



PATENT HAPPENINGS

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

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JUDICIAL HAPPENINGS

“E.g.” as Part of Lexicographic Definition

Where, in a patent specification, an inventor gave an example of a parameter as part of its express definition of a disputed claim term, the Federal Circuit held that the example operated as a limitation on the scope of the claim. In *Sinorgchem Co. v. Int’l Trade Comm’n*, No. 2006-1633, 2007 WL 4465270, *3-*7 (Fed. Cir. Dec. 21, 2007), the patentee asserted claims directed to a method of producing a compound, 6PPD, which acted as a rubber tire antidegradant. One of the steps of the claimed method recited reacting certain chemicals in the presence of a suitable base and a “controlled amount of protic material” to produce an intermediate compound. In the specification, the inventor stated “A ‘controlled amount’ of protic material is an amount up to that which inhibits the reaction of aniline with nitrobenzene, e.g., up to about 4% H₂O based on the volume of the reaction mixture when aniline is utilized as the solvent.” The accused product used aniline as its solvent, but had at least 10 to 15% of water throughout the reaction.

At the ITC, the Commission construed the term “controlled amount” to require an amount that inhibited the reaction of aniline with nitrobenzene. It thereby applied the first half of the inventor’s stated definition of “controlled amount.” But the ITC did not impose the condition following the “e.g.,” which required that if aniline was the solvent, the amount of water could not exceed “about 4%” of the volume of the reaction mixture. Instead, the ITC treated the “e.g.” as being an example of a preferred embodiment and not a claim limitation since it found the 4% limitation inconsistent with one of the examples shown in the patent. With its construction, the ITC found that the accused process literally infringed, and therefore entered a partial exclusion order.

On appeal, the Federal Circuit held that the ITC erred in its construction of the term “controlled

amount,” with respect to accused processes that use aniline as the solvent. Noting that when an inventor defines a claim term in the specification “the patentee must be bound by the express definition,” the court held that the clause following the “*e.g.*” in the definition had to be given effect. *Id.* at *4.¹ Rejecting the ITC’s reliance on portions of the specification vaguely intimating that a concentration of water greater than 4% could be used where aniline was the solvent, the Federal Circuit stated that the “vague language [in the specification] cannot override the express definitional language.” *Id.* at *5. It stated further that “[w]hen the specification explains and defines a term used in the claims, without ambiguity or incompleteness, there is no need to search further for the meaning of the term. When aniline is used as the solvent, the express definition is neither ambiguous nor incomplete – the ‘controlled amount’ is ‘up to about 4% H₂O based on the volume of the reaction mixture’ – and we need look no further for its meaning.” *Id.*

The Federal Circuit also rejected the ITC’s reliance on one of the examples in the specification that allegedly showed the use of an amount of water exceeding the 4% upper bound as supporting a broad construction. The Federal Circuit noted that the example was but one out of twenty-one other examples in the patent. Noting that where “multiple embodiments are disclosed, [the court has] previously interpreted claims to exclude embodiments where those embodiments are inconsistent with unambiguous language in the patent’s specification or prosecution history,” the Federal Circuit ruled that “the fact that the calculated amount of water in Example 10 exceeds 4% where aniline is used as the solvent is entitled to little weight, and cannot override the clear definitional language set forth in the specification.” *Id.* at *6-*7. Accordingly, the Federal Circuit held that in situations where aniline was used as the solvent the term “controlled amount” had to be construed to mean no more than “about 4% of water.” Since the accused product was made by a process using aniline as the solvent and with at least 10% of water, the Federal Circuit ruled there could be no literal infringement. It vacated the exclusion order and remanded for the ITC to consider whether the accused process infringed under the doctrine of equivalents. *Id.* at *8.

Judge Newman dissented. In her view the panel

¹ See generally, Robert A. Matthews, Jr., 1 ANNOTATED PATENT DIGEST § 4:28 General Aspects of Inventors Acting as Their Own Lexicographer [hereinafter APD].

erred in applying “the number that is described for one condition, to a limit under all conditions, contrary to the specification.” *Id.* at *10. She criticized the majority for making erroneous appellate findings of scientific fact, which she viewed as being directly contrary to the Commission’s fact findings, to support its claim construction. *Id.* at *11.

