

Last Month at the Federal Circuit

June 2007

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- In *In re Princo Corp.*, Misc. No. 841 (Fed. Cir. May 4, 2007), the Federal Circuit, on petition for rehearing, affirmed its grant of Princo Corporation and Princo America Corporation's (collectively "Princo") petition for a writ of mandamus pursuant to 28 U.S.C. § 1659, instructed the U.S. District Court for the Southern District of New York to stay a suit for patent infringement brought by U.S. Phillips Corporation ("Phillips") against Princo until a related proceeding at the ITC "becomes final," and denied the petition for rehearing.

In its petition for rehearing, Phillips asserted that the language "becomes final," as it appears in 19 U.S.C. § 1337, is understood to mean finality at the ITC level rather than the appellate level and, therefore, § 1337 should be used to inform the meaning of the phrase in § 1659. While the Federal Circuit agreed with Phillips that § 1337 does indeed refer to a final decision at the ITC level, the Court held that it did not err in construing the language of § 1659 to require a final decision after appeal. The Court observed that neither statute references the other, which ultimately dissuades the Court from using a definition found in one statute to inform the meaning of language in another. Additionally, the Court explained that the two statutes had very different purposes. Section 1337 allows for judicial review after a determination by the ITC, whereas § 1659 prevents concurrent infringement proceedings involving the same issues and substantive matter.

Narrow Claim Language Precludes Infringement on Summary Judgment

Jennifer R. Leach

Judges: Newman, Friedman (author), Prost

[Appealed from C.D. Cal., Judge Selna]

In *Foremost in Packaging Systems, Inc. v. Cold Chain Technologies, Inc.*, No. 06-1582 (Fed. Cir. May 2, 2007), the Federal Circuit affirmed the district court's grant of SJ of noninfringement of claims 9, 13, and 22 of Foremost in Packaging Systems, Inc.'s ("Foremost") U.S. Patent No. 5,294,302 ("the '302 patent").

The '302 patent relates to insulated shipping containers that are designed to carry temperature-sensitive products such as pharmaceuticals and human tissue. These insulated shipping containers consist of an insulated cover and an insulated body. The insulated cover includes insulated blocks that extend downward from the insulated cover. The insulated body includes separate areas called coolant cavities in which the transported products are placed. When the cover is placed on the container, the insulated blocks descend into the coolant cavities.

Claims 9 and 13 of the '302 patent state that "the insulated block [is] adapted to slidably engage

the coolant cavity, thereby the coolant and the insulated block together substantially fill[] the coolant cavity." The other claim at issue, claim 22, recites "an insulated cover adapted to engage the open end of the insulated body and having a configuration for minimizing air spaces within the cavities." The district court construed claims 9, 13, and 22 to require that the insulated cover be inserted into the coolant cavity. As such, the district court found that Cold Chain Technologies, Inc.'s ("Cold Chain") accused cooler in which the insulated block merely covers the opening of, but does not extend into, the coolant cavity, did not infringe claims 9, 13, and 22 of the '302 patent.

On appeal, focusing mainly on the phrase "slidably engage the coolant cavity," Foremost argued that even though the insulated block of Cold Chain's cooler does not extend down into the coolant cavities, the claims of the '302 patent are infringed because the insulated block "slidably engages" the coolant cavity.

The Federal Circuit rejected Foremost's position and held that the district court correctly construed the claims. The Federal Circuit stated that "[i]f the insulating block does not extend down into the coolant cavities, the coolant and the insulated block cannot 'together' substantially fill the cavity," as required by claims 9 and 13. Slip op. at 3. Moreover, regarding claim 22, the Federal Circuit stated that "[t]he only way the insulated cover can have 'a configuration for minimizing air spaces within

the cavities' is if the cover is designed so that part of it extends downward into and therefore fills part of the coolant cavity." *Id.* at 4. Accordingly, the Federal Circuit affirmed the district court's grant of SJ of noninfringement of claims 9, 13, and 22 of the '302 patent.

Obvious to Update Electromechanical Learning Device with Modern Electronic Components

Christopher T. Kent

Judges: Mayer, Lourie (author), Dyk

[Appealed from D. Del., Judge Sleet]

In *Leapfrog Enterprises, Inc. v. Fisher-Price, Inc.*, No. 06-1402 (Fed. Cir. May 9, 2007), the Federal Circuit affirmed the district court's judgment of noninfringement and invalidity of claim 25 of U.S. Patent No. 5,813,861 ("the '861 patent").

Leapfrog Enterprises, Inc. ("Leapfrog") filed suit against Fisher-Price, Inc. and Mattel, Inc. (collectively "Fisher-Price"), alleging that Fisher-Price's PowerTouch learning device infringed claim 25 of its '861 patent. Claim 25 of the '861 patent is directed to an interactive learning device including, inter alia, at least one depiction of a sequence of letters, wherein selection of a depicted letter causes the sound production device to generate a signal corresponding to the sound associated with the selected letter. The district court construed "selection of a depicted letter" to mean "choosing a particular depicted letter from the depicted sequence of letters by contacting or coming into proximity to that particular depicted letter."

After trial, the jury was unable to reach a verdict, and the parties stipulated that the case would be submitted to the district court for decision. The

district court found that the accused PowerTouch device permitted only the selection of a word rather than a particular letter and, thus, held that the PowerTouch device did not infringe claim 25. The district court also held claim 25 invalid as obvious in view of the combination of U.S. Patent No. 3,748,748 to Bevan ("the Bevan patent"), the Texas Instruments Super Speak & Read device ("the SSR device"), and the knowledge of one of ordinary skill in the art.

On appeal, neither party challenged the district court's claim construction. Rather, Leapfrog argued that the district court's finding of noninfringement was clearly erroneous because during operation of the PowerTouch device, for at least some words, a particular letter can be selected for a word, and it does not matter that the response is the same regardless of the particular letter selected. Fisher-Price countered by arguing that the limitation is only meaningful if the selection of a particular letter of a word results in a different outcome. Agreeing with Fisher-Price, the Federal Circuit held that the district court's finding was not clearly erroneous, explaining that a selection involves a choice and, further, that the ordinary meaning of choice requires that alternatives from which a choice is made will result in different outcomes.

In the Federal Circuit's first review of the question of obviousness since the Supreme Court's decision in *KSR International Co. v. Teleflex Inc.*, 127 S. Ct. 1727 (2007), the Federal Circuit affirmed the district court's finding of obviousness. Leapfrog argued that (1) the district court's obviousness finding relied on improper hindsight reasoning because the Bevan patent device has a different (i.e., mechanical) function than the electronic components of the '861 patent, (2) there was no motivation to combine the Bevan patent with the SSR device to arrive at the claimed invention, and (3) the district court failed to properly consider Leapfrog's substantial evidence of secondary considerations in support of nonobviousness. The Federal Circuit, relying on the guidance of *KSR*, affirmed the district court's finding of obviousness.

The Court began its analysis by stating that the goal of the '861 patent is to allow a child to press a switch associated with a single letter in a word and hear the sound of the letter as it is used in that word. The Court then explained that adapting a prior art mechanical device that accomplishes that goal to modern electronics would have been “reasonably obvious” to one having ordinary skill in the art in designing children’s learning devices and, further, that applying modern electronics to older mechanical devices has been commonplace in recent years.

Looking first to the Bevan patent, the Federal Circuit found that the Bevan patent discloses an electromechanical learning toy, one embodiment of which includes a puzzle piece that is imprinted with a letter from a word. When the letter is pressed, the Bevan patent device produces the sound of the letter by causing a particular portion of a phonograph record to play via a speaker. The Court concluded that the Bevan patent teaches an apparatus that achieves the same goal as that of the '861 patent, associating letters with their sounds and encouraging children to sound out words phonetically through a similar type of interaction.

Looking to the SSR device, the Federal Circuit found that the SSR device is a modern learning toy constructed with electronic components, including a processor, memory, and a speaker. Noting that in one mode of operation, a child presses a first letter of a word and hears the sound of the first letter followed by the sound of the entire word, the Court found that the SSR device provides a “roadmap” for one of ordinary skill in the art desiring to produce an electronics-based learning toy for children that allows the use of phonetic-based learning methods, including the association of individual letters with their phonemes. Thereafter, the Court concluded that it would have been obvious to combine the Bevan patent device with the SSR device to update it using the modern electronic components in order to gain the commonly understood benefits of the adaptation, such as decreased size, increased reliability, simplified operation, and reduced cost. Further, the

combination is the adaptation of an old idea or invention (as shown by the Bevan patent) using newer technology that is commonly understood in the art (as shown by the SSR device).

Finding that the combination of the Bevan patent and the SSR device still failed to teach a reader as claimed in the '861 patent, the Federal Circuit nevertheless concluded that there was sufficient evidence to support the district court’s finding that such readers were well known in the art at the time of the invention. The Court further concluded that it would have been obvious to add a reader to the children’s toy to provide an added benefit and simplified use of the toy for the child in order to increase its marketability. The Court thereafter cited Leapfrog’s failure to provide any evidence that provision of a reader was uniquely challenging or difficult for one of ordinary skill in the art, or that inclusion of a device commonly used in the field of electronics and electronic children’s toys (i.e., the reader) represented an unobvious step over the prior art.

