

OPINION UNDER SECTION 74A

Patent	GB2327340 B
Proprietor(s)	Synlatex Limited
Exclusive Licensee	
Requester	Louise Ferguson
Observer(s)	
Date Opinion issued	09 February 2015

The request

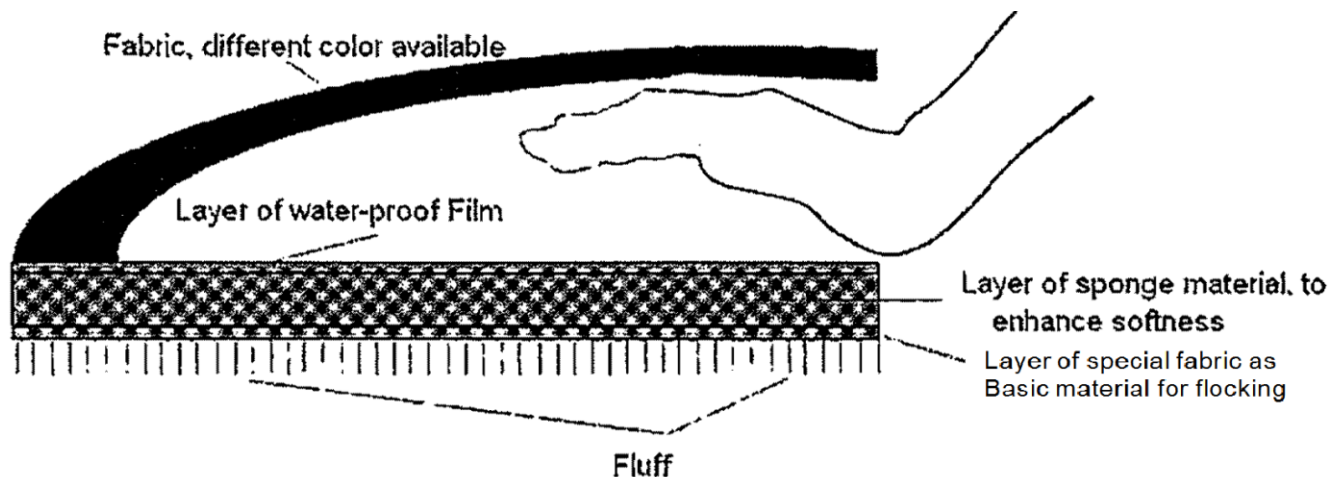
1. The comptroller has been requested to issue an opinion as to whether a particular tanning mitt (the Product) would infringe GB 2327340 B (the Patent). The Patent was filed on 15th July 1998, has a priority date of 22nd July 1997, was granted on 30 May 2001 and remains in force.

Observations

2. Observations on behalf of Synlatex Limited were received from Marks & Clerk LLP on 26th November 2014. No observations in reply were filed by the requester.

The Product

3. The Product is a tanning mitt as depicted below. The Product is described as being for self-tanning and formed in the following manner: “flocking onto base fabric firstly, and then laminate the velvet fabric with sponge.”



4. It is clear that the main laminated part of the mitt comprises the following essential features:
 - a. Layer of waterproof film
 - b. Sponge-like material
and further comprising a combination of the following
 - c. Fabric layer
 - d. Fibres extending away from the fabric layer
5. It is strongly implied that a combined layer (c+d) is produced by a flocking process, in which layer c is a base layer to which flock fibres are applied. The combined layer is then laminated together with layers a & b. Flocking typically involves the use of adhesive, so it is deduced that the Product may comprise at least one adhesive layer in addition to those listed above. I consider that a flocked construction comprising four layers, plus any adhesive layers, for the main laminated part, is the most reasonable interpretation of that part of the Product's description.
6. However, ambiguity has been caused by use of the word "velvet" in the Product's description. Velvet is understood in the art to be a woven fabric which includes woven fibres which extend from a surface of the fabric, and which are cut after the weaving of the fabric. This is different from the flocking of fibres onto a base material. In correspondence accompanying the request, the Product was also described as being "the 3-layer current mitt" and the request has described that "different technologies" are involved (compared to the Patent). These factors cast doubt on the 4-layer construction above. If woven velvet is present, then there are only 3 constituent layers:
 - a. Layer of waterproof film
 - b. Sponge-like material
 - e. Woven Velvet (which inherently includes outwardly extending surface fibres, formed by cutting after weaving)
7. For completeness, I have considered it to be reasonable to cover both constructions. These are (i) the flocked construction and (ii) the 3 layer construction comprising woven velvet, which would be recognisably and materially inherently different from a product produced by a flocking process.

