

EIP

Prevayl v Whoop [2025] EWHC 399 (IPEC)

His Honour Judge Hacon has found that Prevayl's patent for a smart bra was invalid for obviousness over two pieces of prior art. However, had the patent been valid, Whoop would be indirectly infringing the patent by the sale of its "Whoop bra" and its "Whoop 4.0" sensor module.

Background

Prevayl's patent (GB 2 598 947) is for a "smart bra", which consists of bra which has a sensor module contained entirely in the "side region" of the bra, not the underband (claim 1). Claim 2 requires the module to be situated in a pocket.

Whoop sells a sport bra which has a pocket specifically designed to house a sensor module (which may or may not be supplied by Whoop). It also provides its "Whoop 4.0" sensor module free to customers who subscribe to the Whoop app. This module is not designed specifically for the Whoop bra, but can be used in that way.

Whoop admitted that the combination of the two products would constitute a product within claims 1 and 2 of the Patent. They also accepted that the Whoop bra was a "means essential" element of the patent, and suitable for putting the invention into effect.

Unusually, there was a mismatch between the area of expertise for the experts of Prevayl and Whoop. Prevayl put forward two experts who wrote a single joint report, one with a background in electronics and wearable tech and the other in garment design including for athletes. Whoop used a single expert who was a professor of computer science and human performance. The Judge found all experts to be knowledgeable, and the difference in approach does not appear to have been relevant to the outcome.

Validity

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Whoop pleaded two patent applications as prior art.

US application 2018/0317845 discloses a bra with sensors in several places, including the side region. To go from this disclosure to the patent would necessitate going from multiple sensors to just one, and the subsequent choice of which of the possible disclosed locations to use. The Judge found that these steps would be obvious, and that claim 1 was therefore obvious. The Judge also found that the addition of a pocket would also be obvious.

PCT application WO 2018/206853 discloses a bra which has a sensor in the side region, but does not have an underband. The Judge found that when starting with a bra with an underband, such as a sports bra, it would be obvious to place the sensor in the side region and not the underband. Claim 1 was therefore obvious. Again, the addition of a pocket would be obvious.

Infringement

The Judge summarised the law on indirect infringement under s60(2) of the Patents Act 1977 as a three-pronged test[1]:

1. "There is in the UK a supply or offer to supply a means relating to an essential element of the invention, i.e. a means which contributes to implementing the technical teaching of the invention without being of completely subordinate importance, irrespective of where the core of the invention lies;
2. "Adaptation of such means or its use together with other means would put the invention into effect; and
3. "at the time of supply or offer to supply, the supplier knows, or it would be obvious to a reasonable person in the circumstances, that a) adaptation of the means supplied or its use together with other means would put the invention into effect and b) at least some ultimate users will intend to put the invention into effect in the UK in that way".

Whoop had conceded elements 2 and 3 of this test. They clearly knew that the Whoop 4.0 module with an appropriate bra, or the Whoop bra with an appropriate module, would put the invention into effect, and they had clear knowledge that users may do so. The only argument they raised was that the Whoop 4.0 module was not a means relating to an essential element of the patent. They did so by arguing that the "core" of the invention was the location of the sensor, and that therefore the sensor itself could not be means essential. However, according to the judge whether a means is essential to the invention

does not depend on where the core of the invention lies – but on whether it contributes to implementing the technical teaching of the invention without being of completely subordinate importance. The Judge found that the sensor was in fact a central feature.

There was a secondary argument from Whoop that, since the Whoop bra was means essential, the supply of the Whoop 4.0 should not also be subject to damages. The Judge dismissed this argument, and stated that he could not see how a finding that both supplies, module and bra, were infringements of the patent could lead to excessive damages. However, this was likely obiter as the patent was already found to be invalid, and therefore there was no need for the Judge to consider this argument fully.

The judgment is [here](#).

[1] See paragraph 87