

NIP CASE 2014

Tougkvas A/S

Legal Representative: GHP Ky LLP

Lakiasiaintoimisto

Vs.

Rope Twist Inc.

GHP KY LLP

TOUGKVAS A/S STATEMENT OF CLAIM

Oslo, October 6th, 2014

Claimant: Toukvas A/S

Legal Representative: GHP Ky LLP
Lakiasiaintoimisto
123 Lakikatu, Helsinki
00123 Finland

vs.

Defendant: Rope Twist Inc.

1. Claims

Toukvas A/S respectfully asks the tribunal to rule the following:

1. As a preliminary assessment, declare that the trademark “MOUNTAIN SAFE” is valid;
2. Rope Twist’s use of the trademark “MOUNTAIN SAFE” is an infringement of Toukvas’ trademark under Article 5(1)(a) of the Trademark Directive, Section 4(1) of the Finnish Trademark Act and Section 4(a) of the Norwegian Trademarks Act;
3. Rope Twist’s use of Toukvas’ business name as a key word is an infringement of Toukvas’ rights in accordance with Article 4(a) of Norwegian Trademarks Act;
4. The use of Toukvas’ business name constitutes a prohibited act of unfair business practice under Section 1(1) of the Finnish Unfair Business Practices Act;
5. The use of the phrase “Rope Twist technology makes mountaineering safe” constitutes an a prohibited act of unfair business practice under applicable law;
6. As a preliminary assessment, declare that the amendment requests to the Danish patent and the Swedish, Norwegian and Finnish patent applications are lawful;
7. The commercial exploitation of the products by Rope Twist constitutes a violation of Toukvas’ patent and related industrial rights;
8. Rope Twist’s use of the Toukvas’ confidential information constitutes a breach of contract, which in this case is the Non Disclosure Agreement;

9. Rope Twist's use of Tougkvas' business secrets constitutes an unfair business practice under applicable law;
10. That the tribunal issues certain Preliminary Injunctions to stop Rope Twist from manufacturing, importing, and selling the infringing products in all of Europe, to stop Rope Twist from using expressions "mountain safe" and "tougkvas" as a keywords in its advertisement and from using the phrase "Rope Twist technology makes mountaineering safe" on its web page, to stop Rope Twist from Using Tougkvas' Business Secrets;
11. That the tribunal issues certain Permanent Injunctions to stop Rope Twist from using expressions «mountain safe» and «tougkvas» as a keywords in its advertisement, to stop Rope Twist from using the phrase "Rope Twist technology makes mountaineering safe" on its web page, to stop Rope Twist from manufacturing, importing, and selling the products that infringe Tougkvas' patent rights, to stop Rope Twist from using Tougkvas' business secrets;
12. Rope Twist pays Tougkvas 600 000 euros in compensation and damages, as well as additional interest and attorneys' fees.

2. Summary of Facts

1. Tougkvas A/S produces and develops fabrics for various ropes and cords that need to tolerate wearing and hard strain, including ropes used in mountain climbing
2. In early 2012, CEO of Tougkvas, Rasmus Repschlager undertook various experiments with the aim of improving the current rope technology. He conducted extensive experiments both with various fibres and various ways of braiding the fibers together.
3. In May Repschlager concluded that certain fibres were preferable to others. He also discovered that the sheathing would be particularly strong when the fibres in each ribbon (1) were in parallel, woven together with transverse threads. The right figure shows the pattern of such a ribbon.
4. Repschlager immediately saw an immense commercial potential for his new invention, and a patent application was submitted to the Danish Patent and Trademark Office on 5 June 2012 and On 4 June 2013 an international application in accordance

with the rules of the PCT treaty. The patent application also contained a description on how the ropes could be produced.

5. The subsequent International Search Report revealed no prior art that could put novelty or inventive step into serious question.
6. In order to start mass production, Tougkvas A/S would have to install new machinery. This would take at least 3 months and cost 500.000 Euros. Tougkvas A/S entered into negotiations in October 2013 with a US company that already had the necessary machinery installed, Rope Twist, Inc.
7. If Rope Twist could start production and promise delivery by mid-January 2014, Tougkvas A/S could bid for a contract of delivery to one of Europe's biggest producers of climbing gear, the Swedish company Hagfjäll.
8. Before entering the negotiations, the parties entered into a mutual Non-Disclosure Agreement (NDA), which is enclosed as Exhibit 1.
9. During the negotiations Repschlager disclosed to Rope Twist that nylon (polyamide) worked well in the ribbons as an alternative to polyester.
10. On 5 December 2013, Tougkvas' Danish patent application became publicly available according to Section 22 of the Danish Patent Act.
11. On 20 December, Rope Twist, Inc suddenly informed that it had decided to pursue other priorities for the moment, and the negotiations ended without any agreement. Tougkvas A/S understood that it had no chances in bidding for the contract with Hagfjäll, but as the market nevertheless seemed promising, they decided to build a production line with the necessary new machinery.
12. Tougkvas filed a trademark application for the phrase MOUNTAIN SAFE with the Danish Patent and Trademark Office early in late December 2013. An application for international registration under the Madrid Protocol was filed soon afterwards. The trademarks were registered in all Nordic countries approximately at the same time – June-August 2014.
13. Tougkvas decided to file national patent applications for the invention in some important countries, among others Norway, Sweden and Finland.

14. In March 2014, Tougkvas learnt that the contract of delivery to Hagfjäll had gone to Rope Twist, Inc. The contract had been signed on 1 January and deliveries started on 15 January.
15. Rope Twist produced the rope material exactly as described in Tougkvas' patent, with the exception that nylon fibres were used instead of polyester as Tougkvas had instructed Rope Twist.
16. Rope Twist had never informed Tougkvas about its contacts with Hagfjäll.
17. Rope Twist marketed its new rope on the Internet, with the text "Rope Twist technology makes mountaineering safe" without mentioning Tougkvas as the source of the technology.
18. Rope Twist, Inc used Google's referencing service "AdWords" and registered "mountain safe" and "tougkvas" as key words, so that customers entering these words as search terms in the Google search engine would receive a link to Rope Twist's webpages.
19. Tougkvas demanded that Rope Twist immediately stopped marketing the infringing products and that Rope Twist, Inc paid 100.000 Euros for lost profit due to the lost contract with Hagfjäll, and 300.000 Euros as further damages. Tougkvas also informed Rope Twist that they were in breach of the confidentiality agreement, infringed Tougkvas trademarks and that any sale would violate the patents.
20. Rope Twist, Inc acknowledged that Tougkvas would probably have got the contract with Hagfjäll if Rope Twist hadn't got it, and that this would have given them a profit of 100.000 Euros.
21. The parties agreed to refer the dispute to arbitration according to the Rules of the International Chamber of Commerce. The place of arbitration would be Oslo and the language of the proceedings English. The parties also agreed that the Tribunal shall make a preliminary assessment of whether the MOUNTAIN SAFE trademark is valid. The parties further agreed that the Trade Mark Directive (2008/95/EC) and common Nordic rules on contract law, unfair competition law and patentability shall be applied by the tribunal.

3. Legal Grounds

3.1 The Preliminary Assessment must declare that the Trademark “MOUNTAIN SAFE” is Valid.

The parties agreed that the Trade Mark Directive shall be applied by the tribunal. The grounds for invalidity of a trademark are set out in articles 3 and 4. Since each of the grounds listed is independent of others it requires separate examination (Henkel KGsS v OHIM Case C-456/01). The application was examined by the Danish Patent and Trademark Office and trademark was registered. It is submitted, that MOUNTAIN SAFE trademark satisfies all relevant criteria of validity.

MOUNTAIN SAFE trademark shall not be declared invalid Under Article 3(1)(a) because word mark is recognized as a sign which constitutes a trademark.

Under Article 3(1)(b) trademarks shall be declared invalid if it devoid of any distinctive character. MOUNTAIN SAFE trademark cannot fail this test because it is not descriptive and because it is capable of distinguishing goods and services.