Improper to Read In Singular Condition

Several days after handing down *Sinorgchem, supra*, the Federal Circuit again addressed an inventor acting as his own lexicographer in *Hyperphrase Tech., LLC v. Google, Inc.*, No. 2007-1176, 2007 WL 4509047, *3-*5 (Fed. Cir. Dec. 26, 2007) (*nonprecedential*). In that case, the Federal Circuit held that a district court erred by reading into a claim term defined in the specification a requirement of singularity which was not contained in the inventor’s express definition for the claim term but allegedly evident from other parts of the specification. At issue was the proper construction of the term “data reference,” as used in claims directed to an invention for contextually linking related computerized records. The patent described the invention as reading a web page and finding unique tokens (“data references”) on the page, such as a tracking number of a shipped product, and then locating and retrieving a record from another web site based on the value of the token.

Regarding the construction of the disputed claim term “data reference,” the inventor had stated in the specification that a “data reference” “is a unique phrase or word which may be used in a record to refer to another record or record segment.” The district court adopted this definition for its claim construction. But the district court added an additional requirement that the data reference (e.g., token) could only refer to one and only one possible record. Because the accused product used the token from the first web page to reference multiple different web pages, the district court granted the accused infringer summary judgment of no infringement since the token was not linked to one and only one other record.

The Federal Circuit agreed that the inventor had acted as his own lexicographer and defined the term “data reference” in the specification to mean “a unique phrase or word which may be used in a record to refer to another record or record segment.” It disagreed, however, that the claim had to be limited to linking the reference to one and only one other record (or web page). Noting that the use of the term “a” with open claim language generally does not limit a claim to a

singular meaning,² the Federal Circuit found that the recitation in the claim to “a reference to a second data record” did not support reading in the requirement that the data reference had to be linked to one and only one other record. *Id.* at *4.

The court also found that the specification and prosecution history did not show that the inventor intended to limit the term “data reference” to one and only one other record. While the specification disclosed some embodiments of the invention with a data reference linking to one and only one other reference, the specification also disclosed other embodiments with the data reference linking to more than one other record. After noting that “[a] claim construction that excludes an embodiment of the relevant claim(s) is typically incorrect,” the Federal Circuit held that “while many of the embodiments do indeed illustrate data references referring to single records, the district court’s adoption of that limitation here constituted an improper importation of that limitation from the specification into the claims, especially given that other embodiments refute that limitation.” *Id.* at *5.

Use of Same Material Vitiates Claim Limitation

The Federal Circuit applied the vitiation doctrine to affirm a summary judgment of no infringement in *Wleklinski v. Targus, Inc.*, No. 2007-1273, 2007 WL 4460620 (Fed. Cir. Dec. 19, 2007) (*nonprecedential*).³ There, the claims at issue covered a shoulder strap assembly having an “auxiliary strap means.” The claims further recited that the “auxiliary strap means” had “first and second *separate* end sections made of a relatively non-stretchable material, and also including a *separate* center section made of material which is longitudinally stretchable.” (emphasis added) Agreeing with the district court, the Federal Circuit construed this term to require that the strap be formed from two separate and different materials. It explained “[i]n our view, the plain meaning of the claim language requires that the center and end sections be composed of different materials. The limitation refers to the end sections being ‘made of a relatively non-stretchable material’ and the center section being ‘made of material which is longitudinally stretchable.’ At the same time, the center and end sections are both

described as being ‘separate’ from each other. The most persuasive reading of the claim language is that the center and end sections are constructed of different materials.” *Id.* at *3 (emphasis in original).

