

OPINION UNDER SECTION 74A

Patent	EP 2321150 B1
Proprietor(s)	Bentley Motors Limited
Exclusive Licensee	
Requester	Jaguar Land Rover
Observer(s)	Wilson Gunn
Date Opinion issued	05 September 2018

The request

1. The Comptroller has received a request from Jaguar Land Rover (the requester) to issue a validity opinion in respect of patent EP 2321150 B1 (the patent) in the name of Bentley Motors Limited (the proprietor). The request questions the validity of the patent on the basis that the claims are either not novel, lack an inventive step or are excluded from patentability.
2. The patent has a filing date of 30 July 2009 and was initially published as WO 2010/013001 A1. It was granted on 29 January 2014 and remains in force.
3. Observations were received from Wilson Gunn acting as agent for the proprietor and observations in reply were subsequently received from the requester.

Preliminary Matters

4. Prior to the request being received, the proprietor had commenced limitation proceedings at the European Patent Office (EPO) in which they sought to amend the claims of the patent to limit their scope. The opinion request was rightly pursued on the basis of the claims as originally granted. In their observations, the proprietor proposed that the request should be refused as it would be inappropriate to issue an opinion on the basis of claims which, once the limitation procedure had completed, would be deemed never to have existed. Furthermore, the EPO had by this point formally deemed that the limitation was allowable. The requester responded that the request should not be refused as the proprietor had to undertake certain steps before the limitation took effect (and the limitation would have been refused if those steps had not been performed). However, it seems that just prior to the observations in reply being submitted, the proprietor did complete all the necessary steps. On 17 August the EPO issued their decision to limit the patent but this does not take effect

until 12 September (EPC Art. 105b(3)).

5. The requester had no choice but to base their request on the existing claims of the patent. Those claims remain in force until 12 September. The Office cannot accept any request on the limited claims until that date. The requester is entitled to a timely response and the opinion service is intended to be reasonably quick with opinions normally being issued within three months of the request. The end of that three month period coincides with the date the limitation takes effect. Accordingly my opinion will be valid when it issues (albeit briefly) and I consider that it is appropriate to issue an opinion in these particular circumstances.

Invention

6. The invention relates to a method of stitching perforated material, in particular to create a quilted effect for vehicle upholstery or trim.
7. Figure 1 of the patent (reproduced below) illustrates a prior art method of stitching perforated material. It will be noted that the stitches are not parallel to the perforations such that at certain points the stitches coincide with the holes. More particularly, it is stated that the needle will preferentially enter the holes when in their vicinity rather than pierce the material, with the result that the stitches can become uneven and unsightly. The patent also states that it is difficult to stitch parallel to the rows of perforations.

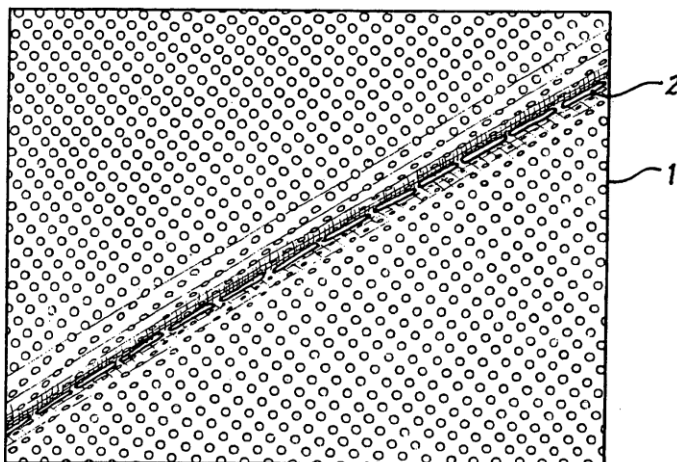
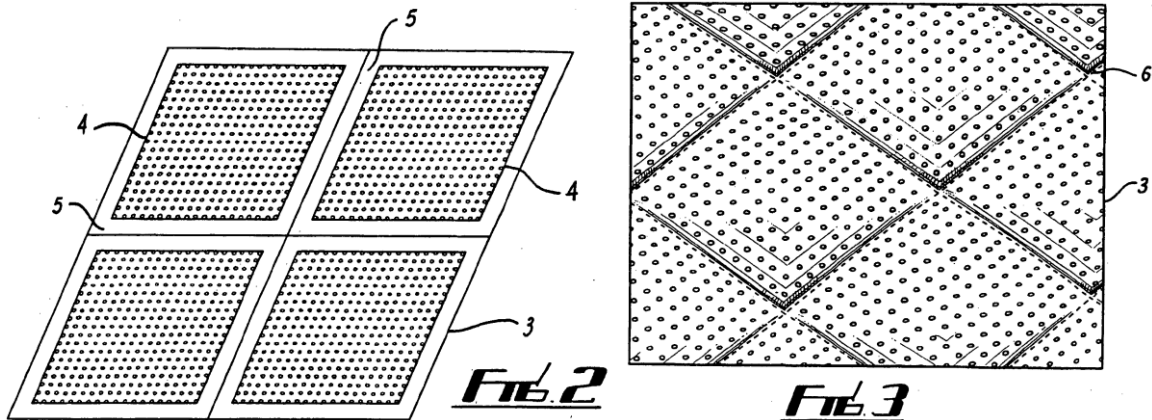


