



PATENT HAPPENINGS

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on judicial, legislative, and administrative developments in patent law.

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JUDICIAL HAPPENINGS

En Banc Hearing on Design Patent Infringement

On November 26, 2007, the Federal Circuit ordered an *en banc* rehearing in *Egyptian Goddess, Inc. v. Swisa, Inc.*, No. 2006-1526, 2007 WL 4179111 (Fed. Cir. Nov. 26, 2007), to address several significant issues regarding the legal tests for determining design patent infringement.¹ Specifically, the court ordered the parties to address the following issues:

1) Should “point of novelty” be a test for infringement of design patent?²

2) If so, (a) should the court adopt the non-trivial advance test adopted by the panel majority in this case; (b) should the point of novelty test be part of the patentee’s burden on infringement or should it be an available defense; (c) should a design patentee, in defining a point of novelty, be permitted to divide closely related or ornamentally integrated features of the patented design to match features contained in an accused design; (d) should it be permissible to find more than one “point of novelty” in a patented design; and (e) should the overall appearance of a design be permitted to be a point of novelty?

3) Should claim construction apply to design patents, and, if so, what role should that construction play in the infringement analysis?

The *en banc* order does not appear likely to disturb

¹ A summary of the underlying opinion, *Egyptian Goddess, Inc. v. Swisa, Inc.*, 498 F.3d 1354 (Fed. Cir. Aug. 29, 2007), can be found in the August 2007, Part II issue of Patent Happenings (available in the “Publication” section of the firm’s website).

² Given that the Supreme Court effectively applied a “point of novelty test” in *Smith v. Whitman Saddle Co.*, 148 U.S. 674, 682 (1893), it seems unlikely that the Federal Circuit could totally eliminate the point of novelty test. *See generally*, Robert A. Matthews, Jr., 4 ANNOTATED PATENT DIGEST § 29:58 Case Origin of the Point of Novelty Test [*hereinafter* APD].

the jurisprudence associated with the ordinary observer test under *Gorham Co. v. White*, 81 U.S. 511 (1871).³ Nonetheless, the anticipated *en banc* decision will likely have a significant impact on all future litigations involving issues of design patent infringement.

Inoperable Prosecution Disclaimer

The Federal Circuit considered once again the binding impact of erroneous statements by a patent attorney present in the prosecution history in *Elbex Video, Ltd. v. Sensormatic Elecs. Corp.*, No. 2007-1097, 2007 WL 4180138, *5-*6 (Fed. Cir. 2007).⁴ The district court applied a narrow construction to a claimed “receiving means” based on its view that a statement in the file history limited the scope of the claim. Specifically, the court held that a statement that a camera generated a signal that was received by a monitor operated as a prosecution disclaimer to limit the claimed “receiving means” to a monitor. Based on this limiting construction, the district court granted summary judgment of noninfringement because the accused product did not have a monitor receive the camera signal.

Relying on the principle that prosecution statements showing an obvious mistake should not create a disclaimer, the Federal Circuit ruled that the district court erred in limiting the scope of the claim. To support its ruling that the statement was an obvious mistake that did not result in a disclaimer, the Federal Circuit noted that the “statement in the prosecution history [wa]s unsupported by even a shred of evidence from the specification.” The court also ruled that while the statement in isolation may have suggested a disclaimer, the totality of the prosecution history rendered the statement ambiguous, and therefore legally incapable of supporting a prosecution disclaimer. Third, the court noted that one of skill in the art when reading the entire specification and prosecution history would realize that the statement was a mistake since “if taken literally [it] would result in an inoperable system.” Thus, the court concluded that “[o]n this unique amalgamation of facts, including (1) the absence of support in the specification or drawings for a monitor that receives code signals from and returns code signals to the cameras; (2) the ambiguity created by other statements in the same prosecution document; (3) the fact that Sensormatic’s

own technical witness did not understand how the system would operate consistent with the erroneous statement; and (4) the inoperability of a device constructed in accordance with the incorrect statement, . . . this is not a case of prosecution disclaimer.”