The “auxiliary strap” of the accused product consisted of a unitary strap made from a stretchable material. The end portions of the strap had two plies of the material stitched together to make the end portions nonstretchable. The center portion had only one ply of the material. Given its affirmation of the claim construction requiring that the strap be made from two different materials and that the strap in the accused product was made from only one material, the Federal Circuit affirmed the summary judgment of no literal infringement. It then rejected the patentee’s contention that infringement could exist under the doctrine of equivalents. According to the Federal Circuit, the use of a single unitary material made of the same fabric in the accused product “is the fundamental opposite of the claimed invention.” *Id.* at *4. Thus, it ruled that a “finding of equivalence with a single strap lacking separate sections and different materials would impermissibly vitiate” the claim limitation.⁴ *Id.* Accordingly, the court affirmed the summary judgment of no infringement.

Improper Infringement Proof

An improper product comparison and reliance on customer testimonials failed to meet a patentee’s burden to prove infringement on summary judgment according to the district court in *Mannatech, Inc. v. Glycobiotics Int’l, Inc.*, 2007 WL 4386244 (N.D. Tex. Dec. 14, 2007). *Mannatech* involved claims directed to a dietary supplement that provided “nutritionally effective amounts” of isolated and purified saccharides. The patent defined “nutritionally effective amounts” to mean “that amount which will provide a beneficial nutritional effect or response in a mammal.” To show that the accused product met the “nutritionally effective amount” limitation, the patentee proffered testimony from its expert who had developed his own similar dietary supplement. The expert compared the ingredients in the supplement he developed with the ingredients in the accused product and based on that product comparison opined that the accused product provided a beneficial nutritional effect, and therefore

² See generally, APD § 4:59 “A” or “An” Generally Construed as Meaning “At Least One.”

³ See generally APD § 13:20 Theory of Equivalence too Broad and Reads Out Limitation.

⁴ For further cases on vitiation see APD § 13:21 Cases Finding Theory of Equivalence Vitiates Claim Limitation and § 13:22 Cases Finding Theory of Equivalence did Not Vitate Claim Limitation.

met that “nutritionally effective amount” limitation. Relying on the well-settled principle that an infringement analysis must compare the accused product to the claims of the patent, and not to another product,⁵ the district court held that it could not accept the expert’s testimony as evidence that the accused product met the “nutritionally effective amount” claim limitation. *Id.* at *3. The court noted that it was “improper” for the expert to base his “infringement determination on a comparison of the two products rather than evidence that the accused product contains each limitation of the asserted claim.” *Id.* The court also rejected the expert’s reliance on testimonials from the accused infringer’s customers as to the positive effect they allegedly felt upon taking the accused product as evidence that the accused product met the “nutritionally effective” limitation. The court ruled that the testimonials were “wholly unreliable” and “wholly insufficient” to support the patentee’s proof burden on summary judgment, especially given the disclaimers placed on the website by the accused infringer regarding the testimonials. *Id.* at *4-*5.

Customer-Suit Exception and Component Parts

The “customer-suit” exception generally permits a declaratory judgment action filed by a manufacturer after the patentee has filed a suit against the manufacturer’s customer to take precedence over the patentee’s infringement action.⁶ Judge Clark from the Eastern District of Texas held in *Microsoft Corp. v. Commonwealth Scientific and Indus. Research Organisation*, 2007 WL 4376104, *3 (E.D. Tex. Dec. 13, 2007), that where the “manufacturer” only supplies a component of the accused product, and that component does not directly infringe the asserted patent by itself, the “customer-suit” exception does not apply to give precedence to the component manufacturer’s later-filed suit.

In *Microsoft*, a chip manufacturer moved to intervene in a declaratory judgment action filed by one of its customers against the patentee and to stay that portion of the customer’s action that related to the component parts the chip manufacturer supplied. The court denied the motion to stay on two grounds. First, the court found that the chip manufacturer’s action would not completely resolve the infringement issues in the action involving the customer. The court noted that since “[i]t is a cardinal rule that in the absence of

direct infringement, there can be no indirect infringement,” that factor weighed in favor of not staying the customer’s action which would resolve the issue of direct infringement. Second, undue delay by the chip manufacturer further supported denying the request for the partial stay. The chip manufacturer had waited for over two years before attempting to intervene and request the partial stay. The district court noted that “[s]itting on the sidelines for two years does not promote efficiency or judicial economy; this fact alone weighs heavily against granting the partial stay.”

