United States District Court,
W.D. Missouri, Western Division.

Eileen M. GLICK,
Plaintiff.
v.
U.S. TOY CO., INC,
Defendant.

No. 01-0260-CV-W-3-ECF

Nov. 19, 2001.

Thomas Marshall Deacy, Deacy & Deacy, Kansas City, MO, Eric Hugh Chadwick, Patterson & Keough, Minneapolis, MN, for Plaintiffs.

Ginnie C. Derusseau, James J. Kernell, Michael Yakimo, Jr., Erickson, Kernell, Derusseau & Kleypas, LLC, Overland Park, KS, for Defendants.

CLAIM CONSTRUCTION

ORTRIE D. SMITH**, District Judge.**

Plaintiff Eileen Glick ("Glick") brought this patent infringement action against Defendant U.S. Toy Co, Inc. ("U.S.Toy"), alleging that U.S. Toy infringed Glick's Patent Nos. 5,620,325 ("'325 patent") and 5,947,786 ("'786 patent"). Both of these patents are entitled "Educational Blocks with Enhanced Manipulation Features." The patents are asserted against U.S. Toy's block models or SKU numbers "CPX-999L," "CPX-999," and "XX 3023" and any other similar product. The parties have submitted claim construction briefs in which several terms are in dispute.

Analysis

Standard for Claim Construction

A patent infringement analysis requires two steps: proper construction of the asserted claim and a determination of whether the accused method or product infringes the asserted claim as properly construed. Vitronics Corp. v. Conceptronic, Inc. 90 F.3d 1576, 1581-82 (Fed.Cir.1996). In determining the proper construction of a claim, "the court should look first to the intrinsic evidence of record, *i.e*. the patent itself, including the claims, the specification, and if in evidence, the prosecution history." Id. at 1582. The court should begin with the language of the claims themselves, which defines the scope of the protected invention. York Products., Inc. v. Central Tractor Farm & Family Ctr., 99 F.3d 1568, 1572 (Fed.Cir.1996). The significance of claims in defining a patent has been expressed as follows:

The claims of the patent provide the concise formal definition of the invention. They are the numbered

paragraphs which 'particularly [point] out and distinctly [claim] the subject matter which the applicant regards as his invention.' 35 U.S.C. S 112. It is to these wordings that one must look to determine whether there has been infringement. Courts can neither broaden nor narrow the claims to give the patentee something different than what he has set forth. No matter how great the temptations of fairness or policy making, courts do not rework claims. They only interpret them.

E.I. du Pont de Nemours & Co. v. Phillips petroleum Co., 849 F.2d 1430, 1433 (Fed.Cir.1988)(quoting Autogiro Co. of America v. United States, 181 Ct.Cl. 55, 384 F.2d 391(Ct.Cl.1967)).

Claim terms are to be given their ordinary and accustomed meaning. Johnson Worldwide Assocs., Inc. v. Zebco Corp., 175 F.3d 985, 989 (Fed.Cir.1999). There are two instances in which a court may be compelled to give the definition of a term a meaning other than the ordinary and accustomed one. First, a patentee may choose to be his own lexicographer by clearly stating the special definition of the term in the patent specification or file history. Id. at 990. The second arises when the terms chosen by the patentee "so deprive the claim of clarity that there is no means by which the scope of the claim may be ascertained from the language used." *Id*. Ambiguities in a claim should be construed against the patentee becuase the applicant could have prevented the ambiguities through clearer claim drafting. Hoganas AB v. Dresser Indus., 9 F.3d 948 (Fed.Cir.1993).

The court next looks to the patent specification to aid in defining the terms used in the claims. The specification contains a written description of the invention that must be clear and complete enough to enable those of ordinary skill in the art to make and use it. Vitronics, 90 F.3d at 1582. Consequently, the specification is "always highly relevant to the claim construction analysis" and "is usually dispositive; it is the single best guide to the meaning of a disputed term." *Id.; see* E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co., 849 F.2d 1430, 1433 (Fed.Cir.1988) (stating that the specification can supply understanding of unclear terms, but should never trump the clear meaning of the claim terms). The court also may consider the prosecution history of the patent, if in evidence. Vitronics, 90 F.3d at 1582. The prosecution history can and should be used to understand the language in the claim, but it cannot be used to "enlarge, diminish, or vary" the terms in the claims. Markman v. Westview Instruments, Inc., 52 F.3d 967, 980 (Fed.Cir.1995)(en banc), *aff'd* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996).

