

# Patent and Trademark Bulletin for the District of Massachusetts

A reporter on recent patent and trademark opinions from the  
United States District Court for the District of Massachusetts



February 2013

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## PATENT

***In re Body Science LLC Patent Litigation***, MDL No. 12-2375-FDS, 2012 WL 5449667 (D. Mass. Nov. 2, 2012) (Saylor, D.J.) [Stay Pending Reexamination]

Plaintiff Body Science LLC (“Body Science”) filed patent infringement actions against a number of defendants, which have been consolidated for pretrial purposes into a single multi-district litigation (“MDL”). Body Science asserts that Defendants’ products infringe U.S. Patent Nos. 6,289,238 (“the ‘238 patent”) and 7,215,991 (“the ‘991 patent”). After the start of discovery, defendant Philips Electronic North America Corporation (“Philips”) filed a request for *ex parte* reexamination of both patents-in-suit. Philips then moved to stay the case pending reexamination. Judge Saylor granted the motion.

In deciding whether a stay of litigation pending reexamination is appropriate, the court looks to three factors: (1) whether a stay would impose undue prejudice or present a clear tactical disadvantage to the non-moving party, (2) whether a stay would simplify the issues, and (3) the stage of the litigation. Judge Saylor also considered cases from the Northern District of California and the Eastern District of Texas expressing “a liberal policy in favor of granting motions to stay proceedings pending the outcome of reexamination.”

With respect to the issue of undue prejudice, the Court acknowledged that it was likely that the case would be stayed for at least one year. Nonetheless, “mere delay, without more, does not constitute undue prejudice.” Moreover, to avoid any potential loss of evidence during the stay period, the Court structured the stay to require parties to preserve relevant evidence and allow the taking of depositions of any witnesses who likely are to become unavailable. The Court also rejected Body Science’s claim that the grant of a stay in this case would promote the use of reexamination proceedings as a litigation tactic merely to delay patent lawsuits.

In examining whether a stay would simplify the issues, Judge Saylor looked to the statistics from the USPTO concerning reexaminations. He found that, “statistically, it is more likely than not that at least some claims will be narrowed or invalidated.”

Because the case was in its infancy—some initial discovery had been served, but claim construction briefing had not commenced—the stage-of-the-litigation factor weighed in favor of a stay.

***Everyscape, Inc. v. Adobe Systems, Inc.*, C.A. No. 10-11597-RGS, 2012 WL 5389735 (D. Mass. Nov. 5, 2012) (Stearns, D.J.) [Claim Construction]**

Plaintiff Everyscape filed suit against Defendant Adobe Systems ("Adobe") alleging infringement of U.S. Patents Nos. 7,327,374 ("the '374 patent") and 7,593,022 ("the '022 patent"). Adobe counterclaimed, alleging Everyscape infringed U.S. Patents Nos. 6,411,742 ("the '742 patent") and 7,095,905 ("the '905 patent"). The District Court (Stearns, D.J.) settled claim construction disputes for various terms in the four patents.

Everyscape's patents are directed to "clone brushing" which involves copying and pasting different portions of a digital image from one region of an image to another. The '374 and '022 patents improve on clone brushing by using a "homography" to map an image from the source image to an intermediate "world plane." The mapping can be used to paste the copied portion to a destination image at an appropriate scale that matches the scale of the destination image.

The two terms construed from the '374 and '022 patents were "homography" and "source position." Everyscape argued "homography" should be construed as "a linear mapping between a world plane and an image plane." Adobe countered that the proper construction was "a 2D projective transformation." Both parties pointed to different portions of the specification, with Adobe arguing that using the term "i.e." signals an intent to define a word and Everyscape countering that using an "em dash" can also signal a definition. The Court looked past these arguments, holding that nothing in the intrinsic record indicated "homography" was being used differently than its customary meaning. Also, the Court noted that the provisional application that the Everyscape patents claimed priority to, which appeared to be the Ph.D. thesis of one of the inventors, cited to a classic algebraic geometry text to define the term. The Court then used the provisional application's definition, and an understanding of how the claimed invention worked, to conclude that the proper construction was a combination of both parties' constructions: "a 2D projective transformation that determines a linear mapping between an image and a world plane."

