

OPINION UNDER SECTION 74A

Patent	GB 2412061
Proprietor(s)	Picture House Cabinets Ltd
Exclusive Licensee	
Requester	Picture House Cabinets Ltd, on 10 January 2008
Observer(s)	
Date Opinion issued	10 April 2008

The request

1. The comptroller has received a request from Picture House Cabinets Limited (“the requester”) to issue an opinion as to whether the requester’s granted patent, GB2412061 (“the patent”), has been infringed by the manufacture and sale of a fire surround and television lifting equipment by Mr Bob Barbour of Dennyloanhead in Stirlingshire. The requester says that Mr Barbour is trading under the names of Popuptvs and Robert Barbour Designs. I shall refer to the alleged infringer as “Popuptvs” throughout this written opinion.

Observations

2. No observations were received in response to this request.

The patent

3. The patent relates to an apparatus and method for allowing movement of a flat display screen from a viewing position above a fire surround for a fireplace and into a hidden position within the fire surround and vice versa. Furniture designed to support a flat screen display such that it may be moved from a viewing position to a hidden position is in itself well known
4. I note that the patent was filed on 13 July 2005 and claims a priority date of 9 February 2005. It was granted on 24 May 2006. According to the register of patents, it is still in force. The requester/patentee states that a

licence has not been sought.

The law

5. Firstly, I need to consider what actually constitutes infringement of an invention protected by a patent. Infringing acts are defined by section 60 of the Patents Act 1977 and the subsections which are relevant to this case read as follows:

(1) Subject to the provision of this section, a person infringes a patent for an invention if, but only if, while the patent is in force, he does any of the following things in the United Kingdom in relation to the invention without the consent of the proprietor of the patent, that is to say -

(a) where the invention is a product, he makes, disposes of, offers to dispose of, uses or imports the product or keeps it whether for disposal or otherwise;

(b) where the invention is a process

(c) where the invention is a process

(2) Subject to the following provisions of this section, a person (other than the proprietor of the patent) also infringes a patent for an invention if while the patent is in force and without the consent of the proprietor, he supplies or offers to supply in the United Kingdom a person other than a licensee or other person entitled to work the invention with any of the means, relating to an essential element of the invention, for putting the invention into effect when he knows, or it is obvious to a reasonable person in the circumstances, that those means are suitable for putting, and are intended to put, the invention into effect in the United Kingdom.

(3) Subsection (2) above shall not apply to the supply or offer of a staple commercial product unless the supply or the offer is made for the purpose of inducing the person supplied or, as the case may be, the person to whom the offer is made to do an act which constitutes an infringement of the patent by virtue of subsection (1) above.

The monopoly

6. In coming to an opinion as to whether the patent has been infringed, I

must determine whether the alleged infringing act or item lies wholly within the scope of the patent's claims. There are 12 claims in total, including two independent claims (1 and 12) which read as follows:

“ 1. A fireplace apparatus for use with a flat-screen display, the apparatus comprising: a fireplace and a fireplace surround adapted to stand against a wall and comprising a mechanism which can support a flat screen display in a first position such that the flat-screen display remains entirely within the fireplace surround, hidden from view, and in a second position such that the flat-screen display is raised above the fireplace surround into an operating position, the mechanism being operable to move the flat-screen display between the first and the second positions; the fireplace being operable in both the first and second positions of the mechanism such that heat produced by the fire does not detrimentally affect the flat screen display. “

“ 12. A method of operating a fireplace apparatus for use with a flat-screen display, the apparatus comprising: a fireplace and a fireplace surround wherein the fireplace surround is adapted to stand against a wall and comprising a mechanism which can support a flat screen display in first and second positions, the mechanism being operable to move the flat-screen display between the first and the second positions, wherein the method comprises the steps of; operating the fire irrespective of position of the flat screen display supporting mechanism such that the flat screen display is not detrimentally affected by the heat produced by the fire. “

Claim construction

7. Since no observations were filed, there is no dispute about claim construction. Even so I think I must consider the scope of the independent claims and to this end I shall use the principles set out in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] RPC 9, where Lord Hoffmann said that a purposive construction must be put on the claim as interpreted in the light of the description and drawing as instructed by Section 125(1). However, in determining the extent of protection, he said that account must be taken of the Protocol to Article 69 of the EPC.

8. At paragraph 69 he summarized this approach when he said the question to be asked is:

“what would the person skilled in the art have understood the patentee to have used the language of the claim to mean?”

9. His Lordship also referred to the well-known case of *Catnic Components Ltd v Hill & Smith Ltd* [1982] RPC, where he said at paragraph 48:

“The Catnic principle of construction is, in my opinion, precisely in accordance with the Protocol. It is intended to give the patentee the full extent, but not more than the full extent, of the monopoly which a reasonable person skilled in the art, reading the claims in context, would think he was intending to claim.”

