

OPINION UNDER SECTION 74A

Patent	EP(UK) 1078038
Proprietor(s)	Coors European Properties GMBH
Exclusive Licensee	
Requester	Mrs Kathryn Naylor, on 6 May 2008
Observer(s)	
Date Opinion issued	5 August 2008

The request

- 1 The comptroller has been requested by Mrs Kathryn Naylor (“the requester”) to issue an opinion as to whether claims 1-3 and 5 of EP (UK) 1 078 038 (“the patent”) are valid over the following document:

JP 02-171570 (Kiyota Iwaki) (JP’570)

- 2 The requesters submissions on the validity of the patent related only to the novelty of claims 1-3 and 5 in light of JP’570. The requester provided a certified translation of the unexamined Japanese application, JP’570.

Observations

- 3 Observations in response to the request were received from the patent holder, Coors Worldwide, Inc (“the proprietor”) on 13 June 2008. These maintain that the invention is new, and point out that the requester has requested an opinion on novelty only and not obviousness.

Observations in reply

- 4 Observations in reply were received from the requester on 26 Jun 2008 that countered the challenges of the proprietor.
- 5 On the question whether the opinion should address inventive step in addition to novelty, the requester observes that should the UK-IPO be minded to consider this, the requester considers this to be appropriate. I am not minded

to broaden the scope of the opinion since the request as filed addresses novelty only and makes no submission in accordance with rule 93(1)(b) of the Patents Rules 2007 on the question of inventive step. Therefore this opinion only addresses the novelty of the claims in question.

The patent

- 6 International patent application number PCT/GB99/01551 was filed on 14 May 1999, and was granted by the EPO on 23 July 2003, with the title "Alcoholic draught beverage".
- 7 The patent relates to a draught dispensed alcoholic beverage, and methods of presenting, and in particular cooling, the beverage by the formation of ice in the beverage after dispensing. The beverage is delivered from a dispensing unit, which comprises a series of heat exchangers that cool the pressurised beverage such that it is below the freezing point of water at the ambient atmospheric pressure. When the beverage is then delivered, it is exposed to the ambient temperature and atmospheric pressure and ice begins to form as the temperature of the beverage increases. The ice keeps the beverage cooler for longer, and as it is formed by water from within the beverage, it does not dilute the beverage when it melts in the way that ice added to be beverage would.

The claims

- 8 Independent claims 1, 2, 3 and 5 read as follows:
 1. *A method of keeping a draught-dispensed alcoholic beverage (50; 70; 170; 248) comprising a water content, an alcohol content, and a dissolved gas content cool in an open-topped drinking vessel (52; 72; 172; 246), said method comprising forming ice (54; 88; 188; 262) in the draught-dispensed beverage after it has been dispensed into the open-topped drinking vessel, said ice having a cooling effect on the beverage, and said ice being formed in the beverage in the drinking vessel after dispense of the beverage into said drinking vessel from water of said water content.*
 2. *An open-topped drinking vessel (52; 72; 172; 246) of a draught-dispensed alcoholic beverage (50; 70; 170; 248), **characterised in that** the beverage comprises an alcohol content, a water content and a dissolved gas content, the draught-dispensed beverage in said drinking vessel having an ice formation (54; 88; 188; 262) made of many ice crystals, the ice formation having been produced by ice forming in the beverage when said beverage is in said drinking vessel after said beverage was dispensed into said drinking vessel.*

3. *An alcoholic beverage (50; 70; 170; 248) available on draught and comprising a water content, an alcohol content, and a dissolved gas content, **characterized in that** prior to being dispensed the draught beverage has a temperature below the freezing point of water at ambient atmospheric pressure, and is arranged to issue upon dispense from a draught-dispense outlet (14; 220) into a container (52; 72; 172; 246) open to ambient atmospheric pressure in a manner such that the aforesaid gas bubbles (86; 120; 122; 252a; 252b) out of the beverage and at least a portion of said water content becomes ice (54; 88; 188; 262)*

5. *A method of serving a draught alcoholic beverage (50; 70; 170; 248) which comprises a water content and a dissolved gas content, said method being **characterized by** comprising issuing the draught beverage from an outlet (14; 220) into an open topped vessel (52; 72; 172; 246), prior to said issuing, storing or handling the beverage in a manner which impedes loss of aforesaid dissolved gas from the beverage and cooling said beverage to a temperature below the freezing point of water at said ambient atmospheric pressure, and in said aforesaid gas bubbles (86; 120; 122; 252A; 252B) out of the beverage and at least a portion of said water becomes ice (54; 88; 188; 262).*

9 The specification comprises a number of figures that aid with the understanding of the invention. The two most useful figures, which demonstrate the cooling and dispensing system, are figures 1 and 20.