Additionally, the Federal Circuit found no basis to disagree with the district court’s finding that the strength of the prima facie case of obviousness was sufficient to overcome the evidence of secondary considerations.

Inventor’s Awareness of Detergent Tablet Possessing the Discernible Property Required by the Interference Count Enough to Show Appreciation of the Invention

Cortney S. Alexander

Judges: Gajarsa, Linn (author), Moore

[Appealed from the Board]

In *Henkel Corp. v. Procter & Gamble Co.*, No. 06-1542 (Fed. Cir. May 11, 2007), the Federal Circuit vacated the Board’s denial of

Henkel Corporation’s (“Henkel”) Substantive Motion No. 4, the dismissal as moot of The Procter & Gamble Company’s (“Procter & Gamble”) motions, and the entry of judgment against Henkel.

“[A]n inventor can demonstrate appreciation without enunciating the precise language of the interference count.” Slip op. at 10.

Henkel and Procter & Gamble both developed detergent tablets, known as “ring tabs,” which are comprised of a “compressed” region and a “solidified solution or melt” region, in which the compressed region dissolves at a faster rate than the solidified region. Procter & Gamble obtained U.S. Patent No. 6,399,564 (“the ’564 patent”) directed to the ring-tab technology, while Henkel claimed the same subject matter in its U.S. Patent Application Nos. 09/446,434 (“the ’434 application”) and 09/446,578 (“the ’578 application”).

The Board declared an interference between Procter & Gamble’s ’564 patent and Henkel’s ’434 and ’578 applications, designating Procter & Gamble the senior party based on its priority date of November 26, 1997, and Henkel the junior party with a priority date of December 30, 1997. Henkel argued that it was entitled to priority based on its development of the ring tabs before Procter & Gamble’s priority date.

By April 1997, Dr. Thomas Holderbaum, a named inventor on Henkel’s ring-tab applications, had conceived of a melt-filled ring tab and directed a technician, Thomas Schliwka, to perform testing of a ring tab that included a compressed region filled with a melt composition identified through previous work. During testing, Schliwka visually observed that the melt region of the tablet “does not dissolve in the prewash cycle” of the dishwasher, whereas the compressed region lost 8 grams out of 29 grams, and recorded these observations in a laboratory notebook. Holderbaum testified that he “supervised [another technician] and

Mr. Schliwka and conferred with them on virtually a daily basis and was well aware of their activities and results.” Slip op. at 2. Also, in April 1997, another Henkel employee performed additional testing of several tablets, including ring tabs like those tested by Schliwka. These tests showed that the ring tabs lost a smaller percentage of their weight than those without a melt region during a prewash cycle. These results were reported at a meeting attended by three inventors of Henkel’s applications in late April or May 1997.

The sole count of the interference was directed to a tablet comprising a compressed region and a solidified solution or melt region, the compressed region having a faster dissolution rate than the solidified region. The one disputed aspect of the construction of the interference count was over the meaning of the term “dissolution rate.” Procter & Gamble argued that in order to measure the comparative dissolution rates of the compressed and noncompressed regions, samples of each had to be apportioned into equal weights and tested at a constant temperature in separate compartments. Henkel argued that it was only necessary to demonstrate that a greater weight of the compressed region dissolved than of the melt region, referred to as a “weight-by-weight basis.”

The Board applied Henkel’s methodology, but concluded that Henkel failed to carry its burden of showing it had conceived the invention and reduced it to practice before Procter & Gamble. Specifically, the Board held that Henkel failed to show that its inventors appreciated their invention contemporaneously with their conception and reduction to practice. Consistent with this finding, the Board awarded priority to Procter & Gamble. Henkel appealed.

The Federal Circuit held that the Board correctly accepted Henkel’s position on the scope of “dissolution rate” because the interference count did not require specific ranges of dissolution rates. Instead, the correct requirement of the count simply called for a showing that the dissolution rate of the compressed region be “greater” than that of the other region. However,

the Court held that the Board improperly held Henkel to a more stringent standard by requiring a showing that its inventors appreciated specific dissolution rates.

The Court held that Schliwka’s observation that the tested ring tab had a compressed region that dissolved faster than the melt region was sufficient to demonstrate that Henkel made a tablet meeting the limitations of the count by April 1997. Moreover, Schliwka’s observations, coupled with his interactions with inventor Holderbaum, demonstrated that Holderbaum appreciated that the compressed region had a faster dissolution rate than the melt region. Although Holderbaum did not explicitly testify that the inventors appreciated the specific limitation at the time of Schliwka’s experiments, “such a formulaic affirmation is unnecessary” because the limitation in question was directly observed by a technician working under the close supervision of an inventor. *Id.* at 10. The Court noted that the law does not require a “junior party in an interference demonstrate that it recognized the exact language of the ultimate count—only the subject matter of the invention.” *Id.* at 9.

The Federal Circuit also addressed the requirement for an inventor in an interference proceeding to put forth objective evidence corroborating his subjective beliefs about the invention, observing that there must be “evidence that the junior party timely interpreted or evaluated the results, and understood them to show the existence [of] the invention.” *Id.* at 10 (alteration in original) (internal quotation marks and citation omitted). Here, the Court found that because Henkel’s technician recorded in a laboratory notebook his direct visual observation that the tablets met the limitations of the count, there was no need for additional interpretation or evaluation of the test results. The recording was objective evidence sufficient to confirm the testimony of the Henkel technicians and inventor Holderbaum that the named inventors appreciated the disputed limitation before the critical date.

Finding that the Board erred in holding that Henkel failed to demonstrate that the inventors appreciated a detergent tablet having a compressed region that dissolved faster than a noncompressed region, the Federal Circuit vacated the Board’s judgment and remanded to the Board for further proceedings.

The Board May Not Make Factual Findings Based on Its Expertise

Courtney B. Meeker

Judges: Michel, Archer, Dyk (author)

[Appealed from the Board]

In *Brand v. Miller*, No. 06-1419 (Fed. Cir. May 14, 2007), the Federal Circuit reversed the Board’s decision entering judgment in favor of Thomas Miller and others (collectively “Miller”) on the issue of priority.

The invention relates to methods of cutting veneer from wood logs. Typically, logs are cut lengthwise into “fitches,” which are held in place by clamping “dogs” on a rotating apparatus for veneer cutting. Because logs are usually tapered, the ends were often cut off to allow for more uniform cuts. The invention provides for a more efficient use of the wood by allowing a tapered fitch to be mounted such that the veneer-producing face is parallel to the cutting knife.

“We therefore hold that, in the context of a contested case, it is impermissible for the Board to base its factual findings on its expertise, rather than on evidence in the record, although the Board’s expertise appropriately plays a role in interpreting record evidence.”
Slip op. at 10-11.

Thomas Miller was a production manager at Miller Veneers, Inc. and is the named inventor of U.S. Patent No. 5,865,232 (“the ’232 patent”),

directed to this technology. Robert Brand was the chief engineer at Capital Machine Company and the named inventor of U.S. Patent Application No. 09/377,120 (“the ’120 application”). On April 28, 2004, the Board declared an interference based on a single count, which is identical to claims in the ’232 patent and the ’120 application, although the inventors used different methods to solve the problem of attaching a tapered fitch to the apparatus. Specifically, the ’232 patent employs radially expandable round “collett dogs,” and the ’120 application uses multiheaded tall pin dogs. Brand was named the senior party, having filed his application on May 31, 1995, and Miller was the junior party. The Board held that Miller failed to prove it reduced to practice first and, therefore, was not entitled to priority on that basis. However, the Board awarded priority to Miller because it found that Brand derived the invention from Miller. Brand filed a request for rehearing, which the Board denied. Brand appealed.

On appeal, the Federal Circuit first addressed the standard of review for cases from the Board. Specifically, the Court noted that “35 U.S.C. § 144 directs us to review ‘on the record’ the decisions of the Board.” Slip op. at 8 (citation omitted). Therefore, the Court explained, the Board’s finding must be supported by substantial evidence within the four corners of the record. The Court also noted that the Supreme Court has specifically “rejected an agency’s attempt to rely on its own expertise in a contested proceeding.” *Id.* at 9. An agency’s expertise cannot substitute for record evidence; otherwise, effective judicial review would be impossible. Moreover, the Court recognized that PTO regulations also highlight the importance of a detailed record and the Board’s role as an impartial adjudicator of a dispute between two parties. Thus, the Federal Circuit held that, in a contested case, “it is impermissible for the Board to base its factual findings on its expertise, rather than on evidence in the record,” *Id.* at 10.

