being used when forming the article, which is, as noted above, not something defined in claim 1.

Turning to "Section B" of the description, examples are given of "integrally formed" systems where certain paragraphs have a type of disclaiming clause, stating that these "do not form part of the present invention" (which clause was added at these junctures after the application was filed and before grant). Examples are given concerning what the author of the description amendments considered to "not form part of the present invention". Likewise in paragraphs [0083 and 0084] also cited by the respondent, the disclaiming clause "do not form part of the present invention" in relation to particular described embodiments was again introduced before grant.

1.1.20 However, as discussed during oral proceedings before the Board, none of the passages of the description forms a definition of what "engaged with" must be understood to mean. Instead, the respondent attempts to rely on these "disclaimer-like" statements in the description to try to limit the claims, without however introducing any restricting definition or disclaimer into the claims themselves.

1.1.21 The appellant in turn cited further paragraphs of the description in rebuttal, arguing that the respondent's reliance on the description was anyway misplaced. For the purposes of this decision however, discussion of these further arguments can be omitted since, as stated above, the claims contain no such restriction and the

description (even if it were to be used to assist in interpreting the claims) contains no definition of how "engaged with" is necessarily to be interpreted.

1.1.22 Therefore, considering all the above points, the Board finds that the expression 'engaged with' in claim 1 encompasses arrangements in which the lower back position feedback system is integrally incorporated into the garment structure.

1.2 *Novelty over A9 (Article 54 EPC)*

1.2.1 The subject-matter of claim 1 lacks novelty over A9 as follows, reference to the disclosure in A9 being placed in parentheses:

An article of apparel (see para. [0001]), comprising:
a garment structure (see para. [0004], [0019], Figs. 1 and 2)
for covering at least a lower back portion of a human torso
wherein the garment structure includes one or more fabric elements (12, see para. [0005], [0014], Figs. 1 and 2), and
wherein the garment structure is a shirt structured and arranged so as to provide a close fit to at least the lower back portion (see e.g. Figs. 1, 2, 6 and 7; claim 16);
wherein a lower back position feedback system is engaged with the garment structure at the lower back portion (see paras. [0006], [0020] and the foregoing reasoning), and
wherein the lower back position feedback system includes at least a first region (see Figs. 2 and 4; 18B, upside-down V-shape) in the lower back portion (at least the lower tips of the upside-down V-shape) having

a higher compressive force application capability (see para. [0020]) than a compressive force application capability of the fabric element (12) making up a largest proportion of the garment structure (see Fig. 2).

- 1.2.2 Other than its arguments regarding interpretation of claim 1, the sole further argument of the respondent as regards novelty over A9 was that the Fig. 2 embodiment would be unable to provide a close fit to at least the lower back portion (feature 1.4) in absence of the higher contracting pressure section 18B. Based on the assumption that the material of the shirt would fall away from the wearer's body if the section 18B of Fig. 2 were removed, this argument further relies on the premise that this could not happen on the claimed article of apparel since the feedback system was a completely separate entity to the garment structure which would fully maintain its form as a shirt even absent the feedback system. However, as stated above, the Board finds this interpretation of claim 1 to be overly limiting. Even taking the respondent's argument on its merits, the material of the shirt in the Fig. 2 embodiment alleged to fall away from the wearer's body would, however, not result in a close fit (to at least the lower back portion) being lost. Fig. 2 unambiguously depicts a strip of garment material between the lowest point of the section 18B and the bottom edge of the garment. Despite this strip of garment material having a lower contracting pressure than the section 18B with higher contracting pressure (see para. [0005]), it is nonetheless completely made of elastic material and so would provide and maintain a close fit to the lower back portion even if the material immediately above it were to lose its close fit due to it falling away from the wearer's body.

Thus, even considering the respondent's argument, the Fig. 2 embodiment of A9 does provide a close fit to at least the lower back portion of a human torso. Consequently all features of claim 1 are known from A9.

1.2.3 The subject-matter of claim 1 thus lacks novelty (Article 54 EPC).

2. *Auxiliary request 1*

2.1 In its submission addressing auxiliary request 1 filed with the respondent's reply to the grounds of appeal, the appellant argued the objective technical problem starting from Fig. 2 of A9 to be 'to provide an alternative shape of the lower back position feedback system'. In its communication under Article 15(1) RPBA, the Board disagreed with this formulation and provisionally considered the problem would instead be 'to provide an alternative configuration for the known lower back position feedback system'. With its submission dated 24 January 2024 in reaction to the Board's communication, the respondent indicated a still further problem that it saw to be objective, reading 'to enable improved sensory feedback for the user's lower back'. Consequently, during the oral proceedings, it was apparent that not insignificant differences existed between how each of the two parties, and still further the Board, viewed the technical effects achieved by the differentiating features over Fig. 2 of A9 and the resulting objective technical problem.

2.2 Additionally, at the oral proceedings, the appellant's inventive step objections started from the embodiment of Fig. 2 and also from that of Figs. 6 and 7 of A9. As to the latter objection, the appellant deemed this to be *prima facie* relevant to at least an inventive step

attack, in particular having regard to the different technical problem formulated by the respondent only with its latest reply. The respondent in turn objected to the admittance of an inventive step objection starting from Figs. 6 and 7 of A9, whereupon the appellant also requested remittal of the case for this objection to be considered before the opposition division.

- 2.3 Both parties thus requested remittal for consideration of inventive step of the subject-matter of claim 1 of auxiliary request 1.

The respondent argued that auxiliary request 1 (and the further auxiliary requests) all concerned specific arrangements of a feedback system and that none of the issues regarding patentability of the subject-matter of claim 1 of auxiliary request 1 had been examined and decided upon by the opposition division, such that the Board would not be reviewing the opposition division's decision at all, but would be considering entirely new subject-matter for the first time. As is clear from point 2.1 above, the inventive step issue requires careful consideration of the technical effect necessarily achieved by the differentiating features and thus the resultant objective technical problem to be solved. Merely as an example, it was an issue of contention between the parties at oral proceedings in relation to the potential objective technical problem, whether or not the first and second regions as defined in claim 1 of auxiliary request 1 had to have a certain length or width extension and/or whether the first and second regions had to be separated vertically by more than merely a negligible distance in order that the stimulated and unstimulated areas in the lower back could be detected by a wearer. In this regard, both

parties referred to paragraph [0031] of the patent, which had of course not previously been relevant to a (e.g. single) first region in claim 1 of the main request. Likewise, the possible dimensions of this first region alone or its relative dimensions in relation to the second region in claim 1 of auxiliary request 1 had also been of no relevance to the main request.

Given the requests of both parties for remittal, and given that the Board's decision on the main request has overturned the fundamental basis on which the opposition division reached its conclusions on both novelty and inventive step, special reasons (Article 11 RPBA 2020) exist for remittal of the case. As discussed with the parties during oral proceedings before the Board, remittal would also enable the parties to develop their arguments on this request. Although the Board notes that the patent expires in 2028 at the latest, this fact is not of itself a sufficient reason to override the parties' requests in the present case, noting that possibilities for requesting accelerated prosecution exist. Issues concerning the format of the claim, currently in an (incorrect) two-part form, may also be addressed by the parties.

2.4 In view of all the above points, the Board avails itself of its power under Article 111(1) EPC to remit the case to the opposition division for further prosecution.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the opposition division for further prosecution.

The Registrar:

The Chairman:



D. Grundner

M. Harrison

Decision electronically authenticated