Using Inherent Critical Function to Limit Claim

Stumbo v. Eastman Outdoors, Inc., No. 2007-1186, 2007 WL 4180137 (Fed. Cir. Nov. 28, 2007), provides an example of the dangers of using the word “must” in a specification. In that case, the Federal Circuit affirmed a limiting claim construction and resulting summary judgment of noninfringement in view of a flexing function that the specification stated “must” be done. More specifically, the asserted claims were directed to a foldable tent-like hunting shelter. The dispute focused on a claim limitation directed to the opening of the shelter, which the claim recited as being a “closable vertical opening.” The district court construed the limitation as requiring a vertically oriented slit-like opening. The accused product had a triangular shaped zipped opening. The Federal Circuit agreed with the district court that in view of the specification, the claims were limited to a slit-like opening. The court noted that the specification stated the supporting poles in the shelter *must* be flexed to provide sufficient slack for the “closable vertical opening” to open up, and that flexing function therefore meant that the opening had to be a linear slit since any other opening would not requiring the flexing of the support poles. *Id.* at *3. Hence, the court read into the claim the inherent function of required flexing due to the presence of the term “must” in the specification. *Id.* at *4. This led to the conclusion that the opening had to be limited to slit-like openings since this was the only type of opening that required flexing to work.

After affirming the claim construction, the Federal Circuit further affirmed the summary judgment of no infringement. It found that the patentee’s proffer of expert testimony which only stated in a conclusory fashion that the triangular zipped opening in the accused product was equivalent to the claimed slit-like opening did not raise an issue of fact over the accused infringer’s expert’s detailed showing that the accused product performed its function in a different way to achieve a different result. Specifically, the accused infringer showed that its triangular opening did not require any flexing of the support poles, and therefore operated in a different way. Further, it noted that the triangular opening achieved greater safety and greater

³ See generally APD §§ 29:42 – 29:57.

⁴ For other cases on this issue see APD Part III, E. Patent Attorney’s Erroneous Statements, §§ 6:40-6:42.

ease of use than the slit-like opening, and therefore did not perform the same result. The patentee argued that safety performance and ease of use were not claimed, and therefore the alleged differences in safety and ease of use should not be relevant to the function-way-result analysis. The Federal Circuit disagreed. It held that while “the function-way-result test focuses on ‘an examination of the claim and the explanation of it found in the written description of the patent.’ . . . this, of course, does not mean that discussion of the equivalence of the function, way, or result between a claimed invention and an accused product is irrelevant when the claims and specification of a patent are silent on the subject. When the claims and specification of a patent are silent as to the result of a claim limitation, as they are in the ’338 patent, we should turn to the ordinarily skilled artisan.” *Id.* at *5. Because one of skill would consider the safety and ease of use of an opening to be a relevant aspect of its performance, the court held that safety and ease of use were relevant considerations to the analysis of infringement under the doctrine of equivalents even though the patent specification was silent as to these two aspects.⁵ *Id.*

§ 102(g) Anticipation

In *z4 Technologies, Inc. v. Microsoft Corp.*, No. 2006-1638, 2007 WL 3407175, *9-*11 (Fed. Cir. Nov. 16, 2007), the Federal Circuit rejected an accused infringer’s argument that an alleged prior invention anticipated the infringed patent claims under § 102(g)(2) because the accused infringer failed to show the prior invention worked for its intended purpose. The patentee, z4 Technologies, had sued Microsoft for including an anti-piracy feature in its software products that z4 asserted infringed its patent. Microsoft contended that a prior art anti-piracy feature found in earlier software products invalidated the asserted claims under § 102(g). The Federal Circuit instructed that to prove an actual reduction to practice it must be proven that: (1) the purported inventor constructed an embodiment or performed a process that met all the limitations and (2) the inventor had determined that the invention would work for its intended purpose.⁶ *Id.* at *9. Agreeing with z4, the court held that the record contained substantial evidence for a reasonable jury to conclude that the anti-