As it is adjudicated in case C-383/99 (Procter & Gamble Co v OHIM (Baby Dry)), only signs that may serve in normal usage from a customer’s point of view to designate goods or services’ to fail the test of capability of distinguishing the goods or services. We argue that word combination ‘mountain safe’ may not serve in normal usage of language at all, while phrases such as ‘safe mountaineering’, ‘to make mountaineering safe’ or ‘mountain safety’ may.

Later, in case C-191/01 ECJ (Wrigley v OHIM), discussing word “doublemint” in relation to chewing gum ECJ said that a sign should be refused registration “if at least one of its possible meanings designates a characteristic of the goods or services concerned”. For instance, Doublemint is “a factual, objective reference to mint flavor in some way doubled”, as AG Jacobs noted. That is true, because if “doublemint” protected by trademark, other economic operators will not be able to describe a certain flavor, which is substantial feature of a gum.

Below, we will apply this test to MOUNTAIN SAFE trademark. The trademark may be used to all kinds of goods and services, but we will discuss it in relation to ropes, as that is relevant to the case. The rope is usually meant to be strong and durable – these are examples of rope’s characteristics. Therefore, word marks such as “durable” and “strong” may be used to designate features for ropes and should not be registered as trademarks in relation to ropes.

Conversely, word “safe” even in itself does not describe a rope’s characteristic. However, if used for mountaineering, a strong, durable rope may be beneficial for one’s safety. Considering this and other possibilities of improving safety with ropes, word marks such as “safety rope”, “mountain rope”, or “safe mountaineering rope” may fail given test because they constitute obvious and efficient way to describe functions, effects and use of rope, and one’s trademark should never restrict other economic operators from reference product characteristic. Expression “mountain safe” conversely does not constitute a reference to rope’s characteristics.

One can argue that trademark MOUNTAIN SAFE obviously creates association with safety and security on mountains. However, this is not enough to designate characteristics of goods. The kind of trademarks which tend to indicate the nature, quality, or a characteristic of the products in relation to which it is used, but does not describe this characteristic, and requires imagination on the part of the consumer to identify the characteristic called suggestive trademarks. Thus, MOUNTAIN SAFE is a suggestive trademark, which tends to indicate that the use of strong and durable ropes may contribute to one’s safety during dangerous activities. The indication is sufficiently far removed from description of ropes characteristics such as strong and durable.

The suggestive trademarks are widely used and registered across the world. Well known examples of suggestive marks are: Microsoft (Community Trade Mark No. 000330910), Business Week (Community Trade Mark No. 000030577), Wall Street Journal (Community Trade Mark No. 000808667), Finnair (Community Trade Mark No. 003036316), Jaguar (Community Trade Mark No. 000026625) and many others. All of these such trademarks for which acquired distinctiveness were not claimed.

Therefore, under Article 3(1)(b) MOUNTAIN SAFE shall not be declared invalid because it is not descriptive and capable of distinguishing goods and services.

Similarly, MOUNTAIN SAFE shall not be declared invalid under Article 3(1)(c & d) because it does not consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, or the time of production of the goods or of rendering of the service, or other characteristics of the goods or services, signs or indications which have become customary in the current language or in the bona fide and established practices of the trade.

MOUNTAIN SAFE is also not contrary to public policy or to accepted principles of morality and does not deceive the public under Article 3(1)(f & g).

Thus, Rope Twist pleads that the Tribunal declares that the trademark MOUNTAIN SAFE is valid.

3.2 Rope Twist's use of the Trademark MOUNTAIN SAFE is an Infringement of Tougvas' Trademark under Article 5(1)(a) of the Trademark Directive, Section 4(1) of the Finnish Trademark and Section 4(a) of the Norwegian Trademarks Act

Rope Twist filed a trademark application for the phrase MOUNTAIN SAFE with the Danish Patent and Trademark Office in December 2013. After that an application for international registration was filed. In March 2014 Rope Twist used Google's referencing service "AdWords" and registered "mountain safe" as key words, so that customers entering these words as search terms in the Google search engine would receive a link to Rope Twist's webpages under the heading "sponsored links". By that time Rope Twist already had started selling ropes. Therefore, after trademarks were registered in all Nordic countries in June-August 2014, use of "mountain safe" as a keyword by Rope Twist constitutes trademark infringement.

According to Article 5(1)(a) of the Directive the proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign which is identical with the trademark in relation to goods or services which are identical with those for which the trade mark is registered.

Pursuant to Section 4(1) of the Finnish Trademark Act, "no one other than the proprietor of the trade symbol may use in his business any symbol liable to be confused with it for his goods, whether on the goods themselves or on their packaging, in advertising or commercial documents, or in any other way, including oral use".

According to Section 4(a) of the Norwegian Trademarks Act, "a trademark right has the effect that no one, without the consent of the proprietor of the trademark right (the trademark proprietor), may use in an industrial or commercial undertaking any sign which is identical with the trademark for goods or services for which the trademark is protected".

The expression registered by Rope Twist as a keyword is "mountain safe" and this is identical to Tougvas' registered trademark MOUNTAIN SAFE.

As established by ECJ in the Joined Cases C-236/08 to C-238/08 Google France SARL v Louis Vuitton Malletier SA, an advertiser who used a sign identical to a trademark as a keyword as part of Google's AdWords service thereby used the sign in the course of trade in relation to the advertised goods or services.

Since both Rope Twist and Tougkvas produce ropes, the use of sign was in relation to goods which are identical with those for which the trade mark is registered. It follows that in present case all conditions expressed in Article 5(1)(a) of the Trade Mark Directive, Section 4(1) of the Finnish Trademark and Section 4(a) of the Norwegian Trademarks Act to establish trademark infringement are met.

The case law of the ECJ establishes that the proprietor of a trademark can only succeed in a claim under Article 5(1)(a) of the Directive if six conditions are satisfied: (i) there must be use of a sign by a third party within the relevant territory; (ii) the use must be in the course of trade; (iii) it must be without the consent of the proprietor of the trade mark; (iv) it must be of a sign which is identical to the trade mark; (v) it must be in relation to goods or services which are identical to those for which the trade mark is registered; and (vi) it must affect or be liable to affect the functions of the trademark (see in particular Case C-206/01 Arsenal Football plc v Reed ECR I-10273 at [51], Case C-48/05 Adam Opel AG v Autec AG ECR I-1017 at [18]-[22], Case C-17/06 Céline SARL v Céline SA ECR I-7041 at [16] and Case C-62/08 UDV North America Inc v Brandtraders NV ECR I-1279 at [42]).

As we indicated above, there should be no dispute that the first five conditions are satisfied. Regarding the sixth condition it is necessary to consider whether there was an adverse effect on one of the functions of the trademark.

MOUNTAIN SAFE was registered by Tougkvas to protect the trademark from misuse by third parties and, *inter alia*, competitors. It is necessary that MOUNTAIN SAFE trademark remains distinctive, and all of the functions of trademarks are protected. It is submitted, that Rope Twist's use of the trademark on Google has an adverse effect on functions of the trademark.

For instance, such use adversely affects the trademark's function of indicating origin. Customers entering Rope Twist's registered trademark as search term in the Google search engine would receive a link to Rope Twist's webpages informed *inter alia* Rope Twist's products. While webpages stated that they were administered by Rope Twist, it was likely

that users would assume that products offered by Rope Twist were produced by Tougkvas. It is important, that Tougkvas is known as a producer of fabrics for ropes. Therefore, reasonably well-informed and reasonably observant internet users would likely assume wrong origin of a product. Therefore, use of “mountain safe” by Rope Twist adversely affects trademark’s function of indicating origin.

As ECJ ruled in Case C-323/09 Interflora Inc and Interflora British Unit v Marks & Spencer plc and Flowers Direct Online Limited, use adversely affects the trade mark’s function of indicating origin where the advertising displayed on the basis of that keyword does not enable reasonably well-informed and reasonably observant internet users, or enables them only with difficulty, to ascertain whether the goods or services concerned by the advertisement originate from the proprietor of the trade mark or an undertaking economically linked to that proprietor or, on the contrary, originate from a third party.

Secondly, such use adversely affects the trademark’s investment and advertising functions as whenever Tougkvas will take an action to promote its trademark, Rope Twist will also directly benefit from that, getting more users to the website.

