

Inside this issue:

1
Avoiding Patent Owner Disputes

1
Federal Circuit Further Limits Doctrine of Equivalents Under “Specific Exclusion” Principle

6
USPTO Patent Prosecution Practice Rule Changes

8
mbhb News: Welcome New Associates

9
mbhb is...

Avoiding Patent Owner Disputes

The resources needed for researching and bringing new products to market determine how companies develop new products. Many small companies and individual inventors often do not have the resources required for researching, developing, and protecting new products. A solution to this problem is to establish collaborations with other companies in order to obtain the funds and technologies to develop and protect new products.

A consequence of collaborations is that employees of the parties involved will be joint

inventors of technologies resulting from such collaborations. The parties also become joint owners of the patents that protect such technologies. Joint ownership of patents means that each owner jointly controls the patents and shares the profits. However, joint ownership of patents sometimes gives rise to disputes that could affect the patents' value.

Joint Inventorship

Before 1984, 35 U.S.C. § 116 required that patent applications be filed by inventors who *continued on p. 4*

Federal Circuit Further Limits Doctrine of Equivalents Under “Specific Exclusion” Principle

The Federal Circuit's decision in *Bicon* (*Bicon, Inc. v. Straumann Co.*, No. 05-1158 (Fed. Cir. March 20, 2006)) appears to mark a further narrowing in the scope and availability of the doctrine of equivalents (“DOE”), particularly for patents where the claim recites physical structures. Significantly, the court's doctrine of equivalents discussion makes no mention of the familiar tests for DOE coverage, i.e., the function/way/result test of the *Graver Tank & Mfg. Co. v. Linde Air Prods.* 339 U.S. 605, 609 (1950) decision, or the “insubstantial differences” test of *Hilton Davis Chemical Co. v. Warner-Jenkinson Co.*, 62 F.3d 1512 (Fed. Cir. 1995), rev'd & remanded, 520 U.S. 17 (1997). Rather, the Court invoked a new exclusion principle essentially foreclosing coverage under the DOE in cases where a claim contains a detailed recitation of structure, stating that such a claim is accorded “limited recourse to the doctrine of equivalents.” Slip op. at 17.

For support of this rule, the court cites cases purportedly standing for “an exclusion rule” that denies any coverage under the DOE for subject matter where such subject matter is “inconsistent with the language of the claim.” Slip op. at 17-18, citing *Sci-Med Life Sys. Inc. v. Advanced Cardiovascular Sys.*, 242 F.3d 1337 (Fed. Cir. 2001); *Ethicon Endo-Surgery Inc. v. U.S. Surgical Corp.*, 149 F.3d 1309 (Fed. Cir. 1998), and other cases.

The problem is that, by definition, a claim term that is expanded under the DOE is, in some fashion, “inconsistent” with the literal scope of the claim. *Bicon* suggests that such inconsistencies are resolved by barring application of the DOE. *Bicon* is difficult to reconcile with prior precedent upholding findings of infringement under the DOE, decisions which by defi-

continued on p. 2

Federal Circuit Further Limits Doctrine of Equivalents Under “Specific Exclusion” Principle

continued from p. 1

nition accommodate inconsistency between the claims and the accused device.

The particular invention at issue in *Bicon* pertained to a dental implant. The court was examining language in the claim preamble, which, in a separate portion of the opinion, was found to be an affirmative limitation of the claim. The claim at issue, claim 5 of U.S. Patent No. 5,791,731, recited:

5. An emergence cuff member for use in preserving the interdermal papilla during the procedure of placing an abutment on a root member implanted in the alveolar bone of a patient in which

[a] the abutment has a frusto-spherical basal surface portion and

[b] a conical surface portion having a selected height extending therefrom comprising . . . [body of claim].