piracy feature of the prior art software did not work for its intended purpose of reducing software piracy. The court noted that Microsoft documents showed that Microsoft itself opted not to use the alleged prior invention in its own software. Additionally, internal e-mails, which Microsoft had improperly withheld during discovery, reported that more than five months after z4’s filing date, the alleged prior invention still had problems and failed to prevent one copy of software from being installed on 40 different machines. *Id.* at *10. The court found that collectively the foregoing provided sufficient evidence for the jury to properly conclude that the alleged prior invention did not work to reduce software piracy, and therefore did not constitute an actual reduction to practice.

The Federal Circuit also rejected Microsoft’s contention that the jury should have been instructed that when an accused infringer offers prior art that was not considered by the PTO, its burden of proving invalidity is more easily carried than if the PTO had considered the prior art. *Id.* at *12.

New Matter and Written Description Rejection

The Federal Circuit affirmed a PTO’s written description/new matter rejection in *In re Lew*, No. 2007-1196, 2007 WL 4201279, *3-*4 (Fed. Cir. Nov. 29, 2007) (*nonprecedential*). There, the applicant’s original specification disclosed the use of ball bearings in claims directed to a wheel hub clutch for bicycles. Initially, the examiner issued a statutory double patenting rejection. To overcome the double patenting rejection, the applicant submitted a substitute specification in which it replaced the term “ball bearings” with the term “curved members” in the claims and specification even though the original specification never disclosed the use of “curved members.” Noting that the applicant did not contest that the term “curved members” is broader than “ball bearings,” the Federal Circuit affirmed the rejection of the new claims for lack of an adequate written description since the original specification did not describe the broader concept of using curved members. The applicant argued that because “ball bearings” inherently contained “curved members,” it allegedly had the right to claim the broader concept of “curved members.” Rejecting that argument, the Federal Circuit stated that “[its] case law offers no support for such a broad rule.” Instead, the Federal Circuit held that “the Board properly framed the question as whether Lew’s disclosure of only ‘ball bearings’ is sufficient, in light of the initial disclosure, for a person

⁵ See also APD § 13:48 Alleged Equivalent Provides Advantages or Better Results than Claimed Element.

⁶ See generally APD § 26:38 Reduction to Practice Must Show Invention Meets Intended Purpose.

of ordinary skill in the art to have determined that Lew was in possession, as of the initial filing date, of using any ‘curved member’ in place of the ball bearings.” It then found that nothing in the original written description suggested that the disclosure of using “ball bearings” was just one example of a more broadly disclosed invention. Accordingly, the court ruled that the specification only supported the use of spherical ball bearings and did not support the broader concept of using any curved member.

Design Around Defeats Willful Infringement

Relying on an infringer’s efforts to design around the asserted patent, the district court in *Rhino Associates, L.P. v. Berg Mfg. and Sales Corp.*, 2007 WL 3490165, *4 (M.D. Pa. Nov. 14, 2007), denied a patentee’s request for enhanced damages. The court held that the infringer’s attempt, after reading the patent, to make a two-piece version of the patent’s one-piece component showed that the infringer “did not act with ‘an objectively high likelihood that its actions constituted infringement of a valid patent.’” Accordingly, the court found that the patentee had “not demonstrated objective recklessness by [the infringer]” and therefore, enhanced damages were not warranted under *Seagate*.⁷