Second, the Federal Circuit turned to the facts of the case and reversed the Board’s decision to

award priority to Miller, reasoning that the Board substituted its own expertise for record evidence that Miller was obligated to prove. To prove derivation, the junior party must demonstrate (1) prior conception of the claimed subject matter, and (2) communication of that conception to the patentee sufficient to enable the patentee to construct and successfully operate the invention. In the present case, the Board rejected as unconvincing Miller’s testimony that he told Brand how to practice the invention and there was no testimony from one skilled in the art that the drawing communicated an enabling disclosure. Rather, the Court found that the Board improperly used its own expertise to interpret the drawings of record and conclude what the artisan would have deduced from the drawings in the absence of any explanation on the record. The Court also found that nothing in the record supports the path the Board determined a skilled artisan would have followed to arrive at the invention.

Accordingly, the Court held that the Board’s decision was not supported by substantial evidence of record, reversed the award of priority in favor of Miller, and ordered that judgment be entered in favor of Brand.

Patent Infringement Claim Barred Under Covenant Not to Sue as Rights Under Settlement Did Not Transfer with Business Assets

Adriana L. Burgy

Judges: Bryson, Clevenger, Linn (author)

[Appealed from D. Minn., Judge Erickson]

In *General Mills, Inc. v. Kraft Foods Global, Inc.*, Nos. 06-1569, -1606 (Fed. Cir. May 16, 2007), the Federal Circuit affirmed the district court’s dismissal of General Mills, Inc.’s (“General Mills”) claim for patent infringement

against Kraft Foods Global, Inc. (“Kraft”) and affirmed the district court’s finding that Kraft abandoned its counterclaim alleging that General Mills breached a settlement agreement.

General Mills sued the Farley Candy Company (“Farley”) for patent infringement of two patents directed to rolled food items. General Mills and Farley resolved that dispute through a settlement agreement. As part of the settlement agreement, General Mills released its patent claims and provided for a covenant not to sue Farley for past, current, or future infringement in exchange for a lump sum. The settlement agreement defined Farley as encompassing “Farley Candy Company and its Affiliates, including, without limitation, all parent corporations, subsidiaries, heirs, executors, administrators, and corporate predecessors and *successors*.” Slip op. at 2 (emphasis in original). Likewise, the covenant not to sue contained language that released Farley and its “successors.”

The settlement agreement also contained two provisions that limited the conditions to the assignment or transfer of rights under the agreement to another party by Farley. The first provision required that the party assigning or transferring their rights provide written notice to the other party. The second provision required that, *inter alia*, Farley may assign its rights and obligations under the settlement agreement provided that “Farley must transfer its entire rolled food product business, including without limitation all assets, good will, and trademarks to the party to whom the rights and obligations are being assigned; . . .” *Id.* at 3.

Based on a series of transactions, Kraft succeeded Farley and complied with the requirements of the settlement agreement, as General Mills conceded. Subsequently, Kraft sold and transferred Farley’s assets, which included Farley’s trademark and good will, to Catterton Partners (“Catterton”), but Kraft retained at least some portion of Farley’s original assets as well as Farley’s rolled food business. Following the sale to Catterton, Kraft sold the

remaining portion of Farley’s assets to Kellogg Company (“Kellogg”).

For the time period between the Catterton and Kellogg transactions, General Mills filed suit against Kraft, alleging infringement of the two patents directed to rolled food items that were originally asserted against Farley. Kraft answered and counterclaimed, alleging that General Mills breached the settlement agreement. General Mills replied to Kraft’s counterclaim, and Kraft moved for SJ. General Mills later filed an amended complaint reasserting the patent infringement claim and added a new breach of contract claim, which included a copy of the settlement agreement. Kraft moved to dismiss both counts of the amended complaint and never answered the amended complaint or reasserted its counterclaim.

The district court granted Kraft’s motion to dismiss and thereby dismissed General Mills’s patent infringement claim. The district court then declined to exercise jurisdiction over the remaining state law contract claim and, thus, entered judgment in favor of Kraft. As for Kraft’s counterclaim, the district court stated that “Kraft did not reassert its counterclaim in response to the amended complaint, no counterclaim was pending when the district court entered judgment and . . . the judgment was therefore final and complete.” *Id.* at 5. General Mills appealed and Kraft cross-appealed.

On appeal, General Mills argued that the Catterton transaction divested Kraft of any rights under the settlement agreement, as Farley’s assets were sold and Kraft cannot be in the shoes of Farley. The Federal Circuit explained that General Mills’s argument stems from the provision in which Farley “‘must transfer its entire rolled food business’ if it wishes to assign its rights under the Settlement Agreement without General Mills’ consent.” *Id.* at 7. The Court noted that the district court correctly recognized that the settlement agreement focused on the assignment of rights and Kraft did not assign its rights under the settlement agreement.

Moreover, the Court highlighted that the settlement agreement does not “bar Farley from retaining its rights under the agreement when it transfers parts of its rolled food business.” *Id.* As a result, the Court concluded that “[t]here is simply nothing in the contract that requires Kraft to retain all or any particular assets of the Farley business to preserve Kraft’s status as successor.” *Id.* at 8.

The Court further indicated that the only way General Mills could prevail was if “Kraft’s rights under the agreement must have either (1) terminated by operation of law at the time of the Catterton transaction, or (2) been transferred from Kraft to Catterton by operation of law or by the terms of the Catterton transaction.” *Id.* As for the first circumstance, courts avoid construing contracts to forfeit a party’s rights, unless there is clear intent in the contract to do so, and this holds true for patent rights. Likewise, unless the transaction is a consolidation or merger, transfers of property in corporate law do not include all the powers or immunities of the selling corporation. Admittedly, Catterton did not acquire all of Farley and was not a merger or consolidation. Thus, the Federal Circuit held that the district court properly dismissed General Mills’s patent infringement claim against Kraft.

Regarding Kraft’s counterclaim, the Federal Circuit found that “a motion to dismiss does not extend the time for filing an answer to an amended complaint, . . . where the time for responding to the original complaint has already run.” *Id.* at 12. Specifically, the Court explained that under Fed. R. Civ. P. 15, Kraft had only ten days after service of General Mills’s amended complaint to file an answer and counterclaim because the response for the original pleading had lapsed. Although Fed. R. Civ. P. 12(a)(4) may extend periods of time, the time for answering an amended complaint is set by Rule 15. Accordingly, the Federal Circuit held that the district court did not abuse its discretion in finding that Kraft abandoned its counterclaim.

Nondisclosure of Prior Art Rejection from Copending Application Results in Finding of Inequitable Conduct

Jeffrey W. Abraham

Judges: Newman (dissenting), Clevenger (author), Bryson

[Appealed from E.D. Cal., Judge Damrell]

In *McKesson Information Solutions, Inc. v. Bridge Medical, Inc.*, No. 06-1517 (Fed. Cir. May 18, 2007), the Federal Circuit upheld the district court’s finding that U.S. Patent No. 4,857,716 (“the ’716 patent”) was unenforceable due to inequitable conduct.

In 2002, McKesson Information Solutions, Inc. (“McKesson”) filed a patent infringement suit against Bridge Medical, Inc. (“Bridge Medical”). The district court bifurcated the trial, the first phase being a bench trial on the issue of inequitable conduct, followed, if necessary, by a jury trial on the remaining claims, counterclaims, and affirmative defenses.

The ’716 patent claims “a patient identification and verification system” that relates items with patients and ensures that an identified item corresponds to an identified patient. The only independent claim of the ’716 patent recites “three node communication” and “programmable unique identifier” limitations.

“[T]he MPEP to which Schumann would have referred . . . leaves no doubt that material rejections in co-pending applications fall squarely within the duty of candor.” Slip op. at 42.

Following a bench trial, the district court held the ’716 patent to be unenforceable. Specifically, the district court found that in the course of prosecuting the ’716 patent, the prosecuting attorney, Schumann, failed to disclose to

Examiner Trafton (1) the existence of U.S. Patent No. 4,456,793 to Baker (“the Baker patent”), which was cited in a rejection in another very similar application, U.S. Patent Application No. 06/862,149 (“the ’149 application”), that was being prosecuted by Schumann before a different examiner, Lev; (2) Examiner Lev’s rejection of the initially broad claims in the ’149 application; and (3) the allowance of the claims in another application prosecuted by Schumann before Examiner Trafton that recited a three-node communication feature, which issued as U.S. Patent No. 4,835,372 (“the ’372 patent”). The district court found these to be material omissions made with an intent to deceive.

On appeal, the Federal Circuit first addressed Schumann’s failure to disclose the Baker patent to Examiner Trafton during prosecution of the applications leading to the ’716 patent. The Court rejected McKesson’s argument that the Baker patent was cumulative and less relevant than another reference, the Hawkins patent, that was before Examiner Trafton. In rejecting this argument, the Court noted that one of Schumann’s primary arguments for the patentability of the claims of the ’716 patent was the use of three-node communication. The Court found no error in the district court’s conclusion that “Baker discloses three-node communication more clearly than Hawkins,” slip op. at 25, and that Baker therefore would have been important to a reasonable examiner.