For the next term, Everyscape argued that "source position" should be construed as "a position that is selected by a user independently of a destination position." Adobe responded that "source position" does not need to be construed, and alternatively, should be construed as "a position from which image information is copied." The Court agreed with Adobe that Everyscape's construction improperly imported limitations from a preferred embodiment and that it did not capture the main aspect of the term—that it is the "source" of the image. The Court construed the term as "a position different from the destination position, relative to which image information is copied."

Adobe's patents are directed to merging multiple digital images to form a combined image, such as forming a panoramic image from multiple digital pictures. The parties disputed the phrase "mask out part of the image" from the '905 patent. Everyscape argued the phrase should be interpreted to mean "set the mask value of the pixels in the part of the first image corresponding to the first portion of the second image to be '0'." The Court again found that the construction would improperly import limitations from a preferred embodiment, and instead adopted the specification's description of the term: "obstruct part of the first image." In making its ruling, the Court quoted *Intervet Am., Inc. v. Kee-Vet Labs., Inc.*, 887 F.2d 1050, 1053 (Fed. Cir.1989): "interpreting what is meant by a word in a claim 'is not to be confused with adding an extraneous limitation appearing in the specification, which is improper.'" The Court also addressed another term from the '905 patent, and three terms from the '742 patent, finding in each case that no construction was necessary.

***Irwin Indus. Tool Co. v. Bibow Indus., Inc.*, C.A. No. 11-30023-DPW, 2012 WL 5420033 (D. Mass. Nov. 6, 2012) (Woodlock, D.J.) [Inventorship]**

The District Court (Woodlock, D.J.) granted summary judgment confirming the patent-in-suit was not invalid for failure to name a co-inventor and also dismissed counterclaims related to inventorship issues.

Plaintiff Irwin Industrial Tool Company, which does business as Lenox ("Lenox"), brought a declaratory judgment action to establish the validity of three patents. The action was brought after Defendants Bibow Industries, Inc. and Christopher W. Bibow (collectively, "Defendants") asserted that Christopher Bibow, the

president and owner of Bibow Industries, Inc., should have been a co-inventor on the three patents. The three patents, U.S. Patent Nos. 7,373,947 (“the ‘947 patent”), 7,415,988 (“the ‘988 patent”), and 7,195,031 (“the ‘031 patent”), relate to small oxy-acetylene tanks, so-called “hand torches.”

Each of the three patents lists three inventors, all of whom were Lenox employees at the time of conception and none of whom was Christopher Bibow. Mr. Bibow, in fact, was never an employee of Lenox, but he did communicate about intellectual property with various employees of Lenox, the parent company of Lenox, and the parent company’s related subsidiaries. Mr. Bibow indicated he was comfortable sharing his intellectual property in these communications because he had filed his own materials with the United States Patent and Trademark Office prior to any such communications.

Defendants argued that Mr. Bibow was an inventor based on several discussions he had with one of the three inventors prior to the filing of the patent applications. Defendants further argued that Mr. Bibow contributed to three inventive elements of the patents at issue during his discussions. The Court, however, disagreed.

The Court found that, even in a light most favorable to Defendants, Mr. Bibow’s contributions with respect to the three inventive elements, in fact, were not inventive. The Court determined Mr. Bibow merely provided information to Lenox’s inventor regarding existing art, *i.e.*, Mr. Bibow’s own previously filed patents. For all three of Lenox’s patents, the patentees made the USPTO aware of Mr. Bibow’s prior art, and yet the PTO granted the claims. The Court saw this, coupled with other factors, as a clear indication that Mr. Bibow’s contributions were not inventive.

As a result, the Court granted Lenox’s summary judgment motion, confirming the patent was not invalid on the basis of failing to name a co-inventor. The Court also dismissed Defendants’ two remaining counterclaims—to name Mr. Bibow as a co-inventor and to invalidate the patents due to fraud on the patent office for failing to name all of the inventors—because it determined Bibow was not a co-inventor. No further issues remain in front of the Court.