Marking Product’s Packaging

Heraeus Electro-Nite Co. v. Midwest Instrument Co., Inc., 2007 WL 3407128, *3-*5 (E.D. Pa. Nov. 14, 2007), addresses the issue of when a patentee can mark a patented product’s package without marking the product itself and still comply with the marking statute of 35 U.S.C. § 287(a).⁸ In that case, the patent covered probes inserted into molten steel and thereby were destroyed upon their use. The accused infringer moved for summary judgment that the patentee’s failure to mark its probes with the patent number, while placing other markings on the probes, showed that the patentee failed to comply with the marking statute. The court denied the motion. Distinguishing over the cases which ruled that marking a package, but not the product, was insufficient to comply with the marking statute, the court noted that in those cases the products continued to exist long after the packaging material was discarded. With the probes at issue, however, the probes were destroyed upon use. Additionally, the

⁷ *In re Seagate Technology*, 497 F.3d 1360, 1370-71 (Fed. Cir. 2007) (*en banc*).

⁸ See generally, APD § 30:141 Physically Marking the Product or Package.

patentee presented evidence that the industry custom was to mark packages, and not the probes. Under these circumstances, the court ruled that it could not conclude as a matter of law that marking the packaging material, and not the probes, failed to provide sufficient constructive notice of the patent and comply with the marking statute.

Invalidity Rulings During Claim Construction

After previously ruling, as part of its claim construction order, that some of the asserted claims were invalid for lack of an adequate written description, the district court in *Tuna Processors, Inc. v. Hawaii Intern. Seafood, Inc.*, 2007 WL 4104014, *1-*2 (D. Hawai’i Nov. 15, 2007), granted the patentee’s request for reconsideration and vacated its invalidity ruling. The court concluded that by holding the claims invalid as part of its claim-construction order, the court had erred by not giving the patentee a full opportunity to respond to the invalidity contention or to require that the accused infringer prove invalidity by clear and convincing evidence. The court noted that “in addressing the validity issue in the context of claims construction, the Court did not allow the parties the same opportunity to present facts that would have been afforded them in a summary judgment proceeding.” It rejected the accused infringer’s contention that the court’s invalidity ruling could be supported as an exercise of the right to grant summary judgment *sua sponte* because the Court did “not believe that the parties were given adequate time to develop necessary facts, or to make the sorts of arguments that would have been raised in a summary judgment proceeding.” While vacating the invalidity ruling, the court did note that the accused infringer could still challenge the validity of the claim on written description grounds in a later-filed motion for summary judgment.

In a second case decided a few days later, the same district court in *Kowalski v. Ocean Duke Corp.*, 2007 WL 4104259, *3 (D. Hawai’i Nov. 19, 2007), refused to consider whether a claim was invalid for indefiniteness as part of its claim-construction order.⁹

⁹ Compliance with the written description requirement is a question of fact, APD § 22:8. It requires assessing how one of skill in the art would understand what the specification discloses, APD § 22:14, and, generally, whether the specification shows that the inventor possessed the claimed invention as of the application filing date, APD § 22:23. Accordingly, factual questions may arise on written description issues that may not be addressed in a claim construction proceeding making a ruling on these issues during claim construction improper. In contrast, indefiniteness is “a legal

Dispute Resolution Clause Barred Reexamination

Judge Robinson of the United States District Court for the District of Delaware held in *Callaway Golf Co. v. Acushnet Co.*, 2007 WL 4115789, *12-*13 (D. Del. Nov. 20, 2007), that by filing an *inter partes* reexamination proceeding in the PTO, the defendant breached a prior agreement relating to the patents that were the subject of the reexamination. In the case, the accused infringer's predecessor had settled a patent dispute with the plaintiff patentee. The agreement settling the dispute contained a Dispute Resolution clause, which provided that the "sole and exclusive procedure" to resolve all disputes regarding the patents at issue was in accordance with terms set forth in the agreement. These terms included mandatory negotiations and mediation and the possibility of initiating legal proceedings in United States District Court for the District of Delaware. No other form of dispute resolution was allowed. Despite the agreement, the accused infringer filed an *inter partes* reexamination proceeding in the PTO. The patentee petitioned the PTO to vacate the reexamination proceeding in view of the accused infringer's breach of the Dispute Resolution clause. The PTO refused the patentee's request. It determined that the "(1) plaintiff cited no authority for the proposition that private parties may abrogate the PTO's statutory jurisdiction to conduct and decide the merits of a request for *inter partes* reexamination; (2) 'a contractual provision preventing a party from seeking reexamination would be void as contrary to public policy' allowing licensees to challenge the validity of patents; (3) the Agreement was executed prior to the enactment of the statute authorizing *inter partes* reexamination, '[t]hus it was not even possible for the Agreement to address preventing a party to the Agreement from filing such a request for reexamination'; (4) there was no indication that the reexamination was ordered contrary to a statutory prohibition or due to clerical error; and (5) Congress did not provide for an 'estoppel' arising out of a settlement or other contractual agreement between parties." Consequently, the PTO concluded that the