All the mentioned functions also adversely affected by the Rope Twist use, as advertising on the basis of such a keyword is detrimental to the distinctive character of a trademark and contributes to turning that trademark into a generic term (Case C-323/09 Interflora Inc and Interflora British Unit v Marks & Spencer plc and Flowers Direct Online Limited).

Thus, use of “mountain safe” by Rope Twist adversely affects trademark’s advertising, investment functions and function of indicating origin; substantially interferes with Tougkvas’ use of its trademark to acquire and preserve a reputation capable of attracting consumers and retaining their loyalty.

Since keywords were chosen and purchased by Rope Twist and these were used after trademark was registered, Rope Twist’s actions constitute trademark infringement committed with intent.

Due to the fact that Rope Twist, in the course of trade, has used Tougkvas’ trademark, the conclusion must be made that Rope Twist infringes Tougkvas’ rights in accordance with Article 5(1)(a) of the Trade Mark Directive, Section 4(1) of the Finnish Trademark and Section 4(a) of the Norwegian Trademarks Act.

3.3 The use of Toughkvas' Business Name is an Infringement of Toughkvas' Rights in Accordance with Article 4(a) of Norwegian Trademarks Act

In March 2014 Rope Twist used Google's referencing service "AdWords" and registered "tougkvas" as key word, so that customers entering this word as a search term in the Google search engine would receive a link to Rope Twist's webpages under the heading "sponsored links". By that time Rope Twist already had started selling ropes.

In accordance with Section 1(3) of Norwegian Trademarks Act, any person who uses his own name or a protected business name as a sign for his goods or services enjoys protection pursuant to the rules of this Act against unlawful use of the name as a trademark by other persons within the same geographical territory.

"Tougkvas" is a protected business name. Due to the fact that Rope Twist, in the course of trade, has used Toughkvas' business name, the conclusion must be made that Rope Twist infringes Toughkvas' rights in accordance with Article 4(a) of Norwegian Trademarks Act.

Since the use of different words as keywords is the only difference between claims expressed in sections 3.2 and 3.3, same arguments as listed in section 3.2 should be used in relation to this claim. The "tougkvas" keyword was chosen and purchased by Rope Twist, therefore this action constitutes trademark infringement committed with intent.

It is submitted that Rope Twist should have known that "tougkvas" is a protected business name, as Rope Twist conducted negotiations and entered in contract with Toughkvas. These circumstances clearly show that the Rope Twists actions were intentional.

3.4 The Use of Toughkvas' Business Name Constitutes a Prohibited Act of Unfair Business Practice under Section 1(1) of the Finnish Unfair Business Practices Act.

In March 2014 Rope Twist used Google's referencing service "AdWords" and registered "tougkvas" as key word, so that customers entering this word as a search term in the Google search engine would receive a link to Rope Twist's webpages under the heading "sponsored links". These actions constitute unfair business practice under Section 1(1) of the Finnish Unfair Business Practices Act.

Pursuant to Section 1(1) of the Finnish Unfair Business Practices Act, "good business practice may not be violated nor may practices that are otherwise unfair to other entrepreneurs be used in business."

The Finnish Market Court has in its decision MAO 121/12 ruled that use of another entity's business name in trade constitutes an unfair business practice if it is likely to cause confusion as to the source of the business. "Toukvas" is a protected business name. As expressed in sections 3.2 and 3.3 of this statement of the claims, Rope Twist's use of expression "toukvas" on Google could lead a reasonably well-informed and reasonably observant internet user to assume a wrong origin for the products in the case at hand.

For the reasons listed above, Rope Twist's use of "toukvas" on Google constitutes a prohibited act of unfair competition under Section 1(1) of the Finnish Unfair Business Practices Act.

3.5 The Use of the Phrase "Rope Twist technology makes mountaineering safe" Constitutes a Prohibited Act of Unfair Business Practice under Applicable Law.

Rope Twist's use of the phrase "Rope Twist technology makes mountaineering safe" constitutes an unfair business practice and misleading marketing under applicable law. In March 2014 Rope Twist marketed its new rope on the Internet, with the text "Rope Twist technology makes mountaineering safe". However, the technology used to produce rope never was invented or belonged to Rope Twist. In fact, Rope Twist acknowledged that after the publication of Toukvas' patent, the information about use of nylon in the production of Toukvas' patented technology was no longer confidential. Thus, Rope Twist admitted that its new rope is produced with the use of Toukvas' technology.

According to Section 2 (1) of Finnish Unfair Business Practices Act, "A false or misleading expression concerning one's own business or the business of another may not be used in business if the said expression is likely to affect the demand for or supply of a product or harm the business of another."

Pursuant to Section 10 (1) of Swedish Marketing Act, "in the course of marketing a trader may not make any incorrect statement or other representation that is misleading with respect to the trader's own or another person's business activity."

Thus, Rope Twist is liable for a false expression concerning the origin of a new rope's technology under Section 2 (1) of Finnish Unfair Business Practices Act. The said expression is likely to affect the demand of a product and harm the business of Toukvas, as user would assume that technology used by Rope Twist is unique and provided only by Rope Twist, and not by Toukvas.

In a same way Rope Twist is liable for making incorrect statement that is misleading with respect to the trader's own or another person's business activity under Section 10 (1) of Swedish Marketing Act.

For the reasons listed above, Rope Twist's actions constitute a prohibited act of unfair competition under common Nordic rules on unfair competition law.

3.6 The Preliminary Assessment must Declare that the Amendment Requests to the Danish Patent and the Swedish, Norwegian and Finnish Patent Applications are Lawful

3.6.1 The Scope of the Patent Protection is Comprised in the Claims; the Scope of the Danish Patent is the Same as that of the Patent Applications in Finland, Sweden and Norway

Our client has previously indicated at the initiation of the proceedings, that nylon was not comprised under the word polyester neither literally or under the doctrine of equivalents. Our client is not bound by that statement, and is free to present another position before the tribunal. Consequently, it is now our position that nylon is comprised by the word polyester under the Doctrine of Equivalents.

The definition of the scope of the protection granted by a patent is explained in the Section 39 of the Finnish Patent Act, which provides that the scope of protection is determined by the claims contained within the patent. The Finnish Patent Act is also the result of a joint drafting effort in the Nordic countries; it is therefore submitted that the rule is the same in those other Nordic countries. This article is consistent with its European equivalent which is Section 69 of the European Patent Convention (EPC). In conclusion, the Danish patent awarded and published has its scope of protection described in the claims of said published patent.

Section 60 of the Finnish Patent Act provides indications on the scope of protection in the countries where the patent applications were not granted yet. It states: "until a patent has been granted under section 20, protection shall extend only to the subject matter disclosed both in the claims as worded when the application became available to the public and in the claims according to the patent." Consequently, since the Danish published application contains the same disclosed subject matter as the undisclosed subject matter in the other applications, the interpretation of their scope should be the same under Nordic law.

3.6.2. The Patent Description Must Also Be Considered when Assessing the Scope of Protection of a Patent

Pursuant to section 39 of the Finnish Patents Act: “The description may serve as guidance for interpreting the claims.” The description of this patent reads as follows:

“The main object of the invention is to provide ropes with a solid and wear resistant sheathing for demanding application purposes, both at sea and at land. In particular it is an object to create a sheathing with a surface so dense that the penetration of contaminants, such as sand, or the risk of hooking a foreign body (such as sharp rocks) is considerably reduced.

According to the invention, the sheathing should be made of ribbons of substantially parallel fibres woven together with transverse threads. If the thread should burst, the construction of the sheathing will prevent it from loosening. Polyester fibres are very useful.“

The description indicates to us that it is actually the surface of the sheathing which is the innovation at hand. The nature of the fibre is not portrayed as necessarily the core of the invention, but “polyester fibres are very useful”. The claim, under the light of the description, clearly has a scope which encompasses the rope of Rope Twist under the doctrine of equivalents.

3.6.3 The Doctrine of Equivalents is firmly established in Finland.

According to Section 13 of the Finnish Patent Act, “an application for a patent may not be amended in such a way that protection is claimed for matter not disclosed in the application at the time it was filed.” This prohibition is also present at Section 19 of the Finnish Patent Decree, which states in a similar manner that “claims may not be amended to include subject matter not disclosed in a document constituting a basic document under the first or second paragraph of section 21 or the first paragraph of section 24.”