The district court also rejected the chip manufacturer’s attempt to disqualify the patentee’s trial counsel based on an asserted conflict of interest arising from patent-prosecution work that the patentee’s trial counsel had previously done for the chip manufacturer. The court found that by waiting two years to assert the alleged conflict, the chip manufacturer had waived any conflict that might have existed. The court also found that the conflict was “thrust upon” the patentee’s trial counsel in view of the chip manufacturer’s failure to inform the patentee’s trial counsel during its relationship with that counsel of the existence of indemnity agreements it had entered into that allegedly created the conflict of interest. Given that the conflict was “thrust upon” the patentee’s counsel, the court held that the counsel was permitted to drop the chip manufacture as a client as a way of resolving the apparent conflict. *Id.* at *6-*9.

Expert Struck for Lawyer’s Ethical Violation

Lawyers for a patentee violated the ethical rule prohibiting a lawyer from communicating about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the matter when the lawyers purchased an accused system and engaged in conversations with the accused infringer’s technician who installed the system in the lawyers’ office. In *Microsoft Corp. v. Alcatel Business Sys.*, 2007 WL 4480632 (D. Del. Dec. 18, 2007), two lawyers representing the patentee purchased an accused system on the open market several months *after* commencing the infringement lawsuit. The lawyers arranged to have the system installed in one of their offices. The technician who installed the system was one of only a few technicians having the necessary knowledge to install the system. He was employed by one of the defendants originally named by the patentee in the suit, but dropped from the suit shortly before the lawyers purchased the accused system. The dropped

⁵ See APD § 12:2 Comparisons with Commercial Embodiments.

⁶ See generally APD § 37:87 Customer-Suit Exception.

defendant appears to have been a corporate subsidiary to one of the remaining defendants. During the installation of the system, the patentee's lawyers directed the technician to provide them with training on the administration, use and configuration of the accused system, and further engaged the technician in ongoing conversations on these subjects. Judge Robinson found that the lawyers violated Model Rule 4.2, since they effectively forced the technician to engage in communications with them regarding the accused system and the technician's position within the company made it a possibility that his statements could bind the accused infringer. *Id.* at *1. Alternatively, the court found that the lawyers' conduct also violated Model Rules 4.1(a), 4.3 and 8.4(c) since the lawyers were "neither forthright nor disinterested" when they "consciously put [the technician], without the benefit of legal representation, in the unwitting position of being directed to engage in conduct that has direct consequences vis a vis his employer and the subject matter of this litigation." *Id.* at *1 n.5

Addressing the appropriate sanction for the violation, the court noted that the patentee did not gain any confidential information from the technician and that the patentee merely obtained "objective information about the accused products, without the glaze of litigation stratagems that usually accompanies the discovery process." *Id.* at *2. Nonetheless, the court held that deterrence required some sanction for the improper conduct. Accordingly, the court ordered as a sanction that the patentee could not use the fruits of the violating lawyers' conduct. *Id.* To implement this sanction, the court ordered that the patentee's retained expert, who presumably was given information about the installation, could not serve as a consultant or an expert witness in the litigation. Additionally, the lawyers who communicated with the technician could not be involved in the litigation, nor could any information obtained from the installation be given to any witness for use in the case. *Id.*

