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Claimed co-ownership – New DK decision

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In a recent judgment rendered by the Danish Maritime and Commercial Court between Coloplast A/S (Coloplast) and Hollister Incorporated (Hollister), the Court considered whether or not Coloplast was the co-inventor (and co-owner) of a patent application filed by Hollister.

In 2011, Hollister filed its European patent application EP 11175010.5 regarding a catheter package and the EPO stated its intention to grant a European patent to Hollister on that basis. The EPO had issued a Druckexemplar including the patent claims that the EPO in-tended to grant. The Court decided to render its judgment on the basis of the Druckexem-plar.

Coloplast claimed co-inventorship and co-ownership in the patent application filed by Hol-lister. Coloplast further claimed that Hollister must transfer a 50% undivided share of the patent application to Coloplast. Hollister refuted the claims.

Coloplast argued that Hollister had acquired Coloplast's technology (for a so-called) wet-laid concept and incorporated it in claim 1 of the patent application, and thus that Colo-plast had contributed to the patent.

Prior to Hollister filing the at-issue patent application in 2011, Coloplast had been granted a patent in 2005, which Hollister had opposed. During those opposition proceedings, Colo-plast had submitted data showing that the skilled person – on the basis of the Coloplast pa-tent and the skilled person's general knowledge – would be able to make a catheter that was wet-laid in water without dissolved PVP with an acceptable shelf life also (wet-laid concept). Coloplast held that Hollister had not previously considered the wet-laid concept to be Hollister's own invention.

Coloplast further argued that shortly after EPO's Technical Board of Appeal rendered its decision in the opposition case, Hollister extended claim 1 of the at-issue patent applica-tion to cover activation of a hydrophilic surface upon direct liquid contact (the wet-laid concept), whereas the application had originally been limited to activation upon vapor hy-dration.

In turn, Hollister argued that Coloplast had not proven entitlement to the patent applica-tion as inventor, let alone invented or contributed to the invention.

Laying emphasis on the court-appointed expert opinion, Hollister argued that the objective technical problem, which the invention was to solve, was how to avoid contact with the activated hydrophilic coating on the catheter package when handling the catheter at inser-tion. The solution to this problem was – according to claim 1 – the provision of a flexible, collapsible sleeve for the

catheter. Hollister argued that Coloplast had not lifted its burden of proof of entitlement to the claimed invention.

Hollister further argued that both the objective technical problem and its inventive solution had been set out in the at-issue patent application from the outset and.

The Court firstly defined the objective technical problem of patent claim 1 to be avoiding contact with the hydrophilic coating when handling under insertion of the catheter. Refer-ring to the court-appointed expert opinion, the Court found that the solution was dis-closed in claim 1 with the feature “a flexible, collapsible sleeve surrounding the tube to al-low gripping of the tube or the handle through the sleeve”. The remaining features of the patent claim were considered prior art.

The Court ruled in favour of Hollister on the grounds that Coloplast had not proved its con-tribution to the distinguishing feature of claim 1 (“a flexible, collapsible sleeve surrounding the tube to allow gripping of the tube or the handle through the sleeve”). Also, the Court held, the technology used by Hollister (stated in the introductory part of the claim) was built on prior art. Consequently, the Court ruled that Coloplast had not contributed to the invention and was neither co-inventor nor co-owner of the patent application.

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