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D E C I S I O N
of 5 December 2000

Case Number: T 0829/97 - 3.2.6

Application Number: 90910848.2

Publication Number: 0484370

IPC: D04B 1/00

Language of the proceedings: EN

Title of invention:
Structured Knitted Woven Fabrics

Patentee:
COATS VIYELLA PLC

Opponent:
Recaro GmbH & Co.

Headword:
-

Relevant legal provisions:
EPC Art. 52(1), 54, 56, 82, 100(a)

Keyword:
"No further evidence for alleged prior use after withdrawn opposition"

Decisions cited:
T 0789/89; T 0300/86

Catchword:
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Beschwerdekammern | Boards of Appeal | Chambres de recours

Case Number: T 0829/97 - 3.2.6

D E C I S I O N
of the Technical Board of Appeal 3.2.6
of 5 December 2000

Appellant: (Proprietor of the patent)
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Decision under appeal: **Decision of the Opposition Division of the European Patent Office posted 30 May 1997 revoking European patent No. 0 484 370 pursuant to Article 102(1) EPC.**

Composition of the Board:

Chairman: P. Alting van Geusau
Members: G. C. Kadner
M. J. Vogel

Summary of Facts and Submissions

I. The mention of the grant of European patent No. 0 484 370 in respect of European patent application No. 90 910 848.2 filed on 10 July 1990 was published on 1 March 1995.

II. Notice of opposition was filed on 1 December 1995 on the grounds of Article 100(a).

The Opponent relied upon an alleged prior use of knit-pattern No. ANVH-B.J0140A00.S, and filed the following documents as evidence:

(D1) Attachment 1: A Coloured copy of the knit-pattern No. ANVH-B.J0140A00.S bearing the date 1984 of the company Stoll GmbH & Co based in Reutlingen, Germany

(D2) Attachment 2: A written statement of two employees of the Stoll company, Mr Oliver Vogt and Mr Helmut Schuler, from 29 November 1995

Furthermore, Mr Jürgen Schnapper, Am Bienenacker 1a, 27777 Sandelzhofen, Germany, was drawn to the attention of the Opposition division as a member of the public acting as a witness for the public prior use of the fabric sample according to D1.

Additionally the following documents were cited in support of an alleged lack of inventive step:

(D3) DE-C-705 541

(D4) Translation of JP-A-63-220 990

III. By decision posted on 30 May 1997 the Opposition Division revoked the European patent 0 484 370. The Opposition Division was of the opinion that the method of claim 1 of the granted patent was not new with respect to the knitted fabric of the alleged prior use which was considered proved by the facts and evidence presented by the Opponent. The sample of the knit-pattern No. ANVH-B.J0140A00.S was made available to the public by disseminating it to Mr Schnapper, a representative of the Stoll company, and who offered it as part of a collection of samples to all his clients. Although the text "This pattern may not be copied or made available to third parties without our express permission" was printed on the knit-pattern these clients could be considered to be an unrestricted section of the public since it was assumed that the Stoll company being a flat knitting machine builder wanted to disseminate its technical information without limitation.

IV. On 29 July 1997 a notice of appeal was lodged against the decision of the Opposition Division. The appeal fee was paid on 30 July 1997.

The statement of grounds of appeal was filed on 29 September 1997.

The Appellant (Patentee) requested that the decision under appeal be set aside and that the patent be upheld as granted (main request),

auxiliarily that the patent be upheld in amended form with not yet formulated amended claims according to auxiliary requests I to VIII.

Claim 1 of the patent reads as follows:

"A method of knitting an inlaid fabric on a double needle bed machine over a predetermined knitting cycle comprising the steps of creating a ground structure of loops extending between the beds (B, F) of needles (10, 13, 11, 14, 18, 19, 20, 21, 30, 31, 40, 41) and laying inlay material (12, 12', 22, 27, 28, 33, 34) onto the said loops between the needles of both beds (B, F) of needles at least one selected stage in the knitting cycle, and trapping inlay material (12, 12', 22, 27, 28, 33, 34) into the ground structure by transferring stitches from one bed to another, wherein during the knitting cycle the fabric is knitted on both beds (B, F) of needles and inlay material (12, 12', 22, 27, 28, 33, 34) is interlaced into the ground structure at one location by transferring stitches at least from a first (B or F) of the beds to a second (F or B) of the beds, characterised in that inlay material is interlaced into the ground structure at a further location spaced apart from said one location in the direction of knitting by transferring stitches at least from the second bed (F or B) to the first bed (B or F)."

