United States District Court,
D. Massachusetts.

THE GILLETTE COMPANY,
Plaintiff.
v.
ENERGIZER HOLDINGS,
INC. Defendant.

No. Civ.A. 03-11514-PBS

Jan. 15, 2004.

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MEMORANDUM AND ORDER

SARIS**, J.**

INTRODUCTION

Plaintiff The Gillette Company ("Gillette"), manufacturer of a three-bladed razor with "progressive geometry," seeks a preliminary injunction barring Defendant Energizer Holdings, Inc. ("Energizer") from making, using, importing, offering to sell or selling the Quattro four-bladed razor. Gillette claims that the Quattro infringes claims 1 through 10 of U.S. Patent No. 6,212,777 B1 (issued Apr. 10, 2001) (the " '777 patent").

After a two-day hearing, the motion is *DENIED* on the ground that this Court finds no reasonable likelihood of success on the claim of literal infringement. FN1

FN1. The parties have extensively briefed numerous issues of infringement, validity, inequitable conduct, and failure to meet the written description requirement. In addition, the Court held a two-day evidentiary hearing. However, as Gillette has not demonstrated a reasonable likelihood of success on the threshold issue of literal infringement, the Court need not address the remaining substantive issues. Gillette did not press a claim of infringement by equivalents.

FACTUAL BACKGROUND

1. *Mach III*

Proclaiming itself as the market leader in wet shaving, Gillette over the last 30 years has developed: a twin blade shaving system (TRAC II(R) 1970); a pivoting head shaving system (Atra(R) 1977); a lubricating strip shaving cartridge (AtraPlus(R) 1985); a shaving cartridge using spring-mounted moving blades (Sensor(R) 1990); and a three-blade shaving system (MACH3(R) 1998).

Gillette claims that its '777 patent contains a "breakthrough" invention consisting of setting a group of three blades in a "progressive geometry" (a term that does not appear in the patent) so that the first or primary blade of the group has a negative exposure (meaning that the blade edge is further away from the skin than the adjacent skin-contacting elements of the blade unit), the third (or "tertiary") blade of the group has a positive exposure (meaning its edge is closer to the skin than the adjacent skin-contacting elements), and the second blade has an exposure between the exposures of the first and last blades. '777 Patent at 1:47-44; 2:28-30. Gillette currently manufactures and sells three brands featuring "progressive geometry": the Mach III, Mach III Turbo, and Venus razors and shaving cartridges.

Claim 1 of the '777 Patent, the independent claim, provides:

A safety razor blade unit comprising a guard, a cap, and a group of first, second, and third blades with parallel sharpened edges located between the guard and cap, the first blade defining a blade edge nearest the guard having a negative exposure not less than -0.2 mm, and the third blade defining a blade edge nearest the cap having a positive exposure of not greater than +0.2 mm, said second blade defining a blade edge having an exposure not less than the exposure of the first blade and not greater than the exposure of the third blade.

Claim 10 provides: "A safety razor according to Claim 1, wherein the exposure of the second blade is substantially equal to zero."

"Blade exposure" is defined in the '777 Patent to be "the perpendicular distance or height of the blade edge measured with respect to a plane tangential to the skin contacting surfaces of the blade unit elements next in front of and next behind the edge." *Id*. at 1:50-53. The exposure of the first (or primary) blade is measured by reference to a plane tangential to the guard, which is located in front of the first blade, and the edge of the second blade. *Id*. at 1:55-57. That definition specifically identifies "the guard" and the "edge of the second blade" as the skin contacting surfaces of the blade unit "next in front of and next behind" the first blade. *Id*. at 1:50-57. The exposure of the third (or tertiary) blade is similarly measured with reference to a plane tangential to the edge of the second blade and the cap. *Id*. at 1:57-59. The definition identifies the "second blade" and the "cap" as the skin contacting surfaces "next in front of and next behind" the third blade. *Id*.