The accused device had a trumpet-shaped, concave surface, which was argued to be equivalent to the convex frusto-spherical basal surface of part [a] of the preamble. In rejecting the patentee’s equivalency argument, the court stated:

The problem that [the patentee] faces in this regard is that limitation [a] and [b] of the claim contain a detailed recitation of the shape of the abutment, including that it has a frusto-spherical basal portion. A claim that contains a detailed recitation of structure is properly accorded limited recourse under the doctrine of equivalents. See *Tanabe Seiyaku Co. v. Int’l Trade Comm’n*, 109 F.3d 726 732 (Fed. Cir. 1997) (“The sharply restricted nature of the claims has much to do with the scope we accord to

the doctrine of equivalents.”). We have explained, “by defining the claim in a way that clearly excluded certain subject matter, the patent implicitly disclaimed the subject matter that was excluded and thereby barred the patentee from asserting infringement under the doctrine of equivalents.” *Sci-Med Life Sys. Inc. v. Advanced Cardiovascular Sys.*, 242 F.3d 1337, 1346 (Fed. Cir. 2001) [further citations omitted]; *Ethicon Endo-Surgery, Inc. v. U.S. Surgical Corp.*, 149 F.3d 1309, 1317 (Fed. Cir. 1998) (subject matter is “specifically excluded” from coverage under the doctrine of equivalents if its inclusion is “inconsistent with the language of the claim.”)

Slip op. at 17-18.

There are several things of note in this analysis. Significantly, the Federal Circuit does not engage in any function/way/result analysis under *Graver Tank*, or any examination of whether the differences in geometry between the accused device and the claimed invention are insubstantial under *Hilton-Davis*. Rather, the Federal Circuit seems to be excluding availability of the doctrine of equivalents completely, based solely on a textual analysis of the claim itself and noting that the accused product is not within the literal scope of the patent.

The decision raises the question of whether the bar on availability of the doctrine of equivalents, based on the “specific exclusion principle”, is a question of law that might be amenable to summary judgment. If so, it would avoid the factual disputes associated with a function/way/result or insubstantial differences analysis. It is at least arguable that this “spe-

snippets

...The Federal Circuit seems to be excluding availability of the doctrine of equivalents completely, based solely on a textual analysis of the claim itself and noting that the accused product is not within the literal scope of the patent.

cific exclusion principle” is one of law and amenable to summary judgment.

The rule of exclusion based on a textual analysis of a claim brings to the fore the tension in the doctrine between the two opposing principles of (1) allowing some additional claim scope beyond the literal bounds of the claim in an appropriate case under the DOE, while (2) preserving the public notice function of claims. The decision in *Bicon* lands squarely on the side of the upholding the latter principle at the expense of the former. In doing so, it is consistent with the trend of the Federal Circuit cutting back on the scope of the DOE. Creative litigants will surely apply the *Bicon* “specific exclusion principle” to other areas besides the mechanical arts. It would seem that virtually any claim limitation is amenable to a “specific exclusion principle” argument.

If the Federal Circuit’s specific exclusion doctrine is interpreted as meaning that a selection of a particular claim term operates as a matter of law as a disclaimer of coverage under the DOE for subject matter not within the literal definition of that term, then the death knell for the doctrine of equivalents has basically been rung.

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MBHB is celebrating its 10th Anniversary in October!

From our humble roots as a small firm of five attorneys, to our present count of more than 70 lawyers, we’ve remained a progressive, technology-focused entrepreneurial law firm. We are honored that you’ve been a part of our past, and we look forward to sharing our future with you.

Avoiding Patent Owner Disputes

continued from p. 1

invented each and every claim in the application. When an inventor was not the inventor of every claim, more than one application had to be filed to protect what was really one invention. Thus, patents were invalidated by the courts simply because all of the named inventors did not contribute to each and every claim. *Amax Fly Ash Corp. v. United States*, 182 U.S.P.Q. 210 (Ct. Cl. 1975).

In response, Congress recognized that most research is conducted by collaborations, and in 1984 amended 35 U.S.C. § 116 to permit patent applications to be filed by inventors who did not invent each and every claim. Pub. L. 98-622, § 104, 98 Stat. 3384, Nov. 8, 1984. Accordingly, a single application could be filed that included claims invented by different inventors. Thus, the amendments to 35 U.S.C. § 116 allowed individuals to be named as inventors on patents regardless of whether they made minor or major contributions.

