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**Datasheet for the decision  
of 28 June 2022**

**Case Number:** T 1492/18 - 3.2.06

**Application Number:** 09774499.9

**Publication Number:** 2321454

**IPC:** D05C11/00, D05C15/34

**Language of the proceedings:** EN

**Title of invention:**

STITCH DISTRIBUTION CONTROL SYSTEM FOR TUFTING MACHINES

**Patent Proprietor:**

Card-Monroe Corporation

**Opponent:**

Cobble - Van de Wiele Limited

**Headword:**

**Relevant legal provisions:**

EPC Art. 84

EPC R. 103(1) (a)

**Keyword:**

Claims - clarity after amendment (no)  
Reimbursement of appeal fee - equitable by reason of a  
substantial procedural violation - substantial procedural  
violation (yes) - violation of the right to be heard (yes)

**Decisions cited:**

R 0008/15, T 0763/04, T 1123/04, T 0246/08

**Catchword:**



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Case Number: T 1492/18 - 3.2.06

**D E C I S I O N**  
**of Technical Board of Appeal 3.2.06**  
**of 28 June 2022**

**Appellant:** Cobble - Van de Wiele Limited  
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**Respondent:** Card-Monroe Corporation  
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**Representative:** Arnold & Siedsma  
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**Decision under appeal:** **Interlocutory decision of the Opposition  
Division of the European Patent Office posted on  
3 April 2018 concerning maintenance of the  
European Patent No. 2321454 in amended form.**

**Composition of the Board:**

**Chairman** M. Harrison  
**Members:** M. Dorfstätter  
J. Hoppe

## **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, on the basis of auxiliary request 2, European patent No. 2 321 454 met the requirements of the EPC.
- II. The appellant requested with its grounds of appeal that the decision under appeal be set aside, the European patent be revoked and the appeal fee be reimbursed.
- III. The respondent (patent proprietor) requested with its reply that the appeal be dismissed as either inadmissible or unfounded and the patent be maintained as found allowable by the opposition division (main request), or as an auxiliary measure on the basis of an auxiliary request filed with letter dated 17 June 2022 (auxiliary request 1), or on the basis of auxiliary request 4 as filed in the proceedings before the opposition division (auxiliary request 2).
- IV. The Board issued a summons to oral proceedings and a subsequent communication containing its provisional opinion, in which it indicated *inter alia* that claim 1 of the main request lacked clarity.
- V. Oral proceedings were held before the Board on 28 June 2022, during which the respondent withdrew its auxiliary requests and withdrew its request that the appeal be found inadmissible.
- VI. The final requests of the appellant were the same as its initial requests.

The final request of the respondent was that the appeal be dismissed.

VII. Claim 1 of the main request reads as follows (with the contentious feature for the purposes of this decision having been underlined by the Board):

"A tufting machine (10) for forming patterned tufted articles including multiple different yarns (Y1-Y4), comprising:

at least one needle bar (35) having a series of needles (36) mounted therealong;

backing feed rolls (29) for feeding a backing material (B) through a tufting zone (T) of the tufting machine (10);

at least one shifter (31) linked to said at least one needle bar (35) for shifting said at least one needle bar (35) transversely across the tufting zone (T);

a yarn feed mechanism (27, 28) for feeding a series of yarns (Y1-Y4) to said needles (36); and

a series of gauge parts (32) mounted below the tufting zone (T) in a position to engage said needles (36) of said at least one needle bar (35) as said needles (36) are reciprocated into the backing material (B) to form tufts (38) of yarns in the backing material (B);

characterized by

stitch distribution control system (25) at the tufting machine (10), wherein the stitch distribution control system (25) is adapted to receive a pattern or pattern image and perform a series of pattern steps and for controlling said yarn feed mechanism (27, 28) to control feeding of the yarns (Y1-Y4) to said needles (36) so as to present each of the yarns (Y1-Y4) that can be placed at a stitch location to the stitch location and to selectively pull back yarns (Y1-Y4) presented at the stitch location, as needed for forming

tufts of a yarn to be shown at the stitch location, and for controlling said backing feed rolls (29) to control feeding of the backing material (B) at an effective process stitch rate to form the patterned tufted article, wherein selectively pulling back yarns (Y1-Y4) as needed comprises controlling feeding of non-retained yarns to remove them from the selected stitch location, and wherein the stitch distribution control system (25) includes programming to enable tacking or formation of low stitches of non-appearing yarns (Y1-Y4) at desired intervals to secure the non-appearing yarns (Y1-Y4) to the backing material (B)."