In Finland, the courts will consider that a party is liable for patent infringement even though the infringing product or process does not fall within the literal scope of a patent claim; but is nonetheless equivalent to the claimed invention. Such referred to as the Doctrine of Equivalents.

The doctrine of equivalents has successfully been applied in the Helsinki Court of Appeal in the decision number 2783 rendered on October 16, 2012. Another decision by the Helsinki Court of Appeal, number 756, rendered on March 19, 2008 has also applied the doctrine of equivalents while dealing with secondary matters. Further, according to Professor Marcus

Norgård, if the scope of protection of a patent cannot extend beyond the wording, it was felt in Finland that the protection should also cover solutions which differ only in immaterial respects from the wording of the claim. Consequently, one can safely infer from those sources that the Doctrine of Equivalents is now applied in Finland.

3.6.4 The Doctrine of Equivalents is Firmly Established in all Nordic Countries; More Particularly in Norway, where the Case Law, and the Legal Literature Not Only Endorsed the Doctrine of Equivalents, They Further Defined it

The Doctrine of Equivalents is not only a Finnish phenomenon, it is also a Nordic phenomenon. Edward D. Manzo, from the Chicago based law firm Husch Blackwell LLP, and teacher at the DePaul University, believes that the Doctrine of Equivalents is widely utilized in Norway, where in Sweden courts simply refer to concept of equivalents. To this day, the Doctrine of Equivalents was most discussed in the Kingdom of Norway, its case law is most useful when approaching the Doctrine of Equivalents.

If there are no precedents with express references to a Doctrine of Equivalents in Norway, “there are several court decisions in which a patentee has obtained protection for embodiments outside the literal wording of the claims, and this indicating the existence of said doctrine” (AIPPI Report Q175 – Norway). Dr. Are Stenvik, in his book *Patenters beskyttelsesomfang*, also alleges that courts now usually give protection to equivalent embodiments. Some early Supreme Court decisions, finding infringement based on the Doctrine of Equivalents, without making an express reference to it, include the *Brannrør*, *Strekfisk* and *Naturbetong* decisions. He further states that he believes that those decisions, however, did not give any specific criteria to the Doctrine, and rather went for a *broad and overall assessment subject to judiciary discretion, where the primary question to be answered has been whether the alleged infringing embodiment was substantially the same as the protected subject matter*. Stenvik, again in his *Patenters beskyttelsesomfang*, notes that three main criteria were developed in the Norwegian legal literature for the Doctrine of Equivalents to apply:

- (1) The contested embodiment must solve the same problem as the patented invention;*
- (2) The modification must have been obvious for a person skilled in the art;*
- (3) The contested embodiment must not form part of the state of the art.*

The first criterion is usually satisfied when the contested embodiment has the same effect, result or solves the same technical problem. This criterion is assessed objectively, and the interpretation is influenced by the level of abstraction utilized in the drafting of the claim.

The second criterion is more subjective. The decision Donepezil has provided guidance on this matter. This decision has established some “starting points”: first, the obviousness must be assessed at the time when the information was made available to the public by the patent owner, secondly, the standard for obviousness is the same as the standard applied when assessing an inventive step, and thirdly, the degree of differentness between the inventions must also be considered.

The third criterion makes a general reference to the principle that the information already available to the public at the time of the application should not subsequently be monopolized by the issuance of patent protection. This criterion makes the reference that the infringing embodiment is already part of the state of the art at the moment of the infringement.

The state of the law today in Norway, and the most elaborate decision concurrent to the Doctrine of Equivalents is the decision Rt. 2009 (Donepezil) by the Supreme Court of Norway. The issue in the decision was that the alleged infringer was fabricating the patent protected Donepezil via methods not comprised in the literal sense of the claims contained in the patent. If the decision applies the Doctrine of Equivalents to Analogy Method Patents, we believe that it also applies in the case at hand. The court first noted that the rule of law established by the Article 39 of the Patent Act does not discuss the question of equivalents, but does make a reference to the Article 69 of the EPC. The Article 69 EPC has been interpreted to be consistent with the existence of the Doctrine of Equivalents by the EPO Courts, and so the Norwegian Supreme Court presumed the article 39 to be congruent with such interpretation, and so considered it to be consistent with the Doctrine of Equivalents as well. The Court further duly noted that references to the Doctrine of Equivalents were made in many rulings by the Courts of Appeal of Norway.

The Court, while endorsing the Doctrine of Equivalents, added what follows:

“the doctrine of equivalence, as I have described it, is a remedy to extend protection to methods that are fairly identical, and therefore can be described as modifications of the patent.”

The Court further stated that:

“(…) the decisive factor must be an assessment of whether the (contested) method has a sufficient proximity to the method disclosed in the claim, such that it can be described as fairly identical. Anything else would involve going too far from the basic principle that the claim determines the scope. The specific assessment (of fairly identical) goes beyond what the Supreme Court may try. I do however agree with the Appellate Court, that in identifying this distinction, one would, to no insignificantly degree, have to be supported by technical expertise.”

The Court has so accepted and established a clarification of the criteria number two (non-obviousness): that the contested method, to fall outside of the scope of the first patent, must be non-obvious, but must also be considered as a “modification” of the previous method. In the same step, an objective assessment of the proximity between the two methods, endorsed by technical expertise, is strongly recommended.

We strongly support the position that the court took in the Donezepil case, which we understand is currently the state of the rule of law in Norway, we further believe that the interpretation by the Supreme Court should serve as a guide for the other Nordic Tribunals, and rightly also in the case at hand.

3.6.5 The application of the three criteria of Donezepil shows that the use of nylon by Rope Twist infringes the scope of protection of the patent and patent applications of Tougkvas A/S under the Doctrine of Equivalents

3.6.5.1 The use of nylon by Rope Twist has the same technical effect as the use of polyester by Tougkvas A/S

The first criterion, is usually satisfied when the contested embodiment has the same effect, result or solves the same technical problem. This criterion is assessed objectively, and the interpretation is influenced by the level of abstraction utilized in the drafting of the claim.

For the purpose of this case, the claim determining the scope of protection of the patent of Tougkvas A/S, reads as follows:

“Rope, comprising a core of parallel or braided core strings, and a braided sheathing of sheathing elements characterized in that in that the sheathing elements (1) are ribbons of substantially parallel polyester fibres woven together with transverse threads.”

The description of the invention in the patent gives an indication of the effect sought in the invention: “The main object of the invention is to provide ropes with a solid and wear

resistant sheathing for demanding application purposes, both at sea and at land. In particular it is an object to create a sheathing with a surface so dense that the penetration of contaminants, such as sand, or the risk of hooking a foreign body (such as sharp rocks) is considerably reduced. According to the invention, the sheathing should be made of ribbons of substantially parallel fibres woven together with transverse threads. If the thread should burst, the construction of the sheathing will prevent it from loosening.”

The effect sought by the use of the polyester fibres is hence to create a sheathing having the effects described in the invention’s description. To satisfy the first criteria, the use nylon fibres must have the same technical effect, result or solve the same problem as the use of polyester fibres.

The Handbook of Fibre Rope Technology provides with some insight on the technical similarities between the nylon and polyester as fibre material: both nylon and polyester are considered in the book as “general purpose synthetic polymers”. They are both described as serving similar roles as fibre material: “what makes the nylon molecule, and also polyester, successful as a fibre material is the alternation of two types of unit along the chains (...) The $\text{--CH}_2\text{--}$ sequences provide flexibility, since above about -100 degree Celsius there is free rotation around the C-C bonds. The --CO--NH groups attract one another with hydrogen bonds, which are intermediate in strength between the covalent bonds of main chains and the weak Van der Waals’ forces between most other molecular groups. In the dry state, the hydrogen bonds become mobile around 100 degree Celsius (...)”