FIG. 1
(Prior Art)

8. The solution provided by the patent is to provide a perforated material which has a region devoid of perforations between regions which have perforations. The stitching can then be performed in the region devoid of perforations. In a particularly favoured embodiment the region devoid of perforations and the stitching are arranged so that the stitches are formed centrally in the unperforated region and they appear to coincide with where a line of perforations ought to be, the resulting impression being that the material is continuously perforated. Figures 2 and 3 of the patent (below) illustrate respectively a piece of material prior to stitching and the resulting stitched

material showing the quilted effect.



Claim construction

9. As a first step I must correctly construe the claims. This means interpreting them in the light of the description and drawings as instructed by Section 125(1). In doing so I must interpret the claims in context through the eyes of the person skilled in the art. Ultimately the question is what the person skilled in the art would have understood the patentee to be using the language of the claims to mean. This approach has been confirmed in the decisions of the High Court in *Mylan v Yeda*¹ and the Court of Appeal in *Actavis v ICOS*².
10. I consider the skilled person would be a designer or manufacturer of vehicle upholstery.
11. Claim 1 is the only independent claim and the remaining claims 2 to 10 are dependent upon claim 1 (see Annex 1 for complete claim set). Claim 1 reads as follows (adopting the feature labelling a-g used in the request):
 1. (a) *A method of producing upholstery or automotive trim comprising the steps of:*
 - (b) *providing a sheet material (3) with at least one perforated region (4) comprising*
 - (c) *a plurality of parallel, evenly spaced apart rows of perforations*
 - and*
 - (d) *at least one unperforated region,*
 - (e) *and stitching the sheet material in the at least one unperforated region (5) to form a line of stitching (6) which is*
 - (f) *substantially parallel to an edge of a perforated region (4) and*

¹ *Generics UK Ltd (t/a Mylan) v Yeda Research and Dev. Co. Ltd & Anor* [2017] EWHC 2629 (Pat)