10. I have considered the independent claims carefully and in my view there is nothing in the claims that a skilled person would misunderstand when reading them in context and they would be clear to such a person. In other words, the claims can be read literally.
11. The critical characterizing feature of the apparatus and method claims is that of a mechanism being able to support a flat screen display whilst allowing the screen to be moved between two positions in conjunction with the normal operation of the fire to produce heat whilst not detrimentally affecting the display when it is in either position. Claim 1 explicitly refers to the two positions as being one position in which the screen is situated entirely within the fire surround and hidden from view while in the other position the screen is raised above the fireplace into an operating position

The dependent claims

12. The requester argues that many if not all of the dependent claims are also infringed. Again, I consider that these claims are generally clear and many refer to features which are common to fireplaces and their surrounds. I shall now summarize the content of the dependent claims claims.
13. Claims 2 and 3 are directly dependent upon claim 1 and indicate that the fireplace comprises a hearth and a mantel shelf and an electric or gas fireplace respectively. Claim 4 further specifies that the electric or gas fire of claim 3 has a flame effect arrangement.
14. Claim 5 is also directly dependent upon claim 1 and indicates that the mantel shelf is displaceable to allow the otherwise hidden flat screen to be raised for viewing.
15. Claims 6 and 7 are dependent upon claim 5 and indicate that part, or all, of the mantel shelf is attached to the upper edge of the screen or the screen raising mechanism. Alternatively, claim 8 says that part, or all, of the mantel is hinged to the remainder of the fireplace surround whilst

alternatively claim 9 allows for part, or all, of the mantel to be slid out of the way or withdrawn into the fire surround. Claim 9 is said to be dependent upon claim 6 but it appears to me that the intention may be to refer to claim 5 as that would make more sense.

16. Claim 10 is dependent upon claim 3 and specifies the use of gas ducting arrangements which do not interfere with the raising and lowering mechanism whilst claim 11 specifies a variety of different conventional raising and lowering mechanisms.

The requester's case

17. The requester makes it clear that the alleged infringer has not been granted a licence to exploit the patent and that it sent a copy of the patent to a representative of Popuptvs on 7 March 2006. The requester has presented three exhibits which it says are extracts from Popuptvs' website and which are apparently dated 18 June 2007.
18. I note that exhibit 3 relates to previous correspondence between the requester, Popuptvs and the Office about an alleged contravention of section 111 due to an unauthorized claim that a patent has been applied for. However, that issue cannot be the subject of this opinion.
19. In summary the requester argues that between them, the exhibits indicate that claims 1-12 are infringed by Popuptvs' fireplace product because these exhibits show products which have the features of the claims and are manufactured and offered for sale within the UK by Popuptvs. Therefore, the provision of these fireplace products is contrary to section 60(1).
20. The requester also referred me to Popuptvs' website address, presumably as part of its evidence. I have briefly viewed this website and I have found that there are sections relating to the "Elgin fireplace" and to "some examples of TV lift projects using the Popuptv Co's products". These sections appear to disclose most if not all the information presented in the requester's exhibits. The latter section also shows the use of television lifting equipment in a variety of furniture.
21. The requester also asserts that Popuptvs are separately providing the television lifting devices themselves and in doing so this amounts to contributory infringement under section 60(2) or alternatively under section 60(3). However, there is little evidence or argument to back up this assertion.

Assessment of the information provided

22. In the absence of any observations from Popuptvs, I must take an impartial view of the alleged infringement by taking account of the law, the patent's claims as correctly construed and my assessment of the material that has been put before me. I also appreciate that the mere fact that observations have not been made is not necessarily indicative of anything.
23. Exhibit 1 shows photographs of several otherwise conventional fire surround arrangements, each having a hearth and a mantel shelf. I cannot determine from the photographs if the fireplace is of the gas or electric type and I also cannot determine whether it has a flame effect feature.
24. Indeed, the photographs show a variety of different fireplace surround designs incorporating flat screen displays which are obviously operating. Some are shown in what I would describe as the half way down position. It also seems that the fire is operating when the screen is in the lowered or hidden position. In one photograph there is a sign above the fire which carries the price of the product and the company name of the alleged infringer.
25. In at least one of the photographs, there is on the top edge of the screen what looks like part of the mantel shelf because it matches the material comprising the remainder of the mantel shelf. Another appears to illustrate the lowered position where the part of the mantel attached to the screen is flush with the remainder of mantel shelf. Exhibit 2 shows further examples of similar fireplaces and also appears to show the fire functioning with the screen in all positions.
26. Exhibit 2 also includes an advertisement of the "Elgin fireplace", taken from Popuptvs' website. This product is clearly offered for sale at a price of "£2250 with free UK delivery" and the advertisement goes on to explain that the fire is an electric fire. Based on this disclosure and what seems to be the appearance of flames in the previously mentioned photographs, it seems the fire does incorporate a flame effect arrangement.
27. The requester says it believes the product sold by Popuptvs is operable such that the heat from the fireplace does not detrimentally affect the screen in either position and although there is no hard evidence to support this view, I think it is unlikely that they would offer a fireplace for mounting a very expensive flat screen display unless it was arranged accordingly. Of course there are many ways in which Popuptvs product might prevent the screen being damaged in the hidden position, for

example, an interlock arrangement might prevent the fire from being used when the screen is hidden within the fire surround. Of course, such an arrangement would not fall within the claims. However, the photographic evidence does suggest that the fire is usable in both the viewing and hidden positions, as claimed.