The book goes on about comparing polyester and nylon: “[in polyester] as in nylon, there are two sorts of units in the chains. The aliphatic sequences $\text{--CO--O--CH}_2\text{--CH}_2\text{--O--CO--}$, provide flexibility, and the benzene rings provide molecular interaction. The two main differences from nylons are that: (1) the rings stiffen the structure in the amorphous regions, particularly as they associate in pairs; (2) there is no attraction for water molecules, so that the increased mobility of the benzene ring bonding is due only to temperature (...) High-tenacity polyester yarns are melt-spun and drawn in the same way as nylon. The fine structure is similar, though there must be some differences that are not understood. The thermal transitions are analogous (...) though they are not affected by water. The main property difference is that the stiffening effect of the benzene rings shows up at as a higher initial fibre modulus. Polyester fibres do not suffer from the poor abrasion resistance shown by wet nylon, though in dry conditions nylon shows the better performance.”

The Handbook is rather clear about the similar characteristics and the interchangeability of the two fibres. Considering the preceding facts, the objective technical evaluation shows that they have the same technical effect, the first criteria of the Doctrine of Equivalence is satisfied.

3.6.5.2 The possibility to use nylon by Rope Twist was obvious to a person skilled in the art at the commencement of the infringement

To satisfy the second criterion, the contested method must be obvious to a person skilled in the art, but must also be considered as a “modification” of the previous method. In the end, the Nordic approach considers that the second criterion will apply if the two inventions are “fairly identical”.

The question of obviousness to a person skilled in the art refers to whether or not, a person skilled in the art would find obvious that the fibres of polyester be replaceable by fibres of nylon. The answer is yes, it is obvious. The two fibres are not only considered similar by the technical literature, they are further put in the same “general purpose synthetic polymers category” and are considered as being attributable to similar uses. The interchangeability of the fibres of nylon and polyester are not only known to the technical experts; they are also a widely spread knowledge and practice in the field of mountaineering rope manufacturing. A short review of popular mountaineering equipment providers’ webpages, and a short review of the literature aimed at the profane available online, shows that the interchangeability of those fibres is a widely known possibility. It is noteworthy, that a lot of mountaineering ropes are made either of one or the other material, sometimes by a combination of both.

Considering the previously stated facts, one can safely say that Rope Twist uses a “modification” of the previous method, in order to avoid patent infringement. Rope Twist was aware of the patent applications and their content, and carefully proceeded to modify the method just enough to presumably see its product fall outside of the literal scope of protection of the patent owned by Tougkvas A/S. Finally, notwithstanding the minor differences between the two fibres, one can also safely affirm that the two fibres, for the purpose of mountaineering, were at the very least “fairly identical”.

3.6.5.3 The possibility to use nylon by Rope Twist was part of the state of the art at the commencement of the infringement

The third criterion makes a general reference to the principle that the information already available to the public at the time of the application should not subsequently be monopolized by the issuance of patent protection. This criterion makes the reference that the infringing embodiment is already part of the state of the art at the moment of the infringement.

At the moment of the violation of the patent rights by the actions of Rope Twist, even though the potential use of nylon as a fibre in the invention was not disclosed expressly by Tougkvas A/S, the similar virtues of nylon with regards to polyester were already part of the state of the art. Considering the proximity of the embodiments of Rope Twist with those of Tougkvas A/S, the use of nylon as an interchangeable element with polyester should be considered as being part of the state of the art.

3.7 The commercial exploitation of the rope by Rope Twist constitutes a violation of Tougkvas A/S's patent and related industrial rights

3.7.1 Tougkvas A/S was entitled to the provisions on patent infringement mutatis mutandis as from December 5, 2013, date of the publication and attribution of the Danish patent application

Tougkvas A/S, the Danish company Tougkvas A/S is the rightful owner of a Danish Patent as well as Swedish, Norwegian and Finnish Patent applications. Such patent and applications relates to improved ribbons used to braid the sheathing, resulting in a more secure rope, whose utility is particularly profitable as mountaineering equipment. The Danish patent application was published and attributed on December 5, 2013. The alleged violation of this patent through the practice of the American company Rope Twist is at the origin of this dispute, amongst other issues.

Section 60 of the Finnish Patent Act provides that “where any person commercially exploits an invention which is the subject of a patent application after the application documents have been made available under section 22, the provisions on patent infringement shall apply mutatis mutandis, if the application results in a patent. However, until a patent has been granted under section 20, protection shall extend only to the subject matter disclosed both in the claims as worded when the application became available to the public and in the claims according to the patent.” The Danish application became public in December 5, 2013, and since such date, Rope Twist should have been aware of the existence of such protection. The scope of protection, for all countries subject to national PCT proceedings, as discussed in the

previous section and pursuant to Section 60, is the disclosed subject matter in the published Danish Application. The future award of a patent not being in question in any of the Northern countries, we consider that the provisions on patent infringement apply in the case at hand.

Accordingly, it is a settled matter that Tougkvas A/S is the rightful owner a patent protection and related industrial rights relating to its invention in all of the Nordic countries, this protection applies mutatis mutandis as from December 5, 2013, the date when the patent application was published in Denmark.

3.7.2 The use by Rope Twist of the rope amounts to commercial exploitation

The definition of commercial exploitation in the law is contained in Section 3 of the Finnish Patent Act. The exclusive right granted to Tougkvas A/S is to prevent others from utilizing the invention at hand either by:

“(1) making, offering, putting on the market or using a product protected by the patent, or importing or possessing such product for these purposes;

(2) using a process protected by the patent, or offering such process for use in this country if he knows or if it is evident from the circumstances that the use of the process is prohibited without the consent of the proprietor of the patent;

(3) offering, putting on the market or using a product obtained by a process protected by the patent or importing or possessing such product for these purposes.”

By manufacturing the product, importing it to countries where such product is subject to patent protection and related industrial rights; then by offering and selling such product, Rope Twist's actions clearly amount to a commercial exploitation.

3.7.3 There exists no mandate, authorization, permit or any other legally binding arrangements, explicit or implied, between Tougkvas A/S and Rope Twist constituting an authorization to commercially utilize the invention of Tougkvas A/S

It is also clear that Tougkvas A/S never gave implied or explicit consent for Rope Twist to manufacture or put the ropes on the market. The objective of Rasmus Repschlager was to have the American company manufacture the ropes on his behalf for a bid on a contract of delivery for Hagfjäll. If some negotiations were initiated, Rope Twist clearly indicated that they had other priorities to pursue, and so no agreement was ever established. Furthermore, the independent application of Tougkvas A/S to the same bid is a proof of the absence of any

contractual link between the two companies further than the non-disclosure agreement. The two companies behaved relating to the said contract, as competitors.

3.7.4 The rights conferred by patent protection, and the provisions on patent infringement applicable to Tougkvas A/S allows it to remedy past, existing and future infringement by Rope Twist in the territories subject to such protection

Pursuant to Section 3 of the Finnish Patent Act the attribution of a patent provides Tougkvas A/S with the exclusive right to prevent others from exploiting the said invention; also, the Section 60 of the Finnish Patent Act provides Tougkvas A/S with the right to make use of the provisions on patent infringement even if a patent has not been issued yet, considering that it will be issued. The Section 3 of the Finnish Patent Act indicates what can Tougkvas A/S prevent others from doing:

“(1) making, offering, putting on the market or using a product protected by the patent, or importing or possessing such product for these purposes;

(2) using a process protected by the patent, or offering such process for use in this country if he knows or if it is evident from the circumstances that the use of the process is prohibited without the consent of the proprietor of the patent;

(3) offering, putting on the market or using a product obtained by a process protected by the patent or importing or possessing such product for these purposes.”

Further, such protection provides Tougkvas A/S with possibilities of action in justice. Pursuant to section 57 of the Finnish Patent Act, “the court may forbid any person who infringes the exclusive right afforded by a patent (patent infringement) from continuing or repeating the act.” As the injured party, Tougkvas A/S is entitled to pursue such action in justice. Following such action, and pursuant to Section 58 of the Finnish Patent Act, Tougkvas A/S is moreover entitled to a reasonable compensation for the exploitation of the invention and damages for other injury caused by the infringement. Section 59 of the same Act also provides with the option to prevent any further infringement by either destroying or seizing the products obtained in violation of the exclusive patent right.

