



PATENT HAPPENINGS

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

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JUDICIAL HAPPENINGS

Limiting Business Method Patents

The Federal Circuit reinforced the boundaries of business method patents in *In re Comiskey*, No.2006-1286, 2007 WL 2728361 (Fed. Cir. Sept. 20, 2007) by holding that patents directed to “business methods”

must comply with the same requirements for patentable subject matter as other patents. *Id.* at *6. The method claims at issue in *Comiskey* were directed to an allegedly novel method of conducting an arbitration. The Federal Circuit found that the claims did not require a machine, and did not describe a process of manufacture or a process for the alteration of a composition of matter—subject matter that may be patented under § 101. Instead, the method claims claimed the mental process of resolving a legal dispute between two parties by the decision of a human arbitrator. The court held that these claims failed to meet the patentable subject matter standard of 35 U.S.C. § 101 since they only claimed a mental process. It explained that “mental processes—or processes of human thinking—standing alone are not patentable even if they have practical application.” *Id.* at *9. Consequently, “the present statute does not allow patents to be issued on particular business systems—such as a particular type of arbitration—that depend entirely on the use of mental processes. In other words, the patent statute does not allow patents on particular systems that depend for their operation on human intelligence alone, a field of endeavor that both the framers and Congress intended to be beyond the reach of patentable subject matter.” *Id.* at *10.

A different result applied to the system claims of the patent, which claimed a physical system that used computer and communication equipment to perform the disclosed arbitration method. The court found that these claims, by combining the use of machines with the mental process, claimed patentable subject under § 101. *Id.* at *11. Nevertheless, relying on *Leapfrog* and its instruction that the application of modern technology to an old idea is likely obvious,¹ the Federal Circuit noted that “[t]he routine addition of modern electronics to an otherwise unpatentable

¹ *Leapfrog Enterprises, Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1161 (Fed. Cir. 2007)

invention typically creates a prima facie case of obviousness.” *Id.* Consequently, it remanded to the Board to determine whether the system claims were obvious over the prior art.

Electrical Signals Unpatentable

Considering the scope of patentable subject matter when applied to modern electronics, the Federal Circuit held in *In re Nuijten*, No. 2006-1371, 2007 WL 2728397 (Fed. Cir. Sept. 20, 2007), that transitory electrical signals by themselves are not patentable under 35 U.S.C. § 101. Individually addressing each of the four categories of patentable subject matter, i.e., process, machine, article of manufacture, or composition of matter, the court found that the signals do not fall within the scope of any of these categories. Specifically, the Federal Circuit held that since the electronic signals are not an “act,” the signals do not qualify as a process. *Id.* at *6. Since the signals are “not made of ‘parts’ or ‘devices’ in any mechanical sense,” they do not qualify as a “machine.” *Id.* at *7. The signals are not “tangible articles or commodities” produced from a manufacturing process, and therefore, they do not fall within the scope of an “article of manufacture.” *Id.* Finally, the court held that the signals do not constitute a composition of matter since the signals are “not a ‘chemical union,’ nor a gas, fluid, powder, or solid.” *Id.* at *8. Since the signals are not “a ‘process, machine, manufacture, or composition of matter[,]” and “[t]hose four categories define the explicit scope and reach of subject matter patentable under 35 U.S.C. § 101[,]” the Federal Circuit concluded that the signals cannot be patentable subject matter. *Id.* at *8.

Judge Linn dissented. In his view, since the signals were a man-made creation they fall within the scope of an “article of manufacture” despite being intangible. *Id.* at *17; *see also id.* at *11-13. Additionally, Judge Linn questioned the PTO’s position of allowing claims to signals as stored in a tangible medium, while denying claims to the signals themselves. He stated his view that:

As a matter of principle, there is little reason to allow patent claims to otherwise unpatentable, deemed abstractions just because those deemed abstractions are stored in a tangible medium, while rejecting the same inventions standing alone. . . . To allow a patent on a storage medium containing the signal but to deny one to the real underlying invention “make[s] the determination of patentable subject matter depend simply on the draftsman’s

art” in the sense criticized by the Supreme Court in *Flook*. . . . A better distinction is made based on the nature of the underlying invention, without regard to the particular way it is claimed. The “utility” requirement of § 101 provides a basis to differentiate patentable inventions involving the manipulation or transmission of information from unpatentable inventions whose only utility lies in the particular information they convey—often a difficult line to draw in computer-related arts.

Id. at *16.