VIII. The appellant's arguments relevant to the decision may be summarised as follows:

Claim 1 lacked clarity contrary to Article 84 EPC. The wording "at the tufting machine" rendered it unclear whether the stitch distribution control system was comprised in the tufting machine or only located in the vicinity thereof.

If however this wording did not change the scope of claim 1 as granted and was thus redundant, the requirements of Rule 80 EPC were not fulfilled.

Since the opposition division did not deal with this objection, this was a substantial procedural violation which justified the reimbursement of the appeal fee.

IX. The respondent's arguments relevant to the decision may be summarised as follows:

Claim 1 was clear. The wording "at the tufting machine" was introduced in the proceedings before the opposition division for the case that "comprising" were to have

been interpreted as covering remote design centres. It was not the intention to change the scope of claim 1 by this amendment. "At the tufting machine" meant that the stitch distribution control system was located at the same location and in the same place as the tufting machine. The control system was part of the tufting machine and thus a single entity with the tufting machine.

The requirements of Rule 80 EPC were fulfilled since the amendment was a *bona fide* attempt to overcome a ground for opposition, namely the alleged lack of novelty over D1.

## **Reasons for the Decision**

### 1. *Article 84 EPC*

Claim 1 lacks clarity (Article 84 EPC). Due to the introduced formulation 'at the tufting machine' it is unclear

- whether the stitch distribution control system is comprised in the tufting machine and thus an integral part thereof,
- whether it is a separate entity but arranged in some sense at the same location, or
- whether it is located in some sense near the tufting machine
- or even whether it is located further away but not at an entirely remote location, and in some way joined to the machine.

1.1 The respondent argued that the wording 'at the tufting machine' was not introduced with the intention of changing the scope of claim 1 but merely to clarify the

position of the stitch distribution control system in case the opposition division interpreted the claim more broadly than envisaged so as to cover the arrangement shown in D1. This argument was also made by the respondent in part to address an objection of the appellant under Article 123(3) EPC as a result of the introduced wording. In this respect, the Board however considers it unnecessary for the present decision to determine the scope of protection before the amendment compared to the scope of protection thereafter. It is also not relevant for the present decision whether the amendment is actually capable of defining a distinguishing feature over D1, thereby overcoming an alleged lack of novelty. This is so because even if it were accepted that it had been introduced with the intention of overcoming a novelty objection and thus a ground for opposition (and that the requirement of Rule 80 EPC were thus fulfilled), the amendment is still detrimental to maintenance of the patent as it introduces a lack of clarity into claim 1 contrary to Article 84 EPC.

- 1.2 This already becomes clear from the literal meaning of the preposition 'at', but also by the various interpretations given by the respondent (even if they might arguably differ only slightly). The preposition of location 'at' does not imply a single, definite spatial relationship. Its meaning can vary within the borders of 'in' or 'on' to 'nearby'. 'At the tufting machine' can thus indeed take all forms indicated by the respondent, encompassing meanings like 'located at the same location', 'located in the same place', 'being part of the tufting machine' or 'being a single entity with the tufting machine'. However, it can equally be understood to mean arranged near the tufting machine, e.g. in the same room, but as a separate entity.



Indeed, even the meanings given to it by the respondent of "at the same location" and "located in the same place" may themselves be understood to allow a location in the same undefined vicinity.

