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**Datasheet for the decision
of 12 April 2016**

Case Number: T 2523/11 - 3.2.06

Application Number: 02770665.4

Publication Number: 1448820

IPC: D03D11/00, D04H3/00

Language of the proceedings: EN

Title of invention:

HIGH-SPEED SPUN-BOND PRODUCTION OF NON-WOVEN FABRICS

Patent Proprietor:

ALBANY INTERNATIONAL CORP.

Opponent:

Huyck.Wangner Germany, GmbH

Relevant legal provisions:

EPC Art. 123(2)

EPC R. 139

Keyword:

Amendments - correction of errors (no) - allowable (no)

Decisions cited:

G 0003/89, G 0001/10, T 0200/89, T 0946/91, T 0962/92,
T 0438/98, T 0508/08



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 2523/11 - 3.2.06

D E C I S I O N
of Technical Board of Appeal 3.2.06
of 12 April 2016

Appellant: ALBANY INTERNATIONAL CORP.
(Patent Proprietor) 1373 Broadway
Albany, New York 12204 (US)

Representative: Bugnion Genève
Bugnion S.A.
Conseils en Propriété Industrielle
Route de Florissant 10
Case Postale 375
1211 Genève 12 (CH)

Respondent: Huyck.Wangner Germany, GmbH
(Opponent) Föhrstraße 39
72760 Reutlingen (DE)

Representative: Popp, Eugen
Meissner, Bolte & Partner GbR
Widenmayerstraße 47
80538 München (DE)

Decision under appeal: **Decision of the Opposition Division of the
European Patent Office posted on 19 October 2011
revoking European patent No. 1448820 pursuant to
Article 101(3) (b) EPC.**

Composition of the Board:

Chairman M. Harrison
Members: G. de Crignis
E. Kossonakou

Summary of Facts and Submissions

- I. European patent No. 1 448 820 was revoked by the opposition division by way of its decision posted on 19 October 2011.
- II. The opposition division held that the ground of opposition under Article 100(c) EPC was prejudicial to maintenance of the patent since the subject-matter of claim 1 as granted did not meet the requirement of Article 123(2) EPC, as no clear and unambiguous disclosure in the originally filed application could be identified for the feature of "warp yarns and weft yarns having a diameter in the range of 0.20 mm to 0.80 mm".
- III. On 12 December 2011 the appellant (patent proprietor) filed an appeal against this decision and paid the appeal fee.
- IV. With letter of 5 January 2012, the appellant indicated that it could not approve the minutes of the oral proceedings before the opposition division, since they omitted one of the appellant's arguments, and requested a correction of the minutes to include the omitted statements.
- V. A statement setting out the grounds of appeal was received at the European Patent Office on 17 February 2012. The appellant requested to set aside the decision of the opposition division and to maintain the patent based on a main request, contingent on a request for a correction under Rule 139 EPC of claim 1 as granted; in the alternative, to maintain the patent based on one of the first to third auxiliary requests.

- VI. With letter of 22 October 2015 the Board summoned the parties to oral proceedings.
- VII. By way of its letter of 20 January 2016, the appellant informed the Board that it would not attend the oral proceedings.
- VIII. With communication dated 9 March 2016, the Board indicated its provisional opinion that neither the main request nor one of the three auxiliary requests appeared to be allowable. In regard to the main request, the Board noted that the requirement for making a correction in accordance with G 3/89 did not appear to be met since at least the error itself did not appear to be obvious. With regard to the auxiliary requests, the Board also explained why it considered that none of them appeared to meet the requirement of Article 123(2) EPC.
- IX. Oral proceedings were held before the Board on 12 April 2016 in the absence of the appellant. The requests made by the appellant in its grounds of appeal (see point V above) remained unchanged. The respondent requested that the appeal be dismissed.
- X. Claim 1 of the main request reads as follows:

"Apparatus for production of spun-bond webs comprising a fabric for collecting stretched filaments intended to form a spun-bond web, characterized in that said fabric is woven such that air flow through said fabric is prevented in a direction substantially perpendicular to the surface plane of said fabric with warp yarns having a diameter in the range of 0.20 mm to 0.80 mm and weft yarns having a diameter in the range of 0.20 mm to 1.0 mm, where said fabric has a 4-shed double layer with support shute weave design in order to be woven in an 4B

pattern with a stuffer yarn in the center and where said woven fabric has a permeability in the range of 0.18876 m³/s to 0.37752 m³/s."