conclusion that is drawn from the court's performance of its duty as the construer of patent claims." *All Dental Prodx, LLC v. Advantage Dental Prods., Inc.*, 309 F.3d 774, 778 (Fed. Cir. 2002). As a legal question based on claim construction, indefiniteness challenges appear to be appropriate for resolution during the claim construction phase of the case. Indeed, other "courts have shown a willingness to hear and decide summary judgment motions that a claim term is indefinite simultaneously with the claim-construction proceeding." § APD § 23.21 (collecting cases).

public interest of resolving the substantial new question of patentability required that the reexamination proceed.

Judge Robinson held that once the PTO determined that a substantial new question of patentability existed, "the PTO was clearly within its jurisdiction" to deny the patentee's request to dismiss the reexamination proceedings. But she also ruled "the court owe[d] no deference to the PTO's interpretation of the legal effect of the Agreement or, more generally, the legality of a provision that purports to prevent parties from filing *inter partes* reexaminations." Comparing the Dispute Resolution clause to a forum selection clause, she ruled that "the parties have not contracted away their rights to contest the validity of each other's patents, but have agreed to do so before a court, rather than before the PTO." Since the accused infringer failed to present "a compelling reason not to honor the parties' choice of forum for their patent disputes," Judge Robinson found that the defendant violated the Agreement by filing the *inter partes* reexaminations to contest the validity of the patents. While granting the patentee summary judgment that the accused infringer had breached the agreement, the court did not specify what remedy, if any, would be awarded.

Third Party Settlement Agreement Discoverable

While various legal rules often make third-party settlement agreements irrelevant and non-discoverable¹⁰, the district court held in *Abbott Diabetes Care Inc. v. Roche Diagnostics Corp.*, 2007 WL 4166030, *2-*3 (N.D. Cal. Nov. 19, 2007), that portions of a settlement agreement a patentee had with a third party were discoverable since they had relevance to the issue of lost profits. Specifically, after an *in camera* inspection of the agreement, the court ruled that agreement could provide evidence as to whether the third party became licensed under the asserted patents such that its products became acceptable noninfringing substitutes whose existence could impact the patentee's lost profit claim. The court further held that use of the settlement agreement in this way did not run afoul of Fed. R. Evid. 408. Nor, did the confidentiality interest of the third party and patentee, and the federal policy of encouraging settlements, trump the accused infringer's need for the

¹⁰ See generally, APD § 30:95—Rate Proposed in Settlement Negotiations Maybe Inadmissible and Irrelevant and § 44:93 Settlement Negotiations Under Rule 408.

discovery. Accordingly, the court ruled that “[i]n this instance, Abbott’s and LifeScan’s confidentiality interests must yield to disclosure of at least those portions of the settlement agreement that are directly relevant to lost profits claim.”