Requesting Sanctions Leads to Sanctions

Showing the dangers of asserting a questionable motion seeking sanctions against an adversary, the district court in *Perfect Web Technologies, Inc. v. infoUSA, Inc.*, 2007 WL 4414819, *3 (S.D. Fla. Dec. 14, 2007), after denying a patentee's motion for sanctions against the accused infringer, granted the accused infringer's request for sanctions against the patentee's trial counsel under § 1927 for bringing the

original sanction motion.⁷ During the proceedings the accused infringer's trial counsel had identified the accused infringer's corporate president as a relevant fact witness to support a motion to transfer venue to Nebraska. After the court denied the transfer motion, the patentee sought to depose the corporate president. The accused infringer's counsel informed the patentee's counsel that while it would make the president available in Nebraska, the president did not have much knowledge of the specifics of the accused product and suggested that the patentee would be better off deposing others in the corporation. Thereafter, the patentee asserted that the accused infringer acted in bad faith in identifying the president as a relevant fact witness to support the transfer motion. The district court disagreed. It did not find any inconsistency in the accused infringer's conduct and to the contrary viewed the accused infringer as trying to streamline the discovery process. Accordingly, it denied the patentee's request for sanctions. It further found that the patentee's sanction motion was baseless, and that it "unreasonably and vexatiously increased costs of this action to Defendant." Accordingly, the court ordered the patentee to pay to the accused infringer the costs, expenses and attorneys' fees reasonably incurred by the accused infringer in responding to the patentee's motion.

Counsel Sanctioned for Deposition Objections

A lawyer's conduct in making improper objections during a Rule 30(b)(6) deposition led to sanctions in *Promos Tech., Inc. v. Freescale Semiconductor, Inc.*, No. 06-788-JJF, (D. Del. Dec. 20, 2007). Specifically, the court found that during a 30(b)(6) deposition of an accused infringer, the accused infringer's counsel "obstructed the questioning of [the deponent] by the improper assertion of work product privilege and interposing numerous objections unsupported by the rules of evidence." *Slip opn.* at 2. The court found that "the inappropriateness of the objections [wa]s plain from a reading of the deposition transcript." *Id.* As a consequence, the court ordered the accused infringer to produce the deponent for a second deposition on the topics set forth in the 30(b)(6) notice at a time and place designated by the patentee. Additionally, the court sanctioned the accused infringer's counsel, personally, by ordering the counsel to pay "all costs and attorney's fees" incurred by the patentee in the

⁷ See generally APD § 33:63 addressing sanctions for attorney misconduct under 28 U.S.C. § 1927.

original deposition and in the re-deposition. *Id.* at 3.

Declarations Contrary to 30(b)(6) Testimony

In *Orthoarm, Inc. v. Forestadent USA, Inc.*, 2007 WL 4457409 (E.D. Mo. Dec. 14, 2007), the district court granted a patentee's motion to strike a declaration submitted by an accused infringer's 30(b)(6) designee as to the characteristics of the accused product because the declaration was directly contrary to the designee's prior 30(b)(6) deposition testimony and the court concluded that the declaration was a sham. The designee had acknowledged in his 30(b)(6) deposition that he was the accused infringer's corporate representative authorized to testify as to the characteristics of the accused product and that he knew "quite a lot" about the product. In the 30(b)(6) deposition, the designee testified that in the accused product a clip contacted a bracket. Yet five months later, in opposing the patentee's motion for summary judgment, which relied on the 30(b)(6) deposition testimony, the accused infringer submitted a declaration from the designee stating that the clip did not contact the bracket, thereby directly contradicting the prior testimony. In an attempt to justify the changed testimony, the designee stated in his declaration that he "had never really thought of the question whether the clip came into contact with the tab because whether it did nor didn't come into contact was irrelevant to the operation of the bracket." He also claimed that his training and responsibility were for sales and marketing, and that he did "not get involved in the technical design, manufacture or development of our products."