Nor was the Federal Circuit persuaded by McKesson’s argument that Baker was cumulative of other prior art before Examiner Trafton that disclosed three-node systems. The Court noted that “the description of the preferred embodiment in Baker spans over eleven columns and provides a highly technical discussion of the implementation of the three-node communication system with unique addressing, whereas the same description in [the prior art patent before Examiner Trafton] is just under two columns and provides only cursory implementation details.” *Id.* at 25-26. The Court also found that the district court did not clearly err in concluding that the Baker patent undermined Schumann’s

argument to Examiner Trafton that “none of the references [either singularly or in combination] teach the three node approach to communications as provided in the claimed invention.” *Id.* at 26 (alteration in original).

Regarding the intent-to-deceive prong, McKesson argued that there was no such deceptive intent because the features disclosed in Baker were already present in the art of record. The Court found this argument to be nothing more than an attempt to rehash the same argument made with respect to the materiality prong.

The Federal Circuit was also unconvinced by McKesson’s argument that Schumann did not know and should not have known of Baker’s materiality because Examiner Lev cited it for a “unique addressing” feature that was already before Examiner Trafton in the Hawkins patent. The Court explained that simply because Examiner Lev cited Baker for its unique addressing feature “did not release Schumann from the relevance of Baker’s other teachings,” *id.* at 31, especially considering the small size of the Baker patent, which put Schumann on notice of the content of the whole document.

McKesson further argued that the seventeen-day gap between Schumann’s assertion to Examiner Trafton that none of the prior art teaches three-node communication and Schumann’s interview with Examiner Lev regarding Baker could not be evidence of intent given that the assertion to Examiner Trafton was *before* the interview with Baker. The Federal Circuit rejected this argument, noting that Schumann’s duty to disclose material information to the PTO extended well beyond the interview with Examiner Lev. Moreover, the Court explained, “[t]he mere seventeen-day gap is important . . . because it bolsters the district court’s inferences that Schumann knew or should have known of Baker’s materiality to the [application leading to the ’716 patent], and that he intentionally withheld Baker from Examiner Trafton with deceptive intent.” *Id.* at 31-32.

With regard to the prosecuting attorney’s failure to disclose Examiner Lev’s rejections in the ’149 application, the Federal Circuit explained that it addressed the failure to disclose rejections in copending applications in *Dayco Products, Inc. v. Total Containment, Inc.*, 329 F.3d 1358, 1368 (Fed. Cir. 2003). In that case, the Court held that a contrary decision of another examiner reviewing a “substantially similar” claim meets the “reasonable examiner” threshold materiality test. McKesson argued on appeal that the district court misapplied *Dayco* because it used a lesser “in some respects identical” test that failed to account for differences between the compared sets of claims.

The Federal Circuit rejected McKesson’s argument, explaining that a “showing of substantial similarity is *sufficient* to prove materiality. It does not necessarily follow, however, that a showing of substantial similarity is *necessary* to prove materiality.” Slip op. at 35 (emphases in original). Here, the district court correctly found under the accepted “reasonable examiner” standard that Examiner Lev’s rejection of certain ’149 application claims was in fact material to the prosecution of the application that led to the ’716 patent before Examiner Trafton.

The Federal Circuit also noted that the district court did compare the differences between the claims and explained the rationale for rejecting those differences as insufficient to undermine a finding of materiality. Moreover, the Court noted that Schumann’s response to Examiner Lev’s office action in the ’149 application was nearly identical to a response made to Examiner Trafton one month later about similar claims in the ’716 patent. In addition, Schumann’s cancellation of claims in response to Examiner Lev’s rejection was evidence that the rejections could not be easily overcome—further evidence of materiality.

As to intent, McKesson argued, as evidence of good faith, that Schumann made two separate disclosures of the existence of the ’149 application to Examiner Trafton during

prosecution of the ’716 patent. According to McKesson, given the state of the law in the mid-1980s, “there was no awareness” that the further disclosure of rejections in copending applications was necessary. The Federal Circuit, however, concluded that “the MPEP to which Schumann would have referred . . . leaves no doubt that material rejections in co-pending applications fall squarely within the duty of candor,” *id.* at 42, and, thus, the district court did not err in finding deceptive intent.

Finally, with regard to Schumann’s failure to notify Examiner Trafton of the allowance of the ’372 patent claims, the Federal Circuit found that “the district court’s stated basis for finding materiality—the conceivability of a double patenting rejection—is not incorrect because allowance of the three-node system of the ’372 patent claims plainly gives rise to a *conceivable* double patenting rejection, . . .” *Id.* at 45 (emphasis in original). Further, the Federal Circuit dismissed McKesson’s argument that the district court allegedly failed to consider that Examiner Trafton was the examiner who allowed the ’372 patent claims, and that he did so within a few months of allowing the ’716 patent claims. The Court noted that the MPEP at the time explained that a prosecuting attorney should not assume that a PTO examiner retains details of every pending file in his mind when he is reviewing a particular application, and PTO regulations required all disclosures to be in writing. The Court thus held that Schumann was not entitled to assume that Examiner Trafton would recall his decision to grant the claims of the ’372 patent when he was examining the application that led to the ’716 patent in the absence of a written disclosure to that effect. The Court thus affirmed the district court’s finding that the ’716 patent was unenforceable due to inequitable conduct before the PTO.

Writing in dissent, Judge Newman stated that there was not clear and convincing evidence of deceptive intent. “To avoid the inequity resulting from litigation-driven distortion of the complex procedures of patent prosecution,” she wrote, “precedent firmly requires that the intent element

of inequitable conduct must be established by clear and convincing evidence of deceptive intent -- not of mistake, if there were such, but of culpable intent.” Newman Dissent at 1-2. She further warned that “[t]his court returns to the ‘plague’ of encouraging unwarranted charges of inequitable conduct, spawning the opportunistic litigation that here succeeded despite consistently contrary precedent.” *Id.* at 2.

Lost Profits Award Set Aside Where Patentee Did Not Sell Product During Period of Infringement and No Evidence That Patentee Would Have Made Sales but for the Infringement

Meredith H. Schoenfeld

Judges: Mayer (dissenting-in-part), Gajarsa, Prost (author)

[Appealed from C.D. Cal., Judge Snyder]

In *Wechsler v. Macke International Trade, Inc.*, Nos. 05-1242, -1243 (Fed. Cir. May 18, 2007), the Federal Circuit (1) reversed the district court’s grant of JMOL that an individual defendant was personally liable for inducing patent infringement of a corporation defendant, and (2) set aside an award for lost profits damages because there was insufficient evidence to support such an award.

In 1997, U.S. Patent No. 5,636,592 (“the ’592 patent”) issued to Lawrence Wechsler for a portable device that permits the dispensing of water, potable liquids, particulate solids, and other such feed material to dogs and other animals from a reservoir. In late 1998, Macke International Trade, Inc. (“Macke”) began distributing the “Handi-Drink” portable device for carrying and dispensing water for a pet. In 1999, Anthony O’Rourke, president and sole employee of Macke, learned of the ’592 patent while prosecuting a patent application for the Handi-Drink device. While O’Rourke believed that the ’592 patent was invalid and not infringed

by the “Handi-Drink,” he nonetheless had counsel for Macke enter into licensing negotiations with Wechsler. However, licensing negotiations broke down in 1999 when Wechsler sued Macke and O’Rourke for patent infringement. Macke kept the original Handi-Drink on the market until April 2000, and then replaced it with a redesigned version.

“The issue, however, is not whether Wechsler *could* have sold his product to those individuals; the issue is whether Wechsler *would* have sold his product to those individuals.” Slip op. at 11 (emphases in original).

In 2004, the district court ruled on SJ that O’Rourke was not the alter ego of Macke and was not liable for infringement under 35 U.S.C. § 271(a). A jury later returned a verdict that Macke and O’Rourke willfully infringed the ’592 patent, but that O’Rourke was not personally liable for inducing Macke’s infringement. However, the district court granted Wechsler’s motion for JMOL that O’Rourke was personally liable for inducement. The jury awarded Wechsler lost profits and reasonable royalties. Judge Snyder then denied a motion by Macke and O’Rourke to set aside the lost profits damages.

On appeal, O’Rourke challenged the district court’s grant of JMOL that O’Rourke was personally liable for inducement. The district court granted JMOL on this issue because it found that the jury’s special verdict that O’Rourke was not personally liable for inducement was inconsistent with the special verdict of willful infringement by both defendants.

The Federal Circuit found that this action by the district court was erroneous. “A trial court is rarely entitled to disregard jury verdicts that are supported by substantial evidence,” it stressed, quoting the Ninth Circuit’s ruling in *Duk v. MGM Grand Hotel, Inc.*, 320 F.3d 1052, 1058 (9th Cir. 2003). Moreover, a trial court “cannot choose to ignore a legitimate finding that is part

of the special verdict,” it added, quoting *Floyd v. Laws*, 929 F.2d 1390, 1397 (9th Cir. 1991). The district court did not find that the special verdict of no personal liability for inducement lacked substantial evidence.