Divided Infringement Claims

The Federal Circuit addressed the issue of liability for direct infringement of a method claim where different entities perform different steps of the claimed method, i.e., divided infringement claims, in *BMC Resources, Inc. v. Paymentech, L.P.*, No. 2006-1503, 2007 WL 2728400, *4-*7 (Fed. Cir. 2007). Approving what appears to have become the majority rule among the district courts,² the Federal Circuit held that for liability under a joint performance theory, there must be “a close relationship or connection between the accused infringer and the other entity such that the party accused of infringement directs or controls the actions of the other party.” *Id.* Applying this standard, the Federal Circuit affirmed the summary judgment of no direct infringement because the accused infringer did not direct or control the actions of the debit networks and financial institutions that performed the steps of the claimed method that the accused infringer did not perform. *Id.* at *7. The court left it to the patentee to properly draft its patent claims in a manner that avoided proof problems for divided infringement claims where no single entity directs or controls the actions of the other entities performing steps of the method. Admonishing litigants and patent drafters alike, the Federal Circuit warned that it “will not unilaterally restructure the claim or the standards for joint infringement to remedy [such] ill-conceived claims.” *Id.*

Enjoining Patentee’s Speech

The Federal Circuit vacated a preliminary injunction enjoining a patentee from making communications to an accused infringer’s customers, distributors, contractors and others during the

² See generally Robert A. Matthews, Jr., 1 Annotated Patent Digest § 10:171 Steps of Process Performed by Different Entities (hereafter APD)

pendency of the declaratory judgment litigation advising them of the lawsuit and the patentee's threats to sue them if they failed to stop selling the accused infringer's products in *GP Indus., Inc. v. Eran Indus., Inc.*, No. 2007-1087, 2007 WL 2728418, *3-*5 (Fed. Cir. Sept. 20, 2007). The district court had found that the patentee had subjective bad faith in making its statements since its president had not formally investigated its infringement allegations before threatening the accused infringer's customers. The district court, however, had failed to determine whether the infringement accusations were objectively baseless.

The Federal Circuit noted that an injunction against a patentee's speech is "a much more serious matter" than an injunction against carrying out accused infringing activity. *Id.* at *3. It explained that because the law allows a patentee to inform the public of its patent rights and suspected infringement of those rights,³ "an injunction against communication is strong medicine that must be used with care and only in exceptional circumstances." *Id.* Applying the two-part standard applicable to bad-faith enforcement claims, i.e., the patent infringement claim must be objectively baseless and the patentee must have made the infringement claim with subjective bad faith, the Federal Circuit held that the district court erred in finding that the patentee's statements constituted unfair competition, and therefore could be enjoined, without first determining whether the patentee's infringement claim was objectively baseless. *Id.* at *4. The court instructed that "[s]ubjective considerations of bad faith are irrelevant if the assertions are not objectively baseless." *Id.* at *5. The court further found that "[b]y recognizing that the patent is not necessarily invalid and that the [district] court could not conclude that there was no infringement, the [district] court established that [the patentee]'s assertions were not objectively baseless." *Id.* at *4. Accordingly, it vacated the preliminary injunction.

Proving Infringement with Comparative Data

Vacating a summary judgment of no infringement and remanding in *In re Gabapentin Patent Litig.*, No. 2006-1572, 2007 WL 2752892, *4-*6 (Fed. Cir. Sept. 21, 2007), the Federal Circuit held that a patentee's comparative pH test data raised a genuine issue of fact where that data, while not directly measuring the magnitude of a required concentration level,

³ See generally APD § 34:70 Patentee May Publicize Infringement Accusations if Done in Good Faith

nonetheless, provided information to show whether the accused product met the claimed concentration limit. Specifically, the claim at issue recited a pharmaceutical composition that required "less than 20 ppm of an anion of a mineral acid." To prove that the accused products had less than 20 ppm of an anion of a mineral acid, the patentee offered comparative test data based on the pH levels. According to the patentee's expert, comparing the pH levels in the accused compositions against a standard of a known composition showed whether the accused product had less than 20 ppm of an anion of a mineral acid. The accused infringers argued that since the patent expressly claimed a specific concentration level of the anion, the patentee had to produce evidence in quantitative terms showing the concentration of the anions in the accused product. The Federal Circuit rejected this contention. Distinguishing over its prior precedent where testing of unclaimed characteristics failed to prove whether a claimed characteristic was present in the accused product, the Federal Circuit found that, based on the record evidence, the comparative pH technique, permitted one to determine whether an unknown sample fell within the recited anion limitation of the patent, and therefore the comparative testing was a proper methodology to prove infringement. *Id.* at *5. Additionally, the Federal Circuit ruled that, for purposes of the motion for summary judgment, the accused infringers waived their arguments on whether the pH tests were invalid, inaccurate, or unreliable because the accused infringers stated in open court that while they disputed the reliability of the pH testing, that factual issue was not part of their motion for summary judgment. *Id.*