***Koninklijke Philips Electronics N.V. v. ZOLL Medical Corp.***, C.A. No. 10-11041-NMG, 2012 WL 5932059 (D. Mass. Nov. 26, 2012) (Gorton, D.J.) [*Claim Construction*]

Philips Electronics North America Corp. and its parent company, Koninklijke Philips Electronics N.V., (collectively, “Philips”) filed suit against ZOLL Medical Corp. (“ZOLL”), alleging that ZOLL infringes several U.S. Patents relating to components of automated external defibrillators (“AEDs”). In a later-filed case, ZOLL sued Philips for patent infringement, relating to similar technology and products. The two cases were consolidated, and the District Court (Gorton, D.J.) settled claim construction disputes regarding fifteen disputed terms. The Court construed some of the terms and also declined to construe several of the terms. A selection of terms and constructions is discussed below.

*“monitoring/monitoring . . . during”*

ZOLL requested that the Court adopt the ordinary meaning of “monitoring,” which ZOLL asserted has a notion of “ongoingness.” Thus, ZOLL contended that monitoring must occur continuously through the discharge step, whereas Philips contended monitoring is only required to occur one or more times during the discharge step. The Court adopted Philips’ construction, noting, although the use of both terms “monitoring” and “measuring” “raises an inference that the terms have different meanings, [] that inference is not determinative” because it would read out preferred embodiments.

*“the discharge step/the discharging step”*

ZOLL requested that the Court construe this step to make clear that it is “not a test pulse to measure patient impedance,” but the Court declined to do so, stating that by requesting the addition of a negative limitation to a claim term ZOLL was proposing that the Court resolve an infringement question during claim construction. Elaborating that “‘the role of the district court in construing claims’ is not to ‘read limitations into the claims to obviate factual questions of infringement,’” the Court instead adopted the terms’ plain meaning: “the step of discharging the energy source.” The Court also noted that statements made during the prosecution history further limited the term.

*“plurality of electronic switches”*

Philips requested that the Court adopt the same construction of this term as in a prior case. The Court declined because at the *Markman* hearing in the present case both parties agreed that disavowals made during prosecution history did not meet the standard for the “clear and unmistakable” surrender necessary to reject the ordinary meaning. Moreover, in the earlier case, the court relied on expert evidence and inventor testimony, extrinsic evidence not available here. The Court ultimately concluded that the term did not require construction since the ordinary meaning of plurality would be clear to a jury.

*“envelope comprising a sheet of material”*

The construction dispute centered on whether the “envelope” must be fully enclosed. ZOLL asserted that the term should be given its ordinary meaning and, thus, did not require construction, whereas Philips argued that envelope must be an “enclosure.” The Court agreed with Philips, noting that the patent taught isolation as necessary and, if the envelope did not “enclose” the electrodes, the invention would not work as described.

*“seal”*

Like the “envelope” discussed previously, ZOLL argued that the seal need only serve as a “barrier,” while Philips argued that the seal must be “airtight.” The Court noted that simply construing a seal as “a barrier” would ignore the required isolation in order to “prevent the adhesive gel from drying out” as described in the specification. Furthermore, the patent used the terms “seal” and “barrier” differently. Thus, the Court construed “seal” to be “an airtight barrier.”

*“a concentration of an electrolyte that produces a combination series resistance of two of said electrodes, when measured with the electrodes configured in a series circuit with a 50Q resistance, and with the electrolytic gel layer of each electrode in contact with that of the other electrode, that is greater than 1Q when a 200 Joule defibrillation pulse is discharged into the series circuit”*

Philips argued that the term was indefinite because there is no explanation “for how one skilled in the art would choose specific testing conditions to determine whether the resistance of a given gel electrode is ‘greater than 1Q.’” A term is indefinite where the infringing product “might or might not infringe depending on its usage

in changing circumstances.” *Geneva Pharms. Inc. v. GlaxoSmithKline PLC*, 349 F.3d 1373, 1384 (Fed. Cir. 2003). The Court declined to construe the term, stating “[t]his is not a case where a defense of indefiniteness is based upon claims which, on their face, are so vague that they cannot reasonably be interpreted but rather is a case where the relevant claims can be construed but are alleged to be indefinite as applied.” As the parties’ respective experts each offered evidence of whether the disclosure sufficiently allowed a person of ordinary skill to identify the relevant testing conditions, the Court concluded that “[t]his ‘battle of the experts’ is not, therefore, properly decided at the claim construction phase.”