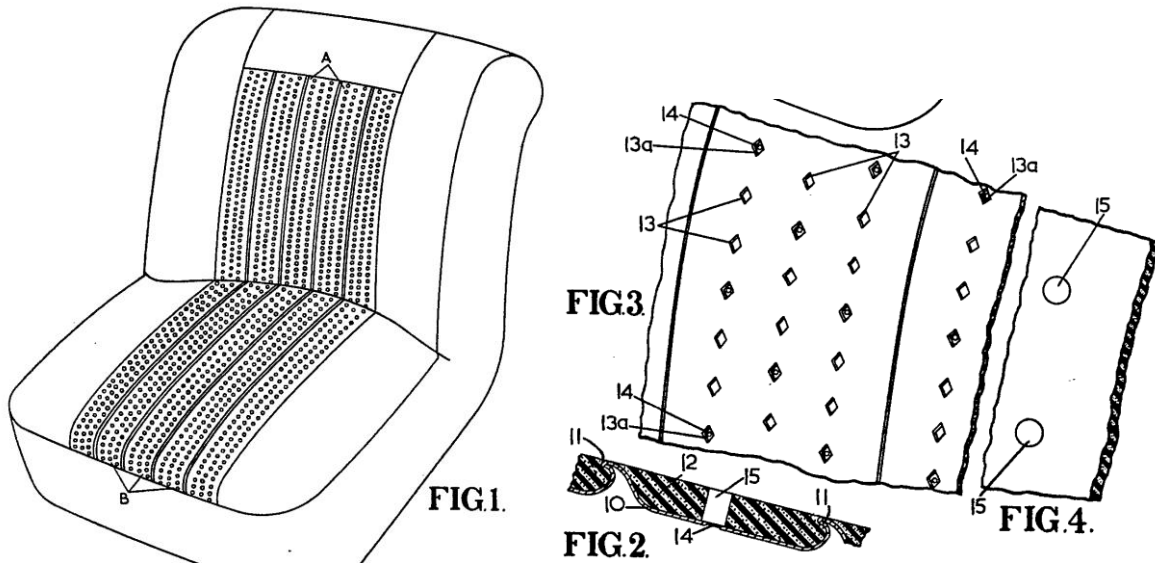
² *Actavis Group & Ors v ICOS Corp & Eli Lilly & Co.* [2017] EWCA Civ 1671

(g) *spaced apart from the edge of said perforated region by a distance which is an integer number of multiples of a distance between adjacent rows of perforations in the at least one perforated region.*

12. In general the claim is considered straightforward to construe and may be construed as read. However, the following points are worth noting.
13. Firstly, I would emphasise that the claim is directed towards a method of manufacturing and the method comprises two steps: providing the sheet material having the perforated and unperforated regions and then stitching the sheet material in the required manner. It is clear from the claim and the specification as a whole that the perforated and unperforated regions are formed before the material is stitched.
14. Secondly, in relation to the cited prior art, the construction of the phrase “line of stitching” needs to be considered. The claim specifies “*stitching the sheet material ... to form a line of stitching*”. I consider the skilled person would understand that the *line of stitching* is the actual line created by the stitches themselves and it is not some other line formed as a result of stitching the material, e.g. a fold, pleat or hem.
15. Finally, I also note that whilst the *edge of a perforated region* is not explicitly defined in the claim, it is clearly intended that the relevant edge is defined by a row of perforations and features (f) and (g) are construed accordingly.

Prior art

16. The prior art evidence relied on by the requester to demonstrate lack of novelty comprises the following:
 - D1 GB 987862 (STANDARD MOTOR CO LTD) - 12 February 1964
 - D2 GB 1036387 (STANDARD MOTOR CO LTD) - 14 June 1965
 - D3 Upholstery of 1970 Triumph 1300 car - registration no. SBO 85H
 - D4 Images of plan and cross sections taken from Triumph 1300 seat
17. This prior art is all substantially the same. D1 & D2 are related and were filed by the Standard Motor Company Limited who were the then owner of the Triumph brand. The inventions of D1 and D2 were apparently implemented in the upholstery of the Triumph 1300 as illustrated by D3 and D4.
18. D1 describes a ventilated upholstery covering for a vehicle seat, the covering having perforations. The covering further comprises an unperforated region and it is stitched to form decorative panels. The figures of D1 are reproduced below. Figure 1 shows the overall appearance and the decorative panels. Figure 2 shows a cross-section through a part of the stitched covering. Figure 3 shows the detail of the covering and figure 4 the detail of an inner layer of the covering. It should be noted that not all the diamond shapes illustrated represent perforations. The perforations are identified in figure 3 by the reference numeral 14 and are intended to align with holes 15 provided in the inner layer.