Given that the jury instructions only referred to Macke, the Federal Circuit found that the most reasonable interpretation of the special verdicts is that the jury intended to find that Macke willfully infringed, but that O’Rourke was not personally liable for that infringement. Thus, “rather than disregarding the jury’s explicit finding that O’Rourke was not personally liable for infringement,” slip op. at 8, the district court should have interpreted the finding of willful infringement as extending only to Macke. Doing so would have resolved any apparent inconsistency between the two special verdicts and been consistent with both the jury instructions that referred to willful infringement by Macke alone and the grant of SJ that Macke was not the alter ego of O’Rourke. Accordingly, the Federal Circuit reversed the district court’s JMOL as to O’Rourke’s personal liability.

The Federal Circuit then turned to the district court’s denial of the motion by Macke and O’Rourke for JMOL on the award of lost profits. Macke and O’Rourke argued that lost profits should not be available to Wechsler as a matter of law because he lacked the ability to produce a product while the Handi-Drink was on the market. Quoting *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1548 (Fed. Cir. 1995), the Federal Circuit recognized that “if the patentee is not selling a product, by definition there can be no lost profits.” Slip op. at 10. The only exception is where the patentee has the ability to manufacture and market a product, but for some legitimate reason does not. Even in these situations, though, “the burden on a patentee who has not begun to manufacture the patented product is commensurately heavy.” *Id.* (quoting *Hebert v. Lisle Corp.*, 99 F.3d 1109, 1120 (Fed. Cir. 1996)).

The Federal Circuit then noted that the evidence was clear that Wechsler lacked the capability to manufacture his device during the period of infringement. And although “Wechsler could

still receive lost profit damages if Macke’s infringing sales preempted subsequent sales by Wechsler and/or eroded the market price Wechsler was able to charge for his product,” *id.* at 11, the Court found that “Wechsler and his expert presented little more than conclusory evidence on these theories.” *Id.* For example, Wechsler and his expert testified that Wechsler could have sold his product to those people who were desirous of a product like that sold by Macke. The Court noted though that the appropriate inquiry is not whether Wechsler *could* have sold his product to those individuals but whether Wechsler *would* have sold his product to those individuals. Nothing in the record indicated that such sales would have happened. Similarly, with regard to price erosion, nothing in the record linked any price difference to Macke’s earlier presence in the market. In fact, nothing even indicated that Wechsler ever attempted to sell his product at his originally intended price. Moreover, since Macke’s and Wechsler’s products were not on the market contemporaneously, there could not have been any direct price competition between the two. Accordingly, finding that the jury’s award of lost profits was not supported by substantial evidence, the Federal Circuit reversed the denial of Macke and O’Rourke’s motion for JMOL on lost profits.

Dissenting from the reversal on the lost profits issue, Judge Mayer argued that there was substantial evidence to support the jury award. He first quoted *Rite-Hite’s* statement, 56 F.3d at 1545, that a patentee “must show a reasonable probability that, ‘but for’ the infringement, it would have made the sales that were made by the infringer” to recover lost profits damages. Mayer Dissent at 1. He noted that the jury was presented with expert testimony that Wechsler could have sold every infringing unit sold by Macke but for the infringement. Additionally, the expert’s opinion was premised on the lack of a suitable noninfringing alternative product and demand for the patented product. “With evidence of demand for the product and no suitable alternative, the jury was free to reasonably conclude that Wechsler would have made the sales made by the infringer.” *Id.* at 4.

Judge Mayer added that the jury was also presented evidence of the damages amount, including evidence as to pricing of similar goods on the market, the lack of suitable alternatives, Wechsler's manufacturing costs, price erosion, and testimony on calculating damages. The jury presumably found this evidence credible, and, without proof of a suitable alternative, "it was free to conclude that Wechsler would have made all of the sales made by Macke." *Id.*

Finally, a patent owner's burden of proof is not absolute, but rather one of reasonable probability. *Id.* (citing *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1065 (Fed. Cir. 1983)). Quoting *Lam*, he added that since the "amount of the damages cannot be ascertained with precision, any doubts regarding the amount must be resolved against the infringer." *Id.* Therefore, Judge Mayer dissented from the Court's reversal of the lost profits award.

Federal Circuit's Decision in *Pfizer, Inc. v. Apotex, Inc.* Will Not Be Reheard or Reviewed En Banc

Rebecca D. Hess

[Judges: Separate dissents in the denial of a petition for rehearing en banc by Judges Newman, Lourie, and Rader.]

[Appealed from N.D. Ill., Chief Judge Rosenbaum]

In *Pfizer, Inc. v. Apotex, Inc.*, No. 06-1261 (Fed. Cir. May 21, 2007), the Federal Circuit denied Pfizer, Inc.'s ("Pfizer") request to rehear the case or review the panel's decision en banc. Previously, on March 22, 2007, the Federal Circuit had *reversed* a district court's holding that Pfizer's patent covering the hypertension drug Norvasc® was valid and nonobvious. (That March 2007 decision was summarized in the

April edition of *Last Month at the Federal Circuit*.) Pfizer petitioned the Federal Circuit to have the panel rehear the case or to review the reversal en banc. Pfizer argued that the panel should have followed precedent and deferred to the district court's supported factual findings. Pfizer also argued that the panel's reversal of the district court's decision was inconsistent with precedent regarding the law on both nonobviousness and patentability. Five amicus curiae briefs were filed on behalf of large pharmaceutical companies and trade/industry organizations, because of the potential impact of the panel's decision in the pharmaceutical field. Pfizer's petitions were denied without comment, but Judges Newman, Lourie, and Rader dissented from the denial for rehearing en banc, each writing a separate dissent.

Judge Newman's dissent focused on the policy and legal problems generated by the panel's decision, arguing that the panel's decision incorrectly applied the "obvious to try" standard, changed the criteria and analysis for patentability, and created inconsistent Federal Circuit law. For example, Judge Newman stated that the panel's holding that compounds discovered by routine experimentation are not patentable has "particular significance for [its] effect on the conduct of R&D, the costs of drug development, and the balance between generic access to established products and the incentive to development of new products. The amici curiae on both sides of the issue stress different policy considerations: the pharmaceutical research companies point out that diminished access to patenting will affect the kind and direction of

"The panel decision changes the criteria as well as the analysis of patentability, with results of particular significance for their effect on the conduct of R&D, the costs of drug development, and the balance between generic access to established products and the incentive to development of new products." Newman Dissent at 3.

product development; the generic producers point out that the sooner they can enter the market for established drugs, the lower the consumer price.” Newman Dissent at 3.

“A primary purpose for which [the Federal Circuit] was formed was to provide the judicial stability that supports commercial investment . . . in recognition of the dependence of technology-based industry on an effective patent system.” *Id.* at 3-4. “When conflicts arise between panel decisions of the Federal Circuit[,] the ensuing uncertainty is of national scope, contravening the purpose of establishing th[e] Federal Circuit.” *Id.* at 4. The Federal Circuit, Judge Newman argued, has an “obligation to undertake *en banc* review, both to reestablish consistency in the law and to correct errors in panel decisions.” *Id.*

Judge Lourie also dissented, similarly stating that “an *en banc* hearing is warranted . . . in order to maintain uniformity of the court’s decisions and because [the case] presents questions of exceptional importance.” Lourie Dissent at 2. First, Judge Lourie stated that precedent required the panel to defer to the district court’s findings that the new salt had unexpected, superior properties and that there was no reasonable expectation of success, because such findings were supported by a myriad of evidence in the district court record. Instead, the panel improperly substituted its own finding that a reasonable expectation of success existed. Second, Judge Lourie stated that the panel placed too much importance on the *therapeutic* value of the claimed compound, as opposed to the value of the new salt’s *physical* properties. Judge Lourie argued that a compound should not be required to possess a *specific* type of improvement over the prior art to be patentable. “Any useful and unexpected property should be eligible to overcome a *prima facie* obviousness determination.” *Id.* at 4.

Third, Judge Lourie pointed out that the panel’s finding that the new salt was not patentable because it was found as the result of “routine experimentation” was against the statutory

mandate of 35 U.S.C. § 103(a), which requires that “[p]atentability shall not be negated by the manner in which the invention was made.” Fourth, Judge Lourie stated that the inventor’s own expectation of success should not be relied upon over the objective unexpectedness of the properties of a compound. An inventor’s optimism about what he or she chooses to experiment with should not necessarily suggest obviousness.

Finally, Judge Lourie stated that this case raised issues of exceptional importance because “general public, innovative companies, and, ultimately, generic companies, depend upon faithful adherence to th[e] principle” that unexpected, commercially important physical properties (not just biologic or therapeutic properties) are relevant to the value of a compound and should be a basis for patentability. *Id.* at 5.

In Judge Rader’s dissent, he pointed out that three separate district courts had found Pfizer’s patent nonobvious and, because the district courts’ factual findings were not clearly erroneous, the Federal Circuit should have deferred to those factual findings. Judge Rader reiterated that the properties of new pharmaceutical salt forms are entirely unpredictable, that even the reference relied upon by the Federal Circuit panel in its reversal evidenced this unpredictability, and that the superior properties of the new salt over the prior art were indeed unexpected. Judge Rader also stated that the proper analysis here was that the unpredictability of the art rebutted any expectation of success, and that the Court’s apparent “obvious to try” analysis was improper.