***American Superconductor Corp. v. S & C Elec. Co.***, C.A. No. 11-10033-FDS, 2012 WL 5932071 (D. Mass. Nov. 26, 2012) (Saylor, D.J.) [*Claim Construction*]

American Superconductor Corporation (“AMSC”) brought suit, claiming that a product of S & C Electric Company (“S&C”) infringes AMSC’s patents regarding reactive power compensations for electric utility systems. S&C counterclaimed for declarations of non-infringement and invalidity of U.S. Patent No. 6,900,619, U.S. Patent No. 7,265,521, and U.S. Reissue Patent No. RE41,170.

During claim construction, the parties disputed five terms. The below summarizes the Court’s holding with respect to three of these terms: (1) “substantially simultaneously;” (2) “activates the reactive power compensation device;” and (3) “predetermined first duration.”

*“Substantially Simultaneously”*

The parties agreed that the term “simultaneous” means “at the same time” and that “substantially” modifies the term. The parties’ disagreement concerned how “substantially” should be interpreted to modify the scope of the phrase. Plaintiff’s proposed construction was “sufficiently close in time to at least partially cancel out a step-like change in line voltage” and defendant’s proposed construction was “at the same logical step.”

Because the language of the claims provided little guidance as to how close in time the events described must be to fall within the claims, the Court looked to the specification. The specification described that the purpose of events being “substantially simultaneous” was to use a compensation device to offset “the magnitude of a potentially large step-like change in reactive power.”

The Court found that the specification was in line with the plaintiff's construction, as the specification never mentioned logical steps. Relying on *Medrad, Inc. v. MRI Devices Corp.*, 401 F.3d 1313, 1319 (Fed. Cir. 2005), the Court found that, when there is very little guidance in the patent, it is appropriate to look to functional meaning.

*"Activates The Reactive Power Compensation Device"*

The parties agreed that the term "reactive power compensation device" means the device providing reactive power of a second, opposite polarity. The parties, however, disagreed on the meaning of the term "activates" with respect to such a device. Defendant argued that "activates" means "turns on and connects," because "activating" the device is distinct from the device actually providing reactive power. Plaintiff argued that "activates" means "causes the device to begin to provide reactive power." Looking to the claims, the Court found that activation and connection were referred to separately and because of this, held that "activate" is unlikely to mean both activate and connect. Similarly, the ordinary meaning of "activate" is "to make active." That definition comports with AMSC's proposed construction because, in the context of reactive power compensation, a device is active when reactive power is flowing through it into the system.

*"Predetermined First Duration"*

The parties disputed the meaning of "predetermined first duration"—specifically, whether the term "predetermined" requires interpretation that goes beyond its plain meaning. S&C contended that "predetermined" means "set" or "fixed" "prior to detecting the change in the nominal value." AMSC contended that the term needs no further construction, because a layperson could understand it, but, should the Court construe the term, it should be given its plain meaning, which is "a period of time that is determined in advance." AMSC also contended that S&C's position impermissibly read a limitation into the claim. The Court agreed and found that the ordinary meaning should be used, but supplemented to define that the duration must be determined "before" (in other words, "in advance of").

***Select Retrieval, LLC v. Bulbs.com Inc.***, C.A. No. 12-10389-TSH, 2012 WL 6045942 (D. Mass. Dec. 4, 2012) (Hillman, D.J.) [*Motion to Dismiss, Pleading Standard*]

Select Retrieval, LLC ("Select") alleges infringement by Defendant Bulbs.com, Inc. ("Bulbs") of U.S. Patent No. 6,128,617 ("the '617 patent"), entitled "Data Display Software With Actions and Links Integrated With Information." Pursuant to Fed. R. Civ. P. 12(b)(6), Bulbs moved to dismiss the complaint for failure to state claim. The Court denied the motion with respect to Select's claims of direct infringement, but granted the motion and dismissed Select's claims of inducement of infringement, contributory infringement, and willful infringement.