19. I also note that the line of stitching is not a simple stitch through the outer and inner layers. In order to create the panel effect a pleat is created in the material and the layers forming the pleat are sewn together (11).
20. D2 is a *patent of addition* in relation to D1 and teaches essentially the same as D1 except that it adds an additional feature. In particular, D2 specifies that all the diamond depressions are provided with perforations, but this has no bearing on the relevant teaching of these documents. For procedural efficiency I will not consider D2 in detail. If D1 anticipates or demonstrates lack of inventive step of the claims of the patent, then so does D2.
21. D3 is a vehicle exhibited at the British Motor Museum. The requester has provided some photographs of the upholstery of this vehicle as part of the request but they are not particularly detailed.
22. D4 comprises photographs of a Triumph 1300 seat alleged to pre-date the patent. In contrast to D3, the photographs are detailed and include a photograph of the seat cover which has been unstitched to show its construction. Although the proprietor has suggested that the requester has failed to establish the date the seat was made available to the public, suggesting perhaps that it is not clear that it is an original seat, I nevertheless consider it appropriate evidence on which to form an opinion. I note the similarity with D1 and especially D2 which suggests it is contemporaneous, but further dating evidence may be required before this could be used in any revocation action.

Novelty

23. The requester has sought an opinion on the validity of claims 1 to 6 on the basis that they are not novel in respect of each of the prior art disclosures D1 to D4.
24. In view of the ongoing limitation, the proprietor has not submitted specific argument in their observations in relation to claims 1 to 7. This approach has been adopted as these claims will not survive the limitation procedure. The proprietor makes clear that the lack of argument is not an admission of invalidity, but done for procedural

efficiency. However, the proprietor has provided argument in relation to the inventiveness of claim 8, and, in view of its dependence on claims 1, 6 and 7, they have necessarily had to provide argument in relation to the features of these claims when discussing claim 8. I have taken account of these arguments in reaching my opinion on novelty.

25. The proprietor's main argument in relation to the features of claim 1 is that none of the evidence discloses the required method steps and the order in which they take place.

26. D1 states (page 1, line 56):

"The upholstery of the back and squab of the motor car seat shown in Figure 1 includes an outer layer 10 of polyvinyl chloride which is pleated, and sewn at 11 to form decorative panels A in the seat back, and B in the seat squab."

27. I consider this discloses a method step of stitching the outer layer. However, there is no disclosure of whether this is done before or after the perforations are made.

28. The requester identifies the following passage of D1 (page 1, line 33):

"the outer layer is formed with depressions forming a patterned surface and at least some of the depressions are formed with small though holes"

29. Although this passage describes the formation of the perforations, it does not disclose whether this is done before or after stitching. The requester suggests it is implicit that the perforations are created before the panels are stitched. This is not something I can agree with. The perforations could be formed either before or after the panels are stitched.

30. The requester makes the arguments in their observations in reply that:

"It would be immediately obvious to the skilled person that the step of forming the outer layer is performed before any stitching is conducted."

and

"It would be immediately obvious to the skilled person that it would be entirely impractical to mould depressions in the polyvinyl-chloride outer layer once it had been formed into a shaped seat cover".

31. I do not think either of these statements is wholly correct. In relation to the first I think it is only obvious that the outer layer *could be* perforated before it is stitched. In relation to the second I do not think the outer cover has to be formed into a shaped seat cover after stitching and before the depressions and perforations are formed. I think there is a danger of reading D1 and D2 with hindsight knowledge of the patent.

32. The requester has also directed my attention to paragraph 2.07 of the Manual of Patent Practice (MoPP):

2.07 While it is generally necessary, for a finding of lack of novelty, for all the features of the claim under consideration to have been explicitly disclosed, the

teaching implicit in a document may also be taken into account. If a person skilled in the art would conclude that an earlier invention would, as a matter of normal practice, necessarily be performed in a way which would fall within the scope of the claim under consideration, then the matter defined by the claim is not new...