Gillette's '777 specification also notes that the exposure of the first blade, which is negative, "must not be so low that it will not make effective contact with the skin surface being shaved," *id*. at 1:66-2:2, and discloses that "an exposure not less than -0.2 mm is satisfactory for the primary blade," *id*. at 2:10-11. Conversely, the Gillette specification noted that the exposure of the tertiary blade should not be so great that it "carries to high a risk of cutting the skin, and that "a maximum exposure of around +0.2 mm will ensure satisfactory results." *Id*. at 2:24-26. Because "[a] steadily increasing blade exposure has been found most effective, ...

the value of the exposure of the secondary blade is ideally approximately half way between the exposure values for the primary and tertiary blades." *Id*. at 2:32-34.

The specification of the '777 patent consistently describes the cartridge as a three-bladed unit. *See, e.g., id*. at Abstract ("A safety razor blade unit including a guard, a cap, and a group of three blades...."); 1:32-37 ("It has been found that with a blade unit comprising three blades, the frictional drag forces can be kept at an acceptable level while allowing an improved shaving efficiency, by setting the blades relative to each other and to guard and cap surfaces positioned in front of and behind the blade edges, according to a particular geometrical disposition."); 1:37-40 ("Thus, in accordance with the present invention there is provided a safety razor blade unit comprising a guard, a cap and a group of three blades with parallel sharpened edges...."); 1:54 ("Therefore, for the three-bladed blade unit of the invention...."); 2:50-53 ("With a three-bladed safety razor blade unit having the blades disposed as specified herein we have found...."); 2:47-49 ("It is not necessary for all three blades to have the same shaving angles...."); 3:16-20 ("[T]he novel aspects of the present invention residing in the provision of three blades set in the blade unit set in particular dispositions with respect to each other...."); 4:3 ("Three sharpened blades").

2. ***The Quattro***

On March 23, 2003, Energizer acquired Schick, a competitor of Gillette in the wet shaving market. Schick recently introduced a new razor, under the name Quattro, which employs a cartridge having a guard, a cap and, as the moniker suggests, four blades. The Quattro has two middle blades with essentially the same exposure. The first blade nearest the guard has a negative exposure of not less than-0.2 millimeters. The measurement of the blade closest to the cap is positive and not greater than +0.2 millimeters. The measurements of the exposures of the middle blades indicate that they were greater than the exposure of the blade closest to the guard and less than the exposure of the blade closest to the cap, and "for all practical purposes, identical to each other" (Trotta Decl. para. 17). The measurements "hover around zero and in many instances the actual readings were zero." (*Id*.)

Accusing Schick of studying and copying its progressive geometry (Pesce Decl. Ex. E), Gillette contends that the Quattro contains every element of Claims 1 and 10 of the '777 patent.

DISCUSSION

A. ***Preliminary Injunction Standard***

The Court has the authority to grant preliminary injunctive relief in patent cases "in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable." 35 U.S.C. s. 283 (1952). However, this relief is a "drastic and extraordinary remedy that is not to be routinely granted." Intel Corp. v. ULSI Sys. Tech., Inc. ., 995 F.2d 1566, 1568 (Fed.Cir.1993).

To obtain a preliminary injunction, the movant must show each of the following four factors: 1) a reasonable likelihood of success on the merits; 2) irreparable harm in the absence of a preliminary injunction; 3) the balance of hardships weights in favor of the movant; and 4) the public interest favors an injunction. *Id.;* Nutrition 21 v. United States, 930 F.2d 867, 869 (Fed.Cir.1991). To obtain a preliminary injunction, a patent holder must show that there exists a reasonable likelihood of success on the merits with regard to the showings of the infringement of its patent by the defendant and the validity of its patent. Hybritech Inc. v. Abbott Labs., 849 F.2d 1446, 1451 (Fed.Cir.1988).