The patent

8. Claim 1 of the granted patent reads as follows:

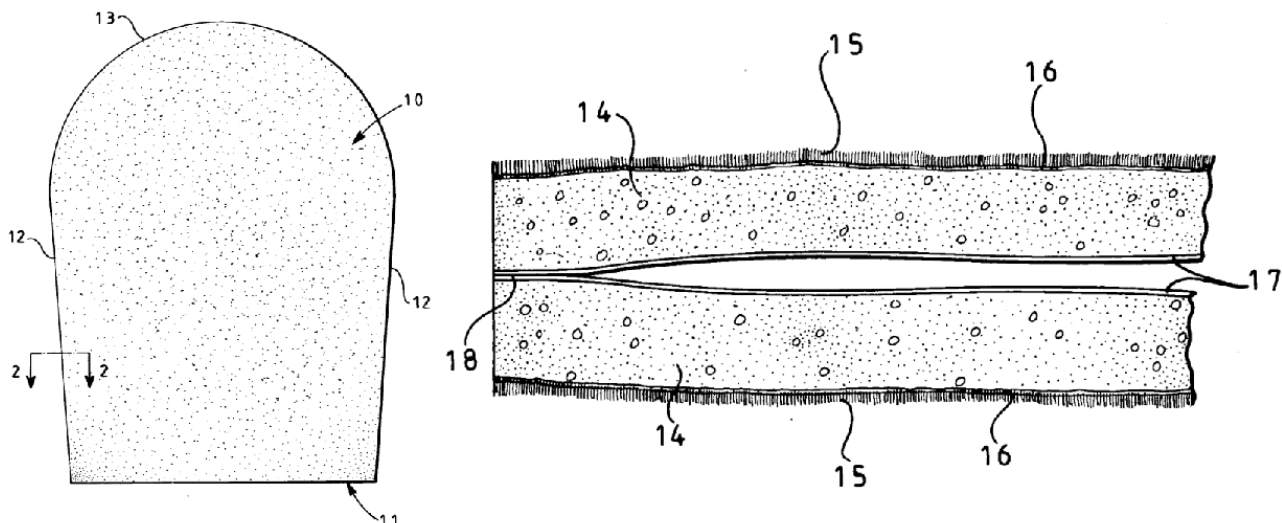
"An applicator for lotions comprising two layers of flexible material joined together in a manner to allow insertion of at least a part of a user's hand between the layers, at least one of said layers comprising a flexible synthetic foam material to the outer surface of which is applied a layer of flock."
9. Claims 14 and 15 are also of relevance in that they clarify the number of layers which may be present:

"14. An applicator according to any of the preceding Claims 1 to 12, wherein there is applied to the foam a layer of liquid-impermeable material to prevent liquid migrating inwardly from the outer surface of the applicator to the inner

region between the layers.”

“15. An applicator according to Claim 14, wherein the liquid-impermeable layer comprises the adhesive by which the flock is adhered to the foam, or an additional layer 11 between such adhesive and the foam.”

10. The drawings included in the Patent are as follows, the first of which is a plan view (shown at reduced scale below) and the second of which is a cross-section:



11. In embodiments, the applicator is in the form of a mitten 10 having an open edge 11. It typically comprises two layers of foam 14 to the outer surface of each of which is applied a layer of closely packed flock fibres 15 secured to the foam 14 by an adhesive layer 16. A coating of liquid-impermeable material 17 may be applied to the inner surface of each foam layer 14.
12. The specification also states (page 4 lines 13-15) that “The liquid-impermeable layer may be applied to either side of the foam layer. For example, the liquid-impermeable layer may comprise the adhesive by which the flock is adhered to the foam, or an additional layer between such adhesive and the foam.”

