

OPINION UNDER SECTION 74A

Patent	GB 2435687
Proprietor(s)	Francis O'Hare
Exclusive Licensee	
Requester	Francis O'Hare
Observer(s)	Australian Bodycare UK Ltd
Date Opinion issued	11 July 2016

The request

1. The comptroller has been requested by Mr Francis O'Hare ("the Requester") to issue an opinion as to whether actions of Australian Bodycare UK Ltd regarding their Hy-Wax Tube Heater ("the Product") would constitute an infringement of patent GB2435687 ("the Patent") under section 60(1) of the Patents Act 1977.
2. The request was received from the Requester, who is also the patentee and proprietor of the Patent, on 14 April 2016.

Observations & Observations in reply

3. Observations were received from Mr Lamacraft, Managing Director of Australian Bodycare UK Ltd ("the Observer"), on 11 May 2016. No observations from the Requester were received in reply.

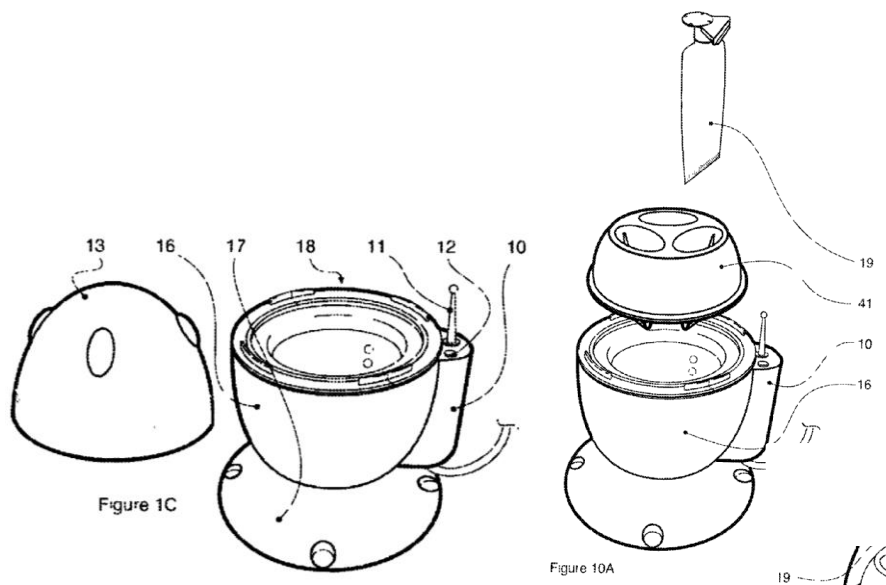
Background to the request

4. The question of whether actions related to the Product would constitute an infringement of the Patent was the subject of previous opinion 03/12 issued on 21 June 2012. Here, the examiner concluded that in his view the supply or sale of the Product did not infringe the Patent. The Requester, as proprietor, exercised his right to apply for a review of the opinion. The review was issued on 11 November 2013 as BL O/449/13. The Hearing Officer found that the examiner made an error construing the phrase "comprising a plate" and failed to construe an important word ("adaptor") in claim 1 of the Patent. He therefore considered that the examiner's finding on infringement was wrong and that the opinion should be set aside. As this was a review of an opinion and not a separate finding on the issue, the Hearing Officer did

not go on to decide whether actions related to the Product did or did not infringe the Patent. The Requester has filed this new request to obtain a further opinion on the matter.

The Patent

5. The Patent entitled 'Heater and warmer for depilatory wax' was filed on 02 March 2007, granted on 18 May 2011 and is still in force.
6. The Patent relates to a heater for warming wax to be used for hair removal. Warming the wax ensures it is easier to apply. The invention allows a conventional so-called 'wax pot' that is used to heat wax in bulk form to be converted to one that allows more convenient tubes of wax to be heated. The wax pot comprises a shell 16, an inner heating module 18, base 17 and removable lid 13. This forms a hollow body for placing the wax to be warmed. (See Fig. 1C reproduced below.) In order to deal with wax tubes, the tubes are held vertically in a removable structure which has a number of apertures shaped to individually receive the tubes. The Patent describes different types of structure to achieve this purpose, for example item 41 in Fig. 10A reproduced below.



7. The Patent has 18 claims with a single independent claim, claim 1, three omnibus claims and 14 dependent claims. Claim 1 reads as follows:

1.A wax tube heating device comprising:
a. a hollow body with an integral heating element;
b. an adaptor removably mounted to the body and comprising a plate with substantially oval apertures each of which is sized and dimensioned to receive and support a respective wax tube in a spaced relationship from other wax tubes received in adjacent apertures; and
c. one or more wax tubes each having a profile that is tapered from circular to substantially oval to a flattened end;

wherein each of the one or more wax tubes is received in one of the apertures such that the aperture cooperates with an intermediate substantially oval portion of the wax tube, thereby to support the wax tube in the body.