The first auxiliary request corresponds to the granted patent, whereby claim 1 differs from claim 1 of the main request in that the feature concerning the diameter of the warp and weft yarns reads as follows:

"warp yarns and weft yarns having a diameter in the range of 0.20 mm to 0.80 mm".

In claim 1 of the second auxiliary request, the aforementioned feature is amended to read:

"warp yarns having a diameter in the range of 0.20 mm to 0.80 mm and weft yarns having a diameter of 0.20 mm, 0.30 mm, 0.40 mm, 0.50 mm, 0.60 mm, 0.70 mm, or 0.80 mm".

In claim 1 of the third auxiliary request, this feature is amended to read:

"warp yarns having a diameter in the range of 0.20 mm to 0.80 mm and weft yarns having a diameter of 0.20 mm".

XI. The written arguments of the appellant as far as relevant for the decision were essentially as follows:

A transcription error was made when filing claim 1 on 31 August 2006 in the form as later granted. It had been stated in the applicant's response to the examining division's communication that the features of previous claims 1 to 6 had been combined into a new main claim, whereby the incorrect range of values for the weft yarns had been included. The error remained unnoticed by the applicant and the examining division, such that the patent was granted with the error included. The request for correction under Rule 139 EPC was not only

admissible but the proposed correction was also allowable in that it was immediately apparent that an error had occurred and that nothing else would have been intended than what was offered as the correction. Decisions T 200/89, T 946/91, T 962/92 and T 438/98 as well as G 3/89 supported this interpretation of Rule 139 EPC. The correction was also in line with the requirement of Article 123(2) EPC since the wording of the correction was strictly consistent with the wording of the passage of the description as originally filed. Hence, the main request should be allowed.

Concerning the first auxiliary request (patent as granted), the opposition division had held that claim 1 contained subject-matter which extended beyond the content of the application as filed. The opposition division erroneously interpreted the Guidelines and the order of G 1/93. The concept of the combination of ranges not being disclosed represented an artificial argument constructed by the opposition division. The invention worked when the diameter of the weft yarns was set at any value included in the whole range between 0.20 mm to 1.0 mm. Moreover, the application as filed did not disclose that the limited range provided a supplementary technical effect; thus no more technical information was disclosed in the granted claim compared to what was originally disclosed. The claim merely excluded a certain part of protection by limiting the claim scope. Therefore, the claims of the patent as granted were allowable.

Concerning the second auxiliary request, the claimed individual values were implicitly, directly and unambiguously disclosed in the application as filed, since they were all values contained within the disclosed range.

Claim 1 of the third auxiliary request was limited to the diameter of the weft yarns being 0.20 mm, which value was disclosed in the application as filed.

XII. The respondent argued essentially as follows:

The main request was not allowable. Even assuming that G 3/89 was still to be applied for the correction of granted patents in the aftermath of G 1/10, it was not immediately apparent that an error was present, particularly since the value of the weft yarn diameter lay within the originally disclosed range. Nothing would immediately indicate to a skilled person that the weft yarn diameter range was in any way incorrect.

The first auxiliary request was not allowable. There was no disclosure in the application as filed for the claimed upper value in the range for the weft yarns (Article 123(2) EPC). Although the appellant had argued that protection of part of the range was simply being excluded, this was not the case since the values in the two ranges defined provided a new technical meaning and had to be considered together with the permeability range to which they were linked.

Claim 1 of the second auxiliary request included a series of individual values lying in the range of 0.2 mm to 0.8 mm for the diameter of the weft yarn, which values were not disclosed in the application as filed (Article 123(2) EPC). Merely because values fell within a broader range did not render such values disclosed. This was established case law. Accordingly, this request was not allowable.

Claim 1 of the third auxiliary request limited the diameter of the weft yarns to the distinct value of 0.2 mm. Whilst this value per se was disclosed for the weft yarn diameter, the original disclosure defined only a range of values for the weft yarns in combination with further claimed features. Thus, the limitation to one particular value was not disclosed in this context.