Claim construction

13. Standard principles of claim construction and case law relating thereto are outlined and referenced in Section 125(1) of the Patents Act and in the corresponding section of the Manual of Patent Practice. I have applied these principles to the claims, with particular attention to claim 1 of the Patent.
14. Claim 1 includes the words “a layer of flock”, which a relevant skilled person would take to comprise fibres adhered to a surface. Basis for this can be found, for example, in the Chambers Dictionary of Science and Technology¹ which defines that Flock is “Short-cut or ground wool, cotton or manmade fibres for spraying on to adhesive coated backings for furniture or upholstery purposes.” Light is also shed on the nature of flocking by the Dictionary’s definition of Electrostatic Flocking “The application of a coloured flock directed by an electrostatic field on to a fabric pre-

¹ Dictionary of Science and Technology, 1st Edition, Chambers [1999]

treated with an adhesive. The fibres of the flock protrude from the surface of the fabric giving it a characteristically prickly feel. The products are often used as wall hangings.” Common definitions of flock may be reasonably taken to include its applicability to other items, including hand held devices such as applicators. A relevant skilled person would also be aware that flocking produces a product which is inherently different to woven velvet, which is formed by a process of weaving and then of cutting some of the woven fibres, so that they extend outwardly. This is in contrast to flocking, which involves flock fibres being applied to a base material/layer in a process which is separate from any weaving or forming of that material/layer.

15. Claim 1 also states that the flock is applied to “an outer surface” of at least one layer of synthetic foam material. This raises the question as to whether it means direct or indirect application. From purposive construction and by consideration in the light of other parts of the specification, such as claims 14 & 15 and page 4 lines 13-15 (as referred to above), it is clear that claim 1 does not require the flock to be necessarily directly applied to the foam layer, and that it allows for the possibility of there being an intervening layer of material in addition to any adhesive which may be present.
16. Therefore I conclude that, in the light of the specification as a whole, the integers of claim 1 should be summarised as follows:-
 - a. An item suitable for use in applying lotions
 - b. The item having an opening between two layers for allowing insertion of a user’s hand or digits
 - c. The layers comprising flexible material
 - d. The flexible material of at least a first of the layers being (i) synthetic and (ii) having a foam structure
 - e. A layer of flock being applied to the first layer either directly or indirectly wherein “flock” is construed as in the preceding paragraph above and wherein “indirectly” permits the option of an intervening material layer between the flock and the foam
17. Claims 14 & 15 relate to a case with “indirectly” applied flock. These claims are appended to claim 1 and define that the applicator preferably comprises a material (with a particular property) which lies between the flock and the foam.

The law in relation to infringement

18. Section 60 Patents Act 1977 (the Act) governs what constitutes infringement of a patent; Section 60(1) relates to direct infringement and Section 60(2) relates to indirect infringement. These sections of the Act read 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, he uses the process or he offers it for use in the United Kingdom when he knows, or it is obvious to a reasonable

person in the circumstances, that its use there without the consent of the proprietor would be an infringement of the patent;

(c) where the invention is a process, he disposes of, offers to dispose of, uses or imports any product obtained directly by means of that process or keeps any such product whether for disposal or otherwise.

(2) Subject to the following provisions of the 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.”

Infringement

19. I shall now analyse whether the Product, when taken as comprising a flocked construction, meets the requirements of each of the integers of claim 1. This analysis is provided as follows:
 - a) The Product satisfies the 1st integer in that a tanning mitt is an applicator for applying lotions.
 - b) The Product satisfies the 2nd integer, in that it has an opening suitable for hand insertion
 - c) The Product satisfies the 3rd integer, in that it would seem implicit that the back and the front of a mitt would both provide some flexibility
 - d) The Product satisfies both features of the 4th integer in that (i) it would seem implicit that the sponge is not natural sponge and (ii) sponge and foam are both similarly characterised by internal cavities.
 - e) The Product satisfies both features of the 5th integer, in that the flock is applied (indirectly) to the outside of the aforementioned foam-like layer.
20. Therefore the Product, when taken as comprising a flocked construction, meets all of the integers of claim 1 and has the clear potential to infringe.
21. For completeness, I will consider the alternative 3 layered construction comprising woven velvet. In this case, no flock would be applied to the outside of the foam-like sponge layer, either directly or indirectly. Therefore, in this construction, the Product would not meet the requirements of the 5th integer of claim 1 of the Patent. This leads to a conclusion that the construction comprising woven velvet could not infringe the Patent.
22. However, the main construction is the flocked construction, and this does meet the requirements of each integer as listed above.

Opinion

23. I consider that the Product, as described including a Flock layer, includes the essential features of the Patent. Therefore, it is my opinion that relevant acts in

relation to the Product, which includes a Flock layer, would infringe the Patent.

24. I have also considered an alternative construction wherein the Product conceivably has a woven Velvet layer without applied Flock. It is my opinion that with that alternative construction of the Product, the Patent would not be infringed.

Application for review

25. 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.

MARK THWAITES
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.