Joint Ownership

The amendments to 35 U.S.C. § 116 corrected problems of patent inventorship but did not affect the laws of patent ownership. Patent inventorship and ownership are separate legal issues. *Beech Aircraft Corp. v. EDO Corp.*, 26 U.S.P.Q.2d 1572 (Fed. Cir. 1993). The patent law governing ownership states that “patents shall have the attributes of personal property.” 35 U.S.C. § 261. Owners of patents, under common law, have an undivided interest in the patent because the patents are considered personal property. The rights of patent owners are governed by 35 U.S.C. § 262, which states that in the absence of any agreement to the contrary, each joint owner may make, use,

or offer to sell the patented invention without the consent of the other owners. However, from an equitable point of view, 35 U.S.C. § 262 is incompatible with the way research is conducted today where the contribution of one inventor may be unequal to that of another inventor. Thus, disagreements may arise between an inventor who contributed a lot but shares equal ownership with an inventor who contributed very little.

Schering Corp. v. Roussel-UCLAF SA

The court in *Schering Corp. v. Roussel-UCLAF SA*, 104 F.3d 341 (Fed. Cir. 1997), dealt with the issue of whether a license granted by one co-owner to a third party without the consent of the other co-owner was valid. Schering and Roussel were co-owners of U.S. Patent No. 4,472,382 ('382), which covered a method for treating prostate cancer using combination therapies comprising antiandrogen. Zeneca, Inc. and Zeneca Holding, Inc. (“Zeneca”) also developed their own antiandrogen and contacted Roussel to obtain a license to sell a combination therapy. Schering also contacted Roussel to see if Schering could get exclusive rights under the '382 patent. However, Roussel elected to license Zeneca rather than grant exclusive rights to Schering. Roussel did not inform Schering of the license to Zeneca until Schering initiated a lawsuit against Zeneca.

The court in *Schering* affirmed the district court's decision to grant partial summary judgment to Zeneca holding that the license to Zeneca was valid. The *Schering* court reasoned that each co-owner's rights carry the right to license to others without the consent of the other co-owners. The *Schering* court further reasoned that unless a co-owner gives up its rights

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...Disagreements may arise between an inventor who contributed a lot but shares equal ownership with an inventor who contributed very little.

through an "agreement to the contrary" as stated in 35 U.S.C. § 262, the co-owner can exploit the patent, including the grant of licenses to third parties, on whatever conditions the co-owner chooses.

Preventing Disputes

One solution to ownership disputes is to file more than one patent application so that each application covers different aspects of the invention invented by different inventors. However, filing more than one application has some disadvantages. For example, should the inventor of one patent decide to use the invention of a second inventor, a license from the second inventor is necessary. Further, filing more than one application covering a single invention is expensive because each application must be drafted and prosecuted separately.

A preferred way to avoid ownership disputes is to enter into written agreements that clearly define the ownership rights of all inventors. This approach eliminates the expense of filing and prosecuting separate applications. In addition, written agreements can be made to reflect a more equitable distribution of rewards that depend on the contribution of each inventor. For example, an agreement could compensate a co-worker who developed a compound as an analgesic and forbid the co-worker from using the compound as an antitumor agent. Further, an agreement could also require the co-worker to assign all ownership rights to a single entity through an assignment document.

Sometimes parties prefer to have joint ownership of patents. In such cases, it may be advantageous for the written agreements to require all parties to con-

sent to infringement lawsuits against infringers. Alternatively, written agreements could give each party the unilateral right to sue in order to prevent one party from refusing to join in an infringement lawsuit. Nevertheless, these provisions do not prevent a co-owner from licensing to a licensee that is then sued as an infringer by the other co-owner. Thus, an assignment of ownership rights and payment of royalty as compensation can be a much preferred way to prevent disputes among owners.

Conclusion

The differences between the laws governing joint inventorship and joint ownership of patents can create ownership disputes. The most effective way to avoid such disputes is to enter into written agreements that clearly define ownership rights. Failure to enter into a written agreement may cause the parties to incur expensive settlements or litigations.

Dr. Raef M. Shaltout's research experience includes preparation and characterization of polysilanes and polycarbosilanes using group 4 metallocene catalysts. Dr. Shaltout is a former MBHB associate.

Dr. Baltazar Gomez's practice includes providing technological advice in support of validity, infringement and patentability analyses, patent application preparation and prosecution, and litigation matters in the areas of biology, chemistry, biochemistry, and cellular and molecular biology. Dr. Gomez's doctoral research concerned bioenergetics and membrane biochemistry.