Judge Rader also argued, like the other two dissenting judges, that the panel should not have required that the superior characteristics of the salt relate to “therapeutic value” (i.e., in clinical trials), since therapeutic value is just *one* property of a pharmaceutical and other physical properties, such as solubility, stability, hygroscopicity, and processability, should be considered in the analysis as well.

Finally, Judge Rader agreed with the other two dissenting judges that the panel violated the statutory mandate that “patentability shall not be negated by manner in which the invention was made” by holding the invention unpatentable because it was made by routine testing or well-known problem solving strategy. 35 U.S.C. § 103(a). Since “[m]any if not most” pharmaceutical inventions are discovered this way, Judge Rader noted that the panel’s decision “calls into question countless pharmaceutical patents, which in turn could have a profoundly negative effect on investments into the design and development of new life-saving pharmaceuticals.” Rader Dissent at 3.

Trademark Protection for ASPIRINA Denied as Proposed Mark Is Merely Descriptive and Similar in Sound, Appearance, and Meaning to Generic Term “Aspirin”

Seth D. Greenstein

Judges: Newman (dissenting), Schall, Moore (author)

[Appealed from the TTAB]

In *In re Bayer Aktiengesellschaft*, No. 06-1279 (Fed. Cir. May 24, 2007), the Federal Circuit affirmed the TTAB’s ruling that the proposed mark ASPIRINA was merely descriptive for analgesic goods and affirmed the denial of Bayer Aktiengesellschaft’s (“Bayer”) intent-to-use application to register the mark.

On February 10, 2003, Bayer filed an intent-to-use application for the mark ASPIRINA in connection with analgesic goods. The application was initially refused by the examining attorney on the ground that the mark was merely descriptive. Bayer provided

evidence to the contrary, yet the examiner was not persuaded and issued a final refusal. Bayer appealed the decision to the TTAB to no avail. The TTAB affirmed the examining attorney’s refusal to register the ASPIRINA mark, concluding that consumers will view ASPIRINA as merely a variation or misspelling of the generic term “aspirin” and also that the terms are close in sound, appearance, and meaning. Bayer appealed.

The issues on appeal were whether the differences in ASPIRINA and “aspirin” are sufficient to transform ASPIRINA into an inherently distinctive mark capable of registration and whether the evidence on record supports the finding that the relevant purchasing public views ASPIRINA as a trademark or a merely descriptive term.

The Federal Circuit first examined the TTAB’s finding that the ASPIRINA mark and “aspirin” are sufficiently close in sound, meaning, and appearance to render ASPIRINA merely descriptive of analgesics. Noting the similarities in spelling and meaning, the Court explained that adding an “a” to “aspirin” results in almost no distinction with respect to the visual and commercial impressions of the terms. The Court noted that the marks will be used in the same channel of trade and in association with the same analgesic goods. Unmoved by the fact that the words contain different syllables and emphasis, the Court held that when viewed as a whole, the significant similarities in appearance and meaning support the finding that ASPIRINA is merely descriptive of analgesics.

Next, the Federal Circuit reviewed the evidence of record regarding the relevant purchasing public’s understanding of ASPIRINA and whether it shows that it is viewed as a trademark or that it means “aspirin.” Such evidence may include dictionary definitions, trade journals, newspapers, surveys, and other publications. The evidence in this particular case included dictionary definitions and translations, Google

search results, NEXIS story excerpts, and foreign registrations. Although the Court considered the weight, reliability, and admissibility of each type of evidence, the Court’s underlying conclusion was that there is conflicting evidence showing that consumers have been exposed to ASPIRINA as a registered trademark and a generic or descriptive term. In view of the deferential substantial evidence standard of review, the Court held that there was “sufficient evidence as a reasonable mind might accept as adequate to support the [TTAB]’s finding that ASPIRINA is merely descriptive.” Slip op. at 15.

In view of the determination that ASPIRINA is merely descriptive and the conclusion that there was substantial evidence to support the determination that ASPIRINA and “aspirin” are similar in sound, appearance, and meaning, the Federal Circuit affirmed the TTAB’s decision to deny Bayer’s intent-to-use application for ASPIRINA.

Judge Newman dissented, stating that the proper criterion for determining trademark status is whether the mark identifies the source and the quality of the goods, rather than the majority’s focus on the similarity to a generic word. Judge Newman explained that the majority erred in depriving Bayer of the opportunity to obtain trademark protection for a well-known foreign mark when the legal requirements of registration in the United States had been met.

Reasonable Royalty Is Not Limited to License Fee Regularly Charged at Time of Sale

Maryann T. Puglielli

Judges: Lourie, Rader, Bryson (author)

[Appealed from E.D. Mo., Judge Perry]

In *Monsanto Co. v. McFarling*, Nos. 05-1570, -1598 (Fed. Cir. May 24, 2007), the Federal Circuit held that the jury’s verdict of a reasonable

royalty of \$40 per bag of genetically modified seed was supported by evidence and was not grossly excessive.

“In determining the amount of a reasonable royalty, it was proper for the jury to consider not only the benefits of the licensing program to Monsanto, but also the benefits that Monsanto’s technology conferred on farmers such as Mr. McFarling.” Slip op. at 11.

The technology at issue relates to genetically modified soybean plants that contain an enzyme that confers resistance to the pesticide glyphosate, also known as Roundup®. Farmers can apply Roundup® to crops containing the modified soybean plants to kill weeds without harming the soybean plants. Monsanto Company (“Monsanto”) protected its genetically engineered soybean seeds under two of its patents, U.S. Patent Nos. 5,633,435 (“the ’435 patent”) and 5,352,605 (“the ’605 patent”). The ’435 patent claimed a plant cell containing a DNA molecule encoding a genetically modified enzyme, and the ’605 patent claimed a plant cell containing a genetic promoter facilitating the production of the modified enzyme by a plant.

For a farmer to obtain Monsanto’s soybean seeds, he had to purchase the seeds from a dealer authorized by Monsanto and he had to sign a “Technology Agreement,” promising not to replant seeds from the first generation of soybean crops and not to sell seeds that were produced by the first generation crop to others. At the time of purchase, Monsanto collected a license fee of \$6.50 per fifty-pound bag of seed and the dealer charged \$19 to \$22 per bag of seed.

In 1998, Homan McFarling purchased Monsanto’s soybean seeds from an authorized dealer, signed the Technology Agreement for that year, and paid the license fee. Later that year, however, McFarling saved the seeds that came from the first generation soybean crop and

planted those seeds in 1999. He repeated his actions the following year, saving the seeds from the second generation crop in 1999 and planting them in 2000. He did not pay Monsanto the license fee for 1999 or 2000.

The current appeal to the Federal Circuit is the third appeal to this Court in this case. In the first appeal, the Federal Circuit affirmed the district court's granting of a preliminary injunction to prohibit McFarling from continuing to plant genetically modified soybean seeds. In the second appeal, the Federal Circuit upheld the district court's finding that McFarling was liable for breach of contract and upheld the district court's rejection of various defenses raised by McFarling, but reversed the district court's judgment, holding that the liquidated damages provision in the contract was unenforceable. Based upon this finding, the Federal Circuit remanded the case for a determination of Monsanto's actual damages. In the third and current appeal, the Federal Circuit addressed four issues.

First, the Federal Circuit considered whether McFarling could reassert the defenses he raised in the second appeal because, on remand, Monsanto canceled the claim upon which the Court based its denial of those defenses. Specifically, in the second appeal, the Federal Circuit determined that Monsanto's license did not impermissibly restrict the use of farmer-grown genetically modified soybean seeds. Concluding that the '435 patent read on first and second generation seeds, the Court held that Monsanto did not misuse its patent because prohibiting the use of second-generation seeds was tantamount to prohibiting unlicensed use of the invention. Upon remand, Monsanto withdrew its claim of infringement under the '435 patent, but maintained its claim under the '605 patent. Because the Federal Circuit found that the logic underlying a finding of no patent misuse of the '435 patent also applied to the '605 patent, the Court did not reconsider its prior rejection of that defense. The Court also rejected McFarling's argument that the Court should reconsider his prior asserted antitrust

counterclaim because the Court found that McFarling's counterclaim was merely a restatement of his defense of patent misuse.

Second, the Federal Circuit determined whether the jury's finding that \$40 per fifty-pound bag of seed was supported by the evidence. McFarling argued that he should pay no more than the \$6.50 license fee per bag. The Court disagreed with McFarling and noted that if the reasonable royalty were limited to the \$6.50 license fee, it would give infringers like McFarling an unfair advantage over farmers that complied with all of the provisions of the Monsanto license. In addition, Monsanto would be denied benefits from the cooperation of seed companies in promoting its seeds and regulating the distribution of its seeds.