33. The crucial word in that paragraph is “*necessarily*”. It seems to me that the perforations are not necessarily formed before the stitching is carried out and there can be no anticipation. I note also that D1 states (my underlining) “*each panel is provided with a symmetrical array of diamond shaped depressions and some of these, indicated at 13a, are provided with small diameter through holes*”. This may be read as suggesting the panels are formed (by sewing) prior to forming the perforations. Claim 2 of D1 also refers to “*... the said outer layer is embossed so as to simulate panels, and a plurality of depressions arranged symmetrically in each panel.*”

34. The following paragraph of MoPP (2.07.1) refers to the *General Tire*³ judgement as follows:

“If on the other hand, the prior publication contains a direction which is capable of being carried out in a manner which would infringe the patentee’s claim, but would be at least as likely to be carried out in a way which would not do so, the patentee’s claim will not have been anticipated, although it may fail on the ground of obviousness. To anticipate the patentee’s claim the prior publication must contain clear and unmistakable directions to do what the patentee claims to have invented.... A signpost, however clear, upon the road to the patentee’s invention will not suffice. The prior inventor must be clearly shown to have planted his flag at the precise destination before the patentee”.

35. D1 does not contain clear and unmistakable directions to carry out the method in the way claimed and I do not consider that it anticipates claim 1.

36. D2 offers no further information regarding the method of manufacturing the seat and also does not therefore anticipate claim 1 of the patent for the same reasons as D1.

37. D3 and D4 have been provided as evidence of prior use of the invention. However, the invention relates to a method of manufacturing upholstery and there is no information about how the upholstery of D3 and D4 was manufactured. It may be that they were manufactured according to a method falling within the scope of claim 1, but no evidence has been provided. It would in any event have to be established if such a method of manufacturing them was disclosed to the public.

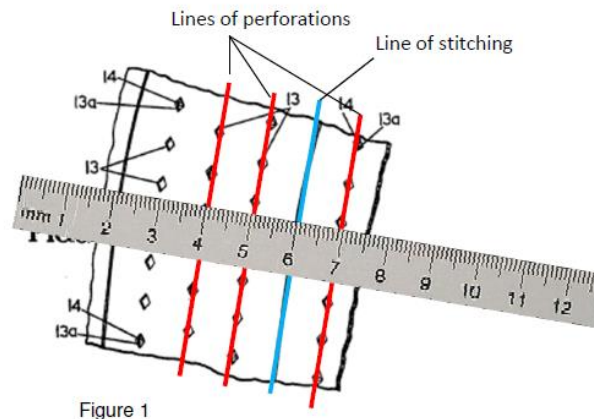
38. None of D1 to D4 provide sufficient details regarding the method of manufacture to anticipate claim 1 and claim 1 is therefore considered to be novel in relation to this prior art on this basis.

39. I will nevertheless also consider whether or not these documents disclose feature (g). In particular whether or not they disclose that the line of stitching is spaced apart from the edge of the perforated region by a distance which is an integer number of

³ *General Tire & Rubber Co. v Firestone Tyre & Rubber Co. Ltd. & Ors.* [1972] RPC 457.

multiples of the distance between adjacent rows of perforations.

40. The requester has provided a diagram (figure 1 in the statement accompanying the request – reproduced below) showing figure 3 of D1 with a ruler overlain on it to show that the distance between the apparent line of stitching and the edge of the perforated region is equal to the spacing between the rows of perforations. However, the figures of the patent are intended only to be illustrative. Furthermore, as is apparent from figure 2 of D1, the *line of stitching* is not clearly coincident with the edges of the panels illustrated in figures 1 and 3 of D1.



41. Ultimately, I am content to rely on paragraph 2.08.1 of MoPP, which states (my underlining):

2.08.1 Care should be taken when relying on dimensions derived from drawings. It was held by the EPO Board of Appeal in Decision T204/83 (OJEPO 10/85) that although features shown solely in a drawing form part of the state of the art when a skilled person could derive a technical teaching from them without further description, it is not generally possible to derive a technical teaching by measuring dimensions in a diagrammatic representation; and that dimensions under these circumstances do not therefore form part of the state of the art.