Before beginning the analysis with respect to the complaint at issue, the Court noted the tension between the pleading requirements as announced, on the one hand, by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and, on the other hand, by Form 18. Citing to both the Federal Circuit and other district courts, Judge Hillman emphasized that all that is required by Form 18 is notification of the "nature of plaintiff's claims and the grounds upon which they rest."

Despite the fact that Select's allegations of direct infringement "are barebones and somewhat vague," the Court found them sufficient to meet the minimum requirements of Form 18 and, thus, sufficient to plausibly state a claim for relief. Select identified the jurisdictional basis for its claim, asserted ownership of the patent, stated that Bulbs infringes by maintaining one or more websites, alleged notice, and claimed entitlement to damages. Nothing more is required in order to withstand a motion to dismiss under 12(b)(6).

In contrast, the Court held that claims for indirect infringement and willful infringement are not informed by Form 18 and, thus, must meet the requirements of *Iqbal* and *Twombly*. As to Select's claims for contributory and inducement of infringement, the Court found that the allegations did nothing more than parrot the elements of the claim. It further held that, although Select would be given leave to amend its complaint to remedy the deficiencies, the filing of a lawsuit would not suffice to satisfy the knowledge element required for indirect infringement. At bottom, the Court put Select on notice that "the filing of a law suit is not enough to support Select's claim for indirect infringement."

Similarly the Court dismissed Select's claim for willful infringement, holding that the plaintiff must make a pleading equivalent to "with knowledge of the patent and his infringement."

***EMC Corp. v. Parallel Iron, L.L.C.***, C.A. No. 12-11096-FDS, 2012 WL 6213133 (D. Mass. Dec. 12, 2012) (Saylor, D.J.) [*Venue, First-to-File Rule*]

Plaintiff EMC Corporation ("EMC") filed a complaint against Defendant Parallel Iron, L.L.C. ("Parallel Iron") seeking a declaratory judgment of non-infringement. This is the second-filed of two suits between EMC and Parallel Iron. One day before this suit was filed, Parallel Iron sued EMC in the United States District Court for the District of Delaware alleging infringement of three patents: U.S. Patent Nos. 7,197,662 ("the '662 patent"), 7,543,177 ("the '177 patent"), and 7,958,388 ("the '388 patent"). Parallel Iron moved to dismiss the declaratory judgment action, or in the alternative, to transfer the case to the District Court of Delaware, where its suit for patent infringement against EMC was already pending. Judge Saylor stayed the declaratory action to allow the Delaware court to determine any challenges to venue and denied without prejudice Parallel Iron's motion to dismiss or transfer.

The Court began its analysis by interpreting the "first-to-file" rule. The first-to-file rule has historically been used in the patent context to promote judicial efficiency and to avoid duplicative litigation in cases of concurrent jurisdiction by requiring the court which first has possession of the subject matter to decide it. The Court, however, explained that the rule should not be applied in a mechanical way. In fact, there are at least two widely-recognized exceptions to the first-to-file rule: (1) where the balance of convenience substantially favors the second-filed action or (2) where there are "special circumstances" justifying a transfer.

EMC argued that this case warrants departure from the first-to-file rule. First, it asserted that the convenience factors under 28 U.S.C. § 1404 favor this district. EMC stated that the case in this Court would be substantially more convenient to EMC and only slightly less convenient to Parallel Iron and EMC's places of business, witnesses, and documentary evidence are all here. Second, EMC argued that Parallel Iron's suit in Delaware is the result of forum shopping, a "special circumstance." It posited that Parallel Iron only became a Delaware company for purposes of litigation.

The Court conceded that the disputes were essentially identical and that it would be duplicative and inefficient for both suits to go forward simultaneously. However, in deciding which court was best suited to determine

the appropriate forum in which to proceed, the Court noted that this was not the appropriate forum for raising EMC's questions concerning the convenience and appropriateness of the District of Delaware as a venue. The Court explained that the first-to-file rule dictates not only which forum is appropriate, but also which forum should decide which forum is appropriate. In nearly every circuit, courts have held that the court in which the second action was filed should defer to courts in the first-filed action. Although the Court has not addressed this issue in the patent context, the First Circuit seems to have adopted this rationale generally. Accordingly, the Court decided to briefly stay the declaratory action to allow EMC time to file a motion for transfer of venue in the Delaware action. The Court also denied without prejudice Parallel Iron's motion to dismiss or transfer.