Declaratory Judgment Jurisdiction

The Federal Circuit in *Adenta GmbH v. Orthoarm, Inc.*, No. 2006-1571, 2007 WL 2713327, *5 (Fed. Cir. Sept. 19, 2007), reaffirmed that a patentee's decision not to assert a compulsory infringement counterclaim to an invalidity declaratory judgment claim does not show that a sufficient controversy is lacking. Hence, where a licensee informed a patentee that it believed the patent claims were invalid, and therefore it would no longer pay royalties, and the patentee stated to the licensee that if the licensee breached its royalty payment obligations the patentee would "pursue its available legal remedies," the situation demonstrated a case or controversy that was justiciable under the Declaratory Judgment Act. The patentee's prior infringement action against the licensee's predecessor

on the same patent covered by the license agreement further supported finding that a case or controversy existed. *Id.*

Corroborating Public Use

In addition to the ruling on the declaratory judgment issue discussed above, the Federal Circuit in *Adenta*, also affirmed a denial of the patentee's motion for a JMOL seeking to overturn the jury's verdict that displaying a product at a trade show constituted an invalidating public use or on-sale bar. 2007 WL 2713327, *6-*8. The patentee only disputed whether the witnesses' testimony offered to prove the characteristics of the displayed product was sufficiently corroborated and did not challenge specifically whether displaying its product at a trade show truly constituted a public "use," and hence resolution of that issue will have to await another day.⁴ On the corroboration issue, the Federal Circuit held that the accused infringer sufficiently corroborated testimony of two interested witnesses as to the invalidating public use with testimony of three disinterested witnesses, including the named inventor, documentary evidence describing the product made before and after the trade show, and a letter from a German patent attorney instructing the U.S. attorney to file a patent application within one year of the trade show. Rejecting the patentee's seriatim attack on the alleged deficiencies in each of the individual corroborating items, the Federal Circuit held that under the "rule of reason" the totality of "the testimony of the witnesses together with the documentary evidence provided a coherent and convincing story." *Id.* at *8.

The *Adenta* court also affirmed the district court's finding of no inequitable conduct and its refusal to award the successful declaratory judgment plaintiff attorney's fees. The Federal Circuit ruled that the district court did not abuse its discretion in finding the named inventor lacked an intent to deceive the PTO by not disclosing the alleged contribution of another to one of the limitations in some of the application claims, where those claims had been cancelled before the patent issued. The inventor had testified that he cancelled the claims because he did not think he could antedate other prior art invalidating those claims rather than because of any concern over the inventorship of the claims. The district court found that testimony credible, and the Federal Circuit saw no reason to

⁴ See generally APD § 17:139.50 Public Use from Displaying at a Trade Show

disturb that credibility finding under its deferential standard of review applicable to credibility determinations.⁵ *Id.* at *9.

"Comprised Of" as an Open Transition Term

The Federal Circuit held in *CIAS, Inc. v. Alliance Gaming Corp.*, No. 2006-1342, 2007 WL 2791695 (Fed. Cir. Sept. 27, 2007), that as a general proposition, the term "comprised of" when used as a transitional phrase in a patent claim should be treated the same as "comprising," and therefore imparts openness.⁶ *Id.* at *3-*4. Hence, the district court erred in treating "comprised of" in a claim directed to a counterfeit detection system and requiring "unique authorized information" that was "comprised of machine readable code elements according to a detectable series" as excluding systems with both detectable and "secret" elements, as present in the accused systems. *Id.* at *4. Nevertheless, the circumstances of the prosecution history showed that the patentee had limited the scope of "unique authorized information" to exclude "secret" elements as present in the accused product. *Id.* at *5. Consequently, while the district court may have erred in narrowly construing "comprised of," the Federal Circuit affirmed the summary judgment of noninfringement based on the surrender of claim scope evident from the prosecution history. The court remarked: "Although the usage 'comprised of' does not of itself exclude the presence of additional elements or steps, this does not permit recovery of claim scope that was limited during prosecution. The district court was correct that the amendments and arguments during examination and reexamination bar interpretation of 'unique randomly selected authorized information' to include the accused systems." *Id.* at *6.