28. I have considered the arguments together with the supporting evidence and it is my opinion that on the balance of probabilities, the exhibits show a fire surround arrangement in which a flat screen display is shown in a first viewing position above a fire surround and which is capable of being moved via a supporting mechanism to a second position where it is hidden within the fire surround. Accordingly, if Popuptvs' fire surround allows the fire to be used without detrimentally affecting the screen when it is in either a viewing position or a hidden position within the fire surround then it would fall within the scope of claims 1 and 12 and dependent claims 2-6.
29. Exhibits 1 and 2 do not appear to show that all, or part, of the mantel is attached to a raising mechanism as in claim 7 because a part of it appears to be attached to the upper edge of the screen. Also, the exhibits do not show the alternative hinged and slide mountings of mantel which are features of claims 8 and 9. Accordingly, those claims do not appear to be infringed.
30. On balance, I have not been provided with enough evidence to determine whether claim 10 has been infringed and the fact that exhibit 2 refers to an electric fire suggests that it is not.
31. Also, I am not clear how the drive mechanism works so I will say claim 11 is not infringed. However, if the apparatus shown in the exhibits does contain the drive mechanisms of claim 11, as they well might, then those claims would be infringed. It is a matter of evidence.

Specified acts

32. Once a non-binding opinion is given as to whether a product or process specified by a requester falls within the claims, one then has to go on to determine whether the evidence shows that the alleged infringer has actually performed an act within the meaning of section 60(1).
33. Based on the information given to me, admittedly without the benefit of an alternative account from the alleged infringer, it seems to follow on that an actual infringement of the patent has taken place. It appears that Popuptvs have offered a product for sale within the UK without the patentee's permission as indicated in exhibits 1 and 2. The product falls

within the patent's claims as specified above. Therefore, it is my opinion that those acts do fall within the meaning of section 60(1) of the Act.

Contributory infringement

34. As indicated earlier, very little argument has been made by the requester with regard to the alleged contributory infringement under section 60, subsections 2 and 3. For that reason alone I think it is very difficult for me to come to an opinion which is adverse to the alleged infringer.
35. Based on what the requester tells me, Popuptvs appear to separately offer television lifting equipment of the type which can be used in the patentee's invention. However, there might be more to the inventive concept than merely the lifting of the screen from within the fire surround. The invention also requires that heat produced by the fire does not detrimentally affect the flat screen display in either position. Therefore, it is not clear to me whether I can or should consider the lifting equipment alone to be an essential element of the invention.
36. As I understand it, the lifting equipment may also be used within other types of furniture in which a flat screen may be hidden and then lifted into a viewing position. Therefore, it is suitable for many purposes and so merely providing the lifting equipment might not be enough to satisfy subsection 2, which requires that the infringer "*supplies or offers to supplyany of the means, relating to an essential element of the invention, for putting the invention into effect when he knows, or it is obvious to a reasonable person in the circumstances, that those means are suitable for putting, and are intended to put, the invention into effect in the United Kingdom.*"
37. Neither has the requester provided an argument and evidence as to whether the lifting equipment may or may not be described as "*staple commercial products*". If it was, this fact might provide a defence under subsection 3. Indeed, the requester says that Mr Barbour imports the lifting equipment. Does this mean that it might be a staple commercial product? If so, the offer of such a staple commercial products would not count as a contributory infringement under subsection 3 unless it was considered to be an inducement to infringe.
38. As I said previously, the television lifting equipment can be used in a variety of applications and because of this it may be difficult to conclude, without evidence, that "*...the offer is made for the purpose of inducing the person supplied or, as the case may be, the person to whom the offer is made to do an act which constitutes an infringement of the patent by virtue of subsection (1) above.*"

39. Given the lack of argument and evidence, it is my opinion that on the balance of probabilities, the supply of television lifting equipment by Popuptvs does not qualify as a contributory infringement of the invention under section 60, subsections (2) and (3).

Opinion

40. I conclude that the fire surround arrangement offered for sale by Popuptvs, as described in the request and shown in exhibits 1 and 2, infringes claims 1-6 and 12 of patent number GB2412061 on the condition that the fireplace is operable irrespective of position of the flat screen display such that heat produced by the fire does not detrimentally affect the flat screen display. I also conclude that the television lifting equipment offered for sale by Popuptvs does not qualify as a contributory infringement.

Application for review

41. Under section 74B and rule 77H, the proprietor may, within three months of the date of issue of this opinion, apply to the comptroller for a review of the opinion.
42. Under rule 77H(5), such an application for review may be made only on the grounds that, by reason of its interpretation of the specification of the patent, the opinion wrongly concluded that a particular act did not or would not constitute an infringement of the patent.

NOTE

This opinion is not based on the outcome of fully litigated proceedings. Rather, it is based on whatever material the persons requesting the opinion and filing observations have chosen to put before the Patent Office.

Eamonn Quirk
Examiner