Infringement-the law

8. Section 60 Patents Act 1977 governs what constitutes infringement of a patent; the relevant part of section 60(1) reads as follows:

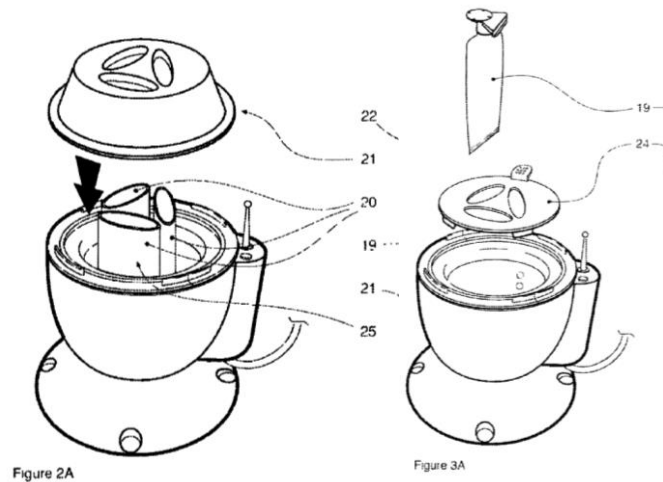
Subject to the provision of this section, a person infringes a patent for an invention if, but only if, while the patent is in force, he does any of the following things in the United Kingdom in relation to the invention without the consent of the proprietor of the patent, that is to say -
(a) where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

9. In order to decide whether there is any infringement of claim 1 of the Patent, I shall follow the usual approach in opinions of deciding whether or not the Product falls within the scope of claim 1. In other words I will determine whether or not the Product has all the features defined in claim 1 of the Patent. If I find infringement of claim 1, I will consider further claims 10-18 as requested by the Requester.

Claim construction

10. Before I can do this I need to construe claim 1 of the Patent following the well known authority on claim construction which is *Kirin-Amgen and others v Hoechst Marion Roussel Limited and others* [2005] RPC 9. This requires that I put a purposive construction on the claim, interpret it in the light of the description and drawings as instructed by section 125(1) of the Act and take account of the Protocol to Article 69 of the EPC. Simply put, I must decide what a person skilled in the art would have understood the patentee to have used the language of the claim to mean.
11. Firstly, I consider the person skilled in the art to be a person, or a team of persons, familiar with the design and manufacture of heaters for heating wax used for hair removal.
12. Most of claim 1 is straightforward to construe. It seems, and this is agreed by both the Requester, and the Observer in previous submissions, that the only part that requires construction is that which reads *“an adaptor removably mounted to the body and comprising a plate with substantially oval apertures”*.
13. I will begin with the word ‘plate’. In the description of the Patent in a first embodiment the “location plate” 21 has a cap-like structure with an upper planar surface (Fig. 2A, reproduced below); in a second embodiment the “location plate” 24 is generally flat

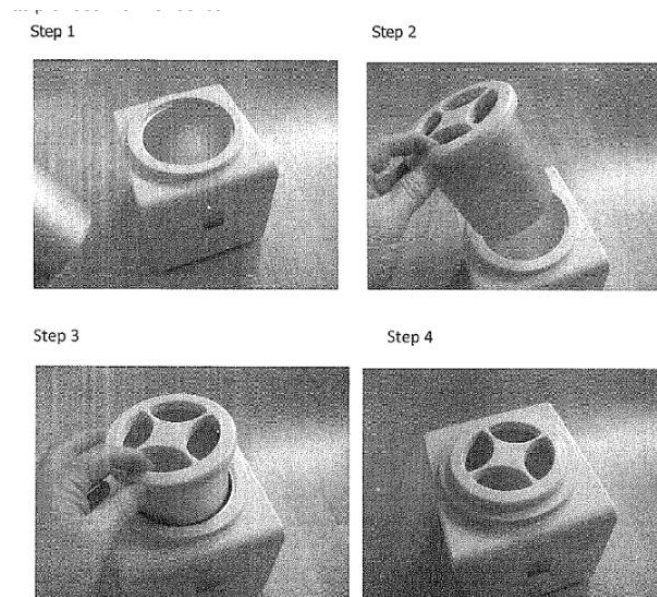
(Fig. 3A, reproduced below); and in a third embodiment the “spacer/locator plate” 41 again has a cap-like structure with an upper planar surface (Fig. 10A, see above). In each, the plate encompasses the oval apertures for locating the tubes of wax in a vertical orientation. In opinion 03/12 the examiner therefore construed the word “plate” broadly to cover the different forms presented in the embodiments. This approach was deemed as correct by the Hearing Officer in the later review and will be adopted here.