Noting the general rule "that an affidavit filed in opposition to a motion for summary judgment that directly contradicts the affiant's previous deposition testimony is insufficient to create a genuine issue of material fact under Rule 56," the district court examined the circumstances surrounding the contradictory declaration, including the designee's alleged justifications, and concluded that the accused infringer had "offered an insufficient explanation to justify permitting [the designee] to directly contradict his Rule 30(b)(6) testimony." *Id.* at *2-*3. The court found that i) the accused infringer was responsible under Rule 30(b)(6) to provide a witness who was informed and prepared to testify on the exact issue of whether the clip contacted the bracket; ii) that the accused infringer represented that the designee was prepared to testify as to the matters listed in the 30(b)(6) Notice; iii) that the designee testified

unequivocally in the Rule 30(b)(6) testimony; and iv) that the designee's testimony demonstrated no confusion or uncertainty on the issue of whether the clip contacted the bracket. The court further noted that it found "suspicious that the . . . Declaration was submitted . . . months after the 30(b)(6) deposition, and only in response to plaintiffs' motion for summary judgment." *Id.* Accounting for these circumstances, the court concluded that the declaration was "a sham affidavit which should not be considered on summary judgment." *Id.*

The accused infringer had also submitted a second declaration from another fact witness testifying that the clip in the accused product did not contact the bracket. The patentee sought to have this declaration stricken for being contrary to the 30(b)(6) testimony. The court denied the request to strike. While noting that the accused infringer was bound by the 30(b)(6) testimony, the court ruled that since the deposition of the second witness was consistent with his declaration, and that the patentee had notice of the position of this witness before it filed its summary judgment motion, it would not strike the second witness's declaration even though the declaration conflicted with the 30(b)(6) testimony. *Id.* at *4.

LEGISLATIVE HAPPENINGS

When it returns from its recess on January 22, 2008, the Senate is expected to take up "as early in the new year as possible" Senate Bill S. 1145, the Patent Reform Act of 2007. In statements made on the Senate floor on December 18, 2007 Senators Leahy and Hatch spoke on the "urgent need to modernize our patent laws." Congressional Record – Senate at S15898 (Dec. 18, 2007). Senator Leahy stated that the efforts by the courts to deal with the changing needs of both science and the economy by interpreting the patent law "in ways that make sense in light of the change" has been a "piecemeal process" that "has left many areas unclear" and left other areas of the law "out of balance." Accordingly, "action by the Congress is needed, and needed urgently." *Id.* at S15899. Senator Leahy identified the areas of "ensuring compensation for infringement is fair and adequate; clarifying the rules on venue; and improving the ability of parties to challenge the validity of granted patents through administrative process" as the main issues of concern. *Id.* Adding to this list, Senator Hatch stated that there is also a "need to make further reforms to the inequitable conduct defense . . . to change the use of this defense as an unfair litigation tactic." *Id.*

Focusing on the need to protect new drug innovators from inequitable conduct challenges by generic drug manufacturers, Senator Hatch stated that “[u]nless we promote and protect a structure that fosters a strong and vibrant environment for innovators, there will be fewer and fewer drugs for the generics to manufacture—and all, including patients, will suffer.” *Id.* Warning that a “do nothing” approach to patent reform would be detrimental to the nation, the senators promised an “open and deliberative process” to gain favorable Senate action on the bill “as early as the floor schedule permits.” *Id.*

ADMINISTRATIVE HAPPENINGS

Effective January 4, 2008, the Patent Prosecution Highway (PPH) between the USPTO and the Japan Patent Office will be implemented on a full time basis. Applicants participating in the PPH, after receiving a ruling from either patent office that at least one claim in an application is patentable may request the other office to “fast track” the examination of corresponding

claims in corresponding applications. As a result, the USPTO predicts that applicants can expect to obtain patents in both offices faster. The USPTO also stated that it will soon make available updated requirements for the PPH.

FIRM HAPPENINGS

On March 25, 2008, Robert A. Matthews, Jr., will speak on the topic of “Willful Infringement after *In re Seagate*” at the IP Law & Business’s Annual IP Counsel Forum in San Jose, CA. Information regarding the conference can be found on the organizer’s website at www.almevents.com.

To accommodate the firm’s growth, we moved our Herndon, VA office to a new office suite within the same building on Park Center Road. Matthew Latimer and Timothy Donaldson man the Herndon office. The new address for the Herndon office is 13878 Park Center Road, Suite 106, Herndon, VA 20171. Our Herndon office phone numbers remain the same.

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