Reasons for the Decision

1. Main Request - Request for correction

1.1 Claim 1 includes the feature:

"said fabric with warp yarns having a range of 0.20 mm to 0.80 mm and weft yarns having a diameter in the range of 0.20 mm to 1.0 mm".

1.2 The appellant argued that the granted wording "said fabric with warp yarns and weft yarns having a diameter in the range of 0.20 mm to 0.80 mm" was an obvious error which was correctable, under Rule 139 EPC, to the form as stated in item 1.1. above.

1.3 Leaving aside the issue of whether an error in a granted patent may at all be corrected under Rule 139 EPC after the issue of G 1/10 (see reasons, 9 to 11), in order for a correction to be allowable under Rule 139 EPC and in accordance with G 3/89, the respective criteria for correction of an error have to be met.

1.4 Pursuant to G 3/89 (see reasons, 3 and 6) the parts of a European patent relating to the disclosure can be

corrected only within the limits of what the skilled person would derive directly and unambiguously, using common knowledge and seen objectively and relative to the date of filing, from the whole of these documents as originally filed. No correction is possible, if there is any doubt as to whether a mistake existed, or whether nothing else could have been intended other than what was offered as the correction. If it is doubtful whether the feature was incorrectly defined, then a correction is ruled out.

- 1.5 Whilst the range in claim 1 may not necessarily have been what the appellant now wishes to pursue and even if this may indeed have been unintentional, the error itself is not obvious, since the wording of claim 1 is clear and understandable, no inconsistency with regard to the description exists, the range falls within the range as originally disclosed and it makes perfect technical sense. Hence, the skilled person would not have any reason to doubt that it was anything but the limited range which was intended to be pursued.
- 1.6 The Board had already given its provisional opinion in its communication to the parties prior to the oral proceedings, stating inter alia that the criteria set out in G 3/89 for making a correction did not appear to be met. The appellant filed no response to this communication and thus the Board sees no reason to alter its provisional opinion.
- 1.7 The appellant cited decisions T 200/89, T 946/91, T 962/92 and T 438/98 in support of its interpretation of Rule 139 EPC. However, these decisions do not alter the foregoing conclusions:

- 1.7.1 T 200/89 confirms (see headnote V and reasons, 3.4) that the obviousness of an error in a patent was an objective matter which had to be established by reference to the patent text in its entirety, but in isolation, and thus without reference to the file history. No such obviousness of an error can be established in the present case, as explained above.
- 1.7.2 In T 946/91, the requested corrections were partly considered allowable as being obvious with regard to examples and tables in the description of the patent. No such consistent description is present in the current case, there merely being one quotation of the diameter range of the weft yarns, within which the claimed range falls.
- 1.7.3 T 962/92 concerns an appeal against a refusal of the examining division. No considerations concerning a granted patent are made.
- 1.7.4 T 438/98 (reasons, 3.1) concerns an appeal against a decision of an opposition division. It underlines that a correction corresponds to an amendment which must both correspond to the correction of an obvious clerical error and satisfy the requirements of Article 123(2) EPC. This does not alter the foregoing conclusion.
- 1.8 Hence, since in the current case the skilled person would not recognise that an obvious error with regard to the range for the diameter of the weft yarns was present, the request for correction in accordance with the main request is not allowable.

2. *First auxiliary request*

- 2.1 This request concerns the claims as granted, claim 1 including the feature of "warps yarns and weft yarns having a diameter in the range of 0.20 and 0.80 mm".
- 2.2 The disclosure in the application as filed does not include an end point of 0.80 mm with regard to the range of the diameter of the weft yarns. The originally filed disclosure on page 5, line 1 is specific in defining the diameter of the weft yarns in the range from 0.20 mm to 1.00 mm, and originally filed claim 5 specifies the diameter of the weft yarns consistently in this range.
- 2.3 The appellant argued that the limitation of the range was merely a restriction of the scope of protection and that it did not contribute any further technical information or a supplementary technical effect and thus would not provide any other technical contribution when compared with the originally claimed range.
- 2.4 However, the Board finds that the limitation of the range indeed changes the technical information and provides another technical contribution when compared with the originally claimed range by creating a particular selection of a range. In particular, when related to the claimed range for the permeability, the combination of the diameter of the weft and warp yarns is clearly a matter of consideration to a skilled person. When changing the diameter range for the weft yarns, it is not unambiguously disclosed whether the diameter range for the warp yarns and the range for permeability can remain unamended. More particularly, there is no basis in the application as filed for allowing the selection of a different range for the weft yarns to be combined with the entire range disclosed for