3.8 Rope Twist’s use of Tougkvas’ Confidential Information Constitutes a Breach of Contract

The actions taken by Rope Twist, namely the use of Tougkvas’ proprietary and confidential information concerning the use of nylon in the production of Tougkvas’ patented technology,

as well as the use of details on Tougkvas' confidential negotiations with Hagfjäll constitutes a clear breach of Rope Twist's contractual obligation of confidentiality and the non-use requirement as set out in the non-disclosure agreement (hereinafter "Agreement"). The Agreement entered into between Rope Twist and Tougkvas on 12.10.2013 stipulates, *inter alia*, that:

- 1) "Confidential Information means financial, technical, operational, commercial, management and other information, experience and expertise of whatever kind relating to the parties or the Project" (Article 1, paragraph 2); and that
- 2) Neither of the parties will without prior written consent of the other party use any Confidential Information for any other purpose than to assess the potential future business co-operation (Article 2, subsection 2; read together with Article 1, paragraph 1).

The definition of Confidential Information negotiated by and agreed to between the Parties clearly covers both the use of nylon and Tougkvas plan to contract with Hagfjäll for the distribution of Tougkvas products, as well as the patented invention to the extent it was not public at the time. The first mentioned information falls at least within the categories of technical and operational information under the Agreement and the last mentioned as financial-, operational-, commercial- and management information. Moreover, the confidential information was disclosed by Tougkvas to Rope Twist after the conclusion and entry into force of the Agreement and pertaining to the discussions for a possible co-operation and was thus also to this extent clearly covered by the Agreement. In fact, the above mentioned information disclosed by Tougkvas must be considered to be within the core of the information intended to be protected by the Agreement, as these constituted the foundation for Tougkvas business plan to which the negotiations with Rope Twist were related.

Rope Twist's deliberate choice to use nylon in its production of ropes made by using Tougkvas technology exposed this confidential information to a broader audience than was necessary for the purpose which was to assess the future business co-operation between the parties. Thus, Rope Twist is continuously in breach of its undertaking under Article 4 (1) of the Agreement to "limit access to Confidential Information to those employees who require the information for the purpose referred to in article 2 (2) ("need to know)". The purpose referred to in article 2 (2) being the assessment of the future business co-operation.

Rope Twist further breached, and is continuously in breach of, the non-use obligation under article 2 (2) by using the confidential information concerning use of nylon in the production of the products, and relying on information concerning Hagfjälls interest to act as distributor for the products made with Tougkvas' technology. This amounts to use that without a doubt is done in pursuit of purposes other than that specified and allowed under the Agreement. The sole and exclusive purpose for which the information was disclosed was the assessment of a future business co-operation with Tougkvas (Article 2 (2), read together with Article 1 (1)). Therefore, when Rope Twist implemented the use of nylon in the production of the products that utilized Tougkvas' technology, it clearly was not anymore acting in pursuit of the purpose as agreed under article 1 of the Agreement. Similarly, when Rope Twist entered into discussions and later agreed with Hagfjäll for the distribution of the products made with Tougkva's technology, Rope Twist used confidential information regarding Tougkvas' business plans not for the purpose of assessing a potential co-operation between Tougkvas' and Rope Twist, but in fact, to exclude Tougkvas' from the distribution of products made with Tougkvas' own technology.

In conclusion, Rope Twist's use of Tougkvas' confidential information constitutes a breach of Rope Twist's core obligations pertaining to the Agreement and violated the exact interests of Tougkvas' which the Agreement was intended to protect. Rope Twist's actions are aggravated by the fact that the breach is ongoing, and despite Tougkvas' requests, Rope Twist has taken no steps to remedy the breach. The ongoing breach has already caused Tougkvas irreparable harm.

3.9 Rope Twist's Use of Tougkvas' Business Secrets Constitutes an Unfair Business Practice under Applicable Law

Rope Twist's use of nylon in the production of Tougkvas' patented technology, and the solicitation of a contract with Hagfjäll by relying on Tougkvas business plan, constitute a deliberate misuse of Tougkvas' by law protected business secrets and constitutes a prohibited act of unfair competition under common principles of Nordic unfair competition law.

According to Section 4 (1) of the Finnish Unfair Business Practices Act, "no one may unjustifiably obtain or seek to obtain information regarding a business secret or use or reveal information obtained in such a manner" (the same rule is expressed also in Sections 2 and 6 of the Swedish Act on the Protection of Trade Secrets). The Finnish Act does not specify the definition of business secrets, but the preparatory works for the Act specifies that business

secrets can under applicable law can be either technical or business information characterized by being of value to the holder of the information (HE 114/1978, p. 14). In the Swedish Act referenced above, a “business secret” has been defined in Section 1 as information “which that person wants to keep secret and the divulgation of which would be likely to cause damage to him from the point of view of competition”. It seems clear, that the information in question - the use of nylon in the production and the details in Tougkvas’ business plan concerning seeking a distribution contract with Hagfjäll - were of value to Tougkvas as its proprietary and confidential information. This value is also highlighted by the steps Tougkvas’ has taken to maintain the confidentiality of the information under the confidentiality agreement. Thus, these should be considered Tougkvas’ business secrets protected under the applicable law. As Rope Twist’s uses were not allowed by Tougkvas, they were made in breach of the applicable law, as highlighted by both Section 4 (1) of the Finnish Unfair Business Practices Act and Sections 2 and 6 of the Swedish Act on the Protection of Trade Secrets.

Moreover, the claims made pursuant to the Finnish Unfair Business Practices Act are also, and in the alternative, made pursuant to the Section 1 of the same Act. Whereas, that Section is a general prohibition against unfair competition, any misuse of business secrets under applicable law, should also be considered to be an unfair practice under the general rule.

3.10 The Tribunal is Requested to Issue Certain Preliminary Injunctions

3.10.1 The Tribunal is Requested to Issue a Preliminary Injunction to Stop Rope Twist from Manufacturing, Importing, and Selling the Infringing Products in All of Europe

The activities of Rope Twist with regard to Tougkvas’ patent rights and the continuation of such activity could seriously damage Tougkvas. Pursuant to Article 28 of the ICC Rules of Arbitration, the tribunal may order any interim or conservatory measure it deems appropriate. Tougkvas’ requests that the Tribunal issues a preliminary injunction to stop Rope Twist from importing, and selling the infringing product in Europe, more precisely in all of the countries where a patent application was filed, or a patent awarded.

Pursuant to the ECJ Decision C-616/10, the issuance of a pan-European preliminary injunction is in line with European law, and is strongly compatible here. The reasoning put forward in the decision is that when the infringing product is the same in multiple countries, then the issuance of a pan-European injunction is necessary. We believe that the test is

fulfilled here, and so we request the issuance of a pan-European preliminary injunction against Rope Twist.

First, article 9 of the Enforcement Directive specifies that EU member states shall guarantee, inter alia, that precautionary measures in the form of injunctions against an alleged infringer may be issued “with the intention to prevent any imminent infringement”. Erik Fisk in his document “A Comparative Law Analysis of Pharmaceutical Patent Protection and Injunction Proceedings in the Nordic Countries”, states that: “In Denmark, Norway and Finland preliminary injunctions may be issued against imminent infringements of (...) patents when the applicant establishes a probability that the counterparty intends to launch an infringing product in the near future. This is the case, e.g. when the counterparty has given a statement regarding a planned launch of the product.” Rope Twist is definitely launching its infringing product in Europe, and so the remedy of a preliminary injunction is compatible in the case at hand.

In Finland, preliminary injunctions relating to IPRs can be granted pursuant to Chapter 7 Section 3 of the Code for Judicial Procedure, before or during the main proceedings. Section 68 of the Patent Act further provides that preliminary injunctions can be obtained during the proceedings. There are three prerequisites for a preliminary injunction in Finland:

- (i) Claim requirement: the first criterion is that the plaintiff must show that it owns an enforceable right against the other party. The evaluation of the fulfilment of the claim requirement is based on probability assessment. If it is deemed at least somewhat more likely that the right in question is infringed by the Tougkvas than the opposite, the claim requirement is deemed to be fulfilled.
- (ii) Danger requirement: the second criteria is fulfilled if the infringing party by deed, action, or negligence, or in some other manner, hinders or undermines the realization of the right holder’s right or decreases essentially the value or significance of said right. Actual existence of the danger is generally not required to be proven, a claim thereof suffices.
- (iii) Comparison of interest / undue inconvenience: to fulfill the last criterion, the Tribunal must consider the interests of both parties and assess whether the Tougkvas would suffer undue inconvenience in comparison to the benefit to be secured.