V. In support of its request the Appellant essentially relied upon the following submissions:

The notices on the sample sheet would clearly show that the pattern in accordance with D1 was not public at that time. The circle of persons who could gain knowledge of it was restricted to the customers of the Stoll company, and they were bound to confidentiality. No evidence was given that Mr Schnapper had received the pattern without obligation of secrecy, and had made it available to third parties.

The Opponent itself, or perhaps a related company in the name of Tecnit-Technische Textilien und Systeme GmbH, had filed a patent application after publication of the opposed patent, without referring to any help from the Stoll pattern, yet the subject-matter was very similar to that of the opposed patent. This fact would also indicate that the knowledge of the Stoll pattern was not publicly available at the filing date of the present patent.

The Opposition procedure was short-circuited, and the decision was established by the Opposition Division before the Patentee had been given the opportunity to formulate auxiliary requests which had already been mentioned in its submissions.

VI. In a communication dated 13 June 2000 the Board of Appeal expressed the preliminary opinion that it was doubtful whether the pattern of D1 had become public. In particular, there was no convincing evidence that the sample of weft knitted fabric was disseminated

outside the limited circle of the clients of the Stoll company. According to similar cases in decisions of the Boards of Appeal no free access by third parties could be assumed.

The written statement by Mr Vogt and Mr Schuler ("Erklärung") dated 29 November 1995 only indicated the production year 1984 of the sample but it did not allow any conclusions to be drawn as to when and in which way the sample was made available to the public nor as to the period during which Mr Schnapper was representative of the Stoll company and as to his contractual obligations in this function.

VII. The Respondent withdrew its Opposition with letter dated 16 October 2000.

Reasons for the Decision

1. The appeal is admissible.

2. *Alleged prior use*

2.1. Since the opposition has been withdrawn the Respondent is no longer a party to the Appeal proceedings (see also decision T 789/89, OJ 1994, 482), and further evidence in respect of the alleged prior use cannot be gained from this side.

2.2. When considering whether the alleged prior use of the knit-pattern of D1 is sufficiently substantiated to be accepted as state of the art within the meaning of Article 54[2] EPC examination is needed of **what** was made available **when** and under **what circumstances**. As to

the latter point it was indicated in the Board's communication that it was doubtful whether the submitted evidence was sufficient so as to prove unambiguously that the knowledge about the knit-pattern of D1 had become public.

In decision T 300/86 the Board was of the opinion that a report of the invention was not made available to the public if it was passed to a large, but nevertheless restricted circle of persons who were bound to secrecy, and there was no indication that the recipients broke their pledge of secrecy.

In particular the question arises whether the information was passed to an unrestricted circle of persons in view of the printed text on the sample D1: "This pattern may not be copied or made available to third parties without our express permission".

If there is no indication that the information spread outside of the intended circle of persons, confidentiality has to be assumed. In this respect it is to be noted that there is no evidence that a third party could get notice of the pattern D1. The statement of Mr Vogt and Mr Schuler does not prove that any one of the clients and representatives of Stoll ignored the secrecy-note and distributed the sample to other persons. Mr Schnapper in his special responsibility as a representative had to follow the instruction of the Stoll company. It was not submitted that he in fact passed the pattern to any third person.

2.3. Since evidence clarifying the situation in respect of the public availability of the pattern in accordance with D1 is not available this alleged prior use cannot be taken into consideration because of insufficient substantiation of at least the circumstances of the alleged prior use.