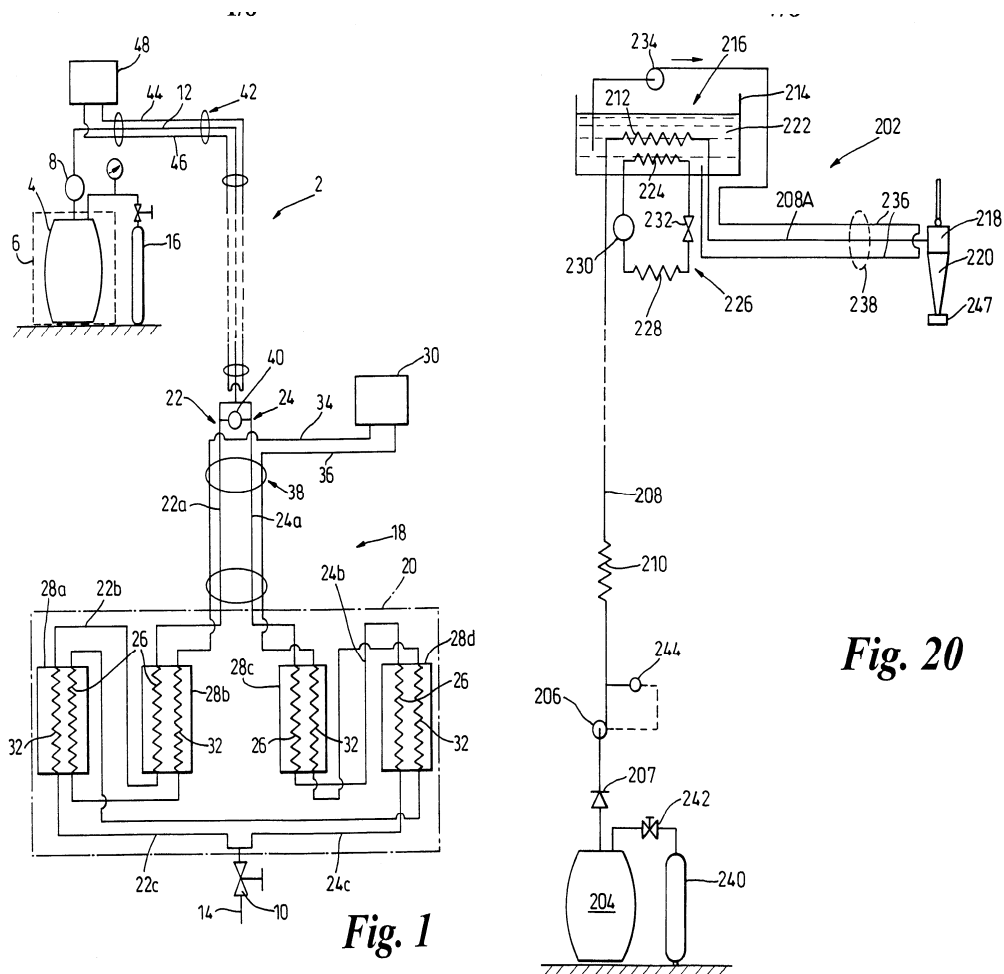


Fig. 20

10 In the observations, the patentee referred to the *Catnic*¹ approach of Lord Diplock and the *Improver*² approach of Lord Hoffman as tests for the purposive construction of the claims. In my assessment of the novelty of the claims I will make a purposive construction of the claims following the judgment of Lord Hoffman in *Kirin Amgen*³. I will therefore construe the claims in the way that I consider a person skilled in the art would have understood the patentee to mean by the language of the claim.

Discussion

11 In considering the novelty of the claims in light of JP'570, I have taken into account the judgment of the House of Lords in *Smithkline Beecham PLC's*

¹ *Catnic Components Ltd v Hill & Smith Ltd* [1982] RPC 183
² *Improver Corp v Remington Consumer Products Ltd* [1989] RPC 69
³ *Kirin Amgen v Hoechst Marion Roussel Ltd* [2005] RPC 9

*(Paratoxetine Methanesulfonate) Patent*⁴, where Lord Hoffman stated that anticipation requires a prior disclosure that necessarily infringes the patent when performed. In this judgment it was also held that the prior disclosure must be construed as it would have been by the skilled person at the date of the disclosure and not in light of the subsequent patent.