the diameter of the warp yarns together with the entire range disclosed for the permeability of the fabric. Hence, the requirement of Article 123(2) EPC is not met and for this reason the request is not allowable. Again, the appellant filed no response to the Board's provisional opinion, such that the Board also here sees no reason to alter that provisional opinion.

3. *Second auxiliary request*

3.1 Claim 1 includes the feature in dispute by means of the wording:

"said fabric with warp yarns having a range of 0.20 mm to 0.80 mm and weft yarns having a diameter of 0.20 mm, 0.30 mm, 0.40 mm, 0.50 mm, 0.60 mm, 0.70 mm or 0.80 mm".

3.2 The appellant submitted that the claimed point values would be "implicitly, directly and unambiguously disclosed in the application as filed", since they were contained within the range.

3.3 However, there is no disclosure of the entire set of individual values in the application documents - neither when considering the specific values themselves nor when considering the subject-matter arising from the combination of these individual values with the whole range of the diameter of the warp yarns and the whole range for the permeability (see also point 2.4 above). Whilst a value may be contained within a range, it is established case law of the boards of appeal that a selection of a value from within a range is not disclosed merely by the disclosure of the range per se. As with the previous requests, in response to the Board's provisional opinion, the appellant filed no comments, such that the Board also here sees no reason to alter that provisional opinion.

Hence, the requirement of Article 123(2) EPC is not met and the request is not allowable.

4. *Third auxiliary request*

4.1 The disputed feature in claim 1 is limited to the diameter of the weft yarn being 0.20 mm.

4.2 It is evident, since the value of 0.2 mm is an end point of the range originally disclosed for the weft yarn diameters, that the selection of the end point of the weft yarn diameters per se is disclosed. This is also established case law of the boards of appeal. However, there is no disclosure in the application as filed that the diameter of the weft yarns may be restricted to the value of exactly 0.20 mm while at the same time keeping all other values in the claim unchanged to arrive at the subject-matter defined in the claim. No disclosure is present for example where the diameter of the warp yarns varies over the whole range of from 0.20 mm to 0.80 mm and the diameter of the weft yarns is 0.20 mm for the entire diameter range of warp yarns, even less so in combination with the claimed range for the permeability of the fabric (see also points 2.4 and 3.3 above). The appellant was informed of the Board's provisional opinion that no disclosure of the combination of features in claim 1 could be identified and filed no response thereto.

4.3 Hence, the Board confirms its provisional opinion herewith for the reasons given above that there is no disclosure of the specific combination of features as defined in claim 1. Accordingly, the requirement of Article 123(2) EPC is not met, whereby also auxiliary request 3 is not allowable.

5. *Request for correction of the minutes*

The appellant's request for correction of the minutes has been noted. In its letter following the notice of appeal, the appellant argued that the following arguments presented by the appellant's representative during the oral proceedings before the opposition division had been omitted from the minutes:

- not denying the fact that the end point of 0.8 mm was not explicitly stated in the application with regard to the weft yarns;
- maintaining the argument that the subject-matter contained inside the narrower range (0.20 mm; 0.80 mm) was directly and unambiguously disclosed in the application as filed in the sense of G 2/10.

As the appellant was already informed with the Board's provisional opinion on the case, it is the department before which oral proceedings had been held (in the case at issue the opposition division) which is competent and responsible to correct its minutes. There is no provision which would enable the Board to compel the opposition division to discharge its obligation concerning such a request (see also T 508/08, reasons, point 2).

It is nevertheless noted that in the current case the requested amendment would not alter the outcome of the appeal proceedings in the present case, since the statements have no impact on the Board's decision.

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