Instead, the Federal Circuit began its analysis by first calculating the amount of money a farmer would normally pay per bag of seed by adding the license fee per bag (\$6.50) and the fee per bag (\$19-\$22) charged by the authorized seed dealer. Just because Monsanto split these fees between itself and the dealer, the Court reasoned, did not mean that the dealer's fee should not have been considered in the reasonable royalty calculation. The Court noted, however, that it would have been improper to hold that the reasonable royalty damages would be between \$25.50 and \$28.50 per bag of seed.

In addition to the license fee and dealer's fee, the Federal Circuit also considered the benefits Monsanto enjoyed as a result of its licensing requirement that farmers not save and replant seeds. This licensing scheme reduced the risk of underreporting and harm to Monsanto's reputation among farmers, allowed Monsanto to monitor the quality of its seeds from year to year, and provided leverage to Monsanto in negotiating with new seed companies. Though the Court did not assign a monetary value to these benefits, it nonetheless explained that they should be taken into consideration.

Additionally, the Federal Circuit also considered the benefits that McFarling gained by his

practices in 1999 and 2000. Monsanto's expert testified that the use of Monsanto's seeds increased the crop yield on McFarling's farm by a value of \$14 to \$25 per acre when compared to a crop yield for natural soybean plants. Also, Monsanto's genetically engineered plants reduced the expense of weed control, allowing McFarling to save \$17 to \$36 per acre. Based on this testimony, the Federal Circuit concluded that McFarling saved between \$31 and \$61 per acre by improperly using next generation seeds from Monsanto's soybean plants. Because a fifty-pound bag of seed provided enough plants for approximately one acre, the Court concluded that McFarling saved between \$31 and \$61 per bag of seed. Based on this additional savings alone, the Court concluded that the jury's verdict of a \$40 reasonable royalty per fifty-pound bag of seed was supported by the evidence and was not excessive.

Third, the Federal Circuit addressed McFarling's argument that Monsanto's expert should not have been allowed to testify as to damages because the expert was not a farmer or agronomist. According to McFarling, the expert's testimony was no more than subjective opinion. Acknowledging that the expert was a valuation analyst, the Court held that the district court was within its discretion to allow the expert's testimony because McFarling's objection spoke to whether the jury should believe the expert and not whether the expert's opinions had a reasonable basis in fact.

Fourth and finally, the Federal Circuit considered Monsanto's request to modify the district court's permanent injunction against McFarling. Monsanto argued that the injunction forced Monsanto to license its genetically engineered seeds to McFarling and, thus, requested that the injunction be amended to enjoin McFarling from obtaining the seeds unless Monsanto gave its "express authorization." The Federal Circuit disagreed with Monsanto's interpretation of the injunction and explained that the injunction meant that if Monsanto entered into a binding technology agreement with McFarling again through the purchase of seed from a lawful dealer, the injunction would not prohibit the licensed conduct.

Customer Proposals and Experimental Demonstrations of Terrain Warning System Did Not Constitute Offer for Sale or Public Use

Aaron J. Capron

Judges: Rader (author), Gajarsa, Dyk

[Appealed from D. Del., Magistrate Judge Thyngel]

In *Honeywell International Inc. v. Universal Avionics Systems Corp.*, Nos. 05-1112, -1151, -1152 (Fed. Cir. May 25, 2007), the Federal Circuit vacated the district court's claim construction and remanded for a new infringement determination. Further, the Federal Circuit affirmed the district court's grant of SJ of invalidity for claims that had been withdrawn from the litigation. Lastly, the Federal Circuit affirmed the district court's decision that Honeywell International Inc.'s ("Honeywell") proposals and demonstrations of its system did not constitute an offer for sale or public use under 35 U.S.C. § 102(b) because Honeywell was experimenting at the time to determine if the invention worked for its intended purpose.

In 1995, Honeywell received the five patents at issue (U.S. Patent Nos. 5,839,080; 6,092,009; 6,122,570; 6,138,060; and 6,219,592), all directed to a "look ahead" terrain warning system. This terrain warning system provides a reliable warning when detecting abruptly changing terrain by comparing the aircraft's position with an on-board digitized map of the earth's terrain and man-made obstacles. After the Federal Aviation Administration required that certain aircraft include this terrain warning system, Universal Avionics Systems Corporation ("Universal") and Sandel Avionics Inc. ("Sandel") developed competing technologies. Honeywell then sued Universal and Sandel, claiming that they infringed the patents at issue.

After construing the claims, the district court granted defendants' motions for (1) SJ of invalidity of certain claims that had been withdrawn from the litigation, and (2) SJ of noninfringement. Only two of the five contested terms contributed to the district court's infringement determination. Before the Federal Circuit, Universal argued that these two terms should be the only terms considered for claim construction. The Federal Circuit rejected this argument and held that it had the power to evaluate all five contested terms because the three remaining terms concerned factual issues in dispute.

“The video . . . shows that Honeywell performed tests to determine that the invention worked for its intended purpose. These tests, however, were part of the Honeywell effort to reduce the invention to practice, rather than an actual reduction.”
Slip op. at 22.

When construing the five contested terms, the Federal Circuit determined that the district court correctly construed two of the terms. But even under the district court's correct claim construction, the Federal Circuit determined that genuine issues of material fact remained concerning

whether the accused devices infringed the patents at issue. Accordingly, the Court held that the granting of SJ of noninfringement was improper. Regarding the district court's construction of the three other terms, the Federal Circuit determined that the district court unduly narrowed the claims by reading in limitations from the specification. Consequently, the Federal Circuit remanded for the district court to apply this broader claim construction.

Further, Honeywell appealed the district court's decision to preclude Honeywell from relying on the DOE. The district court reasoned that Honeywell's expert's belated testimony on the DOE was defective because it was not included in his expert report. Because evidentiary rulings do not generally raise issues unique to patent law,

the Federal Circuit used Third Circuit precedent, which required an abuse of discretion standard of review. When considering that Honeywell's expert had no opinion regarding DOE during cross examination for his deposition and that his expert report did not mention DOE, the Federal Circuit held that the district court did not abuse its discretion in excluding Honeywell's deposition testimony concerning the DOE.

Honeywell further appealed the district court's decision granting SJ of invalidity for claims withdrawn from the litigation from two of the patents. Specifically, Honeywell argued that the district court erred by exercising jurisdiction over defendants' request for declaratory relief on the withdrawn claims. Applying the Supreme Court's recent decision in *MedImmune, Inc. v. Genentech Inc.*, 127 S. Ct. 764 (2007), the Federal Circuit considered whether there was an actual controversy between the parties, as required by the DJ Act and Article III of the Constitution. The Court explained that infringement of a dependent claim also entails infringement of its associated independent claim. When Honeywell withdrew some independent claims from the litigation, it also chose to maintain causes of action based on certain dependent claims. Thus, the Court found, Honeywell left the entire subject matter of the claims of those patents at issue. Accordingly, the Federal Circuit affirmed the district court's decision to retain jurisdiction over the withdrawn claims.

Sandel and Universal cross-appealed the district court's denial of invalidity for Honeywell's patents under the “on-sale” and “public use” portions of 35 U.S.C. § 102(b). The on-sale bar prohibits the patenting of an invention that has been the subject of an offer for sale before the critical date. According to the Supreme Court in *Pfaff v. Wells Electronics, Inc.*, 525 U.S. 55 (1998), the on-sale bar requires that (1) the invention be the subject of a commercial offer for sale and (2) the invention be “ready for patenting” at the time of the offer or sale. Universal and Sandel pointed to Honeywell's

proposals to airplane manufacturer customers to develop Honeywell's system with their luxury airplanes.

The Federal Circuit upheld the district court's ruling because Honeywell was still experimenting with its terrain warning system when it was negotiating with its customers. Honeywell entered into these negotiations to facilitate its programs to test its new system with human pilots in a genuine cockpit setting and to determine whether the invention worked for its intended purpose. If, and only if, those tests were successful, Honeywell proposed commercial terms for the supply of new systems. If the tests were not successful, Honeywell proposed to supply its nonpatented system instead. "Although the experimentation did not alter any specific part of Honeywell's claimed system," the Court held that "this aspect of the record does not prejudice Honeywell's invocation of experimentation to negate any on-sale bar." Slip op. at 21.

Regarding the second prong of the *Pfaff* test, the Court concluded that the invention was not "ready for patenting" before the critical date. A video showing the invention in operation before the critical date illustrated that Honeywell performed tests to determine that the invention worked for its intended purpose. The Court found that these tests, however, were part of Honeywell's effort to reduce the invention to practice, rather than an actual reduction. "In sum," the Court stated, "Honeywell used computer simulations, test aircraft, and demonstrations to those with expertise in air safety such as pilots to move the invention toward a reduction to practice." *Id.* at 22. Therefore, the Federal Circuit determined that the record supported the district court's findings that Honeywell's patented inventions were not on sale before the critical date.