3. *Novelty*

3.1. D3 (DE-C-705 541) discloses a method of knitting a tubular fabric on a circular knitting machine comprising a double needle-bed whereby a rubber thread is inlaid between the loops of a double knitted structure by a thread feeder. The stitches comprising the inlay are knitted on both needle-beds whereas the stiches not comprising an inlay have a single structure (see page 4, claim 1, lines 69 to 84).

The method according to claim 1 of the patent in suit differs from this known method in that the single structure fabric is knitted on both needle beds and inlay material is interlaced into the ground structure at one location by transferring stitches from the first to the second of the needle-beds, and at a further location spaced apart from said one location by transferring stiches vice versa from the second to the first of the needle beds.

3.2. The reinforcement sheet of D4 (JP-A-63-220 990) is produced by knitting several courses of matrix yarns in a double structure, then inserting one course of reinforcing yarns and bonding yarns, and repeating this as one knitting unit (page 2, 1st paragraph). The claimed method of the patent differs from the method of D4 by the features as described above.

3.3. In view of the above considerations the method of claim 1 meets the requirements of Art 54 EPC.

4. *Inventive step*

4.1.1 The closest state of the art to the invention is represented by D3. This document discloses a method of knitting an inlaid fabric on a double needle bed machine over a predetermined knitting cycle comprising the steps of creating a ground structure of loops extending between the beds of needles 4, 4' and laying inlay material 3 onto the said loops between the needles 4, 4' of both beds of needles in the knitting cycle, and trapping the inlay material 3 into the ground structure by transferring stitches from one bed to another. During the knitting cycle the fabric is knitted as a double structure (Rechts- und Rechtsmaschenreihen) on both beds of needles 4, 4'. The inlay material is a rubber thread which is laid in between the front stitches 1 and the rear stitches 1. Since the tension becomes too high if the rubber threads are laid into each row of stitches the double structure knitting of the fabric is changed to a single structure knitting during some knitting cycles, and these rows of stitches 2 are free from rubber threads (Figures 1 to 3; page 4, lines 12 to 31).

4.1.2 The problem to be solved by the subject-matter of claim 1 (column 1, lines 47 to 50 of the patent) is the provision of a novel inlaid double needle bed fabric in which an inlay thread or yarn is "interlaced" or "woven" into the fabric during the knitting cycle whereby the visibility of the inlaid yarns should be improved and they should be securely knitted in (column 1, lines 37 to 40).

4.1.3 The solution is a method by which inlay material is interlaced into the ground structure at one location by transferring stitches at least from a first of the beds to a second of the beds, and that inlay material is interlaced into the ground structure at a further location spaced apart from said one location in the direction of knitting by transferring stitches at least from the second bed to the first bed. In other words, by this method the inlay material is "woven" into a single structure knitted fabric, the visibility of the inlaid threads from both sides of the fabric is improved, and large surface patterns can be constructed.

4.1.4 According to D3 the inlaid threads are reduced and securely knitted in between a double structure knit fabric whereas the invention proposes a single structure fabric and interlacing the inlaid threads by transferring stitches from one of the needle beds to the other and vice versa. Since the method of D3 is directed to a very different solution a skilled person cannot draw any conclusion from its teaching in order to solve the problem of the patent by the claimed method without carrying out an inventive step.

4.2. D4 also deals with a double knitted structure, and therefore this document cannot provide any contribution to the claimed solution.

5. Considering the above, the Board concludes that, with respect to the state of the art disclosed in the documents D3 and D4, the subject-matter covered by claim 1 of the patent in suit is novel and involves an inventive step (Articles 54[1] and 56 EPC). Said subject-matter also meets the requirements of

Article 57 EPC and is therefore patentable under Article 52[1] EPC. The same conclusion applies to the subject-matter of claims 2 to 9 which cover particular embodiments of the method according to claim 1, and to the knitted fabric according to claims 10 to 12 which is produced in accordance with the method of one of claims 1 to 9.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside

2. The patent is maintained as granted

The Registrar: The Chairman:

M. Patin P. Alting van Geusau