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USPTO Patent Prosecution Practice Rule Changes

The U.S. Patent and Trademark Office has proposed a series of dramatic changes to patent prosecution practice rules that promise (or threaten) to influence how all U.S. patent applications are prosecuted.

One set of these changes relates to "continuation" applications, which are applications that have been examined without obtaining an allowance (for at least some of the claims), and that are re-submitted to the Office for further examination. These types of applications arise either as the result of patent prosecution strategy by an applicant (who can elect to cancel non-allowed claims to have other claims granted, and retain the right to pursue the non-allowed claims in the continuation application), or as the result of unwillingness by the Office to allow claims in an application (where further prosecution is needed to amend claims or present arguments or evidence of patentability). Also included under this definition are Requests for Continued Examination ("RCEs"), a procedural device that does not result in a new application filing but permits continued prosecution of non-allowed claims in an application.

The Office proposes to limit the number of continuation applications to one as of right, and to require an applicant who wants an additional continuation to show by petition that the amendments, evidence, or arguments could not have been previously submitted. This change is dramatic and departs drastically from current practice, because it would eliminate the opportunity for strategic decisions to cancel certain non-allowed claims to obtain other claims deemed allowable by the Office. The examples provided by the Office also make clear that most applicants would be precluded from filing more than one continuation or RCE.

In addition, the Office proposes requiring an applicant to designate ten claims as "representative" in any application having more than ten claims as filed. All independent claims must be designated, and designating dependent claims up to ten total is optional. These ten claims will be searched and examined by the Office, and if found allowable, all other dependent claims will be examined solely for compliance with the utility (Section 101) and written description/enablement/best mode requirements (Section 112).

Alternatively, if an application has more than ten independent claims, or at the applicant's election, the Office will search and examine all claims in an application. However, under these circumstances the applicant must perform a search, using USPTO searching criteria, and then submit a patentability statement that identifies all claim limitations present in the prior art (with specificity) and explain how the representative claims are patentable over the prior art. The decision to submit representative claims or the search or patentability information can be changed during prosecution at applicant's election.

There are also proposed rules for other types of "related applications," including divisional applications and continuation-in-part applications. For divisional applications, only involuntary divisions (i.e., those required by the Office for unity-of-invention reasons) will be permitted. More importantly, a divisional will be able to claim priority only to the parent application. All divisional applications will need to be filed during the pendency of the original application; any divisional applications filed later will be entitled to claim priority only to the earliest still-pending divisional application. Continuations-in-part will still be permitted, but the applicant

will be required to identify all claims disclosed in the parent application (which will be given the original filing date) and all other claims will be given the filing date of the continuation-in-part application. Moreover, any claims in any continuation application filed from a continuation-in-part will be entitled only to the filing date of the continuation-in-part application, thus foreclosing the priority right of a continuation application to any remaining claims from the original parent application.

The Office is further proposing a requirement that an applicant identify, within two months of the filing date, all co-pending applications or co-owned patents having a common assignee and common inventor for all applications, in an effort to identify applications that should be subject to obviousness-type double-patenting restrictions. These applications will be under a rebuttable presumption that their claims are patentably indistinct from the claims of the related applications, and an applicant will have to affirmatively establish patentable distinctness or submit a terminal disclaimer. Otherwise, the Office may merge such claims into a single application (presumably the earlier-filed one), although it remains possible that even a terminal disclaimer will not prevent the Office from requiring merger.

The justifications for these proposed changes are two-fold: pendency and examination quality. The Office is experiencing an increasing backlog of pending cases: there are more than 900,000 cases pending at present, and the backlog number is growing. As a consequence, the pendency times (which vary by art unit) range from 28 – 52 months, and absent changes in the examiner corps or the pace of patent filings, it would take 36 – 130 months (depending on the art unit) to

work through the backlog. Additionally, the "error rates" (cases where claims that should be allowed are not, and vice versa) is between 4 - 8% (depending on art unit). Although the Office is planning to hire 1,000 new examiners this year, and train them for about 8 months in a new training academy, the Office does not believe that either personnel measure is sufficient to reduce pendency and improve quality.