42. I consider that D1 does not teach anything about the respective spacings. I consider the skilled man would take the figures as diagrammatic and would envisage that other criteria would have an impact on the choice of spacing. For example, the width of the seat and the desired number of panels may dictate the spacing.
43. I therefore consider that feature (g) of claim 1 is not disclosed by D1 and the patent is novel in relation to D1 on this basis also.
44. D2 teaches essentially the same as D1 and claim 1 is considered to be novel in relation to it for the same reasons.
45. In relation to D3, it is not possible to discern the actual construction of the seat covers from the photographs provided. Accordingly there is insufficient evidence accompanying the request for me to reach an opinion in relation to D3 alone.

46. The photographs of D4 (the two most significant of which are reproduced below) show a seat cover which is generally similar to that illustrated in D1 and D2. It appears to comprise a stitch across a fold or pleat formed in the cover, the stitch being formed to the rear of the cover so that it is not visible when applied to a seat. The line of stitching can be seen in the unstitched cover by virtue of the holes created.



Stitched seat cover of D4

Unstitched seat cover of D4 showing unperforated region

47. In order to show the distances between the perforations and the stitching the requester has provided a photograph of the stitched seat cover with a ruler overlain (see below - figure 12 of the request). It can be seen that the distance between the edge of the panel created by the stitching and the perforations is equal to the distance between the perforations. However, the spacings in the unstitched seat cover appear different such that there is a larger gap between the line of stitching and the perforations than between the perforations. (On an A4 printed copy of the request the distance between perforations indicated in figure 8 is 11mm and the distance between the perforations and the line of stitching is 14mm, as is the distance between the perforations and the fold line in the left of the figure.) The reasons for this are not clear. It may be because the photographs are a two-dimensional representation of a three-dimensional shape and the unstitched cover is flattened such that the dimensions are more realistically represented, although it seems unlikely this would have such a dramatic effect. Alternatively the images may be from different parts of the seat which have different spacing and this would be borne out by the apparently different colours of the stitched and unstitched photographs. In view of the conclusion I have already reached regarding the novelty of claim 1 I do not have to reach a definitive conclusion on this aspect of the claim. Based on the apparent distances between the perforations and the edge of the panel in the photograph of the stitched seat cover, and the proximity of the line of stitching to the apparent edge of the panel in the unstitched seat cover, feature (g) of claim 1 appears to be disclosed by D4.

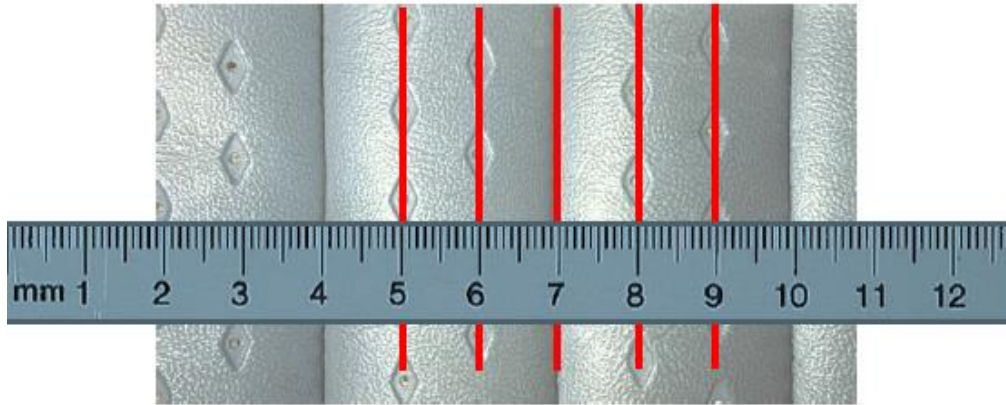


Figure 12 - Image of D4 Seat

48. In view of the conclusion I have reached that claim 1 is novel, claims dependant on it are also novel and I do not need to consider further the arguments relating to lack of novelty of the dependant claims.