Construction of the claims

- 12 Before I begin my construction of the claims, I will first identify the person skilled in the art, as this is a necessary requirement for purposive construction. The patent relates to a method of cooling an alcoholic beverage, which is served in an open topped vessel. In my opinion, a person skilled in the art in this case would simply be a bartender, or someone associated with the drinks industry, and in particular with the beer industry. I note that neither the requester or the proprietor has provided any suggestion as to who the person skilled in the art might be.
- 13 The requester and the proprietor have construed the claims differently, and to a significant extent these differences hinge on the “draught-dispensed” feature of the beverage of claims 1 and 2. I agree that the interpretation of and the weight given to this feature is of importance when determining novelty in light of JP’570. Consequently, before making an assessment of the novelty of the claims, I will consider the limitation, if any, that the draught-dispensed feature provides.
- 14 The requester argues that draught-dispensing is a process step that occurs before the cooling method of the claim and therefore does not impart any technical characteristics to the claimed method. In the opinion of the requester, it is technically irrelevant whether the beverage has been draught-dispensed or otherwise dispensed, such as by pouring from a can or bottle, as it has no effect on the method of cooling the beverage in the drinking vessel. The proprietor on the other hand argues that “draught-dispensed” is a limiting feature, and was introduced into the claims during prosecution at the European Patent Office (EPO) in order to distinguish the claims from the prior art. The proprietor also considered that the public reading the claims would consider “draught-dispensed” to be a limitation.
- 15 I agree with the requester that the draught-dispensing is a process step, and that the draught-dispensed beverage cannot be rendered novel by this step. Claim 1 defines a method of keeping a draught-dispensed alcoholic beverage cool. The beverage is in an open-topped drinking vessel and will have the same composition as the equivalent alcoholic beverage not dispensed from the draught, such as from a bottle or a can. The only way of distinguishing an alcoholic beverage dispensed from the draught from the same alcoholic beverage dispensed from a bottle or can is by its method of dispensing. As

⁴ *Smithkline Beecham PLC’s (Paratoxetine Methanesulfonate) Patent* [2006] RPC 10

pointed out by the requester in the observations in reply it was clearly stated in *Kirin Amgen* that novelty cannot be conferred on a known product simply by its method of manufacture. In my opinion this reasoning also applies to claim 1 of the patent, where you have a known product defined in terms of its method of delivery. The product itself is identical to the same product delivered by another means.

- 16 I have noted that the addition of the “draught-dispensed” feature to the alcoholic beverage of the claims during prosecution at the EPO was intended to distinguish the claims from the prior art. The proprietor argued that it was the intention of the drafter to exclude beverages that were not draught dispensed, and the skilled man would understand this intention. In my opinion this argument covers two separate points. The first is the legal point on what effect the “draught-dispensed” feature has on the scope of the claims, which I have discussed above. The second is how the skilled man would interpret the claims using purposive construction. In other words, what would the skilled man understand by the alcoholic beverage of claims 1 and 2; would the beverage dispensed from a draught differ from a beverage dispensed from a bottle or a can? The skilled man would understand the claim to be to a method of keeping an alcoholic beverage cool in a drinking vessel by the formation of ice in the vessel. He would appreciate that in terms of composition, the alcoholic beverage in the drinking vessel would be the same no matter how it was served.
- 17 Consequently, claim 1 can be construed as a method of keeping an alcoholic beverage cool in an open-topped drinking vessel by the formation of ice in the vessel after the beverage has been dispensed into the drinking vessel.
- 18 Claim 2 defines an open-topped drinking vessel of a draught-dispensed alcoholic beverage. Following my reasoning for claim 1, this claim would also be construed as an open-topped drinking vessel of an alcoholic beverage *per se*. The beverage is also characterised by an ice formation made of many ice crystals. The requester argues that even a single sheet of ice is composed of many ice crystals, whereas the proprietor considers that a sheet of ice means a “single, rigid, planar layer of ice being a unitary member”. In my opinion, the skilled man when construing the claim, and particularly in light of the description, would understand that an ice formation made of many crystals as defined in claim 2 would in fact be a slush of ice and not a single sheet of ice.
- 19 Therefore, claim 2 can be construed as an open topped drinking vessel of an alcoholic beverage, wherein the beverage in said vessel has a slush of ice forming in the beverage upon dispensing.
- 20 Claim 3 defines an alcoholic beverage available on draught wherein the beverage is dispensed or issued from a draught-dispense outlet. The beverage is further characterised by features before it is issued from a

draught-dispense outlet. The requester argues that the claim relates to a beverage *per se*, and its means of dispense is irrelevant as it is a process step which cannot impart novelty to a claim. The requester on the other hand argues that the beverage is in a draught-dispense system, and so has not yet been dispensed.