The Office justifies the proposed changes by noting that less than 5% of all pending applications have more than ten independent claims, and that less than 15% of all applications have two or more continuations or requests for continued examination. However, it appears that the proposed changes would have little effect at overcoming the pendency and quality problems, and at best simply maintain the status quo. The Office also concedes that the only way the number of backlogged cases could be reduced over the five-year period between 2007 and 2012 would be if all applicants were required to submit the search/patentability evidence now proposed to be required only of applicants submitting more than ten independent claims for examination.

Although the USPTO has only proposed these changes, we suggest that inventors (or their assignees) consider making significant alterations to their current practices. For example, inventors should review the scope of inventions disclosed in an application, and limit the disclosure to support no more than 10 independent claims. Also, current restriction practice should inform the subject matter of such claims to reduce the number of independent inventions encompassed by the claims. Alternatively, inventors should budget to file divisional applications during the pendency of the originally-filed ap-

plication. Claims should also be written to elicit election-of-species requirements, rather than restriction to different inventions. For biotechnology patents, the Office's reluctance (or refusal) to examine more than one gene sequence per application can be used to distinguish different applications directed to different genes (even if related by sequence, gene family or function).

Regarding continuation practice, inventors need to consider increasing the stringency and thoroughness of first Office Action Responses, to record as much evidence and argument necessary to be ready to file an appeal to the Board of Patent Appeals and Interferences rather than filing an RCE or continuing application. In addition, inventors should prepare to challenge improper examination practices by the Office, such as issuing a final rejection based on amendments, incorporating limitations from a dependent claim into an independent claim, or citing new art that should have been asserted in the first Action. The Office has indicated that these practices, although widespread, are improper and can be rectified by petitioning the Commissioner of Patents. Although not likely to expedite prosecution of applications to allowance, the inaccessibility of continuation applications under the proposed rules will force an applicant to avoid using an RCE or continuation improvidently. Losing the procedural tool of the continuation application can also be expected to increase, rather than decrease, pendency times for applications, if only because a much higher percentage of applications will be appealed. Thus, the proposed rules will reverse the one positive trend in the Patent Office over the last few years, reducing the number of applications on appeal, while doing little to solve the problems to

which the changes are purportedly directed.

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mbhb News: Welcome New Associates

McDonnell Boehnen Hulbert & Berghoff LLP (“MBHB”) welcomes the following associates, who joined the firm in March:

- o **Joseph A. Herndon**'s experience includes voltage and current transmission line studies, with expertise in power electronics and energy systems. He earned his J.D. from DePaul University College of Law (*summa cum laude*) and his B.S. in Electrical Engineering (With Honors) from the University of Illinois.
- o **Sherri L. Oslick, Ph.D.** performed her doctoral research on secondary structure formation in short, template-nucleated helical peptides. She earned her J.D. (*cum laude*) from The John Marshall Law School, her Ph.D. in Bio-Organic Chemistry from the Massachusetts Institute of Technology, and her B.A. in Chemistry (*cum laude*, With Distinction in All Subjects) from Cornell University.

Both Joe and Sherri joined MBHB as a technical advisors in 2001. They attended law school classes at night while maintaining their full-time positions as law clerks and patent agents at the firm.

MBHB welcomes eleven new associates in September. These recent law school graduates just took the July 2006 Illinois State Bar Exam. Joining us in the fall are:

Rebecca Brown	Scott Miller
Y. Elaine Chang	Kurt Rohde
Mike Clifford	Rory Shea
Paul Kafadar	Jim Suggs
Nicole Lammers	Jim Wasicak
Jessica Lunney	

With more than 70 attorneys, the firm has been one of the fastest growing in the country. Based in Chicago with a west coast office in the Seattle area, MBHB has broad experience in litigation and prosecution of patents, trademarks and copyrights. Most of MBHB's professionals have Ph.D.s or other advanced technical degrees and practical experience working in high-tech fields ranging from biotechnology, pharmaceuticals, and medical diagnostics to telecommunications, computers, and electrical engineering.

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With offices in Chicago and Washington state, MBHB provides comprehensive legal services to obtain and enforce our clients' intellectual property rights, from navigating patent office procedures to litigating complex infringement actions.

We don't merely procure rights and litigate cases; we craft winning strategies that achieve our clients' business objectives.

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Review of Developments in Intellectual Property Law

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