While none of these factors alone is dispositive, preliminary injunctive relief may be precluded where the plaintiff fails to make a sufficient showing with respect to any one factor, as each is weighed and measured "against the other factors and against the form and magnitude of the relief requested." *Id.;* Intel, 995 F.2d at 1570.

B. ***Likelihood Of Success***

1. ***Construing a Claim***

"Determining whether a patent has been infringed involves two steps: (1) claim construction to determine the scope of the claims, followed by (2) determination whether the properly construed claim encompasses the accused structure." Bai v. L & L Wings, Inc., 160 F.3d 1350, 1353 (Fed.Cir.1998). An accused device may infringe a given patent claim, and thus the patent, in one of two ways: literally, or under the doctrine of equivalents. Jurgens v. McKasy, 927 F.2d 1552, 1560 (Fed.Cir.1991). "Literal infringement requires that the accused device contain each limitation of the claim [at issue] exactly; any deviation from the claim precludes a finding of literal infringement." Litton Sys., Inc. v. Honeywell, Inc., 140 F.3d 1449, 1454 (Fed.Cir.1998).

To construe a patent claim, courts principally consult evidence intrinsic to the patent, including the claims themselves, the specification, and the prosecution history. Deering Precision Instruments v. Vector Distribution Sys., Inc., 347 F.3d 1314, 1322 (Fed.Cir.2003). The Court indulges a strong presumption that claim terms carry their ordinary and customary meaning. *Id*. The ordinary meaning of a claim must be determined "from the standpoint of a person of ordinary skill in the relevant art." Teleflex, Inc. v. Ficosa North America Corp., 299 F.3d 1313, 1325 (Fed.Cir.2002). "The use of extrinsic evidence to construe the scope of a claim is improper where the ordinary and accustomed meaning of a claim term does not render the claim unclear and where the patentee has not chosen to be his own lexicographer." Northern Telecom Ltd. v. Samsung Elecs., 215 F.3d 1281, 1288 (Fed.Cir.2000). "While the Court may rely on expert testimony to understand the technology and the ordinary meaning of terms to practitioners in the art, expert testimony may not be used to contradict claim language or the specification." VLT Corp. v. Lambda Elecs., 238 F.Supp.2d 347, 350 (D.Mass.2003).

The Federal Circuit clarified the relationship between claim language and the specification in Texas Digital Sys., Inc. v. Telegenix, Inc., 308 F.3d 1193, 1204 (Fed.Cir.2002), stating that "[c]onsulting the written description and prosecution history as a threshold step in the claim construction process, before any effort is made to discern the ordinary and customary meanings attributed to the words themselves, invites a violation of our precedent counseling against importing limitations into the claims." The Federal Circuit emphasized that "dictionaries, encyclopedias and treatises are particularly useful resources to assist the court in determining the ordinary and customary meanings of claim terms," id. at 1202, for such sources "are objective resources that serve as reliable sources of information on the established meanings that would have been attributed to the terms of the claims by those of skill in the art." Id. at 1203. "Further, the presumption also will be rebutted if the inventor has disavowed or disclaimed the scope of coverage, by using words or expressions of manifest exclusion or restriction, representing a clear disavowal of claim scope." *Id*.

2. ***Arguments***

Energizer argues that the plain meaning of Claim 1 indicates that it does not cover razors having more than three blades. Gillette argues that the Quattro contains a group of three blades meeting the terms of the claims in the '777 patent, and that the addition of the fourth blade does not avoid infringement.

Claim 1 requires a "safety razor blade unit comprising ... a group of first, second, and third blades." The term "first" used as an adjective in this context indicates an item that is "before all others with respect to time, order, rank, importance, etc., used as the ordinal number of *one*." *Random House Webster's College Dictionary* 501 (1992). The term "second," when used as an adjective in this context, indicates an item that is "next after the first; being the ordinal number for two." Id. at 1210. Similarly, the term "third" in this context indicates an item that is "next after the second; being the ordinal number for three." Id. at 1387.