- 21 I agree with the proprietor that a skilled person when construing claim 3 would understand the claim to define an alcoholic beverage in the draught-dispense system, particularly as the beverage is characterised by its temperature when in the draught-dispense system. Although the alcoholic beverage when dispensed into a drinking vessel would be the same as an alcoholic beverage dispensed from a can or bottle, it is necessarily part of the draught-dispense system of claim 3, and would be construed as an alcoholic beverage in a draught-dispense system with a temperature below the freezing point of water.
- 22 Claim 5 defines a method of serving a draught alcoholic beverage, comprising issuing the beverage from an outlet. The requester argues that the term “draught” implies no technical characteristics of the beverage *per se*, and that it has no effect on the method of the claim. The proprietor argues that the method of claim 5 explicitly includes the step of issuing the draught beverage from an outlet into an open topped vessel.
- 23 A person skilled in the art, when construing claim 5, would understand a draught alcoholic beverage to be an alcoholic beverage stored in a keg or a cask; the draught beverage is also described as such in paragraph [0077] of the description. He would also understand that such a beverage would be issued from a tap. Consequently, in my opinion, a person skilled in the art interpreting claim 5 in light of the description, and particularly the figures, would understand that the claim is intended to relate to beverages served from a draught- dispensing outlet. Therefore claim 5 can be construed as a method of serving an alcoholic beverage from a keg or cask by issuing it from a draught dispense outlet.

Novelty

- 24 JP'570 discloses a method of cooling a carbonated beverage, such as beer or cola. The beverage is stored in a high pressure container and the internal pressure is raised by the injection of carbon dioxide liquid or gas. The container is then placed in a freezer compartment and cooled to below 0°C; due to the increased internal pressure the beverage within the container does not freeze. When the beverage is dispensed at ambient atmospheric pressure and temperature ice forms at the surface of the beverage. A skilled person reading JP'570 would interpret the method of the invention as a method of keeping a canned or bottled beverage cool. As the beverage must necessarily be placed into a freezer compartment and be poured into a glass the method will only apply to beverages stored in and dispensed from small, transportable

containers such as bottles or cans. Such a method would not been seen by the skilled person to extend to draught beverages due to the nature of storage and dispensing of these beverages.

- 25 The beverage described in the patent is a draught-dispensed alcoholic beverage, and the means for cooling the beverage are clearly related to its method of serving as the beverage passes through a series of cooling compartments on its journey from its storage keg to the dispense outlet. Whilst the principle of cooling the beverages in the patent and JP'570 is the same (i.e. the formation of ice crystals in the beverage when the cooled and pressurised beverage comes into contact with ambient temperatures and atmospheric pressures), the methods of cooling the beverages are distinct, and are particular to the type of beverage claimed.
- 26 Claim 1, when properly construed, defines a method of keeping an alcoholic beverage cool in an open-topped drinking vessel comprising forming ice in the beverage after dispensing. JP'570 defines a method of keeping a beverage, including alcoholic beverages, cool in an open-topped drinking vessel by the formation of ice in the beverage after dispensing. As reasoned above, draught-dispensing feature of claim 1 is a process step that cannot impart novelty to a claim for a known product, and therefore this process step cannot distinguish the beverage of the patent from the beverage of JP'570. Consequently, claim 1 is not novel in light of the disclosure of JP'570.
- 27 Claim 2, when properly construed, defines an open topped drinking vessel of an alcoholic beverage, characterised in that the beverage has an ice formation made of many ice crystals, i.e. a slush of ice, formed in the beverage after dispensing. JP'570 discloses an open topped drinking vessel of an alcoholic beverage, wherein a sheet of ice forms on the surface of the beverage after dispensing. In my opinion, claim 2 of the patent is distinguished from JP'570 as the ice formed in the patent is a slush and does not form a uniform sheet of ice, as disclosed in JP'570. The two are distinct, and using the infringement test, the disclosure of JP'570 would not infringe claim 2 of the patent. Therefore claim 2 is novel in light of JP'570.
- 28 Claim 3 defines an alcoholic beverage that is issued from a draught-dispense outlet. When properly construed, this claim relates to an alcoholic beverage in the draught-dispense system. JP'570 relates to a beverage, which may be alcoholic, that is within a high-pressure container, exemplified as a can. It does not disclose a draught-dispensing system and therefore claim 3 is novel in light of JP'570.
- 29 Claim 5 defines a method of serving a draught alcoholic beverage comprising issuing the beverage from an outlet into an open topped vessel. It is construed as relating to an alcoholic beverage from a keg or a cask. JP'570 discloses a beverage in a can only and therefore claim 5 is novel.

Opinion

- 30 I conclude that claim 1 is not novel over the disclosure of JP'570 submitted by the requester. I also conclude that claims 2, 3 and 5 are novel over the disclosure of JP'570.

Application for review

- 31 Under section 74B and rule 98, the proprietor may, within three months of the date of issue of this opinion, apply to the comptroller for a review of the opinion.

Rowena Dinham
Examiner