Splitting Rights in Bankruptcy Defeated Standing

Ruling that the law of standing to sue for patent infringement applies when rights to a patent are distributed as part of settling a bankruptcy estate, the Federal Circuit in *Morrow v. Microsoft Corp.*, No. 2006-1512, 2007 WL 2713248 (Fed. Cir. Sept. 19, 2007), vacated a summary judgment of noninfringement after ruling that the district court erred in concluding that the plaintiff, a trustee for part of a bankruptcy estate, had standing to assert an

⁵ See APD § 27:61 Deference Due Trial Court's Credibility Determinations Regarding Intent

⁶ See generally APD § 4:37 "Comprising" as Transitional Term Permits Presence of Unrecited Elements

infringement claim. The bankruptcy liquidation plan in *Morrow* created three trusts to represent three different classes of creditors. The plan contractually gave to a first trust the right to enforce the patents by suing entities that were not shareholders of the bankrupt patentee. But the plan did not give the first trust legal title to the patent, the right to exercise any of the exclusive rights of the patent, or even the right to grant nonexclusive rights to practice the patent as part of settling any of the infringement actions it brought. Instead, the first trust had a bare right to sue, while a second trust retained legal title to the patent, but not the right to practice the patent. In its own name, the first trust instituted an infringement suit against Microsoft. Microsoft brought the second trust into the suit through its counterclaim, but argued that since the first trust lacked ownership in any of the exclusive rights in the patent, standing was defective. The Federal Circuit agreed. It held that the right to sue did not convey to the first trust any of the ownership rights in the patent. Without any ownership rights, the first trust had not suffered an injury-in-fact, as needed to have constitutional standing. *Id.* at *8. Consequently, the later joining of the second trust as a third-party defendant did not cure the lack of constitutional standing existing when the first trust filed suit. *Id.* at *10. The first trust had also argued that because, under the liquidation plan, it would obtain in the future whatever assets were left in the second trust after the second trust wound up the business affairs of the bankrupt patentee, its equitable rights to the future assets gave it standing. The Federal Circuit rejected this argument citing its prior precedent that equitable rights in a patent do not give standing to seek money damages. *Id.* at *9.

Judge Prost dissented. In her view, the first trust's right to sue implicitly carried the right to grant nonexclusive licenses, and therefore the first trust, while not an exclusive licensee, had sufficient rights in the patent to join as a co-plaintiff with the second trust. *Id.* at *12.

Special Master for Claim Construction

Perhaps breathing life into the use of special masters in patent cases, a district court in *Chrimar Systems, Inc. v. Powersdine, Ltd.*, 2007 WL 2688602, *1 (E.D. Mich. Sept. 10, 2007), overruled objections to its appointment of a law professor as a special master for recommending a claim construction ruling to the

court.⁷ The court quoted the 2003 Advisory Committee Notes to Fed. R. Civ. P. 53 and its explicit instruction that

The court's responsibility to interpret patent claims as a matter of law, for example, may be greatly assisted by appointing a master who has expert knowledge of the field in which the patent operates. Review of the master's findings will be *de novo* under Rule 53(g)(4), but the advantages of initial determination by a master may make the process more effective and timely than disposition by the judge acting alone.

Following this guidance, the district court determined that since other proceedings demonstrated that the case was complex, the use of the professor would aid the court in the matter. Further, the court found the expenses associated with the master were reasonable where the professor agreed to cap the fees for his services at \$30,000.

Invalidity Defenses Precluded

Following what is emerging as the majority trend among the district courts, the court in *Roche Palo Alto LLC v. Apotex, Inc.*, 2007 WL 2694175, *6-*7 (N.D. Cal. Sept. 11, 2007), held that where an accused infringer failed to prove the invalidity of the claims of an asserted patent in a first infringement action, *issue preclusion* barred the accused infringer from asserting in a second action *any* invalidity defenses, even invalidity defenses that the accused infringer had never raised in the first action.⁸ Rejecting the accused infringer's argument that issue preclusion should only apply to the specific grounds of invalidity adjudicated in the first action, the court stated that "[t]he authorities that have considered this question support Plaintiff's view and indicate that the relevant 'issue' which Defendants are precluded from relitigating is the ultimate determination on patent validity itself." *Id.*

In a less controversial ruling, the *Roche* court also held that the accused product in the second action, an ANDA application specifying a drug formulation 0.4% KT ophthalmic solution, was "essentially the same" as

⁷ The patent reform bill passed by the House of Representatives on September 7, 2007 calls for the Administrative Office of the United States Courts to study the use of special masters in patent cases and to determine whether special masters are beneficial in resolving patent litigation, and, if so, whether any special programs should be implemented to facilitate their use.