Intrinsic evidence is "the most significant source of the legally operative meaning of the disputed claim language" and, ordinarily, that alone is sufficient to resolve any ambiguities and determine the meaning of a disputed claim term. Vitronics, 90 F.3d at 1582-83. When the intrinsic evidence is unambiguous, it is improper for the court to rely on extrinsic evidence, e.g. expert testimony, for the purposes of claim construction. Id. at 1583. However, a court may rely on extrinsic evidence to interpret claims if claim language "remains genuinely ambiguous after consideration of the intrinsic evidence." Bell & Howell Document Management Prods. Co. v. Altek Sys., 132 F.3d 701, 706 (Fed.Cir.1997). Extrinsic evidence may be considered only to assist in the court's understanding of the patent, not to vary or contradict the claim terms. Markman, 52 F.3d at 981.

Having set forth the relevant standards of claim construction, the Court will now construe the disputed claim terms:

Disputed Terms

" ***Disposed*** "

This term is used in claims 1 and 10 of the '325 patent in the phrase, "means for enhanced gripping disposed on the at least one ledge". Defendant states that this term is unambiguous and means "on". Plaintiff argues that the term "disposed" means to "put in place" or to be "arranged". Claim terms are to be given their ordinary and accustomed meaning. "Disposed" is defined in Marion Webster Collegiate Dictionary as, "to place, distribute, or arrange ." The Court sees no reason why a special definition of the term "disposed" should be given. Consistent with its ordinary and accustomed meaning, the Court defines "disposed" as meaning "to place, distribute or arrange."

" ***Means for Enhanced Gripping*** "

This term is used in claims 1 and 10 of the '325 patent in the phrase, "means for enhanced gripping disposed on the at least one ledge" and is written in means-plus-function language. FN1 Congress has allowed patentees the ability to express their claims in functional, rather than structural, language by using a means-plus function statement. However, a means-plus function statement must be interpreted under and limited by 35 U.S.C. s. 112, para. 6. *See, e.g.,* O.I. Corp. v. Tekmar Co., 115 F.3d 1576, 1580-81 (Fed.Cir.1997). Section 12, para. 6 provides:

FN1. Both parties agree that there is no mean-plus function statement in the '786 patent.

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material, or acts in support thereof, and such claim shall be construed to cover the corresponding structure, material, or acts described in the specification and equivalents thereof.
35 U.S.C.S 122, P 6 (1994).
Construction of claims under this provision includes interpretation of both the claimed function and the claimed means and is a question of law. Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., 145 F.3d 1303, 1309 (Fed.Cir.1998) (citing Cybor Corp. v. FAS Technologies, Inc., 138 F.3d 1448 (Fed.Cir.1998) (en banc)); B. Braun Medical, Inc. v. Abbott Laboratories, NP Medical, Inc., 124 F.3d 1419, 1424-25 (Fed.Cir.1997)). When construing such claims, the Court must be mindful that "structure disclosed in the specification is 'corresponding' structure only if the specification or prosecution history clearly links or associates that structure to the function recited in the claim." B. Braun Medical, Inc., 124 F.3d at 1424.

Defendant argues that the structure that allows for the means for enhanced gripping refers to the groove and lip on the width of the ledge. Plaintiff argues that the ledge sizing configurations and material of the block itself are the corresponding structure to the recited means for enhanced gripping. Defendant asks the court to construe the "means for enhanced gripping" claim language as limited to the groove and lip on the at least one ledge-interpreted by Defendants to be only the width of the ledge and not to include a height limitation. Defendant relies on dependent claims 7 and 13, which describe the groove and lip, and the material of the block itself as structure to enhance gripping, but does not refer to a ledge height. Plaintiff seeks a broader construction, and asks the Court to construe the limitation in issue to capture the entire ledge sizing configuration (ledge width, ledge height, groove and/or lip) or the material of the block itself.