14. More difficult to construe is the term ‘adaptor’. As discussed above the Hearing Officer noted that the examiner failed to construe this term. The Hearing Officer did not consider it necessary to construe this term himself. I will therefore construe it here.
15. The adaptor, also referred to as a “locator” or “insert”, is considered in the description on page 4 lines 2-4 to allow “conversion or adaptation of diverse or generic format wax pots to support wax tubes – whilst preserving facility for heat exchange”. Further on page 2 lines 16-17 we are told that the adaptor should have “some means to mutually isolate, but co-operatively support, multiple tubes or cartridges”. The description has several embodiments with different types of adaptor. In the embodiment of Fig. 2A the adaptor includes location plate 21, metal tubes 20 and a base support element 23. In Fig. 3A the adaptor comprises only location plate 24. Similarly in Fig. 10A the adaptor comprises a single spacer/locator plate 41.
16. From this I think the relevant skilled person would understand the adaptor to be a removable structure which allows a conventional bulk wax heater to be converted to one that allows multiple tubes of wax to be heated. The structure both supports the wax tubes individually in a spaced-apart fashion and allows heat to be transferred from the heating element to the tubes. The structure may consist of more than one element.
17. Finally, as the Hearing Officer confirmed the expression ‘adaptor ... comprising a plate’ should be construed as meaning that the adaptor *includes* a plate i.e. the adaptor may or may not include other elements as well.
18. I will now decide whether the Product exhibits all the features of claim 1.

Comparison of the Product with claim 1

19. The Product (see illustrations below) is a wax pot with a hollow body having an integral heating element. Bulk wax may be inserted through a large circular aperture. The heater also includes a circular rubber disk with four substantially oval-shaped apertures of suitable size to receive and support four tubes of wax, spaced apart and in a vertical orientation. The disk is removably attached to a metal cup. The cup with disk attached is inserted through the circular aperture of the wax pot. In this way the wax pot can be adapted to heat tubes of wax rather than bulk wax. The cup allows the wax pot to be easily cleaned particularly if one of the tubes of wax were to leak.



20. There is no dispute and it is clear to see that the Product exhibits all the features of parts a and c of claim 1. Similarly, regarding part b, the only part I need to consider is whether the Product exhibits “*an adaptor removably mounted to the body and comprising a plate with substantially oval apertures*”.
21. Using the construction derived above, the Product in my view has a two-part adaptor including the metal cup and the circular rubber disk. These two elements allow a conventional bulk wax heater to be converted to one that allows multiple tubes of wax to be heated. They clearly support the wax tubes individually and in a spaced-apart fashion. The cup is made of metal and will allow heat to be transferred from the heating element to the tubes.
22. We see that the adaptor in the form of cup and disk can be mounted to the body and then subsequently removed. Therefore the adaptor is *removably mounted to the body* as required by the claim.
23. The adaptor comprises, i.e. includes, a plate in the form of the rubber disk. The disk has substantially oval apertures for receiving the tubes of wax.
24. As discussed in the review of the earlier opinion, the Observer’s representative argues that the adaptor of the Product cannot include the metal cup. In her view, the adaptor therefore only comprises the disk or plate. To support this she points out that

in each of the embodiments of the Patent the adaptor is used for adapting a pot (i.e. the bulk wax pot) but does not comprise another pot (such as the cup of the Product). She concedes that in the embodiment of Fig. 2A (reproduced above) the adaptor includes additional metal tubes 20. However, she asserts that the function of these tubes is to improve heat exchange. She argues that the cup of the Product has a completely different function which is to facilitate cleaning. In the Product the disk or plate is placed on the cup, not directly onto the body of the heater, and therefore she concludes that the Product does not meet the terms of claim 1.

25. Although I appreciate these arguments, in response I consider that it is not significant, in my mind, that there is not a similar cup in the embodiments of the invention. From the diverse structures in the Figures, it is clear that different arrangements are envisaged to lie within the scope of the claims including as noted an adaptor having additional metal tubes (20, Fig. 2A). Further because the cup is made of metal it will surely allow heat to be transferred to the wax tubes. Finally, although the cup has a function to ease cleaning it is still assisting in converting a bulk wax heater into one that is suitable for wax tubes. I note that the need to clean the wax pot may arise because the tubes can leak during warming. Therefore the cup seems to be a key element in this design to enable conversion to a heater for wax tubes. Therefore in my view the metal cup along with the rubber disc meets the terms of the 'adaptor' as construed above.
26. Therefore in my view the Product exhibits all the features of this key part and therefore all the features of claim 1.
27. I will now consider briefly claims 10-18. Using similar arguments to those presented above, in my view the Product also meets the terms of claim 17 (a method of heating a wax cartridge or tube) and claim 18 (a kit of parts for assembly into a wax tube heating device).
28. The adaptor of the Product is configured to be removably mounted to the body of the heating device. Presumably the adaptor (particularly the rubber disk) along with the body of the device will serve to retain heat at least to some extent within the body. Therefore the Product appears to meet the terms of further claims 10-13.
29. As is conventional practice, whilst other claims are present, I will ignore the omnibus claims 14-16.

Conclusion

30. It is therefore my opinion that the Product falls within the scope of claims 1, 10-13, 17 and 18 of the Patent. Thus any of the actions specified in section 60(1) in respect of the Product, such as selling, offering to sell, importing or manufacturing the Product, will in my opinion constitute an infringement of these claims of the Patent.

Susan Dewar
Examiner

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 Office.