- 1.3 At the same time, claim 1 still defines that the tufting machine is characterised by the stitch distribution control system, which is listed as one of the components which the tufting machine comprises. This wording normally implies that the stitch distribution system is part of the tufting machine. Consequently, the addition of the wording 'at the tufting machine' alters the understanding of claim 1 to allow the stitch distribution control system to be located (for example) merely nearby the tufting machine rather than it being comprised as part of it.

The respondent argued that the two definitions "the tufting machine ... comprising ... the stitch distribution control system" and the stitch distribution control system being "at the tufting machine" had to be read together. And then, with a mind willing to understand, its meaning allegedly became clear and the interpretation 'nearby', in the sense of being at a distance from the machine but in some undefined way close to it, would then be excluded.

This is not persuasive. As explained above, the literal meaning of 'at' encompasses an arrangement nearby. 'A stitch distribution control system at the tufting machine' is thus not a clear limitation over a tufting machine 'comprising' or 'characterised by a stitch distribution control system'. A lack of clarity of a claim cannot be remedied by consulting the description. In the present case the description would anyway not help in proving a better understanding of the intended

meaning either, as it gives no example nor any explanation with respect to the stitch distribution control system, as to what is meant by 'at the tufting machine'. On the contrary, in paragraph [0042] it is explained that the input device 31 (being a part of the stitch distribution control system) is 'located at or near the tufting machine', making reference to Fig. 1. This figure being of merely schematic nature, no spatial relationship can be deduced therefrom either, not least since the stitch control distribution system and system controller, of which it is part, are connected by communication lines of indeterminate length. It thus remains also unclear what kind of limitation is implied by 'at or near' as used at this juncture.

- 1.4 The Board therefore concludes that claim 1 lacks clarity (Article 84 EPC). The respondent's request is thus not allowable.

2. *Reimbursement of the appeal fee*

The corrected minutes of the oral proceedings before the opposition division state the following (see item 5, second paragraph):

'The opponent started [*sic*] that for the auxiliary requests in general he had problems under Rule 80, Articles 123(2), 123(3) and 84. He explicitly turned to the introduced passage "at the tufting machine" and raised the question why it was introduced and where the stitch distribution control system is located now that it is "at the machine".'

The Board understands the question as to why the wording 'at the tufting machine' was introduced as an objection that this amendment did not fulfil the requirement of Rule 80 EPC. The question as to where the stitch distribution control system was located is plainly the objection that the opponent was making under Article 84 EPC with regard to the formulation lacking clarity. It was undisputed by the parties that the opponent had made these objections during the oral proceedings before the opposition division.

In the contested decision however, the opposition division dealt with the formulation 'at the tufting machine' only under Articles 123(2) and (3) EPC (see Reasons 24). Not dealing with the issue of clarity (Article 84 EPC) and the requirement of Rule 80 EPC with respect to the introduction of the wording "at the tufting machine" in the opposition division's decision amounts to a substantial procedural violation because the appellant's right to be heard was violated. The right to be heard is not just a right to present comments but also to have those comments duly considered (see, e.g. R 8/15, Reasons 2.2.2; T 763/04, Reasons 4.3; T 1123/04, Reasons 2.2.4 and T 246/08, Reasons 2.2).

The failure to deal with the objection under Article 84 EPC is also a substantial procedural violation in the sense that the failure to address it led to the need to appeal and indeed was found, as explained above, to be prejudicial to maintenance of the patent. According to Rule 103(1)(a) EPC, the appeal fee shall be reimbursed in full ... 'where the Board of Appeal deems an appeal to be allowable, if such reimbursement is equitable by reason of a substantial procedural violation.' With the appeal being allowable due to a lack of clarity that

has not been dealt with by the opposition division in its decision, the reimbursement is also equitable, such that these conditions are met. The appeal fee is thus to be reimbursed as requested by the appellant.

## Order

### For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The patent is revoked.
3. The appeal fee is reimbursed.

The Registrar:

The Chairman:



K. Boelicke

M. Harrison

Decision electronically authenticated