Inventive step

49. The requester has sought an opinion on the inventiveness of claims 2, 7, 8, 9 and 10. However, all of the arguments relating to these claims are predicated on the basis that claim 1 lacks novelty. As I have found that claim 1 is novel the requester's arguments fail and I conclude that these claims are inventive.
50. The requester has not sought an opinion on the inventiveness of claim 1, nor provided any corresponding argument. I am not therefore in a position to offer an opinion on the inventiveness of claim 1, nor any of claims 3 to 6.

Excluded subject matter

51. The requester has also sought an opinion on whether or not claims 7, 8, 9 and 10 are excluded as being nothing more than aesthetic creations, such that they fall within the exclusion from patentability of Section 1(2)(b) of the Act.
52. However, the requester's arguments, and in particular the identification of the contribution, are based on the lack of novelty of claim 1. So long as claim 1 is novel, inventive and not excluded itself, any dependant claims will derive a technical effect from claim 1 and cannot be excluded as relating to aesthetic creations *as such*. As I have found claim 1 to be novel and have not been provided with arguments relating to its inventiveness, claims 7 to 10 are on the face of it not excluded.
53. The proprietor has drawn my attention to paragraph 1.30.2 of MoPP which states:

1.30.2 The means of obtaining a purely aesthetic effect may be patentable if it is characterised by non-excluded features, such as the structure of an article or the steps in a process. For example, a fabric may be provided with an attractive appearance by means of a layered structure not previously used for this purpose, in which case a fabric incorporating such a structure might be

patentable.

54. Based on the material provided by the requester the invention is characterised by the steps of the process of claim 1 and the inventions of claim 1 and any claims dependant therefrom are not excluded on this basis.

Opinion

55. Based on the evidence and argument provided, it is my opinion that claim 1 of EP 2321150 B1 is novel. In view of the novelty of claim 1, dependant claims 2 to 10 are also novel.
56. Similarly, in light of the novelty of claim 1 and based on the requester's arguments, claims 2, 7, 8, 9 and 10 do not lack an inventive step and claims 7, 8, 9 and 10 are not excluded.
57. I offer no opinion regarding the inventiveness of claim 1 or claims 3 to 6.

Matthew Jefferson
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.

Annex 1

Claims

1. A method of producing upholstery or automotive trim comprising the steps of: providing a sheet material (3) with at least one perforated region (4) comprising a plurality of parallel, evenly spaced apart rows of perforations and at least one unperforated region, and stitching the sheet material in the at least one unperforated region (5) to form a line of stitching (6) which is substantially parallel to an edge of a perforated region (4) and spaced apart from the edge of said perforated region by a distance which is an integer number of multiples of a distance between adjacent rows of perforations in the at least one perforated region.
2. A method as claimed in claim 1 wherein the sheet material (3) comprises leather, suede, alcantara, imitations thereof or plastics material.
3. A method as claimed in either claim 1 or 2 wherein the sheet material (3) comprises multiple layers.
4. A method as claimed in any preceding claim wherein the stitching (6) is spaced apart from the edge of the perforated region (4) at a distance which is substantially the same as a distance between adjacent rows of perforations in the perforated region.
5. A method as claimed in any preceding claim wherein the unperforated region (5) is formed within a perforated region (4) and/or lies between two perforated regions.
6. A method as claimed in any preceding claim wherein the unperforated region (5) comprises one or more strips or bands of unperforated material extending through a perforated region (4).
7. A method as claimed in claim 6 wherein the width of the unperforated strip or band of material is substantially twice the distance between adjacent rows of perforations within the perforated region (4).
8. A method as claimed in claim 7 wherein a line of stitching (6) is formed mid-way along the unperforated region (5) to give a completely perforated appearance.
9. A method as claimed in any preceding claim wherein the sheet material (3) is perforated with a diamond pattern with perforated diamond shaped regions separated by unperforated regions (5) along which stitching (6) is subsequently formed to produce a diamond quilted effect.
10. A method as claimed in claim 9 wherein two substantially parallel lines of stitching (6) are formed along each unperforated region (5).