First-To-File Battles

In *Abbott Labs. v. Johnson and Johnson, Inc.*, 2007 WL 4184349, *4 (D. Del. Nov. 28, 2007), the district court rejected an accused infringer’s attempt to create a favorable “first-to-file” situation by seeking to supplement an original declaratory judgment complaint with claims directed to newly issued patents. On the day that the new patents issued, the patentee filed electronically an infringement action in a different forum at 12:01 am. A few minutes later, the accused infringer had electronically filed in the forum a motion to supplement its original declaratory judgment complaint with claims directed to the new patents. At 8:30 that morning it also filed a second separate declaratory judgment on the new patents (local rules precluded the accused infringer from filing the second action before 8:30 am). The accused infringer argued that its original declaratory judgment should be supplemented or in the alternative that its second action should be consolidated with the original declaratory judgment action and treated as a first-filed action to the patentee’s suit. The court disagreed. Noting that no patent rights exist until the new patents actually issue, the district court rejected the accused infringer’s argument that the new patents were “inextricably intertwined” with the patents that formed the subject matter of the original declaratory judgment complaint or that the infringement allegations based on the new patents should be deemed to “relate back” to the filing of the original declaratory judgment complaint. The court concluded that even though the new “patents are continuations to two of the patents originally named in the 06-613 action, and the same product (the Xience V stent) is at issue with respect to each of these patents, [that] does not overcome the fact that jurisdiction did not exist with respect to any of the continuation patents until their issuance.” Consequently, it ruled that in this race to the court house the “true plaintiff,” the patentee, had to prevail. The court explained: “Even if [the patentee]’s 12:01 a.m. filing of the first New Jersey action were to be considered the functional equivalent of [the accused infringer]’s 8:30 a.m. filing of the 07-259 action in this district (and the court declines to find a ‘dead heat’ in this instance), the winner of this race to the court house

is the true plaintiff, not the declaratory judgment plaintiff, as this court respects the choices made by plaintiffs in choosing this state as a forum and must, therefore, respect their choice of a different forum.”

Attorney Argument Was Not Fraud on the Court

Affirming a summary judgment dismissing a patentee’s Rule 60(b) motion seeking to overturn an invalidity judgment, the Federal Circuit held in *Apotex Corp. v. Merck & Co., Inc.*, No. 2006-1405, 2007 WL 3407197 (Fed. Cir. Nov. 16, 2007), that attorney argument based on the inferences to be drawn from the record evidence did not constitute sufficiently egregious conduct necessary for relief under the fraud provisions of Rule 60(b). In the challenged judgment, the accused infringer had succeeded in proving that its earlier work was § 102(g) prior art that anticipated the patentee’s claims. The patentee contended in its Rule 60(b) motion that the accused infringer’s attorneys had committed a fraud on the district court in presenting their arguments for § 102(g) anticipation. Noting that the “fraud” needed to set aside a judgment under Rule 60(b) “is typically limited to egregious events such as bribery of a judge or juror or improper influence exerted on the court,” *id.* at *3, the Federal Circuit agreed with the district court that the attorney argument presented by the accused infringer did not rise to this level of “fraud.” The Federal Circuit also agreed with the district court “that if some aspect of Merck’s witness presentation or attorney argument at the trial had been defective or over-stated, then Apotex should have challenged it with contrary evidence and argument at the trial.” *Id.* at *4. Given that the “evidence that was adduced and argument presented at the trial d[id] not establish corruption of the judicial process,” the Federal Circuit affirmed the summary judgment dismissing the Rule 60(b) motion. *Id.* at *5.

The Federal Circuit also affirmed the district court’s denial of the patentee’s motion to compel discovery of privileged material based on the patentee’s assertion that the crime-fraud exception applied to waive the accused infringer’s attorney-client privilege. The court instructed that the party seeking to pierce the privilege under the crime-fraud exception “must make a *prima facie* showing of some foundation for the asserted fraud.” *Id.* at *5. Since the alleged fraud was “simply attorney argument as to the inferences to be drawn from the evidence,” and the patentee failed to show falsity in the arguments, the Federal Circuit held that the district court correctly ruled that the patentee failed to show a *prima facie* case

of fraud, and correctly upheld the privilege. *Id.*

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