The assessment of the facts in this case make it obvious that the issuance of a preliminary injunction is justified and necessary.

- (i) Claim requirement: the first criterion is fulfilled as Tougkvas is the rightful owner of a patent covering the product manufactured by Rope Twist. Considering the analysis provided under section 3.7 of this statement of claim, it is far more probable that the products of Rope Twist are infringing the rights of Tougkvas than that they are not.
- (ii) Danger requirement: the second criteria is fulfilled as the actions of Rope Twist do undermine the realization of Tougkvas' rights. Even though the proof of the existence of the danger is not necessary for the fulfillment of this criterion, we wish to point out the loss of the Hagfjäll contract as a good indication of the dangers related to the activities of Rope Twist.
- (iii) Comparison of interest / undue inconvenience: the fulfillment of the third criterion is also evident. There is no proof indicating that Rope Twist would have ever applied to the call for offerings if Tougkvas did not indicate the existence of this contract to it. If Rope Twist is allowed to continue its activities, an irreparable damage would be suffered by Tougkvas. The interests of Tougkvas in seeing its patent rights respected is far superior to the interest of Rope Twist to be permitted to go forward with its contract with Hagfjäll during the current proceedings.

In conclusion, we request a preliminary injunction to stop the activities of Rope Twist in Europe where by its action, Rope Twist would be infringing Tougkvas' patents.

3.10.2 The Tribunal is Requested to issue a preliminary injunction to stop Rope Twist from using expressions "mountain safe" and "tougkvas" as a keywords in its advertisement and from using the phrase "Rope Twist technology makes mountaineering safe" on its web page

As explained in sections 3.2 and 3.3 Rope Twist's use of the phrases "mountain safe" and "tougkvas" constitute trademark infringement. Rope Twist's use of the phrase "Rope Twist technology makes mountaineering safe" constitutes an unfair business practice and misleading marketing, as discussed in section 3.4 of this statement of claim.

The assessment of the facts in this case makes it obvious that all three prerequisites for a preliminary injunction in Finland are satisfied.

- (i) Claim requirement: the first criterion is fulfilled as Rope Twist's actions harming the business of Tougkvas. Considering the analysis provided under section 3.4 of this statement of claim, it is more probable that Rope Twist's actions constitute trademark infringement, unfair business practice and misleading marketing than not.
- (ii) Danger requirement: the second criterion is fulfilled as the actions of Rope Twist do undermine the realization of Tougkvas' rights.
- (iii) Comparison of interest / undue inconvenience: The criterion is fulfilled as Rope Twist will not suffer undue inconvenience in comparison with the benefit to be secured if preliminary injunctions issued.

Pursuant to Article 28 of the ICC Rules of Arbitration, we demand that the Tribunal issue a preliminary injunction to stop Rope Twist from using expressions "mountain safe" and "tougkvas" as a keywords in its advertisement and to stop Rope Twist from using the phrase "Rope Twist technology makes mountaineering safe" on its web page.

3.10.3 The Tribunal is Requested to Issue a Preliminary Injunction to stop Rope Twist from Using Tougkvas' Business Secrets

Pursuant to Section 6 (3) of the Unfair Business Practices Act, a person in violation of Section 4 (1) of said Act may be prohibited from continuing to use the business secret with the risk of being fined in case of non-compliance. The same rule is also expressed in corresponding Section 11 of the Swedish Act on the Protection of Trade Secrets.

It is submitted that the requirements for a preliminary injunction under Finnish law are fulfilled:

- (i) Claim requirement: As has been shown by Tougkvas under sections 3.7 and 3.8, Tougkvas' has valid claims against Rope Twist for its breach of the Agreement and acts of unfair business practices directed at Tougkvas' interests.
- (ii) Danger requirement: As has been shown by Tougkvas under sections 3.7 and 3.8, Rope Twist continuous use of Tougkvas business secrets have caused irreparable harm to Tougkvas' interests and endanger Tougkvas' business secrets on a daily basis for a risk of being further exposed to the public.
- (iii) Comparison of interest / undue inconvenience: The criteria criterion is fulfilled as Rope Twist will not suffer an undue inconvenience in comparison to the invaluable interest of

keeping Toughkvas' business secrets protected from further exploitation and risk of further public exposure.

Rope Twist should therefore, as has been claimed by Toughkvas, under the authority granted to the Tribunal pursuant to Article 28 of the Arbitration Rules, immediately be ordered to stop the production which utilizes Toughkvas' business secrets and seize its collaboration with Hagfjäll that were entered into relying on Toughkva's business secrets. The Tribunal is further asked to set a fine to be imposed in case of non-compliance with the prohibitory order.

3.11 The Tribunal is Requested to Issue Certain Permanent Injunctions

3.11.1 The Tribunal is Requested to Issue a Permanent Injunction to stop Rope Twist from using expressions «mountain safe» and «toughkvas» as a keywords in its advertisement

As explained in sections 3.2 and 3.3, Rope Twist's use of the phrases "mountain safe" and "toughkvas" constitutes trademark infringement.

Pursuant to section 38 of Finnish Trademark Act, anyone who infringes the right to a trade symbol may be prohibited by court order from proceeding with or repeating the act. According to section 57 of Norwegian Trademark Act, any person who has infringed another person's rights pursuant to the Act, or aided and abetted thereto, may by judgment be prohibited from repeating this action.

Thus, we demand that the Tribunal issues Permanent Injunctions to stop Rope Twist from using expressions "mountain safe" and "toughkvas" as a keywords in its advertisement.

3.11.2 The Tribunal is Requested to Issue a Permanent Injunction to stop Rope Twist from using the phrase "Rope Twist technology makes mountaineering safe" on its web page

As explained in sections 3.4 of this statement of claim Rope Twist's use of the phrase "Rope Twist technology makes mountaineering safe" violates Section 2 of Finnish Unfair Business Practices Act. Pursuant to Section 6 of the act, an entrepreneur may be prohibited from continuing or repeating practices that violate sections 1 - 3.

The incorrect statement "Rope Twist technology makes mountaineering safe" as well violates Section 10(1) of Swedish Marketing Act. According to Section 23 of the act, a trader whose marketing is unfair may be prohibited from continuing with that or other similar practices.

Thus, we demand that the Tribunal issues Permanent Injunctions to stop Rope Twist from using the phrase “Rope Twist technology makes mountaineering safe” on its webpage.

3.11.3 The Tribunal is Requested to Issue a Permanent Injunction to stop Rope Twist from Manufacturing, Importing, and Selling the Products that Infringe Tougkvas’ Patent Rights

Pursuant to Section 3 of the Finnish Patent Act the attribution of a patent provides Tougkvas A/S with the exclusive right to prevent others from exploiting the said invention; also, the Section 60 of the Finnish Patent Act provides Tougkvas A/S with the right to make use of the provisions on patent infringement even if a patent has not been issued yet, considering that it will be issued.

Such protection provides Tougkvas A/S with possibilities of action in justice. Pursuant to section 57 of the Finnish Patent Act, “the court may forbid any person who infringes the exclusive right afforded by a patent (patent infringement) from continuing or repeating the act.” As the injured party, Tougkvas A/S is entitled to pursue such action in justice. Following such action, and pursuant to Section 58 of the Finnish Patent Act, Tougkvas A/S is moreover entitled to a reasonable compensation for the exploitation of the invention and damages for other injury caused by the infringement. Section 59 of the same Act also provides with the option to prevent any further infringement by either destroying or seizing the products obtained in violation of the exclusive patent right.

Pursuant to Sections 57, 58 and 59 of the Finnish Patent Act, we hereby present the court with a request for a permanent injunction against Rope Twist to prevent them from commercially exploiting the rope as it is manifest that this commercial exploitation is a breach of Tougkvas’s patent rights.