## TRADEMARK

***Genzyme Corp. v. Shire Human Genetic Therapies, Inc.***, C.A. No. 12-11386, 2012 U.S. Dist. WL 5974049 (D. Mass. Nov. 29, 2012) (Stearns, D.J.) [*False Advertising*]

Plaintiff Genzyme Corp. ("Genzyme") brought this action against Defendants Shire Human Genetic Therapies, Inc. ("Shire HGT") and Shire plc ("Shire"), alleging false advertising under the Lanham Act. Shire HGT filed a motion to dismiss for failure to state a claim and Shire filed a motion to dismiss for lack of personal jurisdiction. The District Court (Stearns, D.J.) denied Shire HGT's motion but granted Shire's motion.

Both Genzyme and Shire HGT manufacture and sell competitive drugs for treating Gaucher disease, a rare genetic disorder. In June 2012, Shire HGT issued a press release touting the clinical superiority of Shire HGT's drug over Genzyme's drug. The press release, targeted at physicians and patients, included clinical data on both drugs' performance. Genzyme demanded that the press release be retracted and, upon Shire HGT's refusal, filed suit alleging false advertising under the Lanham Act.

Shire HGT moved to dismiss for failure to plead elements of the false advertising claim. First, Shire HGT argued the press release did not amount to a commercial advertisement because it constituted "scientific speech" protected by the First Amendment. Following case law from other districts, the Court held that Shire HGT's dissemination of the press release did constitute commercial speech, even though the original publication

of the clinical data was protected speech under the First Amendment. The factors influencing the Court's holding included the use of commercial names for the drugs and their manufacturers in the press release, publication of the information as a press release whose target audience was potential purchasers of the drugs, and the selective dissemination of information favorable to Shire HGT and unfavorable to Genzyme.

Second, Shire HGT argued that the press release was not actually misleading. The Court dismissed this argument, as it would require "delving into murky scientific data and analysis, a task that cannot be satisfactorily undertaken on a motion to dismiss." The Court also rejected Shire HGT's argument that the potential consumers were too sophisticated to be misled, since there is a presumption of consumer deception where the dissemination of false statements has been alleged. Thus, Shire HGT's motion to dismiss was denied.

The Court, however, did grant Shire's motion to dismiss for lack of personal jurisdiction, as there was no allegation that Shire was involved in the press release or that Shire had any relationship with Shire HGT beyond "common ownership and directorship."

**Greene v. Albon**, C.A. No. 09-10937-DJC, 2012 WL 6597779 (D. Mass. Dec. 17, 2012) (Casper, D.J.) [Preliminary Injunction]

Following the Court's summary judgment finding that Massachusetts General Hospital ("MGH") owns the marks "Collaborative Problem Solving" and "The Collaborative Problem Solving Approach" (the "CPS Marks"), MGH moved for a preliminary injunction enjoining Plaintiff Ross Greene ("Greene") from claiming ownership to or using these marks. The Court (Casper, D.J.) granted the motion for injunctive relief.

The Court noted that its ruling on the present motion for preliminary injunction necessarily flowed from Court's prior finding of ownership and not on the basis of a finding of likelihood of success on the merits of a trademark infringement claim. Specifically, the Court found that "whether MGH can successfully bring a trademark infringement suit against Greene or anyone else is a different matter from whether Greene is

contractually restricted from using or claiming ownership of the marks, where Greene's employment contract incorporates the language that all trademarks 'shall be owned' by MGH." Because ownership has been decided in favor of MGH and is now the law of the case, the Court concluded that likelihood of success on the merits had been shown.

Moreover, the Court held that because Greene, a former employee, is using the CPS Marks in ways not directed by MGH that MGH may suffer damage to its goodwill and reputation. It also found that the other factors in deciding a preliminary injunction—balance of the equities and public interest—also favored MGH.

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