⁸ For a collection of other cases addressing this issue see APD § 38:42.50 Applying to Different Theories of Invalidity.

the accused product in the first action, an ANDA application specifying a drug formulation 0.5% KT ophthalmic solution. Consequently, *claim* preclusion also applied to bar any challenge to the validity of the patent. The court found that the two ANDAs were for “essentially the same” accused product because “[t]he only colorable changes identified by Defendants are ‘unrelated to the limitations in the claim of the patent’, and therefore [could not] prevent the application of claim preclusion.” *Id.* at *9. The court also held that even if the intervening decision in *KSR* fundamentally changed the law of obviousness, that did not alter the applicability of claim preclusion because “[u]nder controlling precedent from the Supreme Court and the Ninth Circuit, the fact that a judgment may have been wrong, or have rested on a since-repudiated legal principle, does not alter the claim preclusive effect of a final judgment.” *Id.* at *10.

No Patent Misuse From Covenant Not to Compete

The Seventh Circuit held in *County Materials Corp. v. Allan Block Corp.*, No. 06-2857, 2007 WL 2701979 (7th Cir. 2007), that a non-compete provision in a license agreement whereby the licensee was required after the termination of the license agreement to limit its sale of noninfringing products to only two specific types of products for a period of 18 months, and then only to a specific geographic location, did not amount to patent misuse. Applying a “rule of reason” analysis, the Seventh Circuit concluded that the license agreement bestowed valuable benefits upon the licensee beyond the patent rights, and therefore the patentee had not used the patent as leverage to make the licensee agree to the covenant not to compete. Further, given the mild nature of the restrictions, and the ability of the former licensee to sell two types of competing products, the court found that there was no evidence that “these limited requirements have hurt *competition* for cement blocks in County Materials’s former exclusive territory.”

ADMINISTRATIVE HAPPENINGS

On September 17, 2007, the USPTO and Swedish Patent and Registration Office (PRV) announced that they will begin a pilot program to test the feasibility of having the PRV perform search and examination services for the USPTO on international applications filed with the USPTO under the Patent Cooperation Treaty (PCT). The pilot program is part of the

USPTO’s efforts to reduce the backlog of U.S. national applications, with the expectation that outsourcing the search and examination of PCT international applications will allow the USPTO to dedicate more time to the approximately 750,000 U.S. national applications waiting to be examined. Under the pilot program, the PRV will process 50 PCT Chapter I applications covering a range of technologies. The USPTO will review the PRV’s work to see if it meets the USPTO’s standards for quality and accuracy.

FIRM HAPPENINGS

LMM-IP is pleased to announce that Robert A. Matthews, Jr., will be giving a presentation on how the Federal Circuit and district courts have been applying *KSR* to the AIPLA Patent Litigation Committee on Friday, October 19, during the committee’s 3:30 pm meeting at AIPLA’s 2007 Annual Meeting in Washington D.C.

The firm is also pleased to announce that Timothy Donaldson will be giving a presentation on Biotechnology and Patent Law: Recent Developments, at the Southeastern Regional Meeting of the American Chemical Society on October 24 in Greenville, South Carolina. The presentation will include a discussion of the USPTO’s precedential opinion *Ex parte Kubin*, applying *KSR* to claims directed to nucleic acids.

Contact Bob or Tim if you would like a copy of their presentation materials.

The firm has also been active on the publication front. An article by Bob Matthews, entitled “A Primer on US Antitrust Claims Against Patentees Under *Walker Process*,” appears as the lead “practice point” article in the October, 2007 issue of the *Journal of Intellectual Property Law & Practice*, published by Oxford University Press. As part of its “Key Author” white paper series, Thomson West will be releasing in October, an article Bob wrote earlier this month on the changes to the standards for proving willful infringement entitled “A Sea of Unanswered Questions Spawned by the Wake of *In re Seagate*.” Contact Bob if you would like a copy of either article.

The firm is also pleased to note that the *Annotated Patent Digest* was recently cited by Judge Shabaz in his opinion in *Encyclopaedia Britannica, Inc. v. Magellan Navigation, Inc.*, 2007 WL 2660053, *7 (W.D. Wis. Aug. 31, 2007).

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