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Painting a picture of prior use anticipation attacks

Brian Cordery (Bristows) · Tuesday, May 8th, 2012

When does the demonstration of a model at a trade fair, or a similar limited availability of a product, constitute novelty-destroying prior disclosure? Although it will depend on the patent claims, the public's opportunity to investigate the model may be important as demonstrated in the recent case of Wagner v Earlex*.

As of the implementation of the EPC, prior use in and of itself no longer anticipates a patent claim under UK patent law. The English courts have also now adopted the EPO approach on 'availability to the public' (as set out by the Enlarged Board in decision G1/92), although the English courts refer to the requirement for an 'enabling disclosure'. If the person skilled in the art is able to discover the composition or internal structure of the prior art product and reproduce it without undue burden, then there may be an availability to the public giving rise to an enabling disclosure. However, the disclosure to be derived from the public availability of a product depends on the extent to which the public have unrestricted access to the product.

In this case, the patent claimed a type of paint spray gun. One of the alleged prior disclosures was a prototype example of a paint spraying device demonstrated at a trade fair. The device was demonstrated to members of the public visiting the fair. The public were also permitted to, and did, use the sprayer themselves. The relevant claimed integers (holes in the air cap of the spraying device) would have been visible to anyone who looked at the spray gun with interest.

Having held that that a product falling within the scope of the claims had been demonstrated publicly, the judge had to decide whether it anticipated the patent. Although the person skilled in the art would have seen the holes in the prototype spray gun at the trade fair had he examined the device, the judge held that the invention would not have been disclosed to him. The person skilled in the art would need to have been able to deduce clearly and unambiguously two further aspects of the air holes, which in the circumstances he could not have done. The evidence at trial did not demonstrate that any particular prominence was given at the time to the presence of the air holes, as there was no evidence that the representatives of the company demonstrating the spray gun told any members of the public what the holes were for or of any contemporaneous documentary evidence as to the importance of the holes. On the other hand, the patent claims were held obvious over the prior disclosure of the prototype.

*[2012] EWHC 984 (Pat)

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