Generally adopting Plaintiff's proposed approach, the Court construes the disputed language as follows: The function recited in the disputed means clause is "enhanced gripping." The corresponding structure which enables this function includes (1) the ledge sizing configurations, which may consist of a groove or lip, the ledge height and width, or the ledge on both sides of the interior member; and (2) the material of the block

itself, such as a hook and loop material, metal surface, low tack surface, felt or cloth, or magnetic material.

The specifications support this conclusion. The specification clearly identifies the structure performing the function as "the ledge sizing configurations [which] are quite useful in enhancing the overall ability of a user to grip a block." '325 patent, col. 3, lines 28-29. The specification refers to a "basic configuration of a ledge or recess which greatly enhances the ability of a user to grip the block." '325 patent, col. 3, lines 17-19. The ledge, "may have a width, W, which is sized to accommodate and optimize gripping" and "[i]n similar manner, may also be sized with a ledge height, H_1, optimized for gripping by a user's middle phalanx portion of a finger." ' 325 patent, col. 3, lines 19-21, 25-26. The specification discloses an additional means for enhancing grip and manipulation-"an improved surface application placed on the external frame member surfaces." '325 patent, col. 3, lines 65-67. This surface application may be a hook an loop type material, metal surface, low tack surface, felt or cloth, or magnetic material. '325 patent, col. 4, lines 2-9. Overall, the language of the specifications shows that the "means for enhanced gripping" includes the ledge sizing configurations and the material of the block itself.

" ***Translucent*** "

This term is used in the dependent claims of both the '325 and '786 patents to describe the nature of the interior member. Both parties refer to the meaning set forth in the Merriam-Webster Collegiate dictionary which defines translucent as, "transmitting and diffusing light so that objects beyond cannot be seen clearly." However, Defendant argues that this definition should be interpreted to exclude tinted or colored panels, which Defendant contends are transparent, not translucent, elements. Plaintiff argues that tinted and colored glass are in fact translucent, because they impair a user's ability to see objects clearly beyond the member. The Court agrees with Plaintiff and concludes that the term "translucent" includes tinted or colored members or any interior member beyond which items cannot be seen clearly.

" ***Accomodated*** "

This term appears repeatedly in both the '325 and '786 patents in the phrase, "the distal phalanx portion length is accommodated when the block is grasped by the user." Plaintiff argues that the term "accommodated" should be defined as "to give consideration to" or "to allow for." Defendant suggests that the term means "to have room for" and, thus, the entire distal portion must fit completely on the ledge. The term "accommodated" is defined in the Merriam-Webster Collegiate dictionary as "to have room for," "to give consideration to" or "to allow for," and "to hold without crowding or inconvenience." Given that there is no specific size or dimension of the distal phalanx portion or the ledge specified in the patents, and noting that the distal phalanx portion size varies from user to user, the Court believes that Defendant's proposed construction is too narrow. The term "accommodate" does not require that the entire distal phalanx portion fit completely on the ledge, but is better defined as "to allow for", meaning that the ledge will hold or allow for part of, not necessarily the entirety, of the distal phalanx portion during gripping.

" ***Ledge*** "

The definition of ledge differs between the '325 patent and the '786 patent. As stated in the '325 patent, the ledge is peripheral in nature and is comprised of an interior surface of the peripheral member adjacent to the interior member and an exterior surface of the peripheral member. This interpretation is supported by the language of claim 1 and the specifications. However, the definition of "ledge" is indeterminate in the '786 patent. The ledge appears to be planar in nature because the description of the ledge width and ledge height are virtually identical. Although the specifications indicated a separate width and height of the ledge, the

Court cannot form a definition of ledge because the wording of claim 1 does not distinctly point out the ledge configurations. The ramifications of this erroneous language will be further addressed in a separate summary judgment ruling.

IT IS SO ORDERED.

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