Regarding the public-use bar, Universal and Sandel argued that Honeywell's flight demonstrations had a commercial purpose. They

further argued that one of these flights, in which a reporter was aboard, constituted public disclosure because the reporter published an article about the flight and the terrain warning system. But the article further stated that the terrain warning system was still under development, and the district court relied on this fact to determine that the terrain warning system was still under experimentation. The Federal Circuit agreed, concluding that Honeywell's demonstrations were experimental and not barring public uses. The Court further explained that "[a]lthough these demonstrations did not always relate to [the] claimed features, this court permits testing to determine the workability of an invention even if the claims do not expressly set forth the intended use under examination." *Id.* at 24.

Moreover, Sandel appealed the district court's determination that Honeywell had not committed inequitable conduct by failing to disclose to the PTO documentation about the demonstrations and the article published by the reporter. The Federal Circuit affirmed the district court's decision, noting that Honeywell did provide the PTO with express statements about its commercial flights and about the industry demonstrations, and thus the undisclosed documentation and article were merely cumulative.

Finally, Universal appealed the district court's decision that Honeywell filed the suit in bad faith with the knowledge that these patents were invalid under § 102(b) and inequitable conduct as part of a scheme to monopolize the market. The district court determined that Universal had not shown by clear and convincing evidence that Honeywell used the litigation for anticompetitive purposes and, in fact, that the record illustrated that Honeywell conducted a reasonable presuit investigation. The Federal Circuit agreed with the district court that Universal's arguments were without merit.

Visual Disclosure of Keyboard, Where Keyboard Was Not Connected to a Computer, Was Not Public Use for Purposes of § 102(b)

Joyce Craig-Rient

Judges: Rader (author), Dyk, Moore

[Appealed from D. Or., Judge Aiken]

In *Motionless Keyboard Co. v. Microsoft Corp.*, No. 05-1497 (Fed. Cir. May 29, 2007), the Federal Circuit affirmed a district court’s SJ ruling of noninfringement of two U.S. patents, but reversed the lower court’s rulings of patent invalidity. The Federal Circuit concluded that an embodiment of the patents was not in public use more than one year prior to their filing dates (“the critical dates”) because the embodiment was viewed only by potential investors and a few others, most of whom were subject to nondisclosure agreements and did not use the embodiment for its intended purpose.

The two patents-in-suit, U.S. Patent Nos. 5,178,477 (“the ’477 patent”) and 5,332,322 (“the ’322 patent”), disclose ergonomic keyboard devices requiring only slight finger or thumb movement. The ’322 patent issued as a CIP of the ’477 patent. Motionless Keyboard Company (“Motionless”) sued Microsoft Corporation (“Microsoft”), Nokia Inc. (“Nokia”), and Saitek Industries Ltd. (“Saitek”) for patent infringement. Specifically, Motionless claimed that Microsoft’s “Strategic Commander” game controller infringed the ’477 patent, and that various Nokia telephones, two of Microsoft’s “Sidewinder” controllers, and various Saitek game joysticks infringed the ’322 patent.

Thomas Gambaro is the sole inventor of both patents. In February 1987, Mr. Gambaro developed the Cherry Model 5 keyboard, which embodied the inventions ultimately disclosed in

the patents-in-suit. Shortly thereafter, Mr. Gambaro entered into a business partnership and sought financial support to further develop and patent the keyboard technology. In 1987, Mr. Gambaro demonstrated the Cherry Model 5 to potential investors, who signed two-year nondisclosure agreements (“NDAs”). Mr. Gambaro also demonstrated the Cherry Model 5 to a friend, who did not sign an NDA. None of these people used the device to transmit data to a computer. On July 25, 1990, Mr. Gambaro hired a product tester to conduct typing tests using the keyboard. The typing tester signed an NDA and used the device to transmit data to a computer.

Mr. Gambaro filed the application that resulted in the ’477 patent on June 6, 1991. Thus, the critical date for the ’477 patent is June 6, 1990. The critical date for the ’322 patent is January 11, 1992. Mr. Gambaro eventually assigned both patents to Motionless.

After Motionless sued Microsoft, Nokia, and Saitek for infringement, the parties filed cross-motions for SJ. Motionless moved for SJ of infringement against all three defendants. The defendants, in turn, collectively moved for SJ of invalidity of both patents based on public use under 35 U.S.C. § 102(b).

After construing the claims of both patents, the district court entered SJ of noninfringement. In construing claim 1 of the ’322 patent, the district court read the limitations “a concavity in said housing at said key-actuation position, and a thumb-associable cluster of keys forming a keyboard within said concavity” to require

“In short, the Cherry Model 5 was not in public use as the term is used in section 102(b) because the device, although visually disclosed and only tested one time with a[n] NDA signed by the typing tester, was never connected to be used in the normal course of business to enter data into a system.”
Slip op. at 15.

“that the concavity must be formed by a depression in the housing of the device, and that all keys comprising the keyboard must be contained entirely within the concave area and sunk below the surface of the housing, so that the thumb movement occurs within the concave area.” Because the district court found that the accused products lacked a concavity in the housing and a keyboard within a concavity, it entered SJ of noninfringement with regard to both patents.

The district court also invalidated both patents based on public use after concluding that the invention entered the public domain prior to the critical dates. The district court also declared the ’322 patent invalid for obviousness in light of a terminal disclaimer filed with the PTO by Mr. Gambaro that made the ’322 patent coterminous with the ’477 patent.

On appeal, Motionless first argued that the district court improperly construed claim 1 of the ’322 patent. Specifically, Motionless argued that “a concavity in said housing at said key-actuation position, and a thumb-associable cluster of keys forming a keyboard within said concavity” means that the tops of the keys can form the concavity. The Federal Circuit disagreed, finding that the patentee defined a depression within the housing of the device and set the keyboard entirely within that depression. Having affirmed the district court’s claim construction, the Federal Circuit went on to conclude that the accused products do not literally infringe the ’322 patent because they lack a concavity in the housing and a keyboard within the concavity. Further, the Court found insufficient evidence of infringement under the DOE. Accordingly, the Federal Circuit affirmed the district court’s SJ ruling of noninfringement of the ’322 patent.

Turning to invalidity, the Federal Circuit concluded that the district court erroneously

found that the Cherry Model 5 embodying both patents was placed in public use prior to the critical date of each patent. In concluding that Mr. Gambaro had not disclosed his invention to the public, the Court distinguished the circumstances of this case from those in *Egbert v. Lippman*, 104 U.S. 333 (1881), and *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5 (1939). In *Egbert*, the Supreme Court concluded that a corset spring that had been used for years for its intended purpose without confidentiality provisions was a public use. In *Electric Storage*, the ordinary use of a machine for commercial purposes was found to be a public use. In this case, the Federal Circuit noted that Mr. Gambaro showed the Cherry Model 5 only to a narrow group of people, most of whom were subject to the constraints of an NDA. The Court found that only the product tester used the invention for its intended purpose. Because the other people did not use the keyboard to transmit data, the Court concluded the visual disclosures of the invention to these people did not rise to the level of a public use for the purposes of § 102(b). Further, because the typing test occurred on July 25, 1990, the Court found that it occurred after the critical date of the ’477 patent. Although the typing test occurred before the critical date of the ’322 patent, because the product tester signed an NDA and did not appear to use the Cherry Model 5 after the typing test, the Court concluded that the device was never in public use. Accordingly, the Court reversed the district court’s entry of SJ of invalidity under § 102(b).

The Federal Circuit also reversed the lower court’s finding that the ’322 patent was invalid as obvious under 35 U.S.C. § 103 because the inventor filed a terminal disclaimer to make the ’322 patent coterminous with the ’477 patent. In so doing, the Court noted that a terminal disclaimer is not an admission that a later-filed application is obvious.

Abbreviations | Acronyms

ALJ	Administrative Law Judge	IDS	Information Disclosure Statement
ANDA	Abbreviated New Drug Application	IP	Intellectual Property
APA	Administrative Procedures Act	ITC	International Trade Commission
APJ	Administrative Patent Judge	JMOL	Judgment as a Matter of Law
Board	Board of Patent Appeals and Interferences	MPEP	Manual of Patent Examining Procedure
Commissioner	Commissioner of Patents and Trademarks	PCT	Patent Cooperation Treaty
CIP	Continuation-in-Part	PTO	United States Patent and Trademark Office
DJ	Declaratory Judgment	SEC	Securities and Exchange Commission
DOE	Doctrine of Equivalents	SJ	Summary Judgment
FDA	Food & Drug Administration	SM	Special Master
		TTAB	Trademark Trial and Appeal Board

Looking Ahead

- On June 7, the en banc Federal Circuit heard oral arguments in *In re Seagate Technology, LLC*, Misc. No. 830, addressing the issues of (1) whether a party's assertion of the advice of counsel defense to willful infringement extends waiver of the attorney-client privilege to communications with that party's trial counsel; (2) the effect of any such waiver on work-product immunity; and (3) whether the Court should reconsider the duty of care standard announced in *Underwater Devices, Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380 (Fed. Cir. 1983).
- New PTO rules are expected to be published in July or August, and go into effect thirty days after publication. Public PTO statements suggest that the final rules relate to limiting the number of continuation applications that may be filed and the number of claims in each patent, among other things.

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Last Month at the Federal Circuit



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