3.11.4 The Tribunal is Requested to Issue a Permanent Injunction to stop Rope Twist from Using Tougkvas’ Business Secrets

Pursuant to Section 6 (3) of the Unfair Business Practices Act, a person in violation of Section 4 (1) of said Act may be prohibited from continuing to use the business secret with the risk of being fined in case of non-compliance. The same rule is also expressed in corresponding Section 11 of the Swedish Act on the Protection of Trade Secrets. Rope Twist should therefore, as has been claimed by Tougkvas, immediately be ordered to stop the production which utilizes Tougkvas’ business secrets and cease its collaboration with Hagfjäll

that were entered into relying on Tougkva's business secrets. The Tribunal is further asked to set a fine to be imposed in case of non-compliance with the prohibitory order.

3.12 The Tribunal is Requested to Rule that Rope Twist Shall Pay Rope Twist 600,000 Euros in Compensation and Damages.

As has been shown above, Rope Twist is liable for the damage Tougkvas has been caused by Rope Twists breach of contract, misuse of Tougkvast business secrets, and infringement of Tougkvas' patents and trademarks. The basis for assessing the value of damages and compensation under applicable law is presented below. In addition Tougkvas asks for its attorney's fees, which are to be specified at a later date, to be reimbursed by Rope Twist.

3.12.1 Breach of Contract.

Rope Twist should be liable for all and any damage caused to Tougkvas as a consequence of Rope Twist's breach of its obligations under the Agreement. Under applicable law, a non-breaching party should be compensated according to that party's positive contract interest and thus be set in the same position as if the breaching party would have fulfilled its obligations under the contract as agreed between the parties (KKO 1999:48; KKO 2000:102; Hemmo, Mika: Sopimusoikeus I, 2003, pp. 255 – 265).

Rope Twist has in its response to Tougkvas confirmed, with regards to the amount, that the agreement which Tougkvas lost due to Rope Twist's breach represented a damage of 100.000 euros and this amount can therefore be considered as non-contentious. The damage is also directly attributable to Rope Twist's breach, as Rope Twist became aware of Hagfjäll's interest in the products through Tougkvas and would not have been able to produce the products without reliance on Tougkvas' confidential information regarding the use of nylon. Rope Twist also admits that Tougkvas' would "likely have got the contract with Hagfjäll if Rope Twist hadn't got it". Thus, had Rope Twist not acted in breach of the Agreement, Tougkvas would have gained a profit of 100.000 euros from the contract with Hagfjäll.

It is submitted, that Tougkvas was caused substantial damages beyond the loss of the contract with Hagfjäll due to Rope Twist's breach of contract. The damages referred to in the previous paragraph are mainly directed to compensate for the damage caused to Tougkvas from Rope Twist's use of the confidential information regarding Tougkvas' plan to contract with Hagfjäll for the distribution. Thus, that sum does not in itself contain any reparation for the use of the confidential information regarding the use of nylon in the production using

Tougkvas' technology as well as for the delay in setting up Tougkvas own production due to Rope Twist's abusive business practices. These have clearly caused Tougkvas additional damages in the form of lost profit from additional contracts and production. Where there is no exact figure available, the damage must be evaluated according to a fair assessment according to Chapter 17, Section 6 of the Finnish Code of Judicial Procedure. It is submitted that this proprietary information would have secured several similar contracts as that with Hagfjäll in the foreseeable timeframe which were lost due to the breach of confidentiality. Based on the fact that one single distribution contract above would have generated a profit of 100.000 euros, it is submitted that 300.000 represents a minimum level of damage due to the disclosure and misuse of Tougkvas' confidential information.

Thus, the damage caused to Tougkvas' amounts to at least 400.000 euros to which interest has accumulated in accordance with Section 7 of the Finnish Interest Act.

3.12.2 Unfair Business Practices

Rope Twist is liable pursuant to Chapter 5, Section 1 of the Finnish Tort Liability Act to compensate Tougkvas' for the damage caused to it due to Rope Twist's violation of Section 4 (1) of the Unfair Business Practices Act (the same rule is expressed in Section 6 of the Swedish Act on the Protection of Trade Secrets). The named section under Chapter 5 provides that "where the injury or damage has been caused by an act punishable by law or in the exercise of public authority, or in other cases, where there are especially weighty reasons for the same, damages shall also constitute compensation for economic loss that is not connected to personal injury or damage to property." The Finnish Supreme Court has repeatedly in its case law considered that violations of prohibitions under the Unfair Business Practices Act are to their nature such as to fulfil the requirement of "especially weighty reasons" (KKO: 1997:181, which was expressly related to business secrets; KKO: 2005:105). Therefore, the compensation payable to Rope Twist should represent full compensation for the damage caused to Tougkvas as a consequence of Rope Twists violation of Section 4 (1) (Sections 2 and 6 of the Swedish Act on the Protection of Trade Secrets) and Section 1 (1) of the Unfair Business Practices Act. As submitted under section 3.12.1 herein, this amounts to 400.000 euros with interest added in accordance with Section 7 of the Finnish Interest Act.

3.12.3 Infringement of Patent Rights

Rope Twist is liable under applicable law (as reflected in e.g. Section 58 of the Finnish Patent Act) for the damage caused to Tougkvas' as a consequence of Rope Twist's infringement of Tougkvas' patent rights. As submitted above and admitted by Rope Twist, the infringement precluded Tougkvas' from entering into a contract with Hagfjäll. This caused Tougkvas a damage of 100.000 euros. With reference to the submission made by Tougkvas under section 3.12.1 herein, a fair assessment of the addition damage amounts to 300.000 at a minimum. The total amount is thus 400.000 euros with interest added in accordance with Section 7 of the Finnish Interest Act. The damage for the patent infringement is claimed in the alternative to the extent that these damages are not covered under the claims for the breach of contract or abuse of Tougkvas business secrets.

3.12.4 Trademark infringement

As explained in sections 3.2 and 3.3 of this statement of claims, Rope Twist's use of the phrases "mountain safe" and "tougkvas" constitutes trademark infringement committed with intent.

Pursuant to Section 38 of Finnish Trademark Act, "any person who intentionally or negligently infringes the trademark right of another person shall pay compensation equivalent to a fair license fee for the use of the trademark, plus damages for any further damage caused by the infringement"

According to Section 58 of the Norwegian Trademarks Act for trademark infringements committed with intent or through negligence, the infringer shall pay the rightholder:

- a) compensation corresponding to a reasonable licence fee for the exploitation, as well as damages for any loss resulting from the infringement that would not have arisen in connection with licensing,
- b) damages for any loss resulting from the infringement, or
- c) compensation corresponding to the gain obtained as a result of the infringement.

The compensation and damages are stipulated on the basis of the provision in letters a to c that is most favourable for the rightholder.

If the infringement was committed intentionally or through gross negligence, the infringer shall, if the rightholder so demands, pay compensation corresponding to double a reasonable licence free for the exploitation instead of compensation and damages stipulated pursuant to the first paragraph.

Where there is no exact figure available, the damage must be evaluated according to a fair assessment according to Chapter 17, Section 6 of the Finnish Code of Judicial Procedure.

Thus, compensation should be based on a hypothetical market license fee. Tougkvas is a company that produces very specialised products (fabrics for ropes and cords that need to tolerate wearing and hard strain), so to keep Tougkvas and mountain safe brands distinctive is very important for companies marketing and commercial success.

Taking this into consideration, the fee should be set as high as 100.000 euros. As the infringement was committed intentionally, compensation should be doubled and set to 200.000 euros.

Thus, compensation for trademark infringement amounts to at least 200.000 euros to which interest has accumulated in accordance with Section 7 of the Finnish Interest Act.

4. Exhibits

4.1 Non Disclosure Agreement: provides evidence of the contractual relationship between Tougkvas and Rope Twist.

4.2 Handbook of Fibre Rope Technology: provides evidence of the proximity between nylon and polyester as materials.

4.3 Web pages: provides evidence of the knowledge in the field of climbing gear manufacturing of the proximity and interchangeability between nylon and polyester.

Oslo, October 6th 2014

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