Claim 1 governs the spatial and sequential placement of the three blades. Claim 1 states that the first blade in the group of three is a "first blade defining a blade edge nearest the guard having a negative exposure not less than-.02 mm." The third blade is a "third blade defining a blade edge nearest the cap having a positive exposure not greater than + .02 mm." Thus, the "first blade" in the group of three is defined as the one "nearest the guard" with a certain negative exposure. The "third blade" is defined as the one "nearest the cap" with a certain positive exposure. The "second" blade has "a blade edge not less than the exposure of the first blade and not greater than the exposure of the third blade." Thus, the three blades with "progressive geometry" must be in the proper sequence of exposures within the blade unit. The addition of fourth blade in the middle between the first and second blade or the second and third blade is inconsistent with the plain language of "first," "second," and "third" because the blade "nearest the cap" would really be the "fourth" blade in the sequence.

Gillette insists that the use of the word "comprising" in Claim 1 indicates that it covers a razor with a group of three blades arrayed in the specific geometry of the '777 Patent, even if that razor unit includes additional intervening blades. *Cf.* Cybor Corp. v. Fas Tech, Inc., 138 F.3d 1448, 1459 (Fed.Cir.1998) (construing the limitation "to" in the term "by first pumping means to second pumping means" not to preclude the fluid passing through intervening components). It is true that "comprising" is "generally understood to signify that the claims do not exclude the presence in the accused apparatus or method of factors in addition to those explicitly recited." Smith & Nephew, Inc. v. Ethicon, Inc., 276 F.3d 1304, 1311 (Fed.Cir.2001) (citing *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.,* 200 F.3d 794, 811 (Fed.Cir.1999)). *See also* Genentech, Inc. v. Chiron Corp., 112 F.3d 495, 501 (Fed.Cir.1997) (" 'Comprising' is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim.") (citation omitted).

But "comprising" is not a "weasel word with which to abrogate claim limitations." *See* Spectrum Int'l, Inc. v. Sterilite Corp., 164 F.3d 1372, 1379-80 (Fed.Cir.1998). While the term "comprising" does not exclude additional unrecited elements, the term could not be used to "affect the scope of the particular structure recited within the method claim's step." Moleculon Research Corp. v. CBS, Inc., 793 F.2d 1261, 1271 (Fed.Cir.1986) (holding that a step which recites engaging "eight cube pieces as a composite cube" does not read on a step which engages more than eight cube pieces despite the use of the transitional term "comprising").

Here, Claim 1 provides for a safety razor blade comprising: (1) a cap; (2) a guard; and (3) "a group of first, second, and third blades." While the use of the word "comprising" indicates that certain elements may be added (e.g., the wires in the Quattro blade unit) without vitiating a claim of infringement, any placement of another blade in the middle would contradict the plainly defined configuration of the "group of first, second and third blades in the blade unit" mandated by Claim 1. No amount of creative numbering (like Gillette's designating the middle blades as 2a and 2b) can avoid the plain language regarding blade configuration in Claim 1 that excludes from its literal scope the possibility that the accused razor unit contain four blades.

See N. Telecom Ltd. v. Samsung Elecs. Co. Ltd., 215 F.3d 1281, 1296-97 (Fed.Cir.2000) ("[I]f a patent requires A, and the accused device uses A *and* B, infringement will be avoided only if the patent's definition of A excludes the possibility of B...."). This interpretation of the plain language in the claim is consistent with the specification, which Defendant asserts uses the words "three," "third" or "tertiary" in 30 different places. Nothing cited in the prosecution history speaks to the contrary. Therefore, Gillette is unlikely to prevail on its argument that Schick's accused Quattro razor meets all the limitations in Claim 1 or 10.FN2

FN2. As Gillette has not demonstrated a likelihood of success on literal infringement, the Court need not turn to the other factors in the test for a preliminary injunction in a patent case.

ORDER

The motion for a preliminary injunction is *DENIED*.

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